



CASE NUMBER: 50-2003-CA-005045-OCAJ-MB

Dockets & Documents ▾

Public = 

VOR = 

In Process = 
Page Size: All ▾

Docket Number	Effective Date	Description
1	05/08/2003	CAFF
2	05/08/2003	COMPLAINT
3	05/08/2003	CIVIL COVER SHEET
4	05/08/2003	PENDING
5	05/08/2003	RECEIPT FOR PAYMENT
6	05/08/2003	SUMMONS ISSUED
7	05/08/2003	SERVICE RETURN (ATTACHED)
8	05/08/2003	ADDITIONAL COMMENTS
9	05/08/2003	ADDITIONAL COMMENTS
10	05/08/2003	ADDITIONAL COMMENTS
11	05/09/2003	REQUEST
12	05/09/2003	NOTICE OF TAKING DEPOSITION
13	05/23/2003	MOTION
14	05/23/2003	NOTICE OF HEARING
15	05/29/2003	NOTICE
16	06/02/2003	ORDER

16div-000001

17	06/23/2003	ANSWER
18	06/25/2003	MOTION
19	06/25/2003	MOTION TO DISMISS
20	06/26/2003	OBJECTION
21	07/01/2003	NOTICE OF HEARING
22	07/08/2003	SUBPOENA RETURNED / SERVED
23	07/08/2003	SUBPOENA RETURNED / SERVED
24	07/08/2003	RE-NOTICE OF HEARING
25	07/10/2003	ORDER
26	07/11/2003	OBJECTION
27	07/14/2003	REQUEST
28	07/14/2003	REPLY/RESPONSE
29	07/17/2003	MOTION
30	07/18/2003	NOTICE OF TAKING DEPOSITION
31	07/23/2003	NOTICE OF TAKING DEPOSITION
32	07/28/2003	MOTION
33	07/28/2003	MOTION
34	07/28/2003	MOTION
35	07/28/2003	MOTION
36	07/29/2003	NOTICE OF TAKING DEPOSITION
37	07/29/2003	MOTION
38	07/29/2003	NOTICE OF HEARING
39	07/29/2003	NOTICE OF TAKING DEPOSITION
40	07/30/2003	REQUEST

41	07/30/2003	NOTICE OF FILING INTERROGS
42	07/30/2003	OBJECTION
43	07/31/2003	ORDER
44	08/01/2003	ORDER
45	08/01/2003	ORDER
46	08/01/2003	ORDER
47	08/01/2003	ORDER
48	08/05/2003	SUBPOENA RETURNED / SERVED
49	08/05/2003	SUBPOENA RETURNED / SERVED
50	08/08/2003	REQUEST
51	08/13/2003	NOTICE
52	08/15/2003	OBJECTION
53	08/15/2003	OBJECTION
54	08/18/2003	MOTION
55	08/18/2003	MOTION
56	08/18/2003	MOTION
57	08/18/2003	RESPONSE TO:
58	08/18/2003	NOTICE OF FILING
59	08/19/2003	REQUEST FOR ADMISSIONS
60	08/20/2003	ORDER
61	08/20/2003	ORDER
62	08/20/2003	ORDER
63	08/22/2003	MOTION
64	08/25/2003	NOTICE OF TAKING DEPOSITION

65	09/02/2003	NOTICE OF FILING INTERROGS
66	09/02/2003	AGREED ORDER
67	09/04/2003	SEALED
68	09/08/2003	MOTION
69	09/11/2003	MOTION
70	09/15/2003	MOTION
71	09/15/2003	NOTICE OF HEARING
72	09/16/2003	ORDER
73	09/16/2003	ORDER
74	09/16/2003	LETTER
75	09/17/2003	LETTER
76	09/18/2003	MOTION
77	09/18/2003	MOTION
78	09/19/2003	ORDER
79	09/19/2003	MOTION TO COMPEL
80	09/19/2003	ORDER
81	09/22/2003	REQUEST
82	09/22/2003	NOTICE OF TAKING DEPOSITION
83	09/23/2003	NOTICE OF HEARING
84	09/23/2003	SEALED
85	09/24/2003	LETTER
86	09/25/2003	RESPONSE TO:
87	09/25/2003	RESPONSE TO:
88	09/25/2003	MOTION

89	09/26/2003	ORDER
90	09/26/2003	NOTICE OF TAKING DEPOSITION
91	09/26/2003	RE-NOTICE OF HEARING
92	09/30/2003	MOTION
93	09/30/2003	ORDER SETTING HEARING
94	09/30/2003	ORDER
95	09/30/2003	ORDER
96	09/30/2003	ORDER
97	09/30/2003	LETTER
98	10/01/2003	ORDER
99	10/01/2003	ORDER
100	10/01/2003	LETTER
101	10/02/2003	MOTION
102	10/03/2003	SUBPOENA RETURNED / SERVED
103	10/03/2003	NOTICE OF TAKING DEPOSITION
104	10/03/2003	NOTICE OF HEARING
105	10/03/2003	SEALED
106	10/07/2003	AGREED ORDER
107	10/07/2003	ORDER SETTING HEARING
108	10/07/2003	SUBPOENA RETURNED / NOT SERVED
109	10/07/2003	SUBPOENA RETURNED / SERVED
110	10/07/2003	MOTION FOR PROTECTIVE ORDER
111	10/07/2003	NOTICE OF HEARING
112	10/08/2003	RE-NOTICE OF HEARING

113	10/09/2003	SUBPOENA RETURNED / NOT SERVED
114	10/14/2003	MOTION
115	10/14/2003	NOTICE OF HEARING
116	10/14/2003	NOTICE OF FILING
117	10/14/2003	SEALED
118	10/14/2003	SEALED
119	10/16/2003	SUBPOENA RETURNED / SERVED
120	10/16/2003	SUBPOENA RETURNED / SERVED
121	10/16/2003	NOTICE OF CANCELLATION
122	10/16/2003	NOTICE
123	10/16/2003	MOTION FOR PROTECTIVE ORDER
124	10/17/2003	SUBPOENA RETURNED / SERVED
125	10/17/2003	MOTION
126	10/17/2003	NOTICE OF HEARING
127	10/20/2003	ORDER
128	10/21/2003	MOTION
129	10/22/2003	RE-NOTICE OF HEARING
130	10/22/2003	AGREED ORDER
131	10/27/2003	SUBPOENA RETURNED / SERVED
132	10/27/2003	ORDER
133	10/28/2003	NOTICE OF TAKING DEPOSITION
134	10/29/2003	MOTION TO COMPEL
135	10/29/2003	NOTICE OF HEARING
136	10/29/2003	NOTICE OF FILING

137	10/29/2003	SEALED
138	10/29/2003	NOTICE OF HEARING
139	10/30/2003	AGREED ORDER
140	11/03/2003	AFFIDAVIT
141	11/04/2003	NOTICE OF FILING INTERROGS
142	11/04/2003	NOTICE OF FILING
143	11/04/2003	SEALED
144	11/05/2003	RESPONSE TO:
145	11/05/2003	MOTION
146	11/12/2003	NOTICE OF TAKING DEPOSITION
147	11/14/2003	RESPONSE TO:
148	11/14/2003	RESPONSE TO:
149	11/14/2003	RESPONSE TO:
150	11/14/2003	ORDER SETTING HEARING
151	11/14/2003	ORDER
152	11/19/2003	MOTION
153	11/19/2003	NOTICE OF HEARING
154	11/19/2003	NOTICE OF FILING INTERROGS
155	11/19/2003	NOTICE OF TAKING DEPOSITION
156	11/20/2003	ORDER
157	11/20/2003	ORDER
158	11/20/2003	CORRESPONDENCE
159	11/20/2003	ORDER
160	11/20/2003	LETTER

161	11/20/2003	NOTICE OF FILING
162	11/20/2003	SEALED
163	11/20/2003	LETTER
164	11/21/2003	RESPONSE TO:
165	11/24/2003	NOTICE OF TAKING DEPOSITION
166	12/01/2003	ORDER
167	12/01/2003	ORDER
168	12/01/2003	REPLY/RESPONSE
169	12/03/2003	MOTION TO COMPEL
170	12/03/2003	RE-NOTICE OF HEARING
171	12/03/2003	ANSWER TO INTERROGATORIES
172	12/04/2003	RE-NOTICE OF HEARING
173	12/09/2003	NOTICE OF TAKING DEPOSITION
174	12/11/2003	REPLY/RESPONSE
175	12/11/2003	ORDER
176	12/11/2003	NOTICE OF TAKING DEPOSITION
177	12/11/2003	AGREED ORDER
178	12/12/2003	NOTICE
179	12/12/2003	NOTICE
180	12/15/2003	NOTICE OF TAKING DEPOSITION
181	12/15/2003	ORDER
182	12/15/2003	ORDER
183	12/15/2003	MOTION TO DISMISS
184	12/16/2003	ORDER

185	12/17/2003	ORDER
186	12/18/2003	REQUEST
187	12/18/2003	ORDER
188	12/18/2003	DEPOSITION
189	12/18/2003	ORDER
190	12/18/2003	ORDER
191	12/18/2003	SEALED
192	12/19/2003	MOT/NOT TO SET JURY TRIAL
193	12/19/2003	NOTICE OF TAKING DEPOSITION
194	12/19/2003	MOTION
195	12/19/2003	NOTICE OF HEARING
196	12/29/2003	MOTION TO COMPEL
197	12/29/2003	MOTION
198	12/30/2003	NOTICE
199	12/30/2003	RE-NOTICE OF HEARING
200	12/30/2003	NOTICE OF TAKING DEPOSITION
201	12/31/2003	NOTICE OF HEARING
202	01/05/2004	RE-NOTICE OF HEARING
203	01/06/2004	MOTION
204	01/06/2004	NOTICE OF HEARING
205	01/06/2004	ORDER
206	01/07/2004	ORDER
207	01/07/2004	NOTICE OF HEARING
208	01/08/2004	AGREED ORDER

209	01/08/2004	ORDER
210	01/08/2004	NOTICE
211	01/09/2004	CAFF/NOA/
212	01/09/2004	RECEIPT FOR PAYMENT
213	01/09/2004	NOTICE OF NON FINAL APPEAL BOOK 016432 PAGE 00663
214	01/09/2004	MOTION
215	01/09/2004	RESPONSE TO:
216	01/12/2004	ORDER
217	01/12/2004	MOTION
218	01/14/2004	NOTICE
219	01/14/2004	ORDER
220	01/15/2004	ACKNOWLEDGMENT OF NEW CASE
221	01/15/2004	NOTICE OF TAKING DEPOSITION
222	01/15/2004	NOTICE OF HEARING
223	01/16/2004	MOTION
224	01/20/2004	NOTICE OF TAKING DEPOSITION
225	01/21/2004	NOTICE OF TAKING DEPOSITION
226	01/21/2004	NOTICE OF TAKING DEPOSITION
227	01/21/2004	AGREED ORDER
228	01/22/2004	RESPONSE TO:
229	01/22/2004	MOTION
230	01/22/2004	NOTICE OF HEARING
231	02/02/2004	AMENDED
232	02/02/2004	AMENDED

233	02/05/2004	ORDER
234	02/11/2004	NOTICE OF HEARING
235	02/11/2004	MOTION TO COMPEL
236	02/12/2004	NOTICE OF FILING
237	02/17/2004	STATEMENT
238	02/17/2004	NOTICE OF FILING
239	02/17/2004	STATEMENT
240	02/17/2004	NOTICE OF FILING
241	02/17/2004	SEALED
242	02/19/2004	NOTICE OF TAKING DEPOSITION
243	02/20/2004	MOTION TO COMPEL
244	02/20/2004	NOTICE OF HEARING
245	02/23/2004	ORDER
246	02/23/2004	SEALED
247	02/24/2004	ORDER
248	02/27/2004	MOTION
249	02/27/2004	NOTICE OF HEARING
250	03/02/2004	SEALED
251	03/02/2004	SEALED
252	03/02/2004	RESPONSE TO:
253	03/03/2004	ORDER
254	03/03/2004	RE-NOTICE OF HEARING
255	03/04/2004	NOTICE OF TAKING DEPOSITION
256	03/04/2004	NOTICE OF TAKING DEPOSITION

257	03/08/2004	NOTICE OF SERVICE
258	03/12/2004	APPENDIX
259	03/12/2004	MOTION TO COMPEL
260	03/12/2004	NOTICE
261	03/12/2004	MOTION
262	03/12/2004	NOTICE OF HEARING
263	03/12/2004	NOTICE OF HEARING
264	03/12/2004	NOTICE OF FILING
265	03/12/2004	MOTION
266	03/15/2004	ORDER
267	03/15/2004	CORRESPONDENCE
268	03/15/2004	ORDER
269	03/17/2004	SUBPOENA RETURNED / SERVED
270	03/17/2004	RESPONSE TO:
271	03/17/2004	MOTION
272	03/17/2004	MOTION
273	03/17/2004	MOTION
274	03/17/2004	NOTICE OF HEARING
275	03/17/2004	SEALED
276	03/18/2004	NOTICE OF FILING
277	03/18/2004	NOTICE OF FILING
278	03/18/2004	RESPONSE TO:
279	03/18/2004	NOTICE OF FILING
280	03/18/2004	SEALED

281	03/19/2004	AGREED ORDER
282	03/19/2004	AGREED ORDER
283	03/22/2004	ORDER
284	03/22/2004	ORDER
285	03/22/2004	ORDER
286	03/22/2004	ORDER
287	03/24/2004	ORDER
288	03/24/2004	CORRESPONDENCE
289	03/29/2004	NOTICE OF TAKING DEPOSITION
290	03/29/2004	MOTION
291	03/30/2004	RETURNED MAIL
292	04/02/2004	SUBPOENA RETURNED / SERVED
293	04/12/2004	RESPONSE TO:
294	04/12/2004	MOTION TO COMPEL
295	04/12/2004	MOTION TO COMPEL
296	04/12/2004	NOTICE OF HEARING
297	04/12/2004	MOTION FOR PROTECTIVE ORDER
298	04/12/2004	MOTION TO COMPEL
299	04/12/2004	NOTICE OF FILING
300	04/12/2004	NOTICE OF FILING
301	04/12/2004	NOTICE OF FILING
302	04/12/2004	NOTICE OF FILING
303	04/12/2004	SEALED
304	04/12/2004	SEALED

305	04/12/2004	SEALED
306	04/12/2004	SEALED
307	04/13/2004	NOTICE
308	04/14/2004	RESPONSE TO:
309	04/14/2004	RESPONSE TO:
310	04/14/2004	NOTICE OF FILING
311	04/14/2004	NOTICE
312	04/14/2004	NOTICE OF FILING
313	04/14/2004	RESPONSE TO:
314	04/14/2004	NOTICE
315	04/14/2004	NOTICE OF FILING
316	04/14/2004	SEALED
317	04/14/2004	SEALED
318	04/16/2004	NOTICE OF TAKING DEPOSITION
319	04/16/2004	NOTICE OF FILING
320	04/16/2004	SEALED
321	04/19/2004	AGREED ORDER
322	04/19/2004	ORDER
323	04/19/2004	ORDER
324	04/19/2004	ORDER
325	04/19/2004	ORDER
326	04/19/2004	ORDER
327	04/19/2004	AGREED ORDER
328	04/19/2004	ORDER

329	04/23/2004	APPENDIX
330	04/23/2004	NOTICE OF TAKING DEPOSITION
331	04/23/2004	NOTICE OF FILING
332	04/23/2004	NOTICE OF FILING
333	04/23/2004	NOTICE OF HEARING
334	04/23/2004	REPLY/RESPONSE
335	04/23/2004	MOTION
336	04/26/2004	SEALED
337	04/26/2004	NOTICE OF TAKING DEPOSITION
338	04/26/2004	ORDER
339	04/26/2004	NOTICE OF SERVICE
340	04/28/2004	NOTICE OF TAKING DEPOSITION
341	04/30/2004	MOTION
342	04/30/2004	NOTICE OF FILING
343	04/30/2004	ORDER
344	04/30/2004	SEALED
345	05/03/2004	AGREED ORDER
346	05/06/2004	NOTICE OF FILING
347	05/06/2004	MOTION
348	05/12/2004	NOTICE OF TAKING DEPOSITION
349	05/12/2004	NOTICE OF TAKING DEPOSITION
350	05/12/2004	NOTICE OF TAKING DEPOSITION
351	05/13/2004	RESPONSE TO:
352	05/14/2004	NOTICE OF TAKING DEPOSITION

353	05/17/2004	NOTICE OF TAKING DEPOSITION
354	05/17/2004	ORDER
355	05/17/2004	NOTICE OF HEARING
356	05/17/2004	NOTICE OF HEARING
357	05/18/2004	ORDER
358	05/18/2004	ORDER
359	05/18/2004	CORRESPONDENCE
360	05/18/2004	ORDER
361	05/18/2004	CORRESPONDENCE
362	05/18/2004	ORDER
363	05/18/2004	CORRESPONDENCE
364	05/19/2004	ORDER
365	05/19/2004	ORDER SETTING HEARING
366	05/19/2004	EXHIBIT LIST
367	05/20/2004	NOTICE OF COMPLIANCE
368	05/21/2004	MOTION
369	05/21/2004	NOTICE OF HEARING
370	05/21/2004	NOTICE OF TAKING DEPOSITION
371	05/25/2004	ORDER
372	05/26/2004	NOTICE OF FILING
373	05/26/2004	SEALED
374	05/28/2004	ORDER
375	05/28/2004	NOTICE OF TAKING DEPOSITION
376	06/01/2004	REQUEST

377	06/01/2004	NOTICE OF PRODUCTION NON PARTY
378	06/01/2004	NOTICE OF FILING
379	06/01/2004	NOTICE
380	06/02/2004	SEALED
381	06/02/2004	NOTICE OF FILING
382	06/04/2004	NOTICE OF FILING
383	06/04/2004	SEALED
384	06/04/2004	NOTICE OF FILING
385	06/04/2004	SEALED
386	06/04/2004	MOTION
387	06/04/2004	NOTICE OF HEARING
388	06/07/2004	NOTICE OF HEARING
389	06/08/2004	ORDER
390	06/08/2004	NOTICE
391	06/09/2004	NOTICE OF FILING
392	06/09/2004	SEALED
393	06/09/2004	NOTICE OF FILING
394	06/09/2004	RESPONSE TO:
395	06/10/2004	MOTION
396	06/11/2004	COPY
397	06/11/2004	AGREED ORDER
398	06/11/2004	AGREED ORDER
399	06/11/2004	AGREED ORDER
400	06/11/2004	NOTICE

401	06/14/2004	NOTICE OF UNAVAILABILITY
402	06/16/2004	REQUEST FOR ADMISSIONS
403	06/16/2004	REQUEST
404	06/17/2004	NOTICE OF SERVICE
405	06/18/2004	NOTICE OF TAKING DEPOSITION
406	06/18/2004	NOTICE OF TAKING DEPOSITION
407	06/18/2004	NOTICE OF FILING
408	06/18/2004	NOTICE OF TAKING DEPOSITION
409	06/18/2004	NOTICE OF TAKING DEPOSITION
410	06/18/2004	REQUEST
411	06/18/2004	NOTICE OF FILING INTERROGS
412	06/21/2004	SEALED
413	06/21/2004	NOTICE OF FILING
414	06/22/2004	NOTICE OF TAKING DEPOSITION
415	06/23/2004	NOTICE
416	06/23/2004	NOTICE OF TAKING DEPOSITION
417	06/23/2004	NOTICE OF TAKING DEPOSITION
418	06/23/2004	NOTICE OF TAKING DEPOSITION
419	06/25/2004	NOTICE OF HEARING
420	06/25/2004	NOTICE OF FILING
421	06/25/2004	NOTICE
422	06/25/2004	MOTION TO COMPEL
423	06/28/2004	STIPULATION AND ORDER
424	06/28/2004	NOTICE OF FILING

425	06/29/2004	NOTICE OF SERVICE
426	06/29/2004	MOTION
427	06/29/2004	NOTICE OF HEARING
428	06/30/2004	NOTICE
429	06/30/2004	NOTICE OF SERVICE
430	06/30/2004	OBJECTION
431	06/30/2004	RESPONSE TO:
432	06/30/2004	NOTICE OF TAKING DEPOSITION
433	06/30/2004	NOTICE OF TAKING DEPOSITION
434	06/30/2004	NOTICE OF FILING
435	06/30/2004	ANSWER
436	06/30/2004	NOTICE OF FILING
437	06/30/2004	SEALED
438	07/01/2004	OBJECTION
439	07/01/2004	NOTICE OF UNAVAILABILITY
440	07/02/2004	STIPULATION AND ORDER
441	07/07/2004	REQUEST FOR ADMISSIONS
442	07/07/2004	SUBPOENA RETURNED / SERVED
443	07/09/2004	MOTION
444	07/09/2004	NOTICE OF HEARING
445	07/09/2004	NOTICE OF UNAVAILABILITY
446	07/12/2004	ORDER
447	07/13/2004	NOTICE OF TAKING DEPOSITION
448	07/14/2004	NOTICE OF TAKING DEPOSITION

449	07/14/2004	SUBPOENA RETURNED / SERVED
450	07/15/2004	NOTICE OF FILING
451	07/15/2004	MOTION TO COMPEL
452	07/15/2004	NOTICE OF FILING
453	07/15/2004	MOTION
454	07/15/2004	NOTICE OF FILING
455	07/15/2004	SEALED
456	07/15/2004	NOTICE OF FILING
457	07/15/2004	MOTION
458	07/15/2004	NOTICE OF FILING
459	07/15/2004	ANSWER TO INTERROGATORIES
460	07/15/2004	MOTION
461	07/15/2004	RESPONSE TO:
462	07/15/2004	RESPONSE TO:
463	07/15/2004	RESPONSE TO:
464	07/15/2004	ORDER
465	07/16/2004	NOTICE
466	07/16/2004	NOTICE OF HEARING
467	07/16/2004	NOTICE OF HEARING
468	07/16/2004	NOTICE OF HEARING
469	07/16/2004	NOTICE OF FILING
470	07/16/2004	SEALED
471	07/19/2004	NOTICE OF FILING
472	07/21/2004	NOTICE OF TAKING DEPOSITION

473	07/21/2004	NOTICE OF TAKING DEPOSITION
474	07/21/2004	NOTICE OF FILING
475	07/21/2004	SEALED
476	07/21/2004	NOTICE OF FILING
477	07/21/2004	SEALED
478	07/21/2004	NOTICE OF FILING
479	07/21/2004	SEALED
480	07/21/2004	NOTICE OF FILING
481	07/21/2004	SEALED
482	07/22/2004	NOTICE OF FILING
483	07/22/2004	SEALED
484	07/22/2004	MOTION
485	07/23/2004	NOTICE OF FILING
486	07/28/2004	ORDER
487	07/28/2004	ORDER
488	07/28/2004	ORDER
489	07/28/2004	ORDER
490	07/28/2004	ORDER
491	07/28/2004	MOTION
492	07/28/2004	NOTICE OF HEARING
493	07/28/2004	NOTICE OF FILING
494	07/28/2004	SEALED
495	07/29/2004	NOTICE OF TAKING DEPOSITION
496	07/29/2004	MOTION

497	07/29/2004	ORDER
498	07/30/2004	MOTION
499	07/30/2004	MOTION
500	07/30/2004	NOTICE OF HEARING
501	07/30/2004	NOTICE OF FILING
502	07/30/2004	SEALED
503	07/30/2004	NOTICE OF FILING
504	07/30/2004	SEALED
505	07/30/2004	NOTICE OF FILING
506	07/30/2004	SEALED
507	08/02/2004	NOTICE OF TAKING DEPOSITION
508	08/02/2004	NOTICE OF HEARING
509	08/02/2004	MOTION TO DISMISS
510	08/02/2004	NOTICE OF HEARING
511	08/02/2004	RE-NOTICE OF HEARING
512	08/03/2004	MOTION
513	08/03/2004	NOTICE OF SERVICE
514	08/03/2004	RE-NOTICE OF HEARING
515	08/03/2004	RE-NOTICE OF HEARING
516	08/04/2004	MOTION
517	08/04/2004	NOTICE OF HEARING
518	08/04/2004	NOTICE OF FILING
519	08/04/2004	SEALED
520	08/05/2004	REQUEST

521	08/06/2004	NOTICE OF FILING
522	08/06/2004	SEALED
523	08/06/2004	NOTICE OF FILING
524	08/06/2004	SEALED
525	08/06/2004	REQUEST
526	08/06/2004	RESPONSE TO:
527	08/06/2004	NOTICE
528	08/09/2004	MOTION
529	08/10/2004	ORDER
530	08/10/2004	ORDER
531	08/11/2004	ORDER
532	08/11/2004	ORDER
533	08/11/2004	NOTICE OF SERVICE
534	08/12/2004	RE-NOTICE OF TAKING DEPOSITION
535	08/13/2004	ORDER
536	08/13/2004	ORDER
537	08/13/2004	ORDER
538	08/13/2004	ORDER
539	08/13/2004	ORDER
540	08/16/2004	REQUEST FOR ADMISSIONS
541	08/17/2004	REQUEST FOR ADMISSIONS
542	08/17/2004	MOTION TO COMPEL
543	08/17/2004	NOTICE OF HEARING
544	08/17/2004	CORRESPONDENCE

545	08/17/2004	ORDER
546	08/17/2004	CORRESPONDENCE
547	08/17/2004	NOTICE OF FILING
548	08/17/2004	SEALED
549	08/18/2004	MOTION TO COMPEL
550	08/18/2004	NOTICE OF FILING
551	08/18/2004	SEALED
552	08/19/2004	NOTICE OF HEARING
553	08/20/2004	NOTICE
554	08/23/2004	NOTICE
555	08/23/2004	NOTICE
556	08/23/2004	MEMORANDUM
557	08/25/2004	NOTICE OF TAKING DEPOSITION
558	08/27/2004	ORDER
559	08/27/2004	ORDER
560	08/30/2004	MEMORANDUM OF LAW
561	08/30/2004	NOTICE OF TAKING DEPOSITION
562	08/30/2004	ORDER
563	08/31/2004	NOTICE OF TAKING DEPOSITION
564	09/01/2004	NOTICE OF TAKING DEPOSITION
565	09/14/2004	MOTION
566	09/14/2004	RESPONSE TO:
567	09/14/2004	MOTION TO COMPEL
568	09/14/2004	MOTION

569	09/14/2004	MOTION TO COMPEL
570	09/14/2004	NOTICE OF HEARING
571	09/14/2004	MOTION
572	09/14/2004	ORDER SETTING HEARING
573	09/15/2004	NOTICE OF FILING INTERROGS
574	09/15/2004	MOTION
575	09/15/2004	ORDER
576	09/15/2004	ORDER
577	09/16/2004	ORDER
578	09/16/2004	NOTICE
579	09/16/2004	NOTICE
580	09/17/2004	NOTICE
581	09/17/2004	NOTICE OF FILING INTERROGS
582	09/20/2004	MOTION
583	09/21/2004	NOTICE
584	09/21/2004	NOTICE OF TAKING DEPOSITION
585	09/21/2004	RESPONSE TO:
586	09/21/2004	NOTICE OF TAKING DEPOSITION
587	09/21/2004	NOTICE OF TAKING DEPOSITION
588	09/21/2004	MOTION
589	09/21/2004	MOTION
590	09/21/2004	MOTION
591	09/21/2004	NOTICE OF HEARING
592	09/21/2004	AGREED ORDER

593	09/21/2004	ORDER
594	09/21/2004	STIPULATION AND ORDER
595	09/21/2004	APPENDIX
596	09/21/2004	APPENDIX
597	09/21/2004	APPENDIX
598	09/21/2004	MOTION
599	09/21/2004	NOTICE OF FILING
600	09/21/2004	SEALED
601	09/21/2004	NOTICE
602	09/21/2004	NOTICE
603	09/21/2004	NOTICE
604	09/21/2004	NOTICE
605	09/22/2004	MOTION
606	09/22/2004	RESPONSE TO:
607	09/22/2004	NOTICE OF TAKING DEPOSITION
608	09/22/2004	NOTICE OF TAKING DEPOSITION
609	09/22/2004	MOTION
610	09/22/2004	NOTICE OF HEARING
611	09/22/2004	STIPULATION
612	09/23/2004	NOTICE OF TAKING DEPOSITION
613	09/23/2004	NOTICE OF TAKING DEPOSITION
614	09/23/2004	EXHIBIT LIST
615	09/24/2004	NOTICE OF TAKING DEPOSITION
616	09/24/2004	NOTICE OF HEARING

617	09/24/2004	ORDER
618	09/24/2004	MOTION
619	09/24/2004	MOTION
620	09/24/2004	MOTION
621	09/30/2004	NOTICE OF TAKING DEPOSITION
622	09/30/2004	NOTICE OF TAKING DEPOSITION
623	09/30/2004	NOTICE OF HEARING
624	09/30/2004	MOTION
625	09/30/2004	RE-NOTICE OF HEARING
626	09/30/2004	NOTICE OF TAKING DEPOSITION
627	09/30/2004	REQUEST
628	09/30/2004	REQUEST
629	09/30/2004	ORDER
630	09/30/2004	ORDER
631	09/30/2004	ORDER
632	10/01/2004	MOTION
633	10/01/2004	MOTION
634	10/01/2004	MOTION
635	10/01/2004	NOTICE OF HEARING
636	10/01/2004	NOTICE OF HEARING
637	10/01/2004	ORDER
638	10/01/2004	ORDER
639	10/01/2004	REQUEST
640	10/01/2004	NOTICE OF TAKING DEPOSITION

641	10/01/2004	NOTICE OF TAKING DEPOSITION
642	10/01/2004	NOTICE OF TAKING DEPOSITION
643	10/01/2004	NOTICE OF TAKING DEPOSITION
644	10/01/2004	NOTICE OF TAKING DEPOSITION
645	10/04/2004	FEE/PRO HAC VICE (\$100.00)
646	10/04/2004	FEE/PRO HAC VICE (\$100.00)
647	10/04/2004	FEE/PRO HAC VICE (\$100.00)
648	10/04/2004	RECEIPT FOR PAYMENT
649	10/04/2004	NOTICE OF TAKING DEPOSITION
650	10/04/2004	NOTICE OF TAKING DEPOSITION
651	10/04/2004	NOTICE OF TAKING DEPOSITION
652	10/04/2004	NOTICE OF TAKING DEPOSITION
653	10/05/2004	ORDER
654	10/06/2004	NOTICE OF FILING
655	10/06/2004	SEALED
656	10/06/2004	NOTICE OF TAKING DEPOSITION
657	10/06/2004	NOTICE OF FILING
658	10/07/2004	NOTICE OF HEARING
659	10/07/2004	MOTION
660	10/07/2004	ORDER
661	10/08/2004	MEMORANDUM
662	10/08/2004	NOTICE
663	10/08/2004	MEMORANDUM OF LAW
664	10/12/2004	NOTICE

665	10/12/2004	NOTICE OF TAKING DEPOSITION
666	10/12/2004	NOTICE OF TAKING DEPOSITION
667	10/12/2004	MOTION
668	10/12/2004	NOTICE OF HEARING
669	10/12/2004	ORDER
670	10/12/2004	ORDER
671	10/12/2004	ORDER DENYING
672	10/12/2004	NOTICE OF FILING
673	10/12/2004	SEALED
674	10/12/2004	NOTICE
675	10/13/2004	NOTICE OF FILING INTERROGS
676	10/13/2004	REQUEST
677	10/13/2004	NOTICE OF TAKING DEPOSITION
678	10/13/2004	REQUEST
679	10/14/2004	FEE/PRO HAC VICE (\$100.00)
680	10/14/2004	FEE/PRO HAC VICE (\$100.00)
681	10/14/2004	FEE/PRO HAC VICE (\$100.00)
682	10/14/2004	RECEIPT FOR PAYMENT
683	10/14/2004	NOTICE OF TAKING DEPOSITION
684	10/14/2004	NOTICE OF FILING
685	10/15/2004	ORDER
686	10/15/2004	NOTICE OF COMPLIANCE
687	10/15/2004	ORDER
688	10/15/2004	ORDER

689	10/15/2004	ORDER SETTING HEARING
690	10/15/2004	ORDER
691	10/15/2004	ORDER
692	10/15/2004	ORDER
693	10/15/2004	ORDER
694	10/15/2004	MOTION
695	10/15/2004	NOTICE OF FILING
696	10/18/2004	FEE/PRO HAC VICE (\$100.00)
697	10/18/2004	FEE/PRO HAC VICE (\$100.00)
698	10/18/2004	RECEIPT FOR PAYMENT
699	10/18/2004	VOIDED RECEIPT
700	10/18/2004	MOTION
701	10/18/2004	ORDER
702	10/19/2004	MOTION
703	10/19/2004	SUBPOENA RETURNED / SERVED
704	10/19/2004	MOTION FOR PROTECTIVE ORDER
705	10/20/2004	DOCKET NBR ASSIGNED IN ERROR
706	10/20/2004	NOTICE OF TAKING DEPOSITION
707	10/20/2004	NOTICE OF TAKING DEPOSITION
708	10/20/2004	NOTICE OF FILING
709	10/22/2004	NOTICE OF TAKING DEPOSITION
710	10/22/2004	NOTICE OF FILING INTERROGS
711	10/22/2004	NOTICE OF PRODUCTION NON PARTY
712	10/22/2004	NOTICE OF TAKING DEPOSITION

713	10/22/2004	NOTICE OF TAKING DEPOSITION
714	10/22/2004	REQUEST
715	10/22/2004	NOTICE OF HEARING
716	10/22/2004	NOTICE OF HEARING
717	10/22/2004	NOTICE OF TAKING DEPOSITION
718	10/22/2004	NOTICE OF TAKING DEPOSITION
719	10/22/2004	NOTICE OF TAKING DEPOSITION
720	10/22/2004	MOTION FOR PROTECTIVE ORDER
721	10/22/2004	MOTION FOR PROTECTIVE ORDER
722	10/22/2004	NOTICE OF HEARING
723	10/22/2004	NOTICE
724	10/22/2004	MOTION TO STRIKE
725	10/22/2004	NOTICE OF FILING
726	10/22/2004	SEALED
727	10/22/2004	NOTICE OF FILING
728	10/22/2004	SEALED
729	10/25/2004	REQUEST FOR ADMISSIONS
730	10/25/2004	NOTICE OF FILING
731	10/25/2004	MOTION
732	10/25/2004	MOTION
733	10/25/2004	MOTION
734	10/25/2004	NOTICE OF TAKING DEPOSITION
735	10/25/2004	NOTICE OF TAKING DEPOSITION
736	10/25/2004	MOTION

737	10/25/2004	MOTION
738	10/25/2004	MOTION
739	10/25/2004	NOTICE OF UNAVAILABILITY
740	10/25/2004	NOTICE OF TAKING DEPOSITION
741	10/25/2004	NOTICE OF FILING
742	10/25/2004	NOTICE OF HEARING
743	10/26/2004	NOTICE OF TAKING DEPOSITION
744	10/26/2004	NOTICE OF FILING
745	10/26/2004	MOTION
746	10/26/2004	NOTICE OF HEARING
747	10/26/2004	NOTICE OF TAKING DEPOSITION
748	10/26/2004	MOTION
749	10/26/2004	NOTICE OF FILING INTERROGS
750	10/26/2004	REQUEST
751	10/27/2004	REQUEST
752	10/27/2004	NOTICE OF FILING INTERROGS
753	10/27/2004	RESPONSE TO:
754	10/27/2004	RESPONSE TO:
755	10/27/2004	NOTICE OF TAKING DEPOSITION
756	10/27/2004	REQUEST FOR ADMISSIONS
757	10/27/2004	RESPONSE TO:
758	10/27/2004	NOTICE OF TAKING DEPOSITION
759	10/27/2004	NOTICE OF TAKING DEPOSITION
760	10/27/2004	RE-NOTICE OF HEARING

761	10/27/2004	NOTICE OF HEARING
762	10/27/2004	NOTICE OF TAKING DEPOSITION
763	10/27/2004	NOTICE
764	10/28/2004	MOTION TO COMPEL
765	10/28/2004	NOTICE OF HEARING
766	10/28/2004	NOTICE OF TAKING DEPOSITION
767	10/29/2004	RESPONSE TO:
768	10/29/2004	NOTICE OF HEARING
769	10/29/2004	RESPONSE TO:
770	10/29/2004	NOTICE
771	10/29/2004	RESPONSE TO:
772	10/29/2004	RESPONSE TO:
773	11/01/2004	NOTICE
774	11/01/2004	NOTICE
775	11/01/2004	OBJECTION
776	11/01/2004	NOTICE OF FILING
777	11/01/2004	MOTION FOR PROTECTIVE ORDER
778	11/01/2004	NOTICE OF HEARING
779	11/01/2004	REPLY/RESPONSE
780	11/02/2004	ORDER
781	11/02/2004	SEALED
782	11/02/2004	MOTION FOR PROTECTIVE ORDER
783	11/02/2004	MOTION FOR PROTECTIVE ORDER
784	11/03/2004	NOTICE OF TAKING DEPOSITION

785	11/03/2004	ORDER
786	11/03/2004	AGREED ORDER
787	11/03/2004	ORDER
788	11/03/2004	ORDER
789	11/03/2004	ORDER
790	11/03/2004	ORDER
791	11/03/2004	RESPONSE TO:
792	11/03/2004	NOTICE
793	11/04/2004	OBJECTION
794	11/04/2004	MOTION TO COMPEL
795	11/04/2004	NOTICE OF TAKING DEPOSITION
796	11/04/2004	NOTICE OF TAKING DEPOSITION
797	11/04/2004	NOTICE
798	11/04/2004	RESPONSE TO:
799	11/05/2004	OBJECTION
800	11/05/2004	NOTICE OF TAKING DEPOSITION
801	11/05/2004	ORDER
802	11/05/2004	MOTION FOR PROTECTIVE ORDER
803	11/05/2004	NOTICE OF TAKING DEPOSITION
804	11/05/2004	ORDER
805	11/05/2004	NOTICE OF TAKING DEPOSITION
806	11/05/2004	NOTICE OF CANCELLATION
807	11/05/2004	ORDER
808	11/05/2004	OBJECTION

809	11/05/2004	OBJECTION
810	11/05/2004	OBJECTION
811	11/05/2004	NOTICE OF SERVICE
812	11/05/2004	NOTICE OF TAKING DEPOSITION
813	11/05/2004	ORDER
814	11/05/2004	ORDER
815	11/05/2004	ORDER
816	11/05/2004	ORDER
817	11/05/2004	RESPONSE TO:
818	11/08/2004	NOTICE OF HEARING
819	11/08/2004	RE-NOTICE OF HEARING
820	11/08/2004	MOTION FOR PROTECTIVE ORDER
821	11/08/2004	RE-NOTICE OF HEARING
822	11/08/2004	ORDER
823	11/09/2004	MOTION FOR PROTECTIVE ORDER
824	11/09/2004	NOTICE OF HEARING
825	11/09/2004	OBJECTION
826	11/09/2004	OBJECTION
827	11/09/2004	OBJECTION
828	11/09/2004	MOTION FOR PROTECTIVE ORDER
829	11/10/2004	ANSWER TO INTERROGATORIES
830	11/10/2004	RESPONSE TO:
831	11/10/2004	NOTICE OF TAKING DEPOSITION
832	11/10/2004	MOTION TO COMPEL

833	11/10/2004	MOTION TO COMPEL
834	11/10/2004	MOTION TO COMPEL
835	11/10/2004	NOTICE OF HEARING
836	11/12/2004	EXHIBIT LIST
837	11/12/2004	MOTION TO COMPEL
838	11/12/2004	NOTICE OF HEARING
839	11/12/2004	MOTION
840	11/12/2004	MOTION TO COMPEL
841	11/12/2004	MOTION FOR PROTECTIVE ORDER
842	11/12/2004	NOTICE
843	11/12/2004	NOTICE OF TAKING DEPOSITION
844	11/12/2004	MOTION FOR PROTECTIVE ORDER
845	11/12/2004	NOTICE OF TAKING DEPOSITION
846	11/15/2004	NOTICE OF FILING
847	11/15/2004	RE-NOTICE OF TAKING DEPOSITION
848	11/15/2004	RESPONSE TO:
849	11/15/2004	NOTICE OF TAKING DEPOSITION
850	11/15/2004	NOTICE
851	11/16/2004	RESPONSE TO:
852	11/16/2004	MOTION FOR PROTECTIVE ORDER
853	11/16/2004	NOTICE OF TAKING DEPOSITION
854	11/16/2004	NOTICE OF TAKING DEPOSITION
855	11/17/2004	ORDER
856	11/17/2004	ORDER

857	11/17/2004	ORDER
858	11/17/2004	NOTICE OF TAKING DEPOSITION
859	11/17/2004	NOTICE OF TAKING DEPOSITION
860	11/17/2004	NOTICE OF TAKING DEPOSITION
861	11/18/2004	ORDER
862	11/18/2004	ORDER
863	11/18/2004	ORDER
864	11/18/2004	ORDER
865	11/18/2004	ORDER
866	11/18/2004	ORDER
867	11/18/2004	ORDER
868	11/18/2004	ORDER
869	11/18/2004	ORDER
870	11/19/2004	NOTICE OF HEARING
871	11/19/2004	ORDER
872	11/19/2004	MOTION
873	11/19/2004	NOTICE OF TAKING DEPOSITION
874	11/19/2004	NOTICE OF TAKING DEPOSITION
875	11/19/2004	NOTICE OF TAKING DEPOSITION
876	11/22/2004	MOTION TO COMPEL
877	11/22/2004	MOTION
878	11/22/2004	RESPONSE TO:
879	11/22/2004	NOTICE OF CANCELLATION
880	11/22/2004	NOTICE OF HEARING

881	11/22/2004	NOTICE OF HEARING
882	11/22/2004	NOTICE OF TAKING DEPOSITION
883	11/22/2004	NOTICE OF TAKING DEPOSITION
884	11/22/2004	NOTICE OF TAKING DEPOSITION
885	11/23/2004	RESPONSE TO:
886	11/23/2004	ANSWER
887	11/23/2004	NOTICE OF TAKING DEPOSITION
888	11/23/2004	NOTICE OF TAKING DEPOSITION
889	11/23/2004	MOTION
890	11/23/2004	MOTION
891	11/23/2004	NOTICE OF TAKING DEPOSITION
892	11/23/2004	MOTION
893	11/23/2004	RESPONSE TO:
894	11/23/2004	AGREED ORDER
895	11/23/2004	NOTICE OF HEARING
896	11/23/2004	RESPONSE TO:
897	11/24/2004	SUBPOENA RETURNED / SERVED
898	11/24/2004	NOTICE OF TAKING DEPOSITION
899	11/24/2004	MOTION FOR PROTECTIVE ORDER
900	11/24/2004	MOTION TO COMPEL
901	11/24/2004	NOTICE OF HEARING
902	11/24/2004	NOTICE OF HEARING
903	11/24/2004	NOTICE OF TAKING DEPOSITION
904	11/24/2004	SUBPOENA RETURNED / SERVED

905	11/24/2004	RESPONSE TO:
906	11/29/2004	NOTICE OF TAKING DEPOSITION
907	11/29/2004	NOTICE OF TAKING DEPOSITION
908	11/29/2004	RESPONSE TO:
909	11/29/2004	RESPONSE TO:
910	11/29/2004	RESPONSE TO:
911	11/29/2004	AGREED ORDER
912	11/30/2004	NOTICE OF TAKING DEPOSITION
913	11/30/2004	RESPONSE TO:
914	11/30/2004	RESPONSE TO:
915	11/30/2004	MOTION
916	12/01/2004	NOTICE OF TAKING DEPOSITION
917	12/01/2004	NOTICE
918	12/01/2004	NOTICE
919	12/01/2004	AFFIDAVIT
920	12/02/2004	NOTICE OF TAKING DEPOSITION
921	12/02/2004	NOTICE OF TAKING DEPOSITION
922	12/02/2004	ORDER
923	12/03/2004	SUBPOENA RETURNED / SERVED
924	12/03/2004	SUBPOENA RETURNED / SERVED
925	12/03/2004	NOTICE OF TAKING DEPOSITION
926	12/03/2004	NOTICE OF TAKING DEPOSITION
927	12/03/2004	ORDER
928	12/03/2004	ORDER

929	12/03/2004	ORDER
930	12/03/2004	ORDER
931	12/03/2004	ORDER
932	12/03/2004	ORDER
933	12/03/2004	ORDER
934	12/03/2004	ORDER
935	12/07/2004	NOTICE OF HEARING
936	12/07/2004	MOTION
937	12/07/2004	NOTICE OF TAKING DEPOSITION
938	12/08/2004	MOTION
939	12/08/2004	NOTICE OF HEARING
940	12/08/2004	MOTION TO COMPEL
941	12/09/2004	NOTICE OF TAKING DEPOSITION
942	12/09/2004	NOTICE OF HEARING
943	12/09/2004	MOTION
944	12/09/2004	NOTICE OF HEARING
945	12/09/2004	MOTION
946	12/09/2004	NOTICE OF HEARING
 947	12/10/2004	NOTICE
 948	12/10/2004	MEMORANDUM
 949	12/10/2004	NOTICE
 950	12/10/2004	NOTICE
 951	12/10/2004	NOTICE
952	12/10/2004	NOTICE

953	12/10/2004	MOTION
954	12/10/2004	NOTICE OF FILING
955	12/10/2004	MOTION FOR SUMMARY JUDGMENT
956	12/10/2004	NOTICE OF FILING
957	12/10/2004	NOTICE OF FILING
958	12/10/2004	MOTION
959	12/10/2004	NOTICE OF HEARING
960	12/13/2004	AGREED ORDER
961	12/13/2004	NOTICE
962	12/14/2004	RESPONSE TO:
963	12/14/2004	RESPONSE TO:
964	12/14/2004	RESPONSE TO:
965	12/15/2004	MOTION
966	12/15/2004	NOTICE OF HEARING
967	12/15/2004	ORDER
968	12/15/2004	RESPONSE TO:
969	12/15/2004	ORDER
970	12/15/2004	ORDER
971	12/15/2004	ORDER
972	12/16/2004	MOTION
973	12/16/2004	NOTICE OF HEARING
974	12/16/2004	NOTICE OF TAKING DEPOSITION
975	12/17/2004	NOTICE OF TAKING DEPOSITION
976	12/21/2004	MOTION TO STRIKE

977	12/21/2004	NOTICE OF HEARING
978	12/21/2004	RESPONSE TO:
979	12/21/2004	RESPONSE TO:
980	12/21/2004	RE-NOTICE OF HEARING
981	12/22/2004	ORDER SETTING HEARING
982	12/22/2004	NOTICE OF TAKING DEPOSITION
983	12/22/2004	ORDER
984	12/23/2004	MOTION
985	12/23/2004	MOTION
986	12/23/2004	NOTICE OF HEARING
987	12/23/2004	NOTICE OF FILING
 988	12/23/2004	RESPONSE TO:
989	12/28/2004	NOTICE OF TAKING DEPOSITION
990	12/28/2004	MOTION
991	12/29/2004	NOTICE OF HEARING
992	12/30/2004	NOTICE OF FILING
993	12/30/2004	SEALED
994	12/30/2004	NOTICE OF FILING
995	12/30/2004	SEALED
996	12/30/2004	NOTICE OF FILING
997	12/30/2004	SEALED
998	12/30/2004	NOTICE OF FILING
999	12/30/2004	SEALED
1000	12/30/2004	NOTICE OF FILING

1001	12/30/2004	SEALED
1002	12/30/2004	NOTICE OF FILING
1003	12/30/2004	SEALED
1004	12/30/2004	NOTICE OF FILING
1005	12/30/2004	SEALED
1006	12/30/2004	MOTION TO COMPEL
1007	12/30/2004	NOTICE OF HEARING
1008	12/30/2004	NOTICE OF FILING
1009	12/30/2004	SEALED
1010	12/30/2004	NOTICE OF FILING
1011	12/30/2004	SEALED
1012	12/30/2004	NOTICE OF FILING
1013	12/30/2004	SEALED
1014	12/30/2004	NOTICE OF FILING
1015	12/30/2004	SEALED
1016	12/30/2004	NOTICE OF FILING
1017	12/30/2004	SEALED
1018	12/30/2004	NOTICE OF FILING
1019	12/30/2004	SEALED
1020	12/30/2004	NOTICE OF FILING
1021	12/30/2004	SEALED
1022	12/30/2004	NOTICE OF FILING
1023	12/30/2004	SEALED
1024	12/30/2004	NOTICE OF FILING

1025	12/30/2004	SEALED
1026	12/30/2004	NOTICE OF FILING
1027	12/30/2004	SEALED
1028	12/30/2004	NOTICE OF FILING
1029	12/30/2004	SEALED
1030	12/30/2004	NOTICE OF FILING
1031	12/30/2004	SEALED
1032	12/30/2004	NOTICE OF FILING
1033	12/30/2004	SEALED
1034	12/30/2004	NOTICE OF FILING
1035	12/30/2004	SEALED
1036	12/30/2004	NOTICE OF FILING
1037	12/30/2004	SEALED
1038	12/30/2004	NOTICE OF FILING
1039	12/30/2004	SEALED
1040	12/30/2004	NOTICE OF FILING
1041	12/30/2004	SEALED
1042	12/30/2004	NOTICE OF FILING
1043	12/30/2004	SEALED
1044	12/30/2004	NOTICE OF FILING
1045	12/30/2004	SEALED
1046	12/30/2004	NOTICE OF FILING
1047	12/30/2004	SEALED
1048	12/30/2004	NOTICE OF FILING

1049	12/30/2004	SEALED
1050	01/03/2005	NOTICE OF TAKING DEPOSITION
1051	01/03/2005	NOTICE OF TAKING DEPOSITION
1052	01/03/2005	RESPONSE TO:
1053	01/03/2005	RESPONSE TO:
1054	01/03/2005	RESPONSE TO:
1055	01/03/2005	RESPONSE TO:
1056	01/03/2005	NOTICE OF FILING
1057	01/03/2005	SEALED
1058	01/03/2005	NOTICE OF FILING
1059	01/03/2005	APPENDIX
1060	01/03/2005	APPENDIX
1061	01/03/2005	APPENDIX
1062	01/03/2005	APPENDIX
1063	01/03/2005	APPENDIX
1064	01/03/2005	APPENDIX
1065	01/03/2005	APPENDIX
1066	01/03/2005	APPENDIX
1067	01/03/2005	APPENDIX
1068	01/03/2005	APPENDIX
1069	01/03/2005	APPENDIX
1070	01/03/2005	APPENDIX
 1071	01/03/2005	APPENDIX
 1072	01/03/2005	APPENDIX

 1073	01/03/2005	APPENDIX
 1074	01/03/2005	APPENDIX
 1075	01/03/2005	APPENDIX
 1076	01/03/2005	APPENDIX
 1077	01/03/2005	APPENDIX
 1078	01/03/2005	APPENDIX
 1079	01/03/2005	APPENDIX
 1080	01/03/2005	APPENDIX
 1081	01/03/2005	APPENDIX
 1082	01/03/2005	APPENDIX
1083	01/04/2005	ORDER
1084	01/04/2005	AGREED ORDER
1085	01/04/2005	ORDER
1086	01/04/2005	RE-NOTICE OF HEARING
 1087	01/04/2005	AGREED ORDER
 1088	01/04/2005	ORDER
 1089	01/04/2005	RE-NOTICE OF HEARING
 1090	01/04/2005	ORDER
1091	01/05/2005	NOTICE OF HEARING
1092	01/05/2005	MOTION TO COMPEL
1093	01/05/2005	NOTICE OF TAKING DEPOSITION
1094	01/05/2005	NOTICE OF HEARING
1095	01/05/2005	MOTION
1096	01/05/2005	RE-NOTICE OF HEARING

	1097	01/05/2005	NOTICE OF FILING
	1098	01/05/2005	SEALED
	1099	01/05/2005	NOTICE OF HEARING
	1100	01/05/2005	MOTION TO COMPEL
	1101	01/05/2005	NOTICE OF TAKING DEPOSITION
	1102	01/05/2005	MOTION FOR EXTENSION OF TIME
	1103	01/05/2005	RE-NOTICE OF HEARING
	1104	01/05/2005	NOTICE OF FILING
	1105	01/05/2005	SEALED
	1106	01/05/2005	NOTICE OF HEARING
	1107	01/06/2005	NOTICE OF FILING
	1108	01/06/2005	SEALED
	1109	01/06/2005	NOTICE OF FILING
	1110	01/06/2005	SEALED
	1111	01/06/2005	NOTICE OF FILING
	1112	01/06/2005	SEALED
	1113	01/06/2005	NOTICE OF FILING
	1114	01/06/2005	SEALED
	1115	01/07/2005	NOTICE OF FILING
	1116	01/07/2005	NOTICE OF FILING
	1117	01/07/2005	MEMORANDUM
	1118	01/07/2005	NOTICE OF FILING
	1119	01/07/2005	MEMORANDUM
	1120	01/07/2005	NOTICE OF FILING

	1121	01/07/2005	NOTICE OF FILING
	1122	01/07/2005	REPLY/RESPONSE
	1123	01/07/2005	NOTICE OF FILING
	1124	01/07/2005	MEMORANDUM
	1125	01/10/2005	MOTION
	1126	01/10/2005	MOTION
	1127	01/10/2005	NOTICE OF FILING
	1128	01/10/2005	MOTION
	1129	01/10/2005	MOTION
	1130	01/10/2005	MOTION
	1131	01/10/2005	NOTICE OF FILING
	1132	01/10/2005	NOTICE OF FILING
	1133	01/10/2005	NOTICE OF FILING
	1134	01/10/2005	MOTION
	1135	01/10/2005	NOTICE OF FILING
	1136	01/10/2005	MOTION
	1137	01/10/2005	MOTION
	1138	01/10/2005	RESPONSE TO:
	1139	01/10/2005	MOTION
	1140	01/10/2005	NOTICE OF FILING
	1141	01/10/2005	SEALED
	1142	01/10/2005	NOTICE OF FILING
	1143	01/10/2005	SEALED
	1144	01/10/2005	SEALED

1145	01/10/2005	SEALED
1146	01/10/2005	SEALED
1147	01/10/2005	SEALED
1148	01/10/2005	SEALED
1149	01/10/2005	NOTICE OF FILING
1150	01/10/2005	SEALED
1151	01/10/2005	NOTICE OF FILING
1152	01/10/2005	SEALED
1153	01/10/2005	NOTICE OF FILING
1154	01/10/2005	SEALED
1155	01/10/2005	NOTICE OF FILING
1156	01/10/2005	SEALED
1157	01/10/2005	NOTICE OF FILING
1158	01/10/2005	SEALED
1159	01/10/2005	NOTICE OF FILING
1160	01/10/2005	SEALED
1161	01/11/2005	FEE/PRO HAC VICE (\$100.00)
1162	01/11/2005	RECEIPT FOR PAYMENT
1163	01/11/2005	MOTION
1164	01/11/2005	NOTICE OF FILING
1165	01/11/2005	SUPPLEMENT
1166	01/11/2005	RESPONSE TO:
1167	01/11/2005	SUPPLEMENT
1168	01/11/2005	SUPPLEMENT

1169	01/11/2005	SUPPLEMENT
1170	01/11/2005	SUPPLEMENT
1171	01/11/2005	SUPPLEMENT
1172	01/11/2005	SUPPLEMENT
1173	01/11/2005	SUPPLEMENT
1174	01/11/2005	SEALED
1175	01/11/2005	SEALED
1176	01/11/2005	MOTION
1177	01/11/2005	MOTION
1178	01/11/2005	MOTION
1179	01/11/2005	MOTION
1180	01/11/2005	MOTION
1181	01/11/2005	MOTION
1182	01/11/2005	MOTION
1183	01/11/2005	MOTION
1184	01/11/2005	MOTION
1185	01/11/2005	MOTION
1186	01/11/2005	MOTION
1187	01/11/2005	MOTION
1188	01/11/2005	MOTION
1189	01/11/2005	MOTION
1190	01/11/2005	MOTION
1191	01/11/2005	MOTION
1192	01/11/2005	MOTION

1193	01/11/2005	MOTION
1194	01/11/2005	ORDER
1195	01/11/2005	NOTICE
1196	01/11/2005	NOTICE OF FILING
1197	01/11/2005	MOTION
1198	01/11/2005	RESPONSE TO:
1199	01/11/2005	MOTION
1200	01/11/2005	NOTICE OF FILING
1201	01/11/2005	NOTICE OF FILING
1202	01/11/2005	EXHIBIT LIST
1203	01/11/2005	WITNESS LIST
 1204	01/11/2005	SUPPLEMENT
 1205	01/11/2005	RESPONSE TO:
 1206	01/11/2005	SUPPLEMENT
 1207	01/11/2005	SUPPLEMENT
 1208	01/11/2005	SUPPLEMENT
 1209	01/11/2005	SUPPLEMENT
 1210	01/11/2005	SUPPLEMENT
 1211	01/11/2005	SUPPLEMENT
 1212	01/11/2005	SUPPLEMENT
1213	01/12/2005	MOTION TO STRIKE
1214	01/12/2005	MOTION FOR PROTECTIVE ORDER
1215	01/12/2005	MOTION TO COMPEL
1216	01/12/2005	NOTICE OF HEARING

1217	01/12/2005	WITNESS LIST
1218	01/12/2005	EXHIBIT LIST
1219	01/12/2005	ORDER
1220	01/12/2005	AGREED ORDER
1221	01/12/2005	ORDER
1222	01/12/2005	ORDER
1223	01/13/2005	MOTION TO COMPEL
1224	01/13/2005	NOTICE OF HEARING
1225	01/13/2005	NOTICE OF FILING
1226	01/13/2005	NOTICE OF FILING
1227	01/13/2005	NOTICE OF FILING
1228	01/13/2005	NOTICE OF FILING
1229	01/13/2005	NOTICE OF FILING
1230	01/13/2005	NOTICE OF FILING
1231	01/13/2005	NOTICE OF FILING
1232	01/13/2005	NOTICE OF FILING
1233	01/14/2005	NOTICE OF FILING
1234	01/14/2005	SEALED
1235	01/14/2005	NOTICE OF FILING
1236	01/14/2005	SEALED
1237	01/14/2005	NOTICE OF FILING
1238	01/14/2005	SEALED
1239	01/14/2005	NOTICE OF FILING
1240	01/14/2005	SEALED

1241	01/14/2005	NOTICE OF FILING
1242	01/14/2005	SEALED
1243	01/14/2005	NOTICE OF FILING
1244	01/14/2005	SEALED
1245	01/14/2005	NOTICE OF FILING
1246	01/14/2005	SEALED
1247	01/14/2005	NOTICE OF FILING
1248	01/14/2005	SEALED
1249	01/14/2005	SEALED
1250	01/14/2005	NOTICE OF FILING
1251	01/14/2005	ORDER
1252	01/14/2005	ORDER
1253	01/18/2005	RESPONSE TO:
1254	01/18/2005	RESPONSE TO:
1255	01/18/2005	RESPONSE TO:
1256	01/18/2005	RESPONSE TO:
1257	01/18/2005	RESPONSE TO:
1258	01/18/2005	RESPONSE TO:
1259	01/18/2005	RESPONSE TO:
1260	01/18/2005	RESPONSE TO:
1261	01/18/2005	NOTICE
1262	01/18/2005	RESPONSE TO:
1263	01/18/2005	RESPONSE TO:
1264	01/18/2005	MOTION

1265	01/18/2005	NOTICE OF HEARING
1266	01/18/2005	RESPONSE TO:
1267	01/18/2005	RESPONSE TO:
1268	01/18/2005	NOTICE OF FILING
1269	01/18/2005	NOTICE
1270	01/18/2005	NOTICE OF FILING
1271	01/18/2005	RESPONSE TO:
1272	01/18/2005	NOTICE OF FILING
1273	01/18/2005	RESPONSE TO:
1274	01/18/2005	NOTICE OF FILING
1275	01/18/2005	RESPONSE TO:
1276	01/18/2005	NOTICE OF FILING
1277	01/18/2005	RESPONSE TO:
1278	01/18/2005	NOTICE OF FILING
1279	01/18/2005	SEALED
1280	01/18/2005	NOTICE OF FILING
1281	01/18/2005	SEALED
1282	01/18/2005	NOTICE OF FILING
1283	01/18/2005	SEALED
1284	01/18/2005	NOTICE OF FILING
1285	01/18/2005	SEALED
1286	01/18/2005	NOTICE OF FILING
1287	01/18/2005	MEMORANDUM
1288	01/18/2005	NOTICE OF FILING

1289	01/18/2005	SEALED
1290	01/18/2005	NOTICE OF FILING
1291	01/18/2005	SEALED
1292	01/18/2005	NOTICE OF FILING
1293	01/18/2005	SEALED
1294	01/18/2005	NOTICE
1295	01/18/2005	RESPONSE TO:
1296	01/18/2005	NOTICE
1297	01/18/2005	RESPONSE TO:
1298	01/18/2005	RESPONSE TO:
1299	01/18/2005	RESPONSE TO:
1300	01/18/2005	RESPONSE TO:
1301	01/18/2005	RESPONSE TO:
1302	01/18/2005	RESPONSE TO:
1303	01/18/2005	RESPONSE TO:
1304	01/18/2005	RESPONSE TO:
1305	01/18/2005	RESPONSE TO:
1306	01/18/2005	RESPONSE TO:
1307	01/18/2005	RESPONSE TO:
1308	01/18/2005	RESPONSE TO:
1309	01/18/2005	RESPONSE TO:
1310	01/18/2005	RESPONSE TO:
1311	01/18/2005	MEMORANDUM
1312	01/19/2005	MOTION

1313	01/19/2005	ORDER
1314	01/20/2005	NOTICE
1315	01/20/2005	NOTICE OF TAKING DEPOSITION
1316	01/20/2005	NOTICE OF FILING
1317	01/20/2005	RESPONSE TO:
1318	01/20/2005	NOTICE OF FILING
1319	01/20/2005	SEALED
1320	01/20/2005	NOTICE OF FILING
1321	01/20/2005	SEALED
1322	01/21/2005	ORDER
1323	01/21/2005	ORDER
1324	01/21/2005	RESPONSE TO:
1325	01/21/2005	ORDER
1326	01/24/2005	NOTICE
1327	01/24/2005	SEALED
1328	01/24/2005	NOTICE OF FILING
1329	01/24/2005	NOTICE
1330	01/25/2005	NOTICE
1331	01/25/2005	MOTION
1332	01/26/2005	ORDER
1333	01/26/2005	MOTION
1334	01/26/2005	MOTION
1335	01/26/2005	MOTION
1336	01/26/2005	MOTION

1337	01/26/2005	NOTICE OF HEARING
1338	01/26/2005	RE-NOTICE OF HEARING
 1339	01/26/2005	MOTION
1340	01/27/2005	ORDER
1341	01/27/2005	MOTION
1342	01/27/2005	MOTION
1343	01/27/2005	MOTION
1344	01/27/2005	MOTION
1345	01/27/2005	MOTION
1346	01/27/2005	MOTION
1347	01/27/2005	MOTION
1348	01/27/2005	MOTION
1349	01/27/2005	MOTION
1350	01/27/2005	NOTICE OF FILING
1351	01/27/2005	SEALED
1352	01/27/2005	NOTICE OF FILING
1353	01/27/2005	SEALED
1354	01/27/2005	NOTICE OF FILING
1355	01/27/2005	SEALED
1356	01/27/2005	NOTICE OF FILING
1357	01/27/2005	SEALED
1358	01/27/2005	NOTICE OF FILING
1359	01/27/2005	SEALED
1360	01/27/2005	NOTICE OF FILING

1361	01/27/2005	SEALED
1362	01/27/2005	NOTICE OF FILING
1363	01/27/2005	SEALED
1364	01/27/2005	NOTICE OF FILING
1365	01/27/2005	SEALED
1366	01/27/2005	NOTICE OF FILING
1367	01/27/2005	SEALED
1368	01/31/2005	MANDATE
1369	01/31/2005	NOTICE
1370	01/31/2005	MOTION
1371	01/31/2005	NOTICE OF HEARING
1372	01/31/2005	NOTICE OF FILING
1373	01/31/2005	SEALED
 1374	01/31/2005	NOTICE
1375	02/01/2005	ORDER
 1376	02/01/2005	ORDER
1377	02/02/2005	NOTICE OF HEARING
1378	02/02/2005	ORDER
1379	02/02/2005	ORDER
1380	02/03/2005	MEDIATION REPORT
1381	02/03/2005	ORDER
1382	02/03/2005	ORDER
1383	02/03/2005	ORDER SETTING HEARING
1384	02/03/2005	ORDER

1385	02/03/2005	ORDER
1386	02/03/2005	ORDER
1387	02/03/2005	ORDER
1388	02/03/2005	NOTICE OF TAKING DEPOSITION
1389	02/04/2005	MOTION
1390	02/04/2005	ORDER
1391	02/04/2005	ORDER
1392	02/04/2005	ORDER
1393	02/04/2005	ORDER
1394	02/04/2005	ORDER
1395	02/04/2005	ORDER
1396	02/07/2005	RESPONSE TO:
1397	02/07/2005	NOTICE
1398	02/07/2005	MOTION
1399	02/07/2005	NOTICE OF HEARING
1400	02/07/2005	REQUEST
1401	02/07/2005	NOTICE
1402	02/07/2005	MOTION
1403	02/07/2005	RESPONSE TO:
1404	02/07/2005	NOTICE OF FILING
1405	02/07/2005	SEALED
1406	02/07/2005	NOTICE OF FILING
1407	02/07/2005	SEALED
1408	02/08/2005	FEE/PRO HAC VICE (\$100.00)

1409	02/08/2005	FEE/PRO HAC VICE (\$100.00)
1410	02/08/2005	RECEIPT FOR PAYMENT
1411	02/08/2005	MOTION
1412	02/08/2005	MOTION
1413	02/08/2005	MOTION
1414	02/08/2005	NOTICE OF HEARING
1415	02/08/2005	MOTION
1416	02/08/2005	NOTICE OF HEARING
1417	02/09/2005	FEE/PRO HAC VICE (\$100.00)
1418	02/09/2005	RECEIPT FOR PAYMENT
1419	02/09/2005	MOTION
1420	02/09/2005	RESPONSE TO:
1421	02/09/2005	RESPONSE TO:
1422	02/09/2005	RESPONSE TO:
1423	02/09/2005	NOTICE OF HEARING
1424	02/09/2005	NOTICE OF TAKING DEPOSITION
1425	02/09/2005	NOTICE OF TAKING DEPOSITION
1426	02/09/2005	NOTICE OF HEARING
1427	02/09/2005	RESPONSE TO:
1428	02/09/2005	NOTICE OF TAKING DEPOSITION
1429	02/09/2005	RESPONSE TO:
1430	02/09/2005	RESPONSE TO:
1431	02/09/2005	MOTION
1432	02/09/2005	SUPPLEMENT

1433	02/09/2005	MOTION TO COMPEL
1434	02/09/2005	RESPONSE TO:
1435	02/09/2005	RESPONSE TO:
1436	02/09/2005	RESPONSE TO:
1437	02/09/2005	RESPONSE TO:
1438	02/09/2005	MOTION
1439	02/09/2005	MOTION
1440	02/11/2005	FEE/PRO HAC VICE (\$100.00)
1441	02/11/2005	FEE/PRO HAC VICE (\$100.00)
1442	02/11/2005	RECEIPT FOR PAYMENT
1443	02/11/2005	MEMORANDUM
1444	02/11/2005	MOTION
1445	02/11/2005	RESPONSE TO:
1446	02/11/2005	RESPONSE TO:
1447	02/11/2005	RESPONSE TO:
1448	02/11/2005	NOTICE
1449	02/11/2005	AGREED ORDER
1450	02/11/2005	AGREED ORDER
1451	02/11/2005	AGREED ORDER
1452	02/11/2005	AGREED ORDER
1453	02/11/2005	AGREED ORDER
1454	02/11/2005	NOTICE OF FILING
1455	02/11/2005	SEALED
1456	02/14/2005	NOTICE

	1457	02/14/2005	NOTICE OF FILING
	1458	02/14/2005	SEALED
	1459	02/14/2005	NOTICE
	1460	02/14/2005	MOTION
	1461	02/14/2005	RESPONSE TO:
	1462	02/14/2005	STIPULATION AND ORDER
	1463	02/14/2005	NOTICE
	1464	02/14/2005	MOTION IN LIMINE
	1465	02/14/2005	RESPONSE TO:
	1466	02/14/2005	STIPULATION
	1467	02/14/2005	NOTICE
	1468	02/14/2005	NOTICE
	1469	02/14/2005	NOTICE OF FILING
	1470	02/14/2005	NOTICE
	1471	02/15/2005	MOTION TO COMPEL
	1472	02/15/2005	NOTICE OF VOLUNTARY DISMISSAL
	1473	02/15/2005	SUBPOENA RETURNED / SERVED
	1474	02/15/2005	STIPULATION AND ORDER
	1475	02/15/2005	NOTICE OF FILING
	1476	02/15/2005	SEALED
	1477	02/15/2005	NOTICE
	1478	02/15/2005	NOTICE
	1479	02/15/2005	SEALED
	1480	02/15/2005	MOTION TO COMPEL

	1481	02/15/2005	NOTICE OF VOLUNTARY DISMISSAL
	1482	02/15/2005	SUBPOENA RETURNED / SERVED
	1483	02/15/2005	NOTICE OF FILING
	1484	02/15/2005	STIPULATION
	1485	02/15/2005	NOTICE
	1486	02/15/2005	NOTICE
	1487	02/16/2005	EXHIBIT LIST
	1488	02/16/2005	MOTION
	1489	02/16/2005	NOTICE OF FILING
	1490	02/16/2005	MOTION TO STRIKE
	1491	02/16/2005	MOTION
	1492	02/16/2005	MOTION
	1493	02/16/2005	RESPONSE TO:
	1494	02/16/2005	ORDER
	1495	02/16/2005	ORDER
	1496	02/16/2005	ORDER
	1497	02/16/2005	ORDER DENYING
	1498	02/16/2005	ORDER
	1499	02/16/2005	ORDER DENYING
	1500	02/16/2005	ORDER
	1501	02/16/2005	NOTICE OF FILING
	1502	02/16/2005	SEALED
	1503	02/16/2005	SEALED
	1504	02/16/2005	SEALED

1505	02/16/2005	SEALED
1506	02/16/2005	NOTICE OF FILING
1507	02/16/2005	SEALED
1508	02/16/2005	SEALED
1509	02/16/2005	MOTION
1510	02/16/2005	AGREED ORDER
1511	02/17/2005	NOTICE
1512	02/17/2005	ORDER
1513	02/17/2005	ORDER
1514	02/17/2005	ORDER
1515	02/17/2005	AGREED ORDER
1516	02/17/2005	RESPONSE TO:
1517	02/17/2005	NOTICE
1518	02/17/2005	SEALED
1519	02/17/2005	SEALED
1520	02/17/2005	SEALED
1521	02/17/2005	SEALED
1522	02/17/2005	SEALED
1523	02/17/2005	SEALED
1524	02/17/2005	SEALED
1525	02/18/2005	SEALED
1526	02/18/2005	MOTION
1527	02/18/2005	ORDER
1528	02/18/2005	ORDER

1529	02/18/2005	ORDER
1530	02/18/2005	ORDER
1531	02/18/2005	ORDER
1532	02/18/2005	ORDER
1533	02/18/2005	ORDER
1534	02/18/2005	ORDER
1535	02/18/2005	ORDER
1536	02/18/2005	ORDER
1537	02/18/2005	ORDER
1538	02/18/2005	ORDER
1539	02/18/2005	ORDER
1540	02/18/2005	ORDER
1541	02/18/2005	ORDER
1542	02/18/2005	ORDER
1543	02/18/2005	ORDER
1544	02/22/2005	OBJECTION
1545	02/22/2005	NOTICE OF FILING
1546	02/22/2005	NOTICE
1547	02/22/2005	NOTICE
1548	02/22/2005	MOTION
1549	02/22/2005	MOTION TO DISMISS
1550	02/22/2005	MOTION TO STRIKE
1551	02/22/2005	MOTION
1552	02/22/2005	MOTION

1553	02/22/2005	NOTICE
1554	02/22/2005	MOTION TO COMPEL
1555	02/22/2005	MOTION
1556	02/22/2005	RETURNED MAIL
1557	02/22/2005	ORDER
1558	02/22/2005	NOTICE
1559	02/22/2005	MOTION
1560	02/22/2005	NOTICE OF HEARING
1561	02/22/2005	NOTICE OF FILING
1562	02/22/2005	SEALED
 1563	02/22/2005	MOTION
 1564	02/22/2005	MOTION TO COMPEL
1565	02/23/2005	MOTION
1566	02/23/2005	MEMORANDUM OF LAW
1567	02/23/2005	TRANSCRIPT
1568	02/23/2005	NOTICE OF FILING
1569	02/23/2005	SEALED
1570	02/24/2005	NOTICE OF FILING
1571	02/24/2005	MEMORANDUM
1572	02/24/2005	SUPPLEMENT
1573	02/24/2005	NOTICE
1574	02/24/2005	MOTION
1575	02/24/2005	RESPONSE TO:
1576	02/24/2005	ORDER

1577	02/24/2005	RESPONSE TO:
1578	02/24/2005	MOTION
1579	02/24/2005	RESPONSE TO:
1580	02/24/2005	RESPONSE TO:
1581	02/24/2005	MOTION
1582	02/24/2005	NOTICE OF FILING
1583	02/24/2005	SEALED
1584	02/24/2005	NOTICE OF FILING
1585	02/24/2005	SEALED
1586	02/24/2005	SEALED
1587	02/24/2005	SEALED
1588	02/24/2005	LETTER
1589	02/24/2005	RESPONSE TO:
1590	02/24/2005	NOTICE
1591	02/25/2005	NOTICE
1592	02/25/2005	MEMORANDUM OF LAW
1593	02/25/2005	NOTICE OF FILING
1594	02/25/2005	NOTICE OF TAKING DEPOSITION
1595	02/25/2005	NOTICE
1596	02/25/2005	NOTICE OF FILING
1597	02/25/2005	NOTICE OF FILING
1598	02/25/2005	SEALED
1599	02/25/2005	SEALED
1600	02/25/2005	SEALED

1601	02/25/2005	SEALED
1602	02/25/2005	SEALED
1603	02/25/2005	SEALED
1604	02/25/2005	SEALED
1605	02/25/2005	SEALED
1606	02/28/2005	RECEIPT FOR PAYMENT
1607	02/28/2005	ORDER
1608	02/28/2005	ORDER
1609	02/28/2005	ORDER
1610	02/28/2005	MEMORANDUM OF LAW
1611	02/28/2005	ORDER
1612	02/28/2005	ORDER
1613	02/28/2005	ORDER
1614	02/28/2005	ORDER
1615	02/28/2005	ORDER
1616	02/28/2005	ORDER
1617	02/28/2005	ORDER
1618	02/28/2005	CORRESPONDENCE
1619	02/28/2005	ORDER
1620	02/28/2005	ORDER
1621	02/28/2005	NOTICE
1622	02/28/2005	ORDER
1623	02/28/2005	ORDER
1624	02/28/2005	ORDER

1625	02/28/2005	ORDER
1626	02/28/2005	ORDER
1627	02/28/2005	ORDER
1628	02/28/2005	ORDER
1629	02/28/2005	CORRESPONDENCE
1630	02/28/2005	ORDER
1631	02/28/2005	NOTICE
1632	02/28/2005	NOTICE
1633	02/28/2005	RESPONSE TO:
1634	02/28/2005	NOTICE OF FILING
1635	02/28/2005	MOTION
1636	02/28/2005	MOTION
1637	02/28/2005	RESPONSE TO:
1638	02/28/2005	MOTION
1639	02/28/2005	NOTICE OF FILING
1640	02/28/2005	SEALED
1641	02/28/2005	NOTICE OF FILING
1642	02/28/2005	SEALED
1643	02/28/2005	NOTICE OF FILING
1644	02/28/2005	SEALED
1645	02/28/2005	SEALED
1646	02/28/2005	SEALED
1647	02/28/2005	SEALED
1648	02/28/2005	SEALED

1649	02/28/2005	SEALED
1650	02/28/2005	SEALED
1651	02/28/2005	SEALED
1652	02/28/2005	SEALED
1653	02/28/2005	SEALED
1654	02/28/2005	SEALED
1655	02/28/2005	NOTICE OF FILING
1656	02/28/2005	SEALED
1657	02/28/2005	SEALED
 1658	02/28/2005	ORDER
 1659	02/28/2005	ORDER
1660	03/01/2005	ORDER
1661	03/01/2005	NOTICE OF FILING
1662	03/01/2005	SEALED
1663	03/01/2005	NOTICE OF FILING
1664	03/01/2005	SEALED
1665	03/01/2005	SEALED
1666	03/01/2005	SEALED
1667	03/01/2005	RESPONSE TO:
1668	03/01/2005	NOTICE OF HEARING
1669	03/01/2005	MEMORANDUM
1670	03/01/2005	NOTICE
1671	03/01/2005	MOTION
1672	03/01/2005	RESPONSE TO:

1673	03/01/2005	NOTICE OF COMPLIANCE
1674	03/01/2005	NOTICE OF FILING
1675	03/01/2005	NOTICE OF TAKING DEPOSITION
1676	03/01/2005	RESPONSE TO:
1677	03/01/2005	SEALED
 1678	03/01/2005	APPENDIX
1679	03/02/2005	NOTICE OF FILING
1680	03/02/2005	NOTICE OF TAKING DEPOSITION
1681	03/02/2005	BRIEF
1682	03/02/2005	ORDER
1683	03/02/2005	ORDER
1684	03/02/2005	ORDER
1685	03/02/2005	ORDER
1686	03/02/2005	ORDER
1687	03/02/2005	AGREED ORDER
1688	03/02/2005	ORDER
1689	03/02/2005	ORDER
1690	03/02/2005	NOTICE OF FILING
1691	03/02/2005	SEALED
1692	03/02/2005	NOTICE OF FILING
1693	03/02/2005	SEALED
1694	03/02/2005	MOTION
1695	03/02/2005	NOTICE OF FILING
1696	03/02/2005	SEALED

 1697	03/02/2005	AMENDED ORDER
 1698	03/02/2005	ORDER
1699	03/03/2005	MOTION TO COMPEL
1700	03/03/2005	NOTICE OF HEARING
1701	03/03/2005	NOTICE OF FILING
1702	03/03/2005	SEALED
1703	03/03/2005	SEALED
1704	03/03/2005	SEALED
1705	03/03/2005	SEALED
1706	03/03/2005	SEALED
1707	03/03/2005	SEALED
1708	03/03/2005	SEALED
1709	03/03/2005	SEALED
1710	03/03/2005	SEALED
1711	03/03/2005	SEALED
1712	03/03/2005	NOTICE OF FILING
1713	03/03/2005	SEALED
1714	03/04/2005	MOTION
1715	03/04/2005	FEE/PRO HAC VICE (\$100.00)
1716	03/04/2005	RECEIPT FOR PAYMENT
1717	03/04/2005	ORDER
1718	03/04/2005	AGREED ORDER
1719	03/04/2005	ORDER
1720	03/04/2005	ORDER

1721	03/04/2005	NOTICE OF TAKING DEPOSITION
1722	03/04/2005	MOTION
1723	03/04/2005	NOTICE OF HEARING
1724	03/04/2005	REPLY/RESPONSE
1725	03/04/2005	NOTICE
1726	03/04/2005	NOTICE OF FILING
1727	03/04/2005	SEALED
1728	03/04/2005	NOTICE OF FILING
1729	03/04/2005	SEALED
1730	03/04/2005	SEALED
1731	03/04/2005	NOTICE OF FILING
1732	03/04/2005	SEALED
1733	03/04/2005	SEALED
1734	03/04/2005	NOTICE OF FILING
1735	03/04/2005	SEALED
 1736	03/04/2005	MOTION
1737	03/07/2005	NOTICE OF FILING
1738	03/07/2005	SEALED
1739	03/07/2005	EXHIBIT RECEIPT
1740	03/07/2005	NOTICE OF FILING
1741	03/07/2005	NOTICE OF FILING
1742	03/07/2005	NOTICE
1743	03/07/2005	NOTICE OF TAKING DEPOSITION
1744	03/07/2005	NOTICE OF TAKING DEPOSITION

1745	03/07/2005	NOTICE OF TAKING DEPOSITION
1746	03/07/2005	NOTICE
1747	03/07/2005	NOTICE OF TAKING DEPOSITION
1748	03/07/2005	MEMORANDUM OF LAW
1749	03/07/2005	NOTICE OF TAKING DEPOSITION
1750	03/07/2005	NOTICE OF FILING
1751	03/07/2005	MOTION
1752	03/07/2005	ORDER
1753	03/07/2005	AGREED ORDER
1754	03/07/2005	AGREED ORDER
1755	03/07/2005	ANSWER & AFFIRMATIVE DEFENSES
1756	03/07/2005	NOTICE OF FILING
1757	03/07/2005	SEALED
1758	03/08/2005	MEMORANDUM
1759	03/08/2005	RESPONSE TO:
1760	03/08/2005	NOTICE OF FILING
1761	03/08/2005	MOTION
1762	03/08/2005	ORDER
1763	03/08/2005	ORDER
1764	03/08/2005	NOTICE OF HEARING
1765	03/08/2005	NOTICE OF FILING
1766	03/08/2005	SEALED
1767	03/08/2005	NOTICE OF FILING
1768	03/08/2005	SEALED

 1769	03/08/2005	MOTION
1770	03/09/2005	SEALED
1771	03/09/2005	NOTICE OF FILING
1772	03/09/2005	MOTION
1773	03/09/2005	MOTION TO STRIKE
1774	03/09/2005	NOTICE OF TAKING DEPOSITION
1775	03/09/2005	MOTION
1776	03/09/2005	RESPONSE TO:
1777	03/09/2005	ORDER
1778	03/09/2005	NOTICE OF HEARING
1779	03/09/2005	ORDER
1780	03/09/2005	SEALED
1781	03/09/2005	NOTICE OF FILING
1782	03/09/2005	SEALED
1783	03/09/2005	SEALED
1784	03/09/2005	SEALED
1785	03/09/2005	NOTICE OF FILING
1786	03/09/2005	SEALED
1787	03/09/2005	NOTICE OF FILING
1788	03/09/2005	SEALED
1789	03/10/2005	ORDER
1790	03/10/2005	ORDER
1791	03/10/2005	MOTION
1792	03/10/2005	RESPONSE TO:

1793	03/10/2005	ORDER
1794	03/10/2005	NOTICE OF FILING
1795	03/10/2005	SEALED
 1796	03/10/2005	MOTION
1797	03/11/2005	MOTION
1798	03/11/2005	FEE/PRO HAC VICE (\$100.00)
1799	03/11/2005	RECEIPT FOR PAYMENT
1800	03/11/2005	AGREED ORDER
1801	03/11/2005	ORDER
1802	03/11/2005	ORDER
1803	03/11/2005	NOTICE
1804	03/11/2005	MOTION
1805	03/11/2005	MOTION TO COMPEL
1806	03/11/2005	NOTICE OF TAKING DEPOSITION
1807	03/11/2005	MOTION
1808	03/11/2005	NOTICE OF FILING
1809	03/11/2005	SEALED
1810	03/11/2005	NOTICE OF FILING
1811	03/11/2005	SEALED
1812	03/11/2005	NOTICE OF FILING
1813	03/11/2005	SEALED
1814	03/11/2005	NOTICE OF FILING
1815	03/11/2005	SEALED
1816	03/11/2005	MOTION

1817	03/11/2005	MOTION
1818	03/11/2005	NOTICE OF FILING
1819	03/11/2005	SEALED
1820	03/14/2005	MOTION
1821	03/14/2005	NOTICE OF HEARING
1822	03/14/2005	MOTION
1823	03/14/2005	NOTICE OF HEARING
1824	03/14/2005	ORDER
1825	03/14/2005	CORRESPONDENCE
1826	03/14/2005	AGREED ORDER
1827	03/14/2005	ORDER
1828	03/14/2005	MEMORANDUM
1829	03/14/2005	MEMORANDUM
1830	03/14/2005	MOTION
1831	03/14/2005	NOTICE
1832	03/14/2005	NOTICE OF FILING
1833	03/14/2005	SEALED
1834	03/14/2005	NOTICE OF FILING
1835	03/14/2005	SEALED
1836	03/14/2005	NOTICE OF FILING
1837	03/14/2005	SEALED
1838	03/14/2005	MOTION
 1839	03/14/2005	MEMORANDUM
1840	03/15/2005	RESPONSE TO:

1841	03/15/2005	RESPONSE TO:
1842	03/15/2005	SEALED
1843	03/15/2005	NOTICE OF FILING
1844	03/15/2005	SEALED
1845	03/15/2005	NOTICE OF FILING
1846	03/15/2005	SEALED
1847	03/15/2005	RESPONSE TO:
1848	03/15/2005	DEPOSITION
1849	03/15/2005	RESPONSE TO:
1850	03/16/2005	MOTION
1851	03/16/2005	RESPONSE TO:
1852	03/16/2005	RESPONSE TO:
1853	03/16/2005	RESPONSE TO:
1854	03/16/2005	MOTION TO COMPEL
1855	03/16/2005	NOTICE OF HEARING
1856	03/16/2005	MOTION
1857	03/16/2005	NOTICE OF HEARING
1858	03/16/2005	MOTION
1859	03/16/2005	MOTION
1860	03/16/2005	MOTION
1861	03/16/2005	AGREED ORDER
1862	03/16/2005	ORDER
1863	03/16/2005	CORRESPONDENCE
1864	03/16/2005	ORDER

1865	03/16/2005	NOTICE OF FILING
1866	03/16/2005	SEALED
1867	03/16/2005	NOTICE OF FILING
1868	03/16/2005	SEALED
1869	03/16/2005	NOTICE OF FILING
1870	03/16/2005	SEALED
1871	03/16/2005	NOTICE OF FILING
1872	03/16/2005	SEALED
1873	03/16/2005	NOTICE OF FILING
1874	03/16/2005	SEALED
1875	03/16/2005	CORRESPONDENCE
 1876	03/16/2005	RESPONSE TO:
 1877	03/16/2005	RESPONSE TO:
1878	03/17/2005	MOTION
1879	03/17/2005	NOTICE OF HEARING
1880	03/17/2005	NOTICE OF FILING
1881	03/17/2005	NOTICE OF FILING
1882	03/17/2005	EXHIBIT
1883	03/18/2005	NOTICE
1884	03/18/2005	ORDER
1885	03/18/2005	CORRESPONDENCE
1886	03/18/2005	ORDER
1887	03/18/2005	CORRESPONDENCE
1888	03/18/2005	SEALED

1889	03/18/2005	SEALED
1890	03/18/2005	NOTICE OF FILING
1891	03/18/2005	NOTICE OF FILING
1892	03/18/2005	MOTION
1893	03/18/2005	RESPONSE TO:
1894	03/18/2005	NOTICE
1895	03/18/2005	RESPONSE TO:
1896	03/18/2005	RESPONSE TO:
1897	03/18/2005	MOTION
1898	03/18/2005	NOTICE
1899	03/18/2005	RESPONSE TO:
1900	03/21/2005	NOTICE
1901	03/21/2005	NOTICE
1902	03/21/2005	RESPONSE TO:
1903	03/21/2005	EXHIBIT LIST
1904	03/21/2005	RESPONSE TO:
1905	03/21/2005	RESPONSE TO:
1906	03/21/2005	NOTICE
1907	03/21/2005	NOTICE
1908	03/21/2005	MOTION TO COMPEL
1909	03/21/2005	NOTICE
1910	03/21/2005	NOTICE
1911	03/21/2005	NOTICE OF FILING
1912	03/21/2005	SEALED

1913	03/21/2005	NOTICE OF FILING
1914	03/21/2005	SEALED
1915	03/21/2005	NOTICE OF FILING
1916	03/21/2005	SEALED
1917	03/21/2005	SEALED
1918	03/22/2005	ORDER
1919	03/22/2005	NOTICE
1920	03/22/2005	ORDER
1921	03/22/2005	CORRESPONDENCE
1922	03/23/2005	ORDER
1923	03/23/2005	ORDER
1924	03/23/2005	MOTION
1925	03/23/2005	NOTICE OF FILING
1926	03/23/2005	MOTION
1927	03/23/2005	NOTICE
1928	03/23/2005	NOTICE OF FILING
1929	03/23/2005	SEALED
 1930	03/23/2005	ORDER
1931	03/24/2005	ORDER
1932	03/24/2005	ORDER
1933	03/24/2005	ORDER
1934	03/24/2005	ORDER
1935	03/24/2005	SUBPOENA RETURNED / SERVED
1936	03/24/2005	SUBPOENA RETURNED / SERVED

1937	03/24/2005	ORDER
1938	03/24/2005	ORDER
1939	03/24/2005	ORDER
1940	03/24/2005	LETTER
1941	03/24/2005	MOTION
 1942	03/24/2005	ORDER
1943	03/25/2005	MEMORANDUM OF LAW
1944	03/28/2005	NOTICE
1945	03/28/2005	NOTICE OF FILING
1946	03/28/2005	NOTICE
1947	03/28/2005	REPLY/RESPONSE
1948	03/28/2005	MOTION
1949	03/28/2005	NOTICE OF HEARING
1950	03/28/2005	STATEMENT
1951	03/28/2005	ORDER
1952	03/28/2005	ORDER
1953	03/28/2005	ORDER
1954	03/29/2005	STATEMENT
1955	03/29/2005	ORDER
1956	03/29/2005	ORDER
1957	03/29/2005	ORDER
1958	03/29/2005	ORDER
1959	03/29/2005	ORDER
1960	03/29/2005	MOTION TO STRIKE

1961	03/29/2005	ORDER
1962	03/30/2005	MOTION
1963	03/30/2005	ORDER
1964	03/30/2005	ORDER
1965	03/30/2005	ORDER
1966	03/30/2005	AGREED ORDER
1967	03/30/2005	ORDER
1968	03/30/2005	ORDER
1969	03/30/2005	CORRESPONDENCE
1970	03/30/2005	ORDER
1971	03/30/2005	NOTICE
1972	03/30/2005	ORDER
1973	03/30/2005	CORRESPONDENCE
1974	03/31/2005	ORDER
1975	03/31/2005	ORDER
1976	03/31/2005	CORRESPONDENCE
1977	03/31/2005	NOTICE
1978	03/31/2005	MOTION
1979	03/31/2005	NOTICE
1980	03/31/2005	NOTICE OF COMPLIANCE
1981	03/31/2005	NOTICE
1982	03/31/2005	NOTICE
1983	03/31/2005	NOTICE OF FILING
1984	04/01/2005	MOTION

1985	04/01/2005	NOTICE OF HEARING
1986	04/01/2005	NOTICE
1987	04/01/2005	NOTICE OF TAKING DEPOSITION
1988	04/04/2005	MOTION
1989	04/04/2005	NOTICE OF HEARING
1990	04/04/2005	NOTICE OF HEARING
1991	04/04/2005	NOTICE
1992	04/04/2005	NOTICE
1993	04/04/2005	NOTICE
1994	04/04/2005	MOTION
1995	04/04/2005	NOTICE OF HEARING
1996	04/04/2005	MOTION
1997	04/04/2005	NOTICE OF HEARING
1998	04/04/2005	MOTION
1999	04/04/2005	NOTICE OF HEARING
2000	04/04/2005	MOTION
2001	04/04/2005	NOTICE OF HEARING
2002	04/04/2005	MOTION
2003	04/04/2005	DISCLOSURE
2004	04/04/2005	MOTION
2005	04/04/2005	NOTICE OF HEARING
2006	04/04/2005	NOTICE OF FILING
2007	04/04/2005	SEALED
 2008	04/04/2005	MOTION

2009	04/05/2005	NOTICE OF FILING
2010	04/05/2005	SEALED
2011	04/05/2005	MOTION
2012	04/05/2005	ORDER
2013	04/05/2005	ORDER
2014	04/05/2005	ORDER
2015	04/05/2005	AGREED ORDER
2016	04/05/2005	ORDER
2017	04/05/2005	ORDER
2018	04/05/2005	ORDER
2019	04/05/2005	ORDER
2020	04/05/2005	ORDER
2021	04/05/2005	ORDER
2022	04/05/2005	ORDER
2023	04/05/2005	ORDER
2024	04/05/2005	NOTICE
2025	04/05/2005	MOTION
2026	04/05/2005	ORDER
2027	04/05/2005	ORDER
2028	04/05/2005	RESPONSE TO:
2029	04/05/2005	MOTION
2030	04/05/2005	NOTICE
2031	04/05/2005	MOTION
2032	04/05/2005	NOTICE

2033	04/05/2005	MOTION
 2034	04/05/2005	NOTICE
 2035	04/05/2005	MOTION
2036	04/06/2005	MOTION
2037	04/06/2005	MOTION TO STRIKE
2038	04/06/2005	NOTICE OF HEARING
2039	04/06/2005	MOTION
2040	04/06/2005	NOTICE OF HEARING
2041	04/06/2005	DISCLOSURE
2042	04/06/2005	DISCLOSURE
2043	04/06/2005	ORDER
2044	04/06/2005	NOTICE OF HEARING
2045	04/06/2005	RESPONSE TO:
2046	04/07/2005	ORDER
2047	04/07/2005	ORDER
2048	04/07/2005	EXHIBIT LIST
2049	04/07/2005	DISCLOSURE
2050	04/07/2005	RESPONSE TO:
2051	04/07/2005	NOTICE
2052	04/07/2005	MOTION
2053	04/07/2005	NOTICE OF HEARING
2054	04/08/2005	NOTICE OF FILING
2055	04/08/2005	ORDER
2056	04/08/2005	ORDER

2057	04/08/2005	NOTICE OF TAKING DEPOSITION
2058	04/11/2005	MOTION
2059	04/11/2005	FEE/PRO HAC VICE (\$100.00)
2060	04/11/2005	RECEIPT FOR PAYMENT
2061	04/11/2005	NOTICE
2062	04/11/2005	MOTION TO COMPEL
2063	04/11/2005	NOTICE OF HEARING
2064	04/11/2005	RESPONSE TO:
2065	04/11/2005	MOTION
2066	04/11/2005	DISCLOSURE
2067	04/11/2005	MOTION
2068	04/11/2005	NOTICE OF HEARING
2069	04/11/2005	ORDER
2070	04/11/2005	ORDER
2071	04/11/2005	ORDER
2072	04/11/2005	ORDER
2073	04/11/2005	AGREED ORDER
2074	04/11/2005	ORDER
2075	04/11/2005	NOTICE OF FILING
2076	04/11/2005	SEALED
2077	04/12/2005	MOTION
2078	04/12/2005	ORDER
2079	04/12/2005	MOTION
2080	04/12/2005	MOTION

2081	04/12/2005	MOTION
2082	04/12/2005	NOTICE OF HEARING
2083	04/12/2005	DISCLOSURE
2084	04/12/2005	ORDER
2085	04/12/2005	ORDER
2086	04/13/2005	RESPONSE TO:
2087	04/13/2005	ORDER
2088	04/13/2005	AGREED ORDER
2089	04/13/2005	EXHIBIT LIST
2090	04/13/2005	JURY QUESTIONS
2091	04/13/2005	JURY QUESTIONS
2092	04/13/2005	SEALED
2093	04/14/2005	ORDER
2094	04/14/2005	ORDER
2095	04/14/2005	ORDER
2096	04/15/2005	ORDER
2097	04/15/2005	ORDER
2098	04/15/2005	ORDER
2099	04/15/2005	ORDER
2100	04/15/2005	ORDER
2101	04/15/2005	ORDER
2102	04/15/2005	NOTICE
2103	04/15/2005	NOTICE
2104	04/15/2005	STATEMENT

2105	04/18/2005	ORDER
2106	04/18/2005	ORDER
2107	04/18/2005	MOTION
2108	04/18/2005	MOTION
2109	04/18/2005	NOTICE OF HEARING
2110	04/18/2005	MOTION
2111	04/18/2005	NOTICE OF FILING
2112	04/18/2005	MOTION
2113	04/18/2005	NOTICE
2114	04/18/2005	NOTICE
2115	04/18/2005	NOTICE OF HEARING
2116	04/18/2005	MOTION
2117	04/18/2005	NOTICE
2118	04/18/2005	JURY QUESTIONS
2119	04/19/2005	ORDER
2120	04/19/2005	ORDER
2121	04/19/2005	MOTION
2122	04/19/2005	MOTION
2123	04/19/2005	BRIEF
2124	04/19/2005	NOTICE
2125	04/19/2005	SEALED
2126	04/19/2005	NOTICE OF FILING
2127	04/20/2005	ORDER
2128	04/20/2005	MOTION

2129	04/20/2005	NOTICE
2130	04/20/2005	NOTICE OF FILING
2131	04/20/2005	SEALED
2132	04/21/2005	MOTION
2133	04/21/2005	NOTICE OF HEARING
2134	04/21/2005	ORDER
2135	04/21/2005	SEALED
2136	04/21/2005	JURY QUESTIONS
2137	04/22/2005	MOTION
2138	04/22/2005	MOTION
2139	04/22/2005	RESPONSE TO:
2140	04/22/2005	RESPONSE TO:
2141	04/22/2005	RESPONSE TO:
2142	04/22/2005	DISCLOSURE
2143	04/22/2005	MOTION
2144	04/22/2005	NOTICE OF FILING
2145	04/22/2005	NOTICE
2146	04/22/2005	MOTION
2147	04/22/2005	ORDER
2148	04/22/2005	NOTICE OF FILING
2149	04/22/2005	SEALED
2150	04/25/2005	MOTION
2151	04/25/2005	NOTICE
2152	04/25/2005	NOTICE

2153	04/25/2005	MOTION
2154	04/25/2005	MOTION
2155	04/25/2005	MOTION TO COMPEL
2156	04/25/2005	MOTION
2157	04/25/2005	BRIEF
2158	04/25/2005	BRIEF
2159	04/25/2005	MEMORANDUM
2160	04/25/2005	ORDER
2161	04/25/2005	CORRESPONDENCE
2162	04/25/2005	NOTICE OF FILING
2163	04/25/2005	SEALED
2164	04/25/2005	JURY QUESTIONS
2165	04/26/2005	ORDER
2166	04/26/2005	ORDER
2167	04/26/2005	MOTION
2168	04/26/2005	MEMORANDUM
2169	04/26/2005	AFFIDAVIT
2170	04/27/2005	RESPONSE TO:
2171	04/27/2005	EXHIBIT LIST
2172	04/28/2005	ORDER
2173	04/28/2005	RESPONSE TO:
2174	04/28/2005	NOTICE
2175	04/28/2005	NOTICE
2176	04/28/2005	RESPONSE TO:

2177	04/28/2005	NOTICE
2178	04/28/2005	JURY QUESTIONS
2179	04/29/2005	REPLY/RESPONSE
2180	04/29/2005	RESPONSE TO:
2181	04/29/2005	MOTION
2182	04/29/2005	NOTICE OF HEARING
2183	04/29/2005	MOTION
2184	04/29/2005	NOTICE OF HEARING
2185	04/29/2005	NOTICE OF FILING
2186	05/02/2005	NOTICE
2187	05/02/2005	ORDER
2188	05/02/2005	ORDER
2189	05/02/2005	ORDER
2190	05/02/2005	NOTICE
2191	05/02/2005	MOTION
2192	05/02/2005	NOTICE OF HEARING
2193	05/02/2005	OBJECTION
2194	05/03/2005	ORDER
2195	05/03/2005	ORDER
2196	05/03/2005	MOTION
2197	05/03/2005	MEMORANDUM
2198	05/03/2005	NOTICE
2199	05/03/2005	MEMORANDUM
2200	05/03/2005	MOTION

2201	05/04/2005	RESPONSE TO:
2202	05/04/2005	NOTICE
2203	05/04/2005	MEMORANDUM
2204	05/04/2005	MEMORANDUM
2205	05/04/2005	ORDER
2206	05/04/2005	CORRESPONDENCE
2207	05/04/2005	ORDER
2208	05/04/2005	ORDER
2209	05/04/2005	ORDER
2210	05/04/2005	RESPONSE TO:
2211	05/04/2005	NOTICE
2212	05/04/2005	JURY QUESTIONS
2213	05/05/2005	DISCLOSURE
2214	05/05/2005	NOTICE
2215	05/05/2005	AMENDED
2216	05/05/2005	NOTICE
2217	05/05/2005	NOTICE OF FILING
2218	05/05/2005	MOTION
2219	05/05/2005	OBJECTION
2220	05/05/2005	NOTICE
2221	05/06/2005	MOTION
2222	05/06/2005	DISCLOSURE
2223	05/06/2005	NOTICE
2224	05/06/2005	NOTICE OF FILING

2225	05/06/2005	NOTICE OF FILING
2226	05/06/2005	NOTICE
2227	05/06/2005	OBJECTION
2228	05/06/2005	MOTION
2229	05/06/2005	NOTICE OF FILING
2230	05/06/2005	NOTICE OF FILING
2231	05/06/2005	NOTICE OF FILING
2232	05/06/2005	NOTICE OF FILING
2233	05/06/2005	NOTICE
2234	05/06/2005	NOTICE OF FILING
2235	05/06/2005	NOTICE OF FILING
2236	05/06/2005	NOTICE OF FILING
2237	05/06/2005	NOTICE OF FILING
2238	05/06/2005	NOTICE OF FILING
2239	05/06/2005	NOTICE OF FILING
2240	05/06/2005	NOTICE OF FILING
2241	05/06/2005	NOTICE OF FILING
2242	05/06/2005	NOTICE OF FILING
2243	05/06/2005	SEALED
2244	05/06/2005	NOTICE OF FILING
2245	05/06/2005	SEALED
2246	05/06/2005	NOTICE OF FILING
2247	05/06/2005	SEALED
2248	05/06/2005	NOTICE OF FILING

2249	05/06/2005	SEALED
2250	05/06/2005	NOTICE OF FILING
2251	05/06/2005	SEALED
2252	05/06/2005	NOTICE OF FILING
2253	05/06/2005	SEALED
2254	05/06/2005	NOTICE OF FILING
2255	05/06/2005	SEALED
2256	05/06/2005	NOTICE OF FILING
2257	05/06/2005	SEALED
2258	05/06/2005	NOTICE OF FILING
2259	05/06/2005	SEALED
2260	05/06/2005	NOTICE OF FILING
2261	05/06/2005	SEALED
2262	05/06/2005	NOTICE OF FILING
2263	05/06/2005	SEALED
2264	05/06/2005	NOTICE OF FILING
2265	05/06/2005	SEALED
2266	05/06/2005	NOTICE OF FILING
2267	05/06/2005	SEALED
2268	05/06/2005	NOTICE OF FILING
2269	05/06/2005	SEALED
2270	05/06/2005	NOTICE OF FILING
2271	05/06/2005	SEALED
2272	05/06/2005	NOTICE OF FILING

2273	05/06/2005	SEALED
2274	05/06/2005	NOTICE OF FILING
2275	05/06/2005	SEALED
2276	05/06/2005	NOTICE OF FILING
2277	05/06/2005	SEALED
2278	05/06/2005	ORDER
2279	05/06/2005	SEALED
2280	05/09/2005	OBJECTION
2281	05/09/2005	MEMORANDUM
2282	05/09/2005	NOTICE OF FILING
2283	05/09/2005	NOTICE OF FILING
2284	05/09/2005	NOTICE OF FILING
2285	05/09/2005	NOTICE OF FILING
2286	05/09/2005	NOTICE
2287	05/09/2005	NOTICE OF FILING
2288	05/09/2005	OBJECTION
2289	05/09/2005	OBJECTION
2290	05/09/2005	NOTICE OF FILING
2291	05/09/2005	NOTICE OF FILING
2292	05/09/2005	NOTICE OF FILING
2293	05/09/2005	NOTICE OF FILING
2294	05/09/2005	NOTICE OF FILING
2295	05/09/2005	ORDER
2296	05/09/2005	ORDER

2297	05/09/2005	ORDER
2298	05/09/2005	ORDER
2299	05/09/2005	DISCLOSURE
2300	05/09/2005	NOTICE
2301	05/09/2005	NOTICE OF FILING
2302	05/09/2005	NOTICE OF FILING
2303	05/09/2005	NOTICE OF FILING
2304	05/09/2005	NOTICE OF FILING
2305	05/09/2005	NOTICE OF FILING
2306	05/09/2005	SEALED
2307	05/09/2005	NOTICE OF FILING
2308	05/09/2005	SEALED
2309	05/09/2005	NOTICE OF FILING
2310	05/09/2005	SEALED
2311	05/09/2005	NOTICE OF FILING
2312	05/09/2005	SEALED
2313	05/09/2005	NOTICE OF FILING
2314	05/09/2005	SEALED
2315	05/09/2005	NOTICE OF FILING
2316	05/09/2005	SEALED
2317	05/09/2005	NOTICE OF FILING
2318	05/09/2005	SEALED
2319	05/09/2005	NOTICE OF FILING
2320	05/09/2005	SEALED

2321	05/09/2005	SERVICE RETURNED (NUMBERED)
2322	05/09/2005	ORDER
2323	05/09/2005	MEDIATION REPORT
2324	05/10/2005	NOTICE OF FILING
2325	05/10/2005	NOTICE OF FILING
2326	05/10/2005	NOTICE OF FILING
2327	05/10/2005	NOTICE OF FILING
2328	05/10/2005	NOTICE OF FILING
2329	05/10/2005	NOTICE OF FILING
2330	05/10/2005	NOTICE OF FILING
2331	05/10/2005	NOTICE OF FILING
2332	05/10/2005	NOTICE OF FILING
2333	05/10/2005	NOTICE OF FILING
2334	05/10/2005	NOTICE OF FILING
2335	05/10/2005	NOTICE OF FILING
2336	05/10/2005	NOTICE OF FILING
2337	05/10/2005	NOTICE OF FILING
2338	05/10/2005	NOTICE OF FILING
2339	05/10/2005	NOTICE OF FILING
2340	05/10/2005	NOTICE OF FILING
2341	05/10/2005	SEALED
2342	05/10/2005	NOTICE OF FILING
2343	05/10/2005	SEALED
2344	05/10/2005	NOTICE OF FILING

2345	05/10/2005	SEALED
2346	05/10/2005	NOTICE OF FILING
2347	05/10/2005	SEALED
2348	05/10/2005	MOTION
2349	05/10/2005	RESPONSE TO:
2350	05/10/2005	MOTION
2351	05/10/2005	NOTICE OF FILING
2352	05/10/2005	ORDER
2353	05/10/2005	MOTION TO STRIKE
2354	05/10/2005	REQUEST
2355	05/10/2005	MOTION
2356	05/10/2005	ORDER
2357	05/10/2005	ORDER
2358	05/10/2005	MOTION
2359	05/10/2005	STATEMENT
2360	05/11/2005	STATEMENT
2361	05/11/2005	MOTION
2362	05/11/2005	NOTICE
2363	05/12/2005	ORDER
2364	05/12/2005	NOTICE
2365	05/12/2005	NOTICE OF FILING
2366	05/12/2005	ADDENDUM
2367	05/12/2005	ORDER
2368	05/12/2005	SEALED

2369	05/13/2005	NOTICE OF FILING
2370	05/13/2005	SEALED
2371	05/13/2005	NOTICE
2372	05/13/2005	RESPONSE TO:
2373	05/13/2005	REPLY/RESPONSE
2374	05/13/2005	MOTION
2375	05/13/2005	MOTION
2376	05/13/2005	RESPONSE TO:
2377	05/13/2005	JURY QUESTIONS
2378	05/13/2005	JURY QUESTIONS
2379	05/13/2005	JURY QUESTIONS
2380	05/13/2005	JURY QUESTIONS
2381	05/16/2005	NOTE
2382	05/16/2005	REQUESTED JURY INSTRUCTIONS
2383	05/16/2005	VERDICT BOOK 018592 PAGE 00119
2384	05/16/2005	ORDER
2385	05/16/2005	ORDER
2386	05/16/2005	ORDER
2387	05/16/2005	MOTION
2388	05/16/2005	SEALED
2389	05/17/2005	EXHIBIT LIST
2390	05/17/2005	REQUESTED JURY INSTRUCTIONS
2391	05/17/2005	REQUESTED JURY INSTRUCTIONS
2392	05/17/2005	NOTICE OF FILING

2393	05/17/2005	NOTICE OF FILING
2394	05/17/2005	SEALED
2395	05/18/2005	NOTICE
2396	05/18/2005	NOTICE
2397	05/18/2005	REQUESTED JURY INSTRUCTIONS
2398	05/18/2005	NOTE
2399	05/18/2005	VERDICT BOOK 018608 PAGE 00055
2400	05/18/2005	MOTION
2401	05/18/2005	MEMORANDUM
2402	05/19/2005	OBJECTION
2403	05/19/2005	ORDER SETTING HEARING
2404	05/19/2005	RESPONSE TO:
2405	05/25/2005	ORDER
2406	05/25/2005	CORRESPONDENCE
2407	05/26/2005	EXHIBIT LIST
2408	05/26/2005	EXHIBIT LIST
2409	05/26/2005	EXHIBIT LIST
2410	05/26/2005	EXHIBIT LIST
2411	05/26/2005	EXHIBIT LIST
2412	05/26/2005	EXHIBIT LIST
2413	05/26/2005	EXHIBIT LIST
2414	05/26/2005	EXHIBIT LIST
2415	05/26/2005	MOTION
2416	05/26/2005	MOTION

2417	05/26/2005	MOTION
2418	05/27/2005	MOTION
2419	05/27/2005	MOTION
2420	06/06/2005	BRIEF
2421	06/06/2005	NOTICE OF HEARING
2422	06/07/2005	EXHIBIT LIST
2423	06/07/2005	MEMORANDUM
2424	06/07/2005	MEMORANDUM
2425	06/07/2005	NOTICE OF FILING
2426	06/07/2005	SEALED
2427	06/08/2005	MEMORANDUM
2428	06/08/2005	DISCLOSURE
2429	06/08/2005	NOTICE OF FILING
2430	06/08/2005	SEALED
2431	06/09/2005	NOTICE OF FILING
2432	06/09/2005	MOTION
2433	06/09/2005	NOTICE OF HEARING
2434	06/10/2005	NOTICE OF CANCELLATION
2435	06/13/2005	FEE/PRO HAC VICE (\$100.00)
2436	06/13/2005	RECEIPT FOR PAYMENT
2437	06/13/2005	MOTION
2438	06/13/2005	NOTICE OF TAKING DEPOSITION
2439	06/13/2005	MOTION
2440	06/13/2005	NOTICE OF HEARING

2441	06/13/2005	MOTION
2442	06/13/2005	NOTICE OF CANCELLATION
2443	06/13/2005	BRIEF
2444	06/14/2005	NOTICE OF FILING
2445	06/14/2005	RESPONSE TO:
2446	06/14/2005	WITNESS LIST
2447	06/14/2005	EXHIBIT LIST
2448	06/14/2005	OBJECTION
2449	06/14/2005	OBJECTION
2450	06/15/2005	MEMORANDUM
2451	06/15/2005	RESPONSE TO:
2452	06/15/2005	NOTICE OF TAKING DEPOSITION
2453	06/15/2005	RESPONSE TO:
2454	06/15/2005	NOTICE OF FILING
2455	06/15/2005	SEALED
2456	06/16/2005	MOTION TO COMPEL
2457	06/16/2005	NOTICE OF FILING
2458	06/16/2005	AGREED ORDER
2459	06/16/2005	ORDER
2460	06/16/2005	NOTICE OF TAKING DEPOSITION
2461	06/17/2005	WITNESS LIST
2462	06/17/2005	NOTICE
2463	06/17/2005	EXHIBIT LIST
2464	06/17/2005	ORDER

2465	06/20/2005	EXHIBIT LIST
2466	06/20/2005	EXHIBIT LIST
2467	06/21/2005	ORDER
2468	06/22/2005	ORDER
2469	06/22/2005	ORDER
2470	06/23/2005	FINAL JUDGMENT
2471	06/23/2005	DISPOSED BY JURY TRIAL
2472	06/23/2005	ORDER
2473	06/23/2005	ORDER
2474	06/23/2005	MOTION
2475	06/23/2005	NOTICE OF FILING
2476	06/23/2005	ORDER
2477	06/23/2005	CORRESPONDENCE
2478	06/23/2005	CORRESPONDENCE
2479	06/23/2005	ORDER
2480	06/23/2005	REOPEN
2481	06/23/2005	REDISPOSED
2482	06/23/2005	REOPEN
2483	06/23/2005	REDISPOSED
2484	06/23/2005	REOPEN
2485	06/24/2005	ORDER
2486	06/24/2005	CORRESPONDENCE
2487	06/24/2005	ORDER
2488	06/27/2005	NOTICE OF APPEAL BOOK 018819 PAGE 01767

2489	06/27/2005	CAFF/NOA/
2490	06/27/2005	RECEIPT FOR PAYMENT
2491	06/27/2005	BOND
2492	06/28/2005	EXHIBIT LIST
2493	06/28/2005	NOTICE OF SERVICE
2494	07/07/2005	DIRECTIONS TO CLERK
2495	07/07/2005	DESIGNATION TO COURT REPORTER
2496	07/07/2005	NOTICE OF FILING
2497	07/07/2005	NOTICE OF FILING
2498	07/07/2005	NOTICE OF FILING
2499	07/07/2005	NOTICE OF FILING
2500	07/11/2005	ACKNOWLEDGMENT OF NEW CASE
2501	07/14/2005	NOTICE OF FILING
2502	07/14/2005	TRANSCRIPT
2503	07/14/2005	TRANSCRIPT
2504	07/14/2005	TRANSCRIPT
2505	07/14/2005	TRANSCRIPT
2506	07/14/2005	TRANSCRIPT
2507	07/14/2005	TRANSCRIPT
2508	07/14/2005	TRANSCRIPT
2509	07/14/2005	TRANSCRIPT
2510	07/14/2005	TRANSCRIPT
2511	07/14/2005	TRANSCRIPT
2512	07/14/2005	TRANSCRIPT

2513	07/14/2005	TRANSCRIPT
2514	07/14/2005	TRANSCRIPT
2515	07/14/2005	TRANSCRIPT
2516	07/14/2005	TRANSCRIPT
2517	07/14/2005	TRANSCRIPT
2518	07/14/2005	TRANSCRIPT
2519	07/14/2005	TRANSCRIPT
2520	07/14/2005	TRANSCRIPT
2521	07/14/2005	TRANSCRIPT
2522	07/14/2005	TRANSCRIPT
2523	07/14/2005	TRANSCRIPT
2524	07/14/2005	TRANSCRIPT
2525	07/14/2005	TRANSCRIPT
2526	07/14/2005	TRANSCRIPT
2527	07/19/2005	MOTION
2528	07/19/2005	AMENDED
2529	07/20/2005	TRANSCRIPT
2530	07/20/2005	TRANSCRIPT
2531	07/20/2005	TRANSCRIPT
2532	07/20/2005	TRANSCRIPT
2533	07/20/2005	TRANSCRIPT
2534	07/20/2005	TRANSCRIPT
2535	07/20/2005	TRANSCRIPT
2536	07/20/2005	TRANSCRIPT

2537	07/20/2005	TRANSCRIPT
2538	07/20/2005	TRANSCRIPT
2539	07/20/2005	TRANSCRIPT
2540	07/20/2005	TRANSCRIPT
2541	07/20/2005	TRANSCRIPT
2542	07/20/2005	TRANSCRIPT
2543	07/20/2005	TRANSCRIPT
2544	07/20/2005	TRANSCRIPT
2545	07/20/2005	TRANSCRIPT
2546	07/20/2005	TRANSCRIPT
2547	07/20/2005	TRANSCRIPT
2548	07/20/2005	TRANSCRIPT
2549	07/20/2005	TRANSCRIPT
2550	07/20/2005	TRANSCRIPT
2551	07/20/2005	TRANSCRIPT
2552	07/20/2005	TRANSCRIPT
2553	07/20/2005	TRANSCRIPT
2554	07/20/2005	TRANSCRIPT
2555	07/20/2005	TRANSCRIPT
2556	07/20/2005	TRANSCRIPT
2557	07/20/2005	TRANSCRIPT
2558	07/20/2005	TRANSCRIPT
2559	07/20/2005	TRANSCRIPT
2560	07/20/2005	TRANSCRIPT

2561	07/20/2005	TRANSCRIPT
2562	07/20/2005	TRANSCRIPT
2563	07/20/2005	TRANSCRIPT
2564	07/20/2005	TRANSCRIPT
2565	07/20/2005	TRANSCRIPT
2566	07/20/2005	TRANSCRIPT
2567	07/20/2005	TRANSCRIPT
2568	07/20/2005	TRANSCRIPT
2569	07/20/2005	TRANSCRIPT
2570	07/20/2005	TRANSCRIPT
2571	07/20/2005	TRANSCRIPT
2572	07/20/2005	TRANSCRIPT
2573	07/20/2005	TRANSCRIPT
2574	07/20/2005	TRANSCRIPT
2575	07/20/2005	TRANSCRIPT
2576	07/20/2005	TRANSCRIPT
2577	07/20/2005	TRANSCRIPT
2578	07/20/2005	TRANSCRIPT
2579	07/20/2005	TRANSCRIPT
2580	07/20/2005	TRANSCRIPT
2581	07/20/2005	TRANSCRIPT
2582	07/20/2005	TRANSCRIPT
2583	07/20/2005	TRANSCRIPT
2584	07/20/2005	TRANSCRIPT

2585	07/20/2005	TRANSCRIPT
2586	07/20/2005	TRANSCRIPT
2587	07/20/2005	TRANSCRIPT
2588	07/20/2005	TRANSCRIPT
2589	07/20/2005	TRANSCRIPT
2590	07/20/2005	TRANSCRIPT
2591	07/20/2005	TRANSCRIPT
2592	07/20/2005	TRANSCRIPT
2593	07/20/2005	TRANSCRIPT
2594	07/20/2005	TRANSCRIPT
2595	07/20/2005	TRANSCRIPT
2596	07/20/2005	TRANSCRIPT
2597	07/20/2005	TRANSCRIPT
2598	07/20/2005	TRANSCRIPT
2599	07/20/2005	TRANSCRIPT
2600	07/20/2005	TRANSCRIPT
2601	07/20/2005	TRANSCRIPT
2602	07/20/2005	TRANSCRIPT
2603	07/20/2005	TRANSCRIPT
2604	07/20/2005	TRANSCRIPT
2605	07/20/2005	TRANSCRIPT
2606	07/20/2005	TRANSCRIPT
2607	07/20/2005	TRANSCRIPT
2608	07/20/2005	TRANSCRIPT

2609	07/20/2005	TRANSCRIPT
2610	07/20/2005	TRANSCRIPT
2611	07/20/2005	TRANSCRIPT
2612	07/20/2005	TRANSCRIPT
2613	07/20/2005	TRANSCRIPT
2614	07/20/2005	TRANSCRIPT
2615	07/20/2005	TRANSCRIPT
2616	07/20/2005	TRANSCRIPT
2617	07/20/2005	TRANSCRIPT
2618	07/20/2005	TRANSCRIPT
2619	07/20/2005	TRANSCRIPT
2620	07/20/2005	TRANSCRIPT
2621	07/20/2005	TRANSCRIPT
2622	07/20/2005	TRANSCRIPT
2623	07/20/2005	TRANSCRIPT
2624	07/20/2005	TRANSCRIPT
2625	07/20/2005	TRANSCRIPT
2626	07/20/2005	TRANSCRIPT
2627	07/20/2005	TRANSCRIPT
2628	07/20/2005	TRANSCRIPT
2629	07/20/2005	TRANSCRIPT
2630	07/20/2005	TRANSCRIPT
2631	07/20/2005	TRANSCRIPT
2632	07/20/2005	TRANSCRIPT

2633	07/20/2005	TRANSCRIPT
2634	07/20/2005	TRANSCRIPT
2635	07/20/2005	TRANSCRIPT
2636	07/20/2005	TRANSCRIPT
2637	07/20/2005	TRANSCRIPT
2638	07/20/2005	TRANSCRIPT
2639	07/20/2005	TRANSCRIPT
2640	07/20/2005	TRANSCRIPT
2641	07/20/2005	TRANSCRIPT
2642	07/20/2005	TRANSCRIPT
2643	07/20/2005	TRANSCRIPT
2644	07/20/2005	TRANSCRIPT
2645	07/20/2005	TRANSCRIPT
2646	07/20/2005	TRANSCRIPT
2647	07/20/2005	TRANSCRIPT
2648	07/20/2005	TRANSCRIPT
2649	07/20/2005	TRANSCRIPT
2650	07/20/2005	TRANSCRIPT
2651	07/20/2005	TRANSCRIPT
2652	07/20/2005	TRANSCRIPT
2653	07/20/2005	TRANSCRIPT
2654	07/20/2005	TRANSCRIPT
2655	07/20/2005	TRANSCRIPT
2656	07/20/2005	TRANSCRIPT

2657	07/20/2005	TRANSCRIPT
2658	07/20/2005	TRANSCRIPT
2659	07/20/2005	TRANSCRIPT
2660	07/20/2005	TRANSCRIPT
2661	07/20/2005	TRANSCRIPT
2662	07/20/2005	TRANSCRIPT
2663	07/20/2005	TRANSCRIPT
2664	07/20/2005	TRANSCRIPT
2665	07/20/2005	TRANSCRIPT
2666	07/20/2005	TRANSCRIPT
2667	07/20/2005	TRANSCRIPT
2668	07/20/2005	TRANSCRIPT
2669	07/20/2005	TRANSCRIPT
2670	07/20/2005	TRANSCRIPT
2671	07/20/2005	TRANSCRIPT
2672	07/20/2005	TRANSCRIPT
2673	07/20/2005	TRANSCRIPT
2674	07/20/2005	TRANSCRIPT
2675	07/20/2005	TRANSCRIPT
2676	07/20/2005	TRANSCRIPT
2677	07/20/2005	TRANSCRIPT
2678	07/20/2005	TRANSCRIPT
2679	07/20/2005	TRANSCRIPT
2680	07/20/2005	TRANSCRIPT

2681	07/22/2005	NOTICE OF APPEAL BOOK 018961 PAGE 01125
2682	07/22/2005	CAFF/NOA/
2683	07/22/2005	RECEIPT FOR PAYMENT
2684	07/25/2005	MOTION
2685	07/26/2005	MOTION
2686	07/26/2005	NOTICE OF HEARING
2687	07/27/2005	PETITION
2688	07/28/2005	NOTICE OF FILING
2689	07/29/2005	ACKNOWLEDGMENT OF NEW CASE
2690	08/01/2005	NOTICE OF HEARING
2691	08/01/2005	RESPONSE TO:
2692	08/02/2005	DIRECTIONS TO CLERK
2693	08/02/2005	STATEMENT-JUDICIAL ACTS
2694	08/02/2005	ORDER
2695	08/04/2005	ORDER SETTING HEARING
2696	08/05/2005	INVOICE
2697	08/05/2005	INDEX TO RECORD ON APPEAL
2698	08/12/2005	INDEX TO RECORD ON APPEAL
2699	08/12/2005	INVOICE
2700	08/15/2005	RECEIPT FOR PAYMENT
2701	08/25/2005	NOTICE
2702	08/29/2005	TRUE COPY
2703	08/29/2005	ORDER
2704	09/01/2005	RECEIPT FOR PAYMENT

2705	09/06/2005	TRUE COPY
2706	09/06/2005	AGREED ORDER
2707	09/08/2005	TRUE COPY
2708	09/08/2005	NOTICE OF APPEARANCE
2709	09/12/2005	STIPULATION AND ORDER
2710	09/13/2005	NOTICE OF APPEARANCE
2711	09/14/2005	NOTICE
2712	09/15/2005	STIPULATION
2713	09/20/2005	FEE/PRO HAC VICE (\$100.00)
2714	09/20/2005	FEE/PRO HAC VICE (\$100.00)
2715	09/20/2005	RECEIPT FOR PAYMENT
2716	09/20/2005	MOTION
2717	09/20/2005	MOTION
2718	09/20/2005	NOTICE
2719	09/20/2005	NOTICE
2720	09/20/2005	NOTICE
2721	09/20/2005	NOTICE
2722	09/21/2005	EXHIBIT CHECK OUT RECEIPT
2723	09/22/2005	NOTICE TRANSMIT RECORD APPEAL
2724	09/22/2005	MOTION
2725	09/22/2005	MOTION
2726	09/22/2005	ORDER
2727	09/22/2005	ORDER
2728	09/22/2005	ORDER

2729	09/22/2005	ORDER
2730	09/22/2005	FEE/PRO HAC VICE (\$100.00)
2731	09/22/2005	FEE/PRO HAC VICE (\$100.00)
2732	09/23/2005	INVOICE
2733	09/23/2005	INDEX TO RECORD ON APPEAL
2734	09/23/2005	MOTION
2735	09/23/2005	MOTION
2736	09/23/2005	MOTION
2737	09/23/2005	MOTION
2738	09/23/2005	AGREED ORDER
2739	09/23/2005	AGREED ORDER
2740	09/23/2005	AGREED ORDER
2741	09/23/2005	FEE/PRO HAC VICE (\$100.00)
2742	09/23/2005	FEE/PRO HAC VICE (\$100.00)
2743	09/23/2005	FEE/PRO HAC VICE (\$100.00)
2744	09/23/2005	FEE/PRO HAC VICE (\$100.00)
2745	09/27/2005	RECEIPT FOR PAYMENT
2746	09/27/2005	STIPULATION AND ORDER
2747	09/28/2005	RECEIPT FOR PAYMENT
2748	09/28/2005	ORDER
2749	09/28/2005	ORDER
2750	09/30/2005	MOTION
2751	09/30/2005	MOTION
2752	10/03/2005	RECEIPT FOR PAYMENT

2753	10/03/2005	VOIDED RECEIPT
2754	10/03/2005	RECEIPT FOR PAYMENT
2755	10/05/2005	AGREED ORDER
2756	10/05/2005	AGREED ORDER
2757	10/07/2005	LETTER
2758	10/11/2005	BRIEF
2759	10/12/2005	FEE/PRO HAC VICE (\$100.00)
2760	10/12/2005	FEE/PRO HAC VICE (\$100.00)
2761	10/12/2005	FEE/PRO HAC VICE (\$100.00)
2762	10/12/2005	MOTION
2763	10/12/2005	MOTION
2764	10/12/2005	MOTION
2765	10/12/2005	FEE/PRO HAC VICE (\$100.00)
2766	10/13/2005	RECEIPT FOR PAYMENT
2767	10/13/2005	RECEIPT FOR PAYMENT
2768	10/13/2005	RECEIPT FOR PAYMENT
2769	10/17/2005	ORDER
2770	10/17/2005	ORDER
2771	10/17/2005	ORDER
2772	10/19/2005	MOTION
2773	10/19/2005	NOTICE OF HEARING
2774	10/20/2005	MOTION
2775	10/20/2005	ORDER
2776	10/20/2005	ORDER

2777	10/20/2005	ORDER SETTING STATUS HEARING
2778	10/20/2005	ORDER SETTING STATUS HEARING
2779	10/21/2005	ORDER
2780	10/21/2005	RE-NOTICE OF HEARING
2781	10/31/2005	RETURNED MAIL
2782	10/31/2005	MOTION
2783	10/31/2005	NOTICE OF HEARING
2784	10/31/2005	RE-NOTICE OF HEARING
2785	10/31/2005	RE-NOTICE OF HEARING
2786	10/31/2005	RE-NOTICE OF HEARING
2787	11/01/2005	RESPONSE TO:
2788	11/01/2005	NOTICE OF FILING
2789	11/01/2005	NOTICE OF FILING
2790	11/02/2005	NOTICE
2791	11/02/2005	ORDER
2792	11/02/2005	ORDER
2793	11/02/2005	MEMORANDUM
2794	11/02/2005	COPY
2795	11/02/2005	COPY
2796	11/03/2005	BRIEF
2797	11/14/2005	ORDER
2798	11/16/2005	MOTION
2799	11/16/2005	NOTICE OF HEARING
2800	11/18/2005	ORDER

2801	11/22/2005	JUDGMENT BOOK 19597 PAGE 0950
2802	12/08/2005	NOTICE OF UNAVAILABILITY
2803	12/16/2005	NOTICE OF APPEAL BOOK 19690 PAGE 0484
2804	12/16/2005	CAFF/NOA/
2805	12/16/2005	RECEIPT FOR PAYMENT
2806	12/16/2005	NOTICE OF SERVICE
2807	12/16/2005	BOND
2808	12/19/2005	NOTICE TRANSMIT RECORD APPEAL
2809	12/19/2005	INDEX TO RECORD ON APPEAL
2810	12/22/2005	ACKNOWLEDGMENT OF NEW CASE
2811	12/29/2005	ACKNOWLEDGEMENT
2812	01/09/2006	NOTICE TRANSMIT RECORD APPEAL
2813	01/11/2006	ACKNOWLEDGEMENT
2814	01/13/2006	TRUE COPY
2815	01/17/2006	INDEX TO RECORD ON APPEAL
2816	01/17/2006	INVOICE
2817	01/30/2006	TRUE COPY
2818	02/02/2006	RECEIPT FOR PAYMENT
2819	06/12/2006	MANDATE
2820	06/16/2006	TRUE COPY
2821	06/22/2006	TRUE COPY
2822	08/31/2006	RECORD
2823	12/21/2006	STIPULATION
2824	12/21/2006	NOTICE

	2825	01/04/2007	ORDER
	2826	01/04/2007	REDISPOSED
	2827	06/08/2007	ORDER
	2828	06/08/2007	LETTER
	2829	06/11/2007	MOTION
	2830	06/11/2007	MOTION
	2831	06/12/2007	ORDER
	2832	06/12/2007	ORDER
	2833	06/12/2007	RECEIPT OF
	2834	06/25/2007	MANDATE
	2835	07/18/2007	MOTION
	2836	07/18/2007	MOTION
	2837	07/18/2007	MOTION
	2838	08/20/2007	TRUE COPY
	2839	01/02/2008	TRUE COPY
	2840	01/16/2008	REQUEST
	2841	01/17/2008	NOTICE OF HEARING
	2842	01/17/2008	REOPEN
	2843	01/22/2008	NOTICE
	2844	01/23/2008	ORDER
	2845	01/23/2008	NOTICE OF FILING
	2846	01/25/2008	NOTICE OF HEARING
	2847	01/25/2008	NOTICE
	2848	01/28/2008	NOTICE OF REASSIGNMENT

 2849	02/01/2008	ORDER OF RECUSAL
 2850	02/01/2008	LETTER
 2851	02/01/2008	LETTER
 2852	02/04/2008	NOTICE OF REASSIGNMENT
 2853	02/07/2008	ORDER OF RECUSAL
 2854	02/08/2008	NOTICE OF REASSIGNMENT
 2855	02/22/2008	NOTICE OF HEARING
 2856	02/27/2008	ORDER OF RECUSAL
 2857	02/28/2008	NOTICE OF REASSIGNMENT
 2858	03/04/2008	ORDER OF RECUSAL
 2859	03/04/2008	RETURNED MAIL
 2860	03/06/2008	NOTICE OF REASSIGNMENT
 2861	03/10/2008	RECORD
 2862	03/10/2008	RECORD
 2863	03/10/2008	RECORD
 2864	03/17/2008	MANDATE
 2865	03/17/2008	ORDER SETTING HEARING
 2866	03/18/2008	FINAL JUDGMENT BOOK 022528 PAGE 00227
2867	03/18/2008	REDISPOSED
 2868	03/25/2008	MOTION
 2869	03/25/2008	NOTICE
2870	03/25/2008	REOPEN
 2871	03/31/2008	ORDER
 2872	04/01/2008	MOTION

	2873	04/01/2008	MOTION
	2874	04/01/2008	NOTICE OF FILING
	2875	04/01/2008	NOTICE OF FILING
	2876	04/01/2008	NOTICE OF FILING
	2877	04/01/2008	NOTICE OF FILING
	2878	04/01/2008	MOTION
	2879	04/01/2008	NOTICE OF FILING
	2880	04/07/2008	BRIEF
	2881	04/09/2008	ORDER SETTING HEARING
	2882	04/11/2008	NOTICE
	2883	04/21/2008	RESPONSE TO:
	2884	05/21/2008	NOTICE
	2885	05/28/2008	MOTION
	2886	06/02/2008	BRIEF
	2887	06/02/2008	ORDER
	2888	06/03/2008	MOTION
	2889	06/03/2008	RESPONSE TO:
	2890	06/05/2008	RECORD
	2891	06/11/2008	ORDER GRANTING
	2892	06/24/2008	AGREED ORDER
	2893	07/25/2008	NOTICE OF TAKING DEPOSITION
	2894	07/25/2008	NOTICE OF TAKING DEPOSITION
	2895	07/25/2008	REQUEST
	2896	07/25/2008	NOTICE OF TAKING DEPOSITION

	2897	07/25/2008	NOTICE OF TAKING DEPOSITION
	2898	07/25/2008	NOTICE OF TAKING DEPOSITION
	2899	07/25/2008	NOTICE OF TAKING DEPOSITION
	2900	07/25/2008	NOTICE OF TAKING DEPOSITION
	2901	08/20/2008	MOTION
	2902	08/20/2008	SUBPOENA RETURNED / SERVED
	2903	08/25/2008	RESPONSE TO:
	2904	09/02/2008	ORDER
	2905	09/02/2008	AGREED ORDER
	2906	09/02/2008	AGREED ORDER
	2907	09/10/2008	MOTION FOR EXTENSION OF TIME
	2908	09/10/2008	NOTICE OF HEARING
	2909	09/11/2008	MOTION
	2910	09/16/2008	NOTICE OF CANCELLATION
	2911	09/17/2008	AGREED ORDER
	2912	09/24/2008	MOTION
	2913	09/24/2008	NOTICE OF HEARING
	2914	09/26/2008	NOTICE OF APPEARANCE
	2915	10/01/2008	CAFF/NOA/
	2916	10/01/2008	RECEIPT FOR PAYMENT
	2917	10/01/2008	NOTICE OF NON FINAL APPEAL BOOK 022895 PAGE 00195
	2918	10/07/2008	ORDER SETTING HEARING
	2919	10/15/2008	ACKNOWLEDGMENT OF NEW CASE
	2920	10/29/2008	NOTICE

	2921	11/07/2008	NOTICE OF FILING
	2922	11/07/2008	NOTICE OF FILING
	2923	11/07/2008	NOTICE OF FILING
	2924	11/14/2008	NOTICE OF FILING
	2925	11/18/2008	NOTICE OF FILING
	2926	12/17/2008	NOTICE OF UNAVAILABILITY
	2927	12/31/2008	REQUEST FOR ADMISSIONS
	2928	01/14/2009	ORDER
	2929	01/27/2009	RESPONSE TO:
	2930	02/04/2009	NOTICE
	2931	02/13/2009	AGREED ORDER
	2932	02/13/2009	REDISPOSED
	2933	02/20/2009	AMENDED ORDER
	2934	08/24/2009	CHANGE NAME OR ADDRESS
	2935	11/20/2009	NOTICE
	2936	12/21/2009	MANDATE
	2937	05/21/2010	TRUE COPY

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

 COLEMAN (PARENT) HOLDINGS INC.,)
)
 Plaintiff,)
)
 v.)
)
 MORGAN STANLEY & CO., INC.,)
)
 Defendant.)

Case No. CA 005045 AI

DOROTHY H. WILKEN
CLERK OF CIRCUIT COURT
CIRCUIT CIVIL DIVISION

MAY 09 2003

COPY / ORIGINAL
RECEIVED FOR FILING

PLAINTIFF'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS

Plaintiff Coleman (Parent) Holdings, Inc. ("CPH" or "Plaintiff"), by its attorneys Searcy Denney Scarola Barnhart & Shipley P.A. and Jenner & Block, LLC, hereby serves its First Request for Production of Documents upon Defendant Morgan Stanley & Co., Inc. ("Morgan Stanley" or "Defendant"), and requests responses and the production of documents at the office of Searcy Denney Scarola Barnhart & Shipley P.A., 2139 Palm Beach Lakes Blvd., West Palm Beach, Florida, within the time provided by Florida Rule of Civil Procedure 1.350(b).

DEFINITIONS

1. "Arbitrations" means Albert J. Dunlap and Sunbeam Corporation, No. 32 160 00088 99 (AAA); and Russell A. Kersh and Sunbeam Corporation, No. 32 160 00091 99 (AAA).
2. "Coleman" means the Coleman Company, Inc. or any of its present and former officers, directors, employees, representatives, agents, and all other persons acting or purporting to act on its behalf.

3. "CPH" means Coleman (Parent) Holdings Inc., Coleman Worldwide Corporation, CLN Holdings, Co. Inc., or any of their present and former officers, directors, employees, representatives, agents, and all other persons acting or purporting to act on their behalf.

4. "Coleman Transaction" means the transaction contemplated by the February 27, 1998 Agreements.

5. "Communication" means the transmittal of information by letter, memorandum, facsimile, orally, or otherwise.

6. "Concerning" means reflecting, relating to, referring to, describing, evidencing, or constituting.

7. "Documents" means documents whether fixed in tangible medium or electronically stored. The word "documents" shall include, by way of example and not by way of limitation, all of the following: papers, correspondence, trade letters, envelopes, memoranda, telegrams, cables, notes, messages, reports, studies, press releases, comparisons, books, accounts, checks, audio and video recordings and transcriptions thereof, pleadings, testimony, articles, bulletins, pamphlets, brochures, magazines, questionnaires, surveys, charts, newspapers, calendars, desk calendars, pocket calendars, lists, logs, publications, notices, diagrams, instructions, diaries, minutes for meetings, corporate minutes, orders, resolutions, agendas, memorials or notes of oral communications, whether by telephone or face-to-face, contracts, agreements, drafts of or proposed contracts or agreements, memoranda of understanding, letters of intent, computer tapes, computer drives or memories, computer diskettes or disks, e-mail, CD-ROMs, or any other tangible thing on which any handwriting, typing, printing, photostatic, electronic, or other form of communication or information is recorded or reproduced, together with all notations on any of the foregoing, all

originals, file copies, or other unique copies of the foregoing, and all versions or drafts thereof, whether used or not.

8. "February 27, 1998 Agreements" means (a) the Agreement and Plan of Merger dated as of February 27, 1998 among Sunbeam Corp., Laser Acquisition Corp., CLN Holdings, Inc. and Coleman (Parent) Holdings Inc. and (b) the Agreement and Plan of Merger dated as of February 27, 1998 among Sunbeam Corp., Camper Acquisition Corp., and The Coleman Company, Inc.

9. "Financial Statements" means, without limitation, balance sheets, statements of income, earnings, retained earnings, sources and applications of funds, cash flow projections, notes to each such statements, or any other notes which pertain to the past or present financial condition of Sunbeam, whether any of the foregoing is audited or unaudited, whether final, interim or pro forma, complete or partial, consolidated, yearly, monthly, or otherwise.

10. "Litigations" means In Re Sunbeam Securities Litigation, 98-8258-Civ.-Middlebrooks (S.D. Fla.); Camden Asset Management, L.P., et al. v. Sunbeam Corporation, et al., 98-8773-Civ.-Middlebrooks and 98-8275-Civ.-Middlebrooks (S.D. Fla.); Krim v. Dunlap, et al., No. CL983168AD (15th Jud. Cir., Fla.); Stapleton v. Sunbeam Corp., et al., No. 98-1676-Civ.-King (S.D. Fla.); Sunbeam Corp. v. PricewaterhouseCoopers LLP, No. CL005444AN (15th Jud. Cir., Fla.); In re Sunbeam Corp., Inc., No. 01-40291 (AJG) (Bankr. S.D.N.Y.) and any adversary proceedings therein; SEC v. Dunlap, et al., No. 01-8437-Civ.-Middlebrooks (S.D. Fla.); Oaktree Capital Management LLC v. Arthur Andersen LLP, No. BC257177 (L.A. Cty., CA); and Coleman (Parent) Holdings Inc. v. Arthur Andersen LLP, et al., No. CA 01-06062AN (15th Jud. Cir., Fla).

11. "Morgan Stanley" means Morgan Stanley & Co., Inc. or any of its subsidiaries, divisions, predecessors, successors, present and former employees, representatives, agents, attorneys, accountants, advisors, or all other persons acting or purporting to act on its behalf.

12. "SEC Administrative Proceedings" means In the Matter of Sunbeam Corp., SEC Administrative Proceeding File No. 3-10481, and In the Matter of David C. Fannin, SEC Administrative Proceeding File No. 3-10482.

13. "SEC" means the Securities and Exchange Commission.

14. "Subordinated Debentures" means Sunbeam's Zero Coupon Convertible Senior Subordinated Debentures Due 2018.

15. "Subordinated Debenture Offering" means the offering of Sunbeam's Subordinated Debentures.

16. "Sunbeam" means Sunbeam Corporation, or any of its subsidiaries, divisions, affiliates, predecessors, successors, present and former employees, representatives, agents, and all other persons acting or purporting to act on its behalf.

17. "You" or "Your" means Morgan Stanley & Co., Inc. and/or any of its subsidiaries, divisions, predecessors, successors, present or former employees, representatives, agents, attorneys, accountants, advisors, or anyone acting or purporting to act on its behalf.

INSTRUCTIONS

1. Documents shall be produced as they are kept in the usual course of business, or organized and labeled to correspond to the categories in this Request. Documents attached to each other should not be separated. Documents consisting of items previously produced in the Litigations, Arbitrations, and/or SEC Administrative Proceedings with Bates numbering shall be produced in Bates number order.

2. All documents shall be produced in the file folder, envelope or other container in which the documents are kept or maintained by you. If, for any reason, the container cannot be produced, produce copies of all labels or other identifying marks.

3. The relevant period, unless otherwise indicated, shall be from **January 1, 1997 through the date of trial of this matter**, and shall include all documents and information which relate in whole or in part to such period, or to events or circumstances during such period, even though dated, prepared, generated or received prior or subsequent to that period. Please supplement or correct your responses to these requests if, at any time, you become aware that your responses are incomplete or incorrect in any respect.

4. If you claim the attorney-client privilege, or any other privilege or work-product protection for all or any portion of a document, you shall provide a privilege log that describes the withheld material sufficiently to allow CPH to test the privilege or protection asserted.

5. The following rules of construction apply:

- a) The connectives "and" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery requests all responses that might otherwise be outside of their scope;
- b) The term "including" shall be construed to mean "without limitation";
and
- c) The use of the singular form of any word includes the plural and vice versa.

DOCUMENTS REQUESTED

1. All documents concerning your efforts to have Sunbeam retain or maintain your investment banking and/or securities underwriting services.

2. All documents reflecting all fees and expenses paid by Sunbeam to you, including without limitation all billing statements, invoices, time detail records, individual calendars,

daily diaries (including electronic calendar programs), or other documents that describe or record the time spent, or expenses incurred (including back-up for any out-of-pocket expenses), by any Morgan Stanley personnel, or that describe or record any aspect of their activities concerning any services performed on behalf of, or concerning, Sunbeam.

3. All documents concerning any investigation, analysis, or due diligence of Sunbeam conducted by you or on your behalf in 1997 or 1998.

4. All documents concerning any investigation, analysis, or due diligence of Coleman or CPH conducted by you or on your behalf in 1997 or 1998.

5. All documents concerning your attempts in 1997 or 1998 to locate someone to purchase or otherwise acquire Sunbeam, whether through merger, purchase, transfer of assets or securities, or otherwise.

6. All documents concerning your attempts in 1997 or 1998 to locate companies for Sunbeam to purchase or otherwise acquire, whether through merger, purchase, transfer of assets or securities, or otherwise.

7. All documents concerning the negotiation and signing of the February 27, 1998 Agreements.

8. All documents concerning the closing of the Coleman Transaction, including without limitation all documents concerning the decision to close the Coleman Transaction.

9. All documents concerning the meetings of Sunbeam's Board of Directors in 1997 and 1998.

10. All documents concerning any discussion, promise, agreement, or plan to have research analysts, whether or not at Morgan Stanley, provide coverage for Sunbeam or any of its debt or equity securities.

11. All documents used, analyzed, consulted, or prepared by any Morgan Stanley research analyst, including without limitation Andrew Conway, James Dormer, Jake Foley, and Karen Eltrich, concerning Sunbeam.
12. All documents concerning communications between or among you, Sunbeam, and Wall Street analysts concerning Sunbeam or the Coleman Transaction.
13. All documents concerning any valuation of Sunbeam or Sunbeam securities.
14. All documents concerning the stock market's valuation of Sunbeam securities, including without limitation documents describing or analyzing the increase or decline in the market price of Sunbeam stock in the period from and including July 1, 1996 through and including December 31, 1998.
15. All documents concerning any valuation of Coleman or Coleman securities.
16. All documents concerning synergies that might be achieved from a business combination of Sunbeam and Coleman.
17. All documents concerning Sunbeam's financial statements and/or restated financial statements.
18. All documents concerning the increase in the size of the Subordinated Debenture Offering from \$500 million to \$750 million.
19. All documents concerning any draft or executed "comfort letters" requested by you or provided to you in connection with the Subordinated Debenture Offering.
20. All documents concerning the sale of, or your attempts to sell, Subordinated Debentures, including without limitation documents concerning road shows, communications with potential investors, or communications with or among Morgan Stanley's sales personnel.
21. All documents concerning the pricing of the Subordinated Debentures.

22. All documents concerning the conversion features of the Subordinated Debentures.
23. All documents concerning the "book of demand" for the Subordinated Debentures.
24. All documents concerning the events that took place on March 19, 1998 at Global Financial Press, including without limitation documents concerning Lawrence Bornstein and/or John Tyree.
25. All documents concerning your communications with Sunbeam on March 18, 1998.
26. All documents concerning the "bring-down" due diligence for the Subordinated Debenture Offering.
27. All documents concerning your communications with Sunbeam on March 24, 1998.
28. All documents concerning Sunbeam's first quarter 1998 sales and/or earnings.
29. All documents concerning the closing of the Subordinated Debenture Offering including without limitation all documents concerning the decision to close the Subordinated Debenture Offering.
30. All documents concerning the Subordinated Debenture Offering.
31. All documents concerning any work or services you performed for or on behalf of Sunbeam in 1997 or 1998, regardless of whether you were compensated for that work.
32. All documents concerning press releases issued by Sunbeam on October 23, 1997, March 19, 1998, April 3, 1998, May 9, 1998, June 15, 1998, June 25, 1998, June 30, 1998, October 20, 1998, and November 12, 1998.

33. All documents concerning the statements contained in the press releases issued by Sunbeam on October 23, 1997, March 19, 1998, April 3, 1998, May 9, 1998, June 15, 1998, June 25, 1998, June 30, 1998, October 20, 1998, and November 12, 1998.

34. All documents concerning communications relating to Sunbeam, Coleman, or CPH, including without limitation internal communications within Morgan Stanley or communications between or among Morgan Stanley and Sunbeam; Skadden, Arps, Slate, Meagher & Flom LLP; Coopers & Lybrand LLP; Llama Company; Arthur Andersen LLP; Sard Verbinnen & Co., Inc.; Hill & Knowlton, Inc.; The Coleman Company, Inc.; Credit Suisse First Boston; Coleman (Parent) Holdings Inc.; MacAndrews & Forbes Holdings, Inc.; Wachtell Lipton, Rosen & Katz; Davis Polk & Wardwell; or any other person or company, and/or any of their respective employees, agents, or representatives.

35. All documents concerning the Coleman Transaction.

36. All documents concerning the Subordinated Debenture Offering.

37. All documents concerning Albert Dunlap and/or Russell Kersh.

38. All documents concerning the Scott Paper Company.

39. All documents concerning Coleman or CPH.

40. All documents concerning MacAndrews & Forbes Holdings, Inc. with respect to Sunbeam, Coleman, or CPH.

41. All documents concerning the events and matters that are the subject of the Complaint filed in this action.

42. Organizational charts, memoranda, or similar documents that describe the business organizational structure and the administrative, management, and reporting structure of Morgan Stanley from and including January 1, 1997 through and including December 31, 1998.

43. All documents concerning Morgan Stanley's policies, procedures, manuals, guidelines, reference materials, or checklists that were in effect from and including January 1, 1997 through and including December 31, 1998 for the performance of due diligence, including without limitation due diligence performed in connection with underwriting the sale of equity or debt securities.

44. All documents concerning employment contracts, performance evaluations, and/or personnel files (including without limitation any documents that describe or discuss the training, experience, competence, and accomplishments) of all Morgan Stanley personnel who performed services for or on behalf of Sunbeam in 1997 or 1998.

45. All documents concerning Morgan Stanley's performance evaluation criteria or guidelines in effect from and including January 1, 1997 through and including December 31, 1998.

46. All documents concerning Morgan Stanley's compensation criteria or guidelines in effect from and including January 1, 1997 through and including December 31, 1998.

47. All marketing or other promotional material prepared or used by, or on behalf of, Morgan Stanley concerning investment banking or securities underwriting services that were created or used at any time from and including January 1, 1997 through and including December 31, 1998.

48. All of your document retention or document destruction policies or procedures or similar procedures for the back-up or deletion of electronic or hard copy documents of any kind for any time during 1997 through the present, including without limitation any amendments to any such policies or procedures, schedules or related documents, and any memoranda or other instructions communicated to your employees concerning the obligation and procedures to be

utilized to preserve all relevant documents, including without limitation evidence concerning the Litigations, the Arbitrations, and the SEC Administrative Proceedings.

49. All documents you have provided or produced to any party (whether voluntarily or in response to a document request, subpoena duces tecum, or other process served on you) in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings (including without limitation any reports, communications, filings, testimony, legal memoranda, statements, or other documents submitted to the Securities & Exchange Commission or any other party).

50. All documents you have provided to the SEC, the Attorney General of New York, or any other governmental or regulatory body concerning Sunbeam.

51. All documents you have received from the SEC, the Attorney General of New York, or any other governmental or regulatory body concerning Sunbeam.

52. All discovery requests or subpoenas served on you in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

53. All responses and/or objections that you provided or produced in response to a discovery request or subpoena served on you in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

54. All communications concerning any discovery request or subpoena served on you in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

55. All motions, memoranda, briefs, rulings, orders, or transcripts of proceedings concerning any discovery request, subpoena, or other process in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

56. All privilege logs you prepared in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings with respect to documents that you withheld from production in response to any document requests, subpoenas duces tecum, or other process.

57. All transcripts of and exhibits to any depositions, recorded statements, or affidavits in connection with any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

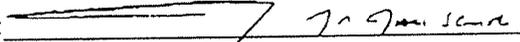
58. All documents obtained by you or produced to you by other parties, third parties, or non-parties (whether voluntarily or in response to any document requests, subpoenas duces tecum, or other process served by you or any other party) concerning Sunbeam.

59. All document requests, subpoenas duces tecum, interrogatories, requests for admission, responses, or objections that you served on, or received from, any party, third party or non-party in In re Sunbeam Corp., Inc., No. 01-40291 (AJG) (Bankr. S.D.N.Y.) and any adversary proceedings therein.

60. All transcripts of any hearings held in connection with the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

61. All affidavits, declarations, or other testimonial statements filed or submitted in connection with any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

COLEMAN (PARENT) HOLDINGS INC.

By: 
One of Its Attorneys

Jerold S. Solovy
Ronald L. Marmer
Robert T. Markowski
Deirdre E. Connell
JENNER & BLOCK, LLC
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

Jack Scarola
SEARCY DENNEY SCAROLA BARNHART
& SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33402-3626
(561) 686-6300

Authorities Sp.

COPY / ORIGINAL
RECEIVED FOR FILING

JUN 25 2003

DOROTHY H. WILKEN
CLERK OF CIRCUIT COURT
CIRCUIT CIVIL DIVISION

IN THE CIRCUIT COURT
OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

CASE NO: 2003 CA 005045 AI

v.

Judge Elizabeth T. Maass

MORGAN STANLEY & CO., INC.,

Defendant.

**DEFENDANT'S MOTION TO DISMISS PURSUANT TO
FLORIDA RULE OF CIVIL PROCEDURE RULE 1.061 OR, IN THE ALTERNATIVE,
FOR JUDGMENT ON THE PLEADINGS**

Defendant, Morgan Stanley & Co. Incorporated ("MS & Co."), moves to dismiss the complaint pursuant to Florida Rule of Civil Procedure Rule 1.061 or, in the alternative, for judgment on the pleadings and says:

1. Plaintiff, Coleman (Parent) Holdings, Inc. ("CPH") has filed a four count complaint against MS & Co. alleging fraudulent misrepresentation, aiding and abetting fraud, conspiracy and negligent misrepresentation. MS & Co. filed its answer and affirmative defenses to the complaint on June 23, 2003. The complaint is based on CPH's sale of its interest in the Coleman Company to Sunbeam Corporation.

2. As more fully set forth in the memorandum of law served contemporaneously with this Motion, incorporated herein by reference and attached hereto, MS & Co. moves to dismiss this action pursuant to Fla.R.Civ.P., Rule 1.061 on the ground that New York courts are the more appropriate forum for resolution of this dispute.

SERVICE LIST

<p>John Scarola SEARCY, DENNEY, SCAROLA, BARNHARDT & SHIPLEY, P.A. 2139 Palm Beach Lakes Boulevard West Palm Beach, Florida 33409</p>	<p>Counsel for Plaintiff</p>
<p>Jerold S. Solovy JENNER & BLOCK, LLC One IBM Plaza Suite 4400 Chicago, Illinois 60611</p>	<p>Counsel for Plaintiff</p>

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

_____)	
COLEMAN (PARENT) HOLDINGS, INC.,)	
)	
Plaintiff,	)	2003 CA 005045 AI
)	
v.	)	Judge Elizabeth T. Maass
)	
MORGAN STANLEY & CO., INC.,)	
)	
Defendant.)	
_____)	

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS
PURSUANT TO FLORIDA RULE OF CIVIL PROCEDURE 1.061 OR, IN THE
ALTERNATIVE, FOR JUDGMENT ON THE PLEADINGS

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett H. McGurk
KIRKLAND & ELLIS
655 15th Street, N.W. 12th Floor
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

Joseph Ianno, Jr. (FL Bar # 655351)
CARLTON FIELDS
222 Lake View Avenue - Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile (561) 659-7368

Attorneys For Morgan Stanley & Co. Incorporated

TABLE OF CONTENTS

Table of Contents i

Table of Authorities iii

INTRODUCTION 1

FACTUAL BACKGROUND 3

A. Sunbeam Hires MS & Co. To Advise It Regarding A Possible Corporate Sale Or Acquisition — *Not* To Replace Sunbeam’s Outside Auditor Or To Review Sunbeam’s Accounting Practices. 4

B. After A “False Start” In Florida, Sunbeam And CPH Negotiate The Written Merger Agreement In New York..... 5

C. MS & Co. Puts Its Own Money And Reputation On The Line By Agreeing To Serve As Underwriter For Sunbeam’s \$750 Million Debenture Offering..... 7

D. The March 19, 1998 Press Release. 8

E. The Acquisition And Financing Transactions Close In New York. 9

F. Accounting Irregularities Are Discovered At Sunbeam. 9

STANDARD OF REVIEW 9

ARGUMENT 10

I. THIS COURT MUST APPLY NEW YORK LAW TO PLAINTIFF’S CLAIMS..... 10

A. Settled Choice-of-Law Principles Require Application Of New York Law. 10

B. Where (As Here) Misrepresentation Claims Relating To The Sale Of A Business Have A Factual Nexus To New York, the Eleventh Circuit Has Already Held That Those Claims *Must* Be Determined By New York Law..... 13

II. THIS COURT SHOULD DISMISS THIS ENTIRE CASE PURSUANT TO FLORIDA RULE OF CIVIL PROCEDURE 1.061. 15

III. PLAINTIFF’S FRAUD CLAIM (COUNT I) MUST BE DISMISSED. 17

A. CPH Specifically Disclaimed Reliance On The Representations Now Alleged To Be Fraudulent..... 18

B. CPH Cannot Bring A Fraud Claim Because It Failed To Exercise Its Contractual Right To Inspect Sunbeam’s Books And Records. 21

C.	Plaintiff Cannot Allege That It Relied On Any Of The Misrepresentations Identified In The Complaint.....	23
D.	Plaintiff's Allegations Of Scierter Make No Sense — And Fail To Meet The Basic Pleading Requirements For Fraud.	25
IV.	PLAINTIFF'S AIDING-AND-ABETTING CLAIM (COUNT II) MUST BE DISMISSED.	27
A.	The Complaint Does Not Allege That MS & Co. Had "Actual Knowledge" Of Sunbeam's Fraud.	27
1.	If MS & Co. Is Deemed To Have Had "Actual Knowledge" Of Sunbeam's Fraud, Then So Did CPH — By Virtue Of Its Equal Access To Sunbeam's Books And Records.....	28
2.	Allegations Of "Constructive Knowledge" Are Not Enough.....	29
3.	Economic Motive Is <u>Not</u> "Actual Knowledge."	29
B.	Plaintiff's Allegations Of "Substantial Assistance" Are Legally Defective.....	30
V.	PLAINTIFF'S NEGLIGENT MISREPRESENTATION CLAIM (COUNT IV) MUST BE DISMISSED.	32
A.	Plaintiff Cannot Allege That A "Special Relationship" Existed Between CPH and MS & Co.	32
B.	Plaintiff Does Not Allege Reasonable Reliance.	34
VI.	PLAINTIFF'S CONSPIRACY CLAIM (COUNT III) MUST BE DISMISSED.....	34
	CONCLUSION.....	35

TABLE OF AUTHORITIES

Cases

<i>389 Orange St. Partners v. Arnold</i> , 179 F.3d 656 (9th Cir. 1999)	14
<i>Alexander & Alexander of N.Y., Inc. v. Fritzen</i> , 503 N.E.2d 102 (N.Y. 1986).....	34
<i>American Baptist Churches of Metro N.Y. v. Galloway</i> , 271 A.D.2d 92 (N.Y. App. Div. 2000)	34
<i>Armstrong v. McAalpin</i> , 699 F.2d 79 (2d Cir. 1983).....	27
<i>Batlemento v. Dove Fountain, Inc.</i> , 593 So. 2d 234 (Fla. 5th DCA 1991).....	19
<i>Belin v. Weissler</i> , No. 97 Civ. 8787 (RWS), 1998 WL 391114 (S.D.N.Y. July 14, 1998).....	21
<i>Bishop v. Florida Specialty Paint Co.</i> , 389 So. 2d 999 (Fla. 1980).....	10, 12
<i>Boca Raton Transp., Inc. v. Zaldivar</i> , 648 So. 2d 812 (Fla. 4th DCA 1995).....	3
<i>Butvin v. Doubleclick, Inc.</i> , No. 99 Civ. 4727, 2000 WL 827673 (S.D.N.Y. June 26, 2000).....	33
<i>Ciba-Geigy Ltd. v. Fish Peddler, Inc.</i> , 691 So. 2d 1111 (Fla. 4th DCA 1997).....	16
<i>Citibank, N.A. v. Itochu Intern. Inc.</i> , No. 01 Civ. 6007 (GBD), 2003 WL 1797847 (S.D.N.Y. April 3, 2003)	32
<i>Consolidated Edison, Inc. v. Northeast Utilities</i> , 249 F. Supp. 2d 387 (S.D.N.Y. 2003).....	20
<i>Cromer Fin. Ltd. v. Berger</i> , 137 F. Supp. 2d 452 (S.D.N.Y. 2001).....	27, 30, 31
<i>CSI Inv. Partners II, L.P. v. Cendant Corp.</i> , 2002 WL 925044 (S.D.N.Y. Feb. 28, 2002).....	33
<i>Cutler v. Aleman</i> , 701 So. 2d 390 (Fla. 3d DCA 1997).....	9, 10

<i>Danann Realty Corp. v. Harris</i> , 157 N.E.2d 597 (N.Y. 1959).....	21
<i>Default Proof Credit Card Sys., Inc. v. State Street Bank & Trust Co.</i> , 753 F. Supp. 1566 (S.D. Fla. 1990)	14
<i>Diduck v. Kaszycki & Sons Contractors, Inc.</i> , 974 F.2d 270 (2d Cir. 1992).....	30
<i>Duncan v. Pencer</i> , No. 94 Civ. 0321 (LAP), 1996 WL 19043 (S.D.N.Y. Jan 18, 1996).....	26
<i>Dyncorp v. GTE Corp.</i> , 215 F. Supp. 2d 308 (S.D.N.Y. 2002).....	19, 20, 21, 34
<i>Ehrlich-Bober & Co. v. University of Houston</i> , 49 N.Y.2d 574 (N.Y. 1980)	12
<i>Emergent Capital Inv. Mgmt., LLC v. Stonepath Group, Inc.</i> , 195 F. Supp. 2d 551 (S.D.N.Y. 2002).....	19
<i>Filler v. Havnit Bank</i> , 247 F. Supp. 2d 425 (S.D.N.Y. 2003).....	27, 30, 34
<i>Friedman v. Arizona World Nurseries Ltd. P'ship</i> , 730 F. Supp. 521 (S.D.N.Y. 1990), <i>aff'd</i> , 927 F.2d 595 (2d Cir. 1991).....	26
<i>Giannacopoulos v. Credit Suisse</i> , 37 F. Supp. 2d 626 (S.D.N.Y. 1999).....	22
<i>Granite Partners, L.P. v. Bear, Stearns & Co.</i> , 17 F. Supp. 2d 275 (S.D.N.Y. 1998).....	21
<i>Ground Improvement Techniques, Inc. v. Merchants Bonding Co.</i> , 707 So. 2d 1138 (Fla. 5th DCA 1998).....	15
<i>Grumman Allied Indus., Inv. v. Rohr Indus.</i> , 748 F.2d 729 (2d Cir. 1984).....	22
<i>Gulf Oil Corp. v. Gilbert</i> , 330 U.S. 501 (1947).....	16
<i>Hari & Assocs. v. RNBC, Inc.</i> , 946 F. Supp. 531 (M.D. Tenn. 1996).....	14
<i>Harris v. Kearney</i> , 786 So. 2d 1222 (Fla. 4th DCA 2001).....	3

<i>Harsco Corp. v. Segui</i> , 91 F.3d 337 (2d Cir. 1996).....	18
<i>Heard v. City of N.Y.</i> , 82 N.Y.2d 66 (N.Y. 1993)	34
<i>Hillcrest Pac. Corp. v. Yamamura</i> , 727 So. 2d 1053 (Fla. 4th DCA 1999).....	9, 19
<i>Hirsch v. Arthur Andersen & Co.</i> , 72 F.3d 1085 (2d Cir. 1995).....	31
<i>Hoch v. Rissman, Weisberg, Barrett</i> , 742 So. 2d 451 (Fla. 5th DCA 1999).....	34
<i>Hydro Investors, Inc. v. Trafalgar Power Inc.</i> , 227 F.3d 8 (2d Cir. 2000).....	32
<i>In Re Reliance Sec. Litig.</i> , 135 F. Supp. 2d 480 (D. Del. 2001).....	29
<i>Inacom Corp. v. Sears, Roebuck & Co.</i> , 254 F.3d 683 (8th Cir. 2001)	14
<i>J. Zeevi & Sons, Ltd. v. Grindlays Bank (Uganda) Ltd.</i> , 333 N.E.2d 168 (N.Y. 1975).....	12
<i>Kalnit v. Eichler</i> , 99 F. Supp. 2d 327 (S.D.N.Y. 2000), <i>aff'd</i> , 264 F.3d 131 (2d Cir. 2001).....	26
<i>Kinney System, Inc. v. Continental Ins. Co.</i> , 674 So. 2d 86 (1996).....	15
<i>Kolbeck v. LIT Am. Inc.</i> , 939 F. Supp. 240 (S.D.N.Y. 1996), <i>aff'd</i> , 152 F.3d 918 (2d Cir. 1998).....	29
<i>Lazard Freres & Co. v. Protective Life Ins. Co.</i> , 108 F.3d 1531 (2d Cir. 1997).....	19, 20
<i>Linden v. Lloyd's Planning Serv. Inc.</i> , 750 N.Y.S.2d 20 (N.Y. App. Div. 2002)	34
<i>Macurdy v. Sikov & Love, P.A.</i> , 894 F.2d 818 (6th Cir. 1990)	14

<i>Marcellus Constr. Co. v. Village of Broadalbin</i> , 755 N.Y.S.2d 474 (N.Y. App. Div. 2003)	33
<i>Marine Midland Bank, N.A. v. United Mo. Bank</i> , 223 A.D.2d 119 (N.Y. App. Div. 1996)	12
<i>Myers v. Myers</i> , 652 So. 2d 1214 (Fla. 5th DCA 1995)	28
<i>Nigerian Nat'l Petroleum Corp. v. Citibank, N.A.</i> , No. 98 Civ. 4960 (MBM), 1999 WL 558141 (S.D.N.Y. July 30, 1999)	30
<i>North Am. Knitting Mills, Inc. v. International Women's Apparel, Inc.</i> , No. 99 Civ. 4643 (LAP), 2000 WL 1290608 (S.D.N.Y. Sept. 12, 2000)	32
<i>Optopics Labs. Corp. v. Savannah Bank of Nigeria, Ltd.</i> , 816 F. Supp. 898 (S.D.N.Y. 1993)	12
<i>Primavera Familienstiftung v. Askin</i> , 173 F.R.D. 115 (S.D.N.Y. 1997)	29
<i>Prudential Ins. Co. of Am. v. Dewey, Ballantine, Bushby, Palmer & Wood</i> , 80 N.Y.2d 377 (N.Y. 1992)	33
<i>Rotterdam Ventures, Inc. v. Ernst & Young LLP</i> , 752 N.Y.S.2d 746 (N.Y. App. Div. 2002)	21
<i>Schlaifer Nance & Co. v. Estate of Andy Warhol</i> , 119 F.3d 91 (2d Cir. 1997)	22
<i>Shields v. Citytrust Bancorp., Inc.</i> , 25 F.3d 1124 (2d Cir. 1994)	25, 26, 27, 29
<i>Sky Tech. Partners, LLC v. Midwest Research Inst.</i> , 125 F. Supp. 2d 286 (S.D. Ohio 2000)	14
<i>Stolow v. Greg Manning Auctions, Inc.</i> , No. 02 Civ 2591 (SAS), 2003 WL 355447 (S.D.N.Y. Feb. 14, 2003)	27
<i>THC Holdings Corp. v. Chinn</i> , No. 95 Civ. 4422 (KMW), 1998 WL 50202 (S.D.N.Y. Feb. 6, 1998)	25
<i>Thomas v. N.A. Chase Manhattan Bank</i> , 994 F.2d 236 (5th Cir. 1993)	14
<i>Trumpet Vine Investments, N.V. v. Union Capital Partners I, Inc.</i> , 92 F.3d 1110 (11th Cir. 1996)	13, 14

<i>United Safety of Am., Inc. v. Consolidated Edison Co. of N.Y., Inc.</i> , 213 A.D.2d 283 (N.Y. App. Div. 1995)	33
<i>UST Private Equity Investors Fund, Inc. v. Salomon Smith Barney</i> , 288 A.D.2d 87 (N.Y. App. Div. 2001)	21
<i>Valassis Communications, Inc. v. Weimer</i> , 758 N.Y.S.2d 311 (N.Y. App. Div. 2003)	21
<i>Value House, Inc. v. MCI Telecomms. Corp.</i> , 917 F. Supp. 5 (D.D.C. 1996)	14
<i>Window Headquarters, Inc. v. MAI Basic Four, Inc.</i> , No. 91 Civ. 1816 (MBM), 1994 WL 673519 (S.D.N.Y. Dec. 1, 1994)	19

Statutes

Fla. Stat § 90.202(6) (2003)	3
------------------------------------	---

Rules

Florida Rule of Civil Procedure 1.061	2, 15, 16, 17
Florida Rule of Civil Procedure 1.120(b)	19
Florida Rule of Civil Procedure 1.140(c)	3

Other Authorities

Eugene F. Scoles & Peter Hay, <i>Conflict of Laws</i> § 17.52 (3d ed. 2000)	10
<i>Restatement (Second) of the Conflicts of Law</i> § 148(1)	10, 11, 13, 14

INTRODUCTION

This lawsuit is spurious. Filed on the eve of the running of a four-year statute of limitations, Plaintiff Coleman (Parent) Holdings Company ("CPH") seeks to extract vast payments from Morgan Stanley & Co. Incorporated ("MS & Co.") on the sole ground that MS & Co. formerly served as an advisor to the once-bankrupt and now-reorganized Sunbeam Corporation. The dispute revolves around negotiations that occurred in New York in mid 1997 and early 1998, during which CPH agreed to sell its interest in the Coleman Company ("Coleman") to Sunbeam. MS & Co. served as an advisor to Sunbeam — CPH's *counterparty* in the negotiations — for parts of the deal.

CPH now alleges — five years after the fact — that it sold its stake in Coleman (and agreed to accept Sunbeam stock as part of the purchase price) based on false representations regarding Sunbeam's financial health. CPH purports to bring these claims against MS & Co., but *every factual allegation* in the Complaint deals exclusively with misrepresentations by Sunbeam insiders and Sunbeam's auditor, Arthur Andersen. In fact, CPH has already asserted *precisely the same claims* against Sunbeam and Andersen, alleging — through prior filings in this very Court — that it "*directly relied*" on financial information provided by Sunbeam and Andersen (*not* MS & Co.) when it agreed to sell its stake in Coleman. CPH's effort to recycle these claims against MS & Co. — which is twice removed from the misrepresentations alleged in the Complaint — is a transparent attempt to extend liability far beyond legal precedent. This Court should not allow CPH to ignore all bounds of principle and precedent in its quest for solvent defendants. Instead, under settled law, this Court should dismiss the Complaint.

Indeed, rather than being a *co-participant* in alleged fraud at Sunbeam, the pleadings demonstrate that MS & Co. was itself a *victim* of that fraud, as its own affiliate invested and lost hundreds of millions of dollars in the same transaction that is the subject of this lawsuit. It

would be unprecedented to permit a sophisticated plaintiff like CPH to state a claim for fraud against a financial advisor who not only represented the plaintiff's *counterparty* in a contentious arm's length transaction, but who also was substantially injured by the very fraud that is the subject of the plaintiff's Complaint.

The abusive nature of this suit is further revealed by the fact that it was filed here, in the Fifteenth Judicial District of *Florida*, rather than in *New York*, where (1) *all* named parties are headquartered, (2) *all* operative legal agreements were negotiated, drafted, and executed, (3) *all* alleged misstatements or omissions of material fact occurred, and (4) *all* action taken in reliance on those alleged misstatements and omissions occurred. Given the strong connection between this dispute and New York, this case requires — and MS & Co. now moves for — the application of New York law. For substantially the same reasons, the Complaint should be dismissed on *forum non conveniens* grounds under Florida Rule of Civil Procedure 1.061(a).

The reason CPH chose this forum is clear: it hopes to avoid the application of New York law, which bars all of its claims as a matter of law. Indeed, should the Court reach the legal merits of Plaintiff's claims, those claims should be dismissed for any of the following independent reasons:

- *First*, Plaintiff's misrepresentation claims are barred by various provisions of the written Merger Agreement, which explicitly disclaim reliance on pre-agreement negotiations and representations.
- *Second*, Plaintiff cannot plead a legally valid misrepresentation claim because it had the same access to Sunbeam's books and records as MS & Co., yet failed to take any steps to verify or investigate the representations it now claims were fraudulent.
- *Third*, Plaintiff cannot state a valid claim for fraud based on allegations that MS & Co. acted out of ordinary economic motive — such as the collection of investment banking fees — let alone on allegations that MS & Co. acted contrary to its own economic interest in participating in the alleged fraud.

- *Fourth*, Plaintiff cannot state a claim for negligent misrepresentation because it cannot allege that it enjoyed a “special relationship” with MS & Co., the financial advisor to Plaintiff’s counterparty in a contentious multi-billion dollar negotiation.
- *Fifth*, Plaintiff cannot state a valid claim for conspiracy or aiding and abetting fraud because there is no factual allegation that MS & Co. knew of the alleged fraud at Sunbeam let alone knowingly facilitated it.

At bottom, CPH should not be permitted to file a lawsuit in Florida over a transaction based entirely in New York, and thereby avoid the impact of settled New York law, which defeats CPH’s claims as a matter of law. Accordingly, in the event that the Court finds the Fifteenth Judicial Circuit a proper forum for this case, the Court should apply New York law to determine the legal sufficiency of Plaintiff’s claims and dismiss the case pursuant to Florida Rule of Civil Procedure 1.140(c).

FACTUAL BACKGROUND¹

All of the parties in this case are headquartered in New York. Plaintiff CPH is a Delaware corporation with its principal place of business in New York.² Prior to March 30,

¹ The background statement is based principally on the allegations of the Complaint, which are accepted as true only for purposes of this motion. See, e.g., *Harris v. Kearney*, 786 So. 2d 1222, 1225 (Fla. 4th DCA 2001). Reference is also made to documents directly quoted and relied upon in the Complaint, including the February 27, 1998 Merger Agreement (quoted at Compl. ¶ 65) and the March 19, 1998 Press Release (quoted at Compl. ¶ 60). The Memorandum also refers to the March 19, 1998 Note Offering Memorandum, and the February 27, 1998 Fairness Opinion, both of which are relied upon or referenced in the Complaint. (*Id.* ¶¶ 42-43, 47-52.) Copies of these documents and related materials are attached to Defendant’s Answer, which is filed simultaneously herewith (see Answer Exhibits 1-6), and thus may properly be considered on this motion for judgment on the pleadings. See, e.g., *Boca Raton Transp., Inc. v. Zaldivar*, 648 So. 2d 812, 813 (Fla. 4th DCA 1995). Finally, for purposes of the Court’s choice-of-law analysis, this Memorandum attaches and references the affidavits of several individuals who were present at pertinent meetings and occurrences discussed in the Complaint, all of which occurred in New York. (See Memorandum Exs. A-C.)

² It is telling that CPH conspicuously omits its principal place of business from its own Complaint. (Compl. ¶ 8.) In two pleadings filed by CPH in this very court, however — by the very same counsel who represent CPH here — CPH plainly stated that its “principal offices [are] located in New York.” See March 15, 2002 1st Am. Compl. ¶ 16, *Coleman (Parent) Holdings v. Arthur Andersen et al.*, No. CA 01-06062 AN (Rapp, J.) (“*Arthur Andersen* 1st Am. Compl.”) (Ex. D); June 8, 2001 Compl. ¶ 15, *Coleman (Parent) Holdings v. Arthur Andersen LLP & Phillip Harlow*, No. 01-06062AN (Ex. E). The Court may take judicial notice of these pleadings pursuant to Fla. Stat § 90.202(6) (2003), which permits judicial notice of the “[r]ecords of any court of this state.”

1998, CPH owned approximately 82% of the shares of Coleman, a manufacturer and marketer of outdoor recreation products. (Compl. ¶ 8.) On March 30, 1998, pursuant to a written Merger Agreement that was negotiated, executed, and consummated in New York, CPH sold its interest in Coleman to Sunbeam. (*Id.*) Neither Sunbeam nor Coleman is a party to this action.

Defendant MS & Co., a wholly-owned subsidiary of Morgan Stanley, is a registered broker-dealer headquartered in New York. In mid 1997 and early 1998, MS & Co. assisted Sunbeam in identifying potential acquisition candidates and served as Sunbeam's financial advisor with respect to certain aspects of Sunbeam's acquisition of Coleman and two smaller companies. (*Id.* ¶¶ 9, 32.) MS & Co. also served as underwriter for a \$750 million offering of convertible debentures, which Sunbeam used to finance the acquisitions. (*Id.* ¶¶ 9, 47, 52.) MS & Co. is incorporated in Delaware and has its principal place of business in New York. (*See* June 23, 3003 Answer of Morgan Stanley & Co. Incorporated ¶ 6.)

A. Sunbeam Hires MS & Co. To Advise It Regarding A Possible Corporate Sale Or Acquisition — Not To Replace Sunbeam's Outside Auditor Or To Review Sunbeam's Accounting Practices.

In mid 1997, Sunbeam engaged MS & Co. for advice with respect to a possible sale of Sunbeam's core business and/or the initiation of one or more acquisitions. (Compl. ¶ 31.) Throughout the fall of 1997, MS & Co. contacted at least ten potential bidders that it believed might have an interest in acquiring Sunbeam. (*Id.* ¶ 32.) In December 1997, unable to find a buyer for Sunbeam, MS & Co. recommended that Sunbeam's management consider acquiring other companies instead. (*Id.* ¶ 34.) According to the Complaint, MS & Co. suggested that Sunbeam consider using Sunbeam stock as part of the consideration offered to potential acquisition candidates. (*Id.*) Arthur Andersen served as "Sunbeam's outside auditors" (*Id.* ¶¶ 13, 67-68) and thus assumed responsibility for monitoring Sunbeam's accounting practices and verifying Sunbeam's publicly-filed financial reports, upon which Sunbeam's stock price was

based. Plaintiff has recently acknowledged in this Court that it “directly relied on Andersen’s 1996 and 1997 audit reports when it decided to close the transaction with Sunbeam.” *Arthur Andersen*, 1st Am. Compl. ¶ 93.

B. After A “False Start” In Florida, Sunbeam And CPH Negotiate The Written Merger Agreement In New York.

In December 1997, MS & Co. identified Coleman as a potential acquisition candidate. (Compl. ¶ 36.) After an initial meeting between Sunbeam and CPH in New York to discuss the possibility of such an acquisition (Stynes Decl. ¶ 4 (Ex. A)), according to the Complaint, MS & Co. “laid the groundwork” for a meeting in Palm Beach, Florida between Al Dunlap (CEO of Sunbeam), Russell Kersh (CFO of Sunbeam), and representatives of CPH (Compl. ¶ 37). The meeting was a complete disaster. According to the Complaint, Dunlap “nearly scuttled” the proposed deal when he “cursed and ranted” at the CPH representatives and “stormed out” of the meeting. (*Id.*) This aborted meeting — which MS & Co. did not attend and which does not form the basis for any claim — is the only meeting alleged in the Complaint that took place in Florida.

Sunbeam and CPH ultimately resumed negotiations in New York. (Stynes Decl. ¶ 5.) The Complaint alleges that, “[d]uring the course of negotiations,” MS & Co. “prepared and provided CPH with false financial and business information about Sunbeam.” (Compl. ¶ 39.) The Complaint alleges that these materials, together with “false projections” and misleading “earnings estimates,” were provided to CPH during “negotiations” and “face-to-face discussions” between CPH and Sunbeam. (*Id.*) All, or substantially all, such “negotiations” and “face-to-face discussions” took place in New York. (Stynes Decl. ¶ 5.)

On February 27, 1998, after several weeks of arm’s length negotiations, Sunbeam’s Board of Directors convened a special meeting in New York to consider the proposed acquisition of Coleman. (Compl. ¶ 41.) The Board of Directors met at MS & Co.’s offices in New York.

(Stynes Decl. ¶ 6.) Several representatives from MS & Co. attended the board meeting and provided Sunbeam with a written "fairness opinion" regarding the fair acquisition price of Coleman. (Compl. ¶¶ 42-43.) The Complaint does not allege that CPH was present at this board meeting, or that it relied on any representations that were made there. (*Id.*) At the conclusion of the New York meeting, Sunbeam's Board of Directors approved the Coleman acquisition. (*Id.* ¶ 44.) Later that same day, Sunbeam and CPH formally executed the Merger Agreement in New York. (Stynes Decl. ¶ 7.)

The Merger Agreement is fundamental to this case. Although the Complaint quotes directly from the Merger Agreement and CPH purports to base its claims (at least in part) on the Merger Agreement itself (Compl. ¶ 65), CPH has failed to attach the Merger Agreement to its Complaint. Its failure to do so is not surprising because several express provisions of the Merger Agreement defeat CPH's claims as a matter of law:

- *First*, the Merger Agreement contains a clear integration clause which expressly prohibits CPH from relying on any representations or statements made during pre-closing negotiations. (Merger Agmt. § 12.5 (Answer Ex. 1).)
- *Second*, the Merger Agreement contains detailed covenants, representations and warranties, none of which contemplate reliance on extra-contractual representations or statements. (Merger Agmt. §§ 5.1-6.10.)³
- *Third*, the Merger Agreement required Sunbeam to provide CPH and all of its "financial advisors, legal counsel, accountants, consultants and other representatives" with "full access . . . to all of [Sunbeam's] books, records, properties, plants and personnel." (Merger Agmt. § 6.7.) Thus, CPH and MS & Co. stood at all times on *equal footing* regarding access to information pertinent to Sunbeam's true financial condition.

³ Article V of the Merger Agreement further incorporates every additional representation and warranty contained in the separate agreement that was executed by Coleman and Sunbeam, none of which contemplate reliance on extra-contractual representations. (See Feb. 27, 1998 Company Merger Agmt. §§ 5.1-5.12 (Answer Ex. 3).)

- *Fourth*, the Merger Agreement expressly recognized that CPH had its own sophisticated financial advisors with respect to the acquisition, and would thus be represented throughout negotiations, due diligence, and closing by Credit Suisse First Boston ("CSFB"). (*Id.* §§ 1.1; 4.11.)⁴

The Merger Agreement also set forth the commercial terms for the acquisition. In exchange for CPH's 82% ownership interest in Coleman, Sunbeam agreed to pay \$159,956,756 in cash — and transfer 14,099,749 shares of Sunbeam's common stock to CPH. (Merger Agmt. § 3.1(a)(i).) In addition, Sunbeam agreed to assume or repay more than \$1 billion in debt belonging to Coleman and CPH. The Merger Agreement specified that the acquisition would close in New York and that all share certificates and/or other consideration would be exchanged by the parties at the closing in New York. (*Id.* §§ 2.2, 3.1(b)(i).)

C. MS & Co. Puts Its Own Money And Reputation On The Line By Agreeing To Serve As Underwriter For Sunbeam's \$750 Million Debenture Offering.

Sunbeam needed to raise funds to pay the substantial "cash portion" of consideration for Coleman's \$2 billion purchase price. (Compl. ¶ 47; Merger Agmt. § 3.1(a)(i).) MS & Co. recommended that Sunbeam raise a portion of this amount through an offering of convertible debentures ("the Note Offering"). (Compl. ¶ 47; MS & Co.'s Answer ¶¶ 47, 50; March 19, 1998 Note Offering Mem. at 8, 23 (Answer Ex. 5).) MS & Co. agreed to serve as the sole underwriter for Sunbeam's Note Offering and thus agreed to market the debentures to its most valuable institutional clients. (Compl. ¶ 47.) The notes were presented to potential investors at a series of "road show" meetings (*id.* ¶ 50) in New York (Porat Decl. ¶ 3 (Ex. B).) The Complaint alleges that MS & Co. "misrepresented Sunbeam's financial performance" during the "road shows" and "conference calls" which took place in connection with the Note Offering. (Compl. ¶ 50.) There

⁴ CPH also was represented throughout the negotiations and due diligence process by Wachtell, Lipton, Rosen & Katz, a prominent New York law firm which specializes in counseling its clients in high-stakes mergers and acquisitions. (Stynes Decl. ¶ 3.)

is no allegation, however, that CPH ever received these alleged misrepresentations or that it relied on them when deciding to close the transaction. (*Id.*) The Note Offering ultimately raised \$750 million, which Sunbeam used to pay part of the cash consideration for the Coleman acquisition. (*Id.* ¶ 52.)

Another portion of this consideration (approximately \$680 million) was financed by Morgan Stanley Senior Funding (“MSSF”), an affiliate of MS & Co., and a wholly-owned subsidiary of Morgan Stanley. (MS & Co.’s Answer ¶ 47; Note Offering Mem. at 8, 23, 47.) Specifically, in March 1998, MSSF entered into a credit agreement with Sunbeam and agreed to lend Sunbeam approximately \$680 million to finance the acquisition. (Hart Decl. ¶ 3 (Ex. C).) Thus, through its subsidiary, Morgan Stanley invested hundreds millions of dollars in the Coleman acquisition. (MS & Co.’s Answer ¶¶ 31, 47, 66; Note Offering Mem. at 47; June 1998 Credit Facilities Mem. at 1-2; 39 (Answer Ex. 2).)⁵

D. The March 19, 1998 Press Release.

Plaintiff alleges that on March 19, 1998 — eleven days before the acquisition was scheduled to close — Sunbeam issued a “false press release” regarding Sunbeam’s first quarter financial performance. (Compl. ¶ 59.) Plaintiff alleges that the press release was prepared and issued with MS & Co.’s “knowledge and assistance,” and that the press release “affirmatively misstated and concealed Sunbeam’s true condition.” (*Id.*) The Complaint nowhere alleges that CPH relied on this press release for any reason or that CPH ever sought to verify the information contained therein.

⁵ MSSF’s loan is the subject of a companion case that is also pending in this Court. See *Morgan Stanley Senior Funding, Inc. v. Coleman (Parent) Holdings Inc. & MacAndrews & Forbes Inc.*, No. 2003 CA 00-5165AG (filed May 12, 2003). In that companion case, MSSF alleges that CPH and MAFCO fraudulently inflated the acquisition price for Coleman, causing MSSF to loan (and ultimately lose) hundreds of millions of dollars.

E. The Acquisition And Financing Transactions Close In New York.

The Note Offering closed in New York on March 19, 1998. (Porat Decl. ¶ 3.) The acquisition itself closed in New York on March 28, 1998. (Stynes Decl. ¶ 8.) CPH tendered its Coleman stock to Sunbeam in New York, as required by the Merger Agreement. (Merger Agmt. §§ 2.2, 3.1(b)(i).) Sunbeam delivered the consideration for these shares (including roughly 14.1 million shares of common stock and \$1.6 billion in cash) to CPH at the closing in New York. (*Id.* § 2.2.) The Bank Facility closed in New York on March 31, 1998. (Hart Decl. ¶ 4.) MSSF funded the Bank Facility by transferring \$680 million from its New York bank account. (*Id.*)

F. Accounting Irregularities Are Discovered At Sunbeam.

Several days after the acquisition closed, Sunbeam announced that its sales for the first quarter of 1998 were lower than sales numbers that it had reported in the first quarter of 1997. (Compl. ¶ 74.) In May 1998, Sunbeam announced that it would record a first quarter loss of \$.09 per share. (*Id.* ¶ 76.) In June 1998, Sunbeam's Board of Directors launched an internal investigation into Sunbeam's accounting practices. (*Id.* ¶ 77.) That investigation led to the June 13, 1998 firing of Al Dunlap (Sunbeam's CEO) and Russell Kersh (Sunbeam's CFO) and, ultimately, to the October 1998 restatement of Sunbeam's financial statements for 1996, 1997, and the first quarter of 1998. (*Id.*)

STANDARD OF REVIEW

On a motion for judgment on the pleadings under Florida Rule of Civil Procedure 1.140(c), the Court must accept as true all well-pleaded factual allegations of the non-moving party. *See Cutler v. Aleman*, 701 So. 2d 390, 391 (Fla. 3d DCA 1997). The Court need not, however, ignore general factual allegations that are inconsistent with specific facts "revealed by [an] exhibit attached or referred to in the complaint." *Hillcrest Pac. Corp. v. Yamamura*, 727 So. 2d 1053, 1056 (Fla. 4th DCA 1999) (internal quotation marks & citation omitted). Judgment on

the pleadings is appropriate where “on the facts as admitted for the purposes of the motion, the moving party is clearly entitled to judgment.” *Cutler*, 701 So. 2d at 391.

ARGUMENT

I. THIS COURT MUST APPLY NEW YORK LAW TO PLAINTIFF’S CLAIMS.

A. Settled Choice-of-Law Principles Require Application Of New York Law.

In *Bishop v. Florida Specialty Paint Co.*, 389 So. 2d 999 (Fla. 1980), the Florida Supreme Court adopted the principles set forth in the *Restatement (Second) of the Conflict of Laws* (“*Restatement*”) for resolving disputes over choice-of-law in controversies involving more than one jurisdiction. Applying the *Restatement* analysis to this case, it is clear that this Court must apply New York law to CPH’s claims.

All of the claims in the Complaint are based on allegations of fraud and misrepresentation. As such, the substantive law applied to these claims must be determined in accordance with Section 148 of the *Restatement*, which provides in relevant part:

When the plaintiff has suffered pecuniary harm on account of his reliance on the defendant’s false representations and *when the plaintiff’s action in reliance took place in the state where the false representations were made and received, the local law of this state determines the rights and liabilities of the parties*

Restatement § 148(1); *see also* Eugene F. Scoles & Peter Hay, *Conflict of Laws* § 17.52 at 798 (3d ed. 2000) (“In cases of fraud and misrepresentation, the choice of the applicable law is relatively easy. When the defendant’s fraud or misrepresentation and the defendant’s reliance occur in the same state, no problem arises.”) (citing *Restatement* § 148(1)).⁶ Application of these principles here plainly requires this Court to apply New York law to Plaintiff’s claims.

⁶ Unless otherwise indicated, all emphasis is supplied.

First, every representation alleged in the Complaint occurred in New York. All substantive “negotiations” and “face-to-face” discussions involving MS & Co. took place in New York. (Stynes Decl. ¶ 5.) Preparation for the “road show” meetings took place in New York, and the meetings themselves took place in New York and three other cities, none in Florida. (Porat Decl. ¶ 3.) MS & Co.’s presentation to Sunbeam’s Board of Directors took place in New York. (Stynes Decl. ¶ 6.) MS & Co.’s “fairness opinion” was presented to Sunbeam in New York. To the extent that MS & Co. reviewed the March 19, 1998 press release, it did so in New York. (Porat Decl. ¶ 4.) And there are no allegations — (nor could there be) — that MS & Co. made any representations to anyone in Florida.

Second, every act of reliance alleged in the Complaint occurred in New York. CPH executed and closed the Merger Agreement in New York. (Merger Agmt. § 2.2.) CPH tendered its shares of Coleman in New York. (*Id.* §§ 2.2, 3.1(b)(i).) CPH accepted shares of Sunbeam stock in New York. (*Id.*) The Note Offering closed in New York. (Porat Decl. ¶ 3.) The Bank Facility closed in New York. (Hart Decl. ¶ 4.) And there are no allegations — nor could there be — that CPH ever committed a single act of reliance to its detriment in Florida, as opposed to New York, its principal place of business.⁷

Third, every injury alleged in the Complaint occurred in New York. CPH tendered its shares of Coleman in New York. (Merger Agmt. § 3.1(b)(i).) CPH accepted shares of Sunbeam

⁷ Even if CPH based its claims on representations made from Florida, the *Restatement* would still compel application of New York law. The fact that CPH relied to its detriment in New York — the same state as its principal place of business — is completely determinative of the choice-of-law question, regardless of whether the representations were made from another state. See *Restatement* § 148 (comment j) (“[W]hen the plaintiff acted in reliance upon the defendant’s representations in a single state, this state will usually be the state of the applicable law . . . if (a) the defendant’s representations were received by the plaintiff in this state, or (b) this state is the state of the plaintiff’s domicile or principal place of business.”).

stock in New York. (*Id.*) Sunbeam filed for bankruptcy in New York. And there is no Florida party before this Court, let alone an injured one.⁸

Fourth, New York has a *paramount sovereign interest* in having its law applied to this controversy, which arises out of a sophisticated business transaction that was negotiated, executed and closed in New York — between two parties who are headquartered there. Indeed, it is precisely for cases like this that New York has developed a sophisticated body of law to govern fraud and misrepresentation claims that arise from New York-based financial transactions.⁹

Fifth, Florida has *no sovereign interest* in having its law applied to this controversy. There are no Florida parties before this Court; there is no Florida injury to redress; and every discussion or representation identified in the Complaint took place in New York — not Florida. Indeed, it is only by applying New York law to a case like this one that the Florida courts can ensure — as the Florida Supreme Court requires — that “rights and liabilities” are defined by the law of the state with “the most significant relationship to the occurrence and the parties.” *Bishop*, 389 So. 2d at 1001.

⁸ The Complaint makes curious reference to “Florida investors” who may have purchased some of the convertible notes (Compl. ¶ 52), but this is entirely irrelevant to the choice-of-law inquiry because (i) no such “Florida investors” are before this Court and (ii) CPH’s claims have nothing to do with investors in the convertible notes, from Florida or anywhere else.

⁹ The federal and state courts of New York have repeatedly and consistently recognized this paramount sovereign interest. See, e.g., *Marine Midland Bank, N.A. v. United Mo. Bank*, 223 A.D.2d 119, 124 (N.Y. App. Div. 1996) (“[A] known, stable, and commercially sophisticated body of law may be considered as much an attraction to conducting business in New York as its unique financial and communications resources.”) (citing *Ehrlich-Bober & Co. v. University of Houston*, 49 N.Y.2d 574, 581 (N.Y. 1980)); *Optics Labs. Corp. v. Savannah Bank of Nigeria, Ltd.*, 816 F. Supp. 898, 904 (S.D.N.Y. 1993) (recognizing that New York has “an overriding and paramount interest” in the outcome of financial transaction litigation because New York is “a financial capital of the world [and] international clearinghouse and market place for a plethora of international transactions”) (quoting *J. Zeevi & Sons, Ltd. v. Grindlays Bank (Uganda) Ltd.*, 333 N.E.2d 168, 172 (N.Y. 1975)).

B. Where (As Here) Misrepresentation Claims Relating To The Sale Of A Business Have A Factual Nexus To New York, the Eleventh Circuit Has Already Held That Those Claims Must Be Determined By New York Law.

This case raises choice-of-law issues that are nearly identical to those presented in *Trumpet Vine Investments, N.V. v. Union Capital Partners I, Inc.*, 92 F.3d 1110 (11th Cir. 1996). That case arose out of the multi-billion dollar acquisition of Del Monte, an international corporation headquartered in Coral Gables, Florida. *See id.* at 1113-14. The plaintiff (Union Capital) claimed that the defendant (Trumpet Vine) conspired with other companies to shut it out of the acquisition. *See id.* There, as here, negotiations for the acquisition occurred chiefly in New York. *See id.* at 1116. There, as here, the plaintiff filed its claims in Florida, where the subject of the New York-based transaction (Del Monte) was headquartered and where some due diligence activities occurred. *See id.* at 1113-14. And there, as here, the plaintiff sought to assert various tort theories of fraud, misrepresentation, and conspiracy. *See id.* at 1114.

The “threshold issue” was choice-of-law. *Id.* at 1115. Union Capital argued that Florida law should govern on grounds that one of the parties to the acquisition (Del Monte) was based in Florida, and that the plaintiff (Union Capital) was itself based there. The defendant (Trumpet Vine) argued that New York law governed the claims because the transaction was negotiated and closed in New York. The District Court, applying Florida’s choice-of-law rules and Section 148 of the *Restatement*, held that New York law must be applied. A three-judge panel of the United States Court of Appeals for the Eleventh Circuit agreed — and upheld the choice-of-law ruling on appeal. *See id.* at 1118.

The same considerations that guided the courts in *Trumpet Vine* apply to this case:

- In *Trumpet Vine*, as in this case, it was *irrelevant* that Del Monte was headquartered in Florida, because “*the takeover itself was to be consummated in New York.*” *Id.*

- In *Trumpet Vine*, as in this case, it was *irrelevant* that some of the preliminary discussions took place in Florida, or even that “some acts in reliance (the due diligence) occurred in Florida.” *Id.*
- And in *Trumpet Vine*, as in this case, it was *irrelevant* that the subject of the underlying transaction was based in Florida because “New York had the most significant contacts, as *the place where the misrepresentations and the initial acts of reliance occurred.*” *Id.*

Indeed, this case presents an even *stronger* basis for applying New York law than *Trumpet Vine* because no party in this case has *any* presence in Florida. In *Trumpet Vine*, *the injured plaintiff was headquartered in Florida* and the principal injury *occurred in Florida*. No such interests are implicated here.

Trumpet Vine thus offers powerful guidance that where, as here, a business transaction is executed and closed in New York, and alleged misrepresentations, reliance, and injuries all occur in New York, the legal sufficiency of Plaintiff’s claims must be determined under the law of New York. For the Court’s convenience, a chart summarizing the parallels between CPH’s Complaint and the *Trumpet Vine* case is attached hereto as Exhibit F.¹⁰

¹⁰ Further guidance is found in the fact that reported cases applying *Restatement* principles to disputes arising from sophisticated multi-jurisdictional business transactions uniformly reach the same result as *Trumpet Vine*. See, e.g., *Inacom Corp. v. Sears, Roebuck & Co.*, 254 F.3d 683, 688 (8th Cir. 2001) (applying Nebraska law to suit arising out of the sale of a business division located in Illinois because plaintiff received, took action on, and suffered damages from fraudulent concealment in Nebraska); *389 Orange St. Partners v. Arnold*, 179 F.3d 656, 662 (9th Cir. 1999) (applying law of state where claimant signed documents containing misrepresentations and was to render payment in reliance on such misrepresentations); *Thomas v. N.A. Chase Manhattan Bank*, 994 F.2d 236, 241-42 (5th Cir. 1993) (applying law of New York because negotiations and reliance occurred in New York); *Macurdy v. Sikov & Love, P.A.*, 894 F.2d 818, 820-21 (6th Cir. 1990) (applying law of state where misrepresentations and reliance occurred); *Sky Tech. Partners, LLC v. Midwest Research Inst.*, 125 F. Supp. 2d 286, 297-98 (S.D. Ohio 2000) (applying law of state where plaintiffs had their principal place of business and acted in reliance upon alleged misrepresentations); *Hari & Assocs. v. RNBC, Inc.*, 946 F. Supp. 531, 536 (M.D. Tenn. 1996) (applying law of state where contracts and agreements were executed and misrepresentations occurred); *Value House, Inc. v. MCI Telecomms. Corp.*, 917 F. Supp. 5, 7 (D.D.C. 1996) (applying law of state where plaintiffs received negligent misrepresentations and acted in reliance thereon); *Default Proof Credit Card Sys., Inc. v. State Street Bank & Trust Co.*, 753 F. Supp. 1566, 1570-71 (S.D. Fla. 1990) (applying Massachusetts law because negotiations and actionable conduct occurred in Massachusetts notwithstanding that losses from alleged fraud occurred in Florida where the plaintiff had its principal place of business). To apply Florida law here, in short, would not only be unprecedented, it would turn the *Restatement* on its head.

II. THIS COURT SHOULD DISMISS THIS ENTIRE CASE PURSUANT TO FLORIDA RULE OF CIVIL PROCEDURE 1.061.

As the foregoing makes clear, Florida has scant connection with the underlying facts or the injury alleged in the Complaint. Under a traditional *forum non conveniens* analysis, codified by the Florida Supreme Court in Florida Rule of Civil Procedure 1.061(a), CPH's lawsuit should proceed (if at all) only in New York — where all the events alleged occurred, where the overwhelming majority of the witnesses and relevant documents are located, and where the injuries it claims to have suffered occurred. This strong preference for a New York forum is confirmed by the fact that this Court — or any other court adjudicating this controversy — will have to apply New York law to CPH's claims. *See, e.g., Kinney System, Inc. v. Continental Ins. Co.*, 674 So. 2d 86, 92 (Fla. 1996) (“[A] trial court has discretion to grant *forum non conveniens* dismissal upon finding that . . . foreign law will predominate if jurisdiction is retained.”).

Florida Rule of Civil Procedure 1.061(a) recognizes that there are certain cases that are so inconvenient to litigate in the forum selected by a plaintiff that they must be dismissed. Rule 1.061(a) allows the court to exercise its “sound discretion” — and dismiss the case — where it appears that the practical interest of the litigants and witnesses require the action to be tried in a more convenient judicial forum. Florida courts considering Rule 1.061 dismissal evaluate three key factors: (1) whether “an adequate alternate forum exists”; (2) whether “all relevant factors of private interest favor the alternate forum”; and (3) “[i]f the balance of private interests is at or near equipoise,” whether “factors of public interest tip the balance in favor of trial in the alternate forum.” *Id.* at 94; *see, e.g., Ground Improvement Techniques, Inc. v. Merchants Bonding Co.*, 707 So. 2d 1138, 1139 (Fla. 5th DCA 1998) (dismissing complaint under Rule 1.061 where pleadings and attachments showed another state was more convenient).

This case is tailor-made for a Rule 1.061 dismissal. *First*, the New York courts are clearly an “adequate alternative forum” for adjudication of a dispute which arises out of a business transaction that was negotiated, executed, and closed in New York — between two parties who are headquartered in New York. Indeed, New York courts are routinely asked to decide similar cases involving substantially identical issues. Moreover, both of the parties to this action are undoubtedly subject to personal jurisdiction in New York. And because CPH is a Delaware corporation with a New York headquarters, its choice of a Florida forum is entitled no weight in the Rule 1.061(a) inquiry. *See, e.g., Ciba-Geigy Ltd. v. Fish Peddler, Inc.*, 691 So. 2d 1111, 1118 (Fla. 4th DCA 1997) (reversing denial of motion to dismiss under Rule 1.061(a) because “no special weight should have been given to a foreign plaintiff’s choice of forum”).

Second, all relevant public and private interest factors weigh in favor of this case being pursued in New York. As set forth in detail in Part I of this Memorandum and described in the materials submitted to the Court for the choice-of-law determination:

- **The Parties, Witnesses, and Documents Are Located in New York.** All of the relevant events occurred in New York, and the overwhelming majority of witnesses, documents, and other relevant evidence are located in New York.
- **The Court Must Apply New York Law.** The Court must consider the impact of choice-of-law problems on the forum, particularly since the need to apply the law of another state points toward dismissal. The familiarity of New York courts with New York law supports dismissal here under Rule 1.061(a).
- **The Localized Nature Of The Controversy.** There is a “local interest in having localized controversies decided at home.”...*Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947). This case presents a case that is “local” to New York. The relevant events all occurred there, and the courts of New York have a significant interest in regulating the conduct of companies that transact business agreements there.
- **The Unfairness Of Imposing Jury Duty On Florida Residents.** There is no persuasive reason for imposing the burden of jury duty and the cost of trial on the residents of Florida where a transaction is based entirely in New York. In this case especially, the attenuated connection between CPH’s claims and

Florida make it unfair to impose the burden of jury duty on the residents of Palm Beach County.

- **The Court's Busy Docket Warrants Dismissal.** Permitting what promises to be a complex case involving the application of New York law — and discovery disputes involving New York parties, witnesses, and documents — to proceed in Florida will only further crowd an already busy docket and delay justice to Florida residents with Florida-based claims.

For all of the foregoing reasons, New York has a greater interest in this dispute than Florida and is by far the most convenient forum for the litigation of CPH's claims. Accordingly, the convenience of the parties and their witnesses, as well as the interests of justice, require the Court to dismiss the case pursuant to Federal Rule of Civil Procedure 1.061(a).¹¹

III. PLAINTIFF'S FRAUD CLAIM (COUNT I) MUST BE DISMISSED.

CPH's fraud claim fails for three separate and independent reasons. *First*, Plaintiff's claims are foreclosed by the integration clause in the Merger Agreement, which expressly disclaims reliance on pre-agreement negotiations. *Second*, settled law prohibits CPH from bringing a fraud claim based on alleged representations by MS & Co. (the financial advisor to CPH's *counterparty* in arm's length negotiations) where it failed to inspect and verify the accuracy of those alleged representations, as it had the contractual right to do. *Third*, CPH cannot base its fraud claims on allegations that MS & Co. acted against its own economic interest — *i.e.*, that it engaged in a massive fraud, allowed its affiliate to risk and lose hundreds of millions of dollars, and intentionally ripped off its own clients, all for the alleged purpose of

¹¹ In the event that this Court dismisses this action on *forum non conveniens* grounds, MSSF agrees to stipulate pursuant to Florida Rule of Civil Procedure 1.061(b) that it will voluntarily dismiss the companion case now pending in this Court and refile its complaint in New York. MSSF filed its action here only because CPH filed its case here — and only because the cases involve common facts and judicial economy demands that they be consolidated in the same forum. The most appropriate forum for these cases, however, is clearly New York, not Florida.

collecting an ordinary banking fee. Such nonsensical allegations fail, as a matter of law, to establish the “scienter” element of Plaintiff’s fraud claim.

A. CPH Specifically Disclaimed Reliance On The Representations Now Alleged To Be Fraudulent.

To state a claim for fraud, CPH must allege that it reasonably relied on fraudulent representations made by MS & Co. *See, e.g., Harsco Corp. v. Segui*, 91 F.3d 337, 342 (2d Cir. 1996). But CPH cannot establish this threshold requirement because the only representations alleged to have been made by MS & Co. — statements and materials provided during pre-closing negotiations (Compl. ¶ 39) — are expressly disclaimed in the Merger Agreement’s integration clause. Section 12.5 of the Merger Agreement provides:

Entire Agreement. This Agreement (including all Schedules and Exhibits hereto) contains *the entire agreement* among the parties hereto with respect to the subject matter hereof and *supercedes all prior agreements and understandings, oral or written, with respect to such matters*, except for the Confidentiality Agreements which will remain in full force and effect for the term provided for therein.

(Merger Agmt. § 12.5.)

This provision disclaims, in plain language, the representations alleged in Paragraph 39 of the Complaint — the *only* representations that are alleged to have been made by MS & Co. Indeed, the Merger Agreement contains or expressly incorporates dozens of representations and warranties which, pursuant to the integration clause, are the *only* representations and warranties CPH relied upon in agreeing to sell its stake in Coleman. (Merger Agmt. § 5.1-5.4; Company Merger Agmt. §§ 5.1-5.12.) These representations and warranties refer to the truth and accuracy of financial information “filed by [Sunbeam] with the SEC” (Company Merger Agmt. § 4.6);

they clearly *do not* refer to any information alleged to have been “provided” by MS & Co. (Compl. ¶ 39), which is the *only* factual basis for CPH’s fraudulent misrepresentation claim.¹²

New York law is crystal clear that a party who expressly disclaims reliance on representations in the course of a complex business transaction (as CPH has done here) cannot later sue for fraud claiming reliance on those very same representations. *See, e.g., Dyncorp v. GTE Corp.*, 215 F. Supp. 2d 308, 322-23 (S.D.N.Y. 2002) (dismissing fraud claim based on extra-contractual representations where plaintiff negotiated a merger agreement with express representations, warranties, and an integration clause); *Emergent Capital Inv. Mgmt., LLC v. Stonepath Group, Inc.*, 195 F. Supp. 2d 551, 562 (S.D.N.Y. 2002) (same).¹³

This well-established principle applies with special force where (as here) the plaintiff is a sophisticated commercial actor with substantial experience negotiating complex financial transactions. *See, e.g., Lazard Freres & Co. v. Protective Life Ins. Co.*, 108 F.3d 1531, 1543 (2d Cir. 1997) (“[A] substantial and sophisticated player . . . [is] under a further duty to protect itself from misrepresentation.”). Indeed, sophisticated entities like CPH have a legal obligation to

¹² It is significant for purposes of this Motion that, in a ninety-six paragraph Complaint, only this single paragraph (Compl. ¶ 39) alleges that MS & Co. made any representations to CPH. Every other substantive portion of the Complaint — including (i) the allegations of Sunbeam’s accounting fraud (*Id.* ¶¶ 14-27), (ii) statements made by MS & Co. to prospective purchasers of the convertible notes (*Id.* ¶¶ 47-52), and (iii) statements made by MS & Co. to the Sunbeam Board of Directors (*Id.* ¶¶ 41-44) — simply has no relevance to CPH’s claims, as there is no factual allegation that MS & Co. knew of the Sunbeam fraud or that representations by MS & Co. to the other parties were ever communicated to CPH. Given the stringent pleading standards for fraudulent misrepresentation claims, moreover, the Complaint’s conclusory and hollow allegations cannot state a claim as a matter of law. *See, e.g., Batlemento v. Dove Fountain, Inc.*, 593 So. 2d 234, 238 (Fla. 5th DCA 1991) (dismissing fraud claim where “the amended complaint does no more than identify the subject matter of the alleged false representations of fact”) (citing Fla. R. Civ. P. 1.120(b)); *see also Window Headquarters, Inc. v. MAI Basic Four, Inc.*, No. 91 Civ. 1816 (MBM), 1994 WL 673519, at *5 (S.D.N.Y. Dec. 1, 1994) (“To specify fraud with particularity, plaintiffs must allege specifically the circumstances of the fraud claimed, including the content of any alleged misrepresentation, and the date, place and identity of the persons making the misrepresentations.”).

¹³ Florida law is no different in this regard. *See, e.g., Hillcrest Pac. Corp. v. Yamamura*, 727 So. 2d 1053, 1056 (Fla. 4th DCA 1999) (“A party cannot recover in fraud for alleged oral misrepresentations that are adequately covered or expressly contradicted in a later written contract.”).

protect themselves before relying on statements or representations apart from those memorialized in a detailed agreement. *See, e.g., id.* (“[T]he failure to insert [appropriate protective language] in the agreement — by itself — renders reliance unreasonable as a matter of law.”) (citations omitted); *Consolidated Edison, Inc. v. Northeast Utilities*, 249 F. Supp. 2d 387, 402 (S.D.N.Y. 2003) (sophisticated parties cannot allege reasonable reliance on alleged statements and representations where they “could have made them a basis for a specific representation and warranty in the Merger Agreement but failed to do so”) (citations omitted); *Dyncorp*, 215 F. Supp. 2d at 322 (“Sophisticated parties to major transactions cannot avoid their disclaimers by complaining that they received less than all information, for they could have negotiated for fuller information or more complete warranties.”). Dismissal of Plaintiff’s fraud claim is warranted on this ground alone.

Indeed, CPH is part of a multi-billion dollar financial empire that routinely engages in the world’s most sophisticated and complex corporate mergers and acquisitions. In addition, CPH was represented by an army of attorneys and financial advisors who themselves are experts in precisely the sort of transaction at issue here. (*See, e.g., Merger Agmt.* §§ 1.1, 4.11 (Credit Suisse First Boston).) As a matter of law, therefore, CPH cannot plead that it reasonably relied on representations supposedly made by MS & Co. — an advisor to CPH’s *counterparty* in the negotiations — especially after having expressly *disclaimed* those representations in the Merger Agreement. To the extent CPH now alleges that it relied on such representations to support its fraudulent misrepresentation claim, its allegations are legally deficient and require this Court to dismiss Count I as a matter of law.¹⁴

¹⁴ CPH cannot claim that it is entitled to discovery on this claim, since courts routinely dismiss fraudulent misrepresentation claims that are contrary to an integration clause and not encompassed within any contractual
(Continued...)

B. CPH Cannot Bring A Fraud Claim Because It Failed To Exercise Its Contractual Right To Inspect Sunbeam's Books And Records.

Quite apart from the claim-defeating integration clause, Plaintiff's fraud claim is barred for the additional reason that — despite a clear provision in the Merger Agreement that gave it unfettered access to Sunbeam's books and financial records — CPH does not allege that it ever sought to verify the financial representations it now claims were fraudulent. Indeed, “[a]s a matter of law, a sophisticated plaintiff *cannot establish* that it entered into an arm's length transaction in justifiable reliance on an alleged misrepresentation if that plaintiff *failed to make use of the means of verification that were available to it, such as reviewing the files of the other parties.*” *UST Private Equity Investors Fund, Inc. v. Salomon Smith Barney*, 288 A.D.2d 87, 88 (N.Y. App. Div. 2001) (affirming motion to dismiss fraud claims where sophisticated plaintiff failed to verify the accuracy of alleged misrepresentation during due diligence).

The reason for this rule is simple. A sophisticated party who “plainly had both access to the relevant [company] financial statements,” and the “wherewithal through [its] own financial advisors” to ascertain the financial condition of that company, is presumed as a matter of law to have had the “means to ascertain the truth of the alleged representations.” *Rotterdam Ventures, Inc. v. Ernst & Young LLP*, 752 N.Y.S.2d 746, 749 (N.Y. App. Div. 2002). Therefore, to state a

representation or warranty, especially where (as here) the plaintiff is a highly sophisticated party that could have protected itself before relying on alleged extra-contractual representations. See, e.g., *Dyncorp*, 215 F. Supp. 2d at 320 (“ruling on the legal sufficiency of a complaint based on [fraudulent] representations may properly be made on the complaint and contract alone, *without waiting for discovery*”); *Belin v. Weissler*, No. 97 Civ. 8787 (RWS), 1998 WL 391114, *5 (S.D.N.Y. July 14, 1998) (dismissing sophisticated plaintiff's misrepresentation claim that contradicts integration clause because “the asserted reliance must be found to be justifiable under all the circumstances before a complaint can be found to state a cause of action in fraud”) (quoting *Danann Realty Corp. v. Harris*, 157 N.E.2d 597, 599-600 (N.Y. 1959)); *Granite Partners, L.P. v. Bear, Stearns & Co.*, 17 F. Supp. 2d 275, 290 (S.D.N.Y. 1998) (same and noting that “whether a plaintiff has adequately pleaded justifiable reliance is a proper subject for a motion to dismiss”); *Valassis Communications, Inc. v. Weimer*, 758 N.Y.S.2d 311, 312 (N.Y. App. Div. 2003); (“In light, however, of provisions of the parties' Purchase Agreement specifically prohibiting plaintiff's reliance on extra-contractual representations such as those upon which plaintiff's fraud claim is premised, it is plain that plaintiff's possess no viable claim for fraud”) (citations omitted).

legally valid fraud claim, such a party "*must show* that he or she made an independent inquiry into the available information." *Giannacopoulos v. Credit Suisse*, 37 F. Supp. 2d 626, 632 (S.D.N.Y. 1999).¹⁵

CPH clearly had "access to the relevant financial statements" and the "wherewithal, through [its] own financial advisors," to verify the representations identified in the Complaint. The Merger Agreement required Sunbeam to provide CPH and its "financial advisors, legal counsel, accountants consultants and other representatives" with "full access . . . to all of [Sunbeam's] books, records, properties, plants and personnel." (Merger Agmt. § 6.7.) Moreover, CPH is undeniably a sophisticated party that was advised at all times by its own expert financial advisors, consultants, accountants and attorneys, including the international investment bank of Credit Suisse First Boston. (*Id.* §§ 1.1, 4.11.) And here, CPH was negotiating to acquire "14.1 million shares of Sunbeam stock worth approximately \$600 million." (Compl. ¶ 40.) Therefore, unlike MS & Co., which never had and was not seeking an equity stake in Sunbeam, CPH had a profound financial incentive to inspect and verify any representation relating to the value of Sunbeam stock.

Thus, there is no question that CPH had the unfettered contractual right to access and inspect Sunbeam's books and records. There is similarly no question that CPH had an *equal opportunity* — and *even greater incentive* — to discover accounting problems at Sunbeam before choosing to proceed with the acquisition. Despite this unlimited access, opportunity, and incentive, the Complaint nowhere alleges that CPH ever exercised its right to inspect Sunbeam's

¹⁵ See also *Schlaifer Nance & Co. v. Estate of Andy Warhol*, 119 F.3d 91, 98 (2d Cir. 1997) ("Where sophisticated businessmen engaged in major transactions enjoy access to critical information but fail to take advantage of that access, New York courts are particularly disinclined to entertain claims of justifiable reliance.") (quoting *Grumman Allied Indus., Inv. v. Rohr Indus.*, 748 F.2d 729, 737 (2d Cir. 1984)).

books and records or sought to independently verify the financial representations it now claims were fraudulent. Under these circumstances, CPH's fraud claim must be dismissed as a matter of law.

C. Plaintiff Cannot Allege That It Relied On Any Of The Misrepresentations Identified In The Complaint.

CPH purports to base its fraud claim — at least in part — on a March 19, 1998 Sunbeam press release warning investors that Sunbeam's net sales for the first quarter of 1998 would be lower than Wall Street analysts' estimates, but that sales in future quarters should improve. (Compl. ¶¶ 59-66.) Significantly, however, the Complaint does not allege that CPH ever *relied* on any statement in this press release.¹⁶ Indeed, any such reliance is expressly foreclosed by the plain terms of the press release, which explicitly warned readers *not to rely* on the forward-looking projections of Sunbeam's future performance:

Cautionary Statements — Statements contained in this press release, including statements relating to the Company's expectations regarding anticipated performance in the future, are 'forward looking statements,' as such term is defined in the Private Securities Litigation Reform Act of 1995. *Actual results could differ materially from the Company's statements in this release regarding its expectations, goals, or projected results, due to various factors*

(March 19, 1998 Press Release at 2 (Answer Ex. 6).) These express warnings and "Cautionary Statements" prevent CPH from relying on the press release as the basis for a fraud claim.

Similarly, the Complaint alleges that "Morgan Stanley misrepresented Sunbeam's financial performance" at a series of "'road show' meetings and conference calls" which took place in the course of the Note Offering. (Compl. ¶ 50.) Significantly, however, the Complaint

¹⁶ Equally significant, despite the explicit warning of a sharp and sudden drop in sales, the Complaint never alleges (i) that CPH or any of its expert advisors *ever* inquired as to why Sunbeam sales had suddenly declined, or (ii) that CPH or any of its expert advisors *ever* demanded access to Sunbeam's books and records, as the Merger Agreement entitled them to do, to verify future sales projections. This alone is fatal to any fraud and misrepresentation claim based on representations made in the press release. See Part III.B, *supra*.

does *not* allege that anyone from CPH was present for those "road show" meetings and conference calls, or that the alleged misrepresentations were ever communicated to CPH. Equally fatal, there are no allegations in the Complaint that CPH reasonably relied upon such representations. Nor could there be, since the Note Offering Memorandum makes clear that MS & Co. *itself* relied on financial information provided by Sunbeam and Arthur Andersen (Note Offering Mem. at 2-3, 72); CPH does not allege that it was an investor in the Note Offering; and no such investor is before this Court.

The same is true regarding the February 27, 1998 Board Meeting — and the alleged misrepresentations made by MS & Co. in connection with the presentation of its opinion on the fairness of the acquisition price. (*Id.* ¶¶ 41-44.) It is clear from the face of the Complaint that any such misrepresentation was made *to the Sunbeam Board* — and not CPH. (*Id.*) There are no allegations in the Complaint — nor could there be — that CPH ever received those representations, let alone that CPH reasonably relied upon them. (*Id.*) The written opinion that is referenced in the Complaint definitively states that MS & Co. based its analysis exclusively on audit reports that had been provided by Coleman and Sunbeam "without independent verification [of their] accuracy and completeness." (Feb. 27, 1998 Fairness Op. at 3 (Answer Ex. 4).) This opinion also states, moreover, that MS & Co.'s analysis is provided solely "for the information of the Board of Directors of [Sunbeam] and may not be used for *any other purpose* without our prior written consent." (*Id.*) Thus, even if the Complaint alleged that CPH received or relied on information provided to the Board at this meeting, such reliance would not be reasonable as a matter of law.

D. Plaintiff's Allegations Of Scienter Make No Sense — And Fail To Meet The Basic Pleading Requirements For Fraud.

The Complaint alleges that MS & Co. knowingly participated in a massive multi-billion dollar fraud with the intent to (i) retain Sunbeam as a client and (ii) collect roughly \$30 million in investment banking and underwriting fees — an amount that is not unusual for a sophisticated \$2.2 billion transaction. (Compl. ¶¶ 31, 66, 73.) But if retention of a client and collection of normal fees is enough to plead scienter as a matter of law, then the scienter element would be rendered a dead letter in Florida — and the floodgates would be opened to a wave of frivolous fraud claims based on ordinary economic motive.

Of course, such allegations are *not* enough to state a claim for fraud. Recognizing the seriousness of fraud-based allegations, the courts have been careful to require *more* than simply an ordinary economic interest: “In looking for a sufficient allegation of motive, [courts] assume that the defendant is acting in his or her informed economic self-interest.” *Shields v. Citytrust Bancorp., Inc.*, 25 F.3d 1124, 1130 (2d Cir. 1994). Here, however, the *only* allegations of scienter are the ordinary economic motives of any financial services firm. (See Compl. ¶ 31 (“Morgan Stanley knew that if it failed to deliver a major transaction, Morgan Stanley would not be compensated for the extensive work it had performed for Sunbeam”); *Id.* ¶ 66 (alleging that “[e]verything . . . depended on closing the Coleman acquisition” because “if the transaction did not close, Morgan Stanley would not be paid its \$10.28 million fee for the Coleman acquisition or its \$22.5 million fee for underwriting the [Note Offering]”).) These allegations alone require dismissal of Plaintiff’s fraud claim because they fail to plead the requisite element of scienter. See, e.g., *THC Holdings Corp. v. Chinn*, No. 95 Civ. 4422 (KMW), 1998 WL 50202, *9 (S.D.N.Y. Feb. 6, 1998) (“A mere allegation that defendant was in a position to receive normal compensation for professional services rendered is not sufficient to support a showing of motive

in the fraud scienter analysis.”) (citing *inter alia*, *Friedman v. Arizona World Nurseries Ltd. P’ship*, 730 F. Supp. 521, 532 (S.D.N.Y. 1990) (dismissing fraud-based claim on ground that incentive of receiving fee for professional services is insufficient to allege scienter), *aff’d*, 927 F.2d 595 (2d Cir. 1991)).

Plaintiff’s allegations of scienter are not merely legally deficient, however. For even if the Court accepts all of the Complaint’s allegations as well-pleaded, it would *defy economic reason* for MS & Co. to have knowingly participated in Sunbeam’s fraud. It defies all reason to believe that MS & Co. risked its own professional reputation, knowingly ripped off its most valued clients and institutional investors, knowingly permitted its affiliate to invest and lose hundreds of millions of dollars, and exposed itself to massive liability, *all* for the supposed purpose of retaining a single client and collecting investment banking and underwriting fees for a single transaction. The economic irrationality of Plaintiff’s scienter allegations provide an additional, independent ground for dismissing its fraud claim. *See, e.g., Kalnit v. Eichler*, 99 F. Supp. 2d 327, 343 (S.D.N.Y. 2000) (“[W]here plaintiff’s view of the facts defies economic reason . . . it does not yield a reasonable inference of fraudulent intent.”) (internal quotations & citation omitted), *aff’d*, 264 F.3d 131 (2d Cir. 2001); *see also Duncan v. Pencer*, No. 94 Civ. 0321 (LAP), 1996 WL 19043, at *10 (S.D.N.Y. Jan 18, 1996) (dismissing fraud-based claim on grounds that it is “economically irrational” to assume that accounting firm “would knowingly condone a client’s fraud in order to preserve a fee that, at best, is an infinitesimal percentage of its annual revenues”) (citing *Shields*, 25 F.3d at 1130).

Indeed, Plaintiff’s far-fetched theory of scienter rings especially hollow in light of the Complaint’s allegations that MS & Co. and Sunbeam knew the fraud would be revealed shortly after “the Coleman transaction closed at the end of March 1998.” (Compl. ¶ 58; *see id.* ¶ 66.) It

simply makes no sense to believe that MS & Co. knowingly persuaded its clients to invest hundreds of millions of dollars in Sunbeam and allowed its affiliate to invest hundreds of millions of dollars in Sunbeam *two days after* the Coleman acquisition closed, all the while knowing that the fraud would be revealed shortly after the closing date. *See, e.g., Shields*, 25 F.3d at 1130 (affirming dismissal of fraud-based claim for lack of scienter and noting that “[i]t is hard to see what benefits accrue from a short term respite from an inevitable day of reckoning”).

IV. PLAINTIFF’S AIDING-AND-ABETTING CLAIM (COUNT II) MUST BE DISMISSED.

To state a claim for aiding and abetting fraud, Plaintiff must allege with the requisite particularity each of the following elements: (1) the existence of primary fraud; (2) defendant’s actual knowledge of the fraud; and (3) defendant’s substantial assistance in the commission of the fraud. *See, e.g., Cromer Fin. Ltd. v. Berger*, 137 F. Supp. 2d 452, 470 (S.D.N.Y. 2001); *Stolow v. Greg Manning Auctions, Inc.*, No. 02 Civ 2591 (SAS), 2003 WL 355447, at *10 (S.D.N.Y. Feb. 14, 2003) (citing *Armstrong v. McAalpin*, 699 F.2d 79, 91 (2d Cir. 1983)). Because the Complaint fails to allege either that MS & Co. had “actual knowledge” of Dunlap and Kersh’s alleged fraud, or that MS & Co. provided “substantial assistance” in the commission of that fraud, Count II must be dismissed as a matter of law.

A. The Complaint Does Not Allege That MS & Co. Had “Actual Knowledge” Of Sunbeam’s Fraud.

The Complaint does not contain a single non-conclusory, factual allegation that MS & Co. had actual knowledge of Dunlap and Kersh’s alleged fraud. Plaintiff’s conclusory allegations that MS & Co. “knew of Dunlap’s fraudulent scheme and helped to conceal it” (Compl. ¶ 86) is not enough to state a claim for aiding and abetting fraud. *See, e.g., Filler v. Havnit Bank*, 247 F. Supp. 2d 425, 431 (S.D.N.Y. 2003) (factual elements of aiding and abetting fraud must be alleged with particularity); *Myers v. Myers*, 652 So. 2d 1214, 1215 (Fla. 5th DCA

1995) (“Allegations contained in a pleading are insufficient if they are too general, vague or conclusory.”) (citations omitted). Here, the Complaint contains *no* factual allegations — nor could it — to support a claim that MS & Co. had “actual knowledge” of Sunbeam’s fraud.

Indeed, even if all the facts alleged in the Complaint were proven, none would show that MS & Co. had “actual knowledge” of the underlying fraudulent activities at Sunbeam. The Complaint alleges, for example, that MS & Co. recommended an acquisition strategy that included using Sunbeam stock to pay part of the purchase price (Compl. ¶ 34), and that such a strategy permitted Dunlap to conceal his fraud (*id.* ¶ 35). Notably absent from the Complaint, however, is any *factual* allegation that MS & Co. ever suspected (much less had “actual knowledge”) that Sunbeam’s stock was inflated by accounting fraud. (*Id.*) Absent such a *factual* allegation, the Complaint alleges nothing more than that MS & Co. recommended using stock to finance an acquisition — a common practice in corporate mergers and acquisitions.

1. If MS & Co. Is Deemed To Have Had “Actual Knowledge” Of Sunbeam’s Fraud, Then So Did CPH — By Virtue Of Its Equal Access To Sunbeam’s Books And Records.

To the extent CPH alleges that MS & Co. had “actual knowledge” of Sunbeam’s fraud because MS & Co. conducted due diligence on Sunbeam during the underwriting process, such allegations are fatal to CPH’s misrepresentation claims. If MS & Co. is deemed to have “actual knowledge” of fraud because of its access to Sunbeam during the due diligence process, then CPH — by virtue of the fact that it enjoyed *exactly the same access* to Sunbeam’s “books, records, properties, plants and personnel” (Merger Agmt. § 6.7) — *also* had “actual knowledge” of Sunbeam’s fraud, eliminating any claim that it relied on MS & Co. as a matter of law. Similarly, CPH cannot bootstrap MS & Co.’s role as an underwriter of Sunbeam securities into one of advisor for *CPH*, especially when CPH retained and relied upon its own army of expert advisors, attorneys, and accountants throughout the negotiation process.

2. Allegations Of “Constructive Knowledge” Are Not Enough.

The Complaint alleges that investment bankers at MS & Co. had phone conversations and meetings with Sunbeam insiders, including Dunlap and Kersh, and thus “[MS & Co.] would have been apprised of Sunbeam’s financial performance during the first two months of 1998.” (Compl. ¶ 54.) But such allegations of constructive knowledge are not enough. *See, e.g., Kolbeck v. LIT Am. Inc.*, 939 F. Supp. 240, 246 (S.D.N.Y. 1996) (“New York common law, which controls the analysis here, has not adopted a constructive knowledge standard for imposing aiding and abetting liability.”), *aff’d*, 152 F.3d 918 (2d Cir. 1998). Similarly, allegations that MS & Co. “should” or “would” have known that Sunbeam’s sales declined during the first two months of 1998 hardly supports a claim that MS & Co. had *actual knowledge* of an extensive fraud which traced to late 1996.¹⁷

3. Economic Motive Is Not “Actual Knowledge.”

Like Count I, Plaintiff’s aiding and abetting claim must be dismissed because the allegations of fraudulent intent are legally deficient. *See* Part III.C, *supra*. As with fraud generally, it is equally well-established that an allegation of “ordinary economic motives [is] insufficient to support the scienter element of an aiding and abetting claim.” *Primavera Familienstiftung v. Askin*, 173 F.R.D. 115, 127-28 (S.D.N.Y. 1997) (citing *Shields*, 25 F.3d at 1130); *Cromer Fin.*, 137 F. Supp. 2d at 495 (dismissing aiding and abetting claim against

¹⁷ Nor could there be such an allegation, since, as the Complaint itself acknowledges, MS & Co. was retained by Sunbeam only to provide financial advice to Sunbeam with respect to potential mergers and acquisitions. (Compl. ¶¶ 29-31.) MS & Co. was not retained to verify the accuracy of Sunbeam’s professionally audited financial reports, and, in fact, relied at all times on financial information provided to it by Sunbeam, Coleman, and their respective accountants. (See Fairness Op. at 2-3; Note Offering Mem. at 2-3, 12-17, 72); *e.g., In Re Reliance Sec. Litig.*, 135 F. Supp. 2d 480, 516 (D. Del. 2001) (dismissing claims against financial advisors where advisors “did not contract to re-audit [the company’s] financial statements and projections. Rather, [the company] asked the Financial Advisors to make a judgment based on a limited set of data”). It goes without saying, moreover, that if MS & Co. “should” or “would” have known of Sunbeam’s fraud, then so “should” or “would” have CPH known of Sunbeam’s fraud by virtue of its *equal access* to Sunbeam’s books, records, property, plants, and personnel. (Merger Agmt. § 6.7.)

financial advisor for failure to adequately plead fraudulent intent). Accordingly, allegations that MS & Co. was motivated by the collection of ordinary investment banking and underwriting fees cannot give rise to liability for aiding and abetting a massive fraud.

B. Plaintiff's Allegations Of "Substantial Assistance" Are Legally Defective.

Plaintiff does not — and indeed cannot — allege that MS & Co. provided "substantial assistance" to Sunbeam's fraud. A defendant "provides substantial assistance *only* if it 'affirmatively assists, helps conceal, or by virtue of failing to act when required to do enables [the fraud] to proceed.'" *Nigerian Nat'l Petroleum Corp. v. Citibank, N.A.*, No. 98 Civ. 4960 (MBM), 1999 WL 558141, at *8 (S.D.N.Y. July 30, 1999) (quoting *Diduck v. Kaszycki & Sons Contractors, Inc.*, 974 F.2d 270, 284 (2d Cir. 1992)) (alteration in *Nigerian Nat'l*). "In alleging the requisite 'substantial assistance' by the aider and abettor, the complaint must allege that the acts of the aider and abettor *proximately caused* the harm to the [corporation] on which the primary liability is predicated. *Allegations of a 'but for' causal relationship are insufficient.*" *Filler*, 247 F. Supp. 2d at 431 (internal quotation marks & citations omitted). "*Inaction* is actionable participation *only* when the defendant owes a fiduciary duty directly to the plaintiff." *Cromer Fin.*, 137 F. Supp. 2d at 470 (internal quotation marks & citation omitted). Plaintiff's allegations regarding MS & Co. fall well short of these requirements.

Plaintiff's allegations of alleged "assistance" fall into three main categories, all of which fail to support a claim as a matter of law.

First, the Complaint alleges that MS & Co. "assist[ed] with the false March 19, 1998 press release." (Compl. ¶ 87.) But CPH does not allege that it *relied* on the press release; thus, there can be no allegation that the press release "proximately caused" any harm to CPH. *See, e.g., Cromer Fin.*, 137 F. Supp. 2d at 471-72.

Second, the Complaint alleges that MS & Co. made false statements in the course of marketing the convertible notes, and that the “proceeds from [the notes] were used to fund Sunbeam’s purchase of Coleman.” (Compl. ¶ 87; *see also id.* ¶ 72 (“debenture offering . . . was needed to close the Coleman transaction”).) But these allegations — which allege only a “but for” causal relationship between the Note Offering and the acquisition — cannot support an aiding and abetting claim. *See, e.g., Cromer Fin.*, 137 F. Supp. 2d at 470-72.¹⁸

Third, the Complaint alleges that MS & Co. provided CPH “with false financial and business information concerning Sunbeam” and thereby “persuad[ed] CPH to sell its interest in Coleman and to accept 14.1 million shares of Sunbeam stock and other consideration.” (Compl. ¶ 87.) As explained above, however, there is no allegation that MS & Co. *knew* that Sunbeam’s financial and business information was false, let alone that MS & Co. participated in the preparation of such false information. *See Part IV.A, supra.*¹⁹

Accordingly, because the Complaint contains no allegations that are legally sufficient to support an aiding and abetting claim, Count II must be dismissed as a matter of law.

¹⁸ Furthermore, the Complaint itself forecloses any argument that the note offering “proximately caused” CPH’s alleged harm. The Complaint concedes that the note offering provided the “*cash portion* of the acquisition consideration.” (Compl. ¶ 47.) The only injury alleged in the Complaint, however, concerns the *equity portion* of consideration, which fell in value when Sunbeam restated its 1996 and 1997 earnings and later declared bankruptcy. On the face of the Complaint, therefore, the Note Offering has no causal relation — proximate or otherwise — with the only injury that CPH seeks to redress in this case. *See, e.g., Hirsch v. Arthur Andersen & Co.*, 72 F.3d 1085, 1095 (2d Cir. 1995) (sustaining dismissal of the complaint where “attenuated allegations” supporting claim “are contradicted . . . by more specific allegations in the complaint”).

¹⁹ Furthermore, there is no connection (causal or otherwise) between information allegedly provided by the advisor to a counterparty across the table from a sophisticated corporate entity like CPH, and that entity’s decision to enter into a \$2 billion transaction, especially where the entity has retained its own team of sophisticated advisors, accountants and lawyers.

V. PLAINTIFF'S NEGLIGENT MISREPRESENTATION CLAIM (COUNT IV) MUST BE DISMISSED.

To state a claim for negligent misrepresentation, Plaintiff must allege that “(1) defendant had a duty, *as a result of a special relationship*, to give correct information; (2) the defendant made a false representation that he or she should have known was incorrect; (3) the information supplied in the representation was known by the defendant to be desired by the plaintiff for a serious purpose; (4) the plaintiff *intended to rely and act upon it*; and (5) the plaintiff *reasonably relied* on it to his or her detriment.” *Hydro Investors, Inc. v. Trafalgar Power Inc.*, 227 F.3d 8, 20 (2d Cir. 2000). CPH’s negligent misrepresentation claim fails as a matter of law because (i) the Complaint alleges no facts that give rise to a “special relationship” and (ii) none of the alleged facts support a showing of reasonable reliance.²⁰

A. Plaintiff Cannot Allege That A “Special Relationship” Existed Between CPH and MS & Co.

For the requisite “special relationship” to exist, the parties must enjoy “a closer degree of trust than an ordinary business relationship.” *Citibank, N.A. v. Itochu Intern. Inc.*, No. 01 Civ. 6007 (GBD), 2003 WL 1797847, *5 (S.D.N.Y. April 3, 2003) (internal quotations & citation omitted). “A simple arm’s length relationship is not enough.” *North Am. Knitting Mills, Inc. v. International Women’s Apparel, Inc.*, No. 99 Civ. 4643 (LAP), 2000 WL 1290608, at *5 (S.D.N.Y. Sept. 12, 2000) (dismissing negligent misrepresentation claim) (quoting *United Safety*

²⁰ There are of course other legal defects in the Complaint, including (i) that only one paragraph of the entire Complaint alleges that MS & Co. made any representations actually received by CPH; (ii) that these representations were explicitly disclaimed in the Merger Agreement; (iii) that no facts are alleged to support the conclusory allegation that MS & Co. knew or had reason to know that Sunbeam’s professionally audited financial reports were false and misleading; and (iv) that no facts are alleged to support the conclusory allegation that MS & Co. intended or believed that CPH, who retained its own expert advisors, would rely without verification on information provided by MS & Co. in the course of negotiating a multi-billion dollar corporate acquisition. Count IV fails as a matter of law for *any* of these independent reasons.

of *Am., Inc. v. Consolidated Edison Co. of N.Y., Inc.*, 213 A.D.2d 283, 286 (N.Y. App. Div. 1995)). To the contrary, “there must be a showing that there was either *actual privity of contract between the parties or a relationship so close as to approach that of privity.*” *Marcellus Constr. Co. v. Village of Broadalbin*, 755 N.Y.S.2d 474, 475 (N.Y. App. Div. 2003) (quoting *Prudential Ins. Co. of Am. v. Dewey, Ballantine, Bushby, Palmer & Wood*, 80 N.Y.2d 377, 382 (N.Y. 1992)); see also *Butvin v. Doubleclick, Inc.*, No. 99 Civ. 4727, 2000 WL 827673, at *10 (S.D.N.Y. June 26, 2000) (“a plaintiff may only recover for negligent misrepresentation *where the defendant owes him a fiduciary duty*”).

The Complaint alleges no facts to meet this required element. Nor could it, since, as alleged in the Complaint, MS & Co.’s client and CPH had a contentious business relationship, circumstances which cannot give rise to a negligent misrepresentation claim. Indeed, CPH was never MS & Co.’s client or even a shareholder of MS & Co.’s client. To the contrary, CPH always sat on *the other side of the negotiating table* from Sunbeam, MS & Co.’s client.²¹ MS & Co. was thus *twice removed* from CPH, in the context of an arms-length, across-the-table negotiation. And CPH itself was advised at all times by its own team of sophisticated experts, including its own financial advisors from Credit Suisse First Boston. (Merger Agmt. §§ 1.1, 4.11.) Accordingly, the Complaint cannot state a negligent misrepresentation claim. See, e.g., *CSI Inv. Partners II, L.P. v. Cendant Corp.*, 2002 WL 925044, *9 (S.D.N.Y. Feb. 28, 2002) (“Since APC alleges nothing more than ordinary arm’s length negotiations, its negligent misrepresentation claims fails as a matter of law.”).

²¹ Indeed, Plaintiff’s own Complaint shows how contentious the pre-acquisition negotiations were between Sunbeam and CPH. Paragraph 37 of the Complaint describes how, during an initial meeting, Sunbeam CEO Al Dunlap “cursed and ranted” at CPH representations and “stormed out” of the meeting. (Compl. ¶ 37.)

B. Plaintiff Does Not Allege Reasonable Reliance.

Like a claim for fraudulent misrepresentation, a claim of negligent misrepresentation requires a showing of reasonable reliance. *See, e.g., Dyncorp v. GTE*, 215 F. Supp. 2d 308, 328 (S.D.N.Y. 2002) (“In order to plead a claim for negligent misrepresentation, *just as for fraud*, a plaintiff must adequately plead reasonable reliance upon the alleged misrepresentations by the defendant.”) (citing *Heard v. City of N.Y.*, 82 N.Y.2d 66, 74 (N.Y. 1993)). As detailed above, there can be no such reliance in this case as a matter of law because there is no allegation that CPH ever sought to verify the accuracy of representations alleged to have been made by MS & Co, and because CPH in any event disclaimed those representations in the Merger Agreement. *See Part III, supra*. Accordingly, Count III must be dismissed.

VI. PLAINTIFF’S CONSPIRACY CLAIM (COUNT III) MUST BE DISMISSED.

Plaintiff’s conspiracy claim is makeweight and frivolous. Neither New York nor Florida recognize an independent tort for conspiracy. *See, e.g., American Baptist Churches of Metro N.Y. v. Galloway*, 271 A.D.2d 92, 101 (N.Y. App. Div. 2000); *Hoch v. Rissman, Weisberg, Barrett*, 742 So. 2d 451, 460 (Fla. 5th DCA 1999). Thus, because Plaintiff states no other claim as a matter of law, its conspiracy claim is foreclosed. *See, e.g., Linden v. Lloyd’s Planning Serv. Inc.*, 750 N.Y.S.2d 20, 21 (N.Y. App. Div. 2002) (“[S]ince plaintiff has no viable underlying claim for fraud or any other tort, her civil conspiracy claim was properly dismissed”) (citing *Alexander & Alexander of N.Y., Inc. v. Fritzen*, 503 N.E.2d 102, 103 (N.Y. 1986)). Even if Plaintiff could plead an actionable tort, moreover, the Complaint falls well short of pleading any facts to support a conspiracy claim.²² Accordingly, Count III must be dismissed.

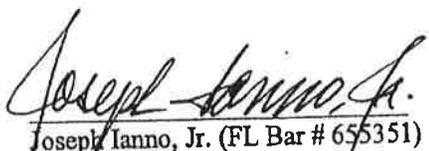
²² To state a claim for conspiracy to defraud, plaintiff must allege “(1) an agreement among two or more parties, (2) a common objective, (3) acts in furtherance of the objective and (4) knowledge [of the underlying fraud].” *Filler*, 247 F. Supp. 2d at 431 (internal quotation marks & citation omitted). The Complaint obviously fails in this regard. As demonstrated above, the
(Continued...)

CONCLUSION

For the reasons stated above, Plaintiff's Complaint should be dismissed in its entirety pursuant to Florida Rule of Civil Procedure 1.061(a). Alternatively, Defendant is entitled to judgment on the pleadings pursuant to Florida Rule of Civil Procedure 1.140(c).

Dated: June 25, 2003

Respectfully Submitted,



Joseph Ianno, Jr. (FL Bar # 655351)

CARLTON FIELDS

222 Lake View Avenue - Suite 1400

West Palm Beach, FL 33401

Telephone: (561) 659-7070

Facsimile: (561) 659-7368

Thomas D. Yannucci, P.C

Thomas A. Clare

Brett H. McGurk

KIRKLAND & ELLIS

655 15th Street, N.W. 12th Floor

Washington, D.C. 20005

Telephone: (202) 879-5000

Facsimile: (202) 879-5993

Attorneys for Defendant,

Morgan Stanley & Co. Incorporated

Complaint does not adequately plead a claim of actual knowledge. Thus, there is no allegation — nor could there be an allegation — of knowing participation. Similarly, there is no allegation that MS & Co. and Sunbeam insiders acted with common objective. To the contrary, the Complaint concedes that MS & Co. had nothing to gain from the transaction other than the collection of normal investment banking fees (Compl. ¶ 66) and in fact put its own name and reputation on the line in the course of marketing the convertible notes (*Id.* ¶¶ 47-52). That is hardly enough to plead a "common objective" with Al Dunlap, whose acknowledged aim was to "collect tens of millions of dollars *for himself* before the outside world could learn the truth of Sunbeam's phony 'turnaround.'" (*Id.* ¶ 28.)

**IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA
CASE No. 2003CA005045A1**

COLEMAN (PARENT) HOLDINGS INC.,

v.

MORGAN STANLEY & CO., INC.

DECLARATION OF JAMES STYNES

1. My name is James Stynes. I am a Managing Director in the mergers & acquisitions group at Morgan Stanley & Co. Incorporated ("MS & Co."). I have been employed by MS & Co. continuously for over 20 years and am familiar with MS & Co.'s structure and business operations.

2. My area of expertise is mergers and acquisitions. In that role, I provide financial analysis and advice to clients involved in mergers and acquisitions transactions.

3. In 1997, MS & Co. was formally retained by Sunbeam Corporation ("Sunbeam") to provide general financial advice with respect to Sunbeam's March 1998 acquisition of three companies, including the Coleman Company ("Coleman"). I was one of the people from MS & Co. who worked on these transactions. In this capacity, I was involved in negotiations and face-to-face discussions with Coleman (Parent) Holdings Company ("CPH") and Sunbeam, virtually all of which took place in New York. During these discussions, CPH was represented by the New York law firm Wachtell, Lipton, Rosen & Katz.

4. In December 1997, I attended meetings with representatives of CPH and Sunbeam to discuss Sunbeam's possible acquisition of Coleman. These meetings took place in New York. The initial meeting with CPH representatives took place at the New York offices of CPH's

parent company, MacAndrews & Forbes Inc. (“MAFCO”). Neither I nor any representatives of MS & Co. attended a meeting in Florida between CPH and Sunbeam.

5. All of the meetings, negotiations and discussions that I participated in between Sunbeam and CPH were in New York, including a face-to-face meeting at MAFCO’s offices in New York.

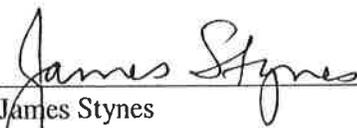
6. In February 27, 1998, I attended a meeting with the Sunbeam Board of Directors to discuss the fairness of the proposed acquisition price in light of financial information provided by Coleman, MAFCO, Sunbeam, and their respective accountants. At this meeting, MS & Co. presented a “Fairness Opinion” to the Sunbeam Board, which opined based on such information that the proposed price was fair to Sunbeam from a financial point of view. At the conclusion of this meeting, Sunbeam’s Board of Directors approved the Coleman acquisition and agreed to memorialize the negotiated terms of the acquisition. This meeting took place at Morgan Stanley’s headquarters in New York.

7. Also on February 27, 1998, Sunbeam and CPH formally executed merger agreements to memorialized the terms of the acquisition. Two merger agreements were executed, one by Sunbeam and Coleman and one by Sunbeam and CPH — both at the New York offices of Morgan Stanley.

8. On March 28, 1998, Sunbeam’s acquisition of Coleman closed at the New York offices of Skadden, Arps, Meagher & Flom, a New York law firm. Pursuant to the terms set forth in the Merger Agreements, CPH tendered its shares of Coleman and received shares of Sunbeam as consideration for the acquisition at the closing.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my knowledge and belief.

Dated this 19th day of June, 2003.


James Stynes

**IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA
CASE No. 2003CA005045A1**

COLEMAN (PARENT) HOLDINGS INC.,

v.

MORGAN STANLEY & CO., INC.

DECLARATION OF RUTH PORAT

1. My name is Ruth Porat. I am a Managing Director of Morgan Stanley & Co. Incorporated ("MS & Co.") and work in its Investment Banking Division. I have been employed by MS & Co. continuously for the past seven years.

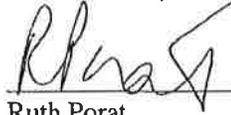
2. At the time of the Sunbeam's March 1998 acquisition of Coleman, I was a Managing Director in MS & Co.'s Equity Capital Markets Department. In that role, I helped analyze whether Sunbeam's acquisition could be financed with an equity or equity-related security and was ultimately involved in Sunbeam's convertible debenture offering ("Note Offering").

3. The Note Offering was marketed to investors through a series of "road show" meetings and conference calls. The road show meetings took place in New York and three other cities. None of the road show meetings took place in Florida. Several of the road show conference calls were conducted from New York. Materials that MS & Co. prepared for the road shows were prepared in New York, and the Note Offering priced and closed in New York.

4. On March 19, 1998, Sunbeam issued a press release stating that Sunbeam sales revenues might not meet analyst expectations for the first quarter 1998. To the extent that I reviewed the press release prior to the time it was issued or discussed the proposed press release with Sunbeam employees or attorneys, I did so from my offices in New York.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my knowledge and belief.

Dated this 19 day of June, 2003.

A handwritten signature in cursive script, appearing to read 'Ruth Porat', written over a horizontal line.

Ruth Porat

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA
CASE No. 2003CA005045A1

COLEMAN (PARENT) HOLDINGS INC.,

v.

MORGAN STANLEY & CO., INC.

DECLARATION OF MICHAEL HART

1. My name is Michael Hart. I am a Managing Director of Morgan Stanley & Co. Incorporated ("MS & Co."), and from 1996-2000, I worked in the senior loan group responsible for structuring and negotiating senior loans.

2. In connection with Sunbeam's March 1998 acquisition of Coleman Company and two other companies, I worked with the leverage finance team and was involved with Morgan Stanley Senior Funding's ("MSSF") agreement to help finance the acquisition.

3. To help fund Sunbeam's acquisition of Coleman, in March 1998, Sunbeam entered into a senior credit agreement with secured lenders (the "Bank Facility"), for which MSSF served as the Syndication Agent.

4. On March 31, 1998, MSSF and Sunbeam closed the Bank Facility in New York. All amounts funded by MSSF pursuant to the Bank Facility were transferred from MSSF's New York bank account.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my knowledge and belief.

Dated this 19 day of June, 2003.



Michael Hart

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS, INC.,)

Case No.: CA 01-06062 AN - (Rapp)

Plaintiff,)

v.)

JURY TRIAL DEMANDED

ARTHUR ANDERSEN LLP (a United States)
partnership); ANDERSEN WORLDWIDE,)
SOCIÉTÉ COOPÉRATIVE (a Swiss)
cooperative); ARTHUR ANDERSEN & CO.)
(a Canadian company); ARTHUR)
ANDERSEN & CO. (a Hong Kong)
company); RUIZ, URQUIZA Y CIA, S.C. (a)
Mexican company); PIERNAVIEJA,)
PORTA, CACHAFEIRO & AVOCADOS (a)
Venezuela company); ARTHUR)
ANDERSEN (a United Kingdom company);)
and PHILLIP E. HARLOW,)

Defendants.)

FIRST AMENDED COMPLAINT

Plaintiff Coleman (Parent) Holdings, Inc. ("Coleman-Parent"), by its attorneys, alleges the following against defendants Arthur Andersen LLP ("Andersen-US"); Andersen Worldwide, Société Coopérative (a Swiss cooperative) ("Andersen-Worldwide"); Arthur Andersen & Co. (a Canadian company) ("Andersen-Canada"); Arthur Andersen & Co. (a Hong Kong company) ("Andersen-Hong Kong"); Ruiz, Urquiza Y Cia, S.C. (a Mexican company) ("Andersen-Mexico"); Piernavieja, Porta, Cachafeiro & Avocados (a Venezuela company) ("Andersen-Venezuela"); Arthur Andersen (a United Kingdom company) ("Andersen-UK") (Andersen-US, Andersen-Worldwide, Andersen-Canada, Andersen-Hong Kong, Andersen-Mexico, Andersen-Venezuela and Andersen-UK collectively referred to herein as "Andersen"); and Phillip E. Harlow ("Harlow"). Unless otherwise stated, allegations made against "Andersen"

103

COPIES FILED: 12

9. Within weeks of the closing of the Coleman Company acquisition on March 30, 1998, the deception facilitated by Andersen began to unravel. On April 3, 1998, just four days after the closing, Sunbeam's management issued a press release announcing that, despite having predicted positive quarterly results in another press release just two weeks earlier, Sunbeam now would show a loss for the first quarter of 1998. On May 11, 1998, Sunbeam issued an earnings release for the first quarter of 1998 reporting a loss of 52 cents per share, compared with a gain of 8 cents per share in the same quarter of 1997. Press coverage ensued in the following month questioning whether Sunbeam had utilized – and Andersen had approved – manipulative and improper accounting practices in order to create the ruse of a turnaround.

10. In June 1998, the Sunbeam board of directors began an inquiry into Sunbeam's accounting practices. On June 15, 1998, the board announced that it had removed Dunlap as Chairman and CEO of Sunbeam. On June 25, 1998, Andersen withheld its consent for use of its unqualified 1997 audit opinion in a registration statement that was to have been filed with the Securities and Exchange Commission ("SEC"). On June 30, 1998, Sunbeam acknowledged that it had undertaken a review of its financial statements and the review could result in a restatement of the financial statements. On October 20, 1998, Sunbeam and Andersen announced a restatement of the financial statements. Thereafter, Andersen issued a new unqualified audit opinion for Sunbeam reporting only \$93 million in operating earnings for 1997. That amount was approximately half of the figure that Andersen previously certified.

11. In February 2001, Sunbeam filed a voluntary bankruptcy petition under Chapter 11 of the Bankruptcy Code. Coleman-Parent's equity stake in Sunbeam is now worthless.

are made against each of Andersen-US, Andersen-Worldwide, Andersen-Canada, Andersen-Hong Kong, Andersen-Mexico, Andersen-Venezuela and Andersen-UK jointly and severally.

NATURE OF THE ACTION

1. This action arises out of Coleman-Parent's sale of its controlling interest in The Coleman Company, Inc. ("Coleman Company") to Sunbeam Corporation, Inc. ("Sunbeam") on March 30, 1998, in exchange for 14.1 million shares of Sunbeam common stock, plus other consideration. In deciding to go forward with that sale, Coleman-Parent relied on Sunbeam's financial statements, which were audited by Andersen and certified on behalf of Andersen by Andersen-US. Andersen promoted itself as the largest accounting firm in the world at the time of the audits.

2. Unbeknownst to Coleman-Parent, however, Andersen had audited and certified financial statements that it knew to be inaccurate and misleading. Those audited financial statements painted a false picture of Sunbeam, depicting it as a company in the midst of an impressive financial turnaround. The reality was that Sunbeam's turnaround was a sham, and when the truth emerged, Sunbeam's stock lost virtually all of its value. The company is now in bankruptcy. By relying on the financial statements improperly certified by Andersen, Coleman-Parent has suffered losses exceeding \$600 million.

3. By holding itself out as Sunbeam's independent certified public accountant and certifying Sunbeam's financial statements, Andersen knowingly assumed a responsibility that transcended its relationship with Sunbeam as a client. As an independent public accountant auditing Sunbeam's financial statements, Andersen owed a duty to Coleman-Parent and others whom it knew were relying upon Andersen's certification that Sunbeam's reports fairly depicted the company's financial status. Andersen was required to maintain independence from its client,

Sunbeam, and speak with total honesty befitting the trust that had been placed in its word. In carrying out its audit of Sunbeam's financial statements, Andersen utterly failed to live up to that responsibility. To the contrary, Andersen's audits were not performed in accordance with generally accepted auditing standards ("GAAS"), and the financial statements it certified were not, as Andersen claimed, in conformity with generally accepted accounting principles ("GAAP"). Even more egregious, Phillip Harlow, the audit partner on the Sunbeam account, and others at Andersen knew the financial statements were not prepared in conformity with GAAP, but Andersen certified them nonetheless.

4. Defendants' motivation was simple – to do whatever was necessary to retain a major client. Andersen had served as Sunbeam's independent auditor for many years. In 1993, Andersen's Fort Lauderdale, Florida, office took charge of the account, and Sunbeam became one of the few Fortune 500 clients in that office. Sunbeam's audits generated significant fees. For example, Sunbeam paid Andersen more than \$1 million for its 1995 audit. Over the years, in addition to auditing work, Sunbeam also generated numerous consulting engagements and their accompanying fees. Defendants were motivated to preserve the Sunbeam relationship not only to ensure that audit engagements would continue but also to reinforce the opportunity to perform lucrative consulting work. In addition, maintaining the relationship with Sunbeam was important to defendants because being dropped by a high-profile client such as Sunbeam would have brought negative publicity to the Ft. Lauderdale office and to Andersen.

5. However, in 1996 that relationship was threatened by Sunbeam's new CEO, Albert Dunlap. Dunlap was eager to show a turnaround at Sunbeam in order to position the company for a quick sale, as he recently had done at Scott Paper. To accomplish that goal, Dunlap's new management team knowingly employed improper accounting methods that first

overstated the company's loss in 1996 and then inflated the company's income in 1997. In total abrogation of its responsibility as an independent auditor, Andersen permitted – indeed, blessed – those improper accounting treatments, rather than risk losing Sunbeam's audit business to Dunlap's accountant of choice, Coopers & Lybrand.

6. Ironically, the financial results certified by Andersen for 1996 and 1997 drove the price of Sunbeam stock so high that new management could not locate a willing buyer for a quick sale of the company, as had been hoped. As a result, Sunbeam was forced to shift gears and pursue acquisitions of other companies, including Coleman Company, in the hope that those mergers would obscure Sunbeam's true financial position and forestall revelation of the accounting gimmickry. To effectuate that plan, some of the very same Andersen partners and employees who were functioning as Sunbeam's "independent" auditors (including Harlow) added another role and joined Sunbeam's due diligence team for the acquisitions.

7. Because of the dual roles as auditor and acquisitions consultant that defendants played, defendants knew full well not only that the purchase of Coleman Company was taking place, but also that Coleman-Parent was relying on the financial statements certified by Andersen. Nonetheless, Andersen took no steps before the Coleman Company acquisition closed to correct the grossly misleading impression created by its certifications.

8. At the time of the sale to Sunbeam, Coleman Company was a leading manufacturer and marketer of consumer products for the worldwide outdoor recreation market, with annual revenues in excess of \$1 billion. As payment for its stake in Coleman Company, Coleman-Parent was to receive 14,099,749 shares of Sunbeam stock, \$160 million in cash and other consideration. Based on Sunbeam's share price at the time of the closing, Coleman-Parent received Sunbeam shares that had an aggregate market value of over \$619.5 million.

12. In order to retain the Sunbeam account and lucrative auditing and consulting fees, Andersen turned its back on its professional and legal obligations and certified Sunbeam financial statements that it knew to be false and misleading. It did so with full knowledge that Coleman-Parent would be harmed immensely by Andersen's misstatements and omissions. As a direct and foreseeable result of Andersen's actions, Coleman-Parent has sustained damages in excess of \$600,000,000.

13. By this complaint, Coleman-Parent seeks recovery of over \$600 million in compensatory damages. In addition, Coleman-Parent reserves the right to seek leave to amend its complaint pursuant to Fla. Stat. § 768.72 to assert claims for an additional recovery of punitive damages in excess of \$1.2 billion as allowed by law.

JURISDICTION AND VENUE

14. This Court has jurisdiction over the subject matter of this action pursuant to Fla. Stat. § 26.012(2)(a). This Court has jurisdiction over Andersen-US, Andersen-Worldwide, Andersen-Canada, Andersen-Hong Kong, Andersen-Mexico, Andersen-Venezuela, Andersen-UK and Harlow pursuant to Fla. Stat. §§ 48.193(1)(a) and (f), (2) and/or (5).

15. Venue is proper in this district pursuant to Fla. Stat. §§ 47.011 and 47.021 because Andersen maintains an office with more than 30 employees and partners in West Palm Beach, Florida, and therefore resides in Palm Beach County. In addition, Harlow is a resident of South Florida.

PARTIES

16. Coleman (Parent) Holdings, Inc. ("Coleman-Parent") is a corporation incorporated in the state of Delaware with its principal business offices located in New York.

Coleman-Parent is a wholly owned subsidiary of Mafco Holdings Inc. ("MAFCO"). Prior to March 30, 1998, Coleman-Parent owned approximately 81% of Coleman Company.

17. Andersen Worldwide, Société Coopérative, Switzerland ("Andersen-Worldwide") is a partnership organized under the Swiss Federal Code of Obligations. Its partners include more than 2,000 individuals from 390 offices in 84 countries. Various individuals who are partners of Andersen-Worldwide participated in the 1996 and 1997 audits of Sunbeam, and in the 1998 restatement of the reports of those audits. Andersen-Worldwide and Andersen-US dictate the policies and procedures to be used within Andersen throughout the world.

18. Arthur Andersen LLP ("Andersen-Canada") is part of Andersen-Worldwide. Andersen-Canada participated in the 1996 and 1997 audits of Sunbeam and the 1998 restatement of the reports of those audits.

19. Arthur Andersen & Co. ("Andersen-Hong Kong") is part of Andersen-Worldwide. Andersen-Hong Kong participated in the 1996 and 1997 audits of Sunbeam and the 1998 restatement of the reports of those audits.

20. Ruiz, Urquiza Y Cia, S.C. ("Andersen-Mexico") is part of Andersen-Worldwide. Andersen-Mexico participated in the 1996 and 1997 audits of Sunbeam and the 1998 restatement of the reports of those audits.

21. Piernavieja, Porta, Cachafeiro & Avocados ("Andersen-Venezuela") is part of Andersen-Worldwide. Andersen-Venezuela participated in the 1996 and 1997 audits of Sunbeam and the 1998 restatement of the reports of those audits.

22. Arthur Andersen ("Andersen-UK") is part of Andersen-Worldwide.

Andersen-UK participated in the 1996 and 1997 audits of Sunbeam and the 1998 restatement of the reports of those audits.

23. Arthur Andersen LLP ("Andersen-US") is part of Andersen-Worldwide.

Andersen-US is a partnership formed under the laws of the State of Illinois. The partners of Andersen-US are residents of Florida and numerous other states. Andersen-US participated in and coordinated the 1996 and 1997 audits of Sunbeam and the 1998 restatement of the reports of those audits. In addition, Andersen-US partners and employees provided consulting services to Sunbeam as part of due diligence work performed in conjunction with Sunbeam's acquisition of Coleman Company, and on other projects.

24. Phillip E. Harlow ("Harlow") has been a partner at Andersen-US since

1983, and also is a partner of Andersen-Worldwide. He served as the engagement partner on the audits of Sunbeam's financial statements from 1993 to 1998. As engagement partner, Harlow had primary responsibility for supervising the 1996 and 1997 audits of Sunbeam, including overseeing the activities with respect to the Sunbeam work performed by numerous persons at Andersen. Harlow also participated as a member of Sunbeam's due diligence team in connection with Sunbeam's acquisition of Coleman Company.

ANDERSEN AS "ONE FIRM"

25. In 1913, an accounting and consulting partnership was formed in Illinois

under the name "Arthur Andersen & Co." The company began to expand internationally in the 1930s. The firm operated on a global scale through a network of international offices, branches and subsidiaries of the U.S. partnership premised under a "one firm" concept.

26. In 1977, as Andersen increased its global presence, it created a new structure: the Andersen Worldwide Organization ("AWO"), comprised of Andersen-Worldwide, the individual partners of Andersen-Worldwide and Andersen-Worldwide's offices around the globe, operating as a single global partnership or joint venture. The AWO structure was and is designed to maintain the "one firm" concept, and was and is intended to foster the belief that Andersen operates as a single entity. In its promotional literature, including its web site, Andersen-Worldwide markets itself as "one firm," "a single worldwide operating structure" that "think[s] and act[s] as one."

27. Andersen-Worldwide is the instrumentality through which the "one firm" concept becomes reality. It achieves this in four distinct ways.

(a) Partner Overlap: Andersen-Worldwide is a partnership made up of more than 2,000 individuals from 390 offices in 84 different countries worldwide. Simultaneously, the partners of Andersen-Worldwide also are partners (or the equivalent) in the entities that make up those offices. Thus, all of those offices are managed by individuals who are both local partners (or the equivalent) and partners of Andersen-Worldwide.

(b) Global Setting of Professional Standards: Andersen-Worldwide purports to establish the professional standards and principles under which its offices operate. Andersen-Worldwide's international offices enter into a standard agreement with Andersen-Worldwide under which they agree to be bound by those professional standards and principles. An office of Andersen-Worldwide that breaches the agreement is subject to removal from the organization. The Assurance Professional Standards Group has firm-

wide responsibility for providing guidance on the professional standards to be followed by Andersen-Worldwide's offices.

(c) Sharing of Costs and Profits: Andersen-Worldwide coordinates the sharing of costs and allocation of revenues and profits among its partners and its offices around the world.

(d) Infrastructure and Administration: Andersen-Worldwide handles all borrowing on behalf of its international offices, and maintains the financial records, payroll and employee and health benefits for those international offices as well. All of Andersen's offices also share global computer operations, a worldwide tax structure and training facilities.

28. By establishing a legal, financial and administrative infrastructure, Andersen-Worldwide enables each of its offices around the world to function as, and to appear to clients as, an extension of a single, global entity.

29. Andersen-Worldwide manages, directs and controls its international offices in two overlapping groups: by practice areas (also known as "lines of service") and by geographic location.

30. Each practice group is managed by a global practice director who oversees, directs and controls the operations of each practice group worldwide. Regional practice directors report to the global practice director and manage, direct and control the practice group within their regions. The global practice director and managing partner for the audit practice group of Andersen-Worldwide is C.E. Andrews, a United States-based partner.

31. In addition, Andersen-Worldwide groups its offices into several geographic regions and assigns a managing partner to each region.

32. Andersen-Worldwide has grown to be one of the world's largest accounting firms. The Andersen-Worldwide organization employs over 77,000 professionals in fields such as accounting, taxation, business consulting, corporate finance, risk management and business fraud investigation. Andersen-Worldwide's global revenues for the fiscal year ending August 31, 2001 totaled more than \$9.3 billion.

33. Andersen-US is dominant within Andersen-Worldwide. Andersen-Worldwide is largely controlled by its U.S.-resident partners, who also are partners of Andersen-US. Approximately half of the partners of Andersen-Worldwide are also partners of Andersen-US. Likewise, approximately half of the partners of Andersen-US are partners of Andersen-Worldwide.

34. The engagement partner on the Sunbeam audits, Harlow, and the concurring partner on those audits, William Pruitt, are partners of both Andersen-US and Andersen-Worldwide. The engagement partner on the Sunbeam restatement, Donald Denkhaus, who as Audit Division Head also was manager of Andersen's audit practice for the entire South Florida region, also is a partner of both Andersen-US and Andersen-Worldwide.

35. In addition to overlapping partners, Andersen-Worldwide and Andersen-US share officers in common as well. For example, the Chief Executive Officer and Managing Partner of Andersen-Worldwide is Joseph Berardino, who also is the Chief Executive Officer and Managing Partner of Andersen-US. In addition, Andrew Pincus is the General Counsel of both Andersen-US and Andersen-Worldwide. The Andersen-Worldwide regional managing partner for North America is Terry E. Hatchett, who also is the country managing partner for Andersen-US.

36. Andersen-Worldwide and Andersen-US share more than partners and officers – they share the same address. In its promotional literature, Andersen-Worldwide states that its headquarters are located at 33 West Monroe Street, Chicago, Illinois 60603. That is the same address as the headquarters of Andersen-US.

37. Andersen-Worldwide and its affiliates demonstrate the "one firm" concept not only through their actions relative to the outside world, but also internally within the Andersen organization itself.

38. The components of the Andersen organization ignore corporate formalities in referring to themselves or to each other. Documents by Andersen-US often bear the insignia and logos of Andersen-Worldwide, including "Andersen Worldwide," "Andersen," and "Arthur Andersen Co., SC". In its promotional literature, Andersen uses the names "Andersen Worldwide," "Andersen," and "Arthur Andersen LLP" interchangeably. In addition, Andersen sometimes uses only the name "Andersen" and does not differentiate between Andersen-Worldwide and its offices around the globe. Some promotional literature has stated, "Arthur Andersen will now be known simply as Andersen." Indeed, when Joseph F. Berardino appeared before Congress in December 2001, he supplied written testimony that identified him as "Managing Partner – Chief Executive Officer, Andersen" (emphasis added).

39. Andersen took the same approach in work relating to Sunbeam. The auditors used Andersen-Worldwide and Andersen-US stationery and logos interchangeably, or otherwise used the identifier "Arthur Andersen," on internal correspondence, on correspondence with Sunbeam and on presentation materials for Sunbeam. Top partners responsible for the Sunbeam audits and restatement were partners of both Andersen-US and Andersen-Worldwide.

40. Andersen's audits and restatement work for Sunbeam illustrate the "one firm" concept in action. Sunbeam was a multinational corporation with operations in Canada, Mexico, Venezuela, Hong Kong and Europe. The engagements required the participation of auditors from each of those countries and numerous American cities. Harlow, on behalf of both Andersen-US and Andersen-Worldwide, developed work plans that he circulated to Andersen-Canada, Andersen-Hong Kong, Andersen-Mexico, Andersen-Venezuela and Andersen-UK. Those offices worked together with Harlow and others to complete the tasks outlined in the plan, and sent their work product to Harlow for inclusion in an Andersen Worldwide Management Letter.

SUBSTANTIVE ALLEGATIONS

A. Sunbeam's New Management Team (1996-1998).

41. In the years leading up to 1996, Sunbeam had experienced increasing financial difficulties and growing losses. In an effort to remedy the situation, Sunbeam's board of directors undertook a change in Sunbeam's management in July 1996. The management team the board brought in was headed by Albert Dunlap, a person who had earned a reputation as a turnaround specialist through brief terms as Chief Executive Officer of a number of publicly traded corporations. Based on his penchant for rapidly slashing personnel and closing plants to achieve quick turnaround results, Dunlap is widely known as "Chainsaw Al."

B. Dunlap Arrives at Sunbeam and Initiates Restructuring.

42. Sunbeam hired Dunlap on July 18, 1996 and installed him as its Chairman and Chief Executive Officer. Immediately after joining Sunbeam, Dunlap hired Russell A. Kersh as Sunbeam's principal financial officer. Kersh had been associated with Dunlap for over 15 years, and had served as a senior executive during various Dunlap turnaround engagements.

Dunlap also brought in other hand-picked executives to make up his senior management team. He hired Donald R. Uzzi as Vice President, Marketing and Product Development. Uzzi later became Executive Vice President, Consumer Products Worldwide. Dunlap also hired Lee B. Griffith as Vice President, Sales. Dunlap retained Robert J. Gluck, formerly Controller of Sunbeam, as Sunbeam's Principal Accounting Officer.

43. Dunlap and the senior members of his management team entered into lucrative employment agreements that gave them a strong financial incentive to cause Sunbeam's stock price to increase and then to sell the company quickly. All stood to make many millions of dollars if that happened. Andersen was fully aware of those audit risks and the fact that a disproportionate share of those executives' potential earnings was dependent on stock options or restricted shares of stock.

44. In addition to the personal financial incentives deriving from his employment contract, Dunlap also had his reputation as a turnaround specialist to protect and advance. Dunlap used his reputation as a specialist in turning around troubled companies to make aggressive promises about Sunbeam's future performance and support false and misleading announcements of record performance -- results that were rendered credible because Andersen had certified Sunbeam's financial statements.

C. Andersen Is Recruited to Help Create the Illusion of a Successful Restructuring.

45. To lay the foundation for the appearance of a successful turnaround in 1997, Sunbeam's new senior management team decided to take improper expenses and record unjustified accounting writeoffs in 1996, thus lowering the benchmark for measuring their ultimate "success" in turning Sunbeam around.

46. Dunlap and his team needed the help of Sunbeam's auditors in approving the improper accounting tactics or the scheme would have had no chance of success. Andersen's Phillip Harlow was such a willing participant. Harlow knew of Dunlap's reputation as a fast-moving turnaround specialist who was quick to fire anyone who did not advance his agenda. Harlow also knew that in other highly publicized turnaround engagements, Dunlap had employed Coopers & Lybrand, one of Andersen's major competitors, as a financial consultant and independent auditor. Consistent with past practice, one of the first things Dunlap did after joining Sunbeam was to hire Coopers & Lybrand as a financial advisor with the lucrative assignment of planning Sunbeam's massive restructuring, which led to the firing of nearly half of Sunbeam's 12,000 employees. Andersen – and especially Harlow – were keenly aware that this did not bode well for the future of Andersen's relationship with Sunbeam.

47. Sunbeam had been a major client of Andersen's for many years and Sunbeam had paid Andersen over \$1 million in fees for its 1995 audit alone. Harlow had been the Sunbeam engagement partner since 1993. When Dunlap took control of Sunbeam and hired Coopers & Lybrand for the restructuring, Harlow became concerned that Dunlap would fire Andersen as the company's independent auditor and hire Coopers & Lybrand instead. Indeed, Harlow was so concerned about the possible loss of Sunbeam as a client that he agreed to a 30% reduction in Andersen's fee for 1996. A reduction in audit fees was simply one price Andersen had to pay in order to keep Sunbeam as a client.

D. Andersen's Early Assistance in the Scheme.

48. When Harlow began work on the audit of Sunbeam's 1996 financial statements, Harlow and Andersen learned the true price of keeping Sunbeam as an audit client. In addition to reducing its audit fees, Andersen was required to accept the improper and

misleading accounting treatments used by Sunbeam's senior management to create the illusion of a successful turnaround. In the end, Andersen's desire to retain a valuable client overrode any sense of duty or professionalism. To keep Sunbeam as an Andersen client, Harlow and Andersen ignored numerous accounting improprieties Andersen knew had been employed. Even when Harlow expressly identified certain of management's bogus accounting treatments, he ultimately acquiesced in management's refusal to correct the improprieties, and Andersen issued unqualified or "clean" audit opinions. Andersen did so despite the harm it knew would be inflicted on all who relied upon Andersen's audit opinions.

1. Improper Accounting Practices In 1996.

49. As set forth below, Andersen and Harlow permitted management to employ numerous accounting practices in 1996 that did not comply with GAAP.

50. One of the accounting practices permitted by Andersen and Harlow was the creation of a massive \$338 million non-GAAP reserve for restructuring charges. Although certain types of restructuring reserves may be proper, the reserves created by management included improper reserves and accruals, excessive write-downs and prematurely recognized expenses that were not proper restructuring reserves under GAAP. Those intentionally inflated reserves served two purposes. First, because the reserves were charged as an expense against income, they allowed Sunbeam to overstate its 1996 loss, and lower the benchmark for measuring the eventual success of Sunbeam's turnaround. Second, the inflated restructuring reserves created a "cookie-jar" of overstated liabilities on Sunbeam's books that Dunlap could reduce in the years after 1996, purportedly to correct the overstatements, and at the same time increase income in the year of the corrections. Those adjustments, too, fostered the illusion of a successful turnaround.

51. One of the largest components of the Sunbeam "cookie-jar" reserves permitted by Andersen and Harlow was millions of dollars in items that benefitted future activities, and hence were not properly part of the restructuring reserve. Those items included costs of redesigning product packaging, costs of relocating employees and equipment, bonuses to be paid to employees who were told that they were being laid off but were asked to stay temporarily, advertising expenses and certain consulting fees. Note 2 to the audited 1996 financial statements falsely described the restructuring charges as follows:

In conjunction with the implementation of the restructuring and growth plan, the Company recorded a pre-tax special charge to earnings of approximately \$337.6 million in the fourth quarter of 1996. This amount is allocated as follows in the accompanying Consolidated Statement of Operations: \$154.9 million to Restructuring, Impairment and Other Costs as further described below; \$92.3 million to Cost of Goods Sold related principally to inventory write-downs from the reduction in SKU's and costs of inventory liquidation programs; \$42.5 million to Selling, General and Administrative expenses principally for increases in environmental and litigation reserves (see Notes 12 and 13) and other reserve categories; and the estimated pre-tax loss on the divestiture of the Company's furniture business of approximately \$47.9 million.

As Sunbeam's eventual restatement of its financial statements showed, those reserves were materially inflated and were not recorded in accordance with GAAP.

52. In connection with the audit of Sunbeam's 1996 year-end financial statements, Harlow discovered that certain components of Sunbeam's restructuring reserves were not being recorded in compliance with GAAP and proposed that the company reverse several of the accounting entries establishing those reserves. As Harlow told Kersh and Gluck, under GAAP, entries that benefitted Sunbeam's future results were not considered to be proper restructuring charges in 1996. But Kersh and Gluck refused to reverse those items. Instead of standing firm, as professional ethics required, Harlow turned a blind eye to his duties as an independent auditor and caused Andersen to acquiesce in management's refusal to reverse those

non-GAAP reserves. Those improper reserves caused Sunbeam's 1996 audited financial statements to be materially false and misleading.

53. In connection with the 1996 audited financial statements, Andersen and Harlow also permitted management to create an excessive \$12 million reserve for a lawsuit alleging that Sunbeam was liable for a portion of the cleanup costs for a hazardous waste site. In fact, that reserve overstated Sunbeam's estimated liability by at least 100%, and provided Sunbeam with an inflated reserve that could be drawn down to boost income figures artificially in later periods.

54. Andersen and Harlow also permitted Sunbeam to write down its household products inventory in 1996. In connection with the restructuring, Dunlap's management team planned to eliminate half of Sunbeam's product lines and to liquidate Sunbeam's inventory of eliminated product lines at a substantial discount. Notwithstanding that the change affected only half of Sunbeam's product lines, Andersen and Harlow permitted management to reduce the cost basis for Sunbeam's entire inventory of household products at 1996 year end, without distinction between eliminated and continuing product lines (including inventories that were later sold in the ordinary course of business). As a result, the balance sheet value of Sunbeam's inventory at year-end 1996 was understated by approximately \$2 million, and Sunbeam overstated its 1996 loss by the same amount. Andersen and Harlow negligently or fraudulently disregarded facts indicating that (a) Sunbeam had understated the carrying value of its household products inventory, (b) the understatement had contributed to the material misstatement of Sunbeam's financial statements at year-end 1996 and (c) the understatement would improperly increase Sunbeam's income during 1997 when household products were sold at artificially inflated margins.

55. Andersen and Harlow also permitted management improperly to recognize \$2.3 million in 1997 advertising expenses and related costs as a 1996 expense. Andersen and Harlow negligently or fraudulently disregarded facts indicating that the accounting treatment would contribute to the material overstatement of Sunbeam's 1996 year-end loss and exaggerate Sunbeam's so-called turnaround by the same amount in 1997.

56. Finally, Andersen and Harlow permitted Sunbeam to manipulate its 1996 liabilities for cooperative advertising. In addition to buying national advertising to create demand for its products, Sunbeam funded a portion of its retailers' costs of running local promotions. As required by GAAP, Sunbeam accrued its estimated liabilities for such "cooperative advertising," and then charged its expenses in relation to its sales revenue during the year. At year-end 1996, Sunbeam set its cooperative advertising accrual at \$21.8 million, an amount that was approximately 25% higher than the prior year's accrual amount, without any basis for the increase. Harlow learned of the inflated accrual for cooperative advertising in connection with Andersen's audit of Sunbeam's year-end 1996 financial statements and discussed it with Kersh and Gluck. Nevertheless, Andersen and Harlow negligently or fraudulently disregarded facts concerning the lack of a proper basis for the accrual and the likelihood that the excess accrual would be released into income in early 1997. In fact, \$5.8 million of that excessive accrual was used (without disclosure) to inflate Sunbeam's 1997 income.

2. Andersen's 1996 Unqualified Audit Opinion.

57. In March 1997, Andersen issued an unqualified audit opinion regarding Sunbeam's 1996 financial statements and authorized the inclusion of its audit opinion in Sunbeam's 1996 Form 10-K filed with the SEC. Andersen's opinion stated:

We conducted our audits in accordance with generally accepted auditing standards. Those standards require that we plan and

perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement. An audit includes examining, on a test basis, evidence supporting the amounts and disclosures in the financial statements. An audit also includes assessing the accounting principles used and significant estimates made by management, as well as evaluating the overall financial statement presentation. We believe that our audits provide a reasonable basis for our opinion.

In our opinion, the financial statements . . . present fairly, in all material respects, the financial position of Sunbeam Corporation and subsidiaries as of December 31, 1995 and December 29, 1996, and the results of their operations and their cash flows for each of the three fiscal years in the period ended December 29, 1996 in conformity with generally accepted accounting principles.

58. Andersen's unqualified audit opinion was false in two material respects.

First, the financial statements Andersen audited did not "fairly" present Sunbeam's financial position in conformity with GAAP, as it represented. Second, Andersen did not, as it claimed, conduct its audit in accordance with GAAS.

59. In all, the 1996 financial statements audited by Andersen were materially false and misleading, and overstated Sunbeam's loss for 1996. Andersen and Harlow negligently or fraudulently disregarded facts indicating that (a) Andersen's unqualified audit opinion was incorrect, (b) Sunbeam's financial statements were materially false and misleading and not in conformity with GAAP and (c) Andersen had failed to perform an audit in accordance with GAAS.

E. Andersen Assists Sunbeam as a Financial Adviser in Sunbeam's Purchase of Coleman Company.

60. During 1997, Sunbeam's senior management continued to use improper accounting to create the illusion that a successful turnaround was underway at Sunbeam. By maintaining that illusion, Dunlap's management team hoped to position Sunbeam for a quick sale. However, the illusion proved too convincing to the market, and the price of Sunbeam stock

was driven so high that no willing buyer could be found. Management was aware that, absent a sale, it would be unable to sustain the appearance of a successful turnaround. Therefore, in late 1997, Sunbeam sought to acquire other businesses, in order to consolidate their results with Sunbeam's and thereby continue to obscure Sunbeam's past accounting improprieties. Once again, Sunbeam management required Andersen's assistance in perpetuating the deception.

61. In early December 1997, officers and directors of Sunbeam met with various officers of Coleman Company regarding a potential combination with Sunbeam. After that initial overture was rejected by Coleman-Parent, Dunlap's representative returned with another proposal in January 1998. At that point, Coleman-Parent indicated it was willing to discuss a potential transaction.

62. On January 28, 1998, Sunbeam announced its financial results for 1997, reporting total revenues of \$1.168 billion, and total earnings from continuing operations of \$189 million (or \$1.41 per share). Sunbeam's announcement coincided with Andersen's purported completion of the field work for its audit of Sunbeam's 1997 financial statements, although its work continued for more than a month.

63. On February 3, 1998, Harlow met with key officers of Sunbeam to discuss the acquisition of Coleman Company and its financial impact on Sunbeam. By that time, Harlow knew that Sunbeam had utilized improper accounting to achieve its 1997 results. Harlow also knew Coleman-Parent would insist on reviewing Andersen's 1997 audit opinion before agreeing to consummate any transaction in which the consideration included hundreds of millions of dollars in Sunbeam stock.

64. On February 20, 1998, Andersen agreed to act as a Sunbeam financial advisor and perform financial due diligence in connection with Sunbeam's acquisition of

Coleman Company and two other companies, First Alert, Inc. and Signature Brands USA, Inc. In agreeing to undertake that assignment, Andersen became an active member of the team working to assist Sunbeam in acquiring Coleman Company.

65. During the latter weeks of February 1998, representatives of Sunbeam and Coleman-Parent met to negotiate the details of a potential acquisition of Coleman Company and to prepare a proposed structure for that transaction.

66. Between February 23 and 25, 1998, representatives of Andersen, including Harlow, conducted due diligence concerning Coleman Company and the other target companies on behalf of Sunbeam. During that period, Andersen representatives participated in various meetings with officers and consultants of Coleman Company. At no point, however, did Andersen's representatives suggest that Sunbeam's financial statements were materially false and misleading. Meanwhile, Sunbeam worked on negotiating the terms of its acquisition of Coleman Company.

67. On February 27, 1998, Harlow met with Sunbeam executives in New York to discuss Andersen's due diligence. That afternoon, Sunbeam and Coleman-Parent reached an agreement for the sale of Coleman Company.

68. As part of the Coleman Company acquisition agreement, Sunbeam represented and warranted that all of its filings with the SEC, which included the 1996 financial statements audited by Andersen, were accurate and not misleading, and that they would continue to be accurate and not misleading as of the transaction's closing date, which was expected to be several weeks later. Sunbeam also represented that its audited financial statements were prepared in accordance with GAAP, and that at the time of the closing of the transaction, its

representation would continue to be true and correct. Andersen was fully aware of those representations and warranties when the merger agreement was executed on February 27, 1998.

69. As a result of Andersen's involvement in the Coleman Company acquisition transaction, it knew that Coleman-Parent would rely on Sunbeam's audited financial statements (1) in deciding to close the transaction, and (2) in accepting 14.1 million shares of Sunbeam stock and other consideration in return for its stake in Coleman Company. Moreover, as an independent certified public accountant, Andersen had a duty to disclose to Coleman-Parent that Sunbeam's audited financial statements in fact were neither accurate nor reliable. Notwithstanding that Andersen had met with representatives of Coleman-Parent and its auditors during its due diligence review, Andersen remained mute regarding the true financial condition of Sunbeam and the improprieties buried in Sunbeam's audited financial statements.

F. Andersen Issues its 1997 Audit Report.

70. In the first week of March 1998, shortly after the agreement for Sunbeam's purchase of Coleman Company was signed, but before the transaction closed, Andersen updated its audit work to reflect Sunbeam's acquisitions. That work was done by the same individuals who also were working as consultants on the Sunbeam acquisitions. The three acquisitions were specifically described in Note 14 to the audited financial statements. The description included the fact that Sunbeam was paying for the Coleman Company shares with Sunbeam common stock as well as cash and assumption of debt. Andersen then rendered an unqualified audit opinion for Sunbeam's 1997 financial statements. With Andersen's express consent, management included that opinion in Sunbeam's 1997 Form 10-K filed with the SEC.

1. Andersen's 1997 Unqualified Audit Report.

71. In its opinion concerning Sunbeam's 1997 financial statements, Andersen stated:

We conducted our audits in accordance with generally accepted auditing standards. Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement. An audit includes examining, on a test basis, evidence supporting the amounts and disclosures in the financial statements. An audit also includes assessing the accounting principles used and significant estimates made by management, as well as evaluating the overall financial statement presentation. We believe that our audits provide a reasonable basis for our opinion.

In our opinion, the financial statements . . . present fairly, in all material respects, the financial position of Sunbeam Corporation and subsidiaries as of December 29, 1996 and December 28, 1997, and the results of its operations and its cash flows for each of the three fiscal years in the period ended December 28, 1997 in conformity with generally accepted accounting principles.

72. Andersen's 1997 audit opinion was false in two material respects. First, the financial statements Andersen audited did not "fairly" present Sunbeam's financial position in conformity with GAAP, as it represented. Second, Andersen did not, as it claimed, conduct its audit in accordance with GAAS.

73. In all, the 1997 financial statements audited by Andersen were materially false and misleading in that they overstated Sunbeam's operating income for the year by 50%. Andersen and Harlow negligently or fraudulently disregarded facts indicating that (a) Andersen's unqualified audit opinion was incorrect, (b) Sunbeam's financial statements were materially false and misleading and not in conformity with GAAP and (c) Andersen had failed to perform an audit in accordance with GAAS.

2. Improper Accounting Practices In 1997.

74. Harlow was well aware of the potential for fraud and irregularities in Sunbeam's 1997 books, including the risk that Sunbeam management would attempt to claim profits and revenue on transactions before the earnings process was completed. Harlow specifically advised Andersen's foreign offices (including Andersen-Canada, Andersen-Hong Kong, Andersen-Mexico, Andersen-Venezuela and Andersen-UK), for example, that Dunlap had made promises to the public regarding earnings-per-share to be attained in 1997, and that management had a vested interest in achieving the promised earnings levels because management's primary form of compensation was based on the company's stock price. Harlow also noted the presence of the possibility of a third party purchase of the company's stock or assets.

75. Despite having specifically noted key reasons to employ heightened scrutiny in the 1997 audit, Harlow and Andersen permitted Sunbeam to engage in improper "earnings management" practices designed to achieve exactly the result Harlow had warned the Andersen audit team to watch for.

76. One of the most flagrant accounting abuses Andersen and Harlow permitted in 1997 was to allow Sunbeam to record a profit on a sham sale of its warranty and spare parts business to its spare parts provider, EPI Printers, Inc. Prior to 1997, EPI satisfied spare parts and warranty requests of Sunbeam customers on a fee basis. To raise additional revenue at year end 1997, however, Sunbeam entered into a sham sale of the warranty and spare parts inventories already in EPI's warehouse. As a result of the transaction, management fraudulently recognized millions of dollars of phony sales and profits in 1997.

77. The problem with the EPI transaction was that the transaction was not a sale at all, for at least three reasons. First, there was never a final agreement between Sunbeam and EPI. The closest the parties ever came to a meeting of the minds was the execution of a mere "agreement to agree." Second, by its terms, the proposed sale was to terminate on January 23, 1998, with no payment obligation on the part of EPI, absent a subsequent agreement between Sunbeam and EPI on the value of the inventory. In other words, the sale could be completely unwound just after year-end without EPI ever having paid a cent. Third, Sunbeam had agreed as part of the proposed sale to pay certain fees to EPI and to guarantee a 5% profit to EPI on the eventual resale of the inventory. In essence, even after the proposed sale, EPI remained a contractor compensated by Sunbeam on a fee basis for its services. In sum, the relationship between EPI and Sunbeam was not fundamentally altered by the purported "sale."

78. Harlow became aware of the true nature of the EPI transaction and raised it with management as part of Andersen's 1997 year-end audit. Harlow proposed that Sunbeam reverse the accounting entries reflecting the revenue recognition for that transaction, having concluded that the profit guarantee and the indeterminate value of the contract rendered revenue recognition inconsistent with GAAP. Simply stated, there was no revenue to recognize because the transaction was illusory. Kersh and Gluck refused to reverse the transaction. Instead of refusing to lend Andersen's name to management's fraudulent revenue recognition, Harlow again acquiesced in management's actions. As a result, Sunbeam's 1997 audited financial statements reflect almost \$10 million of phony profit on the sham EPI transaction.

79. The EPI transaction raised a clear red flag that should have – and must have – alerted Andersen to the need for greater scrutiny regarding all of Sunbeam's revenue recognition decisions. At a minimum, Andersen should have been on guard as to all items

Harlow previously identified as proposed audit adjustments (but which Harlow eventually acquiesced in), and any previously recognized improper items that were ultimately dismissed as "immaterial."

80. Another 1997 revenue inflation scheme permitted by Andersen and Harlow was Sunbeam's use of improper "bill-and-hold" transactions. A bill-and-hold transaction is a transaction in which the seller bills a customer for a purchase while holding the merchandise for later delivery. During 1997, Dunlap's management team offered financial incentives to various customers to make purchases earlier than they would otherwise have done so. Management then proposed that Sunbeam hold the merchandise until the normal time for delivery.

81. Under certain limited circumstances, bill-and-hold transactions may be permitted for revenue recognition purposes. However, bill-and-hold transactions must meet specific stringent accounting criteria satisfying GAAP. The relevant criteria include, among others: a requirement that the buyer, not the seller, requested a sale on a bill-and-hold basis; that the buyer had a substantial business purpose for ordering the goods on a bill-and-hold basis; and that risks and rewards of ownership passed to the buyer at the time of the bill-and-hold sale.

82. Bill-and-hold transactions improperly added in excess of \$29 million to Sunbeam's 1997 sales and \$4.5 million to income. In the course of the audit of Sunbeam's 1997 financial statements, Andersen and Harlow discovered that the purported bill-and-hold customers had not requested the bill-and-hold treatment, and that in numerous cases involving rights of return "the risks of ownership and legal title" were not actually "passed to the customer." Nevertheless, Andersen negligently or fraudulently disregarded facts indicating that bill-and-hold transactions did not satisfy the required revenue recognition criteria. Ultimately, Andersen

acquiesced in Sunbeam's decisions to recognize revenue for all of those non-GAAP sales in 1997, and to misdescribe the company's bill-and-hold practices in the financial statements as customer-driven legitimate sales.

83. Another income inflation tactic Sunbeam management used in 1997 was to decrease the inflated 1996 reserves to create the illusion of 1997 income. By decreasing the reserves in 1997, management increased Sunbeam's 1997 income by almost \$5 million. In connection with Andersen's year-end audit of Sunbeam's financial statements, Harlow discovered that tactic and concluded that it was improper. Harlow proposed reversing management's misuse of the reserves, but management refused to do so. Rather than insisting that the adjustments be made, Andersen gave Sunbeam a pass, and permitted the entries. In doing so, Andersen and Harlow negligently or fraudulently disregarded facts indicating that the improper accounting materially distorted Sunbeam's reported results of operations for 1997.

84. Another of Sunbeam's 1997 accounting gimmicks was to record income from non-recurring events as ordinary income. In connection with Andersen's work on the 1997 audit, Harlow learned that management had arranged for the sale of deeply discounted and obsolete inventory during 1997, creating \$19 million in non-recurring revenue. Although the recognition of that revenue was permitted under GAAP, Sunbeam was required to disclose in its financial statements that the income from the sale was a non-recurring event. Sunbeam failed to do so. Notwithstanding that material omission, Andersen certified Sunbeam's 1997 financial statements.

85. In addition, during Andersen's 1997 audit, Harlow proposed adjustments to reverse \$2.9 million related to a Sunbeam inventory overvaluation and \$563,000 in additional items. Management again refused to make appropriate adjustments, and Andersen and Harlow

acquiesced in the refusal to reverse those errors. In doing so, Andersen and Harlow negligently or fraudulently disregarded facts indicating that those items contributed to the misstatement of Sunbeam's 1997 reported results of operations.

86. International sales represented a significant proportion of Sunbeam's overall income from sales. However, part of Sunbeam's reported income from international sales was artificially inflated. Several of Sunbeam's foreign subsidiaries engaged in guaranteed sales that could not have been booked under applicable accounting principles because they included an unlimited right to return unsold merchandise and because the amount of future returns on such sales could not reasonably be estimated.

87. Sunbeam's Hong Kong subsidiary recorded sales revenue of \$8.6 million from various guaranteed sales made during the fourth quarter of 1997. However, that revenue should not have been recognized because sales were made with an unlimited right of return and because the amount of future returns could not reasonably be estimated. Indeed, in 1998 much of the product "sold" in 1997 was returned. Nevertheless, Andersen allowed those sales to be booked in 1997.

88. Sunbeam's Canadian subsidiary similarly engaged in guaranteed sales with an unlimited right of return. The revenue from those sales revenue could not have been recognized because the amount of future returns could not reasonably be estimated. Nevertheless, Andersen permitted those sales to be booked.

89. Sunbeam's Mexican subsidiary engaged in \$900,000 in bill-and-hold transactions that should not have been recognized as income until 1998. However, Andersen permitted the full amount of such sales to be booked in 1997. Harlow and Andersen identified a total of \$2.9 million in adjustments relating to inventory overvaluation that were proposed to

Sunbeam. Management refused to make those adjustments; Andersen and Harlow nevertheless issued clean audit opinions. In addition, the financial statements for Sunbeam's Mexico operations failed to include an expense for the profit sharing obligations of that business, an adjustment that reduced the earnings of that business by more than \$3 million when Sunbeam later restated its 1997 results.

90. Sunbeam's Venezuela subsidiary also improperly valued inventory. Its books reflected purchased raw materials that were held at various suppliers. Andersen failed to confirm that the booked amounts represented materials actually in the possession of suppliers. If Andersen had done so, Andersen would have discovered that the materials did not exist. Nevertheless, Andersen permitted the full amount to be included on Sunbeam's financial statements.

91. In the end, Andersen's 1997 audit opinion certified financial statements that reported Sunbeam's income to be \$186 million, much of which was improper under GAAP. The overstatements included in all over \$90 million of improper net income including, without limitation, approximately \$10 million from the sham sale to EPI, approximately \$4.5 million from non-GAAP bill-and-hold sales, approximately \$35 million in income derived from the use of non-GAAP reserves and accruals taken at year-end 1996 and approximately \$6 million from improper revenue recognition.

92. As Andersen and Harlow knew, Coleman-Parent relied on Sunbeam's report of \$186 million in income in deciding to close the sale of its interest in Coleman Company. If Andersen had not issued a materially false and misleading audit report, and instead had complied with GAAP and GAAS, Sunbeam's 1997 operating income would have been approximately half of what Andersen certified in the financial statements.

G. Coleman-Parent Relies on Andersen's Unqualified Audit Opinions and Closes the Sale to Sunbeam.

93. The merger agreement signed by Coleman-Parent on February 27, 1998 provided that a condition precedent to Coleman-Parent's obligation to close the transaction was the absence of any event, change, or development that would have a material adverse effect on the business, results of operation, or financial condition of Sunbeam. The closing also was conditioned on the absence of any material misrepresentation or omissions in Sunbeam's SEC filings, including Andersen's 1996 and 1997 audit reports in the Form 10-Ks. If Andersen had not been negligent or fraudulent in performing its audits, and had issued qualified or adverse reports exposing the falsity of Sunbeam's financial statements, Coleman-Parent would have been put on notice of an adverse material change affecting Sunbeam before closing, and of a material misstatement in Sunbeam's SEC filings. Coleman-Parent's obligation to close the transaction with Sunbeam would have been discharged by the failure of a condition precedent, and Coleman-Parent never would have suffered losses in excess of \$600 million. Coleman-Parent directly relied on Andersen's 1996 and 1997 audit reports when it decided to close the transaction with Sunbeam and to accept 14.1 million shares of Sunbeam stock as consideration for selling its interest in Coleman Company.

94. Andersen was fully aware of the terms and conditions of the Coleman Company transaction and of Coleman-Parent's anticipated and actual reliance upon Andersen's unqualified 1996 and 1997 audit opinions.

95. On March 30, 1998, unaware of the falsity of Sunbeam's financial statements and Andersen's audit reports, Coleman-Parent closed the transaction with Sunbeam and accepted 14.1 million shares of what turned out to be essentially worthless Sunbeam common stock for the sale of its interest in Coleman Company.

H. Andersen's Improper Accounting and Misrepresentations Are Revealed, Causing the Market Value of Sunbeam's Stock to Plummet.

96. Almost immediately after the consummation of Coleman-Parent's sale of Coleman Company to Sunbeam, Sunbeam's facade of financial health began to crumble.

97. In an April 3, 1998 conference call with securities analysts, Sunbeam revealed that sales for the first quarter of 1998 were 5% below reported sales for the same period of the prior year. Only two weeks earlier, on March 19, 1998, Sunbeam had issued a press release in which it announced that sales for the first quarter of 1998 were "expected to exceed" sales for the same period of the prior year.

98. On June 6, 1998, an article was published in Barron's that raised serious questions regarding Sunbeam's apparent success under Dunlap, and suggested it was the result of "accounting gimmickry." On June 15, 1998, Sunbeam's Board announced that it had removed Dunlap as Chairman and CEO.

99. On June 25, 1998, Andersen withheld its consent for use of its 1997 audit opinion in a registration statement that was to have been filed with the SEC.

100. On June 30, 1998, Sunbeam announced that the Audit Committee of its Board of Directors would conduct an inquiry into the accuracy of its 1997 financial statements. The Audit Committee subsequently retained Deloitte & Touche LLP to assist in the review, in addition to Andersen. Sunbeam stated that "pending the completion of its review, its 1997 financial statements and the report of Arthur Andersen LLP should not be relied upon." Sunbeam added that the review "could result in a restatement of the 1997 financial statements and the first quarter 1998 Form 10-Q."

101. On August 6, 1998, Sunbeam announced that its Audit Committee had determined that Sunbeam would be required to restate its audited financial statements for 1997 and possibly for 1996, as well as its unaudited financial statements for the first quarter of 1998.

102. On November 12, 1998, Sunbeam released its restated 1996 and 1997 financial results, again audited by Andersen. The restated 1996 financial statements reported operating losses for 1996 that were approximately \$40 million less than originally reported, losses from continuing operations that were approximately \$26 million less than previously reported and net losses that were approximately \$20 million less than previously reported.

103. The restated 1997 financial statements reported operating earnings for 1997 that were approximately \$95 million less than originally reported, earnings from continuing operations that were approximately \$70 million less than previously reported and net earnings that were approximately \$70 million less than previously reported. The new operating income figure for 1997 was approximately 50% less than the amount Andersen previously certified.

104. In the wake of Dunlap's firing, Sunbeam's board of directors asked members of Coleman-Parent's management to assume key positions within Sunbeam in order to carry out damage control and attempt to salvage the value remaining in the company. New management was unable to overcome the devastating effects of the manipulation and distortion of Sunbeam's business.

105. On February 5, 2001, Sunbeam filed a voluntary petition for Chapter 11.

106. As a result of having been fraudulently induced into exchanging its ownership of Coleman Company for over 14 million shares of Sunbeam stock, Coleman-Parent has suffered direct damages in excess of \$600,000,000.

**VIOLATIONS OF GAAP AND GAAS IN
ANDERSEN'S 1996 AND 1997 AUDITS**

107. The objectives of financial reporting are to provide information that is useful in investment and credit decisions, information that is useful in assessing cash flow prospects and information about enterprise resources, claims to those resources and changes in them. (See "Objectives of Financial Reporting by Business Enterprises," Statement of Financial Accounting Concepts No. 1 (Financial Accounting Standards Board, November 1978).) In order to minimize misinterpretation of financial statements, the accounting profession has developed sets of standards regarding financial reporting and auditing practice that are generally accepted and universally practiced. Those standards are known as GAAP and GAAS. The development of common standards for auditing and financial reporting has provided businesspeople and investors with a valuable frame of reference in evaluating the financial condition of enterprises.

108. Auditors know they must adhere to GAAP and GAAS, or the standards would cease to have any meaning. Consistent with the objectives of the profession in developing those standards, the public has come to understand the importance of GAAP and GAAS in enhancing the reliability of audited financial statements. As a result, when an auditing firm represents that it has conducted an audit of a company in accordance with GAAS, and opines that such company's financial statements present the company's financial condition fairly in conformity with GAAP, readers of those financial statements have the right to rely on the integrity of those financial statements.

109. In auditing Sunbeam in 1996 and 1997, and in issuing unqualified opinions regarding Sunbeam's 1996 and 1997 financial statements, Andersen and Harlow did not adhere to the standards of the profession. Although Andersen's audit opinions stated that the firm had conducted its audits of Sunbeam in accordance with GAAS, and based on those audits had

concluded that Sunbeam's financial statements presented the company's financial condition fairly in conformity with GAAP, that simply was not true.

A. Sunbeam's Audited 1996 and 1997 Financial Statements Were Not In Conformity With GAAP.

110. As alleged below, Sunbeam's audited 1996 and 1997 financial statements failed to conform to GAAP in numerous respects.

111. Sunbeam's 1996 and 1997 financial statements, certified by Andersen, failed to conform to GAAP because those financial statements did not comply with the accounting principle of reliability. That principle requires that the quality of reported information assures that the information is reasonably free from error or bias and faithfully represents what it purports to represent. FASB Statement of Financial Accounting Concepts No. 2, §§ 58-71; APB Statement No. 4, §§ 109, 138, 189.

112. The financial statements also failed to comply with the accounting principle of completeness, which requires that financial information be complete and that it validly represent the underlying event and conditions. FASB Statement of Financial Accounting Concepts No. 2, §§ 79, 80; APB Statement No. 4, § 94.

113. The financial statements also failed to comply with the accounting principle of conservatism, which requires that a conservative approach be taken in the accounting for transactions and the early recognition of unfavorable events. FASB Statement of Financial Accounting Concepts No. 2, §§ 91-97; APB Statements No. 9, §§ 35, 71.

114. The financial statements also failed to comply with the accounting principle of neutrality, which requires that there should be an absence in reported information of bias intended to attain a predetermined result. FASB Statement of Financial Accounting Concepts No. 2, § 98.

115. The financial statements also failed to comply with the accounting principle of relevance, which requires that reported information should have the capacity to make a difference in a decision by helping users to form predictions about the outcomes of past, present and future events. FASB Statement of Financial Accounting Concepts No. 2, §§ 47, 48.

B. Andersen's 1996 and 1997 Audits Were Not Conducted In Accordance With GAAS.

116. As alleged below, Andersen failed in numerous respects to conduct its audits in accordance with GAAS.

117. Andersen and Harlow violated GAAS because they negligently or fraudulently failed to perform the audits with an attitude of professional skepticism as required by Statement on Auditing Standards ("SAS") No. 53, which states: "An audit of financial statements in accordance with generally accepted accounting standards should be planned and performed with an attitude of professional skepticism." AU § 316.16. Thus:

a. Andersen and Harlow negligently or fraudulently failed to reach a conclusion that there existed a significant risk of intentional distortion of financial statements by Sunbeam management. Andersen and Harlow should have reached that conclusion because Sunbeam's management was dominated by a single person, Dunlap; because Dunlap's attitude toward financial reporting was unduly aggressive; because Dunlap placed undue emphasis on meeting earnings projections; because of the extremely rapid change in Sunbeam's performance; and/or because Dunlap's plan to quickly "turn around" and sell Sunbeam incentivized him to distort financial statements. See AU §§ 316.10 and 316.12.

b. Andersen and Harlow also were negligent or fraudulent in failing to recognize that the accounting policies employed by Sunbeam were not acceptable in

the circumstances. Thus, "when the auditor has reached a conclusion that there is a significant risk of intentional distortion of financial statements, the auditor should recognize that management's selection and application of significant accounting policies, particularly those related to revenue recognition, asset valuation, and capitalization versus expensing, may be misused. Increased risk of intentional distortion of the financial statements should cause greater concern about whether accounting principles that are otherwise generally accepted are being used in inappropriate circumstances to create a distortion of earnings." AU § 316.19.

c. Andersen and Harlow also acted negligently or fraudulently by failing to obtain sufficient competent evidential matter through inspection, observation, inquiries and confirmations to afford a reasonable basis for its opinions regarding Sunbeam's financial statements. That failure violated the third standard of field work adopted by the American Institute of Certified Public Accountants ("AICPA") (AU § 150.02). Furthermore, "[w]hen evaluation at the financial statement level indicates significant risk, the auditor requires more or different evidence to support material transactions than would be the case in the absence of such risk. For example, the auditor may perform additional procedures to determine that sales are properly recorded, giving consideration to the possibility that the buyer has a right to return the product. Transactions that are both large and unusual, particularly at year-end, should be selected for testing." AU § 316.20.

118. Andersen and Harlow negligently or fraudulently failed to exercise due professional care in the performance of the 1996 and 1997 audits, in violation of the AICPA's third general auditing standard (AU § 150.02).

119. Andersen and Harlow negligently or fraudulently failed to plan the work adequately to uncover the errors and irregularities in Sunbeam's accounting information, in violation of the AICPA's first standard of field work (AU § 150.02).

120. Andersen and Harlow negligently or fraudulently failed to obtain a sufficient understanding of Sunbeam's internal control structure to plan the audits and to determine the nature, timing and extent of tests to be performed, in violation of the AICPA's second standard of field work (AU § 150.02). Specifically, Andersen and Harlow fraudulently failed to assess properly the risk of management override of controls in light of Dunlap's plan to quickly "turn around" and sell Sunbeam.

121. Andersen and Harlow negligently or fraudulently relied on management representations rather than applying the auditing procedures necessary to afford a reasonable basis for an opinion on Sunbeam's financial statements, in violation of SAS No. 19 (AU § 333.02).

122. Andersen and Harlow were negligent or fraudulent in not recognizing that misstatements resulting from misapplication of GAAP, departures from fact and omissions of necessary information, in aggregate, caused Sunbeam's financial statements to be materially misstated, in violation of SAS No. 47 (AU § 312.04).

123. As alleged above, on numerous occasions Andersen and Harlow concluded that certain misstatements caused Sunbeam's financial statements to be materially misstated. Although they requested that Sunbeam management eliminate the misstatements, management refused. Andersen acted negligently or fraudulently in not issuing a qualified or adverse opinion in such instances, in violation of SAS No. 47 (AU § 312.31).

124. Andersen and Harlow were negligent or fraudulent in concluding that the accounting principles applied by Sunbeam were appropriate in the circumstances and that Sunbeam's financial statements were informative of matters that could affect their use, understanding and interpretation, in violation of SAS No. 69 (AU § 411.04(b) and (c)).

125. Andersen and Harlow were negligent or fraudulent in failing to report that a change in the application of accounting principles in Sunbeam's 1997 financial statements had materially affected their comparability with the financial statements for prior periods, especially 1996, due to a different treatment of sales and reserves in those periods, in violation of SAS Nos. 1 and 43 (AU § 420.02).

126. Andersen's and Harlow's failure to conduct the audits in accordance with GAAS, and Andersen's certification of financial statements that were not in conformity with GAAP, as shown above, caused Coleman-Parent to suffer damages in excess of \$600,000,000.

127. Andersen-Worldwide, Andersen-US, Andersen-Canada, Andersen-Hong Kong, Andersen-Mexico, Andersen-Venezuela and Andersen-UK are jointly and severally liable to plaintiff because they participated in the course of conduct that constitutes the wrongful acts alleged herein, acted in concert to injure plaintiff, constituted alter egos of one another, constituted agents of one another, aided and abetted the conduct complained of herein, and/or conspired with each other to injure plaintiff.

COUNT I
Fraudulent Misrepresentation

128. Coleman-Parent repeats and realleges each and every allegation above as if set forth fully herein.

129. At the time Andersen issued its unqualified audit opinions for Sunbeam's 1996 and 1997 financial statements, Andersen and Harlow possessed knowledge superior to

Coleman-Parent concerning Sunbeam's financial position, the accounting principles Sunbeam used, the results of Sunbeam's operations and cash flows and whether Sunbeam's financial condition was presented in conformity with GAAP.

130. As described in detail above, Andersen and Harlow made representations of fact that were false in the unqualified audit opinions it issued for Sunbeam's 1996 and 1997 financial statements, including, among other things, (a) that Andersen's audits of Sunbeam were conducted in accordance with GAAS; (b) that Sunbeam's financial statements fairly presented the financial position of Sunbeam during the relevant periods; (c) that Sunbeam's financial statements fairly presented the results of Sunbeam's operations and cash flows during the relevant periods; and (d) that Sunbeam's financial statements were in conformity with GAAP.

131. As described in detail above, Andersen and Harlow knew that those representations were false at the time they were made and/or made those representations with recklessness as to their truth.

132. Andersen consented to the publication of its audit reports to the public and business world by consenting to their inclusion in Sunbeam's SEC filings. Given that publication, Andersen and Harlow intended that the public -- including Coleman-Parent -- would rely on Andersen's representations. Moreover, Andersen and Harlow specifically knew the terms of the agreement for Coleman-Parent's sale of Coleman Company to Sunbeam and consented to the publication of Andersen's audit report in Sunbeam's March 6, 1998 Form 10-K filing with the intent that Coleman-Parent rely upon Andersen's representations.

133. In agreeing to sell its interest in Coleman Company for approximately 14.1 million shares of Sunbeam stock plus cash and other consideration, Coleman-Parent reasonably

and justifiably relied upon Andersen's representations and omissions as to Andersen's 1996 and 1997 audits.

134. But for Andersen's misrepresentations, Coleman-Parent would not have agreed to sell its business to Sunbeam in return for artificially-inflated Sunbeam stock, among other consideration. As a result of Andersen's and Harlow's misconduct, Coleman-Parent has been damaged in excess of \$600,000,000.

COUNT II
Fraudulent Inducement To Contract
(Conspiracy and Concerted Action)

135. Coleman-Parent repeats and realleges each and every allegation above as if set forth fully herein.

136. As described in detail above, Sunbeam's 1996 and 1997 financial statements contained false statements of material fact. Those material misrepresentations included, among other things, (a) overstating Sunbeam's 1996 operating losses by approximately \$40 million; (b) overstating Sunbeam's 1996 losses from continuing operations by approximately \$26 million; (c) overstating Sunbeam's 1996 net losses by approximately \$20 million; (d) overstating Sunbeam's 1997 operating earnings by approximately \$95 million; (e) overstating Sunbeam's 1997 earnings from continuing operations by over \$70 million; (f) overstating Sunbeam's 1997 net earnings by approximately \$70 million; and (g) overstating Sunbeam's 1997 operating income figure by approximately 50%.

137. As described in detail above, Andersen and Harlow made representations of fact that were false in the unqualified audit opinions it issued for Sunbeam's 1996 and 1997 financial statements, including, among other things, (a) that Andersen's audits of Sunbeam were conducted in accordance with GAAS; (b) that Sunbeam's financial statements fairly presented the

financial position of Sunbeam during the relevant periods; (c) that Sunbeam's financial statements fairly presented the results of Sunbeam's operations and cash flows during the relevant periods; and (d) that Sunbeam's financial statements were in conformity with GAAP.

138. As described in detail above, Sunbeam, Andersen and Harlow knew that those representations were false when made and/or made those representations with reckless disregard as to their truth.

139. In order to induce Coleman-Parent further into entering into and fulfilling a contract to sell its interest in Coleman Company to Sunbeam in exchange for approximately 14.1 million shares of Sunbeam stock, Sunbeam represented that its SEC filings dating back to January 1, 1997 were accurate and not misleading as of February 27, 1998 and would be accurate and not misleading on March 30, 1998. Sunbeam's management, Andersen and Harlow knew and/or recklessly disregarded that those representations were false when made because Sunbeam's SEC filings contained Sunbeam's false and misleading 1996 and 1997 financial statements and Andersen's false and misleading audit reports.

140. In reasonable and justifiable reliance on Sunbeam's representations that its SEC filings – including its financial statements and Andersen's audit reports – were accurate with respect to Sunbeam's financial position and operating results, Coleman-Parent agreed to accept 14.1 million shares of Sunbeam stock and other consideration in exchange for its controlling stake in Coleman Company.

141. As a proximate result of its reliance on those misrepresentations, Coleman-Parent gave up its stake in Coleman Company in exchange for shares of Sunbeam which, once the truth of Sunbeam's financial situation was revealed, became worthless. Those misrepresentations proximately caused injury to Coleman-Parent in excess of \$600,000,000.

142. Andersen and Harlow were part of a team with Dunlap, Kersh and the other senior Sunbeam executives that acted in concert and wrongfully conspired to create the appearance that Sunbeam was performing at a high level to artificially inflate the stock price of Sunbeam and make it attractive for a sale to another company. Andersen and Harlow explicitly or implicitly by acquiescence agreed to become part of that conspiracy and committed overt acts in furtherance of its fraudulent scheme in order to retain Sunbeam as a client and earn significant fees.

143. In furtherance of that conspiracy, Dunlap and the other Sunbeam executives decided to acquire Coleman Company in order to further increase Sunbeam's stock price and maintain the illusion of its good performance. In pursuance of that scheme, Andersen and Harlow committed the overt acts of issuing Andersen's false and misleading March 1998 unqualified audit opinion with respect to Sunbeam's 1997 financial statements and of consenting to its publication to the SEC as part of Sunbeam's Form 10-K filing on March 6, 1998. Andersen and Harlow knew that Andersen's audit opinion would be used by Sunbeam to induce Coleman-Parent into selling its controlling stake in Coleman Company in exchange for shares of artificially-inflated Sunbeam stock. Andersen's audit report also furthered that conspiracy by actively supporting the illusion of Sunbeam's performance that had been created in the market, which helped support the company's artificially-inflated stock price. In doing so, Andersen and Harlow committed the tortious act of fraudulent inducement in concert with Dunlap and the other Sunbeam executives pursuant to a common design.

144. As described above, Coleman-Parent was damaged as a result of those concerted acts performed as part of that conspiracy.

COUNT III
Negligent Misrepresentation

145. Coleman-Parent repeats and realleges each and every allegation above as if set forth fully herein.

146. Andersen provided the information in its audit reports regarding Sunbeam's 1996 and 1997 financial statements in the course of its business as an accounting firm in the employ of Sunbeam.

147. In issuing its audit report regarding Sunbeam's 1997 and 1996 financial statements and in consenting to that report's inclusion in Sunbeam's March 6, 1998 Form 10-K filing with the SEC, Andersen and Harlow were aware that such information was being provided, in part, for the specific guidance and reliance of Coleman-Parent, which was agreeing to sell Coleman Company to Sunbeam for approximately 14.1 million shares of Sunbeam stock plus cash. In particular, Sunbeam warranted and represented to Coleman-Parent that its SEC filings, and audited financial statements including Andersen's report, were accurate – a fact that Andersen and Harlow were aware of when Andersen issued its report and consented to its publication. Andersen and Harlow expected that Coleman-Parent would rely on Andersen's 1997 audit report. Andersen and Harlow also were aware and expected that Coleman-Parent specifically was relying on Andersen's previously issued 1996 audit report, which Andersen did not retract until long after the Coleman Company transaction closed.

148. As described in detail above, Andersen's unqualified audit opinions for Sunbeam's 1996 and 1997 financial statements contained material falsehoods, including, among other things, (a) that its audits of Sunbeam were conducted in accordance with GAAS; (b) that Sunbeam's financial statements fairly presented the financial position of Sunbeam during the relevant periods; (c) that Sunbeam's financial statements fairly presented the results of Sunbeam's

operations and cash flows during the relevant periods; and (d) that Sunbeam's financial statements were in conformity with GAAP.

149. As described in more detail above, Andersen and Harlow failed to exercise reasonable care or competence in obtaining or communicating the information contained in their audit reports regarding Sunbeam's 1996 and 1997 financial statements.

150. Coleman-Parent reasonably and justifiably relied upon the information contained in Andersen's audit reports, including their material falsehoods regarding Sunbeam's financial condition and operating results and regarding the conformance of Sunbeam's financial statements to GAAP. In reliance on those material falsehoods, Coleman-Parent agreed to sell its interest in Coleman Company for approximately 14.1 million shares of Sunbeam stock, cash and other consideration.

151. As a result of Andersen's and Harlow's misconduct, Coleman-Parent has been injured in an amount in excess of \$600,000,000.

WHEREFORE, plaintiff Coleman (Parent) Holdings, Inc. demands judgment against Andersen-Worldwide, Andersen-US, Andersen-Canada, Andersen-Hong Kong, Andersen-Mexico, Andersen-Venezuela, Andersen-UK and Phillip E. Harlow, jointly and severally, as follows:

- A. Compensatory damages in an amount in excess of \$600,000,000;
- B. An award of costs and expenses incurred in this action, including reasonable attorneys' and experts' fees; and
- C. Any further relief as the Court may deem just and proper in light of all the circumstances of the case.

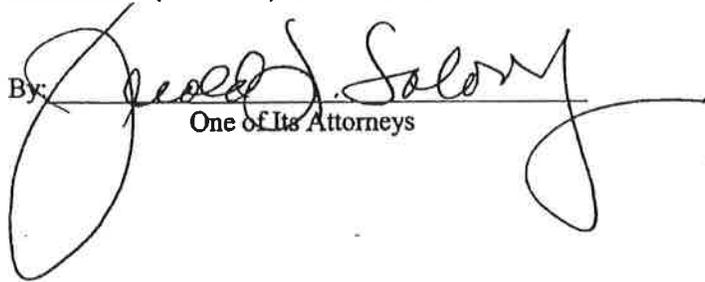
D. Coleman-Parent expressly reserves the right to seek leave to amend its complaint pursuant to Fla. Stat. § 768.72 to assert claims for punitive damages in excess of \$1.2 billion as allowed by law.

JURY DEMAND

Plaintiff demands a trial by jury.

Dated: March 15 2002

COLEMAN (PARENT) HOLDINGS, INC.

By: 

One of Its Attorneys

John Scarola
SEARCY DENNEY SCAROLA
BARNHART & SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409
(561) 686-6300

Jerold S. Solovy
Ronald L. Marmer
Robert T. Markowski
Matthew M. Neumeier
Avidan J. Stern
JENNER & BLOCK, LLC
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

742267

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS, INC.,)
)
Plaintiff,)
)
v.)
)
ARTHUR ANDERSEN LLP and)
PHILLIP E. HARLOW,)
)
Defendants.)

Case No.: **CA '01 - 06062 AN**

JURY TRIAL DEMANDED
[Signature]
FILED
01 JUN - 8 PM 4:11
CIRCUIT CIVIL 8

COMPLAINT

Plaintiff Coleman (Parent) Holdings, Inc. ("Coleman-Parent"), by its attorneys, alleges the following against defendants Arthur Andersen LLP ("Andersen") and Phillip E. Harlow ("Harlow"):

NATURE OF THE ACTION

1. This action arises out of Coleman-Parent's sale of its controlling interest in The Coleman Company, Inc. ("Coleman Company") to Sunbeam Corporation, Inc. ("Sunbeam") on March 30, 1998, in exchange for 14.1 million shares of Sunbeam common stock, plus other consideration. In deciding to go forward with that sale, Coleman-Parent relied on Sunbeam's financial statements, which were audited and certified by Andersen, the largest accounting firm in the world.

2. Unbeknownst to Coleman-Parent, however, Andersen had audited and certified financial statements that it knew to be inaccurate and misleading. Those audited financial statements painted a false picture of Sunbeam, depicting it as a company in the midst of an impressive financial turnaround. The reality was that Sunbeam's turnaround was a sham, and when the truth emerged, Sunbeam's stock lost virtually all of its value. The company is now in

①

bankruptcy. By relying on the financial statements improperly certified by Andersen, Coleman-Parent has suffered losses exceeding \$600 million.

3. By holding itself out as Sunbeam's independent certified public accountant and certifying Sunbeam's financial statements, Andersen knowingly assumed a responsibility that transcended its relationship with Sunbeam as a client. As an independent public accountant auditing Sunbeam's financial statements, Andersen owed a duty to Coleman-Parent and others whom it knew were relying upon Andersen's certification that Sunbeam's reports fairly depicted the company's financial status. Andersen was required to maintain independence from its client, Sunbeam, and speak with total honesty befitting the trust that had been placed in its word. In carrying out its audit of Sunbeam's financial statements, Andersen utterly failed to live up to that responsibility. To the contrary, Andersen's audits were not performed in accordance with generally accepted auditing standards ("GAAS"), and the financial statements it certified were not, as Andersen claimed, in conformity with generally accepted accounting principles ("GAAP"). Even more egregious, Phillip Harlow, the audit partner on the Sunbeam account, and others at Andersen knew the financial statements were not prepared in conformity with GAAP, but Andersen certified them nonetheless.

4. The motivation of Harlow and Andersen was simple – to do whatever was necessary to retain a major client. Sunbeam was one of few Fortune 500 clients of Andersen's Fort Lauderdale, Florida, office. Andersen had served as Sunbeam's independent auditor for many years. Sunbeam had paid Andersen more than \$1 million for its 1995 audit. However, in 1996 that relationship was threatened by Sunbeam's new CEO, Albert Dunlap. Dunlap was eager to show a turnaround at Sunbeam in order to position the company for a quick sale, as he recently had done at Scott Paper. To accomplish that goal, Dunlap's new management team

knowingly employed improper accounting methods that first overstated the company's loss in 1996 and then inflated the company's income in 1997. In total abrogation of its responsibility as an independent auditor, Andersen permitted – indeed, blessed – those improper accounting treatments, rather than risk losing Sunbeam's audit business to Dunlap's accountant of choice, Coopers & Lybrand.

5. Ironically, the financial results certified by Andersen for 1996 and 1997 drove the price of Sunbeam stock so high that new management could not locate a willing buyer for a quick sale of the company, as had been hoped. As a result, Sunbeam was forced to shift gears and pursue acquisitions of other companies, including Coleman Company, in the hope that those mergers would obscure Sunbeam's true financial position and forestall revelation of the accounting gimmickry. To effectuate that plan, the very same Andersen partners and employees who were functioning as Sunbeam's "independent" auditors (including Harlow) added another role and joined Sunbeam's due diligence team for the acquisitions.

6. Because of Andersen's dual roles as auditor and acquisitions consultant, it knew full well not only that the purchase of Coleman Company was taking place, but also that Coleman-Parent was relying on the financial statements certified by Andersen. Nonetheless, Andersen took no steps before the Coleman Company acquisition closed to correct the grossly misleading impression created by its certifications.

7. At the time of the sale to Sunbeam, Coleman Company was a leading manufacturer and marketer of consumer products for the worldwide outdoor recreation market, with annual revenues in excess of \$1 billion. As payment for its stake in Coleman Company, Coleman-Parent was to receive 14,099,749 shares of Sunbeam stock, \$160 million in cash, and

other consideration. Based on Sunbeam's share price at the time of the closing, Coleman-Parent received Sunbeam shares that had an aggregate market value of over \$619.5 million.

8. Within weeks of the closing of the Coleman Company acquisition on March 30, 1998, the deception facilitated by Andersen began to unravel. On April 3, 1998, just four days after the closing, Sunbeam's management issued a press release announcing that, despite having predicted positive quarterly results in another press release just two weeks earlier, Sunbeam now would show a loss for the first quarter of 1998. On May 11, 1998, Sunbeam issued an earnings release for the first quarter of 1998 reporting a loss of 52 cents per share, compared with a gain of 8 cents per share in the same quarter of 1997. Press coverage ensued in the following month questioning whether Sunbeam had utilized – and Andersen had approved – manipulative and improper accounting practices in order to create the ruse of a turnaround.

9. In June 1998, the Sunbeam board of directors began an inquiry into Sunbeam's accounting practices. On June 15, 1998, the board announced that it had removed Dunlap as Chairman and CEO of Sunbeam. On June 25, 1998, Andersen withheld its consent for use of its unqualified 1997 audit opinion in a registration statement that was to have been filed with the Securities and Exchange Commission ("SEC"). On June 30, 1998, Sunbeam acknowledged that it had undertaken a review of its financial statements and the review could result in a restatement of the financial statements. On October 20, 1998, Sunbeam and Andersen announced a restatement of the financial statements. Thereafter, Andersen issued a new unqualified audit opinion for Sunbeam reporting only \$93 million in operating earnings for 1997. That amount was approximately half of the figure that Andersen previously certified.

10. In February 2001, Sunbeam filed a voluntary bankruptcy petition under Chapter 11 of the Bankruptcy Code. Coleman-Parent's equity stake in Sunbeam is now worthless.

11. In order to retain the Sunbeam account and lucrative auditing and consulting fees, Andersen turned its back on its professional and legal obligations and certified Sunbeam financial statements that it knew to be false and misleading. It did so with full knowledge that Coleman-Parent would be harmed immensely by Andersen's misstatements and omissions. As a direct and foreseeable result of Andersen's actions, Coleman-Parent has sustained damages in excess of \$600,000,000.

12. By this complaint, Coleman-Parent seeks recovery of over \$600 million in compensatory damages. In addition, Coleman-Parent reserves the right to seek leave to amend its complaint pursuant to Fla. Stat. § 768.72 to assert claims for an additional recovery of punitive damages in excess of \$1.2 billion as allowed by law.

JURISDICTION AND VENUE

13. This Court has jurisdiction over the subject matter of this action pursuant to Fla. Stat. § 26.012(2)(a). This Court has jurisdiction over Andersen and Harlow pursuant to Fla. Stat. §§ 48.193(1)(a) and (f), (2), and (5).

14. Venue is proper in this district pursuant to Fla. Stat. §§ 47.011 and 47.021 because Andersen maintains an office with more than 30 employees in West Palm Beach, Florida, and therefore resides in Palm Beach County. In addition, Harlow is a resident of South Florida.

PARTIES

15. Coleman-Parent is a corporation incorporated in the state of Delaware with its principal business offices located in New York. Coleman-Parent is a wholly owned subsidiary of Mafco Holdings Inc. ("MAFCO"). Prior to March 30, 1998, Coleman-Parent owned approximately 81% of Coleman Company.

16. Andersen is a limited liability partnership formed under the laws of the State of Illinois. As the world's largest accounting firm, Andersen employs over 77,000 professionals in fields such as accounting, taxation, business consulting, corporate finance, risk management, and business fraud investigation. Andersen has partners who are residents of Florida and numerous other states. Andersen's global revenues for the fiscal year ending August 31, 2000 totaled more than \$8 billion.

17. Harlow has been a partner at Andersen since 1983. He served as the engagement partner on the Andersen audits of Sunbeam's financial statements from 1993 to 1998. Harlow also participated as a member of Sunbeam's due diligence team for Sunbeam's acquisition of Coleman Company.

SUBSTANTIVE ALLEGATIONS

A. Sunbeam's New Management Team (1996-1998).

18. In the years leading up to 1996, Sunbeam had experienced increasing financial difficulties and growing losses. In an effort to remedy the situation, Sunbeam's board of directors undertook a change in Sunbeam's management in July 1996. The management team the board brought in was headed by Albert Dunlap, a person who had earned a reputation as a turnaround specialist through brief terms as Chief Executive Officer of a number of publicly

traded corporations. Based on his penchant for rapidly slashing personnel and closing plants to achieve quick turnaround results, Dunlap is widely known as "Chainsaw Al."

B. Dunlap Arrives at Sunbeam and Initiates Restructuring.

19. Sunbeam hired Dunlap on July 18, 1996 and installed him as its Chairman and Chief Executive Officer. Immediately after joining Sunbeam, Dunlap hired Russell A. Kersh as Sunbeam's principal financial officer. Kersh had been associated with Dunlap for over 15 years, and had served as a senior executive during various Dunlap turnaround engagements. Dunlap also brought in other hand-picked executives to make up his senior management team. He hired Donald R. Uzzi as Vice President, Marketing and Product Development. Uzzi later became Executive Vice President, Consumer Products Worldwide. Dunlap also hired Lee B. Griffith as Vice President, Sales. Dunlap retained Robert J. Gluck, formerly Controller of Sunbeam, as Sunbeam's Principal Accounting Officer.

20. Dunlap and the senior members of his management team entered into lucrative employment agreements that gave them a strong financial incentive to cause Sunbeam's stock price to increase and then to sell the company quickly. All stood to make many millions of dollars if that happened. Andersen was fully aware of those agreements and the fact that a disproportionate share of those executives' potential earnings was dependent on stock options or restricted shares of stock.

21. In addition to the personal financial incentives deriving from his employment contract, Dunlap also had his reputation as a turnaround specialist to protect and advance. Dunlap used his reputation as a specialist in turning around troubled companies to make aggressive promises about Sunbeam's future performance and support false and misleading

announcements of record performance – results that were rendered credible because Andersen had certified Sunbeam's financial statements.

C. Andersen Is Recruited to Help Create the Illusion of a Successful Restructuring.

22. To lay the foundation for the appearance of a successful turnaround in 1997, Sunbeam's new senior management team decided to take improper expenses and record unjustified accounting writeoffs in 1996, thus lowering the benchmark for measuring their ultimate "success" in turning Sunbeam around.

23. Dunlap and his team needed the help of Sunbeam's auditors in approving the improper accounting tactics or the scheme would have had no chance of success. Andersen's Phillip Harlow was such a willing participant. Harlow knew of Dunlap's reputation as a fast-moving turnaround specialist who was quick to fire anyone who did not advance his agenda. Harlow also knew that in other highly publicized turnaround engagements, Dunlap had employed Coopers & Lybrand, one of Andersen's major competitors, as a financial consultant and independent auditor. Consistent with past practice, one of the first things Dunlap did after joining Sunbeam was to hire Coopers & Lybrand as a financial advisor with the lucrative assignment of planning Sunbeam's massive restructuring, which led to the firing of nearly half of Sunbeam's 12,000 employees. Andersen – and especially Harlow – were keenly aware that this did not bode well for the future of Andersen's relationship with Sunbeam.

24. Sunbeam had been a major client of Andersen's for many years and Sunbeam had paid Andersen over \$1 million in fees for its 1995 audit alone. Harlow had been the Sunbeam engagement partner since 1993. When Dunlap took control of Sunbeam and hired Coopers & Lybrand for the restructuring, Harlow became concerned that Dunlap would fire Andersen as the company's independent auditor and hire Coopers & Lybrand instead. Indeed,

Harlow was so concerned about the possible loss of Sunbeam as a client that he agreed to a 30% reduction in Andersen's fee for 1996. A reduction in audit fees was simply one price Andersen had to pay in order to keep Sunbeam as a client.

D. Andersen's Early Assistance in the Scheme.

25. When Harlow began work on the audit of Sunbeam's 1996 financial statements, Harlow and Andersen learned the true price of keeping Sunbeam as an audit client. In addition to reducing its audit fees, Andersen was required to accept the improper and misleading accounting treatments used by Sunbeam's senior management to create the illusion of a successful turnaround. In the end, Andersen's desire to retain a valuable client overrode any sense of duty or professionalism. To keep Sunbeam as an Andersen client, Harlow and Andersen ignored numerous accounting improprieties Andersen knew had been employed. Even when Harlow expressly identified certain of management's accounting treatments as improper, he ultimately acquiesced in management's refusal to correct the improprieties, and Andersen issued unqualified or "clean" audit opinions. Andersen did so despite the harm it knew would be inflicted on all who relied upon Andersen's audit opinions.

1. Improper Accounting Practices In 1996.

26. As set forth below, Andersen and Harlow permitted management to employ numerous accounting practices in 1996 that did not comply with GAAP.

27. One of the accounting practices permitted by Andersen and Harlow was the creation of a massive \$338 million non-GAAP reserve for restructuring charges. Although certain types of restructuring reserves may be proper, the reserves created by management included improper reserves and accruals, excessive write-downs, and prematurely recognized expenses that were not proper restructuring reserves under GAAP. Those intentionally inflated

reserves served two purposes. First, because the reserves were charged as an expense against income, they allowed Sunbeam to overstate its 1996 loss, and lower the benchmark for measuring the eventual success of Sunbeam's turnaround. Second, the inflated restructuring reserves created a "cookie-jar" of overstated liabilities on Sunbeam's books that Dunlap could reduce in the years after 1996, purportedly to correct the overstatements, and at the same time increase income in the year of the corrections. Those adjustments, too, fostered the illusion of a successful turnaround.

28. One of the largest components of the Sunbeam "cookie-jar" reserves permitted by Andersen and Harlow was millions of dollars in items that benefitted future activities, and hence were not properly part of the restructuring reserve. Those items included costs of redesigning product packaging, costs of relocating employees and equipment, bonuses to be paid to employees who were told that they were being laid off but were asked to stay temporarily, advertising expenses, and certain consulting fees. Note 2 to the audited 1996 financial statements falsely described the restructuring charges as follows:

In conjunction with the implementation of the restructuring and growth plan, the Company recorded a pre-tax special charge to earnings of approximately \$337.6 million in the fourth quarter of 1996. This amount is allocated as follows in the accompanying Consolidated Statement of Operations: \$154.9 million to Restructuring, Impairment and Other Costs as further described below; \$92.3 million to Cost of Goods Sold related principally to inventory write-downs from the reduction in SKU's and costs of inventory liquidation programs; \$42.5 million to Selling, General and Administrative expenses principally for increases in environmental and litigation reserves (see Notes 12 and 13) and other reserve categories; and the estimated pre-tax loss on the divestiture of the Company's furniture business of approximately \$47.9 million.

As Sunbeam's eventual restatement of its financial statements showed, those reserves were materially inflated and were not recorded in accordance with GAAP.

29. In connection with the audit of Sunbeam's 1996 year-end financial statements, Harlow discovered that certain components of Sunbeam's restructuring reserves were not being recorded in compliance with GAAP and proposed that the company reverse several of the accounting entries establishing those reserves. As Harlow told Kersh and Gluck, under GAAP, entries that benefitted Sunbeam's future results were not considered to be proper restructuring charges in 1996. But Kersh and Gluck refused to reverse those items. Instead of standing firm, as professional ethics required, Harlow turned a blind eye to his duties as an independent auditor and caused Andersen to acquiesce in management's refusal to reverse those non-GAAP reserves. Those improper reserves caused Sunbeam's 1996 audited financial statements to be materially false and misleading.

30. In connection with the 1996 audited financial statements, Andersen and Harlow also permitted management to create an excessive \$12 million reserve for a lawsuit alleging that Sunbeam was liable for a portion of the cleanup costs for a hazardous waste site. In fact, that reserve overstated Sunbeam's estimated liability by at least 100%, and provided Sunbeam with an inflated reserve that could be drawn down to boost income figures artificially in later periods.

31. Andersen and Harlow also permitted Sunbeam to write down its household products inventory in 1996. In connection with the restructuring, Dunlap's management team planned to eliminate half of Sunbeam's product lines and to liquidate Sunbeam's inventory of eliminated product lines at a substantial discount. Notwithstanding that the change affected only half of Sunbeam's product lines, Andersen and Harlow permitted management to reduce the cost basis for Sunbeam's entire inventory of household products at 1996 year end, without distinction between eliminated and continuing product lines (including

inventories that were later sold in the ordinary course of business). As a result, the balance sheet value of Sunbeam's inventory at year-end 1996 was understated by approximately \$2 million, and Sunbeam overstated its 1996 loss by the same amount. Andersen and Harlow negligently or fraudulently disregarded facts indicating that (a) Sunbeam had understated the carrying value of its household products inventory, (b) the understatement had contributed to the material misstatement of Sunbeam's financial statements at year-end 1996, and (c) the understatement would improperly increase Sunbeam's income during 1997 when household products were sold at artificially inflated margins.

32. Andersen and Harlow also permitted management improperly to recognize \$2.3 million in 1997 advertising expenses and related costs as a 1996 expense. Andersen and Harlow negligently or fraudulently disregarded facts indicating that the accounting treatment would contribute to the material overstatement of Sunbeam's 1996 year-end loss and exaggerate Sunbeam's so-called turnaround by the same amount in 1997.

33. Finally, Andersen and Harlow permitted Sunbeam to manipulate its 1996 liabilities for cooperative advertising. In addition to buying national advertising to create demand for its products, Sunbeam funded a portion of its retailers' costs of running local promotions. As required by GAAP, Sunbeam accrued its estimated liabilities for such "cooperative advertising," and then charged its expenses in relation to its sales revenue during the year. At year-end 1996, Sunbeam set its cooperative advertising accrual at \$21.8 million, an amount that was approximately 25% higher than the prior year's accrual amount, without any basis for the increase. Harlow learned of the inflated accrual for cooperative advertising in connection with Andersen's audit of Sunbeam's year-end 1996 financial statements and discussed it with Kersh and Gluck. Nevertheless, Andersen and Harlow negligently or

fraudulently disregarded facts concerning the lack of a proper basis for the accrual and the likelihood that the excess accrual would be released into income in early 1997. In fact, \$5.8 million of that excessive accrual was used (without disclosure) to inflate Sunbeam's 1997 income.

2. Andersen's 1996 Unqualified Audit Opinion.

34. In March 1997, Andersen issued an unqualified audit opinion regarding Sunbeam's 1996 financial statements and authorized the inclusion of its audit opinion in Sunbeam's 1996 Form 10-K filed with the SEC. Andersen's opinion stated:

We conducted our audits in accordance with generally accepted auditing standards. Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement. An audit includes examining, on a test basis, evidence supporting the amounts and disclosures in the financial statements. An audit also includes assessing the accounting principles used and significant estimates made by management, as well as evaluating the overall financial statement presentation. We believe that our audits provide a reasonable basis for our opinion.

In our opinion, the financial statements . . . present fairly, in all material respects, the financial position of Sunbeam Corporation and subsidiaries as of December 31, 1995 and December 29, 1996, and the results of their operations and their cash flows for each of the three fiscal years in the period ended December 29, 1996 in conformity with generally accepted accounting principles.

35. Andersen's unqualified audit opinion was false in two material respects.

First, the financial statements Andersen audited did not "fairly" present Sunbeam's financial position in conformity with GAAP, as it represented. Second, Andersen did not, as it claimed, conduct its audit in accordance with GAAS.

36. In all, the 1996 financial statements audited by Andersen were materially false and misleading, and overstated Sunbeam's loss for 1996. Andersen and Harlow negligently

or fraudulently disregarded facts indicating that (a) Andersen's unqualified audit opinion was incorrect, (b) Sunbeam's financial statements were materially false and misleading and not in conformity with GAAP, and (c) Andersen had failed to perform an audit in accordance with GAAS.

E. Andersen Assists Sunbeam as a Financial Adviser in Sunbeam's Purchase of Coleman Company.

37. During 1997, Sunbeam's senior management continued to use improper accounting to create the illusion that a successful turnaround was underway at Sunbeam. By maintaining that illusion, Dunlap's management team hoped to position Sunbeam for a quick sale. However, the illusion proved too convincing to the market, and the price of Sunbeam stock was driven so high that no willing buyer could be found. Management was aware that, absent a sale, it would be unable to sustain the appearance of a successful turnaround. Therefore, in late 1997, Sunbeam sought to acquire other businesses, in order to consolidate their results with Sunbeam's and thereby continue to obscure Sunbeam's past accounting improprieties. Once again, Sunbeam management required Andersen's assistance in perpetuating the deception.

38. In early December 1997, officers and directors of Sunbeam met with various officers of Coleman Company regarding a potential combination with Sunbeam. After that initial overture was rejected by Coleman-Parent, Dunlap's representative returned with another proposal in January 1998. At that point, Coleman-Parent indicated it was willing to discuss a potential transaction.

39. On January 28, 1998, Sunbeam announced its financial results for 1997, reporting total revenues of \$1.168 billion, and total earnings from continuing operations of \$189 million (or \$1.41 per share). Sunbeam's announcement coincided with Andersen's completion of the field work for its audit of Sunbeam's 1997 financial statements.

40. On February 3, 1998, Harlow met with key officers of Sunbeam to discuss the acquisition of Coleman Company and its financial impact on Sunbeam. By that time, Harlow knew that Sunbeam had utilized improper accounting to achieve its 1997 results. Harlow also knew Coleman-Parent would insist on reviewing Andersen's 1997 audit opinion before agreeing to consummate any transaction in which the consideration included hundreds of millions of dollars in Sunbeam stock.

41. On February 20, 1998, Andersen agreed to act as a Sunbeam financial advisor and perform financial due diligence in connection with Sunbeam's acquisition of Coleman Company and two other companies, First Alert, Inc. and Signature Brands USA, Inc. In agreeing to undertake that assignment, Andersen became an active member of the team working to assist Sunbeam in acquiring Coleman Company.

42. During the latter weeks of February 1998, representatives of Sunbeam and Coleman-Parent met to negotiate the details of a potential acquisition of Coleman Company and to prepare a proposed structure for that transaction.

43. Between February 23 and 25, 1998, representatives of Andersen, including Harlow, conducted due diligence concerning Coleman Company and the other target companies on behalf of Sunbeam. During that period, Andersen representatives participated in various meetings with officers and consultants of Coleman Company. At no point, however, did Andersen's representatives suggest that Sunbeam's financial statements were materially false and misleading. Meanwhile, Sunbeam worked on negotiating the terms of its acquisition of Coleman Company.

44. On February 27, 1998, Harlow met with Sunbeam executives in New York to discuss Andersen's due diligence. That afternoon, Sunbeam and Coleman-Parent reached an agreement for the sale of Coleman Company.

45. As part of the Coleman Company acquisition agreement, Sunbeam represented and warranted that all of its filings with the SEC, which included the 1996 financial statements audited by Andersen, were accurate and not misleading, and that they would continue to be accurate and not misleading as of the transaction's closing date, which was expected to be several weeks later. Sunbeam also represented that its audited financial statements were prepared in accordance with GAAP, and that at the time of the closing of the transaction, its representation would continue to be true and correct. Andersen was fully aware of those representations and warranties when the merger agreement was executed on February 27, 1998.

46. As a result of Andersen's involvement in the Coleman Company acquisition transaction, it knew that Coleman-Parent would rely on Sunbeam's audited financial statements (1) in deciding to close the transaction, and (2) in accepting 14.1 million shares of Sunbeam stock and other consideration in return for its stake in Coleman Company. Moreover, as an independent certified public accountant, Andersen had a duty to disclose to Coleman-Parent that Sunbeam's audited financial statements in fact were neither accurate nor reliable. Notwithstanding that Andersen had met with representatives of Coleman-Parent and its auditors during its due diligence review, Andersen remained mute regarding the true financial condition of Sunbeam and the improprieties buried in Sunbeam's audited financial statements.

F. Andersen Issues its 1997 Audit Report.

47. In the first week of March 1998, shortly after the agreement for Sunbeam's purchase of Coleman Company was signed, but before the transaction closed, Andersen updated its audit work to reflect Sunbeam's acquisitions. That work was done by the same individuals who also were working as consultants on the Sunbeam acquisitions. The three acquisitions were specifically described in Note 14 to the audited financial statements. The description included the fact that Sunbeam was paying for the Coleman Company shares with Sunbeam common stock as well as cash and assumption of debt. Andersen then rendered an unqualified audit opinion for Sunbeam's 1997 financial statements. With Andersen's express consent, management included that opinion in Sunbeam's 1997 Form 10-K filed with the SEC.

1. Andersen's 1997 Unqualified Audit Report.

48. In its opinion concerning Sunbeam's 1997 financial statements, Andersen stated:

We conducted our audits in accordance with generally accepted auditing standards. Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement. An audit includes examining, on a test basis, evidence supporting the amounts and disclosures in the financial statements. An audit also includes assessing the accounting principles used and significant estimates made by management, as well as evaluating the overall financial statement presentation. We believe that our audits provide a reasonable basis for our opinion.

In our opinion, the financial statements . . . present fairly, in all material respects, the financial position of Sunbeam Corporation and subsidiaries as of December 29, 1996 and December 28, 1997, and the results of its operations and its cash flows for each of the three fiscal years in the period ended December 28, 1997 in conformity with generally accepted accounting principles.

49. Andersen's 1997 audit opinion was false in two material respects. First, the financial statements Andersen audited did not "fairly" present Sunbeam's financial position in conformity with GAAP, as it represented. Second, Andersen did not, as it claimed, conduct its audit in accordance with GAAS.

50. In all, the 1997 financial statements audited by Andersen were materially false and misleading in that they overstated Sunbeam's operating income for the year by 50%. Andersen and Harlow negligently or fraudulently disregarded facts indicating that (a) Andersen's unqualified audit opinion was incorrect, (b) Sunbeam's financial statements were materially false and misleading and not in conformity with GAAP, and (c) Andersen had failed to perform an audit in accordance with GAAS.

2. Improper Accounting Practices In 1997.

51. One of the most flagrant accounting abuses Andersen and Harlow permitted in 1997 was to allow Sunbeam to record a profit on a sham sale of its warranty and spare parts business to its spare parts provider, EPI Printers, Inc. Prior to 1997, EPI satisfied spare parts and warranty requests of Sunbeam customers on a fee basis. To raise additional revenue at year end 1997, however, Sunbeam entered into a sham sale of the warranty and spare parts inventories already in EPI's warehouse. As a result of the transaction, management fraudulently recognized sales revenue of \$11 million and \$5 million in income in 1997.

52. The problem with the EPI transaction was that the transaction was not a sale at all, for at least three reasons. First, there was never a final agreement between Sunbeam and EPI. The closest the parties ever came to a meeting of the minds was the execution of a mere "agreement to agree." Second, by its terms, the proposed sale was to terminate on January 23, 1998, with no payment obligation on the part of EPI, absent a subsequent agreement between

Sunbeam and EPI on the value of the inventory. In other words, the sale could be completely unwound just after year-end without EPI ever having paid a cent. Third, Sunbeam had agreed as part of the proposed sale to pay certain fees to EPI and to guarantee a 5% profit to EPI on the eventual resale of the inventory. In essence, even after the proposed sale, EPI remained a contractor compensated by Sunbeam on a fee basis for its services. In sum, the relationship between EPI and Sunbeam was not fundamentally altered by the purported "sale."

53. Harlow became aware of the true nature of the EPI transaction and raised it with management as part of Andersen's 1997 year-end audit. Harlow proposed that Sunbeam reverse the accounting entries reflecting the revenue recognition for that transaction, having concluded that the profit guarantee and the indeterminate value of the contract rendered revenue recognition inconsistent with GAAP. Simply stated, there was no revenue to recognize because the transaction was illusory. Kersh and Gluck refused to reverse the transaction, but agreed to take a \$3 million reserve against the transaction, lessening but not eliminating the fraudulent gain. Instead of refusing to lend Andersen's name to management's fraudulent revenue recognition, Harlow again acquiesced in management's actions. As a result, Sunbeam's 1997 audited financial statements reflect approximately \$5 million of phony profit on the sham EPI transaction.

54. The EPI transaction raised a clear red flag that should have – and must have – alerted Andersen to the need for greater scrutiny regarding all of Sunbeam's revenue recognition decisions. At a minimum, Andersen should have been on guard as to all items Harlow previously identified as proposed audit adjustments (but which Harlow eventually acquiesced in), and any previously recognized improper items that were ultimately dismissed as "immaterial."

55. Another 1997 revenue inflation scheme permitted by Andersen and Harlow was Sunbeam's use of improper "bill-and-hold" transactions. A bill-and-hold transaction is a transaction in which the seller bills a customer for a purchase while holding the merchandise for later delivery. During 1997, Dunlap's management team offered financial incentives to various customers to make purchases earlier than they would otherwise have done so. Management then proposed that Sunbeam hold the merchandise until the normal time for delivery.

56. Under certain limited circumstances, bill-and-hold transactions may be permitted for revenue recognition purposes. However, bill-and-hold transactions must meet specific stringent accounting criteria satisfying GAAP. The relevant criteria include, among others: a requirement that the buyer, not the seller, requested a sale on a bill-and-hold basis; that the buyer had a substantial business purpose for ordering the goods on a bill-and-hold basis; and that risks and rewards of ownership passed to the buyer at the time of the bill-and-hold sale.

57. Bill-and-hold transactions improperly added in excess of \$29 million to Sunbeam's 1997 sales and \$4.5 million to income. In the course of the audit of Sunbeam's 1997 financial statements, Andersen and Harlow discovered that the purported bill-and-hold customers had not requested the bill-and-hold treatment, and that in numerous cases involving rights of return "the risks of ownership and legal title" were not actually "passed to the customer." Nevertheless, Andersen negligently or fraudulently disregarded facts indicating that bill-and-hold transactions did not satisfy the required revenue recognition criteria. Ultimately, Andersen acquiesced in Sunbeam's decisions to recognize revenue for all of those non-GAAP sales in 1997, and to misdescribe the company's bill-and-hold practices in the financial statements as customer-driven legitimate sales.

58. Another income inflation tactic Sunbeam management used in 1997 was to decrease the inflated 1996 reserves to create the illusion of 1997 income. By decreasing the reserves in 1997, management increased Sunbeam's 1997 income by almost \$5 million. In connection with Andersen's year-end audit of Sunbeam's financial statements, Harlow discovered that tactic and concluded that it was improper. Harlow proposed reversing management's misuse of the reserves, but management refused to do so. Rather than insisting that the adjustments be made, Andersen gave Sunbeam a pass, and permitted the entries. In doing so, Andersen and Harlow negligently or fraudulently disregarded facts indicating that the improper accounting materially distorted Sunbeam's reported results of operations for 1997.

59. Another of Sunbeam's 1997 accounting gimmicks was to record income from non-recurring events as ordinary income. In connection with Andersen's work on the 1997 audit, Harlow learned that management had arranged for the sale of deeply discounted and obsolete inventory during 1997, creating \$19 million in non-recurring revenue. Although the recognition of that revenue was permitted under GAAP, Sunbeam was required to disclose in its financial statements that the income from the sale was a non-recurring event. Sunbeam failed to do so. Notwithstanding that material omission, Andersen certified Sunbeam's 1997 financial statements.

60. Finally, during Andersen's 1997 audit, Harlow proposed adjustments to reverse \$2.9 million related to a Sunbeam inventory overvaluation and \$563,000 in additional items. Management again refused to make appropriate adjustments, and Andersen and Harlow acquiesced in the refusal to reverse those errors. In doing so, Andersen and Harlow negligently or fraudulently disregarded facts indicating that those items contributed to the misstatement of Sunbeam's 1997 reported results of operations.

61. In the end, Andersen's 1997 audit opinion certified financial statements that reported Sunbeam's income to be \$186 million, much of which was improper under GAAP. The overstatements included in all over \$90 million of improper revenue including, without limitation, approximately \$5 million from the sham sale to EPI, approximately \$4.5 million from non-GAAP bill-and-hold sales, approximately \$35 million in income derived from the use of non-GAAP reserves and accruals taken at year-end 1996, and approximately \$6 million from improper revenue recognition.

62. As Andersen and Harlow knew, Coleman-Parent relied on Sunbeam's report of \$186 million in income in deciding to close the sale of its interest in Coleman Company. If Andersen had not issued a materially false and misleading audit report, and instead had complied with GAAP and GAAS, Sunbeam's 1997 operating income would have been approximately half of what Andersen certified in the financial statements.

G. Coleman-Parent Relies on Andersen's Unqualified Audit Opinions and Closes the Sale to Sunbeam.

63. The merger agreement signed by Coleman-Parent on February 27, 1998 provided that a condition precedent to Coleman-Parent's obligation to close the transaction was the absence of any event, change, or development that would have a material adverse effect on the business, results of operation, or financial condition of Sunbeam. The closing also was conditioned on the absence of any material misrepresentation or omissions in Sunbeam's SEC filings, including Andersen's 1996 and 1997 audit reports in the Form 10-Ks. If Andersen had not been negligent or fraudulent in performing its audits, and had issued qualified or adverse reports exposing the falsity of Sunbeam's financial statements, Coleman-Parent would have been put on notice of an adverse material change affecting Sunbeam before closing, and of a material misstatement in Sunbeam's SEC filings. Coleman-Parent's obligation to close the transaction

with Sunbeam would have been discharged by the failure of a condition precedent, and Coleman-Parent never would have suffered losses in excess of \$600 million. Coleman-Parent directly relied on Andersen's 1996 and 1997 audit reports when it decided to close the transaction with Sunbeam and to accept 14.1 million shares of Sunbeam stock as consideration for selling its interest in Coleman Company.

64. Andersen was fully aware of the terms and conditions of the Coleman Company transaction and of Coleman-Parent's anticipated and actual reliance upon Andersen's unqualified 1996 and 1997 audit opinions.

65. On March 30, 1998, unaware of the falsity of Sunbeam's financial statements and Andersen's audit reports, Coleman-Parent closed the transaction with Sunbeam and accepted 14.1 million shares of what turned out to be essentially worthless Sunbeam common stock for the sale of its interest in Coleman Company.

H. Andersen's Improper Accounting and Misrepresentations Are Revealed, Causing the Market Value of Sunbeam's Stock to Plummet.

66. Almost immediately after the consummation of Coleman-Parent's sale of Coleman Company to Sunbeam, Sunbeam's facade of financial health began to crumble.

67. In an April 3, 1998 conference call with securities analysts, Sunbeam revealed that sales for the first quarter of 1998 were 5% below reported sales for the same period of the prior year. Only two weeks earlier, on March 19, 1998, Sunbeam had issued a press release in which it announced that sales for the first quarter of 1998 were "expected to exceed" sales for the same period of the prior year.

68. On June 6, 1998, an article was published in Barron's that raised serious questions regarding Sunbeam's apparent success under Dunlap, and suggested it was the result of

"accounting gimmickry." On June 15, 1998, Sunbeam's Board announced that it had removed Dunlap as Chairman and CEO.

69. On June 25, 1998, Andersen withheld its consent for use of its 1997 audit opinion in a registration statement that was to have been filed with the SEC.

70. On June 30, 1998, Sunbeam announced that the Audit Committee of its Board of Directors would conduct an inquiry into the accuracy of its 1997 financial statements. The Audit Committee subsequently retained Deloitte & Touche LLP to assist in the review, in addition to Arthur Andersen. Sunbeam stated that "pending the completion of its review, its 1997 financial statements and the report of Arthur Andersen LLP should not be relied upon." Sunbeam added that the review "could result in a restatement of the 1997 financial statements and the first quarter 1998 Form 10-Q."

71. On August 6, 1998, Sunbeam announced that its Audit Committee had determined that Sunbeam would be required to restate its audited financial statements for 1997 and possibly for 1996, as well as its unaudited financial statements for the first quarter of 1998.

72. On November 12, 1998, Sunbeam released its restated 1996 and 1997 financial results, again audited by Andersen. The restated 1996 financial statements reported operating losses for 1996 that were approximately \$40 million less than originally reported, losses from continuing operations that were approximately \$26 million less than previously reported, and net losses that were approximately \$20 million less than previously reported.

73. The restated 1997 financial statements reported operating earnings for 1997 that were approximately \$95 million less than originally reported, earnings from continuing operations that were approximately \$70 million less than previously reported, and net earnings

that were approximately \$70 million less than previously reported. The new operating income figure for 1997 was approximately 50% less than the amount Andersen previously certified.

74. In the wake of Dunlap's firing, Sunbeam's board of directors asked members of Coleman-Parent's management to assume key positions within Sunbeam in order to carry out damage control and attempt to salvage the value remaining in the company. New management was unable to overcome the devastating effects of the manipulation and distortion of Sunbeam's business.

75. On February 5, 2001, Sunbeam filed a voluntary petition for Chapter 11.

76. As a result of having been fraudulently induced into exchanging its ownership of Coleman Company for over 14 million shares of Sunbeam stock, Coleman-Parent has suffered direct damages in excess of \$600,000,000.

VIOLATIONS OF GAAP AND GAAS IN ANDERSEN'S 1996 AND 1997 AUDITS

77. The objectives of financial reporting are to provide information that is useful in investment and credit decisions, information that is useful in assessing cash flow prospects, and information about enterprise resources, claims to those resources, and changes in them. (See "Objectives of Financial Reporting by Business Enterprises," Statement of Financial Accounting Concepts No. 1 (Financial Accounting Standards Board, November 1978).) In order to minimize misinterpretation of financial statements, the accounting profession has developed sets of standards regarding financial reporting and auditing practice that are generally accepted and universally practiced. Those standards are known as GAAP and GAAS. The development of common standards for auditing and financial reporting has provided businesspeople and investors with a valuable frame of reference in evaluating the financial condition of enterprises.

78. Auditors know they must adhere to GAAP and GAAS, or the standards would cease to have any meaning. Consistent with the objectives of the profession in developing those standards, the public has come to understand the importance of GAAP and GAAS in enhancing the reliability of audited financial statements. As a result, when an auditing firm represents that it has conducted an audit of a company in accordance with GAAS, and opines that such company's financial statements present the company's financial condition fairly in conformity with GAAP, readers of those financial statements have the right to rely on the integrity of those financial statements.

79. In auditing Sunbeam in 1996 and 1997, and in issuing unqualified opinions regarding Sunbeam's 1996 and 1997 financial statements, Andersen and Harlow did not adhere to the standards of the profession. Although Andersen's audit opinions stated that the firm had conducted its audits of Sunbeam in accordance with GAAS, and based on those audits had concluded that Sunbeam's financial statements presented the company's financial condition fairly in conformity with GAAP, that simply was not true.

A. Sunbeam's Audited 1996 and 1997 Financial Statements Were Not In Conformity With GAAP.

80. As alleged below, Sunbeam's audited 1996 and 1997 financial statements failed to conform to GAAP in numerous respects.

81. Sunbeam's 1996 and 1997 financial statements, certified by Andersen, failed to conform to GAAP because those financial statements did not comply with the accounting principle of reliability. That principle requires that the quality of reported information assures that the information is reasonably free from error or bias and faithfully represents what it purports to represent. FASB Statement of Financial Accounting Concepts No. 2, §§ 58-71; APB Statement No. 4, §§ 109, 138, 189.

82. The financial statements also failed to comply with the accounting principle of completeness, which requires that financial information be complete and that it validly represent the underlying event and conditions. FASB Statement of Financial Accounting Concepts No. 2, §§ 79, 80; APB Statement No. 4, § 94.

83. The financial statements also failed to comply with the accounting principle of conservatism, which requires that a conservative approach be taken in the accounting for transactions and the early recognition of unfavorable events. FASB Statement of Financial Accounting Concepts No. 2, §§ 91-97; APB Statements No. 9, §§ 35, 71.

84. The financial statements also failed to comply with the accounting principle of neutrality, which requires that there should be an absence in reported information of bias intended to attain a predetermined result. FASB Statement of Financial Accounting Concepts No. 2, § 98.

85. The financial statements also failed to comply with the accounting principle of relevance, which requires that reported information should have the capacity to make a difference in a decision by helping users to form predictions about the outcomes of past, present and future events. FASB Statement of Financial Accounting Concepts No. 2, §§ 47, 48.

B. Andersen's 1996 and 1997 Audits Were Not Conducted In Accordance With GAAS.

86. As alleged below, Andersen failed in numerous respects to conduct its audits in accordance with GAAS.

87. Andersen and Harlow violated GAAS because they negligently or fraudulently failed to perform the audits with an attitude of professional skepticism as required by Statement on Auditing Standards ("SAS") No. 53, which states: "An audit of financial

statements in accordance with generally accepted accounting standards should be planned and performed with an attitude of professional skepticism.” AU § 316.16. Thus:

a. Andersen and Harlow negligently or fraudulently failed to reach a conclusion that there existed a significant risk of intentional distortion of financial statements by Sunbeam management. Andersen and Harlow should have reached that conclusion because Sunbeam’s management was dominated by a single person, Dunlap; because Dunlap’s attitude toward financial reporting was unduly aggressive; because Dunlap placed undue emphasis on meeting earnings projections; because of the extremely rapid change in Sunbeam’s performance; and/or because Dunlap’s plan to quickly “turn around” and sell Sunbeam incentivized him to distort financial statements. See AU §§ 316.10 and 316.12.

b. Andersen and Harlow also were negligent or fraudulent in failing to recognize that the accounting policies employed by Sunbeam were not acceptable in the circumstances. Thus, “when the auditor has reached a conclusion that there is a significant risk of intentional distortion of financial statements, the auditor should recognize that management’s selection and application of significant accounting policies, particularly those related to revenue recognition, asset valuation, and capitalization versus expensing, may be misused. Increased risk of intentional distortion of the financial statements should cause greater concern about whether accounting principles that are otherwise generally accepted are being used in inappropriate circumstances to create a distortion of earnings.” AU § 316.19.

c. Andersen and Harlow also acted negligently or fraudulently by failing to obtain sufficient competent evidential matter through inspection, observation,

inquiries, and confirmations to afford a reasonable basis for its opinions regarding Sunbeam's financial statements. That failure violated the third standard of field work adopted by the American Institute of Certified Public Accountants ("AICPA") (AU § 150.02). Furthermore, "[w]hen evaluation at the financial statement level indicates significant risk, the auditor requires more or different evidence to support material transactions than would be the case in the absence of such risk. For example, the auditor may perform additional procedures to determine that sales are properly recorded, giving consideration to the possibility that the buyer has a right to return the product. Transactions that are both large and unusual, particularly at year-end, should be selected for testing." AU § 316.20.

88. Andersen and Harlow negligently or fraudulently failed to exercise due professional care in the performance of the 1996 and 1997 audits, in violation of the AICPA's third general auditing standard (AU § 150.02).

89. Andersen and Harlow negligently or fraudulently failed to plan the work adequately to uncover the errors and irregularities in Sunbeam's accounting information, in violation of the AICPA's first standard of field work (AU § 150.02).

90. Andersen and Harlow negligently or fraudulently failed to obtain a sufficient understanding of Sunbeam's internal control structure to plan the audits and to determine the nature, timing, and extent of tests to be performed, in violation of the AICPA's second standard of field work (AU § 150.02). Specifically, Andersen and Harlow fraudulently failed to assess properly the risk of management override of controls in light of Dunlap's plan to quickly "turn around" and sell Sunbeam.

91. Andersen and Harlow negligently or fraudulently relied on management representations rather than applying the auditing procedures necessary to afford a reasonable basis for an opinion on Sunbeam's financial statements, in violation of SAS No. 19 (AU § 333.02).

92. Andersen and Harlow were negligent or fraudulent in not recognizing that misstatements resulting from misapplication of GAAP, departures from fact, and omissions of necessary information, in aggregate, caused Sunbeam's financial statements to be materially misstated, in violation of SAS No. 47 (AU § 312.04).

93. As alleged above, on numerous occasions Andersen and Harlow concluded that certain misstatements caused Sunbeam's financial statements to be materially misstated. Although they requested that Sunbeam management eliminate the misstatements, management refused. Andersen acted negligently or fraudulently in not issuing a qualified or adverse opinion in such instances, in violation of SAS No. 47 (AU § 312.31).

94. Andersen and Harlow were negligent or fraudulent in concluding that the accounting principles applied by Sunbeam were appropriate in the circumstances and that Sunbeam's financial statements were informative of matters that could affect their use, understanding, and interpretation, in violation of SAS No. 69 (AU § 411.04(b) and (c)).

95. Andersen and Harlow were negligent or fraudulent in failing to report that a change in the application of accounting principles in Sunbeam's 1997 financial statements had materially affected their comparability with the financial statements for prior periods, especially 1996, due to a different treatment of sales and reserves in those periods, in violation of SAS Nos. 1 and 43 (AU § 420.02).

96. Andersen's and Harlow's failure to conduct the audits in accordance with GAAS, and Andersen's certification of financial statements that were not in conformity with GAAP, as shown above, caused Coleman-Parent to suffer damages in excess of \$600,000,000.

COUNT I
Fraudulent Misrepresentation

97. Coleman-Parent repeats and realleges each and every allegation above as if set forth fully herein.

98. At the time Andersen issued its unqualified audit opinions for Sunbeam's 1996 and 1997 financial statements, Andersen and Harlow possessed knowledge superior to Coleman-Parent concerning Sunbeam's financial position, the accounting principles Sunbeam used, the results of Sunbeam's operations and cash flows, and whether Sunbeam's financial condition was presented in conformity with GAAP.

99. As described in detail above, Andersen and Harlow made representations of fact that were false in the unqualified audit opinions it issued for Sunbeam's 1996 and 1997 financial statements, including, among other things, (a) that Andersen's audits of Sunbeam were conducted in accordance with GAAS; (b) that Sunbeam's financial statements fairly presented the financial position of Sunbeam during the relevant periods; (c) that Sunbeam's financial statements fairly presented the results of Sunbeam's operations and cash flows during the relevant periods; and (d) that Sunbeam's financial statements were in conformity with GAAP.

100. As described in detail above, Andersen and Harlow knew that those representations were false at the time they were made and/or made those representations with recklessness as to their truth.

101. Andersen consented to the publication of its audit reports to the public and business world by consenting to their inclusion in Sunbeam's SEC filings. Given that

publication, Andersen and Harlow intended that the public – including Coleman-Parent – would rely on Andersen's representations. Moreover, Andersen and Harlow specifically knew the terms of the agreement for Coleman-Parent's sale of Coleman Company to Sunbeam and consented to the publication of Andersen's audit report in Sunbeam's March 6, 1998 Form 10-K filing with the intent that Coleman-Parent rely upon Andersen's representations.

102. In agreeing to sell its interest in Coleman Company for approximately 14.1 million shares of Sunbeam stock plus cash and other consideration, Coleman-Parent reasonably and justifiably relied upon Andersen's representations and omissions as to Andersen's 1996 and 1997 audits.

103. But for Andersen's misrepresentations, Coleman-Parent would not have agreed sell its business to Sunbeam in return for artificially-inflated Sunbeam stock, among other consideration. As a result of Andersen's and Harlow's misconduct, Coleman-Parent has been damaged in excess of \$600,000,000.

COUNT II
Fraudulent Inducement To Contract
(Conspiracy and Concerted Action)

104. Coleman-Parent repeats and realleges each and every allegation above as if set forth fully herein.

105. As described in detail above, Sunbeam's 1996 and 1997 financial statements contained false statements of material fact. Those material misrepresentations included, among other things, (a) overstating Sunbeam's 1996 operating losses by approximately \$40 million; (b) overstating Sunbeam's 1996 losses from continuing operations by approximately \$26 million; (c) overstating Sunbeam's 1996 net losses by approximately \$20 million; (d) overstating Sunbeam's 1997 operating earnings by approximately \$95 million; (e) overstating

Sunbeam's 1997 earnings from continuing operations by over \$70 million; (f) overstating Sunbeam's 1997 net earnings by approximately \$70 million; and (g) overstating Sunbeam's 1997 operating income figure by approximately 50%.

106. As described in detail above, Andersen and Harlow made representations of fact that were false in the unqualified audit opinions it issued for Sunbeam's 1996 and 1997 financial statements, including, among other things, (a) that Andersen's audits of Sunbeam were conducted in accordance with GAAS; (b) that Sunbeam's financial statements fairly presented the financial position of Sunbeam during the relevant periods; (c) that Sunbeam's financial statements fairly presented the results of Sunbeam's operations and cash flows during the relevant periods; and (d) that Sunbeam's financial statements were in conformity with GAAP.

107. As described in detail above, Sunbeam, Andersen, and Harlow knew that those representations were false when made and/or made those representations with reckless disregard as to their truth.

108. In order to induce Coleman-Parent further into entering into and fulfilling a contract to sell its interest in Coleman Company to Sunbeam in exchange for approximately 14.1 million shares of Sunbeam stock, Sunbeam represented that its SEC filings dating back to January 1, 1997 were accurate and not misleading as of February 27, 1998 and would be accurate and not misleading on March 30, 1998. Sunbeam's management, Andersen, and Harlow knew and/or recklessly disregarded that those representations were false when made because Sunbeam's SEC filings contained Sunbeam's false and misleading 1996 and 1997 financial statements and Andersen's false and misleading audit reports.

109. In reasonable and justifiable reliance on Sunbeam's representations that its SEC filings – including its financial statements and Andersen's audit reports – were accurate

with respect to Sunbeam's financial position and operating results, Coleman-Parent agreed to accept 14.1 million shares of Sunbeam stock and other consideration in exchange for its controlling stake in Coleman Company.

110. As a proximate result of its reliance on those misrepresentations, Coleman-Parent gave up its stake in Coleman Company in exchange for shares of Sunbeam which, once the truth of Sunbeam's financial situation was revealed, became worthless. Those misrepresentations proximately caused injury to Coleman-Parent in excess of \$600,000,000.

111. Andersen and Harlow were part of a team with Dunlap, Kersh, and the other senior Sunbeam executives that acted in concert and wrongfully conspired to create the appearance that Sunbeam was performing at a high level to artificially inflate the stock price of Sunbeam and make it attractive for a sale to another company. Andersen and Harlow explicitly or implicitly by acquiescence agreed to become part of that conspiracy and committed overt acts in furtherance of its fraudulent scheme in order to retain Sunbeam as a client and earn significant fees.

112. In furtherance of that conspiracy, Dunlap and the other Sunbeam executives decided to acquire Coleman Company in order to further increase Sunbeam's stock price and maintain the illusion of its good performance. In pursuance of that scheme, Andersen and Harlow committed the overt acts of issuing Andersen's false and misleading March 1998 unqualified audit opinion with respect to Sunbeam's 1997 financial statements and of consenting to its publication to the SEC as part of Sunbeam's Form 10-K filing on March 6, 1998. Andersen and Harlow knew that Andersen's audit opinion would be used by Sunbeam to induce Coleman-Parent into selling its controlling stake in Coleman Company in exchange for shares of artificially-inflated Sunbeam stock. Andersen's audit report also furthered that conspiracy by

actively supporting the illusion of Sunbeam's performance that had been created in the market, which helped support the company's artificially-inflated stock price. In doing so, Andersen and Harlow committed the tortious act of fraudulent inducement in concert with Dunlap and the other Sunbeam executives pursuant to a common design.

113. As described above, Coleman-Parent was damaged as a result of those concerted acts performed as part of that conspiracy.

COUNT III
Negligent Misrepresentation

114. Coleman-Parent repeats and realleges each and every allegation above as if set forth fully herein.

115. Andersen provided the information in its audit reports regarding Sunbeam's 1996 and 1997 financial statements in the course of its business as an accounting firm in the employ of Sunbeam.

116. In issuing its audit report regarding Sunbeam's 1997 and 1996 financial statements and in consenting to that report's inclusion in Sunbeam's March 6, 1998 Form 10-K filing with the SEC, Andersen and Harlow were aware that such information was being provided, in part, for the specific guidance and reliance of Coleman-Parent, which was agreeing to sell Coleman Company to Sunbeam for approximately 14.1 million shares of Sunbeam stock plus cash. In particular, Sunbeam warranted and represented to Coleman-Parent that its SEC filings, and audited financial statements including Andersen's report, were accurate – a fact that Andersen and Harlow were aware of when Andersen issued its report and consented to its publication. Andersen and Harlow expected that Coleman-Parent would rely on Andersen's 1997 audit report. Andersen and Harlow also were aware and expected that Coleman-Parent

specifically was relying on Andersen's previously issued 1996 audit report, which Andersen did not retract until long after the Coleman Company transaction closed.

117. As described in detail above, Andersen's unqualified audit opinions for Sunbeam's 1996 and 1997 financial statements contained material falsehoods, including, among other things, (a) that its audits of Sunbeam were conducted in accordance with GAAS; (b) that Sunbeam's financial statements fairly presented the financial position of Sunbeam during the relevant periods; (c) that Sunbeam's financial statements fairly presented the results of Sunbeam's operations and cash flows during the relevant periods; and (d) that Sunbeam's financial statements were in conformity with GAAP.

118. As described in more detail above, Andersen and Harlow failed to exercise reasonable care or competence in obtaining or communicating the information contained in their audit reports regarding Sunbeam's 1996 and 1997 financial statements.

119. Coleman-Parent reasonably and justifiably relied upon the information contained in Andersen's audit reports, including their material falsehoods regarding Sunbeam's financial condition and operating results and regarding the conformance of Sunbeam's financial statements to GAAP. In reliance on those material falsehoods, Coleman-Parent agreed to sell its interest in Coleman Company for approximately 14.1 million shares of Sunbeam stock, cash, and other consideration.

120. As a result of Andersen's and Harlow's misconduct, Coleman-Parent has been injured in an amount in excess of \$600,000,000.

WHEREFORE, plaintiff Coleman (Parent) Holdings, Inc. demands judgment against Arthur Andersen LLP and Phillip E. Harlow as follows:

- A. Compensatory damages in an amount in excess of \$600,000,000;
- B. An award of costs and expenses incurred in this action, including reasonable attorneys' and experts' fees; and
- C. Any further relief as the Court may deem just and proper in light of all the circumstances of the case.
- D. Coleman-Parent expressly reserves the right to seek leave to amend its complaint pursuant to Fla. Stat. § 768.72 to assert claims for punitive damages in excess of \$1.2 billion as allowed by law.

JURY DEMAND

Plaintiff demands a trial by jury.

Dated: June 8, 2001

COLEMAN (PARENT) HOLDINGS, INC.

By: _____

John Scarola
One of Its Attorneys

John Scarola
SEARCY DENNEY SCAROLA
BARNHART & SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33402-3626
(561) 686-6300

Jerold S. Solovy
Ronald L. Marmer
Joel J. Africk
Matthew M. Neumeier
Avidan J. Stern
JENNER & BLOCK, LLC
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

SIMILARITIES BETWEEN THIS CASE AND TRUMPET VINE INVESTMENTS

	<i>Trumpet Vine Investments</i>	<i>Coleman (Parent) v. MS & Co.</i>
<u>Plaintiff's Headquarters</u>	Florida	New York
<u>Defendant's Headquarters</u>	Netherlands Antilles	New York
<u>Place Of Alleged Injury</u>	Florida	New York
<u>Place Where Alleged Misrepresentations Made</u>	New York	New York
<u>Place Where Alleged Misrepresentations Received</u>	New York	New York
<u>Place Where Alleged Reliance Occurred</u>	New York	New York
<u>HOLDING:</u>	FLORIDA'S CHOICE-OF-LAW RULES REQUIRE APPLICATION OF NEW YORK LAW TO FRAUD-BASED CLAIMS	THIS COURT SHOULD APPLY NEW YORK LAW TO FRAUD-BASED CLAIMS



sysdeliv@fn3a.prod.fedex.com on 06/26/2003 11:45:43 AM

Please respond to FedEx <donotreply@fedex.com>

To: Kimberly Chervenak/Washington DC/Kirkland-Ellis@K&E
cc:

Subject: FedEx shipment 791422214115

Our records indicate that the shipment sent from KIMBERLY CHERVENAK/KIRKLAND & ELLIS to Jerold Solovy/Jenner & Block, LLC has been delivered. The package was delivered on 06/26/2003 at 9:29 AM and signed for or released by E.BRADLEY.

The ship date of the shipment was 06/25/2003.

The tracking number of this shipment was 791422214115.

FedEx appreciates your business. For more information about FedEx services, please visit our web site at <http://www.fedex.com>

To track the status of this shipment online please use the following:
http://www.fedex.com/cgi-bin/tracking?tracknumbers=791422214115&action=track&language=english&cntry_code=us

Disclaimer

FedEx has not validated the authenticity of any email address.

16div-000278



Thomas Clare
06/25/2003 07:32 PM

To: mbrody@jenner.com
cc: Jlanno@CarltonFields.com (bcc: Kimberly Chervenak/Washington DC/Kirkland-Ellis)

Subject: MS & Co. / Coleman Litigation

Mike:

Per the parties' agreement for electronic service of pleadings, I am attaching the following documents:

- (1) MS& Co.'s Motion To Dismiss Or, In The Alternative, For Judgment On The Pleadings
- (2) MS & Co.'s Motion To Stay Discovery
- (3) MS & Co.'s Objections to CPH's First Set of Document Requests

Exhibits for (1) have been sent by Federal Express and will arrive tomorrow.

--- Tom



20030625 MS ObjsCPH1stRFP 20030625 MS MotStayDisc.ç 20030625 MS Mot&MemDismiss



Thomas Clare
06/25/2003 07:32 PM

To: mbrody@jenner.com
cc: Jlanno@CarltonFields.com (bcc: Kimberly Chervenak/Washington DC/Kirkland-Ellis)

Subject: MS & Co. / Coleman Litigation

Mike:

Per the parties' agreement for electronic service of pleadings, I am attaching the following documents:

- (1) MS & Co.'s Motion To Dismiss Or, In The Alternative, For Judgment On The Pleadings
- (2) MS & Co.'s Motion To Stay Discovery
- (3) MS & Co.'s Objections to CPH's First Set of Document Requests

Exhibits for (1) have been sent by Federal Express and will arrive tomorrow.

--- Tom



20030625 MS ObjsCPH1stRFP. 20030625 MS MotStayDisc.p 20030625 MS Mot&MemDismiss.

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CASE NO: 03 CA-005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

COPY / ORIGINAL
RECEIVED FOR FILING

JUN 25 2003

DOROTHY H. WILKEN
CLERK OF CIRCUIT COURT
CIRCUIT CIVIL DIVISION

DEFENDANT'S MOTION TO STAY DISCOVERY

Defendant Morgan Stanley & Co. Incorporated ("MS & Co."), pursuant to Florida Rule of Civil Procedure 1.280(c), moves for a protective order staying all discovery in this action until the Court has had an opportunity to rule on MS & Co.'s Motion to Dismiss Pursuant to Florida Rule of Civil Procedure 1.061 (*forum non conveniens*), and to rule on MS & Co.'s case dispositive Motion For Judgment on the Pleadings. The protective order sought in this motion is designed to protect MS & Co. — and non-party witnesses in this case — from the undue burden and unnecessary expense that would occur from allowing discovery to go forward in a case that is not even properly before this Court.

PROCEDURAL HISTORY

Plaintiff Coleman (Parent) Holdings Inc. ("CPH") filed this action on May 8, 2003, alleging that it was persuaded to sell its stake in the Coleman Company ("Coleman") to the Sunbeam Corporation ("Sunbeam") in reliance on false and misleading representations about Sunbeam's financial health. The only named defendant is MS & Co., who served as a financial advisor to Sunbeam for part of the deal and who played no role in auditing Sunbeam's financial

statements or making representations regarding Sunbeam's financial health. CPH has recently pursued identical claims in this Court against Arthur Anderson — Sunbeam's auditor — and settled those claims for an undisclosed sum.

Immediately after filing its Complaint, Plaintiff served MS & Co. with notice to take depositions of ten individuals over a two week period starting July 10, 2003. (See May 9, 2003 Notice of Taking Videotaped Deps. ("Notice of Deps.") (Ex. A).) Most of these individuals are New York residents; only one is an MS & Co. employee (and he works and lives in London); and only one is under the legal control of MS & Co. Plaintiff also served MS & Co. with a blanket request for production of documents, containing sixty-one separate paragraphs many of which themselves contain two or three separate and independent requests. (See May 9, 2003 Pl.'s 1st Request for Prod. of Docs. ("1st Request") (Ex. B).) These requests have nothing to do with Florida — to the contrary, all or substantially all of the requested documents are located in New York.¹

MS & Co. answered the Complaint on June 23, 2003. The Answer demonstrates that the Complaint fails to state any legally valid claims. The Complaint contains no factual allegation that CPH relied on any representation attributed to MS & Co. and the documents quoted in the Complaint foreclose such reliance as a matter of law. Moreover, MS & Co.'s affiliate lent and

¹ They are also redundant and abusive. See, e.g., *id.* ¶ 2 ("All documents reflecting all fees and expenses paid by Sunbeam to you, including without limitation all billing statements, invoices, time detail records, individual calendars, daily diaries (including electronic calendar programs), or other documents that describe or record the time spent, or expenses incurred (including back-up for any out-of-pocket expenses), by any Morgan Stanley personnel, or that describe or record any aspect of their activities concerning any services performed on behalf of, or concerning Sunbeam."); *id.* ¶ 29 ("All documents concerning the closing of the Subordinated Debenture Offering including without limitation all documents concerning the decision to close the Subordinated Debenture Offering."); *id.* ¶ 30 ("All documents concerning the Subordinated Debenture Offering."); *id.* ¶ 35 ("All documents concerning the Coleman Transaction."); *id.* ¶ 36 ("All documents concerning the Subordinated Debenture Offering."); *id.* ¶ 39 ("All documents concerning Coleman or CPH."); *id.* ¶ 41 ("All documents concerning the events and matters that are the subject of the Complaint filed [in] this action.").

lost hundreds of millions of dollars to Sunbeam in the course of the Coleman transaction. Thus, rather than being complicit in the fraud alleged in the Complaint, the pleadings show that MS & Co. was itself a victim of that fraud.

Simultaneously with this Motion to Stay Discovery, MS & Co. has filed its Motion to Dismiss Pursuant to Florida Rule of Civil Procedure 1.061 Or, In The Alternative, For Judgment On The Pleadings (“Motion to Dismiss”), which provides the Court with two substantial and independent grounds for disposing of Plaintiff’s Complaint in its entirety.

First, MS & Co. moves to dismiss on the ground of *forum non conveniens* pursuant to Florida Rule of Civil Procedure 1.061. Under Rule 1.061, CPH’s lawsuit should proceed in New York — where the events and injuries it complains of allegedly occurred, where both parties are headquartered, and where the overwhelming majority of the witnesses and relevant documents are located. This strong preference for a New York forum is confirmed by the fact that this Court — or any other court adjudicating this controversy — will have to apply New York law to Plaintiff’s claims.

Second, MS & Co. moves for judgment on the pleadings pursuant to Florida Rule of Civil Procedure 1.140(c). As set forth in detail in the Motion to Dismiss and Memorandum of Law filed in support thereof, Plaintiff’s Complaint suffers from numerous legal defects and should be dismissed in its entirety for failure to state a legally valid Claim.

DISCUSSION

I. This Court Has Broad Discretion To Control The Timing And Sequence Of Discovery.

Florida Rule of Civil Procedure 1.280(c) authorizes this Court to stay burdensome and ultimately wasteful discovery pending decision on dispositive motions. Rule 1.280(c) provides:

Upon motion by a party or the person from who discovery is sought, and for good cause shown, the court in which the action is

pending may make *any order* to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense that justice requires

Fla. R. Civ. P. 1.280(c). Additionally, Florida Rule of Civil Procedure 1.280(d) authorizes the Court, upon motion of one of the parties, to issue an order controlling the timing and sequence of discovery “for the convenience of parties and witnesses and in the interest of justice.”

Together, Rule 1.280(c) and Rule 1.280(d) provide the court with broad discretion to impose a stay of discovery pending the determination of dispositive motions by the issuance of a protective order. *See, e.g., Rasmussen v. South Fla. Blood Serv., Inc.*, 500 So. 2d 533, 535 (Fla. 1987) (“The discovery rules . . . confer broad discretion on the trial court to limit or prohibit discovery.”); *SCI Funeral Servs. of Fla., Inc. v. Light*, 811 So. 2d 796, 798 (Fla. 4th DCA 2002) (“[T]he scope and limitation of discovery is within the broad discretion of the trial court.”).

II. A Stay Of Discovery Is Particularly Appropriate Here Because MS & Co.’s Motion To Dismiss Raises Substantial *Forum Non Conveniens* Issues — And May Dispose of Plaintiff’s Entire Action As A Matter Of Law.

The requested stay of discovery pending resolution of MS & Co.’s Motion to Dismiss would best serve the interests of justice and judicial economy in this case because that Motion raises the serious threshold question whether — under Florida Rule of Civil Procedure 1.061 — Florida is the even appropriate forum for resolution of Plaintiff’s claims.

Indeed, nothing compels this Court to oversee the discovery of a New York plaintiff against a New York defendant regarding a transaction that was based entirely in New York. And the oversight required here would be substantial. As stated above, Plaintiff here requests discovery from non-party witnesses over whom MS & Co. has no legal control and of potentially hundreds of thousands of documents, few of which have anything to do with the merits of Plaintiff’s claims, and all (or substantially all) of which are located outside of Florida. (*See* 1st Request and Notice of Deps.) None of this discovery, of course, is relevant to the dispositive

questions now pending before this Court — *i.e.*, whether this Court is the proper forum to resolve this New York-based controversy and/or whether the Complaint states any legally valid claim — either of which may dispose of this case *in its entirety*.

Under these circumstances, a stay of the discovery sought by Plaintiff is warranted on a number of independent grounds:

First, because this action should proceed — if at all — in New York, not Florida, this Court is not the proper forum for directing discovery on the merits of Plaintiff's claims. *See, e.g., Gleneagle Ship Mgmt. Co. v. Leondakos*, 602 So. 2d 1282, 1284 (Fla. 1992) (discovery conducted during pendency of motion to dismiss for lack of jurisdiction should not address merits of case and “should not be broad, onerous or expansive”); *Church of Scientology of Cal., Inc. v. Cazares*, 401 So. 2d 810, 810 (Fla. 2d DCA 1981) (authority of a trial court found to lack venue is limited to entry of an order dismissing or transferring the case).

Second, it would impose an unnecessary burden and expense to require the parties to engage in extensive discovery prior to this Court's ruling on a motion that is likely to dispose of the *entire case* as a matter of law. *See, e.g., Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1367 (11th Cir. 1997) (“Facial challenges to the legal sufficiency of a claim or defense, such as a motion to dismiss based on failure to state a claim for relief, *should . . . be resolved before discovery begins.*”) (emphasis added).²

² Florida courts look to federal decisions for guidance in interpreting Florida's Rules of Civil Procedure. *See, e.g., Gleneagle*, 602 So. 2d at 1283-84; *Smith v. Southern Baptist Hosp. of Fla., Inc.*, 564 So. 2d 1115, 1117 & n.2 (Fla. 1st DCA 1990) (federal cases are “pertinent and highly persuasive” for construing Rule 1.280(c)). These federal decisions typically stay discovery in circumstances materially indistinguishable from this case — indeed, there appears to be *no reported case* of any jurisdiction questioning a trial court's broad discretion to limit discovery in the circumstances presented here. *See, e.g., Enplanar, Inc. v. Marsh*, 11 F.3d 1284, 1291 (5th Cir. 1994) (“[Plaintiffs] cite to *no authority*, and we have found none, *holding the district court has abused its discretion in denying merits-related discovery pending ruling on a motion for change of venue.*”) (emphasis added); *Landry v. Air Line Pilots Ass'n Int'l*, 901 F.2d 404, 435-36 (5th Cir. 1990) (affirming stay of broad discovery not related to

(Continued...)

Third, non-party witnesses should not be forced to retain counsel and appear for depositions before it is determined that there is some basis for this suit to proceed in this forum, if at all. See *Chudasama*, 123 F.3d at 1368 (“Allowing a case to proceed through the pretrial process with an invalid claim. . . . does nothing but waste the resources of the litigants in the action before the court, delay resolution of disputes between other litigants, squander scarce judicial resources, and damage the integrity and the public’s perception of the . . . judicial system.”).

Fourth, the discovery sought here imposes the sort of “undue burden or expense” for which “justice requires” a temporary stay under Rule 1.280(c). Plaintiff has indiscriminately demanded every scrap of information from “Morgan Stanley” — defined broadly to include all subsidiaries, divisions, predecessors, successors, and representatives — that even tangentially relates to claims alleged in the Complaint. This information would come in the form of hardcopy files, electronic servers, computer hard drives, and electronic mail, among other sources, and could generate hundreds of thousands of documents from multiple facilities. It is hard to imagine a more burdensome or unnecessary request at this stage of the litigation.

dispositive motion); *Transunion Corp. v. PepsiCo, Inc.*, 811 F.2d 127, 130 (2d Cir. 1987) (affirming stay of discovery pending decision on motion to dismiss for *forum non conveniens*); *Spencer Trask Software & Info. Servs., L.L.C. v. RPost Int’l Ltd.*, 206 F.R.D. 367, 368 (S.D.N.Y. 2002) (“[S]tay of discovery should be granted where *motion to dismiss* ‘is potentially dispositive, and appears to be not unfounded in the law.’”) (emphasis added) (quoting *Gandler v. Nazarov*, No. 94 Civ. 2272 (CSH), 1994 WL 702004, at *4 (S.D.N.Y. Dec. 14, 1994)); *Johnson v. New York Univ. School of Educ.*, 205 F.R.D. 433, 434 (S.D.N.Y. 2002) (granting stay where “defendant’s *motion to dismiss* is potentially dispositive and does not appear to be unfounded in the law”) (emphasis added); *Chavous v. D.C. Fin. Responsibility & Mgmt Assistance Auth.*, 201 F.R.D. 1, 2 (D.D.C. 2001) (“It is well settled that *discovery is generally considered inappropriate while a motion that would be thoroughly dispositive of the claims in the Complaint is pending.*”) (internal quotation & citation omitted; emphasis added); *Anti-Monopoly, Inc. v. Hasbro, Inc.*, No. 94 Civ. 2120 (LMM), 1996 WL 101277, at *3 (S.D.N.Y. March 7, 1996) (granting stay on the ground that discovery “*will be totally unnecessary if [Defendant’s] motion for judgment on the pleadings . . . is granted*”) (emphasis added).

Finally, Plaintiff will not be prejudiced if discovery is postponed. The question whether the Plaintiff states any legally valid claims is a pure question of law — no factual development can assist the Court in making that determination. Nor do any of Plaintiff's discovery requests pertain to whether this Court is a proper forum for this suit. At bottom, Plaintiff has filed suit in a foreign jurisdiction with no connection to the underlying claim and now seeks to have discovery directed by a foreign court against a foreign defendant and non-party witnesses. The interests of justice, judicial economy, fundamental fairness and common sense require that such discovery be stayed prior to a ruling on whether this case even belongs in Florida and/or whether this case presents any legally valid claims.

CONCLUSION

Staying discovery pending resolution of MS & Co.'s Motion to Dismiss best serves the interest of justice and judicial economy. MS & Co.'s Motion to Dismiss will allow the Court to dispose of Plaintiff's entire action with no additional expenditure of resources by the parties. Compared to the burden of discovery, especially for non-party and non-resident witnesses, Plaintiff will suffer no cognizable injury from allowing the Court to determine whether the Florida courts are a proper forum for this case before discovery commences. Allowing discovery to go forward, however — before the forum issue has been determined and the legal sufficiency of Plaintiff's Complaint has been established — would be wasteful, burdensome, and prejudicial.

For these reasons, Defendant MS & Co. respectfully requests that this Court enter an order staying all discovery pending the Court's rulings on MS & Co.'s Motion to Dismiss.

CERTIFICATE OF SERVICE

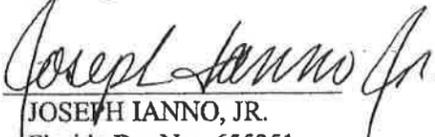
I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Federal Express to all counsel of record on the attached service list on this 15th day of June, 2003.

Thomas D. Yannucci, P.C.
Thomas A. Clare
Larissa Paule-Carres
Brett McGurk
KIRKLAND & ELLIS
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5993

COUNSEL FOR DEFENDANT

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

BY:


JOSEPH IANNO, JR.
Florida Bar No: 655351

SERVICE LIST

John Scarola SEARCY, DENNEY, SCAROLA, BARNHARDT & SHIPLEY, P.A. 2139 Palm Beach Lakes Boulevard West Palm Beach, Florida 33409	Counsel for Plaintiff
Jerold S. Solovy JENNER & BLOCK, LLC One IBM Plaza Suite 4400 Chicago, Illinois 60611	Counsel for Plaintiff

A

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

 COLEMAN (PARENT) HOLDINGS INC.,)
)
 Plaintiff,)
)
 v.)
)
 MORGAN STANLEY & CO., INC.,)
)
 Defendant.)

Case No. CA 005045 AI
 DOROTHY H. WILKEN
 CLERK OF CIRCUIT COURT
 CIRCUIT CIVIL DIVISION
 MAY 09 2003
 COPY / ORIGINAL
 RECEIVED FOR FILING

NOTICE OF TAKING VIDEOTAPED DEPOSITIONS

To: Morgan Stanley & Co., Inc.
1585 Broadway
New York, NY 10036

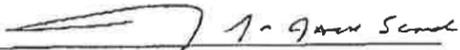
PLEASE TAKE NOTICE that Plaintiff Coleman (Parent) Holdings Inc., will take the depositions upon oral examination of the following witnesses pursuant to Florida Rule of Civil Procedure 1.310 on the dates and at the times set forth below:

John Tyree	July 10-11, 2003 at 9:00 a.m.
Robert Kitts	July 14-15, 2003 at 9:00 a.m.
Alexandre Fuchs	July 16-17, 2003 at 9:00 a.m.
Lawrence Bornstein	July 21, 2003 at 9:00 a.m.
Mark Brockelman	July 23, 2003 at 9:00 a.m.
Dennis Pastrana	July 28, 2003 at 9:00 a.m.
Richard Goudis	July 30, 2003 at 9:00 a.m.
David Fannin	August 4, 2003 at 9:00 a.m.
Albert Dunlap	August 11, 2003 at 9:00 a.m.
Deborah MacDonald	August 18, 2003 at 9:00 a.m.

The depositions will be recorded by videotape and stenographic means at the offices of Searcy Denney Scarola Barnhart & Shipley, P.C., 2139 Palm Beach Lakes Blvd., West Palm Beach, Florida. The deposition will be taken before a person authorized to administer oaths and will continue day to day until completed.

The videotape operator will be Esquire Deposition Services at 515 West Flagler Drive, Suite P-200, West Palm Beach, FL 33401.

COLEMAN (PARENT) HOLDINGS INC.

By: 
One of Its Attorneys

Jerold S. Solovy
Ronald L. Marmer
Robert T. Markowski
Deirdre E. Connell
JENNER & BLOCK, LLC
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

Jack Scarola
SEARCY DENNEY SCAROLA BARNHART
& SHIPLEY P.A.
2139 Palm Beach Lakes Blvd
West Palm Beach, Florida 33409
(561) 686-6300

B

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

 COLEMAN (PARENT) HOLDINGS INC.,
)
 Plaintiff,
)
 v.
)
 MORGAN STANLEY & CO., INC.,
)
 Defendant.

Case No. CA 005045 AI

DOROTHY H. WILKEN
CLERK OF CIRCUIT COURT
CIRCUIT CIVIL DIVISION

MAY 09 2003

COPY / ORIGINAL
RECEIVED FOR FILING

PLAINTIFF'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS

Plaintiff Coleman (Parent) Holdings, Inc. ("CPH" or "Plaintiff"), by its attorneys Searcy Denney Scarola Barnhart & Shipley P.A. and Jenner & Block, LLC, hereby serves its First Request for Production of Documents upon Defendant Morgan Stanley & Co., Inc. ("Morgan Stanley" or "Defendant"), and requests responses and the production of documents at the office of Searcy Denney Scarola Barnhart & Shipley P.A., 2139 Palm Beach Lakes Blvd., West Palm Beach, Florida, within the time provided by Florida Rule of Civil Procedure 1.350(b).

DEFINITIONS

1. "Arbitrations" means Albert J. Dunlap and Sunbeam Corporation, No. 32 160 00088 99 (AAA); and Russell A. Kersh and Sunbeam Corporation, No. 32 160 00091 99 (AAA).
2. "Coleman" means the Coleman Company, Inc. or any of its present and former officers, directors, employees, representatives, agents, and all other persons acting or purporting to act on its behalf.

3. "CPH" means Coleman (Parent) Holdings Inc., Coleman Worldwide Corporation, CLN Holdings, Co. Inc., or any of their present and former officers, directors, employees, representatives, agents, and all other persons acting or purporting to act on their behalf.

4. "Coleman Transaction" means the transaction contemplated by the February 27, 1998 Agreements.

5. "Communication" means the transmittal of information by letter, memorandum, facsimile, orally, or otherwise.

6. "Concerning" means reflecting, relating to, referring to, describing, evidencing, or constituting.

7. "Documents" means documents whether fixed in tangible medium or electronically stored. The word "documents" shall include, by way of example and not by way of limitation, all of the following: papers, correspondence, trade letters, envelopes, memoranda, telegrams, cables, notes, messages, reports, studies, press releases, comparisons, books, accounts, checks, audio and video recordings and transcriptions thereof, pleadings, testimony, articles, bulletins, pamphlets, brochures, magazines, questionnaires, surveys, charts, newspapers, calendars, desk calendars, pocket calendars, lists, logs, publications, notices, diagrams, instructions, diaries, minutes for meetings, corporate minutes, orders, resolutions, agendas, memorials or notes of oral communications, whether by telephone or face-to-face, contracts, agreements, drafts of or proposed contracts or agreements, memoranda of understanding, letters of intent, computer tapes, computer drives or memories, computer diskettes or disks, e-mail, CD-ROMs, or any other tangible thing on which any handwriting, typing, printing, photostatic, electronic, or other form of communication or information is recorded or reproduced, together with all notations on any of the foregoing, all

originals, file copies, or other unique copies of the foregoing, and all versions or drafts thereof, whether used or not.

8. "February 27, 1998 Agreements" means (a) the Agreement and Plan of Merger dated as of February 27, 1998 among Sunbeam Corp., Laser Acquisition Corp., CLN Holdings, Inc. and Coleman (Parent) Holdings Inc. and (b) the Agreement and Plan of Merger dated as of February 27, 1998 among Sunbeam Corp., Camper Acquisition Corp., and The Coleman Company, Inc.

9. "Financial Statements" means, without limitation, balance sheets, statements of income, earnings, retained earnings, sources and applications of funds, cash flow projections, notes to each such statements, or any other notes which pertain to the past or present financial condition of Sunbeam, whether any of the foregoing is audited or unaudited, whether final, interim or pro forma, complete or partial, consolidated, yearly, monthly, or otherwise.

10. "Litigations" means In Re Sunbeam Securities Litigation, 98-8258-Civ.-Middlebrooks (S.D. Fla.); Camden Asset Management L.P., et al. v. Sunbeam Corporation, et al., 98-8773-Civ.-Middlebrooks and 98-8275-Civ.-Middlebrooks (S.D. Fla.); Krim v. Dunlap, et al., No. CL983168AD (15th Jud. Cir., Fla.); Stapleton v. Sunbeam Corp., et al., No. 98-1676-Civ.-King (S.D. Fla.); Sunbeam Corp. v. PricewaterhouseCoopers LLP, No. CL005444AN (15th Jud. Cir., Fla.); In re Sunbeam Corp., Inc., No. 01-40291 (AJG) (Bankr. S.D.N.Y.) and any adversary proceedings therein; SEC v. Dunlap, et al., No. 01-8437-Civ.-Middlebrooks (S.D. Fla.); Oaktree Capital Management LLC v. Arthur Andersen LLP, No. BC257177 (L.A. Cty., CA); and Coleman (Parent) Holdings Inc. v. Arthur Andersen LLP, et al., No. CA 01-06062AN (15th Jud. Cir., Fla).

11. "Morgan Stanley" means Morgan Stanley & Co., Inc. or any of its subsidiaries, divisions, predecessors, successors, present and former employees, representatives, agents, attorneys, accountants, advisors, or all other persons acting or purporting to act on its behalf.

12. "SEC Administrative Proceedings" means In the Matter of Sunbeam Corp., SEC Administrative Proceeding File No. 3-10481, and In the Matter of David C. Fannin, SEC Administrative Proceeding File No. 3-10482.

13. "SEC" means the Securities and Exchange Commission.

14. "Subordinated Debentures" means Sunbeam's Zero Coupon Convertible Senior Subordinated Debentures Due 2018.

15. "Subordinated Debenture Offering" means the offering of Sunbeam's Subordinated Debentures.

16. "Sunbeam" means Sunbeam Corporation, or any of its subsidiaries, divisions, affiliates, predecessors, successors, present and former employees, representatives, agents, and all other persons acting or purporting to act on its behalf.

17. "You" or "Your" means Morgan Stanley & Co., Inc. and/or any of its subsidiaries, divisions, predecessors, successors, present or former employees, representatives, agents, attorneys, accountants, advisors, or anyone acting or purporting to act on its behalf.

INSTRUCTIONS

1. Documents shall be produced as they are kept in the usual course of business, or organized and labeled to correspond to the categories in this Request. Documents attached to each other should not be separated. Documents consisting of items previously produced in the Litigations, Arbitrations, and/or SEC Administrative Proceedings with Bates numbering shall be produced in Bates number order.

2. All documents shall be produced in the file folder, envelope or other container in which the documents are kept or maintained by you. If, for any reason, the container cannot be produced, produce copies of all labels or other identifying marks.

3. The relevant period, unless otherwise indicated, shall be from **January 1, 1997 through the date of trial of this matter**, and shall include all documents and information which relate in whole or in part to such period, or to events or circumstances during such period, even though dated, prepared, generated or received prior or subsequent to that period. Please supplement or correct your responses to these requests if, at any time, you become aware that your responses are incomplete or incorrect in any respect.

4. If you claim the attorney-client privilege, or any other privilege or work-product protection for all or any portion of a document, you shall provide a privilege log that describes the withheld material sufficiently to allow CPH to test the privilege or protection asserted.

5. The following rules of construction apply:

- a) The connectives "and" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery requests all responses that might otherwise be outside of their scope;
- b) The term "including" shall be construed to mean "without limitation";
and
- c) The use of the singular form of any word includes the plural and vice versa.

DOCUMENTS REQUESTED

1. All documents concerning your efforts to have Sunbeam retain or maintain your investment banking and/or securities underwriting services.

2. All documents reflecting all fees and expenses paid by Sunbeam to you, including without limitation all billing statements, invoices, time detail records, individual calendars,

daily diaries (including electronic calendar programs), or other documents that describe or record the time spent, or expenses incurred (including back-up for any out-of-pocket expenses), by any Morgan Stanley personnel, or that describe or record any aspect of their activities concerning any services performed on behalf of, or concerning, Sunbeam.

3. All documents concerning any investigation, analysis, or due diligence of Sunbeam conducted by you or on your behalf in 1997 or 1998.
4. All documents concerning any investigation, analysis, or due diligence of Coleman or CPH conducted by you or on your behalf in 1997 or 1998.
5. All documents concerning your attempts in 1997 or 1998 to locate someone to purchase or otherwise acquire Sunbeam, whether through merger, purchase, transfer of assets or securities, or otherwise.
6. All documents concerning your attempts in 1997 or 1998 to locate companies for Sunbeam to purchase or otherwise acquire, whether through merger, purchase, transfer of assets or securities, or otherwise.
7. All documents concerning the negotiation and signing of the February 27, 1998 Agreements.
8. All documents concerning the closing of the Coleman Transaction, including without limitation all documents concerning the decision to close the Coleman Transaction.
9. All documents concerning the meetings of Sunbeam's Board of Directors in 1997 and 1998.
10. All documents concerning any discussion, promise, agreement, or plan to have research analysts, whether or not at Morgan Stanley, provide coverage for Sunbeam or any of its debt or equity securities.

11. All documents used, analyzed, consulted, or prepared by any Morgan Stanley research analyst, including without limitation Andrew Conway, James Dormer, Jake Foley, and Karen Eltrich, concerning Sunbeam.

12. All documents concerning communications between or among you, Sunbeam, and Wall Street analysts concerning Sunbeam or the Coleman Transaction.

13. All documents concerning any valuation of Sunbeam or Sunbeam securities.

14. All documents concerning the stock market's valuation of Sunbeam securities, including without limitation documents describing or analyzing the increase or decline in the market price of Sunbeam stock in the period from and including July 1, 1996 through and including December 31, 1998.

15. All documents concerning any valuation of Coleman or Coleman securities.

16. All documents concerning synergies that might be achieved from a business combination of Sunbeam and Coleman.

17. All documents concerning Sunbeam's financial statements and/or restated financial statements.

18. All documents concerning the increase in the size of the Subordinated Debenture Offering from \$500 million to \$750 million.

19. All documents concerning any draft or executed "comfort letters" requested by you or provided to you in connection with the Subordinated Debenture Offering.

20. All documents concerning the sale of, or your attempts to sell, Subordinated Debentures, including without limitation documents concerning road shows, communications with potential investors, or communications with or among Morgan Stanley's sales personnel.

21. All documents concerning the pricing of the Subordinated Debentures.

22. All documents concerning the conversion features of the Subordinated Debentures.

23. All documents concerning the "book of demand" for the Subordinated Debentures.

24. All documents concerning the events that took place on March 19, 1998 at Global Financial Press, including without limitation documents concerning Lawrence Bornstein and/or John Tyree.

25. All documents concerning your communications with Sunbeam on March 18, 1998.

26. All documents concerning the "bring-down" due diligence for the Subordinated Debenture Offering.

27. All documents concerning your communications with Sunbeam on March 24, 1998.

28. All documents concerning Sunbeam's first quarter 1998 sales and/or earnings.

29. All documents concerning the closing of the Subordinated Debenture Offering including without limitation all documents concerning the decision to close the Subordinated Debenture Offering.

30. All documents concerning the Subordinated Debenture Offering.

31. All documents concerning any work or services you performed for or on behalf of Sunbeam in 1997 or 1998, regardless of whether you were compensated for that work.

32. All documents concerning press releases issued by Sunbeam on October 23, 1997, March 19, 1998, April 3, 1998, May 9, 1998, June 15, 1998, June 25, 1998, June 30, 1998, October 20, 1998, and November 12, 1998.

33. All documents concerning the statements contained in the press releases issued by Sunbeam on October 23, 1997, March 19, 1998, April 3, 1998, May 9, 1998, June 15, 1998, June 25, 1998, June 30, 1998, October 20, 1998, and November 12, 1998.

34. All documents concerning communications relating to Sunbeam, Coleman, or CPH, including without limitation internal communications within Morgan Stanley or communications between or among Morgan Stanley and Sunbeam; Skadden, Arps, Slate, Meagher & Flom LLP; Coopers & Lybrand LLP; Llama Company; Arthur Andersen LLP; Sard Verbinnen & Co., Inc.; Hill & Knowlton, Inc.; The Coleman Company, Inc.; Credit Suisse First Boston; Coleman (Parent) Holdings Inc.; MacAndrews & Forbes Holdings, Inc.; Wachtell Lipton, Rosen & Katz; Davis Polk & Wardwell; or any other person or company, and/or any of their respective employees, agents, or representatives.

35. All documents concerning the Coleman Transaction.

36. All documents concerning the Subordinated Debenture Offering.

37. All documents concerning Albert Dunlap and/or Russell Kersh.

38. All documents concerning the Scott Paper Company.

39. All documents concerning Coleman or CPH.

40. All documents concerning MacAndrews & Forbes Holdings, Inc. with respect to Sunbeam, Coleman, or CPH.

41. All documents concerning the events and matters that are the subject of the Complaint filed in this action.

42. Organizational charts, memoranda, or similar documents that describe the business organizational structure and the administrative, management, and reporting structure of Morgan Stanley from and including January 1, 1997 through and including December 31, 1998.

43. All documents concerning Morgan Stanley's policies, procedures, manuals, guidelines, reference materials, or checklists that were in effect from and including January 1, 1997 through and including December 31, 1998 for the performance of due diligence, including without limitation due diligence performed in connection with underwriting the sale of equity or debt securities.

44. All documents concerning employment contracts, performance evaluations, and/or personnel files (including without limitation any documents that describe or discuss the training, experience, competence, and accomplishments) of all Morgan Stanley personnel who performed services for or on behalf of Sunbeam in 1997 or 1998.

45. All documents concerning Morgan Stanley's performance evaluation criteria or guidelines in effect from and including January 1, 1997 through and including December 31, 1998.

46. All documents concerning Morgan Stanley's compensation criteria or guidelines in effect from and including January 1, 1997 through and including December 31, 1998.

47. All marketing or other promotional material prepared or used by, or on behalf of, Morgan Stanley concerning investment banking or securities underwriting services that were created or used at any time from and including January 1, 1997 through and including December 31, 1998.

48. All of your document retention or document destruction policies or procedures or similar procedures for the back-up or deletion of electronic or hard copy documents of any kind for any time during 1997 through the present, including without limitation any amendments to any such policies or procedures, schedules or related documents, and any memoranda or other instructions communicated to your employees concerning the obligation and procedures to be

utilized to preserve all relevant documents, including without limitation evidence concerning the Litigations, the Arbitrations, and the SEC Administrative Proceedings.

49. All documents you have provided or produced to any party (whether voluntarily or in response to a document request, subpoena duces tecum, or other process served on you) in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings (including without limitation any reports, communications, filings, testimony, legal memoranda, statements, or other documents submitted to the Securities & Exchange Commission or any other party).

50. All documents you have provided to the SEC, the Attorney General of New York, or any other governmental or regulatory body concerning Sunbeam.

51. All documents you have received from the SEC, the Attorney General of New York, or any other governmental or regulatory body concerning Sunbeam.

52. All discovery requests or subpoenas served on you in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

53. All responses and/or objections that you provided or produced in response to a discovery request or subpoena served on you in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

54. All communications concerning any discovery request or subpoena served on you in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

55. All motions, memoranda, briefs, rulings, orders, or transcripts of proceedings concerning any discovery request, subpoena, or other process in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

56. All privilege logs you prepared in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings with respect to documents that you withheld from production in response to any document requests, subpoenas duces tecum, or other process.

57. All transcripts of and exhibits to any depositions, recorded statements, or affidavits in connection with any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

58. All documents obtained by you or produced to you by other parties, third parties, or non-parties (whether voluntarily or in response to any document requests, subpoenas duces tecum, or other process served by you or any other party) concerning Sunbeam.

59. All document requests, subpoenas duces tecum, interrogatories, requests for admission, responses, or objections that you served on, or received from, any party, third party or non-party in In re Sunbeam Corp., Inc., No. 01-40291 (AJG) (Bankr. S.D.N.Y.) and any adversary proceedings therein.

60. All transcripts of any hearings held in connection with the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

61. All affidavits, declarations, or other testimonial statements filed or submitted in connection with any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

COLEMAN (PARENT) HOLDINGS INC.

By: 
One of Its Attorneys

Jerold S. Solovy
Ronald L. Marmer
Robert T. Markowski
Deirdre E. Connell
JENNER & BLOCK, LLC
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

Jack Scarola
SEARCY DENNEY SCAROLA BARNHART
& SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33402-3626
(561) 686-6300

-12-

TABLE OF AUTHORITIES

Cases

1. *Anti-Monopoly, Inc. v. Hasbro, Inc.*, No. 94 Civ. 2120 (LMM), 1996 WL 101277 (S.D.N.Y. March 7, 1996)
2. *Chavous v. D.C. Fin. Responsibility & Mgmt. Assistance Auth.*, 201 F.R.D. 1 (D.D.C. 2001)
3. *Church of Scientology of Cal., Inc. v. Cazares*, 401 So. 2d 810 (Fla. 2d DCA 1981)
4. *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353 (11th Cir. 1997)
5. *Enplanar, Inc. v. Marsh*, 11 F.3d 1284 (5th Cir. 1994)
6. *Gandler v. Nazarov*, No. 94 Civ. 2272, 1994 WL 702004 (CSH) (S.D.N.Y. Dec. 14, 1994)
7. *Gleneagle Ship Mgmt. Co. v. Leondakos*, 602 So. 2d 1282 (Fla. 1992)
8. *Johnson v. New York Univ. School of Educ.*, 205 F.R.D. 433 (S.D.N.Y. 2002)
9. *Landry v. Air Line Pilots Ass'n Int'l, AFL-CIO*, 901 F.2d 404 (5th Cir. 1990)
10. *Rasmussen v. South Fla. Blood Serv., Inc.*, 500 So. 2d 533 (Fla. 1987)
11. *SCI Funeral Servs. of Fla., Inc. v. Light*, 811 So. 2d 796 (Fla. 4th DCA 2002)
12. *Smith v. Southern Baptist Hosp. of Fla., Inc.*, 564 So. 2d 1115 (Fla. 1st DCA 1990)
13. *Spencer Trask Software & Info. Servs., L.L.C. v. RPost Int'l Ltd.*, 206 F.R.D. 367 (S.D.N.Y. 2002)
14. *Transunion Corp. v. PepsiCo, Inc.*, 811 F.2d 127 (2d Cir. 1987)

Rules

15. Florida Rule of Civil Procedure 1.061
16. Florida Rule of Civil Procedure 1.140
17. Florida Rule of Civil Procedure 1.280

Only the Westlaw citation is currently available.

United States District Court, S.D. New York.

ANTI-MONOPOLY, INC., Plaintiff,
v.
HASBRO, INC., Defendant.

No. 94Civ.2120(LMM)(AJP).

March 7, 1996.

Carl E. Person, New York City, for Anti-Monopoly, Inc.

David Berger, Palo Alto, CA, Neil R. Stoll, New York City, for Kmart Corp.

OPINION AND ORDER

PECK, United States Magistrate Judge:

*1 In this antitrust action by Anti-Monopoly, Inc. against major game manufacturer Hasbro, Inc. (the manufacturer of, among other games, "Monopoly"), defendant Hasbro seeks a stay of discovery relating to plaintiff's "secondary-line" Robinson-Patman Act claims until Judge McKenna rules on Hasbro's recently filed motion for judgment on the pleadings on those claims for plaintiff's lack of antitrust standing. For the reasons set forth below, Hasbro's pending motion for judgment on the pleadings provides "good cause" for the stay of discovery, which is granted.

FACTS

Anti-Monopoly's Complaint

Anti-Monopoly's amended complaint (hereafter, "complaint") is summarized in Judge McKenna's prior Opinion granting in part defendants' motion to dismiss the complaint, familiarity with which is assumed. *Anti-Monopoly, Inc. v. Hasbro, Inc.*, 94 Civ. 2120, 1995 WL 380300 (S.D.N.Y. June 27, 1995). Plaintiff Anti-Monopoly, which possesses less than 1% of the market for family board games, developed and marketed a family board game called "Anti-Monopoly."

Id. at *1. Defendant Hasbro is the leading manufacturer of family board games with more than 80% of the market. Id. The complaint also named retailers Toys "R" Us and K-Mart as defendants, id., but plaintiff has subsequently settled with both of them. (See Declaration of Marthe Larosiliere, dated February 22, 1996 [hereafter "Larosiliere Dec."], Exs. A(3)-(4).)

After Judge McKenna's June 1995 decision, the following claims survived against Hasbro: (1) Count I -- violation of § 2 of the Sherman Act "by monopolizing, wilfully attempting to monopolize, and combining and conspiring to monopolize, the manufacturing and sale of family board games" (1996 WL 380300 at *4-5); (2) Count III -- tortious interference with advantageous business relationships under New York law (id. at *6-7); (3) Count VI -- Hasbro's violation of § 7 of the Clayton Act by acquiring competitors where the effect has been to substantially lessen competition and to create a monopoly (id. at *8); (4) Count VII -- violation of the Robinson-Patman Act (§ 2 of the Clayton Act) by "providing substantial discounts, terms and services to major family board game retailers which are not made available on equal terms to competing smaller family board game retailers and wholesalers and which are not either cost justified or otherwise permitted under § 2." (id. at *8, quoting complaint; see also id. at *9); (5) Count VIII -- violation of § 1 of the Sherman Act through illegal contracts, conspiracies and combinations to restrain trade (id. at *9-10); and (6) Count IX -- violation of § 3 of the Clayton Act by selling to K-Mart, Toys "R" Us and others on terms which require them not to buy from Anti-Monopoly and other small competitors (id. at *3).

This motion relates to Count VII of the complaint, plaintiff's Robinson-Patman Act claims for price discrimination. See id. at *8-9. Plaintiff has alleged both a primary-line and secondary-line Robinson-Patman Act claim. Finding that the amended complaint alleged that Hasbro "prices its products below an appropriate measure of its costs," as required by the case law under the Robinson-Patman Act, the Court upheld the claim. Id. at *9. The

(Cite as: 1996 WL 101277, *1 (S.D.N.Y.))

Court noted, however, that "[b]ecause the Court agrees that Anti-Monopoly has stated a claim for primary-line injury, the Court does not address at this time Anti-Monopoly's claim that it has suffered a secondary-line injury." Id.

*2 Hasbro has now moved before Judge McKenna to dismiss plaintiff's secondary-line Robinson-Patman Act claim for lack of standing. That motion, which is pending, provides the linchpin for Hasbro's motion to stay discovery.

Because the difference between primary and secondary-line injury is the key to these motions, I quote Judge McKenna's explanation of primary and secondary-line cases:

Two classes of plaintiffs are recognized to have standing to bring a Robinson-Patman claim. Direct competitors of the predator are said to suffer primary-line injury when they are unable to match the predator's prices and must either sell at a loss or lose market share. Competitors of the favored purchasers are said to suffer secondary-line injuries when they are forced to compete in the same market as the purchasers who are enjoying the benefit of lower overhead for the same product. Anti-Monopoly has argued that it has suffered both types of injuries.

Id. at *9.

Anti-Monopoly's Discovery Requests

After the initial pretrial conference on August 9, 1995, by Order dated August 16, 1995, the Court set a cutoff date of March 15, 1996 for fact discovery and May 10, 1996 for expert discovery. The Court notes that the parties had proposed, and the Court rejected, a much more leisurely schedule -- fact discovery through September 1996 and expert discovery through March 30, 1997. (See 8/9/95 "Proposed Joint Discovery Plan.")

In late December 1995, plaintiff served Requests to Admit and a Second Set of Interrogatories on defendant Hasbro, seeking discovery in support of plaintiff's secondary-

line Robinson-Patman Act claim. (Larosiliere Dec. Exs. F-G.) In late January, plaintiff served a Second Set of Requests to Admit, containing requests 201-431, all of which appear directed at the secondary-line claim. (Id. Ex. I.) That same day, plaintiff served its Second Request for Production of Documents, including 12 requests directed at plaintiff's secondary-line claim. (Id. Ex. J.)

ANALYSIS

Pursuant to Rule 26(c), it is clear that the Court has the discretion to stay discovery for "good cause," and that good cause may be shown where a party has filed (or sought leave to file) a dispositive motion such as a motion to dismiss. This is especially so where the stay is for a "short" period of time and the opposing party (here, plaintiff) will not be prejudiced by the stay. See, e.g., *In re Towers Financial Corp. Noteholders Litigation*, 93 Civ. 0810, --- WL ----- (S.D.N.Y. Jan. 29, 1996) (Peck, M.J.); *American Booksellers Assoc., Inc. v. Houghton Mifflin Co.*, 94 Civ. 8566, 1995 WL 72376 at *1 (S.D.N.Y. Feb. 22, 1995); *Gandler v. Nazarov*, 94 Civ. 2272, 1994 WL 702004 at *4 (S.D.N.Y. Dec. 14, 1994); *Chrysler Corp. v. Century Power Corp.*, 137 F.R.D. 209, 211 (S.D.N.Y. 1991); 2 M. Silberberg, *Civil Practice in the Southern District of New York* § 24.04 at 24-8 (and cases cited therein) (1995).

The Breadth and Burden of the Requested Discovery

*3 Two related factors that the courts consider in deciding a motion for a stay of discovery are the breadth of the discovery sought and the burden of responding to it. E.g., *American Booksellers v. Houghton Mifflin*, 1995 WL 72376 at *1; *Chrysler v. Century*, 137 F.R.D. at 211. Here, plaintiff's secondary-line discovery requests are quite extensive. They involve almost 300 Requests to Admit, as well as 14 interrogatories and 12 document requests. (See Hasbro's Brief at 4-5 & nn.7-8, 10; see also Berger 2/29/96 Letter to the Court at 1-2.) These requests will be totally unnecessary if Hasbro's motion for judgment on the pleadings as to the secondary-line Robinson-Patman Act claim is granted.

(Cite as: 1996 WL 101277, *3 (S.D.N.Y.))

(The Court is relying on Hasbro's assertion that these requests only relate to the secondary-line claim, which has not been challenged by plaintiff.)

There Is No Prejudice to Plaintiff from a Stay of Discovery

Another factor that the courts consider is whether the party opposing the stay would be unfairly prejudiced by a stay. E.g., *Gandler v. Nazarov*, 1994 WL 702004 at *4; *Chrysler v. Century*, 137 F.R.D. at 211.

Plaintiff will not be prejudiced by a stay here. Plaintiff argues that "The requested stay would destroy the accelerated time schedule for discovery under which the parties and the Court have been working, and almost reached." (Person 2/26/96 Letter to the Court, at 1.) It is true that fact discovery is scheduled to be completed by March 15, 1996. The Court notes, however, that the parties originally proposed that fact discovery run through September 1996 (and expert discovery through March 30, 1997.) The deadlines were accelerated only because this Court believes in running a "rocket docket" and suggested that the parties could condense and expedite their discovery schedule, to which they agreed. The Court has every reason to believe that Hasbro's motion will be decided, and if it is denied that the additional fact and expert discovery needed will be conducted, before the original March 30, 1997 cutoff date.

Plaintiff's second prejudice argument is that:

Plaintiff cannot afford to call witnesses for some of the needed discovery, and then have to go through the process again for the Robinson-Patman type discovery, if a stay is granted. This means additional preparation time, additional travel time to and from the depositions, and other problems associated with bifurcated discovery especially of third-party witnesses, including re-noticing them at this late date in discovery.

(Person 2/26/96 Letter at 1.) However, as of this date, less than two weeks before the scheduled March 15, 1996 close of fact

discovery, plaintiff has noticed only three depositions of senior Hasbro executives (Messrs. Hassenfeld, Dittomassi and Wilson), and no non-party depositions. (See Berger 2/29/96 Letter to the Court at 3.) Further, Hasbro contends that these three senior executives do not "have specific or detailed knowledge of pricing issues." (Id.) Thus, according to Hasbro, if their motion for judgment on the pleadings were denied, no depositions would be repeated. (Id.) Even if Hasbro were incorrect and these three depositions would need to be reopened, any extra cost to plaintiff is more than outweighed by the expense to Hasbro (and to plaintiff) of conducting discovery on a claim that may be dismissed as legally insufficient. Moreover, the "additional travel time to and from the depositions" is a factor that, if necessary, can be obviated in other ways later (e.g., by agreement or order that the depositions occur in New York when the witness is in New York for business reasons, or permitting telephonic depositions, etc.). It is premature to decide what cost protection, if any, plaintiff will be given later. But it is clear that there is no prejudice to plaintiff from the stay.

Hasbro's Motion For Judgment on the Pleadings has "Substantial Grounds"

*4 The third and final factor the courts examine is the strength of the dispositive motion that is the basis for the discovery stay application. E.g., *Gandler v. Nazarov*, 1994 WL 702004 at *4 (stay granted where motion to dismiss "is potentially dispositive, and appears to be not unfounded in the law") (emphasis added); *Chrysler v. Century*, 137 F.R.D. at 211 (motions to dismiss "appear to have substantial grounds") (emphasis added).

From the Court's preliminary look at Hasbro's motion for judgment on the pleadings, the motion is "not unfounded in the law" and "appears to have substantial grounds."

Plaintiff's secondary-line standing argument appears to be that Hasbro's price discrimination has put small retailers out of business, and that plaintiff sold or would have

sold its game to these retailers if they had not gone out of business. (See Larosiliere Dec. Ex. D: Plf's 1994 Brief Opposing Motion to Dismiss, at 16.) In *G.K.A. Beverage Corp. v. Honickman*, 55 F.3d 762 (2d Cir.), cert. denied, 116 S. Ct. 381 (1995), the Second Circuit dismissed a similar Robinson-Patman Act claim for lack of standing, holding:

It follows naturally that a party in a business relationship with an entity that failed as a result of an antitrust violation has not suffered the antitrust injury necessary for antitrust standing....

Although the [plaintiff] distributors undoubtedly suffered injury as a result of the alleged antitrust violation, the injury suffered by the distributors is derivative of the injury suffered by Seven-Up Brooklyn. Thus, ... it was not the distributors that suffered direct antitrust injury, but Seven-Up Brooklyn. Therefore, the proper party to bring the antitrust action on these facts was Seven-Up Brooklyn....

55 F.3d at 766-67. Hasbro argues that the party suffering direct antitrust injury here, and thus the party with standing, are the small retailers allegedly forced out of business by Hasbro's price discrimination, and any injury suffered by plaintiff is derivative and not antitrust injury.

Hasbro also cites two district court decisions that held that a competing manufacturer (like plaintiff here) has no antitrust standing to bring a secondary-line claim under Sections 2(d) and 2(e) of the Robinson-Patman Act for a competitor's providing discriminatory allowances or services to customers. *Ashkanazy v. I. Rokeach & Sons, Inc.*, 757 F. Supp. 1527, 1553-54 (N.D. Ill. 1991); *Frito-Lay, Inc. v. Bachman Co.*, 659 F. Supp. 1129, 1140-41 (S.D.N.Y. 1986).

Plaintiff distinguishes these cases and relies on certain "target area" cases. (See Larosiliere Dec. Ex. D: Plf's 1994 Brief at 16-19.) The Court need not decide whether Anti-Monopoly or Hasbro is correct -- that motion is before Judge McKenna. The Court's reading of the parties' prior briefs on this issue, and the cases cited above, however, makes clear that

not only does Hasbro's motion to dismiss "appear not unfounded on the law" but indeed it "appears to have substantial grounds."

CONCLUSION

*5 All of the factors relied on by the courts support a stay of discovery. Accordingly, for the reasons set forth above, the Court grants Hasbro's motion to stay fact and expert discovery that relates solely to plaintiff's secondary-line Robinson-Patman Act claim. The stay will be lifted without further Court order if Judge McKenna denies Hasbro's motion for judgment on the pleadings as to the secondary-line claim.

SO ORDERED.

1996 WL 101277, 1996 WL 101277 (S.D.N.Y.)

END OF DOCUMENT

United States District Court,
District of Columbia.

Kevin P. CHAVOUS, et al., Plaintiffs,
v.
DISTRICT OF COLUMBIA FINANCIAL
RESPONSIBILITY AND MANAGEMENT
ASSISTANCE
AUTHORITY, et al., Defendants.

No. CIV.A. 01-0921.

May 21, 2001.

City council members brought action against District of Columbia, District of Columbia Financial Responsibility and Management Assistance Authority, and related defendants, alleging that Authority had exceeded scope of its statutory authority in connection with contract with hospital, in violation of members' constitutional rights, and seeking injunctive relief. Members moved to compel discovery, and defendants moved to quash notices of deposition. The District Court, Robinson, United States Magistrate Judge, held that stay of discovery pending resolution of parties' pending discovery motions was warranted.

Discovery stayed pending determination of parties' dispositive motions.

West Headnotes

[1] Federal Civil Procedure ⇨ 1267.1
170Ak1267.1
Trial courts are vested with broad discretion to manage the conduct of discovery. Fed.Rules Civ.Proc.Rule 26, 28 U.S.C.A.

[2] Federal Civil Procedure ⇨ 1271
170Ak1271
Entry of order staying discovery pending determination of dispositive motions is appropriate exercise of trial court's discretion to manage the conduct of discovery. Fed.Rules Civ.Proc.Rule 26, 28 U.S.C.A.

[3] Federal Civil Procedure ⇨ 1271
170Ak1271
Stay of discovery pending determination of a

motion to dismiss is rarely appropriate when the pending motion will not dispose of the entire case.

[4] Federal Civil Procedure ⇨ 1271
170Ak1271
Trial court ordinarily should not stay discovery that is necessary to gather facts to defend against motion to dismiss.

[5] Federal Civil Procedure ⇨ 1271
170Ak1271
In determining whether to stay discovery while pending dispositive motions are decided, the trial court inevitably must balance the harm produced by a delay in discovery against the possibility that a dispositive motion will be granted and entirely eliminate the need for such discovery.

[6] Federal Civil Procedure ⇨ 1271
170Ak1271
Stay of discovery was warranted when parties agreed that, if granted, either plaintiffs' pending summary judgment motion or defendant's pending motion to dismiss would be dispositive of entire case, plaintiffs did not contend that they needed discovery sought to oppose motions to dismiss, significant privilege issues raised by discovery requests supported conclusion that permitting discovery under such circumstances would be wasteful and inefficient, and plaintiffs failed to show that they would be harmed by stay, in that there was no nexus between claimed prejudice and discovery sought. Fed.Rules Civ.Proc.Rule 26(b)(1), 28 U.S.C.A.

*1 Elizabeth B. Sandza, David Mitchell Ross, Jr., Leboeuf, Lamb, Greene, Macrae, L.L.P., Washington, DC, for plaintiffs.

Daniel A. Rezneck, D.C. Financial Responsibility & Management Assistance Author., David A. Hickerson, Weil, Gotshal & Manges, L.L.P., Robert C. Utiger, Office of Corporation Counsel, D.C., for defendants.

Carl A. Messineo, Partnership for Civil Justice, Inc., Washington, DC, for movants.

James Hiram Lesar, Washington, DC,

amicus.

MEMORANDUM ORDER

ROBINSON, United States Magistrate Judge.

This action was referred to the undersigned United States Magistrate Judge for resolution of the parties' discovery disputes. Two motions which concern the conduct of *2 discovery are pending for determination by the undersigned: (1) plaintiffs' Motion to Compel Production of PriceWaterhouseCoopers Due Diligence Report (Docket No. 6); and (2) Motion of District of Columbia Financial Responsibility and Management Assistance Authority (the "Control Board"), Dr. Alice M. Rivlin and Francis S. Smith to Quash Notices of Deposition (Docket No. 7). Also pending are the parties' dispositive motions: plaintiffs have moved for summary judgment, and each of the defendants has filed a motion to dismiss. Oral argument with respect to plaintiffs' motion for preliminary injunction and the parties' dispositive motions is scheduled for June 8, 2001. [FN1]

FN1. On April 30, counsel for plaintiffs, defendant Control Board and defendant District of Columbia appeared before the court (Roberts, J.) for a hearing on plaintiffs' motion for a temporary restraining order. Plaintiffs suggested that the parties agree that the status quo be maintained for "thirty or sixty days[.]" Transcript of Proceedings Before the Honorable Richard W. Roberts ("Transcript"), p. 3. After hearing the arguments of counsel, the court denied the request for a temporary restraining order. Transcript, p. 84. The court asked plaintiffs' counsel to respond to defendant Control Board's proposal that the court schedule a consolidated hearing on the motion for a preliminary injunction and cross-motions for summary judgment. Plaintiffs' counsel said that [w]e're going to embrace that, your honor, and we'd like to do so on the most expedited basis. Transcript, p. 84.

On May 18, 2001, the undersigned heard the arguments of counsel with respect to the two motions which concern the conduct of

discovery. [FN2] Upon consideration of plaintiffs' motion to compel and defendant Control Board's motion to quash; the memoranda in support thereof and in opposition thereto; the proffer of evidence by plaintiffs' counsel; the arguments of all counsel and the entire record herein, all discovery, including further consideration of the motion to compel and motion to quash, will be stayed pending determination of the parties' dispositive motions.

FN2. At the hearing, plaintiffs withdrew the motion to compel with respect to defendant Greater Southeast Community Hospital Corporation 1 ("Greater Southeast") upon consideration of the representation of Greater Southeast that it does not have possession, custody or control of the requested documents. See Defendant Greater Southeast Community Hospital Corporation 1's Opposition to Plaintiffs' Motion to Compel Production of PriceWaterhouseCoopers Due Diligence Report at 1.

DISCUSSION

I. Exercise of Discretion to Stay Discovery

[1][2] It has long been recognized that trial courts are vested with broad discretion to manage the conduct of discovery. See, e.g., *Brennan v. Local Union No. 639, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen and Helpers*, 494 F.2d 1092, 1100 (D.C.Cir.1974); *Fed.R.Civ.P. 26*. It is settled that entry of an order staying discovery pending determination of dispositive motions is an appropriate exercise of the court's discretion:

A trial court has broad discretion and inherent power to stay discovery until preliminary questions that may dispose of the case are determined.

Petrus v. Bowen, 833 F.2d 581, 583 (5th Cir.1987) (citations omitted); see *Ladd v. Equicredit Corp. of Am.*, No. CIV.A. 00-2688, 2001 WL 175236, at *1 (E.D.La. Feb. 21, 2001); *White v. Fraternal Order of Police*, 909 F.2d 512, 517 (D.C.Cir.1990).

In accordance with this broad discretion, this court (Oberdorfer, J.) has observed that [i]t is well settled that discovery is generally

considered inappropriate while a motion that would be thoroughly dispositive of the claims in the Complaint is pending.

Anderson v. United States Attorneys Office, No. CIV.A. 91-2262, 1992 WL 159186, at *1 (D.D.C. June 19, 1992). A stay of discovery pending the determination of a dispositive motion "is an eminently logical means to prevent wasting the time and effort of all concerned, and to make the most efficient use of judicial resources." Coastal States Gas Corp. v. Department of Energy, 84 F.R.D. 278, 282 (D.Del.1979) (citations omitted).

[3] In Anderson, a motion to dismiss that would have been dispositive of all of the issues was pending when the court considered plaintiff's motion to compel discovery *3 and defendant's motion for protective order. In this action, each defendant has filed a motion to dismiss. Perhaps more significantly, plaintiffs have filed a motion for summary judgment, and in it, state that "there is no genuine dispute as to any material fact and that based on the undisputed material facts Plaintiffs are entitled to judgment in their favor as a matter of law." Plaintiffs' Motion for Summary Judgment (Docket No. 10) at 1. At the May 18 hearing, plaintiffs and defendant Control Board agreed that either plaintiffs' motion for summary judgment or defendant Control Board's motion to dismiss, if granted, would be "thoroughly dispositive." See Anderson, 1992 WL 159186, at *1. While a stay of discovery pending determination of a motion to dismiss "is rarely appropriate when the pending motion will not dispose of the entire case[,]" Keystone Coke Co. v. Pasquale, No. CIV.A. 97-6074, 1999 WL 46622, at *1 (E.D.Pa. Jan. 7, 1999), no such concern exists here, since the parties agree that the grant of either plaintiffs' motion for summary judgment or defendant Control Board's motion to dismiss will be dispositive of "the entire case." See also Feldman v. Flood, 176 F.R.D. 651, 652 (M.D.Fla.1997) ("the Court ordinarily should not stay discovery which is necessary to gather facts in order to defend against the motion.").

[4] Plaintiffs do not contend--nor did they at the April 30 hearing--that they would be

unable to file their oppositions to defendants' motions to dismiss in the absence of such discovery. [FN3] A trial court "ordinarily should not stay discovery which is necessary to gather facts in order to defend against [a] motion [to dismiss]." Feldman, 176 F.R.D. at 652; cf. Coastal States Gas Corp., 84 F.R.D. at 282 ("discovery should precede consideration of dispositive motions when the facts sought to be discovered are relevant to consideration of the particular motion at hand."). However, plaintiffs have never suggested that they need the discovery they now seek in order to oppose the pending motions to dismiss. [FN4]

FN3. See n. 1, supra.

FN4. This court (Penn. J.) has previously held that a "bald assertion" by a defendant that its motion to dismiss will be granted, or that discovery would be burdensome, is generally insufficient to justify the entry of an order staying discovery. People With AIDS Health Group v. Burroughs Wellcome Co., No. CIV.A. 91-0574, 1991 WL 221179, at *1. However, the facts of the instant action is distinguishable in two material respects. First, plaintiffs in this action have moved for summary judgment. Second, the significant privilege issues presented by the plaintiffs' discovery requests warrant the conclusion that permitting discovery before the need for such discovery is determined would be wasteful and inefficient. See Coastal States Gas Corp., 84 F.R.D. at 282; cf. Maljack Prod., Inc. v. Motion Picture Ass'n of Am., No. CIV.A. 90-1121, 1990 WL 157900, at *1 (D.D.C. Oct. 3, 1990) ("avoidance of potentially unnecessary discovery is warranted" where a motion to dismiss is pending and plaintiff would not be prejudiced by a stay of discovery pending determination of the motion to dismiss).

In the memorandum in support of their motion for summary judgment, plaintiffs state that they have sought to compel the production of the PriceWaterhouseCoopers due diligence reports, and to depose Dr. Rivlin and Mr. Smith. Plaintiffs' Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment at 4, n. 1. While plaintiffs state that they "reserve the right to supplement the undisputed material

facts" with the report and the deposition testimony, they do not contend that their motion is premature or incomplete without such discovery. While a trial court could well be found to have abused its discretion by staying discovery where it is necessary for the party opposing summary judgment to develop "additional facts," see *Moore v. United States*, 213 F.3d 705, 710 n. 3 (D.C.Cir.2000), no authority supports plaintiffs' effort to concurrently move for summary judgment and take discovery regarding the issues addressed in the motion.

II. Absence of Prejudice to Plaintiffs

[5] In the determination of whether to stay discovery while pending dispositive motions are decided, the trial court "inevitably must balance the harm produced by a delay in discovery against the possibility that [a dispositive] motion will be granted and entirely eliminate the need for such discovery." *Feldman*, 176 F.R.D. at 652. The undersigned finds that plaintiffs have not demonstrated *4 that they would be harmed by a stay of discovery pending determination of the dispositive motions. When asked at the hearing what prejudice plaintiffs would suffer if discovery were stayed, plaintiffs' counsel responded that the plaintiffs would be prejudiced by (1) the continued violation of their constitutional rights, [FN5] and (2) the compromise of appropriate health care resulting from the reduction of services at D.C. General Hospital.

FN5. Plaintiffs, in their three-count First Amended Complaint, allege, inter alia, that plaintiffs Chavous and Catania, members of the D.C. City Council, "have a constitutionally protected right to cast unimpeded votes on issues of public importance." First Amended Complaint, Count Two, ¶ 46. Plaintiffs also allege that defendant Control Board exceeded the scope of its statutory authority (Count One), and seek to enjoin defendants Greater Southeast and the District of Columbia "from acting in furtherance of" the contract the Control Board entered with Greater Southeast (Count Three).

With respect to the first claim of prejudice, the undersigned finds that there is no nexus

between the discovery plaintiffs now seek and the alleged violation of the constitutional rights of plaintiffs Chavous and Catania. The only violation of any constitutional right alleged in this action is that the right of plaintiffs Chavous and Catania "to cast unimpeded votes" was infringed by defendant Control Board. See First Amended Complaint, Count Two, ¶¶ 45-49. The constitutional violation alleged is therefore wholly independent of any facts which could be developed through either the production of the due diligence reports, or the depositions of Dr. Rivlin and Mr. Smith. The undersigned cannot find that plaintiffs would be prejudiced by a stay of discovery where the discovery sought is not relevant to the claims or defenses of any of the parties, or even relevant to the subject matter involved in this action. See Fed.R.Civ.P. 26(b)(1).

With respect to the second claim of prejudice, the undersigned finds that there is no nexus between the discovery plaintiffs now seek and any compromise of health care resulting from the reduction of services at D.C. General Hospital. Access to health care is undeniably a matter of grave public concern. However, it is not the issue presented by plaintiffs in this action; rather, plaintiffs allege only that defendant Control Board exceeded the scope of its statutory authority, and that it violated the constitutional rights of plaintiffs Chavous and Catania. [FN6] Thus, the undersigned again finds that plaintiffs would not be prejudiced by a stay of discovery regarding matters which are not relevant to the claims or defenses of any party, or even relevant to the subject matter of this action. [FN7] See Fed.R.Civ.P. 26(b)(1).

FN6. See n. 5, supra.

FN7. For example, in the memorandum in support of their motion for summary judgment, plaintiffs state that the due diligence reports "[are] essential to an evaluation of whether Greater Southeast will be able to provide equivalent volume and types of services to D.C. General and whether Greater Southeast will meet adequate standards of quality and accessibility." Plaintiffs' Memorandum of

Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment at 4, n. 1. However, this issue is not before the court in this action. For that reason, the undersigned denied the request of plaintiffs' counsel that plaintiff Catania be permitted to either "address the court," or testify, to relate the details of reports that some ambulance drivers recently found that the emergency rooms at some local hospitals were closed.

Finally, the undersigned finds that plaintiffs have offered no cogent explanation for their failure to inform the court, when they appeared for oral argument on their motion for a temporary restraining order, that they required discovery before the briefing of dispositive motions could be completed, or to request leave to take such discovery. [FN8] Defendant Control Board, at the hearing before the undersigned, suggested that this failure indicates that discovery was "an afterthought." In response, plaintiffs' counsel claimed simply that counsel "didn't think about it"; however, this self-deprecating explanation undermines plaintiffs' claim that they now require discovery in order "to make [their] best argument for summary judgment." [FN9]

FN8. See n. 1, supra.

FN9. Plaintiffs' counsel referred to the due diligence reports at the April 30 hearing, but never asked that they be produced. Transcript, p. 23. Plaintiffs' counsel's discussion of the reports was limited to the concern that the executive summary plaintiffs received "still doesn't have the detail that tells us whether these entities can do what they promise to do for the price they promise to pay"; however, that is not an issue in this action. See n. 5, supra. The only reference to discovery at the April 30 hearing was by counsel for the Control Board, who said of an issue raised by plaintiffs that "I'd like to know more about it if we have to go forward with discovery which I hope we won't because I'm hopeful that this can be resolved on cross-motions." Transcript, p. 47. Plaintiffs' counsel never disputed this proposition.

***5 CONCLUSION**

[6] Plaintiffs have failed to articulate any

reason which would warrant a departure from the authorities which hold that a trial court properly exercises its discretion to stay discovery where a motion which would be entirely dispositive if granted is pending; the discovery is not needed to permit the party who seeks discovery to oppose the pending dispositive motion; and the party who seeks discovery would not be prejudiced by a stay. A stay of discovery in the circumstances presented here furthers the ends of economy and efficiency, since if either the plaintiffs' dispositive motion or defendant Control Board's dispositive motion is granted, there will be no need for discovery. If both dispositive motions are denied, then the court will undertake an informed consideration of what discovery is appropriate in the context of the issues actually before the court.

It is, therefore, this ____ day of May, 2001,

ORDERED that all discovery, including further consideration of plaintiffs' motion to compel (Docket No. 6) and the Control Board's motion to quash notices of deposition (Docket No. 7), is STAYED pending determination of the parties' dispositive motions.

201 F.R.D. 1

END OF DOCUMENT

District Court of Appeal of Florida, Second District.

The CHURCH OF SCIENTOLOGY OF CALIFORNIA, INC., and Mary Sue Hubbard, Appellants,

v.

Gabriel CAZARES and Margaret Cazares, his wife, Appellees.

No. 80-1438.

April 1, 1981.

Defendants appealed from an order of the Circuit Court, Pinellas County, Fred L. Bryson, J., denying their motion for change of venue to the limited extent that they sought a recusal of the court and assignment of the case to another judge in another circuit, but granting the motion to the extent that the trial of the cause would be held in another county. The District Court of Appeal, Scheb, C. J., held that, once the circuit court concluded that the cause should be transferred, it had to enter an order transferring the action to a court of the same jurisdiction in another county and could not retain jurisdiction and merely transfer the trial to another county; defendants were required to pay accrued costs.

Vacated and remanded.

West Headnotes

Venue ⇨ 80

401k80

Once circuit court concluded that cause should be transferred, it had to enter order transferring action to court of like jurisdiction in another county and could not retain jurisdiction and merely transfer trial to another county; defendants were required to pay accrued costs. West's F.S.A. §§ 47.141, 47.191.

*810 Paul Antinori, Jr., Tampa, for appellants.

Walt Logan, St. Petersburg, Wagner, Cunningham, Vaughan, Genders &

McLaughlin, Tampa, and Joel D. Eaton of Podhurst, Orseck & Parks, Miami, for appellees.

SCHEB, Chief Judge.

Gabriel and Margaret Cazares sued The Church of Scientology of California, Inc., and Mary Sue Hubbard in circuit court in Pinellas County. The Church and Hubbard each moved for a change of venue under section 47.101(1)(b), Florida Statutes (1979), on the ground that they could not receive a fair trial in Pinellas County because The Church was odious to the inhabitants of Pinellas County and the people associated Hubbard with The Church because she was the wife of its founder.

Following a hearing the trial court entered its order stating:

(T)hat the Motions for Change of Venue are denied to the limited extent that they seek a recusal of the Court and assignment of the case to another Judge in another Circuit, however,

It is further ORDERED AND ADJUDGED that the Motion is granted in part to the extent that the trial of the cause shall be held in Daytona Beach, Volusia County, Florida.

....

It is further ORDERED that F.S. 47.191 shall not be applied to require the movants, MARY SUE HUBBARD and THE CHURCH OF SCIENTOLOGY OF CALIFORNIA INC. to pay taxable costs at this time since the cause has not been transferred away from the Circuit Court for Pinellas County, Florida and that jurisdiction still lies in that Court.

While the court denied The Church and Hubbard's motions to the extent that they sought recusal, the order indicates that the court concluded that the cause should be transferred. Once the court determined this, it had to enter an order transferring the action to a court of the same jurisdiction in another county. s 47.141, Fla.Stat. (1979). The court's authority at that point was limited to entry of an order transferring jurisdiction. Kern v.

401 So.2d 810
(Cite as: 401 So.2d 810, *810)

Kern, 309 So.2d 563 (Fla. 2d DCA 1975);
University Federal Savings and Loan
Association of Coral Gables v. Lightbourn, 201
So.2d 568 (Fla. 4th DCA 1967).

*811 Further, the court having improperly
attempted to retain jurisdiction, it also erred
in not requiring The Church and Hubbard, as
movants, to pay accrued costs. s 47.191,
Fla.Stat. (1979).

Accordingly, we vacate the court's order,
remand, and direct the trial court to enter an
order transferring venue in accordance with
section 47.141 and directing payment of costs
as required by section 47.191.

HOBSON and DANAHY, JJ., concur.

401 So.2d 810

END OF DOCUMENT

United States Court of Appeals,
Eleventh Circuit.

Bhupendra CHUDASAMA; Gunvanti B.
Chudasama, Plaintiffs-Appellees,
v.
MAZDA MOTOR CORPORATION; Mazda
Motor of America, Inc., Defendants-
Appellants.

Nos. 95-8896, 95-8921.

Sept. 15, 1997.

Auto owners who were injured in accident brought products liability and fraud action against manufacturer of their auto. The United States District Court for the Middle District of Georgia, No. 4:93-CV-61-JRE, J. Robert Elliott, J., 1995 WL 641984, entered default against manufacturer for failing to comply with court order compelling discovery. Manufacturer appealed. The Court of Appeals, Tjoflat, Circuit Judge, held that: (1) prior to issuing order compelling discovery, district court should have ruled on manufacturer's motion to dismiss fraud claim; (2) order of default was abuse of discretion; and (3) case would be reassigned to different judge on remand.

Vacated and remanded with instruction.

West Headnotes

[1] Federal Courts ⇌ 770
170Bk770
On interlocutory appeal of sanctions order, Court of Appeals lacked power to limit its jurisdiction to certain aspect of that order, i.e., portion that vacated protective order; rather, Court would review entire order. 28 U.S.C.A. § 1292(b).

[2] Federal Courts ⇌ 770
170Bk770
Court of Appeals had jurisdiction to review both order compelling discovery and order imposing sanctions, which was issued in part for defendant's alleged violation of compel order; even though compel order was

interlocutory order over which Court would not normally have jurisdiction, Court could exercise pendent appellate jurisdiction over that order, as it was inextricably intertwined with sanctions order, and meaningful review of sanctions order required review of compel order. 28 U.S.C.A. § 1292(b).

[3] Federal Civil Procedure ⇌ 1278
170Ak1278
District courts enjoy substantial discretion in deciding whether and how to impose sanctions against party that violates order compelling discovery. Fed.Rules Civ.Proc.Rule 37, 28 U.S.C.A.

[4] Federal Courts ⇌ 820
170Bk820
Court of Appeals reviews for abuse of discretion order that imposes sanctions against party that violates order compelling discovery. Fed.Rules Civ.Proc.Rule 37, 28 U.S.C.A.

[5] Federal Courts ⇌ 763.1
170Bk763.1
Court of Appeals' review of order striking defendant's pleadings for failure to comply with discovery order should be particularly scrupulous lest district court too lightly resort to this extreme sanction, amounting to judgment against defendant without opportunity to be heard on merits. Fed.Rules Civ.Proc.Rule 37(b)(2)(C), 28 U.S.C.A.

[6] Federal Courts ⇌ 820
170Bk820
Orders compelling discovery are reviewed for abuse of discretion.

[7] Federal Courts ⇌ 820
170Bk820
In evaluating whether district court abuses its discretion when it imposes severe sanctions upon party that violates order compelling discovery, important factor is whether entry of that order was itself abuse of discretion. Fed.Rules Civ.Proc.Rule 37(b), 28 U.S.C.A.

[8] Federal Courts ⇌ 763.1
170Bk763.1

Because litigants are expected to comply with orders compelling discovery, even those they believe were improvidently granted, sanctions for failure to comply will very often be sustained, particularly when infirmity of violated order is not clear and sanctions imposed are moderate. Fed.Rules Civ.Proc.Rule 37(b), 28 U.S.C.A.

[9] Federal Civil Procedure ⇌ 1991
170Ak1991

District courts must take active role in managing cases on their docket.

[10] Federal Civil Procedure ⇌ 928
170Ak928

Failure to consider and rule on significant pretrial motions before issuing dispositive orders can be abuse of discretion. Fed.Rules Civ.Proc.Rule 37(b), 28 U.S.C.A.

[11] Federal Civil Procedure ⇌ 928
170Ak928

[11] Federal Civil Procedure ⇌ 1828
170Ak1828

Resolution of pretrial motion that turns on findings of fact--for example, motion to dismiss for lack of personal jurisdiction--may require some limited discovery before meaningful ruling can be made. Fed.Rules Civ.Proc.Rule 12(b)(2), 28 U.S.C.A.

[12] Federal Civil Procedure ⇌ 1828
170Ak1828

Facial challenges to legal sufficiency of claim or defense, such as motion to dismiss based on failure to state claim for relief, should be resolved before discovery begins; such dispute always presents purely legal question, and thus, neither parties nor court have any need for discovery before court rules on motion.

[13] Federal Civil Procedure ⇌ 1828
170Ak1828

When faced with motion to dismiss claim for relief that significantly enlarges scope of discovery, district court should rule on motion before entering discovery orders, if possible; court's duty in this regard becomes more imperative when contested claim is especially dubious.

[14] Federal Civil Procedure ⇌ 1264
170Ak1264

[14] Federal Civil Procedure ⇌ 1828
170Ak1828

Issuance of order compelling discovery in auto owners' products liability and fraud action against auto manufacturer was abuse of discretion, as district court had not ruled on manufacturer's motion to dismiss fraud claim for failure to plead fraud with particularity; fraud claim was novel, of questionable validity, and dramatically enlarged scope of discovery, and district court could have resolved many, if not most, discovery disputes by ruling on manufacturer's motion. Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.

[15] Fraud ⇌ 3
184k3

Under Georgia law, elements of fraud claim are false representation by defendant, scienter, intention to induce plaintiff to act or refrain from acting, justifiable reliance by plaintiff, and damage to plaintiff.

[16] Federal Civil Procedure ⇌ 1271
170Ak1271

When parties to case inform court that there are objections to discovery requests that they cannot resolve, court should provide rulings on objections.

[17] Federal Civil Procedure ⇌ 1271
170Ak1271

When party moves court to compel discovery, court should consider and rule on objections filed by resisting party; while it has discretion to grant or deny motion, it should not grant motion in face of well developed, bona fide objections without meaningful explanation of its decision.

[18] Federal Civil Procedure ⇌ 1271
170Ak1271

In granting plaintiff's motion to compel discovery, district court should have explained why it granted compel order over defendant's objections or otherwise indicated that it had taken objections into consideration.

[19] Federal Civil Procedure ⇌ 1278

170Ak1278

Order striking defendant's pleadings, entering default on all claims, and vacating previously entered protective order, all in response to defendant's failure to comply with order compelling discovery, was abuse of discretion; patent ambiguity in discovery requests that court compelled defendant to satisfy and court's utter failure to clarify defendant's obligations were largely to blame for its "noncompliance," and less onerous sanctions were available. Fed.Rules Civ.Proc.Rule 37(b)(2)(C), 28 U.S.C.A.

[20] Federal Civil Procedure ⇌ 1278

170Ak1278

Regardless of willfulness of party's discovery violation, default judgment cannot stand on complaint that fails to state claim. Fed.Rules Civ.Proc.Rule 37(b)(2)(C), 28 U.S.C.A.

[21] Federal Civil Procedure ⇌ 1278

170Ak1278

Where default is ordered for noncompliance with order compelling discovery, court must find that defendant's "noncompliance" with compel order was intentional or in bad faith. Fed.Rules Civ.Proc.Rule 37(b)(2)(C), 28 U.S.C.A.

[22] Federal Civil Procedure ⇌ 1278

170Ak1278

Violation of discovery order caused by simple negligence, misunderstanding, or inability to comply will not justify default. Fed.Rules Civ.Proc.Rule 37(b)(2)(C), 28 U.S.C.A.

[23] Federal Civil Procedure ⇌ 1278

170Ak1278

Order of default for noncompliance with discovery order is abuse of discretion where less draconian but equally effective sanctions were available. Fed.Rules Civ.Proc.Rule 37(b)(2)(C), 28 U.S.C.A.

[24] Federal Civil Procedure ⇌ 1278

170Ak1278

Court must impose "appropriate sanction" once court makes factual determination that discovery filing was signed in violation of rule which provides that attorney's signature on discovery-related filing certifies that it

conforms to discovery rules, is made for proper purpose, and does not impose undue burdens on opposing party. Fed.Rules Civ.Proc.Rule 26(g)(3), 28 U.S.C.A.

[25] Federal Courts ⇌ 820

170Bk820

[25] Federal Courts ⇌ 870.1

170Bk870.1

When reviewing sanctions order entered for violation of rule which provides that attorney's signature on discovery-related filing certifies that it conforms to discovery rules, is made for proper purpose, and does not impose undue burdens on opposing party, Court of Appeals reviews district court's factual finding that certification violated that rule for clear error, and court's decision of appropriate sanction for abuse of discretion. Fed.Rules Civ.Proc.Rule 26(g)(3), 28 U.S.C.A.

[26] Federal Civil Procedure ⇌ 1278

170Ak1278

Order of default and vacatur of protective order were unwarranted, despite evidence that defendant abused discovery procedures, withheld admittedly relevant information, and engaged in dilatory tactics; district court's failure to rule on motion to dismiss or address defendant's discovery objections demonstrated that it did not analyze needs of case, and majority of defendant's misconduct was due to court's utter failure to exercise its discretion in managing case. Fed.Rules Civ.Proc.Rule 26(g)(3), 28 U.S.C.A.

[27] Federal Courts ⇌ 951.1

170Bk951.1

In determining whether to reassign case to another district judge on remand, Court of Appeals considers whether original judge would have difficulty putting his previous views and findings aside, whether reassignment is appropriate to preserve appearance of justice, and whether reassignment would entail waste and duplication out of proportion to gains realized from reassignment. 28 U.S.C.A. § 2106.

[28] Federal Courts ⇌ 951.1

170Bk951.1

Case would be reassigned to different district judge upon remand from reversal of default entered against defendant for failure to comply with order compelling discovery, issuance of which was abuse of discretion; judge's practice of delegating task of drafting sensitive, dispositive orders to plaintiffs' counsel, and then uncritically adopting his proposed orders nearly verbatim, would belie appearance of justice to average observer. 28 U.S.C.A. § 2106.

*1355 Charles M. Shaffer, Jr., Michael M. Raeber, King & Spalding, Atlanta, GA, Jerry A. Buchanan, Buchanan & Land, Columbus, GA, Richard H. Willis, Nelson, Mullins, Riley & Scarborough, Atlanta, GA, Thomas Field, Stroock, Stroock, & Lavan, New York City, for Defendants-Appellants.

William S. Stone, Kevin R. Dean, Blakely, GA, James E. Butler, Jr., Joel O. Wooten, Jr., Butler, Wooten, Overby & Cheeley, Columbus, GA, for Plaintiffs-Appellees.

*1356 Appeals from the United States District Court for the Middle District of Georgia.

Before TJOFLAT and ANDERSON, Circuit Judges, and NANGLE [FN*], Senior Circuit Judge.

FN* Honorable John F. Nangle, Senior U.S. District Judge for the Eastern District of Missouri, sitting by designation.

TJOFLAT, Circuit Judge:

This case illustrates the mischief that results when a district court effectively abdicates its responsibility to manage a case involving contentious litigants and permits excessive and dilatory discovery tactics to run amok. Not only did the district court fail to manage discovery in this case, it in effect delegated the duty to manage to the plaintiffs' counsel. To protect themselves from the plaintiffs' inevitable overreaching, the defendants resorted to self-help and did not provide full discovery. Their tactic resulted in draconian sanctions, including the entry of

a default under Rules 26 and 37 of the Federal Rules of Civil Procedure. Finding that the district court abused its discretion, we vacate the order imposing sanctions and direct that the case be assigned on remand to another district judge.

In part I of this opinion, we describe the discovery disputes below and the district court's management of the case. In part II, we delineate the scope of our jurisdiction over these consolidated appeals. We conclude, in part III, that the court's order was improper under Rule 37 and, in part IV, that the order was improper under Rule 26 as well. Having decided that the order must be vacated, we explain in part V why the chief district judge must assign the case to another district judge on remand.

I.

On May 16, 1991, Bhupendra Chudasama and his wife, Gunvanti B., appellees, purchased a used 1989 Mazda MPV minivan (the "MPV minivan") from Jays Dodge City, a Columbus, Georgia Dodge dealer. On the morning of October 15, 1991, Gunvanti Chudasama was injured when Bhupendra Chudasama lost control of the minivan and it collided with a utility pole. [FN1] Mrs. Chudasama sustained a broken pelvis and broken facial bones; Mr. Chudasama was uninjured. Mrs. Chudasamas' medical bills totaled approximately \$13,000, and she lost approximately \$5,000 in wages. The accident left the MPV minivan, worth approximately \$11,000, beyond repair.

FN1. The Chudasamas' complaint states that, "[a]ccording to the police report, the vehicle was traveling, in the rain, 45 miles per hour in a 25 mile per hour zone."

On April 30, 1993, the Chudasamas filed a products liability action against the appellants-Mazda Motor Corp. ("Mazda Japan"), a Japanese company, and Mazda Motor of America, Inc. ("Mazda America"), an American subsidiary of Mazda Japan, (collectively "Mazda")-in the United States District Court for the Middle District of

Georgia. [FN2] The complaint pointed to two alleged defects in the MPV minivan as the cause of the Chudasamas' accident and resulting injuries: (1) the brakes were likely to cause "the driver's unexpected loss of control ... in the highway environment of its expected use," and (2) the "doors, side panels and supporting members [were] inadequately designed and constructed, and fail[ed] to provide a reasonable degree of occupant safety so that they [were] unreasonably likely to crush and deform into the passenger compartment." Their complaint contained four counts: three standard products liability counts--strict liability, breach of implied warranty, and negligent design and manufacture--and one count of fraud. Each count sought compensatory damages to cover Mrs. Chudasama's medical bills and lost wages, to compensate her for pain and suffering, to compensate Mr. Chudasama for his loss of his wife's "society, companionship and services," and to cover the loss of the vehicle. All but the breach of implied warranty count also sought punitive damages.

FN2. Federal jurisdiction was based on diversity of citizenship under 28 U.S.C. § 1332 (1994). The Chudasamas are Georgia residents; Mazda Japan is a Japanese corporation; and Mazda America is a California corporation.

Over the next two years, the parties engaged in protracted discovery disputes. As has become typical in recent years, both *1357 sides initially adopted extreme and unreasonable positions; the plaintiffs asked for almost every tangible piece of information or property possessed by the defendants, and the defendants offered next to nothing and took several steps to delay discovery. In this case, however, the district court never attempted to resolve the parties' disputes and force the parties to meet somewhere in the middle of their respective extreme positions. As a result, what began as a relatively common discovery dispute quickly deteriorated into unbridled legal warfare.

We see no useful purpose in describing the drawn-out discovery battle in detail; [FN3] a relatively brief summary will suffice. On

July 28, 1993, the Chudasamas served Mazda with their first interrogatories and requests for production. Both documents were models of vague and overly broad discovery requests. The production requests, for example, contained 20 "special instructions," 29 definitions, and 121 numbered requests (some containing as many as 11 subparts). Similarly, the interrogatories contained 18 "special instructions," 29 definitions, and 31 numbered interrogatories. "One" interrogatory included five separate questions that applied to each of the 121 numbered requests for production, arguably expanding the number of interrogatories to 635. [FN4]

FN3. The district court's docket sheet contains no fewer than ninety-five entries of discovery-related pleadings. The parties have further supplemented the record with hundreds of pages of additional unfiled correspondence between counsel for both sides and the court.

FN4. The local rules in the Middle District of Georgia currently limit the number of production requests to 10 for each party and the number of interrogatories to 25 for each party without court approval. See M.D. Ga. Local R. 4.3, 4.4. The record shows that the Chudasamas neither requested nor received the approval of the district court to exceed these limits. Mazda specifically objected to this practice, and the Chudasamas contended that the rules in question came into force after their complaint was filed and therefore should not apply. The local rules became effective on June 2, 1993, just over a month after the complaint was filed. As became its standard operating procedure, the district court never ruled on Mazda's objection. We also note that, although Mazda never filed an objection under the Federal Rules of Civil Procedure, the 1993 amendments to the rules also imposed a limit of 25 interrogatories without leave of court. See Fed.R.Civ.P. 33(a). The applicability of these amendments is discussed *infra* note 32.

The production requests all but asked for every document Mazda ever had in its possession and then some. For example, the Chudasamas sought detailed information about practically all of Mazda's employees worldwide. They requested production of all documents relating to organizational

charts, books or manuals of Mazda ... which will or may assist in identifying an [sic] locating those operating divisions, committees, groups, departments, employees, and personnel ... involved in the conception, market analysis, development, testing, design safety engineering and marketing of the product for all years during which the product has been developed, designed, manufactured and marketed.

Record, vol. I, no. 20, at 17, produc. req. C.2. They also sought "all documents relating to any organizational chart or structure for each of Mazda [']s] ... committees, sub-committees, boards, task forces, and technical groups which took any part in overseeing the design, market analysis, cost/benefits analysis, economic feasibility analysis, development, testing and safety engineering of the product." Record, vol. I, no. 20, at 18, produc. req. C.5.

The scope of these requests becomes apparent only after reading the Chudasamas' definition of the term "product":

This word means the Mazda MPV Minivan involved in the incident and all vehicles similar, though not necessarily identical, to that Minivan. The word includes all variations of 1989 Mazda MPV Minivan vehicles, as well as all variations of the MPV Minivan vehicles produced by Mazda ... in all years before and after the incident. The term should be construed to include each and every component part of the vehicle and more specifically the related components of the assemblies and subassemblies of the vehicle's chassis, wheelbase, steering system, suspension system, braking system, side and side supporting system.

Record, vol. I, no. 20, at 9. The Chudasamas thus asked for production of nearly every document ever made that would list or assist in finding every person that ever had anything *1358 to do with any component of any year model of the MPV minivan "and all vehicles similar."

Another representative example of the breadth of discovery sought by the Chudasamas involves Mazda's advertising

campaigns. They requested production of all documents relating to any print and broadcast media advertisements, catalogues, sales brochures, product inserts, or promotional information of any kind, relating to the product issued by or on behalf of Mazda ... for the purpose of marketing the product to consumers in the United States [or] in any other country where the product was marketed.

Record, vol. I, no. 20, at 23, produc. req. D.20, D.21. In other words, the Chudasamas wanted every document related to any form of advertising anywhere in the world of any year Mazda MPV minivan and "all vehicles similar" and all components thereof.

In addition to being broad, several requests were so vague as to be all but unintelligible. For example, the Chudasamas requested "all documents reflecting the conditions and circumstances of the environment of use of the product." Record, vol. I, no. 20, at 19, produc. req. D.2. "Environment of use" is defined by the Chudasamas as "real-world conditions to which motor vehicles are actually exposed in their use by members of the public including, but not limited to, the occurrence of collisions and/or side-impacts." Record, vol. I, no. 20, at 6.

Other requests simply asked Mazda to research the Chudasamas' case. They requested "copies of any and all governmental statutes, regulations, or standards, industry standards, corporate standards, authoritative articles or treatises, which Mazda ... contends or admits are applicable to the design, development, testing, safety engineering or distribution of the product," Record, vol. I, no. 20, at 21, produc. req. D.12, and "all documents in [Mazda's] libraries ... which address the design, engineering, and manufacturing of cars and trucks that address brake failures and/or side-impact accidents, injuries, integrity, and/or crush," Record, vol. I, no. 20, at 28, produc. req. E.10. [FN5] Neither request was limited to documents prepared by or for Mazda or to documents relating to the "product." Again, we emphasize that the above examples are only a few representative samples. [FN6]

FN5. In lieu of the actual documents, the Chudasamas offered to allow Mazda to "simply furnish[] a complete bibliography thereof." Record, vol. I, no. 20, at 27, produc. req. E.10 (emphasis in original).

FN6. The boundless discovery requests were not limited to production requests. For example, one of the interrogatories asks Mazda to "[i]dentify every document, every tangible thing, and every item of real or demonstrative evidence which is relevant to the subject matter of this action." Record, vol. I, no. 19, at 13, interrog. 8. Of course, the Chudasamas provide their own 25-part definition of "relevant to the subject matter of this action." Record, vol. I, no. 19, at 9-10.

In response to the Chudasamas' excessively broad discovery requests, Mazda adopted four different strategies. First, it objected to almost every production request and interrogatory on almost every imaginable ground. While some of its objections were clearly boilerplate and bordered on being frivolous, many were directly on point and raised bona fide questions of law. On ten different occasions from September 7, 1993, until November 21, 1994, Mazda filed written objections to the Chudasamas' discovery requests. Moreover, during three different hearings in January, August, and September of 1994, Mazda asked the district court to rule on its objections no fewer than twentyfive times, all to no avail. Finally, on November 4, 1994, counsel for Mazda sent a letter to the court imploring it to rule on three specific aspects of the Chudasamas' discovery requests. [FN7] Mazda apparently hoped that such rulings would limit the scope of discovery or, at the very least, clarify its duties. The district *1359 court never directly ruled on any of these objections or requests for rulings; nor did it ever give any indication that it had considered them in even the most cursory fashion. Accordingly, the Chudasamas continued their broad demands, unchecked by the district court.

FN7. Specifically, it asked the court (1) to limit the Chudasamas' definition of "product," quoted supra, (2) to determine whether Mazda should produce documents relating to the recall of 1990-91 MPV

minivans in addition to the recall of the 1989 MPV minivan involved in the case, and (3) to limit the Chudasamas' definition of the term "similar incidents" (another term broadly defined by the Chudasamas) to refer only to those incidents involving 1989 Mazda MPV minivans in which the brakes allegedly locked up or the right-side passenger compartment was alleged to be uncrashworthy.

On October 21, 1993, Mazda began pursuing a second strategy for countering the Chudasamas' vague and overbroad discovery requests. It filed a motion to dismiss their fraud count for failure to plead fraud with particularity, pursuant to Fed.R.Civ.P. 9(b). [FN8] Mazda contended that the Chudasamas had failed to point to any specific misrepresentation made by Mazda.

FN8. This rule requires that "[i]n all averments of fraud the circumstances constituting fraud ... shall be stated with particularity." Fed.R.Civ.P. 9(b).

The Chudasamas' fraud claim is based on the Federal Motor Vehicle Safety Standards, promulgated by the National Highway and Traffic Safety Administration. [FN9] They alleged in their complaint that the MPV minivan only satisfied the standards that applied to "multipurpose" vehicles (the "multipurpose standards") and not the standards applicable to "passenger cars" (the "car standards"). [FN10] Mazda "defrauded and deceived the American consuming public, including the plaintiffs and others similarly situated," the Chudasamas alleged, because it marketed the MPV minivan "as a family passenger car or vehicle intended to be used primarily for transporting adults and children." This marketing scheme was fraudulent according to the complaint because Mazda "well knew" that the MPV minivan only met the multipurpose standards and not the car standards. [FN11] Moreover, the complaint alleged, the Chudasamas "reasonably relied on the impression created" by this marketing scheme when they purchased their used minivan. [FN12]

FN9. The Chudasamas' complaint is an all-too-

typical shotgun pleading. The four counts it presents follow forty-three numbered paragraphs of factual allegations, many of which are vague. Each count has two numbered paragraphs, the first of which incorporates by reference all forty-three paragraphs of factual allegations. Many of the factual allegations appear to relate to only one or two counts, or to none of the counts at all. Thus, a reader of the complaint must speculate as to which factual allegations pertain to which count. As a result, discerning the Chudasamas' exact theory of fraud is no easy task. Now that the Chudasamas have been forced to articulate and develop their theory in response to Mazda's motion to dismiss and arguments on appeal, it has become clear that their claim is as we describe it in this opinion.

FN10. The Federal Motor Vehicle Standards are set out at subpart B of 49 C.F.R. § 571 (1996). The specific standard that the Chudasamas alleged the MPV minivan did not satisfy was standard 214 governing side-impact protection. See 49 C.F.R. § 571.214. Before September 1, 1993, this standard applied only to "passenger cars." § 571.214(S2). The term "passenger car" is defined as "a motor vehicle with motive power, except a multipurpose passenger vehicle, motorcycle, or trailer, designed to carry 10 persons or less." § 571.3(b) (emphasis added). The term "multipurpose passenger vehicle" is defined as "a motor vehicle with motive power, except a trailer, designed to carry 10 persons or less which is constructed either on a truck chassis or with special features for occasional off-road operation." *Id.*

FN11. Mazda asserts, and the Chudasamas concede, that the MPV minivan is a "multipurpose passenger vehicle" (hence the initials "MPV") for purposes of the standards. The Chudasamas therefore do not contend that the MPV minivan does not satisfy the applicable standards.

FN12. The complaint does not indicate how Mazda's allegedly fraudulent marketing scheme caused the accident. The remedies for fraud are generally limited to rescission, in which the buyer seeks to rescind the transaction by tendering a return of the item purchased and asking for a return of the purchase price, or damages, in which the buyer stands on the transaction and seeks damages for the difference between the value of the product

as represented and its actual value at the time of purchase. See generally 2 Fowler V. Harper et al., *The Law of Torts* § 7.15 (2d ed.1986). Because the Chudasamas purchased the MPV minivan from a used car lot, we question whether the Chudasamas could have pursued either claim for relief against Mazda, as opposed to the used car dealer. The complaint makes clear, however, that the Chudasamas do not seek either form of relief. Rather, as indicated in the text, they seek compensatory and punitive damages relating to the accident. We assume that the Chudasamas intend to establish causation by employing the "but-for" theory of causation: Had Mazda not duped them into purchasing the MPV minivan, the accident would never have occurred. The Chudasamas have not represented--in their memoranda to the district court or in their brief to this court--that Georgia law would recognize such a but-for theory of causation. In fact, a review of Georgia case law suggests otherwise. See, e.g., *Black v. Georgia S. & Fla. Ry. Co.*, 202 Ga.App. 805, 807, 415 S.E.2d 705, 707 (1992) (distinguishing between but-for and proximate causation); *Ekstedt v. Charter Med. Corp.*, 192 Ga.App. 248, 384 S.E.2d 276, 277 (1989) (rejecting fraud claim for lack of evidence of proximate cause); *Citizens Bank of Ball Ground v. Johnson*, 191 Ga.App. 155, 158, 381 S.E.2d 121, 124 (1989) (same). We briefly address two other apparent deficiencies to the fraud claim *infra* at note 39.

***1360** Mazda recognized that the fraud count substantially widened the scope of discovery. Absent the fraud count, the only information that the Chudasamas would be entitled to discover would be information related to the 1989 MPV minivan's brakes and side structure. The fraud count, however, arguably widened the scope of discovery to include information relating to Mazda's intentions in designing and marketing the MPV minivans, and possibly other "vehicles similar." Therefore, if Mazda could convince the district court to dismiss the fraud count, discovery would become substantially more manageable.

In its motion to dismiss the fraud count, Mazda contended that the Chudasamas failed to allege the "time, place and content of the alleged misrepresentations." The

Chudasamas' memorandum in opposition to Mazda's motion argued that the misrepresentations were made in advertisements they had viewed in the past. They needed discovery from Mazda, they said, to find out which particular advertisements they had viewed and relied upon.

Despite the fact that both parties fully briefed Mazda's motion to dismiss, the district court never ruled on it. Although Mazda frequently reminded the district court--over a period of time exceeding a year and a half--that the motion was pending, the only indication in the record that the district court even acknowledged the motion was a statement made at a hearing in August 1994 (over nine months after the motion was filed) suggesting that the motion would be considered after discovery. [FN13] The motion thus remained pending [FN14] and failed to narrow the Chudasamas' discovery demands.

FN13. After counsel for Mazda reiterated the need to rule on the motion, the court stated, "Let's go ahead with the discovery, and we can more clearly understand the fraud." Record, vol. 9, no. 70, at 65.

FN14. Mazda amended the still-pending motion on June 22, 1995, to include a request that the fraud count be dismissed pursuant to Fed.R.Civ.P. 12(b)(6) on the grounds that Mazda's advertisements, as described by the complaint, were not sufficient to support a claim of fraud. The only "statement" to be gleaned from the complaint was that the MPV minivan was a passenger vehicle intended to transport adults and children. Mazda contended that this statement not only was not misleading, it was entirely accurate, especially in view of the standard's definition of "multipurpose passenger vehicles." Mazda further contended that the Chudasamas' allegation of reliance was refuted by their own testimony. The motion alleged that Mr. Chudasama admitted in a deposition both that he could not remember viewing any specific advertisements and that he did not rely on any advertisements in purchasing the MPV minivan.

Mazda's third strategy was to seek a protective order. Much of the information requested by the Chudasamas involved

confidential documents that went to the heart of Mazda's business. They sought, inter alia, marketing studies, internal memoranda, and documentation on the history of the development and design of the MPV minivan and other vehicles. Fearing disclosure of this information to its competitors or to other potential plaintiffs, Mazda sought a "non-sharing" protective order that would keep the information under seal and prohibit the Chudasamas from sharing Mazda's proprietary information with anyone. They filed a motion for such a protective order on August 16, 1994. The Chudasamas objected, but indicated that they would accept a "sharing" protective order that would allow them to share the information with similarly situated plaintiffs, but not with anyone else.

At a hearing in September 1994, Mazda offered to stipulate to a sharing protective order if the Chudasamas would narrow their proposed definition of similarly situated plaintiffs. The Chudasamas declined this invitation, and on September 15, 1994, the district court began an alarming trend by adopting nearly verbatim the proposed sharing protective order drafted by counsel for the Chudasamas. [FN15] If nothing more, however, *1361 the sharing protective order issued by the court provided for the protection of Mazda's confidential information from disclosure to its competitors.

FN15. The order proposed by the Chudasamas' counsel and the order actually entered by the district court are perfectly identical in all but one respect. The proposed order begins with the clause, "With the consent of counsel for the plaintiffs and counsel for the defendants." The actual order also begins with this clause, but the clause has been crossed out.

Perhaps because it realized that the district court had no intention of ruling on its motion to dismiss the fraud count or its various objections, Mazda adopted a fourth strategy; it withheld a substantial amount of information that it later conceded was properly discoverable. Early in the litigation, Mazda Japan moved to dismiss the Chudasamas' claims against it based on

alleged deficiencies in their service of process. [FN16] Although the district court denied its motion in August 1993, Mazda Japan refused to participate in discovery until the district court denied its motion for reconsideration in January 1994, out of fear that its objections would be deemed waived if it participated. Because Mazda Japan and Mazda America were represented by the same counsel, Mazda Japan in effect received the benefits of Mazda America's discovery without suffering the burden of complying with the Chudasamas' requests. This was a particularly effective strategic advantage because Mazda America contended that most of the documents and information sought by the Chudasamas were in Mazda Japan's possession.

FN16. Specifically, Mazda Japan contended that the Chudasamas' service of process did not conform to the requirements of the Hague Convention because it did not include copies of the summons and complaint translated into Japanese. See Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Jan. 8, 1969, art. 5, 20 U.S.T. 361, 658 U.N.T.S. 163.

On November 12, 1993, the Chudasamas filed a motion to compel Mazda to respond "fully and completely" to a laundry list of their interrogatories and requests for production. [FN17] They also sought attorneys' fees. The motion alleged that Mazda had only provided "evasive and incomplete" responses and that Mazda's objections were all too general, improperly asserted, or simply without merit.

FN17. This list omitted several discovery requests that were either redundant in light of other requests included on the list or obviously lifted from other unrelated cases. We note that all the examples quoted supra were included in the list.

The district court held a hearing on January 21, 1994, to address the discovery disputes. Counsel for the Chudasamas and counsel for Mazda discussed the various disputed issues at the hearing, and Mazda repeatedly asked the court to rule on its objections. [FN18] The district court remained silent throughout most

of the hearing, and at the end of the hearing made it clear that it did not want to rule on any objections or motions relating to discovery and warned that, if forced to rule, it would be inclined to issue sanctions "on somebody." [FN19] Instead of managing the disputes itself, the court wanted the parties to confer and settle the disputes on their own. [FN20] The hearing thus ended without any rulings from the bench.

FN18. For example, counsel for Mazda recommended that the parties "go through the objections one by one and simply have [the court] rule on them or have them referred to a magistrate or a special master and have him rule on them." Record, vol. 7, no. 57, at 11-12.

FN19. The court warned: I don't know--you fellows seem to be having so much trouble even agreeing on what is pertinent in the case. Well, if I have to take hold of the thing myself--like I do not want to do--but if I have to take hold of it and straighten it out, I'm going to impose some sanctions on somebody, because it sounds to me like a case that's leading in that direction. I don't know who, either plaintiff or the defendant. If I get the impression that somebody's just deliberately confusing the thing and fouling it up and making it impossible and throwing it on the Court needlessly, I'm going to put a penalty on somebody, one way or another, about it, either plaintiffs' lawyers or the defendants' lawyers, one or the other; in the way of attorney's fees or some other type of sanction. Record, vol. 7, no. 57, at 30-31.

FN20. Specifically, the court stated: Well, I tell you what let's do. Let's see what you can do about getting together on what your problem is. And, if [counsel for the Chudasamas] is still of the attitude that he thinks he needs to pursue his Motion to Compel, he can just let me know that he still thinks he's got to proceed with his motion. And we'll just proceed to rule on the motion. That's all I know. I hope it won't reach that stage. Record, vol. 7, no. 57, at 33.

On January 26, Mazda filed amended objections and responses to the Chudasamas' *1362 requests. Approximately six months later, on August 8, 1994, the Chudasamas renewed their motion to compel. Mazda filed

its motion for protective order, discussed *supra*, on August 16, and the district court conducted a status conference on August 17. As was the case in the January hearing, most of the conference consisted of the attorneys stating their grievances. After reminding the court that its motion to dismiss the fraud count was fully briefed and pending and that it had filed numerous discovery objections on which the court had yet to rule, [FN21] Mazda indicated that it was withholding a substantial amount of information until the court either entered a protective order or conclusively determined that no protective order would be entered. Consistent with its approach at the previous hearing, the district court declined to rule on Mazda's motion or objections. The hearing concluded with the understanding that the attorneys would negotiate a protective order and that Mazda would disclose the withheld discovery shortly thereafter. As noted above, the parties tried to negotiate a stipulated protective order and failed, and the court adopted the plaintiffs' version of the order--verbatim--on September 15.

FN21. Regarding the objections, counsel for Mazda argued that Mazda was "entitled to object, argue that objection and have [the court] rule on it." Record, vol. 9, no. 70, at 50. Later, counsel for Mazda complained to the court that the Chudasamas were "trying to turn this products case into a fraud case. [Mazda has] made a motion to dismiss the fraud cause of action on a number of different grounds. It's been fully briefed and pending before [the court]." Record, vol. 9, no. 70, at 65.

After Mazda disclosed the withheld discovery, the district court held another status conference on September 30. Like the previous two hearings, the court spent most of the hearing simply listening to the attorneys present their grievances. This time, however, the court indicated about halfway through the hearing that it was not interested in hearing Mazda's objections, but simply wanted counsel for the Chudasamas to summarize the state of discovery on each of the discovery requests in dispute. Although Mazda again made clear that it needed a ruling on its various objections, [FN22] this conference ended like

the previous two--without a ruling from the bench.

FN22. Counsel for Mazda stated, "There are some objections here that we have made that we cannot go beyond that we would like the court to rule on, which we don't think we can negotiate it further and reach a compromise.... [W]e are frankly prepared for [the court] to rule on these matters." Record, vol. 10, no. 94, at 99-100.

As mentioned previously, counsel for Mazda wrote a letter to the court on November 4, imploring the court to rule on three specific issues. Mazda received no response. On November 28, counsel for the Chudasamas wrote a letter complaining about Mazda's responses. This letter contained a new laundry list of discovery requests to which they had not received satisfactory responses from Mazda. [FN23] They thus sought an order to compel Mazda to respond. Unlike the letter from Mazda's counsel, this letter received prompt treatment by the district court. Three days later, on December 1, 1994, the court granted the Chudasamas' motion and entered a compel order incorporating the laundry list set out in the November 28 letter.

FN23. As with the list contained in their motion, this list did not include all the Chudasamas' original requests, but did contain all the requests discussed earlier in this opinion as well as many more of a similarly broad or vague nature.

The order contained three paragraphs. The first excoriated Mazda for its conduct in the discovery disputes. The second paragraph contained the details of the order. It directed Mazda to "make complete, proper, non-evasive responses to" the listed interrogatories and production requests. The order directed that Mazda comply within fifteen days of the date of the order and concluded in its final paragraph with the warning: "Upon failure of the Defendants to comply with this order it will be the Court's intention to impose the ultimate sanction of judgment by default."

December 1 was clearly a turning point in the case. Although the order made no mention of Mazda's objections or motion to

dismiss, Mazda assumed that all of its objections had been implicitly overruled. The Chudasamas' broad and vague discovery requests were no longer simply the initial, *1363 unreasonable discovery demands that had become commonplace. They had been transformed undiluted into the court's unqualified mandate. Although the listed discovery requests were practically impossible to satisfy with any degree of certainty, Mazda had no more than fifteen days [FN24] in which to satisfy the Chudasamas' excessive demands, on pain of a default judgment.

FN24. Mazda has contended, both before the district court and on appeal, that it did not receive the December 1 order in the mail until December 5, and therefore only had eleven days in which to reply.

While it certainly could not hope to satisfy the plaintiffs, Mazda made a near-herculean effort to comply. It gathered four boxes of documents from all over the world, documents that it had hoped it would never need to compile based on its objections. Sometime in the afternoon of Friday, December 16, the date compliance was due, counsel for Mazda in Atlanta telephoned the Chudasamas' counsel to report that Mazda's responses had been compiled and were ready for delivery. He offered to hand deliver the responses to the Chudasamas' counsel at his office in Blakely, Georgia, almost 200 miles away. When he stated that he would be unable to reach Blakely until after five o'clock, counsel for the Chudasamas refused to accept delivery either that day or the following day, a Saturday, because he did not want to wait at the office or ask any of his employees to stay late. Accordingly, counsel for Mazda arranged to have the responses delivered by private courier on Monday, December 19.

Not only did the Chudasamas' counsel refuse to accept Mazda's responses after five o'clock on the day they were due, he drafted a motion for sanctions that very day. The motion requested that the court strike Mazda's answers and enter a default judgment against Mazda on all four counts of the complaint, leaving damages as the only issue to be

litigated on the merits. The motion was filed on December 19, the day the Chudasamas' counsel received Mazda's responses. Counsel therefore filed the motion before he could determine whether Mazda's responses, though possibly a day late, [FN25] provided "complete, proper, non-evasive responses" as required by the compel order.

FN25. The Federal Rules of Civil Procedure provide the rule for service of pleadings and papers, including "every paper relating to discovery required to be served upon a party." Fed.R.Civ.P. 5(a). They provide that "[s]ervice by mail is complete upon mailing." Fed.R.Civ.P. 5(b). Mazda delivered its responses to the private courier on the date they were due and thus argued below that its responses were not late. The Chudasamas contended that "mailing" in Rule 5(b) only refers to the United States mail and therefore Mazda was one day late. While this argument seems strange in light of the fact that it would have taken longer for the Chudasamas to receive the responses had they been mailed, we note that there are authorities supporting each side. Compare *Magnuson v. Video Yesteryear*, 85 F.3d 1424, 1430-31 (9th Cir.1996) ("mailing" does not include use of private courier), with *United States v. 63-29 Trimble Rd.*, 812 F.Supp. 332, 334 (E.D.N.Y.1992) ("mailing" does include use of private courier), and *Edmond v. United States Postal Serv.*, 727 F.Supp. 7, 11 (D.D.C.1989) (same), *aff'd in part and rev'd in part*, 949 F.2d 415 (D.C.Cir.1991). At any rate, we have no need to resolve this issue at this time. While the district court concluded in its sanctions order that "[s]ervice by courier is not complete under the rule until the pleading or other paper is handed to the [opposing] counsel or delivered to his office," it revealed this conclusion to be dicta by "mak[ing] clear that sanctions are not being imposed here merely because the Defendants were a few days late in serving their responses." For purposes of this opinion, we will assume that Mazda's responses were a day late.

Counsel for the Chudasamas filed an amended motion on December 21. The amendments contained a number of technical objections to Mazda's attempt to comply with the order. [FN26] On March 2 and 9, 1995, the Chudasamas' counsel augmented his

amended motion with two affidavits in which he presented several grounds for default. In *1364 addition to arguing that Mazda's responses were late and suffered several technical deficiencies, he also stated that Mazda had not provided "complete, proper, non-evasive responses" as directed by the compel order.

FN26. For example, the motion was based in part on the fact that some of the responses were improperly initialed by someone other than counsel of record. Record, vol. 4, no. 86, at 2. The motion further complained that Mazda's counsel "falsely signed a certificate of service stating that the supplemental responses ... were deposited in the United States mail," even though they were actually shipped by a private courier. Id. at 3. The amended motion also alleged that the responses were incomplete, but admitted that "plaintiff's counsel has not had sufficient time to make an elaborate comparison between [the responses] and the many prior answers filed by" Mazda. Id.

Before receiving any response from Mazda to the allegations in the two affidavits, the court informed the parties by letter on March 23, 1995, that it intended to grant the Chudasamas' motion. It further requested counsel for the Chudasamas to draft "an appropriate opinion and order, setting forth a narrative history of this matter." On March 30, Mazda moved the court to hold a hearing on the issue and sought leave to respond to the affidavits. The court granted both requests, and on April 19, Mazda filed a comprehensive memorandum addressing the allegations in the two affidavits.

The sanctions hearing, held on April 24, 1995, followed the pattern of the previous three discovery hearings: counsel for both sides presented their arguments, while the court remained mostly silent, made few comments, and did not ask any substantive questions. At the conclusion of the hearing, the court admitted that it had only skimmed through Mazda's memorandum. It pledged to give Mazda's submission more thorough consideration and indicated that it would issue a ruling shortly thereafter.

On April 26, the court again informed the parties by letter that it intended to grant the motion for sanctions. It again asked the Chudasamas' counsel to draft the opinion and order. It directed that a copy of the proposed order be delivered to Mazda for comment.

Counsel for the Chudasamas delivered an eighty-six-page proposed order on May 1, to Mazda. On May 30, Mazda filed a comprehensive memorandum in response. That same day, it also filed a motion for reconsideration or clarification of the December 1 compel order. Mazda contended that compliance with the literal terms of the order was all but impossible and asked the court for guidance as to what deficiencies it perceived in Mazda's responses. During this time, Mazda continued to supplement its responses to the Chudasamas' discovery requests. On June 22, it produced documents which it now concedes were "responsive to legitimate discovery requests and should have been produced at an earlier stage of the litigation." Brief at 16. These documents related to a federal recall of the MPV minivan and arguably suggested that Mazda had deceived the National Highway and Traffic Safety Administration.

On June 26, 1995, the court issued an opinion and order granting the Chudasamas' motion for sanctions (the "sanctions order"). The seventy-page order was largely identical to the proposed order drafted by counsel for the Chudasamas, except that sixteen pages of material had been deleted. In its order, the court struck Mazda's answers and affirmative defenses and directed the clerk to enter a "default judgment" [FN27] in favor of the Chudasamas. The order noted that a jury trial would be required to determine the amount of damages. The order also directed Mazda to pay the Chudasamas' expenses, including attorneys' fees. Finally, the order vacated the previously entered protective order. [FN28]

FN27. Although the Chudasamas requested that a "default judgment" be entered; the court directed that a "default judgment" be entered; and the district court clerk filed a document entitled "default

judgment," no judgment has been entered in this case. Defaults are governed by Rule 55. The clerk is required to enter a "default" when a party against whom relief is sought fails to "plead or otherwise defend" the claim. Fed.R.Civ.P. 55(a). The clerk can only enter a "judgment by default" if the "plaintiff's claim ... is for a sum certain or for a sum which can by computation be made certain." Fed.R.Civ.P. 55(b)(1). When the amount of damages is in dispute, as in the instant case, only the court may enter judgment, and then only after determining the amount of damages. See Fed.R.Civ.P. 55(b)(2). There can be no "judgment" without a determination of relief. Thus, the document entitled "default judgment" in this case is more properly termed simply a "default."

FN28. The Chudasamas did not seek this relief in their motion for sanctions, and it was not discussed at any hearing. Moreover, the court's letter requesting counsel for the Chudasamas to draft the sanctions order also made no mention of such relief. We can only presume that counsel for the Chudasamas seized the opportunity to overreach granted by the district court and included this relief either out of spite or for personal gain. Such relief certainly had no beneficial effect on the interests of his clients.

*1365 Mazda sought appellate review through two avenues. First, on June 30, 1995, it moved for a stay of the vacatur of the protective order pending appeal and for certification under 28 U.S.C. § 1292(b). [FN29] The district court denied the stay, but amended its June 26 order to include a 1292(b) certification. Mazda also filed a notice of appeal on July 14, 1995. The clerk of this court assigned number 95-8896 to that appeal. On July 26, a panel of this court granted Mazda permission to appeal the sanctions order under section 1292(b), "but only as to that part of the order vacating the Protective Order." [FN30] The panel also granted Mazda a stay pending appeal of the district court's sanctions order to the extent that that order vacated the protective order. The clerk assigned number 95-8921 to the section 1292(b) appeal. The two numbered appeals were consolidated as they both seek review of the same order.

FN29. This provision allows a district judge to certify an interlocutory order for immediate appeal if the order "involves a controlling question of law as to which there is substantial ground for difference of opinion and ... an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b) (1994).

FN30. Section 1292(b) grants courts of appeals discretion whether to accept interlocutory jurisdiction over a certain order.

II.

[1] We begin our analysis by briefly addressing the scope of our jurisdiction in this case. As mentioned supra, another panel of this court granted Mazda permission to proceed with the section 1292(b) appeal, "but only as to that part of the order vacating the Protective Order." While this language implies that our jurisdiction is limited to one part of the sanctions order, there is no such limitation. See *Yamaha Motor Corp. v. Calhoun*, --U.S.--, 516 U.S. 199, ---, 116 S.Ct. 619, 623, 133 L.Ed.2d 578 (1996); *United States v. Fleet Factors Corp.*, 901 F.2d 1550, 1554 n. 2 (11th Cir.1990), cert. denied, 498 U.S. 1046, 111 S.Ct. 752, 112 L.Ed.2d 772 (1991). On the contrary, a court of appeals simply has no power to limit its jurisdiction to certain issues. See generally *Edwardsville Nat'l Bank & Trust Co. v. Marion Lab. Inc.*, 808 F.2d 648, 650 (7th Cir.1987) ("[Section 1292(b)] refers to certifying an 'order' for interlocutory appeal. It is not a method of certifying questions."). We therefore have jurisdiction to review the entire sanctions order. [FN31]

FN31. Mazda argues that we also have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 (1994), under the collateral order doctrine announced in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). Because our jurisdiction under § 1292(b) is clear, we do not address this argument.

[2] Because the sanctions order was issued in part for Mazda's purported violation of the district court's compel order, we must also

review that earlier order. Although the compel order is clearly an interlocutory order over which we would not normally have jurisdiction, we may exercise pendent appellate jurisdiction "when a nonappealable decision is 'inextricably intertwined' with an appealable decision or when 'review of the former decision [is] necessary to ensure meaningful review of the latter.'" United States v. Lopez-Lukis, 102 F.3d 1164, 1167 n. 10 (11th Cir.1997) (quoting Swint v. Chambers County Comm'n, 514 U.S. 35, 51, 115 S.Ct. 1203, 1212, 131 L.Ed.2d 60 (1995)). "Meaningful review" of the sanctions order clearly requires review of the compel order. As we discuss below, the propriety of the sanctions order depends in large part on the propriety of the compel order. We therefore have jurisdiction to review the compel order as well as the sanctions order.

III.

The district court based its decision to impose sanctions on Rules 37(b)(2) and 26(g) of the Federal Rules of Civil Procedure. Although the order contained several sanctions, it gave no indication as to which sanctions were imposed under which rule. Because the framework for imposing sanctions differs under the two rules, we analyze the propriety of the entire order under both rules. The order must stand unless it cannot be supported by either rule. Because Rule 37(b)(2) explicitly contemplates the sanction of default, *1366 which is at the heart of the order, we analyze the sanctions order under this rule first. We review the propriety of the sanctions order under Rule 26(g) in part IV.

[3][4][5] Rule 37 authorizes a district court to impose such sanctions "as are just" against a party that violates an order compelling discovery. Fed.R.Civ.P. 37(b)(2). [FN32] Included in the rule's list of possible sanctions is an order striking a defendant's answer and entering a default. Fed.R.Civ.P. 37(b)(2)(C). District courts enjoy substantial discretion in deciding whether and how to impose sanctions under Rule 37. See Malautea v. Suzuki Motor Co., 987 F.2d 1536, 1542 (11th Cir.), cert. denied, 510 U.S. 863, 114 S.Ct. 181, 126

L.Ed.2d 140 (1993). We accordingly review such orders for abuse of discretion. See Maddow v. Procter & Gamble Co., 107 F.3d 846, 853 (11th Cir.1997). When reviewing an order striking a defendant's pleadings, our "review should be particularly scrupulous lest the district court too lightly resort to this extreme sanction, amounting to judgment against the defendant without an opportunity to be heard on the merits." Emerick v. Fenick Indus., 539 F.2d 1379, 1381 (5th Cir.1976). [FN33]

FN32. The rules governing discovery were amended on April 22, 1993. The amendments became effective on December 1, 1993, just over seven months after the Chudasamas' filed their complaint. The Supreme Court has ordered that these amendments apply "insofar as just and practicable, [to] all proceedings in civil cases ... pending" on December 1, 1993. Order of April 22, 1993, Orders of the Supreme Court of the United States Adopting and Amending Rules, Fed.R.Civ.P. Rules 1-11, 28 U.S.C.A. at 23 (Supp.1997); see also Reed v. Binder, 165 F.R.D. 424, 428 n. 4 (D.N.J.1996) (noting that courts have generally applied amendments retroactively "to the maximum extent possible"). We see no reason why the amendments should not have governed the proceedings in this case after December 1, 1993. With few exceptions, the amendments did not materially change the duties of the parties or the court. Although discovery in this case began before the effective date, the vast majority of the discovery-related motions and all the hearings and court orders came well after that date. For these reasons, unless otherwise noted, we quote from and refer to the amended version of the rules.

FN33. In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

[6][7][8] To the extent that the district court based its sanctions order on Rule 37(b), the propriety of that order depends in large part on the propriety of the earlier compel order. See GFI Computer Indus. v. Fry, 476 F.2d 1, 5 (5th Cir.1973) (reversing order of default imposed for violation of erroneously entered

order). We review orders compelling discovery under the same abuse of discretion standard. Maddow, 107 F.3d at 853. In evaluating whether a district court abuses its discretion when it imposes severe sanctions upon a party that violates an order, we believe that an important factor is whether the entry of that order was itself an abuse of discretion. [FN34] We therefore focus our analysis in part A on the district court's decision to compel discovery and conclude that it was an abuse of discretion. In part B, we return to the sanctions order proper and draw the same conclusion.

FN34. Because we expect litigants to obey all orders, even those they believe were improvidently entered, sanctions will very often be sustained, particularly when the infirmity of the violated order is not clear and the sanctions imposed are moderate. This case presents neither of these circumstances.

A.

[9] We find that the district court's decision to compel discovery in this case was an abuse of discretion. We draw this conclusion based on the district court's failure adequately to manage this case. District courts must take an active role in managing cases on their docket. See generally *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 171, 110 S.Ct. 482, 487, 107 L.Ed.2d 480 (1989) (emphasizing "wisdom and necessity for early judicial intervention in the management of litigation"); William W. Schwarzer, *Managing Civil Litigation: The Trial Judge's Role*, 61 *Judicature* 400, 402, 404 (1978) (urging district judges to adopt more active role in pretrial proceedings, especially in managing discovery disputes), cited in *Hoffmann-La Roche*, 493 U.S. at 171, 110 S.Ct. at 487.

We recognize that district courts enjoy broad discretion in deciding how best to manage the cases before them. See, e.g., *United States v. McCutcheon*, 86 F.3d 187, 190 (11th *1367 Cir.1996). This discretion is not unfettered, however. When a litigant's rights are materially prejudiced by the district court's mismanagement of a case, we must redress the abuse of discretion. The mismanagement

of two key parts of this case--Mazda's motion to dismiss the Chudasamas' fraud claim and Mazda's resistance to the Chudasamas' discovery requests--indicates that the district court abused its discretion.

1.

[10][11][12] Failure to consider and rule on significant pretrial motions before issuing dispositive orders can be an abuse of discretion. See, e.g., *In re School Asbestos Litig.*, 977 F.2d 764, 792-93 (3d Cir.1992) (granting writ of mandamus as remedy for district court's "arbitrar [y] refus[all] to rule on a summary judgment motion"); *Ellison v. Ford Motor Co.*, 847 F.2d 297, 300-01 (6th Cir.1988) (finding district court's failure to rule on motion to amend complaint before granting summary judgment abuse of discretion); *McDonnell Douglas Corp. v. Polin*, 429 F.2d 30, 31 (3d Cir.1970) (directing district court to consider and rule on motion to transfer before discovery on the merits of the case (but after discovery related solely to transfer issue)). Resolution of a pretrial motion that turns on findings of fact--for example, a motion to dismiss for lack of personal jurisdiction pursuant to Fed.R.Civ.P. 12(b)(2)--may require some limited discovery before a meaningful ruling can be made. Facial challenges to the legal sufficiency of a claim or defense, such as a motion to dismiss based on failure to state a claim for relief, [FN35] should, however, be resolved before discovery begins. Such a dispute always presents a purely legal question; there are no issues of fact because the allegations contained in the pleading are presumed to be true. See *Mitchell v. Duval County Sch. Bd.*, 107 F.3d 837, 838 n. 1 (11th Cir.1997) (*per curiam*). Therefore, neither the parties nor the court have any need for discovery before the court rules on the motion. See *Kaylor v. Fields*, 661 F.2d 1177, 1184 (8th Cir.1981) ("Discovery should follow the filing of a well-pleaded complaint. It is not a device to enable a plaintiff to make a case when his complaint has failed to state a claim.").

FN35. We note that these observations would apply with equal force to challenges to the sufficiency of

affirmative defenses, counterclaims, or cross-claims found in any party's pleadings. The district court should resolve all such disputes as early as possible for the reasons we state. We focus on motions to dismiss by defendants only because this case involves such a motion.

Although mechanisms for effective discovery are essential to the fairness of our system of litigation, see generally 6 James Wm. Moore et al., *Moore's Federal Practice* § 26.02 (3d ed.1997) (outlining beneficial purposes of discovery), they also carry significant costs, see generally Maurice Rosenberg, *Federal Rules of Civil Procedure in Action: Assessing Their Impact*, 137 U. Pa. L.Rev. 2197, 2204-05 (1989) (discussing costs and noting that in survey of 1000 judges, "abusive discovery was rated highest among the reasons for the high cost of litigation"). Discovery imposes several costs on the litigant from whom discovery is sought. These burdens include the time spent searching for and compiling relevant documents; the time, expense, and aggravation of preparing for and attending depositions; the costs of copying and shipping documents; and the attorneys' fees generated in interpreting discovery requests, drafting responses to interrogatories and coordinating responses to production requests, advising the client as to which documents should be disclosed and which ones withheld, and determining whether certain information is privileged. The party seeking discovery also bears costs, including attorneys' fees generated in drafting discovery requests and reviewing the opponent's objections and responses. Both parties incur costs related to the delay discovery imposes on reaching the merits of the case. Finally, discovery imposes burdens on the judicial system; [FN36] scarce judicial resources must be *1368 diverted from other cases to resolve discovery disputes.

FN36. For instance, as discussed *infra* part IV, Rule 26(g)(2)(C) requires the parties to certify, on pain of mandatory sanctions, that all discovery requests, responses, or objections are not "unreasonably or unduly burdensome or expensive." Failure to rule on a motion to dismiss a claim impacting the needs of the case clouds the parties' ability to certify and hinders their ability to

conduct appropriate discovery. Allowing a dubious claim that impacts the needs of the case to remain in the lawsuit without a meaningful ruling from the court therefore prevents discovery from proceeding smoothly and efficiently.

If the district court dismisses a nonmeritorious claim before discovery has begun, unnecessary costs to the litigants and to the court system can be avoided. Conversely, delaying ruling on a motion to dismiss such a claim until after the parties complete discovery encourages abusive discovery and, if the court ultimately dismisses the claim, imposes unnecessary costs. For these reasons, any legally unsupported claim that would unduly enlarge the scope of discovery [FN37] should be eliminated before the discovery stage, if possible. [FN38] Allowing a case to proceed through the pretrial processes with an invalid claim that increases the costs of the case does nothing but waste the resources of the litigants in the action before the court, delay resolution of disputes between other litigants, squander scarce judicial resources, and damage the integrity and the public's perception of the federal judicial system.

FN37. The scope of allowable discovery is determined by the claims (and defenses) raised in the case. The rules describe the general scope of discovery as follows: Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. Fed.R.Civ.P. 26(b)(1) (emphasis added).

FN38. Moreover, the ruling must be meaningful. It is not enough simply to deny a motion to dismiss a claim with little or no comment and then revisit the defendant's legal contentions when the

defendant files a motion for summary judgment after discovery has concluded. We realize that the Civil Justice Reform Act has led to strict case management deadlines, making it difficult for district courts to take the time to consider pretrial motions closely. See 28 U.S.C. § 471 (1994) (requiring district courts to implement plans intended in part to "ensure just, speedy, and inexpensive resolutions of civil disputes"). Nonetheless, district courts simply must not allow the most critical pretrial motions to be carried with the case until the final pretrial conference unless to do so is absolutely necessary.

[13] In sum, as the burdens of allowing a dubious claim to remain in the lawsuit increase, so too does the duty of the district court finally to determine the validity of the claim. Thus, when faced with a motion to dismiss a claim for relief that significantly enlarges the scope of discovery, the district court should rule on the motion before entering discovery orders, if possible. The court's duty in this regard becomes all the more imperative when the contested claim is especially dubious.

[14] Turning to the facts of the instant case, we note that even the most cursory review of the Chudasamas' shotgun complaint reveals that it contains a fraud count that is novel and of questionable validity. Upon reading the complaint, the district court should have noted that the fraud count dramatically enlarged the scope of the Chudasamas' case. Without the fraud theory, the scope of discovery likely would have been limited to information tending to show that the MPV minivan was a defective product and that Mazda was negligent in designing it. With the fraud theory in the case, on the other hand, the scope of discovery broadened to include, inter alia, Mazda's marketing strategies and safety testing. As a result, the Chudasamas could seek much broader discovery with the fraud count in the complaint than without it. The presence of the fraud count accordingly contributed greatly to the discovery disputes. Furthermore, as long as the fraud claim remained in the case without a dispositive ruling from the bench, any analysis of "the needs of the case," as required of the court by

Rule 26(b)(2) and of the litigants by Rule 26(g)(2)(C), would be hindered. As a result, Mazda faced significant uncertainty in certifying that any of its responses were "complete, proper, and non-evasive."

[15] Many, if not most, of these problems could have been solved had the district court simply ruled on Mazda's motion to dismiss the fraud claim. Had it granted the motion, then the Chudasamas would have been forced to narrow the scope of their discovery requests considerably. Had it denied the *1369 motion and ruled that the Chudasamas had stated a claim for fraud, then Mazda would have been forced to accept a broader view of discoverable information.

The dubious nature of the fraud count made the need for a ruling even more imperative. While the question of whether the Chudasamas' allegations of fraud state a claim for relief is not directly before us, we find it hard to believe that Georgia law would recognize such a claim. [FN39] At any rate, we conclude that this claim was dubious enough to require the district court to rule on Mazda's motion to dismiss prior to entering the compel order. When the court refused to do so and, instead, allowed the case to proceed through discovery without an analysis of the fraud claim, it abused its discretion.

FN39. The Chudasamas do not cite a single reported products liability case in the United States, much less in Georgia or the Eleventh Circuit, that has recognized the fraud theory they allege (i.e., a fraud claim based on advertisements of a product that does not meet an inapplicable federal safety standard). Cf. *Logan Equip. Corp. v. Simon Aerials, Inc.*, 736 F.Supp. 1188, 1200-02 (D.Mass.1990) (fraud claim based on statement that product complied with applicable standards); *Geo. Byers Sons, Inc. v. East Europe Import Export, Inc.*, 488 F.Supp. 574, 582-83 (D.Md.1980) (same). Under Georgia law, "[t]he tort of fraud has five elements: a false representation by a defendant, scienter, intention to induce the plaintiff to act or refrain from acting, justifiable reliance by plaintiff, and damage to plaintiff." *Crawford v. Williams*, 258 Ga. 806, 806, 375 S.E.2d 223, 224 (1989). Aside from problems with the damages

they seek, see *supra* note 12, the Chudasamas' allegations appear deficient with regard to at least two of these elements. First, they must prove a "false misrepresentation." Although the Chudasamas' correctly point out that an express misrepresentation is not required, see O.C.G.A. § 51-6-4 (1982) (providing that fraud can be shown by acts or silence); *Sapp v. ABC Credit & Inv. Co.*, 243 Ga. 151, 157, 253 S.E.2d 82, 86 (1979) ("There are infinite means by which it can be accomplished.... It may be perpetrated by signs and tricks, and even silence may in some instances amount to fraud.") (citation to original omitted), they must prove that Mazda somehow misled them. The Chudasamas characterize Mazda's alleged deceptive practice as "false advertising." Answer Br. at 8-9, 37. They contend that by advertising the MPV minivan as a "vehicle intended to be used primarily for transporting adults and children," Mazda "deceived" them into believing that the MPV met the federal standards for cars. They concede that (1) that standard does not apply to the MPV minivan and (2) the MPV minivan complies with the applicable multipurpose passenger vehicle standard, which applies to "motor vehicle[s] designed to carry 10 persons or less which [are] constructed either on a truck chassis or with special features for occasional off-road operation." See *supra* note 10. Nothing in the federal standards suggests that the car standards provide sufficient safety for the transportation of adults and children, while the multipurpose vehicle standards do not. In the face of these facts, how the advertisement described by the Chudasamas could possibly be characterized as false or deceptive is beyond our comprehension. The second glaring problem with their fraud claim is the allegation that they relied on Mazda's "false" advertising. The Chudasamas failed to allege that they were even aware that the federal government imposed different safety standards on "multipurpose passenger vehicles," which the MPV minivan was, and on "passenger cars," which the minivan was not. Georgia law clearly requires proof of reasonable reliance for a claim of fraud. See, e.g., *Cobb County Sch. Dist. v. MAT Factory, Inc.*, 215 Ga.App. 697, 700-01, 452 S.E.2d 140, 144 (1994) (holding that without proof of justifiable reliance, fraud "claim tumbles like a house of cards"). As a threshold matter, the Chudasamas must prove they actually relied on Mazda's advertisements when they bought the MPV minivan. Mazda contends that they have admitted, during a pretrial

deposition, that they did not so rely. At any rate, their complaint failed to point to any specific advertisement on which they allegedly relied. The Chudasamas seek to overcome these obstacles with a unique "fraud on the market" theory. Because Mazda subjected "the whole market" to its deceptive advertising, they argue, reliance should be presumed. Answer Br. at 37-38. They do not cite a single Georgia case applying this doctrine (probably because there is no such case). Instead, they cite several federal securities law cases. The fraud on the market theory of securities law, however, is based on concepts and policies that simply do not apply in a products liability case. See generally *Basic Inc. v. Levinson*, 485 U.S. 224, 241-45, 108 S.Ct. 978, 988-90, 99 L.Ed.2d 194 (1988) (discussing rationale behind fraud on the market theory); *Ross v. Bank South, N.A.*, 885 F.2d 723, 739 (11th Cir.1989) (en banc) (Tjoflat, J., specially concurring) (same), cert. denied, 495 U.S. 905, 110 S.Ct. 1924, 109 L.Ed.2d 287 (1990). We find it very doubtful that Georgia courts would change their historic requirement of proof of reliance by grafting a rule of federal securities law onto their body of tort law. The point of this discussion is not to conclusively demonstrate that the Chudasamas have failed to state a claim for relief. Rather, the clear weaknesses in their claim illustrate the severity of the district court's abuse of discretion in not issuing a ruling on Mazda's motion to dismiss.

***1370 2.**

[16][17] By and large, the Federal Rules of Civil Procedure are designed to minimize the need for judicial intervention into discovery matters. They do not eliminate that need, however. See *ACF Indus. v. E.E.O.C.*, 439 U.S. 1081, 1087, 99 S.Ct. 865, 869, 59 L.Ed.2d 52 (1979) (Powell, J. dissenting from denial of certiorari) ("With respect to abuse of discovery ... there is a pressing need for judicial supervision...."); *Malautea*, 987 F.2d at 1547 (Roney, J., concurring) (noting that "failure of busy courts to properly monitor the use of discovery procedures" is partially to blame for "improper discovery activity which unnecessarily prolongs and raises the costs of litigation"). When the parties to a case inform the court that there are objections to discovery requests that they cannot resolve,

the court should provide rulings on the objections. [FN40] When a party moves the court to compel discovery, the court should consider and rule on the objections filed by the resisting party. While it has discretion to grant or deny the motion, it should not grant the motion in the face of well-developed, bona fide objections without a meaningful explanation of its decision.

FN40. If the parties' disputes are complex or would require an inordinate amount of the district court's time to resolve, the court may appoint a magistrate judge to referee the discovery process pursuant to Federal Rule of Civil Procedure 72(a). The local rules in the Middle District of Georgia have a similar provision. See M.D. Ga. Local Rule 12.2. While a magistrate judge could not decide dispositive matters, like a motion to dismiss, without the consent of the parties, the judge could issue proposed findings of fact and recommendations to aid the district court in reaching its decision. See 28 U.S.C. § 636(b)(1)(B)(1994); Fed.R.Civ.P. 72(b); M.D. Ga. Local R. 12.3. If the district court does not believe it has the time to resolve discovery disputes, it is free to delegate much of that task to a magistrate judge.

Filtering out overly burdensome discovery requests before issuing dispositive orders serves many of the same purposes as eliminating nonmeritorious claims for relief that unnecessarily broaden the scope of discovery. To the extent that such requests unduly broaden the scope of discovery, rejecting them saves significant costs to the parties, the court, and other litigants. To the extent the requests unduly increase the parties' costs of compliance, rejecting them will result in more equitable and more efficient discovery management and will discourage further abuse.

[18] Our review of the record in this case convinces us that Mazda filed and argued numerous good-faith objections based on persuasive grounds. Although we express no opinion as to whether the objections should have been sustained, we are deeply concerned by the district court's failure either to explain why it granted the compel order over Mazda's

objections or otherwise to indicate that it had taken the objections into consideration. As with the court's refusal to rule on the motion to dismiss, we find that this mismanagement by the court strongly suggests that the court abused its discretion in issuing the compel order. When both instances of the court's mismanagement are viewed together, any doubt that the court abused its discretion in issuing the compel order disappears. That order must be vacated.

B.

[19][20] Having determined that the district court abused its discretion in ordering Mazda to respond to the Chudasamas' requests, we turn to the subsequent sanctions order to determine whether it fell within the district court's broad discretion. The answer is fairly clear: the district court would have been hard pressed to fashion sanctions more severe than those included in its order. Mazda lost nearly everything that was at stake in the litigation and more. In addition to granting costs and attorneys' fees to the Chudasamas, the court struck Mazda's answer and ordered that a default be entered on all claims, [FN41] reserving damages as the only issue to be tried on the merits. Moreover, it *1371 vacated its previously entered protective order. This may have been as prejudicial a sanction as it could adopt. [FN42] Not only could Mazda's commercial competitors gain access to the design documents, marketing materials, and other proprietary information which Mazda had already disclosed, the order made it clear that Mazda had to disclose even more sensitive information to assist the Chudasamas in the looming trial on damages. These sanctions were so unduly severe under the circumstances as to constitute a clear abuse of discretion.

FN41. The court still did not determine whether the fraud claim stated a valid cause of action. Regardless of the willfulness of a party's discovery violation, a default judgment cannot stand on a complaint that fails to state a claim. See *Nishimatsu Constr. Co. v. Houston Nat'l Bank*, 515 F.2d 1200, 1206 (5th Cir.1975) ("A default judgment is unassailable on the merits but only so

far as it is supported by well-pleaded allegations, assumed to be true.") (citing Thomson v. Wooster, 114 U.S. 104, 113, 5 S.Ct. 788, 792, 29 L.Ed. 105 (1885)); Black v. Lane, 22 F.3d 1395, 1399 (7th Cir.1994); Whittlesey v. Weyerhaeuser Co., 640 F.2d 739, 742 (5th Cir.1981).

FN42. This sanction makes us question an earlier panel's characterization of a default as "the most awesome weapon in the Rule 37 arsenal." Adolph Coors Co. v. Movement Against Racism & the Klan, 777 F.2d 1538, 1543 (11th Cir.1985).

[21][22][23] The severity of these sanctions required the court to find that Mazda's "noncompliance" with the compel order was intentional or in bad faith. See Societe Internationale Pour Participations Industrielles et Commerciales v. Rogers, 357 U.S. 197, 212, 78 S.Ct. 1087, 1096, 2 L.Ed.2d 1255 (1958); Searock v. Stripling, 736 F.2d 650, 653 (11th Cir.1984). "Violation of a discovery order caused by simple negligence, misunderstanding, or inability to comply will not justify a Rule 37 default..." Malautea, 987 F.2d at 1542. Moreover, a district court abuses its discretion under Rule 37(b)(2) if it enters a default when "less draconian but equally effective sanctions were available." Adolph Coors Co. v. Movement Against Racism & the Klan, 777 F.2d 1538, 1543 (11th Cir.1985).

In its sanctions order, the district court found that Mazda acted in bad faith when it failed to comply with the compel order. This finding has little support in the record and is erroneous. The district court's compel order required Mazda to "make complete, proper, non-evasive responses" to a list of the Chudasamas' discovery requests. The order itself and the record in general are completely devoid of any guidance from the court as to how Mazda was to respond. As we have illustrated above, many of these requests were extremely broad, vague, or both. Literal compliance with several of the requests was simply not possible. Thus, Mazda's assumption that literal compliance was not required is at least understandable.

Mazda brought these complications to the

court's attention both before and after the compel order was entered. Prior to the entry of the order, Mazda's objections, and especially its November 4, 1994, letter listing three main disputes that required resolution, put the court on notice of the need for clarification of the Chudasamas' requests. After the court entered its compel order, it received even clearer notice of Mazda's inability to comply with the Chudasamas' discovery requests; the statements of Mazda's counsel at the April 24, 1995, hearing, Mazda's April 19 memorandum opposing sanctions, and Mazda's May 30 motion for reconsideration or clarification of the compel order all informed the court that literal compliance with the discovery requests--and thus the compel order--was simply not possible. The district court disregarded Mazda's emphatic requests for rulings or clarification and issued a compel order containing no guidance as to how it was to be satisfied. In short, the patent ambiguity in the discovery requests that the court compelled Mazda to satisfy and the court's utter failure to clarify Mazda's obligations were largely to blame for Mazda's "noncompliance." Moreover, less onerous sanctions were available; the vacatur of the protective order in particular was entirely unnecessary. [FN43] Therefore, the severe sanctions *1372 order entered in this case was a clear abuse of discretion and cannot stand under Rule 37(b)(2).

FN43. The sanction of vacating a protective order is particularly problematic. "[A] primary purpose of Rule 37 sanctions is to deter future abuse of discovery." Adolph Coors Co., 777 F.2d at 1542 (citing National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 643, 96 S.Ct. 2778, 2781, 49 L.Ed.2d 747 (1976) (per curiam)). The record clearly shows that Mazda relied on the protective order when it provided a large percentage of its discovery responses. The potential economic harm of allowing Mazda's proprietary information to be disclosed to its commercial competitors may very well exceed its potential liability in this case. If we were to let the sanctions stand, Mazda, and other large corporations amenable to suit in the Middle District of Georgia, may determine that, from the outset, Mazda would have been better off to disclose no

proprietary information and accept a default. Although it would have lost the lawsuit, it would have been assured that its proprietary information would not end up in the public record. Thus, instead of deterring Mazda and other potential commercial defendants from abusing the discovery process in the future, the district court's sanctions order could have the opposite effect.

IV.

As noted, the district court also based its sanctions order on Rule 26(g). This rule requires that discovery-related filings bear the signature of an attorney of record. This signature certifies that the filing conforms to the discovery rules, is made for a proper purpose, and does not impose undue burdens on the opposing party in light of the circumstances of the case. Fed.R.Civ.P. 26(g)(2). [FN44] If the court finds that "without substantial justification a certification is made in violation of the rule," then it must impose on the offending party "an appropriate sanction, which may include an order to pay" the other party's expenses including attorneys' fees. Fed.R.Civ.P. 26(g)(3).

FN44. Specifically, the signature certifies that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the request, response, or objection is: (A) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (B) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (C) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. Fed.R.Civ.P. 26(g).

[24][25] The decision whether to impose sanctions under Rule 26(g)(3) is not discretionary. Once the court makes the factual determination that a discovery filing was signed in violation of the rule, it must impose "an appropriate sanction." See *Malautea*, 987 F.2d at 1545. The decision of what sanction is appropriate, however, is

committed to the district court's discretion. Fed.R.Civ.P. 26(g) advisory committee's note (1983 amend.) ("The nature of the sanction is a matter of judicial discretion to be exercised in light of the particular circumstances."). When reviewing a sanctions order entered pursuant to Rule 26(g)(3), we therefore review the court's factual finding that a certification was made in violation of Rule 26(g) for clear error and the court's decision of the appropriate sanction for an abuse of discretion. See *Malautea*, 987 F.2d at 1545.

[26] The record does contain some evidence that Mazda abused the discovery procedures, withheld admittedly relevant information, and engaged in dilatory tactics. Accordingly, the court's determination that Mazda certified its discovery responses and objections in violation of Rule 26(g) is not clearly erroneous. Contrary to the Chudasamas' assertions, however, this evidence is not enough to support the severe sanctions order. First, the majority of Mazda's misconduct was due to the court's utter failure to exercise its discretion in managing the case. While we do not condone self-help, under the circumstances here, we find the entry of a default and the vacatur of the protective order to be undue punishment.

Second, the imposition of such severe sanctions "is appropriate only as a last resort." *Malautea*, 987 F.2d at 1542. Had the court taken the time to examine Mazda's motion to dismiss or its discovery objections and then issued a meaningful ruling, we believe that Mazda's compliance with the Chudasamas' requests would have been satisfactory.

Finally and most importantly, in exercising its discretion under Rule 26(g)(3) for determining an appropriate sanction, the district court must analyze the needs of the case. See Fed.R.Civ.P. 26(g)(2)(C). As our earlier analysis demonstrates, the court clearly failed to do this. It never ruled on Mazda's motion to dismiss or offered any indication that it had given the motion serious consideration. The court's failure to rule on the motion to dismiss or to address Mazda's discovery objections demonstrates that it did

not analyze the needs of the case. Although sanctions may have been appropriate, the severe sanctions imposed were clearly excessive, and the court's determination of the "appropriate sanction" under Rule 26(g)(2)(C) was therefore an abuse of discretion. [FN45] Because the sanctions order cannot *1373 stand under either Rule 37(b) or Rule 26(g), it must be vacated.

FN45. We note that the imposition of costs and attorneys' fees probably would not have been an abuse of discretion. Rule 26(g)(3) suggests just such a sanction. See *Malautea*, 987 F.2d at 1545. Although this observation may suggest that we should affirm at least that part of the district court's order imposing this sanction and vacate the rest, we cannot do so in this case. First, the order requires payment of all costs and fees "associated with th[e] protracted and costly discovery dispute." As the text of the rule suggests, an order imposing costs generally should be limited to "the reasonable expenses incurred because of the violation." Fed.R.Civ.P. 26(g)(3) (emphasis added). Clearly, the unreasonably broad and vague discovery requests propounded by the Chudasamas and their unwillingness to narrow them were as much to blame for the delay and excessive costs that have been incurred in this case as were Mazda's dilatory tactics. Even more to blame, in our view, is the district court itself for failing actively to manage this case. Second, as should now be apparent, the district court's management of this case, including the imposition of sanctions, is so infected with abuses of discretion that we must vacate the order in toto. It is simply not possible to carve out a portion of the order and affirm it on the ground that it was not an abuse of discretion.

V.

Understandably, Mazda asks us to reassign this case to another district judge on remand. Our authority to grant this relief is well established. See 28 U.S.C. § 2106 (1994) (authorizing court of appeals to "remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances"); *United States v. Remillong*, 55 F.3d 572, 577-78 n. 12 (11th Cir.1995) (per curiam).

[27] Three factors inform our decision to reassign a case on remand: "(1) whether the original judge would have difficulty putting his previous views and findings aside; (2) whether reassignment is appropriate to preserve the appearance of justice; (3) whether reassignment would entail waste and duplication out of proportion to the gains realized from reassignment." *Id.* at 578 n. 12 (quoting *United States v. Torkington*, 874 F.2d 1441, 1446 (11th Cir.1989) (per curiam)).

[28] While the strong language employed in both the compel order and the sanctions order suggest that the district judge may have trouble putting aside his previous views, we find the second factor the most telling. The extent of the judge's abuse of discretion--and the partiality of the practices constituting that abuse--would have a significant effect on the appearance of justice should he remain assigned to this case. In particular, the judge's practice of delegating the task of drafting sensitive, dispositive orders to plaintiffs' counsel, and then uncritically adopting his proposed orders nearly verbatim, would belie the appearance of justice to the average observer. [FN46]

FN46. We have consistently frowned upon the practice of delegating the task of drafting important opinions to litigants, and "[t]he cases admonishing trial courts for the verbatim adoption of proposed orders drafted by litigants are legion." *Colony Square Co. v. Prudential Ins. Co.*, 819 F.2d 272, 274-75 (11th Cir.1987). This practice harms the quality of the district court's deliberative process, see *id.* at 275, impedes our ability to review the district court's decisions, see *Keystone Plastics, Inc. v. C & P Plastics, Inc.*, 506 F.2d 960, 962 (5th Cir.1975), and creates "the potential for overreaching and exaggeration on the part of attorneys preparing findings of fact when they have already been informed that the judge has decided in their favor," *Anderson v. City of Bessemer City*, 470 U.S. 564, 572, 105 S.Ct. 1504, 1510, 84 L.Ed.2d 518 (1985). See also *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 657 n. 4, 84 S.Ct. 1044, 1047 n. 4, 12 L.Ed.2d 12 (1964) (quoting Judge J. Skelly Wright's admonition that the lawyers who draft opinions "in their zeal and advocacy and their enthusiasm are going to state the

case for their side ... as strongly as they possibly can. When these [opinions] get to the courts of appeals they won't be worth the paper they are written on as far as assisting the court of appeals in determining why the judge decided the case."). We fully recognize that the district court's adoption of the Chudasamas' draft orders nearly verbatim does not affect our standard of review, see Anderson, 470 U.S. at 572, 105 S.Ct. at 1510, and does not automatically create an "appearance of impropriety" that would require the district judge to recuse under 28 U.S.C. § 455(a) (1994), see Colony Square Co., 819 F.2d at 276 n. 14. Nonetheless, in light of (1) the extent of the court's abuse of discretion in managing the case, (2) the utter lack of an appearance of impartiality in the text of the proposed orders, (3) the fact that one of the orders imposed sanctions against the opposing party and counsel, (4) the inclusion in the order of the vacatur of the protective order, which was neither requested in the Chudasamas' motion for sanctions nor suggested by the district court when it asked counsel to draft the order, and (5) the frequency with which the district judge employed this procedure in this case, the court's practice of uncritically adopting counsel's proposed orders strongly suggests, if not requires, that this case be reassigned.

***1374** Finally, although significant time has already been spent on this case under his direction, the judge's failure to manage the case removes any concerns involving waste or duplication. Although he had the case for over a year and a half by the time he issued the sanctions order, the record gives no indication that the judge ever spent any time considering the key pretrial issue, the motion to dismiss the fraud count. Despite the length of time this case has been pending, it is really a simple products liability case. We have confidence that a new judge who properly manages this case will need little time to "get up to speed." The gains to be realized from reassignment will far outweigh the costs.

VI.

For the foregoing reasons, we VACATE both the district court's order compelling discovery and its order granting the appellee's amended motion for sanctions and REMAND this case

with the instruction that the Chief Judge of the Middle District of Georgia reassign the case to a different district judge for further proceedings consistent with this opinion.

123 F.3d 1353, 38 Fed.R.Serv.3d 1494, 11 Fla. L. Weekly Fed. C 609

END OF DOCUMENT

United States Court of Appeals,
Fifth Circuit.

ENPLANAR, INC., V. Keeler & Company,
Inc. and Dragon Limited, Inc., Plaintiffs-
Appellants,

v.

John MARSH, In His Official Capacity as
Secretary of the Army of the United
States, et al., Defendants-Appellees.

No. 91-3837.

Jan. 19, 1994.

Contractors brought action challenging suspension of award of contracts under minority set-aside program by the Army Corps of Engineers. The United States District Court for the Eastern District of Louisiana, Henry A. Mentz, Jr., J., entered summary judgment in favor of defendants, and contractors appealed. The Court of Appeals, Garwood, Circuit Judge, held that: (1) Corps articulated nondiscriminatory reason for suspension of award of contracts under minority set-aside program, that it was result of adverse district court decision finding practice to be improper, and contractors failed to show that proffered reasons were a mere pretext for discrimination, and (2) contractors were not entitled to attorney fees under the Equal Access to Justice Act (EAJA) or civil rights statute.

Affirmed.

West Headnotes

[1] Federal Courts ⇨ 712
170Bk712

Parties should not fear the forfeiture of requested relief, on mootness grounds, based merely on statement made in introductory section of brief summarizing its argument.

[2] United States ⇨ 53(8)
393k53(8)

Contractors were barred from receiving injunctive relief against the Army Corps of Engineers concerning its administration of

minority set-aside program, as Small Business Act precludes injunctive relief against Small Business Administration (SBA), and contractors could not obtain indirectly against Army what they could not obtain directly against SBA. Small Business Act, §§ 2(5)(b)(1), 8(a), as amended, 15 U.S.C.A. §§ 634(b)(1), 637(a).

[3] United States ⇨ 53(8)
393k53(8)

Provision of the Federal Courts Improvement Act of 1982 (FCIA) allowing injunctive relief against the Small Business Administration (SBA) and, by extension, against agencies participating in SBA's programs applies only to cases brought before United States Court of Federal Claims, and does not apply to suits brought in district court. 28 U.S.C.A. § 1491(a)(1, 3).

[4] Injunction ⇨ 195
212k195

Although court in equity may award monetary restitution as adjunct to injunctive relief, court may not grant monetary damages to party as substitute for injunctive relief, as long as such result would destroy distinction between monetary and equitable damages.

[5] Federal Courts ⇨ 595
170Bk595

District court's ruling denying contractors' motion for partial summary judgment concerning availability of injunctive relief as to project, with regard to whether it was subject to minority set-aside program, was interlocutory order not appealable at present, where claims concerning project had not been disposed of, but merely transferred to different venue.

[6] Federal Civil Procedure ⇨ 1271
170Ak1271

District court did not abuse its discretion in denying merits-related discovery pending ruling on motion for change of venue. 28 U.S.C.A. § 1404(a); Fed.Rules Civ.Proc.Rule 21, 28 U.S.C.A.

[7] Federal Civil Procedure ⇨ 2553

170Ak2553

Defendants are entitled to receive continuance for additional discovery if they requested extended discovery prior to ruling on summary judgment, placed district court on notice that further discovery pertaining to summary judgment motion was being sought, and demonstrated to district court with reasonable specificity how requested discovery pertained to pending motion. Fed.Rules Civ.Proc.Rule 56(f), 28 U.S.C.A.

[8] Federal Courts ⇌ 640
170Bk640

[8] Federal Courts ⇌ 643
170Bk643

Court of Appeals may review claim alleging improperly denied discovery only if complaining party presented to district court motion for extension of time for further discovery or equivalent statement, preferably in writing, that conveys need for additional discovery in areas complained of on appeal. Fed.Rules Civ.Proc.Rule 56(f), 28 U.S.C.A.

[9] Federal Civil Procedure ⇌ 2553
170Ak2553

Contractors' motion for additional discovery failed to show to district court with reasonable specificity how requested pretrial motion would likely pertain to pending summary judgment motion by Army Corps of Engineers, in suit by contractors challenging administration of minority set-aside program, and thus, district court did not abuse its discretion in denying additional discovery. Fed.Rules Civ.Proc.Rule 56(f), 28 U.S.C.A.

[10] Federal Civil Procedure ⇌ 2553
170Ak2553

Parties seeking further discovery before summary judgment do not need to know precise content of requested discovery, but they do need to give district court some idea of how sought after discovery might reasonably be supposed to create factual dispute; mere fleeting mention of matter, without description of its likely relevance, will not suffice to alert district court to importance of undiscovered item. Fed.Rules Civ.Proc.Rule 56(f), 28 U.S.C.A.

[11] Federal Civil Procedure ⇌ 1824
170Ak1824

[11] Federal Civil Procedure ⇌ 1837.1
170Ak1837.1

District court's subsequent grant of summary judgment as to all defendants based on evidence not contained in pleadings, required disregarding of earlier decision to dismiss complaint as to first two defendants, and thus, district court did not improperly sua sponte dismiss claims against two defendants.

[12] United States ⇌ 50.10(1)
393k50.10(1)

Contractors, who alleged that Army Corps of Engineers and other subdivision of United States denied them property interest without procedural due process as a result of suspension of award of contracts under minority set-aside program, failed to raise cognizable Bivens claim concerning suspension; contractors did not name as defendants any government officers in their individual capacities. U.S.C.A. Const.Amend. 5.

[13] United States ⇌ 50.1
393k50.1
(Formerly 393k50(1))

Bivens claim is available only against government officers in their individual capacities.

[14] United States ⇌ 64.15
393k64.15

Army Corps of Engineers' three-month suspension of decisions regarding submission of new minority set-aside projects was supported by articulated nondiscriminatory reason that Corps' practice of awarding large number of small business projects to minority set-aside program was improper, and contractors failed to show that articulated reason was pretext for discrimination. 42 U.S.C.A. §§ 1981, 1985(2); Civil Rights Act of 1964, § 601, 42 U.S.C.A. § 2000d; Small Business Act, s 8(a), 15 U.S.C.A. § 637(a).

[15] Constitutional Law ⇌ 276(2)
92k276(2)

[15] United States ⇌ 50.10(1)
393k50.10(1)
Contractors' claims against employees of Army Corps of Engineers alleging that they were deprived of right to self-marketing in retaliation against nonminority contractors, without procedural due process, by employees' refusing to meet with contractors during pendency of suit challenging minority set-aside program did not state cause of action, as there existed no legitimate claim of entitlement; contractors had no right to access of Corps personnel for such purpose, as the Small Business Administration (SBA) was authorized to contract as prime contractors with procurement agency. U.S.C.A. Const.Amend. 5; Small Business Act, § 8(a), 15 U.S.C.A. § 637(a).

[16] United States ⇌ 50.1
393k50.1
(Formerly 393k50(1))

[16] United States ⇌ 50.20
393k50.20
Under Bivens, victim of constitutional violation by federal agent has right to recover damages against agent in federal court; therefore, Bivens action requires plaintiff to claim deprivation of constitutional right, including violations of First Amendment or deprivation of Fifth Amendment due process. U.S.C.A. Const.Amend. 1, 5.

[17] Constitutional Law ⇌ 254.1
92k254.1

[17] Constitutional Law ⇌ 277(1)
92k277(1)
To succeed on procedural due process claim, plaintiffs must show that they had cognizable property or liberty interest and that such property interest must be legitimate claim of entitlement. U.S.C.A. Const.Amend. 5.

[18] Constitutional Law ⇌ 90.1(1)
92k90.1(1)

[18] United States ⇌ 50.10(1)
393k50.10(1)

[18] United States ⇌ 64.15

393k64.15
Claim by contractors that Army Corps of Engineers denied them self-marketing in retaliation for lawsuit challenging minority set-aside program, for purpose of chilling access to courts, failed to show unconstitutional or retaliatory denial in violation of First Amendment, as there was no showing that denial of access was based on official Army policy, rather than discretionary. U.S.C.A. Const.Amend. 1; Small Business Act, § 8(a), 15 U.S.C.A. § 637(a).

[19] Constitutional Law ⇌ 90.1(1)
92k90.1(1)

[19] Constitutional Law ⇌ 328
92k328

[19] Officers and Public Employees ⇌ 110
283k110
Government employee, who is potential witness, is not improperly chilling access to courts or retaliating for use of judicial system, in violation of First Amendment, when he refuses to speak to party concerning matter that is related to gravamen of that party's litigation against him or his employer. U.S.C.A. Const.Amend. 1.

[20] Civil Rights ⇌ 293
78k293
Contractors, who claimed that by bringing suit challenging suspension of minority set-aside program they forced Army Corps of Engineers to resume program, were not entitled to attorney fees under civil rights attorney fees statute; even if contractors caused resumption of program, suspension was not based on any racial animus. Small Business Act, § 8(a), 15 U.S.C.A. § 637(a); 42 U.S.C.A. § 1988.

[21] United States ⇌ 147(12)
393k147(12)
Contractors, who brought suit against Army Corps of Engineers challenging suspension of minority set-aside program, failed to allege any facts showing that defense position was not substantially justified, and thus, award of attorney fees under Equal Access to Justice Act was not warranted; suspension of program

was based on adverse decision by federal district court. Small Business Act, § 8(a), 15 U.S.C.A. § 637(a); 28 U.S.C.A. § 2412(d)(1)(A).

[22] Federal Courts ⇨ 586
170Bk586

Grant of change of venue motion is interlocutory order and is not reviewable.

*1287 Louis R. Koerner, Jr., New Orleans, LA, for plaintiffs-appellants.

Harry Rosenberg, U.S. Atty., New Orleans, LA, for defendants-appellees.

Marie K. McElderry, David K. Flynn, U.S. Dept. of Justice, Civ. Rights Div. Appellate Sec., Marybeth Martin, U.S. Dept. of Justice, Employment Litigation, Civ. Rights Div., Washington, DC, Henry Black, U.S. Army Corps of Engineers, Vicksburg, MS, for Marsh, R. Page, H. Hatch, S. Page, et al.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before REYNALDO G. GARZA and GARWOOD, Circuit Judges and WERLEIN, [FN*] District Judge.

FN* District Judge of the Southern District of Texas, sitting by designation.

GARWOOD, Circuit Judge:

This case involves the grant of summary judgment against a suit for unspecified damages from a three-month suspension of a discretionary minority set-aside program. E.J.A., Inc. (EJA); Enplanar, Inc. (Enplanar); Dragon Limited, Inc. (Dragon); and V. Keeler & Co., Inc. (Keeler) appeal the district court's grant of summary judgment in favor of the United States Army Corps of Engineers (the Corps). We affirm.

Facts and Proceedings Below

This case relates to the Corps' administration of its set-aside program for minority businesses (the 8(a) program), as described in the Small Business Act § 8(a), 15 U.S.C. § 637(a). The operation of the 8(a)

program is delineated in *Fordice Constr. Co. v. Marsh*, 773 F.Supp. 867, 869-70 (S.D.Miss.1990). As noted in that opinion, Congress created the 8(a) program to encourage minority small-business enterprises. *Id.* at 869. Under this program, the Small Business Administration (SBA) determines which minority businesses are eligible to participate in the 8(a) program. 15 U.S.C. § 637(a)(4)-(8). The SBA then acts as an intermediary between government procurement agencies--such as the Corps--and these certified minority businesses. Under this system, a procurement agency's proposed project may be placed in the 8(a) program in one of three ways, all of which are entirely at the discretion of the SBA and the procurement agency: (1) the SBA advises the procurement agency of an 8(a) firm's capabilities and asks that agency to identify and submit to the 8(a) program its proposed contracts that support the firm's business plan; (2) the SBA identifies a specific contract for a particular 8(a) firm and asks the agency to offer the contract to the 8(a) program for the firm; or (3) the agency reviews its proposed contracts and identifies and offers those which are suitable for the 8(a) program. *Id.* at 637(a)(1)(A); 48 C.F.R. §§ 19.800(b), 19.803(a)-(c), 19.804. [FN1] Once a contract has been set aside for minority businesses, the SBA then selects the minority contractor best suited to perform the contract. 15 U.S.C. § 637(a)(1)(B), (a)(7)(A); 13 C.F.R. § 124.307(d). The SBA, on behalf of the minority contractor, then certifies to the procurement agency that the minority contractor can perform the contract, and the SBA begins to negotiate with the agency's contracting officer upon mutually agreeable terms and conditions. 48 C.F.R. § 19.800(c). *1288 Alternatively, upon mutual agreement between the SBA and the agency, the minority contractor itself may be allowed to negotiate with the agency. 48 C.F.R. § 19.808-1(b). Throughout this process, it is within the procurement agency's discretion to withdraw the project from the 8(a) program before the contract is awarded. 48 C.F.R. § 19.800(c). Finally, the minority contractor cannot be awarded the project if the price of the contract results in a cost to the procurement agency which exceeds a fair

market price. 48 C.F.R. § 19.806(b).

FN1. A minority contractor may also influence this discretionary process through informal "self-marketing." Self-marketing is a way for 8(a) contractors to notify a procurement agency of projects the agency could choose to refer to the SBA. The 8(a) contractors contact that agency's personnel and market their services concerning projects that the contractors could work on. The agency can then decide to refer the project to the SBA which may, in its discretion, give the project to the contractor who engaged in the self-marketing. 48 C.F.R. §§ 19.803(c), 19.804-2(a)(12).

Prior to the case sub judice, three nonminority small-business contractors challenged the Corps' joint administration of the 8(a) program with the SBA. Specifically, these contractors challenged the Corps' submission practice whereby it set aside one-hundred percent of its small-business contracts for minority businesses. These contractors contended that in setting aside one-hundred percent of the contracts, the agencies failed to consider the effect a minority enterprise set-aside would have on competing nonminority small-business contractors. The district court initially dismissed the suit on mootness grounds, and we reversed. *Valley Constr. Co. v. Marsh*, 714 F.2d 26 (5th Cir.1983) (Valley I). On remand, the district court held that the Corps' administration of the 8(a) program impermissibly excluded the nonminority small-business contractors in violation of 42 U.S.C. § 2000d, and that the SBA ignored its statutorily directed policy pursuant to 15 U.S.C. § 637(d)(1) requiring it to consider the economic impact on these contractors. *Fordice*, 773 F.Supp. at 882. The government initially appealed the decision, but it withdrew its appeal on October 23, 1990.

In early November 1990, in response to the *Fordice* decision and the withdrawal of the government's appeal, the Corps sought legal guidance from Army Headquarters concerning the continuing legality of its administration of the 8(a) program, and the possible personal liability of the contracting officers in submitting contracts to the SBA under the program. While awaiting advice, the Corps

continued to abide by previously awarded 8(a) contracts, and exercised the options on all 8(a) contracts for extending performance by the minority contractor into later years. Although the Corps did not terminate any pre-existing 8(a) contracts, it did hold in abeyance any ongoing activity in reference to 8(a) contracts not yet awarded. This abeyance continued until January 22, 1991, when the Corps received guidance from Army Headquarters notifying it that, as to the currently administered 8(a) program, there existed no legal impediment to awarding contracts to the SBA through the 8(a) program. [FN2]

FN2. Subsequently, this advice was at least partially confirmed by this Circuit, which held in a separate case that the Corps there properly administered the 8(a) program in conformity with newly promulgated regulations. See 48 C.F.R. 19.804-1(2)(3); *Valley Constr. Co. v. Marsh*, 984 F.2d 133, 135 (5th Cir.1993) (Valley II) (Corps reasonably interpreted regulation not to require "impact analysis" for "new, non-recurring construction contracts"). The appellant attempted to rely on *Fordice* as authority for the proposition that the Corps was still improperly awarding contracts to minority businesses under the 8(a) program because it was not considering the economic impact of nonminority businesses, but we determined that "[n]ot only is *Fordice* factually distinguishable from this case, but it is non-binding on this court." *Id.* at 135 n. 5.

On January 8, 1991, EJA, Enplanar, Dragon, and Keeler (collectively, the Contractors) brought suit in Louisiana seeking injunctive and declaratory relief against, inter alia, the Corps and its personnel in their official capacities, and the SBA (collectively, the Defendants), claiming that the Corps' suspension of their 8(a) referrals to the SBA discriminated against the Contractors in violation of 42 U.S.C. §§ 1981, 1985(3), 2000d. The Contractors also argued that the suspension was an unconstitutional taking of their property rights without due process.

Specifically, EJA alleged that, prior to the abeyance, the Corps failed to renew the Southwest Pass program even though EJA had worked on the project during the previous

year. The Corps did not dispute that in April of 1990, it had decided not to place the project in the 8(a) program because it already had four of its ten small-business projects in the program, and was concerned about the potential legal liability of adding more small-business projects to the 8(a) program. EJA alleged that it had a reasonable *1289 expectancy that the project would be renewed but because of the constitutional concerns, the project was pulled from the 8(a) program. Enplanar alleged that it was in negotiations concerning two 8(a) contracts but the Corps' suspension had indefinitely postponed the implementation of these projects. Dragon and Keeler alleged that the suspension had indefinitely delayed the Corps from making referrals for other, unspecified, future projects which the SBA might give to Dragon or Keeler when and if the projects materialized. Finally, Keeler also alleged that the Corps had wrongfully failed to award it the Cotton Meade project. [FN3] The Contractors asked for injunctive relief which would remove the suspension and order the Corps to award the Southwest Pass project to EJA and the Cotton Meade Project to Keeler.

FN3. Keeler began negotiating for the Cotton Meade project on April 25, 1989. The Corps withdrew the project from the 8(a) program on August 28, 1990. Keeler claimed that this project was withdrawn in bad faith.

On February 8, the district court directed the parties to brief whether the SBA was a necessary party in light of the fact that the suspension had been lifted. On February 27, in its responsive brief, the Contractors stated that the SBA was not a necessary party, and indicated in the summary of its argument that all injunctive relief was moot. However, in the argument itself, they asked for injunctive relief as to the Cotton Meade project. On March 13, the district court denied the Contractors' partial motion for summary judgment seeking injunctive relief finding that all such relief was moot.

The Defendants then filed motions for summary judgment and for change of venue. On March 26, the magistrate stayed discovery

pending a ruling on the venue motion. The Contractors made a Rule 56(f) motion to compel discovery, which was denied. Subsequently, the Contractors filed an amended complaint alleging post-suspension claims for retaliation and unconstitutional interference with the Contractors' rights of access to the courts, based on the Corps engineers' refusal to meet with the Contractors during the pendency of this suit. This amended complaint added as defendants Corps' engineers Stephenson W. Page (Page) and Robert Green (Green) in their individual capacities (the original complaint had included them in their official capacities). It also requested attorneys' fees, claiming that the Contractors' lawsuit caused the Corps to lift its suspension. In response, the Defendants filed a supplemental memorandum in support of their motions for summary judgment, addressing the new claims. [FN4] On July 15, the district court granted summary judgment on all of the Contractors' claims except for Keeler's claims concerning the Cotton Meade project. These latter claims were transferred to Mississippi based on the Defendants' motion for change of venue.

FN4. This response also included a supplemental memorandum concerning the Defendants' earlier motion to dismiss the complaint against Green and Page. The Defendants argued that their service had been improper under Federal Rule of Civil Procedure 4(c)(2)(C)(ii) and that therefore their complaint should be dismissed pursuant to Rule 12(b)(5).

Discussion

The Contractors now argue on appeal that the district court erred by: (1) denying their motion for partial summary judgment on the merits for injunctive relief; (2) denying their additional discovery; (3) prematurely ruling on their claims; (4) granting summary judgment against their claims concerning the Defendants' alleged suspension of the 8(a) program and retaliation; (5) dismissing their claim for attorneys fees; and (6) granting the change of venue motion regarding Keeler's Cotton Meade project claims.

I. Denial of Injunctive Relief

[1] The Contractors contend that the district court erred in denying as moot their motion for partial summary judgment concerning injunctive relief. They admit that the resumption of the 8(a) program did moot their request for injunctive and declaratory relief which sought to lift the Corps' suspension of the 8(a) program. However, they argue that the district court erred in ruling that they also were not entitled to injunctive relief concerning the Southwest Pass project and the Cotton Meade project. They contend that the district court erroneously found all of their requested injunctive relief moot *1290 based on their statement summarizing the argument in their brief that the Corps' resumption of awarding new 8(a) contracts "moots all injunctive relief concerning the 8(a) Program." They now contend that the argument in their brief made clear that only the injunctive relief requesting the suspension's removal was moot and that the relief regarding the specific projects was not moot. We tend to agree. A party should not fear the forfeit of his requested relief based merely on a statement made in the introductory section of his brief summarizing his argument. However we still find that the district court did not err in denying such relief.

[2][3][4][5] In Valley I, we held that as to the Corps' administration of the 8(a) program, "injunctive relief would be improper because a necessary party to the suit is the SBA, which administers the overall § 8(a) minority enterprise set-aside program. The Small Business Act, 15 U.S.C. § 634(b)(1), precludes injunctive relief against the SBA. We ... will not allow the contractors to obtain indirectly (against the Army) what they cannot obtain directly (against the SBA)." 714 F.2d at 29. [FN5] We find that this holding is the controlling law in this case. [FN6] The district court did not err in finding that the Contractors were barred from receiving injunctive relief against the Corps concerning its administration of the 8(a) program. [FN7]

FN5. The Contractors argue that the SBA is no longer a party in this case except for its possible

liability as to attorneys' fees, and that any injunctive relief granted concerning the Southwest Pass and Cotton Meade projects would not affect the SBA. We disagree. If a court ordered the Corps to award these projects to specific 8(a) participants, this order would also require injunctive relief concerning the SBA's conduct as to its statutory duties regarding its selection of 8(a) contractors for a specific project, and its subsequent negotiations with a procurement agency concerning the terms of the project's contract. See 13 C.F.R. §§ 124.307(d), 124.308(d), 124.309; 48 C.F.R. § 19.800(c).

FN6. The Contractors argue that this holding is no longer binding because The Federal Courts Improvement Act of 1982 as codified at 28 U.S.C. § 1491(a)(3) now allows injunctive relief against the SBA--and by extension, against agencies participating in the SBA's programs. This Court has not addressed the effect that section 1491(a)(3) has on the injunctive immunity of the SBA, although other courts have recognized that this law abrogates the SBA's injunctive immunity in certain circumstances. See *Cavalier Clothes, Inc. v. United States*, 810 F.2d 1108, 1111-112 (Fed.Cir.1987); *Related Industries, Inc. v. United States*, 2 Cl.Ct. 517 (1983). However, we need not decide this issue because section 1491(a)(3) applies only to cases brought before the United States Court of Federal Claims. 28 U.S.C. § 1491(a)(1); *Cavalier*, 810 F.2d at 1112 (holding that this section "specifically empowers the Claims Court generally to grant injunctive relief" against the SBA). Since this case was not brought before the Claims Court, section 1491(a)(3) is irrelevant. The Contractors also argue that other circuits have held that the SBA is subject to injunctive relief in certain circumstances regardless of the applicability of section 1491(a)(3). See *Ulstein Maritime, Ltd. v. United States*, 833 F.2d 1052, 1056 (1st Cir.1987), and cases cited therein. However, as noted by *Ulstein*, this Circuit has "concluded that all injunctive relief directed at the SBA is absolutely prohibited." *Id.* We are bound by our prior decisions that such relief is barred. See *Valley I*, 714 F.2d at 29, *Romeo v. United States*, 462 F.2d 1036, 1038 (5th Cir.1972), cert. denied, 410 U.S. 928, 93 S.Ct. 1361, 35 L.Ed.2d 589 (1973); *Expedient Servs., Inc. v. Weaver*, 614 F.2d 56 (5th Cir.1980).

FN7. Furthermore, as to EJA's claims concerning the Southwest Pass project, during oral argument it was revealed that EJA no longer exists, and therefore it cannot perform the contract. Consequently, the injunctive relief sought is actually "equitable monetary" relief which would provide money damages in lieu of the injunctive relief. Federal courts have granted injunctive relief against governmental units in which the performance of such relief would cost money. See *Edelman v. Jordan*, 415 U.S. 651, 680, 94 S.Ct. 1347, 1364, 39 L.Ed.2d 662 (1974) (Douglas, J., dissenting) (noting that in cases involving injunctive relief against state government entities "[m]ost ... decisions by federal courts have a financial impact on the States"). Furthermore, "a court in equity may award monetary restitution as an adjunct to injunctive relief." *Tull v. United States*, 481 U.S. 412, 424, 107 S.Ct. 1831, 1839, 95 L.Ed.2d 365 (1987). However, the Contractors do not cite to any authority where a court has granted monetary damages to a party as a substitute for injunctive relief. To allow such a result would destroy the distinction between monetary and equitable damages. See *Edelman*, 415 U.S. at 666, 94 S.Ct. at 1357 (rejecting the contention that in an equity proceeding relief in the form of money damages may be awarded under the rubric of "equitable restitution" because "the relief may be labeled 'equitable' in nature"). Furthermore, since EJA's claim concerning the Southwest Pass project names only the Corps and its divisions as defendants, it is thereby suing only the United States. Consequently, it should have brought such a monetary claim in the Court of Claims. See *Amoco Production Co. v. Hodel*, 815 F.2d 352, 359 (5th Cir.1987), cert. denied, 487 U.S. 1234, 108 S.Ct. 2898, 101 L.Ed.2d 932 (1988). We conclude that the district court did not err in denying injunctive relief as to EJA's claims concerning the Southwest Pass project. As to the Cotton Meade project, the district court's ruling is not before us. Keeler's claims concerning this project have not been disposed of, but merely transferred to a different venue. Therefore, the district court's ruling denying the Contractors' partial summary-judgment motion concerning the availability of injunctive relief as to this project is an interlocutory order not subject to appeal at this time. See 10 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2715 p. 636 (noting that "the denial of a Rule 56 motion is

an interlocutory order from which no appeal is available until the entry of judgment"); see also *In re Corrugated Container Antitrust Litigation*, 694 F.2d 1041 (5th Cir.1983).

II. Discovery

The Contractors claim that the district court denied them proper discovery so that *1291 they were unable to create contested issues of fact to overcome the Defendants' summary judgment motions. Specifically, the Contractors contend that they were improperly denied discovery as to the abeyance of the 8(a) program, and as to Keeler's Cotton Meade claims. In reviewing such claims, "The trial judge's decision to curtail discovery is granted great deference and, thus, is reviewed under an abuse of discretion standard." *Wichita Falls Office Assoc. v. Banc One Corp.*, 978 F.2d 915, 918 (5th Cir.1992), cert. denied, 508 U.S. 910, 113 S.Ct. 2340, 124 L.Ed.2d 251 (1993); see also *Landry v. Air Line Pilots Ass'n Int'l*, 901 F.2d 404, 436 (5th Cir.), cert. denied, 498 U.S. 895, 111 S.Ct. 244, 112 L.Ed.2d 203 (1990).

[6] As to the Cotton Meade project, these claims were not disposed of in summary judgment, but were rather transferred to another court based on the Defendants' motion for change of venue. 28 U.S.C. § 1404(a); *Fed.R.Civ.P.* 21. As such, the claims were still alive and still subject to discovery--albeit in a different venue. The Contractors cite to no authority, and we have found none, holding the district court has abused its discretion in denying merits-related discovery pending ruling on a motion for change of venue. Federal courts have long recognized that two of the factors supporting a change in venue are convenience of the witnesses and the location of records and documents. 15 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* §§ 3851, 3853; see also *Southern Investors II v. Commuter Aircraft Corp.*, 520 F.Supp. 212, 218 (M.D.La.1981); *American Standard, Inc. v. Bendix Corp.*, 487 F.Supp. 254, 264 (W.D.Mo.1980). Although these factors are usually considered in connection with securing the witnesses' and documents' availability for

trial, they also necessarily implicate the ease of conducting merits-related discovery in a location which is near the relevant witnesses and documents. Moreover, if a change of venue motion is granted, the discovery is not denied but merely delayed. The Contractors tendered no showing that the delay in discovery somehow prejudiced their case respecting the Cotton Meade project through loss of documents or unavailability of witnesses. See Fed.R.Civ.P. 61; *FDIC v. Fuller*, 994 F.2d 223 (5th Cir.1993); *King v. Gulf Oil Co.*, 581 F.2d 1184 (5th Cir.1978). The district court did not abuse its discretion in refusing to allow discovery concerning Keeler's claims arising from the Cotton Meade project pending the grant of the Defendants' change of venue motion regarding these claims.

[7] Concerning the remaining claims, which were subsequently disposed of by the district court's grant of the Defendants' summary judgment motion, the Contractors were entitled to receive a continuance for additional discovery if they: (i) requested extended discovery prior to the court's ruling on summary judgment; (ii) placed the district court on notice that further discovery pertaining to the summary judgment motion was being sought; and (iii) demonstrated to the district court with reasonable specificity how the requested discovery pertained to the pending motion. *Chevron U.S.A., Inc. v. Traillour Oil Co.*, 987 F.2d 1138, 1155-56 (5th Cir.1993); *Wichita Falls*, 978 F.2d at 919 (citing *Int'l Shortstop, Inc. v. Rally's, Inc.*, 939 F.2d 1257 (5th Cir.1991)).

[8] As to the first two requirements, we can review a claim alleging improperly denied *1292 discovery only if the complaining party presented to the district court a Rule 56(f) motion or an " 'equivalent statement preferably in writing' that conveys the need for additional discovery" in the areas now complained of on appeal. *Wichita Falls*, 978 F.2d at 919 (quoting *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir.1986)). In this regard, the Contractors contend in their reply brief that they made a Rule 56(f) motion or its equivalent in six separate instances.

However, as to four of the motions cited to us, even when read broadly as complying with the requirements of Rule 56(f), these motions concern only the Cotton Meade project. Therefore, as to these motions, the Contractors failed to inform the district court that they were seeking any additional discovery outside the scope of that project.

[9][10] Only in two motions, do the Contractors bring to the district court's attention a request for additional discovery concerning claims other than the Cotton Meade project. In their opposition motion and additional opposition motion to the Defendants' motions for summary judgment and for change of venue, the Contractors note in passing that they have been refused a copy of the Justice Department's memorandum concerning its October 1990 determination not to appeal the Fordice decision. [FN8] In these passing references, they do not explain how this requested discovery would or could create a fact issue to overcome the Defendants' summary-judgment motion. [FN9] Therefore, they have failed the third requirement which requires them to demonstrate to the district court with reasonable specificity how the requested discovery would likely pertain to the pending summary judgment motion. See *Krim v. BancTexas Group, Inc.*, 989 F.2d 1435, 1442 (5th Cir.1993) (holding that a nonmovant's Rule 56(f) motion was insufficient where "absent from the affidavit was an explanation of ... how the materials listed in the plaintiff's first document request, or in the handwritten list appended to the affidavit, would enable plaintiff to oppose defendant's summary judgment motion by establishing a genuine issue of material fact"). Certainly, we are not requiring clairvoyance on the part of the Contractors. They do not need to know the precise content of the requested discovery, but they do need to give the district court some idea of how the sought-after discovery might reasonably be supposed to create a factual dispute. The mere fleeting mention of a matter, without a description of its likely relevance, will not suffice to alert the district court to the potential importance of that undiscovered item. Therefore, the district court did not abuse its discretion in

denying additional discovery.

FN8. The Contractors now complain on appeal that they were denied needed discovery as to: (1) an October 17, 1990 memorandum prepared by a member of the Corps; (2) a November 15, 1990 memorandum prepared by the Corps' assistant general counsel; (3) an undated memorandum by the Vicksburg district counsel; and (4) the September 1990 written recommendations of the Department of Justice, Small Business Administration, and the Department of the Army concerning the constitutionality of the 8(a) program. None of these matters were the subject of the Contractors' Rule 56(f) motions or equivalents. In their reply brief, the Contractors assert, with no citation to the record, that they notified the district court of their need for these documents. After a fruitless search of the record, we conclude that there exists no indication in the record that these matters were brought to the attention of the district court, and therefore, it did not abuse its discretion in refusing to allow discovery concerning these matters.

FN9. We infer from the placement of the stray remark noting that the Contractors had been denied this memorandum, that this undiscovered document will bolster their argument that the 8(a) program was suspended based on the Corps' contracting officers fear of personal liability. However, this matter is undisputed.

III. Summary Judgment Procedure

[11] The Contractors complain that the district court prematurely dismissed their claims of retaliation against defendants Page and Green in their individual capacity, and that it prematurely granted summary judgment in favor of all of the Defendants without giving the Contractors notice. Specifically, the Contractors assert that the district court sua sponte dismissed their claims against Page and Green because the only motion filed on their behalf was a motion to dismiss for improper service which was subsequently cured. Furthermore, the Contractors claim that the district court granted summary judgment dismissing their amended *1293 complaint although the Defendants failed to move for summary

judgment as to that complaint.

These two arguments conveniently overlook the Defendants' supplemental memorandum in support of their motions for summary judgment. This document was filed on May 13, 1991, after the Contractors' amended complaint, and it specifically addresses the claims in that amended complaint. This document addresses, as a ground for dismissal, the Contractors' failure to properly serve Page and Green, but it also explicitly discusses various grounds for summary judgment as to all the defendants—including the retaliation claims brought against Page and Green. Therefore, this memorandum served to supplement the original summary judgment motion, and provided the Contractors with notice of the Defendants' challenges to their amended complaint. Cf. *Spickard v. Ribicoff*, 211 F.Supp. 555, 558 (W.D.Ky.1962) (granting summary judgment where no motion was filed but the movant submitted a brief in support of summary judgment and the nonmovant treated it as a summary judgment motion). [FN10] Although the district court on July 15, 1991, granted a dismissal as to Page and Green, it also granted summary judgment as to all the defendants based on evidence not contained in the pleadings. Under these circumstances, the district court's order to dismiss the complaint as to Page and Green is disregarded, and we instead review the grant of summary judgment as to all defendants—including Page and Green. See *Fed.R.Civ.P.* 12(b); *Wilson v. U.S. Dept. of Agriculture*, 991 F.2d 1211, 1214 (5th Cir.1993); *Conoco, Inc. v. Republic Ins. Co.*, 819 F.2d 120, 122 n. 1 (5th Cir.1987) (treating a court's order as granting summary judgment and disregarding the statement in the order directing, "and this case is dismissed"). The district court did not sua sponte dismiss the claims against Page and Green, but rather granted summary judgment in their favor based on the Defendants' memorandum in support of summary judgment filed approximately two months previously. Cf. *Carlinas Cotton Growers Ass'n v. United States*, 785 F.2d 1195, 1200 (4th Cir.1986) ("[I]t is the conclusion of the court that the references to summary judgment are in fact simply

mislabeledings not affecting the validity of the finding of the court below."). [FN11] This equivalent of a motion for summary judgment explicitly also covered the other defendants, and served as the proper basis for the district court's summary judgment as to those defendants. Therefore, the district court did not prematurely rule on the Contractors' claims.

FN10. This case is distinguishable from *Reese v. Sparks*, 760 F.2d 64 (3d Cir.1985), which held that a district court could not grant summary judgment on an amended complaint based on a motion for summary judgment filed before that amended complaint if the amended complaint contained new legal theories and additional, different facts. *Id.* at 66. Here, the equivalent of a summary judgment motion was properly filed after the amended complaint and it specifically addressed the new claims alleged in it.

FN11. Since the Defendants filed the supplement to their summary-judgment motion some two months before the district court entered summary judgment, the Contractors received sufficient notice of the Defendants' new arguments supporting their summary judgment motion. See Fed.R.Civ.P. 56(c) (requiring that the summary judgment motion "shall be served at least 10 days before the time fixed for the hearing"); *Arkwright-Boston Mfrs. Mut. Ins. Co. v. Aries Marine Corp.*, 932 F.2d 442, 445 (5th Cir.1991); *Atchison, T. & S. F. R. Co. v. Buell*, 480 U.S. 557, 568 n. 15, 107 S.Ct. 1410, 1417 n. 15, 94 L.Ed.2d 563 (1987). This two-month notice also satisfied the "hearing" requirement in Rule 56(c). As long as the nonmovants have sufficient notice of the pending summary judgment motion, the district court may rule on that motion based solely on the pleadings and evidence on file without a formal conference with the parties. See *Western Fire Ins. Co. v. Copeland*, 786 F.2d 649, 652 (5th Cir.1986) (holding that the district court erred by not affording the nonmovants "either the ten-day notice of Rule 56(c) or an opportunity to present their evidence"); *Cowgill v. Raymark Indus. Inc.*, 780 F.2d 324, 329 (3d Cir.1985) (holding that nonmovant not entitled to notice of date when motion for summary judgment would be resolved because the nonmovant "is under an obligation to respond ... in a timely fashion and to place before

the court all materials it wishes to have considered when the court rules on the motion"); see also *Daniels v. Morris*, 746 F.2d 271 (5th Cir.1984); *Brumley Estate v. Iowa Beef Processors, Inc.*, 704 F.2d 1351 (5th Cir.1983), cert. denied, 465 U.S. 1028, 104 S.Ct. 1288, 79 L.Ed.2d 690 (1984).

IV. Summary Judgment Claims

The Contractors contend that the district court erred in granting summary judgment *1294 dismissing the claims in their amended complaint. This Court reviews a district court's grant of summary judgment de novo, taking the evidence and inferences to be drawn therefrom in the light most favorable to the nonmoving party, and determining whether the pleadings, depositions, answers to interrogatories, and affidavits show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Crenshaw v. General Dynamics Corp.*, 940 F.2d 125, 127 (5th Cir.1991); Fed.R.Civ.P. 56(c). Summary judgment is proper "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). Here, the burden of proof was on the Contractors.

[12][13][14] The Contractors first argue that the district court erred in ruling that they were not entitled to declaratory relief arising from the partial suspension of the 8(a) program. [FN12] They contend that because of their minority status they were denied their equal-protection rights, and that the 8(a) program was administered in a discriminatory manner in violation of 42 U.S.C. §§ 1981, 1985(2), 2000d. However, the Defendants articulated a nondiscriminatory reason for the suspension, namely that it was due to the Fordice decision which found that the Corps' practice of awarding a large number of small-business projects to the minority set-aside program was improper. The Contractors admit in their briefs to this Court that the suspension was due to the Defendants' belief that the 8(a) program was unconstitutional as

a result of the Fordice decision. The Contractors even surmise that the presidential administration--at the time of the suspension--believed that all minority set-aside programs were unconstitutional. They then make the conclusory assertion that such a belief was an unjustified pretext. We disagree.

FN12. The Contractors also claim on appeal that they were denied a property interest without procedural due process in violation of the due process clause of the Fifth Amendment because the suspension was enacted without notice or a hearing. As a result, they claim they are entitled to monetary damages on a Bivens constitutional-tort claim based on the suspension. See *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). However, a Bivens claim is available only against government officers in their individual capacities. *Williamson v. U.S. Dept. of Agriculture*, 815 F.2d 368, 380 (5th Cir.1987) (holding that a Bivens claim "only applies against the individual appellees in their individual capacities"). In their claim concerning the suspension, the Contractors state that the only defendants are "the Corps of Engineers and the Vicksburg Corps," which are subdivisions of the United States. The United States may be sued only under the Federal Torts Claims Act. See *Rykers v. Alford*, 832 F.2d 895, 897 (5th Cir.1987) (holding that "[t]he United States may be sued only within the exception to sovereign immunity provided by the Federal Torts Claims Act"). This the Contractors have failed to do. The Contractors have not raised a cognizable Bivens claim concerning the suspension.

The three-month suspension affected only the Corps' decisions regarding the submission of new projects to the SBA. Such a decision is within the complete discretion of the Corps. 48 C.F.R. § 19.803(a)-(c). Even when the Corps offers a project to the SBA, it is then within the SBA's complete discretion to accept the project, and then to select a minority contractor to work on the project. 15 U.S.C. § 637(a)(1)(B); 13 C.F.R. §§ 124.307(d), 124.309. Therefore, this is not an instance where a government agency is accused of discrimination because of its failure to undertake some mandatory requirement; rather, this is an instance where the agency's

discretionary failure can be fairly attributed to reasons other than invidious discrimination. [FN13] Here, the Corps' decision to suspend the submission of new contracts to the SBA was reasonable in light of the Fordice decision *1295 in which the district court issued a declaratory judgment finding that the Corps had illegally administered the 8(a) program--specifically in regard to its submission practice. 773 F.Supp. at 882. If the Fordice decision was a mere pretext for discrimination on the Corps' part, then it seems remarkable that the Corps would have sought legal advice, and then after a mere three months, the Corps upon receipt of that advice would have immediately lifted the suspension concerning that part of the 8(a) program which was directly involved in the Fordice litigation. The Contractors have failed to carry their burden to produce summary judgment evidence which would sustain a finding that the Defendants' proffered reasons were a mere pretext for discrimination. See *Guthrie v. Tifco Industries*, 941 F.2d 374, 378 (5th Cir.1991), cert. denied, 503 U.S. 908, 112 S.Ct. 1267, 117 L.Ed.2d 495 (1992) (holding that in deciding a summary judgment motion "[a]bsent countervailing evidence, the trier of fact must accept the defendant's explanation as the real reason" for the action); *Brown v. American Honda Motor Co.*, 939 F.2d 946 (11th Cir.1991), cert. denied, 502 U.S. 1058, 112 S.Ct. 935, 117 L.Ed.2d 106 (1992) (granting summary judgment when "the defendant's proffer of credible, nondiscriminatory reasons for its actions is sufficiently probative, then the plaintiff must come forward with specific evidence demonstrating that the reasons given by defendant were a pretext for discrimination"). Given the Corps' unfettered discretion and its real apprehensions regarding the legality of its administration of the 8(a) program, we find that the Contractors have failed to carry their burden of proof to refute the reasons offered by the Defendants. See *Grigsby v. Reynolds Metals Co.*, 821 F.2d 590, 596 (11th Cir.1987) (holding that a defendant can present such strong evidence of a nondiscriminatory rationale that summary judgment is warranted). Therefore, the district court did not err in granting summary judgment

against the Contractors' discrimination claims. [FN14]

FN13. We do not hold that a minority plaintiff cannot prevail on a claim for discrimination where an agency has unfettered discretion but chooses to use such discretion to discriminate against minorities. Rather, we are merely pointing out that complete discretion makes it more difficult for a minority plaintiff to make out a prima facie case, since the violation of a mandated policy in and of itself can serve as the basis for the finding of discriminatory intent. See *Young v. Pierce*, 822 F.2d 1368, 1371 (5th Cir.1987) (finding of discriminatory intent by the Department of Housing and Urban Development based on its failure to perform its affirmative duty under Title VIII to learn of and to abate segregation in public housing).

FN14. The Contractors also complain that the district court erred in granting summary judgment against EJA's claim concerning the Southwest Pass project. However, as explained above, the Corps had complete discretion concerning whether it would submit the project to the 8(a) program. The Contractors argue that EJA had already worked on the project the prior year and had an "expectation" that it would receive the project again. They allege it did not receive the project because the Corps feared that too many of its small business set-asides were going into the 8(a) program. Assuming this explanation is true, it still does not suffice to sustain a finding that the Corps' decision not to submit the project was based on a discriminatory intent.

[15][16] Finally, the Contractors contend that the district court erred in rejecting their Bivens claims for declaratory, injunctive, and monetary relief. Their Bivens claims alleged constitutional torts against Page and Green for denying the Contractors the ability to self-market their services to the Corps. [FN15] Under Bivens, "the victim of a constitutional violation by a federal agent has a right to recover damages against the agent in federal court." *Bush v. Lucas*, 647 F.2d 573, 575 (5th Cir. Unit B June 1981), *aff'd*, 462 U.S. 367, 103 S.Ct. 2404, 76 L.Ed.2d 648 (1983). Therefore, a Bivens action requires the plaintiff to "claim a deprivation of a constitutional right." *Zernial v. United States*, 714 F.2d 431, 435 (5th Cir.1983). This

action extends to alleged violations of the First Amendment and to deprivations of Fifth Amendment due process rights. *Bush*, 462 U.S. 367, 103 S.Ct. 2404 (First Amendment); *Butz v. Economou*, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978) (Fifth Amendment). The Contractors' Bivens claims are based on two theories: that they have a right to self-marketing and they have been deprived of that right without procedural due process in contravention of the Fifth Amendment; and that this denial of self-marketing is in retaliation against the Contractors, and is an attempt to deny them access to the courts as is their right under the First Amendment.

FN15. The Contractors also brought this claim against the Corps, but as already explained above, such a claim is cognizable only against individuals. *Williamson*, *supra*.

[17] To succeed on a procedural due process claim, the Contractors must show they had a "cognizable property or liberty interest," and such a property interest must be "a legitimate claim of entitlement." *Broadway *1296 v. Block*, 694 F.2d 979, 985 (5th Cir.1982). Here, there exists no legitimate claim of entitlement. The Contractors have no right to access of Corps personnel for this purpose. 48 C.F.R. 19.803(c). As described above, under the 8(a) program, the SBA, and not the individual minority contractor, is authorized to contract as the prime contractor with the procurement agency. *Id.* The SBA may, in its discretion, allow the individual minority contractor to negotiate directly with the procurement agency, and familiarize that agency with its capabilities for future contracts; but the SBA is not required to do so. 48 C.F.R. §§ 19.803(c), 19.804-2(a)(12). These direct communications through "self-marketing" are not required by any statute or regulation. As found by the district court, the Contractors are allowed to self-market at the sufferance of Corps personnel, and the Corps has complete discretion concerning whether it will give such access to the Contractors. Under these facts no liberty or property interest is implicated. The district court did not err in finding that the Contractors had

failed to present a violation of procedural due process.

[18][19] The Contractors also contend that the denial of self-marketing is in retaliation for the lawsuit and is designed to chill access to the courts of the United States in violation of the Contractors' First Amendment rights. [FN16] Because of the preeminent place that the First Amendment occupies in our constitutional jurisprudence, the Contractors need not prove that in being denied the right to self-market, they have been denied a property right or liberty interest or some other independent legal right. See *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). But they still must show a constitutional violation. Here, the fact that the contracting officers refused to speak to the Contractors during the pendency of this suit does not indicate that such refusal was made in an effort to chill the Contractors' access to the courts or to punish them for having brought suit. Rather, such a refusal was made pursuant to an Information Paper that instructed agency procurement officers to avoid contact with contractors during the pendency of their litigation with the agency. [FN17] This paper was issued on February 6, 1990--months before the suspension--and was apparently distributed by the Army's general counsel to all defense procurement agencies. It notes that contact should be avoided so that the procurement officer will not inadvertently "give the contractor any ammunition to weaken the Government's position. Any such statements may be used by the contractor in litigation and may ultimately lead to the depositions of the officials who make the statements and their subsequent testimony." A government employee who is a potential witness is not improperly chilling access to the courts or retaliating for use of the judicial system when he refuses to speak to a party concerning a matter that is related to the gravamen of that party's litigation against him or his employer. Page and Green did not deny the Contractors their constitutional rights under the First Amendment. There is nothing which would sustain a finding that Page and Green's actions--perhaps more accurately, their inactions--were retaliatory or

motivated by considerations other than those of the Information Paper or that they were a pretext for unconstitutional retaliation. Consequently, "any assertion that [the officers'] actions ... were retaliatory can only be speculation." *Bowles v. U.S. Army Corps of Engineers*, 841 F.2d 112, 117 (5th Cir.), cert. *1297 denied, 488 U.S. 803, 109 S.Ct. 33, 102 L.Ed.2d 13 (1988). The district court did not err in finding that since access for self-marketing was discretionary and that the denial of self-marketing was based on official army policy, it was not unconstitutional or "retaliatory" for Corps personnel to avoid the plaintiffs during the litigation. [FN18]

FN16. In their opaque brief, the Contractors make some murky allusions to the possibility that their First Amendment rights have also been violated by the mere fact that Page and Green will not speak to them. They cite no authority for this theory, and we will not root about in the case law seeking support for it. Cf. *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir.1991) ("Judges are not like pigs, hunting for truffles buried in briefs."). Furthermore, their amended complaint does not offer this theory as a basis for recovery, and they did not argue this theory below. Therefore, the Contractors have waived any claim on this basis.

FN17. The Contractors now contend that this paper is hearsay, and cannot be relied on by the district court in rendering summary judgment. However, they did not raise this hearsay objection below, so the error, if any, is waived. See *United States v. Maddox*, 492 F.2d 104, 107 (5th Cir.), cert. denied, 419 U.S. 851, 95 S.Ct. 92, 42 L.Ed.2d 82 (1974) (holding that "[a] rule of evidence not invoked is waived").

FN18. Furthermore, as to both Bivens claims, the Contractors sought monetary damages against Page and Green. However, as pointed out by the district court, the Contractors introduced no evidence showing that Page's and Green's refusal to speak with the Contractors led to the Contractors being denied any contracts. In an earlier suit against the Corps concerning the discretionary award of contracts, this Court noted that the plaintiffs wisely abstained from pressing any claims for monetary damages because, "Such a claim would force upon them the Herculean task of proving the Corps

actually would have awarded them the contracts in question in the absence of the claimed violations." Valley 1, 714 F.2d at 29 n. 4. In the case sub judice, not only have the Contractors failed to show that the Corps would have awarded them contracts if the Contractors were allowed to self-market, but they have also failed to describe any particular contracts as to which they were in contention. Therefore, for this reason also, the district court did not err in finding that the Contractors were not entitled to monetary damages based on their Bivens claims.

V. Attorneys' Fees

[20] The Contractors argue that they are entitled to attorneys' fees under 28 U.S.C. § 2412(d) and 42 U.S.C. § 1988 because by filing the lawsuit and vigorously prosecuting it, they forced the Corps to resume the 8(a) program. Allegedly, these actions qualify them to be considered as prevailing parties because they "acted as a catalyst in prompting the opposing party to make amends." *Ramon by Ramon v. Soto*, 916 F.2d 1377, 1384 (9th Cir.1989). We reject these contentions.

Section 1988 can serve as the basis for the recovery of attorneys' fees only if the Contractors can show that they have presented a substantial racial discrimination claim. See *Kelly v. City of Leesville*, 897 F.2d 172, 177 (5th Cir.1990); *McDonald v. Doe*, 748 F.2d 1055, 1077 (5th Cir.1984) (noting that section 1988 "was adopted because the actions in which fees are allowed vindicate rights based on the federal constitution or federal statutes. If it is determined that no constitutional right was violated, the predicate for the award of fees vanishes."). However, as we have discussed above, the Contractors have wholly failed to make out a claim for racial discrimination. At best, the Contractors have alleged that the Corps suspended the 8(a) program for an inadequate reason: their fear that the Fordice decision will lead to further lawsuits or potential liability concerning their participation in the 8(a) program. But, the Corps' suspension of the program based on its reaction to the Fordice decision does not somehow transmute that motivation into

racial discrimination. Even assuming that the Contractors' actions caused the resumption of the 8(a) program, since the suspension was not based on any racial animus, the Contractors could not recover under section 1988(b) and therefore cannot be considered prevailing parties under that statute. See *McQuiston v. Marsh*, 707 F.2d 1082, 1085 (9th Cir.1983) (finding that an unsuccessful bidder on a government contract could be a prevailing party under section 2412 based on his claim of bad faith, but not under section 1988 because he could not prevail on his discrimination claim).

[21] The Contractors can recover under the Equal Access to Justice Act codified at section 2412(d)(1)(A) only if they show: (1) that they are a "prevailing party"; (2) that the Government's position was not "substantially justified"; and (3) that no "special circumstances make an award unjust." *Perales v. Casillas*, 950 F.2d 1066, 1072 (5th Cir.1992). [FN19] The Contractors have not alleged any facts showing that the Defendants' position was not substantially justified. Since the Defendants' abeyance was based on the adverse Fordice decision, we find that their position concerning the suspension of the 8(a) program pending further guidance was substantially *1298 justified. Therefore, the district court did not err in denying attorneys' fees to the Contractors.

FN19. We note that the *Ramon* court decided only the first factor and held that the plaintiffs were entitled to fees "unless the government's position was substantially justified or special circumstances would make an award unjust." *Ramon*, 916 F.2d at 1384. Therefore, even if the Contractors can be classified as "catalysts" for the Defendants' resumption of the 8(a) program, they still must satisfy the remaining requirements of section 2412(d).

VI. Change of Venue

[22] The Contractors contend that the district court erred in granting the Defendants' change of venue motion as to Keeler's Cotton Meade project claims. However, the grant of a change of venue

motion is an interlocutory order and is not reviewable. See Louisiana Ice Cream Distributors v. Carvel Corp., 821 F.2d 1031, 1033-34 (5th Cir.1987); Garner v. Wolfenbarger, 433 F.2d 117, 120 (5th Cir.1970); Chas. Pfizer & Co. v. Olin Mathieson Chem. Corp., 225 F.2d 718 (5th Cir.1955). Keeler's Cotton Meade project claims have been severed from this action and transferred to a different forum. These claims are unreviewable in this appeal.

Conclusion

Based on the foregoing, the district court's orders are

AFFIRMED.

11 F.3d 1284, 27 Fed.R.Serv.3d 1469, 39
Cont.Cas.Fed. (CCH) P 76,613

END OF DOCUMENT

Only the Westlaw citation is currently available.

United States District Court, S.D. New York.

Mark GANDLER and International Sports
Advisors Co., Plaintiffs,

v.

Andrei NAZAROV, Defendant.

No. 94 Civ. 2272 (CSH).

Dec. 14, 1994.

MEMORANDUM OPINION AND ORDER

HAIGHT, District Judge:

*1 Three issues in this breach of contract action are now before the Court: (1) Whether the law firm of Berkovich & McMenemy should be disqualified from representing plaintiffs; (2) Whether plaintiffs are entitled to Rule 11 sanctions based on defendant's motion for disqualification; and (3) Whether discovery should be stayed pending resolution of defendant's motion to dismiss for lack of personal jurisdiction. I will consider each of these issues in turn.

1. Law Firm Disqualification

The Court is presented with the issue of whether vicarious disqualification of a law firm is warranted when one of the firm's attorney's is disqualified under the advocate-witness rule.

Plaintiffs had previously been represented by Alexander Berkovich, a partner in the firm of Berkovich & McMenemy. The underlying action surrounds a contract allegedly entered into by the parties.

Plaintiff International Sports Advisors Co. ("ISA") is in the business of representing professional hockey players in the National Hockey League ("NHL"). Plaintiff Mark Gandler is a principal of ISA. In May of 1992, plaintiffs entered into a written Representation Agreement with defendant Andrei Nazarov, at the time a 17-year old

Russian hockey player aspiring to play in the NHL in the United States. This Agreement provided that ISA would represent Nazarov in his attempts to secure employment in the NHL, in return for which Nazarov would pay ISA a commission.

In April of 1993, Nazarov informed ISA that he was terminating the Representation Agreement. Plaintiffs maintain that this attempted termination placed Nazarov in breach of the Representation Agreement, prompting them to institute the present suit. Nazarov contends that the contract is unenforceable, in whole or in part, because the terms of the contract were never adequately explained to him, he was never provided a Russian translation of the contract, and the terms of the contract are inherently unfair.

Of particular significance here is a dispute over the extent to which plaintiffs translated and explained the terms and meaning of the Representation Agreement to Nazarov. On May 15 and 16, 1992, Berkovich met with Nazarov and Nazarov's father to discuss the Representation Agreement. Berkovich maintains that his efforts at those meetings adequately conveyed to Nazarov the import of the various provisions of the Representation Agreement. Nazarov disputes the scope of the efforts that Berkovich says he made, and contends that they were entirely inadequate.

It is thus apparent that a key issue is what happened at those meetings in May of 1992. Aware of the centrality of this issue, this Court, on July 1, 1994, raised with counsel the possibility that Berkovich would need to serve as a witness at trial, and that this possibility might merit disqualification of Berkovich under the advocate-witness rule.

After allowing the parties an opportunity to present arguments on the issue, this Court issued an opinion on July 27, 1994, finding that Berkovich should be disqualified as counsel. That ruling was grounded on Disciplinary Rule ("DR") 5-102(A), which reads:

"If, after undertaking employment in contemplated or pending litigation, a lawyer

learns or it is obvious that the lawyer ought to be called as a witness on behalf of his own client, the lawyer shall withdraw as an advocate before the tribunal, except that the lawyer may continue as an advocate and may testify in the circumstances enumerated in DR 5-101(B)(1) through (4)."

*2 Applying this Rule, this Court wrote:

"Berkovich was intimately involved in the negotiation and execution of the Representation Agreement. Absent his testimony, it will be impossible for the plaintiffs to explain or rebut defendant's testimony. See *MacArthur v. Bank of New York*, 524 F.Supp. 1205, 1207 (S.D.N.Y.1981) (applying a "significantly useful" standard rather than a "necessary" standard). The mandatory direction of DR 5-102(A) requires that in those circumstances, an attorney be disqualified."

Following the disqualification of Berkovich, Paul McMenamain, Berkovich's law partner, informed the Court by letter that he would be substituting as counsel for plaintiffs. [FN1] By letter to the Court dated August 11, 1994, defendant argues that since Berkovich was disqualified, the lawyers in Berkovich's firm should be vicariously disqualified, and that McMenamain should therefore not be allowed to substitute as counsel. In its reply papers, plaintiff maintains that relatively recent revisions to the New York Code of Professional Responsibility dictate that Berkovich's firm should not be disqualified.

Discussion

Attorney disqualification and vicarious disqualification of an attorney's law firm are in the discretion of the court. *Kubin v. Miller*, 801 F.Supp. 1101 (S.D.N.Y.1992). Nonetheless, the cases are uniform in holding that pursuant to Disciplinary Rule 5-102(A) of the New York Code of Professional Responsibility (22 NYCRR 1200.21), an attorney's firm should not be disqualified simply because that attorney will testify on behalf of his client. *Talvy v. American Red Cross*, 1994 WL 593353 (N.Y.A.D. 1st Dep't 1994); *Tisby v. Buffalo General Hospital*,

1994 WL 522792 (W.D.N.Y.1994); *Kubin*, 801 F.Supp. at 1114; *Kaplan v. Maytex Mills, Inc.*, 590 N.Y.S.2d 136 (N.Y.A.D. 2nd Dep't 1992); *Minami International Corp. v. Clark*, 1991 WL 102464 (S.D.N.Y.1991); *Paretti v. Cavalier Label Company, Inc.*, 722 F.Supp. 985, 988-89 (S.D.N.Y.1989).

In its opposition papers, defendant cites a number of cases that reached an opposite result, holding that vicarious disqualification of a law firm follows after one of the firm's attorney's is disqualified as a witness. These cases, however, all predate 1990, before the New York Code of Professional Responsibility was revised to permit a law firm to continue representation even if one attorney in the firm is required to testify. *Kaplan*, 590 N.Y.S. at 137. [FN2]

Given that the cases cited by defendant are no longer good law, the only component of defendant's argument that might plausibly allow a finding in its favor is its contention that disqualification is in the discretion of the Court. [FN3] Indeed, defendant acknowledges that its cited cases predate the 1990 revisions to the disciplinary rules, but maintains that the policy reasons cited for the old rule should still guide the Court in its exercise of discretion.

While defendant is correct that this Court has the discretion to disqualify Berkovich's law firm, it has offered no reason why the Court, in exercising its discretion, should not be guided by the revised disciplinary rules. Vicarious disqualification of a law firm is discretionary because the New York Code of Professional Responsibility is not legally binding on the federal courts in New York. See, e.g. *United States v. Perlmutter*, 637 F.Supp. 1134, 1137 (S.D.N.Y.1986). Nonetheless, the ethical guidelines contained in the New York Code of Professional Responsibility, and the cases applying those guidelines, are highly instructive to the Court in arriving at an equitable resolution of the disqualification issue.

*3 The 1990 revisions reflected a growing consensus that vicarious disqualification of a

law firm should occur only rarely, and that the reasons traditionally stated for disqualifying the firm when one of its attorneys will testify were no longer compelling. See, e.g., Paretti, 772 F.Supp. at 988-89. [FN4] Undoubtedly, there is a clear public policy in preventing an individual attorney from being both trial counsel and witness. See, e.g., Paretti, 722 F.Supp. at 988. [FN5] As to the attorney's firm, however, the New York State Bar Association argued, in recommending the revision to the disciplinary rules at issue here, that "[t]he change is consistent with the public policy of avoiding confusion between the lawyer's role as advocate and witness without unduly interfering with the client's ability to be represented by counsel of the client's choice." New York State Bar Ass'n, Report of the Special Committee to Consider Adoption of ABA Model Rules of Professional Conduct, 21 (1984).

Given that those with an expertise in formulating the ethics of the profession feel that public policy is best served by not disqualifying a firm when one of its attorneys must serve as a party witness, it is wise for this Court to adopt that same view in reaching an equitable resolution of the present case. Indeed, as the cases cited earlier show, those federal courts that have considered the revisions have embraced them as well.

Therefore, defendant having offered no reason why the Court's discretion should be exercised in its favor, and the weight of authority being in favor of no vicarious disqualification in the present situation, defendant's motion to disqualify the firm of Berkovich & McMenamain is denied. McMenamain may therefore substitute as counsel for plaintiffs.

McMenamin has also moved to be admitted to practice before this Court pursuant to Local Rule 2(C) of the United States District Courts for the Southern District. He has submitted the required documentation, and his motion is granted.

2. Rule 11 Sanctions

McMenamin, in his letter opposing disqualification, asks the Court to impose Rule 11 sanctions upon defendant for making what he believes is a frivolous disqualification motion. It is this Court's policy to entertain Rule 11 motions only at the conclusion of the case. Therefore, McMenamain's request for Rule 11 sanctions is denied without prejudice and is freely renewable at the conclusion of the case.

3. Discovery

On July 5, 1994, this Court ordered that discovery in this case be stayed. Prior to the issuance of that Order, defendant had argued that a stay was warranted, since defendant had made a motion to dismiss for lack of personal jurisdiction, potentially obviating the need to engage in costly discovery. Plaintiffs opposed this motion, and expressed their belief that discovery should proceed expeditiously, since difficulties were perceived in finding an opportunity to depose defendant once the NHL season had begun. [FN6]

*4 The July 5 Order staying discovery, however, was not a ruling on whether discovery should be stayed pending adjudication of the motion to dismiss. Rather, the Court stayed discovery pending resolution of the motion to disqualify counsel. As this opinion holds, that motion is denied. Plaintiffs have thus moved to lift the stay and begin discovery.

It is well-settled that a district court has discretion to halt discovery pending its decision on a motion to dismiss. *Chrysler Capital Corporation v. Century Power Corp.*, 137 F.R.D. 209, 211 (S.D.N.Y.1991); *Transunion Corp. v. PepsiCo, Inc.*, 811 F.2d 127, 130 (2d Cir.1987). Defendant's motion to dismiss based on lack of personal jurisdiction is potentially dispositive, and appears to be not unfounded in the law. In addition, plaintiffs have not presented any evidence to suggest that they will be unfairly prejudiced by a stay. Therefore, because the adjudication of the pending motion to dismiss might avoid the need for costly and time-consuming discovery, all discovery in this case

is hereby stayed pending resolution of defendant's motion to dismiss.

1994 WL 702004 (S.D.N.Y.)

END OF DOCUMENT

The pending motion to dismiss is sub judice, and will be resolved in due course.

SO ORDERED.

FN1. McMenamain also applied for pro hac vice admission before this Court.

FN2. Prior to the revision, DR 5-102(A) read: "If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR 5-101(B)(1) through (4)." (emphasis added).

FN3. If Berkovich had been disqualified due to a conflict of interest, or if he were going to offer testimony adverse to his client, then disqualification of the firm might be warranted. As this Court's July 27, 1994, opinion made clear, however, Berkovich will be testifying, if at all, only on behalf of his client.

FN4. Indeed, the American Bar Association's Code of Professional Responsibility, as well as the Model Rules of Professional Conduct, both embody the principle that vicarious disqualification is no longer necessary when an individual attorney is disqualified as a necessary witness. Kubin, 801 F.Supp. at 1113-14.

FN5. "[The] cases explain that D.R. 5-102(A) is designed to avoid the public perception that the lawyer as witness is distorting the truth for the sake of a client, or is enhancing his own credibility as an advocate by taking an oath as a witness, and is also designed to deny opposing counsel the unfair and difficult task of cross-examining an adversary and impeaching the adversary's credibility." Paretti, 722 F.Supp. at 988.

FN6. A difficulty that, sadly, no longer seems present.

Supreme Court of Florida.

GLENEAGLE SHIP MANAGEMENT CO.,
etc., et al., Petitioners,
v.
Anthony LEONDAKOS, et ux., Respondents.

No. 78248.

July 16, 1992.

Injured plaintiff moved to compel discovery relating to issue of jurisdiction and motion was served while defendant management company's motion to dismiss, made on grounds of lack of jurisdiction, was pending. The Circuit Court, Pinellas County, Crockett Farnell, J., ordered company to respond to discovery request, and company petitioned for writ of certiorari. The District Court of Appeal, Second District, 581 So.2d 222, denied the petition. On review based on conflict, the Supreme Court, Harding, J., held that limited discovery is allowed on questions of jurisdiction to provide trial court with additional information on which to base its decision regarding jurisdiction.

Remanded.

West Headnotes

[1] Courts ⇌ 97(1)
106k97(1)

Supreme Court will look to federal rules and decisions for guidance in interpreting Florida's civil procedure rules.

[2] Pretrial Procedure ⇌ 36.1
307Ak36.1

(Formerly 307Ak36)
Discovery is permitted for purpose of determining issues such as whether jurisdiction exists.

[3] Pretrial Procedure ⇌ 36.1
307Ak36.1

(Formerly 307Ak36)
Limited discovery is allowed on questions of jurisdiction to provide trial court with additional information on which to base its

decision regarding jurisdiction.

*1282 Nathaniel G.W. Pieper and David W. McCreadie of Lau, Lane, Pieper & Asti, P.A., Tampa, for petitioners.

Corey R. Stutin, Hendrik Uiterwyk and John Golding of Trapp, Chastain & Uiterwyk, P.A., Tampa, for respondents.

HARDING, Justice.

We have for review Gleneagle Ship Management Co. v. Leondakos, 581 So.2d 222 (Fla. 2d DCA 1991), based on express and direct conflict with F. Hoffmann LaRoche & Co. v. Felix, 512 So.2d 997 (Fla. 3d DCA 1987). We have jurisdiction based on article V, section 3(b)(3) of the Florida Constitution.

The issue here is whether discovery is appropriate on jurisdictional issues while the jurisdictional question is still pending before the trial court. Although this issue is one of first impression in this Court, we note that the federal courts allow discovery to answer jurisdictional questions and find that this policy expresses the better view.

Anthony Leondakos (Leondakos), a Florida resident, brought an action alleging that he was injured in the Persian Gulf while on board the Bridgeton, a ship owned and operated by the petitioners, Gleneagle Ship Management Company and Chesapeake Shipping. Leondakos contends *1283 his injury occurred because the petitioners negligently maintained a stairwell on the ship. He filed an action in the circuit court based on general maritime law and the Jones Act, 46 U.S.C.App. § 688 (1988). Because the petitioners are foreign corporations, the Florida Secretary of State accepted the summons and complaint pursuant to chapter 48 of the Florida Statutes. The petitioners filed an answer and affirmative defenses to the complaint alleging the following grounds: 1) failure to state a cause of action; 2) lack of personal jurisdiction; 3) improper venue; 4) negligence on Leondakos' part; 5) lack of subject matter jurisdiction; 6) forum non

conveniens; and 7) failure to comply with section 768.72, Florida Statutes (1989) (no claim for punitive damages can be brought in a civil action without a reasonable showing by the evidence of a basis for recovery of such damages). One month later, the petitioners filed a motion to dismiss based on a lack of personal jurisdiction, *forum non conveniens*, and improper venue. The petitioners filed sworn affidavits from two of their corporate officers alleging a lack of contacts with the State of Florida.

In response to the motion to dismiss, Leondakos moved for a continuance asserting that he needed more time to complete discovery in order to support his contention that the trial court had proper jurisdiction. After the trial court granted the continuance, Leondakos filed a request for production and interrogatories. Leondakos' discovery requests focused on any business contacts that the petitioners might have with the State of Florida or its citizens. The petitioners filed a motion for a protective order on the grounds that until the trial court determined whether it had jurisdiction, Leondakos' discovery request was premature. When the trial court denied the motion for a protective order, the petitioners filed a writ of certiorari with the Second District Court of Appeal seeking the protective order, which the district court denied. The district court upheld the trial court and adopted the federal judiciary's policy of permitting discovery. [FN1] The district court held that " 'jurisdictional discovery' is available during the pendency of jurisdictional issues, subject of course to the supervision of the trial court." *Gleneagle*, 581 So.2d at 223. Further, the district court expressly rejected the reasoning of the Third District Court of Appeal in *F. Hoffmann LaRoche*.

FN1. *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 n. 13, 98 S.Ct. 2380, 2389 n. 13, 57 L.Ed.2d 253 (1978) (allowing discovery for limited jurisdictional questions).

In *F. Hoffmann LaRoche*, the Third District Court of Appeal held that a plaintiff could not seek discovery as to jurisdictional issues while the question of jurisdiction was still before the

trial court. In *F. Hoffmann LaRoche*, the court followed the reasoning of *Far Out Music, Inc. v. Jordan*, 438 So.2d 912 (Fla. 3d DCA 1983), which "held that a plaintiff could not seek party discovery, including the use of interrogatories, as to jurisdictional issues while that question is being contested by the defendant on appeal from an order sustaining jurisdiction." *F. Hoffmann LaRoche*, 512 So.2d at 998 (explaining *Far Out Music*). The district court in *F. Hoffmann LaRoche* reasoned that if discovery as to jurisdictional issues was not allowed until the question was finally determined on review, then discovery would not be allowed where the trial court has not decided the issue of jurisdiction. However, the court also stated that had the question been an open one, it would have favored applying the federal rule which permits jurisdictional discovery, including interrogatories, production, and depositions directed to "parties," while the jurisdictional issue was still pending before the trial court. *F. Hoffmann LaRoche*, 512 So.2d at 998 n. 3.

[1] Although the Federal Rules of Civil Procedure and the Florida Rules of Civil Procedure differ in some respects, "the objective in promulgating the Florida rules has been to harmonize our rules with the federal rules." *Miami Transit Co. v. Ford*, 155 So.2d 360, 362 (Fla.1963); see also *Fontainebleau Hotel Corp. v. Walters*, 246 So.2d 563, 565 (Fla.1971) (Florida's rules modeled after federal rules of civil procedure). Thus, we look to the federal *1284 rules and decisions for guidance in interpreting Florida's civil procedure rules. See *Zuberbuhler v. Division of Admin.*, 344 So.2d 1304, 1306 (Fla. 2d DCA 1977).

[2] Federal courts permit discovery for the purpose of determining issues such as whether jurisdiction exists. See *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 n. 13, 98 S.Ct. 2380, 2389 n. 13, 57 L.Ed.2d 253 (1978). In *Silk v. Sieling*, 7 F.R.D. 576, 577 (E.D.Pa.1947), the federal district court stated: There can be no doubt that this Court has the judicial power to hear and determine questions involving its jurisdiction either of the person or of the subject matter nor that,

in order to resolve fact issues on which jurisdiction depends, the ordinary process of the court is available to cause evidence bearing on the fact in issue to be produced.

The Silk court reasoned that if it refused to allow discovery, defendants would be able to withhold facts concerning the issue which the defendants had raised to the court. In another case which is factually similar to the instant case, the Fifth Circuit Court of Appeals held that a sailor injured on a foreign ship was "not required to rely exclusively upon a defendant's affidavit for resolution of the jurisdictional issue where that defendant ha[d] failed to answer plaintiff's interrogatories specifically directed to that issue." *Blanco v. Carigulf Lines*, 632 F.2d 656, 658 (5th Cir.1980). The Fifth Circuit reasoned that to require a plaintiff to rely solely on a defendant's affidavits regarding jurisdiction would give the defendant, who fails to comply with discovery, an unfair advantage in the proceedings.

[3] We adopt the federal courts' policy allowing discovery on questions of jurisdiction because limited discovery in such instances will provide the trial court with additional information on which to base its decision regarding jurisdiction. This policy is in harmony with our decision in *Venetian Salami Co. v. Parthenais*, 554 So.2d 499 (Fla.1989), where this Court set out the procedure to be followed when a nonresident defendant contests the complaint regarding jurisdiction or lack of minimum contacts. As we stated in *Venetian Salami*:

A defendant wishing to contest the allegations of the complaint concerning jurisdiction or to raise a contention of minimum contacts must file affidavits in support of his position. The burden is then placed upon the plaintiff to prove by affidavit the basis upon which jurisdiction may be obtained. In most cases, the affidavits can be harmonized, and the court will be in a position to make a decision based upon facts which are essentially undisputed.

Id. at 502-03 (citation omitted). *Venetian*

Salami presented a problem of opposing and irreconcilable affidavits. Under those facts, we held that the trial court should conduct a limited evidentiary hearing in order to determine the jurisdictional issue. Limited discovery on jurisdictional issues will assist the trial court in answering the question of whether to grant or deny jurisdiction. While a plaintiff should not file a frivolous complaint alleging personal jurisdiction, we recognize that averments made in good faith may not always rise to assertions which could be made under oath. Thus, a plaintiff should be able to conduct limited discovery on the jurisdictional question in order to gather facts and file an opposing affidavit. Once discovery on the jurisdictional issue is concluded, the procedure outlined in *Venetian Salami* should be followed by the trial court.

We emphasize that the discovery which is envisioned by our holding here should not be broad, onerous or expansive, nor should it address the merits of the case. Also, where possible, the discovery should be carried out so as to minimize expense to the defendant.

Accordingly, we approve the Second District Court of Appeal's decision in *Gleneagle* and disapprove the Third District Court of Appeal's decision in *F. Hoffmann LaRoche* to the extent it is inconsistent with this opinion. We remand to the trial court for proceedings consistent with this opinion.

It is so ordered.

*1285 BARKETT, C.J., and OVERTON,
McDONALD, SHAW, GRIMES and KOGAN,
JJ., concur.

602 So.2d 1282, 17 Fla. L. Weekly S452

END OF DOCUMENT

United States District Court,
S.D. New York.

Johnny JOHNSON, Plaintiff,
v.
NEW YORK UNIV. SCHOOL OF EDUC.,
Defendant.

No. 00 Civ. 8117(WK)(RLE).

Jan. 30, 2002.

On defendant's request for stay of discovery pending resolution of its motion to dismiss, the District Court, Ellis, United States Magistrate Judge, held that defendant's request would be granted, where motion to dismiss did not appear to unfounded in the law, plaintiff did not demonstrate the he would be prejudiced by a stay, and adjudication of pending motion might obviate the need for burdensome discovery.

Request granted.

West Headnotes

[1] Federal Civil Procedure ⇨ 1271
170Ak1271

Pursuant to discovery rule, a district court may stay discovery upon a showing of "good cause." Fed.Rules Civ.Proc.Rule 26(c), 28 U.S.C.A.

[2] Federal Civil Procedure ⇨ 1271
170Ak1271

A stay of discovery is appropriate pending resolution of a potentially dispositive motion where the motion appears to have substantial grounds or, stated another way, does not appear to be without foundation in law. Fed.Rules Civ.Proc.Rule 26(c), 28 U.S.C.A.

[3] Federal Civil Procedure ⇨ 1271
170Ak1271

Defendant's request for stay of discovery pending determination of its motion to dismiss would be granted, where motion did not appear to be unfounded in the law, plaintiff did not demonstrate that he would be prejudiced by a stay, and adjudication of pending motion might obviate the need for

burdensome discovery. Fed.Rules
Civ.Proc.Rule 26(c), 28 U.S.C.A.

*434 Johnny Johnson, Memphis, TN, pro se.

S. Andrew Schaffer, Stephanie Vullo, New
York City, for defendant.

MEMORANDUM AND ORDER

ELLIS, United States Magistrate Judge.

Defendant has requested a stay of discovery pending this Court's determination of its motion to dismiss filed on December 14, 2001. Based on the following, defendant's request is GRANTED.

[1][2] Pursuant to Rule 26(c) of the Federal Rules of Civil Procedure, a district court may stay discovery upon a showing of "good cause." *Thrower v. Pozzi*, 2002 WL 91612 at *7 (S.D.N.Y. Jan. 24, 2002) (quoting *Siemens Credit Corp. v. American Transit Ins. Co.*, 2000 WL 534497, at *1 (S.D.N.Y. May 3, 2000)). This Court may also control the timing and sequence of discovery pursuant to Federal Rule of Civil Procedure Rule 26(d). Based on these provisions, courts in this district have held "that a stay of discovery is appropriate pending resolution of a potentially dispositive motion where the motion 'appear[s] to have substantial grounds' or, stated another way, 'do[es] not appear to be without foundation in law.'" In re Currency Conversion Fee Antitrust Litigation, 2002 WL 88278, at *1 (S.D.N.Y. Jan. 22, 2002) (quoting *Chrysler Capital Corp. v. Century Power Corp.*, 137 F.R.D. 209, 209-10 (S.D.N.Y.1991)) (citing *Flores v. Southern Peru Copper Corp.*, 203 F.R.D. 92, 2001 WL 396422, at *2 (S.D.N.Y. Apr. 19, 2001); *Anti-Monopoly, Inc. v. Hasbro, Inc.*, 1996 WL 101277, at *2 (S.D.N.Y. March 7, 1996)). In granting a stay, courts generally consider "the breadth of discovery sought and the burden of responding to it." *Anti-Monopoly, Inc.*, 1996 WL 101277, at *3.

[3] In this case, defendant's motion to dismiss is potentially dispositive and does not appear to be unfounded in the law.

Additionally, plaintiff has not demonstrated that he would be prejudiced by a stay. The discovery being sought by plaintiff consists of an extensive set of interrogatories directed at New York University's Director of Personnel that asks for information covering a span of more than five years. Therefore, because the adjudication of the pending motion to dismiss may obviate the need for burdensome discovery, defendant's request for a stay of discovery is GRANTED, until resolution of the motion to dismiss.

205 F.R.D. 433

END OF DOCUMENT

United States Court of Appeals,
Fifth Circuit.

Frank LANDRY, et al., Plaintiffs-Appellants,
v.
AIR LINE PILOTS ASSOCIATION
INTERNATIONAL AFL-CIO, Taca Airlines,
S.A. and
Charles J. Huttinger, Defendants-Appellees.

No. 88-3363.

Jan. 31, 1990.

Opinion Modified, Rehearing Denied April 27,
1990.

Airline pilots brought suit against airline, pilots' union, pilot who represented union in negotiations with airline, and administrator of their pension plan, alleging violations of labor law, ERISA and RICO. The United States District Court for the Eastern District of Louisiana, George Arceneaux, Jr., J., granted defendants' motions for summary judgment and granted protective order preventing further discovery of defendants, and pilots appealed. The Court of Appeals, Brown, Circuit Judge, held that: (1) statute of limitations barred labor law claims; (2) fact questions as to fiduciary status of defendants precluded summary judgment on ERISA claims; (3) fact questions precluded summary judgment on some RICO claims; and (4) trial court did not abuse its discretion in staying discovery until summary judgment motions were resolved.

Affirmed in part, reversed in part and remanded.

West Headnotes

[1] Labor Relations ⇨ 759
232Ak759

Airline pilots' claim that their union breached its fair duty of representation in negotiating a new collective bargaining agreement was subject to National Labor Relations Act's six-month statute of limitations, even though claim arose under Railway Labor Act, which had its own two-year limitations provision.

Railway Labor Act, §§ 1-208, as amended, 45 U.S.C.A. §§ 151-188; Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185; National Labor Relations Act, § 10(b), as amended, 29 U.S.C.A. § 160(b).

[2] Limitation of Actions ⇨ 95(14)
241k95(14)

Six-month statute of limitations on airline pilots' claim against their union for breach of duty of fair representation was not tolled by alleged fraudulent concealment of facts that gave rise to cause of action; pilots were on "inquiry notice" if not actual notice of acts that formed basis of their claim for much longer than six months before they filed suit. National Labor Relations Act, § 10(b), as amended, 29 U.S.C.A. § 160(b).

[3] Federal Civil Procedure ⇨ 2016
170Ak2016

District court properly refused to reopen case imposing injunction allegedly violated by pilots' union; issues involved in old case and new one were not substantially similar, parties were different and transfer or consolidation would have complicated the case.

[4] Labor Relations ⇨ 416.4
232Ak416.4

Any dispute over whether defendants' action was an improper attempt to decertify pilots' union as bargaining agent for pilots was within exclusive jurisdiction of National Mediation Board. Railway Labor Act, § 2, subd. 9, as amended, 45 U.S.C.A. § 152, subd. 9.

[5] Pensions ⇨ 43.1
296k43.1
(Formerly 296k43)

Decisions as to whether or when to establish employee benefit plan, or how to design a plan, are not subject to any ERISA fiduciary obligation; nor does any fiduciary obligation arise during negotiation or execution of agreement regarding future benefits. Employee Retirement Income Security Act of 1974, §§ 4(a), 401(a), as amended, 29 U.S.C.A. §§ 1003(a), 1101(a).

[6] Federal Civil Procedure ⇨ 2497.1
170Ak2497.1
(Formerly 170Ak2481)

In airline pilots' action alleging ERISA violations, there was fact question as to whether airline, pilots' union and pilot who represented union in negotiations with airline had any fiduciary duties under ERISA that would make them liable for wrongs alleged, precluding summary judgment. Employee Retirement Income Security Act of 1974, § 3(21)(A), as amended, 29 U.S.C.A. § 1002(21)(A).

[7] Pensions ⇨ 43.1
296k43.1
(Formerly 296k43)

Airline, pilots' union and pilot representing union in negotiations with airline were impressed with fiduciary duties under ERISA by virtue of control exercised over disposition of plan assets, even if they were not listed as fiduciaries with respect to that function, and if they colluded in order to provide pilot with retirement benefits, these duties were breached. Employee Retirement Income Security Act of 1974, §§ 3(21)(A), 406(b), as amended, 29 U.S.C.A. §§ 1002(21)(A), 1106(b).

[8] Racketeer Influenced and Corrupt Organizations ⇨ 45
319Hk45
(Formerly 83k82.71)

Pilots' "union", as a RICO enterprise, could not also be a RICO "person" under theory regarding union as vehicle for racketeering activities perpetrated by airline and pilot representing union in negotiations with airline; language of governing RICO section dealt with a "person employed by or associated with any enterprise," indicating Congress' intention that RICO person and enterprise be separate entities. 18 U.S.C.A. § 1962(c).

[9] Racketeer Influenced and Corrupt Organizations ⇨ 64
319Hk64
(Formerly 83k82.71)

Since pilots' union could not be a RICO person under theory regarding union as lawful enterprise which was vehicle for racketeering activities perpetrated by airline and pilot who

represented union in negotiations with airline, union could not be held vicariously liable for acts of pilot. 18 U.S.C.A. § 1962(c).

[10] Racketeer Influenced and Corrupt Organizations ⇨ 64
319Hk64
(Formerly 83k82.71)

Pilots' union could be both RICO enterprise and RICO defendant for purposes of alleged violation of RICO section requiring only use of enterprise by a person. 18 U.S.C.A. § 1962(b).

[11] Racketeer Influenced and Corrupt Organizations ⇨ 64
319Hk64
(Formerly 83k82.71)

Enterprise which derived benefit from its representative's wrongful acts may be found vicariously liable under RICO section prescribing use of an enterprise by a person. 18 U.S.C.A. § 1962(b).

[12] Racketeer Influenced and Corrupt Organizations ⇨ 28
319Hk28
(Formerly 83k82.71)

Absent allegation that airline constituted a continuing threat, airline was not a RICO "person." 18 U.S.C.A. § 1962(c).

[13] Federal Civil Procedure ⇨ 2497.1
170Ak2497.1
(Formerly 170Ak2497)

Summary judgment on pilots' RICO theory regarding pilots' union as vehicle for racketeering activities perpetrated by airline and pilot representing union in negotiations with airline was precluded by fact questions as to whether union posed continuing threat of engaging in racketeering activities, and as to whether defendant pilot's receipt of retirement benefits would constitute mail fraud or embezzlement or conversion, and thus as to whether he posed a continuing threat. 18 U.S.C.A. §§ 664, 1341, 1962(b, c).

[14] Racketeer Influenced and Corrupt Organizations ⇨ 7
319Hk7
(Formerly 83k82.71)

Alleged acts of sabotage committed at

direction of RICO defendants could not be considered predicate acts, absent allegation that acts were committed in establishment or conduct of affairs of an enterprise, or allegation of resulting injury. 18 U.S.C.A. §§ 1951, 1961(1).

[15] Labor Relations ⇌ 1052.2
232Ak1052.2

Under pilots' union's constitution and bylaws, disabled pilot was properly on "active" status and entitled to all privileges of union membership including right to vote and hold office, and therefore, severance payment received by pilot did not violate section of Labor Management Relations Act making it illegal for an employer to pay or lend money to union that represents its employees and for union to receive or demand such payments. Labor Management Relations Act, 1947, § 302, 29 U.S.C.A. § 186.

[16] Labor Relations ⇌ 414
232Ak414

Airline came under coverage of Railway Labor Act, and was not subject to Labor Management Relations Act section making it illegal for an employer to pay or lend money to union that represents its employees and for union to receive or demand such payments. Labor Management Relations Act, 1947, § 501(3), 29 U.S.C.A. § 142(3); National Labor Relations Act, § 2(2, 3), as amended, 29 U.S.C.A. § 152(2, 3); Railway Labor Act, § 202, as amended, 45 U.S.C.A. § 182.

[17] Racketeer Influenced and Corrupt Organizations ⇌ 31
319Hk31

(Formerly 83k82.71)
Alleged acts of mail and wire fraud were sufficient to support RICO violation, where alleged enterprise was continuously in existence throughout negotiation process during which alleged acts occurred. 18 U.S.C.A. §§ 1341, 1962.

[18] Postal Service ⇌ 35(2)
306k35(2)

(Formerly 83k82.70)
Elements of mail fraud as predicate offense for RICO purposes are: scheme or artifice to

defraud or to obtain money or property by means of false or fraudulent pretenses, representation or promises; interstate or intrastate use of mails for purpose of furthering or executing scheme or artifice to defraud; use of mails by defendant connected with scheme or artifice to defraud; and actual injury to business or property of plaintiff. 18 U.S.C.A. §§ 1341, 1962.

[19] Racketeer Influenced and Corrupt Organizations ⇌ 70
319Hk70

(Formerly 83k82.71)

Claim of mail fraud, as predicate offense for RICO, was stated by allegations that false misrepresentations, omissions and false promises of airline, pilots' union and pilot representing union in negotiations with airline lulled pilots into inaction, with ultimate effect of defrauding pilots of their jobs and pension benefits, while airline was able to relocate, union was not prosecuted and was able to drop its representation of pilots, and defendant pilot received severance and retirement benefits. 18 U.S.C.A. §§ 1341, 1962.

[20] Racketeer Influenced and Corrupt Organizations ⇌ 7
319Hk7

(Formerly 83k82.72)

RICO predicate act was stated by allegations that receipt of retirement benefits by pilot representing pilots' union in negotiations with airline violated statute proscribing theft or embezzlement from employee benefit plan. 18 U.S.C.A. § 664.

[21] Racketeer Influenced and Corrupt Organizations ⇌ 28
319Hk28

(Formerly 83k82.72)

Relationship between predicate acts, required to allege pattern of racketeering activity under RICO was satisfied by pilots' allegations arising out of alleged scheme to relocate pilots' base to El Salvador; all predicate acts were aimed at achieving single goal of relocation of pilots' base, participants and victims were the same, and events were related in sense that they all occurred or

commenced during or grew out of process of negotiating relocation of airline. 18 U.S.C.A. § 1962.

[22] Racketeer Influenced and Corrupt Organizations ⇌ 38
319Hk38
(Formerly 83k82.70)

"Association-in-fact" enterprise under RICO must have existence separate and apart from pattern of racketeering, it must be ongoing organization and its members must function as continuing unit shown by hierarchical or consensual decision-making structure. 18 U.S.C.A. § 1962.

[23] Racketeer Influenced and Corrupt Organizations ⇌ 50
319Hk50
or Intent.
(Formerly 83k82.71)

Requirement of RICO association-in-fact enterprise that enterprise function as a continuing unit was not met where alleged enterprise, if it ever existed, briefly flourished and faded. 18 U.S.C.A. § 1962.

[24] Racketeer Influenced and Corrupt Organizations ⇌ 45
319Hk45
(Formerly 83k82.71)

Pilots' union, which was continuously in existence throughout period when alleged predicate acts occurred, could be found to be the enterprise which was a vehicle for racketeering activities. 18 U.S.C.A. § 1961(4).

[25] Federal Civil Procedure ⇌ 1366
170Ak1366

Summary judgment movants seeking protective order to prevent taking of depositions had burden to show why protective order was warranted; burden was not on nonmovants, other than in rebuttal, to show why discovery was needed. Fed.Rules Civ.Proc.Rule 26(c), 28 U.S.C.A.

[26] Federal Civil Procedure ⇌ 1359
170Ak1359

Trial court did not abuse its discretion in staying discovery until summary judgment motions were resolved; summary judgment

movants showed that discovery sought would be unduly burdensome and expensive, and nonmovants failed to show need for the depositions. Fed.Rules Civ.Proc.Rule 56(e), 28 U.S.C.A.

[27] Federal Civil Procedure ⇌ 2497.1
170Ak2497.1
(Formerly 170Ak2497)

Whether retirement plan was in effect, giving rise to fiduciary duties, and whether union representative had fiduciary duty to disclose information about plan when asked were questions of fact precluding summary judgment in pilots' action against union and representative. Labor-Management Reporting and Disclosure Act of 1959, § 501(a), 29 U.S.C.A. § 501(a).

*407 Tom W. Thornhill, Slidell, La., R. Neal Wilkinson, Baton Rouge, La., Richard A. Machen, Slidell, La., for plaintiffs-appellants.

Stephen B. Moldof, Cohen, Weiss & Simon, Michael L. Winston, New York City, Robert H. Urann, Metairie, La., for Airline & Hutt.

Jerry J. Blouin, New Orleans, La., for Fringe.

Joseph Z. Fleming, John B. Waldrip, New Orleans, La., for TACA.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before BROWN, JOHNSON and DAVIS,
Circuit Judges.

JOHN R. BROWN, Circuit Judge:

Several airline pilots brought this action against their former employer, union, union representative, and the administrator of their pension plan. The pilots alleged violations of labor law, ERISA, and RICO. Granting motions for summary judgment, the Court held: (i) the statute of limitations barred the labor law claims; (ii) ERISA imposed no fiduciary duties on the defendants; and (iii) the pilots failed to meet the necessary elements of a RICO claim. The Court also

granted a protective order preventing further discovery of the defendants. On appeal, we affirm the lower court's holding with respect to the statute of limitations and the protective order. However, we find that summary judgment was improper on the ERISA and RICO claims. Accordingly, we reverse and remand to the trial court the ERISA and RICO claims.

I. The Facts

A. History of Relations between TACA and ALPA

1. If at first you don't succeed ...

TACA International Airlines, S.A. (TACA), incorporated under the laws of El Salvador, operates in Central America and the United States. From 1949 until 1985, all TACA pilots were based in New Orleans, Louisiana. In 1968, the Airline Pilots Association, International, AFL-CIO (ALPA), was certified as the collective bargaining representative for all pilots employed by TACA, and thereafter negotiated numerous collective bargaining agreements with TACA.

The relevant history of this case begins over two decades ago. In 1969, shortly after TACA entered into its first agreement with ALPA, the Republic of El Salvador requested that TACA relocate its pilot base from New Orleans to El Salvador. When TACA attempted to comply with the request of the Salvadoran government, ALPA sought and obtained an injunction, maintaining that if the relocation occurred, ALPA could no longer, under Salvadoran law, represent the pilots. A bar of representation would have abrogated the recently-entered collective bargaining agreement between ALPA and TACA. This Court affirmed the district court injunction. *Ruby v. TACA International Airlines, S.A.*, 439 F.2d 1359 (5th Cir.1971).

2. ... try, try, again ...

In October of 1979, TACA and ALPA entered into a collective bargaining agreement, effective January 1, 1980 and amendable on December 31, 1983 (the 1980 collective bargaining agreement). In October,

1983, ALPA and TACA commenced negotiations to amend and continue the 1980 collective bargaining agreement.

However, on December 20, 1983, the Republic of El Salvador adopted a new Constitution; Article 110, § 4 of that constitution provided that Salvadoran public service *408 companies must have their work center and base of operations in El Salvador. *Airline Pilots Ass'n, Int'l v. TACA, Int'l Airlines, S.A.*, 748 F.2d 965, 968 (5th Cir.1984), cert. denied, 471 U.S. 1100, 105 S.Ct. 2324, 85 L.Ed.2d 842 (1985). As a result, while in the midst of negotiations, TACA announced its intention to immediately relocate its pilot base from New Orleans to El Salvador, to unilaterally terminate the existing agreement and impose new terms and conditions of employment on its pilot employees, and to withdraw its recognition of ALPA. R. 503. Pilots were given until December 31, 1983 to accept the new terms or lose their employment with TACA. Meanwhile, because of the potential that the pilots would not move, TACA began advertising for new pilots.

ALPA filed a lawsuit in the United States District Court for the Eastern District of Louisiana, seeking injunctive relief against TACA. Judge Feldman issued a permanent injunction prohibiting TACA from relocating the pilot base, unilaterally changing the terms of employment, recruiting replacement pilots, and interfering with the pilots' choice of ALPA as their bargaining agent.

This court affirmed the injunction, but stated

we neither hold nor suggest that TACA may not relocate its pilot base. We hold only that TACA must relocate its pilot base and effect the other intended steps in accordance with the substantive laws and procedures set forth in the Railway Labor Act and other relevant domestic laws.

Id., at 972.

3. ... until you do

Between 1984 and 1985, TACA and ALPA

continued negotiations under the auspices of the National Mediation Board (NMB). On July 24, 1985, TACA and ALPA reached an agreement entitled "Pilots' Agreement," which superseded the 1980 collective bargaining agreement under which the parties had been operating. The "Pilots' Agreement" provided that ALPA would not oppose TACA's relocation of its pilot base to El Salvador after August 31, 1985. All pilots on the seniority list as of June 30, 1985 could elect either: (i) to receive severance pay (\$1,200.00 to each pilot for each full year of service and pro rata amounts for partial years, with length of service calculated through August 31, 1985), and other benefits (passes and insurance), or (ii) to continue their employment as TACA pilots, based in El Salvador. R. 504.

On July 24, 1985, Mr. Charles J. Huttinger, a TACA pilot who represented ALPA in the negotiations with TACA, sent a letter to all TACA pilots stating that "The Association has reached a tentative agreement (subject to ratification) with TACA.... The Company has agreed to a total package which we believe justifies your support."

Some of the pilots allegedly understood the July 24, 1985 letter to mean that the agreement would not be final until it was ratified by the individual pilots. However, on August 3, 1985, a representative of TACA sent a memorandum to all TACA pilots, informing them that "an agreement [has been] reached by which TACA will move its pilots base to El Salvador effective September 1, 1985." The memorandum further stated that "the decision to continue working for the company or retire must be made by August 15, 1985, at the latest." Each of the named plaintiffs, except Gary Zyriek, elected to take severance pay. Mr. Zyriek had changed jobs and was flying for United Airlines by June 30, 1985, the date of eligibility for severance payments.

The July 24, 1985 "Pilots' Agreement" further provided that TACA's obligation to contribute to the pilots' retirement fund would cease as of August 31, 1985. Although the parties dispute the effective date of the retirement plan (see *infra*), it was formally

implemented on April 18, 1985. Fringe Benefit Administrators (FBA) was named as the plan administrator and the First National Bank of Covington was the plan trustee.

On December 17, 1985, TACA and ALPA entered into a final "settlement agreement" *409 which resolved all claims arising out of the July 24, 1985, "Pilots' Agreement." Among other things, the agreement provided that "ALPA agrees and acknowledges that TACA has no further obligations to the individuals who selected the severance option under the 'Pilots' Agreement'.... concerning insurance coverage or benefits of any kind, or premium payments of any kind."

B. Procedural History

In the original Complaint, the pilots [FN1] asserted that the July 24, 1985 "Pilots' Agreement" was negotiated and executed in breach of ALPA's duty of fair representation (DFR) to the TACA pilots and TACA's prior collective bargaining agreement with ALPA, in violation of the Railway Labor Act (RLA), 45 U.S.C. §§ 151-88, and the National Labor Relations Act (NRLA), 29 U.S.C. §§ 141-87. Pilots sought approximately \$30 million in damages. R. 1-18. Pilots did not file their Complaint until July 23, 1986. R. 1.

FN1. There were fifteen plaintiff pilots at the trial court: Frank Landry, Jules Corona, Charles South, Robert A. Massa, Don Johnson, Thomas Brignac, T.Q. Howard, Robert Lukenbill, Bert Haffner, Walter Keller, Joe Haas, Gary Zyriek, Don Jenkins, Emile Cerisier, and M. Letona. The same pilots are appellants on appeal, except for Thomas Brignac, Robert Lukenbill, Bert Haffner, and Gary Zyriek, who have dropped out of the case.

Pilots alleged that ALPA agreed to enter into the July 24, 1985 agreement as a result of TACA's threat to sue ALPA because some of the pilots purportedly sabotaged TACA property at ALPA's direction. The pilots characterized this conduct as a breach of the duty of fair representation by ALPA. In addition, the pilots have asserted that Mr. Huttinger was unqualified to represent ALPA in the negotiation of the "Pilots' Agreement."

Huttinger had been placed on "sick" status by TACA, and according to the pilots, under the Constitution and By-Laws of ALPA, a pilot classified as "sick" was not permitted to hold an office within the union.

Moreover, the pilots have filed the affidavit of Emile Cerisier, one of the plaintiffs. Mr. Cerisier states that Mr. G.M. Padgett was a TACA pilot who was a member of the ALPA negotiation team that arranged the relocation of the pilot base to El Salvador. The pilots claim that Mr. Padgett should not have been allowed on the team because he had been suspended by TACA for sabotaging TACA equipment.

The Original Complaint also alleged that ALPA, TACA, and FBA violated the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001-1461. The pilots claim that ALPA, TACA, and FBA breached fiduciary duties imposed by ERISA in the administration and implementation of the Plan. More specifically, the pilots allege that the defendants: (i) delayed Plan implementation for three years; (ii) refused to disclose Plan details despite repeated requests; (iii) failed to disclose various information about the fund's location, amount, etc.; and (iv) colluded among each other to allow Huttinger to illegitimately receive retirement benefits.

FBA filed an answer on October 22, 1986. R. 261. ALPA and TACA filed motions to dismiss or, alternatively, for summary judgment, contending that the DFR/breach of contract claim was barred by the applicable six-month statute of limitations and that the pilots had failed to state a claim for relief under ERISA. R. 33-51, 240-60. On January 13, 1987, the pilots noticed the depositions of Charles Huttinger and First National Bank, eventually postponed at the request of the defendants. R. 383-86.

On February 10, 1987, while those motions were pending, the pilots asked the District Court to stay all proceedings and to transfer the case for consolidation with an action filed by ALPA in 1983, Air Line Pilots Ass'n, Int'l

v. TACA Int'l Airlines, S.A., Civ. No. 83-6238 (E.D.La.), aff'd, 748 F.2d 965 (5th Cir.1984), cert. denied, 471 U.S. 1100, 105 S.Ct. 2324, 85 L.Ed.2d 842 (1985), for the expressed purpose of seeking an adjudication that TACA was in contempt of an injunction issued to ALPA in the 1983 case. R. 408-13. Judge Feldman, who had presided over the earlier action, denied pilots' motion, explaining that *410 "[t]his case had been closed for several years, and this Court no longer has any jurisdiction in this matter." Supplemental Record on Appeal, Minute Entry, (Feldman, J.), March 13, 1987. By subsequent Order, the Court below denied pilots' motion to transfer, determining, in consultation with Judge Feldman, "that the issues presented in this matter [the case sub judice] are not sufficiently similar to warrant transfer." R. 427.

On March 11, 1987, the pilots filed an amended and supplemental Complaint, alleging violations of the Racketeer Influenced and Corrupt Organizations Act (RICO) 18 U.S.C. §§ 1961-68, and requesting nearly \$100 million in damages. R. 493-99. Huttinger was added as a defendant in the Amended Complaint, which incorporated all of the allegations in the original Complaint.

By Opinion and Order dated April 24, 1987, the District Court granted the ALPA and TACA motions directed at the Original Complaint, holding, inter alia, that the pilots had failed to demonstrate that "TACA or ALPA should be held liable as a 'fiduciary' within the meaning of ERISA and, to the extent that the pilots intend to assert a 'hybrid' claim under the RLA, [FN2] it is clearly barred by the six-month [statute] of limitations." R. 511.

FN2. See infra.

In May, 1987, TACA, ALPA, and Huttinger responded to the RICO claim in the Amended Complaint by filing motions to dismiss or alternatively, for summary judgment. R. 516-83; 584-608. The Court denied the motions without prejudice and ordered the pilots, in accordance with a newly adopted Standing

Order, to file a RICO Case Statement (RICO St.) [FN3] R. 759-62. Pursuant to express leave of the Court, R. 758, ALPA, Huttinger, and TACA renewed their dispositive motions, R. 855-974, 798-854, following the filing of pilots' RICO St. R. 764-90.

FN3. See Appendix A: see also *Elliott v. Foufas*, 867 F.2d 877, 880 (5th Cir.1989).

On November 18, 1987, the defendants moved for protective orders to quash depositions of TACA, Huttinger, and FBA that the pilots had noticed for October. R. 1007. The protective order was granted on December 11, 1987. R. 1104.

On December 14, 1987, the pilots filed a motion for the Court to reconsider the application of tolling principles to the dismissal of their DFR claims, contending that the Court had "overlooked the doctrine of equitable tolling." R. 1109. A request by the pilots to file a supplemental brief in support of their motion to reconsider was disallowed. On February 29, 1988, the Court denied the pilots' motion for reconsideration and ordered the pilots to respond to the defendants' request for sanctions.

By Opinion and Order dated March 17, 1988, the District Court granted summary judgment on the RICO claim. R. 1295-1311. Judgments pursuant to F.R.Civ.P. 54(b) in favor of ALPA and TACA were entered on April 28, 1988, R. 1315, and, as to Huttinger, on May 4, 1988. R. 1316. Eleven of the fifteen plaintiffs filed a notice of appeal on May 27, 1988.

The following issues are presented on appeal: (i) Did the District Court apply the appropriate statute of limitations to the pilots' labor law claims, and did it give adequate consideration to when the limitations period began to run? (ii) Did the lower court properly find no ERISA plan was established until the spring of 1985, and that neither ALPA, Huttinger, nor TACA were fiduciaries under ERISA? (iii) Did the court below err in ruling against the pilots' RICO claims? (iv) Did the trial judge abuse his discretion in quashing

discovery depositions the pilots had noticed for hearing?

II. Statute of Limitations

In their Original Complaint, pilots alleged that ALPA breached its duty of fair representation (DFR), implied under the RLA. They also alleged that TACA was a party to the DFR breach. The breach arose during the process of negotiating a new collective bargaining agreement--which ultimately resulted in the removal of *411 the TACA pilot base to El Salvador and the severance of all of the plaintiffs to this action. The trial court found that by its allegations, pilots brought a "hybrid" claim. [FN4] Such claims are subject to a six month statute of limitations. [FN5] The complaint was filed August 25, 1986, but the cause of action accrued, at the latest, on December 17, 1985 when the settlement agreement was signed. Thus the pilots' labor law claims were held time barred.

FN4. In the original "hybrid" action, an employee brought a claim against his employer under § 301 of the NLRA for breach of the collective bargaining agreement and against his union for breach of the duty of fair representation implied under the NLRA. The two actions are inextricably intertwined, for in order to prevail on one, the employee must prevail on both. See *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 164-65, 103 S.Ct. 2281, 2290-91, 76 L.Ed.2d 476, 489 (1983). As we shall develop, *infra*, this original meaning has been expanded to apply to the type of claim brought here.

FN5. *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983). This limitation period is imported from § 10(b) of the NLRA and applies both to the cause of action against the union and to the one against the employee. The *DelCostello* court chose to apply this analogous federal statute of limitations rather than borrow from state law.

Pilots challenge this ruling on several grounds. They assert that (1) this is not a *DelCostello* "hybrid" action; (2) more appropriate limitations periods may be found

by resort to Louisiana's one year statute of limitations for tort law and ten year statute of limitations for contract law; (3) the running of the statute should have been tolled until defendants' fraud and collusion was discovered by pilots; (4) defendants should have been required to honor the judgment that forbid their relocation unless it was accomplished in compliance with the RLA; (5) any decertification of ALPA as the employees' collective bargaining agent should have been carried out by the National Mediation Board.

[1] We find that dismissal under F.R.Civ.P. 56(c) was warranted because it was clear from the face of the complaint and the declarations submitted that no material facts were in dispute and that defendants were entitled to judgment as a matter of law on the undisputed facts. [FN6] We agree with the trial court that DelCostello states the appropriate limitations period and that pilots' labor law claims were time-barred.

FN6. "[T]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." F.R.Civ.P. 56(c).

Pilots argue that DelCostello does not apply for two reasons. First, this case implicates the RLA, while DelCostello dealt with a violation of § 301 of the NLRA. Second, DelCostello arose in the context of a grievance proceeding under an existing collective bargaining agreement. In the case sub judice by contrast, the dispute arose out of the process of negotiating a collective bargaining agreement. There was no grievance procedure in place, so a time bar on the federal cause of action would preclude pilots from all avenues of relief.

The Fifth Circuit has held that when a claim alleges unfair representation, it is subject to DelCostello's six month limitations period even when it arises under the RLA, rather than the NLRA as was the case in DelCostello. [FN7] The claim also need not

be a "classic" hybrid claim. The six month limitation period is applicable whenever there is a DFR claim. [FN8] Pilots have clearly alleged a breach of the duty of fair representation.

FN7. Brock v. Republic Airlines, Inc., 776 F.2d 523, 525-26 (5th Cir.1985) (The "six-month statute of limitations in § 10(b) of the [NLRA] controls hybrid actions brought under the [RLA]. Hybrid claims under either act originate from an identical implied duty of fair representation and involve a similar balancing of competing interests."); see also Coyle v. Brotherhood of Ry., Airline & S.S. Clerks, 838 F.2d 1404, 1405 (5th Cir.1988).

FN8. Richardson v. United Steelworkers of America, 864 F.2d 1162, 1167 (5th Cir.1989); see also Degan v. Ford Motor Co., 869 F.2d 889, 892-93 (5th Cir.1989).

In addition, at least one other circuit has held explicitly that the limitations period should apply "equally to disputes arising *412 from the process of negotiation and to those arising from actions under the agreement resulting from the negotiations." [FN9] We agree that the rationale of DelCostello applies to the facts before us now. Thus pilots' labor law claims are subject to a six month statute of limitations.

FN9. United Independent Flight Officers v. United Air Lines, 756 F.2d 1262, 1271 (7th Cir.1985).

In support of their second argument, pilots cite United Parcel Service, Inc. v. Mitchell, [FN10] for the proposition that state law provides the appropriate limitations period. Mitchell held that a state statute of limitations for vacation of an arbitration award rather than for breach of contract governed a similar suit. Two questions were left unanswered in Mitchell, however: (i) what statute of limitations should govern the action against the union (only the action against the employer was subject to the arbitration statute) and (ii) whether the statute of limitations should be borrowed from federal law, namely NLRA § 10(b), 29 U.S.C. § 160(b), rather than from state law. DelCostello resolved these unanswered questions holding

that it was indeed appropriate to borrow from federal law and apply the six month statute of limitations from § 10(b). That limitations period applies to the claims against the employer and those against the union. [FN11]

FN10. 451 U.S. 56, 101 S.Ct. 1559, 67 L.Ed.2d 732 (1981).

FN11. DelCostello, 462 U.S. at 154-55, 103 S.Ct. at 2285-86, 76 L.Ed.2d at 482-83.

In the pilots' third challenge to the trial court's ruling, they assert that the trial court should have applied the doctrine of equitable tolling to find that pilots' claims were not barred by the statute of limitations. Pilots argue that they didn't know of the fraud and collusion perpetrated upon them until less than six months before they filed suit. They do not, however, detail the fraud and collusion which kept this knowledge from them or what and how they found out about it.

Pilots begin by arguing that where fraud and collusion have been alleged, DelCostello is inapplicable and a two year statute of limitations set forth in the RLA applies. [FN12] Brock v. Republic Airlines, Inc., [FN13] the only case pilots cite for this proposition, does not go nearly as far as pilots would take it. The RLA's statute of limitations applies only to actions arising under its own provisions; pilots have not alleged a violation of those provisions. The "fraud and collusion" Brock alleged denied him a fair hearing before the National Railroad Adjustment Board which issued the order Brock appealed. [FN14] Pilots do not appeal an Adjustment Board order, nor do they allege fraud and collusion in connection with such an order. In short, their claims fall entirely outside the parameters of Brock.

FN12. 45 U.S.C. § 153 (First) (r), the section pilots claim is applicable, provides: All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.

FN13. 776 F.2d 523, 526-27 (5th Cir.1985).

FN14. Id. Such a cause of action is specifically provided for in 45 U.S.C. § 153 (First) (p) and therefore subject to the two year limitation period established in 45 U.S.C. § 153 (First) (r).

[2] Even though DelCostello does apply, and not Brock's two year limitations period, pilots nevertheless argue that they meet the six month statute of limitations. Eight months after the DFR claim was dismissed, pilots moved for reconsideration of the dismissal arguing that the trial court had "apparently overlooked the doctrine of equitable tolling in its ruling." [FN15] Pilots argued that the statute should have been tolled until a time less than six months before they filed suit because the defendants had fraudulently concealed the facts that gave rise to their cause of action. The trial court found that their motion had no merit because the issue was not adequately raised when the claims were initially disposed of and pilots failed to show a proper basis for the exercise of equitable tolling. We agree.

FN15. R. 1110.

Allegations of fraudulent concealment do not free plaintiffs of their obligation to *413 exercise reasonable diligence to discover frauds perpetrated against them once they are on notice that such acts might have occurred. [FN16] Plaintiffs' own affidavits submitted before the summary judgment and with the motion for reconsideration show they were on "inquiry notice" if not actual notice of the acts that form the basis of their DFR claim for much longer than six months before they filed suit.

FN16. Jensen v. Snellings, 841 F.2d 600, 607 (5th Cir.1988), reh'g granted in part (unpublished opinion). [A]n act of concealment should not relieve the plaintiff of his duty to exercise reasonable diligence to discover the fraud.... Concealment by the defendant is only a factor to be considered in determining when the plaintiff should have discovered the fraud. The requirement of diligent inquiry imposes an affirmative duty upon the potential plaintiff.... A plaintiff who has learned of facts which would cause a reasonable person to inquire further must proceed with a reasonable and

diligent investigation, and is charged with the knowledge of all facts such an investigation would have disclosed. (Citations omitted). Although Jensen dealt with alleged securities fraud, its reasoning extends to this situation. Like investors, employees "are not free to ignore storm warnings" that would alert a reasonable employee to the possibility of fraud. *Id.*

For example, plaintiffs allege that Huttinger misrepresented that the Pilots' Agreement would be subject to ratification in July 1985; pilots knew by August 3, 1985 that the agreement was to be immediately implemented without ratification. [FN17] Haffner, one of the pilots, was aware in July or August 1985 that Huttinger and ALPA had no alternative but to take the buyout. ALPA would not support the pilots through a strike because (i) ALPA was financially depleted and could not afford to do so and (ii) ALPA had been threatened with suit by TACA and ALPA's legal department felt they would lose. [FN18] In the spring of 1985, while negotiations were ongoing, Zyriek--another pilot--learned from a vice president of TACA that Huttinger was not qualified to represent the pilots and that Huttinger and Padgett were lying to the pilots about the course of the negotiations. [FN19]

FN17. See Amended Complaint at ¶¶ 41-42, R. 495-96; ALPA's Statement of Material Facts Not in Dispute at ¶ 10, R. 571 and Pilots' Controverted Statements at ¶ 10, R. 727.

FN18. Declaration of Bert Haffner, R. 1179-1181.

FN19. See Declaration of Gary Zyriek, R. 1196-98.

At least some of the pilots were informed about the events taking place and potential problems with the negotiations. Many of the pilots also declared that they were aware of and asked by ALPA to participate in sabotage of TACA equipment. This alone should have put them on notice that things were not as they should be. Finally, *First Federal Savings and Loan Assoc. of Miami v. Mortgage Corp. of the South* [FN20] holds that ignorance of one aspect of an alleged fraud, where many other facts were known, is

insufficient to delay the running of the statute.

FN20. 650 F.2d 1376, 1378-79 (5th Cir. Unit B 1981).

Given these allegations, there is no question that the pilots were on inquiry notice of the labor law claims they raised in this suit in the spring or summer of 1985. Pilots have not alleged or provided any proof which would tend to show that defendants actively concealed their conduct or that the pilots exercised reasonable diligence, from that time until less than six months before they filed suit, in order to learn of their legal claims. [FN21] The trial court did not abuse its discretion in failing to grant reconsideration. No fact issues regarding the pilots' exercise of diligence in finding the grounds of their complaint were presented for resolution.

FN21. *United Klans of America v. McGovern*, 621 F.2d 152, 153 (5th Cir. 1980): Fraudulent concealment tolls the statute of limitations. To rely on this tolling doctrine, "plaintiff must show that the defendants concealed the conduct complained of, and that he failed, despite the exercise of due diligence on his part, to discover the facts that form the basis of his claim." Citing *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148, 1169 (5th Cir. 1979).

Pilots' fourth argument measures the actions of ALPA and TACA against an injunction. In 1983, El Salvador adopted a new Constitution which required Salvadoran public service companies to have their *414 bases in El Salvador. Pursuant to that new requirement, TACA attempted to move its pilots base to San Salvador. ALPA immediately sought an injunction against the move which was granted by the district court and upheld by the Fifth Circuit. [FN22] The injunction did not prevent TACA from relocating its base. It simply provided that "TACA must relocate its pilot base, and effect the other intended steps in accordance with the substantive law and procedures set forth in the Railway Labor Act and other relevant domestic laws." [FN23] The pilots contend that TACA effected its move in violation of

the RLA and thus is in violation of the injunction.

FN22. See *Airline Pilots Ass'n International, AFL-CIO v. TACA International Airlines, S.A.*, 748 F.2d 965 (5th Cir.1984), cert. denied, 471 U.S. 1100, 105 S.Ct. 2324, 85 L.Ed.2d 842 (1985).

FN23. *Id.* at 972.

[3] Pilots did not raise this issue until February 1987--long after they had filed this action. We find that the courts below acted properly in refusing to reopen that case. The issues involved in the old case and the current one are not substantially similar and the parties are different--only TACA was bound by the injunction. A transfer or consolidation to resolve this issue would have complicated the case--not simplified it.

Pilots' final argument against the operation of DelCostello and the bar of the six month statute of limitations is to classify the actions of ALPA and TACA as an improper attempt to decertify ALPA as the bargaining agent for the pilots. In this guise, pilots argue that the rationale of DelCostello is inappropriate. [FN24]

FN24. Pilots do not explain why they believe this characterization makes DelCostello inapplicable, nor do they state which statute of limitations then becomes applicable or why. We respond to pilots' arguments without the need to answer these questions.

[4] Disputes which involve the determination of the certified representative of airline employees in collective bargaining and contract administration are classified by the RLA as "representation" disputes. Such disputes are governed by Section 2, Ninth of the RLA, [FN25] which provides that "it is the duty of the [National Mediation] Board to investigate any dispute as to who is the collective bargaining representative of employees and to certify the organization properly designated." [FN26] We have no jurisdiction over this claim.

FN25. 45 U.S.C. § 152, Ninth.

FN26. *International Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of America v. Texas International Airlines, Inc.*, 717 F.2d 157, 159 (5th Cir.1983).

The Act commits disputes involving a determination of who is to represent airline employees in collective bargaining to the exclusive jurisdiction of the National Mediation Board. A court may not entertain an action involving such a dispute even if it arises in the context of otherwise justiciable claims. [FN27]

FN27. *Id.* at 161 (citations omitted).

In conclusion, we hold that pilots' labor law claims were time barred. A straightforward application of DelCostello, as it has evolved, compels this result. The remainder of pilots' arguments--equitable tolling, enforcement of a prior injunction, and wrongful decertification of ALPA--avail them not at all.

III. Erisa Claims

A. Did a "Plan" Exist Before April 18, 1985?

[5] The fiduciary obligations created by Title I of ERISA apply only to established "plans." Section 401(a), 29 U.S.C. § 1101(a) (fiduciary responsibilities apply to employee benefit plans); Section 4(a), 29 U.S.C. § 1003(a) ("this subchapter shall apply to any employee benefit plan if it is established or maintained" by an employer, employee organization, or both) (emphasis added). Decisions as to whether or when to establish a plan, or how to design a plan, are not subject to any ERISA fiduciary obligation. [FN28] Nor does any fiduciary obligation *415 arise during the negotiation or execution of an agreement regarding future pension benefits. [FN29] Thus, we must determine when the retirement plan for the TACA pilots went into effect, so that we can decide when any fiduciary duties may have been created.

FN28. See *UMWA Health & Retirement Funds v. Robinson*, 455 U.S. 562, 573-76, 102 S.Ct. 1226, 1232-34, 71 L.Ed.2d 419 (1982); *NLRB v. Amax Coal Co.*, 453 U.S. 322, 336-38, 101 S.Ct. 2789, 2797-98, 69 L.Ed.2d 672 (1981); *United*

Independent Flight Officers, Inc. (UIFO-I), 756 F.2d 1262, 1266-69; Moore v. Reynolds Metal Co. Retirement Program, 740 F.2d 454, 456 (6th Cir.1984) cert. denied, 469 U.S. 1109, 105 S.Ct. 786, 83 L.Ed.2d 780 (1985).

FN29. UIFO-I, 756 F.2d at 1268; United Independent Flight Officers, Inc. v. United Air Lines, Inc., 756 F.2d 1274, 1280 (7th Cir.1985); Sutton v. Weirton Steel Division of National Steel Corp., 567 F.Supp. 1184, 1201 (N.D.W.Va.), aff'd, 724 F.2d 406 (4th Cir.1983), cert. denied, 467 U.S. 1205, 104 S.Ct. 2387, 81 L.Ed.2d 345 (1984).

A pension plan subject to ERISA is one which is "established or maintained by an employer or by an employee organization or both" to provide retirement income to employees. Section 3(21)(A), 29 U.S.C. s 1002(21)(A). ALPA cites *Donovan v. Dillingham*, 688 F.2d 1367, 1373 (11th Cir.1982) (en banc), for the proposition that a plan is "established" if, "from the surrounding circumstances a reasonable person could ascertain" the following four elements: "the intended [i] benefits, [ii] beneficiaries, [iii] source of financing, and [iv] procedures for receiving benefits." [FN30]

FN30. *Accord Rasmussen v. Metropolitan Life Ins. Co.*, 675 F.Supp. 1497, 1500 (W.D.La.1987); *Ogden v. Michigan Bell Telephone Co.*, 657 F.Supp. 328, 332 n. 3 (E.D.Mich.), appeal dismissed, 829 F.2d 1126 (6th Cir.1987).

On February 2, 1982, ALPA and TACA entered a "Letter of Agreement" in which they agreed to establish a retirement plan for all TACA pilots. However, a formal retirement plan was not implemented until April 18, 1985, when TACA and ALPA executed the "TACA International Air Lines, S.A. Pilots' Retirement Plan and Trust" (the Plan). The 1982 "Letter of Agreement" provided that TACA would contribute \$75,000 a year to a fund for the pilots' retirement plus a variable amount depending upon the number of pilots listed on the seniority list and whether a second B-737 aircraft was acquired. TACA's obligation to make monthly contributions commenced on March 31, 1982. "[U]ntil such

time as the retirement plan for pilots has been established and implemented," TACA's contributions were to be deposited in an institution named by ALPA to be held in trust for the benefit of the retirement plan. The "Letter of Agreement" was effective from February 25, 1982 to February 25, 1987, at which time the agreement would be subject to renewal.

Since the 1982 agreement did not describe the intended benefits or procedure for receipt of benefits, (although it does impart the source of financing and the beneficiaries), ALPA argues that there was no plan until the signing of the 1985 retirement plan, which satisfies all four of the Dillingham requirements. [FN31]

FN31. In *Dillingham*, an en banc Eleventh Circuit held that employers and unions that subscribed to a group insurance trust to furnish health insurance for employees or members, "established employee welfare benefit plans" for purposes of deciding subject matter jurisdiction over ERISA claims. *Dillingham*, 688 F.2d at 1374.

Our opinion in no way undermines *Dillingham*'s holding that a plan is established if "from the surrounding circumstances a reasonable person can ascertain the intended benefits, a class of beneficiaries, the source of financing, and procedures for receiving benefits." *Id.* at 1373. But in our case the issue is not if a plan has been established, as in *Dillingham*, (because it is undisputed that an ERISA-covered plan was eventually established), but rather when the plan was established, taking into consideration the retroactivity provision in the 1985 retirement plan. [FN32]

FN32. Of course, this distinction can easily be collapsed by recognizing that a plan is normally established when all of the requirements for a plan are met. But the distinction is useful here because there is no contention that all of the requirements for a plan were met by 1985.

ALPA also argues that the "circumstances" surrounding the February, 1982 Letter of Agreement, as reflected in its terms, prove

that a plan was not established at that time. In particular, ALPA points to the following language of the 1982 Agreement *416 to support its claim that a pension plan was to be created at some time in the future, and not by the 1982 Agreement itself: "the specifics of the retirement plan for the pilots shall be determined ..."; TACA's contributions would be held in trust "until such time as the retirement plan for pilots has been established and implemented"; and "[a]t that time the Company's required monthly contributions shall be made to the retirement plan for pilots." (Emphasis added by ALPA). [FN33]

FN33. The more complete version of relevant provisions of the 1982 Agreement are as follows:

LETTER OF AGREEMENT
between
TACA INTERNATIONAL AIRLINES, S.A.
and
THE AIR LINE PILOTS
in the service of
TACA INTERNATIONAL AIRLINES, S.A.
as represented by
THE AIR LINE PILOTS ASSOCIATION
INTERNATIONAL

THIS LETTER OF AGREEMENT is made and entered into in accordance with the provisions of the Railway Labor Act as amended, by and between TACA INTERNATIONAL AIRLINES, S.A. (hereinafter referred to as the "Company") and the AIR LINE PILOTS in the services of TACA INTERNATIONAL AIRLINES, S.A. as represented by the AIR LINE PILOTS ASSOCIATION, INTERNATIONAL (hereinafter referred to as the "Association").

* * * * *

1. The Company will fund a retirement plan for all pilots of the Company on the seniority list as of February 1, 1982 and any pilots added to the seniority list thereafter. The Company contributions to the plan shall be as follows: (a) \$75,000 per year, and (b) an additional \$25,000 per year when second B-737 aircraft is acquired by (i.e. owned by or leased to) the Company, and (c) an additional \$2,000 per year for each pilot on the seniority list in excess of fifty (50) pilots and (d) all

obligations coming due under clauses (a), (b), and (c) above will be paid by 12 payments 1/12 each such payments on the last business calendar day of the month and each such payments prorated to any increased obligation.

* * * * *

5. The specifics of the retirement plan for pilots shall be determined by the Association provided that the plan receives I.R.S. qualification and it treats all pilots in a fair and equitable manner. 6. The Company contributions required by Paragraphs 1 and 4 above shall be deposited in a trust account established in an institution to be named by the Association to be held in trust by that institution for the benefit of the retirement plan for pilots until such time as the retirement plan for pilots has been established and implemented. At that time the Company's required monthly contributions shall be made to the retirement plan for pilots.

* * * * *

We can ignore the implications of these terms in the 1982 Letter of Agreement, however, because the April, 1985 retirement plan is explicitly retroactive to February, 1982. The very first sentence of the 1985 retirement plan states that TACA "established a pension plan for its Pilots" on February 1, 1982. [FN34] The retirement plan unambiguously marks the plan's Effective Date as February 1, 1982. [FN35] All pilots employed on the Effective Date are eligible to *417 participate in the Plan. [FN36] We will not interfere with the intent of the parties to make the Plan effective on February 1, 1982. Thus, we instruct the court on remand to accept as a matter of law that the Plan was in effect on February 1, 1982.

FN34. Article 1.1 of the TACA INTERNATIONAL AIRLINES, S.A. PILOTS RETIREMENT PLAN AND TRUST provides: Establishment and Name of the Plan and Trust--TACA INTERNATIONAL AIRLINES, S.A., (hereinafter referred to as the "Company"), on February 1, 1982, established a pension plan for its

Pilots, which, as it may be amended from time to time, is known as the TACA International Airlines, S.A. Pilots Retirement Plan and Trust.

FN35. Article II--(Definitions) defines "Effective Date": The term 'Effective Date' means February 1, 1982, the date on which the provisions of this Plan are effective. Other provisions support the view that the 1985 Plan is retroactive to 1982. "Future Service" is defined as "a Pilot's aggregate period of employment as a Pilot on or after February 1, 1982, including approved leaves of absence and furloughs." "Past Service" is defined as "a Pilot's aggregate period of employment as a Pilot prior to February 1, 1982, including approved leaves of absence and furloughs; provided, however, that a Pilot's total Past Service which may be credited under the Plan shall not exceed twenty (20) years." "Plan Year" is defined as "the twelve (12) month period commencing each January 1st and ending on the following December 31st. However, the first Plan Year shall commence February 1, 1982 and end December 31, 1982." 4.1 Company Contributions--The Company shall contribute to the Plan such amounts as shall be required by the Letter of Agreement between TACA INTERNATIONAL AIRLINES, S.A. and the AIR LINE PILOTS in the service of TACA INTERNATIONAL AIRLINES, S.S. as represented by THE AIR LINE PILOTS ASSOCIATION, INTERNATIONAL in effect as of February 24, 1982 and as subsequently amended or replaced, in accordance with the funding standards of the Internal Revenue Code and ERISA.

FN36. However, one year of service is required before eligibility: 3.1 Eligibility--Each person who is employed as a Pilot on the Effective Date and who, as of the Effective Date, has completed one year of Past Service, shall participate in this Plan as of the Effective Date.

B. Did TACA, ALPA and Huttinger Have Any Fiduciary Duties Under the Retirement Plan?

Finding a need for greater protection of employees covered by benefit plans, Congress enacted ERISA in 1974. 29 U.S.C. §§ 1001 et seq. In so doing, Congress sought to protect "the interests of participants in private pension plans and their beneficiaries by

improving the equitable character and the soundness of such plans." 29 U.S.C. § 1001(c). [FN37] ERISA is therefore to be construed liberally to safeguard the interests of fund participants and beneficiaries, and to preserve the integrity of fund assets. This court has previously held that a liberal construction of ERISA is in keeping with its remedial purposes. [FN38]

FN37. Amending ERISA in 1986 with the Single-Employer Pension Plan Amendments Act, (SEPPAA) Title XI of Pub.L.No. 99-272, tit. XI, 100 Stat. 237 (1986), Congress declared that the policy of the legislation was "to increase the likelihood that participants and beneficiaries under single-employer defined benefit pension plans will receive their full benefits." 29 U.S.C. § 1001b(c)(3) (Supp. VII 1989). Another declaration of policy under SEPPAA was "to provide for the transfer of unfunded pension liabilities onto the single-employer pension plan termination insurance system only in cases of severe hardship." 29 U.S.C. § 1001b(c)(4) (Supp. VII 1989).

FN38. American Federation of Unions Local 102 Health & Welfare Fund v. Equitable Life Assurance Society of the United States, 841 F.2d 658, 662 (5th Cir.1988); Donovan v. Mercer, 747 F.2d 304, 308 (5th Cir.1984).

[6] Section 3(21)(A) of ERISA, 29 U.S.C. § 1002(21)(A), provides that a "person" is a fiduciary only "to the extent" he

(1) exercises discretionary control or authority over the management of the Plan or the Plan's disposition of its assets, (2) renders investment advice with regard to assets of the plan, or (3) has discretionary authority or responsibility in the administration of the plan."

In *Sommers Drug Stores, Co. Employee Profit Sharing Trust v. Corrigan Enterprises, Inc.*, 793 F.2d 1456, 1459-60 (5th Cir.1986), reh'g den., 797 F.2d 977 (5th Cir.1986) cert. denied, 479 U.S. 1034, 107 S.Ct. 884, 93 L.Ed.2d 837 (1987), we held that "[t]he phrase 'to the extent' indicates that a person is a fiduciary [under ERISA] only with respect to those aspects of the plan over which he exercises authority or control." [FN39] The court below applied 3(21)(A) and *Sommers* to conclude that

neither TACA nor ALPA had any fiduciary duties "because the 1985 retirement plan does not establish any power or authority on behalf of TACA or ALPA, nor has any such authority or power been demonstrated to have been exercised in fact." *Landry v. ALPA*, No. 86-3196, slip op. at p. 9 (E.D.La. Apr. 24, 1987) (mem.). A genuine issue of material fact [FN40] existed as to whether TACA, ALPA, and Huttinger had any fiduciary duties under ERISA that *418 would make them liable for the wrongs alleged in the pilots' complaint.

FN39. *Accord Gelardi v. Pertec Computer Corp.*, 761 F.2d 1323, 1325 (9th Cir.1985); *Brandt v. Grounds*, 687 F.2d 895, 897 (7th Cir.1982); *Holland v. Bank of America*, 673 F.Supp. 1511, 1518 (S.D.Cal.1987).

FN40. In a practice all too common in summary judgment decisions, the trial court made no mention of the standard it was applying to reach its decision. Assuming that the appropriate standard for a rule 56(c) motion was being tacitly applied, it would behoove the district court to spell out that "no genuine issues as to any material fact" could be found in support of plaintiff's case. F.R.Civ.P. 56(c). See also, S. Childress & M. Davis, *Standard of Review* 310 (Wiley & Sons 1986). Such judicial pedagogy might reduce the frequency of the same omission in briefs, motions, etc.

Initially, we must emphasize that fiduciary status is to be determined by looking at the actual authority or power demonstrated, as well as the formal title and duties of the party at issue. As described in the legislative history of ERISA, "the definition [of 'fiduciary'] includes persons who have authority and responsibility with respect to the matter in question, regardless of their formal title." H.R.Conf.Rep. No. 93-1280, 93d Cong., 2nd Sess., reprinted in 1974 U.S.Code Cong. & Admin.News 4639, 5038, 5103. Thus "fiduciary" should be defined not only by reference to particular titles such as "plan administrator," "committee chairman," or "sponsor," but also by considering the authority which a particular person or entity exercises over the employee benefit plan at issue. *Donovan v. Mercer*, 747 F.2d at 308. See also *Brink v. DaLesio*, 496 F.Supp. 1350,

1374-75 (D.Md.1980), rev'd in part on other grounds, 667 F.2d 420 (4th Cir.1982); *Leigh v. Engle*, 727 F.2d 113, 134 n. 33 (7th Cir.1984) ("we think ERISA directs courts to look beyond ... formal authority with respect to the plan ... to consider what real authority they had over plan investments ...").

The fact that someone is a fiduciary under a retirement plan does not necessarily mean he is a fiduciary with respect to all of the obligations under the plan. As we stressed in *Sommers*, 793 F.2d at 1459, the key language in the statutory definition is that a person is a fiduciary "to the extent" he or she exercises control over the plan. The Secretary of Labor explained this language in a bulletin interpreting ERISA, which was published in the Code of Federal Regulations. In this bulletin, the Secretary was asked the following question and gave the following response:

D-4 Q: In the case of a plan established and maintained by an employer, are members of the board of directors of the employer fiduciaries with respect to the plan?

A: Members of the board of directors of an employer which maintains an employee benefit plan will be fiduciaries only to the extent that they have responsibility for the functions described in section 3(21)(A) of the Act. For example, the board of directors may be responsible for the selection and retention of plan fiduciaries. In such a case, members of the board of directors exercise "discretionary authority or discretionary control respecting management of such plan" and are, therefore, fiduciaries with respect to the plan. However, their responsibility, and consequently, their liability, is limited to the selection and retention of fiduciaries (apart from co-fiduciary liability arising under circumstances described in section 405(a) of the Act). In addition, if the directors are made named fiduciaries of the plan, their liability may be limited pursuant to a procedure provided for in the plan instrument for the allocation of fiduciary responsibilities among named fiduciaries or for the designation of persons other than named fiduciaries to carry out fiduciary

responsibilities, as provided in section 405(c)(2).

The Internal Revenue Service notes that it would reach the same answer to this question under section 4975(e)(3) of the Internal Revenue Code of 1954.

ERISA Interpretive Bulletin 75-8, 29 CFR § 2509.75-8 (1983) (emphasis supplied).

While the fiduciary duty of a board of directors is not directly at issue in our case, the excerpted dialogue from the bulletin illustrates the important parameters and limitations of fiduciary responsibility. Thus, it will be the task of the court on remand to determine precisely the extent, as a factual matter, of actual fiduciary authority possessed or exercised by ALPA, Huttinger, and TACA with respect to the wrongs alleged by the pilots. The pilots' complaint maintains the following four wrongs as a consequence of ERISA violations: [FN41]

FN41. Of course, to the extent the district court allows the pilots to amend their complaint on remand pursuant to F.R.Civ.P. 15, this list of alleged wrongs may be expanded.

(i) delay in implementation of the retirement plan for three years; (ii) failure and *419 refusal to discuss or disclose the Plan and its benefits to the Pilots upon repeated requests; (iii) failure to disclose the amount of contributions by TACA, where the funds were deposited, the type of investment account and interest rates the invested funds received; and (iv) collusion between TACA, ALPA, and FBA to allow Huttinger to receive benefits to which he was not legitimately entitled. [FN42]

FN42. FBA is only an intervenor in this appeal. See *infra*. The original Complaint alleged collusion between ALPA, FBA, and Huttinger. The amended Complaint, however, implicates TACA in this collusion to improperly provide Huttinger with funds.

1. Too Slow

Although, as we determined above, the Plan was in effect in February, 1982, a detailed

retirement plan laying out the rights and obligations of the parties was not implemented until over three years later. [FN43] In August of 1984, FBA was contacted by ALPA about a possible contract to perform retirement plan services. On October 30, 1984, a Plan Services Agreement was entered between ALPA and FBA delineating specific services that FBA would provide under the Plan. In this Plan Services Agreement, FBA agreed to take "all the steps required to make the plan and trust operative."

FN43. In an inquiry filed with the U.S. Department of Labor, Division of Technical Assistance, Bert Haffner, one of the plaintiff TACA pilots, complained of an "unusual time delay and lapse from time of inception (1 Feb 82) to the time of issuance of plan outline (16 April 85)." R. 1183.

However, while FBA's duties under the Plan are retroactive to February, 1982, any fiduciary obligations undertaken by FBA in the Plan Services Agreement do not begin until October 30, 1984. Thus, assuming without deciding that FBA had a fiduciary duty to implement the Plan beginning on October 30, 1984, there is still a disputed fact issue as to which party had the responsibility to implement the Plan from February, 1982 until the signing of the Plan Services Agreement. [FN44] If the trial court on remand discovers that TACA, ALPA, or Huttinger formally possessed or actually assumed any fiduciary duty with respect to implementing the Plan, then they will be potentially liable for any damages resulting from the delay in implementation.

FN44. There is nothing in either the "Letter of Agreement" or the Plan itself that imposes a fiduciary duty to implement the Plan.

2. Didn't Show

The pilots' alleged that Charles Huttinger refused to discuss or disclose the Plan and details about its benefits despite repeated requests. Huttinger was appointed to the pilots' retirement committee which, according to section 12.4 of the Plan, [FN45] was charged with interpreting and construing the

Plan, determining questions of eligibility and rights of participants and their beneficiaries, and providing guidelines for the plan administrator as required for the orderly and uniform administration of the Plan.

FN45. 12.4 Retirement Committee--In order to assist in the administration of the Plan, the Association shall appoint a Retirement Committee to: (a) interpret and construe the Plan; (b) determine questions of eligibility and of rights of Participants and their Beneficiaries; (c) provide guidelines for the Plan Administrator, as required for the orderly and uniform administration of the Plan.

The affidavit of Bert Haffner, one of the TACA pilots, declares that Huttinger "refused to supply [him] with a copy of the retirement plan or tell [him] how to get one" despite repeated requests. R. 1179. In July or August of 1985, Haffner met with Huttinger at his home "in order to obtain his help in applying for all benefits [that he] might be eligible for." R. 1180. Haffner claimed that he "did this in accordance with recommendations in ALPA manuals, to contact the union chairman for help in applying for benefits." R. 1180.

Another pilot, Jules Corona, declared that despite numerous requests, he "was never given any information as to where the TACA contributed retirement funds were held in Trust, nor when the plan was implemented, nor any of the ERISA required disclosure information until after *420 the August 1, 1985 termination date of the plan." R. 303.

Huttinger clearly assumed both a de facto and a de jure role in construing the Plan and informing the pilots about its contents. Thus, we find as a matter of law that Huttinger had a fiduciary duty to disclose information about the Plan to the pilots when asked. Whether he breached that fiduciary duty must be resolved on remand.

3. Couldn't Know

ALPA argues that it is not a fiduciary with respect to the alleged failure to disclose information about the Plan and its assets

because the Plan charged the Plan Administrator, FBA, with the day-to-day administration of the Plan, and consistent with Section 101 of ERISA, 29 U.S.C. § 1021, [FN46] with specific responsibility for providing participants in the Plan with all information required by law, including information and reports regarding the Plan and its assets. [FN47]

FN46. § 1021. Duty of disclosure and reporting
(a) Summary plan description and information to be furnished to participants and beneficiaries The administrator of each employee benefit plan shall cause to be furnished in accordance with section 1024(b) of this title to each participant covered under the plan and to each beneficiary who is receiving benefits under the plan--(1) a summary plan description described in section 1022(a)(1) of this title; and (2) the information described in section 1024(b)(3) and 1025(a) and (c) of this title.

FN47. Formal responsibility to notify beneficiaries and participants about the Plan falls on FBA. 9.8 Powers, Duties and Responsibilities of the Plan Administrator--The specific powers and responsibilities of the Plan Administrator are to:

* * * * *

(c) Prepare and arrange for delivery to Participants such summaries, descriptions, announcements and reports as are required to be given to Participants under applicable laws and regulations; Our opinion decides nothing with respect to FBA. See infra.

However, while the responsibility for notifying beneficiaries and participants with Plan information formally fell upon FBA, there are indications that FBA's actual authority over Plan matters was (at least sometimes) subordinated to and dependent upon decisions by ALPA. [FN48] For example, when the president of FBA, Richard Watson, was asked why Huttinger was able to apply for and begin receiving benefits in November of 1985, but Haffner was not allowed to do the same, Watson reportedly explained "that was the way ALPA had told him to do it." [FN49]

FN48. The Plan plainly gives ALPA some fiduciary duties. Article 11.2 of the Plan gives ALPA the authority to terminate the plan and the trust by an instrument in writing signed by the president of ALPA or his designee for such purpose. R. 1389. Article 11.2 provides: Termination of Plan and Trust--"This Plan and Trust may be terminated by an instrument in writing signed by the President of the Association or his designee for such purpose. Notwithstanding the foregoing, the Plan shall automatically terminate in the event of a complete discontinuance of contributions by the Company. Upon the termination or partial termination of the Plan, the rights of all affected Participants and Beneficiaries to benefits accrued to the date of such termination, partial termination, or discontinuance, to the extent funded as of such date, are nonforfeitable." ALPA has the sole authority and control to remove and appoint the Trustee, the Plan Administrator and the Investment Manager. Article 9.5(a) provides: The Association is empowered to appoint and remove the Trustee, the Plan Administrator and the Investment Manager as it deems necessary for the proper administration of the Plan, to assure that the Plan is being operated for the exclusive benefit of the Participants and their Beneficiaries in accordance with the terms of this Agreement, the Internal Revenue Code and ERISA. Article 9.5(c) explicitly provides for the discretion of ALPA: "The Association may in its discretion appoint an Investment Manager to manage all or a designated portion of the assets of the Plan. In such event, the Trustee shall follow the directives of the Investment Manager in investing the assets of the Plan managed by the Investment Manager. While there is an Investment Manager, the Association shall have no obligation under this Plan with regard to the performance or non-performance of the duties delegated to the Investment Manager."

FN49. Bert Haffner provided this information about his conversation with Watson. R. 1181.

Even if the actual fiduciary duty to disclose information about the Plan falls upon FBA, its failure to notify Plan participants *421 and beneficiaries may not constitute a breach of that duty because ALPA and TACA undertook an obligation to keep FBA informed about certain matters. [FN50] If ALPA failed to do so, FBA may have been prevented from fulfilling its fiduciary duty to notify the

beneficiaries and participants.

FN50. Sections 3 and 4 of the Plan Services Agreement provide in full: 3. Obtaining Information--The Association agrees to furnish information or data which FBA requests in order to perform services under this Agreement within 90 days of the initial request or FBA will not be held responsible for services under this Agreement. FBA reserves the right to require that data be furnished over the signature of an authorized official of the Association or the entity or representative providing the data on behalf of the Association. FBA reserves the right to reject information or data which it considers unsuitable for processing. FBA's sole responsibility, in this regard, shall be to forward questionnaires and forms as necessary to the Association on a timely basis, enabling the Association to provide the information needed. 4. Liability for Information--The Association shall provide complete, accurate and timely information, upon which information FBA may rely fully. The Company and the Association shall indemnify and hold FBA harmless for errors, omissions, and inaccurate or incomplete reports completed, based on inaccurate, incomplete or untimely information furnished by the Company and the Association.

Similarly, in the Plan, TACA agrees to supply "full and timely information to the Plan Administrator on all matters relating to the compensation of all Participants, their periods of service, their retirement, death, disability or termination of employment, and such other pertinent facts as [FBA] may require." [FN51] However, any fiduciary duty on the part of TACA arising under § 9.9 (or any other section) of the Plan is unenforceable, because TACA is neither a signatory nor a party to the Plan. [FN52]

FN51. Plan § 9.9 provides: 9.9 Information From Company--To enable the Plan Administrator to perform his functions, the Company shall supply full and timely information to the Plan Administrator on all matters relating to the compensation of all Participants, their periods of service, their retirement, death, disability, or termination of employment, and such other pertinent facts as the Administrator may require; and the Administrator shall advise the Trustee and the

Investment Manager of such of the foregoing facts as may be pertinent to their duties under the Plan. Subject to Section 9.2, all fiduciaries may rely upon such information as is supplied by the Company and shall have no duty or responsibility to verify such information.

FN52. Merely because TACA was not a party to the Plan does not preclude a finding that TACA was a fiduciary with respect to the Plan. If further facts discovered on remand reveal that TACA undertook actual obligations to notify in accordance with § 9.9 of the Plan, then TACA will be a fiduciary to that extent. See Section II.B.4. Where'd the \$ Go?

The trial court on remand must determine the actual fiduciary duties assumed by ALPA and TACA with respect to providing FBA and the Plan beneficiaries and participants with information under the Plan. [FN53]

FN53. In a memorandum responding to ALPA's motion to dismiss, FBA, a defendant below, admitted that "[a] factual determination is required to determine whether those disclosures [pertaining to the Plan] were made." FBA also asserted: "Factual determinations abound in the delegation issue, pretermittng summary judgment on that basis." R. 1191.

4. Where'd the \$ Go?

A genuine issue of material fact exists as to whether TACA and ALPA colluded with Huttinger in order to provide him with retirement benefits. As discussed supra, Frank Landry declared in an affidavit that each party to the alleged collusion was motivated by different factors. According to Landry, TACA threatened civil suit and criminal prosecution against ALPA for the intentional damage of TACA's engines by some of the ALPA pilots. [FN54] In return for ALPA's accepting the 1986 Pilots' Agreement, TACA agreed not to carry out this threat. TACA, meanwhile, would be able to move its pilot base to El Salvador and avoid its obligations under the Plan.

FN54. These allegations are discussed more fully in the RICO section, infra.

[7] Landry further claimed that Huttinger was offered benefits to which he would otherwise not have been entitled as an incentive for him to vote against the *422 pilots' interests. If such collusion did occur, then TACA, ALPA, and Huttinger are implicated as fiduciaries under 3(21)(A) because they would have exercised actual control over the disposition of the assets of the Plan. In other words, by allegedly colluding to provide Huttinger with retirement benefits, ALPA, TACA, and Huttinger became fiduciaries over the distribution of Plan funds, even if they are not listed as fiduciaries with respect to that function.

C. Breach of Fiduciary Duties

Plan fiduciaries are statutorily prohibited from dealing with Plan assets in their own interest. [FN55] Moreover, the Plan fiduciaries agreed to "discharge [their] duties solely in the interest of the Participants and their Beneficiaries" and to act "for the exclusive purpose of providing benefits to Participants." [FN56] To the extent that ALPA and TACA colluded with Huttinger to provide the latter with Plan benefits, so that the former could serve their own interests, fiduciary duties were breached under § 1106(b).

FN55. § 1106. Prohibited transactions

* * * * *

(b) Transactions between plan and fiduciary A fiduciary with respect to a plan shall not-(1) deal with the assets of the plan in his own interest or for his own account, (2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries, or (3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan. 29 U.S.C. § 1106(b).

FN56. Article 9.2 provides in relevant part: General

901 F.2d 404
(Cite as: 901 F.2d 404, *422)

Fiduciary Duties--Each Plan fiduciary will discharge his duties solely in the interest of the Participants and their Beneficiaries and act: (a) for the exclusive purpose of providing benefits to Participants and their Beneficiaries and defraying reasonable expenses of administering the Plan; (b) with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims; ... No Plan fiduciary shall engage in any transaction prohibited under ERISA, the Internal Revenue Code, or any other law." This Plan language follows the terms of the ERISA provision on the standard of care for fiduciaries: § 1104. Fiduciary duties (a) Prudent man standard of care (1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and--(A) for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan; (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims; (C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter or subchapter III of this chapter. 29 U.S.C. § 1104(a).

Moreover, we must stress that although Sommers limited the liability of fiduciaries by the "to the extent" language of § 3(21)(A) this limitation does not apply to § 1105(a). [FN57] To illustrate, even if ALPA is only found to be a fiduciary "to the extent" of appointing and removing the Plan administrator *423 and Trustee, [FN58] ALPA may still be liable, for example, for the breaches of FBA if ALPA "participat[ed] knowingly in, or knowingly undertook to conceal, an act or omission of [FBA], knowing such act or omission [was] a breach." § 1105(a)(1).

FN57. § 1105. Liability for breach of co-fiduciary (a) Circumstances giving rise to liability In addition to any liability which he may have under any other provision of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances: (1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach; (2) if, by his failure to comply with section 1104(a)(1) of this title in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or (3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach. 29 U.S.C. § 1105(a).

FN58. This example is only an illustration to assist the trial court on remand; it reaches no conclusions.

D. Status of FBA

The pilots' case against FBA is still pending in the district court. FBA has moved for summary judgment against the pilots' claims, but the trial court has not decided the motion. [FN59] Although the decision appealed herein does not directly address FBA's fiduciary status or liability, FBA has filed an intervenor brief seeking to protect its interest in the litigation. Basically, FBA appears to be concerned that since the trial court found that TACA and ALPA were not fiduciaries, and dismissed the claim against Huttinger, the only party remaining upon which fiduciary duty can be imposed is FBA.

FN59. In expectation of an appellate opinion that would be forced to explicitly or implicitly discuss the fiduciary status and liability of FBA, the trial court may, wisely, be waiting for our decision before ruling on FBA's motion for summary judgment. An obvious possibility is to consolidate this remanded action with the FBA action.

Thus, in its intervenor brief FBA argues that a determination of whether TACA or ALPA acted in accordance with the fiduciary provisions of ERISA is neither necessary nor

relevant. FBA asserts that allegations of improper plan termination do not raise any ERISA issues--but rather involve the RLA--since plan termination is a mandatory subject of collective bargaining under the RLA. FBA also claims that the Plan should be placed into trusteeship by voluntary action of the Pension Benefits Guarantee Corporation (PBGC).

FBA's arguments are unconvincing. The ERISA claim against ALPA and TACA on which the Court below ruled--the only ERISA ruling before us on appeal--only concerned action taken prior to Plan termination. Because the District Court's ruling properly confined itself to the claims before it, and did not address any ERISA claim related to Plan termination, there is no ERISA "finding" related to Plan termination which we could reverse. FBA's request actually asks us to become a fact-finder ab initio, a role which does not properly rest with this Court. *Booker v. School Dist. No. 1*, 585 F.2d 347, 353 (8th Cir.1978) ("function of the appellate court is not to make an initial decision [on factual issues] but simply to review the action of the trial court."), cert. denied, 443 U.S. 915, 99 S.Ct. 3106, 61 L.Ed.2d 878 (1979).

Moreover, arguments by FBA that it should initiate proceedings against PBGC for ancillary relief under the insurance guaranty provisions of ERISA are not relevant to the issue of whether TACA, ALPA, or Huttinger had any fiduciary duties under the Plan. An August 10, 1988 letter from the PBGC to the president of FBA stated that the notification given to the pilots was insufficient, and that the Plan was an ongoing plan until properly terminated. According to the PBGC letter, TACA is required to meet the minimum funding standards under § 302 of ERISA and § 412 of the Internal Revenue Code as long as the Plan is ongoing. Thus, while the pilots may ultimately choose to seek relief from the PBGC, FBA cannot force it to take this approach.

In sum, when summary judgment was granted on the ERISA claims, the record contained disputed issues of material fact regarding the fiduciary status of the

defendants with respect to the wrongs alleged in the complaint. We remand to the trial court for a determination not inconsistent with this opinion.

IV. RICO CLAIMS

In their amended complaint, pilots sought treble damages from TACA, ALPA and Huttinger under two subsections of RICO. [FN60] We must determine whether *424 TACA, ALPA, and Huttinger showed there were no genuine issues of material fact concerning the existence of (i) a RICO person, (ii) predicate acts of racketeering activity, (iii) a pattern of racketeering activity, and (iv) an enterprise. [FN61] The absence of a fact issue regarding any one of these elements is sufficient to grant summary judgment provided the legal analysis also favors the movants.

FN60. 18 U.S.C. § 1962. Prohibited Activities:

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

FN61. *Delta Truck & Tractor, Inc. v. J.I. Case Co.*, 855 F.2d 241, 242 (5th Cir.1988), cert. denied, 489 U.S. 1079, 109 S.Ct. 1531, 103 L.Ed.2d 836 (1989) ("Reduced to its three essentials, a civil RICO claim must involve: (1) a person who engages in (2) a pattern of racketeering activity (3) connected to the acquisition, establishment, conduct, or control of an enterprise."); see also *Gray v. Cauble*, 849 F.2d 946, 949 n. 7 (5th Cir.1988) (test for § 1962(c)); *Moss v. Morgan Stanley, Inc.*, 719 F.2d 5, 17 (2d Cir.1983), cert. denied, 465 U.S. 1025, 104 S.Ct. 1280, 79 L.Ed.2d 684 (1984) (test for § 1962(a)-(c)).

The trial judge granted summary judgment against the pilots. In brief, he found that if any predicate acts occurred, they took place before the alleged RICO enterprise came into being. Additionally, none of the alleged predicate acts were found sufficient for the RICO claim. [FN62] The trial court did find that a "pattern" of racketeering activities was alleged, [FN63] but held that there was no enterprise because plaintiffs failed to allege the appropriate "continuity" under either of its enterprise theories.

FN62. For the specifics as to the trial court's disposition of each of the alleged predicate acts, see *infra* Part IV. B.

FN63. In making this ruling, the trial court was constrained by *R.A.G.S. Couture, Inc. v. Hyatt*, 774 F.2d 1350 (5th Cir.1985), although it made an effort to show why no pattern should be found in this circumstance.

Our review of a grant of summary judgment is *de novo*. [FN64] The standards for granting or denying summary judgment are well known.

FN64. *Impossible Electronics Techniques, Inc. v. Wackenhut Protective Systems, Inc.*, 669 F.2d 1026, 1030 (5th Cir. Unit B 1982) ("In reviewing a decision granting or denying summary judgment, this court applies the same legal standards as those that control the district court in determining whether summary judgment is appropriate.") (Citations omitted).

The party seeking summary judgment bears the exacting burden of demonstrating that there is no actual dispute as to any material fact in the case.... In assessing whether the movant has met this burden, the courts should view the evidence introduced and all factual inferences from that evidence in the light most favorable to the party opposing the motion.... All reasonable doubts about the facts should be resolved in favor of the non-moving litigant.... A court must not decide any factual issues it finds in the record, but if such are present, the court must deny the motion and proceed to trial.... If reasonable minds might differ on the

inference arising from undisputed facts, then the court should deny summary judgment. [FN65]

FN65. *Id.* at 1031 (citations omitted).

Appropriate summary judgment evidence consists of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any." F.R.Civ.P. 56(c). The affidavits must be made on "personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." F.R.Civ.P. 56(e). Finally, once the movant has made and supported its motion as provided in this rule, the "adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." *Id.*

*425 A. The RICO Persons

The Fifth Circuit recently clarified the definition of the RICO "person"--the defendant--in *Delta Truck & Tractor, Inc. v. J.I. Case Co.* [FN66]

FN66. 855 F.2d 241, 242 (5th Cir.1988), cert. denied, 489 U.S. 1079, 109 S.Ct. 1531, 103 L.Ed.2d 836 (1989).

If we are to restrict RICO to the type of conduct Congress intended to proscribe, the RICO person must be either one that poses or has posed a continuous threat of engaging in acts of racketeering.... The continuous threat requirement may not be satisfied if no more is pled than that the person has engaged in a limited number of predicate racketeering acts.

We are faced here with three RICO defendants and two theories of the enterprise [FN67] which figure them in different ways.

FN67. Pilots' two enterprise theories are discussed in detail, *infra*, Part IV.D..

1. Association-in-fact Persons

Under pilots' "association-in-fact" enterprise theory, Huttinger, ALPA and TACA formed or acted as an enterprise, whose alleged purpose was to move the TACA pilot base, end ALPA's representation of the TACA pilots, ensure Huttinger's retirement benefits and ultimately deprive the pilots of their rights under the collective bargaining agreement. Under this enterprise theory, all three could be RICO defendants. According to pilots' allegations and affidavit evidence, those goals have been accomplished, so the enterprise no longer exists. [FN68] There are no RICO defendants under this theory.

FN68. This is discussed in detail in Part IV.D., *infra*.

2. ALPA-as-Enterprise Persons

[8] The pilots' other enterprise theory regards ALPA as a lawful enterprise which was the vehicle for racketeering activities perpetrated by TACA and Huttinger. Under this theory, ALPA cannot be a RICO person-or defendant-for the § 1962(c) violation because in such a situation, "the 'person' and the 'enterprise' must be distinct." [FN69] The rationale for this distinction comes from the language of the statute which deals with a "person employed by or associated with any enterprise." 18 U.S.C. § 1962(c). [FN70] This language shows that Congress intended for the RICO person and the enterprise to be separate entities.

FN69. *Bishop v. Corbitt Marine Ways, Inc.*, 802 F.2d 122, 123 (5th Cir.1986); see also *Atkinson v. Anadarko Bank and Trust Co.*, 808 F.2d 438, 441 (5th Cir.), cert. denied, 483 U.S. 1032, 107 S.Ct. 3276, 97 L.Ed.2d 780 (1987).

FN70. The Fifth Circuit has adopted the rationale of the Seventh Circuit in this regard. See *Haroco v. American National Bank & Trust Co. of Chicago*, 747 F.2d 384, 400 (7th Cir.1984), aff'd 473 U.S. 606, 105 S.Ct. 3291, 87 L.Ed.2d 437 (1985).

[9] It would be incongruous here to find that while ALPA, as the enterprise, cannot be a RICO person, it can be held vicariously liable

for the acts of Huttinger. If this were the rule, all legal enterprises could be found liable under RICO if their employees or agents were involved in perpetrating predicate acts through or against them. This is contrary to the rule Congress meant to impose as evidenced by the language of the statute. ALPA is thus not appropriately a defendant under this legal enterprise theory for purposes of the § 1962(c) violation, either as a RICO person or vicariously.

[10][11] ALPA can be both the enterprise and a RICO defendant for the § 1962(b) violation. In contrast to the language of subsection (c) which "requires a relationship between the 'person' and the 'enterprise,' subsection [...] (b) require[s] only the use of an 'enterprise' by a 'person.'" [FN71] Thus the RICO person and the enterprise need not be distinct for a person to be held liable under subsection (b). A finding of vicarious liability on the part of an enterprise which derived benefit from its representative's wrongful acts is also consistent with this view. [FN72]

FN71. *Liquid Air Corp. v. Rogers*, 834 F.2d 1297, 1307 (7th Cir.1987), cert. denied, 492 U.S. 917, 109 S.Ct. 3241, 106 L.Ed.2d 588 (1989).

FN72. *Id.*

***426** [12][13] The continuing threat requirement must still be met. For purposes of the alleged subsection (c) violation, only TACA and Huttinger could be defendants. Pilots have not alleged that TACA constitutes or has constituted a continuing threat--it is not a RICO person. A fact issue exists as to whether Huttinger poses a continuing threat resulting from his receipt of retirement benefits. This turns on the fact issue which we find to exist, as to whether the receipt of these benefits constitutes mail fraud.

For purposes of the subsection (b) violation, pilots have alleged that ALPA poses a threat of continuing harm to other victims. As an example, they cite a suit against ALPA by Continental Airlines pilots making much the same allegations as the TACA pilots: ALPA sold them out to protect itself from prosecution

for the acts of sabotage it directed. This allegation is unrefuted by any summary judgment evidence. Thus the allegation that ALPA poses a continuing threat of engaging in racketeering activities remains to be resolved. Likewise there is a fact issue as to whether Huttinger's receipt of retirement benefits is a continuation of racketeering activity. Again, TACA is not a RICO person for purposes of this violation. [FN73]

FN73. Although we have found that TACA is not appropriately a RICO person—or defendant—for any of the alleged RICO violations, pilots' allegations of TACA's past wrongdoing will frequently be discussed in the remainder of this section. We will explain the effect of TACA's status where appropriate.

B. Racketeering Activity [FN74]

FN74. Racketeering activity is defined in relevant part as: (A) state law felonies; (B) acts indictable under several sections of 18 U.S.C. relating to, e.g., bribery (§ 201), embezzlement from pension and welfare funds (§ 664), mail fraud (§ 1341), wire fraud (§ 1343); (C) acts indictable under sections of 29 U.S.C. including violations of restrictions on payments and loans to labor organizations (§ 186) and embezzlement from union funds (§ 501(c)); and (D) offenses involving fraud under Title 11, in the sale of securities, etc. 18 U.S.C. § 1961(1).

1. The Extortion Claim

[14] As one of the predicate acts of racketeering activity, the pilots claimed that TACA, ALPA and Huttinger committed extortion in violation of Louisiana state law [FN75] and 18 U.S.C. § 1951. [FN76] In support of these claims, the pilots alleged that Padgett, at the direction of Huttinger and ALPA, committed acts of sabotage against TACA aircraft and equipment to coerce concessions during negotiation of the collective bargaining agreement.

FN75. The particular provision of Louisiana state law that was violated is not specified in the RICO case statement or the trial court's opinion.

FN76. 18 U.S.C. § 1951 Interference with commerce by threats or violence. "(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than \$10,000 or imprisoned not more than twenty years, or both."

We agree with the trial court that these acts may not properly be considered predicate acts. The pilots did not allege that these extortionate acts were committed in the establishment or conduct of the affairs of an enterprise. If anything, they could only have been hostile to the goals of an alleged enterprise of which TACA and ALPA were both members. [FN77] Finally, the acts of sabotage are not actionable because the pilots did not allege or show that they sustained any injury as a result. [FN78] In fact, *427 the sabotage, under the theory advanced by pilots, was intended to provide the pilots with an advantage in the form of bargaining concessions. It was not intended to deprive them of any rights.

FN77. This claim could not properly be raised under the ALPA-as-Enterprise theory in connection with the § 1962(c) claim since ALPA is not properly a defendant for that claim. See supra notes 68-70 and accompanying text.

FN78. R.A.G.S. Couture, Inc. v. Hyatt, 774 F.2d 1350, 1354 (5th Cir.1985) ("Any injury to business or property caused by a violation of 18 U.S.C. § 1962(c) is sufficient.") (Emphasis added). The Fifth Circuit derived this rule from Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 495, 105 S.Ct. 3275, 3284, 87 L.Ed.2d 346, 358 (1985), which held, If the defendant engages in a pattern of racketeering activity in a manner forbidden by these provisions, and the racketeering activities injure the plaintiff in his business or property, the plaintiff has a claim under § 1964(c).

2. The 29 U.S.C. § 186 Violation

The pilots alleged that ALPA made illegal

payments to a labor official in violation of 29 U.S.C. § 186, which is section 302 of the LMRA. [FN79] In support of their claim, they provide the following facts. Huttinger suffered from a disability which prevented him from flying. The result of this should have been his removal from active status in late 1984, five years after he became disabled. Once removed from active status, he would not have been entitled to sick leave, to be on the priority list, or to represent ALPA in its negotiations with TACA. Yet Huttinger stayed on the seniority list, received sick leave benefits, represented ALPA in its negotiations with TACA, and received a \$26,000 severance payment.

FN79. 29 U.S.C. § 186 provides: (a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value--(1) to any representative of any of his employees who are employed in an industry affecting commerce; or (2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or (3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or (4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization. (b)(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

[15][16] There is no factual issue to be resolved regarding these allegations for two

reasons. First, ALPA has produced affidavits and documents that we find establish as a matter of law that under its constitution and by-laws, Huttinger was properly on the "active" status list and therefore entitled to all the privileges of ALPA membership including the right to vote and hold office. Since the pilots presented no evidence to rebut this, ALPA has shown the absence of a material fact issue in this respect. Second, the LMRA makes it illegal for an employer to pay or lend money to a union that represents its employees and for the union to receive or demand such payments. However, the LMRA excludes from coverage RLA employers and employees. [FN80] Airlines and airline pilots come under the RLA. [FN81]

FN80. 29 U.S.C. §§ 142(3), 152(2), (3); see also *United States v. Davidoff*, 359 F.Supp. 545, 547-48 (E.D.N.Y.1973).

FN81. 45 U.S.C. § 182.

In response to the seemingly conclusory statutory disposition of this issue, pilots raise a subtle argument. Their theory is that TACA, ALPA, and Huttinger contractually converted themselves from RLA to LMRA coverage through the agreement by which TACA was relocated to El Salvador and the pilots were terminated. The district court rejected this argument, finding that TACA was not relieved of RLA obligations until September 1, 1985 which was after any enterprise that may have existed was dissolved. We agree that TACA was an RLA employer when the alleged LMRA violations occurred. Although TACA is not a RICO defendant, we must reach this issue to determine the status of Huttinger and ALPA, who were likewise subject to the RLA. Thus no predicate racketeering act is stated.

3. The Mail and Wire Fraud Claims

The pilots have described four acts which they allege constituted mail fraud and *428 therefore predicate acts for RICO. (1) On July 3, 1985 Huttinger wrote the pilots to say negotiations between ALPA and TACA had broken down. He said that regardless of the

outcome of the negotiations, TACA would have to contribute to the pension plan. TACA has not continued its contributions to the plan. (2) On July 24, 1985 Huttinger sent a letter and telegram to the pilots saying that TACA and ALPA had reached an agreement "subject to ratification." Pilots were not given the chance to ratify the agreement. (3) On August 3, 1985 TACA sent a letter to the pilots informing them that ALPA had agreed to the relocation of the pilot base to El Salvador. The pilots were given twelve days to decide to leave TACA and take severance pay or to move themselves and their families to El Salvador. This communication did not inform the pilots that their retirement fund would be terminated or that they needed to take certain actions to protect their eligibility to receive benefits. Pilots later learned that they had lost their right to receive benefits. (4) The pilots allege that illegal payments of severance pay and retirement benefits were made and are being made by mail to Huttinger in furtherance of the scheme to defraud the pilots.

The trial court disregarded the final allegation (No. (4)) on the grounds that it had not been pleaded with sufficient particularity to withstand F.R.Civ.P. 9(b). [FN82] It apparently found that the other allegations of mail fraud were insufficient, based upon its general finding that the alleged acts predated any possible enterprise.

FN82. This is discussed infra; see text accompanying notes 92-93.

[17] We disagree with the trial court's characterization of the timing. These alleged acts of mail and wire fraud occurred during the negotiation process. ALPA was continuously in existence throughout this time so any acts that occurred or were alleged took place during the existence of the "ALPA-as-enterprise" enterprise.

[18] The crime of mail fraud is committed when the mails are used as part of a scheme or artifice to defraud. [FN83] The elements of mail fraud as a predicate offense for civil RICO purposes are:

FN83. 18 U.S.C. § 1341. Frauds and Swindles. Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, ... for the purpose of executing such scheme or artifice or attempting to do so, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than \$1,000 or imprisoned not more than five years, or both.

- (1) A scheme or artifice to defraud or to obtain money or property by means of false or fraudulent pretenses, representation or promises.
- (2) Interstate or intrastate use of the mails for the purpose of furthering or executing the scheme or artifice to defraud.
- (3) The use of the mails by the defendant connected with the scheme artifice [sic] to defraud.
- (4) Actual injury to the business or property of the plaintiff. [FN84]

FN84. 1 D. McCormack, *Racketeer Influenced Corrupt Organizations* 4-46-4-47 (Knowles Law Book Publishing, Inc. 1989).

The mail fraud statute proscribes two different offenses. The first is acting pursuant to a scheme or artifice to defraud. The second is acting pursuant to a scheme or artifice for the purpose of obtaining money or property by means of false or fraudulent pretenses, representations or promises. [FN85] Plaintiffs have alleged both types of schemes in this case.

FN85. *Id.* at 4-47, citing, *United States v. Margiotta*, 688 F.2d 108, 121 (2d Cir.1982), cert. denied, 461 U.S. 913, 103 S.Ct. 1891, 77 L.Ed.2d 282 (1983) ("The prohibition against schemes or artifices to defraud is properly interpreted to be independent of the clause 'for obtaining money or property.' ") (Citations omitted); see also *United States v. Townley*, 665 F.2d 579, 585 (5th Cir.),

901 F.2d 404
(Cite as: 901 F.2d 404, *428)

cert. denied, 456 U.S. 1010, 102 S.Ct. 2305, 73 L.Ed.2d 1307 (1982); McLendon v. Continental Group, Inc., 602 F.Supp. 1492, 1507 (D.N.J.1985).

*429 [19] First, they allege that TACA and Huttinger operating through and with the enterprise ALPA, schemed to achieve the relocation of TACA's pilot base to El Salvador. [FN86] Each of the participants had individual motivations for wishing the achievement of this end, but they all required the success of this common goal. In order to achieve their end, TACA, ALPA and Huttinger participated in a scheme to defraud the pilots of their jobs and pension benefits. [FN87] Reading the facts in the light most favorable to the pilots, the following steps could have occurred as part of this plan to defraud. The pilots were sent letters telling them that the plan would not be touched and was not a subject of the negotiations between TACA and ALPA. They were told that the agreement ultimately reached was "subject to ratification." They were not told that the agreement which was reached, and which actually did not require ratification by the membership, terminated their pension benefits at the time they had to decide between quitting (for severance pay) and relocating to El Salvador.

FN86. The pilots also alleged that the association-in-fact enterprise of ALPA, TACA, and Huttinger, which we find did not exist, had this goal.

FN87. The pilots have sufficiently alleged an intent to defraud, but even in the absence of such a showing, the intent to defraud is imputed to civil RICO defendants who act with reckless indifference to the truth or falsity of their representations. *United States v. Frick*, 588 F.2d 531, 536 (5th Cir.), cert. denied, 441 U.S. 913, 99 S.Ct. 2013, 60 L.Ed.2d 385 (1979); see also *United States v. Love*, 535 F.2d 1152, 1158 (9th Cir.), cert. denied, 429 U.S. 847, 97 S.Ct. 130, 50 L.Ed.2d 119 (1976); *United States v. Beecroft*, 608 F.2d 753, 757 (9th Cir.1979). If the misrepresentations, omissions and false promises alleged here were not intentional, then they were certainly reckless. The RICO defendants correctly state that under the mail fraud statute, the determination of what constitutes

fraud is left largely to outside sources of law. *Parr v. United States*, 363 U.S. 370, 389, 80 S.Ct. 1171, 1182, 4 L.Ed.2d 1277, 1289 (1960). They are incorrect, however, in their position that such fraud must be found in the pilots' DFR, ERISA, LMRA, or conversion claims. Clearly the state common law of fraud may provide a source of substantive law and the allegations are sufficient to support such a claim having been made.

These misrepresentations, omissions [FN88] and false promises may have initially lulled the pilots into inaction. Based on these communications, they thought that Huttinger and ALPA were protecting their interests and they had no reason to question the system. Pilots allege that this correspondence ultimately had the effect of defrauding them of their jobs and pension benefits. TACA was able to relocate; ALPA was not prosecuted and was able to drop its representation of the TACA pilots; Huttinger received severance and retirement benefits. Only the pilots lost out. The intentional misrepresentations and omissions could have created a valuable undue advantage for TACA, ALPA and Huttinger [FN89] and thus constituted a scheme or artifice to defraud. [FN90]

FN88. See *United States v. Beecroft*, 608 F.2d 753, 757 (9th Cir.1979) (both communication of half truths and concealment of material facts are actionable under the mail fraud statute).

FN89. Although we have referred to TACA's goals and the benefits it received, they are not necessary. The fact issues with regard to ALPA and Huttinger are sufficient to state the claim.

FN90. *United States v. Rasheed*, 663 F.2d 843, 849 (9th Cir.1981), cert. denied, 454 U.S. 1157, 102 S.Ct. 1031, 71 L.Ed.2d 315 (1982).

Additionally, the defendants allegedly sought to obtain money or property by means of false or fraudulent pretenses, representation or promises. These are seen in their asserted motivations for their common goal of effecting the relocation and the benefits each received as a result. ALPA would save money by ridding itself of a small, yet costly, local union. It would also avoid

the expense of defending against civil cases and criminal charges based on its alleged sabotage of TACA's planes. Huttinger would gain his severance pay and pension benefits. [FN91]

FN91. Because he retired at the appropriate time, Huttinger qualified for pension benefits. However, the pension plan was underfunded and could not afford to pay full benefits to all the pilots eligible for retirement under the plan. Thus, one could infer from the undisputed facts that once Huttinger began receiving payment under the plan, or realized he could qualify for benefits and preempt any other pilots from doing so, he had an incentive to provoke the relocation, thereby denying the other pilots the opportunity to prove their eligibility. Even before he began to receive retirement payments, Huttinger had an incentive to keep the pilots in ignorance of the effect a termination would have and of their rights under the plan. As chairman of the pension committee, he was in the perfect spot to have all the information needed to protect his interest and at the same time to know what information he should not disseminate in order to protect that interest against diminution by the claims of all the eligible pilots.

*430 Only ALPA has controverted the goals, outlined above, which pilots have asserted. In an unchallenged affidavit ALPA has stated that the cost of representing the TACA pilots was not a factor in its negotiating strategy or posture. We point out that ALPA has not said exactly what it was trying to accomplish on behalf of the pilots. ALPA also has not denied that it was threatened with criminal prosecution and civil damage suits. In light of the remaining undisputed facts and the inferences therefrom, we find that mail fraud has been sufficiently alleged to create genuine factual issues regarding predicate acts of racketeering activity.

We also disagree with the trial court's disposition of the allegations of mail fraud in connection with Huttinger's receipt of pension benefits. F.R.Civ.P. 9(b) requires that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." However, Rule 9(b) is read in connection with F.R.Civ.P.

8 which requires only a "short and plain statement of the claim showing that the pleader is entitled to relief." [FN92] The pilots have certainly pleaded sufficient facts to put the defendants on notice of their claim with regard to Huttinger's receipt of pension benefits. As early as the Original Complaint, [FN93] the pilots alleged that Huttinger had breached his duty of fair representation, a fiduciary duty, by agreeing to the structuring of the termination agreement in such a way that Huttinger's pension would be funded, but no one else's. Additionally, in the amended complaint, the pilots alleged that Huttinger applied for and is receiving pension benefits and that this was in connection with the scheme to defraud the pilots.

FN92. F.R.Civ.P. 8(a)(2); see *Ross v. A.H. Robins Co.*, 607 F.2d 545, 557 n. 20 (2d Cir.1979), cert. denied, 446 U.S. 946, 100 S.Ct. 2175, 64 L.Ed.2d 802 (1980) ("The requirement of particularity does not abrogate Rule 8, and it should be harmonized with the general directives ... of Rule 8 that the pleading should contain a 'short and plain' statement of the claim or defense and with each averment should be 'simple, concise and direct.' Rule 9(b) does not require nor make legitimate the pleading of detailed evidentiary matter.") (Citations omitted).

FN93. The claims alleged in the original complaint were dismissed before the RICO claim was addressed by the trial court. The factual allegations contained in the Original Complaint are relevant to the RICO claim, however, because the Amended Complaint incorporates them all by reference.

Finally, in the RICO Case Statement, the pilots spent a great deal of time detailing their factual allegations regarding Huttinger's receipt of pension funds. They alleged, in pertinent part, that Huttinger and ALPA bargained away TACA's obligation to continue funding the pension plan in return for TACA's agreement not to bring civil or criminal charges against ALPA for the acts of espionage described, supra. Huttinger was aware that this left the plan underfunded and that not all pilots would be able to receive their pension benefits. The pilots claimed

that Huttinger intentionally failed to inform them of their right to apply for early retirement or of the fact that if they did not apply for benefits prior to the termination of funding, they would not be entitled to receive any benefits. Thus, the pilots argued that, in manifest abuse of his fiduciary position, Huttinger assured himself of his own benefits by keeping those he represented in the dark. We cannot conceive of how the defendants failed to be put on notice of the claim with the amount of detail that was provided. We find that the pilots have alleged with particularity the defendants' acts which they contend amount to fraud. [FN94]

FN94. See *Unimobil 84, Inc. v. Spurney*, 797 F.2d 214, 217 (5th Cir.1986).

***431 4. Violation of 18 U.S.C. § 664 [FN95]**

FN95. 18 U.S.C. § 664 Theft or embezzlement from employee benefit plan: Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use or to the use of another, any of the moneys, funds, securities, premiums, credits, property, or other assets of any employee welfare benefit plan or employee pension benefit plan, or of any fund connected therewith, shall be fined not more than \$10,000, or imprisoned not more than five years, or both.

[20] Pilots allege that Huttinger's receipt of retirement benefits is a violation of 18 U.S.C. § 664. The trial court did not address this issue, finding that pilots had not pleaded the issue in its Original or Amended Complaints. We disagree, finding the allegation at Paragraph 39 of the Amended Complaint where pilots said: "On information and belief, ... TACA and Charles J. Huttinger converted money and funds of the TACA pilot's employee benefit plan for their own uses." Additionally, the trial court found that pilots had adduced no evidence on this claim since the only relevant affidavit was not based on personal knowledge. We deal with this finding below.

Pilots have not directly shown, by affidavit or otherwise, what acts constituted conversion, who committed these acts, when the acts were

done, or by whom. However, it is clear, in connection with pilots' other factual allegations, that they are referring to Huttinger's receipt of retirement benefits.

The Ninth Circuit dealt extensively with § 664 liability in *United States v. Andreen*, 628 F.2d 1236 (9th Cir.1980). The terms in the statute are to be given their traditional meanings. Thus, "[t]he concept of unlawful conversion encompasses the use of property, placed in one's custody for a limited purpose, in an unauthorized manner or to an unauthorized extent." [FN96] Embezzlement "encompasses the fraudulent appropriation of the property of another by one in lawful possession thereof." [FN97] The statute encompasses more than traditional embezzlement and unlawful conversion, however, and imposes liability for intentional breaches of special fiduciary duties imposed by other statutes or the instruments governing the trust. [FN98]

FN96. *Id.* at 1241, citing, *Morissette v. United States*, 342 U.S. 246, 272, 72 S.Ct. 240, 254, 96 L.Ed. 288 (1952).

FN97. *Id.*, citing, *United States v. Dupee*, 569 F.2d 1061, 1064 (9th Cir.1978).

FN98. *Id.*

The RICO defendants argue that pilots have not stated a predicate act here because they have shown neither scienter, [FN99] nor that Huttinger's receipt of pension benefits was "substantially inconsistent with the fiduciary purposes and objectives of the ... pension plan, as set forth by statutes, bylaws, charters, or trust documents which govern uses of the funds in question." [FN100]

FN99. *Id.* Scienter is an essential element of a § 664 violation.

FN100. Brief of ALPA and Huttinger at 36-37, citing, *United States v. Andreen*, 628 F.2d 1236, 1241 (9th Cir.1980).

We state once again that pilots' burden in response to the motions for summary

judgment was not to prove its case, but to show the existence of genuine and material fact issues regarding its essential elements. The RICO defendants have not produced any evidence negating the scienter element. They have not demonstrated that Huttinger did not act willfully, that is "with a fraudulent intent or a bad purpose or an evil motive." [FN101] Since the movants have not shown the absence of any disputed fact issues in this regard, they have failed to meet their burden. Thus the allegations in the pilots' Complaints stand and remain for resolution on remand.

FN101. *Id.*

The fact that pilots have made allegations which the RICO defendants refute in brief but not with facts, by way of affidavit evidence or otherwise, shows that factual issues remain to be resolved. The only way movants could prevail on this aspect of their summary judgment motion is by a legal finding that Huttinger did not breach any fiduciary duties under ERISA or 29 *432 U.S.C. § 501. [FN102] As we found above that Huttinger clearly did breach fiduciary duties, [FN103] the factual issues remain to be resolved.

FN102. Pilots allege that Huttinger breached the fiduciary duties imposed by ERISA and those created by 29 U.S.C. § 501. The ERISA claims are dealt with, *supra*, 29 U.S.C. § 501. Fiduciary responsibility of officers of labor organizations: (a) The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person ... to hold its money and property solely for the benefit of the organization and its members....

FN103. See *supra*, ERISA portion of opinion.

C. Pattern

The United States Supreme Court has recently revised and "clarified" the definition of pattern in the RICO statute. In *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989), the Supreme Court rejected the Eighth

Circuit's "multiple scheme" requirement and also disagreed with "those courts that have suggested that a pattern is established merely by proving two predicate acts." [FN104] The Fifth Circuit has explicitly recognized that *H.J. Inc.* narrowed the definition of pattern from that previously used in this circuit. [FN105] Thus prior Fifth Circuit precedent, and those cases cited by the parties, are of little assistance to us.

FN104. *H.J., Inc.*, 492 U.S. at ----, 109 S.Ct. at 2899, 106 L.Ed.2d at 206.

FN105. *Smith v. Cooper/T. Smith Corp.*, 886 F.2d 755, 756 (5th Cir.1989). The prior Fifth Circuit pattern requirement was described in *R.A.G.S. Couture, Inc. v. Hyatt*, 774 F.2d 1350, 1355 (5th Cir.1985) (holding that two "related" acts of mail fraud constitute a pattern).

In *H.J. Inc.*, the Supreme Court found that RICO's legislative history reveals Congress' intent that to prove a pattern of racketeering activity a plaintiff or prosecutor must show that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity. [FN106]

FN106. *H.J. Inc.*, 492 U.S. at ----, 109 S.Ct. at 2900, 106 L.Ed.2d at 208. The relationship element has been defined by borrowing from a related statute. "[C]riminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission or otherwise are interrelated by distinguishing characteristics and are not isolated events." [FN107] The Supreme Court found the definition of continuity more difficult, and opted for a flexible approach that they believe derives from a common everyday understanding of RICO.

FN107. *Id.* The definition of relationship thus adopted is the pattern definition from Title X of the Organized Crime Control Act (OCCA), which is the Dangerous Special Offender Sentencing Act, 18 U.S.C. § 3575, et seq. RICO forms Title IX of the OCCA.

What a plaintiff or prosecutor must prove is continuity of racketeering activity, or its

threat, simpliciter.... "Continuity" is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition.... It is, in either case, centrally a temporal concept-and particularly so in the RICO context, where what must be continuous, RICO's predicate acts or offenses, and the relationship these predicates must bear to one another, are distinct requirements. [FN108]

FN108. Id., 492 U.S. at ---, 109 S.Ct. at 2901, 106 L.Ed.2d at 209. The Court went on to clarify how "continuity" may be proved. A party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time. Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement: Congress was concerned in RICO with long-term criminal conduct. Often a RICO action will be brought before continuity can be established in this way. In such cases, liability depends on whether the threat of continuity is demonstrated.

*433 [21] The relationship element is easily satisfied here by pilots' allegations. First, all of the predicate acts were aimed at achieving a single goal-relocation of the pilots' base to El Salvador. Only through the accomplishment of this goal could all of the RICO defendants' subsidiary goals be accomplished. Second, we find the participants were the same: ALPA and Huttinger. Third, the victims were the same: the pilots. Finally, the events are in no way isolated, but are related in the sense that they all occurred or commenced during or grew out of the process of negotiating TACA's relocation program. The RICO defendants have put on some evidence that might negate the first element. For example, they have showed that ALPA's actions were not motivated by a desire to rid itself of a small, costly union. They have not, however, rebutted the allegation that ALPA gave in to TACA to avoid prosecution for its sabotage activities. Likewise, they have tried to show that Huttinger's receipt of pension benefits

was proper from the standpoint of FBA. They have not, however, removed factual disputes regarding the propriety of Huttinger's activities or his goals.

In sum, pilots have alleged relationship. The RICO defendants' affidavits and submissions do not "show that there is no genuine issues as to any material fact" in this regard. F.R.Civ.P. 56(c). Thus, on remand, the trial court must determine whether the relationship element of the pattern requirement is met.

We find that the continuity element of the pattern requirement is disposed of by our prior discussion of the RICO person requirement. There we found the existence of factual issues regarding the threat of continued racketeering activity by these defendants/appellees. At least some of the racketeering acts that threaten to continue are related under the test applied above and for the same reasons.

D. Enterprise

Pilots have developed two alternative theories of the enterprise. The above discussion has made reference to these separate claims where necessary, and they will be dealt with in detail here.

1. "Association-in-Fact" Enterprise

[22][23] An association-in-fact enterprise must also meet a continuity requirement. Such an enterprise "(1) must have an existence separate and apart from the pattern of racketeering, (2) must be an ongoing organization and (3) its members must function as a continuing unit shown by a hierarchical or consensual decision making structure." [FN109] We find that the association-in-fact enterprise, if it ever existed, was one that "briefly flourished and faded" and therefore fails to meet the requirement that it function as a continuing unit. We do not believe this to be inconsistent with our findings of fact issues regarding continuity in the RICO person and the pattern requirements. There the threat was sufficient if it came from an individual.

Here pilots were required to show that the enterprise as a whole functioned as a continuing unit. In a case like this, where the enterprise's goals have been accomplished, and where those goals were achieved in a matter of months, through a discrete pattern of activity, there is no continuity.

FN109. *Delta Truck & Tractor, Inc. v. J.I. Case Co.*, 855 F.2d 241, 243 (5th Cir.1988), cert. denied, 489 U.S. 1079, 109 S.Ct. 1531, 103 L.Ed.2d 836 (1989), citing, *Manax v. McNamara*, 842 F.2d 808, 811 (5th Cir.1988); *Foval v. First Nat'l Bank of Commerce*, 841 F.2d 126, 129-30 (5th Cir.1988); *Montesano v. Seafirst Commercial Corp.*, 818 F.2d 423, 426-27 (5th Cir.1987); *Atkinson v. Anadarko Bank & Trust Co.*, 808 F.2d 438, 440-41 (5th Cir.1987), cert. denied, 483 U.S. 1032, 107 S.Ct. 3276, 97 L.Ed.2d 780 (1987); *Shaffer v. Williams*, 794 F.2d 1030, 1032 (5th Cir.1986).

In addition, pilots have not alleged or shown the existence of an enterprise separate and apart from the pattern of racketeering activity. [FN110] It appears that once the "Pilots' Agreement" was reached, and the follow-up acts-such as obtaining the pilots' severances and terminating ALPA *434 representation-had occurred, the enterprise ceased to exist. In reality, the association of ALPA and Huttinger had no alleged purpose other than to commit the predicate acts leading up to the relocation.

FN110. See *Ocean Energy II v. Alexander & Alexander, Inc.*, 868 F.2d 740, 748-49 (5th Cir.1989), citing, *Montesano v. Seafirst Commercial Corp.*, 818 F.2d 423, 427 (5th Cir.1987).

2. ALPA as Enterprise

[24] The pilots' second enterprise theory sees ALPA as the legal enterprise which was a vehicle for racketeering activities by TACA and Huttinger. [FN111] There is no question that ALPA itself satisfies § 1961(4)'s definition of enterprise: "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact

although not a legal entity." ALPA was continuously in existence throughout the period when the alleged predicate acts occurred. It remains in existence today. Thus this district court erred in not finding an enterprise under this theory.

FN111. ALPA's position as a defendant under this theory is discussed, *supra* at Part IV.A.1.

E. RICO Conclusion

We have found that TACA is not an appropriate RICO defendant because pilots did not allege that it constitutes a continuing threat. ALPA is a RICO defendant only for purposes of the § 1962(b) violation; it cannot be both the enterprise and a defendant for purposes of the § 1962(c) claim. Huttinger is properly a RICO defendant as to all of pilots' claims.

With regard to the alleged predicate acts of racketeering activity, we have affirmed the trial court in some regards and reversed in others. We agree with the trial court that the extortion claim was not properly alleged nor supported by the record. The 29 U.S.C. § 186 claim cannot stand because RLA employers and employees, as a matter of law, are not subject to this provision of the LMRA. We reverse the trial court's decision with respect to the mail and wire fraud claims. There are genuine issues of material fact. Finally, we find that the summary judgment movants have not met their burden of showing the absence of factual disputes regarding Huttinger's alleged embezzlement or conversion. Thus pilots' allegations remain to be resolved on remand.

The Supreme Court's recent decision in *H.J., Inc.* holds that in order to prove a pattern of racketeering activity, the RICO plaintiff must show both relationship and continuity. We affirm the trial court's holding that a pattern was properly alleged under this new test. The increased complexity of the new test requires that we remand this issue for resolution of material factual disputes.

Finally, we affirm in part and reverse in

part the trial court's holding that there was no enterprise alleged. We agree that there was no "association-in-fact" enterprise alleged because pilots could not show the requisite continuity. However, we hold that the pilots properly alleged that ALPA is a RICO enterprise.

V. Discovery Issues

The pilots filed an amended complaint setting forth a RICO claim on April 6, 1987 and a RICO Case Statement, required by the district court's standing order, on August 25, 1987. At no time in this interval did the pilots seek discovery. ALPA, TACA and Huttinger moved for summary judgment on the RICO claims and those motions were set for hearing on October 21, 1987. After the motions were set for argument, the pilots requested and received a "courtesy" continuance [FN112] postponing the hearing until December 2, 1987. Once they had the continuance, pilots noticed the depositions of Huttinger, FBA and Captain Donald Scott for the last week in October.

FN112. We adopt this term to refer to an unopposed continuance motion signed by the trial court.

TACA, ALPA and Huttinger moved for protective orders pursuant to F.R.Civ.P. 26(c) and (d) to prevent the taking of these depositions prior to the resolution of the summary judgment motions. The hearing on the summary judgment motions was again continued so that the requests for protective orders could be heard. At ALPA's request the depositions were rescheduled *435 to mid-December. The trial court granted the protective order staying discovery pending its decision on the summary judgment motions. Eventually, the summary judgment motions were granted on March 17, 1988, with no discovery having been taken.

In its order, the trial court stayed discovery pursuant to F.R.Civ.P. 26(c) "for good cause." It found that many of the issues raised by the summary judgment motions were purely legal and that discovery would therefore not aid

their resolution. As to the factual issues presented by the motion, the trial court ruled that "the plaintiffs have failed to identify with the requisite specificity of F.R.Civ.P. 56(f) the issues which must be amplified by discovery."

F.R.Civ.P. 56(f) provides that:
Should it appear from the affidavits of a party opposing the [summary judgment] motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

[25][26] However, what existed below was not a Rule 56(f) motion. In the typical 56(f) case, a nonmovant submits affidavits and requests additional time to conduct discovery to enable him to respond to a summary judgment motion. In the case at bar, a continuance was granted. In the time thus created before the hearing on the motions, the pilots sought discovery to enable them better to respond. In the ordinary course of events this discovery would have been freely allowed, even unquestioned. However, in this case, the summary judgment movants, ALPA, TACA and Huttinger, moved the court for a Rule 26(c) protective order to prevent the taking of the depositions. Thus the burden was on ALPA, TACA and Huttinger to show why a protective order was warranted. The burden was not on the pilots, other than in rebuttal, to show why the discovery was needed. [FN113] Although the trial court applied the wrong standard and placed the burden on the wrong party, we find that it reached the correct result.

FN113. Had pilots sought a continuance for purposes of obtaining summary judgment evidence, the burden would have been on them to demonstrate "how postponement of a ruling on the motion [would] enable [them], by discovery or other means, to rebut the movant's showing of the absence of a genuine issue of fact." S.E.C. v. Spence & Greene, 612 F.2d 896, 901 (5th Cir.1980), citing, Willmar Poultry Co. v. Morton-

Norwich Products, Inc., 520 F.2d 289, 297 (8th Cir.1975), cert. denied, 424 U.S. 915, 96 S.Ct. 1116, 47 L.Ed.2d 320 (1976). However, as we have stated, supra, no Rule 56(f) motion was filed. Pilots had already received the continuance order when they noticed the depositions. Pilots had a rebuttal burden, but no burden to make a prima facie showing of need. We acknowledge that pilots filed a Rule 56(f) affidavit in response to the motions for protective orders. This was an inappropriate response on their part. Pilots did not have the burden to make a Rule 56(f) showing to counter the Rule 26(c) motions.

"Upon motion by a party or by the person from whom discovery is sought, and for good cause shown," a district court is authorized to "make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." F.R.Civ.P. 26(c). In their motions for protective orders, the defendants gave several reasons why this discovery was not needed prior to the resolution of the summary judgment motions which, if granted, would preclude the need for the discovery altogether. They correctly stated that no discovery was needed to resolve the motions to dismiss under F.R.Civ.P. 12(b)(6). Such motions are decided on the face of the complaint. Defendants also argued that the summary judgment motions could be decided as a matter of law on the basis of the undisputed facts already before the court. They alleged that the timing of the depositions--coming as they did after the grant of a courtesy continuance to respond to the motions--was evidence of bad faith. Finally, they argued that since the discovery was not needed to resolve the summary judgment motions--and thus perhaps *436 not needed at all--the depositions would be unduly expensive and burdensome.

We find that by these arguments ALPA, TACA and Huttinger met their burden of showing, prima facie, why a protective order was warranted--that is, why the discovery sought would be unduly burdensome and expensive. Thus the burden reverted to the pilots, on rebuttal, to show a need for the depositions such that their burden and

expense would not be "undue." Pilots did respond. They argued that the case was still in a "preliminary stage" given the complexity of the legal issues involved and that they had "always contemplated discovery" but that the "early motions of the defendants simply required none." Also they pointed to the fact that no pretrial discovery deadline had been set.

The protective order suspended activity until a decision could be made on the summary judgment motion. The trial court sought to resolve an issue that might preclude the need for the discovery altogether thus saving time and expense. [FN114] In response to the movants' showing, the pilots failed to show the protective order was unwarranted. They asserted no facts they hoped to adduce, no genuine issues of material fact they hoped to create, no showing they hoped to rebut. In fact pilots said they had sufficient evidence to defeat the summary judgment motions and sought discovery only to obtain "better" evidence.

FN114. Trial courts possess broad discretion to supervise discovery. *Pan-Islamic Trade Corp. v. Exxon Corp.*, 632 F.2d 539, 550 (5th Cir.1980), cert. denied, 454 U.S. 927, 102 S.Ct. 427, 70 L.Ed.2d 236 (1981).

We find that pilots' showing was insufficient. "[A] plaintiff's entitlement to discovery prior to a ruling on a motion for summary judgment is not unlimited and may be cut off when the record shows that the requested discovery is not likely to produce the facts needed by [the party] to withstand a Rule 56(e) motion for summary judgment." [FN115]

FN115. *Williamson v. United States Dept. of Agriculture*, 815 F.2d 368, 382 (5th Cir.1987), citing, *Paul Kadair, Inc. v. Sony Corp. of America*, 694 F.2d 1017, 1029-30 (5th Cir.1983).

Discovery is not justified when cost and inconvenience will be its sole result. [FN116] On the record before it, the trial court had to reach the decision that it did reach. The procedural posture of the case and the

showings of the parties left it little choice. Whether the trial judge surmised that pilots would not be able to defeat the summary judgment motions or whether he, like us, saw sufficient disputed facts to preclude summary judgment is irrelevant. Under the circumstances, there was no abuse of discretion in the order staying discovery until the summary judgment motions were resolved. [FN117]

FN116. See *Washington v. Norton Manufacturing, Inc.*, 588 F.2d 441, 447 (5th Cir.1979), cert. denied, 442 U.S. 942, 99 S.Ct. 2886, 61 L.Ed.2d 313 (1979) (discovery properly denied where it "could not have added any significant facts and would only have been expensive and burdensome ..."); *Wyatt v. Kaplan*, 686 F.2d 276, 284 n. 15 (5th Cir.1982) (clarifying *Washington*).

FN117. See *Scroggins v. Air Cargo, Inc.*, 534 F.2d 1124, 1133 (5th Cir.1976) (no abuse of discretion in limiting discovery to issues raised by the summary judgment motions, although "the situation would be quite different if plaintiff had been denied discovery which related to the summary judgment motion").

Of course our finding that the stay of discovery was not an abuse of discretion has no effect as to those matters remanded. The parties are entitled to the full scope of discovery generally available during preparation for trial.

VI. Conclusion

Our opinion affirms in part, reverses in part, and remands in part.

We affirm the trial court's holding that pilots' labor law claims were barred by the statute of limitations.

As for ERISA, we reverse the trial court's holding that the Plan was not in effect until April 15, 1985. On remand, we instruct the court to accept as a matter of law that the Plan was in effect on February 1, 1982.

We reverse the court's holding that there were no genuine issues of material fact as to

whether ALPA, TACA, or Huttinger had *437 any fiduciary duties under the Plan. On remand, we instruct the court to determine whether ALPA, TACA, or Huttinger had any fiduciary duties with respect to the ERISA-based wrongs alleged in the complaint. We also find as a matter of law that Huttinger had a fiduciary duty to disclose information about the Plan when asked.

On the RICO issues, we affirm the trial court's holdings that: (i) TACA is not a RICO defendant; [FN118] (ii) pilots have not properly alleged extortion or a violation of 29 U.S.C. § 186 as predicate acts; (iii) a pattern of racketeering activity was alleged; and (iv) no association-in-fact enterprise existed.

FN118. We also find that ALPA is not a RICO defendant for purposes of the § 1962(c) claim.

We reverse the trial court and hold that ALPA was a RICO enterprise. Finally, we find that genuine issues of material fact exist with regard to the following allegations made by the pilots: (i) ALPA and Huttinger are RICO persons and thus appropriate RICO defendants; (ii) predicate acts of mail and wire fraud and an 18 U.S.C. § 664 violation occurred; (iii) a pattern of racketeering activity exists; and (iv) ALPA constitutes an enterprise for RICO purposes. Because we find that a genuine issue of material fact exists as to each of the elements essential to stating a valid RICO claim, we remand these issues to the trial court for proceedings not inconsistent with this opinion.

Lastly, we affirm the trial court's decision to grant a protective order staying discovery pending its summary judgment decision. Our affirmance of this order has no effect as to those matters remanded. We expect that discovery will proceed on a normal course at that time.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

ON PETITION FOR REHEARING

PER CURIAM:

[27] Defendants-Appellees Air Line Pilots Association, International (ALPA) and Charles J. Huttinger (Huttinger) petition this court for rehearing in our opinion, *Landry v. Air Line Pilots Association International AFL-CIO*, 901 F.2d 404 (5th Cir.1990). In *Landry*, we reversed the District Court's grant of summary judgment to ALPA and Huttinger. [FN1] Although we remanded the case to the District Court for a determination of several issues, we also entered findings against ALPA and Huttinger as to the following: (i) "we instruct the court on remand to accept as a matter of law that the [retirement plan for the plaintiffs-pilots] was in effect on February 1, 1982" *Landry*, at 417; and (ii) "we find as a matter of law that Huttinger had a fiduciary duty to disclose information about the Plan when asked." [FN2] *Landry*, at 420.

FN1. TACA International Airlines, S.A. was also a defendant in that action. TACA's petition for rehearing, however, has been denied.

FN2. We also inadvertently stated: "As we found above that Huttinger clearly did breach fiduciary duties, the factual issues [as to whether 18 U.S.C. § 664 was violated] remain to be resolved." TACA at 432. We intended to assert that "Huttinger clearly did possess fiduciary duties." Obviously, however, in light of our discussion herein, we no longer make any conclusive findings with respect to Huttinger's fiduciary duties, except to hold that a genuine issue of material fact exists as to whether or not he had any fiduciary duties. Factual issues also exist as to whether any fiduciary duties which Huttinger may have had were breached.

In their petition for rehearing, ALPA and Huttinger urge that on a motion for summary judgment, the Court's role "is not ... to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986); *Mozeke v. International Paper Co.*, 856 F.2d 722 (5th Cir.1988). This court went too fast in making findings against ALPA and Huttinger. Because they have never been placed on notice of any need or obligation to respond to any of plaintiffs' assertions (i.e., that a failure to

respond *438 could subject them to adverse factual findings or to adverse legal determinations predicated on such factual determinations), as, for example, they would have been had plaintiffs cross-moved for relief, the effect of entry of factual findings against ALPA and Huttinger under these circumstances deprived them of an opportunity to dispute the facts material to the plaintiffs' claims. *Fountain v. Filson*, 336 U.S. 681, 683, 69 S.Ct. 754, 755, 93 L.Ed. 971 (1949); *E.C. Ernst, Inc. v. General Motors Corp.*, 537 F.2d 105, 109 (5th Cir.1976).

Accordingly, we modify our earlier opinion to withdraw the two findings, *supra*. Instead, based on the evidence discussed in *Landry*, we now hold that there was a genuine issue of material fact as to whether (i) the retirement plan was in effect on February 1, 1982, and (ii) Huttinger had a fiduciary duty to disclose information about the plan when asked. On remand, after the parties have been given a full opportunity to discover and present the evidence, these issues are for determination by the trier of fact in accordance with our earlier opinion, *Landry v. ALPA*, 901 F.2d 404, as modified herein.

ALPA and Huttinger have also questioned our use of 29 U.S.C. § 501(a) in the portion of our opinion which holds that a fact issue exists as to whether there was a violation of 18 U.S.C. § 664 (a RICO predicate act). Section 501(a) imposes special fiduciary duties upon officers of labor organizations. As we stated in our opinion, see *Landry* at 431, text accompanying note 98, a breach of special fiduciary duties may be a violation of § 664. In order to clarify this holding, we insert the following text at the end of the existing footnote 102, *Landry* at 432:

We find that a fact issue exists as to whether Huttinger breached any of the fiduciary duties imposed by 29 U.S.C. § 501(a). As we state, *supra*, "intentional breaches of special fiduciary duties imposed by other statutes ..." then 18 U.S.C. § 664 may give rise to liability under 18 U.S.C. § 664.

With respect to ALPA and Huttinger's criticism of that portion of our footnote 87,

901 F.2d 404
(Cite as: 901 F.2d 404, *438)

Page 107

Landry at 429, which states that state law fraud may serve as a source of substantive law for the mail fraud claim and the question of pre-emption which they raise, we neither approve nor disapprove their position. The resolution of this issue must await the development of all the facts before the trier of fact.

In all other respects, the petition of ALPA and Huttinger for rehearing is denied.

901 F.2d 404, 134 L.R.R.M. (BNA) 2311, 115 Lab.Cas. P 10,090, RICO Bus.Disp.Guide 7490

END OF DOCUMENT

Supreme Court of Florida.

Donald RASMUSSEN, Petitioner,
v.
**SOUTH FLORIDA BLOOD SERVICE,
INC., Respondent.**

No. 67081.

Jan. 5, 1987.

AIDS victim served blood donation organization with subpoena requesting names and addresses of blood donors. The Circuit Court denied motion to quash subpoena, but the Third District Court of Appeal, 467 So.2d 798, reversed, and certified question of great public importance. The Supreme Court, Barkett, J., held that AIDS victim was not entitled to subpoena to assist him in proving that source of his disease was blood transfusions he received in medical treatment following automobile accident; privacy interests of blood donors and society's interest in maintaining strong volunteer blood donation system outweighed victim's interest, which could be protected under present discovery rules, pursuant to which method could be formulated to verify organization's report that none of the donors was known AIDS victim, while preserving confidentiality of donors' identities.

Third district decision approved.

Boyd, J., concurred in result only.

West Headnotes

Pretrial Procedure ⇌ **40**
307Ak40 Most Cited Cases

Pretrial Procedure ⇌ **382**
307Ak382 Most Cited Cases

Witnesses ⇌ **196.4**
410k196.4 Most Cited Cases
(Formerly 410k196)

AIDS victim was not entitled to subpoena duces tecum requiring blood donation

organization to provide him with names and addresses of blood donors in order to assist him in proving that source of his disease was blood transfusions he received in medical treatment following automobile accident; privacy interests of blood donors and society's interest in maintaining strong volunteer blood donation system outweighed victim's interest, which could be protected under present discovery rules, pursuant to which method could be formulated to verify organization's report that none of the donors was known AIDS victim, while preserving confidentiality of donors' identities.

*533 George C. Bender of Bender, Bender and Chandler, Coral Gables, for petitioner.

James E. Tribble and Diane H. Tutt of Blackwell, Walker, Fascell and Hoehl, Miami, for respondent.

*534 Richard J. Ovelmen, General Counsel, Miami, and Edward Soto of the Law Offices of Edward Soto, P.A., Miami, for The Miami Herald Pub. Co., amicus curiae.

David E. Willett of Hassard, Bonnington, Rogers and Huber, San Francisco, Cal., for American Ass'n of Blood Banks, amicus curiae.

Michael H. Cardozo, Washington, D.C., for American Blood Com'n, amicus curiae.

B.J. Anderson and Kirk Johnson, Chicago, Ill., for American Medical Ass'n, amicus curiae.

Karen Shoos Lipton, Asst. General Counsel, Washington, D.C., for American Nat. Red Cross.

H. Robert Halper and Christina W. Fleps of O'Connor and Hannan, Washington, D.C., for Council of Community Blood Centers, amicus curiae.

Roger G. Welcher of the Law Offices of Roger G. Welcher, and Betsy E. Gallagher and Gail L. Kniskern of Talburt, Kubicki, Bradley and Draper, Miami, for Dade County Medical

Ass'n, amicus curiae.

Thomas J. Guilday and Ralph A. DeMeo of Akerman, Senterfitt and Eidson, Tallahassee, for Florida Ass'n of Blood Banks, amicus curiae.

John Thrasher, Jacksonville, for Florida Medical Ass'n, amicus curiae.

Abby R. Rubinfeld, Managing Atty., Abraham L. Clott and Kevin Kopelson, Cooperating Attys., New York City, for Lambda Legal Defense and Educ. Fund, Inc., amicus curiae.

BARCKETT, Justice.

We have for review *South Florida Blood Service, Inc. v. Rasmussen*, 467 So.2d 798 (Fla. 3d DCA 1985). In that decision, the district court certified the following as a question of great public importance:

Do the privacy interests of volunteer blood donors and a blood service's and society's interest in maintaining a strong volunteer blood donation system outweigh a plaintiff's interest in discovering the names and addresses of the blood donors in the hope that further discovery will provide some evidence that he contracted AIDS from transfusions necessitated by injuries which are the subject of his suit?

Id. at 805 n. 13. We have jurisdiction. Art. V, § 3(b)(4), Fla.Const. We answer the question in the affirmative.

On May 24, 1982, petitioner, Donald Rasmussen, was sitting on a park bench when he was struck by an automobile. He sued the driver and alleged owner of the automobile for personal injuries he sustained in the accident. While hospitalized as a result of his injuries, Rasmussen received fifty-one units of blood via transfusion. In July of 1983, he was diagnosed as having "Acquired Immune Deficiency Syndrome" (AIDS) and died of that disease one year later. [FN1] In an attempt to prove that the source of his AIDS was the necessary medical treatment he received because of injuries sustained in the accident,

Rasmussen served respondent, South Florida Blood Service (Blood Service), with a subpoena duces tecum requesting "any and all records, documents and other material indicating the names and addresses of the [51] blood donors." (South Florida Blood Service is not a party to the underlying personal injury litigation, and there has been no allegation of negligence on the part of the Blood Service.)

FN1. His estate is proceeding with this action.

The Blood Service moved the trial court to either quash the subpoena or issue a protective order barring disclosure. That court denied the motion and ordered the Blood Service to disclose the subpoenaed information. On certiorari review, the Third District Court of Appeal, applying the balancing test that courts have traditionally performed under the Florida discovery rules, concluded that the requested material should not be discovered. Although we agree with respondent's contention that Rasmussen's blood donors' rights of privacy are protected by state and federal *535 constitutions, we need not engage in the stricter scrutiny mandated by constitutional analysis. We find that the interests involved here are adequately protected under our discovery rules and approve the decision of the district court. This opinion in no way changes or dilutes the compelling state interest standard appropriate to a review of state action that infringes privacy rights under article I, section 23 of the Florida Constitution as established in *Winfield v. Division of Pari-Mutuel Wagering, Department of Regulation*, 477 So.2d 544, 547 (Fla.1985).

The potential for invasion of privacy is inherent in the litigation process. Under the Florida discovery rules, any nonprivileged matter that is relevant to the subject matter of the action is discoverable. Fla.R.Civ.P. 1.280(b)(1). The discovery rules also confer broad discretion on the trial court to limit or prohibit discovery in order to "protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Fla.R.Civ.P. 1.280(c). Under this authority, a court may act to protect the privacy of the affected person. *Springer v. Greer*, 341 So.2d

212, 214 (Fla. 4th DCA 1976), *appeal dismissed*, 351 So.2d 406 (Fla.1977).

In deciding whether a protective order is appropriate in a particular case, the court must balance the competing interests that would be served by granting discovery or by denying it. *North Miami General Hospital v. Royal Palm Beach Colony, Inc.*, 397 So.2d 1033, 1035 (Fla. 3d DCA 1981); *Dade County Medical Association v. Hlis*, 372 So.2d 117, 121 (Fla. 3d DCA 1979). Thus, the discovery rules provide a framework for judicial analysis of challenges to discovery on the basis that the discovery will result in undue invasion of privacy. This framework allows for broad discovery in order to advance the state's important interest in the fair and efficient resolution of disputes while at the same time providing protective measures to minimize the impact of discovery on competing privacy interests.

Accordingly, we must assess all of the interests that would be served by the granting or denying of discovery--the importance of each and the extent to which the action serves each interest. In undertaking this analysis, we begin by examining the nature and importance of the donors' rights.

The Supreme Court first recognized a right of privacy based on the United States Constitution in *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965). This right of privacy has been described as "the most comprehensive of rights and the right most valued by civilized man." *Stanley v. Georgia*, 394 U.S. 557, 564, 89 S.Ct. 1243, 1248, 22 L.Ed.2d 542 (1969) (citing *Olmstead v. United States*, 277 U.S. 438, 478, 48 S.Ct. 564, 572-73, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting)). In recent cases, the Court has discussed the privacy right as one of those fundamental rights that are " 'implicit in the concept of ordered liberty' such that 'neither liberty nor justice would exist if [they] were sacrificed.' " *Bowers v. Hardwick*, 478 U.S. 186, 106 S.Ct. 2841, 2844, 92 L.Ed.2d 140 (1986) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325-26, 58 S.Ct. 149, (1937)). See *Roe v. Wade*, 410 U.S. 113, 152, 93 S.Ct. 705, 726, 35 L.Ed.2d 147 (1973). In *Whalen v. Roe*, 429 U.S.

589, 599-600, 97 S.Ct. 869, 876-77, 51 L.Ed.2d 64 (1977), the Supreme Court specifically recognized that the right to privacy encompasses at least two different kinds of interests, "the individual interest in avoiding disclosure of personal matters, and ... the interest in independence in making certain kinds of important decisions." [FN2] In *Nixon v. Administrator of General Services*, 433 U.S. 425, 457-458, 97 S.Ct. 2777, 2797-98, 53 L.Ed.2d 867 (1977), the Supreme Court reaffirmed the confidentiality strand of privacy. *536 Lower federal courts have recognized that the essential core of this zone of privacy is the right "to prevent disclosure of ... identity in a damaging context." *E.g., Lora v. Board of Education of City of New York*, 74 F.R.D. 565, 580 (1977). These cases clearly establish that the federal right to privacy extends protection in some circumstances against disclosure of personal matters.

FN2. One commentator has incorporated these related interests into a unitary concept by defining privacy as autonomy or control over the intimate aspects of identity. Gerety, *Redefining Privacy*, 12 Harv.C.R.--C.L.L.Rev. 233, 236 (1977).

Moreover, in Florida, a citizen's right to privacy is independently protected by our state constitution. In 1980, the voters of Florida amended our state constitution to include an express right of privacy. Art. V, § 23, Fla.Const. [FN3] In approving the amendment, Florida became the fourth state to adopt a strong, freestanding right of privacy as a separate section of its state constitution, [FN4] thus providing an explicit textual foundation for those privacy interests inherent in the concept of liberty which may not otherwise be protected by specific constitutional provisions. [FN5]

FN3. Article I, section 23, Florida Constitution, provides:
Right of Privacy.--Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

FN4. The other three are Alaska, California, and Montana. Six other states--Arizona, Hawaii, Illinois, Louisiana, South Carolina, and Washington--protect privacy to a lesser degree. See Note, *Toward a Right of Privacy as a Matter of State Constitutional Law*, 5 Fla.St.U.L.Rev. 631, 636-37 (1977).

FN5. For example, intrusions into privacy during criminal investigations are generally protected by the prohibition against unreasonable search and seizure. See art. I, § 12, Fla.Const.

Although the general concept of privacy encompasses an enormously broad and diverse field of personal action and belief, [FN6] there can be no doubt that the Florida amendment was intended to protect the right to determine whether or not sensitive information about oneself will be disclosed to others. The proceedings of the Constitution Revision Commission reveal that the right to informational privacy was a major concern of the amendment's drafters. At the opening session of Florida's 1977-78 Constitution Revision Commission, then Chief Justice Ben F. Overton remarked:

FN6. See, e.g., *Stanley v. Georgia*, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969) (privacy of one's personal library); *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) (privacy of marital relationship).

[W]ho, ten years ago, really understood that *personal* and financial data on a substantial part of our population could be collected by government or business and held for easy distribution by computer operated information systems? There is a public concern about how personal information concerning an individual citizen is used, whether it be collected by government or by business. The subject of individual privacy and privacy law is in a developing stage.... It is a new problem that should probably be addressed. (Emphasis added.)

Address by Chief Justice Ben F. Overton to the Constitution Revision Commission (July 6, 1977). Thus, a principal aim of the constitutional provision is to afford

individuals some protection against the increasing collection, retention, and use of information relating to all facets of an individual's life.

It is now known that AIDS is a major health problem with calamitous potential. At present, there is no known cure and the mortality rate is high. [FN7] As noted by the court below, medical researchers have identified a number of groups which have a high incidence of the disease and are labeled "high risk" groups. *Rasmussen*, 467 So.2d at 800. Seventy-two percent of all AIDS victims are homosexual or bisexual males with multiple sex partners and seventeen percent are intravenous drug users. *Id.* Other high risk groups are hemophiliacs (1 percent), heterosexual partners of *537 AIDS victims (1 percent), and blood transfusion recipients (1 percent). *Id.* at n. 4.

FN7. The mortality rate may be as high as 40 percent. Blodgett, *Despite the public's hands-off attitude towards AIDS, those who discriminate against the disease's victims are finding immunity from the law*, 12 Student Law 8 (Jan. 1984).

As the district court recognized, petitioner needs more than just the names and addresses of the donors. His interest is in establishing that one or more of the donors has AIDS or is in a high risk group. Petitioner argues that his inquiry *may* never go beyond comparing the donors' names against a list of known AIDS victims, [FN8] or against other public records (e.g., conviction records in order to determine whether any of the donors is a known drug user). He contends that because a limited inquiry *may* reveal the information he seeks, with no invasion of privacy, the donors' privacy rights are not yet at issue. We find this argument disingenuous. As we have already noted, the discovery rules allow a trial judge upon good cause shown to set conditions under which discovery will be given. Fla.R.Civ.P. 1.280(c). Some method could be formulated to verify the Blood Service's report that none of the donors is a known AIDS victim while preserving the confidentiality of the donors' identities. However, the subpoena in question gives petitioner access to

the names and addresses of the blood donors with no restrictions on their use. There is nothing to prohibit petitioner from conducting an investigation without the knowledge of the persons in question. We cannot ignore, therefore, the consequences of disclosure to nonparties, including the possibility that a donor's co-workers, friends, employers, and others may be queried as to the donor's sexual preferences, drug use, or general life-style.

FN8. South Florida Blood Service has stated that none of Rasmussen's fifty-one donors appears in lists of identified AIDS victims. We agree with petitioner, however, that he should not have to rely on the Blood Service's statement.

The threat posed by the disclosure of the donors' identities goes far beyond the immediate discomfort occasioned by third party probing into sensitive areas of the donors' lives. Disclosure of donor identities in any context involving AIDS could be extremely disruptive and even devastating to the individual donor. If the requested information is released, and petitioner queries the donors' friends and fellow employees, it will be functionally impossible to prevent occasional references to AIDS. As the district court recognized:

AIDS is the modern day equivalent of leprosy. AIDS, or a suspicion of AIDS, can lead to discrimination in employment, education, housing and even medical treatment.

Rasmussen, 467 So.2d at 802. We wish to emphasize that although the importance of protecting the privacy of donor information does not depend on the special stigma associated with AIDS, public response [FN9] to the disease does make this a more critical matter. By the very nature of this case, disclosure of donor identities is "disclosure in a damaging context." See *Lora*, 74 F.R.D. at 580. We conclude, therefore, that the disclosure sought here implicates constitutionally protected privacy interests.

FN9. Social hostility to the disease has been extended to individuals associated with the disease, however tangentially, even though they do not in fact

have AIDS. See, e.g., N.Y. City Commission on Human Rights, *Gay and Lesbian Discrimination Documentation Project* (1984).

Our analysis of the interests to be served by denying discovery does not end with the effects of disclosure on the private lives of the fifty-one donors implicated in this case. Society has a vital interest in maintaining a strong volunteer blood supply, a task that has become more difficult with the emergence of AIDS. The donor population has been reduced by the necessary exclusion of potential blood donors through AIDS screening and testing procedures [FN10] as well *538 as by the unnecessary reduction in the donor population as a result of the widespread fear that donation itself can transmit the disease. [FN11] In light of this, it is clearly "in the public interest to discourage any serious disincentive to volunteer blood donation." *Rasmussen*, 467 So.2d at 804. Because there is little doubt that the prospect of inquiry into one's private life and potential association with AIDS will deter blood donation, we conclude that society's interest in a strong and healthy blood supply will be furthered by the denial of discovery in this case.

FN10. On March 2, 1985, a serologic test which detects the presence of AIDS antibodies (the "HTLV-III antibody test") was licensed by the FDC, and is now being implemented in blood centers across the nation. Testing data indicates that, for a blood center collecting 100,000 units of blood annually, use of the HTLV-III test could result in discarding 610 units of blood annually and deferring 220 donors. Council of Community of Blood Centers *Newsletter* (March 4, 1985) at 3.

FN11. This fear prompted the Surgeon General to distribute the following to newspapers across the nation: "There is no way that a donor can contract AIDS or any other disease by giving a pint of blood. Despite the known safety of donating blood, some people are afraid to give. In fact, blood donations are down from a year ago, and there is evidence that some previous donors are staying away from blood drives because they are afraid they will get AIDS." Public Health Service, Department of Health and Human Services, *Donate Blood Regularly*

(December 1984).

500 So.2d 533, 55 USLW 2376, 56 A.L.R.4th
739, 12 Fla. L. Weekly 33

END OF DOCUMENT

In balancing the competing interests involved, we do not ignore Rasmussen's interest in obtaining the requested information in order to prove aggregation of his injuries and obtain full recovery. We recognize that petitioner's interest parallels the state's interest in ensuring full compensation for victims of negligence. However, we find that the discovery order requested here would do little to advance that interest. The probative value of the discovery sought by Rasmussen is dubious at best. The potential of significant harm to most, if not all, of the fifty-one unsuspecting [FN12] donors in permitting such a fishing expedition is great and far outweighs the plaintiff's need under these circumstances.

FN12. Without fully addressing the issue as it is unnecessary to our decision, we note that because disclosure of the information requested threatens damage to the donors' reputation and other liberty interests, the donors' due process rights are also implicated. See *Wisconsin v. Constantineau*, 400 U.S. 433, 437, 91 S.Ct. 507, 510, 27 L.Ed.2d 515 (1971) ("Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."); *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168, 71 S.Ct. 624, 646-47, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring) ("the right to be heard before being condemned to suffer grievous loss of any kind ... is a principle basic to our society"); *Utz v. Cullinane*, 520 F.2d 467, 480 (D.C.Cir.1975) ("Due process obligates the government to accord an individual the opportunity to disprove potentially damaging allegations before it disseminates information that might be used to his detriment.").

Accordingly, we approve the decision of the Third District.

It is so ordered.

McDONALD, C.J., and ADKINS, OVERTON,
EHRlich and SHAW, JJ., concur.

BOYD, J., concurs in result only.

District Court of Appeal of Florida,
Fourth District.

SCI FUNERAL SERVICES OF FLORIDA,
INC. and Service Corporation International,
Petitioners,

v.

Joan LIGHT, Shirley Eisenberg and Carol
Prisco, Respondents.

No. 4D02-581.

March 14, 2002.

Plaintiffs sued cemetery operators, alleging operators mismanaged cemeteries and otherwise engaged in wrongful conduct by selling burial plots without sufficient space, burying remains in the wrong plots, and desecrating remains in an effort to wrongfully conceal their mismanagement. The Circuit Court, Broward County, J. Leonard Fleet, J., ordered depositions closed to the public but permitted media to obtain transcripts and videotapes of depositions. Cemetery operators petitioned for writ of certiorari. The District Court of Appeal, Warner, J., held that operators were not entitled to stronger protective order limiting public access to discovery.

Petition denied.

West Headnotes

[1] Constitutional Law ⇨ 90.1(3)
92k90.1(3)

There is no First Amendment right of access to pretrial discovery materials. U.S.C.A. Const.Amend. 1.

[2] Pretrial Procedure ⇨ 19
307Ak19

Scope and limitation of discovery is within the broad discretion of the trial court.

[3] Pretrial Procedure ⇨ 413.1
307Ak413.1

Cemetery operators were not entitled to stronger protective order limiting public access to discovery conducted in underlying

action alleging operators mismanaged cemeteries, although operators claimed prohibiting access was essential to prevent harm to families whose private burial information would be the subject of discovery; affidavits attested to significant publicity already surrounding discovery of desecrated graves and emotional upset regarding cemeteries' conditions, and trial court concluded that disseminating correct information would be more helpful than prohibiting flow of all information to plot owners and relatives.

*797 Barry R. Davidson, Samuel A. Danon and Christina T. Ng of Hunton & Williams, Miami, and Dennis M. O'Hara of Wicker, Smith, Tutan, O'Hara, McCoy, Graham & Ford, P.A., Fort Lauderdale, for petitioners.

Marc Cooper and Ervin A. Gonzalez of Colson, Hicks, Eidson, Colson, Cooper, Matthews, Martinez, Gonzalez, Kalbac & Kane, Coral Gables, and Neal W. Hirschfeld of Greenspoon, Marder, Hirschfeld, Rafkin, Ross & Berger, Fort Lauderdale, for respondents Joan Light, Shirley Eisenberg and Carol Prisco.

L. Martin Reeder, Jr. of Greenberg Traurig, P.A., West Palm Beach, for respondent The Palm Beach Post.

John R. Hargrove and Dana J. McElroy of Heinrich, Gordon, Hargrove, Weihe & James, P.A., Fort Lauderdale, and David S. Bralow, Orlando, for respondent The Sun-Sentinel Company.

WARNER, J.

Petitioners seek review of a protective order limiting public access to discovery conducted in the underlying action. Petitioners argue that the order did not go far enough in limiting the public's access to discovery. Because the trial court is granted broad discretion in determining what type of order is necessary, petitioners have failed to show a departure from the essential requirements of law. We deny the petition.

Petitioners ("SCI") own and operate several South Florida cemeteries know as "Menorah Gardens." The plaintiffs filed suit against SCI, on behalf of themselves and similarly situated individuals, alleging SCI mismanaged the cemeteries and otherwise engaged in wrongful conduct by selling burial plots without sufficient space, burying remains in the wrong plots, and desecrating remains in an effort to wrongfully conceal their mismanagement.

Before discovery began, SCI filed a motion for a protective order to, (1) exclude persons other than the parties and their attorneys from attending depositions in the case; (2) prohibit any of the parties, their attorneys, or court reporters from using or disseminating any information obtained in discovery without prior court approval; and (3) prohibit the parties or their attorneys from filing with the court any evidentiary matters or information obtained in discovery without first obtaining court approval. SCI's grounds for requesting such relief were, (1) protection of the privacy interests of plot owners in Menorah Gardens from being "unnecessarily upset" by the release of information, and (2) protection of SCI's right to a fair trial because of pretrial publicity.

The court held a hearing at which both the plaintiffs and news media organizations argued against a protective order. After hearing from all sides, the trial court *798 ordered the depositions closed to all but the parties, their attorneys, and a representative of the attorney general. However, it permitted the media to obtain the transcripts and videotapes of the depositions directly from the court reporter once they were finalized. The court also admonished all participants "to conduct themselves in a manner consistent with Florida Bar Rule 4-3.6 regarding trial publicity." Finally, the judge noted that prohibiting the dissemination of information may be more harmful than disseminating the condition of the cemetery to loved ones whose relatives are buried in Menorah Gardens and who are unaware of what has happened to their plots or their deceased loved ones' remains.

[1][2] In its petition to this court, SCI maintains that there is no constitutional right to disseminate unfiled discovery information and that the protective order requested, prohibiting all access to discovery information without court approval, is essential to prevent harm to families whose private burial information will be the subject of the discovery. It is settled law that there is no First Amendment right of access to pretrial discovery materials. See Fla. Freedom Newspapers, Inc. v. McCrary, 520 So.2d 32, 35 (Fla.1988); Miami Herald Publ'g. Co. v. Gridley, 510 So.2d 884, 885 (Fla.1987) (extending the rule to pretrial discovery in civil proceedings); Palm Beach Newspapers, Inc. v. Burk, 504 So.2d 378, 382 (Fla.1987). However, because there is no right to this discovery, it does not necessarily follow that there is a constitutional right to prevent access to discovery. Indeed, in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984), upon which our supreme court relied in Burk and Gridley, the Supreme Court explained that trial courts have broad discretion to decide what type of protective order may be necessary to prevent damaging information from being released. It stated:

[Washington Rule of Civil Procedure] 26(c) confers broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required. The legislature of the State of Washington, following the example of the Congress in its approval of the Federal Rules of Civil Procedure, has determined that such discretion is necessary, and we find no reason to disagree. The trial court is in the best position to weigh fairly the competing needs and interests of parties affected by discovery. The unique character of the discovery process requires that the trial court have substantial latitude to fashion protective orders.

Id. at 36, 104 S.Ct. 2199 (citations omitted) (emphasis added). Similarly, Florida Rule of Civil Procedure 1.280(c) provides for the issuance of protective orders upon good cause shown. Thus, the scope and limitation of discovery is within the broad discretion of the trial court. See *Gross v. Sec. Trust Co.*, 453 So.2d 944, 945 (Fla. 4th DCA 1984).

[3] No abuse of that discretion resulting in a departure from the essential requirements of law has been shown. The trial court considered the issues and the affidavits. Those affidavits attested to the significant publicity already surrounding the discovery of the desecrated graves and the victims' emotional upset regarding the cemetery's conditions. The trial court concluded that this publicity would not stop and that disseminating correct information would be more helpful than prohibiting the flow of all information to the plot owners and loved ones of persons buried in the cemetery.

Moreover, the trial court did offer some protection. The depositions could not be attended by the press. If highly confidential, private matters were revealed in the depositions, a motion for a protective order *799 could be filed to prevent the release of any particular deposition.

Finally, we question whether SCI may assert the privacy interests of the plot owners when the plaintiffs seek to represent the plot owners as a class and whose attorneys apparently already represent a sizeable portion of that class. See generally *Alterra Health Care Corp. v. Shelley ex rel. Mitchell*, 779 So.2d 635, 636 (Fla. 1st DCA 2001) (holding an employer does not have standing to raise the privacy rights of its employees). The plaintiffs and their attorneys clearly opposed the protective order sought by SCI.

Finding no departure from the essential requirements of law, the petition is denied.

POLEN, C.J., and STEVENSON, J., concur.

811 So.2d 796, 27 Fla. L. Weekly D666

END OF DOCUMENT

District Court of Appeal of Florida,
First District.

Lillie Mae SMITH, Appellant,
v.
SOUTHERN BAPTIST HOSPITAL OF
FLORIDA, INC., etc., et al., Appellees.

No. 90-391.

June 21, 1990.

Order on Motion for Certification, Opinion
Revised July 19, 1990.

Patient sued supervising doctor for medical malpractice. Patient moved to exclude nonparty treating doctor from attending supervising doctor's deposition. Thereafter the patient filed petition for writ of certiorari requesting that Court of Appeal quash lower court order allowing attendance. The District Court of Appeal, Thompson, Ford L. (Ret.), Associate Judge, held that: (1) there was no unwritten rule of sequestration prohibiting prospective witnesses from attending depositions, and (2) court did not abuse discretion in denying her request for protective order based upon alleged annoyance, embarrassment, oppression, or expense arising out of attendance of treating doctor.

Writ of certiorari denied.

West Headnotes

[1] Courts ⇨ 97(1)
106k97(1) Most Cited Cases

Where federal civil procedure rule is nearly identical to Florida rule, federal case law in which the rule is interpreted is pertinent and highly persuasive.

[2] Pretrial Procedure ⇨ 128
307Ak128 Most Cited Cases

[2] Pretrial Procedure ⇨ 131
307Ak131 Most Cited Cases

Unwritten rule that witnesses must be

sequestered at trial did not apply to depositions; exclusion of possible witness from attending depositions could be accomplished only through rule authorizing protective order to protect against annoyance, embarrassment, oppression or expense. West's F.S.A. RCP Rule 1.280(c).

[3] Pretrial Procedure ⇨ 136
307Ak136 Most Cited Cases

Patient suing supervising doctor for malpractice had not met burden for establishment of entitlement to protective order preventing nonparty treating doctor from attending supervising doctor's deposition; general allegation that treating doctor, as critical eyewitness, should not be allowed to be influenced by hearing testimony of supervising doctor, was insufficient. West's F.S.A. RCP Rule 1.280(c).

*1116 C. Rufus Pennington, III, of Margol & Pennington, Jacksonville, for appellant.

Charles Cook Howell, III and Michael S. O'Neal, of Commander, Legler, Werber, Dawes, Sadler & Howell, P.A., Jacksonville, for appellee Bd. of Regents of the State of Fla.

THOMPSON, FORD L. (Ret.), Associate Judge.

Smith, the plaintiff below, filed a petition for writ of certiorari requesting that this court quash the lower court's order that a nonparty witness be allowed to attend the deposition of one of the defendants. We deny certiorari.

In August of 1987, Smith was admitted to Baptist Medical Center to undergo medical treatment. She later filed a medical negligence action against Dr. David T. Murray for failing to diagnose a circulation problem which resulted in an allegedly needless amputation of her leg. Dr. Kenneth Parks, a resident physician-in-training, also treated her. The claims against the hospital and the Board of Regents arise from the alleged negligence of Dr. Parks. However, Dr. Parks was not named a party defendant because Section 768.28, Florida Statutes (1987),

provides that no action shall be brought against an officer or an employee of an agency of the state personally unless such act or omission was committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.

The plaintiff scheduled Dr. Murray for deposition on February 6, 1990, and Dr. Parks was present at the deposition. One hour into Dr. Murray's deposition, Smith's counsel asked if Dr. Parks was the person sitting next to counsel for the Board of Regents. The Board's attorney responded in the affirmative and Smith's counsel then invoked the rule of sequestration of witnesses and asked that Dr. Parks leave the room. The Board's attorney declined to exclude Dr. Parks.

The plaintiff's attorney then sought a ruling from the assigned trial court judge but he was not available. Counsel then made an oral motion to Judge Mattox Hair for a protective order excluding Dr. Parks from the deposition of Dr. Murray. After hearing arguments, Judge Hair denied the oral motion for the reasons that Dr. Murray's deposition had been in progress for approximately one hour before plaintiff's counsel attempted to invoke the exclusionary rule, and further that the defendant Board of Regents of the State of Florida is a defendant in the law suit solely because of the alleged negligence of Dr. Parks.

*1117 Smith relies primarily upon the case of *Dardashti v. Singer*, 407 So.2d 1098 (Fla. 4th DCA 1982), in support of her contention that the trial court abused its discretion in refusing to compel sequestration of a nonparty witness during the taking of a party's deposition, requiring the issuance of a writ of certiorari. While *Dardashti* involved the exclusion and sequestration of witnesses at deposition, the court utilized reasoning which is applicable to the rule of exclusion and sequestration of witnesses at trial. This "rule" is established by case law and has never been adopted by the supreme court as a written rule. Moreover, this unwritten rule is applicable at the trial of cases, not depositions. The presence of witnesses at a deposition is controlled by

Florida Rule of Civil Procedure 1.280(c), a written rule adopted by the Supreme Court of Florida, which provides that upon a motion by a party and for good cause shown, the court in which an action is pending may enter a protective order that discovery may be conducted with no one present except persons designated by the court. The court in *Dardashti* makes it very clear that the latter rule was not involved in that case as no attempt had been made by the petitioner to seek its assistance either before in the trial court or the appellate court. In *Dardashti* the court did not cite any case to support its conclusion that the unwritten rule of exclusion or sequestration of witnesses at trial is applicable to depositions, and we have been unable to find any such case except *Dardashti*.

Because Florida has no written rule of sequestration; the Board of Regents urges this court to look to the federal rule and federal decisions for guidance. Federal Rule of Evidence 615 makes the exclusion of witnesses mandatory when requested. [FN1] However, it does except from the rule: (1) a party who is a natural person; (2) an officer or employee of a party who is not a natural person designated as its representative by its attorney; or (3) a person whose presence is shown by a party to be essential to the presentation of his cause. Even if the unwritten rule of sequestration of witnesses at trial were applicable to depositions, the Board argues, the federal rule would indicate that Dr. Parks, whose presence is essential to the Board of Regents' presentation of its cause, would be excused from the rule.

FN1. On the contrary, in *Stano v. State*, 473 So.2d 1282 (Fla.1985), the supreme court held that the trial court is vested with the discretion to permit a witness to attend proceedings even though the rule of sequestration of witnesses has been invoked, and that absent a showing of an abuse of discretion, the court's ruling will not be disturbed on appeal.

[1] However, there are several decisions in which federal courts have held that evidence rule 615 applies to court proceedings, and *not* to depositions, and that Federal Rule of Civil Procedure 26(c), which is nearly identical to

Florida's rule 1.280(c), [FN2] applies to the taking of depositions. *BCI Communications Sys., Inc. v. Bell Atlantic Sys., Inc.*, 112 F.R.D. 154 (N.D.Ala.1986); *Skidmore v. Northwest Eng'g Co.*, 90 F.R.D. 75 (S.D.Fla.1981). "Since Rule 26(c), Fed.R.Civ.P., specifically requires a court order before persons may be excluded from the conduct of the deposition discovery process, it is clear that Fed.R.Evid. 615 does not apply to the taking of depositions." *BCI Communications*, 112 F.R.D. at 157. *But see Lumpkin v. Bi-Lo, Inc.*, 117 F.R.D. 451 (M.D.Ga.1987) (rule 615 does apply to oral depositions, justifying exclusion of defendant's employees from plaintiff's deposition). [FN3]

FN2. Because the federal rule is nearly identical to the Florida rule, federal case law in which the rule is interpreted is pertinent and highly persuasive. *Delta Rent-A-Car, Inc. v. Rihl*, 218 So.2d 467 (Fla. 4th DCA 1969).

FN3. The court in *Lumpkin* may have been influenced by the fact that Federal Rule of Civil Procedure 30(c) states that the Federal Rules of Evidence apply to depositions. This is unlike Florida Rule of Civil Procedure 1.310(c), which, although otherwise essentially tracking the federal rule, does not provide that Florida's evidentiary rules apply to depositions.

[2] We similarly conclude that the burden was on Smith to satisfy the provisions of rule 1.280(c) to justify excluding Dr. Parks from Dr. Murray's deposition, rather *1118 than simply invoking the unwritten rule of sequestration which is applicable at trial.

[3] Rule 1.280(c) provides, in part:
Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense that justice requires, including ...
(5) that discovery be conducted with no one present except persons designated by the court[.]

The trial court has broad discretion in determining whether a protective order is

warranted under the circumstances. *Waite v. Wellington Boats, Inc.*, 459 So.2d 425 (Fla. 1st DCA 1984); *Gross v. Security Trust Co.*, 453 So.2d 944 (Fla. 4th DCA 1984). The trial court may limit discovery only when the movant has made an affirmative showing of good cause. *Deltona Corp. v. Bailey*, 336 So.2d 1163 (Fla.1976); *Travelers Indem. Co. v. Hill*, 388 So.2d 648 (Fla. 5th DCA 1980). In her brief, Smith did not allege that she would be harmed in any of the ways enumerated in rule 1.280(c). Instead, she simply argued that she should be permitted to invoke the rule of sequestration, and that the trial judge had made no finding that Smith would *not* be prejudiced if the rule was not applied.

Smith did obliquely state in her brief that "Dr. Parks, as a critical eyewitness, should never be allowed to be influenced or 'colored' by his having listened to the testimony of Dr. Murray." This indirect statement does not satisfy Smith's burden of affirmatively showing good cause for a protective order. *See e.g., Kerschbaumer v. Bell*, 112 F.R.D. 426 (D.D.C.1986) (court refused to bar a party from deposition based upon "some inchoate fear that perjury would result"); *BCI Communication Sys., Inc. v. Bell Atlantic Sys., Inc.*, 112 F.R.D. 154 (N.D.Ala.1986) (defendant's contention that excluding potential witness for plaintiff from depositions of other deponents was necessary to prevent witness from being exposed to deponent's testimony, thus permitting subsequent collusion or fabrication, did not justify protective order); *Skidmore v. Northwest Eng'g Co.*, 90 F.R.D. 75 (S.D.Fla.1981) (defendant's argument that attendance of plaintiff's expert at deposition of defendant's employee would be unfair because expert had not yet formed opinions was not sufficient to justify protective order). Smith failed to show that the trial court abused its discretion in denying her motion for protective order.

Certiorari DENIED.

ERVIN and NIMMONS, JJ., concur.

ORDER ON MOTION FOR CERTIFICATION
OF DIRECT CONFLICT

564 So.2d 1115
(Cite as: 564 So.2d 1115, *1118)

Page 4

PER CURIAM.

Petitioner moves to certify a direct conflict between the instant case and *Dardashti v. Singer*, 407 So.2d 1098 (Fla. 4th DCA 1982). Upon consideration of the motion and review of our previous decision in the instant case, we hereby grant the motion for certification and revise the opinion filed on June 21, 1990, as follows:

The full paragraph on page 3 shall read:
[FN*]

FN* Editor's Note: The revisions have been incorporated in the opinion at page 1117.

ERVIN, NIMMONS and WOLF, JJ., concur.

564 So.2d 1115, 15 Fla. L. Weekly D1654, 15
Fla. L. Weekly D1887

END OF DOCUMENT



United States District Court,
S.D. New York.

SPENCER TRASK SOFTWARE AND
INFORMATION SERVICES, LLC, formerly
known as
Spencer Trask Internet Group, LLC; and
Spencer Trask Ventures, Inc.,
Plaintiffs,

v.

RPOST INTERNATIONAL LIMITED; Zafar
Khan; Terry Tomkow; and Ken Barton,
Defendants.

No. 02 Civ. 1276(PKL).

April 9, 2002.

Investors brought action against Internet company seeking to provide secure means of sending electronic email for breach of agreement to sell its stock to enable corporation to finance new product venture. On corporation's motion to stay discovery pending outcome of its motion to dismiss, the District Court, Leisure, J., held that company was entitled to stay of discovery.

Motion granted.

West Headnotes

[1] Federal Civil Procedure ⇌ 1271
170Ak1271

In deciding motion for stay of discovery pending outcome of motion to dismiss, court should consider breadth of discovery sought, burden of responding to it, and strength of dispositive motion. Fed.Rules Civ.Proc.Rules 12(b)(6), 26(c), 28 U.S.C.A.

[2] Federal Civil Procedure ⇌ 1271
170Ak1271

Internet company seeking to provide secure means of sending electronic email was entitled to stay of discovery pending resolution of its motion to dismiss investors' breach of contract claim against it, despite investors' assertion that breadth of discovery sought was not outrageously broad, where company presented substantial arguments for dismissal of many, if not all, of claims, and expense and possible

injury to success of company's current contractual negotiations were great. Fed.Rules Civ.Proc.Rules 12(b)(6), 26(c), 28 U.S.C.A.

*367 Patterson, Belknap, Webb & Tyler, LLP, Stephen P. Younger, New York City, for the Plaintiffs.

Stillman & Friedman, P.C., John B. Harris, New York City, Hill & Barlow, P.C., Daniel C. Winston, David S. Friedman, Boston, MA, for the Defendants.

MEMORANDUM ORDER

LEISURE, District Judge.

Defendants RPost International Limited ("RPost") and its three co-founders, Zafar Khan, Terry Tomkow, and Ken Barton, move this Court pursuant to Rule 26(c) of the Federal Rules of Civil Procedure for a stay of discovery during the pendency of their motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. For the following reasons, defendants' motion is granted.

Background

Plaintiffs Spencer Trask Software and Information Services, LLC ("Information Services"), formerly known as Spencer Trask Internet Group, LLC ("the Internet Group") and Spencer Trask Ventures, Inc. ("Ventures") (with their affiliates collectively as "Spencer Trask") bring this action for inter alia: (1) breach of contract; (2) promissory estoppel; (3) equitable estoppel; (4) unjust enrichment; and (5) fraud. At the root of the lawsuit is an agreement allegedly entered into by the parties to enable RPost to finance its new venture involving electronic mail. RPost is an internet company seeking to provide a secure means of sending electronic email that operates like registered mail on behalf of the United States Postal Service. Plaintiffs contend this new product venture will be very lucrative. The overall result of the alleged agreement was to give Spencer Trask the right to acquire approximately 20% of RPost stock.

Discussion

Defendants have moved to dismiss the First Amended Complaint in this action pursuant to Rule 12(b)(6). See Fed.R.Civ.P. 12(b)(6). Based on the face of the complaint, defendants assert, inter alia, that: (1) plaintiffs' *368 contract claims fail to state a claim on the merits as a matter of law; (2) their contract claims are barred in their entirety by the statute of frauds; and (3) their fraud claims fail as a matter of law. See Defendants' Memorandum of Law in Support of Motion to Dismiss the First Amended Complaint ("Defs.' Mem. Dismiss"). Plaintiffs are due to serve and file their opposition papers by April 25, 2002 and defendants shall serve and file their reply papers, if any, by May 6, 2002.

Pursuant to Rule 26(c) of the Federal Rules of Civil Procedure, a court has discretion to stay discovery "for good cause shown." Fed.R.Civ.P. 26(c). Good cause may be shown where a party has filed a dispositive motion, the stay is for a short period of time, and the opposing party will not be prejudiced by the stay. See *Anti-Monopoly, Inc. v. Hasbro, Inc.*, No. 94 Civ. 2120, 1996 WL 101277, at *2 (S.D.N.Y. March 7, 1996) (collecting cases).

[1] However, while discovery may in a proper case be stayed pending the outcome of a motion to dismiss, "the issuance of a stay is by no means automatic." In re WRT Energy Secs. Litig., No. 96 Civ. 3610, 1996 WL 580930, at *1 (S.D.N.Y. Oct.9, 1996) (Keenan, J.); see *Moran v. Flaherty*, No. 92 Civ. 3200, 1992 WL 276913, at *1 (S.D.N.Y. Sept.25, 1992) ("[D]iscovery should not be routinely stayed simply on the basis that a motion to dismiss has been filed."); In re Chase Manhattan Corp. Secs. Litig., No. 90 Civ. 6092, 1991 WL 79432, at *1 (S.D.N.Y. May 7, 1991) (same). Two related factors a court may consider in deciding a motion for a stay of discovery are the breadth of discovery sought and the burden of responding to it. See *Anti-Monopoly, Inc.*, 1996 WL 101277, at *3. Finally, a court should also consider the strength of the dispositive motion that is the basis of the discovery stay application. See, e.g., *Gandler v. Nazarov*, No. 94 Civ. 2272,

1994 WL 702004, at *4 (S.D.N.Y. Dec. 14, 1994) (stay of discovery should be granted where motion to dismiss "is potentially dispositive, and appears to be not unfounded in the law.").

[2] This Court cannot attempt to predict the outcome of the motion to dismiss, particularly because it has not yet viewed plaintiffs' opposition papers. However, based on the papers submitted and upon oral argument from counsel, the Court notes at this preliminary stage that defendants do appear to have substantial arguments for dismissal of many, if not all, of the claims asserted in this lawsuit. Although plaintiffs contend that the breadth of discovery sought is not outrageously broad, nor is the burden substantial, the Court finds otherwise and believes that the expense and possible injury to the success of defendants' current contractual negotiations are great. [FN1] Furthermore, the Court intends to decide the motion expeditiously and thus the stay will neither unnecessarily delay the action nor prejudice the plaintiffs thereby. "A stay pending determination of a dispositive motion that potentially eliminates the entire action will neither substantially nor unduly delay the action, should it continue." *Rivera v. Heyman*, No. 96 Civ. 4489, 1997 WL 86394, at *1 (S.D.N.Y. Feb.27, 1997). Therefore, at this point in the litigation, proceeding with discovery while the motion to dismiss is pending would unnecessarily drain the parties' resources.

FN1. One of the third-parties plaintiffs seek to depose is the Deputy Postmaster General of the United States Postal Service, with whom RPost is currently in discussions regarding the new email venture. RPost notes that the issuance of a subpoena at this stage in their "delicate" negotiations could irreparably damage the success of the venture. See Defendants' Proposed Emergency Motion for Stay of Discovery and/or A Protective Order ("Defs.' Stay Mem."), at 3.

Conclusion

For the foregoing reasons, the requested stay of discovery pending disposition of the

206 F.R.D. 367
(Cite as: 206 F.R.D. 367, *368)

Page 130

motion to dismiss is HEREBY GRANTED.
The parties are HEREBY ORDERED to
refrain from issuing any discovery requests or
subpoenas during the pendency of the motion
to dismiss the First Amended Complaint.

SO ORDERED.

206 F.R.D. 367

END OF DOCUMENT

United States Court of Appeals,
Second Circuit.

**TRANSUNION CORPORATION and
Union Industries, Inc., Appellants,**

v.

PEPSICO, INC., Appellee.

No. 561, Docket 86-7805.

Argued Dec. 9, 1986.

Decided Feb. 5, 1987.

Philippine corporation brought suit against United States corporation for breach of contract, fraud, and RICO violations, and United States corporation moved to dismiss on grounds of forum non conveniens. The United States District Court for the Southern District of New York, Edward Weinfeld, J., 640 F.Supp. 1211, conditionally granted motion, and Philippine corporation appealed. The Court of Appeals held that: (1) dismissal of action on forum non conveniens grounds was appropriate as Philippine corporation had very minimal contacts with United States; (2) although Philippine corporation would not be able to claim RICO violations in Philippine court, it would still be able to maintain fraud actions underlying RICO counts; (3) fact that Philippine corporation could not obtain treble damages if successful in demonstrating fraud did not require United States court to hear case; and (4) trial judge did not abuse his discretion in granting protective order to prevent further discovery prior to his decision on motion to dismiss.

Affirmed.

West Headnotes

[1] Federal Courts ⇌ 45
170Bk45 Most Cited Cases

Dismissal of Philippine corporation's action against United States corporation on forum non conveniens grounds was proper where Philippine corporation had minimal contacts with United States, contracts at issue related exclusively to the Philippines, most witnesses

and documents were in the Philippines, many witnesses speak Philippine dialect as primary language, and there was no showing that political unrest in the Philippines would have adverse effect upon judicial system there.

[2] Federal Courts ⇌ 45
170Bk45 Most Cited Cases

Inability of Philippine corporation to bring RICO claim in Philippine court, if United States action were dismissed on grounds of forum non conveniens, was not dispositive, where Philippine corporation could assert three underlying fraud claims upon which their RICO claim was based, though they would not be entitled to triple damages, and where, RICO cause of action, as alleged, appeared to be legally deficient. 18 U.S.C.A. §§ 1961-1968.

[3] Federal Courts ⇌ 45
170Bk45 Most Cited Cases

Reference in RICO statute to "present" antitrust legislation indicated that earlier antitrust interpretation, which provided that such actions could not be dismissed on forum non conveniens grounds, was effectively overruled, and thus at time RICO was enacted, forum non conveniens doctrine applied both to antitrust suits and RICO actions. Clayton Act, § 12, 15 U.S.C.A. § 22; 28 U.S.C.A. § 1404(a); 18 U.S.C.A. § 1965(a).

[4] Federal Civil Procedure ⇌ 1271
170Ak1271 Most Cited Cases

[4] Federal Courts ⇌ 45
170Bk45 Most Cited Cases

Trial judge did not abuse his discretion in granting protective order to prevent further discovery prior to its decision on United States corporation's motion to dismiss; motions for forum non conveniens may be decided on basis of affidavits.

*128 Richard G. Menaker, Menaker & Herrmann, New York City (Robert F. Herrmann, of counsel), for appellants.

Ronald S. Rolfe, Cravath, Swaine & Moore, New York City, (Louis M. Solomon, James J. Buchal, of counsel), for appellee.

Before OAKES, CARDAMONE and WINTER, Circuit Judges.

PER CURIAM:

Transunion Corporation ("Transunion") and its subsidiary Union Industries, Inc. ("UII"), Philippines corporations, appeal the judgment and order of the United States District Court for the Southern District of New York, Edward Weinfeld, Judge, dismissing their action against PepsiCo, Inc. ("PepsiCo"), for fraudulently inducing them to enter into a Compromise Agreement to settle an earlier dispute, for damages for breach of this and of an earlier agreement, and for treble damages for civil RICO violations under 18 U.S.C. §§ 1961- 1968 (1982). Judge Weinfeld's opinion is reported as *Transunion Corp. v. PepsiCo, Inc.*, 640 F.Supp. 1211 (S.D.N.Y.1986). Appellants argue that Judge Weinfeld abused his discretion when he granted PepsiCo's motion to dismiss the complaint on the ground of forum non conveniens. They argue too that he abused his discretion when he stayed discovery pending determination of the motion to dismiss. We affirm, substantially on Judge Weinfeld's opinion.

Transunion had a contract (the "1981 Supply Agreement") to supply Pepsi-Cola Bottling Company of the Philippines ("PCBCP") with glass bottles. In 1983, Transunion brought an action in the Philippines against PCBCP and PepsiCo for breach of this contract. Following negotiations in the Philippines and in New York, this action was settled by a 1983 Compromise Agreement that required, inter alia, PepsiCo to buy bottles from Transunion through 1986 and Transunion to meet certain quality standards. In March 1985, PepsiCo sold its Philippines bottling operations to a third party. On December 5, 1985, Transunion gave notice of its cancellation of the 1983 Compromise Agreement on the ground that PepsiCo had breached it by this sale. On December 17, 1985, however, PepsiCo filed suit in the Philippines alleging,

inter alia, that appellants had breached the Agreement's quality standards. The Philippine court granted PepsiCo a writ of preliminary attachment on properties of Transunion and its president, Carlos Ty.

On December 27, appellants filed this suit in the Southern District of New York. Dismissal on forum non conveniens grounds was conditioned on PepsiCo's (1) waiver of any statute of limitations defenses it might have in the Philippines with respect to the claims asserted in the Southern District of New York and (2) agreement to make its employees available in the Philippines for deposition or trial.

The appropriate standard of review of a forum non conveniens determination is whether the trial court abused its discretion in weighing the established public and *129 private interest factors articulated by the Supreme Court. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257, 102 S.Ct. 252, 266, 70 L.Ed.2d 419 (1981); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509, 67 S.Ct. 839, 843, 91 L.Ed. 1055 (1947); see also *Piper Aircraft*, 454 U.S. at 241 n. 6, 102 S.Ct. at 258 n. 6 (factors). The judge's opinion here is typically careful and complete, and his decision a reasonable one. The judge clearly stated that "a plaintiff's choice of forum should rarely be disturbed and the burden is on the defendant to establish that the action should be dismissed on the ground of forum non conveniens." 640 F.Supp. at 1215. His statement that this presumption is less weighty where plaintiffs are foreigners, *id.*, is fully supported by his citation to *Piper Aircraft*, 454 U.S. at 255-56, 102 S.Ct. at 265-66.

[1] Judge Weinfeld reasonably held that appellants have very minimal contacts with the United States: the contracts at issue in this action relate exclusively to the Philippines; most witnesses and documents are in the Philippines; many witnesses speak Tagalog, a Philippines dialect, as their primary language; and obtaining documents located in the Philippines would probably require the use of letters rogatory and might also be complicated by a Philippines presidential decree prohibiting removal of

documents from the Philippines without official approval. 640 F.Supp. at 1215-17. On the other side, favoring a New York forum, were the facts that PepsiCo is a New York corporation; some negotiations for the 1983 settlement did happen to occur in New York while Transunion's president was visiting there, and it was during these negotiations that the alleged fraudulent misrepresentations were made by senior PepsiCo officials; and some few witnesses and documents are in New York. *Id.* at 1216. Judge Weinfeld reasonably concluded that "[p]laintiffs have not offered a single compelling reason with respect to their own convenience to support their choice of this forum." *Id.* at 1217.

Public interest factors similarly were reasonably held to favor dismissal: Philippines law would probably apply to both the 1981 and 1983 agreements and to the effects of the order entered by a Philippine court upon settlement of the 1983 Philippine litigation; Philippine courts are apparently no more congested than the courts of the Southern District of New York; no showing was made that political unrest in the Philippines has had an adverse effect upon the judicial system there; PepsiCo has assets in the Philippines against which a Philippine judgment could be enforced (alternatively, if these proved inadequate, a Philippines judgment could be enforced against New York assets); and appellants could assert their claims in the New York complaint as counterclaims in PepsiCo's Philippines action, thereby saving the unwarranted waste of judicial resources that would result from the trial of claims arising out of the same facts in both New York and the Philippines. *Id.* at 1217-19.

[2] Appellants rely heavily on the fact that the New York complaint includes a RICO count that they may not be able to assert in the Philippines. This argument has no merit. First, though appellants might not be able to claim RICO violations and RICO triple damages in the Philippines, they could assert the three underlying frauds (set out at 640 F.Supp. at 1214). That they could not get triple damages if they proved the frauds

underlying their RICO claim in the Philippines is irrelevant: "dismissal may not be barred solely because of the possibility of an unfavorable change in law." *Piper Aircraft*, 454 U.S. at 249, 102 S.Ct. at 262. Furthermore, Judge Weinfeld noted that "plaintiffs' RICO cause of action, as alleged, appears to be legally deficient" due to improper pleading and lack of standing as to two of the three alleged predicate acts, 640 F.Supp. at 1217 & n. 19.

Appellants raise for the first time on appeal the argument that the RICO statute specifies venue in the United States. Though 18 U.S.C. § 1965(a) (1982) provides that any civil RICO action "may be instituted" in the district court in any district with which the defendant has certain specified *130 connections, dismissal on forum non conveniens grounds has been upheld in many other cases involving statutes with special venue provisions. For example, the Jones Act provides, 46 U.S.C. § 688(a) (1982), that jurisdiction "shall be" in district court. Yet this court, upholding a dismissal of a Jones Act claim when there was a convenient Philippines forum, has held that the forum non conveniens doctrine is applicable in Jones Act cases. *Cruz v. Maritime Company of Philippines*, 702 F.2d 47, 48 (2d Cir.1983) (per curiam); see also *Koster v. Lumbermens Mutual Casualty Co.*, 330 U.S. 518, 522 n. 2 & 531-32, 67 S.Ct. 828, 830 n. 2 & 835, 91 L.Ed. 1067 (1947) (upholding dismissal on forum non conveniens grounds of a derivative suit filed under 28 U.S.C. § 112 (recodified as amended at 28 U.S.C. § 1401 (1982))); *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 431 (9th Cir.1977) (suggesting a Lanham Act infringement claim might be dismissed on forum non conveniens grounds, though the Act contains a special venue provision, 15 U.S.C. § 1121 (1982)).

[3] Appellants' argument that RICO cases cannot be dismissed on forum non conveniens grounds is based chiefly upon the statement in the legislative history that "[s]ection 1965 [of RICO] contains broad provisions regarding venue ..., which are modelled on present antitrust legislation," H.R.Rep. No. 1549, 91st

Cong., 2d Sess. 58 (1970) ("House Report"), reprinted in 1970 U.S.Code Cong. & Admin.News 4007, 4034. This statement, they argue, indicates congressional intent that the RICO venue provision should embody the holding in *United States v. National City Lines, Inc.*, 334 U.S. 573, 68 S.Ct. 1169, 92 L.Ed. 1584 (1948), that a special venue provision, section 12 of the Clayton Act, 15 U.S.C. § 22 (1982), deprived the court of discretion to dismiss a Sherman Act suit on forum non conveniens grounds. This argument is unpersuasive. The decision in *National City Lines* was based upon a thorough review of legislative history of the Clayton Act, which disclosed "no other thought than that the choice of forums was given as a matter of right, not as one limited by judicial discretion." 334 U.S. at 586-87, 68 S.Ct. at 1176. A review of the legislative history of RICO, however, discloses no mandate that the doctrine of forum non conveniens should not apply, nor is there any indication that Congress had the interpretation of 15 U.S.C. § 22 in *National City Lines* in mind when it drafted section 1965 of RICO. Indeed, the House Report's reference to "present" antitrust legislation suggests that Congress was aware that the result in *National City Lines* was effectively overruled by Congress in 1948 when it enacted 28 U.S.C. § 1404(a) (1982), the legislative history of which states that it "was drafted in accordance with the doctrine of forum non conveniens, permitting transfer to a more convenient forum, even though the venue is proper." H.R.Rep. No. 308, 80th Cong., 1st Sess. A132 (1947); see *United States v. National City Lines, Inc.*, 337 U.S. 78, 69 S.Ct. 955, 93 L.Ed. 1226 (1949). It follows that at the time RICO was enacted in 1970, the forum non conveniens doctrine applied to antitrust suits by virtue of 28 U.S.C. § 1404(a), so the reference in the RICO legislative history to 18 U.S.C. § 1965(a) having been modeled on the antitrust venue provisions does not avail appellants.

[4] Nor is there any merit in appellants' claim that the judge abused his discretion in granting a protective order to prevent further discovery prior to its decision on the motion to dismiss. Motions to dismiss for forum non

conveniens may be decided on the basis of affidavits. *Alcoa Steamship Co. v. M/V Nordic Regent*, 654 F.2d 147, 149 (2d Cir.) (en banc), cert. denied, 449 U.S. 890, 101 S.Ct. 248, 66 L.Ed.2d 116 (1980). Indeed, as the Court noted in *Piper Aircraft*, 454 U.S. at 258, 102 S.Ct. at 267, "[r]equiring extensive investigation would defeat the purpose of [the] motion."

Judgment affirmed.

811 F.2d 127, RICO Bus.Disp.Guide 6538

END OF DOCUMENT

RULE 1.010. SCOPE AND TITLE OF RULES

These rules apply to all actions of a civil nature and all special statutory proceedings in the circuit courts and county courts except those to which the Florida Probate Rules, the Florida Family Law Rules of Procedure, or the Small Claims Rules apply. The form, content, procedure, and time for pleading in all special statutory proceedings shall be as prescribed by the statutes governing the proceeding unless these rules specifically provide to the contrary. These rules shall be construed to secure the just, speedy, and inexpensive determination of every action. These rules shall be known as the Florida Rules of Civil Procedure and abbreviated as Fla. R. Civ. P.

RULE 1.030. NONVERIFICATION OF PLEADINGS

Except when otherwise specifically provided by these rules or an applicable statute, every written pleading or other paper of a party represented by an attorney need not be verified or accompanied by an affidavit.

Committee Notes

1976 Amendment. Subdivisions (a)-(b) have been amended to require the addition of the filing party's telephone number on all pleadings and papers filed.

RULE 1.040. ONE FORM OF ACTION

There shall be one form of action to be known as "civil action."

RULE 1.050. WHEN ACTION COMMENCED

Every action of a civil nature shall be deemed commenced when the complaint or petition is filed except that ancillary proceedings shall be deemed commenced when the writ is issued or the pleading setting forth the claim of the party initiating the action is filed.

RULE 1.060. TRANSFERS OF ACTIONS

(a) **Transfers of Courts.** If it should appear at any

time that an action is pending in the wrong court of any county, it may be transferred to the proper court within said county by the same method as provided in rule 1.170(j).

(b) **Wrong Venue.** When any action is filed laying venue in the wrong county, the court may transfer the action in the manner provided in rule 1.170(j) to the proper court in any county where it might have been brought in accordance with the venue statutes. When the venue might have been laid in 2 or more counties, the person bringing the action may select the county to which the action is transferred, but if no such selection is made, the matter shall be determined by the court.

(c) **Method.** The service charge of the clerk of the court to which an action is transferred under this rule shall be paid by the party who commenced the action within 30 days from the date the order of transfer is entered, subject to taxation as provided by law when the action is determined. If the service charge is not paid within the 30 days, the action shall be dismissed without prejudice by the court that entered the order of transfer.

Court Commentary

1984 Amendment. Because of confusion in some circuits, subdivision (c) is added:

(a) to specify who is to pay the clerk's service charge on transfer;

(b) to provide for the circumstance in which the service charge is not paid; and

(c) to require the dismissal to be by the court which entered the order of transfer.

RULE 1.061. CHOICE OF FORUM

(a) **Grounds for Dismissal.** An action may be dismissed on the ground that a satisfactory remedy may be more conveniently sought in a jurisdiction other than Florida when:

(1) the trial court finds that an adequate alternate forum exists which possesses jurisdiction over the whole case, including all of the parties;

(2) the trial court finds that all relevant factors

of private interest favor the alternate forum, weighing in the balance a strong presumption against disturbing plaintiffs' initial forum choice;

(3) if the balance of private interests is at or near equipoise, the court further finds that factors of public interest tip the balance in favor of trial in the alternate forum; and

(4) the trial judge ensures that plaintiffs can reinstate their suit in the alternate forum without undue inconvenience or prejudice.

The decision to grant or deny the motion for dismissal rests in the sound discretion of the trial court, subject to review for abuse of discretion.

(b) **Stipulations in General.** The parties to any action for which a satisfactory remedy may be more conveniently sought in a jurisdiction other than Florida may stipulate to conditions upon which a forum-non-conveniens dismissal shall be based, subject to approval by the trial court. The decision to accept or reject the stipulation rests in the sound discretion of the trial court, subject to review for abuse of discretion.

A forum-non-conveniens dismissal shall not be granted unless all defendants agree to the stipulations required by subdivision (c) and any additional stipulations required by the court.

(c) **Statutes of Limitation.** In moving for forum-non-conveniens dismissal, defendants shall be deemed to automatically stipulate that the action will be treated in the new forum as though it had been filed in that forum on the date it was filed in Florida, with service of process accepted as of that date.

(d) **Failure to Refile Promptly.** When an action is dismissed in Florida for forum non conveniens, plaintiffs shall automatically be deemed to stipulate that they will lose the benefit of all stipulations made by the defendant, including the stipulation provided in subdivision (c) of this rule, if plaintiffs fail to file the action in the new forum within 120 days after the date the Florida dismissal becomes final.

(e) **Waiver of Automatic Stipulations.** Upon unanimous agreement, the parties may waive the

conditions provided in subdivision (c) or (d), or both, only when they demonstrate and the trial court finds a compelling reason for the waiver. The decision to accept or reject the waiver shall not be disturbed on review if supported by competent, substantial evidence.

(f) **Reduction to Writing.** The parties shall reduce their stipulation to a writing signed by them, which shall include all stipulations provided by this rule and which shall be deemed incorporated by reference in any subsequent order of dismissal.

(g) **Time for Moving for Dismissal.** A motion to dismiss based on forum non conveniens shall be served not later than 60 days after service of process on the moving party.

(h) **Retention of Jurisdiction.** The court shall retain jurisdiction after the dismissal to enforce its order of dismissal and any conditions and stipulations in the order.

Court Commentary

This section was added to elaborate on Florida's adoption of the federal doctrine of forum non conveniens in *Kinney System, Inc. v. Continental Insurance Co.*, 674 So.2d 86 (Fla. 1996), and it should be interpreted in light of that opinion.

Subdivision (a) codifies the federal standard for reviewing motions filed under the forum-non-conveniens doctrine. Orders granting or denying dismissal for forum non conveniens are subject to appellate review under an abuse-of-discretion standard.

As stated in *Kinney*, the phrase "private interests" means adequate access to evidence and relevant sites, adequate access to witnesses, adequate enforcement of judgments, and the practicalities and expenses associated with the litigation. Private interests do not involve consideration of the availability or unavailability of advantageous legal theories, a history of generous or stingy damage awards, or procedural nuances that may affect outcomes but that do not effectively deprive the plaintiff of any remedy.

"Equipoise" means that the advantages and disadvantages of the alternative forum will not significantly undermine or favor the "private interests" of any particular party, as compared with the forum in which suit was filed.

"Public interests" are the ability of courts to protect their dockets from causes that lack significant connection to the jurisdiction; the ability of courts to encourage trial of controversies in the localities in which they arise; and the ability of courts to consider their familiarity with governing law when deciding whether to retain jurisdiction over a case. Even when the private conveniences of the litigants are nearly in balance, a trial court has discretion to grant a forum-non-conveniens dismissal upon finding that retention of jurisdiction would be unduly

burdensome to the community, that there is little or no public interest in the dispute, or that foreign law will predominate if jurisdiction is retained.

Subdivision (b) provides that the parties can stipulate to conditions of a forum-non-conveniens dismissal, subject to the trial court's approval. The trial court's acceptance or rejection of the stipulation is subject to appellate review under an abuse-of-discretion standard.

Subdivisions (c) and (d) provide automatic conditions that shall be deemed included in every forum-non-conveniens dismissal. The purpose underlying subdivision (c) is to ensure that any statute of limitation in the new forum is applied as though the action had been filed in that forum on the date it was filed in Florida. The purpose underlying subdivision (d) is to ensure that the action is promptly refiled in the new forum. Both of these stipulations are deemed to be a part of every stipulation that does not expressly state otherwise, subject to the qualification provided in subdivision (e).

Subdivision (e) recognizes that there may be extraordinary conditions associated with the new forum that would require the waiver of the conditions provided in subdivisions (c) and (d). Waivers should be granted sparingly. Thus, the parties by unanimous consent may stipulate to waive those conditions only upon showing a compelling reason to the trial court. The trial court's acceptance or rejection of the waiver may not be reversed on appeal where supported by competent, substantial evidence.

Subdivision (f) requires the parties to reduce their stipulation to written form, which the parties must sign. When and if the trial court accepts the stipulation, the parties' agreement then is treated as though it were incorporated by reference in the trial court's order of dismissal. To avoid confusion, the parties shall include the automatic stipulations provided by subdivisions (c) and (d) of this rule, unless the latter are properly waived under subdivision (e). However, the failure to include these automatic conditions in the stipulation does not waive them unless the dismissing court has expressly so ruled.

Committee Notes

2000 Amendment. Subdivision (a)(1) is amended to clarify that the alternative forum other than Florida must have jurisdiction over all of the parties for the trial court to grant a dismissal based on forum non conveniens.

Subdivision (b) is amended to clarify that all of the defendants, not just the moving defendant, must agree to the stipulations required by subdivision (c) as well as any additional stipulations required by the trial court before an action may be dismissed based on forum non conveniens.

Subdivision (g) is added to require that a motion to dismiss based on forum non conveniens be served not later than 60 days after service of process on the moving party.

Subdivision (h) is added to require the court to retain jurisdiction over the action after the dismissal for purposes of enforcing its order of dismissal and any conditions and stipulations contained in the order.

RULE 1.070. PROCESS

(a) **Summons; Issuance.** Upon the commencement of the action, summons or other process authorized by law shall be issued forthwith by the clerk or judge under the clerk's or the judge's signature and the seal of the court and delivered for service without precept.

(b) **Service; By Whom Made.** Service of process may be made by an officer authorized by law to serve process, but the court may appoint any competent person not interested in the action to serve the process. When so appointed, the person serving process shall make proof of service by affidavit promptly and in any event within the time during which the person served must respond to the process. Failure to make proof of service shall not affect the validity of the service. When any process is returned not executed or returned improperly executed for any defendant, the party causing its issuance shall be entitled to such additional process against the unserved party as is required to effect service.

(c) **Service; Numerous Defendants.** If there is more than 1 defendant, the clerk or judge shall issue as many writs of process against the several defendants as may be directed by the plaintiff or the plaintiff's attorney.

(d) **Service by Publication.** Service of process by publication may be made as provided by statute.

(e) **Copies of Initial Pleading for Persons Served.** At the time of personal service of process a copy of the initial pleading shall be delivered to the party upon whom service is made. The date and hour of service shall be endorsed on the original process and all copies of it by the person making the service. The party seeking to effect personal service shall furnish the person making service with the necessary copies. When the service is made by publication, copies of the initial pleadings shall be furnished to the clerk and mailed by the clerk with the notice of action to all parties whose addresses are stated in the initial pleading or sworn statement.

(f) **Service of Orders.** If personal service of a court order is to be made, the original order shall be filed with the clerk, who shall certify or verify a copy of it without charge. The person making service shall use the certified copy instead of the original order in

sued in a representative capacity, that party shall do so by specific negative averment which shall include such supporting particulars as are peculiarly within the pleader's knowledge.

(b) **Fraud, Mistake, Condition of the Mind.** In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with such particularity as the circumstances may permit. Malice, intent, knowledge, mental attitude, and other condition of mind of a person may be averred generally.

(c) **Conditions Precedent.** In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.

(d) **Official Document or Act.** In pleading an official document or official act it is sufficient to aver that the document was issued or the act done in compliance with law.

(e) **Judgment or Decree.** In pleading a judgment or decree of a domestic or foreign court, a judicial or quasi-judicial tribunal, or a board or officer, it is sufficient to aver the judgment or decree without setting forth matter showing jurisdiction to render it.

(f) **Time and Place.** For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.

(g) **Special Damage.** When items of special damage are claimed, they shall be specifically stated.

RULE 1.130. ATTACHING COPY OF CAUSE OF ACTION AND EXHIBITS

(a) **Instruments Attached.** All bonds, notes, bills of exchange, contracts, accounts, or documents upon which action may be brought or defense made, or a copy thereof or a copy of the portions thereof material to the pleadings, shall be incorporated in or attached to the pleading. No papers shall be unnecessarily annexed as exhibits. The pleadings shall contain no unnecessary recitals of deeds, documents, contracts, or other instruments.

(b) **Part for All Purposes.** Any exhibit attached to a pleading shall be considered a part thereof for all purposes. Statements in a pleading may be adopted by reference in a different part of the same pleading, in another pleading, or in any motion.

RULE 1.140. DEFENSES

(a) When Presented.

(1) A defendant shall serve an answer within 20 days after service of original process and the initial pleading on the defendant, or not later than the date fixed in a notice by publication. A party served with a pleading stating a crossclaim against that party shall serve an answer to it within 20 days after service on that party. The plaintiff shall serve an answer to a counterclaim within 20 days after service of the counterclaim. If a reply is required, the reply shall be served within 20 days after service of the answer.

(2) The service of a motion under this rule, except a motion for judgment on the pleadings or a motion to strike under subdivision (f), alters these periods of time so that if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleadings shall be served within 10 days after notice of the court's action or, if the court grants a motion for a more definite statement, the responsive pleadings shall be served within 10 days after service of the more definite statement unless a different time is fixed by the court in either case.

(3) If the court permits or requires an amended or responsive pleading or a more definite statement, the pleading or statement shall be served within 10 days after notice of the court's action. Responses to the pleadings or statements shall be served within 10 days of service of the pleadings or statements.

(b) **How Presented.** Every defense in law or fact to a claim for relief in a pleading shall be asserted in the responsive pleading, if one is required, but the following defenses may be made by motion at the option of the pleader: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a cause of action, and (7) failure to join indispensable parties. A motion making any of

these defenses shall be made before pleading if a further pleading is permitted. The grounds on which any of the enumerated defenses are based and the substantial matters of law intended to be argued shall be stated specifically and with particularity in the responsive pleading or motion. Any ground not stated shall be deemed to be waived except any ground showing that the court lacks jurisdiction of the subject matter may be made at any time. No defense or objection is waived by being joined with other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert any defense in law or fact to that claim for relief at the trial, except that the objection of failure to state a legal defense in an answer or reply shall be asserted by motion to strike the defense within 20 days after service of the answer or reply.

(c) Motion for Judgment on the Pleadings. After the pleadings are closed, but within such time as not to delay the trial, any party may move for judgment on the pleadings.

(d) Preliminary Hearings. The defenses 1 to 7 in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment in subdivision (c) of this rule shall be heard and determined before trial on application of any party unless the court orders that the hearing and determination shall be deferred until the trial.

(e) Motion for More Definite Statement. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, that party may move for a more definite statement before interposing a responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) Motion to Strike. A party may move to strike or the court may strike redundant, immaterial, impertinent, or scandalous matter from any pleading

at any time.

(g) Consolidation of Defenses. A party who makes a motion under this rule may join with it the other motions herein provided for and then available to that party. If a party makes a motion under this rule but omits from it any defenses or objections then available to that party that this rule permits to be raised by motion, that party shall not thereafter make a motion based on any of the defenses or objections omitted, except as provided in subdivision (h)(2) of this rule.

(h) Waiver of Defenses.

(1) A party waives all defenses and objections that the party does not present either by motion under subdivisions (b), (e), or (f) of this rule or, if the party has made no motion, in a responsive pleading except as provided in subdivision (h)(2).

(2) The defenses of failure to state a cause of action or a legal defense or to join an indispensable party may be raised by motion for judgment on the pleadings or at the trial on the merits in addition to being raised either in a motion under subdivision (b) or in the answer or reply. The defense of lack of jurisdiction of the subject matter may be raised at any time.

Committee Notes

1972 Amendment. Subdivision (a) is amended to eliminate the unnecessary statement of the return date when service is made by publication, and to accommodate the change proposed in rule 1.100(a) making a reply mandatory under certain circumstances. Motions to strike under subdivision (f) are divided into 2 categories, so subdivision (a) is also amended to accommodate this change by eliminating motions to strike under the new subdivision (f) as motions that toll the running of time. A motion to strike an insufficient legal defense will now be available under subdivision (b) and continue to toll the time for responsive pleading. Subdivision (b) is amended to include the defense of failure to state a sufficient legal defense. The proper method of attack for failure to state a legal defense remains a motion to strike. Subdivision (f) is changed to accommodate the 2 types of motions to strike. The motion to strike an insufficient legal defense is now in subdivision (b). The motion to strike under subdivision (f) does not toll the time for responsive pleading and can be made at any time, and the matter can be stricken by the court on its initiative at any time. Subdivision (g) follows the terminology of Federal Rule of Civil Procedure 12(g). Much difficulty has been experienced in the application of this and the succeeding subdivision with the result that the same defenses are being raised

several times in an action. The intent of the rule is to permit the defenses to be raised one time, either by motion or by the responsive pleading, and thereafter only by motion for judgment on the pleadings or at the trial. Subdivision (h) also reflects this philosophy. It is based on federal rule 12(h) but more clearly states the purpose of the rule.

1988 Amendment. The amendment to subdivision (a) is to fix a time within which amended pleadings, responsive pleadings, or more definite statements required by the court and responses to those pleadings or statements must be served when no time limit is fixed by the court in its order. The court's authority to alter these time periods is contained in rule 1.090(b).

RULE 1.150. SHAM PLEADINGS

(a) **Motion to Strike.** If a party deems any pleading or part thereof filed by another party to be a sham, that party may move to strike the pleading or part thereof before the cause is set for trial and the court shall hear the motion, taking evidence of the respective parties, and if the motion is sustained, the pleading to which the motion is directed shall be stricken. Default and summary judgment on the merits may be entered in the discretion of the court or the court may permit additional pleadings to be filed for good cause shown.

(b) **Contents of Motion.** The motion to strike shall be verified and shall set forth fully the facts on which the movant relies and may be supported by affidavit. No traverse of the motion shall be required.

RULE 1.160. MOTIONS

All motions and applications in the clerk's office for the issuance of mesne process and final process to enforce and execute judgments, for entering defaults, and for such other proceedings in the clerk's office as do not require an order of court shall be deemed motions and applications grantable as of course by the clerk. The clerk's action may be suspended or altered or rescinded by the court upon cause shown.

RULE 1.170. COUNTERCLAIMS AND CROSSCLAIMS

(a) **Compulsory Counterclaims.** A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, provided it arises out of the transac-

tion or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties over whom the court cannot acquire jurisdiction. But the pleader need not state a claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon that party's claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on the claim and the pleader is not stating a counterclaim under this rule.

(b) **Permissive Counterclaim.** A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

(c) **Counterclaim Exceeding Opposing Claim.** A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

(d) **Counterclaim against the State.** These rules shall not be construed to enlarge beyond the limits established by law the right to assert counterclaims or to claim credits against the state or any of its subdivisions or other governmental organizations thereof subject to suit or against a municipal corporation or against an officer, agency, or administrative board of the state.

(e) **Counterclaim Maturing or Acquired after Pleading.** A claim which matured or was acquired by the pleader after serving the pleading may be presented as a counterclaim by supplemental pleading with the permission of the court.

(f) **Omitted Counterclaim or Crossclaim.** When a pleader fails to set up a counterclaim or crossclaim through oversight, inadvertence, or excusable neglect, or when justice requires, the pleader may set up the counterclaim or crossclaim by amendment with leave of the court.

(g) **Crossclaim against Co-Party.** A pleading may state as a crossclaim any claim by one party

(c) **Adding Parties.** Parties may be added once as a matter of course within the same time that pleadings can be so amended under rule 1.190(a). If amendment by leave of court or stipulation of the parties is permitted, parties may be added in the amended pleading without further order of court. Parties may be added by order of court on its own initiative or on motion of any party at any stage of the action and on such terms as are just.

Committee Notes

1972 Amendment. Subdivision (c) is amended to permit the addition of parties when the pleadings are amended by stipulation. This conforms the subdivision to all of the permissive types of amendment under rule 1.190(a). It was an inadvertent omission by the committee when the rule in its present form was adopted in 1968 as can be seen by reference to the 1968 committee note.

RULE 1.260. SURVIVOR; SUBSTITUTION OF PARTIES

(a) **Death.**

(1) If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing, shall be served on all parties as provided in rule 1.080 and upon persons not parties in the manner provided for the service of a summons. Unless the motion for substitution is made within 90 days after the death is suggested upon the record by service of a statement of the fact of the death in the manner provided for the service of the motion, the action shall be dismissed as to the deceased party.

(2) In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action shall not abate. The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties.

(b) **Incompetency.** If a party becomes incompetent, the court, upon motion served as provided in subdivision (a) of this rule, may allow the action to be continued by or against that person's representative.

(c) **Transfer of Interest.** In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in subdivision (a) of this rule.

(d) **Public Officers; Death or Separation from Office.**

(1) When a public officer is a party to an action in an official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and the officer's successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution.

(2) When a public officer sues or is sued in an official capacity, the officer may be described as a party by the official title rather than by name but the court may require the officer's name to be added.

RULE 1.270. CONSOLIDATION; SEPARATE TRIALS

(a) **Consolidation.** When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

(b) **Separate Trials.** The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, crossclaim, counterclaim, or third-party claim or of any separate issue or of any number of claims, crossclaims, counterclaims, third-party claims, or issues.

RULE 1.280. GENERAL PROVISIONS GOVERNING DISCOVERY

(a) **Discovery Methods.** Parties may obtain

discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property for inspection and other purposes; physical and mental examinations; and requests for admission. Unless the court orders otherwise and under subdivision (c) of this rule, the frequency of use of these methods is not limited, except as provided in rule 1.200 and rule 1.340.

(b) **Scope of Discovery.** Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) **In General.** Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) **Indemnity Agreements.** A party may obtain discovery of the existence and contents of any agreement under which any person may be liable to satisfy part or all of a judgment that may be entered in the action or to indemnify or to reimburse a party for payments made to satisfy the judgment. Information concerning the agreement is not admissible in evidence at trial by reason of disclosure.

(3) **Trial Preparation: Materials.** Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that party's representative, including that party's attorney, consultant, surety, indemnitor, insurer, or agent, only upon a showing that the party seeking discovery has need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial

equivalent of the materials by other means. In ordering discovery of the materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation. Without the required showing a party may obtain a copy of a statement concerning the action or its subject matter previously made by that party. Upon request without the required showing a person not a party may obtain a copy of a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for an order to obtain a copy. The provisions of rule 1.380(a)(4) apply to the award of expenses incurred as a result of making the motion. For purposes of this paragraph, a statement previously made is a written statement signed or otherwise adopted or approved by the person making it, or a stenographic, mechanical, electrical, or other recording or transcription of it that is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) **Trial Preparation: Experts.** Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A) (i) By interrogatories a party may require any other party to identify each person whom the other party expects to call as an expert witness at trial and to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

(ii) Any person disclosed by interrogatories or otherwise as a person expected to be called as an expert witness at trial may be deposed in accordance with rule 1.390 without motion or order of court.

(iii) A party may obtain the following discovery regarding any person disclosed by interrogatories or otherwise as a person expected to be called as an expert witness at trial:

1. The scope of employment in the pending case and the compensation for such service.

2. The expert's general litigation experience, including the percentage of work performed for plaintiffs and defendants.

3. The identity of other cases, within a reasonable time period, in which the expert has testified by deposition or at trial.

4. An approximation of the portion of the expert's involvement as an expert witness, which may be based on the number of hours, percentage of hours, or percentage of earned income derived from serving as an expert witness; however, the expert shall not be required to disclose his or her earnings as an expert witness or income derived from other services.

An expert may be required to produce financial and business records only under the most unusual or compelling circumstances and may not be compelled to compile or produce nonexistent documents. Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and other provisions pursuant to subdivision (b)(4)(C) of this rule concerning fees and expenses as the court may deem appropriate.

(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in rule 1.360(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (b)(4)(A) and (b)(4)(B) of this rule; and concerning discovery from an expert obtained under subdivision (b)(4)(A) of this rule the court may require, and concerning discovery obtained under subdivision (b)(4)(B) of this rule shall require, the party seeking discovery to pay the other party a fair part of the fees and

expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(D) As used in these rules an expert shall be an expert witness as defined in rule 1.390(a).

(5) Claims of Privilege or Protection of Trial Preparation Materials. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(c) **Protective Orders.** Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense that justice requires, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; and (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court. If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of rule 1.380(a)(4) apply to the award of expenses incurred in relation to the motion.

(d) **Sequence and Timing of Discovery.** Except as provided in subdivision (b)(4) or unless the court

upon motion for the convenience of parties and witnesses and in the interest of justice orders otherwise, methods of discovery may be used in any sequence, and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not delay any other party's discovery.

(e) **Supplementing of Responses.** A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information thereafter acquired.

Committee Notes

1972 Amendment. The rule is derived from Federal Rule of Civil Procedure 26 as amended in 1970. Subdivisions (a), (b)(2), and (b)(3) are new. Subdivision (c) contains material from former rule 1.310(b). Subdivisions (d) and (e) are new, but the latter is similar to former rule 1.340(d). Significant changes are made in discovery from experts. The general rearrangement of the discovery rule is more logical and is the result of 35 years of experience under the federal rules.

1988 Amendment. Subdivision (b)(2) has been added to enable discovery of the existence and contents of indemnity agreements and is the result of the enactment of sections 627.7262 and 627.7264, Florida Statutes, proscribing the joinder of insurers but providing for disclosure. This rule is derived from Federal Rule of Civil Procedure 26(b)(2). Subdivisions (b)(2) and (b)(3) have been redesignated as (b)(3) and (b)(4) respectively.

The purpose of the amendment to subdivision (b)(3)(A) (renumbered (b)(4)(A)) is to allow, without leave of court, the depositions of experts who have been disclosed as expected to be used at trial. The purpose of subdivision (b)(4)(D) is to define the term "expert" as used in these rules.

1996 Amendment. The amendments to subdivision (b)(4)(A) are derived from the Supreme Court's decision in *Elkins v. Syken*, 672 So. 2d 517 (Fla. 1996). They are intended to avoid annoyance, embarrassment, and undue expense while still permitting the adverse party to obtain relevant information regarding the potential bias or interest of the expert witness.

Subdivision (b)(5) is added and is derived from Federal Rule of Civil Procedure 26(b)(5) (1993).

Court Commentary

2000 Amendment. *Allstate Insurance Co. v. Boecher*, 733 So.2d 993, 999 (Fla. 1999), clarifies that subdivision (b)(4)(A)(iii) is not intended "to place a blanket bar on discovery from parties about information they have in their possession about an expert, including the party's financial relationship with the expert."

RULE 1.290. DEPOSITIONS BEFORE ACTION OR PENDING APPEAL

(a) Before Action.

(1) **Petition.** A person who desires to perpetuate that person's own testimony or that of another person regarding any matter that may be cognizable in any court of this state may file a verified petition in the circuit court in the county of the residence of any expected adverse party. The petition shall be entitled in the name of the petitioner and shall show: (1) that the petitioner expects to be a party to an action cognizable in a court of Florida, but is presently unable to bring it or cause it to be brought, (2) the subject matter of the expected action and the petitioner's interest therein, (3) the facts which the petitioner desires to establish by the proposed testimony and the petitioner's reasons for desiring to perpetuate it, (4) the names or a description of the persons the petitioner expects will be adverse parties and their addresses so far as known, and (5) the names and addresses of the persons to be examined and the substance of the testimony which the petitioner expects to elicit from each; and shall ask for an order authorizing the petitioner to take the deposition of the persons to be examined named in the petition for the purpose of perpetuating their testimony.

(2) **Notice and Service.** The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will apply to the court at a time and place named therein for an order described in the petition. At least 20 days before the date of hearing the notice shall be served either within or without the county in the manner provided by law for service of summons, but if such service cannot with due diligence be made upon any expected adverse party named in the petition, the court may make an order for service by publication or otherwise, and shall appoint an attorney for persons not served in the manner provided by law for service of summons who shall represent them, and if they are not otherwise represented, shall cross-examine the deponent.

(3) **Order and Examination.** If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the deposition

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CASE NO: 03 CA-005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

**MORGAN STANLEY & CO. INCORPORATED'S OBJECTIONS TO
COLEMAN (PARENT) HOLDINGS, INC. FIRST REQUEST FOR
PRODUCTION OF DOCUMENTS**

Pursuant to Rules 1.280 and 1.350 of the Florida Rules of Civil Procedure, defendant, Morgan Stanley & Co. Incorporated ("MS & Co.") hereby interposes the following objections to Coleman (Parent) Holdings, Inc.'s ("CPH") First Request for Production of Documents ("Request for Production").

GENERAL OBJECTIONS

The following general objections apply to all specifications of CPH's Request for Production. Each General Objection is hereby incorporated in the response to each request herein as if fully set forth:

1. MS & Co. objects to the entire Request for Production on the ground that discovery at this stage of the litigation would result in unnecessary burden and expense to MS & Co. On June 25, 2003, MS & Co. filed a Motion to Dismiss Or In the Alternative For Judgment on the Pleadings that is potentially dispositive of all of CPH's claims and will allow the Court to

dismiss CPH's Complaint as a matter of law. Requiring MS & Co. to respond to CPH's Request for Production before the Court has had an opportunity to rule on this case-dispositive motion is unduly burdensome and would require MS & Co. to incur additional and unnecessary expense. MS & Co. is simultaneously filing a Motion To Stay Discovery, and hereby incorporates by reference all of the arguments contained in that Motion to Temporarily Stay as general objections to the entire Request for Production.

2. MS & Co. objects to the entire Request for Production as over broad and unduly burdensome. CPH has requested the production of impermissibly broad categories of documents that would require MS & Co. to collect, review and produce potentially hundreds of thousands of pages of documents, e-mails, electronic documents on servers and hard drives, and other materials from multiple MS & Co. business locations around the United States. MS & Co. should not be required to shoulder this burden that goes well beyond the requirements of the Florida Rules of Civil Procedure, particularly where, as here, MS & Co.'s Motion to Dismiss Or In the Alternative For Judgment on the Pleadings is potentially dispositive of all of CPH's claims.

3. MS & Co. objects to the entire Request for Production because many of these requests seek documents which MS & Co. had produced in connection with other related actions. CPH has obtained or has access to copies of MS & Co.'s prior productions, and therefore already has documents responsive to these requests in its possession. MS & Co. should not be required to bear the burden of expending valuable time and financial resources to search for, review and produce documents that CPH already has in its possession.

4. MS & Co. objects to the entire Request for Production to the extent that it seeks documents that are protected from disclosure by the attorney-client, attorney work product, other applicable common law or statutory privileges, or which are otherwise immune from discovery (hereinafter referred to as "Privileges"). MS & Co. expressly reserves the right to assert any and all common law or statutory privileges to which MS & Co. and its attorneys are entitled under applicable law. MS & Co. will exchange with CPH a categorization of documents not produced based on a claim of privilege or discovery immunity at the time the documents are produced, or at such time as may be agreed upon by the parties.

5. MS & Co. objects to the entire Request for Production to the extent it seeks documents not relevant to the subject matter of this litigation or not reasonably calculated to lead to the discovery of admissible evidence.

6. MS & Co. objects to the entire Request for Production, including the Instructions, to the extent it purports to impose requirements beyond those specified by the Florida Rules of Civil Procedure, discovery guidelines of this Court, and applicable case law.

7. MS & Co. objects to the entire Request for Production to the extent it calls for documents which are in the public domain and accessible to all parties.

8. MS & Co. objects to the entire Request for Production to the extent that it is intended to harass or annoy MS & Co. or its employees, to create additional and unnecessary expense for MS & Co., or intended to serve any other improper purpose.

9. MS & Co. objects to the entire Request for Production to the extent it seeks the production of documents beyond MS & Co.'s possession, custody or control. Any statement by

MS & Co. to the effect that it will produce responsive documents shall not be construed as an admission that any such documents exist or are within MS & Co.'s possession, custody or control.

10. MS & Co.'s responses to CPH's document requests shall not be construed in any way as an admission that any definition provided by CPH is either factually correct or legally binding upon MS & Co., or a waiver of any of MS & Co.'s Objections including, but not limited to, objections regarding discoverability and admissibility of documents.

11. MS & Co. objects to the entire Request for Production, including the Instructions, to the extent it purports to impose a continuing duty of supplementation extending beyond the requirements of the Florida Rules of Civil Procedure, discovery guidelines of this Court, or applicable case law.

12. MS & Co.'s objections are based on its investigations and discovery to date. MS & Co. expressly reserves the right to modify and supplement these objections.

13. MS & Co. generally objects to the production of any documents unless and until an appropriate Protective Order has been agreed to by both parties to this litigation and entered by the Court.

SPECIFIC OBJECTIONS

Each of the General Objections set forth above is deemed incorporated into each Specific Objection. The enumeration of specific objections does not constitute, and shall not be construed or deemed as, a waiver of any objection listed.

DEFINITION NO. 1

“Arbitrations” means Albert J. Dunlap and Sunbeam Corporation, No. 32160 00088 99 (AAA); and Russell A. Kersh and Sunbeam Corporation, No. 32 160 00091 99 (AAA).

MS & Co.’s Objections:

MS & Co. objects to the definition of “Arbitrations” as overbroad, unduly burdensome, irrelevant to this litigation and not reasonably calculated to lead to admissible evidence.

DEFINITION NO. 2

“Coleman” means the Coleman Company, Inc. or any of its present and former officers, directors, employees, representatives, agents, and all other persons acting or purporting to act on its behalf.

MS & Co.’s Objections:

MS & Co. objects to the definition of “Coleman” as overbroad on the grounds that such a definition is vague and ambiguous and purports to impute to MS & Co. the responsibility for ascertaining relationships and affiliations unknown to MS & Co., as well as determining the present and former officers, directors, employees, representatives, agents, and all other persons acting or purporting to act on its behalf.

DEFINITION NO. 3

“CPH” means Coleman (Parent) Holdings Inc., Coleman Worldwide Corporation, CLN Holdings, Co., Inc., or any of their present and former officers, directors, employees, representatives, agents, and all other persons acting or purporting to act on their behalf.

MS & Co.’s Objections:

MS & Co. objects to the definition of “CPH” as overbroad on the grounds that such a definition is vague and ambiguous and purports to impute to MS & Co. the responsibility for ascertaining relationships and affiliations unknown to MS & Co., as well as determining the present and former officers, directors, employees, representatives, agents, and all other persons acting or purporting to act on its behalf.

DEFINITION NO. 7

“Documents” means documents whether fixed in tangible medium or electronically stored. The word “documents” shall include, by way of example and not by way of limitation, all of the following: papers, correspondence, trade letters, envelopes, memoranda, telegrams, cables, notes, messages, reports, studies, press releases, comparisons, books, accounts, checks, audio and video recordings and transcriptions thereof, pleadings, testimony, articles, bulletins, pamphlets, brochures, magazines, questionnaires, surveys, charts, newspapers, calendars, desk calendars, pocket calendars, lists, logs, publications, notices, diagrams, instructions, diaries, minutes for meetings, corporate minutes, orders, resolutions, agendas, memorials or notes of oral communications, whether by telephone or face-to-face, contracts, agreements, drafts of or proposed contracts or agreements, memoranda of understanding, letters of intent, computer tapes, computer drives or memories, computer diskettes or disks, e-mail, CD-ROMS, or any other tangible thing on which any handwriting, typing, printing, photostatic, electronic, or other form of communication or information is recorded or reproduced, together with all notations of any of the foregoing, all originals, file copies, or other unique copies of the foregoing, and all versions or drafts thereof, whether used or not.

MS & Co.’s Objections:

MS & Co. objects to the definition of the term “documents” as overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence to the extent it purports to require a search of all electronic media without regard for the undue expense and burden of such an undertaking in light of the marginal benefits to be obtained from such a search.

DEFINITION NO. 10

“Litigations” means In Re Sunbeam Securities Litigation, 98-8258-Civ.-Middlebrooks (S.D.Fla.); Camden Asset Management, L.P., et al. v. Sunbeam Corporation, et al., 98-8773-Civ. Middlebrooks and 98-8275-Civ.-Middlebrooks (S.D. Fla.); Krim v. Dunlap, et al., No. CL983168AD (15th Jud. Cir., Fla.); Stapleton v. Sunbeam Corp., et al., No. 98-1676-Civ.-King(S.D. Fla.); Sunbeam Corp. v. PricewaterhouseCoopers LLP, No. CL005444AN (15th Jud. Cir., Fla.); In re Sunbeam Corp., Inc., No. 01-40291 (AJG) Bankr. S.D.N.Y.) and any adversary proceedings therein; SEC v. Dunlap, et al., No. 01-8437-Vic.-Middlebrooks (S.D. Fla); Oaktree Capital Management LLC v. Arthur Andersen LLP, No. BC257177 (L.A. Cty., CA); and Coleman (Parent) Holdings Inc. v. Arthur Andersen LLP, et al., No. CA 01-060662AN (15th Jud. Cir., Fla).

MS & Co.'s Objections:

MS & Co. objects to the definition of "Litigations" as overbroad, unduly burdensome, irrelevant to this litigation and not reasonably calculated to lead to admissible evidence.

DEFINITION NO. 11

"MS & Co." means MS & Co., Inc. or any of its subsidiaries, divisions, predecessors, successors, present and former employees, representatives, agents, attorneys, accountants, advisors, or all other persons acting or purporting to act on its behalf.

MS & Co.'s Objections:

MS & Co. objects to the definition of the term "MS & Co." on the ground that its adoption would require a document search that is overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence to the extent that it may be construed to require MS & Co. to produce documents that are not within its actual "possession, custody, or control" pursuant to Florida Rule of Civil Procedure 1.350(a).

DEFINITION NO. 12

"SEC Administrative Proceedings" means In the Matter of Sunbeam Corp., SEC Administrative Proceeding File No. 3-10481, and In the Matter of David C. Fannin, SEC Administrative Proceeding File No. 3-10482.

MS & Co.'s Objections:

MS & Co. objects to the definition of "SEC Administrative Proceedings" as overbroad, unduly burdensome, irrelevant to this litigation and not reasonably calculated to lead to admissible evidence.

DEFINITION NO. 16

"Sunbeam" means Sunbeam Corporation, or any of its subsidiaries, divisions, affiliates, predecessors, successors, present and former employees, representatives, agents and all other persons acting or purporting to act on its behalf.

MS & Co.'s Objections:

MS & Co. objects to the definition of "Sunbeam" as overbroad, vague and not reasonably calculated to lead to the discovery of admissible evidence. MS & Co. further objects to this definition to the extent that it purports to impute on MS & Co. the responsibility of ascertaining relationships and affiliations unknown to MS & Co., as well as determining the present and former officers, directors, employees, representatives, agents, and all other persons acting or purporting to act on its behalf. Further, MS & Co. objects to this definition to the extent that it purports to impose on MS & Co. the obligation to provide documents outside of its possession, custody, or control.

DEFINITION NO. 17

"You" or "Your" means MS & Co., Inc. and/or any of its subsidiaries, divisions, predecessors, successors, present or former employees, representatives, agents, attorneys, accountants, advisors, or anyone acting or purporting to act on its behalf.

MS & Co.'s Objections:

MS & Co. objects to the definition of the term "You" or "Your" on the ground that its adoption would require a document search that is overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence to the extent that it may be construed to require MS & Co. to produce documents that are not within its actual "possession, custody, or control" pursuant to Florida Rule of Civil Procedure 1.350(a).

INSTRUCTION NO. 2

All documents shall be produced in the file folder envelope or other container in which the documents are kept or maintained by you. If, for any reason, the container cannot be produced, produce copies of all labels or other identifying marks.

MS & Co.'s Objections:

MS & Co. objects to Instruction No. 2 insofar as it purports to impose on MS & Co. the obligation to disclose information beyond the scope of obligations imposed by the Florida Rules of Civil Procedure and other applicable law.

INSTRUCTION NO. 3

The relevant period, unless otherwise indicated, shall be from January 1 1997 through the date of trial of this matter, and shall include all documents and information which relate in whole or in part to such period, or to events or circumstances during such period, even though dated, prepared, generated, or received prior to or subsequent to that period. Please supplement or correct your responses to these requests if, at any time, you become aware that your responses are incomplete or incorrect in any respect.

MS & Co.'s Objections:

MS & Co. objects to this Instruction as vague and ambiguous insofar as it refers to documents and information "which relate in whole or in part to" the relevant period, or "to events or circumstances during such period." MS & Co. also objects to this Instruction to the extent that it purports to impose a continuing duty of supplementation not required by the Florida Rules of Civil Procedure.

INSTRUCTION NO. 4

If you claim the attorney-client privilege, or any other privilege or work-product protection for all or any portion of a document, you shall provide a privilege log that describes the withheld material sufficiently to allow CPH to test the privilege or protection asserted.

MS & Co.'s Objections:

MS & Co. will exchange with CPH a privilege log listing otherwise responsive documents for which privilege is claimed within thirty (30) days after the categories of documents that include such documents for which privilege is claimed are produced, either pursuant to unobjected-to discovery requests or pursuant to Court order.

DOCUMENT REQUEST NO. 1

All documents concerning your efforts to have Sunbeam retain or maintain your investment banking and/or securities underwriting services.

MS & Co.'s Objections:

In addition to the General Objections set forth above, MS & Co. objects to this request because it seeks documents which MS & Co. had produced in connection with other related actions. Documents previously produced by MS & Co. include all documents responsive to this request. CPH has obtained or has access to MS & Co.'s prior productions, and therefore already has documents responsive to this request in its possession. In addition, MS & Co. objects to this request because it is duplicative of other document requests, including, but not limited to Request Nos. 49 and 59.

DOCUMENT REQUEST NO. 2

All documents reflecting all fees and expenses paid by Sunbeam to you, including without limitation all billing statements, invoices, time detail records, individual calendars, daily diaries (including electronic calendar programs), or other documents that describe or record the time spent, or expenses incurred (including back-up for any out-of pocket expenses), by any MS & Co. personnel, or that describe or record any aspect of their activities concerning any services performed on behalf of, or concerning, Sunbeam.

MS & Co.'s Objections:

In addition to the General Objections set forth above, MS & Co. objects to this request because it seeks documents which MS & Co. had produced in connection with other related actions. Documents previously produced by MS & Co. include all documents responsive to this request. CPH has obtained or has access to MS & Co.'s prior productions, and therefore already has documents responsive to this request in its possession. In addition, MS & Co. objects to this request because it is duplicative of other document requests, including, but not limited to Request Nos. 49 and 59.

Further, MS & Co. objects to this request on the ground that it consists of two distinct requests which are each overly broad and not reasonably calculated to lead to the discovery of admissible evidence.

MS & Co. further objects to the Request to the extent that it seeks documents “that describe or record any aspect of their activities concerning any services performed on behalf of, or concerning, Sunbeam” as duplicative of Request 31.

DOCUMENT REQUEST NO. 3

All documents concerning any investigation, analysis, or due diligence of Sunbeam conducted by you or on your behalf in 1997 or 1998.

MS & Co.’s Objections:

In addition to the General Objections set forth above, MS & Co. objects to this request because it seeks documents which MS & Co. had produced in connection with other related actions. Documents previously produced by MS & Co. include all documents responsive to this request. CPH has obtained or has access to MS & Co.’s prior productions, and therefore already has documents responsive to this request in its possession. In addition, MS & Co. objects to this request because it is duplicative of other document requests, including, but not limited to Request Nos. 49 and 59.

Further, MS & Co. objects to this request to the extent that it seeks documents “conducted . . . on your behalf” as being vague and ambiguous. MS & Co. also objects to this request to the extent that it seeks documents which are not in MS & Co.’s possession or control.

DOCUMENT REQUEST NO. 4

All documents concerning any investigation, analysis, or due diligence of Coleman or CPH conducted by you or on your behalf in 1997 or 1998.

MS & Co.'s Objections:

In addition to the General Objections set forth above, MS & Co. objects to this request because it seeks documents which MS & Co. had produced in connection with other related actions. Documents previously produced by MS & Co. include all documents responsive to this request. CPH has obtained or has access to MS & Co.'s prior productions, and therefore already has documents responsive to this request in its possession. In addition, MS & Co. objects to this request because it is duplicative of other document requests, including, but not limited to Request Nos. 49 and 59.

Further, MS & Co. objects to this request to the extent that it seeks documents "conducted . . . on your behalf" as being vague and ambiguous. MS & Co. also objects to this request to the extent that it seeks documents which are not in MS & Co.'s possession or control.

DOCUMENT REQUEST NO. 5

All documents concerning your attempts in 1997 or 1998 to locate someone to purchase or otherwise acquire Sunbeam, whether through merger, purchase, transfer of assets or securities, or otherwise.

MS & Co.'s Objections:

In addition to the General Objections set forth above, MS & Co. objects to this request because it seeks documents which MS & Co. had produced in connection with other related actions. Documents previously produced by MS & Co. include all documents responsive to this request. CPH has obtained or has access to MS & Co.'s prior productions, and therefore already has documents responsive to this request in its possession. In addition, MS & Co. objects to this request because it is duplicative of other document requests, including, but not limited to Request Nos. 49 and 59.

DOCUMENT REQUEST NO. 6

All documents concerning your attempts in 1997 or 1998 to locate companies for Sunbeam to purchase or otherwise acquire, whether through merger, purchase, transfer of assets or securities, or otherwise.

MS & Co.'s Objections:

In addition to the General Objections set forth above, MS & Co. objects to this request because it seeks documents which MS & Co. had produced in connection with other related actions. Documents previously produced by MS & Co. include all documents responsive to this request. CPH has obtained or has access to MS & Co.'s prior productions, and therefore already has documents responsive to this request in its possession. In addition, MS & Co. objects to this request because it is duplicative of other document requests, including, but not limited to Request Nos. 49 and 59.

DOCUMENT REQUEST NO. 7

All documents concerning the negotiation and signing of the February 27, 1998 Agreements.

MS & Co.'s Objections:

In addition to the General Objections set forth above, MS & Co. objects to this request because it seeks documents which MS & Co. had produced in connection with other related actions. Documents previously produced by MS & Co. include all documents responsive to this request. CPH has obtained or has access to MS & Co.'s prior productions, and therefore already has documents responsive to this request in its possession. In addition, MS & Co. objects to this request because it is duplicative of other document requests, including, but not limited to Request Nos. 49 and 59.

DOCUMENT REQUEST NO. 8

All documents concerning the closing of the Coleman Transaction, including without limitation all documents concerning the decision to close the Coleman Transaction.

MS & Co.'s Objections:

In addition to the General Objections set forth above, MS & Co. objects to this request because it seeks documents which MS & Co. had produced in connection with other related actions. Documents previously produced by MS & Co. include all documents responsive to this request. CPH has obtained or has access to MS & Co.'s prior productions, and therefore already has documents responsive to this request in its possession. In addition, MS & Co. objects to this request because it is duplicative of other document requests, including, but not limited to Request Nos. 49 and 59.

MS & Co. further objects to this request to the extent that it seeks documents that had not in the custody or control of MS & Co. Given that the decision to close the Coleman Transaction was made by the Sunbeam Board of Directors -- not MS & Co. -- many of the requested documents will in fact not be within MS & Co.'s custody or control.

DOCUMENT REQUEST NO. 9

All documents concerning the meetings of Sunbeam's Board of Directors in 1997 and 1998.

MS & Co.'s Objections:

In addition to the General Objections set forth above, MS & Co. objects to this request because it seeks documents which MS & Co. had produced in connection with other related actions. Documents previously produced by MS & Co. include all documents responsive to this request. CPH has obtained or has access to MS & Co.'s prior productions, and therefore already has documents responsive to this request in its possession. In addition, MS & Co. objects to this request because it is duplicative of other document requests, including, but not limited to Request Nos. 49 and 59.

MS & Co. objects to the Request for “[a]ll documents concerning the meetings of Sunbeam’s Board of Directors” as vague, ambiguous, overbroad and burdensome. MS & Co. understands this request to cover all documents regarding all meetings of the Sunbeam Board of Directors, regardless of whether such documents, or such meetings, addresses the Sunbeam/Coleman transaction at issue in this litigation therefore it is irrelevant to this litigation and not reasonably calculated to lead to the discovery of admissible evidence.

MS & Co. further objects to this request to the extent that it seeks documents that had not in the possession or control of MS & Co. Given that the decision to close the Coleman Transaction was made by the Sunbeam Board of Directors -- not MS & Co. -- many of the requested documents will in fact not be within MS & Co.’s possession or control.

DOCUMENT REQUEST NO. 10

All documents concerning any discussion, promise, agreement, or plan to have research analysts, whether or not at MS & Co., provide coverage for Sunbeam or any of its debt or equity securities.

MS & Co.’s Objections:

In addition to the General Objections set forth above, MS & Co. objects to this request because it seeks documents which MS & Co. had produced in connection with other related actions. Documents previously produced by MS & Co. include all documents responsive to this request. CPH has obtained or has access to MS & Co.’s prior productions, and therefore already has documents responsive to this request in its possession. In addition, MS & Co. objects to this request because it is duplicative of other document requests, including, but not limited to Request Nos. 49 and 59.

MS & Co. objects to this request as vague, ambiguous, overbroad and burdensome. MS & Co. understands this request to cover all documents regarding any research analyst’s coverage of Sunbeam, or its securities, regardless of whether the analyst was affiliated

with MS & Co. or whether such coverage pertained to the Sunbeam/Coleman transaction at issue in this litigation, therefore it is irrelevant to this litigation and not reasonably calculated to lead to the discovery of admissible evidence.

MS & Co. further objects to this request to the extent that it seeks documents which are not in MS & Co.'s possession or control. MS & Co. also objects to this request to the extent that it assumes the existence of such a "discussion, promise, agreement or plan."

DOCUMENT REQUEST NO. 11

All documents used, analyzed, consulted, or prepared by any MS & Co. research analyst, including without limitation Andrew Conway, James Dormer, Jake Foley, and Karen Eltrich, concerning Sunbeam.

MS & Co.'s Objections:

In addition to the General Objections set forth above, MS & Co. objects to this request because it seeks documents which MS & Co. had produced in connection with other related actions. Documents previously produced by MS & Co. include all documents responsive to this request. CPH has obtained or has access to MS & Co.'s prior productions, and therefore already has documents responsive to this request in its possession. In addition, MS & Co. objects to this request because it is duplicative of other document requests, including, but not limited to Request Nos. 49 and 59.

DOCUMENT REQUEST NO. 12

All documents concerning communications between or among you, Sunbeam, and Wall Street analysts concerning Sunbeam or the Coleman Transaction.

MS & Co.'s Objections:

In addition to the General Objections set forth above, MS & Co. objects to this request because it seeks documents which MS & Co. had produced in connection with other related actions. Documents previously produced by MS & Co. include all documents responsive

to this request. CPH has obtained or has access to MS & Co.'s prior productions, and therefore already has documents responsive to this request in its possession. In addition, MS & Co. objects to this request because it is duplicative of other document requests, including, but not limited to Request Nos. 49 and 59.

MS & Co. further objects to this request to the extent that it seeks documents pertaining to communications to which MS & Co. was not party, for such documents are not in MS & Co.'s possession or control.

DOCUMENT REQUEST NO. 13

All documents concerning any valuation of Sunbeam or Sunbeam securities.

MS & Co.'s Objections:

In addition to the General Objections set forth above, MS & Co. objects to this request because it seeks documents which MS & Co. had produced in connection with other related actions. Documents previously produced by MS & Co. include all documents responsive to this request. CPH has obtained or has access to MS & Co.'s prior productions, and therefore already has documents responsive to this request in its possession. In addition, MS & Co. objects to this request because it is duplicative of other document requests, including, but not limited to Request Nos. 49 and 59.

MS & Co. further objects to this request to the extent that it seeks documents which are not in MS & Co.'s possession or control. Furthermore, MS & Co. objects to this request as impermissibly overbroad and vague, seeking documents which are irrelevant to this litigation and unreasonably calculated to lead to the discovery of admissible evidence.

DOCUMENT REQUEST NO. 14

All documents concerning the stock market's valuation of Sunbeam securities, including without limitation documents describing or analyzing the increase or decline in the

market price of Sunbeam stock in the period from and including July 1, 1996 through and including December 31, 1998.

MS & Co.'s Objections:

In addition to the General Objections set forth above, MS & Co. objects to this request because it seeks documents which MS & Co. had produced in connection with other related actions. Documents previously produced by MS & Co. include all documents responsive to this request. CPH has obtained or has access to MS & Co.'s prior productions, and therefore already has documents responsive to this request in its possession. In addition, MS & Co. objects to this request because it is duplicative of other document requests, including, but not limited to Request Nos. 49 and 59.

MS & Co. further objects to this request to the extent that it seeks documents which are not in MS & Co.'s possession or control. MS & Co. also objects to this request to the extent that it seeks the production of documents which are publicly available, and therefore equally accessible by all parties.

DOCUMENT REQUEST NO. 15

All documents concerning any valuation of Coleman or Coleman securities.

MS & Co.'s Objections:

In addition to the General Objections set forth above, MS & Co. objects to this request because it seeks documents which MS & Co. had produced in connection with other related actions. Documents previously produced by MS & Co. include all documents responsive to this request. CPH has obtained or has access to MS & Co.'s prior productions, and therefore already has documents responsive to this request in its possession. In addition, MS & Co. objects to this request because it is duplicative of other document requests, including, but not limited to Request Nos. 49 and 59.

MS & Co. further objects to this request to the extent that it seeks documents which are not in MS & Co.'s possession or control. Furthermore, MS & Co. objects to this request as impermissibly overbroad and vague, seeking documents which are irrelevant to this litigation and unreasonably calculated to lead to the discovery of admissible evidence.

DOCUMENT REQUEST NO. 16

All documents concerning synergies that might be achieved from a business combination of Sunbeam and Coleman.

MS & Co.'s Objections:

In addition to the General Objections set forth above, MS & Co. objects to this request because it seeks documents which MS & Co. had produced in connection with other related actions. Documents previously produced by MS & Co. include all documents responsive to this request. CPH has obtained or has access to MS & Co.'s prior productions, and therefore already has documents responsive to this request in its possession. In addition, MS & Co. objects to this request because it is duplicative of other document requests, including, but not limited to Request Nos. 49 and 59.

MS & Co. further objects to this request to the extent that it seeks documents which are not in MS & Co.'s possession or control.

DOCUMENT REQUEST NO. 17

All documents concerning Sunbeam's financial statements and/or restated financial statements.

MS & Co.'s Objections:

In addition to the General Objections set forth above, MS & Co. objects to this request because it seeks documents which MS & Co. had produced in connection with other related actions. Documents previously produced by MS & Co. include all documents responsive to this request. CPH has obtained or has access to MS & Co.'s prior productions, and therefore

already has documents responsive to this request in its possession. In addition, MS & Co. objects to this request because it is duplicative of other document requests, including, but not limited to Request Nos. 49 and 59.

MS & Co. further objects to this request to the extent that it seeks documents which are not in MS & Co.'s possession or control. MS & Co. also objects to this request to the extent that it seeks the production of documents which are publicly available, and therefore equally accessible by all parties.

DOCUMENT REQUEST NO. 18

All documents concerning the increase in the size of the Subordinated Debenture Offering from \$500 million to \$750 million.

MS & Co.'s Objections:

In addition to the General Objections set forth above, MS & Co. objects to this request because it seeks documents which MS & Co. had produced in connection with other related actions. Documents previously produced by MS & Co. include all documents responsive to this request. CPH has obtained or has access to MS & Co.'s prior productions, and therefore already has documents responsive to this request in its possession. In addition, MS & Co. objects to this request because it is duplicative of other document requests, including, but not limited to Request Nos. 49 and 59.

DOCUMENT REQUEST NO. 19

All documents concerning any draft or executed "comfort letters" requested by your or provided to you in connection with the Subordinated Debenture Offering.

MS & Co.'s Objections:

In addition to the General Objections set forth above, MS & Co. objects to this request because it seeks documents which MS & Co. had produced in connection with other related actions. Documents previously produced by MS & Co. include all documents responsive

to this request. CPH has obtained or has access to MS & Co.'s prior productions, and therefore already has documents responsive to this request in its possession. In addition, MS & Co. objects to this request because it is duplicative of other document requests, including, but not limited to Request Nos. 49 and 59.

MS & Co. further objects to this request to the extent that it seeks the production of documents which are not in MS & Co.'s custody or control.

DOCUMENT REQUEST NO. 20

All documents concerning the sale of, or your attempts to sell, Subordinated Debentures, including without limitation documents concerning road shows, communications with potential investors, or communications with or among MS & Co.'s sales personnel.

MS & Co.'s Objections:

In addition to the General Objections set forth above, MS & Co. objects to this request because it seeks documents which MS & Co. had produced in connection with other related actions. Documents previously produced by MS & Co. include all documents responsive to this request. CPH has obtained or has access to MS & Co.'s prior productions, and therefore already has documents responsive to this request in its possession. In addition, MS & Co. objects to this request because it is duplicative of other document requests, including, but not limited to Request Nos. 49 and 59.

MS & Co. further objects to this request to the extent that it seeks the production of documents which are not in MS & Co.'s custody or control.

DOCUMENT REQUEST NO. 21

All documents concerning the pricing of the Subordinated Debentures.

MS & Co.'s Objections:

In addition to the General Objections set forth above, MS & Co. objects to this request because it seeks documents which MS & Co. had produced in connection with other

related actions. Documents previously produced by MS & Co. include all documents responsive to this request. CPH has obtained or has access to MS & Co.'s prior productions, and therefore already has documents responsive to this request in its possession. In addition, MS & Co. objects to this request because it is duplicative of other document requests, including, but not limited to Request Nos. 49 and 59.

MS & Co. further objects to this request to the extent that it seeks the production of documents which are not in MS & Co.'s custody or control.

DOCUMENT REQUEST NO. 22

All documents concerning the conversion features of the Subordinated Debentures.

MS & Co.'s Objections:

In addition to the General Objections set forth above, MS & Co. objects to this request because it seeks documents which MS & Co. had produced in connection with other related actions. Documents previously produced by MS & Co. include all documents responsive to this request. CPH has obtained or has access to MS & Co.'s prior productions, and therefore already has documents responsive to this request in its possession. In addition, MS & Co. objects to this request because it is duplicative of other document requests, including, but not limited to Request Nos. 49 and 59.

MS & Co. further objects to this request to the extent that it seeks the production of documents which are not in MS & Co.'s custody or control.

DOCUMENT REQUEST NO. 23

All documents concerning the "book of demand" for the Subordinated Debentures.

MS & Co.'s Objections:

In addition to the General Objections set forth above, MS & Co. objects to this request because it seeks documents which MS & Co. had produced in connection with other related actions. Documents previously produced by MS & Co. include all documents responsive to this request. CPH has obtained or has access to MS & Co.'s prior productions, and therefore already has documents responsive to this request in its possession. In addition, MS & Co. objects to this request because it is duplicative of other document requests, including, but not limited to Request Nos. 49 and 59.

MS & Co. further objects to this request as vague and ambiguous as to the meaning of "book of demand."

DOCUMENT REQUEST NO. 24

All documents concerning the events that took place on March 19, 1998 at Global Financial Press, including without limitation documents concerning Lawrence Bornstein and/or John Tyree.

MS & Co.'s Objections:

In addition to the General Objections set forth above, MS & Co. objects to this request because it seeks documents which MS & Co. had produced in connection with other related actions. Documents previously produced by MS & Co. include all documents responsive to this request. CPH has obtained or has access to MS & Co.'s prior productions, and therefore already has documents responsive to this request in its possession. In addition, MS & Co. objects to this request because it is duplicative of other document requests, including, but not limited to Request Nos. 49 and 59.

MS & Co. further objects to this request to the extent that it seeks the production of documents which are not in MS & Co.'s custody or control. MS & Co. objects to this request

for all documents concerning “the events that took place” on March 19, 1998 as vague, ambiguous and over broad.

DOCUMENT REQUEST NO. 25

All documents concerning your communications with Sunbeam on March 18, 1998.

MS & Co.’s Objections:

In addition to the General Objections set forth above, MS & Co. objects to this request because it seeks documents which MS & Co. had produced in connection with other related actions. Documents previously produced by MS & Co. include all documents responsive to this request. CPH has obtained or has access to MS & Co.’s prior productions, and therefore already has documents responsive to this request in its possession. In addition, MS & Co. objects to this request because it is duplicative of other document requests, including, but not limited to Request Nos. 49 and 59.

MS & Co. further objects to this request to the extent that it seeks the production of documents which are not in MS & Co.’s custody or control. MS & Co. objects to this request for all documents concerning “your communications with Sunbeam on March 18, 1998” as vague, ambiguous and over broad.

DOCUMENT REQUEST NO. 26

All documents concerning the “bring-down” due diligence for the Subordinated Debenture Offering.

MS & Co.’s Objections:

In addition to the General Objections set forth above, MS & Co. objects to this request because it seeks documents which MS & Co. had produced in connection with other related actions. Documents previously produced by MS & Co. include all documents responsive to this request. CPH has obtained or has access to MS & Co.’s prior productions, and therefore

already has documents responsive to this request in its possession. In addition, MS & Co. objects to this request because it is duplicative of other document requests, including, but not limited to Request Nos. 49 and 59.

MS & Co. further objects to this request to the extent that it seeks documents which are not in MS & Co.'s custody or control.

DOCUMENT REQUEST NO. 27

All documents concerning your communications with Sunbeam on March 24, 1998.

MS & Co.'s Objections:

In addition to the General Objections set forth above, MS & Co. objects to this request because it seeks documents which MS & Co. had produced in connection with other related actions. Documents previously produced by MS & Co. include all documents responsive to this request. CPH has obtained or has access to MS & Co.'s prior productions, and therefore already has documents responsive to this request in its possession. In addition, MS & Co. objects to this request because it is duplicative of other document requests, including, but not limited to Request Nos. 49 and 59.

MS & Co. objects to this request for all documents concerning "your communications with Sunbeam on March 24, 1998" as vague, ambiguous and over broad.

DOCUMENT REQUEST NO. 28

All documents concerning Sunbeam's first quarter 1998 sales and/or earnings.

MS & Co.'s Objections:

In addition to the General Objections set forth above, MS & Co. objects to this request because it seeks documents which MS & Co. had produced in connection with other related actions. Documents previously produced by MS & Co. include all documents responsive

to this request. CPH has obtained or has access to MS & Co.'s prior productions, and therefore already has documents responsive to this request in its possession. In addition, MS & Co. objects to this request because it is duplicative of other document requests, including, but not limited to Request Nos. 49 and 59.

MS & Co. further objects to this request on the grounds that it is duplicative of Requests 13 and 17. MS & Co. objects to this request to the extent that it seeks documents which are not in MS & Co.'s custody or control, are publicly available, and therefore equally accessible by all parties.

DOCUMENT REQUEST NO. 29

All documents concerning the closing of the Subordinated Debenture Offering including without limitation all documents concerning the decision to close the Subordinated Debenture Offering.

MS & Co.'s Objections:

In addition to the General Objections set forth above, MS & Co. objects to this request because it seeks documents which MS & Co. had produced in connection with other related actions. Documents previously produced by MS & Co. include all documents responsive to this request. CPH has obtained or has access to MS & Co.'s prior productions, and therefore already has documents responsive to this request in its possession. In addition, MS & Co. objects to this request because it is duplicative of other document requests, including, but not limited to Request Nos. 49 and 59.

MS & Co. further objects to this request to the extent that it seeks documents that had not in the custody or control of MS & Co. Given that the decision to close the Subordinated Debenture Offering was made by the Sunbeam Board of Directors -- not MS & Co. -- many of the requested documents will in fact not be within MS & Co.'s custody or control.

DOCUMENT REQUEST NO. 30

All documents concerning the Subordinated Debenture Offering.

MS & Co.'s Objections:

In addition to the General Objections set forth above, MS & Co. objects to this request because it seeks documents which MS & Co. had produced in connection with other related actions. Documents previously produced by MS & Co. include all documents responsive to this request. CPH has obtained or has access to MS & Co.'s prior productions, and therefore already has documents responsive to this request in its possession. In addition, MS & Co. objects to this request because it is duplicative of other document requests, including, but not limited to Request Nos. 49 and 59.

MS & Co. further objects to this request as vague, ambiguous, overbroad, unduly burdensome, and duplicative of Requests 10, 18, 19, 20, 21, 22, 23, 26, 29 and 36. Requiring MS & Co. to produce all documents "concerning the Subordinated Debenture Offering," with no further specification or identification of requested documents would impose an unreasonable and undue burden on MS & Co. It is unreasonable to so broadly tailor a request so as to encompass absolutely every document drafted or received by MS & Co. pertaining to the Subordinated Debenture Offering.

DOCUMENT REQUEST NO. 31

All documents concerning any work or services you performed for or on behalf of Sunbeam in 1997 or 1998, regardless of whether you were compensated for that work.

MS & Co.'s Objections:

In addition to the General Objections set forth above, MS & Co. objects to this request because it seeks documents which MS & Co. had produced in connection with other related actions. Documents previously produced by MS & Co. include all documents responsive

to this request. CPH has obtained or has access to MS & Co.'s prior productions, and therefore already has documents responsive to this request in its possession. In addition, MS & Co. objects to this request because it is duplicative of other document requests, including, but not limited to Request Nos. 49 and 59.

MS & Co. further objects to this request as duplicative of Request 2. MS & Co. specifically objects to this request's use of the phrase "on behalf of Sunbeam," because MS & Co. did not act "on behalf" of Sunbeam. MS & Co. objects to this request to the extent that it seeks documents that had not in the custody or control of MS & Co.

DOCUMENT REQUEST NO. 32

All documents concerning press releases issued by Sunbeam on October 23, 1997, March 19, 1998, April 3, 1998, May 9, 1998, June 15, 1998, June 25, 1998, June 30, 1998, October 20, 1998, and November 12, 1998.

MS & Co.'s Objections:

In addition to the General Objections set forth above, MS & Co. objects to this request because it seeks documents which MS & Co. had produced in connection with other related actions. Documents previously produced by MS & Co. include all documents responsive to this request. CPH has obtained or has access to MS & Co.'s prior productions, and therefore already has documents responsive to this request in its possession. In addition, MS & Co. objects to this request because it is duplicative of other document requests, including, but not limited to Request Nos. 49 and 59.

MS & Co. further objects to this request to the extent it calls for documents that are the public domain, and thus equally accessible to all parties. MS & Co. objects to this request to the extent that it seeks documents which are not relevant or reasonably calculated to lead to the discovery of admissible evidence regarding MS & Co.

DOCUMENT REQUEST NO. 33

All documents concerning the statements contained in the press releases issued by Sunbeam on October 23, 1997, March 19, 1998, April 3, 1998, May 9, 1998, June 15, 1998, June 25, 1998, June 30, 1998, October 20, 1998, and November 12, 1998.

MS & Co.'s Objections:

In addition to the General Objections set forth above, MS & Co. objects to this request because it seeks documents which MS & Co. had produced in connection with other related actions. Documents previously produced by MS & Co. include all documents responsive to this request. CPH has obtained or has access to MS & Co.'s prior productions, and therefore already has documents responsive to this request in its possession. In addition, MS & Co. objects to this request because it is duplicative of other document requests, including, but not limited to Request Nos. 49 and 59.

MS & Co. further objects to this request to the extent it calls for documents that are the public domain, and thus equally accessible to all parties, and as duplicative of Request 32. MS & Co. objects to this request to the extent that it seeks documents which are not relevant or likely to lead to admissible information regarding MS & Co.

DOCUMENT REQUEST NO. 34

All documents concerning communications relating to Sunbeam, Coleman, or CPH, including without limitation internal communications within MS & Co. or communications between or among MS & Co. and Sunbeam; Skadden, Arps, Slate, Meagher & Flom LLP; Coopers & Lybrand LLP; Llama Company; Arthur Andersen LLP; Sard Verbinnen & Co., Inc.; Hill & Knowlton, Inc.; The Coleman Company, Inc.; Credit Suisse First Boston; Coleman (Parent) Holdings Inc.; MacAndrews & Forbes Holdings, Inc.; Wachtell Lipton, Rosen & Katz; Davis Polk & Wardwell; or any other person or company, and/or any of their respective employees, agents, or representatives.

MS & Co.'s Objections:

In addition to the General Objections set forth above, MS & Co. objects to this request because it seeks documents which MS & Co. had produced in connection with other

related actions. Documents previously produced by MS & Co. include all documents responsive to this request. CPH has obtained or has access to MS & Co.'s prior productions, and therefore already has documents responsive to this request in its possession. In addition, MS & Co. objects to this request because it is duplicative of other document requests, including, but not limited to Request Nos. 49 and 59.

MS & Co. further objects to this request to the extent that it is over broad, unduly burdensome and duplicative of other requests.

DOCUMENT REQUEST NO. 35

All documents concerning the Coleman Transaction.

MS & Co.'s Objections:

In addition to the General Objections set forth above, MS & Co. objects to this request because it seeks documents which MS & Co. had produced in connection with other related actions. Documents previously produced by MS & Co. include all documents responsive to this request. CPH has obtained or has access to MS & Co.'s prior productions, and therefore already has documents responsive to this request in its possession. In addition, MS & Co. objects to this request because it is duplicative of other document requests, including, but not limited to Request Nos. 49 and 59.

MS & Co. objects to this request as vague, ambiguous, overbroad, and unduly burdensome. Requiring MS & Co. to produce all documents "concerning the Coleman Transaction," with no further specification or identification of requested documents would impose an unreasonable and undue burden on MS & Co. It is unreasonable to so broadly tailor a request so as to encompass absolutely every document pertaining to the Coleman Transaction.

DOCUMENT REQUEST NO. 36

All documents concerning the Subordinated Debenture Offering.

MS & Co.'s Objections:

In addition to the General Objections set forth above, MS & Co. objects to this request because it seeks documents which MS & Co. had produced in connection with other related actions. Documents previously produced by MS & Co. include all documents responsive to this request. CPH has obtained or has access to MS & Co.'s prior productions, and therefore already has documents responsive to this request in its possession. In addition, MS & Co. objects to this request because it is duplicative of other document requests, including, but not limited to Request Nos. 49 and 59.

MS & Co. further objects to this request as vague, ambiguous, overbroad, unduly burdensome, and duplicative of Requests 10, 18, 19, 20, 21, 22, 23, 26, 29 and 36. Additionally, this request is verbatim the same as request 30. MS & Co. will not produce documents responsive to this request.

DOCUMENT REQUEST NO. 37

All documents concerning Albert Dunlap and/or Russell Kersh.

MS & Co.'s Objections:

In addition to the General Objections set forth above, MS & Co. objects to this request because it seeks documents which MS & Co. had produced in connection with other related actions. Documents previously produced by MS & Co. include all documents responsive to this request. CPH has obtained or has access to MS & Co.'s prior productions, and therefore already has documents responsive to this request in its possession. In addition, MS & Co. objects to this request because it is duplicative of other document requests, including, but not limited to Request Nos. 49 and 59.

Furthermore, MS & Co. objects to this request as vague, overbroad, and unduly burdensome. This requests seeks documents that are irrelevant to this litigation and not reasonably calculated to lead to the discovery of admissible evidence.

DOCUMENT REQUEST NO. 38

All documents concerning the Scott Paper Company.

MS & Co.'s Objections:

MS & Co. objects to this request as vague, ambiguous, overly broad, and unduly unduly burdensome. Further, MS & Co. objects to this request in that it is wholly irrelevant to the instant litigation and is not reasonably calculated to lead to the discovery of admissible evidence. MS & Co. had no interactions with the Scott Paper Company, or with Albert Dunlap or Russell Kersh during their tenures at the Scott Paper Company. The Scott Paper Company is not party to this action. MS & Co. will not produce documents responsive to this request.

DOCUMENT REQUEST NO. 39

All documents concerning Coleman or CPH.

MS & Co.'s Objections:

In addition to the General Objections set forth above, MS & Co. objects to this request because it seeks documents which MS & Co. had produced in connection with other related actions. Documents previously produced by MS & Co. include all documents responsive to this request. CPH has obtained or has access to MS & Co.'s prior productions, and therefore already has documents responsive to this request in its possession. In addition, MS & Co. objects to this request because it is duplicative of other document requests, including, but not limited to Request Nos. 49 and 59.

MS & Co. objects to this request as vague, ambiguous, overbroad, and unduly burdensome. Furthermore, this request also is duplicative of Requests 4, 8, 12, 15, 16, 34, 35,

and 40. Requiring MS & Co. to produce all documents “concerning Coleman or CPH,” with no further specification or identification of requested documents would impose an unreasonable and undue burden on MS & Co. It is unreasonable to so broadly tailor a request so as to encompass absolutely every document pertaining to Coleman or CPH.

DOCUMENT REQUEST NO. 40

All documents concerning MacAndrews & Forbes Holdings, Inc. with respect to Sunbeam, Coleman or CPH.

MS & Co.’s Objections:

In addition to the General Objections set forth above, MS & Co. objects to this request because it seeks documents which MS & Co. had produced in connection with other related actions. Documents previously produced by MS & Co. include all documents responsive to this request. CPH has obtained or has access to MS & Co.’s prior productions, and therefore already has documents responsive to this request in its possession. In addition, MS & Co. objects to this request because it is duplicative of other document requests, including, but not limited to Request Nos. 49 and 59.

MS & Co. objects to this request as vague, ambiguous, overbroad, and unduly burdensome. Furthermore, this request also is duplicative of Requests 4, 8, 12, 15, 16, 34, 35, and 39. Requiring MS & Co. to produce all documents concerning MacAndrews & Forbes Holdings, Inc., despite the further specification of documents relating to the equally overbroad “Sunbeam, Coleman or CPH,” would impose an unreasonable and undue burden on MS & Co. It is unreasonable to so broadly tailor a request so as to encompass absolutely every document pertaining to MacAndrews & Forbes Holdings, Inc.

DOCUMENT REQUEST NO. 41

All documents concerning the events and matters that are the subject of the Complaint filed this [stet] action.

MS & Co.'s Objections:

In addition to the General Objections set forth above, MS & Co. objects to this request because it seeks documents which MS & Co. had produced in connection with other related actions. Documents previously produced by MS & Co. include all documents responsive to this request. CPH has obtained or has access to MS & Co.'s prior productions, and therefore already has documents responsive to this request in its possession. In addition, MS & Co. objects to this request because it is duplicative of other document requests, including, but not limited to Request Nos. 49 and 59.

MS & Co. objects to this request as vague, ambiguous, overbroad, and unduly burdensome. Furthermore, this request is duplicative of almost all other document requests listed by CPH. Requiring MS & Co. to produce all documents concerning "the events and matters that are the subject of the Complaint" would impose an unreasonable and undue burden on MS & Co. It is unreasonable to so broadly tailor a request so as to encompass absolutely every document pertaining to the subject litigation.

DOCUMENT REQUEST NO. 42

Organizational charts, memoranda, or similar documents that describe the business organizational structure and the administrative, management, and reporting structure of MS & Co. from and including January 1, 1997 through and including December 31, 1998.

MS & Co.'s Objections:

In addition to the General Objections set forth above, MS & Co. objects to this request because it seeks documents which MS & Co. had produced in connection with other related actions. Documents previously produced by MS & Co. include all documents responsive to this request. CPH has obtained or has access to MS & Co.'s prior productions, and therefore already has documents responsive to this request in its possession. In addition, MS & Co.

objects to this request because it is duplicative of other document requests, including, but not limited to Request Nos. 49 and 59.

MS & Co. further objects to this request on the ground that it is an overbroad request for documents for entities other than MS & Co. and Morgan Stanley Senior Funding.

DOCUMENT REQUEST NO. 43

All documents concerning MS & Co.'s policies, procedures, manuals, guidelines, reference materials, or checklists that were in effect from and including January 1, 1997 through and including December 31, 1998 for the performance of due diligence, including without limitation due diligence performed in connection with underwriting the sale of equity or debt securities.

MS & Co.'s Objections:

MS & Co. objects to this request to the extent that it is vague, ambiguous, over broad and unduly burdensome. To the extent that it seeks documents concerning MS & Co.'s policies, procedures, manuals, etc... for the performance of due diligence other than that due diligence performed in the course of MS & Co.'s engagement for Sunbeam, the request is requesting documents which are irrelevant to this litigation and not reasonably calculated to lead to the discovery of admissible evidence. MS & Co. further objects to this request to the extent that it seeks the production of documents which do not exist.

Subject to and without waiving its specific or general objections, MS & Co. will, if necessary following the Court's determination of the pending case-dispositive motions, endeavor to produce any non-privileged documents in its possession, responsive to this request.

DOCUMENT REQUEST NO. 44

All documents concerning employment contracts, performance evaluations, and/or personnel files (including without limitation any documents that describe or discuss the training, experience, competence, and accomplishments) of all MS & Co. personnel who performed services for or on behalf of Sunbeam in 1997 or 1998.

MS & Co.'s Objections:

MS & Co. objects to this request to the extent that it seeks documents which are protected by the attorney-client, attorney work product, other common law or statutory privileges, or which are otherwise immune from discovery. MS & Co. expressly reserves the right to assert any and all common law or statutory privileges to which MS & Co. and its attorneys are entitled under applicable law.

This request seeks to compel production of personnel files and performance evaluations of individual MS & Co. employees that are neither relevant to CPH's claims nor reasonably calculated to lead to the discovery of admissible evidence and, in addition, would unnecessarily infringe on the privacy interests of those employees.

MS & Co. will not produce documents responsive to this request.

DOCUMENT REQUEST NO. 45

All documents concerning MS & Co.'s performance evaluation criteria or guidelines in effect from and including January 1, 1997 through and including December 31, 1998.

MS & Co.'s Objections:

MS & Co. objects to this request in that it seeks the production of documents which are irrelevant to this litigation and not reasonably calculated to lead to the discovery of admissible evidence.

MS & Co. will not produce documents responsive to this request.

DOCUMENT REQUEST NO. 46

All documents concerning MS & Co.'s compensation criteria or guidelines in effect from and including January 1, 1997 through and including December 31, 1998.

MS & Co.'s Objections:

MS & Co. objects to this request in that it seeks the production of documents which are irrelevant to this litigation and not reasonably calculated to lead to the discovery of admissible evidence.

MS & Co. will not produce documents responsive to this request.

DOCUMENT REQUEST NO. 47

All marketing or other promotional material prepared or used by, or on behalf of, MS & Co. concerning investment banking or securities underwriting services that were created or used at any time from and including January 1, 1997 through and including December 31, 1998.

MS & Co.'s Objections:

MS & Co. objects to this request for "all marketing or promotional material...concerning investment banking or securities underwriting services" as overbroad, unduly burdensome and inadequately tailored. Requiring MS & Co. to produce all documents sought in this request would necessitate the production of all of MS & Co.'s promotional materials, in their entirety, which would result in the production of documents irrelevant to this litigation and not reasonably calculated to lead to the discovery of admissible evidence. MS & Co. stands ready to negotiate a limitation to this request, if necessary following the Court's determination of the pending case-dispositive motions.

DOCUMENT REQUEST NO. 48

All of your document retention or document destruction policies or procedures or similar procedures for the back-up or deletion of electronic or hard copy documents of any kind for any time during 1997 through the present, including without limitation any amendments to any such policies or procedures, schedules or related documents, and any memoranda or other instructions communicated to your employees concerning the obligation and procedures to be utilized to preserve all relevant documents, including without limitation evidence concerning the Litigations, the Arbitrations, and the SEC Administrative Proceedings.

MS & Co.'s Objections:

MS & Co. objects to this request to the extent that it seeks documents which are protected by the attorney-client, attorney work product, other common law or statutory privileges, or which are otherwise immune from discovery. MS & Co. expressly reserves the right to assert any and all common law or statutory privileges to which MS & Co. and its attorneys are entitled under applicable law. Subject to and without waiving its specific or general objections, MS & Co. will, if necessary following the Court's determination of the pending case-dispositive motions, endeavor to produce any formal document retention policies in its possession, custody or control only if CPH agrees to reciprocate by providing the same.

DOCUMENT REQUEST NO. 49

All documents you have provided or produced to any party (whether voluntarily or in response to a document request, subpoena duces tecum, or other process served on you) in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings (including without limitation any reports, communications, filings, testimony, legal memoranda, statements, or other documents submitted to the Securities & Exchange Commission or any other party).

MS & Co.'s Objections:

In addition to the General Objections set forth above, MS & Co. objects to this request to the extent that it seeks documents already in CPH's possession. CPH has already obtained copies of MS & Co.'s prior productions, and therefore already has documents responsive to this request in its possession. Further, MS & Co. objects to this request as being duplicative of other of CPH's requests for production.

Subject to and without waiving its specific or general objections, MS & Co. will, if necessary following the Court's determination of the pending case-dispositive motions, endeavor to produce any non-privileged documents in its possession and which CPH does not already have, responsive to this request only if CPH agrees to reciprocate by providing the same.

DOCUMENT REQUEST NO. 50

All documents you have provided to the SEC, the Attorney General of New York, or any other governmental or regulatory body concerning Sunbeam.

MS & Co.'s Objections:

In addition to the General Objections set forth above, MS & Co. objects to this request to the extent that it seeks documents already in CPH's possession. Documents previously produced by MS & Co. include all documents responsive to this request. CPH has already obtained copies of MS & Co.'s prior productions, and therefore already has documents responsive to this request in its possession.

MS & Co. further objects to this request as duplicative of Request No. 49. Subject to and without waiving its specific or general objections, MS & Co. will, if necessary following the Court's determination of the pending case-dispositive motions, endeavor to produce any non-privileged documents in its possession and which CPH does not already have, responsive to this request only if CPH agrees to reciprocate by providing the same.

DOCUMENT REQUEST NO. 51

All documents you have received from the SEC, the Attorney General of New York, or any other governmental or regulatory body concerning Sunbeam.

MS & Co.'s Objections:

In addition to the General Objections set forth above, MS & Co. objects to this request to the extent that it seeks documents already in CPH's possession. CPH has already obtained copies of MS & Co.'s prior productions, and therefore may already have documents responsive to this request in its possession.

MS & Co. further objects to this request in that it is vague, ambiguous and over broad. "All documents . . . received from . . . any other governmental or regulatory body

concerning Sunbeam” seeks documents which are potentially irrelevant to this litigation, and not reasonably calculated to lead to the discovery of admissible evidence.

Subject to and without waiving its specific or general objections, MS & Co. will, if necessary following the Court’s determination of the pending case-dispositive motions, endeavor to produce any non-privileged documents in its possession and which CPH does not already have, responsive to this request only if CPH agrees to reciprocate by providing the same.

DOCUMENT REQUEST NO. 52

All discovery requests or subpoenas served on you in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

MS & Co.’s Objections:

In addition to the General Objections set forth above, MS & Co. objects to this request to the extent that it seeks documents already in CPH’s possession. CPH has already obtained copies of MS & Co.’s prior productions, and therefore may already have documents responsive to this request in its possession.

Subject to and without waiving its specific or general objections, MS & Co. will, if necessary following the Court’s determination of the pending case-dispositive motions, endeavor to produce any non-privileged documents in its possession and which CPH does not already have, responsive to this request only if CPH agrees to reciprocate by providing the same.

DOCUMENT REQUEST NO. 53

All responses and/or objections that you provided or produced in response to a discovery request or subpoena served on you in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

MS & Co.’s Objections:

In addition to the General Objections set forth above, MS & Co. objects to this request to the extent that it seeks documents already in CPH’s possession. CPH has already

obtained copies of MS & Co.'s prior productions, and therefore may already have documents responsive to this request in its possession.

Subject to and without waiving its specific or general objections, MS & Co. will, if necessary following the Court's determination of the pending case-dispositive motions, endeavor to produce any non-privileged documents in its possession and which CPH does not already have, responsive to this request only if CPH agrees to reciprocate by providing the same.

DOCUMENT REQUEST NO. 54

All communications concerning any discovery request or subpoena served on you in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

MS & Co.'s Objections:

In addition to the General Objections set forth above, MS & Co. objects to this request to the extent that it seeks documents already in CPH's possession. CPH has already obtained copies of MS & Co.'s prior productions, and therefore may already have documents responsive to this request in its possession.

MS & Co. objects to this request to the extent that it seeks documents which are protected by the attorney-client, attorney work product, other common law or statutory privileges, or which are otherwise immune from discovery. MS & Co. expressly reserves the right to assert any and all common law or statutory privileges to which MS & Co. and its attorneys are entitled under applicable law.

MS & Co. objects to this request for "[a]ll communications concerning any discovery request" as impermissibly overbroad and burdensome, irrelevant to this litigation and not likely to lead to the discovery of admissible evidence. MS & Co. stands ready to negotiate a more limited request, if necessary following the Court's determination of the pending case-dispositive motions.

DOCUMENT REQUEST NO. 55

All motions, memoranda, briefs, rulings, orders, or transcripts of proceedings concerning any discovery request, subpoena, or other process in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

MS & Co.'s Objections:

MS & Co. objects to this request to the extent that it seeks documents which are publicly available, and therefore *equally accessible* by all parties, and not in the possession, custody or control of MS & Co. MS & Co. objects to this request for *all* of the pleadings, papers, orders, and transcripts in *all* of the prior proceedings only tangentially relating to this action, if at all, as shifting a facially impermissible cost burden onto MS & Co. Furthermore, MS & Co. objects to this request in that it seeks documents irrelevant to this litigation, and not likely to lead to the discovery of admissible evidence.

MS & Co. will not produce documents responsive to this request.

DOCUMENT REQUEST NO. 56

All privilege logs you prepared in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings with respect to documents that you withheld from production in response to any document requests, subpoenas duces tecum, or other process.

MS & Co.'s Objections:

MS & Co. objects to this request to the extent that it seeks documents which are protected by the attorney-client, attorney work product, other common law or statutory privileges, or which are otherwise immune from discovery. MS & Co. expressly reserves the right to assert any and all common law or statutory privileges to which MS & Co. and its attorneys are entitled under applicable law.

MS & Co. further objects to this request in that it seeks documents irrelevant to this litigation, and not likely to lead to the discovery of admissible evidence. Subject to and without waiving its specific or general objections, MS & Co. will, if necessary following the

Court's determination of the pending case-dispositive motions, endeavor to produce any non-privileged documents in its possession, responsive to this request only if CPH agrees to reciprocate by providing the same.

DOCUMENT REQUEST NO. 57

All transcripts of and exhibits to any depositions, recorded statements, or affidavits in connection with any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

MS & Co.'s Objections:

MS & Co. objects to this request to the extent that it seeks documents which are publicly available, and therefore *equally accessible* by all parties, and not in the possession, custody or control of MS & Co. MS & Co. objects for this request as duplicative of Requests 55 and 61. MS & Co. further objects to this request for *all* transcripts of depositions and their exhibits, *all* recorded statements, and all affidavits in *all* of the prior proceedings relating to this action as once again shifting a facially impermissible cost burden onto MS & Co. Furthermore, MS & Co. objects to this request in that it seeks documents irrelevant to this litigation, and not likely to lead to the discovery of admissible evidence.

MS & Co. will not produce documents responsive to this request.

DOCUMENT REQUEST NO. 58

All documents obtained by you or produced to you by other parties, third parties, or non-parties (whether voluntarily or in response to any document requests, subpoenas duces tecum, or other process served by you or any other party) concerning Sunbeam.

MS & Co.'s Objections:

MS & Co. objects to this request as overbroad and vague and will construe this request as calling for documents produced to MS & Co. concerning Sunbeam during the prior Litigations, Arbitrations, or SEC Administrative Proceedings by other parties, third parties or non-parties. MS & Co. further objects to this request to the extent that it calls for the production

of documents that were provided to MS & Co. pursuant to the terms of a Confidentiality Agreement. MS & Co. will not produce documents responsive to this request without having first obtained the requisite approval from the original owners of the documents. Subject to and without waiving its specific or general objections, MS & Co. will, if necessary following the Court's determination of the pending case-dispositive motions, endeavor to produce any non-privileged documents in its possession, responsive to this request only if CPH agrees to reciprocate by providing the same.

DOCUMENT REQUEST NO. 59

All document requests, subpoenas duces tecum, interrogatories, requests for admission, responses, or objections that you served on, or received from, any party, third party or non-party in In re Sunbeam Corp., Inc., No. 01-40291 (AJG) (Bankr. S.D.N.Y.) and any adversary proceedings therein.

MS & Co.'s Objections:

In addition to the General Objections set forth above, MS & Co. objects to this request to the extent that it seeks documents already in CPH's possession. CPH has already obtained copies of MS & Co.'s prior productions, and therefore may already have documents responsive to this request in its possession.

MS & Co. objects to the request as vague and ambiguous with regard to the phrase "any adversary proceedings therein." MS & Co. objects to this request as being duplicative of CPH's other requests for production specifications, including Request No. 52. Furthermore, MS & Co. objects to this request in that it is overbroad, unduly burdensome, and seeking documents that are potentially irrelevant to this litigation, and not likely to lead to the discovery of admissible evidence.

Subject to and without waiving its specific or general objections, MS & Co. will, if necessary following the Court's determination of the pending case-dispositive motions,

endeavor to produce any non-privileged documents in its possession and which CPH does not already have, responsive to this request only if CPH agrees to reciprocate by providing the same.

DOCUMENT REQUEST NO. 60

All transcripts of any hearings held in connection with the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

MS & Co.'s Objections:

MS & Co. objects to this request to the extent that it seeks documents which are publicly available, and therefore *equally accessible* by all parties, and not in the possession, custody or control of MS & Co. MS & Co. further objects to this request for *all* transcripts of *any* hearings regarding the Litigations, Arbitrations, or SEC Administrative Proceedings as once again shifting a facially impermissible cost burden onto MS & Co. Furthermore, MS & Co. objects to this request in that it seeks documents irrelevant to this litigation, and not likely to lead to the discovery of admissible evidence.

Furthermore, MS & Co. objects to this request as duplicative of the demand in Request 55 for “[a]ll...transcripts of proceedings concerning any...other process in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.” MS & Co. will not produce documents responsive to this request.

DOCUMENT REQUEST NO. 61

All affidavits, declarations, or other testimonial statements filed or submitted in connection with any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

MS & Co.'s Objections:

MS & Co. objects to this request to the extent that it seeks documents which are publicly available, and therefore *equally accessible* by all parties, and not in the possession, custody or control of MS & Co. MS & Co. objects for this request as duplicative of Requests 55 and 57's demand for “[a]ll transcripts of...recorded statements or affidavits” filed “in connection

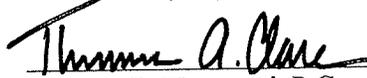
with any of the Litigations the Arbitrations, or the SEC Administrative Proceedings.” MS & Co. further objects to this request for *all* affidavits, testimonial statements filed in any of the prior proceedings relating to this action as once again shifting a facially impermissible cost burden onto MS & Co. Furthermore, MS & Co. objects to this request in that it seeks documents irrelevant to this litigation, and not likely to lead to the discovery of admissible evidence.

MS & Co. will not produce documents responsive to this request.

Dated: June 25, 2003

Respectfully Submitted,

Joseph Ianno, Jr. (FL Bar # 655351)
CARLTON FIELDS
222 Lake View Avenue - Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368



Thomas D. Yannucci, P.C

Thomas A. Clare

Larissa Paule-Carres

Kathryn DeBord

KIRKLAND & ELLIS

655 15th Street, N.W. 12th Floor

Washington, D.C. 20005

Telephone: (202) 879-5000

Facsimile: (202) 879-5200

Attorneys for Defendant

Morgan Stanley & Co. Incorporated

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by e-mail and Federal Express to all counsel of record on the attached service list on this 25th day of June, 2003.

Thomas D. Yannucci, P.C.
Thomas A. Clare
Larissa Paule-Carres
Brett H. McGurk
KIRKLAND & ELLIS
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

Counsel for Defendant
Morgan Stanley & Co. Incorporated

Joseph Ianno, Jr. (FL Bar # 655351)
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

BY: Thomas A. Clare
Thomas A. Clare

SERVICE LIST

<p>John Scarola SEARCY, DENNEY, SCAROLA, BARNHARDT & SHIPLEY, P.A. 2139 Palm Beach Lakes Boulevard West Palm Beach, Florida 33409</p>	<p>Counsel for Plaintiff</p>
<p>Jerold S. Solovy JENNER & BLOCK, LLC One IBM Plaza Suite 4400 Chicago, Illinois 60611</p>	<p>Counsel for Plaintiff</p>

#230580/mm

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT IN AND
FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

CASE NO.: 2003-CA 005045 AI

Plaintiffs,

vs.

MORGAN STANLEY & CO., INC.,

Defendant,

NOTICE OF HEARING

YOU ARE HEREBY NOTIFIED that the undersigned has called up for hearing the

following:

DATE: July 8, 2003

TIME: 8:45 a.m.

JUDGE: Hon. Elizabeth T. Maass

PLACE: Palm Beach County Courthouse, Room #11.1208, 205 North Dixie Highway,
West Palm Beach, FL 33401

SPECIFIC MATTERS TO BE HEARD:

DEFENDANT'S MOTION TO STAY DISCOVERY

Moving counsel certifies that he or she contacted opposing counsel and attempted to resolve the discovery dispute without hearing.

Coleman Holdings, Inc. vs Morgan Stanley & Company
Case No.: 2003 CA 005045 AI
Notice of Hearing

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by
U.S. Mail to all Counsel on the attached list, this 30th day of JUNE, 2003.



JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 478-0754
Attorney for Plaintiffs

Coleman Holdings, Inc. vs Morgan Stanley & Company
Case No.: 2003 CA 005045 AI
Notice of Hearing

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

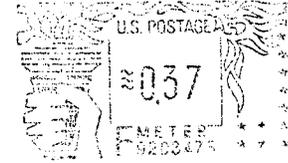
Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block, LLC
One IBM Plaza
Suite 4400
Chicago, IL 60611

SEARCY
DENNEY
SCAROLA
BARNHART
& SHIPLEY.

*Attorneys
at Law*

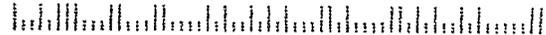
P.O. DRAWER 3626, WEST PALM BEACH, FLORIDA 33402-3626



*L-circulated
on 7/1/03*

Thomas D. Yannucci, P.C.
Thomas A. Clare ✓
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

2000545793 41



SEARCY
DENNEY
SCAROLA
BARNHART
& SHIPLEY P.A.

*Attorneys
at Law*

2130 PALM BEACH LAKES BLVD.
WEST PALM BEACH
FLORIDA 33409

P.O. DRAWER 3020
WEST PALM BEACH
FLORIDA 33402-3020

(561) 686-6800
1-800-780-6607
FAX:
(561) 478-0754

ATTORNEYS AT LAW:

- ROBALYN SIA BAKER
- F. GREGORY BARNHART*
- LANCE BLOCK*
- EARL L. DENNEY, JR.*
- SEAN C. DOMINICK
- JAMES W. GUSTAFSON, JR.
- DAVID K. KELLEY, JR.*
- WILLIAM B. KING
- DARRYL L. LEWIS
- WILLIAM A. NORTON*
- PATRICK E. QUINLAN
- DAVID J. SALES*
- JOHN SCAROLA*
- CHRISTIAN D. SEARCY*
- HARRY A. SHEVIN
- JOHN A. SHIPLEY III*
- CHRISTOPHER K. SPEED*
- KAREN E. TERRY
- C. CALVIN WARRINER III*
- DAVID J. WHITE*

*SHAREHOLDERS

PARALEGALS:

- VIVIAN AVAN-TEJEDA
- LAURIE J. BRIGGS
- DEANE L. CADY
- DANIEL J. CALLOWAY
- EMILIO DIAMANTIS
- DAVID W. GILMORE
- TED E. KULESA
- JAMES PETER LOVE
- CHRISTOPHER J. PILATO
- ROBERT W. PITCHER
- WILLIAM H. SEABOLD
- KATHLEEN SIMON
- STEVE M. SMITH
- WALTER A. STEIN
- BRIAN P. SULLIVAN
- KEVIN J. WALSH
- JUDSON WHITEHEAD

VIA FACSIMILE 561-659-7368

July 16, 2003

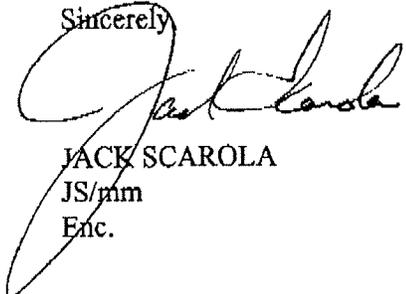
Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue, Suite 1400
West Palm Beach, FL 33401

Re: Coleman Holdings, Inc. vs Morgan Stanley & Company
Matter No.: 029986-230580

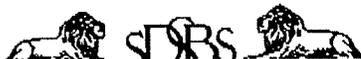
Dear Joe:

Please let me know if we can come to an agreement on a new briefing schedule for the Motion to Dismiss. See my enclosed motion.

Sincerely



JACK SCAROLA
JS/mm
Enc.



#230580/mm

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

CASE NO: 2003 CA 005045 AI

Plaintiffs,

vs.

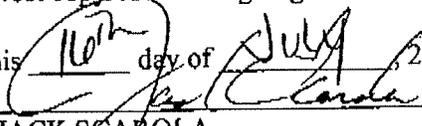
MORGAN STANLEY & CO., INC.

Defendant.

MOTION TO EXTEND DEADLINE FOR SUBMISSION OF MEMORANDUM

Plaintiff, Coleman (Parent) Holdings Inc., moves this Honorable Court to extend the deadline for submission of Plaintiff's memorandum in response to Defendant's Motion to Dismiss, which deadline is presently set at July 25, 2003. In support of this motion, Plaintiff would show that scheduling conflicts among counsel for the parties and the availability of the Court preclude scheduling a hearing on Defendant's Motion to Dismiss before October of 2003. Accordingly, a delay of 30 days in the submission of Plaintiff's memorandum will not delay the disposition of the motion, will permit a more thorough review of the issues, and will still allow more than adequate time for the preparation and submission of a reply well in advance of the contemplated hearing.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to all counsel on the attached list on this 16th day of July, 2003.



JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 478-0754
Attorneys for Plaintiffs

Coleman Holdings, Inc. vs Morgan Stanley & Company
Motion To Extend Deadline For Submissions Of Memorandum
Case No.: 2003 CA 005045 A1

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block, LLC
One IBM Plaza
Suite 4400
Chicago, IL 60611

**IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA**

<hr/>)
COLEMAN (PARENT) HOLDINGS INC.,)
)
Plaintiff,)
)
v.)
)
MORGAN STANLEY & CO., INC.,)
)
Defendant.)
<hr/>)

Case No. 2003 CA 005045 AI

Judge Elizabeth I. Maass

NOTICE OF DEPOSITION

To: Thomas A. Clare, Esq.	Joseph Ianno, Jr., Esq.
KIRKLAND & ELLIS	CARLTON FIELDS
655 Fifteenth Street, N.W.	222 Lake View Avenue, Suite 1400
Suite 1200	West Palm Beach, FL 33401
Washington, D.C. 20005	

PLEASE TAKE NOTICE that Plaintiff Coleman (Parent) Holdings, Inc. requests the deposition upon oral examination of Defendant Morgan Stanley & Co., Inc. pursuant to Florida Rule of Civil Procedure 1.310 on the date and at the time set forth below:

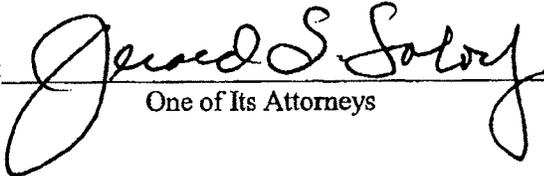
Morgan Stanley & Co., Inc. August 6, 2003 at 9:30 a.m.

The deposition will be recorded by stenographic means at the offices of Searcy Denney Scarola Barnhart & Shipley, P.C., 2139 Palm Beach Lakes Blvd., West Palm Beach, Florida. The deposition will be taken before a person authorized to administer oaths and will continue day to day until completed.

The deposition is being taken with respect to the topics described on the attached Exhibit A. Please designate one or more officers, directors, managing agents, or other persons to testify on your behalf and state the matters on which each person designated will testify.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by facsimile and mail to all counsel on the attached Service List, this 22nd day of July, 2003.

COLEMAN (PARENT) HOLDINGS INC.

By: 
One of Its Attorneys

Jerold S. Solovy
Ronald L. Marmer
Robert T. Markowski
Deirdre E. Connell
JENNER & BLOCK, LLC
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

Jack Scarola
SEARCY DENNEY SCAROLA BARNHART &
SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409
(561) 686-6300

SERVICE LIST

Thomas A. Clare, Esq.
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Joseph Ianno, Jr., Esq.
CARLTON FIELDS
222 Lake View Avenue, Suite 1400
West Palm Beach, FL 33401

EXHIBIT A**CORPORATE DEPOSITION TOPICS**

1. The corporate relationship between Morgan Stanley & Co., Inc. and Morgan Stanley & Co. International Ltd.
2. The circumstances surrounding Mr. John Tyree's employment with and alleged departure from the employment of Morgan Stanley & Co., Inc. and Mr. Tyree's alleged employment with Morgan Stanley & Co. International Ltd., including, but not limited to the identity of the entity that: (a) makes any direct or indirect salary payment to Mr. John Tyree; (b) makes any direct or indirect bonus payment to Mr. John Tyree; (c) provides Mr. Tyree anything of value by reason of his past or continued employment; (d) provides Mr. Tyree with information or forms concerning any of his taxes; (e) authorizes, pays for, and/or employs any counsel – whether in-house counsel or outside counsel – for Mr. Tyree.
3. All communications between and among Mr. Tyree and in-house or outside counsel for Morgan Stanley & Co., Inc. or its corporate parent, Morgan Stanley, concerning the claims asserted by Coleman (Parent) Holdings Inc. against Morgan Stanley & Co., Inc., including the date(s) of any communications and the persons involved in those communications.

LAW OFFICES

JENNER & BLOCK, LLC

ONE IBM PLAZA
CHICAGO, ILLINOIS 60611

(312) 222-9350
(312) 527-0484 FAX

DEIRDRE E. CONNELL
312-923-2661 Direct Dial
312-840-7661 Direct Facsimile

TELECOMMUNICATION TRANSMITTAL

DATE: July 22, 2003

TO: **Thomas A. Clare, Esq.** **VOICE:** (202) 879-5993
KIRKLAND & ELLIS
655 Fifteenth Street, N.W., Suite 1200 **FAX:** (202) 879-5200
Washington, D.C. 20005-5793

FROM: Deirdre E. Connell **SECY. EXT.:** 6486

EMP. NO.: 035666 **CLIENT NO.:** 41198-10003

IMPORTANT: THIS MESSAGE IS INTENDED ONLY FOR THE USE OF THE INDIVIDUAL OR ENTITY TO WHICH IT IS ADDRESSED, AND MAY CONTAIN INFORMATION THAT IS ATTORNEY WORK PRODUCT, PRIVILEGED, CONFIDENTIAL AND EXEMPT FROM DISCLOSURE UNDER APPLICABLE LAW. IF THE READER OF THIS MESSAGE IS NOT THE INTENDED RECIPIENT, OR THE EMPLOYEE OR AGENT RESPONSIBLE FOR DELIVERING THE MESSAGE TO THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION, DISTRIBUTION OR COPYING OF THIS COMMUNICATION IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE NOTIFY US IMMEDIATELY BY TELEPHONE, AND RETURN THE ORIGINAL MESSAGE TO US AT THE ABOVE ADDRESS VIA POSTAL SERVICE. THANK YOU.

MESSAGE: **Please see attached.**

Total number of pages including this cover sheet: 9

DATE SENT: 7/22/03 TIME SENT: 4:36pm SENT BY: S. EDDINGTON

IF YOU DO NOT RECEIVE ALL PAGES, PLEASE CALL (312) 222-9350, EXT: 6486

OR (312) 923-2661; AFTER 6:00 P.M. & WEEKENDS (312) 222-9350, EXT. 6120, 6121

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CASE NO: 03 CA-005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

**MORGAN STANLEY & CO. INCORPORATED'S SUPPLEMENTAL OBJECTIONS TO
COLEMAN (PARENT) HOLDINGS, INC. FIRST REQUEST FOR
PRODUCTION OF DOCUMENTS**

Pursuant to Rules 1.280 and 1.350 of the Florida Rules of Civil Procedure, defendant, Morgan Stanley & Co. Incorporated ("MS & Co.") hereby interposes the following supplemental objections to plaintiff Coleman (Parent) Holdings, Inc.'s ("CPH") First Request for Production of Documents ("Request for Production").

GENERAL OBJECTIONS

The following general objections apply to all specifications of CPH's Request for Production. Each General Objection is hereby incorporated in the response to each specific request as if fully set forth therein:

1. MS & Co. objects to the entire Request for Production as over broad and unduly burdensome. CPH has requested the production of impermissibly broad categories of documents that, if read literally and in combination with the equally overbroad Definitions, would require MS & Co. to collect, review and produce potentially hundreds of thousands of pages of

documents, e-mails, electronic documents on servers and hard drives, and other materials from multiple MS & Co. business locations around the United States. MS & Co. should not be required to shoulder this burden that goes well beyond the requirements of the Florida Rules of Civil Procedure.

2. MS & Co. objects to the entire Request for Production because it seeks documents that MS & Co. has previously produced in response to subpoenas in related legal proceedings. Although it was under no legal obligation to do so, MS & Co. permitted CPH to have access to these documents years ago. The documents requested and produced in these cases are substantially identical to the categories of documents that CPH now seeks. To the extent that MS & Co. has already made these documents available to CPH in prior cases, MS & Co. should not be required to bear the burden of expending valuable time and financial resources to search for, review and produce the documents again.

3. MS & Co. objects to the entire Request for Production to the extent that it seeks documents that are protected from disclosure by the attorney-client, attorney work product, other applicable common law or statutory privileges, or which are otherwise immune from discovery (hereinafter referred to as "Privileges"). MS & Co. expressly reserves the right to assert any and all common law or statutory privileges to which MS & Co. and its attorneys are entitled under applicable law. MS & Co. will exchange a privilege log with CPH in accordance with the terms of the agreement that is currently being negotiated by the parties.

4. MS & Co. objects to the entire Request for Production to the extent it seeks documents not relevant to the subject matter of this litigation or not reasonably calculated to lead to the discovery of admissible evidence.

5. MS & Co. objects to the entire Request for Production, including the Instructions, to the extent it purports to impose requirements beyond those specified by the Florida Rules of Civil Procedure, discovery guidelines of this Court, and applicable case law.

6. MS & Co. objects to the entire Request for Production to the extent it calls for documents which are in the public domain and accessible to all parties.

7. MS & Co. objects to the entire Request for Production to the extent that it is intended to harass or annoy MS & Co. or its employees, to create additional and unnecessary expense for MS & Co., or intended to serve any other improper purpose.

8. MS & Co. objects to the entire Request for Production to the extent it seeks the production of documents beyond MS & Co.'s possession, custody or control. Any statement by MS & Co. to the effect that it will produce responsive documents shall not be construed as an admission that any such documents exist -- or that any such documents are within MS & Co.'s possession, custody or control.

9. MS & Co.'s responses to CPH's document requests shall not be construed in any way as an admission that any Definition, statement, or characterization is either factually correct or legally binding upon MS & Co., or a waiver of any objection that MS & Co. is entitled to make at trial, including but not limited to objections regarding relevance and admissibility of documents.

10. MS & Co. objects to the entire Request for Production, including the Instructions, to the extent it purports to impose a continuing duty of supplementation extending beyond the

requirements of the Florida Rules of Civil Procedure, discovery guidelines of this Court, or applicable case law.

11. Discovery in this case has just begun. MS & Co.'s objections and responses are based on a good-faith search for documents and information within its possession, custody, and control. MS & Co. expressly reserves the right to amend, modify and supplement its objections and responses.

12. MS & Co. generally objects to the production of any documents unless and until an appropriate Protective Order has been agreed to by both parties to this litigation and entered by the Court.

SPECIFIC OBJECTIONS

Each of the General Objections set forth above is deemed incorporated into each Specific Objection. The enumeration of specific objections does not constitute, and shall not be construed or deemed as, a waiver of any objection listed.

DEFINITION NO. 2

"Coleman" means the Coleman Company, Inc. or any of its present and former officers, directors, employees, representatives, agents, and all other persons acting or purporting to act on its behalf.

MS & Co.'s Objections:

MS & Co. objects to the definition of "Coleman" as overbroad on the grounds that it is vague and ambiguous and purports to impute to MS & Co. the responsibility for ascertaining relationships and affiliations unknown to MS & Co., as well as the responsibility for determining the identities of Coleman's present and former officers, directors, employees, representatives, agents, and all other persons "acting or purporting to act" on its behalf. MS &

Co. will construe references to "Coleman" to mean the Coleman Company, Inc. or any of its present and former officers, directors, employees, representatives, and agents known by MS & Co. to be acting on behalf of the Coleman Company, Inc.

DEFINITION NO. 3

"CPH" means Coleman (Parent) Holdings Inc., Coleman Worldwide Corporation, CLN Holdings, Co., Inc., or any of their present and former officers, directors, employees, representatives, agents, and all other persons acting or purporting to act on their behalf.

MS & Co.'s Objections:

MS & Co. objects to the definition of "CPH" as overbroad on the grounds that such a definition is vague and ambiguous and purports to impute to MS & Co. the responsibility for ascertaining relationships and affiliations unknown to MS & Co., as well as the responsibility for determining the identities of CPH's present and former officers, directors, employees, representatives, agents, and all other persons "acting or purporting to act" on its behalf. MS & Co. will construe references to "CPH" to mean the Coleman (Parent) Holdings Inc., Coleman Worldwide Corporation CLN Holdings Co., Inc., or any of their present and former officers, directors, employees, representatives, and agents known by MS & Co. to be acting on behalf of the Coleman Company, Inc. or Coleman Worldwide Corporation CLN Holdings Co., Inc.

DEFINITION NO. 7

"Documents" means documents whether fixed in tangible medium or electronically stored. The word "documents" shall include, by way of example and not by way of limitation, all of the following: papers, correspondence, trade letters, envelopes, memoranda, telegrams, cables, notes, messages, reports, studies, press releases, comparisons, books, accounts, checks, audio and video recordings and transcriptions thereof, pleadings, testimony, articles, bulletins, pamphlets, brochures, magazines, questionnaires, surveys, charts, newspapers, calendars, desk calendars, pocket calendars, lists, logs, publications, notices, diagrams, instructions, diaries, minutes for meetings, corporate minutes, orders, resolutions, agendas, memorials or notes of oral communications, whether by telephone or face-to-face, contracts, agreements, drafts of or proposed contracts or agreements, memoranda of understanding, letters of intent, computer tapes, computer drives or memories, computer diskettes or disks, e-mail, CD-ROMS, or any other tangible thing on which any handwriting, typing, printing, photostatic, electronic, or other form of communication or information is recorded or reproduced, together

with all notations of any of the foregoing, all originals, file copies, or other unique copies of the foregoing, and all versions or drafts thereof, whether used or not.

MS & Co.'s Objections:

MS & Co. objects to the definition of the term "documents" as overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence to the extent it purports to require a search of all electronic media without regard for the undue expense and burden of such an undertaking in light of the marginal benefits to be obtained from such a search. With respect to electronic media, MS & Co. will review custodian electronic mail files, electronic files of custodians stored on servers, and the hard drives of custodians.

DEFINITION NO. 11

"Morgan Stanley" means Morgan Stanley & Co., Inc. or any of its subsidiaries, divisions, predecessors, successors, present and former employees, representatives, agents, attorneys, accountants, advisors, or all other persons acting or purporting to act on its behalf.

MS & Co.'s Objections:

MS & Co. objects to the definition of the term "Morgan Stanley" on the ground that its adoption would require a document search that is overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. MS & Co. further objects to this definition to the extent that it purports to require MS & Co. to produce documents that are not within its actual "possession, custody, or control" pursuant to Florida Rule of Civil Procedure 1.350(a). MS & Co. will construe references to "MS & Co." to mean Morgan Stanley & Co. Incorporated and its officers, directors, former or present employees, representatives, agents, and all other persons known by MS & Co. to be acting on its behalf.

DEFINITION NO. 16

"Sunbeam" means Sunbeam Corporation, or any of its subsidiaries, divisions, affiliates, predecessors, successors, present and former employees, representatives, agents and all other persons acting or purporting to act on its behalf.

MS & Co.'s Objections:

MS & Co. objects to the definition of "Sunbeam" as overbroad on the grounds that it is vague and ambiguous and purports to impute to MS & Co. the responsibility for ascertaining relationships and affiliations unknown to MS & Co., as well as the responsibility for determining the identities of Sunbeam's subsidiaries, divisions, affiliates, predecessors, successors, present and former employees, representatives, agents, and all other persons "acting or purporting to act" on its behalf. MS & Co. will construe references to "Sunbeam" to mean Sunbeam Corporation and any of its officers, directors, former or present employees, representatives, and agents, and all other persons known by MS & Co. to be acting on behalf of Sunbeam Corporation.

DEFINITION NO. 17

"You" or "Your" means Morgan Stanley & Co., Inc. and/or any of its subsidiaries, divisions, predecessors, successors, present or former employees, representatives, agents, attorneys, accountants, advisors, or anyone acting or purporting to act on its behalf.

MS & Co.'s Objections:

MS & Co. objects to the definition of the terms "You" and "Your" on the ground that its adoption would require a document search that is overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. MS & Co. further objects to this definition to the extent that it purports to require MS & Co. to produce documents that are not within its actual "possession, custody, or control" pursuant to Florida Rule of Civil Procedure 1.350(a). MS & Co. will construe references to "You" and "Your" to mean Morgan Stanley & Co. Incorporated and its officers, directors, former or present employees, representatives, agents, and all other persons known by MS & Co. to be acting on its behalf.

INSTRUCTION NO. 2

All documents shall be produced in the file folder envelope or other container in which the documents are kept or maintained by you. If, for any reason, the container cannot be produced, produce copies of all labels or other identifying marks.

MS & Co.'s Objections:

MS & Co. objects to Instruction No. 2 insofar as it purports to impose on MS & Co. the obligation to disclose information beyond the scope of obligations imposed by the Florida Rules of Civil Procedure and other applicable law.

INSTRUCTION NO. 3

The relevant period, unless otherwise indicated, shall be from January 1 1997 through the date of trial of this matter, and shall include all documents and information which relate in whole or in part to such period, or to events or circumstances during such period, even though dated, prepared, generated, or received prior to or subsequent to that period. Please supplement or correct your responses to these requests if, at any time, you become aware that your responses are incomplete or incorrect in any respect.

MS & Co.'s Objections:

MS & Co. objects to this Instruction to the extent that it purports to impose a continuing duty of supplementation not required by the Florida Rules of Civil Procedure.

INSTRUCTION NO. 4

If you claim the attorney-client privilege, or any other privilege or work-product protection for all or any portion of a document, you shall provide a privilege log that describes the withheld material sufficiently to allow CPH to test the privilege or protection asserted.

MS & Co.'s Objections:

MS & Co. will exchange a privilege log with CPH in accordance with the terms of the agreement that is currently being negotiated by the parties.

DOCUMENT REQUEST NO. 1

All documents concerning your efforts to have Sunbeam retain or maintain your investment banking and/or securities underwriting services.

MS & Co.'s Objections:

MS & Co. objects to this request to the extent it seeks documents which MS & Co. has previously produced in response to subpoenas in related legal proceedings, and which MS & Co. has previously agreed to make available to CPH. In addition, MS & Co. objects to this request because it is duplicative of other document requests, including, but not limited to Request Nos. 49 and 59. Subject to and without waiving its general and specific objections, MS & Co. will produce non-privileged documents, located after a good-faith search of documents in its possession, custody, or control, that are responsive to this request.

DOCUMENT REQUEST NO. 2

All documents reflecting all fees and expenses paid by Sunbeam to you, including without limitation all billing statements, invoices, time detail records, individual calendars, daily diaries (including electronic calendar programs), or other documents that describe or record the time spent, or expenses incurred (including back-up for any out-of-pocket expenses), by any Morgan Stanley personnel, or that describe or record any aspect of their activities concerning any services performed on behalf of, or concerning, Sunbeam.

MS & Co.'s Objections:

MS & Co. objects to this request to the extent it seeks documents which MS & Co. has previously produced in response to subpoenas in related legal proceedings, and which MS & Co. has previously agreed to make available to CPH. In addition, MS & Co. objects to this request because it is duplicative of other document requests, including, but not limited to Request Nos. 31, 49 and 59. Subject to and without waiving its general and specific objections, MS & Co. will produce non-privileged documents, located after a good-faith search of documents in its possession, custody, or control, that are responsive to this request.

DOCUMENT REQUEST NO. 3

All documents concerning any investigation, analysis, or due diligence of Sunbeam conducted by you or on your behalf in 1997 or 1998.

MS & Co.'s Objections:

MS & Co. objects to this request to the extent it seeks documents which MS & Co. has previously produced in response to subpoenas in related legal proceedings, and which MS & Co. has previously agreed to make available to CPH. In addition, MS & Co. objects to this request because it is duplicative of other document requests, including, but not limited to Request Nos. 49 and 59. MS & Co. also objects to this request to the extent that it seeks documents which are not in MS & Co.'s possession, custody, or control. Subject to and without waiving its general and specific objections, MS & Co. will produce non-privileged documents, located after a good-faith search of documents in its possession, custody, or control, that are responsive to this request.

DOCUMENT REQUEST NO. 4

All documents concerning any investigation, analysis, or due diligence of Coleman or CPH conducted by you or on your behalf in 1997 or 1998.

MS & Co.'s Objections:

MS & Co. objects to this request to the extent it seeks documents which MS & Co. has previously produced in response to subpoenas in related legal proceedings, and which MS & Co. has previously agreed to make available to CPH. In addition, MS & Co. objects to this request because it is duplicative of other document requests, including, but not limited to Request Nos. 49 and 59. MS & Co. also objects to this request to the extent that it seeks documents which are not in MS & Co.'s possession, custody, or control. Subject to and without waiving its general and specific objections, MS & Co. will produce non-privileged documents, located after a good-faith search of documents in its possession, custody, or control, that are responsive to this request.

DOCUMENT REQUEST NO. 5

All documents concerning your attempts in 1997 or 1998 to locate someone to purchase or otherwise acquire Sunbeam, whether through merger, purchase, transfer of assets or securities, or otherwise.

MS & Co.'s Objections:

MS & Co. objects to this request to the extent it seeks documents which MS & Co. has previously produced in response to subpoenas in related legal proceedings, and which MS & Co. has previously agreed to make available to CPH. In addition, MS & Co. objects to this request because it is duplicative of other document requests, including, but not limited to Request Nos. 49 and 59. Subject to and without waiving its general and specific objections, MS & Co. will produce non-privileged documents, located after a good-faith search of documents in its possession, custody, or control, that are responsive to this request.

DOCUMENT REQUEST NO. 6

All documents concerning your attempts in 1997 or 1998 to locate companies for Sunbeam to purchase or otherwise acquire, whether through merger, purchase, transfer of assets or securities, or otherwise.

MS & Co.'s Objections:

MS & Co. objects to this request to the extent it seeks documents which MS & Co. has previously produced in response to subpoenas in related legal proceedings, and which MS & Co. has previously agreed to make available to CPH. In addition, MS & Co. objects to this request because it is duplicative of other document requests, including, but not limited to Request Nos. 49 and 59. Subject to and without waiving its general and specific objections, MS & Co. will produce non-privileged documents, located after a good-faith search of documents in its possession, custody, or control, that are responsive to this request.

DOCUMENT REQUEST NO. 7

All documents concerning the negotiation and signing of the February 27, 1998 Agreements.

MS & Co.'s Objections:

MS & Co. objects to this request to the extent it seeks documents which MS & Co. has previously produced in response to subpoenas in related legal proceedings, and which MS & Co. has previously agreed to make available to CPH. In addition, MS & Co. objects to this request because it is duplicative of other document requests, including, but not limited to Request Nos. 49 and 59. MS & Co. also objects to this request to the extent that it seeks documents which are not in MS & Co.'s possession, custody, or control. Subject to and without waiving its general and specific objections, MS & Co. will produce non-privileged documents, located after a good-faith search of documents in its possession, custody, or control, that are responsive to this request.

DOCUMENT REQUEST NO. 8

All documents concerning the closing of the Coleman Transaction, including without limitation all documents concerning the decision to close the Coleman Transaction.

MS & Co.'s Objections:

MS & Co. objects to this request to the extent it seeks documents which MS & Co. has previously produced in response to subpoenas in related legal proceedings, and which MS & Co. has previously agreed to make available to CPH. In addition, MS & Co. objects to this request because it is duplicative of other document requests, including, but not limited to Request Nos. 49 and 59. MS & Co. also objects to this request to the extent that it seeks documents which are not in MS & Co.'s possession, custody, or control. Subject to and without waiving its general and specific objections, MS & Co. will produce non-privileged documents,

located after a good-faith search of documents in its possession, custody, or control, that are responsive to this request.

DOCUMENT REQUEST NO. 9

All documents concerning the meetings of Sunbeam's Board of Directors in 1997 and 1998.

MS & Co.'s Objections:

MS & Co. objects to this request to the extent it seeks documents which MS & Co. has previously produced in response to subpoenas in related legal proceedings, and which MS & Co. has previously agreed to make available to CPH. In addition, MS & Co. objects to this request because it is duplicative of other document requests, including, but not limited to Request Nos. 49 and 59. MS & Co. also objects to this request to the extent that it seeks documents which are not in MS & Co.'s possession, custody, or control. Subject to and without waiving its general and specific objections, MS & Co. will produce non-privileged documents, located after a good-faith search of documents in its possession, custody, or control, that are responsive to this request.

DOCUMENT REQUEST NO. 10

All documents concerning any discussion, promise, agreement, or plan to have research analysts, whether or not at Morgan Stanley, provide coverage for Sunbeam or any of its debt or equity securities.

MS & Co.'s Objections:

MS & Co. objects to this request to the extent it seeks documents which MS & Co. has previously produced in response to subpoenas in related legal proceedings, and which MS & Co. has previously agreed to make available to CPH. In addition, MS & Co. objects to this request because it is duplicative of other document requests, including, but not limited to Request Nos. 49 and 59. MS & Co. also objects to this request to the extent that it seeks

documents which are not in MS & Co.'s possession, custody, or control. Subject to and without waiving its general and specific objections, MS & Co. will produce non-privileged documents, located after a good-faith search of documents in its possession, custody, or control, that are responsive to this request, that were created or relate to the period from January 1, 1997 to December 31, 1998.

DOCUMENT REQUEST NO. 11

All documents used, analyzed, consulted, or prepared by any Morgan Stanley research analyst, including without limitation Andrew Conway, James Dormer, Jake Foley, and Karen Eltrich, concerning Sunbeam.

MS & Co.'s Objections:

MS & Co. objects to this request to the extent it seeks documents which MS & Co. has previously produced in response to subpoenas in related legal proceedings, and which MS & Co. has previously agreed to make available to CPH. In addition, MS & Co. objects to this request because it is duplicative of other document requests, including, but not limited to Request Nos. 49 and 59. Subject to and without waiving its general and specific objections, MS & Co. will produce non-privileged documents, located after a good-faith search of documents in its possession, custody, or control, that are responsive to this request, that were created or relate to the period from January 1, 1997 to December 31, 1998.

DOCUMENT REQUEST NO. 12

All documents concerning communications between or among you, Sunbeam, and Wall Street analysts concerning Sunbeam or the Coleman Transaction.

MS & Co.'s Objections:

MS & Co. objects to this request to the extent it seeks documents which MS & Co. has previously produced in response to subpoenas in related legal proceedings, and which MS & Co. has previously agreed to make available to CPH. In addition, MS & Co. objects to

this request because it is duplicative of other document requests, including, but not limited to Request Nos. 49 and 59. MS & Co. also objects to this request to the extent that it seeks documents which are not in MS & Co.'s possession, custody, or control. Subject to and without waiving its general and specific objections, MS & Co. will produce non-privileged documents, located after a good-faith search of documents in its possession, custody, or control, that are responsive to this request.

DOCUMENT REQUEST NO. 13

All documents concerning any valuation of Sunbeam or Sunbeam securities.

MS & Co.'s Objections:

MS & Co. objects to this request to the extent it seeks documents which MS & Co. has previously produced in response to subpoenas in related legal proceedings, and which MS & Co. has previously agreed to make available to CPH. In addition, MS & Co. objects to this request because it is duplicative of other document requests, including, but not limited to Request Nos. 49 and 59. MS & Co. also objects to this request to the extent that it seeks documents which are not in MS & Co.'s possession, custody, or control. Subject to and without waiving its general and specific objections, MS & Co. will produce non-privileged documents, located after a good-faith search of documents in its possession, custody, or control, concerning the valuation of common stock issued by Sunbeam Corporation.

DOCUMENT REQUEST NO. 14

All documents concerning the stock market's valuation of Sunbeam securities, including without limitation documents describing or analyzing the increase or decline in the market price of Sunbeam stock in the period from and including July 1, 1996 through and including December 31, 1998.

MS & Co.'s Objections:

MS & Co. objects to this request to the extent it seeks documents which MS & Co. has previously produced in response to subpoenas in related legal proceedings, and which MS & Co. has previously agreed to make available to CPH. In addition, MS & Co. objects to this request because it is duplicative of other document requests, including, but not limited to Request Nos. 13, 49 and 59. MS & Co. also objects to this request to the extent that it seeks documents which are not in MS & Co.'s possession, custody, or control. Subject to and without waiving its general and specific objections, MS & Co. will produce non-privileged documents, located after a good-faith search of documents in its possession, custody, or control, concerning the valuation of common stock issued by Sunbeam Corporation.

DOCUMENT REQUEST NO. 15

All documents concerning any valuation of Coleman or Coleman securities.

MS & Co.'s Objections:

MS & Co. objects to this request to the extent it seeks documents which MS & Co. has previously produced in response to subpoenas in related legal proceedings, and which MS & Co. has previously agreed to make available to CPH. In addition, MS & Co. objects to this request because it is duplicative of other document requests, including, but not limited to Request Nos. 49 and 59. MS & Co. also objects to this request to the extent that it seeks documents which are not in MS & Co.'s possession, custody, or control. Subject to and without waiving its general and specific objections, MS & Co. will produce non-privileged documents, located after a good-faith search of documents in its possession, custody, or control, concerning the valuation of common stock issued by the Coleman Company, Inc.

DOCUMENT REQUEST NO. 16

All documents concerning synergies that might be achieved from a business combination of Sunbeam and Coleman.

MS & Co.'s Objections:

MS & Co. objects to this request to the extent it seeks documents which MS & Co. has previously produced in response to subpoenas in related legal proceedings, and which MS & Co. has previously agreed to make available to CPH. In addition, MS & Co. objects to this request because it is duplicative of other document requests, including, but not limited to Request Nos. 49 and 59. MS & Co. also objects to this request to the extent that it seeks documents which are not in MS & Co.'s possession, custody, or control. Subject to and without waiving its general and specific objections, MS & Co. will produce non-privileged documents, located after a good-faith search of documents in its possession, custody, or control, concerning the synergies that might be achieved from a business combination of Sunbeam Corporation and the Coleman Company, Inc.

DOCUMENT REQUEST NO. 17

All documents concerning Sunbeam's financial statements and/or restated financial statements.

MS & Co.'s Objections:

MS & Co. objects to this request to the extent it seeks documents which MS & Co. has previously produced in response to subpoenas in related legal proceedings, and which MS & Co. has previously agreed to make available to CPH. In addition, MS & Co. objects to this request because it is duplicative of other document requests, including, but not limited to Request Nos. 49 and 59. MS & Co. also objects to this request to the extent that it seeks documents which are not in MS & Co.'s possession, custody, or control. Subject to and without waiving its general and specific objections, MS & Co. will produce non-privileged documents,

located after a good-faith search of documents in its possession, custody, or control, concerning Sunbeam Corporation's financial statements and restated financial statements.

DOCUMENT REQUEST NO. 18

All documents concerning the increase in the size of the Subordinated Debenture Offering from \$500 million to \$750 million.

MS & Co.'s Objections:

MS & Co. objects to this request to the extent it seeks documents which MS & Co. has previously produced in response to subpoenas in related legal proceedings, and which MS & Co. has previously agreed to make available to CPH. In addition, MS & Co. objects to this request because it is duplicative of other document requests, including, but not limited to Request Nos. 49 and 59. Subject to and without waiving its general and specific objections, MS & Co. will produce non-privileged documents, located after a good-faith search of documents in its possession, custody, or control, that are responsive to this request.

DOCUMENT REQUEST NO. 19

All documents concerning any draft or executed "comfort letters" requested by your or provided to you in connection with the Subordinated Debenture Offering.

MS & Co.'s Objections:

MS & Co. objects to this request to the extent it seeks documents which MS & Co. has previously produced in response to subpoenas in related legal proceedings, and which MS & Co. has previously agreed to make available to CPH. In addition, MS & Co. objects to this request because it is duplicative of other document requests, including, but not limited to Request Nos. 49 and 59. MS & Co. also objects to this request to the extent that it seeks documents which are not in MS & Co.'s possession, custody, or control. Subject to and without waiving its general and specific objections, MS & Co. will produce non-privileged documents,

located after a good-faith search of documents in its possession, custody, or control, that are responsive to this request.

DOCUMENT REQUEST NO. 20

All documents concerning the sale of, or your attempts to sell, Subordinated Debentures, including without limitation documents concerning road shows, communications with potential investors, or communications with or among Morgan Stanley's sales personnel.

MS & Co.'s Objections:

MS & Co. objects to this request to the extent it seeks documents which MS & Co. has previously produced in response to subpoenas in related legal proceedings, and which MS & Co. has previously agreed to make available to CPH. In addition, MS & Co. objects to this request because it is duplicative of other document requests, including, but not limited to Request Nos. 49 and 59. MS & Co. also objects to this request to the extent that it seeks documents which are not in MS & Co.'s possession, custody, or control. Subject to and without waiving its general and specific objections, MS & Co. will produce non-privileged documents, located after a good-faith search of documents in its possession, custody, or control, that are responsive to this request.

DOCUMENT REQUEST NO. 21

All documents concerning the pricing of the Subordinated Debentures.

MS & Co.'s Objections:

MS & Co. objects to this request to the extent it seeks documents which MS & Co. has previously produced in response to subpoenas in related legal proceedings, and which MS & Co. has previously agreed to make available to CPH. In addition, MS & Co. objects to this request because it is duplicative of other document requests, including, but not limited to Request Nos. 49 and 59. MS & Co. also objects to this request to the extent that it seeks documents which are not in MS & Co.'s possession, custody, or control. Subject to and without

waiving its general and specific objections, MS & Co. will produce non-privileged documents, located after a good-faith search of documents in its possession, custody, or control, that are responsive to this request.

DOCUMENT REQUEST NO. 22

All documents concerning the conversion features of the Subordinated Debentures.

MS & Co.'s Objections:

MS & Co. objects to this request to the extent it seeks documents which MS & Co. has previously produced in response to subpoenas in related legal proceedings, and which MS & Co. has previously agreed to make available to CPH. In addition, MS & Co. objects to this request because it is duplicative of other document requests, including, but not limited to Request Nos. 49 and 59. MS & Co. also objects to this request to the extent that it seeks documents which are not in MS & Co.'s possession, custody, or control. Subject to and without waiving its general and specific objections, MS & Co. will produce non-privileged documents, located after a good-faith search of documents in its possession, custody, or control, that are responsive to this request.

DOCUMENT REQUEST NO. 23

All documents concerning the "book of demand" for the Subordinated Debentures.

MS & Co.'s Objections:

MS & Co. objects to this request to the extent it seeks documents which MS & Co. has previously produced in response to subpoenas in related legal proceedings, and which MS & Co. has previously agreed to make available to CPH. In addition, MS & Co. objects to this request because it is duplicative of other document requests, including, but not limited to Request Nos. 49 and 59. MS & Co. also objects to this request to the extent that it seeks

documents which are not in MS & Co.'s possession, custody, or control. Subject to and without waiving its general and specific objections, MS & Co. will produce non-privileged documents, located after a good-faith search of documents in its possession, custody, or control, that are responsive to this request.

DOCUMENT REQUEST NO. 24

All documents concerning the events that took place on March 19, 1998 at Global Financial Press, including without limitation documents concerning Lawrence Bornstein and/or John Tyree.

MS & Co.'s Objections:

MS & Co. objects to this request to the extent it seeks documents which MS & Co. has previously produced in response to subpoenas in related legal proceedings, and which MS & Co. has previously agreed to make available to CPH. In addition, MS & Co. objects to this request because it is duplicative of other document requests, including, but not limited to Request Nos. 49 and 59. MS & Co. also objects to this request to the extent that it seeks documents which are not in MS & Co.'s possession, custody, or control. MS & Co. further objects to this request for all documents concerning "the events that took place" on March 19, 1998 as vague, ambiguous and over broad. MS & Co. will construe "the events that took place" to mean the events alleged in paragraphs 3, 52 59-68 of your Complaint. MS & Co. denies those allegations. Subject to and without waiving its general and specific objections, and without accepting the allegations in your Complaint as true or accurate, MS & Co. will produce non-privileged documents, located after a good-faith search of documents in its possession, custody, or control, that are responsive to this request.

DOCUMENT REQUEST NO. 25

All documents concerning your communications with Sunbeam on March 18, 1998.

MS & Co.'s Objections:

MS & Co. objects to this request to the extent it seeks documents which MS & Co. has previously produced in response to subpoenas in related legal proceedings, and which MS & Co. has previously agreed to make available to CPH. In addition, MS & Co. objects to this request because it is duplicative of other document requests, including, but not limited to Request Nos. 49 and 59. MS & Co. also objects to this request to the extent that it seeks documents which are not in MS & Co.'s possession, custody, or control.

MS & Co. further objects to this request for all documents concerning "your communications with Sunbeam on March 18, 1998" as vague, ambiguous and over broad, and will construe "your communications with Sunbeam on March 18, 1998" to mean the communications you allege in paragraphs 3, 57-58 of your Complaint. MS & Co. denies those allegations. Subject to and without waiving its general and specific objections, and without accepting the allegations in your Complaint as true or accurate, MS & Co. will produce non-privileged documents, located after a good-faith search of documents in its possession, custody, or control, that are responsive to this request.

DOCUMENT REQUEST NO. 26

All documents concerning the "bring-down" due diligence for the Subordinated Debenture Offering.

MS & Co.'s Objections:

MS & Co. objects to this request to the extent it seeks documents which MS & Co. has previously produced in response to subpoenas in related legal proceedings, and which MS & Co. has previously agreed to make available to CPH. In addition, MS & Co. objects to this request because it is duplicative of other document requests, including, but not limited to Request Nos. 49 and 59. MS & Co. further objects to this request to the extent it seeks

documents which are not in MS & Co.'s possession, custody, or control. Subject to and without waiving its general and specific objections, MS & Co. will produce non-privileged documents, located after a good-faith search of documents in its possession, custody, or control, that are responsive to this request.

DOCUMENT REQUEST NO. 27

All documents concerning your communications with Sunbeam on March 24, 1998.

MS & Co.'s Objections:

MS & Co. objects to this request to the extent it seeks documents which MS & Co. has previously produced in response to subpoenas in related legal proceedings, and which MS & Co. has previously agreed to make available to CPH. In addition, MS & Co. objects to this request because it is duplicative of other document requests, including, but not limited to Request Nos. 49 and 59.

MS & Co. objects to this request for all documents concerning "your communications with Sunbeam on March 24, 1998" as vague, ambiguous and over broad, and will construe "your communications with Sunbeam on March 24, 1998" to mean the communications you allege in paragraph 70 of your Complaint. MS & Co. denies those allegations. Subject to and without waiving its general and specific objections, and without accepting the allegations in your Complaint as true or accurate, MS & Co. will produce non-privileged documents, located after a good-faith search of documents in its possession, custody, or control, that are responsive to this request.

DOCUMENT REQUEST NO. 28

All documents concerning Sunbeam's first quarter 1998 sales and/or earnings.

MS & Co.'s Objections:

MS & Co. objects to this request to the extent it seeks documents which MS & Co. has previously produced in response to subpoenas in related legal proceedings, and which MS & Co. has previously agreed to make available to CPH. In addition, MS & Co. objects to this request because it is duplicative of other document requests, including, but not limited to Request Nos. 13, 17, 49 and 59.

Subject to and without waiving its general and specific objections, MS & Co. will produce non-privileged documents, located after a good-faith search of documents in its possession, custody, or control, concerning Sunbeam Corporation's first quarter 1998 sales and earnings.

DOCUMENT REQUEST NO. 29

All documents concerning the closing of the Subordinated Debenture Offering including without limitation all documents concerning the decision to close the Subordinated Debenture Offering.

MS & Co.'s Objections:

MS & Co. objects to this request to the extent it seeks documents which MS & Co. has previously produced in response to subpoenas in related legal proceedings, and which MS & Co. has previously agreed to make available to CPH. In addition, MS & Co. objects to this request because it is duplicative of other document requests, including, but not limited to Request Nos. 49 and 59. Subject to and without waiving its general and specific objections, MS & Co. will produce non-privileged documents, located after a good-faith search of documents in its possession, custody, or control, that are responsive to this request .

DOCUMENT REQUEST NO. 30

All documents concerning the Subordinated Debenture Offering.

MS & Co.'s Objections:

MS & Co. objects to this request to the extent it seeks documents which MS & Co. has previously produced in response to subpoenas in related legal proceedings, and which MS & Co. has previously agreed to make available to CPH. In addition, MS & Co. objects to this request because it is duplicative of other document requests, including, but not limited to Request Nos. 10, 18, 19, 20, 21, 22, 23, 26, 29, 36, 49 and 59. Subject to and without waiving its general and specific objections, MS & Co. will produce non-privileged documents, located after a good-faith search of documents in its possession, custody, or control, that are responsive to this request.

DOCUMENT REQUEST NO. 31

All documents concerning any work or services you performed for or on behalf of Sunbeam in 1997 or 1998, regardless of whether you were compensated for that work.

MS & Co.'s Objections:

MS & Co. objects to this request to the extent it seeks documents which MS & Co. has previously produced in response to subpoenas in related legal proceedings, and which MS & Co. has previously agreed to make available to CPH. In addition, MS & Co. objects to this request because it is duplicative of other document requests, including, but not limited to Request Nos. 2, 49 and 59.

Subject to and without waiving its general and specific objections, MS & Co. will produce non-privileged documents, located after a good-faith search of documents in its possession, custody, or control, concerning work or services Morgan Stanley & Co., Incorporated performed for or on behalf of Sunbeam Corporation in 1997 and 1998.

DOCUMENT REQUEST NO. 32

All documents concerning press releases issued by Sunbeam on October 23, 1997, March 19, 1998, April 3, 1998, May 9, 1998, June 15, 1998, June 25, 1998, June 30, 1998, October 20, 1998, and November 12, 1998.

MS & Co.'s Objections:

MS & Co. objects to this request to the extent it seeks documents which MS & Co. has previously produced in response to subpoenas in related legal proceedings, and which MS & Co. has previously agreed to make available to CPH. In addition, MS & Co. objects to this request because it is duplicative of other document requests, including, but not limited to Request Nos. 49 and 59. Subject to and without waiving its general and specific objections, MS & Co. will produce non-privileged documents, located after a good-faith search of documents in its possession, custody, or control, that are responsive to this request.

DOCUMENT REQUEST NO. 33

All documents concerning the statements contained in the press releases issued by Sunbeam on October 23, 1997, March 19, 1998, April 3, 1998, May 9, 1998, June 15, 1998, June 25, 1998, June 30, 1998, October 20, 1998, and November 12, 1998.

MS & Co.'s Objections:

MS & Co. objects to this request to the extent it seeks documents which MS & Co. has previously produced in response to subpoenas in related legal proceedings, and which MS & Co. has previously agreed to make available to CPH. In addition, MS & Co. objects to this request because it is duplicative of other document requests, including, but not limited to Request Nos. 32, 49 and 59. Subject to and without waiving its general and specific objections, MS & Co. will produce non-privileged documents, located after a good-faith search of documents in its possession, custody, or control, that are responsive to this request.

DOCUMENT REQUEST NO. 34

All documents concerning communications relating to Sunbeam, Coleman, or CPH, including without limitation internal communications within Morgan Stanley or communications between or among Morgan Stanley and Sunbeam; Skadden, Arps, Slate, Meagher & Flom LLP; Coopers & Lybrand LLP; Llama Company; Arthur Andersen LLP; Sard Verbinnen & Co., Inc.; Hill & Knowlton, Inc.; The Coleman Company, Inc.; Credit Suisse First Boston; Coleman (Parent) Holdings Inc.; MacAndrews & Forbes Holdings, Inc.; Wachtell Lipton, Rosen & Katz; Davis Polk & Wardwell; or any other person or company, and/or any of their respective employees, agents, or representatives.

MS & Co.'s Objections:

MS & Co. objects to this request to the extent it seeks documents which MS & Co. has previously produced in response to subpoenas in related legal proceedings, and which MS & Co. has previously agreed to make available to CPH. In addition, MS & Co. objects to this request because it is duplicative of other document requests, including, but not limited to Request Nos. 2, 49 and 59. MS & Co. further objects to the extent that this request calls for privileged communications.

Subject to and without waiving its general and specific objections, MS & Co. will produce non-privileged documents, located after a good-faith search of documents in its possession, custody, or control, concerning communications relating to Sunbeam Corporation, the Coleman Company, Inc., or Coleman (Parent) Holdings Inc.

DOCUMENT REQUEST NO. 35

All documents concerning the Coleman Transaction.

MS & Co.'s Objections:

MS & Co. objects to this request to the extent it seeks documents which MS & Co. has previously produced in response to subpoenas in related legal proceedings, and which MS & Co. has previously agreed to make available to CPH. In addition, MS & Co. objects to this request because it is duplicative of other document requests, including, but not limited to

Request Nos. 49 and 59. Subject to and without waiving its general and specific objections, MS & Co. will produce non-privileged documents, located after a good-faith search of documents in its possession, custody, or control, that are responsive to this request.

DOCUMENT REQUEST NO. 36

All documents concerning the Subordinated Debenture Offering.

MS & Co.'s Objections:

MS & Co. objects to this request to the extent it seeks documents which MS & Co. has previously produced in response to subpoenas in related legal proceedings, and which MS & Co. has previously agreed to make available to CPH. In addition, MS & Co. objects to this request because it is duplicative of other document requests, including, but not limited to Request Nos. 10, 18, 19, 20, 21, 22, 23, 26, 29, 36, 49 and 59. Additionally, this request is verbatim the same as request 30. Subject to and without waiving its general and specific objections, MS & Co. will produce non-privileged documents, located after a good-faith search of documents in its possession, custody, or control, that are responsive to this request.

DOCUMENT REQUEST NO. 37

All documents concerning Albert Dunlap and/or Russell Kersh.

MS & Co.'s Objections:

MS & Co. objects to this request to the extent it seeks documents which MS & Co. has previously produced in response to subpoenas in related legal proceedings, and which MS & Co. has previously agreed to make available to CPH. In addition, MS & Co. objects to this request because it is duplicative of other document requests, including, but not limited to Request Nos. 49 and 59. Subject to and without waiving its general and specific objections, MS & Co. will produce non-privileged documents, located after a good-faith search of documents in its possession, custody, or control, that are responsive to this request .

DOCUMENT REQUEST NO. 38

All documents concerning the Scott Paper Company.

MS & Co.'s Objections:

MS & Co. objects to this request as vague, ambiguous, overly broad, and unduly unduly burdensome. Further, MS & Co. objects to this request in that it is wholly irrelevant to the instant litigation and is not reasonably calculated to lead to the discovery of admissible evidence. The Scott Paper Company is not party to this action. MS & Co. will not produce documents responsive to this request.

DOCUMENT REQUEST NO. 39

All documents concerning Coleman or CPH.

MS & Co.'s Objections:

MS & Co. objects to this request to the extent it seeks documents which MS & Co. has previously produced in response to subpoenas in related legal proceedings, and which MS & Co. has previously agreed to make available to CPH. In addition, MS & Co. objects to this request because it is duplicative of other document requests, including, but not limited to Request Nos. 4, 8, 12, 15, 16, 34, 35, 40, 49 and 50. Requiring MS & Co. to produce all documents "concerning Coleman or CPH," with no further specification or identification of requested documents would impose an unreasonable and undue burden on MS & Co. It is unreasonable to so broadly tailor a request so as to encompass absolutely every document pertaining to Coleman or CPH. Subject to and without waiving its general and specific objections, MS & Co. will produce non-privileged documents, located after a good-faith search of documents in its possession, custody, or control, relating to the Coleman Company, Inc. or Coleman (Parent) Holdings, Inc. to the extent that they also relate to Sunbeam Corporation and/or the Coleman Transaction.

DOCUMENT REQUEST NO. 40

All documents concerning MacAndrews & Forbes Holdings, Inc. with respect to Sunbeam, Coleman or CPH.

MS & Co.'s Objections:

MS & Co. objects to this request to the extent it seeks documents which MS & Co. has previously produced in response to subpoenas in related legal proceedings, and which MS & Co. has previously agreed to make available to CPH. In addition, MS & Co. objects to this request because it is duplicative of other document requests, including, but not limited to Request Nos. 4, 8, 12, 15, 16, 34, 35, 39, 49 and 59. MS & Co. further objects to this request as overbroad and unduly burdensome. It is unreasonable to so broadly tailor a request so as to encompass absolutely every document pertaining to MacAndrews & Forbes Holdings, Inc. Subject to and without waiving its general and specific objections, MS & Co. will produce non-privileged documents, located after a good-faith search of documents in its possession, custody, or control, relating to MacAndrews & Forbes Holdings, Inc. to the extent that they also relate to Sunbeam Corporation and/or the Coleman Transaction.

DOCUMENT REQUEST NO. 41

All documents concerning the events and matters that are the subject of the Complaint filed this [sic] action.

MS & Co.'s Objections:

MS & Co. objects to this request to the extent it seeks documents which MS & Co. has previously produced in response to subpoenas in related legal proceedings, and which MS & Co. has previously agreed to make available to CPH. MS & Co. also objects to this request as vague, ambiguous, overbroad, and unduly burdensome. Furthermore, this request is duplicative of almost all other document requests listed by CPH. Requiring MS & Co. to produce all documents concerning "the events and matters that are the subject of the Complaint"

would impose an unreasonable and undue burden on MS & Co. It is unreasonable to so broadly tailor a request so as to encompass absolutely every document pertaining to the subject litigation. Subject to and without waiving its general and specific objections, MS & Co. will produce non-privileged documents, located after a good-faith search of documents in its possession, custody, or control, that are responsive to this request, insofar as the documents are also responsive to one of the other requests.

DOCUMENT REQUEST NO. 42

Organizational charts, memoranda, or similar documents that describe the business organizational structure and the administrative, management, and reporting structure of Morgan Stanley from and including January 1, 1997 through and including December 31, 1998.

MS & Co.'s Objections:

MS & Co. objects to this request to the extent it seeks documents which MS & Co. has previously produced in response to subpoenas in related legal proceedings, and which MS & Co. has previously agreed to make available to CPH. In addition, MS & Co. objects to this request because it is duplicative of other document requests, including, but not limited to Request Nos. 49 and 59. Subject to and without waiving its general and specific objections, MS & Co. will produce non-privileged documents, located after a good-faith search of documents in its possession, custody, or control, sufficient to show the structure of Morgan Stanley & Co. Incorporated and Morgan Stanley Senior Funding Incorporated.

DOCUMENT REQUEST NO. 43

All documents concerning Morgan Stanley's policies, procedures, manuals, guidelines, reference materials, or checklists that were in effect from and including January 1, 1997 through and including December 31, 1998 for the performance of due diligence, including without limitation due diligence performed in connection with underwriting the sale of equity or debt securities.

MS & Co.'s Objections:

MS & Co. objects to this request to the extent that it is vague, ambiguous, over broad and unduly burdensome. To the extent that it seeks documents concerning due diligence other than that due diligence performed in the course of MS & Co.'s engagement for Sunbeam, the request is requesting documents which are irrelevant to this litigation and not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving its general and specific objections, MS & Co. will produce non-privileged documents, located after a good-faith search of documents in its possession, custody, or control, relating to the due diligence performed by MS & Co. in the course of its engagement with Sunbeam Corporation or relating to the Coleman Transaction, and any general due diligence materials responsive to this request. MS & Co. will not produce documents that relate to other transactions not relevant to this lawsuit.

DOCUMENT REQUEST NO. 44

All documents concerning employment contracts, performance evaluations, and/or personnel files (including without limitation any documents that describe or discuss the training, experience, competence, and accomplishments) of all Morgan Stanley personnel who performed services for or on behalf of Sunbeam in 1997 or 1998.

MS & Co.'s Objections:

MS & Co. objects to this request to the extent that it seeks documents which are protected by the attorney-client, attorney work product, other common law or statutory privileges, or which are otherwise immune from discovery. MS & Co. expressly reserves the right to assert any and all common law or statutory privileges to which MS & Co. and its attorneys are entitled under applicable law.

This request seeks to compel production of personnel files and performance evaluations of individual MS & Co. employees that are neither relevant to CPH's claims nor

reasonably calculated to lead to the discovery of admissible evidence and, in addition, would unnecessarily infringe on the privacy interests of those employees.

MS & Co. will not produce documents responsive to this request.

DOCUMENT REQUEST NO. 45

All documents concerning Morgan Stanley's performance evaluation criteria or guidelines in effect from and including January 1, 1997 through and including December 31, 1998.

MS & Co.'s Objections:

MS & Co. objects to this request to the extent that it seeks documents which are protected by the attorney-client, attorney work product, other common law or statutory privileges, or which are otherwise immune from discovery. MS & Co. expressly reserves the right to assert any and all common law or statutory privileges to which MS & Co. and its attorneys are entitled under applicable law.

MS & Co. objects to this request in that it seeks the production of documents which are irrelevant to this litigation and not reasonably calculated to lead to the discovery of admissible evidence. MS & Co. will not produce documents responsive to this request.

DOCUMENT REQUEST NO. 46

All documents concerning Morgan Stanley's compensation criteria or guidelines in effect from and including January 1, 1997 through and including December 31, 1998.

MS & Co.'s Objections:

MS & Co. objects to this request to the extent that it seeks documents which are protected by the attorney-client, attorney work product, other common law or statutory privileges, or which are otherwise immune from discovery. MS & Co. expressly reserves the right to assert any and all common law or statutory privileges to which MS & Co. and its attorneys are entitled under applicable law.

MS & Co. objects to this request in that it seeks the production of documents which are irrelevant to this litigation and not reasonably calculated to lead to the discovery of admissible evidence. MS & Co. will not produce documents responsive to this request.

DOCUMENT REQUEST NO. 47

All marketing or other promotional material prepared or used by, or on behalf of, Morgan Stanley concerning investment banking or securities underwriting services that were created or used at any time from and including January 1, 1997 through and including December 31, 1998.

MS & Co.'s Objections:

MS & Co. objects to this request for "all marketing or promotional material...concerning investment banking or securities underwriting services" as overbroad, unduly burdensome and inadequately tailored. Requiring MS & Co. to produce all documents sought in this request would necessitate the production of all of MS & Co.'s promotional materials, in their entirety, which would result in the production of documents irrelevant to this litigation and not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving its general and specific objections, MS & Co. will produce any general marketing or promotional materials responsive to this request, and any marketing or promotional material provided or presented to Sunbeam, CPH, or MAFCO, responsive to this request, located after a good-faith search of documents in its possession, custody, or control.

DOCUMENT REQUEST NO. 48

All of your document retention or document destruction policies or procedures or similar procedures for the back-up or deletion of electronic or hard copy documents of any kind for any time during 1997 through the present, including without limitation any amendments to any such policies or procedures, schedules or related documents, and any memoranda or other instructions communicated to your employees concerning the obligation and procedures to be utilized to preserve all relevant documents, including without limitation evidence concerning the Litigations, the Arbitrations, and the SEC Administrative Proceedings.

MS & Co.'s Objections:

MS & Co. objects to this request to the extent that it seeks documents which are protected by the attorney-client, attorney work product, other common law or statutory privileges, or which are otherwise immune from discovery. MS & Co. expressly reserves the right to assert any and all common law or statutory privileges to which MS & Co. and its attorneys are entitled under applicable law. Subject to and without waiving its general and specific objections, MS & Co. will produce non-privileged documents, located after a good-faith search of documents in its possession, custody, or control, reflecting document retention policies adopted by MS & Co.

DOCUMENT REQUEST NO. 49

All documents you have provided or produced to any party (whether voluntarily or in response to a document request, subpoena duces tecum, or other process served on you) in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings (including without limitation any reports, communications, filings, testimony, legal memoranda, statements, or other documents submitted to the Securities & Exchange Commission or any other party).

MS & Co.'s Objections:

MS & Co. objects to this request to the extent that it seeks documents already in CPH's possession. Further, MS & Co. objects to this request as being duplicative of other of CPH's requests for production. Subject to and without waiving its general and specific objections, MS & Co. will produce non-privileged documents, located after a good-faith search of documents in its possession, custody, or control, that are responsive to this request.

DOCUMENT REQUEST NO. 50

All documents you have provided to the SEC, the Attorney General of New York, or any other governmental or regulatory body concerning Sunbeam.

MS & Co.'s Objections:

MS & Co. objects to this request to the extent it seeks documents which MS & Co. has previously produced in response to subpoenas in related legal proceedings, and which MS & Co. has previously agreed to make available to CPH. In addition, MS & Co. objects to this request because it is duplicative of other document requests, including, but not limited to Request Nos. 49 and 59. Subject to and without waiving its general and specific objections, MS & Co. will produce non-privileged documents, located after a good-faith search of documents in its possession, custody, or control, that are responsive to this request.

DOCUMENT REQUEST NO. 51

All documents you have received from the SEC, the Attorney General of New York, or any other governmental or regulatory body concerning Sunbeam.

MS & Co.'s Objections:

MS & Co. objects to this request to the extent it seeks documents which MS & Co. has previously produced in response to subpoenas in related legal proceedings, and which MS & Co. has previously agreed to make available to CPH. In addition, MS & Co. objects to this request because it is duplicative of other document requests, including, but not limited to Request Nos. 49 and 59. Subject to and without waiving its general and specific objections, MS & Co. will produce non-privileged documents, located after a good-faith search of documents in its possession, custody, or control, that are responsive to this request.

DOCUMENT REQUEST NO. 52

All discovery requests or subpoenas served on you in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

MS & Co.'s Objections:

MS & Co. objects to this request to the extent it seeks documents which MS & Co. has previously produced in response to subpoenas in related legal proceedings, and which

MS & Co. has previously agreed to make available to CPH. In addition, MS & Co. objects to this request because it is duplicative of other document requests, including, but not limited to Request Nos. 49 and 59. Subject to and without waiving its general and specific objections, MS & Co. will produce non-privileged documents, located after a good-faith search of documents in its possession, custody, or control, that are responsive to this request.

DOCUMENT REQUEST NO. 53

All responses and/or objections that you provided or produced in response to a discovery request or subpoena served on you in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

MS & Co.'s Objections:

MS & Co. objects to this request to the extent it seeks documents already in CPH's possession. Subject to and without waiving its general and specific objections, MS & Co. will produce non-privileged documents, located after a good-faith search of documents in its possession, custody, or control, that are responsive to this request.

DOCUMENT REQUEST NO. 54

All communications concerning any discovery request or subpoena served on you in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

MS & Co.'s Objections:

MS & Co. objects to this request to the extent that it seeks documents already in CPH's possession. MS & Co. also objects to this request to the extent that it seeks documents which are protected by the attorney-client, attorney work product, other common law or statutory privileges, or which are otherwise immune from discovery. MS & Co. expressly reserves the right to assert any and all common law or statutory privileges to which MS & Co. and its attorneys are entitled under applicable law.

Subject to and without waiving its general and specific objections, MS & Co. will produce non-privileged documents, located after a good-faith search of documents in its possession, custody, or control, that are responsive to this request.

DOCUMENT REQUEST NO. 55

All motions, memoranda, briefs, rulings, orders, or transcripts of proceedings concerning any discovery request, subpoena, or other process in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

MS & Co.'s Objections:

MS & Co. objects to this request to the extent it seeks documents already in CPH's possession. Subject to and without waiving its general and specific objections, MS & Co. will produce non-privileged documents, located after a good-faith search of documents in its possession, custody, or control, that are responsive to this request.

DOCUMENT REQUEST NO. 56

All privilege logs you prepared in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings with respect to documents that you withheld from production in response to any document requests, subpoenas duces tecum, or other process.

MS & Co.'s Objections:

Subject to and without waiving its general and specific objections, MS & Co. will produce non-privileged documents, located after a good-faith search of documents in its possession, custody, or control, that are responsive to this request.

DOCUMENT REQUEST NO. 57

All transcripts of and exhibits to any depositions, recorded statements, or affidavits in connection with any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

MS & Co.'s Objections:

Subject to and without waiving its general and specific objections, MS & Co. will produce non-privileged documents, located after a good-faith search of documents in its possession, custody, or control, that are responsive to this request.

DOCUMENT REQUEST NO. 58

All documents obtained by you or produced to you by other parties, third parties, or non-parties (whether voluntarily or in response to any document requests, subpoenas duces tecum, or other process served by you or any other party) concerning Sunbeam.

MS & Co.'s Objections:

Subject to and without waiving its general and specific objections, MS & Co. will produce non-privileged documents, located after a good-faith search of documents in its possession, custody, or control, that are responsive to this request.

DOCUMENT REQUEST NO. 59

All document requests, subpoenas duces tecum, interrogatories, requests for admission, responses, or objections that you served on, or received from, any party, third party or non-party in In re Sunbeam Corp., Inc., No. 01-40291 (AJG) (Bankr. S.D.N.Y.) and any adversary proceedings therein.

MS & Co.'s Objections:

Subject to and without waiving its general and specific objections, MS & Co. will produce non-privileged documents, located after a good-faith search of documents in its possession, custody, or control, that are responsive to this request.

DOCUMENT REQUEST NO. 60

All transcripts of any hearings held in connection with the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

MS & Co.'s Objections:

Subject to and without waiving its general and specific objections, MS & Co. will produce non-privileged documents, located after a good-faith search of documents in its possession, custody, or control, that are responsive to this request.

DOCUMENT REQUEST NO. 61

All affidavits, declarations, or other testimonial statements filed or submitted in connection with any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

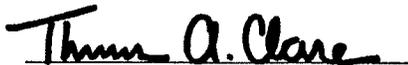
MS & Co.'s Objections:

Subject to and without waiving its general and specific objections, MS & Co. will produce non-privileged documents, located after a good-faith search of documents in its possession, custody, or control, that are responsive to this request.

Dated: July 25, 2003

Respectfully Submitted,

Joseph Ianno, Jr. (FL Bar # 655351)
CARLTON FIELDS
222 Lake View Avenue - Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368



Thomas D. Yannucci, P.C

Thomas A. Clare

Larissa Paule-Carres

Kathryn DeBord

KIRKLAND & ELLIS

655 15th Street, N.W. 12th Floor

Washington, D.C. 20005

Telephone: (202) 879-5000

Facsimile: (202) 879-5200

Attorneys for Defendant

Morgan Stanley & Co. Incorporated

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by e-mail and facsimile to all counsel of record on the attached service list on this 25th day of July, 2003.

Thomas D. Yannucci, P.C.
Thomas A. Clare
Larissa Paule-Carres
Brett H. McGurk
KIRKLAND & ELLIS
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

**Counsel for Defendant
Morgan Stanley & Co. Incorporated**

Joseph Ianno, Jr. (FL Bar # 655351)
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

BY: Thomas A. Clare
Thomas A. Clare

SERVICE LIST

<p>John Scarola SEARCY, DENNEY, SCAROLA, BARNHARDT & SHIPLEY, P.A. 2139 Palm Beach Lakes Boulevard West Palm Beach, Florida 33409</p>	<p>Counsel for Plaintiff</p>
<p>Jerold S. Solovy JENNER & BLOCK, LLC One IBM Plaza Suite 4400 Chicago, Illinois 60611</p>	<p>Counsel for Plaintiff</p>

Kathryn DeBord
07/27/2003 10:07 AM

To: mem@searcylaw.com, jsolovy@jenner.com
cc: (bcc: Kimberly Chervenak/Washington DC/Kirkland-Ellis)

Subject: MS & Co.'s Supplemental Objections to CPH's First Request for Production

Attached please find MS & Co.'s supplemental objections, which were sent by fax Friday evening (7/25).



MS & CO.'s Supplemental Objections

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CASE NO: 03 CA-005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

**MORGAN STANLEY & CO. INCORPORATED'S OBJECTIONS TO COLEMAN
(PARENT) HOLDINGS, INC. SECOND REQUEST FOR
PRODUCTION OF DOCUMENTS**

Pursuant to Rules 1.280 and 1.350 of the Florida Rules of Civil Procedure, defendant Morgan Stanley & Co. Incorporated ("MS & Co.") hereby interposes the following objections to plaintiff Coleman (Parent) Holdings, Inc.'s ("CPH") Second Request for Production of Documents ("Request for Production").

GENERAL OBJECTIONS

The following general objections apply to all specifications of CPH's Request for Production. Each General Objection is hereby incorporated in the response to each specific request as if fully set forth therein:

1. MS & Co. objects to the entire Request for Production as over broad and unduly burdensome. CPH has requested the production of impermissibly broad categories of documents that, if read literally and in combination with the equally overbroad Definitions, would require MS & Co. to collect, review and produce potentially hundreds of thousands of pages of

documents, e-mails, electronic documents on servers and hard drives, and other materials from multiple MS & Co. business locations around the United States. MS & Co. should not be required to shoulder this burden that goes well beyond the requirements of the Florida Rules of Civil Procedure.

2. MS & Co. objects to the entire Request for Production because it seeks documents that MS & Co. has previously produced in response to subpoenas in related legal proceedings. Although it was under no legal obligation to do so, MS & Co. permitted CPH to have access to these documents years ago. The documents requested and produced in these cases are substantially identical to the categories of documents that CPH now seeks. To the extent that MS & Co. has already made these documents available to CPH in prior cases, MS & Co. should not be required to bear the burden of expending valuable time and financial resources to search for, review and produce the documents again.

3. MS & Co. objects to the entire Request for Production to the extent that it seeks documents that are protected from disclosure by the attorney-client, attorney work product, other applicable common law or statutory privileges, or which are otherwise immune from discovery (hereinafter referred to as "Privileges"). MS & Co. expressly reserves the right to assert any and all common law or statutory privileges to which MS & Co. and its attorneys are entitled under applicable law. MS & Co. will exchange a privilege log with CPH in accordance with the terms of the agreement that is currently being negotiated by the parties.

4. MS & Co. objects to the entire Request for Production to the extent it seeks documents not relevant to the subject matter of this litigation or not reasonably calculated to lead to the discovery of admissible evidence.

5. MS & Co. objects to the entire Request for Production, including the Instructions, to the extent it purports to impose requirements beyond those specified by the Florida Rules of Civil Procedure, discovery guidelines of this Court, and applicable case law.

6. MS & Co. objects to the entire Request for Production to the extent it calls for documents which are in the public domain and accessible to all parties.

7. MS & Co. objects to the entire Request for Production to the extent that it is intended to harass or annoy MS & Co. or its employees, to create additional and unnecessary expense for MS & Co., or intended to serve any other improper purpose.

8. MS & Co. objects to the entire Request for Production to the extent it seeks the production of documents beyond MS & Co.'s possession, custody or control. Any statement by MS & Co. to the effect that it will produce responsive documents shall not be construed as an admission that any such documents exist -- or that any such documents are within MS & Co.'s possession, custody or control.

9. MS & Co.'s responses to CPH's document requests shall not be construed in any way as an admission that any Definition, statement, or characterization is either factually correct or legally binding upon MS & Co., or a waiver of any objection that MS & Co. is entitled to make at trial, including but not limited to objections regarding relevance and admissibility of documents.

10. MS & Co. objects to the entire Request for Production, including the Instructions, to the extent it purports to impose a continuing duty of supplementation extending beyond the

requirements of the Florida Rules of Civil Procedure, discovery guidelines of this Court, or applicable case law.

11. Discovery in this case has just begun. MS & Co.'s objections and responses are based on a good-faith search for documents and information within its possession, custody, and control. MS & Co. expressly reserves the right to amend, modify and supplement its objections and responses.

12. MS & Co. generally objects to the production of any documents unless and until an appropriate Protective Order has been agreed to by both parties to this litigation and entered by the Court.

SPECIFIC OBJECTIONS

Each of the General Objections set forth above is deemed incorporated into each Specific Objection. The enumeration of specific objections does not constitute, and shall not be construed or deemed as, a waiver of any objection listed.

DEFINITION NO. 2

"Coleman" means the Coleman Company, Inc. or any of its present and former officers, directors, employees, representatives, agents, and all other persons acting or purporting to act on its behalf.

MS & Co.'s Objections:

MS & Co. objects to the definition of "Coleman" as overbroad on the grounds that it is vague and ambiguous and purports to impute to MS & Co. the responsibility for ascertaining relationships and affiliations unknown to MS & Co., as well as the responsibility for determining the identities of Coleman's present and former officers, directors, employees, representatives, agents, and all other persons "acting or purporting to act" on its behalf.

DEFINITION NO. 3

“CPH” means Coleman (Parent) Holdings Inc., Coleman Worldwide Corporation, CLN Holdings, Co., Inc., or any of their present and former officers, directors, employees, representatives, agents, and all other persons acting or purporting to act on their behalf.

MS & Co.’s Objections:

MS & Co. objects to the definition of “CPH” as overbroad on the grounds that such a definition is vague and ambiguous and purports to impute to MS & Co. the responsibility for ascertaining relationships and affiliations unknown to MS & Co., as well as the responsibility for determining the identities of CPH’s present and former officers, directors, employees, representatives, agents, and all other persons “acting or purporting to act” on its behalf.

DEFINITION NO. 7

“Documents” means documents whether fixed in tangible medium or electronically stored. The word “documents” shall include, by way of example and not by way of limitation, all of the following: papers, correspondence, trade letters, envelopes, memoranda, telegrams, cables, notes, messages, reports, studies, press releases, comparisons, books, accounts, checks, audio and video recordings and transcriptions thereof, pleadings, testimony, articles, bulletins, pamphlets, brochures, magazines, questionnaires, surveys, charts, newspapers, calendars, desk calendars, pocket calendars, lists, logs, publications, notices, diagrams, instructions, diaries, minutes for meetings, corporate minutes, orders, resolutions, agendas, memorials or notes of oral communications, whether by telephone or face-to-face, contracts, agreements, drafts of or proposed contracts or agreements, memoranda of understanding, letters of intent, computer tapes, computer drives or memories, computer diskettes or disks, e-mail, CD-ROMS, or any other tangible thing on which any handwriting, typing, printing, photostatic, electronic, or other form of communication or information is recorded or reproduced, together with all notations of any of the foregoing, all originals, file copies, or other unique copies of the foregoing, and all versions or drafts thereof, whether used or not.

MS & Co.’s Objections:

MS & Co. objects to the definition of the term “documents” as overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence to the extent it purports to require a search of all electronic media without regard for the undue expense and burden of such an undertaking in light of the marginal benefits to be obtained

from such a search. With respect to electronic media, MS & Co. will review custodian electronic mail files, electronic files of custodians stored on servers, and the hard drives of custodians.

DEFINITION NO. 11

“Morgan Stanley” means Morgan Stanley & Co., Inc. or any of its subsidiaries, divisions, predecessors, successors, present and former employees, representatives, agents, attorneys, accountants, advisors, or all other persons acting or purporting to act on its behalf.

MS & Co.’s Objections:

MS & Co. objects to the definition of the term “Morgan Stanley” on the ground that its adoption would require a document search that is overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. MS & Co. further objects to this definition to the extent that it purports to require MS & Co. to produce documents that are not within its actual “possession, custody, or control” pursuant to Florida Rule of Civil Procedure 1.350(a).

DEFINITION NO. 16

“Sunbeam” means Sunbeam Corporation, or any of its subsidiaries, divisions, affiliates, predecessors, successors, present and former employees, representatives, agents and all other persons acting or purporting to act on its behalf.

MS & Co.’s Objections:

MS & Co. objects to the definition of “Sunbeam” as overbroad on the grounds that it is vague and ambiguous and purports to impute to MS & Co. the responsibility for ascertaining relationships and affiliations unknown to MS & Co., as well as the responsibility for determining the identities of Sunbeam’s subsidiaries, divisions, affiliates, predecessors, successors, present and former employees, representatives, agents, and all other persons “acting or purporting to act” on its behalf.

DEFINITION NO. 17

“You” or “Your” means Morgan Stanley & Co., Inc. and/or any of its subsidiaries, divisions, predecessors, successors, present or former employees, representatives, agents, attorneys, accountants, advisors, or anyone acting or purporting to act on its behalf.

MS & Co.’s Objections:

MS & Co. objects to the definition of the terms “You” and “Your” on the ground that its adoption would require a document search that is overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. MS & Co. further objects to this definition to the extent that it purports to require MS & Co. to produce documents that are not within its actual “possession, custody, or control” pursuant to Florida Rule of Civil Procedure 1.350(a).

INSTRUCTION NO. 2

All documents shall be produced in the file folder envelope or other container in which the documents are kept or maintained by you. If, for any reason, the container cannot be produced, produce copies of all labels or other identifying marks.

MS & Co.’s Objections:

MS & Co. objects to Instruction No. 2 insofar as it purports to impose on MS & Co. the obligation to disclose information beyond the scope of obligations imposed by the Florida Rules of Civil Procedure and other applicable law.

INSTRUCTION NO. 3

The relevant period, unless otherwise indicated, shall be from January 1 1997 through the date of trial of this matter, and shall include all documents and information which relate in whole or in part to such period, or to events or circumstances during such period, even though dated, prepared, generated, or received prior to or subsequent to that period. Please supplement or correct your responses to these requests if, at any time, you become aware that your responses are incomplete or incorrect in any respect.

MS & Co.’s Objections:

MS & Co. objects to this Instruction to the extent that it purports to impose a continuing duty of supplementation not required by the Florida Rules of Civil Procedure.

INSTRUCTION NO. 4

If you claim the attorney-client privilege, or any other privilege or work-product protection for all or any portion of a document, you shall provide a privilege log that describes the withheld material sufficiently to allow CPH to test the privilege or protection asserted.

MS & Co.'s Objections:

MS & Co. will exchange a privilege log with CPH in accordance with the terms of the agreement that is currently being negotiated by the parties.

DOCUMENT REQUEST NO. 1

All documents concerning, or that may tend to support or refute, your assertion in your answers to paragraphs 3, 58, and 59 of the Complaint that you "performed all of [your] obligations as an underwriter of Sunbeam securities."

MS & Co.'s Objections:

MS & Co. objects to this request to the extent it seeks documents which MS & Co. has previously produced in response to subpoenas in related legal proceedings, and which MS & Co. has previously agreed to make available to CPH. Subject to and without waiving its general and specific objections, MS & Co. will produce non-privileged documents, located after a good-faith search of documents in its possession, custody, or control, that are responsive to this request.

DOCUMENT REQUEST NO. 2

All documents concerning, or that may tend to support or refute, your assertion in your answer to paragraph 3 of the Complaint that, during the negotiation process, CPH had access to the same documents that Morgan Stanley had access to as a result of its work for Sunbeam.

MS & Co.'s Objections:

Subject to and without waiving its general and specific objections, MS & Co. will produce non-privileged documents, located after a good-faith search of documents in its possession, custody, or control, that are responsive to this request.

DOCUMENT REQUEST NO. 3

All Sunbeam documents to which Morgan Stanley had access as a result of its work for Sunbeam, and all documents that identify the Sunbeam documents to which Morgan Stanley had access as a result of its work for Sunbeam, as described in your answer to paragraph 3 of the Complaint.

MS & Co.'s Objections:

MS & Co. objects to this request to the extent that it seeks documents which are not in MS & Co.'s possession, custody, or control. Subject to and without waiving its general and specific objections, MS & Co. will produce non-privileged documents, located after a good-faith search of documents in its possession, custody, or control, that are responsive to this request.

DOCUMENT REQUEST NO. 4

All documents provided by you to CPH that "specifically disclaim[]" your "independent evaluation of Sunbeam's financial records and expressly state [] that you relied solely on documentation and information provided by Sunbeam and Sunbeam's audited financial statements," as asserted in your answer to paragraph 3 of the Complaint.

MS & Co.'s Objections:

MS & Co. objects to this request to the extent it seeks documents which MS & Co. has previously produced in response to subpoenas in related legal proceedings, and which MS & Co. has previously agreed to make available to CPH. Subject to and without waiving its general and specific objections, MS & Co. will produce non-privileged documents, located after a good-faith search of documents in its possession, custody, or control, that are responsive to this request.

DOCUMENT REQUEST NO. 5

All documents you used to assemble marketing materials for use in meetings with potential acquirers of Sunbeam, as described in your answer to paragraph 32 of the Complaint.

MS & Co.'s Objections:

Subject to and without waiving its general and specific objections, MS & Co. will produce non-privileged documents, located after a good-faith search of documents in its possession, custody, or control, that are responsive to this request.

DOCUMENT REQUEST NO. 6

All documents used by you to form your "written fairness opinion," as described in your answer to paragraph 43 of the Complaint.

MS & Co.'s Objections:

Subject to and without waiving its general and specific objections, MS & Co. will produce non-privileged documents, located after a good-faith search of documents in its possession, custody, or control, that are responsive to this request.

DOCUMENT REQUEST NO. 7

All documents concerning, or that may tend to support or refute, your assertion in your answer to paragraph 47 of the Complaint that the "cash portion" of the consideration set forth in the Merger Agreement was also financed in part through a \$680 million loan made by Morgan Stanley Senior Funding."

MS & Co.'s Objections:

Subject to and without waiving its general and specific objections, MS & Co. will produce non-privileged documents, located after a good-faith search of documents in its possession, custody, or control, that are responsive to this request.

DOCUMENT REQUEST NO. 8

All documents concerning, or that may tend to support or refute, your denial of the allegation in paragraph 52 that you sold debentures to investors based in Florida.

MS & Co.'s Objections:

Subject to and without waiving its general and specific objections, MS & Co. will produce non-privileged documents, located after a good-faith search of documents in its possession, custody, or control, that are responsive to this request.

DOCUMENT REQUEST NO. 9

All documents concerning, or that may tend to support or refute, your assertion in your answer to paragraph 55 of the Complaint that Morgan Stanley “regularly publicized through disclaimer statements” that “any information communicated by MS & Co. was based on financial data and information provided to it by Sunbeam and Arthur Andersen.”

MS & Co.’s Objections:

MS & Co. objects to this request to the extent it seeks documents which MS & Co. has previously produced in response to subpoenas in related legal proceedings, and which MS & Co. has previously agreed to make available to CPH. Subject to and without waiving its general and specific objections, MS & Co. will produce non-privileged documents, located after a good-faith search of documents in its possession, custody, or control, that are responsive to this request.

DOCUMENT REQUEST NO. 10

All documents concerning, or that may tend to support or refute, your assertion in your answer to paragraph 91 of the Complaint that you “informed CPH that [you] were relying solely on financial data and information provided to [you] by Sunbeam and Arthur Andersen.”

MS & Co.’s Objections:

Subject to and without waiving its general and specific objections, MS & Co. will produce non-privileged documents, located after a good-faith search of documents in its possession, custody, or control, that are responsive to this request.

DOCUMENT REQUEST NO. 11

All documents concerning, or that may tend to support or refute, your fourth affirmative defense that CPH’s claims are barred by the doctrine of estoppel.

MS & Co.’s Objections:

MS & Co. objects to this request to the extent that it seeks documents not in MS & Co.’s possession, custody or control. Subject to and without waiving its general and specific

objections, MS & Co. will produce non-privileged documents, located after a good-faith search of documents in its possession, custody, or control, that are responsive to this request.

DOCUMENT REQUEST NO. 12

All documents concerning, or that may tend to support or refute, your fifth affirmative defense that CPH's claims are barred by the doctrine of waiver.

MS & Co.'s Objections:

MS & Co. objects to this request to the extent that it seeks documents not in MS & Co.'s possession, custody or control. Subject to and without waiving its general and specific objections, MS & Co. will produce non-privileged documents, located after a good-faith search of documents in its possession, custody, or control, that are responsive to this request.

DOCUMENT REQUEST NO. 13

All documents concerning, or that may tend to support or refute, your sixth affirmative defense that CPH's claims are barred by the doctrine of unclean hands.

MS & Co.'s Objections:

MS & Co. objects to this request to the extent that it seeks documents not in MS & Co.'s possession, custody or control. Subject to and without waiving its general and specific objections, MS & Co. will produce non-privileged documents, located after a good-faith search of documents in its possession, custody, or control, that are responsive to this request.

DOCUMENT REQUEST NO. 14

All documents concerning, or that may tend to support or refute, your seventh affirmative defense that CPH's claims are barred by CPH's alleged failure to mitigate damages.

MS & Co.'s Objections:

MS & Co. objects to this request to the extent that it seeks documents not in MS & Co.'s possession, custody or control. Subject to and without waiving its general and specific objections, MS & Co. will produce non-privileged documents, located after a good-faith search of documents in its possession, custody, or control, that are responsive to this request.

DOCUMENT REQUEST NO. 15

All documents concerning, or that may tend to support or refute, your eighth affirmative defense that CPH's claims are barred because CPH allegedly experienced no damage, its claimed loss is speculative and/or was avoidable.

MS & Co.'s Objections:

MS & Co. objects to this request to the extent that it seeks documents not in MS & Co.'s possession, custody or control. Subject to and without waiving its general and specific objections, MS & Co. will produce non-privileged documents, located after a good-faith search of documents in its possession, custody, or control, that are responsive to this request.

DOCUMENT REQUEST NO. 16

All documents concerning, or that may tend to support or refute, your eleventh affirmative defense that CPH's claims are barred because of Morgan Stanley's alleged "repeated disclaimers of reliance."

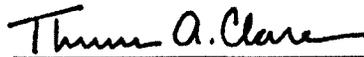
MS & Co.'s Objections:

MS & Co. objects to this request to the extent that it seeks documents not in MS & Co.'s possession, custody or control. Subject to and without waiving its general and specific objections, MS & Co. will produce non-privileged documents, located after a good-faith search of documents in its possession, custody, or control, that are responsive to this request.

Dated: August 11, 2003

Respectfully Submitted,

Joseph Ianno, Jr. (FL Bar # 655351)
CARLTON FIELDS
222 Lake View Avenue - Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368



Thomas D. Yannucci, P.C.

Thomas A. Clare

Larissa Paule-Carres

Kathryn DeBord

KIRKLAND & ELLIS

655 15th Street, N.W. 12th Floor

Washington, D.C. 20005

Telephone: (202) 879-5000

Facsimile: (202) 879-5200

Attorneys for Defendant

Morgan Stanley & Co. Incorporated

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by e-mail and facsimile to all counsel of record on the attached service list on this 11th day of August, 2003.

Thomas D. Yannucci, P.C.
Thomas A. Clare
Larissa Paule-Carres
Brett H. McGurk
KIRKLAND & ELLIS
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

**Counsel for Defendant
Morgan Stanley & Co. Incorporated**

Joseph Ianno, Jr. (FL Bar # 655351)
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

BY: Thomas A. Clare
Thomas A. Clare

SERVICE LIST

<p>John Scarola SEARCY, DENNEY, SCAROLA, BARNHARDT & SHIPLEY, P.A. 2139 Palm Beach Lakes Boulevard West Palm Beach, Florida 33409</p>	<p>Counsel for Plaintiff</p>
<p>Jerold S. Solovy JENNER & BLOCK, LLC One IBM Plaza Suite 4400 Chicago, Illinois 60611</p>	<p>Counsel for Plaintiff</p>

**IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA**

<hr/>)
COLEMAN (PARENT) HOLDINGS INC.,)
)
Plaintiff,)
)
v.)
)
MORGAN STANLEY & CO., INC.,)
)
Defendant.)
)
<hr/>)

Case No. 2003 CA 005045 AI

Judge Elizabeth I. Maass

NOTICE OF DEPOSITION

To: Thomas A. Clare, Esq.
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Joseph Ianno, Jr., Esq.
CARLTON FIELDS
222 Lake View Avenue, Suite 1400
West Palm Beach, FL 33401

PLEASE TAKE NOTICE that Plaintiff Coleman (Parent) Holdings, Inc. ("CPH") requests the deposition upon oral examination of Defendant Morgan Stanley & Co., Inc. pursuant to Florida Rule of Civil Procedure 1.310 on the date and at the time set forth below:

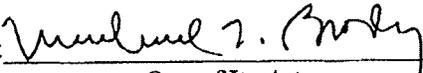
Morgan Stanley & Co., Inc. September 9, 2003 at 9:30 a.m.

The deposition will be recorded by stenographic means at the offices of Searcy Denney Scarola Barnhart & Shipley, P.C., 2139 Palm Beach Lakes Blvd., West Palm Beach, Florida. The deposition will be taken before a person authorized to administer oaths and will continue day to day until completed.

The deposition is being taken with respect to the topics described on the attached Exhibit A. Please designate one or more officers, directors, managing agents, or other persons to testify on your behalf and state the matters on which each person designated will testify.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by facsimile and mail to all counsel on the attached Service List, this 22nd day of August, 2003.

COLEMAN (PARENT) HOLDINGS INC.

By: 

One of Its Attorneys

Jerold S. Solovy
Ronald L. Marmer
Robert T. Markowski
Deirdre E. Connell
JENNER & BLOCK, LLC
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

Jack Scarola
SEARCY DENNEY SCAROLA BARNHART &
SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409
(561) 686-6300

SERVICE LIST

Thomas A. Clare, Esq.
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Joseph Ianno, Jr., Esq.
CARLTON FIELDS
222 Lake View Avenue, Suite 1400
West Palm Beach, FL 33401

EXHIBIT A

CORPORATE DEPOSITION TOPICS

1. The corporate organizational structure of Morgan Stanley & Co., Inc. and its parents, subsidiaries, and affiliates.
2. The policies and procedures for maintaining and preserving electronic or hard copy documents and/or files of Morgan Stanley & Co., Inc.
3. The location and/or procedure for the collection of documents responsive to CPH's previously served Requests for Production of Documents.

FAX TRANSMITTAL

J E N N E R & B L O C K

Jenner&Block, LLC
One IBM Plaza
Chicago, IL 60611-7603
Tel 312 222-9350
www.jenner.com

Chicago
Dallas
Washington, DC

Date: August 22, 2003

To: Thomas A. Clare, Esq.
Kirkland & Ellis

cc: Joseph Ianno, Jr.
Carlton Fields, P.A.

John Scarola, Esq.
Searcy Denney Scarola
Barnhart & Shipley, P.A.

From: Michael T. Brody
312 923-2711

Fax: (202) 879-5200
Voice: (202) 879-5993

Fax: (561) 659-7368
Voice: (561) 659-7070

Fax: (561) 684-5816 (before 5:00 pm)
Voice: (561) 686-6350, Ext. 140

Client Number: 41198-10003

Important: This message is intended only for the use of the individual or entity to which it is addressed, and may contain information that is attorney work product, privileged, confidential and exempt from disclosure under applicable law. If the reader of this message is not the intended recipient, or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone, and return the original message to us at the above address via postal service. Thank you.

Message:

Total number of pages including this cover sheet: 10

Time Sent:

If you do not receive all pages, please call: 312 222-9350

Sent By:

Secretary: Caryn Jo Geisler

Extension: 6490

JENNER & BLOCK

August 22, 2003

Jenner & Block, LLC	Chicago
One IBM Plaza	Dallas
Chicago, IL 60611-7603	Washington, DC
Tel 312 222-9350	
www.jenner.com	

By Facsimile

Thomas A. Clare, Esq.
 KIRKLAND & ELLIS LLP
 655 Fifteenth Street, N.W.
 Suite 1200
 Washington, D.C. 20005

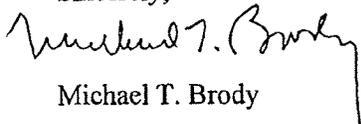
Michael T. Brody
 Tel 312 923-2711
 Fax 312 840-7711
 mbrody@jenner.com

Re: *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co.*

Dear Tom:

I enclose the revised notices of deposition referenced in my letter of yesterday.

Sincerely,


 Michael T. Brody

Enclosures

cc: Joseph Ianno, Esq. (by facsimile)
 John Scarola, Esq. (by facsimile)
 Jerold S. Solovy, Esq.

**IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA**

COLEMAN (PARENT) HOLDINGS, INC.,)	
)	
Plaintiff,	)	Case No.: 2003 CA 005045 AI
)	
v.	)	Judge Elizabeth T. Maass
)	
MORGAN STANLEY & CO., INC.,)	
)	
Defendant.)	
)	

PLAINTIFF'S MOTION TO APPOINT COMMISSION

Plaintiff Coleman (Parent) Holdings, Inc. ("CPH"), pursuant to Florida Statutes § 92.251, files this Motion to Appoint Commission so that it can subpoena for depositions and documents witnesses in other jurisdictions. CPH states as follows:

CPH requests that this Court appoint a commission so that it may subpoena the following witnesses:

- Custodian of Records
WACHTELL, LIPTON, ROSEN & KATZ
51 West 52nd Street
New York, New York 10019

- Custodian of Records
DAVIS POLK & WARDWELL
450 Lexington Ave.
New York, New York 10017

The commission that CPH seeks to have appointed is:

Michael I. Allen
SHAPIRO MITCHELL FORMAN ALLEN & MILLER LLP
380 Madison Avenue
New York, New York 10017

or any person duly authorized by him and able to administer oaths pursuant to the laws of New York.

WHEREFORE, CPH respectfully requests the entry of an order appointing the above
as a commission in the listed jurisdiction for purposes of this case.

Dated: September 10th, 2003

Jerold S. Solovy
JENNER & BLOCK, LLC
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

COLEMAN (PARENT) HOLDINGS, INC.

By: 
One of Its Attorneys

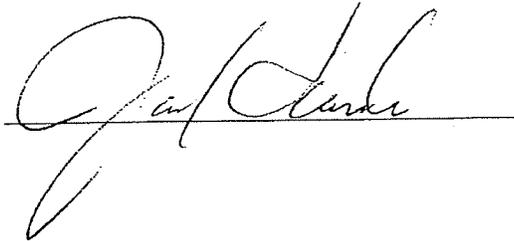
Jack Scarola
SEARCY DENNEY SCAROLA BARNHART
& SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33402-362
(561) 686-6300

CERTIFICATE OF SERVICE

I, Jack Seavolt, hereby certify that a true and correct copy of the foregoing
PLAINTIFF'S MOTION TO APPOINT COMMISSION has been served upon the parties listed below via
Facsimile and U.S. Mail on this 10th day of September, 2003.

Thomas A. Clare, Esq.
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lake View Avenue
Suite 1400
West Palm Beach, FL 33401

A handwritten signature in cursive script, appearing to read "Jack Seavolt", is written over a horizontal line.

SERVICE LIST

Thomas A. Clare, Esq.
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Joseph Ianno, Jr., Esq.
CARLTON FIELDS
222 Lake View Avenue, Suite 1400
West Palm Beach, FL 33401

Michael I. Allen
Shapiro Mitchell Forman Allen & Miller LLP
380 Madison Avenue
New York, NY 10017

or any person able to administer oaths pursuant to the laws of New York duly authorized by him.

Done and Ordered in Palm Beach County, Florida this ___ day of _____, 2003.

Circuit Court Judge Elizabeth T. Maass

Coleman v. Morgan Stanley
2003 CA 005045 AI
Order on Appointment of Commission

Copies furnished to:

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lakeview Avenue
Suite 1400
West Palm Beach, Florida 33401
(561) 659-7070
(561) 659-7368 (fax)

John Scarola, Esq.
SEARCY DENNEY SCAROLA BARNHART
& SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33409
(561) 686-6300
(561) 478-0754 (fax)

Jerold S. Solovy, Esq.
JENNER & BLOCK, LLC
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350
(312) 527-0484 (fax)

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett H. McGurk
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 879-5000
(202) 879-5200 (fax)

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CASE NO: 03 CA-005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

DOROTHY H. WILKIN
CLERK OF CIRCUIT COURT
CIRCUIT CIVIL DIVISION

SEP 15 2003

COPY / ORIGINAL
RECEIVED FOR FILING

NOTICE OF HEARING

NOTICE IS HEREBY given that a hearing has been set in the above-styled case as follows:

DATE: September 29, 2003
TIME: 8:45 A.M.
PLACE: Palm Beach County Courthouse
205 N. Dixie Highway
Room 11B
West Palm Beach, Florida 33401
BEFORE: Judge Elizabeth Maass
CONCERNING: Defendant's Motion to Set hearing on Defendant's Motion
to Dismiss.

KINDLY GOVERN YOURSELVES ACCORDINGLY.

The undersigned counsel hereby certifies that a good faith attempt to resolve
the issues contained in the foregoing motions or matters will be made with

opposing counsel prior to hearing on these matters on the Court's Motion

Calendar.

If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no costs to you, to the provision of certain assistance. Please contact the ADA Coordinator in the Administrative Office of the Court, Palm Beach County Courthouse, 205 North Dixie Highway, Room 5.2500, West Palm Beach, Florida 33401; telephone number (561) 355-2431 within two (2) working days of your receipt of this notice; if you are hearing or voice impaired, call 1-800-955-8771.

CERTIFICATE OF SERVICE

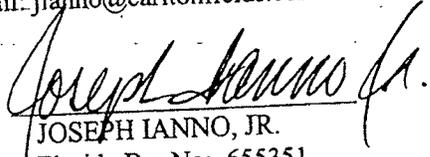
I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by facsimile and U.S. Mail to all counsel of record on the attached service list on this 15th day of September, 2003.

Thomas D. Yannucci, P.C.
Thomas A. Clare
Larissa Paule-Carres
Brett H. McGurk
KIRKLAND & ELLIS
655 15th Street, N.W. - Suite 1200
Washington, D.C.: 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

COUNSEL FOR DEFENDANT

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

BY:


JOSEPH IANNO, JR.

Florida Bar No: 655351

SERVICE LIST

Jack Scarola SEARCY, DENNY, SCAROLA, BARNHARDT & SHIPLEY, P.A. 2139 Palm Beach Lakes Blvd. West Palm Beach, FL 33409	Counsel for Plaintiff
Jerold S. Solovy Michael Brody JENNER & BLOCK, LLC One IBM Plaza Suite 400 Chicago, IL 60611	Counsel for Plaintiff

IN THE CIRCUIT COURT OF THE
 FIFTEENTH JUDICIAL CIRCUIT, IN AND
 FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 2003 CA 005045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

NOTICE OF TAKING VIDEOTAPED DEPOSITIONS

To: Thomas A. Clare, Esq.
 KIRKLAND & ELLIS, LLP
 655 Fifteenth Street, N.W.
 Suite 1200
 Washington, D.C. 20005

Joseph Ianno, Jr., Esq.
 CARLTON FIELDS, P.A.
 222 Lake View Avenue
 Suite 1400
 West Palm Beach, FL 33401

PLEASE TAKE NOTICE that Plaintiff Coleman (Parent) Holdings Inc. will take the depositions upon oral examination of the following witnesses pursuant to Florida Rule of Civil Procedure 1.310 on the dates, times, and locations set forth below:

DEPONENT	DATE AND TIME	LOCATION
Vance F. Kistler	October 7, 2003 at 9:00 a.m.	SEARCY DENNEY SCAROLA BARNHART & SHIPLEY, P.C. 2139 Palm Beach Lakes Blvd. West Palm Beach, Florida 33409
Kevin C. Krayner	October 8, 2003 at 9:00 a.m..	ESQUIRE DEPOSITION SERVICES 600 S. Andrews Ave., 2nd Floor Ft. Lauderdale, Florida 33301
Urban Kantola	October 9, 2003 at 9:00 a.m.	ESQUIRE DEPOSITION SERVICES 600 S. Andrews Ave., 2nd Floor Ft. Lauderdale, Florida 33301

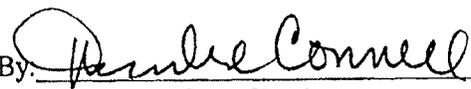
The depositions will be recorded by videotape and stenographic means. The deposition will be taken before a person authorized to administer oaths and will continue day to day until completed.

The videotape operator will be Esquire Deposition Services at 515 West Flagler Drive, Suite P-200, West Palm Beach, FL 33401.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by facsimile and mail to all counsel on the attached Service List, this 18th day of September, 2003.

Dated: September 18, 2003

COLEMAN (PARENT) HOLDINGS INC.

By: 
One of Its Attorneys

Jerold S. Solovy
Michael T. Brody
Deirdre E. Connell
JENNER & BLOCK, LLC
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

Jack Scarola
SEARCY DENNEY SCAROLA BARNHART
& SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33409
(561) 686-6300

Document Number: 975951v2

Coleman Holdings, Inc. vs Morgan Stanley & Company
Case No.: 2003 CA 005045 AI
Plaintiff's Subpoena for Deposition
September 18, 2003

SERVICE LIST

Thomas A. Clare, Esq.
KIRKLAND & ELLIS, LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lake View Avenue, Suite 1400
West Palm Beach, FL 33401

LAW OFFICES
JENNER & BLOCK, LLC

ONE IBM PLAZA
CHICAGO, ILLINOIS 60611

(312) 222-9350
(312) 527-0484 FAX

DEIRDRE E. CONNELL
312-923-2661 Direct Dial
312-840-7661 Direct Facsimile

TELECOMMUNICATION TRANSMITTAL

DATE: September 18, 2003

TO: Thomas A. Clare, Esq.
KIRKLAND & ELLIS, LLP

VOICE: (202) 879-5993
FAX: (202) 879-5200

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.

VOICE: (561) 659-7070
FAX: (561) 659-7368

FROM: Deirdre E. Connell

SECY. EXT.: 6486

EMP. NO.: 035666

CLIENT NO.: 41198-10003

IMPORTANT: THIS MESSAGE IS INTENDED ONLY FOR THE USE OF THE INDIVIDUAL OR ENTITY TO WHICH IT IS ADDRESSED, AND MAY CONTAIN INFORMATION THAT IS ATTORNEY WORK PRODUCT, PRIVILEGED, CONFIDENTIAL AND EXEMPT FROM DISCLOSURE UNDER APPLICABLE LAW. IF THE READER OF THIS MESSAGE IS NOT THE INTENDED RECIPIENT, OR THE EMPLOYEE OR AGENT RESPONSIBLE FOR DELIVERING THE MESSAGE TO THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION, DISTRIBUTION OR COPYING OF THIS COMMUNICATION IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE NOTIFY US IMMEDIATELY BY TELEPHONE, AND RETURN THE ORIGINAL MESSAGE TO US AT THE ABOVE ADDRESS VIA POSTAL SERVICE. THANK YOU.

MESSAGE: **Please see attached.**

Total number of pages including this cover sheet: 4

DATE SENT: 9/18/03 TIME SENT: 1:45 pm SENT BY: S. EDDINGTON

IF YOU DO NOT RECEIVE ALL PAGES, PLEASE CALL (312) 222-9350, EXT: 6486

OR (312) 923-2661; AFTER 7:00 P.M. & WEEKENDS (312) 222-9350, EXT. 6120, 6121

**IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA**

COLEMAN (PARENT) HOLDINGS INC.,)

Plaintiff,)

v.)

MORGAN STANLEY & CO., INC.,)

Defendant.)

Case No. 2003 CA 005045 AI

Judge Elizabeth T. Maass

**COLEMAN (PARENT) HOLDINGS INC.'S
FIRST SET OF REQUESTS FOR ADMISSION**

Plaintiff Coleman (Parent) Holdings Inc., by its attorneys and pursuant to Florida Rule of Civil Procedure 1.370, hereby requests that defendant Morgan Stanley & Co., Inc. answer, under oath and in writing, the following requests for admission within 30 days of the date of service of these requests.

DEFINITIONS

1. "Arthur Andersen" means "Arthur Andersen LLP."
2. "Bank Facility" means the Credit Agreement, including amendments, and any funds extended by MSSF, First Union, and/or Bank of America to Sunbeam pursuant to the Credit Agreement, including, but not limited to, Tranche A, Tranche B, and the Revolving Credit Facility.
3. "Bank of America" means Bank of America National Trust and Savings Association, or any of its subsidiaries, present and former employees, representatives, agents, and any other persons acting or purporting to act on its behalf.
4. "Coleman" means The Coleman Company, Inc.

5. "CPH" means Coleman (Parent) Holdings Inc.
6. "Coleman Transaction" means the transaction by which Sunbeam acquired CPH's interest in Coleman.
7. "Communications" means the transmittal of information, ideas, or opinions by letter, memorandum, facsimile, orally, electronically, or otherwise.
8. "Concerning" means concerning, reflecting, relating to, referring to, describing, evidencing or constituting.
9. "Coopers & Lybrand" means Coopers & Lybrand LLP.
10. "Credit Agreement" means that agreement entered into by Sunbeam Corporation, as borrower, with MSSF, First Union, and Bank of America, as lenders, dated March 30, 1998 and all amendments thereto, as in effect from time to time.
11. "Davis Polk" means Davis Polk & Wardwell, or any of its present or former partners, members, associates, employees, representatives, agents, and any other persons acting or purporting to act on its behalf.
12. "Debenture Purchase Agreement" means the agreement pursuant to which Sunbeam Corporation issued and sold to Morgan Stanley & Co., Inc. debentures pursuant to the provisions of the Subordinated Debenture Offering.
13. "February 27, 1998 Agreements" means the Agreement and Plan of Merger dated as of February 27, 1998 among Sunbeam Corporation, Laser Acquisition Corp., CLN Holdings, Inc. and Coleman (Parent) Holdings Inc. and the Agreement and Plan of Merger dated as of February 27, 1998 among Sunbeam Corporation, Camper Acquisition Corp. and The Coleman Company, Inc.

14. "First Union" means First Union National Bank, or any of its subsidiaries, present and former employees, representatives, agents, and any other persons acting or purporting to act on its behalf.
15. "Lock Up Letter" means the March 19, 1998 document concerning restrictions on the sale of options and/or shares of Sunbeam stock held by certain individuals.
16. "MAFCO" means MacAndrews and Forbes Holdings Inc.
17. "Morgan Stanley" means Morgan Stanley & Co., Inc., or any of its direct or indirect parents or subsidiaries, and present and former officers, directors, employees, representatives, agents, and any other persons acting or purporting to act on its behalf.
18. "MSSF" means Morgan Stanley Senior Funding, Inc., or any of its direct or indirect parents or subsidiaries, and present and former officers, directors, employees, representatives, agents, and any other persons acting or purporting to act on its behalf.
19. "Residence" means any ownership, lease, or rental interest in real property, including but not limited to primary and secondary (e.g., vacation) homes.
20. "Skadden" means Skadden, Arps, Slate, Meagher & Flom, or any of its present or former partners, members, associates, employees, representatives, agents, and any other persons acting or purporting to act on its behalf.
21. "Subordinated Debentures" means Sunbeam's Zero Coupon Convertible Senior Subordinated Debentures Due 2018.
22. "Subordinated Debenture Offering" means the offering of Sunbeam's Subordinated Debentures.

23. "Sunbeam" means Sunbeam Corporation, or any of its subsidiaries, present and former officers, directors, employees, representatives, agents, and any other persons acting or purporting to act on its behalf.

REQUESTS FOR ADMISSION

1. Morgan Stanley has one or more offices in the State of Florida.
2. At the time of the Coleman Transaction, Morgan Stanley had one or more offices in Florida.
3. The law department of Morgan Stanley Securities has an office in Sarasota, Florida.
4. Morgan Stanley has an office in West Palm Beach, Florida.
5. Morgan Stanley has an office in Palm Beach, Florida.
6. Morgan Stanley has an office in North Palm Beach, Florida.
7. Morgan Stanley has an office in Delray Beach, Florida.
8. Morgan Stanley has an office in Boca Raton, Florida.
9. Morgan Stanley has an office in Coral Gables, Florida.
10. Morgan Stanley has an office in Orlando, Florida.
11. Morgan Stanley has an office in Miami, Florida.
12. Morgan Stanley has an office in Aventura, Florida.
13. Morgan Stanley has an office in Hallandale, Florida.
14. Morgan Stanley has an office in Plantation, Florida.
15. Morgan Stanley has an office in Fort Lauderdale, Florida.
16. Morgan Stanley has an office in Coral Springs, Florida.

17. Morgan Stanley has an office in Stuart, Florida.
18. Morgan Stanley has an office in Naples, Florida.
19. Morgan Stanley has an office in Winter Park, Florida.
20. Morgan Stanley has an office in Eustis, Florida.
21. Morgan Stanley has an office in Deland, Florida.
22. Morgan Stanley has an office in Winter Haven, Florida.
23. Morgan Stanley has an office in Ocala, Florida.
24. Morgan Stanley has an office in Gainesville, Florida.
25. Morgan Stanley has an office in St. Augustine, Florida.
26. Morgan Stanley has an office in Ponte Vedra Beach, Florida.
27. Morgan Stanley has an office in Jacksonville, Florida.
28. Morgan Stanley has an office in Tampa, Florida.
29. Morgan Stanley has an office in Clearwater, Florida.
30. Morgan Stanley has an office in St. Petersburg, Florida.
31. Morgan Stanley has an office in Port Richey, Florida.
32. Morgan Stanley has an office in Ormand Beach, Florida.
33. Morgan Stanley has an office in Tallahassee, Florida.
34. Morgan Stanley has an office in Venice, Florida.
35. Morgan Stanley has an office in Punta Gorda, Florida.
36. Morgan Stanley has an office in Sarasota, Florida.
37. Morgan Stanley has an office in Bradenton, Florida.
38. Morgan Stanley has an office in Cape Coral, Florida.

39. Morgan Stanley has an office in Melbourne, Florida.
40. Morgan Stanley has an office in Port St. Lucie, Florida.
41. Morgan Stanley has an office in Vero Beach, Florida.
42. Morgan Stanley has an office in Indialantic, Florida.
43. Morgan Stanley has an office in Pensacola, Florida.
44. Morgan Stanley has a registered agent in the State of Florida.
45. Morgan Stanley's registered agent in the State of Florida is CT Corporation System, which has an office in Plantation, Florida.
46. MSSF has a registered agent in the State of Florida.
47. Morgan Stanley is authorized to transact business in the State of Florida.
48. MSSF is authorized to transact business in the State of Florida.
49. One or more Morgan Stanley personnel or representatives had an office in Florida at the time of the Coleman Transaction.
50. One or more MSSF personnel or representatives had an office in Florida at the time of the Coleman Transaction.
51. One or more MSSF personnel or representatives has an office in Florida.
52. One or more Morgan Stanley personnel or representatives who played a role in Coleman Transaction had an office in Florida at the time of the Coleman Transaction.
53. One or more Morgan Stanley personnel or representatives who played a role in Coleman Transaction had a residence in Florida at the time of the Coleman Transaction.
54. One or more MSSF personnel or representatives who played a role in the Coleman Transaction had an office in Florida at the time of the Coleman Transaction.

55. One or more MSSF personnel or representatives who played a role in the Coleman Transaction had a residence in Florida at the time of the Coleman Transaction.
56. American Household, Inc. is the successor to Sunbeam.
57. The principal place of business of American Household, Inc. is located in Boca Raton, Florida.
58. The principal place of business of Sunbeam Products, Inc. is located in Boca Raton, Florida.
59. At the time of the Coleman Transaction, Sunbeam's principal place of business was located in Delray Beach, Florida.
60. Sunbeam personnel or representatives involved with the Coleman Transaction had offices in Florida at the time of the Coleman Transaction.
61. Albert Dunlap, former Chairman and Chief Executive Officer of Sunbeam, had an office at Sunbeam's offices in Florida at the time of the Coleman Transaction.
62. Russell Kersh, former Executive Vice President and Chief Financial Officer of Sunbeam, had an office at Sunbeam's offices in Florida at the time of the Coleman Transaction.
63. David Fannin, former Executive Vice President and General Counsel of Sunbeam, had an office at Sunbeam's offices in Florida at the time of the Coleman Transaction.
64. Richard Goudis, former Vice President of Investor Relations and Corporate Planning of Sunbeam, had an office at Sunbeam's offices in Florida at the time of the Coleman Transaction.
65. Donald Uzzi, former Senior Vice President at Sunbeam, had an office at Sunbeam's offices in Florida at the time of the Coleman Transaction.

66. Lee Griffith, former Vice President of Sales at Sunbeam, had an office at Sunbeam offices in Florida at the time of the Coleman Transaction.
67. Deborah MacDonald, former Director of Corporate Planning and Analysis at Sunbeam, had an office at Sunbeam's offices in Florida at the time of the Coleman Transaction.
68. Robert Gluck, former Vice President and Controller of Sunbeam, had an office at Sunbeam's offices in Florida at the time of the Coleman Transaction.
69. Janet Kelley had an office at Sunbeam's offices in Florida at the time of the Coleman Transaction.
70. Charles Elson, former outside director of Sunbeam, had an office in Florida at the time of the Coleman Transaction.
71. Peter Langerman, former outside director of Sunbeam, had an office in Florida at the time of the Coleman Transaction.
72. At the time of the Coleman Transaction, Albert Dunlap had a residence in Boca Raton, Florida.
73. Albert Dunlap has a residence in Florida.
74. At the time of the Coleman Transaction, Russell Kersh had a residence in Boca Raton, Florida.
75. Russell Kersh has a residence in Florida.
76. At the time of the Coleman Transaction, David Fannin had a residence in Fort Lauderdale, Florida.
77. David Fannin has a residence in Florida.

78. At the time of the Coleman Transaction, Richard Goudis had a residence in Boca Raton, Florida.
79. Richard Goudis has a residence in Florida.
80. At the time of the Coleman Transaction, Donald Uzzi had a residence in Florida.
81. Donald Uzzi has a residence in Florida.
82. At the time of the Coleman Transaction, Lee Griffith had a residence in Florida.
83. Lee Griffith has a residence in Florida.
84. At the time of the Coleman Transaction, Deborah MacDonald had a residence in Boca Raton, Florida.
85. Deborah MacDonald has a residence in Florida.
86. At the time of the Coleman Transaction, Robert Gluck had a residence in Boca Raton, Florida.
87. Robert Gluck has a residence in Florida.
88. At the time of the Coleman Transaction, Janet Kelley had a residence in Delray Beach, Florida.
89. At the time of the Coleman Transaction, Charles Elson had a residence in Florida.
90. Charles Elson has a residence in Florida.
91. At the time of the Coleman Transaction, Peter Langerman had a residence in Florida.

92. Peter Langerman has a residence in Florida.
93. Howard G. Kristol has a residence in Florida.
94. Jerry Levin, former Chief Executive Officer of Coleman and current Chief Executive Officer of American Household, Inc., has an office in Boca Raton, Florida.
95. Jerry Levin has a residence in Florida.
96. Howard Gittis has a residence in Florida.
97. Paul Shapiro has a residence Florida.
98. Steven Isko has a residence in Florida.
99. Ronald Perelman has a residence in Florida.
100. At the time of the Coleman Transaction, Blaine Fogg was a partner at Skadden, and had a residence in Florida.
101. Blaine Fogg has a residence in Florida.
102. At the time of the Coleman Transaction, Arthur Andersen, Sunbeam's former auditor, had an office in West Palm Beach, Florida.
103. At the time of the Coleman Transaction, Arthur Andersen, Sunbeam's former auditor, had an office in Fort Lauderdale, Florida.
104. At the time of the Coleman Transaction, Arthur Andersen, Sunbeam's former auditor, had an office in Miami, Florida.
105. Phillip Harlow had an office in Florida at the time of the Coleman Transaction.
106. At the time of the Coleman Transaction, Phillip Harlow had a residence in Fort Lauderdale, Florida.

107. Phillip Harlow has a residence in Florida.
108. Lawrence Bornstein, former Senior Audit Manager at Arthur Andersen, had an office in Florida at the time of the Coleman Transaction.
109. At the time of the Coleman Transaction, Lawrence Bornstein had a residence in Lake Worth, Florida.
110. Lawrence Bornstein has a residence in Florida.
111. Dennis Pastrana had an office in Florida at the time of the Coleman Transaction.
112. At the time of the Coleman Transaction, Dennis Pastrana had a residence in Florida.
113. Dennis Pastrana has a residence in Florida.
114. Mark Brockelman had an office in Florida at the time of the Coleman Transaction.
115. At the time of the Coleman Transaction, Mark Brockelman had a residence in Florida.
116. Mark Brockelman has a residence in Florida.
117. William Pruitt had an office in Florida at the time of the Coleman Transaction.
118. At the time of the Coleman Transaction, William Pruitt had a residence in Florida.
119. William Pruitt has a residence in Florida.
120. First Union had one or more offices in Palm Beach County, Florida at the time of the Coleman Transaction.

121. M. Walker Duvall, former Senior Vice President of Corporate Banking at First Union, had an office in Florida at the time of the Coleman Transaction.
122. M. Walker Duvall had a residence in Florida at the time of the Coleman Transaction.
123. M. Walker Duvall has a residence in Florida.
124. William Rutter, former Senior Vice President at First Union and director of Sunbeam, had an office in Florida at the time of the Coleman Transaction.
125. William Rutter had a residence in Florida at the time of the Coleman Transaction.
126. William Rutter has a residence in Florida.
127. Morgan Stanley conducted business in Florida with Sunbeam.
128. MSSF conducted business in Florida with Sunbeam.
129. Morgan Stanley conducted business in Florida with Sunbeam in connection with the Coleman Transaction.
130. MSSF conducted business in Florida with Sunbeam in connection with the Coleman Transaction.
131. Morgan Stanley conducted due diligence in Florida in connection with the Coleman Transaction.
132. MSSF conducted due diligence in Florida in connection with the Coleman Transaction.

133. Morgan Stanley personnel or representatives spoke by telephone with Sunbeam personnel or representatives located in Florida in connection with the Coleman Transaction.

134. MSSF personnel or representatives spoke by telephone with Sunbeam personnel or representatives located in Florida in connection with the Coleman Transaction.

135. Morgan Stanley personnel or representatives spoke by telephone with Arthur Andersen personnel or representatives located in Florida in connection with the Coleman Transaction.

136. MSSF personnel or representatives spoke by telephone with Arthur Andersen personnel or representatives located in Florida in connection with the Coleman Transaction.

137. Morgan Stanley personnel or representatives faxed, mailed, or caused to be delivered by other means correspondence, documents, and other communications to Sunbeam personnel or representatives located in Florida in connection with the Coleman Transaction.

138. MSSF personnel or representatives faxed, mailed, or caused to be delivered by other means correspondence, documents, and other communications to Sunbeam personnel or representatives located in Florida in connection with the Coleman Transaction.

139. Morgan Stanley personnel or representatives faxed, mailed, or caused to be delivered by other means correspondence, documents, and other communications to Arthur Andersen personnel or representatives located in Florida in connection with the Coleman Transaction.

140. MSSF personnel or representatives faxed, mailed, or caused to be delivered by other means correspondence, documents, and other communications to Arthur Andersen personnel or representatives located in Florida in connection with the Coleman Transaction.

141. Morgan Stanley conducted business in Florida with Sunbeam in connection with the Subordinated Debenture Offering.
142. MSSF conducted business in Florida with Sunbeam in connection with the Subordinated Debenture Offering.
143. Morgan Stanley conducted due diligence in Florida in connection with the Subordinated Debenture Offering.
144. MSSF conducted due diligence in Florida in connection with the Subordinated Debenture Offering.
145. Morgan Stanley personnel or representatives spoke by telephone with Sunbeam personnel or representatives located in Florida in connection with the Subordinated Debenture Offering.
146. MSSF personnel or representatives spoke by telephone with Sunbeam personnel or representatives located in Florida in connection with the Subordinated Debenture Offering.
147. Morgan Stanley personnel or representatives spoke by telephone with Arthur Andersen personnel or representatives located in Florida in connection with the Subordinated Debenture Offering.
148. MSSF personnel or representatives spoke by telephone with Arthur Andersen personnel or representatives located in Florida in connection with the Subordinated Debenture Offering.
149. Morgan Stanley personnel or representatives faxed, mailed, or caused to be delivered by other means correspondence, documents, and other communications to Sunbeam

personnel or representatives located in Florida in connection with the Subordinated Debenture Offering.

150. MSSF personnel or representatives faxed, mailed, or caused to be delivered by other means correspondence, documents, and other communications to Sunbeam personnel or representatives located in Florida in connection with the Subordinated Debenture Offering.

151. Morgan Stanley personnel or representatives faxed, mailed, or caused to be delivered by other means correspondence, documents, and other communications to Arthur Andersen personnel or representatives located in Florida in connection with the Subordinated Debenture Offering.

152. MSSF personnel or representatives faxed, mailed, or caused to be delivered by other means correspondence, documents, and other communications to Arthur Andersen personnel or representatives located in Florida in connection with the Subordinated Debenture Offering.

153. Morgan Stanley conducted business in Florida with Sunbeam in connection with the Bank Facility.

154. MSSF conducted business in Florida with Sunbeam in connection with the Bank Facility.

155. Morgan Stanley conducted due diligence in Florida in connection with the Bank Facility.

156. MSSF conducted due diligence in Florida in connection with the Bank Facility.

157. Morgan Stanley personnel or representatives spoke by telephone with Sunbeam personnel or representatives located in Florida in connection with the Bank Facility.
158. MSSF personnel or representatives spoke by telephone with Sunbeam personnel or representatives located in Florida in connection with the Bank Facility.
159. Morgan Stanley personnel or representatives spoke by telephone with Arthur Andersen personnel or representatives located in Florida in connection with the Bank Facility.
160. MSSF personnel or representatives spoke by telephone with Arthur Andersen personnel or representatives located in Florida in connection with the Bank Facility.
161. Morgan Stanley personnel or representatives faxed, mailed, or caused to be delivered by other means correspondence, documents, and other communications to Sunbeam personnel or representatives located in Florida in connection with the Bank Facility.
162. MSSF personnel or representatives faxed, mailed, or caused to be delivered by other means correspondence, documents, and other communications to Sunbeam personnel or representatives located in Florida in connection with the Bank Facility.
163. Morgan Stanley personnel or representatives faxed, mailed, or caused to be delivered by other means correspondence, documents, and other communications to Arthur Andersen personnel or representatives located in Florida in connection with the Bank Facility.
164. MSSF personnel or representatives faxed, mailed, or caused to be delivered by other means correspondence, documents, and other communications to Arthur Andersen personnel or representatives located in Florida in connection with the Bank Facility.
165. On or about April 22, 1997, Morgan Stanley personnel or representatives met in Florida to meet with Albert Dunlap and Russell Kersh of Sunbeam.

166. On or about July 18, 1997, Morgan Stanley personnel or representatives sent a memorandum concerning potential synergies to Russell Kersh in Florida.

167. On or about July 18, 1997, Morgan Stanley personnel or representatives participated in a conference call with Russell Kersh, who was in Florida.

168. On or about July 21, 1997, Morgan Stanley personnel or representatives participated in a conference call with Sunbeam personnel or representatives, who were located in Florida, concerning synergies that could result from various potential business combinations.

169. On or about July 24, 1997, William Strong, Robert Kitts, James Stynes, and Alexandre Fuchs of Morgan Stanley met in Florida with Albert Dunlap and Russell Kersh of Sunbeam to discuss strategic alternatives for Sunbeam.

170. On or about August 4, 1997, Tyrone Chang of Morgan Stanley faxed to Russell Kersh in Florida a document entitled "Beta Corporation Discussion Materials."

171. On or about August 8, 1997, Morgan Stanley personnel or representatives met with Sunbeam personnel or representatives in Florida to discuss potential acquisition candidates.

172. Meetings between Morgan Stanley and Sunbeam in July and August 1997 were held at Sunbeam's offices in Florida.

173. On or about September 5, 1997, Morgan Stanley sent an engagement letter to Sunbeam's Florida offices.

174. On or about September 11, 1997, David Fannin signed Morgan Stanley's engagement letter in Florida.

175. On or about September 11, 1997, Morgan Stanley sent to Sunbeam's Florida offices a document entitled "Project Laser Discussion Materials."

176. On or about September 11, 1997, Morgan Stanley personnel or representatives participated in a conference call with Sunbeam personnel or representatives, who were in Florida, in connection with Morgan Stanley's work for Sunbeam.
177. On or about September 18, 1997, Morgan Stanley personnel or representatives sent to Sunbeam's Florida offices a draft "Information Memorandum."
178. On or about September 19, 1997, William Strong of Morgan Stanley sent Albert Dunlap in Florida a letter regarding an amendment to Morgan Stanley's engagement letter.
179. On or about September 22, 1997, Morgan Stanley personnel or representatives met with Sunbeam personnel or representatives in Florida in connection with Morgan Stanley's work for Sunbeam.
180. On or about September 23 and 24, 1997, Morgan Stanley personnel or representatives conducted due diligence of Sunbeam at Sunbeam's offices in Florida.
181. On or about September 26, 1997, William Strong sent a fax to David Fannin in Florida regarding a letter agreement with Llama Company.
182. David Fannin signed an amendment to Morgan Stanley's engagement letter on or about October 9, 1997 in Florida.
183. On or about October 9, 1997, Morgan Stanley personnel or representatives sent briefing materials to Russell Kersh and David Fannin in Florida.
184. On or about October 23, 1997, Sunbeam issued a press release from Sunbeam's offices in Delray Beach, Florida, announcing Sunbeam's engagement of Morgan Stanley.
185. On or about October 29, 1997, Morgan Stanley personnel or representatives conducted due diligence of Sunbeam at Sunbeam's offices in Florida.

186. On or about December 11, 1997, James Stynes sent to David Fannin in Florida discussion materials concerning a potential transaction involving Sunbeam and Coleman.

187. On or about December 16, 1997, Tyrone Chang sent a fax to David Fannin in Florida containing documents concerning a potential transaction involving Coleman and Sunbeam.

188. On or about December 18, 1997, Albert Dunlap, Michael Price, Ronald Perelman, and Howard Gittis met in Florida to discuss a potential transaction involving Sunbeam and Coleman.

189. On or about December 24, 1997, Gene Yoo of Morgan Stanley sent a memorandum to David Fannin in Florida, attaching documents concerning durable consumer product companies.

190. On or about January 5, 1998, Alexandre Fuchs and Gene Yoo of Morgan Stanley conducted business in Florida in connection with Morgan Stanley's work for Sunbeam.

191. On or about January 5, 1998, Morgan Stanley personnel or representatives met with Sunbeam personnel or representatives in Florida in connection with Morgan Stanley's work for Sunbeam.

192. On or about January 15, 1998, Morgan Stanley personnel or representatives participated in a conference call with Russell Kersh, who was in Florida.

193. On or about January 20, 1998, Morgan Stanley personnel or representatives conducted a conference call with Sunbeam personnel or representatives in Florida concerning potential buyers and acquisition targets.

194. On or about January 21, 1998, Morgan Stanley personnel or representatives met with Albert Dunlap in Florida in connection with Morgan Stanley's work for Sunbeam.

195. On or about January 26, 1998, Tyrone Chang of Morgan Stanley faxed materials to Russell Kersh in Florida involving a potential transaction between Sunbeam and Coleman.

196. On or about January 31, 1998, Bram Smith met with Sunbeam in Florida in connection with Morgan Stanley's work for Sunbeam.

197. On or about February 2, 1998, Morgan Stanley personnel or representatives faxed to Sunbeam's Delray Beach, Florida offices a document concerning income projections for Coleman and Sunbeam.

198. On or about February 2, 1998, Morgan Stanley personnel or representatives participated in a conference call with Sunbeam personnel or representatives, who were in Florida, in connection with Morgan Stanley's work for Sunbeam.

199. On or about February 3, 1998, Russell Kersh and David Fannin met with Phillip Harlow at Sunbeam's Florida offices in connection with the Coleman Transaction.

200. On or about February 4, 1998, Morgan Stanley personnel or representatives faxed to Sunbeam's Florida offices an accretion/dilution analysis.

201. On or about February 5, 1998, Morgan Stanley personnel or representatives participated in a conference call with Sunbeam personnel or representatives, who were in Florida, in connection with Morgan Stanley's work for Sunbeam.

202. On or about February 17, 1998, James Stynes and Robert Kitts participated in a conference call with Sunbeam personnel or representatives in Florida and a representative from

Sedgwick of Florida, Inc., one of Sunbeam's insurance brokers, to discuss issues concerning insurance due diligence.

203. At the time of the Coleman Transaction, Sedgwick of Florida, Inc. had an office in Fort Lauderdale, Florida.

204. On or about February 20, 1998, Alexandre Fuchs faxed to Robert Gluck in Florida proposed summary transaction terms in connection with the Coleman Transaction.

205. On or about February 20, 1998, Alexandre Fuchs faxed information on Sard Verbinnen & Co. to Albert Dunlap in Florida.

206. On or about February 24, 1998, Morgan Stanley personnel or representatives participated in a conference call with Russell Kersh and David Fannin in Florida, and James Maher to discuss the Coleman Transaction.

207. Sunbeam's March 2, 1998 press release announcing the Coleman Transaction was issued out of Sunbeam's Delray Beach, Florida offices.

208. On or about March 3, 1998, Morgan Stanley participated in a conference call with Arthur Andersen personnel or representatives and Sunbeam personnel or representatives, both of whom were located in Florida, concerning the Credit Facility and Subordinated Debenture Offering.

209. On or about March 4, 1998, Morgan Stanley personnel or representatives conducted due diligence at Sunbeam's Florida offices.

210. On or about March 4, 1998, MSSF personnel or representatives conducted due diligence at Sunbeam's Florida offices.

211. On or about March 5, 1998, Morgan Stanley personnel or representatives conducted due diligence at Sunbeam's Florida offices.
212. On or about March 5, 1998, MSSF personnel or representatives conducted due diligence at Sunbeam's Florida offices.
213. On or about March 4, 1998, John Tyree traveled to Florida to attend a drafting session in connection with the Subordinated Debenture Offering.
214. On or about March 5, 1998, John Tyree attended a drafting session in Florida in connection with the Subordinated Debenture Offering.
215. On or about March 4, 1998, Andrew Savarie of Morgan Stanley traveled to Florida in connection with Morgan Stanley's work for Sunbeam.
216. On or about March 4, 1998, Ishaan Seth of Morgan Stanley traveled to Florida in connection with Morgan Stanley's work for Sunbeam.
217. On or about March 4, 1998, Bram Smith of Morgan Stanley traveled to Florida in connection with Morgan Stanley's work for Sunbeam.
218. On or about March 4, 1998, Michael Hart of Morgan Stanley traveled to Florida in connection with Morgan Stanley's work for Sunbeam.
219. On or about March 4, 1998, Thomas Burchill of Morgan Stanley traveled to Florida in connection with Morgan Stanley's work for Sunbeam.
220. On March 5, 1998, John Tyree, Andrew Savarie, Bram Smith, Ishaan Seth, Thomas Burchill, and Michael Hart, all of Morgan Stanley, met at Sunbeam's offices in Delray Beach, Florida in connection with Morgan Stanley's work for Sunbeam.

221. On or about March 5, 1998, Bram Smith caused to be delivered to Russell Kersh in Florida a letter concerning Sunbeam's financing.

222. The March 5, 1998 letter from Bram Smith to Russell Kersh concerning Sunbeam's financing was countersigned by Russell Kersh in Florida.

223. On or about March 10, 1998, Morgan Stanley faxed a memorandum concerning the Subordinated Debt Offering memorandum to Sunbeam's Florida offices.

224. On or about March 11, 1998, Morgan Stanley prepared a management presentation for Sunbeam.

225. On or about March 11, 1998, Morgan Stanley sent a management presentation document to Albert Dunlap in Florida.

226. On or about March 11, 1998, Morgan Stanley sent a letter to Phillip Harlow in Florida requesting a "comfort letter."

227. On or about March 11, 1998, Tyrone Chang faxed to Deborah MacDonald in Florida pro forma financial information concerning Sunbeam's acquisitions.

228. On or about March 12, 1998, Morgan Stanley personnel or representatives conducted an accounting due diligence conference call with Phillip Harlow and Lawrence Bornstein, who were in Florida.

229. On March 18, 1998, Sunbeam personnel or representatives in Florida faxed to Morgan Stanley information concerning Sunbeam's first quarter 1998 sales.

230. On March 18, 1998, Morgan Stanley personnel or representatives participated in one or more conference calls with Sunbeam personnel or representatives, who were in Florida, concerning Sunbeam's first quarter 1998 sales and/or the issuance of a press release.

231. On March 18, 1998, Morgan Stanley personnel or representatives participated in one or more conference calls with Sunbeam personnel or representatives, who were in Florida, concerning the issuance of a press release about Sunbeam's first quarter 1998 sales.

232. On or about March 19, 1998, Morgan Stanley personnel or representatives discussed with Sunbeam the necessity of issuing a press release concerning Sunbeam's first quarter 1998 sales.

233. Sunbeam's March 19, 1998 press release was issued out of Sunbeam's Delray Beach, Florida offices.

234. On or about March 19, 1998, Arthur Andersen issued from Florida a "comfort letter" to Morgan Stanley.

235. On or about March 19, 1998, Morgan Stanley received executed Lock Up Letters from Albert Dunlap, Russell Kersh, David Fannin, Donald Uzzi, Charles Elson, Howard Kristol, Faith Whittlesey, and William Rutter.

236. The Lock Up Letter signed by Charles Elson contains the address of Sunbeam's Florida offices on the signature page.

237. The Lock Up Letter signed by Howard Kristol contains the address of Sunbeam's Florida offices on the signature page.

238. The Lock Up Letter signed by Faith Whittlesey contains the address of Sunbeam's Florida offices on the signature page.

239. The Lock Up Letter signed by William Rutter contains the address of Sunbeam's Florida offices on the signature page.

240. The Lock Up Letter signed by Donald Uzzi contains the address of Sunbeam's Florida offices on the signature page.

241. The Lock Up Letters signed by Charles Elson, Howard Kristol, Faith Whittlesey, William Rutter, and Donald Uzzi were faxed from Sunbeam's offices in Florida.
242. On or about March 23, 1998, John Tyree faxed to Janet Kelley in Florida a memorandum concerning bring-down due diligence.
243. On or about March 24, 1998, John Tyree spoke by telephone with Russell Kersh, who was in Florida, concerning due diligence.
244. On or about March 25, 1998, Arthur Andersen issued from Florida a "comfort letter" to Morgan Stanley.
245. On or about March 25, 1998, Sunbeam sent to Morgan Stanley an Officers' Certificate signed by David Fannin and Janet Kelley.
246. On or about March 31, 1998, Morgan Stanley sent to Sunbeam in Florida a \$9.6 million invoice.
247. On or about March 31, 1998, Donald Burnett of Coopers & Lybrand met with Sunbeam personnel or representatives in Florida.
248. On or about April 20, 1998 through April 24, 1998, Coopers & Lybrand representatives conducted due diligence of Sunbeam in Florida.
249. On or about May 12, 1998, William Strong attended Sunbeam's Annual Meeting of Shareholders in Florida.
250. On or about May 12, 1998, Alexandre Fuchs attended Sunbeam's Annual Meeting of Shareholders in Florida.
251. The Subordinated Debentures were offered and sold to investors nationwide.
252. The Subordinated Debentures were offered and sold to investors in Florida.

253. William Strong had between 50 and 100 phone conversations with Albert Dunlap and Russell Kersh between December 1997 and April 1998 in connection with Morgan Stanley's work for Sunbeam.

254. More than 20 lawsuits concerning Sunbeam's allegedly fraudulent accounting practices were filed in or transferred to Florida state and federal courts.

255. The following lawsuit concerning Sunbeam's allegedly fraudulent accounting practices was filed in or transferred to Florida federal court: *Bird v. Sunbeam Corporation, et al.*, No. 98-8258 (S.D. Fla.).

256. The following lawsuit concerning Sunbeam's allegedly fraudulent accounting practices was filed in or transferred to Florida federal court: *Frankel v. Sunbeam Corporation, et al.*, No. 98-8310 (S.D. Fla.)

257. The following lawsuit concerning Sunbeam's allegedly fraudulent accounting practices was filed in or transferred to Florida federal court: *Lionelli v. Sunbeam Corporation, et al.*, No. 98-8323 (S.D. Fla.)

258. The following lawsuit concerning Sunbeam's allegedly fraudulent accounting practices was filed in or transferred to Florida federal court: *Goldberg v. Dunlap, et al.*, No. 98-8260 (S.D. Fla.)

259. The following lawsuit concerning Sunbeam's allegedly fraudulent accounting practices was filed in or transferred to Florida federal court: *Lembeck v. Dunlap, et al.*, No. 98-8307 (S.D. Fla.)

260. The following lawsuit concerning Sunbeam's allegedly fraudulent accounting practices was filed in or transferred to Florida federal court: *Mintz v. Sunbeam Corporation, et al.*, No. 98-8281 (S.D. Fla.)

261. The following lawsuit concerning Sunbeam's allegedly fraudulent accounting practices was filed in or transferred to Florida federal court: *Klewin v. Sunbeam Corporation, et al.*, No. 98-8313 (S.D. Fla.)

262. The following lawsuit concerning Sunbeam's allegedly fraudulent accounting practices was filed in or transferred to Florida federal court: *Applestein v. Sunbeam Corporation, et al.*, No. 98-8316 (S.D. Fla.)

263. The following lawsuit concerning Sunbeam's allegedly fraudulent accounting practices was filed in or transferred to Florida federal court: *Singleton v. Sunbeam Corporation, et al.*, No. 98-8347 (S.D. Fla.)

264. The following lawsuit concerning Sunbeam's allegedly fraudulent accounting practices was filed in or transferred to Florida federal court: *Lindeman v. Sunbeam Corporation, et al.*, No. 98-8289 (S.D. Fla.)

265. The following lawsuit concerning Sunbeam's allegedly fraudulent accounting practices was filed in or transferred to Florida federal court: *Stapleton v. Sunbeam Corporation, et al.*, No. 98-1676 (S.D. Fla.)

266. The following lawsuit concerning Sunbeam's allegedly fraudulent accounting practices was filed in or transferred to Florida federal court: *Cunningham v. Sunbeam Corporation, et al.*, No. 98-6723 (S.D. Fla.)

267. The following lawsuit concerning Sunbeam's allegedly fraudulent accounting practices was filed in or transferred to Florida federal court: *Klein v. Sunbeam Corporation, et al.*, No. 98-8418 (S.D. Fla.)

268. The following lawsuit concerning Sunbeam's allegedly fraudulent accounting practices was filed in or transferred to Florida federal court: *Havsy v. Sunbeam Corporation, et al.*, No. 98-8475 (S.D. Fla.)

269. The following lawsuit concerning Sunbeam's allegedly fraudulent accounting practices was filed in or transferred to Florida federal court: *Cutler v. Sunbeam Corporation, et al.*, No. 98-8321 (S.D. Fla.)

270. The following lawsuit concerning Sunbeam's allegedly fraudulent accounting practices was filed in or transferred to Florida federal court: *Gottlieb v. Sunbeam Corporation, et al.*, No. 98-8401 (S.D. Fla.)

271. The following lawsuit concerning Sunbeam's allegedly fraudulent accounting practices was filed in or transferred to Florida federal court: *Kavlak v. Dunlap, et al.*, No. 98-8400 (S.D. Fla.)

272. The following lawsuit concerning Sunbeam's allegedly fraudulent accounting practices was filed in or transferred to Florida federal court: *U.S. National Bank of Galveston v. Sunbeam Corporation, et al.*, No. 99-8283 (S.D. Fla.)

273. The cases cited above in request numbers 255 to 272 were consolidated in the U.S. District Court for the Southern District of Florida in a case entitled: *In re Sunbeam Securities Litigation*, No. 98-CV-8258 (S.D. Fla.).

274. The following lawsuit concerning Sunbeam's allegedly fraudulent accounting practices was filed in or transferred to Florida federal court: *Securities and Exchange Commission v. Dunlap, et al.*, No. 01-CV-8437 (S.D. Fla.);

275. The following lawsuit concerning Sunbeam's allegedly fraudulent accounting practices was filed in or transferred to Florida federal court: *Shallal v. Elson, et al.*, No. 98-8739 (S.D. Fla.).

276. The following lawsuit concerning Sunbeam's allegedly fraudulent accounting practices was filed in or transferred to Florida federal court: *Camden Asset Management, L.P. et al. v. Sunbeam Corporation, et al.*, Nos. 98-CV-8773 (S.D. Fla.).

277. The following lawsuit concerning Sunbeam's allegedly fraudulent accounting practices was filed in or transferred to Florida federal court: *Hamilton Partners v. Sunbeam Corporation, et al.*, No. 99-8275 (S.D. Fla.).

278. The following lawsuit concerning Sunbeam's allegedly fraudulent accounting practices was filed in Florida state court: *Krim v. Dunlap, et al.*, No. 983168-AD (15th Jud. Cir. Fla.).

279. The following lawsuit relating to Al Dunlap's purported restructuring of Sunbeam was filed in Florida state court: *Sunbeam Corp. v. PricewaterhouseCoopers LLP*, No. 00-5444-AN (15th Jud. Cir. Fla.).

280. The following lawsuit concerning Sunbeam's allegedly fraudulent accounting practices was filed in Florida state court: *Coleman (Parent) Holdings, Inc. v. Arthur Andersen LLP and Philip Harlow*, No. CA 01-6062-AN (15th Jud. Cir. Fla.).

281. Skadden, Arps, Slate, Meagher & Flom was Sunbeam's counsel in connection with the Coleman Transaction and the Subordinated Debenture Offering.

282. Davis Polk & Wardwell was Morgan Stanley's counsel in connection with the Subordinated Debenture Offering.

283. On or about March 4, 1998, Skadden sent to Sunbeam in Florida a memorandum concerning the Subordinated Debenture Offering and a conference call scheduled for March 5, 1998.

284. On or about March 5, 1998, Skadden sent to Sunbeam in Florida a memorandum concerning a draft Schedule 13-D relating to the Coleman Transaction.

285. On or about March 10, 1998, Skadden faxed to Sunbeam in Florida a memorandum concerning the Coleman Transaction.

286. On or about March 10, 1998, Davis Polk sent to Sunbeam in Florida a memorandum concerning the Subordinated Debenture Offering.

287. On or about March 10, 1998, Skadden faxed to Sunbeam in Florida a memorandum concerning the Coleman Transaction.

288. On or about March 10, 1998, Skadden sent to Sunbeam and Arthur Andersen in Florida a draft of the Offering Memorandum for the Subordinated Debenture Offering.

289. On or about March 12, 1998, Davis Polk sent to Sunbeam in Florida a fax concerning a disclosure in connection with the Coleman Transaction.

290. On or about March 17, 1998, Skadden sent to Morgan Stanley, with a copy to Sunbeam in Florida, a memorandum concerning the draft Debenture Purchase Agreement.

291. On or about March 17, 1998, Davis Polk sent to Sunbeam in Florida a memorandum concerning the Subordinated Debenture Offering.

292. On or about March 18, 1998, Skadden sent to Morgan Stanley, with copies to Sunbeam in Florida, a memorandum concerning the Subordinated Debenture Offering.

293. On or about March 18, 1998, Skadden sent to Sunbeam in Florida a memorandum concerning a revised draft of a form opinion letter.

294. On or about March 18, 1998, Skadden sent to Sunbeam in Florida a memorandum concerning the Subordinated Debenture Offering.

295. On or about March 19, 1998, Davis Polk sent to Skadden, with copies to Sunbeam in Florida, a memorandum concerning a draft of the Debenture Purchase Agreement.

296. On or about March 20, 1998, Skadden sent to Morgan Stanley, with copies to Sunbeam in Florida, a memorandum concerning the Credit Facility and the Subordinated Debenture Offering.

297. On or about March 20, 1998, Skadden sent to Morgan Stanley, with copies to Sunbeam in Florida, a memorandum concerning the Credit Facility.

298. On or about March 23, 1998, Skadden sent to Sunbeam in Florida a memorandum concerning the Subordinated Debenture Offering.

299. On or about March 24, 1998, Davis Polk faxed to Sunbeam in Florida a memorandum enclosing a draft indenture for the Subordinated Debenture Offering.

300. On or about March 26, 1998, Skadden sent to Sunbeam in Florida a memorandum concerning the Registration Rights Agreement in connection with the Coleman Transaction.

301. On or about March 27, 1998, Skadden faxed to Sunbeam in Florida a copy of a March 26, 1998 memorandum to Ralph Chianese concerning stock certificates in connection with the Coleman Transaction.

302. On or about April 1, 1998, Skadden faxed to Sunbeam in Florida a letter addressed to First Trust National Association (dated March 26, 1998) concerning the redemption of Liquid Yield Option Notes for the Coleman Transaction.

303. On or about April 1, 1998, Skadden faxed to Sunbeam in Florida copies of prepayment notices in connection with the Coleman Transaction.

304. On or about May 12, 1998, Blaine Fogg attended Sunbeam's Annual Meeting of Shareholders in Florida.

305. On or about May 11, 1998, Skadden sent to Sunbeam in Florida a memorandum concerning Sunbeam's registration statement on Form S-4.

306. On or about May 27, 1998, Skadden faxed to Sunbeam in Florida a message concerning certificates relating to the Coleman Transaction.

307. On or about June 3, 1998, Davis Polk faxed to Sunbeam in Florida a memorandum concerning the Credit Agreement.

308. On or about June 11, 1998, Davis Polk faxed to Sunbeam in Florida a memorandum concerning the Credit Agreement.

309. On or about June 24, 1998, Skadden faxed to Phillip Harlow in Florida a message concerning the Credit Agreement.

310. On or about July 1, 1998, Davis Polk faxed to Paul Shapiro in Florida a draft amendment to the Credit Agreement.

311. On or about January 21, 1999, Skadden sent to Sunbeam and Arthur Andersen in Florida a memorandum concerning a revised draft of the Registration Statement on Form S-1 for Sunbeam.

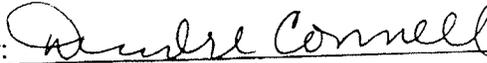
312. On or about January 21, 1999, Skadden faxed to Arthur Andersen in Florida draft documents concerning the Registration Statement on Form S-1 for Sunbeam.

313. On or about April 29, 1999, Skadden sent to Sunbeam in Florida a draft amendment to the Sunbeam Form S-4 in connection with the Coleman Transaction.

314. On or about May 15, 1999, Skadden sent to Sunbeam in Florida documents filed with the Securities and Exchange Commission in connection with the Coleman Transaction.

COLEMAN (PARENT) HOLDINGS INC.

Dated: September 18, 2003

By: 
One of Its Attorneys

John Scarola
SEARCY DENNEY SCAROLA BARNHART
& SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33402-3626
(561) 686-6300

Jerold S. Solovy
Michael T. Brody
Deirdre E. Connell
JENNER & BLOCK, LLC
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that a copy of the foregoing has been furnished by U.S. Mail and facsimile to the following counsel of record on this 18th day of September, 2003:

Joseph Ianno, Jr.
CARLTON FIELDS
222 Lake View Avenue, Suite 1400
West Palm Beach, FL 33401
Tel.: (561) 659-7070
Fax: (561) 659-7368

Thomas A. Clare
KIRKLAND & ELLIS
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Tel.: (202) 879-5000
Fax: (202) 879-5200



Deirdre E. Connell

LAW OFFICES
JENNER & BLOCK, LLC

ONE IBM PLAZA
CHICAGO, ILLINOIS 60611

(312) 222-9350
(312) 527-0484 FAX

DEIRDRE E. CONNELL
312-923-2661 Direct Dial
312-840-7661 Direct Facsimile

TELECOMMUNICATION TRANSMITTAL

DATE: September 22, 2003

TO: **Thomas A. Clare, Esq.** **VOICE:** (202) 879-5993
KIRKLAND & ELLIS
655 Fifteenth Street, N.W., Suite 1200 **FAX:** (202) 879-5200
Washington, D.C. 20005-5793

FROM: Deirdre E. Connell **SECY. EXT.:** 6486

EMP. NO.: 035666 **CLIENT NO.:** 41198-10003

IMPORTANT: THIS MESSAGE IS INTENDED ONLY FOR THE USE OF THE INDIVIDUAL OR ENTITY TO WHICH IT IS ADDRESSED, AND MAY CONTAIN INFORMATION THAT IS ATTORNEY WORK PRODUCT, PRIVILEGED, CONFIDENTIAL AND EXEMPT FROM DISCLOSURE UNDER APPLICABLE LAW. IF THE READER OF THIS MESSAGE IS NOT THE INTENDED RECIPIENT, OR THE EMPLOYEE OR AGENT RESPONSIBLE FOR DELIVERING THE MESSAGE TO THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION, DISTRIBUTION OR COPYING OF THIS COMMUNICATION IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE NOTIFY US IMMEDIATELY BY TELEPHONE, AND RETURN THE ORIGINAL MESSAGE TO US AT THE ABOVE ADDRESS VIA POSTAL SERVICE. THANK YOU.

MESSAGE: **Please see attached.**

Total number of pages including this cover sheet: 69

DATE SENT: 9/22/03 TIME SENT: 9:35 am SENT BY: S. EDDINGTON

IF YOU DO NOT RECEIVE ALL PAGES, PLEASE CALL (312) 222-9350, EXT: 6486

OR (312) 923-2661; AFTER 6:00 P.M. & WEEKENDS (312) 222-9350, EXT. 6120, 6121

3. CPH objects to the Requests for Admission on the basis that many of them are duplicative and constitute an unnecessary waste of time.

4. CPH objects to the Requests for Admission on the basis that they are abusive and vexatious. Many of the Requests for Admission concern factual allegations peculiarly within the possession of Morgan Stanley or third parties, which could be confirmed with less expense and burden on the parties through more traditional techniques of discovery.

5. CPH responds to Morgan Stanley's Requests for Admission without waiving the Initial Objections. CPH incorporates, as though fully set forth therein, these Initial Objections into each of the Responses and Objections set forth below.

RESPONSES AND FURTHER OBJECTIONS

1. The parties to this action are headquartered in New York.

RESPONSE: CPH admits that its principal place of business is in New York and also admits that Morgan Stanley has its principal place of business in New York, along with offices in Florida, including: West Palm Beach, Palma Beach, North Palm Beach, Delray Beach, Boca Raton, Coral Gables, Orlando, Miami, Aventura, Hallandale, Plantation, Fort Lauderdale, Coral Springs, Stuart, Naples, Winter Park, Eustis, Deland, Winter Haven, Ocala, Gainesville, St. Augustine, Ponte Vedra Beach, Jacksonville, Tampa, Clearwater, St. Petersburg, Port Richey, Ormand Beach, Tallahassee, Venice, Punta Gorda, Sarasota, Bradenton, Cape Coral, Melbourne, Port St. Lucie, Vero Beach, Indialantic, and Pensacola.

2. The parties to this action maintain their principal place of business in New York.

RESPONSE: Admitted. Answering further, CPH states that Morgan Stanley has offices in Florida, including: West Palm Beach, Palm Beach, North Palm Beach, Delray Beach, Boca Raton, Coral Gables, Orlando, Miami, Aventura, Hallandale, Plantation, Fort Lauderdale, Coral Springs, Stuart, Naples, Winter Park, Eustis, Deland, Winter Haven, Ocala, Gainesville, St. Augustine, Ponte Vedra Beach, Jacksonville, Tampa, Clearwater, St. Petersburg, Port Richey, Ormand Beach, Tallahassee, Venice, Punta Gorda, Sarasota, Bradenton, Cape Coral, Melbourne, Port St. Lucie, Vero Beach, Indialantic, and Pensacola.

3. The personnel of the parties to this action that were involved with the Transaction are based in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH admits this request with respect to CPH. With respect to Morgan Stanley, CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated March 11, 1998. CPH believes that document was prepared by Morgan Stanley because it is attached to a Morgan Stanley cover sheet. That working group lists indicates that Morgan Stanley personnel involved in the Transaction were based in Chicago, Illinois and New York, New York. However, CPH is unable to verify the accuracy or completeness of that document, or whether it reflects the current location of Morgan Stanley personnel that were involved in the Transaction. CPH lacks knowledge or information sufficient to answer this request and therefore denies this request insofar as it relates to Morgan Stanley. Answering further, CPH states that Morgan Stanley has offices in Florida, including: West Palm Beach, Palm Beach, North Palm Beach, Delray Beach, Boca Raton, Coral Gables, Orlando, Miami, Aventura, Hallandale, Plantation, Fort Lauderdale, Coral Springs, Stuart, Naples, Winter Park, Eustis, Deland, Winter Haven, Ocala, Gainesville, St. Augustine, Ponte Vedra Beach, Jacksonville, Tampa, Clearwater, St. Petersburg, Port Richey, Ormand Beach, Tallahassee, Venice, Punta Gorda,

Sarasota, Bradenton, Cape Coral, Melbourne, Port St. Lucie, Vero Beach, Indian River, and Pensacola.

Answering further, upon information and belief, CPH states that more than one Morgan Stanley individual involved with the Transaction is not currently based in New York.

4. At the time of the Transaction, the personnel of the parties to this action that were involved with the Transaction were based in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH admits this request with respect to CPH. With respect to Morgan Stanley, CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated March 11, 1998. CPH believes that document was prepared by Morgan Stanley because it is attached to a Morgan Stanley cover sheet. That working group list indicates that Morgan Stanley personnel involved in the Transaction were based in Chicago, Illinois and New York, New York. However, CPH is unable to verify the accuracy or completeness of that document. CPH lacks knowledge or information sufficient to answer this request and therefore denies this request insofar as it relates to Morgan Stanley. Answering further, CPH states that personnel or representatives of Morgan Stanley and/or Morgan Stanley Senior Funding ("MSSF"): 1) traveled to Florida to conduct business with Sunbeam in connection with the Transaction; "the Credit Agreement" (the agreement entered into by Sunbeam Corporation, as borrower, with MSSF, First Union National Bank ("First Union"), and Bank of America National Trust and Savings Association ("Bank of America"), as lenders, dated March 30, 1998 and all amendments thereto); and "the Bank Facilities" (the Credit Agreement, including amendments, and all funds extended by MSSF, First Union, and/or Bank of America to Sunbeam pursuant to the Credit Agreement, including, but not limited to, Tranche A, Tranche B, and the Revolving Credit Facility); 2) traveled to Florida to conduct due diligence at Sunbeam in connection with the Transaction, the Credit Agreement, and the Bank Facilities; 3) telephoned Sunbeam personnel or

representatives located in Florida in connection with the Transaction, the Credit Agreement, and the Bank Facilities; 4) telephoned Arthur Andersen, LLP ("Arthur Andersen") personnel or representatives located in Florida in connection with the Transaction, the Credit Agreement, and the Bank Facilities; and 5) faxed, mailed, or caused to be delivered by other means documents and other communications to Sunbeam and Arthur Andersen personnel or representatives located in Florida in connection with the Transaction, the Credit Agreement, and the Bank Facilities.

5. At the time of the Transaction, no personnel of any party to this action that was involved with the Transaction was based in Florida.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH admits this request with respect to CPH. With respect to Morgan Stanley, CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated March 11, 1998. CPH believes that document was prepared by Morgan Stanley because it is attached to a Morgan Stanley cover sheet. That working group list indicates that Morgan Stanley personnel involved in the Transaction were based in Chicago, Illinois and New York, New York. However, CPH is unable to verify the accuracy or completeness of that document. CPH lacks knowledge or information sufficient to answer this request and therefore denies this request insofar as it relates to Morgan Stanley. Answering further, CPH states that personnel or representatives of Morgan Stanley and/or MSSF: 1) traveled to Florida to conduct business with Sunbeam in connection with the Transaction, the Credit Agreement, and the Bank Facilities; 2) traveled to Florida to conduct due diligence at Sunbeam in connection with the Transaction, the Credit Agreement, and the Bank Facilities; 3) telephoned Sunbeam personnel or representatives located in Florida in connection with the Transaction, the Credit Agreement, and the Bank Facilities; 4) telephoned Arthur Andersen personnel or representatives located in Florida in connection with the Transaction, the Credit Agreement, and the Bank Facilities; and 5) faxed,

mailed, or caused to be delivered by other means documents and other communications to Sunbeam and Arthur Andersen personnel or representatives located in Florida in connection with the Transaction, the Credit Agreement, and the Bank Facilities.

6. No current employee of any party to this action that was involved with the Transaction is based in Florida.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH admits this request with respect to CPH. With respect to Morgan Stanley, CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated March 11, 1998. CPH believes that document was prepared by Morgan Stanley because it is attached to a Morgan Stanley cover sheet. That working group list indicates that Morgan Stanley personnel involved in the Transaction were based in Chicago, Illinois and New York, New York. However, CPH is unable to verify the accuracy or completeness of that document or whether it reflects the current location of Morgan Stanley personnel that were involved in the Transaction. CPH lacks knowledge or information sufficient to answer this request and therefore denies this request insofar as it relates to Morgan Stanley. Answering further, CPH states that Morgan Stanley has offices in Florida, including: West Palm Beach, Palm Beach, North Palm Beach, Delray Beach, Boca Raton, Coral Gables, Orlando, Miami, Aventura, Hallandale, Plantation, Fort Lauderdale, Coral Springs, Stuart, Naples, Winter Park, Eustis, Deland, Winter Haven, Ocala, Gainesville, St. Augustine, Ponte Vedra Beach, Jacksonville, Tampa, Clearwater, St. Petersburg, Port Richey, Ormand Beach, Tallahassee, Venice, Punta Gorda, Sarasota, Bradenton, Cape Coral, Melbourne, Port St. Lucie, Vero Beach, Indian River, and Pensacola.

7. CPH, MS & Co., MSSF and MAFCO are headquartered in New York.

RESPONSE: CPH admits that CPH, Morgan Stanley, MSSF and MAFCO have their principal places of business in New York. Answering further, CPH states that Morgan Stanley has offices in Florida, including: West Palm Beach, Palm Beach, North Palm Beach, Delray Beach, Boca Raton, Coral Gables, Orlando, Miami, Aventura, Hallandale, Plantation, Fort Lauderdale, Coral Springs, Stuart, Naples, Winter Park, Eustis, Deland, Winter Haven, Ocala, Gainesville, St. Augustine, Ponte Vedra Beach, Jacksonville, Tampa, Clearwater, St. Petersburg, Port Richey, Ormand Beach, Tallahassee, Venice, Punta Gorda, Sarasota, Bradenton, Cape Coral, Melbourne, Port St. Lucie, Vero Beach, Indialantic, and Pensacola.

8. CPH, MS & Co., MSSF and MAFCO's principal places of business are in New York.

RESPONSE: Admitted. Answering further, CPH states that Morgan Stanley has offices in Florida, including: West Palm Beach, Palm Beach, North Palm Beach, Delray Beach, Boca Raton, Coral Gables, Orlando, Miami, Aventura, Hallandale, Plantation, Fort Lauderdale, Coral Springs, Stuart, Naples, Winter Park, Eustis, Deland, Winter Haven, Ocala, Gainesville, St. Augustine, Ponte Vedra Beach, Jacksonville, Tampa, Clearwater, St. Petersburg, Port Richey, Ormand Beach, Tallahassee, Venice, Punta Gorda, Sarasota, Bradenton, Cape Coral, Melbourne, Port St. Lucie, Vero Beach, Indialantic, and Pensacola.

9. The personnel of CPH, MS & Co., MSSF and MAFCO that were involved with the Transaction are based in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH admits this request with respect to CPH and MAFCO. Answering further, CPH states that some of the MAFCO personnel involved in the Transaction maintain residences in Florida. With respect to Morgan Stanley, CPH has made a reasonable inquiry and located a document entitled "Working Group List,"

dated March 11, 1998. CPH believes that document was prepared by Morgan Stanley because it is attached to a Morgan Stanley cover sheet. That working group list indicates that Morgan Stanley personnel involved in the Transaction were based in Chicago, Illinois and New York, New York. However, CPH is unable to verify the accuracy or completeness of that document, or whether it reflects the current location of Morgan Stanley personnel who were involved in the Transaction. CPH lacks knowledge or information sufficient to answer this request and therefore denies this request insofar as it relates to Morgan Stanley. Answering further, upon information and belief, CPH states that more than one Morgan Stanley individual involved with the Transaction is not currently based in New York. With respect to MSSF, CPH has made a reasonable inquiry and located multiple documents entitled "Working Group List" that appear to identify the personnel involved with the Transaction. However, those documents do not include personnel from MSSF. CPH lacks knowledge or information sufficient to answer this request and therefore denies this request insofar as it relates to MSSF. Answering further, CPH states that personnel or representatives of Morgan Stanley and/or MSSF: 1) traveled to Florida to conduct business with Sunbeam in connection with the Transaction, the Credit Agreement, and the Bank Facilities; 2) traveled to Florida to conduct due diligence at Sunbeam in connection with the Transaction, the Credit Agreement, and the Bank Facilities; 3) telephoned Sunbeam personnel or representatives located in Florida in connection with the Transaction, the Credit Agreement, and the Bank Facilities; 4) telephoned Arthur Andersen personnel or representatives located in Florida in connection with the Transaction, the Credit Agreement, and the Bank Facilities; and 5) faxed, mailed, or caused to be delivered by other means documents and other communications to Sunbeam and Arthur Andersen personnel or representatives located in Florida in connection with the Transaction, the Credit Agreement, and the Bank Facilities.

10. At the time of the Transaction, the personnel of CPH, MS & Co., MSSF and MAFCO that were involved with the Transaction were based in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH admits this request with respect to CPH and MAFCO. Answering further, CPH states that some of the MAFCO personnel involved in the Transaction maintained residences in Florida at the time of the Transaction. With respect to Morgan Stanley, CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated March 11, 1998. CPH believes that document was prepared by Morgan Stanley because it is attached to a Morgan Stanley cover sheet. That working group list indicates that Morgan Stanley personnel involved in the Transaction were based in Chicago, Illinois and New York, New York. However, CPH is unable to verify the accuracy or completeness of that document. CPH lacks knowledge or information sufficient to answer this request and therefore denies this request insofar as it relates to Morgan Stanley. With respect to MSSF, CPH has made a reasonable inquiry and located multiple documents entitled "Working Group List" that appear to identify the personnel involved with the Transaction. However, those documents do not include personnel from MSSF. CPH lacks knowledge or information sufficient to answer this request and therefore denies this request insofar as it relates to MSSF. Answering further, CPH states that personnel or representatives of Morgan Stanley and/or MSSF: 1) traveled to Florida to conduct business with Sunbeam in connection with the Transaction, the Credit Agreement, and the Bank Facilities; 2) traveled to Florida to conduct due diligence at Sunbeam in connection with the Transaction, the Credit Agreement, and the Bank Facilities; 3) telephoned Sunbeam personnel or representatives located in Florida in connection with the Transaction, the Credit Agreement, and the Bank Facilities; 4) telephoned Arthur Andersen personnel or representatives located in Florida in connection with the Transaction, the Credit Agreement, and the Bank Facilities; and 5) faxed, mailed, or caused to be delivered by other means documents and other

communications to Sunbeam and Arthur Andersen personnel or representatives located in Florida in connection with the Transaction, the Credit Agreement, and the Bank Facilities.

11. MS & Co. is headquartered in New York.

RESPONSE: CPH admits that Morgan Stanley has its principal place of business in New York. Answering further, CPH states that Morgan Stanley has offices in Florida, including: West Palm Beach, Palm Beach, North Palm Beach, Delray Beach, Boca Raton, Coral Gables, Orlando, Miami, Aventura, Hallandale, Plantation, Fort Lauderdale, Coral Springs, Stuart, Naples, Winter Park, Eustis, Deland, Winter Haven, Ocala, Gainesville, St. Augustine, Ponte Vedra Beach, Jacksonville, Tampa, Clearwater, St. Petersburg, Port Richey, Ormand Beach, Tallahassee, Venice, Punta Gorda, Sarasota, Bradenton, Cape Coral, Melbourne, Port St. Lucie, Vero Beach, Indialantic, and Pensacola.

12. MS & Co.'s principal place of business is in New York.

RESPONSE: Admitted. Answering further, CPH states that Morgan Stanley has offices in Florida, including: West Palm Beach, Palm Beach, North Palm Beach, Delray Beach, Boca Raton, Coral Gables, Orlando, Miami, Aventura, Hallandale, Plantation, Fort Lauderdale, Coral Springs, Stuart, Naples, Winter Park, Eustis, Deland, Winter Haven, Ocala, Gainesville, St. Augustine, Ponte Vedra Beach, Jacksonville, Tampa, Clearwater, St. Petersburg, Port Richey, Ormand Beach, Tallahassee, Venice, Punta Gorda, Sarasota, Bradenton, Cape Coral, Melbourne, Port St. Lucie, Vero Beach, Indialantic, and Pensacola.

13. At the time of the Transaction, no MS & Co. personnel involved with the Transaction were based in Florida.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated March 11, 1998. CPH believes that document was prepared by Morgan Stanley because it is attached to a Morgan Stanley cover sheet. That working group list indicates that Morgan Stanley personnel involved in the Transaction were based in Chicago, Illinois and New York, New York. However, CPH is unable to verify the accuracy or completeness of that document. CPH lacks knowledge or information sufficient to answer this request and therefore denies this request. Answering further, CPH states that personnel or representatives of Morgan Stanley and/or MSSF: 1) traveled to Florida to conduct business with Sunbeam in connection with the Transaction, the Credit Agreement, and the Bank Facilities; 2) traveled to Florida to conduct due diligence at Sunbeam in connection with the Transaction, the Credit Agreement, and the Bank Facilities; 3) telephoned Sunbeam personnel or representatives located in Florida in connection with the Transaction, the Credit Agreement, and the Bank Facilities; 4) telephoned Arthur Andersen personnel or representatives located in Florida in connection with the Transaction, the Credit Agreement, and the Bank Facilities; and 5) faxed, mailed, or caused to be delivered by other means documents and other communications Sunbeam and Arthur Andersen personnel or representatives located in Florida in connection with the Transaction, the Credit Agreement, and the Bank Facilities.

14. No MS & Co. personnel involved with the Transaction are based in Florida.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated March 11, 1998. CPH believes that document was prepared by Morgan Stanley because it is attached to a Morgan Stanley cover sheet. That working group list indicates that Morgan Stanley personnel involved in

the Transaction were based in Chicago, Illinois and New York, New York. However, CPH is unable to verify the accuracy or completeness of that document, or whether it reflects the current location of Morgan Stanley personnel who were involved in the Transaction. CPH lacks knowledge or information sufficient to answer this request and therefore denies this request. Answering further, CPH states that Morgan Stanley has offices in Florida, including: West Palm Beach, Palm Beach, North Palm Beach, Delray Beach, Boca Raton, Coral Gables, Orlando, Miami, Aventura, Hallandale, Plantation, Fort Lauderdale, Coral Springs, Stuart, Naples, Winter Park, Eustis, Deland, Winter Haven, Ocala, Gainesville, St. Augustine, Ponte Vedra Beach, Jacksonville, Tampa, Clearwater, St. Petersburg, Port Richey, Ormand Beach, Tallahassee, Venice, Punta Gorda, Sarasota, Bradenton, Cape Coral, Melbourne, Port St. Lucie, Vero Beach, Indialantic, and Pensacola.

15. MSSF is headquartered in New York.

RESPONSE: CPH admits that MSSF has its principal place of business in New York.

16. MSSF's principal place of business is in New York.

RESPONSE: Admitted.

17. At the time of the Transaction, no MSSF personnel involved with the Transaction were based in Florida.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located multiple documents entitled "Working Group List" that appear to identify the personnel involved with the Transaction. However, those documents do not include personnel from MSSF. CPH lacks knowledge or information sufficient to answer this request and therefore denies this request. Answering further, CPH states that personnel or representatives of

Morgan Stanley and/or MSSF: 1) traveled to Florida to conduct business with Sunbeam in connection with the Transaction, the Credit Agreement, and the Bank Facilities; 2) traveled to Florida to conduct due diligence at Sunbeam in connection with the Transaction, the Credit Agreement, and the Bank Facilities; 3) telephoned Sunbeam personnel or representatives located in Florida in connection with the Transaction, the Credit Agreement, and the Bank Facilities; 4) telephoned Arthur Andersen personnel or representatives located in Florida in connection with the Transaction, the Credit Agreement, and the Bank Facilities; and 5) faxed, mailed, or caused to be delivered by other means documents and other communications to Sunbeam and Arthur Andersen personnel or representatives located in Florida in connection with the Transaction, the Credit Agreement, and the Bank Facilities.

18. No MSSF personnel involved with the Transaction are based in Florida.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry into the document in its possession, including working group lists produced by Morgan Stanley. However, those documents do not include personnel from MSSF. CPH lacks knowledge or information sufficient to answer this request and therefore denies this request.

19. CPH is headquartered in New York.

RESPONSE: CPH admits that its principal place of business is in New York.

20. CPH's principal place of business is in New York.

RESPONSE: Admitted.

21. At the time of the Transaction, the CPH personnel involved with the Transaction were based in New York.

RESPONSE: Consistent with CPH's interpretation of the term "Transaction," admitted.

22. The CPH personnel involved with the Transaction are based in New York.

RESPONSE: Consistent with CPH's interpretation of the term "Transaction," admitted.

23. No CPH personnel involved with the Transaction were based in Florida.

RESPONSE: Consistent with CPH's interpretation of the term "Transaction," admitted.

24. MAFCO is headquartered in New York.

RESPONSE: CPH admits that MAFCO has its principal place of business is in New York.

25. MAFCO's principal place of business is in New York.

RESPONSE: Admitted.

26. At the time of the Transaction, the MAFCO personnel involved with the Transaction were based in New York.

RESPONSE: Consistent with CPH's interpretation of the term "Transaction," admitted. Answering further, CPH states that some of the MAFCO personnel involved in the Transaction maintained residences in Florida at the time of the Transaction.

27. The MAFCO personnel involved with the Transaction are based in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," admitted. Answering further, CPH states that some of the MAFCO personnel involved in the Transaction maintain residences in Florida.

28. At the time of the Transaction, Ronald O. Perelman resided at 36 East 63rd Street in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH admits that, at the time of the Transaction, Ronald O. Perelman maintained a residence at 36 East 63rd Street, New York, New York. Answering further, CPH states that, at the time of the Transaction, Ronald O. Perelman maintained a residence in Palm Beach, Florida.

29. Ronald O. Perelman resides in New York.

RESPONSE: CPH admits that Ronald O. Perelman maintains a residence in New York. Answering further, CPH states that Ronald O. Perelman maintains a residence in Palm Beach, Florida.

30. At the time of the Transaction, Howard Gittis resided at 760 Park Avenue in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH admits that, at the time of the Transaction, Howard Gittis maintained a residence at 760 Park Avenue, New York, New York. Answering further, CPH states that, at the time of the Transaction, Howard Gittis maintained a residence in Palm Beach, Florida.

31. At the time of the Transaction, Howard Gittis resided at 500 Ox Pasture Lane in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH admits that, at the time of the Transaction, Howard Gittis maintained a residence at 500 Ox Pasture Lane in Southampton, New York. Answering further, CPH states that, at the time of the Transaction, Howard Gittis maintained a residence in Palm Beach, Florida.

32. Howard Gittis resides in New York.

RESPONSE: CPH admits that Howard Gittis maintains a residence in New York. Answering further, CPH states that Howard Gittis maintains a residence in Palm Beach, Florida.

33. At the time of the Transaction, James R. Maher resided at 775 Park Avenue in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH admits that, at the time of the Transaction, James R. Maher maintained a residence at 775 Park Avenue, New York, New York.

34. James R. Maher resides in New York.

RESPONSE: CPH admits that James R. Maher maintains a residence in New York.

35. At the time of the Transaction, Paul E. Shapiro resided at 8 East 75th Street in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH admits that at the time of the Transaction, Paul E. Shapiro maintained a residence at 8 East 75th Street, New York, New York. Answering further, CPH states that, at the time of the Transaction, Paul E. Shapiro maintained a residence in Boca Raton, Florida.

36. Paul E. Shapiro resides in New York.

RESPONSE: CPH admits that Paul E. Shapiro maintains a residence in New York. Answering further, CPH states that Paul E. Shapiro maintains a residence is in Florida.

37. At the time of the Transaction, Glenn P. Dickes resided at 90 Riverside Drive in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH admits that, at the time of the Transaction, Glenn P. Dickes maintained a residence at 90 Riverside Drive, New York, New York.

38. Glenn P. Dickes resides in New York.

RESPONSE: CPH admits that Glenn P. Dickes maintains a residence in New York.

39. At the time of the Transaction, Joram C. Salig resided at 155 West 15th Street in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH admits that, at the time of the Transaction, Joram C. Salig maintained a residence at 155 West 15th Street, New York, New York.

40. Joram C. Salig resides in New York.

RESPONSE: CPH admits that Joram C. Salig maintains a residence in New York.

41. At the time of the Transaction, Steven R. Isko resided at 400 East 70th Street in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH admits that, at the time of the Transaction, Steven R. Isko maintained a residence at 400 East 70th Street, New York, New York.

42. Steven R. Isko resides in New York.

RESPONSE: CPH admits that Steven R. Isko maintains a residence in New York.

43. At the time of the Transaction, J. Eric Hanson resided at 38 East 63rd Street in New York.

RESPONSE: Denied.

44. J. Eric Hanson resides in New York.

RESPONSE: CPH admits that J. Eric Hanson maintains a residence in New York.

45. At the time of the Transaction, no MAFCO personnel involved with the Transaction were based in Florida.

RESPONSE: Consistent with CPH's interpretation of the term "Transaction," admitted. Answering further, CPH states that some MAFCO personnel involved with the Transaction maintained residences in Florida at the time of the Transaction.

46. No MAFCO personnel involved with the Transaction are based in Florida.

RESPONSE: Consistent with CPH's interpretation of the term "Transaction," admitted. Answering further, CPH states that some of the MAFCO personnel involved in the Transaction maintain residences in Florida.

47. Sunbeam has offices in New York

RESPONSE: Admitted. Answering further, CPH states that the principal place of business for Sunbeam (now known as American Household, Inc.) is Boca Raton, Florida.

48. Sunbeam has an office at 660 Madison Avenue in New York.

RESPONSE: Admitted. Answering further, CPH states that the principal place of business for Sunbeam (now known as American Household, Inc.) is Boca Raton, Florida.

49. Sunbeam has an office at 2 Penn Plaza in New York.

RESPONSE: CPH has made a reasonable inquiry into the documents in its possession, contacted directory assistance, searched internet yellow pages, and searched the Westlaw electronic database of Dun & Bradstreet Business Directory for New York. However, none of these inquiries indicated that Sunbeam (now known as American Household, Inc.) has an office at 2 Penn Plaza, New York, New York. CPH lacks knowledge or information sufficient to answer this request and therefore denies this request. Answering further, CPH states that Sunbeam's principal place of business is in Boca Raton, Florida.

50. Sunbeam has an office in Syracuse, New York.

RESPONSE: CPH has made a reasonable inquiry into the document in its possession, contacted directory assistance, searched internet yellow pages, and searched the Westlaw electronic database of Dun & Bradstreet Business Directory for New York. However, none of these inquiries indicates that Sunbeam (now known as American Household, Inc.) has an office in Syracuse, New York. CPH lacks knowledge or information sufficient to answer this request and therefore denies this request.

Answering further, CPH states that Sunbeam's principal place of business is located in Boca Raton, Florida.

51. At the time of the Transaction, Jerry W. Levin resided at 15 East 70th Street in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH admits that, at the time of the Transaction, Jerry W. Levin maintained a residence at 15 East 70th Street, New York, New York.

52. Jerry W. Levin resides in New York.

RESPONSE: CPH admits that Jerry W. Levin maintains a residence in New York. Answering further, CPH states that Jerry W. Levin maintains a residence in Florida.

53. At the time of the Transaction, Howard Kristol had an office at 45 Rockefeller Plaza in New York.

RESPONSE: Admitted. Answering further, CPH states that Howard Kristol maintains a residence in Boca Raton, Florida.

54. At the time of the Transaction, Albert Dunlap rented an office at 45 Rockefeller Plaza in New York.

RESPONSE: Consistent with its interpretation of "Transaction," CPH has made a reasonable inquiry and located multiple documents entitled "Working Group List" that appear to identify the personnel involved with the Transaction. However, none of those documents identifies an office at 45 Rockefeller Plaza in New York for Albert Dunlap. CPH lacks knowledge or information sufficient to answer this request and therefore denies this request. Answering further, CPH states

that, at the time of the Transaction, Albert Dunlap maintained his principal office in Delray Beach, Florida and a residence in Boca Raton, Florida.

55. The investment bankers retained by Sunbeam and CPH for purposes of the Transaction were headquartered in New York.

RESPONSE: Consistent with its interpretation of "Transaction," CPH denies this request with respect to CPH. With respect to Sunbeam, CPH admits that Morgan Stanley had its principal place of business in New York, but also had offices in Florida and elsewhere outside of New York. Answering further, CPH states that other investment bankers retained by Sunbeam had their principal place of business outside of New York, such as Llama, which had its principal place of business in Arkansas.

56. The principal place of business of the investment bankers retained by Sunbeam and CPH for purposes of the Transaction was in New York.

RESPONSE: Consistent with its interpretation of "Transaction," CPH denies this request with respect to CPH. With respect to Sunbeam, CPH admits that Morgan Stanley had its principal place of business in New York, but also had offices in Florida and elsewhere outside of New York. Answering further, CPH states that other investment bankers retained by Sunbeam had their principal place of business outside of New York, such as Llama, which had its principal place of business in Arkansas.

57. Credit Suisse First Boston's U.S. headquarters is in New York.

RESPONSE: CPH admits that Credit Suisse First Boston has offices in New York, along with offices in Miami and Tampa, Florida, among other locations throughout the United States and the world.

58. Credit Suisse First Boston's principal U.S. place of business is in New York.

RESPONSE: CPH admits that Credit Suisse First Boston has offices in New York, along with offices in Miami and Tampa, Florida, among other locations throughout the United States and the world.

59. At the time of the Transaction, the Credit Suisse First Boston personnel involved with the Transaction were based in New York.

RESPONSE: Consistent with CPH's interpretation of the term "Transaction," admitted. Answering further, CPH states that Credit Suisse First Boston had offices in Florida at the time of the Transaction, among other locations throughout the United States and the world.

60. The Credit Suisse First Boston personnel involved with the Transaction are based in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry into the document in its possession and conducted searches of an electronic database, detailed in responses 61-64. However, that inquiry did not indicate the current location of the Credit Suisse First Boston personnel involved in the Transaction. CPH lacks knowledge or information sufficient to answer this request and therefore denies this request. Answering further, CPH states that Credit Suisse First Boston has offices in Miami and Tampa, Florida, among other locations throughout the United States and the world.

61. At the time of the Transaction, Robert J. Duffy resided at 401 East 81st Street in New York.

RESPONSE: Consistent with its interpretation of "Transaction," CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate an address for Robert J. Duffy at the time of the Transaction. CPH also has conducted a search of the LexisNexis "P-Trak Person Locator File" electronic database. That search indicates that, at some point in time, Robert J. Duffy maintained a residence at 401 East 81st Street, New York, New York. However, CPH is unable to verify the accuracy or completeness of that database or whether Robert J. Duffy maintained this address at the time of the Transaction. CPH lacks information or knowledge sufficient to answer this request and therefore denies this request.

62. Robert J. Duffy resides in New York.

RESPONSE: CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate whether Robert J. Duffy currently maintains a residence in New York. CPH also has conducted a search of the LexisNexis "P-Trak Person Locator File" electronic database. That search indicates that, at some point in time, Robert J. Duffy maintained a residence in New York. However, CPH is unable to verify the accuracy or completeness of that database, lacks information or knowledge sufficient to answer this request, and therefore denies this request.

63. At the time of the Transaction, Steven K. Geller resided at 219 East 81st Street in New York.

RESPONSE: Consistent with its interpretation of "Transaction," CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate an address for Steven K.

Geller at the time of the Transaction. CPH also has conducted a search of the LexisNexis "P-Trak Person Locator File" electronic database. That search indicates that, at some point in time, Steven K. Geller maintained a residence at 219 East 81st Street, New York, New York. However, CPH is unable to verify the accuracy or completeness of that database or whether Steven K. Geller maintained this address at the time of the Transaction. CPH lacks information or knowledge sufficient to answer this request and therefore denies this request.

64. Steven K. Geller resides in New York.

RESPONSE: CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate whether Steven K. Geller currently maintains a residence in New York. CPH also has conducted a search of the LexisNexis "P-Trak Person Locator File" electronic database. That search indicates that, at some point in time, Steven K. Geller maintained a residence in New York. However, CPH is unable to verify the accuracy or completeness of that database, lacks information or knowledge sufficient to answer this request, and therefore denies this request.

65. At the time of the Transaction, no Credit Suisse First Boston personnel involved with the Transaction were based in Florida.

RESPONSE: Consistent with CPH's interpretation of the term "Transaction," admitted. Answering further, CPH states that Credit Suisse First Boston had offices in Florida at the time of the Transaction, among other locations throughout the United States and the world.

66. No Credit Suisse First Boston personnel involved with the Transaction are based in Florida.

RESPONSE: Consistent with its interpretation of "Transaction," CPH has made a reasonable inquiry into the document in its possession and conducted searches of an electronic database, detailed in responses 61-64. However, that inquiry did not indicate the current location of the Credit Suisse First Boston personnel involved in the Transaction. CPH lacks knowledge or information sufficient to answer this request and therefore denies this request. Answering further, CPH states that Credit Suisse First Boston has offices in Miami and Tampa, Florida, among other locations throughout the United States and the world.

67. Ernst & Young LLP is headquartered in New York.

RESPONSE: CPH admits that Ernst & Young has offices in New York. Answering further, CPH states that Ernst & Young LLP has offices in West Palm Beach, Tampa, Miami, Jacksonville, Orlando and Fort Lauderdale, Florida, among other locations throughout the United States and the world.

68. Ernst & Young LLP's principal place of business is in New York.

RESPONSE: CPH admits that Ernst & Young LLP has offices in New York. Answering further, CPH states that Ernst & Young LLP has offices in West Palm Beach, Tampa, Miami, Jacksonville, Orlando and Fort Lauderdale, Florida, among other locations throughout the United States and the world.

69. At the time of the Transaction, the Ernst & Young LLP personnel involved with the Transaction were based in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH admits that some Ernst & Young LLP personnel involved with the Transaction were based in New York, but others were based outside of New York.

70. The Ernst & Young LLP personnel involved with the Transaction are based in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH admits that some Ernst & Young LLP personnel involved with the Transaction are based in New York, but others are based outside of New York.

71. At the time of the Transaction, Gerald D. Cohen resided at 505 East 79th Street in New York.

RESPONSE: Consistent with CPH's interpretation of the term "Transaction," CPH admits that, at the time of the Transaction, Gerald D. Cohen maintained a residence at 505 East 79th Street, New York, New York.

72. Gerald D. Cohen resides in New York.

RESPONSE: CPH admits that Gerald D. Cohen maintains a residence in New York.

73. At the time of the Transaction, Michael J. Fitzpatrick resided at 135 East 69th Street in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated March 11, 1998. CPH believes that document was prepared by Morgan Stanley because it is attached to a Morgan Stanley cover sheet. That working group list indicates an address of 135 East 69th Street, New York,

New York for Michael J. Fitzpatrick. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

74. Michael J. Fitzpatrick resides in New York.

RESPONSE: CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate whether Michael J. Fitzpatrick currently maintains a residence in New York. CPH also has conducted a search of the LexisNexis "P-Trak Person Locator File" electronic database. That search indicates that, at some point in time, Michael J. Fitzpatrick maintained a residence in New York. However, CPH is unable to verify the accuracy or completeness of that database, lacks information or knowledge sufficient to answer this request, and therefore denies this request.

75. At the time of the Transaction, Mitchell Rosendorf resided at 83-83 118th Street in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated March 11, 1998. CPH believes that document was prepared by Morgan Stanley because it is attached to a Morgan Stanley cover sheet. That working group list indicates an address of 83-83 118th Street, New York, New York for Mitchell Rosendorf. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

76. Mitchell Rosendorf resides in New York.

RESPONSE: CPH admits that Mitchell Rosendorf maintains a residence in Chappaqua, New York.

77. Arthur Andersen LLP is not headquartered in Florida.

RESPONSE: CPH admits that Arthur Andersen's principal place of business is Chicago, Illinois. Answering further, CPH states that, at the time of Transaction, Arthur Andersen had offices in West Palm Beach, Fort Lauderdale, and Miami, Florida, among other locations. Moreover, the principal auditors performing the Sunbeam 1996 and 1997 audits were based in Arthur Andersen's West Palm Beach and Fort Lauderdale, Florida offices.

78. Cooper [sic] & Lybrand LLP is headquartered in New York.

RESPONSE: CPH denies this request because Coopers & Lybrand no longer exists.

79. The law firms that advised Sunbeam and Coleman in connection with the Transaction were headquartered in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH admits that the law firm that advised Sunbeam had an office in New York, but also had offices in locations throughout the United States and the world. With respect to Coleman, CPH admits that one of the law firms that advised Coleman had its principal place of business in New York, but that other law firms that advised Coleman had their principal places of business outside of New York.

80. The principal place of business of all of the law firms that advised Sunbeam and Coleman in connection with the Transaction was in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH admits that the law firm that advised Sunbeam had an office in New York, but also had offices in locations throughout the United States and the world. With respect to Coleman, CPH admits that one of the law firms that

advised Coleman had its principal place of business in New York, but that other law firms that advised Coleman had their principal places of business outside of New York.

81. The lawyers that advised Sunbeam and CPH in connection with the Transaction were based in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH admits some of the lawyers that advised Sunbeam were based in New York, but that other lawyers that advised Sunbeam were based outside of New York. With respect to CPH, CPH admits that some of the lawyers that advised CPH were in New York, but that other lawyers that advised CPH were based outside of New York.

82. Wachtell Lipton Rosen & Katz is headquartered in New York.

RESPONSE: CPH admits that Wachtell Lipton Rosen & Katz's principal place of business is New York.

83. Wachtell Lipton Rosen & Katz's principal place of business is in New York.

RESPONSE: Admitted.

84. At the time of the Transaction, the Wachtell Lipton Rosen & Katz personnel involved with the Transaction were based in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH admits that, at the time of the Transaction, the Wachtell Lipton Rosen & Katz personnel involved with the Transaction were based in New York.

85. The Wachtell Lipton Rosen & Katz personnel involved with the Transaction are based in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH states that it has made a reasonable inquiry into the document in its possession and conducted searches of an electronic database, detailed in responses 86-113. However, that inquiry did not indicate the current location of the Wachtell Lipton Rosen & Katz personnel involved in the Transaction. CPH lacks knowledge or information sufficient to answer this request and therefore denies this request.

86. At the time of the Transaction, Martin Lipton resided at 550 Park Avenue in New York.

RESPONSE: Consistent with CPH's interpretation of the term "Transaction," CPH admits that, at the time of the Transaction, Martin Lipton maintained a residence at 550 Park Avenue, New York, New York.

87. Martin Lipton resides in New York.

RESPONSE: CPH admits that Martin Lipton maintains a residence in New York.

88. At the time of the Transaction, Adam O. Emmerich resided at 171 West 71st Street in New York.

RESPONSE: Consistent with CPH's interpretation of the term "Transaction," CPH admits that, at the time of the Transaction, Adam O. Emmerich maintained a residence at 171 West 71st Street, New York, New York.

89. Adam O. Emmerich resides in New York.

RESPONSE: CPH admits that Adam O. Emmerich maintains a residence in New York.

90. At the time of the Transaction, Steven A. Cohen resided at 250 West 99th Street in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated August 7, 1998. That working group list indicates an address of 250 West 99th Street, New York, New York for Steven A. Cohen. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

91. Steven A. Cohen resides in New York.

RESPONSE: CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate whether Steven A. Cohen currently maintains a residence in New York. CPH also has conducted a search of the LexisNexis "P-Trak Person Locator File" electronic database. That search indicates that, at some point in time, Steven A. Cohen maintained a residence in New York. However, CPH is unable to verify the accuracy or completeness of that database, lacks information or knowledge sufficient to answer this request, and therefore denies this request.

92. At the time of the Transaction, Frank L. Miller resided at 141 East 55th Street in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated August 7, 1998. That working group list indicates an address of 141 East 55th Street, New York, New York for Frank L. Miller. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

93. Frank L. Miller resides in New York.

RESPONSE: CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate whether Frank L. Miller currently maintains a residence in New York. CPH also has conducted a search of the LexisNexis "P-Trak Person Locator File" electronic database. That search indicates that, at some point in time, Frank L. Miller maintained a residence in New York. However, CPH is unable to verify the accuracy or completeness of that database, lacks information or knowledge sufficient to answer this request, and therefore denies this request.

94. At the time of the Transaction, Harold Novikoff resided at 369 East Shore Road in Kings Point, NY.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated August 7, 1998. That working group list indicates an address of 369 East Shore Road, Kings Point, New York for Harold Novikoff. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

95. Harold Novikoff resides in New York.

RESPONSE: CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate whether Harold Novikoff currently maintains a residence in New York. CPH also has conducted a search of the LexisNexis "P-Trak Person Locator File" electronic database. That search indicates that, at some point in time, Harold Novikoff maintained a residence in New York. However, CPH is unable to verify the accuracy or completeness of that database, lacks information or knowledge sufficient to answer this request, and therefore denies this request.

96. At the time of the Transaction, Peter C. Cannellos [*sic*] resided at 85 Sutton Manor in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated August 7, 1998. That working group list indicates an address of 85 Sutton Manor, New Rochelle, New York for Peter Canellos. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

97. Peter C. Cannellos [*sic*] resides in New York.

RESPONSE: CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate whether Peter C. Canellos currently maintains a residence in New York. CPH also has conducted a search of the LexisNexis "P-Trak Person Locator File" electronic database. That search indicates that, at some point in time, Peter C. Canellos maintained a residence in New York. However, CPH is unable to verify the accuracy or completeness of that database, lacks information or knowledge sufficient to answer this request, and therefore denies this request.

98. At the time of the Transaction, David M. Einhorn resided at 87 The Serpentine in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled Sunbeam Corporation entitled "Working Group List," dated August 7, 1998. That working group list indicates an address of 87 The Serpentine, Roslyn Estates, New York for David M. Einhorn. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

99. David M. Einhorn resides in New York.

RESPONSE: CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate whether David M. Einhorn currently maintains a residence in New York. CPH also has conducted a search of the LexisNexis "P-Trak Person Locator File" electronic database. That search indicates that, at some point in time, David M. Einhorn maintained a residence in New York. However, CPH is unable to verify the accuracy or completeness of that database, lacks information or knowledge sufficient to answer this request, and therefore denies this request.

100. At the time of the Transaction, Deborah L. Paul resided at One Astor Place in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated August 7, 1998. That working group list indicates an address of One Astor Place, New York, New York for Deborah L. Paul. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

101. Deborah L. Paul resides in New York.

RESPONSE: CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate whether Deborah L. Paul currently maintains a residence in New York. CPH also has conducted a search of the LexisNexis "P-Trak Person Locator File" electronic database. That search indicates that at some point in time, Deborah L. Paul maintained a residence in New York. However, CPH is unable to verify the accuracy or completeness of that database, lacks information or knowledge sufficient to answer this request and therefore denies this request.

102. At the time of the Transaction, Michael S. Katze [sic] resided at 150 Columbus Avenue in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated August 7, 1998. That working group list indicates an address of 150 Columbus Avenue, New York, New York for Michael S. Katzke. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

103. Michael S. Katze [sic] resides in New York.

RESPONSE: CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate whether Michael S. Katzke currently maintains a residence in New York. CPH also has conducted a search of the LexisNexis "P-Trak Person Locator File" electronic database. That search indicates that, at some point in time, Michael S. Katzke maintained a residence in New York. However, CPH is unable to verify the accuracy or completeness of that database, lacks information or knowledge sufficient to answer this request, and therefore denies this request.

104. At the time of the Transaction, Michael W. Schwartz resided at 5 Riverside Drive in New York.

RESPONSE: Consistent with CPH's interpretation of the term "Transaction," CPH admits that, at the time of the Transaction, Michael W. Schwartz maintained a residence at 5 Riverside Drive, New York, New York.

105. Michael W. Schwartz resides in New York.

RESPONSE: CPH admits that Michael W. Schwartz maintains a residence in New York.

106. At the time of the Transaction, Paul K. Rowe resided at 840 Park Avenue in New York.

RESPONSE: Consistent with CPH's interpretation of the term "Transaction," CPH admits that, at the time of the Transaction, Paul K. Rowe maintained a residence at 840 Park Avenue, New York, New York.

107. Paul K. Rowe resides in New York.

RESPONSE: CPH admits that Paul K. Rowe maintains a residence in New York.

108. At the time of the Transaction, Rachelle Silverberg resided at 201 East 87th Street in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated August 7, 1998. That working group list indicates an address of 201 East 87th Street, New York, New York for Rachelle Silverberg. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

109. Rachelle Silverberg resides in New York.

RESPONSE: CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate whether Rachelle Silverberg currently maintains a residence in New York. CPH also has conducted a search of the LexisNexis "P-Trak Person Locator File" electronic database. That

search indicates that, at some point in time, Rachelle Silverberg maintained a residence in New York. However, CPH is unable to verify the accuracy or completeness of that database, lacks information or knowledge sufficient to answer this request, and therefore denies this request.

110. At the time of the Transaction, Ilene Knable Gotts resided at 115 Central Park West in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated August 7, 1998. That working group list indicates an address of 115 Central Park West, New York, New York for Ilene Knable Gotts. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

111. Ilene Knable Gotts resides in New York.

RESPONSE: CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate whether Ilene Knable Gotts currently maintains a residence in New York. CPH also has conducted a search of the LexisNexis "P-Trak Person Locator File" electronic database. That search indicates that, at some point in time, Ilene Knable Gotts maintained a residence in New York. However, CPH is unable to verify the accuracy or completeness of that database, lacks information or knowledge sufficient to answer this request, and therefore denies this request.

112. At the time of the Transaction, Michael W. Jahnke resided at 10 Park Avenue in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated August 7, 1998. That working group list indicates an address of 10 Park Avenue, New York, New York for Michael W. Jahnke. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

113. Michael W. Jahnke resides in New York.

RESPONSE: CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate whether Michael W. Jahnke currently maintained a residence in New York. CPH also has conducted a search of the LexisNexis "P-Trak Person Locator File" electronic database. That search indicates that, at some point in time, Michael W. Jahnke maintained a residence in New York. However, CPH is unable to verify the accuracy or completeness of that database, lacks information or knowledge sufficient to answer this request, and therefore denies this request.

114. At the time of the Transaction, no Wachtell Lipton Rosen & Katz personnel involved with the Transaction were based in Florida.

RESPONSE: Consistent with CPH's interpretation of the term "Transaction," admitted.

115. No Wachtell Lipton Rosen & Katz personnel involved with the Transaction are based in Florida.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry into the document in its possession and conducted searches of an electronic database, detailed in responses 86-113. However, that inquiry did not indicate the current location

of the Wachtell Lipton Rosen & Katz personnel involved in the Transaction. CPH lacks knowledge or information sufficient to answer this request and therefore denies this request.

116. Skadden Arps Slate Meagher & Flom is headquartered in New York.

RESPONSE: CPH admits that the Skadden Arps Slate Meagher & Flom has an office in New York, but also has offices in locations throughout the United States and the world.

117. Skadden Arps Slate Meagher & Flom's principal place of business is in New York.

RESPONSE: CPH admits that the Skadden Arps Slate Meagher & Flom has an office in New York, but also has offices in locations throughout the United States and the world.

118. At the time of the Transaction, the Skadden Arps Slate Meagher & Flom personnel involved with the Transaction were based in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH admits that, at the time of the Transaction, some Skadden Arps Slate Meagher & Flom personnel involved with the Transaction were based in New York, but others were based outside of New York.

119. At the time of the Transaction, Blaine V. ("Finn") Fogg resided at 1185 Park Avenue in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated March 11, 1998. CPH believes that document was prepared by Morgan Stanley because it is attached to a Morgan Stanley cover sheet. That working group list indicates an address of 1185 Park Avenue, New York, New York for Blaine V. ("Finn") Fogg. However, CPH is unable to verify the accuracy or

completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request. Answering further, upon information and belief, CPH states that, at the time of the Transaction, Blaine V. ("Finn") Fogg maintained a residence in Palm Beach, Florida.

120. Blaine V. ("Finn") Fogg resides in New York.

RESPONSE: CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate whether Blaine V. ("Finn") Fogg currently maintains a residence in New York. CPH also has conducted a search of the LexisNexis "P-Trak Person Locator File" electronic database. That search indicates that, at some point in time, Blaine V. ("Finn") Fogg maintained a residence in New York. However, CPH is unable to verify the accuracy or completeness of that database, lacks information or knowledge sufficient to answer this request, and therefore denies this request. Answering further, upon information and belief, CPH states that Blaine V. ("Finn") Fogg maintains a residence in Palm Beach, Florida.

121. At the time of the Transaction, Timothy F. Nelson resided at 76-22 170th Street in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated February 24, 1998 and produced by Morgan Stanley. That working group list indicates an address of 76-22 170th Street, Flushing, New York for Timothy F. Nelson. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

122. Timothy F. Nelson resides in New York.

RESPONSE: CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate whether Timothy F. Nelson currently maintains a residence in New York. CPH also has conducted a search of the LexisNexis "P-Trak Person Locator File" electronic database. That search indicates that, at some point in time, Timothy F. Nelson maintained a residence in New York. However, CPH is unable to verify the accuracy or completeness of that database, lacks information or knowledge sufficient to answer this request, and therefore denies this request.

123. At the time of the Transaction, Mitchell J. Solomon resided at 1125 Park Avenue in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated February 24, 1998 and produced by Morgan Stanley. That working group list indicates an address of 1125 Park Avenue, New York, New York for Mitchell J. Solomon. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

124. Mitchell J. Solomon resides in New York.

RESPONSE: CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate whether Mitchell J. Solomon currently maintains a residence in New York. CPH also has conducted a search of the LexisNexis "P-Trak Person Locator File" electronic database. That search indicates that, at some point in time, Mitchell J. Solomon maintained a residence in New York. However, CPH is unable to verify the accuracy or completeness of that database, lacks information or knowledge sufficient to answer this request, and therefore denies this request.

125. At the time of the Transaction, William J. Weiss resided at 251 West 19th Street in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated February 24, 1998 and produced by Morgan Stanley. That working group list indicates an address of 251 West 19th Street, New York, New York for Bill Weiss. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

126. William J. Weiss resides in New York.

RESPONSE: CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate whether William J. Weiss currently maintains a residence in New York. CPH also has conducted a search of the LexisNexis "P-Trak Person Locator File" electronic database. That search indicates that, at some point in time, William J. Weiss maintained a residence in New York. However, CPH is unable to verify the accuracy or completeness of that database, lacks information or knowledge sufficient to answer this request, and therefore denies this request.

127. At the time of the Transaction, Stephen M. Banker resided at 155 East 34th Street in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated February 24, 1998 and produced by Morgan Stanley. That working group list indicates an address of 155 East 34th Street, New York, New York for Stephen M. Banker. However, CPH is unable to verify the

accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

128. Stephen M. Banker resides in New York.

RESPONSE: CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate whether Stephen M. Banker currently maintains a residence in New York. CPH also has conducted a search of the LexisNexis "P-Trak Person Locator File" electronic database. That search indicates that, at some point in time, Stephen M. Banker maintained a residence in New York. However, CPH is unable to verify the accuracy or completeness of that database, lacks information or knowledge sufficient to answer this request, and therefore denies this request.

129. At the time of the Transaction, Joseph P. Nisa resided at 62 Orchard Ridge Road in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located multiple documents entitled "Working Group List" that appear to identify the personnel involved with the Transaction. However, none of those documents identify an address for Joseph P. Nisa. CPH lacks knowledge or information sufficient to answer this request and therefore denies this request.

130. Joseph P. Nisa resides in New York.

RESPONSE: CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate whether Joseph P. Nisa currently maintains a residence in New York. CPH also has conducted a search of the LexisNexis "P-Trak Person Locator File" electronic database. That search indicates that, at some point in time, Joseph P. Nisa maintained a residence in New York. However,

CPH is unable to verify the accuracy or completeness of that database, lacks information or knowledge sufficient to answer this request, and therefore denies this request.

131. At the time of the Transaction, Richard L. Easton resided at The Mark Hotel on 25 East 77th Street in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated March 11, 1998. CPH believes that document was prepared by Morgan Stanley because it is attached to a Morgan Stanley cover sheet. That working group list indicates an address of The Mark Hotel, 25 East 77th Street, New York, New York for Richard L. Easton. CPH also has located a document entitled "Working Group List," dated February 24, 1998 and produced by Morgan Stanley. That working group list indicates an address 457 East Street Road, Kennett Square, Pennsylvania for Richard L. Easton. However, CPH is unable to verify the accuracy or completeness of those documents, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

132. Richard L. Easton resides in New York.

RESPONSE: CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate whether Richard L. Easton currently maintains a residence in New York. CPH also has conducted a search of the LexisNexis "P-Trak Person Locator File" electronic database. That search indicates that, at some point in time, Richard L. Easton maintained a residence in New York. However, CPH is unable to verify the accuracy or completeness of that database, lacks information or knowledge sufficient to answer this request, and therefore denies this request. Moreover, upon information and belief, Richard L. Easton's principal office is in Delaware, although he also works at times in New York.

133. At the time of the Transaction, Mark T. Shehan resided at 525 East 82nd Street in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated March 11, 1998. CPH believes that document was prepared by Morgan Stanley because it is attached to a Morgan Stanley cover sheet. That working group list indicates the following addresses for Mark T. Shehan: 525 East 82nd Street, New York, New York; 24 Lilac Road, Westhampton Beach, New York; and 16 Upper Ridge Road, Sharon, Connecticut. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

134. Mark T. Shehan resides in New York.

RESPONSE: CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate whether Mark T. Shehan currently maintains a residence in New York. CPH also has conducted a search of the LexisNexis "P-Trak Person Locator File" electronic database. That search indicates that, at some point in time, Mark T. Shehan maintained a residence in New York. However, CPH is unable to verify the accuracy or completeness of that database, lacks information or knowledge sufficient to answer this request, and therefore denies this request.

135. At the time of the Transaction, Peter J. Neckles resided at 16 North Chatsworth Avenue in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated March 11, 1998. CPH believes that document was prepared by Morgan Stanley because it is attached to a Morgan

Stanley cover sheet. That working group list indicates an address of 16 North Chatsworth, Larchmont, New York for Peter J. Neckles. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

136. Peter J. Neckles resides in New York.

RESPONSE: CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate whether Peter J. Neckles currently maintains a residence in New York. CPH also has conducted a search of the LexisNexis "P-Trak Person Locator File" electronic database. That search indicates that, at some point in time, Peter J. Neckles maintained a residence in New York. However, CPH is unable to verify the accuracy or completeness of that database, lacks information or knowledge sufficient to answer this request, and therefore denies this request.

137. At the time of the Transaction, Michele D. Gartand [*sic*] resided at 41 West 72nd Street in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated March 11, 1998. CPH believes that document was prepared by Morgan Stanley because it is attached to a Morgan Stanley cover sheet. That working group list indicates an address of 41 West 72nd Street, New York, New York for Michele D. Gartland. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

138. Michele D. Gartand [*sic*] resides in New York.

RESPONSE: CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate whether Michele D. Gartland currently maintains a residence in New York. CPH also has conducted a search of the LexisNexis "P-Trak Person Locator File" electronic database. That search indicates that, at some point in time, Michele D. Gartland maintained a residence in New York. However, CPH is unable to verify the accuracy or completeness of that database, lacks information or knowledge sufficient to answer this request, and therefore denies this request.

139. At the time of the Transaction, Gregory A. Femicola resided at 300 West 23rd Street in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated March 11, 1998. CPH believes that document was prepared by Morgan Stanley because it is attached to a Morgan Stanley cover sheet. That working group list indicates an address of 300 West 23rd Street, New York, New York for Gregory A. Femicola. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

140. Gregory A. Femicola resides in New York.

RESPONSE: CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate whether Gregory A. Femicola currently maintains a residence in New York. CPH also has conducted a search of the LexisNexis "P-Trak Person Locator File" electronic database. That search indicates that, at some point in time, Gregory A. Femicola maintained a residence in New York. However, CPH is unable to verify the accuracy or completeness of that database, lacks information or knowledge sufficient to answer this request, and therefore denies this request.

141. At the time of the Transaction, Adrian Deitz resided at 220 East 65th Street in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated March 11, 1998. CPH believes that document was prepared by Morgan Stanley because it is attached to a Morgan Stanley cover sheet. That working group list indicates an address of 220 East 65th Street, New York, New York for Adrian Deitz. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

142. Adrian Deitz resides in New York.

RESPONSE: CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate whether Adrian Deitz currently maintains a residence in New York. CPH also has conducted a search of the LexisNexis "P-Trak Person Locator File" electronic database. That search indicates that, at some point in time, Adrian Deitz maintained a residence in New York. However, CPH is unable to verify the accuracy or completeness of that database, lacks information or knowledge sufficient to answer this request, and therefore denies this request.

143. At the time of the Transaction, Leander C. Gray resided at 279 Clifton [sic] Street in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated March 11, 1998. CPH believes that document was prepared by Morgan Stanley because it is attached to a Morgan Stanley cover sheet. That working group list indicates an address of 279 Clinton Street, Brooklyn,

New York for Leander C. Gray. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

144. Leander C. Gray resides in New York.

RESPONSE: CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate whether Leander C. Gray currently maintains a residence in New York. CPH also has conducted a search of the LexisNexis "P-Trak Person Locator File" electronic database. That search indicates that, at some point in time, Leander C. Gray maintained a residence in New York. However, CPH is unable to verify the accuracy or completeness of that database, lacks information or knowledge sufficient to answer this request, and therefore denies this request.

145. At the time of the Transaction, Todd E. Freed resided at 403 East 69th Street in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated March 11, 1998. CPH believes that document was prepared by Morgan Stanley because it is attached to a Morgan Stanley cover sheet. That working group list indicates an address of 403 East 69th Street, New York, New York for Todd E. Freed. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

146. Todd E. Freed resides in New York.

RESPONSE: CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate whether Todd E. Freed currently maintains a residence in New York. CPH also has conducted a search of the LexisNexis "P-Trak Person Locator File" electronic database. That search indicates that, at some point in time, Todd E. Freed maintained a residence in New York. However, CPH is unable to verify the accuracy or completeness of that database, lacks information or knowledge sufficient to answer this request, and therefore denies this request.

147. At the time of the Transaction, no Skadden Arps Slate Meagher & Flom personnel involved with the Transaction were based in Florida.

RESPONSE: Consistent with CPH's interpretation of the term "Transaction," admitted.

148. No Skadden Arps Slate Meagher & Flom personnel involved with the Transaction are based in Florida.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry into the document in its possession and conducted searches of an electronic database, detailed in responses 119-146. However, that inquiry did not indicate the current location of the Skadden Arps Slate Meagher & Flom personnel involved in the Transaction. CPH lacks knowledge or information sufficient to answer this request and therefore denies this request.

149. Shearman & Sterling is headquartered in New York.

RESPONSE: CPH admits that Shearman & Sterling has offices in New York, but also has offices in locations throughout the United States and the world.

150. Shearman & Sterling's principal place of business is in New York.

RESPONSE: CPH admits that Shearman & Sterling has offices in New York, but also has offices in locations throughout the United States and the world.

151. At the time of the Transaction, the Shearman & Sterling personnel involved with the Transaction were based in New York.

RESPONSE: Consistent with CPH's interpretation of the term "Transaction," admitted.

152. The Shearman & Sterling personnel involved with the Transaction are based in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry into the document in its possession and conducted searches of an electronic database, detailed in responses 153-156. However, that inquiry did not indicate the current location of the Shearman & Sterling personnel involved in the Transaction. CPH lacks knowledge or information sufficient to answer this request and therefore denies this request.

153. At the time of the Transaction, Bonnie Greaves resided at 473 West End Avenue in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located multiple documents entitled "Working Group List" that appear to identify the personnel involved with the Transaction. However, those documents do not identify an address for Bonnie Greaves. CPH lacks knowledge or information sufficient to answer this request and therefore denies this request.

154. Bonnie Greaves resides in New York.

RESPONSE: CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate whether Bonnie Greaves currently maintains a residence in New York. CPH also has conducted a search of the LexisNexis "P-Trak Person Locator File" electronic database. That search indicates that, at some point in time, Bonnie Greaves maintained a residence in New York. However, CPH also has reviewed Shearman & Sterling's website and that website indicates that Bonnie Greaves currently maintains a residence in London, England. CPH is unable to verify the accuracy or completeness of the LexisNexis database or the Shearman website, lacks information or knowledge sufficient to answer this request, and therefore denies this request.

155. At the time of the Transaction, Allesandro C. De Giorgis resided at 244 Madison Avenue in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located multiple documents entitled "Working Group List" that appear to identify the personnel involved with the Transaction. However, those documents do not identify an address for Allesandro C. De Giorgis, and therefore, CPH lacks knowledge or information sufficient to answer this request and therefore denies this request.

156. Allesandro C. De Giorgis resides in New York.

RESPONSE: CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate whether Allesandro C. De Giorgis currently maintains a residence in New York. CPH also has conducted a search of the LexisNexis "P-Trak Person Locator File" electronic database. That search indicates that, at some point in time, Allesandro C. De Giorgis maintained a residence in New York. However, CPH is unable to verify the accuracy or completeness of that

database, lacks information or knowledge sufficient to answer this request, and therefore denies this request.

157. At the time of the Transaction, no Shearman & Sterling personnel involved with the Transaction were based in Florida.

RESPONSE: Consistent with CPH's interpretation of the term "Transaction," admitted.

158. No Shearman & Sterling personnel involved with the Transaction are based in Florida.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry into the document in its possession and conducted searches of an electronic database, detailed in responses 153-156. However, that inquiry did not indicate the current location of the Shearman & Sterling personnel involved in the Transaction. CPH lacks knowledge or information sufficient to answer this request and therefore denies this request.

159. Davis Polk & Wardwell is headquartered in New York.

RESPONSE: CPH has made a reasonable inquiry and reviewed Davis Polk & Wardwell's website. According to this website, Davis Polk & Wardwell has its largest office in New York but also has offices in locations throughout the United States and the world. However, CPH is unable to verify the accuracy or completeness of this website, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

160. Davis Polk & Wardwell's principal place of business is in New York.

RESPONSE: CPH has made a reasonable inquiry and reviewed Davis Polk & Wardwell's website. According to this website, Davis Polk & Wardwell has its largest office in New York but also has offices in locations throughout the United States and the world. However, CPH is unable to verify the accuracy or completeness of this website, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

161. At the time of the Transaction, the Davis Polk & Wardwell personnel involved with the Transaction were based in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated March 11, 1998. CPH believes that document was prepared by Morgan Stanley because it is attached to a Morgan Stanley cover sheet. That working group list indicates New York addresses for the Davis Polk & Wardwell attorneys involved with the Transaction. However, CPH is unable to verify the accuracy or completeness of that working group list, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

162. The Davis Polk & Wardwell personnel involved with the Transaction are based in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry into the document in its possession and conducted searches of an electronic database, detailed in responses 164-177. However, that inquiry did not indicate the current location of the Davis Polk & Wardwell personnel involved in the Transaction. CPH lacks knowledge or information sufficient to answer this request and therefore denies this request.

163. At the time of the Transaction, no Davis Polk & Wardwell personnel involved with the Transaction were based in Florida.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated March 11, 1998. CPH believes that document was prepared by Morgan Stanley because it is attached to a Morgan Stanley cover sheet. That working group list indicates New York addresses for the Davis Polk & Wardwell attorneys involved with the Transaction. However, CPH is unable to verify the accuracy or completeness of that working group list, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

164. At the time of the Transaction, Alan Dean resided at 30 Hampton Road in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated March 11, 1998. CPH believes that document was prepared by Morgan Stanley because it is attached to a Morgan Stanley cover sheet. That working group list indicates an address of 30 Hampton Road, Scarsdale, New York for Alan Dean. However, CPH is unable to verify the accuracy or completeness of that working group list, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

165. Alan Dean resides in New York.

RESPONSE: CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate whether Alan Dean currently maintains a residence in New York. CPH also has conducted a search of the LexisNexis "P-Trak Person Locator File" electronic database. That search indicates that, at some point in time, Alan Dean maintained a residence in New York. However,

CPH is unable to verify the accuracy or completeness of that database, lacks information or knowledge sufficient to answer this request, and therefore denies this request.

166. At the time of the Transaction, Peter Douglas resided at 328 East 51st Street in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated March 11, 1998. CPH believes that document was prepared by Morgan Stanley because it is attached to a Morgan Stanley cover sheet. That working group list indicates an address of 328 East 51st Street, New York, New York for Peter Douglas. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

167. Peter Douglas resides in New York.

RESPONSE: CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate whether Peter Douglas currently maintains a residence in New York. CPH also has conducted a search of the LexisNexis "P-Trak Person Locator File" electronic database. That search indicates that, at some point in time, Peter Douglas maintained a residence in New York. However, CPH is unable to verify the accuracy or completeness of that database, lacks information or knowledge sufficient to answer this request, and therefore denies this request.

168. At the time of the Transaction, Peter Levin resided at 30 West 60th Street in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated March 11, 1998. CPH believes that document was prepared by Morgan Stanley because it is attached to a Morgan Stanley cover sheet. That working group list indicates an address of 30 West 60th Street, New York, New York for Peter Levin. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

169. Peter Levin resides in New York.

RESPONSE: CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate whether Peter Levin currently maintains a residence in New York. CPH also has conducted a search of the LexisNexis "P-Trak Person Locator File" electronic database. That search indicates that, at some point in time, Peter Levin maintained a residence in New York. However, CPH is unable to verify the accuracy or completeness of that database, lacks information or knowledge sufficient to answer this request, and therefore denies this request.

170. At the time of the Transaction, James Lurie resided at 130 Cedar Avenue in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated March 11, 1998 and prepared by Morgan Stanley. That working group list indicates an address of 130 Cedar Avenue, Hewlett Bay Park, New York for James Lurie. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

171. James Lurie resides in New York.

RESPONSE: CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate whether James Lurie currently maintains a residence in New York. CPH also has conducted a search of the LexisNexis "P-Trak Person Locator File" electronic database. That search indicates that, at some point in time, James Lurie maintained a residence in New York. However, CPH is unable to verify the accuracy or completeness of that database, lacks information or knowledge sufficient to answer this request, and therefore denies this request.

172. At the time of the Transaction, Alexander Kwit resided at 305 West 72nd Street in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated March 4, 1998. CPH believes that document was prepared by Morgan Stanley because it is attached to a Morgan Stanley cover sheet. That working group list indicates an address of 305 West 72nd Street, New York, New York for Alexander Kwit. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

173. Alexander Kwit resides in New York.

RESPONSE: CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate whether Alexander Kwite currently maintains a residence in New York. CPH also has conducted a search of the LexisNexis "P-Trak Person Locator File" electronic database. That search indicates that, at some point in time, Alexander Kwit maintained a residence in New York.

However, CPH is unable to verify the accuracy or completeness of that database, lacks information or knowledge sufficient to answer this request, and therefore denies this request.

174. At the time of the Transaction, William Megevick resided at 1170 Fifth Avenue in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated March 11, 1998. CPH believes that document was prepared by Morgan Stanley because it is attached to a Morgan Stanley cover sheet. That working group list indicates an address of 305 West 72nd Street, New York, New York for William Megevick. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

175. William Megevick resides in New York.

RESPONSE: CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate whether William Megevick currently maintains a residence in New York. CPH also has conducted a search of the LexisNexis "P-Trak Person Locator File" electronic database. That search indicates that, at some point in time, William Megevick maintained a residence in New York. However, CPH is unable to verify the accuracy or completeness of that database, lacks information or knowledge sufficient to answer this request, and therefore denies this request.

176. At the time of the Transaction, Heather Stack resided at 585 West End Avenue in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated March 11, 1998 and prepared by Morgan Stanley. That working group list indicates an address of 585 West End Avenue, New York, New York for Heather Stack. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

177. Heather Stack resides in New York.

RESPONSE: CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate whether Heather Stack currently maintains a residence in New York. CPH also has conducted a search of the LexisNexis "P-Trak Person Locator File" electronic database. That search indicates that, at some point in time, Heather Stack maintained a residence in New York. However, CPH is unable to verify the accuracy or completeness of that database, lacks information or knowledge sufficient to answer this request, and therefore denies this request.

178. No Davis Polk & Wardwell personnel involved with the Transaction are based in Florida.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry into the document in its possession and conducted searches of an electronic database, detailed in responses 164-177. However, that inquiry did not indicate the current location of the Davis Polk & Wardwell personnel involved in the Transaction. CPH lacks knowledge or information sufficient to answer this request and therefore denies this request.

179. At the time of the Transaction, the public relations firms involved with the Transaction were based in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry with respect to the public relations firm Hill & Knowlton and located a document entitled "Working Group List," dated February 20, 1998 and produced by Morgan Stanley. That working group list indicates a New York address for Hill & Knowlton. With respect to the public relations firm Sard & Verbinnen & Co., Inc., CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated August 7, 1998. That working group list indicates a New York address for Sard & Verbinnen & Co., Inc. However, CPH is unable to verify the accuracy or completeness of those documents, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

180. The public relations firms involved with the Transaction are based in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry into the document in its possession with respect to Hill & Knowlton. That inquiry did not indicate whether Hill & Knowlton is based in New York. CPH also has reviewed Hill & Knowlton's website. According to this website, Hill & Knowlton has its U.S. headquarters in New York, but also has offices in Miami and Tampa, Florida, among other locations throughout the United States. However, CPH is unable to verify the accuracy or completeness of this website, lacks knowledge or information sufficient to answer this request, and therefore denies this request insofar as it relates to Hill & Knowlton. With respect to Sard Verbinnen & Company, CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate whether Sard Verbinnen & Company is based in New York. CPH also has reviewed the website of Citigate Sard Verbinnen, the successor to Sard Verbinnen & Company. According to this website, Citigate Sard

Verbinnen has locations in Chicago, Illinois and New York, New York. However, CPH is unable to verify the accuracy or completeness of this website, lacks knowledge or information sufficient to answer this request, and therefore denies this request insofar as it relates to Sard Verbinnen & Company.

181. At the time of the Transaction, none of the public relations firms involved with the Transactions were based in Florida.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry with respect to Hill & Knowlton and located a document entitled "Working Group List," dated February 20, 1998 and produced by Morgan Stanley. That working group list indicates a New York address for Hill & Knowlton. With respect to Sard & Verbinnen & Co., Inc., CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated August 7, 1998. That working group list indicates a New York address for Sard & Verbinnen & Co., Inc. However, CPH is unable to verify the accuracy or completeness of those documents, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

182. None of the public relations firms involved with the Transaction are based in Florida.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry into the document in its possession with respect to Hill & Knowlton. That inquiry did not indicate whether Hill & Knowlton is based in Florida. CPH also has reviewed Hill & Knowlton's website. According to this website, Hill & Knowlton has its U.S. headquarters in New York, but also has offices in Miami and Tampa, Florida, among other locations throughout the United States. However, CPH is unable to verify the accuracy or completeness of this website, lacks knowledge or information sufficient to answer this request, and therefore denies this request insofar

as it relates to Hill & Knowlton. With respect to Sard Verbinnen & Company, CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate whether Citigate Sard Verbinnen, the successor to Sard Verbinnen & Company, is based in Florida. CPH also has reviewed the website of Citigate Sard Verbinnen. According to this website, Citigate Sard Verbinnen has locations in Chicago, Illinois and New York, New York. However, CPH is unable to verify the accuracy or completeness of this website and therefore, lacks knowledge or information sufficient to answer this request, and therefore denies this request insofar as it relates to Sard Verbinnen & Company.

183. Hill & Knowlton is headquartered in New York.

RESPONSE: CPH has made a reasonable inquiry and reviewed Hill & Knowlton's website. According to this website, Hill & Knowlton has its headquarters in New York, but also has offices in Miami and Tampa, Florida, among other locations throughout the United States. However, CPH is unable to verify the accuracy or completeness of this website, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

184. Hill & Knowlton's principal place of business is in New York.

RESPONSE: CPH has made a reasonable inquiry and reviewed Hill & Knowlton's website. According to this website, Hill & Knowlton has its headquarters in New York, but also has offices in Miami and Tampa, Florida, among other locations throughout the United States. However, CPH is unable to verify the accuracy or completeness of this website, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

185. At the time of the Transaction, the Hill & Knowlton personnel involved with the Transaction were based in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated February 20, 1998 and produced by Morgan Stanley. That working group list indicates a New York address for Hill & Knowlton. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

186. The Hill & Knowlton personnel involved with the Transaction are based in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry into the document in its possession and conducted searches of Hill & Knowlton's website. However, that inquiry did not indicate the current location of the Hill & Knowlton personnel involved in the Transaction. CPH lacks knowledge or information sufficient to answer this request and therefore denies this request.

187. At the time of the Transaction, no Hill & Knowlton personnel involved with the Transaction were based in Florida.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated February 20, 1998 and produced by Morgan Stanley. That working group list indicates a New York address for Hill & Knowlton. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

188. No Hill & Knowlton personnel involved with the Transaction are based in Florida.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry into the document in its possession and conducted searches of Hill & Knowlton's website. However, that inquiry did not indicate the current location of the Hill & Knowlton personnel involved in the Transaction. CPH lacks knowledge or information sufficient to answer this request and therefore denies this request.

189. Sard Verbinnen & Company is headquartered in New York.

RESPONSE: CPH has made a reasonable inquiry and reviewed the website of Citigate Sard Verbinnen, the successor to Sard Verbinnen & Company. According to this website, Citigate Sard Verbinnen has locations in Chicago, Illinois and New York, New York. However, CPH is unable to verify the accuracy or completeness of this website, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

190. Sard Verbinnen & Company's principal place of business is in New York.

RESPONSE: CPH has made a reasonable inquiry and reviewed the website of Citigate Sard Verbinnen, the successor to Sard Verbinnen & Company. According to this website, Citigate Sard Verbinnen has locations in Chicago, Illinois and New York, New York. However, CPH is unable to verify the accuracy or completeness of this website, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

191. At the time of the Transaction, the Sard Verbinnen & Company personnel involved with the Transaction were based in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated August 7, 1998.

That working group list indicates New York addresses for Sard & Verbinnen & Co., Inc. personnel involved with the Transaction. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

192. The Sard Verbinnen & Company personnel involved with the Transaction are based in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry into the document in its possession and has reviewed the website of Citigate Sard Verbinnen, the successor to Sard Verbinnen & Company. However, that inquiry did not indicate the current location of the Sard Verbinnen & Company personnel involved in the Transaction. CPH lacks knowledge or information sufficient to answer this request and therefore denies this request.

193. At the time of the Transaction, no Sard Verbinnen & Company personnel involved with the Transaction were based in Florida.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated August 7, 1998. That working group list indicates New York addresses for Sard & Verbinnen & Co., Inc. personnel involved with the Transaction. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

194. No Sard Verbinnen personnel involved with the Transaction are based in Florida..

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry into the document in its possession and has reviewed the website of Citigate Sard Verbinnen, the successor to Sard Verbinnen & Company. However, that inquiry did not indicate the current location of the Sard Verbinnen & Company personnel involved in the Transaction. CPH lacks knowledge or information sufficient to answer this request and therefore denies this request.

195. None of the lenders involved with the Transaction are headquartered in Florida.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry with respect to First Union, which has since merged with Wachovia, and reviewed its website. According to this website, Wachovia has its headquarters in Charlotte, North Carolina, as well as has offices in Florida, among other locations throughout the United States. However, CPH is unable to verify the accuracy or completeness of this website, lacks knowledge or information sufficient to answer this request, and therefore denies this request insofar as it relates to First Union. With respect to Bank of America, CPH has made a reasonable inquiry and reviewed its website. According to this website, Bank of America lists its corporate address as Charlotte, North Carolina, but also has offices in Florida, among other locations throughout the United States. However, CPH is unable to verify the accuracy or completeness of this website, lacks knowledge or information sufficient to answer this request, and therefore denies this request insofar as it relates to Bank of America. With respect to MSSF, CPH admits that MSSF's principal place of business is not in Florida.

196. None of the lenders involved with the Transaction have their principal place of business in Florida.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry with respect to First Union, which has since merged with Wachovia, and reviewed its website. According to this website, Wachovia has its headquarters in Charlotte, North Carolina, as well as has offices in Florida, among other locations throughout the United States. However, CPH is unable to verify the accuracy or completeness of this website, lacks knowledge or information sufficient to answer this request, and therefore denies this request insofar as it relates to First Union. With respect to Bank of America, CPH has made a reasonable inquiry and reviewed its website. According to this website, Bank of America lists its corporate address as Charlotte, North Carolina, but also has offices in Florida, among other locations throughout the United States. However, CPH is unable to verify the accuracy or completeness of this website, lacks knowledge or information sufficient to answer this request, and therefore denies this request insofar as it relates to Bank of America. With respect to MSSF, CPH admits that MSSF's principal place of business is not in Florida.

197. First Union, now known as Wachovia, is headquartered in Charlotte, North Carolina.

RESPONSE: CPH has made a reasonable inquiry with respect to First Union, which has since merged with Wachovia, and reviewed its website. According to this website, Wachovia has its headquarters in Charlotte, North Carolina, as well as has offices in Florida, among other locations throughout the United States. However, CPH is unable to verify the accuracy or completeness of this website, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

198. First Union's principal place of business is in Charlotte, North Carolina.

RESPONSE: CPH denies this request because First Union no longer exists.

199. At the time of the Transaction, no First Union personnel involved in the Transaction were based in Florida.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated March 11, 1998. CPH believes that document was prepared by Morgan Stanley because it is attached to a Morgan Stanley cover sheet. That working group list indicates addresses in North Carolina and Florida for the First Union personnel involved in the Transaction. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request. Answering further, CPH states on that information and belief, M. Walker Duvall, Senior Vice President of Corporate Banking at First Union, maintained an office and a residence in Florida at the time of the Transaction. CPH further states that on information and belief, William Rutter, Senior Vice President of Private Banking at First Union, maintained an office and a residence in Florida at the time of the Transaction.

200. None of the First Union personnel involved with the Transaction are based in Florida.

RESPONSE: CPH admits this request because First Union no longer exists.

201. Bank of America is headquartered in Charlotte, North Carolina.

RESPONSE: CPH has made a reasonable inquiry and reviewed Bank of America's website. According to this website, Bank of America lists its corporate address as Charlotte, North Carolina, but also has offices in Florida, among other locations throughout the United States. However, CPH is unable to verify the accuracy or completeness of this website, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

202. Bank of America's principal place of business is in Charlotte, North Carolina.

RESPONSE: CPH has made a reasonable inquiry and reviewed Bank of America's website. According to this website, Bank of America lists its corporate address as Charlotte, North Carolina, but also has offices in Florida, among other locations throughout the United States. However, CPH is unable to verify the accuracy or completeness of this website, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

203. At the time of the Transaction, no Bank of America personnel involved in the Transaction were based in Florida.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated March 11, 1998. CPH believes that document was prepared by Morgan Stanley because it is attached to a Morgan Stanley cover sheet. That working group list indicates addresses in New York and Georgia for the Bank of America personnel involved in the Transaction. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

204. None of the Bank of America personnel involved with the Transaction are based in Florida.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry into the document in its possession and reviewed the website of Bank of America. However, that inquiry did not indicate the current location of the Bank of America personnel involved with the Transaction. CPH lacks knowledge or information sufficient to answer this request and therefore denies this request.

205. BancAmerica Robertson Stephens is based in New York.

RESPONSE: CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated March 11, 1998. CPH believes that document was prepared by Morgan Stanley because it is attached to a Morgan Stanley cover sheet. That working group list indicates an address of New York, New York for BancAmerica Robertson Stephens. However, CPH is unable to verify the accuracy or completeness of that document, or whether it reflects where BancAmerica Robertson Stephens currently is based, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

206. BancAmerica Robertson Stephens's principal place of business is in New York.

RESPONSE: CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated March 11, 1998. CPH believes that document was prepared by Morgan Stanley because it is attached to a Morgan Stanley cover sheet. That working group list indicates an address of New York, New York for BancAmerica Robertson Stephens. However, CPH is unable to verify the accuracy or completeness of that document, or whether it reflects the current principal place of business. CPH lacks knowledge or information sufficient to answer this request and therefore denies this request.

207. At the time of the Transaction, Robert Karen resided at 14 Ulster Drive in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated March 11, 1998. CPH believes that document was prepared by Morgan Stanley because it is attached to a Morgan Stanley cover sheet. That working group list indicates an address of 14 Ulster Drive, Jericho, New

York for Robert Karen. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

208. Robert Karen resides in New York.

RESPONSE: CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate whether Robert Karen currently maintains a residence in New York. CPH also has conducted a search of the LexisNexis "P-Trak Person Locator File" electronic database. That search indicates that, at some point in time, Robert Karen maintained a residence in New York. However, CPH is unable to verify the accuracy or completeness of that database, lacks information or knowledge sufficient to answer this request, and therefore denies this request.

209. At the time of the Transaction, Chuck Francavilla resided at 1965 Broadway in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated March 11, 1998. CPH believes that document was prepared by Morgan Stanley because it is attached to a Morgan Stanley cover sheet. That working group list indicates an address of 1965 Broadway, New York, New York for Chuck Francavilla. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

210. Chuck Francavilla resides in New York.

RESPONSE: CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate whether Chuck Francavilla currently maintains a residence in New York. CPH also has conducted a search of the LexisNexis "P-Trak Person Locator File" electronic database. That search indicates that, at some point in time, Chuck Francavilla maintained a residence in New York. However, CPH is unable to verify the accuracy or completeness of that database, lacks information or knowledge sufficient to answer this request, and therefore denies this request.

211. At the time of the Transaction, Rosemary Halpin resided at 6 West 75th Street in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated March 11, 1998. CPH believes that document was prepared by Morgan Stanley because it is attached to a Morgan Stanley cover sheet. That working group list indicates an address of 6 West 75th Street, New York, New York for Rosemary Halpin. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

212. Rosemary Halpin resides in New York.

RESPONSE: CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate whether Rosemary Halpin currently maintains a residence in New York. CPH also has conducted a search of the LexisNexis "P-Trak Person Locator File" electronic database. That search indicates that, at some point in time, Rosemary Halpin maintained a residence in New York. However, CPH is unable to verify the accuracy or completeness of that database, lacks information or knowledge sufficient to answer this request, and therefore denies this request.

213. At the time of the Transaction, no BancAmerica Robertson Stephens personnel involved with the Transaction were based in Florida.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated March 11, 1998. CPH believes that document was prepared by Morgan Stanley because it is attached to a Morgan Stanley cover sheet. That working group list indicates an address of New York, New York for BancAmerica Robertson Stephens. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

214. None of the BancAmerica Robertson Stephens personnel involved with the Transaction are based in Florida.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry into the document in its possession and conducted searches of an electronic database, detailed in responses 207-212. However, that inquiry did not indicate the current location of the BancAmerica Robertson Stephens personnel involved in the Transaction. CPH lacks knowledge or information sufficient to answer this request and therefore denies this request.

215. At the time of the Transaction, Global Financial Press was headquartered in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated March 11, 1998. CPH believes that document was prepared by Morgan Stanley because it is attached to a Morgan Stanley cover sheet. That working group list indicates an address of New York, New York for Global Financial Press. However, CPH is unable to verify the accuracy or completeness of that

document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

216. At the time of the Transaction, Global Financial Press's principal place of business was in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated March 11, 1998. CPH believes that document was prepared by Morgan Stanley because it is attached to a Morgan Stanley cover sheet. That working group list indicates an address of New York, New York for Global Financial Press. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

217. At the time of the Transaction, Global Financial Press had an office at 75 9th Avenue in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated March 11, 1998. CPH believes that document was prepared by Morgan Stanley because it is attached to a Morgan Stanley cover sheet. That working group list indicates an address of 75 9th Avenue, New York, New York for Global Financial Press. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

218. On November 6, 1997, MS & Co. and MAFCO representatives met at MAFCO headquarters in New York to discuss the Transaction.

RESPONSE: Denied, except that CPH admits that on November 6, 1997, Morgan Stanley representatives and a MAFCO representative met at MAFCO headquarters in New York.

219. On December 11, 1997, MS & Co. met with Sunbeam at The Palace Hotel in New York to discuss the Transaction.

RESPONSE: Consistent with CPH's interpretation of the term "Transaction," admitted.

220. On December 12, 1997, Sunbeam, Coleman and MAFCO representatives met at MAFCO headquarters in New York to discuss the Transaction.

RESPONSE: Consistent with CPH's interpretation of the term "Transaction," CPH admits that on December 12, 1997, Sunbeam, Coleman and MAFCO representatives met in New York to discuss the Transaction.

221. At the December 12, 1997 meeting, Coleman provided Sunbeam with a detailed written schedule identifying 15 different areas of synergies between Sunbeam and Coleman, totaling over \$150 million per year.

RESPONSE: Denied.

222. On December 18, 1997, Sunbeam and MAFCO representatives met in New York to negotiate the Transaction.

RESPONSE: Denied. Answering further, CPH states that on December 18, 1997, Albert Dunlap, Michael Price, Ronald Perelman and Howard Gittis met in Palm Beach, Florida to discuss a possible acquisition of CPH's interest in Coleman.

223. On January 23, 1998, MS & Co. met with MAFCO representatives at MAFCO headquarters in New York to discuss the Transaction.

RESPONSE: Denied, except that, consistent with its interpretation of the term "Transaction," CPH admits that on January 23, 1998, Morgan Stanley representative met with a MAFCO representative at MAFCO headquarters in New York to discuss the Transaction.

224. On January 29, 1998, Sunbeam, MS & Co., Coleman, MAFCO and Credit Suisse First Boston representatives met at MAFCO/Revlon headquarters in New York to discuss the Transaction and preliminary due diligence.

RESPONSE: Denied, except that, consistent with its interpretation of the term "Transaction," CPH admits that on January 29, 1998, Sunbeam and Morgan Stanley representatives met with Coleman, MAFCO, and Credit Suisse First Boston representatives in New York to discuss the Transaction and preliminary due diligence.

225. At the January 29, 1998 meeting at MAFCO/Revlon headquarters in New York, Coleman affirmed that \$150 million was the projected synergies in connection with the Transaction.

RESPONSE: Denied.

226. On February 6, 1998, MS & Co., MAFCO, and Credit Suisse First Boston met at MAFCO headquarters in New York to negotiate the Transaction.

RESPONSE: Consistent with CPH's interpretation of the term "Transaction," admitted.

227. On February 19, 1998, Sunbeam, MS & Co., and MAFCO met at MS & Co. headquarters in New York to negotiate the Transaction.

RESPONSE: Denied.

228. At the February 19, 1998 meeting at MS & Co. headquarters in New York, a preliminary handshake agreement was reached on a 0.745 exchange ratio.

RESPONSE: Denied.

229. On February 23, 1998, Sunbeam, MS & Co., Coleman, MAFCO, and Credit Suisse First Boston representatives attended a due diligence meeting at MAFCO headquarters in New York in connection with the Transaction.

RESPONSE: Consistent with CPH's interpretation of the term "Transaction," admitted. Answering further, CPH states that meetings and communications concerning due diligence in connection with the Transaction occurred in Florida and elsewhere outside of New York.

230. On February 24, 1998, Sunbeam, MS & Co., MAFCO and others met at MS & Co. headquarters in New York to discuss the Transaction.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry into its documents. That inquiry did not indicate whether on February 24, 1998, Sunbeam, Morgan Stanley, MAFCO and others met at Morgan Stanley headquarters in New York to discuss the Transaction. CPH lacks information or knowledge sufficient to answer this request and therefore denies this request.

231. Due diligence meetings concerning the Transaction were held in New York.

RESPONSE: Consistent with CPH's interpretation of the term "Transaction," admitted. Answering further, CPH states that meetings and communications concerning due diligence in connection with the Transaction occurred in Florida and elsewhere outside of New York.

232. On February 25, 1998, Sunbeam, MS & Co., MAFCO and others met at Morgan Stanley headquarters in New York to discuss the Transaction.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry into its documents. That inquiry did not indicate whether on February 25, 1998, Sunbeam, Morgan Stanley, MAFCO and others met at Morgan Stanley headquarters in New York to discuss the Transaction. CPH lacks information or knowledge sufficient to answer this request and therefore denies this request.

233. On February 25, 1998, Coleman's Board of Directors met in New York with MAFCO, Wachtell and CSFB representatives to discuss the Transaction.

RESPONSE: Consistent with CPH's interpretation of the term "Transaction," admitted. Answering further, CPH states that some of the Coleman Directors attended this meeting by telephone and that some Coleman Directors did not attend this meeting.

234. On February 26, 1998, Sunbeam, MS & Co., MAFCO, Skadden Arps Slate Meager [sic] & Flom and others met at MS & Co. headquarters in New York to discuss the Transaction.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry into its documents. That inquiry did not indicate whether on February 26, 1998, Sunbeam, Morgan Stanley, MAFCO, Skadden Arps Slate Meagher & Flom and others met at Morgan Stanley headquarters in New York to discuss the Transaction. CPH lacks information or knowledge sufficient to answer this request and therefore denies this request.

235. At the February 26, 1998 meeting at MS & Co. headquarters in New York, the final structure of the Transaction was agreed upon.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry into its documents. That inquiry did not indicate whether on February 26, 1998, the final structure of the Transaction was agreed upon at Morgan Stanley headquarters in New York. CPH lacks information or knowledge sufficient to answer this request and therefore denies this request.

236. The Transaction was negotiated in New York.

RESPONSE: Consistent with CPH's interpretation of the term "Transaction," CPH admits that some negotiations concerning the Transaction took place in New York, but other negotiations took place in Florida and elsewhere outside of New York.

237. On February 27, 1998, Sunbeam's Board of Directors met at MS & Co.'s offices in New York to discuss the Transaction.

RESPONSE: Consistent with CPH's interpretation of the term "Transaction," admitted.

238. At the February 27, 1998 meeting of the Board of Directors, Sunbeam approved the Transaction.

RESPONSE: Consistent with CPH's interpretation of the term "Transaction," admitted.

239. On February 27, 1998, Coleman's Board of Directors met in New York to discuss the Transaction.

RESPONSE: Consistent with CPH's interpretation of the term "Transaction," admitted. Answering further, CPH states that some of the Coleman Directors attended this meeting by telephone.

240. At the February 27, 1998 meeting of the Board of Directors, Coleman approved the Transaction.

RESPONSE: Consistent with CPH's interpretation of the term "Transaction," admitted.

241. Both the Sunbeam and Coleman Boards of Directors approved the Transaction at meetings held in New York.

RESPONSE: Consistent with CPH's interpretation of the term "Transaction," admitted.

242. On February 27, 1998, the February 27, 1998 Agreements were executed in New York.

RESPONSE: CPH admits that on either February 27 or 28, 1998, the February 27, 1998 Agreements were executed in New York.

243. On March 2, 1998, the Transaction was announced in New York before the markets opened.

RESPONSE: Denied, except that, consistent with CPH's interpretation of the term "Transaction," CPH admits that on March 2, 1998, Sunbeam issued a press release from Sunbeam's headquarters in Delray Beach, Florida announcing the Transaction.

244. MSSF planned the Bank Facility to finance the Transaction in New York.

RESPONSE: Denied, except that CPH admits that MSSF did some work on the Bank Facility in New York, but also did some work in Florida. Answering further, CPH states that the two other banks involved in the Bank Facility, First Union and Bank of America, were headquartered outside of New York and did work on the Bank Facility outside of New York.

245. MSSF prepared and disseminated the preliminary and final offering memorandum for the Bank Facility in New York.

RESPONSE: Denied.

246. On March 17, 1998, Sunbeam and MS & Co. held a "road show" for potential Sunbeam investors in New York.

RESPONSE: Denied.

247. On March 18, 1998, Sunbeam and MS & Co. held a "road show" for potential Sunbeam investors in New York.

RESPONSE: Admitted.

248. No "road shows" for potential Sunbeam investors were held in Florida.

RESPONSE: CPH has made a reasonable inquiry and located a document entitled "Sunbeam Road Show Itinerary" and produced by Morgan Stanley. That document indicates that no road shows took place in Florida. However, CPH is unable to verify the accuracy or completeness of this document, lacks knowledge or information sufficient to answer this request, and therefore denies this request. Answering further, CPH states that the coupon convertible senior subordinated debentures issued by Sunbeam and marketed by Morgan Stanley were purchased by investors nationwide, including investors based in Florida. Moreover, upon information and belief, CPH states that Morgan Stanley caused the Offering Memorandum for the debentures issued by Sunbeam to be delivered to potential investors in Florida.

249. On March 19, 1998, the Note Offering closed in New York.

RESPONSE: Denied.

250. The press conference following the March 19, 1998 press release was held in New York.

RESPONSE: CPH objects to this request as vague and ambiguous because it does not identify a specific date or subject matter for the press conference. Several press conferences have taken place since March 19, 1998. Subject to and without waiving this objection, CPH states that it has made a reasonable inquiry into the document in its possession. That inquiry did not indicate a press conference held on or about March 19, 1998. CPH lacks knowledge or information sufficient to answer this request and therefore denies this request.

251. On March 30, 1998, the Transaction closed in New York.

RESPONSE: Consistent with CPH's interpretation of the term "Transaction," admitted.

252. On March 31, 1998, the Bank Facility closed in New York.

RESPONSE: Admitted.

253. At the time of the Transaction, Sunbeam was listed on the New York Stock Exchange.

RESPONSE: Consistent with CPH's interpretation of the term "Transaction," admitted.

254. At the time of the Transaction, Coleman was listed on the New York Stock Exchange.

RESPONSE: Consistent with CPH's interpretation of the term "Transaction," admitted.

255. No meetings between MS & Co. and Coleman took place in Florida.

RESPONSE: Admitted. Answering further, CPH states that Morgan Stanley prepared Sunbeam representatives to meet with a Coleman representative in Florida.

256. No meetings between MS & Co. and CPH took place in Florida.

RESPONSE: Admitted. Answering further, CPH states that Morgan Stanley prepared Sunbeam representatives to meet with CPH representatives in Florida.

257. No meetings between MS & Co. and MAFCO took place in Florida.

RESPONSE: Admitted. Answering further, CPH states that Morgan Stanley prepared Sunbeam representatives to meet with MAFCO representatives in Florida.

258. No meetings between MSSF and Coleman took place in Florida.

RESPONSE: Admitted.

259. No meetings between MSSF and CPH took place in Florida.

RESPONSE: Denied.

260. No meetings between MSSF and MAFCO took place in Florida.

RESPONSE: Denied.

261. On April 27, 1998, Sunbeam and Coleman met with Coopers & Lybrand and Sard Verbinnen at Coopers & Lybrand offices in New York.

RESPONSE: CPH has made a reasonable inquiry and located a document prepared by Sunbeam that indicates that on April 27, 1998, Sunbeam, Coopers & Lybrand, and Sard Verbinnen representatives met at the Coopers & Lybrand offices in New York. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

262. On May 4, 1998, Sunbeam and Coleman met with Coopers & Lybrand and Sard Verbinnen at Coopers & Lybrand offices in New York.

RESPONSE: CPH has made a reasonable inquiry and located a document prepared by Sunbeam that indicates that on May 4, 1998, Sunbeam, Coopers & Lybrand, and Sard Verbinnen representatives met at the Coopers & Lybrand offices in New York. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

263. On May 6, 1998, Sunbeam and Coleman held a special joint meeting of the respective Boards of Directors at Coopers & Lybrand offices in New York.

RESPONSE: Admitted.

264. On May 7-9, 1998, Sunbeam prepared for the May 11th presentation in New York.

RESPONSE: CPH has made a reasonable inquiry and located a document prepared by Sunbeam that indicates that Sunbeam representatives were in New York on May 7-9, 1998. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

265. On May 11, 1998, Sunbeam and Coleman made a special "Strategy for Growth" presentation to Wall Street analysts and investors in New York regarding the Sunbeam situation.

RESPONSE: CPH has made a reasonable inquiry and located a Sunbeam presentation entitled "Strategy for Growth" dated May 11, 1998. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

266. On June 9, 1998, the Special Committee of the Board of Directors of Sunbeam met in New York to discuss the June 8, 1998 article in Barrons concerning Sunbeam's accounting practices.

RESPONSE: Denied, except that CPH admits that on June 9, 1998, the Board of Directors of Sunbeam held a meeting in New York and the June 8, 1998 article in Barron's Magazine concerning Sunbeam's accounting practices was discussed.

267. On June 13, 1998, the Special Committee of the Board of Directors of Sunbeam met in New York to remove Albert Dunlap as CEO of Sunbeam.

RESPONSE: Denied, except that CPH admits that on June 13, 1998, the Board of Directors of Sunbeam held a meeting in New York and the Board of Directors removed Albert Dunlap as CEO of Sunbeam at that meeting.

268. On June 19, 1998, MS & Co., First Union, Bank of America and MAFCO met at MAFCO headquarters in New York to discuss the Sunbeam situation.

RESPONSE: Admitted.

269. On July 10, 1998, the Special Committee of the Board of Directors of Sunbeam held an organizational meeting at the offices of Reboul, MacMurray, Hewitt, Maynard & Kristol at 45 Rockefeller Plaza in New York to discuss the negotiations between Sunbeam and its lenders.

RESPONSE: Admitted.

270. On July 28, 1998, the Special Committee of the Board of Directors of Sunbeam met at the offices of Reboul, MacMurray, Hewitt, Maynard & Kristol at 45 Rockefeller Plaza in New York to discuss the status of the ongoing fact investigation at Sunbeam.

RESPONSE: Admitted.

271. On February 6, 2001, Sunbeam filed for bankruptcy in the United States Bankruptcy Court for the Southern District of New York.

RESPONSE: Admitted.

272. The adversary proceedings against Sunbeam were instituted in New York.

RESPONSE: CPH has made a reasonable inquiry into the documents in its possession and has reviewed the docket sheet for the Bankruptcy Petition filed by Sunbeam on February 6, 2001 in the United States Bankruptcy Court for the Southern District of New York. Neither of these inquiries indicated that adversary proceedings have been instituted against Sunbeam. CPH lacks information or knowledge sufficient to answer this request and therefore denies this request. Answering further, CPH states that more than 20 lawsuits concerning Sunbeam's fraudulent accounting practices have been filed in or transferred to Florida state and federal courts, including:

- a. *Bird v. Sunbeam Corporation, et al.*, No. 98-8258 (S.D. Fla.)
- b. *Frankel v. Sunbeam Corporation, et al.*, No. 98-8310 (S.D. Fla.)
- c. *Lionelli v. Sunbeam Corporation, et al.*, No.98-8323 (S.D. Fla.)
- d. *Goldberg v. Dunlap, et al.*, No. 98-8260 (S.D. Fla.)

- e. *Lembeck v. Dunlap, et al.*, No. 98-8307 (S.D. Fla.)
- f. *Mintz v. Sunbeam Corporation, et al.*, No. 98-8281 (S.D. Fla.)
- g. *Klewin v. Sunbeam Corporation, et al.*, No. 98-8313 (S.D. Fla.)
- h. *Applestein v. Sunbeam Corporation, et al.*, No. 98-8316 (S.D. Fla.)
- i. *Singleton v. Sunbeam Corporation, et al.*, No. 98-8347 (S.D. Fla.)
- j. *Lindeman v. Sunbeam Corporation, et al.*, No. 98-8289 (S.D. Fla.)
- k. *Stapleton v. Sunbeam Corporation, et al.*, No. 98-1676 (S.D. Fla.)
- l. *Cunningham v. Sunbeam Corporation, et al.*, No. 98-6723 (S.D. Fla.)
- m. *Klein v. Sunbeam Corporation, et al.*, No. 98-8418 (S.D. Fla.)
- n. *Havsy v. Sunbeam Corporation, et al.*, No. 98-8475 (S.D. Fla.)
- o. *Cutler v. Sunbeam Corporation, et al.*, No. 98-8321 (S.D. Fla.)
- p. *Gottlieb v. Sunbeam Corporation, et al.*, No. 98-8401 (S.D. Fla.)
- q. *Kavlak v. Dunlap, et al.*, No. 98-8400 (S.D. Fla.)
- r. *U.S. National Bank of Galveston v. Sunbeam Corporation, et al.*, No. 99-8283 (S.D. Fla.)
- s. The cases cited above (a- r) were consolidated in: *In re Sunbeam Securities Litigation*, No. 98-CV-8258 (S.D. Fla.).
- t. *Securities and Exchange Commission v. Dunlap, et al.*, No. 01-CV-8437 (S.D. Fla);
- u. *Shallal v. Elson, et al.*, No. 98-8739 (S.D. Fla.)
- v. *Camden Asset Management, L.P. et al. v. Sunbeam Corporation, et al.*, Nos. 98-CV-8773 (S.D. Fla.)
- w. *Hamilton Partners v. Sunbeam Corporation, et al.*, No. 99-8275 (S.D. Fla.)

- x. *Krim v. Dunlap, et al.*, No. 983168-AD (15th Jud. Cir. Fla.)
- y. *Sunbeam Corp. v. PricewaterhouseCoopers LLP*, No. 00-5444-AN (15th Jud. Cir. Fla.);
- z. *Coleman (Parent) Holdings, Inc. v. Arthur Andersen LLP and Philip Harlow*, No. CA 01-6062-AN (15th Jud. Cir.);

273. The U.S. Attorney for the Southern District of New York led the U.S. Department of Justice investigation into Sunbeam's business practices.

RESPONSE: Admitted.

Dated: September 24, 2003

COLEMAN (PARENT) HOLDINGS INC.

By: 
One of Its Attorneys

Jerold S. Solovy
Deirdre E. Connell
Denise Kirkowski Bowler
JENNER & BLOCK, LLC
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

John Scarola
SEARCY DENNEY SCAROLA
BARNHART & SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33402-3626
(561) 686-6300

CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that a copy of the foregoing has been furnished by U.S. Mail and facsimile to the following counsel of record on this 24th day of September, 2003:

Joseph Ianno, Jr.
CARLTON FIELDS
222 Lake View Avenue, Suite 1400
West Palm Beach, FL 33401
Tel.: (561) 659-7070
Fax: (561) 659-7368

Thomas A. Clare
KIRKLAND & ELLIS
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Tel.: (202) 879-5000
Fax: (202) 879-5200


Deirdre E. Connell

FAX TRANSMITTAL

JENNER & BLOCK

Jenner & Block, LLC
One IBM Plaza
Chicago, IL 60611-7605
Tel 312 222-9350
www.jenner.com

Chicago
Dallas
Washington, DC

Date: September 24, 2003
To: Thomas A. Clare
Kirkland & Ellis
655 15th Street, N.W.
Suite 1200
Washington, D.C. 20005
From: Denise Kirkowski Bowler
Ph: (312) 840-8671
Fax: (312) 840-8771

Fax: (202) 879-5200
Voice: (202) 879-5000

Client Number: 41198-10003

Important: This message is intended only for the use of the individual or entity to which it is addressed, and may contain information that is attorney work product, privileged, confidential and exempt from disclosure under applicable law. If the reader of this message is not the intended recipient, or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone, and return the original message to us at the above address via postal service. Thank you.

Message:

Please see attached.

Total number of pages including this cover sheet: 91
If you do not receive all pages, please call: (312) 222-9350
Secretary: Marilyn Pearre

Time Sent:
Sent By: MP
Extension: 6388



THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
OF FLORIDA

CHAMBERS OF
ELIZABETH T. MAASS
CIRCUIT JUDGE

COUNTY COURTHOUSE
WEST PALM BEACH, FLORIDA 33401
561/355-6050

September 17, 2003

Jack Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

RE: Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co., Inc.
Case No.: CA 03-5045 AI

Dear Mr. Scarola:

I am in receipt of your letter dated September 22, 2003 and the proposed Agreed Order Permitting Foreign Attorneys to Appear for the action referenced above.

The copy of Plaintiff Coleman (Parent) Holdings Inc.'s Motion to Permit Foreign Attorney to Appear included seeks admission of Clark C. Johnson only. The Motion fails to address the items required by Rule 2.061 (b) (4) and (5), Fla. R. Jud. Admin. Further, the proposed Agreed Order admits Jerold S. Solovy, Ronald L. Marmar, Robert T. Markowski, Michael T. Brody, Jeffrey T. Shaw, Deirdre E. Connell, Elizabeth A. Coleman, Denise K. Bowler, John W. Joyce, Christopher M. O'Connor, Stephen P. Baker, and Daniel E. Shaw as co-counsel. I have not, then, signed the proposed Agreed Order, which, together with the copy of the Motion, is returned with this letter.

Very truly yours,

A handwritten signature in cursive script, appearing to read 'E. Maass', written over a horizontal line.

Elizabeth T Maass
Circuit Court Judge

copies to:

Joseph Ianno, Jr., Esq., 222 Lakeview Ave., Suite 1400, West Palm Beach, FL 33401
Thomas D. Yannucci, P.C., 655 15th Street, N.W., Suite 1200, Washington, DC 20005
Jerold S. Solovy, Esq., One IBM Plaza, Suite 4400, Chicago, IL 60611

16div-000717

**IN THE CIRCUIT COURT FOR THE
FIFTEENTH JUDICIAL CIRCUIT, IN
AND FOR PALM BEACH COUNTY,
FLORIDA**

**COLEMAN (PARENT) HOLDINGS,
INC.**

Plaintiff,

v.

MORGAN STANLEY & CO., INC.

CASE NO.: 2003 CA 005045 AI

Defendant.

**MOTION OF NON-PARTY TO APPEAR THROUGH
USE OF COMMUNICATION EQUIPMENT**

Non-Party, Bank of America, N.A., pursuant to Rule 2.071(c) of the Florida Judicial Administration Rules, hereby requests this Court that it be permitted to participate through communication equipment in the motion calendar hearing which has been scheduled by plaintiff for Monday, September 29, 2003 and as grounds therefor would show:

1. Bank of America, N.A. is a non-party in this action. Bank of America, N.A. has been served with certain subpoenas to produce documents.
2. Because the subpoenas seek disclosure of banking records protected by Fla. Stat. § 655.059(2)(b), Bank of America, N.A. has advised plaintiff that the documents Bank of America, N.A. has agreed to produce can only be produced upon the entry of an appropriate order pursuant to § 655.059(2)(b).

3. Plaintiff has filed a Motion to Compel, which Bank of America, N. A. has been advised seeks the entry of an order that production of the agreed-upon documents is appropriate under § 655.059(2)(b). Plaintiff, on Tuesday, September 23, 2003, scheduled a hearing on the Motion to Compel for Monday, September 29, 2003, at 8:45 a.m. on the Court's motion calendar. Bank of America, N.A. was not consulted about the hearing date.

4. The undersigned counsel for Bank of America, N.A. cannot be present in West Palm Beach on Monday, September 29, but does not wish to impede the ability of the parties to proceed forward with discovery. Accordingly, Bank of America, N.A. is prepared to proceed with the hearing and appear by telephone. Pursuant to Rule 2.071(c) of the Florida Judicial Administrative Rules, appearance by telephone is appropriate, absent a showing of good cause to deny the request, where the hearing is set for not longer than 15 minutes. The pending motion is set for the Court's motion calendar which is intended to deal with motions of less than 15 minutes.

WHEREFORE, Bank of America, N.A. requests that it be permitted to appear for the above-referenced hearing by telephone or that the hearing be rescheduled to a mutually convenient date.

McGuireWoods LLP

By: 

David M. Wells

Florida Bar No. 0309291

Michael Cavendish

Florida Bar No.: 0143774

50 N. Laura St., Suite 3300

Jacksonville, Florida 32202

(904) 798-2693

(904) 798-3207 (FAX)

Attorneys for non-party Bank of America, N.A.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was transmitted by facsimile on September 24th, 2003 to:

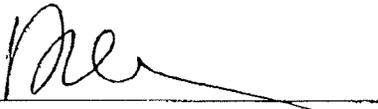
Jack Scarola, Esquire
Searcy Denney Scarola Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33402-3626

Jerold S. Solovy, Esquire
Jenner & Block, LLC
One IBM Plaza
Suite 4400
Chicago, IL 60611

Joseph Ianno, Esquire
Carlton Fields
222 Lake View Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannuci, Esquire
Kirkland and Ellis
655 15th Street, N.W.
Suite 1200
Washington, D.C. 20005

Mark F. Bideau, Esquire
Lorie K. Gleim
Greenberg Traurig, P.A.
777 South Flagler Drive
Suite 300 East
West Palm Beach, FL 33401



Attorney

IN THE CIRCUIT COURT FOR THE
FIFTEENTH JUDICIAL CIRCUIT, IN
AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS,
INC.

Plaintiff,

v.

MORGAN STANLEY & CO., INC.

CASE NO.: 2003 CA 005045 AI

Defendant.

**NON-PARTY BANK OF AMERICA, N.A.'S
RESPONSE TO MOTION TO COMPEL PRODUCTION**

Bank of America, N.A. ("Bank of America") a non-party to the above-styled action, responds to the Motion to Compel of Coleman (Parent) Holdings, Inc. ("CPH") and states:

1. CPH has filed a Motion to Compel Production ("Motion") directed to non-party Bank of America seeking a ruling from the Court that the production of documents agreed to between CPH and Bank of America may proceed notwithstanding the restrictions on the disclosure of banking records imposed by Fla. Stat. § 655.059(2)(b). As set forth below, Bank of America has no objection to the entry of the order CPH requests so long as the depositor/borrower in question Sunbeam Corporation n/k/a American Household, Inc. is given valid and appropriate notice of the Motion and a reasonable opportunity to respond.

2. The instant subpoena was served upon Bank of America on July 3, 2003 and required the production of documents by July 31, 2003. See Exhibit A.

3. On July 29, 2003, Bank of America, through counsel, responded in writing and requested an extension of the compliance date so that a reasonable document search could be done, *and expressly cautioned that many of the documents requested appeared to fall under the protections of Fla. Stat. § 655.059(2)(b)*. See Exhibit B.

4. Counsel for CPH and Bank of America then conferred and agreed that the compliance date would be extended to August 15, 2003 to allow Bank of America to look for documents and issue a written response to the subpoena, identifying the documents it expected to produce and proposing a time and manner of production. See Exhibit C.

5. The same day, CPH issued a nearly identical replacement subpoena, requiring the deposition of a Bank of America corporate representative in West Palm Beach on August 15, 2003. See Exhibit D.

6. Counsel for Bank of America did not learn of the service of the replacement subpoena until August 12, 2003, since, like the original, it was purportedly served directly upon unknown personnel at a retail bank branch in West Palm Beach. Upon receipt, counsel for Bank of America wrote to counsel for CPH and objected to the deposition aspect of the replacement subpoena since counsel and Bank of America had not been consulted in advance as to scheduling. See Exhibit E.

7. Counsel for CPH and Bank of America conferred, and on August 13, 2003 counsel for CPH indicated that no deposition was necessary, and counsel then exchanged letters confirming their previous agreement that Bank of America would by August 15,

2003 produce a list of documents it would produce and otherwise respond to the subpoena. See composite Exhibit F.

8. On August 15, 2003 Bank of America served its written response and objections to the subpoena identifying a number of documents to be produced, and, importantly, *asserting objections to significant number of the individual subpoena requests*. See composite Exhibit G. In the response and objection letter, Bank of America indicated that it would produce, without objection, the following documents responding to the subpoena:

- The March 30, 1998 Credit Agreement
- Agreements and closing documents ancillary thereto
- Amendments to and waivers of the March 30, 1998 Credit Agreement
- Circulated drafts of the March 30, 1998 Credit Agreement
- Documents pertaining to analyses or evaluations of the Sunbeam-Coleman transaction
- Borrowing requests issued by Sunbeam pertaining to the March 30, 1998 Credit Agreement
- Brokerage reports and other documents valuing Sunbeam and Sunbeam stock
- News articles and wire stories discussing changes in the price of Sunbeam stock and related issues
- Documents pertaining to meetings among Sunbeam, Bank of America, First Union, and Morgan Stanley
- Pledge agreements and other documents regarding the collateral pledged under the March 30, 1998 Credit Agreement
- The Morgan Stanley Offering Statement pertaining to the subordinated debentures
- Documents pertaining to Sunbeam's Q1 1998 financials
- 1998 Sunbeam press releases

However, production could not yet issue since the majority of these documents are protected by Fla. Stat. § 655.059(2)(b) as confidential banking and borrowing records.

9. In an attempt to resolve the obstacle to production imposed by Fla. Stat. § 655.059(2)(B), counsel for CPH on August 19, 2003 wrote to counsel for Bank of America indicating that a confidentiality order had been entered in this action between the parties. See Exhibit H.

10. By return letter dated August 20, 2003, counsel for Bank of America inquired as to whether the confidentiality order addressed the restriction imposed by Fla. Stat. § 655.059(2)(b). See Exhibit I. Upon receipt of a copy of the confidentiality order, it was apparent that it did not encompass the restrictions imposed by Fla. Stat. § 655.059(2)(b). Accordingly, counsel for Bank of America wrote to counsel for CPH on September 12, 2003 and indicated that, to satisfy the statute, either the protected party—Sunbeam—would need to consent to the request for documents or a Court order requiring disclosure and vitiating the protections of the statute would need to issue before Bank of America could proceed to turn over the documents it agreed to produce on August 15, 2003. See Exhibit J.

11. Thereafter, CPH filed its Motion to Compel Production on September 19, 2003, which, notably, *does not state any basis for compelling the production of the documents* protected by Fla. Stat. § 655.059(2)(b), but which presumably seeks an order from the Court vitiating the protections of the statute.

12. Insofar as CPH seeks an order removing the protections of Fla. Stat. § 655.059(2)(b) for those documents Bank of America has agreed to produce, Bank of America has no objection to the relief CPH seeks in its Motion, but questions whether the protected party—Sunbeam Corporation n/k/a American Household, Inc.—has been given reasonable notice¹ of the basis of the Motion. However, it is Bank of America's understanding the CPH's Motion is not directed toward those documents for which Bank

¹ The Motion was served upon two individuals at the Greenberg Traurig law firm whom CPH identifies as counsel for Sunbeam, but again, the Motion is not reasoned and does not offer any basis for the relief requested, preventing Sunbeam from having notice of the grounds or the necessity for the removal of the statutory protection. Moreover, as far as Bank of America can tell, the September 29, 2003 hearing on the Motion was set by CPH unilaterally on short notice and over the objection of Bank of America and possibly others. See Exhibit K.

of America asserted a timely, valid objection in its August 15, 2003 letter, and for which a more extensive evidentiary hearing and briefing would be required, given the undue burden analysis the objections implicate.

WHEREFORE, non-party Bank of America, N.A. respectfully requests that this Court enter an Order ruling on whether the protections of Fla. Stat. § 655.059(2)(b) prevent the discovery by CPH of the above-described documents in the custody of Bank of America, and for such other relief as is just and proper.

McGuireWoods LLP

By: 

David M. Wells
Florida Bar No. 0309291
Michael Cavendish
Florida Bar No.: 0143774
50 N. Laura St., Suite 3300
Jacksonville, Florida 32202
(904) 798-2606
(904) 798-3267 (FAX)

Attorneys for non-party Bank of America, N.A.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was transmitted by Federal Express on September 24, 2003 to:

Jack Scarola
Searcy Denney Scarola Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33402-3626

Jerold S. Solovy
Jenner & Block, LLC
One IBM Plaza
Suite 4400
Chicago, IL 60611

Joseph Ianno
Carlton Fields
222 Lake View Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannuci
Kirkland and Ellis
655 15th Street, N.W.
Suite 1200
Washington, D.C. 20005

Mark F. Bideau
Lorie K. Gleim
Greenberg Traurig, P.A.
777 South Flagler Drive
Suite 300 East
West Palm Beach, FL 33401

Attorney

223938

A

JUL 23 2003 10:41 FR B0A T LIT
JUL 19 2003 12:42 FR
20'3082 9082 992 056

704 386 1768 T 19047983267 P.24
704 388 0021 TO 3 760 P.03/23
JUL 14 2003 15:17

#230580/mm

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 2003 CA 005045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiffs,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.

RECEIVED

JUL 08 2003

FL-BGS
LEGAL SUPPORT

SUBPOENA DUCES TECUM WITHOUT DEPOSITION

THE STATE OF FLORIDA

TO: Custodian of Records
Bank of America National Trust and Savings Association
625 N. Flagler Drive
West Palm Beach, FL 33401

7-303 102 pa
[Handwritten signature]

YOU ARE COMMANDED to appear at Searcy Deaney Scarola Barnhart & Shipley,
P.A., 2139 Palm Beach Lakes Boulevard, West Palm Beach, FL, 33409 on:

SEE ATTACHMENT A

and to have with you at that time and place the following:

Duces Tecum: SEE ATTACHMENT A

These items will be inspected and may be copied at that time. You will not be required to
surrender the original items. You may comply with this subpoena by providing legible copies of

JUL 14 2003 15:17 704 388 0021 TO 3 760 P.03/23 954 766 7406 TO 91704368021 P.02/22

Coleman Holdings, Inc. vs Morgan Stanley & Company
2003 CA 005045 AJ
SDT Without Deposition

the items to be produced to the attorney whose name appears on this subpoena on or before the scheduled date of production. You may condition the preparation of the copies upon the payment in advance of the reasonable cost of preparation. You may mail or deliver the copies to the attorney whose name appears on this subpoena and thereby eliminate your appearance at the time and place specified above. You have the right to object to the production pursuant to this subpoena at any time before production by giving written notice to the attorney whose name appears on this subpoena. **THIS WILL NOT BE A DEPOSITION. NO TESTIMONY WILL BE TAKEN.**

If you fail to:

- 1) Appear as specified; or
- 2) Furnish the records instead of appearing as provided above; or
- 3) Object to this subpoena,

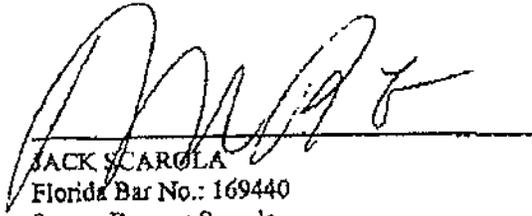
You may be in contempt of court. You are subpoenaed to appear by the following attorney, and unless excused from this subpoena by this attorney or the court, you shall respond to this subpoena as directed.

JUL 23 2003 10:41 FR BORG T LIT
JUL 15 2003 12:42 FR BORG
PAGE 08 954 755 7405

704 386 1760 T 19047903267 P.26
704 388 8021 TO 307760 P.05/23
JUL 14 2003 16:18

Coleman Holdings, Inc. vs Morgan Stanley & Company
2003 CA 005045 AI
SDI Without Deposition

DATED this 15th day of July, 2003.



JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 478-0754
Attorneys for Plaintiffs

554 755 7405 TO 91704388021 P.04/22

JUL 14 2003 16:18

Coleman Holdings, Inc. vs Morgan Stanley & Company
2003 CA 005045 AI
SDT Without Deposition

did or

did not, take an oath,

and who executed the foregoing certification, and who acknowledged the foregoing certification
to be freely and voluntarily executed for the purposes therein recited.

Notary Public, State of Florida at Large

My Commission Expires:

Coleman Holdings, Inc. vs Morgan Stanley & Company
2003 CA 005045 AJ
SDT Without Deposition

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block, LLC
One IBM Plaza
Suite 4400
Chicago, IL 60611

ATTACHMENT A

SUBPOENA TO CUSTODIAN OF RECORDS OF
BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION

You are hereby requested to produce the following documents pursuant to the definitions and instructions contained herein:

DOCUMENTS REQUESTED

1. All documents concerning synergies that might be achieved from a business combination of Sunbeam, Coleman, Signature Brands, and First Alert, or any combination thereof.
2. All documents concerning the potential or actual integration of Coleman, First Alert, and/or Signature Brands with Sunbeam, including, but not limited to, studies, reports, analyses, evaluations, projections, estimates, comments, or other work, performed by Coopers & Lybrand, Morgan Stanley, MSSF, Bank of America, or First Union.
3. All documents concerning any evaluation or assessment of the Bank Facilities, either prior to or after March 31, 1998, by you or any of the Lenders, including, but not limited to, any credit review or portfolio review, credit review sheets, call reports, contact reports, credit approval forms, portfolio forms, credit risk reviews, and covenant compliance reports.
4. All communications by and among the Lenders concerning the Credit Agreement, the Bank Facilities, Sunbeam, Coleman, or the Coleman Transaction.
5. All documents concerning the Lenders' plans or efforts to syndicate or sell off any portion of the Lenders' Commitments, as reflected in Schedule 2.01 of the Credit Agreement, including, but not limited to, information packages provided to potential lenders, lists or designations of potential lenders, communications with potential lenders, expressions of

interest and/or commitment made by any potential lender, and/or presentations or handouts used at lender group meetings.

6. All documents concerning Sunbeam's intention to draw down any portion of the Credit Agreement, specifically including, but not limited to, any and all written Borrowing Requests.

7. All documents concerning whether or not you or any of the Lenders considered exercising their right to terminate service under the Credit Agreement following any material adverse change in the financial status of Sunbeam.

8. All documents concerning any offer to buy Reorganized Sunbeam, or the sale, or possible sale of Reorganized Sunbeam or any subsidiary or material group of assets thereof.

9. All documents concerning your efforts to have Sunbeam retain or maintain your lending services both prior to and after the closing of the Bank Facilities.

10. All documents reflecting all fees and expenses paid by Sunbeam to you including, but not limited to, any Documentation Agent (as defined in the Credit Agreement) fee and any other fee related to the Credit Agreement.

11. All documents concerning the Bank Facilities, including, but not limited to, the sources and uses of the Bank Facilities, the decision to close the Bank Facilities, and the closing of the Bank Facilities.

12. All documents concerning any investigation, analysis, or due diligence of Sunbeam conducted by you or on your behalf or by Morgan Stanley in 1997 or 1998.

13. All documents concerning any investigation, analysis, or due diligence of Coleman or CPH conducted by you or on your behalf or by Morgan Stanley in 1997 or 1998.

14. All documents concerning the negotiation and signing of the February 27, 1998 Agreements.
15. All documents concerning the closing of the Coleman Transaction, including, without limitation, all documents concerning the decision to close the Coleman Transaction.
16. All documents concerning the meetings of Sunbeam's Board of Directors.
17. All documents concerning any valuation of Sunbeam or Sunbeam securities.
18. All documents concerning the stock market's valuation of Sunbeam securities, including, without limitation, documents describing or analyzing the increase or decline in the market price of Sunbeam stock in any portion of the period from and including July 1, 1996 through and including December 31, 1998.
19. All documents concerning your role as Documentation Agent for the Credit Agreement or Bank Facilities.
20. All documents concerning your April 28, 1998 meeting with Sunbeam, First Union, MSSF and/or Morgan Stanley, including, but not limited to, all notes taken of or during the meeting and documents memorializing, describing, or referring to the meeting.
21. All documents concerning any amendment to the Credit Agreement, including, but not limited to, the April 1998, June 1998, and July 1998 amendments. Your response should include, but is not limited to, all documents concerning the reasons for the amendments.
22. All documents concerning your meetings with Sunbeam, First Union, MSSF and/or Morgan Stanley at which the topics of Sunbeam or the Bank Facilities were

discussed including, but not limited to, all notes taken of or during the meeting and documents concerning the meeting. Your response should include documents from the period after the Bank Facilities closed on March 31, 1998.

23. All documents concerning the lien placed by you and/or MSSF and First Union on Coleman stock owned by Sunbeam, including, but not limited to, documents concerning the reason or decision to seek the lien.

24. All documents concerning the collateral for the Bank Facilities, including, but not limited to, all documents evaluating or assessing the value of that collateral.

25. All documents concerning the settlement agreement between CPH and Sunbeam dated August 12, 1998.

26. All documents concerning any write-off or loss reserve you have taken against the Bank Facilities.

27. All documents concerning your rating of the Bank Facilities and any change made to that rating.

28. All documents concerning any distribution you received as part of Sunbeam's bankruptcy reorganization plan, including, but not limited to, the value of the Sunbeam stock you received, and all documents evaluating or assessing the value of that distribution.

29. All documents concerning Sunbeam's decision to file for bankruptcy.

30. All documents concerning Sunbeam's plan of reorganization.

31. All documents concerning any settlement or compromise reached with the Official Committee of Unsecured Creditors of Sunbeam Corporation.

32. All documents concerning any valuation of Coleman or Coleman securities.
33. All documents concerning Sunbeam's or Coleman's financial statements and/or Sunbeam's restated financial statements.
34. All documents concerning the increase in the size of the Subordinated Debenture Offering from \$500 million to \$750 million.
35. All documents concerning the decrease in the amount of the Bank Facilities from \$2.0 billion to \$1.7 billion.
36. All documents concerning any draft or executed "comfort letters" prepared in connection with the Subordinated Debenture Offering.
37. All documents concerning the sale of Subordinated Debentures, including, without limitation, documents concerning road shows, communications with potential investors, or communications with or among Morgan Stanley's sales personnel.
38. All documents concerning the Subordinated Debenture Offering, including, but not limited to the pricing, conversion features, and/or "book of demand" for the Subordinated Debentures.
39. All documents concerning the events that took place on March 19, 1998 at Global Financial Press, including, without limitation, documents concerning Lawrence Bornstein and/or John Tyree.
40. All documents concerning the "bring-down" due diligence for the Subordinated Debenture Offering.
41. All documents concerning Sunbeam's first quarter 1998 sales and/or earnings.

without limitation, any reports, communications, filings, testimony, legal memoranda, statements, or other documents submitted to the Securities & Exchange Commission or any other party). Your response should include:

- a. All discovery requests, subpoenas duces tecum, interrogatories, or requests for admissions served on you in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings;
 - b. All responses and/or objections that you provided or produced in response to any discovery request, subpoena duces tecum, interrogatories, or requests for admission served on you in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings; and
 - c. All privilege logs you prepared in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings with respect to documents that you withheld from production in response to any document requests, subpoenas duces tecum, or other request for information and/or documents.
53. All communications concerning any discovery request, subpoena duces tecum, interrogatories, or requests for admission served on you in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.
54. All documents you have provided to or received from the SEC, the Attorney General of New York, or any other governmental or regulatory body concerning Sunbeam or the Coleman Transaction.

55. All motions, memoranda, briefs, rulings, orders, or transcripts of any proceeding concerning any discovery request, subpoena, or other request for information and/or documents in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

56. All transcripts of and exhibits to any depositions, recorded statements, affidavits or hearings held in connection with any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

57. All documents obtained by you or produced to you by other parties, third parties, or non-parties (whether voluntarily or in response to any document requests, subpoenas duces tecum, or other process served by you or any other party) concerning Sunbeam or the Coleman Transaction.

58. All affidavits, declarations, or other testimonial statements filed or submitted in connection with any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

DEFINITIONS

1. "Arbitrations" means Albert I. Dunlap and Sunbeam Corporation, No. 32 160 00088 99 (AAA); and Russell A. Kersh and Sunbeam Corporation, No. 32 160 00091 99 (AAA).

2. "Bank Facility" means the Credit Agreement, including amendments, and all funds extended by MSSF, First Union, and/or Bank of America to Sunbeam pursuant to the Credit Agreement, including, but not limited to, Tranche A, Tranche B, and the Revolving Credit Facility.

3. "Bank of America" means Bank of America National Trust and Savings Association and any of its subsidiaries, divisions, affiliates, predecessors, successors, joint

ventures, present and former officers, directors, employees, representatives, and agents, and all other persons acting or purporting to act on its behalf.

4. "Borrowing Request" means any request by Sunbeam for a Borrowing in accordance with Section 2.03 of the Credit Agreement.

5. "Coleman" means The Coleman Company, Inc. and any of its predecessors, successors, subsidiaries, and present and former officers, directors, and employees.

6. "CPH" means Coleman (Parent) Holdings Inc., Coleman Worldwide Corporation, CLN Holdings Inc., and any of their predecessors, successors, subsidiaries, and present and former officers, directors, and employees.

7. "Coleman Transaction" means the transaction contemplated by the February 27, 1998 Agreements.

8. "Communication" means the transmittal of information (in the form of facts, ideas, inquiries or otherwise) by letter, memorandum, facsimile, orally, electronically or otherwise.

9. "Concerning" means concerning, reflecting, relating to, referring to, describing, evidencing, or constituting.

10. "Coopers & Lybrand" means the former Coopers & Lybrand LLP (now known as PricewaterhouseCoopers LLP), and any of its predecessors, successors, affiliates, subsidiaries, and present and former partners, employees, representatives, and agents.

11. "Credit Agreement" means that agreement entered into by Sunbeam Corporation, as borrower, with MSSF, First Union, and Bank of America, as Lenders, dated March 30, 1998 and all amendments thereto.

12. "Documents" shall be given the broad meaning provided in Rule 1.350 of the Florida Rules of Civil Procedure and refers to any form or means, whether physical, visual, or electronic, in or by which words, numbers, or ideas are recorded or preserved, whether fixed in tangible medium or electronically stored; including any and all drafts of any final document. The word "documents" shall include, by way of example and not by way of limitation, all of the following: papers, correspondence, trade letters, envelopes, memoranda, telegrams, cables, notes, messages, reports, studies, press releases, comparisons, books, accounts, checks, audio and video recordings and transcriptions thereof, pleadings, testimony, articles, bulletins, pamphlets, brochures, magazines, questionnaires, surveys, charts, newspapers, calendars, desk calendars, pocket calendars, lists, logs, publications, notices, diagrams, instructions, diaries, minutes for meetings, corporate minutes, orders, resolutions, agendas, memorials or notes of oral communications, whether by telephone or face-to-face, contracts, agreements, drafts of or proposed contracts or agreements, memoranda of understanding, letters of intent, computer tapes, computer drives or memories, computer diskettes or disks, e-mail, CD-ROMs, or any other tangible thing on which any handwriting, typing, printing, photostatic, electronic, or other form of communication or information is recorded or reproduced, together with all notations on any of the foregoing, all originals, file copies, or other unique copies of the foregoing, and all versions or drafts thereof, whether used or not.

13. "February 27, 1998 Agreements" means (a) the Agreement and Plan of Merger dated as of February 27, 1998 among Sunbeam Corp., Laser Acquisition Corp., CLN Holdings Inc. and Coleman (Parent) Holdings Inc. and (b) the Agreement and Plan of Merger dated as of February 27, 1998 among Sunbeam Corp., Camper Acquisition Corp., and The Coleman Company, Inc.

14. "Financial Statements" means, without limitation, balance sheets, statements of income, earnings, retained earnings, sources and applications of funds, cash flow projections, notes to each such statements, or any other notes which pertain to the past or present financial condition of Sunbeam, whether any of the foregoing is audited or unaudited, whether final, interim or pro forma, complete or partial, consolidated, yearly, monthly, or otherwise.

15. "First Alert" means First Alert, Inc., and any of its predecessors, successors, affiliates, subsidiaries, and present and former officers, directors, employees, representatives, and agents.

16. "First Union" means First Union National Bank (now known as Wachovia Bank, National Association) and any of its predecessors, successors, affiliates, subsidiaries, and present and former officers, directors, employees, representatives, and agents.

17. "Lenders" means the entities listed on Schedule 2.01 of the Credit Agreement under the heading "Lenders" and any other Person that shall have become a party to the Credit Agreement as a Lender pursuant to an assignment and acceptance.

18. "Litigations" means In Re Sunbeam Securities Litigation, 98-8258-Civ.-Middlebrooks (S.D. Fla.); Camden Asset Management L.P., et al. v. Sunbeam Corporation, et al., 98-8773-Civ.-Middlebrooks and 98-8275-Civ.-Middlebrooks (S.D. Fla.); Krim v. Dunlap, et al., No. CL983168AD (15th Jud. Cir., Fla.); Stapleton v. Sunbeam Corp., et al., No. 98-1676-Civ.-King (S.D. Fla.); Sunbeam Corp. v. PricewaterhouseCoopers LLP, No. CL005444AN (15th Jud. Cir., Fla.); In re Sunbeam Corp., No. 01-40291 (AIG) (Bankr. S.D.N.Y.) and every adversary proceeding therein; SEC v. Dunlap, et al., No. 01-8437-Civ.-Middlebrooks (S.D. Fla.); Oaktree Capital Management LLC v. Arthur Andersen LLP, No. BC257177 (L.A. Cty., CA); and

Coleman (Parent) Holdings Inc. v. Arthur Andersen LLP, et al., No. CA 01-06062AN (15th Jud. Cir., Fla).

19. "Mafoo" means MacAndrews & Forbes Holdings Inc. and any of its predecessors, successors, subsidiaries, and present and former officers, directors, and employees.

20. "Morgan Stanley" means Morgan Stanley & Co., Inc. and any of its predecessors, successors, affiliates, subsidiaries, and present and former officers, directors, partners, employees, representatives, and agents.

21. "MSSF" means Morgan Stanley Senior Funding, Inc. and any of its predecessors, successors, affiliates, subsidiaries, and present and former officers, directors, partners, employees, representatives, and agents.

22. "Person" means any natural person, corporation, limited liability company, trust, joint venture, association, company, partnership, governmental authority, or other entity.

23. "Reorganized Sunbeam" means Sunbeam Corporation on and after the effective date of Sunbeam's chapter 11 plan of reorganization as filed with the United States Bankruptcy Court in the Southern District of New York.

24. "SEC Administrative Proceedings" means In the Matter of Sunbeam Corp., SEC Administrative Proceeding File No. 3-10481, and In the Matter of David C. Fanning, SEC Administrative Proceeding File No. 3-10482.

25. "SEC" means the Securities and Exchange Commission.

26. "Signature Brands" means Signature Brands USA, Inc. and any of its predecessors, successors, affiliates, subsidiaries, and present and former officers, directors, employees, representatives, and agents.

27. "Subordinated Debentures" means Sunbeam's Zero Coupon Convertible Senior Subordinated Debentures Due 2018.

28. "Subordinated Debenture Offering" means the offering of Sunbeam's Subordinated Debentures.

29. "Sunbeam" means Sunbeam Corporation and any of its predecessors, successors, affiliates, subsidiaries, and present and former officers, directors, employees, representatives, and agents.

30. "You" or "Your" means Bank of America and any of its subsidiaries, divisions, predecessors, successors, present or former employees, representatives, agents, attorneys, accountants, advisors, or anyone acting or purporting to act on its behalf.

INSTRUCTIONS

1. Documents shall be produced as they are kept in the usual course of business, or organized and labeled to correspond to the categories in this Request. Documents attached to each other should not be separated. Documents consisting of items previously produced in the Litigations, Arbitrations, and/or SEC Administrative Proceedings with Bates numbering shall be produced in Bates number order.

2. All documents shall be produced in the file folder, envelope or other container in which the documents are kept or maintained by you. If, for any reason, the container cannot be produced, produce copies of all labels or other identifying marks.

3. The relevant period, unless otherwise indicated, shall be from January 1, 1996 through the date of trial of this matter, and shall include all documents and information which relate in whole or in part to such period, or to events or circumstances during such period.

even though dated, prepared, generated or received prior or subsequent to that period. Please supplement or correct your responses to these requests if, at any time, you become aware that your responses are incomplete or incorrect in any respect.

4. If you claim the attorney-client privilege, or any other privilege or work-product protection for all or any portion of a document, you shall provide a privilege log that describes the withheld material sufficiently to allow CPH and Mafco to test the privilege or protection asserted.

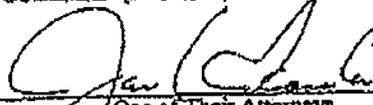
5. The following rules of construction apply:

a. The connectives "and" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery requests all responses that might otherwise be outside of their scope;

b. The term "including" shall be construed to mean "without limitation"; and

c. The use of the singular form of any word includes the plural and vice versa.

MACANDREWS & FORBES HOLDINGS INC.
and COLEMAN (PARENT) HOLDINGS INC.

By: 
One of Their Attorneys

Jack Scarola
SEAROY DENNEY SCAROLA BARNHART
& SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33402-3626
(561) 686-6300

Jerold S. Solovy
Ronald L. Marmor
Robert T. Markowski
Deirdre E. Connell
JENNER & BLOCK, LLC
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

July
Dated: June 1, 2003

B

McGuireWoods LLP
Bank of America Tower
50 North Laura Street
Suite 3300
Jacksonville, FL 32202-3661
Phone: 904.798.3200
Fax: 904.798.3207
www.mcguirewoods.com

David M. Wells
Direct 904.798.2693

McGUIREWOODS

dwells@mcguirewoods.com
Direct Fax: 904.798.3207

July 29, 2003

684-5816
Via Facsimile (561) 478-0754 and U.S. Mail

Jack Scarola, Esq.
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33402-3626

Re: Subpoenas issued by Coleman (Parent) Holdings, Inc. to Bank of America
National Trust and Savings Association

Dear Mr. Scarola:

I represent Bank of America, N.A. On July 3, 2003, you served a Palm Beach, Florida office of Bank of America, N.A. with a July 1, 2003 Subpoena Duces Tecum Without Deposition directed to Bank of America National Trust and Savings Association. While I have some concerns about this subpoena, which I will share with you, I hope that we can work together in a cooperative fashion to meet your client's need for documents while protecting Bank of America, N.A.'s interests and non-party rights.

At the outset, it appears that the subpoena was not served according to the requirements of Section 48.081, Florida Statutes, in that no attempt was made to serve any officer of Bank of America, N.A. prior to the July 3rd service on the Bank of America office in Palm Beach. This resulted in an unusual delay in processing the subpoena and getting it before lawyers' eyes.

As a matter of pure logistics, the subpoena as written is onerous. There are 58 separate categories of requested documents, and the subpoena requires production in West Palm Beach twenty-seven days after service. There will be significant costs involved in responding.

I also have concerns about the substance of many of the requests in the subpoenas. They appear to ask for documents relating to Sunbeam's banking and loan records, which records are expressly confidential and not subject to production via subpoena under Florida Statute § 655.059.

Many of the requests are extremely broad, seeking "all" documents over a 7 year span relating to entire corporations and what may be lengthy business relationships. I have not yet had the opportunity to review the claims and defenses in your lawsuit, to determine whether the dispute between your client and Morgan Stanley makes material the entire scope of the documents you have requested.

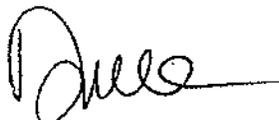
16div-000750

July 29, 2003
Page 2

To preserve these and other objections to the subpoena, I must take action on or before the day of compliance, which is Thursday, July 31st. I would prefer to avoid moving to quash at this time because I think that the most efficient, most reasonable course of action for both of our clients is to cooperate and agree on a document search and production that is fair to Bank of America, N.A. and necessary to the maintenance of your client's case. To that end, I suggest that you agree to a thirty (30) day extension of the response date to your July 1st subpoena in case number 005045, and the identical subpoena you executed on July 8th in the sister litigation between CPH and Morgan Stanley in case number 005565. During that time I will work with you to try to reach agreement on what will be produced, when and under what terms. If we are unable to reach complete agreement, we can then turn to the Court with each of our rights preserved.

I will call you shortly to discuss my proposal. Thank you.

Very truly yours,



David M. Wells

DMW/mm

cc: Michael Cavendish

214321

16div-000751

C

McGuireWoods LLP
Bank of America Tower
50 North Laura Street
Suite 3300
Jacksonville, FL 32202-3661
Phone: 904.798.3200
Fax: 904.798.3207
www.mcguirewoods.com

David M. Wells
Direct: 904.798.2693

McGUIREWOODS

dwells@mcguirewoods.com
Direct fax: 904.798.3207

July 30, 2003

Via Facsimile (561) 478-0754 and U.S. Mail

Jack Scarola, Esq.
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33402-3626

Re: Subpoenas issued by Coleman (Parent) Holdings, Inc. to Bank of America
National Trust and Savings Association

Dear Mr. Scarola:

This will confirm that you have agreed to extend by fifteen days, or until August 15, 2003, the deadline for Bank of America, N.A. to provide a written response and/or motion identifying any objections to the two subpoenas you served on Bank of America, N.A. and identifying any documents that will be produced and when. As we discussed, I will get back with you next week to discuss the issues these subpoenas raise.

Very truly yours,



David M. Wells

DMW/mm

214321

16div-000753

August 12, 2003
Page 2

DMW/mm

cc: Michael Cavendish

216881

16div-000754

D

7/29/03

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 2003 CA 005045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,

Defendant(s).

RECEIVED

AUG 06 2003

FL-BGS
LEGAL SUPPORT

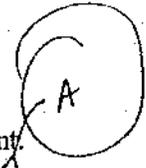
NOTICE OF DEPOSITION

TO: Counsel on the attached list

PLEASE TAKE NOTICE that Plaintiff Coleman (Parent) Holdings, Inc., hereby notices the deposition upon oral examination of the Custodian of Records, Bank of America National Trust and Savings Association pursuant to Florida Rule of Civil Procedure 1.410 on the date and at the time set forth below:

Custodian of Records
Bank of America National Trust
and Savings Association

August 15, 2003 at 9:30 a.m.

The witness will be requested to bring to the deposition documents specified on Attachment 

The deposition will be recorded by stenographic means at the offices of Searcy Denney Scarola Barnhart & Shipley, P.C., 2139 Palm Beach Lakes Blvd., West Palm Beach, Florida.

The deposition will be taken before a person authorized to administer oaths and will continue until completed.

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 2003 CA 005045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,

Defendant(s).

NOTICE OF DEPOSITION

8/10/03 1:30pm
[Handwritten signature]

TO: Counsel on the attached list

PLEASE TAKE NOTICE that Plaintiff Coleman (Parent) Holdings, Inc., hereby notices the deposition upon oral examination of the Custodian of Records, Bank of America National Trust and Savings Association pursuant to Florida Rule of Civil Procedure 1.410 on the date and at the time set forth below:

Custodian of Records
Bank of America National Trust
and Savings Association

August 15, 2003 at 9:30 a.m.

The witness will be requested to bring to the deposition documents specified on Attachment A.

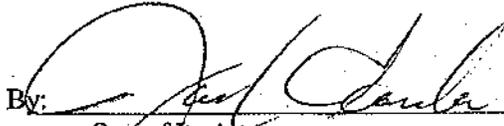
The deposition will be recorded by stenographic means at the offices of Searcy Denney Scarola Barnhart & Shipley, P.C., 2139 Palm Beach Lakes Blvd., West Palm Beach, Florida.

The deposition will be taken before a person authorized to administer oaths and will continue until completed.

MSSFI V. MACANDREWS, ET AL.
2003 CA 005045 AI

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by
telefax and by overnight mail to all counsel on the attached Service List, this 29th day of
July, 2003.

COLEMAN (PARENT) HOLDINGS, INC.

By: 

One of its Attorneys

Jerold S. Solovy
Ronald L. Marmer
Robert T. Markowski
Deirdre E. Connell
JENNER & BLOCK, LLC
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

Jack Scarola
SEARCY DENNEY SCAROLA
BARNHART & SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409
(561) 686-6300

MSSF I V. MACANDREWS, ET AL.
2003 CA 005045 AI

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block, LLC
One IBM Plaza
Suite 4400
Chicago, IL 60611

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 2003 CA 005045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,

Defendant(s).

SUBPOENA DUCES TECUM

THE STATE OF FLORIDA

TO: Custodian of Records
Bank of America National Trust and
Savings Association
625 N. Flagler Drive
West Palm Beach, FL 33401

YOU ARE COMMANDED to appear for deposition at Searcy Denney Scarola Barnhart
& Shipley, P.A., 2139 Palm Beach Lakes Boulevard, West Palm Beach, FL, 33409 on the 15th
day of August, 2003 at 9:30 a.m. and to have with you at that time and place the documents
specified on Attachment A.

If you fail to:

- 1) Appear as specified; or
- 2) Furnish the records instead of appearing as provided above; or

MSSFI V. MACANDREWS, ET AL.
2003 CA 005045 AI

3) Object to this subpoena,

You may be in contempt of court. You are subpoenaed to appear by the following attorney, and unless excused from this subpoena by this attorney or the court, you shall respond to this subpoena as directed.

DATED this 29th day of July, 2003.



JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 478-0754
Attorneys for Plaintiff

MSSFI V. MACANDREWS, ET AL.
2003 CA 005045 AI

CERTIFICATION OF RESPONSE TO
SUBPOENA DUCES TECUM

STATE OF FLORIDA
COUNTY OF _____

The undersigned, as custodian of records for Bank of America National Trust and Savings Association, certifies that the attached documents consisting of _____ pages represents a true copy of all items within my possession, custody or control which are described in the Subpoena Duces Tecum served on me in the above styled action and each page is numbered by me for identification. Production is complete and has been numbered by the custodian of records.

It is further certified that originals of the items produced are maintained under the direction, custody and control of the undersigned.

The foregoing Certification was acknowledged before me, an officer duly authorized in the State and County aforesaid to take acknowledgments, this _____ day of _____, 20____, who:

- is personally known to me; or
- has produced _____ as identification; and who:
- did or
- did not, take an oath,

MSSF I V. MACANDREWS, ET AL.
2003 CA 005045 AJ

and who executed the foregoing certification, and who acknowledged the foregoing certification
to be freely and voluntarily executed for the purposes therein recited.

Notary Public, State of Florida at Large

My Commission Expires:

ATTACHMENT A

**SUBPOENA TO CUSTODIAN OF RECORDS OF
BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION**

You are hereby requested to produce the following documents pursuant to the definitions and instructions contained herein:

DOCUMENTS REQUESTED

1. All documents concerning synergies that might be achieved from a business combination of Sunbeam, Coleman, Signature Brands, and First Alert, or any combination thereof.
2. All documents concerning the potential or actual integration of Coleman, First Alert, and/or Signature Brands with Sunbeam, including, but not limited to, studies, reports, analyses, evaluations, projections, estimates, comments, or other work, performed by Coopers & Lybrand, Morgan Stanley, MSSF, Bank of America, or First Union.
3. All documents concerning any evaluation or assessment of the Bank Facilities, either prior to or after March 31, 1998, by you or any of the Lenders, including, but not limited to, any credit review or portfolio review, credit review sheets, call reports, contact reports, credit approval forms, portfolio forms, credit risk reviews, and covenant compliance reports.
4. All communications by and among the Lenders concerning the Credit Agreement, the Bank Facilities, Sunbeam, Coleman, or the Coleman Transaction.
5. All documents concerning the Lenders' plans or efforts to syndicate or sell off any portion of the Lenders' Commitments, as reflected in Schedule 2.01 of the Credit Agreement, including, but not limited to, information packages provided to potential lenders, lists or designations of potential lenders, communications with potential lenders, expressions of

interest and/or commitment made by any potential lender, and/or presentations or handouts used at lender group meetings.

6. All documents concerning Sunbeam's intention to draw down any portion of the Credit Agreement, specifically including, but not limited to, any and all written Borrowing Requests.

7. All documents concerning whether or not you or any of the Lenders considered exercising their right to terminate service under the Credit Agreement following any material adverse change in the financial status of Sunbeam.

8. All documents concerning any offer to buy Reorganized Sunbeam, or the sale, or possible sale of Reorganized Sunbeam or any subsidiary or material group of assets thereof.

9. All documents concerning your efforts to have Sunbeam retain or maintain your lending services both prior to and after the closing of the Bank Facilities.

10. All documents reflecting all fees and expenses paid by Sunbeam to you including, but not limited to, any Documentation Agent (as defined in the Credit Agreement) fee and any other fee related to the Credit Agreement.

11. All documents concerning the Bank Facilities, including, but not limited to, the sources and uses of the Bank Facilities, the decision to close the Bank Facilities, and the closing of the Bank Facilities.

12. All documents concerning any investigation, analysis, or due diligence of Sunbeam conducted by you or on your behalf or by Morgan Stanley in 1997 or 1998.

13. All documents concerning any investigation, analysis, or due diligence of Coleman or CPH conducted by you or on your behalf or by Morgan Stanley in 1997 or 1998.

14. All documents concerning the negotiation and signing of the February 27, 1998 Agreements.

15. All documents concerning the closing of the Coleman Transaction, including, without limitation, all documents concerning the decision to close the Coleman Transaction.

16. All documents concerning the meetings of Sunbeam's Board of Directors.

17. All documents concerning any valuation of Sunbeam or Sunbeam securities.

18. All documents concerning the stock market's valuation of Sunbeam securities, including, without limitation, documents describing or analyzing the increase or decline in the market price of Sunbeam stock in any portion of the period from and including July 1, 1996 through and including December 31, 1998.

19. All documents concerning your role as Documentation Agent for the Credit Agreement or Bank Facilities.

20. All documents concerning your April 28, 1998 meeting with Sunbeam, First Union, MSSF and/or Morgan Stanley, including, but not limited to, all notes taken of or during the meeting and documents memorializing, describing, or referring to the meeting.

21. All documents concerning any amendment to the Credit Agreement, including, but not limited to, the April 1998, June 1998, and July 1998 amendments. Your response should include, but is not limited to, all documents concerning the reasons for the amendments.

22. All documents concerning your meetings with Sunbeam, First Union, MSSF and/or Morgan Stanley at which the topics of Sunbeam or the Bank Facilities were

discussed including, but not limited to, all notes taken of or during the meeting and documents concerning the meeting. Your response should include documents from the period after the Bank Facilities closed on March 31, 1998.

23. All documents concerning the lien placed by you and/or MSSF and First Union on Coleman stock owned by Sunbeam, including, but not limited to, documents concerning the reason or decision to seek the lien.

24. All documents concerning the collateral for the Bank Facilities, including, but not limited to, all documents evaluating or assessing the value of that collateral.

25. All documents concerning the settlement agreement between CPH and Sunbeam dated August 12, 1998.

26. All documents concerning any write-off or loss reserve you have taken against the Bank Facilities.

27. All documents concerning your rating of the Bank Facilities and any change made to that rating.

28. All documents concerning any distribution you received as part of Sunbeam's bankruptcy reorganization plan, including, but not limited to, the value of the Sunbeam stock you received, and all documents evaluating or assessing the value of that distribution.

29. All documents concerning Sunbeam's decision to file for bankruptcy.

30. All documents concerning Sunbeam's plan of reorganization.

31. All documents concerning any settlement or compromise reached with the Official Committee of Unsecured Creditors of Sunbeam Corporation.

32. All documents concerning any valuation of Coleman or Coleman securities.
33. All documents concerning Sunbeam's or Coleman's financial statements and/or Sunbeam's restated financial statements.
34. All documents concerning the increase in the size of the Subordinated Debenture Offering from \$500 million to \$750 million.
35. All documents concerning the decrease in the amount of the Bank Facilities from \$2.0 billion to \$1.7 billion.
36. All documents concerning any draft or executed "comfort letters" prepared in connection with the Subordinated Debenture Offering.
37. All documents concerning the sale of Subordinated Debentures, including, without limitation, documents concerning road shows, communications with potential investors, or communications with or among Morgan Stanley's sales personnel.
38. All documents concerning the Subordinated Debenture Offering, including, but not limited to the pricing, conversion features, and/or "book of demand" for the Subordinated Debentures.
39. All documents concerning the events that took place on March 19, 1998 at Global Financial Press, including, without limitation, documents concerning Lawrence Bornstein and/or John Tyree.
40. All documents concerning the "bring-down" due diligence for the Subordinated Debenture Offering.
41. All documents concerning Sunbeam's first quarter 1998 sales and/or earnings.

42. All documents concerning the closing of the Subordinated Debenture Offering including, without limitation, all documents concerning the decision to close the Subordinated Debenture Offering.

43. All documents concerning any press releases or any statement contained in any press release by Sunbeam bearing the following dates or issued on or about October 23, 1997, March 19, 1998, April 3, 1998, May 9, 1998, June 15, 1998, June 25, 1998, June 30, 1998, October 20, 1998, or November 12, 1998.

44. All documents concerning communications relating to Sunbeam, Coleman, or CPH, concerning the subject of the Coleman Transaction or the Bank Facility, including, without limitation, internal communications within Bank of America or communications between or among Bank of America and Sunbeam; Skadden, Arps, Slate, Meagher & Flom LLP; Coopers & Lybrand; Llama Company; Arthur Andersen LLP; Sard Verbinnen & Co., Inc.; Hill & Knowlton, Inc.; Coleman; Credit Suisse First Boston; CPH; Mafco.; Wachtell Lipton, Rosen & Katz; Davis Polk & Wardwell; or any other person or company, and/or any of their respective employees, agents, or representatives.

45. All documents concerning any inquiry from, or any communication between or among you and any Sunbeam investor, potential investor, securities or financial analyst, or rating agency relating to Sunbeam.

46. All documents concerning any meeting between and among you, Sunbeam, Arthur Andersen, Coopers & Lybrand, Morgan Stanley, MSSF, First Union, Coleman, First Alert, or Signature Brands related to the 1998 acquisitions, the integration of the acquisitions, including, but not limited to, documents prepared for, disseminated at, utilized during, or prepared after such meetings.

47. All documents concerning the Coleman Transaction.
48. All documents concerning Albert Dunlap and/or Russell Kersh.
49. Organizational charts, memoranda, or similar documents that describe the business organizational structure and the administrative, management, and reporting structure of Bank of America from and including January 1, 1997 through and including December 31, 1998.
50. All documents concerning Bank of America's policies, procedures, manuals, guidelines, reference materials, or checklists that were in effect during any period from and including January 1, 1997 through and including December 31, 1998 for the performance of due diligence, including, without limitation, due diligence performed in connection with underwriting credit facilities.
51. All of your document retention or document destruction policies or procedures or similar procedures for the preservation, storage, destruction, back-up or deletion of documents of any kind, including electronic or hard copy versions of documents, for any time during 1996 through the present, including, without limitation, any amendment to any such policies or procedures, schedules or related documents, any and all records concerning adherence to and failure to adhere to or abide by any such policies or procedures, and any memoranda or other instructions concerning the obligation and procedures to be utilized to preserve all relevant documents, including without limitation evidence concerning the Litigations, the Arbitrations, and the SEC Administrative Proceedings.
52. All documents or other information you have provided or produced to any party (whether voluntarily or in response to document requests, subpoena duces tecum, interrogatories, requests for admission, or other requests for information and/or documents) in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings (including,

without limitation, any reports, communications, filings, testimony, legal memoranda, statements, or other documents submitted to the Securities & Exchange Commission or any other party). Your response should include:

- a. All discovery requests, subpoenas duces tecum, interrogatories, or requests for admissions served on you in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings;
- b. All responses and/or objections that you provided or produced in response to any discovery request, subpoena duces tecum, interrogatories, or requests for admission served on you in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings; and
- c. All privilege logs you prepared in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings with respect to documents that you withheld from production in response to any document requests, subpoenas duces tecum, or other request for information and/or documents.

53. All communications concerning any discovery request, subpoena duces tecum, interrogatories, or requests for admission served on you in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

54. All documents you have provided to or received from the SEC, the Attorney General of New York, or any other governmental or regulatory body concerning Sunbeam or the Coleman Transaction.

55. All motions, memoranda, briefs, rulings, orders, or transcripts of any proceeding concerning any discovery request, subpoena, or other request for information and/or documents in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

56. All transcripts of and exhibits to any depositions, recorded statements, affidavits or hearings held in connection with any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

57. All documents obtained by you or produced to you by other parties, third parties, or non-parties (whether voluntarily or in response to any document requests, subpoenas duces tecum, or other process served by you or any other party) concerning Sunbeam or the Coleman Transaction.

58. All affidavits, declarations, or other testimonial statements filed or submitted in connection with any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

DEFINITIONS

1. "Arbitrations" means Albert J. Dunlap and Sunbeam Corporation, No. 32 160 00088 99 (AAA); and Russell A. Kersh and Sunbeam Corporation, No. 32 160 00091 99 (AAA).

2. "Bank Facility" means the Credit Agreement, including amendments, and all funds extended by MSSF, First Union, and/or Bank of America to Sunbeam pursuant to the Credit Agreement, including, but not limited to, Tranche A, Tranche B, and the Revolving Credit Facility.

3. "Bank of America" means Bank of America National Trust and Savings Association and any of its subsidiaries, divisions, affiliates, predecessors, successors, joint

ventures, present and former officers, directors, employees, representatives, and agents, and all other persons acting or purporting to act on its behalf.

4. "Borrowing Request" means any request by Sunbeam for a Borrowing in accordance with Section 2.03 of the Credit Agreement.

5. "Coleman" means The Coleman Company, Inc. and any of its predecessors, successors, subsidiaries, and present and former officers, directors, and employees.

6. "CPH" means Coleman (Parent) Holdings Inc., Coleman Worldwide Corporation, CLN Holdings Inc., and any of their predecessors, successors, subsidiaries, and present and former officers, directors, and employees.

7. "Coleman Transaction" means the transaction contemplated by the February 27, 1998 Agreements.

8. "Communication" means the transmittal of information (in the form of facts, ideas, inquiries or otherwise) by letter, memorandum, facsimile, orally, electronically or otherwise.

9. "Concerning" means concerning, reflecting, relating to, referring to, describing, evidencing, or constituting.

10. "Coopers & Lybrand" means the former Coopers & Lybrand LLP (now known as PricewaterhouseCoopers LLP), and any of its predecessors, successors, affiliates, subsidiaries, and present and former partners, employees, representatives, and agents.

11. "Credit Agreement" means that agreement entered into by Sunbeam Corporation, as borrower, with MSSF, First Union, and Bank of America, as Lenders, dated March 30, 1998 and all amendments thereto.

12. "Documents" shall be given the broad meaning provided in Rule 1.350 of the Florida Rules of Civil Procedure and refers to any form or means, whether physical, visual, or electronic, in or by which words, numbers, or ideas are recorded or preserved, whether fixed in tangible medium or electronically stored, including any and all drafts of any final document. The word "documents" shall include, by way of example and not by way of limitation, all of the following: papers, correspondence, trade letters, envelopes, memoranda, telegrams, cables, notes, messages, reports, studies, press releases, comparisons, books, accounts, checks, audio and video recordings and transcriptions thereof, pleadings, testimony, articles, bulletins, pamphlets, brochures, magazines, questionnaires, surveys, charts, newspapers, calendars, desk calendars, pocket calendars, lists, logs, publications, notices, diagrams, instructions, diaries, minutes for meetings, corporate minutes, orders, resolutions, agendas, memorials or notes of oral communications, whether by telephone or face-to-face, contracts, agreements, drafts of or proposed contracts or agreements, memoranda of understanding, letters of intent, computer tapes, computer drives or memories, computer diskettes or disks, e-mail, CD-ROMs, or any other tangible thing on which any handwriting, typing, printing, photostatic, electronic, or other form of communication or information is recorded or reproduced, together with all notations on any of the foregoing, all originals, file copies, or other unique copies of the foregoing, and all versions or drafts thereof, whether used or not.

13. "February 27, 1998 Agreements" means (a) the Agreement and Plan of Merger dated as of February 27, 1998 among Sunbeam Corp., Laser Acquisition Corp., CLN Holdings Inc. and Coleman (Parent) Holdings Inc. and (b) the Agreement and Plan of Merger dated as of February 27, 1998 among Sunbeam Corp., Camper Acquisition Corp., and The Coleman Company, Inc.

14. "Financial Statements" means, without limitation, balance sheets, statements of income, earnings, retained earnings, sources and applications of funds, cash flow projections, notes to each such statements, or any other notes which pertain to the past or present financial condition of Sunbeam, whether any of the foregoing is audited or unaudited, whether final, interim or pro forma, complete or partial, consolidated, yearly, monthly, or otherwise.

15. "First Alert" means First Alert, Inc., and any of its predecessors, successors, affiliates, subsidiaries, and present and former officers, directors, employees, representatives, and agents.

16. "First Union" means First Union National Bank (now known as Wachovia Bank, National Association) and any of its predecessors, successors, affiliates, subsidiaries, and present and former officers, directors, employees, representatives, and agents.

17. "Lenders" means the entities listed on Schedule 2.01 of the Credit Agreement under the heading "Lenders" and any other Person that shall have become a party to the Credit Agreement as a Lender pursuant to an assignment and acceptance.

18. "Litigations" means In Re Sunbeam Securities Litigation, 98-8258-Civ.-Middlebrooks (S.D. Fla.); Camden Asset Management, L.P., et al. v. Sunbeam Corporation, et al., 98-8773-Civ.-Middlebrooks and 98-8275-Civ.-Middlebrooks (S.D. Fla.); Krim v. Dunlap, et al., No. CL983168AD (15th Jud. Cir., Fla.); Stapleton v. Sunbeam Corp., et al., No. 98-1676-Civ.-King (S.D. Fla.); Sunbeam Corp. v. PricewaterhouseCoopers LLP, No. CL005444AN (15th Jud. Cir., Fla.); In re Sunbeam Corp., No. 01-40291 (AJG) (Bankr. S.D.N.Y.) and every adversary proceeding therein; SEC v. Dunlap, et al., No. 01-8437-Civ.-Middlebrooks (S.D. Fla.); Oaktree Capital Management LLC v. Arthur Andersen LLP, No. BC257177 (L.A. Cty., CA); and

Coleman (Parent) Holdings Inc. v. Arthur Andersen LLP, et al., No. CA 01-06062AN (15th Jud. Cir., Fla).

19. "Mafco" means MacAndrews & Forbes Holdings Inc. and any of its predecessors, successors, subsidiaries, and present and former officers, directors, and employees.

20. "Morgan Stanley" means Morgan Stanley & Co., Inc. and any of its predecessors, successors, affiliates, subsidiaries, and present and former officers, directors, partners, employees, representatives, and agents.

21. "MSSF" means Morgan Stanley Senior Funding, Inc. and any of its predecessors, successors, affiliates, subsidiaries, and present and former officers, directors, partners, employees, representatives, and agents.

22. "Person" means any natural person, corporation, limited liability company, trust, joint venture, association, company, partnership, governmental authority, or other entity.

23. "Reorganized Sunbeam" means Sunbeam Corporation on and after the effective date of Sunbeam's chapter 11 plan of reorganization as filed with the United States Bankruptcy Court in the Southern District of New York.

24. "SEC Administrative Proceedings" means In the Matter of Sunbeam Corp., SEC Administrative Proceeding File No. 3-10481, and In the Matter of David C. Fannin, SEC Administrative Proceeding File No. 3-10482.

25. "SEC" means the Securities and Exchange Commission.

26. "Signature Brands" means Signature Brands USA, Inc. and any of its predecessors, successors, affiliates, subsidiaries, and present and former officers, directors, employees, representatives, and agents.

27. "Subordinated Debentures" means Sunbeam's Zero Coupon Convertible Senior Subordinated Debentures Due 2018.

28. "Subordinated Debenture Offering" means the offering of Sunbeam's Subordinated Debentures.

29. "Sunbeam" means Sunbeam Corporation and any of its predecessors, successors, affiliates, subsidiaries, and present and former officers, directors, employees, representatives, and agents.

30. "You" or "Your" means Bank of America and any of its subsidiaries, divisions, predecessors, successors, present or former employees, representatives, agents, attorneys, accountants, advisors, or anyone acting or purporting to act on its behalf.

INSTRUCTIONS

1. Documents shall be produced as they are kept in the usual course of business, or organized and labeled to correspond to the categories in this Request. Documents attached to each other should not be separated. Documents consisting of items previously produced in the Litigations, Arbitrations, and/or SEC Administrative Proceedings with Bates numbering shall be produced in Bates number order.

2. All documents shall be produced in the file folder, envelope or other container in which the documents are kept or maintained by you. If, for any reason, the container cannot be produced, produce copies of all labels or other identifying marks.

3. The relevant period, unless otherwise indicated, shall be from January 1, 1996 through the date of trial of this matter, and shall include all documents and information which relate in whole or in part to such period, or to events or circumstances during such period,

even though dated, prepared, generated or received prior or subsequent to that period. Please supplement or correct your responses to these requests if, at any time, you become aware that your responses are incomplete or incorrect in any respect.

4. If you claim the attorney-client privilege, or any other privilege or work-product protection for all or any portion of a document, you shall provide a privilege log that describes the withheld material sufficiently to allow CPH and Mafco to test the privilege or protection asserted.

5. The following rules of construction apply:

a. The connectives "and" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery requests all responses that might otherwise be outside of their scope;

b. The term "including" shall be construed to mean "without limitation"; and

c. The use of the singular form of any word includes the plural and vice versa.

MACANDREWS & FORBES HOLDINGS INC.
and COLEMAN (PARENT) HOLDINGS INC.

By: _____

One of Their Attorneys

Jerold S. Solovy
Ronald L. Marmer
Robert T. Markowski
Deirdre E. Connell
JENNER & BLOCK, LLC
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

Jack Scarola
SEARCY DENNEY SCAROLA BARNHART
& SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33402-3626
(561) 686-6300

Dated: July __, 2003

E

McGuireWoods LLP
Bank of America Tower
50 North Laura Street
Suite 3300
Jacksonville, FL 32202-3661
Phone: 904.798.3200
Fax: 904.798.3207
www.mcguirewoods.com

David M. Wells
Direct: 904.798.2693

McGUIREWOODS

dwells@mcguirewoods.com
Direct Fax: 904.798.3207

August 12, 2003

Via Federal Express
2nd transmission after facsimile transmission failure

Jack Scarola, Esq.
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33402-3626

Re: Subpoenas Issued by Coleman (Parent) Holdings, Inc. to Bank of America
National Trust and Savings Association

Dear Mr. Scarola:

We have just learned that on July 29, 2003 you executed notices of deposition for the August 15, 2003 deposition of a Bank of America custodian of documents. We are not aware of any deposition subpoena being served on Bank of America, and we were not provided with the courtesy of a copy of the deposition notice or the attendant subpoena that would be required for the deposition of a non-party. Nor were we consulted as to the proposed time or place of the deposition.

As set forth in my letters of July 29 and July 30, we agreed that you would provide Bank of America with an initial two week extension to respond to the two Subpoena Duces Tecum Without Deposition issued by your client. We agreed that prior to August 15, we would discuss the scope of these subpoenas to see if we could agree to a solution that worked for both of our clients. There was no discussion of a deposition.

I presume that not copying me on the notice of deposition was an oversight, and that you will have no objection to postponing the depositions until such time as we have resolved any outstanding issues with the subpoenas, and can agree on an appropriate time and place for depositions, if they are necessary. Either I or my colleague Mike Cavendish will call tomorrow to confirm that depositions will be postponed, so that we may avoid filing motions with the Court.

Very truly yours,



David M. Wells

16div-000780

August 12, 2003
Page 2

DMW/mm

cc: Michael Cavendish

216881

F

SEARCY
DENNEY
SCAROLA
BARNHART
& SHIPLEY P.A.

*Attorneys
at Law*

WEST PALM BEACH OFFICE:

2188 PALM BEACH LAKES BLVD.,
WEST PALM BEACH, FLORIDA 33409

P.O. DRAWER 3626
WEST PALM BEACH, FLORIDA 33402-9626

(561) 686-6300
1-800-780-8607
FAX: (561) 478-0764

TALLAHASSEE OFFICE:

P.O. DRAWER 1230
TALLAHASSEE, FL 32302

(850) 224-7800
FAX: (850) 224-7602

ATTORNEYS AT LAW:

ROSALYN SIA BAKER
F. GREGORY BARNHART
KARLE BLOCK
EARL L. DENNEY, JR.
SEAN C. DOMNICK
JAMES W. GUSTAFSON, JR.
DAVID K. KELLEY, JR.
WILLIAM B. KING
DARRYL L. LEWIS
WILLIAM A. NORTON
DAVID J. SALES
JOHN SCAROLA
CHRISTIAN D. SEARCY
HARRY A. SHEVIN
JOHN A. SHIPLEY III
CHRISTOPHER K. SPEED
KAREN E. TERRY
C. CALVIN WARRINER III
DAVID J. WHITE

*SHAREHOLDERS

PARALEGALS:

N. AYAN-TEJEDA
ARIE J. BRIGGS
JEANE L. CADY
DANIEL J. CALLOWAY
EMILIO DIAMANTIS
DAVID W. GILMORE
TED E. KULESA
JAMES PETER LOVE
CHRISTOPHER J. PILATO
ROBERT W. PITCHER
WILLIAM H. SEABOLD
KATHLEEN SIMON
STEVE M. SMITH
WALTER A. STEIN
BRIAN P. SULLIVAN
KEVIN J. WALSH
GEORGIA K. WETHERINGTON
JUDSON WHITEHORN

VIA FACSIMILE 904-798-3207

August 13, 2003

David M. Wells, Esq.
McGuire Woods, LLP
Bank of America Tower
50 North Laura Street, Suite 3300
Jacksonville, FL 32202-3661

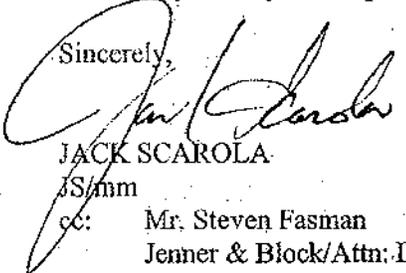
Re: Coleman Holdings, Inc. vs Morgan Stanley & Company
MSSFI v. MacAndrews & Forbes
Matter No.: 029986-230580

Dear David:

This will confirm our telephone discussions regarding the subpoena issued to Bank of America in the referenced matter. We will not expect a records custodian to appear in response to the subpoena on August 15. We will instead expect to receive from you on that date, a written response identifying the documents Bank of America expects to make available to us and the time and manner of production. You will also identify categories of documents described in the subpoena, which will not be made available, and the reason production cannot or will not be made.

We thank you for your cooperation.

Sincerely,


JACK SCAROLA

JS/mm

cc: Mr. Steven Fasman
Jenner & Block/Attn: Deirdre Connell, Esq.
Tom Clare, Esq.



WWW.SEARCYLAW.COM

16div-000783

McGuireWoods LLP
Bank of America Tower
50 North Laura Street
Suite 3300
Jacksonville, FL 32202-3661
Phone: 904.798.3200
Fax: 904.798.3207
www.mcguirewoods.com

David M. Wells
Direct: 904.798.2693

McGUIREWOODS

dwells@mcguirewoods.com
Direct Fax: 904.798.3207

August 13, 2003

Via Facsimile and U.S. Mail

Jack Scarola, Esq.
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33402-3626

Re: Subpoenas issued by Coleman (Parent) Holdings, Inc. to Bank of America
National Trust and Savings Association

Dear Mr. Scarola:

This will confirm our telephone conversation of today where you indicated that the Subpoena Duces Tecum issued on July 29, 2003 and their accompanying notices of deposition were issued only to cure a procedural defect caused by the Subpoena Duces Tecum Without Deposition issued on July 1 and July 8, 2003, that there will be no deposition on Friday, August 15, 2003, and that our agreement reflected in my letter to you of July 30, 2003 remains in effect.

I will provide you with our response to the original subpoenas on August 15, and then we can work together to resolve Bank of America's objections thereto and set a mutually agreeable date and location for production.

Very truly yours,



David M. Wells

DMW/mm

cc: Michael Cavendish

16div-000784

G

McGuireWoods LLP
Bank of America Tower
50 North Laura Street
Suite 3300
Jacksonville, FL 32202-3661
Phone: 904.798.3200
Fax: 904.798.3207
www.mcguirewoods.com

David M. Wells
Direct: 904.798.2693

McGUIREWOODS

dwells@mcguirewoods.com
Direct Fax: 904.798.3207

August 15, 2003

Via Facsimile and U.S. Mail

Jack Scarola, Esq.
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33402-3626

Re: Subpoenas issued by Coleman (Parent) Holdings, Inc. to Bank of America
National Trust and Savings Association n/k/a Bank of America, N.A.
Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc., 2003 CA 005045
*Morgan Stanley Senior Funding, Inc. v. MacAndrews & Forbes Holdings, Inc. and
Coleman (Parent) Holdings, Inc.*, 2003 CA 005165

Dear Mr. Scarola:

As previously agreed, we have carefully reviewed each of the 58 discrete requests for production of documents contained within each of the two identical subpoenas served by you on Bank of America, N.A. in the above-captioned actions. The purpose of this letter is to attempt to reach agreement upon what documents should be produced, when and where.

To avoid reviewing the 58 separate requests in a vacuum, we obtained copies of the complaints and answers filed in the above-captioned cases and carefully reviewed them to develop an understanding of what the issues in the cases are, and, accordingly, what would be fair, reasonable and necessary discovery. In reviewing the 58 separate requests, we also took into consideration the fact that Bank of America is not a party to these actions and the fact that the conduct of Bank of America is not at issue in these actions.

Our review of the 58 separate requests was hampered somewhat by the fact that the events at issue happened some five years ago and, as might be expected, there has been some turnover of personnel who might have knowledge of the loan relationship.

Nevertheless, we have undertaken reasonable due diligence, spoken to available bank personnel with the best knowledge available about the loan relationship and have gathered certain documents from a variety of locations. Many of the separate requests seek "all documents concerning" or "all documents reflecting" certain broadly described transactions, events or entities. Rather than debate what such terms may mean, we have identified the foregoing specific documents or categories of documents that we are prepared to produce within the next two weeks at our offices for review or, if you wish, copied and sent to you.

16div-000786

August 15, 2003

Page 2

These documents were located as a result of a reasonable search of the files most likely to yield responsive documents. We have not conducted an exhaustive search of the files of each person that may have had some involvement in the loan facility over time. We have, however, in good faith searched the likely repositories. In offering the production of the following documents, we do so without waiving specific objections to the breadth and/or vagueness of the request. The documents available for review and production are:

- The March 30, 1998 Credit Agreement
- Agreements and closing documents ancillary thereto
- Amendments to and waivers of the March 30, 1998 Credit Agreement
- Circulated drafts of the March 30, 1998 Credit Agreement
- Documents pertaining to analyses or evaluations of the Sunbeam-Coleman transaction
- Borrowing requests issued by Sunbeam pertaining to the March 30, 1998 Credit Agreement
- Brokerage reports and other documents valuing Sunbeam and Sunbeam stock
- News articles and wire stories discussing changes in the price of Sunbeam stock and related issues
- Documents pertaining to meetings among Sunbeam, Bank of America, First Union, and Morgan Stanley
- Pledge agreements and other documents regarding the collateral pledged under the March 30, 1998 Credit Agreement
- The Morgan Stanley Offering Statement pertaining to the subordinated debentures
- Documents pertaining to Sunbeam's Q1 1998 financials
- 1998 Sunbeam press releases

We believe that the foregoing documents are generally responsive to requests 3-4, 6, 11, 17-18, 21-22, 24, 33, 37-38, 41 and 43. Certain of these documents may contain confidential, proprietary or private information and, as such, should be the subject of a confidentiality order. We are prepared to discuss the terms of the confidentiality order with you. If one has already been entered in either of the cases, please forward the order to me for review.

As noted above, certain of the individual requests are vague, ambiguous and overbroad and would, as written, impose an improper and undue burden on Bank of America. These requests are 1-4, 7-20, 23-25, 29, 31-40, 42-45 and 47-48.

Other of the requests seek documents that should be peculiarly within the custody of Coleman (Parent) Holdings, Inc. or Morgan Stanley. It would be appropriate to seek those documents there rather than impose the burden of production on Bank of America. Those requests are 2-3, 7, 12-15, 18, 20, 22-23, 25, 32-34, 36-37, 41-42, 44, 46-47 and 51.

Certain of the separate requests seek documents that do not appear to be reasonably calculated to lead to discovery of any evidence relevant to any of the claims or defenses in these actions. As a non-party, Bank of America should not be burdened with reviewing the records of transactions that took place some five years ago in search of documents of no relevance to the case. These requests are 5, 9, 10, 16, 24-31, 45, and 49-58.

16div-000787

August 15, 2003
Page 3

Other requests, in addition to the foregoing problems, appear to seek trade secret or confidential business information as well as documents protected by the Attorney-Client Privilege. Those requests are 3, 44, and 50.

To avoid unnecessary argument and without waiving any of the foregoing objections, our due diligence to date has not revealed documents responsive to requests 7, 14, 16, 19 (other than as set forth in the text of the Credit Agreement) 20, 32, 36, 42 and 54, at least as we interpret the requests. Moreover, we have not located documents responsive to requests 8, 39 and 40, but we note that we are not familiar with the general descriptions of the subject matter provided.

We are prepared to discuss these specific objections with you at your convenience.

Very truly yours,



David M. Wells

DMW/mm

cc: Michael Cavendish

217222

16div-000788

IN THE CIRCUIT COURT FOR THE
FIFTEENTH JUDICIAL CIRCUIT, IN
AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS,
INC.

Plaintiff,

v.

MORGAN STANLEY & CO., INC.

CASE NO.: 2003 CA 005045 AI

Defendant.

MORGAN STANLEY SENIOR
FUNDING, INC.

Plaintiff,

v.

MACANDREWS & FORBES HOLDINGS
INC. and COLEMAN (PARENT)
HOLDINGS, INC.,

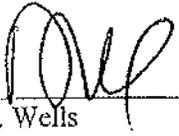
CASE NO.: 2003 CA 005165 AG

Defendants.

**NON-PARTY BANK OF AMERICA'S NOTICE OF FILING
RESPONSE AND OBJECTIONS TO SUBPOENAS**

Non-party Bank of America, N.A. (Bank of America) hereby gives notice of filing its response and objections to Subpoenas Duces Tecum, which has been served today upon Coleman (Parent) Holdings, Inc. ("Coleman"), and is attached hereto as Exhibit A.

McGuireWoods LLP

By: 

David M. Wells
Florida Bar No. 0309291
Michael Cavendish
Florida Bar No.: 0143774
50 N. Laura St., Suite 3300
Jacksonville, Florida 32202
(904) 798-2606
(904) 798-3267 (FAX)

Attorneys for non-party Bank of America, N.A.

CERTIFICATE OF SERVICE

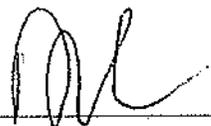
The undersigned hereby certifies that a true and correct copy of the foregoing was transmitted by first class U.S. Mail on August 15, 2003 to:

Jack Scarola
Searcy Denney Scarola Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33402-3626

Jerold S. Solovy
Jenner & Block, LLC
One IBM Plaza
Suite 4400
Chicago, IL 60611

Joseph Ianno
Carlton Fields
222 Lake View Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannuci
Thomas Clare
Ryan Phair
Kirkland and Ellis
655 15th Street, N.W.
Suite 1200
Washington, D.C. 20005



Attorney

216920.2

16div-000790

McGuireWoods LLP
Bank of America Tower
50 North Laura Street
Suite 3300
Jacksonville, FL 32202-3661
Phone: 904.798.3200
Fax: 904.798.3207
www.mcguirewoods.com

David M. Wells
Direct: 904.798.2693

McGUIREWOODS

dwells@mcguirewoods.com
Direct Fax: 904.798.3207

August 15, 2003

Via Facsimile and U.S. Mail

Jack Scarola, Esq.
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33402-3626

Re: Subpoenas issued by Coleman (Parent) Holdings, Inc. to Bank of America National Trust and Savings Association n/k/a Bank of America, N.A.
Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc., 2003 CA 005045
Morgan Stanley Senior Funding, Inc. v. MacAndrews & Forbes Holdings, Inc. and Coleman (Parent) Holdings, Inc., 2003 CA 005165

Dear Mr. Scarola:

As previously agreed, we have carefully reviewed each of the 58 discrete requests for production of documents contained within each of the two identical subpoenas served by you on Bank of America, N.A. in the above-captioned actions. The purpose of this letter is to attempt to reach agreement upon what documents should be produced, when and where.

To avoid reviewing the 58 separate requests in a vacuum, we obtained copies of the complaints and answers filed in the above-captioned cases and carefully reviewed them to develop an understanding of what the issues in the cases are, and, accordingly, what would be fair, reasonable and necessary discovery. In reviewing the 58 separate requests, we also took into consideration the fact that Bank of America is not a party to these actions and the fact that the conduct of Bank of America is not at issue in these actions.

Our review of the 58 separate requests was hampered somewhat by the fact that the events at issue happened some five years ago and, as might be expected, there has been some turnover of personnel who might have knowledge of the loan relationship.

Nevertheless, we have undertaken reasonable due diligence, spoken to available bank personnel with the best knowledge available about the loan relationship and have gathered certain documents from a variety of locations. Many of the separate requests seek "all documents concerning" or "all documents reflecting" certain broadly described transactions, events or entities. Rather than debate what such terms may mean, we have identified the foregoing specific documents or categories of documents that we are prepared to produce within the next two weeks at our offices for review or, if you wish, copied and sent to you.

EXHIBIT A

16div-000791

These documents were located as a result of a reasonable search of the files most likely to yield responsive documents. We have not conducted an exhaustive search of the files of each person that may have had some involvement in the loan facility over time. We have, however, in good faith searched the likely repositories. In offering the production of the following documents, we do so without waiving specific objections to the breadth and/or vagueness of the request. The documents available for review and production are:

- The March 30, 1998 Credit Agreement
- Agreements and closing documents ancillary thereto
- Amendments to and waivers of the March 30, 1998 Credit Agreement
- Circulated drafts of the March 30, 1998 Credit Agreement
- Documents pertaining to analyses or evaluations of the Sunbeam-Coleman transaction
- Borrowing requests issued by Sunbeam pertaining to the March 30, 1998 Credit Agreement
- Brokerage reports and other documents valuing Sunbeam and Sunbeam stock
- News articles and wire stories discussing changes in the price of Sunbeam stock and related issues
- Documents pertaining to meetings among Sunbeam, Bank of America, First Union, and Morgan Stanley
- Pledge agreements and other documents regarding the collateral pledged under the March 30, 1998 Credit Agreement
- The Morgan Stanley Offering Statement pertaining to the subordinated debentures
- Documents pertaining to Sunbeam's Q1 1998 financials
- 1998 Sunbeam press releases

We believe that the foregoing documents are generally responsive to requests 3-4, 6, 11, 17-18, 21-22, 24, 33, 37-38, 41 and 43. Certain of these documents may contain confidential, proprietary or private information and, as such, should be the subject of a confidentiality order. We are prepared to discuss the terms of the confidentiality order with you. If one has already been entered in either of the cases, please forward the order to me for review.

As noted above, certain of the individual requests are vague, ambiguous and overbroad and would, as written, impose an improper and undue burden on Bank of America. These requests are 1-4, 7-20, 23-25, 29, 31-40, 42-45 and 47-48.

Other of the requests seek documents that should be peculiarly within the custody of Coleman (Parent) Holdings, Inc. or Morgan Stanley. It would be appropriate to seek those documents there rather than impose the burden of production on Bank of America. Those requests are 2-3, 7, 12-15, 18, 20, 22-23, 25, 32-34, 36-37, 41-42, 44, 46-47 and 51.

Certain of the separate requests seek documents that do not appear to be reasonably calculated to lead to discovery of any evidence relevant to any of the claims or defenses in these actions. As a non-party, Bank of America should not be burdened with reviewing the records of transactions that took place some five years ago in search of documents of no relevance to the case. These requests are 5, 9, 10, 16, 24-31, 45, and 49-58.

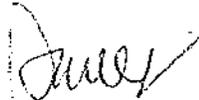
August 15, 2003
Page 3

Other requests, in addition to the foregoing problems, appear to seek trade secret or confidential business information as well as documents protected by the Attorney-Client Privilege. Those requests are 3, 44, and 50.

To avoid unnecessary argument and without waiving any of the foregoing objections, our due diligence to date has not revealed documents responsive to requests 7, 14, 16, 19 (other than as set forth in the text of the Credit Agreement) 20, 32, 36, 42 and 54, at least as we interpret the requests. Moreover, we have not located documents responsive to requests 8, 39 and 40, but we note that we are not familiar with the general descriptions of the subject matter provided.

We are prepared to discuss these specific objections with you at your convenience.

Very truly yours,



David M. Wells

DMW/mm

cc: Michael Cavendish

217222

16div-000793

McGuireWoods LLP
Bank of America Tower
50 North Laura Street
Suite 3300
Jacksonville, FL 32202-3661
Phone: 904.798.3200
Fax: 904.798.3207
www.mcguirewoods.com

David M. Wells
Direct: 904.798.2693

McGUIREWOODS

dwells@mcguirewoods.com
Direct Fax: 904.798.3207

September 23, 2003

Via Facsimile and U.S. Mail

Jack Scarola, Esq.
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33402-3626

Re: Subpoenas issued by Coleman (Parent) Holdings, Inc. to Bank of America
National Trust and Savings Association

Dear Mr. Scarola:

I am in receipt of your notice of today's date setting a hearing on your Motion to Compel for 8:45 a.m. on Monday, September 29, 2003.

I was surprised to receive this notice. Upon receipt of your Motion to Compel, I immediately faxed you a letter suggesting that we agree upon a mutually convenient date to set the hearing. No one from your office contacted me or my secretary to set the hearing for Monday, which I understand is a five-minute motion calendar hearing. I cannot attend an 8:45 a.m. hearing on Monday in West Palm Beach nor will five minutes be sufficient if Sunbeam has any objection to the entry of an order resolving our concerns under Florida Statute §655.059(2)(b).

I note from your motion and notice, that you have apparently been able to identify the counsel for Sunbeam. I suggest that the more efficient course of action would be to contact Sunbeam's counsel and determine if they have any objection to the entry of an order providing that documents can be produced pursuant to the existing confidentiality order. We have placed a call to Sunbeam's counsel but have been advised that both of the lawyers identified in your notice are out until tomorrow. Please let me know if there is a time tomorrow when we could try to have a conference call with Sunbeam's counsel to determine if they would agree to the entry of an appropriate order. If so, we can send an appropriate order to the court for entry and avoid the need for a hearing. At that point we can produce the previously agreed-upon documents for your review and consideration.

I look forward to hearing from you. I hope that we can work this out and I do not have to

16div-000794

September 23, 2003
Page 2

schedule an emergency telephone conference hearing with the judge on the issue of scheduling a hearing.

Very truly yours,



David M. Wells

DMW:mm

\\COM223903.1

H

SEARCY
DENNEY
SCAROLA
BARNHART
& SHIPLEY P.A.

*Attorneys
at Law*

WEST PALM BEACH OFFICE:

2139 PALM BEACH LAKES BLVD.,
WEST PALM BEACH, FLORIDA 33409

P.O. DRAWER 3628
WEST PALM BEACH, FLORIDA 33402-3628

(561) 686-4300
1-800-780-8607
FAX: (561) 478-0754

TALLAHASSEE OFFICE:

P.O. DRAWER 1230
TALLAHASSEE, FL 32302

(850) 224-7600
FAX: (850) 224-7602

ATTORNEYS AT LAW:

ROSALYN SIA BAKER
F. GREGORY BARNHART
LANCE BLOCK
EARL L. DENNEY, JR.
SEAN C. DOMNICK
JAMES W. GUSTAFSON, JR.
DAVID K. KELLEY, JR.
WILLIAM B. KING
DARRYL L. LEWIS
WILLIAM A. NORTON
DAVID J. SALES
JOHN SCAROLA
CHRISTIAN D. SEARCY
HARRY A. SHEVIN
JOHN A. SHIPLEY III
CHRISTOPHER K. SPEED
KAREN E. TERRY
C. CALVIN WARRINER III
DAVID J. WHITE

*SHAMHOLDERS

PARALEGALS:

AN AYAN-TEJEDA
LAURIE J. BRIGGS
DEANE L. CADDY
DANIEL J. CALLOWAY
EMILIO DIAMANTIS
DAVID W. GILMORE
TED E. KULESA
JAMES PETER LOVE
CHRISTOPHER J. PILATO
ROBERT W. PITCHER
WILLIAM H. SEAROLO
KATHLEEN SIMON
STEVE M. SMITH
WALTER A. STEIN
BRIAN P. SULLIVAN
KEVIN J. WALSH
GEORGIA K. WETHERINGTON
JUDSON WHITEHORN

VIA FACSIMILE 904-798-3207

August 19, 2003

David M. Wells, Esq.
McGuire Woods, LLP
Bank of America Tower
50 North Laura Street, Suite 3300
Jacksonville, FL 32202

Re: Coleman Holdings, Inc. vs Morgan Stanley & Company
Morgan Stanley Senior Funding v. MacAndrews & Forbes
Matter No.: 029986-230580

Dear Mr. Wells:

This is in partial response to various points raised in your letter of April 15, 2003.

First, a confidentiality order has been entered in this matter and we are prepared to agree to its application to documents produced by Bank of America, N.A., in response to our subpoena in the referenced matter. Please confirm in writing your acceptance of the obligations, procedures and protections contained in that order.

To assist us in determining whether we will inspect the currently available documents in your offices or have them copied and sent to us, we would like a reasonable estimate of the volume of the production and an opportunity to obtain an estimate of copying costs.

As to your assertion that Bank of America ought not to be obliged to produce documents "that should be peculiarly within the custody of Coleman (Parent) Holdings Inc. or Morgan Stanley", we respectfully disagree. What "should be" in the custody of others either may not be in their custody or may not be acknowledged to be in their custody. A legitimate function of third party production is to test the accuracy and completeness of a party's discovery responses.



WWW.SEARCYLAW.COM

16div-000797

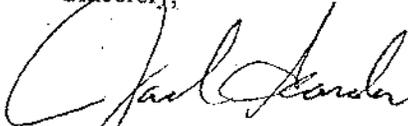
David M. Wells, Esq.
August 19, 2003
Page 2

Concerning your privilege assertions, we would expect to receive a properly detailed privilege log to enable us (and, if necessary, the Court) to assess the propriety of such assertions.

Finally, we will address other issues raised in your letter once we have been able to review the documents you are willing to produce.

Thank you for your anticipated cooperation.

Sincerely,



JACK SCAROLA

JS/mm

Enc.

cc: Jenner & Block, LLC



I

McGuireWoods LLP
Bank of America Tower
North Laura Street
Suite 3300
West Palm Beach, FL 33202-3661
Phone: 904.798.3200
Fax: 904.798.3207
www.mcguirewoods.com

David M. Wells
Direct: 904.798.2693

McGUIREWOODS

dwells@mcguirewoods.com
Direct Fax: 904.798.3207

August 20, 2003

Via Facsimile and U.S. Mail

Jack Scarola, Esq.
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33402-3626

Re: Subpoenas issued by Coleman (Parent) Holdings, Inc. to Bank of America
National Trust and Savings Association n/k/a Bank of America, N.A.
Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc., 2003 CA 005045
Morgan Stanley Senior Funding, Inc. v. MacAndrews & Forbes Holdings, Inc. and
Coleman (Parent) Holdings, Inc., 2003 CA 005165

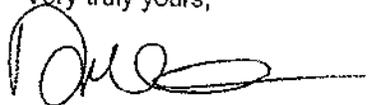
Dear Mr. Scarola:

I have now had the opportunity to review your letter of August 19, 2003.

Please forward to me a copy of the Confidentiality Order referenced in the second paragraph of your letter. Does the Confidentiality Order entered in the above-captioned action address the bank privacy concerns embedded within Fla. Stat. § 655.059 raised in our letter of July 29th? Specifically, does it address the issue whether Coleman Holdings, Inc. has obtained the appropriate consents to review the banking records and financial records of Bank of America's borrower? If not, you will need to procure the appropriate consents from the borrower or obtain a ruling from the Court vitiating the statutory protection and authorizing Bank of America to produce before we can turn the documents over.

Once I have had the opportunity to review the Confidentiality Order and confirm that the appropriate consents are in place, we can coordinate the copying or production for review by you here. We can address your other issues at an appropriate time.

Very truly yours,



David M. Wells

DMW/rmm

cc: Michael Cavendish

16div-000800

J

McGuireWoods LLP
Bank of America Tower
50 North Laura Street
Suite 3300
Jacksonville, FL 32202-3667
Phone: 904.798.3200
Fax: 904.798.3207
www.mcguirewoods.com

David M. Wells
Direct: 904.798.2693

McGUIREWOODS

dwells@mcguirewoods.com
Direct fax: 904.798.3207

September 12, 2003

Via Facsimile and U.S. Mail

Jack Scarola, Esq.
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33402-3626

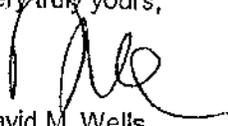
Re: Subpoenas issued by Coleman (Parent) Holdings, Inc. to Bank of America
National Trust and Savings Association n/k/a Bank of America, N.A.
Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc., 2003 CA 005045
Morgan Stanley Senior Funding, Inc. v. MacAndrews & Forbes Holdings, Inc. and
Coleman (Parent) Holdings, Inc., 2003 CA 005165

Dear Mr. Scarola:

Thank you for your letter of September 10, 2003 and the enclosed confidentiality order.

As I mentioned in my previous letter, unless the advance consent of Sunbeam is procured, or a court order issues specifically overriding the statute, Section 655.059(2)(b), Florida Statutes restricts Bank of America from disclosing the borrower account and loan information the subpoenas request, on pain of liability for a third degree felony as provided by § 655.059(2)(c). A review of the confidentiality order indicates that it does not address this statutory restriction on disclosure. To protect itself, Bank of America must wait for the written consent of Sunbeam, n/k/a American Household, Inc., or an order from the Court that specifically addresses § 655.059(2)(b) before it can produce the bulk of the responsive documents it has agreed to produce to Coleman (Parent) Holdings, Inc. If you are aware of any legal authority to the contrary, or an opinion construing the statute differently, please advise me of the same.

Very truly yours,


David M. Wells

DMW/mm

cc: Michael Cayendish
222131

16div-000802

K

McGuireWoods LLP
Bank of America Tower
50 North Laura Street
Suite 3300
Jacksonville, FL 32202-3661
Phone: 904.798.3200
Fax: 904.798.3207
www.mcguirewoods.com

David M. Wells
Direct: 904.798.2693

McGUIREWOODS

dwells@mcguirewoods.com
Direct Fax: 904.798.3207

September 23, 2003

Via Facsimile and U.S. Mail

Jack Scarola, Esq.
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33402-3626

Re: Subpoenas issued by Coleman (Parent) Holdings, Inc. to Bank of America
National Trust and Savings Association

Dear Mr. Scarola:

I am in receipt of your notice of today's date setting a hearing on your Motion to Compel for 8:45 a.m. on Monday, September 29, 2003.

I was surprised to receive this notice. Upon receipt of your Motion to Compel, I immediately faxed you a letter suggesting that we agree upon a mutually convenient date to set the hearing. No one from your office contacted me or my secretary to set the hearing for Monday, which I understand is a five-minute motion calendar hearing. I cannot attend an 8:45 a.m. hearing on Monday in West Palm Beach nor will five minutes be sufficient if Sunbeam has any objection to the entry of an order resolving our concerns under Florida Statute §655.059(2)(b).

I note from your motion and notice, that you have apparently been able to identify the counsel for Sunbeam. I suggest that the more efficient course of action would be to contact Sunbeam's counsel and determine if they have any objection to the entry of an order providing that documents can be produced pursuant to the existing confidentiality order. We have placed a call to Sunbeam's counsel but have been advised that both of the lawyers identified in your notice are out until tomorrow. Please let me know if there is a time tomorrow when we could try to have a conference call with Sunbeam's counsel to determine if they would agree to the entry of an appropriate order. If so, we can send an appropriate order to the court for entry and avoid the need for a hearing. At that point we can produce the previously agreed-upon documents for your review and consideration.

I look forward to hearing from you. I hope that we can work this out and I do not have to

16div-000804

September 23, 2003
Page 2

schedule an emergency telephone conference hearing with the judge on the issue of scheduling a hearing.

Very truly yours,



David M. Wells

DMW:mm

\\COM\223903.1

McGuireWoods LLP
Bank of America Tower
50 North Laura Street
Suite 3300
Jacksonville, FL 32202-3661
Phone: 904.798.3200
Fax: 904.798.3207
www.mcguirewoods.com

David M. Wells
Direct: 904.798.2693

McGUIREWOODS

dwells@mcguirewoods.com
Direct Fax: 904.798.3207

September 22, 2003

Via Facsimile and U.S. Mail

Jack Scarola, Esq.
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33402-3626

Re: Subpoenas issued by Coleman (Parent) Holdings, Inc. to Bank of America
National Trust and Savings Association n/k/a Bank of America, N.A.
Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc., 2003 CA 005045
*Morgan Stanley Senior Funding, Inc. v. MacAndrews & Forbes Holdings, Inc. and
Coleman (Parent) Holdings, Inc.*, 2003 CA 005165

Dear Mr. Scarola:

We received a fax copy of your Motion to Compel Production ("Motion"). We wish to cooperate with the scheduling of a hearing on your Motion. As you know, we have previously filed a Notice of Filing Response and Objections to Subpoenas ("Objections"), which covers a broader range of issues than the Motion. It may make sense to set the Motion and the Objections for hearing together at the same mutually agreeable time. Please let me know whether you will be contacting Judge Maas' chambers to procure potential hearing dates and who from your office will then be contacting us to discuss scheduling.

Very truly yours,



David M. Wells

DMW/mm

cc: Michael Cavendish

223347

16div-000806

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 2003 CA 005045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.

NOTICE OF DEPOSITION

***Duces Tecum**

TO: Counsel on the attached list

PLEASE TAKE NOTICE that Plaintiff Coleman (Parent) Holdings Inc., hereby notices the deposition upon oral examination of the Custodian of Records, PricewaterhouseCoopers LLP, pursuant to Florida Rule of Civil Procedure 1.410 on the date and at the time set forth below:

Custodian of Records
PricewaterhouseCoopers LLP

October 17, 2003 at 9:30 a.m.

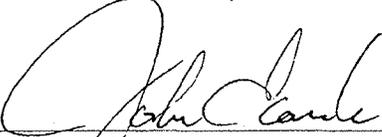
Duces Tecum: The witness will be requested to bring to the deposition documents specified on Attachment A.

The deposition will be recorded by stenographic means at the offices of Searcy Denney Scarola Barnhart & Shipley, P.C., 2139 Palm Beach Lakes Blvd., West Palm Beach, Florida. The deposition will be taken before a person authorized to administer oaths and will continue until completed.

Coleman Holdings, Inc. vs. Morgan Stanley & Company
Case No.: 2003 CA 005045 AI
Plaintiff's Notice Taking Deposition Duces Tecum

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by
telefax and by overnight mail to all counsel on the attached Service List, this ^{27th}~~26th~~ day of
Sept, 2003. _{29th}

COLEMAN (PARENT) HOLDINGS INC.

By: 

One of Its Attorneys

Jerold S. Solovy
Ronald L. Marmer
Robert T. Markowski
Deirdre E. Connell
JENNER & BLOCK, LLC
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

Jack Scarola
SEARCY DENNEY SCAROLA
BARNHART & SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409
(561) 686-6300

AMERICANS WITH DISABILITIES ACT

In accordance with the Americans With Disabilities Act, persons in need of a special accommodation to participate in this proceeding should contact the Human Resources Manager, Searcy Denney Scarola Barnhart & Shipley, P.A., no later than seven days prior to the proceeding. Please telephone (561) 686-6300.

Coleman Holdings, Inc. vs. Morgan Stanley & Company
Case No.: 2003 CA 005045 AJ
Plaintiff's Notice Taking Deposition Duces Tecum

COUNSEL LIST

Joseph Ianno, Jr., Esq.
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block, LLC
One IBM Plaza, Suite 4400
Chicago, IL 60611

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

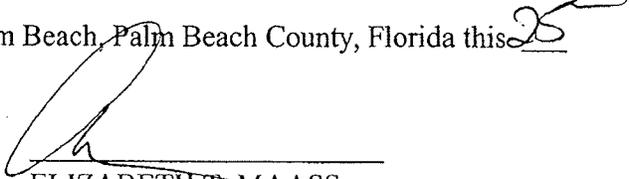
MORGAN STANLEY & CO., INC.,
Defendant(s).

**ORDER GRANTING MOTION OF NON-PARTY TO APPEAR THROUGH USE OF
COMMUNICATION EQUIPMENT**

THIS CAUSE came before the Court, in Chambers, on Non-Party Bank of America, N.A.'s Motion to Appear Through Use of Communication Equipment. Based on a review of the Motion, it is

ORDERED AND ADJUDGED that Non-Party Bank of America, N.A.'s Motion to Appear Through Use of Communication Equipment is Granted. Non-Party Bank of America, N.A. may appear by speaker telephone at hearing set September 29, 2003 upon prior arrangement with the Court's Judicial Assistant, Nancy Ross, at (561) 355-6050.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 25
day of September, 2003.


ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci
655 15th Street, NW, Suite 1200
Washington DC 20005

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, Il 60611

Mark F. Bideau, Esq.
777 S. Flagler Dr., Suite 300E
West Palm Beach, FL 33401

David M. Wells, Esq.
50 N. Laura Street, Suite 3300
Jacksonville, FL 32202

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

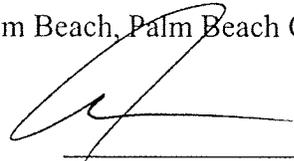
MORGAN STANLEY & CO., INC.,
Defendant(s).

ORDER AND DIRECTIONS TO THE CLERK

THIS CAUSE came before the Court, in Chambers, on its own Motion. Based on the foregoing, it is

ORDERED AND ADJUDGED that the Clerk is directed to docket and file attorney Joseph Ianno's letter dated September 29, 2003.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 30 day of September, 2003.



ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci
655 15th Street, NW, Suite 1200
Washington DC 20005

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, IL 60611

Mark F. Bideau, Esq.
777 S. Flagler Dr., Suite 300E
West Palm Beach, FL 33401

David M. Wells, Esq.
50 N. Laura Street, Suite 3300
Jacksonville, FL 32202

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

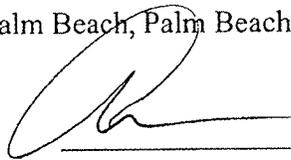
MORGAN STANLEY & CO., INC.,
Defendant(s).

ORDER DENYING REHEARING

THIS CAUSE came before the Court, in Chambers, on Defendant's counsel's letter dated September 29, 2003, which the Court elects to treat as including a Motion for Rehearing. Based on the foregoing, it is

ORDERED AND ADJUDGED that Defendant's Motion for Rehearing is Denied. Hearing on Defendant's Motion to Dismiss remains set December 5, 2003, at 8:00 a.m.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 30th day of September, 2003.



ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci
655 15th Street, NW, Suite 1200
Washington DC 20005

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, IL 60611

Mark F. Bideau, Esq.
777 S. Flagler Dr., Suite 300E
West Palm Beach, FL 33401

David M. Wells, Esq.
50 N. Laura Street, Suite 3300
Jacksonville, FL 32202

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

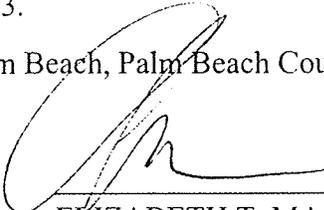
MORGAN STANLEY & CO., INC.,
Defendant(s).

ORDER AND DIRECTIONS TO THE CLERK

THIS CAUSE came before the Court, in Chambers, on its own Motion. Based on the foregoing, it is

ORDERED AND ADJUDGED that the Clerk is directed to docket and file attorney Jack Scarola's letter dated September 29, 2003.

 DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this
1 day of October, 2003.


ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci
655 15th Street, NW, Suite 1200
Washington DC 20005

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, IL 60611

Mark F. Bideau, Esq.
777 S. Flagler Dr., Suite 300E
West Palm Beach, FL 33401

David M. Wells, Esq.
50 N. Laura Street, Suite 3300
Jacksonville, FL 32202

SEARCY
DENNEY
SCAROLA
BARNHART
& SHIPLEY PA

*Attorneys
at Law*

WEST PALM BEACH OFFICE:

2139 PALM BEACH LAKES BLVD.
WEST PALM BEACH, FLORIDA 33409

P.O. DRAWER 3626
WEST PALM BEACH, FLORIDA 33402

(561) 686-6300
1-800-780-8607
FAX: (561) 476-0754

TALLAHASSEE OFFICE:

P.O. DRAWER 122
TALLAHASSEE, FLORIDA 32302

(850) 224-7600
1-888-549-7011
FAX: (850) 224-7600

VIA FACSIMILE 561-659-7368

October 3, 2003

ATTORNEYS AT LAW:

ROSALYN SIA BAKER
F. GREGORY BARNHART
LANCE BLOCK
EARL L. DENNEY, JR.
SEAN C. DOMNICK
JAMES W. GUSTAFSON, JR.
DAVID K. KELLEY, JR.
WILLIAM B. KING
DARRYL L. LEWIS
WILLIAM A. NORTON
DAVID J. SALES
JOHN SCAROLA
CHRISTIAN D. SEARCY
HARRY A. SHEVIN
JOHN A. SHIPLEY III
CHRISTOPHER K. SPEED
KAREN E. TERRY
C. CALVIN WARRINER III
DAVID J. WHITE

*SHAREHOLDERS

PARALEGALS:

VIVIAN AYAN-TEJEDA
LAURIE J. BRIGGS
DEANE L. CADY
DANIEL J. CALLOWAY
EMILIO DIAMANTIS
DAVID W. GILMORE
TED E. KULESA
JAMES PETER LOVE
CHRISTOPHER J. PILATO
ROBERT W. PITCHER
WILLIAM H. SEABOLD
KATHLEEN SIMON
STEVE M. SMITH
WALTER A. STEIN
BRIAN P. SULLIVAN
KEVIN J. WALSH
GEORGIA K. WETHERINGTON
JUDSON WHITEHORN

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue, Suite 1400
West Palm Beach, FL 33401

Re: Coleman Holdings, Inc. vs Morgan Stanley & Company
Matter No.: 029986-230580

Dear Joe:

Enclosed is a copy of Plaintiff's Motion to Compel Production of Deposition Witness which is being filed under seal today. Also enclosed is our Notice of Hearing on the motion for October 9, 2003. If there is a possibility of resolving any of the issues raised in the motion without the necessity of court intervention, please call me. Since my schedule often makes it difficult to reach me by phone during regular business hours, I invite you, if necessary, to call me at home in the evening at 561-575-2427.

Sincerely,

Jack Scarola
JACK SCAROLA
JS/mjn
Enc.

cc: Jenner & Block, LLC

#230580/mm

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

CASE NO.: 2003 CA 005045 AI

Plaintiffs,

vs.

MORGAN STANLEY & CO., INC.,

Defendant,

_____ /

NOTICE OF HEARING

YOU ARE HEREBY NOTIFIED that the undersigned has called up for hearing the following:

DATE: October 9, 2003

TIME: 8:45 a.m.

JUDGE: Hon. Elizabeth T. Maass

PLACE: Palm Beach County Courthouse, Room #11.1208, 205 North Dixie Highway,
West Palm Beach, FL 33401

SPECIFIC MATTERS TO BE HEARD:

Coleman (Parent) Holdings Inc.'s Motion to Compel
Production of Deposition Witness (Filed Under Seal)

Moving counsel certifies that he or she contacted opposing counsel and attempted to resolve the discovery dispute without hearing.

Coleman Holdings, Inc. vs Morgan Stanley & Company
Case No.: 2003 CA 005045 A1
Notice of Hearing

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by
Fax and Federal Express to all Counsel on the attached list, this 3rd day of Oct.,
2003.



JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 478-0754
Attorney for Plaintiffs

Coleman Holdings, Inc. vs Morgan Stanley & Company
Case No.: 2003 CA 005045 AI
Notice of Hearing

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block, LLC
One IBM Plaza
Suite 4400
Chicago, IL 60611

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 2003 CA 005045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

NOTICE OF TAKING VIDEOTAPED DEPOSITIONS

To: Thomas A. Clare, Esq.
KIRKLAND & ELLIS, LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lake View Avenue
Suite 1400
West Palm Beach, FL 33401

PLEASE TAKE NOTICE that Plaintiff Coleman (Parent) Holdings Inc. will take the depositions upon oral examination of the following witnesses pursuant to Florida Rule of Civil Procedure 1.310 on the dates, times, and locations set forth below:

DEPONENT	DATE AND TIME	LOCATION
Andrew Savarie	October 20, 2003 at 9:30 a.m.	JENNER & BLOCK, LLC One IBM Plaza Chicago, Illinois 60611
Vance Kistler	October 21, 2003 at 9:30 a.m.	SEARCY DENNEY SCAROLA BARNHART & SHIPLEY, P.C. 2139 Palm Beach Lakes Blvd. West Palm Beach, Florida 33409
Donald Denkhaus	October 22, 2003 at 9:30 a.m.	SEARCY DENNEY SCAROLA BARNHART & SHIPLEY, P.C. 2139 Palm Beach Lakes Blvd. West Palm Beach, Florida 33409

Kevin Krayner	October 23, 2003 at 9:30 a.m.	ESQUIRE DEPOSITION SERVICES 600 S. Andrews Avenue, 2nd Floor Ft. Lauderdale, Florida 33301
Tyrone Chang	October 24, 2003 at 9:30 a.m.	SHAPIRO MITCHELL FORMAN ALLEN & MILLER LLP 380 Madison Avenue New York, New York 10017
Scott Yales	October 27, 2003 at 9:30 a.m.	SEARCY DENNEY SCAROLA BARNHART & SHIPLEY, P.C. 2139 Palm Beach Lakes Blvd. West Palm Beach, Florida 33409
William Strong	October 28, 2003 at 9:30 a.m.	JENNER & BLOCK, LLC One IBM Plaza Chicago, Illinois 60611
Urban Kantola	October 29, 2003 at 9:30 a.m.	ESQUIRE DEPOSITION SERVICES 600 S. Andrews Avenue, 2nd Floor Ft. Lauderdale, Florida 33301
William Pruitt	October 30, 2003 at 9:30 a.m.	SEARCY DENNEY SCAROLA BARNHART & SHIPLEY, P.C. 2139 Palm Beach Lakes Blvd. West Palm Beach, Florida 33409
Lee Griffith	October 31, 2003 at 9:30 a.m.	SEARCY DENNEY SCAROLA BARNHART & SHIPLEY, P.C. 2139 Palm Beach Lakes Blvd. West Palm Beach, Florida 33409
Deborah MacDonald	November 3, 2003 at 9:30 a.m.	SEARCY DENNEY SCAROLA BARNHART & SHIPLEY, P.C. 2139 Palm Beach Lakes Blvd. West Palm Beach, Florida 33409
R. Bram Smith	November 5, 2003 at 9:30 a.m.	SHAPIRO MITCHELL FORMAN ALLEN & MILLER LLP 380 Madison Avenue New York, New York 10017
Deidra Den Danto	November 6, 2003 at 9:30 a.m.	STRONGWATER & ASSOCIATES, LLC 1360 Peachtree Street, N.E. Suite 930 Atlanta, Georgia 30309

Coleman Holdings Inc. v. Morgan Stanley & Company
Case No.: 2003 CA 005045 AI
Plaintiff's Subpoena for Deposition
October 2, 2003

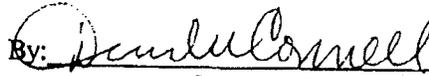
The depositions will be recorded by videotape and stenographic means. The deposition will be taken before a person authorized to administer oaths and will continue day to day until completed.

The videotape operator will be Esquire Deposition Services at the following locations: (1) 515 West Flagler Drive, Suite P-200, West Palm Beach, FL 33401 for the depositions proceeding in Florida; (2) 155 N. Wacker Drive, Chicago, IL 60606 for the depositions proceeding in Illinois; (3) 216 E. 45th Street, New York, NY 10017 for the depositions proceeding in New York; and (4) 1100 Spring Street NW, #102, Atlanta, Georgia 30309-2823 for the deposition proceeding in Atlanta.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by facsimile and mail to all counsel on the attached Service List, this 2nd day of October, 2003.

Dated: October 2, 2003

COLEMAN (PARENT) HOLDINGS INC.

By: 
One of Its Attorneys

Jerold S. Solovy
Michael T. Brody
Deirdre E. Connell
JENNER & BLOCK, LLC
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

Jack Scarola
SEARCY DENNEY SCAROLA BARNHART
& SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33409
(561) 686-6300

Coleman Holdings Inc. v. Morgan Stanley & Company
Case No.: 2003 CA 005045 AI
Plaintiff's Subpoena for Deposition
October 2, 2003

SERVICE LIST

Thomas A. Clare, Esq.
KIRKLAND & ELLIS, LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lake View Avenue
Suite 1400
West Palm Beach, FL 33401

LAW OFFICES
JENNER & BLOCK, LLC

ONE IBM PLAZA
CHICAGO, ILLINOIS 60611

(312) 222-9350
(312) 527-0484 FAX

DEIRDRE E. CONNELL
312-923-2661 Direct Dial
312-840-7661 Direct Facsimile

TELECOMMUNICATION TRANSMITTAL

DATE: October 2, 2003

TO: **Thomas A. Clare, Esq.** **VOICE:** (202) 879-5993
KIRKLAND & ELLIS, LLP **FAX:** (202) 879-5200

Joseph Ianno, Jr., Esq. **VOICE:** (561) 659-7070
CARLTON FIELDS, P.A. **FAX:** (561) 659-7368

FROM: Deirdre E. Connell **SECY. EXT.:** 6486

EMP. NO.: 035666 **CLIENT NO.:** 41198-10003

IMPORTANT: THIS MESSAGE IS INTENDED ONLY FOR THE USE OF THE INDIVIDUAL OR ENTITY TO WHICH IT IS ADDRESSED, AND MAY CONTAIN INFORMATION THAT IS ATTORNEY WORK PRODUCT, PRIVILEGED, CONFIDENTIAL AND EXEMPT FROM DISCLOSURE UNDER APPLICABLE LAW. IF THE READER OF THIS MESSAGE IS NOT THE INTENDED RECIPIENT, OR THE EMPLOYEE OR AGENT RESPONSIBLE FOR DELIVERING THE MESSAGE TO THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION, DISTRIBUTION OR COPYING OF THIS COMMUNICATION IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE NOTIFY US IMMEDIATELY BY TELEPHONE, AND RETURN THE ORIGINAL MESSAGE TO US AT THE ABOVE ADDRESS VIA POSTAL SERVICE. THANK YOU.

MESSAGE: **Please see attached.**

Total number of pages including this cover sheet: 5

DATE SENT: 10/2/03 TIME SENT: 5:05pm SENT BY: S. EDDINGTON

IF YOU DO NOT RECEIVE ALL PAGES, PLEASE CALL (312) 222-9350, EXT: 6486

#230580/mm

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN
AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

CASE NO: 2003 CA 005045 AI

Plaintiffs,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.

AGREED ORDER PERMITTING FOREIGN ATTORNEYS TO APPEAR

THIS CAUSE having come to be considered upon the Defendant, MacAndrews & Forbes Holdings Inc.'s and Coleman (Parent) Holdings Inc.'s Motion to Permit Foreign Attorneys to Appear, and the Court having reviewed the file and being fully advised in the premises, it is hereby,

ORDERED and ADJUDGED that Jerold S. Solovy, Ronald L. Marmer, Robert T. Markowski, Michael T. Brody, Jeffrey T. Shaw, Deirdre E. Connell, Elizabeth A. Coleman, Denise K. Bowler, John W. Joyce, Christopher M. O'Connor, Stephen P. Baker, and Daniel E. Shaw are admitted Pro Hac Vice in the above-styled matter on behalf of Defendants.

DONE AND ORDERED at West Palm Beach, ~~County~~ Florida, this _____ day of _____, 2003.

SIGNED AND DATED
OCT 03 2003
JUDGE ELIZABETH T. MAASS
ELIZABETH T. MAASS
CIRCUIT COURT JUDGE

Copies have been furnished to all counsel on the attached counsel list.

Coleman v. Morgan Stanley
Case No.: 2003 CA 005045 AI
Order Permitting Foreign Attys to Appear

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block, LLC
One IBM Plaza
Suite 4400
Chicago, IL 60611

Jack Scarola, Esq.
Searcy Denney Scarola Barnhart & Shipley
P.O. Drawer 3626
West Palm Beach, FL 33402

#230580/mm

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

CASE NO: 2003 CA 005045 AI

Plaintiffs,

vs.

MORGAN STANLEY & CO., INC.

Defendant.

NOTICE OF WITHDRAWAL OF MOTION

In reliance on agreements reached between the parties with respect to the resumption of the deposition of the witness John Tyree, the Plaintiff, Coleman (Parent) Holdings Inc., hereby withdraws its currently pending Motion to Compel without prejudice.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Fax and U.S. Mail to all counsel on the attached list on this 15th day of October, 2003.



JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 478-0754
Attorneys for Plaintiffs

Coleman Holdings, Inc. vs Morgan Stanley & Company
Notice Of Withdrawal of Motion
Case No.: 2003 CA 005045 AI

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block, LLC
One IBM Plaza
Suite 4400
Chicago, IL 60611

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

Case No. 2003 CA-005045 AI

MORGAN STANLEY & CO., INC.,

Defendant.

**PRICEWATERHOUSECOOPERS LLP'S MOTION FOR PROTECTIVE ORDER AND
OBJECTIONS AND RESPONSES TO SUBPOENA DUCES TECUM WITH DEPOSITION**

Pursuant to and in accordance with the Florida Rules of Civil Procedure, non-party PricewaterhouseCoopers LLP ("PwC") hereby moves for a protective order with respect to, and objects to, the Subpoena Duces Tecum With Deposition dated September 26, 2003 (the "Subpoena") served on PwC by Plaintiff Coleman (Parent) Holdings Inc. ("Plaintiff" or "Coleman"). The Subpoena seeks to impose upon PwC – a non-party that is not mentioned in either the Complaint or Answer in this case, much less accused of any wrongdoing – the enormous burden of producing hundreds of thousands of pages of documents relating to every aspect of the services its predecessor, Coopers & Lybrand L.L.P. ("Coopers"), performed for Sunbeam Corporation ("Sunbeam") at various times between 1996 and June 1998. The Subpoena also seeks the deposition of the records custodian of PwC, and commands appearance on October 17, 2003. As set forth below, there is simply no way that PwC can comply with the Subpoena by October 17, 2003. Nor can PwC produce a records custodian by that date, if ever.

GENERAL OBJECTIONS AND MOTION FOR PROTECTIVE ORDER

1. Coleman's Subpoena contains thirty (30) separate document requests which collectively seek hundreds of thousands of documents from PwC. PwC is the successor in interest to Coopers. In 1996, Sunbeam Corporation ("Sunbeam") hired Coopers to assist Sunbeam in arriving at a restructuring plan. That engagement was completed in 1996 and had no relationship to Coleman or any of the claims in this action. Following that initial engagement, Sunbeam engaged Coopers on various other projects. Most of these engagements did not involve Coleman in any way. The above-captioned case relates to Sunbeam's March 1998 acquisition of The Coleman Company, Inc., First Alert, Inc., and Signature Brands USA, Inc. (the "Acquisition").

2. The Subpoena requests PwC to produce a host of documents related to all of Coopers' various consulting engagements with Sunbeam. Although several of the requests contained in the Subpoena are appropriately limited to those relating to the issues in this case, many of the requests seek documents that are wholly irrelevant to any issue in this case and are not reasonably calculated to lead to the discovery of admissible evidence.

3. Accordingly, PwC objects to the Subpoena on the basis that it: (1) is overly broad, unduly burdensome, oppressive, and harassing; (2) seeks documents which have no relevance whatsoever to Coleman's claims and are not reasonably calculated to lead to the discovery of admissible evidence; (3) seeks documents that contain proprietary, confidential business records of PwC and/or Sunbeam which are the subject of a Confidentiality Agreement between Sunbeam and PwC; (4) seeks documents containing personal, private, or sensitive information protected from disclosure by the United States Constitution and/or Florida State Constitution; and (5) seeks documents protected by the attorney-client privilege and/or work-product doctrine.

4. For example, according to the Subpoena's Instructions, the time period for the requests is "from January 1, 1996 through the date of trial of this matter." Coopers' services for Sunbeam ended in May 1998. As a result of this instruction, many of the requests are rendered overly broad, unduly burdensome, oppressive, and harassing. In addition, also as a result of this instruction, many requests seek documents subject to the attorney-client privilege or work-product doctrine.

5. Likewise, Coleman seeks all documents produced by any party or non-party in thirteen (13) different "Litigations" (defined to include nine lawsuits, two SEC administrative proceedings, and two arbitrations), even though PwC is a party in only one of those matters.¹ See Subpoena, Request No. 29(d). Coleman also seeks all documents, including invoices, time records, individual diaries and calendars, or any other documents reflecting any services performed by Coopers for Sunbeam. See Subpoena, Request No. 20. This request is made without regard to whether the services at issue relate to the Acquisition and later integration of the acquired companies. Indeed, the work performed by Coopers in 1996 and 1997 – all of which is the subject of the Subpoena – has absolutely nothing to do with the issues in this action.

6. The Subpoena is also oppressive and imposes an undue burden on PwC in light of the fact that many of the documents requested can be obtained from court files (e.g., all of the pleadings, filings, orders, etc. in nine of the thirteen Litigations) or parties to those matters (e.g., all of the fact and expert discovery in nine of the thirteen Litigations and all available materials from the two SEC administrative proceedings and the two arbitrations).

¹ The one lawsuit in which PwC is a party is captioned Sunbeam Corp. v. PricewaterhouseCoopers, LLP, No. CL 003444 AN (15th Jud. Cir., Fla.) (the "Sunbeam litigation"). In the Sunbeam litigation, Sunbeam asserted claims of, among other things, negligence and professional malpractice against PwC based on consulting services Coopers provided in 1996 and 1998.

7. In addition, the Subpoena seeks documents which are protected by the attorney-client privilege and/or work product doctrine. For instance, to the extent that PwC has obtained materials generated in any of the other 12 Litigations, many of those materials were collected by PwC exclusively for its defense of the Sunbeam litigation and therefore are protected by the work-product doctrine. Such documents reflect the selection process employed by PwC and/or its counsel in defending the Sunbeam litigation. Were PwC to produce those documents in this case, PwC would be waiving the work product protection and necessarily provide Sunbeam, its adversary in the Sunbeam litigation, with insight into its defense strategy.

8. PwC further objects to the Subpoena to the extent it calls for disclosure of documents which contain trade secrets and information that are confidential and proprietary in nature, the disclosure of which would be harmful to PwC and would violate public policy. Such documents have been developed over time at great expense and effort to PwC, and constitute trade secrets and confidential research, development or commercial information.

9. PwC further objects to the Subpoena to the extent that it seeks confidential documents with respect to any person where disclosure of such documents would constitute an unwarranted invasion of personal privacy, and which would violate, among other things, the United States Constitution and/or the Florida State Constitution. For example, as worded, numerous requests seek individual calendars, diaries, and or billing reports that contain personal and private information, including but limited to employee social security numbers and/or financial information.

10. PwC further objects to the Subpoena on the basis that, given the enormous volume of materials sought by the Subpoena, PwC cannot possibly comply with the Subpoena by October 17, 2003. Nor can PwC provide a records custodian for deposition. The consulting division of PwC (into which the Coopers' consulting division was incorporated upon the merger

of PriceWaterhouse and Coopers) was acquired by IBM in 2002. In addition, most of the documents requested by the Subpoena are in the possession of and being maintained by the undersigned counsel for PwC in the Sunbeam litigation, and Coleman has offered no basis for deposing counsel with respect to the subpoenaed documents.

11. Finally, PwC objects to the Subpoena to the extent that it does not provide for payment of attorneys' fees, paralegal time, and the costs of outside services necessary to produce the documents requested. Although the Subpoena provides that PwC "may condition the preparation of copies upon the payment in advance of the reasonable costs of preparation," in light of the volume of documents sought, and the significant amount of attorney and paralegal oversight that will be required in order to complete the production, PwC seeks an Order establishing a procedure for the advance payment of such costs. PwC proposes that it submit an estimated budget to Coleman and that, upon Coleman's approval of the budget and advancement of 50% of the amount of the estimated budget, PwC will undertake the process of preparing the documents for production. Following preparation of the documents but prior to and as a condition of production, Coleman shall then pay to PwC the remainder of the attorneys' fees, costs and other expenses. Upon such payment, PwC will produce the documents at Issue.

12. PwC makes these objections (including the Objections and Responses to Specific Requests set forth below) without in any way waiving or intending to waive, but preserving and intending to preserve:

a. all questions as to the competency, relevancy, materiality, privilege or admissibility as evidence, for any purpose, at any trial or hearing in this case or in any related or subsequent action or proceeding, of any of the documents produced or the subject matter thereof;

- b. the right to object on any ground at any time to a demand for further documents; and
- c. the right to revise, supplement, amend, correct or add to these responses and objections.

13. By stating that PwC will produce documents responsive to a particular request, PwC does not represent that such documents exist.

PROCEDURE FOR PRODUCTION OF RESPONSIVE DOCUMENTS

1. If and when the Court denies PwC's Motion for Protective Order, in whole or part, PwC will produce existing non-objectionable documents consistent with the Court's order at a time and place to be mutually agreed upon.

OBJECTIONS AND RESPONSES TO SPECIFIC REQUESTS

Subject to the General Objections above, which are expressly incorporated by reference as to each response below, PwC responds to the specific paragraphs of Coleman's Subpoena as follows:

Request No. 1

All documents concerning any analysis of potential or actual synergies that might be achieved from a business combination of Sunbeam, and any or all of Coleman, Signature Brands or First Alert.

Response

In addition to the foregoing General Objections, PwC objects to this request on the basis that it is vague and ambiguous. Subject to these objections and the conditions set forth in the above Motion for Protective Order and without waiver thereof, PwC shall produce responsive, non-privileged documents in its possession, custody, or control to the extent that they were produced in the Sunbeam litigation.

Request No. 2

All documents concerning due diligence or evaluations performed concerning Sunbeam, Coleman, First Alert, and/or Signature Brands.

Response

In addition to the foregoing General Objections, PwC objects to this request on the basis that it is vague and ambiguous. PwC further objects to this request on the basis that it seeks information which may be protected by the attorney-client privilege, the accountant-client privilege, and/or the work product doctrine. Subject to these objections and the conditions set forth in the above Motion for Protective Order and without waiver thereof, PwC shall produce responsive, non-privileged documents in its possession, custody, or control to the extent that they were produced in the Sunbeam litigation.

Request No. 3

All documents concerning the Coleman Transaction.

Response

In addition to the foregoing General Objections, PwC objects to this request on the basis that it is vague and ambiguous. PwC further objects to this request on the basis that it seeks information which may be protected by the attorney-client privilege, the accountant-client privilege, and/or the work product doctrine. Subject to these objections and the conditions set forth in the above Motion for Protective Order and without waiver thereof, PwC shall produce responsive, non-privileged documents in its possession, custody, or control to the extent that they were produced in the Sunbeam litigation.

Request No. 4

All documents concerning meetings with or communications to, from, or relating to Sunbeam or Morgan Stanley, MSSF, Bank of America, First Union, Coleman, First Alert, and/or Signature Brands to the extent that those meetings or communications also concern Sunbeam.

Response

In addition to the foregoing General Objections, PwC objects to this request on the basis that it seeks information which may be protected by the attorney-client privilege, the accountant-client privilege, and/or the work product doctrine. Subject to these objections and the conditions set forth in the above Motion for Protective Order and without waiver thereof, PwC shall produce responsive, non-privileged documents in its possession, custody, or control to the extent that they were produced in the Sunbeam litigation.

Request No. 5

All documents concerning potential business combinations involving Sunbeam, including but not limited to, potential acquisitions by Sunbeam, potential acquisitions of Sunbeam, or potential mergers between Sunbeam and another company or entity.

Response

In addition to the foregoing General Objections, PwC objects to this request on the basis that it is overly broad, unduly burdensome, vague, ambiguous and seeks documents which have no relevance whatsoever to Coleman's claims and are not reasonably calculated to lead to the discovery of admissible evidence. PwC further objects to this request on the basis that it seeks information which may be protected by the attorney-client privilege, the accountant-client privilege, and/or the work product doctrine. Subject to these objections and the conditions set forth in the above Motion for Protective Order and without waiver thereof, PwC shall produce responsive, non-privileged documents in its possession, custody, or control to the extent that they were produced in the Sunbeam litigation.

Request No. 6

All documents concerning any inquiry from, or any communication between or among you and any Sunbeam investor, potential investor, securities or financial analyst, or rating agency relating to Sunbeam.

Response

In addition to the foregoing General Objections, PwC objects to this request on the basis that it is overly broad, unduly burdensome, oppressive, harassing, vague, ambiguous and seeks documents which have no relevance whatsoever to Coleman's claims and are not reasonably calculated to lead to the discovery of admissible evidence. PwC further objects to this request on the basis that it seeks information which may be protected by the attorney-client privilege, the accountant-client privilege, and/or the work product doctrine. Subject to these objections and the conditions set forth in the above Motion for Protective Order and without waiver thereof, PwC shall produce responsive, non-privileged documents in its possession, custody, or control to the extent that they were produced in the Sunbeam litigation.

Request No. 7

All documents concerning any Sunbeam financial plan, budget, target, goal, forecast, or projection for sales, earnings, synergies, or operating margins, including, but not limited to, (i) the bases for such financial plans, budgets, targets, goals, forecasts, or projections, and (ii) variances from such plans, budgets, targets, goals, forecasts, or projections.

Response

In addition to the foregoing General Objections, PwC objects to this request on the basis that it is overly broad, unduly burdensome, oppressive, harassing, vague, ambiguous and seeks documents which have no relevance whatsoever to Coleman's claims and are not reasonably calculated to lead to the discovery of admissible evidence. PwC further objects to this request on the basis that it seeks information which may be protected by the attorney-client privilege, the accountant-client privilege, and/or the work product doctrine. Subject to these

objections and the conditions set forth in the above Motion for Protective Order and without waiver thereof, PwC shall produce responsive, non-privileged documents in its possession, custody, or control to the extent that they were produced in the Sunbeam litigation.

Request No. 8

All documents concerning the issuance of any opinion, report, or assurance, relating to Sunbeam's acquisitions of Coleman, Signature Brands, and/or First Alert and the integration of those acquisitions.

Response

In addition to the foregoing General Objections, PwC objects to this request on the basis that it is overly broad, unduly burdensome, vague, ambiguous and seeks documents which have no relevance whatsoever to Coleman's claims and are not reasonably calculated to lead to the discovery of admissible evidence. PwC further objects to this request on the basis that it seeks information which may be protected by the attorney-client privilege, the accountant-client privilege, and/or the work product doctrine. Subject to these objections and the conditions set forth in the above Motion for Protective Order and without waiver thereof, PwC shall produce responsive, non-privileged documents in its possession, custody, or control to the extent that they constitute any opinion, report, or written assurance by Coopers regarding Sunbeam's acquisitions of Coleman, Signature Brands, and/or First Alert and the integration of those acquisitions and to the extent that they were produced in the Sunbeam litigation.

Request No. 9

All documents concerning the Subordinated Debentures.

Response

In addition to the foregoing General Objections, PwC objects to this request on the basis that it is vague and ambiguous. PwC further objects to this request on the basis that it seeks information which may be protected by the attorney-client privilege, the accountant-client

privilege, and/or the work product doctrine. Subject to these objections and the conditions set forth in the above Motion for Protective Order and without waiver thereof, PwC shall produce responsive, non-privileged documents in its possession, custody, or control to the extent that they were produced in the Sunbeam litigation.

Request No. 10

All documents concerning the Offering Memorandum.

Response

In addition to the foregoing General Objections, PwC objects to this request on the basis that it is vague and ambiguous. PwC further objects to this request on the basis that it seeks information which may be protected by the attorney-client privilege, the accountant-client privilege, and/or the work product doctrine. Subject to these objections and the conditions set forth in the above Motion for Protective Order and without waiver thereof, PwC shall produce responsive, non-privileged documents in its possession, custody, or control to the extent that they were produced in the Sunbeam litigation.

Request No. 11

All documents concerning the Bank Facilities.

Response

In addition to the foregoing General Objections, PwC objects to this request on the basis that it is vague and ambiguous. PwC further objects to this request on the basis that it seeks information which may be protected by the attorney-client privilege, the accountant-client privilege, and/or the work product doctrine. Subject to these objections and the conditions set forth in the above Motion for Protective Order and without waiver thereof, PwC shall produce responsive, non-privileged documents in its possession, custody, or control to the extent that they were produced in the Sunbeam litigation.

Request No. 12

All documents concerning the Credit Agreement.

Response

In addition to the foregoing General Objections, PwC objects to this request on the basis that it is vague and ambiguous. PwC further objects to this request on the basis that it seeks information which may be protected by the attorney-client privilege, the accountant-client privilege, and/or the work product doctrine. Subject to these objections and the conditions set forth in the above Motion for Protective Order and without waiver thereof, PwC shall produce responsive, non-privileged documents in its possession, custody, or control to the extent that they were produced in the Sunbeam litigation.

Request No. 13

All documents concerning Sunbeam's actual and/or expected sales, revenues, or earnings for all or any portion of 1996, 1997, and/or 1998.

Response

In addition to the foregoing General Objections, PwC objects to this request on the basis that it is overly broad, unduly burdensome, oppressive, harassing, vague, ambiguous and seeks documents which have no relevance whatsoever to Coleman's claims and are not reasonably calculated to lead to the discovery of admissible evidence. PwC further objects to this request on the basis that it seeks information which may be protected by the attorney-client privilege, the accountant-client privilege, and/or the work product doctrine. Subject to these objections and the conditions set forth in the above Motion for Protective Order and without waiver thereof, PwC shall produce responsive, non-privileged documents in its possession, custody, or control to the extent that they reflect Sunbeam's actual or projected sales,

revenues, or earnings for any portion of 1996, 1997, and/or 1998 to the extent that they were produced in the Sunbeam litigation.

Request No. 14

All documents concerning the March 19, 1998 press release issued by Sunbeam.

Response

In addition to the foregoing General Objections, PwC objects to this request on the basis that it is vague and ambiguous. PwC further objects to this request on the basis that it seeks information which may be protected by the attorney-client privilege, the accountant-client privilege, and/or the work product doctrine. Subject to these objections and the conditions set forth in the above Motion for Protective Order and without waiver thereof, PwC shall produce responsive, non-privileged documents in its possession, custody, or control to the extent that they were produced in the Sunbeam litigation.

Request No. 15

All documents concerning any valuation of Coleman or Sunbeam.

Response

In addition to the foregoing General Objections, PwC objects to this request on the basis that it is vague, ambiguous, and seeks documents which have no relevance whatsoever to Coleman's claims and are not reasonably calculated to lead to the discovery of admissible evidence. PwC further objects to this request on the basis that it seeks information which may be protected by the attorney-client privilege, the accountant-client privilege, and/or the work product doctrine. Subject to these objections and the conditions set forth in the above Motion for Protective Order and without waiver thereof, PwC shall produce responsive, non-privileged

documents in its possession, custody, or control to the extent that they were produced in the Sunbeam litigation.

Request No. 16

All documents concerning the integration of Sunbeam and Coleman, First Alert, and/or Signature Brands operations following the acquisition by Sunbeam of Coleman, First Alert, and Signature Brands.

Response

In addition to the foregoing General Objections, PwC objects to this request on the basis that it is vague and ambiguous. PwC further objects to this request on the basis that it seeks information which may be protected by the attorney-client privilege, the accountant-client privilege, and/or the work product doctrine. Subject to these objections and the conditions set forth in the above Motion for Protective Order and without waiver thereof, PwC shall produce responsive, non-privileged documents in its possession, custody, or control to the extent that they were produced in the Sunbeam litigation.

Request No. 17

All documents concerning the report on the 1998 integration and restructuring of First Alert, Coleman and Standard[sic] Brands presented to Sunbeam's Board of Directors on May 6, 1998, including, but not limited to, all drafts, preliminary reports, interim reports, source documents, interview notes, outlines, planning reports and comments by any other entity.

Response

In addition to the foregoing General Objections, PwC objects to this request on the basis that it is vague, ambiguous, and seeks documents which have no relevance whatsoever to Coleman's claims and are not reasonably calculated to lead to the discovery of admissible evidence. PwC further objects to this request on the basis that it seeks information which may be protected by the attorney-client privilege, the accountant-client privilege, and/or the work product doctrine. Subject to these objections and the conditions set forth in the above Motion

for Protective Order and without waiver thereof, PwC shall produce responsive, non-privileged documents in its possession, custody, or control to the extent that they were produced in the Sunbeam litigation.

Request No. 18

All documents concerning the hiring or retention of Coopers & Lybrand by Sunbeam.

Response

In addition to the foregoing General Objections, PwC objects to this request on the basis that it is overly broad, unduly burdensome, vague, ambiguous, oppressive, harassing, and seeks documents which have no relevance whatsoever to Coleman's claims and are not reasonably calculated to lead to the discovery of admissible evidence. PwC further objects to this request on the basis that it seeks information which may be protected by the attorney-client privilege, the accountant-client privilege, and/or the work product doctrine. Subject to these objections and the conditions set forth in the above Motion for Protective Order and without waiver thereof, PwC shall produce responsive, non-privileged documents in its possession, custody, or control to the extent that they constitute engagement letters, engagement proposals, or correspondence between Coopers and Sunbeam regarding same.

Request No. 19

All letters of engagement, representation letters, management or attorney inquiry letters and responses thereto relating to any work you performed for Sunbeam.

Response

In addition to the foregoing General Objections, PwC objects to this request on the basis that it is overly broad, unduly burdensome, oppressive, harassing, vague, ambiguous, and seeks documents which have no relevance whatsoever to Coleman's claims and are not reasonably calculated to lead to the discovery of admissible evidence. PwC further objects to this request on the basis that it seeks information which may be protected by the attorney-client

privilege, the accountant-client privilege, and/or the work product doctrine. Subject to these objections and the conditions set forth in the above Motion for Protective Order and without waiver thereof, PwC shall produce responsive, non-privileged documents in its possession, custody, or control.

Request No. 20

All billing statements, invoices, time detail records, individual calendars, daily diaries (including electronic calendar programs), or other documents that describe or record the work performed, meetings attended, the time spent, or expenses incurred (including back-up for any out-of-pocket expenses), by any Coopers & Lybrand personnel, or that describe or record any aspect of their activities concerning any services performed on behalf of, or concerning, Sunbeam.

Response

In addition to the foregoing General Objections, PwC objects to this request on the basis that it is vague, ambiguous, and seeks documents which have no relevance whatsoever to Coleman's claims and are not reasonably calculated to lead to the discovery of admissible evidence. PwC further objects to this request on the basis that it seeks documents which include information that is personal, private, and/or sensitive in nature and which is protected from disclosure by the United States Constitution and/or the Florida State Constitution. PwC also objects to this request on the basis that it seeks information which may be protected by the attorney-client privilege, the accountant-client privilege, and/or the work product doctrine. Subject to these objections and the conditions set forth in the above Motion for Protective Order and without waiver thereof, PwC shall produce responsive, non-privileged documents in its possession, custody, or control to the extent that they were produced in the Sunbeam litigation.

Request No. 21

For the period from January 1, 1996 to date of this response, all documents sufficient to reflect (a) the fees, expenses or compensation you received from Sunbeam; and (b) negotiations between you and Sunbeam relating to monies Sunbeam would pay for your audit, accounting, consulting, or other work for Sunbeam.

Response

In addition to the foregoing General Objections, PwC objects to this request on the basis that it is vague, ambiguous, and seeks documents which have no relevance whatsoever to Coleman's claims and are not reasonably calculated to lead to the discovery of admissible evidence. PwC further objects to this request on the basis that it seeks information which may be protected by the attorney-client privilege, the accountant-client privilege, and/or the work product doctrine. Subject to these objections and the conditions set forth in the above Motion for Protective Order and without waiver thereof, PwC shall produce responsive, non-privileged documents in its possession, custody, or control to the extent that they were produced in the Sunbeam litigation.

Request No. 22

Documents sufficient to reflect the identity of persons at Coopers & Lybrand who performed any work for Sunbeam, including, but not limited to, time budgets and analyses, billing runs, expense reports, and memoranda.

Response

In addition to the foregoing General Objections, PwC objects to this request on the basis that it is vague, ambiguous, and seeks documents which have no relevance whatsoever to Coleman's claims and are not reasonably calculated to lead to the discovery of admissible evidence. PwC further objects to this request on the basis that it seeks documents which include information that is personal, private, and/or sensitive in nature and which is protected from disclosure by the United States Constitution and/or the Florida State Constitution. PwC

also objects to this request on the basis that it seeks information which may be protected by the attorney-client privilege, the accountant-client privilege, and/or the work product doctrine. Subject to these objections and the conditions set forth in the above Motion for Protective Order and without waiver thereof, PwC shall produce responsive, non-privileged documents in its possession, custody, or control to the extent that they were produced in the Sunbeam litigation.

Request No. 23

All files, working papers, desk and pocket calendars, diaries, documents, reading and chronological files, and notebooks maintained by or reports generated by any of your personnel concerning any activities they performed in connection with work performed for Sunbeam, including, but not limited to, those of Donald Burnett, Albert Lapierre, Andrew Molenar, Jack Bonini, Dan Dooley, Harvey Kelly, Frank Pringle, Steven Skalak, Cassandra Reynolds, Jong Lee, Dick Oishi, John Wong, Todd Evans, Chris Rhee, Erik Mauch, Tom Nicholas, and Keith Polak.

Response

In addition to the foregoing General Objections, PwC objects to this request on the basis that it is vague, ambiguous, and seeks documents which have no relevance whatsoever to Coleman's claims and are not reasonably calculated to lead to the discovery of admissible evidence. PwC further objects to this request on the basis that it seeks documents which include information that is personal, private, and/or sensitive in nature and which is protected from disclosure by the United States Constitution and/or the Florida State Constitution. PwC also objects to this request on the basis that it seeks information which may be protected by the attorney-client privilege, the accountant-client privilege, and/or the work product doctrine. Subject to these objections and the conditions set forth in the above Motion for Protective Order and without waiver thereof, PwC shall produce responsive, non-privileged documents in its possession, custody, or control to the extent that they were produced in the Sunbeam litigation.

Request No. 24

All documents, including, but not limited to, original Workpapers concerning any work performed for Sunbeam, including Acquisition Consulting or Integration Consulting.

Response

In addition to the foregoing General Objections, PwC objects to this request on the basis that it is vague, ambiguous, and seeks documents which have no relevance whatsoever to Coleman's claims and are not reasonably calculated to lead to the discovery of admissible evidence. PwC further objects to this request on the basis that it seeks information which may be protected by the attorney-client privilege, the accountant-client privilege, and/or the work product doctrine. Subject to these objections and the conditions set forth in the above Motion for Protective Order and without waiver thereof, PwC shall produce responsive, non-privileged documents in its possession, custody, or control to the extent that they were produced in the Sunbeam litigation.

Request No. 25

Documents constituting an index of your Workpapers concerning any work performed for Sunbeam, including, but not limited to, all Acquisition Consulting and Integration Consulting.

Response

In addition to the foregoing General Objections, PwC objects to this request on the basis that it seeks documents which have no relevance whatsoever to Coleman's claims and are not reasonably calculated to lead to the discovery of admissible evidence. PwC further objects to this request on the basis that it seeks information which may be protected by the attorney-client privilege, the accountant-client privilege, and/or the work product doctrine. Subject to these objections and the conditions set forth in the above Motion for Protective Order and without

waiver thereof, PwC shall produce responsive, non-privileged documents in its possession, custody, or control to the extent that they were produced in the Sunbeam litigation.

Request No. 26

All documents relating to the work plan or methodology employed by Coopers & Lybrand in its Acquisition Consulting and Integration Consulting, including, but not limited to, the goals and the basis for any recommendations.

Response

In addition to the foregoing General Objections, PwC objects to this request on the basis that it is vague and ambiguous. PwC further objects to this request on the basis that it seeks information which may be protected by the attorney-client privilege, the accountant-client privilege, and/or the work product doctrine. Subject to these objections and the conditions set forth in the above Motion for Protective Order and without waiver thereof, PwC shall produce responsive, non-privileged documents in its possession, custody, or control to the extent that they were produced in the Sunbeam litigation.

Request No. 27

All documents relating to interviews conducted by Coopers & Lybrand as part of its work for Sunbeam, including but not limited to its Acquisition Consulting and Integration Consulting.

Response

In addition to the foregoing General Objections, PwC objects to this request on the basis that it is vague, ambiguous, and seeks documents which have no relevance whatsoever to Coleman's claims and are not reasonably calculated to lead to the discovery of admissible evidence. PwC further objects to this request on the basis that it seeks information which may be protected by the attorney-client privilege, the accountant-client privilege, and/or the work product doctrine. Subject to these objections and the conditions set forth in the above Motion for Protective Order and without waiver thereof, PwC shall produce responsive, non-privileged

documents in its possession, custody, or control to the extent that they were produced in the Sunbeam litigation.

Request No. 28

All of your document retention or document destruction policies or procedures or similar procedures for the preservation, storage, destruction, back-up or deletion of documents of any kind, including of electronic or hard copy versions of documents, for any time during 1996 through the present, including, without limitation, any amendment to any such policies or procedures, schedules or related documents, any and all records concerning adherence to and failure to adhere to or abide by any such policies or procedures, and any memoranda or other instructions concerning the obligation and procedures to be utilized to preserve all relevant documents, including without limitation evidence concerning the Litigations.

Response

In addition to the foregoing General Objections, PwC objects to this request on the basis that it is vague, ambiguous, and seeks documents which have no relevance whatsoever to Coleman's claims and are not reasonably calculated to lead to the discovery of admissible evidence. PwC further objects to this request on the basis that it seeks information which may be protected by the attorney-client privilege, the accountant-client privilege, and/or the work product doctrine. Subject to these objections and the conditions set forth in the above Motion for Protective Order and without waiver thereof, PwC shall produce responsive, non-privileged documents in its possession, custody, or control, if any exist.

Request No. 29

All documents concerning any of the Litigations, including but not limited to all: (a) pleadings, motions, memoranda, briefs, affidavits, declarations, or other court filings; (b) orders and/or rulings; (c) hearing transcripts; (c) [sic] written discovery, including but not limited to document requests, subpoenas, request for admission, interrogatories, and responses thereto; (d) documents produced by any parties or non-parties; (e) privilege logs; (f) deposition transcripts or exhibits; (g) expert reports or other expert discovery, and (h) documents concerning communications or correspondence concerning the Litigations. The relevant time period for this request is April 1998 through the service of this subpoena.

Response

In addition to the foregoing General Objections, PwC objects to this request on the basis that it is overly broad, unduly burdensome, and seeks documents which have no relevance whatsoever to Coleman's claims and are not reasonably calculated to lead to the discovery of admissible evidence. PwC further objects to this request on the basis that it seeks information which is protected by the attorney-client privilege, the accountant-client privilege, and/or the work product doctrine. Subject to these objections and the conditions set forth in the above Motion for Protective Order and without waiver thereof, PwC shall produce responsive, non-privileged documents in its possession, custody, or control to the extent that they constitute (a) pleadings, motions, memoranda, briefs, affidavits, declarations, or other court filings in the Sunbeam litigation; (b) orders and/or rulings in the Sunbeam litigation; (c) hearing transcripts in the Sunbeam litigation; (d) written discovery, including but not limited to document requests, subpoenas, request for admission, interrogatories, and responses thereto in the Sunbeam litigation; (e) documents produced by any parties or non-parties in the Sunbeam litigation; (f) privilege logs in the Sunbeam litigation; (g) deposition transcripts and exhibits of depositions taken in the Sunbeam litigation; and (h) transcripts and exhibits of depositions or testimony taken of current or former Coopers employees in any of the Litigations to the extent the

Coopers employee performed consulting services for Sunbeam in connection with the acquisitions and or integration of Coleman, First Alert, and/or Signature Brands.

Request No. 30

All documents you have provided to or received from the SEC, the Justice Department, the U.S. Attorney for the Southern District of New York, the Attorney General of New York, any other federal, state governmental or regulatory body, or any other self-regulatory body concerning Sunbeam, Morgan Stanley, MSSF, or the Coleman Transaction. The relevant time period for this request is February 1998 through the date of service of this subpoena.

Response

In addition to the foregoing General Objections, PwC objects to this request on the basis that it is overly broad, unduly burdensome, and seeks documents which have no relevance whatsoever to Coleman's claims and are not reasonably calculated to lead to the discovery of admissible evidence. Among other things, as written, the request is not limited to the transactions at issue in this action or even to Coopers' consulting services for Sunbeam. Subject to these objections and the conditions set forth in the above Motion for Protective Order and without waiver thereof, PwC shall produce responsive, non-privileged documents in its possession, custody, or control to the extent that they relate to Sunbeam.

WHEREFORE, for the foregoing reasons, PwC objects to Coleman's Subpoena Duces Tecum With Deposition and requests entry of a protective order that (i) narrows the requests to discovery in the Sunbeam litigation (including all depositions, written discovery, and document productions), (ii) provides for protection of all of PwC's proprietary business information, (iii) provides PwC with an adequate amount of time in which to gather and prepare the materials at issue; and (iv) provides for payment in advance of preparation and production of all of PwC's reasonable fees, costs, and expenses incurred in preparing the materials to be

produced (including, but not limited to, attorneys fees expended, paralegal time, and all reproduction costs).

Dated: October 15, 2003

Respectfully submitted,



Richard H. Critchlow (Florida Bar No. 155227)
Brian F. Spector (Florida Bar No. 261254)
Harry R. Schafer (Florida Bar No. 508667)
Elizabeth B. Honkonen (Florida Bar No. 0149403)
KENNY NACHWALTER SEYMOUR ARNOLD
CRITCHLOW & SPECTOR, P.A.
201 South Biscayne Boulevard
1100 Miami Center
Miami, Florida 33131-4327
Telephone: (305) 373-1000
Facsimile: (305) 372-1861

Attorneys for PricewaterhouseCoopers, LLP

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via facsimile and U.S. Mail on October 15, 2003 upon the following:

Jack Scarola, Esq.
Searcy Denney Scarola Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409



166284.1

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CASE NO: 03 CA-005045 AI

COLEMAN (PARENT) HOLDING INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

NOTICE OF CANCELLATION OF HEARING

Defendant, MORGAN STANLEY & CO. INC., by and through its undersigned attorneys, hereby give notice of its cancellation of hearing, scheduled for October 16, 2003 at 8:45 a.m., before the Honorable Elizabeth T. Maass, on Defendant's Motion for Protective Order, Sanctions and Imposition of a Cost Bond.

CERTIFICATE OF SERVICE

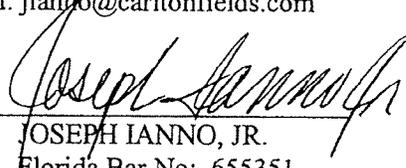
I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by e-mail and facsimile to all counsel of record on the attached service list on this 15 day of October, 2003.

Thomas D. Yannucci, P.C.
Thomas A. Clare
Larissa Paule-Carres
Brett H. McGurk
KIRKLAND & ELLIS, LLP
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

**COUNSEL FOR DEFENDANT,
MORGAN STANLEY & CO., INC.**

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

BY:


JOSEPH IANNO, JR.
Florida Bar No: 655351

SERVICE LIST

<p>John Scarola, Esq. SEARCY, DENNEY, SCAROLA, BARNHARDT & SHIPLEY, P.A. 2139 Palm Beach Lakes Boulevard West Palm Beach, Florida 33409 Telephone: (561) 686-6300 Facsimile (561) 478-0754</p>	<p>Counsel for Plaintiff</p>
<p>Jerold S. Solovy, Esq. JENNER & BLOCK, LLC One IBM Plaza, Suite 4400 Chicago, Illinois 60611 Telephone: (312) 222-9350 Facsimile: (312) 840-7671</p>	<p>Counsel for Plaintiff</p>



Thomas Clare
10/21/2003 10:38 AM

To: Kimberly Chervenak/Washington DC/Kirkland-Ellis@K&E

cc:

Subject: Coleman v. Morgan Stanley

----- Forwarded by Thomas Clare/Washington DC/Kirkland-Ellis on 10/21/2003 10:43 AM



JDillard@CarltonFields.com on 10/15/2003 04:25:11 PM

To: Thomas Clare/Washington DC/Kirkland-Ellis@K&E, "Jack Scarola (RightFax)"
<"IMCEARFAX-Jack+20Scarola+40_FN="+2B1+20+28040+29561+29+20684-5816_VN="+28040+29561+29+20686-6300_CO=Searcy+20Denney+20Scarola+20+26+20Barnhard_CI=West+20Palm+20Beach+2C+20FL"@carltonfields.com>, jsolovy@jenner.com

cc:

Subject: Coleman v. Morgan Stanley

Attached please find a copy of Defendant's Notice of Cancellation of Hearing set for October 15, 2003.
<<Morgan-cancel.pdf>>



- Morgan-cancel.pdf

CARLTON FIELDS WPB

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CASE NO: 03 CA-005045 AI

COLEMAN (PARENT) HOLDING INC.,
Plaintiff,

v.

MORGAN STANLEY & CO., INC.,
Defendant.

NOTICE OF CANCELLATION OF HEARING

Defendant, MORGAN STANLEY & CO. INC., by and through its undersigned attorneys, hereby give notice of its cancellation of hearing, scheduled for October 16, 2003 at 8:45 a.m., before the Honorable Elizabeth T. Maass, on Defendant's Motion for Protective Order, Sanctions and Imposition of a Cost Bond.

CERTIFICATE OF SERVICE

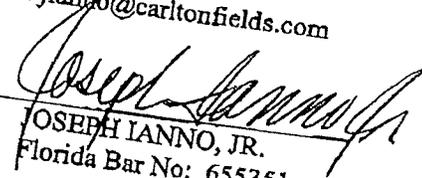
I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by e-mail and facsimile to all counsel of record on the attached service list on this 12 day of October, 2003.

Thomas D. Yannucci, P.C.
Thomas A. Clare
Larissa Paule-Carres
Brett H. McGurk
KIRKLAND & ELLIS, LLP
655 15th Street, N.W. - Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

**COUNSEL FOR DEFENDANT,
MORGAN STANLEY & CO., INC.**

WPB#570606.1

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

BY: 
JOSEPH IANNO, JR.
Florida Bar No: 655351

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT IN
AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDING INC.,

Plaintiff,

CASE NO: 03 CA-005045 A1

v.

MORGAN STANLEY & CO., INC.,

Defendant.

**DEFENDANT'S MOTION TO COMPEL PLAINTIFF TO PRODUCE
SETTLEMENT AGREEMENT WITH ARTHUR ANDERSEN**

Defendant, Morgan Stanley & Co, Inc., pursuant to Fla.R.Civ.P., Rules 1.280 and 1.380, moves to compel Plaintiff to produce the Settlement Agreement between Plaintiff and Arthur Anderson, LLP and states:

1. Several years ago, long before it filed this lawsuit against defendant Morgan Stanley & Co. Incorporated ("MS & Co."), plaintiff Coleman (Parent) Holdings, Inc. ("CPH") filed nearly identical claims against Arthur Andersen arising out of the same financial transaction. That prior lawsuit against Arthur Andersen — filed by the very same counsel who represent CPH here — was based on the same series of financial transactions, contained substantially identical factual allegations and legal theories, and sought to recover exactly the same damages CPH seeks to recover from MS & Co. in this case. See March 15, 2002 1st Am. Compl., *Coleman (Parent) Holdings v. Arthur Andersen et al.*, No. CA 01-06062 AN (Rapp, J.) (Ex. 1). CPH settled the case with Andersen in Fall 2002.

2. Now, CPH refuses, in response to MS & Co.'s discovery requests, to produce its settlement agreement with Arthur Andersen. The agreement between CPH and Arthur Andersen is plainly relevant to, among other things, the damages that CPH seeks to recover in this case (including issues relating to mitigation and set-off) --- and to the credibility of a number of Arthur Andersen witnesses that CPH has noticed for deposition beginning October 28, 2003. Florida courts have routinely held that such settlement agreements are discoverable. MS & Co. moves, pursuant to Florida Rule of Civil Procedure 1.380(a), for an order compelling CPH to produce the Arthur Andersen settlement agreement and all related documents prior to the deposition of any current or former Arthur Andersen employees.

DISPUTE HISTORY

3. This case revolves around negotiations that occurred in New York in mid 1997 and 1998, during which CPH agreed to sell its interest in the Coleman Company ("Coleman") to Sunbeam. MS & Co. served as an advisor to Sunbeam --- CPH's *counterparty* in the negotiations --- for parts of the deal. CPH now alleges --- five years after the fact --- that it sold its stake in Coleman (and agreed to accept Sunbeam stock as part of the purchase price) based on false representations regarding Sunbeam's financial health. CPH purports to bring these claims against MS & Co., but *every factual allegation* in the Complaint deals exclusively with misrepresentations by Sunbeam insiders and Sunbeam's auditor, Arthur Andersen. In fact, in June 2001, CPH asserted precisely the same claims against Arthur Andersen, alleging --- through prior filings in this very Court --- that it "*directly relied*" on financial information provided by Andersen (not MS & Co.) when it agreed to sell its stake in Coleman. See June 8, 2001 Compl., *Coleman (Parent) Holdings v. Arthur Andersen et al.*, No. CA 01-06062 AN (Rapp, J.) (Ex. 2).

4. In the instant case, MS & Co. served its First Request for Production of Documents upon CPH on July 15, 2003, requesting "[a]ll documents referring or relating to the settlement

agreement between CPH and Arthur Andersen.” (July 15, 2003 Morgan Stanley & Co. Inc.’s 1st Req. for Prod. of Docs. to Pfl. at Req. 40 (Ex. 3).) CPH objected to producing the Andersen settlement agreement, citing a confidentiality provision in the agreement. MS & Co. attempted to resolve this issue with CPH without the need for judicial intervention. (See Aug. 27, 2003 DeBord Letter to Brody at 4 (Ex. 4).) CPH reiterated its refusal to produce these documents because “CPH would be in violation of the terms of the settlement agreement between CPH and Arthur Andersen if CPH disclosed any of the terms of the settlement agreement.” (See Sept. 12, 2003 Brody Letter to DeBord at 4 (Ex. 5).)

5. Morgan Stanley renewed its request for the settlement agreement, citing well-established Florida law favoring the discoverability of settlement agreements despite confidentiality agreements. (See Sept. 30, 2003 DeBord Letter to Brody at 2 (Ex. 6).) Ultimately, while CPH recognizes that it will eventually be forced to produce the settlement agreement, it refuses to produce the agreement or related documents “at this stage of the litigation.” (See Oct. 7, 2003 Brody Letter to Brown (Ex. 7).) CPH cannot, however, seek hundreds of millions of dollars in damages from MS & Co. and then hide relevant facts. The Court has entered a Protective Order to maintain the confidentiality of the settlement agreement. MS & Co. is entitled to receive the settlement agreement and related documents in sufficient time to allow it to prepare for the deposition of a number witnesses that CPH has noticed.

ARGUMENT

I. A CONTRACTUAL CONFIDENTIALITY PROVISION CANNOT BE USED TO RESIST DISCOVERY.

It is well-established in Florida that a confidentiality provision in a settlement agreement cannot be used as a shield to resist legitimate discovery. The Florida courts have squarely held that the defendant “is entitled to evaluate its potential liability exposure with all information on

hand” and that a confidentiality term in a settlement agreement “may not be subsequently employed by a litigant to obscure issues or otherwise thwart an opponent’s discovery.” *City of Homestead v. Rogers*, 789 So. 2d 483, 484 (Fla. 3d DCA 2001) (reversing district court for failing to grant motion to compel discovery of settlement terms and amount) (quoting *Smith v. TTB Bank of the Keys*, 687 So. 2d 895, 896 (Fla. 3d DCA 1997)); *Griffin v. Mushariki*, No. 96 Civ. 6400, 1997 WL 756914 (S.D.N.Y. Dec. 8, 1997) (ordering production of settlement agreement despite confidentiality clause); *Tribune Co. v. Furciogliotti*, No. 93 Civ. 7222 (LAP), 1996 WL 337277 (S.D.N.Y. June 19, 1996) (same).

II. THE ARTHUR ANDERSEN SETTLEMENT AGREEMENT IS HIGHLY RELEVANT TO THE PRESENT ACTION.

CPH’s settlement agreement with Arthur Andersen is highly relevant to the present action. It is axiomatic that CPH cannot be permitted double recovery of its alleged damages. *Whalen v. Kawasaki Motors Corp.*, 703 N.E.2d 246, 248 (N.Y. 1998) (“[T]he possibility of double recovery should be avoided.”).¹ CPH sued — and then settled with — Arthur Andersen to recover the same types of damages it seeks from MS & Co. in the current case. CPH’s recovery from Arthur Andersen (and a prior recovery from Sunbeam) reduces the damages that CPH would be entitled to if it prevailed in this action. MS & Co. is “entitled to evaluate its potential liability exposure with all information on hand.” *See City of Homestead*, 789 So. 2d at 484 (holding settlement agreement is relevant because “[s]ctoff is an issue in this case”).

Moreover, MS & Co. is entitled to examine CPH’s settlement agreement with Arthur Andersen in order to evaluate witnesses’ potential bias, interest and credibility. *See, e.g.*,

¹ Settled choice-of-law principles require the Court to apply New York law to plaintiff’s claims. (See June 25, 2003 Def.’s Mot. to Dismiss Pursuant to Fla. R. Civ. P. 1.061 or, in the Alternative, for I. on the Plds.)
(Continued...)

Westside-Marrero Jeep Eagle, Inc. v. Chrysler Corp., No. Civ. A. 97-3012, 1998 WL 186705, at *3 (E.D. La. Apr. 17, 1998) (discovery of settlement agreements permitted to evaluate a witness' potential bias, interest, and credibility) (collecting cases); *Griffin*, 1997 WL 756914, at *2 (same) (collecting cases). CPH has already noticed the deposition of 8 current and former Arthur Andersen employees in this case. At the very least, MS & Co. is entitled to explore, during depositions of Arthur Andersen and CPH witnesses, for example, "whether any promises have been made" by Arthur Andersen in the settlement agreement that could affect the present action. *White v. Kenneth Warren & Son, Ltd.*, 203 F.R.D. 364, 367 (N.D. Ill. 2001).

CONCLUSION

For the foregoing reasons, MS & Co. respectfully requests an order compelling CPH to immediately produce its settlement agreement with Arthur Andersen and related documents and award such other and further relief as is just and proper.

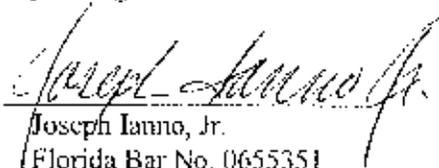
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by facsimile, U.S. Mail and e-mail to all counsel of record on the attached service list on this 27th day of October, 2003.

Thomas D. Yannucci, P.C.
Thomas A. Clare
KIRKLAND & ELLIS LLP
655 15th Street, N.W. Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

Counsel for Defendant
Morgan Stanley & Co. Incorporated

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

BY: 
Joseph Ianno, Jr.
Florida Bar No. 0655351

However, the prohibition against double-recovery is exactly the same in Florida. See *Anderson v. Ewing*, 768 So. 2d 1161, 1165 (Fl. 4th DCA 2000) (granting setoff to prevent double recovery).

SERVICE LIST

<p>John Scarola SEARCY, DENNEY, SCAROLA, BARNHARDT & SHIPLEY, P.A. 2139 Palm Beach Lakes Boulevard West Palm Beach, Florida 33409</p>	<p>Counsel for Plaintiff</p>
<p>Jerold S. Solovy JENNER & BLOCK, LLC One IBM Plaza Suite 4400 Chicago, Illinois 60611</p>	<p>Counsel for Plaintiff</p>

EXHIBIT 1

are made against each of Andersen-US, Andersen-Worldwide, Andersen-Canada, Andersen-Hong Kong, Andersen-Mexico, Andersen-Venezuela and Andersen-UK jointly and severally.

NATURE OF THE ACTION

1. This action arises out of Coleman-Parent's sale of its controlling interest in The Coleman Company, Inc. ("Coleman Company") to Sunbeam Corporation, Inc. ("Sunbeam") on March 30, 1998, in exchange for 14.1 million shares of Sunbeam common stock, plus other consideration. In deciding to go forward with that sale, Coleman-Parent relied on Sunbeam's financial statements, which were audited by Andersen and certified on behalf of Andersen by Andersen-US. Andersen promoted itself as the largest accounting firm in the world at the time of the audits.

2. Unbeknownst to Coleman-Parent, however, Andersen had audited and certified financial statements that it knew to be inaccurate and misleading. Those audited financial statements painted a false picture of Sunbeam, depicting it as a company in the midst of an impressive financial turnaround. The reality was that Sunbeam's turnaround was a sham, and when the truth emerged, Sunbeam's stock lost virtually all of its value. The company is now in bankruptcy. By relying on the financial statements improperly certified by Andersen, Coleman-Parent has suffered losses exceeding \$600 million.

3. By holding itself out as Sunbeam's independent certified public accountant and certifying Sunbeam's financial statements, Andersen knowingly assumed a responsibility that transcended its relationship with Sunbeam as a client. As an independent public accountant auditing Sunbeam's financial statements, Andersen owed a duty to Coleman-Parent and others whom it knew were relying upon Andersen's certification that Sunbeam's reports fairly depicted the company's financial status. Andersen was required to maintain independence from its client,

Sunbeam, and speak with total honesty befitting the trust that had been placed in its word. In carrying out its audit of Sunbeam's financial statements, Andersen utterly failed to live up to that responsibility. To the contrary, Andersen's audits were not performed in accordance with generally accepted auditing standards ("GAAS"), and the financial statements it certified were not, as Andersen claimed, in conformity with generally accepted accounting principles ("GAAP"). Even more egregious, Phillip Harlow, the audit partner on the Sunbeam account, and others at Andersen knew the financial statements were not prepared in conformity with GAAP, but Andersen certified them nonetheless.

4. Defendants' motivation was simple – to do whatever was necessary to retain a major client. Andersen had served as Sunbeam's independent auditor for many years. In 1993, Andersen's Fort Lauderdale, Florida, office took charge of the account, and Sunbeam became one of the few Fortune 500 clients in that office. Sunbeam's audits generated significant fees. For example, Sunbeam paid Andersen more than \$1 million for its 1995 audit. Over the years, in addition to auditing work, Sunbeam also generated numerous consulting engagements and their accompanying fees. Defendants were motivated to preserve the Sunbeam relationship not only to ensure that audit engagements would continue but also to reinforce the opportunity to perform lucrative consulting work. In addition, maintaining the relationship with Sunbeam was important to defendants because being dropped by a high-profile client such as Sunbeam would have brought negative publicity to the Ft. Lauderdale office and to Andersen.

5. However, in 1996 that relationship was threatened by Sunbeam's new CEO, Albert Dunlap. Dunlap was eager to show a turnaround at Sunbeam in order to position the company for a quick sale, as he recently had done at Scott Paper. To accomplish that goal, Dunlap's new management team knowingly employed improper accounting methods that first

overstated the company's loss in 1996 and then inflated the company's income in 1997. In total abrogation of its responsibility as an independent auditor, Andersen permitted -- indeed, blessed -- those improper accounting treatments, rather than risk losing Sunbeam's audit business to Dunlap's accountant of choice, Coopers & Lybrand.

6. Ironically, the financial results certified by Andersen for 1996 and 1997 drove the price of Sunbeam stock so high that new management could not locate a willing buyer for a quick sale of the company, as had been hoped. As a result, Sunbeam was forced to shift gears and pursue acquisitions of other companies, including Coleman Company, in the hope that those mergers would obscure Sunbeam's true financial position and forestall revelation of the accounting gimmickry. To effectuate that plan, some of the very same Andersen partners and employees who were functioning as Sunbeam's "independent" auditors (including Harlow) added another role and joined Sunbeam's due diligence team for the acquisitions.

7. Because of the dual roles as auditor and acquisitions consultant that defendants played, defendants knew full well not only that the purchase of Coleman Company was taking place, but also that Coleman-Parent was relying on the financial statements certified by Andersen. Nonetheless, Andersen took no steps before the Coleman Company acquisition closed to correct the grossly misleading impression created by its certifications.

8. At the time of the sale to Sunbeam, Coleman Company was a leading manufacturer and marketer of consumer products for the worldwide outdoor recreation market, with annual revenues in excess of \$1 billion. As payment for its stake in Coleman Company, Coleman-Parent was to receive 14,099,749 shares of Sunbeam stock, \$160 million in cash and other consideration. Based on Sunbeam's share price at the time of the closing, Coleman-Parent received Sunbeam shares that had an aggregate market value of over \$619.5 million.

9. Within weeks of the closing of the Coleman Company acquisition on March 30, 1998, the deception facilitated by Andersen began to unravel. On April 3, 1998, just four days after the closing, Sunbeam's management issued a press release announcing that, despite having predicted positive quarterly results in another press release just two weeks earlier, Sunbeam now would show a loss for the first quarter of 1998. On May 11, 1998, Sunbeam issued an earnings release for the first quarter of 1998 reporting a loss of 52 cents per share, compared with a gain of 8 cents per share in the same quarter of 1997. Press coverage ensued in the following month questioning whether Sunbeam had utilized -- and Andersen had approved -- manipulative and improper accounting practices in order to create the ruse of a turnaround.

10. In June 1998, the Sunbeam board of directors began an inquiry into Sunbeam's accounting practices. On June 15, 1998, the board announced that it had removed Dunlap as Chairman and CEO of Sunbeam. On June 25, 1998, Andersen withheld its consent for use of its unqualified 1997 audit opinion in a registration statement that was to have been filed with the Securities and Exchange Commission ("SEC"). On June 30, 1998, Sunbeam acknowledged that it had undertaken a review of its financial statements and the review could result in a restatement of the financial statements. On October 20, 1998, Sunbeam and Andersen announced a restatement of the financial statements. Thereafter, Andersen issued a new unqualified audit opinion for Sunbeam reporting only \$93 million in operating earnings for 1997. That amount was approximately half of the figure that Andersen previously certified.

11. In February 2001, Sunbeam filed a voluntary bankruptcy petition under Chapter 11 of the Bankruptcy Code. Coleman-Parent's equity stake in Sunbeam is now worthless.

12. In order to retain the Sunbeam account and lucrative auditing and consulting fees, Andersen turned its back on its professional and legal obligations and certified Sunbeam financial statements that it knew to be false and misleading. It did so with full knowledge that Coleman-Parent would be harmed immensely by Andersen's misstatements and omissions. As a direct and foreseeable result of Andersen's actions, Coleman-Parent has sustained damages in excess of \$600,000,000.

13. By this complaint, Coleman-Parent seeks recovery of over \$600 million in compensatory damages. In addition, Coleman-Parent reserves the right to seek leave to amend its complaint pursuant to Fla. Stat. § 768.72 to assert claims for an additional recovery of punitive damages in excess of \$1.2 billion as allowed by law.

JURISDICTION AND VENUE

14. This Court has jurisdiction over the subject matter of this action pursuant to Fla. Stat. § 26.012(2)(a). This Court has jurisdiction over Andersen-US, Andersen-Worldwide, Andersen-Canada, Andersen-Hong Kong, Andersen-Mexico, Andersen-Venezuela, Andersen-UK and Harlow pursuant to Fla. Stat. §§ 48.193(1)(a) and (D), (2) and/or (5).

15. Venue is proper in this district pursuant to Fla. Stat. §§ 47.011 and 47.021 because Andersen maintains an office with more than 30 employees and partners in West Palm Beach, Florida, and therefore resides in Palm Beach County. In addition, Harlow is a resident of South Florida.

PARTIES

16. Coleman (Parent) Holdings, Inc. ("Coleman-Parent") is a corporation incorporated in the state of Delaware with its principal business offices located in New York.

Coleman-Parent is a wholly owned subsidiary of Mafco Holdings Inc. ("MAFCO"). Prior to March 30, 1998, Coleman-Parent owned approximately 81% of Coleman Company.

17. Andersen Worldwide, Société Coopérative, Switzerland ("Andersen-Worldwide") is a partnership organized under the Swiss Federal Code of Obligations. Its partners include more than 2,000 individuals from 390 offices in 84 countries. Various individuals who are partners of Andersen-Worldwide participated in the 1996 and 1997 audits of Sunbeam, and in the 1998 restatement of the reports of those audits. Andersen-Worldwide and Andersen-US dictate the policies and procedures to be used within Andersen throughout the world.

18. Arthur Andersen LLP ("Andersen-Canada") is part of Andersen-Worldwide. Andersen-Canada participated in the 1996 and 1997 audits of Sunbeam and the 1998 restatement of the reports of those audits.

19. Arthur Andersen & Co. ("Andersen-Hong Kong") is part of Andersen-Worldwide. Andersen-Hong Kong participated in the 1996 and 1997 audits of Sunbeam and the 1998 restatement of the reports of those audits.

20. Ruiz, Urquiza Y Cia, S.C. ("Andersen-Mexico") is part of Andersen-Worldwide. Andersen-Mexico participated in the 1996 and 1997 audits of Sunbeam and the 1998 restatement of the reports of those audits.

21. Piermavieja, Porta, Cachafeiro & Avogados ("Andersen-Venezuela") is part of Andersen-Worldwide. Andersen-Venezuela participated in the 1996 and 1997 audits of Sunbeam and the 1998 restatement of the reports of those audits.

22. Arthur Andersen ("Andersen-UK") is part of Andersen-Worldwide.

Andersen-UK participated in the 1996 and 1997 audits of Sunbeam and the 1998 restatement of the reports of those audits.

23. Arthur Andersen LLP ("Andersen-US") is part of Andersen-Worldwide.

Andersen-US is a partnership formed under the laws of the State of Illinois. The partners of Andersen-US are residents of Florida and numerous other states. Andersen-US participated in and coordinated the 1996 and 1997 audits of Sunbeam and the 1998 restatement of the reports of those audits. In addition, Andersen-US partners and employees provided consulting services to Sunbeam as part of due diligence work performed in conjunction with Sunbeam's acquisition of Coleman Company, and on other projects.

24. Phillip E. Harlow ("Harlow") has been a partner at Andersen-US since

1983, and also is a partner of Andersen-Worldwide. He served as the engagement partner on the audits of Sunbeam's financial statements from 1993 to 1998. As engagement partner, Harlow had primary responsibility for supervising the 1996 and 1997 audits of Sunbeam, including overseeing the activities with respect to the Sunbeam work performed by numerous persons at Andersen. Harlow also participated as a member of Sunbeam's due diligence team in connection with Sunbeam's acquisition of Coleman Company.

ANDERSEN AS "ONE FIRM"

25. In 1913, an accounting and consulting partnership was formed in Illinois

under the name "Arthur Andersen & Co." The company began to expand internationally in the 1930s. The firm operated on a global scale through a network of international offices, branches and subsidiaries of the U.S. partnership premised under a "one firm" concept.

26. In 1977, as Andersen increased its global presence, it created a new structure: the Andersen Worldwide Organization ("AWO"), comprised of Andersen-Worldwide, the individual partners of Andersen-Worldwide and Andersen-Worldwide's offices around the globe, operating as a single global partnership or joint venture. The AWO structure was and is designed to maintain the "one firm" concept, and was and is intended to foster the belief that Andersen operates as a single entity. In its promotional literature, including its web site, Andersen-Worldwide markets itself as "one firm," "a single worldwide operating structure" that "think[s] and act[s] as one."

27. Andersen-Worldwide is the instrumentality through which the "one firm" concept becomes reality. It achieves this in four distinct ways.

(a) Partner Overlap: Andersen-Worldwide is a partnership made up of more than 2,000 individuals from 390 offices in 84 different countries worldwide. Simultaneously, the partners of Andersen-Worldwide also are partners (or the equivalent) in the entities that make up those offices. Thus, all of those offices are managed by individuals who are both local partners (or the equivalent) and partners of Andersen-Worldwide.

(b) Global Setting of Professional Standards: Andersen-Worldwide purports to establish the professional standards and principles under which its offices operate. Andersen-Worldwide's international offices enter into a standard agreement with Andersen-Worldwide under which they agree to be bound by those professional standards and principles. An office of Andersen-Worldwide that breaches the agreement is subject to removal from the organization. The Assurance Professional Standards Group has firm-

wide responsibility for providing guidance on the professional standards to be followed by Andersen-Worldwide's offices.

(c) Sharing of Costs and Profits: Andersen-Worldwide coordinates the sharing of costs and allocation of revenues and profits among its partners and its offices around the world.

(d) Infrastructure and Administration: Andersen-Worldwide handles all borrowing on behalf of its international offices, and maintains the financial records, payroll and employee and health benefits for those international offices as well. All of Andersen's offices also share global computer operations, a worldwide tax structure and training facilities.

28. By establishing a legal, financial and administrative infrastructure, Andersen-Worldwide enables each of its offices around the world to function as, and to appear to clients as, an extension of a single, global entity.

29. Andersen-Worldwide manages, directs and controls its international offices in two overlapping groups: by practice areas (also known as "lines of service") and by geographic location.

30. Each practice group is managed by a global practice director who oversees, directs and controls the operations of each practice group worldwide. Regional practice directors report to the global practice director and manage, direct and control the practice group within their regions. The global practice director and managing partner for the audit practice group of Andersen-Worldwide is C.E. Andrews, a United States-based partner.

31. In addition, Andersen-Worldwide groups its offices into several geographic regions and assigns a managing partner to each region.

32. Andersen-Worldwide has grown to be one of the world's largest accounting firms. The Andersen-Worldwide organization employs over 77,000 professionals in fields such as accounting, taxation, business consulting, corporate finance, risk management and business fraud investigation. Andersen-Worldwide's global revenues for the fiscal year ending August 31, 2001 totaled more than \$9.3 billion.

33. Andersen-US is dominant within Andersen-Worldwide. Andersen-Worldwide is largely controlled by its U.S.-resident partners, who also are partners of Andersen-US. Approximately half of the partners of Andersen-Worldwide are also partners of Andersen-US. Likewise, approximately half of the partners of Andersen-US are partners of Andersen-Worldwide.

34. The engagement partner on the Sunbeam audits, Harlow, and the concurring partner on those audits, William Pruitt, are partners of both Andersen-US and Andersen-Worldwide. The engagement partner on the Sunbeam restatement, Donald Denkhaus, who as Audit Division Head also was manager of Andersen's audit practice for the entire South Florida region, also is a partner of both Andersen-US and Andersen-Worldwide.

35. In addition to overlapping partners, Andersen-Worldwide and Andersen-US share officers in common as well. For example, the Chief Executive Officer and Managing Partner of Andersen-Worldwide is Joseph Berardino, who also is the Chief Executive Officer and Managing Partner of Andersen-US. In addition, Andrew Pincus is the General Counsel of both Andersen-US and Andersen-Worldwide. The Andersen-Worldwide regional managing partner for North America is Terry E. Hatchett, who also is the country managing partner for Andersen-US.

36. Andersen-Worldwide and Andersen-US share more than partners and officers -- they share the same address. In its promotional literature, Andersen-Worldwide states that its headquarters are located at 33 West Monroe Street, Chicago, Illinois 60603. That is the same address as the headquarters of Andersen-US.

37. Andersen-Worldwide and its affiliates demonstrate the "one firm" concept not only through their actions relative to the outside world, but also internally within the Andersen organization itself.

38. The components of the Andersen organization ignore corporate formalities in referring to themselves or to each other. Documents by Andersen-US often bear the insignia and logos of Andersen-Worldwide, including "Andersen Worldwide," "Andersen," and "Arthur Andersen Co., SC". In its promotional literature, Andersen uses the names "Andersen Worldwide," "Andersen," and "Arthur Andersen LLP" interchangeably. In addition, Andersen sometimes uses only the name "Andersen" and does not differentiate between Andersen-Worldwide and its offices around the globe. Some promotional literature has stated, "Arthur Andersen will now be known simply as Andersen." Indeed, when Joseph F. Berardino appeared before Congress in December 2001, he supplied written testimony that identified him as "Managing Partner -- Chief Executive Officer, Andersen" (emphasis added).

39. Andersen took the same approach in work relating to Sunbeam. The auditors used Andersen-Worldwide and Andersen-US stationery and logos interchangeably, or otherwise used the identifier "Arthur Andersen," on internal correspondence, on correspondence with Sunbeam and on presentation materials for Sunbeam. Top partners responsible for the Sunbeam audits and restatement were partners of both Andersen-US and Andersen-Worldwide.

40. Andersen's audits and restatement work for Sunbeam illustrate the "one firm" concept in action. Sunbeam was a multinational corporation with operations in Canada, Mexico, Venezuela, Hong Kong and Europe. The engagements required the participation of auditors from each of those countries and numerous American cities. Harlow, on behalf of both Andersen-US and Andersen-Worldwide, developed work plans that he circulated to Andersen-Canada, Andersen-Hong Kong, Andersen-Mexico, Andersen-Venezuela and Andersen-UK. Those offices worked together with Harlow and others to complete the tasks outlined in the plan, and sent their work product to Harlow for inclusion in an Andersen Worldwide Management Letter.

SUBSTANTIVE ALLEGATIONS

A. Sunbeam's New Management Team (1996-1998).

41. In the years leading up to 1996, Sunbeam had experienced increasing financial difficulties and growing losses. In an effort to remedy the situation, Sunbeam's board of directors undertook a change in Sunbeam's management in July 1996. The management team the board brought in was headed by Albert Dunlap, a person who had earned a reputation as a turnaround specialist through brief terms as Chief Executive Officer of a number of publicly traded corporations. Based on his penchant for rapidly slashing personnel and closing plants to achieve quick turnaround results, Dunlap is widely known as "Chainsaw Al."

B. Dunlap Arrives at Sunbeam and Initiates Restructuring.

42. Sunbeam hired Dunlap on July 18, 1996 and installed him as its Chairman and Chief Executive Officer. Immediately after joining Sunbeam, Dunlap hired Russell A. Kersh as Sunbeam's principal financial officer. Kersh had been associated with Dunlap for over 15 years, and had served as a senior executive during various Dunlap turnaround engagements.

Dunlap also brought in other hand-picked executives to make up his senior management team. He hired Donald R. Uzzi as Vice President, Marketing and Product Development. Uzzi later became Executive Vice President, Consumer Products Worldwide. Dunlap also hired Lee B. Griffith as Vice President, Sales. Dunlap retained Robert J. Gluck, formerly Controller of Sunbeam, as Sunbeam's Principal Accounting Officer.

43. Dunlap and the senior members of his management team entered into lucrative employment agreements that gave them a strong financial incentive to cause Sunbeam's stock price to increase and then to sell the company quickly. All stood to make many millions of dollars if that happened. Andersen was fully aware of those audit risks and the fact that a disproportionate share of those executives' potential earnings was dependent on stock options or restricted shares of stock.

44. In addition to the personal financial incentives deriving from his employment contract, Dunlap also had his reputation as a turnaround specialist to protect and advance. Dunlap used his reputation as a specialist in turning around troubled companies to make aggressive promises about Sunbeam's future performance and support false and misleading announcements of record performance -- results that were rendered credible because Andersen had certified Sunbeam's financial statements.

C. Andersen Is Recruited to Help Create the Illusion of a Successful Restructuring.

45. To lay the foundation for the appearance of a successful turnaround in 1997, Sunbeam's new senior management team decided to take improper expenses and record unjustified accounting writeoffs in 1996, thus lowering the benchmark for measuring their ultimate "success" in turning Sunbeam around.

46. Dunlap and his team needed the help of Sunbeam's auditors in approving the improper accounting tactics or the scheme would have had no chance of success. Andersen's Phillip Harlow was such a willing participant. Harlow knew of Dunlap's reputation as a fast-moving turnaround specialist who was quick to fire anyone who did not advance his agenda. Harlow also knew that in other highly publicized turnaround engagements, Dunlap had employed Coopers & Lybrand, one of Andersen's major competitors, as a financial consultant and independent auditor. Consistent with past practice, one of the first things Dunlap did after joining Sunbeam was to hire Coopers & Lybrand as a financial advisor with the lucrative assignment of planning Sunbeam's massive restructuring, which led to the firing of nearly half of Sunbeam's 12,000 employees. Andersen -- and especially Harlow -- were keenly aware that this did not bode well for the future of Andersen's relationship with Sunbeam.

47. Sunbeam had been a major client of Andersen's for many years and Sunbeam had paid Andersen over \$1 million in fees for its 1995 audit alone. Harlow had been the Sunbeam engagement partner since 1993. When Dunlap took control of Sunbeam and hired Coopers & Lybrand for the restructuring, Harlow became concerned that Dunlap would fire Andersen as the company's independent auditor and hire Coopers & Lybrand instead. Indeed, Harlow was so concerned about the possible loss of Sunbeam as a client that he agreed to a 30% reduction in Andersen's fee for 1996. A reduction in audit fees was simply one price Andersen had to pay in order to keep Sunbeam as a client.

D. Andersen's Early Assistance in the Scheme.

48. When Harlow began work on the audit of Sunbeam's 1996 financial statements, Harlow and Andersen learned the true price of keeping Sunbeam as an audit client. In addition to reducing its audit fees, Andersen was required to accept the improper and

misleading accounting treatments used by Sunbeam's senior management to create the illusion of a successful turnaround. In the end, Andersen's desire to retain a valuable client overrode any sense of duty or professionalism. To keep Sunbeam as an Andersen client, Harlow and Andersen ignored numerous accounting improprieties Andersen knew had been employed. Even when Harlow expressly identified certain of management's bogus accounting treatments, he ultimately acquiesced in management's refusal to correct the improprieties, and Andersen issued unqualified or "clean" audit opinions. Andersen did so despite the harm it knew would be inflicted on all who relied upon Andersen's audit opinions.

1. Improper Accounting Practices In 1996.

49. As set forth below, Andersen and Harlow permitted management to employ numerous accounting practices in 1996 that did not comply with GAAP.

50. One of the accounting practices permitted by Andersen and Harlow was the creation of a massive \$338 million non-GAAP reserve for restructuring charges. Although certain types of restructuring reserves may be proper, the reserves created by management included improper reserves and accruals, excessive write-downs and prematurely recognized expenses that were not proper restructuring reserves under GAAP. Those intentionally inflated reserves served two purposes. First, because the reserves were charged as an expense against income, they allowed Sunbeam to overstate its 1996 loss, and lower the benchmark for measuring the eventual success of Sunbeam's turnaround. Second, the inflated restructuring reserves created a "cookie-jar" of overstated liabilities on Sunbeam's books that Dunlap could reduce in the years after 1996, purportedly to correct the overstatements, and at the same time increase income in the year of the corrections. Those adjustments, too, fostered the illusion of a successful turnaround.

51. One of the largest components of the Sunbeam "cookie-jar" reserves permitted by Andersen and Harlow was millions of dollars in items that benefitted future activities, and hence were not properly part of the restructuring reserve. Those items included costs of redesigning product packaging, costs of relocating employees and equipment, bonuses to be paid to employees who were told that they were being laid off but were asked to stay temporarily, advertising expenses and certain consulting fees. Note 2 to the audited 1996 financial statements falsely described the restructuring charges as follows:

In conjunction with the implementation of the restructuring and growth plan, the Company recorded a pre-tax special charge to earnings of approximately \$337.6 million in the fourth quarter of 1996. This amount is allocated as follows in the accompanying Consolidated Statement of Operations: \$154.9 million to Restructuring, Impairment and Other Costs as further described below; \$92.3 million to Cost of Goods Sold related principally to inventory write-downs from the reduction in SKU's and costs of inventory liquidation programs; \$42.5 million to Selling, General and Administrative expenses principally for increases in environmental and litigation reserves (see Notes 12 and 13) and other reserve categories; and the estimated pre-tax loss on the divestiture of the Company's furniture business of approximately \$47.9 million.

As Sunbeam's eventual restatement of its financial statements showed, those reserves were materially inflated and were not recorded in accordance with GAAP.

52. In connection with the audit of Sunbeam's 1996 year-end financial statements, Harlow discovered that certain components of Sunbeam's restructuring reserves were not being recorded in compliance with GAAP and proposed that the company reverse several of the accounting entries establishing those reserves. As Harlow told Kersh and Gluck, under GAAP, entries that benefitted Sunbeam's future results were not considered to be proper restructuring charges in 1996. But Kersh and Gluck refused to reverse those items. Instead of standing firm, as professional ethics required, Harlow turned a blind eye to his duties as an independent auditor and caused Andersen to acquiesce in management's refusal to reverse those

non-GAAP reserves. Those improper reserves caused Sunbeam's 1996 audited financial statements to be materially false and misleading.

53. In connection with the 1996 audited financial statements, Andersen and Harlow also permitted management to create an excessive \$12 million reserve for a lawsuit alleging that Sunbeam was liable for a portion of the cleanup costs for a hazardous waste site. In fact, that reserve overstated Sunbeam's estimated liability by at least 100%, and provided Sunbeam with an inflated reserve that could be drawn down to boost income figures artificially in later periods.

54. Andersen and Harlow also permitted Sunbeam to write down its household products inventory in 1996. In connection with the restructuring, Dunlap's management team planned to eliminate half of Sunbeam's product lines and to liquidate Sunbeam's inventory of eliminated product lines at a substantial discount. Notwithstanding that the change affected only half of Sunbeam's product lines, Andersen and Harlow permitted management to reduce the cost basis for Sunbeam's entire inventory of household products at 1996 year end, without distinction between eliminated and continuing product lines (including inventories that were later sold in the ordinary course of business). As a result, the balance sheet value of Sunbeam's inventory at year-end 1996 was understated by approximately \$2 million, and Sunbeam overstated its 1996 loss by the same amount. Andersen and Harlow negligently or fraudulently disregarded facts indicating that (a) Sunbeam had understated the carrying value of its household products inventory, (b) the understatement had contributed to the material misstatement of Sunbeam's financial statements at year-end 1996 and (c) the understatement would improperly increase Sunbeam's income during 1997 when household products were sold at artificially inflated margins.

55. Andersen and Harlow also permitted management improperly to recognize \$2.3 million in 1997 advertising expenses and related costs as a 1996 expense. Andersen and Harlow negligently or fraudulently disregarded facts indicating that the accounting treatment would contribute to the material overstatement of Sunbeam's 1996 year-end loss and exaggerate Sunbeam's so-called turnaround by the same amount in 1997.

56. Finally, Andersen and Harlow permitted Sunbeam to manipulate its 1996 liabilities for cooperative advertising. In addition to buying national advertising to create demand for its products, Sunbeam funded a portion of its retailers' costs of running local promotions. As required by GAAP, Sunbeam accrued its estimated liabilities for such "cooperative advertising," and then charged its expenses in relation to its sales revenue during the year. At year-end 1996, Sunbeam set its cooperative advertising accrual at \$21.8 million, an amount that was approximately 25% higher than the prior year's accrual amount, without any basis for the increase. Harlow learned of the inflated accrual for cooperative advertising in connection with Andersen's audit of Sunbeam's year-end 1996 financial statements and discussed it with Kersh and Gluck. Nevertheless, Andersen and Harlow negligently or fraudulently disregarded facts concerning the lack of a proper basis for the accrual and the likelihood that the excess accrual would be released into income in early 1997. In fact, \$5.8 million of that excessive accrual was used (without disclosure) to inflate Sunbeam's 1997 income.

2. Andersen's 1996 Unqualified Audit Opinion.

57. In March 1997, Andersen issued an unqualified audit opinion regarding Sunbeam's 1996 financial statements and authorized the inclusion of its audit opinion in Sunbeam's 1996 Form 10-K filed with the SEC. Andersen's opinion stated:

We conducted our audits in accordance with generally accepted auditing standards. Those standards require that we plan and

perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement. An audit includes examining, on a test basis, evidence supporting the amounts and disclosures in the financial statements. An audit also includes assessing the accounting principles used and significant estimates made by management, as well as evaluating the overall financial statement presentation. We believe that our audits provide a reasonable basis for our opinion.

In our opinion, the financial statements . . . present fairly, in all material respects, the financial position of Sunbeam Corporation and subsidiaries as of December 31, 1995 and December 29, 1996, and the results of their operations and their cash flows for each of the three fiscal years in the period ended December 29, 1996 in conformity with generally accepted accounting principles.

58. Andersen's unqualified audit opinion was false in two material respects.

First, the financial statements Andersen audited did not "fairly" present Sunbeam's financial position in conformity with GAAP, as it represented. Second, Andersen did not, as it claimed, conduct its audit in accordance with GAAS.

59. In all, the 1996 financial statements audited by Andersen were materially false and misleading, and overstated Sunbeam's loss for 1996. Andersen and Harlow negligently or fraudulently disregarded facts indicating that (a) Andersen's unqualified audit opinion was incorrect, (b) Sunbeam's financial statements were materially false and misleading and not in conformity with GAAP and (c) Andersen had failed to perform an audit in accordance with GAAS.

E. Andersen Assists Sunbeam as a Financial Adviser in Sunbeam's Purchase of Coleman Company.

60. During 1997, Sunbeam's senior management continued to use improper accounting to create the illusion that a successful turnaround was underway at Sunbeam. By maintaining that illusion, Dunlap's management team hoped to position Sunbeam for a quick sale. However, the illusion proved too convincing to the market, and the price of Sunbeam stock

was driven so high that no willing buyer could be found. Management was aware that, absent a sale, it would be unable to sustain the appearance of a successful turnaround. Therefore, in late 1997, Sunbeam sought to acquire other businesses, in order to consolidate their results with Sunbeam's and thereby continue to obscure Sunbeam's past accounting improprieties. Once again, Sunbeam management required Andersen's assistance in perpetuating the deception.

61. In early December 1997, officers and directors of Sunbeam met with various officers of Coleman Company regarding a potential combination with Sunbeam. After that initial overture was rejected by Coleman-Parent, Dunlap's representative returned with another proposal in January 1998. At that point, Coleman-Parent indicated it was willing to discuss a potential transaction.

62. On January 28, 1998, Sunbeam announced its financial results for 1997, reporting total revenues of \$1.168 billion, and total earnings from continuing operations of \$189 million (or \$1.41 per share). Sunbeam's announcement coincided with Andersen's purported completion of the field work for its audit of Sunbeam's 1997 financial statements, although its work continued for more than a month.

63. On February 3, 1998, Harlow met with key officers of Sunbeam to discuss the acquisition of Coleman Company and its financial impact on Sunbeam. By that time, Harlow knew that Sunbeam had utilized improper accounting to achieve its 1997 results. Harlow also knew Coleman-Parent would insist on reviewing Andersen's 1997 audit opinion before agreeing to consummate any transaction in which the consideration included hundreds of millions of dollars in Sunbeam stock.

64. On February 20, 1998, Andersen agreed to act as a Sunbeam financial advisor and perform financial due diligence in connection with Sunbeam's acquisition of

Coleman Company and two other companies, First Alert, Inc. and Signature Brands USA, Inc. In agreeing to undertake that assignment, Andersen became an active member of the team working to assist Sunbeam in acquiring Coleman Company.

65. During the latter weeks of February 1998, representatives of Sunbeam and Coleman-Parent met to negotiate the details of a potential acquisition of Coleman Company and to prepare a proposed structure for that transaction.

66. Between February 23 and 25, 1998, representatives of Andersen, including Harlow, conducted due diligence concerning Coleman Company and the other target companies on behalf of Sunbeam. During that period, Andersen representatives participated in various meetings with officers and consultants of Coleman Company. At no point, however, did Andersen's representatives suggest that Sunbeam's financial statements were materially false and misleading. Meanwhile, Sunbeam worked on negotiating the terms of its acquisition of Coleman Company.

67. On February 27, 1998, Harlow met with Sunbeam executives in New York to discuss Andersen's due diligence. That afternoon, Sunbeam and Coleman-Parent reached an agreement for the sale of Coleman Company.

68. As part of the Coleman Company acquisition agreement, Sunbeam represented and warranted that all of its filings with the SEC, which included the 1996 financial statements audited by Andersen, were accurate and not misleading, and that they would continue to be accurate and not misleading as of the transaction's closing date, which was expected to be several weeks later. Sunbeam also represented that its audited financial statements were prepared in accordance with GAAP, and that at the time of the closing of the transaction, its

representation would continue to be true and correct. Andersen was fully aware of those representations and warranties when the merger agreement was executed on February 27, 1998.

69. As a result of Andersen's involvement in the Coleman Company acquisition transaction, it knew that Coleman-Parent would rely on Sunbeam's audited financial statements (1) in deciding to close the transaction, and (2) in accepting 14.1 million shares of Sunbeam stock and other consideration in return for its stake in Coleman Company. Moreover, as an independent certified public accountant, Andersen had a duty to disclose to Coleman-Parent that Sunbeam's audited financial statements in fact were neither accurate nor reliable. Notwithstanding that Andersen had met with representatives of Coleman-Parent and its auditors during its due diligence review, Andersen remained mute regarding the true financial condition of Sunbeam and the improprieties buried in Sunbeam's audited financial statements.

F. Andersen Issues its 1997 Audit Report.

70. In the first week of March 1998, shortly after the agreement for Sunbeam's purchase of Coleman Company was signed, but before the transaction closed, Andersen updated its audit work to reflect Sunbeam's acquisitions. That work was done by the same individuals who also were working as consultants on the Sunbeam acquisitions. The three acquisitions were specifically described in Note 14 to the audited financial statements. The description included the fact that Sunbeam was paying for the Coleman Company shares with Sunbeam common stock as well as cash and assumption of debt. Andersen then rendered an unqualified audit opinion for Sunbeam's 1997 financial statements. With Andersen's express consent, management included that opinion in Sunbeam's 1997 Form 10-K filed with the SEC.

1. **Andersen's 1997 Unqualified Audit Report.**

71. In its opinion concerning Sunbeam's 1997 financial statements, Andersen stated:

We conducted our audits in accordance with generally accepted auditing standards. Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement. An audit includes examining, on a test basis, evidence supporting the amounts and disclosures in the financial statements. An audit also includes assessing the accounting principles used and significant estimates made by management, as well as evaluating the overall financial statement presentation. We believe that our audits provide a reasonable basis for our opinion.

In our opinion, the financial statements . . . present fairly, in all material respects, the financial position of Sunbeam Corporation and subsidiaries as of December 29, 1996 and December 28, 1997, and the results of its operations and its cash flows for each of the three fiscal years in the period ended December 28, 1997 in conformity with generally accepted accounting principles.

72. Andersen's 1997 audit opinion was false in two material respects. First, the financial statements Andersen audited did not "fairly" present Sunbeam's financial position in conformity with GAAP, as it represented. Second, Andersen did not, as it claimed, conduct its audit in accordance with GAAS.

73. In all, the 1997 financial statements audited by Andersen were materially false and misleading in that they overstated Sunbeam's operating income for the year by 50%. Andersen and Harlow negligently or fraudulently disregarded facts indicating that (a) Andersen's unqualified audit opinion was incorrect, (b) Sunbeam's financial statements were materially false and misleading and not in conformity with GAAP and (c) Andersen had failed to perform an audit in accordance with GAAS.

2. **Improper Accounting Practices In 1997.**

74. Harlow was well aware of the potential for fraud and irregularities in Sunbeam's 1997 books, including the risk that Sunbeam management would attempt to claim profits and revenue on transactions before the earnings process was completed. Harlow specifically advised Andersen's foreign offices (including Andersen-Canada, Andersen-Hong Kong, Andersen-Mexico, Andersen-Venezuela and Andersen-UK), for example, that Dunlap had made promises to the public regarding earnings-per-share to be attained in 1997, and that management had a vested interest in achieving the promised earnings levels because management's primary form of compensation was based on the company's stock price. Harlow also noted the presence of the possibility of a third party purchase of the company's stock or assets.

75. Despite having specifically noted key reasons to employ heightened scrutiny in the 1997 audit, Harlow and Andersen permitted Sunbeam to engage in improper "earnings management" practices designed to achieve exactly the result Harlow had warned the Andersen audit team to watch for.

76. One of the most flagrant accounting abuses Andersen and Harlow permitted in 1997 was to allow Sunbeam to record a profit on a sham sale of its warranty and spare parts business to its spare parts provider, EPI Printers, Inc. Prior to 1997, EPI satisfied spare parts and warranty requests of Sunbeam customers on a fee basis. To raise additional revenue at year end 1997, however, Sunbeam entered into a sham sale of the warranty and spare parts inventories already in EPI's warehouse. As a result of the transaction, management fraudulently recognized millions of dollars of phony sales and profits in 1997.

77. The problem with the EPI transaction was that the transaction was not a sale at all, for at least three reasons. First, there was never a final agreement between Sunbeam and EPI. The closest the parties ever came to a meeting of the minds was the execution of a mere "agreement to agree." Second, by its terms, the proposed sale was to terminate on January 23, 1998, with no payment obligation on the part of EPI, absent a subsequent agreement between Sunbeam and EPI on the value of the inventory. In other words, the sale could be completely unwound just after year-end without EPI ever having paid a cent. Third, Sunbeam had agreed as part of the proposed sale to pay certain fees to EPI and to guarantee a 5% profit to EPI on the eventual resale of the inventory. In essence, even after the proposed sale, EPI remained a contractor compensated by Sunbeam on a fee basis for its services. In sum, the relationship between EPI and Sunbeam was not fundamentally altered by the purported "sale."

78. Harlow became aware of the true nature of the EPI transaction and raised it with management as part of Andersen's 1997 year-end audit. Harlow proposed that Sunbeam reverse the accounting entries reflecting the revenue recognition for that transaction, having concluded that the profit guarantee and the indeterminate value of the contract rendered revenue recognition inconsistent with GAAP. Simply stated, there was no revenue to recognize because the transaction was illusory. Kersh and Gluck refused to reverse the transaction. Instead of refusing to lend Andersen's name to management's fraudulent revenue recognition, Harlow again acquiesced in management's actions. As a result, Sunbeam's 1997 audited financial statements reflect almost \$10 million of phony profit on the sham EPI transaction.

79. The EPI transaction raised a clear red flag that should have -- and must have -- alerted Andersen to the need for greater scrutiny regarding all of Sunbeam's revenue recognition decisions. At a minimum, Andersen should have been on guard as to all items

Harlow previously identified as proposed audit adjustments (but which Harlow eventually acquiesced in), and any previously recognized improper items that were ultimately dismissed as "immaterial."

80. Another 1997 revenue inflation scheme permitted by Andersen and Harlow was Sunbeam's use of improper "bill-and-hold" transactions. A bill-and-hold transaction is a transaction in which the seller bills a customer for a purchase while holding the merchandise for later delivery. During 1997, Dunlap's management team offered financial incentives to various customers to make purchases earlier than they would otherwise have done so. Management then proposed that Sunbeam hold the merchandise until the normal time for delivery.

81. Under certain limited circumstances, bill-and-hold transactions may be permitted for revenue recognition purposes. However, bill-and-hold transactions must meet specific stringent accounting criteria satisfying GAAP. The relevant criteria include, among others: a requirement that the buyer, not the seller, requested a sale on a bill-and-hold basis; that the buyer had a substantial business purpose for ordering the goods on a bill-and-hold basis; and that risks and rewards of ownership passed to the buyer at the time of the bill-and-hold sale.

82. Bill-and-hold transactions improperly added in excess of \$29 million to Sunbeam's 1997 sales and \$4.5 million to income. In the course of the audit of Sunbeam's 1997 financial statements, Andersen and Harlow discovered that the purported bill-and-hold customers had not requested the bill-and-hold treatment, and that in numerous cases involving rights of return "the risks of ownership and legal title" were not actually "passed to the customer." Nevertheless, Andersen negligently or fraudulently disregarded facts indicating that bill-and-hold transactions did not satisfy the required revenue recognition criteria. Ultimately, Andersen

acquiesced in Sunbeam's decisions to recognize revenue for all of those non-GAAP sales in 1997, and to misdescribe the company's bill-and-hold practices in the financial statements as customer-driven legitimate sales.

83. Another income inflation tactic Sunbeam management used in 1997 was to decrease the inflated 1996 reserves to create the illusion of 1997 income. By decreasing the reserves in 1997, management increased Sunbeam's 1997 income by almost \$5 million. In connection with Andersen's year-end audit of Sunbeam's financial statements, Harlow discovered that tactic and concluded that it was improper. Harlow proposed reversing management's misuse of the reserves, but management refused to do so. Rather than insisting that the adjustments be made, Andersen gave Sunbeam a pass, and permitted the entries. In doing so, Andersen and Harlow negligently or fraudulently disregarded facts indicating that the improper accounting materially distorted Sunbeam's reported results of operations for 1997.

84. Another of Sunbeam's 1997 accounting gimmicks was to record income from non-recurring events as ordinary income. In connection with Andersen's work on the 1997 audit, Harlow learned that management had arranged for the sale of deeply discounted and obsolete inventory during 1997, creating \$19 million in non-recurring revenue. Although the recognition of that revenue was permitted under GAAP, Sunbeam was required to disclose in its financial statements that the income from the sale was a non-recurring event. Sunbeam failed to do so. Notwithstanding that material omission, Andersen certified Sunbeam's 1997 financial statements.

85. In addition, during Andersen's 1997 audit, Harlow proposed adjustments to reverse \$2.9 million related to a Sunbeam inventory overvaluation and \$563,000 in additional items. Management again refused to make appropriate adjustments, and Andersen and Harlow

acquiesced in the refusal to reverse those errors. In doing so, Andersen and Harlow negligently or fraudulently disregarded facts indicating that those items contributed to the misstatement of Sunbeam's 1997 reported results of operations.

86. International sales represented a significant proportion of Sunbeam's overall income from sales. However, part of Sunbeam's reported income from international sales was artificially inflated. Several of Sunbeam's foreign subsidiaries engaged in guaranteed sales that could not have been booked under applicable accounting principles because they included an unlimited right to return unsold merchandise and because the amount of future returns on such sales could not reasonably be estimated.

87. Sunbeam's Hong Kong subsidiary recorded sales revenue of \$8.6 million from various guaranteed sales made during the fourth quarter of 1997. However, that revenue should not have been recognized because sales were made with an unlimited right of return and because the amount of future returns could not reasonably be estimated. Indeed, in 1998 much of the product "sold" in 1997 was returned. Nevertheless, Andersen allowed those sales to be booked in 1997.

88. Sunbeam's Canadian subsidiary similarly engaged in guaranteed sales with an unlimited right of return. The revenue from those sales revenue could not have been recognized because the amount of future returns could not reasonably be estimated. Nevertheless, Andersen permitted those sales to be booked.

89. Sunbeam's Mexican subsidiary engaged in \$900,000 in bill-and-hold transactions that should not have been recognized as income until 1998. However, Andersen permitted the full amount of such sales to be booked in 1997. Harlow and Andersen identified a total of \$2.9 million in adjustments relating to inventory overvaluation that were proposed to

Sunbeam. Management refused to make those adjustments; Andersen and Harlow nevertheless issued clean audit opinions. In addition, the financial statements for Sunbeam's Mexico operations failed to include an expense for the profit sharing obligations of that business, an adjustment that reduced the earnings of that business by more than \$3 million when Sunbeam later restated its 1997 results.

90. Sunbeam's Venezuela subsidiary also improperly valued inventory. Its books reflected purchased raw materials that were held at various suppliers. Andersen failed to confirm that the booked amounts represented materials actually in the possession of suppliers. If Andersen had done so, Andersen would have discovered that the materials did not exist. Nevertheless, Andersen permitted the full amount to be included on Sunbeam's financial statements.

91. In the end, Andersen's 1997 audit opinion certified financial statements that reported Sunbeam's income to be \$186 million, much of which was improper under GAAP. The overstatements included in all over \$90 million of improper net income including, without limitation, approximately \$10 million from the sham sale to EPI, approximately \$4.5 million from non-GAAP bill-and-hold sales, approximately \$35 million in income derived from the use of non-GAAP reserves and accruals taken at year-end 1996 and approximately \$6 million from improper revenue recognition.

92. As Andersen and Harlow knew, Coleman-Parent relied on Sunbeam's report of \$186 million in income in deciding to close the sale of its interest in Coleman Company. If Andersen had not issued a materially false and misleading audit report, and instead had complied with GAAP and GAAS, Sunbeam's 1997 operating income would have been approximately half of what Andersen certified in the financial statements.

G. Coleman-Parent Relies on Andersen's Unqualified Audit Opinions and Closes the Sale to Sunbeam.

93. The merger agreement signed by Coleman-Parent on February 27, 1998 provided that a condition precedent to Coleman-Parent's obligation to close the transaction was the absence of any event, change, or development that would have a material adverse effect on the business, results of operation, or financial condition of Sunbeam. The closing also was conditioned on the absence of any material misrepresentation or omissions in Sunbeam's SEC filings, including Andersen's 1996 and 1997 audit reports in the Form 10-Ks. If Andersen had not been negligent or fraudulent in performing its audits, and had issued qualified or adverse reports exposing the falsity of Sunbeam's financial statements, Coleman-Parent would have been put on notice of an adverse material change affecting Sunbeam before closing, and of a material misstatement in Sunbeam's SEC filings. Coleman-Parent's obligation to close the transaction with Sunbeam would have been discharged by the failure of a condition precedent, and Coleman-Parent never would have suffered losses in excess of \$600 million. Coleman-Parent directly relied on Andersen's 1996 and 1997 audit reports when it decided to close the transaction with Sunbeam and to accept 14.1 million shares of Sunbeam stock as consideration for selling its interest in Coleman Company.

94. Andersen was fully aware of the terms and conditions of the Coleman Company transaction and of Coleman-Parent's anticipated and actual reliance upon Andersen's unqualified 1996 and 1997 audit opinions.

95. On March 30, 1998, unaware of the falsity of Sunbeam's financial statements and Andersen's audit reports, Coleman-Parent closed the transaction with Sunbeam and accepted 14.1 million shares of what turned out to be essentially worthless Sunbeam common stock for the sale of its interest in Coleman Company.

H. Andersen's Improper Accounting and Misrepresentations Are Revealed, Causing the Market Value of Sunbeam's Stock to Plummet.

96. Almost immediately after the consummation of Coleman-Parent's sale of Coleman Company to Sunbeam, Sunbeam's facade of financial health began to crumble.

97. In an April 3, 1998 conference call with securities analysts, Sunbeam revealed that sales for the first quarter of 1998 were 5% below reported sales for the same period of the prior year. Only two weeks earlier, on March 19, 1998, Sunbeam had issued a press release in which it announced that sales for the first quarter of 1998 were "expected to exceed" sales for the same period of the prior year.

98. On June 6, 1998, an article was published in *Barron's* that raised serious questions regarding Sunbeam's apparent success under Dunlap, and suggested it was the result of "accounting gimmickry." On June 15, 1998, Sunbeam's Board announced that it had removed Dunlap as Chairman and CEO.

99. On June 25, 1998, Andersen withheld its consent for use of its 1997 audit opinion in a registration statement that was to have been filed with the SEC.

100. On June 30, 1998, Sunbeam announced that the Audit Committee of its Board of Directors would conduct an inquiry into the accuracy of its 1997 financial statements. The Audit Committee subsequently retained Deloitte & Touche LLP to assist in the review, in addition to Andersen. Sunbeam stated that "pending the completion of its review, its 1997 financial statements and the report of Arthur Andersen LLP should not be relied upon." Sunbeam added that the review "could result in a restatement of the 1997 financial statements and the first quarter 1998 Form 10-Q."

101. On August 6, 1998, Sunbeam announced that its Audit Committee had determined that Sunbeam would be required to restate its audited financial statements for 1997 and possibly for 1996, as well as its unaudited financial statements for the first quarter of 1998.

102. On November 12, 1998, Sunbeam released its restated 1996 and 1997 financial results, again audited by Andersen. The restated 1996 financial statements reported operating losses for 1996 that were approximately \$40 million less than originally reported, losses from continuing operations that were approximately \$26 million less than previously reported and net losses that were approximately \$20 million less than previously reported.

103. The restated 1997 financial statements reported operating earnings for 1997 that were approximately \$95 million less than originally reported, earnings from continuing operations that were approximately \$70 million less than previously reported and net earnings that were approximately \$70 million less than previously reported. The new operating income figure for 1997 was approximately 50% less than the amount Andersen previously certified.

104. In the wake of Dunlap's firing, Sunbeam's board of directors asked members of Coleman-Parent's management to assume key positions within Sunbeam in order to carry out damage control and attempt to salvage the value remaining in the company. New management was unable to overcome the devastating effects of the manipulation and distortion of Sunbeam's business.

105. On February 5, 2001, Sunbeam filed a voluntary petition for Chapter 11.

106. As a result of having been fraudulently induced into exchanging its ownership of Coleman Company for over 14 million shares of Sunbeam stock, Coleman-Parent has suffered direct damages in excess of \$600,000,000.

**VIOLATIONS OF GAAP AND GAAS IN
ANDERSEN'S 1996 AND 1997 AUDITS**

107. The objectives of financial reporting are to provide information that is useful in investment and credit decisions, information that is useful in assessing cash flow prospects and information about enterprise resources, claims to those resources and changes in them. (See "Objectives of Financial Reporting by Business Enterprises," Statement of Financial Accounting Concepts No. 1 (Financial Accounting Standards Board, November 1978).) In order to minimize misinterpretation of financial statements, the accounting profession has developed sets of standards regarding financial reporting and auditing practice that are generally accepted and universally practiced. Those standards are known as GAAP and GAAS. The development of common standards for auditing and financial reporting has provided businesspeople and investors with a valuable frame of reference in evaluating the financial condition of enterprises.

108. Auditors know they must adhere to GAAP and GAAS, or the standards would cease to have any meaning. Consistent with the objectives of the profession in developing those standards, the public has come to understand the importance of GAAP and GAAS in enhancing the reliability of audited financial statements. As a result, when an auditing firm represents that it has conducted an audit of a company in accordance with GAAS, and opines that such company's financial statements present the company's financial condition fairly in conformity with GAAP, readers of those financial statements have the right to rely on the integrity of those financial statements.

109. In auditing Sunbeam in 1996 and 1997, and in issuing unqualified opinions regarding Sunbeam's 1996 and 1997 financial statements, Andersen and Harlow did not adhere to the standards of the profession. Although Andersen's audit opinions stated that the firm had conducted its audits of Sunbeam in accordance with GAAS, and based on those audits had

concluded that Sunbeam's financial statements presented the company's financial condition fairly in conformity with GAAP, that simply was not true.

A. Sunbeam's Audited 1996 and 1997 Financial Statements Were Not In Conformity With GAAP.

110. As alleged below, Sunbeam's audited 1996 and 1997 financial statements failed to conform to GAAP in numerous respects.

111. Sunbeam's 1996 and 1997 financial statements, certified by Andersen, failed to conform to GAAP because those financial statements did not comply with the accounting principle of reliability. That principle requires that the quality of reported information assures that the information is reasonably free from error or bias and faithfully represents what it purports to represent. FASB Statement of Financial Accounting Concepts No. 2, §§ 58-71; APB Statement No. 4, §§ 109, 138, 189.

112. The financial statements also failed to comply with the accounting principle of completeness, which requires that financial information be complete and that it validly represent the underlying event and conditions. FASB Statement of Financial Accounting Concepts No. 2, §§ 79, 80; APB Statement No. 4, § 94.

113. The financial statements also failed to comply with the accounting principle of conservatism, which requires that a conservative approach be taken in the accounting for transactions and the early recognition of unfavorable events. FASB Statement of Financial Accounting Concepts No. 2, §§ 91-97; APB Statements No. 9, §§ 35, 71.

114. The financial statements also failed to comply with the accounting principle of neutrality, which requires that there should be an absence in reported information of bias intended to attain a predetermined result. FASB Statement of Financial Accounting Concepts No. 2, § 98.

115. The financial statements also failed to comply with the accounting principle of relevance, which requires that reported information should have the capacity to make a difference in a decision by helping users to form predictions about the outcomes of past, present and future events. FASB Statement of Financial Accounting Concepts No. 2, §§ 47, 48.

B. Andersen's 1996 and 1997 Audits Were Not Conducted In Accordance With GAAS.

116. As alleged below, Andersen failed in numerous respects to conduct its audits in accordance with GAAS.

117. Andersen and Harlow violated GAAS because they negligently or fraudulently failed to perform the audits with an attitude of professional skepticism as required by Statement on Auditing Standards ("SAS") No. 53, which states: "An audit of financial statements in accordance with generally accepted accounting standards should be planned and performed with an attitude of professional skepticism." AU § 316.16. Thus:

a. Andersen and Harlow negligently or fraudulently failed to reach a conclusion that there existed a significant risk of intentional distortion of financial statements by Sunbeam management. Andersen and Harlow should have reached that conclusion because Sunbeam's management was dominated by a single person, Dunlap; because Dunlap's attitude toward financial reporting was unduly aggressive; because Dunlap placed undue emphasis on meeting earnings projections; because of the extremely rapid change in Sunbeam's performance; and/or because Dunlap's plan to quickly "turn around" and sell Sunbeam incentivized him to distort financial statements. See AU §§ 316.10 and 316.12.

b. Andersen and Harlow also were negligent or fraudulent in failing to recognize that the accounting policies employed by Sunbeam were not acceptable in

the circumstances. Thus, "when the auditor has reached a conclusion that there is a significant risk of intentional distortion of financial statements, the auditor should recognize that management's selection and application of significant accounting policies, particularly those related to revenue recognition, asset valuation, and capitalization versus expensing, may be misused. Increased risk of intentional distortion of the financial statements should cause greater concern about whether accounting principles that are otherwise generally accepted are being used in inappropriate circumstances to create a distortion of earnings." AU § 316.19.

c. Andersen and Harlow also acted negligently or fraudulently by failing to obtain sufficient competent evidential matter through inspection, observation, inquiries and confirmations to afford a reasonable basis for its opinions regarding Sunbeam's financial statements. That failure violated the third standard of field work adopted by the American Institute of Certified Public Accountants ("AICPA") (AU § 150.02). Furthermore, "[w]hen evaluation at the financial statement level indicates significant risk, the auditor requires more or different evidence to support material transactions than would be the case in the absence of such risk. For example, the auditor may perform additional procedures to determine that sales are properly recorded, giving consideration to the possibility that the buyer has a right to return the product. Transactions that are both large and unusual, particularly at year-end, should be selected for testing." AU § 316.20.

118. Andersen and Harlow negligently or fraudulently failed to exercise due professional care in the performance of the 1996 and 1997 audits, in violation of the AICPA's third general auditing standard (AU § 150.02).

119. Andersen and Harlow negligently or fraudulently failed to plan the work adequately to uncover the errors and irregularities in Sunbeam's accounting information, in violation of the AICPA's first standard of field work (AU § 150.02).

120. Andersen and Harlow negligently or fraudulently failed to obtain a sufficient understanding of Sunbeam's internal control structure to plan the audits and to determine the nature, timing and extent of tests to be performed, in violation of the AICPA's second standard of field work (AU § 150.02). Specifically, Andersen and Harlow fraudulently failed to assess properly the risk of management override of controls in light of Dunlap's plan to quickly "turn around" and sell Sunbeam.

121. Andersen and Harlow negligently or fraudulently relied on management representations rather than applying the auditing procedures necessary to afford a reasonable basis for an opinion on Sunbeam's financial statements, in violation of SAS No. 19 (AU § 333.02).

122. Andersen and Harlow were negligent or fraudulent in not recognizing that misstatements resulting from misapplication of GAAP, departures from fact and omissions of necessary information, in aggregate, caused Sunbeam's financial statements to be materially misstated, in violation of SAS No. 47 (AU § 312.04).

123. As alleged above, on numerous occasions Andersen and Harlow concluded that certain misstatements caused Sunbeam's financial statements to be materially misstated. Although they requested that Sunbeam management eliminate the misstatements, management refused. Andersen acted negligently or fraudulently in not issuing a qualified or adverse opinion in such instances, in violation of SAS No. 47 (AU § 312.31).

124. Andersen and Harlow were negligent or fraudulent in concluding that the accounting principles applied by Sunbeam were appropriate in the circumstances and that Sunbeam's financial statements were informative of matters that could affect their use, understanding and interpretation, in violation of SAS No. 69 (AU § 411.04(b) and (c)).

125. Andersen and Harlow were negligent or fraudulent in failing to report that a change in the application of accounting principles in Sunbeam's 1997 financial statements had materially affected their comparability with the financial statements for prior periods, especially 1996, due to a different treatment of sales and reserves in those periods, in violation of SAS Nos. 1 and 43 (AU § 420.02).

126. Andersen's and Harlow's failure to conduct the audits in accordance with GAAS, and Andersen's certification of financial statements that were not in conformity with GAAP, as shown above, caused Coleman-Parent to suffer damages in excess of \$600,000,000.

127. Andersen-Worldwide, Andersen-US, Andersen-Canada, Andersen-Hong Kong, Andersen-Mexico, Andersen-Venezuela and Andersen-UK are jointly and severally liable to plaintiff because they participated in the course of conduct that constitutes the wrongful acts alleged herein, acted in concert to injure plaintiff, constituted alter egos of one another, constituted agents of one another, aided and abetted the conduct complained of herein, and/or conspired with each other to injure plaintiff.

COUNT I
Fraudulent Misrepresentation

128. Coleman-Parent repeats and realleges each and every allegation above as if set forth fully herein.

129. At the time Andersen issued its unqualified audit opinions for Sunbeam's 1996 and 1997 financial statements, Andersen and Harlow possessed knowledge superior to

Coleman-Parent concerning Sunbeam's financial position, the accounting principles Sunbeam used, the results of Sunbeam's operations and cash flows and whether Sunbeam's financial condition was presented in conformity with GAAP.

130. As described in detail above, Andersen and Harlow made representations of fact that were false in the unqualified audit opinions it issued for Sunbeam's 1996 and 1997 financial statements, including, among other things, (a) that Andersen's audits of Sunbeam were conducted in accordance with GAAS; (b) that Sunbeam's financial statements fairly presented the financial position of Sunbeam during the relevant periods; (c) that Sunbeam's financial statements fairly presented the results of Sunbeam's operations and cash flows during the relevant periods; and (d) that Sunbeam's financial statements were in conformity with GAAP.

131. As described in detail above, Andersen and Harlow knew that those representations were false at the time they were made and/or made those representations with recklessness as to their truth.

132. Andersen consented to the publication of its audit reports to the public and business world by consenting to their inclusion in Sunbeam's SEC filings. Given that publication, Andersen and Harlow intended that the public -- including Coleman-Parent -- would rely on Andersen's representations. Moreover, Andersen and Harlow specifically knew the terms of the agreement for Coleman-Parent's sale of Coleman Company to Sunbeam and consented to the publication of Andersen's audit report in Sunbeam's March 6, 1998 Form 10-K filing with the intent that Coleman-Parent rely upon Andersen's representations.

133. In agreeing to sell its interest in Coleman Company for approximately 14.1 million shares of Sunbeam stock plus cash and other consideration, Coleman-Parent reasonably

and justifiably relied upon Andersen's representations and omissions as to Andersen's 1996 and 1997 audits.

134. But for Andersen's misrepresentations, Coleman-Parent would not have agreed to sell its business to Sunbeam in return for artificially-inflated Sunbeam stock, among other consideration. As a result of Andersen's and Harlow's misconduct, Coleman-Parent has been damaged in excess of \$600,000,000.

COUNT II
Fraudulent Inducement To Contract
(Conspiracy and Concerted Action)

135. Coleman-Parent repeats and realleges each and every allegation above as if set forth fully herein.

136. As described in detail above, Sunbeam's 1996 and 1997 financial statements contained false statements of material fact. Those material misrepresentations included, among other things, (a) overstating Sunbeam's 1996 operating losses by approximately \$40 million; (b) overstating Sunbeam's 1996 losses from continuing operations by approximately \$26 million; (c) overstating Sunbeam's 1996 net losses by approximately \$20 million; (d) overstating Sunbeam's 1997 operating earnings by approximately \$95 million; (e) overstating Sunbeam's 1997 earnings from continuing operations by over \$70 million; (f) overstating Sunbeam's 1997 net earnings by approximately \$70 million; and (g) overstating Sunbeam's 1997 operating income figure by approximately 50%.

137. As described in detail above, Andersen and Harlow made representations of fact that were false in the unqualified audit opinions it issued for Sunbeam's 1996 and 1997 financial statements, including, among other things, (a) that Andersen's audits of Sunbeam were conducted in accordance with GAAS; (b) that Sunbeam's financial statements fairly presented the

financial position of Sunbeam during the relevant periods; (c) that Sunbeam's financial statements fairly presented the results of Sunbeam's operations and cash flows during the relevant periods; and (d) that Sunbeam's financial statements were in conformity with GAAP.

138. As described in detail above, Sunbeam, Andersen and Harlow knew that those representations were false when made and/or made those representations with reckless disregard as to their truth.

139. In order to induce Coleman-Parent further into entering into and fulfilling a contract to sell its interest in Coleman Company to Sunbeam in exchange for approximately 14.1 million shares of Sunbeam stock, Sunbeam represented that its SEC filings dating back to January 1, 1997 were accurate and not misleading as of February 27, 1998 and would be accurate and not misleading on March 30, 1998. Sunbeam's management, Andersen and Harlow knew and/or recklessly disregarded that those representations were false when made because Sunbeam's SEC filings contained Sunbeam's false and misleading 1996 and 1997 financial statements and Andersen's false and misleading audit reports.

140. In reasonable and justifiable reliance on Sunbeam's representations that its SEC filings – including its financial statements and Andersen's audit reports – were accurate with respect to Sunbeam's financial position and operating results, Coleman-Parent agreed to accept 14.1 million shares of Sunbeam stock and other consideration in exchange for its controlling stake in Coleman Company.

141. As a proximate result of its reliance on those misrepresentations, Coleman-Parent gave up its stake in Coleman Company in exchange for shares of Sunbeam which, once the truth of Sunbeam's financial situation was revealed, became worthless. Those misrepresentations proximately caused injury to Coleman-Parent in excess of \$600,000,000.

142. Andersen and Harlow were part of a team with Dunlap, Kersh and the other senior Sunbeam executives that acted in concert and wrongfully conspired to create the appearance that Sunbeam was performing at a high level to artificially inflate the stock price of Sunbeam and make it attractive for a sale to another company. Andersen and Harlow explicitly or implicitly by acquiescence agreed to become part of that conspiracy and committed overt acts in furtherance of its fraudulent scheme in order to retain Sunbeam as a client and earn significant fees.

143. In furtherance of that conspiracy, Dunlap and the other Sunbeam executives decided to acquire Coleman Company in order to further increase Sunbeam's stock price and maintain the illusion of its good performance. In pursuance of that scheme, Andersen and Harlow committed the overt acts of issuing Andersen's false and misleading March 1998 unqualified audit opinion with respect to Sunbeam's 1997 financial statements and of consenting to its publication to the SEC as part of Sunbeam's Form 10-K filing on March 6, 1998. Andersen and Harlow knew that Andersen's audit opinion would be used by Sunbeam to induce Coleman-Parent into selling its controlling stake in Coleman Company in exchange for shares of artificially-inflated Sunbeam stock. Andersen's audit report also furthered that conspiracy by actively supporting the illusion of Sunbeam's performance that had been created in the market, which helped support the company's artificially-inflated stock price. In doing so, Andersen and Harlow committed the tortious act of fraudulent inducement in concert with Dunlap and the other Sunbeam executives pursuant to a common design.

144. As described above, Coleman-Parent was damaged as a result of those concerted acts performed as part of that conspiracy.

COUNT III
Negligent Misrepresentation

145. Coleman-Parent repeats and realleges each and every allegation above as if set forth fully herein.

146. Andersen provided the information in its audit reports regarding Sunbeam's 1996 and 1997 financial statements in the course of its business as an accounting firm in the employ of Sunbeam.

147. In issuing its audit report regarding Sunbeam's 1997 and 1996 financial statements and in consenting to that report's inclusion in Sunbeam's March 6, 1998 Form 10-K filing with the SEC, Andersen and Harlow were aware that such information was being provided, in part, for the specific guidance and reliance of Coleman-Parent, which was agreeing to sell Coleman Company to Sunbeam for approximately 14.1 million shares of Sunbeam stock plus cash. In particular, Sunbeam warranted and represented to Coleman-Parent that its SEC filings, and audited financial statements including Andersen's report, were accurate – a fact that Andersen and Harlow were aware of when Andersen issued its report and consented to its publication. Andersen and Harlow expected that Coleman-Parent would rely on Andersen's 1997 audit report. Andersen and Harlow also were aware and expected that Coleman-Parent specifically was relying on Andersen's previously issued 1996 audit report, which Andersen did not retract until long after the Coleman Company transaction closed.

148. As described in detail above, Andersen's unqualified audit opinions for Sunbeam's 1996 and 1997 financial statements contained material falsehoods, including, among other things, (a) that its audits of Sunbeam were conducted in accordance with GAAS; (b) that Sunbeam's financial statements fairly presented the financial position of Sunbeam during the relevant periods; (c) that Sunbeam's financial statements fairly presented the results of Sunbeam's

operations and cash flows during the relevant periods; and (d) that Sunbeam's financial statements were in conformity with GAAP.

149. As described in more detail above, Andersen and Harlow failed to exercise reasonable care or competence in obtaining or communicating the information contained in their audit reports regarding Sunbeam's 1996 and 1997 financial statements.

150. Coleman-Parent reasonably and justifiably relied upon the information contained in Andersen's audit reports, including their material falsehoods regarding Sunbeam's financial condition and operating results and regarding the conformance of Sunbeam's financial statements to GAAP. In reliance on those material falsehoods, Coleman-Parent agreed to sell its interest in Coleman Company for approximately 14.1 million shares of Sunbeam stock, cash and other consideration.

151. As a result of Andersen's and Harlow's misconduct, Coleman-Parent has been injured in an amount in excess of \$600,000,000.

WHEREFORE, plaintiff Coleman (Parent) Holdings, Inc. demands judgment against Andersen-Worldwide, Andersen-US, Andersen-Canada, Andersen-Hong Kong, Andersen-Mexico, Andersen-Venezuela, Andersen-UK and Phillip E. Harlow, jointly and severally, as follows:

- A. Compensatory damages in an amount in excess of \$600,000,000;
- B. An award of costs and expenses incurred in this action, including reasonable attorneys' and experts' fees; and
- C. Any further relief as the Court may deem just and proper in light of all the circumstances of the case.

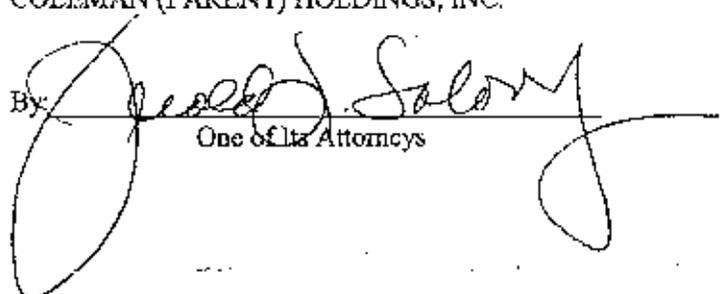
D. Coleman-Parent expressly reserves the right to seek leave to amend its complaint pursuant to Fla. Stat. § 768.72 to assert claims for punitive damages in excess of \$1.2 billion as allowed by law.

JURY DEMAND

Plaintiff demands a trial by jury.

Dated: March 15, 2002

COLEMAN (PARENT) HOLDINGS, INC.

By: 

One of its Attorneys

John Scarola
SEARCY DENNEY SCAROLA
BARNHART & SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409
(561) 686-6300

Jerold S. Solovy
Ronald L. Marmer
Robert T. Markowski
Matthew M. Neumeier
Avidan J. Stern
JENNER & BLOCK, LLC
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

742267

EXHIBIT 2

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

ARTHUR ANDERSEN LLP and
PHILLIP E. HARLOW,

Defendants.

Case No.: CA '01 - 06062 AN

JURY TRIAL DEMANDED

FILED
01 JUN - 8 PM 4:11
CIRCUIT CIVIL 8

COMPLAINT

Plaintiff Coleman (Parent) Holdings, Inc. ("Coleman-Parent"), by its attorneys, alleges the following against defendants Arthur Andersen LLP ("Andersen") and Phillip E. Harlow ("Harlow"):

NATURE OF THE ACTION

1. This action arises out of Coleman-Parent's sale of its controlling interest in The Coleman Company, Inc. ("Coleman Company") to Sunbeam Corporation, Inc. ("Sunbeam") on March 30, 1998, in exchange for 14.1 million shares of Sunbeam common stock, plus other consideration. In deciding to go forward with that sale, Coleman-Parent relied on Sunbeam's financial statements, which were audited and certified by Andersen, the largest accounting firm in the world.

2. Unbeknownst to Coleman-Parent, however, Andersen had audited and certified financial statements that it knew to be inaccurate and misleading. Those audited financial statements painted a false picture of Sunbeam, depicting it as a company in the midst of an impressive financial turnaround. The reality was that Sunbeam's turnaround was a sham, and when the truth emerged, Sunbeam's stock lost virtually all of its value. The company is now in

①

bankruptcy. By relying on the financial statements improperly certified by Andersen, Coleman-Parent has suffered losses exceeding \$600 million.

3. By holding itself out as Sunbeam's independent certified public accountant and certifying Sunbeam's financial statements, Andersen knowingly assumed a responsibility that transcended its relationship with Sunbeam as a client. As an independent public accountant auditing Sunbeam's financial statements, Andersen owed a duty to Coleman-Parent and others whom it knew were relying upon Andersen's certification that Sunbeam's reports fairly depicted the company's financial status. Andersen was required to maintain independence from its client, Sunbeam, and speak with total honesty befitting the trust that had been placed in its word. In carrying out its audit of Sunbeam's financial statements, Andersen utterly failed to live up to that responsibility. To the contrary, Andersen's audits were not performed in accordance with generally accepted auditing standards ("GAAS"), and the financial statements it certified were not, as Andersen claimed, in conformity with generally accepted accounting principles ("GAAP"). Even more egregious, Phillip Harlow, the audit partner on the Sunbeam account, and others at Andersen knew the financial statements were not prepared in conformity with GAAP, but Andersen certified them nonetheless.

4. The motivation of Harlow and Andersen was simple - to do whatever was necessary to retain a major client. Sunbeam was one of few Fortune 500 clients of Andersen's Fort Lauderdale, Florida, office. Andersen had served as Sunbeam's independent auditor for many years. Sunbeam had paid Andersen more than \$1 million for its 1995 audit. However, in 1996 that relationship was threatened by Sunbeam's new CEO, Albert Dunlap. Dunlap was eager to show a turnaround at Sunbeam in order to position the company for a quick sale, as he recently had done at Scott Paper. To accomplish that goal, Dunlap's new management team

knowingly employed improper accounting methods that first overstated the company's loss in 1996 and then inflated the company's income in 1997. In total abrogation of its responsibility as an independent auditor, Andersen permitted -- indeed, blessed -- those improper accounting treatments, rather than risk losing Sunbeam's audit business to Dunlap's accountant of choice, Coopers & Lybrand.

5. Ironically, the financial results certified by Andersen for 1996 and 1997 drove the price of Sunbeam stock so high that new management could not locate a willing buyer for a quick sale of the company, as had been hoped. As a result, Sunbeam was forced to shift gears and pursue acquisitions of other companies, including Coleman Company, in the hope that those mergers would obscure Sunbeam's true financial position and forestall revelation of the accounting gimmickry. To effectuate that plan, the very same Andersen partners and employees who were functioning as Sunbeam's "independent" auditors (including Harlow) added another role and joined Sunbeam's due diligence team for the acquisitions.

6. Because of Andersen's dual roles as auditor and acquisitions consultant, it knew full well not only that the purchase of Coleman Company was taking place, but also that Coleman-Parent was relying on the financial statements certified by Andersen. Nonetheless, Andersen took no steps before the Coleman Company acquisition closed to correct the grossly misleading impression created by its certifications.

7. At the time of the sale to Sunbeam, Coleman Company was a leading manufacturer and marketer of consumer products for the worldwide outdoor recreation market, with annual revenues in excess of \$1 billion. As payment for its stake in Coleman Company, Coleman-Parent was to receive 14,099,749 shares of Sunbeam stock, \$160 million in cash, and

other consideration. Based on Sunbeam's share price at the time of the closing, Coleman-Parent received Sunbeam shares that had an aggregate market value of over \$619.5 million.

8. Within weeks of the closing of the Coleman Company acquisition on March 30, 1998, the deception facilitated by Andersen began to unravel. On April 3, 1998, just four days after the closing, Sunbeam's management issued a press release announcing that, despite having predicted positive quarterly results in another press release just two weeks earlier, Sunbeam now would show a loss for the first quarter of 1998. On May 11, 1998, Sunbeam issued an earnings release for the first quarter of 1998 reporting a loss of 52 cents per share, compared with a gain of 8 cents per share in the same quarter of 1997. Press coverage ensued in the following month questioning whether Sunbeam had utilized -- and Andersen had approved -- manipulative and improper accounting practices in order to create the ruse of a turnaround.

9. In June 1998, the Sunbeam board of directors began an inquiry into Sunbeam's accounting practices. On June 15, 1998, the board announced that it had removed Dunlap as Chairman and CEO of Sunbeam. On June 25, 1998, Andersen withheld its consent for use of its unqualified 1997 audit opinion in a registration statement that was to have been filed with the Securities and Exchange Commission ("SEC"). On June 30, 1998, Sunbeam acknowledged that it had undertaken a review of its financial statements and the review could result in a restatement of the financial statements. On October 20, 1998, Sunbeam and Andersen announced a restatement of the financial statements. Thereafter, Andersen issued a new unqualified audit opinion for Sunbeam reporting only \$93 million in operating earnings for 1997. That amount was approximately half of the figure that Andersen previously certified.

10. In February 2001, Sunbeam filed a voluntary bankruptcy petition under Chapter 11 of the Bankruptcy Code. Coleman-Parent's equity stake in Sunbeam is now worthless.

11. In order to retain the Sunbeam account and lucrative auditing and consulting fees, Andersen turned its back on its professional and legal obligations and certified Sunbeam financial statements that it knew to be false and misleading. It did so with full knowledge that Coleman-Parent would be harmed immensely by Andersen's misstatements and omissions. As a direct and foreseeable result of Andersen's actions, Coleman-Parent has sustained damages in excess of \$600,000,000.

12. By this complaint, Coleman-Parent seeks recovery of over \$600 million in compensatory damages. In addition, Coleman-Parent reserves the right to seek leave to amend its complaint pursuant to Fla. Stat. § 768.72 to assert claims for an additional recovery of punitive damages in excess of \$1.2 billion as allowed by law.

JURISDICTION AND VENUE

13. This Court has jurisdiction over the subject matter of this action pursuant to Fla. Stat. § 26.012(2)(a). This Court has jurisdiction over Andersen and Harlow pursuant to Fla. Stat. §§ 48.193(1)(a) and (f), (2), and (5).

14. Venue is proper in this district pursuant to Fla. Stat. §§ 47.011 and 47.021 because Andersen maintains an office with more than 30 employees in West Palm Beach, Florida, and therefore resides in Palm Beach County. In addition, Harlow is a resident of South Florida.

PARTIES

15. Coleman-Parent is a corporation incorporated in the state of Delaware with its principal business offices located in New York. Coleman-Parent is a wholly owned subsidiary of Mafco Holdings Inc. ("MAFCO"). Prior to March 30, 1998, Coleman-Parent owned approximately 81% of Coleman Company.

16. Andersen is a limited liability partnership formed under the laws of the State of Illinois. As the world's largest accounting firm, Andersen employs over 77,000 professionals in fields such as accounting, taxation, business consulting, corporate finance, risk management, and business fraud investigation. Andersen has partners who are residents of Florida and numerous other states. Andersen's global revenues for the fiscal year ending August 31, 2000 totaled more than \$8 billion.

17. Harlow has been a partner at Andersen since 1983. He served as the engagement partner on the Andersen audits of Sunbeam's financial statements from 1993 to 1998. Harlow also participated as a member of Sunbeam's due diligence team for Sunbeam's acquisition of Coleman Company.

SUBSTANTIVE ALLEGATIONS

A. Sunbeam's New Management Team (1996-1998).

18. In the years leading up to 1996, Sunbeam had experienced increasing financial difficulties and growing losses. In an effort to remedy the situation, Sunbeam's board of directors undertook a change in Sunbeam's management in July 1996. The management team the board brought in was headed by Albert Dunlap, a person who had earned a reputation as a turnaround specialist through brief terms as Chief Executive Officer of a number of publicly

traded corporations. Based on his penchant for rapidly slashing personnel and closing plants to achieve quick turnaround results, Dunlap is widely known as "Chainsaw Al."

B. Dunlap Arrives at Sunbeam and Initiates Restructuring.

19. Sunbeam hired Dunlap on July 18, 1996 and installed him as its Chairman and Chief Executive Officer. Immediately after joining Sunbeam, Dunlap hired Russell A. Kersh as Sunbeam's principal financial officer. Kersh had been associated with Dunlap for over 15 years, and had served as a senior executive during various Dunlap turnaround engagements. Dunlap also brought in other hand-picked executives to make up his senior management team. He hired Donald R. Uzzi as Vice President, Marketing and Product Development. Uzzi later became Executive Vice President, Consumer Products Worldwide. Dunlap also hired Lee B. Griffith as Vice President, Sales. Dunlap retained Robert J. Gluck, formerly Controller of Sunbeam, as Sunbeam's Principal Accounting Officer.

20. Dunlap and the senior members of his management team entered into lucrative employment agreements that gave them a strong financial incentive to cause Sunbeam's stock price to increase and then to sell the company quickly. All stood to make many millions of dollars if that happened. Andersen was fully aware of those agreements and the fact that a disproportionate share of those executives' potential earnings was dependent on stock options or restricted shares of stock.

21. In addition to the personal financial incentives deriving from his employment contract, Dunlap also had his reputation as a turnaround specialist to protect and advance. Dunlap used his reputation as a specialist in turning around troubled companies to make aggressive promises about Sunbeam's future performance and support false and misleading

announcements of record performance – results that were rendered credible because Andersen had certified Sunbeam's financial statements.

C. Andersen Is Recruited to Help Create the Illusion of a Successful Restructuring.

22. To lay the foundation for the appearance of a successful turnaround in 1997, Sunbeam's new senior management team decided to take improper expenses and record unjustified accounting writeoffs in 1996, thus lowering the benchmark for measuring their ultimate "success" in turning Sunbeam around.

23. Dunlap and his team needed the help of Sunbeam's auditors in approving the improper accounting tactics or the scheme would have had no chance of success. Andersen's Phillip Harlow was such a willing participant. Harlow knew of Dunlap's reputation as a fast-moving turnaround specialist who was quick to fire anyone who did not advance his agenda. Harlow also knew that in other highly publicized turnaround engagements, Dunlap had employed Coopers & Lybrand, one of Andersen's major competitors, as a financial consultant and independent auditor. Consistent with past practice, one of the first things Dunlap did after joining Sunbeam was to hire Coopers & Lybrand as a financial advisor with the lucrative assignment of planning Sunbeam's massive restructuring, which led to the firing of nearly half of Sunbeam's 12,000 employees. Andersen – and especially Harlow – were keenly aware that this did not bode well for the future of Andersen's relationship with Sunbeam.

24. Sunbeam had been a major client of Andersen's for many years and Sunbeam had paid Andersen over \$1 million in fees for its 1995 audit alone. Harlow had been the Sunbeam engagement partner since 1993. When Dunlap took control of Sunbeam and hired Coopers & Lybrand for the restructuring, Harlow became concerned that Dunlap would fire Andersen as the company's independent auditor and hire Coopers & Lybrand instead. Indeed,

Harlow was so concerned about the possible loss of Sunbeam as a client that he agreed to a 30% reduction in Andersen's fee for 1996. A reduction in audit fees was simply one price Andersen had to pay in order to keep Sunbeam as a client.

D. Andersen's Early Assistance in the Scheme.

25. When Harlow began work on the audit of Sunbeam's 1996 financial statements, Harlow and Andersen learned the true price of keeping Sunbeam as an audit client. In addition to reducing its audit fees, Andersen was required to accept the improper and misleading accounting treatments used by Sunbeam's senior management to create the illusion of a successful turnaround. In the end, Andersen's desire to retain a valuable client overrode any sense of duty or professionalism. To keep Sunbeam as an Andersen client, Harlow and Andersen ignored numerous accounting improprieties Andersen knew had been employed. Even when Harlow expressly identified certain of management's accounting treatments as improper, he ultimately acquiesced in management's refusal to correct the improprieties, and Andersen issued unqualified or "clean" audit opinions. Andersen did so despite the harm it knew would be inflicted on all who relied upon Andersen's audit opinions.

1. Improper Accounting Practices In 1996.

26. As set forth below, Andersen and Harlow permitted management to employ numerous accounting practices in 1996 that did not comply with GAAP.

27. One of the accounting practices permitted by Andersen and Harlow was the creation of a massive \$338 million non-GAAP reserve for restructuring charges. Although certain types of restructuring reserves may be proper, the reserves created by management included improper reserves and accruals, excessive write-downs, and prematurely recognized expenses that were not proper restructuring reserves under GAAP. Those intentionally inflated

reserves served two purposes. First, because the reserves were charged as an expense against income, they allowed Sunbeam to overstate its 1996 loss, and lower the benchmark for measuring the eventual success of Sunbeam's turnaround. Second, the inflated restructuring reserves created a "cookie-jar" of overstated liabilities on Sunbeam's books that Dunlap could reduce in the years after 1996, purportedly to correct the overstatements, and at the same time increase income in the year of the corrections. Those adjustments, too, fostered the illusion of a successful turnaround.

28. One of the largest components of the Sunbeam "cookie-jar" reserves permitted by Andersen and Harlow was millions of dollars in items that benefitted future activities, and hence were not properly part of the restructuring reserve. Those items included costs of redesigning product packaging, costs of relocating employees and equipment, bonuses to be paid to employees who were told that they were being laid off but were asked to stay temporarily, advertising expenses, and certain consulting fees. Note 2 to the audited 1996 financial statements falsely described the restructuring charges as follows:

In conjunction with the implementation of the restructuring and growth plan, the Company recorded a pre-tax special charge to earnings of approximately \$337.6 million in the fourth quarter of 1996. This amount is allocated as follows in the accompanying Consolidated Statement of Operations: \$154.9 million to Restructuring, Impairment and Other Costs as further described below; \$92.3 million to Cost of Goods Sold related principally to inventory write-downs from the reduction in SKU's and costs of inventory liquidation programs; \$42.5 million to Selling, General and Administrative expenses principally for increases in environmental and litigation reserves (see Notes 12 and 13) and other reserve categories; and the estimated pre-tax loss on the divestiture of the Company's furniture business of approximately \$47.9 million.

As Sunbeam's eventual restatement of its financial statements showed, those reserves were materially inflated and were not recorded in accordance with GAAP.

29. In connection with the audit of Sunbeam's 1996 year-end financial statements, Harlow discovered that certain components of Sunbeam's restructuring reserves were not being recorded in compliance with GAAP and proposed that the company reverse several of the accounting entries establishing those reserves. As Harlow told Kersh and Gluck, under GAAP, entries that benefitted Sunbeam's future results were not considered to be proper restructuring charges in 1996. But Kersh and Gluck refused to reverse those items. Instead of standing firm, as professional ethics required, Harlow turned a blind eye to his duties as an independent auditor and caused Andersen to acquiesce in management's refusal to reverse those non-GAAP reserves. Those improper reserves caused Sunbeam's 1996 audited financial statements to be materially false and misleading.

30. In connection with the 1996 audited financial statements, Andersen and Harlow also permitted management to create an excessive \$12 million reserve for a lawsuit alleging that Sunbeam was liable for a portion of the cleanup costs for a hazardous waste site. In fact, that reserve overstated Sunbeam's estimated liability by at least 100%, and provided Sunbeam with an inflated reserve that could be drawn down to boost income figures artificially in later periods.

31. Andersen and Harlow also permitted Sunbeam to write down its household products inventory in 1996. In connection with the restructuring, Dunlap's management team planned to eliminate half of Sunbeam's product lines and to liquidate Sunbeam's inventory of eliminated product lines at a substantial discount. Notwithstanding that the change affected only half of Sunbeam's product lines, Andersen and Harlow permitted management to reduce the cost basis for Sunbeam's entire inventory of household products at 1996 year end, without distinction between eliminated and continuing product lines (including

inventories that were later sold in the ordinary course of business). As a result, the balance sheet value of Sunbeam's inventory at year-end 1996 was understated by approximately \$2 million, and Sunbeam overstated its 1996 loss by the same amount. Andersen and Harlow negligently or fraudulently disregarded facts indicating that (a) Sunbeam had understated the carrying value of its household products inventory, (b) the understatement had contributed to the material misstatement of Sunbeam's financial statements at year-end 1996, and (c) the understatement would improperly increase Sunbeam's income during 1997 when household products were sold at artificially inflated margins.

32. Andersen and Harlow also permitted management improperly to recognize \$2.3 million in 1997 advertising expenses and related costs as a 1996 expense. Andersen and Harlow negligently or fraudulently disregarded facts indicating that the accounting treatment would contribute to the material overstatement of Sunbeam's 1996 year-end loss and exaggerate Sunbeam's so-called turnaround by the same amount in 1997.

33. Finally, Andersen and Harlow permitted Sunbeam to manipulate its 1996 liabilities for cooperative advertising. In addition to buying national advertising to create demand for its products, Sunbeam funded a portion of its retailers' costs of running local promotions. As required by GAAP, Sunbeam accrued its estimated liabilities for such "cooperative advertising," and then charged its expenses in relation to its sales revenue during the year. At year-end 1996, Sunbeam set its cooperative advertising accrual at \$21.8 million, an amount that was approximately 25% higher than the prior year's accrual amount, without any basis for the increase. Harlow learned of the inflated accrual for cooperative advertising in connection with Andersen's audit of Sunbeam's year-end 1996 financial statements and discussed it with Kersh and Gluck. Nevertheless, Andersen and Harlow negligently or

fraudulently disregarded facts concerning the lack of a proper basis for the accrual and the likelihood that the excess accrual would be released into income in early 1997. In fact, \$5.8 million of that excessive accrual was used (without disclosure) to inflate Sunbeam's 1997 income.

2. **Andersen's 1996 Unqualified Audit Opinion.**

34. In March 1997, Andersen issued an unqualified audit opinion regarding Sunbeam's 1996 financial statements and authorized the inclusion of its audit opinion in Sunbeam's 1996 Form 10-K filed with the SEC. Andersen's opinion stated:

We conducted our audits in accordance with generally accepted auditing standards. Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement. An audit includes examining, on a test basis, evidence supporting the amounts and disclosures in the financial statements. An audit also includes assessing the accounting principles used and significant estimates made by management, as well as evaluating the overall financial statement presentation. We believe that our audits provide a reasonable basis for our opinion.

In our opinion, the financial statements . . . present fairly, in all material respects, the financial position of Sunbeam Corporation and subsidiaries as of December 31, 1995 and December 29, 1996, and the results of their operations and their cash flows for each of the three fiscal years in the period ended December 29, 1996 in conformity with generally accepted accounting principles.

35. Andersen's unqualified audit opinion was false in two material respects. First, the financial statements Andersen audited did not "fairly" present Sunbeam's financial position in conformity with GAAP, as it represented. Second, Andersen did not, as it claimed, conduct its audit in accordance with GAAS.

36. In all, the 1996 financial statements audited by Andersen were materially false and misleading, and overstated Sunbeam's loss for 1996. Andersen and Harlow negligently

or fraudulently disregarded facts indicating that (a) Andersen's unqualified audit opinion was incorrect, (b) Sunbeam's financial statements were materially false and misleading and not in conformity with GAAP, and (c) Andersen had failed to perform an audit in accordance with GAAS.

E. Andersen Assists Sunbeam as a Financial Adviser in Sunbeam's Purchase of Coleman Company.

37. During 1997, Sunbeam's senior management continued to use improper accounting to create the illusion that a successful turnaround was underway at Sunbeam. By maintaining that illusion, Dunlap's management team hoped to position Sunbeam for a quick sale. However, the illusion proved too convincing to the market, and the price of Sunbeam stock was driven so high that no willing buyer could be found. Management was aware that, absent a sale, it would be unable to sustain the appearance of a successful turnaround. Therefore, in late 1997, Sunbeam sought to acquire other businesses, in order to consolidate their results with Sunbeam's and thereby continue to obscure Sunbeam's past accounting improprieties. Once again, Sunbeam management required Andersen's assistance in perpetuating the deception.

38. In early December 1997, officers and directors of Sunbeam met with various officers of Coleman Company regarding a potential combination with Sunbeam. After that initial overture was rejected by Coleman-Parent, Dunlap's representative returned with another proposal in January 1998. At that point, Coleman-Parent indicated it was willing to discuss a potential transaction.

39. On January 28, 1998, Sunbeam announced its financial results for 1997, reporting total revenues of \$1.168 billion, and total earnings from continuing operations of \$189 million (or \$1.41 per share). Sunbeam's announcement coincided with Andersen's completion of the field work for its audit of Sunbeam's 1997 financial statements.

40. On February 3, 1998, Harlow met with key officers of Sunbeam to discuss the acquisition of Coleman Company and its financial impact on Sunbeam. By that time, Harlow knew that Sunbeam had utilized improper accounting to achieve its 1997 results. Harlow also knew Coleman-Parent would insist on reviewing Andersen's 1997 audit opinion before agreeing to consummate any transaction in which the consideration included hundreds of millions of dollars in Sunbeam stock.

41. On February 20, 1998, Andersen agreed to act as a Sunbeam financial advisor and perform financial due diligence in connection with Sunbeam's acquisition of Coleman Company and two other companies, First Alert, Inc. and Signature Brands USA, Inc. In agreeing to undertake that assignment, Andersen became an active member of the team working to assist Sunbeam in acquiring Coleman Company.

42. During the latter weeks of February 1998, representatives of Sunbeam and Coleman-Parent met to negotiate the details of a potential acquisition of Coleman Company and to prepare a proposed structure for that transaction.

43. Between February 23 and 25, 1998, representatives of Andersen, including Harlow, conducted due diligence concerning Coleman Company and the other target companies on behalf of Sunbeam. During that period, Andersen representatives participated in various meetings with officers and consultants of Coleman Company. At no point, however, did Andersen's representatives suggest that Sunbeam's financial statements were materially false and misleading. Meanwhile, Sunbeam worked on negotiating the terms of its acquisition of Coleman Company.

44. On February 27, 1998, Harlow met with Sunbeam executives in New York to discuss Andersen's due diligence. That afternoon, Sunbeam and Coleman-Parent reached an agreement for the sale of Coleman Company.

45. As part of the Coleman Company acquisition agreement, Sunbeam represented and warranted that all of its filings with the SEC, which included the 1996 financial statements audited by Andersen, were accurate and not misleading, and that they would continue to be accurate and not misleading as of the transaction's closing date, which was expected to be several weeks later. Sunbeam also represented that its audited financial statements were prepared in accordance with GAAP, and that at the time of the closing of the transaction, its representation would continue to be true and correct. Andersen was fully aware of those representations and warranties when the merger agreement was executed on February 27, 1998.

46. As a result of Andersen's involvement in the Coleman Company acquisition transaction, it knew that Coleman-Parent would rely on Sunbeam's audited financial statements (1) in deciding to close the transaction, and (2) in accepting 14.1 million shares of Sunbeam stock and other consideration in return for its stake in Coleman Company. Moreover, as an independent certified public accountant, Andersen had a duty to disclose to Coleman-Parent that Sunbeam's audited financial statements in fact were neither accurate nor reliable. Notwithstanding that Andersen had met with representatives of Coleman-Parent and its auditors during its due diligence review, Andersen remained mute regarding the true financial condition of Sunbeam and the improprieties buried in Sunbeam's audited financial statements.

F. Andersen Issues its 1997 Audit Report.

47. In the first week of March 1998, shortly after the agreement for Sunbeam's purchase of Coleman Company was signed, but before the transaction closed, Andersen updated its audit work to reflect Sunbeam's acquisitions. That work was done by the same individuals who also were working as consultants on the Sunbeam acquisitions. The three acquisitions were specifically described in Note 14 to the audited financial statements. The description included the fact that Sunbeam was paying for the Coleman Company shares with Sunbeam common stock as well as cash and assumption of debt. Andersen then rendered an unqualified audit opinion for Sunbeam's 1997 financial statements. With Andersen's express consent, management included that opinion in Sunbeam's 1997 Form 10-K filed with the SEC.

1. Andersen's 1997 Unqualified Audit Report.

48. In its opinion concerning Sunbeam's 1997 financial statements, Andersen stated:

We conducted our audits in accordance with generally accepted auditing standards. Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement. An audit includes examining, on a test basis, evidence supporting the amounts and disclosures in the financial statements. An audit also includes assessing the accounting principles used and significant estimates made by management, as well as evaluating the overall financial statement presentation. We believe that our audits provide a reasonable basis for our opinion.

In our opinion, the financial statements . . . present fairly, in all material respects, the financial position of Sunbeam Corporation and subsidiaries as of December 29, 1996 and December 28, 1997, and the results of its operations and its cash flows for each of the three fiscal years in the period ended December 28, 1997 in conformity with generally accepted accounting principles.

49. Andersen's 1997 audit opinion was false in two material respects. First, the financial statements Andersen audited did not "fairly" present Sunbeam's financial position in conformity with GAAP, as it represented. Second, Andersen did not, as it claimed, conduct its audit in accordance with GAAS.

50. In all, the 1997 financial statements audited by Andersen were materially false and misleading in that they overstated Sunbeam's operating income for the year by 50%. Andersen and Harlow negligently or fraudulently disregarded facts indicating that (a) Andersen's unqualified audit opinion was incorrect, (b) Sunbeam's financial statements were materially false and misleading and not in conformity with GAAP, and (c) Andersen had failed to perform an audit in accordance with GAAS.

2. Improper Accounting Practices In 1997.

51. One of the most flagrant accounting abuses Andersen and Harlow permitted in 1997 was to allow Sunbeam to record a profit on a sham sale of its warranty and spare parts business to its spare parts provider, EPI Printers, Inc. Prior to 1997, EPI satisfied spare parts and warranty requests of Sunbeam customers on a fee basis. To raise additional revenue at year end 1997, however, Sunbeam entered into a sham sale of the warranty and spare parts inventories already in EPI's warehouse. As a result of the transaction, management fraudulently recognized sales revenue of \$11 million and \$5 million in income in 1997.

52. The problem with the EPI transaction was that the transaction was not a sale at all, for at least three reasons. First, there was never a final agreement between Sunbeam and EPI. The closest the parties ever came to a meeting of the minds was the execution of a mere "agreement to agree." Second, by its terms, the proposed sale was to terminate on January 23, 1998, with no payment obligation on the part of EPI, absent a subsequent agreement between

Sunbeam and EPI on the value of the inventory. In other words, the sale could be completely unwound just after year-end without EPI ever having paid a cent. Third, Sunbeam had agreed as part of the proposed sale to pay certain fees to EPI and to guarantee a 5% profit to EPI on the eventual resale of the inventory. In essence, even after the proposed sale, EPI remained a contractor compensated by Sunbeam on a fee basis for its services. In sum, the relationship between EPI and Sunbeam was not fundamentally altered by the purported "sale."

53. Harlow became aware of the true nature of the EPI transaction and raised it with management as part of Andersen's 1997 year-end audit. Harlow proposed that Sunbeam reverse the accounting entries reflecting the revenue recognition for that transaction, having concluded that the profit guarantee and the indeterminate value of the contract rendered revenue recognition inconsistent with GAAP. Simply stated, there was no revenue to recognize because the transaction was illusory. Kersh and Gluck refused to reverse the transaction, but agreed to take a \$3 million reserve against the transaction, lessening but not eliminating the fraudulent gain. Instead of refusing to lend Andersen's name to management's fraudulent revenue recognition, Harlow again acquiesced in management's actions. As a result, Sunbeam's 1997 audited financial statements reflect approximately \$5 million of phony profit on the sham EPI transaction.

54. The EPI transaction raised a clear red flag that should have – and must have – alerted Andersen to the need for greater scrutiny regarding all of Sunbeam's revenue recognition decisions. At a minimum, Andersen should have been on guard as to all items Harlow previously identified as proposed audit adjustments (but which Harlow eventually acquiesced in), and any previously recognized improper items that were ultimately dismissed as "immaterial."

55. Another 1997 revenue inflation scheme permitted by Andersen and Harlow was Sunbeam's use of improper "bill-and-hold" transactions. A bill-and-hold transaction is a transaction in which the seller bills a customer for a purchase while holding the merchandise for later delivery. During 1997, Dunlap's management team offered financial incentives to various customers to make purchases earlier than they would otherwise have done so. Management then proposed that Sunbeam hold the merchandise until the normal time for delivery.

56. Under certain limited circumstances, bill-and-hold transactions may be permitted for revenue recognition purposes. However, bill-and-hold transactions must meet specific stringent accounting criteria satisfying GAAP. The relevant criteria include, among others: a requirement that the buyer, not the seller, requested a sale on a bill-and-hold basis; that the buyer had a substantial business purpose for ordering the goods on a bill-and-hold basis; and that risks and rewards of ownership passed to the buyer at the time of the bill-and-hold sale.

57. Bill-and-hold transactions improperly added in excess of \$29 million to Sunbeam's 1997 sales and \$4.5 million to income. In the course of the audit of Sunbeam's 1997 financial statements, Andersen and Harlow discovered that the purported bill-and-hold customers had not requested the bill-and-hold treatment, and that in numerous cases involving rights of return "the risks of ownership and legal title" were not actually "passed to the customer." Nevertheless, Andersen negligently or fraudulently disregarded facts indicating that bill-and-hold transactions did not satisfy the required revenue recognition criteria. Ultimately, Andersen acquiesced in Sunbeam's decisions to recognize revenue for all of those non-GAAP sales in 1997, and to misdescribe the company's bill-and-hold practices in the financial statements as customer-driven legitimate sales.

58. Another income inflation tactic Sunbeam management used in 1997 was to decrease the inflated 1996 reserves to create the illusion of 1997 income. By decreasing the reserves in 1997, management increased Sunbeam's 1997 income by almost \$5 million. In connection with Andersen's year-end audit of Sunbeam's financial statements, Harlow discovered that tactic and concluded that it was improper. Harlow proposed reversing management's misuse of the reserves, but management refused to do so. Rather than insisting that the adjustments be made, Andersen gave Sunbeam a pass, and permitted the entries. In doing so, Andersen and Harlow negligently or fraudulently disregarded facts indicating that the improper accounting materially distorted Sunbeam's reported results of operations for 1997.

59. Another of Sunbeam's 1997 accounting gimmicks was to record income from non-recurring events as ordinary income. In connection with Andersen's work on the 1997 audit, Harlow learned that management had arranged for the sale of deeply discounted and obsolete inventory during 1997, creating \$19 million in non-recurring revenue. Although the recognition of that revenue was permitted under GAAP, Sunbeam was required to disclose in its financial statements that the income from the sale was a non-recurring event. Sunbeam failed to do so. Notwithstanding that material omission, Andersen certified Sunbeam's 1997 financial statements.

60. Finally, during Andersen's 1997 audit, Harlow proposed adjustments to reverse \$2.9 million related to a Sunbeam inventory overvaluation and \$563,000 in additional items. Management again refused to make appropriate adjustments, and Andersen and Harlow acquiesced in the refusal to reverse those errors. In doing so, Andersen and Harlow negligently or fraudulently disregarded facts indicating that those items contributed to the misstatement of Sunbeam's 1997 reported results of operations.

61. In the end, Andersen's 1997 audit opinion certified financial statements that reported Sunbeam's income to be \$186 million, much of which was improper under GAAP. The overstatements included in all over \$90 million of improper revenue including, without limitation, approximately \$5 million from the sham sale to EPI, approximately \$4.5 million from non-GAAP bill-and-hold sales, approximately \$35 million in income derived from the use of non-GAAP reserves and accruals taken at year-end 1996, and approximately \$6 million from improper revenue recognition.

62. As Andersen and Harlow knew, Coleman-Parent relied on Sunbeam's report of \$186 million in income in deciding to close the sale of its interest in Coleman Company. If Andersen had not issued a materially false and misleading audit report, and instead had complied with GAAP and GAAS, Sunbeam's 1997 operating income would have been approximately half of what Andersen certified in the financial statements.

G. Coleman-Parent Relies on Andersen's Unqualified Audit Opinions and Closes the Sale to Sunbeam.

63. The merger agreement signed by Coleman-Parent on February 27, 1998 provided that a condition precedent to Coleman-Parent's obligation to close the transaction was the absence of any event, change, or development that would have a material adverse effect on the business, results of operation, or financial condition of Sunbeam. The closing also was conditioned on the absence of any material misrepresentation or omissions in Sunbeam's SEC filings, including Andersen's 1996 and 1997 audit reports in the Form 10-Ks. If Andersen had not been negligent or fraudulent in performing its audits, and had issued qualified or adverse reports exposing the falsity of Sunbeam's financial statements, Coleman-Parent would have been put on notice of an adverse material change affecting Sunbeam before closing, and of a material misstatement in Sunbeam's SEC filings. Coleman-Parent's obligation to close the transaction

with Sunbeam would have been discharged by the failure of a condition precedent, and Coleman-Parent never would have suffered losses in excess of \$600 million. Coleman-Parent directly relied on Andersen's 1996 and 1997 audit reports when it decided to close the transaction with Sunbeam and to accept 14.1 million shares of Sunbeam stock as consideration for selling its interest in Coleman Company.

64. Andersen was fully aware of the terms and conditions of the Coleman Company transaction and of Coleman-Parent's anticipated and actual reliance upon Andersen's unqualified 1996 and 1997 audit opinions.

65. On March 30, 1998, unaware of the falsity of Sunbeam's financial statements and Andersen's audit reports, Coleman-Parent closed the transaction with Sunbeam and accepted 14.1 million shares of what turned out to be essentially worthless Sunbeam common stock for the sale of its interest in Coleman Company.

H. Andersen's Improper Accounting and Misrepresentations Are Revealed, Causing the Market Value of Sunbeam's Stock to Plummet.

66. Almost immediately after the consummation of Coleman-Parent's sale of Coleman Company to Sunbeam, Sunbeam's facade of financial health began to crumble.

67. In an April 3, 1998 conference call with securities analysts, Sunbeam revealed that sales for the first quarter of 1998 were 5% below reported sales for the same period of the prior year. Only two weeks earlier, on March 19, 1998, Sunbeam had issued a press release in which it announced that sales for the first quarter of 1998 were "expected to exceed" sales for the same period of the prior year.

68. On June 6, 1998, an article was published in Barron's that raised serious questions regarding Sunbeam's apparent success under Dunlap, and suggested it was the result of

"accounting gimmickry." On June 15, 1998, Sunbeam's Board announced that it had removed Dunlap as Chairman and CEO.

69. On June 25, 1998, Andersen withheld its consent for use of its 1997 audit opinion in a registration statement that was to have been filed with the SEC.

70. On June 30, 1998, Sunbeam announced that the Audit Committee of its Board of Directors would conduct an inquiry into the accuracy of its 1997 financial statements. The Audit Committee subsequently retained Deloitte & Touche LLP to assist in the review, in addition to Arthur Andersen. Sunbeam stated that "pending the completion of its review, its 1997 financial statements and the report of Arthur Andersen LLP should not be relied upon." Sunbeam added that the review "could result in a restatement of the 1997 financial statements and the first quarter 1998 Form 10-Q."

71. On August 6, 1998, Sunbeam announced that its Audit Committee had determined that Sunbeam would be required to restate its audited financial statements for 1997 and possibly for 1996, as well as its unaudited financial statements for the first quarter of 1998.

72. On November 12, 1998, Sunbeam released its restated 1996 and 1997 financial results, again audited by Andersen. The restated 1996 financial statements reported operating losses for 1996 that were approximately \$40 million less than originally reported, losses from continuing operations that were approximately \$26 million less than previously reported, and net losses that were approximately \$20 million less than previously reported.

73. The restated 1997 financial statements reported operating earnings for 1997 that were approximately \$95 million less than originally reported, earnings from continuing operations that were approximately \$70 million less than previously reported, and net earnings

that were approximately \$70 million less than previously reported. The new operating income figure for 1997 was approximately 50% less than the amount Andersen previously certified.

74. In the wake of Dunlap's firing, Sunbeam's board of directors asked members of Coleman-Parent's management to assume key positions within Sunbeam in order to carry out damage control and attempt to salvage the value remaining in the company. New management was unable to overcome the devastating effects of the manipulation and distortion of Sunbeam's business.

75. On February 5, 2001, Sunbeam filed a voluntary petition for Chapter 11.

76. As a result of having been fraudulently induced into exchanging its ownership of Coleman Company for over 14 million shares of Sunbeam stock, Coleman-Parent has suffered direct damages in excess of \$600,000,000.

VIOLATIONS OF GAAP AND GAAS IN ANDERSEN'S 1996 AND 1997 AUDITS

77. The objectives of financial reporting are to provide information that is useful in investment and credit decisions, information that is useful in assessing cash flow prospects, and information about enterprise resources, claims to those resources, and changes in them. (See "Objectives of Financial Reporting by Business Enterprises," Statement of Financial Accounting Concepts No. 1 (Financial Accounting Standards Board, November 1978).) In order to minimize misinterpretation of financial statements, the accounting profession has developed sets of standards regarding financial reporting and auditing practice that are generally accepted and universally practiced. Those standards are known as GAAP and GAAS. The development of common standards for auditing and financial reporting has provided businesspeople and investors with a valuable frame of reference in evaluating the financial condition of enterprises.

78. Auditors know they must adhere to GAAP and GAAS, or the standards would cease to have any meaning. Consistent with the objectives of the profession in developing those standards, the public has come to understand the importance of GAAP and GAAS in enhancing the reliability of audited financial statements. As a result, when an auditing firm represents that it has conducted an audit of a company in accordance with GAAS, and opines that such company's financial statements present the company's financial condition fairly in conformity with GAAP, readers of those financial statements have the right to rely on the integrity of those financial statements.

79. In auditing Sunbeam in 1996 and 1997, and in issuing unqualified opinions regarding Sunbeam's 1996 and 1997 financial statements, Andersen and Harlow did not adhere to the standards of the profession. Although Andersen's audit opinions stated that the firm had conducted its audits of Sunbeam in accordance with GAAS, and based on those audits had concluded that Sunbeam's financial statements presented the company's financial condition fairly in conformity with GAAP, that simply was not true.

A. Sunbeam's Audited 1996 and 1997 Financial Statements Were Not In Conformity With GAAP.

80. As alleged below, Sunbeam's audited 1996 and 1997 financial statements failed to conform to GAAP in numerous respects.

81. Sunbeam's 1996 and 1997 financial statements, certified by Andersen, failed to conform to GAAP because those financial statements did not comply with the accounting principle of reliability. That principle requires that the quality of reported information assures that the information is reasonably free from error or bias and faithfully represents what it purports to represent. FASB Statement of Financial Accounting Concepts No. 2, §§ 58-71; APB Statement No. 4, §§ 109, 138, 189.

82. The financial statements also failed to comply with the accounting principle of completeness, which requires that financial information be complete and that it validly represent the underlying event and conditions. FASB Statement of Financial Accounting Concepts No. 2, §§ 79, 80; APB Statement No. 4, § 94.

83. The financial statements also failed to comply with the accounting principle of conservatism, which requires that a conservative approach be taken in the accounting for transactions and the early recognition of unfavorable events. FASB Statement of Financial Accounting Concepts No. 2, §§ 91-97; APB Statements No. 9, §§ 35, 71.

84. The financial statements also failed to comply with the accounting principle of neutrality, which requires that there should be an absence in reported information of bias intended to attain a predetermined result. FASB Statement of Financial Accounting Concepts No. 2, § 98.

85. The financial statements also failed to comply with the accounting principle of relevance, which requires that reported information should have the capacity to make a difference in a decision by helping users to form predictions about the outcomes of past, present and future events. FASB Statement of Financial Accounting Concepts No. 2, §§ 47, 48.

B. Andersen's 1996 and 1997 Audits Were Not Conducted In Accordance With GAAS.

86. As alleged below, Andersen failed in numerous respects to conduct its audits in accordance with GAAS.

87. Andersen and Harlow violated GAAS because they negligently or fraudulently failed to perform the audits with an attitude of professional skepticism as required by Statement on Auditing Standards ("SAS") No. 53, which states: "An audit of financial

statements in accordance with generally accepted accounting standards should be planned and performed with an attitude of professional skepticism." AU § 316.16. Thus:

a. Andersen and Harlow negligently or fraudulently failed to reach a conclusion that there existed a significant risk of intentional distortion of financial statements by Sunbeam management. Andersen and Harlow should have reached that conclusion because Sunbeam's management was dominated by a single person, Dunlap; because Dunlap's attitude toward financial reporting was unduly aggressive; because Dunlap placed undue emphasis on meeting earnings projections; because of the extremely rapid change in Sunbeam's performance; and/or because Dunlap's plan to quickly "turn around" and sell Sunbeam incentivized him to distort financial statements. See AU §§ 316.10 and 316.12.

b. Andersen and Harlow also were negligent or fraudulent in failing to recognize that the accounting policies employed by Sunbeam were not acceptable in the circumstances. Thus, "when the auditor has reached a conclusion that there is a significant risk of intentional distortion of financial statements, the auditor should recognize that management's selection and application of significant accounting policies, particularly those related to revenue recognition, asset valuation, and capitalization versus expensing, may be misused. Increased risk of intentional distortion of the financial statements should cause greater concern about whether accounting principles that are otherwise generally accepted are being used in inappropriate circumstances to create a distortion of earnings." AU § 316.19.

c. Andersen and Harlow also acted negligently or fraudulently by failing to obtain sufficient competent evidential matter through inspection, observation,

inquiries, and confirmations to afford a reasonable basis for its opinions regarding Sunbeam's financial statements. That failure violated the third standard of field work adopted by the American Institute of Certified Public Accountants ("AICPA") (AU § 150.02). Furthermore, "[w]hen evaluation at the financial statement level indicates significant risk, the auditor requires more or different evidence to support material transactions than would be the case in the absence of such risk. For example, the auditor may perform additional procedures to determine that sales are properly recorded, giving consideration to the possibility that the buyer has a right to return the product. Transactions that are both large and unusual, particularly at year-end, should be selected for testing." AU § 316.20.

88. Andersen and Harlow negligently or fraudulently failed to exercise due professional care in the performance of the 1996 and 1997 audits, in violation of the AICPA's third general auditing standard (AU § 150.02).

89. Andersen and Harlow negligently or fraudulently failed to plan the work adequately to uncover the errors and irregularities in Sunbeam's accounting information, in violation of the AICPA's first standard of field work (AU § 150.02).

90. Andersen and Harlow negligently or fraudulently failed to obtain a sufficient understanding of Sunbeam's internal control structure to plan the audits and to determine the nature, timing, and extent of tests to be performed, in violation of the AICPA's second standard of field work (AU § 150.02). Specifically, Andersen and Harlow fraudulently failed to assess properly the risk of management override of controls in light of Dunlap's plan to quickly "turn around" and sell Sunbeam.

91. Andersen and Harlow negligently or fraudulently relied on management representations rather than applying the auditing procedures necessary to afford a reasonable basis for an opinion on Sunbeam's financial statements, in violation of SAS No. 19 (AU § 333.02).

92. Andersen and Harlow were negligent or fraudulent in not recognizing that misstatements resulting from misapplication of GAAP, departures from fact, and omissions of necessary information, in aggregate, caused Sunbeam's financial statements to be materially misstated, in violation of SAS No. 47 (AU § 312.04).

93. As alleged above, on numerous occasions Andersen and Harlow concluded that certain misstatements caused Sunbeam's financial statements to be materially misstated. Although they requested that Sunbeam management eliminate the misstatements, management refused. Andersen acted negligently or fraudulently in not issuing a qualified or adverse opinion in such instances, in violation of SAS No. 47 (AU § 312.31).

94. Andersen and Harlow were negligent or fraudulent in concluding that the accounting principles applied by Sunbeam were appropriate in the circumstances and that Sunbeam's financial statements were informative of matters that could affect their use, understanding, and interpretation, in violation of SAS No. 69 (AU § 411.04(b) and (c)).

95. Andersen and Harlow were negligent or fraudulent in failing to report that a change in the application of accounting principles in Sunbeam's 1997 financial statements had materially affected their comparability with the financial statements for prior periods, especially 1996, due to a different treatment of sales and reserves in those periods, in violation of SAS Nos. 1 and 43 (AU § 420.02).

96. Andersen's and Harlow's failure to conduct the audits in accordance with GAAS, and Andersen's certification of financial statements that were not in conformity with GAAP, as shown above, caused Coleman-Parent to suffer damages in excess of \$600,000,000.

COUNT I
Fraudulent Misrepresentation

97. Coleman-Parent repeats and realleges each and every allegation above as if set forth fully herein.

98. At the time Andersen issued its unqualified audit opinions for Sunbeam's 1996 and 1997 financial statements, Andersen and Harlow possessed knowledge superior to Coleman-Parent concerning Sunbeam's financial position, the accounting principles Sunbeam used, the results of Sunbeam's operations and cash flows, and whether Sunbeam's financial condition was presented in conformity with GAAP.

99. As described in detail above, Andersen and Harlow made representations of fact that were false in the unqualified audit opinions it issued for Sunbeam's 1996 and 1997 financial statements, including, among other things, (a) that Andersen's audits of Sunbeam were conducted in accordance with GAAS; (b) that Sunbeam's financial statements fairly presented the financial position of Sunbeam during the relevant periods; (c) that Sunbeam's financial statements fairly presented the results of Sunbeam's operations and cash flows during the relevant periods; and (d) that Sunbeam's financial statements were in conformity with GAAP.

100. As described in detail above, Andersen and Harlow knew that those representations were false at the time they were made and/or made those representations with recklessness as to their truth.

101. Andersen consented to the publication of its audit reports to the public and business world by consenting to their inclusion in Sunbeam's SEC filings. Given that

publication, Andersen and Harlow intended that the public – including Coleman-Parent – would rely on Andersen's representations. Moreover, Andersen and Harlow specifically knew the terms of the agreement for Coleman-Parent's sale of Coleman Company to Sunbeam and consented to the publication of Andersen's audit report in Sunbeam's March 6, 1998 Form 10-K filing with the intent that Coleman-Parent rely upon Andersen's representations.

102. In agreeing to sell its interest in Coleman Company for approximately 14.1 million shares of Sunbeam stock plus cash and other consideration, Coleman-Parent reasonably and justifiably relied upon Andersen's representations and omissions as to Andersen's 1996 and 1997 audits.

103. But for Andersen's misrepresentations, Coleman-Parent would not have agreed sell its business to Sunbeam in return for artificially-inflated Sunbeam stock, among other consideration. As a result of Andersen's and Harlow's misconduct, Coleman-Parent has been damaged in excess of \$600,000,000.

COUNT II
Fraudulent Inducement To Contract
(Conspiracy and Concerted Action)

104. Coleman-Parent repeats and realleges each and every allegation above as if set forth fully herein.

105. As described in detail above, Sunbeam's 1996 and 1997 financial statements contained false statements of material fact. Those material misrepresentations included, among other things, (a) overstating Sunbeam's 1996 operating losses by approximately \$40 million; (b) overstating Sunbeam's 1996 losses from continuing operations by approximately \$26 million; (c) overstating Sunbeam's 1996 net losses by approximately \$20 million; (d) overstating Sunbeam's 1997 operating earnings by approximately \$95 million; (e) overstating

Sunbeam's 1997 earnings from continuing operations by over \$70 million; (f) overstating Sunbeam's 1997 net earnings by approximately \$70 million; and (g) overstating Sunbeam's 1997 operating income figure by approximately 50%.

106. As described in detail above, Andersen and Harlow made representations of fact that were false in the unqualified audit opinions it issued for Sunbeam's 1996 and 1997 financial statements, including, among other things, (a) that Andersen's audits of Sunbeam were conducted in accordance with GAAS; (b) that Sunbeam's financial statements fairly presented the financial position of Sunbeam during the relevant periods; (c) that Sunbeam's financial statements fairly presented the results of Sunbeam's operations and cash flows during the relevant periods; and (d) that Sunbeam's financial statements were in conformity with GAAP.

107. As described in detail above, Sunbeam, Andersen, and Harlow knew that those representations were false when made and/or made those representations with reckless disregard as to their truth.

108. In order to induce Coleman-Parent further into entering into and fulfilling a contract to sell its interest in Coleman Company to Sunbeam in exchange for approximately 14.1 million shares of Sunbeam stock, Sunbeam represented that its SEC filings dating back to January 1, 1997 were accurate and not misleading as of February 27, 1998 and would be accurate and not misleading on March 30, 1998. Sunbeam's management, Andersen, and Harlow knew and/or recklessly disregarded that those representations were false when made because Sunbeam's SEC filings contained Sunbeam's false and misleading 1996 and 1997 financial statements and Andersen's false and misleading audit reports.

109. In reasonable and justifiable reliance on Sunbeam's representations that its SEC filings – including its financial statements and Andersen's audit reports – were accurate

with respect to Sunbeam's financial position and operating results, Coleman-Parent agreed to accept 14.1 million shares of Sunbeam stock and other consideration in exchange for its controlling stake in Coleman Company.

110. As a proximate result of its reliance on those misrepresentations, Coleman-Parent gave up its stake in Coleman Company in exchange for shares of Sunbeam which, once the truth of Sunbeam's financial situation was revealed, became worthless. Those misrepresentations proximately caused injury to Coleman-Parent in excess of \$600,000,000.

111. Andersen and Harlow were part of a team with Dunlap, Kersh, and the other senior Sunbeam executives that acted in concert and wrongfully conspired to create the appearance that Sunbeam was performing at a high level to artificially inflate the stock price of Sunbeam and make it attractive for a sale to another company. Andersen and Harlow explicitly or implicitly by acquiescence agreed to become part of that conspiracy and committed overt acts in furtherance of its fraudulent scheme in order to retain Sunbeam as a client and earn significant fees.

112. In furtherance of that conspiracy, Dunlap and the other Sunbeam executives decided to acquire Coleman Company in order to further increase Sunbeam's stock price and maintain the illusion of its good performance. In pursuance of that scheme, Andersen and Harlow committed the overt acts of issuing Andersen's false and misleading March 1998 unqualified audit opinion with respect to Sunbeam's 1997 financial statements and of consenting to its publication to the SEC as part of Sunbeam's Form 10-K filing on March 6, 1998. Andersen and Harlow knew that Andersen's audit opinion would be used by Sunbeam to induce Coleman-Parent into selling its controlling stake in Coleman Company in exchange for shares of artificially-inflated Sunbeam stock. Andersen's audit report also furthered that conspiracy by

actively supporting the illusion of Sunbeam's performance that had been created in the market, which helped support the company's artificially-inflated stock price. In doing so, Andersen and Harlow committed the tortious act of fraudulent inducement in concert with Dunlap and the other Sunbeam executives pursuant to a common design.

113. As described above, Coleman-Parent was damaged as a result of those concerted acts performed as part of that conspiracy.

COUNT III Negligent Misrepresentation

114. Coleman-Parent repeats and realleges each and every allegation above as if set forth fully herein.

115. Andersen provided the information in its audit reports regarding Sunbeam's 1996 and 1997 financial statements in the course of its business as an accounting firm in the employ of Sunbeam.

116. In issuing its audit report regarding Sunbeam's 1997 and 1996 financial statements and in consenting to that report's inclusion in Sunbeam's March 6, 1998 Form 10-K filing with the SEC, Andersen and Harlow were aware that such information was being provided, in part, for the specific guidance and reliance of Coleman-Parent, which was agreeing to sell Coleman Company to Sunbeam for approximately 14.1 million shares of Sunbeam stock plus cash. In particular, Sunbeam warranted and represented to Coleman-Parent that its SEC filings, and audited financial statements including Andersen's report, were accurate – a fact that Andersen and Harlow were aware of when Andersen issued its report and consented to its publication. Andersen and Harlow expected that Coleman-Parent would rely on Andersen's 1997 audit report. Andersen and Harlow also were aware and expected that Coleman-Parent

specifically was relying on Andersen's previously issued 1996 audit report, which Andersen did not retract until long after the Coleman Company transaction closed.

117. As described in detail above, Andersen's unqualified audit opinions for Sunbeam's 1996 and 1997 financial statements contained material falsehoods, including, among other things, (a) that its audits of Sunbeam were conducted in accordance with GAAS; (b) that Sunbeam's financial statements fairly presented the financial position of Sunbeam during the relevant periods; (c) that Sunbeam's financial statements fairly presented the results of Sunbeam's operations and cash flows during the relevant periods; and (d) that Sunbeam's financial statements were in conformity with GAAP.

118. As described in more detail above, Andersen and Harlow failed to exercise reasonable care or competence in obtaining or communicating the information contained in their audit reports regarding Sunbeam's 1996 and 1997 financial statements.

119. Coleman-Parent reasonably and justifiably relied upon the information contained in Andersen's audit reports, including their material falsehoods regarding Sunbeam's financial condition and operating results and regarding the conformance of Sunbeam's financial statements to GAAP. In reliance on those material falsehoods, Coleman-Parent agreed to sell its interest in Coleman Company for approximately 14.1 million shares of Sunbeam stock, cash, and other consideration.

120. As a result of Andersen's and Harlow's misconduct, Coleman-Parent has been injured in an amount in excess of \$600,000,000.

WHEREFORE, plaintiff Coleman (Parent) Holdings, Inc. demands judgment against Arthur Andersen LLP and Phillip E. Harlow as follows:

- A. Compensatory damages in an amount in excess of \$600,000,000;
- B. An award of costs and expenses incurred in this action, including reasonable attorneys' and experts' fees; and
- C. Any further relief as the Court may deem just and proper in light of all the circumstances of the case.
- D. Coleman-Parent expressly reserves the right to seek leave to amend its complaint pursuant to Fla. Stat. § 768.72 to assert claims for punitive damages in excess of \$1.2 billion as allowed by law.

JURY DEMAND

Plaintiff demands a trial by jury.

Dated: June 8, 2001

COLEMAN (PARENT) HOLDINGS, INC.

By: _____

One of Its Attorneys

John Scarola
SEARCY DENNEY SCAROLA
BARNHART & SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33402-3626
(561) 686-6300

Jerold S. Solovy
Ronald L. Marmer
Joel J. Africk
Matthew M. Neumeier
Avidan J. Stern
JENNER & BLOCK, LLC
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

EXHIBIT 3

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CASE NO: 03 CA-005045 A1

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

**MORGAN STANLEY & CO. INCORPORATED'S FIRST REQUEST
FOR PRODUCTION OF DOCUMENTS TO PLAINTIFF**

Pursuant to Rules 1.280 and 1.350 of the Florida Rules of Civil Procedure, Morgan Stanley & Co. Incorporated ("MS & Co.") requests that plaintiff produce the documents and things referred to in the following specific requests. The specific requests are preceded by Instructions and Definitions which shall govern the specific requests. Documents and things responsive to these requests should be produced to counsel for Morgan Stanley & Co. Incorporated at the law firm of Carlton Fields, P.A., 222 Lakeview Avenue, Suite 1200, West Palm Beach, FL 33401, within the time required by Florida Rule of Civil Procedure 1.350(b) or as otherwise agreed to by the parties or specified by the Court.

INSTRUCTIONS

1. The connectives "and" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery request all responses that might otherwise be construed to be outside of its scope.

2. The use of the singular form of any word includes the plural and vice versa.

3. Documents requested and to be produced include all Documents in the possession, custody or control of the plaintiff including, but not limited to, any agents, employees, contractors, attorneys, and consultants or experts working for or in favor of the plaintiff or its attorneys.

4. If, in responding to this Request for Production, you encounter any ambiguities when construing a request or definition, the response shall set forth the matter deemed ambiguous and the construction used in responding.

5. Whenever in this Request you are asked to identify or produce a document which is deemed by you to be properly withheld from production for inspection or copying under claim of privilege (including, but not limited to, the work product doctrine), provide a privilege log that includes: the type of document, the general subject matter of the document, the date of the document, and such other information as is sufficient to identify the document, including, where appropriate, the author, addressee, custodian, and any other recipient of the document, and where not apparent, the relationship of the author, the addressee, custodian, and any other recipient to each other, in a manner that, without revealing the information claimed to be protected, will enable this party to assess the applicability of the privilege protection claimed by you. The privilege log shall be provided within the time set forth in the agreed-upon order.

6. If production of any requested document(s) is objected to on the grounds that production is unduly burdensome, describe the burden or expense of the proposed discovery.

7. When a document contains both privileged and non-privileged material, the non-privileged material must be disclosed to the fullest extent possible without disclosing the

privileged material. If a privilege is asserted with regard to part of the material contained in a document, the party claiming the privilege must clearly indicate the portions as to which the privilege is claimed. When a document has been redacted or altered in any fashion, identify as to each document the reason for the redaction or alteration. Any redaction must be clearly visible on the redacted document.

8. If a responsive document exists but is no longer in your possession, custody, or control, state: its date, author(s), recipient(s), subject matter, what disposition was made of the document, and the person or entity, if any, now in possession, custody, or control of the document. If a responsive document has been destroyed, identify the date of destruction, the person who destroyed the document and the person who directed that the document be destroyed and state the reason for its destruction.

9. Produce all of the documents responsive to the numbered requests below either as they are kept in the usual course of business or by custodian.

10. If any of these documents cannot be produced in full, you are requested to produce them to the fullest extent possible, specifying clearly the reasons for your inability to produce the remainder and stating any information, knowledge, or belief you have concerning the unproduced portion.

11. If the requested documents are maintained in a file, the file folder is included in the request for production of those documents.

12. The terms "any," "all" and "each" shall be construed to mean "any," "all," or "each".

13. The term "including" shall be construed to mean "including but not limited to."

14. The present tense shall be construed to include the past and future tenses.
15. The specificity of any request herein shall not be construed to limit the generality or reach of any other request herein.
16. Unless otherwise specified, this Request calls for the production of documents created, delivered, distributed, sent, received, accessed, or modified up to the date of your response to this Request.

DEFINITIONS

1. "Advisors" means financial advisors, legal advisors, accountants, consultants and any other third-party advising or assisting CPH in any way with the Coleman Transaction, including but not limited to Credit Suisse First Boston and Wachtell, Lipton, Rosen & Katz.
2. "Arbitrations" means *Albert J. Dunlap and Sunbeam Corporation*, No. 32 160 00088 99 (AAA); and *Russell A. Kersh and Sunbeam Corporation*, No. 32 160 00091 99 (AAA).
3. "Communication" means any exchange or transmittal of information by any means of transmission, including, without limitation, face-to-face conversation, mail, overnight delivery, Internet, telephone, electronic mail, or facsimile.
4. The term "concerning" means relating to, referring to, describing, evidencing, or constituting.
5. "Coleman" means Coleman Company, Inc.
6. The "Coleman Transaction" means Sunbeam's acquisition of Coleman Company, Inc. from CPH and all related communications, agreements, and transactions, including the February 27, 1998 Agreements and the March 30, 1998 closing.

7. "CPH" means Coleman (Parent) Holdings Inc. and any of its officers, directors, former or present employees, representatives and agents.

8. The "December 1997 Meeting" means the meeting referred to in paragraph 37 of your Complaint.

9. "Document" means any recording in any tangible form of any information, whether handwritten, typed, printed, stored on computer disks, tapes, or databases, or otherwise reproduced. "Document" or "documents" also includes electronic documents whether stored on servers or hard drives, e-mail, backup tapes, voicemail and video and audio recordings. A draft or non-identical copy is a separate document within the meaning of this term.

10. "Document Retention Policy" refers to all documents, either electronic or paper, referring or relating to the destruction of documents, including, without limitation, the formulation, implementation, and application of such policies; the use of instant messaging technology to avoid retention or preservation of communications; any disciplinary actions taken against employees for destruction of documents which should have been preserved pursuant to CPH policies; communications sent to CPH employees regarding the preservation and collection of documents relating to any litigation; your policies, practices, techniques, or considerations regarding intentional efforts not to preserve records; and all indices or listings of back up tapes currently in the possession of CPH. Document Retention Policies include both policies of general application, as well as any policies adopted in connection with any litigation, Arbitration, or SEC Administrative Proceeding, including the Complaint against Morgan Stanley.

11. The "February 27, 1998 Meeting" means the February 27, 1998 Board of Directors meeting referred to in paragraphs 41-44 of your Complaint.

12. The "February 27, 1998 Agreements" means (a) the Agreement and Plan of Merger dated February 27, 1998 between Sunbeam Corp., Laser Acquisition Corp., CJN Holdings, Inc. and Coleman (Parent) Holdings Inc. and (b) the Agreement and Plan of Merger dated February 27, 1998 between Sunbeam Corp., Camper Acquisition Corp., and The Coleman Company, Inc., and all schedules, exhibits, and documents related to those Agreements.

13. "Financial Information" means information concerning the past or present financial condition of Sunbeam or Sunbeam securities.

14. "Financial Statements" means documents reflecting Financial Information, including without limitation quarterly reports, yearly reports, balance sheets, statements of income, earnings, cash flow projections, and sources and applications of funds.

15. The term "identify" (with respect to documents) means to give, to the extent known, the (i) type of document; (ii) general subject matter; (iii) date of the document; and (iv) author(s), addressee(s) and recipient(s).

16. "Litigations" means *In re Sunbeam Securities Litigation*, 98-8258-Civ.-Middlebrooks (S.D. Fla.); *Camden Asset Management L.P. v. Sunbeam Corporation*, 98-8773-Civ.-Middlebrooks and 98-8275-Civ.-Middlebrooks (S.D. Fla.); *Krim v. Dunlap*, No. CL 983168AD (15th Jud. Cir., Fla.); *Stapleton v. Sunbeam Corp.*, No. 98-1676-Civ.-King (S.D. Fla.); *Sunbeam Corp. v. PricewaterhouseCoopers LLP*, No. CL 005444AN (15th Jud. Cir., Fla.); *In re Sunbeam Corp., Inc.*, No. 01-40291 (AJG) (Bankr. S.D.N.Y.) and any adversary proceedings therein; *SEC v. Dunlap*, No. 01-8437-Civ.-Middlebrooks (S.D. Fla.); *Oaktree Capital Management LLC v. Arthur Andersen LLP*, No. BC257177 (L.A. Cty., CA); and *Coleman (Parent) Holdings Inc. v. Arthur Andersen LLP*, No. CA 01-06062AN (15th Jud. Cir., Fla.).

17. The "March 19, 1998 Press Release" means the press release referred to in paragraphs 59 and 60 your Complaint.

18. "MS & Co." means Morgan Stanley & Co. Inc. and any of its officers, directors, former or present employees, representatives and agents.

19. "MSSF" means Morgan Stanley Senior Funding, Inc. and any of its officers, directors, former or present employees, representatives and agents.

20. The term "person" is defined as any natural person or any business, legal or governmental entity or association.

21. The terms "plaintiff" and "defendant" as well as a party's full or abbreviated name or pronoun referring to a party mean the party and, where applicable, its officers, directors, employees, partners, corporate parent, subsidiaries or affiliates. This definition is not intended to impose a discovery obligation on any person who is not a party to the litigation.

22. The term "relating to" means concerning, evidencing, referring to, or constituting.

23. The "Relevant Period," unless otherwise indicated, shall be from January 1, 1997 through the date of trial of this matter.

24. "SEC Administrative Proceedings" means *In the Matter of Sunbeam Corp.*, SEC Administrative Proceeding File No. 3-10481, and *In the Matter of David C. Fannin*, SEC Administrative Proceeding File No. 3-10482.

25. "Sunbeam" means Sunbeam Corporation or any of its subsidiaries, divisions, predecessors, successors, present and former employees, representatives, and agents.

26. "Synergies" means post-acquisition gains through increased revenue and/or decreased cost.

27. The terms "you" or "your" means "CPH" as defined in Definition 7.

DOCUMENTS TO BE PRODUCED

1. All documents concerning the negotiation, signing, and implementation of the February 27, 1998 Agreements.

2. All documents referring or relating to the Coleman Transaction.

3. All documents reflecting, referring, or relating to communications between CPH and MS & Co. regarding the Coleman Transaction.

4. All documents reflecting, referring, or relating to communications between CPH and its Advisors regarding the Coleman Transaction.

5. All documents referring or relating to the December 1997 Meeting.

6. All documents supporting your allegation that MS & Co. knew about accounting irregularities at Sunbeam.

7. All documents supporting your allegation that MS & Co. developed a "strategy" to "conceal" Sunbeam's accounting fraud.

8. All documents referring or relating to Arthur Andersen's 1996 and 1997 audit of Sunbeam, including without limitation any review, investigation, analysis, and due diligence of the audit conducted by CPH personnel or its Advisors.

9. All documents reflecting, referring, or relating to the value of Sunbeam securities.

10. All documents referring or relating to the January-February 1998 discussions between representatives of CPH and MS & Co. referred to in your complaint.

11. All documents upon which you will rely for your allegation that MS & Co. "persuaded CPH to sell its shares of Coleman to Sunbeam and accept 14.1 million shares of Sunbeam stock as part of the consideration."

12. All documents referring or relating to the February 27, 1998 Meeting.

13. All documents identified, described, or referred to in your Complaint, including without limitation all documents you allege were prepared by MS & Co.

14. All documents identified, described, or referred to in your Complaint that you allege were reviewed by MS & Co.

15. All documents referring or relating to any review, investigation, analysis, or due diligence of Sunbeam conducted by CPH or its Advisors, including without limitation all documents reflecting Financial Information obtained by CPH or its Advisors.

16. All documents reflecting, referring, or relating to due diligence performed by you or your Advisors in connection with the sale of any company in which you received stock as part of the consideration for sale.

17. All documents referring or relating to Sunbeam's public announcement of the Coleman Transaction.

18. All documents upon which you will rely for your allegations that MS & Co. knew or had reason to know that Sunbeam's reported Financial Statements were false and/or misleading.

19. All documents supporting your allegation that MS & Co. "misrepresented Sunbeam's financial performance" in the road show meetings and conference calls.

20. All documents referring or relating to the March 19, 1998 Press Release.

21. All documents supporting the allegation in your complaint that MS & Co. was "fully aware" that the "March 19, 1998 press release was false, misleading, and failed to disclose material information."

22. All documents concerning or identifying any communications that took place between MS & Co. and Arthur Andersen concerning Sunbeam.

23. All documents reflecting, referring, or relating to any communications that took place between MS & Co. and Sunbeam.

24. All Financial Statements CPH claims it relied upon in connection with the Coleman Transaction.

25. All documents concerning synergies that might be achieved from the Coleman Transaction.

26. All documents concerning the potential or actual integration of Coleman, First Alert, and/or Signature Brands with Sunbeam, including, but not limited to, studies, reports, analyses, evaluations, projections, estimates, comments, or other work performed by Coopers & Lybrand, MS & Co., MSSF, Bank of America, or First Union.

27. All documents referring or relating to your Document Retention Policy.

28. Organization charts sufficient to show your organization as a whole, and the detail of all divisions of your organization during the Relevant Period.

29. All documents referring or relating to CPH's policies, procedures, manuals, guidelines, reference materials, or checklists for performing due diligence that were in effect during the Relevant Period.

30. All calendars and other day planners, whether paper or electronic, reflecting meetings, events, telephone conferences or other communications regarding the Coleman Transaction.

31. All calendars and other day planners, whether paper or electronic, belonging to Ronald Perelman, Howard Gittis, William Nesbitt, Lorchie Borland, Steve Fasman, and James Maher from December 1997 through March 1998.

32. All documents you have provided or produced to any party in any of the Litigations, Arbitrations, or SEC Administrative Proceedings, including documents responding to discovery requests, interrogatories, privilege logs, reports, communications, filings, testimony, legal memoranda, statements, affidavits, declarations and other documents.

33. All documents you have received from any party in any of the Litigations, Arbitrations, or SEC Administrative Proceedings, including documents responding to discovery requests, interrogatories, privilege logs, reports, communications, filings, testimony, legal memoranda, statements, affidavits, declarations and other documents.

34. All documents you have provided to the SEC or any other state or federal governmental or regulatory body concerning Sunbeam or MS & Co.

35. All documents you have received from the SEC or any other state or federal governmental or regulatory body concerning Sunbeam or MS & Co.

36. All discovery requests or subpoenas served on you in any of the Litigations, Arbitrations, or SEC Administrative Proceedings.

37. All responses and/or objections that you made in response to a discovery request or subpoena served on you in any of the Litigations, Arbitrations or SEC Administrative Proceedings, including without limitation responses to interrogatories and privilege logs.

38. All communications concerning any discovery request or subpoena served on you in any of the Litigations, Arbitrations, or SJC Administrative Proceedings.

39. All documents referring or relating to the settlement agreement between CPH and Sunbeam.

40. All documents referring or relating to the settlement agreement between CPH and Arthur Andersen.

41. All documents or other things related to the investigation, analysis, opinions, conclusions or other results of work by any expert retained for purposes of litigation relating to the Coleman Transaction or aftermath, including, but not limited to any resume or curriculum vitae of such experts, any correspondence to or from such experts, and any report, notes, work papers and documents or things relied upon by each expert.

Dated: July 15, 2003



Thomas D. Yannucci, P.C.

Thomas A. Clare

Larissa Paule-Carres

Brett H. McGurk

Kathryn DeBord

KIRKLAND & ELLIS LLP

655 15th Street, N.W. – Suite 1200

Washington, D.C. 20005

Telephone: (202) 879-5000

Facsimile: (202) 879-5200

Joseph Ianno, Jr. (FL Bar # 655351)

CARLTON FIELDS, P.A.

222 Lakeview Ave., Suite 1400

West Palm Beach, FL 33401

Telephone: (561) 659-7070

Facsimile: (561) 659-7368

Counsel for Defendant

Morgan Stanley & Co. Incorporated

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by facsimile and e-mail to all counsel of record on the attached service list on this 14th day of July, 2003.

Thomas D. Yannucci, P.C.
Thomas A. Clare
Larissa Paule-Carres
Brett H. McGuirk
Kathryn DeBord
KIRKLAND & ELLIS LLP
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

Counsel for Defendant
Morgan Stanley & Co. Incorporated

Joseph Ianno, Jr. (FL Bar # 655351)
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

BY: Thomas A. Clare
Thomas A. Clare

SERVICE LIST

<p>John Scarola SEARCY, DENNEY, SCAROLA, BARNHARDT & SHIPLEY, P.A. 2139 Palm Beach Lakes Boulevard West Palm Beach, Florida 33409</p>	<p>Counsel for Plaintiff</p>
<p>Michael Brody JENNER & BLOCK, LLC One IBM Plaza Suite 4400 Chicago, Illinois 60611</p>	<p>Counsel for Plaintiff</p>

EXHIBIT 4

KIRKLAND & ELLIS LLP

AND AFFILIATED FIRM(S)

655 Fifteenth Street, N.W.
Washington, D.C. 20005

Kathryn R. DeBord
To Call Writer Directly:
(202) 579-5078
kdebord@kirkland.com

202 879-5000
www.kirkland.com

Facsimile:
202 879-5200
Dir. Fax: (202) 879-5200

August 27, 2003

By Facsimile

Michael Brody, Esq.
Jenner & Block, LLC
One IBM Plaza
Chicago, IL 60611-7603

Re: *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc.*
MSSF v. MacAndrews & Forbes Holdings Inc. et al.

Dear Mike:

I write regarding your responses and objections to MS & Co.'s and MSSF's First Request for Production of Documents, which were served on August 15, 2003.

I first address your responses and objections to MS & Co.'s Request for Production. I then address your responses and objections to MSSF's Request for Production, to the extent that those responses and objections are unique to MSSF.

Initial Objections to MS & Co.'s First Request for Production of Documents:

1. **Initial Objection 1.**

You stated in your Initial Objection Number 1 that you would not comply with MS & Co.'s and MSSF's instructions 3, 4, 5, 6, 7, 8, 9, 10, 11, and 16 to the extent that they exceed or are inconsistent with applicable law. You objected, for example, to MS & Co. and MSSF's instruction number 11, which states: "[i]f the requested documents are maintained in a file, the file folder is included in the request for production of those documents." Likewise, instruction 16 directs that "[u]nless otherwise specified, this Request calls for the production of documents created, delivered, distributed, sent, received, accessed or modified up to the date of your response to this Request." Do you intend to withhold documents (or copies of file folders) based on your objections to any of the enumerated instructions? If so, please inform us promptly what documents you plan to withhold.

In addition, you objected to Definitions 9 (defining "documents") and 15 (defining "identify") to the extent they impose requirements that exceed or are inconsistent with the

Chicago

London

Los Angeles

New York

San Francisco

16div-000966

KIRKLAND & ELLIS LLP

Michael Brody, Esq.
August 27, 2003
Page 2

applicable rules. Do you intend to withhold documents based on your objections to these definitions? If so, please inform us promptly what documents you plan to withhold.

2. Initial Objection 3.

You narrowed MS & Co. and MSSF's definition of the "Coleman Transaction" to exclude "all related communications, agreements, and transactions, including the February 27, 1998 Agreements and the March 30, 1998 closing." We do not accept this limitation and ask you to reconsider.

Responses and Further Objections to MS & Co.'s First Request for Production

1. Request No. 1.

You objected to Request No. 1 on the grounds that the term "implementation" is vague and ambiguous, and you construed "implementation" to refer to the closing of the transaction by which CPH transferred its interest in the Coleman Company to Sunbeam. Your objection is unclear. "Implementation" means "to put into effect," and we are not sure what, if any, documents you are withholding based on your construction. Please inform us if you intend to withhold documents based on your objection.

2. Request No. 8.

Request No. 8 asks for all documents referring or relating to Arthur Andersen's 1996 and 1997 audit of Sunbeam. You construed this request as seeking only those documents relating to any review, investigation, analysis, and due diligence of Arthur Andersen's audit by *CPH personnel or advisors of CPH*. MS & Co. does not accept your limitation, which excludes documents created by non-CPH entities concerning Arthur Andersen's audit that are equally relevant to this litigation. We ask you to withdraw your objection and limitation. In addition, have you withheld documents based on this objection from your production?

3. Request No. 9.

You construed this request, seeking all documents reflecting, referring or relating to the value of Sunbeam securities, as seeking only those documents referring or relating to the *market* valuation of Sunbeam securities. This limitation excludes other valuations of Sunbeam securities, such as CPH's internal valuations. Furthermore, your own requests 13 (in the MS & Co. action) and 47 (in the MSSF action) seek "[a]ll documents concerning any valuation of Sunbeam or Sunbeam securities," and yet you object to our request -- seeking the very same

KIRKLAND & ELLIS LLP

Michael Brody, Esq.
August 27, 2003
Page 3

types of documents -- as "vague and ambiguous." We ask you to reconsider. In addition, have you withheld documents based on this objection from your production?

4. Request No. 15.

Request 15 seeks "All documents referring or relating to any review, investigation, analysis, or due diligence of Sunbeam conducted by CPH or its Advisors..." You limited this request to seek only those documents referring or relating to any review, investigation, etc. concerning the *valuation of Sunbeam or Sunbeam securities*. This limitation changes the substance of this request and would exclude documents relating to any investigation, analysis, etc. of Sunbeam not necessarily related to the valuation of Sunbeam or Sunbeam Securities. In addition, your own requests 3 (in the MS & Co. action) and 43 (in the MSSF action) are virtually identical to our request. We ask you to withdraw your objection to this request and your limitation of this request. In addition, please inform us if you have withheld documents from your production based on your objection.

5. Request No. 16.

You limited this request to the due diligence performed by CPH or its Advisors in connection with the transfer of CPH's interest in The Coleman Company to Sunbeam and CPH's general due diligence guidelines or policies. We ask that you also produce to us all due diligence-related materials provided to you by your financial advisors (including general due diligence guidelines or policies). In addition, please inform us if you have withheld documents from your production based on your objection.

7. Request No. 28.

You state in your objection to this request that, due to the manner in which Morgan Stanley has chosen to define "your," there are no documents responsive to this request. Please explain what this means. In addition, your objection to this request for organizational charts limits your production to documents sufficient to show the ownership relationship among CPH and its corporate subsidiaries at the time of the February 27, 1998 Agreements. We object to this limitation, which would exclude documents showing your organizational structure, your corporate relationship, and the reporting relationships within your corporation prior to and post February 27, 1998. We ask you to withdraw your objection and limitation. In addition, please inform us if you have withheld documents from your production based on your objection.

KIRKLAND & ELLIS LLP

Michael Brody, Esq.
August 27, 2003
Page 4

8. Request 31.

You limited our requests for the calendars and dayplanners of "Ronald Perelman, Howard Gittis, William Nesbitt, Lorelie Bertand, Steve Fasman, and James Maher from December 1997 through March 1998" to calendar entries that also relate to the "transaction by which CPH transferred its interest in The Coleman Company to Sunbeam." We do not accept this limitation and ask you to withdraw your limitation and objection. In addition, please inform us if you have withheld documents based on your objection.

9. Request No. 32.

With regard to your objections to and enumerated limitations of this request, do you intend to withhold documents otherwise responsive to this request? If so, what documents?

10. Request No. 33.

With regard to your objections to and enumerated limitations of this request, do you intend to withhold documents otherwise responsive to this request? If so, what documents?

11. Request No. 34.

With regard to your objections to and enumerated limitations of this request, do you intend to withhold documents otherwise responsive to this request? If so, what documents?

12. Request No. 35.

With regard to your objections to and enumerated limitations of this request, do you intend to withhold documents otherwise responsive to this request? If so, what documents?

13. Request No. 40.

With regard to your objection to producing documents relating to the settlement agreement between CPH and Arthur Andersen, please provide to us the provisions specifying the circumstances under which the terms of the settlement agreement can be disclosed.

Initial Objections to MSSF's First Request for Production of Documents

1. Initial Objection No. 1.

I refer you to Initial Objection No. 1 in the MS & Co. action discussed above.

KIRKLAND & ELLIS LLP

Michael Brody, Esq.
August 27, 2003
Page 5

2. **Initial Objection No. 3**

I refer you to Initial Objection No. 3 in the MS & Co. action discussed above.

3. **Initial Objection No. 6.**

MSSF defined "MAFCO" to mean "MacAndrews & Forbes and any of its officers, directors, former or present employees, representatives and agents." You objected to this definition as "vague and ambiguous" and limited the definition of "MAFCO" to "MacAndrews & Forbes Holdings Inc." You made this limitation despite the fact that you have rejected our efforts to narrow your own definitions of corporate entities and despite the fact that *your own requests* define "MAFCO" to mean "MacAndrews & Forbes or any of their present and former officers, directors, employees, representatives, and agents." We ask you to withdraw this objection and limitation.

Responses and Further Objections to MSSF's First Request for Production

1. **Request No. 1.**

I refer you to Request No. 1 in the MS & Co. action discussed above.

2. **Request No. 6.**

There appears to be a typographical error in your response to Request No. 6. Please confirm that, subject to your objections, CPH and MAFCO will produce all documents referring or relating to the December 1997 meeting.

3. **Request No. 8.**

I refer you to Request No. 15 in the MS & Co. action discussed above.

4. **Request No. 9.**

Request 9 seeks "All documents referring or relating to any review, investigation, analysis, or due diligence of Sunbeam conducted by MAFCO or its Advisors..." You limited this request to seek only those documents referring or relating to any review, investigation, etc. concerning the *valuation of Sunbeam or Sunbeam securities*. This limitation changes the substance of this request and would exclude documents relating to any investigation, analysis, etc. of Sunbeam not necessarily related to the valuation of Sunbeam or Sunbeam Securities. In

KIRKLAND & ELLIS LLP

Michael Brody, Esq.
August 27, 2003
Page 6

addition, your own Request 3 (in the MS & Co. action) and Request 43 (in the MSSF action) is virtually identical to our request. We ask you to withdraw your objection to this request and your limitation of this request. In addition, please inform us if you have withheld documents from your production based on this objection.

5. Request No. 15.

Your response to this request is ambiguous. Do you intend to withhold documents responsive to this request? If so, please identify those documents.

6. Request No. 22.

You construed this request, seeking all documents reflecting the value of Coleman stock, as seeking only those documents reflecting the *market* valuation of Coleman stock. This limitation excludes other valuations of Coleman stock, such as internal CPH valuations. Furthermore, your own requests 15 (in the MS & Co. action) and 49 (in the MSSF action) seek "[a]ll documents concerning any valuation of Coleman or Coleman securities," and yet you object to our own request -- seeking the very same types of documents -- as "vague and ambiguous." We ask you to withdraw your objections to and limitations of this request. In addition, please inform us if you have withheld documents based on your objection.

7. Request 30.

Your objection to this request for organizational charts limits your production to documents sufficient to show the ownership relationship among CPH and its corporate subsidiaries the time of the February 27, 1998 Agreements. We object to this limitation, which would exclude documents showing CPH and MAFCO's organizational structure, CPH and MAFCO's corporate relationship, and CPH and MAFCO's reporting relationships prior to and post February 27, 1998. We ask you to withdraw this objection and limitation. In addition, please inform us if you have withheld documents based on your objection.

9. Request 34.

I refer you to Request No. 16 in the MS & Co. action discussed above.

10. Request 36.

I refer you to Request No. 31 in the MS & Co. action discussed above.

KIRKLAND & ELLIS LLP

Michael Brody, Esq.
August 27, 2003
Page 7

11. Request 37.

With regard to your objections to and enumerated limitations of this request, do you intend to withhold documents otherwise responsive to this request? If so, what documents?

12. Request 38.

With regard to your objections to and enumerated limitations of this request, do you intend to withhold documents otherwise responsive to this request? If so, what documents?

13. Request 39.

With regard to your objections to and enumerated limitations of this request, do you intend to withhold documents otherwise responsive to this request? If so, what documents?

14. Request 40.

With regard to your objections to and enumerated limitations of this request, do you intend to withhold documents otherwise responsive to this request? If so, what documents?

15. Request 41.

With regard to your objections to and enumerated limitations of this request, do you intend to withhold documents otherwise responsive to this request? If so, what documents?

16. Request 42.

With regard to your objections to and enumerated limitations of this request, do you intend to withhold documents otherwise responsive to this request? If so, what documents?

* * * * *

In addition, of the boxes of documents that you "made available" to us for review, we found that very few of those boxes of documents actually contained CPH or MAFCO documents. The overwhelming majority of those documents were our own documents, third-party documents, or documents from the prior litigations and other related actions. Will your next production include more CPH/MAFCO documents? When can we expect your next production?

KIRKLAND & ELLIS LLP

Michael Brody, Esq.
August 27, 2003
Page 8

I look forward to your prompt response.

Sincerely,

A handwritten signature in cursive script, reading "Kathryn R. DeBord".

Kathryn R. DeBord

cc: Joseph Ianno, Jr., Esq. (by facsimile)
Deirdre Connell, Esq. (by facsimile)
Jerold S. Solovy, Esq. (by facsimile)
John Scarola, Esq. (by facsimile)

EXHIBIT 5

JENNER & BLOCK

September 12, 2003

By Facsimile

Kathryn R. DeBord, Esq.
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005

Jenner & Block, LLC
One 1001 Plaza
Chicago, IL 60611-7603
Tel 312 522-9350
www.jenner.com

Chicago
Dallas
Washington, DC

Michael T. Brody
Tel 312 923-2711
Fax 312 840-7711
mtbrody@jenner.com

*Re: Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co.
Morgan Stanley Senior Funding v. MacAndrews & Forbes Holdings Inc., et al.*

Dear Kathryn:

I write in response to your letter of August 27, 2003 concerning CPH's objections and responses to Morgan Stanley's first requests for production of documents and CPH's and Mafco's objections and responses to MSSF's first requests for production of documents.

Objections and Responses to Morgan Stanley's Requests For Production

Initial Objection 1. CPH and Mafco produced to Morgan Stanley and MSSF over a million pages of documents within 30 days of receiving your documents requests. We have made every effort to provide complete and accurate responses in accordance with the Florida Rules of Civil Procedure. To the extent Morgan Stanley seeks to impose additional burdens or requirements that exceed or are inconsistent with the Florida Rules, we advised you that CPH and Mafco will not comply with your additional demands. Morgan Stanley has lodged many of the same objections to our document requests, including its General Objections Nos. 3, 5, 8, and 10.

You have inquired whether we intend to withhold documents based upon our objections to your instructions and definitions. To the extent your requests call for the production of documents protected by the attorney-client privilege or work product doctrine, we intend to withhold documents that otherwise would be responsive, as we state in our Initial Objection 2. We will comply with the stipulation entered by the court regarding the production of privilege logs. We stand on our objection that Instructions 3, 4, 5, 6, 7, 8, 9, 10, 11, and 16, and Definitions 9 and 15 (Morgan Stanley) and 11 and 17 (MSSF) go beyond the requirements of applicable law. We will address these in turn.

Instructions No. 3 and 8: CPH and Mafco will produce all documents in their possession, custody, or control as required by the Florida Rules. We have produced documents originally in the possession of CPH's prior counsel. We note that Morgan Stanley is willing to produce documents in the possession of certain of its counsel, but not others. You have been unwilling to explain your inconsistent position with respect to documents in the possession of third parties.

Kathryn R. DeBord, Esq.
September 12, 2003
Page 2

JENNER & BLOCK

See Brody to Clare letter, August 20, 2003. CPH and Mafco will not withhold documents on the basis of these objections.

Instruction No. 4: In response to specific document requests, we have identified ambiguities in your requests and have provided the construction we used in our responses to those ambiguous requests. Unless noted in response to a specific request, CPH and Mafco will not withhold documents on the basis of this initial objection.

Instruction No. 5: We will produce a privilege log in accordance with the Florida Rules and in the manner stipulated to by the parties, as entered by the Court on September 4, 2003.

Instruction 6: We object to the production of documents where production would be unduly burdensome. We have not interposed this objection in response to any of your specific requests and therefore will not withhold any documents on the basis of this objection.

Instruction 7: We will produce documents in redacted form when necessary to prevent the production of privileged communications, work product, or non-responsive information in accordance with the Florida Rules. CPH and Mafco will not otherwise withhold documents on the basis of this objection.

Instructions 9 and 10: CPH and Mafco have not withheld documents on the basis of these objections.

Instruction 11: This instruction seeks the production of documents protected from disclosure by the attorney-client privilege or work product doctrine. CPH and Mafco will not produce file folders that were created by Jenner & Block, and which therefore constitute work product.

Instruction 16: This instruction is exceptionally broad, and seeks documents over a longer time frame than is encompassed by Morgan Stanley's or MSSF's responses. We invite you to propose a reasonable time frame for your requests.

Morgan Stanley Definition 9 / MSSF Definition 11: CPH and Mafco stand on their objection to the definition of "documents" to the extent the definition is inconsistent with their obligations under the Florida Rules of Civil Procedure. CPH and Mafco will not withhold any documents based on these objections.

Morgan Stanley Definition 15 / MSSF Definition 17: We objected to your definition of "identify," and your August 27 letter does not offer any explanation of the term. We note, however, that this term, although defined, is not used in your document requests.

Initial Objection 3. We remain unwilling to accept Morgan Stanley's definition of "Coleman Transaction." You have defined that term to mean "Sunbeam's acquisition of Coleman Company, Inc. from CPH," which did not occur, and further to include other "related agreements and transactions," which we do not understand. In our objection, we explained that we would

Kathryn R. DeBord, Esq.
September 12, 2003
Page 3

JENNER & BLOCK

produce documents concerning the transaction that actually took place. What more are you interested in receiving?

Morgan Stanley Request No. 1. We objected to the use of the term "implementation." We explained that we would construe that term to mean the closing of the transaction. We further explained that if you meant the term to mean the actual integration of the companies, those documents were encompassed by your Request 26, which seeks "all documents concerning potential or actual integration of Coleman, First Alert, and/or Signature Brands with Sunbeam . . ." Your attempt to clarify your Request by defining "implementation" to mean "to put into effect" is unhelpful and does not allow us to further respond to this Request. Based on our construction of Requests 1 and 26, we believe we have fully responded to your requests.

Morgan Stanley Request No. 8. CPH stands on its objection and response to this Request. CPH will not withhold documents based on this objection.

Morgan Stanley Request No. 9. We are investigating our production regarding this request, and we will respond under separate cover.

Morgan Stanley Request No. 15. This Request sought information concerning due diligence, which we agreed to provide. It continues to state: "including without limitation" documents reflecting all "Financial Information" CPH ever obtained about Sunbeam. As we understand your definition, the request for "Financial Information" is broader than the request for due diligence information, in which it is supposedly encompassed. We have not withheld any documents responsive to what we understand this request to seek -- due diligence. The further request, for all Financial Information, is overbroad.

Morgan Stanley Request No. 16. In this request, you sought various due diligence materials. We agreed to provide exactly what you have agreed to provide: documents relating to due diligence for this transaction, and general due diligence materials. We are not providing (nor are you) due diligence materials from other transactions. Why are you entitled to receive documents you are not willing to produce to us? Do you intend to modify your prior response to our Request No. 43?

Morgan Stanley Request No. 28. In response to this request, we offered to produce more documents than you requested. Morgan Stanley's definition of "your" was limited to "CPH." CPH does not have an organizational chart or a chart of reporting relationships, and therefore there are no documents responsive to this Request. Nonetheless, we responded by voluntarily producing documents sufficient to show the relationship of CPH with its corporate parent at the time of the February 27, 1998 Agreements. We specifically refer Morgan Stanley to the 10-Ks filed by the Coleman Co., Inc. in 1997 and 1998, which we produced, which explain the relationship between CPH and its parent and subsidiaries at all relevant times. We have also provided a written response describing corporate structure. CPH stands on its objections and response to this Request.

Kathryn R. DeBord, Esq.
September 12, 2003
Page 4

JENNER & BLOCK

Morgan Stanley Request No. 31. CPH produced redacted calendars responsive to this Request that include relevant entries. You apparently want calendar entries that have nothing to do with Coleman or Sunbeam. We invite you to explain what other information from these calendars you believe you are entitled to receive, and why.

Morgan Stanley Request Nos. 32-35. In response to these requests, we outlined precisely what we were producing. We are not producing documents that reflect attorney-client communications or work product from other litigation arising from the Sunbeam transaction. We invite you to explain what other documents you believe you are entitled to receive that we are not providing in our responses.

Morgan Stanley Request No. 40. As we explained in our response, CPH would be in violation of the terms of the settlement agreement between CPH and Arthur Andersen if CPH disclosed any of the terms of the settlement agreement. We therefore are unable to agree to your request to produce a portion of the agreement. We invite you to explain why you believe you are entitled to any portion of the settlement agreement and the legitimate purpose that would be served by disclosure of the terms of the settlement agreement.

Objections and Responses to MSSF's First Request for Production

Certain of the issues you raise relating to the MSSF requests are duplicative of the same issues you raise with regard to the Morgan Stanley requests. I will not repeat the discussion below of items I have already addressed.

Initial Objection No. 6. We objected to MSSF's definition of "MAFCO," because it is incorrect. CPH and Mafco will construe the definition to refer to MacAndrews & Forbes Holdings Inc. and any of its officers, directors, former or present employees, representatives, and agents. We are not withholding any documents based upon this definition, as corrected.

MSSF Request No. 6. Our response to Request No. 6 contained a typographical error. The response should read: "Defendants object to the multiple false premises contained in the request. Subject to and without waiving these objections and the foregoing Initial Objections, including without limitation defendants' objection to the term 'Schedule of Synergies,' CPH and Mafco will produce documents referring or relating to the December 1997 meeting."

MSSF Request No. 9. See our discussion of Morgan Stanley Request No. 15 above.

MSSF Request No. 15. We stand by our objection to this request. There was never any "decision" to make any such "representation," and therefore there are no documents responsive to this Request.

MSSF Request No. 22. We are investigating our production regarding this request, and we will respond under separate cover.

Kathryn R. DeBord, Esq.
September 12, 2003
Page 5

JENNER & BLOCK

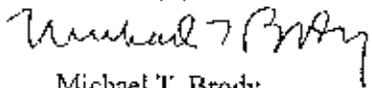
MSSF Request No. 30. We have fully responded to this request. We have produced documents, as you request, sufficient to show the corporate relationships between the relevant entities at the relevant time. CPH and MacAndrews & Forbes Holdings Inc. do not have any organization charts of internal reporting relationships. Please advise me if you believe you are entitled to additional documents.

MSSF Request Nos. 37-42. In response to these requests, we outlined precisely what we were producing. We are not producing documents that reflect attorney-client communications or work product from other litigation arising from the Sunbeam transaction. We invite you to explain what other documents you believe you are entitled to receive that we are not providing in our responses.

Finally, you complain that we have not produced enough documents from CPH or Maeco. CPH and Maeco produced an extraordinary number of documents and other discovery materials to Morgan Stanley and MSSF. As we have advised you on several occasions, a majority of the documents in our production are documents we received from third parties arising from Sunbeam's fraudulent practices and related litigation. We have produced documents from our clients' files relating to the relevant topics. In stark contrast, Morgan Stanley and MSSF, two global financial and investment institutions, have produced a small number of documents and Morgan Stanley has been afforded almost four months to respond to our requests.

Please contact me if you would like to discuss any of these issues.

Very truly yours,



Michael T. Brody

cc: Joseph Ianno, Esq. (by facsimile)
John Scarola, Esq. (by facsimile)
Jerold S. Solovy, Esq.

Doc. No. 972199

EXHIBIT 6

KIRKLAND & ELLIS LLP

AND AFFILIATED MEMBERSHIPS

655 Fifteenth Street, N.W.
Washington, D.C. 20005

202 879-5000

www.kirkland.com

Kathryn K. DeBard
To Call Writer Directly:
(202) 879-5078
kdebard@kirkland.com

Facsimile:
202 879-5200

Dir. Fax: (202) 879-5200

September 30, 2003

By Facsimile

Michael Brody, Esq.
Jenner & Block, L.L.C.
One IBM Plaza
Chicago, IL 60611-7603

Re: *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc.*
MSSF v. MacAndrews & Forbes Holdings Inc. et al.

Dear Mike:

I write as a follow-up to your September 12, 2003 letter. You stated in that letter that you are "investigating" your production and would be providing a follow-up response -- which we still have not received -- to MS & Co.'s Request Number 9 (asking for all documents "reflecting, referring, or relating to the value of Sunbeam securities") and MSSF's Request Number 22 (asking for "all documents reflecting the value of Coleman stock during the Relevant Period."). Please inform me promptly of the status of your investigation.

In addition, you objected in your September 12 letter to producing documents relating to the past or present financial condition of Sunbeam or Sunbeam securities because that request was "overbroad." (MS & Co. Request 15.) We do not agree that this request is overbroad, and refer you to your own Request 41 as a proper example of overbreadth (asking for "all documents concerning the events and matters that are the subject of the complaint filed this [sic] action."). Please inform me if you are withholding documents reflecting the past or present financial condition of Sunbeam or Sunbeam securities.

Finally, you invited me to explain why MS & Co. is entitled to certain categories of documents in this case -- namely, Request 31 (relating to calendar entries), and Request 40 (relating to your settlement agreement with Arthur Andersen). With regard to those Requests, we stand by our position that those documents are discoverable:

- **Request 31.** You have no grounds for redacting certain portions of the calendar entries. Our request for calendar entries not related to the transaction is plainly relevant to our defense in this case. As you know, we believe that Ron Perelman and other MAFCO

Chicago

London

Los Angeles

New York

San Francisco

16div-000981

KIRKLAND & ELLIS LLP

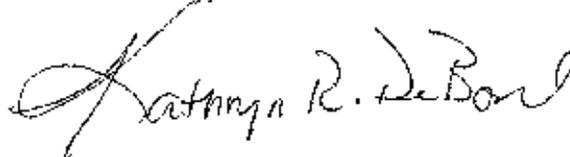
Michael Brody, Esq.
September 30, 2003
Page 2

representatives were distracted during the critical time periods by external events when it should have been focusing on due diligence for the Coleman transaction.

- **Request 40.** As for your settlement agreement with Arthur Andersen, Florida courts recognize that discovery of settlement agreements can be appropriate despite the presence of a confidentiality agreement. In this case, the settlement agreement is relevant -- in part because it defines CPH/MAPCO's relationship with Arthur Andersen, and Arthur Andersen is a witness in this case. See *City of Homestead v. Rogers*, 789 So.2d 483 (Fla. 3d DCA 2001) (stating that the defendant "is entitled to evaluate its potential liability exposure with all information on hand" and holding that "the settlement terms and amount must be disclosed."); *Smith v. TIB Bank of the Keys*, 687 So.2d 895, 896-97 (Fla. 3d DCA 1997) (holding discovery of terms of settlement agreement proper and stating that "[w]hile confidentiality agreements are necessary in some circumstances...they may not be subsequently employed by a litigant to obscure issues or otherwise thwart an opponent's discovery."). See also *Stockham v. Stockham*, 168 So.2d 320, 322 (Fla. 1964) ("It would be uneven justice to permit plaintiffs to invoke the powers of this court for the purpose of seeking redress and, at the same time, to permit plaintiffs to fend off questions, the answers to which may constitute a valid defense or materially aid the defense."); *Westside-Marrero Jeep Eagle, Inc. v. Chrysler Corp., Inc.*, 1998 WL 186705 (E.D. La. 1998) (discovery of settlement agreements permitted to evaluate a witness' potential bias, interest, and credibility); *Griffin v. Mashariki*, 1997 WL 756914 (S.D.N.Y. 1997) (same).

Please inform us whether you will or will not produce documents responsive to these requests.

Sincerely,



Kathryn R. DeBord

cc: Joseph Ianno, Jr., Esq. (by facsimile)
Deirdre Connell, Esq. (by facsimile)

16div-000982

EXHIBIT 7

JENNER & BLOCK

October 7, 2003

Jenner & Block, LLC
One West Plaza
Chicago, IL 60611-7609
Tel 312 442-9330
www.jenner.com

Chicago
Dallas
Washington, DC

Via Facsimile

Zhouette M. Brown, Esq.
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005

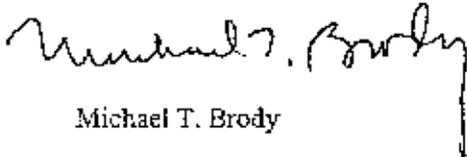
Michael T. Brody
Tel 312 923-2711
Fax 312 840-7711
mbrody@jenner.com

Re: *Coleman (Parent) Holdings, Inc. v. Arthur Andersen LLP, et al.*

Dear Zhouette:

I write in further response to your letter of October 3, 2003 concerning your request for the Andersen settlement agreement. I have now consulted with the individuals who were unavailable yesterday and our position remains the same. We decline to produce the settlement agreement on the ground that it is not reasonably calculated to lead to the discovery of admissible evidence. In addition, the settlement terms are confidential, and we see no reason why any of those terms need to be disclosed at this stage of the litigation.

Very truly yours,



Michael T. Brody

MTB:sd

cc: Joseph Ianno, Esq. (by facsimile)
John Scarola, Esq. (by facsimile)
Jerold S. Solovy, Esq.

#230580/mm

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

CASE NO: 2003 CA 005045 AI

Plaintiffs,

vs.

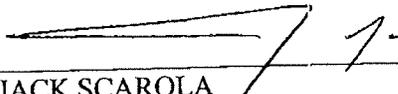
MORGAN STANLEY & CO., INC.

Defendant.

NOTICE OF FILING PLEADING UNDER SEAL.

Plaintiff, COLEMAN (PARENT) HOLDINGS INC., hereby gives Notice of the filing of
a Motion to Compel Concerning E-Mails, filed under Seal on this date.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by
U.S. Mail to all counsel on the attached list on this 29th day of October, 2003.



JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 478-0754
Attorneys for Plaintiff

Coleman (Parent) Holdings Inc. vs Morgan Stanley & Company
Notice Of Filing Pleading Under Seal
Case No.: 2003 CA 005045 AI

COUNSEL LIST

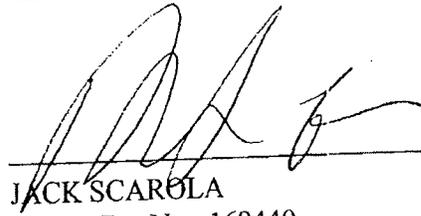
Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block, LLC
One IBM Plaza
Suite 4400
Chicago, IL 60611

Coleman Holdings, Inc. vs Morgan Stanley & Company
Case No.: 2003 CA 005045 AI
Notice of Hearing

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by
U.S. Mail to all Counsel on the attached list, this 29th day of Oct., 2003.



JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 478-0754
Attorney for Plaintiff

#230580/mm

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC., CASE NO.: 2003 CA 005045 AI

Plaintiffs,

vs.

MORGAN STANLEY & CO., INC.,

Defendant,

NOTICE OF HEARING

YOU ARE HEREBY NOTIFIED that the undersigned has called up for hearing the

following:

DATE: November 6, 2003

TIME: 8:45 a.m.

JUDGE: Hon. Elizabeth T. Maass

PLACE: Palm Beach County Courthouse, Room #11.1208, 205 North Dixie Highway,
West Palm Beach, FL 33401

SPECIFIC MATTERS TO BE HEARD:

COLEMAN (PARENT) HOLDINGS INC.'S MOTION TO COMPEL CONCERNING E-
MAILS (**FILED UNDER SEAL**)

Moving counsel certifies that he or she contacted opposing counsel and attempted to
resolve the discovery dispute without hearing.

**IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA**

COLEMAN (PARENT) HOLDINGS INC.,)	
)	
Plaintiff,	)	Case No. 03 CA 005045 AI
)	
v.	)	Judge Elizabeth T. Maass
)	
MORGAN STANLEY & CO., INC.,)	
)	
Defendant.)	
)	

**COLEMAN (PARENT) HOLDINGS INC.'S RESPONSES AND
OBJECTIONS TO DEFENDANT MORGAN STANLEY & CO., INC.'S
THIRD SET OF INTERROGATORIES**

Plaintiff Coleman (Parent) Holdings Inc. ("CPH"), by its attorneys, and pursuant to Florida Rules of Civil Procedure 1.280, 1.340 and 1.350, hereby responds and objects to Morgan Stanley & Co. Incorporated's ("Morgan Stanley") Third Set of Interrogatories ("Interrogatories") dated October 13, 2003 as follows:

INITIAL OBJECTIONS

1. CPH incorporates by reference the Initial Objections set forth in its written response to Morgan Stanley's first set of interrogatories.

INTERROGATORY RESPONSES AND FURTHER OBJECTIONS

INTERROGATORY NO. 1: State with particularity the 1997 and 1998 net worth, income, revenue and global holdings (including non-MAFCO holdings) of MAFCO, CPH, Ronald Perelman, Howard Gittis, and any other MAFCO or CPH employee who participated in the due diligence or financial review of Sunbeam's acquisition of the Coleman Company.

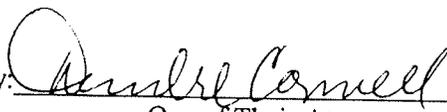
RESPONSE: CPH notes that Interrogatory No. 1 constitutes multiple separate interrogatories. CPH objects to Interrogatory No. 1 as overbroad and not relevant to the litigation nor reasonably calculated to lead to the discovery of admissible evidence. CPH further objects to Interrogatory No. 1 because it seeks personal information about entities and individuals not party to

this lawsuit, including Mafco, Ronald Perelman, Howard Gittis, and other individuals employed by Mafco or CPH.

INTERROGATORY NO. 2: Identify all persons at CPH or MAFCO whose job responsibilities included, in 1997 or 1998, due diligence or financial review of proposed mergers and acquisitions, including a description of each person's educational and employment history, a description of any accounting or financial certifications or licenses held by such persons, and a description of any financial or business training they have had.

RESPONSE: CPH notes that Interrogatory No. 2 constitutes multiple separate interrogatories. CPH objects to Interrogatory No. 2 insofar as it seeks information related to Mafco, a non-party to this lawsuit. CPH further objects to Interrogatory No. 2 as overbroad and as seeking information not relevant to the litigation nor reasonably calculated to lead to the discovery of admissible evidence because Interrogatory No. 2 is not limited to individuals who performed due diligence concerning the transaction by which Sunbeam acquired CPH's interest in The Coleman Company, Inc. CPH further objects to Interrogatory No. 2 on the ground that it is vague, ambiguous, and overbroad insofar as it fails to define the term "due diligence" or otherwise identify with sufficient particularity the activities that might be encompassed by that term.

As to objections:

By: 
One of Their Attorneys

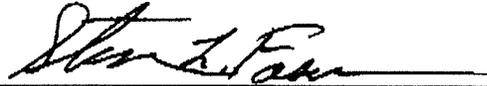
Dated: November 12, 2003

John Scarola
SEARCY DENNEY SCAROLA BARNHART
& SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33402-3626
(561) 686-6300

Jerold S. Solovy
Michael T. Brody
Deirdre E. Connell
JENNER & BLOCK, LLC
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

ATTORNEYS FOR COLEMAN (PARENT) HOLDINGS INC.

I, Steven L. Fasman, being duly sworn, depose and say that I am authorized on behalf of Coleman (Parent) Holdings Inc. and, on its behalf, I have read the foregoing **COLEMAN (PARENT) HOLDINGS INC.'S RESPONSES AND OBJECTIONS TO MORGAN STANLEY & CO., INC.'S THIRD SET OF INTERROGATORIES**, and to the best of my knowledge and belief the responses contained therein are true and correct.



STEVEN L. FASMAN

Subscribed and sworn to before me
this 12th day of November, 2003.



Notary Public *D*
DEBBIE HERNANDEZ
Notary Public, State of New York
No. 01HE5021255
Qualified in Queens County
Certificate Filed in New York County
Commission Expires December 13, 4th 2005

CERTIFICATE OF SERVICE

I, Deirdre E. Connell, hereby certify that a true and correct copy of the foregoing **COLEMAN (PARENT) HOLDINGS INC.'S RESPONSES AND OBJECTIONS TO DEFENDANT MORGAN STANLEY & CO., INC.'S THIRD SET OF INTERROGATORIES** has been served upon the parties listed below via facsimile and U.S. mail on this 12th day of November 2003.

Thomas A. Clare, Esq.
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lake View Avenue, Suite 1400
West Palm Beach, FL 33401



Deirdre E. Connell

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Company, Inc.
Case No.: 2003 CA 005045 AI
Notice of Taking Videotaped Deposition
November 19, 2003

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 2003 CA 005045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

_____ /

NOTICE OF TAKING VIDEOTAPED DEPOSITION

To: Thomas A. Clare, Esq.
KIRKLAND & ELLIS, LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lake View Avenue
Suite 1400
West Palm Beach, FL 33401

PLEASE TAKE NOTICE that Plaintiff Coleman (Parent) Holdings Inc. will take the deposition upon oral examination of the following witness pursuant to Florida Rule of Civil Procedure 1.310 on the date, time, and at the location set forth below:

DEPONENT	DATE AND TIME	LOCATION
Tyrone Chang	December 9, 2003 at 9:30 a.m.	Susman & Godfrey, L.L.P. 1880 Century Park East Suite 950 Los Angeles, California 90067

The deposition will be recorded by videotape and stenographic means. The deposition will be taken before a person authorized to administer oaths and will continue day to day until completed.

The videotape operator will be Esquire Deposition Services located at 6222 Wilshire Blvd., Second Floor, Los Angeles, California 90028.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by facsimile and mail to all counsel on the attached Service List, this 18th day of November, 2003.

Dated: November 18, 2003

COLEMAN (PARENT) HOLDINGS INC.

By: 
One of Its Attorneys

Jerold S. Solovy
Michael T. Brody
Deirdre E. Connell
JENNER & BLOCK, LLC
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

Jack Scarola
SEARCY DENNEY SCAROLA BARNHART
& SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33409
(561) 686-6300

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Company, Inc.
Case No.: 2003 CA 005045 AI
Notice of Taking Videotaped Deposition
November 19, 2003

SERVICE LIST

Thomas A. Clare, Esq.
KIRKLAND & ELLIS, LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lake View Avenue
Suite 1400
West Palm Beach, FL 33401

LAW OFFICES
JENNER & BLOCK, LLC

ONE IBM PLAZA
 CHICAGO, ILLINOIS 60611

(312) 222-9350
 (312) 527-0484 FAX

DEIRDRE E. CONNELL
 312-923-2661 Direct Dial
 312-840-7661 Direct Facsimile

TELECOMMUNICATION TRANSMITTAL

DATE: November 18, 2003

TO: **Thomas A. Clare, Esq.** **VOICE:** (202) 879-5993
KIRKLAND & ELLIS, LLP **FAX:** (202) 879-5200

Joseph Ianno, Jr., Esq. **VOICE:** (561) 659-7070
CARLTON FIELDS, P.A. **FAX:** (561) 659-7368

FROM: Deirdre E. Connell **SECY. EXT.:** 6486

EMP. NO.: 035666 **CLIENT NO.:** 41198-10003

IMPORTANT: THIS MESSAGE IS INTENDED ONLY FOR THE USE OF THE INDIVIDUAL OR ENTITY TO WHICH IT IS ADDRESSED, AND MAY CONTAIN INFORMATION THAT IS ATTORNEY WORK PRODUCT, PRIVILEGED, CONFIDENTIAL AND EXEMPT FROM DISCLOSURE UNDER APPLICABLE LAW. IF THE READER OF THIS MESSAGE IS NOT THE INTENDED RECIPIENT, OR THE EMPLOYEE OR AGENT RESPONSIBLE FOR DELIVERING THE MESSAGE TO THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION, DISTRIBUTION OR COPYING OF THIS COMMUNICATION IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE NOTIFY US IMMEDIATELY BY TELEPHONE, AND RETURN THE ORIGINAL MESSAGE TO US AT THE ABOVE ADDRESS VIA POSTAL SERVICE. THANK YOU.

MESSAGE: **Please see attached.**

Total number of pages including this cover sheet: 4

DATE SENT: 11/18/03 TIME SENT: 3:30 pm SENT BY: S. EDDINGTON

IF YOU DO NOT RECEIVE ALL PAGES, PLEASE CALL (312) 222-9350, EXT: 6486

#230580/mm

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

CASE NO.: 2003 CA 005045 AI

Plaintiffs,

vs.

MORGAN STANLEY & CO., INC.,

Defendant,

NOTICE OF HEARING

YOU ARE HEREBY NOTIFIED that the undersigned has called up for hearing the following:

DATE: November 25, 2003

TIME: 8:45 a.m.

JUDGE: Hon. Elizabeth T. Maass

PLACE: Palm Beach County Courthouse, Room #11.1208, 205 North Dixie Highway,
West Palm Beach, FL 33401

SPECIFIC MATTERS TO BE HEARD:

Plaintiff's Motion for Entry of Order Upon Stipulation of the Parties

Moving counsel certifies that he or she contacted opposing counsel and attempted to resolve the discovery dispute without hearing.

Coleman (Parent) Holdings Inc. vs Morgan Stanley & Company
Case No.: 2003 CA 005045 AI
Notice of Hearing

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by
Fax and U.S. Mail to all Counsel on the attached list, this 19th day of NOV., 2003.



JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 478-0754
Attorney for Plaintiffs

Coleman (Parent) Holdings Inc. vs Morgan Stanley & Company
Case No.: 2003 CA 005045 AI
Notice of Hearing

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block, LLC
One IBM Plaza
Suite 4400
Chicago, IL 60611

#230580/mm

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

CASE NO: 2003 CA 005045 AI

Plaintiffs,

vs.

MORGAN STANLEY & CO., INC.

Defendant.

MOTION FOR ENTRY OF ORDER
UPON STIPULATION OF THE PARTIES

Plaintiff, Coleman (Parent) Holdings Inc., moves this Honorable Court to enter the proposed Order previously submitted to the Court on Plaintiff's Motion to Compel concerning Emails and in support thereof would show:

1. Plaintiff moved to compel discovery concerning emails (Motion to Compel was filed under seal);
2. At a duly noticed Uniform Motion Calendar hearing on November 6, 2003 (transcript attached), the parties placed a stipulation on the record resolving the referenced motion;
3. Plaintiff drafted a proposed Order accurately reflecting the stipulation of the parties and submitted it to opposing counsel for review and approval (correspondence and proposed Order attached);

Coleman Holdings, Inc. vs Morgan Stanley & Company
Motion For Entry Of Order Upon Stipulation Of The Parties
Case No.: 2003 CA 005045 AI

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block, LLC
One IBM Plaza
Suite 4400
Chicago, IL 60611

1 IN THE FIFTEENTH JUDICIAL CIRCUIT COURT
 2 IN AND FOR PALM BEACH COUNTY, FLORIDA
 3 CASE NUMBER: 2003 CA 005045 AI

4 COLEMAN (PARENT) HOLDINGS, INC.,
 5 Plaintiffs,
 6 vs.
 7 MORGAN STANLEY & CO., INC.
 8 Defendant.

9 PROCEEDINGS BEFORE THE HONORABLE ELIZABETH T. MAASS

10 APPEARANCES:

11 SHEARCY, DENNEY, SCAROLA,
 12 BARNHART & SHIPLEY, P.A.,
 13 2139 Palm Beach Lakes Boulevard
 14 West Palm Beach, Florida 33409
 15 Phone: (561) 686-6100
 16 ATTORNEYS FOR THE PLAINTIFF
 17 BY: JACK SCAROLA, ESQUIRE

18 KIRKLAND AND ELLIS
 19 655 15 Street, N.W., Suite 1200
 20 Washington, D.C. 20005
 21 Phone: (202) 879-5000
 22 ATTORNEYS FOR THE DEFENDANT
 23 BY: THOMAS A. CLARE

24 CARLTON FIELDS, et al.
 25 222 Lakeview Avenue, Suite 1400
 West Palm Beach, Florida 33401
 PHONE: (561) 659-7070
 ATTORNEYS FOR THE DEFENDANT
 BY: JOSEPH IANNO, JR., ESQUIRE

Thursday, November 6, 2003
 Palm Beach County Courthouse
 West Palm Beach, Florida

PINNACLE REPORTING, INC.
 (561) 820-9066

1 and retrieval capabilities with regard to emails.
 2 They will also produce all documents that were
 3 submitted to federal regulators with regard to
 4 Morgan Stanley's email retention policies and
 5 retrieval capabilities.

6 THE COURT: I don't think I have that motion.
 7 The only one I have deals with the objections to
 8 production of the settlement agreement. Are you
 9 submitting a proposed agreed order on this?

10 MR. SCAROLA: We will submit a proposed
 11 agreed order.

12 THE COURT: You're just telling me stuff and
 13 hopefully I'll remember it when I see the order.

14 MR. SCAROLA: Yes.

15 We have agreed reciprocally that we will
 16 provide a corporate representative who will
 17 address the same issues on behalf of Coleman
 18 (Parent) Holdings, Incorporated.

19 THE COURT: Okay.

20 MR. SCAROLA: With regard to the second
 21 motion, that's the Defense's motion, so I'll allow
 22 them to go first.

23 THE COURT: That's the one. Do we really
 24 think we're going to get this done at an 8:45?

25 MR. CLARE: Judge, this is on Morgan

PINNACLE REPORTING, INC.
 (561) 820-9066

1 TRANSCRIPT OF THE PROCEEDINGS, TAKEN BEFORE
 2 THE HONORABLE ELIZABETH MAASS IN COURTROOM 11B, PALM
 3 BEACH COUNTY COURTHOUSE, WEST PALM BEACH, FLORIDA, ON
 4 THURSDAY, NOVEMBER 6, 2003, BEGINNING AT 8:55 A.M.

5

6 THE COURT: Do we really think we're going to
 7 do this this morning?

8 MR. SCAROLA: We are going to surprise Your
 9 Honor.

10 THE COURT: Okay. How are we doing that?

11 MR. SCAROLA: We're going to surprise you by
 12 telling you first that with regard to the motion
 13 to compel production of emails, we have come to an
 14 agreement.

15 THE COURT: Okay.

16 MR. SCAROLA: And we will describe the terms
 17 of that agreement for the record.

18 For the record, my name is Jack Scarola. I'm
 19 hear on behalf of the Plaintiff Coleman (Parent)
 20 Holdings. There are two motions. First is motion
 21 to compel directed to the production of emails.

22 The agreement that we have reached is that
 23 the Defendant Morgan Stanley will produce a
 24 witness who is knowledgeable with respect to the
 25 retention and retrieval -- the retention policies

PINNACLE REPORTING, INC.
 (561) 820-9066

1 Stanley's motion to compel the production of a
 2 single document, the settlement agreement between
 3 Coleman (Parent) and Arthur Andersen. And just
 4 briefly, I think it's fairly straightforward in
 5 terms of the history of this, that prior to
 6 initiating the lawsuit against Morgan Stanley,
 7 Coleman (Parent) brought a virtually identical
 8 lawsuit against Arthur Andersen, same allegations,
 9 same claim of damages, and now have settled.

10 THE COURT: Let me ask you this. This is the
 11 notebook you gave me for this; right?

12 MR. CLARE: That includes the cases that
 13 we've cited.

14 THE COURT: I can't do this on an 8:45.
 15 Please understand, 8:45's are things -- I can read
 16 everything. I can walk in and not know anything.
 17 I can read everything I've got to read, absorb
 18 everything I've got to, and I can do it in ten
 19 minutes. I can't even read your motion in ten
 20 minutes.

21 MR. CLARE: I have one case, City of
 22 Homestead case, that --

23 THE COURT: I'm happy to get the book and
 24 specially set. I'm happy to do it on an expedited
 25 basis. I cannot do this on an 8:45. If you

PINNACLE REPORTING, INC.
 (561) 820-9066

1 bothered to put together a notebook like this, I
 2 know I need more time with it, okay?
 3 Do you want me to get the book? Do you have
 4 access to your schedules?
 5 MR. CLARE: Sure.
 6 MR. SCAROLA: I don't, but can make a phone
 7 call to my office.
 8 THE COURT: Okay. That's great.
 9 MR. SCAROLA: Would you like me to get my
 10 office on the line, Your Honor?
 11 THE COURT: Sure.
 12 MR. CLARE: Just in the interest of
 13 completeness and while we're waiting for the
 14 schedule, Mr. Scarola described in broad outlines
 15 what the agreed upon order would be on this other
 16 motion. There is one caveat I explained to
 17 Mr. Scarola in the hallway, and we will work it
 18 out between the parties before we submit an agreed
 19 upon order to Your Honor. I am not aware as I sit
 20 here right now what limitations there are right
 21 now without disclosing to Mr. Scarola's client
 22 information we provided to federal regulators. We
 23 agreed to provide whatever it is we can provide.
 24 THE COURT: Are you saying we might have a
 25 legal dispute later about what you're permitted to

PINNACLE REPORTING, INC.
(561) 820-9066

1 disclose?
 2 MR. CLARE: About what we're permitted to
 3 disclose, and I just don't know all the details
 4 without consulting with my client. We have an
 5 agreement in principle that whatever we can
 6 provide on this, we'll provide. I know there are
 7 materials we can provide, I just don't know the
 8 scope of it. And I don't want to represent to the
 9 court that we're waiving or even have the ability
 10 to waive protections that I'm not aware of right
 11 now.
 12 MR. SCAROLA: The only caveat to that is that
 13 there's a commitment that they will provide good
 14 faith cooperation in obtaining whatever
 15 information is necessary in order to make full
 16 disclosure.
 17 THE COURT: Okay.
 18 MR. CLARE: That's correct.
 19 THE COURT: We can try the 14th, which is a
 20 week from tomorrow at 4:30. Do you know if you're
 21 available, sir?
 22 MR. CLARE: There was a deposition that was
 23 scheduled that day.
 24 THE COURT: In this case?
 25 MR. CLARE: In this case in New York.

PINNACLE REPORTING, INC.
(561) 820-9066

1 THE COURT: Who?
 2 MR. CLARE: Mr. John Tirey (ph) is coming
 3 from that the United Kingdom for a deposition that
 4 day.
 5 THE COURT: You have depositions in this
 6 case, so that's probably not a good day. Let's
 7 find a better time.
 8 We could try 4:30 on Tuesday, November 25.
 9 That's the Tuesday of Thanksgiving week, just so
 10 you-all are clear.
 11 MR. CLARE: That's fine with me, Your Honor.
 12 MR. IANNO: That's not a problem.
 13 MR. SCAROLA: That works, Your Honor.
 14 THE COURT: Is that okay? We will do it
 15 then. And I'll hold the stuff you gave me. If
 16 you want me to look at anything else, send it to
 17 me a few days ahead of time so I have it.
 18 MR. CLARE: Thank you.
 19 MR. SCAROLA: Thank you, Your Honor.
 20 THE COURT: Thank you.
 21 (Whereupon, at 9:03 a.m., the proceedings concluded.)
 22
 23
 24
 25

PINNACLE REPORTING, INC.
(561) 820-9066

1 C E R T I F I C A T E
 2
 3
 4 STATE OF FLORIDA
 5 COUNTY OF PALM BEACH
 6
 7 I, PAMELA GRIMALDI, Registered Professional
 8 Reporter, do hereby certify that I was authorized to
 9 and did stenographically report the foregoing
 10 proceedings and that the transcript is a true and
 11 correct transcription of my stenotype notes of the
 12 proceedings.
 13
 14 Dated this 18th day of November, 2003.
 15
 16
 17
 18 PAMELA GRIMALDI
 19 Registered Professional Reporter
 20
 21
 22
 23
 24 The foregoing certification of this transcript does not
 25 apply to any reproduction of the same by any means
 unless under the direct control and/or direction of the
 certifying reporter.

PINNACLE REPORTING, INC.
(561) 820-9066

-	ask 4/10	Defendant 1/7 1/18 1/21 2/23
-- 4/15 4/22	at 2/4 3/24 6/20 7/16 7/21	Defense's 3/21
0	ATTORNEYS 1/14 1/18 1/21	DENNEY 1/12
005045 1/2	authorized 8/8	deposition 6/22 7/3
03 7/21	available 6/21	depositions 7/5
1	Avenue 1/20	describe 2/16
11B 2/2	aware 5/19 6/10	described 5/14
1200 1/16	B	details 6/3
1400 1/20	BARNHART 1/12	did 8/9
14th 6/19	basis 4/25	direct 8/24
15 1/16	be 5/15	directed 2/21
18th 8/14	before 1/9 2/1 5/18	direction 8/24
2	BEGINNING 2/4	disclose 6/1 6/3
2003 1/2 1/24 2/4 8/14	behalf 2/19 3/17	disclosing 5/21
2005 1/17	better 7/7	disclosure 6/16
202 1/17	between 4/2 5/18	dispute 5/25
2139 1/13	book 4/23 5/3	document 4/2
222 1/20	bothered 5/1	documents 3/2
3	Boulevard 1/13	does 8/23
30 6/20 7/8	briefly 4/4	doing 2/10
33401 1/20	broad 5/14	don't 3/6 5/6 6/3 6/7 6/8
33409 1/13	brought 4/7	done 3/24
4	but 5/6	E
45 3/24 4/14 4/25	C	ELIZABETH 1/9 2/2
45's are 4/15	CA 1/2	ELLIS 1/16
5	call 5/7	else 7/16
55 2/4	can't 4/14 4/19	email 3/4
561 1/14 1/21	cannot 4/25	emails 2/13 2/21 3/1
6	capabilities 3/1 3/5	ESQUIRE 1/15 1/22
655 1/16	CARLTON 1/19	et 1/19
659-7070 1/21	case 1/2 4/21 4/22 6/24 6/25	even 4/19 6/9
686-6300 1/14	7/6	everything 4/16 4/17 4/18
8	cases 4/12	expedited 4/24
879-5000 1/17	caveat 5/16 6/12	explained 5/16
A	certification 8/23	F
a.m 2/4 7/21	certify 8/8	fairly 4/4
ability 6/9	certifying 8/25	faith 6/14
about 5/25 6/2	CIRCUIT 1/1	federal 3/3 5/22
absorb 4/17	cited 4/13	few 7/17
access 5/4	City 4/21	FIELDS 1/19
address 3/17	claim 4/9	FIFTEENTH 1/1
against 4/6 4/8	CLARE 1/18	find 7/7
agreed 3/9 3/11 3/15 5/15	clear 7/10	fine 7/11
5/18 5/23	client 5/21 6/4	first 2/12 2/20 3/22
agreement 2/14 2/17 2/22 3/8	CO 1/6	FLORIDA 1/1 1/13 1/20 1/25
4/2 6/5	COLEMAN 1/3 2/19 3/17 4/3	2/3 8/4
ahead 7/17	4/7	foregoing 8/9 8/23
AI 1/2	come 2/13	full 6/15
al 1/19	coming 7/2	G
all 3/2 6/3	commitment 6/13	gave 4/11 7/15
allegations 4/8	compel 2/13 2/21 4/1	get 3/24 4/23 5/3 5/9
allow 3/21	completeness 5/13	go 3/22
also 3/2	concluded 7/21	going 2/6 2/8 2/11 3/24
am 5/19	consulting 6/4	good 6/13 7/6
Andersen 4/3 4/8	control 8/24	got 4/17 4/18
any 8/24 8/24	cooperation 6/14	great 5/8
anything 4/16 7/16	corporate 3/16	GRIMALDI 8/7 8/18
APPEARANCES 1/11	correct 6/18 8/11	H
apply 8/24	could 7/8	hallway 5/17
are 2/8 2/10 2/20 3/8 5/20	COUNTY 1/1 1/24 2/3 8/5	happy 4/23 4/24
5/24 6/6 7/10	court 1/1 6/9	hear 2/19
Arthur 4/3 4/8	Courthouse 1/24 2/3	here 5/20
as 5/19	COURTROOM 2/2	hereby 8/8
	D	history 4/5
	D.C 1/17	hold 7/15
	damages 4/9	HOLDINGS 1/3 2/20 3/18
	Dated 8/14	Homestead 4/22
	day 6/23 7/4 7/6 8/14	Honor 2/9 5/10 5/19 7/11
	days 7/17	7/13 7/19
	deals 3/7	

H	need 5/2 New 6/25 not 4/16 5/19 6/10 7/6 7/12 8/23 notebook 4/11 5/1 notes 8/11 November 1/24 2/4 8/14 November 25 7/8 now 4/9 5/20 5/21 6/11 NUMBER 1/2	retrieval -- 2/25 right 4/11 5/20 5/20 6/10
HONORABLE 1/9 2/2 hopefully 3/13 How 2/10		S
I		sane 3/17 4/8 4/9 8/24 saying 5/24 SCAROLA 1/12 1/15 2/18 schedule 5/14 scheduled 6/23 schedules 5/4 scope 6/8 SEARCY 1/12 second 3/20 see 3/13 seed 7/16 set 4/24 settled 4/9 settlement 3/8 4/2 SHIPLEY 1/12 single 4/2 sir 6/21 sit 5/19 so 3/21 7/6 7/9 7/17 specially 4/24 STANLEY 1/6 2/23 4/6 Stanley's 3/4 4/1 STATE 8/4 stenographically 8/9 stenotype 8/11 straightforward 4/4 Street 1/16 stuff 3/12 7/15 submit 3/10 5/18 submitted 3/3 submitting 3/9 Suite 1/16 1/20 Sure 5/5 5/11 surprise 2/8 2/11
I'll 3/13 3/21 7/15 I'm 2/18 4/23 4/24 6/10 I've 4/17 4/18 IANNO 1/22 identical 4/7 if 4/25 6/20 7/15 INC 1/3 1/6 includes 4/12 Incorporated 3/18 information 5/22 6/15 initiating 4/6 interest 5/12 issues 3/17 it's 4/4	O objections 3/7 obtaining 6/14 office 5/7 5/10 okay 2/10 2/15 3/19 5/2 5/8 6/17 7/14 one 3/7 3/23 4/21 5/16 only 3/7 6/12 or 6/9 8/24 order 3/9 3/11 3/13 5/15 5/19 6/15 other 5/15 out 5/18 outlines 5/14	
J		T
JACK 1/15 2/18 JOSEPH 1/22 JR 1/22 Judge 3/25 JUDICIAL 1/1 just 3/12 4/3 5/12 6/3 6/7 7/9	P P.A. 1/12 PAMELA 8/7 8/18 PARENT 1/3 2/19 3/18 4/3 4/7 parties 5/18 permitted 5/25 6/2 ph 7/2 phone 1/14 1/17 1/21 5/6 PLAINTIFF 1/14 2/19 Plaintiffs 1/4 Please 4/15 policies 2/25 3/4 principle 6/5 prior 4/5 probably 7/6 problem 7/12 proceedings 1/9 2/1 7/21 8/10 8/12 produce 2/23 3/2 production 2/13 2/21 3/8 4/1 Professional 8/7 8/19 proposed 3/9 3/10 protections 6/10 provide 3/16 5/23 5/23 6/6 6/6 6/7 6/13 provided 5/22 put 5/1	TAKEN 2/1 telling 2/12 3/12 ten 4/18 4/19 terms 2/16 4/5 Thank 7/18 7/19 7/20 Thanksgiving 7/9 that's 3/21 3/23 5/8 6/18 7/6 7/9 7/11 7/12 them 3/22 then 7/15 there 2/20 5/16 5/20 6/6 6/22 there's 6/13 they 3/2 6/13 things 4/15 think 2/6 3/6 3/24 4/4 THOMAS 1/18 Thursday 1/24 2/4 time 5/2 7/7 7/17 Tirey 7/2 together 5/1 tomorrow 6/20 transcript 2/1 8/10 8/23 transcription 8/11 true 8/10 try 6/19 7/8 Tuesday 7/8 7/9 two 2/20
K		U
Kingdom 7/3 KIRKLAND 1/16 know 4/16 5/2 6/3 6/6 6/7 6/20 knowledgeable 2/24		under 8/24 understand 4/15 United 7/3
L		
Lakes 1/13 Lakeview 1/20 later 5/25 lawsuit 4/6 4/8 legal 5/25 Let 4/10 Let's 7/6 like 5/1 5/9 limitations 5/20 line 5/10 look 7/16		
M		
MAASS 1/9 2/2 make 5/6 6/15 materials 6/7 means 8/24 might 5/24 minutes 4/19 4/20 more 5/2 MORGAN 1/6 2/23 3/4 3/25 4/6 morning 2/7 motion 2/12 2/20 3/6 3/21 3/21 4/1 4/19 5/16 motions 2/20 Mr. John 7/2 Mr. Scarola 5/14 5/17 Mr. Scarola's 5/21 My 2/18 5/7 5/9 6/4 8/11	R reached 2/22 read 4/15 4/17 4/17 really 2/6 3/23 reciprocally 3/15 record 2/17 2/18 reed 4/19 regard 2/12 3/1 3/3 3/20 Registered 8/7 8/19 regulators 3/3 5/22 remember 3/13 report 8/9 reporter 8/8 8/19 8/25 represent 6/8 representative 3/16 reproduction 8/24 respect 2/24 retention 2/25 2/25 3/4 retrieval 3/1 3/5	
N		
N.W 1/16 name 2/18 necessary 6/15		

<p>U</p> <p>unless 8/24 upon 5/15 5/19</p> <p>V</p> <p>virtually 4/7</p> <p>W</p> <p>waiting 5/13 waive 6/10 waiving 6/9 walk 4/16 want 5/3 6/8 7/16 was 6/22 6/22 8/8 Washington 1/17 we'll 6/6 we're 2/6 2/11 3/24 5/13 6/2 6/9 we've 4/13 week 6/20 7/9 were 3/2 West 1/13 1/20 1/25 2/3 what 5/15 5/20 5/25 6/2 whatever 5/23 6/5 6/14 when 3/13 Whereupon 7/21 which 6/19 while 5/13 who 2/24 3/16 7/1 without 5/21 6/4 witness 2/24 work 5/17 works 7/13 would 5/9 5/15</p> <p>Y</p> <p>Yes 3/14 York 6/25 you're 3/12 5/25 6/20 you-all 7/10 your 2/8 4/19 5/4 5/10 5/19 7/11 7/13 7/19</p>		
--	--	--

MARY MCCANN

From: tclare@kirkland.com
Sent: Wednesday, November 12, 2003 11:47 AM
To: MARY MCCANN
Cc: Ianno, Joseph; MARY MCCANN; dconnell@jenner.com
Subject: RE: Coleman v. Morgan Stanley

Have forwarded to client for review.

MEM@SearcyLaw.com on 11/12/2003 11:51:09 AM

To: "Ianno, Joseph" <JIanno@CarltonFields.com>
cc: Thomas Clare/Washington DC/Kirkland-Ellis@K&E,
"MARY MCCANN" <MEM@SearcyLaw.com>,
dconnell@jenner.com

Subject: RE: Coleman v. Morgan Stanley

Awaiting your response. Status, please. Thank you.

Mary McCann, Secretary to Jack Scarola

-----Original Message-----
From: Ianno, Joseph [mailto:JIanno@CarltonFields.com]
Sent: Tuesday, November 11, 2003 9:41 AM
To: MARY MCCANN
Subject: RE: Coleman v. Morgan Stanley

I had to forward to T. Clare since it was his agreement. Please copy him with any e-mails on this case.

Thanks

Joe

Joseph Ianno, Jr., Esquire
Carlton Fields, P.A.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401
(561) 659-7070
(561) 659-7368 facsimile
jianno@carltonfields.com
www.carltonfields.com

The information contained in this communication is confidential, may be attorney-client privileged, may constitute attorney work product, and is intended only for the use of the addressee. It is the property of

Carlton Fields. Unauthorized use, disclosure or copying of this communication or any part thereof is strictly prohibited and may be unlawful. For a copy of Carlton Fields' Privacy Policy, please visit our website at <http://www.carltonfields.com/privacy.htm>.

-----Original Message-----

From: MARY MCCANN [mailto:MEM@SearcyLaw.com]
Sent: Tuesday, November 11, 2003 9:40 AM
To: Ianno, Joseph
Cc: MARY MCCANN; dconnell@jenner.com
Subject: Coleman v. Morgan Stanley

Please see attached proposed Agreed Order on Coleman (Parent) Holdings Inc.'s Motion to Compel Concerning E-Mails for your review and approval prior to submission to the Court.

Please get back to me at your earliest possible opportunity. Thank you.

JS/mm
<<doc_103_8DBF.DOC>>

Privileged and Confidential

The information contained in this e-mail message is intended for the use of the individual or entity to which it is addressed and may contain information that is proprietary, privileged, confidential, and exempt from disclosure under applicable laws. If the reader of this message is not the intended recipient, or the employee or agent responsible for delivery to the intended recipient, you are hereby notified that any use, printing, reproduction, disclosure or dissemination of this communication may be subject to legal restriction or sanction.

#230580/mmm

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN
AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

CASE NO: 2003 CA 005045 AI

Plaintiffs,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.

**ORDER ON COLEMAN (PARENT) HOLDINGS INC.'S
MOTION TO COMPEL CONCERNING E-MAILS**

THIS CAUSE is before the Court upon Coleman (Parent) Holdings Inc.'s Motion to Compel Concerning E-mails, and the subsequent stipulation of the parties, upon consideration of which, it is hereby,

ORDERED and ADJUDGED:

1. The Defendant shall within 10 days of the date of this order produce all materials submitted to regulators in connection with any investigation of Morgan Stanley's e-mail retention policies;
2. To the extent any restrictions may limit the ability of the Defendant to comply with the provisions of Paragraph 2 of his Order, the Defendant shall cooperate in good faith to secure the removal of those restrictions.
3. Within 15 days following the production called for in Paragraph 1, each party shall produce a corporate representative to be deposed at a mutually agreeable time and place to testify pursuant to the provisions of Rule 1.310, F.R. Civ. P. concerning that party's e-mail retention policies, practices and procedures at all times material to the

Coleman Holdings, Inc. vs Morgan Stanley & Company
Case No.: 2003 CA 005045 AI
Order

claims asserted herein and also concerning the ability, procedure, time, labor and
expense involved in retrieving e-mails generated during the relevant time period;

DONE AND ORDERED at West Palm Beach, Palm Beach County, Florida, this _____
day of _____, 2003.

ELIZABETH T. MAASS
CIRCUIT COURT JUDGE

Copies have been furnished to all counsel on the attached counsel list.

Coleman Holdings, Inc. vs Morgan Stanley & Company
Case No.:2003 CA 005045 AI
Order

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block, LLC
One IBM Plaza
Suite 4400
Chicago, IL 60611

Jack Scarola, Esq.
Searcy Denney Scarola Barnhart & Shipley
P.O. Drawer 3626
West Palm Beach, FL 33402

WEST PALM BEACH OFFICE:

2139 PALM BEACH LAKES BLVD.
WEST PALM BEACH, FLORIDA 33409

P.O. DRAWER 3828
WEST PALM BEACH, FLORIDA 33402

(561) 866-8300
1-800-780-8607
FAX: (561) 478-0754

SEARCY
DENNEY
SCAROLA
BARNHART
& SHIPLEY P.A.

*Attorneys
at Law*

TALLAHASSEE OFFICE:

P.O. DRAWER 1230
TALLAHASSEE, FLORIDA 32302

(850) 224-7800
1-888-549-7011
FAX: (850) 224-7602

Via Hand Delivery
November 19, 2003

ATTORNEYS AT LAW:

ROSALYN SIA BAKER
F. GREGORY BARNHART
LANCE BLOCK
EARL L. DENNEY, JR.
SEAN C. DOMINICK
JAMES W. GUSTAFSON, JR.
DAVID K. KELLEY, JR.
WILLIAM B. KING
DARRYL L. LEWIS
WILLIAM A. NORTON
DAVID J. SALES
JOHN SCAROLA
CHRISTIAN D. SEARCY
HARRY A. SHEVIN
JOHN A. SHIPLEY III
CHRISTOPHER K. SPEED
KAREN E. TERRY
C. CALVIN WARRINER III
DAVID J. WHITE

***SHAREHOLDERS**

PARALEGALS:

VIVIAN AYAN-TEJEDA
LAURIE J. BRIGGS
DEANNE L. CADY
DANIEL J. CALLOWAY
EMILIO DIAMANTIS
DAVID W. GILMORE
TED E. KULESA
JAMES PETER LOVE
CHRISTOPHER J. PILATO
ROBERT W. FITCHER
WILLIAM H. SEABOLD
KATHLEEN SIMON
STEVE M. SMITH
WALTER A. STERN
BRIAN P. SULLIVAN
KEVIN J. WALSH
GEORGIA K. WETHERINGTON
JUDSON WHITEHORN

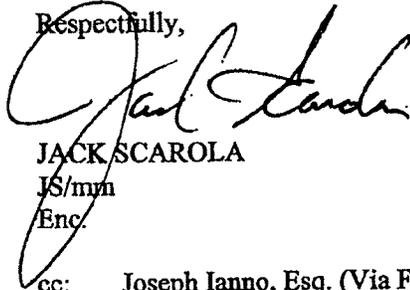
Hon. Elizabeth T. Maass
Palm Beach County Courthouse
Room #11.1208
205 North Dixie Highway
West Palm Beach, FL 33401

Re: Coleman (Parent) Holdings Inc. vs Morgan Stanley & Company
Case No. 2003 CA 005045 AI
Matter No.: 029986-230580

Dear Judge Maass:

A proposed order was submitted to the Court by mail concerning a motion to compel directed at the production of information concerning emails. The Defendants have subsequently objected by letter of November 18 to the entry of that Order and the accompanying motion has been filed and noticed for hearing in response to that objection.

Respectfully,



JACK SCAROLA

JS/mym

Enc.

cc: Joseph Ianno, Esq. (Via Fax)
Thomas A. Clare, Esq. (Via Fax)
Jenner & Block, LLC (Via Fax)



WWW.SEARCYLAW.COM

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CASE NO: 03 CA-005165 AG

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

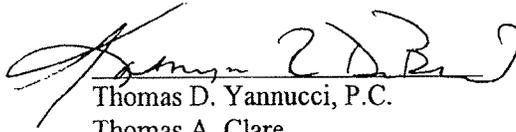
MORGAN STANLEY & CO., INCORPORATED,

Defendant.

**DEFENDANT'S NOTICE OF SERVING CONFIDENTIAL ANSWERS TO PLAINTIFFS
SECOND SET OF INTERROGATORIES**

Defendant Morgan Stanley & Co., Incorporated, by and through their undersigned
counsel, hereby give notice that Defendant served confidential answers to Plaintiff's Second Set
of Interrogatories, on this 1st day of December, 2003.

Dated: December 1, 2003



Thomas D. Yannucci, P.C.

Thomas A. Clare

Zhonette Brown

Larissa Paule-Carres

Brett H. McGurk

Kathryn DeBord

KIRKLAND & ELLIS LLP

655 15th Street, N.W. – Suite 1200

Washington, D.C. 20005

Telephone: (202) 879-5000

Facsimile: (202) 879-5200

Joseph Ianno, Jr. (FL Bar # 655351)

CARLTON FIELDS, P.A.

222 Lakeview Ave., Suite 1400

West Palm Beach, FL 33401

Telephone: (561) 659-7070

Facsimile: (561) 659-7368

Counsel for Defendant

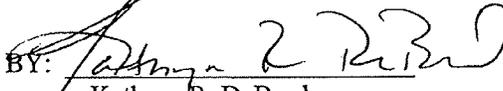
Morgan Stanley & Co. Incorporated

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by facsimile and e-mail to all counsel of record on the attached service list on this 1st day of December, 2003.

Thomas D. Yannucci, P.C.
Thomas A. Clare
Zhonette Brown
Larissa Paule-Carres
Brett H. McGurk
Kathryn DeBord
KIRKLAND & ELLIS LLP
655 15th Street, N.W. -- Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

Joseph Ianno, Jr. (FL Bar # 655351)
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

BY: 
Kathryn R. DeBord

Counsel for Defendant
Morgan Stanley & Co. Incorporated

SERVICE LIST

<p>John Scarola SEARCY, DENNEY, SCAROLA, BARNHARDT & SHIPLEY, P.A. 2139 Palm Beach Lakes Boulevard West Palm Beach, Florida 33409</p>	<p>Counsel for Plaintiff</p>
<p>Jerold S. Solovy JENNER & BLOCK, LLC One IBM Plaza Suite 4400 Chicago, Illinois 60611</p>	<p>Counsel for Plaintiff</p>

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

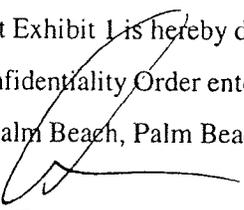
**ORDER ON DEFENDANT'S MOTION TO COMPEL PRODUCTION OF
SETTLEMENT AGREEMENT**

THIS CAUSE came before the Court November 25, 2003 on Defendant's Motion to Compel Production of Settlement Agreement, with all parties and Arthur Andersen well represented by counsel. Based on the proceedings before the Court, it is,

ORDERED AND ADJUDGED that the Motion is Granted, in part, and Denied, in part. Defendant shall have access to that document attached hereto as Exhibit 1, excluding those portions redacted by the Court. The Court has sealed a complete copy of the Settlement Agreement and placed it in the Court file. The sealed envelope shall not be unsealed or removed from the Court file without further order of this or an appellate court. The undersigned's Judicial Assistant shall supply Plaintiff's counsel with a conformed copy of this Order on request made no earlier than 12:00 noon on December 5, 2003. The undersigned's Judicial Assistant shall supply Defendant's counsel with a conformed copy of this Order on request made no earlier than 4:00 p.m. on December 8, 2003. The Court file shall not be released from the undersigned's Chambers before 4:00 p.m. on December 9, 2003. It is further

ORDERED AND ADJUDGED that Exhibit 1 is hereby deemed "Confidential" and subject to the terms of the parties' Stipulated Confidentiality Order entered July 31, 2003.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida, this 4
day of December, 2003.



ELIZABETH T. MAASS
Circuit Court Judge

copies furnished, without Exhibit:
Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci
655 15th Street, NW, Suite 1200
Washington DC 20005

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, IL 60611

Mark F. Bideau, Esq.
777 S. Flagler Dr., Suite 300E
West Palm Beach, FL 33401

David M. Wells, Esq.
50 N. Laura Street, Suite 3300
Jacksonville, FL 32202

SETTLEMENT AGREEMENT

This AGREEMENT, made as of the 10th day of October, 2002, by and among Arthur Andersen LLP, an Illinois limited liability partnership, Coleman (Parent) Holdings, Inc., a Delaware corporation, New Coleman Holdings, Inc., a Delaware corporation, MacAndrews & Forbes Holdings, Inc., a Delaware corporation, and Mafco Holdings, Inc., a Delaware corporation (each of which is referred to herein as a "Party" and all of which are referred to herein collectively as the "Parties").

WHEREAS, Coleman (Parent) Holdings, Inc. has commenced litigation against Arthur Andersen LLP, Andersen Worldwide Société Coopérative, a Swiss cooperative organization, Arthur Andersen & Co. (a Canadian entity), Arthur Andersen & Co. (a Hong Kong entity), Ruiz, Urquiza y Cia, S.C. (a Mexican entity), Piernavieja, Porta, Cachafeiro & Asociados (a Venezuelan entity), Arthur Andersen (a United Kingdom entity) and Phillip E. Harlow, an individual, in an action captioned Coleman (Parent) Holdings, Inc. v. Arthur Andersen LLP et al., Case No.: CA 01-06062 AN—Rapp (in the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida) (the "Coleman Action"), seeking to recover losses arising from its transfer of its controlling interest in The Coleman Company, Inc. to Sunbeam Corporation, Inc. ("Sunbeam") on March 30, 1998, in exchange for shares of Sunbeam stock, plus other consideration;

WHEREAS, the Parties desire to resolve and settle on the terms and conditions set forth herein their differences and disputes fully and finally without protracted litigation and without in any way acknowledging any fault or liability on the part of Arthur Andersen LLP, Phillip E. Harlow or any other defendant or proposed defendant;

NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED, by and among the undersigned, that:

1. Defined Terms. The following terms used in this Agreement shall have the following meanings:

- a. "AALLP" shall mean:
 - i. Arthur Andersen LLP, an Illinois limited liability partnership;
 - ii. the respective past and present subsidiaries, parents, predecessors, Member Firms, affiliates of all types, including without limitation cooperating, representative, affiliate, and related firms, and divisions of Arthur Andersen LLP;
 - iii. all past and present partners, members, officers, directors, principals, shareholders, advisors, agents and employees of Arthur Andersen LLP and/or of any entity covered by subparagraphs (i) and (ii) above;
 - iv. all heirs, executors, administrators, spouses, assigns, and bankruptcy estates of any person or entity covered by subparagraph (iii) above; and

v. all successors⁵¹⁰ to, acquirers of, merger partners of, or entities that have otherwise entered into a contractual arrangement with respect to association, cooperation, coordination, combination or integration of their businesses (now or in the future) with, Arthur Andersen LLP or any person or entity covered by subparagraphs (ii), (iii), or (iv) above (including without limitation successors to, acquirers or merger partners of, or contractual counterparties with respect to any portions or assets (including personnel and clients) of Arthur Andersen LLP or of any person or entity covered by subparagraphs (ii), (iii), or (iv) above) and all affiliates of any type of any such successor, acquirer, merger partner, or contractual counterparty (including without limitation any worldwide organization with which any such person or entity may be associated); provided, however, that such successors, acquirers, merger partners, contractual counterparties, or affiliates of any of them are deemed to be Arthur Andersen LLP only with respect to claims against them based on, arising out of, or related to acts or omissions of Arthur Andersen LLP, or any person or entity covered by subparagraphs (ii), (iii), or (iv) above.

b. "AWSC" shall mean Andersen Worldwide Société Coopérative, a cooperative organization formed under the Swiss Code of Obligations and domiciled in Geneva, Switzerland.

c. "AWSC Entity" shall mean:

i. all current and former firms worldwide that have each entered into a "Member Firm Interfirm Agreement" with AWSC (each a "Member Firm"), including without limitation AALLP, the Defendant Member Firms; Andersen Legal, CV; Accenture LLP (formerly known as Andersen Consulting LLP); Accenture Partners, SC (formerly known as Andersen Consulting Partners, SC); all other firms formerly known as Andersen Consulting; and Accenture Ltd.;

ii. the respective past and present subsidiaries, parents, predecessors, Member Firms, affiliates of all types, including without limitation cooperating, representative, affiliate, and related firms, and divisions of AWSC and/or of any person or entity covered by subparagraph (i) above;

iii. all past and present partners, members, officers, directors, principals, shareholders, advisors, agents and employees of AWSC and/or of any person or entity covered by subparagraphs (i) or (ii) above;

iv. all heirs, executors, administrators, spouses, assigns, and bankruptcy estates of any person or entity covered by subparagraph (iii) above; and

v. all successors to, acquirers of, merger partners of, or entities that have otherwise entered into a contractual arrangement with respect to association, cooperation, coordination, combination or integration of their businesses (now or in the future) with, AWSC or any person or entity covered by subparagraphs (i), (ii), (iii), or (iv) above (including without limitation successors to, acquirers or merger partners of, or contractual counterparties with respect to any portions or assets (including personnel and clients) of AWSC or of any person or entity covered by subparagraphs (i), (ii), (iii), or (iv) above) and all affiliates of any type of any such successor, acquirer, merger partner, or contractual counterparty (including without limitation any worldwide organization with which any such person or entity may be associated); provided, however, that such

successors, acquirers, merger partners, contractual counterparties, or affiliates of any of them are deemed to be AWSC Entities only with respect to claims against them based on, arising out of, or related to acts or omissions of AWSC, or any person or entity covered by subparagraphs (i), (ii), (iii), or (iv) above.

d. "MacAndrews" shall mean MacAndrews & Forbes Holdings, Inc. and Mafco Holdings, Inc., and all of their direct and indirect parents, subsidiaries, divisions, joint ventures, predecessors, successors, assigns, shareholders and any person or entity in which any of them has a controlling interest.

e. "Coleman" shall mean Coleman (Parent) Holdings, Inc. and New Coleman Holdings, Inc. and all of their direct and indirect parents, subsidiaries, divisions, joint ventures, predecessors, successors, assigns, shareholders and any person or entity in which any of them has a controlling interest.

f. "Defendant Member Firms" shall mean the current and former Member Firms of AWSC presently named as defendants in the Coleman Action, specifically Arthur Andersen & Co. (a Canadian entity), Arthur Andersen & Co. (a Hong Kong entity), Ruiz, Urquiza y Cia, S.C. (a Mexican entity), Piernavieja, Porta, Cachafeiro & Asociados (a Venezuelan entity), and Arthur Andersen (a United Kingdom entity).

g. "Harlow" shall mean Phillip E. Harlow.

h. "Released Claims" shall mean any and all claims or causes of action of any nature whatsoever that Coleman and/or MacAndrews has, had, or may have against AALLP, AWSC, and/or any other AWSC Entity or Harlow or that AALLP, AWSC, and/or any other AWSC Entity or Harlow has, had, or may have against Coleman and/or MacAndrews, which claims or causes of action (i) arise in or relate to the Coleman Action and/or (ii) are based on, arise out of, or relate to, directly or indirectly, the transfer or sale by Coleman or MacAndrews of the controlling interest in The Coleman Company, Inc. to Sunbeam on March 30, 1998, in exchange for shares of Sunbeam stock and other consideration, Coleman's and/or MacAndrews' purchase of shares of stock of Sunbeam, the settlement between Coleman and/or MacAndrews and Sunbeam pursuant to which Coleman and/or MacAndrews obtained warrants to purchase Sunbeam stock, Coleman's and/or MacAndrews' ownership of shares of stock, and warrants to purchase the stock, of Sunbeam, or any services (audit, tax, business consulting, or otherwise) provided to Sunbeam (or any entity affiliated with Sunbeam) by AWSC, AALLP or any other AWSC Entity or Harlow.

2. **Settlement Payment.** On or before October 17, 2002, AALLP shall transfer by wire to Coleman funds in the amount of \$70 million U.S. dollars (the "Settlement Payment") as follows:

Coleman and MacAndrews agree that AALLP alone is responsible for making the Settlement Payment, and that neither AWSC nor any AWSC Entity (other than AALLP) shall be responsible for making such payment.

3. Dismissal of Coleman Action.

a. Upon receipt of the Settlement Payment by Coleman (the "Effective Date"), Coleman and AALLP shall promptly file the Joint Motion for Staying the Proceeding in the Coleman Action, which Joint Motion is annexed hereto as Exhibit A. Upon execution of this Agreement, Coleman shall provide to Curtis, Mallet-Prevost, Colt & Mosle LLP ("Curtis") a signed Notice of Dismissal With Prejudice of the Coleman Action (it being understood that each of the parties to the Coleman Action shall bear its own fees and costs), the original of which is annexed hereto as Exhibit B and shall be handled in accordance with the terms of this Paragraph 3. Curtis shall retain the Notice of Dismissal With Prejudice until one hundred (100) days after the Effective Date, at which time Curtis shall, subject to the provisions of this Paragraph 3 and with the authorization of Coleman which is hereby given, file the Notice of Dismissal With Prejudice with the court in the Coleman Action and effectuate service on the parties to the Coleman Action (hereinafter in this Paragraph, all references to filing the Notice of Dismissal With Prejudice shall include service thereof on such parties). If within the 100 day period following the Effective Date, AALLP becomes the subject of a voluntary or involuntary petition under Title 11 of the United States Code, Coleman shall have the right to exercise one of the following options, which option must be exercised by written notice (the "Option Notice") delivered to AALLP within 30 days of the date of the filing of such petition: (i) Coleman shall retain the Settlement Payment, in which case Curtis shall file the Notice of Dismissal With Prejudice promptly upon receipt of the Option Notice; or (ii) Coleman shall return the Settlement Payment in full (together with interest thereon from the Effective Date to the date of the return at the rate of 3% per annum) (the "Return Payment"), in which case Curtis shall not file the Notice of Dismissal With Prejudice, Coleman shall make the Return Payment to AALLP on or before the 40th day following the date of the filing of the petition, and, upon Coleman making the Return Payment, Curtis shall return the Notice of Dismissal With Prejudice to counsel for Coleman, this Agreement, including all covenants, promises, and releases herein, shall be null and void, and subject to the applicable provisions of the Bankruptcy Code, Coleman shall be permitted to seek to have the automatic stay lifted and the stay of the Coleman Action vacated. With respect to the foregoing, it is agreed that, in the event that (x) Coleman fails for any reason to provide the Option Notice to AALLP in accordance with the preceding sentence within the 30 day period following the date of the filing of the petition by or against AALLP, or (y) if Coleman elects the option set forth in (ii) above but fails to make the Return Payment in full to AALLP as required on or before the 40th day following the date of the filing of the petition by or against AALLP, such failure shall be deemed to constitute an automatic election by Coleman under the option set forth in (i) above.

b. Notwithstanding the foregoing, in the event that during the 100 day period following the Effective Date (i) AALLP becomes the subject of an involuntary petition under Title 11 of the United States Code and AALLP challenges the filing of said petition, and (ii) Coleman has given an Option Notice with respect to option (ii) in subsection a. of this Paragraph 3, then Coleman shall have no obligation during the pendency of the challenge by AALLP to make the Return Payment and (x) in the event that AALLP's challenge is upheld such that the involuntary petition is dismissed, Coleman's Option Notice shall be deemed void ab initio, Coleman shall retain the Settlement Payment and Curtis shall file the Notice of Dismissal With

Prejudice provided at least 100 days has expired between the Effective Date and the date of dismissal of such involuntary petition (or if 100 days has not expired, upon the expiration of the 100 day period following the Effective Date); or (y) in the event that AALLP's challenge is denied such that the involuntary petition stands, Coleman shall have 30 days from the date that the order of the Bankruptcy Court is entered upholding the validity of the involuntary petition to either (i) make the Return Payment (in which case, Curtis shall return the Notice of Dismissal With Prejudice to counsel for Coleman, this Agreement, including all covenants, promises, and releases herein, shall be null and void, and subject to the applicable provisions of the Bankruptcy Code, Coleman shall be permitted to seek to have the automatic stay lifted and the stay of the Coleman Action vacated), or (ii) change its election and chose option (i) in a. of this Paragraph 3.

c. Up to 10 days prior to the day on which an Option Notice is required to be made, Coleman may elect to extend the date upon which an Option Notice is required to be made for a period of 60 days (the "Extension Period") by giving written notice of such request to AALLP (the "Extension Notice") and such Extension Period shall be deemed to automatically occur unless AALLP gives written notice to Coleman within 5 days of AALLP's receipt of the Extension Notice that AALLP objects to the Extension Period, in which case there shall be no Extension Period and the Option Notice required to be made under subsection a. shall be made within 5 days of the receipt by Coleman of AALLP's objection. In the event an Extension Period is requested and not objected to by AALLP, then, in such event, Coleman shall be entitled to continue to request additional Extension Periods in accordance with this subsection c. until such time as AALLP objects to an Extension Period in which case the Option Notice required to be given pursuant to subsection a. shall be made within 5 days of the receipt by Coleman of AALLP's objection and no further Extension Notices may be given.

d. In the event that an involuntary petition is converted to a voluntary petition or an Order for Relief is entered in the involuntary case, then the provisions of subsection a. above shall control, with the date of conversion or the date on which the Order of Relief is entered constituting the "date of the filing of such petition" as set forth in the fourth sentence of subsection a.

4. **Mutual Releases.** As of the "Effective Date":

a. Each of Coleman and MacAndrews, for itself and its respective subsidiaries, controlled companies, agents, representatives, officers, directors, employees, partners, successors, assigns, heirs, executors, administrators, attorneys and shareholders (collectively, the "Coleman Releasers"), for good and valuable consideration, receipt of which is hereby acknowledged, releases, remises and forever discharges AWSC, AALLP, Harlow and each and every AWSC Entity, and the present and former subsidiaries, parents, insurers, agents, representatives, officers, directors, employees, principals, partners, members, shareholders, successors, assigns, heirs, executors, administrators and attorneys of AWSC, AALLP, Harlow and every other AWSC Entity (collectively, the "AA Releasees"), from all manner of actions, causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, guarantees, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims and demands whatsoever, of whatever kind or nature, whether known or unknown, or suspected or unsuspected, direct or by assignment, in law or in equity, that the Coleman Releasers ever had, now have or may have in the future for, upon, or by reason of any matter, cause or thing whatever, from the beginning of

the World to the Effective Date, relating in any way to the Released Claims; provided, however, that nothing herein shall constitute a release of AALLP's obligations under this Agreement.

b. AALLP, for itself, Harlow, AWSC and all other AWSC Entities, and each of its or his respective subsidiaries, controlled companies, agents, representatives, officers, directors, employees, partners, successors, assigns, heirs, executors, administrators, attorneys and shareholders (collectively, the "AA Releasers"), for good and valuable consideration, receipt of which is hereby acknowledged, releases, remises and forever discharges Coleman and MacAndrews, and the present and former subsidiaries, parents, insurers, agents, representatives, officers, directors, employees, principals, partners, members, shareholders, successors, assigns, and attorneys of Coleman and MacAndrews (collectively, the "Coleman Releasees") from all manner of actions, causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, guarantees, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims and demands whatsoever, of whatever kind or nature, whether known or unknown, or suspected or unsuspected, direct or by assignment, in law or in equity, that the AA Releasers ever had, now have or may have in the future for, upon, or by reason of any matter, cause or thing whatever, from the beginning of the World to the Effective Date, relating in any way to the Released Claims; provided, however, that nothing herein shall constitute a release of Coleman's and/or MacAndrews' obligations under this Agreement.

5. Indemnification.

a. In the event that Coleman or MacAndrews commences an action or otherwise pursues a recovery against any person or entity not released hereunder (for purposes of this paragraph 5 a. only, a "Third Party") with respect to any claim based on, arising out of, or related to, directly or indirectly, the transfer or sale by Coleman or MacAndrews of the controlling interest in The Coleman Company, Inc. to Sunbeam on March 30, 1998, in exchange for shares of Sunbeam stock and other consideration, Coleman's and/or MacAndrews' purchase of shares of stock of the Sunbeam Corporation, the settlement between Coleman and/or MacAndrews and Sunbeam pursuant to which Coleman and/or MacAndrews obtained warrants to purchase Sunbeam stock, Coleman's and/or MacAndrews' ownership of shares of stock, and warrants to purchase the stock, of Sunbeam, and such Third Party makes any claim (whether in the same action or otherwise) relating in any manner to Sunbeam or any services (audit, tax, business consulting, or otherwise) provided to Sunbeam (or any entity affiliated with Sunbeam), by AWSC, AALLP or any other AWSC Entity or Harlow against any AA Releasee, then Coleman and MacAndrews shall indemnify and hold such AA Releasee harmless from all losses and damages (including, without limitation, reasonable attorneys' fees) incurred in connection with such claim such that the AA Releasee will have no obligation to make any payment to any such Third Party.

b. In the event that AALLP or any AWSC Entity commences an action or otherwise pursues a recovery against any person or entity not released hereunder (for purposes of this paragraph 5 b. only, a "Third Party") with respect to any claim based on, arising out of, or related to, directly or indirectly, the Settlement Payment made pursuant to this Agreement, the transfer or sale by Coleman or MacAndrews of the controlling interest in The Coleman Company, Inc. to Sunbeam on March 30, 1998, in exchange for shares of Sunbeam stock and other consideration, Coleman's and/or MacAndrews' purchase of shares of stock of the Sunbeam Corporation, the settlement between Coleman and/or MacAndrews and Sunbeam pursuant to which Coleman

and/or MacAndrews obtained warrants to purchase Sunbeam stock, Coleman's and/or MacAndrews' ownership of shares of stock, and warrants to purchase the stock, of Sunbeam, and such Third Party makes any claim (whether in the same action or otherwise) relating in any manner to Sunbeam or any services (audit, tax, business consulting, or otherwise) provided to Sunbeam (or any entity affiliated with Sunbeam), by AWSC, AALLP or any other AWSC Entity or Harlow against any Coleman Releasee, then AALLP shall indemnify and hold such Coleman Releasee harmless from all losses and damages (including, without limitation, reasonable attorneys' fees) incurred in connection with such claim such that the Coleman Releasee will have no obligation to make any payment to any such Third Party.

6. Confidentiality of Settlement and Settlement Discussions.

(a) Each of Coleman and MacAndrews, for itself and its subsidiaries, and AALLP, for itself, AWSC, and the other AWSC Entities hereby:

(i) represent, covenant and warrant that they and their counsel shall, for all time, maintain the confidentiality of, and not disclose the terms of this Agreement; the amounts of the payments set forth in Paragraph 2, the identity of the other parties to this Agreement, or the negotiations and discussions that led up to this Agreement (collectively, "Confidential Matters"), and shall agree to take all reasonable steps to ensure the confidentiality of Confidential Matters, including, but not limited to, by not (i) making any statements of any kind to the press concerning any Confidential Matters, or (ii) voluntarily showing or giving this Agreement or disclosing any other Confidential Matters to any other person or entity, except as may be required by statute, rule, regulation, generally accepted accounting principles, court order, subpoena or similar legal process, or as otherwise required by law or relevant stock exchange, and except as may be reasonably necessary for any of the Coleman Releasers or AA Releasers to make claims as to available insurance;

(ii) agree that, notwithstanding the foregoing subsection (i), Coleman and MacAndrews shall be permitted to disclose Confidential Matters to their accountants and in-house counsel and, if truly necessary, to outside counsel (in addition to counsel of record in the Coleman Action), all of whom must agree to be bound by the terms of this Paragraph 6;

(iii) agree, in the event this Agreement is required to be filed or lodged with a court in any proceeding, or Confidential Matters are required to be disclosed in any such court proceeding, the Party seeking to do so shall use reasonable efforts to preserve their confidentiality under seal of court or other applicable procedures at all times;

(iv) agree to inform any person to whom Confidential Matters are disclosed that such matters are confidential and require that such matters not be disclosed to any other person, except as provided in this Paragraph 6; and

(v) agree, in the event that any Party to this Agreement receives a subpoena or similar demand that seeks to compel disclosure of any Confidential Matters, that Party shall promptly inform the other Parties to this Agreement of the receipt of the subpoena or other instrument so that such other Parties shall have an appropriate opportunity to challenge the subpoena or demand or to otherwise seek appropriate protections with respect to the Confidential Matters.

(b) Coleman and MacAndrews agree that, in the event Coleman or MacAndrews discloses Confidential Matters in a manner other than those set forth in paragraph 6(a), it would be difficult, costly or impossible to conclusively establish the amount of actual damages that AALLP would suffer as a consequence thereof, and expressly agree that \$3 million U.S. dollars shall constitute liquidated damages for such breach, and that such amount represents a reasonable pre-estimate of the actual costs and damages which would be sustained by AALLP in the event of such a breach, and further agree that such amount is compensatory only, and not punitive or in the nature of a penalty and is, in any event, just, fair and reasonable under the circumstances.

7. **No Evidence of Liability.** Neither the fact nor the provisions of this Agreement shall in any manner be construed against any Party as an acknowledgement, affirmation, admission or evidence of any violation of law, liability or of any wrongdoing of any nature whatsoever. AALLP denies and continues to deny that it has committed any act or omission giving rise to any violation of law, liability or of any wrongdoing of any nature whatsoever.

8. **Representations.**

a. Each of Coleman and MacAndrews hereby represents and warrants that neither Coleman nor MacAndrews controls any entity (other than as alleged in the Coleman Action) that holds any potential claim against any AA Releasee based on, arising out of, or related to, directly or indirectly, the transfer or sale by Coleman or MacAndrews of the controlling interest in The Coleman Company, Inc. to Sunbeam on March 30, 1998, in exchange for shares of Sunbeam stock and other consideration, Coleman's and/or MacAndrews' purchase of shares of stock of Sunbeam, the settlement between Coleman and/or MacAndrews and Sunbeam pursuant to which Coleman and/or MacAndrews obtained warrants to purchase Sunbeam stock, Coleman's and/or MacAndrews' ownership of shares of stock, and warrants to purchase the stock, of Sunbeam, or any services (audit, tax, business consulting, or otherwise) provided to Sunbeam (or any entity affiliated with Sunbeam) by AWSC, AALLP or any other AWSC Entity or Harlow. Each of Coleman and MacAndrews further represents and warrants that it has the authority to enter into this Agreement and to bind all persons and entities referred to in the respective definitions of "Coleman" and "MacAndrews" set forth herein. Each of Coleman and MacAndrews further represents and warrants that it has not sold, assigned, transferred, or otherwise conveyed any of the claims, rights or causes of action that it had, has, or may have against the AA Releasees.

b. AALLP hereby represents and warrants that it does not control any entity that holds any potential claim against any Coleman Releasee based on, arising out of, or related to, directly or indirectly, the transfer or sale by Coleman or MacAndrews of the controlling interest in The Coleman Company, Inc. to Sunbeam on March 30, 1998, in exchange for shares of Sunbeam stock and other consideration, Coleman's and/or MacAndrews' purchase of shares of stock of Sunbeam, the settlement between Coleman and/or MacAndrews and Sunbeam pursuant to which Coleman and/or MacAndrews obtained warrants to purchase Sunbeam stock, Coleman's and/or MacAndrews' ownership of shares of stock, and warrants to purchase the stock, of Sunbeam, or any services (audit, tax, business consulting, or otherwise) provided to Sunbeam (or any entity affiliated with Sunbeam) by AWSC, AALLP or any other AWSC Entity or Harlow. AALLP further represents and warrants that it has the authority to enter into this Agreement and to bind all persons and entities referred to in the respective definitions of "AALLP," "AWCS" and "AWSC Entities" and "Harlow" set forth herein. AALLP further represents and warrants that it has not sold, assigned, transferred, or otherwise conveyed any of the claims, rights or causes of action that it had, has, or may have against the Coleman Releasees.

9. **Execution in Counterparts.** This Agreement may be executed in two or more counterparts, and all such counterparts shall constitute one and the same instrument. This Agreement shall be deemed to have been executed when the Parties hereto each execute and exchange counterparts thereof, which may be accomplished by facsimile or in person in accordance with the convenience of the Parties. This Agreement is not binding and shall be of no force and effect whatsoever unless and until this Agreement is executed by all Parties hereto. To the extent of their full authority, Coleman, MacAndrews and AALLP shall cause their respective affiliates, subsidiaries, controlled companies, agents, representatives, officers, directors, employees, partners, successors, assigns and attorneys to take, or refrain from taking, any action as may be necessary for such affiliates, subsidiaries, controlled companies, agents, representatives, officers, directors, employees, partners, successors, assigns and attorneys to comply with the releases and other undertakings contained in this Agreement. The Parties agree to take all reasonable steps, including the execution of additional documents, to effectuate the provisions hereof, including, without limitation, to effectuate the stay and the dismissal with prejudice of the Coleman Action as contemplated in Paragraph 3.

10. **Application of New York Law.** This Agreement shall be construed and enforced in accordance with the laws of the State of New York without regard to the conflict of law principles of the State of New York.

11. **Entire Agreement.** This Agreement represents the entire agreement of the Parties. The Parties acknowledge that no representation or promise not expressly set forth in this Agreement has been made by any of the Parties hereto or any of their agents, employees, representatives or attorneys. No modification of, or amendment to, this Agreement shall be valid unless it is in writing and signed by the Parties.

12. **Notice.** All notices and other communications required or permitted to be given to the Parties hereto in connection with this Agreement shall be given, in the case of notice to Coleman and any of its affiliates, subsidiaries and/or controlled companies, to:

Coleman (Parent) Holdings Inc.
Attn: Barry F. Schwartz, Esq.
35 East 62nd Street
New York, New York 10021

with a copy to:

Jenner & Block, LLC (Attn: Jerold S. Solovy, Esq.)
One IBM Plaza
Chicago, IL 60611

In the case of notice to MacAndrews, to:

MacAndrews & Forbes Holdings Inc.
Attn: Barry F. Schwartz, Esq.
35 East 62nd Street
New York, New York 10021

with a copy to:

Jenner & Block, LLC (Attn: Jerold S. Solovy, Esq.)
One IBM Plaza
Chicago, IL 60611

And, in the case of notice to Arthur Andersen LLP, to:

Arthur Andersen LLP
Attention: Lynne M. Raimondo, Esq.
33 West Monroe Street
Chicago, Illinois 60603

with a copy to:

Curtis, Mallet-Prevost, Colt & Mosle
Attention: Eliot Lauer, Esq.
101 Park Avenue
New York, New York 10178

IN WITNESS WHEREOF, and intending to be legally bound, the Parties have executed the foregoing Agreement.

COLEMAN (PARENT) HOLDINGS, INC.

By: Barry F. Schwartz
Name: Barry F. Schwartz
Title: Executive Vice President

NEW COLEMAN HOLDINGS, INC.

By: Barry F. Schwartz
Name: Barry F. Schwartz
Title: Executive Vice President

MacANDREWS & FORBES HOLDINGS, INC.

By: Barry F. Schwartz
Name: Barry F. Schwartz
Title: Executive Vice President

MAFCO HOLDINGS, INC.

By: Barry F. Schwartz
Name: Barry F. Schwartz
Title: Executive Vice President

ARTHUR ANDERSEN LLP

By: _____
Name:
Title:

Jenner & Block, LLC (Attn: Jerold S. Solovy, Esq.)
One IBM Plaza
Chicago, IL 60611

And, in the case of notice to Arthur Andersen LLP, to:

Arthur Andersen LLP
Attention: Lynne M. Raimondo, Esq.
33 West Monroe Street
Chicago, Illinois 60603

with a copy to:

Curtis, Mallet-Prevost, Colt & Mosle
Attention: Eliot Lauer, Esq.
101 Park Avenue
New York, New York 10178

IN WITNESS WHEREOF, and intending to be legally bound, the Parties have executed the foregoing Agreement.

COLEMAN (PARENT) HOLDINGS, INC.

By: _____
Name:
Title:

NEW COLEMAN HOLDINGS, INC.

By: _____
Name:
Title:

MacANDREWS & FORBES HOLDINGS, INC.

By: _____
Name:
Title:

MAFCO HOLDINGS, INC.

By: _____
Name:
Title:

ARTHUR ANDERSEN LLP

By: 
Name: LYNNE M. RAIMONDO
Title: GENERAL COUNSEL

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

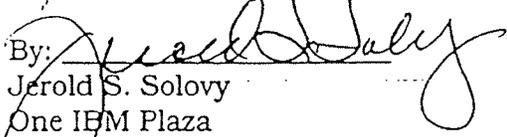
_____)	
COLEMAN (PARENT) HOLDINGS,	)	Case No.: CA 01-06062AN
INC.,)	
)	
Plaintiff,	)	Judge Stephen A. Rapp
)	
v.)	
)	
ARTHUR ANDERSEN LLP et al)	
)	
Defendants.)	
_____)	

JOINT MOTION FOR STAYING THE PROCEEDING

Plaintiff Coleman (Parent) Holdings, Inc. and Defendant Arthur Andersen LLP jointly move that this action be stayed in all respects, including, but not limited to, the filing and serving of pleadings, motions, notices and discovery, as well as, the Court ruling on any pending motions, until such time as any named party moves to lift the stay, the Court lifts the stay sua sponte, or a notice of voluntary dismissal pursuant to Rule 1.420(a), Florida Rules of Civil Procedure, is filed with the Court. Undersigned counsel advise and represent that they have contacted the counsel for all other named parties in this matter and that they have no objection to this motion.

DATED: _____

JENNER & BLOCK, LLC

By: 
Jerold S. Solovy
One IBM Plaza
Chicago, IL 60611
Tel: 312-222-9350
Fax: 312-527-0484

CURTIS, MALLETT-PREVOST, COLT
& MOSLE LLP

By: 
Eliot Lauer
Benard V. Preziosi
101 Park Avenue
New York, NY 10178
Tel: 212-696-6000
Fax: 212-697-1559

SEARCY DENNEY SCAROLA
BARNHART & SHIPLEY P.A.
Jack Scarola, Esq.
2139 Palm Beach Lake Blvd.
West Palm Beach, FL 33402
Tel: 561-686-6300
Fax: 561-684-5816

Attorneys for Plaintiff Coleman
(Parent) Holdings, Inc.

BARTLIT BECK HERMAN
PALENCHAR & SCOTT
Mark L. Levine
Mark Ouweleen
Courthouse Place
54 West Hubbard Street
Chicago IL 60610

HOLLAND & KNIGHT LLP
Hank Jackson
625 North Flagler Drive
West Palm Beach, FL 33401

Attorneys for Defendants
Arthur Andersen LLP and
Phillip E. Harlow

ORDER GRANTING JOINT MOTION FOR STAYING THE PROCEEDING

THIS CAUSE having come before this court on the Joint Motion for Staying the Proceeding and the Court being fully advised in the premises and there being no objection by any of the parties, it is hereby,

ORDERED AND ADJUDGED that the Joint Motion for Staying the Proceeding is GRANTED.

DONE AND ORDERED in Chambers at West Palm Beach, Palm Beach County, Florida this ____ day of October, 2002.

Judge Stephen A. Rapp
Circuit Court Judge

cc: J. Scarola, Esq. B. Preziosi, Esq.
H. Jackson, Esq. G. Richman, Esq.
M. Levine, Esq. S. Stubbs, Esq.
M. Neumeier, Esq.

003950-000028

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

ARTHUR ANDERSEN LLP et al

Defendants.

Case No.: CA 01-06062AN

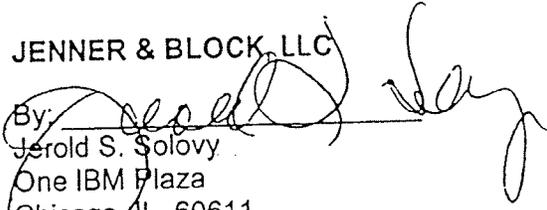
Judge Stephen A. Rapp

NOTICE OF VOLUNTARY DISMISSAL WITH PREJUDICE

Plaintiff Coleman (Parent) Holdings, Inc., by its undersigned counsel,
hereby gives notice of its voluntary dismissal with prejudice of the above captioned
action in its entirety.

Dated: October 10, 2002

JENNER & BLOCK, LLC

By: 
Jerold S. Solovy
One IBM Plaza
Chicago, IL 60611
Tel: 312-222-9350
Fax: 312-527-0484

SEARCY DENNEY SCAROLA
BARNHART & SHIPLEY P.A.
Jack Scarola, Esq.
2139 Palm Beach Lake Blvd.
West Palm Beach, FL 33402
Tel: 561-686-6300
Fax: 561-684-5816

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CASE NO: 03 CA-005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO. INC.,

Defendant.

**REPLY MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS
PURSUANT TO FLORIDA RULE OF CIVIL PROCEDURE 1.061 OR, IN THE
ALTERNATIVE, FOR JUDGMENT ON THE PLEADINGS**

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett H. McGurk
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

Joseph Ianno, Jr. (FL Bar # 655351)
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368

Dated: December 5, 2003

Counsel for Defendant
Morgan Stanley & Co. Incorporated

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

PRELIMINARY STATEMENT 1

STANDARD OF REVIEW 5

ARGUMENT 5

I. THIS COURT MUST APPLY NEW YORK LAW TO CPH’S CLAIMS. 5

 A. Settled Choice-of-Law Principles Require Application Of New York Law. 5

 1. As A Consequence Of Omitting Its Principal Place Of Business
 CPH Applies The Incorrect *Restatement* Provision. 6

 2. CPH Misapprehends The “Most Significant Relationship” Test. 9

 3. CPH Cannot Avoid The Application Of New York Law By
 Pleading “Around” Obvious New York Contacts. 11

 B. CPH Ignores (And Therefore Concedes) The Eleventh Circuit’s Holding
 In *Trumpet Vine*. 13

II. THIS CASE SHOULD BE DISMISSED PURSUANT TO RULE 1.061. 15

 A. CPH Errs In Arguing That Its Forum Choice Is Presumptively Correct. 16

 B. Private Interests Favor A New York Forum For This Case. 18

 1. All Relevant Events Took Place In New York. 18

 2. Most Non-Party Witnesses Are New York Residents. 21

 C. Public Interests Favor A New York Forum For This Case. 24

 D. CPH’s Parent Company (A Key Non-Party Witness) Has Successfully
 Argued For Transfer Of Litigation To New York. 25

III. PLAINTIFF’S FRAUD CLAIM (COUNT I) MUST BE DISMISSED 27

 A. The Complaint Fails To State A Fraud Claim Against Morgan Stanley. 28

 1. Plaintiff Fails To Allege That Morgan Stanley Knew The
 Representations Were False When They Were Made And
 Received. 28

2.	Plaintiff Does Not Allege That It Relied On The March 19, 1998 Press Release.....	28
B.	CPH Cannot Escape Its Own Integration Clause.....	30
C.	CPH Cannot Excuse Its Failure To Inspect Books And Records	32
D.	The Scienter Allegations Fail As A Matter Of Law.	35
IV.	PLAINTIFF’S AIDING-AND-ABETTING CLAIM (COUNT II) MUST BE DISMISSED.	37
V.	PLAINTIFF’S NEGLIGENT MISREPRESENTATION CLAIM (COUNT IV) MUST BE DISMISSED	40
VI.	PLAINTIFF’S CONSPIRACY CLAIM (COUNT III) MUST BE DISMISSED.....	42
	CONCLUSION.....	44

TABLE OF AUTHORITIES

Cases

Acquardo v. Bergeron,
851 So. 2d 665 (Fla. 2003)..... 23

Belin v. Weissler,
No. 97 Civ. 8787 (RWS), 1998 WL 391114 (S.D.N.Y. July 14, 1998) 27

Bishop v. Florida Specialty Paint Co.,
389 So. 2d 999 (Fla. 1980)..... 5, 10

Bloor v. Carro, Spanbock, Londin, Rodman & Fass,
754 F.2d 57 (2d Cir. 1985)..... 40

Boca Raton Transp., Inc. v. Zaldivar,
648 So. 2d 812 (Fla. 4th DCA 1995)..... 5

Botton v. Elbaz,
722 So. 2d 974 (Fla. 4th DCA 1999)..... 5

Brown v. National Car Rental Sys., Inc.,
707 So. 2d 394 (Fla. 3d DCA 1998)..... 15

Butvin v. Doubleclick, Inc.,
No. 99 Civ. 4727, 2000 WL 827673 (S.D.N.Y. June 26, 2000),
aff'd, 2001 WL 1486519 (2d Cir. Nov. 15, 2001)..... 42

Camp Illahee Invs. Inc. v. Blackman,
No. 2D202-4324, 2003 WL 22715216 (Fla. 2d DCA Nov. 19, 2003)..... 17, 18

Ciba-Geigy Ltd. v. Fish Peddler, Inc.,
691 So. 2d 1111 (Fla. 4th DCA 1997)..... 16, 17

Consolidated Edison, Inc. v. Northeast Utilities,
249 F. Supp. 2d 387 (S.D.N.Y. 2003)..... 31

Credit Alliance Corp. v. Arthur Andersen & Co.,
493 N.Y.S.2d 435 (N.Y. 1985)..... 40, 41

Crossland Savs. FSB v. Rockwood Ins. Co.,
692 F. Supp. 1510 (S.D.N.Y. 1988)..... 41

Danann Realty Corp. v. Harris,
157 N.E.2d 597 (N.Y. 1959)..... 27

Doehla v. Wathne Ltd,
98 Civ. 6087 CSH, 1999 WL 566311 (S.D.N.Y. Aug. 13, 1999) 33

<i>Dole Food Co. v. Patrickson</i> , 123 S. Ct. 1655 (April 22, 2003)	40
<i>Dyncorp v. GTE Corp.</i> , 215 F. Supp. 2d 308 (S.D.N.Y. 2002).....	31, 41
<i>Esfeld v. Costa Crociere, S.P.A.</i> , 289 F.3d 1300 (11th Cir. 2002)	17
<i>Execu-Tech Bus. Sys., Inc. v. New Oji Paper Co.</i> , 752 So. 2d 582 (Fla. 2000).....	23
<i>Filler v. Havnit Bank</i> , 247 F. Supp. 2d 425 (S.D.N.Y. 2003).....	40
<i>Filler v. Havnit</i> , No. 01 CIV. 9510 (MGC), 2003 WL 21729978 (S.D.N.Y. July 25, 2003)	40
<i>First Fla. Bank N.A. v. Max Mitchell & Co.</i> , 558 So. 2d 9 (Fla. 1990).....	41
<i>First Union Brokerage v. Milos</i> , 717 F. Supp. 1519 (S.D. Fla. 1989), <i>aff'd</i> , 997 F.2d 835 (11th Cir. 1993).....	27
<i>Friedman v. Arizona World Nurseries Ltd. P'Ship</i> , 740 F. Supp. 521(S.D.N.Y 1990), <i>aff'd</i> , 927 F.2d 594 (2d Cir. 1991)	36
<i>Gabriel Capital, L.P., v. NatWest Fin., Inc.</i> , 94 F. Supp. 2d 491 (S.D.N.Y. 2000).....	43
<i>Giannacopoulos v. Credit Suisse</i> , 37 F. Supp. 2d 626 (S.D.N.Y. 1999).....	33
<i>Gulf Oil Corp. v. Gilbert</i> , 330 U.S. 501 (1946).....	25
<i>Hillcrest Pac. Corp. v. Yamamura</i> , 727 So. 2d 1053 (Fla. 4th DCA 1999).....	5, 31, 32
<i>Houbigant, Inc. v. Deloitte & Touche LLP</i> , 753 N.Y.S.2d 493 (N.Y. App. Div. 2003)	38
<i>Ingram v. Rencor Controls, Inc.</i> , 217 F. Supp. 2d 141 (D. Me. 2002)	12, 13

<i>Kaufman v. Cohen</i> , 760 N.Y.S.2d 157 (N.Y. App. Div. 2003)	39
<i>Kinney Sys., Inc. v. Continental Ins. Co.</i> , 674 So. 2d 86 (Fla. 1996).....	15, 18, 24, 25
<i>Linea Naviera de Cabotaje, C.A. v. Mar Caribe de Navegacion, C.A.</i> , 169 F. Supp. 2d 1341 (M.D. Fla. 2001).....	16
<i>M/I Schottenstein Homes, Inc. v. Azam</i> , 813 So. 2d 91 (Fla. 2002).....	34
<i>Mayo v. Hartford Life Ins. Co.</i> , 220 F. Supp. 2d 714 (S.D. Tex. 2002)	13
<i>Mursia Invs. Corp. v. Industria Cartonera Dominicana</i> , 847 So. 2d 1064 (Fla. 3d DCA 2003)	17
<i>Pafco Gen. Ins. Co. v. Wah-Wai Furniture Co.</i> , 701 So. 2d 902 (Fla. 3d DCA 1997).....	24
<i>Parrott v. Coopers & Lybrand, L.L.P.</i> , 702 N.Y.S.2d 40 (N.Y. App. Div. 2000)	39
<i>Shields v. Citytrust Bancorp, Inc.</i> , 25 F.3d 1124 (2d Cir. 1994).....	36
<i>Tew v. Chase Manhattan Bank, N.A.</i> , 728 F. Supp. 1551 (S.D. Fla. 1990)	11
<i>THC Holdings Corp. v. Chinn</i> , No. 95 Civ. 4422 (KMW), 1998 WL 50202 (S.D.N.Y. Feb 6, 1998)	36
<i>Trierweiler v. Croxton & Trench Holding Corp.</i> , 90 F.3d 1523 (10th Cir. 1996)	8
<i>Trujillo v. Banco Central del Ecuador</i> , 35 F. Supp. 2d 908 (S.D. Fla. 1998)	15
<i>Trumpet Vine Investments N.V. v. Union Capital Partners I, Inc.</i> , 92 F.3d 1110 (11th Cir. 1996)	passim
<i>United Safety of Am. Inc. v. Consolidated Edison Co. of N.Y., Inc.</i> , 213 A.D.2d 283 (N.Y. App. Div. 1995)	41
<i>UST Private Equity Investors Fund, Inc. v. Salomon Smith Barney</i> , 288 A.D.2d 87 (N.Y. App. Div. 2001)	33

Woods v. Nova Cos. Belize Ltd.,
739 So. 2d 617 (Fla. 4th DCA 1999)..... 16

Other Authorities

12A Fla. Jur. 2d Courts and Judges § 71 (1998)..... 23
Restatement (Second) Conflict of Laws § 148 (1971)..... passim
Restatement (Second) Conflict of Laws § 6 (1971)..... 9
Restatement (Second) of Torts § 545A (1977)..... 27
Restatement (Second) of Torts § 552 (1971)..... 41

Rules

Florida Rule of Civil Procedure 1.061 passim
Florida Rule of Civil Procedure 1.140..... 1, 5, 44

PRELIMINARY STATEMENT

Morgan Stanley has moved to dismiss this case pursuant to Florida Rule of Civil Procedure 1.061 or, in the alternative, for judgment on the pleadings in its favor pursuant to Rule 1.140(c). The reasons supporting Morgan Stanley's motion are straightforward. *First*, this case must be governed by the substantive law of New York because it involves only New York parties and because every relevant event took place in New York. *Second*, the need to apply New York law, combined with the location of the parties, witnesses, and evidence in New York, requires dismissal under Rule 1.061 in favor of a New York forum. *Third*, the claims must be dismissed because the theories of liability are expressly foreclosed under New York law — and (at best) are wholly unprecedented under Florida law.

CPH has now had more than five months to respond to these points. Yet, in all that time, and even with the benefit of a 57-page Opposition Memorandum, CPH never acknowledges Morgan Stanley's principal arguments, never cites (let alone attempts to distinguish) Morgan Stanley's principal cases and authority, and never discusses undisputed facts that control this motion. Morgan Stanley's reply Memorandum will focus on the omissions in CPH's Complaint and Opposition — and explain how these unrebutted arguments, viewed in the context of controlling New York and Florida precedent, require dismissal or judgment on the pleadings.

With regard to the law that must be applied, CPH *omits* that its principal place of business is in New York, as CPH has acknowledged in other pleadings filed in this Court, and as its officers have stated in sworn affidavits requesting transfer of other lawsuits to New York. CPH further *omits* the location of events relevant to its own claims, such as where documents were allegedly drafted, where representations were allegedly made, and where reliance allegedly occurred — events that occurred exclusively in New York. CPH finally *omits* any discussion or even citation of *Trumpet Vine Investments N.V. v. Union Capital Partners I, Inc.*, 92 F.3d 1110

(11th Cir. 1996), an important Eleventh Circuit decision applying Florida’s choice-of-law rules and holding that New York law must govern facts and claims virtually identical to those presented here. No Florida court has criticized *Trumpet Vine*, and CPH offers no reason for this Court to depart from it — a departure that, in any event, would be inconsistent with principles articulated by the Florida Supreme Court.

As for Rule 1.061, CPH argues that its chosen forum is presumptively correct, but never acknowledges binding Florida precedent holding that *foreign* plaintiffs, like CPH, are not entitled to *any* presumption in the Rule 1.061 inquiry. CPH further omits the most relevant information for that inquiry — such as the location of the parties, relevant witnesses, historical events, and evidence — in favor of wholly irrelevant “contacts” with Florida, and the fact that some witnesses reside in Florida. These arguments rest on a fundamental legal error, however, and confuse the Rule 1.061 inquiry with the “minimum contacts” relevant to personal jurisdiction. Because Rule 1.061 assumes that jurisdiction is proper in Florida, minimum contacts with Florida and the residence of a handful of third-party witnesses are wholly irrelevant to whether Florida is a proper forum for this litigation. Under the proper Rule 1.061 standard, the litigation plainly belongs in New York.

Additionally, Morgan Stanley has discovered important new information regarding the validity of CPH’s assertions regarding why this case belongs in Florida. When MacAndrews & Forbes (the 100% owner of CPH) was recently sued in Alabama, Barry Schwartz, the General Counsel of MacAndrews & Forbes (who was *also* the Executive Vice President and General Counsel of CPH), submitted a sworn declaration in support of a motion requesting that the case be *transferred to New York*. In his sworn declaration, Mr. Schwartz affirmed the strong connection between MacAndrews & Forbes (and its shell-company subsidiaries) and New York,

and his companies' strong preference to litigate claims arising out of New York-based financial transactions in their home state of New York. Mr. Schwartz declared:

- MacAndrews & Forbes “maintains its principal place of business at 35 East 62nd Street, New York, New York 10021” — *the same office building that it shares with CPH.*
- “The underwriters and accountants involved in the issuance of the bonds which are the subject of the complaint are also located in New York” — *as is the case here.*
- “All of the defendants’ employees, officers, or directors with knowledge relevant to the Complaint are currently employed . . . in New York” — *as is the case here.*
- “All of the defendants’ documents relating to the allegations in the Complaint are maintained . . . in New York” — *as is the case here.*
- “All of the employees of the Corporate Defendants, . . . all of the investment bankers and all of the advisors who participated in formulating the so-called plan referred to in Plaintiff’s complaint maintain their headquarters or are located in New York” — *as is the case here.*

Aug. 20, 1997 Schwartz Decl. ¶¶ 2, 5, 7, 8, 9, *Keller v. Perelman*, No. CV 97-N-2104S (N.D. Ala.) (Ex. G).¹ CPH cannot have it both ways. If MacAndrews & Forbes (which shares officers, employees, headquarters, and office space with CPH) is entitled to litigate fraud-based claims arising from a New York-based transaction in New York, then so is Morgan Stanley.

Finally, should this Court choose to exercise jurisdiction over this case at all, CPH’s claims against Morgan Stanley are legally meritless and should be dismissed. CPH argues that fraud claims are inherently factual and thus largely immune from judgment on the pleadings. But this argument is misplaced. Factual disputes are immaterial to this motion; what matters is that trial courts in this state routinely dismiss claims by foreign plaintiffs who seek to avoid the

¹ Unless otherwise indicated, all emphasis herein is supplied. Citations to Exhibits A-F are attached to the June 25, 2003 Memorandum in Support of Defendant’s Motion to Dismiss Pursuant to Florida Rule of Civil Procedure 1.061 or, in the Alternative, for Judgment on the Pleadings (“Mem.”). Also, citations to Exhibits 1-6 are attached to the June 23, 2003 Answer of Morgan Stanley & Co. Incorporated.

application of governing claims and extend liability far beyond legal precedent. And that is precisely what is happening here. Having already recovered what it can from Sunbeam and Arthur Andersen, CPH now seeks to launch *another* lawsuit against *another* defendant alleging novel liability theories that have been squarely *rejected* as a matter of law in New York, and never accepted in Florida. There is simply no authority for a sophisticated party like CPH, who was advised at all times by its own team of advisors, lawyers and accountants, to allege that it relied on supposed representations of a counterparty's advisor when closing a \$2 billion deal, especially where (as here) that advisor itself lost hundreds of millions of dollars in the same deal.

Indeed, state and federal courts in New York routinely dismiss claims identical in all relevant respects to this case, and CPH cannot obtain a different result by filing its complaint here in Florida. CPH characteristically fails to address or distinguish these cases cited by Morgan Stanley in its opening Memorandum, despite having more than five months and almost 60 pages to do so. Nor does CPH cite *any* precedent from Florida for its novel theory of financial advisor liability.

* * * * *

In sum, CPH's lengthy Opposition is more relevant for what it fails to say than for what it actually says. Pages of bullet points reciting immaterial events cannot overcome the fact that CPH is based in New York where every event relevant to this case took place. String citations to irrelevant authorities cannot obscure directly on-point authority that compels application of New York law and, thus, strongly directs dismissal under Rule 1.061. And mere recitation of Florida-based witnesses is meaningless since CPH's claims can neither be proved nor disproved without the testimony of far more numerous New York-based witnesses. Accordingly, for the reasons set

forth in the opening Memorandum and below, this Court should either (1) dismiss this lawsuit pursuant to Rule 1.061, or (2) dismiss the Complaint outright pursuant to Rule 1.140(c).

STANDARD OF REVIEW

In accordance with Florida law, Morgan Stanley makes reference below to documents directly quoted or relied upon in the Complaint, *see, e.g., Boca Raton Transp., Inc. v. Zaldivar*, 648 So. 2d 812, 813 (Fla. 4th DCA 1995), as well as to affidavits and other sworn evidence necessary to the choice-of-law and Rule 1.061 inquiries, *see, e.g., Botton v. Elbaz*, 722 So. 2d 974, 975 (Fla. 4th DCA 1999). On the motion for judgment on the pleadings, the Court accepts as true all well-pleaded factual allegations of the non-moving party, but need not ignore general allegations that are inconsistent with specific facts “revealed by [an] exhibit [attached or referred to in the complaint].” *Hillcrest Pac. Corp. v. Yamamura*, 727 So. 2d 1053, 1056 (Fla. 4th DCA 1999) (internal quotations & citation omitted; second alternation in original).

ARGUMENT

I. THIS COURT MUST APPLY NEW YORK LAW TO CPH’S CLAIMS.

A. Settled Choice-of-Law Principles Require Application Of New York Law.

Both parties agree that the *Restatement (Second) Conflict of Laws* governs the determination of which state’s law — New York or Florida — must be applied to CPH’s claims. *See Bishop v. Florida Specialty Paint Co.*, 389 So. 2d 999 (Fla. 1980). Even the most cursory reading of the *Restatement* confirms, however, that it is impossible to read the applicable provision (§ 148) and apply Florida law to those claims. CPH must recognize this, because it spends eight pages briefing this issue but *never once mentions* its own principal place of business — New York — which is among the most pertinent factors to be considered in the choice-of-law analysis. *See Restatement (Second) Conflict of Laws* § 148 cmt. i (1971) (“The plaintiff’s domicile or residence, if he is a natural person, or the principal place of business, if

plaintiff is a corporation, are contacts of substantial significance when the loss is pecuniary in nature”). CPH’s omission on this critical point eviscerates its analysis of the *Restatement* factors.

1. As A Consequence Of Omitting Its Principal Place Of Business CPH Applies The Incorrect *Restatement* Provision.

CPH incorrectly argues that this case is governed by *Restatement* § 148(2) and falsely contends that Morgan Stanley applied the “wrong section” by focusing instead on § 148(1). (Nov. 14, 2003 Plf.’s Resp. in Opp. to Def.’s Mot. to Dismiss Under R. 1.061 or, in the Alternative, for J. on the Plds. at 31-32 (“Opp.”).) As an initial matter, Morgan Stanley plainly stated that New York law must be applied under either subsection of *Restatement* § 148 — a point that is clearly made in comment j of *Restatement* § 148(2), which Morgan Stanley quoted and discussed in its opening Memorandum. (Mem. at 11 n.7.) Comment j explains that, even where defendants allegedly make representations from more than one state, the governing law is supplied by the state of the *plaintiff’s principal place of business* and either (i) the place where the plaintiff *relied on alleged misrepresentations*, or (ii) the place where the plaintiff *received the alleged misrepresentations*. See *Restatement* § 148 cmt. j.² CPH never responds to this point; but it squarely compels the application of New York law in light of the undisputed record which shows:

- CPH’s principal place of business is in New York. (Mem. at 3 n.2);
- CPH received every alleged misrepresentation in New York. (Mem. at 11 (citing Stynes Decl. ¶¶ 5, 6 (Ex. A); Porat Decl. ¶¶ 3, 4 (Ex. B)));

² In relevant part, this comment states: “[W]hen the plaintiff acted in reliance upon the defendant’s representations in a single state, this state will usually be the state of the applicable law . . . if (a) the defendant’s representations were received by the plaintiff in this state, or (b) this state is the state of the plaintiff’s domicile or principal place of business”

- CPH relied on alleged misrepresentations in New York — where the Merger Agreement was executed; where CPH tendered its Coleman shares; and where CPH received its shares of Sunbeam in return. (Merger Agmt. §§ 2.2, 3.1(b)(i) (Ex. 1).)

Accordingly, even under the *Restatement* provision cited by CPH, the substantive law of New York applies to its claims.³

CPH offers no grounds for a contrary finding under Section 148(2) — it simply quotes the relevant factors without explaining how those factors support its proposed application of Florida law. Nor could it, since every factor compels the application of New York law. To summarize briefly, the six factors set forth in Section 148(2) unmistakably point to New York:

- **“The place, or places, where the plaintiff acted in reliance upon the defendant’s representations.”** It is undisputed that CPH purportedly “acted in reliance” in New York — the place where CPH negotiated and closed the acquisition transaction, and where it tendered its shares of Coleman stock, supposedly in reliance on the representations it allegedly received.
- **“The place where the plaintiff received the representations.”** It is undisputed that CPH received every alleged misrepresentation in New York, its principal place of business — CPH does not even allege that it received a single representation in Florida.
- **“The place where the defendant made the representations.”** It is undisputed that every alleged representation made by Morgan Stanley was made in New York. Though CPH points to representations made by, or to, other parties (*i.e.* Sunbeam and Arthur Andersen), the only *relevant* representations are those *made by the defendant* (Morgan Stanley) and *received by the plaintiff* (CPH), all of which occurred in New York.

³ CPH suggests in a single sentence that “Morgan Stanley’s fraudulent actions and CPH’s reliance took place in at least two states: primarily in Florida, but also in New York.” (Opp. at 31.) This single sentence is then followed by a single “*see, e.g.,*” citation to ¶¶ 36-44 of the Complaint and pages 10-12 of Morgan Stanley’s opening Memorandum. (*Id.* at 31-32.) Not surprisingly, the citation does not support the sentence and has nothing to do with the *Restatement*. The referenced Complaint paragraphs do not identify a *single representation* made or received in Florida, and the referenced memorandum pages show that *every* alleged representation was in fact made and received in *New York*. Representations allegedly made by Morgan Stanley *to Sunbeam* are irrelevant since the only relevant contact is “the place where the representations were first communicated *to the plaintiff*.” *Restatement* § 148(2) cmt. g. In addition, CPH’s choice-of-law argument is completely foreclosed by CPH’s principal place of business and the undisputed fact that every act of reliance took place exclusively in New York, where the underlying acquisition transaction closed. (Mem. at 11 & n.7.)

- **“The domicile, nationality, place of incorporation and place of business of the parties.”** Both parties are incorporated in Delaware and have their principal place of business in New York. Again, for choice-of-law purposes, the principal place of business is a contact of “substantial significance” where (as here) the alleged injury is “pecuniary in nature.”
- **“The place where a tangible thing which is the subject of the transaction between the parties was situated at the time.”** The subject of the transaction here was common stock traded on the New York Stock Exchange and, thus, was located in New York at the time of the transaction.⁴
- **“The place where the plaintiff is to render performance under a contract which he has been induced to enter by the false representations of the defendant.”** It is undisputed that CPH rendered performance, *i.e.*, traded its shares of the Coleman Company for shares of Sunbeam, in New York.

Consequently, because CPH’s only-cited provision *expressly forecloses* the application of Florida law, CPH lacks any credible argument that Florida law should govern its claims.

CPH’s other arguments are equally meritless. Allegations that “Florida-based outside auditors were shocked,” (Opp. at 35 (citing Compl. ¶ 55)), or that “debentures were sold to investors nationwide, including investors based in Florida,” (*id.* (citing Compl. ¶ 52)), or that “Arthur Andersen . . . provided outside accounting services to Sunbeam through its West Palm Beach, Florida office,” (*id.* (citing Compl. ¶ 13)), have nothing whatsoever to do with alleged misrepresentations at issue here, *i.e.*, those made by one New York resident (Morgan Stanley) to another (CPH) in New York.

⁴ Even CPH does not argue that the location of Sunbeam is relevant to the choice-of-law inquiry. Nor could it, since the claim here is that CPH was induced to trade the common stock of the Coleman Company (a Kansas-based corporation) for the common stock of Sunbeam (a Florida-based corporation), and it is undisputed that (i) the shares of both companies were traded on the New York Stock Exchange and (ii) the shares were exchanged by CPH and Sunbeam “at the New York offices of Skadden, Arps, Slate, Meagher & Flom, 919 Third Avenue, New York, New York 10022.” (Merger Agmt. § 2.2 (Ex. 1); *see id.* § 3.1(b)(i).) *See, e.g., Trumpet Vine Invs.*, 92 F.3d at 1118 (location of corporation that is subject of New York-based merger and acquisition has no bearing on choice-of-law analysis); *Trierweiler v. Croxton & Trench Holding Corp.*, 90 F.3d 1523, 1537 (10th Cir. 1996) (location of the subject of a transaction irrelevant to a purely financial transaction); *see also* Mem. at 14 n. 10 (citing cases).

2. CPH Misapprehends The “Most Significant Relationship” Test.

CPH argues that, even if Section 148(1) applies to this case, the Court can apply Florida substantive law to its claims because Florida has the “most significant relationship” to the underlying dispute. (Opp. at 31-36 (citing *Restatement (Second) Conflict of Laws* § 6 (1971)).) But nothing could be further from the truth — legally or factually.

Section 148(1) provides an exception for cases where, despite representations having been made and received in one state, another state has a “more significant relationship under the principles stated in § 6 to the occurrence and the parties.” *Restatement* § 148. But this exception does not swallow the rule — and certainly does not permit application of Florida law where the *parties* are from New York, and every relevant *occurrence* took place in New York.⁵ It is no surprise, therefore, that CPH fails to apply the *Restatement’s* “most significant relationship” principles to its own Complaint — all of which embody broad-based policy considerations that point exclusively to New York.⁶

There is simply no question that the State of New York, as a worldwide financial center, has the paramount policy interest in having its own laws apply to claims brought by a *New York*

⁵ Indeed, the comment to § 148(1) makes clear that it is the rare case in which the law of the state where representations are made and received does not control: “A possible example of this sort is where A and B are both domiciled in state X and, by reasons of A’s fraudulent representations made to him in state Y, B signs in Y a long term lease of land in X.” *Restatement* § 148(1) cmt. d. That, of course, is a far cry from applying *Florida* law to a dispute between two parties who have their principal place of business *in New York*, regarding financial transactions that were negotiated and closed *in New York*, involving common stock that was located *in New York* — and representations that were made and received in *New York*.

⁶ Section 6 of the Restatement permits courts to consider “(a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty predictability and uniformity of result, (g) ease in the determination and application of the law to be applied.” CPH suggests that Morgan Stanley never discusses these factors in its opening Memorandum. (Opp. at 32). This suggestion is odd, since the Section 6 factors focus on competing state policies, which Morgan Stanley’s opening Memorandum discusses in detail, showing that New York “has the paramount sovereign interest in having its law applied to this controversy” and that Florida has no corresponding interest. (Mem. at 12.)

plaintiff who allegedly suffered injuries *in New York* on account of alleged misrepresentations made by a *New York defendant* regarding the value of common stock traded on a *New York exchange*, and who then, in reliance on those alleged misrepresentations, consummated a merger *in New York* by tendering and receiving shares of stock *in New York*. To apply the substantive law of Florida in such a case would turn the *Restatement* on its head. As the Florida Supreme Court stated, “[t]he state where the injury occurred” remains “the *decisive consideration* in determining the applicable choice of law.” *Bishop*, 389 So. 2d at 1001. Consequently, unless there is an overwhelming policy preference for *not* applying the law of the state where the plaintiff was injured and representations were received, the Section 6 factors simply confirm the appropriateness of applying the law of that state to the underlying dispute.

CPH devotes only three sentences to arguing that Florida has *any* interest in this case, none of which advances a relevant point. (Opp. at 36.) CPH notes that “at least 24 cases arising from the Sunbeam fraud have been adjudicated in this state” (*id.*) — but fails to mention that *all* of those prior cases involved at least one Florida defendant who made representations or misstatements from Florida, and most involved Florida plaintiffs who were injured in Florida.⁷ These “24 cases” are thus irrelevant to the choice-of-law question in this case, which involves *no Florida parties* and focuses on a financial transaction based entirely in New York.

⁷ Indeed, no less than *seventeen* of these cases were consolidated into a single action that included a class of nationwide investors, including Florida investors. See Apr. 22, 1998 Compl. – Class Action ¶ 20, *Bird v. Sunbeam Corp.*, No. 98-8258 (S.D. Fla.). CPH refers repeatedly to “Florida investors” and suggests that they somehow have an interest in the outcome of this case. (Compl. ¶ 52; Opp. at 12.) But this is patently untrue, because the only parties here are New York-based corporations, not Florida investors. Accordingly, even if CPH could prove its allegations against Morgan Stanley, any judgment would inure entirely to the benefit of CPH — *not* Florida residents or investors, who have no stake in those allegations. Furthermore, the referenced “Florida investors” are investors who purchased Sunbeam’s convertible debentures (see Compl. ¶ 52), and thus have nothing to do with CPH’s claims, all of which concern a merger transaction that was negotiated and closed in New York and involved no “investors” other than CPH and Sunbeam.

CPH then cites a single case for the unremarkable proposition that “Florida has an ‘interest in punishing fraudulent actions committed by corporate entities and principals doing business here.’” (Opp. at 36 (quoting *Tew v. Chase Manhattan Bank, N.A.*, 728 F. Supp. 1551, 1564 (S.D. Fla. 1990)).) But in *Tew*, the plaintiff was a Florida-based trustee of a Florida-based estate; every misrepresentation and all relevant misconduct occurred from and in Florida; and the defendant “offer[ed] no factual support as to the significance of any New York contacts.” *Tew*, 728 F. Supp. at 1560. Such a case clearly does not support application of Florida law on the facts and circumstances of this case.

3. CPH Cannot Avoid The Application Of New York Law By Pleading “Around” Obvious New York Contacts.

CPH advances the incredible argument that it is “improper” for the Court to consider declarations that show relevant events took place in New York because choice-of-law issues arise on a motion for judgment on the pleadings. (Opp. at 36-38.) This argument fails for a number of reasons. To begin with, CPH *does not argue* that Morgan Stanley made representations from Florida, or that CPH received and relied on representations in Florida, or that CPH is based in Florida. CPH instead contends that Morgan Stanley improperly based its choice-of-law argument on declarations “[i]nstead of addressing the complaint allegations.” (*Id.* at 36.) That is not true. Morgan Stanley’s opening Memorandum contains a point-by-point discussion of CPH’s allegations with citations to the declarations and the Merger Agreement which prove that *every* relevant event (including where representations were made and received)

took place *in New York*. (Mem. at 5-9, 11.) CPH cannot secure application of Florida law by hiding behind a complaint that repeatedly and consistently *omits* the location of relevant events.⁸

Indeed, CPH's argument on this score is (at best) a transparent effort to hide the ball. Citing no authority, it asks this Court to believe that plaintiffs can simply plead around unfavorable law by failing to disclose their principal place of business or domicile and then omitting from their own complaint the location of every event relevant to choice of law. That is not the law. Though reported cases are few, where plaintiffs have had the temerity to raise this sort of argument, it has been rejected out of hand. As the federal district court in Maine recently explained, while the merits of a motion to dismiss "must be evaluated primarily by considering the allegations in the complaint, the act of determining what law must be applied to those allegations is not and cannot be limited to those allegations." *Ingram v. Rencor Controls, Inc.*, 217 F. Supp. 2d 141, 146 (D. Me. 2002). The court then elaborated on this point:

The defendant, which takes the position that its motion to dismiss must be addressed under New York law, must be allowed to present evidence on these [choice-of-law] factors without turning the motion to dismiss into one for summary judgment Otherwise, an artful plaintiff could *prevent a court from determining whether his action should proceed under the state law that should be applicable to his claim merely by omitting certain facts essential to the choice-of-law issue from his complaint.*

⁸ For example, the *only* paragraph to allege that Morgan Stanley made representations *to CPH* — the representations relevant for the choice-of-law inquiry — discusses "face-to-face negotiations" and a "course of negotiations" that took place between January and February 1998. (Compl. ¶ 39.) This paragraph *omits* where these "negotiations" took place, because, as the declarations attached to the opening Memorandum show, they took place exclusively in New York. (See Stynes Decl. (Ex. A); Porat Decl. (Ex. B).) Even without these declarations, moreover, the Complaint *never alleges* that Morgan Stanley made any representations from Florida or that CPH received representations in Florida. Likewise, the Complaint discusses the closings of the underlying transactions — an event fundamental to choice-of-law as it shows where reliance was rendered — but *omits* the fact that these transactions closed in New York. (See *id.* ¶ 72.) Finally, CPH deletes its principal place of business from its Complaint (*id.* ¶ 8) despite acknowledging in prior filings and in virtually identical complaints filed in this Court that its "principal offices [are] located in New York." March 15, 2002 1st Am. Compl. ¶ 16, *Coleman (Parent) Holdings v. Arthur Andersen*, No. CA 01-06062 AN (Rapp, J.) ("*CPH v. Andersen*, Am. Compl.") (Ex. D). The notion that this Court is bound to select the governing law on the basis of such willful pleadings deficiencies is simply incorrect.

Id.; see also *Mayo v. Hartford Life Ins. Co.*, 220 F. Supp. 2d 714, 730 n.37 (S.D. Tex. 2002) (“The facts on which choice-of-law rulings depend must be determined by the Court after considering the affidavits, depositions, and other matters submitted by the parties.”). CPH advances no reason for a different conclusion.

Regrettably, CPH’s argument is also disingenuous. As the Court is aware, shortly after CPH filed its complaint in this case, Morgan Stanley moved to set a briefing schedule that would have allowed this Court to determine the choice-of-law question first, and then allowed the parties to brief the sufficiency of the pleadings under the appropriate substantive law. CPH opposed Morgan Stanley’s briefing proposal, arguing at a June 2, 2003 hearing that “[t]o brief choice of law issues in the abstract before the issues have been defined simply doesn’t make any sense . . . and appears only to be a means by which to delay these proceedings.” (June 2, 2003 Hrg. at 7.) Yet now CPH asks this Court to do exactly what it said should not be done: decide choice of law “in the abstract” without the benefit of knowing where relevant choice-of-law events took place, or even that CPH is a foreign plaintiff based in New York.

Such gamesmanship should be rejected. It would be one thing if CPH claimed that Morgan Stanley’s declarations were false, or that it actually received representations in Florida, or rendered reliance in Florida, or that Morgan Stanley made representations to CPH from Florida. But it claims no such thing, because it knows that every relevant event took place in New York. There is no basis for CPH’s argument that this Court must blind itself to critical facts when making the choice-of-law determination.

B. CPH Ignores (And Therefore Concedes) The Eleventh Circuit’s Holding In *Trumpet Vine*.

CPH’s Opposition completely ignores the salient holding in *Trumpet Vine Investments, N.V. v. Union Capital Partners I, Inc.*, 92 F.3d 1110 (11th Cir. 1996) — a case arising out of

comparable financial transactions and involving nearly identical tort theories of fraud, conspiracy, and misrepresentation. Applying the same Florida choice-of-law rules that apply in this case, the *Trumpet Vine* court held that New York law applies when: (1) the misrepresentations complained of are made in New York; (2) the misrepresentations are received in New York; and (3) the plaintiff acted in reliance on the misrepresentations in New York. *See id.* at 1118. Those same considerations apply with even greater force where, as here, CPH and its parent company are headquartered in New York. (Mem. at 13-14 & *Trumpet Vine* Chart (Ex. F).)

Indeed, *Trumpet Vine* squarely rejects all of the arguments posited by CPH. The *Trumpet Vine* court held that the plaintiff's fraud-based claims must be governed by New York law, *regardless* of whether: (i) some due diligence took place in Florida, (ii) some acts in reliance occurred in Florida, (iii) some misrepresentations were made in Florida, (iv) a Florida company was the subject of the transaction, or (v) the plaintiff had its principal base of business and suffered injury in Florida. *See Trumpet Vine*, 92 F.3d at 1118. There is simply no meaningful distinction between that holding and this case — which explains why CPH never cites, much less tries to distinguish, *Trumpet Vine*.

In fact, CPH presents choice-of-law arguments that are significantly *weaker* than those advanced by the plaintiff (and rejected by the Eleventh Circuit) in *Trumpet Vine*. The plaintiff in *Trumpet Vine* sought the application of Florida law chiefly on the ground that it was based in Florida and suffered injury in Florida — arguments that are *unavailable* to CPH in this case. *See* Jan. 17, 1996 Reply Br. of Appellant at 12, *Trumpet Vine Invs. v. Union Capital Partners, Inc.*, No. 95-4520 (11th Cir.) (Ex. H). The *Trumpet Vine* plaintiff further argued that the parties' relationship was "clearly centered in Florida" because "the contract was formed in Florida," it

received representations at meetings held in Florida, and “[its] acts of detrimental reliance occurred in great part if not exclusively in Florida.” *See id.* at 23. These arguments are also *unavailable* to CPH. The *Trumpet Vine* plaintiff finally argued that “the subject of the entire transaction was obviously Del Monte which was headquartered in Florida and where the three-day due diligence meeting and exchange of Proprietary Information took place.” *Id.* Even this argument is *unavailable* to CPH. Although Sunbeam is located in Florida, the “subject of the entire transaction” was common stock of a Delaware corporation traded on New York stock exchanges — and there is no allegation that CPH received any fraudulent information from *anyone* in Florida.

In short, there is no credible argument that would compel the application of Florida law in this case. Apart from the straightforward application of the *Restatement* discussed above, *Trumpet Vine* stands on all fours with CPH’s complaint, and has never been criticized by a Florida court. Accordingly, the application of New York law has the added virtue of ensuring the uniform application of choice-of-law principles in this state — itself a paramount objective of the *Restatement*. *See, e.g., Brown v. National Car Rental Sys., Inc.*, 707 So. 2d 394, 396 (Fla. 3d DCA 1998) (noting that the *Restatement* cites “certainty, predictability and uniformity of result . . . as major factors in determining the proper choice of law”) (internal quotations omitted).

II. THIS CASE SHOULD BE DISMISSED PURSUANT TO RULE 1.061.

The application of New York law alone warrants dismissal of the case pursuant to Florida Rule of Civil Procedure 1.061. *See Kinney Sys., Inc. v. Continental Ins. Co.*, 674 So. 2d 86, 92 (Fla. 1996) (dismissal warranted where “foreign law will predominate if jurisdiction is retained”) (internal quotations & citation omitted); *Trujillo v. Banco Central del Ecuador*, 35 F. Supp. 2d 908, 911 (S.D. Fla. 1998) (“choice of law matters” support *forum non conveniens* dismissal); *see also* Fla. Rule Civ. P. 1.061 (commentary) (“[A] trial court has discretion to grant a forum-non-

conveniens dismissal upon finding that . . . foreign law will predominate if jurisdiction is retained.”). Although the Court could obviously elect to retain jurisdiction over the case and apply New York law, there is no compelling reason why a Florida court should undertake this additional burden, especially since the courts of New York provide an adequate alternative forum, are familiar with the substantive law that must be applied, and have a fundamental interest in applying New York law to this case. *See Linea Naviera de Cabotaje, C.A. v. Mar Caribe, de Navegacion, C.A.*, 169 F. Supp. 2d 1341, 1350 (M.D. Fla. 2001) (*forum non conveniens* recognizes “the appropriateness of litigation at home with . . . the law that must govern the case”) (internal quotations & citation omitted; alteration in original).

This reasoning is especially powerful where, as here, the parties and a substantial majority of witnesses are located in New York, the claims arise from events and injuries that occurred in New York, and — as demonstrated below — CPH has advanced no credible reason why this case should be heard in Florida.

A. CPH Errs In Arguing That Its Forum Choice Is Presumptively Correct.

In framing its Rule 1.061 argument, CPH asserts that Morgan Stanley must “overcom[e] the presumption against disturbing CPH’s choice of Florida as the forum for this lawsuit.” (Opp. at 20.) CPH fundamentally misstates the law. As the Fourth District has consistently recognized, a foreign plaintiff (like CPH) enjoys *no presumption* under Rule 1.061. *See Ciba-Geigy Ltd. v. Fish Peddler, Inc.*, 691 So. 2d 1111, 1118 (Fla. 4th DCA 1997) (reversing denial of motion to dismiss under Rule 1.061(a) because “no special weight should have been given to a foreign plaintiff’s choice of forum”); *Woods v. Nova Cos. Belize Ltd.*, 739 So. 2d 617, 621 n.3 (Fla. 4th DCA 1999) (foreign plaintiffs “are not entitled” to any presumption against disturbing plaintiff’s initial forum choice). CPH is surely aware of this binding authority since Morgan Stanley explained in its opening Memorandum that, where a corporate defendant is

headquartered and based outside of Florida, its “choice of a Florida forum is entitled *no weight* in the Rule 1.061(a) inquiry.” (Mem. at 16 (citing *Ciba-Geigy*)). CPH’s failure to respond to this basic point — and its omission of its own principal place of business from its own pleadings — speaks to the weakness of its position under Rule 1.061.⁹

CPH compounds this error with a fundamental misunderstanding of the Rule 1.061 inquiry. The Opposition is larded with so-called “significant and numerous Florida contacts” and assertions that “Morgan Stanley most certainly could expect to be *haled into Florida* to answer for its conduct.” (Opp. at 27, 29.) But “contacts” with a forum state and expectations of being “haled into Florida” are relevant to whether *personal jurisdiction* is proper in Florida — a question not at issue here. Rule 1.061, by contrast, presumes that “personal jurisdiction and venue are otherwise proper,” and requires dismissal “where there is a more convenient forum for the case to be litigated.” *Esfeld v. Costa Crociere, S.P.A.*, 289 F.3d 1300, 1302 n.4 (11th Cir. 2002); *see also Camp Illahee Invs. Inc. v. Blackman*, No. 2D202-4324, 2003 WL 22715216, at *2 (Fla. 2d DCA Nov. 19, 2003) (personal jurisdiction and venue must be satisfied before a court can entertain a Rule 1.061 challenge).

For this reason, Rule 1.061 demands a careful analysis of the conveniences and relevant connections between the two competing forums — not a mere counting of contacts (relevant and irrelevant) with the forum in which the plaintiff filed suit. As the Rule itself explains: “An action may be dismissed on the ground that a satisfactory remedy may be more conveniently sought in a

⁹ Because CPH cites no cases for its purported “presumption” in favor of its chosen forum, it also ignores recent Third District authority that reversed the denial of Rule 1.061 dismissal in part because “no special weight should have been given to the plaintiffs’ choice of forum because they are all foreign plaintiffs.” *Mursia Invs. Corp. v. Industria Cartonera Dominicana*, 847 So. 2d 1064, 1067 (Fla. 3d DCA 2003). Pursuant to that rule, the Third District rejected invocation of a Florida forum by a Missouri-based plaintiff on the ground that, while some events and witnesses were common to Florida, the most relevant events occurred elsewhere. *See id.*

jurisdiction other than Florida.” Fla. R. Civ. P. 1.061; *see also Kinney Sys.*, 674 So. 2d at 93 (noting that “a corporation’s various connections with Florida — if any — will only be factors to be weighed in the balance of conveniences”). Accordingly, CPH’s rigid focus on “contacts” with Florida (most of which have nothing to do with its claims) is irrelevant to whether this case warrants dismissal under Rule 1.061.¹⁰

B. Private Interests Favor A New York Forum For This Case.

Shorn of its erroneous legal foundation, CPH’s position on Rule 1.061 collapses under the weight of its own claims. For the record is *uncontradicted* that (1) every factual predicate to those claims occurred in New York and (2) the vast majority of party and non-party witnesses lives in New York.

1. All Relevant Events Took Place In New York.

CPH tries mightily to claim that events relevant to this case took place in Florida because Sunbeam is located here and Al Dunlap lives here. (Opp. at 1, 21.) But this is not a case against Sunbeam or Al Dunlap. It is a case against Morgan Stanley, a *New York-based financial advisor* whose *only* work for Sunbeam was performed primarily by *New York-based personnel*, and conducted primarily out of *New York offices*.¹¹ More significantly, the *only* activities

¹⁰ CPH’s conflation of legal doctrines explains its meritless assertion that invocation of *venue* by Morgan Stanley Senior Funding Inc. in a companion case bears on the *forum non conveniens* analysis in this case. (Opp. at 21.) As noted above, it is not only *appropriate* to raise *forum non conveniens* where personal jurisdiction and venue are concededly proper, a *forum non conveniens* challenge can *only* be raised if venue and personal jurisdiction are proper. *See Camp Illahee*, 2003 WL 22715216, at *2. Moreover, upon dismissal of this action, the companion case will be voluntarily dismissed and refiled in New York pursuant to stipulation under Rule 1.061(b). (Mem. at 17 n. 11.) The case was filed here *only* because CPH initially invoked this forum and judicial economy requires that both actions be litigated together — its filing has nothing to do, however, with whether Florida is the proper place for that litigation, ultimately, to proceed.

¹¹ Indeed, that Morgan Stanley’s work on behalf of Sunbeam was centered in New York is made patently clear by the fact that Morgan Stanley’s Engagement Letter with Sunbeam was, by mutual consent of the parties, governed by New York law. (Sept. 5, 1997 Engagement Letter between Morgan Stanley and Sunbeam (MSC 0008964) (Ex. 1).)

relevant to CPH’s actual claims — and thus the *only* activities relevant to Rule 1.061 — took place *exclusively* in New York. CPH alleges (1) that Morgan Stanley made misrepresentations directly to CPH during face-to-face negotiations (Compl. ¶ 39); (2) that Morgan Stanley made (or allowed Sunbeam to make) misrepresentations in the March 19, 1998 press release and at a Boston road show presentation soon after the press release was issued (*id.* ¶¶ 59-68); and (3) that Morgan Stanley “allowed” Sunbeam’s acquisition and financing transactions to close (*id.* ¶¶ 72-73). CPH pleads these allegations ambiguously to avoid revealing where the purported misconduct occurred; but artful pleading cannot change the unassailable fact that the purported misconduct occurred in New York.

Indeed, juxtaposing the ambiguous allegations in the Complaint with the unambiguous Rule 1.061 record now before this Court, leaves no doubt that this case belongs in New York, not Florida. This point is best summarized in a chart, as follows:

	¶	Allegation	Location
Negotiations With CPH	¶ 39	“During the course of negotiations, Morgan Stanley prepared and provided CPH with false financial and business information about Sunbeam designed to create the appearances that Sunbeam was prospering and that Sunbeam’s stock had great value.”	<u>New York</u>
	¶ 39	“Together, in face-to-face discussions, Morgan Stanley and Sunbeam assured CPH that (a) Sunbeam would meet or exceed its first quarter 1998 earnings estimates; (b) analysts’ 1998 earnings estimates for Sunbeam were correct; and (c) Sunbeam’s plan to earn \$2.20 per share in 1998 was easily achievable and probably low.”	<u>New York</u>
	¶ 39	“Morgan Stanley and Sunbeam together specifically advised CPH that Sunbeam’s first quarter 1998 sales were ‘tracking fine’ and running ahead of analysts’ estimates.”	<u>New York</u>
Press Release	¶ 59	“Instead, with Morgan Stanley’s knowledge and assistance, Sunbeam prepared and issued a false press release on March 19, 1998 that affirmatively misstated and concealed Sunbeam’s true condition.”	Drafted in <u>New York</u> Reviewed by Morgan Stanley in <u>New York</u>
	¶ 68	“One of Sunbeam’s senior outside auditors, Lawrence Bornstein, has testified under oath that on March 19, 1998, he told Morgan Stanley’s John Tyree that the statement in Sunbeam’s March 19, 1998 press release – that Sunbeam would at least exceed first quarter 1997 sales of \$253.4 million – was not credible”	Global Financial Press (<u>New York</u>)

Road Show	¶ 63	"After Sunbeam's false press release was issued, Morgan Stanley stood arm-in-arm with Sunbeam while Dunlap and Kersh told CPH, analysts, and investors that the March 19, 1998 release was a purely cautionary statement because some first quarter 1998 sales might simply 'spillover' into the second quarter and that Sunbeam still believed that it actually would meet analysts' estimates of \$285 million to \$295 million in the first quarter 1998 sales."	Boston, MA
Allows Transaction To Close	¶ 72	"Morgan Stanley had a duty to disclose the true facts before the closing of the debenture offering and the Coleman acquisition Instead, Morgan Stanley marched forward and closed the \$750 million debenture offering on March 25, 1998, which was needed to close the Coleman transaction, and assisted Sunbeam in closing the acquisition of Coleman on March 30, 1998."	Debenture offering closes in <u>New York</u> Coleman acquisition closes in <u>New York</u>

Since CPH filed its Complaint, it has repeatedly and consistently *admitted* (as it must) that the events relevant to its claims took place in New York. For example:

- "On December 12, 1997, Coleman representatives and Sunbeam representatives *met in New York* to discuss the Transaction."
- "On January 23, 1998, Morgan Stanley representatives met with a Mafco representative *in New York* to discuss the Transaction."
- On January 29, 1998, Sunbeam and Morgan Stanley representatives met with Coleman, Mafco, and Credit Suisse First Boston representatives *in New York* to discuss the Transaction."
- "On February 6, 1998, Morgan Stanley, Mafco, and Credit Suisse First Boston met *in New York* to negotiate the Transaction."
- "On February 25, 1998, Sunbeam, Coleman, Wachtell, and Skadden representatives met to discuss the Transaction *in New York*."
- "On February 25, 1998, Coleman's Board of Directors met *in New York* with Mafco, Wachtell, and CSFB representatives to discuss the transaction."
- On February 27, 1998, Coleman's Board of Directors met *in New York* to discuss the Transaction"

(Oct. 13, 2003 CPH Resps. to Morgan Stanley's 2d Set of Interrogs. at Resp. 1 (Ex. J).) These admissions refer to the "who," "what," "when," and "where" of this case — the crux of the Rule 1.061 inquiry.

At bottom, every event relevant to proving CPH's claims took place exclusively in *New York* — and the record is *uncontradicted* on this score. A case between New York parties arising out of New York events with a voluminous documentary record located almost

exclusively in New York — at the New York offices of CPH, MacAndrews & Forbes, and Morgan Stanley; the New York law firms Davis Polk & Wardwell, Skadden Arps, and Wachtell Lipton; the New York investment bank Credit Suisse First Boston; the New York accounting firms Ernst & Young and Coopers & Lybrand; and the New York public relations firms Hill & Knowlton and Sard Verbinnen — belongs in New York.¹²

2. Most Non-Party Witnesses Are New York Residents.

CPH purports to list sixteen “important non-party witnesses” and contends that these witnesses may be unavailable if the litigation proceeds in New York. (Opp. at 23.) This is a red herring. To begin with, of these so-called “important non-party witnesses,” two have been deposed thus far, and both admitted that they have *nothing* relevant to say about any pending claim.¹³ And even if these witnesses did have something relevant to say, it is simply not true that most “important non-party witnesses” reside in Florida — for the *vast majority* of such witnesses reside in New York.

As noted, the primary allegations in CPH’s complaint are that Morgan Stanley misled CPH in “face-to-face discussions” in New York (Compl. ¶ 39); assisted in preparing the March 19, 1998 press release from New York (*id.* ¶ 59); stood “arm-in-arm” with Sunbeam at a road

¹² The record is replete with references to these New York-based entities, evidence from whom is critical to proving or disproving every claim at issue in this case. (Sept. 24, 2003 CPH’s Resps. to Morgan Stanley & Co.’s 1st Set of Reqs. for Admission at Resps. 7, 8, 9, 19, 20, 21, 22, 23, 24, 25, 26, 27, 59, 65, 67, 69, 82, 83, 84, 114, 116, 117, 118, 147, 159, 160, 181, 183, 189, and 190 (Ex. K).)

¹³ Indeed, these depositions were almost comical in their total irrelevance to this case. Donald Denkhaus (“important” witness number 3 (Opp. at 21)) testified that he had no direct contact with anyone from Morgan Stanley regarding Sunbeam. (Nov. 6, 2003 Denkhaus Dep. at 84-86 (Ex. L).) Similarly, Vance Kistler (“important” witness number 6 (Opp. at 22)) testified that he had no discussions with any of the investment bankers advising the parties to the transaction, and never even communicated with anyone from Morgan Stanley in the course of his Sunbeam-related work at Andersen. (Oct. 29, 2003 Kistler Dep. at 65-72 (Ex. M).) Characterizing such witnesses as “important” is patently misleading, and gives a false impression of who the “important” witnesses really are, *i.e.*, the numerous New York witnesses who actually attended and participated in the events relevant to this case.

show in Boston (*id.* ¶ 63); and proceeded with the closings in New York (*id.* ¶¶ 72-73). Obviously, the witnesses needed to prove these allegations are those witnesses who were *actually present* when the negotiations and discussions took place, the press release was prepared, the road show was conducted, and the closing occurred — substantially all of whom reside in New York. As CPH’s own discovery responses make clear, the New York-based advisors, experts, attorneys and accountants, who were involved in these events make up the vast majority of “important” non-party witnesses should this case ever reach the trial stage:

Institution	# of Potential Witnesses	Location
Davis Polk & Wardwell	15	New York
Skadden Arps	19	New York
Wachtell Lipton	9	New York
Credit Suisse First Boston	3	New York
Coopers & Lybrand	10	New York
Ernst & Young	3	New York
Bank of America NT & SA	4	New York
Hill & Knowlton	1	New York
Global Financial Press	1	New York

(Sept. 2, 2003 CPH’s Resp. to Morgan Stanley & Co.’s 1st Set of Interrogs. (Ex. N).) CPH’s argument to the contrary is not credible, because for every Florida witness it purports to list, at least two or three New York witnesses are equally, if not more, important to relevant testimony.

The arguments relating to Lawrence Bornstein illustrate the point well. CPH contends that Mr. Bornstein is a “key witness” because he is alleged to have “warned” Morgan Stanley about Sunbeam’s earnings shortfalls immediately prior to the March 19 press release (Opp. at 23), an allegation at the heart of the Complaint. (Opp. at 23.) But even this allegation has scant connection to Florida: the alleged “warning” was *made in New York*, at the offices of Global Financial Press; almost all witnesses present at the time — including attorneys from Davis Polk

and Skadden Arps, and John Tyree of Morgan Stanley — were *New York residents* with no connection to Florida; and at least some of these critical witnesses are under the control of no party and would not be subject to the compulsory process of a Florida court. Based on CPH's own logic, the residences of these "key witnesses" render New York, not Florida, the appropriate forum for this case. For the truth or accuracy of CPH's central allegation turns on events that occurred in New York and the testimony of mostly New York witnesses.

In any event, CPH makes no showing that Bornstein, or any other "important non-party witnesses" would be unwilling to come to New York to testify, or that the cost of their doing so would be burdensome. Indeed, Bornstein himself was *represented by New York counsel*, as are two other "key witnesses" (Dunlap and Kersh), *and all three have been deposed in New York* in the course of prior Sunbeam-related litigation.¹⁴ The notion that it is inconvenient for these well-traveled parties to take a trip to New York, or that their mere maintenance of a Florida residence makes it more convenient to litigate this New York-based case in Florida, is not credible and contrary to the principles of Rule 1.061.¹⁵

¹⁴ See Jan. 10, 2001 Bornstein Dep. at 2, *In re Sunbeam Secs. Litig.*, 98-8258 (S.D. Fla.); Apr. 23, 2001 Kersh Dep. at 1, *In re Sunbeam Secs. Litig.*, 98-8258 (S.D. Fla.); July 12, 2000 Dunlap Dep. at 1, *Dunlap v. Sunbeam*, RE 32160008899 (AAA) (Ex. O).

¹⁵ CPH notably fails to cite *any* Rule 1.061 authority to support this Court's retention of jurisdiction over this case. Indeed, the *only* cases CPH cites as authority for its private interest analysis discuss *personal jurisdiction* — not Rule 1.061 — and have no relevance to this motion. (See Opp. at 29 (citing *Execu-Tech Bus. Sys., Inc. v. New Oji Paper Co.*, 752 So. 2d 582, 585 (Fla. 2000); *Acquardo v. Bergeron*, 851 So. 2d 665, 670 (Fla. 2003)).) CPH commits the same error when it argues that Florida courts have a "virtually 'unflagging obligation' to exercise jurisdiction over lawsuits filed here." (Opp. at 30 (citing 12A Fla. Jur. 2d Courts and Judges § 71 (1998)).) As the attributed source explains in *the very next paragraph*, courts may "decline to exercise jurisdiction" where (as here) "the cause of action is not sufficiently related to the court's forum." 12A Fla. Jur. 2d § 71. In fact, this secondary source and the cases cited therein strongly support dismissal, not retention, of jurisdiction in this case. It says: "The doctrine of forum non conveniens is a common-law doctrine addressing the problem that arises when a local court technically has jurisdiction over a suit but the cause of action can be fairly and more conveniently litigated elsewhere. It serves as a brake on the tendency of some plaintiffs to shop for the 'best' jurisdiction in which to bring suit." *Id.* (citations omitted). That is wise counsel here, since CPH's forum shopping is readily apparent.

C. Public Interests Favor A New York Forum For This Case.

CPH musters only a few sentences to argue that Florida has an interest in this case, focusing exclusively on “[t]he fact that many Sunbeam cases have been adjudicated in this State.” (Opp. at 30.) As noted, however, this fact is irrelevant to Florida’s interest in *this* case, which (unlike previously-filed actions) involves no Florida parties and no Florida events. *See supra* at 18-21. CPH’s half-hearted argument simply underscores that public interests favor the forum where local law applies, where both parties are based, and where relevant events took place — a New York-only denominator. And while CPH purports to cite a case in support of its few sentences on public interest, that case involved a *single defendant* in a *single tribunal* in a *single case*, and clearly has no bearing here. (Opp. at 30 (citing *Pafco Gen. Ins. Co. v. Wah-Wai Furniture Co.*, 701 So. 2d 902, 904 (Fla. 3d DCA 1997) (eleven indemnity claims brought against single manufacturer of defective chairs sold in many states including Florida).) Morgan Stanley has never been sued in this court for Sunbeam-related claims, and there is no possibility of duplicative litigation since the relevant statute of limitations is now expired.

Finally, CPH scoffs at the notion that Florida courts should conserve their limited resources for cases that involve Florida parties and / or Florida-based claims. (Opp. at 31.) But this very interest is built into Rule 1.061, *see* Rule 1.061 (commentary) (“‘Public interests’ [include] the ability of courts to protect their dockets from causes that lack significant connection to the jurisdiction”), and no less than the Supreme Courts of both the United States and Florida have explained that conservation of judicial resources is *fundamental* to the *forum non conveniens* doctrine. *See Kinney*, 674 So. 2d at 90 (“Florida’s judicial interests are at their zenith, and the expenditure of tax-funded judicial resources most clearly justified, when the issues involve matters with a strong nexus to Florida’s interests. But that interest and justification wane to the degree such a nexus is lacking.”) (citing *Gulf Oil Corp. v. Gilbert*, 330

U.S. 501, 508 (1946)); *see also id.* at 92 (“[C]ourts may validly protect their dockets from cases which arise within their jurisdiction, but which lack significant connection to it”) (internal quotations & citation omitted). CPH characteristically fails to acknowledge these binding authorities, and its response that courts cannot “decline jurisdiction on the ground of overwork” (Opp. at 31) is rhetorical and meaningless.

For all of these reasons, even if private interests could be said to be in equipoise where a case involves New York law, New York parties, and New York events, the public interest tips such equipoise overwhelmingly in favor of resolving the case in New York. *See, e.g., Kinney*, 674 So. 2d at 92 (“[E]ven when the private conveniences of the litigants are nearly in balance, a trial court has discretion to grant *forum non conveniens* dismissal upon finding that retention of jurisdiction would be unduly burdensome to the community, that there is little or no public interest in the dispute, or that foreign law will predominate if jurisdiction is retained.”) (internal quotations & citation omitted). The proper disposition, therefore, is to dismiss this action pursuant to Rule 1.061 and allow the litigation to proceed in New York, where it belongs.

D. CPH’s Parent Company (A Key Non-Party Witness) Has Successfully Argued For Transfer Of Litigation To New York.

CPH’s dogged insistence that this case must be litigated in Florida is ironic in light of the *sworn arguments* advanced by its own General Counsel that claims of fraud and misrepresentation arising from New York-based financial transactions should be litigated in New York. *See Keller v. Perelman*, Nos. CV-97-TMP-1895-S and CV-97-N-2104-S (N.D. Ala.). In *Keller*, MacAandrews & Forbes (the 100% owner of CPH) was sued on a series of fraud-based claims arising from various transactions involving the defendant and several of its “shell-company” subsidiaries. As here, all of these transactions were negotiated and closed in New York. And as here, the plaintiffs alleged that the defendant issued a materially misleading press

release regarding the financial health of a company. Unlike this case, however, the plaintiffs chose to sue in their home forum (Alabama) where their alleged injuries were suffered.

Almost immediately, MacAndrews & Forbes and its subsidiaries filed a motion to *transfer the case to New York*. That filing is remarkable, because it is totally inconsistent with CPH's position in this case — as well as with the pleadings CPH has filed with this Court. Barry F. Schwartz, then the general counsel of both MacAndrews & Forbes and CPH — *and an important fact witness in this case* — submitted a sworn declaration attesting to the following facts, all of which MacAndrews & Forbes argued required transfer of the case to New York:

- “MAFCO is a Delaware corporation and *maintains its principal place of business at 35 East 62nd Street, New York, New York 10021.*” Schwartz Decl. ¶ 2 (Ex. G).
- “All of the defendants’ documents relating to the allegations in the Complaint are maintained at either MAFCO’s or MacAndrews’ headquarters *in New York.*” *Id.* ¶ 5.
- “All of the defendants’ employees, officers or directors with knowledge relevant to the Complaint are currently employed at MAFCO’s and MacAndrews’ offices located *in New York.*” *Id.* ¶ 7.
- “All of the employees of the Corporate Defendants . . . all of the investment bankers and all of the advisers who participated in formulating the so-called plan referred to in Plaintiff’s complaint maintain their headquarters or are located *in New York.*” *Id.* ¶ 8.
- “The underwriters . . . involved in the issuance of the bonds which are the subject of the complaint are also located *in New York . . .*” *Id.* ¶ 9.

This, of course, is precisely the information that this Court needs to determine whether dismissal is warranted here — and it is *precisely* the information that CPH *omits* from its pleadings. These considerations apply with even greater force in this case, because *all* of the parties have their headquarters and principal place of business in New York. Accordingly, for substantially the reasons sworn to by CPH’s general counsel (but never acknowledged by CPH here) this case belongs in New York and should be dismissed pursuant to Rule 1.061.

III. PLAINTIFF'S FRAUD CLAIM (COUNT I) MUST BE DISMISSED

Quite apart from Rule 1.061 grounds, the fraud count is fatally defective and must be dismissed as a matter of law. (Mem. at 17-27.) CPH contends that fraud claims are "especially ill-suited for resolution on the pleadings." (Opp. at 40.) But that argument is badly misplaced in this case. Indeed, CPH wholly ignores the many cases cited in Morgan Stanley's opening Memorandum that confirm the *necessity* of dismissing fraud counts in circumstances *identical* in all relevant respects to this case. (Mem. at 17-27 & 20-21 n.14.) For this is not a typical fraud case. Rather, it is a case in which a sophisticated plaintiff, worth billions of dollars, who specializes in mergers and acquisitions and is represented at all times by its own legal counsel and financial advisors, alleges that it closed a \$2 billion acquisition based on a press release issued by a non-party and relied on representations made by the non-party's financial advisor, which itself lost hundreds of millions of dollars in the same deal. (See Compl. ¶¶ 39,59-66,82.) Such a novel claim cannot survive merely because it sounds in fraud.

To the contrary, settled law demands (at the very least) that "the asserted reliance must be found to be justifiable under all the circumstances before a complaint can be found to state a cause of action in fraud." *Belin v. Weissler*, No. 97 Civ. 8787 (RWS), 1998 WL 391114, at *5 (S.D.N.Y. July 14, 1998) (quoting *Danann Realty Corp. v. Harris*, 157 N.E.2d 597, 599-600 (N.Y. 1959) and granting a motion to dismiss); see *First Union Brokerage v. Milos*, 717 F. Supp. 1519, 1525 (S.D. Fla. 1989) ("The reasonableness of reliance is distinct from the reliance itself."), *aff'd*, 997 F.2d 835 (11th Cir. 1993); *Restatement (Second) of Torts* § 545A cmt. b (1977) (justifiable reliance must be evaluated in light of the "characteristics of the *particular plaintiff*, and the circumstances of the *particular case*"). And on the pleadings before this Court, not only is CPH's asserted reliance manifestly *unjustifiable* as a matter of law, every other

element of its fraud claim is riddled with legal deficiencies — none meaningfully addressed in CPH’s Opposition.

A. The Complaint Fails To State A Fraud Claim Against Morgan Stanley.

1. Plaintiff Fails To Allege That Morgan Stanley Knew The Representations Were False When They Were Made And Received.

Only *one paragraph* in the Complaint alleges that Morgan Stanley (as opposed to Arthur Andersen or Sunbeam) made representations to CPH. (*See* Compl. ¶ 39.) Yet the Complaint nowhere alleges that Morgan Stanley *knew or had reason to know* that the representations contained in this paragraph were false or misleading when made. In fact, the Complaint itself forecloses such an allegation since it elsewhere alleges that Morgan Stanley first learned of Sunbeam’s financial shortfalls in March 1998 (*id.* ¶¶ 53-58), more than a month *after* these representations were supposedly made and received.

CPH’s Opposition does not address (and therefore concedes) this pleading defect, which alone is fatal to plaintiff’s fraud claim. Dismissal of the fraud count is appropriate — and indeed required — on this ground alone. (Mem. at 25-27.)

2. Plaintiff Does Not Allege That It Relied On The March 19, 1998 Press Release.

The Complaint alleges that the March 19, 1998 press release — which “*Sunbeam* prepared and issued” (Compl. ¶ 59) — supports a fraud claim against *Morgan Stanley*. But the Complaint makes *no particularized allegation* that CPH relied on this press release — which communicated “bad news” about Sunbeam’s sales to the financial markets — when it agreed to purchase Sunbeam. (Mar. 19, 1998 Press Release at 2 (Ex. 6).) Nor could there be such an allegation, since the press release contains only forward-looking statements and explicitly warned readers *not* to rely on such projections. (Mem. at 18-19.) CPH’s responses on this point are inadequate to sustain a fraud claim. It argues, for example, that the press release failed to

disclose material information and that “cautionary statements” cannot foreclose a fraud claim. (Opp. at 47-48.) But those arguments beg two crucial questions:

First, how could CPH, one of the most sophisticated players in the world of mergers and acquisitions, *justifiably* rely on a press release that contained numerous warnings and cautionary statements about projected earnings whose express purpose was to *warn* the financial markets about *lower* sales at Sunbeam? CPH never addresses these elementary points, either of which warrant dismissal of the fraud count.

Second, how as a matter of law could the March 19, 1998 press release give rise to a fraud claim against *Morgan Stanley* — as opposed to Sunbeam, who issued the press release, or Arthur Andersen, whose publicly audited records were in part the basis of the press release? On that score, CPH would have this Court believe that Arthur Andersen was a “white knight” in this episode, valiantly striving to warn all who would listen that Sunbeam was poised for imminent implosion. But that is flatly inconsistent with CPH’s *own earlier lawsuit* against Arthur Andersen, in which Andersen allegedly engaged in “flagrant accounting abuses” and “remained mute regarding the true financial condition of Sunbeam” through at least mid-1998. *CPH v. Andersen*, Am. Compl. ¶¶ 69, 76 (Ex. D).

Indeed, CPH’s conclusory allegations in this case are expressly contradicted by the detailed and specific allegations against Arthur Andersen. With respect to reliance, for example, CPH alleged in its prior lawsuit that it “*directly relied on Andersen’s 1996 and 1997 audit reports when it decided to close the transaction with Sunbeam.*” *Id.* ¶ 93. Having recovered what it could from Arthur Andersen, CPH now adjusts its story and fixes its sights on Morgan Stanley, pretending that a lone press release issued by someone else was what *really* persuaded CPH to execute the \$2 billion Sunbeam transaction. These radically inconsistent allegations do

not reveal a fraud claim against Morgan Stanley — if anything, they reveal a deliberate hunt for deeper pockets and solvent defendants through artful and strategic pleading.

CPH points to now-completed SEC investigations to lend its Complaint an aura of credibility. (See Compl. ¶¶ 11-12; *id.* ¶ 20 (stating that “SEC officials subsequently described [Sunbeam] as a ‘case study’ in financial fraud”).) These investigations, of course, are not pertinent to any issue in this case. But CPH cannot have it both ways. If the SEC investigations are somehow relevant to the Complaint, then the actual findings of the SEC must also be relevant — and those findings render CPH’s allegations demonstrably baseless. Indeed, despite having conducted one of the largest and most extensive financial investigations up to that point in time, the many pleadings and findings issued by the SEC contain not even a hint of wrongdoing by Morgan Stanley. To the contrary, the SEC found that: “Uzzi recklessly disregarded facts indicating that the information he provided to [Morgan Stanley] was materially false and misleading.” Jan. 27, 2003 2d Am. Compl. ¶ 126, *SEC v. Uzzi*, No. 01-8437-Civ. (S.D. Fla.).

B. CPH Cannot Escape Its Own Integration Clause.

In any event, the Merger Agreement’s integration clause expressly disclaims reliance on the very representations that form the basis of CPH’s fraud claims. (Mem. at 18-20.) CPH advances three grounds for ignoring the integration clause — all without merit.

First, CPH claims Morgan Stanley “cannot invoke” the integration clause because Morgan Stanley “is not a party to the agreement.” (Opp. at 41-42.) It then cites authority for the principle that “[a] person who is not a party to a contract may not sue for breach.” (*Id.* at 41.) This argument is both misplaced and backwards: Morgan Stanley is not seeking to “invoke” the integration clause or “sue for breach” — it is merely pointing out that CPH expressly contracted to rely on certain representations (including the same audited financial statements relied upon by Morgan Stanley) when it agreed to purchase Sunbeam. The idea that CPH disclaimed reliance

on pre-contractual representations made by Sunbeam but not by Sunbeam's financial advisor — a party twice removed from CPH — is fallacious. If the idea were accepted, moreover, it would render integration clauses virtually meaningless since the disclaiming party could simply reach behind its contractual partner to sue a deeper-pocketed advisor. In any event, CPH cannot believe its own argument, because it specifically invoked the Merger Agreement in its lawsuit against Arthur Andersen, *see CPH v. Andersen*, Am. Compl. ¶ 68 (Ex. D), even though Arthur Andersen was the auditor to Sunbeam and thus (like Morgan Stanley) was not a party to the Merger Agreement.

Second, CPH claims that an integration clause cannot preclude a claim for fraud or fraudulent inducement of an agreement. (*See Opp.* at 42-43.) But that is not true where (as here) an agreement expressly includes detailed representations and warranties and the plaintiff later proclaims reliance on altogether different representations that could have been (but were not) included in the agreement. *See, e.g., Consolidated Edison, Inc. v. Northeast Utilities*, 249 F. Supp. 2d 387, 402 (S.D.N.Y. 2003) (reasonable reliance precluded where sophisticated party “could have made [alleged representations] a basis for a specific representation and warranty in the Merger Agreement but failed to do so”); *Dyncorp v. GTE Corp.*, 215 F. Supp. 2d 308, 322-23 (S.D.N.Y. 2002) (dismissing fraud claim based on extra-contractual representations where plaintiff negotiated a merger agreement with express representations, warranties, and an integration clause); *Hillcrest Pac. Corp. v. Yamamura*, 727 So. 2d 1053, 1056 (Fla. 4th DCA 1999) (“A party cannot recover in fraud for alleged oral misrepresentations that are adequately covered or expressly contradicted in a later written contract.”). Tellingly, CPH neither mentions the Merger Agreement's detailed representations and warranties, nor discusses any of the cases cited by Morgan Stanley on this dispositive point. (Mem. at 18-20.)

Third, CPH claims that “Morgan Stanley cannot escape responsibility for its fraud” because “the Merger Agreement is dated February 27, 1998” and thus cannot apply to representations made after that date. (Opp. at 43.) But this argument *confirms* that CPH’s fraud claims hinge on the March 19, 1998 press release — *not* the representations contained in Paragraph 39 of the Complaint, which are the *only* representations attributed to Morgan Stanley. *See supra* at 28-29. It also acknowledges that the bulk of CPH’s allegations — *i.e.*, those discussing pre-February 27, 1998, events — are not relevant to the claims against Morgan Stanley. Finally, to the extent the integration clause could be read not to cover the March 19, 1998 press release, the Complaint still does not allege, and cannot allege, that CPH justifiably relied on the press release.¹⁶

In short, CPH cannot escape the terms of the integration clause, which supply an independent ground for dismissing the fraud count as a matter of law.

C. CPH Cannot Excuse Its Failure To Inspect Books And Records

CPH specifically contracted for the right to inspect the books and records of Sunbeam and thus had access to the *same information* available to Morgan Stanley. (Mem. at 21-23 (discussing Merger Agmt .§§ 1.1, 4.11, 6.7 (Ex. 1)).) In light of this contractual right, CPH cannot state a claim for fraud without *any allegation* that it sought to verify the representations

¹⁶ CPH argues that its “complaint is *replete* with allegations that CPH relied on the representations set out in the complaint.” (Opp. at 46.) But, far from being “replete,” CPH identifies one such instance of reliance, in one paragraph, which contains one conclusory sentence: “In agreeing to accept approximately 14.1 million shares of Sunbeam stock in connection with the sale of CPH’s interest in Coleman, CPH reasonably and justifiably relied upon Morgan Stanley’s representations concerning Sunbeam.” (Compl. ¶ 82.) Notably absent is any allegation that CPH ever actually *read* the press release, or *where* it did so, much less that it *justifiably* relied on it to close a \$2 billion transaction. As noted above, the justification of any alleged reliance is a distinct element of fraud and there is nothing on the face of the Complaint that could render CPH’s purported reliance on the press release justified — a fact made more manifest by CPH’s sophistication and expertise in executing high-stakes mergers and acquisitions. *See, e.g., Hillcrest Pac.*, 727 So. 2d at 1057 (holding that a sophisticated investor’s “vague and conclusory statement that they [sic] were induced by the misrepresentation [could not] withstand a motion to dismiss”).

upon which it now claims to have justifiably relied. *See, e.g., UST Private Equity Investors Fund, Inc. v. Salomon Smith Barney*, 288 A.D.2d 87, 88 (N.Y. App. Div. 2001) (“As a matter of law, a sophisticated plaintiff cannot establish that it entered into an arm’s length transaction in justifiable reliance on an alleged misrepresentation if the plaintiff failed to make use of the means of verification that were available to it, such as reviewing the files of the other parties.”).

CPH’s counterarguments make no sense. *First*, CPH contends that the New York rule does not apply because “Florida procedural law still applies to the question of what CPH need and need not plead in its complaint.” (Opp. at 44.) But the requirements for stating a claim for fraud in New York are *part of the substantive law of New York*. New York courts recognize (and rightly so) that sophisticated parties should generally protect themselves *ex ante* before entering into binding agreements. Accordingly, if CPH wishes to allege that it relied on a press release to execute a \$2 billion acquisition, it must also allege that it “made an independent inquiry” into the accuracy of that information before rendering such reliance. *Giannacopoulos v. Credit Suisse*, 37 F. Supp. 2d 626, 632 (S.D.N.Y. 1999). This is a reasonable rule; it is required under the governing substantive law of New York; and it cannot be circumvented by selectively filing suit outside of New York.¹⁷

Second, CPH repeats its argument that “reliance is a question for the trier of fact that generally is considered unsuited for disposition on a threshold motion such as this.” (Opp. at

¹⁷ CPH contends the law is otherwise in New York, but its only cited case supports Morgan Stanley. (See Opp. at 44 (quoting *Doehla v. Wathne Ltd*, 98 Civ. 6087 CSH, 1999 WL 566311, at *11 (S.D.N.Y. Aug. 13, 1999)).) Indeed, CPH quotes the relevant language from *Doehla*, but fails to note that the holding applies where “*no facts alleged suggest that [the plaintiff’s] pleaded reliance . . . was unreasonable.*” 1999 WL 566311, at *13. The same cannot be said where a plaintiff with substantial expertise in consummating mergers and acquisitions, alleges that it relied on a press release, containing forward-looking projections and cautionary statements, to close a \$2 billion deal.

45.) As explained above, that argument does not work here, because courts routinely dismiss claims identical to this one, without discovery. (*See supra* 29-31; Mem. at 20-21 n.14.)

Third, CPH cites a Florida decision purporting to hold that “whether a public record disclosed the truth could not be resolved through a motion to dismiss.” (Opp. at 45.) This is of course irrelevant in light of (and inconsistent with) CPH’s earlier argument that Florida courts do not recognize its duty to inspect the books and records of its counterparty. The cited case, moreover, obviously has nothing to do with the obligation to exercise contractual rights to inspect books and records before asserting justified reliance on extra-contractual representations. In fact, the Florida Supreme Court took pains to note that, where “an examination of [certain] documents prior to the transfer of . . . property is entirely expected,” an action for fraud will not lie when the purchaser has failed to conduct such an examination. *See M/I Schottenstein Homes, Inc. v. Azam*, 813 So. 2d 91, 95 (Fla. 2002). Surely it is “entirely expected” that a sophisticated party such as CPH would investigate the books and records of its counterparty in a \$2 billion merger; and yet, CPH has failed to allege that it made *any* such investigation.

Fourth, CPH contends that its inquiry duty was not triggered because “the truth was peculiarly within the knowledge of Morgan Stanley and the other defrauders.” (Opp. at 45.) This argument is irrelevant since the Complaint never alleges that information was “peculiarly within the knowledge of Morgan Stanley.” Moreover, the argument merely highlights that the Complaint fails to allege Morgan Stanley *knew* Sunbeam’s financial statements and/or Andersen’s audit reports were false or misleading. These were of course the same financial statements and audit reports that were fully available to CPH, and upon which CPH “directly relied” when closing the Sunbeam acquisition. *See CPH v. Andersen*, Am. Compl. ¶ 93 (Ex. D). Accordingly, because both parties had the same access to Sunbeam’s financial information, there

is no basis for CPH to argue that certain information was peculiarly within Morgan Stanley's knowledge — an allegation that, in any event, is not in the Complaint.

D. The Scierter Allegations Fail As A Matter Of Law.

CPH responds to the fatal defects in its scierter allegations by making up facts that appear nowhere in the Complaint and are simply not true. (Opp. at 48-50.) To begin with, it draws an inflammatory analogy to the Enron scandal, replete with citations to front-page articles from the *New York Times* entitled “A Warning Shot to Banks on Role in Others’ Fraud,” and “2 Banks Settle Accusations They Aided in Enron Fraud.” (*Id.* at 50.) The Enron scandal has nothing to do with Morgan Stanley, however, and if such grossly prejudicial arguments are what CPH hopes to present to a jury, then there is every reason for this case never to get that far. Indeed, the distinction between Enron and the allegations here is apparent in CPH's own Opposition, which says, “the SEC and the U.S. Attorney in Manhattan both accused banks of assisting Enron in misrepresenting its true financial condition for years — and the banks ended up paying \$300 million in fines and penalties to resolve the matter.” (*Id.*) The Sunbeam matter has similarly been investigated to the hilt by state and federal officials but, as noted above, has never resulted in *any* allegations against Morgan Stanley. Nor have any of the Sunbeam-related lawsuits cited in CPH's own pleadings (involving thousands of plaintiffs and every manner of claim) ever so much as alleged that Morgan Stanley played a role in the Sunbeam fraud. CPH's argument on this score, in short, borders on the defamatory and speaks volumes about the lack of merit in any underlying claim.

CPH lacks a credible argument for resurrecting its factually deficient scierter allegations. The pleadings reveal that Morgan Stanley lost hundreds of millions of dollars in the same transaction upon which CPH now bases its claims against Morgan Stanley. This fact destroys CPH's theory of scierter, where the only relevant allegation is that Morgan Stanley hoped to

collect an ordinary fee and retain a client. (Mem. at 25-27.) Morgan Stanley cited a number of cases showing that in like circumstances courts routinely dismiss allegations of fraud and misrepresentation. *See, e.g., Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1130 (2d Cir. 1994) (“In looking for a sufficient allegation of motive, [courts] assume that the defendant is acting in his or her informed economic self-interest.”); *THC Holdings Corp. v. Chinn*, No. 95 Civ. 4422 (KMW), 1998 WL 50202, at *9 (S.D.N.Y. Feb 6, 1998) (“A mere allegation that defendant was in a position to receive normal compensation for professional services rendered is not sufficient to support a showing of motive in the fraud scienter analysis.”) (citing, *inter alia*, *Friedman v. Arizona World Nurseries Ltd. P’Ship*, 740 F. Supp. 521, 532 (S.D.N.Y. 1990) (dismissing fraud-based claim on ground that incentive of receiving fee for professional services is insufficient to allege scienter), *aff’d*, 927 F.2d 594 (2d Cir. 1991)). Yet CPH once again responds with no cases of its own, and fails to acknowledge controlling authority that disposes of its own allegations.

CPH’s own arguments in fact confirm the wisdom of these decisions. For example, CPH argues that “Morgan Stanley wanted to work for Sunbeam into the future and was deeply concerned that it would be replaced if it did not participate in the fraud.” (Opp. at 49.) But this is almost verbatim what Sunbeam alleged to constitute scienter against Arthur Andersen and other defendants: “Defendant’s motivation was simple — to do whatever was necessary to retain a major client.” *CPH v. Andersen*, Am. Compl. ¶ 4 (Ex. D); *see also* June 8, 2001 Compl. ¶ 4, *Coleman (Parent) Holdings v. Arthur Andersen LLP & Phillip Harlow*, No. 01-06062AN (“The motivation of Harlow and Andersen was simple — to do whatever was necessary to retain a major client.”) (Ex. E). In other words, CPH’s scienter allegation is mere boilerplate, which, if accepted, would render the scienter element of fraud meaningless in suits against financial

services firms. As Morgan Stanley explained in its opening Memorandum: “[I]f retention of a client and collection of fees is enough to plead scienter as a matter of law, then the scienter element would be rendered a dead letter in Florida — and the floodgates would be open to a wave of frivolous claims based on ordinary economic motive.” (Mem. at 25.) CPH’s assembly-line approach to litigation in this Court proves this sentiment all too true.

Finally, CPH dismisses the fact that Morgan Stanley Senior Funding (“MSSF”) — a sister company to Morgan Stanley — lost hundreds of millions of dollars of its own money when Sunbeam collapsed. Desperate to avoid the implications of this argument for its fraud claim, CPH resorts to *making up facts* about the loan to save its own deficient pleadings. CPH asserts, for example, that Morgan Stanley and MSSF “expected” to “syndicate most or all of the loan” to other potential lenders, and “in fact MSSF did so.” (Opp. at 50.) This assertion is supported with no citation to the pleadings, and thus is irrelevant to this motion for judgment on the pleadings. It is also simply not true: as soon as Sunbeam’s financial troubles and suspicion of fraud came to light, MSSF and other lenders to Sunbeam *suspended* syndication of the loan. CPH’s efforts to distort the historical record notwithstanding, its theory of fraud — that Morgan Stanley knowingly lent hundreds of millions of dollars of its own money to a corrupt client in order to make tens of millions of dollars of fees — simply makes no sense on the face of the pleadings, and thus compels dismissal as a matter of law. (*See* Mem. at 26-27.)

IV. PLAINTIFF’S AIDING-AND-ABETTING CLAIM (COUNT II) MUST BE DISMISSED.

CPH’s position on aiding-and-abetting liability is unprecedented — and asks this Court to sanction a novel cause of action against financial advisors who (until now) hold no independent obligation to re-audit the financial records of their clients. Indeed, as the Complaint itself acknowledges, Morgan Stanley was retained by Sunbeam to provide financial advice to

Sunbeam with respect to potential mergers and acquisitions. (Compl. ¶¶ 29-31.) Morgan Stanley was *not* retained to verify the accuracy of Sunbeam's professionally audited financial reports. (Feb. 27, 1998 Fairness Op. at 2-3 (Ex. 4); Note Offering Mem. at 2-3, 12-17, 72 (Ex. 5).) To the contrary, the pleadings reveal that Morgan Stanley relied exclusively on financial information provided by Sunbeam, Coleman, and their respective financial accountants — the same information that was available to CPH. (See Merger Agmt. § 6.7 (Ex. 1).) This fact is uncontradicted and fatal to any so-called “aiding and abetting” claim.

Indeed, CPH's own cited authority again supports dismissal of its Complaint. CPH relies chiefly on *Houbigant, Inc. v. Deloitte & Touche LLP*, 753 N.Y.S.2d 493, 498 (N.Y. App. Div. 2003), which it reads to “embrace” a liberal pleading standard “in cases like this.” (Opp. at 52.) But that case was not like this one — it involved a suit against an *accountant* for certifying “several years’ worth of audited financial statements” that overstated earnings “by nearly \$200 million.” 753 N.Y.S.2d at 495. The court held:

[C]areful review of these cases [dismissing fraud claims for deficient allegations of scienter] impels us to emphasize that at the pleading stage of a fraud claim *against an accountant*, the plaintiff need not be able to make an evidentiary showing of exactly what the accountant knew as to falsehoods in the certified financial statements.

Id. at 497. The court then made clear that its holding applies to claims against *accountants*, citing various authorities for the principle that accountants hold a special duty to “independently verify information provided by the client.” *Id.* at 499. There is no basis for extending this holding to claims against *underwriters*, who have no such duty.

CPH's unparalleled attempt to hold a financial advisor liable for the sins of its client's accountants is clear from the face of the Complaint. CPH simply retools its earlier allegations against Arthur Andersen with *no factual allegation* as to how or why Morgan Stanley knew (or should have known) that Arthur Andersen's audited financial reports were false or misleading.

Because Morgan Stanley was entitled to rely on these financial reports, the Complaint is manifestly insufficient to state a claim for aiding and abetting fraud, which requires some *factual allegation* that the defendant *actually knew* of the alleged fraud. Indeed, CPH asserts that “[t]he complaint alleges that Morgan Stanley ‘knew of Dunlap’s fraudulent scheme and helped to conceal it,’ which should be the end of the matter.” (Opp. at 51 (quoting Compl. ¶ 86).) In fact, this *does* end the matter, *in favor of dismissal*, because a single conclusory allegation of knowledge cannot state a claim for aiding and abetting fraud:

While not unmindful of the inherent difficulty in pleading a defendant’s actual state of mind, plaintiffs’ allegations of the [defendants’] purported knowledge of [underlying misconduct] are extremely sparse and *wholly conclusory* consisting of *this single statement*: “Upon information and belief, [defendants] were aware of Cohen’s and plaintiff’s prior involvement with and beneficial ownership interest in the Falchi Building, and therefore knew of the fiduciary duty owed to plaintiffs by Cohen or acted in reckless disregard of the same.”

Kaufman v. Cohen, 760 N.Y.S.2d 157, 169 (N.Y. App. Div. 2003). The court then dismissed the aiding-and-abetting claim because “[a]part from this conclusory allegation, there are *no facts in the complaint* from which it could be inferred that the [defendants] had *actual knowledge*” of the underlying tort. *Id.*; see also *Parrott v. Coopers & Lybrand, L.L.P.*, 702 N.Y.S.2d 40, 53 (N.Y. App. Div. 2000) (“Defendant cannot be held liable for another’s intentional tort ‘unless the circumstances of his connection therewith [and knowledge thereof] can be alleged in detail from the outset.’”) (citation omitted). The same conclusion is warranted here. For the *only* allegation that Morgan Stanley made actual representations to CPH refers to “false 1996 and 1997 sales and revenue figures” and other information based on Andersen’s audited financials (Compl. ¶ 39) — the truth or accuracy of which CPH never alleges Morgan Stanley had reason to doubt.

Finally, CPH’s allegations of “substantial assistance” in the Sunbeam fraud amount to no more than Morgan Stanley’s assistance in advising a client and investing hundreds of millions of dollars of its own money in the underlying transaction. (See Opp. at 43-54.) At most, the

allegation here is that the transaction would not have closed “but for” Morgan Stanley’s role in it — an allegation that falls short of stating a claim for aiding and abetting a known fraud. *See, e.g., Bloor v. Carro, Spanbock, Londin, Rodman & Fass*, 754 F.2d 57, 62-63 (2d Cir. 1985) (“In alleging the requisite ‘substantial assistance’ by the aider and abettor, the complaint must allege that the acts of the aider and abettor proximately caused the harm to the [plaintiff] on which the primary liability is predicated *Allegations of a ‘but for’ causal relationship are insufficient.*”).¹⁸ The unprecedented nature of CPH’s theory of liability is again revealed by its complete failure to cite a single case (from New York or Florida) in support of its “substantial assistance” allegations — and we are aware of no case that supports those allegations.

V. PLAINTIFF’S NEGLIGENT MISREPRESENTATION CLAIM (COUNT IV) MUST BE DISMISSED

The negligent misrepresentation claim fails for the same reason: CPH relies on a single case that is specific to *accountants* and the issuance of audited financial statements — *not* advisors who rely on audited financial statements to render financial advice. (*See* Opp. at 55-56 (citing *Credit Alliance Corp. v. Arthur Andersen & Co.*, 493 N.Y.S.2d 435 (N.Y. 1985)).) The manipulation of authority in this regard is particularly misleading. CPH contends that *Credit Alliance* establishes a “three-prong test” for pleading negligent misrepresentation, the first prong of which (according to CPH) is that “the defendant must have been aware that its representation

¹⁸ Morgan Stanley quotes this same language in its opening Memorandum, citing *Filler v. Havnit Bank*, 247 F. Supp. 2d 425 (S.D.N.Y. 2003). CPH points out that *Filler* “has since been vacated” but fails to note that it was vacated in light of a recent decision of the United States Supreme Court on a question of sovereign immunity, *see Filler v. Havnit*, No. 01 CIV. 9510 (MGC), 2003 WL 21729978 (S.D.N.Y. July 25, 2003) (vacating in light of *Dole Food Co. v. Patrickson*, 123 S. Ct. 1655 (April 22, 2003)) — *not* on grounds that have anything to do with this case. Accordingly, the New York authorities cited in *Filler* and relied upon by Morgan Stanley remain valid and controlling here.

would be used for a particular purpose.” (Opp. at 55.) But here is what *Credit Alliance* actually says in the referenced passage:

Before *accountants* may be held liable in negligence to noncontractual parties who rely to their detriment on *inaccurate financial reports*, certain prerequisites must be satisfied: (1) the *accountants* must have been aware that the *financial reports* were to be used for a particular purpose or purposes

Credit Alliance, 493 N.Y.S.2d at 443. That CPH believes it must import this holding — one the New York Court of Appeals itself characterized as “*the law of accountants’ liability*,” *id.* — into a case that involves neither accountants nor the auditing of financial reports,¹⁹ illustrates the unprecedented nature of its negligent misrepresentation claim.¹⁹

Indeed, the governing standard generally forecloses a negligent misrepresentation claim where the defendant served as the financial advisor to the defendant’s *counterparty* during contentious arm’s length negotiations. (See Mem. at 32-34 (citing *United Safety of Am. Inc. v. Consolidated Edison Co. of N.Y., Inc.*, 213 A.D.2d 283, 286 (N.Y. App. Div. 1995) (“A simple arm’s length relationship is not enough.”) (other citations omitted)); *Dyncorp v. GTE*, 215 F. Supp. 2d 308, 329 (S.D.N.Y. 2002) (The requisite “special relationship of trust generally does not exist between sophisticated commercial entities entering into arms-length business transactions.”). This is especially true here, since CPH was represented at all times by its *own*

¹⁹ Courts in New York and Florida recognize that *Credit Alliance* was a case about accounts’ liability and thus not applicable in a case like this, which does not involve accountants. See *Crossland Savs. FSB v. Rockwood Ins. Co.*, 692 F. Supp. 1510, 1513 (S.D.N.Y. 1988) (noting that “[t]he Court of Appeals’ decision [in *Credit Alliance*] . . . was limited to accountants”); *First Fla. Bank N.A. v. Max Mitchell & Co.*, 558 So. 2d 9, 14 (Fla. 1990) (adopting the “rationale of section 552, *Restatement (Second) of Torts* (1976), as setting forth the circumstances under which *accountants* may be held liable in negligence to persons who are not in contractual privity”). Moreover, while Florida law is not as clear on this point, CPH is wrong to suggest that courts here permit negligent misrepresentation claims with no concern for the relationship between the plaintiff and the defendant. See *Restatement (Second) of Torts* § 552 cmt. d (1971) (noting that where the supplier of information “makes no pretense to special competence” regarding the information supplied, “the recipient is not justified in expecting more than that care and competence which the nonprofessional character of his informant entitles him to expect”). It is thus fair to say that CPH’s theory of negligent representation — attempting as it does to impose *accountants’* liability on investment bankers and underwriters — is unprecedented under either New York or Florida law.

stable of advisors, attorneys, and accountants, and Morgan Stanley — which was twice removed from CPH — was manifestly not in the position of a fiduciary to CPH. *See, e.g., Butvin v. Doubleclick, Inc.*, No. 99 Civ. 4727, 2000 WL 827673, at *10 (S.D.N.Y. June 26, 2000) (“[A] plaintiff may only recover for negligent misrepresentation where the defendant owes him a fiduciary duty.”) (citations omitted), *aff’d*, 2001 WL 1486519 (2d Cir. Nov. 15, 2001). Even CPH cannot bring itself to argue that the Complaint meets this heightened pleading standard, relying instead on the lesser standards for accountant liability, which obviously do not apply here.

In any event, the negligent misrepresentation claim fails on the additional and independent grounds that (i) there is no factual allegation that Morgan Stanley knew or should have known that the *only* representations it ever made to CPH — those set forth in Compl. ¶ 39 — were false or misleading when made, and (ii) there is no factual allegation that CPH justifiably relied on those representations. Accordingly, as explained in the opening Memorandum, this claim must be dismissed for substantially the same reasons that the fraud claim must be dismissed. (*See Mem.* at 34.)

VI. PLAINTIFF’S CONSPIRACY CLAIM (COUNT III) MUST BE DISMISSED.

Because CPH fails to state a fraudulent or negligent misrepresentation claim, it cannot state a civil conspiracy claim under either Florida or New York law. (*See Mem.* at 34.) CPH concedes this point — acknowledging that the conspiracy claim is “derivative” of other claims — so there is no dispute that this claim rises or falls largely on arguments already discussed. (*See Opp.* at 57.) But even if CPH could state an underlying claim, its conspiracy claim fails because it rests on the conclusory statement that “Morgan Stanley conspired with Dunlap and other senior Sunbeam executives to conceal the truth about Sunbeam’s financial performance and business operations.” (Compl. ¶ 90.) That will not suffice, because “a complaint *must*

contain more than general allegations in support of the conspiracy.” Gabriel Capital, L.P. v. NatWest Fin., Inc., 94 F. Supp. 2d 491, 511 (S.D.N.Y. 2000) (internal quotations & citation omitted), *cited in* Opp. at 57. The Complaint here simply does not specifically allege any requisite “*agreement between the conspirator and the wrongdoer.*” *Id.*

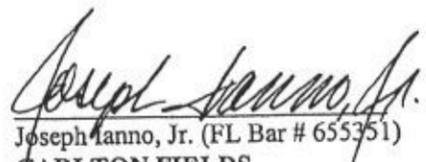
Moreover, even if the Complaint specifically alleged such a conspiratorial agreement, the “overt acts” identified by CPH refer almost exclusively to events that occurred *before* there is even an allegation that Morgan Stanley knew of Sunbeam’s true financial situation. (*See* Opp. at 57.) The only possible exception is the March 19, 1998 press release, but (again) there is *no factual allegation* that CPH ever read the press release, much less relied on it to close the Sunbeam acquisition. *See supra* at 29-31. CPH points to no authority that would permit such tendentious allegations to support a civil conspiracy claim as a matter of law — and we are aware of none. The claim, accordingly, must be dismissed.

CONCLUSION

For the reasons stated above, and for the reasons stated in Morgan Stanley's opening Memorandum, plaintiff's Complaint should be dismissed in its entirety pursuant to Florida Rule of Civil Procedure 1.061(a). Alternatively, defendant is entitled to judgment on the pleadings pursuant to Florida Rule of Civil Procedure 1.140(c).

Dated: December 5, 2003

Respectfully Submitted,



Joseph Manno, Jr. (FL Bar # 655351)
CARLTON FIELDS
222 Lake View Avenue - Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett H. McGurk
KIRKLAND & ELLIS
655 15th Street, N.W. 12th Floor
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5993

Attorneys for Defendant,
Morgan Stanley & Co. Incorporated

CERTIFICATE OF SERVICE

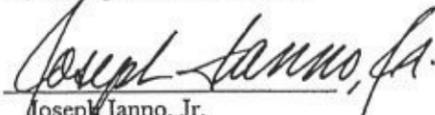
I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand deliver to John Scarola and by e-mail without exhibits and by overnight courier with exhibits, Saturday delivery, to all other counsel of record on the attached service list on this 5th day of December 2003.

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett H. McGurk
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

Counsel for Defendant
Morgan Stanley & Co. Incorporated

Joseph Ianno, Jr. (FL Bar # 655351)
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

BY:


Joseph Ianno, Jr.

SERVICE LIST

<p>John Scarola SEARCY, DENNEY, SCAROLA, BARNHARDT & SHIPLEY, P.A. 2139 Palm Beach Lakes Boulevard West Palm Beach, Florida 33409</p>	<p>Counsel for Plaintiff</p>
<p>Jerold S. Solovy JENNER & BLOCK, LLC One IBM Plaza Suite 4400 Chicago, Illinois 60611</p>	<p>Counsel for Plaintiff</p>

G

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

97 AUG 25 PM 4:
N.D. ALABAMA

GEORGE F. KELLER, on Behalf of)
Himself and All Others Similarly)
Situated,)
)
Plaintiff,)
)
v.)
)
RONALD O. PERELMAN, et al.,)
)
Defendants.)

CIVIL ACTION NO. CV 97-N-2104-S

MOTION TO TRANSFER VENUE

Defendants Ronald O. Perelman, Mafco Holdings Inc. ("MAFCO"), MacAndrews and Forbes Holdings Inc. ("MacAndrews"), and Andrews Group Incorporated ("Andrews") moves this Honorable Court to transfer this action to the United States District Court for the Southern District of New York pursuant to 28 U.S.C. § 1404(a), for the convenience of the parties and witnesses and in the interest of justice.


N. Lee Cooper
A. Inge Selden III
Carranza M. Pryor

Attorneys for Defendants

OF COUNSEL:
MAYNARD, COOPER & GALE, P.C.
1901 Sixth Avenue North
2400 AmSouth/Harbert Plaza
Birmingham, Alabama 35203-2602
(205) 254-1000

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Motion to Transfer Venue has been served upon the following listed persons by placing a copy of the same in the United States mail, first class postage prepaid and properly addressed, on this 25th day of August, 1997.

Mr. David R. Donaldson
Mr. David J. Guin
Donaldson & Guin
The Carriage House
1314 Cobb Lane
Birmingham, AL 35205

Carrington M. Pryor
OF COUNSEL

355084

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

GEORGE F. KELLER, on Behalf of Him- self and All Others Similarly Situated,	§	
	§	
	§	
Plaintiff,	§	CIVIL ACTION CASE NUMBER
	§	CV-97-N-2104-S
-against-	§	
	§	
RONALD O. PERELMAN, MAFCO	§	DECLARATION OF BARRY F.
HOLDINGS, INC., MACANDREWS AND	§	SCHWARTZ PURSUANT TO 28
FORBES HOLDINGS, INC., and THE	§	U.S.C. § 1746 IN SUPPORT
ANDREWS GROUP, INC.,	§	OF DEFENDANTS' MOTION
	§	TO TRANSFER VENUE TO
	§	THE SOUTHERN DISTRICT
Defendants.	§	<u>OF NEW YORK</u>

Barry F. Schwartz declares as follows:

1. I am General Counsel of Andrews Group Incorporated ("Andrews"), Mafco Holdings Inc. ("MAFCO") and MacAndrews and Forbes Holdings Inc. ("MacAndrews") (collectively, the "Corporate Defendants"). As a result of my positions with the Corporate Defendants, I have personal knowledge of the facts set forth herein, except where noted to be upon information and belief. I submit this declaration in support of the defendants' motion to transfer venue to the Southern District of New York.
2. MAFCO is a Delaware corporation and maintains its principal place of business at 35 East 62nd Street, New York, New York 10021. MAFCO is not authorized to do business in Alabama and maintains no offices in Alabama.

3. MacAndrews is a Delaware corporation and maintains its principal place of business at 35 East 62nd Street, New York, New York 10021. MacAndrews is not authorized to do business in Alabama and maintains no offices in Alabama.

4. Andrews is a Delaware corporation. Andrews is not authorized to do business in Alabama and maintains no offices in Alabama.

5. All of the defendants' documents relating to the allegations in the Complaint are maintained at either MAFCO's or MacAndrews' headquarters in New York.

6. None of the defendants' documents relating to the allegations in the Complaint are located in Alabama.

7. All of the defendants' employees, officers or directors with knowledge relevant to the Complaint are currently employed at MAFCO's and MacAndrews' offices located in New York.

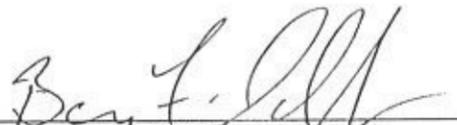
8. All of the employees of the Corporate Defendants, all former employees of Marvel, all of the investment bankers and all of the advisers who participated in formulating the so-called plan referred to in Plaintiff's complaint maintain their headquarters or are located in New York.

9. The underwriters and accountants involved in the issuance of the bond: which are the subject of the complaint are also located in New York: Merrill Lynch & Co. Bear, Stearns & Co. Inc. and Ernst & Young LLP.

10. In paragraphs 7 and 48 of the Complaint, plaintiff alleges that representatives of the defendants met with representatives of Fidelity Investments ("Fidelity") and Putnam Investments ("Putnam") on November 8, 1996. Although we deny the substance of the allegations concerning such meetings, upon information and belief, I am aware that Putnam's offices are located at One Post Office Square, Boston, Massachusetts and Fidelity's offices are located at 82 Devonshire Road, Boston, Massachusetts.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

Dated: August 20, 1997
New York, New York


BARRY F. SCHWARTZ

H

RECEIVED
CLERK
JAN 17 1996
ELEVENTH CIRCUIT

95-4520

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 95-4520

JAN 17 1996

TRUMPET VINE INVESTMENTS

v.

UNION CAPITAL PARTNERS, INC.

Corrected

APPEAL FROM THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 92-2032-Civ-Graham

REPLY BRIEF OF APPELLANT

CLARKE SILVERGLATE WILLIAMS & MONTGOMERY
New World Tower - Suite 2401
100 North Biscayne Boulevard
Miami, FL 33132
305/377-0700

HICKS, ANDERSON & BLUM, P.A.
New World Tower - Suite 2402
100 North Biscayne Boulevard
Miami, FL 33132
305/374-8171

HICKS, ANDERSON & BLUM, P.A.

SUITE 2402 NEW WORLD TOWER, 100 NORTH BISCAYNE BOULEVARD, MIAMI, FL 33132-2513 • TEL. (305) 374-8171

16div-001094

forth in the initial brief (pp.29-33) and below, Florida law clearly applies to UCP's entire breach of fiduciary duty claim.

First, governing Florida state case law holds that in all tort actions, including commercial injury claims for breach of fiduciary duty, the "*lex loci delicti*" or "place of injury" is presumptively controlling and only displaced if the other Restatement factors show that another jurisdiction has a more significant relationship. See Bates v. Cook, Inc., 509 So. 2d 1112, 1113-14 (Fla. 1987) ("we see no reason to treat an action for theft of trade secrets differently than other tort actions"); State Farm Mut. Auto. Ins. Co. v. Olsen, 406 So. 2d 1109, 1111 (Fla. 1981); Bishop v. Florida Specialty Paint Co., 389 So. 2d 999, 1001 (Fla. 1980); Tinwood N.V. v. Sun Banks, Inc., 570 So. 2d 955, 959 n.3 (Fla. 5th DCA 1990) (applying State Farm to breach of fiduciary duty claim).⁷ It is settled that the *lex loci delicti* of a fiduciary duty claim is the place of plaintiff's pecuniary injury. E.g., Sound Video Unlimited, Inc. v. Video Shack Inc., 700 F. Supp. 127, 133-34 (S.D. N.Y. 1988). Accordingly, the law of Florida - the situs of UCP's pecuniary injury and principal place of business - presumptively controls. Appellees' arguments to the contrary are meritless.⁸

⁷This Court has recognized that it is "bound to adhere to decisions of the state's intermediate appellate courts absent some persuasive indication that the state's highest court would decide the issue otherwise." Fioretti, 53 F.3d at 1236 n.28.

⁸The federal district court decisions cited by appellees do not support their argument. In International Tele-marine Corp. v. Malone & Assocs., Inc., 845 F. Supp. 1427 (D. Colo. 1994), the court merely found that the other MSR factors outweighed the place of injury. Id. at 1430-31. Significantly, the court relied on Bishop - a *lex loci delicti*-presumption case - in applying the MSR test to a breach of fiduciary duty claim. Id. Default Proof

Florida); Restatement of Conflict of Laws §377 n.4 (1934). Here, the evidence shows - and the court found - that this was Florida.

Moreover, appellees' contention that the evidence establishes that New York was the sole place of appellees' fraud is erroneous and hotly disputed. Florida is clearly the situs where UCP executed the confidentiality agreement and received NAFINSA's fraudulently stated intention to "enter into discussions slating to possible acquisitions, equity investments, partnerships or joint venture operations involving [Del Monte]." Aziz also had telephone conversations with Van Diepen from Florida on July 14 and 16 - and, of course, prior to the July 8 meeting in New York - during which appellees' fraudulent intentions of using UCP as an "entry ticket" were never revealed. Appellees surely committed fraud in Florida.

Further, in reliance on appellees' false statements of "joining forces," UCP not only arranged for appellees entrance into due diligence from Florida but exchanged Proprietary Information in Florida as well. Appellees' assertion that the parties agreed to enter the confidentiality agreement at their initial New York meeting is controverted by Van Diepen's own testimony that an agreement would not be reached until UCP obtained a due diligence date for the parties. Thus, UCP's acts of detrimental reliance occurred in great part if not exclusively in Florida.

As previously detailed, Florida is also the state where the parties' relationship was centered. Contrary to appellees' assertion, the subject of the entire transaction was obviously Del Monte which was headquartered in Florida and where the three-day due diligence meeting and exchange of Proprietary Information took place. Appellees additionally ignore that the confidentiality agreement was executed by UCP and Del Monte in Florida - i.e., the contract was formed in Florida. Under appellees' own case law, therefore, Florida plainly has the most significant relationship. See Merriman, 1993 U.S. Dist. LEXIS 10528 at *29-30:

Morgan Stanley & Co. Incorporated
1585 Broadway
New York, New York 10036

Gentlemen:

REDACTED

This agreement and the Engagement Letter shall be governed by and construed in accordance with the laws of the State of New York applicable to contracts executed in and to be performed in that state.

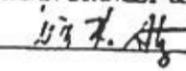
Very truly yours,
SUNBEAM CORPORATION

By: 

David C. Finkle
Executive Vice President
General Counsel

Accepted:

MORGAN STANLEY & CO. INCORPORATED

By: 

Date: September 5, 1997

F-752 1-930 P-006/011 MAR 02 '98 15:35

SUNBEAM OSTER CO

7672105

9/95

MORGAN STANLEY CONFIDENTIAL

0008964

16div-001098

J

K

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,)	
)	
Plaintiff,	)	Case No. 2003 CA 005045 AI
)	
v.	)	Judge Elizabeth T. Maass
)	
MORGAN STANLEY & CO., INC.,)	
)	
Defendant.)	

CPH'S RESPONSE TO MORGAN STANLEY & CO. INCORPORATED'S
FIRST SET OF REQUESTS FOR ADMISSION

Plaintiff Coleman (Parent) Holdings Inc. ("CPH"), by its attorneys and pursuant to Florida Rules of Civil Procedure 1.370, hereby responds and objects to Morgan Stanley & Co. Incorporated's ("Morgan Stanley") First Set of Request for Admission ("Requests for Admission") dated August 18, 2003:

INITIAL OBJECTIONS

1. CPH objects to the definition of "Transaction" because Morgan Stanley's definition mischaracterizes the transaction that closed on March 30, 1998 and because the definition is vague and ambiguous to the extent it includes "all related communications, agreements, and transactions." CPH will construe the term "Transaction" to mean the transaction by which CPH transferred its interest in The Coleman Company, Inc. ("Coleman") to Sunbeam Corporation ("Sunbeam").
2. CPH objects to the definition of "Coleman" to the extent that it includes CPH. CPH will construe the term "Coleman" to mean The Coleman Company, Inc.

3. CPH objects to the Requests for Admission on the basis that many of them are duplicative and constitute an unnecessary waste of time.

4. CPH objects to the Requests for Admission on the basis that they are abusive and vexatious. Many of the Requests for Admission concern factual allegations peculiarly within the possession of Morgan Stanley or third parties, which could be confirmed with less expense and burden on the parties through more traditional techniques of discovery.

5. CPH responds to Morgan Stanley's Requests for Admission without waiving the Initial Objections. CPH incorporates, as though fully set forth therein, these Initial Objections into each of the Responses and Objections set forth below.

RESPONSES AND FURTHER OBJECTIONS

1. The parties to this action are headquartered in New York.

RESPONSE: CPH admits that its principal place of business is in New York and also admits that Morgan Stanley has its principal place of business in New York, along with offices in Florida, including: West Palm Beach, Palm Beach, North Palm Beach, Delray Beach, Boca Raton, Coral Gables, Orlando, Miami, Aventura, Hallandale, Plantation, Fort Lauderdale, Coral Springs, Stuart, Naples, Winter Park, Eustis, Deland, Winter Haven, Ocala, Gainesville, St. Augustine, Ponte Vedra Beach, Jacksonville, Tampa, Clearwater, St. Petersburg, Port Richey, Ormand Beach, Tallahassee, Venice, Punta Gorda, Sarasota, Bradenton, Cape Coral, Melbourne, Port St. Lucie, Vero Beach, Indian River, and Pensacola.

2. The parties to this action maintain their principal place of business in New York.

RESPONSE: Admitted. Answering further, CPH states that Morgan Stanley has offices in Florida, including: West Palm Beach, Palm Beach, North Palm Beach, Delray Beach, Boca Raton, Coral Gables, Orlando, Miami, Aventura, Hallandale, Plantation, Fort Lauderdale, Coral Springs, Stuart, Naples, Winter Park, Eustis, Deland, Winter Haven, Ocala, Gainesville, St. Augustine, Ponte Vedra Beach, Jacksonville, Tampa, Clearwater, St. Petersburg, Port Richey, Ormand Beach, Tallahassee, Venice, Punta Gorda, Sarasota, Bradenton, Cape Coral, Melbourne, Port St. Lucie, Vero Beach, Indialantic, and Pensacola.

3. The personnel of the parties to this action that were involved with the Transaction are based in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH admits this request with respect to CPH. With respect to Morgan Stanley, CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated March 11, 1998. CPH believes that document was prepared by Morgan Stanley because it is attached to a Morgan Stanley cover sheet. That working group lists indicates that Morgan Stanley personnel involved in the Transaction were based in Chicago, Illinois and New York, New York. However, CPH is unable to verify the accuracy or completeness of that document, or whether it reflects the current location of Morgan Stanley personnel that were involved in the Transaction. CPH lacks knowledge or information sufficient to answer this request and therefore denies this request insofar as it relates to Morgan Stanley. Answering further, CPH states that Morgan Stanley has offices in Florida, including: West Palm Beach, Palm Beach, North Palm Beach, Delray Beach, Boca Raton, Coral Gables, Orlando, Miami, Aventura, Hallandale, Plantation, Fort Lauderdale, Coral Springs, Stuart, Naples, Winter Park, Eustis, Deland, Winter Haven, Ocala, Gainesville, St. Augustine, Ponte Vedra Beach, Jacksonville, Tampa, Clearwater, St. Petersburg, Port Richey, Ormand Beach, Tallahassee, Venice, Punta Gorda,

Sarasota, Bradenton, Cape Coral, Melbourne, Port St. Lucie, Vero Beach, Indian River, and Pensacola.

Answering further, upon information and belief, CPH states that more than one Morgan Stanley individual involved with the Transaction is not currently based in New York.

4. At the time of the Transaction, the personnel of the parties to this action that were involved with the Transaction were based in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH admits this request with respect to CPH. With respect to Morgan Stanley, CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated March 11, 1998. CPH believes that document was prepared by Morgan Stanley because it is attached to a Morgan Stanley cover sheet. That working group list indicates that Morgan Stanley personnel involved in the Transaction were based in Chicago, Illinois and New York, New York. However, CPH is unable to verify the accuracy or completeness of that document. CPH lacks knowledge or information sufficient to answer this request and therefore denies this request insofar as it relates to Morgan Stanley. Answering further, CPH states that personnel or representatives of Morgan Stanley and/or Morgan Stanley Senior Funding ("MSSF"): 1) traveled to Florida to conduct business with Sunbeam in connection with the Transaction; "the Credit Agreement" (the agreement entered into by Sunbeam Corporation, as borrower, with MSSF, First Union National Bank ("First Union"), and Bank of America National Trust and Savings Association ("Bank of America"), as lenders, dated March 30, 1998 and all amendments thereto); and "the Bank Facilities" (the Credit Agreement, including amendments, and all funds extended by MSSF, First Union, and/or Bank of America to Sunbeam pursuant to the Credit Agreement, including, but not limited to, Tranche A, Tranche B, and the Revolving Credit Facility); 2) traveled to Florida to conduct due diligence at Sunbeam in connection with the Transaction, the Credit Agreement, and the Bank Facilities; 3) telephoned Sunbeam personnel or

representatives located in Florida in connection with the Transaction, the Credit Agreement, and the Bank Facilities; 4) telephoned Arthur Andersen, LLP ("Arthur Andersen") personnel or representatives located in Florida in connection with the Transaction, the Credit Agreement, and the Bank Facilities; and 5) faxed, mailed, or caused to be delivered by other means documents and other communications to Sunbeam and Arthur Andersen personnel or representatives located in Florida in connection with the Transaction, the Credit Agreement, and the Bank Facilities.

5. At the time of the Transaction, no personnel of any party to this action that was involved with the Transaction was based in Florida.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH admits this request with respect to CPH. With respect to Morgan Stanley, CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated March 11, 1998. CPH believes that document was prepared by Morgan Stanley because it is attached to a Morgan Stanley cover sheet. That working group list indicates that Morgan Stanley personnel involved in the Transaction were based in Chicago, Illinois and New York, New York. However, CPH is unable to verify the accuracy or completeness of that document. CPH lacks knowledge or information sufficient to answer this request and therefore denies this request insofar as it relates to Morgan Stanley. Answering further, CPH states that personnel or representatives of Morgan Stanley and/or MSSF: 1) traveled to Florida to conduct business with Sunbeam in connection with the Transaction, the Credit Agreement, and the Bank Facilities; 2) traveled to Florida to conduct due diligence at Sunbeam in connection with the Transaction, the Credit Agreement, and the Bank Facilities; 3) telephoned Sunbeam personnel or representatives located in Florida in connection with the Transaction, the Credit Agreement, and the Bank Facilities; 4) telephoned Arthur Andersen personnel or representatives located in Florida in connection with the Transaction, the Credit Agreement, and the Bank Facilities; and 5) faxed,

mailed, or caused to be delivered by other means documents and other communications to Sunbeam and Arthur Andersen personnel or representatives located in Florida in connection with the Transaction, the Credit Agreement, and the Bank Facilities.

6. No current employee of any party to this action that was involved with the Transaction is based in Florida.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH admits this request with respect to CPH. With respect to Morgan Stanley, CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated March 11, 1998. CPH believes that document was prepared by Morgan Stanley because it is attached to a Morgan Stanley cover sheet. That working group list indicates that Morgan Stanley personnel involved in the Transaction were based in Chicago, Illinois and New York, New York. However, CPH is unable to verify the accuracy or completeness of that document or whether it reflects the current location of Morgan Stanley personnel that were involved in the Transaction. CPH lacks knowledge or information sufficient to answer this request and therefore denies this request insofar as it relates to Morgan Stanley. Answering further, CPH states that Morgan Stanley has offices in Florida, including: West Palm Beach, Palm Beach, North Palm Beach, Delray Beach, Boca Raton, Coral Gables, Orlando, Miami, Aventura, Hallandale, Plantation, Fort Lauderdale, Coral Springs, Stuart, Naples, Winter Park, Eustis, Deland, Winter Haven, Ocala, Gainesville, St. Augustine, Ponte Vedra Beach, Jacksonville, Tampa, Clearwater, St. Petersburg, Port Richey, Ormand Beach, Tallahassee, Venice, Punta Gorda, Sarasota, Bradenton, Cape Coral, Melbourne, Port St. Lucie, Vero Beach, Indian River, and Pensacola.

7. CPH, MS & Co., MSSF and MAFCO are headquartered in New York.

RESPONSE: CPH admits that CPH, Morgan Stanley, MSSF and MAFCO have their principal places of business in New York. Answering further, CPH states that Morgan Stanley has offices in Florida, including: West Palm Beach, Palm Beach, North Palm Beach, Delray Beach, Boca Raton, Coral Gables, Orlando, Miami, Aventura, Hallandale, Plantation, Fort Lauderdale, Coral Springs, Stuart, Naples, Winter Park, Eustis, Deland, Winter Haven, Ocala, Gainesville, St. Augustine, Ponte Vedra Beach, Jacksonville, Tampa, Clearwater, St. Petersburg, Port Richey, Ormand Beach, Tallahassee, Venice, Punta Gorda, Sarasota, Bradenton, Cape Coral, Melbourne, Port St. Lucie, Vero Beach, Indialantic, and Pensacola.

8. CPH, MS & Co., MSSF and MAFCO's principal places of business are in New York.

RESPONSE: Admitted. Answering further, CPH states that Morgan Stanley has offices in Florida, including: West Palm Beach, Palm Beach, North Palm Beach, Delray Beach, Boca Raton, Coral Gables, Orlando, Miami, Aventura, Hallandale, Plantation, Fort Lauderdale, Coral Springs, Stuart, Naples, Winter Park, Eustis, Deland, Winter Haven, Ocala, Gainesville, St. Augustine, Ponte Vedra Beach, Jacksonville, Tampa, Clearwater, St. Petersburg, Port Richey, Ormand Beach, Tallahassee, Venice, Punta Gorda, Sarasota, Bradenton, Cape Coral, Melbourne, Port St. Lucie, Vero Beach, Indialantic, and Pensacola.

9. The personnel of CPH, MS & Co., MSSF and MAFCO that were involved with the Transaction are based in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH admits this request with respect to CPH and MAFCO. Answering further, CPH states that some of the MAFCO personnel involved in the Transaction maintain residences in Florida. With respect to Morgan Stanley, CPH has made a reasonable inquiry and located a document entitled "Working Group List,"

dated March 11, 1998. CPH believes that document was prepared by Morgan Stanley because it is attached to a Morgan Stanley cover sheet. That working group list indicates that Morgan Stanley personnel involved in the Transaction were based in Chicago, Illinois and New York, New York. However, CPH is unable to verify the accuracy or completeness of that document, or whether it reflects the current location of Morgan Stanley personnel who were involved in the Transaction. CPH lacks knowledge or information sufficient to answer this request and therefore denies this request insofar as it relates to Morgan Stanley. Answering further, upon information and belief, CPH states that more than one Morgan Stanley individual involved with the Transaction is not currently based in New York. With respect to MSSF, CPH has made a reasonable inquiry and located multiple documents entitled "Working Group List" that appear to identify the personnel involved with the Transaction. However, those documents do not include personnel from MSSF. CPH lacks knowledge or information sufficient to answer this request and therefore denies this request insofar as it relates to MSSF. Answering further, CPH states that personnel or representatives of Morgan Stanley and/or MSSF: 1) traveled to Florida to conduct business with Sunbeam in connection with the Transaction, the Credit Agreement, and the Bank Facilities; 2) traveled to Florida to conduct due diligence at Sunbeam in connection with the Transaction, the Credit Agreement, and the Bank Facilities; 3) telephoned Sunbeam personnel or representatives located in Florida in connection with the Transaction, the Credit Agreement, and the Bank Facilities; 4) telephoned Arthur Andersen personnel or representatives located in Florida in connection with the Transaction, the Credit Agreement, and the Bank Facilities; and 5) faxed, mailed, or caused to be delivered by other means documents and other communications to Sunbeam and Arthur Andersen personnel or representatives located in Florida in connection with the Transaction, the Credit Agreement, and the Bank Facilities.

10. At the time of the Transaction, the personnel of CPH, MS & Co., MSSF and MAFCO that were involved with the Transaction were based in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH admits this request with respect to CPH and MAFCO. Answering further, CPH states that some of the MAFCO personnel involved in the Transaction maintained residences in Florida at the time of the Transaction. With respect to Morgan Stanley, CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated March 11, 1998. CPH believes that document was prepared by Morgan Stanley because it is attached to a Morgan Stanley cover sheet. That working group list indicates that Morgan Stanley personnel involved in the Transaction were based in Chicago, Illinois and New York, New York. However, CPH is unable to verify the accuracy or completeness of that document. CPH lacks knowledge or information sufficient to answer this request and therefore denies this request insofar as it relates to Morgan Stanley. With respect to MSSF, CPH has made a reasonable inquiry and located multiple documents entitled "Working Group List" that appear to identify the personnel involved with the Transaction. However, those documents do not include personnel from MSSF. CPH lacks knowledge or information sufficient to answer this request and therefore denies this request insofar as it relates to MSSF. Answering further, CPH states that personnel or representatives of Morgan Stanley and/or MSSF: 1) traveled to Florida to conduct business with Sunbeam in connection with the Transaction, the Credit Agreement, and the Bank Facilities; 2) traveled to Florida to conduct due diligence at Sunbeam in connection with the Transaction, the Credit Agreement, and the Bank Facilities; 3) telephoned Sunbeam personnel or representatives located in Florida in connection with the Transaction, the Credit Agreement, and the Bank Facilities; 4) telephoned Arthur Andersen personnel or representatives located in Florida in connection with the Transaction, the Credit Agreement, and the Bank Facilities; and 5) faxed, mailed, or caused to be delivered by other means documents and other

communications to Sunbeam and Arthur Andersen personnel or representatives located in Florida in connection with the Transaction, the Credit Agreement, and the Bank Facilities.

11. MS & Co. is headquartered in New York.

RESPONSE: CPH admits that Morgan Stanley has its principal place of business in New York. Answering further, CPH states that Morgan Stanley has offices in Florida, including: West Palm Beach, Palm Beach, North Palm Beach, Delray Beach, Boca Raton, Coral Gables, Orlando, Miami, Aventura, Hallandale, Plantation, Fort Lauderdale, Coral Springs, Stuart, Naples, Winter Park, Eustis, Deland, Winter Haven, Ocala, Gainesville, St. Augustine, Ponte Vedra Beach, Jacksonville, Tampa, Clearwater, St. Petersburg, Port Richey, Ormand Beach, Tallahassee, Venice, Punta Gorda, Sarasota, Bradenton, Cape Coral, Melbourne, Port St. Lucie, Vero Beach, Indialantic, and Pensacola.

12. MS & Co.'s principal place of business is in New York.

RESPONSE: Admitted. Answering further, CPH states that Morgan Stanley has offices in Florida, including: West Palm Beach, Palm Beach, North Palm Beach, Delray Beach, Boca Raton, Coral Gables, Orlando, Miami, Aventura, Hallandale, Plantation, Fort Lauderdale, Coral Springs, Stuart, Naples, Winter Park, Eustis, Deland, Winter Haven, Ocala, Gainesville, St. Augustine, Ponte Vedra Beach, Jacksonville, Tampa, Clearwater, St. Petersburg, Port Richey, Ormand Beach, Tallahassee, Venice, Punta Gorda, Sarasota, Bradenton, Cape Coral, Melbourne, Port St. Lucie, Vero Beach, Indialantic, and Pensacola.

13. At the time of the Transaction, no MS & Co. personnel involved with the Transaction were based in Florida.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated March 11, 1998. CPH believes that document was prepared by Morgan Stanley because it is attached to a Morgan Stanley cover sheet. That working group list indicates that Morgan Stanley personnel involved in the Transaction were based in Chicago, Illinois and New York, New York. However, CPH is unable to verify the accuracy or completeness of that document. CPH lacks knowledge or information sufficient to answer this request and therefore denies this request. Answering further, CPH states that personnel or representatives of Morgan Stanley and/or MSSF: 1) traveled to Florida to conduct business with Sunbeam in connection with the Transaction, the Credit Agreement, and the Bank Facilities; 2) traveled to Florida to conduct due diligence at Sunbeam in connection with the Transaction, the Credit Agreement, and the Bank Facilities; 3) telephoned Sunbeam personnel or representatives located in Florida in connection with the Transaction, the Credit Agreement, and the Bank Facilities; 4) telephoned Arthur Andersen personnel or representatives located in Florida in connection with the Transaction, the Credit Agreement, and the Bank Facilities; and 5) faxed, mailed, or caused to be delivered by other means documents and other communications Sunbeam and Arthur Andersen personnel or representatives located in Florida in connection with the Transaction, the Credit Agreement, and the Bank Facilities.

14. No MS & Co. personnel involved with the Transaction are based in Florida.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated March 11, 1998. CPH believes that document was prepared by Morgan Stanley because it is attached to a Morgan Stanley cover sheet. That working group list indicates that Morgan Stanley personnel involved in

the Transaction were based in Chicago, Illinois and New York, New York. However, CPH is unable to verify the accuracy or completeness of that document, or whether it reflects the current location of Morgan Stanley personnel who were involved in the Transaction. CPH lacks knowledge or information sufficient to answer this request and therefore denies this request. Answering further, CPH states that Morgan Stanley has offices in Florida, including: West Palm Beach, Palm Beach, North Palm Beach, Delray Beach, Boca Raton, Coral Gables, Orlando, Miami, Aventura, Hallandale, Plantation, Fort Lauderdale, Coral Springs, Stuart, Naples, Winter Park, Eustis, Deland, Winter Haven, Ocala, Gainesville, St. Augustine, Ponte Vedra Beach, Jacksonville, Tampa, Clearwater, St. Petersburg, Port Richey, Ormand Beach, Tallahassee, Venice, Punta Gorda, Sarasota, Bradenton, Cape Coral, Melbourne, Port St. Lucie, Vero Beach, Indialantic, and Pensacola.

15. MSSF is headquartered in New York.

RESPONSE: CPH admits that MSSF has its principal place of business in New York.

16. MSSF's principal place of business is in New York.

RESPONSE: Admitted.

17. At the time of the Transaction, no MSSF personnel involved with the Transaction were based in Florida.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located multiple documents entitled "Working Group List" that appear to identify the personnel involved with the Transaction. However, those documents do not include personnel from MSSF. CPH lacks knowledge or information sufficient to answer this request and therefore denies this request. Answering further, CPH states that personnel or representatives of

Morgan Stanley and/or MSSF: 1) traveled to Florida to conduct business in connection with the Transaction, the Credit Agreement, and the Bank Facilities; 2) traveled to Florida to conduct due diligence at Sunbeam in connection with the Transaction, the Credit Agreement, and the Bank Facilities; 3) telephoned Sunbeam personnel or representatives located in Florida in connection with the Transaction, the Credit Agreement, and the Bank Facilities; 4) telephoned Arthur Andersen personnel or representatives located in Florida in connection with the Transaction, the Credit Agreement, and the Bank Facilities; and 5) faxed, mailed, or caused to be delivered by other means documents and other communications to Sunbeam and Arthur Andersen personnel or representatives located in Florida in connection with the Transaction, the Credit Agreement, and the Bank Facilities.

18. No MSSF personnel involved with the Transaction are based in Florida.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry into the document in its possession, including working group lists produced by Morgan Stanley. However, those documents do not include personnel from MSSF. CPH lacks knowledge or information sufficient to answer this request and therefore denies this request.

19. CPH is headquartered in New York.

RESPONSE: CPH admits that its principal place of business is in New York.

20. CPH's principal place of business is in New York.

RESPONSE: Admitted.

Morgan Stanley and/or MSSF: 1) traveled to Florida to conduct business with Sunbeam in connection with the Transaction, the Credit Agreement, and the Bank Facilities; 2) traveled to Florida to conduct due diligence at Sunbeam in connection with the Transaction, the Credit Agreement, and the Bank Facilities; 3) telephoned Sunbeam personnel or representatives located in Florida in connection with the Transaction, the Credit Agreement, and the Bank Facilities; 4) telephoned Arthur Andersen personnel or representatives located in Florida in connection with the Transaction, the Credit Agreement, and the Bank Facilities; and 5) faxed, mailed, or caused to be delivered by other means documents and other communications to Sunbeam and Arthur Andersen personnel or representatives located in Florida in connection with the Transaction, the Credit Agreement, and the Bank Facilities.

18. No MSSF personnel involved with the Transaction are based in Florida.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry into the document in its possession, including working group lists produced by Morgan Stanley. However, those documents do not include personnel from MSSF. CPH lacks knowledge or information sufficient to answer this request and therefore denies this request.

19. CPH is headquartered in New York.

RESPONSE: CPH admits that its principal place of business is in New York.

20. CPH's principal place of business is in New York.

RESPONSE: Admitted.

21. At the time of the Transaction, the CPH personnel involved with the Transaction were based in New York.

RESPONSE: Consistent with CPH's interpretation of the term "Transaction," admitted.

22. The CPH personnel involved with the Transaction are based in New York.

RESPONSE: Consistent with CPH's interpretation of the term "Transaction," admitted.

23. No CPH personnel involved with the Transaction were based in Florida.

RESPONSE: Consistent with CPH's interpretation of the term "Transaction," admitted.

24. MAFCO is headquartered in New York.

RESPONSE: CPH admits that MAFCO has its principal place of business is in New York.

25. MAFCO's principal place of business is in New York.

RESPONSE: Admitted.

26. At the time of the Transaction, the MAFCO personnel involved with the Transaction were based in New York.

RESPONSE: Consistent with CPH's interpretation of the term "Transaction," admitted. Answering further, CPH states that some of the MAFCO personnel involved in the Transaction maintained residences in Florida at the time of the Transaction.

27. The MAFCO personnel involved with the Transaction are based in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," admitted. Answering further, CPH states that some of the MAFCO personnel involved in the Transaction maintain residences in Florida.

28. At the time of the Transaction, Ronald O. Perelman resided at 36 East 63rd Street in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH admits that, at the time of the Transaction, Ronald O. Perelman maintained a residence at 36 East 63rd Street, New York, New York. Answering further, CPH states that, at the time of the Transaction, Ronald O. Perelman maintained a residence in Palm Beach, Florida.

29. Ronald O. Perelman resides in New York.

RESPONSE: CPH admits that Ronald O. Perelman maintains a residence in New York. Answering further, CPH states that Ronald O. Perelman maintains a residence in Palm Beach, Florida.

30. At the time of the Transaction, Howard Gittis resided at 760 Park Avenue in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH admits that, at the time of the Transaction, Howard Gittis maintained a residence at 760 Park Avenue, New York, New York. Answering further, CPH states that, at the time of the Transaction, Howard Gittis maintained a residence in Palm Beach, Florida.

31. At the time of the Transaction, Howard Gittis resided at 500 Ox Pasture Lane in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH admits that, at the time of the Transaction, Howard Gittis maintained a residence at 500 Ox Pasture Lane in Southampton, New York. Answering further, CPH states that, at the time of the Transaction, Howard Gittis maintained a residence in Palm Beach, Florida.

32. Howard Gittis resides in New York.

RESPONSE: CPH admits that Howard Gittis maintains a residence in New York. Answering further, CPH states that Howard Gittis maintains a residence in Palm Beach, Florida.

33. At the time of the Transaction, James R. Maher resided at 775 Park Avenue in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH admits that, at the time of the Transaction, James R. Maher maintained a residence at 775 Park Avenue, New York, New York.

34. James R. Maher resides in New York.

RESPONSE: CPH admits that James R. Maher maintains a residence in New York.

35. At the time of the Transaction, Paul E. Shapiro resided at 8 East 75th Street in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH admits that at the time of the Transaction, Paul E. Shapiro maintained a residence at 8 East 75th Street, New York, New York. Answering further, CPH states that, at the time of the Transaction, Paul E. Shapiro maintained a residence in Boca Raton, Florida.

36. Paul E. Shapiro resides in New York.

RESPONSE: CPH admits that Paul E. Shapiro maintains a residence in New York. Answering further, CPH states that Paul E. Shapiro maintains a residence is in Florida.

37. At the time of the Transaction, Glenn P. Dickes resided at 90 Riverside Drive in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH admits that, at the time of the Transaction, Glenn P. Dickes maintained a residence at 90 Riverside Drive, New York, New York.

38. Glenn P. Dickes resides in New York.

RESPONSE: CPH admits that Glenn P. Dickes maintains a residence in New York.

39. At the time of the Transaction, Joram C. Salig resided at 155 West 15th Street in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH admits that, at the time of the Transaction, Joram C. Salig maintained a residence at 155 West 15th Street, New York, New York.

40. Joram C. Salig resides in New York.

RESPONSE: CPH admits that Joram C. Salig maintains a residence in New York.

41. At the time of the Transaction, Steven R. Isko resided at 400 East 70th Street in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH admits that, at the time of the Transaction, Steven R. Isko maintained a residence at 400 East 70th Street, New York, New York.

42. Steven R. Isko resides in New York.

RESPONSE: CPH admits that Steven R. Isko maintains a residence in New York.

43. At the time of the Transaction, J. Eric Hanson resided at 38 East 63rd Street in New York.

RESPONSE: Denied.

44. J. Eric Hanson resides in New York.

RESPONSE: CPH admits that J. Eric Hanson maintains a residence in New York.

45. At the time of the Transaction, no MAFCO personnel involved with the Transaction were based in Florida.

RESPONSE: Consistent with CPH's interpretation of the term "Transaction," admitted. Answering further, CPH states that some MAFCO personnel involved with the Transaction maintained residences in Florida at the time of the Transaction.

46. No MAFCO personnel involved with the Transaction are based in Florida.

RESPONSE: Consistent with CPH's interpretation of the term "Transaction," admitted. Answering further, CPH states that some of the MAFCO personnel involved in the Transaction maintain residences in Florida.

47. Sunbeam has offices in New York

RESPONSE: Admitted. Answering further, CPH states that the principal place of business for Sunbeam (now known as American Household, Inc.) is Boca Raton, Florida.

48. Sunbeam has an office at 660 Madison Avenue in New York.

RESPONSE: Admitted. Answering further, CPH states that the principal place of business for Sunbeam (now known as American Household, Inc.) is Boca Raton, Florida.

49. Sunbeam has an office at 2 Penn Plaza in New York.

RESPONSE: CPH has made a reasonable inquiry into the documents in its possession, contacted directory assistance, searched internet yellow pages, and searched the Westlaw electronic database of Dun & Bradstreet Business Directory for New York. However, none of these inquiries indicated that Sunbeam (now known as American Household, Inc.) has an office at 2 Penn Plaza, New York, New York. CPH lacks knowledge or information sufficient to answer this request and therefore denies this request. Answering further, CPH states that Sunbeam's principal place of business is in Boca Raton, Florida.

50. Sunbeam has an office in Syracuse, New York.

RESPONSE: CPH has made a reasonable inquiry into the document in its possession, contacted directory assistance, searched internet yellow pages, and searched the Westlaw electronic database of Dun & Bradstreet Business Directory for New York. However, none of these inquiries indicates that Sunbeam (now known as American Household, Inc.) has an office in Syracuse, New York. CPH lacks knowledge or information sufficient to answer this request and therefore denies this request.

Answering further, CPH states that Sunbeam's principal place of business is located in Boca Raton, Florida.

51. At the time of the Transaction, Jerry W. Levin resided at 15 East 70th Street in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH admits that, at the time of the Transaction, Jerry W. Levin maintained a residence at 15 East 70th Street, New York, New York.

52. Jerry W. Levin resides in New York.

RESPONSE: CPH admits that Jerry W. Levin maintains a residence in New York. Answering further, CPH states that Jerry W. Levin maintains a residence in Florida.

53. At the time of the Transaction, Howard Kristol had an office at 45 Rockefeller Plaza in New York.

RESPONSE: Admitted. Answering further, CPH states that Howard Kristol maintains a residence in Boca Raton, Florida.

54. At the time of the Transaction, Albert Dunlap rented an office at 45 Rockefeller Plaza in New York.

RESPONSE: Consistent with its interpretation of "Transaction," CPH has made a reasonable inquiry and located multiple documents entitled "Working Group List" that appear to identify the personnel involved with the Transaction. However, none of those documents identifies an office at 45 Rockefeller Plaza in New York for Albert Dunlap. CPH lacks knowledge or information sufficient to answer this request and therefore denies this request. Answering further, CPH states

that, at the time of the Transaction, Albert Dunlap maintained his principal office in Delray Beach, Florida and a residence in Boca Raton, Florida.

55. The investment bankers retained by Sunbeam and CPH for purposes of the Transaction were headquartered in New York.

RESPONSE: Consistent with its interpretation of "Transaction," CPH denies this request with respect to CPH. With respect to Sunbeam, CPH admits that Morgan Stanley had its principal place of business in New York, but also had offices in Florida and elsewhere outside of New York. Answering further, CPH states that other investment bankers retained by Sunbeam had their principal place of business outside of New York, such as Llama, which had its principal place of business in Arkansas.

56. The principal place of business of the investment bankers retained by Sunbeam and CPH for purposes of the Transaction was in New York.

RESPONSE: Consistent with its interpretation of "Transaction," CPH denies this request with respect to CPH. With respect to Sunbeam, CPH admits that Morgan Stanley had its principal place of business in New York, but also had offices in Florida and elsewhere outside of New York. Answering further, CPH states that other investment bankers retained by Sunbeam had their principal place of business outside of New York, such as Llama, which had its principal place of business in Arkansas.

57. Credit Suisse First Boston's U.S. headquarters is in New York.

RESPONSE: CPH admits that Credit Suisse First Boston has offices in New York, along with offices in Miami and Tampa, Florida, among other locations throughout the United States and the world.

58. Credit Suisse First Boston's principal U.S. place of business is in New York.

RESPONSE: CPH admits that Credit Suisse First Boston has offices in New York, along with offices in Miami and Tampa, Florida, among other locations throughout the United States and the world.

59. At the time of the Transaction, the Credit Suisse First Boston personnel involved with the Transaction were based in New York.

RESPONSE: Consistent with CPH's interpretation of the term "Transaction," admitted. Answering further, CPH states that Credit Suisse First Boston had offices in Florida at the time of the Transaction, among other locations throughout the United States and the world.

60. The Credit Suisse First Boston personnel involved with the Transaction are based in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry into the document in its possession and conducted searches of an electronic database, detailed in responses 61-64. However, that inquiry did not indicate the current location of the Credit Suisse First Boston personnel involved in the Transaction. CPH lacks knowledge or information sufficient to answer this request and therefore denies this request. Answering further, CPH states that Credit Suisse First Boston has offices in Miami and Tampa, Florida, among other locations throughout the United States and the world.

61. At the time of the Transaction, Robert J. Duffy resided at 401 East 81st Street in New York.

RESPONSE: Consistent with its interpretation of "Transaction," CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate an address for Robert J. Duffy at the time of the Transaction. CPH also has conducted a search of the LexisNexis "P-Trak Person Locator File" electronic database. That search indicates that, at some point in time, Robert J. Duffy maintained a residence at 401 East 81st Street, New York, New York. However, CPH is unable to verify the accuracy or completeness of that database or whether Robert J. Duffy maintained this address at the time of the Transaction. CPH lacks information or knowledge sufficient to answer this request and therefore denies this request.

62. Robert J. Duffy resides in New York.

RESPONSE: CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate whether Robert J. Duffy currently maintains a residence in New York. CPH also has conducted a search of the LexisNexis "P-Trak Person Locator File" electronic database. That search indicates that, at some point in time, Robert J. Duffy maintained a residence in New York. However, CPH is unable to verify the accuracy or completeness of that database, lacks information or knowledge sufficient to answer this request, and therefore denies this request.

63. At the time of the Transaction, Steven K. Geller resided at 219 East 81st Street in New York.

RESPONSE: Consistent with its interpretation of "Transaction," CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate an address for Steven K.

Geller at the time of the Transaction. CPH also has conducted a search of the LexisNexis "P-Trak Person Locator File" electronic database. That search indicates that, at some point in time, Steven K. Geller maintained a residence at 219 East 81st Street, New York, New York. However, CPH is unable to verify the accuracy or completeness of that database or whether Steven K. Geller maintained this address at the time of the Transaction. CPH lacks information or knowledge sufficient to answer this request and therefore denies this request.

64. Steven K. Geller resides in New York.

RESPONSE: CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate whether Steven K. Geller currently maintains a residence in New York. CPH also has conducted a search of the LexisNexis "P-Trak Person Locator File" electronic database. That search indicates that, at some point in time, Steven K. Geller maintained a residence in New York. However, CPH is unable to verify the accuracy or completeness of that database, lacks information or knowledge sufficient to answer this request, and therefore denies this request.

65. At the time of the Transaction, no Credit Suisse First Boston personnel involved with the Transaction were based in Florida.

RESPONSE: Consistent with CPH's interpretation of the term "Transaction," admitted. Answering further, CPH states that Credit Suisse First Boston had offices in Florida at the time of the Transaction, among other locations throughout the United States and the world.

66. No Credit Suisse First Boston personnel involved with the Transaction are based in Florida.

RESPONSE: Consistent with its interpretation of "Transaction," CPH has made a reasonable inquiry into the document in its possession and conducted searches of an electronic database, detailed in responses 61-64. However, that inquiry did not indicate the current location of the Credit Suisse First Boston personnel involved in the Transaction. CPH lacks knowledge or information sufficient to answer this request and therefore denies this request. Answering further, CPH states that Credit Suisse First Boston has offices in Miami and Tampa, Florida, among other locations throughout the United States and the world.

67. Ernst & Young LLP is headquartered in New York.

RESPONSE: CPH admits that Ernst & Young has offices in New York. Answering further, CPH states that Ernst & Young LLP has offices in West Palm Beach, Tampa, Miami, Jacksonville, Orlando and Fort Lauderdale, Florida, among other locations throughout the United States and the world.

68. Ernst & Young LLP's principal place of business is in New York.

RESPONSE: CPH admits that Ernst & Young LLP has offices in New York. Answering further, CPH states that Ernst & Young LLP has offices in West Palm Beach, Tampa, Miami, Jacksonville, Orlando and Fort Lauderdale, Florida, among other locations throughout the United States and the world.

69. At the time of the Transaction, the Ernst & Young LLP personnel involved with the Transaction were based in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH admits that some Ernst & Young LLP personnel involved with the Transaction were based in New York, but others were based outside of New York.

70. The Ernst & Young LLP personnel involved with the Transaction are based in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH admits that some Ernst & Young LLP personnel involved with the Transaction are based in New York, but others are based outside of New York.

71. At the time of the Transaction, Gerald D. Cohen resided at 505 East 79th Street in New York.

RESPONSE: Consistent with CPH's interpretation of the term "Transaction," CPH admits that, at the time of the Transaction, Gerald D. Cohen maintained a residence at 505 East 79th Street, New York, New York.

72. Gerald D. Cohen resides in New York.

RESPONSE: CPH admits that Gerald D. Cohen maintains a residence in New York.

73. At the time of the Transaction, Michael J. Fitzpatrick resided at 135 East 69th Street in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated March 11, 1998. CPH believes that document was prepared by Morgan Stanley because it is attached to a Morgan Stanley cover sheet. That working group list indicates an address of 135 East 69th Street, New York,

New York for Michael J. Fitzpatrick. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

74. Michael J. Fitzpatrick resides in New York.

RESPONSE: CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate whether Michael J. Fitzpatrick currently maintains a residence in New York. CPH also has conducted a search of the LexisNexis "P-Trak Person Locator File" electronic database. That search indicates that, at some point in time, Michael J. Fitzpatrick maintained a residence in New York. However, CPH is unable to verify the accuracy or completeness of that database, lacks information or knowledge sufficient to answer this request, and therefore denies this request.

75. At the time of the Transaction, Mitchell Rosendorf resided at 83-83 118th Street in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated March 11, 1998. CPH believes that document was prepared by Morgan Stanley because it is attached to a Morgan Stanley cover sheet. That working group list indicates an address of 83-83 118th Street, New York, New York for Mitchell Rosendorf. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

76. Mitchell Rosendorf resides in New York.

RESPONSE: CPH admits that Mitchell Rosendorf maintains a residence in Chappaqua, New York.

77. Arthur Andersen LLP is not headquartered in Florida.

RESPONSE: CPH admits that Arthur Andersen's principal place of business is Chicago, Illinois. Answering further, CPH states that, at the time of Transaction, Arthur Andersen had offices in West Palm Beach, Fort Lauderdale, and Miami, Florida, among other locations. Moreover, the principal auditors performing the Sunbeam 1996 and 1997 audits were based in Arthur Andersen's West Palm Beach and Fort Lauderdale, Florida offices.

78. Cooper [sic] & Lybrand LLP is headquartered in New York.

RESPONSE: CPH denies this request because Coopers & Lybrand no longer exists.

79. The law firms that advised Sunbeam and Coleman in connection with the Transaction were headquartered in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH admits that the law firm that advised Sunbeam had an office in New York, but also had offices in locations throughout the United States and the world. With respect to Coleman, CPH admits that one of the law firms that advised Coleman had its principal place of business in New York, but that other law firms that advised Coleman had their principal places of business outside of New York.

80. The principal place of business of all of the law firms that advised Sunbeam and Coleman in connection with the Transaction was in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH admits that the law firm that advised Sunbeam had an office in New York, but also had offices in locations throughout the United States and the world. With respect to Coleman, CPH admits that one of the law firms that

advised Coleman had its principal place of business in New York, but that other law firms that advised Coleman had their principal places of business outside of New York.

81. The lawyers that advised Sunbeam and CPH in connection with the Transaction were based in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH admits some of the lawyers that advised Sunbeam were based in New York, but that other lawyers that advised Sunbeam were based outside of New York. With respect to CPH, CPH admits that some of the lawyers that advised CPH were in New York, but that other lawyers that advised CPH were based outside of New York.

82. Wachtell Lipton Rosen & Katz is headquartered in New York.

RESPONSE: CPH admits that Wachtell Lipton Rosen & Katz's principal place of business is New York.

83. Wachtell Lipton Rosen & Katz's principal place of business is in New York.

RESPONSE: Admitted.

84. At the time of the Transaction, the Wachtell Lipton Rosen & Katz personnel involved with the Transaction were based in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH admits that, at the time of the Transaction, the Wachtell Lipton Rosen & Katz personnel involved with the Transaction were based in New York.

85. The Wachtell Lipton Rosen & Katz personnel involved with the Transaction are based in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH states that it has made a reasonable inquiry into the document in its possession and conducted searches of an electronic database, detailed in responses 86-113. However, that inquiry did not indicate the current location of the Wachtell Lipton Rosen & Katz personnel involved in the Transaction. CPH lacks knowledge or information sufficient to answer this request and therefore denies this request.

86. At the time of the Transaction, Martin Lipton resided at 550 Park Avenue in New York.

RESPONSE: Consistent with CPH's interpretation of the term "Transaction," CPH admits that, at the time of the Transaction, Martin Lipton maintained a residence at 550 Park Avenue, New York, New York.

87. Martin Lipton resides in New York.

RESPONSE: CPH admits that Martin Lipton maintains a residence in New York.

88. At the time of the Transaction, Adam O. Emmerich resided at 171 West 71st Street in New York.

RESPONSE: Consistent with CPH's interpretation of the term "Transaction," CPH admits that, at the time of the Transaction, Adam O. Emmerich maintained a residence at 171 West 71st Street, New York, New York.

89. Adam O. Emmerich resides in New York.

RESPONSE: CPH admits that Adam O. Emmerich maintains a residence in New York.

90. At the time of the Transaction, Steven A. Cohen resided at 250 West 99th Street in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated August 7, 1998. That working group list indicates an address of 250 West 99th Street, New York, New York for Steven A. Cohen. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

91. Steven A. Cohen resides in New York.

RESPONSE: CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate whether Steven A. Cohen currently maintains a residence in New York. CPH also has conducted a search of the LexisNexis "P-Trak Person Locator File" electronic database. That search indicates that, at some point in time, Steven A. Cohen maintained a residence in New York. However, CPH is unable to verify the accuracy or completeness of that database, lacks information or knowledge sufficient to answer this request, and therefore denies this request.

92. At the time of the Transaction, Frank L. Miller resided at 141 East 55th Street in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated August 7, 1998. That working group list indicates an address of 141 East 55th Street, New York, New York for Frank L. Miller. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

93. Frank L. Miller resides in New York.

RESPONSE: CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate whether Frank L. Miller currently maintains a residence in New York. CPH also has conducted a search of the LexisNexis "P-Trak Person Locator File" electronic database. That search indicates that, at some point in time, Frank L. Miller maintained a residence in New York. However, CPH is unable to verify the accuracy or completeness of that database, lacks information or knowledge sufficient to answer this request, and therefore denies this request.

94. At the time of the Transaction, Harold Novikoff resided at 369 East Shore Road in Kings Point, NY.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated August 7, 1998. That working group list indicates an address of 369 East Shore Road, Kings Point, New York for Harold Novikoff. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

95. Harold Novikoff resides in New York.

RESPONSE: CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate whether Harold Novikoff currently maintains a residence in New York. CPH also has conducted a search of the LexisNexis "P-Trak Person Locator File" electronic database. That search indicates that, at some point in time, Harold Novikoff maintained a residence in New York. However, CPH is unable to verify the accuracy or completeness of that database, lacks information or knowledge sufficient to answer this request, and therefore denies this request.

96. At the time of the Transaction, Peter C. Cannellos [sic] resided at 85 Sutton Manor in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated August 7, 1998. That working group list indicates an address of 85 Sutton Manor, New Rochelle, New York for Peter Canellos. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

97. Peter C. Cannellos [sic] resides in New York.

RESPONSE: CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate whether Peter C. Canellos currently maintains a residence in New York. CPH also has conducted a search of the LexisNexis "P-Trak Person Locator File" electronic database. That search indicates that, at some point in time, Peter C. Canellos maintained a residence in New York. However, CPH is unable to verify the accuracy or completeness of that database, lacks information or knowledge sufficient to answer this request, and therefore denies this request.

98. At the time of the Transaction, David M. Einhorn resided at 87 The Serpentine in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled Sunbeam Corporation entitled "Working Group List," dated August 7, 1998. That working group list indicates an address of 87 The Serpentine, Roslyn Estates, New York for David M. Einhorn. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

99. David M. Einhorn resides in New York.

RESPONSE: CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate whether David M. Einhorn currently maintains a residence in New York. CPH also has conducted a search of the LexisNexis "P-Trak Person Locator File" electronic database. That search indicates that, at some point in time, David M. Einhorn maintained a residence in New York. However, CPH is unable to verify the accuracy or completeness of that database, lacks information or knowledge sufficient to answer this request, and therefore denies this request.

100. At the time of the Transaction, Deborah L. Paul resided at One Astor Place in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated August 7, 1998. That working group list indicates an address of One Astor Place, New York, New York for Deborah L. Paul. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

101. Deborah L. Paul resides in New York.

RESPONSE: CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate whether Deborah L. Paul currently maintains a residence in New York. CPH also has conducted a search of the LexisNexis "P-Trak Person Locator File" electronic database. That search indicates that at some point in time, Deborah L. Paul maintained a residence in New York. However, CPH is unable to verify the accuracy or completeness of that database, lacks information or knowledge sufficient to answer this request and therefore denies this request.

102. At the time of the Transaction, Michael S. Katze [*sic*] resided at 150 Columbus Avenue in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated August 7, 1998. That working group list indicates an address of 150 Columbus Avenue, New York, New York for Michael S. Katzke. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

103. Michael S. Katze [*sic*] resides in New York.

RESPONSE: CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate whether Michael S. Katzke currently maintains a residence in New York. CPH also has conducted a search of the LexisNexis "P-Trak Person Locator File" electronic database. That search indicates that, at some point in time, Michael S. Katzke maintained a residence in New York. However, CPH is unable to verify the accuracy or completeness of that database, lacks information or knowledge sufficient to answer this request, and therefore denies this request.

104. At the time of the Transaction, Michael W. Schwartz resided at 5 Riverside Drive in New York.

RESPONSE: Consistent with CPH's interpretation of the term "Transaction," CPH admits that, at the time of the Transaction, Michael W. Schwartz maintained a residence at 5 Riverside Drive, New York, New York.

105. Michael W. Schwartz resides in New York.

RESPONSE: CPH admits that Michael W. Schwartz maintains a residence in New York.

106. At the time of the Transaction, Paul K. Rowe resided at 840 Park Avenue in New York.

RESPONSE: Consistent with CPH's interpretation of the term "Transaction," CPH admits that, at the time of the Transaction, Paul K. Rowe maintained a residence at 840 Park Avenue, New York, New York.

107. Paul K. Rowe resides in New York.

RESPONSE: CPH admits that Paul K. Rowe maintains a residence in New York.

108. At the time of the Transaction, Rachelle Silverberg resided at 201 East 87th Street in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated August 7, 1998. That working group list indicates an address of 201 East 87th Street, New York, New York for Rachelle Silverberg. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

109. Rachelle Silverberg resides in New York.

RESPONSE: CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate whether Rachelle Silverberg currently maintains a residence in New York. CPH also has conducted a search of the LexisNexis "P-Trak Person Locator File" electronic database. That

search indicates that, at some point in time, Rachelle Silverberg maintained a residence in New York. However, CPH is unable to verify the accuracy or completeness of that database, lacks information or knowledge sufficient to answer this request, and therefore denies this request.

110. At the time of the Transaction, Ilene Knable Gotts resided at 115 Central Park West in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated August 7, 1998. That working group list indicates an address of 115 Central Park West, New York, New York for Ilene Knable Gotts. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

111. Ilene Knable Gotts resides in New York.

RESPONSE: CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate whether Ilene Knable Gotts currently maintains a residence in New York. CPH also has conducted a search of the LexisNexis "P-Trak Person Locator File" electronic database. That search indicates that, at some point in time, Ilene Knable Gotts maintained a residence in New York. However, CPH is unable to verify the accuracy or completeness of that database, lacks information or knowledge sufficient to answer this request, and therefore denies this request.

112. At the time of the Transaction, Michael W. Jahnke resided at 10 Park Avenue in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated August 7, 1998. That working group list indicates an address of 10 Park Avenue, New York, New York for Michael W. Jahnke. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

113. Michael W. Jahnke resides in New York.

RESPONSE: CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate whether Michael W. Jahnke currently maintained a residence in New York. CPH also has conducted a search of the LexisNexis "P-Trak Person Locator File" electronic database. That search indicates that, at some point in time, Michael W. Jahnke maintained a residence in New York. However, CPH is unable to verify the accuracy or completeness of that database, lacks information or knowledge sufficient to answer this request, and therefore denies this request.

114. At the time of the Transaction, no Wachtell Lipton Rosen & Katz personnel involved with the Transaction were based in Florida.

RESPONSE: Consistent with CPH's interpretation of the term "Transaction," admitted.

115. No Wachtell Lipton Rosen & Katz personnel involved with the Transaction are based in Florida.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry into the document in its possession and conducted searches of an electronic database, detailed in responses 86-113. However, that inquiry did not indicate the current location

of the Wachtell Lipton Rosen & Katz personnel involved in the Transaction. CPH lacks knowledge or information sufficient to answer this request and therefore denies this request.

116. Skadden Arps Slate Meagher & Flom is headquartered in New York.

RESPONSE: CPH admits that the Skadden Arps Slate Meagher & Flom has an office in New York, but also has offices in locations throughout the United States and the world.

117. Skadden Arps Slate Meagher & Flom's principal place of business is in New York.

RESPONSE: CPH admits that the Skadden Arps Slate Meagher & Flom has an office in New York, but also has offices in locations throughout the United States and the world.

118. At the time of the Transaction, the Skadden Arps Slate Meagher & Flom personnel involved with the Transaction were based in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH admits that, at the time of the Transaction, some Skadden Arps Slate Meagher & Flom personnel involved with the Transaction were based in New York, but others were based outside of New York.

119. At the time of the Transaction, Blaine V. ("Finn") Fogg resided at 1185 Park Avenue in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated March 11, 1998. CPH believes that document was prepared by Morgan Stanley because it is attached to a Morgan Stanley cover sheet. That working group list indicates an address of 1185 Park Avenue, New York, New York for Blaine V. ("Finn") Fogg. However, CPH is unable to verify the accuracy or

completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request. Answering further, upon information and belief, CPH states that, at the time of the Transaction, Blaine V. ("Finn") Fogg maintained a residence in Palm Beach, Florida.

120. Blaine V. ("Finn") Fogg resides in New York.

RESPONSE: CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate whether Blaine V. ("Finn") Fogg currently maintains a residence in New York. CPH also has conducted a search of the LexisNexis "P-Trak Person Locator File" electronic database. That search indicates that, at some point in time, Blaine V. ("Finn") Fogg maintained a residence in New York. However, CPH is unable to verify the accuracy or completeness of that database, lacks information or knowledge sufficient to answer this request, and therefore denies this request. Answering further, upon information and belief, CPH states that Blaine V. ("Finn") Fogg maintains a residence in Palm Beach, Florida.

121. At the time of the Transaction, Timothy F. Nelson resided at 76-22 170th Street in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated February 24, 1998 and produced by Morgan Stanley. That working group list indicates an address of 76-22 170th Street, Flushing, New York for Timothy F. Nelson. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

122. Timothy F. Nelson resides in New York.

RESPONSE: CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate whether Timothy F. Nelson currently maintains a residence in New York. CPH also has conducted a search of the LexisNexis "P-Trak Person Locator File" electronic database. That search indicates that, at some point in time, Timothy F. Nelson maintained a residence in New York. However, CPH is unable to verify the accuracy or completeness of that database, lacks information or knowledge sufficient to answer this request, and therefore denies this request.

123. At the time of the Transaction, Mitchell J. Solomon resided at 1125 Park Avenue in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated February 24, 1998 and produced by Morgan Stanley. That working group list indicates an address of 1125 Park Avenue, New York, New York for Mitchell J. Solomon. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

124. Mitchell J. Solomon resides in New York.

RESPONSE: CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate whether Mitchell J. Solomon currently maintains a residence in New York. CPH also has conducted a search of the LexisNexis "P-Trak Person Locator File" electronic database. That search indicates that, at some point in time, Mitchell J. Solomon maintained a residence in New York. However, CPH is unable to verify the accuracy or completeness of that database, lacks information or knowledge sufficient to answer this request, and therefore denies this request.

125. At the time of the Transaction, William J. Weiss resided at 251 West 19th Street in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated February 24, 1998 and produced by Morgan Stanley. That working group list indicates an address of 251 West 19th Street, New York, New York for Bill Weiss. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

126. William J. Weiss resides in New York.

RESPONSE: CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate whether William J. Weiss currently maintains a residence in New York. CPH also has conducted a search of the LexisNexis "P-Trak Person Locator File" electronic database. That search indicates that, at some point in time, William J. Weiss maintained a residence in New York. However, CPH is unable to verify the accuracy or completeness of that database, lacks information or knowledge sufficient to answer this request, and therefore denies this request.

127. At the time of the Transaction, Stephen M. Banker resided at 155 East 34th Street in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated February 24, 1998 and produced by Morgan Stanley. That working group list indicates an address of 155 East 34th Street, New York, New York for Stephen M. Banker. However, CPH is unable to verify the

accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

128. Stephen M. Banker resides in New York.

RESPONSE: CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate whether Stephen M. Banker currently maintains a residence in New York. CPH also has conducted a search of the LexisNexis "P-Trak Person Locator File" electronic database. That search indicates that, at some point in time, Stephen M. Banker maintained a residence in New York. However, CPH is unable to verify the accuracy or completeness of that database, lacks information or knowledge sufficient to answer this request, and therefore denies this request.

129. At the time of the Transaction, Joseph P. Nisa resided at 62 Orchard Ridge Road in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located multiple documents entitled "Working Group List" that appear to identify the personnel involved with the Transaction. However, none of those documents identify an address for Joseph P. Nisa. CPH lacks knowledge or information sufficient to answer this request and therefore denies this request.

130. Joseph P. Nisa resides in New York.

RESPONSE: CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate whether Joseph P. Nisa currently maintains a residence in New York. CPH also has conducted a search of the LexisNexis "P-Trak Person Locator File" electronic database. That search indicates that, at some point in time, Joseph P. Nisa maintained a residence in New York. However,

CPH is unable to verify the accuracy or completeness of that database, lacks information or knowledge sufficient to answer this request, and therefore denies this request.

131. At the time of the Transaction, Richard L. Easton resided at The Mark Hotel on 25 East 77th Street in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated March 11, 1998. CPH believes that document was prepared by Morgan Stanley because it is attached to a Morgan Stanley cover sheet. That working group list indicates an address of The Mark Hotel, 25 East 77th Street, New York, New York for Richard L. Easton. CPH also has located a document entitled "Working Group List," dated February 24, 1998 and produced by Morgan Stanley. That working group list indicates an address 457 East Street Road, Kennett Square, Pennsylvania for Richard L. Easton. However, CPH is unable to verify the accuracy or completeness of those documents, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

132. Richard L. Easton resides in New York.

RESPONSE: CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate whether Richard L. Easton currently maintains a residence in New York. CPH also has conducted a search of the LexisNexis "P-Trak Person Locator File" electronic database. That search indicates that, at some point in time, Richard L. Easton maintained a residence in New York. However, CPH is unable to verify the accuracy or completeness of that database, lacks information or knowledge sufficient to answer this request, and therefore denies this request. Moreover, upon information and belief, Richard L. Easton's principal office is in Delaware, although he also works at times in New York.

133. At the time of the Transaction, Mark T. Shehan resided at 525 East 82nd Street in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated March 11, 1998. CPH believes that document was prepared by Morgan Stanley because it is attached to a Morgan Stanley cover sheet. That working group list indicates the following addresses for Mark T. Shehan: 525 East 82nd Street, New York, New York; 24 Lilac Road, Westhampton Beach, New York; and 16 Upper Ridge Road, Sharon, Connecticut. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

134. Mark T. Shehan resides in New York.

RESPONSE: CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate whether Mark T. Shehan currently maintains a residence in New York. CPH also has conducted a search of the LexisNexis "P-Trak Person Locator File" electronic database. That search indicates that, at some point in time, Mark T. Shehan maintained a residence in New York. However, CPH is unable to verify the accuracy or completeness of that database, lacks information or knowledge sufficient to answer this request, and therefore denies this request.

135. At the time of the Transaction, Peter J. Neckles resided at 16 North Chatsworth Avenue in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated March 11, 1998. CPH believes that document was prepared by Morgan Stanley because it is attached to a Morgan

Stanley cover sheet. That working group list indicates an address of 16 North Chatsworth, Larchmont, New York for Peter J. Neckles. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

136. Peter J. Neckles resides in New York.

RESPONSE: CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate whether Peter J. Neckles currently maintains a residence in New York. CPH also has conducted a search of the LexisNexis "P-Trak Person Locator File" electronic database. That search indicates that, at some point in time, Peter J. Neckles maintained a residence in New York. However, CPH is unable to verify the accuracy or completeness of that database, lacks information or knowledge sufficient to answer this request, and therefore denies this request.

137. At the time of the Transaction, Michele D. Gartand [*sic*] resided at 41 West 72nd Street in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated March 11, 1998. CPH believes that document was prepared by Morgan Stanley because it is attached to a Morgan Stanley cover sheet. That working group list indicates an address of 41 West 72nd Street, New York, New York for Michele D. Gartland. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

138. Michele D. Gartand [*sic*] resides in New York.

RESPONSE: CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate whether Michele D. Gartland currently maintains a residence in New York. CPH also has conducted a search of the LexisNexis "P-Trak Person Locator File" electronic database. That search indicates that, at some point in time, Michele D. Gartland maintained a residence in New York. However, CPH is unable to verify the accuracy or completeness of that database, lacks information or knowledge sufficient to answer this request, and therefore denies this request.

139. At the time of the Transaction, Gregory A. Femicola resided at 300 West 23rd Street in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated March 11, 1998. CPH believes that document was prepared by Morgan Stanley because it is attached to a Morgan Stanley cover sheet. That working group list indicates an address of 300 West 23rd Street, New York, New York for Gregory A. Femicola. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

140. Gregory A. Femicola resides in New York.

RESPONSE: CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate whether Gregory A. Femicola currently maintains a residence in New York. CPH also has conducted a search of the LexisNexis "P-Trak Person Locator File" electronic database. That search indicates that, at some point in time, Gregory A. Femicola maintained a residence in New York. However, CPH is unable to verify the accuracy or completeness of that database, lacks information or knowledge sufficient to answer this request, and therefore denies this request.

141. At the time of the Transaction, Adrian Deitz resided at 220 East 65th Street in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated March 11, 1998. CPH believes that document was prepared by Morgan Stanley because it is attached to a Morgan Stanley cover sheet. That working group list indicates an address of 220 East 65th Street, New York, New York for Adrian Deitz. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

142. Adrian Deitz resides in New York.

RESPONSE: CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate whether Adrian Deitz currently maintains a residence in New York. CPH also has conducted a search of the LexisNexis "P-Trak Person Locator File" electronic database. That search indicates that, at some point in time, Adrian Deitz maintained a residence in New York. However, CPH is unable to verify the accuracy or completeness of that database, lacks information or knowledge sufficient to answer this request, and therefore denies this request.

143. At the time of the Transaction, Leander C. Gray resided at 279 Clifton [*sic*] Street in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated March 11, 1998. CPH believes that document was prepared by Morgan Stanley because it is attached to a Morgan Stanley cover sheet. That working group list indicates an address of 279 Clinton Street, Brooklyn,

New York for Leander C. Gray. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

144. Leander C. Gray resides in New York.

RESPONSE: CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate whether Leander C. Gray currently maintains a residence in New York. CPH also has conducted a search of the LexisNexis "P-Trak Person Locator File" electronic database. That search indicates that, at some point in time, Leander C. Gray maintained a residence in New York. However, CPH is unable to verify the accuracy or completeness of that database, lacks information or knowledge sufficient to answer this request, and therefore denies this request.

145. At the time of the Transaction, Todd E. Freed resided at 403 East 69th Street in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated March 11, 1998. CPH believes that document was prepared by Morgan Stanley because it is attached to a Morgan Stanley cover sheet. That working group list indicates an address of 403 East 69th Street, New York, New York for Todd E. Freed. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

146. Todd E. Freed resides in New York.

RESPONSE: CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate whether Todd E. Freed currently maintains a residence in New York. CPH also has conducted a search of the LexisNexis "P-Trak Person Locator File" electronic database. That search indicates that, at some point in time, Todd E. Freed maintained a residence in New York. However, CPH is unable to verify the accuracy or completeness of that database, lacks information or knowledge sufficient to answer this request, and therefore denies this request.

147. At the time of the Transaction, no Skadden Arps Slate Meagher & Flom personnel involved with the Transaction were based in Florida.

RESPONSE: Consistent with CPH's interpretation of the term "Transaction," admitted.

148. No Skadden Arps Slate Meagher & Flom personnel involved with the Transaction are based in Florida.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry into the document in its possession and conducted searches of an electronic database, detailed in responses 119-146. However, that inquiry did not indicate the current location of the Skadden Arps Slate Meagher & Flom personnel involved in the Transaction. CPH lacks knowledge or information sufficient to answer this request and therefore denies this request.

149. Shearman & Sterling is headquartered in New York.

RESPONSE: CPH admits that Shearman & Sterling has offices in New York, but also has offices in locations throughout the United States and the world.

150. Shearman & Sterling's principal place of business is in New York.

RESPONSE: CPH admits that Shearman & Sterling has offices in New York, but also has offices in locations throughout the United States and the world.

151. At the time of the Transaction, the Shearman & Sterling personnel involved with the Transaction were based in New York.

RESPONSE: Consistent with CPH's interpretation of the term "Transaction," admitted.

152. The Shearman & Sterling personnel involved with the Transaction are based in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry into the document in its possession and conducted searches of an electronic database, detailed in responses 153-156. However, that inquiry did not indicate the current location of the Shearman & Sterling personnel involved in the Transaction. CPH lacks knowledge or information sufficient to answer this request and therefore denies this request.

153. At the time of the Transaction, Bonnie Greaves resided at 473 West End Avenue in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located multiple documents entitled "Working Group List" that appear to identify the personnel involved with the Transaction. However, those documents do not identify an address for Bonnie Greaves. CPH lacks knowledge or information sufficient to answer this request and therefore denies this request.

154. Bonnie Greaves resides in New York.

RESPONSE: CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate whether Bonnie Greaves currently maintains a residence in New York. CPH also has conducted a search of the LexisNexis "P-Trak Person Locator File" electronic database. That search indicates that, at some point in time, Bonnie Greaves maintained a residence in New York. However, CPH also has reviewed Shearman & Sterling's website and that website indicates that Bonnie Greaves currently maintains a residence in London, England. CPH is unable to verify the accuracy or completeness of the LexisNexis database or the Shearman website, lacks information or knowledge sufficient to answer this request, and therefore denies this request.

155. At the time of the Transaction, Allesandro C. De Giorgis resided at 244 Madison Avenue in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located multiple documents entitled "Working Group List" that appear to identify the personnel involved with the Transaction. However, those documents do not identify an address for Allesandro C. De Giorgis, and therefore, CPH lacks knowledge or information sufficient to answer this request and therefore denies this request.

156. Allesandro C. De Giorgis resides in New York.

RESPONSE: CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate whether Allesandro C. De Giorgis currently maintains a residence in New York. CPH also has conducted a search of the LexisNexis "P-Trak Person Locator File" electronic database. That search indicates that, at some point in time, Allesandro C. De Giorgis maintained a residence in New York. However, CPH is unable to verify the accuracy or completeness of that

database, lacks information or knowledge sufficient to answer this request, and therefore denies this request.

157. At the time of the Transaction, no Shearman & Sterling personnel involved with the Transaction were based in Florida.

RESPONSE: Consistent with CPH's interpretation of the term "Transaction," admitted.

158. No Shearman & Sterling personnel involved with the Transaction are based in Florida.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry into the document in its possession and conducted searches of an electronic database, detailed in responses 153-156. However, that inquiry did not indicate the current location of the Shearman & Sterling personnel involved in the Transaction. CPH lacks knowledge or information sufficient to answer this request and therefore denies this request.

159. Davis Polk & Wardwell is headquartered in New York.

RESPONSE: CPH has made a reasonable inquiry and reviewed Davis Polk & Wardwell's website. According to this website, Davis Polk & Wardwell has its largest office in New York but also has offices in locations throughout the United States and the world. However, CPH is unable to verify the accuracy or completeness of this website, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

160. Davis Polk & Wardwell's principal place of business is in New York.

RESPONSE: CPH has made a reasonable inquiry and reviewed Davis Polk & Wardwell's website.

According to this website, Davis Polk & Wardwell has its largest office in New York but also has offices in locations throughout the United States and the world. However, CPH is unable to verify the accuracy or completeness of this website, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

161. At the time of the Transaction, the Davis Polk & Wardwell personnel involved with the Transaction were based in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated March 11, 1998. CPH believes that document was prepared by Morgan Stanley because it is attached to a Morgan Stanley cover sheet. That working group list indicates New York addresses for the Davis Polk & Wardwell attorneys involved with the Transaction. However, CPH is unable to verify the accuracy or completeness of that working group list, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

162. The Davis Polk & Wardwell personnel involved with the Transaction are based in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry into the document in its possession and conducted searches of an electronic database, detailed in responses 164-177. However, that inquiry did not indicate the current location of the Davis Polk & Wardwell personnel involved in the Transaction. CPH lacks knowledge or information sufficient to answer this request and therefore denies this request.

163. At the time of the Transaction, no Davis Polk & Wardwell attorneys involved with the Transaction were based in Florida.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated March 11, 1998. CPH believes that document was prepared by Morgan Stanley because it is attached to a Morgan Stanley cover sheet. That working group list indicates New York addresses for the Davis Polk & Wardwell attorneys involved with the Transaction. However, CPH is unable to verify the accuracy or completeness of that working group list, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

164. At the time of the Transaction, Alan Dean resided at 30 Hampton Road in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated March 11, 1998. CPH believes that document was prepared by Morgan Stanley because it is attached to a Morgan Stanley cover sheet. That working group list indicates an address of 30 Hampton Road, Scarsdale, New York for Alan Dean. However, CPH is unable to verify the accuracy or completeness of that working group list, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

165. Alan Dean resides in New York.

RESPONSE: CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate whether Alan Dean currently maintains a residence in New York. CPH also has conducted a search of the LexisNexis "P-Trak Person Locator File" electronic database. That search indicates that, at some point in time, Alan Dean maintained a residence in New York. However,

163. At the time of the Transaction, no Davis Polk & Wardwell personnel involved with the Transaction were based in Florida.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated March 11, 1998. CPH believes that document was prepared by Morgan Stanley because it is attached to a Morgan Stanley cover sheet. That working group list indicates New York addresses for the Davis Polk & Wardwell attorneys involved with the Transaction. However, CPH is unable to verify the accuracy or completeness of that working group list, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

164. At the time of the Transaction, Alan Dean resided at 30 Hampton Road in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated March 11, 1998. CPH believes that document was prepared by Morgan Stanley because it is attached to a Morgan Stanley cover sheet. That working group list indicates an address of 30 Hampton Road, Scarsdale, New York for Alan Dean. However, CPH is unable to verify the accuracy or completeness of that working group list, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

165. Alan Dean resides in New York.

RESPONSE: CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate whether Alan Dean currently maintains a residence in New York. CPH also has conducted a search of the LexisNexis "P-Trak Person Locator File" electronic database. That search indicates that, at some point in time, Alan Dean maintained a residence in New York. However,

CPH is unable to verify the accuracy or completeness of that database, lacks information or knowledge sufficient to answer this request, and therefore denies this request.

166. At the time of the Transaction, Peter Douglas resided at 328 East 51st Street in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated March 11, 1998. CPH believes that document was prepared by Morgan Stanley because it is attached to a Morgan Stanley cover sheet. That working group list indicates an address of 328 East 51st Street, New York, New York for Peter Douglas. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

167. Peter Douglas resides in New York.

RESPONSE: CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate whether Peter Douglas currently maintains a residence in New York. CPH also has conducted a search of the LexisNexis "P-Trak Person Locator File" electronic database. That search indicates that, at some point in time, Peter Douglas maintained a residence in New York. However, CPH is unable to verify the accuracy or completeness of that database, lacks information or knowledge sufficient to answer this request, and therefore denies this request.

168. At the time of the Transaction, Peter Levin resided at 30 West 60th Street in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated March 11, 1998. CPH believes that document was prepared by Morgan Stanley because it is attached to a Morgan Stanley cover sheet. That working group list indicates an address of 30 West 60th Street, New York, New York for Peter Levin. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

169. Peter Levin resides in New York.

RESPONSE: CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate whether Peter Levin currently maintains a residence in New York. CPH also has conducted a search of the LexisNexis "P-Trak Person Locator File" electronic database. That search indicates that, at some point in time, Peter Levin maintained a residence in New York. However, CPH is unable to verify the accuracy or completeness of that database, lacks information or knowledge sufficient to answer this request, and therefore denies this request.

170. At the time of the Transaction, James Lurie resided at 130 Cedar Avenue in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated March 11, 1998 and prepared by Morgan Stanley. That working group list indicates an address of 130 Cedar Avenue, Hewlett Bay Park, New York for James Lurie. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

171. James Lurie resides in New York.

RESPONSE: CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate whether James Lurie currently maintains a residence in New York. CPH also has conducted a search of the LexisNexis "P-Trak Person Locator File" electronic database. That search indicates that, at some point in time, James Lurie maintained a residence in New York. However, CPH is unable to verify the accuracy or completeness of that database, lacks information or knowledge sufficient to answer this request, and therefore denies this request.

172. At the time of the Transaction, Alexander Kwit resided at 305 West 72nd Street in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated March 4, 1998. CPH believes that document was prepared by Morgan Stanley because it is attached to a Morgan Stanley cover sheet. That working group list indicates an address of 305 West 72nd Street, New York, New York for Alexander Kwit. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

173. Alexander Kwit resides in New York.

RESPONSE: CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate whether Alexander Kwite currently maintains a residence in New York. CPH also has conducted a search of the LexisNexis "P-Trak Person Locator File" electronic database. That search indicates that, at some point in time, Alexander Kwit maintained a residence in New York.

However, CPH is unable to verify the accuracy or completeness of that database, lacks information or knowledge sufficient to answer this request, and therefore denies this request.

174. At the time of the Transaction, William Megevick resided at 1170 Fifth Avenue in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated March 11, 1998. CPH believes that document was prepared by Morgan Stanley because it is attached to a Morgan Stanley cover sheet. That working group list indicates an address of 305 West 72nd Street, New York, New York for William Megevick. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

175. William Megevick resides in New York.

RESPONSE: CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate whether William Megevick currently maintains a residence in New York. CPH also has conducted a search of the LexisNexis "P-Trak Person Locator File" electronic database. That search indicates that, at some point in time, William Megevick maintained a residence in New York. However, CPH is unable to verify the accuracy or completeness of that database, lacks information or knowledge sufficient to answer this request, and therefore denies this request.

176. At the time of the Transaction, Heather Stack resided at 585 West End Avenue in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated March 11, 1998 and prepared by Morgan Stanley. That working group list indicates an address of 585 West End Avenue, New York, New York for Heather Stack. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

177. Heather Stack resides in New York.

RESPONSE: CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate whether Heather Stack currently maintains a residence in New York. CPH also has conducted a search of the LexisNexis "P-Trak Person Locator File" electronic database. That search indicates that, at some point in time, Heather Stack maintained a residence in New York. However, CPH is unable to verify the accuracy or completeness of that database, lacks information or knowledge sufficient to answer this request, and therefore denies this request.

178. No Davis Polk & Wardwell personnel involved with the Transaction are based in Florida.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry into the document in its possession and conducted searches of an electronic database, detailed in responses 164-177. However, that inquiry did not indicate the current location of the Davis Polk & Wardwell personnel involved in the Transaction. CPH lacks knowledge or information sufficient to answer this request and therefore denies this request.

179. At the time of the Transaction, the public relations firms involved with the Transaction were based in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry with respect to the public relations firm Hill & Knowlton and located a document entitled "Working Group List," dated February 20, 1998 and produced by Morgan Stanley. That working group list indicates a New York address for Hill & Knowlton. With respect to the public relations firm Sard & Verbinnen & Co., Inc., CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated August 7, 1998. That working group list indicates a New York address for Sard & Verbinnen & Co., Inc. However, CPH is unable to verify the accuracy or completeness of those documents, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

180. The public relations firms involved with the Transaction are based in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry into the document in its possession with respect to Hill & Knowlton. That inquiry did not indicate whether Hill & Knowlton is based in New York. CPH also has reviewed Hill & Knowlton's website. According to this website, Hill & Knowlton has its U.S. headquarters in New York, but also has offices in Miami and Tampa, Florida, among other locations throughout the United States. However, CPH is unable to verify the accuracy or completeness of this website, lacks knowledge or information sufficient to answer this request, and therefore denies this request insofar as it relates to Hill & Knowlton. With respect to Sard Verbinnen & Company, CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate whether Sard Verbinnen & Company is based in New York. CPH also has reviewed the website of Citigate Sard Verbinnen, the successor to Sard Verbinnen & Company. According to this website, Citigate Sard

Verbinnen has locations in Chicago, Illinois and New York, New York. However, CPH is unable to verify the accuracy or completeness of this website, lacks knowledge or information sufficient to answer this request, and therefore denies this request insofar as it relates to Sard Verbinnen & Company.

181. At the time of the Transaction, none of the public relations firms involved with the Transactions were based in Florida.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry with respect to Hill & Knowlton and located a document entitled "Working Group List," dated February 20, 1998 and produced by Morgan Stanley. That working group list indicates a New York address for Hill & Knowlton. With respect to Sard & Verbinnen & Co., Inc., CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated August 7, 1998. That working group list indicates a New York address for Sard & Verbinnen & Co., Inc. However, CPH is unable to verify the accuracy or completeness of those documents, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

182. None of the public relations firms involved with the Transaction are based in Florida.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry into the document in its possession with respect to Hill & Knowlton. That inquiry did not indicate whether Hill & Knowlton is based in Florida. CPH also has reviewed Hill & Knowlton's website. According to this website, Hill & Knowlton has its U.S. headquarters in New York, but also has offices in Miami and Tampa, Florida, among other locations throughout the United States. However, CPH is unable to verify the accuracy or completeness of this website, lacks knowledge or information sufficient to answer this request, and therefore denies this request insofar

as it relates to Hill & Knowlton. With respect to Sard Verbinnen & Company, CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate whether Citigate Sard Verbinnen, the successor to Sard Verbinnen & Company, is based in Florida. CPH also has reviewed the website of Citigate Sard Verbinnen. According to this website, Citigate Sard Verbinnen has locations in Chicago, Illinois and New York, New York. However, CPH is unable to verify the accuracy or completeness of this website and therefore, lacks knowledge or information sufficient to answer this request, and therefore denies this request insofar as it relates to Sard Verbinnen & Company.

183. Hill & Knowlton is headquartered in New York.

RESPONSE: CPH has made a reasonable inquiry and reviewed Hill & Knowlton's website. According to this website, Hill & Knowlton has its headquarters in New York, but also has offices in Miami and Tampa, Florida, among other locations throughout the United States. However, CPH is unable to verify the accuracy or completeness of this website, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

184. Hill & Knowlton's principal place of business is in New York.

RESPONSE: CPH has made a reasonable inquiry and reviewed Hill & Knowlton's website. According to this website, Hill & Knowlton has its headquarters in New York, but also has offices in Miami and Tampa, Florida, among other locations throughout the United States. However, CPH is unable to verify the accuracy or completeness of this website, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

185. At the time of the Transaction, the Hill & Knowlton personnel involved with the Transaction were based in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated February 20, 1998 and produced by Morgan Stanley. That working group list indicates a New York address for Hill & Knowlton. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

186. The Hill & Knowlton personnel involved with the Transaction are based in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry into the document in its possession and conducted searches of Hill & Knowlton's website. However, that inquiry did not indicate the current location of the Hill & Knowlton personnel involved in the Transaction. CPH lacks knowledge or information sufficient to answer this request and therefore denies this request.

187. At the time of the Transaction, no Hill & Knowlton personnel involved with the Transaction were based in Florida.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated February 20, 1998 and produced by Morgan Stanley. That working group list indicates a New York address for Hill & Knowlton. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

188. No Hill & Knowlton personnel involved with the Transaction are based in Florida.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry into the document in its possession and conducted searches of Hill & Knowlton's website. However, that inquiry did not indicate the current location of the Hill & Knowlton personnel involved in the Transaction. CPH lacks knowledge or information sufficient to answer this request and therefore denies this request.

189. Sard Verbinnen & Company is headquartered in New York.

RESPONSE: CPH has made a reasonable inquiry and reviewed the website of Citigate Sard Verbinnen, the successor to Sard Verbinnen & Company. According to this website, Citigate Sard Verbinnen has locations in Chicago, Illinois and New York, New York. However, CPH is unable to verify the accuracy or completeness of this website, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

190. Sard Verbinnen & Company's principal place of business is in New York.

RESPONSE: CPH has made a reasonable inquiry and reviewed the website of Citigate Sard Verbinnen, the successor to Sard Verbinnen & Company. According to this website, Citigate Sard Verbinnen has locations in Chicago, Illinois and New York, New York. However, CPH is unable to verify the accuracy or completeness of this website, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

191. At the time of the Transaction, the Sard Verbinnen & Company personnel involved with the Transaction were based in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated August 7, 1998.

That working group list indicates New York addresses for Sard & Verbinnen & Co., Inc. personnel involved with the Transaction. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

192. The Sard Verbinnen & Company personnel involved with the Transaction are based in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry into the document in its possession and has reviewed the website of Citigate Sard Verbinnen, the successor to Sard Verbinnen & Company. However, that inquiry did not indicate the current location of the Sard Verbinnen & Company personnel involved in the Transaction. CPH lacks knowledge or information sufficient to answer this request and therefore denies this request.

193. At the time of the Transaction, no Sard Verbinnen & Company personnel involved with the Transaction were based in Florida.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated August 7, 1998. That working group list indicates New York addresses for Sard & Verbinnen & Co., Inc. personnel involved with the Transaction. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

194. No Sard Verbinnen personnel involved with the Transaction are based in Florida.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry into the document in its possession and has reviewed the website of Citigate Sard Verbinnen, the successor to Sard Verbinnen & Company. However, that inquiry did not indicate the current location of the Sard Verbinnen & Company personnel involved in the Transaction. CPH lacks knowledge or information sufficient to answer this request and therefore denies this request.

195. None of the lenders involved with the Transaction are headquartered in Florida.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry with respect to First Union, which has since merged with Wachovia, and reviewed its website. According to this website, Wachovia has its headquarters in Charlotte, North Carolina, as well as has offices in Florida, among other locations throughout the United States. However, CPH is unable to verify the accuracy or completeness of this website, lacks knowledge or information sufficient to answer this request, and therefore denies this request insofar as it relates to First Union. With respect to Bank of America, CPH has made a reasonable inquiry and reviewed its website. According to this website, Bank of America lists its corporate address as Charlotte, North Carolina, but also has offices in Florida, among other locations throughout the United States. However, CPH is unable to verify the accuracy or completeness of this website, lacks knowledge or information sufficient to answer this request, and therefore denies this request insofar as it relates to Bank of America. With respect to MSSF, CPH admits that MSSF's principal place of business is not in Florida.

196. None of the lenders involved with the Transaction have their principal place of business in Florida.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry with respect to First Union, which has since merged with Wachovia, and reviewed its website. According to this website, Wachovia has its headquarters in Charlotte, North Carolina, as well as has offices in Florida, among other locations throughout the United States. However, CPH is unable to verify the accuracy or completeness of this website, lacks knowledge or information sufficient to answer this request, and therefore denies this request insofar as it relates to First Union. With respect to Bank of America, CPH has made a reasonable inquiry and reviewed its website. According to this website, Bank of America lists its corporate address as Charlotte, North Carolina, but also has offices in Florida, among other locations throughout the United States. However, CPH is unable to verify the accuracy or completeness of this website, lacks knowledge or information sufficient to answer this request, and therefore denies this request insofar as it relates to Bank of America. With respect to MSSF, CPH admits that MSSF's principal place of business is not in Florida.

197. First Union, now known as Wachovia, is headquartered in Charlotte, North Carolina.

RESPONSE: CPH has made a reasonable inquiry with respect to First Union, which has since merged with Wachovia, and reviewed its website. According to this website, Wachovia has its headquarters in Charlotte, North Carolina, as well as has offices in Florida, among other locations throughout the United States. However, CPH is unable to verify the accuracy or completeness of this website, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

198. First Union's principal place of business is in Charlotte, North Carolina.

RESPONSE: CPH denies this request because First Union no longer exists.

199. At the time of the Transaction, no First Union personnel involved in the Transaction were based in Florida.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated March 11, 1998. CPH believes that document was prepared by Morgan Stanley because it is attached to a Morgan Stanley cover sheet. That working group list indicates addresses in North Carolina and Florida for the First Union personnel involved in the Transaction. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request. Answering further, CPH states on that information and belief, M. Walker Duvall, Senior Vice President of Corporate Banking at First Union, maintained an office and a residence in Florida at the time of the Transaction. CPH further states that on information and belief, William Rutter, Senior Vice President of Private Banking at First Union, maintained an office and a residence in Florida at the time of the Transaction.

200. None of the First Union personnel involved with the Transaction are based in Florida.

RESPONSE: CPH admits this request because First Union no longer exists.

201. Bank of America is headquartered in Charlotte, North Carolina.

RESPONSE: CPH has made a reasonable inquiry and reviewed Bank of America's website. According to this website, Bank of America lists its corporate address as Charlotte, North Carolina, but also has offices in Florida, among other locations throughout the United States. However, CPH is unable to verify the accuracy or completeness of this website, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

202. Bank of America's principal place of business is in Charlotte, North Carolina.

RESPONSE: CPH has made a reasonable inquiry and reviewed Bank of America's website. According to this website, Bank of America lists its corporate address as Charlotte, North Carolina, but also has offices in Florida, among other locations throughout the United States. However, CPH is unable to verify the accuracy or completeness of this website, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

203. At the time of the Transaction, no Bank of America personnel involved in the Transaction were based in Florida.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated March 11, 1998. CPH believes that document was prepared by Morgan Stanley because it is attached to a Morgan Stanley cover sheet. That working group list indicates addresses in New York and Georgia for the Bank of America personnel involved in the Transaction. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

204. None of the Bank of America personnel involved with the Transaction are based in Florida.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry into the document in its possession and reviewed the website of Bank of America. However, that inquiry did not indicate the current location of the Bank of America personnel involved with the Transaction. CPH lacks knowledge or information sufficient to answer this request and therefore denies this request.

205. BancAmerica Robertson Stephens is based in New York.

RESPONSE: CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated March 11, 1998. CPH believes that document was prepared by Morgan Stanley because it is attached to a Morgan Stanley cover sheet. That working group list indicates an address of New York, New York for BancAmerica Robertson Stephens. However, CPH is unable to verify the accuracy or completeness of that document, or whether it reflects where BancAmerica Robertson Stephens currently is based, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

206. BancAmerica Robertson Stephens's principal place of business is in New York.

RESPONSE: CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated March 11, 1998. CPH believes that document was prepared by Morgan Stanley because it is attached to a Morgan Stanley cover sheet. That working group list indicates an address of New York, New York for BancAmerica Robertson Stephens. However, CPH is unable to verify the accuracy or completeness of that document, or whether it reflects the current principal place of business. CPH lacks knowledge or information sufficient to answer this request and therefore denies this request.

207. At the time of the Transaction, Robert Karen resided at 14 Ulster Drive in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated March 11, 1998. CPH believes that document was prepared by Morgan Stanley because it is attached to a Morgan Stanley cover sheet. That working group list indicates an address of 14 Ulster Drive, Jericho, New

York for Robert Karen. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

208. Robert Karen resides in New York.

RESPONSE: CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate whether Robert Karen currently maintains a residence in New York. CPH also has conducted a search of the LexisNexis "P-Trak Person Locator File" electronic database. That search indicates that, at some point in time, Robert Karen maintained a residence in New York. However, CPH is unable to verify the accuracy or completeness of that database, lacks information or knowledge sufficient to answer this request, and therefore denies this request.

209. At the time of the Transaction, Chuck Francavilla resided at 1965 Broadway in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated March 11, 1998. CPH believes that document was prepared by Morgan Stanley because it is attached to a Morgan Stanley cover sheet. That working group list indicates an address of 1965 Broadway, New York, New York for Chuck Francavilla. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

210. Chuck Francavilla resides in New York.

RESPONSE: CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate whether Chuck Francavilla currently maintains a residence in New York. CPH also has conducted a search of the LexisNexis "P-Trak Person Locator File" electronic database. That search indicates that, at some point in time, Chuck Francavilla maintained a residence in New York. However, CPH is unable to verify the accuracy or completeness of that database, lacks information or knowledge sufficient to answer this request, and therefore denies this request.

211. At the time of the Transaction, Rosemary Halpin resided at 6 West 75th Street in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated March 11, 1998. CPH believes that document was prepared by Morgan Stanley because it is attached to a Morgan Stanley cover sheet. That working group list indicates an address of 6 West 75th Street, New York, New York for Rosemary Halpin. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

212. Rosemary Halpin resides in New York.

RESPONSE: CPH has made a reasonable inquiry into the document in its possession. That inquiry did not indicate whether Rosemary Halpin currently maintains a residence in New York. CPH also has conducted a search of the LexisNexis "P-Trak Person Locator File" electronic database. That search indicates that, at some point in time, Rosemary Halpin maintained a residence in New York. However, CPH is unable to verify the accuracy or completeness of that database, lacks information or knowledge sufficient to answer this request, and therefore denies this request.

213. At the time of the Transaction, no BancAmerica Robertson Stephens personnel involved with the Transaction were based in Florida.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated March 11, 1998. CPH believes that document was prepared by Morgan Stanley because it is attached to a Morgan Stanley cover sheet. That working group list indicates an address of New York, New York for BancAmerica Robertson Stephens. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

214. None of the BancAmerica Robertson Stephens personnel involved with the Transaction are based in Florida.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry into the document in its possession and conducted searches of an electronic database, detailed in responses 207-212. However, that inquiry did not indicate the current location of the BancAmerica Robertson Stephens personnel involved in the Transaction. CPH lacks knowledge or information sufficient to answer this request and therefore denies this request.

215. At the time of the Transaction, Global Financial Press was headquartered in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated March 11, 1998. CPH believes that document was prepared by Morgan Stanley because it is attached to a Morgan Stanley cover sheet. That working group list indicates an address of New York, New York for Global Financial Press. However, CPH is unable to verify the accuracy or completeness of that

document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

216. At the time of the Transaction, Global Financial Press's principal place of business was in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated March 11, 1998. CPH believes that document was prepared by Morgan Stanley because it is attached to a Morgan Stanley cover sheet. That working group list indicates an address of New York, New York for Global Financial Press. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

217. At the time of the Transaction, Global Financial Press had an office at 75 9th Avenue in New York.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry and located a document entitled "Working Group List," dated March 11, 1998. CPH believes that document was prepared by Morgan Stanley because it is attached to a Morgan Stanley cover sheet. That working group list indicates an address of 75 9th Avenue, New York, New York for Global Financial Press. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

218. On November 6, 1997, MS & Co. and MAFCO representatives met at MAFCO headquarters in New York to discuss the Transaction.

RESPONSE: Denied, except that CPH admits that on November 6, 1997, Morgan Stanley representatives and a MAFCO representative met at MAFCO headquarters in New York.

219. On December 11, 1997, MS & Co. met with Sunbeam at The Palace Hotel in New York to discuss the Transaction.

RESPONSE: Consistent with CPH's interpretation of the term "Transaction," admitted.

220. On December 12, 1997, Sunbeam, Coleman and MAFCO representatives met at MAFCO headquarters in New York to discuss the Transaction.

RESPONSE: Consistent with CPH's interpretation of the term "Transaction," CPH admits that on December 12, 1997, Sunbeam, Coleman and MAFCO representatives met in New York to discuss the Transaction.

221. At the December 12, 1997 meeting, Coleman provided Sunbeam with a detailed written schedule identifying 15 different areas of synergies between Sunbeam and Coleman, totaling over \$150 million per year.

RESPONSE: Denied.

222. On December 18, 1997, Sunbeam and MAFCO representatives met in New York to negotiate the Transaction.

RESPONSE: Denied. Answering further, CPH states that on December 18, 1997, Albert Dunlap, Michael Price, Ronald Perelman and Howard Gittis met in Palm Beach, Florida to discuss a possible acquisition of CPH's interest in Coleman.

223. On January 23, 1998, MS & Co. met with MAFCO representatives at MAFCO headquarters in New York to discuss the Transaction.

RESPONSE: Denied, except that, consistent with its interpretation of the term "Transaction," CPH admits that on January 23, 1998, Morgan Stanley representative met with a MAFCO representative at MAFCO headquarters in New York to discuss the Transaction.

224. On January 29, 1998, Sunbeam, MS & Co., Coleman, MAFCO and Credit Suisse First Boston representatives met at MAFCO/Revlon headquarters in New York to discuss the Transaction and preliminary due diligence.

RESPONSE: Denied, except that, consistent with its interpretation of the term "Transaction," CPH admits that on January 29, 1998, Sunbeam and Morgan Stanley representatives met with Coleman, MAFCO, and Credit Suisse First Boston representatives in New York to discuss the Transaction and preliminary due diligence.

225. At the January 29, 1998 meeting at MAFCO/Revlon headquarters in New York, Coleman affirmed that \$150 million was the projected synergies in connection with the Transaction.

RESPONSE: Denied.

226. On February 6, 1998, MS & Co., MAFCO, and Credit Suisse First Boston met at MAFCO headquarters in New York to negotiate the Transaction.

RESPONSE: Consistent with CPH's interpretation of the term "Transaction," admitted.

227. On February 19, 1998, Sunbeam, MS & Co., and MAFCO met at MS & Co. headquarters in New York to negotiate the Transaction.

RESPONSE: Denied.

228. At the February 19, 1998 meeting at MS & Co. headquarters in New York, a preliminary handshake agreement was reached on a 0.745 exchange ratio.

RESPONSE: Denied.

229. On February 23, 1998, Sunbeam, MS & Co., Coleman, MAFCO, and Credit Suisse First Boston representatives attended a due diligence meeting at MAFCO headquarters in New York in connection with the Transaction.

RESPONSE: Consistent with CPH's interpretation of the term "Transaction," admitted. Answering further, CPH states that meetings and communications concerning due diligence in connection with the Transaction occurred in Florida and elsewhere outside of New York.

230. On February 24, 1998, Sunbeam, MS & Co., MAFCO and others met at MS & Co. headquarters in New York to discuss the Transaction.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry into its documents. That inquiry did not indicate whether on February 24, 1998, Sunbeam, Morgan Stanley, MAFCO and others met at Morgan Stanley headquarters in New York to discuss the Transaction. CPH lacks information or knowledge sufficient to answer this request and therefore denies this request.

231. Due diligence meetings concerning the Transaction were held in New York.

RESPONSE: Consistent with CPH's interpretation of the term "Transaction," admitted. Answering further, CPH states that meetings and communications concerning due diligence in connection with the Transaction occurred in Florida and elsewhere outside of New York.

232. On February 25, 1998, Sunbeam, MS & Co., MAFCO and others met at Morgan Stanley headquarters in New York to discuss the Transaction.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry into its documents. That inquiry did not indicate whether on February 25, 1998, Sunbeam, Morgan Stanley, MAFCO and others met at Morgan Stanley headquarters in New York to discuss the Transaction. CPH lacks information or knowledge sufficient to answer this request and therefore denies this request.

233. On February 25, 1998, Coleman's Board of Directors met in New York with MAFCO, Wachtell and CSFB representatives to discuss the Transaction.

RESPONSE: Consistent with CPH's interpretation of the term "Transaction," admitted. Answering further, CPH states that some of the Coleman Directors attended this meeting by telephone and that some Coleman Directors did not attend this meeting.

234. On February 26, 1998, Sunbeam, MS & Co., MAFCO, Skadden Arps Slate Meager [sic] & Flom and others met at MS & Co. headquarters in New York to discuss the Transaction.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry into its documents. That inquiry did not indicate whether on February 26, 1998, Sunbeam, Morgan Stanley, MAFCO, Skadden Arps Slate Meagher & Flom and others met at Morgan Stanley headquarters in New York to discuss the Transaction. CPH lacks information or knowledge sufficient to answer this request and therefore denies this request.

235. At the February 26, 1998 meeting at MS & Co. headquarters in New York, the final structure of the Transaction was agreed upon.

RESPONSE: Consistent with its interpretation of the term "Transaction," CPH has made a reasonable inquiry into its documents. That inquiry did not indicate whether on February 26, 1998, the final structure of the Transaction was agreed upon at Morgan Stanley headquarters in New York. CPH lacks information or knowledge sufficient to answer this request and therefore denies this request.

236. The Transaction was negotiated in New York.

RESPONSE: Consistent with CPH's interpretation of the term "Transaction," CPH admits that some negotiations concerning the Transaction took place in New York, but other negotiations took place in Florida and elsewhere outside of New York.

237. On February 27, 1998, Sunbeam's Board of Directors met at MS & Co.'s offices in New York to discuss the Transaction.

RESPONSE: Consistent with CPH's interpretation of the term "Transaction," admitted.

238. At the February 27, 1998 meeting of the Board of Directors, Sunbeam approved the Transaction.

RESPONSE: Consistent with CPH's interpretation of the term "Transaction," admitted.

239. On February 27, 1998, Coleman's Board of Directors met in New York to discuss the Transaction.

RESPONSE: Consistent with CPH's interpretation of the term "Transaction," admitted. Answering further, CPH states that some of the Coleman Directors attended this meeting by telephone.

240. At the February 27, 1998 meeting of the Board of Directors, Coleman approved the Transaction.

RESPONSE: Consistent with CPH's interpretation of the term "Transaction," admitted.

241. Both the Sunbeam and Coleman Boards of Directors approved the Transaction at meetings held in New York.

RESPONSE: Consistent with CPH's interpretation of the term "Transaction," admitted.

242. On February 27, 1998, the February 27, 1998 Agreements were executed in New York.

RESPONSE: CPH admits that on either February 27 or 28, 1998, the February 27, 1998 Agreements were executed in New York.

243. On March 2, 1998, the Transaction was announced in New York before the markets opened.

RESPONSE: Denied, except that, consistent with CPH's interpretation of the term "Transaction," CPH admits that on March 2, 1998, Sunbeam issued a press release from Sunbeam's headquarters in Delray Beach, Florida announcing the Transaction.

244. MSSF planned the Bank Facility to finance the Transaction in New York.

RESPONSE: Denied, except that CPH admits that MSSF did some work on the Bank Facility in New York, but also did some work in Florida. Answering further, CPH states that the two other banks involved in the Bank Facility, First Union and Bank of America, were headquartered outside of New York and did work on the Bank Facility outside of New York.

245. MSSF prepared and disseminated the preliminary and final offering memorandum for the Bank Facility in New York.

RESPONSE: Denied.

246. On March 17, 1998, Sunbeam and MS & Co. held a "road show" for potential Sunbeam investors in New York.

RESPONSE: Denied.

247. On March 18, 1998, Sunbeam and MS & Co. held a "road show" for potential Sunbeam investors in New York.

RESPONSE: Admitted.

248. No "road shows" for potential Sunbeam investors were held in Florida.

RESPONSE: CPH has made a reasonable inquiry and located a document entitled "Sunbeam Road Show Itinerary" and produced by Morgan Stanley. That document indicates that no road shows took place in Florida. However, CPH is unable to verify the accuracy or completeness of this document, lacks knowledge or information sufficient to answer this request, and therefore denies this request. Answering further, CPH states that the coupon convertible senior subordinated debentures issued by Sunbeam and marketed by Morgan Stanley were purchased by investors nationwide, including investors based in Florida. Moreover, upon information and belief, CPH states that Morgan Stanley caused the Offering Memorandum for the debentures issued by Sunbeam to be delivered to potential investors in Florida.

249. On March 19, 1998, the Note Offering closed in New York.

RESPONSE: Denied.

250. The press conference following the March 19, 1998 press release was held in New York.

RESPONSE: CPH objects to this request as vague and ambiguous because it does not identify a specific date or subject matter for the press conference. Several press conferences have taken place since March 19, 1998. Subject to and without waiving this objection, CPH states that it has made a reasonable inquiry into the document in its possession. That inquiry did not indicate a press conference held on or about March 19, 1998. CPH lacks knowledge or information sufficient to answer this request and therefore denies this request.

251. On March 30, 1998, the Transaction closed in New York.

RESPONSE: Consistent with CPH's interpretation of the term "Transaction," admitted.

252. On March 31, 1998, the Bank Facility closed in New York.

RESPONSE: Admitted.

253. At the time of the Transaction, Sunbeam was listed on the New York Stock Exchange.

RESPONSE: Consistent with CPH's interpretation of the term "Transaction," admitted.

254. At the time of the Transaction, Coleman was listed on the New York Stock Exchange.

RESPONSE: Consistent with CPH's interpretation of the term "Transaction," admitted.

255. No meetings between MS & Co. and Coleman took place in Florida.

RESPONSE: Admitted. Answering further, CPH states that Morgan Stanley prepared Sunbeam representatives to meet with a Coleman representative in Florida.

256. No meetings between MS & Co. and CPH took place in Florida.

RESPONSE: Admitted. Answering further, CPH states that Morgan Stanley prepared Sunbeam representatives to meet with CPH representatives in Florida.

257. No meetings between MS & Co. and MAFCO took place in Florida.

RESPONSE: Admitted. Answering further, CPH states that Morgan Stanley prepared Sunbeam representatives to meet with MAFCO representatives in Florida.

258. No meetings between MSSF and Coleman took place in Florida.

RESPONSE: Admitted.

259. No meetings between MSSF and CPH took place in Florida.

RESPONSE: Denied.

260. No meetings between MSSF and MAFCO took place in Florida.

RESPONSE: Denied.

261. On April 27, 1998, Sunbeam and Coleman met with Coopers & Lybrand and Sard Verbinnen at Coopers & Lybrand offices in New York.

RESPONSE: CPH has made a reasonable inquiry and located a document prepared by Sunbeam that indicates that on April 27, 1998, Sunbeam, Coopers & Lybrand, and Sard Verbinnen representatives met at the Coopers & Lybrand offices in New York. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

262. On May 4, 1998, Sunbeam and Coleman met with Coopers & Lybrand and Sard Verbinnen at Coopers & Lybrand offices in New York.

RESPONSE: CPH has made a reasonable inquiry and located a document prepared by Sunbeam that indicates that on May 4, 1998, Sunbeam, Coopers & Lybrand, and Sard Verbinnen representatives met at the Coopers & Lybrand offices in New York. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

263. On May 6, 1998, Sunbeam and Coleman held a special joint meeting of the respective Boards of Directors at Coopers & Lybrand offices in New York.

RESPONSE: Admitted.

264. On May 7-9, 1998, Sunbeam prepared for the May 11th presentation in New York.

RESPONSE: CPH has made a reasonable inquiry and located a document prepared by Sunbeam that indicates that Sunbeam representatives were in New York on May 7-9, 1998. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

265. On May 11, 1998, Sunbeam and Coleman made a special "Strategy for Growth" presentation to Wall Street analysts and investors in New York regarding the Sunbeam situation.

RESPONSE: CPH has made a reasonable inquiry and located a Sunbeam presentation entitled "Strategy for Growth" dated May 11, 1998. However, CPH is unable to verify the accuracy or completeness of that document, lacks knowledge or information sufficient to answer this request, and therefore denies this request.

266. On June 9, 1998, the Special Committee of the Board of Directors of Sunbeam met in New York to discuss the June 8, 1998 article in Barrons concerning Sunbeam's accounting practices.

RESPONSE: Denied, except that CPH admits that on June 9, 1998, the Board of Directors of Sunbeam held a meeting in New York and the June 8, 1998 article in Barron's Magazine concerning Sunbeam's accounting practices was discussed.

267. On June 13, 1998, the Special Committee of the Board of Directors of Sunbeam met in New York to remove Albert Dunlap as CEO of Sunbeam.

RESPONSE: Denied, except that CPH admits that on June 13, 1998, the Board of Directors of Sunbeam held a meeting in New York and the Board of Directors removed Albert Dunlap as CEO of Sunbeam at that meeting.

268. On June 19, 1998, MS & Co., First Union, Bank of America and MAFCO met at MAFCO headquarters in New York to discuss the Sunbeam situation.

RESPONSE: Admitted.

269. On July 10, 1998, the Special Committee of the Board of Directors of Sunbeam held an organizational meeting at the offices of Reboul, MacMurray, Hewitt, Maynard & Kristol at 45 Rockefeller Plaza in New York to discuss the negotiations between Sunbeam and its lenders.

RESPONSE: Admitted.

270. On July 28, 1998, the Special Committee of the Board of Directors of Sunbeam met at the offices of Reboul, MacMurray, Hewitt, Maynard & Kristol at 45 Rockefeller Plaza in New York to discuss the status of the ongoing fact investigation at Sunbeam.

RESPONSE: Admitted.

271. On February 6, 2001, Sunbeam filed for bankruptcy in the United States Bankruptcy Court for the Southern District of New York.

RESPONSE: Admitted.

272. The adversary proceedings against Sunbeam were instituted in New York.

RESPONSE: CPH has made a reasonable inquiry into the documents in its possession and has reviewed the docket sheet for the Bankruptcy Petition filed by Sunbeam on February 6, 2001 in the United States Bankruptcy Court for the Southern District of New York. Neither of these inquiries indicated that adversary proceedings have been instituted against Sunbeam. CPH lacks information or knowledge sufficient to answer this request and therefore denies this request. Answering further, CPH states that more than 20 lawsuits concerning Sunbeam's fraudulent accounting practices have been filed in or transferred to Florida state and federal courts, including:

- a. *Bird v. Sunbeam Corporation, et al.*, No. 98-8258 (S.D. Fla.)
- b. *Frankel v. Sunbeam Corporation, et al.*, No. 98-8310 (S.D. Fla.)
- c. *Lionelli v. Sunbeam Corporation, et al.*, No. 98-8323 (S.D. Fla.)
- d. *Goldberg v. Dunlap, et al.*, No. 98-8260 (S.D. Fla.)

- e. *Lembeck v. Dunlap, et al.*, No. 98-8307 (S.D. Fla.)
- f. *Minuz v. Sunbeam Corporation, et al.*, No. 98-8281 (S.D. Fla.)
- g. *Klewin v. Sunbeam Corporation, et al.*, No. 98-8313 (S.D. Fla.)
- h. *Applestein v. Sunbeam Corporation, et al.*, No. 98-8316 (S.D. Fla.)
- i. *Singleton v. Sunbeam Corporation, et al.*, No. 98-8347 (S.D. Fla.)
- j. *Lindeman v. Sunbeam Corporation, et al.*, No. 98-8289 (S.D. Fla.)
- k. *Stapleton v. Sunbeam Corporation, et al.*, No. 98-1676 (S.D. Fla.)
- l. *Cunningham v. Sunbeam Corporation, et al.*, No. 98-6723 (S.D. Fla.)
- m. *Klein v. Sunbeam Corporation, et al.*, No. 98-8418 (S.D. Fla.)
- n. *Havsy v. Sunbeam Corporation, et al.*, No. 98-8475 (S.D. Fla.)
- o. *Cutler v. Sunbeam Corporation, et al.*, No. 98-8321 (S.D. Fla.)
- p. *Gottlieb v. Sunbeam Corporation, et al.*, No. 98-8401 (S.D. Fla.)
- q. *Kavlak v. Dunlap, et al.*, No. 98-8400 (S.D. Fla.)
- r. *U.S. National Bank of Galveston v. Sunbeam Corporation, et al.*, No. 99-8283 (S.D. Fla.)
- s. The cases cited above (a- r) were consolidated in: *In re Sunbeam Securities Litigation*, No. 98-CV-8258 (S.D. Fla.).
- t. *Securities and Exchange Commission v. Dunlap, et al.*, No. 01-CV-8437 (S.D. Fla);
- u. *Shallal v. Elson, et al.*, No. 98-8739 (S.D. Fla.)
- v. *Camden Asset Management, L.P. et al. v. Sunbeam Corporation, et al.*, Nos. 98-CV-8773 (S.D. Fla.)
- w. *Hamilton Partners v. Sunbeam Corporation, et al.*, No. 99-8275 (S.D. Fla.)

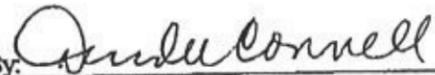
- x. *Krim v. Dunlap, et al.*, No. 983168-AD (15th Jud. Cir. Fla.)
- y. *Sunbeam Corp. v. PricewaterhouseCoopers LLP*, No. 00-5444-AN (15th Jud. Cir. Fla.);
- z. *Coleman (Parent) Holdings, Inc. v. Arthur Andersen LLP and Philip Harlow*, No. CA 01-6062-AN (15th Jud. Cir.);

273. The U.S. Attorney for the Southern District of New York led the U.S. Department of Justice investigation into Sunbeam's business practices.

RESPONSE: Admitted.

Dated: September 24, 2003

COLEMAN (PARENT) HOLDINGS INC.

By: 
One of Its Attorneys

Jerold S. Solovy
Deirdre E. Connell
Denise Kirkowski Bowler
JENNER & BLOCK, LLC
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

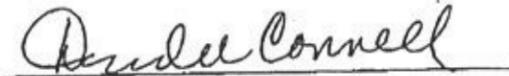
John Scarola
SEARCY DENNEY SCAROLA
BARNHART & SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33402-3626
(561) 686-6300

CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that a copy of the foregoing has been furnished by U.S. Mail and facsimile to the following counsel of record on this 24th day of September, 2003:

Joseph Ianno, Jr.
CARLTON FIELDS
222 Lake View Avenue, Suite 1400
West Palm Beach, FL 33401
Tel.: (561) 659-7070
Fax: (561) 659-7368

Thomas A. Clare
KIRKLAND & ELLIS
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Tel.: (202) 879-5000
Fax: (202) 879-5200


Deirdre E. Connell

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA
Case No. 2003 CA 005045AI

COLEMAN (PARENT) HOLDINGS,

Plaintiff,

vs.

MORGAN STANLEY AND CO., INCORPORATED,

Defendant.

x

DEPOSITION OF DONALD DENKHAUS

Taken before Sherilynn V. McKay, Certified Realtime
Reporter and Registered Merit Reporter, pursuant to
Notice of Taking Deposition filed in the above cause.

- - -

Thursday, November 6, 2003
14th Floor
44 West Flagler Street
Miami, Florida 33130
9:35 a.m. - 12:30 p.m.
1:00 p.m. - 3:00 p.m.
Job No. 581785, (305) 651-0706

COPY

1 Q Have you given deposition testimony as an
2 expert?

3 A Yes.

4 Q Have you been admitted by a court as an
5 expert?

6 A Yes.

7 Q How often that you recall?

8 A I haven't done it in ten or fifteen years, but
9 probably at least, as an expert, at least a half dozen
10 times.

11 Q And this is while you were employed at Arthur
12 Andersen?

13 A Yes.

14 Q You were never retained by Sunbeam as an
15 expert for litigation. Is that correct?

16 A That's correct.

17 Q You had no personal involvement with the 1996
18 or 1997 audit of Sunbeam. Correct?

19 A That's correct.

20 Q You had also no involvement related to
21 Sunbeam's original filing of their 10 K for 1997. Is
22 that correct?

23 A Correct.

24 Q Prior to June of 1998, did you have any
25 communication with anyone from Morgan Stanley about any

1 issue related to Sunbeam?

2 A No.

3 Q Prior to June of 1998, did you have any
4 communication with anyone from Morgan Stanley Senior
5 Funding regarding Sunbeam?

6 A No.

7 Q Prior to June 1998, did you have any
8 communication with anyone from or representing Coleman
9 Company regarding Sunbeam?

10 A No. Prior -- no. That's correct. Prior to
11 June I did not.

12 Q And you had no involvement with Arthur
13 Andersen's March 19, 1998 comfort letter. Is that
14 correct?

15 A That's correct. Other than my
16 responsibilities as the audit division head, but I
17 don't recall any specific -- I didn't look at any of
18 the documents, so there may have been something that
19 somebody asked me about during the process, but I
20 wasn't involved, nor did I -- charged no time to that
21 account, so I don't believe I had any involvement. I
22 don't recall any involvement.

23 Q And you don't have any specific recollection
24 of anyone consulting with you about that?

25 A No, no, I don't.

1 Q Is that also true with regard to the
2 March 25th, 1998 comfort letter?

3 A That's also correct, yes.

4 Q You had no involvement or consultation
5 regarding Sunbeam's offering memoranda for their notes
6 in March of 1998. Is that correct?

7 A That's correct.

8 Q Prior to June of 1998, had anyone expressed to
9 you any concern regarding the accuracy of Sunbeam's
10 financial statements?

11 A Not that I recall.

12 Q Prior to June of 1998, had anyone expressed
13 any concern to you regarding Sunbeam's financial
14 performance in 1998?

15 A Not that I recall.

16 Q Prior to June 1998, did you have any contact
17 directly with Sunbeam personnel in regards to Arthur
18 Andersen's work for Sunbeam?

19 A No.

20 MS. BROWN: This will be Morgan Stanley
21 Exhibit 13.

22 (Deposition Exhibit No. MS 13 was marked
23 for identification.)

24 BY MS. BROWN:

25 Q The court reporter has just handed you what's

M

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA
CASE No.2003 CA 005045AI

COLEMAN (PARENT) HOLDINGS, INC.

Plaintiff,

-vs-

MORGAN STANLEY & CO, INC.,

Defendant.

DEPOSITION OF VANCE KISTLER

Wednesday, October 29, 2003
1:30 - 4:30 p.m.

2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33401

Reported By:
KATHY SZABO, RPR
Notary Public, State of Florida
Esquire Deposition Services
West Palm Beach Office
Phone: 800.330.6952
561.659.4155

COPY

1 your conversations with Mr. Kersh, what topics were
2 discussed or what the purpose of your meeting him
3 was?

4 MR. JOHNSON: Objection to the form and
5 foundation.

6 A. I don't remember discussing anything with
7 him.

8 BY MR. CLARE:

9 Q. Do you remember what occasion you had to
10 talk to Mr. Kersh?

11 A. I met him at a baseball game.

12 Q. Other than social conversation, do you
13 recall discussing anything related to Sunbeam's
14 business or the work that Andersen was performing
15 for Sunbeam?

16 A. No, I do not.

17 Q. Did you ever speak with any of the
18 attorneys that were representing Sunbeam in
19 connection with the acquisitions that were going on
20 in the first quarter of '98?

21 A. No.

22 Q. Are you aware that in 1988 Sunbeam was
23 involved in acquiring three companies?

24 A. Yes.

25 Q. What was the source of your awareness of

1 that?

2 A. I don't recall.

3 Q. Was it just general knowledge at the
4 company?

5 A. Yes.

6 Q. Did you have any involvement in any of the
7 work that was being done by Andersen in connection
8 with the acquisitions?

9 A. No.

10 Q. Did you have any conversations internally
11 with people at Andersen about the acquisitions?

12 A. No.

13 Q. I take it you were not involved in any
14 discussions or negotiations leading to those
15 acquisitions?

16 A. That's correct.

17 Q. Did you have conversations with Sunbeam
18 personnel relating to those acquisitions?

19 A. No.

20 Q. Did you ever meet with any of the
21 attorneys or investment bankers from the parties to
22 the companies that were being acquired, Coleman,
23 First Alert, Signature Rent?

24 A. No.

25 Q. Did you ever meet or speak with anyone

1 from the Coleman Company?

2 A. No.

3 Q. Did you ever meet or speak with anyone
4 from Thomas Lee?

5 A. No.

6 Q. Did you ever meet or speak with any
7 investment bankers representing Coleman Company?

8 A. No.

9 Q. Did you ever meet or speak with Credit
10 Suisse First Boston, CSFB?

11 A. No.

12 Q. Did you ever speak with attorneys who were
13 representing the Coleman Company?

14 A. No.

15 Q. Did you ever speak with anyone from the
16 law firm of Wachtell, Lipton, Rosen and Katz?

17 A. No.

18 Q. Did you ever speak with anyone from
19 Coleman Parent Holding Company?

20 A. No.

21 Q. Did you ever meet or speak with anyone
22 from MacAndrews and Forbes?

23 A. No.

24 Q. As you sit here today, do you have an
25 understanding as to whether -- strike that.

1 In 1998 during the time that you were
2 working for Andersen on Sunbeam-related matters, did
3 you have an understanding that Sunbeam was preparing
4 to do a private placement of convertible notes?

5 A. No.

6 Q. Did you ever have any conversation with
7 anybody at Andersen about an offering of convertible
8 notes or debentures?

9 A. No.

10 Q. Did you ever discuss that with
11 Mr. Bornstein?

12 A. No.

13 Q. Or Mr. Pastrana?

14 A. No.

15 Q. Mr. Harlow?

16 A. No.

17 Q. Mr. Pruitt?

18 A. No.

19 Q. How about anybody from Sunbeam, did you
20 ever have any discussion with Sunbeam personnel
21 about Sunbeam's offering of convertible notes?

22 A. No.

23 Q. Do you recall reading any public
24 information about the offering?

25 A. No.

1 Q. Do you have an understanding what role, if
2 any, Andersen played in connection with the Sunbeam
3 debenture offer?

4 A. No, I do not.

5 Q. Did you have any personal involvement in
6 the offering of convertible debentures in the first
7 quarter of '98?

8 A. No.

9 Q. Did you play any role in drafting or
10 reviewing the offering on -- for the debentures?

11 A. No.

12 Q. Have you ever seen it before?

13 A. No.

14 Q. Are you aware from any source of the
15 content of that offering?

16 A. No.

17 Q. That was not something that was ever
18 discussed with you by Mr. Bornstein?

19 A. No.

20 Q. Or Mr. Pastrana?

21 A. No.

22 Q. Or anybody from Andersen?

23 A. No.

24 Q. Did you know, in March of 1998, what role,
25 if any, Morgan Stanley had in Sunbeam's offering of

1 convertible debentures?

2 A. No.

3 Q. Did you even know that Morgan Stanley had
4 a role in March of 1998?

5 A. No, I did not.

6 Q. Did you play any role in drafting any
7 comfort letters that were provided by Arthur
8 Andersen in connection with that offering?

9 A. No.

10 Q. Are you familiar with the term comfort
11 letter?

12 A. Yes.

13 Q. Have you ever seen those comfort letters
14 before?

15 A. No.

16 Q. During the time that you were working on
17 Sunbeam-related engagements, did you ever meet or
18 speak with anybody from Morgan Stanley?

19 A. No.

20 MR. JOHNSON: Asked and answered.

21 BY MR. CLARE:

22 Q. Did you ever meet or speak with a
23 gentleman named Bill Strong from Morgan Stanley?

24 A. No.

25 Q. John Tyree?

1 A. No.

2 Q. Ruth Porat?

3 A. No.

4 Q. Or Michael Hart?

5 A. No.

6 Q. Were you ever, to your knowledge, on a
7 telephone conference call where anybody from Morgan
8 Stanley was identified as being on?

9 A. No.

10 Q. Did you ever instruct or direct anybody at
11 Arthur Andersen to contact or to communicate with
12 Morgan Stanley on any issue?

13 A. No.

14 Q. So is it fair to say in your dealings at
15 Andersen with regard to Sunbeam-related engagements,
16 you never communicated directly or indirectly with
17 anyone from Morgan Stanley?

18 A. That's correct.

19 (Morgan Stanley Exhibit No. 9 was marked
20 for identification.)

21 (Morgan Stanley Exhibit No. 10 was marked
22 for identification.)

23 A. Okay.

24 BY MR. CLARE:

25 Q. Mr. Kistler, I've handed you two

1 documents. Morgan Stanley Exhibit Number 9, it's a
2 March 19th letter from Arthur Andersen. And
3 Morgan Stanley Exhibit 10 is a March 25, 1998 letter
4 from Arthur Andersen. Have you seen either of these
5 documents before today?

6 A. No.

7 Q. I take it then that you did not play any
8 role in preparing Morgan Stanley Exhibit 9 or Morgan
9 Stanley Exhibit 10?

10 A. That's correct.

11 Q. On page three of Morgan Stanley Exhibit 9,
12 item 5-B includes the description of some sales
13 figures for December 29th, 1997 through
14 February 1, 1998?

15 A. Five what, B as in boy?

16 Q. Correct.

17 A. Okay.

18 Q. It's a table of sales.

19 A. Okay.

20 Q. Did you, as part of the work that you
21 performed, supply any of the information that went
22 into this?

23 A. No.

24 Q. Do you have any knowledge or information
25 about how this information was collected or compiled

0

Page 1

1 UNITED STATES DISTRICT COURT
SOUTHEAST DISTRICT OF FLORIDA

98-2136-CIV
MIDDLEBROOKS

IN RE: SUNBEAM SECURITIES LITIGATION

CAMDEN ASSET MANAGEMENT, L.P., et al.
Plaintiffs,
vs.
SUNBEAM CORPORATION, et al.,
Defendants.

VOLUME I
DEPOSITION OF LAWRENCE BORNSTEIN
VIDEOTAPED

Taken before Denise Cupelli, Registered
Professional Reporter and Notary Public in and for the
State of Florida at Large, pursuant to notice of
taking deposition filed by the Plaintiffs in the above
cause.

Wednesday, January 10, 2001
200 NW 19th Street
Boca Raton, Florida
9:40 a.m. - 5:01 p.m.

Page 3

1 APPEARANCES CONTINUED:

2 On behalf of Donald Ustil:

3 LAW OFFICE OF BRIAN ROSNER
Three New York Plaza
14th Floor
New York, New York 10004
By: KATALIE A. MAPIENALA, ESQUIRE

4 On behalf of David Farrell:

5 PROSKAUER, ROSE, LLP
One Boca Place
Suite 340-W
2235 Glades Road
Boca Raton, Florida 33431
By: MATTHEW TRIGGS, ESQUIRE

6 On behalf of Camden Asset, Freley Revy, JNG
Convertible, Hamilton Partners & all other
similarly situated parties:

7 ZELLE, WOPHORN, VOELKEL & GETTE, LLP
1201 Main Street
Suite 3000
Dallas, Texas 75202
By: JEFF ROSS, ESQUIRE

8 On behalf of Sunbeam:

9 SPADON, ARPS, SLATE, NEAGHER & FLOW, LLP
4 Times Square
New York, New York 10036
By: CHRISTOPHER WALLOT, ESQUIRE

10 ALSO PRESENT:

11 JAMES SOTO, The Videographer
12 HARRIS DEVOR
13 CAROL PESTONE
14 JAMES MILLER

Page 2

1 APPEARANCES:

2 On behalf of the Plaintiffs:

3 BARRACK, ROOFS & BACINE
3300 Two Commerce Square
2001 Market Street
Philadelphia, Pennsylvania 19103
By: M. RICHARD KOWINS, ESQUIRE

4 On behalf of Albert Dunlap and Russell Kerah:

5 PRYOR, CASHMAN, SHERMAN & FLYNN
410 Park Avenue
New York, New York 10022
By: LISA BUCKLEY, ESQUIRE

6 On behalf of Robert Gluck:

7 LeCLAIR, RYAN
707 East Main Street
Eleventh Floor
Richmond, Virginia 23219
By: PAUL O. ANDERS, ESQUIRE

8 On behalf of Arthur Andersen and the Witness:

9 CURTIS, MALLET-PREVOST, COLT & NOSBE
101 Park Avenue
New York, New York 10178
By: ELIOT LAUER, ESQUIRE
and JONATHAN J. WALSH, ESQUIRE
and GARY L. CUTLER, ESQUIRE

10 On behalf of Arthur Andersen:

11 HARVE & CLARBY, LLP
701 South Biscayne Boulevard
Miami Center, Suite 1050
Miami, Florida 33131
By: JEFFREY A. SUDOVITZ, ESQUIRE

Page 4

1 I N D E X

2

3 WITNESS: DIRECT CROSS REDIRECT RECROSS
(LAWRENCE BORNSTEIN)

4 BY DR. KOWINS

5

6 E X H I B I T S

7

NUMBER	DESCRIPTION	PAGE
10	SUNBEAM'S EX. 2554 SEC Enforce Release #108	33
11	SUNBEAM'S EX. 2555-A SEC Test. 5/18/99	38
12	SUNBEAM'S EX. 2555-B SEC Test. 5/19/99	39
13	SUNBEAM'S EX. 2555-C SEC Test. 5/20/99	39
14	SUNBEAM'S EX. 2555-D SEC Test. 10/12/99	39
15	SUNBEAM'S EX. 2555-E SEC Test. 10/13/99	40
16	SUNBEAM'S EX. 2555-F SEC Test. 10/14/99	40
17	SUNBEAM'S EX. 2556 Insurance Certificates	46
18	SUNBEAM'S EX. 2557 Fees & Expenses Report	92
19	SUNBEAM'S EX. 2558 Memo 1/23/98	106
20	SUNBEAM'S EX. 2559 Confirm from Target	129
21	SUNBEAM'S EX. 2560 Letter 12/28/97	189
22	SUNBEAM'S EX. 2561 Review of Sales Trans	215

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

IN RE: SUNBEAM SECURITIES
LITIGATION

-----)		
CAMDEN ASSET MANAGEMENT, L.P.,)	
)	
Plaintiff,	)	98-8258-CIV
vs.	)	MIDDLEBROOKS
)	
SUNBEAM CORPORATION, et al.,)	
)	
Defendants.)	
-----)		

VIDEOTAPED DEPOSITION OF RUSSELL KERSH
New York, New York
Monday, April 23, 2001

Reported by:
ERICA L. RUGGIERI, RPR
JOB NO.:120754

1 -----X
2 In re: The Arbitration
3 ALBERT DUNLAP, RUSSELL A. KERSH,
4 Claimants,
5 -against- RE 32 160 00088 99
32 160 00091 99
6 SUNBEAM CORPORATION,
7 Respondent.
8 -----X
9 July 12, 2000
10 10:00 A.M.
11
12 Deposition of Claimant ALBERT
13 DUNLAP, taken by Respondent, pursuant to
14 Agreement, at the offices of Pryor Cashman
15 Sherman & Flynn LLP, 410 Park Avenue, New
16 York, New York 10022 before Angela Castoro, a
17 Shorthand Reporter and Notary Public within
18 and for the State of New York.
19
20
21
22
23
24
25
Page 1

1 A. Dunlap
2 ALBERT DUNLAP,
3 having been first duly sworn by the
4 Notary Public (Angela Castoro), was
5 examined and testified as follows:
6 EXAMINATION BY MR. BIDEAU:
7 Q. As I told you before my name is
8 Mark Bideau, I represent Sunbeam in this
9 arbitration.
10 I know you have been deposed
11 before, so I am going to dispense of any of
12 the typical deposition instructions other than
13 to tell you if you don't think my questions
14 are clear, please tell me and I will try to
15 make it clear.
16 If you don't understand me,
17 please tell me and I will try to make the
18 question clear for you. If you don't hear me,
19 please tell me and I will be happy to try to
20 repeat the question.
21 Have you been employed at all
22 since June of 1998 when you left Sunbeam?
23 A. No.
24 Q. Have you written any articles
25 since June of 1998 concerning your tenure at
Page 3

1
2 APPEARANCES:
3 PRYOR CASHMAN SHERMAN & FLYNN LLP
4 Attorneys for Claimants
410 Park Avenue
New York, New York 10022
5 BY: DONALD S. ZAKARIN, ESQ.
6 CHRISTOPHER J. SUES, ESQ.
7
8 GREENBERG TRAUJG
9 Attorneys for Respondent
777 South Flagler Drive
Suite 300 East
West Palm Beach, Florida 33401
10 BY: MARK BIDEAU, ESQ.
11 CATHERINE MAUS, ESQ.
12 LORIE M. GLEIM, ESQ.
13 -and-
14 MORVILLO, ABRAMOWITZ, GRAND, IASON &
SILBERBERG, P.C.
565 Fifth Avenue
New York, New York 10017
15 BY: MICHAEL W. MITCHELL, ESQ.
16
17
18
19
20
21
22
23
24
25
Page 2

1 A. Dunlap
2 Sunbeam?
3 A. No.
4 Q. Have you given any speeches since
5 June of 1998 concerning your tenure at
6 Sunbeam?
7 A. Not concerning my tenure at
8 Sunbeam.
9 Q. Have you given any interviews
10 concerning your tenure at Sunbeam since June
11 of 1998?
12 And I will exclude the press
13 release that was issued shortly after you left
14 Sunbeam.
15 A. I don't recall. I don't
16 personally recall.
17 THE WITNESS: Does counsel
18 recall?
19 MR. ZAKARIN: If there is
20 anything that's published, we're
21 unaware of it. If there is anything,
22 it will be a matter of record.
23 MR. BIDEAU: I am excluding the
24 press release shortly after, after the
25 interview.
Page 4

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Company, Inc.
Case No.: 2003 CA 005045 AI
Amended Notice of Taking Videotaped Depositions
December 10, 2003

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 2003 CA 005045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

AMENDED NOTICE OF TAKING VIDEOTAPED DEPOSITIONS

To: Thomas A. Clare, Esq.
KIRKLAND & ELLIS, LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lake View Avenue
Suite 1400
West Palm Beach, FL 33401

PLEASE TAKE NOTICE that Plaintiff Coleman (Parent) Holdings, Inc. ("CPH") requests the depositions upon oral examination of the following non-party witnesses pursuant to the commissions issued by the Circuit Court of the Fifteenth Judicial District of Florida and the subpoenas issued in aid of those commissions by the Supreme Court of the State of New York and the Circuit Court of Cook County, Illinois on the dates, times, and at the locations set forth below:

DEPONENT	DATE AND TIME	LOCATION
R. Bram Smith	January 13, 2004 at 9:30 a.m.	Esquire Deposition Services 216 E. 45 th St., 8 th Floor New York, NY 10017
Robert W. Kitts	January 20, 2004 at 9:30 a.m.	Esquire Deposition Services 216 E. 45 th St., 8 th Floor New York, NY 10017

Andrew Savarie	January 22, 2004 at 9:30 a.m.	JENNER & BLOCK LLP One IBM Plaza, Suite 4000 Chicago, IL 60611
Alexandre J. Fuchs	January 27, 2004 at 9:30 a.m.	Esquire Deposition Services 216 E. 45 th St., 8 th Floor New York, NY 10017

The witnesses are requested to bring to the depositions the documents specified in Exhibit A to the Subpoena for each witness. The depositions will be recorded by stenographic and audio-visual means and will be taken before a person authorized to administer oaths and will continue day to day until completed. The videographer for the New York depositions will be Esquire Deposition Services, New York, NY and the videographer for the Chicago deposition will be Esquire Deposition Services headquartered at 155 N. Wacker Drive, Chicago, IL 60606.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by facsimile and mail to all counsel on the attached Service List, this 10th day of December, 2003.

Dated: December 10, 2003

COLEMAN (PARENT) HOLDINGS INC.

By: Michael T. Brody
One of Its Attorneys

Jerold S. Solovy
Michael T. Brody
Deirdre E. Connell
JENNER & BLOCK LLP
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

Jack Scarola
SEARCY DENNEY SCAROLA BARNHART
& SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33409
(561) 686-6300

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Company, Inc.
Case No.: 2003 CA 005045 AI
Amended Notice of Taking Videotaped Depositions
December 10, 2003

SERVICE LIST

Thomas A. Clare, Esq.
KIRKLAND & ELLIS, LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lake View Avenue
Suite 1400
West Palm Beach, FL 33401

FAX TRANSMITTAL

J E N N E R & B L O C K

Jenner&Block LLP
 One IBM Plaza
 Chicago, IL 60611-7603
 Tel 312 222-9350
 www.jenner.com

Chicago
 Dallas
 Washington, DC

Date: December 10, 2003

To: Thomas A. Clare, Esq.
 Kirkland & Ellis
 Fax: (202) 879-5200
 Voice: (202) 879-5993

cc: Joseph Ianno, Jr.
 Carlton Fields, P.A.
 Fax: (561) 659-7368
 Voice: (561) 659-7070

John Scarola, Esq.
 Searcy Denney Scarola
 Barnhart & Shipley, P.A.
 Fax: (561) 684-5816 (before 5:00 pm)
 Voice: (561) 686-6350, Ext. 140

From: Michael T. Brody
 312 923-2711
 Client Number: 41198-10003

Important: This message is intended only for the use of the individual or entity to which it is addressed, and may contain information that is attorney work product, privileged, confidential and exempt from disclosure under applicable law. If the reader of this message is not the intended recipient, or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone, and return the original message to us at the above address via postal service. Thank you.

Message:

Total number of pages including this cover sheet: *5*

Time Sent: *12:20p.*

If you do not receive all pages, please call: 312 222-9350

Sent By:

Secretary: Caryn Jo Geisler

Extension: 6490

JENNER & BLOCK

December 10, 2003

By Telecopy

Thomas A. Clare, Esq.
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Jenner & Block LLP
One IBM Plaza
Chicago, IL 60611-7603
Tel 312 222-9350
www.jenner.com
Chicago
Dallas
Washington, DC

Michael T. Brody
Tel 312 923-2711
Fax 312 840-7711
mbrody@jenner.com

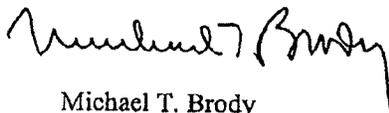
Re: *Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co.*

Dear Tom:

I write in response to your letter of December 9, 2003 concerning the depositions we noticed of former Morgan Stanley employees. We accept the dates you have proposed and confirm that the depositions will commence on the following days and at the locations identified in the attached notice of deposition:

R. Bram Smith	January 13, 2004	New York
Robert Kitts	January 20, 2004	New York
Andrew Savarie	January 22, 2004	Chicago
Alexandre Fuchs	January 27, 2004	New York

Very truly yours,



Michael T. Brody

MTB:cjg
Enclosure

cc: Joseph Ianno, Esq. (by telecopy)
John Scarola, Esq. (by telecopy)
Jerold S. Solovy, Esq.

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CASE NO: 03 CA-005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO. INC.,

Defendant.

**DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR A PROTECTIVE
ORDER TO BAR CERTAIN NON-PARTY DISCOVERY**

Defendant Morgan Stanley & Company Incorporated ("Morgan Stanley"), by and through its undersigned attorneys, respectfully submits this opposition to plaintiff Coleman (Parent) Holdings, Inc.'s ("CPH") Motion for a Protective Order to Bar Certain Non-Party Discovery and states:

CPH errs in seeking to block discovery relating to the due diligence and financial sophistication of its legal and financial advisors, Wachtell, Lipton, Rosen & Katz ("Wachtell") and Credit Suisse First Boston ("CSFB"). By filing this lawsuit alleging misrepresentation claims against Morgan Stanley, CPH has put its alleged reliance on Morgan Stanley (an advisor to CPH's *counterparty*) — and the reasonableness of that reliance — squarely at issue. Accordingly, Morgan Stanley is entitled to fully explore the competence and sophistication of CPH's *own* paid legal and financial advisors, including the abilities of those advisors to counsel CPH on the very same issues for which it claims to have relied on Morgan Stanley.

Additionally, CPH wrongfully seeks to deny Morgan Stanley the very same categories of discovery that CPH itself has sought in this litigation. Having demanded reams of documents from Morgan Stanley and its law firm, CPH cannot now complain when Morgan Stanley seeks the same categories of documents from CPH's own advisors.

I. **Wachtell Lipton Subpoena ¶ 10, Credit Suisse Subpoena ¶ 7.**

It is elementary that, by alleging claims for fraudulent and negligent misrepresentation against Morgan Stanley, CPH has put its alleged "reliance" on Morgan Stanley — and the "reasonableness" of that alleged reliance — squarely at issue. (See May 8, 2003 Complaint ¶ 82 ("CPH reasonably and justifiably relied upon Morgan Stanley's representations concerning Sunbeam."), ¶ 95 ("CPH justifiably relied, on the information provided by Morgan Stanley.")) The experience and sophistication of CPH and its team of legal and financial advisors in acquisition transactions of this type, and the tasks that CPH ordinarily entrusts to its *own* advisors in such transactions, bear directly on the issue of whether CPH "reasonably relied" on Morgan Stanley in this context. See *Hillcrest Pac. Corp. v. Yamamura*, 727 So. 2d 1053, 1057 (Fla. 4th DCA. 1999) (noting financial sophistication of plaintiff in affirming dismissal of fraud claim); *Chateau Communities, Inc. v. Ludtke*, 783 So. 2d 1227 (Fla. 5th DCA 2001) (fraud claims are "factually distinct and require[] proof of matters individual to each plaintiff, such as proof of reasonable reliance and damages.").

Despite the fact that CPH had virtually unfettered access to Sunbeam's financial books and records, it is evident that CPH and its advisors conducted *little or no due diligence of their own* prior to closing the acquisition transaction with Sunbeam. Now that CPH has filed this lawsuit seeking to shift the blame for its due diligence failures to Morgan Stanley (an advisor on the *other side* of the acquisition transaction), Morgan Stanley is entitled to discover how the

perfunctory due diligence conducted by CPH and its team of advisors for the Sunbeam transaction compares to the (presumably) more rigorous due diligence conducted by CPH and MAFCO in structurally similar transactions. To accomplish this, Morgan Stanley limited its request to due diligence documents prepared by CPH's advisors in substantially similar financial transactions "in which CPH or MAFCO received stock as part of the consideration for sale."

CPH's assertion that due diligence work performed by its advisors for transactions structurally similar to the Sunbeam / Coleman acquisition is irrelevant is belied by CPH's *own* discovery requests. For example, CPH requested that Morgan Stanley provide the "policies, procedures, manuals, guidelines, reference materials, or checklists" used by Morgan Stanley in "the performance of due diligence, including *without limitation* due diligence performed in connection with underwriting the sale of equity or debt securities." (May 9, 2003 CPH's 1st Req. for Prod. of Docs., Req. 43 (Ex. 1) (emphasis added).) In response to this request, Morgan Stanley agreed to produce — and did in fact produce — due diligence materials relating not only to the underwriting of Sunbeam's convertible debentures, but *also* general due diligence materials applicable to the performance of due diligence in substantially similar underwriting engagements. Having requested and received these materials from Morgan Stanley (which do not relate directly to the Sunbeam / Coleman acquisition), CPH should not be permitted to shield its own lawyers and bankers from providing information on transactions that are structurally similar to the one at issue here.

II. Wachtell Lipton Request No. 33, Credit Suisse Request No. 30

CPH next objects to Morgan Stanley's limited request for documents "sufficient to identify any work or services" performed by CSFB and Wachtell on behalf of CPH or MAFCO in 1997 or 1998. The relevance of these requests — which are designed to identify the other

financial engagements that CPH and MAFCO entrusted to its financial and legal advisors during the same time period — is obvious, since the requests speak directly to the financial sophistication of CPH and MAFCO’s financial and legal advisors, and CPH and MAFCO’s willingness to rely on its advisors in other settings for the same types of information, advice and counsel that they improperly seek to foist on Morgan Stanley in this lawsuit.

Moreover, CPH’s objection to these requests is unseemly in light of the fact that CPH itself made an *even broader* request of Morgan Stanley. (*See id.* Req. 31 (“All documents concerning any work or services you performed for or on behalf of Sunbeam in 1997 or 1998, regardless of whether you were compensated for that work.”).) Precisely why the 1997 and 1998 records and documents of *Sunbeam’s* advisors are relevant but those of *CPH’s* advisors are not, CPH does not and cannot explain. Just as plaintiffs are entitled to discovery that may prove their factual and legal allegations, defendants such as Morgan Stanley are entitled to discovery that may disprove a plaintiff’s factual and legal claims — that is all that Morgan Stanley seeks.

CPH’s double-standard on this issue is confirmed by its demand for documents held by Davis Polk Wardwell (“Davis Polk”), the law firm that served as underwriter’s counsel to Morgan Stanley in connection with Sunbeam’s debenture offering. (*See* Sept. 2003 Subpoena to Davis Polk & Wardwell, Req. No. 3 (Ex. 2).) The subpoena issued to Davis Polk sought “[a]ll bills, invoices, and back-up statements of professional services rendered by [Davis Polk] and/or expenses incurred on behalf of Sunbeam, Morgan Stanley, or MSSF.” (*Id.*) CPH thus has demanded *all* documents, regardless of date, and regardless of connection to Sunbeam-related engagements, held by the lawyers who advised its counterparty’s underwriter. It strains credulity to assert that such documents are relevant while simultaneously contending that documents

dating from the only relevant time period held by *CPH's own lawyers* are not. And yet, this is precisely what CPH argues.

III. Credit Suisse Requests Nos. 18, 35

CPH's third objection fares no better than the first two. CPH objects to Morgan Stanley's requests that CSFB — CPH's financial advisor for the transaction at issue — produce documents “in connection with any other proposed engagement involving the performance of due diligence” for CPH or MAFCO and related excerpts from CSFB personnel files. (Dec. 19, 2003 PIF's Mot. for a Protective Order to Bar Certain Non-Party Disc. ¶ 4.) Once again, however, CPH's arguments regarding the “irrelevance” of these documents are belied by the allegations in its Complaint — and its own efforts to obtain the very same documents from Morgan Stanley.

The type, extent and quality of financial due diligence work that CSFB performed for CPH and MAFCO relate directly to CPH's trust and confidence in CSFB for such work and the credibility of its claim that it “reasonably relied” upon Morgan Stanley — instead of CSFB or its own in-house merger and acquisition team — to conduct appropriate due diligence into Sunbeam. CSFB's representations to CPH and MAFCO about its own due diligence capabilities, and the sophistication and competence of the CSFB personnel who performed those tasks, are directly relevant to CPH's alleged reliance on Morgan Stanley for advice and information about whether to proceed with the proposed acquisition transaction.

An essential premise of CPH's theory of liability is that Morgan Stanley — Sunbeam's financial advisor — played a critical role in vetting the information presented by Sunbeam during negotiations, despite the fact that CPH had its own team of financial and legal advisors that was supposed to be performing that same function. It simply cannot be the case that the

documents of one advisor to one party to the transaction are relevant, while those of another advisor to the other party are not.

Morgan Stanley therefore urges the Court to deny CPH's Motion for a Protective Order to Bar Certain Non-Party Discovery.

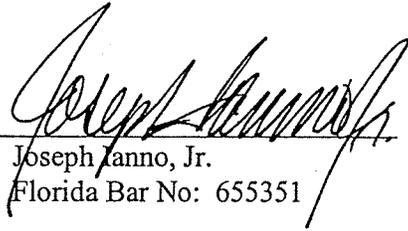
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Federal Express and e-mail to all counsel of record on the attached service list on this 29th day of December, 2003.

Thomas D. Yannucci, P.C.
Thomas A. Clare
Zhonette M. Brown
Larissa Paule-Carres
Kathryn R. DeBord
Ryan P. Phair
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368

BY: _____


Joseph Anno, Jr.
Florida Bar No: 655351

**Counsel for Defendant
Morgan Stanley & Co. Incorporated**

SERVICE LIST

John Scarola SEARCY, DENNEY, SCAROLA, BARNHARDT & SHIPLEY, P.A. 2139 Palm Beach Lakes Boulevard West Palm Beach, Florida 33409	Counsel for Plaintiff
Jerold S. Solovy JENNER & BLOCK, LLC One IBM Plaza Suite 4400 Chicago, Illinois 60611	Counsel for Plaintiff

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

 COLEMAN (PARENT) HOLDINGS INC.,)
)
 Plaintiff,)
)
 v.)
)
 MORGAN STANLEY & CO., INC.,)
)
 Defendant.)

Case No. CA 005045 AI

DOROTHY H. WILKEN
CLERK OF CIRCUIT COURT
CIRCUIT CIVIL DIVISION

MAY 09 2003

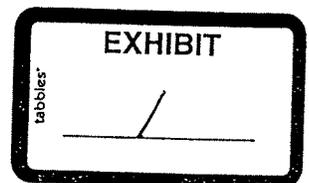
COPY / ORIGINAL
RECEIVED FOR FILING

PLAINTIFF'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS

Plaintiff Coleman (Parent) Holdings, Inc. ("CPH" or "Plaintiff"), by its attorneys Searcy Denney Scarola Barnhart & Shipley P.A. and Jenner & Block, LLC, hereby serves its First Request for Production of Documents upon Defendant Morgan Stanley & Co., Inc. ("Morgan Stanley" or "Defendant"), and requests responses and the production of documents at the office of Searcy Denney Scarola Barnhart & Shipley P.A., 2139 Palm Beach Lakes Blvd., West Palm Beach, Florida, within the time provided by Florida Rule of Civil Procedure 1.350(b).

DEFINITIONS

1. "Arbitrations" means Albert J. Dunlap and Sunbeam Corporation, No. 32 160 00088 99 (AAA); and Russell A. Kersh and Sunbeam Corporation, No. 32 160 00091 99 (AAA).
2. "Coleman" means the Coleman Company, Inc. or any of its present and former officers, directors, employees, representatives, agents, and all other persons acting or purporting to act on its behalf.



3. "CPH" means Coleman (Parent) Holdings Inc., Coleman Worldwide Corporation, CLN Holdings, Co. Inc., or any of their present and former officers, directors, employees, representatives, agents, and all other persons acting or purporting to act on their behalf.

4. "Coleman Transaction" means the transaction contemplated by the February 27, 1998 Agreements.

5. "Communication" means the transmittal of information by letter, memorandum, facsimile, orally, or otherwise.

6. "Concerning" means reflecting, relating to, referring to, describing, evidencing, or constituting.

7. "Documents" means documents whether fixed in tangible medium or electronically stored. The word "documents" shall include, by way of example and not by way of limitation, all of the following: papers, correspondence, trade letters, envelopes, memoranda, telegrams, cables, notes, messages, reports, studies, press releases, comparisons, books, accounts, checks, audio and video recordings and transcriptions thereof, pleadings, testimony, articles, bulletins, pamphlets, brochures, magazines, questionnaires, surveys, charts, newspapers, calendars, desk calendars, pocket calendars, lists, logs, publications, notices, diagrams, instructions, diaries, minutes for meetings, corporate minutes, orders, resolutions, agendas, memorials or notes of oral communications, whether by telephone or face-to-face, contracts, agreements, drafts of or proposed contracts or agreements, memoranda of understanding, letters of intent, computer tapes, computer drives or memories, computer diskettes or disks, e-mail, CD-ROMs, or any other tangible thing on which any handwriting, typing, printing, photostatic, electronic, or other form of communication or information is recorded or reproduced, together with all notations on any of the foregoing, all

originals, file copies, or other unique copies of the foregoing, and all versions or drafts thereof, whether used or not.

8. "February 27, 1998 Agreements" means (a) the Agreement and Plan of Merger dated as of February 27, 1998 among Sunbeam Corp., Laser Acquisition Corp., CLN Holdings, Inc. and Coleman (Parent) Holdings Inc. and (b) the Agreement and Plan of Merger dated as of February 27, 1998 among Sunbeam Corp., Camper Acquisition Corp., and The Coleman Company, Inc.

9. "Financial Statements" means, without limitation, balance sheets, statements of income, earnings, retained earnings, sources and applications of funds, cash flow projections, notes to each such statements, or any other notes which pertain to the past or present financial condition of Sunbeam, whether any of the foregoing is audited or unaudited, whether final, interim or pro forma, complete or partial, consolidated, yearly, monthly, or otherwise.

10. "Litigations" means In Re Sunbeam Securities Litigation, 98-8258-Civ.-Middlebrooks (S.D. Fla.); Camden Asset Management L.P., et al. v. Sunbeam Corporation, et al., 98-8773-Civ.-Middlebrooks and 98-8275-Civ.-Middlebrooks (S.D. Fla.); Krim v. Dunlap, et al., No. CL983168AD (15th Jud. Cir., Fla.); Stapleton v. Sunbeam Corp., et al., No. 98-1676-Civ.-King (S.D. Fla.); Sunbeam Corp. v. PricewaterhouseCoopers LLP, No. CL005444AN (15th Jud. Cir., Fla.); In re Sunbeam Corp., Inc., No. 01-40291 (AJG) (Bankr. S.D.N.Y.) and any adversary proceedings therein; SEC v. Dunlap, et al., No. 01-8437-Civ.-Middlebrooks (S.D. Fla.); Oaktree Capital Management LLC v. Arthur Andersen LLP, No. BC257177 (L.A. Cty., CA); and Coleman (Parent) Holdings Inc. v. Arthur Andersen LLP, et al., No. CA 01-06062AN (15th Jud. Cir., Fla).

11. "Morgan Stanley" means Morgan Stanley & Co., Inc. or any of its subsidiaries, divisions, predecessors, successors, present and former employees, representatives, agents, attorneys, accountants, advisors, or all other persons acting or purporting to act on its behalf.

12. "SEC Administrative Proceedings" means In the Matter of Sunbeam Corp., SEC Administrative Proceeding File No. 3-10481, and In the Matter of David C. Fannin, SEC Administrative Proceeding File No. 3-10482.

13. "SEC" means the Securities and Exchange Commission.

14. "Subordinated Debentures" means Sunbeam's Zero Coupon Convertible Senior Subordinated Debentures Due 2018.

15. "Subordinated Debenture Offering" means the offering of Sunbeam's Subordinated Debentures.

16. "Sunbeam" means Sunbeam Corporation, or any of its subsidiaries, divisions, affiliates, predecessors, successors, present and former employees, representatives, agents, and all other persons acting or purporting to act on its behalf.

17. "You" or "Your" means Morgan Stanley & Co., Inc. and/or any of its subsidiaries, divisions, predecessors, successors, present or former employees, representatives, agents, attorneys, accountants, advisors, or anyone acting or purporting to act on its behalf.

INSTRUCTIONS

1. Documents shall be produced as they are kept in the usual course of business, or organized and labeled to correspond to the categories in this Request. Documents attached to each other should not be separated. Documents consisting of items previously produced in the Litigations, Arbitrations, and/or SEC Administrative Proceedings with Bates numbering shall be produced in Bates number order.

2. All documents shall be produced in the file folder, envelope or other container in which the documents are kept or maintained by you. If, for any reason, the container cannot be produced, produce copies of all labels or other identifying marks.

3. The relevant period, unless otherwise indicated, shall be from January 1, 1997 through the date of trial of this matter, and shall include all documents and information which relate in whole or in part to such period, or to events or circumstances during such period, even though dated, prepared, generated or received prior or subsequent to that period. Please supplement or correct your responses to these requests if, at any time, you become aware that your responses are incomplete or incorrect in any respect.

4. If you claim the attorney-client privilege, or any other privilege or work-product protection for all or any portion of a document, you shall provide a privilege log that describes the withheld material sufficiently to allow CPH to test the privilege or protection asserted.

5. The following rules of construction apply:

- a) The connectives "and" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery requests all responses that might otherwise be outside of their scope;
- b) The term "including" shall be construed to mean "without limitation";
and
- c) The use of the singular form of any word includes the plural and vice versa.

DOCUMENTS REQUESTED

1. All documents concerning your efforts to have Sunbeam retain or maintain your investment banking and/or securities underwriting services.

2. All documents reflecting all fees and expenses paid by Sunbeam to you, including without limitation all billing statements, invoices, time detail records, individual calendars,

daily diaries (including electronic calendar programs), or other documents that describe or record the time spent, or expenses incurred (including back-up for any out-of-pocket expenses), by any Morgan Stanley personnel, or that describe or record any aspect of their activities concerning any services performed on behalf of, or concerning, Sunbeam.

3. All documents concerning any investigation, analysis, or due diligence of Sunbeam conducted by you or on your behalf in 1997 or 1998.
4. All documents concerning any investigation, analysis, or due diligence of Coleman or CPH conducted by you or on your behalf in 1997 or 1998.
5. All documents concerning your attempts in 1997 or 1998 to locate someone to purchase or otherwise acquire Sunbeam, whether through merger, purchase, transfer of assets or securities, or otherwise.
6. All documents concerning your attempts in 1997 or 1998 to locate companies for Sunbeam to purchase or otherwise acquire, whether through merger, purchase, transfer of assets or securities, or otherwise.
7. All documents concerning the negotiation and signing of the February 27, 1998 Agreements.
8. All documents concerning the closing of the Coleman Transaction, including without limitation all documents concerning the decision to close the Coleman Transaction.
9. All documents concerning the meetings of Sunbeam's Board of Directors in 1997 and 1998.
10. All documents concerning any discussion, promise, agreement, or plan to have research analysts, whether or not at Morgan Stanley, provide coverage for Sunbeam or any of its debt or equity securities.

11. All documents used, analyzed, consulted, or prepared by any Morgan Stanley research analyst, including without limitation Andrew Conway, James Dormer, Jake Foley, and Karen Eltrich, concerning Sunbeam.
12. All documents concerning communications between or among you, Sunbeam, and Wall Street analysts concerning Sunbeam or the Coleman Transaction.
13. All documents concerning any valuation of Sunbeam or Sunbeam securities.
14. All documents concerning the stock market's valuation of Sunbeam securities, including without limitation documents describing or analyzing the increase or decline in the market price of Sunbeam stock in the period from and including July 1, 1996 through and including December 31, 1998.
15. All documents concerning any valuation of Coleman or Coleman securities.
16. All documents concerning synergies that might be achieved from a business combination of Sunbeam and Coleman.
17. All documents concerning Sunbeam's financial statements and/or restated financial statements.
18. All documents concerning the increase in the size of the Subordinated Debenture Offering from \$500 million to \$750 million.
19. All documents concerning any draft or executed "comfort letters" requested by you or provided to you in connection with the Subordinated Debenture Offering.
20. All documents concerning the sale of, or your attempts to sell, Subordinated Debentures, including without limitation documents concerning road shows, communications with potential investors, or communications with or among Morgan Stanley's sales personnel.
21. All documents concerning the pricing of the Subordinated Debentures.

22. All documents concerning the conversion features of the Subordinated Debentures.
23. All documents concerning the "book of demand" for the Subordinated Debentures.
24. All documents concerning the events that took place on March 19, 1998 at Global Financial Press, including without limitation documents concerning Lawrence Bornstein and/or John Tyree.
25. All documents concerning your communications with Sunbeam on March 18, 1998.
26. All documents concerning the "bring-down" due diligence for the Subordinated Debenture Offering.
27. All documents concerning your communications with Sunbeam on March 24, 1998.
28. All documents concerning Sunbeam's first quarter 1998 sales and/or earnings.
29. All documents concerning the closing of the Subordinated Debenture Offering including without limitation all documents concerning the decision to close the Subordinated Debenture Offering.
30. All documents concerning the Subordinated Debenture Offering.
31. All documents concerning any work or services you performed for or on behalf of Sunbeam in 1997 or 1998, regardless of whether you were compensated for that work.
32. All documents concerning press releases issued by Sunbeam on October 23, 1997, March 19, 1998, April 3, 1998, May 9, 1998, June 15, 1998, June 25, 1998, June 30, 1998, October 20, 1998, and November 12, 1998.

33. All documents concerning the statements contained in the press releases issued by Sunbeam on October 23, 1997, March 19, 1998, April 3, 1998, May 9, 1998, June 15, 1998, June 25, 1998, June 30, 1998, October 20, 1998, and November 12, 1998.

34. All documents concerning communications relating to Sunbeam, Coleman, or CPH, including without limitation internal communications within Morgan Stanley or communications between or among Morgan Stanley and Sunbeam; Skadden, Arps, Slate, Meagher & Flom LLP; Coopers & Lybrand LLP; Llama Company; Arthur Andersen LLP; Sard Verbinnen & Co., Inc.; Hill & Knowlton, Inc.; The Coleman Company, Inc.; Credit Suisse First Boston; Coleman (Parent) Holdings Inc.; MacAndrews & Forbes Holdings, Inc.; Wachtell Lipton, Rosen & Katz; Davis Polk & Wardwell; or any other person or company, and/or any of their respective employees, agents, or representatives.

35. All documents concerning the Coleman Transaction.

36. All documents concerning the Subordinated Debenture Offering.

37. All documents concerning Albert Dunlap and/or Russell Kersh.

38. All documents concerning the Scott Paper Company.

39. All documents concerning Coleman or CPH.

40. All documents concerning MacAndrews & Forbes Holdings, Inc. with respect to Sunbeam, Coleman, or CPH.

41. All documents concerning the events and matters that are the subject of the Complaint filed in this action.

42. Organizational charts, memoranda, or similar documents that describe the business organizational structure and the administrative, management, and reporting structure of Morgan Stanley from and including January 1, 1997 through and including December 31, 1998.

43. All documents concerning Morgan Stanley's policies, procedures, manuals, guidelines, reference materials, or checklists that were in effect from and including January 1, 1997 through and including December 31, 1998 for the performance of due diligence, including without limitation due diligence performed in connection with underwriting the sale of equity or debt securities.

44. All documents concerning employment contracts, performance evaluations, and/or personnel files (including without limitation any documents that describe or discuss the training, experience, competence, and accomplishments) of all Morgan Stanley personnel who performed services for or on behalf of Sunbeam in 1997 or 1998.

45. All documents concerning Morgan Stanley's performance evaluation criteria or guidelines in effect from and including January 1, 1997 through and including December 31, 1998.

46. All documents concerning Morgan Stanley's compensation criteria or guidelines in effect from and including January 1, 1997 through and including December 31, 1998.

47. All marketing or other promotional material prepared or used by, or on behalf of, Morgan Stanley concerning investment banking or securities underwriting services that were created or used at any time from and including January 1, 1997 through and including December 31, 1998.

48. All of your document retention or document destruction policies or procedures or similar procedures for the back-up or deletion of electronic or hard copy documents of any kind for any time during 1997 through the present, including without limitation any amendments to any such policies or procedures, schedules or related documents, and any memoranda or other instructions communicated to your employees concerning the obligation and procedures to be

utilized to preserve all relevant documents, including without limitation evidence concerning the Litigations, the Arbitrations, and the SEC Administrative Proceedings.

49. All documents you have provided or produced to any party (whether voluntarily or in response to a document request, subpoena duces tecum, or other process served on you) in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings (including without limitation any reports, communications, filings, testimony, legal memoranda, statements, or other documents submitted to the Securities & Exchange Commission or any other party).

50. All documents you have provided to the SEC, the Attorney General of New York, or any other governmental or regulatory body concerning Sunbeam.

51. All documents you have received from the SEC, the Attorney General of New York, or any other governmental or regulatory body concerning Sunbeam.

52. All discovery requests or subpoenas served on you in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

53. All responses and/or objections that you provided or produced in response to a discovery request or subpoena served on you in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

54. All communications concerning any discovery request or subpoena served on you in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

55. All motions, memoranda, briefs, rulings, orders, or transcripts of proceedings concerning any discovery request, subpoena, or other process in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

56. All privilege logs you prepared in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings with respect to documents that you withheld from production in response to any document requests, subpoenas duces tecum, or other process.

57. All transcripts of and exhibits to any depositions, recorded statements, or affidavits in connection with any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

58. All documents obtained by you or produced to you by other parties, third parties, or non-parties (whether voluntarily or in response to any document requests, subpoenas duces tecum, or other process served by you or any other party) concerning Sunbeam.

59. All document requests, subpoenas duces tecum, interrogatories, requests for admission, responses, or objections that you served on, or received from, any party, third party or non-party in In re Sunbeam Corp., Inc., No. 01-40291 (AJG) (Bankr. S.D.N.Y.) and any adversary proceedings therein.

60. All transcripts of any hearings held in connection with the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

61. All affidavits, declarations, or other testimonial statements filed or submitted in connection with any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

COLEMAN (PARENT) HOLDINGS INC.

By: Jack Scarola
One of Its Attorneys

Jerold S. Solovy
Ronald L. Marmer
Robert T. Markowski
Deirdre E. Connell
JENNER & BLOCK, LLC
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

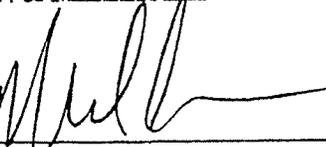
Jack Scarola
SEARCY DENNEY SCAROLA BARNHART
& SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33402-3626
(561) 686-6300

exceed fifty dollars and all damages sustained by reason of your failure to comply.

WITNESS, Honorable _____, Justice of the Supreme Court of
the State of New York, the ____ day of September 2003.

SHAPIRO MITCHELL FORMAN
ALLEN & MILLER LLP

By: _____



Michael I. Allen

380 Madison Avenue
New York, New York 10017
(212) 972-4900

Attorneys for MKP Master Fund, LDC
and MKP Capital Management, L.L.C.

ATTACHMENT A
TO SUBPOENA TO NON-PARTY DAVIS POLK & WARDWELL

You are hereby requested to produce the following documents pursuant to the definitions and instructions set forth below.

DOCUMENTS REQUESTED

1. All documents sufficient to identify any of your personnel, attorneys, or persons acting on your behalf who performed any work for Morgan Stanley or MSSF concerning Sunbeam.
2. All timekeeping sheets or records maintained by you or any of your personnel or attorneys concerning any activities or services performed for Sunbeam, Morgan Stanley, or MSSF concerning the Coleman Transaction, the Credit Agreement, the Bank Facilities, or the Subordinated Debenture Offering, including, but not limited to all timekeeping sheets or records of James Lurie, Alan Dean, David Caplan, Peter Douglas, Gail Flesher, Peter Levin, Po Sit, Bradley Smith, Nicole Duncan, Edith Fassberg, Charles Hsieh, William Megevick, Monica Sliva, Alexander Kwit, and Heather Stack.
3. All bills, invoices, and back-up for statements of professional services rendered by you and/or expenses incurred on behalf of Sunbeam, Morgan Stanley, or MSSF.
4. All documents concerning the Coleman Transaction.
5. All documents concerning the Bank Facilities, including but not limited to the Lenders' decision to underwrite the Bank Facilities, the sources and uses of the Bank Facilities, and the decision to close the Bank Facilities.
6. All documents concerning the decrease in the amount of the Bank Facilities from \$2.0 billion to \$1.7 billion.

7. All documents concerning the collateral for the Bank Facilities, including but not limited to all documents evaluating or assessing the value of the collateral.

8. All documents concerning the Credit Agreement. Your response should include but is not limited to all documents concerning the reasons for any proposed amendments to the Credit Agreement.

9. All documents concerning the Lenders' plans or efforts to syndicate, sell, or transfer all or any portion of the Lenders' Commitments, including but not limited to information packages provided to potential lenders, lists or designations of potential lenders, communications with potential lenders, expressions of commitment made by any potential lender, and/or presentations or handouts used at lender group meetings.

10. All documents concerning whether MSSF should exercise its right to terminate service under the Credit Agreement following any material adverse change in the financial status of Sunbeam.

11. All documents concerning whether MSSF should exercise its right to terminate service under the Credit Agreement due to misrepresentations or material omissions contained in the Credit Agreement.

12. All documents concerning any claims or potential claims that Morgan Stanley or MSSF investigated, pursued, or might have against Sunbeam, Coleman, CPH, Mafco, Coopers & Lybrand, or Arthur Andersen arising out of the Coleman Transaction, the Subordinated Debenture Offering, the Credit Agreement, or the Bank Facilities.

13. All documents concerning the sale of Subordinated Debentures, including but not limited to documents concerning road shows, communications with potential investors, and/or communications with or among Morgan Stanley's sales personnel.

14. All documents concerning the drafting and issuance of the Offering Memorandum.

15. All documents concerning the size of the Subordinated Debenture Offering, including but not limited to the increase from \$500 million to \$750 million.

16. All documents concerning the pricing of the Subordinated Debentures.

17. All documents concerning the Subordinated Debenture Offering.

18. All documents concerning any conversations involving John Tyree and Lawrence Bornstein.

19. All documents concerning the March 19, 1998 meeting at Global Financial Press concerning the Offering Memorandum.

20. All documents concerning the March 19, 1998 press release, including but not limited to whether to issue the press release, whether to include all or any portion of the March 19, 1998 press release in the Offering Memorandum, or concerning the contents or drafting of the press release.

21. All documents concerning communications involving any of the Lenders concerning the Credit Agreement, the Bank Facilities, Sunbeam, Coleman, or the Coleman Transaction, including but not limited to any documents disseminated or circulated at or in connection with those communications.

22. All documents concerning any due diligence conducted on behalf of Morgan Stanley or MSSF concerning Sunbeam, Coleman, the Coleman Transaction, the Bank Facilities, the Credit Agreement, and/or the Subordinated Debenture Offering.
23. All documents concerning any communications between or among any of Morgan Stanley, Davis Polk, Sunbeam, Arthur Andersen LLP, and/or Skadden on March 18, 1998, March 19, 1998, or March 25, 1998, including but not limited to any documents disseminated or circulated at or in connection with those communications.
24. All documents concerning any "comfort letters" prepared in connection with the Subordinated Debenture Offering or the Credit Agreement including but not limited to Arthur Andersen's letters dated March 19, 1998 and March 25, 1998 and any drafts of those letters.
25. All documents concerning Sunbeam's actual or expected sales, revenues, or earnings for all or any portion of 1996, 1997, or 1998.
26. All documents relating to synergies that might be achieved from a business combination of Sunbeam, and any or all of Coleman, Signature Brands USA, and First Alert, Inc.
27. All documents concerning any valuation of Coleman or Sunbeam.
28. All documents concerning the April 3, 1998 press release issued by Sunbeam.
29. All documents concerning the settlement agreement between CPH and Sunbeam dated August 12, 1998.
30. All documents concerning any of the Litigations, including but not limited to all: (a) pleadings, motions, memoranda, briefs, affidavits, declarations, or other court filings;

(b) orders and/or rulings; (c) hearing transcripts; (c) written discovery, including but not limited to document requests, subpoenas, requests for admission, interrogatories, and responses thereto; (d) documents produced by any parties or non-parties; (e) privilege logs; (f) deposition transcripts or exhibits; (g) expert reports or other expert discovery; and (h) documents concerning communications or correspondence concerning the Litigations. The relevant time period for this request is April 1998 through the date of service of this subpoena.

31. All documents you provided to or received from the SEC, the Justice Department, the U.S. Attorney for the Southern District of New York, the Attorney General of New York, any other federal or state governmental or regulatory body, or any other self-regulatory body concerning Sunbeam, Morgan Stanley, MSSF, the Coleman Transaction, the Subordinated Debenture Offering, and/or the Bank Facilities. The relevant time period for this request is February 1998 through the date of service of this subpoena.

DEFINITIONS

1. "Arthur Andersen" means Arthur Andersen LLP.
2. "Bank Facility" means the Credit Agreement, including amendments, and all funds extended by MSSF, First Union, and/or Bank of America to Sunbeam pursuant to the Credit Agreement, including but not limited to Tranche A, Tranche B, and the Revolving Credit Facility.
3. "Bank of America" means Bank of America National Trust and Savings Association and any of its predecessors, successors, affiliates, subsidiaries, and present and former partners, employees, representatives, and agents.

4. "Coleman" means The Coleman Company, Inc., its predecessors, successors, subsidiaries, and its present and former officers, directors, and employees.
5. "Coleman Transaction" means the transaction by which Sunbeam acquired CPH's interest in Coleman.
6. "CPH" means Coleman (Parent) Holdings Inc., and its predecessors, successors, subsidiaries, and its present and former officers, directors, and employees.
7. "Communication" means the transmittal of information (in the form of facts, ideas, inquiries or otherwise) by letter, memorandum, facsimile, orally, electronically or otherwise.
8. "Concerning" means concerning, reflecting, relating to, referring to, describing, evidencing, or constituting.
9. "Credit Agreement" means that agreement entered into by Sunbeam Corporation, as borrower, with Morgan Stanley Senior Funding, Inc., Bank of America National Trust and Savings Association, and First Union National Bank (now known as Wachovia Bank, National Association), as lenders, dated March 30, 1998 and amended periodically thereafter by agreement of the parties.
10. "Documents" shall be given the broad meaning provided in CPLR Rule 3120 and refers to any form or means, whether physical, visual, or electronic, in or by which words, numbers, or ideas are recorded or preserved, whether fixed in tangible medium or electronically stored, including any and all drafts of any final document. The word "documents" shall include, by way of example and not by way of limitation, all of the following: papers, correspondence, trade letters, envelopes, memoranda, telegrams, cables, notes, messages, reports,

studies, press releases, comparisons, books, accounts, checks, audio and video recordings and transcriptions thereof, pleadings, testimony, articles, bulletins, pamphlets, brochures, magazines, questionnaires, surveys, charts, newspapers, calendars, desk calendars, pocket calendars, lists, logs, publications, notices, diagrams, instructions, diaries, minutes for meetings, corporate minutes, orders, resolutions, agendas, memorials or notes of oral communications, whether by telephone or face-to-face, contracts, agreements, drafts of or proposed contracts or agreements, memoranda of understanding, letters of intent, computer tapes, computer drives or memories, computer diskettes or disks, e-mail, CD-ROMs, or any other tangible thing on which any handwriting, typing, printing, photostatic, electronic, or other form of communication or information is recorded or reproduced, together with all notations on any of the foregoing, all originals, file copies, or other unique copies of the foregoing, and all versions or drafts thereof, whether used or not.

11. "First Union" means First Union National Bank (now known as Wachovia Bank, National Association) and any of its predecessors, successors, affiliates, subsidiaries, and present and former officers, directors, employees, representatives, and agents.

12. "Lenders" means the entities listed on Schedule 2.01 of the Credit Agreement under the heading "Lenders" and any other Person that shall have become a party to the Credit Agreement as a Lender pursuant to an assignment and acceptance.

13. "Litigations" means In Re Sunbeam Securities Litigation, 98-8258-Civ.-Middlebrooks (S.D. Fla.); Camden Asset Management, L.P., et al. v. Sunbeam Corporation, et al., 98-8773-Civ.-Middlebrooks and 98-8275-Civ.-Middlebrooks (S.D. Fla.); Krim v. Dunlap, et al., No. CL983168AD (15th Jud. Cir., Fla.); Stapleton v. Sunbeam Corp., et al., No. 98-1676-

Civ.-King (S.D. Fla.); Sunbeam Corp. v. PricewaterhouseCoopers LLP, No. CL005444AN (15th Jud. Cir., Fla.); In re Sunbeam Corp., No. 01-40291 (AJG) (Bankr. S.D.N.Y.), and every adversary proceeding therein; SEC v. Dunlap, et al., No. 01-8437-Civ.-Middlebrooks (S.D. Fla.); Oaktree Capital Management LLC v. Arthur Andersen LLP, No. BC257177 (L.A. Cty., CA); and Coleman (Parent) Holdings Inc. v. Arthur Andersen LLP, et al., No. CA 01-06062AN (15th Jud. Cir., Fla.); Albert J. Dunlap and Sunbeam Corporation, No. 32 160 00088 99 (AAA); and Russell A. Kersh and Sunbeam Corporation, No. 32 160 00091 99 (AAA); In the Matter of Sunbeam Corp., SEC Administrative Proceeding File No. 3-10481; In the Matter of David C. Fannin, SEC Administrative Proceeding File No. 3-10482 and any other matter in which you represented Morgan Stanley or MSSF in connection with Sunbeam, the Coleman Transaction, the Credit Agreement, the Bank Facilities, or the Subordinated Debenture Offering.

14. "Mafco" means MacAndrews & Forbes Holdings Inc. and any of its present and former officers, directors, and employees.
15. "Morgan Stanley" means Morgan Stanley & Co., Inc. and any of its predecessors, successors, and direct or indirect parents, affiliates, subsidiaries, and their present and former officers, directors, partners, employees, representatives, and agents.
16. "MSSF" means Morgan Stanley Senior Funding, Inc. and any of its predecessors, successors, and direct or indirect parents, affiliates, subsidiaries, and their present and former officers, directors, partners, employees, representatives, and agents.
17. "Offering Memorandum" means the offering memorandum for Sunbeam's zero coupon convertible senior subordinated debentures due 2018.

18. "Person" means any natural person, corporation, limited liability company, trust, joint venture, association, company, partnership, governmental authority, or other entity.

19. "SEC" means the Securities and Exchange Commission.

20. "Subordinated Debentures" means Sunbeam's Zero Coupon Convertible Senior Subordinated Debentures Due 2018.

21. "Subordinated Debenture Offering" means the offering of Sunbeam's Subordinated Debentures.

22. "Sunbeam" means Sunbeam Corporation and any of its predecessors, successors, affiliates, subsidiaries, and present and former officers, directors, employees, representatives, and agents.

23. "You" or "Your" means Davis Polk & Wardwell and any of its predecessors, successors, affiliates, subsidiaries, divisions, and present and former partners, employees, representatives, agents, and anyone acting or purporting to act on its behalf.

INSTRUCTIONS

1. Documents shall be produced as they are kept in the usual course of business, or organized and labeled to correspond to the categories in this Request. Documents attached to each other should not be separated. Documents consisting of items previously produced in the Litigations, Arbitrations, and/or SEC Administrative Proceedings with Bates numbering shall be produced in Bates number order.

2. All documents shall be produced in the file folder, envelope or other container in which the documents are kept or maintained by you. If, for any reason, the container cannot be produced, produce copies of all labels or other identifying marks.

3. The relevant period, unless otherwise indicated, shall be from **January 1, 1997 through the last date on which you represented Morgan Stanley and MSSF in any matter concerning with Sunbeam, the Coleman Transaction, the Credit Agreement, the Bank Facilities, or the Subordinated Debenture Offering**, and shall include all documents and information which relate in whole or in part to such period, or to events or circumstances during such period, even though dated, prepared, generated or received prior or subsequent to that period. Please supplement or correct your responses to these requests if, at any time, you become aware that your responses are incomplete or incorrect in any respect.

4. If you claim the attorney-client privilege, or any other privilege or work-product protection for all or any portion of a document, you shall provide a privilege log that describes the withheld material sufficiently to allow CPH to test the privilege or protection asserted.

5. The following rules of construction apply:
- a. The connectives "and" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery requests all responses that might otherwise be outside of their scope;
 - b. The term "including" shall be construed to mean "without limitation"; and
 - c. The use of the singular form of any word includes the plural and vice versa.

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Company, Inc.
Case No.: 2003 CA 005045 AI
Amended Notice of Taking Videotaped Depositions
December 29, 2003

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 2003 CA 005045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

AMENDED NOTICE OF TAKING VIDEOTAPED DEPOSITIONS

To: Thomas A. Clare, Esq.
KIRKLAND & ELLIS, LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lake View Avenue
Suite 1400
West Palm Beach, FL 33401

PLEASE TAKE NOTICE that Plaintiff Coleman (Parent) Holdings, Inc. ("CPH") requests the depositions upon oral examination of the following non-party witnesses pursuant to the subpoenas issued by the Circuit Court of the Fifteenth Judicial District of Florida on the dates, times, and at the locations set forth below:

DEPONENT	DATE AND TIME	LOCATION
William Priutt	January 12, 2004 at 9:00 a.m. until 1:00 p.m., and resuming at 4:00 p.m.	ESQUIRE DEPOSITION SERVICES Courthouse Tower 44 West Flagler Street, 14th Floor Miami, Florida 33130
Dennis Pastrana	January 13, 2004 at 9:00 a.m.	ESQUIRE DEPOSITION SERVICES Courthouse Tower 44 West Flagler Street, 14th Floor Miami, Florida 33130

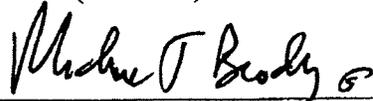
Mark Brockelman	January 14, 2004 at 9:00 a.m.	SEARCY DENNEY SCAROLA BARNHART & SHIPLEY, P.A. 2139 Palm Beach Lakes Blvd. West Palm Beach, Florida 33409
Lawrence Bornstein	January 15, 2004 at 9:00 a.m.	SEARCY DENNEY SCAROLA BARNHART & SHIPLEY, P.A. 2139 Palm Beach Lakes Blvd. West Palm Beach, Florida 33409

The witnesses are requested to bring to the depositions the documents specified in Exhibit A to the Subpoena for each witness. The depositions will be recorded by stenographic and audio-visual means and will be taken before a person authorized to administer oaths and will continue day to day until completed. The videographer for the Florida depositions will be Esquire Deposition Services, Miami, Florida.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by facsimile and mail to all counsel on the attached Service List, this 29th day of December, 2003.

Dated: December 29, 2003

COLEMAN (PARENT) HOLDINGS INC.

By: 
One of Its Attorneys

Jerold S. Solovy
Michael T. Brody
Deirdre E. Connell
JENNER & BLOCK LLP
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

Jack Scarola
SEARCY DENNEY SCAROLA BARNHART
& SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33409
(561) 686-6300

SERVICE LIST

Thomas A. Clare, Esq.
KIRKLAND & ELLIS, LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lake View Avenue, Suite 1400
West Palm Beach, FL 33401

FAX TRANSMITTAL

JENNER & BLOCK

Jenner&Block LLP
 One IBM Plaza
 Chicago, IL 60611-7603
 Tel 312 222-9350
 www.jenner.com

Chicago
 Dallas
 Washington, DC

Date: December 29, 2003

TO: Michael J. Moscato, Esq. Fax: (212) 697-1559
 Curtis, Mallet-Prevost, Colt & Mosle LLP Voice: (212) 696-6000

cc: Thomas A. Clare, Esq. Fax: (202) 879-5200
 Kirkland & Ellis Voice: (202) 879-5993

Joseph Ianno, Jr. Fax: (561) 659-7368
 Carlton Fields, P.A. Voice: (561) 659-7070

John Scarola, Esq. Fax: (561) 684-5816 (before 5:00 pm)
 Searcy Denney Scarola Voice: (561) 686-6350, Ext. 140
 Barnhart & Shipley, P.A.

From: Michael T. Brody Client Number: 41198-10003
 312 923-2711

Important: This message is intended only for the use of the individual or entity to which it is addressed, and may contain information that is attorney work product, privileged, confidential and exempt from disclosure under applicable law. If the reader of this message is not the intended recipient, or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone, and return the original message to us at the above address via postal service. Thank you.

Message:

Total number of pages including this cover sheet: 4

Time Sent:

If you do not receive all pages, please call: 312 222-9350

Sent By:

Secretary: Caryn Jo Geisler

Extension: 6490

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CASE NO: 03 CA-005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that a hearing has been set in the above-styled case as follows:

DATE: January 12, 2004

TIME: 8:45 a.m.

PLACE: Palm Beach County Courthouse, Courtroom 11B
205 North Dixie Highway
West Palm Beach, Florida 33401

BEFORE: Judge Elizabeth T. Maass

CONCERNING: Defendant, Morgan Stanley & Co. Incorporated's Motion
to Compel Discovery (re: Defendant's Third Set of
Interrogatories, Interrogatory No. 1)

KINDLY GOVERN YOURSELVES ACCORDINGLY.

The undersigned counsel hereby certifies that a good faith attempt to resolve the issues contained in the foregoing motions or matters will be made with opposing counsel prior to hearing on these matters on the Court's Motion Calendar.

If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no costs to you, to the provision of certain assistance. Please contact the ADA Coordinator in the Administrative Office of the Court, Palm Beach County Courthouse, 205 North Dixie Highway, Room 5.2500, West Palm Beach, Florida 33401; telephone number (561) 355-2431 within two (2) working days of your receipt of this notice; if you are hearing or voice impaired, call 1-800-955-8771.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Federal Express and e-mail to all counsel of record on the attached service list on this 5th day of January, 2004.

Thomas D. Yannucci, P.C.
Thomas A. Clare
Zhonette M. Brown
Larissa Paule-Carres
Brett H. McGurk
KIRKLAND & ELLIS
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

COUNSEL FOR DEFENDANT

CARLTON FIELDS, P.A.
222 Lakeview Ave.
Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

BY:



JOSEPH IANNO, JR.
Florida Bar No: 655351

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CASE NO: 03 CA-005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO. INC.,

Defendant.

**MORGAN STANLEY & CO. INCORPORATED'S
MOTION TO COMPEL DISCOVERY**

Pursuant to Florida Rule of Civil Procedure 1.380(a), Morgan Stanley & Co. Incorporated ("Morgan Stanley") respectfully moves this Court for an order compelling Coleman (Parent) Holdings Inc. ("CPH") to respond to discovery concerning the financial competence and sophistication of the persons representing CPH in the Transaction at issue, and in particular to respond to Morgan Stanley's Third Set of Interrogatories, Interrogatory No. 1.

As grounds for this motion, Morgan Stanley states:

1. CPH has refused to respond to the following interrogatory related to the financial sophistication of MAFCO, CPH, and those MAFCO and CPH personnel involved with the financial review of Sunbeam's acquisition of the Coleman Company:

State with particularity the 1997 and 1998 net worth, income, revenue and global holdings (including non-MAFCO holdings) of MAFCO, CPH, Ronald Perelman, Howard Gittis, and any other MAFCO or CPH employee who participated in the due diligence or financial review of Sunbeam's acquisition of the Coleman Company.

(Oct. 13, 2003 MS 3d Set of Interrogs. to Plf. CPH, Req. 1 (Ex. 1).)

2. This interrogatory seeks information that will allow MS & Co. to assess the financial sophistication of CPH and MAFCO, such as the diligence with which they approach their equity investments, which is an issue CPH's Complaint places squarely on the table. At the outset, Morgan Stanley wishes to make it perfectly clear that it is only seeking relevant information that is necessary in order to refute Plaintiffs' own allegations in its Complaint and to allow Morgan Stanley to defend those very same allegations. Indeed, Morgan Stanley, at least initially, seeks to discover such information through a narrowly crafted interrogatory rather than through a more inclusive document request.

3. CPH objected to this Interrogatory and refused to respond on the ground that it seeks "personal information about entities and individuals not party to this lawsuit;" and because it is "not relevant to the litigation." (Nov. 12, 2003 CPH Resps. & Objs. to Def. MS 3d Set of Interrog., Resp. 1 (Ex. 2).)

4. As an initial matter, CPH cannot shield MAFCO and its employees from discovery. CPH is a holding company that, according to CPH's Rule 1.310 deposition witness (himself a MAFCO employee), has no employees of its own. Indeed, CPH's lawsuit against Morgan Stanley is premised on an acquisition transaction in which MAFCO, CPH's parent company, played a larger role in the transaction than CPH itself. If Morgan Stanley is unable to get discovery from MAFCO (whose employees negotiated the acquisition and exercised complete control over the actions of CPH), Morgan Stanley will not have access to important discoverable information about the claims alleged against it. CPH, as the plaintiff, cannot employ the resources of MAFCO to bring this litigation to bear, but then hide behind corporate formalities to deprive Morgan Stanley of information clearly relevant to the case.

5. There is no dispute that MAFCO personnel have pertinent discoverable information. CPH's own interrogatory response lists fourteen (14) MAFCO employees as having discoverable information relating to CPH's Complaint – but not a single CPH employee. (See CPH Resp. to MS 1st Set Interrogs., Resp. 1, served Sept. 2, 2003 and filed under seal.) In addition, CPH identified at least six (6) instances in which MAFCO representatives personally met with Morgan Stanley representatives to discuss or negotiate the Coleman Transaction, see CPH Resp. to MS 2d Set of Interrogs. & 2nd Req. for Prod. of Docs., Resp. 1, served Oct. 13, 2003 and filed under seal, and at least eleven (11) instances in which MAFCO representatives discussed the transaction with Morgan Stanley, see *id.* at Resp. 3. None of these discovery responses refer to any action by a CPH employee. In light of MAFCO's important role in the acquisition transaction and CPH's own admission that MAFCO personnel have discoverable information, CPH's refusal to respond to MAFCO-related discovery on the grounds that MAFCO and its employees are non-parties in this instance is groundless. Further, given the relationship between CPH and MAFCO, there can be no question that information that is available to MAFCO is also available to CPH. Pursuant to Rule 1.340, CPH is obligated to “furnish the information available to that party.”

6. Morgan Stanley's request for information regarding CPH and MAFCO's financial sophistication is entirely appropriate. CPH's Complaint alleges claims for fraudulent and negligent misrepresentation. An essential element of misrepresentation is justifiable “reliance.” See, e.g., *Stow v. National Merchandise Co.*, 610 So. 2d 1378, 1382 (Fla. 1st DCA 1992) (fraudulent misrepresentation requires plaintiff to show it acted in reliance upon the representation). CPH's Complaint alleges that it “reasonably” and “justifiably” “relied” on Morgan Stanley in connection with the acquisition transaction. (See May 8, 2003 Complaint

¶ 82 (“CPH reasonably and justifiably relied upon Morgan Stanley’s representations concerning Sunbeam.”), ¶ 95 (“CPH justifiably relied, on the information provided by Morgan Stanley.”).) By making these allegations and bringing these claims, CPH has placed its alleged “reliance” on Morgan Stanley, and the “reasonableness” of that alleged reliance, squarely at issue. CPH’s experience and sophistication in financial investments and transactions of this sort bear directly on the issue of its “reasonable reliance” in this context. See *Hillcrest Pac. Corp. v. Yamamura*, 727 So. 2d 1053, 1057 (Fla. 4th DCA 1999) (noting sophistication of party in affirming dismissal of fraud claim); *Chateau Communities, Inc. v. Ludtke*, 783 So. 2d 1227, 1230 (Fla. 5th DCA 2001) (fraud claims are “factually distinct and require[] proof of matters individual to each plaintiff, such as proof of reasonable reliance and damages.”).

7. For example, CPH claims that CPH and MAFCO personnel were somehow “induced” into entering into the acquisition by a press release that contains numerous “Cautionary Statements” expressly **warning** investors against relying on “forward looking statements” contained in the press release, and **cautioning** that “actual results could differ materially” from those contained in the release. Morgan Stanley is entitled to rebut these ridiculous assertions by -- among other things -- showing that MAFCO and its principals are highly sophisticated investors; that they routinely engage in high-stakes merger and acquisition transactions; that they are highly-educated consumers of financial information; that they are advised and counseled by their own army of sophisticated lawyers, accountants, and investment bankers; that they make investment and financial decisions based on in-depth analysis and consideration of financial information (and not simply press releases); and that they have the financial competence, sophistication, and resources to conduct their own independent analysis of financial information presented to them during negotiations.

8. CPH's objection to divulging this so-called "personal" information is similarly unfounded. There is a Protective Order in place in this case that protects sensitive information disclosed by the parties during discovery. Moreover, CPH cannot have it both ways. CPH cannot simultaneously bring claims against Morgan Stanley and shield itself from disclosing relevant information. If CPH and MAFCO are squeamish about divulging this so-called "personal" information, CPH should not have brought this suit alleging that it "reasonably" and "justifiably" relied on Morgan Stanley's representations. Furthermore, MS & Co. is willing to accept alternative formulations of this request, as long as MS & Co. is able to discover information about CPH and MAFCO's investments that will allow MS & Co. to determine the reasonableness of CPH's alleged reliance in this case.

Conclusion

For the foregoing reasons, Morgan Stanley respectfully requests an order compelling CPH to respond to Morgan Stanley's Third Set of Interrogatories, Interrogatory No. 1.

CERTIFICATE OF SERVICE

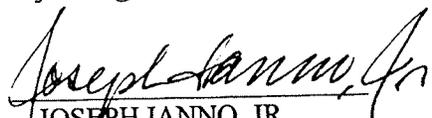
I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Federal Express and e-mail to all counsel of record on the attached service list on this 5th day of January, 2004.

Thomas D. Yannucci, P.C.
Thomas A. Clare
Zhonette M. Brown
Larissa Paule-Carres
Brett H. McGurk
KIRKLAND & ELLIS
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

COUNSEL FOR DEFENDANT

CARLTON FIELDS, P.A.
222 Lakeview Ave.
Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

BY:


JOSEPH IANNO, JR.
Florida Bar No: 655351

SERVICE LIST

<p>John Scarola SEARCY, DENNEY, SCAROLA, BARNHARDT & SHIPLEY, P.A. 2139 Palm Beach Lakes Boulevard West Palm Beach, Florida 33409</p>	<p>Counsel for Plaintiff</p>
<p>Michael Brody JENNER & BLOCK, LLC One IBM Plaza Suite 4400 Chicago, Illinois 60611</p>	<p>Counsel for Plaintiff</p>

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CASE NO: 03 CA-005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

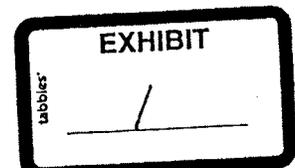
Defendant.

**MORGAN STANLEY & CO. INCORPORATED'S THIRD SET OF
INTERROGATORIES TO PLAINTIFF COLEMAN (PARENT) HOLDINGS, INC.**

Pursuant to the Florida Rules of Civil Procedure 1.280 and 1.340, Defendant Morgan Stanley & Co. Incorporated ("MS & Co.") hereby requests that Plaintiff Coleman (Parent) Holdings, Inc. ("CPH") answer the following interrogatories and otherwise specify objections, if any, in accordance with the definitions and instructions contained herein.

INSTRUCTIONS

1. The connectives "and" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery request all responses that might otherwise be construed to be outside of its scope.
2. The use of the singular form of any word includes the plural and vice versa.
3. Each interrogatory should be answered separately and fully, unless it is objected to, in which event the reasons for the objections should be stated with specificity. The answers are to be signed by plaintiffs and the objections, if any, are to be signed by the attorney(s)



making them. Where a complete answer to a particular interrogatory is not possible, the interrogatory should be answered to the extent possible and a statement should be made indicating why only a partial answer is given, the efforts made by you to obtain the information and the source from which all responsive information may be obtained, to the best of your knowledge or belief.

4. If it is claimed that information responsive to any interrogatory is privileged, work product, or otherwise protected from disclosure, state the nature and basis for any such claim of privilege, work product, or other ground for nondisclosure and identify: (a) the subject matter of any such information; (b) if the information is embodied in a document, the author of the document and each person to whom the original or a copy of the document was sent; (c) if the information was communicated orally, the person making the communication and all persons present at or participating in the communication; (d) the date of the document or oral communication; and (e) the general subject matter of the document or oral communication, within the time set forth in the agreed-upon order. Any part of an answer to which you do not claim privilege or work product should be given in full.

5. The term "identify" (with respect to documents) means to give, to the extent known, the (i) type of document; (ii) general subject matter; (iii) date of the document; and (iv) author(s), addressee(s) and recipient(s).

6. The term "identify" (with respect to persons) means to give, to the extent known, the person's full name, present or last known address, and when referring to a natural person, additionally, the present or last known place of employment. Once a person has been identified in accordance with this subparagraph, only the name of that person need be listed in response to subsequent discovery requesting the identification of that person.

7. When used in reference to a person other than a natural person, "identify" means: (a) to state its name; (b) to describe its nature (e.g., corporation, partnership, etc.); (c) to state the location of its principal place of business; and (d) to identify the person or persons employed by such entity whose actions on behalf of the entity are responsive to the interrogatory.

8. When used with respect to the identification of facts, acts, events, occurrences, meetings, telephone conferences or communications, "identify" means to describe with specificity the fact, act, event, occurrence, meeting, telephone conference, or communication in question, including, but not limited to: (a) identifying all participants in the fact, act, event, occurrence, meeting, telephone conference or communication; (b) stating the date(s) on which the fact, act, event, occurrence, meeting, telephone conference or communication took place; (c) stating the location(s) at which the fact, act, event, occurrence, meeting, telephone conference or communication took place; and (d) providing a description of the substance of the fact, act, event, occurrence, meeting, telephone conference or communication.

9. The terms "any," "all" and "each" shall be construed to mean "any," "all," or "each."

10. The term "including" shall be construed to mean "including but not limited to."

11. The present tense shall be construed to include the past and future tenses.

12. Unless otherwise indicated, these interrogatories request information for the period beginning January 1, 1996.

DEFINITIONS

1. "CPH" means Coleman (Parent) Holdings Inc. and any of its officers, directors, former or present employees, representatives and agents.

2. "MAFCO" means MacAndrews & Forbes Holdings, Inc. and any of its officers, directors, former or present employees, representatives and agents.

3. "MS & Co." means Morgan Stanley & Co. Inc. and any of its officers, directors, former or present employees, representatives and agents.

4. The term "person" is defined as any natural person or any business, legal or governmental entity or association.

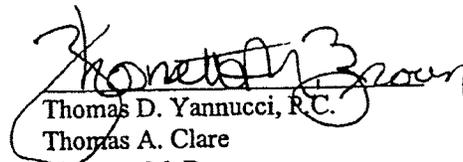
5. The terms "you" or "your" means "CPH" as defined in Definition 16.

INTERROGATORIES

1. State with particularity the 1997 and 1998 net worth, income, revenue and global holdings (including non-MAFCO holdings) of MAFCO, CPH, Ronald Perelman, Howard Gittis, and any other MAFCO or CPH employee who participated in the due diligence or financial review of Sunbeam's acquisition of the Coleman Company.

2. Identify all persons at CPH or MAFCO whose job responsibilities included, in 1997 or 1998, due diligence or financial review of proposed mergers and acquisitions, including a description of each person's educational and employment history, a description of any accounting or financial certifications or licenses held by such persons, and a description of any financial or business training they have had.

Dated: October 13, 2003


Thomas D. Yannucci, R.C.
Thomas A. Clare
Zhonette M. Brown

KIRKLAND & ELLIS LLP
655 15th Street, N.W. - Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

Joseph Ianno, Jr. (FL Bar # 655351)
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368

**Counsel for Defendant
Morgan Stanley & Co. Incorporated**

CERTIFICATE OF SERVICE

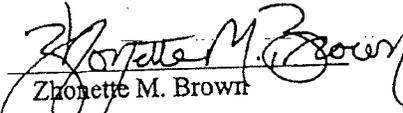
I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by facsimile and e-mail to all counsel of record on the attached service list on this 13th day of October, 2003.

Thomas D. Yannucci, P.C.
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

Counsel for Defendant
Morgan Stanley & Co. Incorporated

Joseph Ianno, Jr. (FL Bar # 655351)
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

BY:


Zhonette M. Brown

SERVICE LIST

<p>John Scarola SEARCY, DENNEY, SCAROLA, BARNHARDT & SHIPLEY, P.A. 2139 Palm Beach Lakes Boulevard West Palm Beach, Florida 33409</p>	<p>Counsel for Plaintiff</p>
<p>Jerold S. Solovy JENNER & BLOCK, LLC One IBM Plaza Suite 4400 Chicago, Illinois 60611</p>	<p>Counsel for Plaintiff</p>

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,)	
)	
Plaintiff,	)	Case No. 03 CA 005045 AI
)	
v.	)	Judge Elizabeth T. Maass
)	
MORGAN STANLEY & CO., INC.,)	
)	
Defendant.)	
)	

**COLEMAN (PARENT) HOLDINGS INC.'S RESPONSES AND
OBJECTIONS TO DEFENDANT MORGAN STANLEY & CO., INC.'S
THIRD SET OF INTERROGATORIES**

Plaintiff Coleman (Parent) Holdings Inc. ("CPH"), by its attorneys, and pursuant to Florida Rules of Civil Procedure 1.280, 1.340 and 1.350, hereby responds and objects to Morgan Stanley & Co. Incorporated's ("Morgan Stanley") Third Set of Interrogatories ("Interrogatories") dated October 13, 2003 as follows:

INITIAL OBJECTIONS

1. CPH incorporates by reference the Initial Objections set forth in its written response to Morgan Stanley's first set of interrogatories.

INTERROGATORY RESPONSES AND FURTHER OBJECTIONS

INTERROGATORY NO. 1: State with particularity the 1997 and 1998 net worth, income, revenue and global holdings (including non-MAFCO holdings) of MAFCO, CPH, Ronald Perelman, Howard Gittis, and any other MAFCO or CPH employee who participated in the due diligence or financial review of Sunbeam's acquisition of the Coleman Company.

RESPONSE: CPH notes that Interrogatory No. 1 constitutes multiple separate interrogatories. CPH objects to Interrogatory No. 1 as overbroad and not relevant to the litigation nor reasonably calculated to lead to the discovery of admissible evidence. CPH further objects to Interrogatory No. 1 because it seeks personal information about entities and individuals not party to

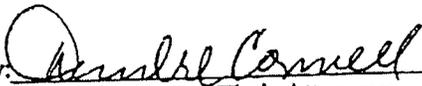
EXHIBIT
tabbles
2

this lawsuit, including Mafco, Ronald Perelman, Howard Gittis, and other individuals employed by Mafco or CPH.

INTERROGATORY NO. 2: Identify all persons at CPH or MAFCO whose job responsibilities included, in 1997 or 1998, due diligence or financial review of proposed mergers and acquisitions, including a description of each person's educational and employment history, a description of any accounting or financial certifications or licenses held by such persons, and a description of any financial or business training they have had.

RESPONSE: CPH notes that Interrogatory No. 2 constitutes multiple separate interrogatories. CPH objects to Interrogatory No. 2 insofar as it seeks information related to Mafco, a non-party to this lawsuit. CPH further objects to Interrogatory No. 2 as overbroad and as seeking information not relevant to the litigation nor reasonably calculated to lead to the discovery of admissible evidence because Interrogatory No. 2 is not limited to individuals who performed due diligence concerning the transaction by which Sunbeam acquired CPH's interest in The Coleman Company, Inc. CPH further objects to Interrogatory No. 2 on the ground that it is vague, ambiguous, and overbroad insofar as it fails to define the term "due diligence" or otherwise identify with sufficient particularity the activities that might be encompassed by that term.

As to objections:

By: 
One of Their Attorneys

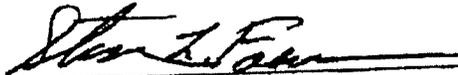
Dated: November 12, 2003

John Scarola
SEARCY DENNEY SCAROLA BARNHART
& SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33402-3626
(561) 686-6300

Jerold S. Solovy
Michael T. Brody
Deirdre E. Connell
JENNER & BLOCK, LLC
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

ATTORNEYS FOR COLEMAN (PARENT) HOLDINGS INC.

I, Steven L. Fasman, being duly sworn, depose and say that I am authorized on behalf of Coleman (Parent) Holdings Inc. and, on its behalf, I have read the foregoing COLEMAN (PARENT) HOLDINGS INC.'S RESPONSES AND OBJECTIONS TO MORGAN STANLEY & CO., INC.'S THIRD SET OF INTERROGATORIES, and to the best of my knowledge and belief the responses contained therein are true and correct.


STEVEN L. FASMAN

Subscribed and sworn to before me
this 12th day of November, 2003.


Notary Public
DEBIE HERNANDEZ
Notary Public, State of New York
No. 01HE5021268
Qualified in Queens County
Certificate Filed in New York County
Commission Expires December 13, 2005

CERTIFICATE OF SERVICE

I, Deirdre E. Connell, hereby certify that a true and correct copy of the foregoing **COLEMAN (PARENT) HOLDINGS INC.'S RESPONSES AND OBJECTIONS TO DEFENDANT MORGAN STANLEY & CO., INC.'S THIRD SET OF INTERROGATORIES** has been served upon the parties listed below via facsimile and U.S. mail on this 12th day of November 2003.

Thomas A. Clare, Esq.
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lake View Avenue, Suite 1400
West Palm Beach, FL 33401



Deirdre E. Connell



JDillard@CarltonFields.com on 01/05/2004 04:59:18 PM

To: jsolovy@jenner.com, mem@searcylaw.com, Thomas Clare/Washington DC/Kirkland-Ellis@K&E,
mbrody@jenner.com, jshaw@jenner.com
cc: Kimberly Chervenak/Washington DC/Kirkland-Ellis@K&E
Subject: Coleman v. Morgan

Attached please find Morgan Stanley's Motion to Compel Discovery re:
Third Set of Interrogatories, Interrogatory No. 1 and Notice of Hearing.

<<MorganCompel.pdf>> <<MorganNOH2.pdf>>



- MorganCompel.pdf



- MorganNOH2.pdf

#230580/smk

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

CASE NO.: 2003 CA 005045 AI

Plaintiffs,

vs.

MORGAN STANLEY & CO., INC.,

Defendant,

RE-NOTICE OF HEARING

YOU ARE HEREBY NOTIFIED that the undersigned has called up for hearing the following:

DATE: January 8, 2004

TIME: 8:45 a.m.

JUDGE: Hon. Elizabeth T. Maass

PLACE: Palm Beach County Courthouse, Room #11.1208, 205 North Dixie Highway,
West Palm Beach, FL 33401

SPECIFIC MATTERS TO BE HEARD:

Plaintiff's Motion for a Protective Order to Bar Certain Non-Party Discovery

Moving counsel certifies that he or she contacted opposing counsel and attempted to resolve the discovery dispute without hearing.

Coleman Holdings, Inc. vs Morgan Stanley & Company
Case No.: 2003 CA 005045 AI
Re-Notice of Hearing

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Fax and U.S. Mail to all Counsel on the attached list, and by Federal Express to Theodore Gewertz, Wachtell, Lipton, Rosen and Katz, 51 West 52nd Street, New York, NY 10019; and Nancy Swift, VP and Counsel, Credit Suisse First Boston, One Madison Avenue, New York, NY 10010 on this 5th day of JAN., 2004.



JACK SCAROLA
Florida Bar No.: 169440
Seney Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 684-5816
Attorney for Plaintiffs

Coleman Holdings, Inc. vs Morgan Stanley & Company
Case No.: 2003 CA 005045 AJ
Re-Notice of Hearing

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block, LLC
One IBM Plaza
Suite 4400
Chicago, IL 60611

#230580/mm

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

CASE NO: 2003 CA 005045 AI

Plaintiffs,

vs.

MORGAN STANLEY & CO., INC.

Defendant.

INGO THOMAS WILKIN
CLERK OF DISTRICT COURT
JAN 06 2004
RECEIVED FOR FILING

**NOTICE OF WITHDRAWAL OF
PLAINTIFF'S MOTION TO COMPEL DATED JANUARY 5, 2004**

Plaintiff hereby withdraws the Motion to Compel (production of the documents sought in the Plaintiff's Third Request for Production over the objections asserted in Morgan Stanley & Co., Inc.'s Response and Objections to Coleman (Parent) Holdings Inc.'s Third Request for Production of Documents) previously filed in this matter on January 5, 2004.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Fax and U.S. Mail to all counsel on the attached list on this 7th day of JAN, 2004 ~~2003.~~



JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2439 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 478-0754

Coleman (Parent) Holdings Inc. vs Morgan Stanley & Company
Notice of Withdrawal of Plaintiff's Motion to Compel Dated January 5, 2004
Case No.: 2003 CA 005045 AI

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block, LLC
One IBM Plaza
Suite 4400
Chicago, IL 60611

FAX TRANSMITTAL

JENNER & BLOCK

Jenner&Block LLP
One IBM Plaza
Chicago, IL 60611-7603
Tel 312 222-9350
www.jenner.com

Chicago
Dallas
Washington, DC

Date: January 9, 2004

To: Zhonette M. Brown, Esq.
Kirkland & Ellis

Fax: (202) 879-5200
Voice: (202) 879-5993

From: Michael T. Brody
312 923-2711

Client Number: 41198-10003

Important: This message is intended only for the use of the individual or entity to which it is addressed, and may contain information that is attorney work product, privileged, confidential and exempt from disclosure under applicable law. If the reader of this message is not the intended recipient, or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone, and return the original message to us at the above address via postal service. Thank you.

Message: As we discussed/

Total number of pages including this cover sheet: 3

Time Sent:

If you do not receive all pages, please call: 312 222-9350

Sent By:

Secretary: Caryn Jo Geisler

Extension: 6490

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

**ORDER ON PLAINTIFF'S MOTION FOR A PROTECTIVE ORDER TO BAR
CERTAIN NON-PARTY DISCOVERY**

THIS CAUSE came before the Court January 8, 2004 on Plaintiff's Motion for a Protective Order to Bar Certain Non-Party Discovery, with both parties well represented by counsel. In open Court Plaintiff's counsel stipulated that it will not call as a witness or offer any testimony at trial from an employee or affiliate of Plaintiff concerning whether Plaintiff breached a standard of care either in relying on representations from Defendant or in failing to perform, or retain others to perform, sufficient due diligence, prior to completion of the Coleman Transaction, as that term is defined in the subpoenas directed to non-parties Watchell, Lipton, Rosen and Katz ("Watchell, Lipton Subpoena") and Credit Suisse First Boston ("Credit Suisse Subpoena"). Based on the foregoing and the proceedings before the Court, it is

ORDERED AND ADJUDGED that Plaintiff's Motion for a Protective Order to Bar Certain Non-Party Discovery is Granted, in part, and Denied, in part. Defendant shall be entitled to receive only those documents requested in Paragraph 10 of the Wachtell Lipton Subpoena and paragraph 7 of the Credit Suisse Subpoena as if the subpoenas were amended by interlineation to insert "requests by Coleman, CPH, or any of either's affiliates or related entities to perform" immediately prior to "due diligence" and to delete "performed" in the first line thereof. Defendant shall not be entitled to receive any documents pursuant to

paragraph 33 of the Wachtell Lipton Subpoena and paragraphs 18, 30, and 35 of the Credit Suisse Subpoena.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 9 day of January, 2004.



ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:

Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci
655 15th Street, NW, Suite 1200
Washington DC 20005

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, Il 60611

Mark F. Bideau, Esq.
777 S. Flagler Dr.; Suite 300E
West Palm Beach, FL 33401

David M. Wells, Esq.
50 N. Laura Street, Suite 3300
Jacksonville, FL 32202

1 | 20 | 04

#230580/mm

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

CASE NO: 2003 CA 005045 AI

Plaintiffs,

vs.

MORGAN STANLEY & CO., INC.

Defendant.

_____ /

MOTION FOR SPECIAL TRIAL SETTING

Plaintiff, COLEMAN (PARENT) HOLDINGS INC., by and through its undersigned attorneys, moves this Honorable Court for a special setting of the trial of the above-styled cause of action and a corresponding extension of pre-trial deadlines presently established in the Uniform Pre-Trial Order attached. In support of this Motion, the Plaintiff would show that the nature and anticipated length of the trial would require significant advance notice of the actual date of commencement of the trial. In addition, insufficient time is available between receipt of the attached Order and the deadlines imposed therein to permit timely and full compliance with the established filing deadlines

WHEREFORE, Plaintiff requests that this matter be re-set for trial approximately 90 days beyond its present setting with all pre-trial deadlines extended accordingly.

Coleman (Parent) Holdings Inc. vs Morgan Stanley & Company
Motion For Special Trial Setting
Case No.: 2003 CA 005045 AI

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by
Fax and U.S. Mail to all counsel on the attached list on this 13th day of JAN.,
2004.



JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 478-0754
Attorneys for Plaintiffs

Coleman (Parent) Holdings Inc. vs Morgan Stanley & Company
Motion For Special Trial Setting
Case No.: 2003 CA 005045 AI

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block, LLC
One IBM Plaza
Suite 4400
Chicago, IL 60611

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CASE NO: 03 CA-005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

NOTICE OF WITHDRAWAL OF ATTORNEY OF RECORD

Defendant, MORGAN STANLEY & CO., INC., by and through its undersigned counsel, hereby gives notice of withdrawal of Attorney Brett H. McGurk of Kirkland & Ellis LLP from this action.

CERTIFICATE OF SERVICE

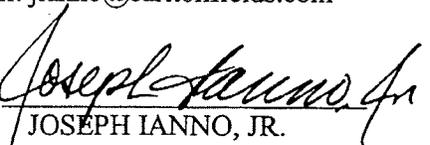
I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Federal Express and e-mail to all counsel of record on the attached service list on this 14th day of January, 2004.

Thomas D. Yannucci, P.C.
Thomas A. Clare
Zhonette M. Brown
Larissa Paule-Carres
Brett H. McGurk
KIRKLAND & ELLIS
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

COUNSEL FOR DEFENDANT

CARLTON FIELDS, P.A.
222 Lakeview Ave.
Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

BY:


JOSEPH IANNO, JR.
Florida Bar No: 655351

SERVICE LIST

Jack Scarola
**SEARCY, DENNY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy
Michael Brody
JENNER & BLOCK, LLC
One IBM Plaza
Suite 400
Chicago, IL 60611

**IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA**

COLEMAN (PARENT) HOLDINGS INC.,)

Plaintiff,)

v.)

MORGAN STANLEY & CO., INC.,)

Defendant.)

Case No. 03 CA 005045 AI

Judge Elizabeth T. Maass

**COLEMAN (PARENT) HOLDINGS INC.'S SUPPLEMENTAL RESPONSE AND
OBJECTIONS TO DEFENDANT MORGAN STANLEY & CO., INC.'S
THIRD SET OF INTERROGATORIES**

Plaintiff Coleman (Parent) Holdings Inc. ("CPH"), by its attorneys, and pursuant to Florida Rules of Civil Procedure 1.280, 1.340 and 1.350, hereby responds and objects to Morgan Stanley & Co. Incorporated's ("Morgan Stanley") Third Set of Interrogatories ("Interrogatories") dated October 13, 2003 as follows:

INITIAL OBJECTIONS

CPH incorporates by reference the Initial Objections set forth in its written response to Morgan Stanley's first set of interrogatories.

INTERROGATORY RESPONSE

INTERROGATORY NO. 2:

Identify all persons at CPH or MAFCO whose job responsibilities included, in 1997 or 1998, due diligence or financial review of proposed mergers and acquisitions, including a description of each person's educational and employment history, a description of any accounting or financial certifications or licenses held by such persons, and a description of any financial or business training they have had.

RESPONSE:

Subject to and without waiving the Initial Objections, CPH states as follows: Review and analysis of available information relating to proposed merger or acquisition candidates is not the

primary or sole function of either CPH, MAFCO or any CPH or MAFCO personnel. Furthermore, neither CPH nor MAFCO, during 1997-98, associated with any particular employee or job title any particular set of "job responsibilities." Finally, some MAFCO employees may have participated in the review or analysis of available information relating to one or more candidates during 1997-98 but not other candidates, for a variety of reasons. The following MAFCO employees generally participated in review or analysis of available information relating to one or more candidates during 1997-98:

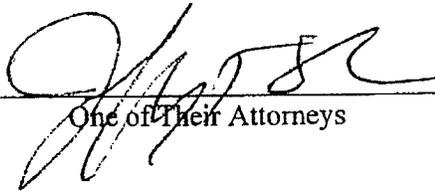
Lorelei Joy Borland*
Terry C. Bridges*
Glenn P. Dickes*
Donald G. Drapkin*
Irwin Engelman*#
Norman J. Ginstling*#
Howard Gittis*
J. Eric Hanson
Anthony J. Ian
Robert I. Knibb
James R. Maher
William G. Nesbitt
Ronald O. Perelman
Joram C. Salig*
Paul G. Savas
Marvin Schaffer
Barry F. Schwartz*
Todd J. Slotkin
John A. Winkel
Gregory J. Woodland

In addition to the people previously identified, other MAFCO employees from time to time provided isolated information or performed isolated tasks with regard to particular transactions during 1997-98, but they were not involved generally in the process of review and analysis. Although it is impossible at this point to determine definitively from CPH and MAFCO records and employees who provided isolated information or performed tasks during 1997-98, those MAFCO employees may have included the following:

Gary L. Leshko*
Steven L. Fasman*
Lenny Ajzenman#
Laurence Winoker#

All of the people identified are college graduates. The people whose names are followed by a "*" are each admitted to practice law in at least one state. The people whose names are followed by a "#" are each licensed as a certified public accountant in at least one state. Ms. Borland and Messrs. Bridges, Drapkin, Gittis and Schwartz were all partners at law firms prior to working for MAFCO. Mr. Salig was an associate at a law firm prior to working for MAFCO.

By: _____



One of Their Attorneys

Dated: January 22, 2004

John Scarola
SEARCY DENNEY SCAROLA BARNHART
& SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33402-3626
(561) 686-6300

Jerold S. Solovy
JENNER & BLOCK LLP
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

ATTORNEYS FOR COLEMAN (PARENT) HOLDINGS INC.

I, Steven L. Fasman, being duly sworn, depose and say that I am authorized on behalf of Coleman (Parent) Holdings Inc. and, on its behalf, I have read the foregoing **COLEMAN (PARENT) HOLDINGS INC.'S RESPONSES AND OBJECTIONS TO DEFENDANT MORGAN STANLEY & CO., INC.'S THIRD SET OF INTERROGATORIES**, and to the best of my knowledge and belief the responses contained therein are true and correct.



STEVEN L. FASMAN

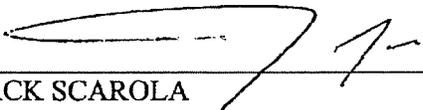
Subscribed and sworn to before me
this 20th day of January, 2004.


Notary Public

DEBBIE HERNANDEZ
Notary Public, State of New York
No. 01HE5021255
Qualified in Queens County
Certificate Filed in New York County
Commission Expires December 13, 2005

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by
Fax and Federal Express to all counsel on the attached list on this 22ND day of
JANUARY, 2004.



JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 478-0754
Attorneys for Plaintiff

Coleman (Parent) Holdings Inc. vs Morgan Stanley & Company
Case No.: 2003 CA 005045 AI

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block, LLC
One IBM Plaza
Suite 4400
Chicago, IL 60611

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,)	
)	
Plaintiff,	)	Case No. CA 03-5045 AI
)	
v.)	
)	
MORGAN STANLEY & CO., INC.,)	
)	
Defendant.)	

AMENDED NOTICE OF VIDEOTAPED DEPOSITION

To: Thomas A. Clare, Esq. KIRKLAND & ELLIS, LLP 655 Fifteenth Street, N.W. Suite 1200 Washington, D.C. 20005	Joseph Ianno, Jr., Esq. CARLTON FIELDS, P.A. 222 Lake View Avenue Suite 1400 West Palm Beach, FL 33401
--	--

PLEASE TAKE NOTICE that Plaintiff Coleman (Parent) Holdings, Inc. ("CPH") requests the deposition upon oral examination of the following non-party witness pursuant to the commission issued by the Circuit Court of the Fifteenth Judicial District of Florida, and the subpoena issued in aid of that commission by the Supreme Court of the State of New York, on the date, time, and at the location set forth below:

Alexandre Fuchs February 13, 2004 at 9:30 a.m.

The deposition will be recorded by stenographic and videographic means at the offices of Esquire Deposition Services, 216 E. 45th Street, 8th floor, New York, New York 10017-3004. The videographer will be Esquire Deposition Services. The deposition will be taken before a person authorized to administer oaths and will continue day to day until complete.

The witness is requested to bring to the deposition the documents specified in Exhibit A to the Subpoena.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by facsimile and mail to all counsel on the attached Service List, this 30th day of January, 2004.

Dated: January 30, 2004

COLEMAN (PARENT) HOLDINGS INC.

By: Mark Brody
One of Its Attorneys

Jerold S. Solovy
Michael T. Brody
Deirdre E. Connell
JENNER & BLOCK LLP
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

Jack Scarola
SEARCY DENNEY SCAROLA BARNHART
& SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33409
(561) 686-6300

SERVICE LIST

Thomas A. Clare, Esq.
KIRKLAND & ELLIS, LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lake View Avenue, Suite 1400
West Palm Beach, FL 33401

FAX TRANSMITTAL

J E N N E R & B L O C K

Jenner&Block LLP
One IBM Plaza
Chicago, IL 60611-7608
Tel 312 222-9350
www.jenner.com

Chicago
Dallas
Washington, DC

Date: January 30, 2004

To: Thomas A. Clare, Esq.
Kirkland & Ellis

cc: Joseph Ianno, Jr.
Carlton Fields, P.A.

John Scarola, Esq.
Searcy Denney Scarola
Barnhart & Shipley, P.A.

From: Michael T. Brody
312 923-2711

Fax: (202) 879-5200
Voice: (202) 879-5993

Fax: (561) 659-7368
Voice: (561) 659-7070

Fax: (561) 684-5816 (before 5:00 pm)
Voice: (561) 686-6350, Ext. 140

Client Number: 41198-10003

Important: This message is intended only for the use of the individual or entity to which it is addressed, and may contain information that is attorney work product, privileged, confidential and exempt from disclosure under applicable law. If the reader of this message is not the intended recipient, or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone, and return the original message to us at the above address via postal service. Thank you.

Message:

Total number of pages including this cover sheet: 8

Time Sent:

If you do not receive all pages, please call: 312 222-9350

Sent By:

Secretary: Caryn Jo Geisler

Extension: 6490

JENNER & BLOCK

January 30, 2004

By Telecopy

Thomas A. Clare, Esq.
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Jenner & Block LLP
One IBM Plaza
Chicago, IL 60611-7603
Tel 312 222-9350
www.jenner.com

Chicago
Dallas
Washington, DC

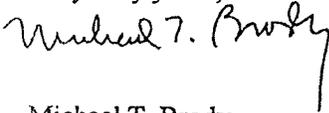
Michael T. Brody
Tel 312 923-2711
Fax 312 840-7711
mbrody@jenner.com

Re: *Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co.*
Morgan Stanley Senior Funding, Inc. v. MacAndrews & Forbes Holdings Inc., et al.

Dear Tom:

I enclose an (a) amended notice of deposition for Alexandre Fuchs, reflecting your proposed date of February 13 and (b) amended notice of Rule 1.310 deposition, reflecting your proposed date of February 10.

Very truly yours,



Michael T. Brody

MTB:cjg

cc: Joseph Ianno, Esq. (by telecopy)
John Scarola, Esq. (by telecopy)
Jerold S. Solovy, Esq.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by facsimile and mail to all counsel on the attached Service List, this 30th day of January, 2004.

COLEMAN (PARENT) HOLDINGS INC.

By: *Michael T. Brody*
One of Its Attorneys

Jerold S. Solovy
Ronald L. Marmor
Robert T. Markowski
Michael T. Brody
JENNER & BLOCK, LLC
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

Jack Scarola
SEARCY DENNEY SCAROLA BARNHART &
SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409
(561) 686-6300

SERVICE LIST

Thomas A. Clare, Esq.
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Joseph Ianno, Jr., Esq.
CARLTON FIELDS
222 Lake View Avenue, Suite 1400
West Palm Beach, FL 33401

EXHIBIT A**CORPORATE DEPOSITION TOPICS**

1. Morgan Stanley's electronic document, including e-mail, retention policies, practices, and procedures and the means of enforcing these policies, and concerning Morgan Stanley's ability (including the procedures, time labor, and expense involved) to retrieve e-mails, including but not limited to:
 - A. whether the media housing Morgan Stanley's electronic documents and e-mail is active/online data, near-line data, offline data, back-up tape, or erased or fragmented material and the means available to access any or each of those media and the reliability of these media;
 - B. what policies, practices, and procedures Morgan Stanley has implemented in order to comply with the SEC's December 3, 2002 Order;
 - C. what policies, practices, and procedures Morgan Stanley had in place prior to the SEC's December 3, 2002 Order;
 - D. the policies, practices, and procedures Morgan Stanley applied with respect to electronic documents and e-mail and prior Sunbeam related litigation; and
 - E. the manner of enforcement and/or discipline utilized by Morgan Stanley in order to implement its retention policies regarding electronic documents, including e-mail.

#230580/mm

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

CASE NO: 2003 CA 005045 AI

Plaintiffs,

vs.

MORGAN STANLEY & CO., INC.

Defendant.

NOTICE OF FILING PLEADING UNDER SEAL

Plaintiff, COLEMAN (PARENT) HOLDINGS INC., hereby gives Notice of the filing of
Coleman (Parent) Holdings Inc.'s Amended Response to Interrogatory No. 1 of Morgan Stanley
& Co. Inc.'s Third Set of Interrogatories, filed under Seal on this date.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by
Fax and Federal Express to all counsel on the attached list on this 12th day of Feb.,
2004.



JACK SCAROLA
Florida Bar No.: 169440
Seatey Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 478-0754
Attorneys for Plaintiff

Coleman (Parent) Holdings Inc. vs Morgan Stanley & Company
Notice Of Filing Pleading Under Seal
Case No.: 2003 CA 005045 AI

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block, LLC
One IBM Plaza
Suite 400
Chicago, IL 60611

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CASE NO: 03 CA-005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

**MORGAN STANLEY & CO. INCORPORATED'S SECOND SET
OF REQUESTS FOR ADMISSION**

Pursuant to Florida Rule of Civil Procedure 1.370, Defendant Morgan Stanley & Co. Incorporated ("Morgan Stanley") submits this second set of requests for admission to Plaintiff Coleman (Parent) Holdings, Inc. ("CPH"). The specific requests are preceded by Instructions and Definitions which shall govern the specific requests. Morgan Stanley requests that Plaintiff answer, under oath, the following requests for admission in accordance with the Florida Rules of Civil Procedure, or within such shorter period as may be agreed by counsel, and submit them in writing to counsel for Morgan Stanley at the offices of Kirkland & Ellis LLP, 655 Fifteenth Street, NW, Suite 1200, Washington, DC 20005.

INSTRUCTIONS

1. The connectives "and" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery request all responses that might otherwise be construed to be outside of its scope.

2. The use of the singular form of any word includes the plural and vice versa.

3. If you cannot admit or deny a request for admission after making a reasonable inquiry and the information known or readily attainable by CPH is insufficient to enable CPH to admit or deny fully, so state and admit or deny to the extent possible, specifying your inability to answer the remainder; stating whatever information or knowledge you have concerning the unanswered portion; and detailing what you did in attempting to secure the information.

4. The terms “any,” “all,” and “each” shall be construed to mean “any,” “all,” or “each”.

5. The term “including” shall be construed to mean “including but not limited to.”

6. The present tense shall be construed to include the past and future tenses.

DEFINITIONS

1. “Advisors” means financial advisors, legal advisors, accountants, consultants, and any other third-party advising or assisting CPH, Coleman, or MAFCO (or any affiliate thereof) in any way with the Coleman Transaction.

2. “Coleman” means Coleman Company, Inc.

3. The “Coleman Transaction” means Sunbeam’s acquisition of Coleman Company, Inc. from CPH and all related communications, agreements, and transactions, including the February 27, 1998 Agreements and the March 30, 1998 closing.

4. “CPH” means Coleman (Parent) Holdings Inc. and any of its officers, directors, former or present employees, representatives, and Advisors.

5. "February 27, 1998 Agreements" means (a) the Agreement and Plan of Merger dated February 27, 1998 between Sunbeam Corp., Laser Acquisition Corp., CLN Holdings, Inc., and Coleman (Parent) Holdings Inc.; (b) the Agreement and Plan of Merger dated February 27, 1998 between Sunbeam Corp., Camper Acquisition Corp., and The Coleman Company, Inc.; and (c) all schedules, exhibits, and documents related to those Agreements.

6. "MAFCO" means MacAndrews & Forbes Holdings, Inc. and any of its officers, directors, former or present employees, representatives and agents, and Advisors.

7. The term "person" is defined as any natural person or any business, legal or governmental entity or association.

8. "Sunbeam" means Sunbeam Corporation or any of its subsidiaries, divisions, predecessors, successors, present and former employees, representatives, and agents.

9. The term "Accounting Irregularities" refers to the accounting practices engaged in by Sunbeam during 1996, 1997, and the first quarter of 1998 that led to the restatement of Sunbeam's financial statements in October of 1998.

REQUESTS FOR ADMISSION

1. CPH retained Credit Suisse First Boston as its exclusive financial advisor for the Coleman Transaction.

2. Coleman retained Credit Suisse First Boston as its exclusive financial advisor for the Coleman Transaction.

3. MAFCO retained Credit Suisse First Boston as its exclusive financial advisor for the Coleman Transaction.

4. Credit Suisse First Boston had the ability in 1997 and 1998 to conduct a due-diligence investigation sufficient to detect Accounting Irregularities at Sunbeam.

5. Credit Suisse First Boston had the ability in 1997 and 1998 to conduct a due-diligence investigation sufficient to detect the falsity of the misrepresentations alleged in the Complaint.

6. CPH retained Wachtell, Lipton, Rosen & Katz as its legal advisor for the Coleman Transaction.

7. Coleman retained Wachtell, Lipton, Rosen & Katz as its legal advisor for the Coleman Transaction.

8. MAFCO retained Wachtell, Lipton, Rosen & Katz as its legal advisor in the Coleman Transaction.

9. Wachtell, Lipton, Rosen & Katz had the ability in 1997 and 1998 to conduct a due-diligence investigation sufficient to detect Accounting Irregularities at Sunbeam.

10. Wachtell, Lipton, Rosen & Katz had the ability in 1997 and 1998 to conduct a due-diligence investigation sufficient to detect the falsity of the misrepresentations alleged in the Complaint.

11. Any reasonable due-diligence investigation by Credit Suisse First Boston in the first quarter of 1998 would have been sufficient to detect Accounting Irregularities at Sunbeam.

12. Any reasonable due-diligence investigation by Credit Suisse First Boston in the first quarter of 1998 would have been sufficient to detect the falsity of the misrepresentations alleged in the Complaint.

13. Any reasonable due-diligence investigation by Wachtell, Lipton, Rosen & Katz in the first quarter of 1998 would have been sufficient to detect Accounting Irregularities at Sunbeam.

14. Any reasonable due-diligence investigation by Wachtell, Lipton, Rosen & Katz in the first quarter of 1998 would have been sufficient to detect the falsity of the misrepresentations alleged in the Complaint.

15. CPH did not ask Credit Suisse First Boston to perform a due-diligence investigation into Sunbeam in the first quarter of 1998.

16. CPH did not ask Wachtell, Lipton, Rosen & Katz to perform a due-diligence investigation into Sunbeam in the first quarter of 1998.

17. Coleman did not ask Credit Suisse First Boston to perform a due-diligence investigation into Sunbeam in the first quarter of 1998.

18. Coleman did not ask Wachtell, Lipton, Rosen & Katz to perform a due-diligence investigation into Sunbeam in the first quarter of 1998.

19. MAFCO did not ask Credit Suisse First Boston to perform a due-diligence investigation into Sunbeam in the first quarter of 1998.

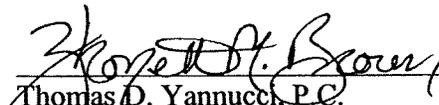
20. MAFCO did not ask Wachtell, Lipton, Rosen & Katz to perform a due-diligence investigation into Sunbeam in the first quarter of 1998.

21. Credit Suisse First Boston did not conduct a due-diligence investigation into Sunbeam in the first quarter of 1998.

22. Wachtell, Lipton, Rosen & Katz did not conduct a due-diligence investigation into Sunbeam in the first quarter of 1998.

23. Neither CPH nor its attorneys are in possession of the letter alleged to have been faxed to Morgan Stanley from Arthur Andersen on March 17, 1998, as described in paragraph 56 in CPH's Complaint.

Dated: February 16, 2004


Thomas D. Yannucci, P.C.

Lawrence P. Bemis

Thomas A. Clare

KIRKLAND & ELLIS LLP

655 15th Street, N.W. – Suite 1200

Washington, D.C. 20005

Telephone: (202) 879-5000

Facsimile: (202) 879-5200

Joseph Ianno, Jr. (FL Bar # 655351)

CARLTON FIELDS, P.A.

222 Lakeview Ave., Suite 1400

West Palm Beach, FL 33401

Telephone: (561) 659-7070

Facsimile: (561) 659-7368

Counsel for Defendant

Morgan Stanley & Co. Incorporated

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by facsimile and e-mail to all counsel of record on the attached service list on this 16th day of February, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis
Thomas A. Clare
KIRKLAND & ELLIS LLP
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

**Counsel for Defendant
Morgan Stanley & Co. Incorporated**

Joseph Ianno, Jr. (FL Bar # 655351)
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

BY:



SERVICE LIST

<p>John Scarola SEARCY, DENNEY, SCAROLA, BARNHARDT & SHIPLEY, P.A. 2139 Palm Beach Lakes Boulevard West Palm Beach, Florida 33409</p>	<p>Counsel for Plaintiff</p>
<p>Michael Brody JENNER & BLOCK, LLC One IBM Plaza Suite 4400 Chicago, Illinois 60611</p>	<p>Counsel for Plaintiff</p>

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CASE NO: 03 CA-005045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

v.

MORGAN STANLEY & CO. INC.,

Defendant.

**MORGAN STANLEY & CO. INCORPORATED'S OPPOSITION TO COLEMAN
(PARENT) HOLDINGS INC.'S MOTION TO COMPEL PRODUCTION OF
DOCUMENTS RELATING TO EMPLOYEE PERFORMANCE**

Plaintiff Coleman (Parent) Holdings Inc.'s ("CPH") motion to compel the indiscriminate production of dozens of confidential personnel, compensation, and employment performance records from more than fifty Morgan Stanley & Co. Incorporated ("Morgan Stanley") employees should be denied. Morgan Stanley has repeatedly attempted to resolve this discovery dispute with CPH and — indeed — already has offered to produce broad categories of employment-related documents responsive to CPH's requests. Unsatisfied with these efforts to compromise, CPH categorically rejected Morgan Stanley's good faith offers of production.

CPH's document requests are overbroad, would unnecessarily impair the effectiveness and confidentiality of Morgan Stanley's performance review process, and do not give appropriate consideration to the privacy concerns of current and former Morgan Stanley employees. For these reasons, CPH's requests are contrary to Florida law and should be denied.

1. CPH's Motion Is Moot As It Relates To Requests 45 and 46.

Morgan Stanley already produced documents in its possession responsive to CPH Request 45 on November 10, 2003 when it produced two manuals, entitled "Performance Evaluation 1997: Evaluator Guide" (MORGAN STANLEY CONFIDENTIAL 0082161-219) and "Performance Evaluation 1998: Evaluator Guide." (MORGAN STANLEY CONFIDENTIAL 0082062-160) These two manuals (totaling more than 150 pages) include comprehensive descriptions of Morgan Stanley's "performance evaluation criteria or guidelines" for 1997 and 1998. CPH's motion is therefore moot as to Request 45.

Similarly, with regard to CPH Request 46, Morgan Stanley has agreed to produce whatever 1997 and 1998 documents it might have concerning "compensation criteria or guidelines" for the Morgan Stanley divisions that performed work related to Sunbeam's acquisition of Coleman. (Feb. 17, 2004 Letter from T. Clare to M. Brody (Ex. A).) CPH's motion is therefore moot as to Request 46.

2. CPH's Remaining Requests for Employee Personnel Files Are Overbroad, Unnecessarily Intrusive, And Thus Contrary to Florida Law.

With respect to CPH Request 44 (which seeks "all documents" relating to "employment contracts, performance evaluations, and/or personnel files" including "any documents" discussing "training, experience, competence, and accomplishments"), Morgan Stanley has already offered to produce the only categories of personnel file documents that are even remotely relevant to this action. Specifically, Morgan Stanley agreed to produce excerpts from employee personnel files addressing:

- all references (positive or negative) to work performed by the employee on Sunbeam-related engagements;
- all references (positive or negative) to the employee's performance in fee generation; and

- all references (positive or negative) to the employee's performance of due diligence activities.

(Sept. 25, 2003 Letter from T. Clare to M. Brody (Ex. B).)

CPH never bothered to respond to Morgan Stanley's offer. Instead, more than four months later, CPH filed this Motion to Compel seeking the wholesale production of *complete* personnel files for more than 50 current and former Morgan Stanley employees. But these intrusive requests are improper and overbroad, as the overwhelming majority of the documents and information in those files are wholly irrelevant to this litigation and not reasonably calculated to lead to discovery of admissible evidence.

A. Florida Law Disfavors Indiscriminate Requests For The Wholesale Production Of Employee Personnel Records.

Florida courts have uniformly recognized the sensitivity and potential for misuse of information contained in employee personnel files — and have routinely refused to enforce blunderbuss requests for employers to produce complete, unredacted copies of employee personnel files.

In *CAC-Ramsay Health Plans, Inc. v. Johnson*, for example, the Third District Court of Appeal held that a request for complete personnel files is fatally overbroad. *See CAC-Ramsay Health Plans, Inc. v. Johnson*, 641 So. 2d 434 (3d DCA 1994). The Court held that the “production of the complete files ... would reveal extensive personal information which is not reasonably calculated to lead to the discovery of admissible evidence. Clearly, some of those files do not contain information relevant to [the plaintiff's] claim.” *Id.* at 435.

The Fourth District Court of Appeal applies the same reasoning — and the same prohibition against wholesale requests for personnel files. Indeed, the Fourth District Court has held that a trial court “depart[s] from the essential requirements of law” when it requires “the

production of the personnel files *in toto*.” *Seta Corp. of Boca, Inc. v. Office of the Attorney General, Fla.*, 756 So. 2d 1093, 1094 (4th DCA 2000).

B. CPH’s Document Request Does Not Contain Any Meaningful Limitation To Relevant Issues.

CPH’s Request No. 44 does not — on its face — contain any relevancy limitation whatsoever. Apparently recognizing this fatal defect, CPH belatedly offers a “compromise.” But CPH’s proposed “compromise” — which demands the production of all documents containing “criticism” or “reprimands” (regardless of whether those “criticisms” or “reprimands” relate to work performed on Sunbeam-related matters or the performance of a task that is relevant to the issues in this case) — does not contain any meaningful limitation to the relevant issues. Instead, CPH’s proposed “compromise” is nothing more than an impermissible fishing expedition into MS & Co. employees’ confidential personnel files.

CPH’s proposed “compromise” involves narrowing Request No. 44 to the following three categories of personnel file documents:

- (1) Documents in employee personnel files that mention Sunbeam by name;
- (2) Documents in employee personnel files relating to fee generation; and
- (3) Documents in employee personnel files that “contain or concern criticisms or reprimands for work done by the relevant employees.”

(Aug. 28, 2003 Letter from M. Brody to T. Clare (Ex. C); Feb. 11, 2004 CPH’s Mot. to Compel Prod. of Docs. Relating to Employee Performance at 2-3.) As noted above, Morgan Stanley has already indicated its willingness to produce the first two categories of documents. (Ex. B.) The only issue for the Court, therefore, is whether the third category of documents in CPH’s proposed “compromise” (“criticisms” and “reprimands”) is sufficiently tailored to the relevant issues in this case. The answer is clear. It is not.

As an initial matter, unless the request for “criticisms” or “reprimands” is limited to subjects relevant to the litigation, CPH’s proposed “compromise” to limit Request No. 44 is meaningless. Indeed, without a subject-matter limitation, *virtually every negative entry* in an employee’s personnel file (no matter how casual the reference or how unrelated to work activities relevant to this action) could be considered a “criticism” or “reprimand.” Like many companies, Morgan Stanley asks reviewers to identify the “strengths” and “weaknesses” of employees in particular categories, and to suggest areas where improvement might be warranted. Under CPH’s approach, every “weakness” and performance area identified for improvement would constitute a “criticism” that would need to be reviewed and produced.

CPH’s request for all “criticisms” and “reprimands” also is hopelessly overbroad, sweeping within its ambit a broad range of potentially embarrassing (but ultimately irrelevant) information in employment files. For example, under CPH’s formulation, even minor “criticisms” and “reprimands” would need to be produced, including those relating to minor employment offenses such as excessive tardiness, unauthorized absences, or excessive personal phone or Internet usage. Clearly, that is not what the Florida District Courts of Appeal had in mind when they cautioned trial courts against requiring the production of confidential personnel documents unrelated to plaintiffs’ claims.

Rather than produce confidential personnel documents reflecting generalized “weaknesses” and irrelevant “criticisms” or “reprimands” concerning unrelated employment activities, Morgan Stanley reasonably offered to produce all “criticisms” and “reprimands” related to the performance of due diligence — the issue that lies at the heart of CPH’s Complaint in this case. (Ex. B.) In addition, to the extent that such entries exist, Morgan Stanley is willing

to produce excerpts of personnel files that constitute “criticisms” or “reprimands” relating to an individual employee’s honesty.

CPH’s position — that simply by alleging “negligence” it may pry into *every* “criticism” or “reprimand” in more than fifty employee personnel files — is untenable. In the context of personnel files, the Florida Supreme Court has explained that “[e]ven though the scope of discovery is broad, [the request for personnel file documents] must be relevant to issues properly framed by the pleadings in the litigation.” *Alterra Healthcare Corp. v. Estate of Shelley*, 827 So. 2d 936, 946 (Fla. 2002). Here, CPH’s Complaint alleges claims for fraud and negligent misrepresentation. These claims, as interpreted by CPH’s counsel, require proof that (1) “[Morgan Stanley] actually knew about Sunbeam’s fraudulent accounting and negligently failed to disclose what it new [sic]” or (2) that “[Morgan Stanley] negligently failed to discover the fraud.” (Jan. 8, 2004 CPH Hearing Hand-up Ex. D.) To be relevant, therefore, any “criticism” or “reprimand” must relate to the truthfulness of the employee in the first scenario, or the performance of due diligence by the employee in the second. *That is precisely the information Morgan Stanley has offered to produce.* This compromise correctly balances the relevance and privacy interests inherent in the release of information from personnel files.

C. CPH’s Overbroad Request Would Impermissibly And Unnecessarily Invade The Privacy Of More Than Fifty Morgan Stanley Employees.

In *CAC-Ramsay Health Plans*, the District Court of Appeal recognized the dangers of requiring employers to produce confidential personnel file documents — *i.e.* the indiscriminate production of “extensive personal information” unrelated to the subject of the litigation. *CAC-Ramsay Health Plans*, 641 So. 2d at 435. Here, that danger exists for *more than fifty* current and former Morgan Stanley employees — many of whom played only a minor role in Morgan Stanley’s Sunbeam-related engagements, and the vast majority of whom had no contact

whatsoever with CPH during the negotiations leading to the acquisition transaction described in the pleadings.

Quite apart from the unnecessary invasion of privacy of individual current and former Morgan Stanley employees, the indiscriminate disclosure of confidential personnel file information would undermine the integrity and effectiveness of Morgan Stanley's review process. Like many companies, Morgan Stanley utilizes an anonymous "360 degree" review process in which employees are reviewed (anonymously) by supervisors and subordinates alike. Requiring Morgan Stanley to produce the "criticisms" of heretofore "anonymous" reviewers creates the very real possibility that the "anonymous" nature of Morgan Stanley's review process (which is designed to encourage candor in reviews) will be destroyed as its employees are confronted — in depositions and elsewhere — with the negative remarks of their co-workers. CPH's overbroad requests, which are not limited to Sunbeam-related references or the performance of relevant tasks, do not justify this unwarranted disruption of Morgan Stanley's review process.

CPH's citation of *Alterra Healthcare Corp.* is misleading. The *Alterra* Court specifically held that "the trial court should fully consider the employees' alleged privacy interest — in the context of determining the relevancy of any discovery request which implicates it." *Alterra Healthcare Corp.*, 827 So. 2d at 947. Here, Morgan Stanley is not seeking to block production of relevant, discoverable information based solely on the privacy rights of its current and former employees. Rather, Morgan Stanley seeks to prevent CPH from indiscriminately seeking broad categories of irrelevant (but highly confidential) employee personnel file information without the required connection to a relevant issue in this case.

CONCLUSION

For these reasons, CPH's Motion to Compel Production of Documents Relating to Employee Performance should be denied. At a minimum, however, CPH's requests for production should be limited to the categories of documents that Morgan Stanley has agreed to produced, an limited to the relevant time period of 1997 and 1998.

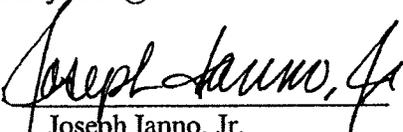
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by facsimile and e-mail to all counsel of record on the attached service list on this 17th day of February, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar No. 618349)
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

**Counsel for Defendant
Morgan Stanley & Co. Incorporated**

Joseph Ianno, Jr. (FL Bar # 655351)
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

BY 
Joseph Ianno, Jr.
Florida Bar No: 655351

SERVICE LIST

<p>John Scarola SEARCY, DENNEY, SCAROLA, BARNHARDT & SHIPLEY, P.A. 2139 Palm Beach Lakes Boulevard West Palm Beach, Florida 33409</p>	<p>Counsel for Plaintiff</p>
<p>Jerold S. Solovy JENNER & BLOCK, LLC One IBM Plaza Suite 4400 Chicago, Illinois 60611</p>	<p>Counsel for Plaintiff</p>

Exhibit A

KIRKLAND & ELLIS LLP

AND AFFILIATED PARTNERSHIPS

655 Fifteenth Street, N.W.
Washington, D.C. 20005

202 879-5000

www.kirkland.com

Thomas A. Clare
To Call Writer Directly:
(202) 879-5993
tclare@kirkland.com

Facsimile:
202 879-5200

Dir. Fax: (202) 879-5200

February 17, 2004

By Facsimile

Michael Brody, Esq.
Jenner & Block, LLC
One IBM Plaza
Chicago, IL 60611-7603

Re: *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc.*
MSSF v. MacAndrews & Forbes Holdings Inc. et al.

Dear Mike:

I write in regard to Request No. 46 of CPH's First Request for Production. Morgan Stanley agrees to produce any documents it may have concerning 1997 or 1998 "compensation criteria or guidelines" for the Morgan Stanley division that performed work related to Sunbeam's acquisition of Coleman. This request will therefore not need to be addressed during the February 19, 2004 hearing on the Motion To Compel Production of Documents Relating to Employee Performance.

Sincerely,



Thomas A. Clare

cc: Joseph Ianno, Jr., Esq. (by facsimile)
Deirdre Connell, Esq. (by facsimile)
Jerold S. Solovy, Esq. (by facsimile)
John Scarola, Esq. (by facsimile)

Chicago

London

Los Angeles

New York

San Francisco

16div-001318

Exhibit B

KIRKLAND & ELLIS LLP

AND AFFILIATED PARTNERSHIPS

855 Fifteenth Street, N.W.
Washington, D.C. 20005

Thomas A. Clare
To Call Writer Directly:
(202) 879-5993
tclare@kirkland.com

202 879-5000
www.kirkland.com

Facsimile:
202 879-5200

September 25, 2003

By Facsimile

Michael Brody, Esq.
Jenner & Block, LLC
One IBM Plaza
Chicago, IL 60611-7603

Re: *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc.*
MSSF v. MacAndrews & Forbes Holdings Inc. et al.

Dear Mike:

I write in response to your September 18 letter regarding employee personnel files. Because of Hurricane Isabel and the closure of our D.C. office, I did not receive your letter until the office reopened on September 22.

CPH's document requests on these issues (even as narrowed in your August 28, 2003 letter) are overbroad and seek sensitive personal information that is neither relevant to the subject matter of the litigation nor reasonably likely to lead to the discovery of relevant information. Even with the protective order in place, the blunderbuss approach suggested by your letter would result in the disclosure of broad categories of irrelevant personal information -- and an unwarranted invasion of the privacy of the employees involved.

With regard to employee personnel files, we are willing to produce, with respect to employees directly involved in Sunbeam related engagements, redacted copies of the personnel files that will allow you to see: (1) all references (positive or negative) to work performed by the employee on Sunbeam-related engagements; (2) all references (positive or negative) to the employee's performance in fee generation; and (3) all references (positive or negative) to the employee's performance of due diligence activities. If this compromise approach is acceptable, we will begin to prepare the documents for production.

Chicago

London

Los Angeles

New York

San Francisco

16div-001320

KIRKLAND & ELLIS LLP

Michael Brody, Esq.
September 25, 2003
Page 2

With regard to the other documents referred to you in your letter (i.e. the "PE Guide"), we will examine those documents to determine if those documents are responsive to CPH's document requests and not otherwise subject to objection.

Sincerely,

*Thomas A. Clare*¹⁰⁴

Thomas A. Clare

Exhibit C

JENNER & BLOCK

August 28, 2003

Jenner & Block, LLC
One 11th Plaza
Chicago, IL 60611-7603
Tel 312 222-9550
www.jenner.com

Chicago
Dallas
Washington, DC

By Telecopy

Thomas A. Clare, Esq.
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Michael T. Brody
Tel 312 923-2711
Fax 312 840-7711
mbrody@jenner.com

**Re: *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co.*
*Morgan Stanley Senior Funding v. MacAndrews & Forbes Holdings Inc., et al.***

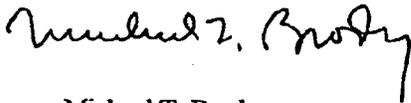
Dear Tom:

I write in an attempt to reach agreement on one outstanding discovery issue. In discovery requests to Morgan Stanley ("MS & Co.") and Morgan Stanley Senior Funding ("MSSF"), CPH sought personnel and compensation documents relating to the individuals who worked on the Sunbeam transactions. MS & Co. and MSSF objected to these requests.

In an attempt to avoid bringing this matter to the Court, and without prejudice to later renewing our requests for the full scope of documents encompassed by our requests, we propose to limit Request 44 served upon MS & Co. and Request 69 served upon MSSF to those documents that are responsive to these requests and mention Sunbeam by name, relate to fee generation (or the lack of it), or contain or concern criticisms or reprimands for work done by the relevant employees. We continue to seek all documents responsive to Requests 45 and 46 upon MS & Co. and Requests 71 and 72 upon MSSF, which are more general in nature.

Please reconsider your objections. If you do not do so by September 3, 2003, we will bring this to the attention of the Court.

Very truly yours,



Michael T. Brody

MTB:cjg

cc: Joseph Ianno, Esq. (by facsimile)
John Scarola, Esq. (by facsimile)
Jerold S. Solovy, Esq.

Exhibit D

NEGLIGENT MISREPRESENTATION

Issue: Was MS negligent in misrepresenting Sunbeam's financial condition to CPH

CPH proves its case only by establishing:

1. MS actually knew about Sunbeam's fraudulent accounting and negligently failed to disclose what it new

OR

2. MS negligently failed to discover the fraud

COMPARATIVE NEGLIGENCE

Issue: Was CPH negligent

1. In choosing to rely on MS without conducting its own due diligence

OR

2. In conducting an inadequate due diligence investigation

MS' CONTENTION

- "Entitled to fully explore the competence and sophistication of CPH's own paid legal and financial advisors"

Issue is not what CPH and its advisors had the capacity to do BUT WHAT THEY IN FACT DID.

MS Memo Page 2: "It is evident that CPH and its advisors conducted little or no due diligence of their own prior to closing the acquisition transaction with Sunbeam" (Defendant's emphasis)

CONFIRMS DEFENDANTS ARE NOT QUESTIONING OUR CAPACITY TO CONDUCT DUE DILIGENCE BUT RATHER OUR CHOICE TO RELY ON THEIR REPRESENTATIONS BASED ON THEIR DUE DILIGENCE.

It would be logically absurd for Plaintiff to argue that Wachtel Lipton or Credit Suisse were incapable of discovering fraud but MS could.

Our position must be that any reasonably prudent due diligence investigation would have detected the fraud and we reasonably relied upon MS to have conducted such an investigation.

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CASE NO: 03 CA-005045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

**JOINT SUBMISSION OF THE PARTIES FOR
FEBRUARY 20, 2004 CASE MANAGEMENT CONFERENCE**

Pursuant to the Court's order of January 13, 2004, Plaintiff Coleman (Parent) Holdings Inc. ("CPH") and Defendant Morgan Stanley & Co. Incorporated ("Morgan Stanley") hereby submit the following Joint Submission in advance of the February 20, 2004 Case Management Conference.

I. Agreed-Upon Statement Of Background And Procedural History

The following is the parties' agreed-upon summary of the two companion cases now pending before this Court. Although the two cases have not yet been consolidated for trial, in the interest of judicial economy, the parties agree that consolidation would be appropriate.

**A. Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co. Incorporated
(Case No. 03 CA-005045 AI)**

Background. This case arises out of an acquisition transaction that was negotiated and consummated in late 1997 and early 1998, in which CPH sold its 82% interest in The Coleman Company, Inc. ("Coleman") to Sunbeam Corporation ("Sunbeam"). Morgan Stanley served as

financial advisor to Sunbeam for parts of the acquisition transaction and served as the lead underwriter for a \$750,000,000 debenture offering that Sunbeam used to finance the acquisition.

CPH's Complaint alleges claims arising from this transaction for fraudulent misrepresentation, negligent misrepresentation, aiding and abetting fraud, and conspiracy. CPH's Complaint has sought damages of at least \$485 million and has reserved the right to seek punitive damages. Morgan Stanley denies the material allegations in CPH's Complaint and also denies CPH's entitlement to damages.

Procedural History. CPH filed its Complaint on May 8, 2003 (the "CPH Action"). Morgan Stanley filed its Answer on June 23, 2003 and, on June 25, 2003 filed its Motion to Dismiss Pursuant To Florida Rule of Civil Procedure 1.061 Or, In the Alternative, For Judgment On The Pleadings. The Court held a hearing on these motions on December 12, 2003. On December 15, 2003, the Court issued an Order denying both motions. On January 9, 2004, Morgan Stanley timely filed a Notice of Appeal regarding the denial of its motion to dismiss. *See* Florida Rule of Appellate Procedure 9.130(a)(3)(A) (providing for interlocutory appellate review of non-final orders "concerning venue").

**B. Morgan Stanley Senior Funding, Inc. v. MacAndrews & Forbes, Inc. et al.
(Case No. 03 CA-005165 AI)**

Background. This action arises out of the same series of financial transactions as the CPH Action. In 1998, Morgan Stanley Senior Funding, Inc. ("MSSF") and other lenders entered into a credit agreement with Sunbeam under which MSSF agreed to provide senior secured financing to Sunbeam in connection with Sunbeam's acquisition of Coleman and two smaller companies.

MSSF's Complaint alleges that, in the course of Sunbeam's acquisition of Coleman, Defendants MacAndrews & Forbes Holdings Inc. ("MAFCO") and CPH provided false

information to MSSF about the “synergies” that Sunbeam would achieve from the combination of Sunbeam and Coleman. MSSF alleges that Defendant’s inflated synergy projections caused Sunbeam to pay a higher price to acquire Coleman and consequently caused Sunbeam’s lenders (including MSSF) to make larger loans to finance the acquisition. MSSF’s Complaint alleges that it suffered hundreds of millions of dollars in damages when Sunbeam declared bankruptcy in February 2001 and defaulted on acquisition-related loans. MSSF has alleged claims for fraud and negligent misrepresentation, and has reserved the right to seek punitive damages. CPH denies the material allegations in MSSF’s Complaint and also denies MSSF’s entitlement to damages.

Procedural History. MSSF filed its Complaint against MAFCO and CPH on May 12, 2003 (the “MSSF Action”). The MSSF Action was initially assigned to Division AG. Because the MSSF Action and the CPH Action involve the same series of financial transactions and arise from a common set of operative facts, the parties agreed that the two cases are companion cases under Local Rule 2.009 and requested a transfer to Division AI, where the first-filed, lower numbered CPH Action was assigned. The motion to transfer was granted on June 9, 2003. Defendants CPH and MAFCO filed their Answer on June 25, 2003.

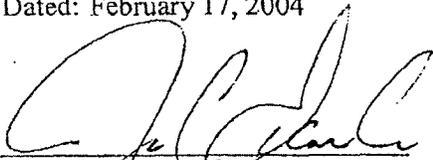
II. Report On Discovery In The Two Cases

CPH, MAFCO, Morgan Stanley, and MSSF are actively pursuing written and deposition discovery. The parties have exchanged hundreds of thousands of pages of documents, have served and answered multiple sets of interrogatories and requests for admission, and have deposed more than a dozen party and non-party witnesses. Discovery is ongoing in both cases.

III. Proposed Pretrial Schedule

The parties have conferred on the issue of a proposed pretrial schedule, but have been unable to agree. CPH's proposed schedule is attached hereto as Exhibit 1. Morgan Stanley's proposed schedule is attached hereto as Exhibit 2.

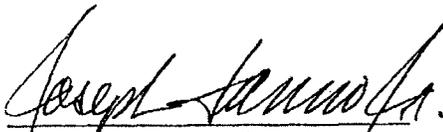
Dated: February 17, 2004



John Scarola (FL Bar No. 169440)
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33402-3626
(561) 686-6300

Jerold S. Solovy
JENNER & BLOCK LLP
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

Counsel for Plaintiff
Coleman (Parent) Holdings, Inc.



Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar No. 618349)
Thomas A. Clare
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
(202) 879-5000

Joseph Ianno, Jr. (FL Bar No. 655351)
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
(561) 659-7070

Counsel for Defendant
Morgan Stanley & Co. Incorporated

**COLEMAN (PARENT) HOLDINGS INC.'S
PROPOSED LITIGATION SCHEDULE**

April 30, 2004 (Friday) - Fact discovery closes

May 3, 2004 (Monday) - Summary judgment motions and supporting briefs due

May 10, 2004 (Monday) - Plaintiff serves expert reports

May 20, 2004 (Thursday) - Defendant serves expert reports

June 1-June 4 (Tuesday-Friday) - Depositions of both sides' experts

June 14, 2004 (Monday) - Both sides exchange rebuttal expert reports

June 21-June 25, 2004 (Monday-Friday) - Depositions of both sides' rebuttal experts

June 25, 2004 (Friday) - Expert discovery closes

July 1, 2004 (Thursday) - Parties exchange exhibit lists
witness lists
deposition designations
jury instructions
motions in limine

July 8, 2004 (Thursday) - Mediation

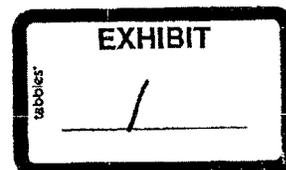
July 12, 2004 (Monday) - Parties exchange objections to exhibits
rebuttal exhibits
objections to deposition designations
counter-deposition designations
objections to jury instructions
responses to motions in limine

July 15-July 16, 2004 (Thursday-Friday) - Meet and confer regarding exhibits
depositions
jury instructions
motions in limine

July 23, 2004 (Friday) - Parties make joint pre-trial submission

July 30, 2004 (Friday) - Final pre-trial conference with Judge Maass

August 2, 2004 (Monday) - Trial begins



Morgan Stanley's Proposed Pretrial Schedule
(PROPOSED ORDER ATTACHED)

<u>Event</u>	<u>Date</u>
Motions to Amend Pleadings	April 16, 2004
Initial Choice-of-Law Briefs	May 28, 2004
Choice-of-Law Oppositions	June 18, 2004
Hearing on Choice-of-Law	Week of June 21, 2004
Proponent Expert Disclosures	August 6, 2004
Completion Of Fact Discovery	September 3, 2004
Opponent Expert Disclosures.	September 3, 2004
Completion Of Expert Depositions	September 24, 2004
Summary Judgment Briefs	October 22, 2004
Summary Judgment Oppositions	November 12, 2004
Mediator Selected	December 3, 2004
Summary Judgment Reply Briefs	December 3, 2004
Mediation Statement	December 13, 2004
Mediation	Week of December 20, 2004
Summary Judgment Hearing	Week of January 10, 2005
Motions In Limine	January 21, 2005
Deposition Designations	January 28, 2005
Witness Lists and Trial Exhibits	January 28, 2005
Motion in Limine Oppositions	February 2, 2005
Deposition Counter-Designations & Initial Objections	February 4, 2005
Objections to Counter-Designation	February 9, 2005
Meet-And-Confer	February 9, 2005
Motion in Limine Arguments	February 9, 2005
Joint Pretrial Statement	February 14, 2005
Final Pretrial Conference	February 21, 2005 9:30 a.m.
Jury Trial (3 weeks)	February 28, 2005 9:30 a.m.

WPB#574778.1



16div-001332

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CASE NO: 03 CA-005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

**ORDER SETTING PRETRIAL SCHEDULE
AND DIRECTING PRETRIAL AND MEDIATION PROCEDURES**

THIS CAUSE having come before the Court for a Case Management Conference on February 20, 2004, and having considered the issues and scheduling proposals tendered by the parties, it is **ORDERED AND ADJUDGED** that the parties shall comply with the following pretrial schedule and procedures:

TRIAL SCHEDULE

1. Jury Trial. This action shall be specially set for a three-week jury trial commencing on February 28, 2005 at 9:30 a.m..
2. Final Pretrial Conference. A final pretrial conference shall be held in this matter on February 21, 2005 at 9:30 a.m., at which time trial counsel for both parties shall appear and be prepared to discuss the Joint Pretrial Statement described in Paragraph 19 of this Order.

3. Trial Date, Final Pretrial Procedures, and Final Pretrial Conference Contingent Upon Disposition of Appeal. The trial date established by Paragraph 1 of this Order, the date for the Final Pretrial Conference established by Paragraph 2 of this Order, and the dates for the Final Pretrial Procedures established by Paragraphs 16 through 22 of this Order, shall depend upon the final disposition — prior to January 7, 2005 — of the interlocutory appeal filed by Defendant regarding Defendant's Motion to Dismiss Pursuant To Rule 1.061. Defendant shall notify the Court in writing promptly upon the disposition of the appeal. If Defendant's appeal has not been decided by January 7, 2005, the parties shall promptly file a joint status report and appear before the Court during Uniform Motion Calendar so that the trial date and the Final Pretrial Conference can be re-set. All other dates established by this Order shall not depend on the disposition of the appeal, and shall not be re-set or extended unless approved by the Court.

PLEADINGS

4. There shall be no motions to amend the pleadings or add additional parties after April 16, 2004 except with leave of Court for good cause shown.

CHOICE OF LAW

5. On or before May 28, 2004, each party shall file a brief (not to exceed 30 double-spaced pages) addressing the substantive state law that it contends should be applied by the Court to the claims then pending before the Court in the pleadings. Opposition briefs on the choice-of-law question (not to exceed 20 double-spaced pages) shall be filed no later than June 18, 2004. The Court shall hold a hearing on the choice-of-law question during a specially set hearing during the week of June 21, 2004, at which time the Court will decide the substantive state law to be applied to the parties' then-pending claims.

DISCOVERY PROCEDURES

6. Completion Of Fact Discovery. Fact discovery shall be completed on or before September 3, 2004. For purposes of this Order, "completed" shall mean that interrogatories, requests for production, and requests for admission must be served so that responses thereto will be due on or before September 3, 2004. All depositions shall be noticed and completed — and all subpoenae issued for discovery shall be returnable — on or before the completion date. All motions to compel further responses to discovery, including objections thereto, shall be filed no later than September 17, 2004, or shall be deemed waived.

7. Proponent Expert Disclosures. On or before August 6, 2004, any party having the burden of proof upon an issue as to which potential Florida Statute §§ 90.702, 90.703, or 90.705 evidence is expected to be offered shall identify the expert witnesses to be proffered upon such issues and provide, for each expert identified:

- (a) Name and business address;
- (b) The subject matter about which the expert will testify;
- (c) The substance of the facts and opinions to which the expert will testify;
- (d) A summary of the grounds for each opinion;
- (e) A copy of any written reports issued by the expert regarding this case;
- (f) A copy of the expert's curriculum vitae;
- (g) A list of all cases in which the expert has testified during the past five years;
- (h) A list of all produced documents relied on by the expert; and
- (i) Copies of all non-produced documents relied on by the expert.

8. Opponent Expert Disclosures. On or before September 3, 2004, any party intending to proffer an expert intended solely to respond to, contradict or rebut evidence on the same subject matter disclosed by another party pursuant to Paragraph 7 of this Order shall identify the expert witnesses to be proffered upon such issues and, as to each expert identified, provide:

- (a) Name and business address;
- (b) The subject matter about which the expert will testify;
- (c) The substance of the facts and opinions to which the expert will testify;
- (d) A summary of the grounds for each opinion;
- (e) A copy of any written reports issued by the expert regarding this case;
- (f) A copy of the expert's curriculum vitae;
- (g) A list of all cases in which the expert has testified during the past five years;
- (h) A list of all produced documents relied on by the expert; and
- (i) Copies of all non-produced documents relied on by the expert.

9. Completion Of Expert Depositions. All expert depositions shall be completed on or before September 24, 2004.

SUMMARY JUDGMENT AND OTHER PRETRIAL MOTIONS

10. Summary Judgment. Motions for summary judgment, and other motions that would potentially dispose of any claim or affirmative defense, shall be filed on or before October 22, 2004. Oppositions to motions for summary judgment shall be filed on or before November 12, 2004. Reply memoranda shall be filed on or before December 3, 2004. The Court shall hold a hearing on any motions for summary judgment during a specially set hearing during the week of January 10, 2005.

11. Motions In Limine / Motions Directed To Expert Testimony. All motions in limine, including all motions to exclude expert testimony intended to be introduced by either party, shall be filed on or before January 21, 2005. Oppositions to motions in limine shall be filed on or before February 2, 2005. The Court will hear argument on motions in limine during the Final Pretrial Conference on February 9, 2005.

MEDIATION PROCEDURES

12. Mandatory Mediation. All parties are required to participate in mediation pursuant to Florida Rule of Civil Procedure 1.700 *et seq.* Completion of mediation is a prerequisite to trial.

13. Mediator / Mediation Schedule. The parties shall agree upon on a mediator by December 3, 2004. If they are unable to agree, any party may apply to the Court for appointment of a mediator in accordance with Florida Rule of Civil Procedure 1.720(f). The mediation shall take place at a location and time convenient for all parties and counsel during the week of December 20, 2004. Plaintiff's counsel shall file and serve on all parties and the mediator a Notice of Mediation giving the time, place and date of the mediation and the mediator's name.

14. Mediation Statement. At least one week before the mediation conference, all parties shall submit to the mediator a mediation statement not to exceed 20 pages (double spaced) in length. The mediation summary shall remain confidential unless the submitting party chooses to provide it to opposing counsel.

15. Mediation Statements To Be Privileged And Confidential. All discussions, representations, and statements made at the mediation conference shall be privileged consistent with Florida Statutes §§ 44.102 and 90.408.

FINAL PRETRIAL PROCEDURES

16. Witness Lists and Trial Exhibits. No later than January 28, 2005, the parties shall exchange lists of all trial exhibits, names and addresses of all trial witnesses, including expert witnesses, rebuttal and impeachment witnesses. The parties exhibit and witness lists shall be specific; "catch-all" categories are prohibited.

17. Deposition Designations. No later than January 28, 2005, each party shall serve its designation of depositions, or portions of depositions, that it intends to offer as testimony during its case-in-chief. No later than February 4, 2005, each opposing party shall serve its counter-designations to portions of designations, together with objections to the depositions, or portions thereof, originally designated. No later than February 9, 2005, each party shall serve its objections to counter designations served by an opposing party.

18. Meet-And-Confer. On or before February 9, 2005, trial counsel for the parties shall meet-and-confer to (a) discuss settlement; (b) attempt to simplify the issues for trial by stipulating, in writing, to as many facts and issues as possible; and (c) prepare a Pretrial Stipulation that complies with Paragraph 19 of this Order; and (d) list all objections to trial exhibits.

19. Joint Pretrial Statement. It shall be the duty of counsel for the Plaintiff to see that the Joint Pretrial Statement is drawn, executed by counsel for all parties, and filed with the Clerk no later than February 14, 2005. Unilateral Pretrial Statements are disallowed, unless approved by the Court, after notice and hearing showing good cause. Counsel for all parties are charged with good faith cooperation in the preparation of the Joint Pretrial Statement, which shall contain, in separately numbered paragraphs:

- (a) A list of all pending motions requiring action by the Court;
- (b) Stipulated facts that require no proof at trial, and which may be read to the jury;
- (c) A statement of all issues of fact for determination at trial;
- (d) A statement of all issues of law for determination by the Court;
- (e) Each party's numbered list of trial exhibits with specific objections thereto;
- (f) Each party's numbered list of trial witnesses, including a statement of whether each witness will be offered through live testimony or by deposition, together with any objections thereto;
- (g) Each party's deposition designations and counter-designations pursuant to Paragraph 17 of this Order;

- (h) A statement of estimated trial time;
- (i) Names of the attorneys who will try the case;
- (j) Number of peremptory challenges per party.

Failure to file the Joint Pretrial Statement or a Court-Approved Unilateral Stipulation as above provided may result in the case being stricken from the Court's Calendar or other sanctions.

20. Additional Exhibits, Witnesses Or Objections. At trial, the parties shall be strictly limited to exhibits and witnesses disclosed and objections reserved in the Joint Pretrial Statement prepared in accordance with Paragraph 19 of this Order, absent agreement specifically stated in the Joint Pretrial Statement or order of the Court upon good cause shown. Failure to reserve objections in the Joint Pretrial Statement shall constitute a waiver. A party desiring to use an exhibit or witness discovered after counsel have conferred pursuant to Paragraph 18 of this Order shall immediately furnish the Court and other counsel with a description of the exhibit or with the witness' name and address and the expected subject matter of the witness' testimony, together with the reason for the late discovery of the exhibit or witness. Use of the exhibit or witness may be allowed by the Court for good cause shown or to prevent manifest injustice.

21. Pre-marking Exhibits. Prior to trial, each party shall meet with and assist the clerk in marking for identification all exhibits, as directed by the clerk.

22. Jury Instructions. A trial by jury has been demanded. Proposed typewritten jury instructions, with authorities in support thereof, shall be delivered to the Clerk on or before the Final Pretrial Conference on the first day of trial.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this ____ day of February 2004.

ELIZABETH T. MAASS
Circuit Court Judge

Copies furnished:

Joseph Ianno, Jr. Esq.
CARLTON FIELDS, P.A.
222 Lakeview Avenue – Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, Esq.
KIRKLAND & ELLIS LLP
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005

John Scarola, Esq.
SEARCY DENNEY SCAROLA BARNHART & SHIPLEY, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33409

Jerold S. Solovy, Esq.
JENNER & BLOCK LLP
One IBM Plaza – Suite 4400
Chicago, IL 60611

CARLTON FIELDS

ATTORNEYS AT LAW

MIAMI
ORLANDO
ST. PETERSBURG
TALLAHASSEE
TAMPA

WEST PALM BEACH

Esperanté
222 Lakeview Avenue, Suite 1400
West Palm Beach, Florida 33401-6149
P.O. Box 150
West Palm Beach, Florida 33402-0150

561.659.7070
561.659.7368 fax
www.carltonfields.com

E-MAIL: jianno@carltonfields.com

February 17, 2004

The Honorable Elizabeth Maass
Palm Beach County Courthouse
205 North Dixie Highway
West Palm Beach, Florida 33401

VIA HAND DELIVERY

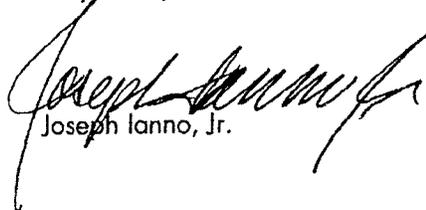
Re: *Coleman (Parent) Holdings Co. v. Morgan Stanley & Co.*
Case No: 03 CA 5045 AI

Dear Judge Maass:

This Court has scheduled a Case Management Conference on Friday, February 20, 2004 at 3:30 p.m. in the above-referenced matter. Plaintiff has also scheduled its Motion for Special Trial Setting to be heard during the Case Management Conference. For Your Honor's convenience, the parties, by and through their respective counsel, submit the enclosed Joint Submission of the Parties for February 20, 2004 Case Management Conference with its proposed exhibits.

Thank you.

Respectfully,



Joseph Ianno, Jr.

Enclosures

cc: Jack Scarola (via facsimile w/encl.)
Jerold Solovy (via facsimile w/encl.)
Thomas Clare (via facsimile w/encl.)



JDillard@CarltonFields.com on 02/17/2004 04:40:16 PM

To: Thomas Clare/Washington DC/Kirkland-Ellis@K&E, mem@searcy.com, jsolovy@jenner.com, Zhonette Brown/Washington DC/Kirkland-Ellis@K&E, "Jeff Shaw" <jshaw@jenner.com>, "Joe Ianno" <jianno@carltonfields.com>, Kimberly Chervenak/Washington DC/Kirkland-Ellis@K&E, "Mike Brody" <mbrody@jenner.com>

cc:

Subject: Coleman v. Morgan

Attached please find Mr. Ianno's letter to Judge Maass enclosing the Joint Submission. The earlier version omitted pages 1 and 2 of the document.

<<joint_submission.PDF>>



- joint_submission.PDF

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Company, Inc.
 Case No.: 2003 CA 005045 AI
 Notice of Taking Videotaped Depositions
 February 18, 2004

IN THE CIRCUIT COURT OF THE
 FIFTEENTH JUDICIAL CIRCUIT, IN AND
 FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 2003 CA 005045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

NOTICE OF TAKING VIDEOTAPED DEPOSITIONS

To: Thomas A. Clare, Esq.
 KIRKLAND & ELLIS, LLP
 655 Fifteenth Street, N.W.
 Suite 1200
 Washington, D.C. 20005

Joseph Ianno, Jr., Esq.
 CARLTON FIELDS, P.A.
 222 Lake View Avenue
 Suite 1400
 West Palm Beach, FL 33401

PLEASE TAKE NOTICE that Plaintiff Coleman (Parent) Holdings Inc. will take the depositions upon oral examination of the following witnesses pursuant to Florida Rule of Civil Procedure 1.310 on the dates, times, and locations set forth below:

DEPONENT	DATE AND TIME	LOCATION
Shani Boone	March 3, 2004 at 9:30 a.m.	Esquire Deposition Services 216 E. 45 th St., 8 th Floor New York, NY 10017
Lili Rafii	March 4, 2004 at 9:30 a.m.	Esquire Deposition Services 216 E. 45 th St., 8 th Floor New York, NY 10017
James Stynes	March 11, 2004 at 9:30 a.m.	Esquire Deposition Services 216 E. 45 th St., 8 th Floor New York, NY 10017

Ruth Porat	March 12, 2004 at 9:30 a.m.	Esquire Deposition Services 216 E. 45 th St., 8 th Floor New York, NY 10017
Michael Hart	March 18, 2004 at 9:30 a.m.	Esquire Deposition Services 216 E. 45 th St., 8 th Floor New York, NY 10017
Andrew Conway	March 19, 2004 at 9:30 a.m.	Esquire Deposition Services 216 E. 45 th St., 8 th Floor New York, NY 10017
Gene Yoo	March 25, 2004 at 9:30 a.m.	Esquire Deposition Services 175 Federal Street Suite 508 Boston, MA 02110
Joshua Webber	March 26, 2004 at 9:30 a.m.	Esquire Deposition Services 175 Federal Street Suite 508 Boston, MA 02110

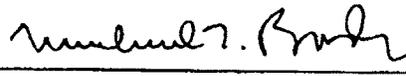
The depositions will be recorded by videotape and stenographic means. The depositions will be taken before a person authorized to administer oaths and will continue day to day until completed.

The videotape operators will be Esquire Deposition Services located in New York, New York and Esquire Deposition Services located in Boston, Massachusetts.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by facsimile and mail to all counsel on the attached Service List, this 18th day of February, 2004.

Dated: February 18, 2004

COLEMAN (PARENT) HOLDINGS INC.

By: 

 One of Its Attorneys

Jerold S. Solovy
 Michael T. Brody
 Clark C. Johnson
 JENNER & BLOCK LLP
 One IBM Plaza, Suite 4400
 Chicago, Illinois 60611
 (312) 222-9350

Jack Scarola
 SEARCY DENNEY SCAROLA BARNHART
 & SHIPLEY P.A.
 2139 Palm Beach Lakes Blvd.
 West Palm Beach, Florida 33409
 (561) 686-6300

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Company, Inc.
Case No.: 2003 CA 005045 AI
Notice of Taking Videotaped Depositions
February 18, 2004

SERVICE LIST

Thomas A. Clare, Esq.
KIRKLAND & ELLIS, LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lake View Avenue
Suite 1400
West Palm Beach, FL 33401

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

CASE NO. CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.
Plaintiff(s),
vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

**CPH'S RESPONSE TO MORGAN STANLEY & CO. INCORPORATED'S
FIFTH REQUEST FOR PRODUCTION OF DOCUMENTS**

Plaintiff Coleman (Parent) Holdings Inc. ("CPH"), by its attorneys and pursuant to Florida Rules of Civil Procedure 1.280 and 1.350, hereby responds and objects to Morgan Stanley & Co. Incorporated's ("Morgan Stanley") Fifth Request for Production of Documents to Plaintiff ("Requests for Production") dated January 30, 2004:

INITIAL OBJECTIONS

1. CPH objects to the Requests for Production, including all Definitions and Instructions, to the extent that they purport to impose upon CPH any requirements that exceed or are inconsistent with the requirements of the Florida Rules of Civil Procedure or any other applicable rule or court order. For example, CPH will not comply with Instructions Nos. 3, 4, 5, 6, 7, 8, 9, 10, 11, and 16 or Definition No. 4 to the extent that they purport to impose on CPH obligations that are not required by Florida rules and case law. CPH will comply with the applicable rules and law.

2. CPH objects to the Requests for Production to the extent that they seek the production of any documents or information protected from discovery by reason of the attorney-client privilege, the work product doctrine, or any other applicable privilege, doctrine, immunity, or rule. CPH reserves the right to assert any and all privileges to which CPH is entitled under the law. CPH will provide a log of documents withheld from production on the basis of the attorney-client privilege, the work product doctrine, or any other applicable privilege, doctrine, immunity, or rule.

3. CPH objects to the extent that any Request for Production seeks documents that are in the public domain and accessible to all parties. In responding to the Requests for Production, CPH will produce publicly available documents to the extent that copies exist in CPH's files of otherwise non-public information responsive to these requests.

4. CPH objects to the definition of "CPH" and "You" to the extent that it includes CPH's counsel in this litigation. CPH interprets these definitions to exclude Jenner & Block LLP and Searcy Denney Scarola Barnhart & Shipley P.A., and their respective attorneys.

5. By stating that CPH will produce documents responsive to a particular document request, CPH does not represent that any such documents exist. Rather, CPH is responding that to the extent such documents are located, they will be produced.

6. By stating that CPH will produce responsive documents, CPH does not concede the relevance of any of the produced documents to the subject matter of this litigation or to the admissibility of those documents at trial.

7. CPH's objections and responses are based on a good-faith search for documents within CPH's possession, custody, and control. CPH expressly reserves the right to amend and/or modify its objections and responses.

8. CPH responds to Morgan Stanley's document requests without waiving the Initial Objections. CPH incorporates, as though fully set forth therein, these Initial Objections into each of the Responses and Objections set forth below.

RESPONSES AND FURTHER OBJECTIONS

REQUEST NO. 1: All documents concerning any instructions, guidelines, rules, bylaws or other guidance or direction provided by Coleman, Coleman Worldwide Corp., CLN Holdings Inc., CPH, New Coleman Holdings, MacAndrews and Forbes Holdings, Inc., Mafco Holdings, Inc. and any other entity owed [sic] directly or indirectly by Mafco Holdings, Inc. which also had a direct or indirect ownership interest in Coleman to the respective members of their Board of Directors.

RESPONSE: CPH objects to this request on the grounds that it is ambiguous, overbroad, and seeks documents that are not relevant nor reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving these objections and the foregoing Initial Objections, CPH will produce documents responsive to this request.

REQUEST NO. 2: All documents concerning any compensation provided by Coleman, Coleman Worldwide Corp., CLN Holdings, Inc., CPH, New Coleman Holdings, MacAndrews and Forbes Holdings, Inc., Mafco Holdings, Inc. and any other entity owed [sic] directly or indirectly by Mafco Holdings, Inc. which also had a direct or indirect ownership interest in Coleman to the respective members of their Board of Directors.

RESPONSE: CPH objects to this request on the grounds that it is ambiguous, overbroad, and seeks documents that are not relevant nor reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving these objections and the foregoing Initial Objections, CPH will produce documents responsive to this request.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by
facsimile and mail to all counsel on the attached Service List, this 1st day of March, 2004.

Dated: March 1, 2004

COLEMAN (PARENT) HOLDINGS INC.

By: Michael T. Brody
One of Its Attorneys

John Scarola
SEARCY DENNEY SCAROLA BARNHART
& SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33402-3626
(561) 686-6300

Jerold S. Solovy
Ronald L. Marmer
Michael T. Brody
JENNER & BLOCK LLP
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

SERVICE LIST

Thomas A. Clare, Esq.
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Joseph Ianno, Jr., Esq.
CARLTON FIELDS
222 Lake View Avenue, Suite 1400
West Palm Beach, FL 33401

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

CASE NO: CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

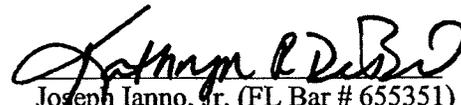
MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

**PLAINTIFF'S NOTICE OF SERVING CONFIDENTIAL AMENDED ANSWERS TO
DEFENDANTS' FIRST SET OF INTERROGATORIES**

Plaintiff Morgan Stanley Senior Funding Inc., by and through their undersigned
counsel, hereby give notice that Plaintiff served confidential amended answers to Defendants'
First Set of Interrogatories, on this 3rd day of March, 2004.

Dated: March 3, 2004

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar # 618349)
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200


Joseph Ianno, Jr. (FL Bar # 655351)
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368

**Counsel for Morgan Stanley & Co. Incorporated
& Morgan Stanley Senior Funding**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by facsimile and e-mail to all counsel of record on the attached service list on this 3rd day of March, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar # 618349)
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

Joseph Ianno, Jr. (FL Bar # 655351)
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

BY 

**Counsel for Morgan Stanley & Co. Incorporated
& Morgan Stanley Senior Funding**

SERVICE LIST

Counsel for Coleman(Parent) Holdings & MacAndrews & Forbes

John Scarola

**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**

2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33409

Jerold S. Solovy

JENNER & BLOCK, LLC

One IBM Plaza, Suite 4400
Chicago, Illinois 60611

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

CASE NO: CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

**MORGAN STANLEY SENIOR FUNDING INC.'S AMENDED RESPONSES AND
OBJECTIONS TO DEFENDANT COLEMAN (PARENT) HOLDING INC.'S FIRST SET
OF INTERROGATORIES**

Plaintiff Morgan Stanley Senior Funding Inc. ("MSSF"), by its attorneys, and pursuant to Florida Rules of Civil Procedure 1.280 and 1.340, hereby amends its responses and objections to Coleman (Parent) Holdings Inc.'s ("CPH") First Set of Interrogatories as follows:

INTERROGATORY NO. 2: Identify with particularity all alleged misrepresentations by CPH and/or Mafco that intends to rely upon at trial, and state, with respect to each such alleged statement, the date and time the alleged misrepresentation was made; the document, setting, or circumstances in which the alleged misrepresentation was made; the individual(s) who made the alleged misrepresentation; the exact wording of the alleged misrepresentation; and all reasons why MSSF believes the alleged misrepresentation was false when it was made.

RESPONSE: MSSF objects to Interrogatory No. 2 as a premature contention interrogatory that would be more appropriate after further discovery has been conducted. Indeed, the full extent of Coleman (Parent) Holdings, Inc.'s ("CPH") and MacAndrews and

Forbes Holdings, Inc.'s ("MAFCO") fraudulent scheme is still being investigated and pursued through discovery at this point. MSSF further notes that Defendant's Interrogatory No. 2 constitutes at least six separate requests. Subject to and without waving its general and specific objections, MSSF provides the following response:

MAFCO and its wholly-owned subsidiary, CPH, provided Sunbeam and its lenders with a series of false information about the "synergies" that Sunbeam could expect to achieve from an acquisition of Coleman. MAFCO and CPH carried out this concerted scheme to defraud MSSF and other lenders during the negotiation and due diligence phases associated with Sunbeam's proposed acquisition of Coleman. MAFCO and CPH knew or should have known that, unless the proposed acquisition of Coleman would create substantial synergies, Sunbeam would either refuse to acquire Coleman or insist on paying significantly less for Coleman than what MAFCO and CPH expected to receive, thereby preventing MAFCO and CPH and their respective senior management teams from receiving a windfall premium on their shares of Coleman stock. MAFCO and CPH thus endeavored to convince Sunbeam and its financial team that most, if not all, of the financial difficulties experienced by Coleman could be offset by merging its operations with those of Sunbeam, knowing that such representations would greatly increase Coleman's acquisition value.

As part of this illicit campaign, MAFCO and CPH made a series of false statements to Sunbeam and its financial team (including MSSF) regarding the post-closing synergies that Sunbeam would achieve annually if it proceeded with the proposed acquisition of Coleman. Specifically, throughout the negotiations, MAFCO and CPH repeatedly and falsely represented that the acquisition would result in post-closing synergies of \$150.5 million per year.

MAFCO and CPH presented these fraudulent synergy representations to Sunbeam and MSSF verbally and in writing during the negotiations leading up to the acquisition.

On or about December 12, 1997, Sunbeam and Coleman representatives held a meeting at MAFCO's offices in New York to discuss the Coleman acquisition and the benefits that would accrue to Sunbeam if the deal went forward. This meeting was attended by, among others, Jerry W. Levin, Coleman's Chairman and Chief Executive Officer, Joseph P. Page, Coleman's Chief Financial Officer, and Paul E. Shapiro, Coleman's General Counsel. Representatives of Sunbeam included Russell A. Kersh, Sunbeam's Chief Financial Officer, David C. Fannin, Sunbeam's Chief Legal Officer, and Peter Langerman, a director of Sunbeam and representative of its then-largest shareholder, Franklin Mutual Advisors, Inc. Coleman's financial advisors were also present for the meeting.

During this meeting, CPH and MAFCO representatives provided Sunbeam with a detailed written schedule identifying 15 different areas of synergies between Sunbeam and Coleman, predicting that the acquisition would result in post-closing synergies totaling \$150.5 million per year. To maintain the credibility of this representation, CPH and MAFCO's written schedule included detailed synergy figures for each of the 15 areas of purported synergies, and a detailed "build-up" of these 15 areas totaling \$150.5 million:

#	<u>Purported Synergy</u>	<u>Amount</u>
1	"Transfer BBQ License"	\$13 million
2	"Synergies re CG BBQ"	\$1.5 million
3	"Corporate Staff"	\$15 million
4	"International Group Staff"	\$2 million
5	"Latin America Staff"	\$2 million
6	"[Coleman] Europe Network Sells [Sunbeam] Products"	\$20 million
7	"[Coleman] Japan Network Sells [Sunbeam] Products"	\$5 million
8	"Factory Outlet Staff"	\$1 million
9	"S Catalytic Appliance Line"	\$ 2 million
10	"Consolidate Division HQ To [Del Ray Beach, FL]"	\$33 million
11	"Consolidate Domestic Salesforces"	\$20 million
12	"Eliminate \$20 million Oracle Expense"	\$6.5 million
13	"Additional \$25M Writeoffs"	\$8.5 million
14	"Global Sourcing Raw Materials"	\$10 million
15	"Consolidation Logistics & Warehousing"	\$10 million
	Total:	\$150.5 million
		Operating Income

In the course of the December 12, 1997 meeting, agents and representatives of CPH and MAFCO verbally supplemented and affirmed the synergy figures contained in this schedule by providing additional information and detail about each of the fifteen line-items. These verbal representations purported to confirm the facts built into each figure and affirmed that the total calculation of \$150.5 million was a fair and prudent estimate of synergies to be gained annually from Sunbeam's acquisition of Coleman.

Thereafter, as the negotiation of the Coleman acquisition progressed, CPH and MAFCO repeatedly and consistently vouched for the \$150.5 million figure represented in their December 12, 1997 synergy schedule, as well as the factual basis from which that figure was purportedly derived. Defendants repeated these false synergy representations during negotiations leading up to the Coleman acquisition.

Specifically, on or about January 29, 1998, representatives of Sunbeam and Coleman held another meeting at MAFCO's New York offices to discuss the proposed acquisition of Coleman by Sunbeam, to update the parties' discussions of synergies from the December 12, 1997 meeting, and to discuss the benefits that would accrue to Sunbeam from the proposed acquisition of Coleman. Representatives from MS & Co. also attended the meeting on behalf of Sunbeam, including Tyrone Chang, Alex Fuchs, and Jim Stynes. Senior officials from the CPH and MAFCO, including MAFCO executives James Maher and William Nesbitt, attended the meeting on behalf of Coleman. (*See also* documents bearing the bates labels CPH1427188-97, MORGAN STANLEY CONFIDENTIAL 0033256-63, and MORGAN STANLEY CONFIDENTIAL 0027053-86).

During the January 29, 1998 meeting, the parties once again discussed synergies of the proposed acquisition. Once again, CPH and MAFCO' agents and representatives discussed, affirmed, and ratified the synergy information contained in their December 12, 1997 schedule. Specifically, CPH and MAFCO's agents and representatives affirmatively declared to both Sunbeam and MS & Co. that \$150.5 million was the fair and prudent projection of annual synergies to be gained through Coleman's acquisition by Sunbeam.

The synergy figures presented by CPH and MAFCO were false. CPH and MAFCO knew — as Coleman's former CEO has since confirmed — that Coleman's \$2.2 billion acquisition price was inflated by more than \$1 billion on account of MAFCO's and CPH's false statements. CPH and MAFCO further knew — as Coleman's former CEO has since confirmed — that annual synergy gains following Coleman's acquisition by Sunbeam could not reach \$50 to \$75 million per year, let alone \$150 million. Despite this knowledge, and with a specific intent to defraud, CPH and MAFCO repeatedly and consistently doubled and/or tripled

their estimated synergy figures in their representations to Sunbeam and MSSF in order to establish a premium price for Coleman that was twice what MAFCO and CPH knew Coleman to be worth.

MSSF's investigation is ongoing. MSSF may identify other misrepresentations, as well as further details with respect to the facts surrounding these misrepresentations, through discovery in this action.

Dated: March 3, 2004

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar # 618349)
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200


Joseph Ianno, Jr. (FL Bar # 655351)
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368

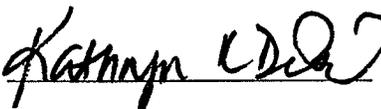
**Counsel for Morgan Stanley & Co. Incorporated
& Morgan Stanley Senior Funding**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by facsimile and e-mail to all counsel of record on the attached service list on this 3rd day of March, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar # 618349)
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

Joseph Ianno, Jr. (FL Bar # 655351)
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

BY: 

**Counsel for Morgan Stanley & Co. Incorporated
& Morgan Stanley Senior Funding**

SERVICE LIST

Counsel for Coleman(Parent) Holdings & MacAndrews & Forbes

John Scarola
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33409

Jerold S. Solovy
JENNER & BLOCK, LLC
One IBM Plaza, Suite 4400
Chicago, Illinois 60611

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH, COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

CASE NO. CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

**COLEMAN (PARENT) HOLDINGS INC.'S
MOTION TO COMPEL CONCERNING E-MAILS
AND OTHER ELECTRONIC DOCUMENTS**

Pursuant to Fla. R. Civ. P. 1.380(a)(1), Coleman (Parent) Holdings Inc. ("CPH") respectfully requests that the Court direct Morgan Stanley & Co., Inc. ("Morgan Stanley") and Morgan Stanley Senior Funding, Inc. ("MSSF") to: (1) search the information in their possession (including backup tapes and hard drives) for e-mail messages and other electronic documents responsive to CPH's document requests for the period 1997-1998, and (2) produce within 14 days any e-mail and other electronic documents that are located. In support of this motion, CPH states as follows:

1. This motion is being brought because Morgan Stanley and MSSF refuse to retrieve and produce e-mail and other electronic documents responsive to CPH's document requests. All of CPH's document requests have stated that Morgan Stanley's productions should include those materials. *See, e.g.*, Definition No. 7 of CPH's First Document Request to Morgan Stanley (defining

“documents” to include “computer tapes, computer drives or memories, computer diskettes or disks, e-mail, CD-ROMs, or any other tangible thing on which any handwriting, typing, printing, photostatic, electronic, or other form of communication or information is recorded or reproduced.” But in the tens of thousands of pages of documents that Morgan Stanley and MSSF have produced so far, there has been only a small handful of e-mail messages.

2. The apparent reason why Morgan Stanley has produced so few e-mail messages is because, until January 2001, Morgan Stanley had an internal policy of overwriting back-up tapes after one year thereby creating a substantial risk of deleting relevant e-mails. That internal policy was contrary to federal law, which requires regulated entities like Morgan Stanley to retain e-mail in a readily accessible fashion and for a longer period of time. As a result, the SEC, NASD, and the New York Stock Exchange launched an investigation into Morgan Stanley’s e-mail non-retention policy and Morgan Stanley ended up paying a \$1.65 million fine.

Morgan Stanley’s Backup Tapes

3. Despite Morgan Stanley’s pre-2001 policy of overwriting backup tapes after one year, we have learned that Morgan Stanley still has backup tapes that likely contain e-mail messages from 1997-1998, the period in which many of the events relevant to this litigation took place. The backup tapes that likely contain those relevant e-mails are the tapes generated in connection with the earliest full backup that Morgan Stanley has performed. We are not certain of the precise number of tapes involved, but based on what Morgan Stanley has told us, we estimate that 25-100 back-up tapes must be searched. Morgan Stanley, however, has refused to attempt to retrieve responsive e-mail and other electronic documents from the backup tapes, despite the likelihood that such materials still exist.

4. In their interrogatory responses, Morgan Stanley and MSSF have identified 36 employees who worked on various aspects of the transaction whereby Sunbeam Inc. ("Sunbeam") acquired The Coleman Company, Inc. ("Coleman"). See Response Nos. 1, 2, 3, 4, and 5 in Morgan Stanley's Responses to CPH's First Set of Interrogatories and Response Nos. 1, 4, 5, and 6 in MSSF's Responses to Defendants' First Set of Interrogatories. With respect to those 36 individuals, Morgan Stanley and MSSF should be required to search their backup tapes for e-mail and other electronic documents created during 1997-1998, the period when Morgan Stanley and MSSF were involved with Sunbeam and the Coleman transaction.

No Undue Burden Exists

5. Morgan Stanley has not disputed that our request for e-mail and other electronic documents seeks information that could lead to the discovery of admissible evidence. The only ground on which Morgan Stanley has objected to our request is undue burden. Specifically, Morgan Stanley has complained of the alleged burden involved both in retrieving e-mail and other electronic documents, and in reviewing the retrieved materials for responsiveness and privilege. Neither objection withstands scrutiny.

A. With respect to the alleged burden associated with retrieving e-mail, there is no indication that the burden would be undue or unfair. Based on our deposition of Morgan Stanley's Rule 1.310 representative, we know that Morgan Stanley backs up its e-mail several times a week and that, for the three-year period starting in January 2000, Morgan Stanley has about 40,000 backup tapes. We are not asking Morgan Stanley and MSSF to search all of those backup tapes. We are asking Morgan Stanley to search only the earliest full backup that they have — a search that will require a review of only a minuscule fraction of the tapes. Although CPH is not sure of the exact number of tapes involved, based on the total number of backups performed and the total number of

tapes generated over a three-year period, we estimate that the number of tapes to be searched is probably in the range of 25-100.

The expense associated with that limited search cannot be great, and Morgan Stanley and MSSF should bear that cost entirely. Indeed, Morgan Stanley's Rule 1.310 witness acknowledged that the burden is limited: (a) if the date range of the backup to be searched is short, as is the case here, given that only the earliest full backup, which was performed on a single day or weekend, needs to be searched; and (b) if the number of employees' e-mail to be located is confined, as it is here, given that we are requesting e-mail for only 36 employees.

Nonetheless, if Morgan Stanley decides that it does not want to conduct the search itself at its own expense, then we propose that a mutually agreed-upon third party conduct the search, and split the cost evenly between Morgan Stanley/MSSF and CPH — with the understanding that the expense incurred by the prevailing party in connection with this discovery would be a taxable cost at the conclusion of this case. Given the choice we are proposing — Morgan Stanley can conduct the search itself at its own expense, or if Morgan Stanley so elects, a mutually agreed-upon third party can conduct the search and split the bill 50-50 — Morgan Stanley's objection to the burden associated with retrieving lost e-mail is not well-taken.

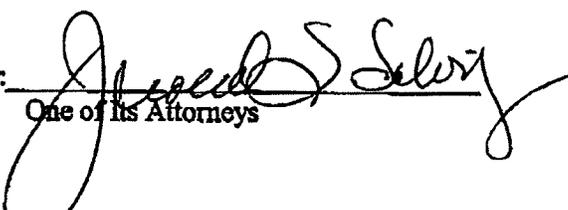
B. With respect to the alleged burden associated with reviewing the retrieved e-mail and other electronic documents, that is a baseless contention, because parties customarily bear their own costs when attorneys review materials for responsiveness and privilege. The review of retrieved e-mail and other electronic documents should not be dealt with any differently, especially given that Morgan Stanley has not shown that the review of the still-existing 1997-1998 e-mail and other electronic documents for the 36 employees involved would be unusual or onerous.

WHEREFORE, CPH requests that this Court direct Morgan Stanley and MSSF to search the information in their possession (including backup tapes and hard drives) for e-mail messages and other electronic documents responsive to CPH's document requests, for the period 1997-1998, for the 36 individuals listed in Morgan Stanley's and MSSF's interrogatory responses. At the election of Morgan Stanley and MSSF, the search may be conducted by them at their sole expense, or by a third party mutually agreed-upon by the parties, with the resulting bill to be split evenly between Morgan Stanley/MSSF and CPH. CPH further requests that this Court direct Morgan Stanley and MSSF to produce within 14 days any e-mail and other electronic documents that are located.

Dated: April 9, 2004

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

By: 

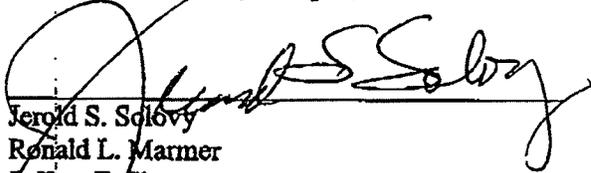
One of its Attorneys

Jerold S. Solovy
Ronald L. Marmor
Jeffrey T. Shaw
JENNER & BLOCK LLP
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

John Scarola
SEARCY DENNEY SCAROLA
BARNHART & SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33402-3626
(561) 686-6300

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by facsimile and E-mail to all counsel on the attached list on this 9th day of April, 2004.



Jerold S. Solovy
Ronald L. Marmer
Jeffrey T. Shaw
Jenner & Block LLP
One IBM Plaza
Suite 4400
Chicago, IL 60611

Jack Scarola
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409

Attorneys for Coleman(Parent)Holdings Inc.
and MacAndrews & Forbes Holdings, Inc.

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005
Telephone: (202) 879-5000
Facimile: (202) 879-5200
e-mail: tclare@kirkland.com

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH, COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

CASE NO. CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

**MOTION TO COMPEL MORGAN STANLEY'S CONSENT
TO THIRD PARTY PRODUCTION OF RESPONSIVE E-MAILS**

Coleman (Parent) Holdings Inc. ("CPH") respectfully requests the Court to direct Morgan Stanley & Co., Inc. and Morgan Stanley Senior Funding, Inc. (collectively, "Morgan Stanley") to consent to the production of e-mail documents responsive to a subpoena CPH served on Bloomberg, Inc. ("Bloomberg"). Bloomberg has in its possession e-mails sent or received by various Morgan Stanley employees who worked on the Sunbeam transaction and who used Bloomberg e-mail accounts. Bloomberg has advised CPH that Bloomberg will not produce the documents without Morgan Stanley's consent. Morgan Stanley, however, has limited its consent to preclude Bloomberg from producing all documents responsive to the subpoena. In further support of this motion, CPH states as follows:

**Morgan Stanley Has Refused To Permit Bloomberg
To Produce All Documents Responsive To CPH's Subpoena**

1. Throughout discovery in this case, CPH has attempted to discover e-mails sent or received by Morgan Stanley employees concerning the events at issue. In a deposition of Morgan Stanley taken pursuant to Florida Rule 1.310, Morgan Stanley disclosed that certain of its employees used e-mail services provided by Bloomberg, an independent company.

2. CPH thereafter subpoenaed Bloomberg to obtain copies of e-mails sent or received by the 36 individuals Morgan Stanley identified by name in response to interrogatories in this case as having worked on various aspects of the Sunbeam transaction. Of the 36 employees Morgan Stanley identified, 18 maintained Bloomberg e-mail accounts. Ten had accounts before January 1, 2000; the remainder opened their Bloomberg accounts after that date.

3. In response to CPH's subpoena, Bloomberg took the position that under federal law, Bloomberg was unable to produce responsive e-mail without the consent of Morgan Stanley. Specifically, Bloomberg contended that the Federal Electronic Communications Privacy Act prevented Bloomberg from disclosing the e-mails without Morgan Stanley's permission.

4. In response to the position taken by Bloomberg, CPH requested Morgan Stanley to consent to the disclosure of the e-mails.

5. In two material respects, Morgan Stanley has declined to consent to the disclosure of its employees' e-mails:

- *First*, Morgan Stanley has refused to consent to the disclosure of any e-mails sent or received after January 1, 2000;

- *Second*, Morgan Stanley has refused to consent to the disclosure of any e-mails concerning the employees that Bloomberg does not believe maintained Bloomberg e-mail accounts.

As shown herein, Morgan Stanley's refusal to consent to the disclosure of responsive e-mails by Bloomberg is unjustified.

Morgan Stanley's Refusal To Consent Is Unjustified

6. *First*, Morgan Stanley's refusal to consent to the production of e-mails sent or received after January 1, 2000 is unjustified. E-mails created after January 1, 2000 that refer to issues in this case, or which summarize or describe events concerning Sunbeam that took place at an earlier time, are plainly responsive. There is no basis for Morgan Stanley to prevent Bloomberg from producing those responsive documents.

7. An obvious example illustrates this point. To resolve a recent motion to compel, Morgan Stanley agreed to produce documents created after Sunbeam filed for bankruptcy in February 2001. Nonetheless, in refusing to grant consent for Bloomberg to produce e-mail that was created after January 1, 2000, Morgan Stanley has prevented Bloomberg from producing e-mails that Morgan Stanley itself has agreed to produce if those documents were in Morgan Stanley's files.

8. Morgan Stanley has attempted to justify its refusal to consent on the ground that the production CPH seeks would be burdensome. That claim is wholly unsubstantiated. Because the e-mails at issue are in the possession of Bloomberg, Morgan Stanley cannot describe, divine, or complain about any supposed burden involved in their production.

9. Moreover, the subpoena calls for Bloomberg to produce responsive documents. The only "burden" is of Morgan Stanley's own making. Morgan Stanley wants Bloomberg to produce responsive documents to Morgan Stanley, so that Morgan Stanley can review them

before they are produced to CPH. We have no objection to Morgan Stanley undertaking a privilege review, if Morgan Stanley chooses to do so, but that is not a reason for Morgan Stanley to withhold its consent. Indeed, Morgan Stanley has gone further, asserting that it plans to conduct a review for responsiveness. There is no legitimate reason for Morgan Stanley to insert itself into the Bloomberg production for any such screening process.

10. *Second*, Morgan Stanley's refusal to consent to the production of any e-mails from 18 of its employees is unjustified. Morgan Stanley has refused to consent to the production of any e-mails from those 18 employees based on a representation from Bloomberg's counsel to Morgan Stanley that those individuals did not have Bloomberg accounts. If Bloomberg has no responsive documents concerning an individual named in the subpoena, Bloomberg will have no such documents to produce, regardless of Morgan Stanley's consent. That consent is relevant only if Bloomberg has responsive documents. By refusing to consent to the disclosure of documents, Morgan Stanley's action will stand in the way of Bloomberg producing documents responsive to CPH's subpoena, should they be found. CPH is entitled to know that Bloomberg has produced the documents it has, not simply the documents Morgan Stanley consents to having produced.

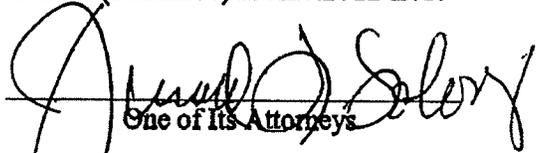
For the foregoing reasons, CPH respectfully requests that this Court direct Morgan Stanley to consent to the production -- without limitation -- to CPH of e-mail responsive to the subpoena CPH served upon Bloomberg.

Dated: April 9, 2004

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

By:



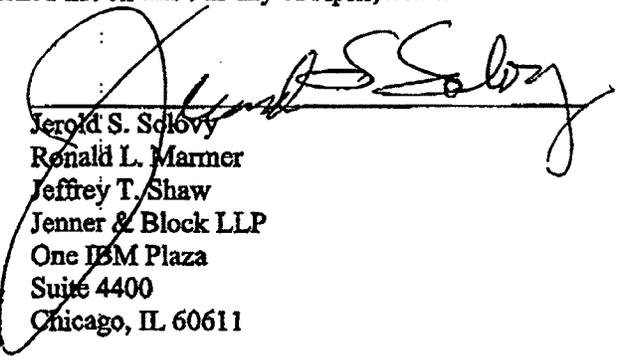
One of its Attorneys

Jerold S. Solovy
Ronald L. Marmer
Jeffrey T. Shaw
JENNER & BLOCK LLP
One IBM Plaza
Chicago, IL 60611
(312) 222-9350

Jack Scarola
SEARCY, DENNEY, SCAROLA,
BARNHART & SHIPLEY, P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33401
(561) 686-6300

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by facsimile and E-mail to all counsel on the attached list on this 9th day of April, 2004.



Jerold S. Solovy
Ronald L. Marner
Jeffrey T. Shaw
Jenner & Block LLP
One IBM Plaza
Suite 4400
Chicago, IL 60611

Jack Scarola
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409

Attorneys for Coleman(Parent)Holdings Inc.
and MacAndrews & Forbes Holdings, Inc.

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005
Telephone: (202) 879-5000
Facimile: (202) 879-5200
e-mail: tclare@kirkland.com

FAX TRANSMITTAL

JENNER & BLOCK

Jenner&Block, LLC	Chicago
One IBM Plaza	Dallas
Chicago, IL 60611-7603	Washington, DC
Tel 312 222-9350	
www.jenner.com	

Date: April 9, 2004

To: Thomas A. Clare
Kirkland & Ellis, LLP

Joseph Ianno, Jr.
Carlton Fields P.A.

From: Elizabeth Abbene Coleman
312 923-2659

Employee Number: 013459

Fax: 202-879-5200

Voice: 202-879-5000

Fax: 561-659-7368

Voice: 561-659-7070

Client Number: 41198-10003

Important: This message is intended only for the use of the individual or entity to which it is addressed, and may contain information that is attorney work product, privileged, confidential and exempt from disclosure under applicable law. If the reader of this message is not the intended recipient, or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone, and return the original message to us at the above address via postal service. Thank you.

Message:
Please see attached.

Total number of pages including this cover sheet:
If you do not receive all pages, please call: 312 222-9350
Secretary: Jacqueline Oreamuno

Time Sent:
Sent By: *Jla*
Extension: 6289 / *6120*

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH, COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,

Defendant(s).

CASE NO. CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,

Plaintiff(s),

vs.

MACANDREWS & FORBES HOLDINGS, INC.,

Defendant(s).

**RESPONSE AND OBJECTIONS TO MORGAN STANLEY & CO. INCORPORATED'S
SIXTH REQUEST FOR PRODUCTION OF DOCUMENTS TO PLAINTIFF**

Plaintiff Coleman (Parent) Holdings Inc. ("CPH"), by its attorneys and pursuant to Florida Rules of Civil Procedure 1.280 and 1.350, hereby responds and objects to Morgan Stanley & Co. Incorporated's ("Morgan Stanley") Sixth Request for Production of Documents to Plaintiff ("Requests for Production"):

INITIAL OBJECTIONS

1. CPH objects to the Requests for Production, including all Definitions and Instructions, to the extent that they purport to impose upon CPH any requirements that exceed or are inconsistent with the requirements of the Florida Rules of Civil Procedure or any other applicable rule or court order. For example, CPH will not comply with Instructions Nos. 3, 4, 5, 6, 7, 8, 9, 10, 11, and 16 or Definitions No. 9 to the extent that they purport to impose on CPH

obligations that are not required by Florida rules and case law. CPH will comply with the applicable rules and law.

2. CPH objects to the Requests for Production to the extent that they seek the production of any documents or information protected from discovery by reason of the attorney-client privilege, the work product doctrine, or any other applicable privilege, doctrine, immunity, or rule. CPH reserves the right to assert any and all privileges to which CPH is entitled under the law. CPH will provide a log of documents withheld from production on the basis of the attorney-client privilege, the work product doctrine, or any other applicable privilege, doctrine, immunity, or rule.

3. CPH objects to the definition of "Coleman Transaction" because Morgan Stanley's definition mischaracterizes the transaction that closed on March 30, 1998 and because the definition is vague and ambiguous to the extent it includes "all related communications, agreements, and transactions." CPH will construe the term "Coleman Transaction" to mean the transaction by which CPH transferred its interest in The Coleman Company to Sunbeam Corporation ("Sunbeam").

4. CPH objects to the extent that any Request for Production seeks documents that are in the public domain and accessible to all parties. In responding to the Requests for Production, CPH will produce publicly available documents to the extent that copies exist in CPH's files of otherwise non-public information responsive to these requests.

5. CPH objects to the definition of "CPH" to the extent it includes CPH's counsel in this litigation. CPH interprets these definitions to exclude Jenner & Block LLP and Searcy Denney Scarola Barnhart & Shipley P.A., and their respective attorneys.

6. By stating that CPH will produce documents responsive to a particular document request, CPH does not represent that any such documents exist. Rather, CPH is responding that to the extent such documents are located, they will be produced.

7. By stating that CPH will produce responsive documents, CPH does not concede the relevance of any of the produced documents to the subject matter of this litigation or to the admissibility of those documents at trial.

8. CPH's objections and responses are based on a good-faith search for documents within CPH's possession, custody, and control. CPH expressly reserves the right to amend and/or modify its objections and responses.

9. CPH responds to Morgan Stanley's document requests without waiving the Initial Objections. CPH incorporates, as though fully set forth therein, these Initial Objections into each of the Responses and Objections set forth below.

DOCUMENTS TO BE PRODUCED

1. All documents that evidence the recognition of revenue or loss of CPH, MAFCO or affiliate company, and the tax treatment or consequences thereof from the sale of Coleman common stock to Sunbeam, including any recognition of revenue concerning the settlement with Sunbeam.

ANSWER: CPH objects to this request as overbroad, burdensome, and not reasonably calculated to call for the discovery of admissible evidence. Documents showing the recognition of revenue or loss by CPH, Mafco, or any affiliated companies, or the tax treatment and consequences thereof, are not relevant issues in this case and their production would require the disclosure of highly confidential information that has no bearing on the issues in this case. Moreover, CPH has not placed its tax treatment of the Coleman Transaction at issue, and Morgan Stanley has failed to show that documents relating to CPH's tax treatment of the Coleman Transaction are likely to provide information that is unavailable from other sources.

2. All documents concerning Scott Paper, including internal or third party analysis of its financial performance and acquisition by Kimberly-Clark.

ANSWER: Subject to and without waiving the foregoing initial objections, CPH will produce documents responsive to this request.

3. All documents concerning Albert Dunlap, including documents referring to his professional employment history.

ANSWER: Subject to and without waiving the foregoing initial objections, CPH will produce documents responsive to this request.

4. All documents concerning the issuance of private placement notes by Revlon Escrow Corporation in February 1998.

ANSWER: CPH objects to this request as overbroad, burdensome, and not reasonably calculated to call for the discovery of admissible evidence. CPH further notes that Morgan Stanley has taken the position in this case that documents relating to transactions other than the Coleman Transaction are not relevant and need not be produced.

5. All documents concerning any transaction contemplated or consummated between October 1, 1997 and March 30, 1998 by or among CPH, MAFCO, or any subsidiary or affiliate regarding Aames Financial Corporation, Bushnell, Day International, Golden State Bancorp, Gucci, Panavision, Timber REITs, or any other transaction contemplated or consummated between October 1, 1997 and March 30, 1998 where the value of consideration offered or received was expected to, or did, exceed \$5 million.

ANSWER: CPH objects to this request as overbroad, burdensome, and not reasonably calculated to call for the discovery of admissible evidence. CPH further notes that Morgan Stanley has taken the position in this case that documents relating to transactions other than the Coleman Transaction are not relevant and need not be produced.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by facsimile and mail to all counsel on the attached Service List, this 9th day of April, 2004.

Dated: April 9, 2004

COLEMAN (PARENT) HOLDINGS INC.

By: Michael T. Brody
One of Its Attorneys

John Scarola
SEARCY DENNEY SCAROLA BARNHART
& SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33402-3626
(561) 686-6300

Jerold S. Solovy
Ronald L. Marmer
Michael T. Brody
JENNER & BLOCK LLP
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

SERVICE LIST

Thomas A. Clare, Esq.
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Joseph Ianno, Jr., Esq.
CARLTON FIELDS
222 Lake View Avenue, Suite 1400
West Palm Beach, FL 33401

FAX TRANSMITTAL

J E N N E R & B L O C K

Jenner&Block LLP
One IBM Plaza
Chicago, IL 60611-7603
Tel 312 222-9350
www.jenner.com

Chicago
Dallas
Washington, DC

Date: April 9, 2004

To: Thomas A. Clare, Esq.
KIRKLAND & ELLIS

Fax: 202 879 5200

Voice: 202 879 5993

From: Clark C. Johnson
312 923-2739

Employee Number:

Client Number: 41198 10003

Important: This message is intended only for the use of the individual or entity to which it is addressed, and may contain information that is attorney work product, privileged, confidential and exempt from disclosure under applicable law. If the reader of this message is not the intended recipient, or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone, and return the original message to us at the above address via postal service. Thank you.

Message: Please see attached.

Total number of pages including this cover sheet:

Time Sent:

If you do not receive all pages, please call: 312 222-9350

Sent By:

Secretary:

Extension:

IN THE FIFTEENTH JUDICIAL CIRCUIT,
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO.: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.

_____/ CASE NO. CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING,
INC.,

Plaintiff,

vs.

MACANDREWS & FORBES HOLDINGS
INC., et al.,

Defendant.

**JOINT SUBMISSION OF THE PARTIES FOR
APRIL 16, 2004 CASE MANAGEMENT CONFERENCE**

Pursuant to the Court's Order of February 24, 2004, the parties in the above-referenced action hereby submit the following Joint Submission in advance of the April 16, 2004 Case Management Conference.

I. Agreed-Upon Statement Of Background And Procedural History

The following is the parties' agreed-upon summary of the two companion cases now pending before this Court, which have been consolidated for trial.

A. **Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co. Incorporated**
(Case No. 03 CA-005045 AI)

Background. This case arises out of an acquisition transaction that was negotiated and consummated in late 1997 and early 1998, in which Coleman (Parent) Holdings Inc. ("CPH") sold its 82% interest in The Coleman Company, Inc. ("Coleman") to Sunbeam Corporation ("Sunbeam"). Morgan Stanley & Co., Inc. ("Morgan Stanley") served as financial advisor to Sunbeam for parts of the acquisition transaction and served as the lead underwriter for a \$750,000,000 debenture offering that Sunbeam used to finance the acquisition.

CPH's Complaint alleges claims arising from this transaction for fraudulent misrepresentation, negligent misrepresentation, aiding and abetting fraud, and conspiracy. CPH's Complaint has sought damages of at least \$485 million and has reserved the right to seek punitive damages. Morgan Stanley denies the material allegations in CPH's Complaint and also denies CPH's entitlement to damages.

Procedural History. CPH filed its Complaint on May 8, 2003 (the "CPH Action"). Morgan Stanley filed its Answer on June 23, 2003 and, on June 25, 2003 filed its Motion to Dismiss Pursuant To Florida Rule of Civil Procedure 1.061 Or, In the Alternative, For Judgment On The Pleadings. The Court held a hearing on these motions on December 12, 2003. On December 15, 2003, the Court issued an Order denying both motions. On January 9, 2004, Morgan Stanley timely filed a Notice of Appeal regarding the denial of its motion to dismiss. See Florida Rule of Appellate Procedure 9.130(a)(3)(A) (providing for interlocutory appellate review of non-final orders "concerning venue"). On February 20, 2004, the Court consolidated CPH's action against Morgan Stanley with Morgan Stanley Senior Funding's action against CPH and MacAndrews & Forbes, Holdings Inc.

B. Morgan Stanley Senior Funding, Inc. v. MacAndrews & Forbes Holdings Inc., et al. (Case No. 03 CA-005165 AI)

Background. This action arises out of the same series of financial transactions as the CPH Action. In 1998, Morgan Stanley Senior Funding, Inc. ("MSSF") and other lenders entered into a credit agreement with Sunbeam under which MSSF agreed to provide senior secured financing to Sunbeam in connection with Sunbeam's acquisition of Coleman and two smaller companies.

MSSF's Complaint alleges that, in the course of Sunbeam's acquisition of Coleman, Defendants MacAndrews & Forbes Holdings Inc. ("MAFCO") and CPH provided false information to MSSF about the "synergies" that Sunbeam would achieve from the combination of Sunbeam and Coleman. MSSF alleges that Defendant's inflated synergy projections caused Sunbeam to pay a higher price to acquire Coleman and consequently caused Sunbeam's lenders (including MSSF) to make larger loans to finance the acquisition. MSSF's Complaint alleges that it suffered hundreds of millions of dollars in damages when Sunbeam declared bankruptcy in February 2001 and defaulted on acquisition-related loans. MSSF has alleged claims for fraud and negligent misrepresentation, and has reserved the right to seek punitive damages. CPH denies the material allegations in MSSF's Complaint and also denies MSSF's entitlement to damages.

Procedural History. MSSF filed its Complaint against MAFCO and CPH on May 12, 2003 (the "MSSF Action"). The MSSF Action was initially assigned to Division AG. Because the MSSF Action and the CPH Action involve the same series of financial transactions and arise from a common set of operative facts, the parties agreed that the two cases are companion cases under Local Rule 2.009 and requested a transfer to Division AI, where the first-filed, lower numbered CPH Action was assigned. The motion to transfer was granted on June 9, 2003.

Defendants CPH and MAFCO filed their Answer on June 25, 2003. On February 20, 2004, the Court consolidated MSSF's action against CPH and MAFCO with CPH's action against Morgan Stanley.

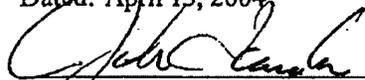
II. Report On Discovery In The Two Cases

CPH, MAFCO, Morgan Stanley, and MSSF are actively pursuing written and deposition discovery. The parties have exchanged hundreds of thousands of pages of documents, have served and answered multiple sets of interrogatories and requests for admission, and have deposed more than a dozen party and non-party witnesses. Discovery is ongoing in both cases.

III. Pretrial Schedule

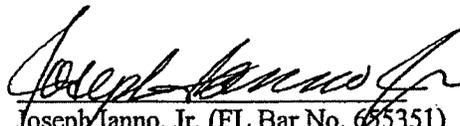
On February 24, 2004, the Court entered an order setting this matter for trial in January 2005, and on March 23, 2004, this Court entered an Agreed Order setting the pretrial schedule in this matter and scheduling trial to begin on January 18, 2005.

Dated: April 13, 2004


John Scarola (FL Bar No. 169440)
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33402-3626
(561) 686-6300

Jerold S. Solovy
JENNER & BLOCK LLP
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

**Counsel for Coleman (Parent) Holdings Inc.
and MacAndrews & Forbes Holdings Inc.**


Joseph Ianno, Jr. (FL Bar No. 65351)
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
(561) 659-7070

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar No. 618349)
Thomas A. Clare
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
(202) 879-5000

**Counsel for Morgan Stanley & Co., Inc., and
Morgan Stanley Senior Funding, Inc.**

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

v.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO., INC.,

Defendant.

MORGAN STANLEY SENIOR FUNDING, INC.,

Plaintiff,

v.

CASE NO: CA 03-5165 AI

MACANDREWS & FORBES HOLDINGS, INC.,

Defendant.

NOTICE OF FILING PLEADING UNDER SEAL

Morgan Stanley & Co. Incorporated and Morgan Stanley Senior Funding, Inc. ("Morgan Stanley"), by and through their undersigned counsel, hereby give notice that Morgan Stanley's Motion for Protective Order has been filed under seal this 16th day of April, 2004.

Coleman v. Morgan Stanley, Case No: CA 03-5045 A:
Morgan Stanley v. MacAndrews, Case No: CA 03-5045
Notice of Filing Under Seal
Page 2

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the service list below by facsimile and Federal Express on this 16th day of April, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar No. 618349)
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
E-mail: jianno@carltonfields.com

Michael K. Kellogg
Mark C. Hansen
James M. Webster
Rebecca A. Beynon
**KELLOGG, HUBER, HANSEN,
TODD & EVANS P.L.L.C.**
Sumner Square
1615 M. Street, N.W., Suite 400
Washington, D.C. 20036
Telephone: (202) 326-7900
Facsimile: (202) 326-7999
(Pro Hac Vice Pending)

BY: 
Joseph Ianno, Jr.
Florida Bar No. 655351

**Counsel for Morgan Stanley & Co.
Incorporated and Morgan Stanley
Senior Funding**

Coleman v. Morgan Stanley, Case No: CA 03-5045 AI
Morgan Stanley v. MacAndrews, Case No: CA 03-5045
Notice of Filing Under Seal
Page 2

SERVICE LIST

Jack Scarola
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy
Michael Brody
JENNER & BLOCK, LLC
One IBM Plaza, Suite 400
Chicago, IL 60611

CARLTON FIELDS, P.A.

ATTORNEYS AT LAW

ESPERANTÉ
222 LAKEVIEW AVENUE, SUITE 1400
WEST PALM BEACH, FLORIDA 33401-6149

MAILING ADDRESS
P.O. BOX 150, WEST PALM BEACH, FL 33402-0150
TEL (561) 659-7070 FAX (561) 659-7368

FAX COVER SHEET

Date:	April 16, 2004	Phone Number	Fax Number
To:	Jack Scarola	(561) 686-6300	(561) 684-5816
	Jerold Solovy/Michael Brody	(312) 222-9350	(312) 527-0484
	Thomas Clare	(202) 879-5993	(202) 879-5200
From:	Joyce Dillard, CLA	(561) 659-7070	(561) 659-7368

Client/Matter No.: 47877/14092

Employee No.:

Total Number of Pages Being Transmitted, Including Cover Sheet: 45

Message:

Coleman v. Morgan Stanley & Co., Inc. / Morgan Stanley Senior Funding, Inc. v. Macandrews & Forbes Holdings, Inc.

To follow please find a copy of Morgan Stanley's Notice of Filing Under Seal and Motion for Protective Order.

Hard copy will follow via Federal Express.

Original to follow Via Regular Mail Original will Not be Sent Original will follow via Overnight Courier

 The information contained in this facsimile message is attorney privileged and confidential information intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone (if long distance, please call collect) and return the original message to us at the above address via the U.S. Postal Service. Thank you.

IF THERE ARE ANY PROBLEMS OR COMPLICATIONS, PLEASE NOTIFY US IMMEDIATELY AT:
(561) 659-7070

TELECOPIER OPERATOR: _____

WPB#566762.3

CARLTON FIELDS, P.A.

TAMPA ORLANDO TALLAHASSEE WEST PALM BEACH ST. PETERSBURG MIAMI

**IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA**

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

CASE NO. CA 03-5045 AI

vs.

MORGAN STANLEY & CO., INC.,
Defendant.

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff,

CASE NO. CA 03-5165 AI

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendants.

AMENDED NOTICE OF DEPOSITION

To: Thomas A. Clare, Esq.
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Joseph Ianno, Jr., Esq.
CARLTON FIELDS
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

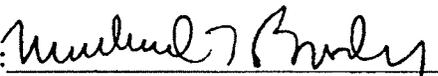
PLEASE TAKE NOTICE that Plaintiff Coleman (Parent) Holdings, Inc. requests the deposition upon oral examination of the following non-party witness pursuant to Florida Rule of Civil Procedure 1.310 on the date, time, and location set forth below:

SHANI BOONE April 22, 2004 at 8:00 a.m. EDT

The deposition will be recorded by stenographic and videographic means at the offices of Esquire Deposition Services, 175 Federal Street, Suite 508, Boston, MA 02110. The videographer will be Esquire Deposition Services. The deposition will be taken before a person authorized to administer oaths and will continue day to day until completed.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by facsimile and mail to all counsel on the attached Service List, this 15th day of April, 2004.

COLEMAN (PARENT) HOLDINGS INC.

By: 
One of Its Attorneys

Jerold S. Solovy
Michael T. Brody
JENNER & BLOCK LLP
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

Jack Scarola
SEARCY DENNEY SCAROLA BARNHART &
SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409
(561) 686-6300

SERVICE LIST

Thomas A. Clare, Esq.
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, DC 20005
Facsimile: (202) 879-5200

Joseph Ianno, Jr.,
CARLTON FIELDS
222 Lakeview Avenue, Suite 1400
West Palm Beach, FL 33401
Facsimile: (561) 659-7368

#230580/smk

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

CASE NO: 2003 CA 005045 AI

Plaintiffs,

vs.

MORGAN STANLEY & CO., INC.

Defendant.

MORGAN STANLEY SENIOR FUNDING,
INC.,

Plaintiff,

CASE NO. CA 03-5165 AI

vs.

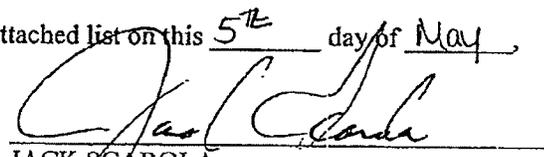
MACANDREWS & FORBES HOLDINGS,
INC.,

Defendant,

NOTICE OF FILING PLEADING UNDER SEAL

Plaintiff, COLEMAN (PARENT) HOLDINGS INC., hereby gives Notice of the filing of
Coleman (Parent) Holdings Inc.'s Motion to Allow Arthur Andersen LLP Access to Confidential
Transcript, filed under Seal on this date.

HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by
Fax and Federal Express to all counsel on the attached list on this 5th day of May,
2004.



JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 684-5815
Attorneys for Coleman (Parent) Holdings, Inc.
and MacAndrews & Forbes Holdings, Inc.

Coleman (Parent) Holdings Inc. vs Morgan Stanley & Company
Notice of Filing Pleading Under Seal
Case No.: 2003 CA 005045 AI

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block, LLC
One IBM Plaza
Suite 4400
Chicago, IL 60611

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

_____/

CASE NO. CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

_____/

ORDER ON PLAINTIFF'S MOTION FOR A RULE TO SHOW CAUSE

THIS CAUSE came before the Court April 30, 2004 on Coleman (Parent) Holdings Inc.'s Motion for a Rule to Show Cause, with all parties well represented by counsel.

On July 31, 2003, the Court entered its Stipulated Confidentiality Order ("Order"). Paragraph 9 (b) of the Order limited dissemination of Confidential materials to

counsel to the parties, including co-counsel of record for the parties actually assisting in the prosecution or defense of this litigation, and the legal associates and clerical or other support staff who are employed by such counsel or attorneys and are working under the express direction of such counsel or attorneys.

Paragraph 3 provided that

Litigation Materials [which includes Confidential materials] and the information derived therefrom shall be used solely for

the purpose of preparing for and conducting this litigation,
and shall not be disclosed or used for any other purpose.

By Order dated December 4, 2003, the Court required Coleman to disclose to Morgan Stanley & Co. its settlement agreement with Arthur Andersen, with limited information redacted. The agreement was designated as Confidential under the Order's terms.

On March 1, 2004 various Morgan Stanley entities, including Morgan Stanley & Co., acting under other than counsel of record here, filed suit against Arthur Andersen. Coleman claims that counsel in this case provided a copy of the settlement agreement to counsel for the Morgan Stanley entities in the Arthur Andersen litigation; that counsel in that case named Morgan Stanley & Co., the Defendant here, as a co-plaintiff; that Morgan Stanley & Co. does not have a colorable claim against Arthur Andersen; that Morgan Stanley & Co. was included as a co-plaintiff to trigger an indemnification obligation in the settlement agreement in order to apply pressure on Coleman in this case; that this constituted an impermissible "use" under the Order; and that Morgan Stanley may have provided the settlement agreement or information about its terms to third parties to induce them to sue Arthur Andersen and trigger the indemnification provision.

The Court determines that (i) the Order prohibited disclosure of the Confidential materials to counsel not actively representing the parties in the current litigation; (ii) there is a disputed issue of fact concerning whether counsel were representing Morgan Stanley & Co. in this litigation at the time the settlement agreement was disclosed; (iii) there is a disputed issue of fact concerning whether the contents of the settlement agreement may have been disclosed to third parties; and (iv) Morgan Stanley's alleged use may, depending on the facts developed, not be for a *legitimate* purpose. See In re: Dual-Deck Video Cassette Recorder, 10 F. 3d 693 (9th Cir. 1993).

Morgan Stanley's counsel argued that a Motion for Rule to Show Cause is procedurally improper; that Coleman should have filed a Motion for Contempt; and that if the Motion for Rule to Show Cause was deemed a Motion for Contempt, it should either be

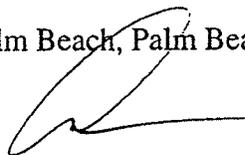
stricken as legally insufficient or denied, for lack of evidence.

The Court concludes that a Motion for Contempt is the proper procedural vehicle to challenge an alleged violation of an order where the movant seeks to compel compliance, not punish. See Trawick, Fla. Prac. and Proc., §27-6 (2004); JPG Enterprises, Inc. v. Viterito, 841 So. 2d 528 (Fla. 4th DCA 2003), rev. den. 855 So. 2d 621 (Fla. 2003); cf. Rule 3.840, Fla. R. Crim. P. The Motion, though, sufficiently places Morgan Stanley on notice of Coleman's contention that Morgan Stanley has violated the Order and the December 4, 2003 Order on Defendant's Motion to Compel Production of Settlement Agreement and its request that Morgan Stanley be held in contempt. It would be patently unfair to construe the Motion as a Motion for Contempt and deny it for lack of evidence presented at the April 30, 2004 hearing, when Morgan Stanley failed to raise the procedural defect in its Opposition to CPH's Motion for Rule to Show Cause.

Based on the foregoing, it is

ORDERED AND ADJUDGED that Plaintiff Coleman (Parent) Holdings, Inc.'s Motion for Rule to Show Cause is deemed a Motion for Contempt. Defendant's ore tenus Motion to Strike the Motion for Contempt is Denied. Either side may set the Motion for Contempt for an evidentiary hearing, once discovery is complete. The Court shall rule on the permissible scope of discovery as disputes arise.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 14th day of May, 2004.



ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:

Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci
655 15th Street, NW, Suite 1200
Washington DC 20005

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, IL 60611

#230580/mp

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

CASE NO: 2003 CA 005045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.

_____ /

MORGAN STANLEY SENIOR FUNDING,
INC.,

Plaintiff,

CASE NO. CA 03-5165 AI

vs.

MACANDREWS & FORBES HOLDINGS,
INC.,

Defendant,

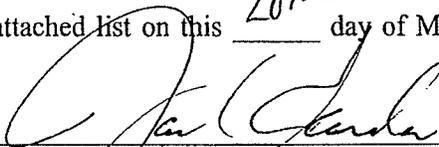
_____ /

NOTICE OF COMPLIANCE WITH ORDER OF MAY 17, 2004

COLEMAN (PARENT) HOLDINGS INC. in compliance with the direction of the Court as contained in this Court's Order of May 17, 2004, does hereby designate the entire transcript of the April 30, 2004 hearing as subject to Coleman (Parent)'s request for limited exemption from this Court's Confidentiality Order. A copy of the transcript is attached.

Coleman (Parent) Holdings Inc. vs Morgan Stanley & Co., Inc.
Notice Of Compliance With Order Of May 17, 2004
Case No.: 2003 CA 005045 AI

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by
Fax and Federal Express to all counsel on the attached list on this 20th day of May, 2004.



JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 478-0754
Attorneys for CPH and Mafco

Coleman (Parent) Holdings Inc. vs Morgan Stanley & Co., Inc.
Notice Of Compliance With Order Of May 17, 2004
Case No.: 2003 CA 005045 AI

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block LLP
One IBM Plaza
Suite 4400
Chicago, IL 60611

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Company, Inc.
Case No.: 2003 CA 005045 AI
Amended Notice of Taking Videotaped Depositions
May 20, 2004

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 2003 CA 005045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

AMENDED NOTICE OF TAKING VIDEOTAPED DEPOSITIONS

To: Thomas A. Clare, Esq.
KIRKLAND & ELLIS, LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lake View Avenue
Suite 1400
West Palm Beach, FL 33401

PLEASE TAKE NOTICE that Plaintiff Coleman (Parent) Holdings Inc. will take the deposition upon oral examination of the following witnesses pursuant to Florida Rule of Civil Procedure 1.310 on the dates, times, and locations set forth below:

DEPONENT	DATE AND TIME
Heather Stack	May 25, 2004 at 9:30 a.m.
Alan Dean	June 3, 2004 at 9:30 a.m.
James Lurie	June 18, 2004 at 9:30 a.m.

All of the depositions will be conducted at Davis Polk & Wardwell, 450 Lexington Avenue, New York, NY 10017. The depositions will be recorded by videotape and stenographic means. The depositions will be taken before a person authorized to administer oaths and will continue day to day until completed.

The videotape operator will be Esquire Deposition Services located in New York, New York.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by facsimile and mail to all counsel on the attached Service List this 20th day of May 2004.

Dated: May 20, 2004

COLEMAN (PARENT) HOLDINGS INC.

By: Michael T. Brody
One of Its Attorneys

Jerold S. Solovy
Michael T. Brody
Clark C. Johnson
JENNER & BLOCK LLP
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

Jack Scarola
SEARCY DENNEY SCAROLA BARNHART
& SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33409
(561) 686-6300

SERVICE LIST

Thomas A. Clare, Esq.
KIRKLAND & ELLIS, LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lake View Avenue
Suite 1400
West Palm Beach, FL 33401

JENNER & BLOCK

May 20, 2004

Jenner & Block LLP
One IBM Plaza
Chicago, IL 60611
Tel 312-222-9350
www.jenner.com

Chicago
Dallas
Washington, DC

By Telecopy

Thomas A. Clare, Esq.
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

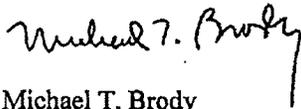
Michael T. Brody
Tel 312 923-2711
Fax 312 840-7711
mbrody@jenner.com

Re: *Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co.*
Morgan Stanley Senior Funding, Inc. v. MacAndrews & Forbes Holdings Inc., et al.

Dear Tom:

As an accommodation to counsel at Davis Polk, we have agreed to move the depositions of Heather Stack, Alan Dean, and James Lurie to the offices of Davis Polk & Wardwell, 450 Lexington Avenue, New York, New York. I have enclosed a revised Notice of Deposition.

Very truly yours,



Michael T. Brody

MTB:cjg

cc: James E. Murray, Esq. (by telecopy)
Joseph Ianno, Esq. (by telecopy)
John Scarola, Esq. (by telecopy)
Jerold S. Solovy, Esq.

FAX TRANSMITTAL

JENNER & BLOCK

Jenner & Block LLP
One IBM Plaza
Chicago, IL 60611
Tel 312 222-9350
www.jenner.com

Chicago
Dallas
Washington, DC

Date: May 20, 2004

To: Thomas A. Clare, Esq. Fax: (202) 879-5200
Voice: (202) 879-5993

Joseph Ianno, Jr., Esq. Fax: (561) 659-7368
Voice: (561) 659-7070

John Scarola, Esq. Fax: (561) 684-5816 (before 5 PM)
Voice: (561) 686-6350, Ext. 140

From: Michael T. Brody
312 923-2711

Employee Number:

Client Number: 41198-10003

Important: This message is intended only for the use of the individual or entity to which it is addressed, and may contain information that is attorney work product, privileged, confidential, and exempt from disclosure under applicable law. If the reader of this message is not the intended recipient, or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution, or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone, and return the original message to us at the above address via postal service. Thank you.

Message:

Total number of pages including this cover sheet:

Time Sent:

If you do not receive all pages, please call: 312 222-9350

Sent By:

Secretary: Caryn Jo Geisler

Extension: 6490

**IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA**

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

Case No. 2003 CA 005045 AI

v.

Judge Elizabeth T. Maass

MORGAN STANLEY & CO., INC.,

Defendant.

MORGAN STANLEY SENIOR FUNDING, INC.,

Plaintiff,

Case No. 2003 CA 005165 AI

v.

MACANDREWS & FORBES HOLDINGS, INC.,

Defendants.

**COLEMAN (PARENT) HOLDING, INC.'S REQUEST FOR PRODUCTION
OF DOCUMENTS CONCERNING ITS MOTION FOR CONTEMPT**

Pursuant to Florida Rules of Civil Procedure 1.280 and 1.350 and the Court's May 14, 2004 Order, Coleman (Parent) Holdings Inc. ("CPH") requests that Morgan Stanley & Co., Inc. ("MS & Co.") and Morgan Stanley Senior Funding, Inc. ("MSSF") produce the following documents, according to the following definitions and instructions, at the office of Searcy Denney Scarola Barnhart & Shipley P.A., 2139 Palm Beach Lakes Blvd., West Palm Beach, Florida, within (30) thirty days of service.

DEFINITIONS AND INSTRUCTIONS

1. The terms "documents" and "concerning" have the meaning ascribed to them in Plaintiff's [CPH's] First Request for Production of Documents.
2. "Arthur Andersen" means Arthur Andersen LLP; Andersen Worldwide, Société Coopérative; Arthur Andersen & Co. (Canada); Ruiz, Urquiza Y Cia, S.C.; Piernavieja, Porta, Cachafeiro & Avocados [Asociados]; Arthur Andersen (U.K.); Phillip Harlow; Lawrence Bornstein; William Pruitt; and/or Donald Denkhaus.

3. "Morgan Stanley Entities" means MS & Co., MSSF, Morgan Stanley, Morgan Stanley Dean Witter & Co., and/or any entity owned in whole or in part, directly or indirectly, by Morgan Stanley.
4. "Settlement Agreement" means the settlement agreement between, *inter alia*, CPH and Arthur Andersen LLP, compelled to be produced and designated as Confidential by the Court on December 4, 2003.
5. CPH incorporates the instructions set forth in Plaintiff's [CPH's] First Request for Production of Documents.

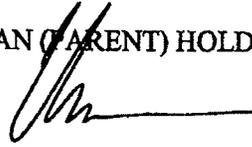
DOCUMENTS REQUESTED

1. All documents relating to (a) whether and when Kellogg, Huber, Hansen, Todd & Evans P.L.L.C. ("Kellogg Huber") began representing MS & Co. and/or MSSF in the above-captioned consolidated litigation; (b) whether, when, and what information contained in the Settlement Agreement was disclosed to Kellogg Huber; and/or (c) the scope of responsibilities assumed by Kellogg Huber with respect to the above-captioned consolidated litigation.
2. All documents concerning why firms other than Kirkland & Ellis LLP and Carlton Fields were being retained in the above-captioned consolidated litigation.
3. All documents concerning why firms other than Kirkland & Ellis LLP and Carlton Fields were being retained to file suit against Arthur Andersen.
4. All documents relating to why Morgan Stanley Entities waited until March 1, 2004 to sue Arthur Andersen.
5. All documents relating to whether the contents of the Settlement Agreement, and/or any other material designated "Confidential," were disclosed to third parties.
6. All documents referring to any portion of the Settlement Agreement.
7. All documents relating to Morgan Stanley Entities' use of the Settlement Agreement.
8. All documents relating to Morgan Stanley Entities' purpose in using the Settlement Agreement.
9. All drafts of complaints by any Morgan Stanley Entities against Arthur Andersen, including all versions reflecting any handwritten comments or marginalia, and all documents reflecting when and/or by whom each draft and version was prepared.
10. All documents relating to any damages that MS & Co. seeks to recover in its claim against Arthur Andersen.

- 11. All documents referring to any advantages Morgan Stanley Entities hope(d) to obtain in the above-captioned consolidated litigation by suing Arthur Andersen.
- 12. All documents relating to, or that were a source of information used in preparing, any answers to the interrogatories served on March 19, 2004 and/or on May 28, 2004.
- 13. All documents, including all time sheets and billing records, reflecting time expended and/or the nature of services rendered by Kellogg Huber in either the above-captioned consolidated litigation and/or *Morgan Stanley & Co., Inc., et al. v. Arthur Andersen LLP, et al.*, No. 50-2004-CA-2257-xxxx-NB, from the inception of such services to and including March 1, 2004.

Dated: May 28, 2004

COLEMAN (PARENT) HOLDINGS INC.

By: 

 One of Its Attorneys

Jerold S. Solovy
 Ronald L. Marmer
 JENNER & BLOCK LLP
 One IBM Plaza, Suite 4400
 Chicago, Illinois 60611
 (312) 222-9350

Jack Scarola
 SEARCY DENNEY SCAROLA BARNHART
 & SHIPLEY P.A.
 2139 Palm Beach Lakes Blvd.
 West Palm Beach, Florida 33402-3626
 (561) 686-6300

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by facsimile and mail to counsel listed below on this 28th day of May, 2004:

Thomas A. Clare, Esq.
 KIRKLAND & ELLIS
 655 Fifteenth Street, N.W.
 Suite 1200
 Washington, D.C. 20005

Joseph Ianno, Jr., Esq.
 CARLTON FIELDS
 222 Lakeview Avenue, Suite 1400
 West Palm Beach, FL 33401

By: 

 CLARK C. JOHNSON

FAX TRANSMITTAL

J E N N E R & B L O C K

Jenner&Block LLP
One IBM Plaza
Chicago, IL 60611-7603
Tel 312 222-9350
www.jenner.com

Chicago
Dallas
Washington, DC

Date: May 28, 2004

To: Thomas A. Clare, Esq.
KIRKLAND & ELLIS

Fax: 202 879 5200

Voice: 202 879 5993

From: Clark C. Johnson
312 923-2739

Employee Number:

Client Number: 41198 10003

Important: This message is intended only for the use of the individual or entity to which it is addressed, and may contain information that is attorney work product, privileged, confidential and exempt from disclosure under applicable law. If the reader of this message is not the intended recipient, or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone, and return the original message to us at the above address via postal service. Thank you.

Message: Please see attached.

Total number of pages including this cover sheet:

8

Time Sent: 3:50

If you do not receive all pages, please call: 312 222-9350

Sent By: [Signature]

Secretary:

Extension: 2737

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO., INC.,

Defendant.

MORGAN STANLEY SENIOR FUNDING, INC.,

Plaintiff,

v.

CASE NO: CA 03-5165 AI

MACANDREWS & FORBES HOLDINGS, INC.,

Defendant.

NOTICE OF FILING PLEADING UNDER SEAL

Morgan Stanley & Co. Incorporated and Morgan Stanley Senior Funding, Inc. ("Morgan Stanley"), by and through their undersigned counsel, hereby give notice that Morgan Stanley's Supplemental Response and Opposition to Coleman (Parent) Holdings, Inc.'s Motion to Allow Arthur Andersen Access to Confidential Transcript has been filed under seal this 2nd day of June, 2004.

Coleman v. Morgan Stanley, Case No: CA 03-5045 AI
Morgan Stanley v. MacAndrews, Case No: CA 03-5045
Notice of Filing Under Seal
Page 2

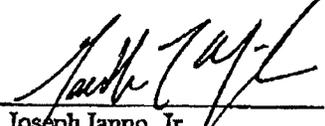
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the service list below by facsimile and U.S. Mail on this 2nd day of June, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar No. 618349)
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
E-mail: jianno@carltonfields.com

**Counsel for Morgan Stanley & Co.
Incorporated and Morgan Stanley
Senior Funding**

BY: 
for Joseph Ianno, Jr.
Florida Bar No: 655351

Coleman v. Morgan Stanley, Case No: CA 03-5045 AI
Morgan Stanley v. MacAndrews, Case No: CA 03-5045
Notice of Filing Under Seal
Page 2

SERVICE LIST

Jack Scarola
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy
Michael Brody
JENNER & BLOCK, LLC
One IBM Plaza, Suite 400
Chicago, IL 60611

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO., INC.,

Defendant.

_____ /

MORGAN STANLEY SENIOR FUNDING, INC.,

Plaintiff,

v.

CASE NO: CA 03-5165 AI

MACANDREWS & FORBES HOLDINGS, INC.,

Defendant.

_____ /

NOTICE OF FILING PLEADING UNDER SEAL

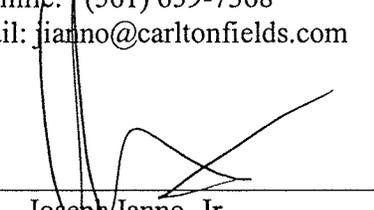
Morgan Stanley & Co. Incorporated and Morgan Stanley Senior Funding, Inc. ("Morgan Stanley"), by and through their undersigned counsel, hereby give notice that Exhibit "1" to Morgan Stanley's Motion to Remove Confidential Designation from Interrogatories has been filed under seal this 4th day of June, 2004.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to
all counsel of record on the service list below by facsimile and Federal Express on this 4th
day of June, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar No. 618349)
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
E-mail: jianno@carltonfields.com

BY: 
Joseph Ianno, Jr.
Florida Bar No: 655351

**Counsel for Morgan Stanley & Co.
Incorporated and Morgan Stanley
Senior Funding**

SERVICE LIST

Jack Scarola
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy
Michael Brody
JENNER & BLOCK, LLC
One IBM Plaza, Suite 400
Chicago, IL 60611

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT IN
AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO., INC.,

Defendant.

_____/

MORGAN STANLEY SENIOR FUNDING, INC.,

Plaintiff,

vs.

CASE NO: CA 03-5165 AI

MACANDREWS & FORBES HOLDINGS, INC.,

Defendant.

_____/

**MORGAN STANLEY'S MOTION TO REMOVE
CONFIDENTIAL DESIGNATION FROM INTERROGATORIES**

Pursuant to Paragraph 14 of the July 31, 2003 Stipulated Confidentiality Order, Morgan Stanley & Co. Incorporated and Morgan Stanley Senior Funding, Inc. (collectively "Morgan Stanley") respectfully request that this Court remove the confidentiality designation placed on Coleman (Parent) Holdings Inc.'s ("CPH") Further Interrogatories Concerning Its Motion For Contempt. In support of its motion, Morgan States as follows:

1. On May 28, 2004, CPH served Morgan Stanley with "Further Interrogatories Concerning Its Motion For Contempt." (May 28, 2004 CPH's Further Interrogs. Concerning Its Mot. for Contempt (Ex. 1) ("May 28 Interrogatories").)

2. The May 28 Interrogatories do not qualify for "Confidential" treatment under the July 31, 2003 Stipulated Confidentiality Order. Specifically, the May 28 Interrogatories do not contain, reveal or reflect "proprietary or confidential trade secrets or technical, business,

financial or personnel information of a current nature,” as required by Paragraph 4 of the Stipulated Confidentiality Order. (July 31, 2003 Stipulated Confidentiality Order ¶ 4 (Ex. 2).)

3. The May 28 Interrogatories do not reveal any of the terms of the Settlement Agreement between CPH and Arthur Andersen, which was designated as “Confidential” by the Court in its December 4, 2003 Order. Indeed, the May 28 Interrogatories are substantially similar in scope and detail (and in some cases nearly identical) to the Interrogatories served by CPH on March 19, 2004, which were not designated as “Confidential.” (March 19, 2004 Notice of Propounding Interrogs. to Morgan Stanley & Co., Inc. (Ex. 3); March 19, 2004 Notice of Propounding Interrogs. to Morgan Stanley Senior Funding, Inc. (Ex. 4).)

4. Morgan Stanley requests that the “Confidential” designation be removed from the May 28 Interrogatories so that attorneys from the law firm of Kellogg, Huber, Hansen Todd & Evans P.L.L.C. (“KHHTE”) may assist in the preparation of objections and responses. KHHTE was retained by Morgan Stanley to be co-counsel with Kirkland & Ellis LLP in these consolidated actions. KHHTE also is counsel to Morgan Stanley in *Morgan Stanley & Co. Inc. v. Arthur Andersen LLP.*, No. 502004CA002257XXXXMB (15th Jud. Dist. Fla.) (Miller, J.). The May 28 Interrogatories request information regarding Morgan Stanley’s retention of KHHTE and the filing of Morgan Stanley’s lawsuit against Arthur Andersen, subjects that are within the (in some cases exclusive) knowledge of KHHTE and its attorneys.

5. On June 1, 2004, counsel for Morgan Stanley sent a letter to counsel for CPH requesting that CPH remove the “Confidential” designation from the May 28 Interrogatories. (June 1, 2004 Letter from T. Clare to M. Brody (Ex. 5).)

6. On June 4, 2004, CPH “declined” Morgan Stanley’s “invitation” to remove the confidentiality designations. (June 4, 2004 Letter from M. Brody to T. Clare (Ex. 6).)

For the foregoing reasons, Morgan Stanley requests that this Court remove the confidentiality designation placed on the May 28 Interrogatories.

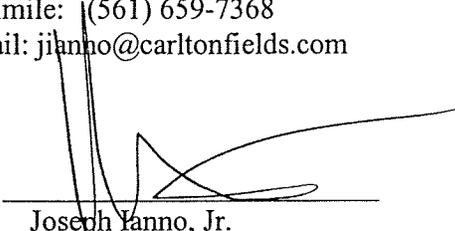
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this 4th day of June, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar No. 618349)
Thomas A. Clare
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

*Counsel for Morgan Stanley & Co.
Incorporated and Morgan Stanley Senior
Funding, Inc.*

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
E-mail: jjanno@carltonfields.com

BY: 
Joseph Yanno, Jr.
Florida Bar No. 655351

SERVICE LIST

Jack Scarola
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy
Michael Brody
JENNER & BLOCK, LLC
One IBM Plaza, Suite 400
Chicago, IL 606119

EXHIBIT "1" – FILED UNDER SEAL

Exhibit 2

**IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA**

COLEMAN (PARENT) HOLDINGS INC.,)	
)	
Plaintiff,	)	Case No.: 2003 CA 005045 AI
v.)	
)	
MORGAN STANLEY & CO., INC.,	)	Judge Elizabeth I. Maass
)	
Defendant.)	
)	

STIPULATED CONFIDENTIALITY ORDER

The parties hereto hereby stipulate and agree to the following Confidentiality Order:

1. Scope of Order. This Order shall apply to all non-public and Confidential (as hereinafter defined) materials produced in this litigation and all testimony given in any deposition by any party to the litigation or by any person or entity that is not a party hereto (a "non-party"), to all non-public and Confidential information disclosed by any party hereto during the course of the captioned litigation and to all non-public information disclosed to any party hereto by any non-party in response to the service of a subpoena or notice of deposition on a non-party in connection with the captioned litigation ("Litigation Materials").

2. This Order shall not apply to any document, testimony or other information that (a) is already in a receiving party's possession at the time it is produced, (b) becomes generally available to the public other than as a result of disclosure in violation of this Order or in breach of any other legal obligation, or (c) becomes available to a party other than through voluntary or required production from a person or party who obtained the document, testimony or other information without any confidentiality restriction.

3. Litigation Materials and the information derived therefrom shall be used solely for the purpose of preparing for and conducting this litigation, and shall not be disclosed or used for any other purpose.

4. Any party or non-party may designate as "Confidential" any Litigation Materials or portions thereof which the party or non-party believes, in good faith, constitute, contain, reveal or reflect proprietary or confidential trade secrets or technical, business, financial or personnel information of a current nature. If a party or non-party produces Litigation Materials that have been produced in another litigation or to any government entity and such Litigation Materials have been designated confidential or were accompanied by a request that confidential treatment be accorded them, such Litigation Materials shall be deemed to have been designated "Confidential" for purposes of this Stipulation and Order.

5. Any documents or other tangible Litigation Materials may be designated as "Confidential" by marking every such page "Confidential" or by informing the other party in writing that such material is Confidential. Such markings will be made in a manner which does not obliterate or obscure the content of the document or other tangible Litigation Material. If Litigation Material is inspected at the choice of location of the party or non-party producing or disclosing Litigation Materials (a "producing party"), all such Litigation Material shall be presumed at such inspection to have been designated as Confidential by the producing party until such time as the producing party provides copies to the party that requested the Litigation Material. Production of Confidential Material for inspection and copying shall not constitute a waiver of confidentiality.

6. Depositions or other testimony may be designated "Confidential" by any one of the following means:

(a) stating orally on the record, with reasonable precision as to the affected testimony, on the day the testimony is given that this information is "Confidential"; or

(b) sending written notice designating, by page and line, the portions of the transcript of the deposition or other testimony to be treated as "Confidential" within 10 days after receipt of the transcripts.

7. The entire transcript of any deposition shall be treated as Confidential Material until thirty days after the conclusion of the deposition. Each page of deposition transcript designated as Confidential Material shall be stamped, as set forth in paragraph 5 above, by the court reporter or counsel.

8. In the event it becomes necessary at a deposition or hearing to show any Confidential Material to a witness, any testimony related to the Confidential Material shall be deemed to be Confidential Material, and the pages and lines of the transcript that set forth such testimony shall be stamped as set forth in paragraph 5 of this Stipulation.

9. Litigation Materials designated "Confidential" and any copies thereof, and the information contained therein, shall not be given, shown, made available or communicated in any way to anyone except:

(a) The Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida (the "Court") (including Clerks and other Court personnel). Litigation Materials designated "Confidential" and any copies thereof, and the information contained therein, that are filed with the Court or any pleadings, motions or other papers filed with the Court, shall be filed under seal in a separate sealed envelope conspicuously marked "Filed Under Seal – Subject to Confidentiality Order," or with such other markings as required by Court rules, and shall be kept under seal until further order of the

Court. Where possible, only those portions of filings with the Court that disclose matters designated "Confidential" shall be filed under seal;

(b) counsel to the parties, including co-counsel of record for the parties actually assisting in the prosecution or defense of this litigation, and the legal associates and clerical or other support staff who are employed by such counsel or attorneys and are working under the express direction of such counsel or attorneys;

(c) parties and current officers and employees of parties to the extent reasonably deemed necessary by counsel disclosing such information for the purpose of assisting in the prosecution or defense of this litigation;

(d) outside photocopying, graphic production services, litigation support services, or investigators employed by the parties or their counsel to assist in this litigation and computer personnel performing duties in relation to a computerized litigation system;

(e) any person who is a witness or deponent, and his or her counsel, during the course of a deposition of testimony in this litigation;

(f) any person who is a potential fact witness in the litigation, provided, however, that a person identified solely in this subparagraph shall not be permitted to retain copies of such Litigation Material;

(g) court reporters, stenographers, or videographers who record deposition or other testimony in the litigation;

(h) experts or consultants retained in connection with the litigation;

(i) any person who is indicated on the face of a document to have been an author, addressee or copy recipient thereof, provided, however, that a person identified

solely in this subparagraph shall not be permitted to retain copies of such Litigation Material; and

(j) any other person, upon written consent from the party or person who designated such Litigation Materials "Confidential."

10. Before any person included in paragraph 9(f) or (h) is given access to Litigation Materials designated "Confidential," and before any person included in subparagraph 9(e) is permitted to retain any copy of Litigation Materials designated Confidential, such person shall be provided with a copy of this Order and shall acknowledge in a written statement, in the form provided as Exhibit A hereto, that he or she read the Order and agrees to be bound by the terms thereof. Such executed forms shall be retained in the files of counsel for the party who gave access to Litigation Materials to the person who was provided such access. Such executed forms shall not be subject to disclosure under the Florida Rules of Civil Procedure unless a showing of good cause is made and the Court so orders.

11. The inadvertent production of privileged or arguably privileged materials shall not be determined to be either: (a) a general waiver of the attorney-client privilege, the work product doctrine or any other privilege; or (b) a specific waiver of any such privilege with respect to documents being produced or the testimony given. Notice of any claim of privilege as to any document claimed to have been produced inadvertently shall be given within a reasonable period of time after discovery of the inadvertent production, and, on request by the producing party, all inadvertently produced materials as to which a claim of privilege is properly asserted and any copies thereof shall be returned promptly.

12. Nothing in this Order shall prevent any producing party from disclosing or using its own "Confidential" Litigation Materials as it deems appropriate, and any such disclosure shall not be deemed a waiver of any party's right or obligations under this Order with

respect to any other information. If a party or non-party that designates information "Confidential" discloses or uses such "Confidential" Litigation Materials in a manner inconsistent with the claim that such information is confidential, any party may move the Court for an order removing such "Confidential" designation pursuant to paragraph 15 herein. Nothing in this Stipulation and Order shall impose any restrictions on the use or disclosure by any party of documents, materials, testimony or other information produced as Litigation Material obtained by such party independently of discovery in this litigation.

13. The parties do not waive any right to object to any discovery request, or to the admission of evidence on any ground, or seek any further protective order, or to seek relief from the Court from any provision of this Order by application on notice on any grounds.

14. If any party objects to the designation of any Litigation Materials as "Confidential," the party shall first state the objection by letter to the party that made such designations. The parties agree to confer in good faith by telephone or in person to attempt to resolve any dispute respecting the terms or operation of this Order. If the parties are unable to resolve such dispute within 5 days of such conference, any party may then move the Court to do so. Until the Court rules on such dispute, the Litigation Materials in question shall continue to be treated as "Confidential," as designated.

15. Upon motion, the Court may order the removal of the "Confidential" designation from any information so designated. In connection with any motion concerning the propriety of a "Confidential" designation, the party making the designation shall bear the burden of proof.

16. Within 60 days of the conclusion of this litigation as to all parties, all Litigation Materials designated "Confidential" and all copies or notes thereof shall be returned to counsel for the producing party who initially produced the Litigation Materials, or destroyed,

except that counsel may retain their work product and copies of court filings, transcripts, and exhibits, provided said retained documents will continue to be treated as provided in this Order, as modified by rulings of the Court. If a party chooses to destroy documents after the litigation has concluded, that party shall certify such destruction in writing to the producing party upon written request for such certification by the producing party.

17. The failure of any party to challenge the designation by another production party of Litigation Material as "Confidential" during the discovery period shall not be a waiver of that party's right to object to the designation of such material at trial.

18. This Stipulation applies to all non-parties that are served with subpoenas in connection with this litigation or who otherwise produce documents or are noticed for deposition in connection with this litigation, and all such non-parties are entitled to the protection afforded hereby upon signing a copy of this agreement and agreeing to be bound by its terms.

19. Any party may move to modify the provisions of this Order at any time or the parties may agree by written stipulation, subject to further order of the Court, to modify the provisions of the Order. Should any non-party seek access to the Confidential Material, by request, subpoena or otherwise, the party or recipient of the Confidential Material from whom such access is sought, as applicable, shall promptly notify the producing party who produced such Confidential Materials of such requested access and shall not provide such materials unless required by law or with the consent of the producing party.

20. This Order shall not apply to any Litigation Materials offered or otherwise used by any party at trial or at any hearing held in open court. Prior to the use of any Litigation Materials that have been designated Confidential at trial or any hearing to be held in open court, counsel who desires to so offer or use such Confidential Material shall take reasonable steps to afford opposing counsel and counsel for the producing party who produced such Confidential

Material a reasonable opportunity to object to the disclosure in open court of such Confidential Material, and nothing herein shall be construed a wavier of such right to object.

21. Written notice provided pursuant to this Order shall be made to counsel of record by facsimile.

22. The provisions of this Order shall survive the final termination of the case for any retained Confidential Litigation Material thereof.

COLEMAN (PARENT) HOLDINGS, INC.

MORGAN STANLEY & CO., INC.

By 
John Scarola
SEARCY, DENNEY, SCAROLA,
BARNHART & SHIPLEY P.A.
2139 Palm Beach Lake Boulevard
West Palm Beach, FL 33409

By 
Joseph Ianno, Jr.
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Jerold S. Solovy
Ronald L. Marmer
Robert T. Markowski
Deirdre E. Connell
JENNER & BLOCK, LLC
One IBM Plaza, Suite 4400
Chicago, IL 60611

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
KIRKLAND & ELLIS
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005

SO ORDERED;

This _____ day of _____, 2003

SIGNED AND DATED
JUL 31 2003
JUDGE ELIZABETH T. MAASS

CIRCUIT JUDGE

COPIES PROVIDED TO COUNSEL OF RECORD ON THE ATTACHED LIST

COUNSEL LIST

Counsel for Plaintiff
COLEMAN (PARENT) HOLDINGS INC.

SEARCY DENNEY SCAROLA
BARNHART & SHIPLEY P.A.
John Scarola, Esq.
2139 Palm Beach Lake Blvd.
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 684-5816

JENNER & BLOCK, LLC
Jerold S. Solovy, Esq.
Ronald L. Marmer, Esq.
Robert T. Markowski, Esq.
Deirdre E. Connell, Esq.
One IBM Plaza, Suite 4400
Chicago, IL 60611
Phone: (312) 222-9350
Fax: (312) 527-0484

Counsel for Defendant
MORGAN STANLEY & CO., INC.

CARLTON FIELDS, P.A.
Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Phone: (561) 659-7070
Fax: (561) 659-7368

KIRKLAND & ELLIS
Thomas D. Yannucci, P.C.
Thomas A. Clare, Esq.
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Phone: (202) 879-5000
Fax: (202) 879-5200

**IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA**

COLEMAN (PARENT) HOLDINGS INC.,)	
)	
Plaintiff,	)	Case No.: 2003 CA 005045 AI
v.)	
)	
MORGAN STANLEY & CO., INC.,	)	Judge Elizabeth I. Maass
)	
Defendant.)	
)	

Exhibit A

**DECLARATION OF ACKNOWLEDGMENT AND
AGREEMENT TO BE BOUND BY PROTECTIVE ORDER**

I, _____, declare under penalty of perjury that:

1. My address is _____.
2. My present employer is _____.
3. My present occupation or job description is _____.

4. I hereby certify and agree that I have read and understand the terms of the Confidentiality Order in the above-captioned actions. I further certify that I will not use "Confidential" information for any purpose other than this litigation among the parties, and will not disclose or cause "Confidential" information to be disclosed to anyone not expressly permitted by the Order to receive "Confidential" information. I agree to be bound by the terms and conditions of the Order.

5. I understand that I am to retain in confidence from all individuals not expressly permitted to receive information designated as "Confidential," whether at home or at

work, all copies of any materials I receive which have been designated as "Confidential," and that I will carefully maintain such materials in a container, drawer, room or other safe place in a manner consistent with the Order. I acknowledge that the return or destruction of "Confidential" material shall not relieve me from any other continuing obligations imposed upon me by the Order.

6. I stipulate to the jurisdiction of this Court.

Date: _____

(Signature)

Document No. 945236

Exhibit 3

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

Case No. CA 03-5045 AI

vs.

MORGAN STANLEY & CO., INC.,

Defendant,

MORGAN STANLEY SENIOR FUNDING, INC.,

Plaintiff,

Case No. CA 03-5165 AI

vs.

MACANDREWS & FORBES HOLDINGS, INC.,

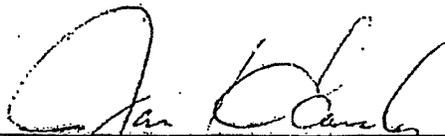
Defendant,

NOTICE OF PROPOUNDING INTERROGATORIES
TO MORGAN STANLEY & CO., INC.

COLEMAN (PARENT) HOLDINGS INC., hereby gives notice that pursuant to Rule 1.340(e), Florida Rules of Civil Procedure, that Interrogatories numbered 1 through 4 have been directed to DEFENDANT, MORGAN STANLEY & CO, INC., this 19th day of March 2004.

Coleman Holdings, Inc. vs Morgan Stanley & Company
Case No.: 2003 CA 005045 AJ

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by
Fax and Federal Express to all Counsel on the attached list on this 19 day of MARCH,
2004.



Jack Scarola
Florida Bar No.: ~~169440~~
Seany Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 478-0754
Attorney for Coleman (Parent) Holdings Inc.
and MacAndrews & Forbes Holdings, Inc.

Coleman Holdings, Inc. vs Morgan Stanley & Company
Case No.: 2003 CA 005045 AI

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block LLP
One H.M. Plaza
Suite 400
Chicago, IL 60611

INTERROGATORIES TO MORGAN STANLEY & CO., INC.

1. Did any provision in the Settlement Agreement play any part in the filing of the New Morgan Stanley Litigation?

2. Identify all individuals, other than Kirkland & Ellis and Carlton Fields attorneys, who have received a copy of all or any portion of any information designated as "confidential" including but not limited to the Settlement Agreement or any information derived from it, whether in whole or in part, in words or in substance, directly or indirectly.

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co.
Case No.: 2003 CA 005045 AI

3. Provide a detailed account setting forth when each individual identified in response to the preceding interrogatory received the confidential information, from whom they received it, how they received it, why it was provided to them, and any use they made of it.

4. Detail the purported factual basis for Morgan Stanley & Co.'s inclusion as a plaintiff in the New Morgan Stanley Litigation, including specifically the nature and amount of any damages alleged to have been sustained by Morgan Stanley & Co.

Coleman Holdings, Inc. vs Morgan Stanley & Company
Case No.: 2003 CA 005045 AI

STATE OF _____)
COUNTY OF _____)

~~The foregoing instrument was sworn to and subscribed before me this _____ day of _____, 20____, by _____, who is personally known to me (_____) or who has provided proper identification _____.~~

(SEAL)

(Notary signature)

(Notary name - print)
NOTARY PUBLIC, State of Florida

(Serial number, if any)

Exhibit 4

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

Case No. CA 03-5045 AI

vs.

MORGAN STANLEY & CO., INC.,

Defendant,

MORGAN STANLEY SENIOR FUNDING, INC.,

Plaintiff,

Case No. CA 03-5165 AI

vs.

MACANDREWS & FORBES HOLDINGS, INC.,

Defendant,

NOTICE OF PROPOUNDING INTERROGATORIES
TO MORGAN STANLEY SENIOR FUNDING, INC.

MACANDREWS & FORBES HOLDINGS INC., hereby gives notice that pursuant to Rule 1 340(e), Florida Rules of Civil Procedure, that Interrogatories numbered 1 through 4 have been directed to DEFENDANT, MORGAN STANLEY SENIOR FUNDING, INC., this 19th day of March, 2004.

MSSF v. MacAndrews
Case No.: 2003 CA 005165 AI

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by
Fax and Federal Express to all Counsel on the attached list on this 19 day of March,
2004.



Jack Scarola
~~Florida Bar No.: 169440~~
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 478-0754
Attorney for Coleman (Parent) Holdings Inc.
and MacAndrews & Forbes Holdings, Inc.

MSSF1 v. MacAndrews
Case No.: 2003 CA 005165 AI

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block LLP
One IFM Plaza
Suite 4400
Chicago, IL 60611

INTERROGATORIES TO MORGAN STANLEY SENIOR FUNDING, INC.

1. Did any provision in the Settlement Agreement play any part in the filing of the New Morgan Stanley Litigation?

2. Identify all individuals, other than Kirkland & Ellis and Carlton Fields attorneys, who have received a copy of all or any portion of any information designated as "confidential" including but not limited to the Settlement Agreement or any information derived from it, whether in whole or in part, in words or in substance, directly or indirectly.

MSSF. v. MacAndrews
Case No.: 2003 CA 005165 AI

3. Provide a detailed account setting forth when each individual identified in response to the preceding interrogatory received the confidential information, from whom they received it, how they received it, why it was provided to them, and any use they made of it.

4. Detail the purported factual basis for Morgan Stanley & Co.'s inclusion as a plaintiff in the New Morgan Stanley Litigation, including specifically the nature and amount of any damages alleged to have been sustained by Morgan Stanley & Co.

MSSFJ v. MacAndrews
Case No.: 2003 CA 005165 AI

STATE OF _____)
COUNTY OF _____)

~~The foregoing instrument was sworn to and subscribed before me this _____ day of _____, 20____, by _____, who is personally known to me (_____) or who has provided proper identification _____.~~

(SEAL)

(Notary signature)

(Notary name - print)
NOTARY PUBLIC, State of Florida

(Serial number, if any)

Exhibit 5

KIRKLAND & ELLIS LLP

AND AFFILIATED PARTNERSHIPS

655 Fifteenth Street, N.W.
Washington, D.C. 20005

Thomas A. Clare
To Call Writer Directly:
(202) 879-5993
tclare@kirkland.com

202 879-5000
www.kirkland.com

Facsimile:
202 879-5200

June 1, 2004

BY FACSIMILE

Michael Brody, Esq.
Jenner & Block, LLC
One IBM Plaza
Chicago, IL 60611-7603

Re: *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc.*
MSSF v. MacAndrews & Forbes Holdings Inc. et al.

Dear Mike:

Pursuant to Paragraph 14 of the Stipulated Confidentiality Order, we object to the designation of CPH's Further Interrogatories Concerning Its Motion For Contempt as "Confidential." CPH's interrogatories do not contain, reveal, or reflect "proprietary or confidential trade secrets or technical, business, financial or personnel information of a current nature" as required by Paragraph 4 of the Stipulated Confidentiality Order, and do not otherwise qualify for confidential treatment under Florida law. Please let me know whether you will consent to the removal of the "Confidential" designation for this document, or promptly inform me of your refusal to do so.

Sincerely,



Thomas A. Clare

cc: Joseph Ianno, Esq. (by facsimile)
John Scarola, Esq. (by facsimile)
Mark C. Hansen, Esq. (by facsimile)

Chicago

London

Los Angeles

New York

San Francisco

16div-001451

Exhibit 6

JENNER & BLOCK

June 4, 2004

Jenner & Block LLP
One IBM Plaza
Chicago, IL 60611
Tel 312-222-9350
www.jenner.com

Chicago
Dallas
Washington, DC

By Telecopy

Thomas A. Clare, Esq.
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

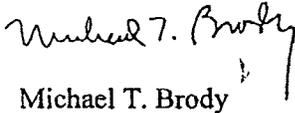
Michael T. Brody
Tel 312 923-2711
Fax 312 840-7711
mbrody@jenner.com

Re: *Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co.*
Morgan Stanley Senior Funding, Inc. v. MacAndrews & Forbes Holdings Inc., et al.

Dear Tom:

We received your letter concerning the confidentiality designation of the interrogatories served last Friday. The interrogatories are designated confidential because certain interrogatories reference confidential aspects of the Andersen settlement agreement, which Judge Maass ordered to be "Confidential." Accordingly, we decline your invitation to remove the confidentiality designation from the interrogatories.

Very truly yours,



Michael T. Brody

MTB:cjg

cc: Joseph Ianno, Esq. (by telecopy)
John Scarola, Esq. (by telecopy)
Jerold S. Solovy, Esq.

#230580/mm

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

CASE NO: 2003 CA 005045 AI

Plaintiffs,

vs.

MORGAN STANLEY & CO., INC.

Defendant.

MORGAN STANLEY SENIOR FUNDING,
INC.,

Plaintiff,

CASE NO. CA 03-5165 AI

vs.

MACANDREWS & FORBES HOLDINGS,
INC.,

Defendant,

NOTICE OF FILING PLEADING UNDER SEAL

Notice is hereby given of the filing of Coleman (Parent) Holdings, Inc.'s and MacAndrews & Forbes Holdings, Inc.'s Response in Opposition to Motion for Application of New York Law, together with the Appendix to same Volumes I, II and III, filed under Seal on this date.

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by Fax and Federal Express to all counsel on the attached list on this 4th day of June, 2004.

JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 478-0754
Attorneys for Coleman and MacAndrews

16div-001454

Coleman (Parent) Holdings Inc. vs Morgan Stanley & Company
Notice Of Filing Pleading Under Seal
Case No.: 2003 CA 005045 AI

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block, LLC
One IBM Plaza
Suite 4400
Chicago, IL 60611

#230510/mp

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

CASE NO: 2003 CA 005045 AI

Plaintiffs,

vs.
MORGAN STANLEY & CO., INC.

Defendant.

MORGAN STANLEY SENIOR FUNDING,
INC.,

Plaintiff,

CASE NO. CA 03-5165 AI

vs.
MACANDREWS & FORBES HOLDINGS,
INC.,

Defendant,

NOTICE OF FILING PLEADING UNDER SEAL

Plaintiff, COLEMAN (PARENT) HOLDINGS INC., hereby gives Notice of the filing of
Coleman (Parent) Holdings Inc.'s Response in Opposition to Morgan Stanley's Motion for
Protective Order, filed under Seal on this date.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by
Fax and Federal Express to all counsel on the attached list on this 9th day of JUNE,
2004.

JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 684-5815
Attorneys for Coleman (Parent) Holdings, Inc.
and MacAndrews & Forbes Holdings, Inc.

Coleman (Parent) Holdings Inc. vs Morgan Stanley & Company
Notice Of Filing Pleading Under Seal
Case No.: 2003 CA 005045 AI

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block, LLC
One IEM Plaza
Suite 4400
Chicago, IL 60611

#23058 0/mp

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

CASE NO: 2003 CA 005045 AI

Plaintiffs,

vs.

MORGAN STANLEY & CO., INC.

Defendant.

MORGAN STANLEY SENIOR FUNDING,
INC.,

Plaintiff,

CASE NO. CA 03-5165 AI

vs.

MACANDREWS & FORBES HOLDINGS,
INC.,

Defendant,

NOTICE OF FILING PLEADING UNDER SEAL

Plaintiff, COLEMAN (PARENT) HOLDINGS INC., hereby gives Notice of the filing of
Coleman (Parent) Holdings Inc.'s Response in Opposition to Morgan Stanley's Motion to
Remove Confidential Designation From Interrogatories, filed under Seal on this date.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by
Fax and Federal Express to all counsel on the attached list on this 9th day of JUNE,
2004.

JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 684-5815
Attorneys for Coleman (Parent) Holdings, Inc.
and MacAndrews & Forbes Holdings, Inc.

Coleman (Parent) Holdings Inc. vs Morgan Stanley & Company
Notice Of Filing Pleading Under Seal
Case No.: 2003 CA 005045 AI

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1000
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block, LLC
One IFM Plaza
Suite 400
Chicago, IL 60611

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT IN
AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO., INC.,

Defendant.

MORGAN STANLEY SENIOR FUNDING, INC.,

Plaintiff,

vs.

MACANDREWS & FORBES HOLDINGS, INC., CASE NO: CA 03-5165 AI

Defendant.

**MORGAN STANLEY & CO. INCORPORATED'S NOTICE OF
SERVING FURTHER INTERROGATORY CONCERNING
COLEMAN (PARENT) HOLDINGS, INC.'S MOTION FOR CONTEMPT**

Morgan Stanley & Co. Incorporated, by and through its undersigned counsel, hereby gives notice that it has served its Further Interrogatory Concerning Coleman (Parent) Holdings, Inc.'s Motion for Contempt upon Coleman (Parent) Holdings, Inc. by facsimile and Federal Express on June 10, 2004 by serving John Scarola, Esquire and Jerold S. Solovy, Esquire.

CERTIFICATE OF SERVICE

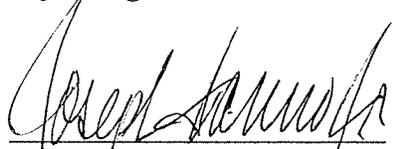
I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the below service list by facsimile and Federal Express on this 11th day of June, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar No. 618349)
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

**Counsel for Morgan Stanley & Co.
Incorporated and Morgan Stanley
Senior Funding**

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
E-mail: jianno@carltonfields.com

BY:


Joseph Ianno, Jr.
Florida Bar No. 655351

SERVICE LIST

Jack Scarola
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy
Michael Brody
JENNER & BLOCK, LLC
One IBM Plaza, Suite 400
Chicago, IL 60611

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

CASE NO: CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

**MORGAN STANLEY & CO. INCORPORATED'S EIGHTH REQUEST FOR
PRODUCTION OF DOCUMENTS**

Pursuant to Rules 1.280 and 1.350 of the Florida Rules of Civil Procedure, Morgan Stanley & Co. Incorporated ("MS & Co.") and Morgan Stanley Senior Funding, Inc. ("MSSF) request that Coleman (Parent) Holdings, Inc. ("CPH") and MacAndrews & Forbes Holdings, Inc. ("MAFCO") produce the documents and things referred to in the following specific requests. The specific requests are preceded by Instructions and Definitions which shall govern the specific requests. Documents and things responsive to these requests should be produced at the law firm of Carlton Fields, P.A., 222 Lakeview Avenue, Suite 1200, West Palm Beach, FL 33401, within the time required by Florida Rule of Civil Procedure 1.350(b) or as otherwise agreed to by the parties or specified by the Court.

INSTRUCTIONS

1. The connectives “and” and “or” shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery request all responses that might otherwise be construed to be outside of its scope.

2. The use of the singular form of any word includes the plural and vice versa.

3. Documents requested and to be produced include all Documents in the possession, custody or control of the plaintiff including, but not limited to, any agents, employees, contractors, attorneys, and consultants or experts working for or in favor of the plaintiff or its attorneys.

4. If, in responding to this Request for Production, you encounter any ambiguities when construing a request or definition, the response shall set forth the matter deemed ambiguous and the construction used in responding.

5. Whenever in this Request you are asked to identify or produce a document which is deemed by you to be properly withheld from production for inspection or copying under claim of privilege (including, but not limited to, the work product doctrine), provide a privilege log that includes: the type of document, the general subject matter of the document, the date of the document, and such other information as is sufficient to identify the document, including, where appropriate, the author, addressee, custodian, and any other recipient of the document, and where not apparent, the relationship of the author, the addressee, custodian, and any other recipient to each other, in a manner that, without revealing the information claimed to be protected, will enable this party to assess the applicability of the privilege protection claimed by you. The privilege log shall be provided within the time set forth in the agreed-upon order.

6. If production of any requested document(s) is objected to on the grounds that production is unduly burdensome, describe the burden or expense of the proposed discovery.

7. When a document contains both privileged and non-privileged material, the non-privileged material must be disclosed to the fullest extent possible without disclosing the privileged material. If a privilege is asserted with regard to part of the material contained in a document, the party claiming the privilege must clearly indicate the portions as to which the privilege is claimed. When a document has been redacted or altered in any fashion, identify as to each document the reason for the redaction or alteration. Any redaction must be clearly visible on the redacted document.

8. If a responsive document exists but is no longer in your possession, custody, or control, state: its date, author(s), recipient(s), subject matter, what disposition was made of the document, and the person or entity, if any, now in possession, custody, or control of the document. If a responsive document has been destroyed, identify the date of destruction, the person who destroyed the document and the person who directed that the document be destroyed and state the reason for its destruction.

9. Produce all of the documents responsive to the numbered requests below either as they are kept in the usual course of business or by custodian.

10. If any of these documents cannot be produced in full, you are requested to produce them to the fullest extent possible, specifying clearly the reasons for your inability to produce the remainder and stating any information, knowledge, or belief you have concerning the unproduced portion.

11. If the requested documents are maintained in a file, the file folder is included in the request for production of those documents.

12. The terms "any," "all" and "each" shall be construed to mean "any," "all," or "each".
13. The term "including" shall be construed to mean "including but not limited to."
14. The present tense shall be construed to include the past and future tenses.
15. The specificity of any request herein shall not be construed to limit the generality or reach of any other request herein.
16. Unless otherwise specified, these requests call for the production of documents created, delivered, distributed, sent, received, accessed, or modified for the period beginning January 1, 1996 to the date of your response to these requests.

DEFINITIONS

1. "Arthur Andersen" shall mean Arthur Andersen LLP and any of its current or former partners, officers, directors, employees, representatives and agents.
2. "CLN Holdings" means CLN Holdings Inc. and any of its current or former officers, directors, employees, representatives, and agents.
3. "Coleman" means The Coleman Company, Inc. and any of its current or former officers, directors, employees, representatives, and agents.
4. "Concerning" shall mean relating to, referring to, describing, evidencing, or constituting.
5. "CPH" shall mean Coleman (Parent) Holdings Inc. and any of its current or former officers, directors, employees, representatives and agents.
6. "Document" shall mean any recording in any tangible form of any information, whether handwritten, typed, printed, stored on computer disks, tapes, or databases, or otherwise reproduced. "Document" or "documents" also includes electronic documents

whether stored on servers or hard drives, e-mail, backup tapes, voicemail and video and audio recordings. A draft or non-identical copy is a separate document within the meaning of this term.

7. "MAFCO" shall mean MacAndrews & Forbes Holdings, Inc. and any of its current or former officers, directors, employees, representatives and agents.

DOCUMENTS TO BE PRODUCED

1. All documents prepared by Arthur Andersen and received by the Coleman Company, CPH, CLN Holdings, or MAFCO between February 27, 1998 and March 30, 1998.

2. All documents concerning the comfort letters described in Section 7.3(b) of the Agreement and Plan of Merger among Sunbeam Corporation, Camper Acquisition Corp. and The Coleman Company Inc. (Morgan Stanley Exhibit 117).

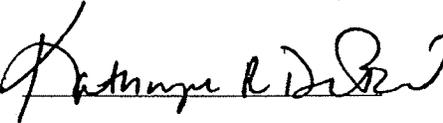
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by facsimile and Federal Express to all counsel of record on the attached service list on this 14th day of June, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar # 618349)
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

Joseph Ianno, Jr. (FL Bar # 655351)
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

BY



**Counsel for Morgan Stanley & Co.
Incorporated & Morgan Stanley Senior
Funding**

SERVICE LIST

Counsel for Coleman(Parent) Holdings & MacAndrews & Forbes

John Scarola
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33409

Jerold S. Solovy
JENNER & BLOCK, LLC
One IBM Plaza, Suite 4400
Chicago, Illinois 60611

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

CASE NO: CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

**MORGAN STANLEY & CO. INCORPORATED'S THIRD SET
OF REQUESTS FOR ADMISSION**

Pursuant to Florida Rule of Civil Procedure 1.370, Defendant Morgan Stanley & Co. Incorporated ("Morgan Stanley") submits this third set of requests for admission to Plaintiff Coleman (Parent) Holdings, Inc. ("CPH"). The specific requests are preceded by Instructions and Definitions which shall govern the specific requests. Morgan Stanley requests that Plaintiff answer, under oath, the following requests for admission in accordance with the Florida Rules of Civil Procedure, or within such shorter period as may be agreed by counsel, and submit them in writing to counsel for Morgan Stanley at the offices of Kirkland & Ellis LLP, 655 Fifteenth Street, NW, Suite 1200, Washington, DC 20005.

INSTRUCTIONS

1. The connectives “and” and “or” shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery request all responses that might otherwise be construed to be outside of its scope.
2. The use of the singular form of any word includes the plural and vice versa.
3. If you cannot admit or deny a request for admission after making a reasonable inquiry and the information known or readily attainable by CPH is insufficient to enable CPH to admit or deny fully, so state and admit or deny to the extent possible, specifying your inability to answer the remainder; stating whatever information or knowledge you have concerning the unanswered portion; and detailing what you did in attempting to secure the information.
4. The terms “any,” “all,” and “each” shall be construed to mean “any,” “all,” or “each”.
5. The term “including” shall be construed to mean “including but not limited to.”
6. The present tense shall be construed to include the past and future tenses.

DEFINITIONS

1. “CLN Holdings” means CLN Holdings Inc. and any of its current or former officers, directors, employees, representatives, and agents.
2. “Coleman” means The Coleman Company, Inc. and any of its current or former officers, directors, employees, representatives, and agents.

3. "Coleman Transaction" means Sunbeam's acquisition of Coleman Company, Inc. from CPH and all related communications, agreements, and transactions, including the February 27, 1998 Agreements and the March 30, 1998 closing.

4. "CPH" means Coleman (Parent) Holdings Inc. and any of its officers, directors, former or present employees, representatives, and agents.

5. "MAFCO" means MacAndrews & Forbes Holdings, Inc. and any of its officers, directors, former or present employees, representatives, and agents.

6. The term "person" is defined as any natural person or any business, legal or governmental entity or association.

7. "Sunbeam" means Sunbeam Corporation or any of its subsidiaries, divisions, predecessors, successors, present and former employees, representatives, and agents.

8. The term "14(f) Information Statement" means the Information Statement filed by Coleman pursuant to Section 14(f) of the Security Exchange Act of 1934 on March 18, 1998.

REQUESTS FOR ADMISSION

1. Coleman did not receive from any person, before March 30, 1998, the "comfort letter" of Arthur Andersen that is described by Section 7.3(b) of the Agreement and Plan of Merger among Sunbeam Corporation, Camper Acquisition Corp. and The Coleman Company Inc. (Morgan Stanley Exhibit 117).

2. Coleman did not request from any person, before March 30, 1998, the "comfort letter" of Arthur Andersen that is described by Section 7.3(b) of the Agreement and Plan of Merger among Sunbeam Corporation, Camper Acquisition Corp. and The Coleman Company Inc. (Morgan Stanley Exhibit 117).

3. CLN Holdings did not receive from any person, before March 30, 1998, the "comfort letter" of Arthur Andersen that is described by Section 7.3(b) of the Agreement and Plan of Merger among Sunbeam Corporation, Camper Acquisition Corp. and The Coleman Company Inc. (Morgan Stanley Exhibit 117).

4. CLN Holdings did not request from any person, before March 30, 1998, the "comfort letter" of Arthur Andersen that is described by Section 7.3(b) of the Agreement and Plan of Merger among Sunbeam Corporation, Camper Acquisition Corp. and The Coleman Company Inc. (Morgan Stanley Exhibit 117).

5. CPH did not receive from any person, before March 30, 1998, the "comfort letter" of Arthur Andersen that is described by Section 7.3(b) of the Agreement and Plan of Merger among Sunbeam Corporation, Camper Acquisition Corp. and The Coleman Company Inc. (Morgan Stanley Exhibit 117).

6. CPH did not request from any person, before March 30, 1998, the "comfort letter" of Arthur Andersen that is described by Section 7.3(b) of the Agreement and Plan of Merger among Sunbeam Corporation, Camper Acquisition Corp. and The Coleman Company Inc. (Morgan Stanley Exhibit 117).

7. MAFCO did not receive from any person, before March 30, 1998, the "comfort letter" of Arthur Andersen that is described by Section 7.3(b) of the Agreement and Plan of Merger among Sunbeam Corporation, Camper Acquisition Corp. and The Coleman Company Inc. (Morgan Stanley Exhibit 117).

8. MAFCO did not request from any person, before March 30, 1998, the "comfort letter" of Arthur Andersen that is described by Section 7.3(b) of the Agreement and

Plan of Merger among Sunbeam Corporation, Camper Acquisition Corp. and The Coleman Company Inc. (Morgan Stanley Exhibit 117).

9. Coleman agreed to close the March 30, 1998 Coleman Transaction without receiving the comfort letter described by Section 7.3(b) of the Agreement and Plan of Merger among Sunbeam Corporation, Camper Acquisition Corp. and The Coleman Company Inc. (Morgan Stanley Exhibit 117).

10. CLN Holdings agreed to close the March 30, 1998 Coleman Transaction without receiving the comfort letter described by Section 7.3(b) of the Agreement and Plan of Merger among Sunbeam Corporation, Camper Acquisition Corp. and The Coleman Company Inc. (Morgan Stanley Exhibit 117).

11. CPH agreed to close the March 30, 1998 Coleman Transaction without receiving the comfort letter described by Section 7.3(b) of the Agreement and Plan of Merger among Sunbeam Corporation, Camper Acquisition Corp. and The Coleman Company Inc. (Morgan Stanley Exhibit 117).

12. MAFCO agreed to close the March 30, 1998 Coleman Transaction without receiving the comfort letter described by Section 7.3(b) of the Agreement and Plan of Merger among Sunbeam Corporation, Camper Acquisition Corp. and The Coleman Company Inc. (Morgan Stanley Exhibit 117).

13. Coleman agreed to close the March 30, 1998 Coleman Transaction without requesting from Arthur Andersen the comfort letter described by Section 7.3(b) of the Agreement and Plan of Merger among Sunbeam Corporation, Camper Acquisition Corp. and The Coleman Company Inc. (Morgan Stanley Exhibit 117).

14. CLN Holdings agreed to close the March 30, 1998 Coleman Transaction without requesting from Arthur Andersen the comfort letter described by Section 7.3(b) of the Agreement and Plan of Merger among Sunbeam Corporation, Camper Acquisition Corp. and The Coleman Company Inc. (Morgan Stanley Exhibit 117).

15. CPH agreed to close the March 30, 1998 Coleman Transaction without requesting from Arthur Andersen the comfort letter described by Section 7.3(b) of the Agreement and Plan of Merger among Sunbeam Corporation, Camper Acquisition Corp. and The Coleman Company Inc. (Morgan Stanley Exhibit 117).

16. MAFCO agreed to close the March 30, 1998 Coleman Transaction without requesting from Arthur Andersen the comfort letter described by Section 7.3(b) of the Agreement and Plan of Merger among Sunbeam Corporation, Camper Acquisition Corp. and The Coleman Company Inc. (Morgan Stanley Exhibit 117).

17. Coleman agreed to close the March 30, 1998 Coleman Transaction without requesting from Sunbeam the comfort letter described by Section 7.3(b) of the Agreement and Plan of Merger among Sunbeam Corporation, Camper Acquisition Corp. and The Coleman Company Inc. (Morgan Stanley Exhibit 117).

18. CLN Holdings agreed to close the March 30, 1998 Coleman Transaction without requesting from Sunbeam the comfort letter described by Section 7.3(b) of the Agreement and Plan of Merger among Sunbeam Corporation, Camper Acquisition Corp. and The Coleman Company Inc. (Morgan Stanley Exhibit 117).

19. CPH agreed to close the March 30, 1998 Coleman Transaction without requesting from Sunbeam the comfort letter described by Section 7.3(b) of the Agreement and

Plan of Merger among Sunbeam Corporation, Camper Acquisition Corp. and The Coleman Company Inc. (Morgan Stanley Exhibit 117).

20. MAFCO agreed to close the March 30, 1998 Coleman Transaction without requesting from Sunbeam the comfort letter described by Section 7.3(b) of the Agreement and Plan of Merger among Sunbeam Corporation, Camper Acquisition Corp. and The Coleman Company Inc. (Morgan Stanley Exhibit 117).

21. Morgan Stanley Exhibit 130 is a true and correct copy of the Section 14(f) Information Statement filed with the Securities Exchange Commission on March 18, 1998.

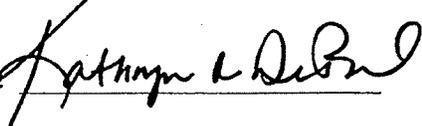
22. Coleman mailed the 14(f) Information Statement to its shareholders on or about March 18, 1998.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by facsimile and Federal Express to all counsel of record on the attached service list on this 14th day of June, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar # 618349)
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

Joseph Ianno, Jr. (FL Bar # 655351)
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

BY: 

**Counsel for Morgan Stanley & Co.
Incorporated & Morgan Stanley Senior
Funding**

SERVICE LIST

Counsel for Coleman(Parent) Holdings & MacAndrews & Forbes

John Scarola

**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**

2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33409

Jerold S. Solovy

JENNER & BLOCK, LLC

One IBM Plaza, Suite 4400
Chicago, Illinois 60611

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO., INC.,

Defendant.

MORGAN STANLEY SENIOR FUNDING, INC.,

Plaintiff,

v.

CASE NO: CA 03-5165 AI

MACANDREWS & FORBES HOLDINGS, INC.,

Defendant.

NOTICE OF FILING PLEADING UNDER SEAL

Morgan Stanley & Co. Incorporated and Morgan Stanley Senior Funding, Inc. ("Morgan Stanley"), by and through their undersigned counsel, hereby give notice that it has filed its Reply Memorandum in Support of Morgan Stanley & Co. Incorporated and Morgan Stanley Senior Funding, Inc.'s Motion for Application of New York Law has been filed under seal this 21st day of June, 2004.

Coleman v. Morgan Stanley, Case No: CA 03-5045 AI
Morgan Stanley v. MacAndrews, Case No: CA 03-5045
Notice of Filing Under Seal
Page 2

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the service list below by facsimile and Federal Express on this 21st day of June, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar No. 618349)
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
E-mail: jianno@carltonfields.com

BY: Joseph Ianno, Jr.
Joseph Ianno, Jr.
Florida Bar No: 655351

**Counsel for Morgan Stanley & Co.
Incorporated and Morgan Stanley
Senior Funding**

Coleman v. Morgan Stanley, Case No: CA 03-5045 AI
Morgan Stanley v. MacAndrews, Case No: CA 03-5045
Notice of Filing Under Seal
Page 2

SERVICE LIST

Jack Scarola
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy
Michael Brody
JENNER & BLOCK, LLC
One IBM Plaza, Suite 400
Chicago, IL 60611

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

CASE NO. CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

AMENDED NOTICE OF DEPOSITION

To: Thomas A. Clare, Esq.
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lake View Avenue, Suite 1400
West Palm Beach, FL 33401

PLEASE TAKE NOTICE that Plaintiff Coleman (Parent) Holdings, Inc. ("CPH") requests the deposition upon oral examination of the following non-party witness pursuant to the commission issued by the Circuit Court of the Fifteenth Judicial District of Florida and the subpoena issued in aid of that commission by the Supreme Court of the State of New York on the date, time, and location set forth below:

DEPONENT	DATE AND TIME	LOCATION
James Stynes	July 13, 2004 at 10:00 a.m.	Esquire Deposition Services 216 E. 45th Street, 8th FL New York, New York 10017

The witness has been requested to bring to the deposition the documents specified in Exhibit A to the Subpoena. The deposition will be recorded by stenographic and audio-visual

means and will be taken before a person authorized to administer oaths and will continue day to day until completed. The videographer will be Esquire Deposition Services, New York, NY.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by facsimile and mail to all counsel on the attached Service List, this 22nd day of June, 2004.

COLEMAN (PARENT) HOLDINGS INC.

By: Michael T. Brody
One of Its Attorneys

Jerold S. Solovy
Michael T. Brody
JENNER & BLOCK, LLC
One IBM Plaza
Suite 4400
Chicago, Illinois 60611
(312) 222-9350

Jack Scarola
SEARCY DENNEY SCAROLA BARNHART
& SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33409
(561) 686-6300

SERVICE LIST

Thomas A. Clare, Esq.
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lake View Avenue
Suite 1400
West Palm Beach, FL 33401

Document Number : 1118740

TOTAL P.05

16div-001483

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff,

vs.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO., INC.,
Defendant.

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff,

vs.

CASE NO: CA 03-5165 AI

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant.

AMENDED NOTICE OF VIDEOTAPED DEPOSITION

PLEASE TAKE NOTICE that Morgan Stanley & Company Incorporated and Morgan Stanley Senior Funding, Inc. will take the videotaped deposition of Robert J. Duffy, pursuant to Florida Rules of Civil Procedure 1.280 and 1.310. The oral examination will take place beginning on July 9, 2004, at 9:30 a.m. and continue from day to day until completed at the offices of Kirkland & Ellis, LLP, 153 East 53rd Street, New York, New York, 10022. The deposition will be taken before a person authorized to administer oaths and recorded by stenographic and videographic means. The video operator will be Esquire Deposition Services of 216 E. 45th Street in New York, New York. The witness is instructed to bring all books, papers, and other things in his possession or under his control relevant to this lawsuit (and not previously produced in discovery) to the examination.

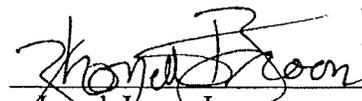
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this 22nd day of June, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar No. 618349)
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
E-mail: jianno@carltonfields.com

BY:


Joseph Ianno, Jr.
Florida Bar No. 655351

*Counsel for Morgan Stanley & Co.
Incorporated and Morgan Stanley Senior
Funding*

SERVICE LIST

Jack Scarola
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy
Michael Brody
JENNER & BLOCK, LLC
One IBM Plaza, Suite 400
Chicago, IL 60611

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff,

vs.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO., INC.,
Defendant.

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff,

vs.

CASE NO: CA 03-5165 AI

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant.

AMENDED NOTICE OF VIDEOTAPED DEPOSITION

PLEASE TAKE NOTICE that Morgan Stanley & Company Incorporated and Morgan Stanley Senior Funding, Inc. will take the videotaped deposition of Steven K. Geller, pursuant to Florida Rules of Civil Procedure 1.280 and 1.310. The oral examination will take place beginning on July 8, 2004, at 9:30 a.m. and continue from day to day until completed at the offices of Kirkland & Ellis, LLP, 153 East 53rd Street, New York, New York, 10022. The deposition will be taken before a person authorized to administer oaths and recorded by stenographic and videographic means. The video operator will be Esquire Deposition Services of 216 E. 45th Street in New York, New York. The witness is instructed to bring all books, papers, and other things in his possession or under his control relevant to this lawsuit (and not previously produced in discovery) to the examination.

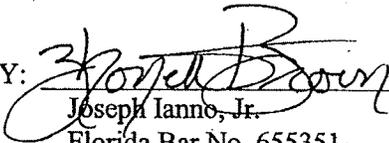
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this 22nd day of June, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar No. 618349)
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

*Counsel for Morgan Stanley & Co.
Incorporated and Morgan Stanley Senior
Funding*

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
E-mail: jianno@carltonfields.com

BY: 
Joseph Ianno, Jr.
Florida Bar No. 655351

SERVICE LIST

Jack Scarola
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy
Michael Brody
JENNER & BLOCK, LLC
One IBM Plaza, Suite 400
Chicago, IL 60611

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

v.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO., INC.,

Defendant.

_____/

MORGAN STANLEY SENIOR FUNDING, INC.,

Plaintiff,

v.

CASE NO: CA 03-5165 AI

MACANDREWS & FORBES HOLDINGS, INC.,

Defendant.

_____/

NOTICE OF FILING ORIGINAL DISCOVERY REQUEST

Morgan Stanley & Co. Incorporated and Morgan Stanley Senior Funding, Inc. ("Morgan Stanley"), by and through their undersigned counsel, hereby give notice that it has filed its original Seventh Request for Production of Documents.

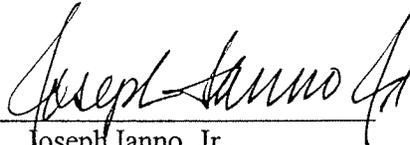
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the service list below by facsimile and Federal Express on this 28th day of June, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar No. 618349)
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

*Counsel for Morgan Stanley & Co.
Incorporated and Morgan Stanley Senior
Funding*

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
E-mail: jianno@carltonfields.com

BY: 
Joseph Ianno, Jr.
Florida Bar No: 655351

SERVICE LIST

Jack Scarola
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy
Michael Brody
JENNER & BLOCK, LLC
One IBM Plaza, Suite 400
Chicago, IL 60611

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

_____ /

CASE NO. CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

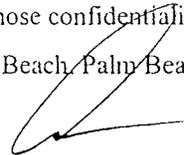
_____ /

**ORDER ON COLEMAN (PARENT) HOLDINGS, INC.'S AND MACANDREWS &
FORBES HOLDINGS, INC.'S MOTION TO REMOVE CONFIDENTIALITY
DESIGNATIONS**

THIS CAUSE came before the Court July 23, 2004 on Coleman (Parent) Holdings, Inc.'s and MacAndrews & Forbes Holdings, Inc.'s Motion to Remove Confidentiality Designations, with all counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that Coleman (Parent) Holdings, Inc.'s and MacAndrews & Forbes Holdings, Inc.'s Motion to Remove Confidentiality Designations is Granted. The confidentiality designations on Exhibits A-D, inclusive, are removed, except as highlighted at Exhibit A, page 13, footnote 9; Exhibit C, page 5, the last sentence of the first paragraph of the block quotation in paragraph 9; and Exhibit D at pages 16, lines 24-25; 25, lines 6-8 and 15-19; 26, lines 18-19; and 29, line 14, without prejudice to Morgan Stanley & Co., Inc., and Morgan Stanley Senior Funding, Inc.'s right to seek to remove those confidentiality designations excepted herein.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 27 day of July, 2004.



ELIZABETH T. MAASS
Circuit Court Judge

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO., INC.,

Defendant.

MORGAN STANLEY SENIOR FUNDING, INC.,

Plaintiff,

v.

CASE NO: CA 03-5165 AI

MACANDREWS & FORBES HOLDINGS, INC.,

Defendant.

NOTICE OF FILING PLEADING UNDER SEAL

Defendant, Morgan Stanley & Co. Incorporated and Plaintiff, Morgan Stanley Senior Funding, Inc., by and through their undersigned counsel, hereby give notice that they have filed Morgan Stanley & Co. Incorporated's Opposition to Coleman (Partner) Holdings Inc.'s Motion to Amend Its Complaint to Seek Punitive Damages under seal.

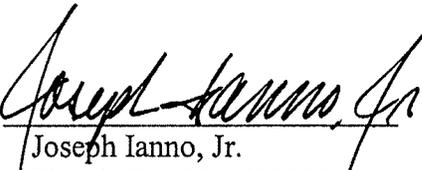
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the service list below by facsimile and Federal Express on this 22ND day of October, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar No. 618349)
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

Mark C. Hansen
James M. Webster, III
Rebecca A. Beynon
**KELLOGG, HUBER, HANSEN,
TODD & EVANS, P.L.L.C.**
Sumner Square
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
Telephone: (202) 326-7900
Facsimile: (202) 326-7999

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
E-mail: jianno@carltonfields.com

BY: 
Joseph Ianno, Jr.
Florida Bar No. 655351

*Counsel for Morgan Stanley & Co.
Incorporated and Morgan Stanley Senior
Funding, Inc.*

SERVICE LIST

Jack Scarola
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy
Michael Brody
JENNER & BLOCK, LLC
One IBM Plaza, Suite 400
Chicago, IL 60611

#230580/mep

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiffs,

CASE NO: 2003 CA 005045 AI

vs.

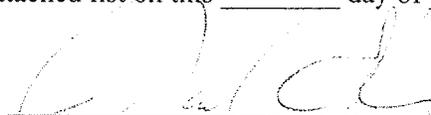
MORGAN STANLEY & CO., INC.

Defendant.

NOTICE OF FILING PLEADING UNDER SEAL

COLEMAN (PARENT) HOLDINGS INC. hereby gives notice of the filing of
COLEMAN (PARENT) HOLDINGS INC.'S Response to Morgan Stanley's Proposed Findings
of Fact and Conclusions of Law In Support of Its Motion for Summary Judgment, Filed under
Seal on this date.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by
Fax and Federal Express to all counsel on the attached list on this 17th day of JAN.,
2005.



JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 684-5815
Attorneys for Plaintiffs

Coleman (Parent) Holdings Inc. vs Morgan Stanley & Company
Notice Of Filing Pleading Under Seal
Case No.: 2003 CA 005045 AI

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block LLP
One IBM Plaza
Suite 4400
Chicago, IL 60611

Mark C. Hansen, Esq.
Kellogg, Huber, Hansen
Todd & Evans, P.L.L.C.
Sumner Square
1615 M. Street, N.W. #400
Washington, DC 20036-3206

#230580/mep

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiffs,

CASE NO: 2003 CA 005045 AI

vs.

MORGAN STANLEY & CO., INC.
Defendant.

NOTICE OF FILING PLEADING UNDER SEAL

COLEMAN (PARENT) HOLDINGS INC. hereby gives notice of the filing of
COLEMAN (PARENT) HOLDINGS INC.'S Response to Morgan Stanley's Proposed Findings
of Fact and Conclusions of Law In Support of Its Motion for Summary Judgment, Filed under
Seal on this date.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by
Fax and Federal Express to all counsel on the attached list on this 11th day of JAN.
2005.



JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 684-5815
Attorneys for Plaintiffs

Coleman (Parent) Holdings Inc. vs Morgan Stanley & Company
Notice Of Filing Pleading Under Seal
Case No.: 2003 CA 005045 AI

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block LLP
One IBM Plaza
Suite 4400
Chicago, IL 60611

Mark C. Hansen, Esq.
Kellogg, Huber, Hansen
Todd & Evans, P.L.L.C.
Sumner Square
1615 M. Street, N.W. #400
Washington, DC 20036-3206

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS, INC.,)
Plaintiff,)
v.)
MORGAN STANLEY & CO., INC.,)
Defendant.)

COPY / ORIGINAL
RECEIVED FOR FILING
JUN 23 2003
DOROTHY H. WILKEN
CLERK OF CIRCUIT COURT
CIRCUIT CIVIL DIVISION

2003 CA 005045 AI
Judge Elizabeth T. Mass

ANSWER OF MORGAN STANLEY & CO. INCORPORATED

Defendant Morgan Stanley & Co. Incorporated ("MS & Co.") responds to Plaintiff Coleman (Parent) Holdings, Inc.'s ("CPH") Complaint by denying generally that MS & Co. engaged in any fraudulent or negligent misrepresentations, any conspiracy to defraud, that MS & Co. assisted Sunbeam Corporation ("Sunbeam") or any employee, director or agent of Sunbeam in the commission of a fraudulent scheme, or that MS & Co. otherwise defrauded CPH in any manner. Specifically, MS & Co. responds to CPH's allegations as follows:

Nature of the Action

1. MS & Co. denies the allegations contained in Paragraph 1.
2. MS & Co. admits that, beginning in mid-1997, MS & Co. served as an investment banker for Sunbeam. MS & Co. admits that it attempted to identify a party interested in purchasing Sunbeam, and that those efforts were ultimately unsuccessful. MS & Co. admits that it recommended that Sunbeam's management consider acquiring other companies instead and suggested, as is common in corporate mergers and acquisitions, that Sunbeam consider, among other options, using Sunbeam stock as part of the consideration for such an acquisition. MS & Co. denies that it had any knowledge as to the accuracy of the value of Sunbeam's stock, or that

MS & Co. knew (or even suspected) that the value of Sunbeam's stock had been "fraudulently inflated." MS & Co. admits that it facilitated communications between Sunbeam and Coleman, but denies that it in any way "persuaded" CPH to sell its interest in Coleman. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of any remaining allegations contained in Paragraph 2 and consequently denies them.

3. MS & Co. admits that it agreed to serve as underwriter of a \$750 million debenture offering for Sunbeam. MS & Co. admits that, as an advisor to Sunbeam, it had access to certain financial documents, and further states that those same documents were made available to CPH during the acquisition negotiations. Further, in that regard, MS & Co. specifically disclaimed any independent evaluation of Sunbeam's financial records, and expressly stated that it relied solely on documentation and information provided by Sunbeam and Sunbeam's audited financial statements. MS & Co. admits that on March 18, 1998, it learned that Sunbeam's first quarter 1998 sales were "soft." Sunbeam insisted that its sales would meet expectations, but MS & Co. insisted that Sunbeam issue a press release to warn the market of the softening sales. Additionally, MS & Co. received two "comfort letters" from Sunbeam's auditors, Arthur Andersen. MS & Co. performed all of its obligations as an underwriter of Sunbeam securities. MS & Co. denies that it had any role in the accounting judgments described in the complaint, or any obligations to audit or independently examine Sunbeam's accounting records. MS & Co. denies that it owed any duties to CPH. MS & Co. denies that it had any independent knowledge as to the reasons behind Sunbeam's soft sales, that Sunbeam had a "practice of accelerating sales," or that it "materially misrepresent[ed]" information to CPH. Further, MS & Co. specifically denies that it in any manner assisted Sunbeam in concealing its 1998 first quarter sales numbers in order to close the transaction. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of any remaining allegations contained in Paragraph 3 and consequently denies them.

4. MS & Co. admits that CPH has brought this action against MS & Co. alleging fraudulent misrepresentation, aiding and abetting, conspiracy, and negligent misrepresentation,

but denies that there is any merit to the suit. MS & Co. specifically denies that it made any fraudulent or negligent representations to CPH, that it in any way aided or abetted a fraudulent scheme against CPH, or that it participated in a conspiracy to defraud CPH. MS & Co. denies that any losses that CPH suffered resulted from fraud or any wrongful conduct on the part of MS & Co. MS & Co. denies the remaining allegations contained in Paragraph 4.

5. MS & Co. admits that CPH purports to seek compensatory damages against MS & Co., but denies that such claim is valid, for MS & Co. denies that it was engaged in any wrongful conduct. MS & Co. denies the remaining allegations contained in Paragraph 5.

Jurisdiction and Venue

6. MS & Co. admits the allegations contained in Paragraph 6. MS & Co. further admits that it is incorporated in Delaware and has its principal place of business in New York.

7. MS & Co. denies that venue is proper in this district.

Parties and Other Key Participants

8. MS & Co. admits that CPH represented, in negotiations with Sunbeam, that it owned, directly or indirectly, approximately 82% of Coleman prior to March 30, 1998. MS & Co. admits that on March 30, 1998, Sunbeam acquired CPH's interest in Coleman by paying CPH with 14.1 million shares of Sunbeam common stock and other consideration, including a cash payment by Sunbeam to CPH in the amount of \$159,956,756.00. (See Feb. 27, 1998 Merger Agmt. § 3.1(a)(i) (Ex. 1).) MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of any remaining allegations contained in Paragraph 8 and consequently denies them.

9. MS & Co. admits that it is an investment banking firm providing financial and securities services. MS & Co. admits that, as part of its business operations, it at times provides advice on mergers and acquisitions, and raises capital in equity and debt markets, depending on the needs of its clients. MS & Co. admits that it served as Sunbeam's investment banker for

certain aspects of Sunbeam's acquisition of Coleman, and served as underwriter of certain securities issued by Sunbeam in connection with the acquisition. MS & Co. denies any remaining allegations contained in Paragraph 9.

10. MS & Co. admits that Sunbeam was a publicly-traded company which manufactures and markets household and specialty consumer products, including outdoor cooking products. MS & Co. admits that Sunbeam marketed these products under several brand names, including Sunbeam and Oster. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of any remaining allegations contained in Paragraph 10 and consequently denies them.

11. MS & Co. admits that Albert Dunlap had served as the Chief Executive Officer of Sunbeam. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 11 and consequently denies them.

12. MS & Co. admits that Russell Kersh had served as the Executive Vice President of Sunbeam. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 12 and consequently denies them.

13. MS & Co. admits that Arthur Andersen LLP served as Sunbeam's auditors and provided independent/outside accounting services to Sunbeam. MS & Co. further admits that, during the performance of its engagement, it received "comfort letters" from Arthur Andersen. MS & Co. never served as auditor for Sunbeam, and never provided Sunbeam with any accounting or accounting-related services. MS & Co. lacks sufficient knowledge or information to know the location of Lawrence Bornstein or to form a belief as to the truth of any allegations pertaining to him, and consequently denies them. MS & Co. denies any remaining allegations contained in Paragraph 13.

Factual Background

14. MS & Co. admits the allegations contained in Paragraph 14.

15. MS & Co. responds that the allegations contained in Paragraph 15 pertain to publicly available information, and refers to such information for the truth or falsity of such allegations. To the extent that further response is required, MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 15 and consequently denies them.

16. MS & Co. responds that the allegations contained in Paragraph 16 pertain to publicly available information, and refers to such information for the truth or falsity of such allegations. To the extent that further response is required, MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 16 and consequently denies them.

17. MS & Co. admits, on information and belief, that Albert Dunlap was hired as Sunbeam's Chief Executive Officer on or about July 18, 1996. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the remaining allegations contained in Paragraph 17 and consequently denies them.

18. MS & Co. admits, on information and belief, that Russell Kersh was hired as Sunbeam's Chief Financial Officer. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the remaining allegations contained in Paragraph 18 and consequently denies them.

19. MS & Co. admits, on information and belief, that Albert Dunlap and members of his senior management team entered into employment agreements with Sunbeam. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the remaining allegations contained in Paragraph 19 and consequently denies them.

20. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 20 and consequently denies them.

21. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 21 and consequently denies them.

22. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 22 and consequently denies them.

23. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 23 and consequently denies them.

24. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 24 and consequently denies them.

25. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 25 and consequently denies them.

26. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 26 and consequently denies them.

27. MS & Co. admits, on information and belief, that Sunbeam reported a loss of \$18.1 million in the third quarter of 1996, and that it had a \$34.5 million gain in the third quarter 1997. MS & Co. further admits, on information and belief, that Sunbeam reported an increase in profits from \$6.5 million in 1996 to \$67.7 million in 1997. MS & Co. responds that the allegations contained in Paragraph 27 regarding stock prices pertain to publicly available information and MS & Co. refers to such information for the truth or falsity of such allegations. To the extent that further response is required, MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 27 and consequently denies them.

28. MS & Co. admits that it was engaged by Sunbeam to explore a possible sale of Sunbeam's core business and/or the initiation of one or more acquisitions. MS & Co. denies that it ever served as Dunlap's "shill." MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of any remaining allegations contained in Paragraph 28 and consequently denies them.

29. MS & Co. admits that William Strong and other MS & Co. employees met with Sunbeam in the spring of 1997 to discuss Sunbeam's investment banking requirements. Further, MS & Co. admits that, although it was not engaged in a previous relationship with Sunbeam,

William Strong had worked with Dunlap before, during Strong's previous employment with Salomon Brothers. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of any remaining allegations contained in Paragraph 29 and consequently denies them.

30. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 30 and consequently denies them.

31. MS & Co. admits that William Strong and other MS & Co. employees met with Sunbeam in the spring of 1997 to discuss Sunbeam's investment banking requirements. MS & Co. admits that it was engaged by Sunbeam to explore a possible sale of Sunbeam's core business and/or the initiation of one or more acquisitions. MS & Co. admits that it initially sought a buyer for Sunbeam. To the extent this Paragraph alleges that MS & Co. was motivated to participate in a fraud in order to retain a single client and receive a customary fee, that allegation is foreclosed, among other reasons, by the fact that MS & Co.'s own affiliate lent hundreds of millions of dollars to Sunbeam two days after the Coleman acquisition closed. (June 1998 Credit Facilities Mem. (Ex. 2).) MS & Co. denies any remaining allegations contained in Paragraph 31.

32. MS & Co. admits that it searched for a buyer for Sunbeam. MS & Co. further admits that it assembled marketing materials based on financial documentation and audited financial statements provided to MS & Co. by Sunbeam and Arthur Andersen, for use in meetings with potential acquirers. MS & Co. admits that, despite contacting many companies, it was unable to find a buyer for Sunbeam. MS & Co. specifically denies CPH's allegation that MS & Co. knew that it would not be compensated if "it failed to deliver a major transaction," or that "Davis and Chase were standing by . . . to reclaim their position as Dunlap's investment banker of choice." MS & Co. denies any remaining allegations contained in Paragraph 32.

33. MS & Co. denies that it provided the "solution" to any "problem" alleged in Paragraph 33. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the remaining allegations contained in Paragraph 33 and consequently denies them.

34. MS & Co. admits after its unsuccessful attempts to locate a purchaser for Sunbeam, it suggested that Sunbeam acquire one or more other companies instead. MS & Co. admits that it proposed to Sunbeam, among other options, the possibility of paying for any such acquisition in part with Sunbeam's stock. MS & Co. specifically denies any knowledge to the effect that a "failure to find a buyer for Sunbeam could prove fatal to [their] relationship." MS & Co. further denies any involvement in or knowledge of fraudulently inflated Sunbeam stock or concealment of any fraud at Sunbeam. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of any remaining allegations contained in Paragraph 34 and consequently denies them.

35. MS & Co. admits that, beginning in mid-1997, MS & Co. served as an investment banker for Sunbeam. MS & Co. admits that it attempted to identify a party interested in purchasing Sunbeam, and that those efforts were ultimately unsuccessful. MS & Co. admits that it recommended that Sunbeam's management consider, among other options, acquiring other companies instead and suggested, as is common in corporate mergers and acquisitions, that Sunbeam consider using Sunbeam stock as part of the consideration for such an acquisition. MS & Co. denies that it developed "acquisition strategies" for Sunbeam or that the services or potential transactions it discussed with Sunbeam's management were deceptive or in any way designed to facilitate fraud. MS & Co. specifically denies that it in any way knew of or knowingly assisted Dunlap to "camouflage Sunbeam's results" thereby making it "difficult to detect any shortfall in Sunbeam's performance," or that it knew of or assisted Dunlap in taking "new massive restructuring charges," which thereby created increased "cookie jar reserves." MS & Co. denies any remaining allegations contained in Paragraph 35.

36. MS & Co. admits that, in its capacity as advisor to Sunbeam, it identified Coleman as a potential acquisition candidate. MS & Co. admits that it communicated with representatives of Coleman to discuss a potential acquisition, but denies that it "persuade[d] CPH to sell its interest in Coleman to Sunbeam." MS & Co. admits that CPH represented, in

negotiations with Sunbeam, that it owned, directly or indirectly, approximately 82% of Coleman prior to March 30, 1998. MS & Co. denies the remaining allegations contained in Paragraph 36.

37. MS & Co. admits that it facilitated a meeting between representatives from Sunbeam and MacAndrews & Forbes Holdings, Inc. ("MAFCO") in December 1997. MS & Co. admits that it prepared Sunbeam's representatives for that meeting. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of any remaining allegations contained in Paragraph 37 and consequently denies them.

38. MS & Co. admits that discussions between Sunbeam, MAFCO and CPH resumed in early 1998. MS & Co. further admits that its Managing Directors James Stynes and Robert Kitts worked on MS & Co.'s engagement for Sunbeam. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of any remaining allegations contained in Paragraph 38 and consequently denies them.

39. MS & Co. denies that it "persuade[d]" CPH to sell Coleman in exchange for Sunbeam stock. MS & Co. denies that it "prepared" financial information for CPH. There is, in any event, no factual allegation contained in Paragraph 39 or elsewhere that identifies such alleged information at all, let alone with particularity. MS & Co. further denies that it knowingly "provided" CPH with false financial and business information, or otherwise knowingly relayed false information to CPH which created an appearance that "Sunbeam was prospering and that Sunbeam's stock had great value." Specifically, MS & Co. denies that it knowingly provided CPH with false 1996 and 1997 sales and revenue figures or with false projections. MS & Co. denies that it "falsely assured CPH that Sunbeam's 'early buy' sales program would not hurt Sunbeam's future revenues," that "Sunbeam would meet or exceed" first quarter 1998 estimates, that 1998 earnings estimates were accurate, that a plan to earn \$2.20/share was attainable or even low, or that it "specifically advised CPH that Sunbeam's first quarter 1998 sales were 'tracking fine' and running ahead of analysts' estimates."

In any event CPH could not have relied on such alleged representations in light of (i) the Merger Agreement's representations and warranties (Merger Agmt. §§ 5.1-5.4), none of

which refer to any alleged representation contained in this Paragraph, (ii) the representations and warranties in a separate agreement that was executed by Coleman and Sunbeam (Feb. 27, 1998 Company Merger Agmt. § 5.1-5.12 (Ex. 3)), which are expressly incorporated into the Merger Agreement and none of which refer to any alleged representation contained in this Paragraph, and (iii) the Merger Agreement's broad integration clause which forecloses reliance on any alleged representation contained in this Paragraph (Merger Agmt. § 12.5). MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the remaining allegations contained in Paragraph 39 and consequently denies them.

40. MS & Co. admits that CPH agreed to sell its shares in Coleman to Sunbeam, and that CPH agreed to accept Sunbeam stock as partial payment for the sale, but denies that MS & Co. "persuaded" CPH to make the deal. CPH is a sophisticated party and was represented by its own expert advisors and attorneys. (*Id.* §§ 1.1; 4.11.) CPH and its advisors also enjoyed full access to Sunbeam's "books, records, properties, plants and personnel." (*Id.* § 6.7.) CPH also expressly disclaimed reliance on statements allegedly made during negotiations. (*Id.* § 12.5.) MS & Co. responds that the allegations contained in Paragraph 40 regarding stock value pertain to publicly available information, and refers to such information for the truth or falsity of such allegations. To the extent that further response is required, MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 40 and consequently denies them.

41. MS & Co. admits that on February 27, 1998, Sunbeam's Board of Directors met at Morgan Stanley's New York offices to discuss Sunbeam's possible purchase of Coleman. MS & Co. denies the remaining allegations contained in Paragraph 41.

42. MS & Co. admits it made a presentation during the February 27, 1998 Sunbeam Board of Directors Meeting. MS & Co. further admits that MS & Co. representatives, including William Strong, Robert Kitts, James Stynes and Ruth Porat, were present at this meeting. MS &

Co. lacks sufficient knowledge or information to form a belief as to the truth of any remaining allegations contained in Paragraph 42 and consequently denies them.

43. MS & Co. admits that at that February 27, 1998 New York meeting, it provided Sunbeam with a written "fairness opinion" regarding the fair acquisition price of Coleman. This opinion was based on financial information provided to MS & Co. by Sunbeam, Coleman, and Arthur Andersen, and on synergy analyses which MS & Co. received from CPH. The written fairness opinion explicitly stated that MS & Co. "[has] not made any independent valuation or appraisal of the assets or liabilities of [Sunbeam]." (Feb. 27, 1998 Fairness Op. at 3 (Ex. 4).) MS & Co. denies any remaining allegations contained in Paragraph 43.

44. MS & Co. admits that the Sunbeam Board of Directors approved the Coleman acquisition at the February 27, 1998 meeting in New York. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of any remaining allegations contained in Paragraph 44 and consequently denies them.

45. MS & Co. admits that it continued to provide investment banking services to Sunbeam after the Coleman acquisition was approved. MS & Co. denies any remaining allegations contained in Paragraph 45.

46. MS & Co. admits that the Coleman acquisition was announced on March 2, 1998. MS & Co. responds that the allegations contained in Paragraph 46 regarding stock prices pertain to publicly available information, and refers to such information for the truth or falsity of such allegations. To the extent that further response is required, MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 46 and consequently denies them.

47. MS & Co. admits that it agreed to serve as underwriter for Sunbeam's subordinated debentures. The "cash portion" of the consideration set forth in the Merger Agreement was also financed in part through a \$680 million loan made by Morgan Stanley Senior Funding, an affiliate of MS & Co. (See Credit Facilities Mem.) MS & Co. lacks

sufficient knowledge or information to form a belief as to the truth of any remaining allegations contained in Paragraph 47 and consequently denies them.

48. MS & Co. admits that the money raised from the sale of the debentures was used in part to finance Sunbeam's acquisition of Coleman.

49. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 49 and consequently denies them.

50. MS & Co. admits that the convertible debentures were presented to potential investors at a series of "road show" meetings and conference calls. MS & Co. admits that it reviewed and commented on the offering memorandum and other materials used to present the debentures to potential investors. MS & Co. denies that it "misrepresented Sunbeam's financial performance" or "emphasized Dunlap's purported 'turnaround' accomplishments." To the contrary, the offering memorandum expressly stated that MS & Co. assumed no responsibility for the accuracy or completeness of Sunbeam's audited financial information and warned investors not to rely on any projections of future performance. (March 19, 1998 Note Offering Mem. at 2-3, 12-17, 72 (Ex. 5).) MS & Co. denies any remaining allegations contained in Paragraph 50.

51. MS & Co. admits that it launched the debenture offering with a presentation to the Morgan Stanley sales force, but denies the remaining allegations contained in Paragraph 51.

52. MS & Co. admits that the debenture offering was increased from \$500 million to \$750 million. MS & Co. admits that the debentures were offered to investors nationwide. MS & Co. denies any remaining allegations contained in Paragraph 52.

53. MS & Co. admits that its employees traveled on one occasion to Sunbeam's Florida offices. MS & Co. denies the remaining allegations contained in Paragraph 53, except to the extent that they constitute legal conclusions to which no response is required.

54. MS & Co. admits that William Strong worked on MS & Co.'s engagement for Sunbeam. MS & Co. also admits that Strong has provided deposition testimony discussing conversations with Sunbeam officials. MS & Co. denies that Strong or any other MS & Co.

employee was accurately apprised of Sunbeam's financial condition because MS & Co. at all times relied on information provided by Sunbeam management and Arthur Andersen, including Sunbeam's audited financial statements. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of any remaining allegations contained in Paragraph 54 and consequently denies them.

55. MS & Co. denies CPH's allegation that it was "telling CPH and the investing public . . . that Sunbeam's turnaround was a success, that Sunbeam's sales for the first quarter of 1998 were ahead of expectations of outside analysts, and that Sunbeam was poised for record sales." Furthermore, any information communicated by MS & Co. was based on financial data and information provided to it by Sunbeam and Arthur Andersen — a fact that MS & Co. regularly publicized through disclaimer statements. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of any remaining allegations contained in Paragraph 55 and consequently denies them.

56. MS & Co. denies the allegations contained in Paragraph 56.

57. MS & Co. admits that it received a facsimile schedule regarding Sunbeam's finances on or about March 18, 1998. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 57 and consequently denies them.

58. MS & Co. admits that on or about March 18, 1998, it received a faxed financial schedule which reflected that Sunbeam's January and February 1998 sales were below those of January and February 1997. MS & Co. denies that it made assertions or otherwise disseminated information to CPH or others that it knew to be false. MS & Co. denies any knowledge of the fact that Sunbeam had not undergone a successful turnaround, or that Sunbeam's financial performance had not improved in the manner presented by Sunbeam's management and audited financial statements. MS & Co. admits that on March 18, 1998, it learned that Sunbeam's first quarter 1998 sales were "soft." Sunbeam insisted that its sales would meet expectations, but MS & Co. insisted that Sunbeam issue a press release to warn the market of the softening sales.

Additionally, MS & Co. received two "comfort letters" from Sunbeam's auditors, Arthur Andersen. MS & Co. performed all of its obligations as an underwriter of Sunbeam securities. MS & Co. denies that it had any role in the accounting judgments described in the complaint, or any obligations to audit or independently examine Sunbeam's accounting records. MS & Co. denies that it owed any duties to CPH. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of any remaining allegations contained in Paragraph 58 and consequently denies them.

59. MS & Co. admits that on March 18, 1998, it learned that Sunbeam's first quarter 1998 sales were "soft." Sunbeam insisted that its sales would meet expectations, but MS & Co. insisted that Sunbeam issue a press release to warn the market of the softening sales. Additionally, MS & Co. received two "comfort letters" from Sunbeam's auditors, Arthur Andersen. MS & Co. performed all of its obligations as an underwriter of Sunbeam securities. MS & Co. denies that it had any role in the accounting judgments described in the Complaint, or any obligations to audit or independently examine Sunbeam's accounting records. MS & Co. denies that it owed any duties to CPH. MS & Co. denies all remaining allegations contained in Paragraph 59.

60. MS & Co. admits that Sunbeam issued a press release on March 19, 1998 that included language selectively quoted in Paragraph 60. MS & Co. further states that the March 19, 1998 press release contained the following additional statement, omitted in the Complaint:

Cautionary Statements - Statements contained in this press release, including statements relating to the Company's expectations regarding anticipated performance in the future, are "forward looking statements," as such term is defined in the Private Securities Litigation Reform act of 1995. Actual results could differ materially from the Company's statements in this release regarding its expectations, goals or projected results, due to various factors, including those set forth in the Company's Cautionary Statements contains in its Annual Report on Form 10-K for its fiscal year ended December 31, 1997 filed with the Securities and Exchange Commission.

(March 19, 1998 Press Release (Ex. 6).)

61. MS & Co. admits that Sunbeam issued a press release on March 19, 1998 that included language selectively quoted in Paragraph 61. MS & Co. further states that the March 19, 1998 press release contained the following additional statement, omitted in the Complaint:

Cautionary Statements - Statements contained in this press release, including statements relating to the Company's expectations regarding anticipated performance in the future, are "forward looking statements," as such term is defined in the Private Securities Litigation Reform act of 1995. Actual results could differ materially from the Company's statements in this release regarding its expectations, goals or projected results, due to various factors, including those set forth in the Company's Cautionary Statements contains in its Annual Report on Form 10-K for its fiscal year ended December 31, 1997 filed with the Securities and Exchange Commission.

(*Id.*) MS & Co. denies all remaining allegations contained in Paragraph 61.

62. MS & Co. denies the allegation that it knew that the "shortfall from analysts' estimates was . . . caused by Sunbeam's acceleration of 1998 sales into the fourth quarter of 1997." MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of any remaining allegations contained in Paragraph 62 and consequently denies them.

63. MS & Co. denies the allegations contained in Paragraph 63.

64. MS & Co. specifically denies that it "knew that a full and truthful disclosure . . . would doom the debenture offering," or that it had any knowledge that the press release was untruthful or otherwise misleading. MS & Co. denies the allegations contained in Paragraph 64.

65. MS & Co. denies the allegations contained in Paragraph 65. To the extent that this Paragraph quotes the Merger Agreement, that document speaks for itself and contradicts the allegations contained in the Complaint.

66. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 66 and consequently denies them.

67. MS & Co. denies the allegations contained in Paragraph 67.

68. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 68 and consequently denies them.

69. MS & Co. admits that it continued to serve as Sunbeam's investment banker, and continued to prepare to close the debenture offering and the acquisition of Coleman, but denies any knowledge as to the alleged falsity of the March 19, 1998 press release. MS & Co. denies the remaining allegations contained in Paragraph 69.

70. MS & Co. admits that throughout its service to Sunbeam, MS & Co. employees, including Tyree, spoke via telephone with representatives of Sunbeam. MS & Co. denies any knowledge that the press release was untruthful or otherwise misleading. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the remaining allegations contained in Paragraph 70 and consequently denies them.

71. MS & Co. admits that it received "comfort letters" from Arthur Andersen. MS & Co. denies the allegation that it knew that "Sunbeam's earnings for the first quarter of 1998 were going to miss Wall Street analysts' earning expectations." MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the remaining allegations contained in Paragraph 71 and consequently denies them.

72. MS & Co. admits that it continued to prepare to close both the debenture offering and the acquisition of Coleman. MS & Co. denies any allegation of its "having directly participated in misleading CPH and other investors." MS & Co. responds that the allegation that MS & Co. "had a duty to disclose the true facts" to CPH is a legal conclusion to which no response is required. MS & Co. denies the remaining allegations contained in Paragraph 72.

73. MS & Co. admits that it received compensation for investment banking work performed by MS & Co. for Sunbeam. MS & Co. denies the allegation that it facilitated Sunbeam's fraud. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of any remaining allegations contained in Paragraph 73 and consequently denies them.

74. MS & Co. admits that on March 19, 1998, Sunbeam issued a press release which stated that "net sales for the first quarter of 1998 may be lower than the range of Wall Street analysts' estimates of \$285 million to \$295 million." MS & Co. lacks sufficient knowledge or

information to form a belief as to the truth of the remaining allegations contained in Paragraph 74 and consequently denies them.

75. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 75 and consequently denies them.

76. MS & Co. admits that it advocated issuing a press release to warn the market of the softening sales, but denies that it represented that Sunbeam's sales would exceed analysts' projections. MS & Co. denies the remaining allegations contained in Paragraph 76.

77. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 77 and consequently denies them.

Count I – Fraudulent Misrepresentation

78. MS & Co. repeats and realleges its responses to Paragraphs 1 through 77 as if set forth herein.

79. MS & Co. denies the allegations contained in Paragraph 79.

80. MS & Co. denies the allegations contained in Paragraph 80.

81. MS & Co. denies the allegations contained in Paragraph 81.

82. MS & Co. denies the allegation contained in Paragraph 82.

83. MS & Co. denies the allegation contained in Paragraph 83.

Count II – Aiding and Abetting Fraud

84. MS & Co. repeats and realleges its responses to Paragraphs 1 through 77 as if set forth herein.

85. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 85 and consequently denies them.

86. MS & Co. denies the allegation contained in Paragraph 86.

87. MS & Co. admits that, beginning in mid-1997, MS & Co. served as an investment banker and underwriter for Sunbeam. MS & Co. admits that it attempted to identify a party

interested in purchasing Sunbeam, and that those efforts were ultimately unsuccessful. MS & Co. admits that it recommended that Sunbeam's management consider acquiring other companies instead and suggested, as is common in corporate mergers and acquisitions, that Sunbeam consider using Sunbeam stock as part of the consideration for such an acquisition. MS & Co. denies that it had any knowledge as to the accuracy of the value of Sunbeam's stock, or that MS & Co. knew (or even suspected) that the value of Sunbeam's stock had been "fraudulently inflated."

MS & Co. admits that it facilitated communications between Sunbeam and Coleman, but denies that it in any way "persuaded" CPH to sell its interest in Coleman.

MS & Co. admits that on March 18, 1998, it learned that Sunbeam's first quarter 1998 sales were "soft." Sunbeam insisted that its sales would meet expectations, but MS & Co. insisted that Sunbeam issue a press release to warn the market of the softening sales. Additionally, MS & Co. received two "comfort letters" from Sunbeam's auditors, Arthur Andersen. MS & Co. performed all of its obligations as an underwriter of Sunbeam securities.

MS & Co. admits that the convertible debentures were presented to potential investors at a series of "road show" meetings and conference calls. MS & Co. admits that it reviewed and commented on the offering memorandum and other materials used to present the debentures to potential investors. MS & Co. denies the remaining allegations contained in Paragraph 87.

88. MS & Co. denies the allegations contained in Paragraph 88.

Count III – Conspiracy

89. MS & Co. repeats and realleges its responses to Paragraphs 1 through 77 as if set forth herein.

90. MS & Co. denies the allegations contained in Paragraph 90.

91. MS & Co. admits that it served as a financial advisor to Sunbeam and an underwriter of Sunbeam securities, but denies that it in any way committed "overt acts in furtherance of a conspiracy." MS & Co. denies that it performed an independent financial analysis of Sunbeam; to the contrary, MS & Co. informed CPH that it was relying solely on financial data and information provided to it by Sunbeam and Arthur Andersen. MS & Co. admits that it underwrote the \$750 million convertible debenture offering. MS & Co. denies the remaining allegations contained in Paragraph 91.

92. MS & Co. denies the allegations contained in Paragraph 92.

Count IV – Negligent Misrepresentation

93. MS & Co. repeats and realleges its responses to Paragraphs 1 through 77 as if set forth herein.

94. MS & Co. admits that it served as a financial advisor to Sunbeam and an underwriter of Sunbeam securities. MS & Co. responds that the allegations contained in Paragraph 94 constitute legal conclusions to which no response is required. Alternatively, MS & Co. denies the remaining allegations contained in Paragraph 94.

95. MS & Co. denies the allegations contained in Paragraph 95.

96. MS & Co. denies the allegations contained in Paragraph 96.

AFFIRMATIVE DEFENSES

In addition to the foregoing responses, MS & Co. asserts the following affirmative defenses to the claims stated in CPH's Complaint. MS & Co. does not assume the burden of proof on these defenses where the substantive law provides otherwise.

First Affirmative Defense

CPH's claims must be dismissed on *forum non conveniens* grounds pursuant to Florida Rule of Civil Procedure 1.061(a).

Second Affirmative Defense

CPH's alleged claims are barred, in whole or in part, for failure to state a claim upon which relief can be granted.

Third Affirmative Defense

CPH's alleged claims are barred, in whole or in part, by the doctrine of laches.

Fourth Affirmative Defense

CPH's alleged claims are barred, in whole or in part, by the doctrine of estoppel.

Fifth Affirmative Defense

CPH's alleged claims are barred, in whole or in part, by the doctrine of waiver.

Sixth Affirmative Defense

CPH's alleged claims are barred, in whole or in part, by the doctrine of unclean hands.

Seventh Affirmative Defense

CPH's alleged claims are barred, in whole or in part, by plaintiff's failure to mitigate its damages.

Eighth Affirmative Defense

CPH's alleged claims are barred because CPH has experienced no damages, and any claimed loss is speculative and/or was avoidable.

Ninth Affirmative Defense

CPH's alleged claims are barred, in whole or in part, because the claimed injuries were not proximately caused by any acts or omissions of MS & Co.

Tenth Affirmative Defense

To the extent CPH's fraud claim relies on non-disclosure, that claim is barred, in whole or in part, because MS & Co. was under no duty to disclose.

Eleventh Affirmative Defense

CPH's claims are barred, in whole or in part, because of MS & Co.'s repeated disclaimers of reliance.

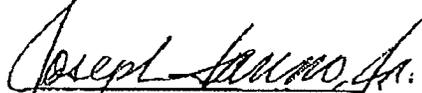
Twelfth Affirmative Defense

Any future claim by CPH for punitive damages is barred, in whole or in part, because (i) the allegedly tortious conduct is not gross, wanton, willful, or otherwise morally culpable; and (ii) the alleged conduct was not part of a pattern directed at the public generally.

WHEREFORE, MS & Co. denies that CPH is entitled to any relief whatsoever, and to the extent that CPH should recover any damage award, that award should be offset by CPH's failure to take appropriate steps to mitigate its damages. MS & Co. respectfully requests that the Court enter judgment for MS & Co. dismissing the complaint with prejudice, award MS & Co. its attorneys' fees, costs and expenses, and grant such other and further relief as may be just and proper.

Dated: June 23, 2003

Respectfully Submitted,


Joseph Ianno, Jr. (FL Bar # 656351)
CARLTON FIELDS
222 Lake View Avenue — Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368

Thomas D. Yannucci, P.C.
Thomas A. Clare
Larissa Paule-Cares
Brett H. McGurk
KIRKLAND & ELLIS
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

ATTORNEYS FOR DEFENDANT,
MORGAN STANLEY & CO. INCORPORATED.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Federal Express to all counsel of record listed below on this *23rd* day of June, 2003.

<p>John Scarola SEARCY, DENNEY, SCAROLA, BARNHARDT & SHIPLEY, P.A. 2139 Palm Beach Lakes Boulevard West Palm Beach, Florida 33409</p>	<p>Counsel for Defendants</p>
<p>Jerold S. Solovy JENNER & BLOCK, LLC One IBM Plaza Suite 4400 Chicago, Illinois 60611</p>	<p>Counsel for Defendants</p>


JOSEPH IANNO, JR.

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH, COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

_____/ CASE NO. CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

**APPENDIX TO COLEMAN (PARENT) HOLDINGS INC.'S
MOTION FOR A RULE TO SHOW CAUSE**

Jerold S. Solovy
Ronald L. Marmer
Jeffrey T. Shaw
JENNER & BLOCK LLP
One IBM Plaza
Chicago, IL 60611
(312) 222-9350

Jack Scarola
SEARCY, DENNEY, SCAROLA,
BARNHART & SHIPLEY, P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33401
(561) 686-6300

TABLE OF CONTENTS

	Tab
Stipulated Confidentiality Order of July 31, 2003	1
Order of December 4, 2003	2
Transcript of Proceedings, November 25, 2003	3
Transcript of Proceedings, February 20, 2004	4
Complaint in <i>Morgan Stanley & Co. Incorporated, et al. v. Arthur Andersen LLP, et al.</i> , No. 2004 CA 002257 XXXX MB, March 1, 2004	5
Complaint in <i>Wachovia Bank v. Arthur Andersen LLP, et al.</i> , No. 2004 CA 002256 XXXX MB, March 1, 2004	6

1

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

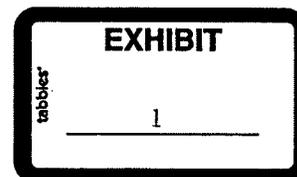
_____)	
COLEMAN (PARENT) HOLDINGS INC.,)	
)	
Plaintiff,	)	Case No.: 2003 CA 005045 AI
v.)	
)	
MORGAN STANLEY & CO., INC.,	)	Judge Elizabeth I. Maass
)	
Defendant.)	
_____)	

STIPULATED CONFIDENTIALITY ORDER

The parties hereto hereby stipulate and agree to the following Confidentiality Order:

1. Scope of Order. This Order shall apply to all non-public and Confidential (as hereinafter defined) materials produced in this litigation and all testimony given in any deposition by any party to the litigation or by any person or entity that is not a party hereto (a "non-party"), to all non-public and Confidential information disclosed by any party hereto during the course of the captioned litigation and to all non-public information disclosed to any party hereto by any non-party in response to the service of a subpoena or notice of deposition on a non-party in connection with the captioned litigation ("Litigation Materials").

2. This Order shall not apply to any document, testimony or other information that (a) is already in a receiving party's possession at the time it is produced, (b) becomes generally available to the public other than as a result of disclosure in violation of this Order or in breach of any other legal obligation, or (c) becomes available to a party other than through voluntary or required production from a person or party who obtained the document, testimony or other information without any confidentiality restriction.



3. Litigation Materials and the information derived therefrom shall be used solely for the purpose of preparing for and conducting this litigation, and shall not be disclosed or used for any other purpose.

4. Any party or non-party may designate as "Confidential" any Litigation Materials or portions thereof which the party or non-party believes, in good faith, constitute, contain, reveal or reflect proprietary or confidential trade secrets or technical, business, financial or personnel information of a current nature. If a party or non-party produces Litigation Materials that have been produced in another litigation or to any government entity and such Litigation Materials have been designated confidential or were accompanied by a request that confidential treatment be accorded them, such Litigation Materials shall be deemed to have been designated "Confidential" for purposes of this Stipulation and Order.

5. Any documents or other tangible Litigation Materials may be designated as "Confidential" by marking every such page "Confidential" or by informing the other party in writing that such material is Confidential. Such markings will be made in a manner which does not obliterate or obscure the content of the document or other tangible Litigation Material. If Litigation Material is inspected at the choice of location of the party or non-party producing or disclosing Litigation Materials (a "producing party"), all such Litigation Material shall be presumed at such inspection to have been designated as Confidential by the producing party until such time as the producing party provides copies to the party that requested the Litigation Material. Production of Confidential Material for inspection and copying shall not constitute a waiver of confidentiality.

6. Depositions or other testimony may be designated "Confidential" by any one of the following means:

(a) stating orally on the record, with reasonable precision as to the affected testimony, on the day the testimony is given that this information is "Confidential"; or

(b) sending written notice designating, by page and line, the portions of the transcript of the deposition or other testimony to be treated as "Confidential" within 10 days after receipt of the transcripts.

7. The entire transcript of any deposition shall be treated as Confidential Material until thirty days after the conclusion of the deposition. Each page of deposition transcript designated as Confidential Material shall be stamped, as set forth in paragraph 5 above, by the court reporter or counsel.

8. In the event it becomes necessary at a deposition or hearing to show any Confidential Material to a witness, any testimony related to the Confidential Material shall be deemed to be Confidential Material, and the pages and lines of the transcript that set forth such testimony shall be stamped as set forth in paragraph 5 of this Stipulation.

9. Litigation Materials designated "Confidential" and any copies thereof, and the information contained therein, shall not be given, shown, made available or communicated in any way to anyone except:

(a) The Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida (the "Court") (including Clerks and other Court personnel). Litigation Materials designated "Confidential" and any copies thereof, and the information contained therein, that are filed with the Court or any pleadings, motions or other papers filed with the Court, shall be filed under seal in a separate sealed envelope conspicuously marked "Filed Under Seal - Subject to Confidentiality Order," or with such other markings as required by Court rules, and shall be kept under seal until further order of the

Court. Where possible, only those portions of filings with the Court that disclose matters designated "Confidential" shall be filed under seal;

(b) counsel to the parties, including co-counsel of record for the parties actually assisting in the prosecution or defense of this litigation, and the legal associates and clerical or other support staff who are employed by such counsel or attorneys and are working under the express direction of such counsel or attorneys;

(c) parties and current officers and employees of parties to the extent reasonably deemed necessary by counsel disclosing such information for the purpose of assisting in the prosecution or defense of this litigation;

(d) outside photocopying, graphic production services, litigation support services, or investigators employed by the parties or their counsel to assist in this litigation and computer personnel performing duties in relation to a computerized litigation system;

(e) any person who is a witness or deponent, and his or her counsel, during the course of a deposition of testimony in this litigation;

(f) any person who is a potential fact witness in the litigation, provided, however, that a person identified solely in this subparagraph shall not be permitted to retain copies of such Litigation Material;

(g) court reporters, stenographers, or videographers who record deposition or other testimony in the litigation;

(h) experts or consultants retained in connection with the litigation;

(i) any person who is indicated on the face of a document to have been an author, addressee or copy recipient thereof, provided, however, that a person identified

solely in this subparagraph shall not be permitted to retain copies of such Litigation Material; and

(j) any other person, upon written consent from the party or person who designated such Litigation Materials "Confidential."

10. Before any person included in paragraph 9(f) or (h) is given access to Litigation Materials designated "Confidential," and before any person included in subparagraph 9(e) is permitted to retain any copy of Litigation Materials designated Confidential, such person shall be provided with a copy of this Order and shall acknowledge in a written statement, in the form provided as Exhibit A hereto, that he or she read the Order and agrees to be bound by the terms thereof. Such executed forms shall be retained in the files of counsel for the party who gave access to Litigation Materials to the person who was provided such access. Such executed forms shall not be subject to disclosure under the Florida Rules of Civil Procedure unless a showing of good cause is made and the Court so orders.

11. The inadvertent production of privileged or arguably privileged materials shall not be determined to be either: (a) a general waiver of the attorney-client privilege, the work product doctrine or any other privilege; or (b) a specific waiver of any such privilege with respect to documents being produced or the testimony given. Notice of any claim of privilege as to any document claimed to have been produced inadvertently shall be given within a reasonable period of time after discovery of the inadvertent production, and, on request by the producing party, all inadvertently produced materials as to which a claim of privilege is properly asserted and any copies thereof shall be returned promptly.

12. Nothing in this Order shall prevent any producing party from disclosing or using its own "Confidential" Litigation Materials as it deems appropriate, and any such disclosure shall not be deemed a waiver of any party's right or obligations under this Order with

COUNSEL LIST

Counsel for Plaintiff
COLEMAN (PARENT) HOLDINGS INC.

SEARCY DENNEY SCAROLA
BARNHART & SHIPLEY P.A.
John Scarola, Esq.
2139 Palm Beach Lake Blvd.
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 684-5816

JENNER & BLOCK, LLC
Jerold S. Solovy, Esq.
Ronald L. Marmor, Esq.
Robert T. Markowski, Esq.
Deirdre E. Connell, Esq.
One IBM Plaza, Suite 4400
Chicago, IL 60611
Phone: (312) 222-9350
Fax: (312) 527-0484

Counsel for Defendant
MORGAN STANLEY & CO., INC.

CARLTON FIELDS, P.A.
Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Phone: (561) 659-7070
Fax: (561) 659-7368

KIRKLAND & ELLIS
Thomas D. Yannucci, P.C.
Thomas A. Clare, Esq.
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Phone: (202) 879-5000
Fax: (202) 879-5200

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

_____)
COLEMAN (PARENT) HOLDINGS INC.,)
)
Plaintiff,)
)
v.)
)
MORGAN STANLEY & CO., INC.,)
)
Defendant.)
_____)

Case No.: 2003 CA 005045 AI

Judge Elizabeth I. Maass

Exhibit A

**DECLARATION OF ACKNOWLEDGMENT AND
AGREEMENT TO BE BOUND BY PROTECTIVE ORDER**

I, _____, declare under penalty of perjury that:

1. My address is _____.
2. My present employer is _____.
3. My present occupation or job description is _____.

_____.

4. I hereby certify and agree that I have read and understand the terms of the Confidentiality Order in the above-captioned actions. I further certify that I will not use "Confidential" information for any purpose other than this litigation among the parties, and will not disclose or cause "Confidential" information to be disclosed to anyone not expressly permitted by the Order to receive "Confidential" information. I agree to be bound by the terms and conditions of the Order.

5. I understand that I am to retain in confidence from all individuals not expressly permitted to receive information designated as "Confidential," whether at home or at

work, all copies of any materials I receive which have been designated as "Confidential," and that I will carefully maintain such materials in a container, drawer, room or other safe place in a manner consistent with the Order. I acknowledge that the return or destruction of "Confidential" material shall not relieve me from any other continuing obligations imposed upon me by the Order.

6. I stipulate to the jurisdiction of this Court.

Date: _____

(Signature)

Document No. 945236

2

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

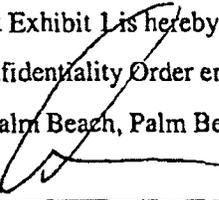
**ORDER ON DEFENDANT'S MOTION TO COMPEL PRODUCTION OF
SETTLEMENT AGREEMENT**

THIS CAUSE came before the Court November 25, 2003 on Defendant's Motion to Compel Production of Settlement Agreement, with all parties and Arthur Andersen well represented by counsel. Based on the proceedings before the Court, it is,

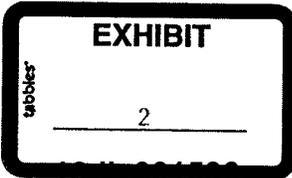
ORDERED AND ADJUDGED that the Motion is Granted, in part, and Denied, in part. Defendant shall have access to that document attached hereto as Exhibit 1, excluding those portions redacted by the Court. The Court has sealed a complete copy of the Settlement Agreement and placed it in the Court file. The sealed envelope shall not be unsealed or removed from the Court file without further order of this or an appellate court. The undersigned's Judicial Assistant shall supply Plaintiff's counsel with a conformed copy of this Order on request made no earlier than 12:00 noon on December 5, 2003. The undersigned's Judicial Assistant shall supply Defendant's counsel with a conformed copy of this Order on request made no earlier than 4:00 p.m. on December 8, 2003. The Court file shall not be released from the undersigned's Chambers before 4:00 p.m. on December 9, 2003. It is further

ORDERED AND ADJUDGED that Exhibit 1 is hereby deemed "Confidential" and subject to the terms of the parties' Stipulated Confidentiality Order entered July 31, 2003.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida, this 4 day of December, 2003.



ELIZABETH T. MAASS
Circuit Court Judge



copies furnished, without Exhibit:
Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci
655 15th Street, NW, Suite 1200
Washington DC 20005

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, IL 60611

Mark F. Bideau, Esq.
777 S. Flagler Dr., Suite 300E
West Palm Beach, FL 33401

David M. Wells, Esq.
50 N. Laura Street, Suite 3300
Jacksonville, FL 32202

3

0001

1 IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
2 IN AND FOR PALM BEACH COUNTY, FLORIDA
3 CASE NO. 2003-CA-005045 AI

4 COLEMAN (PARENT) HOLDINGS, INC.,
5 Plaintiff,

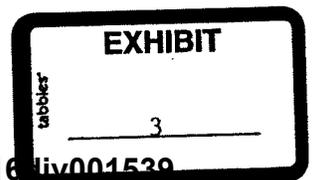
6 vs.

7 MORGAN STANLEY & COMPANY, INC.
8 Defendant.

9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

- - -
TRANSCRIPT OF THE PROCEEDINGS BEFORE
THE HONORABLE ELIZABETH MAASS
- - -

West Palm Beach, Florida
November 25, 2003
4:37 p.m. - 5:18 p.m.



0002

1 APPEARANCES:

2

3 SEARCY, DENNEY, SCAROLA, BARNHART & SHIPLEY, P.A.
4 2139 Palm Beach Lakes Boulevard
5 West Palm Beach, Florida 33401
6 Counsel for the Plaintiff
7 BY: JACK SCAROLA, ESQUIRE

5

6

7

8 CARLTON, FIELDS, WARD, EMMANUEL,
9 SMITH & CUTLER, P.A.
10 Esperante
11 222 Lakeview Avenue, Suite 1400
12 West Palm Beach, Florida 33401-6149
13 Counsel for the Defendant
14 BY: JOSEPH IANNO, JR., ESQUIRE

11

12

13

14 KIRKLAND AND ELLIS
15 655 15th Street N.W., Suite 1200
16 Washington, D.C. 20005
17 Counsel for the Defendant
18 BY: THOMAS A. CLARE, ESQUIRE

16

17

18

19 HOLLAND & KNIGHT, LLP
20 625 North Flagler Drive, Suite 700
21 West Palm Beach, Florida 33401
22 Counsel for Arthur Andersen
23 BY: HANK JACKSON, ESQUIRE

21

22

23

24

25

0003

1 BE IT REMEMBERED that the foregoing
2 proceedings were had before the HONORABLE ELIZABETH
3 MAASS, in the Palm Beach County Courthouse, West Palm
4 Beach, Florida, on November 25, 2003, starting at
5 4:37 p.m., with appearances as hereinabove noted,
6 to wit:

7

8 THE COURT: This is Coleman and Morgan
9 Stanley. It's defendant's motion, I think, to
10 compel production of a settlement agreement.

11 MR. IANNO: That's correct.

12 MR. CLARE: That's correct.

13 THE COURT: You-all can have a seat.

14 The first motion I have though, and I
15 apologize, I didn't have time to go through the
16 files to try to find this, I see that defendant
17 has filed certain things under seal or has
18 tendered certain things under seal, and I hope
19 that none of them have been filed yet. Was there
20 an order entered that permitted that procedure?

21 MR. IANNO: Yes, Your Honor. Joe Ianno:
22 I believe that the confidentiality order that was
23 entered in this case provided for that.

24 THE COURT: You're going to have to tell me,
25 because I thought --

0004

1 MR. IANNO: I didn't bring the
2 confidentiality order with me.

3 THE COURT: Because, obviously, under the
4 Rules of Judicial Administration, things can't get
5 filed under seal --

6 MR. IANNO: Without notice to media.

7 THE COURT: And all that. And I thought when
8 I looked at the proposed order in this case,
9 either I struck through that stuff or I mailed it
10 back to you guys and said I can't sign this. And
11 if I haven't done that yet, that's why we need to
12 find that order.

13 I haven't looked at any of the stuff that was
14 given to me under seal. I need to just give it
15 back to you. It's not my policy to look at things
16 that can't be part of the court record absent a
17 clear order that permits me to do so.

18 It could be somehow I signed it and I forgot.

19 MR. IANNO: I don't believe that the motion
20 at issue though, Your Honor, was filed under seal.

21 THE COURT: No, just some of the stuff. I'll
22 give you guys -- Whoever gave me this stuff, I'm
23 just going to give it back.

24 MR. SCAROLA: I think what was filed under
25 seal was your reply memorandum.

0005

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MR. IANNO: It could be.

THE COURT: I have a couple things under seal. I got this (indicating).

MR. IANNO: If I may, Your Honor.

THE COURT: And then you gave me a copy of it, which I don't want. And then I got this (indicating). I don't know if that's all of it or not.

MR. IANNO: Okay. This was not filed under seal, Your Honor (indicating).

THE COURT: I thought it's telling me it's a copy of what was filed under seal for me. No?

MR. IANNO: That must have been a mistake, Your Honor, because that was not filed under seal.

THE COURT: You're comfortable it wasn't? Do you want to show it to Mr. Scarola?

MR. IANNO: I think it may have been filed. It is a response.

I think that was just a mistake, Your Honor, on this one. That was our reply to Mr. Scarola's opposition.

THE COURT: Okay. And have you seen this (indicating)?

MR. SCAROLA: I have, yes, Your Honor.

THE COURT: Okay. Thanks.

0006

1 MR. IANNO: These are other motions, Your
2 Honor, that are not at issue today.

3 THE COURT: So when it says confidential
4 under seal, it was a misnomer?

5 MR. IANNO: Yes. It was a mistake. That one
6 was not intended to be filed under seal.

7 THE COURT: Do we know if it was filed?

8 MR. IANNO: It may have been.

9 THE COURT: What if it wasn't? Do you want
10 me to do directions to the clerk saying --

11 MR. IANNO: You can file that.

12 THE COURT: The whole thing says
13 confidential.

14 MR. IANNO: That can be filed. That does not
15 need to be under seal.

16 THE COURT: Okay. Thank you.

17 What did you want to say in support of your
18 motion?

19 MR. CLARE: Good morning, Your Honor.
20 Tom Clare from Kirkland and Ellis in Washington on
21 behalf of the defendant, Morgan Stanley. This is
22 our motion to compel the production of the
23 settlement agreement.

24 THE COURT: Right.

25 MR. CLARE: I think to understand the context

0007

1 of the motion, it's helpful to go back in time and
2 understand the events that led up to this lawsuit
3 and the litigations that came before this
4 settlement agreement is the subject of the motion.

5 In March of 1998, Mr. Scarola's client sold
6 its interest in the Coleman Company to Sunbeam.
7 My client, Morgan Stanley, was the financial
8 advisor to Sunbeam for part of that deal. Arthur
9 Andersen was the auditor to Sunbeam at the time.
10 After the acquisition was closed, there were
11 accounting problems discovered at Sunbeam,
12 management was fired, the auditors were changed
13 and litigation ensued.

14 Morgan Stanley was never sued by anybody
15 until Coleman Parent Holdings Company sued us
16 earlier this year, but all the other litigation
17 ensued, including claims that were brought or
18 threatened to be brought by the plaintiff in this
19 case against Sunbeam, and then a second suit
20 against Arthur Andersen. Both of those cases were
21 settled.

22 The settlement agreement between Coleman
23 Parent Holdings and Sunbeam was public, a matter
24 of public record, publicly filed with the SEC
25 filings. The settlement agreement between Coleman

0008

1 and Arthur Andersen was not.

2 Andersen has been identified as an important
3 critical witness in this case. There are partners
4 and former partners of Arthur Andersen who are
5 identified in the Complaint as providing a factual
6 basis for the fraud and negligent
7 misrepresentation counts that are brought against
8 us, and there's an issue of setoff. Very clearly
9 in the case, they were seeking to recover the same
10 damages from us as they've already recovered from
11 Arthur Andersen stating the same allegations of
12 reliance and the same damages allegations.

13 So we're entitled to know, under the City of
14 Homestead case in the Third District Court of
15 Appeals that came down, the position that was
16 recently re-affirmed by the Nester case that came
17 down a month ago in the Court of Appeals in
18 support of that. It's relevant.

19 As well, Your Honor, potentially to the forum
20 non conveniens and choice of law motion that we're
21 going to be back arguing before Your Honor on
22 December 12th, to the extent that --

23 THE COURT: How would it be relevant to
24 choice of law?

25 MR. CLARE: To the extent that Coleman

0009

1 Parent, which is headquartered in New York, and
2 its parent company, which is headquartered in
3 New York, agreed to settle this litigation and
4 enforce the settlement agreement in the courts of
5 New York or agreed to be bound by the choice of
6 law provision that specifies New York law should
7 apply, that's relevant to whether New York is an
8 inconvenient forum for them to litigate this case.
9 THE COURT: So it's not a choice of law, it's
10 just an inconvenient forum argument?
11 MR. CLARE: Well, there's both.
12 THE COURT: How is it choice of law, so I
13 understand?
14 MR. CLARE: On December 12th, we'll be
15 back --
16 THE COURT: Right.
17 MR. CLARE: -- to argue our motion to
18 dismiss, and it's our view that the substantive
19 law of the State of New York applies to their
20 claims.
21 THE COURT: Right, but how is -- I'm sorry.
22 I thought I understood you to say that potentially
23 the settlement agreement between Coleman and
24 Arthur Andersen will have some bearing on the
25 choice of law to be applied in this case.

0010

1 MR. CLARE: I may have misspoken.

2 THE COURT: Maybe I misunderstood it.

3 MR. CLARE: We're not a party to that
4 agreement, so obviously, it doesn't bear directly
5 on it, but I do think it is relevant to their
6 expectation that events giving rise to this
7 controversy arising out of the Sunbeam transaction
8 will be governed at least in part by New York law.

9 So that's an additional reason why we think
10 it's relevant. But the primary reasons are the
11 setoff, the damages claims, we're going to need
12 our experts to prepare damages reports at some
13 point to submit our expert testimony on damages
14 and also to evaluate our position, our potential
15 liability exposure. Without knowing what the
16 setoff is, it's impossible for my client to --

17 THE COURT: So are you saying the only part
18 of the agreement you need access to is the dollar
19 amount?

20 MR. CLARE: No, actually, that's not correct.
21 Under the City of Homestead case, the Court said
22 the amount and the terms need to be disclosed.

23 I can't conjure up all of the reasons why it
24 might be relevant. Those are the reasons that
25 I've identified here. There may be a denial of

0011

1 liability by Arthur Andersen. There may be an
2 admission of liability by Arthur Andersen. There
3 may be a release of claims coming back the other
4 direction against Coleman Parent. I just don't
5 have any idea without seeing the agreement to
6 understand the relevance of it. And that's why
7 the procedures that Mr. Scarola has suggested,
8 which is to delay and defer production of this
9 settlement agreement until later in the case, is
10 not appropriate, nor is an in camera inspection to
11 review, because having access to the discovery,
12 wanting to take the depositions of Arthur Andersen
13 people, there's no way that we can tell from an in
14 camera review or by delaying months and months
15 until trial whether we'll be able to effectively
16 cross examine witnesses during depositions and the
17 like.

18 It would be a different case if they had not
19 identified Arthur Andersen as critical to the
20 establishment of their case.

21 THE COURT: Okay. Let me see what
22 plaintiff's position is. Thank you.

23 MR. SCAROLA: Good afternoon, Your Honor.
24 Jack Scarola on behalf of Coleman Parent Holdings
25 Company.

0012

1 If I may, let me present both the defense and
2 the Court with copies of some highlighted cases
3 that I would like to discuss, Your Honor, in the
4 course of our presentation.

5 THE COURT: Okay. Thank you.

6 MR. SCAROLA: Let me begin, Your Honor, by
7 acknowledging that as the defendants themselves
8 have stated, Rule 1.280(b)(1) permits discovery of
9 all relevant evidence; that is, evidence relevant
10 to the subject matter of the case, but that
11 evidence must also be either admissible or
12 reasonably calculated to lead to the discovery of
13 admissible evidence. And we must concede that the
14 principal case relied upon by the defense, the
15 City of Homestead, would require Your Honor to
16 compel disclosure of the amount of this
17 settlement.

18 There is language in the City of Homestead
19 case that has been accurately quoted in the
20 defendant's brief, and it is that the settlement
21 terms and amount must be disclosed.

22 But if Your Honor takes a look at that
23 opinion, and we're going to go through it together
24 if you'll indulge me for just a moment, you'll
25 find that the reference to terms is pure dicta.

0013

1 This is a case involving the wrongful death
2 of a seven-year-old, and there were two defendants
3 named in the lawsuit; an entity called
4 Meda-Therapy Institute and the City of Homestead.
5 The case, while pending, was settled with
6 Meda-Therapy Institute and proceeded against the
7 city. There was a confidential settlement
8 agreement -- excuse me. There was a settlement
9 agreement that was entered into, and the city,
10 according to the opinion, and this appears under
11 headnote 1, the last sentence in the paragraph,
12 quote, the city filed a motion to compel
13 disclosure of the settlement amount. The Court
14 denied the motion.

15 The opinion then goes on to say, the motion
16 to compel should have been granted, the settlement
17 terms and amount must be disclosed.

18 There was never even, according to the
19 opinion, a request for the terms, there was a
20 request for the amount. And the rationale in the
21 opinion was that the amount may be relevant to
22 setoff and the remaining defendant was entitled to
23 know what that amount was for that reason.

24 So the only issue before the Court was
25 whether the amount should be disclosed. There is

0014

1 no reference to any confidentiality provisions in
2 the settlement agreement, so the case is
3 distinguishable from the standpoint that there was
4 no contractual obligation imposed upon any party,
5 at least based upon the opinion, to keep the terms
6 of the settlement confidential.

7 And the Court also observed that a factor
8 that was taken into consideration in this case was
9 that the defendant seeking this discovery was a
10 public entity, and the Court found that to be a
11 relevant factor. In the last sentence of the
12 opinion, the Court says, the case for disclosure
13 is especially strong, whereas here the plaintiffs
14 are suing a public entity.

15 The precedent upon which this case is based,
16 the one cited authority is the case of Smith vs.
17 TIB Bank of The Keys, another Third DCA opinion.
18 And in that case, a plaintiff was seeking
19 certiorari review of an order compelling answers
20 during the course of a deposition. The plaintiff
21 had been involved in a prior unrelated lawsuit
22 arising out of the plaintiff's employment with an
23 entirely separate entity, and the plaintiff
24 settled that unrelated claim and entered into a
25 settlement agreement that did have contractual

0015

1 requirements that the terms of the settlement
2 remain confidential.

3 When the questions were asked during
4 deposition, the plaintiff declined to answer those
5 on the basis that answering the questions would
6 place the plaintiff in violation of the
7 confidentiality provisions in the earlier order.

8 The trial court entered an order which
9 recognized the obligation for the plaintiff to
10 decline to answer questions that were within the
11 scope of the confidentiality provision of the
12 order, and the trial court fashioned an order that
13 was expressly designed to give maximum effect to
14 the rights of privacy that arose out of the
15 confidentiality provision and at the same time
16 provide the defendant seeking the discovery with
17 relevant and material information.

18 So the Court basically said you must answer
19 these questions, you are within your rights to
20 decline to answer questions that fall within the
21 scope of the confidentiality provision.

22 And if you take a look at the opinion, you
23 will see that the Court has weighed the right of
24 privacy and the expectation of privacy arising out
25 of the confidentiality provisions in the

0016

1 settlement agreement and balanced those against
2 the rights for discovery, which we think is what
3 appropriately must be done.

4 We have also provided the Court with a Fourth
5 DCA case that recognizes a general principal that
6 materials sought to be discovered must properly be
7 related to the issues involved in the litigation.
8 That's a case that has been cited in our brief and
9 recognizes the fact that Rule 1.280(b)(1) is not
10 to be used simply for gathering information
11 regarding settlement possibilities.

12 And we have given the Court two federal cases
13 that interpret the identical provisions in the
14 federal rules and weigh the privacy rights against
15 the rights to disclosure and approve a procedure
16 whereby the Court has conducted an in camera
17 inspection to make a determination as to whether
18 any provisions in the settlement agreement must be
19 disclosed because they have the possibility of
20 providing grounds for impeachment of the settling
21 party.

22 We think that that's the appropriate
23 procedure for the Court to follow under these
24 circumstances.

25 There have been a number of arguments that

0017

1 have been made as to potential reasons for the
2 disclosure of information contained within the
3 settlement agreement. Those are contained within
4 the reply memo that Your Honor has not yet had an
5 opportunity to see, but if you turn to page 6,
6 there are individual bullet points that catalog
7 the bases --

8 THE COURT: I'm sorry, this is contained
9 where?

10 MR. SCAROLA: In the reply memo that was
11 filed by defendants. I'll just give Your Honor my
12 copy.

13 There are various bullet points at the top
14 that talk about things that reasonably might
15 appear within a settlement agreement and might
16 provide a basis for some argument that portions of
17 the settlement agreement are relevant or material.

18 We are prepared to provide the settlement
19 agreement to Your Honor for in camera inspection.
20 I have it with me today. It's relatively brief,
21 and you can look at it quickly. You're going to
22 find, to corroborate the representations we have
23 already made to the Court, there are no
24 cooperation provisions in the agreement, there are
25 no provisions that require Arthur Andersen to

0018

1 produce witnesses in a particular forum.
2 THE COURT: How many pages is it?
3 MR. SCAROLA: It's about four or five.
4 THE COURT: Any objection to my looking at it
5 now?
6 MR. CLARE: No, Your Honor.
7 THE COURT: Okay.
8 It's more than four or five.
9 MR. IANNO: Even with my eyes, Your Honor, it
10 looks single spaced.
11 THE COURT: I saw that.
12 MR. SCAROLA: It is single spaced.
13 I tried to tab the paragraphs that I thought
14 might be of particular concern to the Court, and
15 some of it you'll be able to see just by the
16 nature of the subject matter dealt with in the
17 paragraph.
18 THE COURT: Can you give me just one second
19 to look at it?
20 MR. SCAROLA: Sure.
21 THE COURT: Because I want to get a sense of
22 what we're talking about.
23 MR. SCAROLA: Absolutely.
24 Your Honor, may I interrupt for just one
25 moment?

16div001556

0019

1 THE COURT: Sure.

2 MR. SCAROLA: I would appreciate if Your
3 Honor would order me to produce that for in camera
4 inspection.

5 THE COURT: Oh, yes, I just did. I'm sorry.

6 MR. SCAROLA: Thank you. I thought that's
7 what you were doing.

8 THE COURT: That's what I was doing.

9 MR. SCAROLA: Thank you.

10 THE COURT: Okay.

11 MR. SCAROLA: To conclude, Your Honor, in
12 addition to those items that are listed in the
13 reply memo, there has, for the first time, been a
14 suggestion that if there were a choice of forum
15 provision contained within that agreement, that it
16 might have some relevance to the issues with
17 respect to forum non conveniens, and I think
18 Your Honor will see from a review of the document
19 that there is no stipulation with regard to an
20 appropriate forum for litigation concerning that
21 agreement.

22 So I think that upon review of the document,
23 there is only one provision in the document that
24 has any relevance or materiality with respect to
25 this litigation, and that is the issue of the

0020

1 amount of the settlement which relates solely to
2 the issue of setoff, and upon court order, we are
3 prepared to make a confidential disclosure of the
4 amount of that settlement under the terms of the
5 confidentiality agreement previously entered. We
6 would designate that as confidential information
7 in order to restrict its proper use to this case
8 and make the disclosure with regard to that
9 amount.

10 THE COURT: Any objection to my making a
11 photocopy of it?

12 MR. SCAROLA: No, not at all.

13 THE COURT: Thanks.

14 Was the settlement consummated?

15 MR. SCAROLA: Yes.

16 THE COURT: Under its terms?

17 MR. SCAROLA: Yes.

18 THE COURT: Okay.

19 Do you accept that representation?

20 MR. CLARE: That it was consummated under its
21 terms?

22 THE COURT: Yeah.

23 MR. CLARE: I don't have any reason to
24 believe or not believe that that's incorrect.

25 I would say that this is a non-privileged

0021

1 contract that's no different than any other
2 contract, that I'd like the opportunity to examine
3 the document to understand and pressure test the
4 assertions that Mr. Scarola has made about the
5 document, the nuances associated with it that I
6 would like to explore.

7 And, you know, the Florida courts --

8 MR. SCAROLA: I'm sorry, before there's a
9 rebuttal --

10 THE COURT: I'm sorry, you weren't done.

11 MR. SCAROLA: There's just one last point
12 that I want to make.

13 THE COURT: Sure.

14 MR. SCAROLA: And that is that Florida does
15 have a constitutionally-recognized right to
16 privacy. This is private economic information.
17 There must be a balancing test between that right
18 to privacy and the defendant's rights in this
19 lawsuit, and that right to privacy needs to be
20 taken into careful consideration before any other
21 terms of this agreement were to be disclosed. And
22 I suggest that upon reading the agreement, it is
23 abundantly clear that none of the stated purposes
24 for which this discovery is sought would be served
25 by the disclosure of any other provision in that

0022

1 document at all.

2 THE COURT: Okay.

3 MR. SCAROLA: Thank you.

4 THE COURT: What did you want to respond,
5 sir?

6 MR. CLARE: Just on that last point, Your
7 Honor, there's --

8 MR. SCAROLA: I'm sorry. Just one last
9 thing.

10 Mr. Jackson has been rehearsing all day long
11 to be able to say with credibility I agree with
12 everything Mr. Scarola just said, so could we just
13 give him the opportunity to do that on behalf of
14 Arthur Andersen?

15 MR. JACKSON: Your Honor, Hank Jackson on
16 behalf of Arthur Andersen.

17 THE COURT: Okay. I'm glad to know that
18 you're here. I didn't realize you were here for
19 Arthur Andersen.

20 MR. JACKSON: I'm from Holland & Knight.
21 We represented Arthur Andersen in the previous
22 lawsuit and were part of the settlement
23 negotiations and the settlement.

24 I'd just like to reiterate that the
25 confidentiality provision was a material term of

0023

1 that agreement, and we believe that to the extent
2 permissible by law, that it should be enforced,
3 and it should only be breached or allowed to come
4 out in the open to the extent that it is clearly
5 established that it is relevant. And we believe
6 that the proper procedure is for the Court to look
7 at it in camera and to make that judgment, and
8 we'd ask that you do that.

9 THE COURT: What did you want to respond,
10 sir?

11 MR. CLARE: On Mr. Scarola's final point,
12 with the Court's permission, I'll hand to counsel
13 and to Your Honor just some citations to Florida
14 cases that are all cited in our brief that make
15 the point that a contractual confidentiality
16 provision cannot be used to subvert discovery.

17 There's a protective order in this case. We
18 will agree to be bound by the full extent of the
19 confidentiality order in terms of disclosing it.
20 We will go one step further and agree to make it
21 attorney's eyes only with the proviso that I be
22 able to show it to a limited number of in-house
23 attorneys at Morgan Stanley for the purposes of
24 evaluating it for the purposes that I've
25 identified for Your Honor.

16div001561

0024

1 So with the confidentiality order, the
2 balancing test that Mr. Scarola has already
3 identified has already been done. Those privacy
4 considerations that Arthur Andersen is worried
5 about about disclosure, nothing's going to be in
6 the open. This is all going to be treated as the
7 highest degree of confidentiality under the
8 protective order that Your Honor has already
9 signed, and we agree and are willing to accept
10 those restrictions on our use of it.

11 THE COURT: Okay. Let me take another
12 advisement, okay?

13 Thank you very much.

14 MR. SCAROLA: Your Honor, there is one
15 additional brief matter, if we could impose upon
16 the Court. We had actually set it for an 8:45
17 hearing this morning, and because of Your Honor's
18 crowded calendar, we hoped that we might just
19 bring it to you this afternoon.

20 THE COURT: Sure. What is that?

21 You can take this back, sir. Thanks.

22 MR. SCAROLA: Your Honor, it relates to the
23 exchange of correspondence with which we barraged
24 you concerning the entry of an order --

25 THE COURT: Oh, yeah. Okay.

0025

1 MR. SCAROLA: -- arising out of a stipulated
2 agreement between the parties.

3 If I could hand Your Honor the transcript of
4 the earlier hearing.

5 THE COURT: Okay. Is it your position there
6 was a stipulation?

7 MR. SCAROLA: It is absolutely my position
8 that there was an on-the-record stipulation, yes,
9 Your Honor.

10 THE COURT: Okay.

11 MR. SCAROLA: This is the motion for entry of
12 an order upon stipulation of the parties, and I'll
13 pull Your Honor's attention to those specific and
14 brief provisions that indicate that there was
15 indeed a stipulation.

16 If we begin at page 2, I am addressing the
17 Court at line 13, "We have come to an agreement,
18 specifically with regard to the motion to compel
19 production of e-mails."

20 Going down to line 18, "For the record, my
21 name is Jack Scarola. I'm here on behalf of the
22 plaintiff, Coleman Parent Holdings. There are two
23 motions. The first is a motion to compel directed
24 to the production of e-mails. The agreement that
25 we have reached is that the defendant, Morgan

0026

1 Stanley, will produce a witness who is
2 knowledgeable with respect to the retention and
3 retrieval -- the retention policies and retrieval
4 capabilities with regard to e-mails. They will
5 also produce all documents that were submitted to
6 federal regulators with regard to Morgan Stanley's
7 e-mail retention policies and retrieval
8 capabilities."

9 Morgan Stanley was sued by government
10 regulators and paid in excess of a million dollars
11 for violating document retention policies, and we
12 wanted to get the documents that the federal
13 government obtained in connection with that
14 proceeding. So there's an agreement that they're
15 going to produce a witness.

16 The next part of the agreement appears at
17 page 5.

18 THE COURT: Okay.

19 MR. SCAROLA: Mr. Clare is speaking.

20 Mr. Clare addresses the Court at line 14. He
21 says, beginning at line 12, "Just in the interest
22 of completeness and while we're waiting for the
23 schedule," because there was another motion we
24 were discussing, "Mr. Scarola described in broad
25 outlines what the agreed-upon order would be on

0027

1 this other motion. There is one caveat I
2 explained to Mr. Scarola in the hallway, and we
3 will work it out between the parties before we
4 submit an agreed-upon order to Your Honor. I am
5 not aware as I sit here right now what limitations
6 there are right now without disclosing to
7 Mr. Scarola's client information we provided to
8 federal regulators."

9 And I think that "without" is supposed to be
10 "about" disclosing, "there are right now about
11 disclosing."

12 THE COURT: You're saying if there were
13 regulations in place that would prohibit them from
14 disclosing them.

15 MR. SCAROLA: That's right.

16 THE COURT: Okay.

17 MR. SCAROLA: What Mr. Clare is saying is
18 there may be some restrictions and I don't know
19 what they are and I need --

20 THE COURT: We may not be able to do some of
21 this stuff.

22 MR. SCAROLA: That's correct. So he is
23 saying that.

24 He says, "We agreed to provide whatever it is
25 we can provide."

0028

1 Okay? So he's saying, whatever documents
2 we're allowed to provide, we'll give to you.

3 He then goes on to say at line 6 on page 6,
4 "I know there are materials we can provide, I just
5 don't know the scope of it."

6 I then speak, and I say, "The only caveat to
7 that is that there's a commitment that they will
8 provide good faith cooperation in obtaining
9 whatever information is necessary in order to make
10 full disclosure."

11 And Mr. Clare says, "That's correct."

12 THE COURT: Okay.

13 MR. SCAROLA: Now, that was the agreement.
14 We're going to both provide witnesses that are
15 going to talk about e-mail retention procedures
16 and capabilities, and the second part is, they're
17 going to give us everything that they gave to the
18 federal government except to the extent that they
19 are prohibited from doing so. And if there are
20 prohibitions, they are going to provide good faith
21 cooperation in an effort to try to give us full
22 disclosure.

23 That's the order that I submitted to the
24 Court, and there has been an effort now to recede
25 from that agreement and to change it.

0029

1 THE COURT: Do you have a copy of your
2 proposed order?
3 MR. SCAROLA: Yes, Your Honor, I do.
4 I provided the Court separately the original --
5 THE COURT: It's attached? Oh, this is it.
6 Okay.
7 MR. SCAROLA: Did I give it to Your Honor?
8 THE COURT: I assume so. Yeah. It's
9 attached to the transcript.
10 MR. SCAROLA: That's the one, yes.
11 THE COURT: Okay. That's fine. Let me just
12 look at it.
13 MR. SCAROLA: Sure.
14 THE COURT: Okay. And what's the objection?
15 MR. IANNO: Judge, Joe Ianno. This dispute
16 centers around one thing.
17 THE COURT: What's that?
18 MR. IANNO: The submission that Mr. Scarola
19 wants that was provided to the federal regulators
20 is right now the subject of a motion pending in
21 the Federal Court in the Southern District to
22 prevent its disclosure. By providing it to
23 Mr. Scarola, we would be violating or mooting that
24 motion that was filed by a co-defendant in that
25 case.

16div001567

0030

1 What we've told Mr. Scarola --

2 THE COURT: I'm sorry, tell me a little bit
3 more about what you're saying.

4 MR. IANNO: Okay. There is a motion right
5 now that is pending, an action in the Federal
6 District that we've cited in our response. It's
7 entitled --

8 THE COURT: I don't have your response. If
9 you have it, that would be great.

10 MR. IANNO: I do. Here's a copy of our
11 response, Your Honor.

12 THE COURT: Thank you. Okay.

13 MR. IANNO: And we've attached a proposed
14 alternate order to our response. And the case in
15 the federal court is styled In Re: Initial Public
16 Offering Securities Litigation, it's pending in
17 the Southern District of New York in Federal
18 Court. That motion is directed -- it's filed by a
19 co-defendant of Morgan Stanley's in that case --
20 to prevent the disclosure of what is called the
21 Wells Submission, which is the document that
22 Mr. Scarola is attempting to get.

23 THE COURT: I'm sorry, who is trying to
24 prevent the disclosure of this?

25 MR. IANNO: A co-defendant. There is another

0031

1 underwriting defendant.

2 THE COURT: A private party?

3 MR. IANNO: Another private party. They're
4 saying that this document is prohibited from
5 disclosure because it's settlement discussions.
6 It's the negotiations leading up to the settlement
7 with the SEC, and they're saying that settlement
8 discussions, not the final agreement, but the
9 settlement discussions leading up to the SEC
10 settlement are prohibited from being disclosed in
11 discovery.

12 That motion, to my understanding, has been
13 fully briefed and is awaiting ruling by Judge
14 Scheindlin in New York.

15 THE COURT: These are documents that your
16 client provided?

17 MR. IANNO: To the SEC, I believe that's
18 correct, yes, Your Honor.

19 THE COURT: Okay.

20 MR. IANNO: And this underwriting defendant,
21 co-defendant, is saying these documents are not
22 discoverable in the federal court. We're
23 waiting --

24 THE COURT: Were they documents drafted for
25 the SEC or just documents provided to the SEC?

0032

1 MR. IANNO: They were drafted for the SEC in
2 connection with the settlement discussions of the
3 SEC action that Mr. Scarola referenced in his
4 argument.

5 THE COURT: These are e-mails?

6 MR. IANNO: No. It's a document describing
7 Morgan Stanley's e-mail retrieval and retention.

8 THE COURT: Oh, I see.

9 MR. IANNO: It's discussing how e-mails are
10 stored, how they're backed up, how they're
11 retrieved, things of that nature. It's about a
12 40 or 50-page document is my understanding of that
13 document. And it's submitted in connection with
14 the SEC claims against Morgan Stanley and other
15 defendants, as I understand that.

16 What Mr. Clare said when we were here on
17 November 6th, and it's reflected in the
18 transcript, is he did not know, and he's here to
19 speak to that, but what was our ability to waive
20 at the time. And what Mr. Scarola didn't read
21 from the transcript is when Mr. Clare was here on
22 page 6 --

23 THE COURT: Let me get to that. Okay. What
24 line?

25 MR. IANNO: It's line 8. And it's where

0033

1 Mr. Scarola stopped. "And I don't want to
2 represent to the Court that we're waiving or even
3 have the ability to waive protections that I'm not
4 aware of right now."

5 Specifically, this case came up after we went
6 back and consulted with the client. If you look
7 just above that on line 4, Mr. Clare says he
8 doesn't know all the details without consulting
9 the client.

10 What we had agreed to do on November 6th is
11 go back and draft a proposed agreed order. That's
12 reflected back on page 2, I believe, where the
13 Court asks you, you expect me to remember this
14 when you submit a proposed agreed order. That's
15 what we were talking about.

16 What we've told Mr. Scarola repeatedly and
17 what we've said in our proposed order, once the
18 judge rules in New York, if we're permitted to
19 disclose it, we'll give it to you within five
20 days. That's the only dispute.

21 If the judge rules that it's not
22 discoverable, we can't produce it in this case
23 without violating that court order. And what
24 Mr. Scarola wants us to do, he says, well, I want
25 you to go in and waive that protection and waive

0034

1 the judge's ruling, because if the judge has ruled
2 today --
3 THE COURT: He's saying you already did.
4 Is that right?
5 MR. SCAROLA: Absolutely.
6 MR. IANNO: But Mr. Clare when he was here
7 specifically told the Court, and we knew, and the
8 Court recognized indeed that there may be other
9 problems with the disclosure of this document.
10 THE COURT: Well, let me ask you this.
11 The way I read that transcript, you-all were
12 agreeing that unless some federal regulation
13 prohibits the disclosure, you'll make it, and if
14 it does, you'll apply, you know, to permit a
15 disclosure.
16 MR. IANNO: And we've waived confidentiality.
17 We have done the good faith cooperation and waived
18 the confidentiality. The only thing we can't
19 waive is this federal court proceeding at this
20 time.
21 THE COURT: Why not?
22 MR. IANNO: Because there's a --
23 THE COURT: Because you don't want to, or
24 because there's something else going on?
25 MR. IANNO: It's another defendant that

16div001572

0035

1 brought the motion, Judge. We would be mooting
2 the co-defendant's motion at that point in time.
3 All the details, I'm not a party, I'm not a member
4 of the Bar in New York, I don't know all the
5 details going on in the New York case and why or
6 why not this document is being prohibited from
7 disclosure.

8 But, for instance, if this court rules that
9 we should disclose the Wells Submission to Scarola
10 and at the same time the federal court has ruled
11 that it can't be disclosed --

12 THE COURT: Can't be disclosed to whom?

13 MR. IANNO: To anyone.

14 As I understand the motion in New York, it's
15 to prohibit disclosure of this document in
16 discovery.

17 THE COURT: Well, but that's different than
18 saying it can't be disclosed to a non-party.

19 MR. IANNO: Well, I think it's saying you
20 can't disclose this document to anyone.

21 MR. CLARE: Your Honor --

22 MR. IANNO: And maybe Mr. Clare --

23 MR. CLARE: I only have a little bit better
24 of an understanding of this, because I'm also not
25 a party to this New York action.

0037

1 we had requested in the Wells Process, which is an
2 enforcement action, that we had to maintain its
3 confidentiality.

4 THE COURT: As against whom; the world?

5 MR. CLARE: As against the world, sure.

6 And if we had produced it to the New York
7 Times or provided it to third parties, then we
8 were waiving this protection, this Wells
9 Regulatory Process that we had in place.

10 And so we're willing to waive that. Morgan
11 Stanley has said, for the good of this agreement,
12 we are more than happy to waive that request. The
13 only thing -- There's this judicial proceeding
14 that is determining what is this Wells Process
15 about. It is exactly the federal regulatory
16 enforcement process that's being interpreted by
17 Judge Scheindlin in New York, what is the Wells
18 Process.

19 When you get to a certain stage in the Wells
20 Process and the parties are contemplating a
21 settlement, do materials that are exchanged
22 between the SEC and the potential targets of an
23 investigation, do they take on the conduct of
24 settlement negotiations such that they're not
25 discoverable by third parties? That is the issue

0038

1 that's being --

2 THE COURT: What do you mean they're not
3 discoverable by third parties? If I enter into a
4 settlement agreement, while there may be limits or
5 there may be privileges attached as to what gets
6 said in the settlement, nothing prohibits me in
7 general from going and telling everybody else what
8 happened.

9 MR. CLARE: And the Wells Process, in order
10 to maintain that confidentiality, which is a
11 confidentiality in the Wells Process that
12 implicates enforcement considerations that it
13 might get us crosswise with the SEC if we were to
14 disclose during settlement discussions with the
15 SEC, if we were to go out and say here's what
16 we're talking about the SEC, here's the
17 enforcement proceedings that's underway, here's
18 what they're looking at, that would get my client
19 potentially crosswise with the SEC.

20 So there's a lot of issues at stake with the
21 integrity of the Wells Process.

22 THE COURT: But the SEC is not saying you
23 can't disclose this?

24 MR. CLARE: The SEC is not a party to the
25 pending action in New York.

0040

1 is somehow related to Morgan Stanley. It's a
2 Morgan Stanley subsidiary or affiliate.

3 Now, they can't come before Your Honor and
4 say we're going to provide you with good faith
5 cooperation to get all these documents while at
6 the same time through a subsidiary they're trying
7 to get a New York court to enter an order that
8 would prohibit us from getting the documents.

9 And the bottom line is, this proposed order
10 asks them to do nothing that would violate any
11 existing obligation of confidentiality, but if
12 there is no existing obligation of
13 confidentiality, they're required to turn over
14 everything that they have the authority to turn
15 over. If the authority exists today to turn it
16 over, we should get it. If it doesn't exist
17 today, we can't get it, but they're required to
18 provide good faith cooperation in helping us to
19 get it.

20 THE COURT: Okay.

21 MR. SCAROLA: That's all that we're asking.
22 That's what they agreed to.

23 THE COURT: Let me take another advisement.
24 It's his motion, he goes first and last.

25 MR. IANNO: I have an alternative order,

0041

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Your Honor, on that motion.

THE COURT: Thank you very much.

MR. SCAROLA: Thank you, Your Honor. I appreciate your extra time this afternoon. Happy Thanksgiving.

MR. IANNO: And hopefully, this is your last hearing before the holiday.

THE COURT: It is now.

Thanks. Thanks. Bye-bye.

MR. IANNO: Thank you, Judge.

(Proceedings concluded at 5:18 p.m.)

0042

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T E

THE STATE OF FLORIDA)
)
COUNTY OF PALM BEACH)

I, Lisa D. Danforth, Registered Professional Reporter, Certified Real-Time Reporter, do hereby certify that I was authorized to and did report the foregoing proceedings at the time and place herein stated, and that the foregoing is a true and correct transcription of my stenotype notes taken during said proceedings.

IN WITNESS WHEREOF, I have hereunto set my hand this 1st day of December, 2003.

LISA D. DANFORTH, RPR, CRR

4

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR
PALM BEACH COUNTY, FLORIDA
CASE NO. 2003 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiffs,

-vs-

MORGAN STANLEY & CO., INC.,

Defendant.

_____ /

Transcript of Proceedings beginning at

3:30 p.m., and concluding at 4:31 p.m., on Friday,

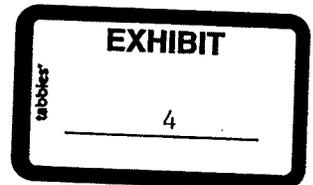
February 20, 2004, taken at the Palm Beach County

Courthouse, West Palm Beach, Florida, before the

Honorable Elizabeth T. Maass, Circuit Court Judge.

Reported by Shirley D. King, Professional Court

Reporter.



PINNACLE REPORTING, INC.
(561) 820-9066

2

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

A P P E A R A N C E S

SEARCY DENNEY SCAROLA
BARNHART & SHIPLEY, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33409
Phone: (561) 686-6300
BY: JACK SCAROLA, ESQUIRE

JENNER & BLOCK LLP
One IBM Plaza
Chicago, Illinois 60611
Phone: (312) 222-9350
BY: JEROLD S. SOLOVY, ESQUIRE
RONALD L. MARMER, ESQUIRE

KIRKLAND & ELLIS LLP
777 South Figueroa Street
Los Angeles, California 90017
Phone: (213) 630-8413
BY: LAWRENCE P. BEMIS, ESQUIRE
THOMAS A. CLARE, ESQUIRE

CARLTON FIELDS
Esperante
222 Lakeview Avenue, Suite 1400
West Palm Beach, Florida 33401
Phone: (561) 659-7070
BY: JOSEPH IANNO, JR., ESQUIRE

Also present: Steve Fastman (ph)

1 P R O C E E D I N G S

2 - - -

3 THE COURT: Good afternoon. Have a seat.
4 This is Coleman and Morgan Stanley. Where do we
5 want to start?

6 MR. SCAROLA: Your Honor, Jack Scarola on
7 behalf of Coleman Parent. With me is Mr. Jerry
8 Solovy, Mr. Ron Marmer, and this is Steve Fastman
9 (ph), our corporate representative.

10 And I think that we are probably in
11 agreement that the first issue to be dealt with,
12 which can be dealt with rather easily, is a
13 determination as to the consolidation of the two
14 related pending cases. And I think that both
15 parties are in agreement that it is appropriate,
16 both for purposes of discovery and trial, to
17 consolidate these related matters.

18 THE COURT: Is that accurate?

19 MR. BEMIS: Good afternoon, Your Honor.
20 Lawrence Bemis with Kirkland & Ellis on behalf of
21 Morgan Stanley and Morgan Stanley Senior
22 Funding.

23 The answer is, yes, I think we all agree to
24 that.

25 THE COURT: I'm just trying to think,

PINNACLE REPORTING, INC.
(561) 820-9066

4

1 mechanically, how do we want to do that?

2 MR. BEMIS: Your Honor, there is no separate
3 order on that. We did submit a proposed order
4 which was based on what we understood was a
5 sample pretrial compliance order for case
6 management conference Your Honor had entered, but
7 the consolidation issue, for reasons which escape
8 me, was not put in there, so we will need a
9 separate order ordering consolidation.

10 THE COURT: Right. But I'm just trying to
11 figure out mechanically what we want the clerk to
12 do with the files and how we would like to
13 proceed with the pleadings.

14 MR. BEMIS: I think the way it's done is we
15 put both case captions on each and file them
16 accordingly.

17 MR. SCAROLA: Either that or Your Honor's
18 order can simply direct us to file all pleadings
19 under the lower case number and we'll just style
20 everything under the lower case number. I think
21 what otherwise happens is that the clerk requires
22 us to file duplicates.

23 THE COURT: We don't want to do that. I
24 want to have one place where we look for
25 everything.

PINNACLE REPORTING, INC.
(561) 820-9066

5

1 MR. BEMIS: What I would like, Your Honor,
2 is not to have the single number on the cases,
3 but that both numbers appear, for reasons I'm
4 going to explain. There may be additional
5 counsel in this case who will be only in one of
6 the cases and not the other.

7 THE COURT: So are we agreeing we're
8 consolidating for all purposes?

9 MR. SCAROLA: Yes, Your Honor, both
10 discovery and trial.

11 MR. BEMIS: Yes, Your Honor.

12 THE COURT: For discovery and trial. Okay.
13 So we will use a joint caption, but with the
14 lower number listed first, and you'll direct the
15 clerk to place everything from now on in the
16 lower-numbered case?

17 MR. SCAROLA: I think that works.

18 MR. BEMIS: That's fine, Your Honor.

19 THE COURT: Okay. Is there a written motion
20 to consolidate? If so, who filed it?

21 MR. BEMIS: It is not, Your Honor. But it
22 would normally be something that under Rule 1.200
23 we would take up at this time.

24 THE COURT: No, no. I'm just trying to
25 think. I'm writing my notes so I can do the

PINNACLE REPORTING, INC.
(561) 820-9066

6

1 order and whether I had to say it was a joint or
2 was it written or oral --

3 MR. SCAROLA: Pursuant to oral stipulation
4 of the parties.

5 THE COURT: So we agree it is a joint ore
6 tenus motion to consolidate?

7 MR. BEMIS: Actually, it's in our joint
8 written statement to the Court, as you ordered,
9 that we agreed to it, so it's actually pursuant
10 to a written statement.

11 THE COURT: Okay. What next?

12 MR. SCAROLA: Your Honor, I think that the
13 next matter appropriately addressed is the issue
14 of the trial date. I think that once Your Honor
15 has made a determination as to when this case
16 will be tried, then the parties are going to be
17 able to come to an agreement with regard to
18 establishing other related deadlines based upon
19 that trial date.

20 And Your Honor may recall from a review of
21 our submissions, that not surprisingly on this
22 side of the courtroom we have requested an August
23 trial date and on that side of the courtroom they
24 have suggested a February 2005 trial date.

25 I will tell Your Honor, that from the

PINNACLE REPORTING, INC.
(561) 820-9066

7

1 Plaintiff's perspective, we are prepared to split
2 the difference with the defense and choose a date
3 between the August and February date, taking into
4 account these considerations; the Jewish Holidays
5 are in September and it would be difficult for us
6 to select a date that was either during or very
7 close to the September Jewish Holidays, and,
8 obviously I think that all parties would be
9 concerned in terms of our ability to select a
10 jury if we start bumping up against Thanksgiving,
11 Christmas and the New Year. What that means,
12 since we anticipate 15 trial days, three weeks of
13 trial, is that a date approximately the middle of
14 October would be far enough away from the
15 September holidays and also far enough away from
16 Thanksgiving that we would be able to comfortably
17 complete the trial in that period. So our
18 suggestion, in light of the requests that have
19 been made on both sides, if it fits in with Your
20 Honor's calendar, we are suggesting that a date
21 be selected in the beginning, approximately mid
22 October.

23 THE COURT: I guess a more fundamental
24 preliminary question, are we at issue yet?

25 MR. BEMIS: We are in --

PINNACLE REPORTING, INC.
(561) 820-9066

8

1 MR. SCAROLA: We are currently at issue.

2 THE COURT: Although you still plan to file
3 a motion to amend punitive damages?

4 MR. SCAROLA: That is correct, we are
5 anticipating filing a motion to amend to add
6 punitive damages.

7 I will tell Your Honor that it is our
8 position that that motion does not, because it
9 only goes to the relief sought, place the case in
10 a position where this matter is not at issue and
11 could not be set for trial.

12 THE COURT: Your suggestion is this be set
13 for trial in mid October?

14 MR. SCAROLA: That's correct.

15 THE COURT: That strikes me, quit honestly,
16 as pretty ambitious for a case this size.

17 MR. SCAROLA: Well, Your Honor, we have been
18 proceeding very quickly with regard to the
19 discovery in this matter. As Your Honor is well
20 aware, this is not the first litigation that
21 arises out of these related circumstances, so
22 discovery has been expedited by virtue of the
23 fact that we have been able to exchange documents
24 previously compiled in relation to other
25 litigation and rely upon prior deposition

16div001587

PINNACLE REPORTING, INC.
(561) 820-9066

9

1 testimony taken in connection with other
2 litigation. And while this certainly is a
3 matter of substantial magnitude, we feel very
4 comfortable about our ability to be ready for
5 trial in early August and certainly anticipate no
6 problem whatsoever in being ready to go to trial
7 in October. So I don't think it is as ambitious
8 as might appear at first blush.

9 MR. BEMIS: Your Honor, may I use the
10 podium?

11 THE COURT: However you're more comfortable
12 is fine.

13 MR. BEMIS: I'm used to a podium.

14 Your Honor, as you're aware, there are two
15 calendars. And I won't go in the intermediate
16 base because I do agree with Mr. Scarola, that
17 once we have a trial date, we can work
18 backwards. And whatever date you select, we'll
19 deal with that offline and not take the Court's
20 time.

21 I didn't know until just now that they're in
22 agreement that it's a three-week trial. So it's
23 a jury trial.

24 THE COURT: Well, the only thing I will
25 point out is we're not in trial on Fridays. So

PINNACLE REPORTING, INC.
(561) 820-9066

10

1 if we're talking about 15 trial days, it's really
2 a four-week trial.

3 MR. BEMIS: So it's a four-week trial, Your
4 Honor.

5 Based on the original schedule, we proposed
6 a date approximately 12 months forward. And I
7 thought that was a very aggressive schedule, for
8 reasons I'm going to tell you, and I question
9 whether we can meet it. And the reason is,
10 overall, while they say this has been done
11 before, it is true that they have done it before,
12 as I'm going to explain, but Morgan Stanley and
13 Morgan Stanley Senior Funding haven't been a
14 party to any of the other litigation and we
15 haven't gone through all of this before, so they
16 had a huge head start in terms of their
17 preparation for the case.

18 Even an October schedule, Your Honor, I
19 think is extraordinarily unrealistic for a number
20 of reasons. First of all, it is a huge case and
21 it's not old. I mean, these cases were filed in
22 May of 2003. It was on the very eve of the
23 running of the statute of limitations, which had
24 already been extended by --

25 THE COURT: That's not relevant to what

PINNACLE REPORTING, INC.
(561) 820-9066

11

1 we're looking at, but go ahead, sir.

2 MR. BEMIS: But the point of it is that
3 there are no equities in this case that require
4 us to go on a crazy track of double tracking
5 depositions and creating all kinds of logistical
6 difficulties when a pace of one year to get this
7 case finished is not unreasonable, given its
8 size. We have \$2 billion of damages asserted on
9 one side; \$680 million on our side. You have
10 five sets of parties to this case: You have the
11 parties to the acquisition, we have the
12 accountants, we have the law firm, investment
13 bankers, financial advisors. There are three
14 sets of either litigation or proposed litigation
15 that were massive that preceded this. There was
16 the Coleman claims against Sunbeam, which did not
17 result in litigation, but there was a lot of
18 paperwork generated there. Coleman sued Arthur
19 Anderson. There was a big settlement there.
20 You're familiar with that because we had an issue
21 over the production of the settlement agreement.
22 There was a shareholder suit for Sunbeam. SEC
23 investigation. We received in August 400 boxes
24 of documents in the case. There have been 210
25 witnesses who have given testimony in these cases

PINNACLE REPORTING, INC.
(561) 820-9066

12

1 over 400 plus days. And we have had eight
2 months at this point to try to work ourself
3 through that.

4 Now the parties have been moving quickly.
5 I've been on the case only three or four weeks.
6 And I was brought in because it has been moving
7 quickly and because I've also -- I practiced in
8 Florida for 18 years. This case -- in nine
9 months we have accomplished an extraordinary
10 amount of written discovery. I could go through
11 it, but I think you're aware of it. We have many
12 document requests, hundreds of requests for
13 admissions, interrogatories. And that's on both
14 cases. We've been doing both cases
15 simultaneously. We've had 18 depositions taken
16 already. There are 28 deposition notices or
17 commissions pending today. Twenty-eight. Now
18 in terms of motion practice, you're well familiar
19 with that. And on top of what we've
20 accomplished, we have the pending appeal on the
21 venue issue. Now Your Honor's ruled on that
22 issue on December 15th. The first appellant
23 brief, Your Honor, is due February 25th. And if
24 we assume the 40/40 -- or excuse me -- 20/20 plus
25 extensions, if any are requested, we still have

16div001591

PINNACLE REPORTING, INC.
(561) 820-9066

13

1 the briefing, their oral argument, which we'll be
2 requesting. I frankly -- my experience in the
3 Fourth DCA is that we probably won't have a
4 decision by either August or October. Now I
5 could be wrong on that. But the last case I had,
6 which the decision came down in October of last
7 year, it took 18 months from oral argument to get
8 an opinion and it's now on rehearing. So I
9 think we're kidding ourselves that we're going to
10 get that issue resolved. Now why is that
11 important? Two reasons. One is, you can't enter
12 a final judgement in the case, even if you triad
13 (ph) the verdict, for either party. You'd have
14 to stay entry of the judgement. If the court of
15 appeals were to disagree with Your Honor -- and
16 respectfully that is a possibility --

17 THE COURT: Sure.

18 MR. BEMIS: -- the entire trial is a nullity,
19 under the Supreme Court's decision in Leroy
20 versus Great Western United at 443 U.S. 173. It
21 was a case under the Williams Act. I don't
22 believe there's any Florida case directly on
23 point, but I know that's Federal law and I
24 believe that would be the law in Florida.

25 Also, Your Honor, there's going to be an

PINNACLE REPORTING, INC.
(561) 820-9066

14

1 additional party requested to be added. Morgan
2 Stanley Senior Funding intends to add Arthur
3 Anderson as a defendant to the case in the Morgan
4 Stanley Senior Funding case. The claims there
5 will be essentially duplicative, in the sense
6 that they will mirror the claims that Coleman
7 filed against Arthur Anderson and resulted in the
8 settlement agreement that you reviewed. We have
9 proposed a date of April 16th to get that
10 resolved.

11 One of the reasons why we need additional
12 time is that Kirkland & Ellis cannot represent
13 Morgan Stanley Senior Funding in that action.
14 We have a conflict. And so Morgan Stanley Senior
15 Funding is reviewing counsel now and they're
16 going to have to handle that matter. The
17 significance of this I think Your Honor would be
18 aware of, having reviewed the settlement
19 agreement, which is subject to a protective order
20 so I don't want to go into the terms of it
21 because it would, I think, violate the terms of
22 it, unless we did an in camera in chambers, but I
23 think Your Honor would know the reason we would
24 bring them in now that we have the settlement
25 agreement, which we didn't get, by the way, until

PINNACLE REPORTING, INC.
(561) 820-9066

15

1 December, so it's a fairly recent development in
2 the case.

3 Another reason, Your Honor, about what is
4 going to happen in terms of scheduling, is just
5 the sheer number of depositions in this case. I
6 did say there have been 18 taken to date. There
7 are now requested, and that means notices are out
8 or commissions have been requested, so we're
9 manipulating dates and witness availability --
10 and, by the way, these have been set without
11 witnesses being asked whether they're available,
12 28 of them in 10 states. We intend to request a
13 total of 42 more depositions and they're located
14 all over the United States. In summary, we've
15 got 28 pending, most of which are by the
16 Plaintiffs. There are some that we have
17 commissions for and we're going to request a
18 total of 42. That's 70 depositions. It's not
19 possible to take 70 depositions in the time that
20 was originally proposed, August 2nd, for trial.
21 That would be one deposition a day, because
22 there's only 70 days left until their proposed
23 discovery cutoff. It's not going to happen. And
24 even extending the discovery cutoff on fact
25 discovery, it is a maniacal schedule that is not

PINNACLE REPORTING, INC.
(561) 820-9066

16

1 conducive to justice in the case. It just isn't
2 necessary when there are no equities to
3 advancement.

4 There are issues you're going to have to
5 resolve, whether it be by summary judgement,
6 which is likely on somebody's part on some of the
7 claims, and we are going to respectfully renew
8 our request that the choice of law issue be
9 resolved prior --

10 THE COURT: Let me ask you all this: I
11 mean, in all honesty, I think October is two
12 months ambitious of a date realistically. What I would
13 like to do is, I'm looking -- can I have a 2005
14 calendar?

15 I believe a good day to start it would be
16 January 27th. That would be the first day of the
17 new docket for me. In my experience, that's a
18 good time to get jurors. Their vacations are
19 done; they're not in that spring vacation mode
20 yet. I just want to double-check that that is a
21 Monday. January 27th is a Monday. I don't
22 know if it's a holiday.

23 MR. BEMIS: It's President's Day.

24 THE COURT: Well, no, I think it might be
25 Martin Luther King's Birthday. It's a holiday.

PINNACLE REPORTING, INC.
(561) 820-9066

17

1 MR. BEMIS: It's one of those days.
2 President's Day is February.

3 THE COURT: That may be Martin Luther King
4 Day. If it is, we'll be starting on a Tuesday.

5 But assuming we take that as a trial date to
6 start, let's work backwards from there.

7 MR. BEMIS: My suggestion on that would be
8 to adopt Mr. Scarola's offer, and that is, that
9 we meet on that and not ask you to take the time
10 today to beat out 30 days, because there are a
11 lot of days --

12 MR. SCAROLA: I agree, Your Honor. That's
13 not likely to create a problem between us.
14 We'll be able to come to an agreement with regard
15 to the dates that fall working backwards from
16 that trial date.

17 THE COURT: That's fine. The only other two
18 things I would like to do then, if we're going to
19 sort of take that as a trial date, is take, I
20 would imagine, at least a day -- you all are
21 going to have to tell me if it needs to be longer
22 than that -- maybe a week or two weeks before the
23 trial date to do all the motions in limine and to
24 do any objections to deposition testimony, and,
25 we need to talk about the procedure for

1 designating both deposition testimony and
2 objections to it. But the only thing that
3 upsets me, particularly if there's a long trial
4 like that, is if we inconvenience the jurors and
5 ask them to wait and waste their time to do
6 things that we, frankly, didn't do ahead of
7 time.

8 MR. BEMIS: I think the proposed schedule
9 that we had put before Your Honor does deal with
10 all those issues. And we'll make sure that it
11 conforms to your suggestion.

12 THE COURT: What I would want to do now,
13 quite honestly, is pick out the time at a minimum
14 for subsequent case management conference
15 hearings and that hearing time we know we're
16 going to need a week or two before the trial gets
17 started. You all then can back into whatever
18 scheduling you want as long as it's before me in
19 a timely manner. But I want the hearing time
20 carved out so we know we have it.

21 MR. SCAROLA: Your Honor, I anticipate that
22 as a consequence of the nature of the litigation
23 and the geographic diversity of the witnesses
24 involved, there will be substantial testimony
25 presented by way of videotape. That will require

PINNACLE REPORTING, INC.
(561) 820-9066

19

1 considerable judicial labor, in terms of page and
2 line designations, and rulings on objections far
3 enough in advance of trial to be able to complete
4 the editing process.

5 THE COURT: Right.

6 MR. SCAROLA: So even the idea that that
7 might be done in a day I think is probably --

8 THE COURT: How long do you think we need?

9 MR. SCAROLA: I'm strictly -- I'm
10 guesstimating based on prior experience in
11 dealing with that kind of situation before. And
12 I would think that we're probably looking at
13 three or four days.

14 THE COURT: That's fine. I'm just
15 looking.

16 MR. SCAROLA: I might suggest that that
17 might be an appropriate task for a special
18 master. That's not something I've discussed with
19 my client or cocounsel yet, but it may be.

20 THE COURT: I don't mind doing that. My
21 only concern would be that requires you to
22 designate the depositions far enough ahead of
23 time so the master can listen to it, issue a
24 report, give time for objections, and then give
25 me time to do whatever I need to do after the

PINNACLE REPORTING, INC.
(561) 820-9066

20

1 objections.

2 MR. SCAROLA: I understand. And, again, I
3 haven't thought about the logistics of that, but
4 it's a suggestion that I think both sides needs
5 to consider. That may help to expedite things
6 ultimately.

7 THE COURT: The only thing I'm wondering,
8 and you all can tell me, my personal experience
9 is that nothing much happens right before or
10 after Christmas. And I'm looking, December 24th
11 is a Friday, whether we want to try to set aside
12 that Monday, Tuesday, Wednesday, Thursday, so now
13 we know we have that time. It's sitting there
14 and if we can use it. . .

15 MR. SCAROLA: That works for us, Your Honor.

16 THE COURT: We can do all the motions in
17 limine and any other objections I'm going to have
18 to rule on we have it ready then.

19 MR. BEMIS: Your Honor, if you do that, I'm
20 going to be stuck here for Christmas.

21 THE COURT: You can't get out the 23rd?
22 You're going the wrong way. Where are you
23 going?

24 MR. BEMIS: I'm going back to the west
25 coast. You said the 24th --

16div001599

PINNACLE REPORTING, INC.
(561) 820-9066

21

1 MR. SCAROLA: That'll be the 20th, the 21st
2 and the 22nd.

3 THE COURT: Just those three days.

4 MR. BEMIS: Monday, Tuesday and Wednesday is
5 fine.

6 THE COURT: Monday, Tuesday, Wednesday.
7 That would take us only to the 22nd, those three
8 days.

9 MR. SOLOVY: I can think of worse places to
10 be stuck than Palm Beach, Your Honor.

11 THE COURT: Most people are coming down
12 here.

13 MR. BEMIS: Thank you, Your Honor.

14 THE COURT: Okay.

15 MR. SOLOVY: That's a great time to get this
16 stuff done.

17 THE COURT: That way we have it done going
18 into the New Year, motions in limine and
19 objections to -- in your proposed timetable, you
20 give time frames for you all to do designations
21 of deposition testimony, objections and --

22 MR. BEMIS: Yes. And then we'd have to
23 present that as a package. We need to work out
24 the logistics of that. Mr. Scarola and I have
25 been through it, I'm sure, and can figure out a

PINNACLE REPORTING, INC.
(561) 820-9066

22

1 way to do it. It isn't easy and it won't be
2 easy for you no matter how we do it.

3 THE COURT: That's fine.

4 I know Defendant had a concern about at some
5 point reaching a determination on what
6 substantive law applies. Are we thinking we
7 would do this by summary judgement or by what
8 mechanism?

9 MR. BEMIS: My suggestion to that, and it's
10 in our schedule, that we brief that issue
11 separately.

12 THE COURT: Tell me procedurally how we're
13 doing it.

14 MR. BEMIS: It's called a motion. We file
15 an undifferentiated motion for choice of law
16 based on the claims. There are four claims in
17 the case. And those four claims state the
18 substantive law -- will determine the substantive
19 law that apply.

20 THE COURT: I hate to do this -- and it's
21 just the way I think. I apologize -- what kind
22 of motion is this? Is it declaratory
23 judgement? Is it summary? What are we calling
24 it?

25 MR. BEMIS: It's just a motion, Your Honor.

PINNACLE REPORTING, INC.
(561) 820-9066

23

1 Just under Florida Rules you can have an
2 undifferentiated motion for anything that
3 requires an order in the case. And Your Honor
4 has to decide the issue at some point. We can't
5 do jury instructions.

6 THE COURT: I agree we need to decide it.
7 Is this something that would require evidence be
8 considered?

9 MR. BEMIS: You can take evidence on it.
10 In fact, we cited some cases in the motion to
11 dismiss. I didn't argue that, but I read the
12 briefs. And it is possible, and not only is it
13 possible, but it should be done that way for your
14 benefit, as well as the parties. Because when we
15 get to the point of summary judgement, the jury
16 instructions, we need to know this issue. And
17 we've put a date in our order to brief the issue.

18 THE COURT: Does Plaintiff agree that this
19 should be done by a motion?

20 MR. SCAROLA: No, Your Honor. As a matter
21 of fact, you may recall that this same suggestion
22 has been made repeatedly by the Defense in
23 earlier hearings and Your Honor's reaction was
24 exactly the same as the reaction you're now
25 having.

16div001602

PINNACLE REPORTING, INC.
(561) 820-9066

24

1 The choice of law issue needs to be
2 determined in a factual context. And you
3 expressly stated that it seems to you that the
4 correct procedural presentation of that issue was
5 by way of motion for summary judgement.

6 THE COURT: Let me ask you this: Do we
7 agree that this is a decision that needs to be --
8 we certainly don't want to be making it in the
9 middle of trial.

10 MR. SCAROLA: We absolutely agree that it
11 needs to be made in advance of trial. And I
12 agree with the suggestion that Your Honor has
13 made repeatedly in the past, the way to address
14 it is by way of summary judgement.

15 THE COURT: Well, why can't I do this: What
16 if there's disputed issues of fact on a summary
17 judgement so we can't reach it on summary
18 judgement. Then what happens?

19 MR. SCAROLA: Well, in the presentation of
20 the summary judgment motion we still need to make
21 a determination, based upon the facts presented
22 to the court, as to the standard that is going to
23 be applied. So the facts can be presented to the
24 court in the context of a summary judgement
25 motion and you'll then be able to determine which

PINNACLE REPORTING, INC.
(561) 820-9066

25

1 law applies. Even if you ultimately determine,
2 that because there are disputed issues of fact,
3 under the law that applies, no summary judgement
4 can be granted. But I really think that Your
5 Honor needs to have a factual context in which to
6 make that determination. It cannot be done in
7 the abstract.

8 MR. BEMIS: Your Honor, the issue of the
9 substantive law that is applicable to the case
10 does not turn on contested issues of who said
11 what to whom. They turn on the gravity of the
12 claims in the sense of the restatement. Those
13 issues can be resolved, you may take evidence on
14 those issues, and you're not going to decide any
15 liability or damages.

16 THE COURT: I understand that.

17 MR. BEMIS: And that should be determined
18 before we go into the process of briefing summary
19 judgment, because it will complicate the matter
20 immeasurably for us to try to prepare for this
21 case for trial with 80 some depositions if we
22 don't know what the controlling law is.

23 When Your Honor first considered this -- and
24 I've read the transcript. I understand you had
25 some difficulties with it. I think the reason

PINNACLE REPORTING, INC.
(561) 820-9066

26

1 for it was -- and I'm not putting my words into
2 your head, but as I read it, it was the
3 combination of the venue issue and trying to deal
4 with what you do with that and the facts related
5 to that and how that would interplay with the
6 summary judgement, as well as a feeling that
7 perhaps you need to have the summary judgement of
8 who said what to whom framed when you were
9 deciding choice of law. And I think
10 fundamentally that's not right. And this one
11 I've heard -- and you'll tell me if you disagree
12 -- I think the process should be, look at the
13 gravity of the claims. Those gravity issues are
14 not dispositive of summary judgement. And we can
15 decide. Who said what to whom will be on summary
16 judgement. What law applies to who said what to
17 whom and when they did it, those are summary
18 judgement issues. The rest is a substantive
19 legal issue that you need to decide as a
20 precursor for deciding summary judgement, if
21 those motions are filed. And that should be
22 decided as promptly as possible, given your
23 schedule.

24 THE COURT: Tell you what, neither one of
25 you is going to convince me today that one

PINNACLE REPORTING, INC.
(561) 820-9066

27

1 approach is correct or incorrect. But I'm just
2 telling you, I still have the same concerns I've
3 had all along, which is something to suggest we
4 do an evidentiary hearing on this kind of point.

5 MR. BEMIS: I don't think it's an
6 evidentiary hearing. I think gravity of claims
7 is like personal jurisdiction, for the most
8 part. You know, those are not dispositive to the
9 case. It's, where did it happen.

10 THE COURT: That's still evidentiary.

11 MR. BEMIS: This is a case about who said
12 what to whom. We need to know what law applies
13 to those representations.

14 THE COURT: Nobody's suggesting it's not an
15 important issue. All we're suggesting is, how do
16 we want to do this.

17 MR. BEMIS: My suggestion is, Your Honor,
18 let's brief the issue. We're the ones doing the
19 work, other than you reading the brief. If you
20 conclude, I can't decide it, I think it's
21 improper without an evidentiary hearing or I'm
22 not going to have an evidentiary hearing, so be
23 it. Then we'll proceed to the next step. But we
24 ought to be given an opportunity to put the issue
25 --

PINNACLE REPORTING, INC.
(561) 820-9066

28

1 THE COURT: So what you are suggesting --

2 MR. SCAROLA: Is an advisory opinion from
3 the Court.

4 MR. BEMIS: No.

5 THE COURT: Well, I'm still trying to figure
6 out how we want to do this. I understand the
7 point you're making, but I also -- let me ask you
8 this: Are you all in agreement on the timetable
9 when this needs to be determined?

10 MR. SCAROLA: It is our belief that it only
11 needs to be determined in the context of whatever
12 summary judgment motions are filed. If the
13 choice of law issue is not dispositive of a
14 claim, then how could it affect the presentation
15 of evidence at trial?

16 THE COURT: No. I understand that you all
17 don't want to be briefing the substantive motion
18 for summary judgement and have to brief it under
19 both law because I haven't made a decision on
20 which one's going to apply.

21 MR. SCAROLA: On the contrary, I believe
22 that's exactly what we should be doing. I think
23 that we should be briefing the summary judgment
24 motions in the context of conflicting laws
25 because the decision doesn't need to be made,

PINNACLE REPORTING, INC.
(561) 820-9066

29

1 except as the laws in fact conflict with regard
2 to a particular set of facts. If there's no
3 difference in the law under Set of Facts A and
4 Set of Facts B, then Your Honor doesn't need to
5 determine which law applies.

6 THE COURT: Yes. But on the other hand,
7 then I'm going through the mental exercise of
8 looking at two different state's laws and
9 deciding whether they're the same or not; and
10 then if they're different, having to go the step
11 to decide -- and I'm doing that on every point of
12 law I'm having to consider, while making the
13 fundamental decision of are we going to apply New
14 York or Florida substantive law. Then we're only
15 looking at one law from then on.

16 MR. SCAROLA: Except that the authorities
17 suggest that this needs to be an issue-by-issue
18 determination.

19 MR. BEMIS: It is an issue-by-issue by
20 claim. There are four claims in the case.
21 Whether they're our claims or their claims or our
22 claims against Arthur Anderson, there are four
23 claims. They're all "who said what to who"
24 claims. You need to decide the gravity of the
25 law that applies to those claims before we get

PINNACLE REPORTING, INC.
(561) 820-9066

30

1 into trying to briefing whether the "who said
2 what to who" gives rise to a liability.

3 THE COURT: I understand what you're saying
4 and I will tend to agree, although I'm still hung
5 up on procedurally how we're going to get to
6 where we need to go.

7 MR. BEMIS: Just brief it and make a
8 decision whether we're right or wrong and one way
9 or the other we live with it and we go on with
10 the case.

11 MR. SCAROLA: Respectfully, Your Honor, if
12 we're briefing something, don't we have to brief
13 it in the context of some kind of motion? And if
14 it's not a summary judgment motion, what is it?

15 MR. BEMIS: There is no rule in Florida that
16 motions have to be summary judgement or anything
17 else. Any request for an order is a motion.

18 THE COURT: I would agree that there are
19 certain requests to the court that simply aren't
20 appropriate. And if I could only have labels on
21 the motions that are appropriate, we know they're
22 appropriate, and there's procedures in place for
23 considering them.

24 MR. BEMIS: Well, that's true, because they
25 have a certain set we review all of the time.

PINNACLE REPORTING, INC.
(561) 820-9066

31

1 But every case has peculiar issues and we don't
2 have choice of law in most cases so we have to
3 have an order telling us. How do you do that?
4 You do it by motion. And any request in Florida
5 for an order by the court is done by motion.
6 Some we have labels for and we have specific
7 standards for. The case law on choice of law,
8 there's a law for that, isn't in the rules, it's
9 in the cases. And there are cases talking about
10 what you consider to determine choice of law,
11 which, again, is not a question of who said what
12 to who, but where's the gravity of the law and
13 how we apply it.

14 THE COURT: Here's what I think we need to
15 do: I think we need to set a deadline for you
16 all to file whatever motions you're going to be
17 filing seeking for determination on choice of
18 law. And if we decide it should be done on
19 summary judgement, you're doing your summary
20 judgement. If somehow I can do a hearing that's
21 not a summary judgment, you file an appropriate
22 motion. If you think it's evidentiary, you put
23 that in a motion.

24 MR. BEMIS: We have a date for that in our
25 proposed order. It's June 21st. But we're going

PINNACLE REPORTING, INC.
(561) 820-9066

32

1 to have to move it in light of your change of the
2 date. But we do have a date for that, which
3 would allow us to get the issue teed up.

4 THE COURT: I think what we need to do now
5 then is to set aside the hearing time for hearing
6 these motions so we know where we're going.

7 MR. BEMIS: We had set the week of June 21st
8 for the hearing. We had a little bit earlier
9 date for this, but we can --

10 MR. SCAROLA: The order anticipates, Your
11 Honor, that there will be a deadline for filing
12 motions and then a period of time shortly
13 following that when those motions --

14 THE COURT: What I'm suggesting, though, is
15 this is a motion that needs to be sped up. This
16 will not be sort of a generic motion for summary
17 judgement.

18 MR. BEMIS: No. What we had contemplated in
19 our order -- and again, we may have to advance
20 this in light of the trial date -- but we had
21 suggested May 28th as the briefing date,
22 responses on June 18th, and a hearing on the week
23 of June 21st. We're perfectly willing to live
24 with that schedule, or we can advance it if we
25 have to. We're far enough in advance of the

PINNACLE REPORTING, INC.
(561) 820-9066

33

1 trial preparation and summary judgement to get
2 that done.

3 So the week of June 21st was our hearing.
4 We were going to suggest that week. We didn't
5 know what your calendar held.

6 THE COURT: Frankly, I'm busy on that day.

7 MR. SCAROLA: We were hoping it was August.

8 THE COURT: And it's sort of hard because
9 right now we don't know how long it would take.

10 MR. BEMIS: I would suggest that we're
11 talking probably an hour, an hour hearing, 30
12 minutes. I mean, if the United States Supreme
13 Court can -- Bush versus Gore was argued 20
14 minutes per side.

15 THE COURT: Sure. But I assume that we're
16 assuming then that we're not taking any
17 evidence.

18 MR. BEMIS: If we do, we'd have to come
19 back. We're far enough in advance we can tell
20 you, Your Honor, the next time we meet with you
21 we're suggesting, I think, at your suggestion, a
22 monthly conference. This is an issue we could
23 address --

24 THE COURT: If you're suggesting we not
25 carve out the time now, that's fine.

16div001612

PINNACLE REPORTING, INC.
(561) 820-9066

34

1 MR. BEMIS: Give us a date during the week
2 of June 21st. We'll live with that and work
3 against it.

4 THE COURT: The week of June 21st we
5 actually have a judges conference. I'm looking
6 at Monday, June 28th, nine-thirty.

7 MR. BEMIS: That's fine. I'm not that busy
8 yet.

9 MR. SCAROLA: Obviously, Your Honor, we need
10 to see what the motion is in order to make a
11 determination as to whether it is an appropriate
12 way in which to present these issues to the
13 Court. And we can't judge that until we see the
14 motion.

15 MR. BEMIS: We do have a provision for reply
16 in responses to the motion.

17 THE COURT: That is all motions seeking a
18 determination of choice of law.

19 MR. BEMIS: And we'll have those on file by
20 -- I think the 18th would be a completion date,
21 which would give Your Honor 10 days in advance.
22 You'd have all the materials, which I would hope
23 would be adequate for consideration.

24 THE COURT: Okay.

25 MR. SCAROLA: Your Honor, just so that I'm

PINNACLE REPORTING, INC.
(561) 820-9066

35

1 sure I understand what you have just said. If
2 it is the Plaintiff's position that choice of law
3 issues need to be resolved in the context of
4 summary judgment motions --

5 THE COURT: What I'm saying is, no, that
6 we're not going to be doing -- to the extent --
7 if at some point you're going to be seeking a
8 determination from me prior to trial of the
9 appropriate substantive law to apply, those
10 motions are going to be heard that day.

11 MR. SCAROLA: Well, our position is that
12 Florida Law applies.

13 THE COURT: Then you wouldn't be seeking any
14 other determination other than Florida Law.

15 MR. SCAROLA: But what I'm trying to
16 determine is, if it is our position that Florida
17 Law applies and consequently we are not filing a
18 choice of law motion, but rather only planning on
19 presenting our summary judgment motions pursuant
20 to Florida Law, is there any --

21 THE COURT: Assuming you won't be arguing in
22 those same motions that Florida Law is the law
23 that gets applied.

24 MR. SCAROLA: Well, clearly whenever we file
25 a summary judgement motion we're arguing that

PINNACLE REPORTING, INC.
(561) 820-9066

36

1 Florida Law applies.

2 MR. BEMIS: Your Honor --

3 THE COURT: You're arguing Florida Law
4 applies, but there is not -- please understand,
5 that what I don't want is motions for summary
6 judgement filed by the Plaintiff in October which
7 both argue Florida Law and argue that Florida Law
8 is the applicable law. The point of this is to
9 determine, for the purposes of this case, the
10 substantive law that will apply. And after this,
11 we won't be arguing which substantive law applies
12 for various claims because we will already, my
13 hope is, have determined that.

14 MR. SCAROLA: And so that the Court
15 understands what our position is, it is our
16 position that the choice of law determination
17 cannot be made in the abstract, but only in the
18 context of specific issues presented in either a
19 summary judgment motion or some other motion that
20 is fact specific.

21 THE COURT: But we already have your claims,
22 correct?

23 MR. SCAROLA: You do have our claims,
24 absolutely. Yes, they're stated in our
25 complaint.

1 THE COURT: Right. And so presumably
2 they're going to be determined by substantive law
3 of New York or Florida.

4 MR. SCAROLA: We presume they're going to be
5 determined by Florida Law.

6 MR. BEMIS: And we presume New York, and
7 that's what we're going to thrash out. Who said
8 what to who will be determined in summary
9 judgement, but the gravity of law will be
10 determined by you as a matter of law, which is
11 your responsibility --

12 THE COURT: But please understand, so you
13 know what I'm trying to say, if we get into
14 October and you file something seeking summary
15 judgment on Florida Law, you can argue Florida
16 Law to me, but you won't be able to argue the
17 applicability of the Florida Law.

18 MR. SCAROLA: Because you will have already
19 made that determination --

20 THE COURT: Because that's the point -- on
21 this point, I agree with Defendant. This is a
22 threshold issue we need to reach, both for the
23 economy of your client and for the economy of the
24 court. It's simply not an efficient way to run a
25 case, not to know which substantive law applies.

PINNACLE REPORTING, INC.
(561) 820-9066

38

1 MR. SCAROLA: I think I understand what the
2 Court's intention is. I'm just having a little
3 bit of difficulty understanding, as a practical
4 matter, how that motion is going to be -- the
5 procedural manner in which that motion is going
6 to be presented to the Court, other than by way
7 of summary judgment.

8 THE COURT: Obviously I share that concern
9 and I'm sure we're going to get educated.

10 MR. BEMIS: Thank you, Your Honor.

11 MR. SCAROLA: Okay.

12 MR. BEMIS: Are there any other critical
13 dates of the pretrial schedule that Your Honor
14 would like to address?

15 THE COURT: Hold on. I just want to finish
16 my notes.

17 And we agree this is a 15-day trial?

18 MR. BEMIS: Fifteen trial days, Your Honor,
19 yes.

20 THE COURT: Is that including jury
21 selection?

22 MR. BEMIS: Yes. I mean, that's our best
23 guess. I mean, at this point it's tough to tell,
24 but that's our best guess. And apparently Mr.
25 Scarola agrees that 15 days appears to be what

1 we're going to need.

2 MR. SCAROLA: I believe so, Your Honor.

3 Your Honor, I'm sorry to go back one more
4 time, but I do want to be certain that I
5 understand.

6 If it is our position that Florida Law does
7 apply in this case, is it necessary for us to be
8 filing something affirmatively?

9 THE COURT: Only if -- please understand --
10 I can't think of how to say it more clearly. Let
11 me think if I can -- that you would be precluded
12 then from arguing later on in your motions for
13 summary judgement the applicability of Florida
14 Law; this would simply be an assumption that it
15 did apply. But if there were disputed issues
16 about whether it did, we wouldn't be arguing it
17 then.

18 MR. SCAROLA: I only need to understand
19 where the burden lies. If nobody does anything
20 between now and the time of filing of motions for
21 summary judgement, I would assume that the law
22 that would have to be applied, based upon what
23 Your Honor just said, is the Law of Florida.

24 THE COURT: No. I would not have a law to
25 apply. And if you go back, that meant that you

PINNACLE REPORTING, INC.
(561) 820-9066

40

1 didn't follow the order following the case
2 management conference.

3 MR. BEMIS: Your Honor, we're going to file
4 a motion that it's New York Law.

5 THE COURT: Right, and that becomes moot,
6 because you're going to force the issue.

7 MR. SCAROLA: If there's a clear
8 understanding that they're forcing the issue,
9 then that's fine. I know that they're going to
10 file a motion to which we're going to respond.

11 But it seems to me, that in the absence of
12 their assuming the burden of demonstrating that
13 New York Law applies, the law that ordinarily
14 applies to Florida cases is Florida Law. So I
15 just need to make sure that we're counting on
16 them filing a motion. And if they don't file a
17 motion --

18 MR. BEMIS: We will. And it will say that
19 New York Law applies and they will respond that
20 Florida Law applies and Your Honor will make a
21 judicial ruling and we'll follow up.

22 MR. SCAROLA: That's fine. The record is
23 clear as to how that's going to happen then.

24 THE COURT: All right. It strikes me, we
25 need to stop abusing 8:45's and carve up some

PINNACLE REPORTING, INC.
(561) 820-9066

41.

1 reasonable hearing time.

2 MR. BEMIS: We have, Your Honor, what I call
3 a modest proposal to reduce frequent flyer miles
4 from our standpoint, and that is, that we take
5 you up on your suggestion of setting aside an
6 hour or if you believe more -- I don't know the
7 appropriate frequency, whether it should be once
8 a month or whether every three weeks, depends on
9 your calendar and what's pending, and then have
10 everything scheduled at one time. I would
11 suggest a seven-and-two rule, where seven days in
12 advance all motions are filed, two days before
13 that responses are filed and Mr. Scarola and I
14 can take alternating responsibility for providing
15 Your Honor with the materials several days in
16 advance. Then we just go through them seriatim.

17 THE COURT: It strikes me that every three
18 weeks may be about right. I'm afraid every month
19 may not be often enough.

20 MR. BEMIS: Three weeks is fine with us.

21 MR. SCAROLA: May I have just one moment?

22 THE COURT: Sure.

23 MR. SCAROLA: Is it Your Honor's intent that
24 there will be no uniform motion calendars during

25 --

PINNACLE REPORTING, INC.
(561) 820-9066

42

1 THE COURT: Well, that's something we can
2 talk about. We've had a number of hearings on
3 the uniform motion calendar that probably
4 shouldn't have been set there. In all honesty,
5 you guys are sophisticated enough attorneys, I
6 would be shocked if you had a motion that clearly
7 was probably not a UMC. It strikes me, you guys
8 will work it out. On the other hand, if there is
9 one, I certainly don't mind hearing it.

10 MR. SCAROLA: I only asked that question
11 because it'll make a difference in terms of what
12 we think appropriate frequency to be.

13 THE COURT: Sure. We're talking about
14 frequency and length of the hearing, whether we
15 think it should be an hour, an hour and a half or
16 two hours, and that depends on how frequently
17 we're going to do it.

18 MR. BEMIS: Your Honor, my proposal is three
19 weeks, two hours. We'll know in advance. I love
20 your suggestion, so that's fine with us.

21 THE COURT: Why don't we just cross out all
22 our time for this case.

23 MR. BEMIS: Actually, Your Honor, your
24 suggestion yesterday is really, in my experience
25 here, it is really the most expeditious way, and

1 the state courts, big cases, just carve it out --

2 THE COURT: I agree with that. Two hours
3 every three weeks is fairly aggressive, but if
4 that's what it needs. I don't want to put all
5 the things in place to have a specially set trial
6 and discover that we didn't have to, a sufficient
7 hearing would have been fine.

8 MR. SCAROLA: Our past experience, our track
9 record thus far is, that we would not consume two
10 hours of Your Honor's time every three weeks. I
11 would also anticipate, however, that as discovery
12 heats up in this case, that we might consume that
13 much time. My suggestion would be that we might
14 want to start out at an hour and then increase
15 the time as we get farther on down the road,
16 because we'll probably need additional time
17 later.

18 MR. BEMIS: That's fine with me, Your Honor.

19 MR. SCAROLA: And we can let you know at one
20 of those one-hour hearings the point in time in
21 which we anticipate we're going to now need two
22 hours.

23 THE COURT: Frankly, by that time it's too
24 late to give you the two hours. I'm going to set
25 the time up right now.

PINNACLE REPORTING, INC.
(561) 820-9066

44

1 MR. SCAROLA: Well then that's great. Then
2 we'll take the two hours now.

3 THE COURT: So first of all, we want mid
4 March. Is that what we're talking about first?

5 MR. SCAROLA: That's fine.

6 THE COURT: I can give you an hour at
7 three-thirty on March 19th. I don't have
8 anything in the morning. Do you want that one?

9 MR. BEMIS: Three-thirty is fine with us.

10 MR. SCAROLA: That's fine.

11 THE COURT: 3/19/04, three-thirty, one
12 hour.

13 The next one is going to be early April. I
14 can do four o'clock on April 16th.

15 MR. BEMIS: April 16th, 4 p.m.

16 THE COURT: Then we got May.

17 We could do it May 7th. Would you prefer
18 morning or afternoon, if given a choice?

19 MR. BEMIS: Frankly, we'd prefer the
20 mornings, so we can come in the night before.

21 THE COURT: I could do eight o'clock on May
22 7th?

23 MR. BEMIS: Fine.

24 THE COURT: All right. And after that we'll
25 start the two-hour ones. So we're looking the

PINNACLE REPORTING, INC.
(561) 820-9066

45

1 beginning of June. That's May 28th. We prefer
2 8 a.m. again?

3 MR. BEMIS: That's fine, Your Honor. What
4 day of the week is May 28th?

5 THE COURT: These are all Fridays, because
6 those are all the special set.

7 MR. BEMIS: May 28th, is that the Friday
8 before Memorial Day?

9 THE COURT: It is the Friday before Memorial
10 Day.

11 MR. BEMIS: Either come up or go back from
12 the 28th, because Memorial Day is very difficult
13 to get in and out.

14 THE COURT: June 4th, 8 a.m., still two
15 hours.

16 MR. BEMIS: Fine.

17 THE COURT: You probably don't want July
18 2nd?

19 MR. BEMIS: July 2nd is okay. That will be
20 okay with us.

21 THE COURT: You sure?

22 MR. BEMIS: Yes.

23 THE COURT: That's a little more than --
24 that's four weeks instead of three.

25 MR. BEMIS: I think by summer we're going to

PINNACLE REPORTING, INC.
(561) 820-9066

46

1 be so deep in depositions that --

2 THE COURT: 8 a.m., two hours.

3 Late July. July 23rd?

4 MR. BEMIS: Fine.

5 THE COURT: That would be 9 a.m.

6 We're in mid August.

7 MR. IANNO: Your Honor, July 23rd was 9

8 a.m.?

9 THE COURT: Yes.

10 Do you want August 13th or August 20th?

11 MR. SCAROLA: 13th, please.

12 MR. BEMIS: 13th is fine.

13 THE COURT: August 13th, '04, 8 a.m.

14 Early September. September 3rd. That would

15 be one-thirty for two hours.

16 MR. BEMIS: Where is that in relation to

17 Labor Day?

18 THE COURT: You want to avoid that?

19 MR. BEMIS: It's so hard to travel on those

20 holidays.

21 THE COURT: I know. I generally go away for

22 a long weekend right after that.

23 MR. SCAROLA: Last week in August.

24 THE COURT: We already have August 13th.

25 MR. BEMIS: If we could just move it to

16div001625

PINNACLE REPORTING, INC.
(561) 820-9066

47

1 another week in September if you have it, because
2 that's a vacation period for a lot of people and
3 a holiday weekend.

4 THE COURT: But then we're up to September

5 --

6 MR. SCAROLA: 10th.

7 THE COURT: No. That's the weekend I
8 usually go away. September 17th or go back in
9 late August.

10 MR. BEMIS: The 17th is fine with us.

11 THE COURT: Isn't the 16th Rosh Hashanah.

12 MR. SOLOVY: Yes it is, and the 17th. So
13 why don't we go the end of August, Your Honor.

14 THE COURT: That's fine. We can go back to
15 August 27th.

16 MR. BEMIS: That's fine.

17 THE COURT: And that we can do 8 a.m.
18 again.

19 And then we're in late September.

20 September 25 -- oh, Yom Kipper.

21 MR. SOLOVY: And that's a Saturday anyway,
22 Your Honor.

23 THE COURT: Oh, that's right. Could you do
24 the 24th? You can't do it first thing in the
25 morning?

PINNACLE REPORTING, INC.
(561) 820-9066

48

1 MR. SOLOVY: No, that will be too hard for
2 me. The only way, if we could intrude upon your
3 Thursday the 23rd, that would work. Anything
4 earlier that week.

5 THE COURT: I could do it the afternoon of
6 the 23rd. I couldn't do it the morning.

7 MR. BEMIS: That's fine.

8 MR. SOLOVY: That would work.

9 THE COURT: 3 p.m.

10 October 15th.

11 MR. BEMIS: That's fine.

12 THE COURT: 8 a.m.

13 November 5th, 8 a.m.

14 And then I think our last one would be early
15 December. December 3rd.

16 MR. BEMIS: That's fine.

17 MR. SOLOVY: Fine.

18 THE COURT: 8 a.m. Okay. We'll get all
19 those done.

20 MR. SCAROLA: Thank you.

21 Your Honor, we do have by agreement one
22 discovery dispute set on the uniform motion
23 calendar for next Thursday I believe, which we
24 would want to be able to --

25 THE COURT: We'll do it then.

PINNACLE REPORTING, INC.
(561) 820-9066

49

1 MR. BEMIS: I think there are actually two
2 set, one on each side.

3 Our suggestion is, let's move them over to
4 the first conference.

5 MR. SCAROLA: We do not want to delay ours.

6 THE COURT: Let me see next week's
7 calendar.

8 Tell you what, I think I could do it
9 nine-thirty on Thursday. Do you want to do that,
10 and then I could give you more time?

11 MR. SCAROLA: I am in trial in front of
12 Judge Miller and we generally begin at
13 nine-thirty.

14 MR. BEMIS: Could I have one second, Your
15 Honor?

16 THE COURT: Sure.

17 I don't mind if you come and we try to do
18 them. I really haven't looked at them so I don't
19 know what they are.

20 MR. BEMIS: First of all, I can't come next
21 week, but I can come on the 19th on this one.
22 It's my anniversary and I'm going to be on
23 vacation.

24 THE COURT: March 19th?

25 MR. BEMIS: I can't be here, but I'm going

PINNACLE REPORTING, INC.
(561) 820-9066

52

1 it back again, but this is a discovery matter
2 that has been pending for a long time.

3 THE COURT: So it's already noticed for
4 Thursday?

5 MR. SCAROLA: Yes.

6 THE COURT: Resetting the hearing -- and
7 Thursday is, what, the 26th -- 2/26/04 at eight
8 forty-five to 3/3/04 at eight-thirty.

9 MR. SCAROLA: Is Your Honor planning on
10 sending out a notice with respect to that
11 hearing?

12 THE COURT: Yes. We'll just include it in
13 this.

14 MR. CLARE: Your Honor, clarification:
15 There are two motions that are pending. There is
16 one filed by the Plaintiff and one filed by the
17 Defendant.

18 THE COURT: That's why I wanted to make sure
19 there was a notice of hearing, so my order
20 wouldn't be referencing something else.

21 MR. SCAROLA: That works. Thank you, Your
22 Honor.

23 Your Honor, one additional matter that I
24 think we need to address in light of the comments
25 about an amendment of the pleadings to add a

PINNACLE REPORTING, INC.
(561) 820-9066

55

1 Court a note ahead of time, Your Honor, so by my
2 silence you didn't think I was thinking this was
3 a happy development.

4 MR. SCAROLA: I would only mention, in the
5 context of what is relevant to the issues before
6 Your Honor, that there is a distinction between a
7 motion to amend to add a new party and the motion
8 to amend with regard to the punitive damage
9 claim, which we likely would not be prepared to
10 make by an April date.

11 MR. BEMIS: We don't have any objection to
12 that. We have the same issue. We'll work that
13 out.

14 THE COURT: Let's assume, and I'm acutely
15 aware when attorneys attempt to give me
16 information that I don't need until the issue's
17 in front of me, and I have to assume they're
18 doing it for other things that may not be
19 appropriate.

20 MR. BEMIS: Understood.

21 THE COURT: Thank you very much.

22 MR. SCAROLA: Thank you very much, Your
23 Honor.

24 (At 4:29 p.m., the deposition was
25 concluded.)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T E

- - -

STATE OF FLORIDA
COUNTY OF PALM BEACH

I, SHIRLEY D. KING, Professional Court Reporter, do hereby certify that I was authorized to and did stenographically report the foregoing proceedings and that the transcript is a true and correct transcription of my stenotype notes of the proceedings.

Dated this 1st day of March, 2004.

SHIRLEY D. KING
Professional Court Reporter

The foregoing certification of this transcript does not apply to any reproduction of the same by any means unless under the direct control and/or direction of the certifying reporter.

5

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
OF FLORIDA, IN AND FOR PALM BEACH COUNTY

MORGAN STANLEY & CO.
INCORPORATED, MORGAN STANLEY
SENIOR FUNDING, INC., and MORGAN
STANLEY,

Plaintiffs,

vs.

ARTHUR ANDERSEN LLP (a United States
partnership); ANDERSEN WORLDWIDE,
SOCIÉTÉ COOPÉRATIVE (a Swiss
cooperative); ARTHUR ANDERSEN & CO.
(a Canadian company); ARTHUR
ANDERSEN & CO. (a Hong Kong
company); RUIZ, URQUIZA Y CIA, S.C. (a
Mexican company); PIERNAVIEJA,
PORTA, CACHAFEIRO & AVOCADOS (a
Venezuela company); ARTHUR
ANDERSEN (a United Kingdom company);
PHILLIP E. HARLOW; WILLIAM PRUITT;
and DONALD DENKHAUS.

Defendants.

50 2004 CA 00 2257 XXXX NB

AA
CASE NO.

Jury Trial Demanded.

DOROTHY H. WIEKEN
CLERK OF CIRCUIT COURT
CIRCUIT CIVIL DIVISION

MAR 01 2004

COPY / ORIGINAL
RECEIVED FOR FILING

COMPLAINT

In March 1998, Morgan Stanley & Co. Incorporated, Morgan Stanley Senior Funding, Inc., and Morgan Stanley (collectively, "Morgan Stanley") — in direct reliance on certified financial statements audited by the Arthur Andersen defendants ("Andersen")¹ — underwrote a multi-million dollar offering of convertible notes and provided a \$680 million loan to Sunbeam

¹ Defendants Arthur Andersen LLP; Andersen Worldwide, Société Coopérative (a Swiss cooperative); Arthur Andersen & Co. (a Canadian company); Arthur Andersen & Co. (a Hong Kong company); Ruiz, Urquiza y Cia, S.C. (a Mexican Company); Piernavieja, Porta, Cachafeiro & Avocados (a Venezuela company); Arthur Andersen (a United Kingdom company), Phillip E. Harlow, William Pruitt, and Donald Denkhaus are hereinafter collectively referred to as "Andersen." Unless otherwise stated, allegations made against "Andersen" are made against each of these defendants jointly and severally.

EXHIBIT

5

16div001633

Corporation, Inc., in connection with Sunbeam's acquisition of three companies. As Sunbeam's subsequent restatement of its financial results showed, the financial statements that Andersen certified grossly misrepresented Sunbeam's true financial condition. Andersen had full knowledge of these misstatements, and it intended that Morgan Stanley would rely on its unqualified audit opinions. Morgan Stanley — as a direct consequence of Andersen's deceit — has lost hundreds of millions of dollars. Accordingly, Morgan Stanley brings this action against Andersen and alleges the following:

Nature of Action

1. In March 1998, Sunbeam acquired The Coleman Company, Inc. ("Coleman") and two smaller companies. In order to finance this acquisition, Morgan Stanley underwrote a \$750 million offering of convertible notes, and it also directly provided Sunbeam with an additional \$680 million in secured financing.

2. In serving as an underwriter and in agreeing to extend the loan, Morgan Stanley relied on Sunbeam's financial statements, which had been audited and certified by Andersen, as well as Andersen's continued opinions about Sunbeam's financial condition. The Sunbeam financial statements painted a picture of Sunbeam as a company in the midst of an extraordinary financial turnaround.

3. In reality, unbeknownst to Morgan Stanley, Sunbeam's "turnaround" was an illusion. As became apparent in the summer of 1998 and as confirmed by Sunbeam's subsequent restatement of its financial results, the 1996 and 1997 statements that Andersen had certified — and upon which Morgan Stanley had relied — did not conform with generally accepted accounting principles ("GAAP"). Andersen, with full knowledge of the material misstatements

contained in Sunbeam's financial reports, issued unqualified audit opinions for both 1996 and 1997. In so doing, it failed to perform its audit in accordance with generally accepted auditing standards ("GAAS").

4. As Andersen knew, the statements that it audited and certified were replete with accounting improprieties. As a consequence, Sunbeam's true financial condition was misstated by millions of dollars. In November 1998, when it restated its 1996 and 1997 financial results, Sunbeam revealed that, in 1996, it had overstated its operating losses by at least \$40 million, thereby establishing an overly bleak financial backdrop against which the company's performance in 1997 would be measured. In 1997, by contrast, Sunbeam dramatically overstated its earnings. When 1997 operating earnings were eventually corrected and restated, they were \$95 million less than the earnings originally reported — and approximately half of the figure that Andersen had previously certified.

5. Andersen's fraud ultimately forced Sunbeam and several of its subsidiaries to seek relief under Chapter 11 of the Bankruptcy Code in February 2001. As part of the bankruptcy court-approved reorganization plan, Morgan Stanley's \$680 million loan to Sunbeam was discharged in full, and Morgan Stanley received Sunbeam stock valued at a small fraction of the original loan. In addition, as a result of Andersen's actions, the convertible notes issued by Sunbeam and held by Morgan Stanley had been rendered substantially less valuable.

6. As the Securities and Exchange Commission ("SEC") subsequently determined, in auditing and certifying Sunbeam's financial statements, Andersen completely disregarded its professional and legal obligations. It certified Sunbeam financial statements that it knew grossly mischaracterized the company's true financial condition. It ignored its duty to maintain

independence from its client, Sunbeam. It did so with full knowledge that Morgan Stanley would be harmed immensely by Andersen's deception.

7. By this complaint, Morgan Stanley seeks compensatory damages of several hundreds of millions of dollars. In addition, Morgan Stanley reserves the right to seek leave to amend its complaint pursuant to Fla. Stat. § 768.72 to assert claims for an additional recovery of punitive damages in excess of \$1.2 billion as allowed by law.

THE PARTIES AND OTHER RELEVANT ENTITIES

8. Plaintiff Morgan Stanley & Co. Incorporated ("MS & Co.") is a financial services firm that engages in underwriting, investment banking, financial advisory services, securities sales and trading, and research. In late 1997 and early 1998, MS & Co. assisted Sunbeam in identifying potential acquisition targets and served as Sunbeam's financial advisor with respect to certain aspects of Sunbeam's acquisitions of Coleman, Signature Brands USA, Inc. and First Alert, Inc. MS & Co. also served as the underwriter of a \$750 million offering of convertible notes that Sunbeam used to finance these acquisitions. MS & Co. is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in New York.

9. Plaintiff Morgan Stanley Senior Funding, Inc. ("MSSF") is a company that provides credit services to its clients. In 1998, MSSF entered into a credit agreement with Sunbeam under which MSSF agreed to provide a loan to Sunbeam in connection with Sunbeam's acquisition of Coleman and two smaller companies. Pursuant to the credit agreement, Sunbeam borrowed \$680 million from MSSF, with the borrowings used by Sunbeam to fund certain costs relating to the acquisitions. MSSF is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in New York.

10. Plaintiff Morgan Stanley is a financial services company. It owns 100 percent of the stock of both MS & Co. and MSSF. Morgan Stanley is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in New York. In this complaint, the term "Morgan Stanley" is used collectively to describe both Morgan Stanley and its two wholly-owned subsidiaries, MS & Co. and MSSF.

11. Defendant Andersen Worldwide, Société Coopérative Switzerland was a partnership organized under the Swiss Federal Code of Obligations. Its partners included more than 2,000 individuals from 390 offices in 84 countries. Various individuals who were partners of Andersen-Worldwide participated in the 1996 and 1997 audits of Sunbeam and the 1998 restatement of the reports of those audits. Andersen-Worldwide and Andersen-US dictated the policies and procedures to be used within Andersen throughout the world.

12. Defendant Arthur Andersen & Co. ("Andersen-Canada") was part of Andersen-Worldwide. Andersen-Canada participated in the 1996 and 1997 audits of Sunbeam and the 1998 restatement of the reports of those audits.

13. Defendant Arthur Andersen & Co. ("Andersen-Hong-Kong") was part of Andersen-Worldwide. Andersen-Hong Kong participated in the 1996 and 1997 audits of Sunbeam and the 1998 restatement of the reports of those audits.

14. Defendant Ruiz, Urquiza y Cia, S.C. ("Andersen-Mexico") was part of Andersen-Worldwide. Andersen-Mexico participated in the 1996 and 1997 audits of Sunbeam and the 1998 restatement of the reports of those audits.

15. Defendant Piernavieja, Porta, Cachafeiro & Avocados ("Andersen-Venezuela") was part of Andersen-Worldwide. Andersen-Venezuela participated in the 1996 and 1997 audits of Sunbeam and the 1998 restatement of the reports of those audits.

16. Defendant Arthur Andersen ("Andersen-UK") was part of Andersen-Worldwide. Andersen-UK participated in the 1996 and 1997 audits of Sunbeam and the 1998 restatement of the reports of those audits.

17. Defendant Arthur Andersen LLP ("Andersen-US") was part of Andersen-Worldwide. Andersen-US is a partnership formed under the laws of the State of Illinois. Once one of the world's largest accounting firms, almost all of its partners have left the firm. Andersen-US participated in and coordinated the 1996 and 1997 audits of Sunbeam and the 1998 restatement of the reports of those audits. In addition, Andersen-US partners and employees provided consulting services to Sunbeam as part of due diligence work performed in conjunction with Sunbeam's acquisition of Coleman, as well as on other projects.

18. Defendant Phillip E. Harlow was a partner at Andersen-US and was also a partner of Andersen-Worldwide. He served as the engagement partner on the audits of Sunbeam's financial statements from 1993 to 1998. As engagement partner, Harlow had primary responsibility for supervising the 1996 and 1997 audits of Sunbeam, including overseeing the activities with respect to the Sunbeam work performed by numerous persons at Andersen. Harlow also participated as a member of Sunbeam's due diligence team in connection with Sunbeam's acquisition of Coleman.

19. Defendant William Pruitt at all times material hereto was a partner of both Andersen-US and Andersen-Worldwide. He served as the concurring partner on the Sunbeam audits for at least 1996 and 1997.

20. Defendant Donald Denkhaus at all times material hereto was a partner of both Andersen-US and Andersen-Worldwide. Denkhaus served as the engagement partner on the

Sunbeam's ultimate restatement of its financial statements, as Audit Division Head and manager of Andersen's audit practice for the entire South Florida region.

21. The Coleman Company, Inc. was a leading manufacturer and marketer of consumer products for the worldwide outdoor recreation market. Coleman was a Delaware corporation, with its principal place of business in Kansas. Prior to March 30, 1998, Coleman (Parent) Holdings Inc. ("Coleman-Parent") owned 44,067,520 shares (or approximately 82 percent) of Coleman. Coleman-Parent is a Delaware corporation, with its principal place of business in New York and is a wholly-owned subsidiary of MacAndrews and Forbes Holdings, Inc. ("MAFCO"). MAFCO is a global investment firm owned and operated by financier Ronald O. Perelman. Through its various subsidiaries and affiliates, MAFCO owns and/or controls a number of multi-billion dollar global corporations, including Revlon, Inc., the international consumer cosmetics company. MAFCO is a Delaware corporation, with its principal place of business in New York.

22. Sunbeam Corporation through its operating subsidiaries and affiliates, manufactured, marketed, and distributed durable household and outdoor leisure consumer products through mass-market and other consumer channels. In 1998, Sunbeam purchased Coleman-Parent's controlling interest in Coleman for \$2.2 billion. On February 6, 2001, Sunbeam and several of its affiliates filed a petition for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York. Sunbeam has since emerged from bankruptcy and now operates under the name American Household.

JURISDICTION AND VENUE

23. This Court has jurisdiction over the subject matter of this action pursuant to Fla. Stat. § 26.012(2)(a) because Plaintiff seeks damages in excess of \$15,000 exclusive of interest, costs and attorneys' fees. This Court has jurisdiction over Andersen-US, Andersen-Worldwide, Andersen-Canada, Andersen-Hong Kong, Andersen-Mexico, Andersen-Venezuela, and Andersen-UK pursuant to Fla. Stat. §§ 48.193(1)(a) and (f), (2) and/or (5).

24. This Court has personal jurisdiction over Andersen pursuant to Fla. Stat. § 48.193(2) because Andersen engaged in substantial business activities in the State of Florida. Additionally, this Court has personal jurisdiction over Andersen pursuant to Fla. Stat. § 48.193(1)(a) because the cause of action arises out of Andersen's activities in the State.

25. Venue is proper in this Court pursuant to Fla. Stat. §§ 47.011 and 47.021 because, when the actionable conduct described herein occurred, Andersen maintained an office with more than 30 employees and partners in West Palm Beach and therefore resided in Palm Beach County.

FACTUAL BACKGROUND

Andersen and Sunbeam's Fraudulent Scheme

26. In July 1996, to address its growing financial difficulties, Sunbeam hired Albert Dunlap as Chairman and Chief Executive Officer. Dunlap was a well-known "turnaround" specialist who had a history of brief tenures at other companies. He was nicknamed "Chainsaw Al" because of his practice of cutting staff and closing plants to achieve quick turnaround results.

27. Immediately after joining Sunbeam, Dunlap replaced almost all of top management with his own selections, hiring Russell A. Kersh (Chief Financial Officer); Donald R. Uzzi (Vice President, Marketing and Product Development, and later Executive Vice

President, Consumer Products Worldwide); Lee B. Griffith (Vice President, Sales); and Robert J. Gluck (Principal Accounting Officer).

28. Immediately after he was hired, Dunlap publicly predicted that, as a result of the Company's restructuring, Sunbeam would attain significant increases in its margins and sales.

29. Unbeknownst to the public and to Morgan Stanley, senior management established an overly dismal financial backdrop against which the company's performance in 1997 would be measured. Management decided to accomplish this task by recording improper expenses and taking unjustified accounting write-offs in their 1996 financial statements. In order to convince the public that their 1996 losses were real, however, Sunbeam needed an outside auditor to validate their financial reports.

30. Andersen stood ready to assist Sunbeam in its scheme. Andersen had a significant stake in retaining Sunbeam, a long-time major client. The company generated substantial income for Andersen, paying over \$1 million in fees for its 1995 audit alone. Andersen also hoped to continue to receive lucrative consulting assignments from Sunbeam. Moreover, being dropped by a high-profile client such as Sunbeam would have been a severe blow to Andersen's reputation. Indeed, Andersen was so eager to keep Sunbeam as its client that it agreed to a 30 percent reduction in its 1996 audit fees.

31. After Dunlap assumed control of Sunbeam, Andersen had reason to fear that its relationship with Sunbeam was in jeopardy. Phillip Harlow, the Andersen engagement partner, knew that Dunlap had employed Coopers & Lybrand, one of Andersen's major competitors, as a financial consultant and independent auditor in past turnaround assignments. In fact, Dunlap had already engaged Coopers & Lybrand to assist in planning Sunbeam's massive restructuring.

32. Ultimately, Andersen's desire to retain a valuable client overrode any sense of duty or professionalism, and it capitulated to Sunbeam's demand that it sanction the improper accounting treatments used by the company's senior management.

Andersen's Worldwide Operations

33. Andersen operated through a global network of international offices, branches and subsidiaries of the U.S. partnership, a structure called the Andersen Worldwide Organization. The Andersen network worked as "one firm" and maintained this "one firm" identity through a variety of mechanisms. Partners (or equivalents) in its various branches were also partners of Andersen-Worldwide, resulting in a global partnership of more than 2,000 individuals from 390 offices in 84 different countries. In addition to overlapping partners, Andersen-Worldwide and Andersen-US shared officers in common. Moreover, Andersen-Worldwide set uniform professional standards for all its offices and required its international offices to agree to be bound by those professional standards and principles. Andersen-Worldwide coordinated the sharing of costs and allocation of revenues and profits among its partners and its offices around the world. Andersen-Worldwide operated under a worldwide tax structure. In addition, Andersen-Worldwide handled all borrowing on behalf of its international offices and maintained those offices' financial records, payroll, and employee health benefits plans. All of Andersen's offices also shared global computer operations and training facilities.

34. Andersen applied the "one firm" approach in its work with Sunbeam. Top partners responsible for the Sunbeam audits and restatement were partners of both Andersen-US and Andersen-Worldwide, including the engagement partner on the Sunbeam audits, Phillip Harlow; the concurring partner on those audits, William Pruitt; and the engagement partner on the Sunbeam restatement, Donald Denkhaus.

35. In addition, various international offices of Andersen-Worldwide did substantial work for Sunbeam. Sunbeam was a multinational corporation with operations in Canada, Mexico, Venezuela, Hong Kong, and Europe. The engagements required the participation of auditors from each of those countries and numerous American cities. Harlow, on behalf of both Andersen-US and Andersen-Worldwide, developed work plans that he circulated to Andersen-Canada, Andersen-Hong Kong, Andersen-Mexico, Andersen-Venezuela, and Andersen-UK. Those offices worked together with Harlow and others to complete the tasks outlined in the plan and sent their work product to Harlow for inclusion in an Andersen-Worldwide Management Letter.

The Fraudulent 1996 Financial Statements

36. In 1996, after Dunlap took control of Sunbeam, Andersen permitted Sunbeam management to employ numerous accounting practices that — as Sunbeam's restatement of its 1996 financial statements and an SEC investigation later showed — did not comply with GAAP.

37. Among other things, Sunbeam's 1996 financial statements, certified by Andersen, did not comply with the accounting principles of (1) reliability, Financial Accounting Standards Board ("FASB") Statement of Financial Accounting Concepts No. 2, §§ 58-97; Accounting Principles Board ("APB") Statement No. 4, §§ 109, 138, 189; (2) completeness, FASB Statement of Financial Accounting Concepts No. 2, §§ 79, 80; APB Statement No. 4, § 94; (3) conservatism, FASB Statement of Financial Accounting Concepts No. 2, §§ 91-97; APB Statements No. 9, §§ 35, 71; (4) neutrality, FASB Statement of Financial Accounting Concepts No. 2, §§ 98-110; or (5) relevance, FASB Statement of Financial Accounting Concepts No. 2, §§ 47, 48.

38. Among the accounting frauds that Andersen knowingly allowed was the artificial inflation of Sunbeam's reserves. Because the reserves were charged as an expense against income, this accounting practice allowed Sunbeam to overstate the 1996 loss against which its 1997 financial results would be compared.

39. For example, Sunbeam created a \$338 million reserve for "restructuring" charges. As the November 1998 restatement made clear, included in these charges were costs of redesigning product packaging; costs of relocating employees and equipment; bonuses to be paid to employees who were told that they were being laid off but were asked to stay on temporarily; advertising expenses; and certain consulting fees. Because these items benefited future activities, GAAP did not permit them to be classified as restructuring charges. Andersen also permitted Sunbeam to violate GAAP by creating a \$12 million reserve for a lawsuit alleging that Sunbeam was liable for cleanup costs associated with a hazardous waste site, even though Sunbeam's estimated liability was, at best, half that amount.

40. Andersen also permitted Sunbeam improperly to write down its household products inventory in 1996. In connection with the restructuring, Sunbeam had decided to eliminate half of Sunbeam's product lines and to liquidate its inventory of those product lines. Although only half of Sunbeam's product lines were eliminated, Andersen allowed Sunbeam to apply, at year-end 1996, the special accounting treatment that it had accorded the eliminated lines to its entire inventory of household products. As a result, as the November 1998 financial restatement later showed, Sunbeam understated the balance sheet value of its inventory at year-end 1996 by approximately \$2 million and overstated its 1996 loss by the same amount.

41. Andersen also allowed management improperly to recognize, as a 1996 expense, \$2.3 million in 1997 advertising expenses and related costs. In addition, Andersen permitted

Sunbeam to manipulate its 1996 liabilities for "cooperative advertising." It was Sunbeam's practice to fund a portion of its retailers' costs of running local promotions. As required by GAAP, Sunbeam accrued its estimated liabilities for this expense. At year-end 1996, Sunbeam set its cooperative advertising accrual at an inflated value of \$21.8 million. According to the November 1998 restatement, this accrual was improper under GAAP because it was approximately 25 percent higher than the prior year's accrual amount, without a proportional increase in sales providing a basis for the increase. Ultimately, as the November 1998 restatement showed, \$5.8 million of that excessive accrual was used (without disclosure) to inflate Sunbeam's 1997 income.

Andersen's 1996 Unqualified Audit Opinion

42. In the course of auditing Sunbeam's 1996 financial statements, Andersen became aware of these improper accounting practices. Indeed, it questioned a Sunbeam employee about the restructuring reserves and was told that the reserve included "everything but the kitchen sink." Harlow, the Andersen engagement partner, raised the issues with Kersh and Gluck and proposed that Sunbeam reverse certain of its improper entries. But when Kersh and Gluck rejected these proposals, Andersen backed down.

43. In March 1997, Andersen issued an unqualified audit opinion regarding Sunbeam's 1996 financial statements and authorized the inclusion of its audit opinion in Sunbeam's 1996 Form 10-K filed with the SEC. Despite its knowledge of the many improper accounting practices that Sunbeam's management had employed, Andersen's opinion stated:

We conducted our audits in accordance with generally accepted auditing standards.

Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the financial statements

are free of material misstatement. An audit includes examining, on a test basis, evidence supporting the amounts and disclosures in the financial statements. An audit also includes assessing the accounting principles used and significant estimates made by management, as well as evaluating the overall financial statement presentation. We believe that our audits provide a reasonable basis for our opinion.

In our opinion, the financial statements . . . present fairly, in all material respects, the financial position of Sunbeam Corporation and subsidiaries as of December 31, 1995 and December 29, 1996, and the results of their operations and their cash flows for each of the three fiscal years in the period ended December 29, 1996 in conformity with generally accepted accounting principles.

44. Andersen also knowingly provided false descriptions of certain of Sunbeam's specific accounting practices. For example, it characterized Sunbeam's treatment of its restructuring charges in Note 2 to the audited 1996 consolidated financial statements as follows:

In conjunction with the implementation of the restructuring and growth plan, the Company recorded a pre-tax special charge to earnings of approximately \$337.6 million in the fourth quarter of 1996. This amount is allocated as follows in the accompanying Consolidated Statement of Operations: \$154.9 million to Restructuring, Impairment and Other Costs as further described below; \$92.3 million to Cost of Goods Sold related principally to inventory write-downs from the reduction in SKUs and costs of inventory liquidation programs; \$42.5 million to Selling, General and Administrative expenses principally for increases in environmental and litigation reserves (see Notes 12 and 13) and other reserve categories; and the estimated pre-tax loss on the divestiture of the Company's furniture business of approximately \$47.9 million.

In fact, however, Andersen knew that Sunbeam had improperly inflated its restructuring costs by millions of dollars.

45. Andersen's 1996 audit violated GAAS because, among other things, Andersen failed (1) to perform the audits with an attitude of professional skepticism as required by the Statement on Auditing Standards ("SAS") No. 53; (2) to conclude that there was a significant

risk that Sunbeam management would intentionally distort the company's financial statements, in violation of American Institute of Certified Public Accountants Professional Standards, AU §§ 316.10 and 316.12; (3) to recognize that the accounting policies employed by Sunbeam were not acceptable in the circumstances, in violation of AU § 316.19; (4) to obtain sufficient competent evidential matter through inspection, observation, inquiries, and confirmations to afford a reasonable basis for its opinions regarding Sunbeam's financial statements, in violation of AU § 150.02; (5) to exercise due professional care in the performance of the audit, in violation of AU § 150.02; (6) to plan the work adequately to uncover the errors and irregularities in Sunbeam's accounting information, in violation of AU § 150.02; and (7) to obtain a sufficient understanding of Sunbeam's internal control structure to plan the audits and to determine the nature, timing, and extent of tests to be performed, in violation of AU § 150.02.

46. In addition, in conducting the 1996 audit, Andersen (1) improperly relied on management representations rather than applying the auditing procedures necessary to afford a reasonable basis for an opinion on Sunbeam's financial statements, in violation of SAS No. 19 (AU § 333.02); (2) failed to recognize that misstatements resulting from misapplication of GAAP, departures from fact, and omissions of necessary information, in aggregate, caused Sunbeam's financial statements to be materially misstated, in violation of SAS No. 47 (AU § 312.04); (3) failed to issue a qualified or adverse opinion, in violation of SAS No. 47 (AU § 312.31); and (4) improperly concluded that the accounting principles applied by Sunbeam were appropriate in the circumstances and that Sunbeam's financial statements were informative of matters that could affect their use, understanding, and interpretation, in violation of SAS No. 69 (AU §§ 411.04(b) and (c)).

47. In all, the 1996 financial statements audited by Andersen were materially false and misleading and overstated Sunbeam's operating losses for 1996 by at least \$40 million. Moreover, Andersen's unqualified audit opinion was false in at least two material respects. First, the financial statements that Andersen audited did not "fairly" present Sunbeam's financial

position in conformity with GAAP, as it represented. Second, Andersen had not, as it claimed, conducted its audit in accordance with GAAS.

The Fraudulent 1997 Financial Statements

48. The accounting frauds in which Andersen permitted Sunbeam to engage in 1997 were aimed at inflating the company's earnings. To accomplish this — as the November 1998 restatement and an SEC investigation subsequently showed — Andersen allowed Sunbeam to record fraudulent sales, to account improperly for one-time events, and improperly to use “cookie-jar” reserves, all in violation of GAAP.

49. Among other things, Sunbeam's 1997 financial statements, certified by Andersen, did not comply with the accounting principles of (1) reliability, FASB Statement of Financial Accounting Concepts No. 2, §§ 58-97; APB Statement No. 4, §§ 109, 138, 189; (2) completeness, FASB Statement of Financial Accounting Concepts No. 2, §§ 79, 80; APB Statement No. 4, § 94; (3) conservatism, FASB Statement of Financial Accounting Concepts No. 2, §§ 91-97; APB Statements No. 9, §§ 35, 71; (4) neutrality, FASB Statement of Financial Accounting Concepts No. 2, §§ 98-110; or (5) relevance, FASB Statement of Financial Accounting Concepts No. 2, §§ 47, 48.

50. According to the November 1998 restatement, one of the revenue inflation tactics permitted by Andersen in 1997 was Sunbeam's improper accounting for “bill-and-hold” sales. A bill-and-hold sale occurs when a seller bills a customer for a purchase while retaining the merchandise for later delivery. During 1997, Dunlap's management team offered financial incentives to various customers to purchase products. Under GAAP, revenue under bill-and-hold transactions may be recognized only if, among others things, the buyer — not the seller — requests a sale on that basis. As Andersen subsequently learned in the course of its 1997 audit, the purported bill-and-hold customers had not requested that treatment, and, in numerous cases, the risks of ownership and legal title were never passed to the customer. According to the

November 1998 restatement, Sunbeam added more than \$29 million to Sunbeam's 1997 sales and \$4.5 million to income by improperly accounting for these transactions.

51. Another income-boosting tactic that Andersen sanctioned was Sunbeam's improper use of its inflated 1996 reserves, which the November 1998 restatement later showed artificially increased the company's 1997 income by almost \$5 million. Andersen also let Sunbeam improperly treat \$19 million that it received from the sale of discounted and obsolete inventory as ordinary income. Although the recognition of that revenue was permitted under GAAP, Sunbeam was required to disclose that revenue as a non-recurring event. Sunbeam failed to do so, again with Andersen's blessing.

52. In addition, Andersen allowed Sunbeam's Hong Kong and Canadian subsidiaries to book sales that violated applicable accounting principles because they included an unlimited right to return unsold merchandise and because the amount of future returns on such sales could not reasonably be estimated. The November 1998 restatement showed that, on Andersen's watch, Sunbeam's Hong Kong subsidiary improperly recorded sales revenue of \$8.6 million from various sales made during the fourth quarter of 1997.

53. Andersen also permitted Sunbeam to employ several improper accounting tricks with respect to its Mexican subsidiary. According to the November 1998 restatement, that subsidiary engaged in \$900,000 in bill-and-hold transactions in 1997 that should not have been recognized as income until 1998. In addition, the subsidiary's inventory was overvalued by \$2 million, and the financial statements for Sunbeam's Mexico operations failed to include \$3 million expense for the profit sharing obligations of that business. According to the November 1998 restatement, Sunbeam's Venezuela subsidiary also improperly valued its inventory.

54. As a result of these and other improper accounting devices, in 1997, Sunbeam reported \$186 million in income, much of which was, according to the November 1998 restatement, improper under GAAP. In all, the overstatements included over \$90 million of

improper net income, including approximately \$10 million from a sham sale of inventory to a contractor, approximately \$4.5 million from non-GAAP bill-and-hold sales, approximately \$35 million in income derived from the use of non-GAAP reserves and accruals taken at year-end 1996 and approximately \$6 million from improper revenue recognition.

Sunbeam's Purchase of Coleman

55. Toward the end of 1997, Sunbeam's senior management initiated an effort to sell the company. Sunbeam engaged Morgan Stanley to advise it with respect to the possible sale of its core businesses and/or the initiation of one or more major acquisitions. Ultimately, Coleman, Signature Brands USA, Inc. and First Alert, Inc. were identified as three companies interested in being acquired by Sunbeam.

56. On January 28, 1998, Sunbeam announced its financial results for 1997, reporting total revenues of \$1.168 billion, and total earnings from continuing operations of \$189 million (or \$1.41 per share). Sunbeam's announcement coincided with Andersen's purported completion of the field work for its audit of Sunbeam's 1997 financial statements, although Andersen's work in fact continued for more than a month.

57. On February 3, 1998, Harlow met with key officers of Sunbeam to discuss the acquisition of Coleman and its financial impact on Sunbeam. By that time, as a result of reviewing Sunbeam's 1997 financial statements in the course of its audit, Andersen knew that Sunbeam's 1997 results were false.

58. On February 20, 1998, Andersen agreed to act as a Sunbeam financial advisor and perform financial due diligence in connection with Sunbeam's acquisition of Coleman, First Alert, and Signature Brands, further compromising its duty as an auditor to maintain its independence from its client. In agreeing to undertake that assignment, Andersen became an active member of the team working to assist Sunbeam in its acquisitions. Andersen employees who worked on Sunbeam's audit also served as members of Sunbeam's due diligence team in connection with Sunbeam's acquisition of Coleman.

59. On February 27, 1998, Sunbeam's Board of Directors met in New York to discuss Sunbeam's possible purchase of Coleman. During the February 27, 1998 meeting, Morgan Stanley provided Sunbeam's Board of Directors with a written "fairness" opinion regarding the fair acquisition price of Coleman. The opinion made clear that, even in the context of issuing a fairness opinion on the Coleman acquisition price, Morgan Stanley had relied upon Andersen's representations regarding Sunbeam's financial health. The fairness opinion explicitly stated that Morgan Stanley had reviewed "certain publicly available financial statements and other information" of Sunbeam. The opinion advised that Morgan Stanley had "assumed and relied upon without independent verification the accuracy and completeness of the information reviewed by us for the purposes of this opinion."

60. The Sunbeam Board of Directors approved the Coleman acquisition. That same day, Coleman-Parent — the 82 percent shareholder of Coleman — agreed to sell Coleman to Sunbeam for a purchase price of \$2.2 billion. Sunbeam agreed to provide Coleman-Parent with \$160 million in cash, to assume \$584 million in Coleman-related debt, and to provide Coleman-Parent with 14,099,749 shares of Sunbeam stock. Sunbeam also agreed to purchase Signature Brands and First Alert for approximately \$300 million.

Andersen's 1997 Unqualified Audit Opinion

61. In the first week of March 1998, shortly after the agreement for Sunbeam's purchase of Coleman was signed, but before the transaction closed, Andersen rendered an unqualified audit opinion for Sunbeam's 1997 financial statements. With Andersen's express consent, management included that opinion in Sunbeam's 1997 Form 10-K filed with the SEC on March 6, 1998.

62. Andersen was well aware of the potential for fraud in Sunbeam's 1997 books, including the risk that Sunbeam management would attempt to claim profits and revenue on transactions before the earnings process was completed. Harlow specifically advised Andersen's foreign offices (including Andersen-Canada, Andersen-Hong Kong, Andersen-Mexico,

Andersen-Venezuela and Andersen-UK), for example, that Dunlap had made promises to the public regarding earnings-per-share to be attained in 1997, and that management had a vested interest in achieving the promised earnings levels because management's primary form of compensation was based on the company's stock price. Harlow also noted the presence of the possibility of a third-party purchase of the company's stock or assets.

63. In the course of its audit of Sunbeam's 1997 financial records, Andersen learned Harlow's concerns were well founded. It discovered that Sunbeam had improperly accounted for certain bill-and-hold sales, had misused its reserves, and had overvalued its inventories. Andersen discussed these problems with Sunbeam's senior management and proposed that Sunbeam reverse these improper entries. But Sunbeam's senior management refused to do so. Rather than insisting that the adjustments be made, Andersen permitted the entries.

64. Once again, Andersen gave Sunbeam a clean bill of financial health. In its opinion concerning Sunbeam's 1997 financial statements, Andersen stated:

We conducted our audits in accordance with generally accepted auditing standards. Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement. An audit includes examining, on a test basis, evidence supporting the amounts and disclosures in the financial statements. An audit also includes assessing the accounting principles used and significant estimates made by management, as well as evaluating the overall financial statement presentation. We believe that our audits provide a reasonable basis for our opinion.

In our opinion, the financial statements . . . , present fairly, in all material respects, the financial position of Sunbeam Corporation and subsidiaries as of December 29, 1996 and December 28, 1997, and the results of its operations and its cash flows for each of the three fiscal years in the period ended December 28, 1997 in conformity with generally accepted accounting principles.

65. In fact, Andersen's 1997 audit violated GAAS because, among other things, Andersen had failed (1) to perform the audits with an attitude of professional skepticism as

required by SAS No. 53; (2) to reach a conclusion that there existed a significant risk of intentional distortion of financial statements by Sunbeam management, in violation of AU §§ 316.10 and 316.12; (3) to recognize that the accounting policies employed by Sunbeam were not acceptable in the circumstances, in violation of AU § 316.19; (4) to obtain sufficient competent evidential matter through inspection, observation, inquiries, and confirmations to afford a reasonable basis for its opinions regarding Sunbeam's financial statements, in violation of AU § 150.02; (5) to exercise due professional care in the performance of the audit, in violation of AU § 150.02; (6) to plan the work adequately to uncover the errors and irregularities in Sunbeam's accounting information, in violation of AU § 150.02; and (7) to obtain a sufficient understanding of Sunbeam's internal control structure to plan the audits and to determine the nature, timing, and extent of tests to be performed, in violation of AU § 150.02.

66. In addition, in conducting the 1997 audit, Andersen (1) improperly relied on management representations rather than applying the auditing procedures necessary to afford a reasonable basis for an opinion on Sunbeam's financial statements, in violation of SAS No. 19 (AU § 333.02); (2) failed to recognize that misstatements resulting from misapplication of GAAP, departures from fact and omissions of necessary information, in aggregate, caused Sunbeam's financial statements to be materially misstated, in violation of SAS No. 47 (AU § 312.04); (3) failed to issue a qualified or adverse opinion, in violation of SAS No. 47 (AU § 312.31); (4) improperly concluded that the accounting principles applied by Sunbeam were appropriate in the circumstances and that Sunbeam's financial statements were informative of matters that could affect their use, understanding and interpretation, in violation of SAS No. 69 (AU §§ 411.04(b) and (c)); and (5) failed to report that a change in the application of accounting principles in Sunbeam's 1997 financial statements had materially affected their comparability with the financial statements for prior periods, especially 1996, due to a different treatment of sales and reserves in those periods, in violation of SAS Nos. 1 and 43 (AU § 420.02).

67. In all, the 1997 financial statements audited by Andersen reported operating income of \$186 million — an overstatement of at least 50 percent. Like its 1996 unqualified audit opinion, Andersen's 1997 opinion was false in two material respects. First, the financial statements Andersen audited did not "fairly" present Sunbeam's financial position in conformity with GAAP, as it represented. Second, Andersen had not, as it claimed, conducted its audit in accordance with GAAS.

**Morgan Stanley's Reliance on Andersen's
Unqualified Audit Opinions**

68. After it agreed to acquire Coleman, First Alert, and Signature Brands, Sunbeam needed to raise approximately \$2.3 billion to refinance existing debt and to fund these acquisitions. To accomplish these financing objectives, Sunbeam's management elected to issue \$500 million in subordinated convertible notes (an amount later increased to \$750 million) (the "Convertible Note Offering") and enter into a new \$2 billion senior credit agreement (later reduced to \$1.7 billion) with secured lenders (the "Bank Facility"). Morgan Stanley served as the lead underwriter for the Convertible Note Offering and as the Syndication Agent for the Bank Facility. Morgan Stanley also coordinated the Bank Facility with First Union and Bank of America, Sunbeam's other secured lenders.

69. Andersen knew of these proposed financing arrangements. Specifically, Andersen knew that the Coleman and other acquisitions would not close unless Sunbeam secured the financing necessary to cover the acquisition prices. Moreover, Andersen knew that Morgan Stanley was a principal participant in the Bank Facility, and that Morgan Stanley would be relying on the representations Andersen made regarding Sunbeam's financial condition. Indeed, Andersen knew that documents issued in connection with the Convertible Note Offering clearly stated that "[Sunbeam] is currently negotiating the terms of the New Credit Facility with a group of banks which [Sunbeam] expects will provide for borrowings by [Sunbeam] or one or more of its subsidiaries in the aggregate principal amount of \$2.0 billion. *The New Credit Facility is being arranged by an affiliate of [Morgan Stanley].*"

70. In addition to its knowledge of Morgan Stanley's role in Sunbeam's acquisitions, Andersen had many reasons to know that Morgan Stanley would rely on Sunbeam's audited financial statements. To begin with, Andersen, in its substantial experience working on multi-billion dollar mergers and acquisitions, understood that Sunbeam's lenders and underwriters would rely on an auditor's certification of Sunbeam's financial condition. As would any lender engaged in a deal of this scale, Morgan Stanley looked to the financial statements provided by Sunbeam and audited by Andersen to evaluate annual cash flow and to assess Sunbeam's ability, following the acquisition, to promptly and comfortably pay interest and ultimately pay back the loan. Indeed, reasonable and professional lenders such as Morgan Stanley, Bank of America, and First Union would not have loaned over \$1 billion dollars to any person or entity without strong assurance that their money would be returned.

71. Not only was Andersen aware that any prudent business in Morgan Stanley's position *would* rely on Andersen's financial statements, but Andersen also knew that Morgan Stanley *was* specifically relying on Andersen's certifications. Indeed, Andersen *itself* had expressly represented to Morgan Stanley that Sunbeam's financial statements were truthful and that Andersen's unqualified audit opinions were reliable. On March 19, 1998, Andersen sent Morgan Stanley a "comfort" letter stating that, in Andersen's opinion, "the consolidated financial statements [for 1996 and 1997] audited by [Andersen] and included in the Offering Memorandum comply as to form in all material respects with the applicable accounting requirements of the [Securities Act of 1933] and the related published rules and regulations." In a follow-up letter dated March 25, 1998, Andersen reaffirmed its previous representation.

72. In addition, Andersen participated in meetings and telephone calls in which it represented to Morgan Stanley that Sunbeam's audited financial statements were accurate.

73. Andersen also knew that Morgan Stanley had stated in a February 27, 1998 "fairness" letter that Morgan Stanley presented to Sunbeam's Board of Directors that Morgan

Stanley had assumed and relied upon the accuracy and completeness of Sunbeam's audited financial statements.

74. In addition, Andersen knew that Sunbeam had expressly represented, in loan negotiations with Morgan Stanley, that Andersen's audit opinions were accurate. Specifically, Andersen knew that, in the Sunbeam-Morgan Stanley credit agreement, Sunbeam warranted that it had provided Morgan Stanley with accurate information regarding Sunbeam's consolidated statements of operations, stockholders' equity and cash flows, as well as its consolidated balance sheets. According to Sunbeam, its financial statements — certified by Andersen — "present[ed] fairly, in all material respects, the financial position and results of operations and cash flows . . . in accordance with GAAP."

75. Similarly, Andersen knew that, in connection with the Convertible Note Offering, Sunbeam had included its 1996 and 1997 audited financial statements in its March 19, 1998 offering memorandum and had represented to Morgan Stanley that its audited financial statements were reliable.

76. Andersen also knew that, as part of the Coleman merger agreement executed on February 27, 1998, Sunbeam had represented and warranted that all of its filings with the SEC, which included the 1996 financial statements audited by Andersen, were accurate and not misleading, and that they would continue to be accurate and not misleading as of the transaction's closing date. Sunbeam further represented that its audited financial statements were prepared in accordance with GAAP, and that at the time of the closing of the transaction, that representation would continue to be true and correct.

77. Significantly, although it knew that Morgan Stanley had based multi-million dollar financing decisions on its representations, Andersen did not tell Morgan Stanley of the accounting concerns that it had raised with Sunbeam management in the course of its 1996 and 1997 audits or that Sunbeam's financial statements had not been fairly stated in 1996 and 1997.

78. On March 25, 1998, the \$750 million Convertible Note Offering closed.

79. Sunbeam closed its acquisition of Coleman on March 30, 1998. On that date, Sunbeam, through a wholly owned subsidiary, acquired approximately 81 percent of the then-outstanding shares of Coleman common stock. These shares were acquired by Sunbeam in exchange for 14,099,749 shares of Sunbeam's common stock and approximately \$160,000,000 in cash. In addition, Sunbeam assumed or repaid approximately \$1,016,000,000 in debt belonging to Coleman and Coleman-Parent. Included in the repaid debt portion of the transaction was an immediate cash payment by Sunbeam to Coleman-Parent of \$590 million.

80. Morgan Stanley and Sunbeam closed the Bank Facility on March 31, 1998. In accordance with the terms of the Bank Facility, Morgan Stanley — unaware of the falsity of Sunbeam's financial statements and Andersen's audit reports — loaned Sunbeam \$680 million in immediately available funds to be used for the acquisitions. First Union, which served as the Administrative Agent for the Bank Facility, loaned Sunbeam an additional \$510 million. Bank of America, which served as the Documentation Agent for the Bank Facility, loaned Sunbeam an additional \$510 million.

81. As Andersen knew, Morgan Stanley had relied on Sunbeam's report of \$186 million in income in deciding to underwrite the Convertible Note Offering and to loan Sunbeam \$680 million. Moreover, Andersen knew that the Sunbeam-Morgan Stanley credit agreement provided that a condition precedent to Morgan Stanley's obligations under the agreement was the absence of any event, change, or development that would have a material adverse effect on the business, results of operation, or financial condition of Sunbeam. Andersen knew that an additional condition precedent to Morgan Stanley's obligations was the absence of any material misrepresentation or omissions in Sunbeam's SEC filings, including Andersen's 1996 and 1997 audit reports in the Form 10-Ks.

82. But for Andersen's fraud and its failure to issue qualified or adverse reports exposing the falsity of Sunbeam's financial statements, Morgan Stanley would have had notice of an adverse material change affecting Sunbeam before funding, and of a material misstatement

in Sunbeam's SEC filings. Not only would Morgan Stanley never have agreed to underwrite the Convertible Note Offering, but Morgan Stanley's obligation to loan Sunbeam \$680 million also would have been discharged by the failure of conditions precedent to its obligations under the credit agreement. Andersen's fraud directly caused the extensive losses that Morgan Stanley suffered.

Andersen's Improper Accounting and Misrepresentations Are Revealed

83. In an April 3, 1998 conference call with securities analysts, Sunbeam revealed that sales for the first quarter of 1998 were 5 percent below reported sales for the same period of the prior year.

84. On April 22, 1998, a class of Sunbeam shareholders sued Sunbeam and its senior officers in the United States District Court for the Southern District of Florida, alleging that the company had violated the securities laws by issuing materially false and misleading statements regarding Sunbeam's financial condition. Andersen was subsequently added as a defendant in this lawsuit.

85. On June 8, 1998, an article was published in *Barron's* that raised serious questions regarding Sunbeam's apparent success under Dunlap, suggesting that it was the result of "accounting gimmickry." On June 15, 1998, Sunbeam's Board announced that it had removed Dunlap as Chairman and CEO. On June 17, 1998, Sunbeam received a letter from the SEC informing it that the SEC had initiated an investigation into the company.

86. Andersen continued to stand behind its fraudulent audit opinions. On June 15, 1998, Andersen allowed Sunbeam's Board of Directors to assert that Andersen had "assured the Board that Sunbeam's audited financial statements [were] accurate in all material respects." It was not until June 25, 1998 — when Andersen withheld its consent for use of its 1997 audit opinion in a registration statement that was to have been filed with the SEC — that Andersen gave any hint that its unqualified audit opinions were unreliable.

87. On June 30, 1998, Sunbeam announced that the Audit Committee of its Board of Directors would conduct an inquiry into the accuracy of its 1997 financial statements. The Audit Committee subsequently retained Deloitte & Touche LLP to assist in the review, in addition to Andersen. Sunbeam stated that "pending the completion of the review, its 1997 financial statements and the report of Arthur Andersen LLP should not be relied upon." Sunbeam added that the review "could result in a restatement of the 1997 financial statements and the first quarter 1998 Form 10-Q."

88. On August 6, 1998, Sunbeam announced that its Audit Committee had determined that Sunbeam would be required to restate its audited financial statements for 1997 and possibly for 1996, as well as its unaudited financial statements for the first quarter of 1998. On October 20, 1998, Sunbeam and Andersen announced a restatement of its 1996 and 1997 financial statements.

89. Holders of the convertible notes sued Sunbeam on October 30, 1998, and Andersen was later named as a defendant in that suit.

90. On November 12, 1998, Sunbeam released its restated 1996 and 1997 financial results, again audited by Andersen. The restated 1996 financial statements reported operating losses for 1996 that were approximately \$40 million less than originally reported, losses from continuing operations that were approximately \$26 million less than previously reported and net losses that were approximately \$20 million less than previously reported.

91. For 1997, the restated financial statements reported operating earnings that were approximately \$95 million less than originally reported, earnings from continuing operations that were approximately \$70 million less than previously reported and net earnings that were approximately \$70 million less than previously reported. The new operating income figure for 1997 was approximately half the amount that Andersen had previously certified.

Sunbeam Declares Bankruptcy

92. On February 6, 2001, as a direct result of the deceit that Andersen had facilitated, Sunbeam and several of its subsidiaries were forced to seek relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York. As part of the bankruptcy court-approved reorganization plan, Morgan Stanley's \$680 million loan to Sunbeam was discharged in full, and Morgan Stanley received Sunbeam stock valued at a fraction of the original loan. In addition, as a result of Andersen's actions, the convertible notes issued by Sunbeam and held by Morgan Stanley had been rendered substantially less valuable.

Subsequent Censure of Andersen's Conduct

93. Both courts and regulators have scrutinized Andersen's facilitation of Sunbeam's fraud. In their judgments against the firm and Harlow, they have denounced Andersen's conduct.

94. In December 1999, for example, the federal court presiding over the Sunbeam shareholders' class action lawsuit refused to dismiss the claims against Andersen. The court concluded that the class plaintiffs had alleged sufficient facts "to demonstrate that Arthur Andersen had acted with severe recklessness in issuing its misleading [1997] Unqualified Audit Opinion." *In re Sunbeam Sec. Litig.*, 89 F. Supp. 2d 1326, 1344 (S.D. Fla. 1999). Andersen subsequently settled this lawsuit in 2001 for \$110 million.

95. On May 15, 2001, the SEC filed a civil action in the United States District Court for the Southern District of Florida against five former Sunbeam officers and Harlow, Andersen's engagement partner.

96. In January 2003, the SEC settled its charges with Harlow. In its settlement order, it made numerous factual findings regarding Harlow and Andersen's improper conduct. It concluded that Harlow had proposed, on many occasions, adjustments to rectify Sunbeam's false financial statements. After management refused to make these adjustments, Harlow improperly acceded to that decision. *In re Phillip E. Harlow*, Rel. No. 34-47261, 2003 WL 169818, at **1-3 (SEC Release Jan. 27, 2003).

97. The SEC's assessment of Harlow's conduct was damning. Among many other things, it concluded that Harlow (1) "failed to exercise professional skepticism when performing audit procedures and gathering and analyzing audit evidence"; (2) "accepted uncorroborated representations of Sunbeam's management in lieu of performing appropriate audit procedures"; (3) "failed to exercise due professional care in performing the audit and preparing the audit report"; (4) "failed to perform sufficient audit procedures to determine whether the financial statements were in conformity with GAAP," even after he had "identified a number of audit risks and accounting issues associated with the Sunbeam engagement"; and (5) "failed to obtain sufficient competent evidential matters through inspection, observation, inquiries, and confirmation to afford a reasonable basis for an audit opinion." *Id.* at *4. Based on these factual findings, the Commission concluded that the 1996 and 1997 financial statements that Harlow had audited were not in conformity with GAAP, and the audit was not performed in accordance with GAAS. *Id.* (citing AU §§ 410, 411, 508.07).

98. Other participants in the Coleman acquisition have also sued Andersen for its fraudulent conduct. On July 1, 2001, Coleman-Parent sued Andersen for fraudulent misrepresentation, fraudulent inducement to contract, and negligent misrepresentation. Andersen subsequently agreed to settle that dispute for an undisclosed amount.

COUNT I

Fraudulent Misrepresentation

99. Paragraphs 1 through 98 are repeated and realleged as if set forth herein.

100. Andersen consented to the publication of its audit reports to the public and business world by permitting Sunbeam to include them in Sunbeam's SEC filings. Given that publication, Andersen knew and intended that the public — including Morgan Stanley — would rely on Andersen's representations.

101. Andersen knew of Morgan Stanley's role in Sunbeam's acquisitions. Andersen also knew that Morgan Stanley would rely and had relied upon Andersen's 1996 and 1997

unqualified audit opinions for the particular purpose of determining whether to underwrite the Convertible Note Offering and to provide Sunbeam with a loan for \$680 million. Andersen itself invited Morgan Stanley to rely on its unqualified audit opinions, expressly representing to Morgan Stanley, in letters dated March 19, 1998, and March 25, 1998, that Sunbeam's financial statements were truthful and that Andersen's unqualified audit opinions were reliable. Moreover, Andersen knew that Morgan Stanley had provided Sunbeam's Board of Directors with a "fairness" letter expressly stating that Morgan Stanley had assumed and relied upon the accuracy and completeness of Sunbeam's audited financial statements.

102. Andersen also knew of Sunbeam's proposed financing arrangements, and it participated in meetings and telephone calls in which it represented to Morgan Stanley that Sunbeam's audited financial statements were accurate.

103. In addition, Andersen knew that Sunbeam had expressly represented, in loan negotiations with Morgan Stanley, that Andersen's audit opinions were accurate and that, in the Sunbeam-Morgan Stanley credit agreement, Sunbeam had warranted that it had provided Morgan Stanley with accurate information regarding its consolidated statements of operations, stockholders' equity and cash flows, as well as its consolidated balance sheets. Similarly, Andersen knew that, in connection with the Convertible Note Offering, Sunbeam had included its 1996 and 1997 audited financial statements in its March 19, 1998 offering memorandum and had represented to Morgan Stanley that its audited financial statements were reliable.

104. Andersen also knew that, as part of the Coleman merger agreement executed on February 27, 1998, Sunbeam had represented and warranted that all of its filings with the SEC, which included the 1996 financial statements audited by Andersen, were accurate, not misleading, and prepared in accordance with GAAP, and that they would continue to be accurate and not misleading as of the transaction's closing date.

105. Andersen knew that Sunbeam's financial statements were replete with accounting irregularities and that the information in Sunbeam's 1996 and 1997 financial statements was

materially false and misleading. Those material misrepresentations included, among other things, overstatements of (a) Sunbeam's 1996 operating losses by approximately \$40 million; (b) its 1996 losses from continuing operations by approximately \$26 million; (c) its 1996 net losses by approximately \$20 million; (d) its 1997 operating earnings by approximately \$95 million; (e) its 1997 earnings from continuing operations by over \$70 million; (f) its 1997 net earnings by approximately \$70 million; and (g) its 1997 operating income figure by approximately 50 percent.

106. In addition, Andersen knew that its 1996 and 1997 unqualified audit opinions were materially false and misleading. Andersen knew that it had falsely stated, among other things, that (a) Sunbeam's financial statements fairly presented the financial position of Sunbeam during 1996 and 1997; (b) Sunbeam's financial statements fairly presented the results of Sunbeam's operations and cash flows during 1996 and 1997; (c) Sunbeam's financial statements conformed with GAAP; and (d) its audits of Sunbeam were conducted in accordance with GAAS.

107. Although Andersen knew that Morgan Stanley would rely and had relied on its false statements, it did not inform Morgan Stanley that the unqualified audit opinions it had provided were materially false or that Sunbeam's financial statements contained numerous misstatements of material facts.

108. Andersen made its materially false representations regarding its unqualified audit opinions and the accuracy of Sunbeam's financial statements with the intent to deceive Morgan Stanley.

109. Andersen knew that the false information that it had provided to Morgan Stanley, and its intentional failure to correct the misrepresentations contained in Sunbeam's financial statements, would be critical to Morgan Stanley's decision to participate in the financing of Sunbeam's acquisitions. But for Andersen's fraudulent representations, Morgan Stanley would

not have underwritten the Convertible Note Offering, nor would it have loaned Sunbeam \$680 million.

110. As a direct result of Andersen's fraud, Morgan Stanley has suffered hundreds of millions of dollars in damages.

COUNT II
Fraudulent Inducement To Contract
(Conspiracy and Concerted Action)

111. Paragraphs 1 through 110 are repeated and realleged as if set forth herein.

112. Sunbeam's 1996 and 1997 financial statements contained false statements of material fact. Those material misrepresentations included, among other things, overstatements of (a) Sunbeam's 1996 operating losses by approximately \$40 million; (b) its 1996 losses from continuing operations by approximately \$26 million; (c) its 1996 net losses by approximately \$20 million; (d) its 1997 operating earnings by approximately \$95 million; (e) its 1997 earnings from continuing operations by over \$70 million; (f) its 1997 net earnings by approximately \$70 million; and (g) its 1997 operating income figure by approximately 50 percent.

113. Andersen knew that its 1996 and 1997 unqualified audit opinions were materially false and misleading. Andersen knew that it had falsely stated, among other things, that (a) Sunbeam's financial statements fairly presented the financial position of Sunbeam during 1996 and 1997; (b) Sunbeam's financial statements fairly presented the results of Sunbeam's operations and cash flows during 1996 and 1997; (c) Sunbeam's financial statements conformed with GAAP; and (d) its audits of Sunbeam were conducted in accordance with GAAS.

114. Both Sunbeam and Andersen knew that their representations regarding Sunbeam's 1996 and 1997 financial statements were false when made and/or made these representations with reckless disregard as to their truth.

115. Andersen, Harlow, Dunlap, Kersh, and other senior Sunbeam executives acted in concert and wrongfully conspired to create the appearance that Sunbeam was performing at a high level in order artificially to inflate the stock price of Sunbeam and make it attractive for a

sale to another company. Andersen explicitly or implicitly by acquiescence agreed to become part of that conspiracy and committed overt acts in furtherance of its fraudulent scheme in order to retain Sunbeam as a client.

116. In furtherance of that conspiracy, Dunlap and the other Sunbeam executives decided to acquire Coleman, First Alert, and Signature Brands. In furtherance of that scheme, in March 1998, Andersen committed the overt acts of issuing Andersen's false and misleading unqualified audit opinion with respect to Sunbeam's 1997 financial statements and of consenting to its publication to the SEC as part of Sunbeam's Form 10-K filing on March 6, 1998.

117. To induce Morgan Stanley into underwriting the Convertible Note Offering and to loan Sunbeam \$680 million to finance its acquisition of Coleman, First Alert, and Signature Brands, Andersen and Sunbeam represented to Morgan Stanley that Sunbeam's audited financial statements and Andersen's audit opinions were accurate and not misleading. Andersen invited Morgan Stanley to rely on its unqualified audit opinions, expressly representing to Morgan Stanley, in letters dated March 19, 1998, and March 25, 1998, that Sunbeam's financial statements were truthful and that Andersen's unqualified audit opinions were reliable. Both Andersen and Sunbeam management knew that Morgan Stanley had provided Sunbeam's Board of Directors with a "fairness" letter expressly stating that Morgan Stanley had assumed and relied upon the accuracy and completeness of Sunbeam's audited financial statements.

118. In connection with the Convertible Note Offering and the Bank Facility, Andersen and Sunbeam participated in meetings and telephone calls in which they represented to Morgan Stanley that Sunbeam's audited financial statements were accurate.

119. In addition, Sunbeam expressly represented, in loan negotiations with Morgan Stanley, that Andersen's audit opinions were accurate. It further warranted, in the Sunbeam-Morgan Stanley credit agreement, that it had provided Morgan Stanley with accurate information regarding its consolidated statements of operations, stockholders' equity and cash flows, as well as its consolidated balance sheets. Likewise, in connection with the Convertible Note Offering,

Sunbeam included its 1996 and 1997 audited financial statements in its March 19, 1998 offering memorandum and represented to Morgan Stanley that its audited financial statements were reliable.

120. Also, as part of the Coleman merger agreement executed on February 27, 1998, Sunbeam represented and warranted that all of its filings with the SEC, which included the 1996 financial statements audited by Andersen, were accurate, not misleading, and prepared in accordance with GAAP, and that they would continue to be accurate and not misleading as of the transaction's closing date.

121. Andersen knew that its audit opinion would be used by Sunbeam to induce Morgan Stanley to underwrite the Convertible Note Offering and to induce Morgan Stanley to loan Sunbeam \$680 million to finance Sunbeam's acquisition of a controlling stake in Coleman. Andersen's audit report furthered the conspiracy between Andersen and Sunbeam by actively perpetuating the illusion that Sunbeam was a financially healthy company, which helped to support the company's artificially inflated stock price. In doing so, Andersen committed the tortious act of fraudulent inducement in concert with Dunlap and the other Sunbeam executives pursuant to a common design.

122. In reasonable and justifiable reliance on Andersen's and Sunbeam's representations that Sunbeam's financial statements and Andersen's audit reports were accurate and truthful, Morgan Stanley agreed to underwrite the Convertible Note Offering, and Morgan Stanley agreed to loan Sunbeam \$680 million to finance Sunbeam's acquisition of Coleman.

123. As a direct result of this conspiracy of fraudulent inducement, Morgan Stanley has suffered hundreds of millions of dollars in damages.

COUNT III

Aiding and Abetting Fraud

124. Paragraphs 1 through 123 are repeated and alleged as if set forth herein.

125. Sunbeam's 1996 and 1997 financial statements contained false statements of material fact. Those material misrepresentations included, among other things, overstatements of (a) Sunbeam's 1996 operating losses by approximately \$40 million; (b) its 1996 losses from continuing operations by approximately \$26 million; (c) its 1996 net losses by approximately \$20 million; (d) its 1997 operating earnings by approximately \$95 million; (e) its 1997 earnings from continuing operations by over \$70 million; (f) its 1997 net earnings by approximately \$70 million; and (g) its 1997 operating income figure by approximately 50 percent.

126. Andersen's 1996 and 1997 unqualified audit opinions were materially false and misleading. Andersen falsely stated, among other things, that (a) Sunbeam's financial statements fairly presented the financial position of Sunbeam during 1996 and 1997; (b) Sunbeam's financial statements fairly presented the results of Sunbeam's operations and cash flows during 1996 and 1997; (c) Sunbeam's financial statements conformed with GAAP; and (d) its audits of Sunbeam were conducted in accordance with GAAS.

127. To induce Morgan Stanley into underwriting the Convertible Note Offering and to loan Sunbeam \$680 million to finance its acquisition of Coleman, First Alert, and Signature Brands, Sunbeam represented to Morgan Stanley in loan negotiations that Sunbeam's audited financial statements were accurate and not misleading. In addition, in the Sunbeam-Morgan Stanley credit agreement, Sunbeam warranted that it had provided Morgan Stanley with accurate information regarding its consolidated statements of operations, stockholders' equity and cash flows, as well as its consolidated balance sheets. Likewise, in connection with the Convertible Note Offering, Sunbeam included its 1996 and 1997 audited financial statements in its March 19, 1998 offering memorandum and represented to Morgan Stanley that its audited financial statements were reliable.

128. Also, as part of the Coleman merger agreement executed on February 27, 1998, Sunbeam expressly represented and warranted that all of its filings with the SEC, which included the 1996 financial statements audited by Andersen, were accurate, not misleading, and prepared

in accordance with GAAP, and that they would continue to be accurate and not misleading as of the transaction's closing date.

129. Sunbeam knew that its representations regarding its 1996 and 1997 financial statements were materially false when made and/or made these representations with reckless disregard as to their truth. In addition, Sunbeam knew that Andersen's 1996 and 1997 unqualified audit opinions were materially false and misleading.

130. Sunbeam knew that Morgan Stanley would rely on its representations in determining whether to act as Sunbeam's underwriter and to loan Sunbeam \$680 million to finance its acquisitions. Although Sunbeam knew that Morgan Stanley would rely and had relied on its false statements, it did not inform Morgan Stanley that the unqualified audit opinions it had provided were materially false or that Sunbeam's financial statements contained numerous misstatements of material facts.

131. Sunbeam made its materially false representations regarding its financial statements and Andersen's unqualified audit opinions with the intent to deceive Morgan Stanley and to induce Morgan Stanley to participate in the financing of Sunbeam's acquisitions.

132. Sunbeam knew that the false information that it had provided to Morgan Stanley, and its intentional failure to correct the misrepresentations contained in Sunbeam's financial statements, would be critical to Morgan Stanley's decision to participate in the financing of Sunbeam's acquisitions. But for Sunbeam's fraudulent representations, Morgan Stanley would not have underwritten the Convertible Note Offering, nor would it have loaned Sunbeam \$680 million.

133. Andersen knowingly and substantially assisted Sunbeam in its fraud. Andersen itself expressly represented to Morgan Stanley, in letters dated March 19, 1998, and March 25, 1998, that Sunbeam's financial statements were truthful and that Andersen's unqualified audit opinions were reliable. In addition, Andersen participated in meetings and telephone calls in which it represented to Morgan Stanley that Sunbeam's audited financial statements were

accurate. Moreover, Andersen knew that Morgan Stanley had provided Sunbeam's Board of Directors with a "fairness" letter expressly stating that Morgan Stanley had assumed and relied upon the accuracy and completeness of Sunbeam's audited financial statements. Andersen did not tell Morgan Stanley of the accounting concerns that it had raised with Sunbeam management in the course of its 1996 and 1997 audits.

134. As a direct result of Sunbeam's fraud, aided and abetted by Andersen, Morgan Stanley has suffered hundreds of millions of dollars in damages.

WHEREFORE, plaintiffs Morgan Stanley demand judgment against Andersen-Worldwide, Andersen-US, Andersen-Canada, Andersen-Hong Kong, Andersen-Mexico, Andersen-Venezuela, Andersen-UK, Harlow, Pruitt, and Denkhaus, jointly and severally, as follows:

- A. Compensatory damages in an amount to be determined at trial;
- B. Attorneys' fees and costs incurred in this and related litigation;
- C. Pre-judgment interest; and
- D. All other relief this Court may deem just and appropriate.

Plaintiffs expressly reserve the right to seek leave to amend its complaint pursuant to Fla. Stat. § 768.72 to assert claims for punitive damages in excess of \$1.2 billion as allowed by law.

JURY DEMAND

Plaintiffs request a trial by jury on any and all issues raised by this Complaint that are triable of right by a jury.

March 1, 2004



D. Culver Smith III
Florida Bar No. 105933

of

D. CULVER SMITH III, P.A.
Suite 401, Northbridge Center
515 North Flagler Drive
West Palm Beach, FL 33401
Tel: (561) 833-3772
Fax: (561) 833-3485

with

Michael K. Kellogg
Mark C. Hansen
James M. Webster
Rebecca A. Beynon

of

KELLOGG, HUBER, HANSEN, TODD
& EVANS, P.L.L.C.
Sumner Square
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

Counsel for Plaintiffs

6

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

WACHOVIA BANK, a National Banking
Association, formerly known as FIRST UNION
NATIONAL BANK,

CASE NO. 50 2004 CA 00 2256 XXXX NB

KB AG

Plaintiff,

v.

JURY TRIAL DEMANDED

ARTHUR ANDERSEN LLP, a United States
Partnership; ANDERSEN WORLDWIDE,
SOCIETE COOPERATIVE, a Swiss
Cooperative; ARTHUR ANDERSEN & CO.,
a Canadian Company; ARTHUR ANDERSEN
& CO., a Hong Kong Company; RUIZ,
URQUIZA Y CIA, S.C., a Mexican Company;
PIERNAVIEJA, PORTA, CACHAFEIRO &
AVOCADOS, a Venezuela Company; ARTHUR
ANDERSEN, a United Kingdom Company;
PHILLIP E. HARLOW, individually; LARRY
BORNSTEIN, individually; GREGORY B. WILDER,
individually; MIGUEL A. FONSECA, individually,
WILLIAM PRUITT, individually, and DONALD
DENKHAUS, individually,

Defendants.

COMPLAINT

Plaintiff WACHOVIA BANK, a National Banking Association, formerly known as First Union National Bank ("Wachovia") sues defendants ARTHUR ANDERSEN LLP, a United States Partnership ("Andersen-US"); ANDERSEN WORLDWIDE, SOCIETE COOPERATIVE, a Swiss Cooperative ("Andersen-Worldwide"); ARTHUR ANDERSEN & CO., a Canadian Company ("Andersen-Canada"); ARTHUR ANDERSEN & CO., a Hong Kong Company ("Andersen-Hong Kong"); RUIZ, URQUIZA Y CIA, S.C., a Mexican Company ("Andersen-Mexico"); PIERNAVIEJA, PORTA, CACHAFEIRO & AVOCADOS, a Venezuela Company ("Andersen-

WPB.17463 c1

EXHIBIT
6
16div001672

Venezuela"); ARTHUR ANDERSEN, a United Kingdom Company ("Andersen-UK") (Andersen-US, Andersen-Worldwide, Andersen-Canada, Andersen-Hong-Kong, Andersen-Mexico, Andersen-Venezuela and Andersen-UK are collectively referred to herein as "Andersen")¹; PHILLIP E. HARLOW, individually ("Harlow"), LARRY BORNSTEIN, individually ("Bornstein"), GREGORY B. WILDER, individually ("Wilder"), MIGUEL A. FONSECA, individually ("Fonseca"), DONALD DENKHAUS ("Denkhaus") and WILLIAM PRUITT ("Pruitt") (Harlow, Bornstein, Wilder, Fonseca, Denkhaus and Pruitt are collectively referred to herein as the "Individual Defendants"), and states:

NATURE OF THE ACTION

1. This action arises out of Wachovia's agreeing to lend up to \$600 million to Sunbeam Corporation, Inc. ("Sunbeam") in connection with a \$2.0 billion credit agreement (the "Credit Agreement") executed by Sunbeam on or about March 30, 1998 and funded in excess of \$400 million by Wachovia on or after March 31, 1998.

2. In deciding to extend credit to Sunbeam, Wachovia relied on Sunbeam's financial statements, which were audited by Andersen and certified on behalf of Andersen by Andersen-US. Andersen promoted itself as the largest accounting firm in the world at the time of the audits.

3. However, unbeknownst to Wachovia, Andersen had audited and certified financial statements that it knew to be inaccurate and misleading at the time the financial statements were certified. Those audited financial statements painted a false picture of Sunbeam, depicting it as a company in the midst of an impressive financial turnaround. The reality was that Sunbeam's turnaround was a sham, and when the truth emerged, Sunbeam's stock lost virtually all of its value.

¹ Unless otherwise stated, allegations made against "Andersen" are made against each of Andersen-US, Andersen-Worldwide, Andersen-Canada, Andersen-Hong Kong, Andersen-Mexico, Andersen-Venezuela and Andersen-UK jointly and severally.

4. By relying upon the financial statements improperly certified by Andersen, Wachovia has suffered losses exceeding \$100 million.

5. By holding itself out as Sunbeam's independent certified public accountant and certifying Sunbeam's financial statements, Andersen knowingly assumed a responsibility that transcended its relationship with Sunbeam as a client. Indeed, Andersen specifically knew that Wachovia was relying upon its work as Sunbeam's independent certified public accountants. As an independent certified public accountant auditing Sunbeam's financial statements, Andersen owed a duty to Wachovia who it knew was relying upon Andersen's certification that Sunbeam's reports fairly depicted Sunbeam's financial status. Andersen was required to maintain independence from its client, Sunbeam, and speak with total honesty befitting the trust that had been placed in its word. In carrying out its audit of Sunbeam's financial statements, Andersen utterly failed to live up to that responsibility. To the contrary, Andersen's audits were not performed in accordance with generally accepted auditing standards ("GAAS"), and the financial statements it certified were not, as Andersen claimed, in conformity with generally accepted accounting principles ("GAAP"). Even more egregious, Phillip Harlow, the audit partner on the Sunbeam account, and others at Andersen, including Pruitt, knew the financial statements were not prepared in conformity with GAAP, but Andersen certified them nonetheless.

6. Defendants' motivation was simple — to do whatever was necessary to retain a major client and earn significant fees. Andersen had served as Sunbeam's independent auditor for many years. In 1993, Andersen's Fort Lauderdale, Florida, office took charge of the account, and Sunbeam became one of the few Fortune 500 clients in that office. Sunbeam's audits generated significant fees. For example, Sunbeam paid Andersen more than \$1 million for its 1995 audit. Over the years, in addition to auditing work, Sunbeam also generated numerous consulting

WPB:174:35.1

engagements and their accompanying fees. Defendants were motivated to preserve the Sunbeam relationship not only to ensure that audit engagements would continue but also to reinforce the opportunity to perform lucrative consulting work. In addition, maintaining the relationship with Sunbeam was important to defendants because being dropped by a high-profile client such as Sunbeam would have brought negative publicity to the Ft. Lauderdale office and to Andersen.

7. However, in 1996 that relationship was threatened by Sunbeam's new CEO, Albert Dunlap. Dunlap was eager to show a turnaround at Sunbeam in order to position the company for a quick sale, as he recently had done at Scott Paper. To accomplish that goal, Dunlap's new management team knowingly employed improper accounting methods that first overstated the company's loss in 1996 and then inflated the company's income in 1997. In total abrogation of its responsibility as an independent auditor, Andersen permitted — indeed, blessed those improper accounting treatments, rather than risk losing Sunbeam's audit business to Dunlap's accountant of choice, Coopers & Lybrand.

8. Ironically, the financial results certified by Andersen for 1996 and 1997 drove the price of Sunbeam stock so high that new management could not locate a willing buyer for a quick sale of the company, as had been hoped. As a result, Sunbeam was forced to shift gears and pursue acquisitions of other companies, including Coleman Company, in the hope that those mergers would obscure Sunbeam's true financial position and forestall revelation of the accounting gimmickry. To effectuate that plan, some of the very same Andersen partners and employees who were functioning as Sunbeam's "independent" auditors (including Harlow, Wilder, Fonseca and Bornstein) added another role and joined Sunbeam's due diligence team for the acquisitions.

9. Because of the dual roles as auditor and acquisitions consultant that defendants played, defendants knew full well not only that the Credit Agreement was being executed, but that

Wachovia was relying on the financial statements certified by Andersen. Nonetheless, defendants took no steps before the Credit Agreement was executed and funded to correct the grossly misleading impression created by its certifications.

10. Within weeks of Sunbeam's execution of the Credit Agreement on or about March 30, 1998, the deception facilitated by Andersen began to unravel. On April 3, 1998, just four days after the closing, Sunbeam's management issued a press release announcing that, despite having predicted positive quarterly results in another press release just two weeks earlier, Sunbeam now would show a loss for the first quarter of 1998. On April 22, 1998, a class of Sunbeam shareholders sued Sunbeam and its senior officers in the United States District Court for the Southern District of Florida alleging that the company violated the securities laws by issuing materially false and misleading statements regarding Sunbeam's financial condition. Andersen was subsequently added as a defendant in this lawsuit. On May 11, 1998, Sunbeam issued an earnings release for the first quarter of 1998 reporting a loss of 52 cents per share, compared with a gain of 8 cents per share in the same quarter of 1997. Press coverage ensued in the following month questioning whether Sunbeam had utilized and Andersen had approved manipulative and improper accounting practices in order to create the ruse of a turnaround.

11. In June 1998, the Sunbeam board of directors began an inquiry into Sunbeam's accounting practices. On June 15, 1998, the board announced that it had removed Dunlap as Chairman and CEO of Sunbeam. On June 25, 1998, Andersen withheld its consent for use of its unqualified 1997 audit opinion in a registration statement that was to have been filed with the Securities and Exchange Commission ("SEC"). On June 30, 1998, Sunbeam acknowledged that it had undertaken a review of its financial statements and the review could result in a restatement of the financial statements. On October 20, 1998, Sunbeam and Andersen announced a restatement of

WPB-17463-1

the financial statements. Thereafter, Andersen issued a new unqualified audit opinion for Sunbeam reporting only \$93 million in operating earnings for 1997. That amount was approximately half of the figure that Andersen previously certified.

12. In February 2001, Sunbeam filed a voluntary bankruptcy petition under Chapter 11 of the Bankruptcy Code.

13. In order to retain the Sunbeam account and lucrative auditing and consulting fees, Andersen turned its back on its professional and legal obligations and certified Sunbeam financial statements that it knew to be false and misleading. It did so with full knowledge that Wachovia would be harmed immensely by Andersen's misstatements and omissions. As a direct and foreseeable result of Andersen's actions, Wachovia has sustained damages in excess of \$100,000,000.

14. By this complaint, Wachovia seeks recovery of over \$100 million in compensatory damages. In addition, Wachovia reserves the right to seek leave to amend its complaint pursuant to Fla. Stat. § 768.72 to assert claims for an additional recovery of punitive damages.²

JURISDICTION AND VENUE

15. This Court has jurisdiction over the subject matter of this action pursuant to Fla. Stat. § 36.012(2)(a) because Plaintiff seeks damages in excess of \$15,000.00 exclusive of interest, costs and attorneys' fees. This Court has jurisdiction over Andersen-US, Andersen-Worldwide, Andersen-Canada, Andersen-Hong Kong, Andersen-Mexico, Andersen-Venezuela, Andersen-UK, Harlow Wilder, Fonseca and Bornstein pursuant to Fla. Stat. §§ 48.193(1)(a) and (f), (2) and/or

² On or about April 24, 2001, Arthur Anderson, LLP and all of its successors, predecessors, affiliates, assigns, partners, employees, agents, officers or directors, non-party Morgan Stanley (f/k/a Morgan Stanley Dean Witter & Co.), non-party Morgan Stanley Senior Funding, Inc., non-party Bank of America, N.A. and Wachovia Bank, N.A. (f/k/a First Union National Bank), and all of their respective successors, predecessors, subsidiaries, affiliates and assigns (collectively, the "Parties") entered a tolling agreement, tolling the statute of limitations from April 24, 2001, through April 23, 2002. The Parties entered into further tolling agreements dated as of April 23, 2002, October 16, 2002, April

(5).

16. Venue is proper in this district pursuant to Fla. Stat. §§ 47.011 and 47.021 because Andersen maintained an office with more than 30 employees and partners in West Palm Beach, Florida, and therefore resides in Palm Beach County. In addition, Bornstein is a resident of Palm Beach County, Florida.

PARTIES

17. Wachovia is a national banking association, authorized and conducting business in Palm Beach County, Florida.

18. Andersen Worldwide Société Coopérative Switzerland ("Andersen-Worldwide") at all time material hereto was a partnership organized under the Swiss Federal Code of Obligations. Its partners included more than 2,000 individuals from 390 offices in 84 countries. Various individuals who were partners of Andersen-Worldwide participated in the 1996 and 1997 audits of Sunbeam, and in the 1998 restatement of the reports of those audits. Andersen-Worldwide and Andersen-US dictated the policies and procedures to be used within Andersen throughout the world.

19. Arthur Andersen LLP ("Andersen-Canada") at all times material hereto was part of Andersen-Worldwide. Andersen-Canada participated in the 1996 and 1997 audits of Sunbeam and the 1998 restatement of the reports of those audits.

20. Arthur Andersen & Co. ("Andersen-Hong Kong") at all time material hereto was part of Andersen-Worldwide. Andersen-Hong Kong participated in the 1996 and 1997 audits of Sunbeam and the 1998 restatement of the reports of those audits.

21. Ruiz, Urquiza Y Cia. S.C. ("Andersen-Mexico") at all time material hereto was part

10, 2003 and October 21, 2003, all of which tolled the statute of limitations through March 1, 2004.

WPB:174/39:1

of Andersen Worldwide. Andersen-Mexico participated in the 1996 and 1997 audits of Sunbeam and the 1998 restatement of the reports of those audits.

22. Piernavieja, Porta, Cachafeiro & Avocados ("Andersen-Venezuela") at all time material hereto was part of Andersen-Worldwide. Andersen-Venezuela participated in the 1996 and 1997 audits of Sunbeam and the 1998 restatement of the reports of those audits.

23. Arthur Andersen ("Andersen-UK") at all time material hereto was part of Andersen-Worldwide. Andersen-UK participated in the 1996 and 1997 audits of Sunbeam and the 1998 restatement of the reports of those audits.

24. Arthur Andersen LLP ("Andersen-US") at all time material hereto was part of Andersen-Worldwide. Andersen-US is a partnership formed under the laws of the State of Illinois. The partners of Andersen-US were residents of Florida and numerous other states. Andersen-US participated in and coordinated the 1996 and 1997 audits of Sunbeam and the 1998 restatement of the reports of those audits. In addition, Andersen-US partners and employees provided consulting services to Sunbeam as part of due diligence work performed in conjunction with Sunbeam's acquisition of Coleman Company, and on other projects.

25. Phillip E. Harlow ("Harlow") at all times material hereto was a partner at Andersen-US since 1983, and also is a partner of Andersen-Worldwide. He served as the engagement partner on the audits of Sunbeam's financial statements from 1993 to 1998. As engagement partner, Harlow had primary responsibility for supervising the 1996 and 1997 audits of Sunbeam, including overseeing the activities with respect to the Sunbeam work, performed by numerous persons at Andersen.

26. Gregory B. Wilder ("Wilder") at all times material hereto was a tax partner at Andersen-US and, upon information and belief, was a partner of Andersen-Worldwide. He served

WPB:174639:

as the tax partner in connection with the audits of Sunbeam's financial statements for at least 1996 and 1997. Wilder served on the Anderson team involved in the negotiation of the Credit Agreement and acquisition of First Alert, Inc., Coleman Company and Signature Brands USA, Inc.

27. Miguel A. Fonseca ("Fonseca") at all times material hereto was a tax manager at Andersen-US. He served under Wilder in connection with the audits of Sunbeam's financial statements for at least 1996 and 1997. Fonseca served on the Anderson team involved in the negotiation of the Credit Agreement and acquisition of First Alert, Inc., Coleman Company and Signature Brands USA, Inc.

28. Larry Bornstein ("Bornstein") at all times material hereto was a senior audit manager at Andersen US. He served under Harlow in connection with the audits of Sunbeam's financial statements for at least 1996 and 1997. Bornstein served on the Anderson team involved in the negotiation of the Credit Agreement and acquisition of First Alert, Inc., Coleman Company and Signature Brands USA, Inc.

29. William Pruitt ("Pruitt") at all times material hereto was a partner of both Andersen-US and Andersen-Worldwide. He served as the concurring partner on the Sunbeam audits for at least 1996 and 1997.

30. Donald Denkhaus ("Denkhau"s") at all times material hereto was a partner of both Andersen-US and Andersen-Worldwide. Denkhau served as the engagement partner on the Sunbeam's ultimate restatement of its financial statements, as Audit Division Head and manager of Andersen's audit practice for the entire South Florida region.

ANDERSEN AS "ONE FIRM"

31. In 1913, an accounting and consulting partnership was formed in Illinois under the name "Arthur Andersen & Co." The company began to expand internationally in the 1930s. At all

WPB:174639 :

times material hereto, Anderson operated on a global scale through a network of international offices branches and subsidiaries of the U.S. partnership premised under a "one firm" concept.

32. In 1977, as Andersen increased its global presence, it created a new structure: the Andersen Worldwide Organization ("AWO"), comprised of Andersen-Worldwide, the individual partners of Andersen-Worldwide and Andersen-Worldwide's offices around the globe, operating as a single global partnership or joint venture. The AWO structure was and is designed to maintain the "one firm" concept, and was and is intended to foster the belief that Andersen operates as a single entity. At all material times hereto, in its promotional literature, including its web site, Andersen-Worldwide marketed itself as "one firm," "a single worldwide operating structure" that "think[s] and act[s] as one."

33. Andersen-Worldwide at all times material hereto was the instrumentality through which the "one firm" concept became a reality. It achieved this in four distinct ways.

(a) Partner Overlap: Andersen-Worldwide at all times material hereto was a partnership made up of more than 2,000 individuals from 390 offices in 84 different countries worldwide. Simultaneously, the partners of Andersen-Worldwide also were partners (or the equivalent) in the entities that made up those offices. Thus, all of those offices were managed by individuals who were both local partners (or the equivalent) and partners of Andersen-Worldwide.

(b) Global Setting of Professional Standards: Andersen-Worldwide at all times material hereto purported to establish the professional standards and principles under which its offices operated. Andersen-Worldwide's international offices entered into a standard agreement with Andersen-Worldwide under which they agreed to be bound by those professional standards and principles. An office of Andersen-Worldwide that breached the agreement was subject to removal from the organization. The Assurance Professional Standards Group had firm-wide responsibility for providing guidance on the professional standards to be followed by Andersen-Worldwide's offices.

(c) Sharing of Costs and Profits: Andersen-Worldwide at all times material hereto coordinated the sharing of costs and allocation of revenues and profits among its partners and its offices around the world.

(d) Infrastructure and Administration: Andersen-Worldwide at all times material hereto handled all borrowing on behalf of its international offices, and maintained

the financial records, payroll and employee and health benefits for those international offices as well. All of Andersen's offices shared global computer operations, a worldwide tax structure and training facilities.

34. By establishing a legal, financial and administrative infrastructure, at all material times hereto, Andersen-Worldwide enabled each of its Offices around the world to function as, and to appear to clients as, an extension of a single, global entity.

35. Andersen-Worldwide at all times material hereto managed, directed and controlled its international offices in two overlapping groups: by practice areas (also known as "lines of service") and by geographic location.

36. At all times material hereto, each practice group was managed by a global practice director who oversaw, directed and controlled the operations of each practice group worldwide. Regional practice directors reported to the global practice director and managed, directed and controlled the practice group within their regions. The global practice director and managing partner for the audit practice group of Andersen-Worldwide was C.E. Andrews, a United States-based partner.

37. In addition, Andersen-Worldwide at all times material hereto grouped its offices into several geographic regions and assigns a managing partner to each region.

38. Andersen-Worldwide at all times material hereto grew to be one of the world's largest accounting firms. The Andersen-Worldwide organization employed over 77,000 professionals in fields such as accounting, taxation, business consulting, corporate finance, risk management and business fraud investigation. Andersen-Worldwide's global revenues for the fiscal year ending August 31, 2001 totaled more than \$9.3 billion.

39. Andersen-US at all times material hereto was dominant within Andersen-Worldwide. Andersen-Worldwide was largely controlled by its U.S.-resident partners, who also

WFB:174639:1

were partners of Andersen-US. Approximately half of the partners of Andersen-Worldwide were also partners of Andersen-US. Likewise, approximately half of the partners of Andersen-US were partners of Andersen-Worldwide.

40. The engagement partner on the Sunbeam audits, Harlow, and the concurring partner on those audits, William Pruitt, were, at all material times hereto, partners of both Andersen-US and Andersen-Worldwide. The engagement partner on the Sunbeam restatement, Donald Denkhaus, who as Audit Division Head also was manager of Andersen's audit practice for the entire South Florida region, also was a partner of both Andersen-US and Andersen-Worldwide.

41. In addition to overlapping partners, Andersen-Worldwide and Andersen-US at all material times hereto shared officers in common as well. For example, the Chief Executive Officer and Managing Partner of Andersen-Worldwide was Joseph Berardino, who also was the Chief Executive Officer and Managing Partner of Andersen-US. In addition, Andrew Pincus was the General Counsel of both Andersen-US and Andersen-Worldwide. The Andersen-Worldwide regional managing partner for North America was Terry E. Hatchett, who also was the country managing partner for Andersen-US.

42. Andersen-Worldwide and Andersen-US at all material times hereto shared more than partners and officers — they shared the same address. In its promotional literature, Andersen-Worldwide stated its headquarters were located at 33 West Monroe Street, Chicago, Illinois 60603. That was the same address as the headquarters of Andersen-US.

43. At all times material hereto, Andersen-Worldwide and its affiliates demonstrated the "one firm" concept not only through their actions relative to the outside world, but also internally within the Andersen organization itself.

44. At all times material hereto, the components of the Andersen organization ignored

WPB:174639:

corporate formalities in referring to themselves or to each other. Documents by Andersen-US often bore the insignia and logos of Andersen-Worldwide, including "Andersen Worldwide," "Andersen," and "Arthur Andersen Co., SC". In its promotional literature, Andersen used the names "Andersen Worldwide," "Andersen," and "Arthur Andersen LLP" interchangeably. In addition, Andersen sometimes used only the name "Andersen" and did not differentiate between Andersen-Worldwide and its offices around the globe. Some promotional literature stated, "Arthur Andersen will now be known simply as Andersen." Indeed, when Joseph F. Berardino appeared before Congress in December 2001, he supplied written testimony that identified him as "Managing Partner — Chief Executive Officer, Andersen" (emphasis added).

45. At all times material hereto, Andersen took the same approach in work relating to Sunbeam. The auditors used Andersen-Worldwide and Andersen-US stationery and logos interchangeably, or otherwise used the identifier "Arthur Andersen," on internal correspondence, on correspondence with Sunbeam and on presentation materials for Sunbeam. Top partners responsible for the Sunbeam audits and restatement were partners of both Andersen-US and Andersen-Worldwide.

46. Andersen's audits and restatement work for Sunbeam illustrate the "one firm" concept in action. Sunbeam was a multinational corporation with operations in Canada, Mexico, Venezuela, Hong Kong and Europe. The engagements required the participation of auditors from each of those countries and numerous American cities. Harlow, on behalf of both Andersen-US and Andersen-Worldwide, developed work plans that he circulated to Andersen-Canada, Andersen-Hong Kong, Andersen-Mexico, Andersen-Venezuela and Andersen-UK. Those offices worked together with Harlow and others to complete the tasks outlined in the plan, and sent their work product to Harlow for inclusion in an Andersen Worldwide Management Letter.

WFB:174636 1

SUBSTANTIVE ALLEGATIONS

47. In the years leading up to 1996, Sunbeam had experienced increasing financial difficulties and growing losses. In an effort to remedy the situation, Sunbeam's board of directors undertook a change in Sunbeam's management in July 1996. The management team the board brought in was headed by Albert Dunlap, a person who had earned a reputation as a turnaround specialist through brief terms as Chief Executive Officer of a number of publicly traded corporations. Based on his penchant for rapidly slashing personnel and closing plants to achieve quick turnaround results, Dunlap is widely known as "Chainsaw AL."

48. Sunbeam hired Dunlap on July 18, 1996 and installed him as its Chairman and Chief Executive Officer. Immediately after joining Sunbeam, Dunlap hired Russell A. Kersh as Sunbeam's principal financial officer. Kersh had been associated with Dunlap for over 15 years, and had served as a senior executive during various Dunlap turnaround engagements.

49. Dunlap also brought in other handpicked executives to make up his senior management team.

50. Dunlap hired Donald R. Uzzi as Vice President, Marketing and Product Development. Uzzi later became Executive Vice President, Consumer Products Worldwide. Dunlap also hired Lee B. Griffith as Vice President, Sales. Dunlap retained Robert J. Gluck, formerly Controller of Sunbeam, as Sunbeam's Principal Accounting Officer.

51. Dunlap and the senior members of his management team entered into lucrative employment agreements that gave them a strong financial incentive to cause Sunbeam's stock price to increase and then to sell the company quickly. All stood to make many millions of dollars if that happened. Andersen was fully aware of those audit risks and the fact that a disproportionate share of those executives' potential earnings was dependent on stock options or restricted shares of stock.

WPB:174639 1

52. In addition to the personal financial incentives deriving from his employment contract, Dunlap also had his reputation as a turnaround specialist to protect and advance. Dunlap used his reputation as a specialist in turning around troubled companies to make aggressive promises about Sunbeam's future performance and support false and misleading announcements of record performance — results that were rendered credible because Andersen had certified Sunbeam's financial statements.

53. To lay the foundation for the appearance of a successful turnaround in 1997, Sunbeam's new senior management team decided to take improper expenses and record unjustified accounting write-offs in 1996, thus lowering the benchmark for measuring their ultimate "success" in turning Sunbeam around.

54. Dunlap and his team needed the help of Sunbeam's auditors in approving the improper accounting tactics or the scheme would have had no chance of success. Andersen's Phillip Harlow, among others, was such a willing participant. Harlow knew of Dunlap's reputation as a fast-moving turnaround specialist who was quick to fire anyone who did not advance his agenda. Harlow also knew that in other highly publicized turnaround engagements, Dunlap had employed Coopers & Lybrand, one of Andersen's major competitors, as a financial consultant and independent auditor. Consistent with past practice, one of the first things Dunlap did after joining Sunbeam was to hire Coopers & Lybrand as a financial advisor with the lucrative assignment of planning Sunbeam's massive restructuring, which led to the firing of nearly half of Sunbeam's 12,000 employees. Andersen — and especially Harlow — was keenly aware that this did not bode well for the future of Andersen's relationship with Sunbeam.

55. Sunbeam had been a major client of Andersen's for many years and Sunbeam had paid Andersen over \$1 million in fees for its 1995 audit alone. Harlow had been the Sunbeam

WPS:17-63 8:1

engagement partner since 1993. When Dunlap took control of Sunbeam and hired Coopers & Lybrand for the restructuring, Harlow became concerned that Dunlap would fire Andersen as the company's independent auditor and hire Coopers & Lybrand instead. Indeed, Harlow was so concerned about the possible loss of Sunbeam as a client that he agreed to a 30% reduction in Andersen's fee for 1996. A reduction in audit fees was simply one price Andersen had to pay in order to keep Sunbeam as a client.

56. When Harlow began work on the audit of Sunbeam's 1996 financial statements, Harlow and Andersen learned the true price of keeping Sunbeam as an audit client. In addition to reducing its audit fees, Andersen was required to accept the improper and misleading accounting treatments used by Sunbeam's senior management to create the illusion of a successful turnaround. In the end, Andersen's desire to retain a valuable client overrode any sense of duty or professionalism. To keep Sunbeam as an Andersen client, Harlow and Andersen ignored numerous accounting improprieties Andersen knew had been employed. Even when Harlow expressly identified certain of management's bogus accounting treatments, he ultimately acquiesced in management's refusal to correct the improprieties, and Andersen issued unqualified or "clean" audit opinions. Andersen did so despite the harm it knew would be inflicted on all who relied upon Andersen's audit opinions.

57. As set forth below, Andersen and the Individual Defendants permitted management to employ numerous accounting practices in 1996 that did not comply with GAAP.

58. One of the accounting practices permitted by Andersen was the creation of a massive \$338 million non-GAAP reserve for restructuring charges. Although certain types of restructuring reserves may be proper, the reserves created by management included improper reserves and accruals, excessive write-downs and prematurely recognized expenses that were not

WPB:1746361

proper restructuring reserves under GAAP. Those intentionally inflated reserves served two purposes. First, because the reserves were charged as an expense against income, they allowed Sunbeam to overstate its 1996 loss, and lower the benchmark for measuring the eventual success of Sunbeam's turnaround. Second, the inflated restructuring reserves created a "cookie-jar" of overstated liabilities on Sunbeam's books that Dunlap could reduce in the years after 1996, purportedly to correct the overstatements, and at the same time increase income in the year of the corrections. Those adjustments, too, fostered the illusion of a successful turnaround.

59. One of the largest components of the Sunbeam "cookie-jar" reserves permitted by Andersen and Harlow was millions of dollars in items that benefited future activities, and hence were not properly part of the restructuring reserve. Those items included costs of redesigning product packaging, costs of relocating employees and equipment, bonuses to be paid to employees who were told that they were being laid off but were asked to stay temporarily, advertising expenses and certain consulting fees. Note 2 to the audited 1996 financial statements falsely described the restructuring charges as follows:

In conjunction with the implementation of the restructuring and growth plan, the Company recorded a pre-tax special charge to earnings of approximately \$337.6 million in the fourth quarter of 1996. This amount is allocated as follows in the accompanying Consolidated Statement of Operations: \$154.9 million to Restructuring, Impairment and Other Costs as further described below; \$92.3 million to Cost of Goods Sold related principally to inventory write-downs from the reduction in SKU's and costs of inventory liquidation programs; \$42.5 million to Selling, General and Administrative expenses principally for increases in environmental and litigation reserves (see Notes 12 and 13) and other reserve categories; and the estimated pre-tax loss on the divestiture of the Company's furniture business of approximately \$47.9 million.

As Sunbeam's eventual restatement of its financial statements showed, those reserves were materially inflated and were not recorded in accordance with GAAP.

60. In connection with the audit of Sunbeam's 1996 year-end financial statements, Harlow discovered that certain components of Sunbeam's restructuring reserves were not being

WPB:174:39:1

recorded in compliance with GAAP and proposed that the company reverse several of the accounting entries establishing those reserves. As Harlow told Kersh and Gluck, under GAAP, entries that benefited Sunbeam's future results were not considered to be proper restructuring charges in 1996. But Kersh and Gluck refused to reverse those items. Instead of standing firm, as professional ethics required, Harlow turned a blind eye to his duties as an independent auditor and caused Andersen to acquiesce in management's refusal to reverse those non-GAAP reserves. Those improper reserves caused Sunbeam's 1996 audited financial statements to be materially false and misleading.

61. In connection with the 1996 audited financial statements, Andersen and Harlow also permitted management to create an excessive \$12 million reserve for a lawsuit alleging that Sunbeam was liable for a portion of the cleanup costs for a hazardous waste site. In fact, that reserve overstated Sunbeam's estimated liability by at least 100%, and provided Sunbeam with an inflated reserve that could be drawn down to boost income figures artificially in later periods.

62. Andersen and Harlow also permitted Sunbeam to write down its household products inventory in 1996. In connection with the restructuring, Dunlap's management team planned to eliminate half of Sunbeam's product lines and to liquidate Sunbeam's inventory of eliminated product lines at a substantial discount. Notwithstanding that the change affected only half of Sunbeam's product lines, Andersen and Harlow permitted management to reduce the cost basis for Sunbeam's entire inventory of household products at 1996 year end, without distinction between eliminated and continuing product lines (including inventories that were later sold in the ordinary course of business). As a result, the balance sheet value of Sunbeam's inventory at year-end 1996 was understated by approximately \$2 million, and Sunbeam overstated its 1996 loss by the same amount. Andersen and Harlow negligently or fraudulently disregarded facts indicating that (a)

WPB.174639.1

Sunbeam had understated the carrying value of its household products inventory; (b) the understatement had contributed to the material misstatement of Sunbeam's financial statements at year-end 1996 and (c) the understatement would improperly increase Sunbeam's income during 1997 when household products were sold at artificially inflated margins.

63. Andersen and Harlow also permitted management improperly to recognize \$2.3 million in 1997 advertising expenses and related costs as a 1996 expense. Andersen and Harlow negligently or fraudulently disregarded facts indicating that the accounting treatment would contribute to the material overstatement of Sunbeam's 1996 year-end loss and exaggerate Sunbeam's so-called turnaround by the same amount in 1997.

64. Finally, Andersen and Harlow permitted Sunbeam to manipulate its 1996 liabilities for cooperative advertising. In addition to buying national advertising to create demand for its products, Sunbeam funded a portion of its retailers' costs of running local promotions. As required by GAAP, Sunbeam accrued its estimated liabilities for such "cooperative advertising," and then charged its expenses in relation to its sales revenue during the year. At year-end 1996, Sunbeam set its cooperative advertising accrual at \$21.8 million, an amount that was approximately 25% higher than the prior year's accrual amount, without any basis for the increase. Harlow learned of the inflated accrual for cooperative advertising in connection with Andersen's audit of Sunbeam's year-end 1996 financial statements and discussed it with Kersh and Gluck. Nevertheless, Andersen and Harlow negligently or fraudulently disregarded facts concerning the lack of a proper basis for the accrual and the likelihood that the excess accrual would be released into income in early 1997. In fact, \$5.7 million of that excessive accrual was used (without disclosure) to inflate Sunbeam's 1997 income.

65. In March 1997, Andersen issued an unqualified audit opinion regarding Sunbeam's

1996 financial statements and authorized the inclusion of its audit opinion in Sunbeam's 1996 Form 10-K filed with the SEC. Andersen's opinion stated:

We conducted our audits in accordance with generally accepted auditing standards. Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement. An audit includes examining, on a test basis, evidence supporting the amounts and disclosures in the financial statements. An audit also includes assessing the accounting principles used and significant estimates made by management, as well as evaluating the overall financial statement presentation. We believe that our audits provide a reasonable basis for our opinion.

In our opinion, the financial statements . . . present fairly, in all material respects, the financial position of Sunbeam Corporation and subsidiaries as of December 31, 1995 and December 29, 1996, and the results of their operations and their cash flows for each of the three fiscal years in the period ended December 29, 1996 in conformity with generally accepted accounting principles.

66. Andersen's unqualified audit opinion was false in two material respects. First, the financial statements Andersen audited did not "fairly" present Sunbeam's financial position in conformity with GAAP, as it represented. Second, Andersen did not, as it claimed, conduct its audit in accordance with GAAS.

67. In all, the 1996 financial statements audited by Andersen were materially false and misleading, and overstated Sunbeam's loss for 1996. Andersen and Harlow negligently or fraudulently disregarded facts indicating that (a) Andersen's unqualified audit opinion was incorrect; (b) Sunbeam's financial statements were materially false and misleading and not in conformity with GAAP and (c) Andersen had failed to perform an audit in accordance with GAAS.

68. During 1997, Sunbeam's senior management continued to use improper accounting to create the illusion that a successful turnaround was underway at Sunbeam. By maintaining that illusion, Dunlap's management team hoped to position Sunbeam for a quick sale. However, the illusion proved too convincing to the market, and the price of Sunbeam stock was driven so high

that no willing buyer could be found. Management was aware that, absent a sale, it would be unable to sustain the appearance of a successful turnaround. Therefore, in late 1997, Sunbeam sought to acquire other businesses, in order to consolidate their results with Sunbeam's and thereby continue to obscure Sunbeam's past accounting improprieties. Once again, Sunbeam management required Andersen's assistance in perpetuating the deception.

69. In early December 1997, officers and directors of Sunbeam met with various officers of Coleman Company regarding a potential combination with Sunbeam. After that initial overture was rejected, Dunlap's representative returned with another proposal in January 1998. At that point, Coleman Company indicated it was willing to discuss a potential transaction.

70. On January 28, 1998, Sunbeam announced its financial results for 1997, reporting total revenues of \$1.168 billion, and total earnings from continuing operations of \$189 million (or \$1.41 per share). Sunbeam's announcement coincided with Andersen's purported completion of the fieldwork for its audit of Sunbeam's 1997 financial statements, although, its work continued for more than a month.

71. On February 3, 1998, Harlow met with key officers of Sunbeam to discuss the acquisition of Coleman Company and its financial impact on Sunbeam. By that time, Harlow knew that Sunbeam had utilized improper accounting to achieve its 1997 results. Harlow also knew lenders such as Wachovia financing Sunbeam's acquisition would insist on reviewing Andersen's 1997 audit opinion before agreeing to finance any transaction.

72. On February 20, 1998, Andersen agreed to act as a Sunbeam financial advisor and perform financial due diligence in connection with Sunbeam's acquisition of Coleman Company and two other companies, First Alert, Inc. and Signature Brands USA, Inc. In agreeing to undertake that assignment, Andersen became an active member of the team working to assist

WPE:17463:1

Sunbeam in acquiring Coleman Company.

73. Between February 23 and 25, 1998, representatives of Andersen, including Harlow, conducted due diligence concerning Coleman Company and the other target companies on behalf of Sunbeam.

74. On February 27, 1998, Harlow met with Sunbeam executives in New York to discuss Andersen's due diligence. That afternoon, Sunbeam and Coleman reached an agreement for the sale of Coleman Company.

75. As part of the Coleman Company acquisition agreement, Sunbeam represented and warranted that all of its filings with the SEC, which included the 1996 financial statements audited by Andersen, were accurate and not misleading, and that they would continue to be accurate and not misleading as of the transaction's closing date, which was expected to be several weeks later. Sunbeam also represented that its audited financial statements were prepared in accordance with GAAP, and that at the time of the closing of the transaction, its representation would continue to be true and correct. Andersen was fully aware of those representations and warranties when the merger agreement was executed on February 27, 1998.

76. As a result of Andersen's involvement in the Coleman Company acquisition transaction, it knew that Wachovia would rely on Sunbeam's audited financial statements (1) in deciding to finance the transaction, and (2) in advancing over \$1 billion on behalf of Sunbeam. Moreover, as an independent certified public accountant, Andersen had a duty to disclose to Wachovia that Sunbeam's audited financial statements in fact were neither accurate nor reliable. Throughout Wachovia's due diligence, Andersen remained mute regarding the true financial condition of Sunbeam and the improprieties buried in Sunbeam's audited financial statements.

77. In the first week of March 1998, shortly after the agreement for Sunbeam's purchase

WPB:1746 39:1

of Coleman Company was signed, but before the transaction closed, Andersen updated its audit work to reflect Sunbeam's acquisitions. The same individuals who also were working as consultants on the Sunbeam acquisitions did that work. The three acquisitions were specifically described in Note 14 to the audited financial statements. The description included the fact that Sunbeam was paying for the Coleman Company shares with Sunbeam common stock as well as cash and assumption of debt. Andersen then rendered an unqualified audit opinion for Sunbeam's 1997 financial statements. With Andersen's express consent, management included that opinion in Sunbeam's 1997 Form 10-K filed with the SEC.

78. In its opinion concerning Sunbeam's 1997 financial statements, Andersen stated:

We conducted our audits in accordance with generally accepted auditing standards. Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement. An audit includes examining, on a test basis, evidence supporting the amounts and disclosures in the financial statements. An audit also includes assessing the accounting principles used and significant estimates made by management, as well as evaluating the overall financial statement presentation. We believe that our audits provide a reasonable basis for our opinion. In our opinion, the financial statements . . . present fairly, in all material respects, the financial position of Sunbeam Corporation and subsidiaries as of December 29, 1996 and December 28, 1997, and the results of its operations and its cash flows for each of the three fiscal years in the period ended December 28, 1997 in conformity with generally accepted accounting principles.

79. Andersen's 1997 audit opinion was false in two material respects. First, the financial statements Andersen audited did not "fairly" present Sunbeam's financial position in conformity with GAAP, as it represented. Second, Andersen did not, as it claimed, conduct its audit in accordance with GAAS.

80. In all, the 1997 financial statements audited by Andersen were materially false and misleading in that they overstated Sunbeam's operating income for the year by 50%. Andersen and Harlow negligently or fraudulently disregarded facts indicating that (a) Andersen's unqualified

WPB:174639:1

audit opinion was incorrect; (b) Sunbeam's financial statements were materially false and misleading and not in conformity with GAAP and (c) Andersen had failed to perform an audit in accordance with GAAS.

81. Harlow was well aware of the potential for fraud and irregularities in Sunbeam's 1997 books, including the risk that Sunbeam management would attempt to claim profits and revenue on transactions before the earnings process was completed. Harlow specifically advised Andersen's foreign offices (including Andersen-Canada, Andersen-Hong Kong, Andersen-Mexico, Andersen-Venezuela and Andersen-UK), for example, that Dunlap had made promises to the public regarding earnings-per-share to be attained in 1997, and that management had a vested interest in achieving the promised earnings levels because management's primary form of compensation was based on the company's stock price. Harlow also noted the presence of the possibility of a third party purchase of the company's stock or assets.

82. Despite having specifically noted key reasons to employ heightened scrutiny in the 1997 audit, Harlow and Andersen permitted Sunbeam to engage in improper "earnings management" practices designed to achieve exactly the result Harlow had warned the Andersen audit team to watch for.

83. One of the most flagrant accounting abuses Andersen and Harlow permitted in 1997 was to allow Sunbeam to record a profit on a sham sale of its warranty and spare parts business to its spare parts provider, EPI Printers, Inc. Prior to 1997, EPI satisfied spare parts and warranty requests of Sunbeam customers on a fee basis. To raise additional revenue at year-end 1997, however, Sunbeam entered into a sham sale of the warranty and spare parts inventories already in EPI's warehouse. As a result of the transaction, management fraudulently recognized millions of dollars of phony sales and profits in 1997.

WPB:174E39:1

84. The problem with the EPI transaction was that the transaction was not a sale at all, for at least three reasons. First, there was never a final agreement between Sunbeam and EPI. The closest the parties ever came to a meeting of the minds was the execution of a mere "agreement to agree." Second, by its terms, the proposed sale was to terminate on January 23, 1998, with no payment obligation on the part of EPI, absent a subsequent agreement between Sunbeam and EPI on the value of the inventory. In other words, the sale could be completely unwound just after year-end without EPI ever having paid a cent. Third, Sunbeam had agreed as part of the proposed sale to pay certain fees to EPI and to guarantee a 5% profit to EPI on the eventual resale of the inventory. In essence, even after the proposed sale, EPI remained a contractor compensated by Sunbeam on a fee basis for its services. In sum, the relationship between EPI and Sunbeam was not fundamentally altered by the purported "sale."

85. Harlow became aware of the true nature of the EPI transaction and raised it with management as part of Andersen's 1997 year-end audit. Harlow proposed that Sunbeam reverse the accounting entries reflecting the revenue recognition for that transaction, having concluded that the profit guarantee and the indeterminate value of the contract rendered revenue recognition inconsistent with GAAP. Simply stated, there was no revenue to recognize because the transaction was illusory. Kersh and Gluck refused to reverse the transaction. Instead of refusing to lend Andersen's name to management's fraudulent revenue recognition, Harlow again acquiesced in management's actions. As a result, Sunbeam's 1997 audited financial statements reflect almost \$10 million of phony profit on the sham EPI transaction.

86. The EPI transaction raised a clear red flag that should have — and must have — alerted Andersen to the need for greater scrutiny regarding all of Sunbeam's revenue recognition decisions. At a minimum, Andersen should have been on guard as to all items Harlow previously

WPB:174639-1

identified as proposed audit adjustments (but which Harlow eventually acquiesced in), and any previously recognized improper items that were ultimately dismissed as "immaterial."

87. Another 1997 revenue inflation scheme permitted by Andersen and Harlow was Sunbeam's use of improper "bill-and-hold" transactions. A bill-and-hold transaction is a transaction in which the seller bills a customer for a purchase while holding the merchandise for later delivery. During 1997, Dunlap's management team offered financial incentives to various customers to make purchases earlier than they would otherwise have done so. Management then proposed that Sunbeam hold the merchandise until the normal time for delivery.

88. Under certain limited circumstances, bill-and-hold transactions may be permitted for revenue recognition purposes. However, bill-and-hold transactions must meet specific stringent accounting criteria satisfying GAAP. The relevant criteria include, among others: a requirement that the buyer, not the seller, requested a sale on a bill-and-hold basis; that the buyer had a substantial business purpose for ordering the goods on a bill-and-hold basis; and that risks and rewards of ownership passed to the buyer at the time of the bill-and-hold sale.

89. Bill-and-hold transactions improperly added in excess of \$29 million to Sunbeam's 1997 sales and \$4.5 million to income. In the course of the audit of Sunbeam's 1997 financial statements, Andersen and Harlow discovered that the purported bill-and-hold customers had not requested the bill-and-hold treatment, and that in numerous cases involving rights of return "the risks of ownership and legal title" were not actually "passed to the customer." Nevertheless, Andersen negligently or fraudulently disregarded facts indicating that bill-and-hold transactions did not satisfy the required revenue recognition criteria. Ultimately, Andersen acquiesced in Sunbeam's decisions to recognize revenue for all of those non-GAAP sales in 1997, and to misdescribe the company's bill-and-hold practices in the financial statements as customer-driven legitimate sales.

WPB:1746:9:1

90. Another income inflation tactic Sunbeam management used in 1997 was to decrease the inflated 1996 reserves to create the illusion of 1997 income. By decreasing the reserves in 1997, management increased Sunbeam's 1997 income by almost \$5 million. In connection with Andersen's year-end audit of Sunbeam's financial statements, Harlow discovered that tactic and concluded that it was improper. Harlow proposed reversing management's misuse of the reserves, but management refused to do so. Rather than insisting that the adjustments be made, Andersen gave Sunbeam a pass, and permitted the entries. In doing so, Andersen and Harlow negligently or fraudulently disregarded facts indicating that the improper accounting materially distorted Sunbeam's reported results of operations for 1997.

91. Another of Sunbeam's 1997 accounting gimmicks was to record income from non-recurring events as ordinary income. In connection with Andersen's work on the 1997 audit, Harlow learned that management had arranged for the sale of deeply discounted and obsolete inventory during 1997, creating \$19 million in non-recurring revenue. Although the recognition of that revenue was permitted under GAAP, Sunbeam was required to disclose in its financial statements that the income from the sale was a non-recurring event. Sunbeam failed to do so. Notwithstanding that material omission, Andersen certified Sunbeam's 1997 financial statements.

92. In addition, during Andersen's 1997 audit, Harlow proposed adjustments to reverse \$2.9 million related to a Sunbeam inventory overvaluation and \$563,000 in additional items. Management again refused to make appropriate adjustments, and Andersen and Harlow acquiesced in the refusal to reverse those errors. In doing so, Andersen and Harlow negligently or fraudulently disregarded facts indicating that those items contributed to the misstatement of Sunbeam's 1997 reported results of operations.

93. International sales represented a significant proportion of Sunbeam's overall income

WPB:7463 2:1

from sales. However, part of Sunbeam's reported income from international sales was artificially inflated. Several of Sunbeam's foreign subsidiaries engaged in guaranteed sales that could not have been booked under applicable accounting principles because they included an unlimited right to return unsold merchandise and because the amount of future returns on such sales could not reasonably be estimated.

14. Sunbeam's Hong Kong subsidiary recorded sales revenue of \$8.6 million from various guaranteed sales made during the fourth quarter of 1997. However, that revenue should not have been recognized because sales were made with an unlimited right of return and because the amount of future returns could not reasonably be estimated. Indeed, in 1998 much of the product "sold" in 1997 was returned. Nevertheless, Andersen allowed those sales to be booked in 1997.

15. Sunbeam's Canadian subsidiary similarly engaged in guaranteed sales with an unlimited right of return. The revenue from those sales could not have been recognized because the amount of future returns could not reasonably be estimated. Nevertheless, Andersen permitted those sales to be booked.

16. Sunbeam's Mexican subsidiary engaged in \$900,000 in bill-and-hold transactions that should not have been recognized as income until 1998. However, Andersen permitted the full amount of such sales to be booked in 1997. Harlow and Andersen identified a total of \$2.9 million in adjustments relating to inventory overvaluation that were proposed to Sunbeam. Management refused to make those adjustments; Andersen and Harlow nevertheless issued clean audit opinions. In addition, the financial statements for Sunbeam's Mexico operations failed to include an expense for the profit sharing obligations of that business, an adjustment that reduced the earnings of that business by more than \$3 million when Sunbeam later restated its 1997 results.

17. Sunbeam's Venezuela subsidiary also improperly valued inventory. Its books

WPB:1746:9:1

reflected purchased raw materials that were held at various suppliers. Andersen failed to confirm that the booked amounts represented materials actually in the possession of suppliers. If Andersen had done so, Andersen would have discovered that the materials did not exist. Nevertheless, Andersen permitted the full amount to be included on Sunbeam's financial statements.

98. In the end, Andersen's 1997 audit opinion certified financial statements that reported Sunbeam's income to be \$186 million, much of which was improper under GAAP. The overstatements included in all over \$90 million of improper net income including, without limitation, approximately \$10 million from the sham sale to EPI, approximately \$4.5 million from non-GAAP bill-and-hold sales, approximately \$35 million in income derived from the use of non-GAAP reserves and accruals taken at year-end 1996 and approximately \$6 million from improper revenue recognition.

99. As Andersen and Harlow knew, Wachovia relied on Sunbeam's report of \$186 million in income in deciding to execute and fund the Credit Agreement. If Andersen had not issued a materially false and misleading audit report, and instead had complied with GAAP and GAAS, Sunbeam's 1997 operating income would have been approximately half of what Andersen certified in the financial statements.

100. The Credit Agreement provided that a condition precedent to Wachovia's obligation to fund the transaction was the absence of any event, change, or development that would have a material adverse effect on the business, results of operation, or financial condition of Sunbeam. The funding also was conditioned on the absence of any material misrepresentation or omissions in Sunbeam's SEC filings, including Andersen's 1996 and 1997 audit reports in the Form 10-Ks. If Andersen had not been negligent or fraudulent in performing its audits, and had issued qualified or adverse reports exposing the falsity of Sunbeam's financial statements, Wachovia would have been

put on notice of an adverse material change affecting Sunbeam before funding, and of a material misstatement in Sunbeam's SEC filings. Wachovia's obligation to fund the transaction with Sunbeam would have been discharged by the failure of a condition precedent, and Wachovia never would have suffered the extensive losses they suffered. Wachovia directly relied on Andersen's 1996 and 1997 audit reports when they decided to execute the Credit Agreement with Sunbeam and to fund the transaction.

101. Andersen was fully aware of the terms and conditions of the Credit Agreement and of Wachovia's anticipated and actual reliance upon Andersen's unqualified 1996 and 1997 audit opinions.

102. On March 30, 1998, unaware of the falsity of Sunbeam's financial statements and Andersen's audit reports, Wachovia executed the Credit Agreement with Sunbeam and funded Sunbeam's transaction with First Alert, Coleman and Signature Brands USA.

103. Almost immediately after the execution of the Credit Agreement, Sunbeam's facade of financial health began to crumble.

104. In an April 3, 1998 conference call with securities analysts, Sunbeam revealed that sales for the first quarter of 1998 were 5% below reported sales for the same period of the prior year. Only two weeks earlier, on March 19, 1998, Sunbeam had issued a press release in which it announced that sales for the first quarter of 1998 were "expected to exceed" sales for the same period of the prior year.

105. On April 22, 1998, a class of Sunbeam shareholders sued Sunbeam and its senior officers in the United States District Court for the Southern District of Florida, alleging that the company violated the securities laws by issuing materially false and misleading statements regarding Sunbeam's financial condition.

WPB:174639:1

106. On June 6, 1998, an article was published in Barron's that raised serious questions regarding Sunbeam's apparent success under Dunlap, and suggested it was the result of "accounting gimmickry." On June 15, 1998, Sunbeam's Board announced that it had removed Dunlap as Chairman and CEO.

107. Andersen continued to stand behind its fraudulent audit opinions. On June 15, 1998, Andersen allowed Sunbeam's Board of Directors to assert that Andersen had "assured the Board that Sunbeam's audited financial statements [were] accurate in all material respects." It was not until June 25, 1998 — when Andersen withheld its consent for use of its 1997 audit opinion in a registration statement that was to have been filed with the SEC — that Andersen gave any hint that its unqualified audit opinions were unreliable.

108. On June 30, 1998, Sunbeam announced that the Audit Committee of its Board of Directors would conduct an inquiry into the accuracy of its 1997 financial statements. The Audit Committee subsequently retained Deloitte & Touche LLP to assist in the review, in addition to Andersen. Sunbeam stated, "pending the completion of its review, its 1997 financial statements and the report of Arthur Andersen LLP should not be relied upon." Sunbeam added that the review "could result in a restatement of the 1997 financial statements and the first quarter 1998 Form 10-Q."

109. On August 6, 1998, Sunbeam announced that its Audit Committee had determined that Sunbeam would be required to restate its audited financial statements for 1997 and possibly for 1996, as well as its unaudited financial statements for the first quarter of 1998.

110. On November 12, 1998, Sunbeam released its restated 1996 and 1997 financial results, again audited by Andersen. The restated 1996 financial statements reported operating losses for 1996 that were approximately \$40 million less than originally reported, losses from continuing

W/PB:174639.1

operations that were approximately \$26 million less than previously reported and net losses that were approximately \$20 million less than previously reported.

111. The restated 1997 financial statements reported operating earnings for 1997 that were approximately \$95 million less than originally reported, earnings from continuing operations that were approximately \$70 million less than previously reported and net earnings that were approximately \$70 million less than previously reported. The new operating income figure for 1997 was approximately 50% less than the amount Andersen previously certified.

112. In the wake of Dunlap's firing, new management was unable to overcome the devastating effects of the manipulation and distortion of Sunbeam's business.

113. On February 5, 2001, Sunbeam filed a voluntary petition for Chapter 11. Pursuant to Sunbeam's Court approved reorganization plan, Wachovia's loan to Sunbeam was discharged in full.

114. Both courts and regulators have scrutinized Andersen's facilitation of Sunbeam's fraud. In their judgments against the firm and Harlow, they have denounced Andersen's conduct.

115. In December 1999, for example, the federal court presiding over the Sunbeam shareholders' class action lawsuit refused to dismiss the claims against Andersen. The court concluded that the class plaintiffs had alleged sufficient facts "to demonstrate that Arthur Andersen had acted with severe recklessness in issuing its misleading [1997] Unqualified Audit Opinion." *In re Sunbeam Litig.*, 89 F. Supp. 2d 1326, 1344 (S.D. Fla. 1999).

116. On May 15, 2001, the SEC filed a civil action in the United States District Court for the Southern District of Florida against five former Sunbeam officers and Harlow, Andersen's engagement partner.

117. In January 2003, the SEC settled its charges with Harlow. In its settlement order, it

WPB:1746: 9:1

made numerous factual findings regarding Harlow and Andersen's improper conduct. It concluded that Harlow had proposed, on many occasions, adjustments to rectify Sunbeam's false financial statements. After management refused to make these adjustments, Harlow improperly acceded to that decision. *In the Matter of Phillip E. Harlow*, SEC Rel. No. 34-47261, 2003 WL 169818, at **1-3 (Jan. 27, 2003).

118. The SEC's assessment of Harlow's conduct was damning. Among many other things, it concluded that Harlow (1) "failed to exercise professional skepticism when performing audit procedures and gathering and analyzing audit evidence"; (2) "accepted uncorroborated representations of Sunbeam's management in lieu of performing appropriate audit procedures"; (3) "failed to exercise due professional care in performing the audit and preparing the audit report"; (4) "failed to perform sufficient audit procedures to determine whether the financial statements were in conformity with GAAP," even after he had "identified a number of audit risks and accounting issues associated with the Sunbeam engagement"; and (5) "failed to obtain sufficient competent evidential matters through inspection, observation, inquiries, and confirmation to afford a reasonable basis for an audit opinion." *Id.* at *4. Based on these factual findings, the Commission concluded that the 1996 and 1997 financial statements that Harlow had audited were not in conformity with GAAP, and the audit was not performed in accordance with GAAS. *Id.* (citing AU §§ 410, 411, 508.07).

19. As a result of having been fraudulently induced into executing the Credit Agreement and funding Sunbeam's transactions with First Alert, Coleman and Signature Brands USA, Wachovia has suffered direct damages in excess of \$100,000,000.

20. The objectives of financial reporting are to provide information that is useful in investment and credit decisions, information that is useful in assessing cash flow prospects and

WPS:17:6:19:1

information about enterprise resources, claims to those resources and changes in them. ("Objectives of Financial Reporting by Business Enterprises," Statement of Financial Accounting Concepts No. 1 (Financial Accounting Standards Board, November 1978)). In order to minimize misinterpretation of financial statements, the accounting profession has developed sets of standards regarding financial reporting and auditing practice that are generally accepted and universally practiced. Those standards are known as GAAP and GAAS. The development of common standards for auditing and financial reporting has provided businesspeople and investors with a valuable frame of reference in evaluating the financial condition of enterprises.

21. Auditors know they must adhere to GAAP and GAAS, or the standards would cease to have any meaning. Consistent with the objectives of the profession in developing those standards, the public has come to understand the importance of GAAP and GAAS in enhancing the reliability of audited financial statements. As a result, when an auditing firm represents that it has conducted an audit of a company in accordance with GAAS, and opines that such company's financial statements present the company's financial condition fairly in conformity with GAAP, readers of those financial statements have the right to rely on the integrity of those financial statements.

122. In auditing Sunbeam in 1996 and 1997, issuing unqualified opinions regarding Sunbeam's 1996 and 1997 financial statements and assisting with Wachovia's due diligence prior to the execution and funding of the Credit Agreement, Andersen and the Individual Defendants did not adhere to the standards of the profession. Although Andersen's audit opinions stated that the firm had conducted its audits of Sunbeam in accordance with GAAS, and based on those audits had concluded that Sunbeam's financial statements presented the company's financial condition fairly in conformity with GAAP, that simply was not true.

WPB:174629:1

IN THE FIFTEENTH JUDICIAL CIRCUIT IN
AND FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

CASE NO.: CA 03-5045 AI

vs.

MORGAN STANLEY & CO., INC.,
Defendant.

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff,

CASE NO.: CA 03-5165 AI

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
et al.

Defendants.

**EXHIBITS EXCLUDED WITHOUT PRIOR DETERMINATION
OF PROTECTABILITY BY COURT**

**APPENDIX TO COLEMAN (PARENT) HOLDINGS INC.'S
MOTION TO AMEND ITS COMPLAINT
TO SEEK PUNITIVE DAMAGES**

VOLUME I of III

Jerold S. Solovy
Ronald L. Marmer
JENNER & BLOCK LLP
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

John Scarola
SEARCY DENNY SCAROLA BARNHART
& SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33402-3626
(561) 686-6300

Attorneys for Coleman (Parent) Holdings Inc. and MacAndrews & Forbes Holdings, Inc.

TABLE OF CONTENTS

	<u>TAB</u>
William Strong Deposition, 12/4/2003	1
Morgan Stanley 85403-85419.....	2
Morgan Stanley 85420-85435.....	3
Morgan Stanley 85436-85452	4
Morgan Stanley 85453-85471.....	5
Morgan Stanley 85472-85493.....	6
Bram Smith Deposition, 2/24/2004	7
Joshua Webber Deposition, 5/18/2004	8
CPH Ex. 84	9
CPH Ex. 9	10
Eugene Yoo Deposition, 6/16/2004.....	11
CPH Ex. 229	12
Lawrence Bornstein Deposition, 1/15/2004	13
CPH Ex. 123	14
First Amended Complaint, <i>Morgan Stanley & Co., Inc. et al. v. Arthur Andersen LLP, et al.</i> ...	15
CPH Ex. 17	16
John Tyree Deposition, 11/14/2003.....	17
CPH Ex. 16	18
CPH 1395046-1395047	19
Alan Dean Deposition, 6/3/2004.....	20
Heather Stack Deposition, 5/25/2004	21

TAB

Dennis Pastrana Deposition, 1/12/2004.....	22
William Pruitt Deposition, 1/13/2004.....	23
CPH Ex. 75	24
Donald Drapkin Deposition, 6/24/2004.....	25
CPH 1241513.....	26
CPH 1039208.....	27
CPH 1059641.....	28
CPH Ex. 121	29
CPH Ex. 118	30
CPH Ex. 119	31
CPH Ex. 114.....	32
Mark Brockelman Deposition, 1/14/2004.....	33
CPH Ex. 33	34
CPH Ex. 34	35
CPH Ex. 35	36
Michael Hart Deposition, 5/19/2004.....	37
CPH Ex. 76	38
CPH Ex. 112	39
CPH 1393269.....	40
CPH Ex. 36	41
CPH Ex. 187	42
William Wright Deposition, 7/1/2004	43
CPH Ex. 110.....	44

TAB

CPH Ex. 24 45

James Lurie Deposition, 6/18/2004 46

Phillip Harlow Deposition, 6/9/1999 47

John Tyree Deposition, 9/15/2003 48

1

**EXHIBIT EXCLUDED WITHOUT PRIOR DETERMINATION
OF PROTECTABILITY BY COURT**

2

**EXHIBIT EXCLUDED WITHOUT PRIOR DETERMINATION
OF PROTECTABILITY BY COURT**

3

**EXHIBIT EXCLUDED WITHOUT PRIOR DETERMINATION
OF PROTECTABILITY BY COURT**

4

**EXHIBIT EXCLUDED WITHOUT PRIOR DETERMINATION
OF PROTECTABILITY BY COURT**

5

**EXHIBIT EXCLUDED WITHOUT PRIOR DETERMINATION
OF PROTECTABILITY BY COURT**

6

**EXHIBIT EXCLUDED WITHOUT PRIOR DETERMINATION
OF PROTECTABILITY BY COURT**

7

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE CIRCUIT COURT OF THE FIFTEENTH
JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS,)
INC.,)
Plaintiff,)
vs.)
MORGAN STANLEY & CO., INC.,)
Defendant.)
-----)

DEPOSITION OF R. BRAM SMITH
New York, New York
Tuesday, February 24, 2004

Reported by:
PAMELA J. MAZZELLA, RPR
JOB NO. 157119

Page 2

1
2
3 February 24, 2004
4 9:23 a.m.
5
6 Deposition of R. BRAM SMITH, held
7 at the offices of Esquire Deposition
8 Services, 216 East 45th Street, New
9 York, New York, pursuant to Notice,
10 before Pamela J. Mazzella, RPR, a
11 Notary Public of the State of New York.
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Page 4

1
2 THE VIDEOGRAPHER: This is tape
3 number 1 of the videotaped deposition of Mr.
4 Bram Smith in the matter Coleman versus
5 Morgan Stanley.
6 This deposition is being held at
7 Esquire Deposition Services located at 216
8 East 45th Street, Manhattan, New York,
9 February 24, 2004 at approximately 9:23 a.m.
10 My name is Ruben Martinez from the
11 firm of Esquire Video Services. The court
12 reporter is Miss Pam Mazzella in association
13 with Esquire Deposition Services.
14 Will counsel please introduce
15 themselves.
16 MR. MARKOWSKI: Bob Markowski from
17 Jenner & Block on behalf of Coleman (Parent)
18 Holdings.
19 MR. O'CONNOR: Christopher
20 O'Connor from Jenner & Block on behalf of
21 Coleman (Parent) Holdings.
22 MR. CLARE: Thomas Clare, Kirkland
23 & Ellis, LLP on behalf of the defendant
24 Morgan Stanley and the witness.
25 THE WITNESS: Witness Bram --

Page 3

1
2 APPEARANCES:
3
4 JENNER & BLOCK, LLC
5 Attorneys for Plaintiff
6 One IBM Plaza
7 Chicago, Illinois 60611-7603
8 BY: ROBERT T. MARKOWSKI, ESQ.
9 AND: CHRISTOPHER M. O'CONNOR, ESQ.
10
11 KIRKLAND & ELLIS, LLP
12 Attorneys for Defendant
13 655 Fifteenth Street, N.W.
14 Washington, D.C. 20005
15 BY: THOMAS A. CLARE, ESQ.
16
17
18
19 ALSO PRESENT:
20 RUBEN MARTINEZ - Videographer
21
22
23
24
25

Page 5

1 Smith
2 okay.
3 THE VIDEOGRAHER: Will the court
4 reporter please swear the witness.
5 R. B R A M S M I T H, called as a
6 witness, having been duly sworn by a
7 Notary Public, was examined and
8 testified as follows:
9 EXAMINATION BY
10 MR. MARKOWSKI:
11 Q. Mr. Smith, would you please state
12 your full name for the record?
13 A. Richard Bram Smith.
14 Q. And where is your current home
15 address, Mr. Smith?
16 A. 44 Drake Road, Scarsdale, New York,
17 10583.
18 Q. Who is your current employer?
19 A. Bear Stearns.
20 Q. And what is your position with Bear
21 Stearns today?
22 A. I'm a senior managing director in
23 capital markets.
24 Q. Do you have a particular assignment
25 at Bear Stearns?

Page 6

1 Smith
2 A. Leveraged financing.
3 Q. And what are your general
4 responsibilities in the leveraged finance
5 group at Bear Stearns?
6 A. Loan capital markets, loan sales
7 and distribution.
8 Q. Where is your office location at?
9 A. 383 Madison.
10 Q. To whom do you report?
11 A. I report to two people, Larry
12 Alletto and Keith Barnish.
13 Q. How long have you been employed at
14 Bear Stearns?
15 A. Coming up on a year.
16 Q. Do you have any supervisory
17 responsibilities?
18 A. Yes.
19 Q. What are those?
20 A. Supervise people in loan capital
21 markets, sales and trade.
22 Q. How many individuals do you
23 supervise?
24 A. About eight.
25 Q. You previously were employed by

Page 7

1 Smith
2 Morgan Stanley?
3 A. I was.
4 Q. When did that employment end?
5 A. About a year ago.
6 Q. Was there any hiatus between the
7 end of your employment at Morgan Stanley and
8 the start of your employment at Bear Stearns?
9 A. A couple of months.
10 Q. You did not have a position at Bear
11 Stearns when you left Morgan Stanley?
12 A. No
13 Q. Do you have any continuing
14 relationship of any sort with Morgan Stanley?
15 A. What do you mean?
16 Q. Do you receive any money from
17 Morgan Stanley?
18 A. No
19 Q. Are you potentially entitled to
20 receive any money from Morgan Stanley in the
21 future?
22 A. I think so.
23 Q. What type of arrangement does that
24 involve?
25 A. Some equity investments made in

Page 8

1 Smith
2 some transactions I worked on.
3 Q. When will you know whether you will
4 be receiving any additional funds from Morgan
5 Stanley?
6 A. I have no idea.
7 Q. Do you know over what period of
8 time those investments may yield returns to
9 you?
10 A. No
11 Q. Is it possible that some of those
12 investments will yield returns to you in the
13 next year?
14 A. Don't know.
15 Q. You don't know whether it's
16 possible then?
17 You have to answer audibly.
18 A. I don't know if it is possible.
19 Q. You are represented today by Morgan
20 Stanley -- is there any other financial
21 arrangement, relationship of any sort today
22 that you have with Morgan Stanley?
23 A. Nope.
24 Q. You are represented today by a
25 Morgan Stanley attorney; is that correct?

Page 9

1 Smith
2 A. Yes.
3 Q. How did that come about?
4 A. How did that come about? Morgan
5 Stanley contacted me when they said I might
6 be asked to testify, and volunteered to be my
7 counsel.
8 Q. Is Morgan Stanley paying for Mr.
9 Clare's time today?
10 MR. CLARE: Objection, foundation.
11 A. I have no idea.
12 Q. Are you paying for it?
13 A. I'm not paying for it.
14 Q. Who called you from Morgan Stanley
15 to advise you that you would be deposed in
16 this case?
17 A. I don't remember the exact name.
18 Q. Was it somebody in the law
19 department at Morgan Stanley?
20 A. Somebody in the law department.
21 Q. What's your education, Mr. Smith?
22 A. In terms of degrees? BS from
23 the -- undergraduate Air Force Academy, MA
24 from Fletcher School at Tufts, and MBA from
25 Harvard.

Page 10

1 Smith
2 Q. Can you summarize for me your
3 employment history prior to your first
4 employment with Morgan Stanley?
5 A. Employment history prior to Morgan
6 Stanley was in the air force for six years.
7 I was going to business school, joined
8 Bankers Trust, I was there I think 17 or 18
9 years, and then Morgan Stanley.
10 Q. When did you leave the air force?
11 A. Oh, 1976.
12 Q. And from there you went to business
13 school?
14 A. Uhm-hmm.
15 Q. And from business school you went
16 to Bankers Trust?
17 A. Right.
18 Q. When would that have been?
19 A. 1978.
20 Q. And you were at Bankers Trust until
21 1996, approximately?
22 A. Yup, 1996.
23 Q. What were your responsibilities at
24 Bankers Trust?
25 A. I was in charge of loan capital

Page 11

1 Smith
2 markets and distribution.
3 Q. Was that your final assignment?
4 A. Uhm-hmm.
5 Q. What do you mean by "loan capital
6 markets," what does that activity involve?
7 A. That activity involves structuring,
8 pricing transactions, and then I distributed
9 them.
10 Q. What kind of transactions are you
11 referring to?
12 A. Mostly leveraged loans.
13 Q. What is a leveraged loan?
14 A. It would be a loan to a
15 noninvestment grade company.
16 Q. And what's a noninvestment grade
17 company?
18 A. It would be a company that was
19 rated less than double -- BBB minus or BAA 3
20 by the two rating agencies, Moody's and S&P.
21 Q. You indicate that your activity
22 also involved distributing the investment if
23 you want, correct?
24 A. Uhm-hmm.
25 Q. What is distributing?

Page 12

1 Smith
2 A. Selling.
3 Q. What does selling mean in this
4 context?
5 A. Selling loans to potential
6 investors.
7 Q. Selling participations in the loan
8 that you've --
9 A. Selling either the participations
10 or the loans themselves.
11 Q. Is that sometimes referred to as
12 syndicating a loan?
13 A. Sometimes referred to as
14 syndicating a loan.
15 Q. Syndicating meaning something
16 distinct in this context, or is that a
17 generic term used to describe the process of
18 selling participations in a loan transaction?
19 A. I think it would probably be
20 generic.
21 Q. At Bankers Trust how large would
22 you say the largest leveraged loan
23 transactions were that you were involved in
24 structuring and syndicating?
25 A. Billions. Billions.

Page 13

1 Smith
2 Q. How many billion dollar plus loan
3 syndications were you involved in while you
4 were at Bankers Trust?
5 A. I don't remember.
6 Q. Would it have been more than five
7 would you say?
8 A. Yup.
9 Q. Why did you leave Bankers Trust?
10 A. Better opportunity at Morgan
11 Stanley.
12 Q. Were you recruited at Morgan
13 Stanley, or did you make an overture to
14 Morgan Stanley?
15 A. Recruited.
16 Q. Who recruited you?
17 A. Steve Newhouse.
18 Q. You had known Mr. Newhouse before
19 that?
20 A. No.
21 Q. Do you know how he came to know of
22 you?
23 A. No.
24 Q. How did he contact you?
25 A. Through an executive recruiter.

4 (Pages 10 to 13)

Page 14

1 Smith
2 Q. How long before you joined Morgan
3 Stanley do you recall being first contacted
4 by the executive recruiting firm?
5 A. Gee, months.
6 Q. Were you being recruited to fill a
7 particular position at Morgan Stanley?
8 A. Yes.
9 Q. What was that?
10 A. To get them into the loan business.
11 Q. What do you mean by getting them in
12 the loan business?
13 A. They wanted to have a lending
14 capability and they hired me to develop that
15 capability for them.
16 Q. Is it your understanding that
17 before you joined Morgan Stanley, Morgan
18 Stanley did not engage in originating loans?
19 MR CLARE: Objection, calls for
20 speculation.
21 Q. I'm asking your understanding.
22 A. I don't know.
23 Q. Did you have an understanding one
24 way or the other when you joined Morgan
25 Stanley, whether Morgan Stanley at the time

Page 15

1 Smith
2 you were being recruited had not engaged at
3 all in origination of loans?
4 A. Again I don't know.
5 Q. What were you told concerning
6 Morgan Stanley's business objectives with
7 respect to creating a capability of being in
8 the loan business?
9 A. I was told they, that they felt it
10 was important strategically to have a loan
11 origination distribution capability.
12 Q. In what way was it important
13 strategically to Morgan Stanley to have the
14 ability to originate and distribute loans?
15 A. They felt it was necessary to, they
16 felt that was necessary to compete against
17 the commercial banks.
18 Q. It was necessary to have this
19 capability to compete against the commercial
20 banks in what areas?
21 A. In leveraged finance, particularly
22 high yield.
23 Q. Did you -- was it your
24 understanding that Morgan Stanley believed it
25 was important to have the ability to

Page 16

1 Smith
2 originate and distribute loans in order to
3 compete with commercial banks for investment
4 banking assignments?
5 A. I don't know.
6 Q. Did Bankers Trust provide
7 investment banking services to its clients in
8 addition to the loan services?
9 A. They provided high yield.
10 Q. High yield investment banking
11 services?
12 A. High yield debt raising
13 capabilities.
14 Q. But did they engage in providing
15 investment banking services of the same sort
16 that firms such as Morgan Stanley provide to
17 clients?
18 A. They had investment banking
19 services.
20 Q. Was it your understanding that
21 Bankers Trust used its ability to also assist
22 clients in raising funds for purposes of
23 financing investment banking transactions to
24 compete for the investment banking side?
25 A. Is it my understanding, is that the

Page 17

1 Smith
2 question?
3 Q. Correct. Let me take a step back,
4 sir.
5 While you were at Bankers Trust you
6 were involved in assisting Bankers Trust
7 clients that didn't have investment grade
8 ratings in raising funds, correct?
9 A. Uhm-hmm.
10 Q. Did those activities involve
11 raising funds in connection with business
12 acquisitions?
13 A. Normally.
14 Q. In those transactions was it
15 sometimes the case that Bankers Trust was
16 also providing investment banking services?
17 A. Sometimes.
18 Q. Was it your experience that Bankers
19 Trust used your ability to assist clients in
20 raising funds for purposes of financing
21 acquisitions to also obtain the investment
22 banking side?
23 A. No.
24 Q. You were never involved in making
25 presentations with other Bankers Trust

5 (Pages 14 to 17)

Page 18

1 Smith
2 representatives who were seeking the
3 investment banking assignment, in which your
4 services were described as an additional
5 benefit that clients could realize by
6 retaining Bankers Trust for the investment
7 banking?
8 A. No.
9 Q. When you went to Morgan Stanley,
10 was it your experience that Morgan Stanley
11 used your ability to assist in raising funds
12 as a way in which to increase its
13 opportunities to be retained to provide
14 investment banking services?
15 A. No.
16 Q. When you first joined Morgan
17 Stanley, what efforts did you engage in to
18 assist Morgan Stanley in developing the
19 capability of originating and distributing
20 loans?
21 A. I set up the group to do that, so
22 recruited and hired people.
23 Q. How large a group did you assemble?
24 A. Probably about 20 at the peak.
25 Q. What would the peak point of time

Page 19

1 Smith
2 have been in terms of the staffing?
3 A. I would say about, probably around
4 2000-ish or so, plus or minus a year.
5 Q. When you joined Morgan Stanley what
6 was your title?
7 A. Managing director.
8 Q. Did you have any other titles?
9 A. I think I was president of Morgan
10 Stanley Senior Fund.
11 Q. Do you know during what time period
12 you had that title?
13 A. Pretty much the whole time I was
14 there.
15 Q. Did you hold any other titles?
16 A. No.
17 Q. Was Morgan Stanley Senior Funding
18 an entity that existed when you first joined
19 Morgan Stanley?
20 A. No.
21 Q. By what Morgan Stanley entity were
22 you employed?
23 A. The dealer-broker.
24 Q. Do you know the name of that
25 entity?

Page 20

1 Smith
2 A. No.
3 Q. Do you know if it is Morgan Stanley
4 & Company, Inc.?
5 A. I don't know.
6 Q. Do you know if you were an employee
7 of Morgan Stanley Senior Funding?
8 A. No.
9 Q. Let me ask a better question.
10 Were you an employee of Morgan
11 Stanley Senior Funding?
12 A. I don't know.
13 Q. Did you receive any compensation
14 for Morgan Stanley Senior Funding?
15 A. No.
16 Q. What were your responsibilities and
17 duties during the period you were employed by
18 Morgan Stanley?
19 A. To manage the loan origination and
20 distribution of it.
21 Q. Did you have any other duties?
22 A. I don't think so.
23 Q. Do you know if you were considered
24 to be assigned to the Morgan Stanley
25 Investment Banking Division?

Page 21

1 Smith
2 A. We were in a joint venture between
3 banking and fixed income.
4 Q. What was the nature of the joint
5 venture?
6 A. It was -- what do you mean?
7 Q. Well, you indicated that you were
8 involved in a joint venture between
9 investment banking and fixed income, correct?
10 A. Uhm-hmm.
11 Q. What was that joint venture?
12 A. Joint venture was, was capital
13 markets.
14 Q. Capital markets function was
15 considered to be a joint venture between
16 investment banking and fixed income?
17 A. Uhm-hmm.
18 Q. And capital markets included what,
19 sir?
20 A. Included the loan origination
21 business.
22 Q. Did it include anything else?
23 A. High yield origination, or high
24 yield capital markets is a better word to
25 think about it.

6 (Pages 18 to 21)

Page 22

1 Smith
 2 Q. Anything else?
 3 A. No.
 4 Q. Loan origination would have been
 5 your function, sir?
 6 A. Yes.
 7 Q. High yield capital markets, would
 8 that have been part of your responsibilities
 9 also?
 10 A. No.
 11 Q. Who was responsible for that
 12 activity while you were at Morgan Stanley?
 13 A. A couple of people. Steve Newhouse
 14 and Bill Kourakos.
 15 Q. Do you know how Mr. Kourakos spells
 16 his name?
 17 A. No. K-O-U-R-A-K-A-S.
 18 Q. What does high yield capital
 19 markets involve?
 20 A. They are the liaisons between the
 21 traders in high yield, the bankers that cover
 22 the clients as well as the clients.
 23 Q. High yield --
 24 A. Is not investment grade securities.
 25 Q. How is it different from the

Page 23

1 Smith
 2 leveraged loans that you described?
 3 A. They are securities, they weren't
 4 loans.
 5 Q. Can you give me an example of a
 6 high yield security?
 7 A. A bond.
 8 Q. You indicated you were president of
 9 Morgan Stanley Senior Funding?
 10 A. Uhm-hmm.
 11 Q. And if I understood your testimony,
 12 Morgan Stanley Senior Funding did not exist
 13 when you first joined Morgan Stanley?
 14 A. Right.
 15 Q. When was it formed?
 16 A. It was formed pretty shortly after
 17 I got there.
 18 Q. Do you know why it was formed?
 19 A. They -- it was felt -- we wanted,
 20 the firm wanted a separate entity through
 21 which to conduct its lending business.
 22 Q. Whose idea was that?
 23 A. Don't know.
 24 Q. I take it it wasn't yours?
 25 A. Unh-unh.

Page 24

1 Smith
 2 Q. Do you know what entity within
 3 Morgan Stanley owned Morgan Stanley Senior
 4 Funding?
 5 A. Nope.
 6 Q. Do you know if Morgan Stanley
 7 Senior Funding had any employees?
 8 A. I don't know.
 9 Q. What were your responsibilities as
 10 the president of Morgan Stanley Senior
 11 Funding?
 12 A. My responsibilities was to, to
 13 manage the loan origination business, and so
 14 really nothing different than what I did.
 15 Q. Do you know what businesses Morgan
 16 Stanley Senior Funding engaged in?
 17 A. It was a funding vehicle for loans.
 18 Q. Did Morgan Stanley Senior Funding
 19 engage in any business activities other than
 20 the origination and distributing,
 21 distribution of the leveraged loans that you
 22 were responsible for?
 23 A. Not that I know of.
 24 Q. So as far as you're aware, the
 25 entire business activity of Morgan Stanley

Page 25

1 Smith
 2 Senior Funding was the business activity for
 3 which you were responsible at Morgan Stanley?
 4 A. Yes.
 5 Q. Do you know where Morgan Stanley
 6 Senior Funding is incorporated, what state?
 7 A. No.
 8 Q. Do you know if it's considered to
 9 have a headquarters?
 10 A. Do not.
 11 Q. Do you know if it's considered to
 12 have a principal place of business in a
 13 particular location?
 14 A. Do not.
 15 Q. Were you ever a director of Morgan
 16 Stanley Senior Funding?
 17 A. I don't remember.
 18 Q. Did Morgan Stanley Senior Funding
 19 hold meetings of its board of directors?
 20 A. Don't know.
 21 Q. Other than yourself, do you know of
 22 any individuals who held officer positions
 23 with Morgan Stanley Senior Funding?
 24 A. Yes, Steve Newhouse, Bill Kourakos.
 25 Q. Anyone else?

Page 26

1 Smith

2 A. I'm sure there were other names. I

3 don't know if I remember.

4 Q. You know there were other officers,

5 you just don't know who they are at this

6 point?

7 A. No.

8 Q. Were you responsible as president

9 of Morgan Stanley Senior Funding, for

10 designating individuals as officers of that

11 entity?

12 A. No.

13 Q. Do you know who was?

14 A. No.

15 Q. Were the officers of Morgan Stanley

16 Senior Funding all employees of other Morgan

17 Stanley entities?

18 A. I -- to the best of my knowledge

19 they were all employees of Morgan Stanley. I

20 don't know anything more about it.

21 Q. Did any of your business

22 responsibilities, sir, at Morgan Stanley

23 involve activities other than the activities

24 of Morgan Stanley Senior Funding?

25 A. No.

Page 27

1 Smith

2 Q. How did your employment at Morgan

3 Stanley end?

4 A. What do you mean?

5 Q. You indicated your employment at

6 Morgan Stanley ended a couple of months

7 before you started at Bear Stearns, correct?

8 A. Uhm-hmm.

9 Q. And you indicated you didn't have a

10 position at Bear Stearns at the time you left

11 Morgan Stanley, correct?

12 A. Right.

13 Q. Were you asked to leave Morgan

14 Stanley?

15 A. Yup.

16 Q. When were you first asked to leave

17 Morgan Stanley?

18 A. Prior to Christmas of '02.

19 Q. Tell me the circumstances.

20 A. I was told that they were reducing

21 staff and I was going to be let go.

22 Q. With whom did you have that

23 conversation?

24 Was it a face-to-face conversation

25 with someone?

Page 28

1 Smith

2 A. No.

3 Q. Did you receive a written

4 communication?

5 A. Nope.

6 Q. Telephone call?

7 A. Telephone call.

8 Q. From whom did you receive the

9 telephone call?

10 A. Steve Newhouse.

11 Q. How long did your conversation with

12 Mr. Newhouse last?

13 A. 15 minutes.

14 Q. Tell me everything you can recall

15 Mr. Newhouse telling you during that

16 15-minute telephone call.

17 A. Described the situation facing the

18 company and it was a hard decision, but they

19 were reducing staff and that I was part of

20 that.

21 Q. Did Mr. Newhouse tell you anything

22 about how you were identified as one of the

23 people who would be let go?

24 A. No.

25 Q. Did he tell you anything about

Page 29

1 Smith

2 other people within your business group who

3 were being let go?

4 A. No.

5 Q. Were other people within your

6 business group at that time being let go at

7 the same time?

8 A. Not at that time.

9 Q. Now, at this point in time, Mr.

10 Smith, were you still president of Morgan

11 Stanley Senior Funding?

12 A. I was.

13 Q. Were you still the person primarily

14 responsible and in charge of the leveraged

15 loan business at Morgan Stanley?

16 A. No.

17 Q. Who was in charge of the business

18 at that point?

19 A. The fella in charge was, ultimately

20 was a fellow named Mitch Petrick.

21 Q. Can you recall anything else that

22 Mr. Newhouse told you during your 15-minute

23 conversation with him?

24 A. No.

25 Q. Did he offer you a severance

Page 30

1 Smith
2 package of any sort?
3 A. The firm did.
4 Q. What was that severance package?
5 A. The severance package was some
6 weeks of salary and some cash.
7 Q. Have you received all of those
8 payments?
9 A. I have received all of those
10 payments.
11 Q. Were they made as a lump sum at
12 some point?
13 A. They were.
14 Q. Do you recall the amount of the
15 payment?
16 A. I -- let's see. Yes, partially.
17 Q. What do you recall the lump sum
18 severance payment being?
19 A. It was about -- the gross was
20 about, I don't know, \$875,000.
21 Q. Other than the lump sum severance
22 payment, did you receive anything else by way
23 of a severance package?
24 A. No.
25 Q. Did Mr. Newhouse tell you that Mr.

Page 31

1 Smith
2 Petrick agreed with his decision?
3 A. No.
4 Q. Did Mr. Petrick's name come up
5 during the conversation?
6 A. No.
7 Q. Before this conversation with Mr.
8 Newhouse, had you at any point been asked to
9 consider looking elsewhere for
10 opportunities --
11 A. No.
12 Q. -- by anyone within Morgan Stanley?
13 A. No.
14 Q. Did this come, did Mr. Newhouse's
15 call to you come as a surprise?
16 A. Yup.
17 Q. Had your performance at Morgan
18 Stanley Senior Funding been criticized in any
19 way prior to your conversation with Mr.
20 Newhouse?
21 A. No.
22 Q. Did Mr. Newhouse explain why you
23 were the person chosen to be let go at that
24 point?
25 A. No.

Page 32

1 Smith
2 Q. Do you have any understanding
3 yourself today why you were the person chosen
4 to be let go in December of 2002?
5 A. No.
6 Q. Do you know if Mr. Petrick agreed
7 with Mr. Newhouse's decision to let you go?
8 A. No.
9 Q. Did you have any conversations with
10 Mr. Petrick concerning your conversation with
11 Mr. Newhouse?
12 A. Yes.
13 Q. When were those?
14 A. Right after the phone call with Mr.
15 Newhouse.
16 Q. Did you call Mr. Petrick?
17 A. Went to see him, yes.
18 Q. You had a face-to-face meeting with
19 Mr. Petrick?
20 A. Yes.
21 Q. Where was that?
22 A. In his office.
23 Q. And where is that?
24 A. At -- what is the address over
25 there? At Morgan Stanley.

Page 33

1 Smith
2 Q. It is here in Manhattan?
3 A. Yes.
4 Q. When did that meeting take place?
5 A. Right after the -- within a couple
6 of days of the phone call with Mr. Newhouse.
7 Q. So we are still before Christmas of
8 2002?
9 A. Before Christmas of 2002.
10 Q. Was anyone else present for your
11 meeting with Mr. Petrick?
12 A. No.
13 Q. Was the meeting in his personal
14 office?
15 A. Yes.
16 Q. How long did that meeting last?
17 A. Probably about five minutes.
18 Q. How was the meeting arranged?
19 Was there a prior arrangement? Let
20 me ask that question first.
21 A. I don't remember.
22 Q. You don't remember calling and
23 making an appointment to see Mr. Petrick or
24 telling him you wanted to be seen?
25 A. It might have been that, but pretty

Page 34

1 Smith
2 informal.
3 Q. Tell me everything you can recall
4 about your meeting with Mr. Petrick.
5 A. He asked if I had spoken to Mr.
6 Newhouse and then we talked about the
7 mechanics of the departure.
8 Q. Did you ask for an explanation for
9 the decision?
10 A. No.
11 Q. Did he offer one?
12 A. No.
13 Q. What was the purpose for your
14 wanting to meet with Mr. Petrick?
15 A. To go over the mechanics of the
16 departure.
17 Q. What were the mechanics that you
18 discussed with him?
19 A. When, and hand off of transactions
20 that I was working on to other members of the
21 team.
22 Q. What was agreed upon with respect
23 to the timing?
24 A. The first of February departure.
25 Q. And who took your responsibilities

Page 35

1 Smith
2 for the matters that you were handling?
3 A. It varied depending on who I was
4 working with on what transaction.
5 Q. At that point did you have any
6 administrative responsibilities for managing
7 the business?
8 A. No.
9 Q. When did Mr. Petrick become
10 president of Morgan Stanley Senior Funding?
11 A. I don't know. Don't know.
12 Q. Do you recall when he assumed your
13 responsibilities for managing the business
14 group?
15 A. It was in the middle, I think
16 middle of '02.
17 Q. The middle of October 2002?
18 A. No, middle of '02.
19 Q. Oh, middle of '02, I'm sorry.
20 Who made that decision?
21 A. Don't know.
22 Q. Was it your choice?
23 A. No.
24 Q. Had Mr. Petrick been working within
25 the Morgan Stanley Senior Funding business

Page 36

1 Smith
2 group?
3 A. No, he had been in high yield.
4 Q. How were you advised that he would
5 be assuming your responsibilities?
6 A. By one of his bosses.
7 Q. Do you recall who that was?
8 A. Zoe Cruz.
9 Q. Could you move your hand down from
10 there?
11 A. Sure.
12 Q. Sorry.
13 Zoe Cruz you said?
14 A. Uhm-hmm.
15 Q. Is Zoe Cruz a woman?
16 A. Yes.
17 Q. What did Miss Cruz tell you?
18 A. That they had -- she had decided,
19 the firm had decided to let Mr. Petrick run
20 the loan business.
21 Q. Did you have a face-to-face
22 conversation with Miss Cruz?
23 A. Yes.
24 Q. Was anyone else present for that?
25 A. No.

Page 37

1 Smith
2 Q. How long before Mr. Petrick took
3 over your responsibilities did this
4 conversation occur?
5 A. Oh, days I guess.
6 Q. But very shortly?
7 A. Very shortly.
8 Q. What did Miss Cruz tell you for the
9 reason for this change of assignment?
10 A. That he was very capable, that they
11 wanted to expand the effort and that she
12 wanted him to do it.
13 Q. What did she mean by "expand the
14 effort," the firm wanted to expand the
15 effort?
16 MR CLARE: Objection, calls for
17 speculation.
18 Q. What was your understanding?
19 A. They wanted to get into the
20 investment grade lending business.
21 Q. Did she say that to you during this
22 meeting?
23 A. No.
24 Q. That was your understanding though?
25 A. Uhm-hmm.

10 (Pages 34 to 37)

Page 38

1 Smith
2 Q. Were you pleased with this change
3 of circumstances?
4 A. Not entirely.
5 Q. Did you express any disappointment
6 to Miss Cruz?
7 A. Nope.
8 Q. Why were you not entirely pleased?
9 A. Because it would be a change in my
10 situation.
11 Q. Did you consider this to be a
12 demotion?
13 A. Yes.
14 Q. Did you discuss this change of
15 assignment with anyone else in senior
16 management Morgan Stanley, other than Miss
17 Cruz?
18 A. No.
19 Q. Prior to the assignment, your
20 reassignment and Mr. Petrick's appointment to
21 the position of president of Morgan Stanley
22 Senior Funding, had you been asked to attempt
23 to expand the business activities of Morgan
24 Stanley Senior Funding in ways that you had
25 been unable to accomplish?

Page 39

1 Smith
2 A. No.
3 Q. Who evaluated your performance at
4 Morgan Stanley? Excuse me, during the time
5 you were employed at Morgan Stanley, 1996
6 through February of 2003, who was responsible
7 for evaluating your performance?
8 A. Various people.
9 Q. Can you identify them for me?
10 A. Steve Newhouse, Bill Kourakos.
11 Take a step back. Normally I would have two
12 evaluators, so it would be Newhouse and
13 somebody from fixed income and Kourakos and
14 somebody from fixed income. Towards the end
15 it was Alan Jones and Mitch Petrick.
16 Q. Was Mr. Petrick the fixed income
17 representative?
18 A. He was the fixed income
19 representative.
20 Q. And the other person responsible
21 for your evaluation was from what part of the
22 business?
23 A. That would be from the high yield
24 capital markets area.
25 Q. Were you evaluated on an annual

Page 40

1 Smith
2 basis?
3 A. Yes.
4 Q. More often than annual?
5 A. I don't think so.
6 Q. What was the form this evaluation
7 took?
8 A. It was written and it was a
9 meeting.
10 Q. Prior to February '03 do you
11 remember receiving any criticism relating to
12 any aspect of your work during your annual
13 evaluations?
14 A. No.
15 Q. Do you consider yourself to be --
16 let me focus on the time period that we're
17 talking about here, Mr. Smith.
18 In 1998 did you consider yourself
19 to be highly sophisticated with respect to
20 underwriting leveraged loans?
21 MR. CLARE: Object to the form of
22 the question.
23 A. I don't know what you mean.
24 Q. Had your career up until 1998, Mr.
25 Smith, involved underwriting leveraged loans?

Page 41

1 Smith
2 A. Yes.
3 Q. How experienced did you consider
4 yourself to be in the first part of 1998 with
5 respect to that business activity?
6 A. Pretty experienced.
7 Q. Would you consider yourself to be
8 highly knowledgeable with respect to the
9 process of underwriting large leveraged loans
10 first quarter of 1998?
11 A. Yes.
12 Q. That had been your entire career,
13 had it not?
14 A. Well, I used to fly helicopters.
15 Q. Subsequent to leaving the air force
16 that had been your entire business career,
17 correct?
18 A. The last half of the Morgan
19 Stanley -- I mean the last half of Bankers
20 Trust, yes.
21 Q. So approximately?
22 A. Ten years.
23 Q. Ten years at Bankers Trust?
24 A. Trust.
25 Q. Plus three years of Morgan Stanley?

Page 42

1 Smith
2 A. Uhm-hmm.
3 Q. Have you ever been deposed before,
4 Mr. Smith?
5 A. I have.
6 Q. On how many occasions?
7 A. I guess a couple.
8 Q. What did those occasions involve?
9 A. One was a personnel matter and the
10 other was about this.
11 Q. What did the personnel matter
12 involve?
13 A. Oh, lawsuit.
14 Q. By a Morgan Stanley employee?
15 A. Nothing to do with Morgan Stanley.
16 Q. Was it at Bankers Trust?
17 A. Bankers Trust.
18 Q. What kind of personnel lawsuit was
19 it?
20 A. I don't really know. I was just
21 called in as a witness.
22 Q. What was your involvement, why were
23 you called as a witness?
24 A. I worked with the individual.
25 Q. Were any of the claims being made

Page 43

1 Smith
2 in that employment dispute by the Bankers
3 Trust employee related to your treatment of
4 the individual?
5 A. No.
6 Q. You indicated you have been deposed
7 previously relating to Sunbeam?
8 A. Uhm-hmm.
9 Q. When was that?
10 MR CLARE: A point of
11 clarification, I'm not sure the witness is
12 using deposed in the same way that you are,
13 so you may want to ask a clarifying question
14 or give a clarifying answer to make sure
15 we're clear about the terms we are using.
16 MR MARKOWSKI: I'll try to do
17 that.
18 Q. Have you testified previously
19 relating to Sunbeam?
20 A. I have.
21 Q. What were the circumstances?
22 A. With the U.S. Attorney.
23 Q. Have you testified in a Grand Jury
24 proceeding?
25 A. No.

Page 44

1 Smith
2 Q. What was the nature of the U.S.
3 Attorney's, what was the nature of the
4 testimony you gave relating to activities of
5 the U.S. Attorney's Office?
6 MR. CLARE: I'll object. Maybe I
7 can shortcut some of this. And you're free
8 to follow up with him. Mr. Smith gave an
9 interview to the U.S. Attorney's Office. It
10 was not testimony in any formal sense, it was
11 an interview that was granted.
12 THE WITNESS: Thank you.
13 Q. Was a court reporter present?
14 A. No.
15 Q. Do you remember when this occurred?
16 A. Three or four years ago.
17 Q. How -- the Sunbeam transactions, to
18 put this in context, closed in the first
19 quarter of 1998?
20 A. Uhm-hmm.
21 Q. Do you recall how soon in
22 relationship to first quarter of 1998 you
23 were interviewed by the U.S. Attorney's
24 Office?
25 A. I assume it would be three or four

Page 45

1 Smith
2 years ago. It would be around '01 or '00, so
3 it would be two or three years afterwards,
4 but that is a very hazy recollection.
5 Q. So that was years after the close
6 of the transactions that you were interviewed
7 by the U.S. Attorney's Office?
8 A. Uhm-hmm.
9 Q. Do you know why U.S. Attorney's
10 Office wanted to interview you?
11 MR CLARE: Objection, calls for
12 speculation.
13 A. No.
14 Q. How much time did you spend in this
15 interview?
16 A. About a day and a half.
17 Q. Were you represented by counsel?
18 A. I was.
19 Q. Was it an in-house attorney by
20 Morgan Stanley?
21 A. No.
22 Q. Who represented you?
23 A. Wachtel, I think.
24 Q. Were any in-house Morgan Stanley
25 lawyers present for the interview?

Page 46

1 Smith
2 A. I don't think so.
3 Q. What subjects were you interviewed
4 about?
5 A. Different facets of the
6 transaction.
7 Q. "The transaction" in this case
8 being what?
9 A. Being the Sunbeam acquisition and
10 financing.
11 Q. The Sunbeam acquisition you're
12 referring to is what?
13 A. Of Coleman and the other two
14 properties.
15 Q. And the financing in this context?
16 A. Would be the loan.
17 Q. The senior loan?
18 A. The senior loan.
19 Q. When you refer to "senior loan,"
20 the senior loan is the loan that Morgan
21 Stanley Senior Funding made to Sunbeam in
22 connection with the acquisition?
23 A. Along with two other existing
24 lenders, Bank of America and Wachovia, yeah.
25 Or First Union at the time.

Page 47

1 Smith
2 Q. Were there any other matters that
3 you were interviewed about other than those
4 two general topics?
5 A. Nope.
6 Q. Do you know how you were chosen for
7 this interview?
8 A. I have no idea.
9 Q. Do you know if you were volunteered
10 by Morgan Stanley or --
11 A. I have no idea.
12 Q. Excuse me, or someone at the U.S.
13 Attorney's Office specifically requested you?
14 A. Don't know.
15 Q. Do you know what the U.S.
16 Attorney's Office was attempting to
17 investigate?
18 MR. CLARE: Objection, calls for
19 speculation.
20 A. No.
21 Q. What was your understanding?
22 A. Didn't have any.
23 Q. Were you told whether Morgan
24 Stanley's conduct was in question?
25 MR. CLARE: Object. You can

Page 48

1 Smith
2 answer the question, but I would instruct you
3 to limit your answer to exclude any
4 conversations or any other information that
5 you learned from in-house Morgan Stanley
6 counsel or outside counsel representing
7 Morgan Stanley at the time. Those
8 conversations are privileged, you're not
9 required to disclose them. I'm instructing
10 you not to disclose them.
11 To the extent you have an
12 understanding outside of any of those
13 privileged communications you are free to
14 answer Mr. Markowski's question.
15 A. What is your question again?
16 Q. Did you have any understanding
17 whether Morgan Stanley's conduct was in
18 question?
19 A. No comment.
20 Q. Sorry?
21 A. No comment.
22 Q. No comment? I'm not sure I know
23 what no comment means.
24 A. I guess I would be following his
25 advice.

Page 49

1 Smith
2 Q. Is your testimony that other than
3 things you were told by Morgan Stanley's
4 attorneys, you don't have any independent
5 understanding whether Morgan Stanley's
6 conduct was under investigation?
7 A. That would be right.
8 Q. Sir, I think it would be useful for
9 the court reporter if you let me finish my
10 questions before you start to answer them. I
11 know it is very natural for you to anticipate
12 where I'm going and provide the answer.
13 A. You're right, I'm sorry.
14 Q. But it is easier for the court
15 reporter if we speak one at a time.
16 THE WITNESS: Do you think we can
17 take a break now?
18 MR. CLARE: Sure.
19 THE VIDEOGRAPHER: The time is
20 10:21, we're going off the record.
21 (Recess taken.)
22 THE VIDEOGRAPHER: The time is
23 10:26, we're back on the record.
24 BY MR. MARKOWSKI:
25 Q. Mr. Smith, other than this day and

Page 50

1 Smith
2 a half interview with the U.S. Attorney's
3 Office, have you been interviewed by anybody
4 else relating to the Sunbeam transactions?
5 A. No.
6 Q. The U.S. Attorney's Office involved
7 in your interview, was that U.S. Attorney's
8 Office here in Manhattan?
9 A. Yes.
10 Q. Do you know if any representatives
11 of the Securities and Exchange Commission
12 were present for that interview?
13 A. I don't recall.
14 Q. Do you remember with whom at U.S.
15 Attorney's Office you met?
16 A. No.
17 Q. Did you take any notes of the
18 discussion that you had with U.S. Attorney's
19 Office?
20 A. No.
21 Q. Can you tell me generally what the
22 U.S. Attorney's Office was interested in
23 learning from you?
24 A. They were interested in issues
25 surrounding the financing of the loan that

Page 51

1 Smith
2 we, Bank of America and First Union, made.
3 Q. Do you know if this inquiry being
4 conducted by the U.S. Attorney's Office was
5 being initiated at the request of Morgan
6 Stanley or Morgan Stanley Senior Funding?
7 MR CLARE: Objection, calls for
8 speculation.
9 A. I do not know.
10 MR CLARE: Make sure you just
11 give me a chance to give my objection.
12 THE WITNESS: I'm sorry.
13 Q. Do you know if it was initiated at
14 the request of First Union or Bank of
15 America?
16 MR CLARE: Same objection.
17 A. Don't know.
18 Q. During the course of the day and a
19 half that you spent with the U.S. Attorney's
20 Office with this interview, Mr. Smith, did
21 you express the view that Morgan Stanley
22 Senior Funding had been the victim of fraud
23 in connection with the loan that it made to
24 Sunbeam?
25 A. I'm sorry, say that again, please.

Page 52

1 Smith
2 Q. During the course of this day and a
3 half interview at the U.S. Attorney's Office
4 did you express the view that Morgan Stanley
5 Senior Funding had been the victim of fraud
6 with respect to the loan it made to Sunbeam?
7 A. I don't really remember.
8 Q. As you sit here today, you don't
9 remember whether during the day and a half
10 interview with the U.S. Attorney's Office you
11 indicated that you believe Morgan Stanley
12 Senior Funding had been the victim of a loan,
13 the victim of a fraud with respect to its
14 loan to Sunbeam; is that correct?
15 A. Well, what, I think a better way to
16 put it was that the three banks were -- I
17 don't know if I ever used the word "fraud" --
18 were misled by what we were told with the
19 financial condition of the company.
20 Q. Financial condition of the company
21 in this context is Sunbeam?
22 A. Sunbeam.
23 Q. Do you recall that you did indicate
24 that you believe Morgan Stanley Senior
25 Funding had been misled by Sunbeam related to

Page 53

1 Smith
2 its financial condition?
3 A. I think I said that Morgan Stanley
4 and the other lenders were misled.
5 Q. Did you explain what, in what way
6 you thought Morgan Stanley Senior Funding had
7 been misled?
8 A. I remember that I said that I felt
9 that the three banks were misled by the
10 financial statements as well as
11 representations made by the company.
12 Q. The financial statements you are
13 referring to are the audited financial
14 statements of Sunbeam?
15 A. Yes.
16 Q. What representations by management
17 did you tell the U.S. Attorney's Office you
18 believe were misleading?
19 A. I don't remember the specifics.
20 Q. Do you remember if you offered
21 specifics to the U.S. Attorney's Office with
22 respect to statements made to Morgan Stanley
23 Senior Funding by Sunbeam management that you
24 considered to be misleading?
25 A. No, I cannot remember.

Page 54

1 Smith
2 Q. Did you indicate to the U.S.
3 Attorney's Office whether any of the
4 information that Morgan Stanley had received
5 from or relating to Coleman company was
6 misleading?
7 A. I don't recall.
8 Q. So as you sit here today you don't
9 recall telling the U.S. Attorney's Office
10 that you remember receiving misleading
11 information from Coleman?
12 A. I don't recall ever telling them
13 that.
14 Q. Is the only misleading information
15 you advised the U.S. Attorney's Office you
16 believe Morgan Stanley Senior Funding had
17 received had come from Sunbeam and related to
18 Sunbeam; is that correct?
19 MR. CLARE: Objection, misstates
20 his testimony.
21 A. It what?
22 MR. CLARE: I objected that it
23 misstates your prior testimony. You can
24 answer.
25 THE WITNESS: What was my prior

Page 55

1 Smith
2 testimony?
3 MR. MARKOWSKI: Can you read the
4 pending question, please.
5 (Record read.)
6 A. Well, no, because they also had the
7 financial statements.
8 Q. Let me break it down.
9 You told the U.S. Attorney's Office
10 that you believe Morgan Stanley Senior
11 Funding had received misleading information
12 from Sunbeam management, correct?
13 A. Yeah, the three banks had received
14 misleading information.
15 Q. And that misleading information
16 related to Sunbeam itself, correct?
17 A. Yes.
18 Q. And you also told the U.S.
19 Attorney's Office that you believe Sunbeam's
20 own financial statements were misleading,
21 correct?
22 A. Yes.
23 Q. And those financial statements
24 relate to Sunbeam itself, correct?
25 A. Yes.

Page 56

1 Smith
2 Q. Is there any other misleading
3 information that you recall advising the U.S.
4 Attorney's Office of that related to the
5 loans that Morgan Stanley Senior Funding
6 received?
7 A. I don't recall anything.
8 Q. Are you familiar with the lawsuit
9 that my client Coleman (Parent) Holdings has
10 filed against Morgan Stanley, sir?
11 A. You mean the one we are here for
12 now?
13 Q. Correct.
14 A. A little bit.
15 Q. What's your understanding of that
16 lawsuit?
17 A. That you're suing Morgan Stanley,
18 that is about it.
19 Q. Do you have any understanding of
20 what the nature of the claims are that my
21 client's asserting against Morgan Stanley?
22 A. Not directly.
23 Q. When you say "not directly," what
24 do you mean?
25 A. No, not -- no.

Page 57

1 Smith
2 Q. Do you understand that my client is
3 alleging that Morgan Stanley misled Coleman
4 (Parent) Holdings in connection with the sale
5 of its interest in Coleman company to
6 Sunbeam?
7 A. Yes, I guess I have heard that.
8 Q. Have you had any discussions with
9 Morgan Stanley personnel relating to Coleman
10 (Parent's) lawsuit?
11 A. No. Well, I guess we had that
12 lawyer from Morgan Stanley, the guy who
13 contacted me, the people who contacted me
14 about showing up here. That would be it.
15 Q. Okay. Other than being advised
16 that we wanted to take your deposition, you
17 have not?
18 A. Nope.
19 Q. Sir, if you let me finish my
20 questions, --
21 A. I'm sorry.
22 Q. -- we'll try and get through this.
23 Other than the telephone call you
24 received from an in-house lawyer at Morgan
25 Stanley advising you we wanted to take your

Page 58

1 Smith
2 deposition, you have not had any discussions
3 with any Morgan Stanley personnel relating to
4 my client's claims against Morgan Stanley?
5 A. Had a face-to-face meeting with a
6 lawyer from Morgan Stanley.
7 Q. When was that?
8 A. It was yesterday.
9 Q. That was to prepare for your
10 testimony today?
11 A. That was to prepare for the
12 testimony today.
13 Q. Other than that conversation, have
14 you had any discussions with anyone at Morgan
15 Stanley relating to my client's claims?
16 A. No.
17 Q. What did you do to prepare for your
18 testimony today, sir?
19 A. Sat down with counsel and reviewed
20 documents.
21 Q. And on what occasions did you meet
22 with counsel to prepare for today?
23 A. I'm sorry, on what occasion?
24 Q. Right.
25 A. You mean like when?

Page 59

1 Smith
2 Q. Yes.
3 A. Yesterday.
4 Q. Any other occasions?
5 A. No.
6 Q. With whom did you meet yesterday?
7 A. With this attorney from Morgan
8 Stanley and counsel.
9 Q. With Mr. Clare?
10 A. Mr. Clare.
11 Q. Do you remember the name of the
12 in-house person at Morgan Stanley?
13 A. Jim Doyle?
14 MR. CLARE: If you remember.
15 A. That's all I remember.
16 Q. Anyone else present at the
17 meetings?
18 A. No.
19 Q. Where did it take place?
20 A. It took place at Bear Stearns.
21 Q. How long did you meet with him?
22 A. About several hours.
23 Q. Can you tell me approximately how
24 many?
25 A. Three-plus.

Page 60

1 Smith
2 Q. Did they show you some documents?
3 A. Yes.
4 Q. Did any of those documents refresh
5 your recollection on matters?
6 A. In a limited way I guess.
7 Q. What documents did they show you
8 that refreshed your recollection?
9 A. There was a variety of documents.
10 It included the offering memorandum on the
11 bank transaction, some press releases, that
12 type of thing.
13 Q. Did they review any testimony of
14 others with you?
15 A. No.
16 Q. Did they review notes of the
17 meeting that had taken place at the U.S.
18 Attorney's Office?
19 A. No.
20 Q. Do you know if either Mr. Doyle or
21 Mr. Clare had notes relating to the interview
22 you had given to the U.S. Attorney's office?
23 A. No idea.
24 Q. Other than the documents that you
25 were shown during the course of this session

Page 61

1 Smith
2 yesterday with Mr. Doyle and Mr. Clare, did
3 you spend any other time reviewing documents?
4 A. No.
5 Q. Did you use E-mail to communicate
6 back in 1998, sir, while you were at Morgan
7 Stanley?
8 A. No, I don't remember doing it.
9 Q. Did you ever use E-mail while you
10 were at Morgan Stanley?
11 A. Limitedly, in a limited manner.
12 Q. During what time period?
13 A. Mostly towards the last two or
14 three years.
15 Q. When you left Morgan Stanley in
16 2003 did you have a personal computer at the
17 office?
18 A. Yes.
19 Q. Do you know whether there were any
20 E-mails or electronic documents on that
21 computer that related in any way to the
22 Sunbeam transactions?
23 A. I do not.
24 Q. So it is possible that your
25 personal computer could have had E-mails or

16 (Pages 58 to 61)

Page 62

1 Smith
2 electronic documents relating to the Sunbeam
3 transaction?
4 A. I'm not a computer genius, but the
5 computer I had was, I only had for a couple
6 of years, so I guess it is not.
7 Q. But you don't know?
8 A. Don't know for sure, no.
9 Q. When you left do you know what
10 happened to your personal computer?
11 A. I do not.
12 Q. You didn't take it with you?
13 A. No, it wasn't mine.
14 Q. Do you know if anyone took any
15 steps to preserve the contents of that
16 computer when you left?
17 A. I do not.
18 Q. Do you know if that computer was
19 reviewed at any time after my client filed
20 its lawsuit against Morgan Stanley in 2003,
21 to determine whether it had on it any
22 documents relating to Sunbeam?
23 MR. CLARE: Objection, no
24 foundation, calls for speculation.
25 A. No idea.

Page 63

1 Smith
2 Q. You don't know one way or the
3 other?
4 A. No.
5 Q. You have no knowledge of it being
6 reviewed at least; is that correct?
7 A. No.
8 Q. Mr. Smith, when did you first
9 become aware that a team of Morgan Stanley
10 investment bankers was working with Sunbeam?
11 A. Tough to say, long time ago. My
12 recollection would be that it would be early
13 '98.
14 Q. Is there a particular event that
15 you relate your first knowledge of Morgan
16 Stanley investment bankers working with
17 somebody?
18 A. The event would be a phone call
19 from Bill Strong inquiring whether our
20 interest in arranging a potential financing
21 for Sunbeam in connection with some
22 acquisitions.
23 Q. Did he identify the potential
24 acquisitions?
25 A. I don't recall.

Page 64

1 Smith
2 Q. Do you recall if those acquisitions
3 turned out to be the acquisition of Coleman
4 company, First Alert, Signature Brand?
5 A. Could have been. It is very
6 general and the conversation like this I had
7 all the time about potential acquisitions, so
8 I think in this case it is still a formative
9 stage.
10 Q. You don't recall as you sit here
11 today whether this call from Mr. Strong
12 related to whether you were interested in
13 potentially structuring financing for
14 Sunbeam's acquisition for some company other
15 than the three companies it ended up
16 acquiring?
17 A. Maybe I'll put it a different way.
18 I think those companies were mentioned. It
19 was unclear whether it was going to be all
20 three, two of them or one.
21 Q. But it ended up being, the
22 financing that Mr. Strong was inquiring about
23 ended up being the financing that was in fact
24 put in place by your group, right?
25 A. For those three properties.

Page 65

1 Smith
2 Q. Did you have any knowledge that Mr.
3 Strong and others were working with Sunbeam
4 earlier with respect to other potential
5 target companies?
6 A. Not then.
7 Q. Were you involved in any Sunbeam
8 activities in 1997 that you can recall?
9 A. 1997, no. I do not recall being
10 involved.
11 Q. Do you believe that you were not?
12 A. I believe I was not.
13 Q. Were you aware that Morgan
14 Stanley's ability to arrange large amounts of
15 financing was being promoted to Sunbeam by
16 Morgan Stanley investment bankers as a reason
17 for retaining Morgan Stanley to provide
18 investment banking services?
19 A. I was not.
20 Q. Were you aware that in August of
21 1997 you were identified as a member of the
22 Morgan Stanley Sunbeam team?
23 A. No.
24 Q. Would it surprise you that without
25 your knowledge you have been identified by

Page 66

1 Smith
 2 Morgan Stanley investment bankers as being a
 3 member of the Sunbeam team?
 4 MR. CLARE: Objection to form and
 5 foundation. You can answer.
 6 A. I don't know how to answer. Does
 7 it surprise me? A little bit I guess.
 8 Q. Mr. Smith, I'm going to show you
 9 what we're going to mark as Coleman (Parent)
 10 Holdings Exhibit 151, it's a document that
 11 bears Bates number Morgan Stanley
 12 confidential 65651 through 6574.
 13 (Coleman (Parent) Holdings Exhibit
 14 151, document that bears Bates number
 15 Morgan Stanley confidential 65651
 16 through 6574, marked for
 17 identification, as of this date.)
 18 Q. I would like you to look at it
 19 briefly just to tell me, first of all,
 20 whether you recall ever seeing that document
 21 before.
 22 A. Is this all one document or is this
 23 several put together?
 24 Q. As far as I'm aware it is one
 25 document, but I could be mistaken about that.

Page 67

1 Smith
 2 It is the way we received it.
 3 A. I don't recollect seeing this.
 4 Q. You see it's labelled in the first
 5 page "Project Laser Discussion Material
 6 August 8, 1997"?
 7 A. Uhm-hmm.
 8 Q. Do you recall Morgan Stanley's work
 9 for Sunbeam was referred to as Project Laser?
 10 A. Yes.
 11 Q. Let me direct your attention to the
 12 page where it has Bates number 65772, it is
 13 towards the end of the document.
 14 A. Towards the end of it?
 15 Q. 772, correct.
 16 A. Uhm-hmm.
 17 Q. Do you see that page is entitled
 18 "Project Laser, the Morgan Stanley team"?
 19 A. Yes.
 20 Q. You see in the bottom left-hand
 21 corner there is a box for debt capital
 22 markets banks?
 23 A. Yes.
 24 Q. And your name appears there,
 25 correct?

Page 68

1 Smith
 2 A. Yes.
 3 Q. Along with Michael Hart's and
 4 Michael McLaughlin, right?
 5 A. Yes.
 6 Q. Can you tell me who Michael Hart
 7 and Michael McLaughlin are?
 8 A. Michael Hart and Michael McLaughlin
 9 were vice presidents who worked as loan
 10 originators in the loan capital, for me in
 11 the loan group.
 12 Q. They were two Morgan Stanley
 13 employees who worked for you?
 14 A. Right.
 15 Q. Does this refresh your recollection
 16 that you're identified Sunbeam in the summer
 17 of 1997, as part of the Morgan Stanley team
 18 for Project Laser?
 19 A. I guess I would put it another way
 20 since I have never seen this before, so this
 21 is my first observation of this and I see my
 22 name as well as 15 other people here.
 23 This looks very similar to a lot of
 24 the pitches Morgan Stanley put together just
 25 listing people in different areas.

Page 69

1 Smith
 2 You will also notice here they had
 3 people from the credit function and people
 4 from Princess Gate on this, so I would view
 5 this as a very generic pitch page.
 6 Q. Do you know what the purpose would
 7 be of listing your group?
 8 A. No, I would not.
 9 Q. Let me direct your attention to the
 10 next page of this document, it bears Bates
 11 65773. It is entitled "Project Laser Global
 12 Leveraged Lending Capabilities." It states
 13 "Morgan Stanley has the ability to provide
 14 below investment grade clients with financing
 15 at every level of the capital structure."
 16 Do you understand that?
 17 A. Yes.
 18 Q. Was it your understanding that
 19 Sunbeam was a below investment grade company?
 20 MR. CLARE: During what time
 21 period?
 22 MR. MARKOWSKI: 1997, 1998.
 23 A. Again I didn't know that this was
 24 done. I don't know what Sunbeam's credit
 25 ratings were at that time, investment grade,

Page 70

1 Smith
2 noninvestment grade.
3 Q. Do you see the entry that reads
4 "seasoned leverage lending professionals"?
5 A. Yes.
6 Q. I would like you to read that, the
7 description next to that to yourself. It has
8 the words "Groups of 12 dedicated
9 professionals"?
10 A. Uhm-hmm.
11 Q. Does that accurately describe your
12 group at the time?
13 A. Yes.
14 Q. Below that there is another heading
15 that reads "Armed With One-Stop Shopping."
16 Do you see that?
17 A. Yes.
18 Q. Would you read that to yourself
19 also. Let me read it into the record, so it
20 is clear what we're talking about.
21 It reads "Seamless execution
22 coordinated among MSSF, Morgan Stanley's
23 bridge and private equity funds and top rank
24 high yield public equity M&A groups."
25 Do you see that?

Page 71

1 Smith
2 A. Yes.
3 Q. Do you have any understanding what
4 the reference to one-stop shopping means in
5 the context of this statement?
6 A. The, again this was a standard
7 pitch page that was included in a lot of
8 presentations to companies.
9 The idea here was that a variety of
10 services could be provided by Morgan Stanley,
11 very similar to what our competitors were
12 also tallying at the time.
13 Q. And those activities would range
14 from what, sir, to what in this context?
15 A. In this context where you just read
16 it would include Morgan Stanley Senior
17 Funding, Morgan Stanley bridge, private
18 equity, high yield, public equity, and M&A.
19 Q. The reference to M&A is to what
20 function, sir, do you know?
21 Do you have any understanding?
22 A. I guess it would be mergers and
23 acquisitions.
24 Q. Is that sometimes referred to as
25 the investment banking function?

Page 72

1 Smith
2 A. I think the investment banking
3 function is broader, but I don't know.
4 Is there investment banking listed
5 here?
6 Q. Was it common for Morgan Stanley
7 investment bankers to represent to potential
8 clients that Morgan Stanley both could
9 provide investment banking advisory services
10 and then assist the company directly or
11 indirectly in raising the funds necessary to
12 complete the acquisitions that were arranged
13 through the investment banking group?
14 MR. CLARE: Objection, calls for
15 speculation.
16 A. Yes, I mean I obviously wasn't on
17 every page so I have no idea how common or
18 uncommon it was.
19 Q. You were part of the financing
20 activity. Was it something that you
21 understood to be taking place?
22 A. When you say "taking place," do you
23 mean taking place 1 percent of the time, 2
24 percent of the time.
25 Q. Common?

Page 73

1 Smith
2 A. I don't know what common means.
3 Q. Was it your understanding that
4 Morgan Stanley -- let me take a step back,
5 sir.
6 Was it your understanding that one
7 of the reasons why Morgan Stanley wanted you
8 to come to Morgan Stanley to establish the
9 ability to fund leveraged loans and to
10 syndicate them, was to assist Morgan Stanley
11 in obtaining investment banking related
12 engagements?
13 A. My understanding was that they want
14 to have the leverage loan capability to help
15 them garner more high yield business per se.
16 Q. Did you understand another
17 objective was to obtain more investment
18 banking engagements as a result of the
19 ability to provide that kind of funding?
20 A. No.
21 Q. That was never expressed to you as
22 an objective?
23 A. No, it was not.
24 Q. Were you aware that --
25 A. Excuse me, are we finished with

Page 74

1 Smith
 2 this?
 3 Q. Yes.
 4 Q. You were aware that the Morgan
 5 Stanley investment banking team was concerned
 6 that it might lose the financing assignments
 7 relating to any acquisitions Sunbeam obtained
 8 to Chase Securities?
 9 A. I don't know if I would have worded
 10 it that way. I think they felt that Chase
 11 was a competitor that could get the financing
 12 business because of their existing
 13 relationship with Sunbeam.
 14 Q. You understood that Chase
 15 Securities had an existing relationship with
 16 Sunbeam?
 17 A. Yes, I did, as did First Union and
 18 Bank of America.
 19 Q. What was the nature of Chase
 20 Securities' relationship with Sunbeam?
 21 MR. CLARE: Objection. Objection,
 22 no foundation. You can answer if you know.
 23 A. The only thing that I know that
 24 they had were they were the lead on their
 25 bank loan. And by "the lead" I mean their

Page 75

1 Smith
 2 agent or the administrative agent.
 3 Q. The bank loan is what, sir?
 4 A. They had a, I think a small
 5 revolving credit, multi-year. Chase was the
 6 admin agent. First Union, Bank America were
 7 two large lenders, participants in that, two
 8 syndicate members.
 9 Q. Do you know who Mark Davis is?
 10 A. From where?
 11 Q. Chase Securities.
 12 A. No, I don't think so.
 13 Q. You were never told that Mark Davis
 14 of Chase Securities had a relationship with
 15 Mr. Dunlap as a result of work that Mr. Davis
 16 had done for Mr. Dunlap at other companies?
 17 A. No.
 18 Q. Have you ever seen the engagement
 19 letter between Morgan Stanley and Sunbeam,
 20 sir?
 21 A. Yes.
 22 Q. When did you see that?
 23 A. I think at various times.
 24 Q. What would have been your reason
 25 for seeing that engagement letter?

Page 76

1 Smith
 2 A. One, getting ready for this, and
 3 then when the letter was issued to, as
 4 normally as, or I think in this case so it
 5 kind of after the fact or right before they
 6 signed the final one.
 7 Q. I show you what we marked
 8 previously as CPH Exhibit 70, it is a letter
 9 dated September 5, 1997 Morgan Stanley
 10 stationery from Bill Strong to Albert Dunlap.
 11 A. Okay.
 12 Q. Take a moment to look at this for
 13 me, sir.
 14 A. Okay.
 15 Q. Do you recall seeing the Morgan
 16 Stanley engagement letter prior to September
 17 5, 1997, sir?
 18 A. I do not recall seeing it prior to
 19 September 5, 1997.
 20 Q. So is it your recollection you did
 21 not see the engagement letter prior to it
 22 being entered into?
 23 A. Yes, that's my recollection.
 24 Q. Do you recall now having looked at
 25 it, how soon after September 1997 you first

Page 77

1 Smith
 2 saw the engagement letter?
 3 A. No.
 4 Q. Do you recall that in fact you did
 5 see it prior to the closing of the
 6 transactions in the first quarter of 1998?
 7 A. I'm not sure.
 8 Q. Were you aware that as part of the
 9 Sunbeam engagement letter, Sunbeam had agreed
 10 to retain Morgan Stanley on mutually
 11 agreeable terms to assist in connection with
 12 any necessary financing?
 13 MR. CLARE: Objection to the
 14 extent it mischaracterizes the document.
 15 A. That's not what this says.
 16 Q. Let me direct your attention to the
 17 second -- the first full paragraph on the
 18 third page of the letter.
 19 A. Uhm-hmm.
 20 Q. It reads "If in connection with
 21 this assignment Sunbeam effects a repurchase
 22 of or public sale or private placement of any
 23 equity referred or debt securities, or
 24 Sunbeam effects real estate financings, asset
 25 or property sales and some reasonable portion

Page 78

1 Smith
2 of investment banking services, in connection
3 with Sunbeam agrees to offer Morgan Stanley
4 on mutually agreeable terms to assist it with
5 such transaction."
6 Is it your understanding that that
7 did not encompass --
8 A. This is boilerplate. Mutually
9 acceptable terms means you have to come with
10 the transaction so both sides have to agree,
11 so there is nothing that ties them, Sunbeam
12 to Morgan Stanley, to do this.
13 Q. Is it your understanding this
14 didn't create a binding obligation on
15 Sunbeam's part?
16 A. Not at all. This is boilerplate.
17 Q. Is it your understanding that this
18 does relate to the financing activities that
19 Sunbeam may need in the event that it engages
20 in an acquisition covered by the terms of
21 this engagement letter?
22 A. Why don't you say that again.
23 Q. Is it your understanding that the
24 language that I just read to you from this
25 engagement letter pertains to financing

Page 79

1 Smith
2 activities related to any acquisition that
3 Sunbeam executes, that is covered by this
4 engagement letter?
5 A. Well, again I guess I don't know
6 what you're driving at or mean. One, this is
7 boilerplate. Two, what this states is that
8 if there is some financing by the way we, we
9 might be able to strike a mutually acceptable
10 deal with them to help provide the financing.
11 Q. Is it typical that Morgan Stanley
12 seeks to involve itself in financing aspects
13 of the investment banking transactions?
14 A. I'm sorry, do you say is it usual?
15 Q. Yes.
16 A. Don't know.
17 Q. Is the opportunity to provide
18 financing another way that Morgan Stanley
19 realizes fee income?
20 A. Yes, as do other institutions.
21 Q. You're aware, sir, that in first
22 quarter of 1998 Sunbeam signed an agreement
23 to acquire my client's interests in Coleman
24 company?
25 A. Yes.

Page 80

1 Smith
2 Q. And in connection with that
3 transaction Morgan Stanley was in fact
4 retained by Sunbeam to provide financing for
5 it, correct?
6 A. I don't know about the chronology,
7 but -- well, you know what, I don't know if
8 that is right. I don't know when we were
9 retained by them to do the financing.
10 Q. Do you recall that Sunbeam retained
11 Morgan Stanley to arrange financing for its
12 acquisition of Coleman company prior to the
13 closing of the acquisition of my client's
14 interest in Coleman?
15 A. Yes.
16 Q. Who within Morgan Stanley, sir, was
17 involved in the financing arrangements
18 relating to the acquisition of my client's
19 interests in Coleman company?
20 A. The financing arrangements? Do you
21 mean specifically the loan?
22 Q. Any aspect of the financing.
23 A. Would that include the convertibles
24 as well?
25 Q. Yes.

Page 81

1 Smith
2 A. Then my list would be limited
3 because I don't know all of the people that
4 were involved.
5 Conceptually there were people from
6 our group which would be the Morgan Stanley
7 senior loan, there would be people from
8 credit, there would be people from high yield
9 research, there would be people from the
10 convertible desk, there would be people from
11 equity capital market, and I don't even know
12 if that is exhaustive, as well as the
13 execution group. So to summarize, many, many
14 people involved.
15 Q. Who from the leveraged finance
16 group is involved?
17 A. There were probably three or four
18 of us, myself, Michael Hart -- Michael Hart,
19 Tom Burchill, and towards the end Simon
20 Rankin.
21 Q. Do you recall who was involved in
22 the equity capital markets group?
23 A. I do not.
24 Q. Did you have any interaction with
25 them in connection with the underwriting of

1 Smith
 2 the senior loan?
 3 A. No.
 4 Q. So you didn't exchange
 5 information -- let me take a step back.
 6 Do you recall if Ruth Porat was
 7 involved in convertible debt?
 8 A. I do, yes.
 9 Q. Did you have any communication with
 10 her at any point prior to the closing on the
 11 senior loan relating to Sunbeam?
 12 A. Did I have any communications prior
 13 to the closing of the loan, yes.
 14 Q. What do you recall about those
 15 communications?
 16 A. Well, a couple of things. The --
 17 because this was a large financing and many
 18 individuals at Morgan Stanley from many
 19 groups were involved. There was a sharing of
 20 information.
 21 Number two, when, just before we
 22 closed the loan there was some issues
 23 regarding sales in the first quarter, some
 24 press releases and so worked with the firm I
 25 guess, and she was one of the members of the

1 Smith
 2 group in terms of investigating this.
 3 Q. Do you recall any other
 4 communications that you had with anyone else
 5 in equity capital markets relating to
 6 Sunbeam?
 7 A. I do not.
 8 Q. So the only point of contact you
 9 had was with Ruth Porat?
 10 A. To the best of my recollection.
 11 Q. Do you know if other people within
 12 leveraged finance had communications with
 13 Miss Porat?
 14 A. I do not know.
 15 Q. Do you know whether other people
 16 within the leveraged finance group had
 17 communications with anyone else in equity
 18 capital markets relating to this?
 19 A. I do not.
 20 Q. You indicated that there was
 21 sharing of information relating to the
 22 financings between leveraged finance and
 23 equity capital markets.
 24 Did I understand that correctly?
 25 A. Yes.

1 Smith
 2 Q. What was the nature of the
 3 information being shared?
 4 A. Let me be more specific. At Morgan
 5 Stanley there was a group, I don't know what
 6 they call it now, the execution group. I
 7 think they called it CSG then. And once the
 8 transaction was one, then they were the
 9 people that chaperoned the process, knew all
 10 of the transactions. They were the
 11 executioners as we called them.
 12 John Tyree was the representative
 13 from CSG who was the quarterback of putting
 14 together a lot of this. And in this capacity
 15 he was the point person and we were able to,
 16 we being the loan group as well as equity
 17 capital markets, use a lot of the work that
 18 he did. And a lot of this we did together,
 19 some of it we relied on him, sometimes he
 20 relied on us.
 21 Again it was a massive effort on
 22 the part of the firm. At any one time 10 to
 23 20 people working on this thing.
 24 Q. We're going to go through that in
 25 more detail.

1 Smith
 2 In the first quarter of 1998 what
 3 was the nature of your personal activity
 4 relating to the underwriting of the Sunbeam
 5 loan?
 6 A. Well, as the manager of the group,
 7 the ultimate responsibility was, and decision
 8 I guess was at least -- decision is the wrong
 9 word. The ultimate responsibility was mine.
 10 We had a very strenuous credit approval
 11 process with many of the individuals that I
 12 had mentioned before as part of the credit
 13 committee at the time that got involved with
 14 the final yes or no.
 15 It was our group that was
 16 responsible, the people that work for me that
 17 were responsible for doing a lot of the due
 18 diligence and the structuring and then the
 19 rest on the loan. So in that way it was in a
 20 supervisory capacity.
 21 Q. Do you recall what activities you
 22 personally engaged in?
 23 A. Partly I guess. Worked with the,
 24 specifically on the loan side, what was the
 25 right structure, i.e., how much A loan, how

Page 86

1 Smith
2 much B loan, what should be the prices, what
3 should be the fees. More generically asking
4 questions about the credit, the combined
5 entity.
6 And once when one of the team
7 members was unable to attend I went down for
8 a, one of the due diligence meetings down in
9 Florida.
10 Q. There are two principal aspects of
11 the Sunbeam financing which was ultimately
12 put in place, correct, sir, the senior loan
13 and the convertible debenture offering?
14 A. Uhm-hmm.
15 Q. You have to answer audibly.
16 A. I'm sorry, yes.
17 Q. Who was involved in the
18 decision-making with respect to how much
19 money would be raised through the convertible
20 debenture offering and how much money would
21 be provided through the senior loan?
22 A. I'm sorry, you say who made that
23 decision?
24 Q. Yes.
25 A. It was kind of a group, a group

Page 87

1 Smith
2 decision. Obviously people at Morgan Stanley
3 had, were involved as well as the company.
4 Q. Were you involved in that process?
5 A. Tangentially.
6 Q. Did you provide a recommendation
7 concerning how much of the debt should be
8 raised through the senior loan and how much
9 of it should be raised through the
10 convertible debenture?
11 A. Initially we did, which was the
12 original structure, and then when the
13 convertible increased in size, then had input
14 into terms of how much to take of the, or how
15 much they should use and then how to reduce
16 the loan to take advantage of the extra money
17 they were able to raise in the convertible
18 market.
19 Q. What you are referring to is the
20 fact that originally it was contemplated that
21 500 million would be raised through the
22 convertible debenture offering?
23 A. Yes.
24 Q. And subsequently that was changed
25 to be something more like 750 million?

Page 88

1 Smith
2 A. Yes.
3 Q. Were you involved in any
4 decision-making or involved in making
5 recommendations with respect to that change?
6 A. No.
7 Q. Do you know who made that decision?
8 A. I think the company eventually made
9 that decision. It is only speculation on my
10 part.
11 Q. Do you know if anyone at Morgan
12 Stanley had a view on that issue?
13 A. No.
14 Q. Did you have a view?
15 A. Not really.
16 Q. Did you consider it to be a good
17 development with respect to the senior loan
18 or a negative development with respect to the
19 senior loan, that the company had raised an
20 additional \$250 million through the
21 convertible debenture?
22 A. I thought it was a positive
23 development.
24 Q. Why is that?
25 A. Because it was more junior capital

Page 89

1 Smith
2 in the, in the capital structure so the loans
3 were, were more, were better off.
4 Q. Is that sometimes referred to as
5 there being more cushion?
6 A. I have heard people use that
7 expression.
8 Q. Is that an expression you've used?
9 A. I don't recall.
10 Q. In any event, you consider it to be
11 the fact that the company raised an
12 additional \$250 million through the
13 convertible debenture offering to be a
14 positive development with respect to Morgan
15 Stanley's exposure on the senior loan?
16 A. I viewed it as a positive
17 development in terms of a senior lender to
18 the company, which would be ourselves and
19 Morgan Stanley Senior Funding, Bank of
20 America and First Union. I thought it also
21 enhanced our ability to distribute it.
22 Q. You thought in general senior
23 lenders would view that as a positive?
24 A. As a positive outcome.
25 Q. What due diligence activity did you

Page 90

1 Smith
2 personally engage in prior to the closing of
3 the senior loan, sir?
4 A. It was rather limited. We had
5 other people tasked with the job and in my
6 cart, but I did go on that one trip down to
7 Florida.
8 Q. Do you recall if that one trip took
9 place in early March?
10 A. I don't remember. That's probably
11 about right.
12 Q. Let me see if we can pin this down
13 in time a little bit.
14 Let me show you, sir, what was
15 previously marked as CPH Exhibit Number 74.
16 It is a letter dated March 5, 1998 on Morgan
17 Stanley stationery, signed by you, directed
18 to Russell Kersh at Sunbeam.
19 Can you tell me what this letter
20 is, sir?
21 A. Give me a second, please.
22 Q. Sure.
23 A. This looks like a highly confident
24 letter.
25 Q. Do you recall whether you provided

Page 91

1 Smith
2 this letter to Sunbeam before or after your
3 trip to Florida?
4 A. I don't recall.
5 Q. Let me show you what we marked
6 previously as CPH Number 37. It is a
7 two-page document bearing Bates Morgan
8 Stanley confidential 45317 through 45318. It
9 is an itinerary for Mr. Tyree's travel to
10 Florida on March 4 and March 5, 1998, sir?
11 A. Uhm-hmm.
12 Q. You see that in the third line
13 there is a reference to you, Seth Shaan, Tom
14 Burchill and Michael Hart as part of the
15 team?
16 A. I do.
17 Q. Do you believe this is a reference
18 to the trip to Florida that you took?
19 A. Yes.
20 Q. Do you recall that Mr. Tyree was
21 part of the team at the Florida meeting?
22 A. I do.
23 Q. Do you recall whether Mr. Hart was
24 there?
25 A. I believe he was not.

Page 92

1 Smith
2 Q. Do you recall if Seth Shaan, Tom
3 Burchill were there?
4 A. I don't recall.
5 Q. Is the reason why you went on this
6 trip that Michael Hart could not?
7 A. That is my recollection.
8 Q. Prior to the trip to Florida in
9 early March where you visited Sunbeam, had
10 Morgan Stanley Senior Funding itself done
11 any, do any due diligence relating to the
12 possibility of structuring a senior loan to
13 Sunbeam?
14 A. I don't recall the exact sequencing
15 of it, but we did have -- we -- so I don't
16 remember when we started getting involved in
17 terms of looking at the, looking at the
18 projections and thinking about loan
19 structures.
20 Q. Would it be fair to say that by the
21 time you sent your March 5, 1998 highly
22 confident letter to Mr. Kersh, that Morgan
23 Stanley Senior Funding had substantially
24 completed its due diligence related to the
25 financing?

Page 93

1 Smith
2 A. Oh, quite the contrary. We had
3 looked at a lot of the available information
4 and accepted it at face.
5 As you see here in the letter, we
6 said there is a lot more work to do. We said
7 this is our preliminary understanding, that
8 we had lots of work to do to include getting,
9 completing due diligence. That no way this
10 was -- and that's I guess that first full
11 paragraph on the second page where we talk
12 about material address change in conditions
13 and business results and the prospects of the
14 company.
15 I think we also had in here
16 someplace about the, we have to complete the
17 due diligence. And that no way could this be
18 construed to be a commitment by Morgan
19 Stanley to lend the money or to underwrite
20 the deal.
21 And I think the operative paragraph
22 here is that we were highly confident that
23 this could be syndicated in the general known
24 market.
25 Q. Have you finished your answer?

24 (Pages 90 to 93)

Page 94

1 Smith
2 A. Yes.
3 Q. Sir, is it your testimony, sir,
4 that Morgan Stanley Senior Funding had not
5 substantially completed its due diligence as
6 of the time it provided Sunbeam with a highly
7 confident letter?
8 A. It is my testimony that it had not
9 completed its due diligence prior to issuing
10 this letter.
11 Q. Right.
12 A. With the caveats that I just
13 mentioned.
14 Q. My question is whether it was
15 substantially complete by this point in time?
16 A. I don't know what that might mean,
17 but there was a lot more to do and I think
18 this letter reflected that.
19 Q. Let me put it this way: Did you
20 think that most of Morgan Stanley Senior
21 Funding's due diligence relating to the
22 underwriting of the senior loan was completed
23 by the time you provided the highly confident
24 letter to Mr. Kersh on March 5, 1998?
25 A. I don't think that most had been

Page 95

1 Smith
2 done by then, but that is a very vague term.
3 Q. Was it the policy of Morgan Stanley
4 that highly confident letters relating to
5 financings should not be issued until
6 substantially all necessary due diligence was
7 completed?
8 A. It -- why don't we say that again.
9 What did you say?
10 Q. Was it the policy of Morgan Stanley
11 that highly confident letters relating to
12 financings should not be issued by the firm
13 until substantially all necessary due
14 diligence had been completed?
15 A. There -- I don't follow you.
16 Q. Was it the policy of Morgan
17 Stanley -- I think it is a fairly simple
18 statement, sir.
19 A. Why don't you go slow.
20 Q. I will. Was it the policy of
21 Morgan Stanley that highly confident
22 letters --
23 A. Like this.
24 Q. -- relating to financing should not
25 be issued until such time as substantially

Page 96

1 Smith
2 all necessary due diligence was completed?
3 A. Well, I'm having a brain aneurysm,
4 I don't know what you're trying to get to.
5 Q. You don't know one way or the other
6 as you sit here today whether Morgan
7 Stanley's policy was --
8 A. I'm not commenting on Morgan
9 Stanley's policy.
10 Q. I'm asking you --
11 A. No comment, no idea.
12 Q. My question is this and I want your
13 knowledge, I'm entitled to your knowledge.
14 A. As best as I can remember.
15 Q. Yes. Is it your testimony that you
16 have no knowledge as you sit here today,
17 whether it was the policy of Morgan Stanley
18 in March of 1998 that the firm should not
19 issue highly confident letters relating to
20 potential financing until such time as
21 substantially all necessary due diligence was
22 completed?
23 A. My understanding was that there
24 would be letters like this issued after it
25 was vetted internally, and the amount of due

Page 97

1 Smith
2 diligence completed before the issuance of
3 this letter would vary.
4 Q. You have no knowledge that there
5 was a requirement that substantially all of
6 necessary due diligence be complete?
7 A. Those are your terms and I'm not
8 aware of any of those, that concept.
9 Q. Who made the decision to issue the
10 highly confident letter on March 5?
11 A. This was a group decision that was
12 vetted by many of the senior people at the
13 firm.
14 Q. You didn't have the authority
15 yourself to issue the March 5 letter?
16 A. No.
17 Q. Who needed to provide approval?
18 A. This would --
19 Q. Let me ask you a different
20 question. Who did provide approval?
21 A. I don't recall exactly, but it
22 would be the people on the Credit Committee,
23 I don't even remember who was the head then
24 of the Credit Committee, and then other
25 senior members of the Credit Committee.

25 (Pages 94 to 97)

Page 98

1 Smith
 2 MR. MARKOWSKI: Why don't we take
 3 a break and change the tape.
 4 THE VIDEOGRAPHER: The time is
 5 11:26, this completes tape number 1.
 6 (Pause in the proceedings.)
 7 THE VIDEOGRAPHER: The time is
 8 11:31, this begins tape number 2.
 9 BY MR. MARKOWSKI:
 10 Q. Mr. Smith, back to the March 5
 11 highly confident letter.
 12 Describe to me the process that was
 13 used at Morgan Stanley in reaching a decision
 14 to issue this letter.
 15 A. The decision would be a, would be
 16 similar to the credit approval process,
 17 realizing that we had less than the complete
 18 information that we would need to make a
 19 credit decision.
 20 And by that I mean that a lot of
 21 the due diligence would be ongoing, not yet
 22 complete, that our views expressed in these
 23 highly confident letters such as this, are
 24 dated March 5, would, would relate to taking
 25 a lot of the information given to us at face

Page 99

1 Smith
 2 value, i.e., the audited financials, i.e.,
 3 the projections, and the rest.
 4 And then based on that was our, we
 5 would then come up with a decision on the
 6 part of the firm, voiced to the Credit
 7 Committee, whether we would be authorized to
 8 send out a highly confident letter such as
 9 the one here.
 10 Q. Was there any sign-off process in
 11 place that required that formal written
 12 approval be given for letters such as this?
 13 A. It was not a sign-off procedure.
 14 It was a meeting that was, that we had a
 15 chairman and that approved credits as well as
 16 sending out these highly confident letters.
 17 Q. That committee was the Leveraged
 18 Finance Committee?
 19 A. It sounds right, but don't hold me
 20 a hundred percent for the name. It changed a
 21 lot.
 22 Q. Were you on that committee?
 23 A. I was on the committee.
 24 Q. Were you the chairman?
 25 A. I was not the chairman.

Page 100

1 Smith
 2 Q. Do you know who was in 1998?
 3 A. I think it had been Mr. Steve
 4 Newhouse.
 5 Q. How did that process work, did the
 6 committee take a vote with respect to whether
 7 a letter -- let me ask you a specific
 8 question.
 9 Do you recall that a committee vote
 10 was taken with respect to the authorization
 11 issued on March 5 had the confident letter
 12 disseminated?
 13 A. I don't remember specifically
 14 whether there was a vote. I don't remember.
 15 Q. Is that typically the way the
 16 process works, the committee takes a vote
 17 with respect to whether to approve the
 18 issuance of a highly confident letter or a
 19 credit, or is it something other than that?
 20 A. That is typically how it would
 21 work.
 22 Q. Who initiated the process with
 23 respect to review of the question whether to
 24 issue a highly confident letter to Sunbeam;
 25 did you?

Page 101

1 Smith
 2 A. Initiate's a funny word. Probably
 3 Mr. Strong and myself were the, would take
 4 the lead on this.
 5 Q. Why Mr. Strong?
 6 A. The procedure at Morgan Stanley was
 7 that the banker, i.e., the person who was
 8 responsible for the client would be actively
 9 involved in all, in proposing extensions of
 10 credit or underwritings for their client.
 11 Q. So Mr. Strong had to endorse this
 12 as part of the internal procedure Morgan
 13 Stanley?
 14 A. Yes.
 15 Q. Do you recall that Mr. Strong asked
 16 you to consider to issue a highly confident
 17 letter to Sunbeam?
 18 A. I recall that he wanted a highly
 19 confident letter from Morgan Stanley to
 20 Sunbeam.
 21 Q. How did you know that Mr. Strong
 22 wanted a highly confident letter?
 23 A. I think he -- we talked about it
 24 and we thought that was helpful in helping us
 25 secure the financing.

Page 102

1 Smith
2 Q. So you and Mr. Strong discussed
3 whether Morgan Stanley should issue a highly
4 confident letter?
5 A. No, Mr. Strong and I discussed
6 whether we should go seek approval from
7 Morgan Stanley to issue a highly confident
8 letter.
9 Q. And Mr. Strong wanted Morgan
10 Stanley to issue a highly confident letter
11 because he thought it would be helpful to
12 Morgan Stanley in obtaining the assignment to
13 arrange for the financing, correct?
14 MR. CLARE: Objection, calls for
15 speculation.
16 A. I can't comment for sure what he
17 was thinking.
18 Q. Did Mr. Strong say to you in words
19 or substance I would like us to be able to
20 issue a highly confident letter to Sunbeam in
21 connection with the financing for the Coleman
22 acquisition because that will be helpful to
23 us in our efforts to obtain that engagement?
24 A. I think he said to the committee
25 that form and substance about what you said,

Page 103

1 Smith
2 that this would be useful in positioning
3 ourselves to seek the financing if that's
4 what we wanted to do.
5 Q. Now, was it clear to the committee
6 in connection with the issuance of -- let me
7 ask a foundational question.
8 Was there an actual meeting of the
9 committee in connection with the decision to
10 issue the March 5 highly confident letter?
11 A. Don't recall for sure, but I
12 believe so.
13 Q. Do you recall being present at such
14 a meeting?
15 A. I do recall, yes. If there was a
16 meeting I was there. And I think there was a
17 meeting.
18 Q. To discuss the issuance of the
19 March 5 --
20 A. To discuss the issuance of this
21 highly confident letter.
22 Q. Do you recall whether the committee
23 at that meeting was advised that a
24 substantial amount of due diligence remained
25 to be done before Morgan Stanley could

Page 104

1 Smith
2 actually commit to make the loan?
3 A. I don't know if I would use the
4 word "substantial." They were certainly
5 aware that there was ongoing work and work to
6 be done.
7 And also what happened here is that
8 once that work was complete it was understood
9 because this was the policy, is to come back
10 to the Credit Committee for approval of what
11 exactly was being asked for.
12 Q. How would issuing a highly
13 confident letter be helpful in Morgan
14 Stanley's efforts to obtain the financing
15 engagement?
16 MR. CLARE: Objection, calls for
17 speculation.
18 A. I don't know what Bill was thinking
19 with the company. I don't know.
20 Q. Did Mr. Strong explain his thinking
21 to you?
22 A. No.
23 Q. Do you have any views of your own,
24 based on your many years of experience in
25 this business that would provide you with a

Page 105

1 Smith
2 basis for understanding how the issuance of a
3 highly confident letter might assist Mr.
4 Strong in obtaining the financing engagement
5 from Sunbeam?
6 A. Not really. It's also situational,
7 so personal, and I had no knowledge of Kersh
8 or Dunlap before that.
9 Q. Before this March 5 letter was
10 issued did you have any direct communications
11 with Mr. Kersh or Mr. Dunlap personally?
12 A. I'm hesitating because the -- I'm
13 trying to remember the first time I met him
14 and that might have been at the board
15 meeting, and I don't remember when that day
16 was.
17 Q. The itinerary for the trip to
18 Florida indicates --
19 A. They might have even been there.
20 Does it say that? I'm sorry.
21 Q. We'll get there. Here is my
22 question: The itinerary for the trip to
23 Florida indicates that the meetings were
24 scheduled for March 4 and March 5. The date
25 of your highly confident letter is March 5.

27 (Pages 102 to 105)

Page 106

1 Smith
2 Do you recall bringing the highly
3 confident letter with you and delivering it
4 personally to Mr. Kersh or Mr. Dunlap during
5 your visit to Florida?
6 A. I don't think so. I think the
7 itinerary is wrong. I think I was only there
8 for a day in and out, I didn't spend the
9 night, and so I don't believe I had this with
10 me to give them when I was down there.
11 Q. Was there something about your trip
12 to Florida that, on March 4 that bears on the
13 timing of the issuance of the letter on March
14 5?
15 A. I don't recall.
16 Q. Do you recall you were holding onto
17 the highly confident letter until your trip
18 to Florida?
19 A. No.
20 Q. Do you recall how far in advance of
21 the issuance of a highly confident letter on
22 March 5 that Mr. Strong first approached you
23 about his desire to have Morgan Stanley
24 provide Sunbeam with such a letter?
25 A. I do not.

Page 107

1 Smith
2 Q. Do you remember if it was more than
3 a week?
4 A. I do not.
5 Q. Is it possible that it was less
6 than a week?
7 A. I can't remember.
8 Q. Was there any disagreement on the
9 part of any members of the committee
10 responsible for making the decision to issue
11 this letter, concerning whether it should be
12 sent?
13 A. Not that I recall.
14 Q. Did you have any reservations
15 personally about it?
16 A. No.
17 Q. I believe you testified earlier
18 that it was your recollection, it is your
19 recollection today that your activity
20 relating to Sunbeam started in the first
21 quarter of 1998?
22 A. That's the best of my recollection.
23 Q. Was it your understanding at the
24 outset of your involvement in first quarter
25 of 1998 relating to Sunbeam, that Mr. Dunlap

Page 108

1 Smith
2 had claimed to have accomplished a
3 significant improvement in Sunbeam's
4 performance and prospects?
5 A. I'm sorry, did you say prior to my
6 involvement?
7 Q. I'll ask a new question.
8 Was it your understanding at the
9 time you became involved in your work
10 relating to Sunbeam in the first quarter of
11 1998, that Mr. Dunlap had been claiming to
12 have accomplished a significant improvement
13 in Sunbeam's performance and prospects in
14 1997?
15 A. After I got involved, yes.
16 Q. Were you aware that Morgan
17 Stanley's presentation to other companies
18 concerning Sunbeam emphasized the success of
19 Mr. Dunlap's turn-around efforts at Sunbeam?
20 A. I didn't have any knowledge of
21 that.
22 Q. Did you ever become familiar, sir,
23 with statements made by Morgan Stanley to my
24 client concerning the success of Mr. Dunlap's
25 turn-around activities of the Sunbeam?

Page 109

1 Smith
2 A. No knowledge at all.
3 Q. Mr. Smith, I'm going to show you
4 what we previously marked as CPH Deposition
5 Exhibit Number 71. It's a October 22, 1997
6 interoffice memorandum from the Sunbeam
7 corporation team to Morgan Stanley Worldwide
8 IBD professionals. It bears Bates stamps
9 Morgan Stanley confidential 5984 through
10 5995.
11 I would like you to take a look at
12 this, sir, and tell me whether you have ever
13 seen this document before.
14 A. I, I don't recall.
15 Q. If in fact this Morgan Stanley
16 interoffice memorandum was sent to all
17 Worldwide IBD professionals, would that have
18 included you?
19 A. I think it might have.
20 Q. IBD is a reference to Investment
21 Banking Division?
22 A. Uhm-hmm.
23 Q. You have to answer audibly.
24 A. I'm sorry, yes.
25 Q. In the ordinary course a memorandum

Page 110

1 Smith
2 directed to all IBD professionals would have
3 gone on to you as well?
4 A. That is true, as well as thousands
5 of other things, so, so I don't remember
6 seeing it.
7 Q. Let me direct your attention to the
8 third page of the document.
9 A. This one?
10 Q. The Sunbeam corporation investment
11 rationale.
12 A. Uhm-hmm.
13 Q. Read for me the four main bullet
14 points on this page. "Sunbeam represents an
15 attractive growth story in investment
16 opportunity. Sunbeam has undergone a
17 profound transformation since the arrival of
18 new management in July 1996. Tremendous
19 intrinsic value in the company. And,
20 finally, valuable opportunity to penetrate
21 and become a global market leader of branded
22 consumer devices."
23 Do you see those four bullet
24 points?
25 A. I do.

Page 111

1 Smith
2 Q. Was that consistent with your
3 understanding with the claims Sunbeam was
4 making in the first quarter of 1998
5 concerning the success of its turnaround?
6 A. Consistent with what Sunbeam was
7 representing? I think, yes. Probably
8 consistent.
9 Q. Do you know if these statements are
10 consistent with the statements that Morgan
11 Stanley was making to third parties on behalf
12 of Sunbeam?
13 MR CLARE: Objection.
14 A. I have no idea.
15 MR CLARE: No foundation. You
16 can answer.
17 Q. Do you know if the purpose of this
18 memorandum to all investment banking
19 professionals was to communicate to them
20 selling points that they should make to third
21 parties relating to Sunbeam?
22 MR CLARE: Same objection,
23 foundation, calls for speculation.
24 A. Don't know.
25 Q. Do you have any knowledge as you

Page 112

1 Smith
2 sit here today, whether statements of this
3 sort were made by Morgan Stanley to my
4 client?
5 A. No idea.
6 Q. Were any statements of this sort,
7 sir, relating to Sunbeam's financial
8 condition and prospects made to you by any
9 members of the Sunbeam investment banking --
10 excuse me, let me start over.
11 Were any statements of the sort
12 contained in CPH Exhibit 71 which I just read
13 to you, made to you by any Morgan Stanley
14 personnel?
15 MR. CLARE: You're asking
16 specifically with regard to the third page of
17 the exhibit?
18 MR. MARKOWSKI: Yes, the third
19 page.
20 A. I think that elements of the third
21 page were, were talked about by members of
22 the team during the process.
23 Q. So there were members of Morgan
24 Stanley personnel who were involved in the
25 investment banking activities for Sunbeam,

Page 113

1 Smith
2 who made statements similar to those we see
3 on the third page of this document to you?
4 A. Yes, and -- but don't forget, if
5 you look at page 3 a lot of these are
6 factual.
7 Number one market share in gas
8 grills. So if somebody tells me they're
9 number one in market share in gas grills, I
10 see it in two or three other places so that's
11 kind of a fact.
12 You can see what they have done in
13 terms of improving profitability and selling
14 some unprofitabilizations. Those are all
15 facts so, yes, a lot of this information was
16 shared by the team with people that weren't
17 as close to the company.
18 Q. Did the members of the Morgan
19 Stanley investment banking team say to you
20 that Sunbeam had accomplished a successful
21 turnaround during Mr. Dunlap's tenure?
22 A. I don't remember anybody saying
23 that specifically to me in words of that. I
24 do remember, however, conversations where we
25 look at the financials and see that margins

Page 114

1 Smith

2 had improved, profits had gone up and the

3 rest.

4 Q. Did anybody on the Morgan Stanley

5 investment banking team say to you in

6 connection with your underwriting review that

7 Mr. Dunlap had accomplished some, Mr. Dunlap

8 had accomplished a substantial improvement in

9 Sunbeam's performance?

10 A. I don't know if anybody said it

11 like that, but again any comments would have

12 come up as we looked at the numbers. Again

13 those were pretty black and white in terms of

14 what you had been able, what the numbers

15 represented that the company had done under

16 his stewardship.

17 Q. Do you recall anybody on the Morgan

18 Stanley investment banking team saying to you

19 that Mr. Dunlap had accomplished great

20 success during his tenure as the CEO of

21 Sunbeam?

22 A. Never anything like that.

23 Q. That Sunbeam represented an

24 attractive growth story?

25 A. No.

Page 115

1 Smith

2 Q. That Sunbeam represented an

3 attractive investment opportunity?

4 A. Never exactly I guess those words.

5 Q. In substance?

6 A. It was more again looking at the

7 numbers, seeing what the, what that looked

8 like and then commenting, and then commenting

9 on the, what the numbers look like over the

10 last couple of years that he had been there.

11 Q. Had anyone on the investment

12 banking team suggested to you that Mr. Dunlap

13 had successfully transformed Sunbeam?

14 A. No, I don't remember those words.

15 Q. That there was tremendous intrinsic

16 value at Sunbeam?

17 A. I don't remember those words.

18 Q. Were you aware of Mr. Dunlap's

19 prior history before becoming the CEO of

20 Sunbeam?

21 A. Just very peripheral.

22 Q. Did you have any knowledge of his

23 tenure at Scott Paper?

24 A. No, other than what I read in the

25 newspapers.

Page 116

1 Smith

2 Q. Did you have any -- what was your

3 understanding generally of Mr. Dunlap's

4 reputation in the first quarter of 1998?

5 A. Generally was that he was a, he was

6 a -- I don't know how to put it. I think his

7 public image was, it was my understanding his

8 public image was he was pretty bottoms line

9 oriented and was focused on cost-cutting and

10 paring out unprofitable ventures in the

11 company.

12 Q. Was it your understanding that Mr.

13 Dunlap's reputation was as a turn-around

14 specialist?

15 A. I guess you could use that concept,

16 that word. I think that was his general

17 persona. It is certainly now his general

18 persona.

19 Q. That is the way he presents

20 himself, correct?

21 A. Yes, in all of the public stuff.

22 Q. Did you prior to the close on the

23 acquisition of my client's interest in

24 Coleman company at the end of March 1998,

25 have any reason to question Mr. Dunlap's

Page 117

1 Smith

2 turn-around accomplishments at either Sunbeam

3 or any of the other companies he had been

4 previously employed at?

5 A. No.

6 Q. Did you make any inquiry concerning

7 Mr. Dunlap's tenure at Scott Paper?

8 A. I did not personally.

9 Q. Did you have anyone do that for

10 you?

11 A. I did not specifically ask anybody

12 to do that for me.

13 Q. Did you receive any reports

14 regarding Mr. Dunlap's tenure at Scott Paper?

15 A. Not that I recall.

16 Q. Did anyone at Morgan Stanley ever

17 suggest to you that Mr. Dunlap's

18 accomplishments at Scott Paper were phony or

19 exaggerated?

20 A. Not that I recall.

21 Q. Let me show you, Mr. Smith, what we

22 previously marked as CPH Exhibit Number 68.

23 It is out of a Business Week article entitled

24 "Did CEO Dunlap Save Scott Paper Or Just

25 Pretty It Up."

Page 118

1 Smith
2 A. Is this July of '97, is that what
3 this says at the bottom?
4 Q. I think there are two dates on this
5 document, sir. The upper left-hand corner is
6 a January 15, 1996 date.
7 A. Okay.
8 Q. And then in the bottom right-hand
9 corner there is a July 16, 1997 date.
10 A. Uhm-hmm.
11 MR. CLARE: Bram, don't mark on
12 the document.
13 Q. It bears Bates number Morgan
14 Stanley 3995 through 4001. Take a moment to
15 look at this.
16 A. Okay.
17 Q. Have you ever seen this before?
18 A. I don't recall directly. Maybe.
19 Q. Do you recall seeing this in
20 connection with your review of Sunbeam prior
21 to the close of Sunbeam's acquisition of my
22 client, client's interests in Coleman
23 company?
24 A. One, I don't remember if I saw it
25 so you can't ask me to speculate when I might

Page 119

1 Smith
2 have seen it.
3 Q. Did you ask, does this refresh your
4 recollection whether you asked any members of
5 the Morgan Stanley due diligence team to
6 investigate reports relating to Mr. Dunlap's
7 tenure at Scott Paper?
8 A. I did not ask anybody to do that.
9 Q. Do you recall being aware that
10 there were questions being raised publicly
11 relating to Mr. Dunlap's claimed
12 accomplishments at Scott Paper?
13 A. I guess tangentially. I knew he
14 was a controversial figure.
15 Q. At the time the transactions closed
16 at the end of March 1998 did you have any
17 personal reason to question on the
18 turn-around claims that Mr. Dunlap had made
19 at Sunbeam?
20 A. Did I personally have any, no.
21 Q. Do you have any reason to question
22 his reputation as a turn-around specialist?
23 A. No.
24 Q. I'm sorry if I asked this
25 previously, but did you have any personal

Page 120

1 Smith
2 contact with Mr. Dunlap in connection with
3 your Sunbeam activities?
4 A. I think you asked that before. I'm
5 trying to remember the first time I met him,
6 it might have been at a board meeting in New
7 York.
8 Q. Was that the board meeting at which
9 the Sunbeam board voted to approve the
10 acquisition of my client's interests in
11 Coleman company?
12 A. Yes, I believe it was.
13 Q. Other than at that meeting, did you
14 have any personal involvement with Mr.
15 Dunlap?
16 A. Did you say prior?
17 Q. Other than at that meeting, prior
18 to or after.
19 A. Other than, yes. Probably on the
20 phone and maybe some face to face, certainly
21 in getting, putting together the presentation
22 for the bank investors' meeting.
23 Q. Prior to March 30 when the
24 acquisition of my client's interests in
25 Coleman company closed, had you had any

Page 121

1 Smith
2 personal contact with Mr. Dunlap other than
3 the board meeting in February?
4 A. I don't recall.
5 Q. Is it the case that most of your
6 contact with Mr. Dunlap postdated the
7 acquisition of my client's interests in the
8 Coleman company?
9 A. Yes, I think that is true.
10 Q. And that would have meant that it
11 also postdated the closing on the senior loan
12 facility, correct?
13 A. Yes.
14 Q. Did you speak at the February 1998
15 Sunbeam board meeting?
16 A. I did not. To the best of my
17 knowledge, to the best of my memory I don't
18 think I made a presentation. I might have
19 responded to questions at the board meeting.
20 Q. What was the purpose for your
21 attending the meeting?
22 A. I think to be there for questions
23 regarding the doability of the financing.
24 Q. Who asked you to attend?
25 A. Mr. Strong.

Page 122

1 Smith
2 Q. Do you recall whether you were
3 asked any questions relating to the doability
4 of the financing?
5 A. I think I was, but I can't remember
6 whether it was before or after the meeting.
7 Probably both.
8 Q. When you say before, after the
9 meeting, you mean before --
10 A. I misspoke. During the meeting and
11 then after the meeting.
12 Q. Are you referring to further
13 discussions that occurred that day?
14 A. That day, immediately after the
15 meeting when the meeting broke.
16 Q. Who do you recall asking questions
17 relating to the doability of the financing,
18 whether at the meeting itself or shortly
19 after?
20 A. The doability I think was maybe
21 from one of the board members or from Al
22 himself, and was a very short response to
23 that which was an affirmative.
24 And then after the meeting it
25 wasn't so much about the doability, it was

Page 123

1 Smith
2 more tactical with Kersh.
3 Q. So do you recall having a more
4 in-depth conversation with Mr. Kersh the same
5 day as the Sunbeam board meeting relating to
6 financing strategy?
7 A. Yes, and it was primarily related
8 to financing the syndication of this loan.
9 Q. Who else was present for that
10 discussion?
11 A. Might have been, I think it was
12 just Bill, Bill and myself and Kersh.
13 Q. Bill Strong?
14 A. Bill Strong.
15 Q. Where did that discussion take
16 place?
17 A. I think it happened right there in
18 the boardroom after it broke.
19 Q. Was that board meeting at Morgan
20 Stanley's office?
21 A. I believe it was right here in New
22 York.
23 Q. Did Mr. Kersh initiate the
24 conversation?
25 A. Mr. Strong and I might have

Page 124

1 Smith
2 initiated the conversation as I remember.
3 Q. And what was the purpose for
4 talking to Mr. Kersh on that subject?
5 A. The purpose was to outline or
6 briefly outline our thoughts in terms of who
7 would be suitable partners in the
8 underwriting of this, of this loan. And we
9 specifically mentioned Bank of America and
10 First Union.
11 Q. What was Mr. Kersh's reaction?
12 A. I guess noncommittal but
13 appreciative of the input, and I don't think
14 he really cared or thought too much about it.
15 Q. Now, what would -- at that point in
16 time, in February of 1998, what was Morgan
17 Stanley's contemplation with respect to the
18 potential role of Bank of America and First
19 Union concerning the senior loan?
20 A. As partners.
21 Q. What do you mean?
22 A. Co-underwriters.
23 Q. What would that involve?
24 A. That would involve the three of us
25 who would commit to lend the company the

Page 125

1 Smith
2 required amount of bank debt it needed to
3 accomplish these acquisitions. It meant that
4 they would participate alongside us on all of
5 the due diligence, that we could lever all of
6 them because they had been existing more --
7 not more, but existing lenders and I think
8 long-term relations.
9 So there was some institutional
10 knowledge that those institutions had about a
11 company that we could lever off of in terms
12 of in our own due diligence as well as the
13 marketing of the transaction.
14 Q. Was it contemplated that at least
15 initially those three institutions, Morgan
16 Stanley, Bank of America and First Union,
17 would provide the entire senior financing?
18 A. When you say "was it contemplated,"
19 it was certainly our hope, our thought to
20 have both of them there. And the idea was
21 that we would approach both and if one said
22 no, that was still okay.
23 Q. And the financing would then be
24 provided entirely?
25 A. By ourselves and one of the others.

Page 126

1 Smith
2 Q. Is it typical that in a loan that
3 is intended to be syndicated to a larger
4 group of banks -- to a large group of banks,
5 that in the first instance the financing will
6 be entirely provided by a smaller number, in
7 this case one or two, possibly three banks,
8 or is the syndication usually in place before
9 the funding occurs?
10 A. Well, you have asked a few
11 questions. What would normally happen is
12 that you would have a group of two, maybe
13 three banks underwrite or commit to the
14 entire loan facility. It is easier for the
15 company because they don't have to negotiate
16 with so many people.
17 And then those institutions, the
18 underwriters would then normally syndicate
19 for maybe a year prior to the close of the
20 loan and then a close of the transaction.
21 Q. Is it more typically the place that
22 the syndication occurs before the close?
23 A. Yes, it is.
24 Q. Is it fair to say that the
25 situation that you were contemplating with

Page 127

1 Smith
2 respect to Sunbeam, where Morgan Stanley
3 either by itself or perhaps with one or two
4 other banks would provide all of the
5 financing, was unusual?
6 A. I don't know about unusual, but it
7 is not the majority of the cases in the
8 United States.
9 Q. Why is it more typical that the
10 syndication takes place before the funding?
11 A. Because normally you have more time
12 and it's just really driven by the time that
13 was agreed to in the -- or the details or the
14 requirements of the deal.
15 Q. Was it the case here that there
16 wasn't sufficient time to put a syndication
17 in place before the funding was needed?
18 A. Yes.
19 Q. Did you suggest to Mr. Strong or to
20 anyone else that it would be preferable for
21 the syndication to be put in place before the
22 funding was required?
23 A. I don't know if I suggested. We
24 certainly talked about it because it was a
25 certain risk profile to close and then

Page 128

1 Smith
2 syndicate than the flip, than the reverse.
3 But the terms of the mergers
4 required that they needed the money by that
5 certain date, not allowing us to syndicate.
6 Q. Do you know why the transactions
7 themselves were scheduled, were structured
8 that way?
9 A. I do not.
10 Q. Did you ask anyone why the need to
11 rush to close the acquisitions before the
12 funding could be obtained through the
13 syndication?
14 MR. CLARE: I object to the form
15 of the question.
16 A. I don't recall. I recall talking
17 about it, but I don't remember who or I can't
18 remember what the, you know, the final answer
19 was other than that was the terms of the
20 deal.
21 Q. Do you remember talking to -- Mr.
22 Strong in this case was the relationship
23 person at Morgan Stanley and Sunbeam,
24 correct?
25 A. I believe so.

Page 129

1 Smith
2 Q. And you indicated earlier that in
3 terms of Morgan Stanley's internal processes,
4 he was viewed as the responsible person with
5 respect to significant aspects of the
6 financing activity, correct?
7 MR. CLARE: Object to the form of
8 the question. I think that misstates his
9 prior testimony. You can answer.
10 A. Help me out, repeat that thing for
11 me.
12 Q. Let me rephrase it.
13 Mr. Strong was viewed -- let me ask
14 a more general question.
15 From your perspective what was Mr.
16 Strong's responsibility for the various
17 aspects of Morgan Stanley's work for Sunbeam?
18 A. He was the person responsible at
19 the firm for the, for the Sunbeam
20 relationship and -- full stop. So that
21 included M&A or other products, then he was
22 responsible to show those to the company.
23 Q. With respect to Morgan Stanley's
24 internal work, what were Mr. Strong's
25 responsibilities relating to Sunbeam?

Page 130

1 Smith
2 A. His internal work, as I think we
3 talked before, is that the banker, the
4 relationship manager in this case, Mr. Strong
5 has to be an advocate internally and endorse
6 a transaction for his client, and in that
7 role he did that on the senior loan.
8 Q. And he endorsed in this case this
9 plan to have Morgan Stanley loan, if
10 necessary, the entire amount of the senior
11 financing necessary to complete the
12 acquisition of my client, Coleman?
13 A. I don't know if that is exactly
14 right. I think he advocated Morgan Stanley
15 taking a leadership role, maybe even a
16 majority role. I don't remember him ever
17 suggesting that we do the whole, do the whole
18 thing.
19 Q. Did you approach Mr. Strong and
20 inquire whether it would be possible to
21 adjust the schedule for the closing of the
22 acquisitions to permit you the time necessary
23 to complete a syndication of the senior
24 financing before funding was required?
25 A. I remember having conversations

Page 131.

1 Smith
2 with the team to include Mr. Strong about the
3 term, of why the need for the fast close.
4 I frankly don't remember what was
5 driving it, whether it was a tax or
6 regulatory or something else. But it was
7 deemed by the group, that's the team, that it
8 was not possible to extend, delay the close
9 to allow for the syndication of the loan.
10 Q. Was it your understanding that
11 Sunbeam wanted the transaction to close as
12 quickly as scheduled?
13 A. I wasn't that close to it, do not
14 know.
15 Q. But your understanding was someone
16 wanted these transactions to close very
17 quickly, correct?
18 MR. CLARE: Objection to the form.
19 A. Don't know.
20 Q. In your conversations with Mr.
21 Dunlap, did you ever learn from Mr. Dunlap
22 that it was Mr. Dunlap who wanted the
23 acquisition of Coleman company to close
24 before the first quarter of 1998 was
25 completed?

Page 132

1 Smith
2 A. No.
3 Q. Did you ever learn from your
4 conversations with Mr. Kersh, that it was Mr.
5 Kersh and Mr. Dunlap who wanted the
6 transaction involving the acquisition of my
7 client's interests in Coleman to close before
8 the first quarter of 1998?
9 A. No.
10 Q. In the period leading up to the
11 closing of the acquisition of my client's
12 interests in Coleman company, Mr. Smith, did
13 you have any communications on any subject
14 with Coleman company management?
15 A. I don't believe so.
16 Q. Did you have any communications
17 with my client, Coleman (Parent), or its
18 representatives?
19 A. I don't believe so.
20 Q. Credit Suisse First Boston was the
21 investment banking firm for my client.
22 Did you have any communications
23 with CS First Boston?
24 A. I do not remember any
25 conversations.

Page 133

1 Smith
2 Q. My client is owned by McAndrews &
3 Forbes, are you aware of that?
4 A. Yes.
5 Q. Did you have any communications
6 with any representatives of McAndrews &
7 Forbes prior to the close of Sunbeam's
8 acquisition of my client's interests in
9 Coleman company?
10 A. I don't believe so.
11 Q. Did you have any conversations with
12 Ronald Perelman?
13 A. No.
14 Q. With Howard Gittis?
15 A. No.
16 Q. Jim Maher?
17 A. No.
18 Q. William Nesbitt?
19 A. No.
20 Q. Do you know Jim Maher?
21 A. I don't think so.
22 Q. Have you ever spoken directly with
23 Mr. Perelman on any subject?
24 A. Yes.
25 Q. What was the nature of that?

Page 134

1 Smith
2 A. Gee, I can't remember all of them
3 for various transactions or various meetings.
4 Q. Have you ever been involved in
5 providing financing to any McAndrews & Forbes
6 related entities?
7 A. No.
8 Q. Have you ever sought the business
9 of McAndrews & Forbes?
10 A. Yes.
11 Q. Unsuccessfully I take it?
12 A. Unsuccessfully.
13 Q. For whom were you working on those
14 occasions?
15 A. Morgan Stanley and Bear Stearns.
16 Q. On what occasions while you were at
17 Morgan Stanley did you seek to obtain
18 business from McAndrews & Forbes?
19 A. I don't recall them now, but -- I
20 don't remember the specifics.
21 Q. Were you working with Morgan
22 Stanley investment bankers in connection with
23 that activity?
24 A. Yes.
25 Q. Do you remember who that was?

Page 135

1 Smith
2 A. The one, the name was -- what was
3 his name? I'm sorry, Bill Reid.
4 Q. Do you remember if that was before
5 the Sunbeam-related one?
6 A. I think it was.
7 Q. Since going to work at Bear Stearns
8 you have tried to get business from McAndrews
9 & Forbes?
10 A. Yes, I have.
11 Q. What did that relate to?
12 A. The most recent one was a
13 refinancing for PanaVision, a company that
14 McAndrews & Forbes owns.
15 Q. When was that?
16 A. That was last summer and last fall.
17 Q. Any other occasions?
18 A. We're currently working on one now,
19 trying to secure the business.
20 Q. Are you working with Bear Stearns
21 investment bankers in connection with that?
22 A. Yes.
23 Q. Who is that?
24 A. I'm sorry?
25 Q. Who is that person?

Page 136

1 Smith
2 A. Larry Alletto.
3 Q. How does he spell his last name?
4 A. A-L-L-E-T-T-O.
5 Q. Are there any other occasions that
6 you can recall speaking to Mr. Perelman
7 directly?
8 A. Just to be clear, did not speak to
9 Mr. Perelman regarding the PanaVision and not
10 the current transaction. But no, don't
11 remember speaking to him.
12 Q. Now, you remained -- we'll get into
13 this in some more detail, but I want to cover
14 this point here.
15 After the senior loan closed in
16 March of 1998, you had continuing involvement
17 with respect to Morgan Stanley Senior
18 Funding's loan to Sunbeam, correct?
19 A. Yes.
20 Q. Did you have any communications
21 with anyone from Coleman (Parent) or
22 McAndrews & Forbes in connection with that
23 activity?
24 A. Yes.
25 Q. Who was that?

Page 137

1 Smith
2 A. Who at McAndrews & Forbes, Howard
3 Gittis. Who is the other guy? Irwin
4 somebody or other. I guess those would be
5 the major ones.
6 Q. I'm sorry, who was the third
7 person?
8 A. His first name was Irwin. I can't
9 remember his last name.
10 Q. We'll get into that in more detail.
11 Were you aware that in late 1997
12 Mr. Dunlap had had a meeting with Mr.
13 Perelman in Florida to discuss Sunbeam's
14 acquisition of Coleman, the possibility of
15 that?
16 A. No.
17 Q. No one has ever reported to you on
18 that meeting?
19 A. Oh, I'm sorry, I misunderstood your
20 question. I didn't know that they had met
21 during a, when we were doing the financing,
22 but reviewing for this case for today found
23 that out.
24 Q. Other than what you learned in
25 preparing for your deposition, do you have

Page 138

1 Smith
2 any knowledge concerning Mr. Perelman's
3 meeting with Mr. Dunlap?
4 A. No.
5 Q. Who at Morgan Stanley, sir, was
6 responsible for making sure that all
7 necessary due diligence was performed?
8 A. I think if you're going to look at
9 it organizationally, it was probably John
10 Tyree. And then in addition to his efforts
11 we basically had a, a person from our group,
12 from Morgan Stanley Senior Funding, in this
13 case Mike Hart, assisted by Burchill and
14 Simon to assist in that effort and do the due
15 diligence from our vantage point, from the
16 financing point.
17 Q. What individuals performed the due
18 diligence in connection with this MSSF?
19 A. Those are the three I just
20 mentioned, Mike Hart, Tom Burchill and Simon
21 Rankin.
22 And I also want to add that the
23 process also included a representative from
24 the credit department.
25 Q. What was the function of the credit

Page 139

1 Smith
2 department with respect to the senior loan?
3 A. They were a, viewing it in a more
4 traditional credit role since our policy
5 stated internally and externally was that we
6 would hold a piece, sometimes a substantial
7 piece of every loan that we made.
8 And it was the credit department's
9 function, role, not only to pass on the
10 underwriting, I need to okay that, but also
11 the long-term view of being a long-term
12 lender to these opportunities such as
13 Sunbeam.
14 So it would not be unusual, I can't
15 remember the name, not be unusual to have
16 them on phone calls, show up at meetings, et
17 cetera, to participate in the due diligence.
18 Q. What portion of the senior loan did
19 Morgan Stanley Senior Funding intend to keep?
20 A. That's -- I'll have to think about
21 that for a second. We committed to 40
22 percent of the transaction and I think we
23 thought that it would probably end up being
24 about 50 to \$60 million.
25 Q. So at the end of the day after the

Page 140

1 Smith
2 loan was fully syndicated, you anticipated
3 that Morgan Stanley Senior Funding would hold
4 about 50 or \$60 million?
5 A. That is my recollection, at least
6 when the syndication stopped it was
7 completed.
8 Q. And how quickly was it contemplated
9 that would occur?
10 A. Normally from the time you start
11 until you are able to syndicate takes about
12 six to eight weeks.
13 Q. The transactions here closed at the
14 end of March. In terms of the schedule that
15 you envisioned at the time the loan was
16 closed, when did you expect the senior, that
17 the syndication of the senior loan to be
18 completed?
19 A. By the end of May.
20 Q. And at that point Morgan Stanley
21 would be holding about 50 or \$60 million of
22 the debt?
23 A. If things went as anticipated.
24 Could be luckier, could be a little less
25 lucky.

Page 141

1 Smith
2 Q. Luckier in this context means what,
3 having less?
4 A. Yeah.
5 Q. Did Morgan Stanley have any
6 obligation to Sunbeam or anybody else to hold
7 any particular amount of the financing?
8 A. No, other than our stated practice
9 which we communicated to Sunbeam and
10 communicated to other lenders, as well as
11 Bank of America and First Union, that we
12 would end up holding some.
13 Q. But there was no commitment as to
14 the amount?
15 A. No.
16 Q. In terms of the due diligence that
17 Morgan, was done from Morgan Stanley Senior
18 Funding, I don't understand how this worked.
19 The individuals involved were Mr.
20 Hart and Mr. Burchill and Mr. Simon, correct?
21 A. Simon Rankin.
22 Q. Simon Rankin?
23 A. Assisted by a representative of the
24 credit department.
25 Q. There were other people at Morgan

Page 142

1 Smith
2 Stanley involved in doing due diligence,
3 correct?
4 A. Yes.
5 Q. Miss Porat's group, for example?
6 A. Right.
7 Q. Mr. Tyree?
8 A. Uhm-hmm.
9 Q. Was it the responsibility of Mr.
10 Hart, Mr. Burchill and Mr. Rankin to
11 independently review all of the due diligence
12 that was being done on all aspects of Morgan
13 Stanley's due diligence, or did it work in a
14 different way?
15 A. Well, since I wasn't them it's
16 tough to say what exactly they did. They
17 would -- but what would normally happen is
18 they do some of their own and then work with
19 and look at the information that other parts
20 of the firm had gotten.
21 Q. Was it their responsibility to
22 familiarize themselves with all of the due
23 diligence that was being done by other parts
24 of the firm?
25 A. It was I guess to familiarize and

Page 143

1 Smith
2 take advantage of the other due diligence
3 done on other parts of the firm.
4 Q. That is what you expected of them?
5 A. Yes.
6 Q. To whom did Mr. Hart, Mr. Burchill
7 and Mr. Rankin report relating to their due
8 diligence work?
9 A. Well, they worked for me. They,
10 however, were, in cases like this they
11 basically report and stand behind their work
12 to the Credit Committee, which is the final
13 grantor, if you will, of credit authority.
14 Q. Were you giving them direction with
15 respect to the due diligence activity that
16 they were engaged in?
17 A. I don't know about direction. Mike
18 was a very experienced transactor so we would
19 consult, respond to questions from him. We
20 would talk about specific issues that might
21 come up.
22 Q. Did you give him any specific
23 direction to investigate any particular
24 aspect of Sunbeam?
25 A. Not that I recall.

Page 144

1 Smith
2 Q. Did you give any specific direction
3 to any Morgan Stanley personnel to
4 investigate any particular aspect of Sunbeam?
5 A. Not that I recall.
6 Q. The transactions were scheduled to
7 close before the end of the first quarter of
8 1998, correct, sir?
9 A. I believe so.
10 Q. Did you believe it was an important
11 part of the financing due diligence to obtain
12 information regarding Sunbeam's performance
13 in the first quarter of 1998?
14 A. I think that was one element of the
15 overall due diligence.
16 Q. To find out how Sunbeam was doing
17 so far in the first quarter of '98, correct?
18 A. Sure, to get an update on their
19 performance.
20 Q. Did you direct anybody to obtain
21 information concerning Sunbeam's first
22 quarter 1998 performance?
23 A. Not that I recall.
24 Q. Do you recall what information you
25 received relating to Sunbeam's first quarter

Page 145

1 Smith
2 1998 performance, if anything?
3 A. I think we had some phone calls,
4 maybe even some documents regarding how they
5 were doing versus the, versus plan and versus
6 last year.
7 Q. When you went to Florida for the
8 meeting at the beginning of March in 1998,
9 did you personally receive any information
10 from Sunbeam at that point relating to how
11 they had done so far in the first quarter?
12 A. I don't believe so.
13 Q. Did you ask any questions on that
14 subject while you were in Florida?
15 A. In Florida it was a different type
16 of due diligence. It was more specific on
17 the appliance business. So we were looking
18 at more granular, different product lines and
19 in the groups they had it then versus how
20 they were doing versus the first two months
21 in the year.
22 Q. So you don't recall asking while
23 you were present in Florida how have you guys
24 done so far in January or February?
25 A. No.

37 (Pages 142 to 145)

Page 146

1 Smith
2 Q. You don't recall anybody from
3 Sunbeam offering any information on that?
4 A. No
5 Q. When do you recall first receiving
6 information relating to how Sunbeam was doing
7 in the first quarter of 1998?
8 A. I think it was the last half of,
9 the last half of March.
10 Q. When you wrote the highly confident
11 letter to Sunbeam on March 5 did you have any
12 information at all about how Sunbeam had been
13 doing in the first two months of 1998?
14 A. To the best of my recollection, no.
15 Q. Did that concern you?
16 A. I'm sorry, what?
17 Q. Were you concerned when you issued
18 the highly confident letter on March 5, that
19 you personally didn't have any information on
20 how Sunbeam had done in January or February
21 of 1998?
22 A. No, because again you go back to
23 that letter, there was still a lot of due
24 diligence to do.
25 We would have been -- we would

Page 147

1 Smith
2 have -- that would have come up in the
3 general course on how they were, on how they
4 were doing.
5 Q. How high on your list of pieces of
6 information to get would have been obtaining
7 a report from Sunbeam on how they were doing
8 in the first two months of 1998?
9 MR. CLARE: Object to the form of
10 the question.
11 A. I don't know how you would say
12 high. It is just one of the bits of
13 information that go into coming up with the
14 ultimate credit decision, so it's important.
15 Is it more important than something else,
16 less important than something else, it just
17 goes into the mix.
18 Q. Well, did you think in light of
19 Sunbeam's claims that it had substantially
20 improved its performance in 1997, that it was
21 especially important for you in connection
22 with your review of the senior loan to obtain
23 good information about how Sunbeam was doing
24 in the first months of 1998?
25 MR. CLARE: Object to the form.

Page 148

1 Smith
2 A. Again I think it was part of the
3 overall view, the overall information we
4 needed to come up with a credit decision on
5 how the company was performing, whether it
6 was a good credit.
7 So to isolate something like that
8 in and of itself as being the talisman of
9 something, that is the go or no-go decision,
10 it is kind of tough to do that out of
11 context.
12 Q. You wouldn't say it was an
13 especially important piece of information to
14 know?
15 A. I didn't say that. I said it was
16 many bits of information that go into making
17 the ultimate credit decision on whether
18 you're comfortable and willing to go ahead
19 with the underwriting.
20 Q. Was it an important bit or was it
21 an important piece of information?
22 A. I'm not a lawyer, so maybe I would
23 put it in between that. So I would say it is
24 important, I would leave it at that.
25 Q. Would you say that knowing how

Page 149

1 Smith
2 Sunbeam had done in the first weeks of 1998
3 was an essential thing for Morgan Stanley to
4 know before it closed on the senior loan?
5 MR. CLARE: Object to the form of
6 the question.
7 A. Like I think I said before, it was
8 an important, you know, consideration to, in
9 terms of making the overall judgment.
10 Q. Would you say you wouldn't agree to
11 close on a loan unless you had that
12 information?
13 A. I don't know if I would say that.
14 Q. Do you know that Morgan Stanley had
15 requested a comfort letter from Sunbeam's
16 auditors?
17 A. Yes, I did.
18 Q. When did you know that?
19 A. I think I knew it back then.
20 Q. What's the purpose for a comfort
21 letter?
22 A. Well, I didn't ask for it and I'm
23 not on the security side, so...
24 Q. What's your understanding?
25 A. I think it's part of the closing

Page 150

1 Smith
2 process for, involving securities.
3 Q. Do you know that one of the things
4 that the auditors do in connection with the
5 comfort letter is to report on the company's
6 most recent financial results for periods
7 that are not yet complete?
8 MR. CLARE: Objection, foundation.
9 A. No.
10 MR. CLARE: If we're getting to a
11 transition point, maybe we should break for
12 lunch.
13 MR. MARKOWSKI: We can do that if
14 you would like.
15 MR. CLARE: Okay.
16 THE VIDEOGRAPHER: The time is
17 12:35, we're going off the record.
18 (Lunch recess: 12:35 p.m.)
19
20
21
22
23
24
25

Page 151

1 Smith
2 AFTERNOON SESSION
3 (Time noted: 1:18 p.m.)
4 R. BRAM SMITH, resumed and
5 testified as follows:
6 THE VIDEOGRAHER: The time is
7 1:18, we're back on the record.
8 EXAMINATION BY (Cont'd.)
9 MR. MARKOWSKI:
10 Q. Mr. Smith, when we broke I had
11 asked you whether you were aware that Morgan
12 Stanley had requested a comfort letter from
13 Sunbeam's outside auditor, Arthur Andersen.
14 Let me show you a copy of what we
15 previously marked as CPH Exhibit Number 17.
16 It's a letter to Morgan Stanley from Arthur
17 Andersen dated March 19, 1998.
18 A. Uhm-hmm.
19 Q. Take a moment to look at this
20 letter, and my first question to you is going
21 to be whether you have ever seen it before.
22 A. Okay.
23 Q. Have you seen this letter before,
24 sir?
25 A. Yup.

Page 152

1 Smith
2 Q. When did you first see it?
3 A. I don't remember when. I do know I
4 saw it yesterday and I don't know whether I
5 saw all of this before or not.
6 Q. Could you take your hand down?
7 A. Oh, sorry.
8 Q. You're not certain as you sit here
9 today, whether you saw this letter back in
10 March of 1998?
11 A. I don't know if I saw the whole
12 thing in March of 1998, yup.
13 Q. Is it possible that you saw
14 portions of this or information drawn from it
15 in March of 1998?
16 A. It might have been.
17 Q. There has been testimony that Mr.
18 Tyree received the signed copy of this letter
19 from Arthur Andersen.
20 Did Mr. Tyree report to you on the
21 substance of the information contained in
22 this March 19 letter?
23 A. Not that I remember.
24 Q. Do you know if anyone working for
25 you received a copy of Arthur Andersen's

Page 153

1 Smith
2 March 19, 1998 comfort letter?
3 A. No.
4 Q. Do you believe it to be the case
5 that the individuals working for you did not
6 receive a copy of the March 19 comfort
7 letter?
8 A. Don't know.
9 Q. Do you know if the people working
10 for you, Mr. Hart and others received a
11 briefing from Mr. Tyree concerning the
12 substance of the March 19 comfort letter?
13 A. Don't know.
14 Q. Did you receive a report from Mr.
15 Hart or the other individuals conducting due
16 diligence for Morgan Stanley Senior Funding
17 concerning the substance of the March 19
18 comfort letter?
19 A. Did not receive a report.
20 Q. Let me draw your attention to
21 paragraph 6C.
22 A. 6E?
23 Q. 6C. It is at the page 5 of the
24 letter. Would you read that to yourself,
25 please.

39 (Pages 150 to 153)

Page 154

1 Smith
2 Have you done it?
3 A. I'm just finishing up here. Okay.
4 Q. This portion of the March 19
5 comfort letter advises that Sunbeam's sales
6 for the first two months of 1998 are
7 substantially below Sunbeam's sales for the
8 first two months of 1997, correct?
9 MR. CLARE: Objection to form.
10 A. Well, they list the two numbers for
11 the two different periods, yes.
12 Q. Do you agree with me that the
13 substance of this paragraph advises that
14 Sunbeam sales for the first two months of '98
15 are substantially below Sunbeam sales for the
16 first two months of 1997, or is that
17 something about which you disagree?
18 A. It shows me the two numbers, 72
19 versus 143, so...
20 Q. It advises that the sales for the
21 first two months of 1998 are about \$72
22 million, correct?
23 A. Correct.
24 Q. And the sales for the first two
25 months of 1997 were about 143-1/2 million,

Page 155

1 Smith
2 correct?
3 A. Uhm-hmm.
4 Q. That's about, the sales for the
5 first two months of 1998 are about half of
6 what they had been in the first two months of
7 1997, correct?
8 A. Yup.
9 Q. Would you agree with me that is a
10 substantial decline in sales for a two-month
11 period?
12 A. A substantial difference in sales,
13 yup.
14 Q. It's a substantial negative
15 variance, correct, substantial decline?
16 A. Decline, uhm-hmm.
17 Q. You agree with me that the decline
18 is substantial, or are you disagreeing?
19 A. I guess I agree.
20 Q. Were you aware that Wall Street was
21 expecting Sunbeam to accomplish sales in the
22 first quarter of 1998 that were substantially
23 greater than the sales that Sunbeam had
24 accomplished in the first quarter of 1997?
25 MR. CLARE: Objection to form.

Page 156

1 Smith
2 Q. As of mid-March 1998?
3 A. No.
4 Q. Did anyone report to you, sir, the
5 information that we've just read in paragraph
6 6C of the Andersen comfort letter, that
7 Sunbeam sales for the first two months of
8 1998 were about half of what they had been in
9 the first two months of 1997?
10 A. Yes.
11 Q. When did you first receive that
12 report?
13 A. Don't remember.
14 Q. Was it before the close of the
15 transaction by which Sunbeam acquired my
16 client's interest in Coleman company?
17 A. Yes.
18 Q. From whom did you receive a report
19 that Sunbeam sales in the first two months of
20 1998 were about half of what they had been in
21 the first two months of 1997?
22 A. I don't know if I would use the
23 word "report," but through the process with
24 the team, both the leveraged finance team and
25 others, that this issue came up.

Page 157

1 Smith
2 Q. Well, who told you?
3 A. It's a big group so it is unclear
4 to me, I can't remember who told me, but
5 talked about it to several people.
6 Q. Do you recall that you first
7 learned this information at a group meeting?
8 A. I can't recall how I or when I
9 first learned it.
10 Q. So you may have learned it at a
11 group meeting or it may have been given to
12 you individually in some way?
13 A. Yes.
14 Q. Do you recall if it was given, this
15 information was given to you in writing?
16 A. The -- no, I don't.
17 Q. But you do recall talking about it
18 with others within Morgan Stanley before the
19 closing of Sunbeam's acquisition of my
20 client's interests in Coleman?
21 A. Yes.
22 Q. With whom within Morgan Stanley do
23 you recall discussing the fact that Sunbeam
24 sales in the first two months of the quarter
25 were about half of what they had been in the

Page 158

1 Smith
2 first two months of '97?
3 A. Mike Hart for sure and maybe,
4 probably others, but I don't recollect who
5 those were.
6 Q. Do you recall discussing it with
7 Miss Porat?
8 A. No.
9 Q. Do you believe you did not discuss
10 this information with Miss Porat?
11 A. I believe I did not.
12 Q. Did you discuss it with Mr. Strong?
13 A. I believe I might have.
14 Q. Do you believe that Mr. Strong is
15 the person who first advised you of this
16 information?
17 A. No recollection.
18 Q. Do you believe it was Mr. Hart?
19 A. Don't recall.
20 Q. What do you recall discussing, what
21 do you recall about your discussions with Mr.
22 Hart concerning the decline in Sunbeam's
23 sales for the first two months of 1998?
24 A. What I recall is the discussing
25 what happened and the impact of this on their

Page 159

1 Smith
2 projections for 1998.
3 Q. When did these discussions take
4 place?
5 A. After we got notice that their
6 sales were \$72 million for the first two
7 months.
8 Q. And that is before the closing of
9 the transactions, correct?
10 A. Before the closing of the
11 transaction.
12 Q. Was it your belief you discussed
13 this with Mr. Hart privately, or was it with
14 a larger group?
15 A. Probably both.
16 Q. How many times do you recall
17 discussing it with Mr. Hart?
18 A. Gee, it's tough. I guess more than
19 several.
20 Q. Do you recall over what period of
21 time you had these conversations, what length
22 of period of time?
23 A. Probably days, but that's a hazy
24 guess.
25 Q. You indicated that you probably

Page 160

1 Smith
2 discussed this with Mr. Hart both privately
3 and with a larger group.
4 Who do you believe was involved in
5 larger group discussions on this topic where
6 both you and Mr. Hart participated?
7 A. Mr. Strong, maybe Mr.
8 Burchill/Rankin, whoever was there at the
9 time, probably somebody from credit, and then
10 a -- I'm sure I kept my bosses involved too.
11 Q. Your bosses would be who during
12 this time period?
13 A. Newhouse, Sippelle and Rankowitz.
14 Q. I'm sorry, I missed the second
15 name.
16 A. Mr. Sippelle.
17 Q. What is Mr. Sippelle's first name?
18 A. Dwight.
19 Q. And the third person?
20 A. Michael Rankowitz.
21 Q. Those are individuals to whom you
22 reported during this time period?
23 A. Uhm-hmm. Yes.
24 Q. Tell me everything you can recall
25 about your conversations on the subject of

Page 161

1 Smith
2 the decline of Sunbeam sales in the first two
3 months of 1998?
4 A. I think the focus of the discussion
5 was really what had happened, what was going
6 to happen for the first quarter, and the
7 implications of that for the full year. When
8 I say that, achieving their projections for
9 the, for 1998.
10 Q. What do you recall being said on
11 each of those topics?
12 A. A lot of questions and then -- a
13 lot of questions and it was basically with
14 members of the team, that would be the big
15 Morgan Stanley team, focus on trying to find
16 these answers.
17 Q. You participated in meetings where
18 people raised questions, correct?
19 A. Yes.
20 Q. And the questions are what's
21 happened so far in the first quarter that
22 caused this, right?
23 A. Yup.
24 Q. What's the full quarter going to
25 look like?

41 (Pages 158 to 161)

Page 162

1 Smith
2 A. Uhm-hmm.
3 Q. And what are the implications of
4 this for 1998, correct?
5 A. Yes.
6 Q. Why were you interested in those
7 things?
8 A. Just as part of our continuing due
9 diligence to make sure we understood what
10 happened.
11 Q. Do you recall getting answers to
12 the questions?
13 A. I recall getting, yes, some answers
14 to the questions from the team.
15 Q. Who provided answers?
16 A. I think it was probably Mr. Hart,
17 who was the -- where I got most of my
18 information. And I don't know how, where did
19 he get it. And he didn't get his directly, I
20 think he was relating from the bigger Morgan
21 Stanley team.
22 Q. Do you recall getting information
23 from anybody other than Mr. Hart concerning
24 answers to these questions?
25 A. No.

Page 163

1 Smith
2 Q. What do you recall Mr. Hart
3 reporting to you?
4 A. Let me go back here. I think
5 probably talked to Strong as well, and in
6 terms of what, what had happened here is
7 that, is that the understanding was that they
8 had some anticipated revenues that were going
9 to come in in the third quarter -- excuse me,
10 the third month of the quarter, the third
11 month of the quarter, and that they would
12 make up a lot of this shortfall then.
13 Q. That's what Mr. Strong reported to
14 you?
15 A. I think that was a combination. We
16 were doing a lot of this in groups of people.
17 Change in composition. So it is very
18 difficult to recall for you exactly who was
19 at each and every one of these meetings.
20 Q. But your best recollection as you
21 sit here is that Mr. Strong said the
22 substance of this to you?
23 A. No. My recollection is that was
24 kind -- that was bits of information that
25 came out of the Morgan Stanley due diligence

Page 164

1 Smith
2 effort that would involve those two
3 individuals at different times and different
4 degrees of involvement as well as others.
5 Q. Did you attempt to speak directly
6 with Sunbeam yourself?
7 A. I did not.
8 Q. Did you direct Mr. Hart to do that?
9 A. I did not.
10 Q. Do you know if Mr. Hart had any
11 direct communications with Sunbeam?
12 A. I do not know.
13 Q. On this topic I'm focusing on?
14 A. I do not know.
15 Q. What do you recall Mr. Hart telling
16 you relating to what had happened in the
17 first two months of the quarter, what the
18 expectations were for the rest of the quarter
19 and what the implications were for '98?
20 A. It's tough for me to remember
21 specifically what his contribution was to
22 that. I think it's more generic, that the
23 Morgan Stanley due diligence team came up
24 with the answers that I described before,
25 that the company was highly confident that

Page 165

1 Smith
2 they were going to make their -- were going
3 to achieve results that were I guess ahead of
4 last year, and that they felt that the rest
5 of the year would come on pretty close to
6 where the projections that they had provided
7 us were going to be.
8 Q. Those are the conclusions that had
9 being provided to you, correct?
10 A. Those were the conclusions
11 provided, yes, by the company to the Morgan
12 Stanley team.
13 Q. Do you know what factual foundation
14 Morgan Stanley had for any of those
15 propositions?
16 A. I think we had gotten some
17 additional information from them, the
18 company, showing how the projected sales for
19 the rest of the quarter.
20 Q. Did you see that information
21 yourself?
22 A. I think so.
23 Q. I thought you had indicated
24 previously that you understood that Miss
25 Porat was assigned to conduct an inquiry

Page 166

1 Smith
2 relating to some of those issues.
3 Did I misunderstand you?
4 A. Did I say that? I think that if
5 she was, she would have been part of the
6 overall Morgan Stanley team. Again I can't
7 overemphasize that it's a -- it was a huge
8 commitment of resources by the part of the
9 firm. At any given time there were 10 or 20
10 people working on it at different levels of
11 seniority.
12 Certainly Ruth was one of the more
13 senior people involved and so at various
14 times she might be in the lead, and sometimes
15 it's Mr. Strong or others.
16 Q. With respect to the question what
17 had happened in the first two months of the
18 quarter, were you told by anyone in the
19 Morgan Stanley team that the primary reason
20 for the shortfall in January and February in
21 sales was that Sunbeam had accelerated first
22 quarter revenue into the fourth quarter of
23 1998?
24 A. No. What we were told was that
25 they were trying to sell more, more of these

Page 167

1 Smith
2 grills, and accelerated the sales faster to
3 get the jump on the competition.
4 Q. I didn't ask about the reason for
5 doing it, but I asked whether you were told
6 that the reason why Sunbeam sales in January
7 and February were so far below 1997 levels
8 was that Sunbeam had accelerated the sale of
9 products into the fourth quarter of 1997.
10 A. No.
11 Q. Let me direct your attention to the
12 March 19 letter, CPH Exhibit 17 which you
13 have in front of you.
14 A. Uhm-hmm.
15 Q. To page 4, paragraph 6B. Let me
16 read the first sentence for you. "For the
17 period from December 29, 1997 through March
18 16, 1998 consolidated net sales decreased as
19 compared to the corresponding period of the
20 preceding year, primarily due to the
21 company's new early buy program for outdoor
22 grills which accelerated outdoor grill sales
23 into the fourth quarter of fiscal 1997."
24 Do you see that statement?
25 A. Uhm-hmm.

Page 168

1 Smith
2 Q. At any time prior to the close of
3 Sunbeam's acquisition of my client's
4 interests in Coleman company, were you
5 advised of the facts contained in that
6 sentence?
7 A. Yes.
8 Q. And who advised you of that?
9 A. Somebody from the team.
10 Q. What were you told?
11 A. That the company had accelerated
12 the sales of grills to capture market share.
13 Q. Accelerated the sale of grills into
14 the four quarter of 1997, correct?
15 A. 1997, yeah.
16 Q. And that the effect of that was to
17 diminish the sales the company had realized
18 in the first two months of 1998?
19 A. Yes.
20 Q. You don't know who told you that?
21 A. No.
22 Q. Do you know if it was part of a
23 group meeting?
24 A. No, I don't recall.
25 Q. Do you know if it was Mr. Strong

Page 169

1 Smith
2 who told you that?
3 A. Don't recall.
4 Q. Do you know if it was Mr. Tyree?
5 A. Don't recall.
6 Q. Miss Porat?
7 A. Don't recall.
8 Q. Mr. Hart?
9 A. Don't recall.
10 Q. Did the fact that Sunbeam's sales
11 had declined so substantially in the first
12 two months of 1998, sir, as a result of
13 activities that resulted in accelerating the
14 sale of grills in the fourth quarter of 1997,
15 cause you to have any questions relating to
16 the turn-around claims that Mr. Dunlap was
17 making?
18 A. No.
19 Q. Why is that?
20 A. That was because that's one bit of
21 information, and to look at it in the overall
22 context of what the company was doing, their
23 performance, where they -- and what that
24 looked like was going to happen in the rest
25 of '98 is all part of the decision.

Page 170

1 Smith
2 Q. Did learning that Sunbeam had
3 engaged in activities to enhance its 1997
4 revenues cause you to believe that Morgan
5 Stanley needed to make further inquiry into
6 Sunbeam's turn-around claims?
7 MR. CLARE: I object to the form
8 of the question.
9 A. Focus of our inquiry was to test
10 the, or to find out more information about
11 the use of these early sales to enhance, you
12 know, market share and total revenues of the
13 grills. That was the emphasis of the
14 inquiry.
15 Q. Did you think this was potentially
16 good news?
17 A. Didn't know enough.
18 Q. You didn't necessarily conclude
19 that the decline in Sunbeam sales in the
20 first two months of 1998 was a negative
21 development?
22 A. I didn't know enough. And again
23 you want to look at this in the context of
24 all of the information we had.
25 Q. In what way would a 50 percent

Page 171

1 Smith
2 decline in sales of the first two months of
3 1998 be a potentially positive development
4 for Sunbeam?
5 A. I don't know about positive. You
6 asked me if it was potentially negative. It
7 could be a host of things that are going on.
8 Again, I think you have to look at
9 all of the facts you have available to you to
10 come up with any view. Very difficult I
11 think to pick out one item and then make that
12 be the linchpin of everything you are trying
13 to do.
14 Q. Is it your testimony, sir, that
15 when you were advised that Sunbeam's net
16 sales for the first two months of 1997 were
17 half of what they had been in the first two
18 months of 1997, and that the reason for that
19 was that Sunbeam had accelerated -- did I
20 misspeak?
21 MR. CLARE: I think you might have
22 said 1997 in both parts of your question.
23 Q. Let me start over.
24 Is it your testimony, sir, that
25 when you learned that Sunbeam's sales in the

Page 172

1 Smith
2 first two months of 1998 were about half of
3 what they had been in the first two months of
4 1997, and that the reason for that was that
5 Sunbeam had accelerated sales from the first
6 quarter of 1998 into the fourth quarter of
7 1997, you thought that was potentially a
8 positive piece of information relating to
9 Sunbeam's --
10 MR. CLARE: I object to the form,
11 and also to the extent it misstates his prior
12 testimony.
13 Q. -- performance and financial
14 condition?
15 A. Well, your first question before
16 was did I view that negatively. I don't
17 think I said I viewed it positively. Again
18 it is just another bit of information that
19 comes out in this due diligence process, and
20 you put that together with all of the other
21 information that we had. And again emphasize
22 the "we" because we had a big group working
23 on this, coming at it from many angles.
24 Q. Putting aside the prior testimony,
25 I'm asking a standalone question here.

Page 173

1 Smith
2 Is it your testimony, sir, that
3 when you learned that Sunbeam sales for the
4 first two months of 1997 were about half --
5 excuse me, for the first two months of 1998
6 were about half of what they had been in the
7 first two months of 1997, that the reason for
8 that was that Sunbeam had accelerated first
9 quarter sales back into the prior fiscal
10 period, that you thought that was potentially
11 a good thing for Sunbeam?
12 A. I wouldn't characterize it. Didn't
13 even approach it as a potentially good thing,
14 just a potential let's find out what goes on.
15 Q. Because it was a potential concern,
16 right?
17 A. No, because I wanted to find out
18 what was going on.
19 Q. Were you concerned?
20 A. It could have been good, it could
21 have been bad.
22 Q. Did you think it was potentially a
23 negative development?
24 A. As is many things, it could be
25 potentially good, potentially bad, just goes

Page 174

1 Smith
2 back into the mosaic of what we are trying to
3 find out here and ascertain what is happening
4 with the company.
5 Q. So you agree with me that when you
6 learned this information, you recognize that
7 it was potentially a bad piece of
8 information, correct?
9 A. I didn't know enough. It could
10 have been good, it could have been bad.
11 Q. That is my question.
12 Were you -- did you know?
13 A. Didn't know enough at the time.
14 Q. To know whether it was either
15 potentially good or potentially bad?
16 A. Not on the basis of this.
17 Q. So why did you want to make further
18 inquiry?
19 A. To find out.
20 Q. Because it might be potentially
21 bad, correct?
22 A. And it might be potentially good.
23 My job is to find out what is going on.
24 Q. You wanted to find out what was
25 going on with respect to this particular

Page 175

1 Smith
2 information because it was something
3 potentially negative with respect to
4 Sunbeam's --
5 A. Could have been potentially
6 negative.
7 Q. -- condition and performance,
8 correct?
9 MR. CLARE: Objection, asked and
10 answered.
11 A. Could have been potentially
12 negative.
13 Q. I'm sorry, could have been
14 potentially what?
15 A. Whatever you said, negative.
16 Q. Negative. While we're waiting for
17 a document, sir, did you wait for Mr. Hart to
18 obtain further information relating to this
19 so you could understand the potential
20 significance of this disclosure?
21 A. We talked about it and agreed, yes,
22 and asked him to find out as much as he
23 could. And he wanted to do that as well,
24 anyway.
25 Q. So you did ask Mr. Hart to find out

Page 176

1 Smith
2 more information relating to this for you,
3 correct?
4 A. Well, when you say for me, for the
5 firm and do what he could, yes.
6 Q. I'm trying to understand if you
7 spoke to Mr. Hart and said we need to get
8 more information about this, asking him to do
9 that?
10 A. You have to remember I met with Mr.
11 Hart like 50 times a day for weeks on this
12 thing, so I'm sure this would come up as part
13 of the conversation.
14 Q. Was the information, was this
15 information consistent with -- let me ask a
16 foundation question.
17 Had you received any information
18 prior to the time you learned that Sunbeam
19 sales for the first two months were about
20 half that they had been the prior fiscal
21 year, about how Sunbeam was doing in the
22 first quarter of 1998?
23 A. I don't recall. Don't think so.
24 Q. Do you think this was the first
25 information you received from Sunbeam

Page 177

1 Smith
2 relating to its performance in 1998?
3 A. I believe so.
4 Q. When you learned it, did you
5 believe that you had been in some way misled
6 by Sunbeam management concerning how things
7 were going in the first portion of 1998?
8 A. I did not.
9 Q. Did you think that Sunbeam
10 management should have advised you of these
11 facts earlier?
12 A. I had no opinion.
13 Q. Did anyone express the view that
14 Sunbeam, anyone within Morgan Stanley express
15 the view that Sunbeam management should have
16 advised Morgan Stanley of these facts earlier
17 in the process?
18 A. I don't recall.
19 Q. Do you recall that Sunbeam issued a
20 press release on March 19 relating to the
21 status of its first quarter sales?
22 A. Yes.
23 Q. And did you have any involvement in
24 the events relating to the issuance of that
25 press release?

Page 178

1 Smith
2 A. The only involvement I may have had
3 was, was either on the phone or walking in
4 and out when a phone call was going on to
5 discuss this.
6 Q. What phone call are you referring
7 to?
8 A. A internal phone call.
9 Q. Who was on that phone call?
10 A. Members of the team. I was not
11 directly on the call, I was walking in and
12 out, I had other stuff going on.
13 Q. This occurred before the issuance
14 of the March 19 press release?
15 A. It is all part and parcel of that.
16 Q. Do you know if anyone other than
17 Morgan Stanley personnel were on this phone
18 call you heard part of?
19 A. No, I think it was only Morgan
20 Stanley people.
21 Q. Do you have any recollection of
22 hearing Sunbeam -- let me ask a more general
23 question.
24 Did you have any communications
25 yourself directly with Sunbeam management

Page 179

1 Smith
2 relating to what had happened in the first
3 quarter of 1998 prior to the issuance of the
4 March 19 press release?
5 A. No.
6 Q. Can you identify any of the
7 individuals who are on the Morgan Stanley
8 team who were part of this phone call?
9 A. Not with a hundred percent
10 certainty.
11 Q. Who did you believe was involved?
12 A. I would have imagined that it would
13 have been Mike Hart, John Tyree, Bill Strong,
14 probably Tom Burchill/Rankin, maybe somebody
15 from the credit department.
16 Q. Did you make any statements during
17 the phone call?
18 A. I don't believe so.
19 Q. What do you remember hearing
20 discussed?
21 A. I remember hearing discussed, and
22 again in and out kind of what we were talking
23 about, what happened, what's the impact of
24 this for the year.
25 Q. Was there discussion about whether

Page 180

1 Smith
2 the company would issue a press release that
3 you heard?
4 A. Yes.
5 Q. What do you remember hearing?
6 A. That should the company issue a
7 press release and what would be the impact of
8 that.
9 Q. So you participated in at least a
10 portion of a conversation where there was
11 internal discussion at Morgan Stanley
12 concerning whether Sunbeam should be asked to
13 issue a press release?
14 MR. CLARE: Object to the form of
15 the question, misstates his testimony about
16 his participation.
17 A. Again I'm in and out. I do think
18 that the concept of a press release was
19 mentioned. I don't know if they were
20 responding to some thoughts that Sunbeam had,
21 some thoughts that they had or anything.
22 Again, I'm not a good witness on that phone
23 call.
24 Q. What do you remember being said by
25 the participants in that phone call

Page 181

1 Smith
2 concerning the pros and cons of a press
3 release and the potential impact?
4 A. I know that they discussed the,
5 discussed the press release, but it wasn't
6 there long enough or consistently enough to
7 pick up any of the pros or cons.
8 Q. What about the potential impact?
9 A. Not that I know of.
10 Q. Did you see a copy of --
11 Let me show you what has previously
12 been marked as CPH Exhibit 14. It's a copy
13 of the March 19 press release that I have
14 been referring to.
15 A. Uhm-hmm.
16 Q. Take a moment to read it.
17 Did you see this press release when
18 it was issued, sir?
19 A. I believe I did.
20 Q. Did you see it prior to its
21 issuance?
22 A. I may have seen a draft.
23 Q. What do you remember about the
24 possibility of seeing a draft of this press
25 release?

Page 182

1 Smith
2 A. Not much. The draft just before it
3 was finalized, it was circulated among the
4 team members.
5 Q. Did you offer comments to anyone
6 concerning the draft?
7 A. I don't think so. But again this
8 is from Sunbeam, right? This is a Sunbeam
9 press release?
10 Q. Yes.
11 A. I offered no comments to Sunbeam on
12 this.
13 Q. Do you recall from whom you
14 received the draft?
15 A. No.
16 Q. Do you recall any discussions
17 within Morgan Stanley relating to the draft
18 press release?
19 A. No.
20 Q. Did you offer comments to anyone
21 relating to press release of any sort of,
22 whether it was a suggestion for a change to
23 it or any other observation about it?
24 A. No. And again this is a Sunbeam
25 press release, not a Morgan Stanley press

Page 183

1 Smith
2 release.
3 Q. I'm asking not only for comments
4 you may have had concerning the language, but
5 observations you had about it.
6 A. No.
7 Q. Did you think the press release
8 adequately disclosed the information that
9 Morgan Stanley was aware of relating to
10 Sunbeam's first quarter 1998 performance when
11 you read it?
12 MR. CLARE: Objection to
13 foundation. Go ahead, you can answer.
14 A. That is up to Sunbeam, that is
15 their statement, have no opinion.
16 Q. My question to you, sir, is do you
17 think this press release adequately disclosed
18 the information, let me start with you, that
19 you were aware of relating to the status of
20 Sunbeam's first quarter 1998 performance?
21 A. Why don't you repeat your question
22 again.
23 Q. Do you think the Sunbeam March 19,
24 1998 press release --
25 A. This thing?

Page 184

1 Smith
2 Q. Correct -- fairly disclosed the
3 information that you, Bram Smith, were aware
4 of on March 19, 1998 concerning the status of
5 Sunbeam's first quarter 1998 performance?
6 A. I think I want to take a break.
7 I'll answer that later.
8 Q. No, you have to answer the question
9 before you take a break.
10 A. No comment then.
11 MR. MARKOWSKI: Keep the camera
12 rolling, we are still on the record.
13 MR. CLARE: The witness has asked
14 to take a break. We're going to go off the
15 record.
16 MR. MARKOWSKI: We're not going
17 off the record. It is my record and this
18 camera is going to roll until he comes back.
19 MR. CLARE: Okay, suit yourself.
20 (Witness and counsel leave the
21 conference room at this time.)
22 Q. Are you prepared to answer my
23 question, Mr. Smith?
24 THE WITNESS: Please repeat it.
25 (Record read.)

Page 185

1 Smith
2 THE WITNESS: And what did I say
3 before?
4 (Record read.)
5 A. So I said I had no opinion.
6 Q. Is it your testimony, sir, that you
7 have no opinion concerning whether the March
8 19, 1998 press release fairly disclosed the
9 information concerning Sunbeam's first
10 quarter 1998 performance that you personally
11 were aware of?
12 A. Yes.
13 Q. The press release contains no
14 statement whatsoever that Sunbeam sales in
15 January and February were below to any extent
16 the sales in January and February of 1997,
17 correct?
18 A. Yup.
19 Q. Contains no statement that Sunbeam
20 had accelerated revenue from the first
21 quarter of 1998 into the fourth quarter of
22 1997, does it?
23 MR. CLARE: I object. The
24 document speaks for itself. It is a waste of
25 time. You can answer.

Page 186

1 Smith
2 A. It does not relate to that.
3 Q. It doesn't disclose that, does it?
4 A. No.
5 Q. Those are facts you were aware of,
6 correct, on March 19, 1998?
7 A. Those are facts that I was aware
8 of.
9 Q. Those were facts that you were
10 aware might be potentially significant to
11 Morgan Stanley, correct?
12 MR. CLARE: Objection,
13 argumentative and lack of foundation. You
14 can answer.
15 A. Those were, as we discussed before,
16 things we wanted to find out more about.
17 Q. Let me show you, sir --
18 MR. MARKOWSKI: Do you want to
19 change the tape?
20 THE VIDEOGRAPHER: Yes. The time
21 is 2:06, this completes tape number 2. Thank
22 you.
23 (Pause in the proceedings.)
24 THE VIDEOGRAPHER: The time is
25 2:07, this begins tape number 3 of the

Page 187

1 Smith
2 videotaped deposition of Mr. Bram Smith.
3 BY MR. MARKOWSKI:
4 Q. Mr. Smith, I show you a one-page
5 document that we'll marked as CPH Deposition
6 Exhibit Number 152. It bears Bate numbers
7 LAB 43.
8 (Cleman (Parent) Holdings Exhibit
9 152, document bearing Bates number LAB
10 43, marked for identification, as of
11 this date.)
12 Q. You testified earlier, sir, that
13 you believe you received some information
14 from Sunbeam relating to sales for the
15 balance of the first quarter of 1998; is that
16 correct?
17 A. I think I said for the balance of
18 the quarter.
19 Q. If I didn't say that, that is what
20 I meant. I'm sorry.
21 A. Okay.
22 Q. Is this the document?
23 A. Yes.
24 Q. How did you receive this?
25 A. From the team.

Page 188

1 Smith
2 Q. Do you know when you received it in
3 relationship to Sunbeam's press release?
4 A. My guess is before.
5 Q. Did you participate in any
6 discussions within Morgan Stanley relating to
7 the information contained on CPH Exhibit 152?
8 A. I believe I did.
9 Q. With whom did you discuss it?
10 A. Again members of the greater due
11 diligence team.
12 Q. Can you identify any particular
13 people who you have a recollection of
14 discussing Exhibit 152 with?
15 A. Aside from Mike Hart, the people
16 come and go, so no.
17 Q. What do you recall concerning the
18 discussions that you had with Morgan Stanley
19 personnel relating to the information
20 contained on CPH Exhibit 152?
21 A. The discussion was seeing how they
22 had performed and where the sales were coming
23 from to get to their -- to exceed last year's
24 numbers.
25 Q. What conclusions did you personally

Page 189

1 Smith
2 come to after receiving CPH Exhibit 152?
3 A. I don't recall.
4 Q. Did you conclude, based on your
5 review of CPH Exhibit 152, that Sunbeam would
6 realize all of the sales listed on this page?
7 A. I don't recall.
8 Q. Did you understand that \$86 million
9 of sales listed on this page as of the date
10 of this document had not even been ordered
11 yet by Sunbeam customers?
12 A. I'm sorry, did you ask if I was
13 aware of that?
14 Q. Yes. Were you aware that \$86
15 million of sales listed on this page had not
16 even been ordered yet by Sunbeam customers?
17 A. I don't recall.
18 Q. Did you come to any conclusions
19 after reviewing this page, concerning how
20 probable it was that Sunbeam would exceed its
21 first quarter 1997 sales?
22 A. No.
23 Q. Were you able to come to any
24 conclusion after receiving CPH Exhibit 152,
25 concerning how likely it was that Sunbeam

Page 190

1 Smith
2 would exceed first quarter 1997 sales?
3 A. No.
4 Q. Did you ask for additional
5 information?
6 A. I don't believe I asked for any
7 additional information.
8 Q. If you couldn't come to any
9 conclusion after reviewing CPH Exhibit 152,
10 sir, why didn't you ask for additional
11 information?
12 A. You have got to remember that I'm
13 one of a large group and that there were
14 other people who were taking the lead on
15 investigating this, talking to the company
16 and then comment back to the group, and that
17 wasn't me.
18 Q. So is the reason why you didn't ask
19 for additional information, the fact that you
20 didn't consider it to be your responsibility
21 to pursue this?
22 A. No. The reason I didn't pursue it
23 was other people were taking the lead on
24 this, had more day-to-day contact with the
25 client.

Page 191

1 Smith
2 Q. Do you know if Morgan Stanley
3 sought additional information from Sunbeam,
4 beyond the information contained on CPH
5 Exhibit 152, concerning the likelihood that
6 Sunbeam would exceed first quarter 1997
7 sales?
8 A. I didn't have any firsthand
9 knowledge of that.
10 Q. You don't know one way or the other
11 whether Sunbeam pursued any additional
12 information on that subject?
13 MR. CLARE: Or whether Morgan
14 Stanley.
15 A. Or whether Morgan Stanley.
16 Q. Sorry, I misspoke.
17 You don't have any knowledge,
18 sitting here today, whether after receiving
19 CPH Exhibit 152 Morgan Stanley pursued any
20 additional information from Sunbeam in order
21 to allow Morgan Stanley to form an opinion
22 concerning the likelihood of Sunbeam
23 exceeding first quarter 1997 sales in the
24 first quarter of 1998?
25 A. I know that there were subsequent

Page 192

1 Smith
2 phone calls with the company. I was not part
3 of it.
4 Q. What do you know about those phone
5 calls?
6 A. That they were had to follow up on
7 this.
8 Q. Do you know whether those phone
9 calls took place before or after the press
10 release?
11 A. I think it was before the press
12 release.
13 Q. Do you know who from Morgan Stanley
14 was involved in those phone calls?
15 A. Again a subset of the team.
16 Q. You don't know any of the people?
17 A. Not directly, not specifically.
18 Q. Do you know with whom they spoke?
19 A. No.
20 Q. Do you know, other than telephone
21 calls with Sunbeam management before the
22 press release was issued concerning CPH
23 Exhibit 152, Morgan Stanley received any
24 other documentary evidence concerning
25 Sunbeam's sales prospects for the balance of

Page 193

1 Smith
2 the first quarter of 1998?
3 A. I am not aware.
4 Q. Did you ever see any?
5 A. No.
6 Q. Is CPH Exhibit Number 152 the sole
7 piece of documentary information you received
8 from Sunbeam relating to its sales prospects
9 for the first quarter of 1998?
10 A. To the best of my memory.
11 Q. Did anyone within Morgan Stanley,
12 sir, to your knowledge express doubts
13 concerning whether Sunbeam was likely to
14 exceed first quarter 1997 sales results in
15 the first quarter of 1998?
16 A. No.
17 Q. Did anyone express an opinion on
18 that subject one way or the other to you?
19 A. Not that I remember.
20 Q. Do you remember anyone saying they
21 had concluded that it was probable or likely
22 that Sunbeam would be able to exceed first
23 quarter 1997 sales results in the first
24 quarter of 1998?
25 A. I don't remember any individual

Page 194

1 Smith
2 saying that.
3 Q. Did you ask for assurances on that
4 subject from anyone within Morgan Stanley?
5 A. Well, again the team was coming up
6 with the answers and that was just part of,
7 that was part of the process to talk to the
8 company about their numbers and their -- and
9 what they were, how competent, how
10 comfortable they were in telling us this was
11 going to happen.
12 Q. My question to you, sir, is whether
13 you asked the team or any particular person
14 on the team whether Morgan Stanley had
15 reached a conclusion that it was probable or
16 likely that Sunbeam would exceed its first
17 quarter 1997 sales results in the first
18 quarter of 1998?
19 A. I don't remember asking any
20 specific member of the team.
21 Q. Do you remember asking the people
22 generally for their view on that?
23 A. Yes.
24 Q. When did you ask that question?
25 A. As part of this process.

Page 195

1 Smith
2 Q. Do you remember a specific occasion
3 where you asked that question?
4 A. No.
5 Q. Do you remember a particular
6 meeting where you asked that question?
7 A. No.
8 Q. Do you remember whether you asked
9 that question before or after the press
10 release was issued?
11 A. Prior to the press release.
12 Q. Do you remember someone responding
13 to your question?
14 A. Not specifically.
15 Q. Do you remember receiving a
16 response to your question?
17 A. I remember people talking about the
18 issue.
19 Q. Do you remember whether as a group,
20 the Morgan Stanley team reached a consensus
21 that it was probable or likely that Sunbeam
22 would exceed first quarter 1997 sales
23 results?
24 A. Yes.
25 Q. Do you remember that in fact was

Page 196

1 Smith
2 the conclusion reached?
3 A. I -- that's my recollection.
4 Q. But you don't remember any
5 particular person expressing that opinion to
6 you, correct?
7 A. I do not.
8 Q. Did you personally have enough
9 information that would permit you to form
10 that opinion?
11 A. No, again I was part of the bigger
12 group and not directly involved with pursuing
13 this avenue of inquiry.
14 Q. So you personally didn't know one
15 way or the other whether that was a
16 reasonable conclusion, correct?
17 A. Did not have any firsthand
18 knowledge of that and was relying on greater
19 due diligence effort of the firm.
20 Q. Did you offer anyone your views
21 concerning the likelihood of Sunbeam
22 exceeding first quarter 1997 sales results?
23 A. I did not because I was too far
24 removed from the direct contact with the
25 company to go over this particular, you know,

Page 197

1 Smith
2 area of inquiry.
3 Q. Do you recall that there was a
4 meeting of the Leveraged Finance Committee on
5 March 20, 1998 to discuss whether approval
6 would be given to underwrite the senior loan
7 of Sunbeam?
8 A. Do I remember the meeting then?
9 Q. Yes.
10 A. I remember we had a meeting, I
11 don't remember for sure when it was.
12 Q. I'm going to show you, Mr. Smith,
13 what we have previously marked as CPH Exhibit
14 Number 76. The cover page is a memorandum
15 dated March 19, 1998 from R.B. Smith to
16 Leveraged Finance Commitment Committee,
17 subject Sunbeam, and it is a document that
18 bears Bates number Morgan Stanley 25829
19 through 25886.
20 I'd like you to look at this
21 document sufficiently, Mr. Smith, to tell me
22 whether you have ever seen it before.
23 A. Yes, I have.
24 Q. Can you tell me what it is?
25 A. It is the Commitment Committee memo

50 (Pages 194 to 197)

Page 198

1 Smith
2 that we, that the leveraged finance, the firm
3 had put together in acquiring or requesting
4 credit approval from the Leveraged Finance
5 Committee.
6 Q. And the credit approval that is the
7 subject of this material is the senior loan
8 of Sunbeam, correct?
9 A. Is the senior loan, yes.
10 Q. You're the author of the March 19
11 cover memo, correct?
12 A. I am the sender of this, yes.
13 Q. And your memorandum advises that
14 there will be a Leveraged Finance Commitment
15 Committee meeting regarding Sunbeam on
16 Friday, March 20 at 7:30 a.m., correct?
17 A. Yes.
18 Q. Did that meeting in fact take
19 place?
20 A. I believe it did. Let me say it
21 again. It did take place. Can I say it took
22 place on the 20th at 7:30, I don't remember.
23 Q. Did you attend the meeting?
24 A. I did.
25 Q. Now, there are a list of people on

Page 199

1 Smith
2 the bottom of that memorandum under the
3 heading Distribution.
4 Do you see that?
5 A. I do.
6 Q. Can you tell me who those
7 individuals are?
8 A. Starting at the top?
9 Q. Yes.
10 A. Dwight Sippelle and Mike Rankowitz
11 were co-head of high yield sales and trading.
12 Bill Kourakos was I think at the time the
13 deputy head of high yield capital markets.
14 Rick Felix was the head of the credit
15 department. You have myself. Steve Newhouse
16 was at the time the head of high yield
17 capital markets. Leslie Bradford was the
18 deputy head of the credit department. Joel
19 Feldmann was a senior member of the high
20 yield capital markets group. S. Brown, I
21 don't remember that. Ralph Pellicchio was a
22 senior lawyer. Steve Munger was one of the
23 senior M&A professionals. Terry Mequid ran
24 IBD. Bill Sanders was his deputy. Ann
25 Short, I don't remember what function she

Page 200

1 Smith
2 might have had. And then there is Bill
3 Strong.
4 Q. Are the members of the Leveraged
5 Finance Commitment Committee included among
6 that list?
7 A. Yes.
8 Q. Who among this group was on the
9 Leveraged Finance Committee?
10 A. To the best of my recollection it
11 was Sippelle, Rankowitz, Kourakos, Felix,
12 Smith, Newhouse were the core members.
13 In addition to that you would have
14 maybe Munger and -- I'm sorry, not Munger.
15 Meguid and maybe Ralph.
16 Q. Why do you distinguish between
17 those two people and the people you referred
18 to as the core group?
19 A. Because they would come
20 periodically to larger transactions or harder
21 transactions or something. They wouldn't
22 come all the time. Whereas the first five or
23 six that I mentioned there were there all the
24 time.
25 Q. Why were the other individuals

Page 201

1 Smith
2 included on the distribution list here?
3 A. Because they were participating.
4 Normally the way -- I don't know specifically
5 why these fellows were, but normally other
6 people would be, receive copies because they
7 were going to participate in this particular,
8 in a particular Leveraged Finance Commitment
9 Committee meeting.
10 For example, Bill Strong doesn't
11 show up all the time, but he would show up if
12 it was his client.
13 Q. Mr. Strong is somebody who is on
14 the Sunbeam team, correct?
15 A. Yes.
16 Q. There is no one else on this list
17 that was part of the Sunbeam engagement team,
18 is there?
19 A. I don't think so.
20 Q. Why then a larger group than the
21 core group for purposes of this particular
22 Leveraged Finance Committee meeting?
23 A. This was not unusual to have other
24 people there, so I can't comment other than
25 as a matter of fact we'd have additional

Page 202

1 Smith
2 faces there.
3 Leslie Bradford, for example, the
4 deputy head of credit, was there most of the
5 time anyway, whether Rick was there or not.
6 Q. Who made the decision whether to
7 add additional people in this particular
8 Leveraged Finance Commitment Committee
9 meeting?
10 A. I don't know. This was pretty much
11 boilerplate.
12 Q. Were you instructed to include
13 additional people?
14 A. I was not to the best of my
15 recollection.
16 Q. Did you make the choice?
17 A. No, I don't remember.
18 Q. Was there something about the size
19 or nature of this loan that made it one where
20 a group larger than the core group would be
21 involved in the decision-making process?
22 A. I would say that there were -- I
23 don't think it was size per se that got
24 everybody's attention. Just a very, very --
25 what's the word, kind of a -- it was a deal

Page 203

1 Smith
2 that had a lot of visibility outside and
3 inside.
4 Q. Were all of these people then going
5 to be responsible for voting yes or no with
6 respect to this proposed credit arrangement?
7 A. Not all the people on the
8 distribution.
9 Q. Who would have voting rights?
10 A. Sipprelle, Rankowitz, Kourakos,
11 Felix, Smith and Newhouse. And then if
12 Meguid showed up, he would have a vote too.
13 Q. Do you remember what the vote was
14 with respect to this particular loan, the
15 Sunbeam loan?
16 A. The vote here was unanimous to go
17 forward.
18 Q. Do you recognize the handwriting on
19 the first page of this document?
20 A. I do.
21 Q. Whose is it?
22 A. Mine.
23 Q. Do you recall when you put this
24 handwriting on this document?
25 A. I think I put it on the document

Page 204

1 Smith
2 during the meeting.
3 Q. These are notes that you took of
4 things that were said during the Leveraged
5 Finance Commitment Committee meeting?
6 A. Notes might be too strong a word.
7 Doodling.
8 Q. But these are writings you added to
9 this document --
10 A. Yes.
11 Q. -- during the course of the
12 Leveraged Finance Commitment Committee
13 meeting relating to the review of the Sunbeam
14 senior loan?
15 A. Yes.
16 Q. And you believe they reflect things
17 that were being said during the course of the
18 meeting?
19 A. No.
20 Q. These are things that you wrote for
21 what reason then?
22 A. I think it would be the
23 combination, things that I was thinking
24 about, things that might have been said,
25 things to follow up on, reminders to myself.

Page 205

1 Smith
2 Q. Do you recall that -- what, tell me
3 what these notes refer to.
4 A. I don't know. Don Uzzi I think is
5 somebody from the company. I don't know why
6 that came up.
7 Q. It says underneath his name "VP
8 sales"?
9 A. God, you have better eyes than I
10 do. Yup. Then these look like ranges of
11 numbers. So that might have been the street
12 estimates and then in terms of what their
13 first sales were going to be.
14 I don't know what the addition on
15 the other side, the 21, 15 and 10 is. That
16 could be some things that had to do with
17 these. And then the rest of it I don't know.
18 Q. The first entry at the top that is
19 circled is the number 112.5, correct?
20 A. Yes.
21 Q. And the word next to that is the
22 word "short"?
23 A. That is what it looks like.
24 Q. Do you recall that that entry
25 relates to the, to how short street

Page 206

1 Smith
2 expectations for sales Sunbeam was as of
3 March 20?
4 A. No, I don't recall.
5 Q. Do you recall that at the Leveraged
6 Finance Commitment Committee meeting on March
7 20 there was discussion relating to the fact
8 that Sunbeam sales for January and February
9 were substantially below the sales for
10 January and February of 1997?
11 A. I believe that was discussed.
12 Q. Who made that point?
13 A. Oh, I think it was -- I don't know
14 who specifically made it. Somebody from the
15 team would have brought that up.
16 Q. Do you recall if it was Mr. Strong
17 who made that statement?
18 A. I do not recall who brought it up.
19 Q. Do you recall if it was you?
20 A. I believe it was not me.
21 Q. Do you recall if it was Mr. Hart?
22 A. I don't recall.
23 Q. Is there anyone else on this list
24 that it could have been in your view other
25 than you, Mr. Hart or Mr. Strong?

Page 207

1 Smith
2 A. This list here on the front page
3 may not have been all the people that
4 attended. There may have been other folks
5 from other disciplines that were there, for
6 example, like John Tyree or the credit person
7 who did the work. So I don't remember
8 everybody who was there, so necessarily who
9 brought it up and/or what type of discussion
10 followed and how many people participated in
11 that discussion.
12 Q. But you do recall that the
13 Leveraged Finance Commitment Committee was
14 advised that Sunbeam sales in January and
15 February of '98 were substantially below --
16 A. Yes.
17 Q. -- Sunbeam sales for January of
18 '97?
19 A. Yes.
20 Q. Do you recall that they were
21 advised that the primary reason for that was
22 that Sunbeam had accelerated the sale of
23 first quarter product into the fourth quarter
24 of 1997?
25 A. I don't remember exactly how it was

Page 208

1 Smith
2 described to the committee.
3 Q. Do you remember whether any
4 statements were made to the committee to
5 explain the reason why Sunbeam sales in the
6 first two months of 1998 were so far below
7 1997 sales results?
8 A. I remember a lot of conversation
9 about it. I think that some of the causes
10 were discussed, one of them being the sale of
11 the grills earlier, as well as expecting
12 sales at the last half of the month here to
13 get them close -- to get them above, excuse
14 me, where they thought they, where they were
15 last year.
16 Q. Now, there is a list of names at
17 the top of the second page.
18 A. Uhm-hmm.
19 Q. That's a memorandum to Leveraged
20 Finance Committee meeting?
21 A. Yes.
22 Q. Leveraged Finance Committee dated
23 March 20, 1998, correct?
24 A. Yes.
25 Q. Do you recall if any of the

Page 209

1 Smith
2 individuals listed on the top portion of this
3 memorandum participated in the Leveraged
4 Finance Committee's meeting?
5 A. I don't -- I don't remember
6 specifically who's there from this group. As
7 I mentioned before, it was a bigger, a better
8 attended meeting than, than the norm because
9 of the visibility. So I think there were
10 members from other groups there. I'm pretty
11 sure there are members from other groups
12 there, but I couldn't specifically tell you
13 who was and who wasn't.
14 Q. Do you recall whether Mr. Strong
15 participated?
16 A. Yes, he did. I do remember him
17 participating.
18 Q. Do you remember if he was there in
19 person?
20 A. I thought he was there in person,
21 but I'm not a hundred percent sure.
22 Q. He might have participated by
23 telephone?
24 A. He could have participated by
25 conference call.

53 (Pages 206 to 209)

Page 210

1 Smith
2 Q. Do you remember if Mr. Strong was
3 asked for his recommendation that the company
4 proceed with the senior loan?
5 A. Mr. Strong, whether he was asked or
6 not, advocated going forward with the senior
7 loan.
8 Q. Do you have any memory of Mr. Tyree
9 being present?
10 A. I thought he was also.
11 Q. Now, if this meeting took place on
12 March 20, it's the day after Sunbeam's March
13 19 press release, correct?
14 A. Yes.
15 Q. Do you recall if Mr. Tyree made any
16 statement -- let me ask a more general
17 question before we get to this particular
18 meeting.
19 Did Mr. Tyree or anyone else, sir,
20 ever advise you that Arthur Andersen had
21 taken the position that the statements
22 contained in Sunbeam's March 19 press release
23 were incomplete and misleading?
24 A. You're question is did Mr. Tyree
25 share that with me?

Page 211

1 Smith
2 MR. MARKOWSKI: Would you read
3 that question back, please.
4 (Record read.)
5 A. No.
6 Q. You have never heard that from
7 anyone?
8 A. No, this is the first time I'm
9 hearing it.
10 Q. Do you think it was appropriate
11 that the Leveraged Finance Commitment
12 Committee was advised of the performance of
13 Sunbeam in January and February of 1998 in
14 connection with evaluating the proposed loan
15 to Sunbeam?
16 A. I think it was appropriate in the
17 context of a, the overall due diligence and
18 in this part of the underwriting.
19 Q. Do you recall whether there was any
20 discussion at the Leveraged Finance
21 Committee's meeting concerning how quickly
22 Morgan Stanley would be able to syndicate its
23 position in the Sunbeam loan?
24 A. Yes.
25 Q. Were you asked to address that?

Page 212

1 Smith
2 A. Yes.
3 Q. Do you recall who asked you to
4 address that?
5 A. No, but it would have -- not
6 specifically, but it would have been one of
7 the senior members of the committee.
8 Q. One of the core group members?
9 A. One of the core group.
10 Q. Do you recall what you said?
11 A. My best recollection is that we
12 thought it would take six to eight weeks,
13 which is pretty standard, to syndicate this
14 once we, once we got going.
15 Q. That is the same target date you
16 gave me earlier, correct, syndicating the
17 position by the first part of May?
18 A. I think we said the last part of
19 May. Yes.
20 Q. That was your view at that point in
21 time?
22 A. Yes, it was.
23 Q. And you expressed that view to the
24 members of the committee?
25 A. I did.

Page 213

1 Smith
2 Q. Did anyone during the course of the
3 Leveraged Finance Committee's meeting raise
4 the question of deferring or delaying the
5 decision?
6 A. The credit decision?
7 Q. Yes.
8 A. Not that I remember.
9 Q. Did anyone raise a question
10 concerning whether the timing of the
11 financing could be delayed so that the
12 closing would occur later?
13 A. I don't recall.
14 Q. Did anyone express any reservations
15 about proceeding with the loan?
16 A. The vote again was unanimous, so I
17 think the committee was on board to go
18 forward.
19 Q. Other than the final vote, did
20 anyone express any questions or concerns
21 about proceeding that reflected in your view
22 a reservation about the decision?
23 A. There were plenty of questions. I
24 wouldn't classify any of them as any
25 reservations.

54 (Pages 210 to 213)

Page 214

1 Smith
2 Q. Did anyone express any concerns
3 concerning the adequacy of the March 19 press
4 release as a disclosure to Sunbeam
5 shareholders?
6 A. I don't think that came up.
7 Q. After, sir, you became aware of the
8 substantial decline in Sunbeam sales in
9 January and February of 1998, did you raise a
10 question concerning the possibility of
11 deferring the financing to a later point?
12 A. I don't know.
13 Q. You didn't go back to Mr. Strong,
14 for example, and say perhaps we should
15 consider delaying the timing of the loan to
16 Sunbeam?
17 A. No.
18 Q. Did anyone else to your knowledge
19 make, raise such a question?
20 A. No.
21 Q. Did you have any reservation, sir,
22 about proceeding with the Sunbeam loan?
23 A. No.
24 Q. Did you give any thought yourself,
25 whether you expressed it to anyone or not,

Page 215

1 Smith
2 whether it might be advisable to delay the
3 financing until Sunbeam's first quarter 1998
4 results were known?
5 A. No.
6 Q. Why not?
7 A. Because we the firm, big team, had
8 done the due diligence and the firm with all
9 of those resources employed was comfortable
10 that this was the, this was a prudent
11 decision. As part of that, but not the front
12 line, I agreed with the decision.
13 Q. You would think it was a prudent
14 decision whether or not Sunbeam in fact was
15 able to exceed its first quarter 1997 sales
16 results in the first quarter of 1998?
17 MR. CLARE: I object to the form
18 of the question. I'm not sure I understand
19 what you're asking.
20 MR. MARKOWSKI: I want to make
21 sure I'm clear on this because it is an
22 important question.
23 Q. Did you think, sir, that the loan
24 to Sunbeam was a prudent decision even if it
25 turned out to be the case that Sunbeam failed

Page 216

1 Smith
2 to exceed its 1997 sales results in the first
3 quarter of 1998?
4 A. I think whether the net exceeded or
5 was off a little bit was just one of many
6 factors and wouldn't have changed anybody's
7 opinion about whether to go forward.
8 Q. Well, you knew based on the
9 information we see on CPH Exhibit 152, that
10 Sunbeam had a lot of work to do, right, in
11 order to exceed first quarter 1997 sales
12 results?
13 Is that a fair statement?
14 MR. CLARE: Objection.
15 A. Sales?
16 Q. Yes.
17 MR. CLARE: Object to the form of
18 the question.
19 Q. A lot of orders to get and a lot of
20 sales to make.
21 A. They had to make some sales to beat
22 last year's.
23 Q. And they had about 10 days to get
24 that done, right?
25 A. Uhm-hmm.

Page 217

1 Smith
2 Q. Did you know it was uncertain at
3 that point whether Sunbeam would have in fact
4 exceeded its first quarter 1997 sales results
5 in the first quarter of 1998?
6 A. First of all, I wasn't part of the
7 phone call of checking with the company; and,
8 number two, everything's uncertain so who
9 knows.
10 It was represented to us, it was
11 represented to members of the team that
12 weren't on the phone call, by people who were
13 on the phone call, that the company had every
14 anticipation of achieving the numbers that
15 they had on that piece of paper.
16 Q. Would you then have prepared to
17 endorse going forward with the Sunbeam loan
18 on March 20, sir, if you knew that Sunbeam
19 would fail to exceed its first quarter 1997
20 sales results?
21 MR. CLARE: Objection, incomplete
22 hypothetical and calls for speculation. You
23 can answer if you can.
24 A. Tough to -- you can't make that
25 call in a vacuum. You have to get more

Page 218

1 Smith
2 information.
3 Q. What more information?
4 A. Why, how far were they off, what's
5 going on, those types of issues.
6 Q. What if they would have been \$20
7 million short?
8 A. Again it's just a -- out of context
9 like that it's -- that doesn't mean much.
10 Q. What if they would have been \$20
11 million short and the primary reason that
12 they were \$20 million short was that they had
13 accelerated first quarter 1998 sales into the
14 fourth quarter of 1997, under those
15 circumstances would you have been comfortable
16 endorsing the senior loan to Sunbeam?
17 MR. CLARE: Same objections.
18 A. Hypothetical, it's -- I don't have
19 a view.
20 Q. You don't have any ability to offer
21 a view on that?
22 A. No.
23 Q. Did you consider that possibility
24 that Sunbeam might be \$20 million short?
25 A. Based on what the team had found

Page 219

1 Smith
2 out from the company, that while always a
3 possibility, didn't think it was anywhere
4 near a probability.
5 Q. But if Sunbeam -- your view was
6 even though it was uncertain whether Sunbeam
7 would exceed its first quarter 1997 sales in
8 the first quarter of 1998, you were still
9 comfortable recommending to the management of
10 Morgan Stanley making this loan, correct?
11 A. Yes.
12 Q. Let me direct your attention to
13 page 16.
14 A. Page 16 is it?
15 Q. Of the March 20 memo.
16 A. Yup.
17 Q. You see a listing at the top of
18 this page with a heading Coleman Synergy,
19 Synergies Rationale 118 million?
20 A. Yes, I do.
21 Q. Do you see several bullet points
22 below that heading?
23 A. I do.
24 Q. What is your understanding of what
25 those bullet points represent?

Page 220

1 Smith
2 A. Give me a second to refresh my
3 memory.
4 Q. Sure.
5 A. These look like -- the 118 looks
6 like it is the synergy number and then the
7 bullet points below that, for at least the
8 Coleman situation, are specific actions or
9 events that were going to happen, that the
10 company was going to take to realize the net.
11 Q. So these are the synergies that
12 this document reflects Sunbeam will realize
13 upon the acquisition of Coleman company.
14 Is that what this is intended to
15 describe to the members of the Leveraged
16 Finance Committee?
17 A. Yes.
18 Q. And this is the -- below that \$118
19 million total on page 16 is the detail
20 concerning the actions or restructuring
21 events that will generate the \$118 million in
22 synergies?
23 A. I wouldn't say the detail, but
24 bullet points where they think the
25 savings/synergies is going to come from.

Page 221

1 Smith
2 Q. And these were the synergies being
3 presented to the Leveraged Finance Committee
4 as those that would pertain to the Coleman
5 acquisition, correct?
6 A. Yes.
7 Q. Do you know if any of the items
8 that are identified, the bullet point items
9 identified there originated with Coleman
10 company management?
11 A. I wasn't part to any of that. I
12 have no idea.
13 Q. Do you know if any of the ideas
14 listed there originated with my client,
15 Coleman (Parent) Holdings?
16 A. No, no idea.
17 Q. Do you know if any of the items
18 listed on the top of page 116 concerning
19 potential Coleman synergies originated with
20 McAndrews & Forbes?
21 A. No idea.
22 Q. Or Mr. Perelman personally?
23 A. No idea.
24 Q. Mr. Gittes?
25 A. No idea.

Page 222

1 Smith
2 Q. Or Jerry Levin?
3 A. No idea.
4 Q. I think I mispronounced his name.
5 Jerry Levin.
6 Do you know who Jerry Levin is?
7 A. Yes, I do.
8 Q. And in March of 1998, the first
9 part of 1998 he was the chief executive
10 officer of Coleman company, correct?
11 A. I believe so.
12 Q. Did you ever have any discussions
13 with Jerry Levin concerning potential
14 synergies?
15 A. Not until after he was in charge of
16 the Sunbeam.
17 Q. After he became chief executive
18 officer of Sunbeam you had some discussions
19 with him about synergies?
20 A. A variety of discussions.
21 Q. But prior to the funding of the
22 senior loan to Sunbeam, you had no
23 discussions with Mr. Levin --
24 A. No discussions.
25 Q. -- concerning potential synergies?

Page 223

1 Smith
2 A. I never met the man.
3 Q. Did you have discussions with any
4 member from Coleman company regarding
5 potential synergies before the senior loan
6 closed?
7 A. I did not.
8 Q. Anybody with Coleman (Parent)?
9 A. I did not.
10 Q. Or McAndrews & Forbes?
11 A. I didn't.
12 Q. Do you remember anyone at the
13 Leveraged Finance Committee -- excuse me.
14 Do you remember anyone at the
15 Leveraged Finance Commitment Committee's
16 meeting saying that with respect to the
17 potential Coleman synergies, we're relying on
18 Coleman management for those concepts or the
19 values associated with them?
20 A. No.
21 Q. Do you recall there being
22 discussion at the Leveraged Finance
23 Commitment Committee's March 20 meeting
24 concerning the fact that the funds raised
25 through the convertible debenture offering

Page 224

1 Smith
2 had been increased from 500 million to \$750
3 million?
4 A. I think it came up during the
5 meeting.
6 Q. You have expressed the view that
7 that was a positive development with respect
8 to the security that the senior lenders had,
9 correct?
10 A. Yes.
11 Q. Was that, is that view also
12 expressed at the Leveraged Finance Commitment
13 Committee's meeting?
14 A. I don't know about directly, but if
15 there is less debt and more junior capital,
16 that's always, that's always a positive from
17 the lender's point of view.
18 Q. Let me direct your attention to
19 page 2 of this memo.
20 A. Page 2.
21 Q. It has Bates number MS 25831.
22 Do you see that?
23 A. Uhm-hmm, yes.
24 Q. There is a box at the bottom, it
25 says "Expected economics."

Page 225

1 Smith
2 Do you see that?
3 A. Uhm-hmm.
4 Q. Above that there is a statement in
5 typed text that reads "We're asking the
6 committee to approve underwriting 2 billion
7 in senior secured credit facilities"?
8 A. Yes.
9 Q. And underneath that there are two
10 boxes, one with the word "April" handwritten
11 in and then an arrow to another box that has
12 the word "mid-May," the words "mid-May"
13 written in it.
14 Do you see that?
15 A. Yes.
16 Q. Is that your handwriting?
17 A. Yes.
18 Q. What is that a reference to?
19 A. The syndication timetable.
20 Q. And does April mean?
21 A. Starting April.
22 Q. What does mid-May refer to?
23 A. Mid-May when it finishes up.
24 Q. And that would be the point by
25 which Morgan Stanley's participation in the

Page 226

1 Smith
2 Sunbeam loan would be reduced to the 50 to
3 \$60 million range that you referred to
4 previously?
5 A. Yes, that is when the syndication
6 should be completed.
7 Q. Now, there is several notes made in
8 or around the box that is labeled "Expected
9 Economics."
10 Do you see that?
11 A. I do.
12 Q. Are those your notes again?
13 A. Yes, they are.
14 Q. Can you interpret them for me?
15 A. The -- I think this was trying to
16 go ahead and come up with or play with how
17 much in terms of fees that Morgan Stanley
18 would make for the, for entering into this
19 underwriting.
20 Q. And what does this show?
21 A. Well, let's see. I think in the
22 memo it shows 5-1/2 to 6. My handwriting is
23 6 to 9. For whatever reason I had 5 -- 8-1/2
24 to 9-1/2, just doing, playing around with the
25 numbers in terms of the total compensation

Page 227

1 Smith
2 for us for taking 40 percent of this loan.
3 Q. Does that include, does Morgan
4 Stanley receive additional fees when the loan
5 is syndicated?
6 A. No, no.
7 Q. Mr. Smith, let me show you what
8 we're marking as CPH Deposition Exhibit
9 Number 153. It's another version, another
10 copy of your March 19 memorandum and another
11 copy of the March 20 memorandum to the
12 Leveraged Finance Committee. It bears Bates
13 number Morgan Stanley 18885 through 19 --
14 excuse me -- 18942.
15 (Coleman (Parent) Holdings Exhibit
16 153, document bearing Bates number
17 Morgan Stanley 18885 through 18942,
18 marked for identification, as of this
19 date.)
20 Q. My question, sir, is whether you
21 can identify the handwriting on the first
22 page of this exhibit?
23 A. I cannot.
24 Q. It is not your handwriting?
25 A. Not mine.

Page 228

1 Smith
2 Q. Not any portion of it?
3 A. I haven't looked through every
4 page, but certainly not the first page.
5 Q. I'm just talking about the first
6 page.
7 Did you attend any -- did you
8 understand Morgan Stanley assisted Sunbeam in
9 connection with the marketing of the
10 convertible debentures?
11 A. Yes.
12 Q. Morgan Stanley was the sole
13 underwriting with respect to the convertible
14 debentures, correct?
15 A. I believe so.
16 Q. And a road show was held to assist
17 Sunbeam in marketing those securities,
18 correct?
19 A. Yes.
20 Q. Did you attend any of the road show
21 presentations?
22 A. I don't believe so.
23 Q. Are you aware of any statements
24 made subsequent to the issuance of the March
25 19 press release, by either Morgan Stanley or

Page 229

1 Smith
2 by Sunbeam representatives, that attempted to
3 minimize the significance of the March 19
4 press release to potential investors and
5 convertible debentures?
6 A. No, I wasn't part of.
7 Q. No one ever reported such
8 statements were being made to you?
9 A. I didn't know.
10 Q. After the March 19 press release,
11 sir, did you think it was especially
12 important for Morgan Stanley to track Sunbeam
13 sales activity in the closing days of the
14 quarter?
15 A. I thought it was important to
16 continue and complete our due diligence
17 before we close the loan.
18 Q. Did you get any undated information
19 after the March 19 press release concerning
20 Sunbeam's efforts to achieve sales at least
21 as great as the first quarter of 1997; for
22 example, a report on how many sales had been
23 made since the March 19 press release?
24 A. I don't recall seeing anything like
25 that.

Page 230

1 Smith
2 Q. Did you request daily reports on
3 Sunbeam sales activities?
4 A. I did not. I don't know if the
5 team requested it.
6 Q. Did you receive any reports between
7 the March 19 press release and the closing of
8 my client, the sale of my client's interest
9 in Coleman company, concerning the status of
10 Sunbeam's first quarter sales efforts?
11 A. I don't remember what I got or what
12 the team got.
13 Q. So between -- let me focus your
14 attention to the time period I'm talking
15 about.
16 Between March 19, 1998 and March
17 30, 1998 do you recall receiving any
18 information concerning the status of
19 Sunbeam's sales activities subsequent to
20 March 19?
21 A. I don't -- I remember -- I don't
22 recall getting anything written, but I think
23 members of the teams who were spending time
24 with the company -- maybe I should have said
25 it before, it wasn't just us.

Page 231

1 Smith
2 We focused a hundred percent on the
3 Morgan Stanley efforts. We have two partners
4 here, First Union, Bank of America, going
5 through the same thing. So they, so
6 everybody I think is talking about this and
7 we're thinking about it.
8 And I don't remember any pieces of
9 paper or being part of any particular
10 conversations myself with anybody from the
11 company.
12 Q. Well, let me make sure we're clear
13 on this. Regardless of what the source was,
14 whether it was Sunbeam, Morgan Stanley, Bank
15 of America or First Union or someone else, do
16 you recall whether you received any
17 information subsequent to Sunbeam's March 19
18 press release, prior to the closing of the
19 acquisition of my client's interest in
20 Coleman company on March 30, relating to
21 Sunbeam's sales efforts between March 19 and
22 March 30?
23 A. I don't remember anything specific.
24 Q. Do you remember anything generally?
25 A. No

Page 232

1 Smith
2 Q. Did you instruct anyone to contact
3 any of the customers that were listed on CPH
4 Exhibit Number 152, sir, to find out what
5 their plans were for making purchases from
6 Sunbeam?
7 A. I would not, that would not have
8 been my function.
9 Q. Do you know whether anyone from
10 Morgan Stanley was asked to do that?
11 A. I do not know.
12 Q. Do you disagree, sir, that on
13 monitoring Sunbeam's end of the quarter sale
14 effort should have been Morgan Stanley's
15 highest priority at that point in time?
16 MR CLARE: I object to the form
17 of the question, argumentative.
18 A. I guess I do disagree.
19 Q. Why?
20 A. Because I think that is one part of
21 the continuing due diligence that we were
22 performing right up until the, right up until
23 the end.
24 Q. As you sit here you don't have any
25 recollection of getting any information from

Page 233

1 Smith
2 any source, including the Morgan Stanley due
3 diligence team, relating to Sunbeam's sale
4 efforts between March 19 and March 30,
5 correct?
6 A. No
7 Q. You don't have any recollection of
8 that?
9 A. No, I do not. But again the team,
10 the big team is there doing that work and I
11 have a lot of confidence in the team all the
12 way from the leveraged finance people to the
13 John Tyree and people from the credit
14 department, so that I think the firm was ably
15 served by those folks and its efforts to
16 parse through this.
17 Q. Are you aware, sir, that the agenda
18 prepared by the due diligence team for -- are
19 you familiar with the concept of bring-down
20 due diligence?
21 A. Yes, I am.
22 Q. And what does that term mean to
23 you?
24 A. Just before you close, to get on
25 the phone with the company, maybe sometimes

Page 234

1 Smith
2 their auditors, to make sure and have the
3 opportunity to ask them kind of the last
4 questions, if there has been any changes from
5 what we all thought had been going on in the
6 last -- since the last time we did it.
7 Q. Were you advised by anyone that
8 Sunbeam's -- that Morgan Stanley's bring-down
9 due diligence agenda was revised after March
10 19 to omit the subject of Sunbeam's views
11 concerning its prospects for the second
12 quarter of 1998?
13 MR. CLARE: Object to the form of
14 the question, lack of foundation. I think it
15 also assumes facts not in evidence. You can
16 answer.
17 A. No, no knowledge at all.
18 Q. No one told you that the due
19 diligence team had been told not to make
20 inquiry into Sunbeam's views of its prospects
21 for the first -- second quarter of 1998 after
22 the March 19 press release was issued?
23 MR. CLARE: Same objections.
24 A. Nobody told me that.
25 Q. Do you think that would be an

Page 235

1 Smith
2 appropriate subject to drop?
3 A. I would be flabbergasted if that
4 ever happened to Morgan Stanley.
5 Q. Do you think that would be an
6 important area to keep inquiring about right
7 up to the time the loan closed?
8 A. I would think that would be part of
9 the continuing due diligence process until
10 the loan closed.
11 Q. So you would be shocked if that
12 subject was specifically omitted from the
13 bring-down due diligence agenda?
14 A. Again I'm not part of the
15 bring-down due diligence agenda process, but
16 I would be shocked that that wasn't part of
17 the continuing due diligence.
18 And again I have no knowledge of
19 that document that you're referring to or
20 what was in or taken out.
21 Q. But you didn't participate in any
22 discussion where people discussed dropping
23 that subject?
24 A. No. No, I had no knowledge of it.
25 Q. Well, the senior loan closed on

Page 236

1 Smith
2 March 30, 1998, correct?
3 A. I believe that's right.
4 Q. Did Morgan Stanley make efforts to
5 move forward with the syndication process at
6 that point?
7 A. Yes.
8 Q. Had efforts been undertaken even
9 prior to the closing of the loan, to initiate
10 the syndication process?
11 A. No.
12 Q. And why is that?
13 A. We didn't have enough time. We
14 were too busy scrambling to complete the due
15 diligence, do all the documentation, complete
16 the loan agreement, which was essentially
17 before we could advance the money.
18 There was a time line, I mean a
19 deadline, so that was the primary focus.
20 Once that was completed, then we shaped our
21 resources to putting together, to put
22 together materials to start the syndication
23 of the loan.
24 Q. When did that start?
25 A. Probably the day after we closed

Page 237

1 Smith
2 the loan.
3 Q. Who was responsible for that
4 effort?
5 A. It was under my supervision, then
6 assisted by the team of Mr. Hart, I guess Mr.
7 Rankin by then, and then we also had our two
8 other banks that were taking pieces of the
9 underwriting.
10 Q. First Union and Bank of America?
11 A. First Union, Bank of America.
12 Q. Were the efforts to syndicate the
13 loan, the senior loan, disrupted?
14 A. I'm sorry, were they --
15 Q. Disrupted? Did something happen to
16 affect the plan for completing the
17 syndication of the loan by mid-May?
18 A. Yes.
19 Q. What was that?
20 A. Well, we had to -- we had to right
21 the book and continue to get information. We
22 were trying to remember what happened, it was
23 a long time ago, six years ago, is that bits
24 of information came out and then we started
25 getting more and more, had more and more

Page 238

1 Smith
2 questions for the company back and forth.
3 Q. Do you recall that, do you recall
4 if something happened that affected your
5 objective of completing the syndication by
6 mid-May?
7 A. I don't remember specifically, but
8 there were, as I remember there were a series
9 of events that precluded us from going right
10 when we wanted to, which in the normal course
11 would have been two to three weeks after we
12 closed the loan.
13 Q. Do you recall that Sunbeam issued a
14 press release on or about April 3, 1998 in
15 which it announced that it had failed to
16 exceed first quarter 1997 sales results?
17 A. I'm sure I saw it, but I don't
18 remember what it said.
19 Q. Did that have, did that
20 announcement have any effect on the timing
21 for the syndication?
22 A. I think that it was part of the,
23 part of the series of events. It could have
24 been the first series of events. Part of the
25 series is the 3rd is only four days after the

Page 239

1 Smith
2 fact. So we are in the midst of preparing
3 our offering memorandum and the rest.
4 Q. I just want to try and understand
5 what effect that announcement had, if any, on
6 the timing.
7 The objective was to complete the
8 syndication by mid-May, correct, that is what
9 is being told to the Leveraged Finance
10 Committee?
11 A. Yes.
12 Q. Sunbeam issues a press release on
13 April 3 announcing that it had failed to
14 exceed first quarter 1997 sales results?
15 A. Uhm-hmm.
16 Q. That announcement in and of itself,
17 did that have any effect on your views
18 concerning the achievability of the May 15
19 date for completing the syndication?
20 A. Not then.
21 Q. Do you recall that in the first
22 part of May Sunbeam and the three banks
23 agreed to amend the senior loan agreement to
24 reduce the amount of the financing being
25 provided?

Page 240

1 Smith
2 A. Yes.
3 Q. What precipitated that change in
4 the loan arrangement?
5 A. Let's see. I guess they were able
6 to raise more on the convertible so they
7 didn't need quite so much bank debt. We --
8 and I think they revised the amount of
9 revolving credit they think they needed, so
10 we were able to reduce the bank loan
11 accordingly. I think that's what happened
12 then. Plus --
13 Q. I'm sorry, did you have something
14 else you wanted to say?
15 A. No.
16 Q. Did Sunbeam's first quarter 1998
17 results have any bearing on the amendment to
18 the credit agreement to reduce the amount of
19 the financing?
20 A. It was part of the process.
21 Q. Did the fact that Sunbeam had
22 failed to exceed first quarter 1997 sales
23 cause the banks to request Sunbeam to reduce
24 the amount of the financing from 2 billion to
25 1,700,000,000?

Page 241

1 Smith
2 A. No, I think that is a simplistic
3 version of it. I think as more and more
4 information came out and more and more work
5 was done that the banks got, and then the
6 company agreed to reduce the amount of the
7 facilities.
8 Q. What I'm trying to understand, sir,
9 is whether -- Sunbeam, as we discussed,
10 raised an additional \$250 million through its
11 convertible debenture?
12 A. Right.
13 Q. What I'm trying to understand is
14 whether that was the reason why the senior
15 loan facility was reduced by \$300 million, or
16 whether there was something about the
17 Sunbeam's financial performance that caused
18 the banks to reduce the amount of the
19 financing?
20 A. I'm sorry, I misunderstood your
21 question. The, they only needed so much
22 money to make these acquisitions and the --
23 if they were able to raise more money in the
24 convertible market, then they needed less
25 bank debt, so as -- and the company made the

61 (Pages 238 to 241)

Page 242

1 Smith
2 decision to take more of the convertible, and
3 so consequently we reduced the bank debt.
4 Q. So the reason why the bank debt, at
5 least as far as you can recall, was reduced
6 from 2 billion to 1,700,000,000 was the fact
7 that Sunbeam had raised additional funds
8 through the convertible debenture offering
9 and didn't need the \$2 billion until the
10 financing?
11 A. Yes.
12 Q. Let me show you what we are marking
13 as CPH Deposition Exhibit Number 154, sir.
14 (Coleman (Parent) Holdings Exhibit
15 154, document bearing Bates number FUNB
16 188 through 189, marked for
17 identification, as of this date.)
18 Q. CPH Exhibit Number 154 is a
19 two-page document that is a memorandum from
20 Thomas L. Molitar and Andrew J. Gamble to
21 distribution, and bears Bates number FUNB 188
22 through 189.
23 I assume you have never seen this,
24 sir, but correct me if I'm wrong.
25 A. I have never seen this, this is not

Page 243

1 Smith
2 one of ours.
3 Q. Do you know who Tom Molitar and
4 Andrew Gamble are?
5 A. Yes.
6 Q. Who are they?
7 A. They worked at First Union. And
8 Tom was on the leveraged finance as corporate
9 side, corporate lending side, and Andrew,
10 Andy was on the syndication side.
11 Q. Did you work with them in
12 connection with the loan to Sunbeam?
13 A. I did.
14 Q. Do you see there are a series of
15 numbered paragraphs in this memorandum?
16 A. I do.
17 Q. I want to focus your attention on
18 the second one.
19 A. Uhm-hmm.
20 Q. It starts with the statement "The
21 parties have agreed to amend the credit
22 agreement that will reduce FUNB exposure from
23 600 million to 510 million."
24 Do you see that statement?
25 A. I do.

Page 244

1 Smith
2 Q. I would like you to explain to me
3 the different items, bullet point items that
4 appear below that with respect to the changes
5 to the Sunbeam senior loan arrangement.
6 A. Okay.
7 Q. The total credit line, you see that
8 bullet?
9 A. Uhm-hmm.
10 Q. From 2 billion to 1.7 billion, that
11 reflects the \$300 million reduction we are
12 talking about?
13 A. Yes.
14 Q. The second item, LIBOR spread, 150
15 EPS to 225 EPS?
16 A. Yup.
17 Q. Can you explain that to me?
18 A. This is the LIBOR, the spread over
19 LIBOR. So originally LIBOR plus 150 loan to
20 LIBOR plus 225 loan. I'm guessing here
21 because this isn't mine, I haven't seen this
22 before, but that's how I --
23 Q. That's how you interpret this?
24 A. Uhm-hmm.
25 Q. And the reference here is to the

Page 245

1 Smith
2 interest rate being charged?
3 A. Yes, to the company.
4 Q. And this reflects an interest rate
5 increase of about three-quarters of a
6 percent?
7 A. It does.
8 Q. Do you recall why that change was
9 made?
10 A. I think what happened here, I guess
11 this is refreshing my memory a little bit, is
12 they came out with some new numbers and new
13 projections and so the banks were, thought it
14 important to change the rate to enhance their
15 ability to sell this.
16 Q. What -- could you move your hand
17 down from your face, sir. I'm sorry.
18 What power did the banks have under
19 the credit agreement to increase the interest
20 rate being charged on the loan?
21 A. I can't remember whether we had --
22 I don't know what contractual right we had,
23 but... So the, our ability to get them to
24 agree to this, I don't remember all of the
25 bells and whistles that we did to make this

62 (Pages 242 to 245)

Page 246

1 Smith
2 happen.
3 Q. Do you remember if it was, if there
4 was, whether Sunbeam resisted the bank's
5 desire to increase the interest rate on the
6 senior loan?
7 A. I think they negotiated, but I
8 don't see resisted here.
9 Q. You believe it is possible the
10 banks had the right to impose an interest
11 rate increase?
12 A. No, I don't think so. I don't
13 think it was that easy.
14 Q. So you think there was a subsequent
15 negotiation with Sunbeam that resulted in an
16 increase in the interest rate?
17 A. Yes.
18 Q. What was the reason why the banks
19 wanted to increase the interest rate?
20 MR. CLARE: Object to the form of
21 the question, calls for speculation with
22 regard to the other banks.
23 MR. MARKOWSKI: Let me rephrase
24 the question.
25 Q. Did Morgan Stanley Senior Funding

Page 247

1 Smith
2 support the increase in the interest rate on
3 the senior loan?
4 A. Yes, we did.
5 Q. And why?
6 A. To assist our ability to sell the
7 loan into the market.
8 Q. So it would help Morgan Stanley
9 Senior Funding and the others banks sell off
10 their, sell off portions of their loan to
11 Sunbeam to other banks?
12 A. Yes.
13 Q. The last statement in this section
14 says "Our up-front fees have been affected by
15 the facility reduction. Those are effective
16 up-front fees, now 132 basis points up from
17 112.5 basis points."
18 Do you see that?
19 A. Yes, I do.
20 Q. Would it have been typically the
21 case that if a facility was reduced so
22 quickly after the loan is made, that the
23 up-front fees would be adjusted accordingly?
24 MR. CLARE: Object to the form of
25 the question.

Page 248

1 Smith
2 A. Well, I guess I would argue that
3 the up-front fees were adjusted. All that
4 happened was they reduced the amount of the
5 facility from 2 to 1.7 and the lenders kept a
6 piece.
7 Q. Right. The up-front fees are
8 typically a percentage of the loan amount,
9 correct?
10 A. Right, the original commitment.
11 Q. And here the commitment is being
12 reduced?
13 A. Right.
14 Q. Shortly after the loan was made?
15 A. Uhm-hmm.
16 Q. Would it typically be the case that
17 the up-front fees would be adjusted under
18 those circumstances or not?
19 A. Well, this is an unusual situation,
20 so I don't know if there is anything
21 customary or normal.
22 The company in Canada, as you
23 probably know, reduced the amount of these
24 commitments at any time and they, as part of
25 this process they elected to do this and

Page 249

1 Smith
2 that's what happened.
3 Q. Did Sunbeam save any money by
4 reducing the amount of the loan commitment
5 from a billion 7 to -- excuse me, from 2
6 billion to 1,700,000,000?
7 MR. CLARE: Objection, no
8 foundation.
9 A. Well, what happened is they reduced
10 their revolving credit I guess and so they
11 didn't have to pay any unfunded on whatever
12 they reduced that to.
13 Q. Sunbeam didn't draw down the full
14 \$2 billion or the full \$1.7 billion
15 immediately, correct?
16 A. No.
17 Q. Were there fees being charged or
18 interest being charged on the unfunded
19 portion of the facility?
20 A. Yes.
21 Q. So by reducing the facility from 2
22 billion to 1.7 billion would Sunbeam realize
23 a savings on those fees?
24 A. They would realize a savings on
25 those fees, but the net total financing fees

Page 250

1 Smith
2 on an annual basis would have gone up because
3 of a change in the interest rates. It would
4 far eclipse that savings.
5 Q. There is a statement -- let me
6 direct your attention to the second page,
7 Exhibit 154.
8 After the last numbered paragraph
9 there is a paragraph that starts with the
10 following sentence: "As a result of the
11 amendments to the credit agreement, we
12 believe that this facility will be syndicated
13 as originally expected."
14 Do you see that statement?
15 A. I do.
16 Q. Was that your view also as of May
17 8, 1998?
18 A. Oh, gee, I have no idea.
19 Q. Mr. Smith, I'm going to show you
20 what we're marking as Coleman (Parent)
21 Holdings Deposition Exhibit Number 155. It's
22 a document, it bears the cover page Sunbeam
23 \$1.7 Billion Senior Secured Credit Facilities
24 Confidential Information Memorandum, it is
25 dated June 1998, and it bears Bates number

Page 251

1 Smith
2 FUNB 10440 through 10557.
3 (Coleman (Parent) Holdings Exhibit
4 155, document bearing Bates number FUNB
5 10440 through 10557, marked for
6 identification, as of this date.)
7 Q. My first question, Mr. Smith, is
8 whether you can identify this document for
9 me.
10 A. It appears to be the offering
11 memorandum that was put together for the
12 syndication of the \$1.7 billion Sunbeam loan.
13 Q. And the purpose of this would have
14 been what?
15 A. The purpose of this would have been
16 to provide this information to banks and
17 institutional investors who are interested in
18 buying, in being part of the syndicate of
19 this loan.
20 Q. Let me direct your attention to
21 page number 8 of the document.
22 A. I'm sorry.
23 Q. Page number 8 of the document.
24 A. Okay.
25 Q. There is a calendar.

Page 252

1 Smith
2 A. Uhm-hmm.
3 Q. A schedule, correct? Timetable?
4 A. Yes.
5 Q. And the timetable reflected here is
6 the timetable for completing the syndication,
7 correct?
8 A. Yes.
9 Q. And it starts with a lender meeting
10 on June 9 and it ends with the closing and
11 funding on July 9, correct?
12 A. Yes.
13 Q. Now, this schedule is somewhat
14 different from the one that you were
15 contemplating when the loan was approved by
16 the Leveraged Finance Committee on March 20,
17 correct?
18 A. Yes, it is.
19 Q. And what caused this change in
20 schedule to a target of completing the
21 syndication by July 9 instead of mid-May?
22 A. The biggest change, as I remember,
23 was that the company came up with a new set
24 of projections.
25 Q. And how did that affect the timing?

Page 253

1 Smith
2 A. Well, we wanted to make sure, this
3 is now the three lenders, the three
4 underwriters, that they understood completely
5 what was going on, that they had a full
6 knowledge of what was transpiring here, and
7 that we felt very comfortable based on the
8 due diligence and continued talks with the
9 company that these projections were in fact
10 achievable, and so we -- because we wanted
11 that to stop moving around, so we had
12 something we could incorporate into the
13 offering memo to get that into the market.
14 Q. As of the time this document was
15 provided to potential participants in the
16 syndication, was it your view personally that
17 it was still going to be possible -- well,
18 that it would be possible to complete the
19 syndication by July 9?
20 A. Yes.
21 Q. Was it your expectation at that
22 point in time also that Morgan Stanley would
23 be able to reduce its participation in the
24 Sunbeam loan to the 50 to \$60 million
25 arrangement that you identified as your

Page 254

1 Smith
2 objective previously?
3 A. Yes. And I believe it was also the
4 view of the other two underwriters.
5 Q. Let me direct your attention to
6 page 25.
7 A. 25? Okay.
8 Q. You see the second paragraph on
9 page 25 reads as follows, at least the
10 starting part of it. "On May 11, 1998
11 Sunbeam announced the integration with
12 expected annual cost savings of \$253 million
13 to be achieved by the middle of 1999.
14 "The company also announced that it
15 expects to achieve incremental revenue of
16 \$265 million as a result of revenue
17 opportunities."
18 Do you see those two statements?
19 A. I do.
20 Q. Do you know what the source was of
21 the statement here that the company expected
22 to achieve \$253 million in cost savings and
23 \$265 million in enhanced revenue through its
24 acquisitions?
25 A. The source I believe was Sunbeam

Page 255

1 Smith
2 because they are intimately, they, the
3 company, the issuer, intimately involved when
4 they put the offering memorandum together.
5 They provided a lot of the information. In
6 fact, most of the information, especially the
7 nonpublic information, this is a nonpublic
8 document. And they review all of this,
9 oftentimes have their lawyers review it. So
10 this to the best of my recollection came
11 right from there.
12 Q. Do you know that, are you aware
13 that Sunbeam was working with Coopers &
14 Lybrand in the spring of 1998 to develop a
15 restructuring plan for Sunbeam and the three
16 companies that it had acquired?
17 A. I, I was aware that they were
18 working on it. I'm not a hundred percent
19 sure when that happened in the March, April,
20 May context.
21 Q. Are you aware that it was Coopers &
22 Lybrand that estimated that the company could
23 expect to achieve \$253 million in cost
24 savings and \$265 million in enhanced revenues
25 as a result of its three acquisitions?

Page 256

1 Smith
2 A. I may have known that then, but
3 frankly I had forgotten it now.
4 Q. The 253 in cost savings and \$265
5 million in revenue opportunities, are those
6 synergies from the three acquisitions?
7 Is that what this is describing?
8 A. I can't remember.
9 Q. Do you recall that Sunbeam in the
10 spring of 1998 announced that it expected to
11 achieve synergies resulting from its
12 acquisitions of Coleman company, Signature
13 Brand, First Alert that substantially
14 exceeded the synergies that were estimated
15 when the acquisitions were first announced?
16 A. No
17 Q. Mr. Smith, let me show you what
18 we're marking as CPH Deposition Number 156.
19 It's a document that bears the cover page
20 Sunbeam 1.7, 1,700,000,000 Senior Secured
21 Credit Facilities Lender Meeting June 9,
22 1998, it bears Bates number FUNB 10583
23 through 10650.
24 (Coleman (Parent) Holdings Exhibit
25 156, document bearing Bates number FUNB

Page 257

1 Smith
2 10583 through 10650, marked for
3 identification, as of this date.)
4 Q. Have you seen this document before,
5 sir?
6 A. I have.
7 Q. Can you tell me what it is?
8 A. This looks to me to be copies of
9 the slide show that we put on for the loan
10 syndication meeting.
11 Q. Was a loan syndication meeting in
12 fact held on June 9, 1998?
13 A. To the best of my knowledge, yes.
14 Q. Did you participate?
15 A. I was in attendance.
16 Q. Who prepared this document, sir?
17 A. That's an interesting concept. We,
18 the banks would be putting the pages together
19 and then sending them to the company, that
20 would add an awful lot of its comments to
21 check the veracity of the numbers because it
22 was basically their presentation to the
23 banking community, not something for -- it is
24 their document. We assisted.
25 Q. The document itself is actually

Page 258

1 Smith
2 assembled by the bankers; is that correct?
3 A. Assembled I would say in terms of
4 printed, in terms of returns, but the
5 information, the content, the tone and all
6 the rest is really set by the company.
7 Q. And the third page of the document,
8 sir?
9 A. The third page?
10 Q. Has the agenda for the meeting?
11 A. Yes, it does.
12 Q. It indicates that Michael Hart at
13 Morgan Stanley make the initial remarks and
14 also make the concluding remarks, correct?
15 A. Yes.
16 Q. Do you recall if that is in fact
17 what took place that day?
18 A. I believe so.
19 Q. Did you speak at all at the
20 lenders' meeting?
21 A. I don't think so.
22 Q. Do you recall how many banks
23 attended?
24 A. Not specifically, but it was a lot.
25 Many institutions. My guess was there were

Page 259

1 Smith
2 50 to 75 between institutions both in person
3 and on the phone.
4 Q. Was it your expectation at the end
5 of the bankers' meeting that day that Morgan
6 Stanley would still be able to successfully
7 complete the syndication of the Sunbeam loan
8 by July 9?
9 A. Yes, it was.
10 Q. Did you think the bankers' meeting
11 went well that day?
12 A. I think the bankers' meeting went
13 fine. We had \$500 million worth of
14 commitments from some of the major
15 institutional players, so that was a very
16 nice start to the syndication.
17 Q. Who had made initial commitments?
18 A. The testimony I'm remembering now,
19 my recollection might have been people like
20 VKM, Merrill Lynch, Eaton Vance, that type of
21 institution, but I don't remember
22 specifically.
23 Q. What would be the form of the
24 commitment; how would that have been
25 communicated to you?

Page 260

1 Smith
2 A. That would have been communicated
3 over the phone like you do for a bond.
4 Q. Mr. Smith, I'm going to show you
5 what we're marking as CPH Exhibit Number 157.
6 It is a two-page document, it bears Morgan
7 Stanley Bates number 18702 to 703, and it
8 appears to be a printout of a Bloomberg press
9 announcement relating to the loan
10 syndication.
11 (Coleman (Parent) Holdings Exhibit
12 157, document bearing Morgan Stanley
13 Bates number 18702 to 703, marked for
14 identification, as of this date.)
15 Q. Have you seen this document before,
16 sir?
17 A. I don't remember. Let me
18 familiarize myself here. Okay, I have seen
19 this before.
20 Q. What is it?
21 A. It is a -- I guess it is a
22 Bloomberg, right? A Bloomberg article that
23 came out on the 11th of June, was it,
24 regarding the loan and the syndication
25 thereof.

Page 261

1 Smith
2 Q. You are quoted in this, correct?
3 A. It looks like it.
4 Q. Do you remember making the
5 statements attributed to you in this article?
6 A. Yes.
7 Q. Does the article accurately
8 reflect --
9 A. Excuse me, can we turn this off?
10 MR. MARKOWSKI: Sure, we can go
11 off the record.
12 THE VIDEOGRAPHER: The time is
13 3:34 and this completes tape number 2.
14 (Recess taken.)
15 THE VIDEOGRAPHER: The time is
16 3:39, this begins tape number 3 of the
17 videotaped deposition of Mr. Bram Smith.
18 BY MR. MARKOWSKI:
19 Q. Mr. Smith, we were looking at the
20 June 11 Blumberg article, you have it right
21 there.
22 Do you have it in front of you,
23 sir?
24 A. I do.
25 Q. And I believe you indicated that

Page 262

1 Smith
2 the statements that are attributed to you in
3 this article accurately reflect the
4 statements that you made at the time?
5 A. Yes.
6 Q. The third paragraph contains a
7 quote attributed to you that reads: "It is a
8 very good fundamental story, said R. Bram
9 Smith."
10 Do you see that?
11 A. Yes.
12 Q. The very fundamental story that you
13 are referring to there was a reference to the
14 bank syndication?
15 A. No, I was referring to the company,
16 to the Sunbeam story with its financial
17 strength, cash flow, good market condition in
18 many brands.
19 Q. It was still your view as of June
20 11 that Morgan Stanley and the other two
21 banks would be able to successfully complete
22 the syndication by July 9?
23 A. Yes.
24 Q. Now, a couple of paragraphs further
25 down there is a statement that the company is

Page 263

1 Smith
2 being shared by shareholders.
3 Do you see that?
4 A. I do.
5 Q. The fact that there was a
6 shareholder lawsuit didn't affect your
7 thinking with respect to the ability of
8 Morgan Stanley and the other banks that
9 syndicated the senior debt?
10 A. Well, I thought that we would still
11 be able to achieve our targets. I did
12 mention in that paragraph that you cited
13 before that it will be a challenge for some
14 lenders to get approval, and that's part of
15 the reason I thought that it might be a
16 challenge to get some of the numbers,
17 especially the banks to participate in this.
18 But we had the flexibility of
19 increasing the terminal in B, which went to
20 the institutional market, and reducing the
21 amount that went into the bank market, so I
22 think all three of us, it would be ourselves,
23 First Union and Bank of America, felt that we
24 would be able to achieve our syndication
25 targets by the time advertised to, whatever

Page 264

1 Smith
2 you said, July 9.
3 Q. Right. So the shareholder lawsuit
4 didn't affect that in light of the
5 flexibility you had to sell more of the loan
6 to institutional investors?
7 A. I think it made it more of a
8 challenge, but it was still achievable in our
9 view.
10 Q. There is also a statement that
11 Sunbeam stock price had fallen more than 50
12 percent and Sunbeam shares were trading at
13 18-1/2.
14 Do you see that?
15 A. Oh, yes, I do.
16 Q. Do you recall that Sunbeam shares
17 had been higher than even \$50 a share in
18 March of 1998?
19 A. I don't recall that, but I'll take
20 your word for it.
21 Q. The fact that Sunbeam share price
22 had fallen so substantially did not mean that
23 you would be unsuccessful in your efforts to
24 syndicate the bank loan?
25 A. That was not my opinion at the

Page 265

1 Smith
2 time. Again we're looking at this from a
3 senior creditor's point of view. We thought
4 that the cash flow story, the market story --
5 excuse me, the market position story, their
6 balance sheet story and the rest were, made
7 this a very syndicable loan.
8 Q. Clearly Sunbeam's shares had been
9 adversely affected by the news that had been
10 coming out about the company since March of
11 1998, correct?
12 A. It looks like that.
13 Q. But the fact that its share price
14 was being adversely affected did not mean
15 that the senior lending aspect of the March
16 transactions would be adversely affected?
17 A. It doesn't necessarily move in
18 concert.
19 Q. And why is that?
20 A. Well, because banks are senior
21 secured lenders, the leverage was relatively
22 low on a bank basis. The equity is the, are
23 the owners and they take all of the residual
24 risk.
25 So the impact of a high stock price

Page 266

1 Smith
2 or a low stock price on the creditworthiness
3 and the cash flow characteristics of the
4 company are sometimes not related, oftentimes
5 not related.
6 Q. So, for example, Sunbeam's ability
7 to maintain a \$50 share price or \$40 share
8 price wouldn't be something that was
9 necessarily significant to you in evaluating
10 the creditworthiness of Sunbeam for the
11 purposes of the senior loan?
12 MR. CLARE: Object to the form of
13 the question. You can answer.
14 A. When we evaluate the feasibility of
15 doing these loans, we look at the balance
16 sheet and the business position, cash flow
17 and all the rest, not necessarily.
18 What's going on in the stock
19 market, whether the stock goes up or down is
20 not going to affect the balance sheet of the
21 company.
22 Q. There is a statement right below
23 that under Loan Division, the heading Loan
24 Division.
25 Do you see that?

Page 267

1 Smith
2 A. Yes, I do.
3 Q. The loan is divided in a \$750
4 million portion typically sold to
5 institutional investors and a \$950 million
6 piece that is typically sold to banks.
7 That is something you just alluded
8 to, correct?
9 A. Yes.
10 Q. The portion from which you had
11 already received an indication of interest
12 that you referred to earlier in your
13 testimony was which piece of this?
14 A. The 750 million piece.
15 Q. And your recollection today is that
16 you had commitments for about 500 million of
17 that 750?
18 A. Yes.
19 Q. Had you received any commitments
20 for the bank piece?
21 A. Not to the best of my recollection.
22 Normally the banks move much, much slower.
23 Q. Now, two days after this, on June
24 13 Mr. Dunlap was terminated.
25 Do you recall that happening?

Page 268

1 Smith
2 A. Yes, I do.
3 Q. Did that have an effect on the
4 syndication?
5 A. Yup.
6 Q. In what way?
7 A. Well, that would be a -- having the
8 CEO be fired by the board makes it an
9 extremely challenging situation, a lot of
10 uncertainty.
11 Q. Do you know why Sunbeam's board
12 determined that it was appropriate to
13 terminate Mr. Dunlap?
14 MR. CLARE: Objection, no
15 foundation, calls for speculation.
16 A. No.
17 Q. Let me show you a one-page
18 document, sir, that we are going to mark as
19 CPH Deposition Exhibit Number 158, it bears
20 Bates number CPH 1392612 and it is a June 15,
21 1998 article from the American Banker. It
22 bears the headline "Morgan Stanley Secures
23 500 Million Commitment for 1.7 Billion
24 Sunbeam Loan."
25 (Cleman (Parent) Holdings Exhibit

Page 269

1 Smith
2 158, document bearing Bates number CPH
3 1392612, marked for identification, as
4 of this date.)
5 Q. Have you seen this document before,
6 this article before, sir?
7 A. Yup.
8 Q. There are several statements
9 attributable to you in this article.
10 Do they accurately report the
11 statements that you made to the reporter?
12 A. Give me a second and I'll look at
13 it. Okay.
14 Q. This article is dated June 15,
15 1998. Do you know if you made your
16 statements before or after -- the pending
17 question was does the article accurately
18 reflect the statements you made to the
19 reporter?
20 A. Yes.
21 Q. Do you know if you made those
22 statements before or after Mr. Dunlap was
23 terminated?
24 A. Don't remember.
25 Q. As of the time you made these

Page 270

1 Smith
2 statements to the American Banker reporter,
3 were you still optimistic that Morgan Stanley
4 would be able to complete the loan
5 syndication successfully?
6 A. When was he terminated?
7 Q. On June 13, which was a Saturday I
8 believe.
9 A. I think when you say confident we
10 would be able to do this, I think increasing,
11 some concern that that's going to be a
12 challenge.
13 Q. Do you know if this interview took
14 place before the news of Mr. Dunlap's
15 termination --
16 A. I can't remember.
17 Q. -- had been disclosed?
18 A. Can't remember.
19 Q. How did you learn that Mr. Dunlap
20 had been terminated?
21 A. I think I might have gotten a phone
22 call from Bill Strong over the weekend.
23 Q. What did Mr. Strong tell you?
24 A. That he had been, that Mr. Dunlap
25 had been terminated.

Page 271

1 Smith
2 Q. Did he say anything else?
3 A. Not that I, not that I recall. The
4 news was stunning and very new and I can't
5 remember whether they picked an interim CEO
6 or what they were going to do.
7 Q. Did Mr. Strong tell you how he had
8 learned this news?
9 A. I don't recall.
10 Q. Did Mr. Strong tell you why the
11 Sunbeam board had taken this action?
12 A. Not that I recall.
13 Q. Did he offer his thoughts
14 concerning why it may have happened?
15 A. Not that I recall.
16 Q. Did you and Mr. Strong have any
17 discussion about the effect this would have
18 on the syndication?
19 A. Not that I recall, but I'm sure we
20 did.
21 Q. Did Mr. Dunlap's termination have
22 an immediate effect on Morgan Stanley's plans
23 to syndicate the senior loan?
24 A. I'm going to confuse a little bit
25 of the timing here, but pretty shortly or

Page 272

1 Smith
2 during this period we decided, that would be
3 the three of us, the three underwriters
4 decided to cease the syndication of the loan.
5 So did that happen on the 15th or
6 16th or whenever I don't remember, but it was
7 all in that period of time.
8 Q. Let me show you what we're going to
9 mark as CPH Exhibit 159, it's a one-page
10 document, it bears Bates number CPH 1392969.
11 It appears to be an American Banker article
12 dated June 17, 1998, and it bears the
13 headline "Morgan Stanley Withdraws Loan To
14 Sunbeam After CEO's Firing."
15 (Coleman (Parent) Holdings Exhibit
16 159, document bearing Bates number CPH
17 1392969, marked for identification, as
18 of this date.)
19 Q. Have you finished reviewing it,
20 sir?
21 A. I did, uhm-hmm.
22 Q. Have you seen this before?
23 A. I must have. I don't really
24 remember.
25 Q. Are the statements attributed to

Page 273

1 Smith
2 you in this article accurate?
3 A. I don't think so because I'm
4 confused, I don't know what this one
5 statement attributed to me means.
6 "But I would say the flow of
7 information is typical of today's
8 lender-borrower relationship." A better word
9 might be disappointed, it doesn't even flow.
10 I'm quoted to sell down the loan
11 eventually, I think that is kind of probably
12 true. Am I quoted again?
13 I don't understand what the first
14 one means, I don't remember saying that.
15 Q. You don't remember saying "But I
16 would say the flow of information is typical
17 of today's lender-borrower relationship"?
18 A. No, and then certainly not jump the
19 position to the next sentence I'm imputed to
20 have made when a better word might have been
21 disappointed.
22 Q. What about the statement in the
23 next paragraph that "Morgan Stanley as well
24 as the co-syndicators, Bank of America Corp.
25 and First Union Corp., were not giving up on

69 (Pages 270 to 273)

Page 274

1 Smith
2 the deal"?

3 A. That is not my statement.
4 Q. It says "Mr. Smith stressed."
5 A. But again it is not a quote, that's
6 the writer.
7 Q. Do you recall saying to the author
8 of this article that Morgan Stanley and other
9 banks were not giving up on syndication?
10 A. I don't know what not giving up on
11 the deal means. It says here in my copy not
12 giving up on the deal versus not giving up on
13 the syndication, so this is -- the Sunbeam
14 had our money so it is kind of a meaningless
15 concept, that statement.
16 Q. Well, let me direct your attention
17 to the right-hand column.
18 A. Uhm-hmm.
19 Q. One, two, three, four, five, sixth
20 paragraph. It says "Mr. Smith said his team
21 will have to meet with Sunbeam's new
22 management to develop a strategy. Pending
23 that meeting a new run at the market is
24 likely later this year he said."
25 Do you recall making that

Page 275

1 Smith
2 statement?

3 A. I remember alluding to the fact
4 that they had 'o get to the bottom of what
5 was going on and then try to restart the
6 syndication some time, yeah.
7 Q. So your plan as of June 17, in any
8 event, Mr. Smith, was to attempt to go back
9 to the syndication market at some point in
10 the future?
11 A. Yes.
12 Q. Did you have any idea as of this
13 point in time how quickly you would be able
14 to do that?
15 A. No.
16 Q. Did you have any hope concerning
17 how quickly you would be able to do that?
18 A. Any what?
19 Q. Hope.
20 A. I always have hope. Remember what
21 happened here. Dunlap's fired, right, there
22 is nothing about any numbers, so the issue is
23 who is going to be the new CEO and what is
24 going to be the new strategy, so we have to
25 sort that out and see who that's going to be

Page 276

1 Smith
2 and then, and then get ready and take it to
3 market some time later. Can't do it too much
4 in the summer, so that's what I meant.
5 Q. Now, Mr. Levin had been announced
6 as Mr. Dunlap's replacement by this point; is
7 that correct?
8 A. I don't remember. Is that what it
9 says here? If not, it was pretty darn close.
10 Q. I'm looking for it, I think it is
11 in here somewhere.
12 Putting that aside, whether it is
13 in the article or not, do you recall that
14 fairly shortly, within a matter of days after
15 Mr. Dunlap was terminated, Mr. Levin was
16 identified as the new chief executive officer
17 of Sunbeam?
18 A. Yes, in the fourth paragraph. Yes,
19 I thought it was pretty close, within days if
20 not a week.
21 Q. Did you have any reaction to the
22 appointment of Mr. Levin as the replacement
23 for Mr. Dunlap?
24 A. Not really. I didn't know him.
25 Q. Do you recall anyone at Morgan

Page 277

1 Smith
2 Stanley expressing at this point in time
3 objections to Mr. Levin's appointment as the
4 new chief executive officer of Sunbeam?
5 A. Not that I'm aware of.
6 Q. Or any reservations about that?
7 A. Not that I'm aware of.
8 Q. What, sir -- move to a different
9 topic.
10 What did Morgan Stanley Senior
11 Funding do to attempt to assess the potential
12 synergies that Sunbeam could realize by
13 acquiring Coleman company?
14 A. Morgan Stanley Senior Funding --
15 let's see -- took advantage of what the
16 firm's effort had been on trying to
17 understand the synergies.
18 Also at the time we were exploring
19 the synergy of potential with the other two
20 underwriting banks, because again all of the
21 due diligence regarding the loan was done
22 with them as well.
23 Q. Do you agree that the evaluation of
24 potential synergies when combining two
25 companies, like combining Sunbeam and Coleman

Page 278

1 Smith
2 company, is highly dependent on the plans of
3 management?
4 A. The synergy strategy and plans and
5 the execution would rely on the management,
6 yes.
7 Q. So, for example, was Morgan Stanley
8 Senior Funding in a position where it could
9 independently assess the potential synergies
10 that Sunbeam could achieve by combining
11 itself with Coleman company?
12 A. Morgan Stanley, the other two banks
13 would probe the management and ask questions
14 on their synergy plans, remember those are
15 their plans, and therefore test, ask
16 questions to them about their ability to
17 execute it, those synergies on the timetable
18 given.
19 Q. So Sunbeam developed its plan for
20 combining itself with Coleman, correct?
21 A. That is normally how it works, and
22 to the best of my recollection that is how it
23 worked here.
24 Q. And they told Morgan Stanley what
25 their expectations were with respect to

Page 279

1 Smith
2 potential cost savings, correct?
3 A. And First Union and Bank of
4 America.
5 Q. Do you know if any of Sunbeam's
6 plans were estimates of potential cost
7 savings dependent upon ideas or information
8 that Sunbeam obtained from Coleman company?
9 A. I have --
10 MR. CLARE: Objection, foundation,
11 call for speculation. You can answer.
12 A. I have no idea.
13 THE WITNESS: Sorry.
14 Q. Did you have any discussions
15 yourself with Sunbeam on the subject of
16 potential synergies prior to the funding of
17 the senior loan?
18 A. I don't believe so.
19 Q. Did, do you know if Mr. Hart did?
20 A. I don't know.
21 Q. Did Mr. Hart ever tell you that
22 Sunbeam's plans for potential cost savings
23 had originated with Mr. Levin?
24 A. I don't recall that.
25 Q. In connection with the position you

Page 280

1 Smith
2 took with the Leveraged Finance Committee
3 concerning approval of the senior loan to
4 Sunbeam, did you place any weight at all on
5 any information that Sunbeam or Morgan
6 Stanley had received from Mr. Levin
7 concerning potential synergies?
8 MR. CLARE: Objection, foundation.
9 A. Not that I'm aware of.
10 Q. Do you have any basis today, sir,
11 for saying that Morgan Stanley Senior Funding
12 was defrauded as a result of false statements
13 made either to it or Morgan Stanley or to
14 Sunbeam, by Jerry Levin concerning potential
15 synergies?
16 MR. CLARE: Foundation, calls for
17 a legal conclusion.
18 A. I missed that, could you read that
19 back to me.
20 Q. I'll state it again, sir.
21 As you sit here today, do you have
22 any factual basis for -- let me start over.
23 As you sit here today, sir, do you
24 believe that Morgan Stanley Senior Funding
25 was defrauded as a result of statements made

Page 281

1 Smith
2 by Jerry Levin to either Sunbeam, Morgan
3 Stanley or Morgan Stanley Senior Funding
4 concerning potential synergies that Sunbeam
5 might realize by acquiring Coleman?
6 MR. CLARE: Same objections.
7 A. I have no idea.
8 Q. As you sit here today, sir, do you
9 believe that Morgan Stanley Senior Funding
10 was misled by any statements made by Jerry
11 Levin to Morgan Stanley, to Sunbeam, or to
12 Morgan Stanley Senior Funding concerning
13 potential synergies?
14 MR. CLARE: Same objections.
15 A. No idea.
16 Q. Mr. Smith, let me show you what
17 we're marking as CPH Deposition Exhibit
18 Number 160, it is a one-page document that
19 bears Bates number Morgan Stanley
20 confidential 3143.
21 (Coleman (Parent) Holdings Exhibit
22 160, document bearing Bates number
23 Morgan Stanley confidential 3143,
24 marked for identification, as of this
25 date.)

Page 282

1 Smith
2 Q. Have you ever seen this document
3 before, sir?
4 A. I don't know. It doesn't look
5 familiar.
6 Q. Put aside the handwriting. Have
7 you ever seen the typed portion of this
8 document before?
9 A. Yes, I guess I did. I guess I
10 have.
11 Q. When was that?
12 A. I saw it yesterday. And I can't
13 remember if I saw it when, during the
14 transaction.
15 Q. As you sit here today, you have no
16 recollection of seeing this during your work
17 in February and March of 1998?
18 A. No, not really.
19 Q. Do you recognize the handwriting?
20 A. No.
21 Q. Looking at the, this list of 15
22 items, sir, --
23 A. Yes.
24 Q. -- do you know whether in
25 connection with Morgan Stanley Senior

Page 283

1 Smith
2 Funding's evaluation of potential synergies,
3 that any of the items on this list were taken
4 into account?
5 A. I really don't know.
6 Q. You have no knowledge that they
7 were, correct, sir?
8 A. I have no knowledge they were, I
9 have no knowledge they weren't.
10 Q. Do you have any information to
11 suggest that the items on this list in any
12 way affected the price that Sunbeam paid for
13 Coleman company?
14 MR. CLARE: Objection, no
15 foundation.
16 A. No, no idea.
17 Q. Do you have any basis for believing
18 that the items on this list were critical to
19 Sunbeam's assessment of Coleman's fair
20 acquisition value?
21 MR. CLARE: Same objection.
22 A. No idea.
23 Q. Did anyone from Morgan Stanley or
24 Morgan Stanley Senior Funding ever suggest to
25 you, sir, that information that Sunbeam or

Page 284

1 Smith
2 Morgan Stanley had received from Coleman
3 relating to potential synergies was grossly
4 overstated?
5 MR. CLARE: Objection to form and
6 foundation.
7 A. I have no idea.
8 Q. Now, you indicated that the
9 syndication was pulled from the market upon
10 Mr. Dunlap's termination, correct?
11 A. It was shortly thereafter, the
12 Monday or Tuesday after the weekend.
13 Q. And the reason for pulling the
14 syndication from the market was Mr. Dunlap's
15 termination, correct?
16 A. That was the, that was the
17 catalyst.
18 Q. It didn't have anything to do with
19 any information that Coleman company had
20 provided to Sunbeam or to Morgan Stanley
21 relating to potential synergies, did it?
22 A. No, not that I was aware of.
23 Q. Your decision to pull the
24 syndication from the market didn't have
25 anything to do with any information that you

Page 285

1 Smith
2 had, you or anyone else from Morgan Stanley
3 had received from the Coleman company related
4 to the synergies?
5 A. No, it did not.
6 Q. Did you ever express to anyone that
7 Jerry Levin should not continue to serve as
8 the chief executive officer of Sunbeam
9 because he had exaggerated the potential
10 synergies that Sunbeam might achieve by
11 acquiring Coleman company?
12 A. No.
13 Q. Do you have any knowledge
14 concerning what synergies Sunbeam in fact did
15 realize as a result of acquiring Coleman
16 company?
17 A. I do not.
18 Q. Do you have any reason to believe
19 that Mr. Perelman and others at McAndrews &
20 Forbes did not expect Sunbeam to achieve
21 substantial synergies from Coleman company?
22 A. Did you say did not?
23 Q. I'll ask the question over.
24 Do you have any reason to believe
25 that Mr. Perelman or others at McAndrews &

Page 286

1 Smith
2 Forbes or Coleman (Parent) Holdings did not
3 expect Sunbeam to achieve substantial
4 synergies as a result of its acquisition of
5 Coleman company?
6 MR CLARE: Objection, calls for
7 speculation.
8 A. I really have no idea.
9 Q. My question is whether you have any
10 reason to believe that today?
11 A. I have no reason to believe that
12 today.
13 Q. In your communications with the
14 bankers at Bank of America or First Union,
15 did you ever indicate that the synergy
16 figures that MSSF was relying upon in
17 connection with evaluating the senior loan to
18 Sunbeam had originated with Mr. Levin?
19 A. I don't believe so.
20 Q. Or the Coleman company?
21 A. I don't believe so.
22 Q. Or with McAndrews & Forbes?
23 A. I don't believe so.
24 Q. Or with Coleman (Parent) Holdings?
25 A. I don't believe so.

Page 287

1 Smith
2 Q. Mr. Smith, let me show you what
3 we're going to mark as Coleman (Parent)
4 Exhibit 161, a three-page document, it bears
5 Bates number CPH 1010442 to 444.
6 (Coleman (Parent) Holdings Exhibit
7 161, document bearing Bates number CPH
8 1010442 to 444, marked for
9 identification, as of this date.)
10 Q. Earlier today, sir, you were
11 attempting to recall the name of someone at
12 McAndrews & Forbes named Irwin.
13 Was that Mr. Engelman?
14 A. I believe so. Isn't he the CFO?
15 Q. The reason I'm trying to assert, is
16 this is a memo from Mr. Engelman to Mr. Levin
17 concerning plans for a bank meeting on June
18 19.
19 Do you see that?
20 A. Yes.
21 Q. And there is a list of attendees
22 that are anticipated to have attended that
23 meeting from Morgan Stanley, from Bank of
24 America and from First Union.
25 Do you see that?

Page 288

1 Smith
2 A. I do.
3 Q. And you're listed as an attendee,
4 do you see that?
5 A. I do.
6 Q. Do you recall attending a bank
7 meeting on June 19 with representatives of
8 McAndrews & Forbes, Mr. Levin?
9 A. Had a lot of meetings and my guess
10 is I was probably there.
11 Q. Do you recall attending a meeting
12 shortly after Mr. Dunlap's termination at
13 McAndrews & Forbes offices in Manhattan where
14 Mr. Hart, Mr. Smith, with you, Mr. Rankin and
15 Mr. Kitts were present from Morgan Stanley?
16 A. I remember going to McAndrews &
17 Forbes that week. I couldn't swear that
18 those were the fellows in attendance.
19 Q. Mr. Smith, let me show you what
20 we're going to mark for identification as CPH
21 Exhibit Number 162. It's a document that
22 bears Morgan Stanley Bates number 268988
23 through 891 and it's a Bank of America
24 letterhead, memorandum from Deirdre Doyle to
25 John H. Shannahan.

Page 289

1 Smith
2 (Coleman (Parent) Holdings Exhibit
3 162, document bearing Morgan Stanley
4 Bates number 268988 through 891, marked
5 for identification, as of this date.)
6 Q. I'm not going to ask you to read
7 the whole document, sir, but I'm going to
8 refer you to a couple of entries in this
9 document.
10 The first sentence indicates this
11 is a report on a meeting held by McAndrews &
12 Forbes offices on June 1998. Representatives
13 of Bank of America, First Union and Morgan
14 Stanley attended.
15 Do you see that statement?
16 A. Yes, I do.
17 Q. And there is a list of McAndrews &
18 Forbes participants.
19 Do you see that?
20 A. Yes, I do.
21 Q. Does this refresh your recollection
22 concerning your participation in a meeting at
23 McAndrews & Forbes offices on June 1998?
24 Mr. Gittis, Mr. Levin, Mr. Shapiro,
25 Mr. Engelman, Mr. Slotkin and Mr. Lipton of

Page 290

1 Smith
2 Wachtel Lipton were present?
3 A. Yes.
4 Q. Is it your recollection now that
5 you were in fact present at that meeting?
6 A. Yes. I thought you were referring
7 to a different meeting. I don't remember
8 Kitts, for example, being at this meeting.
9 Q. Do you recall -- put the document
10 down for a second, sir.
11 Do you recall at this meeting that
12 Mr. Levin addressed his views of analysis
13 that Coopers & Lybrand had done for Sunbeam
14 relating to potential synergies or cost
15 savings that Sunbeam might realize through
16 the combination of Sunbeam and Coleman
17 company?
18 A. Do I remember him commenting on it?
19 Q. Yes.
20 A. Yes.
21 Q. What do you remember Mr. Levin
22 saying?
23 A. I think -- it is a long time ago.
24 I think he had doubts about how realistic
25 those were.

Page 291

1 Smith
2 Q. Do you remember what words he used?
3 A. No.
4 Q. Do you remember how strongly he
5 expressed his doubts?
6 A. No.
7 Q. Let me direct your attention to the
8 bottom third of the first page of Exhibit
9 162. It starts out, there is a bullet point
10 that starts "In reviewing Dunlap's 1998 EPS
11 expectations for Sunbeam"?
12 A. Yes.
13 Q. I would like you to read beginning
14 there through the bottom of the page.
15 A. Okay.
16 Q. Does this refresh your recollection
17 at all on statements made by Mr. Levin
18 concerning his views of the Coopers & Lybrand
19 synergy analysis?
20 A. Not really. I just remembered at
21 the meeting he was pretty derogatory toward
22 the whole thing. I really can't say that it
23 does jog my memory.
24 Q. Do you recall being advised that
25 Coopers & Lybrand had been fired?

Page 292

1 Smith
2 A. I think I do.
3 Q. And that the company was going to
4 refuse to pay Coopers & Lybrand's fee?
5 A. I think I heard that too. I think
6 I heard that too, yes.
7 Q. And the company was considering an
8 action to recover the fees that Coopers &
9 Lybrand had been paid?
10 A. I don't know about that.
11 Q. And did you understand, sir, from
12 anything Mr. Levin had said concerning
13 Coopers & Lybrand's study, that Mr. Levin was
14 expressing the view that information or ideas
15 that he had provided to Sunbeam concerning
16 potential synergies before the acquisition
17 took place were in any way exaggerated or
18 unreasonable?
19 A. I don't remember him addressing
20 that issue.
21 Q. When you left the meeting did you
22 think that Mr. Levin had confessed to
23 misleading Morgan Stanley --
24 MR. CLARE: Objection to form.
25 Q. -- relating to potential synergies?

Page 293

1 Smith
2 A. I had no, no view on that. I
3 wasn't part of the original synergy
4 discussion way back when. He didn't comment
5 here to the best of my recollection.
6 Q. I'm asking what your take-away was
7 from the meeting.
8 When you walked out did you think
9 that Jerry Levin just told us that he misled
10 Morgan Stanley or Sunbeam concerning the
11 potential synergies that Sunbeam might
12 achieve by acquiring Coleman company?
13 A. That was not my impression.
14 Q. At any point, sir, after Mr.
15 Dunlap's termination were you advised that
16 Coleman (Parent) Holdings wanted to rescind
17 the sale of its interest in Coleman company,
18 get the stock back?
19 A. I think so.
20 Q. What do you recall about that?
21 A. Not much. Basically what you said,
22 that is what they wanted to do.
23 Q. What was Morgan Stanley's or Morgan
24 Stanley Senior Funding's position with
25 respect to whether that was an advisable

Page 294

1 Smith
2 thing to do for Sunbeam?
3 MR. CLARE: Object to the form.
4 A. I don't remember.
5 Q. Do you recall Morgan Stanley or
6 Morgan Stanley Senior Funding taking the
7 position that Sunbeam should refuse to
8 rescind the acquisition of Coleman company?
9 A. No.
10 Q. Do you recall coming to the
11 conclusion that it would adversely affect
12 Morgan Stanley Senior Funding's exposure on
13 the senior loan if Sunbeam agreed to rescind
14 the acquisition of my client's interest in
15 Coleman?
16 A. No, I don't remember.
17 Q. When, sir, did Morgan Stanley --
18 let me ask a foundational question.
19 The Sunbeam senior loan has never
20 been syndicated; is that correct?
21 A. True.
22 Q. When did you finally conclude that
23 it would not be possible to syndicate the
24 senior loan?
25 A. I don't know if I had posed it that

Page 295

1 Smith
2 way. I think probably came to the conclusion
3 you couldn't syndicate it in '98, sometime in
4 the fall, and I don't know when we, when I
5 decided that it would be very problematic to
6 syndicate it in its current form.
7 Q. Do you recall whether you still
8 thought throughout the course of 1999 that it
9 might be possible yet to complete the
10 syndication of the loan?
11 A. I didn't think it would be possible
12 to syndicate the loan in the format that we
13 had.
14 Q. And what do you mean by "the format
15 that we had"?
16 A. As an all senior bank deal.
17 Q. What alteration did you think would
18 be necessary?
19 A. I didn't know what would work, but
20 I knew that you couldn't sell that much bank
21 debt into the bank market, so that the bank
22 debt was reduced by a form of, by form of
23 capital markets, high yield or something.
24 Q. When did you come to that
25 conclusion?

Page 296

1 Smith
2 A. I don't remember.
3 Q. Do you think it was sometime in
4 1999?
5 A. It might have been.
6 Q. It might have been later than that?
7 A. I don't think so. Probably
8 mid-'99.
9 Q. Did you have any continuing
10 responsibility for monitoring the Morgan
11 Stanley Senior Funding loan to Sunbeam after
12 the loan closed in March of 1998?
13 A. The monitoring at Morgan Stanley
14 somebody covered for it.
15 Q. Did you have any continuing
16 responsibility of any sort after March of
17 1998 relating to the loan?
18 A. Yes.
19 Q. What was that?
20 A. That was to -- you said after
21 March, so of course go through the
22 syndication, restructuring, probably said
23 syndicate it, pull it, talk to the other
24 banks and to the -- to Levin about what might
25 be -- what might be done, series of

Page 297

1 Smith
2 amendments and waivers, then my involvement
3 lessens as the credit folks and Mitch Petrick
4 get more and more involved.
5 Q. Mitch Petrick's involvement was on
6 behalf of the credit department?
7 A. No, it was on the part of the fixed
8 income/high yield department. He had some,
9 good experience on workouts, so they wanted
10 to take advantage of that because it migrated
11 from a distribution exercise to a recovery
12 phase.
13 Q. Did you ever communicate in writing
14 after March of 1998 relating to the Sunbeam
15 loan?
16 A. I don't believe so.
17 Q. Did you ever communicate by E-mail?
18 A. I don't believe so.
19 Q. Did you ever receive E-mails after
20 March of 1998 relating to the Sunbeam loan?
21 A. I can't recall.
22 Q. Is it possible that you did?
23 A. I guess some possibility.
24 Q. Did Morgan Stanley Senior Funding
25 have any sort of system for rating the loans

Page 298

1 Smith
2 in its portfolio?
3 A. That was a credit department
4 function, so I don't recall. I mean if it
5 was, it was a credit department function and
6 I don't recall.
7 Q. You don't recall whether there was
8 a rating system of any sort?
9 A. Right.
10 Q. Do you know if the Sunbeam loan had
11 some initial sort of rating or evaluation
12 from the credit department when you first
13 met?
14 A. Not specifically, but as part and
15 parcel they would sign off and have to say
16 that they were okay. I don't -- I can't
17 recall what, if any, rating they put on it
18 because I don't remember when the rating
19 system started there.
20 Q. Before you left Morgan Stanley
21 Senior Funding was there a rating system in
22 place?
23 A. I believe so.
24 Q. How large a portfolio of loans does
25 Morgan Stanley Senior Funding maintain?

Page 299

1 Smith
2 MR. CLARE: Objection. What time
3 period?
4 A. I don't know.
5 Q. Let's say in 1998. Apart from the
6 Sunbeam loan, do you know how large a loan
7 portfolio Morgan Stanley Senior Funding had
8 at that point?
9 A. Not really, can't remember.
10 Q. Was it modest?
11 MR. CLARE: Object to the form.
12 A. I can't recall the numbers. I
13 guess you could ask them.
14 Q. You just don't have a recollection
15 one way or the other?
16 A. Yes, it's a long time ago.
17 Q. Was part of the business strategy
18 of Morgan Stanley Senior Funding to maintain
19 a substantial loan portfolio?
20 MR. CLARE: I object to the form.
21 A. The strategy of Morgan Stanley was
22 to make loans, distribute them, hold a piece,
23 that was the strategy.
24 Q. And the piece that you would hold
25 would be the smallest piece you could

Page 300

1 Smith
2 possibly hold?
3 MR. CLARE: Objection to form.
4 A. No, it would be a meaningful,
5 meaningful piece.
6 Q. The pieces that were held after the
7 initial syndication, were those sometimes
8 later marketed?
9 A. Depending on the price, depending
10 on the amounts, sometimes.
11 Q. You were the president of Morgan
12 Stanley Senior Funding, --
13 A. Uhm-hmm.
14 Q. -- correct, sir?
15 But you didn't have any
16 responsibility with respect to monitoring the
17 performance of the loans in the Morgan
18 Stanley Senior Funding portfolio?
19 A. That was a function that was the
20 responsibility of the credit department.
21 Q. Who in the credit department would
22 be responsible for evaluating the loans in,
23 that were being carried in the Morgan Stanley
24 Senior Funding portfolio?
25 A. I don't know the specific person

Page 301

1 Smith
2 who was tasked with that responsibility, but
3 the person who had the overall responsibility
4 for the credit department to include the loan
5 portfolio was Rick Felix.
6 Q. Were your views sought at any point
7 by the credit department relating to the
8 quality of any of the loans in the MSSF
9 portfolio?
10 A. Yes.
11 Q. Were your views sought concerning
12 the quality of the Sunbeam loan at any point?
13 A. I wouldn't say the quality. Views
14 on what to do, sure, all the time.
15 Q. Was there a point, if there was a
16 point, where Sunbeam -- excuse me, where
17 Morgan Stanley Senior Funding wrote off some
18 portion of the Sunbeam senior loan, took a
19 reserve against it?
20 A. I think there were several points
21 that they took off.
22 Q. Do you remember when that took
23 place?
24 A. No, can't remember.
25 Q. Was your input sought at that time

Page 302

1 Smith
2 when the company first took a --
3 A. Yes.
4 Q. What was done, was there a
5 write-off, was there a reserve?
6 A. It was a mark-to-market so we just
7 wrote it down.
8 Q. Do you recall the amount of the
9 first write-down?
10 A. I do not.
11 Q. Do you recall whether it took place
12 in 1999?
13 A. Do not.
14 Q. Do you recall whether it took place
15 later than that?
16 A. I don't remember.
17 Q. Let me go back to 1998. Do you
18 recall whether Morgan Stanley wrote off any
19 portion of the Sunbeam loan in 1998?
20 A. Don't know. I can't remember.
21 Just can't remember.
22 Q. Have you ever seen any reports
23 relating to how much, if any amounts Morgan
24 Stanley Senior Funding has lost on the senior
25 loan of Sunbeam?

Page 303

1 Smith
2 A. No.
3 Q. Morgan Stanley Senior Funding now
4 owns a substantial portion of Sunbeam's
5 successor, American Household, correct?
6 A. Yes, to the best of my
7 understanding.
8 Q. Do you know at what value Morgan
9 Stanley Senior Funding carries its equity
10 ownership in American Household?
11 MR. CLARE: Objection, no
12 foundation, calls for speculation.
13 A. I have no idea.
14 Q. At the time you left Morgan Stanley
15 do you know what Morgan Stanley Senior
16 Funding's plans were for its investment in
17 American Household?
18 A. No idea.
19 Q. You indicated that Mitch Petrick
20 became involved in aspects of the senior
21 loan, correct?
22 A. The senior loan of Sunbeam, yes.
23 Q. And do you know what the nature of
24 his activities has been?
25 MR. CLARE: Objection.

Page 304

1 Smith
2 A. Regarding the Sunbeam loan?
3 Q. Correct.
4 MR. CLARE: Objection on
5 foundation grounds, calls for speculation.
6 A. Not lately.
7 Q. What was it prior to the time you
8 left Morgan Stanley?
9 A. Don't, can't comment about that.
10 Can comment about that summer he started to
11 get involved with the credit people in terms
12 of the meetings with the other banks and then
13 McAndrew, basically Jerry and the company.
14 Q. That, you refer to "that summer,"
15 referring to the summer of 1998?
16 A. Summer of 1998.
17 Q. Did Mr. Petrick remain involved
18 with Morgan Stanley Senior Funding's loan to
19 Sunbeam through the entire time you were at
20 Morgan Stanley?
21 A. To varying degrees I believe that's
22 true.
23 Q. Do you know if he is still involved
24 today?
25 A. Under supervisory conditions would

Page 305

1 Smith
2 be my guess, but that is speculation on my
3 part.
4 Q. But that's your belief, correct?
5 MR. CLARE: Well, objection on
6 foundation grounds.
7 A. That is my speculation.
8 Q. That was the case when you left
9 Morgan Stanley, correct?
10 A. I believe so.
11 Q. Did Mitch Petrick ever express the
12 view to you that Jerry Levin had misled
13 Morgan Stanley or Sunbeam relating to the
14 potential synergies that Sunbeam could
15 achieve in acquiring Coleman company?
16 A. No, I do not believe so.
17 Q. Was there ever a time, sir, where
18 you were asked to preserve any documents or
19 electronic records you had that related to
20 the Sunbeam transactions?
21 A. I believe there were.
22 Q. Do you recall when that first
23 occurred?
24 A. No.
25 Q. Do you recall who made that, gave

Page 306

1 Smith
2 you that direction?
3 A. I think it would be somebody from
4 the legal department, so I don't have a name.
5 Q. Do you recall if it was shortly
6 after the transactions closed?
7 A. I, my best recollection is it was
8 late '98, but that's just an educated guess.
9 Q. Do you recall getting a written
10 direction?
11 A. I believe so, as well as
12 telephones, calls.
13 Q. What, if anything, did you do to
14 preserve the documents and electronic
15 records?
16 A. I gathered them up, gave them to
17 whomever wanted them.
18 Q. Do you have a recollection as to
19 who you gave them to?
20 A. Not any specific individual. I
21 think it was somebody in the credit
22 department. Excuse me, somebody in the legal
23 department.
24 Q. Did you gather the materials
25 personally?

Page 307

1 Smith
2 A. Part of them were personal, part of
3 them I had my assistant get.
4 Q. Who was your assistant back then?
5 A. I don't remember. The timing, I
6 don't remember who it was.
7 Q. Is it someone who worked solely for
8 you or did she work for other people also?
9 I'm assuming it is a woman, but I
10 may be incorrect.
11 Was it a woman?
12 A. It was a woman and she worked for
13 the group.
14 Q. Did she also work for Mr. Hart?
15 A. Yes, but more indirectly.
16 Q. Do you recall if there were other
17 occasions after that initial inquiry, where
18 you were asked to gather materials you had
19 relating to Sunbeam?
20 A. My memory is faulty, but I would
21 bet that I was asked at least two more times.
22 When I say "I," anybody involved with the
23 Sunbeam transaction.
24 Q. Why do you say that?
25 A. Why do I say everybody?

Page 308

1 Smith
2 Q. No, why do you say it happened at
3 least two more times?
4 A. Just my recollection that
5 periodically something would come up from the
6 legal department, or we get more phone calls
7 saying are you sure you have given us
8 everything, please double-check.
9 Q. Did you update your search, see if
10 you had any new materials that you didn't
11 have before?
12 A. We would research the files and the
13 desks and all.
14 Q. Do you recall whether you received
15 any such inquiry after my client filed this
16 lawsuit against Sunbeam -- against Morgan
17 Stanley -- I'm going to start over.
18 Do you recall whether you received
19 an inquiry from the legal department after my
20 client filed its lawsuit against Morgan
21 Stanley in 2003, concerning whether you had
22 any additional Sunbeam-related documents or
23 electronic records?
24 A. When in 2003 was the suit filed?
25 Q. The spring of 2003.

Page 309

1 Smith
2 A. So I was no longer there.
3 Q. You left Morgan Stanley?
4 A. First of February.
5 Q. February. How many communications
6 or meetings, sir, would you say that you had
7 with Sunbeam management in 1998 after Mr.
8 Dunlap was terminated?
9 A. Probably 12 to 15.
10 Q. So 12 to 15 what, meetings?
11 A. Meetings.
12 Q. How many telephone conversations
13 would you say you had?
14 A. Double that number probably. And
15 let me be clear. Many of those meetings and
16 almost all of those phone calls were
17 conference calls, so there would be myself,
18 two or three people from Morgan Stanley, the
19 folks from the other banks.
20 Q. Were you cautioned at all, sir, by
21 anyone not to maintain a written record of
22 any of your communications with post Dunlap
23 management at Sunbeam?
24 A. No.
25 Q. Did you make an effort to document

78 (Pages 306 to 309)

Page 310

1 Smith
2 in any way the substance of your
3 communications with Sunbeam management during
4 that time period?
5 A. I did not.
6 Q. Why was that?
7 A. There were other members of the
8 team that were there to take the notes and
9 write any memos that we wanted or needed.
10 Q. Who was doing that?
11 A. Again unclear at any particular
12 time, but it would be folks like Michael
13 Hart, Simon Rankin, or maybe a more junior
14 person assigned to our group.
15 Q. In 1998, sir, were you expecting
16 litigation to arise out of the loan that
17 Morgan Stanley Senior Funding made to
18 Sunbeam?
19 A. I personally was not.
20 Q. What about internal communications
21 within Morgan Stanley, Morgan Stanley Senior
22 Funding, sir, were you cautioned not to
23 memorialize in notes or in memos internal
24 communications relating to the Sunbeam
25 transactions?

Page 311

1 Smith
2 A. No
3 Q. Were you instructed to keep any
4 documents and notes or E-mails that you had,
5 that you were generating and receiving in
6 connection with your communications with
7 Sunbeam management, after Mr. Dunlap was
8 terminated?
9 A. I don't remember.
10 Q. It's possible that you were
11 receiving things or generating things
12 relating to your communications with Sunbeam
13 management, but not preserving them --
14 MR. CLARE: Objection.
15 Q. -- during the time period after Mr.
16 Dunlap was terminated?
17 MR. CLARE: Objection, foundation.
18 Calls for speculation.
19 A. I don't think so.
20 Q. Do you think whatever you had or
21 whatever you generated would still exist
22 today?
23 A. If some -- if somebody took it or
24 we turned it in, then they should have it.
25 Is that what you mean?

Page 312

1 Smith
2 Q. Well, I'm asking you whether if you
3 received any written communication of any
4 sort relating to communications with Sunbeam
5 management after Mr. Dunlap was terminated,
6 took any notes relating to any of those
7 communications, whether you believe that
8 those materials should still exist today, or
9 whether in the ordinary course you may have
10 discarded them from time to time?
11 A. I really don't know. Anything I
12 had when we got these requests were turned
13 in.
14 Q. But in between requests if you were
15 receiving things or generating things, were
16 you under instruction to preserve it, or did
17 you think if you had no need for it at that
18 point in time for your personal use you could
19 discard it?
20 A. Don't recall.
21 Q. Are you familiar with Morgan
22 Stanley's policy with respect to document
23 destruction?
24 A. Not really.
25 Q. Are you familiar with Morgan

Page 313

1 Smith
2 Stanley's policy that employees are to
3 discard drafts, notes, notebooks, diaries,
4 telephone logs, message slips and other
5 documents when they are no longer considered
6 useful?
7 A. Yes, I guess I'm aware of that.
8 Q. Is that the policy that you
9 personally followed while you were at Morgan
10 Stanley?
11 A. Got rid of a lot of stuff when you
12 no longer needed it.
13 Q. Do you recall doing that on any
14 occasion relating to the work you did
15 concerning Sunbeam?
16 A. No, I do not.
17 Q. Did you give instructions to the
18 people in your group to maintain any
19 documentation they had relating to any aspect
20 of the work that was being done relating to
21 Sunbeam?
22 A. No, I did not.
23 Q. You have indicated, sir, that you
24 took one trip to Florida, correct?
25 A. I took one trip to Florida in early

Page 314

1 Smith
 2 March, yes.
 3 Q. Any other occasions relating to
 4 work that you did for Sunbeam where you
 5 traveled to Florida?
 6 A. I think on at least one more
 7 occasion.
 8 Q. When was that?
 9 A. I think it was sometime in 1998.
 10 It could have been more, but at least one.
 11 Q. What was the occasion for that
 12 trip?
 13 A. The occasion was a bank meeting for
 14 the three banks and the Sunbeam management.
 15 Q. Do you recall whether that was
 16 before or after Mr. Dunlap was fired?
 17 A. It was after he was fired. This is
 18 with Mr. Levin and the team.
 19 Q. Do you recall whether there were
 20 any other occasions where you visited in
 21 Florida concerning work being done for
 22 Sunbeam?
 23 A. Like I say, at least once, could
 24 have been twice, could have been three times,
 25 but the years kind of blend.

Page 315

1 Smith
 2 Q. Is it the case that before the
 3 loans closed, the only occasion for you to
 4 travel to Florida was your meeting in March?
 5 A. That is the best of my
 6 recollection.
 7 Q. What about other forms of
 8 communication in Florida prior to the closing
 9 of the transaction at the end of March 1998?
 10 MR. CLARE: The State of Florida?
 11 MR. MARKOWSKI: With Sunbeam in
 12 Florida.
 13 A. I thought we went over that a
 14 little bit before, but participate either
 15 partly in some of these conversations,
 16 conference calls with the company.
 17 Q. So there were occasions where you
 18 spoke by telephone with people at Sunbeam?
 19 A. Yes.
 20 Q. Prior to the loan closing?
 21 A. Prior to the closing.
 22 Q. And we have seen your March 5
 23 letter to Mr. Kersh, the highly confident
 24 letter you sent to Mr. Kersh in Florida?
 25 A. Yes.

Page 316

1 Smith
 2 Q. Were there any other occasions
 3 where you corresponded with anyone in Florida
 4 prior to the closing of the loans?
 5 A. You mean Sunbeam in Florida?
 6 Q. Yes.
 7 A. Not to the best of my recollection.
 8 Q. What about receiving materials from
 9 Sunbeam prior to the closing of the loan
 10 transaction?
 11 A. Not to the best of my knowledge,
 12 none.
 13 Q. Sir, when you left the room earlier
 14 while I had a question pending, did you
 15 discuss with Mr. Clare how to respond to the
 16 pending question?
 17 MR. CLARE: I instruct the witness
 18 not to answer the question.
 19 A. So I won't.
 20 MR. MARKOWSKI: I don't have
 21 anything further.
 22 MR. CLARE: Neither do I.
 23 THE VIDEOGRAHER: The time is
 24 4:49 and this completes the videotaped
 25 deposition of Mr. Bram Smith.

Page 317

1 Smith
 2 (Time noted: 4:49 p.m.)
 3
 4 R. BRAM SMITH
 5
 6 Subscribed and sworn to before me
 7 this ___ day of _____, 2004.
 8
 9 _____
 10
 11
 12
 13
 14
 15
 16
 17
 18
 19
 20
 21
 22
 23
 24
 25

Page 318

1
2 **C E R T I F I C A T E**
3 **STATE OF NEW YORK)**
4 : ss.
5 **COUNTY OF NEW YORK)**
6
7 I, PAMELA J. MAZZELLA, RPR, a
8 Notary Public within and for the State
9 of New York, hereby certify:
10 That R. BRAM SMITH, the witness
11 whose deposition is hereinbefore set
12 forth, was duly sworn by me and that
13 such deposition is a true record of the
14 testimony given by the witness.
15 I further certify that I am not
16 related to any of the parties to this
17 action by blood or marriage, and that I
18 am in no way interested in the outcome
19 of this matter.
20 IN WITNESS WHEREOF, I have
21 hereunto set my hand this 1st day of
22 March, 2004.
23
24
25 PAMELA J. MAZZELLA, RPR

Page 320

1
2 through 10557, marked for identification....
3 251:3
4 Coleman (Parent) Holdings Exhibit 156,
5 document bearing Bates number FUNB 10583
6 through 10650, marked for identification....
7 256:24
8 Coleman (Parent) Holdings Exhibit 157,
9 document bearing Morgan Stanley Bates number
10 18702 to 703, marked for identification....
11 260:11
12 Coleman (Parent) Holdings Exhibit 158,
13 document bearing Bates number CPH 1392612,
14 marked for identification..... 268:25
15 Coleman (Parent) Holdings Exhibit 159,
16 document bearing Bates number CPH 1392969,
17 marked for identification..... 272:15
18 Coleman (Parent) Holdings Exhibit 160,
19 document bearing Bates number Morgan Stanley
20 confidential 3143, marked for identification
21 281:21
22 Coleman (Parent) Holdings Exhibit 161,
23 document bearing Bates number CPH 1010442 to
24 444, marked for identification..... 287:6
25 Coleman (Parent) Holdings Exhibit 162,

Page 319

1
2 **INDEX**
3 **WITNESS EXAMINATION BY PAGE**
4 R. Bram Smith Mr. Markowski 5
5 **INFORMATION REQUESTS**
6 **DIRECTIONS: 316:13**
7 **EXHIBITS**
8 **COLEMAN (PARENT) HOLDINGS FOR ID.**
9 Coleman (Parent) Holdings Exhibit 151,
10 document that bears Bates number Morgan
11 Stanley confidential 65651 through 6574,
12 marked for identification..... 66:13
13 Coleman (Parent) Holdings Exhibit 152,
14 document bearing Bates number LAB 43, marked
15 for identification..... 187:8
16 Coleman (Parent) Holdings Exhibit 153,
17 document bearing Bates number Morgan Stanley
18 18885 through 18942, marked for
19 identification..... 227:15
20 Coleman (Parent) Holdings Exhibit 154,
21 document bearing Bates number FUNB 188
22 through 189, marked for identification.....
23 242:14
24 Coleman (Parent) Holdings Exhibit 155,
25 document bearing Bates number FUNB 10440

Page 321

1
2 document bearing Morgan Stanley Bates number
3 268988 through 891, marked for identification
4 289:2
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1
2 NAME OF CASE: Coleman (Parent)
3 Holdings, Inc. -v- Morgan Stanley & Co.,
4 Inc.

5 DATE OF DEPOSITION: February 24, 2004
WITNESS: R. Bram Smith

ERRATA SHEET

6	PAGE LINE	
7	_____ CHANGE:	_____
8	_____ REASON:	_____
9	_____ CHANGE:	_____
10	_____ REASON:	_____
11	_____ CHANGE:	_____
12	_____ REASON:	_____
13	_____ CHANGE:	_____
14	_____ REASON:	_____
15	_____ CHANGE:	_____
16	_____ REASON:	_____
17	_____ CHANGE:	_____
18	_____ REASON:	_____
19	_____ CHANGE:	_____
20	_____ REASON:	_____

21 Sworn to before me this _____ day of
22 _____, 2004.

23 _____
(Signature of Witness)

24 _____
(Notary Public)

25 My Commission Expires:

8

**EXHIBIT EXCLUDED WITHOUT PRIOR DETERMINATION
OF PROTECTABILITY BY COURT**

9

**EXHIBIT EXCLUDED WITHOUT PRIOR DETERMINATION
OF PROTECTABILITY BY COURT**

16div001808

10

**EXHIBIT EXCLUDED WITHOUT PRIOR DETERMINATION
OF PROTECTABILITY BY COURT**

1 1

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

EUGENE YOO

Volume: I

Pages: 1 - 227

Exhibits: 217 - 229

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL
CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA

-----x
COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff, Case No. CA 03-5045 AI

v.

MORGAN STANLEY & CO., INC.,

Defendant.

-----x
MORGAN STANLEY SENIOR FUNDING, INC.,

Plaintiff, Case No. CA 03-5165 AI

v.

MACANDREWS & FORBES HOLDINGS, INC.,

Defendants.

-----x
VIDEOTAPED DEPOSITION of EUGENE YOO, a
witness called for examination, taken pursuant
to the Applicable Provisions of the Florida
Rules of Civil Procedure, before Laurie K.
Langer, Registered Professional Reporter and
Notary Public in and for the Commonwealth of

<p style="text-align: right;">Page 2</p> <p>1 EUGENE YOO</p> <p>2 Massachusetts, at the offices of Esquire Boston,</p> <p>3 99 Summer Street, Boston, Massachusetts, on</p> <p>4 Wednesday, June 16, 2004, commencing at 9:30</p> <p>5 a.m.</p> <p>6 APPEARANCES</p> <p>7</p> <p>8 KIRKLAND & ELLIS LLP</p> <p>9 By Zhonette M. Brown, Esq.</p> <p>10 655 Fifteenth Street, N.W.</p> <p>11 Washington, D.C. 20005</p> <p>12 (202) 879-5108</p> <p>13 For Morgan Stanley & Co.,</p> <p>14 Morgan Stanley Senior Funding, Inc.,</p> <p>15 and Eugene Yoo</p> <p>16</p> <p>17 JENNER & BLOCK LLP</p> <p>18 By Christopher M. O'Connor, Esq.</p> <p>19 One IBM Plaza</p> <p>20 Chicago, IL 60611</p> <p>21 (312) 222-9350</p> <p>22 For Coleman (Parent) Holdings, Inc.,</p> <p>23 and MacAndrews & Forbes Holdings, Inc.</p> <p>24</p> <p>25</p>	<p style="text-align: right;">Page 4</p> <p>1 EUGENE YOO</p> <p>2 (Index Continued)</p> <p>3 EXHIBITS PAGE</p> <p>4 227 Document from Skadden Arps 160</p> <p>5 228 1997 Firm wide Performance</p> <p>6 Evaluation 213</p> <p>7 229 Self-evaluation For the 1998</p> <p>8 Firm wide Performance Evaluation 213</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>
<p style="text-align: right;">Page 3</p> <p>1 EUGENE YOO</p> <p>2 ALSO PRESENT</p> <p>3 Shawn Budd, Videographer</p> <p>4</p> <p>5 INDEX</p> <p>6 ATTORNEY EXAMINATION CROSS REDIRECT</p> <p>7 Mr. Johnson 6 223</p> <p>8 Ms. Brown 222</p> <p>9 EXHIBIT PAGE</p> <p>10 217 1998 Fiscal Year Hours Report 35</p> <p>11 218 Document 73</p> <p>12 219 Bates Labeled Morgan Stanley 36347</p> <p>13 through 36349 74</p> <p>14 220 Bates Labeled CPH 467090 through</p> <p>15 467126 75</p> <p>16 221 Document 83</p> <p>17 222 Morgan Stanley Document, Bates</p> <p>18 Labeled 3431 through 3464 101</p> <p>19 223 Document 108</p> <p>20 224 Document 108</p> <p>21 225 Letter from Coopers and Lybrand to</p> <p>22 Mr. Yoo Dated October 3, 1997 135</p> <p>23 226 Fax Cover Sheet For Coopers and</p> <p>24 Lybrand to Gene Yoo Dated October 23, 1997</p> <p>25 and Attached 137</p>	<p style="text-align: right;">Page 5</p> <p>1 EUGENE YOO</p> <p>2 PROCEEDINGS</p> <p>3</p> <p>4 VIDEOGRAPHER: Okay, we are on the record.</p> <p>5 My name is Shawn Budd, your videographer of</p> <p>6 Esquire Deposition Services. Today's date is</p> <p>7 June 16, 2004 and the time is nine thirty-four.</p> <p>8 We are here at the offices of Esquire Deposition</p> <p>9 Services, located at 99 Summer Street, Boston,</p> <p>10 Massachusetts, to take the videotaped deposition</p> <p>11 of Gene Yoo in the matter of Coleman Holdings,</p> <p>12 Inc., versus Morgan Stanley and Company, Inc.</p> <p>13 and Morgan Stanley Senior Funding, Inc. versus</p> <p>14 MacAndrews and Forbes Holding, Inc.</p> <p>15 Will counsel please identify themselves and</p> <p>16 state whom you represent.</p> <p>17 MR. O'CONNOR: Christopher O'Connor of</p> <p>18 Jenner and Block on behalf of the plaintiff</p> <p>19 Coleman Parent Holdings.</p> <p>20 MS. BROWN: Zhonette Brown of Kirkland and</p> <p>21 Ellis on behalf of Morgan Stanley and Morgan</p> <p>22 Stanley Senior Funding and the witness.</p> <p>23 VIDEOGRAPHER: And would the court reporter</p> <p>24 please swear in the witness.</p> <p>25</p>

Page 6

1 EUGENE YOO
 2 EUGENE YOO,
 3 called as a witness, being duly sworn, testified
 4 as follows:
 5
 6 EXAMINATION
 7
 8 BY MR. O'CONNOR:
 9 Q. Mr. Yoo, could you please state your full name
 10 and spell it for the record.
 11 A. Full name is Eugene Kim Yoo, E-u-g-e-n-e, middle
 12 name is K-i-m, the last name is spelled Y-o-o.
 13 Q. And what is your current address?
 14 A. 99 Waltham Street, Unit Number 1, Boston, Mass.,
 15 02118.
 16 Q. Mr. Yoo, have you ever been deposed before?
 17 A. No, I have not.
 18 Q. Let's go over some of the basic ground rules.
 19 First, if you don't understand any of the
 20 questions that I ask you just let me know and
 21 I'll try and rephrase or help you out. If you
 22 need to take a break, that's fine, I just ask
 23 that you don't take breaks while a question is
 24 pending. Are those acceptable?
 25 A. Yes.

Page 7

1 EUGENE YOO
 2 Q. Okay. And also, if you could not answer
 3 questions until I've completed the question, it
 4 will just make the job easier for the court
 5 reporter --
 6 A. Sure.
 7 Q. -- so she can get our answers and our questions.
 8 Have you ever given testimony under oath
 9 before?
 10 A. No, I have not.
 11 Q. Okay. And do you realize that you're under oath
 12 today?
 13 A. Yes, I do.
 14 Q. You're represented today by the law firm of
 15 Kirkland and Ellis?
 16 A. Yes, I am.
 17 Q. Are you paying for that representation?
 18 A. No, I am not.
 19 Q. Are you aware of who is paying for that
 20 representation?
 21 A. I am not.
 22 Q. Do you understand that they, that Miss Brown
 23 represents Morgan Stanley and Morgan Stanley
 24 Senior Funding in this case?
 25 A. Yes, I do.

Page 8

1 EUGENE YOO
 2 Q. Okay. Did those attorneys ever ask you to
 3 search for documents in your possession that
 4 might --
 5 A. Yes.
 6 Q. I'm sorry. -- that might relate to Sunbeam or
 7 the Sunbeam and Coleman transaction?
 8 A. Yes, they did.
 9 Q. Did you have any documents in your possession?
 10 A. No, I did not.
 11 Q. Before we get started on some of the more
 12 interesting questions, I would like to go
 13 through some of your personal background. Not
 14 that that's not interesting. But I would like
 15 to ask you a few questions about your education
 16 after high school.
 17 A. Sure.
 18 Q. Where did you attend college?
 19 A. I went to Boston College for my undergrad
 20 degree.
 21 Q. And what was your degree in?
 22 A. Computer science and business.
 23 Q. What year did you graduate from Boston College?
 24 A. 1990.
 25 Q. Upon graduation what did you do?

Page 9

1 EUGENE YOO
 2 A. I started at Goldman Sachs Co. in New York, I
 3 was in their operations group for four years.
 4 Q. So until 1994?
 5 A. Correct.
 6 Q. And where did you go after Goldman Sachs?
 7 A. I attended Columbia Business School.
 8 Q. Did you graduate from Columbia?
 9 A. Yes, I did.
 10 Q. And in what year?
 11 A. 1996.
 12 Q. With an M.B.A.?
 13 A. Yes, I did.
 14 Q. Any specialization in that program?
 15 A. I concentrated in finance.
 16 Q. Upon graduation what did you do?
 17 A. I started work full-time at Morgan Stanley in
 18 their investment banking division.
 19 Q. Was that directly after graduation?
 20 A. Yes.
 21 Q. You no longer are currently employed with Morgan
 22 Stanley?
 23 A. That's correct.
 24 Q. Okay. When did your employment with Morgan
 25 Stanley cease?

Page 10

1 EUGENE YOO
 2 A. In February of 2000.
 3 Q. When you left Morgan Stanley what did you do?
 4 A. I went to work at Bank of America in their
 5 investment banking group.
 6 Q. Was that in New York?
 7 A. Yes, it was.
 8 Q. Are you still employed with Bank of America?
 9 A. No, I am not.
 10 Q. When did you leave Bank of America?
 11 A. In January of 2002.
 12 Q. And what did you do when you left Bank of
 13 America?
 14 A. I was an independent consultant for about three
 15 years. I should say two years.
 16 Q. Is that your current employment?
 17 A. No, I'm currently a small business owner.
 18 Q. And what type of business do you own?
 19 A. It's a retail shop.
 20 Q. Any other education other than what you've
 21 testified to this morning?
 22 A. No.
 23 Q. Okay. In 1996 when you first joined Morgan
 24 Stanley what was your position at that time?
 25 A. I actually started as an intern while I was at

Page 11

1 EUGENE YOO
 2 Columbia and I worked there during my second
 3 semester in their debt capital markets group.
 4 Then I started full-time in August in the
 5 investment banking division, I was an associate
 6 at that time.
 7 Q. That's August of 1996?
 8 A. Yes.
 9 Q. And I'm sorry, your first position was
 10 associate?
 11 A. First full-time position was associate.
 12 Q. Okay. Did you ever receive a promotion at
 13 Morgan Stanley?
 14 A. No. I left prior to being up for promotion.
 15 Q. Can you explain the duties and responsibilities
 16 of an associate in the investment banking
 17 division at Morgan Stanley back in 1996?
 18 A. Well, I guess it's hard to explain because there
 19 are a lot of different positions for associates
 20 within the investment banking division.
 21 Q. I'll make it easier. What were your
 22 responsibilities in 1996 as an associate?
 23 A. My responsibilities were to manage the deal
 24 team, at least manage the analyst at the lower
 25 level members of the team and to work as a

Page 12

1 EUGENE YOO
 2 liaison between the lower level team and the
 3 managing directors or the senior members of the
 4 team.
 5 Q. And the same responsibilities in 1997?
 6 A. Yes.
 7 Q. And in 1998 did your responsibilities change?
 8 A. Well, the description probably is the same, but
 9 the scope probably expanded a little bit.
 10 Q. And what would -- what did it expand to?
 11 A. Well, in 1996 my, during my first year I was
 12 rotating through different groups so I was
 13 essentially riding alongside with other
 14 associates and learning from them and as we
 15 moved into 1997 and 1998 I began to take more of
 16 that on my own.
 17 Q. Okay. I'm sorry, the analysts that you
 18 supervised, those typically were college
 19 graduates without an M.B.A.?
 20 A. Yes.
 21 Q. What -- who did you report to in 1997 when you
 22 were working as an associate?
 23 A. There were several people. The ones that I can
 24 remember specifically, Bob Kitts, Jim Stynes; I
 25 don't remember anybody else.

Page 13

1 EUGENE YOO
 2 Q. Alex Fuchs?
 3 A. Alex Fuchs. David McCreary (ph.). that's it.
 4 Q. In 1997 do you recall the names of the analysts
 5 that you supervised?
 6 A. I remember some of them. Tyrone Chang, Lilly
 7 Rafii, Andreas Boquist. It's been awhile. I
 8 don't remember anybody else, actually.
 9 Q. Okay. Why did you leave Morgan Stanley in
 10 February of 2000?
 11 A. I decided to change my career direction a little
 12 bit. I was going down a generalist path at
 13 Morgan Stanley and I wanted to focus a little
 14 bit more on a particular industry. And an
 15 opportunity came up with a friend to go to Bank
 16 of America and work in the telecom group, which
 17 I was very interested in.
 18 Q. Your departure from Morgan Stanley was unrelated
 19 to the Sunbeam transaction?
 20 A. It was not related at all.
 21 Q. Okay. Mr. Yoo, when I refer to the Sunbeam
 22 transaction do you understand that to mean
 23 Morgan Stanley's engagement with Sunbeam
 24 Corporation in 1997 and 1998 and Sunbeam's
 25 efforts to sell the company or acquire other

Page 14

1 EUGENE YOO
 2 businesses?
 3 A. Yes.
 4 Q. Sir, are you familiar with, with my client
 5 Coleman Parent Holdings, Inc. which prior to the
 6 sale to Sunbeam owned approximately 82 percent
 7 of the stock of Coleman Company, Inc.?
 8 A. Yes.
 9 Q. Okay. Are you familiar, sir, with my client's
 10 claims against Morgan Stanley and Company?
 11 A. I am somewhat familiar with them.
 12 Q. What is your understanding of that lawsuit?
 13 MS. BROWN: I'm going to object and
 14 instruct you not to answer to the extent that
 15 your answer would reveal any communications that
 16 you had with counsel.
 17 A. I guess I can't answer that.
 18 Q. Okay. Are you aware, sir, that Morgan
 19 Stanley -- let me ask you. Are you familiar
 20 with the entity Morgan Stanley Senior Funding?
 21 A. Somewhat familiar.
 22 Q. Okay. What is your understanding of that
 23 entity?
 24 A. From what I understand it is an organization set
 25 up within Morgan Stanley to provide senior

Page 15

1 EUGENE YOO
 2 lending to clients.
 3 Q. Were you ever employed, sir, by Morgan Stanley
 4 Senior Funding?
 5 A. No, I was not.
 6 Q. Are you aware that Morgan Stanley Senior Funding
 7 has filed a lawsuit against Coleman Parent
 8 Holdings and MacAndrews and Forbes Holdings?
 9 A. Yes, I was.
 10 Q. Are you familiar with that lawsuit?
 11 A. Not very familiar.
 12 Q. Okay. What is your understanding of that
 13 lawsuit?
 14 A. From what I understand Morgan Stanley Senior
 15 Funding is suing in an effort to recover some of
 16 the loan proceeds it had lent out.
 17 Q. Have you read that Complaint?
 18 A. No, I have not.
 19 Q. Did anyone consult you about that Complaint
 20 prior to its filing?
 21 A. No.
 22 Q. Mr. Yoo, when you left Morgan Stanley in
 23 February of 2000 did you take any documents with
 24 you?
 25 A. No.

Page 16

1 EUGENE YOO
 2 Q. What happened to your documents when you left
 3 the company?
 4 A. All of my deal-related documents were left in my
 5 office. They were in my files on my, in my
 6 bookshelf. I don't know what happened to them
 7 after that.
 8 Q. Were you told to leave your deal documents in
 9 your office?
 10 A. I was never really told anything specifically
 11 about them, but I just assume that they were
 12 documents that I shouldn't be taking with me.
 13 Q. Mr. Yoo, when was the first time that you were
 14 contacted by attorneys for Morgan Stanley or
 15 Morgan Stanley Senior Funding in connection with
 16 these lawsuits?
 17 A. I don't remember precisely. I believe it was
 18 sometime in early 2004.
 19 Q. Do you remember who you spoke with?
 20 A. Tom Clare.
 21 Q. Did you speak with any other attorneys for
 22 Morgan Stanley?
 23 A. No.
 24 Q. Did any in-house attorneys from Morgan Stanley
 25 contact you concerning this case?

Page 17

1 EUGENE YOO
 2 A. No.
 3 Q. Mr. Yoo, do you have any continuing contact with
 4 your former colleagues at Morgan Stanley?
 5 A. I keep in touch with a few folks on a sporadic
 6 basis but I don't really talk to anyone on a
 7 regular basis. Just whoever I happen to run
 8 into.
 9 Q. Do you recall any of those people; the names of
 10 those people?
 11 A. Xavier Stationberg (ph.). Who else did I run
 12 into? Davis McCreary, Tyrone Chang. That's
 13 probably about it.
 14 Q. When is the last time that you spoke with
 15 Mr. Change?
 16 A. Let's see, almost a year ago now. It was late
 17 spring of last year when I was in Los Angeles.
 18 Q. Have you spoken to any current or former Morgan
 19 Stanley employees concerning these lawsuits or
 20 your testimony here today?
 21 A. No.
 22 Q. Sir, do you have any business relationships,
 23 existing business relationships with Morgan
 24 Stanley as a result of any of your prior deals
 25 or current business relationships?

Page 18

1 EUGENE YOO
2 A. No, nothing.
3 Q. What did you do to prepare for your deposition
4 today?
5 A. I met yesterday with Zhonette Brown and she
6 filled me in on the details of the case and what
7 was --
8 MS. Brown: You don't need to reveal
9 communications between counsel.
10 A. Right.
11 Q. Did you review any documents?
12 A. Yes.
13 Q. Did any of those documents refresh your
14 recollection of any of the facts or events
15 concerning the Sunbeam/Coleman transaction?
16 A. Not really.
17 Q. Did you review any deposition testimony?
18 A. No, I did not.
19 Q. Was any deposition testimony read to you or
20 described to you?
21 A. No.
22 Q. How long did you meet with Miss Brown?
23 A. Just a few hours.
24 Q. Have you ever been contacted by any state or
25 federal regulators in connection with your

Page 19

1 EUGENE YOO
2 employment at Morgan Stanley?
3 A. No.
4 Q. While you were employed at Morgan Stanley did
5 you use e-mail?
6 A. Yes, I did.
7 Q. Did you ever print out any of the e-mail
8 messages that you sent or received?
9 A. I'm sure I printed some at some point.
10 Q. Did you personally create any documents in
11 connection with the Sunbeam engagement?
12 A. Yes, I did.
13 Q. What did you do with those documents?
14 A. It depends on what documents you're talking
15 about specifically.
16 Q. Well, the deal, the deal documents, --
17 A. I mean.
18 Q. -- other than keeping them in your office when
19 you walked out?
20 A. The original files I guess were at Morgan
21 Stanley still in electronic format; I don't have
22 any of the hard copies.
23 Q. While you were employed at Morgan Stanley were
24 you aware of any document retention or
25 destruction policies?

Page 20

1 EUGENE YOO
2 A. There was a document retention policy which, at
3 least for the MNA group; I don't recall what it
4 was now.
5 Q. Did you file those policies?
6 A. I hope I did.
7 Q. Did you receive any specific instructions on
8 preserving e-mail?
9 A. No, not really.
10 Q. Mr. Yoo, I'm going to show you what's been
11 previously marked as CPH Exhibit 6. Mr. Yoo,
12 have you seen this document before?
13 A. No, I haven't seen this one.
14 MS. Brown: Just for the record, when you
15 ask him whether he's seen documents before, he
16 will exclude any documents that he saw during
17 his preparation.
18 MR. O'CONNOR: Correct. That's fine.
19 Q. Sir, could I point your attention to the first
20 paragraph under file maintenance or it reads,
21 "file should be kept lean and unnecessary
22 material should be discarded on a regular
23 basis." Do you see that?
24 A. Yes, I do.
25 Q. Do you recall that being part of the document

Page 21

1 EUGENE YOO
2 retention policy at Morgan Stanley while you
3 were employed at the company?
4 A. I do recall that, yes.
5 Q. Do you have an understanding of why files should
6 be kept lean at Morgan Stanley?
7 A. I don't know precisely why.
8 Q. Did you keep your files lean in accordance with
9 this policy, sir?
10 A. Well, I mean, I would throw out things that I
11 thought were unnecessary on an ongoing basis.
12 You know, paper tends to pile up pretty quickly.
13 Q. How would you make the decision whether to
14 retain or keep documents in connection with the
15 Sunbeam engagement?
16 A. I don't know what my -- I don't know if there
17 was a methodology. Anything that I considered
18 to be a finished product I usually kept anything
19 that was a work in progress or if there were
20 final versions of it I usually throw out.
21 Q. Were you instructed by anyone to discard
22 documents that were not in their final form?
23 A. No. I was never instructed in any way to
24 discard anything, or not to discard anything.
25 Q. You can set that aside.

Page 22

1 EUGENE YOO
 2 Mr. Yoo, do you recall that Morgan Stanley
 3 began working with Sunbeam in the spring of 1997
 4 to identify opportunities for the sale of
 5 Sunbeam Corporation?
 6 A. Yes, I do.
 7 Q. When was your first involvement on the Sunbeam
 8 engagement?
 9 A. I was involved nearly from the beginning when we
 10 first began to pitch for the business with
 11 Sunbeam, when Al became, Al Dunlap became CEO.
 12 Q. Do you recall who asked you to join the team to
 13 prepare that pitch?
 14 A. At the time I was an associate in the associate
 15 pool and I was doing my MNA rotation and I was
 16 next up for the assignment when it came up.
 17 Q. What do you recall doing to assist Morgan
 18 Stanley in preparing the pitch to Sunbeam?
 19 A. Do you want me to go through all of it?
 20 Q. Sure.
 21 A. We, we, from what I can remember we went through
 22 the history of, you know, where Sunbeam was at
 23 that time and the difficulties that it was in.
 24 The reasons they had brought on Al Dunlap as
 25 CEO. We did some research on Al Dunlap's prior,

Page 23

1 EUGENE YOO
 2 prior work at places like Kimberly-Clark or
 3 Scott Paper, I guess, to just kind of get a
 4 sense of who he was and what he had done. We
 5 did quite a bit of analysis on Sunbeam itself;
 6 financial analysis.
 7 Q. Anything else that you can recall?
 8 A. No, not really.
 9 Q. Okay. What was the purpose of this research
 10 into Sunbeam and Al Dunlap in connection with
 11 this pitch to Sunbeam?
 12 A. Well, it was really just to make sure that we
 13 knew all of the facts before we went into the
 14 meeting, to make sure that we knew the
 15 situation, knew everything about who it was that
 16 we were presenting to and making sure that the
 17 presentation was, you know, on top of
 18 everything.
 19 Q. Do you recall when this presentation occurred?
 20 A. I don't know specifically. It was sometime in
 21 the spring of 1997.
 22 Q. Who else worked with you on preparing this
 23 pitch?
 24 A. Alex Fuchs, Bob Kitts, Jim Stynes, Tyrone Chang.
 25 Q. Anyone else?

Page 24

1 EUGENE YOO
 2 A. No.
 3 Q. Were you aware at that time, sir, that Morgan
 4 Stanley was in competition with other investment
 5 banks for the Sunbeam engagement?
 6 A. I didn't have any firsthand knowledge about who
 7 else was in competition for the business.
 8 Q. But part of this exercise -- part of this
 9 exercise, sir, was to show Sunbeam why Sunbeam
 10 should choose Morgan Stanley as its investment
 11 bankers as opposed to another company; is that
 12 correct?
 13 A. Yes.
 14 Q. Do you recall when Sunbeam formally engaged
 15 Morgan Stanley as its advisers?
 16 A. Again, I don't know the exact date; I believe it
 17 was somewhere around September or October of
 18 '97.
 19 Q. Do you recall, sir, how many hours you worked on
 20 the Sunbeam matter prior to that formal
 21 engagement?
 22 A. I don't know exactly how many.
 23 Q. Would it be in the hundreds of hours?
 24 A. That's most likely correct.
 25 Q. Okay. Did you ever keep track of your time

Page 25

1 EUGENE YOO
 2 working on Sunbeam, the Sunbeam matter?
 3 A. We kept time sheets as a regular process in our
 4 time keeping process in the U.S. banking group.
 5 Q. What information did you record on those time
 6 sheets?
 7 A. Just the hours that we, we would bill our hours
 8 for different clients. That's about it.
 9 Q. You wouldn't provide descriptions, general or
 10 detailed descriptions of the work that you
 11 performed?
 12 A. No.
 13 Q. Okay. Was that time submitted on a regular
 14 basis? Like a weekly basis?
 15 A. I don't remember exactly. I think it was either
 16 weekly or biweekly.
 17 Q. Okay. I'm going to show you what's been
 18 previously marked as CPH Exhibit 163. My first
 19 question, sir, is have you ever seen this
 20 document before?
 21 A. No, I have not.
 22 Q. You'll notice on the first page of Exhibit 163
 23 is a listing of employees at Morgan Stanley and
 24 you'll see that the second to the last is your
 25 name, Gene Yoo?

Page 26

1 EUGENE YOO

2 A. Yes.

3 Q. Okay. If you follow the line over to

4 year-to-date hours there's an entry for 356?

5 A. Okay.

6 Q. And it appears that this document reflects as

7 you'll see in the right hand, just below the

8 upper right-hand corner for fiscal year 1997?

9 A. Yes.

10 Q. Does that number seem accurate for your work on

11 the Sunbeam engagement in 1997?

12 A. I couldn't tell. But it seems right.

13 Q. Okay. If you would flip, sir, to the last page

14 of this document. You'll see that there are

15 entries across from your name for August,

16 September and October of 147 in August, 115 in

17 September and 94 in October. Do you see those,

18 sir?

19 A. Yes, I do.

20 Q. Okay. And if you flip to the page previous to

21 that which is 80429. And across from your name

22 for April, May, June and July there are no hours

23 entered?

24 A. Uh-huh.

25 Q. Do you know why there would be no hours entered

Page 27

1 EUGENE YOO

2 in for those months in 1997?

3 A. I don't know.

4 Q. Did you work on the Sunbeam engagement in April

5 through July of 1997?

6 A. Yes, I did.

7 Q. Okay. So then on the first page of CPH Exhibit

8 163 the year-to-date hours of 356 probably is

9 not an accurate representation of the hours that

10 you worked on the Sunbeam engagement in 1997?

11 A. I couldn't tell. I'm not sure how the, the time

12 keeping department allocated the hours to the

13 months.

14 Q. Set that aside. I'm trying to get a sense of an

15 overview of the scope of your involvement on the

16 Sunbeam engagement. You testified that you were

17 involved in preparing the pitch to Sunbeam;

18 after that assignment what did you work on?

19 A. For Sunbeam?

20 Q. Yes.

21 A. After the pitch I guess it was just continuing

22 to try to come up with ideas for Sunbeam and

23 seeing if there were any other situations that

24 came up that might peak their interests. But we

25 weren't really formally engaged for I think

Page 28

1 EUGENE YOO

2 about five or six months between.

3 Q. Between the time that you, that Morgan Stanley

4 provided the pitch to Sunbeam and the formal

5 engagement agreement, did you continue to work

6 on the Sunbeam transaction identifying these

7 ideas?

8 A. I don't recall specifically. But, you know, I

9 would think that, I think -- I'm pretty sure I

10 did work on it somewhat. I don't know how much.

11 Q. When you say you worked on ideas for Sunbeam,

12 what do you mean by that?

13 A. Well, in coming out of, coming out of the

14 initial meeting, you know, the idea was that

15 they were either looking to sell the company or

16 to find targets, at least, you know, that was

17 the thought. And so were trying to come up with

18 ideas that might turn into something more

19 tangible in terms of a transaction.

20 Q. Did you attend that pitch to Sunbeam?

21 A. No, I did not.

22 Q. Okay. Do you know what Morgan Stanley's primary

23 mission was coming out of that meeting with

24 Sunbeam?

25 MS. Brown: Object to form.

Page 29

1 EUGENE YOO

2 A. I don't know exactly what came out of the

3 meeting. I wasn't there. I didn't hear what

4 they said.

5 Q. Did anyone tell you that the primary focus in

6 1997 was to find a buyer for Sunbeam to sell

7 Sunbeam Corporation?

8 A. They never said that that was the primary focus.

9 Q. Other than identifying these other potential

10 ideas for Sunbeam what else did you do on the

11 engagement?

12 A. From what I remember, before being formally

13 engaged most of the work was really just keeping

14 up with current events on the company or the

15 industry, making sure that we were, you know, on

16 top of getting all of the latest financial

17 filings or earnings releases, any news that came

18 out, any announcements that they made.

19 Q. Did you ever attend any meetings with potential

20 buyers or acquisition targets?

21 A. I personally did not attend any of those

22 meetings.

23 Q. Did you prepare any documents for other members

24 of the Morgan Stanley team in connection with

25 exploring strategic alternatives for Sunbeam?

Page 30

1 EUGENE YOO
 2 A. Yes, I did.
 3 Q. What are the types of documents that you recall
 4 drafting?
 5 A. Again, I don't recall specifically, but the
 6 documents mostly were descriptive materials
 7 about Sunbeam, describing the company,
 8 financials, that's about it.
 9 Q. Did you prepare any of the transaction documents
 10 related to the acquisition of the Coleman
 11 Company?
 12 MS. Brown: Object to the form.
 13 A. I'm not sure what you mean by --
 14 Q. Purchase agreement.
 15 A. No, I did not.
 16 Q. Were you involved in preparing any of the
 17 financing documents in connection with that
 18 deal?
 19 A. No, I was not.
 20 Q. Were you involved in preparing any documents
 21 analyzing potential synergies of a combination
 22 involving Sunbeam and another company?
 23 MS. Brown: Object to form.
 24 A. I'm not sure what documents you're referring to.
 25 Q. Are you aware of the concept of synergies?

Page 31

1 EUGENE YOO
 2 A. Yes.
 3 Q. Okay. Did you personally prepare any documents
 4 that sought to analyze potential synergies,
 5 assuming the transaction would occur between
 6 Sunbeam and another company?
 7 MS. Brown: Object to form.
 8 Q. Or perform a synergies analysis.
 9 A. I'm sure we did some that were part of the
 10 standard investment banking analysis. I don't
 11 recall specifically which documents we did.
 12 Q. Did you perform any due diligence of Sunbeam?
 13 A. The Morgan Stanley team did.
 14 Q. What did you do personally, if anything, to
 15 conduct due diligence on Sunbeam?
 16 A. From what I remember we had, we had done
 17 interviews of the management team, the senior
 18 management team, and we also visited their
 19 headquarters in Florida. We also met with the
 20 heads of all of the different divisions. We
 21 were given a presentation on their new business
 22 plan. We spent some time with Russ Kirsch the
 23 CFO and Don Oosi, I believe he was the COO, and
 24 they spent a good deal of time giving us a lot
 25 of the detail on the turn around plan and the

Page 32

1 EUGENE YOO
 2 growth plan going forward.
 3 Q. Any other aspects of due diligence that you
 4 recall that you performed?
 5 A. And then just the standard, you know, MNA type
 6 of due diligence, going through financial
 7 filings, public documents.
 8 Q. As part of that financial due diligence did you
 9 look at anything other than publicly filed
 10 documents?
 11 MS. Brown: Object to form.
 12 A. I'm not sure what you mean.
 13 Q. Well, what types of public documents would you
 14 look at in conducting the MNA due diligence that
 15 you spoke of?
 16 A. For -- again, for this transaction, from what I
 17 remember, the types of things we looked at were
 18 filings with the SEC, any press releases that
 19 the company put out or any other, any of the
 20 other companies in its industry, any new stories
 21 that came out on any of the relevant companies.
 22 Any, you know, any publicly available equity
 23 research.
 24 Q. In addition to those sources of information did
 25 you look at any non-public information in

Page 33

1 EUGENE YOO
 2 conducting this MNA financing due diligence?
 3 A. Again, I'm not sure what you mean by.
 4 Q. Documents that someone on the street wouldn't
 5 have access to. Not filed with the SEC or
 6 otherwise publicly available.
 7 A. I can't think of anything.
 8 Q. Were you involved on the roadshow for the
 9 debenture offering?
 10 A. No.
 11 Q. Do you recall that happening?
 12 A. I sort of recall, you know, the time it was
 13 happening. But I wasn't part of it at all. I
 14 wasn't part of the financing process.
 15 Q. Do you recall when the deal closed, the Coleman
 16 deal closed?
 17 A. I think it was spring of 2000. I'm sorry.
 18 Spring of 1998.
 19 Q. After that transaction closed did you continue
 20 to work on the Sunbeam engagement?
 21 MS. Brown: Object to the form.
 22 A. It depends on how you define Sunbeam engagement.
 23 Q. I'm just trying to get a sense of every aspect
 24 of the engagement that you worked on. After
 25 Sunbeam acquired the Coleman Company did you

Page 34

1 EUGENE YOO
 2 continue to work for Sunbeam in developing
 3 strategic options for the company?
 4 A. No.
 5 Q. Did you work on any other deals other than
 6 Sunbeam when you were an associate in 1997 and
 7 1998?
 8 A. Yes.
 9 Q. What were those deals?
 10 A. I can't recall specifically what was happening
 11 at the time. We were -- I think the only two
 12 that I can remember specifically we were working
 13 on a sale of a division for General Motors and
 14 we were looking at strategic alternatives for a
 15 technology client on the west coast.
 16 Q. In 1997 what percentage of your time did you
 17 devote to the Sunbeam engagement?
 18 A. In 1997?
 19 Q. Yes.
 20 A. My best guess, somewhere between a third and a
 21 half.
 22 Q. In the first three months of 1998 do you recall
 23 what percentage of your time was devoted to the
 24 Sunbeam engagement?
 25 A. Again, my best guess is about the same.

Page 35

1 EUGENE YOO
 2 Q. A third to a half of your time?
 3 A. (Witness nods in the affirmative.)
 4 MR. O'CONNOR: I'll ask the court reporter
 5 to mark the next exhibit as CPH 217.
 6 (Deposition Exhibit 217 marked for
 7 identification.)
 8 Q. Mr. Yoo, you've been handed what's been marked
 9 as CPH Exhibit 217. This is what appears to be
 10 a 1998 fiscal year hours report.
 11 A. Uh-huh.
 12 Q. You'll see again that your name is listed as an
 13 employee with year-to-date hours of 1,286. And
 14 if you turn, sir, to the second page of this
 15 document. For your hours report for December
 16 indicates 361; January, 289; February, 123; in
 17 March, 106. Do you believe, sir, that to be an
 18 accurate representation of the time that you
 19 worked on the Sunbeam engagement in those
 20 months?
 21 A. And I -- I couldn't tell you for sure.
 22 Q. And if you could turn then to page 80433 of
 23 Exhibit 217. You'll see across from your name
 24 for April it reflects 169 hours. The same for
 25 May and then 69 hours in June. Do you recall,

Page 36

1 EUGENE YOO
 2 sir, what you were working on in April, May and
 3 June of 1998 for Sunbeam?
 4 A. From what I can remember I believe what this is
 5 was we were looking at, or we were in the middle
 6 of selling one of the Coleman divisions.
 7 Q. And that was after Sunbeam acquired the Coleman
 8 Company?
 9 A. That was post closing, yes.
 10 Q. Do you recall why Sunbeam was, attempted to sell
 11 divisions of Coleman after the transaction was
 12 closed in March?
 13 A. I don't know the reasons behind it. They were
 14 very small, though.
 15 Q. Small divisions?
 16 A. Very small divisions, yes.
 17 Q. In the spring of 1997 while you were preparing
 18 the pitch to Sunbeam, did you know why Sunbeam
 19 intended to pursue these strategic alternatives?
 20 MS. Brown: Objection. Foundation.
 21 A. I have no idea.
 22 Q. No one ever expressed Sunbeam's intentions to
 23 you in the spring of 1997?
 24 MS. Brown: Objection. Form.
 25 A. I'm not sure what you mean by that.

Page 37

1 EUGENE YOO
 2 Q. Mr. Kitts or Mr. Stynes never advised the team
 3 at Morgan Stanley why they were preparing a
 4 pitch to Sunbeam other than to get the business
 5 from Sunbeam?
 6 A. For me at the time? I was a first year
 7 associate and it was my first MNA transaction.
 8 And I was more concerned with just getting the
 9 work done.
 10 Q. Did you have a lot of contact, sir, with
 11 Mr. Kitts or Mr. Stynes?
 12 A. Not in the spring of 1997.
 13 Q. When did you begin to have more contacts with
 14 those individuals?
 15 A. It sort of grew over the year. Probably came
 16 more regular by the end of 1997.
 17 Q. Who did you regularly report to in 1997?
 18 A. For the Sunbeam transaction?
 19 Q. Correct.
 20 MS. Brown: Asked and answered.
 21 A. For the most part it was Alex Fuchs.
 22 Q. So if you had a question typically would you go
 23 see Mr. Fuchs?
 24 A. Typically.
 25 Q. Okay. Sir, I'm handing you what's been

Page 38

1 EUGENE YOO
 2 previously marked as CPH Exhibit 77. It's a
 3 one-page document that appears to be a news
 4 release dated April 4th of 1997. Have you seen
 5 this document before? Or this press release.
 6 Not necessarily in this form.
 7 A. I don't recall exactly.
 8 Q. In the first paragraph you'll see that it
 9 states, "that Sunbeam Corp. has begun
 10 interviewing investment bankers to consider
 11 options that include making hostile takeovers of
 12 as much as five billion or selling the company,
 13 chairman Al Dunlap said." Does that refresh
 14 your recollection of Sunbeam's intention in the
 15 spring of 1997 in pursuing strategic
 16 alternatives?
 17 MS. Brown: Object to form.
 18 A. Again, I don't really remember. I don't really
 19 remember much about, you know, the reasoning
 20 behind a lot of what we were doing at the time.
 21 Q. If you look at the last paragraph where it lists
 22 the names of some companies. Chase Manhattan,
 23 Goldman Sachs, JP Morgan and Company; does that
 24 refresh your recollection, sir, of the other
 25 banks that were competing with Morgan Stanley

Page 39

1 EUGENE YOO
 2 for the Sunbeam engagement?
 3 A. At the time, like I said, I really didn't know
 4 who else was competing for the business.
 5 Q. Set that aside. I'm going to show you what's
 6 been previously marked as CPH Exhibit 78. CPH
 7 Exhibit 78 is a, it's a two part e-mail, the
 8 first is dated April 13th of 1997, authored by
 9 Tyrone Chang and the second is dated April 15th
 10 of 1997. Have you seen this e-mail before?
 11 A. No, I've never seen this.
 12 Q. You did not direct Mr. Chang to send out this
 13 e-mail?
 14 A. I don't recall.
 15 Q. Did Mr. Chang report to anyone else besides
 16 yourself on the Sunbeam engagement?
 17 A. He also reported directly to Alex Fuchs on
 18 occasion. Alex and Tyrone were part of a
 19 subgroup called business development. And I was
 20 on loan on my rotation to business development.
 21 Q. Okay. Set that aside. In 1997 what was your
 22 understanding of Al Dunlap's business
 23 reputation?
 24 A. I didn't know much about him prior to being
 25 brought onto the assignment.

Page 40

1 EUGENE YOO
 2 Q. You testified earlier this morning that you
 3 researched Al Dunlap and his history with other
 4 companies; --
 5 A. (Witness nods in the affirmative.)
 6 Q. -- is that correct?
 7 A. That's correct.
 8 Q. What did you learn about Mr. Dunlap in
 9 conducting that research?
 10 A. It's a long time ago. I don't remember much
 11 about the specifics of what we learned.
 12 Generally speaking he had a reputation for
 13 turning around troubled companies.
 14 Q. Did you understand that his involvement at
 15 Sunbeam as the CEO was intended by the board of
 16 Sunbeam to utilize his turn around capabilities?
 17 A. I don't know anything about what the board
 18 intended.
 19 Q. In your review of Sunbeam's historical financial
 20 information did you learn that Sunbeam prior to
 21 Mr. Dunlap's arrival was in need of financial or
 22 business restructuring?
 23 MS. Brown: Object to form.
 24 A. I'm not sure -- can you be a little more
 25 specific with that?

Page 41

1 EUGENE YOO
 2 Q. Do you have any recollection, sir, of why
 3 Mr. Dunlap was hired by the Sunbeam board to be
 4 the CEO of Sunbeam in 1996?
 5 MS. Brown: Objection. Foundation.
 6 A. I don't recall.
 7 Q. I'm sorry?
 8 A. I don't recall -- I don't recall anything about
 9 that.
 10 Q. Did you review any documents or speak to anyone
 11 in order to determine whether Mr. Dunlap was
 12 performing a turn around of Sunbeam?
 13 MS. Brown: Objection. Form.
 14 A. I, as far as what Al was brought in to do at
 15 Sunbeam, again, we didn't, you know, until we
 16 had started working on the project I didn't
 17 really know much about it. I had just, I knew
 18 there was a headline about it, but that was
 19 about it.
 20 Q. And my question was once you started digging
 21 into the information about Sunbeam's historical
 22 and anticipated growth, did you come to learn
 23 that Al Dunlap was touting the turn around of
 24 the Sunbeam Corporation under his leadership?
 25 MS. Brown: Object to form.

Page 42

1 EUGENE YOO
 2 A. I'm not sure what he was touting.
 3 Q. Let me show you, sir, what's been previously
 4 marked as CPH Exhibit 170. My first question,
 5 Mr. Yoo, is whether you've seen this document
 6 before?
 7 A. I don't believe I have.
 8 Q. Do you know if anyone at Morgan Stanley was
 9 involved in drafting this document?
 10 A. I don't know.
 11 Q. I'm going to show you what's previously been
 12 marked as CPH Exhibit 80. This is a document
 13 entitled Memorandum Regarding the Information
 14 Request. Subject: Allen Dunlap's track record.
 15 Have you seen this document before?
 16 A. I don't think so. It doesn't look familiar.
 17 Q. Did you read Mr. Dunlap's book Mean Business in
 18 connection with the Sunbeam engagement?
 19 A. Actually, I did not.
 20 Q. Did you read any portions of that book?
 21 A. I think I did read portions of it. But I didn't
 22 think there was much in there to gain so I
 23 didn't really read much, most of it.
 24 Q. Did you ask Mr. Chang to research Mr. Dunlap's
 25 track record?

Page 43

1 EUGENE YOO
 2 A. I don't remember if it was me specifically who
 3 asked him or if it was something that Bob or
 4 Alex had asked.
 5 Q. In the second paragraph there's a reference to a
 6 Cavenham Forest Industries?
 7 A. Uh-huh.
 8 Q. And, quote, the turn around orchestrated by
 9 Albert Dunlap and completed under his leadership
 10 culminating in the sale of the company in 1990.
 11 Do you see that, sir?
 12 A. Yes.
 13 Q. Did you investigate the -- did you investigate
 14 Dunlap's turn around of Cavenham Forest
 15 Industries in connection with the Sunbeam
 16 engagement?
 17 A. Could you be a little bit more specific when you
 18 say "investigate."
 19 Q. Did you do anything to review the financial or
 20 business condition of that company before and
 21 after Al Dunlap's arrival at that company to
 22 orchestrate a turn around?
 23 A. I don't remember specifically what analysis we
 24 had done on his prior tenures.
 25 Q. Mr. Yoo, when you testified earlier that you

Page 44

1 EUGENE YOO
 2 conducted research on Mr. Dunlap, who he was and
 3 what he did, what did you do?
 4 A. Mostly from what I remember it was, again, going
 5 through prior financials from his past companies
 6 or pulling up news articles from, from his prior
 7 deals.
 8 Q. But you don't recall doing that for Cavenham?
 9 A. Again, I don't remember specifically what we did
 10 for Cavenham.
 11 Q. If you could turn back to CPH Exhibit 170. The
 12 second paragraph. There's a discussion of
 13 Mr. Dunlap's tenure at Scott Paper Company?
 14 A. Uh-huh.
 15 Q. Take a second to read that, please.
 16 A. (Witness reviewing.) Okay.
 17 Q. Do you recall reviewing Scott Paper's financial
 18 condition or news reports about Scott Paper in
 19 connection with your work on the Sunbeam
 20 engagement?
 21 A. I do recall that we did do some, some work on
 22 looking at Scott. I think that was the, the
 23 biggest of the, or the most notable of his turn
 24 around.
 25 Q. Did you confirm, sir, that Mr. Dunlap indeed

Page 45

1 EUGENE YOO
 2 conducted a successful turn around of Scott
 3 Paper Company?
 4 MS. Brown: Object to form.
 5 A. How do you define successful?
 6 Q. Well, what do you recall doing to review
 7 Dunlap's turn around of Scott Paper Company?
 8 A. The only thing I can remember for sure was sort
 9 of a before and after look at the financials of
 10 Scott before Dunlap had arrived. And Scott
 11 after it had arrived. And the return to the
 12 Scott shareholders.
 13 Q. What do you recall learning?
 14 A. I'm sorry.
 15 Q. What do you recall learning from that exercise?
 16 A. At the time it seemed like it was a good deal
 17 for the Scott shareholders. I don't know how it
 18 turned out now, but.
 19 Q. Do you recall why you believed that at the time?
 20 A. I don't know any specifics. I don't remember
 21 anything.
 22 Q. Have you come across any information subsequent
 23 to that investigation of Scott Paper that leads
 24 you to believe that Dunlap did not complete a
 25 successful turn around of the company?

Page 46

1 EUGENE YOO
 2 MS. Brown: Object to the form.
 3 A. I haven't really, you know, I haven't really
 4 looked at it since.
 5 Q. What was the purpose of Morgan Stanley's
 6 research into Mr. Dunlap's background and his
 7 performance in turning around companies prior to
 8 Sunbeam?
 9 MS. Brown: Asked and answered.
 10 A. I'm sorry, could you repeat that again.
 11 Q. Sure. Could you read back the question.
 12 (Prior testimony read back.)
 13 "What was the purpose of Morgan
 14 Stanley's research into
 15 Mr. Dunlap's background and his
 16 performance in turning around
 17 companies prior to Sunbeam?"
 18 A. I think as I said before we were trying to make
 19 sure that we understood, you know, we fully
 20 understood all of the aspects of the meeting, of
 21 the company and the situation and AI before
 22 going into the meeting.
 23 Q. Were you also trying to understand whether
 24 Dunlap's turn around of companies, where he was
 25 CEO prior to Sunbeam were in fact true turn

Page 47

1 EUGENE YOO
 2 arounds of those companies?
 3 MS. Brown: Object to form.
 4 A. I don't know.
 5 Q. No one ever mentioned to you that there might be
 6 some question as to whether his turnaround at
 7 Scott Paper was successful or real?
 8 A. No, not as far as I can remember, that never
 9 came up.
 10 Q. What did you do with the information that you
 11 learned about Mr. Dunlap beyond preparing the
 12 pitch to Sunbeam?
 13 A. All of the information pretty much went to Alex
 14 and Bob and Jim.
 15 Q. That's Mr. Fuchs, Mr. Kitts and Mr. Stynes?
 16 A. Yes.
 17 Q. Do you know what they did with that information?
 18 A. I don't know.
 19 Q. Did you know, Mr. Yoo, that Morgan Stanley had a
 20 prior relationship with Mr. Dunlap before his
 21 arrival at Sunbeam?
 22 A. I didn't know.
 23 Q. Do you know Bill Strong at Morgan Stanley?
 24 A. I met him a few times.
 25 Q. So you were not aware at the time that Bill

Page 48

1 EUGENE YOO
 2 Strong had a relationship with Mr. Dunlap prior
 3 to Dunlap's arrival at Sunbeam?
 4 A. No, I didn't know that.
 5 Q. I'm handing you what's previously been marked as
 6 CPH Exhibit 68. Have you seen this document
 7 before, Mr. Yoo?
 8 A. Yes, I have.
 9 Q. When do you recall seeing this document?
 10 A. I don't know exactly, but it was maybe a few
 11 weeks after the article was published.
 12 Q. So that would be a few weeks after January 15th
 13 of 1996?
 14 A. Yes.
 15 Q. Do you recall why you saw this document?
 16 A. No, I don't.
 17 Q. Did you read this document in connection with
 18 the Sunbeam engagement or did you read it
 19 outside of your work at Morgan Stanley?
 20 A. I don't recall.
 21 Q. Did you read the entire article in 1996?
 22 A. In 1997?
 23 Q. In 1996.
 24 A. No.
 25 Q. Just so we're clear, sir, the, it appears the

Page 49

1 EUGENE YOO
 2 article was written in January of 1996, in the
 3 upper left-hand corner.
 4 A. Oh, okay.
 5 Q. There's also a date on the bottom right-hand
 6 corner of July 16th of 1997. Just so we're
 7 clear, sir, do you recall reading this document
 8 a couple of weeks after January 15th of 1996 or
 9 a couple of weeks after July 16th of 1997?
 10 A. I don't know, I don't remember exactly when I
 11 read it. But probably sometime around the time
 12 that it was published.
 13 Q. Did you have any discussions with anyone at
 14 Morgan Stanley about the contents of this
 15 article?
 16 A. I don't remember anything specifically.
 17 Q. Anything generally?
 18 A. Not about this article itself.
 19 Q. What do you recall discussing with members at
 20 Morgan Stanley about Mr. Dunlap's performance at
 21 Scott Paper?
 22 MS. Brown: Object to form.
 23 A. Other than the analysis that we had done there
 24 wasn't really much other discussion on that.
 25 After the first meeting we didn't really spend a

Page 50

1 EUGENE YOO
 2 lot of time looking back at Scott.
 3 Q. You don't recall any discussions about the
 4 accuracy of the information in this article?
 5 A. Not, there were no discussions about the
 6 accuracy of the article.
 7 Q. Do you recall what your reaction was after
 8 reading this article?
 9 A. I recall thinking that it was humorous at the
 10 time. And I don't know who I was talking to,
 11 but the only thing I can remember talking about
 12 the article was how people who went into turn
 13 around situations tended to get a bad
 14 reputation. But that was the only thing I could
 15 remember.
 16 Q. Why did you think that the article was humorous?
 17 A. The, some of the outrageous, I think if this is
 18 the one I'm thinking about, some of the
 19 outrageous numbers or some of the things that
 20 they were saying about AI seemed to be funny.
 21 Q. When you say "outrageous numbers" are you
 22 referring to the numbers relating to Scott Paper
 23 in the turn around?
 24 A. No, just the, you know, they're talking about,
 25 for instance, here, 225 percent stock gain and

Page 51

1 EUGENE YOO
 2 adding 6.3 billion of company value; it was just
 3 kind of funny that, you know, it was all being
 4 linked to one event, so.
 5 Q. And why was that funny to you?
 6 A. I don't know. The -- there are a lot of things
 7 that can take place over a long period. I just
 8 thought it was funny they were putting it all on
 9 one thing.
 10 Q. What was that one thing?
 11 A. It seemed like they were attributing it all to
 12 AI.
 13 Q. Did you believe that Mr. Dunlap was not
 14 responsible for the stock price increase?
 15 A. I mean, I didn't know either way. It seemed
 16 like that was the assumption that they were
 17 making in the article.
 18 Q. Did you ever investigate whether Mr. Dunlap had
 19 indeed added 6.3 billion in value in stock, or
 20 to Scott Paper?
 21 MS. Brown: Object to form.
 22 A. I don't, I don't remember -- I didn't really
 23 know either way, you know.
 24 Q. So other than thinking that it was funny that
 25 they had attributed these increases to

Page 52

1 EUGENE YOO
 2 Mr. Dunlap, you don't recall ever seeking out
 3 information to confirm or deny that information?
 4 A. I don't think there was any way we could prove
 5 either way.
 6 Q. Did you ask Mr. Dunlap?
 7 A. I didn't really talk to him about this.
 8 Q. Did you ever speak to Mr. Dunlap?
 9 A. I did speak to him probably once or twice.
 10 Q. Did you ever discuss his performance at Scott
 11 Paper?
 12 A. No.
 13 Q. What did you discuss with Mr. Dunlap?
 14 A. Nothing, really. It was just, he would walk
 15 into a meeting that I was attending and we would
 16 say hello. He would ask how things were going
 17 and that's it.
 18 Q. Did you discuss with anyone the information
 19 contained in the Shredder article?
 20 MS. Brown: Object to form.
 21 A. Again, I don't remember ever talking to anyone
 22 specifically about this article. You know, just
 23 talking about Sunbeam in general and that's part
 24 of the deal.
 25 Q. Did you ever tell anyone at Morgan Stanley that

Page 53

1 EUGENE YOO
 2 you thought that this article was humorous?
 3 A. I don't remember. I don't remember who I was
 4 talking to.
 5 Q. Do you recall talking to anyone at Morgan
 6 Stanley about the outrageous numbers in this
 7 article?
 8 MS. Brown: Object to form.
 9 Mischaracterization.
 10 A. No, I don't really. I just remember, again, I
 11 think this was -- I don't recall where -- I
 12 don't recall when exactly I read this in
 13 relation to the time line. Yeah, I don't recall
 14 ever talking about this article specifically, or
 15 bringing this up or anything about this article
 16 before.
 17 Q. You also said that after reviewing this article
 18 you thought that people who did turn around work
 19 received bad reputations; why is that?
 20 MS. Brown: Objection. Vague sentence,
 21 mischaracterizes his testimony.
 22 A. I don't remember exactly who it was, but I just
 23 remember, I think there were a few articles that
 24 came out at that time about people who were
 25 involved in, you know, difficult situation at

Page 54

1 EUGENE YOO
 2 companies. That's the only thing I can remember
 3 about that connection or that aspect of it. For
 4 some reason I just happened to read a few
 5 articles at the time that talked about different
 6 people doing, or working in similar situations.
 7 And they all seemed to be very negative about
 8 those people.
 9 Q. Did you believe that Mr. Dunlap was receiving a
 10 bad reputation as a result of his turn around
 11 work?
 12 MS. Brown: Object to form.
 13 A. I didn't really know. I mean, I didn't really
 14 know, at least at the time I was reading the
 15 article I wasn't really thinking about, I wasn't
 16 concentrating on the specifics of his work.
 17 Q. Was that information you sought to acquire in
 18 your review of his performance at companies
 19 prior to Sunbeam?
 20 MS. Brown: Object to form.
 21 A. I'm not sure what you mean.
 22 Q. Well, as part of your research into Mr. Dunlap's
 23 history did you feel that it was important for
 24 you to determine whether Mr. Dunlap received,
 25 unfairly received a bad reputation for his turn

Page 55

1 EUGENE YOO
 2 around work?
 3 MS. Brown: Object to form.
 4 A. As part of our work at Morgan Stanley, you know,
 5 we weren't really looking at his reputation, you
 6 know, whether, we weren't looking really at that
 7 angle of it, we were just looking at his results
 8 and what had he actually done.
 9 Q. Was his reputation immaterial to your work in
 10 connection with Sunbeam, the Sunbeam engagement?
 11 MS. Brown: Object to form. Argumentative.
 12 A. I mean, I don't know what it related to in terms
 13 of the engagement with Morgan Stanley and
 14 Sunbeam. My part of it was just, you know, my
 15 focus at that time in that deal was just to
 16 perform the analysis on what we looked at at
 17 Scott.
 18 Q. What was your conclusion after performing that
 19 analysis?
 20 A. As I said before, I think at the time it looked
 21 like the numbers were pretty good.
 22 Q. And what do you mean by "pretty good"? That
 23 they were accurate?
 24 A. I don't know what you mean by "accurate."
 25 Q. Whether Mr. Dunlap truly turned around Scott

Page 56

1 EUGENE YOO
 2 Paper prior to its sale?
 3 MS. Brown: Object to form.
 4 A. That's his opinion.
 5 Q. Did you ever reach that opinion one way or the
 6 other?
 7 A. Did I personally reach that opinion?
 8 Q. Right.
 9 A. Like I said, at the time I thought he had done a
 10 good job. You know, the numbers seemed to work
 11 out.
 12 Q. Did anyone at Morgan Stanley disagree with that
 13 opinion to your knowledge?
 14 A. Not that I can remember.
 15 MS. Brown: Let's take a break.
 16 MR. O'CONNOR: Can I go for about two more
 17 minutes?
 18 MS. Brown: Okay.
 19 Q. Sir, I'm going to show you a copy of an exhibit
 20 previously marked CPH 148. Have you seen this
 21 document, sir?
 22 A. Yes, I have.
 23 Q. When did you first see this document?
 24 A. I believe I wrote it.
 25 Q. This is your handwriting?

Page 57

1 EUGENE YOO
 2 A. I think so.
 3 Q. Do you recall why you prepared this document?
 4 A. I don't know exactly. It looks like I'm taking
 5 notes on something.
 6 Q. It appears that you're taking notes on
 7 Mr. Dunlap's performance at Scott Paper; is that
 8 fair to say, --
 9 MS. Brown: Objection.
 10 Q. -- in the left hand column?
 11 MS. Brown: Object to form.
 12 Mischaracterization.
 13 A. I think I was actually taking notes on the
 14 article, from the news article.
 15 Q. If you flip back to CPH Exhibit 68. The next to
 16 the last paragraph which appears on Morgan
 17 Stanley 3996. There's information in that
 18 paragraph concerning 11,000 people that were
 19 eliminated, 11,000 jobs eliminated at Scott
 20 Paper, 71 percent headquarter staff, 50 percent
 21 of the managers and 20 percent of the hourly
 22 workers. That information is also contained in
 23 your handwriting notes on CPH Exhibit 148; is
 24 that correct?
 25 A. Which page are you on? I'm sorry.

Page 58

1 EUGENE YOO

2 Q. It's page 2 of the Shredder article, CPH Exhibit

3 68.

4 A. Okay.

5 Q. It's the next to the last paragraph.

6 A. Okay. Okay.

7 Q. And my question, sir, was the information

8 contained in this article in that paragraph

9 that's also reflected in your handwritten notes

10 in CPH 148 correct?

11 A. It appears to be.

12 Q. Do you recall, sir, why when thinking that this

13 information was humorous you were taking notes

14 of that information as reflected in CPH Exhibit

15 148?

16 MS. Brown: Object to form.

17 Mischaracterization. Assumes facts not in

18 evidence.

19 A. I don't know, again, I don't recall when I read

20 the article the first time. And I don't know

21 when I wrote this.

22 Q. Do you have any general recollection of when you

23 wrote the information on CPH Exhibit 148?

24 A. I don't know specifically. I would have to

25 guess.

Page 59

1 EUGENE YOO

2 Q. You also see on Exhibit CPH Exhibit 148 fourth

3 from the bottom there is an asterisk which

4 states "volume driven plan, arrow, prop up for

5 sale."

6 A. Uh-huh.

7 Q. Do you know what that refers to?

8 A. Again, I don't know. I think it was just

9 something that I had written from the news

10 article.

11 Q. You don't recall whether you investigated,

12 whether Dunlap pursued a volume driven plan at

13 Scott Paper to prop it up for sale?

14 A. There's nothing here. There was no discussion

15 of that kind of, that I know of.

16 Q. On CPH Exhibit 148 there is a column entitled

17 Kimberly-Clark. Do you recall, sir, that Scott

18 Paper was sold to Kimberly-Clark?

19 A. Yes.

20 Q. And you'll see there's a hand notation of 600

21 million in synergies and cost reductions?

22 A. Uh-huh.

23 Q. Synergies and cost reductions appear in quotes.

24 Do you recall why you made that notation?

25 A. Which -- why did I write that line?

Page 60

1 EUGENE YOO

2 Q. Correct.

3 A. Again, I think I was just taking notes from the

4 article. I think that's what actually happened

5 or what they were saying they had achieved.

6 Q. Did you ever investigate whether there were 600

7 million in synergies and cost reductions as a

8 result of that transaction?

9 A. Again, I don't remember the specifics of how we

10 did the analysis on Scott Paper, I would think

11 that we went back and looked at, you know, some

12 of the financial performance of both. But I

13 don't remember exactly what we did.

14 Q. And you don't recall why you prepared this

15 document which has been marked as CPH Exhibit

16 148?

17 A. No. I think that, you know, I don't remember

18 why exactly.

19 Q. Do you remember what was done with this

20 document?

21 A. No.

22 Q. Did you provide it to anybody?

23 A. No. I wouldn't have given something like this

24 to anyone.

25 Q. Was it used to create any documents in

Page 61

1 EUGENE YOO

2 connection with the Sunbeam engagement?

3 A. Not that I know of. I'm sure some of the

4 factual information went into some documents.

5 But, you know.

6 Q. Okay. This is a good time to take a break.

7 VIDEOGRAPHER: The time is ten fifty-eight,

8 we're off the record.

9 (Short break taken.)

10 VIDEOGRAPHER: We're back on the record,

11 this is tape number two and the time is seven

12 minutes after eleven.

13 Q. Mr. Yoo, I'm going to show you what's previously

14 been marked as CPH Exhibit 81. This is a

15 document titled, Project Laser, Laser

16 Corporation, Restructuring and Growth Plans. Do

17 you recall, sir, that the code name for the

18 Sunbeam engagement was Project Laser?

19 A. Yes, I do.

20 Q. Okay. Have you seen this document before?

21 A. I think I have.

22 Q. When did you see this document?

23 A. I think at the time that we, it was prepared.

24 Q. Did you prepare it?

25 A. I didn't personally prepare this, no.

Page 62

1 EUGENE YOO
2 Q. Do you know who did?
3 A. I don't know.
4 Q. What was the purpose of preparing this document?
5 A. I don't remember.
6 Q. If you look at the document page 36394, where it
7 says "restructuring plan." Do you know where
8 this information -- do you know where the person
9 that drafted this document obtained this
10 information?
11 A. No, I don't.
12 Q. And the same question for the growth targets; do
13 you know the source of that information?
14 A. No.
15 Q. Under "growth targets" the first bullet point
16 says "doubling of 1996 sales of about 984
17 million to almost 2 billion by 1999 without
18 acquisitions; do you see that, sir?
19 A. Yes.
20 Q. Did you ever investigate how Sunbeam was going
21 to achieve that growth goal?
22 MS. Brown: Object to form.
23 A. I'm not sure what you mean.
24 Q. Well, do you recall that Sunbeam had a growth
25 target which included doubling its 1996 sales to

Page 63

1 EUGENE YOO
2 almost 2 billion by 1999 without acquisitions?
3 A. I don't remember any of their growth targets or
4 what their plans were. It was such a long time
5 ago.
6 Q. Do you remember conducting any investigation to
7 determine whether Sunbeam's growth targets were
8 attainable?
9 A. We did talk to several people at Sunbeam about
10 the numbers they had given us. We talked to
11 Russ Kirsch and Rich Goudis. Again, I think we
12 spent a day at their office talking to the
13 different division heads about the, their budget
14 plan for the year.
15 Q. Did the information you received from these
16 individuals comport with the growth plans that
17 are indicated in CPH Exhibit 81?
18 A. Again, I don't know if they matched up with
19 this. But I do remember that we were very
20 comfortable with the detailed information they
21 had given us behind their growth plans.
22 Q. Do you recall how you became comfortable with
23 that information?
24 MS. Brown: Object to form.
25 A. How we became comfortable?

Page 64

1 EUGENE YOO
2 Q. Right.
3 A. I'm not sure what you mean.
4 Q. Did you take it on face value what they were
5 saying; did you do something to investigate
6 those statements to confirm you were comfortable
7 with their growth plans?
8 A. We did our investigation as far as we typically
9 do. I mean, there's only so far that we go on
10 an MNA transaction, at some point we're relying
11 on the company and the information they give us
12 to be accurate.
13 Q. And in this respect what, what did you do to
14 become comfortable with the information they
15 were providing you? Do you recall any specific
16 things that you did?
17 MS. Brown: Object to form.
18 A. I don't remember specifically what we did.
19 Q. What typically does Morgan Stanley do in a deal
20 like this to become comfortable with the growth
21 plans provided to them by the company?
22 A. It depends on the company and it depends on the
23 transaction.
24 Q. Okay. In a transaction of this magnitude what
25 does Morgan Stanley typically do?

Page 65

1 EUGENE YOO
2 A. Again, my experience has only been with, and for
3 me this was probably one of the larger
4 transactions that I worked on. So, you know, I
5 can only speak about what I had done.
6 Q. What have you done in the past on deals similar
7 to Sunbeam to determine whether Morgan Stanley
8 is comfortable with the growth plans given to
9 them by the company that's retained them to
10 provide investment counseling or acquisition
11 counseling for the sale of the company?
12 MS. BROWN: Object to form and foundation.
13 A. I guess, it's been a long time since I've done
14 it. I can only really talk about what I've
15 done. But from what I remember on this, as I
16 said, we went through the growth plan, tried to
17 get the detail behind the numbers they were
18 giving us with Russ and with Rich Goudis and we
19 met with the division heads and they walked
20 through how they were going to achieve their
21 numbers. And that's probably pretty typical for
22 any investment bank on an MNA transaction.
23 Q. Is there any independent analysis that Morgan
24 Stanley conducts to confirm the information
25 provided to them by the company?

Page 66

1 EUGENE YOO
 2 MS. Brown: Object to form.
 3 A. I don't know what else they do.
 4 Q. You indicated that you spoke with division heads
 5 at Sunbeam, who were the individuals that you
 6 spoke with?
 7 A. I don't remember specifically.
 8 Q. Did you speak with Don Oosi?
 9 A. Yes.
 10 Q. And did Mr. Oosi provide you with any documents
 11 to back up the growth targets that are indicated
 12 in CPH Exhibit 81?
 13 A. I believe he did.
 14 Q. Do you recall the form of those documents?
 15 A. No. I don't remember what he gave us.
 16 Q. Other than Mr. Kirsch and Mr. Goudis did you
 17 meet with anyone else in senior management at
 18 Sunbeam to determine whether the growth targets
 19 were attainable?
 20 MS. Brown: Object to form.
 21 Mischaracterization testimony.
 22 A. Our primary contact was with Russ and Rich on
 23 almost anything that was deal related, on almost
 24 anything that was Sunbeam related, I should say.
 25 And, you know, the managing directors had

Page 67

1 EUGENE YOO
 2 contact with AI, it was -- I don't recall if
 3 there was anyone else in senior management that
 4 we talked with, you know, above the division
 5 heads.
 6 Q. If you turn to page 2 of that document which is
 7 Morgan Stanley 36395. This is a slide entitled
 8 Scott Paper Restructuring and Growth Plans. If
 9 you take a look at the information under
 10 restructuring plan; do you recall the source of
 11 this information?
 12 A. (Witness shakes head in the negative.) I don't
 13 know specifically, no.
 14 Q. If you look at the fourth bullet point where it
 15 reads, "reduce work force by over 35 percent
 16 with approximately 11,000 layoffs, --
 17 A. Uh-huh.
 18 Q. -- 71 percent of headquarter staff, 50 percent
 19 managers, 20 percent hourly workers and 60
 20 percent R and D." Do you recall, sir, that that
 21 information is contained in CPH Exhibit 148 and
 22 CPH Exhibit 68 that we looked at a few moments
 23 ago?
 24 A. Yeah, they appear to be the same.
 25 Q. Your testimony is that you did not draft this

Page 68

1 EUGENE YOO
 2 document; is that correct?
 3 A. I don't know for sure. I don't think I did.
 4 Q. Do you know what was done with this document,
 5 CPH Exhibit 81?
 6 A. I don't remember.
 7 Q. Do you recall if this document was provided to
 8 any potential buyers?
 9 A. I couldn't say for sure, I don't know.
 10 Q. Or its potential acquisition targets?
 11 A. Again, I don't know. I didn't attend any of
 12 those meetings.
 13 Q. Handing you what's been previously marked as CPH
 14 Exhibit 69, the cover page reads "Project Laser
 15 Discussion Materials, September 11, 1997,
 16 Conference Call." Setting aside the handwriting
 17 on this document, Mr. Yoo, do you recall seeing
 18 this document?
 19 A. I may have seen this. I couldn't say for sure,
 20 but it's possible.
 21 Q. Do you recall seeing the document with the
 22 handwriting?
 23 A. No.
 24 Q. You'll notice in the upper right-hand corner
 25 there's the notation MS and then a list of names

Page 69

1 EUGENE YOO
 2 and the fifth name down appears to be Yoo,
 3 Y-o-o?
 4 A. Uh-huh.
 5 Q. Do you recall attending a September 11, 1997
 6 conference call?
 7 A. I don't remember specifically, but it's
 8 possible.
 9 Q. Do you recall who -- I'm sorry. Withdrawn.
 10 Do you recognize the handwriting on this
 11 document?
 12 A. No, I'm not sure who it is.
 13 Q. On the first page in handwriting off to the
 14 left-hand side right above "Morgan," there's a
 15 handwritten notation "Coopers and Lybrand to
 16 calibrate synergies"?
 17 A. Oh, okay, yeah.
 18 Q. Do you see that. Do you recall, sir, that
 19 Coopers and Lybrand was providing synergy
 20 analysis to Sunbeam and Morgan Stanley in
 21 connection with the Sunbeam engagement in 1997?
 22 MS. BROWN: Object to form.
 23 A. I don't remember exactly what it was that they
 24 were providing us. I do know that they had
 25 worked with AI in the past and I don't remember

Page 70

1 EUGENE YOO
 2 their exact role in this transaction. But from
 3 what I remember I think they were working with
 4 Al on the turn around plan. On developing a
 5 plan, I think, but I don't remember for sure.
 6 Q. That's the turnaround plan at Sunbeam?
 7 A. At Sunbeam, right.
 8 Q. If you could turn to page 3 of the document
 9 which is Morgan Stanley 3897. It's a slide
 10 entitled Overview of Proposed Selling Process?
 11 A. Uh-huh.
 12 Q. Do you see on the left-hand side, sir,
 13 handwriting, it says "just get it done"? To the
 14 left of Overview of Proposed Selling Process.
 15 A. Okay. Yeah.
 16 Q. Does that refresh your recollection, sir, of
 17 participating in this conference call? Someone
 18 making the statement "just get it done"?
 19 A. No. I don't know.
 20 Q. You don't know what that means?
 21 A. No.
 22 Q. In about the middle of the page looking at the
 23 handwriting again there is two asterisks, the
 24 second asterisk says "Kimberly/Scott - won't see
 25 anything." Do you recall anyone making that

Page 72

1 EUGENE YOO
 2 Stanley prepared a document entitled Strategic
 3 Plan or contained the words strategic plan in
 4 the title of the document?
 5 A. I don't know for sure. I mean, we produced a
 6 lot of documents.
 7 Q. I'm sorry. How about long range strategic plan;
 8 do you recall that document?
 9 A. No.
 10 Q. And then in the middle of page 3906 of CPH
 11 Exhibit 69 there's a box around some
 12 handwriting, and the handwriting states "beef up
 13 sex appeal." And there's an arrow to "future
 14 growth opportunities." Do you know what that
 15 refers to?
 16 A. I couldn't say for sure.
 17 Q. Do you recall anyone at Morgan Stanley
 18 discussing beefing up the sex appeal of Sunbeam
 19 by touting future growth opportunities?
 20 MS. BROWN: Object to form.
 21 A. No. I mean, there was really no discussion
 22 about that.
 23 Q. Did anyone at Morgan Stanley refer to Sunbeam
 24 management as amateurs?
 25 A. Not that I can remember, no.

Page 71

1 EUGENE YOO
 2 statement at Morgan Stanley?
 3 A. No, I don't, I don't recall anything about that.
 4 Q. You don't know what that means?
 5 A. No. I, I don't know what that means.
 6 Q. If you can turn to page 12 of the document which
 7 is Morgan Stanley 3906. In much larger
 8 handwriting on the top left of that page it says
 9 "amateurs" and it's underlined; do you see that?
 10 A. Okay.
 11 Q. Does that refresh your recollection of this
 12 September 11th conference call?
 13 A. No.
 14 Q. Do you know what -- do you know what that refers
 15 to?
 16 MS. BROWN: Objection. Speculation.
 17 A. No. I'm not sure.
 18 Q. To the right-hand side in handwriting there's an
 19 asterisk with 20 to 25 pages, Strat Plan;
 20 possibly strategic plan. Does that --
 21 A. Okay.
 22 Q. Does that refresh your recollection of this call
 23 and discussion of a Sunbeam strategic plan?
 24 A. No.
 25 Q. Were you aware, sir, that Sunbeam and Morgan

Page 73

1 EUGENE YOO
 2 Q. If you take a moment, sir, to flip through the
 3 rest of the document. My question for you is
 4 whether you recall preparing any portions of
 5 this document?
 6 A. (Witness reviewing.) I don't know specifically
 7 where, but I'm sure I had a hand in helping to
 8 prepare this somewhere.
 9 Q. You mean you don't recall any specific pages
 10 that you have a recollection of preparing?
 11 A. No.
 12 Q. Did anyone at Morgan Stanley or Sunbeam advise
 13 Morgan Stanley to not contact Kimberly-Clark in
 14 connection with Morgan Stanley's work in trying
 15 to find a buyer or an acquisition target for
 16 Sunbeam?
 17 MS. BROWN: Objection. Foundation.
 18 A. No, there was no discussion of that kind.
 19 Q. That you recall?
 20 A. That I recall.
 21 (Deposition Exhibit 218 marked for
 22 identification.)
 23 Q. Sir, you've been handed what's been marked as
 24 CPH Exhibit 218.
 25 A. Uh-huh.

Page 74

1 EUGENE YOO

2 Q. Do you recall this document?

3 A. I think I do, yeah. It's sort of familiar.

4 Q. Did you draft this document?

5 A. I think I helped write it up.

6 Q. Who assisted you in writing up this document?

7 A. I think it was Alex Fuchs and Tyrone Chang.

8 Q. What was the purpose of drafting this document?

9 A. I don't know what the end goal or the end

10 product was to be, but I think this was part of

11 our due diligence on Sunbeam. Just

12 understanding their growth plan.

13 Q. Why was it important for Morgan Stanley

14 personnel to understand Sunbeam's growth plan?

15 MS. BROWN: Object to form.

16 Characterization.

17 A. I don't remember what the end product was to be

18 or the end goal was here.

19 MR. O'CONNOR: Mark this.

20 (Deposition Exhibit 219 marked for

21 identification.)

22 Q. Do you know if CPH Exhibit 218 was ever sent to

23 Mr. Fannin and Mr. Goudis?

24 A. I don't know for sure.

25 Q. Sir, I'm handing you what's been marked as CPH

Page 75

1 EUGENE YOO

2 Exhibit 219. It's a document bearing Bates

3 label Morgan Stanley 36347 through 36349; do you

4 recall this document?

5 A. Uh-huh. Yes.

6 Q. This appears to be a later version of CPH

7 Exhibit 218, does that refresh your recollection

8 that you may have changed Exhibit 218 in a

9 matter reflected in CPH Exhibit 219?

10 A. I, again, I don't remember exactly what the

11 reasoning was. I think we were just

12 reorganizing the questions into categories to

13 make it easier for them to gather the

14 information.

15 (Deposition Exhibit 220 marked for

16 identification.)

17 Q. Do you recall drafting that document, CPH

18 Exhibit 219 or revising the document that we

19 marked as CPH Exhibit 218?

20 A. I don't remember that specifically, no.

21 Q. I'm handing you what's been marked as CPH

22 Exhibit 220. CPH Exhibit 220 bears Bates labels

23 CPH 467090 through 467126. I'll represent to

24 you that this is the way the document appears in

25 the files, I'm not sure if the first three pages

Page 76

1 EUGENE YOO

2 of CPH Exhibit 220 were physically attached to

3 the following document. But do you know, sir,

4 whether that was the case? Whether these two

5 documents were in fact attached?

6 A. I don't know.

7 Q. Does your handwriting appear on the first page,

8 the fax cover sheet on CPH Exhibit 220?

9 A. No, that's not my handwriting.

10 Q. Is that Mr. Chang's handwriting?

11 A. I don't know whose that is.

12 Q. But you're listed as the author of the fax?

13 A. Yes.

14 Q. On page 2 of that document, CPH 220, under

15 Financial Projections; do you see that?

16 A. Yes.

17 Q. First bullet point reads "please provide backup

18 numbers to all the new revenue stream graphical

19 charts." Do you see that?

20 A. Yes, I do.

21 Q. What was the purpose of attaining that

22 information?

23 A. Again, I don't know if there was any other

24 reasoning behind it other than just typical due

25 diligence and trying to make sure that we fully

Page 77

1 EUGENE YOO

2 understand and are comfortable with their

3 projections.

4 Q. Do you recall whether you received materials

5 that were responsive to the request under

6 "financial projections"?

7 A. I do know we received some documents from them,

8 I don't know for sure we got all of them or not.

9 Q. Did you ever make an effort to determine whether

10 they provided you with all of the information

11 requested in this September 19, 1997 memo?

12 A. I believe we did follow up with them on some

13 outstanding items, yeah. I don't recall if

14 those were ever followed through or not.

15 Q. Looking at the product development R and D

16 pipeline section, the third bullet point. The

17 second dash reads, "is 30 new products a year a

18 reasonable number to achieve." Do you recall

19 receiving any comfort or a response to that

20 inquiry?

21 A. I don't remember specifically.

22 Q. Did you believe that 30 new products a year was

23 an unreasonable number to achieve?

24 A. I had no idea. I didn't really know the

25 industry.

Page 78

1 EUGENE YOO

2 Q. On the third page of the document, CPH 467092,

3 there's a category entitled, not category,

4 /channel/pricing; do you see that?

5 A. Yes.

6 Q. And the fourth bullet point it reads "definition

7 of category management? Does it differ from

8 channel management?" Do you recall inquiring

9 into Sunbeam's channel management?

10 MS. BROWN: Object to form.

11 A. I'm not sure. I mean, I still don't fully know

12 what channel management is. That's part of the

13 question was trying to work through their

14 terminology, understanding what it is they were

15 talking about.

16 Q. Did you ever come to an understanding of

17 Sunbeam's channel management practices?

18 MS. BROWN: Object to form.

19 A. Again, I'm not really sure, you know, what

20 channel management, you know, it's more of a

21 marketing term, I believe. I'm not really sure

22 what channel management is.

23 Q. There's another category entitled Other at the

24 bottom of that same page. And next to the

25 fourth bullet point it reads "provide examples

Page 79

1 EUGENE YOO

2 of how the company has repositioned itself

3 (manufacturing, shipping and billing, R and D

4 and other systems and processes.) For growth as

5 opposed to being viewed as a cost cutter." Do

6 you recall obtaining information in response to

7 this inquiry?

8 A. I don't remember specifically what we got back

9 on this one.

10 Q. Do you recall whether you received any comfort

11 on whether the company repositioned itself for

12 growth as opposed to simply cost cutting?

13 MS. BROWN: Object to form.

14 A. I don't recall.

15 Q. The following document is a list of documents in

16 data room, CPH 467093?

17 A. Uh-huh.

18 Q. And it appears that this document runs through

19 the rest of this exhibit through CPH 467126. Do

20 you recall seeing that document?

21 A. No, I don't think I've seen this before.

22 Q. Did you ever go into a data room in connection

23 with your due diligence of Sunbeam?

24 A. Not that I can remember.

25 Q. Do you know if anyone did?

Page 80

1 EUGENE YOO

2 A. As far as I remember there was, at least for the

3 Morgan Stanley due diligence, I don't believe

4 there was a formal data room set up. I don't

5 recall if there was ever one set up during the

6 transaction, during the actual consummation of

7 the transaction.

8 Q. Did you, did you ever have any contact with the

9 law firm Skadden Arps in connection with the

10 Sunbeam engagement?

11 A. I believe so, yes.

12 Q. Do you recall that Skadden represented Sunbeam

13 in the transaction?

14 A. That sounds familiar, yeah.

15 Q. Okay. Did you have any discussions with Skadden

16 in connection with the due diligence that you

17 performed?

18 A. I don't think we talked about that, no.

19 Q. Do you recall when you started your due

20 diligence of Sunbeam?

21 A. I mean, for a client -- I'm sorry.

22 Q. No, go ahead.

23 A. For a client I don't think it's a one time

24 event. It's sort of an ongoing thing. As I

25 said, we were learning about the company when we

Page 81

1 EUGENE YOO

2 did our first pitch and then from then it was

3 sort of an ongoing process of trying to stay on

4 top of the progress of the company.

5 Q. Is September 19, 1997 a significant date to you

6 in connection with your due diligence work?

7 When the memo that's attached to CPH Exhibit 220

8 was faxed to Mr. Goudis and Mr. Fannin at

9 Sunbeam?

10 A. I don't recall anything specific or anything

11 special about that day.

12 Q. Did Sunbeam ever refuse to provide any

13 information that you requested in connection

14 with your due diligence work?

15 A. No. Not as far as I can remember.

16 Q. Did Sunbeam limit Morgan Stanley's access to any

17 of Sunbeam's customers or employees?

18 MS. BROWN: Objection. Foundation.

19 A. There was no -- there was no attempt on

20 Sunbeam's part to limit our access to any of the

21 customers.

22 Q. Did you interview any customers at Sunbeam?

23 A. I did not personally, no.

24 Q. Do you know if anyone did?

25 A. I don't believe anyone did. But I don't think

Page 82

1 EUGENE YOO
 2 that's -- it's not really part of the normal due
 3 diligence process for an MNA transaction.
 4 Q. You've never contacted companies' customers as
 5 part of due diligence?
 6 A. I haven't personally and I don't know of anyone
 7 that has. I can't think of anybody that has.
 8 Q. Okay. How about lower level employees,
 9 employees below the division heads, did you have
 10 any contact with those employees in connection
 11 with your due diligence?
 12 A. Occasionally here and there. I don't remember
 13 anyone directly.
 14 Q. Do you recall any of those employees that you
 15 spoke with?
 16 A. No.
 17 Q. Do you recall the subjects of your conversations
 18 with those employees?
 19 A. No. It was mainly in the context of when we
 20 would request information or specific documents
 21 most of our contact was with senior or mid level
 22 management and they would have some of their
 23 subordinates do the actual work to provide us
 24 the information. That was really the main
 25 context of our contact with them.

Page 83

1 EUGENE YOO
 2 Q. So is it your testimony that you never spoke to
 3 those employees, you just obtained information
 4 from them through their superiors?
 5 MS. BROWN: Objection. Mischaracterizes.
 6 A. I don't recall the nature our conversations with
 7 them. You know, there was some contact, I don't
 8 really remember what it was.
 9 MR. O'CONNOR: Mark the next exhibit.
 10 (Deposition Exhibit 221 marked for
 11 identification.)
 12 Q. Mr. Yoo, you've been handed what's been marked
 13 as CPH Exhibit 221; do you recall this document?
 14 A. No, I don't think I've seen this one.
 15 Q. Do you recall traveling to Sunbeam's
 16 headquarters in Florida on September 22nd
 17 through the 24th, 1997?
 18 A. I don't know the dates that I was down there. I
 19 made several trips down there.
 20 Q. How many trips do you think you made to Florida
 21 in connection with the Sunbeam engagement?
 22 A. I have to guess. Maybe four or five.
 23 Q. And each time you traveled to Florida did you,
 24 did you go to Sunbeam's headquarters in Del Ray
 25 Beach?

Page 84

1 EUGENE YOO
 2 A. Yes, I believe so.
 3 Q. What were the purposes of your trips to Florida?
 4 A. They were all different. We were down there for
 5 different reasons.
 6 Q. Did you go to the beach?
 7 A. No.
 8 Q. Was this a part of your due diligence of
 9 Sunbeam?
 10 A. Some of it was for due diligence, yes.
 11 Q. Besides due diligence why else did you go to
 12 Sunbeam?
 13 A. Some of it was, I believe there was one meeting
 14 or one presentation we made to them and I think
 15 one was a, I remember we went down there for a,
 16 sort of a preparation session. I think they
 17 were having a meeting with someone, I don't
 18 recall who.
 19 Q. Was this a potential buyer?
 20 A. I don't remember who it was. It was really --
 21 Jim Stynes was the one that went with me in that
 22 meeting and they were asking for Jim's help in
 23 just preparing for a meeting.
 24 Q. In the presentation, of the trip for the
 25 presentation was that for the pitch to Sunbeam?

Page 85

1 EUGENE YOO
 2 A. No. What was that about? I think it was --
 3 Q. That's my next question.
 4 A. I think it was just an update of the progress to
 5 that point. Where we were in our discussions.
 6 Q. Do you recall when that trip occurred?
 7 A. I think it was in the fall sometime that I
 8 remember.
 9 Q. Do you recall Mr. Dunlap being unhappy with
 10 Morgan Stanley because Morgan Stanley could not
 11 find a buyer for Sunbeam?
 12 A. I never knew, I mean, I never, like I said, I
 13 never talked to him.
 14 Q. You never talked to him ever?
 15 A. About the transaction. It was really just
 16 formalities and greetings.
 17 Q. Does CPH Exhibit 221 read in connection with CPH
 18 Exhibit 220, refresh your recollection that your
 19 trip to Florida from September 22nd to the 24th
 20 of 1997 was in connection with the information
 21 that you requested in the September 19, 1997
 22 memo?
 23 A. Okay. I believe we did go down there for that
 24 trip for a due diligence session.
 25 Q. What do you recall about that trip?

Page 86

1 EUGENE YOO

2 A. It was pretty nondescript. I mean, it was just

3 information gathering, going through

4 documentation they had given us, a few

5 presentations. Actually, this may have been the

6 trip where we met with the various division

7 heads and they were giving us their growth plan

8 for the year.

9 Q. Do you recall any of the information they

10 provided you on those growth plans?

11 A. No.

12 Q. Do you recall looking at any documents during

13 this trip that you requested in the September

14 19, 1997 memo?

15 A. We did go through quite a few documents during

16 this time. I don't, again, I couldn't tell you

17 specifically what.

18 Q. Did you find any information in those documents

19 that caused you any concern about Sunbeam's turn

20 around or the future growth projections?

21 MS. BROWN: Object to form.

22 A. No. At the time there was nothing really that

23 raised any red flags for us.

24 Q. Was there anything that raised any yellow flags?

25 A. No.

Page 87

1 EUGENE YOO

2 Q. Did Mr. Chang accompany you on this trip to

3 Florida in September?

4 A. I believe he did.

5 Q. Did anyone else go to Florida with you on this

6 trip, or did you meet anyone from Morgan Stanley

7 down in Florida on this trip?

8 A. I don't remember. I don't think so, but I'm not

9 sure.

10 Q. CPH Exhibit 221 indicates that you spent

11 Tuesday, September 23rd, at Sunbeam?

12 A. Uh-huh.

13 Q. And you were to see Rich Goudis. And it shows

14 your departure on Wednesday, September 24th, six

15 fifteen flight.

16 A. Uh-huh.

17 Q. Does that refresh your recollection on how much

18 time you spent at Sunbeam's headquarters

19 reviewing documents and meeting with division

20 heads?

21 MS. BROWN: On this trip?

22 Q. On this trip. Thanks.

23 A. I thought we were there for a few days, maybe

24 two days or three days. And -- I've got to look

25 at the time line here. Yeah, it looks like

Page 88

1 EUGENE YOO

2 that, it was probably two days.

3 Q. Do you recall whether this trip in late

4 September of 1997 preceded this presentation

5 that you spoke about earlier?

6 A. Which presentation?

7 Q. The trip to Florida where you were involved in a

8 presentation to Sunbeam to update them on the

9 progress?

10 MS. BROWN: With Mr. Stynes.

11 A. I don't remember the exact chronology.

12 Q. How long were you in Florida for that

13 presentation?

14 A. I think it was just a day.

15 Q. In that preparation session?

16 A. I think it was just a day.

17 Q. Other than the trip to Florida on September

18 22nd, do you recall any other trips to Florida

19 in 1997 during which time you performed due

20 diligence of Sunbeam?

21 A. I couldn't say for sure. I don't know.

22 Q. I'm handing you what's been previously marked as

23 CPH Exhibit 71.

24 A. (Witness reviewing.)

25 Q. Have you seen this document before?

Page 89

1 EUGENE YOO

2 A. Yes, I have.

3 Q. When did you see this document?

4 A. I actually helped put this together.

5 Q. Okay. The first two pages of CPH Exhibit 71 are

6 contents of an e-mail authored by Tyrone Chang

7 dated October 23, 1997, attaching an October 22,

8 1997 memo to worldwide IBD Professionals; do you

9 see that?

10 A. Yes, I do.

11 Q. Do you recall the purpose of sending this e-mail

12 and the attached documents at this time? At

13 that time.

14 A. This was a standard announcement that we would

15 send out when we were engaged by a client.

16 Q. What's the purpose of sending out that

17 announcement?

18 A. I think it was just informative for the rest of

19 the investment banking division.

20 Q. You said that you prepared the materials that

21 are attached to that e-mail?

22 A. Well, I helped put this together.

23 Q. When you say you helped put it together, what

24 does that mean?

25 A. I think most of the actual documentation on the

Page 90

1 EUGENE YOO
 2 project, the person who actually physically sat
 3 there and drafted these was Tyrone, and I was
 4 overseeing that and then Alex was overseeing us,
 5 Alex Fuchs.
 6 Q. Did you physically type the information that's
 7 contained on Morgan Stanley 5986?
 8 A. 86? No, I didn't type this.
 9 Q. Do you know who did?
 10 A. I don't know.
 11 Q. Do you recall reading the investment rationale
 12 that appears on this page at this point in time?
 13 A. I believe I did read this.
 14 Q. The first bullet point reads, "Sunbeam
 15 represents an attractive growth story and
 16 investment opportunity"?
 17 A. Uh-huh.
 18 Q. Do you know the basis for that statement?
 19 A. I don't know.
 20 Q. Did you do anything in connection with your due
 21 diligence of Sunbeam to confirm that Sunbeam in
 22 fact represented an attractive growth story and
 23 investment opportunity?
 24 MS. BROWN: Object to form.
 25 A. Well, all of these I think are just opinion

Page 91

1 EUGENE YOO
 2 about the quality of the company. I think the
 3 growth aspect was coming out of the growth plan
 4 that Sunbeam had.
 5 Q. So the statements, the four bullet point
 6 statements that appear on Morgan Stanley 5986
 7 are Morgan Stanley's opinion of the condition of
 8 Sunbeam Corporation at this time?
 9 MS. BROWN: Object. Mischaracter --
 10 Q. I'm sorry. At the time that the document was
 11 circulated to the worldwide IBD Professionals?
 12 MS. BROWN: Objection.
 13 Mischaracterization. Foundation.
 14 A. At the time that this was drafted based on the
 15 information that we had from the company and
 16 what we knew about the company, you know, we
 17 felt that these were reasonably accurate.
 18 Q. Do you recall anything specifically that you did
 19 to confirm that Sunbeam had undergone a profound
 20 transformation since the arrival of new
 21 management in July of 1996?
 22 A. I don't remember specifically.
 23 Q. For the next bullet point "tremendous intrinsic
 24 value, outpacing nearest competitors"?
 25 A. Uh-huh.

Page 92

1 EUGENE YOO
 2 Q. You testified earlier as part of your due
 3 diligence you were keeping an eye on other
 4 companies in the industry?
 5 A. (Witness nods in the affirmative.)
 6 Q. Is that part of what you did to confirm that
 7 Sunbeam presented a tremendous intrinsic value?
 8 A. I can't say for sure, but that's a possibility.
 9 Q. If you turn, sir, to page 5991, a few pages back
 10 in CPH Exhibit 71. There's a summary of recent
 11 analyst commentary.
 12 A. Uh-huh.
 13 Q. And that spans for several pages. Did you draft
 14 those pages of this document?
 15 A. Actually, I don't think that I worked on this
 16 part of it.
 17 Q. Did you perform any research into analyst
 18 commentaries on Sunbeam or did someone else take
 19 care of that?
 20 A. Most of that was actually done by the, by our,
 21 our financial analysts, Tiruse (ph.), Tyrone and
 22 Louie.
 23 Q. You can set that aside. During your trip to
 24 Sunbeam in September, late September of 1997 did
 25 you ever meet with any of the company's internal

Page 93

1 EUGENE YOO
 2 auditors?
 3 A. No, I don't think we did.
 4 Q. You never spoke to Tom Hartshorn?
 5 A. Harshorn?
 6 Q. Thank you.
 7 A. I don't recall ever meeting him face to face. I
 8 think I may have spoken to him on the phone once
 9 or twice.
 10 Q. What did you discuss with him?
 11 A. I don't recall.
 12 Q. How about Deirdre Dadando, did you ever speak
 13 with her on the phone?
 14 A. I don't recall that name.
 15 Q. Did you ever review Sunbeam's internal audit
 16 papers?
 17 A. I don't believe we did.
 18 Q. Did you ever review the audit work papers
 19 prepared by Arthur Andersen, Sunbeam's
 20 accountant?
 21 A. I don't think we did. We typically don't review
 22 the audit papers.
 23 Q. Why is that?
 24 A. We rely on the auditors who provide us with a
 25 comfort on the financials. We couldn't do that

Page 94

1 EUGENE YOO
 2 on every transaction to go in and review their
 3 work.
 4 Q. Did you ever speak to anyone at Arthur Andersen
 5 in connection with your due diligence?
 6 A. I don't think we did.
 7 Q. You don't recall speaking to Larry Bornstein?
 8 A. No. I may have on the phone once, but I don't
 9 really remember. I didn't really deal with
 10 Larry.
 11 Q. Do you know who Larry Bornstein is? Have you
 12 met him?
 13 A. I've never met him, no.
 14 Q. Phil Harlow?
 15 A. Phil I think I've spoken to. I think he was the
 16 person I talked to more.
 17 Q. You don't recall what you discussed with
 18 Mr. Bornstein?
 19 A. No.
 20 Q. Do you recall what you discussed with
 21 Mr. Harlow?
 22 A. I don't remember specifically. It was more in
 23 connection with the acquisitions that Sunbeam
 24 was making.
 25 Q. Was part of your due diligence of Sunbeam and

Page 95

1 EUGENE YOO
 2 its financial condition you didn't have
 3 conversation with Mr. Harlow or Mr. Bornstein?
 4 MS. BROWN: Objection. Mischaracterizes.
 5 A. I don't believe we did.
 6 Q. Sir, I'm handing you what's previously been
 7 marked as CPH Exhibit 84. Have you seen this
 8 document?
 9 A. I don't believe I have.
 10 Q. This is a document that was produced by Morgan
 11 Stanley and it appears to be the chronology of
 12 the events, some of the events, Project Laser.
 13 On page 2 of the chronology next to the date of
 14 September 23rd and 24th, the event reads "MS due
 15 diligence at SOC"?
 16 A. Uh-huh.
 17 Q. First, SOC refers to Sunbeam's stock ticker
 18 symbol; correct?
 19 A. Correct.
 20 Q. And the participants of that due diligence
 21 session at Sunbeam are listed as yourself and
 22 Mr. Chang --
 23 A. Uh-huh.
 24 Q. -- at Sunbeam's headquarters? Do you recall
 25 traveling to Sunbeam on September 23rd and 24th

Page 96

1 EUGENE YOO
 2 as part of your due diligence? I'm sorry. I
 3 withdraw that question.
 4 Is that the same -- does that refer to the
 5 trip that we discussed in CPH Exhibit 221?
 6 A. I believe that's the same trip, yes.
 7 Q. And then the next page lists October 29th?
 8 A. Uh-huh.
 9 Q. "MS due diligence regarding growth strategies
 10 and strategic plan at Sunbeam's headquarters in
 11 Florida" and your name, Mr. Chang's name and
 12 Miss Rafii's name are listed there. Do you
 13 recall traveling to Sunbeam in Florida on
 14 October 29th to conduct due diligence on
 15 Sunbeam's growth strategies and strategic plan?
 16 A. I vaguely remember making the trip.
 17 Q. Do you recall what you did on that trip?
 18 A. I just remember part of it being sitting with
 19 Rich Goudis and with Russ and some of the backup
 20 financials they had to the growth plan,
 21 understanding how they built up to their final,
 22 final numbers. I don't recall what else we did
 23 on that trip.
 24 Q. Did they provide you with documents reflecting
 25 that build up?

Page 97

1 EUGENE YOO
 2 A. Yes, I believe they did.
 3 Q. Do you recall what those documents contained?
 4 A. I don't remember now, no.
 5 Q. Did you speak with anyone besides Mr. Goudis and
 6 Mr. Kirsch during that trip?
 7 A. I may have. I think there was somebody else
 8 that worked for Russ that we actually dealt with
 9 on a more regular basis for the financials. And
 10 we may have talked to, we may have talked to Don
 11 as well, Don Oosi.
 12 Q. Did you speak with anyone below senior
 13 management on that trip to discuss the back up
 14 for the strategic plan or the growth strategies?
 15 A. I don't recall.
 16 Q. Do you recall anything else about that trip or
 17 the information you learned?
 18 A. No. I don't recall anything else about that.
 19 Q. Did anyone else from Morgan Stanley go down to
 20 Florida for that trip other than yourself and
 21 Mr. Chang and Miss Rafii?
 22 A. I don't know. I don't remember.
 23 Q. Handing you what's been previously marked as
 24 Exhibit CPH 173. Do you recall traveling to
 25 Sunbeam's headquarters in Florida on January

Page 98

1 EUGENE YOO
 2 5th?
 3 A. January 5th? I don't remember what the trip was
 4 for.
 5 Q. You don't recall going down to Florida shortly
 6 after New Year's, 1998?
 7 A. I may have. I mean....
 8 Q. If you turn to CPH Exhibit 84, --
 9 A. Uh-huh.
 10 Q. -- page 33259.
 11 A. Uh-huh.
 12 Q. Next to January 5th there's an entry that states
 13 "meeting with SOC to prepare for potential sell
 14 side management presentation to Phillips." Does
 15 that refresh your recollection of your trip to
 16 Florida on January 5th?
 17 A. I'm sorry, I'm drawing a blank on that. I don't
 18 remember.
 19 Q. Mr. Yoo, did you create any documents to reflect
 20 the information that you learned during the due
 21 diligence trips to Sunbeam?
 22 MS. BROWN: Object to the form.
 23 A. The, I mean, on which trip? On --
 24 Q. Any of the trips.
 25 A. I may have taken notes. That's all I know.

Page 99

1 EUGENE YOO
 2 Q. Was it your practice to take handwritten notes
 3 while you were conducting due diligence while
 4 reviewing documents and speaking with people?
 5 A. Generally I took notes, yeah.
 6 Q. But you don't recall doing so in this case?
 7 A. Again, I'm speculating. I'm assuming I did but
 8 I don't have anything.
 9 Q. Nobody at Morgan Stanley was designated as the
 10 point person who was responsible for keeping
 11 notes of the due diligence activities?
 12 A. Typically the analysts were the ones that were
 13 responsible for making sure that any and all
 14 information that we gathered on a due diligence
 15 trip made it back with us to New York. Whether
 16 that was notes or physical documents that we
 17 received or discs or anything like that.
 18 Q. Did the analysts on the Sunbeam engagement do
 19 that?
 20 A. I believe they did.
 21 Q. Do you know where those notes or documents were
 22 stored once they were carried back to New York?
 23 A. No.
 24 Q. Did you ever look at those documents at a
 25 subsequent time after the due diligence trip?

Page 100

1 EUGENE YOO
 2 A. I'm pretty sure we went through some of them
 3 again at some point.
 4 Q. You didn't create any summaries of your due
 5 diligence findings?
 6 A. No.
 7 Q. In 1997 and 1998 did Morgan Stanley have any
 8 policies documenting due diligence?
 9 A. Not that I knew of.
 10 Q. Did you receive any training at Morgan Stanley
 11 on conducting due diligence or documenting due
 12 diligence?
 13 A. There was no formal training class on due
 14 diligence. You know, just like almost anything
 15 else on the job it's sort of learning on the
 16 job, learning with somebody else who knows what
 17 they're doing. In this case, especially in this
 18 case because it was my first MNA transaction, I
 19 was working with Alex and also Tyrone who had
 20 actually more experience than I did in the MNA
 21 group.
 22 Q. Were you ever given a manual at Morgan Stanley
 23 which provided policies and recommendations on
 24 conducting due diligence?
 25 A. I don't think we ever received anything like

Page 101

1 EUGENE YOO
 2 that. I don't remember anything like that.
 3 Q. Other than the trips that we've looked at on
 4 your itineraries or in this chronology, do you
 5 recall any other trips to Sunbeam in 1997 where
 6 you performed due diligence?
 7 A. No. I don't recall any, anything specific.
 8 Q. Mr. Yoo, did you prepare presentation books for
 9 potential acquisition targets in the Sunbeam
 10 engagement?
 11 A. I believe we did.
 12 Q. Did you personally?
 13 A. I am pretty sure that I helped work on them.
 14 Q. Who else was involved in preparing presentation
 15 books?
 16 A. I guess it depends on the book.
 17 (Deposition Exhibit 222 marked for
 18 identification.)
 19 Q. You've been handed what's been marked as CPH
 20 Exhibit 222, which is a Morgan Stanley document
 21 Bates labeled 3431 through 3464. Have you seen
 22 this document before, sir?
 23 A. Yes, I believe I have.
 24 Q. Did you draft this document?
 25 A. I helped put it, I helped put it together.

Page 102

1 EUGENE YOO
 2 Q. Do you recall when you did that?
 3 A. No, I don't remember.
 4 Q. If you look on the lower left-hand corner of the
 5 document there's a computer file stamp and a
 6 date; do you see that?
 7 A. Uh-huh. Yes.
 8 Q. It appears that the date is December 11, 1997.
 9 Does that refresh your recollection as to the
 10 time that you helped prepare this document?
 11 A. Yes, a little bit.
 12 Q. What's the purpose of this document?
 13 MS. BROWN: Objection. Foundation.
 14 A. Who were we presenting this to, or?
 15 Q. Why was that document created?
 16 A. I can't be certain but I think it might have
 17 been to inform or, I guess, educate Sunbeam on
 18 the Coleman Company.
 19 Q. Do you know if this document was given to
 20 Sunbeam?
 21 A. I don't know that for sure.
 22 Q. If you turn back, sir, to CPH Exhibit 84, the
 23 chronology.
 24 A. Okay.
 25 Q. There's an entry there for December 11th.

Page 103

1 EUGENE YOO
 2 "Meeting with Sunbeam management to discuss
 3 potential Coleman transaction. Sunbeam --
 4 A. Okay.
 5 Q. -- initiated talks with Coleman without MS
 6 knowledge background presentation on Coleman and
 7 preliminary financial analysis presented"?
 8 A. Okay.
 9 Q. Does that refresh your recollection, sir, on
 10 what was done with this document?
 11 A. Well, I wasn't actually at the meeting, I don't
 12 know what they used this for. It could have
 13 either been to inform Sunbeam or sometimes our
 14 own team use it to make sure we knew all of the
 15 answers if anybody had any questions on Coleman,
 16 if they asked us what the sales were last year
 17 or anything like that.
 18 Q. Do you recall when you first started researching
 19 the Coleman Company in connection with the
 20 Sunbeam engagement?
 21 A. No. I mean, there were so many things happening
 22 at the time, I don't remember.
 23 Q. If you could turn, sir, to the third page of CPH
 24 Exhibit 222. In the overview of the Coleman
 25 Company the section entitled Overview of the

Page 104

1 EUGENE YOO
 2 Coleman Company. There's a document entitled
 3 the Coleman Company, Inc. Transaction Rationale.
 4 Did you prepare this page?
 5 A. I don't think I did. It doesn't look familiar.
 6 Q. There's a column entitled Issues and there's a
 7 bullet point, second bullet point under that
 8 column indicates "research earnings, estimates
 9 already include 50 million of cost savings"?
 10 A. Okay.
 11 Q. Do you have any recollection of looking into
 12 that information?
 13 A. "Looking into" meaning what?
 14 Q. Determining whether that was in fact the case.
 15 A. I don't know. I don't remember looking into it.
 16 Q. If you flip ahead, sir, to Morgan Stanley 3452.
 17 That page is entitled Synergy and Price
 18 Analysis; did you prepare this page?
 19 A. No. This was part of the model that Tyrone was
 20 working on.
 21 Q. This page in the upper left-hand corner
 22 indicates that this is, this purports to be a
 23 chart relating to Sunbeam's acquisition of
 24 Coleman with synergies; do you see that?
 25 A. Yes.

Page 105

1 EUGENE YOO
 2 Q. Is it your testimony that you were not involved
 3 in preparing model outputs that analyzed an
 4 acquisition of the Coleman Company and the
 5 synergies that are assumed in such an
 6 acquisition?
 7 MS. BROWN: Objection to form.
 8 Mischaracterizes.
 9 A. No, that's not what I am saying. I certainly
 10 helped work on a good portions of the model.
 11 This particular one, though, is one I didn't
 12 really work on.
 13 Q. When you say you worked on portions of the
 14 model, what do you mean by that?
 15 A. Well, I was overseeing Tyrone as he would run
 16 various analyses.
 17 Q. Did you tell Tyrone what data to input into the
 18 model?
 19 MS. BROWN: Object to the form.
 20 A. I didn't, I didn't give him the specific numbers
 21 to put in, but I would help him tell, you know,
 22 help him figure out where the sources were.
 23 Q. What were the sources of that data?
 24 MS. BROWN: Object to form.
 25 A. I mean, the data for the inputs?

Page 106

1 EUGENE YOO
 2 Q. Correct. For the synergy analysis.
 3 A. I don't know what the data for the synergy
 4 analysis was. Generally for the model we used
 5 publicly available financials.
 6 Q. Did you ask Mr. Tyrone where he obtained the
 7 data to perform synergy and price analysis that
 8 appears on Morgan Stanley 3452?
 9 A. No. I think this was something that he was
 10 running with Alex. But I can't be certain. But
 11 I don't really recall anything about this page.
 12 Q. Flip ahead to Morgan Stanley 3454. This is a
 13 chart entitled Transaction Structure Analysis?
 14 A. Uh-huh.
 15 Q. And the upper left-hand corner indicates "SOC
 16 acquires Coleman without synergies"?
 17 MS. BROWN: Coleman, SOC.
 18 Q. Thank you. Did you prepare this document?
 19 A. I don't know if I helped prepare this specific
 20 one. This is again a page from our standard
 21 model which we've run hundreds of times. I
 22 don't know if this specific version is one that
 23 I worked on.
 24 Q. Again, you don't know the source of the data --
 25 I'll withdraw that.

Page 107

1 EUGENE YOO
 2 If you turn to the next page, Morgan
 3 Stanley 3455. It's another transaction
 4 structure analysis. This time it says, "SOC
 5 acquires CLN with synergies." Do you see that?
 6 A. Uh-huh.
 7 Q. And the synergies assumptions in the bottom
 8 left-hand corner states, "includes synergies of
 9 95.1 million." Do you know where that number
 10 came from?
 11 A. No, I don't know.
 12 Q. Turn to the next page. Morgan Stanley 3456.
 13 That analysis includes synergies of 126.8
 14 million. Do you see that?
 15 A. Yes, I do.
 16 Q. Do you know where that number came from?
 17 A. I can take a guess but it's just a guess. I
 18 don't know for certain.
 19 Q. Well, where do you believe it came from? What's
 20 your guess?
 21 MS. BROWN: Objection. Calls for
 22 speculation.
 23 A. And just, it looks like it comes off of this
 24 chart you first showed me, the synergy and price
 25 analysis.

Page 108

1 EUGENE YOO
 2 Q. What page is that?
 3 A. 3452.
 4 Q. And that page you don't recall where those, that
 5 synergy data came from?
 6 A. I don't know.
 7 MS. BROWN: Chris, are we going to take a
 8 lunch break?
 9 MR. O'CONNOR: Yeah, I'm close to moving on
 10 so let's finish this up. I would like that
 11 marked the next document.
 12 (Deposition Exhibit 223 marked for
 13 identification.)
 14 Q. Sir, you've been handed what's been marked as
 15 CPH Exhibit 223; do you recall this document?
 16 A. I think I do, yes.
 17 Q. Did you draft this document?
 18 A. I can't be certain. I don't know.
 19 (Deposition Exhibit 224 marked for
 20 identification.)
 21 Q. Sir, you've been handed what's been marked as
 22 CPH Exhibit 224.
 23 A. Uh-huh.
 24 Q. I'll represent to you, sir, that the first two
 25 pages of this document contain meta data from

Page 109

1 EUGENE YOO
 2 file produced to us by Morgan Stanley. Are you
 3 familiar with the concept of meta data?
 4 A. Not very, no.
 5 Q. Okay. Information contained in the file that
 6 was provided to us indicates that you created
 7 this document on December 11, 1997, as indicated
 8 by your name after author, y-o-o-g?
 9 A. Uh-huh.
 10 Q. And under Document Statistics, Creation Date.
 11 Does this refresh your recollection of your
 12 drafting of this document?
 13 A. Again, I can't be certain, but it's possible I
 14 drafted it.
 15 Q. Do you know why this document was drafted on
 16 December 11, 1997?
 17 A. On the 11th? I don't remember exactly why.
 18 Q. Did you attend a December 12, 1997 meeting
 19 between Sunbeam management and MacAndrews and
 20 Forbes Holdings Company to discuss a potential
 21 transaction involving those two companies?
 22 A. No. I never met with MacAndrews and Forbes.
 23 Q. At anytime?
 24 A. I met with somebody from MacAndrews and Forbes
 25 after the acquisition when we were selling the

Page 110

1 EUGENE YOO
2 spa business.
3 Q. Were you aware of the meeting on December 12th?
4 A. Sure. I'm pretty sure I was.
5 Q. Do you know if Sunbeam used Exhibits 222, 223
6 and 224 in connection with their meeting with
7 MacAndrews and Forbes?
8 A. I don't know.
9 MS. BROWN: Hold on. 224?
10 MR. O'CONNOR: I'm sorry, Exhibit 222 and
11 Exhibit 223. Thank you.
12 MS. BROWN: Objection. Foundation.
13 A. I don't know.
14 Q. Do these documents refresh your recollection,
15 sir, that Morgan Stanley was analyzing potential
16 synergies of a Sunbeam/Coleman transaction prior
17 to the first meeting between Sunbeam and
18 MacAndrews and Forbes on December 12, 1997?
19 MS. BROWN: Object to form. Object to
20 foundation. And also I believe mischaracterizes
21 the facts in evidence.
22 A. I mean, I don't know. I mean, which synergies,
23 which?
24 Q. We looked at two documents that indicated that
25 someone at Morgan Stanley, perhaps Mr. Chang,

Page 111

1 EUGENE YOO
2 perhaps yourself, were compiling information
3 analyzing potential transaction between Sunbeam
4 and Coleman; correct?
5 A. It appears that way, yes.
6 Q. And those documents are dated December 11, 1997;
7 right?
8 A. Okay, yeah.
9 Q. Okay. My question for you is do you recall
10 yourself or Mr. Chang or anyone else at Morgan
11 Stanley analyzing the potential synergies of a
12 transaction between Coleman and Sunbeam before
13 December 12, 1997?
14 MS. BROWN: Object to the form. Compound.
15 And also foundation.
16 A. Again, I don't remember specifically what we
17 were looking at with Coleman prior to the
18 meeting. I don't really remember the chronology
19 of the meetings with Coleman.
20 Q. But although you don't know the source of the
21 synergy data that appears in CPH Exhibit 222
22 that document reveals that someone at Morgan
23 Stanley was inputting synergy assumptions into
24 models to determine a potential transaction with
25 the Coleman Company; correct?

Page 112

1 EUGENE YOO
2 A. It appears that way.
3 Q. A good time to take a lunch break?
4 VIDEOGRAPHER: The time is twelve thirty,
5 we're off the record.
6 (Lunch break taken.)
7 VIDEOGRAPHER: We're back on the record.
8 This is tape number 3, the time is eleven
9 minutes after one.
10 Q. Mr. Yoo, before the lunch break you testified
11 that you had no contacts with representatives of
12 MacAndrews and Forbes Holdings until, except for
13 after the transaction closed; is that correct?
14 A. As far as I can remember that's correct.
15 Q. If you can turn back to CPH Exhibit 84, the
16 chronology.
17 A. Okay.
18 Q. And on page 33259 of that document there's an
19 entry for January 23rd. And next to that entry
20 there is a description, "meeting with Mavco,
21 reinstate talks, Ray Coleman." The location it
22 says Emco headquarters, I believe that to be
23 Mavco headquarters in New York. Your name is
24 listed as an attendee. Is that an error or do
25 you recall meeting with Mavco on January 23rd?

Page 113

1 EUGENE YOO
2 A. I don't recall that meeting at all. I don't
3 think I've ever been to their headquarters.
4 Q. If you turn to the next page there's an entry
5 for January 29th, there are a lot of names
6 listed there, yours is not among them.
7 A. Okay.
8 Q. Reflecting another meeting with Coleman and
9 Mavco. You were not present in that meeting as
10 well, at Revlon's headquarters?
11 A. I was not there.
12 Q. And again, on February 6th there's an entry for
13 a meeting with Mavco to negotiate the Coleman
14 transaction at Mavco's headquarters. Mr.
15 Chang's name is listed but yours is not, you did
16 not attend that meeting?
17 A. Again, I don't believe I ever went there. I
18 don't think I've ever been to the Mavco
19 headquarters.
20 Q. If you can turn to the next page, Morgan Stanley
21 33261. There's an entry dated February 23rd,
22 "strategic due diligence meeting with Coleman,
23 review strategic plan in 1998 projections,
24 arrange for facility visits, due diligence on
25 Sunbeam by Coleman and CSFB." Again, your name

Page 114

1 EUGENE YOO
 2 is not listed there, do you have any
 3 recollection of any meetings on February 23rd
 4 involving those individuals?
 5 A. No, I don't.
 6 Q. You don't recall any discussions involving
 7 MacAndrews and Forbes or anyone from Coleman
 8 with members of Morgan Stanley or Sunbeam
 9 concerning any details of the transaction such
 10 as the price, the timing, the consideration that
 11 would be paid?
 12 A. No, I don't remember being part of any of those
 13 meetings.
 14 Q. I'm handing you what's been previously marked as
 15 CPH Exhibit 9. Do you recall this document,
 16 sir?
 17 A. Yes, I think I do.
 18 Q. What is this document?
 19 A. I think this was our, our company description of
 20 Sunbeam and its current situation.
 21 Q. Do you call this a presentation book?
 22 A. I guess -- what do you mean by presentation
 23 book? It appears to be in presentation format.
 24 Q. Do you know if this document was provided to
 25 Coleman Company representatives or MacAndrews

Page 115

1 EUGENE YOO
 2 and Forbes representatives in February of 1998?
 3 A. I don't know what they were given.
 4 Q. If you could turn to page 26290, which is the
 5 fifth page in on Exhibit 9.
 6 A. Okay.
 7 Q. Do you recognize that document, sir, as the same
 8 document that was circulated to Worldwide IBD
 9 Professionals at Morgan Stanley back on October
 10 22nd of 1997?
 11 MS. BROWN: What's the Exhibit number?
 12 MR. O'CONNOR: CPH Exhibit 71.
 13 (Prior testimony read back.)
 14 "Do you recognize that document,
 15 sir, as the same document that was
 16 circulated to Worldwide IBD
 17 Professionals at Morgan Stanley
 18 back on October 22nd of 1997?"
 19 A. Okay, they look to be the same page?
 20 Q. And this particular page it was prepared by you?
 21 A. You know, again, I don't remember if I prepared
 22 this one specifically.
 23 Q. But you recall -- you recall that document being
 24 prepared in connection with attempting to find a
 25 buyer or acquisition targets for Sunbeam?

Page 116

1 EUGENE YOO
 2 MS. BROWN: Document or page?
 3 MR. O'CONNOR: Page.
 4 A. This page, yes. I do recall that.
 5 Q. What's the purpose of preparing this document,
 6 the discussion materials marked as CPH Exhibit
 7 9?
 8 A. I don't know specifically what meeting this is
 9 for or who the audience was.
 10 Q. Was this document an effort by Morgan Stanley to
 11 in essence sell Sunbeam Corporation -- I
 12 withdraw.
 13 Is this document in essence materials
 14 prepared to provide prospective buyers or
 15 acquisition targets with information concerning
 16 Sunbeam's existing financial and business
 17 condition?
 18 A. I don't know if that was the purpose here.
 19 Q. Do you know of any other purpose --
 20 A. It could have been. I'm sorry.
 21 Q. Do you know of any other purpose this document
 22 would serve?
 23 A. February of '98. It could have been given,
 24 again, just speculating, it could have been
 25 given to anyone just to update them or inform

Page 117

1 EUGENE YOO
 2 them about Sunbeam. Just their current
 3 situation.
 4 Q. For what purpose?
 5 A. Oh, I don't know.
 6 Q. As you flip through this document, Mr. Yoo, did
 7 you prepare, do you recognize any pages in this
 8 document that you prepared?
 9 A. I didn't put any of these pages together myself.
 10 But I worked with Tyrone and Lilly in putting
 11 them together.
 12 Q. Did Mr. Chang and Miss Rafii provide you with
 13 the materials that they were preparing for your
 14 review?
 15 MS. BROWN: Object to the form.
 16 A. They provided me with these pages, you mean?
 17 Q. Were you asked to review the work product of
 18 Mr. Chang and Miss Rafii?
 19 A. Yes, I did review their work.
 20 Q. And if there were any errors or inconsistencies
 21 would you correct those or send the document
 22 back to them to change?
 23 MS. BROWN: Are you referring specifically
 24 to this document?
 25 Q. Generally the documents that they were

Page 118

1 EUGENE YOO
 2 preparing.
 3 A. I'm sorry, what was the question?
 4 Q. In general the documents that were prepared by
 5 Mr. Chang and Miss Rafii for your review, if you
 6 found any inconsistencies or errors in those
 7 documents did you change those documents or did
 8 you send them back down to those individuals for
 9 editing?
 10 A. I would give them the changes to make.
 11 Q. Showing you what has been previously marked as
 12 CPH Exhibit 187. Do you recognize that
 13 document?
 14 A. I think I do.
 15 Q. When do you recall seeing that document?
 16 A. I don't know the exact date. But I think I saw
 17 this or some version of this presentation in the
 18 fall of 1997.
 19 Q. Did you prepare any of the pages in this
 20 document?
 21 A. I don't think so.
 22 Q. Do you know who did?
 23 A. I don't know.
 24 Q. The same question for CPH Exhibit 9, do you know
 25 who compiled the materials to create this

Page 119

1 EUGENE YOO
 2 discussion material packet?
 3 A. CPH 9?
 4 Q. Correct.
 5 A. The raw data and information that was used to
 6 produce this was probably collected by Lilly and
 7 Tyrone.
 8 Q. What did you do to confirm that the information
 9 contained in CPH Exhibit 9 and CPH Exhibit 187
 10 was accurate?
 11 A. Accurate meaning?
 12 Q. True.
 13 A. Was it actually -- okay. Not that these and
 14 this were the same, or?
 15 Q. Correct. Let's take them one at a time.
 16 A. Okay.
 17 Q. CPH Exhibit 9. What did you do to confirm that
 18 the information contained in CPH Exhibit 9 was
 19 accurate?
 20 A. Okay. Again, I couldn't give you specific
 21 examples, but for the most part we would go back
 22 or I would go back and check the file output of
 23 the product, a page like this versus whatever
 24 source data I could get my hands on. Mostly
 25 looking for accuracy and figures and text.

Page 120

1 EUGENE YOO
 2 Q. Do you recall any instance where you found
 3 inaccuracies in their materials that you had to
 4 change?
 5 A. There were a few instances of typographical
 6 errors or just misinterpreting of some numbers,
 7 maybe. But not many.
 8 Q. And again, with CPH Exhibit 187, what did you do
 9 to confirm that the statements contained in this
 10 document were accurate?
 11 MS. BROWN: Objection. Assumes facts not
 12 in evidence.
 13 Q. I'm sorry, what was the --
 14 (Prior testimony read back.)
 15 "And again, with CPH Exhibit 187,
 16 what did you do to confirm that
 17 the statements contained in this
 18 document were accurate?"
 19 A. I don't remember the specific steps that we
 20 took. Many of the things in here are just
 21 statements that, I don't think anybody can
 22 verify one way or the other. The financials, to
 23 the extent they're in here, I don't believe we
 24 really even used because they're too general and
 25 too broad.

Page 121

1 EUGENE YOO
 2 Q. If someone -- I'm sorry.
 3 A. We may have used some of these but I don't
 4 really think we relied on these very much.
 5 Q. If somebody outside of Morgan Stanley or
 6 somebody wanted to confirm the accuracy of these
 7 statements, what would they do?
 8 MS. BROWN: Objection. Hypothetical.
 9 Calls for speculation.
 10 A. Well, I mean, in the few cases that I had where
 11 we had questions with a company's numbers we
 12 would ask for any kind of backup data that they
 13 had to support the final numbers that they were
 14 showing us and how did they arrive at that
 15 particular number, what was the methodology.
 16 Q. So if an individual investor wanted to confirm
 17 the accuracy of these statements they would have
 18 to ask somebody for the backup information; is
 19 that your testimony?
 20 MS. BROWN: Objection. Mischaracterizes.
 21 Also a hypothetical.
 22 A. I don't think an individual investor would ever
 23 see this presentation, but I don't know. I
 24 don't know who it's given to.
 25 Q. If you can turn to page CPH 254636 in Exhibit

Page 122

1 EUGENE YOO
 2 187.
 3 A. Okay.
 4 Q. That page is entitled Long Range Strategic
 5 Objectives Earnings From Continuing Operations.
 6 At the bottom of that table there's EPS,
 7 earnings per share, estimated at two dollars and
 8 twenty cents in 1998; do you see that?
 9 A. Yes.
 10 Q. What did you do to confirm that that estimate
 11 was accurate?
 12 A. I don't remember specifically what we did on
 13 that.
 14 Q. The same question for 1999 and 2000; do you
 15 recall what you did to confirm the accuracy of
 16 two seventy-five a share and three thirty a
 17 share?
 18 A. Again, on these financials and this presentation
 19 I'm not sure if we relied on these numbers as
 20 much. Generally speaking, going back to what I
 21 said before, if there were numbers in any of the
 22 financials we got back from a client that we had
 23 questions on or were unsure of we would go back
 24 and ask for the backup data and then we would
 25 try to rebuild that to try to see if we agreed

Page 123

1 EUGENE YOO
 2 with their conclusions on their numbers.
 3 Q. Do you recall if in 1998 you believe that
 4 Sunbeam's plan to achieve EPS of two twenty a
 5 share in 1998 was attainable?
 6 A. I can't remember any reason why we thought it
 7 was not attainable.
 8 Q. But you can't recall what you did to confirm
 9 that it was attainable?
 10 A. Not specifically, no. I mean, we had our own
 11 models that we ran.
 12 Q. Where did you obtain the data to run those
 13 models?
 14 MS. BROWN: Object to form.
 15 A. For the models that we ran here on Sunbeam, some
 16 of the information was again from public
 17 information, some of the information was from
 18 analysts reports, equity analyst reports.
 19 Q. Was the data also provided by Sunbeam itself?
 20 MS. BROWN: Objection.
 21 A. It depends on when.
 22 Q. I'm sorry?
 23 A. It depends on what time period you're talking
 24 about.
 25 Q. In the first quarter of 1998.

Page 124

1 EUGENE YOO
 2 A. In 1998 we may have been using some financials
 3 from Sunbeam.
 4 Q. How about 1997?
 5 A. Definitely not before we were engaged.
 6 Q. But after -- well, do you mean formally engaged
 7 in the fall of 1997 or starting in April of 1997
 8 when Morgan Stanley began preparing materials in
 9 connection with the pitch and the engagement?
 10 A. Before the formal engagement.
 11 Q. If you could turn to page CPH 254639. It's
 12 entitled net sales growth analysis. At the
 13 bottom it indicates a net sales plan of 1.6
 14 billion in 1998, 2.0 billion in 1999, 2.4
 15 billion in 2000; do you see those numbers?
 16 A. Yes.
 17 Q. What did you do to confirm that Sunbeam --
 18 withdrawn.
 19 What did you do to confirm that these net
 20 sales were attainable?
 21 A. I don't remember about this page specifically.
 22 Or these specific numbers. But in confirming
 23 their growth plan in general, when we went
 24 through the backup financials that they had to
 25 build up to the sales, and we also met with the

Page 125

1 EUGENE YOO
 2 division heads to talk about the growth plans
 3 that they had for each individual, each
 4 individual division, how they were going to get
 5 that.
 6 Q. Were their plans for sales consistent with
 7 what's reflected on page CPH 254639?
 8 A. Were whose plans?
 9 Q. Sunbeam. Sunbeam management. The folks that
 10 you spoke to.
 11 A. These numbers came from them, so I don't
 12 remember exactly what the numbers were at the
 13 time.
 14 Q. If you turn to the next page, CPH 254640. What
 15 did you do, if anything, to confirm the
 16 attainability of first quarter 1998 earnings as
 17 indicated on this page?
 18 A. I think it was the same process. For our first
 19 quarter '98 we were probably also able to
 20 compare the numbers to analyst reports at the
 21 time and their projections for the 1998 first
 22 quarter.
 23 Q. Did you ever speak to any analysts about their
 24 reports?
 25 A. We never spoke to any research analysts. At

Page 126

1 EUGENE YOO
 2 least I did not.
 3 Q. You don't know anyone else who did?
 4 A. I don't believe anyone did.
 5 Q. Did Morgan Stanley attempt to verify or
 6 challenge any of the statements made by the
 7 analysts?
 8 MS. BROWN: Object. Foundation.
 9 A. I don't know.
 10 Q. And, again, you don't recall if either of these
 11 documents were provided to Coleman or MacAndrews
 12 and Forbes?
 13 A. I don't know.
 14 Q. Mr. Yoo, I'm handing you what's previously been
 15 marked as CPH Exhibit 92. My first question for
 16 you, Mr. Yoo, actually is not related
 17 specifically to that document, but other than
 18 reviewing the work performed by Mr. Chang and
 19 Miss Rafii, were you involved in assessing or
 20 estimating the potential synergies of
 21 contemplated a transaction involving Sunbeam and
 22 Coleman?
 23 MS. BROWN: Object to form.
 24 A. I, you know, I was not involved in developing
 25 any kind of estimates or coming up with any kind

Page 127

1 EUGENE YOO
 2 of projections on synergies. Our role was
 3 simply using synergy numbers that others were
 4 providing to us.
 5 Q. Who provided you with those synergy numbers?
 6 A. I don't remember specifically who. But I think
 7 generally synergy numbers were provided by
 8 Sunbeam or Coopers and Lybrand.
 9 Q. And Coopers was retained by Sunbeam or Morgan
 10 Stanley to assist with preparing synergy
 11 analyses?
 12 MS. BROWN: Object? Facts not in evidence.
 13 A. I don't know -- I'm pretty sure they weren't
 14 retained by Morgan Stanley. I don't think they
 15 were working for us.
 16 Q. Other than Sunbeam and Coopers who else provided
 17 synergy numbers for Morgan Stanley's models?
 18 MS. BROWN: Object to form.
 19 Q. If any.
 20 A. Well, as far as I knew for the potential
 21 transactions we were contemplating there were, I
 22 don't think there were any other sources for the
 23 synergy numbers.
 24 Q. Who was involved at Morgan Stanley with taking
 25 that data and reviewing it or manipulating it or

Page 128

1 EUGENE YOO
 2 entering it into financial models?
 3 MS. BROWN: Object. Compound.
 4 A. The actual handling of the models was done by
 5 the analysts, mostly Tyrone. But all of his
 6 work was then ultimately reviewed by either
 7 myself or Alex.
 8 Q. Other than Mr. Chang do you know of anyone else
 9 that was involved with preparing synergy models?
 10 A. Preparing models using the synergy numbers?
 11 Q. Correct.
 12 A. Not that I can think of, no.
 13 Q. Turning to the document that I handed you, CPH
 14 Exhibit 92. Do you recall this document?
 15 A. I think I do, yes.
 16 Q. Do you recall reviewing this document in 1997 in
 17 connection with proposed transactions involving
 18 Black and Decker, any other companies listed in
 19 here?
 20 A. I do recall that.
 21 Q. In the second paragraph on the first page of
 22 Exhibit 92, it states, "enclosed please find our
 23 initial attempts at determining the likely
 24 synergies associated with the change of control.
 25 For each targeted company we have made estimates

Page 129

1 EUGENE YOO
 2 as to the range of attainable synergies and
 3 their ensuing financial impact on the combined
 4 company." Is that consistent with what Morgan
 5 Stanley was doing in connection with the
 6 potential transaction with Coleman?
 7 A. I'm not sure what you mean by that.
 8 Q. Well, in analyzing a potential transaction
 9 involving Sunbeam and Coleman, did Morgan
 10 Stanley make estimates as to the range of
 11 attainable synergies in their financial impact
 12 as is indicated in CPH Exhibit 92?
 13 MS. BROWN: Object to form and foundation.
 14 A. The analysis here is a little different from
 15 what might have been done in the Coleman
 16 transaction. This is a preliminary look before
 17 we had any contact with any company before we
 18 have any potential transaction even showing any
 19 signs. These were just ideas. And these
 20 synergies were also flushed out. We made
 21 guesses here at this point and then talked with
 22 the Sunbeam management team to make sure that
 23 they were reasonable and they adjusted our
 24 estimates, our original estimates to what they
 25 thought were, you know, at least on a first

Page 130

1 EUGENE YOO
 2 broad brush, reasonable assumptions. You know,
 3 at the point with, where we were with Coleman it
 4 was a much more, I don't want to use the word
 5 precise, but it was a different kind of synergy
 6 estimate. It wasn't something that we were
 7 coming up with. At that point we were relying
 8 on Sunbeam or Coopers to give us a more refined
 9 number. Where there was an actual tangible
 10 transaction. At this point there were just too
 11 many companies we were considering.
 12 Q. Okay. In the last sentence of that second
 13 paragraph it states, "we have also included the
 14 background on Scott Paper and Sunbeam which we
 15 used as templates for our analysis"?
 16 A. Uh-huh.
 17 Q. Do you recall if Morgan Stanley used the
 18 background information it possessed on Scott
 19 Paper in analyzing potential synergies in a
 20 transaction involving Sunbeam and Coleman?
 21 A. I don't recall that happening.
 22 Q. Do you know why Morgan Stanley was using Scott
 23 Paper as a template for potential synergies?
 24 MS. BROWN: Objection.
 25 Q. Involving the companies that are listed in these

Page 131

1 EUGENE YOO
 2 materials?
 3 MS. BROWN: Object to form. "These
 4 materials" being CPH 92?
 5 MR. O'CONNOR: Yes. Thank you.
 6 MS. BROWN: I still object to form.
 7 A. From what I can recall I'm not sure if this is
 8 the only reason behind it, but. It was one of
 9 the more recent transactions that Al Dunlap had
 10 been involved with and one of the bigger ones,
 11 and it was a closer fit to the transactions that
 12 we were contemplating at the time. But other
 13 than that I can't, I don't recall any other
 14 reasons.
 15 Q. Is Sunbeam's restructuring and growth plans
 16 relevant to analyzing potential synergies in a
 17 transaction involving Sunbeam and another
 18 company?
 19 MS. BROWN: Can I hear that question back.
 20 (Prior testimony read back.)
 21 "Is Sunbeam's restructuring and
 22 growth plans relevant to analyzing
 23 potential synergies in a
 24 transaction involving Sunbeam and
 25 another company?"

Page 132

1 EUGENE YOO
 2 MS. BROWN: Object to form.
 3 A. I'm not sure I understand the question.
 4 Q. Well, if you turn to page Morgan Stanley 3414.
 5 Included in this package that was sent to
 6 Sunbeam was the Sunbeam restructuring and growth
 7 plans which we've seen before. Two pages prior
 8 to that are Scott paper restructuring plans and
 9 growth projects. Is that information important
 10 for Morgan Stanley to consider in attempting to
 11 estimate a range of attainable synergies in a
 12 potential transaction involving Sunbeam and
 13 another company?
 14 MS. BROWN: Object to form.
 15 Q. Such as the companies that are analyzed in CPH
 16 Exhibit 92?
 17 MS. BROWN: The same objection.
 18 A. For this analysis I don't know how relevant they
 19 are or not. I'm trying to remember what we were
 20 doing here. I can't read the numbers. Again, I
 21 don't know specifically what we were doing. I
 22 can't remember what we were doing on this
 23 analysis. I would think that's, the
 24 restructuring plan and the growth targets might
 25 have some impact on potential synergies, but I

Page 133

1 EUGENE YOO
 2 wouldn't know how to incorporate that into an
 3 analysis.
 4 Q. I show you what's been previously marked as CPH
 5 Exhibit 93. The first two pages are meta data
 6 for the attached document which is entitled
 7 Sunbeam Corporation Executive Summary. The
 8 third page in which is entitled Sunbeam
 9 Corporation Synergies Analysis, do you recognize
 10 this document? This page of this document.
 11 A. Yes, I think I do.
 12 Q. Did you prepare this or review this page?
 13 A. I believe I did review this page.
 14 Q. And then the following page is entitled Sunbeam
 15 Corporation Sources of Synergies.
 16 A. Okay.
 17 Q. Do you see that?
 18 A. Yes, I do.
 19 Q. And the last bullet point on that page reads,
 20 "total potential synergies of over one hundred
 21 and 50 million from Sunbeam with 50 percent
 22 recognized in year one and the remainder by year
 23 two." Do you recall reviewing that statement
 24 back in 1997?
 25 A. Again, I think I do. I'm not sure exactly what

Page 134

1 EUGENE YOO
 2 presentation this was in.
 3 Q. Looking at those two pages, the synergy analysis
 4 and sources of synergies, is that information,
 5 is the information contained on those pages
 6 relevant to Morgan Stanley's analysis of
 7 potential synergies involving Sunbeam and the
 8 transaction involving Sunbeam and another
 9 company?
 10 MS. BROWN: Object to form and foundation.
 11 A. Some of these are somewhat useful. But most of
 12 this is not something that we could use in a
 13 quantitative form for a model or any kind of
 14 quantitative analysis.
 15 Q. Do you recall how Morgan Stanley came up with
 16 the total potential synergies of 150 million
 17 dollars involving Sunbeam?
 18 MS. BROWN: Objection. Foundation. Form.
 19 A. No, I don't recall where the 150 million dollar
 20 figure came from.
 21 Q. Do you recall asking Mr. Chang? I'll represent
 22 to you that the meta data on the first page of
 23 CPH Exhibit 93 indicates that Mr. Chang drafted
 24 this document in October of 1997.
 25 A. Okay.

Page 135

1 EUGENE YOO
 2 Q. Do you ever recall -- do you recall ever
 3 speaking with Mr. Chang about where he obtained
 4 the information that's contained in this, on the
 5 pages entitled Synergies Analysis and Sources of
 6 Synergies?
 7 A. I don't recall ever having that conversation
 8 with him.
 9 (Deposition Exhibit 225 marked for
 10 identification.)
 11 Q. You've been handed what's been marked as CPH
 12 Exhibit 225, this is a letter from Coopers and
 13 Lybrand addressed to yourself dated October 3,
 14 1997. Do you recognize this document?
 15 A. I think I've seen the matrix before.
 16 Q. Do you recall the purpose of, the purpose behind
 17 Coopers sending you this information?
 18 A. I believe this was the initial response back
 19 from Coopers and Lybrand from our request for
 20 more detail and backup on synergies.
 21 Q. So as of October 3rd of 1997 Coopers was
 22 actively engaged in providing its expertise on
 23 analyzing synergies to Morgan Stanley or
 24 potential transaction involving Sunbeam?
 25 MS. BROWN: Object to form.

Page 136

1 EUGENE YOO
 2 Mischaracterization.
 3 A. I don't know what the relationship with Coopers
 4 was. There was no formal relationship that I
 5 knew of between Coopers and Morgan Stanley and I
 6 wasn't aware of what the relationship was
 7 between Coopers and Sunbeam. I didn't know when
 8 they were brought on board or what the
 9 arrangement was with them.
 10 Q. But you knew why they were sending you this
 11 document on October 3rd; right?
 12 A. At the time I knew, yeah. I knew they were
 13 sending it to us, I knew that they were working
 14 on a project with us.
 15 Q. And that project was a potential transaction
 16 involving Sunbeam; right?
 17 A. Right.
 18 Q. And analyzing potential synergies that might
 19 arise from those transactions; correct?
 20 MS. BROWN: Object to form.
 21 Characterization.
 22 A. Well, for, we were trying to narrow down the
 23 field of potential companies that we would
 24 consider to begin looking at potential
 25 transactions. I think at this point it was a

Page 137

1 EUGENE YOO
 2 little too premature, we weren't looking at
 3 transactions with all of these companies.
 4 Q. Do you recall when Coopers first started
 5 providing information to Morgan Stanley
 6 concerning potential synergies?
 7 A. No. I didn't know when they were signed by, or
 8 when they were brought on board by Sunbeam. I
 9 didn't know what their role was.
 10 Q. All you knew is that they were providing you
 11 with information on potential synergies
 12 involving other companies?
 13 MS. BROWN: Object to form.
 14 A. I don't remember the first contact I had with
 15 them or knew about them. We just started
 16 receiving information from them one day.
 17 Q. You had no advanced notice that they were going
 18 to start working in --
 19 A. I don't remember.
 20 Q. Working on providing you with information on
 21 potential synergies involving a transaction with
 22 Sunbeam and another company?
 23 A. I don't remember what we knew about Coopers; we
 24 weren't really focusing on them.
 25 (Deposition Exhibit 226 marked for

Page 138

1 EUGENE YOO
 2 identification.)
 3 Q. Mr. Yoo, you've been handed what's been marked
 4 as CPH Exhibit 226 which is a fax cover sheet
 5 for Coopers and Lybrand to Gene Yoo dated
 6 October 23, 1997 attaching several pages of
 7 documents. Do you recall receiving this fax?
 8 A. I think I do recall this.
 9 Q. Do you recall the purpose behind this
 10 information?
 11 A. I don't remember specifically what we requested
 12 this for.
 13 Q. Is this the type of information that Coopers was
 14 providing Morgan Stanley in 1997 on various
 15 potential strategic alternatives for Sunbeam?
 16 MS. BROWN: Object to form.
 17 A. I couldn't say if this was typical or not.
 18 Q. Do you recall if they prepared a similar
 19 document for a potential acquisition of the
 20 Coleman Company?
 21 A. I don't remember.
 22 Q. Do you recall Al Dunlap ever stating that he
 23 believed the transaction -- strike that.
 24 Do you recall Al Dunlap ever saying that
 25 Sunbeam could attain 2 hundred million dollars

Page 139

1 EUGENE YOO
 2 in synergies as a result of an acquisition of
 3 the Coleman Company?
 4 A. I don't recall anything like that at all.
 5 Q. Do you recall any statements made by any Sunbeam
 6 personnel regarding their beliefs on the
 7 potential to obtain synergies in a transaction
 8 involving the acquisition of the Coleman
 9 Company?
 10 A. I can't remember specifically what anybody said.
 11 Q. Generally?
 12 A. I think the only thing that I can remember was
 13 that some of the potential cost savings were
 14 already implemented on the Coleman side. I
 15 don't remember the amount, but that's the only
 16 thing that I can remember about the Coleman
 17 situation.
 18 Q. How did you know that?
 19 A. I didn't know it; I remember somebody saying
 20 that.
 21 Q. You remember someone telling you that some cost
 22 savings had already been implemented at Coleman?
 23 A. I don't know if it was cost savings or if it was
 24 some of the restructuring plan in place at
 25 Coleman were already underway.

Page 140

1 EUGENE YOO
 2 Q. As compared to what?
 3 A. As compared to Sunbeam coming in and
 4 implementing their own restructuring plan and a
 5 target company.
 6 Q. Were those potential savings that were
 7 identified by Morgan Stanley?
 8 A. No. We didn't identify any savings that I can
 9 remember.
 10 Q. Were the savings that had already been
 11 implemented at Coleman part of the synergies
 12 estimates provided by Sunbeam?
 13 MS. BROWN: Object to foundation.
 14 A. From what I remember of the synergy estimates we
 15 actually segregated out, I thought, the cost
 16 savings that were already achieved or part of
 17 the restructuring plan that was already in
 18 place. I thought we had done that.
 19 Q. Do you recall ever receiving any synergy
 20 estimates or ideas from the Coleman Company?
 21 A. I don't recall what we got from Coleman.
 22 Q. You don't recall any particular number, an
 23 amount of synergies thought to be attainable,
 24 where that information came from Coleman or
 25 MacAndrews and Forbes?

Page 141

1 EUGENE YOO
 2 A. No. I don't remember any specific numbers.
 3 Q. I show you what's been previously marked as CPH
 4 Exhibit 95. Do you recall this document?
 5 A. Yes, I do.
 6 Q. Did you prepare this document?
 7 A. I don't remember if I did this document or not.
 8 Q. Where do you recall seeing this document?
 9 A. I think this came up somewhere during the
 10 negotiations with Coleman, but I don't remember
 11 exactly at what point in time.
 12 Q. The first column is entitled Item and there are
 13 15 items listed under that column. Do you know
 14 where those items came from?
 15 A. I don't remember the source of the data, no.
 16 Q. And the same question with respect to the column
 17 entitled original and the numbers listed in that
 18 column, do you know the source of those numbers?
 19 A. No, I don't. I don't recall.
 20 Q. And then with the revision count, do you know
 21 the source of those revised numbers?
 22 A. Nope. I don't remember.
 23 Q. Do you know what was done with this document, if
 24 anything?
 25 A. I don't remember what we did this for.

Page 142

1 EUGENE YOO

2 Q. You can't recall if Morgan Stanley relied on

3 this document in preparing any synergies

4 analysis?

5 MS. BROWN: Objection. Form and

6 foundation.

7 A. I don't remember what the ultimate use of this

8 was for.

9 Q. Do you recall any conversations that you had

10 with people at Morgan Stanley or Sunbeam

11 concerning the items or the dollar amounts on

12 CPH Exhibit 95?

13 A. No, we never really had any discussions that I

14 can remember about this.

15 Q. Okay. Showing you what's previously been marked

16 as CPH Exhibit 97. Do you recall seeing this

17 document?

18 A. I'm not sure if I've seen this one.

19 Q. In this document there's an additional column, a

20 second revised column. You don't know where

21 those numbers came from?

22 A. No.

23 Q. And on the far right-hand side there's a column

24 entitled Comments. Did you draft any of those

25 comments for this particular document?

Page 143

1 EUGENE YOO

2 A. I don't believe I did.

3 Q. Do you know who did?

4 A. No.

5 Q. Let me ask a better question. Do you know

6 anyone involved in analyzing potential synergies

7 involving these items that would provide these

8 types of comments?

9 MS. BROWN: Can you....

10 (Prior testimony read back.)

11 "Do you know anyone involved in

12 analyzing potential synergies

13 involving these items that would

14 provide these types of comments?"

15 MS. BROWN: Object to form.

16 A. At this level of detail we most likely were

17 relying on Sunbeam and/or Coopers for this

18 information.

19 Q. Do you recall having any conversations with

20 anyone at Morgan Stanley or Sunbeam involving

21 these types of comments or issues related to

22 these potential synergy ideas?

23 MS. BROWN: Object to form.

24 A. I don't recall any conversations.

25 Q. Do you recall if Morgan Stanley or Sunbeam used

Page 144

1 EUGENE YOO

2 CPH Exhibit 97 in connection with the Sunbeam

3 and Coleman transaction?

4 MS. BROWN: Objection. Foundation.

5 A. I don't know.

6 Q. I'm handing you what's been previously marked as

7 CPH Exhibit 62. Do you recall seeing this

8 document with this handwriting?

9 A. No, I don't think I've seen this before.

10 Q. Do you recognize the handwriting?

11 A. No, I'm not sure who it is.

12 Q. Okay. Set that aside. I'm handing you what's

13 been previously marked as CPH Exhibit 139. Do

14 you recognize this document?

15 A. The first page is familiar, the second page is

16 familiar. I'm not sure I've seen the last two

17 pages.

18 Q. You did not prepare the last two pages on CPH

19 Exhibit 139?

20 A. I don't think I did. They're not familiar.

21 Q. If you look at the last page which is labeled

22 Morgan Stanley 26544.

23 A. Okay.

24 Q. It's a page entitled Project Laser Overview of

25 Synergy Analysis Camper. Do you recall the code

Page 145

1 EUGENE YOO

2 name for Coleman Company was Camper?

3 A. I believe that was the case, yes.

4 Q. And on this chart there are three boxes, the

5 first box on the left next to the words

6 estimated annual synergies reflects 100 million

7 dollars in the top of the box; do you see that?

8 A. Yes.

9 Q. And the middle box shows 150 million and the

10 third box shows 200 million?

11 A. Uh-huh.

12 Q. Do you recall the source of those synergy

13 estimates?

14 A. No. I don't, no.

15 Q. You don't recall any conversations with Sunbeam

16 or Morgan Stanley in which the synergy estimates

17 were discussed? The 100, 150 and 200 million

18 dollar estimates?

19 A. Those numbers aren't familiar to me, I don't

20 recall anything about them.

21 Q. Do you recall anyone at Morgan Stanley reaching

22 a decision on the amount of potential synergies

23 that could be attained as a result of Sunbeam's

24 acquisition of the Coleman Company?

25 MS. BROWN: Object to form and foundation.

Page 146

1 EUGENE YOO

2 A. As far as I knew we really didn't make any

3 conclusions or decisions on what the synergies

4 were going to be.

5 Q. Do you recall if anyone at Sunbeam came to any

6 conclusion on the amount of potential synergies

7 that could be attained in the acquisition of the

8 Coleman Company by Sunbeam?

9 MS. BROWN: Objection. Foundation.

10 A. I don't recall who, I don't recall if Sunbeam

11 came up with any definitive answers on the

12 synergies.

13 Q. Do you recall whether anyone at Sunbeam came to

14 a decision as to a range of synergies?

15 MS. BROWN: Objection. Foundation.

16 A. For the most part as far as any synergy

17 discussions we were relying on Russ and it was

18 from the Sunbeam side. We were relying on Russ

19 Kirsch.

20 Q. Relying on him for what?

21 A. For guidance on synergies or potential synergies

22 in a transaction.

23 Q. Why were you relying on Mr. Kirsch for that?

24 A. He seemed to have the , from our position, he

25 seemed to have the best knowledge of what

Page 147

1 EUGENE YOO

2 potential synergies could be with these

3 different target companies.

4 Q. Why did you believe that to be true?

5 A. He seemed to have a level of knowledge of the

6 companies that was deeper than our view as an

7 outside adviser.

8 Q. Knowledge of Sunbeam?

9 A. Of Sunbeam and of the industry in general.

10 Q. Other than Mr. Kirsch anyone else that Morgan

11 Stanley relied on in obtaining guidance on

12 potential synergies?

13 MS. BROWN: Objection. Form and

14 foundation.

15 A. From Sunbeam, you mean?

16 Q. Correct.

17 A. From the Sunbeam side?

18 Q. Correct.

19 A. Russ was our main point of contact. I don't

20 know if there was anyone else at Sunbeam who was

21 working on coming up with the numbers.

22 Q. I'm handing you what's previously been marked as

23 CPH Exhibit 205. Do you recall this document?

24 A. I'm not sure if I've seen this before or not.

25 Q. The top of CPH Exhibit 205 contains a fax line

Page 148

1 EUGENE YOO

2 where it says "sent by C and L" and then across

3 the top it reads "Coopers and Lybrand, dated

4 2/27/98." Does that refresh your recollection

5 with respect to who created this document?

6 A. No. I don't remember this. I may have seen it

7 but I don't remember.

8 Q. I'm sorry. Were you aware that Coopers

9 estimated potential synergies of 118 million

10 with respect to an acquisition of the Coleman

11 Company by Sunbeam?

12 MS. BROWN: Objection. Form, foundation.

13 Assumes facts not in evidence.

14 A. I did know that Coopers was working in some form

15 on developing the synergy estimates. I didn't

16 know, or at least I don't remember now what the

17 ultimate number was that they came up with.

18 Q. Did you have any conversations with anyone at

19 Coopers concerning potential synergies involving

20 an acquisition of Coleman by Sunbeam?

21 A. I don't remember.

22 Q. Do you know if anyone at Morgan Stanley had

23 communications with Coopers on that issue?

24 A. I couldn't say for sure.

25 Q. Do you know if anyone at Coleman or MacAndrews

Page 149

1 EUGENE YOO

2 and Forbes came to any conclusion on the

3 synergies that could be attained in an

4 acquisition of the Coleman Company by Sunbeam?

5 MS. BROWN: Can I have that question back.

6 (Prior testimony read back.)

7 "Do you know if anyone at Coleman

8 or MacAndrews and Forbes came to

9 any conclusion on the synergies

10 that could be attained in an

11 acquisition of the Coleman Company

12 by Sunbeam?"

13 MS. BROWN: Objection. Foundation.

14 A. I don't know any conclusions or anything about

15 what they decided or concluded.

16 Q. Did anyone at Morgan Stanley offer to you their

17 opinion on the level of synergies that could be

18 attained in an acquisition of Coleman by

19 Sunbeam?

20 A. Not that I can recall.

21 Q. Mr. Chang didn't ever give you his opinion on

22 the synergies that might be attained?

23 A. I don't remember. No, I don't remember.

24 Q. Mr. Yoo, did you attend the meeting of the

25 Sunbeam board of directors on February 27, 1998

Page 150

1 EUGENE YOO
 2 where the issue of acquisition of Coleman was
 3 discussed?
 4 A. I was present for a part of the meeting. I was
 5 not there for the first half of the meeting.
 6 Q. Why did you arrive after the start of the
 7 meeting?
 8 A. There were, I believe, five presentations that
 9 Morgan Stanley put together for that meeting and
 10 I was finishing the last two while the meeting
 11 began.
 12 Q. What do you recall being discussed at the board
 13 meeting while you were in attendance?
 14 A. At the point that I walked in I think Jim Stynes
 15 was talking about the details of either
 16 FirstAlert or Signature Brands in an
 17 acquisition. And then I think, I think after
 18 that Bill Strong was talking about financing
 19 alternatives. After that I think it was just a
 20 general Q and A, or open discussion with the
 21 board, I don't remember any of the details after
 22 that.
 23 Q. Do you recall any of the specifics, anything
 24 specific that Mr. Strong told the board in
 25 regard to financing alternatives?

Page 151

1 EUGENE YOO
 2 A. I don't remember any specifics. Mostly it was
 3 just laying out alternatives and views from our
 4 capital market people.
 5 Q. Anything else you can remember being discussed
 6 at the meeting?
 7 A. No. I was pretty tired at that point.
 8 Q. Do you recall any discussion of Sunbeam's
 9 financial performance in January and February of
 10 1998?
 11 A. No.
 12 Q. Any discussions of Sunbeam's projected financial
 13 performance, for example, second quarter of
 14 1998?
 15 A. No, I don't remember anything like that.
 16 Q. Mr. Yoo, I'm handing you what's been previously
 17 marked as CPH Exhibit 89. Do you recall this
 18 document, sir?
 19 A. Yes, I do.
 20 Q. What is this document?
 21 A. This is the presentation that we put together
 22 for the Sunbeam board outlining the potential
 23 acquisition of Coleman.
 24 Q. On the first page of CPH Exhibit 89 up in the
 25 upper right-hand corner there's a designation of

Page 152

1 EUGENE YOO
 2 preliminary draft, do you have any knowledge if
 3 there was drafts subsequent to this that would
 4 have been presented to the board or if this was
 5 in fact the final version?
 6 A. I couldn't say definitively if this was the
 7 final version or not. Yeah, I don't know.
 8 Q. If you could just take a moment to flip through
 9 it. My question would be do you have any reason
 10 to believe this was not the final version?
 11 A. No, there's no reason to believe it's not the
 12 final version.
 13 Q. If you could please turn to page 16 of the
 14 presentation, which is Morgan Stanley 83982.
 15 A. Okay.
 16 Q. This page is entitled Summary of Camper
 17 Evaluation Analyses. Section 4 on this page is
 18 entitled Estimated Value of Synergies, and below
 19 this there's 100 million pre tax, 150 million
 20 pre tax and 200 million pre tax. Do you see
 21 that?
 22 A. Yes, I do.
 23 Q. Do you recall any discussions about the
 24 potential for Sunbeam to realize between 100 and
 25 200 million in pre tax synergies at this board

Page 153

1 EUGENE YOO
 2 meeting?
 3 A. No, I don't recall. I don't think I was even
 4 there for the presentation on Coleman.
 5 Q. Would you please turn to page Morgan Stanley
 6 84007. That page is entitled Review of
 7 Anticipated Combination Synergies. The next
 8 page appears to be the same document that I
 9 showed you earlier. Does that refresh your
 10 recollection with respect to who created that
 11 document or the use of that document?
 12 A. No, not really. I don't really remember this
 13 page.
 14 Q. And then the next page, Morgan Stanley 840009.
 15 It appears to be the same document we looked at
 16 earlier?
 17 A. Uh-huh.
 18 Q. Does that refresh your recollection with respect
 19 to who prepared that document or what the
 20 document was to be used for?
 21 A. No. Again, I don't really remember this page.
 22 Q. If you turn to page 84011, entitled Scott Paper
 23 Restructuring Growth Plans. Does the inclusion
 24 of this page in the board book refresh your
 25 recollection with respect to Morgan Stanley's

Page 154

1 EUGENE YOO
 2 use of Scott Paper restructuring in estimating
 3 potential synergies in a transaction involving
 4 Coleman?
 5 MS. BROWN: Object to form. Assumes facts
 6 not in evidence.
 7 A. As far as Scott Paper I think the only time we
 8 actually ever used it to develop any kind of
 9 synergy estimates was at the very beginning when
 10 we were first pitching for Al's business. From
 11 what I remember this was placed here only as a
 12 reference point just to show that he has done
 13 similar types of restructurings at other places,
 14 that it wasn't completely out of the ballpark
 15 that he could try to do something similar at
 16 Coleman.
 17 Q. So Dunlap's ability to restructure companies was
 18 important to determining the anticipated
 19 combination of synergies of this transaction?
 20 MS. BROWN: Object to the form.
 21 Mischaracterizes.
 22 A. I'm not sure if we used it to develop the
 23 numbers. But it was to show that the idea of Al
 24 Dunlap and his team going in and trying to
 25 restructure a company was not something that was

Page 155

1 EUGENE YOO
 2 unfathomable. It was really more the use here.
 3 It's something that they've been through before
 4 and they may or may not be successful again, but
 5 it's something that they've done before. They
 6 had a track record.
 7 Q. Can you recall anything else from board of
 8 directors meeting on February 27th on the issue
 9 of synergies?
 10 A. No, not synergies.
 11 Q. Was there any discussion of the value of the
 12 Coleman Company and the price that Sunbeam was
 13 paying for the acquisition of the Coleman
 14 Company?
 15 A. No, I, as far as I can remember I wasn't present
 16 for that part of the discussion.
 17 Q. Did you participate at all in the discussion
 18 that day at the board meeting?
 19 A. No, I didn't.
 20 Q. What was your role at that board meeting?
 21 A. I was there simply to observe.
 22 Q. Do you recall working with a public relations
 23 firm in connection with announcing the
 24 transactions that the board approved on February
 25 27, 1998?

Page 156

1 EUGENE YOO
 2 A. I, I didn't work with a, anyone from a public
 3 relations firm that I can remember. There may
 4 have been one that was retained at some point
 5 prior to the announcement, but I don't know for
 6 sure.
 7 Q. Does the name Hilden Knowlton (ph.) ring a bell?
 8 A. I know the company but I don't recall if they
 9 were specifically involved in this or not.
 10 Q. Okay. Were you involved in preparing any
 11 statements or responses to potential questions
 12 that may be asked at the public announcement of
 13 the transaction involving the Coleman Company?
 14 A. No. Not that I can recall.
 15 Q. I'm handing you what's been previously marked as
 16 CPH Exhibit 142. Do you recall seeing this
 17 document?
 18 A. I don't think I've seen this before.
 19 Q. If you turn to page 3 of the document which is
 20 CPH 253549.
 21 A. Okay.
 22 Q. Paragraph 13 reads, "what's your first quarter
 23 going to look like? Are you comfortable with
 24 analyst estimates?" Do you remember discussing
 25 the response that should be given to that

Page 157

1 EUGENE YOO
 2 question upon the announcement of the
 3 transaction?
 4 A. No, I don't think I was ever part of any
 5 discussion on this.
 6 Q. Okay. Between the board meeting on February 27,
 7 1998 and the announcement, were you involved in
 8 any discussions or meetings concerning Sunbeam's
 9 first quarter 1998 sales?
 10 A. No, not that I can recall.
 11 Q. I show you one more previously marked as CPH
 12 143. Page 3 of 12. Paragraph 15. If you can
 13 just read that to yourself.
 14 A. (Witness reviewing.)
 15 Q. Do you have any knowledge of why the response
 16 changed from CPH Exhibit 142 to what's shown on
 17 CPH Exhibit 143?
 18 A. No, I don't know why it changed.
 19 Q. Okay. Set those aside. Mr. Yoo, did you ever
 20 speak to John Tyree in connection with your work
 21 on the Sunbeam engagement?
 22 A. Yes, I did.
 23 Q. What did you discuss with Mr. Tyree?
 24 A. John was taking over on the Sunbeam project once
 25 they moved into the financing phase and I was

Page 158

1 EUGENE YOO
 2 handing off to him.
 3 Q. What were you handing off to Mr. Tyree?
 4 A. Mostly, I think the only involvement I had with
 5 him was with regard to gathering company
 6 information and industry information. They were
 7 putting some of the standard descriptions into,
 8 I guess, the offering document and he was
 9 looking to me to help him fill it in.
 10 Q. And the reason for that was because you were the
 11 one who had been working with Sunbeam --
 12 A. Right
 13 Q. -- all along, gathering the information about
 14 the company?
 15 A. Right. So I had some of that information
 16 readily available and I could give it to him
 17 rather than having him look it up himself.
 18 Q. Were you involved in drafting any portion of the
 19 debenture offering memorandum?
 20 A. No.
 21 Q. And you understand what the debenture offering
 22 memorandum was in this deal?
 23 A. The convertible notes?
 24 Q. Correct.
 25 A. Yes.

Page 159

1 EUGENE YOO
 2 Q. Other than Mr. Tyree do you know who was
 3 involved in drafting that memo?
 4 A. No. I wasn't involved with that.
 5 Q. Okay. Did you ever speak to Mr. Tyree in
 6 connection with any due diligence that may have
 7 been performed on Sunbeam's accounting?
 8 MS. BROWN: Object to form.
 9 A. I never really spoke to him about the financials
 10 as far as I can remember.
 11 Q. Let me show you what's been previously marked as
 12 CPH Exhibit 31. This is a memo from John Tyree
 13 to the Sunbeam financing team dated March 7,
 14 1998 referencing an accounting due diligence
 15 conference call on March 12th; you did not
 16 participate in that call; correct?
 17 A. I don't believe I did.
 18 Q. And you had no conversations with Mr. Tyree or
 19 Shani Boone concerning the accounting due
 20 diligence call?
 21 A. Not that I can remember, no.
 22 Q. You don't recall seeing any documents
 23 summarizing what was discussed on that call or
 24 the information they learned on that call?
 25 A. No.

Page 160

1 EUGENE YOO
 2 Q. You don't remember that ever being discussed at
 3 Morgan Stanley in any meetings, the results of
 4 that conference call?
 5 A. No. My involvement with Sunbeam after the
 6 announcement was limited and then once the
 7 transaction closed it was really only focused on
 8 the sale of the spa business coming out of
 9 Coleman.
 10 Q. Okay.
 11 VIDEOGRAPHER: Can we take a break for one
 12 second? The time is two thirty-seven, we're off
 13 the record.
 14 (Short break taken.)
 15 VIDEOGRAPHER: We're back on the record.
 16 This is tape number four, the time is two
 17 forty-two.
 18 MR. O'CONNOR: I'll ask the court reporter
 19 to please mark the next exhibit.
 20 (Deposition Exhibit 227 marked for
 21 identification.)
 22 Q. Mr. Yoo, take a few minutes to look at what's
 23 been marked as CPH Exhibit 227. Do you
 24 recognize this document, sir?
 25 A. Yes, I do.

Page 161

1 EUGENE YOO
 2 Q. What was the purpose of Skadden Arps sending you
 3 this document?
 4 A. I believe this was part of the due diligence
 5 process as we were trying to, I don't know if we
 6 were just -- this was post announcement or pre
 7 announcement? We were trying to get to a
 8 closure on the deal.
 9 Q. Were you responsible for conducting legal due
 10 diligence of Sunbeam?
 11 A. I personally was not responsible for legal due
 12 diligence, but one of my roles was helping to
 13 make sure that the due diligence process moved
 14 forward smoothly.
 15 Q. Do you know who was responsible for legal due
 16 diligence?
 17 MS. BROWN: Object to form.
 18 A. I believe it was Skadden. I don't remember who
 19 specifically at Skadden.
 20 Q. Do you know why Skadden would be sending this
 21 document to you if they were responsible for
 22 conducting legal due diligence?
 23 A. In this case I think they were asking for any
 24 documents that we may have collected already in
 25 our work so they didn't have to go gather it

Page 162

1 EUGENE YOO
 2 again.
 3 Q. Are they asking you to request documents from
 4 Sunbeam for the due diligence review?
 5 MS. BROWN: Object to form. And
 6 foundation.
 7 A. In this case, no, I don't believe so. As far as
 8 I can remember we were just assisting them, but
 9 they were the ones ultimately responsible for
 10 the due diligence, for the legal due diligence.
 11 Q. Okay. I guess I'm confused by the first
 12 sentence of her memo. Which states, "the
 13 following items should be included as part of
 14 your due diligence request for Project Laser."
 15 Do you have any understanding of what that
 16 means?
 17 A. Oh, I do, actually. We were compiling a master
 18 list for the due diligence and we were getting
 19 lists from the legal team, from, I believe it
 20 was Arthur Andersen and our own, we had included
 21 our own prior list that we had sent to Sunbeam
 22 so that we could, rather than sending four or
 23 five different lists from different sources we
 24 were going to send them one list for the due
 25 diligence.

Page 163

1 EUGENE YOO
 2 Q. Okay. Who were you sending the list to, the
 3 master list?
 4 A. Let's see, I think this was going to, I think
 5 this was going to Coleman or somebody from the
 6 Coleman side.
 7 Q. Okay. And what exactly were you compiling for
 8 this master list, what would this master list
 9 include?
 10 A. I'm not sure what you mean.
 11 MS. BROWN: Object to form.
 12 Q. Well, maybe we're miscommunicating. You
 13 referred to a master list, what is the master
 14 list?
 15 A. A list of all of the items that we would be
 16 requesting as part of the due diligence for the
 17 MNA transaction. And rather than sending a list
 18 for the legal due diligence and a list for the
 19 accounting due diligence and a list for any
 20 other due diligence, financing, whatever, we
 21 were going to send them one list that they could
 22 use to compile their information. We were
 23 trying to make the process as easy for the other
 24 side as possible.
 25 Q. Okay. And part of this master list was this due

Page 164

1 EUGENE YOO
 2 diligence, legal due diligence list?
 3 A. I believe that was the case, if I remember
 4 correctly.
 5 Q. What else was included in the list?
 6 A. I think there was a section that came from
 7 Arthur Andersen, I don't recall whether or not
 8 there was a section that came from Coopers. We
 9 had a -- I believe we had a list that Morgan
 10 Stanley worked with Sunbeam to compile for their
 11 portion of the due diligence.
 12 Q. What materials did you obtain from Arthur
 13 Andersen?
 14 A. We -- I'm not sure what you mean by "materials."
 15 Q. When you said you believe they provided a
 16 section?
 17 A. Well, they provided a list for us to give to the
 18 other side.
 19 Q. Okay. My question is what was that list?
 20 A. I don't know now.
 21 Q. Is it one document?
 22 A. I think it was just a few pages they sent us of
 23 items that they were looking for from the other
 24 side.
 25 Q. Looking for from who?

Page 165

1 EUGENE YOO
 2 A. From the Coleman side.
 3 Q. Seeking information from Coleman?
 4 A. Right.
 5 Q. Okay. I'm handing you what's been previously
 6 marked as CPH Exhibit 28. Do you recognize this
 7 document?
 8 A. I think I do. I think I've seen this.
 9 Q. Where do you recall seeing this document?
 10 A. I don't remember the specific instance when I
 11 had seen this, but I think this was part of our
 12 update process with Sunbeam, just making sure
 13 that we were current on company events.
 14 Q. And why was that important to you?
 15 MS. BROWN: Object. Characterization.
 16 A. Again, I don't remember the specific impetus for
 17 this meeting, but generally, especially if we're
 18 going to go out and talk to other companies
 19 about Sunbeam, which I think this is when it was
 20 happening. I don't remember.
 21 Q. There's a reference there in paragraph 1 to
 22 "recent developments review." And in the third
 23 line down is "high dependence of recent sales
 24 growth on grilles." Do you recall why that was
 25 an issue to explore?

Page 166

1 EUGENE YOO

2 A. The only thing I can think of was that the sales

3 mix had changed a little bit and we were just

4 curious as to why.

5 Q. Do you recall what response you received from

6 Sunbeam on this issue?

7 A. I don't remember the response.

8 Q. Do you know who was responsible for obtaining

9 the information that is listed in this agenda?

10 MS. BROWN: Object to form.

11 A. I'm not sure if there was anyone responsible, or

12 any single person responsible for getting this

13 information. I think this was just a guide for

14 us to hold a discussion with them.

15 Q. Do you know who created this document?

16 A. No, I don't know.

17 Q. Do you recall any discussions with anyone at

18 Morgan Stanley about the contents of this

19 document?

20 A. No.

21 Q. Paragraph 5, "financial forecast review" lists

22 five items --

23 A. Uh-huh.

24 Q. -- for inquiry. Do you remember obtaining any

25 information on those issues?

Page 167

1 EUGENE YOO

2 A. I think we did get most of this at some point.

3 I don't know if it was directly as a result of

4 this. Other than maybe the sensitivity

5 analysis, I don't seem to remember anything

6 about that.

7 Q. Why is this information important to Morgan

8 Stanley?

9 A. In this case, or?

10 Q. Correct.

11 A. I'm not sure when it was. You know, I think it

12 was really just part of our making sure that our

13 financial models were accurate, that we were

14 representing the company and our analyses in the

15 right way.

16 Q. And why is that important?

17 MS. BROWN: Objection.

18 A. We need to make sure we're presenting accurate

19 data.

20 Q. Who were you presenting the accurate data to?

21 MS. BROWN: Objection to form.

22 A. I'm not sure who it was in this case.

23 Q. Is this the type of information that was being

24 provided to potential acquisition targets?

25 MS. BROWN: Object to form.

Page 168

1 EUGENE YOO

2 A. I don't know. I don't know if any of this

3 information was presented to them.

4 Q. Were you concerned about ensuring the accuracy

5 of the presentation books that were being

6 prepared by Morgan Stanley?

7 MS. BROWN: Object to form.

8 A. What do you mean by "concern"?

9 Q. Was one reason why you were performing this due

10 diligence -- withdrawn.

11 Was it important to you that the

12 information contained in presentation

13 statements, or presentation materials provided

14 to third parties was accurate?

15 A. Generally speaking, I mean, that was, I guess,

16 part of my job was to make sure that to the best

17 of our knowledge what we were presenting was

18 accurate.

19 Q. And one way to do that is to conduct due

20 diligence of the company; correct?

21 A. That's correct.

22 Q. And does this agenda reflect the issues that

23 Morgan Stanley needed to explore in order to

24 ensure that the information it had about the

25 company that it was providing to third parties

Page 169

1 EUGENE YOO

2 was accurate?

3 MS. BROWN: Object to form. Can I hear

4 that back, actually.

5 (Prior testimony read back.)

6 "And does this agenda reflect the

7 issues that Morgan Stanley needed

8 to explore in order to ensure that

9 the information it had about the

10 company that it was providing to

11 third parties was accurate?"

12 A. Again, I don't remember the specific instance

13 when we were using this, but this seems like

14 something we would use more, not to verify

15 accuracy, but more just to stay updated on the

16 company. It wasn't really -- this didn't seem

17 to be a matter of going back and questioning

18 anything that we thought was wrong. This is

19 just trying to make sure that we were as current

20 on the company as possible.

21 Q. If in attempting to remain current on the

22 company you discovered information that was

23 inconsistent with what you were communicating to

24 third parties, what would you do?

25 MS. BROWN: Object to form. Improper

Page 170

1 EUGENE YOO
 2 hypothetical.
 3 A. I don't know. I haven't been in that situation.
 4 I haven't had to deal with that yet.
 5 Q. In this transaction you never came across any
 6 information about Sunbeam's business or
 7 financial condition that was inconsistent with
 8 what was being presented to third parties by
 9 Morgan Stanley?
 10 MS. BROWN: Object to form.
 11 A. As far as I knew there were no inconsistencies
 12 between what we were presenting and information
 13 that we were getting from Sunbeam.
 14 Q. And had you come across that information what
 15 would you have done?
 16 MS. BROWN: Objection. Asked and answered.
 17 Improper hypothetical.
 18 A. Again, I don't know. I haven't been in that
 19 situation before, so I don't know.
 20 Q. You may have answered this question as well; you
 21 don't recall who was responsible for obtaining
 22 this information from Sunbeam?
 23 A. I don't think it was any single person. Again,
 24 I don't think this was really a list of items to
 25 gather, it was really more just talking points

Page 171

1 EUGENE YOO
 2 for a meeting or a discussion with them.
 3 Q. Who was responsible for ensuring that all the
 4 appropriate due diligence was completed by
 5 Morgan Stanley?
 6 MS. BROWN: Object to form.
 7 A. On the MNA side? Or --
 8 Q. We can start there.
 9 A. Okay. For this transaction or, I guess, MNA in
 10 general, I don't think there's any person
 11 assigned to oversee the completion of due
 12 diligence. It's part of our process just, you
 13 know, in order to be able to complete all of our
 14 work, to have all of the information that we
 15 need it's sort of fundamental that we have all
 16 of the due diligence completed, and also we have
 17 all the information we need.
 18 Q. If no one is responsible how does your
 19 department know that all of the due diligence
 20 has been conducted?
 21 MS. BROWN: Object to form.
 22 Mischaracterization.
 23 A. Like I said, in order for us to be able to
 24 complete our work and to be able to do our
 25 assignment properly that due diligence sort of

Page 172

1 EUGENE YOO
 2 gets completed as a matter of course. If we
 3 don't complete that we don't have the
 4 information we need to do our work and we're not
 5 able to provide our service to our clients.
 6 Q. Who is responsible for conducting the follow-up
 7 due diligence?
 8 A. I'm not sure what you mean by follow-up.
 9 Q. Well, you testified earlier that part of your
 10 due diligence function was to keep up with
 11 current events of the company, their latest
 12 filings, earnings and announcements. Who was
 13 responsible for ensuring that all of that was
 14 reviewed?
 15 A. It was really the whole deal team, really.
 16 Q. Who was responsible at Morgan Stanley for
 17 conducting the accounting due diligence?
 18 MS. BROWN: Object to form.
 19 A. The accounting due diligence -- well, to a
 20 certain extent we would do due diligence on the
 21 financials, but typically on an MNA transaction
 22 we didn't do any detailed accounting due
 23 diligence, we were relying on the auditors to do
 24 that for us and provide us comfort.
 25 Q. Were you involved in that process?

Page 173

1 EUGENE YOO
 2 MS. BROWN: Object to form.
 3 A. In which process?
 4 Q. In the due diligence process in reviewing the
 5 financial information and reviewing the
 6 auditor's comfort that it was providing to
 7 Morgan Stanley?
 8 MS. BROWN: Object to form.
 9 A. Well, we didn't review the auditors, but we were
 10 reviewing financials that they had signed off
 11 on.
 12 Q. I guess my question is did you review those
 13 financials?
 14 A. Yes, we did.
 15 Q. You personally?
 16 A. I looked at some of them.
 17 Q. Okay. And those were publicly available
 18 documents?
 19 A. Yes.
 20 Q. Any other documents that weren't publicly
 21 available?
 22 MS. BROWN: Asked and answered.
 23 A. In terms of financials?
 24 Q. Correct.
 25 A. There were the growth plans and budget that they

Page 174

1 EUGENE YOO
 2 had shown us.
 3 Q. Did you ever review a comfort letter provided by
 4 Arthur Andersen to Morgan Stanley in connection
 5 with this transaction?
 6 A. In connection with the MNA transaction?
 7 Q. With -- well, in connection with the acquisition
 8 of the Coleman Company in the subsequent
 9 financing of that transaction.
 10 A. I don't think I've seen that.
 11 Q. Let's find it. I'm handing you what's
 12 previously been marked as CPH Exhibit 17. Do
 13 you recall seeing this document?
 14 A. I don't think I've seen this.
 15 Q. While conducting your due diligence did you
 16 discover any information indicating that Sunbeam
 17 was employing bill and hold transactions?
 18 A. I'm sorry, what was the question again?
 19 Q. In conducting your due diligence of Sunbeam did
 20 you acquire any information indicating that
 21 Sunbeam was employing bill and hold practices?
 22 A. There was nothing in anything that we had seen
 23 that indicated that there was any kind of fraud
 24 or anything else going on that was out of the
 25 ordinary, just, you know, regular normal course

Page 175

1 EUGENE YOO
 2 of business.
 3 Q. At that time were you familiar with the concept
 4 of a bill and hold transaction?
 5 A. At the time I was not.
 6 Q. Are you now aware of what a bill and hold
 7 transaction is?
 8 A. Vaguely.
 9 Q. Okay. How did you come to that information?
 10 A. I, in reading about what had happened with
 11 Sunbeam through the newspapers.
 12 Q. While conducting your due diligence did you
 13 acquire any information indicating that Sunbeam
 14 was engaging in other aggressive revenue
 15 recognition practices?
 16 MS. BROWN: Object to form.
 17 A. Again, as far as I could see there was really
 18 nothing that I saw that was out of the ordinary
 19 course of business.
 20 Q. Okay. How about with respect to restructuring
 21 reserves. Did you find anything that indicated
 22 that they were improperly reserving?
 23 A. No. Not that I can remember.
 24 Q. You never had any conversations with Mr. Tyree
 25 on those issues?

Page 176

1 EUGENE YOO
 2 MS. BROWN: Objection. Compound.
 3 A. No. I never really talked to John that much
 4 about, you know, the Sunbeam transaction. I
 5 actually really didn't see him that much,
 6 period.
 7 Q. And your testimony is you have not seen the
 8 March 19, 1998 comfort letter before today?
 9 A. I don't think I have. It doesn't look familiar.
 10 Q. Do you recall reviewing any drafts of this
 11 letter?
 12 A. I don't think so, no.
 13 Q. Was the information about Sunbeam's existing
 14 financial condition, business and financial
 15 condition in January and February of 1998
 16 relevant to the due diligence that you were
 17 performing?
 18 MS. BROWN: Object to form.
 19 A. Are you talking about the due diligence for the
 20 MNA transaction?
 21 Q. Any due diligence that you performed on Sunbeam.
 22 A. The financial condition of the company was
 23 something that I guess is relevant, but in our
 24 case it was something that we were, for the
 25 transaction itself something that we were less

Page 177

1 EUGENE YOO
 2 focused on. We had spent a lot of time with
 3 them and had grown comfortable with their
 4 numbers and when a transaction became tangible
 5 we were more focused on the financials of the
 6 target companies.
 7 Q. Did you ever ask to see the comfort letter
 8 Arthur Andersen was providing to Sunbeam?
 9 A. I did not personally, no.
 10 Q. Did you know in January or February -- strike
 11 that.
 12 Did you know at any point in the first
 13 quarter of 1998 that Sunbeam was experiencing a
 14 significant decline in sales?
 15 MS. BROWN: Object to form.
 16 A. I didn't know that there was any difficulty of
 17 the company in the first quarter.
 18 Q. Is that information that you should have known
 19 in conducting your due diligence?
 20 MS. BROWN: Object to form. And also to
 21 the extent it calls for a legal conclusion.
 22 A. Based on the numbers that we were getting from
 23 the company everything seemed to be in order.
 24 Whether those numbers were accurate or not it
 25 was difficult for us to tell from our vantage

Page 178

1 EUGENE YOO
 2 point.
 3 Q. What numbers do you recall receiving from
 4 Sunbeam the first quarter of 1998 with respect
 5 to its first quarter sales?
 6 A. First quarter sales? I don't remember exactly
 7 what we got from them.
 8 Q. If you could turn, sir, to CPH Exhibit 17, page
 9 MS377. I'm sorry, the bottom of MS378 to the
 10 top of 379. Paragraph 6.
 11 A. Okay.
 12 Q. And 6B. I'm sorry, 6C, which runs over onto
 13 MS379. "Although the company has not provided
 14 us with any financial statements as of any date
 15 or for any period subsequent to February 1,
 16 1998, management has provided net sales from
 17 December 29, 1997 through March 1, 1998 which
 18 were 17,018,000 as compared to 143,499,000 for
 19 the corresponding period of the preceding year."
 20 Do you see that?
 21 A. Yes, I do.
 22 Q. Did you have that information in your possession
 23 in the first quarter of 1998 while you were
 24 conducting due diligence for Sunbeam?
 25 A. I don't believe we did.

Page 179

1 EUGENE YOO
 2 Q. Is that information that would have been
 3 relevant to the tasks you were performing in
 4 conducting due diligence?
 5 MS. BROWN: Object to form.
 6 A. If we had that information it probably would
 7 have been relevant.
 8 Q. If someone at Morgan Stanley had that
 9 information would you expect that person to
 10 advise you about a 50 percent decrease in net
 11 sales over that period of time?
 12 MS. BROWN: Object to form. Hypothetical.
 13 A. I don't know what they would do. I can't
 14 speculate what they would do with that.
 15 Q. But is that something you would have liked to
 16 have known?
 17 MS. BROWN: Object to form.
 18 A. As an adviser on the transaction, you mean?
 19 Q. Yes.
 20 A. Yeah, it would have been good to know if we had
 21 known that at the time.
 22 Q. What would you have done with that information?
 23 MS. BROWN: Object to form. Hypothetical.
 24 A. Again, I don't know. I haven't really been in
 25 that situation.

Page 180

1 EUGENE YOO
 2 Q. You have no idea what you would do?
 3 A. If I had been given this?
 4 Q. Uh-huh.
 5 A. I don't know. I guess it just depends on what
 6 was going on at the time and how I found out
 7 and, you know, what we were doing.
 8 Q. In the context of what you were doing and what
 9 information was being communicated to third
 10 parties in connection with your efforts to find
 11 a buyer or an acquisition target for Sunbeam, is
 12 this the kind of information that would be
 13 important to -- strike that.
 14 Would this information be relevant to those
 15 third parties?
 16 MS. BROWN: Object to form and calls for
 17 speculation.
 18 A. I think it might be important.
 19 Q. Why is that?
 20 A. Because the, I don't know why it would be
 21 important to them. If I were to see this, if
 22 the sales numbers were significantly different
 23 from what I thought they were going to be that
 24 might be something important to let people know.
 25 Q. Do you recall, sir, what Wall Street's

Page 181

1 EUGENE YOO
 2 expectations were of Sunbeam with respect to
 3 first quarter of 1998 sales?
 4 A. No, I don't.
 5 Q. Does the range of 285 to 295 million refresh
 6 your recollection?
 7 A. It might be, I don't know for sure.
 8 Q. You don't recall anyone at Morgan Stanley
 9 discussing the contents of this comfort letter
 10 or the subject of Sunbeam's sales shortfall
 11 prior to the closing of the Coleman transaction?
 12 MS. BROWN: Object to form and foundation.
 13 A. I don't recall anything about that letter.
 14 Q. The contents of the letter?
 15 A. I think there was a public announcement by
 16 Sunbeam to that extent or something along those
 17 lines around that time. But again, at that
 18 point my involvement with Sunbeam was pretty
 19 limited.
 20 Q. You were not involved in preparing or reviewing
 21 a press release in March of 1998?
 22 A. No, I didn't have anything to do with that.
 23 Q. Let me show you what's previously been marked as
 24 CPH Exhibit 14.
 25 A. All right.

Page 182

1 EUGENE YOO

2 Q. Do you recall reading this press release at

3 anytime?

4 A. I do recall reading this maybe the day or the

5 day after that it came out.

6 Q. And again, you were not involved in any

7 discussions concerning the issuance of this

8 press release?

9 A. No.

10 Q. You were not involved in any conferences on

11 March 18th, the day before the press release

12 concerning Sunbeam's sales shortfall?

13 A. Not that I remember.

14 Q. What was your reaction to reading this press

15 release?

16 A. Surprise. That's probably about it, just very

17 surprised.

18 Q. Why were you surprised?

19 A. From what I remember up until that point I

20 thought things were going very well. I thought

21 they were on track for a good first quarter.

22 Q. Reading the first paragraph of that press

23 release, what particular language in the press

24 release surprised you?

25 A. It says its possible that its net sales for the

Page 183

1 EUGENE YOO

2 first quarter of 1998 may be lower than the

3 range of analyst estimates.

4 Q. That came as a surprise to you?

5 A. Yes.

6 Q. With respect to the, the language, "the

7 shortfall from analysts estimates, if any, would

8 be due to changes in inventory management in

9 order patterns at certain of the companies major

10 retail customers." Did that statement surprise

11 you?

12 A. Actually, I didn't really understand that

13 statement as much as part of the operations of

14 the company that we weren't really involved in.

15 That was the area where we started to rely more

16 on the management team and team at Coopers to

17 help us understand. But we weren't really

18 involved at that level.

19 Q. Did you have any conversations with anyone at

20 Morgan Stanley about this press release?

21 A. I think the only person I talked to about it was

22 Tyrone Chang.

23 Q. What did you and Mr. Chang discuss?

24 A. Well, he was the one that brought it to my

25 attention, I believe. And we were both just

Page 184

1 EUGENE YOO

2 talking about how we were surprised, because we

3 were both very involved in the numbers in the

4 model beforehand.

5 Q. Do you recall what specifically Mr. Chang said?

6 A. I don't remember specifically what he said.

7 Q. Did you feel misled when you read this press

8 release?

9 A. I think at this point I wasn't quite sure what

10 was happening, so I didn't know what to think.

11 Q. Did you talk to anybody at Sunbeam about this

12 press release?

13 A. No. I hadn't really had any contact with

14 anybody from Sunbeam since the board meeting.

15 Q. Other than Mr. Chang did you talk to anyone

16 about the press release; Mr. Fuchs, Mr. Stynes,

17 Mr. Kitts?

18 A. No, not Mr. Kitts. Not Mr. Stynes. I don't

19 believe I talked to Alex about it.

20 Q. Did you tell anyone at Morgan Stanley that the

21 information contained in the press release was

22 inconsistent with what you were being told by

23 Sunbeam?

24 A. I never really -- I'm not sure what you mean.

25 Well.

Page 185

1 EUGENE YOO

2 Q. Well, you said you were surprised to learn of

3 this press release.

4 A. Right.

5 Q. Did you convey that surprise to anyone besides

6 Mr. Chang?

7 A. Not that I can remember, no.

8 Q. And you didn't do anything to follow up on the

9 information contained in the press release?

10 A. No, I didn't.

11 Q. Now, CPH Exhibit 14 does not contain the

12 information on the status of Sunbeam's sales in

13 January and February of 1998 as reflected in the

14 comfort letter; is that correct?

15 A. Can you read that back.

16 (Prior testimony read back.)

17 "Now, CPH Exhibit 14 does not

18 contain the information on the

19 status of Sunbeam's sales in

20 January and February of 1998 as

21 reflected in the comfort letter;

22 is that correct?"

23 A. I believe that's correct.

24 Q. There's no discussion in CPH 14 about the 50

25 percent decline in sales in the first two months

Page 186

1 EUGENE YOO
 2 of 1998; right?
 3 A. Not that I can see here, no.
 4 Q. Again, that's information that was not provided
 5 to you either by Sunbeam, Morgan Stanley or
 6 Arthur Andersen for the --
 7 A. Where do you get your information?
 8 Q. The 50 percent decline of sales in the first two
 9 months of 1998.
 10 A. That's correct. As far as I can remember that's
 11 not, that was not provided to us.
 12 Q. And you couldn't, you couldn't tell that sales
 13 had declined by 50 percent by reading the press
 14 release on CPH Exhibit 14; correct?
 15 MS. BROWN: Object to form.
 16 A. I don't know what anybody else could interpret.
 17 I couldn't interpret it from that.
 18 Q. In fact, the press release indicates that it was
 19 still possible that Sunbeam could reach Wall
 20 Street's estimates of 285 to 295 million; right?
 21 A. I don't know. I can't say what other people
 22 would interpret it.
 23 Q. Well, how do you interpret the first sentence?
 24 "Sunbeam Corporation said today that it is
 25 possible that its net sales for the first

Page 187

1 EUGENE YOO
 2 quarter of 1998 may be lower than the range of
 3 Wall Street analysts estimates of 285 million to
 4 295 million, but net sales are expected to
 5 exceed 1997 first quarter net sales of 253.4
 6 million. Do you read that to indicate that
 7 Sunbeam would not make Wall Street estimates of
 8 285 to 295?
 9 A. The way I read it myself personally, I thought
 10 there was a reasonably good chance that they
 11 were not going to be able to make sales in the
 12 range of 285 to 295.
 13 Q. But it's not out of the question as worded in
 14 the press release?
 15 A. It's a possibility it is, based on what the
 16 press release says.
 17 Q. Did you talk to Mr. Tyree about this press
 18 release?
 19 A. I don't believe I did.
 20 Q. At the time you read the press release were you
 21 aware that he had conducted accounting due
 22 diligence of Sunbeam?
 23 A. I was not aware of that.
 24 Q. I'm handing you what's previously been marked as
 25 CPH Exhibit 112. Have you seen this document

Page 188

1 EUGENE YOO
 2 before?
 3 A. No, I don't think so.
 4 Q. This is a March 25, 1998 letter from Arthur
 5 Andersen updating the March 19th comfort letter;
 6 correct?
 7 A. That appears to be the case.
 8 Q. This document was not provided to you at
 9 anytime?
 10 A. I don't believe so, no.
 11 Q. Handing you what's previously been marked as CPH
 12 Exhibit 16. Do you recognize this document?
 13 A. I'm not sure. I don't think I've seen this.
 14 Q. This isn't a document that you obtained from
 15 Sunbeam management during your review of their
 16 expectations for sales in 1998?
 17 A. I don't think I've ever seen this.
 18 Q. Do you recall seeing any build up of sales,
 19 whether it related to the first quarter of 1998
 20 or the entire year of 1998?
 21 MS. BROWN: Object to form.
 22 A. As far as I can remember for 1998 I don't
 23 believe we ever saw any build up like this for
 24 sales. We had seen some historical numbers that
 25 they gave us for 1997.

Page 189

1 EUGENE YOO
 2 Q. They didn't show you any documents that showed
 3 how they were going to reach their sales
 4 expectations for 1998?
 5 MS. BROWN: Object to form.
 6 Mischaracterization.
 7 A. For 1998 I don't remember exactly what we saw,
 8 but I believe the breakdowns were based on
 9 product lines or divisions. But I don't
 10 remember exactly what it was we saw. And I
 11 don't think at the time, at least up until the
 12 point of the transaction they even had very much
 13 data available for first quarter.
 14 Q. Except what's contained in the Arthur Andersen
 15 comfort letters; right?
 16 MS. BROWN: Object to form.
 17 Mischaracterization. Do you want to put a date
 18 on what you're asking?
 19 Q. First quarter of 1998 sales.
 20 A. The -- well, my involvement tailed off after the
 21 board meeting which I think was early March. Up
 22 until that point I don't think we had much
 23 information on the first quarter. After the
 24 board meeting up until closing I had really had
 25 little to do with the transaction until after

Page 190

1 EUGENE YOO
 2 the closing.
 3 Q. What did you do to ensure that others were
 4 looking at Sunbeam's first quarter sales after
 5 your involvement with the transaction tailed
 6 off?
 7 A. I'm not sure if there was anything I did
 8 specifically to point people towards first
 9 quarter sales.
 10 Q. Who assumed your responsibilities on the matter
 11 after the board meeting?
 12 MS. BROWN: Object to form.
 13 A. There was the financing team which basically
 14 took over from the point the transaction was
 15 approved by the board. And then I think the
 16 legal team took over in terms of getting the
 17 deal closed.
 18 Q. Who were the members of the finance team?
 19 A. I don't know the whole team. I only really
 20 interacted with John Tyree.
 21 Q. Ruth Porat?
 22 A. I do believe she was involved at some point, I
 23 don't know how much.
 24 Q. What were the other members of the MNA team
 25 doing after the board meeting on February 27th?

Page 191

1 EUGENE YOO
 2 MS. BROWN: Object to form. Calls for
 3 speculation. Foundation.
 4 Q. I'll clarify. What were they doing with respect
 5 to following Sunbeam's performance in 1998?
 6 MS. BROWN: Object to foundation.
 7 A. I don't know. I don't know what they were doing
 8 specifically. I don't know if there was
 9 anything they were doing at all.
 10 Q. Is it typical that the MNA team stops working on
 11 the deal after the deal has been approved by the
 12 company's board?
 13 A. Once the deal is approved there isn't much for
 14 us to do, we hand it off to mostly the legal
 15 team to get the closing completed. But most of
 16 our advisory work is completed at that point and
 17 then the team usually moves on to the next
 18 transaction.
 19 Q. Who were the members of the legal team?
 20 A. Skadden Arps, I believe. And I don't know who
 21 else.
 22 Q. Is there anyone else in-house at Morgan Stanley
 23 that was working on the legal aspects of the
 24 deal?
 25 A. Not that I can remember.

Page 192

1 EUGENE YOO
 2 Q. Do you recall the law firm of the name Davis
 3 Polk?
 4 A. I know who they are, yes.
 5 Q. Do you recall they were representing Morgan
 6 Stanley in connection with the Sunbeam
 7 engagement?
 8 MS. BROWN: Object to form.
 9 A. I don't recall their involvement.
 10 Q. Skadden represented Sunbeam; right?
 11 A. Yes, I think that's the case.
 12 Q. Other than members of the finance team and the
 13 legal team, was there anyone else at Morgan
 14 Stanley who was responsible for monitoring
 15 Sunbeam's business and financial condition after
 16 the board approved the transaction on February
 17 27th?
 18 MS. BROWN: Object to the form and
 19 characterization with regard to the legal team
 20 and Morgan Stanley.
 21 A. I mean, anybody from the Morgan Stanley MNA
 22 team? Or everybody from Morgan Stanley in
 23 general, or?
 24 Q. Well, you testified that members of the finance
 25 team and the legal team continued to perform due

Page 193

1 EUGENE YOO
 2 diligence of Sunbeam after the board meeting on
 3 February 27th; is that correct?
 4 A. I'm not sure -- I'm not sure what, I'm assuming
 5 they were doing due diligence in preparing for
 6 the offering, but I wasn't involved with it at
 7 all.
 8 Q. Other than those two groups of people, do you
 9 know of anyone else that would have been working
 10 on the Sunbeam transaction after the board
 11 approved the acquisition of Coleman?
 12 A. As far as I know from the MNA side I don't think
 13 there was anyone really actively working on
 14 Sunbeam.
 15 Q. Were you involved in any bring down due
 16 diligence?
 17 A. I was not.
 18 Q. You did not participate in any bring down due
 19 diligence conference calls?
 20 A. No, I don't believe so.
 21 Q. I'm showing you what's been previously marked as
 22 CPH Exhibit 36. Have you seen this document
 23 before?
 24 A. I don't think I saw it in this format. But I
 25 think I did review the press release when it was

Page 194

1 EUGENE YOO
 2 released.
 3 Q. What was your reaction to Sunbeam's April 3rd
 4 press release?
 5 A. Actually, at this point on the announcement of
 6 the financials, the sales shortfall, I actually
 7 really didn't think much of it at that point. I
 8 guess based on the prior press release I knew
 9 that there was a possibility that they were
 10 going to disappoint. So it didn't surprise me
 11 too much.
 12 Q. It didn't surprise you that they were now
 13 announcing that first quarter sales were
 14 expected to be below 1997 levels based on what
 15 you read in the March 19th press release?
 16 A. From my perspective I wasn't really paying
 17 attention to that portion of the press release.
 18 I just knew that the sales were disappointing,
 19 that's all I remember from reading the press
 20 release at that time. I was more focused on
 21 just Rich Goudis leaving, that was the part that
 22 I was more focused on.
 23 Q. Why did you have an interest in his departure?
 24 A. Well, he was the person that I had the most
 25 contact with from Sunbeam and I had gotten along

Page 195

1 EUGENE YOO
 2 quite well with him. I thought he was a good
 3 guy.
 4 Q. You said Rich Goudis?
 5 A. Yes.
 6 Q. Where in this press release does it discuss
 7 Goudis's departure?
 8 A. I think it was -- maybe it wasn't in this one.
 9 Don had left. Maybe it wasn't in this one.
 10 Q. Were you surprised that Mr. Oosi was terminated?
 11 A. I guess at the time I don't think I was that
 12 surprised. It didn't seem like he had a great
 13 relationship with Al. I didn't really know him
 14 that well, but, and they seemed to only bring
 15 him out in certain situations. He wasn't really
 16 present at all of the meetings.
 17 Q. Did you believe that their explanation for the
 18 shortfall was accurate?
 19 MS. BROWN: Object to form.
 20 A. You know, again, that's kind of getting to a
 21 level of business that we weren't all that
 22 involved with. Their inventory management it
 23 seems like.
 24 Q. Did you discuss this press release with anyone
 25 at Morgan Stanley after it was released?

Page 196

1 EUGENE YOO
 2 A. Again, I think the only person I really spoke
 3 about it with was Tyrone Chang, along the same
 4 lines as the prior ones. And I think he was the
 5 one that brought it to my attention.
 6 Q. What did the two of you discuss?
 7 A. I don't really recall what we said at that
 8 point. I think for us Sunbeam was pretty far in
 9 the rearview mirror at that point.
 10 Q. Do you recall hearing that the March, the
 11 contents of the March 19, 1998 press release
 12 were included in the debenture offering memo?
 13 A. I didn't know that they were.
 14 Q. Did you hear that Arthur Andersen objected to
 15 the inclusion of the press release language into
 16 the offering memo?
 17 A. I didn't know anything about that.
 18 Q. No one ever told you about a confrontation
 19 between Mr. Bornstein of Anderson and Mr. Tyree
 20 on March 18th or 19th --
 21 A. No.
 22 Q. -- regarding the contents of the press release
 23 or the offering memo?
 24 A. No, I didn't know anything about that.
 25 Q. Okay. Do you know anything about that now?

Page 197

1 EUGENE YOO
 2 A. (Witness shakes head in the negative.) No, this
 3 is the first time I'm hearing about it.
 4 Q. Have you ever heard Mr. Tyree use profanity
 5 around the office?
 6 A. Not really. I didn't really work with him that
 7 much. I probably talked to him three or four
 8 times total in my four years there. I think he
 9 was a former, he came out of the Navy or the
 10 Army.
 11 Q. One of the services?
 12 A. Yeah. That's all I really knew about him. I
 13 don't think combined I spent more than 30
 14 minutes with him in four years.
 15 Q. You testified earlier you did not participate on
 16 the roadshow; is that correct?
 17 A. That's correct.
 18 Q. Do you recall hearing that Mr. Kirsch or
 19 Mr. Dunlap were downplaying the significance of
 20 the March 19th press release during the
 21 roadshow?
 22 A. I don't think I heard anything about that.
 23 Q. Did you have any communications with Andrew
 24 Conway at Morgan Stanley on the issue of
 25 synergies?

Page 198

1 EUGENE YOO

2 A. I never talked to Andrew about synergies.

3 Actually, I never even spoke to Andrew.

4 Q. You know who he is?

5 A. I believe he's the equity research analyst.

6 Q. Do you know if Mr. Chang ever spoke to

7 Mr. Conway?

8 A. I don't know.

9 Q. Did you have any involvement preparing materials

10 for the leverage finance commitment committee at

11 Morgan Stanley; materials in connection with the

12 debenture offering or the financing of the

13 acquisition of Coleman?

14 MS. BROWN: Objection. Compound.

15 A. Not that I know of.

16 Q. On either of those issues?

17 A. No.

18 Q. And let me show you what has previously been

19 marked as CPH Exhibit 129. This is a fairly

20 long document. I don't have many questions

21 about it. But do you see that your name is

22 listed, it's spelled incorrectly, under Mar?

23 A. Yes.

24 Q. And this is a March 10, 1998 equity commitment,

25 a memo to the equity commitment committee?

Page 199

1 EUGENE YOO

2 A. Right.

3 Q. And it's listed -- the authors are listed as

4 many individuals at Morgan Stanley including

5 yourself?

6 A. Uh-huh.

7 Q. Did you prepare any of the pages of this memo?

8 A. I think I helped draft the background

9 information. I don't recall who wrote the

10 original version, but I think I helped edit it.

11 Q. What pages?

12 A. One and 2.

13 Q. Were you involved in the preparation of the

14 highly confidential letter with regard to the

15 financing of the acquisitions?

16 A. No, I don't believe so.

17 Q. Did you attend any meetings of the equity

18 commitment committee and the leverage finance

19 commitment committee?

20 A. No, I did not.

21 Q. Are those two entities the same; are they

22 referred to as the same?

23 A. I think they're separate entities.

24 Q. Okay. Would you turn to page 516, page 4 of the

25 memo of Exhibit 129. There's a paragraph called

Page 200

1 EUGENE YOO

2 Restructuring?

3 A. Okay.

4 Q. The second sentence, "the restructuring portion

5 of the plan has been substantially completed

6 with only the final, quote, refinement, unquote,

7 stage remaining." Do you see that?

8 A. Maybe I have the wrong page number.

9 Q. I'm sorry. Page 4?

10 A. Page 4.

11 Q. Right. Restructuring?

12 A. Second sentence, I'm sorry. Right.

13 Q. Do you see that? Do you know what that refers

14 to? The final refinement stage.

15 MS. BROWN: Object. Speculation.

16 A. I can't say for certain.

17 Q. You didn't draft this paragraph, to your

18 knowledge?

19 A. No, not this page, not this paragraph.

20 Q. If you turn to page 11 of the memo, which is

21 Morgan Stanley 523.

22 A. Okay.

23 Q. Under "equity valuation," third bullet point,

24 "the company's current trading levels are

25 warranted given the level of expected synergies,

Page 201

1 EUGENE YOO

2 150 million pre tax." Do you know the basis --

3 MS. BROWN: And it continues from there.

4 Q. I'm sorry? And it continues from there.

5 Do you recall the basis for that?

6 MS. BROWN: Objection. Speculation.

7 A. For the 150 million?

8 Q. Right.

9 A. I don't know.

10 Q. If you turn to page 17 of the memo, page 529,

11 paragraph 5. Take a moment to read that,

12 please.

13 A. (Witness reviewing.) Okay.

14 Q. Do you recall the basis for that paragraph?

15 MS. BROWN: Objection. Speculation.

16 A. No, I couldn't say for certain where it came

17 from.

18 Q. Sorry. You didn't draft that?

19 A. No, I didn't write this.

20 Q. Okay. The last sentence refers to Sunbeam

21 management informing -- well, let's see. It

22 shouldn't say that. It refers to a "they," I'm

23 not sure if it's referring to Sunbeam management

24 or who, but "they informed Sunbeam board of

25 directors that the synergies are likely to be in

Page 202

1 EUGENE YOO
 2 the 225 to 275 million pre tax range." Do you
 3 have any knowledge of where those numbers came
 4 from?
 5 A. No, I don't.
 6 Q. Showing you what's previously been marked as CPH
 7 Exhibit 100. It's another lengthy document
 8 entitled The Selling Memorandum, dated March 12,
 9 1998. Have you seen this document before?
 10 A. I don't think I've seen this before. It doesn't
 11 look familiar.
 12 Q. You don't recall preparing any of the pages that
 13 are contained in this document?
 14 A. Let me see. I may have prepared some of these
 15 pages at some point, but not specifically for
 16 this document.
 17 Q. Okay.
 18 A. This looks like a collection of other pages.
 19 Q. Do you know what the purpose of -- strike that.
 20 Do you know if the selling memorandum was
 21 used in connection with the debenture offering?
 22 A. I have no idea.
 23 Q. Okay. If you can turn to page 22 of the memo
 24 which is Morgan Stanley 62882.
 25 A. Okay.

Page 203

1 EUGENE YOO
 2 Q. The paragraph "ability to attain synergies."
 3 The last sentence reads "in addition, while
 4 Andrew Conway has modeled 150 million in
 5 synergies in 1998 he feels that there could be
 6 an upside to this figure." Do you recall any
 7 conversations with anyone at Morgan Stanley
 8 concerning this modeling by Andrew Conway?
 9 A. No, I didn't know anything about this.
 10 Q. And again you never had any conversations with
 11 him about that?
 12 A. I never talked to Andrew, no.
 13 Q. Showing you what's previously been marked as CPH
 14 Exhibit 76. Have you ever seen this document?
 15 A. No, I don't think so.
 16 Q. The first page is a memorandum to the leverage
 17 finance commitment committee from RB Smith or
 18 Braum Smith?
 19 A. Right.
 20 Q. It references a meeting of that committee on
 21 March 20th. Did you attend that meeting?
 22 A. No, I didn't.
 23 Q. Do you know if during that meeting the
 24 commitment committee discussed Sunbeam's sales
 25 shortfall?

Page 204

1 EUGENE YOO
 2 MS. BROWN: Objection. Foundation.
 3 A. I don't know what they discussed at the meeting,
 4 no.
 5 Q. No one ever talked to you about what was
 6 discussed at that meeting?
 7 A. No. As far as I remember I've never heard
 8 anything about it.
 9 Q. I'm handing you what's previously been marked
 10 CPH Exhibit 135. In connection with your work
 11 on potential divestiture of certain aspects of
 12 Coleman or the new Sunbeam, did you attend the
 13 analyst meeting on May 11, 1998?
 14 A. I don't think I did.
 15 Q. Have you seen this document before?
 16 A. No, I haven't.
 17 Q. Do you know if Morgan Stanley prepared any of
 18 the slides that are contained in this document?
 19 MS. BROWN: Objection. Foundation.
 20 A. I don't think we helped them with this. I
 21 couldn't tell you.
 22 Q. If you could turn to page, Morgan Stanley 63748,
 23 please.
 24 A. Okay.
 25 Q. This indicates an original cost savings and.

Page 205

1 EUGENE YOO
 2 synergies of 150 million dollars and it purports
 3 to be an actual cost savings of synergies of 291
 4 million. Do you have any knowledge of this page
 5 or the, or the 291 million dollar figure that
 6 appears on that page?
 7 A. No. I don't know either one.
 8 Q. Please turn to page 63751. It's entitled
 9 Sources of Growth. "Potential 1999 impact of
 10 265 million." Do you have any knowledge of the
 11 basis for that synergy estimate?
 12 A. No, I don't know.
 13 MS. BROWN: Object to the characterization.
 14 Q. Would you please turn to Morgan Stanley 63755
 15 entitled Savings Summary. There's a list of
 16 savings on this page with total savings of
 17 acquired companies 201 million, Sunbeam sourcing
 18 strategy of 52 million with a grand total
 19 savings of 253 million. Do you have any
 20 knowledge of the basis for that calculation?
 21 A. No, I'm not sure where they came up with these
 22 numbers.
 23 Q. You don't know if Morgan Stanley was involved in
 24 providing any of that type of data to Sunbeam?
 25 MS. BROWN: Objection. Asked and answered.

Page 206

1 EUGENE YOO
2 A. I don't know, I don't know if Morgan Stanley was
3 involved at all or not.
4 Q. Set that aside. Mr. Yoo, were you involved in
5 conducting any due diligence of the Coleman
6 Company prior to the close of the transaction?
7 A. I had some involvement with that, yes.
8 Q. And what was your role?
9 A. At that point it was more of a coordination
10 role, I think, between Skadden and Arthur
11 Andersen and Coopers. There were teams that
12 were going through the various corporate
13 documents or visiting various sites around the
14 country and our job at that point was to make
15 sure that people were going to the right places
16 and all the right information was getting
17 gathered.
18 Q. Did you actually attend any of these site
19 visits?
20 A. I did not personally, no.
21 Q. Did you review any documents provided by Coleman
22 as part of the due diligence process?
23 A. I don't recall what documents I went through.
24 Q. But you did in fact go through some documents,
25 or you just can't recall if you looked at any

Page 207

1 EUGENE YOO
2 documents?
3 A. I know we went through some of the financials
4 and some of the projections, but we had already
5 gone through some of that before. I don't
6 recall if there was anything else that we went
7 through or I went through personally.
8 Q. Did you ever request any information from
9 Coleman that you didn't receive?
10 A. Not that I can remember.
11 Q. Did you ever form an opinion on the value of the
12 Coleman Company?
13 MS. BROWN: Object to the form.
14 A. Did I personally --
15 Q. Correct.
16 A. -- come up with an opinion? I probably came up
17 with some, some opinion of what it was worth. I
18 don't recall what it was.
19 Q. Do you have any recollection, ballpark range?
20 A. No. I don't remember anything about it being
21 significantly different from the transaction.
22 Q. You never formed an opinion that Sunbeam was
23 overpaying for the Coleman Company?
24 A. (No response.)
25 Q. I sorry, I didn't hear your answer.

Page 208

1 EUGENE YOO
2 MS. BROWN: He didn't yet.
3 A. I didn't answer. No, I don't think I ever
4 really had that opinion.
5 Q. Did anyone express that opinion to you at
6 anytime?
7 A. Not, not during the transaction, no.
8 Q. After the transaction closed?
9 A. I think I remember hearing some people talking
10 about the value that was ultimately paid, or I
11 guess the price, the dollar price of the stock
12 that was announced.
13 Q. What do you recall hearing?
14 A. I don't remember exactly what they said, but it
15 was something along the lines of, it was a, it
16 was a good price for Pearlman.
17 Q. What did you take that to mean?
18 A. I think at the time that I had heard it I was
19 thinking that the, you know, one could argue
20 that the price was maybe high based on
21 traditional valuation techniques, but we thought
22 that it was still a good deal for Sunbeam, you
23 know.
24 Q. But in your work prior to the close of the
25 transaction in reviewing information about

Page 209

1 EUGENE YOO
2 Coleman's business and Sunbeam's business, you
3 never reached that conclusion; right?
4 A. Which?
5 Q. The conclusion that -- I'll withdraw it.
6 During the time that you were reviewing
7 Coleman's financial and business information and
8 Sunbeam's business and financial information
9 prior to the closing of the transaction, you
10 never formed the conclusion that Sunbeam was
11 overpaying for Coleman; correct?
12 A. No, I never really thought that.
13 Q. Did you hear what the basis was for these people
14 that were saying that, saying that Pearlman,
15 Mr. Pearlman had received whatever it was that
16 they were saying?
17 MS. BROWN: Object to form.
18 Q. It was a bad question. Other than hearing that
19 some people were saying that Mr. Pearlman --
20 I'll withdraw that.
21 Did the people that spoke to you about the
22 Coleman purchase price, did they provide any
23 basis for the statements that they were making
24 about what Sunbeam paid for Coleman?
25 A. I don't really remember the conversation. If I

Page 210

1 EUGENE YOO
 2 remember correctly it was a comment that really
 3 wasn't directed towards me. I just happened to
 4 overhear it.
 5 Q. Do you recall who made the statements?
 6 A. I don't know. Actually, I don't think it was
 7 somebody that I knew.
 8 Q. Where did you overhear this information?
 9 A. I think it was just in passing in the hallway or
 10 somewhere.
 11 Q. This was at Morgan Stanley's offices?
 12 A. No. Where was it? I believe it was either at
 13 the restaurant or the gym across the street,
 14 somewhere over there.
 15 Q. Can you recall when you heard these comments?
 16 A. No. Again, it was sometime after the
 17 announcement, and I think it was, I don't recall
 18 if it was before or after the closing.
 19 Q. But it was sometime in 1998?
 20 A. It was somewhere around that time, yeah.
 21 Q. Who was responsible for conducting the due
 22 diligence of Coleman?
 23 MS. BROWN: Objection. Asked and answered.
 24 A. Again, there's no real single person that's
 25 assigned that particular task, it's just sort of

Page 211

1 EUGENE YOO
 2 the responsibility of the whole team.
 3 Q. Have you ever heard of the phrase "fast track
 4 due diligence"?
 5 A. I don't think I've heard that.
 6 Q. You've never used it before?
 7 A. I don't think I've used it.
 8 Q. If I can have just a couple of seconds to look
 9 over my notes. Take a short break.
 10 A. Okay.
 11 VIDEOGRAPHER: It's one minute after four.
 12 We're off the record.
 13 (Short break taken.)
 14 VIDEOGRAPHER: We're back on the record.
 15 The time is nine minutes after four.
 16 Q. Mr. Yoo, earlier this morning I asked you if you
 17 had ever been given any manuals, due diligence
 18 manuals or policies by Morgan Stanley and I
 19 believe you indicated that you didn't recall
 20 receiving any such thing; is that correct?
 21 A. Yes, that's correct.
 22 Q. I'm going to show you what's been marked as CPH
 23 Exhibit 29. I'll represent to you, sir, that
 24 this is a compilation of various documents, the
 25 index is complete on the first few pages of this

Page 212

1 EUGENE YOO
 2 exhibit, but if you flip through CPH Exhibit 29,
 3 do you recall receiving or seeing any of those
 4 materials, either in a larger document or
 5 separately?
 6 A. No. I haven't seen this. No, I don't think
 7 I've seen any of these pages.
 8 Q. At any point, sir, did anyone ever suggest that
 9 the transaction, the, Sunbeam's acquisition of
 10 the Coleman Company be delayed until the end of
 11 the first quarter of 1998 at Sunbeam?
 12 A. That the transaction be delayed?
 13 Q. Right. The close of the transaction be delayed
 14 into and pushed back into April until after the
 15 close of the first quarter of 1998?
 16 MS. BROWN: Objection. Foundation.
 17 A. As far as I know I wasn't aware of any
 18 discussions about timing of the closing of the
 19 transaction.
 20 Q. Okay. Were you aware or did you -- strike that.
 21 Were you aware that Sunbeam extended the
 22 first quarter of 1998 until after the close of
 23 the transaction in order to capture additional
 24 sales in the remaining days of the calendar
 25 year, the calendar of March of 1998?

Page 213

1 EUGENE YOO
 2 MS. BROWN: Object to the characterization.
 3 A. I was not aware that that had happened.
 4 Q. I asked a slightly different question earlier
 5 today with respect to synergies, but do you know
 6 what synergy estimates, if any, the Sunbeam
 7 board relied on in approving the acquisition of
 8 the Coleman Company?
 9 A. I don't have any idea what numbers they were
 10 using.
 11 MR. O'CONNOR: Let's mark two more
 12 exhibits, please.
 13 (Deposition Exhibits 228 and 229 marked for
 14 identification.)
 15 Q. You've been handed two exhibits, one is marked
 16 CPH Exhibit 228 which is a 1997 firm wide
 17 performance evaluation, a self-evaluation from
 18 1997. Do you recall completing a
 19 self-evaluation in 1997 as part of your
 20 performance reviews at Morgan Stanley?
 21 A. Yes, I do.
 22 Q. I refer you to paragraph 3 of your
 23 self-evaluation, the last sentence in that
 24 paragraph where it reads, "I have shown
 25 repeatedly that am able to perform under

Page 214

1 EUGENE YOO
 2 difficult and demanding situations. Two
 3 particular examples are Odyssey and Sunbeam
 4 where I helped produce high quality work within
 5 extremely short time periods and under less than
 6 optimal conditions." Do you see that sentence?
 7 MS. BROWN: Two sentences.
 8 Q. Two sentences thank you. What did you mean by
 9 "less than optimal conditions"?
 10 A. I think with regard to the Sunbeam transaction
 11 what I was referring to was actually two things,
 12 one, the fact that we were going down two
 13 parallel paths with Sunbeam for quite some time.
 14 And the fact that once we actually got to a
 15 tangible transaction it was actually three
 16 transactions in one, we sort of tripled the
 17 work.
 18 Q. Other than that aspect of the transaction, I'm
 19 sorry, of the engagement, was there anything
 20 else about the Sunbeam engagement that made it
 21 difficult or demanding?
 22 MS. BROWN: Object to form.
 23 A. For me personally I think what was difficult
 24 about it was that it was my first real live MNA
 25 transaction and so it was a learning experience

Page 215

1 EUGENE YOO
 2 and the fact that it was somewhat higher profile
 3 than most just made it more important for me to
 4 not screw up in any way. And so I just felt a
 5 little bit more pressure to perform on that one.
 6 Q. Did Mr. Fuchs provide you with adequate guidance
 7 in the Sunbeam engagement?
 8 A. I believe he did. He was with me pretty much
 9 side by side on everything.
 10 Q. You can set that aside. And take a look at
 11 what's been marked as CPH Exhibit 229, which is
 12 your self-evaluation for the 1998 firm wide
 13 performance evaluation.
 14 A. Okay.
 15 Q. And in the first paragraph under section 2,
 16 let's see, I believe it's the second full
 17 sentence, "as we carried on concurrent
 18 negotiations with the sellers, numerous issues
 19 and alternatives arose which rippled through
 20 each aspect of the deal. Complicating matters
 21 were the complex ownership structure of Coleman,
 22 the volatile personalities involved, Al Dunlap,
 23 Ron Pearlman, and the extremely tight deadline,
 24 we had to announce before 1Q earnings
 25 announcement, had to close before the end of

Page 216

1 EUGENE YOO
 2 second quarter." First, I believe that you were
 3 mistaken, the transaction closed before the end
 4 of the first quarter. But that's --
 5 A. Right. I may have -- I think I misspoke on
 6 that.
 7 Q. Okay. My question actually is what about the
 8 volatile personalities of Mr. Dunlap and
 9 Mr. Pearlman complicated the deal?
 10 A. Well, I think it was just being able to perform
 11 on a normal professional level with two sort of
 12 larger than life people, and I don't know if
 13 you've ever met Al Dunlap, and I think I only
 14 met Ron Pearlman once. But they were sort of
 15 both very strong and very dominating
 16 personalities. And with one -- when you're
 17 dealing with only one, that's fine. But when
 18 you have two and two that are on opposite sides
 19 and going in opposite directions it's hard to be
 20 the person in the middle sometimes. And that's
 21 kind of what I was referring to there. I think
 22 at one point they were sort of slinging insults
 23 at each other through us.
 24 Q. Was there any aspect of Mr. Dunlap's personality
 25 which presented problems with Morgan Stanley

Page 217

1 EUGENE YOO
 2 with respect to closing the deal?
 3 MS. BROWN: Object to form.
 4 A. I'm not sure what you mean.
 5 Q. Was Morgan Stanley under any pressure from
 6 Mr. Dunlap to make a deal happen in the first
 7 quarter of 1998?
 8 MS. BROWN: Form and foundation.
 9 Objection.
 10 A. As far as I knew there was no direct order from
 11 Al or anything like that to get something done.
 12 Just me personally I got the sense that he was
 13 getting a little impatient, but I think that was
 14 just sort of his personality.
 15 Q. What gave you that impression?
 16 A. Well, he, I don't know he, but Bob and Jim would
 17 sort of step up their efforts a little bit to
 18 make sure that we were staying on top of
 19 everything with the deal and make sure that
 20 nothing was falling behind. They just wanted to
 21 make sure there was nothing we were doing that
 22 was holding up any potential transaction.
 23 Q. And when did you first start to feel that
 24 stepping up by Mr. Kitts and Mr. Stynes?
 25 A. Mr. Stynes. It was probably towards the end of

Page 218

1 EUGENE YOO
 2 the year. No, the end of 2000. I'm sorry, the
 3 end of 1997.
 4 Q. Okay. And when you refer to the "extremely
 5 tight deadline, paren, we had to announce before
 6 1Q '98 earnings announcement;" what does that
 7 mean? And I'm sorry. "And had to close before
 8 end of second quarter." Actually, first
 9 quarter.
 10 A. Yeah.
 11 MS. BROWN: Close paren.
 12 Q. Close paren.
 13 A. I don't recall what I was referring to with the
 14 second half of that with the closing. As far as
 15 the first quarter announcement -- I think this
 16 was, again, I can't be entirely sure about it, I
 17 think this was a case where along with the
 18 earnings announcement Al Dunlap wanted to be
 19 able to announce something along with that that
 20 was above and beyond the typical earnings
 21 announcement. He wanted to say -- he wanted to
 22 show he was really making progress and he wanted
 23 to do something to show that it's not just a
 24 first quarter but, you know, we're making
 25 progress, we're actually doing something here at

Page 219

1 EUGENE YOO
 2 Sunbeam.
 3 Q. And when did he want that announcement to occur?
 4 A. Well, the first time he mentioned it was when he
 5 first engaged us and he wanted to have something
 6 announced day one. As he, you know, he was
 7 joking around with us on the first day. But,
 8 you know, for him the sooner the better.
 9 Q. But this reference to 1Q '98 earnings
 10 announcement, your testimony is that doesn't
 11 refer to Sunbeam sales in the first quarter?
 12 A. No, I don't think -- this here, this reference
 13 doesn't have anything to do with that sales
 14 reference. Again, from what I remember this was
 15 about -- he had already gone through two or
 16 three earnings announcements at Sunbeam with
 17 regard to the turn around of the company. And I
 18 think he was looking for something to add on to
 19 just the fact that he turned the company around.
 20 He was doing something company transforming.
 21 Q. So these earnings announcements were
 22 prospective, what he expected the company to
 23 earn in the first quarter of 1998, and that
 24 announcement was sometime before the close of
 25 the first quarter?

Page 220

1 EUGENE YOO
 2 A. I don't know the timing.
 3 Q. You don't know whether he wanted an announcement
 4 of the transactions and other announcements
 5 about its first quarter 1998 prospects to happen
 6 at the same time before the close of the
 7 quarter?
 8 MS. BROWN: Objection. Form and
 9 foundation.
 10 Q. I guess I'm just confused as to your reference
 11 to the first quarter '98 announcement.
 12 A. Yeah, I'm not sure about the timing. It doesn't
 13 seem, maybe I wrote this incorrectly, it doesn't
 14 seem to work.
 15 Q. The sentence following "a great deal of negative
 16 publicity had surrounded our client focused
 17 mainly on the operations and accounting of the
 18 company. Also, there is still the outstanding
 19 issue of the convertibles that were sold and the
 20 outstanding bank debt. Nevertheless, the
 21 acquisitions are still looked upon favorably and
 22 the MNA was certainly positive." Do you believe
 23 that to be true today?
 24 MS. BROWN: Objection. Compound and form.
 25 Q. Let me try and clarify it. Do you believe today

Page 221

1 EUGENE YOO
 2 that the acquisitions are still looked upon
 3 favorably?
 4 MS. BROWN: Objection. Calls for
 5 speculation.
 6 A. I mean, it depends who you ask, I guess.
 7 Q. When did you write this self-evaluation?
 8 A. Let's see, this would be at the end of 1998.
 9 Q. That was after Mr. Dunlap was terminated by the
 10 Sunbeam board?
 11 A. I believe it was.
 12 Q. And after Jerry Levin took over at the new
 13 Sunbeam?
 14 A. I think that's the case, yes.
 15 Q. When you say that there was a great deal of
 16 negative publicity focused mainly in operations
 17 and accounting of the company, what did you mean
 18 by that?
 19 A. What I was referring to was all of the negative
 20 press that the company had received, I'm not
 21 sure exactly what point during the year, but
 22 some point during the year surrounding the sales
 23 shortfall with Al leaving the company, the drop
 24 in the stock price, the accounting issues. So
 25 it was just a lot of negativity surrounding

Page 222

1 EUGENE YOO
 2 anything related to Sunbeam.
 3 Q. In light of what you learned throughout the rest
 4 of 1998 and before you wrote this, is there
 5 anything you would have done differently?
 6 A. Done differently where?
 7 Q. At any point in the Sunbeam engagement.
 8 A. I don't think there's really anything that I
 9 would have done differently. I don't think
 10 we -- we went through the entire deal process
 11 pretty thoroughly and thought.
 12 Q. I have no further questions at this time.
 13 MS. BROWN: Just a couple of quick
 14 questions.
 15 EXAMINATION
 16
 17 BY MS. BROWN:
 18 Q. I think you already told Mr. O'Connor that you
 19 do not -- do you know -- strike that.
 20 Do you know what information Sunbeam relied
 21 on when it determined to acquire Coleman?
 22 A. Do I know?
 23 Q. What information Sunbeam management or board
 24 relied on when it determined to acquire Coleman?
 25 A. I don't know firsthand what information they had

Page 223

1 EUGENE YOO
 2 or what they were using.
 3 Q. Do you know what information Morgan Stanley
 4 Senior Funding relied upon when it provided a
 5 bank facility to Sunbeam?
 6 A. No, I can't say with certainty I know.
 7 Q. Were you involved in the team that was providing
 8 the underwriting service for the convertible
 9 note offering?
 10 A. No, I was not involved.
 11 Q. Are you familiar with the due diligence
 12 performed by that team?
 13 A. No, not really.
 14 Q. Are you familiar with any due diligence
 15 performed by Morgan Stanley Senior Funding
 16 before giving the bank facility to Sunbeam?
 17 A. No, I don't believe so.
 18 Q. No further questions.
 19 EXAMINATION
 20
 21 BY MR. O'CONNOR:
 22 Q. Mr. Yoo, in response to the question of whether
 23 you have knowledge of what Morgan Stanley Senior
 24 Funding relied on in providing financing for the
 25 acquisition, your response was "not with

Page 224

1 EUGENE YOO
 2 certainty." Are you aware of any, anything that
 3 Morgan Stanley Senior Funding relied on?
 4 A. I can assume that they were using most of the
 5 same information that we had, but I don't know.
 6 Q. So other than that assumption you don't know?
 7 A. No.
 8 Q. Okay. No further questions.
 9 VIDEOGRAPHER: The time is four
 10 twenty-eight. We're off the record.
 11 (Whereupon, the deposition concluded at
 12 approximately 4:28 p.m.)
 13
 14
 15
 16
 17
 18
 19
 20
 21
 22
 23
 24
 25

Page 225

1 EUGENE YOO
 2 COMMONWEALTH OF MASSACHUSETTS)
 3 SUFFOLK, ss.)
 4
 5
 6 I, Laurie Langer, Professional
 7 Reporter and Notary Public in and for the
 8 Commonwealth of Massachusetts do hereby certify
 9 that there came before me on the 16th day of
 10 June, 2004, at 9:30 o'clock a.m. the person
 11 hereinbefore named, who was by me duly sworn to
 12 testify to the truth and nothing but the truth
 13 of his knowledge touching and concerning the
 14 matters in controversy in this cause; that he
 15 was thereupon examined upon his oath, and his
 16 examination reduced to typewriting under my
 17 direction; and that the deposition is a true
 18 record of the testimony given by the witness.
 19
 20 I further certify that I am neither
 21 attorney or counsel for, nor related to or
 22 employed by, any of the parties to the action in
 23 which this deposition is taken, and further that
 24 I am not a relative or employee of any attorney
 25 or counsel employed by the parties hereto or
 financially interested in the action.
 In witness whereof, I have hereunto
 set my hand and seal this 20th day of June,
 2004.
 NOTARY PUBLIC
 Commission Expires
 9/20/07

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

EUGENE YOO
ERRATA SHEET DISTRIBUTION INFORMATION
DEPONENT'S ERRATA & SIGNATURE INSTRUCTIONS

ERRATA SHEET DISTRIBUTION INFORMATION
The original of the Errata Sheet has been delivered to Ms. Brown, Esquire.
When the Errata Sheet has been completed by the deponent and signed, a copy thereof should be delivered to each party of record and the ORIGINAL forwarded to Mr. O'Connor, Esquire.

INSTRUCTIONS TO DEPONENT
After reading this volume of your deposition, please indicate any corrections or changes to your testimony and the reasons therefor on the Errata Sheet supplied to you and sign it. DO NOT make marks or notations on the transcript volume itself. Add additional sheets if necessary. Please refer to the above instructions for errata sheet distribution information.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

EUGENE YOO
ATTACH TO THE DEPOSITION OF EUGENE YOO
CASE: Coleman v. Morgan DATE TAKEN: 6/16/04
ERRATA SHEET
Please refer to page 226 for errata sheet instructions and distribution instructions.
PAGE LINE CHANGE REASON

8	_____	_____	_____	_____
9	_____	_____	_____	_____
10	_____	_____	_____	_____
11	_____	_____	_____	_____
12	_____	_____	_____	_____
13	_____	_____	_____	_____
14	_____	_____	_____	_____
15	_____	_____	_____	_____

I have read the foregoing transcript of my deposition and except for any corrections or changes noted above, I hereby subscribe to the transcript as an accurate record of the statements made by me.

Executed this ____ day of _____, 2004

EUGENE YOO

12

**EXHIBIT EXCLUDED WITHOUT PRIOR DETERMINATION
OF PROTECTABILITY BY COURT**

13

Page 1

1 IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
 2 IN AND FOR PALM BEACH COUNTY, FLORIDA
 3 CASE No. CA 03-5045 AI
 4 COLEMAN (PARENT) HOLDINGS, INC.,
 5 Plaintiff,
 6 -vs-
 7 MORGAN STANLEY & CO., INC.,
 8 Defendant.
 9
 10 DEPOSITION OF LAWRENCE ALAN BORNSTEIN
 11 (Videotaped)
 12 VOLUME I
 13
 14 Thursday, January 15, 2004
 15 9:05 - 1:42 p.m.
 16
 17 2139 Palm Beach Lakes Boulevard
 18 West Palm Beach, Florida 33409
 19
 20
 21
 22 Reported By:
 Rachel W. Bridge, RMR, CRR
 23 Notary Public, State of Florida
 Esquire Deposition Services
 24 West Palm Beach Office
 Phone: 800.330.6952
 25 561.659.4155

Page 2

1 APPEARANCES:
 2 On behalf of the Plaintiff:
 3 ROBERT T. MARKOWSKI, ESQUIRE
 CHRISTOPHER M. O'CONNOR, ESQUIRE
 4 JENNER & BLOCK, LLP
 One IBM Plaza
 Chicago, Illinois 60611-7603
 Phone: 312.222.9350
 6
 7 On behalf of the Defendant:
 8 THOMAS A. CLARE, ESQUIRE
 KATHRYN REED DEBORD, ESQUIRE
 9 KIRKLAND & ELLIS, LLP
 655 Fifteenth Street, N.W.
 10 Washington, D.C. 20005
 Phone: 202.879.5078
 11
 12 On behalf of the Witness:
 13 MICHAEL MOSCATO, ESQUIRE
 CURTIS, MALLET-PREVOST, COLT & MOSLE, LLP
 14 101 Park Avenue
 New York, New York 10178-0061
 15 Phone: 212.696.8817
 16 ALSO PRESENT:
 17 EITAN ROSEN, VIDEOGRAPHER
 18
 19
 20
 21
 22
 23
 24
 25

Page 3

1 ---
 INDEX
 2 ---
 3 WITNESS: DIRECT CROSS REDIRECT RECROSS
 4 Lawrence Bornstein
 By Mr. Markowski 5
 5 By Mr. Clare 117
 6
 7 ---
 EXHIBITS
 8 ---
 9 EXHIBIT PAGE
 10 CPH Exhibit 118 12
 11 CPH Exhibit 119 17
 12 CPH Exhibit 120 44
 13 CPH Exhibit 121 84
 14 CPH Exhibit 122 93
 15 CPH Exhibit 123 100
 16 CPH Exhibit 124 110
 17 MS Exhibit 55 156
 18 MS Exhibit 56 172
 19 MS Exhibit 57 172
 20
 21
 22
 23
 24
 25

Page 4

1 PROCEEDINGS
 2 ---
 3 Deposition taken before Rachel W. Bridge,
 4 Registered Professional Reporter and Notary Public
 5 in and for the State of Florida at Large, in the
 6 above cause.
 7 ---
 8 THE VIDEOGRAPHER: We are now going on video
 9 record. The time on the monitor is 9:05 a.m.
 10 (Thereupon, the case was introduced by the
 11 court reporter.)
 12 MR. MARKOWSKI: Bob Markowski from Jenner &
 13 Block on behalf of Coleman (Parent) Holdings.
 14 MR. O'CONNOR: Chris O'Connor from Jenner &
 15 Block on behalf of plaintiff, Coleman (Parent)
 16 Holdings.
 17 MR. CLARE: Tom Clare and Kathryn Debord from
 18 Kirkland & Ellis, LLP on behalf of the defendant,
 19 Morgan Stanley & Company.
 20 MR. MOSCATO: Mark Moscato from Curtis Mallet
 21 on behalf of the witness, Larry Bornstein.
 22 Thereupon,
 23 (LAWRENCE A. BORNSTEIN)
 24 having been first duly sworn or affirmed, was
 25 examined and testified as follows:

Page 5

1 **DIRECT EXAMINATION**
2 **BY MR. MARKOWSKI:**
3 Q. Mr. Bornstein, as you know, my name is Bob
4 Markowski. I'm one of the attorneys for Coleman
5 (Parent) Holdings in its lawsuit here in Palm Beach
6 County against Morgan Stanley.
7 Mr. Bornstein, would you please state your
8 full name?
9 A. Lawrence Alan Bornstein.
10 Q. Mr. Bornstein, where were you employed in
11 1998?
12 A. Arthur Andersen.
13 Q. Where was your office location?
14 A. West Palm Beach, Florida.
15 Q. How long had you been employed by Arthur
16 Andersen at that time?
17 A. '98, approximately ten years.
18 Q. What was your position?
19 A. I believe at the time I was an experience
20 manager, I think was the title.
21 Q. And in general, what were the
22 responsibilities in 1998 that you had as a senior
23 manager at Arthur Andersen?
24 **MR. MOSCATO:** Experience manager?
25 **MR. MARKOWSKI:** Excuse me, experience

Page 6

1 manager.
2 **THE WITNESS:** Supervising and performing
3 tests, audit functions primarily.
4 **BY MR. MARKOWSKI:**
5 Q. How long had you been employed in the West
6 Palm Beach office?
7 A. I believe approximately, probably six years.
8 Q. At that time did you hold any licenses?
9 A. Yes, a CPA, licensed in Massachusetts.
10 Q. When did you obtain your licenses as a
11 certified public accountant?
12 A. I believe in '91 or '92.
13 Q. Mr. Bornstein, do you recall that in the
14 first quarter of 1998 Sunbeam made three acquisitions?
15 A. Yes.
16 Q. Do you recall the names of the three
17 companies that Sunbeam acquired in the first quarter of
18 1998?
19 A. Yes.
20 Q. Can you tell me what they are?
21 A. Coleman -- I don't know the exact name, but
22 Coleman was one. First Alert was another. And I
23 believe the third was Signature Brands.
24 Q. Do you recall that Coleman was the largest of
25 the three companies that Sunbeam acquired at that time?

Page 7

1 A. Yes.
2 Q. Do you recall as part of the Coleman
3 acquisition that Sunbeam acquired all of the Coleman
4 stock that my client, Coleman (Parent) Holdings, owned?
5 **MR. CLARE:** Objection, foundation.
6 **THE WITNESS:** I don't know, I don't know
7 exactly who owned what and where and when, to be
8 honest with you.
9 **BY MR. MARKOWSKI:**
10 Q. Do you recall that Sunbeam acquired the
11 Coleman company stock that Coleman (Parent) Holdings
12 had as part of the transaction?
13 A. I don't remember the exact structure, but I
14 do believe they acquired a good chunk of it during that
15 time period.
16 Q. From Coleman (Parent) Holdings?
17 A. I believe so, yes.
18 Q. Did you perform any work relating to the
19 transaction by which Sunbeam acquired the Coleman
20 company stock?
21 A. I did a limited amount of work, yes.
22 Q. What were the nature of the projects that you
23 were involved in concerning Sunbeam's acquisition of
24 Coleman company?
25 A. I accompanied various management of Sunbeam

Page 8

1 at the time in a due diligence, limited due diligence
2 process.
3 Q. Were there other activities that related in
4 any respect to Sunbeam's acquisition of Coleman that
5 you were involved in?
6 A. A limited amount of review of, I believe
7 their pro forma financial statements or pro forma
8 projections that was done by, I believe it was done by
9 Morgan Stanley.
10 Q. Do you recall being involved in activities
11 related to Sunbeam's financing of the acquisition?
12 A. Yes.
13 Q. And what was your involvement in the
14 financing aspect of the transaction?
15 A. Assisting in the preparation of a 140
16 section, I think it was Section 144 document, bond
17 offering document.
18 Q. That's the document by which Sunbeam sold
19 convertible debentures to finance the acquisition?
20 A. Yes.
21 Q. Do you recall what your involvement was in
22 that process?
23 A. Assisting in the preparation of the pro forma
24 financial statements that were within the document,
25 drafting the document, the body of the document prior

Page 9

1 to the pricing of the bonds, coordinating and assisting
 2 the other accounting firms in getting the information
 3 that's needed in the document. That's pretty much all
 4 I can remember.
 5 Q. That activity all took place in the first
 6 quarter of 1998?
 7 A. For the most part, yes.
 8 Q. Do you recall when during the first part of
 9 1998 that activity was occurring?
 10 A. I think it was middle to end of February
 11 through late March of I guess -- my year, I think it
 12 might have been, I think '98.
 13 Q. Mr. Bornstein, did Arthur Andersen -- let me
 14 take a step back.
 15 Arthur Andersen was involved in these
 16 activities because it served as the outside auditor for
 17 Sunbeam during that time period; is that correct?
 18 A. Yes.
 19 Q. Did Arthur Andersen, in connection with its
 20 function as the outside auditor for Sunbeam, do
 21 anything special at the end of the first quarter of
 22 1998 to monitor Sunbeam's product shipments at the end
 23 of the first quarter?
 24 MR. CLARE: Objection to the form.
 25 THE WITNESS: Can you --

Page 10

1 BY MR. MARKOWSKI:
 2 Q. I can restate it.
 3 At the end of the first quarter of 1998, in
 4 its capacity as the outside auditor for Sunbeam, did
 5 Arthur Andersen do anything special to monitor the
 6 shipments of Sunbeam's products at the end of the first
 7 quarter?
 8 MR. CLARE: Same objection.
 9 THE WITNESS: Yes.
 10 BY MR. MARKOWSKI:
 11 Q. What do you recall that involving?
 12 A. I would call them expanded cutoff procedures,
 13 expanded I would say shipping and receiving type of
 14 procedures at the end of the first quarter.
 15 Q. Did you have any role in making the decision
 16 to cause those procedures to be implemented?
 17 A. Yes.
 18 Q. And what was the role?
 19 A. It was my decision to expand procedures
 20 sufficient enough to conclude that shipments were made
 21 in a timely fashion prior to the end of the quarter and
 22 that they were in fact built, shipped and ordered by
 23 customer.
 24 Q. Now at that point in the first quarter of
 25 1998, were you the senior Arthur Andersen person

Page 11

1 responsible for the Sunbeam audits?
 2 A. No, I was not.
 3 Q. Who was?
 4 A. The partner was Phil Harlow.
 5 Q. Did you recommend to Mr. Harlow that these
 6 procedures be used or did you make the decision on your
 7 own?
 8 A. I recommended to Mr. Harlow that the
 9 procedures be done.
 10 Q. And what was his reaction to your
 11 recommendation?
 12 A. I don't remember.
 13 Q. But were the procedures in fact employed?
 14 A. Yes.
 15 Q. When did you decide that Arthur Andersen --
 16 excuse me, when did you decide that Arthur Andersen
 17 should use these expanded cutoff procedures at the end
 18 of the first quarter of 1998?
 19 A. I don't know the exact date, but probably
 20 March 17th or 18th.
 21 Q. Mr. Bornstein, I'm going to show you what
 22 we're going to mark as Coleman (Parent) Exhibit
 23 Number 118. It's a March 21 e-mail from you to William
 24 Biese, B-i-e-s-e. It bears Bates number AA120304.
 25

Page 12

1 (CPH Exhibit No. 118 was marked for
 2 identification.)
 3 MR. CLARE: Do you have a copy? Thanks.
 4 BY MR. MARKOWSKI:
 5 Q. Mr. Bornstein, I'd like you to take a moment
 6 to look at Exhibit 118.
 7 Can you tell me what this document is?
 8 A. Correspondence with a, I believe, I believe,
 9 I think he was the partner for Arthur Andersen that
 10 worked, I think he -- let me think about this. He, I
 11 think he resided in Mexico City. He was the partner in
 12 charge of the work that was done in Mexico for Sunbeam.
 13 And based on reading this, it's a memorandum
 14 letting him know that we're going to be doing
 15 additional work at the end of the quarter on cutoff
 16 procedures.
 17 Q. The memorandum is dated March 21, 1998; is
 18 that correct?
 19 A. Yes.
 20 Q. Sunbeam had facilities in Mexico City, or in
 21 Mexico? Excuse me.
 22 A. Yeah, they had facilities in Mexico City and
 23 I think I recall them having one or two in, I think it
 24 was called Maquiladora and a couple of other locations
 25 in surrounding Mexico City.

Page 13

1 Q. What was the purpose of your sending this
2 memo to Mr. Biese?
3 A. I believe -- I mean reading this right now,
4 it's to let him know what was going on, let him know
5 there was going to be additional work for him, and then
6 to advise him of, that additional cutoff procedures
7 were going to be needed. And in reading this at this
8 time, it talks about bill and hold transactions as well
9 as the emphasis on sales.
10 Q. Does your memorandum to Mr. Biese explain why
11 Andersen would be conducting additional cutoff
12 procedures at the end of the first quarter of 1998?
13 A. No, not specifically.
14 Q. Does it provide the background concerning the
15 reasons why you wanted to implement additional
16 procedures to monitor cutoffs?
17 A. Not specifically.
18 Q. Does it do it in general terms?
19 A. I believe it does, yes.
20 Q. And what did you advise Mr. Biese as the
21 reason for your desire to do the additional cutoff
22 procedures at the end of the first quarter?
23 A. I don't remember specifically telling him
24 anything, but looking at this memorandum, it's clear
25 that it talks about where they, where they were going,

Page 14

1 where they were planning on going in sales and where
2 they were. And the notation, as you can see, there is
3 a big push on sales and we've been told that they
4 having bill and hold transactions.
5 Q. When you say it says where the company
6 expected to go in sales for the quarter, what are you
7 referring to?
8 A. The company just released an early warning to
9 the street that sales are not going to meet
10 expectations of 285 to 295 million for the quarter.
11 That's specifically where it talks about
12 that.
13 Q. And what does it say about where the company
14 in fact was at that point in time in terms of sales?
15 A. 72 million as of March 1st.
16 Q. And how does, how do those figures relate to
17 your desire to do additional end-of-the-quarter
18 shipping cutoff procedures?
19 A. There is obviously a big spread between what
20 was, what was recorded through March 1st and what the
21 expectations of the company were.
22 So that spread led me to believe that we
23 should be doing additional work at the end of the first
24 quarter.
25 Q. And what is it about that spread that caused

Page 15

1 you to come to that conclusion, that it was appropriate
2 to do additional work at the end of the first quarter?
3 A. I believe that the spread was extremely
4 aggressive and that it warranted additional work to
5 make sure that they -- mentioned earlier that the
6 product was ordered, was built, and it was properly
7 shipped.
8 Q. What was your concern?
9 MR. MOSCATO: I object. I think he just said
10 so.
11 Do you have anything to add?
12 THE WITNESS: No, I don't believe I have
13 anything.
14 BY MR. MARKOWSKI:
15 Q. How did monitoring cutoff procedures have a
16 relationship to what you've just described?
17 A. Monitoring cutoff procedures would in fact
18 give you a much greater assurance that a customer had
19 requested that the product be sold to them; i.e., to
20 clear purchase order, and that the product was in fact
21 built and shipped.
22 Q. Were you concerned that in order to increase
23 the reported sales for the first quarter of 1998, that
24 Sunbeam might attempt to claim shipments had taken
25 place during the first quarter when in fact they had

Page 16

1 not?
2 A. Can you repeat that, please?
3 Q. Were you concerned that because of the great
4 spread as of this point in time between Sunbeam's sales
5 for the first two months of the first quarter and
6 Sunbeam's original expectations for sales for the first
7 quarter, that in order to close the gap between those
8 two numbers, that Sunbeam might attempt to claim
9 shipments in the first quarter that had actually not
10 occurred?
11 MR. CLARE: I object to the form.
12 THE WITNESS: I don't believe that that was
13 my thought process at the time. I wanted to make
14 sure that they were actually going to ship the
15 product and the product was ordered.
16 So I guess in thinking about that, then there
17 is a possibility the concern was that there, you
18 know, that it was a possibility that they would
19 ship product that wasn't ordered, as well as
20 logistically being able to ship that much product
21 in such a short period of time, based on my
22 experience with the company at that point in time.
23 MR. MARKOWSKI: Mr. Bornstein, I'll show you
24 what we're marking as CPH Exhibit 119. It's a
25 memorandum from Dennis Pastrana to you dated

<p style="text-align: right;">Page 17</p> <p>1 March 24, 1998. The subject is cutoff testing, 2 and it bears Bates number AA55758 through -- 3 actually it looks like it's made up of two 4 documents, first. First page is AA55758, and then 5 the pages behind it are AA36921 through 36925. 6 (CPH Exhibit No. 119 was marked for 7 identification.) 8 THE WITNESS: These are just extra copies? 9 BY MR. MARKOWSKI: 10 Q. Yes, right, thank you. If you would, I'd 11 like you to take a moment to take a look at CPH Exhibit 12 Number 119. 13 Mr. Bornstein, can you tell me what CPH 14 Exhibit Number 119 is? 15 A. I apologize. I'm getting a cold, so it's 16 kind of hard for me to hear. Can you repeat that? 17 Q. Can you tell me what CPH Exhibit Number 119 18 is? 19 A. Appears to be a draft of a memorandum 20 outlining the additional procedures on cutoff and 21 shipping that was performed at the end of the first 22 quarter of '98. 23 Q. These are instructions relating to what we've 24 been discussing, the implementation of additional 25 procedures to monitor Sunbeam's</p>	<p style="text-align: right;">Page 19</p> <p>1 only and is not to be shared with client personnel at 2 the facilities you visit. Sunbeam's first quarter 3 fiscal 1998 will end on March 29, 1998," in brackets, 4 "the Sunday closest to the end of the month," end of 5 brackets. "As of March 1, 1998, the company reported 6 sales of approximately 72 million versus 143 million 7 for the corresponding period of the preceding year. 8 Despite this decrease, management has announced to the 9 public that it expects first quarter sales for 1998 to 10 exceed first quarter 1997 sales of 253.5 million. That 11 means that the company expects to ship over 12 181 million," in brackets, "greater than 70 percent 13 expected sales for the quarter," end of brackets, "in 14 the month of March." 15 Q. Now the, did you believe the statement that 16 the company had sales of \$72 million through the first 17 two months of the year to be an accurate statement? 18 A. I believe at the time domestically the 19 \$72 million was the number. 20 Q. Do you know what that number was based on? 21 Let me ask a different question. I asked that poorly. 22 Do you know how Andersen determined that 23 Sunbeam sales for the first two months of 1998 totaled 24 approximately \$72 million? 25 A. I believe based on the company's financial</p>
<p style="text-align: right;">Page 18</p> <p>1 end-of-the-first-quarter shipping practices? 2 A. Yes. 3 Q. Who is Dennis Pastrana? 4 A. He was, he was the senior auditor who worked 5 for me during the Sunbeam audit, who, for lack of a 6 better term, did, supervised the field work on a 7 day-to-day basis. 8 Q. Did you ask Mr. Pastrana to prepare 9 instructions for the additional cutoff procedures? 10 A. Yes, based on this memorandum. I don't 11 recall specifics, but based on this, I would say the 12 answer is yes. 13 Q. Did you provide Mr. Pastrana with guidance 14 concerning what you wanted the procedures to involve? 15 A. Yes. 16 Q. The -- let me direct your attention to the 17 page that has Bates number 36293. The heading starts 18 General Information. 19 A. Yes. 20 Q. Do you have that page in front of you? 21 A. Yes. 22 Q. Would you read the first two paragraphs under 23 General Information out loud, please. 24 A. "Although the information that follows is 25 public information, it is summarized here for your use</p>	<p style="text-align: right;">Page 20</p> <p>1 information that was given to us. 2 Q. Now a statement is made at the beginning of 3 that two paragraphs that I had you read that the 4 information that follows is public information. 5 Do you know whether in fact Sunbeam had 6 announced to the public as of this point in time that 7 its sales for the first two months of 1998 were only 8 \$72 million? 9 A. I don't believe it was. I'm not 100 percent 10 sure, though. 11 Q. You don't have any recollection of the 12 company publicly making that statement, correct? 13 A. No. 14 Q. I'd like to direct your attention down to the 15 bottom third of the page. There is a heading that 16 reads Revenue Recognition Policy. Do you see that? 17 A. Yes. 18 Q. Would you read that first paragraph into the 19 record, please. 20 A. "Because of management pressures to meet 21 earnings expectations, we are taking additional steps 22 in connection with our quarterly review work to ensure 23 that the client achieves a proper sales cutoff." 24 Q. Does that statement accurately reflect the 25 reasons why you decided that Andersen should implement</p>

Page 21

1 additional cutoff testing procedures at the end of the
 2 first quarter of 1998?
 3 A. Yes.
 4 Q. Now, Mr. Bornstein, I note that this document
 5 indicates that Sunbeam's first quarter will end on
 6 March 29, 1998.
 7 Do you see that statement at the top of the
 8 page?
 9 A. Yes.
 10 Q. Did Sunbeam's first quarter in fact end on
 11 March 29, 1998?
 12 A. I don't believe it did, no.
 13 Q. Do you recall what happened?
 14 A. Yes.
 15 Q. Can you explain?
 16 A. One second, I'm sorry.
 17 Q. Sure.
 18 A. As I recall, Sunbeam decided to extend the
 19 quarter, I believe it was I think two days, in order
 20 to -- because they were going to close the Coleman
 21 acquisition I believe on March 31st, they wanted to
 22 include the additional two days of revenue related to
 23 Coleman in their first quarter.
 24 Q. Would extending the quarter also permit
 25 Sunbeam to count its first quarter sales, additional

Page 22

1 sales that Sunbeam itself made during those three days?
 2 A. I believe that was their intention, yes.
 3 Q. As of the time -- this memorandum appears to
 4 have been written on or about March 29 -- well, excuse
 5 me, March 24, I believe.
 6 A. Yes.
 7 Q. As of that point in time, had the first
 8 quarter been extended?
 9 A. No, I don't believe so.
 10 Q. So the decision to extend the first quarter
 11 that Sunbeam made was sometime between the time this
 12 memorandum was prepared and the end of the quarter?
 13 A. Yeah, I believe I testified, somewhere in the
 14 records I'm sure there is a paper trail of the date,
 15 because I specifically remember the phone call I had.
 16 My daughter was in the hospital sick, and I remember
 17 getting the phone call related to the request to extend
 18 the quarter.
 19 Q. Who did you get that call from?
 20 A. I don't recall specifically.
 21 Q. Do you recall that it was Bob Gluck that
 22 called you?
 23 A. It's possible that it was Bob Gluck, yes.
 24 Q. Who is Bob Gluck?
 25 A. He was the corporate controller of Sunbeam.

Page 23

1 Q. Did the fact that Sunbeam advised you that it
 2 wished to extend the first quarter of 1998 have any
 3 effect on your thinking concerning the need to conduct
 4 additional cutoff procedures for the quarter?
 5 A. Yes.
 6 Q. And what was your thought in that regard?
 7 A. Honestly, at that point in time I believe
 8 that they needed to come up with some additional ways
 9 to make the quarter on the revenue side, and that was
 10 one of them, one of a couple as opposed to -- I'm
 11 sorry, but that was one of them.
 12 Q. And how did that conclusion affect your
 13 thinking with respect to the cutoff procedure project?
 14 A. The cutoff procedure project was already
 15 implemented, but it emphasized the need to do it.
 16 Q. Were you concerned that Sunbeam might play
 17 games with respect to its first quarter numbers?
 18 MR. CLARE: Objection to form.
 19 THE WITNESS: I don't consider it playing
 20 games, but there was never a clear definition of
 21 whether or not they intended to include Coleman
 22 sales or not when they made their press releases.
 23 BY MR. MARKOWSKI:
 24 Q. Was the fact that Sunbeam had advised you
 25 that it wished to extend the first quarter consistent

Page 24

1 with your conclusion that management was being pressed
 2 to do whatever it could to maximize first quarter sales
 3 results?
 4 MR. CLARE: Objection to form.
 5 THE WITNESS: That they needed to be
 6 aggressive, yes. That is the way I would
 7 characterize it.
 8 BY MR. MARKOWSKI:
 9 Q. And they needed to be aggressive for what
 10 reason, Mr. Bornstein?
 11 MR. CLARE: Objection, foundation.
 12 MR. MOSCATO: You're asking him what his view
 13 is, not his trying to read their minds?
 14 MR. MARKOWSKI: That's correct.
 15 BY MR. MARKOWSKI:
 16 Q. Why did you think Sunbeam needed to be
 17 aggressive with respect to its first quarter sales
 18 activities?
 19 A. Because again, that was a big spread of sales
 20 that were in fact recorded at March 1st, and what they
 21 had told the public they planned on doing for the first
 22 quarter.
 23 Q. Mr. Bornstein, in general, what did -- let me
 24 ask a foundational question. In fact, Andersen did
 25 take additional steps to monitor Sunbeam's first

Page 25

1 quarter sales shipments at the end of the quarter?
 2 A. Yes.
 3 Q. In general, what did Andersen do?
 4 A. We sent people out to a number of material
 5 locations, manufacturing locations, where Sunbeam in
 6 fact built and shipped product at the end of the first
 7 quarter.
 8 Q. What did those people, what were those people
 9 asked to do?
 10 A. It's pretty much detailed in the memorandum,
 11 but basically to monitor the shipment of product, to
 12 make sure the product was actually shipped at the end
 13 of a quarter, to obtain shipping and receiving
 14 documents, to physically observe the shipping
 15 locations, to do additional work on additional bill and
 16 hold transactions that the company had told us that
 17 they were entering into, and to basically make sure
 18 that the product was there and ready to be shipped or
 19 shipped and do all the cutoff work that we talked
 20 about.
 21 Q. We've been using the term cutoff. What does
 22 cutoff mean?
 23 A. It's just, cutoff means, it's just a period
 24 of time that you take a snapshot. You freeze the, kind
 25 of freeze that period in time and you, exactly what it

Page 26

1 sounds, cut off when a sale is made and when a sale is
 2 not made.
 3 Q. And the cutoff moment in this instance was
 4 what?
 5 A. I believe the policy, the revenue recognition
 6 policy was that it had to have been placed in a truck
 7 and the truck needed to either be filled or pushed off
 8 the dock and title passed to the customer.
 9 Q. By what moment in time?
 10 A. Technically, midnight of whatever the date
 11 was. I think it was March 31st that the quarter ended.
 12 Q. It ultimately was March 31st, correct?
 13 A. Yes.
 14 Q. At the time this memo was written, the end of
 15 the quarter would have been March 29?
 16 A. Yes.
 17 Q. And it was the extension of the quarter by
 18 three days from the 29th to the 31st that resulted in
 19 that change, correct?
 20 A. Yes, being the 31st as opposed to the 29th,
 21 yes.
 22 Q. All right. Now did Andersen staff or,
 23 Andersen staff ask to be physically present on the
 24 Sunbeam shipping docks at midnight on the last day of
 25 the quarter?

Page 27

1 A. Yes.
 2 Q. And the purpose for that was so that they
 3 could do what?
 4 A. To make sure that the process I just
 5 explained was adhered to.
 6 Q. Verify it with their own eyes, correct?
 7 A. Yes.
 8 Q. Now is that something that Andersen did at
 9 the end of each Sunbeam quarter?
 10 A. No.
 11 Q. And the reason for the difference here was
 12 what you've already described, the gulf between where
 13 Sunbeam sales were at the end of March – or excuse me,
 14 at the end of February, and where the company had told
 15 the public it would end up at the end of the first
 16 quarter, correct?
 17 A. Yes. It was, as I explained earlier, a
 18 decision I made sometime in March, March 18th, 19th,
 19 that that was something I was going to have done.
 20 Q. Mr. Bornstein, let me show you what we
 21 previously marked as CPH Exhibit Number 20. Bears
 22 Bates number CPH 0129292 through 192296.
 23 A. Okay.
 24 Q. Can you tell me what this document is?
 25 A. Just give me a couple of minutes to look at

Page 28

1 it.
 2 Q. Sure.
 3 A. It's a, looks like a memo from Vance Kistler,
 4 who was a, I don't know, a staff accountant or it might
 5 have been a higher level, maybe a senior accountant, on
 6 his inventory observation work at Hattisburg.
 7 Q. Who was Vance Kistler again? I'm sorry, he's
 8 an Andersen employee?
 9 A. Yes.
 10 Q. Does this report relate to the sales cutoff
 11 procedures that we've been talking about?
 12 A. Yes.
 13 Q. Does this reflect Mr. Kistler's work and the
 14 work of others at the Hattisburg facility?
 15 A. Yes.
 16 Q. Hattisburg was a Sunbeam facility?
 17 A. Yes.
 18 Q. And what did Sunbeam do at Hattisburg, do
 19 you know?
 20 A. I don't remember specifically what they built
 21 there, but they manufactured equipment and had a
 22 distribution center where product was put on trucks and
 23 shipped to customers.
 24 Q. Do you recall that Hattisburg is one of the
 25 more significant facilities that Sunbeam had for

<p style="text-align: right;">Page 29</p> <p>1 shipping product?</p> <p>2 MR. CLARE: Objection to form.</p> <p>3 THE WITNESS: Yes, I believe their largest at</p> <p>4 the time.</p> <p>5 BY MR. MARKOWSKI:</p> <p>6 Q. Mr. Bornstein, let me show you what we've</p> <p>7 also previously marked as CPH Exhibit 113.</p> <p>8 A. Does anyone else who lives in Florida need</p> <p>9 air conditioning in this room? Is there any way we can</p> <p>10 do that? Us Floridians need air conditioning.</p> <p>11 Q. If at any point, Mr. Bornstein, you need to</p> <p>12 take a break or need something else like air</p> <p>13 conditioning, just let us know. We'll try to make sure</p> <p>14 you are comfortable.</p> <p>15 A. Thank you.</p> <p>16 Q. If you would take a moment to look at CPH</p> <p>17 Exhibit Number 113, my first question is going to be if</p> <p>18 you can identify it for me, tell me what it is.</p> <p>19 A. Okay.</p> <p>20 Q. The question was if you can identify the</p> <p>21 document for me.</p> <p>22 A. The document, after reading it, appears to be</p> <p>23 a documentation of work done by -- I'm not sure who</p> <p>24 this guy is, but another employee of Arthur Andersen on</p> <p>25 cutoff work done at a warehouse in DC, a warehouse in</p>	<p style="text-align: right;">Page 31</p> <p>1 Mr. Bornstein.</p> <p>2 A. Sure.</p> <p>3 Q. Was that huge effort in your mind justified?</p> <p>4 A. Yes.</p> <p>5 Q. And why did you think that huge effort was</p> <p>6 justified under the circumstances that you were</p> <p>7 confronted with?</p> <p>8 A. You know, based on the spread, the</p> <p>9 aggressiveness of management and the spread between</p> <p>10 what was recorded as sales, as well as what was, what</p> <p>11 was out on the street, we talked about them extending</p> <p>12 the quarter.</p> <p>13 Another thing that happened post the</p> <p>14 March 18th time frame was the announcement or the</p> <p>15 information to us that they were going to, Sunbeam was</p> <p>16 in the process of implementing an additional bill and</p> <p>17 hold series of transactions, I guess.</p> <p>18 So again, that was kind of the second thing</p> <p>19 that, that kind of emphasized that additional work</p> <p>20 needed to be done.</p> <p>21 Q. And the work needed to be done in order to do</p> <p>22 what you thought necessary to assure that Sunbeam</p> <p>23 properly reported its sales for the quarter?</p> <p>24 A. Yes.</p> <p>25 Q. And didn't report more sales than it was</p>
<p style="text-align: right;">Page 30</p> <p>1 Aurora. I think that might have been a, I believe that</p> <p>2 was a third-party warehouse.</p> <p>3 And again, work, additional work done on</p> <p>4 cutoff, shipping cutoff, as well as additional work</p> <p>5 done on bill and hold sales.</p> <p>6 Q. And this relates to the project we've been</p> <p>7 talking about, correct?</p> <p>8 A. Yes.</p> <p>9 Q. The monitoring of Sunbeam's end-of-quarter</p> <p>10 sales shipments, correct?</p> <p>11 A. Yes.</p> <p>12 Q. Is it fair to say that it took a fair amount</p> <p>13 of effort, Mr. Bornstein, to arrange and implement the</p> <p>14 additional cutoff monitoring procedures?</p> <p>15 A. I would characterize it as a huge amount of</p> <p>16 effort. Probably more effort on a quarterly inventory</p> <p>17 cutoff than -- probably safe to say on probably any</p> <p>18 work that was done probably for the previous 15 years</p> <p>19 in auditing history.</p> <p>20 Q. And the huge effort was warranted because of</p> <p>21 what again, Mr. Bornstein?</p> <p>22 MR. MOSCATO: I object.</p> <p>23 You can answer again, Larry.</p> <p>24 BY MR. MARKOWSKI:</p> <p>25 Q. Let me ask a different question,</p>	<p style="text-align: right;">Page 32</p> <p>1 entitled to report, correct?</p> <p>2 A. Yes.</p> <p>3 Q. When did you first learn, Mr. Bornstein, that</p> <p>4 Sunbeam's sales for the first two months of 1998 were</p> <p>5 about half of what Sunbeam's sales had been for the</p> <p>6 first two months of 1997?</p> <p>7 MR. MOSCATO: The question is focused on the</p> <p>8 first two months? That's your question?</p> <p>9 MR. MARKOWSKI: That's correct.</p> <p>10 MR. MOSCATO: First two months.</p> <p>11 THE WITNESS: I believe sometime towards</p> <p>12 maybe the first, the end of the first week of</p> <p>13 March. Maybe the second, I'd say anywhere between</p> <p>14 March 7th and maybe March 10th to 13th, in that</p> <p>15 time frame.</p> <p>16 BY MR. MARKOWSKI:</p> <p>17 Q. And how did you learn that information?</p> <p>18 A. From Dennis Pastrana, the senior accountant</p> <p>19 working for me.</p> <p>20 Q. Do you recall whether you were present in a</p> <p>21 room with Mr. Pastrana?</p> <p>22 A. No, it was via telephone.</p> <p>23 Q. Where were you at?</p> <p>24 A. I was working on the 144 offering, I believe</p> <p>25 in New York.</p>

Page 33

1 Q. And where was Mr. Pastrana?
2 A. In Delray Beach, Florida, at Sunbeam's
3 location.
4 Q. Do you recall whether he called you or
5 whether you called him in connection with that phone
6 call?
7 A. No, I don't recall.
8 Q. What do you recall Mr. Pastrana telling you?
9 A. Just the fact of where they were, where they
10 were from a revenue standpoint. And I don't recall
11 anything else specifically.
12 Generally he was doing work to support the
13 work that we were doing up in New York. He was working
14 on a comfort letter, which entailed reviewing the
15 company's financial information for the most recent
16 periods.
17 Q. Did you consider the information he provided
18 to you about Sunbeam's sales for the first two months
19 of 1998 to be significant in any way?
20 MR. CLARE: Objection to form.
21 THE WITNESS: Did I think it was significant,
22 the information that he gave me?
23 BY MR. MARKOWSKI:
24 Q. Correct, concerning Sunbeam's sales for the
25 first two months of the first quarter of '98.

Page 34

1 A. Yes, I did.
2 Q. In what way?
3 A. That it was much lower than the previous
4 year.
5 Q. Do you know if the public was expecting
6 Sunbeam's sales for the first quarter of 1998 to be
7 lower than Sunbeam's sales for the first quarter of
8 1997?
9 MR. CLARE: Objection, no foundation.
10 THE WITNESS: Did I know at that time?
11 BY MR. MARKOWSKI:
12 Q. Right. Did you know if the financial
13 community was expecting Sunbeam's sales in the first
14 quarter of 1998 to be lower or higher than Sunbeam's
15 sales for the first quarter of 1997 had been?
16 MR. CLARE: Same objection.
17 THE WITNESS: I knew that they were expecting
18 I believe to be higher than the previous year.
19 BY MR. MARKOWSKI:
20 Q. Your understanding was the financial
21 community was expecting Sunbeam's sales to grow in the
22 first quarter of 1998 over the first quarter of 1997
23 results, correct?
24 A. Yes.
25 Q. You said that Mr. Pastrana was doing work

Page 35

1 relating to the preparation of a comfort letter?
2 A. Yes.
3 Q. What's a comfort letter?
4 A. A comfort letter is, for lack of a better
5 word, it gives the underwriters and underwriter's
6 counsel comfort that the numbers that are within the
7 bond offering are derived from the company's books and
8 records.
9 Q. Now the letter is prepared by whom?
10 A. By Arthur Andersen.
11 Q. And it goes to whom in this case?
12 A. I believe it goes to underwriter's counsel.
13 So I'm not sure who exactly it's addressed to, to be
14 honest with you, but I believe it was underwriter's
15 counsel.
16 Q. The underwriting you are referring to in this
17 case was whom?
18 A. Morgan Stanley.
19 Q. And Morgan Stanley is underwriting what in
20 this context, just so we're clear?
21 A. The bond offering.
22 Q. And by underwriting, what do you mean?
23 A. They were the ones helping the company sell
24 the bonds.
25 Q. Why was Andersen preparing a comfort letter

Page 36

1 for Morgan Stanley relating to the bond offering?
2 A. It was requested by Morgan Stanley to
3 prepare.
4 Q. Do you know why Sunbeam was issuing the
5 bonds?
6 A. In order to finance a portion of the three
7 acquisitions you talked about earlier.
8 Q. Including the acquisition of Coleman Company,
9 correct?
10 A. Yes.
11 Q. What's the relevance of Sunbeam's sales
12 results in January and February of 1998 to the work
13 Mr. Pastrana was doing on the comfort letter?
14 A. The comfort letter asked for -- the standard
15 comfort letter, there are certain things that are
16 required to be disclosed and certain things that aren't
17 required to be disclosed, but, for example, you'd have
18 to look at net worth of the company compared to the
19 prior year. I forget the exact one. Net assets of the
20 company compared to the prior year. Really any
21 material variation from the same period of the prior
22 year required to disclose to the, to put in the
23 document, put in the comfort letter.
24 Again, the standard things, I don't know what
25 they are. And then if there is anything that's out of

<p style="text-align: right;">Page 37</p> <p>1 the ordinary, typically that might go in there. 2 Q. Mr. Bornstein, in connection with -- as I 3 understand your prior testimony in connection with the 4 Sunbeam audits, you were the second-most senior person 5 assigned in the audit; is that correct, the audit team? 6 A. There was a, there were, I think a concurring 7 partner was also assigned to the team, but that partner 8 didn't actually do the field work. He was more of an 9 advisory partner. So I would consider myself probably 10 the third senior person on the team. 11 Q. All right. In connection with the work you 12 did as the third most senior Andersen person on the 13 Sunbeam audit, if we include Mr. -- the concurring 14 partner was Mr. Pruitt; is that correct? 15 A. Yes. 16 Q. And the engagement partner was Mr. Harlow, 17 the audit partner? 18 A. Yes. 19 Q. And Mr. Harlow would have been more actively 20 involved in the actual audit process than Mr. Pruitt, 21 correct? 22 A. Correct. 23 Q. In connection with the work that you did 24 regarding Andersen's audits of Sunbeam, did you try to 25 keep abreast of statements that Sunbeam made to the</p>	<p style="text-align: right;">Page 39</p> <p>1 Q. When Mr. Pastrana advised you that Sunbeam's 2 sales for the first two months of 1998 were about half 3 of what they had been in the first two months of 1997, 4 did you report that information to anyone else at 5 Arthur Andersen? 6 A. Yes. 7 Q. To whom did you report it? 8 A. I think you can see in the memorandums that 9 we reported that to whoever was on the engagement team 10 working on the cutoff procedures, Mr. Harlow, 11 Mr. Pruitt. I don't specifically remember anyone else, 12 but I'm sure I mentioned it to other people. 13 Q. Did you make certain personally that 14 Mr. Harlow knew that Sunbeam's sales in the first two 15 months of '98 were about half of what they had been in 16 the first two months of '97? 17 A. Yes. 18 Q. Did you personally make sure that Mr. Pruitt 19 knew that as well? 20 A. Yes. 21 Q. Do you recall when you informed Mr. Harlow of 22 that fact? 23 A. As soon as I was aware of it. 24 Q. Do you recall when you advised Mr. Pruitt of 25 that?</p>
<p style="text-align: right;">Page 38</p> <p>1 financial community relating to its performance? 2 A. Yes, I did. 3 Q. And is it in that connection that you had an 4 understanding that Sunbeam had led the financial 5 community to expect that its first quarter 1998 sales 6 would be higher than its first quarter 1997 sales? 7 MR. CLARE: Objection to form. 8 THE WITNESS: It was a combination of a lot 9 of things, newspaper reports, the budgets, 10 statements Mr. Dunlap had made to the financial 11 community and the world on growth projections. 12 So I mean it's a combination of things how you 13 keep track of things like that. 14 Andersen at the time had a system in place 15 where you would get, you know, consensus, first 16 call type of information that can be supplied 17 also. 18 So I mean we were kept pretty -- you know, it 19 was part of our job to be in tune to that 20 information. 21 BY MR. MARKOWSKI: 22 Q. And you considered yourself in the first 23 quarter of 1998 well informed on those issues as they 24 related to Sunbeam? 25 A. Yes.</p>	<p style="text-align: right;">Page 40</p> <p>1 A. I believe not until March 17th or 18th. The 2 night before the, the date before the press release 3 went out and prior to the bonds being priced. 4 Q. Can you tell me what the context of that 5 conversation was? Was it a conversation? 6 A. Yes, just in -- Mr. Pruitt, as part of his 7 responsibility, needed to read the comfort letter in 8 its entirety. And I do recall pointing that out to him 9 specifically, that sales were half of what they were, 10 and -- 11 Q. Where were you both at? 12 A. He was in Miami. I believe I was, I was in 13 West Palm Beach. 14 And I recall the conversation that, that the 15 company was at 72 million versus 143 million, and 16 explained to him where they were versus their estimates 17 on the street. And I don't remember specifically the 18 conversation, but I do recall letting him know that I 19 wasn't 100 percent sure if all parties involved in the 20 transaction were informed of that information. 21 Q. What did Mr. Pruitt say to you? 22 A. He told me that he was going to talk to 23 Mr. Harlow and discuss the issue. 24 Q. And did you tell Mr. Pruitt who you weren't 25 certain -- let me rephrase that.</p>

<p style="text-align: right;">Page 41</p> <p>1 You indicated, if I understood you correctly, 2 Mr. Bornstein, that you raised with Mr. Pruitt an issue 3 concerning whether everyone involved in the debenture 4 offering was aware of the difference between Sunbeam's 5 sales in the first two months of '98 and the first two 6 months of '97, correct? 7 A. Yes. 8 Q. Was there somebody specific you had in mind? 9 A. I wasn't 100 percent sure if Morgan Stanley 10 and Morgan Stanley's counsel, as well as any of the 11 other people working on the transaction other than the 12 people at Sunbeam, knew where the company sales were at 13 that point in time. 14 Q. Did you want to make certain that Morgan 15 Stanley was advised of that information? 16 A. Yes. 17 Q. Is that what you told Mr. Pruitt? 18 A. I didn't tell him that specifically, no. 19 (Thereupon, a cellphone rang.) 20 MR. MARKOWSKI: Can we go off the record. 21 THE VIDEOGRAPHER: We are now going off the 22 video record. The time on the monitor, 10:05 a.m. 23 (Discussion held off the record.) 24 THE VIDEOGRAPHER: We are now back on video 25 record. The time on the monitor, 10:05 a.m.</p>	<p style="text-align: right;">Page 43</p> <p>1 Q. Have you seen this letter before? 2 A. I don't remember the specific one, but I've 3 seen the form letter before. 4 Q. Were you aware that Morgan Stanley had 5 written to Arthur Andersen to formally request Arthur 6 Andersen provide it with a comfort letter? 7 A. Yes, I was. 8 Q. In connection with the Sunbeam debenture 9 offering? 10 A. Yes. I believe we requested that this form 11 letter be provided to Arthur Andersen. 12 Q. I see. So it was Andersen's request that 13 Morgan Stanley provide it with a written request for a 14 comfort letter? 15 A. Yes, because the issue was that this was a 16 144 offering and not in accordance with the, 17 specifically what -- similar to like an IPO or a 33 Act 18 filing, I believe a 144 offering was a 34 Act filing, 19 which is a requirement of Andersen to make sure that 20 the underwriter would sign off on a letter requesting 21 that they were doing the same amount of work that would 22 have been required in the 33 Act filing. 23 Q. That's what Morgan Stanley represented to 24 Andersen in connection with this bond offering? 25 A. Yes.</p>
<p style="text-align: right;">Page 42</p> <p>1 BY MR. MARKOWSKI: 2 Q. Mr. Bornstein, did you specifically tell 3 Mr. Pruitt you weren't certain if Morgan Stanley knew 4 these facts? 5 A. No, I didn't specifically say that. 6 Q. Okay. What did Mr. Pruitt say to you when 7 you raised an issue with respect to whether everyone 8 was on notice of this drop in Sunbeam's sales? 9 A. He told me that if everyone wasn't aware, 10 that we wouldn't issue a comfort letter. 11 Q. And did Mr. Pruitt give you any instruction? 12 A. No. 13 Q. Did Mr. Pruitt tell you he intended to take 14 some action? 15 A. He told me he was going to talk to 16 Mr. Harlow. 17 Q. Mr. Bornstein, I'm going to show you what we 18 previously marked as CPH Exhibit Number 12. It's a 19 two-page document on Morgan Stanley stationery bearing 20 Bates number AA31057 through 058, and it's a letter 21 dated March 11, 1998, from John D. Tyree of Morgan 22 Stanley to Arthur Andersen; attention, Phil Harlow. 23 Would you take a moment to take a look at CPH 24 Exhibit Number 12 for me, Mr. Bornstein. 25 A. Okay.</p>	<p style="text-align: right;">Page 44</p> <p>1 Q. Did Andersen wait to receive this letter 2 before beginning work on the comfort letter? 3 A. No, I don't believe so. 4 MR. MARKOWSKI: Mr. Bornstein, I'm going to 5 show you what we're marking as CPH Exhibit 6 Number 120. It's a three-page document on Sunbeam 7 stationery dated March 16, 1998, bearing Bates 8 number AA31053 through 055. 9 (CPH Exhibit No. 120 was marked for 10 identification.) 11 BY MR. MARKOWSKI: 12 Q. If you would take a moment, sir, I'd like you 13 to review this document, and my first question is 14 whether you can identify it for me. 15 A. Yes. 16 Q. Can you tell me what it is? 17 A. It's a management representation letter from 18 Sunbeam to Arthur Andersen utilized to issue our 19 comfort letter. 20 Q. This is the comfort letter that you've been 21 referring to that Morgan Stanley requested? 22 A. Yes. 23 Q. In connection with the debenture offering, 24 correct? 25 What's the purpose of this letter?</p>

Page 45

1 A. When you, any time you're, basically you're
 2 bringing -- let me back up.
 3 The purpose of this letter again is to issue
 4 a comfort letter. And basically what you're doing is
 5 enough, the same amount of work sufficient that if you
 6 were going to issue a consent to update your opinion on
 7 the financial statements that were whatever the
 8 previous period was.
 9 So it's mainly analytical work and work done
 10 sufficient to issue a comfort letter.
 11 Q. Does this document contain information
 12 relating to Sunbeam's sales for the first two months of
 13 1998?
 14 A. Yes, it does.
 15 Q. Where do you see that?
 16 A. On paragraph 9C.
 17 Q. Would you read that into the record, please?
 18 A. "Net sales from December 29, 1997, through
 19 March 1, 1998, were 72 million, 72,018,000, as compared
 20 to 143,499,000 for the corresponding period of the
 21 preceding year."
 22 Q. That's the information that we've been
 23 talking about that showed that Sunbeam's sales for the
 24 first two months of 1998 were approximately half of
 25 what they had been in the prior year period, correct?

Page 46

1 A. Yes.
 2 Q. And this letter is signed by who, sir?
 3 A. Signed by Albert Dunlap, Russell Kersh, David
 4 Fanin and Bob Gluck, who were all senior executives of
 5 Sunbeam.
 6 Q. Mr. Dunlap's position at this time was what?
 7 A. States here chairman and chief executive
 8 officer.
 9 Q. Of Sunbeam?
 10 A. Of Sunbeam, yes.
 11 Q. Mr. Kersh was what?
 12 A. Executive vice-president of finance and
 13 administration.
 14 Mr. Fanin was executive vice-president,
 15 general counsel.
 16 Mr. Gluck was vice-president and chief
 17 accounting officer.
 18 Q. Four very senior Sunbeam executives, correct?
 19 A. Yes.
 20 Q. Does this letter offer an explanation for the
 21 primary reason for the substantial decline in Sunbeam's
 22 sales for the first two months of '98 compared to the
 23 first two months of '97?
 24 MR. CLARE: Objection to form.
 25 THE WITNESS: In the preceding paragraph, 9B,

Page 47

1 I believe it does.
 2
 3 BY MR. MARKOWSKI:
 4 Q. What does it say? Would you read that into
 5 the record, sir?
 6 A. "For the period from December 29th, 1997,
 7 through March 16, 1998, consolidated net sales
 8 decreased as compared to the corresponding period of
 9 the preceding year primarily to the company's Early Buy
 10 program for outdoor grills which accelerated outdoor
 11 grill sales into the fourth quarter of fiscal 1997.
 12 Additionally, decreased consolidated net sales during
 13 the period as compared to the corresponding period of
 14 the preceding year results, in part, from a
 15 nonrecurring sale in January of 1997 of discontinued
 16 stock keeping units and excess and obsolete inventory
 17 in connection with the company's November 1996
 18 restructuring. Net income decreased primarily due to
 19 the aforementioned sales decrease and a first quarter
 20 compensation charge from restricted stock issued in
 21 connection with new employment agreements for key
 22 officers."
 23 Q. And this is a statement being made to Arthur
 24 Andersen by the senior management of Sunbeam, correct?
 25 A. Yes.

Page 48

1 Q. What does it mean to be accelerating outdoor
 2 grill sales into the fourth quarter of 1997, sir?
 3 A. It talks -- what it means is just what it
 4 says, accelerating sales of grills to the fourth
 5 quarter of the previous year.
 6 Q. How does that affect first quarter sales?
 7 MR. MOSCATO: Objection.
 8 BY MR. MARKOWSKI:
 9 Q. I'm just trying to understand what the
 10 reference to accelerating sales means so that the jury
 11 can understand.
 12 A. Right. The Early Buy program and the bill
 13 and hold program that they had in effect at the end of
 14 1997, you know, based on the facts as of the end of
 15 February, showed that it did have an impact on moving
 16 some of the sales that might have previously been
 17 recorded in the fourth quarter -- in the first quarter,
 18 excuse me, of the corresponding year might have been
 19 accelerated into the previous quarter.
 20 Q. So sales that otherwise would have normally
 21 taken place in the first quarter of 1998 had in fact
 22 already occurred in the fourth quarter of 1997?
 23 MR. CLARE: Object to the form.
 24 THE WITNESS: Yes.
 25

Page 49

1 BY MR. MARKOWSKI:
 2 Q. That's identified here as the primary reason
 3 for the drop in Sunbeam's sales in the first two months
 4 of 1998, correct?
 5 A. That's what it states, yes.
 6 THE WITNESS: Could we take like a
 7 five-minute break for the restroom?
 8 MR. MARKOWSKI: Sure.
 9 THE VIDEOGRAPHER: We are now going off video
 10 record. The time on the monitor is 10:17 p.m.
 11 (Thereupon, a recess was taken.)
 12 THE VIDEOGRAPHER: We are now back on video
 13 record. The time on the monitor is 10:29 a.m.
 14 BY MR. MARKOWSKI:
 15 Q. Mr. Bornstein, as you just testified, Albert
 16 Dunlap was the chief executive officer of Sunbeam in
 17 the first quarter of 1998, correct?
 18 A. Yes.
 19 Q. Do you recall that Mr. Dunlap at that point
 20 had been the chief executive of Sunbeam for something
 21 less than two years?
 22 A. Yes.
 23 Q. Are you aware of Mr. Dunlap's reputation at
 24 that time as a turnaround specialist?
 25 A. Yes.

Page 50

1 Q. What do you know about that? Let me go back
 2 to 1998. Back in the first quarter of 1998, what was
 3 your understanding of Mr. Dunlap's reputation for
 4 turnarounds?
 5 A. That he had a reputation for cutting costs,
 6 turning around companies and selling them.
 7 Q. And doing that all in very short order?
 8 A. Yes.
 9 Q. And were you aware of any public statements
 10 that Mr. Dunlap had made about his success in turning
 11 Sunbeam around during his tenure as Sunbeam's chief
 12 executive officer? Focusing again on what your
 13 knowledge was in the first quarter of 1998.
 14 A. Yes.
 15 Q. What was your understanding of what
 16 Mr. Dunlap had said publicly on that subject?
 17 A. That it was turned around and headed for
 18 brighter and greater pastures.
 19 Q. Mr. Dunlap was projecting significant growth
 20 in sales and profits for 1998 for Sunbeam?
 21 A. Yes.
 22 Q. Compared to its 1997 performance?
 23 A. Yes.
 24 Q. Did you have any personal doubts about that
 25 in the first quarter of 1998?

Page 51

1 A. Yes.
 2 Q. And what were those doubts based upon?
 3 A. The financial performance really through the
 4 first two months of the, of '98, and as well as me, as
 5 well as my observation and review of at least the
 6 operations that I had seen, which included several of
 7 the domestic facilities as well as the Mexico City
 8 facility.
 9 Q. First quarter of 1998, did you consider
 10 yourself to be familiar with Sunbeam's financial
 11 results and performance?
 12 A. For what period of time?
 13 Q. For the prior year.
 14 A. Yes.
 15 Q. And for the first two months of 1998?
 16 A. Yes.
 17 Q. And did you consider yourself generally
 18 familiar with Sunbeam's management?
 19 A. Some of management, yes, from a corporate
 20 standpoint.
 21 Q. And you considered yourself to be familiar
 22 with Sunbeam's facilities?
 23 A. As I mentioned, domestically and in Mexico,
 24 part of Mexico anyway.
 25 Q. Did you think Mr. Dunlap was overstating his

Page 52

1 accomplishments at Sunbeam?
 2 A. I thought there was a possibility that he
 3 was, yes.
 4 Q. And that was your belief in the first quarter
 5 of 1998, correct?
 6 A. Yes.
 7 Q. Mr. Bornstein, let me show you what we've
 8 previously marked as CPH Exhibit Number 17. It's a
 9 document on Arthur Andersen stationery bearing Bates
 10 numbers MS375 through 381.
 11 If you could take a moment, my first question
 12 is going to be whether you can identify that document
 13 for me.
 14 A. Yeah, this is a copy of a, a copy of the
 15 comfort letter.
 16 Q. And it's a letter dated March 19, 1998,
 17 correct?
 18 A. Yes.
 19 Q. And it's from Arthur Andersen to Morgan
 20 Stanley & Company, Inc.?
 21 A. Yes.
 22 Q. And it's signed Arthur Andersen LLP, correct?
 23 A. Yes. I believe it's my handwriting.
 24 Q. You believe you signed the name Arthur
 25 Andersen LLP to the letter?

Page 53

1 A. This was signed about five o'clock in the
 2 morning on the 19th, I believe, the night of the
 3 pricing of the bonds, the following subsequent a.m.
 4 Q. So that process I think from prior testimony
 5 started on the 19th, if it was 5:00 a.m., it would have
 6 been 5:00 a.m. on the 20th?
 7 A. 20th, I believe.
 8 Q. Even though the letter is dated the 19th,
 9 correct?
 10 A. Yes.
 11 Q. Were you authorized to sign this letter on
 12 behalf of Morgan Stanley -- excuse me, I misspoke.
 13 Were you authorized to sign this letter on
 14 behalf of Arthur Andersen?
 15 A. Yes, I was.
 16 Q. And who provided you with that authorization?
 17 A. Phil Harlow.
 18 Q. And Mr. Harlow was the engagement partner, as
 19 you've previously testified, correct?
 20 A. Yes.
 21 Q. And the letter is addressed to Morgan
 22 Stanley.
 23 Do you know if the letter was delivered to
 24 Morgan Stanley?
 25 A. Yes, it was.

Page 54

1 Q. When did that occur? I'm talking about this
 2 version of it signed by you.
 3 A. Four or five o'clock in the morning on the
 4 20th.
 5 Q. And how do you know it was delivered to
 6 Morgan Stanley at that time?
 7 A. I handed it to them.
 8 Q. Who did you hand it to?
 9 A. Probably Bob Lurie. Bob Lurie was an
 10 attorney from Davis Polk, I believe.
 11 Q. I believe Mr. Lurie's name may be James.
 12 A. Maybe. Robert, wasn't it? No?
 13 Q. Maybe I'm mistaken, but Mr. Lurie from Davis
 14 Polk?
 15 A. It's been six years, so yeah.
 16 Q. And he was acting at that time as counsel for
 17 Morgan Stanley?
 18 A. I believe so, yes.
 19 Q. Does the March 19 comfort letter contain
 20 information relating to Sunbeam's sales results for the
 21 first two months of 1998?
 22 A. Yes.
 23 Q. And can you tell me where that appears?
 24 A. Six, paragraph 6C.
 25 Q. Does this contain the identical language that

Page 55

1 you've read into the record from the March 16 letter
 2 from Sunbeam management to Arthur Andersen?
 3 A. It's similar. It's not identical.
 4 Q. CPH Exhibit Number 120. Are the figures
 5 identical?
 6 A. Yes.
 7 Q. And the, just so the record is clear,
 8 Mr. Bornstein, would you read paragraph 6C into the
 9 record.
 10 A. Says, "Although the company has not provided
 11 us with any financial statements as of any date or for
 12 any period subsequent to February 1, 1998, management
 13 has provided net sales from the December 29, 1997,
 14 through March 1st, 1998, which was 72,018,000 as
 15 compared to 143,499,000 for the corresponding period of
 16 the preceding year."
 17 Q. And that again reflects a decline of about
 18 50 percent in sales for the first two months of 1998
 19 from the first two months of 1997, correct, sir?
 20 A. Yes.
 21 Q. And does this letter also repeat the
 22 explanations management provided to Arthur Andersen for
 23 that decline?
 24 A. Yes, the previous paragraph, 6B.
 25 Q. And what is the primary reason that

Page 56

1 management provided again?
 2 A. I believe this is the exact wording.
 3 "Primarily due to the company's new Early Buy program
 4 for outdoor grills, which accelerated outdoor grills
 5 sales into the fourth quarter of fiscal 1997."
 6 Q. Sir, you indicated that you personally handed
 7 this to Morgan Stanley's counsel --
 8 A. Yes.
 9 Q. -- in the early morning hours of March 20th,
 10 correct?
 11 A. Yes, I believe so, yes.
 12 Q. Do you know if this letter with these facts
 13 and figures, the ones that you've just testified about,
 14 had been provided to Morgan Stanley at any earlier
 15 point, either that evening or otherwise?
 16 MR. MOSCATO: You mean a prior draft?
 17 MR. MARKOWSKI: Correct.
 18 THE WITNESS: I believe that it was, but I
 19 can't be certain.
 20 BY MR. MARKOWSKI:
 21 Q. Had you discussed these numbers with anyone
 22 from Morgan Stanley earlier in the evening on
 23 March 19th?
 24 A. Yes, I had.
 25 Q. Who did you discuss them with?

Page 57

1 A. I think his name was John Tyree, specifically
 2 from Morgan Stanley. I don't remember anyone else from
 3 Morgan Stanley being there.
 4 Q. I'm going to take you back in time a little
 5 bit from that moment, Mr. Bornstein.
 6 You indicated that you had had a conversation
 7 two or three days earlier, as I understand it, with
 8 Phil Pruitt relating to these facts, correct?
 9 A. Bill Pruitt.
 10 Q. I'm sorry, Bill Pruitt, the concurring
 11 partner on the Sunbeam audit engagement.
 12 A. I believe the 17th, two days earlier.
 13 Q. And Mr. Pruitt advised you that he was going
 14 to speak with Mr. Harlow concerning making sure that
 15 everyone involved in the transactions that were
 16 underway had notice of these facts, correct?
 17 A. Yes.
 18 Q. What's the next thing you recall happening
 19 bearing on this subject?
 20 MR. CLARE: Object to the form.
 21 THE WITNESS: Personally, I remember that on
 22 the, I think the 19th -- let me think about this,
 23 17th, 18th, 19th.
 24 I believe the 19th I recall was the next time
 25 I got any information on the subject, when I was

Page 58

1 in a hotel room in New York waiting to go to the
 2 printer.
 3 BY MR. MARKOWSKI:
 4 Q. Do you recall what hotel you were in?
 5 A. I think it was the Helmsley Palace Hotel.
 6 Q. You said you were getting ready to go to the
 7 printer. What printer?
 8 A. I think it was Global Financial Press is
 9 where we were doing the work. And I was with an
 10 associate of mine, Mark Brockelman.
 11 Q. What was going to be happening at the
 12 printer?
 13 A. We were going to be finalizing the bond
 14 offering. I believe the bonds were being priced. The
 15 quantity of the bonds was, what was being sold was
 16 going to be finally determined, the interest rate.
 17 And we were going to basically change
 18 whatever numbers needed to be changed in the document
 19 as a result of the pricing, as well as issue a final
 20 comfort letter.
 21 Q. The document that was being finalized was
 22 what?
 23 A. The 144 offering memorandum.
 24 Q. That's the document that would be provided to
 25 potential purchasers of the bonds?

Page 59

1 A. Yes. So that's when I found out about it. I
 2 was, saw it on TV.
 3 Q. You were there with Mr. Brockelman, you
 4 indicated?
 5 A. Yes.
 6 Q. Mr. Brockelman, what was -- he was employed
 7 by Arthur Andersen?
 8 A. Yes.
 9 Q. And his reason for being there with you was
 10 what?
 11 A. To assist me in the process, to have an extra
 12 set of eyes looking at numbers when they changed.
 13 Q. And what happened while you were at the
 14 hotel?
 15 A. We were watching or I was watching CNBC and
 16 saw the crawler on the bottom that Sunbeam had released
 17 an early warning release that they weren't going to
 18 make the number. I forget what the numbers were, but
 19 they were still going to exceed, I think it was first
 20 quarter of the prior year. I think that was the, I
 21 think that's what it was. I'd have to look at the
 22 press release again.
 23 And then I, I think I saw a notation that the
 24 stock went down significantly.
 25 Q. So you recall that there was some notice on

Page 60

1 the CNBC broadcast concerning an announcement by
 2 Sunbeam concerning its first quarter performance?
 3 A. Yes.
 4 Q. And when you saw that, what was your
 5 reaction?
 6 A. My reaction was to learn more about what the
 7 release was.
 8 Q. What did you do?
 9 A. I believe I called Mr. Harlow or I called
 10 someone back, back at Arthur Andersen. Possibly could
 11 have been Bob Gluck, I don't remember, but I wanted to
 12 physically get a copy of the press release.
 13 Q. Did you speak with someone? Did you succeed
 14 in reaching someone to talk to them about the contents
 15 of the press release?
 16 A. Yes.
 17 Q. You can't remember at the moment whether that
 18 was Mr. Harlow or Mr. Gluck?
 19 A. It might have been Dennis Pastrana. I don't
 20 remember who, to be honest with you, I spoke with.
 21 Q. But you spoke with someone who had the press
 22 release itself?
 23 A. Yes.
 24 Q. Let me show you what's been previously marked
 25 as CPH Exhibit Number 14, Mr. Bornstein. It's a

Page 61

1 two-page document that bears Bates number Morgan
 2 Stanley confidential 16944 through 945. And it's
 3 headed "For Immediate Release, Sunbeam states that
 4 first quarter revenues may be lower than street
 5 estimates."
 6 I'd like you to take a moment to take a look
 7 at this document for me, sir.
 8 A. Okay.
 9 Q. Can you tell me what this is?
 10 A. This appears to be the press release that I
 11 was referring to earlier.
 12 Q. And do you recall while you were at the hotel
 13 you succeeded in reaching someone who read to you the
 14 contents of this document?
 15 A. Yes.
 16 Q. Would you read the first sentence of this
 17 press release into the record for me, sir.
 18 A. "Sunbeam Corporation said today that it's
 19 possible that its net sales for the first quarter of
 20 1998 may be lower than the range of Wall Street
 21 analysts' estimates of 285 million to 295 million, but
 22 net sales are expected to exceed 1997's first quarter
 23 net sales of 253.4 million."
 24 Do you want me to keep going?
 25 Q. Well, does this document explain the reason

Page 62

1 why Sunbeam thought that sales might be lower than Wall
 2 Street analysts' estimates of 285 to 295 million for
 3 the quarter?
 4 A. Yes.
 5 Q. What does it say on that subject?
 6 A. It says, "The shortfall from analysts'
 7 estimates, if any, would be due to changes in inventory
 8 management and order patterns at certain of the
 9 company's major retail customers. The company further
 10 stated"-- well, actually that's a different sentence,
 11 but that's the sentence they put in there.
 12 Q. It doesn't mention the Early Buy program,
 13 does it?
 14 A. No.
 15 Q. And it was the Early Buy program that
 16 management's letter to Sunbeam identified as the
 17 primary reason for sales shortfall in the first quarter
 18 of 1998, correct?
 19 A. Yes.
 20 Q. Did Andersen, to your knowledge, sir, have
 21 any involvement in the preparation of the Sunbeam
 22 March 19 press release?
 23 A. Not that I'm aware of, no.
 24 Q. Did you personally have any involvement?
 25 A. No.

Page 63

1 Q. Did you advise Sunbeam in any way what the
 2 March 19 press release should say?
 3 A. No.
 4 Q. Did you see it before it was issued?
 5 A. No.
 6 Q. Did anyone from Sunbeam or anyone from any
 7 other entity read to you or provide you any information
 8 concerning the contents of the March 19 press release
 9 before it was issued?
 10 A. No.
 11 Q. Mr. Bornstein, is this the kind of press
 12 release that you would have expected Sunbeam management
 13 to review with Andersen before it was released
 14 publicly?
 15 MR. MOSCATO: I object.
 16 MR. CLARE: I join in the objection.
 17 THE WITNESS: In my opinion, yes.
 18 BY MR. MARKOWSKI:
 19 Q. And what is that based on?
 20 A. Just previous, previous experience and kind
 21 of joint, joint coordination and understanding of the
 22 relationship between the auditor and the client.
 23 Q. On prior occasions had Sunbeam previously
 24 shown Andersen drafts of press releases relating to
 25 financial information before they were publicly

Page 64

1 disclosed?
 2 A. Yes.
 3 Q. Do you know why that was not done in this
 4 case?
 5 A. No, I do not.
 6 Q. Mr. Bornstein, does the press release, the
 7 March 19 press release, CPH Exhibit Number 14, set
 8 forth the January and February sales results numbers
 9 that are contained in management's representation
 10 letter to Andersen?
 11 A. No.
 12 Q. Does the press release state that Sunbeam's
 13 January and February sales were one half of 1997 sales
 14 for the same time period?
 15 A. No.
 16 Q. Does it state in any way that Sunbeam's sales
 17 for the first two months of 1998 were below to any
 18 extent Sunbeam's sales for the first two months of
 19 1997?
 20 A. No.
 21 Q. Does the press release state that Sunbeam had
 22 in fact determined that it could not accomplish Wall
 23 Street analysts' estimates of 285 million to
 24 295 million in sales for the quarter?
 25 A. They said it's possible.

Page 65

1 Q. They don't say it's not going to happen, do
2 they?
3 A. No.
4 Q. Does the press release say anything about not
5 meeting Wall Street's expectations for earnings for the
6 first quarter of 1998?
7 A. No, it does not.
8 Q. Does the press release say anything about
9 Sunbeam's earnings for the first two months of 1998
10 being below earnings for the first two months of 1997?
11 A. No.
12 Q. Given what you knew at the time, sir, still
13 focusing on the hotel room, the time you were at the
14 hotel room, what was your reaction to what was read to
15 you concerning the contents of Sunbeam's March 19 press
16 release?
17 A. Thought it was very poorly written and
18 described and thought that it was still very
19 aggressive.
20 Q. When you say it was very aggressive, what in
21 particular are you focusing on, sir?
22 A. Exceeding 1997 first quarter sales of
23 253.4 million.
24 Q. When you say you think that's aggressive or
25 at the time you thought that was aggressive, what do

Page 66

1 you mean?
2 A. Based on, again, the sales where they were
3 for the first two months at 72 million, they needed to
4 sell 100 and whatever it is, 180 million to meet that
5 number.
6 Q. To meet the minimum \$253 million number?
7 A. Yes.
8 Q. And by aggressive, you mean that it would be
9 difficult to achieve?
10 A. Less likely than not. How's that?
11 Q. You thought it was not probable that Sunbeam
12 could achieve 253 million in sales for the first
13 quarter of 1998?
14 MR. MOSCATO: Objection.
15 MR. CLARE: Object to the form.
16 THE WITNESS: I thought it was aggressive.
17 BY MR. MARKOWSKI:
18 Q. Were you skeptical?
19 A. Yes.
20 Q. And the reason why you were skeptical was
21 because Sunbeam had so far to go? Is that basically
22 it?
23 A. That, and based on my review of the
24 facilities and the distribution capabilities of the
25 company.

Page 67

1 Q. And your knowledge generally of Sunbeam's
2 operations?
3 A. Yes.
4 Q. If you were skeptical of Sunbeam's ability to
5 achieve \$253 million in sales, Mr. Dunlap -- excuse me,
6 Mr. Bornstein. Let me start over with that again.
7 A. I wish I had his money.
8 Q. No offense.
9 MR. MOSCATO: Not his personality.
10 BY MR. MARKOWSKI:
11 Q. No offense intended, sir.
12 A. No problem.
13 Q. If you were skeptical, Mr. Bornstein, of
14 Sunbeam's ability to accomplish \$253 million in net
15 sales for the first quarter of 1998, what was your view
16 of the company's likelihood of accomplishing 285 to
17 \$295 million in net sales for the quarter?
18 A. Never considered it. It was, I didn't think
19 the 253 was likely, so I never really even, never
20 really went to the higher number, to be honest with
21 you.
22 Q. Did you think Sunbeam had any chance of
23 achieving 285 to 295 million in sales?
24 MR. MOSCATO: Now I object. He just answered
25 the question.

Page 68

1 THE WITNESS: Never gave it any thought.
2 BY MR. MARKOWSKI:
3 Q. I assume you thought it was less likely than
4 accomplishing 253, right?
5 A. Logic would say that.
6 Q. Even more difficult, even more aggressive?
7 A. Yes.
8 Q. After the contents of the press release was
9 read to you, Mr. Bornstein, what happened next?
10 A. We went to the printer's. Mark Brockelman
11 and I took a taxi to the printer's.
12 Q. Do you remember what time of the day that
13 was?
14 A. I believe it was between five and 6:00 p.m.
15 Q. And the printer is Global Financial Press?
16 A. Yes.
17 Q. Who else was there that evening?
18 A. Myself and Mr. Brockelman, John Tyree from
19 Morgan Stanley, Mr. Lurie from Davis Polk. There were
20 two, I think two attorneys from Scadden Arps.
21 Q. Do you remember their names?
22 A. One guy was foreign, I think his name was
23 Adrien Dietz. I don't remember where he was from.
24 Another guy, I think Todd Freed maybe, and I believe
25 Davis Polk had one or two other people there.

Page 69

1 Q. Do you recall if there was more than one
2 person for Morgan Stanley?
3 A. No, I don't recall.
4 Q. The person you recall from Morgan Stanley
5 being there is John Tyree?
6 A. Yes.
7 Q. Was anyone there from Sunbeam?
8 A. No.
9 Q. What happened when you arrived at the
10 printer?
11 A. I think we, we met in a conference room. I
12 don't remember specifically the, what first happened.
13 I know we were told about the success of the offering
14 and that they, it was oversubscribed and that they
15 increased the size to -- I think we were informed about
16 that earlier, but that they, even the fact of the
17 warning release, that everything was still a go.
18 And again, it was oversubscribed and there
19 was no issues.
20 Q. Do you remember how much the offering was
21 originally expected to raise?
22 A. I think the net was about 500 million, I
23 think.
24 Q. And you were told on the 19th when you got to
25 the printer that the marketing activity had been very

Page 70

1 successful; is that correct?
2 A. Yes.
3 Q. That's manage Morgan Stanley's effort to
4 market the debentures on behalf of Sunbeam?
5 A. Yes.
6 Q. So you were being told that Morgan Stanley
7 has had great success in marketing Sunbeam's debentures
8 to potential investors, correct?
9 A. Yes.
10 Q. So successful that the debenture offering is
11 being substantially increased in size, correct?
12 A. Yes.
13 Q. I'm sorry, did you say what the increased
14 amount was?
15 A. I think it was 750 million net.
16 Q. So people are feeling pretty good about the
17 success of the marketing activity, I take it, correct?
18 MR. CLARE: Object to the form and
19 foundation.
20 THE WITNESS: Yeah, they were very excited
21 and pleased with the marketing effort.
22 BY MR. MARKOWSKI:
23 Q. That was being expressed to you at the
24 meeting?
25 A. Yes.

Page 71

1 Q. Do you recall who was expressing that to you?
2 A. It was Tyree and Bob Lurie. Bob? Robert?
3 James? Whatever, Mr. Lurie.
4 Q. Let's call him Mr. Lurie today.
5 A. I don't remember his first name.
6 Q. Did the subject at some point of the March 19
7 press release come up?
8 A. Yes.
9 Q. How did that happen?
10 A. I asked a couple of questions about, you
11 know, the reaction of the press release when marketing
12 the bonds and doing the final allocation and asked
13 about the press release.
14 And they went into the story of kind of how
15 the press release came to be and what time of the night
16 it was and how difficult it was between Scadden Arps
17 and Morgan Stanley and Sunbeam to actually disclose
18 this information and agree on the wording.
19 Q. Can you paint the picture for me a little bit
20 about the setting? You're in a conference room?
21 A. Yeah, it's a very very large, large
22 conference room, probably similar at the time one we're
23 in now at the printer there, multiple locations of
24 different size conference rooms, hallways. There was
25 also rooms for where there is pool and TV and things

Page 72

1 like that, pool table.
2 So this would be kind of to the side, a side
3 conversation with myself and Mr. Lurie and Mr. Tyree.
4 And then everybody else would be sitting around the
5 conference room table.
6 Q. When you asked Mr. the March 19 press
7 release, with whom were you speaking?
8 A. Mr. Tyree and Mr. Lurie.
9 Q. And Mr. Lurie is Mr. Tyree's, Morgan
10 Stanley's attorney?
11 A. Yes.
12 Q. And what were you told?
13 A. That it was a very difficult night. It
14 lasted to the morning. And that Mr. Dunlap was
15 incensed and irate and crazed, I guess, for lack of
16 better terminology, and made the comment that he was
17 going to lose \$100 million because of this, I think was
18 what I recall.
19 Q. So they told you the background leading up to
20 the issuance of the press release, correct?
21 A. Yes.
22 Q. Did you ask any other questions concerning
23 the press release?
24 A. No.
25 Q. Was there any discussion about putting the

Page 73

1 information from the press release in any way into the
 2 offering memorandum that you were in the process of
 3 finalizing?
 4 A. Yes.
 5 Q. How did that subject come up?
 6 A. I asked the question of what they intended on
 7 putting into the document to disclose where the company
 8 was with their sales forecast and what their revised
 9 estimates were going to be.
 10 Q. So you asked a general question, what the
 11 company intended to disclose relating to its
 12 performance in the first part of 1998, correct?
 13 A. It wasn't really what the company was going
 14 to disclose. I mean I understand -- no one from the
 15 company was present, but what the consensus of the
 16 group was.
 17 Q. What would be disclosed in the offering
 18 memorandum?
 19 A. Yes.
 20 Q. So you asked a general question, what is the
 21 offering memorandum going to say about Sunbeam's
 22 performance so far in the first quarter of 1998?
 23 A. Yes.
 24 Q. And who did you ask that question of?
 25 A. I think it was a general question to Tyree,

Page 74

1 to the Scadden Arps folks, because I believe they -- I
 2 don't even remember who the hell they were
 3 representing. They were representing Sunbeam, right?
 4 MR. MOSCATO: Scadden, yes.
 5 THE WITNESS: And Mr. Tyree.
 6 BY MR. MARKOWSKI:
 7 Q. And what was the response?
 8 A. That they were going to put the press release
 9 in verbatim into the document.
 10 Q. Who said those words to you?
 11 A. I think it was Mr. Lurie.
 12 Q. Did anyone disagree with that when Mr. Lurie
 13 made that statement?
 14 A. I did.
 15 Q. Did anyone else other than you disagree?
 16 A. No, I don't recall.
 17 Q. How far into the evening is this conversation
 18 taking place?
 19 A. Early.
 20 Q. What did you say to Mr. Lurie in response to
 21 Mr. Lurie's statement to you that the intention was to
 22 include the contents of the press release as the
 23 disclosure relating to Sunbeam's performance to that
 24 point in the first quarter of '98?
 25 A. I didn't think it was -- I told him I didn't

Page 75

1 think it was appropriate to put in there.
 2 Q. Who was present when you made that statement
 3 to Mr. Lurie?
 4 A. I made the statement to whoever was in the
 5 room at the time.
 6 Q. Was Mr. Tyree there?
 7 A. Yes.
 8 Q. What did you say, do you remember?
 9 A. I said I don't think it's appropriate to put
 10 this in the, in the 2 billion-dollar bond offering,
 11 that it was an extremely forward-looking statement, it
 12 was aggressive, and that I didn't think it was a good
 13 idea.
 14 Q. Do you remember anything else you said at
 15 that point?
 16 A. That I was going to discuss this with Sunbeam
 17 as well as Mr. Harlow.
 18 Q. What was the reaction from the others
 19 present, Mr. Tyree, Mr. Lurie, the Scadden lawyers?
 20 A. At that point I don't know. I left the room.
 21 Q. Did anyone say to you at that point that your
 22 views didn't change their thinking?
 23 A. No.
 24 Q. Okay. So the next thing that happened is you
 25 left the room?

Page 76

1 A. Yes.
 2 Q. And you left the room for what purpose, sir?
 3 A. To call Mr. Harlow to discuss the issue of
 4 what was going to go into the offering memorandum and
 5 to get in touch with Sunbeam, Mr. Gluck.
 6 Q. When you said to discuss with him what was
 7 going to go into the offering memorandum, were you
 8 focusing on what was going to be said in the offering
 9 memorandum relating to Sunbeam's first quarter '98
 10 performance?
 11 A. Yes, the sales numbers.
 12 Q. Did you succeed in reaching Mr. Harlow?
 13 A. Yes.
 14 Q. Where was he located, do you know?
 15 A. I believe he was at his house.
 16 Q. In Florida?
 17 A. In Florida.
 18 Q. And what did you tell Mr. Harlow when you got
 19 him on the phone?
 20 A. Similarly, that they wanted to put the press
 21 release into the document and that I didn't think it
 22 was a good idea, given the aggressiveness and the
 23 forward-looking statement that was being made.
 24 Q. Do you recall what Mr. Harlow said to you?
 25 A. He agreed with me, and we got Mr. Gluck on

Page 77

1 the phone.
2 Q. How did you get Mr. Gluck on the phone?
3 A. I don't recall. I don't believe I -- I'm not
4 sure if I had the capability or Phil dialed him in, but
5 we had a three-way conversation.
6 Q. So Mr. Gluck, Mr. Harlow and you are all on
7 the telephone together at that point?
8 A. Yes.
9 Q. Was anyone else on the phone?
10 A. No.
11 Q. Was anyone else present in the room with you
12 when you had this conversation that you can recall?
13 A. No. I was in the pool room.
14 Q. And as far as you can recall now, you were by
15 yourself?
16 A. Yes.
17 Q. Tell me what you can recall of the
18 conversation that you had with Mr. Gluck and Mr. Harlow
19 at that point.
20 A. Just went through the press release, it was
21 aggressive and wasn't clear. And it was a very large
22 forward-looking statement and that it wasn't
23 appropriate in a bond offering.
24 And the consensus was at the time that we all
25 agreed; however, that because I don't think Mr. Gluck

Page 78

1 was involved in the press release, he deferred to get
2 in touch with Mr. Fanin, and I think her name was Janet
3 Kelly.
4 Q. So Mr. Gluck -- is it your testimony that
5 Mr. Gluck agreed with you and Mr. Harlow that it would
6 be inappropriate to include the contents of the press
7 release as the statement concerning where Sunbeam was
8 at so far in the first quarter of '98?
9 A. Yes.
10 Q. Did Mr. Gluck tell you whether he had been
11 involved in preparing a press release?
12 A. I recall he said he was not intimately
13 involved. I don't know if he was at all. I think he
14 knew about it, but he wasn't really involved.
15 Q. Did Mr. Gluck say anything to you about his
16 views of the press release by itself? Taking it out of
17 the context of whether it's going to go into the
18 offering memorandum, did he offer any views concerning
19 the statements made in the press release?
20 A. Generally I recall that he didn't like the
21 way that it was written. I don't remember specifically
22 on the numbers or anything like that.
23 Q. You don't have a recollection of what he
24 said, but you remember he didn't like the contents of
25 the press release?

Page 79

1 A. Yes.
2 Q. So did that conclude your conversation with
3 Mr. Gluck at that point?
4 A. Yes. Mr. Gluck and Mr. Harlow continued the
5 conversation. I got off the phone to go back to the
6 room to relay that, that my partner as well as
7 Mr. Gluck agreed with me, and that they were going to
8 continue the conversation and get in touch with
9 Mr. Fanin.
10 Q. Who did you make that statement to?
11 A. When I walked back in the room, to the,
12 again, to whoever was in the room.
13 Q. Do you remember if Mr. Tyree was there?
14 A. Yes, he was.
15 Q. What happened at that point that you recall?
16 A. My colleague, Mr. Brockelman, asked me to
17 leave the room with him. And he informed me that the
18 conversation around the table was, was very derogatory
19 towards me and that a lot of bad language was being
20 used about me, who the fuck do I think I am and why
21 didn't he tell me about this prior? And basically that
22 I was, you know, cocky, and so on and so forth.
23 Q. You said it was bad language being used about
24 you, derogatory language.
25 Did Mr. Brockelman tell you what was being

Page 80

1 said? Did he use any of the words?
2 A. Basically "Who the fuck does this guy think
3 he is," basically is what I recall.
4 Q. What happened after you had this side
5 conversation with Mr. Brockelman?
6 A. I remember walking back into the conference
7 room and asking Mr. Lurie and Mr. Tyree to have a side
8 conversation in the conference room but over to the
9 side, and asking Mr. Tyree if he had anything to say to
10 me.
11 I said, you know, "My colleague says that you
12 have some words to say about me, and if you have
13 something to say, say it to my face."
14 And he basically asked me, he says, "Are
15 these guys fucking with me," was the exact quote. "Is
16 Sunbeam fucking with us? Is Sunbeam fucking with me?
17 And are these guys, you know, going to make their
18 numbers?"
19 And, you know, I was obviously very upset and
20 pissed off about the comments and the tone. And, you
21 know, obviously we were in disagreement with the press
22 release.
23 Q. I'm sorry, whose comments and tone are you
24 referring to?
25 A. Mr. Tyree specifically.

<p style="text-align: right;">Page 81</p> <p>1 And I basically said to Mr. Tyree that, you 2 know, "I'm a conservative accountant, that, you know, I 3 can't specifically answer if they're fucking with you. 4 I haven't seen any of the sales projections that you've 5 seen or whatever it is that they have given you, that 6 I've done basic math, that they have done a million 7 dollars in sales a day for the first 72 days and now 8 they have to do" -- whatever it was, 12 to \$15 million 9 in sales for the next-- it was, I don't remember the 10 date, but it was, you know, let's say 17 days, whatever 11 the numbers were, and that I was very skeptical, that I 12 remember saying to him that I don't think this 13 company's turned around. 14 No one has ever seen an Al Dunlap company 15 ever turned around, and if it is turned around and he 16 has the numbers, he's going to make the numbers. And 17 I'm going to make sure that they make the numbers and 18 I'm going to send people to every shipping dock in the 19 country in the world that I have to, if I have to, to 20 make sure that they do make the numbers. 21 I said to him, "You better hope to God that 22 they do, because if not, you're all going to get sued." 23 And I left the room. 24 Q. Did anyone before you left the room say 25 anything in response to your comments to you?</p>	<p style="text-align: right;">Page 83</p> <p>1 specifically if I was faxed or handed this by the folks 2 from Morgan Stanley after our conversation that I just 3 discussed with you. 4 Q. Let me show you what's previously been marked 5 as CPH Exhibit Number 16, sir. It's a one-page 6 document, bears Bates number Morgan Stanley 7 confidential 28858. 8 Is that the document that was handed to you 9 that night? 10 MR. MOSCATO: Well, can I just clarify one 11 thing? Are you asking the basic form of the 12 document? Does your question include all of the 13 writing on the document? 14 MR. MARKOWSKI: For now I'm including 15 everything right now. 16 MR. MOSCATO: So the question is do you 17 recall whether this document containing all the 18 writing on the document was handed to you? 19 THE WITNESS: The handwriting, I'm not sure. 20 I mean I've seen several renditions of the same 21 document with different handwriting on it. 22 What I've seen, what I recall is the actual 23 typed numbers and words as well as the writing on 24 the bottom. 25 MR. MARKOWSKI: Let me show you what we're</p>
<p style="text-align: right;">Page 82</p> <p>1 A. No, not that I recall. 2 Q. Were your comments well received by 3 Mr. Tyree, as far as you could tell? 4 A. I left the room. He was, for lack of a 5 better word, stunned. 6 Q. Mr. Bornstein, did you tell Mr. Tyree that 7 night that you intended to have Andersen personnel 8 monitor Sunbeam's shipping docks at the end of the 9 first quarter of 1998? 10 A. Yes, I did. 11 Q. Did you explain to him why you intended to do 12 that? 13 A. To make sure that they had borders and the 14 product was built and shipped. 15 Q. Did anyone that night, Mr. Bornstein, provide 16 you with any documents concerning Sunbeam's sales plan 17 for the rest of the first quarter? 18 A. Yeah, I believe after that conversation, I 19 went back and made another phone call. And I believe, 20 as a result of Mr. Fanin, them calling Mr. Fanin and 21 discussing it, that a document or one-page spreadsheet 22 was provided to myself, Phil. I'm not sure who else 23 got it. I know that the folks from Morgan Stanley had 24 it. 25 And I believe I was faxed -- I don't recall</p>	<p style="text-align: right;">Page 84</p> <p>1 going to mark for identification as CPH Exhibit 2 Number 121. It also is a one-page document, bears 3 Bates number LAB43. 4 MR. MOSCATO: There is no question pending. 5 MR. MARKOWSKI: We're going to change the 6 videotape right now. 7 THE VIDEOGRAPHER: We are now going off video 8 record on tape number one. We'll be back on tape 9 number two. The time on the monitor is 11:15 a.m. 10 (Discussion held off the record.) 11 THE VIDEOGRAPHER: We are now back on video 12 record. It is tape number two. The time on the 13 monitor, 11:15 a.m. 14 (CPH Exhibit No. 121 was marked for 15 identification.) 16 BY MR. MARKOWSKI: 17 Q. Mr. Bornstein, I've handed you CPH Exhibit 18 Number 121. 19 Have you seen this document before? 20 A. 121, I don't specifically remember. Again, 21 I've seen the general, this general -- this is what I 22 got. I believe the actual copy I got, I attached to a 23 memorandum that I drafted sometime after the night at 24 the printer's. 25 Q. The typed portion of this, does this appear</p>

Page 85

1 to be the information that was provided to you at the
2 printer --
3 A. Yes.
4 Q. -- on the night of March 19th?
5 A. Yes.
6 Q. When you saw this, did it give you comfort
7 with respect to Sunbeam's ability to accomplish Wall
8 Street's expectations for first quarter sales?
9 A. No, it did not.
10 Q. What conclusions did you reach after
11 reviewing this document that night?
12 A. That the numbers were even more aggressive
13 than I thought.
14 Q. And they were more aggressive than you had
15 thought for what reason, sir?
16 A. Because they had close to \$100 million of
17 sales that haven't been ordered yet.
18 Q. Built into their sales plan for the balance
19 of the quarter?
20 A. Yes.
21 Q. So Sunbeam was counting in its plan to get to
22 at least \$253 million, by your count, approximately
23 \$100 million in product sales that hadn't even been
24 ordered yet at that point, correct?
25 MR. MOSCATO: Well, you know, I object to the

Page 86

1 rounding, but you can answer.
2 THE WITNESS: I'm okay with the rounding,
3 sorry. 86 rounds up to 100 million to me.
4 Yeah, it was just numbers on the page to me.
5 BY MR. MARKOWSKI:
6 Q. So this document didn't cause you looking at
7 it to conclude that Sunbeam's statements in the press
8 release about its expectations for the first quarter
9 were reasonable, correct?
10 A. No.
11 Q. What was your reaction, sir, to the manner in
12 which Mr. Tyree had treated you that night?
13 A. Can you repeat the question?
14 Q. What was your reaction, sir, to the manner in
15 which Mr. Tyree had treated you on the night of
16 March 19th when these issues came up?
17 A. I was, felt like I was being treated
18 disrespectfully, not being listened to.
19 Q. Did you think that Mr. Tyree was trying to
20 steamroll you in any way?
21 MR. CLARE: Object to the form and object to
22 foundation, calls for speculation, what Mr. Tyree
23 was trying to do.
24 BY MR. MARKOWSKI:
25 Q. By that I mean, sir, do you think he was

Page 87

1 trying to get you to back off of the statements that
2 you had made?
3 MR. CLARE: Same objection.
4 THE WITNESS: I believe he was, yes.
5 BY MR. MARKOWSKI:
6 Q. Did you?
7 A. No, I did not.
8 Q. What was the final decision that night, sir,
9 concerning what would be put in the offering memorandum
10 relating to Sunbeam's performance to that point in the
11 first quarter of 1998?
12 MR. MOSCATO: Number one, I object. I would
13 like some clarification when you answer as to
14 whose decision it was, who made the decision.
15 BY MR. MARKOWSKI:
16 Q. Let me ask a little different, maybe more
17 pointed question, sir.
18 What was ultimately put in the offering
19 memorandum concerning Sunbeam's performance to that
20 date for the first quarter of 1998?
21 A. I believe it was the press release, the
22 wording from the press release, but I'd have to look at
23 the document.
24 Q. I'm going to show you, Mr. Bornstein, what
25 previously has been marked as CPH Exhibit Number 10.

Page 88

1 It's a document entitled Offering Memorandum,
2 214 billion-dollar Sunbeam zero coupon convertible
3 senior subordinated debentures, due 2018, dated
4 March 19, 1998, bears Bates number CP33169 through
5 33240.
6 A. I just want to check the press release.
7 I believe the first paragraph of the press
8 release was put in verbatim into the document.
9 Q. And where do you see that, sir?
10 A. On Recent Announcements, page eight of the
11 offering memorandum, Exhibit CPH 10.
12 Q. So the contents of the press release
13 ultimately were placed into the offering memorandum,
14 correct?
15 A. Right. And I recall that the last paragraph
16 on page eight was something that I insisted on being
17 put in there.
18 Q. The last paragraph refers to what, sir?
19 A. It's a reference to the forward-looking
20 statement and risk factor sections, which basically it
21 reads, "Actual results could differ materially from the
22 statements in the press release due to various factors,
23 including those set forth in risk factors, management
24 discussion analysis and financial condition end results
25 of operation and business. See forward-looking

<p style="text-align: right;">Page 89</p> <p>1 information." 2 Q. Was it your decision, sir, to repeat the 3 contents of the March 19 press release in the offering 4 memorandum as in the manner we see here on page eight? 5 A. No, it was Sunbeam, the company's decision to 6 do that. 7 Q. Did you recommend, by the end of the evening 8 had you changed your mind with respect to that being 9 appropriate? 10 A. No. 11 Q. Did at any point in the evening to your 12 knowledge Arthur Andersen advise the company that that 13 was the appropriate form of disclosure concerning 14 Sunbeam's first quarter results? 15 A. Not that I recall. 16 Q. Do you know, how was that decision 17 communicated to you, the decision to put the contents 18 of the press release in the offering memorandum over 19 the objections that you had raised? 20 A. I don't remember specifically. I think I got 21 a phone call late in the evening, two, three o'clock in 22 the morning from, either directly from Janet Kelly or 23 from Phil Harlow saying that it was the company's 24 decision to put the same wording in. 25 Q. Were you personally at the end of the evening</p>	<p style="text-align: right;">Page 91</p> <p>1 answer the question based on those conversations, 2 don't attempt to read his mind. 3 THE WITNESS: Again, I alluded to a 4 memorandum that I wrote about the night, and I 5 believe that would refresh my memory, but I do 6 believe Mr. Harlow was in agreement with myself. 7 BY MR. MARKOWSKI: 8 Q. Mr. Bornstein, I'm not going to ask you to 9 read the entire offering memorandum while we sit here. 10 It will speak for itself on this issue, but do you know 11 from your recollection of having worked on it whether 12 that document contains the specific information that's 13 set forth in the management March 16 representation 14 letter to Arthur Andersen and Andersen's March 19 15 comfort letter relating to Sunbeam's actual sales 16 results for the first two months of 1998? 17 MR. CLARE: Object to the form. 18 THE WITNESS: I don't believe that it does, 19 no. 20 BY MR. MARKOWSKI: 21 Q. Do you know if it contains a statement that 22 Sunbeam's sales for the first two months of 1998 are 23 below Sunbeam's sales for the first two months of 1997? 24 A. I don't believe that it does, no. 25 Q. Do you know if it states that the reason why</p>
<p style="text-align: right;">Page 90</p> <p>1 satisfied with that conclusion? 2 A. No, I was not; however, I have the caveat 3 that again, I went along, I went along with the 4 decision by the company. It was the company's 5 decision, the company's document, and that I would 6 strongly advise not putting it in, and also putting 7 the, if it was going to be put in, that it would be 8 cross referenced to the risk factors and have a 9 statement that, you know, that the actual results could 10 differ materially from the wording here. 11 Q. So at the beginning of the evening on 12 March 19 it was your personal view that it was a bad 13 idea to repeat the contents of the press release in the 14 offering memorandum, and it remained your view that 15 that was a bad idea right through the finalization of 16 the document; is that right? 17 MR. CLARE: Object to the form. 18 THE WITNESS: Yes. 19 BY MR. MARKOWSKI: 20 Q. Do you know did if Mr. Harlow's views changed 21 on that subject? 22 MR. CLARE: Objection, calls for speculation. 23 MR. MOSCATO: Don't speculate. Just answer 24 the question if you can based on conversations you 25 had with Mr. Harlow that evening. If you can't</p>	<p style="text-align: right;">Page 92</p> <p>1 Sunbeam's sales for the first quarter of 1998 may be 2 lower than Sunbeam's sales for the first quarter of 3 1997 at the end of that quarter, that the primary 4 reason for that was Sunbeam's acceleration of grill 5 sales into the fourth quarter of 1997? 6 A. Specifically, no, but someone who actually 7 reads the statement might come to that conclusion. 8 Q. But that statement is not made; is that 9 correct, sir? 10 A. This statement is about the Early Buy 11 program, but one would have to make a thesis that that 12 could in fact be the reason. 13 Q. But the specific statement in the management 14 representation letter that that is the primary reason 15 for the shortfall is not made, correct? 16 A. I don't believe so, no. 17 Q. Let me show you what's been marked as CPH 18 Exhibit Number 122 sir, a two-page document, bears 19 Bates AA105868 -- excuse me. 20 Let me show you a document that we've put 21 together. It's got two different Bates numbers that 22 aren't consecutive, but I believe the document is, was 23 originally part of a single two-page memo. It bears 24 Bates number AA105868 and AA105248, and ask you if 25 you've seen this document before, sir.</p>

<p style="text-align: right;">Page 93</p> <p>1 (CPH Exhibit No. 122 was marked for 2 identification.) 3 THE WITNESS: No, I don't recall ever seeing 4 this document. 5 BY MR. MARKOWSKI: 6 Q. I take it you don't recognize the 7 handwriting? 8 A. No. 9 Q. It's not yours? 10 A. No, it's not. 11 Q. Mr. Bornstein, let me show you what we 12 previously marked as CPH Exhibit Number 114. 13 A. I'm sorry, I just want to -- just figuring 14 out what this is, but that's okay. 15 Q. There is nothing you want to add to your 16 prior answer? 17 A. No, it appears this was probably something 18 that was used to draft the paragraph that went into 19 this document. 20 Q. That's why I asked you about it, if you 21 remembered seeing it before. 22 A. I don't remember seeing itself, no. 23 Q. Let me show you what we previously marked as 24 CPH Exhibit Number 114, sir. It's a two-page document, 25 the first page of which, the Bates numbers on the</p>	<p style="text-align: right;">Page 95</p> <p>1 Q. Can I refer you back, sir, to Exhibit 121? 2 A. Yes. 3 Q. The two documents are the same, are they not, 4 sir? 5 A. Yeah, one is a better copy than the other. 6 Q. All right. 7 MR. MOSCATO: Counsel, do you have a copy of 8 this that you could actually read all of the 9 handwritten notes? 10 MR. MARKOWSKI: I think that's the best we've 11 been able to do. 12 BY MR. MARKOWSKI: 13 Q. For what purpose did you prepare your 14 March 31 memorandum, Mr. Bornstein? 15 A. To document the material events that occurred 16 the night at the printer. 17 Q. Did you want to have a record of what you had 18 said to Mr. Tyree? 19 A. Yes, I did. 20 Q. And why was that? 21 A. I thought it was a prudent thing to do, given 22 the differences of opinion that transpired the night at 23 the printer. 24 Q. Mr. Bornstein, I want to move on to something 25 different for a moment.</p>
<p style="text-align: right;">Page 94</p> <p>1 document are AAR10538 through AAR15040. 2 A. Okay. 3 Q. The first page of the document is, bears 4 Arthur Andersen letterhead and is dated March 31, 1998, 5 and a memorandum from Lawrence A. Bornstein to the 6 files, West Palm Beach. 7 I ask you to look at this document, sir, and 8 tell me whether you can identify it for me. 9 Can you identify it for me, sir? 10 A. It's a memorandum that I drafted, looks like 11 several days after the March 19th night at the printer 12 to document, document the discussions that we've been 13 speaking about. 14 Q. Did you personally draft this document, sir? 15 A. Yes, I did. 16 Q. And in drafting it, did you attempt to be 17 accurate at the time? 18 A. Yes. 19 Q. The third page of the document, sir, can you 20 tell me what that is? 21 A. That is the fax that I received from Sunbeam 22 that we were talking about before that showed the 23 estimate of sales, the date and the potential orders to 24 meet the \$253 million expectation that they put in the 25 press release.</p>	<p style="text-align: right;">Page 96</p> <p>1 A. Okay. 2 Q. Do you recall being involved in a conference 3 call earlier in 1998 with Morgan Stanley personnel 4 relating to Sunbeam's accounting practices? 5 A. Yes. 6 Q. Do you recall that call happening on or about 7 March 12? 8 A. I don't remember specifically when it was, 9 but it's possible that was the time frame. 10 Q. Was it approximately a week before the events 11 at the printer? 12 A. It was probably before the original, the 13 original 144 memorandum was released, before they went 14 out to, on the road show or priced the bonds. 15 MR. MOSCATO: Larry, what do you mean by the 16 original 144 memorandum? 17 THE WITNESS: There was a, I think there was 18 one that -- there is a different one than that one 19 that I think talks about the \$500 million offering 20 size. 21 Typically you have an original document 22 that's kind of based on the best estimate at the 23 time, and they use that to market the bonds. 24 Then they go out and do the road show and 25 market the bonds, and then they price and they</p>

<p style="text-align: right;">Page 97</p> <p>1 update the document. So I believe the due 2 diligence call that you're talking about was done 3 prior to the first document. 4 BY MR. MARKOWSKI: 5 Q. Before the road show started? 6 A. Yes. 7 MR. MOSCATO: Sorry, counsel. I just wanted 8 to -- 9 MR. MARKOWSKI: That's fine, appreciate it. 10 BY MR. MARKOWSKI: 11 Q. Let me show you what we previously marked, 12 sir, as CPH Exhibit 31. It's a one-page memorandum on 13 Morgan Stanley letterhead from John Tyree to Sunbeam 14 Financing Team; subject, accounting due diligence call, 15 dated March 7, 1998. Bears Bates number SASMF10709. 16 Have you seen this document before, sir? 17 A. I don't remember specifically, no. 18 Q. Does it appear to relate to the accounting 19 due diligence call you participated in? 20 A. Yes. 21 Q. Do you see that there is an entry -- there is 22 a schedule on this document, correct? 23 A. Yes. 24 Q. And there is an entry for a time for a 25 conference call with Arthur Andersen, correct?</p>	<p style="text-align: right;">Page 99</p> <p>1 Mr. Harlow and myself went through the list and made 2 notations or discussed what was going to be said on the 3 call. 4 Q. And then Mr. Harlow ultimately was the 5 spokesperson when the call took place? 6 A. Yeah, he did 98 percent of the speaking, and 7 I filled in when necessary. 8 Q. Were you two together when the call took 9 place? 10 A. No. 11 Q. Where was Mr. Harlow? 12 A. He was in Florida in his office. 13 Q. And where were you? 14 A. I was at Global Financial Press working on 15 the document. 16 Q. Just an earlier occasion when you were at the 17 printer working on the offering memorandum? 18 A. Yeah, there was probably several days that we 19 were working at the printer, that being one of them. 20 MR. MARKOWSKI: Let me show you, 21 Mr. Bornstein, what we'll mark as CPH Exhibit 22 Number 123. It's a four-page document, bears 23 Bates number AA55761 through 55764, first page of 24 which is on Arthur Andersen letterhead and is a 25 memorandum from Lawrence A. Bornstein, West Palm</p>
<p style="text-align: right;">Page 98</p> <p>1 A. Correct. 2 Q. And that time is 12:00 p.m. on March 12? 3 A. Yes. 4 Q. And the name identified there is yours, 5 correct? 6 A. Correct. 7 Q. Do you recall, do you see that the time for 8 the next call with KPMG is scheduled for 12:30? 9 A. Yes. 10 Q. Do you recall there was approximately 30 11 minutes allotted to this accounting due diligence call 12 with Morgan Stanley? 13 A. Yes. 14 Q. Were you in fact the spokesperson for Arthur 15 Andersen during that telephone call? 16 A. No, I was not. 17 Q. Who was? 18 A. Phil Harlow. 19 Q. What -- did you do anything, sir -- were you 20 involved in the call? Did you personally participate? 21 A. Yes, I was. 22 Q. What did you do to prepare for the call, if 23 anything? 24 A. I believe we were provided a list of 25 questions that were going to be asked, and that</p>	<p style="text-align: right;">Page 100</p> <p>1 Beach, to the files; subject, due diligence call 2 with Morgan Stanley. 3 (CPH Exhibit No. 123 was marked for 4 identification.) 5 6 BY MR. MARKOWSKI: 7 Q. Can you identify this document for me, sir? 8 A. Yeah, let me take a minute to read it. 9 Q. Sure. 10 A. Okay. 11 Q. Can you identify it for me, sir. 12 A. It was a memorandum that I put together to 13 document the due diligence call from, I guess it's 14 March 12th. Looks like -- I have noted here the 15 request is March 7th, so these dates coincide with the 16 previous exhibit. 17 Q. Right. The March 7th -- your memorandum 18 indicates, CPH Exhibit Number 123 indicates that 19 Andersen was requested on March 7 to participate in a 20 due diligence call with Morgan Stanley, correct? 21 A. Right. 22 Q. And we were just looking at CPH Exhibit 23 Number 31 that set up a date for that call to occur on 24 March 12, correct? 25 A. Correct.</p>

<p style="text-align: right;">Page 101</p> <p>1 Q. And the date of that memo is March 7? 2 A. Yes. And then in addition is the list of 3 questions that I mentioned earlier that we were 4 provided with my notations of what was going to be said 5 on the call. 6 You can see a number of the items are crossed 7 out, which means that they were discussed. 8 Q. So the document has two, there is two pieces 9 to the document, sir? 10 A. Yes. 11 Q. First two pages are a memo that you prepared 12 in July of '98? 13 A. Yes. 14 Q. And the second two pages are the list of 15 questions that Morgan Stanley provided to Andersen in 16 advance of the call? 17 A. Yes. 18 Q. And the notations there relating to what 19 would be said? 20 A. Yeah, and again, I believe that everything on 21 here was, was discussed. 22 Q. And you and Mr. Harlow had agreed that in 23 response to these questions, this is the information 24 that Morgan Stanley would be provided, correct? 25 A. For the most part, yes.</p>	<p style="text-align: right;">Page 103</p> <p>1 Q. Someone from Bank of America was on the call, 2 but you don't have that name, correct? 3 A. Yes. 4 Q. That's the same John Tyree that you had, you 5 met with and spoke with on March 19 at Global 6 Financial, correct? 7 A. Yes. 8 Q. Did anyone, sir, from Morgan Stanley suggest 9 to you either during this call or at some other point 10 that it would be inappropriate for Mr. Gluck, as a 11 representative of Sunbeam management, to listen in on 12 Morgan Stanley's due diligence call with Sunbeam's 13 outside auditors? 14 MR. CLARE: Object to the form. 15 THE WITNESS: No, I don't recall that. 16 BY MR. MARKOWSKI: 17 Q. That issue wasn't raised that you can recall? 18 A. No. I believe we were required to have 19 someone from the company present. 20 Q. Morgan Stanley didn't object, to your 21 knowledge? 22 A. Not that I recall. 23 Q. Do you recall, sir, that Mr. Harlow was 24 asked, among other things, to comment on how aggressive 25 Sunbeam was in its accounting policies?</p>
<p style="text-align: right;">Page 102</p> <p>1 Q. Now there is a gap between the time this call 2 took place, sir, on March 12 and your preparation of 3 this memo on July 2. Correct? 4 A. Yes. 5 Q. Can you explain that? 6 A. I believe it was just going back and making 7 sure that all the documentation was in the file, and at 8 the time I thought it was a good idea to note, to 9 memorialize what happened at the meeting. 10 Q. And you had had your notes from back at that 11 time, correct? 12 A. Yes. 13 Q. And you prepared the memo later, but you 14 dated it later, correct? 15 A. Yes. 16 Q. And July 2 is the date on which this 17 memorandum was in fact prepared? 18 A. Yes. 19 Q. Now the participants in the call, sir, in 20 your memo are identified as whom? 21 A. Mr. Harlow and myself, Bob Gluck from 22 Sunbeam, John Tyree from Morgan Stanley, Bob Lurie from 23 Davis Polk, Andy Savart from Morgan Stanley, George 24 Scott, First Union, and then I have a name, I don't 25 know the name, representative from Bank of America.</p>	<p style="text-align: right;">Page 104</p> <p>1 A. Yes. 2 Q. You say that's item eight on the checklist, 3 agenda? 4 A. Yes. 5 Q. So you and Mr. Harlow knew that question 6 would be asked in advance of the telephone call, 7 correct? 8 A. Yes. 9 Q. Do you recall what Mr. Harlow said in 10 response to that question during the conference call 11 itself? 12 A. I believe he said that the accounting, some 13 of the accounting policies were aggressive. 14 Q. Do you recall that he identified any 15 particular examples of that? 16 A. Bill and hold was one. And I have a note 17 here of Encore, and I have 100 percent right of return, 18 which I believe was one of the issues from the audit. 19 There was an adjustment recorded, but I'm not 20 100 percent certain. 21 Then it keeps going on, a couple of other 22 ones. EPI was another one where we had an adjustment. 23 It was a transaction that occurred at the end of the 24 year and was aggressive. 25 Q. The end of 1997?</p>

26 (Pages 101 to 104)

Page 105

1 A. '97.
 2 Q. Can you read the fourth item on that, on your
 3 handwritten note, sir?
 4 A. Yeah, I think it's -- no, I would be
 5 speculating. The first three I can read. It says
 6 aggressive/bill and hold, Encore 100 percent right of
 7 return, EPI printer's.
 8 The fourth one I can't -- it's my
 9 handwriting. If you want to give me a few minutes, I
 10 can probably figure it out.
 11 Q. I'll come back. Let me focus on the first
 12 three for a moment.
 13 A. Right.
 14 Q. The first three entries, aggressive/bill and
 15 hold, Encore 100 percent right of return, and EPI
 16 printers were all things said by Mr. Harlow to Morgan
 17 Stanley during this March 12 conference call as
 18 examples of Andersen's view that Sunbeam at least on
 19 occasion was aggressive in its accounting positions?
 20 MR. CLARE: Object to the form.
 21 THE WITNESS: Yes, I believe so.
 22 BY MR. MARKOWSKI:
 23 Q. All of those items related to events that
 24 occurred in 1997; is that correct?
 25 A. Yes.

Page 106

1 Q. All of them relate to revenue recognition; is
 2 that correct?
 3 A. Yes.
 4 Q. Do you recall that on Encore and EPI -- well,
 5 let me pause for a moment on bill and hold.
 6 Do you recall that Andersen had raised its
 7 reservations with Sunbeam relating to Sunbeam's
 8 extensive use of bill and hold accounting for sales in
 9 1997?
 10 MR. CLARE: Object to the form.
 11 MR. MOSCATO: I object to that.
 12 THE WITNESS: Can you repeat the question?
 13 BY MR. MARKOWSKI:
 14 Q. Do you recall that Andersen had raised with
 15 Sunbeam its reservations about Sunbeam's business
 16 practice of using extensively bill and hold accounting
 17 and sales transactions for 1997 sales?
 18 MR. MOSCATO: I object.
 19 Larry, you don't have to adopt his language
 20 in answering the question. Answer it in your own
 21 words.
 22 THE WITNESS: I don't consider it
 23 reservation, but understanding of the accounting
 24 policy in making sure that it met the rules and
 25 that the appropriate testing was done.

Page 107

1 BY MR. MARKOWSKI:
 2 Q. I'm putting aside the accounting.
 3 Do you recall that Mr. Harlow or yourself
 4 told Sunbeam that it was a poor business practice to
 5 engage extensively in bill and hold sales?
 6 MR. MOSCATO: I object again.
 7 You can answer in your own words.
 8 MR. CLARE: I object to the form.
 9 THE WITNESS: I believe at one point that it
 10 was said, but probably later than this.
 11 BY MR. MARKOWSKI:
 12 Q. Okay. Do you recall -- with respect to
 13 Encore and EPI, do you recall that Andersen took the
 14 position that Sunbeam should reverse the accounting
 15 treatment on these two transactions and not recognize
 16 the sales revenue and profits in 1997?
 17 A. I believe that was the case, yes.
 18 Q. And do you recall that Sunbeam refused to do
 19 that?
 20 A. Yes.
 21 Q. In connection with finalizing the 1997 audit?
 22 A. Yes.
 23 Q. And you advised or Mr. Harlow advised Morgan
 24 Stanley of those three situations during the March 12
 25 conference call, correct?

Page 108

1 MR. CLARE: I object to the form.
 2 THE WITNESS: Yes.
 3 BY MR. MARKOWSKI:
 4 Q. Let me go to the fourth note that you've got
 5 there that you're having some trouble deciphering.
 6 A. Yes.
 7 Q. You said you could speculate, and I guess I
 8 invite that at this point, because maybe that will help
 9 us figure out what that might be a reference to.
 10 Do you have some thought with respect to what
 11 this entry is either from your recollection or what you
 12 can read here?
 13 A. Looks like something, discount accurate,
 14 either accuracy or accounting reports. I'm not -- I
 15 don't know.
 16 Q. Okay.
 17 A. Sorry.
 18 Q. During the March 12 conference call, sir, did
 19 Morgan Stanley request an opportunity to review
 20 Andersen's 1997 audit work papers?
 21 A. I don't remember that specifically, no.
 22 Q. Do you remember at any point Morgan Stanley
 23 requesting an opportunity to review Andersen's 1997
 24 audit work papers?
 25 A. No.

Page 109

1 Q. Do you remember at any point Andersen asking
 2 to review -- excuse me, do you remember at any point
 3 Morgan Stanley asking to review Andersen's list of
 4 proposed audit adjustments relating to the 1997
 5 financial statements of Sunbeam?
 6 A. No.
 7 Q. Is it your recollection that Morgan Stanley
 8 in fact did not request an opportunity to review your
 9 work papers?
 10 MR. CLARE: Object to the form.
 11 THE WITNESS: I don't believe so.
 12 BY MR. MARKOWSKI:
 13 Q. When you say you don't believe so, you don't
 14 believe that request was ever made?
 15 A. No, I don't believe it was ever made.
 16 MR. MOSCATO: Counsel, when you come to a
 17 logical breaking point, can we take a two- or
 18 three-minute break?
 19 MR. MARKOWSKI: I can be finishing up I think
 20 in the next ten minutes or so.
 21 MR. MOSCATO: That's fine.
 22 MR. MARKOWSKI: If you'd like to break
 23 sooner, we can do that and finish up.
 24 MR. MOSCATO: I'm indifferent.
 25

Page 110

1 BY MR. MARKOWSKI:
 2 Q. Mr. Bornstein, do you recall that Arthur
 3 Andersen provided a second comfort letter to Morgan
 4 Stanley in connection with the debenture offering?
 5 A. No. Could be a bring-down letter, but I'm
 6 not sure. Have to look at it.
 7 MR. MARKOWSKI: Let me show you, sir, what
 8 we'll mark as CPH Exhibit Number 124. It's a
 9 three-page document bearing Bates number AA30995
 10 through 997. And it's a letter on Sunbeam
 11 stationery dated March 23, 1998, to Arthur
 12 Andersen.
 13 (CPH Exhibit No. 124 was marked for
 14 identification.)
 15 BY MR. MARKOWSKI:
 16 Q. Can you identify this document for me, sir?
 17 A. This appears to be an updated representation
 18 letter from Sunbeam to Arthur Andersen in connection
 19 with the comfort letter.
 20 Q. And this letter is signed by Mr. Dunlap,
 21 Mr. Kersh, Mr. Fanin and Mr. Gluck; is that correct?
 22 A. Yes.
 23 Q. The same four people that signed the March 16
 24 representation letter, correct?
 25 A. Yes.

Page 111

1 Q. This letter contains the same information
 2 relating to Sunbeam sales for the first two months of
 3 1998, correct? Net sales figures? If you look at
 4 paragraph eight.
 5 A. Yes. This is updated through, has the same
 6 sales number, but it actually has net income or loss
 7 through March 1st.
 8 Q. Right. In addition, it also provides the net
 9 income for Sunbeam's performance in January and
 10 February 1998, correct?
 11 A. Correct.
 12 Q. The March 16 letter only had net income
 13 information for January; is that right?
 14 A. Yes.
 15 MR. MOSCATO: March 19 letter.
 16 MR. MARKOWSKI: March 19 letter, I'm sorry.
 17 MR. MOSCATO: I'm sorry, it was the March --
 18 BY MR. MARKOWSKI:
 19 Q. The March 16 representation letter and the
 20 March 19 comfort letter both only had net income
 21 information through January, correct?
 22 A. Yes.
 23 Q. And this letter provides net income
 24 information for both January and February of 1998,
 25 correct?

Page 112

1 A. Yes.
 2 Q. And it compares Sunbeam's net income for
 3 January and February of 1998 to Sunbeam's net income
 4 for the first two months of 1997, correct?
 5 A. Yes.
 6 Q. And it does that in paragraph eight?
 7 A. Yes.
 8 Q. And what does that comparison show us?
 9 A. Net income for the two months ended
 10 March 2nd, 1997, of 9,765,000 and net loss of
 11 41,190,000 for the two months ended in March of '98.
 12 Q. So in the first two months of 1997 --
 13 A. I mean ended February, excuse me, first two
 14 months of '98.
 15 Q. So for the first two months of 1997, Sunbeam,
 16 according to this document, had a profit of \$9,765,000,
 17 correct?
 18 A. Correct.
 19 Q. And in the first two months of 1998, this
 20 document shows that Sunbeam had a net loss of
 21 \$41,190,000, correct?
 22 A. Yes.
 23 Q. Swaying of more than \$50 million; is that
 24 correct?
 25 A. Yes.

Page 113

1 Q. In a negative direction, correct?
 2 A. Yes.
 3 Q. Mr. Bornstein, I'm going to show you what
 4 was -- I'm sorry, it was already marked.
 5 Mr. Bornstein, let me show you what has been
 6 previously marked as CPH Exhibit Number 112. It's a
 7 four-page document bearing Bates number CPH 129613
 8 through CPH 129616.
 9 A. Okay.
 10 Q. We'll mark this and I'll ask you if you can
 11 identify it for me.
 12 MR. CLARE: I thought this was previously
 13 marked.
 14 MR. MARKOWSKI: I'm sorry, I got myself
 15 confused again.
 16 BY MR. MARKOWSKI:
 17 Q. Sir, let me show you what we previously
 18 marked as Exhibit Number 112. It bears Bates number
 19 129613 through 129616, and ask you if you can identify
 20 that document for me.
 21 A. This appears to be the bring-down letter to
 22 Morgan Stanley related to the bond offering.
 23 Q. And this letter is dated March 25, 1998; is
 24 that correct?
 25 A. Yes.

Page 114

1 Q. And in paragraph E of the letter --
 2 A. Yes.
 3 Q. -- at the top of the second page of the
 4 letter itself?
 5 A. Yes.
 6 Q. The net sales information and net income
 7 information for the first two months of 1998 is
 8 provided, correct?
 9 A. Correct.
 10 Q. And that's the same information that Sunbeam
 11 provided to Morgan Stanley that we just reviewed in the
 12 March 23 representation letter, correct?
 13 MR. CLARE: Object to the form. I think you
 14 misspoke, Bob.
 15 THE WITNESS: Yeah, you provided to Arthur
 16 Andersen, not Morgan Stanley.
 17 BY MR. MARKOWSKI:
 18 Q. I'm sorry. Let me ask a new question.
 19 The net income and net sales information in
 20 paragraph E of Exhibit CPH Exhibit 112 for the first
 21 two months of 1998 is the same as the net sales and net
 22 income information contained in the Sunbeam
 23 representation letter to Arthur Andersen dated
 24 March 23, 1998, correct?
 25 A. Correct.

Page 115

1 Q. And it shows a \$50 million decline in profits
 2 for that time period from the first two months of 1997,
 3 correct?
 4 A. Yes.
 5 Q. And it shows the net sales for the first two
 6 months of 1998 are about 50 percent of Sunbeam's net
 7 sales for the first two months of 1997, correct?
 8 A. Yes.
 9 Q. Do you know who signed this letter on behalf
 10 of Arthur Andersen?
 11 A. Doesn't look like my handwriting. It might
 12 have been Phil Harlow's.
 13 Q. Do you know what the purpose of this letter
 14 dated March 25 is, Mr. Bornstein?
 15 A. I don't specifically know, to be honest with
 16 you. It's typical that you issue a bring-down letter.
 17 I don't recall specifically if this is when the money
 18 is released to Sunbeam or not.
 19 Q. Do you recall that the debenture offering
 20 closed on March 25, 1998?
 21 A. It might have. I don't recall.
 22 Q. Do you recall that Sunbeam requested that
 23 Arthur Andersen give Morgan Stanley a bring-down due
 24 diligence letter prior to the actual closing of the
 25 bond offering?

Page 116

1 A. I don't recall who requested it, if it was
 2 Sunbeam or Morgan Stanley.
 3 Q. But you do recall that a request was made
 4 either by Morgan Stanley or by Sunbeam that Morgan
 5 Stanley provide an updated comfort letter at the time
 6 of the closing of the bond offering?
 7 A. I believe that's the case, yes.
 8 Q. Do you know whether this letter was delivered
 9 to Morgan Stanley prior to the close of the bond
 10 offering?
 11 A. No.
 12 Q. Do you know who would have been responsible
 13 for delivering this letter to Morgan Stanley?
 14 A. It could have been myself or Dennis Pastrana.
 15 Q. And as you sit here, you can't recall
 16 precisely when this letter was delivered to Morgan
 17 Stanley?
 18 A. No.
 19 Q. Do you know that it was?
 20 A. Specifically, no.
 21 Q. Would it have been signed by Arthur Andersen
 22 if it wasn't finalized for delivery to Morgan Stanley?
 23 MR. CLARE: Objection to the form, calls for
 24 speculation.
 25 THE WITNESS: I don't know.

Page 117

1 MR. MARKOWSKI: Why don't we take our break
 2 right now and I'll see if I'm finished.
 3 THE VIDEOGRAPHER: We are now going off video
 4 record. The time on the monitor is 12:03 p.m.
 5 (Thereupon, a recess was taken.)
 6 THE VIDEOGRAPHER: We are now back on video
 7 record. The time on the monitor, 12:18 p.m.
 8 MR. MARKOWSKI: Mr. Bornstein, that concludes
 9 my examination for this morning.
 10 THE WITNESS: Okay, thank you.
 11 CROSS (LAWRENCE A. BORNSTEIN)
 12 BY MR. CLARE:
 13 Q. Good afternoon, Mr. Bornstein. Again, my
 14 name is Tom Clare. I'm with the law firm of Kirkland &
 15 Ellis in Washington, D.C., and I represent Morgan
 16 Stanley in this matter, and I'm going to ask you some
 17 questions this afternoon.
 18 If you don't understand any of my questions
 19 or want me to rephrase them, I'll be happy to do it.
 20 I know you've been deposed numerous times before and
 21 know the rules.
 22 A. Okay.
 23 Q. But make sure that you understand my question
 24 before you answer it and I'll be happy to try to
 25 rephrase and make things more clear.

Page 118

1 Mr. Bornstein, were you contacted earlier
 2 this year by attorneys representing Coleman (Parent)
 3 Holdings about this lawsuit?
 4 A. Yes.
 5 Q. And can you place in time for me when you
 6 were contacted?
 7 A. It was probably two or three months ago.
 8 Q. And do you remember the name of the person
 9 that called you?
 10 A. Not specifically, no.
 11 Q. Was it somebody from Mr. Markowski's firm,
 12 Jenner & Block?
 13 A. Yes.
 14 Q. And you said you think this was a few months
 15 ago?
 16 A. Yes.
 17 Q. Are you aware that Andersen had entered into
 18 a settlement agreement with Coleman (Parent) Holdings
 19 relating to these transactions?
 20 Were you aware of that fact?
 21 A. No, I was not.
 22 Q. So you don't have an understanding one way or
 23 the other of the timing of when that settlement
 24 agreement would have taken place?
 25 A. No.

Page 119

1 Q. Was this a telephone conversation or an
 2 in-person meeting?
 3 A. Telephone.
 4 Q. Was it a single telephone conversation or
 5 multiple?
 6 A. I believe it was two phone conversations.
 7 Q. Same person on both calls?
 8 A. I believe so.
 9 Q. And you don't recall the name of the person
 10 on either call?
 11 A. No.
 12 Q. During these telephone conversations, both
 13 conversations were with lawyers from Mr. Markowski's
 14 firm, Jenner & Block?
 15 A. Yes.
 16 Q. Were there more than one lawyer on the phone?
 17 A. I believe there were.
 18 Q. And tell me what you remember about those
 19 telephone calls, what was said, what they said to you
 20 and what you said back.
 21 A. The first one was that they were going to be
 22 sending me some documentation and wanted me to take a
 23 look at it if I didn't mind, and then give them a call
 24 back once I had a chance to look at it, because they
 25 wanted to ask me a few questions.

Page 120

1 They asked me if I was represented by counsel
 2 at the time. At the time I told them no, I was not,
 3 and that I would be willing to give them some time.
 4 Q. Did they tell you that Coleman (Parent)
 5 Holdings had filed a lawsuit against Morgan Stanley?
 6 A. I believe they did, yes.
 7 Q. And did they ask whether you would be willing
 8 to be a witness against Morgan Stanley in that lawsuit?
 9 A. No.
 10 Q. So just to make sure I understand correctly,
 11 the first telephone call was fairly short, they asked
 12 you if you would be willing to spend some time looking
 13 at some documents?
 14 A. Yes. I believe they were going to tell me
 15 they -- they were going to send me the, I think there
 16 were two lawsuits, one I think Coleman suing Morgan
 17 Stanley, and another one where I think it was Morgan
 18 Stanley suing Coleman maybe.
 19 I'm not sure. It was two separate lawsuits.
 20 Q. Was there anything else discussed on that
 21 first telephone call?
 22 A. No.
 23 Q. And did they in fact send you some documents
 24 to look at?
 25 A. Yes.

Page 121

1 Q. Do you recall what the documents were?
2 A. I believe it was the two lawsuits that we, I
3 mentioned earlier.
4 Q. So the complaint that was filed by Coleman
5 against Morgan Stanley was one of the documents?
6 A. Yes.
7 Q. And then a complaint that was filed by Morgan
8 Stanley against Coleman?
9 A. I believe so.
10 Q. Were those the only two documents that you
11 were sent?
12 A. I believe so.
13 Q. Did you receive any of the documents that you
14 were questioned about this morning that were sent to
15 you?
16 A. No.
17 Q. During the second telephone call, did they
18 ask you questions about the lawsuit or the documents
19 that they had sent you?
20 A. No, not specifically.
21 Q. Tell me what you remember about the second
22 telephone call.
23 A. They asked me some general questions on the
24 timing of the comfort letters, when those were released
25 and delivered to Morgan Stanley.

Page 122

1 And then asked me some questions about my
2 conversation with Mr. Tyree.
3 Q. Is that all you remember?
4 A. Yes.
5 Q. Did you read the documents that they sent
6 you?
7 A. I believe I did, yes.
8 Q. Did you notice that your name was included in
9 the complaint that Coleman had filed against Morgan
10 Stanley?
11 A. Yes.
12 Q. Did you have any discussion with the lawyers
13 about that, the fact that your name had been included?
14 A. No, not specifically, no.
15 Q. Did anybody from Coleman, and I'm
16 specifically referring to their lawyers, ask you if you
17 would mind if your name and a description of your
18 testimony was included in the complaint that they were
19 going to file against Morgan Stanley before it was
20 filed?
21 A. No.
22 MR. MARKOWSKI: Object to the form of the
23 question.
24 THE WITNESS: No, it wasn't.
25

Page 123

1 BY MR. CLARE:
2 Q. So your name was put in the complaint without
3 your permission, without your knowledge?
4 A. Yes.
5 Q. Did, during either of these telephone calls,
6 did anyone representing Coleman ask whether you agreed
7 with the statements that were made in the complaint
8 that was filed against Morgan Stanley?
9 A. No.
10 Q. Did they ask whether you had a belief that
11 Morgan Stanley had conspired with Sunbeam to commit
12 fraud?
13 A. No.
14 Q. Do you believe that Morgan Stanley conspired
15 with Sunbeam to commit fraud as you sit here today?
16 A. I have no knowledge of that, no.
17 Q. So the answer is no, you don't believe that
18 Morgan Stanley conspired with Sunbeam to commit fraud?
19 MR. MARKOWSKI: Object to the form of the
20 question, misstates his testimony.
21 THE WITNESS: You're asking me if I have an
22 opinion today in hindsight?
23 BY MR. CLARE:
24 Q. I'm asking based on everything that you know
25 about the interactions that you had with Morgan Stanley

Page 124

1 and the interactions that you had with Sunbeam, whether
2 you think that Morgan Stanley conspired with Sunbeam to
3 commit fraud.
4 A. I have no idea. I have my opinions of the
5 work that Morgan Stanley did, but I have no idea if
6 they conspired to commit fraud.
7 MR. MOSCATO: Just answer the specific
8 question.
9 THE WITNESS: No, I do not.
10 BY MR. CLARE:
11 Q. And no, you don't have an opinion, or no, you
12 do not believe that Morgan Stanley conspired with
13 Sunbeam to commit fraud?
14 MR. MOSCATO: I think he said he didn't have
15 an opinion.
16 THE WITNESS: I don't have an opinion.
17 BY MR. CLARE:
18 Q. Okay. Do you have any evidence or
19 information in your mind that Morgan Stanley conspired
20 with Sunbeam to commit fraud?
21 MR. MOSCATO: I'm sorry.
22 MR. MARKOWSKI: Objection to the form of the
23 question.
24 MR. MOSCATO: I don't understand.
25

Page 125

1 BY MR. CLARE:
 2 Q. I asked if you had a belief or an opinion,
 3 and you stated that you did not have an opinion or
 4 belief.
 5 MR. MOSCATO: And you're not happy with that
 6 answer?
 7 MR. CLARE: No, I'm fine with that answer,
 8 but regardless of whether or not you have an
 9 opinion or a belief, is there any information in
 10 your mind, is there any evidence in your mind that
 11 there was such a conspiracy between Morgan Stanley
 12 and Sunbeam, or similarly, do you have no view on
 13 that?
 14 MR. MARKOWSKI: Object to the form of the
 15 question. Are you asking him whether any of the
 16 facts he knows are consistent with that? Is that
 17 what you're trying to ask?
 18 MR. CLARE: No, I'm asking -- he says he has
 19 no opinion one way or the other on that.
 20 THE WITNESS: I have no idea if they
 21 committed fraud. I believe that they were
 22 reckless and --
 23 MR. MOSCATO: Larry, answer the question,
 24 please.
 25 THE WITNESS: I have no idea if they

Page 126

1 committed fraud or not. I can't answer that.
 2 MR. MARKOWSKI: That's for the jury to
 3 decide. I don't know why we're asking
 4 Mr. Bornstein to rule on that.
 5 MR. MOSCATO: Larry, you have to be very
 6 disciplined on that. It's getting late in the
 7 morning, but answer the specific question that
 8 you're being asked, please, all right? Thank you.
 9 BY MR. CLARE:
 10 Q. Putting aside the question of fraud, let me
 11 ask a more simple question.
 12 Do you have any evidence that Morgan Stanley
 13 was, intended to deceive Coleman?
 14 MR. MARKOWSKI: Object to the form of the
 15 question. He's testified about the evidence that
 16 he has, and someone else will make a judgment
 17 about its legal significance.
 18 MR. CLARE: That's fine.
 19 THE WITNESS: Will you repeat the question?
 20 BY MR. CLARE:
 21 Q. Do you have any evidence that Morgan Stanley
 22 conspired with Sunbeam to deceive anybody?
 23 A. No.
 24 Q. Did the lawyers representing Coleman ask if
 25 you'd be willing to sign any documents, declaration or

Page 127

1 an affidavit of any kind?
 2 A. No.
 3 Q. Is there anything else about those telephone
 4 calls that you remember?
 5 A. I believe I made a comment about the lawsuit
 6 that was being filed by Morgan Stanley against Coleman
 7 with respect to representations about synergies. I
 8 think I made a comment about that.
 9 Q. What was your comment about that?
 10 A. That I thought it was a silly thing to make
 11 an accusation about, because I never, I never had seen
 12 a seller make representation of cost savings, so I just
 13 thought that was interesting and not on point, I guess.
 14 Q. Do you have any personal knowledge based on
 15 your experience in 1997 or 1998 what representations
 16 were made by Coleman to Sunbeam about synergies?
 17 A. No.
 18 Q. So you don't have any firsthand evidence or
 19 comment on that?
 20 A. No.
 21 Q. It was a comment on the legal theory?
 22 A. Yes.
 23 Q. I want to talk about March 1998, and
 24 specifically the very beginning of March 1998, the
 25 first week. There was some testimony about that this

Page 128

1 morning.
 2 You were in New York working on the offering
 3 memorandum for the debenture offering?
 4 A. I believe I was, yes.
 5 Q. Mr. Pastrana was in Florida doing some post
 6 audit work?
 7 A. Yes.
 8 Q. Including working on the comfort letters?
 9 A. Yes.
 10 Q. And was Mr. Pastrana also working with your
 11 company to close the books for Sunbeam for January and
 12 February?
 13 A. No.
 14 Q. As part of Mr. Pastrana's work for the bond
 15 offering, was one of the things he was tasked to look
 16 at were sales figures for January and February 1998?
 17 A. Yes.
 18 Q. And Mr. Pastrana reported to you at some
 19 point that the January and February 1998 sales figures
 20 were lower than they were in the previous year,
 21 correct?
 22 A. Yes.
 23 Q. And that was the first time you had heard
 24 that information from anyone at Sunbeam?
 25 A. Yes.

Page 129

1 Q. Did you know from any source at the end of
 2 January whether the January '98 sales were lower than
 3 the January '97 sales?
 4 A. No, I don't remember specifically.
 5 Q. Did in that time period Sunbeam close its
 6 books every month so that January sales would have been
 7 available separate from February?
 8 A. I believe they were, yes.
 9 Q. So January 1998 figures would have been
 10 available at some point in February?
 11 A. Yes.
 12 Q. And the February sales would have been
 13 available at some point in early March?
 14 A. Yes.
 15 Q. And I think you said you believed this was in
 16 the first week of March 1998 that you heard this about
 17 January and February 1998?
 18 A. Might have been the second one week. I'm not
 19 100 percent sure.
 20 Q. If we had a calendar from March 1998, would
 21 that help you in placing the date?
 22 A. Probably not.
 23 Q. You discussed with Mr. Pastrana that
 24 Sunbeam's lower year-over-year sales performance should
 25 be disclosed to Morgan Stanley, correct?

Page 130

1 A. Say that again.
 2 Q. Did you discuss with Mr. Pastrana whether
 3 Sunbeam's lower year-over-year sales performance needed
 4 to be disclosed to Morgan Stanley?
 5 A. I don't recall specifically talking to
 6 Mr. Pastrana about that.
 7 Q. But you do remember talking to Mr. Harlow
 8 about it?
 9 A. I remember talking to Mr. Harlow that the
 10 company should be disclosing it to Morgan Stanley, yes.
 11 Q. And you also had a conversation with
 12 Mr. Gluck about that?
 13 A. Yes.
 14 Q. And those conversations took place within a
 15 day or two of you first learning this information from
 16 Mr. Pastrana?
 17 A. Yes.
 18 Q. Now you were in New York at the time working
 19 on the bond offering?
 20 A. Yes.
 21 Q. And you were there working with
 22 representatives from Morgan Stanley?
 23 A. Yes.
 24 Q. And you were at Global Financial Press
 25 attending drafting sessions?

Page 131

1 A. Right.
 2 Q. And Morgan Stanley personnel were there?
 3 A. Right.
 4 Q. Was there any consideration given to you
 5 informing Morgan Stanley there and then during the
 6 drafting session?
 7 MR. MARKOWSKI: Consideration by whom?
 8 BY MR. CLARE:
 9 Q. By you, Mr. Bornstein.
 10 A. No. The question was never asked of me.
 11 Q. Was that discussed with Mr. Harlow or
 12 Mr. Gluck whether that might be one way to communicate
 13 this information to Morgan Stanley?
 14 MR. MOSCATO: The question was whether you
 15 discussed that with Mr. Harlow and Mr. Gluck.
 16 THE WITNESS: No.
 17 BY MR. CLARE:
 18 Q. Was there any discussion about how this
 19 information should be disclosed to Morgan Stanley?
 20 MR. MOSCATO: Objection, I think he answered
 21 that a couple of questions ago, but go ahead.
 22 THE WITNESS: That the company should
 23 disclose it to them.
 24 BY MR. CLARE:
 25 Q. When you say the company, you're referring to

Page 132

1 Sunbeam?
 2 A. Sunbeam.
 3 Q. So it was your view and Mr. Harlow's view
 4 that Sunbeam needed to disclose this information to
 5 Morgan Stanley?
 6 A. Yeah, to be honest with you, I'm not
 7 100 percent sure they were aware of it or not, but it
 8 was the company's responsibility to disclose the
 9 information.
 10 Q. And you and Mr. Harlow communicated that view
 11 to Mr. Gluck at Sunbeam?
 12 A. Yes.
 13 Q. And you communicated to Mr. Gluck that you
 14 believed it was Sunbeam's responsibility to communicate
 15 this information to Morgan Stanley?
 16 A. Yes.
 17 Q. Did Mr. -- did you tell Mr. Gluck that you,
 18 Arthur Andersen, were not going to tell Morgan Stanley
 19 and that you were waiting for Sunbeam to disclose that
 20 information?
 21 MR. MOSCATO: I object to that.
 22 Did you say those words to Mr. Gluck?
 23 THE WITNESS: No.
 24 BY MR. CLARE:
 25 Q. Did Mr. Gluck -- I'll withdraw that.

Page 133

1 Was there any discussion with Mr. Harlow or
 2 Mr. Gluck when this disclosure would be made to Morgan
 3 Stanley?
 4 MR. MARKOWSKI: By whom?
 5 MR. CLARE: By the company.
 6 THE WITNESS: Again, I had no idea if Morgan
 7 Stanley knew or didn't know. I just know they
 8 never asked me the question.
 9 BY MR. CLARE:
 10 Q. But you and Mr. Harlow wanted to assure
 11 yourselves that Morgan Stanley had been informed?
 12 A. Yes.
 13 Q. And you and Mr. Harlow told Mr. Gluck that
 14 you thought it was the company's responsibility to tell
 15 Morgan Stanley?
 16 A. Yes.
 17 Q. And as part of those conversations, did you
 18 or Mr. Harlow express a view as to when the company
 19 ought to provide that information to Morgan Stanley?
 20 A. As soon as possible.
 21 Q. And did you communicate that to Mr. Gluck?
 22 A. Yes.
 23 Q. You and Mr. Harlow told Mr. Gluck that that
 24 information should be provided by Sunbeam to Morgan
 25 Stanley as soon as possible?

Page 134

1 A. I believe so.
 2 Q. Are you able to put a date, an approximate
 3 one, on that conversation with Mr. Gluck where you
 4 communicated that information?
 5 A. Maybe March 12th, March 13th.
 6 Q. Okay. And did you, did Mr. Gluck -- what did
 7 Mr. Gluck say about what the company was going to do
 8 with this information as far as providing it to Morgan
 9 Stanley?
 10 A. I don't remember.
 11 Q. Did he tell you in words or in substance that
 12 he agreed and that the company would provide this
 13 information to Morgan Stanley?
 14 A. Again, I don't recall.
 15 Q. Do you recall, now moving forward a couple of
 16 days, that there was a follow-up discussion with
 17 Mr. Gluck about whether this information had been
 18 communicated to Morgan Stanley?
 19 A. I don't recall.
 20 Q. Do you know when, if at all, Sunbeam told
 21 Morgan Stanley this information about January and
 22 February 1998 sales?
 23 A. I know they were aware of it March 17th or
 24 18th, prior to the press release going out.
 25 Q. How do you know that?

Page 135

1 A. I believe a draft, I believe a draft of the
 2 comfort letter was delivered or it was communicated by
 3 either -- I don't remember specifically. I just, like
 4 I testified earlier, that when I found out about it, my
 5 last thing was having a conversation with Bill Pruitt.
 6 The next thing I knew, I was seeing it on TV.
 7 Q. You testified a moment ago and then also this
 8 morning about a belief that a draft comfort letter was
 9 provided to Morgan Stanley on March 17th or
 10 thereabouts.
 11 Did you personally fax or send a draft of the
 12 comfort letter to Morgan Stanley?
 13 A. I don't remember.
 14 Q. As you sit here today, do you have any
 15 recollection of having done that?
 16 A. Me personally, no.
 17 Q. Did anybody tell you at Andersen that they
 18 had faxed a copy of the comfort letter, a draft of the
 19 comfort letter to Morgan Stanley or its counsel?
 20 A. No, I'm not aware of that.
 21 Q. And so do you have any personal knowledge as
 22 you sit here today whether, that a draft comfort letter
 23 was actually sent to Morgan Stanley or its counsel?
 24 A. Prior to March 19th, no.
 25 Q. So as far as you are able to testify, the

Page 136

1 first time a comfort letter was physically provided to
 2 Morgan Stanley or faxed or sent was March 19th, 1998,
 3 at Global Financial Press?
 4 A. I do recall going through certain portions of
 5 the comfort letter with underwriter's counsel as to the
 6 form of pieces of it, but I don't recall specifically
 7 issuing them a draft comfort letter personally.
 8 Q. These recollections that you have, were these
 9 in-person meetings with underwriter's counsel?
 10 A. Yes.
 11 Q. During these in-person meetings, did you
 12 observe that underwriter's counsel had a draft of the
 13 comfort letter in front of them?
 14 A. I don't recall if they had a draft of other
 15 comfort letters that they used as a sample or if it was
 16 ours, but there was definitely wording, substantive
 17 wording, examples communicated back and forth.
 18 Q. But as you sit here today, can you testify
 19 from your own personal knowledge that Morgan Stanley or
 20 its lawyers were provided with a draft of the
 21 March 19th comfort letter before March 19th?
 22 A. Prior to the night at the printer, no.
 23 Q. And you testified about meetings that you had
 24 with underwriter's counsel to go through the language.
 25 A. Uh huh.

<p style="text-align: right;">Page 137</p> <p>1 Q. And am I correct that you don't know whether 2 the documents that underwriter's counsel had in front 3 of them were in fact a draft of the March 19th letter 4 or perhaps sample comfort letters from other 5 transactions and other companies? 6 You just don't know one way or the other? 7 A. No. Again, the only thing I recollect is 8 finalizing the draft that night and them having a draft 9 early that night, if not, if not -- I don't recall 10 sooner than me physically being there that a draft was 11 delivered to them. 12 My point is it wasn't like at five o'clock in 13 the morning, said here it is. As soon as we got there, 14 they had it, you know, and they were making changes and 15 we made changes on realtime. 16 Q. So you were working on the comfort letter 17 with underwriter's counsel at Global Financial Press 18 the night of the 19th? 19 A. Yes. 20 Q. These meetings that you described with 21 underwriter's counsel were that evening, March 19th, at 22 the print shop? 23 A. As well as previously. 24 Q. Okay. And those are the meetings that you're 25 just not sure what documents underwriter's counsel had</p>	<p style="text-align: right;">Page 139</p> <p>1 A. I am aware that as I sit here today, that the 2 document with the earnings forecast was provided to 3 Morgan Stanley the night before the, the night of the 4 press release going out. 5 Q. When you say the document of an earnings 6 forecast, you're referring to a sales buildup sheet 7 that Mr. Markowski showed you this morning? 8 A. Yes. 9 Q. In the form of document that was marked as 10 CPH Exhibit 121? 11 A. Yes. 12 Q. That form of document? 13 A. Yes, I'm aware that that was provided to, or 14 at least represented to me that it was provided to 15 Morgan Stanley. 16 Q. And Mr. Tyree told you that? 17 A. No, Mr. Fanin told me that. 18 Q. So Mr. Fanin informed you that the sales 19 buildup, CPH 121, or a document in that form, was sent 20 to Morgan Stanley the day before the press release was 21 issued? 22 A. I don't know if the day before or the night 23 of. That was subsequent to that night. 24 Q. Is that the only information that you have 25 about disclosures that were made by Sunbeam to Morgan</p>
<p style="text-align: right;">Page 138</p> <p>1 with them? 2 A. Correct. 3 Q. But you know that that evening at the print 4 shop, you worked on the draft of the comfort letter and 5 it was shared and exchanged -- 6 A. Yes. 7 Q. -- between underwriter's counsel and you? 8 A. Correct. 9 Q. And I think I asked you this, but I can't 10 recall your answer. 11 Do you know when, if at all, anybody from 12 Sunbeam told Morgan Stanley about lower year-over-year 13 sales? 14 A. No, other than prior to the press release 15 going out, I'm not aware of any other time. 16 Q. Okay. What information do you have about 17 disclosures that were made by Sunbeam to Morgan Stanley 18 prior to the press release going out? 19 A. I don't. 20 Q. You don't have any information? 21 A. No. 22 Q. So from your own personal knowledge, you 23 don't have any information about when, if at all, 24 Sunbeam disclosed lower year-over-year sales to Morgan 25 Stanley?</p>	<p style="text-align: right;">Page 140</p> <p>1 Stanley about first quarter 1998 sales? 2 MR. MOSCATO: I'm sorry, can I have the 3 question back? 4 I'm concerned there is a little confusion as 5 the timing here. But I just need to hear the last 6 question. 7 (Thereupon, a portion of the record 8 was read by the reporter.) 9 THE WITNESS: I am, other than what I 10 testified earlier that I was told by Mr. Tyree at 11 the printer that they were informed the night 12 before about the sales forecast. 13 BY MR. CLARE: 14 Q. So what Mr. Tyree told you at the printer was 15 consistent with what Mr. Fanin had told you, that 16 Sunbeam had provided this information to Morgan Stanley 17 the night before the press release? 18 MR. MOSCATO: Objection, that's where the 19 confusion is. I'm not sure he said Fanin told him 20 prior to this happening or Fanin told him after. 21 THE WITNESS: It was after. It was during 22 the restatement work when things, things kind 23 of -- I don't remember. I do recall Mr. Fanin 24 specifically drafting a memo and handing me this 25 document and after the fact and wanted it to get</p>

<p style="text-align: right;">Page 141</p> <p>1 into the files.</p> <p>2 BY MR. CLARE:</p> <p>3 Q. And I appreciate that. I'm not trying to</p> <p>4 confuse you on the timing. I just want to make sure</p> <p>5 that I understand that what Mr. Fanin told you was</p> <p>6 consistent with what Mr. Tyree told you about when</p> <p>7 Morgan Stanley was provided this information by</p> <p>8 Sunbeam.</p> <p>9 MR. MARKOWSKI: Object to the form of the</p> <p>10 question. I think the reference to this</p> <p>11 information at this point is kind of detached from</p> <p>12 what you're referring to.</p> <p>13 MR. CLARE: Okay, let me address that,</p> <p>14 because I think that point is well taken.</p> <p>15 BY MR. CLARE:</p> <p>16 Q. Mr. Fanin told you that Sunbeam provided</p> <p>17 information about its January and February 1990 sales</p> <p>18 to Morgan Stanley the day or night before the press</p> <p>19 release was issued, correct?</p> <p>20 MR. MARKOWSKI: I think you misspoke there in</p> <p>21 terms of the date.</p> <p>22 THE WITNESS: Yes. You said 1990.</p> <p>23 MR. CLARE: Thanks.</p> <p>24 THE WITNESS: I believe so, yes.</p> <p>25</p>	<p style="text-align: right;">Page 143</p> <p>1 MR. MOSCATO: Can we have the question again</p> <p>2 then?</p> <p>3 MR. CLARE: Let me rephrase it.</p> <p>4 MR. MOSCATO: My client made a distinction</p> <p>5 between Tyree's knowledge and Morgan Stanley's</p> <p>6 knowledge. I'm afraid -- listen, we're a neutral</p> <p>7 party here. I just want there to be a clean</p> <p>8 record, and that's why I'm making these</p> <p>9 objections. I just want clarity. So if you can</p> <p>10 ask the question again, I'd appreciate it.</p> <p>11 MR. CLARE: Sure.</p> <p>12 BY MR. CLARE:</p> <p>13 Q. Let me ask it this way and hopefully we can</p> <p>14 cut through it.</p> <p>15 Do you have any information from any source</p> <p>16 that Morgan Stanley or Mr. Tyree or anybody</p> <p>17 representing Morgan Stanley was advised of Sunbeam's</p> <p>18 first quarter 1998 sales before the day or the night</p> <p>19 before the press release was issued?</p> <p>20 A. No, I'm not aware of anything else.</p> <p>21 Q. The only information that you have is what</p> <p>22 you previously testified to about, Mr. Fanin's</p> <p>23 conversation with you?</p> <p>24 A. Yes.</p> <p>25 Q. And what Mr. Tyree told you at the print</p>
<p style="text-align: right;">Page 142</p> <p>1 BY MR. CLARE:</p> <p>2 Q. Let me make sure I've got the right question</p> <p>3 so we're all on the same page and in the same decade.</p> <p>4 Mr. Fanin told you during the restatement</p> <p>5 investigation that Sunbeam had provided Morgan Stanley</p> <p>6 with information about January and February 1998 sales</p> <p>7 the day or night before the press release was issued;</p> <p>8 is that correct?</p> <p>9 A. Yes.</p> <p>10 Q. And Mr. Tyree told you at the print shop that</p> <p>11 Morgan Stanley had been informed of that same</p> <p>12 information the day or night before the press release</p> <p>13 was issued?</p> <p>14 A. I believe he was personally. I don't know</p> <p>15 about Morgan Stanley, but yes, he was.</p> <p>16 Q. So what Mr. Tyree was telling -- what</p> <p>17 Mr. Tyree told you about the timing of Morgan Stanley</p> <p>18 getting this information was the same as what Mr. Fanin</p> <p>19 told you?</p> <p>20 MR. MARKOWSKI: This information is that</p> <p>21 one-page sheet, the sales buildup that you are</p> <p>22 referring to?</p> <p>23 BY MR. CLARE:</p> <p>24 Q. How about any information about Sunbeam's</p> <p>25 January or February sales?</p>	<p style="text-align: right;">Page 144</p> <p>1 shop?</p> <p>2 A. Yes.</p> <p>3 Q. And in both instances, the timing of those</p> <p>4 disclosures were the day or night before the press</p> <p>5 release was issued?</p> <p>6 A. Yes.</p> <p>7 Q. The press release, and we can look at it, was</p> <p>8 dated March 19th, 1998? It is CPH Exhibit --</p> <p>9 A. I have it here, yes, March 19th.</p> <p>10 Q. Can you estimate for me the number of days</p> <p>11 prior to the issuance of the press release that you</p> <p>12 informed Mr. Gluck that you believed January and</p> <p>13 February 1998 sales needed to be disclosed to Morgan</p> <p>14 Stanley?</p> <p>15 A. Like I said, March 12th or March 13th.</p> <p>16 Q. So five or six days elapsed between this</p> <p>17 conversation with Mr. Gluck where you and Mr. Harlow</p> <p>18 spoke with him and the date that Sunbeam issued the</p> <p>19 press release, to the best of your recollection?</p> <p>20 A. Yes.</p> <p>21 Q. And during that time period, that five or</p> <p>22 six-day period, you were working with Morgan Stanley</p> <p>23 and its counsel on the bond offering documents?</p> <p>24 A. Yes.</p> <p>25 Q. And you were in New York together?</p>

<p style="text-align: right;">Page 145</p> <p>1 A. For the most part, yes.</p> <p>2 Q. And during that five or six-day time period,</p> <p>3 am I correct that you never discussed with Morgan</p> <p>4 Stanley or its counsel Sunbeam's January and</p> <p>5 February 1998 sales performance?</p> <p>6 A. Not that I recall, no.</p> <p>7 Q. And it was because you believed it was</p> <p>8 Sunbeam's responsibility to disclose that information</p> <p>9 to Morgan Stanley?</p> <p>10 A. Or if Morgan Stanley asked the question, I</p> <p>11 would answer it truthfully.</p> <p>12 Q. But Morgan Stanley didn't bring it up?</p> <p>13 A. Right.</p> <p>14 Q. And to your knowledge, Sunbeam did not tell</p> <p>15 Morgan Stanley at any point during that five or six-day</p> <p>16 period?</p> <p>17 MR. MOSCATO: Do you know one way or the</p> <p>18 other?</p> <p>19 THE WITNESS: I don't know one way or the</p> <p>20 other if they did or not.</p> <p>21 BY MR. CLARE:</p> <p>22 Q. But again, the only information you have</p> <p>23 about that topic is that Sunbeam informed Morgan</p> <p>24 Stanley and John Tyree the day before the press release</p> <p>25 was issued?</p>	<p style="text-align: right;">Page 147</p> <p>1 Global Financial Press.</p> <p>2 Q. Did you attend any meetings at the offices of</p> <p>3 Morgan Stanley?</p> <p>4 A. No.</p> <p>5 Q. Were representatives of Morgan Stanley</p> <p>6 present for those meetings, some of them?</p> <p>7 A. Yeah, I believe Tyree and there might have</p> <p>8 been someone else in the first couple, but after that,</p> <p>9 there wasn't anybody there.</p> <p>10 Q. So the only person that you remember being</p> <p>11 present at those sessions was John Tyree?</p> <p>12 A. Yes.</p> <p>13 Q. Do you remember anything about your</p> <p>14 conversations with John Tyree during those drafting</p> <p>15 sessions?</p> <p>16 Does anything stick out as having been</p> <p>17 discussed with Mr. Tyree?</p> <p>18 A. The form of the pro forma, financial</p> <p>19 statements and probably certain disclosures or certain,</p> <p>20 the way certain things were presented. Specifically I</p> <p>21 remember talking with Mr. Tyree.</p> <p>22 Q. Now the pro forma information that was put</p> <p>23 into the offering memorandum, was that pro forma</p> <p>24 information that was prepared by Andersen?</p> <p>25 A. No. It was the company's pro formas, but we,</p>
<p style="text-align: right;">Page 146</p> <p>1 MR. MOSCATO: Do you really want to keep</p> <p>2 asking the same question over and over?</p> <p>3 MR. CLARE: Yeah, I do. I just want to make</p> <p>4 sure that we're all on the same page.</p> <p>5 MR. MOSCATO: One last time. Answer the</p> <p>6 question one more time, Larry.</p> <p>7 THE WITNESS: Can you read that question</p> <p>8 again.</p> <p>9 (Thereupon, a portion of the record</p> <p>10 was read by the reporter.)</p> <p>11 THE WITNESS: Yes.</p> <p>12 BY MR. CLARE:</p> <p>13 Q. Mr. Bornstein, we talked about these drafting</p> <p>14 sessions that you attended in New York. How many days</p> <p>15 were you in New York in that first two- or three-week</p> <p>16 period in March 1998, approximately?</p> <p>17 A. I don't know, probably between four and six</p> <p>18 days.</p> <p>19 Q. And all of the time that you spent there in</p> <p>20 New York was working on the bond offering documents?</p> <p>21 A. For the most part, yes.</p> <p>22 Q. And where did those meetings take place?</p> <p>23 A. The preliminary ones took place I believe at</p> <p>24 Scadden Arps' office, and then there was a, as they</p> <p>25 further went down the line, I think they moved over to</p>	<p style="text-align: right;">Page 148</p> <p>1 we assisted in preparing them.</p> <p>2 Q. When you say the company's, it was Sunbeam's</p> <p>3 pro formas?</p> <p>4 A. Yes.</p> <p>5 Q. So this morning in response to a question</p> <p>6 from Mr. Markowski, and I may have misheard you, I</p> <p>7 think you said that the pro forma information was</p> <p>8 prepared by Morgan Stanley. And I wanted to ask you</p> <p>9 about that.</p> <p>10 Was any of the pro forma information that you</p> <p>11 were reviewing prepared by Morgan Stanley?</p> <p>12 A. I reviewed pro forma information that</p> <p>13 included cost savings and synergies that was supplied</p> <p>14 by a guy named Tyrone Chang from Morgan Stanley. Those</p> <p>15 were separate and different from pro formas that went</p> <p>16 into the bond offering, because the pro formas going</p> <p>17 into the bond offering were specific to the</p> <p>18 transaction, and the new debt, those types of things,</p> <p>19 but don't have anything to do with cost savings or</p> <p>20 synergies or any of those types of things.</p> <p>21 Q. The information that you indicated Mr. Chang</p> <p>22 provided, for what purpose were you reviewing that?</p> <p>23 A. I reviewed it for, if they needed help on the</p> <p>24 tax treatment to how to show the tax benefit. I don't</p> <p>25 remember anything else other than that from my review</p>

Page 149

1 of the pro formas.

2 Q. But none of the pro forma information that

3 was prepared or provided to you by Mr. Chang was put

4 into the offering memo?

5 A. Not that I'm aware of, no.

6 Q. So the pro forma information that you

7 discussed, reviewed and that was ultimately included in

8 the offering memorandum was prepared by Sunbeam?

9 A. Sunbeam, and as well as the other companies

10 that were involved. There was Signature Brands, First

11 Alert, Coleman. They were all involved in preparing

12 the pro formas.

13 Q. But as far as the information that went into

14 the offering memorandum, you don't have any information

15 to suggest that Morgan Stanley was involved in

16 preparing those pro forma financial statements?

17 A. As it relates to the numbers, no, but to the

18 disclosures and the footnotes, yes.

19 Q. And you remember discussing those with Morgan

20 Stanley?

21 A. Yes.

22 Q. And there was give and take during those

23 sessions where you discussed with John Tyree, the

24 lawyers at Scadden, about the narrative of the offering

25 memorandum?

Page 150

1 A. Yes.

2 Q. And the disclosures that needed to be made?

3 A. Yes.

4 Q. And during that time everybody was making

5 suggestions and edits to the document?

6 A. Yes.

7 Q. And that was the purpose of that six-day time

8 period that you believe you were in New York was to do

9 that work on the offering memorandum?

10 A. Yes.

11 Q. Now during that time you were in New York,

12 you were aware that Sunbeam's January and February 1998

13 sales were lower than for the prior time period in

14 1997, correct?

15 A. Honestly, I don't remember the timing of it.

16 I believe so, but I'm not certain.

17 Q. Is it fair to say that for at least a portion

18 of those drafting sessions, you were aware of that

19 information?

20 A. Yes.

21 Q. And were you in any way frustrated that you

22 had this information, but Morgan Stanley did not?

23 MR. MOSCATO: I object to that.

24 You can answer.

25 THE WITNESS: I don't know if I was, I

Page 151

1 wouldn't call it frustrated, but unsure if they

2 did or not.

3 BY MR. CLARE:

4 Q. Okay. And you had recommended that to

5 Mr. Gluck or told Mr. Gluck that you believed Sunbeam

6 should disclose that information to Morgan Stanley?

7 A. Yes.

8 MR. MARKOWSKI: Isn't that where we started

9 about half an hour ago?

10 BY MR. CLARE:

11 Q. Were you frustrated that Sunbeam hadn't

12 followed through on that while you were at these

13 drafting sessions working day and night with the people

14 from Morgan Stanley and so far as you could tell, they

15 didn't appear to know?

16 MR. MOSCATO: I'm sorry, I have to object to

17 that. That's, I think that's a real compound

18 question.

19 BY MR. CLARE:

20 Q. Okay. Were you frustrated that you couldn't

21 tell whether Morgan Stanley knew this information or

22 not?

23 A. I said I wasn't frustrated. I just at the

24 time found it amazing that it wasn't a topic of

25 conversation of theirs. No one asked the question. I

Page 152

1 wasn't aware if they knew or didn't know. I just know

2 that it wasn't something that was discussed.

3 Q. Okay. Did you have any follow-up

4 conversations with Mr. Gluck during that time period

5 about whether Sunbeam had provided that information to

6 Morgan Stanley?

7 A. I don't recall specifically, no.

8 MR. MOSCATO: While you're doing that, is

9 there any way we can get a little air in here?

10 BY MR. CLARE:

11 Q. And you testified that at some point during

12 the same time period, you had a discussion with

13 Mr. Pruitt about the same subject matter?

14 A. Yes.

15 Q. And during that discussion, Mr. Pruitt made a

16 reference to withholding the comfort letter if Sunbeam

17 did not disclose this information to Morgan Stanley?

18 A. I believe I did say that, yes.

19 Q. Is that consistent with your recollection?

20 A. Yes.

21 Q. And you were a part of that conversation?

22 A. Yes.

23 Q. Did you agree with Mr. Pruitt that that was

24 an appropriate thing to do if Sunbeam did not disclose

25 the information to Morgan Stanley about its January and

Page 153

1 February 1998 sales?
 2 A. Did I have an opinion? Is that what you
 3 said?
 4 No, I left it up to him.
 5 Q. Okay. But you didn't think it was
 6 inappropriate for Mr. Pruitt to reach that conclusion?
 7 A. Honestly, I was unaware whether or not
 8 Sunbeam had advised Morgan Stanley at that time. I
 9 was, my understanding was that they did not.
 10 Q. Your understanding was that Sunbeam had not
 11 advised Morgan Stanley?
 12 A. Yes.
 13 Q. And your conversation with Mr. Pruitt was
 14 that if that situation wasn't remedied, that Andersen
 15 would withhold its comfort letter?
 16 A. That's what he told me, yes.
 17 Q. Some questions this morning about an
 18 accounting due diligence call that you had with Morgan
 19 Stanley during this time period.
 20 A. Yes.
 21 Q. You participated in that call?
 22 A. Yes.
 23 Q. And that was a due diligence call that was
 24 requested by Morgan Stanley?
 25 A. Yes.

Page 154

1 Q. You and Mr. Harlow were the participants for
 2 Andersen?
 3 A. Yes.
 4 Q. Do you recall, as of the date of the
 5 accounting due diligence call, whether Mr. Pastrana had
 6 already advised you about the January and February 1998
 7 sales? Does that help you place in time --
 8 A. Yeah, I'm not sure. I'm not 100 percent sure
 9 that I knew about this on the 12th.
 10 Q. Mr. Gluck was on the call for Sunbeam?
 11 A. Yes.
 12 Q. Was there anybody else on the phone from
 13 Sunbeam?
 14 A. Not that I'm aware of, no.
 15 Q. Am I correct that you requested Mr. Gluck be
 16 on the call?
 17 A. Yes.
 18 Q. And why?
 19 A. I believe it was an Andersen policy to have
 20 someone present from the company on the call or at the
 21 meeting.
 22 Q. Was it, and this is a standard practice, at
 23 least at the time that you were at Andersen, to have
 24 somebody from the company on the call with underwriters
 25 in a due diligence situation like this?

Page 155

1 A. That was my understanding, yes.
 2 Q. Was there any discussion with Morgan Stanley
 3 about this topic, about whether Mr. Gluck would be on
 4 the call or not?
 5 A. Not that I recall.
 6 Q. Was there any discussion between you and
 7 Mr. Harlow about Mr. Gluck's presence on the call?
 8 A. No.
 9 Q. And you had been on other due diligence calls
 10 with underwriters where there had been representative
 11 from management on the phone with you?
 12 A. Yes.
 13 Q. In accordance with Andersen's policy?
 14 A. Yes.
 15 Q. Was it your hope at the time that if
 16 Mr. Gluck was on the line with you during this due
 17 diligence call, that he might take that as an
 18 opportunity to tell Morgan Stanley about the company's
 19 performance in the first two months of 1998?
 20 A. No. I'm not -- no. That wasn't my hope.
 21 Q. Okay. I'm going to show you some of your
 22 prior deposition testimony on this subject and see if
 23 that refreshes your recollection about that topic and
 24 I'll ask you some follow-up questions about it.
 25 MR. CLARE: Let's mark this as Morgan Stanley

Page 156

1 Exhibit 55.
 2 (MS Exhibit No. 55 was marked for
 3 identification.)
 4 THE WITNESS: Okay, where would you like me
 5 to look?
 6 BY MR. CLARE:
 7 Q. I'm going to invite your attention to page
 8 780 of this transcript.
 9 A. Can you just, someone tell me when and where
 10 this took place? Which one was this?
 11 Q. Sure.
 12 MR. MARKOWSKI: We're celebrating the third
 13 anniversary of it.
 14 THE WITNESS: Is it really that long?
 15 BY MR. CLARE:
 16 Q. This is a deposition transcript taken on
 17 Monday, January 15, 2001. Appears to be day five of
 18 your deposition testimony.
 19 A. Okay. Where would you like me to turn?
 20 Q. And you can read as much it as you'd like to
 21 see if it refreshes your recollection, but specifically
 22 I want to invite your attention to page 780 at the top
 23 of the page. And it might be helpful if you back up to
 24 page 778 for context.
 25 A. Okay.

<p style="text-align: right;">Page 157</p> <p>1 Q. Have you had an opportunity to review a few 2 pages of your deposition from January of 2001? 3 MR. MARKOWSKI: I think we should be specific 4 about what portion of this he's -- 5 MR. MOSCATO: Now Larry, you've reviewed it. 6 Now close the transcript. 7 BY MR. CLARE: 8 Q. I don't know exactly which pages you reviewed 9 but I invited your attention to pages 778 through 780. 10 A. Yes, that's what I read. 11 Q. Okay. And does having reviewed that 12 deposition testimony, does that refresh your 13 recollection in any way about the sequence of events 14 that we've been discussing; specifically, your 15 conversation with Mr. Gluck about the need to disclose 16 this information to Morgan Stanley and the March 12, 17 1998 accounting due diligence call? 18 A. Yes. 19 Q. Okay. And now testifying from your refreshed 20 recollection, is it correct that you had discussed this 21 issue with Mr. Gluck prior to March 12, 1998? 22 A. Yes. 23 Q. And prior to March 12, 1998, you and 24 Mr. Harlow had informed Mr. Gluck that Sunbeam's 25 January and February 1998 sales information needed to</p>	<p style="text-align: right;">Page 159</p> <p>1 A. No. 2 Q. And Mr. Gluck didn't raise it? 3 A. No. 4 Q. And you didn't raise it and Mr. Harlow didn't 5 raise it? 6 A. Correct. 7 Q. Were the answers that you provided -- strike 8 that. 9 Were you answers that you and Mr. Harlow 10 provided on the March 12, 1998, accounting due 11 diligence call any different because Mr. Gluck was on 12 the line? 13 A. No. 14 Q. If Mr. Gluck had not been on the line, would 15 you or Mr. Harlow have volunteered information about 16 Sunbeam's first quarter sales performance to date? 17 MR. MARKOWSKI: May I have the question back, 18 please. 19 (Thereupon, a portion of the record 20 was read by the reporter.) 21 MR. MARKOWSKI: Object, calls for -- 22 MR. MOSCATO: Answer as to yourself. 23 MR. MARKOWSKI: I would object that it calls 24 for speculation. 25 THE WITNESS: I can't answer for Harlow. If</p>
<p style="text-align: right;">Page 158</p> <p>1 be disclosed to Morgan Stanley? 2 A. Yes. 3 Q. And is it correct that at least one of the 4 reasons that you wanted Mr. Gluck on the line for the 5 accounting due diligence call was a hope that he would 6 disclose information about Sunbeam's first quarter 7 performance to Morgan Stanley? 8 A. If the question came up, yes. 9 Q. Okay. But it was your view, independent of 10 whether the question came up, that Sunbeam had a 11 responsibility to disclose it to Morgan Stanley? 12 A. Yes. 13 Q. And was it your hope that independent of 14 whether the question came up, that Mr. Gluck might take 15 this opportunity of talking with Morgan Stanley to 16 disclose that information? 17 A. I believe so, yes. 18 Q. Did Mr. Gluck tell Morgan Stanley about 19 Sunbeam's January and February 1998 sales on the 20 March 12, 1998, accounting due diligence call? 21 A. I don't believe so, no. 22 Q. Do you have any recollection of that topic 23 coming up? 24 A. No. 25 Q. Morgan Stanley didn't raise it?</p>	<p style="text-align: right;">Page 160</p> <p>1 asked the question, I would have answered it 2 truthfully. I wouldn't have volunteered anything. 3 BY MR. CLARE: 4 Q. Because you thought it was Sunbeam's 5 responsibility to tell that information? 6 A. Yes. 7 Q. But your willingness or unwillingness to 8 volunteer that information had nothing to do with 9 whether Mr. Gluck was on the line or not? 10 A. No. 11 Q. Were you any less truthful with Morgan 12 Stanley because Mr. Gluck was on the phone with you for 13 the March 12, 1998, due diligence call? 14 A. No. 15 Q. Were you any less candid with Morgan Stanley 16 because Mr. Gluck was on that call? 17 A. No. 18 Q. If Morgan Stanley had asked the question on 19 March 12, 1998, about Sunbeam's first quarter 20 performance, would you have deferred the response to 21 that question to Mr. Gluck, since he was on the line? 22 A. I have no idea what I would have done. 23 Q. But you believed it was Sunbeam's 24 responsibility to provide that information? 25 A. Yes.</p>

<p style="text-align: right;">Page 161</p> <p>1 Q. Was there any discussion before the March 12, 2 1998, accounting due diligence call how you or 3 Mr. Harlow would respond if Morgan Stanley asked that 4 question? 5 MR. MARKOWSKI: Any discussion between 6 Mr. Bornstein and Mr. Harlow? 7 MR. CLARE: That's correct. 8 THE WITNESS: Specifically on that point, I 9 don't recall. 10 BY MR. CLARE: 11 Q. Even generally? 12 A. No. 13 Q. How about between you and Mr. Harlow or with 14 Mr. Gluck? 15 A. No. 16 Q. Mr. Bornstein, I'm going to ask you to dig 17 out CPH Exhibit 123 that we marked and looked at this 18 morning. 19 MR. MOSCATO: I'm sorry, which one was 123? 20 MR. CLARE: CPH Exhibit 123 is the July 2nd, 21 1998. 22 THE WITNESS: This one right on the top. 23 MR. MOSCATO: This one? 24 BY MR. CLARE: 25 Q. And Mr. Markowski asked you some questions</p>	<p style="text-align: right;">Page 163</p> <p>1 out were placed on there during the call. 2 Q. Okay. 3 MR. MOSCATO: The items were placed there or 4 the crossing out? 5 THE WITNESS: The crossing out. 6 BY MR. CLARE: 7 Q. So the items, the handwriting of the specific 8 items were discussed with you and Mr. Harlow before the 9 call, and then during the call as issues came up, you 10 crossed them off as they were discussed? 11 A. Some of them. These I recall were important 12 issues that I wanted to make sure were discussed. 13 Q. If there is handwriting on pages three and 14 four that's not crossed off, does that mean that they 15 weren't discussed on the call or you just didn't cross 16 them off? 17 A. No, I know that a lot more of these were 18 discussed, but these were items that I wanted to make 19 sure that were discussed by Harlow. 20 Q. Now the date of CPH Exhibit 123 is July 2nd, 21 1998, correct? 22 A. Yes. 23 Q. And that's the date that you prepared the 24 memo documenting your March 12, 1998, accounting due 25 diligence call?</p>
<p style="text-align: right;">Page 162</p> <p>1 about the delay between the date of the call and the 2 date that you started to prepare the memo. Is that 3 correct? 4 A. Yes. 5 Q. And you can tell me again if I've got this in 6 any way wrong, but you said you felt it was important 7 to have a record of what was said during that call. 8 A. Yeah, I thought it was more important than, 9 you know, to have something other than the 10 contemporaneous documentation from the call. 11 Q. And that contemporaneous documentation were 12 the handwritten notes that appear on the third and 13 fourth page of CPH Exhibit 123? 14 A. Yes. 15 Q. And those notes that were placed on the third 16 and fourth page of CPH Exhibit 123, some of those notes 17 were prepared there in advance of the call as a result 18 of discussions between you and Mr. Harlow about how you 19 would respond to the questions? 20 A. Yeah, they were all prepared prior. It was 21 all prepared prior to. 22 Q. That's my next question. You anticipated it, 23 whether any of the handwriting on the third or fourth 24 page of Exhibit 123 was placed there during the call. 25 A. I think some of the items that are crossed</p>	<p style="text-align: right;">Page 164</p> <p>1 A. Yes. 2 Q. Did you start working on this memo at any 3 point before July 2nd, 1998? 4 A. I don't think so, no. 5 Q. So you did not document your discussions with 6 Morgan Stanley for the accounting due diligence call in 7 this memo format at least until July 2nd, 1998? 8 A. Yes. 9 Q. And that was after Mr. Dunlap had been fired 10 from Sunbeam on June 15, 1998? 11 A. I believe so, yes. 12 Q. And after Sunbeam had announced that the SEC 13 was investigating its accounting practices on 14 June 22nd, 1998? 15 A. Yes. 16 Q. And that was after Sunbeam announced that it 17 was delaying an SEC filing relating to the debenture 18 offering? 19 A. Yes. 20 Q. And that was after Sunbeam had announced that 21 its 1997 financial statement should not be relied upon? 22 A. I believe so, yes. 23 Q. That was -- 24 A. I think that was June 30. 25 Q. That was June 30?</p>

<p style="text-align: right;">Page 165</p> <p>1 A. Yes.</p> <p>2 Q. So you did not begin to document that</p> <p>3 conversation with Morgan Stanley until after Sunbeam</p> <p>4 announced that its 1997 financial statement could not</p> <p>5 be relied upon?</p> <p>6 A. Yes.</p> <p>7 MR. MARKOWSKI: Can I have the question back,</p> <p>8 please.</p> <p>9 (Thereupon, a portion of the record</p> <p>10 was read by the reporter.)</p> <p>11 MR. MARKOWSKI: I object, mischaracterizes</p> <p>12 his prior testimony with respect to this.</p> <p>13 BY MR. CLARE:</p> <p>14 Q. So you did not begin to document your</p> <p>15 discussions with Morgan Stanley in memo form until</p> <p>16 after Sunbeam had announced that its 1997 financial</p> <p>17 statements should not be relied upon?</p> <p>18 A. Yes.</p> <p>19 Q. Same question, after Sunbeam announced that</p> <p>20 its 1997 financial statements may need to be restated,</p> <p>21 that was also on June 30, 1998.</p> <p>22 A. I believe so, yes.</p> <p>23 Q. In drafting your July 2nd, 1998 memo, did you</p> <p>24 consult with Mr. Harlow about his recollection of what</p> <p>25 was said on the call?</p>	<p style="text-align: right;">Page 167</p> <p>1 their entirety and the responses were as follows."</p> <p>2 Do you see that?</p> <p>3 A. Yes.</p> <p>4 Q. Item 4A --</p> <p>5 A. Yes.</p> <p>6 Q. Question four relates to the adequacy of</p> <p>7 internal controls. Do you see that on the agenda?</p> <p>8 A. Yes.</p> <p>9 Q. And the response that was indicated on your</p> <p>10 memo says in part, "No material weaknesses in internal</p> <p>11 controls were noted."</p> <p>12 Do you see that?</p> <p>13 A. Yes.</p> <p>14 Q. Do you recall Mr. Harlow telling Morgan</p> <p>15 Stanley that no material weaknesses in internal</p> <p>16 controls were noted by Andersen?</p> <p>17 A. Yes.</p> <p>18 Q. That's consistent with your recollection of</p> <p>19 the call?</p> <p>20 A. I believe so, yes.</p> <p>21 Q. Do you remember Morgan Stanley asking that</p> <p>22 question and Mr. Harlow providing that answer?</p> <p>23 A. Yes.</p> <p>24 Q. Number eight asks, "How aggressive is the</p> <p>25 company in its accounting policies?"</p>
<p style="text-align: right;">Page 166</p> <p>1 A. He reviewed it. I don't specifically</p> <p>2 remember asking him.</p> <p>3 Q. So you prepared a draft and Mr. Harlow</p> <p>4 reviewed it?</p> <p>5 A. Yes.</p> <p>6 Q. Do you remember any discussions with</p> <p>7 Mr. Harlow about the draft that you had prepared or any</p> <p>8 changes that he asked to be made to your draft?</p> <p>9 A. I don't recall, no.</p> <p>10 Q. What about Mr. Gluck? Did you provide a</p> <p>11 draft of the July 2nd, 1998, memo to Mr. Gluck?</p> <p>12 A. No.</p> <p>13 Q. Why not?</p> <p>14 A. It was for Arthur Andersen's files.</p> <p>15 Q. The typewritten memo that's the first two</p> <p>16 pages of CPH Exhibit 123, this was your effort to</p> <p>17 distill from the notes the questions that were asked</p> <p>18 and the responses that were given on the call?</p> <p>19 A. For the most part, yes.</p> <p>20 Q. The third paragraph says, "Attached is the</p> <p>21 agenda as well as notes from that meeting. Mr. Savori</p> <p>22 and Mr. Lurie asked the questions and Mr. Harlow</p> <p>23 provided responses."</p> <p>24 A. Yes.</p> <p>25 Q. "The questions from the agenda were asked in</p>	<p style="text-align: right;">Page 168</p> <p>1 Do you see that?</p> <p>2 A. Yes.</p> <p>3 Q. There was some testimony this morning about</p> <p>4 bill and hold and Encore and EPI, and those items are</p> <p>5 crossed off on page three.</p> <p>6 A. Right.</p> <p>7 Q. Do you see that?</p> <p>8 A. Yes.</p> <p>9 Q. Looking at your typewritten memo, the</p> <p>10 response that appears after item eight, "On a scale of</p> <p>11 one to ten, around a five or six."</p> <p>12 Do you see that?</p> <p>13 A. Yes.</p> <p>14 Q. Do you recall Mr. Harlow ranking how</p> <p>15 aggressive Sunbeam's accounting policies are on a scale</p> <p>16 of one to ten?</p> <p>17 A. Yes. That's, I recall him addressing</p> <p>18 initially the issue that way.</p> <p>19 Q. Okay.</p> <p>20 A. And then going into some of the detail we</p> <p>21 talked about earlier.</p> <p>22 Q. But it's your recollection that on a scale of</p> <p>23 one to ten, Mr. Harlow told Morgan Stanley that Sunbeam</p> <p>24 was about a five or six in terms of the aggressiveness</p> <p>25 of its accounting policies?</p>

Page 169

1 A. Yes.
 2 Q. And Mr. Harlow's ranking of the
 3 aggressiveness of the accounting policies were part of
 4 the same conversation when he was discussing bill and
 5 hold, Encore, EPI?
 6 A. Yes.
 7 Q. Item ten on the agenda asks whether any major
 8 adjustments were recommended.
 9 A. Yes.
 10 MR. MOSCATO: Material.
 11 MR. CLARE: Thank you, material.
 12 BY MR. CLARE:
 13 Q. Item ten on the agenda -- my copy says major.
 14 THE WITNESS: Material.
 15 MR. MOSCATO: I'm sorry. You're right. My
 16 object apologies.
 17 MR. CLARE: That's okay.
 18 THE WITNESS: The Morgan Stanley letter
 19 requesting the question is major and on my
 20 typewritten it's material.
 21 BY MR. CLARE:
 22 Q. Okay. So just to make sure we're all clear,
 23 on page three of CPH Exhibit 123, item ten, the
 24 question that Morgan Stanley provided to you in writing
 25 was whether any major adjustments were recommended.

Page 170

1 A. Correct.
 2 Q. And in handwriting under that it says, "Not
 3 material, Encore or EPI."
 4 A. Yes.
 5 Q. Do you remember discussing that issue with
 6 Morgan Stanley; in other words, Andersen's view that
 7 the Encore and EPI adjustments were not material?
 8 A. Yes, I do remember that.
 9 Q. And that recollection is in fact recorded on
 10 point 10 of your typewritten memo, which says no
 11 material adjustments were recorded?
 12 A. Yes.
 13 Q. Now page three of the Exhibit CPH 123 has a
 14 header on it that says Project One Time accounting due
 15 diligence. Do you see that?
 16 A. Yes.
 17 Q. What does Project One Time refer to?
 18 A. I have no idea.
 19 Q. Are you aware that the project name that
 20 Sunbeam had given to these acquisitions was Project
 21 Laser?
 22 A. Yeah, I recollected that from something I
 23 just looked at earlier, yes.
 24 Q. But that's consistent with your recollection
 25 from 1998?

Page 171

1 A. Yes.
 2 Q. Do you have an understanding as to why the
 3 sheet that you have here as part of your exhibit says
 4 Project One Time, when the project name was Project
 5 Laser?
 6 A. You'd have to ask the person who put it
 7 together and sent it to me. I have no idea.
 8 Q. That was my question. You don't have any
 9 understanding of that?
 10 A. No, no idea.
 11 Q. I will represent to you and I can show you
 12 the documents that other people who were on the call --
 13 A. Yes.
 14 Q. -- got an agenda sheet that said the word
 15 Project Laser --
 16 A. Really? Interesting.
 17 Q. -- on it, and I wanted to know if you had any
 18 explanation for why the document that was attached to
 19 CPH 123 from your files says Project One Time.
 20 A. No.
 21 MR. MARKOWSKI: When you represent, Tom, that
 22 other people on the call got a different agenda,
 23 what call are you referring to, the Arthur
 24 Andersen call, or the call with the other
 25 accounting firms?

Page 172

1 MR. CLARE: I'm representing the Arthur
 2 Andersen call. In fact, why don't we just mark
 3 those as exhibits and I'll ask you about it
 4 specifically, the two documents.
 5 THE WITNESS: Okay.
 6 MR. CLARE: This is 56.
 7 (MS Exhibit Nos. 56 and 57 were marked for
 8 identification.)
 9 THE WITNESS: Okay.
 10 BY MR. CLARE:
 11 Q. And I'm showing you what's been marked as
 12 Morgan Stanley Exhibit 56 and Morgan Stanley 57. These
 13 are a series of faxes, two faxes from Shani Boone at
 14 Morgan Stanley to Mr. Freed at Scadden Arps in
 15 Exhibit 56 and Mr. Molitor at First Union in 57.
 16 Do you see that?
 17 A. Yes.
 18 Q. Just looking at Exhibit 56 for a moment, the
 19 second page of it is the agenda that Mr. Markowski went
 20 through with you this morning.
 21 A. Yes.
 22 Q. And it shows a series of accounting due
 23 diligence calls beginning at 11:30 a.m. and going
 24 through start time of 1:00.
 25 A. Yes.

Page 173

1 Q. And then after that, there are documents, an
 2 agenda for those calls --
 3 A. Yes.
 4 Q. -- that are similar in form to the ones that
 5 we were just looking at attached to your typewritten
 6 memo?
 7 A. Yes, similar.
 8 Q. Similar in form, but not identical?
 9 A. I don't believe identical, but I haven't
 10 proofed them both.
 11 Q. One of the ways in which they are not
 12 identical is the header on the documents that were sent
 13 to Mr. Freed and Mr. Moliter say Product Laser
 14 accounting due diligence, and the agenda that is
 15 attached to your July 2nd memo says Project One Time.
 16 A. Yes.
 17 Q. Do you see that?
 18 A. Yes.
 19 Q. And there are other differences in the agenda
 20 are that are, speak for themselves.
 21 A. Yes.
 22 Q. And do you have any explanation for why your
 23 agenda was different than other participants in the
 24 call?
 25 A. No. It would only be speculation.

Page 174

1 Q. But you don't have any explanation for the
 2 discrepancy between the agenda that First Union and
 3 Scadden Arps had and the agenda that's attached to your
 4 July 2nd --
 5 A. No.
 6 Q. -- '98 memo?
 7 MR. MARKOWSKI: I think you've assumed
 8 something that you haven't proved yet at this
 9 point in time, which is the agenda used in 56 and
 10 57 was in fact the agenda used by those other
 11 parties in connection with the call as opposed to
 12 a draft of what was ultimately sent to
 13 Mr. Bornstein and to Mr. Harlow.
 14 MR. CLARE: All I'm trying to do is
 15 understand whether Mr. Bornstein has any
 16 information about that, and he has told me -- and
 17 correct me if I'm wrong -- that you don't have any
 18 understanding or explanation for why others that
 19 were on the call had a different agenda than the
 20 one attached to your July 2nd.
 21 MR. MARKOWSKI: Well, that's the fact I'm
 22 saying, I'm objecting to on the ground it assumes
 23 facts not in evidence. You haven't shown that the
 24 documents attached to 56 and 57 were in fact the
 25 agendas used by Scadden or by First Union in

Page 175

1 connection with the telephone call.
 2 MR. CLARE: Okay. Well, I'll show that
 3 through different witnesses, and we'll take that
 4 up not on Mr. Bornstein's time.
 5 THE WITNESS: I have no idea.
 6 BY MR. CLARE:
 7 Q. Do you recall -- you don't have any
 8 explanation for that discrepancy as you sit here today?
 9 A. No.
 10 Q. I want to go back to your July 2nd, 1998,
 11 memo for a moment.
 12 Question 16 on the agenda asks the question,
 13 "Company is conservative and leans to full disclosure,"
 14 question mark. Do you see that?
 15 A. Yes.
 16 Q. And your handwritten note says yes, and it's
 17 circled. Do you see that?
 18 A. Yes.
 19 Q. On July 2nd, 19 -- I'm sorry, new question.
 20 On March 12, 1998, did you or Mr. Harlow tell
 21 Morgan Stanley that Sunbeam was conservative and leans
 22 toward full disclosure?
 23 A. As it relates to their financial statements,
 24 yes.
 25 Q. Okay. Is there a distinction there? Did you

Page 176

1 make any discussion with Morgan Stanley about ways in
 2 which Sunbeam was not conservative and leaned towards
 3 full disclosure on the call?
 4 A. No, not that I'm aware of.
 5 Q. So the question was asked the company is
 6 conservative and leans to full disclosure, and the
 7 answer that you and Mr. Harlow gave was yes.
 8 A. I believe as it relates to the financial
 9 statements is what we were talking about.
 10 Q. Okay. But did you say that, do you have a
 11 recollection of saying that on the call?
 12 A. No, I don't.
 13 Q. And in fact, your typewritten memo
 14 memorializing the answers that were given to Morgan
 15 Stanley answers the question yes?
 16 A. Yes.
 17 Q. And that's consistent with your recollection
 18 of what was said on the call?
 19 A. Yes.
 20 MR. CLARE: We need to take a short break to
 21 change the videotape.
 22 THE VIDEOGRAPHER: We are now going off
 23 videotape number two. We'll be back on videotape
 24 number three. The time on the monitor is
 25 1:30 p.m.

<p style="text-align: right;">Page 177</p> <p>1 (Discussion held off the record.) 2 THE VIDEOGRAPHER: We are now back on video 3 record. This is tape number three. The time on 4 the monitor, 1:31 p.m. 5 BY MR. CLARE: 6 Q. Mr. Bornstein, just before the break, I was 7 asking you about item 16 from your July 2nd, 1998 memo. 8 And this relates to the question that Morgan 9 Stanley asked about whether Sunbeam was conservative 10 and leans to full disclosure. 11 On the March 12, 1998 accounting due 12 diligence call, did you tell Morgan Stanley that 13 Sunbeam had resisted including disclosures of its bill 14 and hold sales in its 1997 10K? 15 A. Did we tell Morgan Stanley -- 16 MR. MOSCATO: I'm sorry, repeat that 17 question. 18 (Thereupon, a portion of the record 19 was read by the reporter.) 20 MR. MOSCATO: Answer the question yes or no. 21 Did you? 22 THE WITNESS: No. 23 BY MR. CLARE: 24 Q. Did you tell Morgan Stanley on the March 12, 25 1998 call that Mr. Gluck was resistant about disclosing</p>	<p style="text-align: right;">Page 179</p> <p>1 Q. And one of them related to bill and hold 2 sales? 3 A. Yes. 4 Q. And one of them related to the 5 reclassification of restructuring reserves? 6 A. Yes. 7 Q. And there were other times that you 8 approached Mr. Gluck about disclosure issues? 9 A. Yes. 10 Q. And during those approaches to Mr. Gluck, in 11 several of those conversations Mr. Gluck told you to 12 fuck off when you raised those issues with him? 13 A. Yeah, that was pretty common. 14 Q. And it happened on a number of occasions 15 when you raised disclosure issues with Mr. Gluck? 16 A. Yes. 17 Q. On the March 12, 1998, accounting due 18 diligence call with Morgan Stanley, did you tell Morgan 19 Stanley in words or in substance that Mr. Gluck had 20 told you to fuck off when you had raised disclosure 21 issues with him? 22 A. No. 23 Q. Now the March 12, 1998, telephone 24 conversation was not the only time that you had an 25 opportunity to talk about Sunbeam with Morgan Stanley,</p>
<p style="text-align: right;">Page 178</p> <p>1 Sunbeam's bill and hold sales from the first day that 2 you had raised the issue with them until the day that 3 the 10K was filed? 4 A. I don't know about the time period. 5 Q. But you didn't say that to Morgan Stanley? 6 MR. MOSCATO: Did you say those words to 7 Morgan Stanley? 8 THE WITNESS: No, I did not. 9 BY MR. CLARE: 10 Q. Did you say anything like that to Morgan 11 Stanley about Sunbeam's bill and hold disclosures? 12 A. No 13 Q. Did you tell Morgan Stanley in words or in 14 substance that Sunbeam had resisted disclosing its 15 reclassification of restructuring reserves in 16 connection with its 10K? 17 A. No 18 Q. And, Mr. Bornstein, I've read your prior 19 deposition testimony, and there are a series of 20 discussions that are reflected in that testimony that I 21 want to ask you about. 22 On several occasions during your interactions 23 with Sunbeam you approached Mr. Gluck relating to 24 disclosure issues; is that correct? 25 A. Yes.</p>	<p style="text-align: right;">Page 180</p> <p>1 correct? 2 A. Correct. 3 Q. You had participated in drafting sessions for 4 the offering memo in New York? 5 A. Yes. 6 Q. And during that session or sessions, did 7 Morgan Stanley ask additional questions of you about 8 Sunbeam? 9 A. No. 10 Q. Is there any documentation of those 11 conversations? 12 A. No. 13 Q. So in the course of preparing the offering 14 memorandum and the back and forth that occurred, your 15 testimony is that at no point during those discussions 16 did Morgan Stanley ask you for information about 17 Sunbeam or its financial statements? 18 A. They asked questions, but nothing specific 19 that I can recall. 20 Q. Okay. But they asked you questions during 21 those drafting sessions? 22 A. Right. 23 Q. And there was a give and take in preparing 24 the offering memorandum? 25 A. Yes.</p>

Page 181

1 Q. And that give and take related to the subject
 2 of Sunbeam?
 3 A. Yes.
 4 Q. And that how Sunbeam would be described in
 5 the offering memorandum that you were collectively
 6 working on?
 7 A. Yes.
 8 Q. March 19, 1998, the meeting you had with
 9 Mr. Tyree and others at Global Financial Press, that
 10 was another opportunity that you had time to spend with
 11 Morgan Stanley?
 12 A. Yes.
 13 Q. And how many hours would you say that you
 14 spent with Morgan Stanley that evening?
 15 A. Ten.
 16 Q. And during that evening, did Morgan Stanley
 17 and its representatives ask you questions about
 18 Sunbeam?
 19 A. Yes.
 20 Q. Mr. Bornstein, this morning and in prior
 21 depositions you've offered your opinion about Morgan
 22 Stanley's due diligence, correct?
 23 A. Yes.
 24 Q. And your opinion is that Morgan Stanley's due
 25 diligence in connection with the bond offering is poor?

Page 182

1 A. Yes.
 2 Q. Can you give me the basis for your belief
 3 that Morgan Stanley's due diligence for the bond
 4 offering was poor?
 5 A. Basically that they never asked very simple
 6 questions that should have been asked and that, at
 7 least my understanding of the people that were
 8 involved, which was basically Mr. Tyree, that he was
 9 very distracted and had a lot of other things going on
 10 and didn't really know what the hell was going on with
 11 this deal basically.
 12 Q. So you've identified two reasons why you
 13 think Morgan Stanley's due diligence was poor.
 14 Are there any others that you can think of?
 15 A. You know, that they were aware that the due
 16 diligence, financial due diligence that was performed
 17 by Arthur Andersen & Company of First Alert, Signature
 18 Brands and Coleman was limited at best, and probably,
 19 you know, was in a four or five-day period of time.
 20 Q. Now you're talking, in your answer to my last
 21 question, you're answering specifically with regard to
 22 the due diligence that was performed by Morgan Stanley
 23 on the target companies, correct?
 24 A. I'm not sure what Morgan Stanley did on the
 25 target companies, but they were aware of the limited

Page 183

1 amount of due diligence that the company had done on
 2 the three target acquisition companies.
 3 Q. Okay. Anything else that forms the basis for
 4 your opinion that Morgan Stanley's due diligence was
 5 poor?
 6 A. No, not that I can think of.
 7 Q. What were the simple questions that Morgan
 8 Stanley should have asked in your opinion but didn't?
 9 A. How is the company doing now? Simple as
 10 that.
 11 Q. Is that the only one?
 12 A. They probably should ask more questions on
 13 the financial statement. They should have probably
 14 asked more detailed questions on bill and hold
 15 transactions. They probably should have asked a lot
 16 more questions on the estimates and the projections
 17 that Mr. Dunlap had touted. I forget what they were,
 18 but basic questions.
 19 Q. Were all of the questions that you've just
 20 identified suggested by the public statements that
 21 Sunbeam had made?
 22 A. I don't understand the question.
 23 MR. MARKOWSKI: Object to the form.
 24 BY MR. CLARE:
 25 Q. You asked, you said that Morgan Stanley

Page 184

1 should have asked additional questions about the
 2 financial statements, correct?
 3 A. Yes.
 4 Q. And the assumptions that went into the
 5 financial statements?
 6 A. They should ask some questions on the
 7 financial statements, yes.
 8 Q. These were Sunbeam's audited financial
 9 statements that you're referring to?
 10 A. Yes.
 11 Q. And those financial statements at least for
 12 1997 were publicly available?
 13 A. Yes.
 14 Q. You said that Morgan Stanley should have
 15 asked some additional questions about bill and hold.
 16 A. Yes.
 17 Q. Bill and hold transactions were also publicly
 18 disclosed by Sunbeam in its 1997 10K, correct?
 19 A. Yes.
 20 Q. And were there any other questions that you
 21 think Morgan Stanley should have asked that they didn't
 22 beside the ones you've testified to?
 23 A. Specifically, no.
 24 Q. Do you have any knowledge or information
 25 about the trip that Morgan Stanley made to Sunbeam

Page 185

1 headquarters on March 4th and 5th to conduct due
 2 diligence?
 3 A. No.
 4 Q. You weren't present for any of those
 5 meetings?
 6 A. No.
 7 Q. Did anybody ever report to you what was
 8 discussed during that due diligence meeting?
 9 A. No.
 10 Q. Do you have any knowledge or information
 11 about Morgan Stanley's bring-down due diligence
 12 telephone conference with Sunbeam's management?
 13 A. I don't recall if I was part of that. I
 14 don't believe so.
 15 Q. I don't believe you were either, but do you
 16 have any knowledge or information about that?
 17 A. No.
 18 Q. Did anybody report to you what was said or
 19 discussed during those telephone calls?
 20 A. No.
 21 Q. Specifically, the bring-down telephone calls
 22 that were done with Sunbeam management by Morgan
 23 Stanley to conduct due diligence.
 24 A. No.
 25 Q. Do you have any knowledge or information

Page 186

1 about trips that were taken by Morgan Stanley to
 2 Sunbeam in September of 1997 to conduct due diligence
 3 on Sunbeam?
 4 A. No.
 5 Q. Were you present for any of those meetings?
 6 A. I don't believe so, no.
 7 Q. And nobody has reported to you what was said
 8 or discussed during those due diligence meetings?
 9 A. No.
 10 Q. Do you have any knowledge or information
 11 about what documents Morgan Stanley requested and
 12 received from Sunbeam management?
 13 A. No.
 14 Q. Were you involved in communicating either
 15 requests from Morgan Stanley to Sunbeam management or
 16 communicating those documents back from Sunbeam
 17 management to Morgan Stanley?
 18 A. No.
 19 Q. So you don't know one way or the other what
 20 documents were requested and received by Morgan
 21 Stanley?
 22 A. No.
 23 Q. Are you, do you have any knowledge or
 24 information about the documents that were provided to
 25 Morgan Stanley by Scadden Arps as part of the due

Page 187

1 diligence process?
 2 A. No.
 3 Q. Do you have any knowledge or information
 4 about other documents that Morgan Stanley reviewed as
 5 part of the due diligence process?
 6 A. No.
 7 Q. And so your opinion about Morgan Stanley's
 8 due diligence is based strictly on your personal
 9 interaction with representatives from Morgan Stanley?
 10 A. Yes.
 11 Q. So do you have any basis one way or another
 12 to evaluate the overall due diligence conducted by
 13 Morgan Stanley in connection with the bond offering?
 14 A. No.
 15 MR. CLARE: Why don't we break for lunch.
 16 THE VIDEOGRAPHER: We are now going off video
 17 record. The time on the monitor, 1:42 p.m.
 18 (Thereupon, a lunch recess was taken.)
 19
 20 (End of Volume I)
 21
 22
 23
 24
 25

Page 188

1 IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
 2 IN AND FOR PALM BEACH COUNTY, FLORIDA
 3 CASE No. CA 03-5045 AI
 4
 5 COLEMAN (PARENT) HOLDINGS, INC.,
 6 Plaintiff,
 7 -vs-
 8 MORGAN STANLEY & CO., INC.,
 9 Defendant.
 10
 11 DEPOSITION OF LAWRENCE ALAN BORNSTEIN
 12 (Videotaped)
 13 VOLUME II
 14
 15 Thursday, January 15, 2004
 16 2:03 - 5:30 p.m.
 17
 18 2139 Palm Beach Lakes Boulevard
 19 West Palm Beach, Florida 33409
 20
 21
 22 Reported By:
 23 Rachel W. Bridge, RMR, CRR
 24 Notary Public, State of Florida
 25 Esquire Deposition Services
 West Palm Beach Office
 Phone: 800.330.6952
 561.659.4155

Page 189

1 APPEARANCES:
 2 On behalf of the Plaintiff:
 3 ROBERT T. MARKOWSKI, ESQUIRE
 4 CHRISTOPHER M. O'CONNOR, ESQUIRE
 5 JENNER & BLOCK, LLP
 6 One IBM Plaza
 7 Chicago, Illinois 60611-7603
 8 Phone: 312.222.9350
 9
 10 On behalf of the Defendant:
 11 THOMAS A. CLARE, ESQUIRE
 12 KATHRYN REED DEBORD, ESQUIRE
 13 KIRKLAND & ELLIS, LLP
 14 655 Fifteenth Street, N.W.
 15 Washington, D.C. 20005
 16 Phone: 202.879.5078
 17
 18 On behalf of the Witness:
 19 MICHAEL MOSCATO, ESQUIRE
 20 CURTIS, MALLET-PREVOST, COLT & MOSLE, LLP
 21 101 Park Avenue
 22 New York, New York 10178-0061
 23 Phone: 212.696.8817
 24 ALSO PRESENT:
 25 EITAN ROSEN, VIDEOGRAPHER

Page 190

1 - - -
 2 INDEX
 3 - - -
 4 WITNESS: DIRECT CROSS REDIRECT RECROSS
 5 Lawrence Bornstein
 6 By Mr. Markowski 330, 343
 7 By Mr. Clare 191 (cont'd) 341
 8
 9 EXHIBITS
 10 - - -
 11 EXHIBIT PAGE
 12 MS Exhibit 58 273
 13 MS Exhibit 59 307
 14 MS Exhibit 60 314
 15 MS Exhibit 61 314
 16
 17
 18
 19
 20
 21
 22
 23
 24
 25

Page 191

1 PROCEEDINGS
 2 - - -
 3 Deposition taken before Rachel W. Bridge,
 4 Registered Professional Reporter and Notary Public
 5 in and for the State of Florida at Large, in the
 6 above cause.
 7 - - -
 8 THE VIDEOGRAPHER: We are now back on video
 9 record. The time on the monitor, 2:03 p.m.
 10 CROSS EXAMINATION (Continued)
 11 BY MR. CLARE:
 12 Q. Mr. Bornstein, before the break we were
 13 talking about your opinions about Morgan Stanley's due
 14 diligence. You indicated in response to one of my
 15 questions that one of the bases for your opinion was
 16 your observation that Mr. Tyree was distracted.
 17 Do you have any basis for that other than
 18 your personal observation?
 19 A. During the time period trying to communicate
 20 with him and talk to him, he was working on another
 21 deal I think at the time, I believe, and it was
 22 difficult to get in touch with him if needed.
 23 Q. Other than the fact that it was difficult to
 24 get in touch with Mr. Tyree, do you have any basis for
 25 your opinion that he was distracted?

Page 192

1 A. The lack of knowledge of what I saw of what
 2 he knew about the company.
 3 Q. But again --
 4 A. That's --
 5 Q. Please.
 6 A. That's just my opinion.
 7 Q. But you don't know what steps Mr. Tyree took
 8 outside of your presence to obtain information or
 9 knowledge about the company?
 10 A. No.
 11 Q. And do you know whether Mr. Tyree was
 12 performing Sunbeam-related duties on some of the
 13 occasions when you could not get in touch with him or
 14 on another deal?
 15 A. No, I have no idea.
 16 Q. You don't know one way or the other?
 17 A. No.
 18 Q. I want to switch now to a different topic.
 19 Back in the first quarter of 1998, you knew
 20 that Sunbeam was acquiring the Coleman company,
 21 correct?
 22 A. Yes.
 23 Q. And you knew that the acquisition was a stock
 24 and cash deal?
 25 A. Yes.

<p style="text-align: right;">Page 193</p> <p>1 Q. And by that, I mean that Sunbeam would be 2 providing to the owners of Coleman cash as a portion of 3 the purchase price and stock as a portion of the 4 purchase price? 5 A. Yes. 6 Q. And that is Sunbeam stock? 7 A. Yes. 8 Q. And did you know that the acquisition 9 required for Coleman (Parent) Holdings Company which 10 owned a portion of Coleman to receive over 14 million 11 shares of Sunbeam stock as part of the purchase price? 12 A. Yes. 13 Q. You knew that back in the first quarter of 14 1998? 15 A. Yes. 16 Q. And did you also know that after the sale had 17 taken place that Coleman (Parent) Holdings Company 18 would be a significant shareholder of Sunbeam? 19 A. Yes. 20 Q. Were you informed in the first quarter of 21 1998 by anybody that Coleman and its corporate parents 22 would be conducting their own due diligence on Sunbeam? 23 A. I wasn't aware of anything, no. 24 Q. You were not told anything by the people at 25 Sunbeam that Coleman or its parent corporations would</p>	<p style="text-align: right;">Page 195</p> <p>1 representatives as part of the acquisition transaction? 2 A. No. 3 Q. You were not part of any in-person meetings 4 with Coleman (Parent) Holdings or any of its 5 representatives for that purpose? 6 A. No. 7 Q. Any telephone conferences? 8 A. No. 9 Q. Were you ever asked to participate in an 10 accounting due diligence call with Coleman (Parent) 11 Holdings like the one that Morgan Stanley had conducted 12 that you participated in? 13 A. Not that I recall. 14 Q. Were you aware that Coleman (Parent) Holdings 15 was, and Coleman were being represented in the 16 transaction by Credit Suisse First Boston as their 17 investment advisor? 18 A. No. 19 Q. Did you have any dealings with CSFB during 20 the first quarter of 1998? 21 A. No. 22 Q. Did you receive any inquiries from CSFB 23 during the first quarter of 1998 about Sunbeam or its 24 financial performance? 25 A. No.</p>
<p style="text-align: right;">Page 194</p> <p>1 be conducting due diligence? 2 A. Not that I'm aware of, no. 3 Q. Were you ever informed by any source that 4 Morgan Stanley had been tasked to perform due diligence 5 on behalf of Coleman and its corporate parent? 6 A. No. 7 Q. Did you receive any instructions from Sunbeam 8 about any inquiries that you might get from Coleman 9 (Parent) Holdings and its corporate parent? 10 A. No. 11 Q. Did anybody ever tell you in words or in 12 substance not to provide Coleman (Parent) Holdings and 13 its corporate parent with any information that they 14 requested? 15 A. No. 16 Q. Did anybody ever instruct you to channel all 17 information for Coleman (Parent) Holdings through 18 Morgan Stanley? 19 A. No. 20 Q. Do you have a recollection of any inquiry 21 that you received that you understood to be made on 22 behalf of Coleman (Parent) Holdings? 23 A. No. 24 Q. Are you aware of any due diligence that was 25 performed by Coleman (Parent) Holdings or its</p>	<p style="text-align: right;">Page 196</p> <p>1 Q. Are you aware of any inquiries that Andersen 2 received, even if you were not personally involved, 3 from anybody representing Coleman (Parent) Holdings? 4 A. Not that I'm aware of. 5 Q. Are you aware of any inquiries from Coleman 6 (Parent) Holdings on the subject of Sunbeam's bill and 7 hold sales? 8 A. No. 9 Q. Are you aware of any inquiries from anyone 10 representing Coleman (Parent) Holdings about the bill 11 and hold disclosures that were in Sunbeam's 1997 10K? 12 A. No. 13 Q. Or whether Sunbeam was engaged in bill and 14 hold sales in the first quarter of 1998? 15 A. No. 16 Q. Or Sunbeam's Early Buy program? 17 A. No. 18 Q. Or the Early Buy program disclosures that 19 were in the 1997 10K? 20 A. No. 21 Q. Or the impact of Sunbeam's Early Buy program 22 on Sunbeam's first quarter 1998 sales? 23 A. No. 24 Q. Or Sunbeam's quarter-to-date sales in the 25 first quarter of 1998?</p>

Page 197

1 A. No.
 2 Q. At any point in time?
 3 A. No.
 4 Q. Are you aware of any inquiries from anyone
 5 representing Coleman (Parent) Holdings after the
 6 March 19, 1998, press release about Sunbeam's first
 7 quarter performance?
 8 A. Can you repeat the question?
 9 (Thereupon, a portion of the record
 10 was read by the reporter.)
 11 THE WITNESS: No, not until after Mr. Dunlap
 12 was terminated.
 13 BY MR. CLARE:
 14 Q. When you say not until after Mr. Dunlap was
 15 terminated, it was at that point that a new management
 16 team was installed?
 17 A. Yes.
 18 Q. And then inquiries were made by the new
 19 management team?
 20 A. Yes.
 21 Q. But limiting ourselves to the first quarter
 22 of 1998 and inquiries that may have been received from
 23 Coleman (Parent) Holdings during the first quarter of
 24 1998, are you aware from any source of any inquiries
 25 that were made by Coleman (Parent) Holdings or any of

Page 198

1 its representatives after the March 19, '98 press
 2 release?
 3 A. No.
 4 Q. So no inquiries between March 19, 1998, and
 5 the end of the first quarter?
 6 MR. MARKOWSKI: Object to the form of the
 7 question.
 8 THE WITNESS: Not that I'm aware of, no.
 9 BY MR. CLARE:
 10 Q. Are you aware that on April 3rd, 1998,
 11 Sunbeam announced that its first quarter 1998 sales
 12 were, had fallen short of the first quarter 1997? Were
 13 you generally aware of that?
 14 A. I believe it was the second press release. I
 15 don't remember specifically what it said.
 16 Q. But you're aware that shortly after the first
 17 quarter, Sunbeam issued a press release like the one I
 18 just described?
 19 A. Yes.
 20 Q. Were you aware of any inquiries from Coleman
 21 (Parent) Holdings or anyone representing
 22 Coleman (Parent) Holdings after that April 3rd, 1998
 23 press release?
 24 MR. MARKOWSKI: I want to make sure we're
 25 clear here. You've been focusing on inquiries of

Page 199

1 Andersen. Are you broadening the question now?
 2 MR. CLARE: No. Any inquiries that
 3 Mr. Bornstein is aware of, made to anyone, but
 4 specifically within his knowledge.
 5 MR. MARKOWSKI: So an inquiry to anyone, not
 6 specifically to Arthur Andersen?
 7 MR. CLARE: Correct.
 8 THE WITNESS: I'm not aware of anything.
 9 BY MR. CLARE:
 10 Q. In 1998, the first quarter, as you prepared
 11 to assist Sunbeam with these acquisition transactions,
 12 did you have an expectation that Coleman or its
 13 corporate parent might want it ask questions of Arthur
 14 Andersen?
 15 MR. MARKOWSKI: Object to the form of the
 16 question.
 17 THE WITNESS: I thought it was possible, yes.
 18 BY MR. CLARE:
 19 Q. So that thought did occur to you back in the
 20 first quarter of 1998?
 21 A. Yes.
 22 Q. And you testified that you're not aware of
 23 any inquiries that were made to Andersen and certainly
 24 not to you from Coleman (Parent) Holdings or its
 25 corporate parent?

Page 200

1 A. Yes.
 2 Q. In the first quarter of 1998, did you, were
 3 you surprised by the lack of inquiry from Coleman
 4 (Parent) Holdings or its corporate parent?
 5 A. I'd say yes.
 6 Q. And did you form an opinion about the quality
 7 of due diligence done by Coleman (Parent) Holdings on
 8 Sunbeam in the first quarter of 1998?
 9 MR. MARKOWSKI: Objection, lack of
 10 foundation.
 11 THE WITNESS: I wasn't aware of any that they
 12 did, so if you want to repeat the question, I
 13 don't know if I answered it.
 14 BY MR. CLARE:
 15 Q. Sure. You were surprised that they didn't do
 16 any due diligence, to your knowledge?
 17 MR. MARKOWSKI: Object to the form of the
 18 question. Mischaracterizes his answer.
 19 THE WITNESS: Yes.
 20 BY MR. CLARE:
 21 Q. If there had been inquiries that were made by
 22 Coleman (Parent) Holdings or any of its representatives
 23 to Sunbeam -- strike that, withdrawn.
 24 If there had been any inquiries made by
 25 Coleman (Parent) Holdings or any of its representatives

Page 201

1 to Andersen about Sunbeam, would you have expected to
 2 be notified?
 3 A. Yes.
 4 Q. And because you were the number three person
 5 on the Andersen team advising Sunbeam at the time?
 6 A. Yes.
 7 Q. And because you were the point person for
 8 these acquisition transactions and working with Morgan
 9 Stanley on its due diligence, you and Mr. Harlow?
 10 A. We were working for Sunbeam on the due
 11 diligence, not Morgan Stanley.
 12 Q. Correct, but you were working with Morgan
 13 Stanley in responding to their inquiries as part of
 14 their due diligence?
 15 A. Yes.
 16 Q. And so you would expect that if there were
 17 inquiries from Coleman (Parent) Holdings, that you and
 18 Mr. Harlow would also be involved in those?
 19 MR. MARKOWSKI: Object to the form of the
 20 question.
 21 THE WITNESS: I would think so, yes.
 22 BY MR. CLARE:
 23 Q. Okay. Based on the total lack of due
 24 diligence that you observed from Coleman (Parent)
 25 Holdings, would you agree with me that Morgan Stanley's

Page 202

1 due diligence of Sunbeam was more comprehensive than
 2 Coleman (Parent) Holdings?
 3 MR. MARKOWSKI: Object, lack of foundation.
 4 BY MR. CLARE:
 5 Q. From your observation.
 6 A. From my observation, yes.
 7 MR. MARKOWSKI: Same objection.
 8 BY MR. CLARE:
 9 Q. Sorry?
 10 A. From where I stood, yes.
 11 Q. So from your perspective, Morgan Stanley
 12 spent more time conducting due diligence of Sunbeam
 13 than Coleman (Parent) Holdings?
 14 MR. MARKOWSKI: Same objection, lack of
 15 foundation.
 16 THE WITNESS: From my vantage point, yes.
 17 BY MR. CLARE:
 18 Q. And from your vantage point -- and again,
 19 that's all I'm asking you about is what you have
 20 personal knowledge of -- from your vantage point,
 21 Morgan Stanley conducted more comprehensive due
 22 diligence than Coleman (Parent) Holdings?
 23 MR. MARKOWSKI: Same objection.
 24 THE WITNESS: I would have to say more. I
 25 don't know how comprehensive it was, but more.

Page 203

1 BY MR. CLARE:
 2 Q. It was more comprehensive than the due
 3 diligence performed by Coleman (Parent) Holdings?
 4 MR. MARKOWSKI: Same objection.
 5 THE WITNESS: I wasn't aware of any due
 6 diligence done by Coleman that I was aware of.
 7 BY MR. CLARE:
 8 Q. So Morgan Stanley did due diligence and
 9 Coleman (Parent) Holdings did not, from your
 10 perspective?
 11 MR. MARKOWSKI: Same objection.
 12 THE WITNESS: From my perspective, yes.
 13 BY MR. CLARE:
 14 Q. And you were surprised by the fact that
 15 Coleman (Parent) Holdings had not done any due
 16 diligence that had been directed to you?
 17 MR. MOSCATO: I'm not going to make a big
 18 deal of it. I kind of have an objection of
 19 repeating the same question numerous times.
 20 You can answer, Larry.
 21 THE WITNESS: I think I just stated I was
 22 surprised.
 23 BY MR. CLARE:
 24 Q. And you were surprised back in the first
 25 quarter of 1998?

Page 204

1 A. Yes.
 2 MR. MOSCATO: Part of my objection goes to
 3 the fact that he's a busy man. I really would
 4 appreciate it if you are making points, just not
 5 to belabor them.
 6 MR. CLARE: I understand. I just want to
 7 make sure, as you pointed out earlier, that the
 8 record is clear about Mr. Bornstein's testimony.
 9 MR. MOSCATO: I think it's more than clear at
 10 this point. Go ahead, I'm sorry to interrupt.
 11 MR. CLARE: That's okay.
 12 BY MR. CLARE:
 13 Q. Have you had experience in other engagements
 14 when you were at Andersen in which you were advising
 15 the client that was involved in an acquisition?
 16 MR. MOSCATO: I'm sorry.
 17 BY MR. CLARE:
 18 Q. In other words, besides Sunbeam, were you
 19 involved in other acquisition transactions while you
 20 were at Andersen?
 21 MR. MOSCATO: Is that your question?
 22 MR. CLARE: Yes.
 23 MR. MOSCATO: My objection was to advising
 24 the client about an acquisition, because I don't
 25 think there is any testimony --

<p style="text-align: right;">Page 205</p> <p>1 MR. CLARE: That's fine, I withdraw that. 2 MR. MOSCATO: Okay. 3 BY MR. CLARE: 4 Q. Were you involved in any engagement at 5 Andersen in which Andersen was involved in responding 6 to due diligence inquiries in an acquisition setting 7 besides the Sunbeam one? 8 A. Yes. 9 Q. And in those situations, were you involved in 10 receiving or responding to requests that were made by 11 the party that was investing in Andersen's client? 12 A. Yes. 13 Q. And were you involved in those other 14 situations in responding to requests from the 15 investor's financial advisors? 16 A. Yes. 17 Q. And their lawyers? 18 A. Yes. 19 Q. And in those situations, you had also met 20 with the investing company's accountants? 21 A. Yes. 22 Q. But none of that happened in connection with 23 the Sunbeam acquisition of Coleman; is that right? 24 MR. MARKOWSKI: None of what? 25 MR. CLARE: None of those items that I just</p>	<p style="text-align: right;">Page 207</p> <p>1 A. Yes. 2 Q. Did you think you had done an adequate job of 3 conducting due diligence on Coleman from an accounting 4 perspective? 5 MR. MOSCATO: I object. 6 BY MR. CLARE: 7 Q. Did you have a view at the time? 8 A. I didn't think it was adequate, no. 9 Q. And did you inform anybody of your view that 10 it was inadequate? 11 A. The people I was traveling with. Yes, the 12 answer is yes. 13 Q. Who? 14 A. Bob Gluck. 15 Q. So you told -- 16 A. Janet Kelly, there was another guy there, Bob 17 Tottie, I believe his name was. 18 Q. Was there anybody from Morgan Stanley present 19 at that meeting? 20 A. No. 21 Q. Did you ever express that view to Morgan 22 Stanley that you thought the due diligence that had 23 been done on Coleman by Sunbeam was inadequate? 24 A. I believe I probably did, yeah. 25 Q. As you sit here today, do you have a</p>
<p style="text-align: right;">Page 206</p> <p>1 described. 2 MR. MARKOWSKI: Object to the form of the 3 question. 4 THE WITNESS: That's all over the place, the 5 question, I'm sorry. 6 BY MR. CLARE: 7 Q. Okay. Did you accompany -- let me withdraw 8 that. 9 Were you involved in conducting due diligence 10 on Coleman? 11 A. Yes. 12 Q. And you met with Coleman's outside 13 accountants as part of that due diligence? 14 A. Yes. 15 Q. And you asked questions of them about 16 Coleman's financial condition? 17 A. Yes. 18 Q. And how many days did you spend doing that 19 with Coleman specifically? 20 A. One. 21 Q. And then you spent one day each with the 22 other acquisition targets? 23 A. Yes. 24 Q. And that was as part of Sunbeam's due 25 diligence on Coleman, that one day of due diligence?</p>	<p style="text-align: right;">Page 208</p> <p>1 recollection of when and where and to whom that 2 information was provided at Morgan Stanley? 3 A. No, not specifically, no. 4 Q. Generally? 5 A. No. 6 Q. So you can't testify about a particular 7 conversation that you had or a particular document that 8 was written to communicate that information to Morgan 9 Stanley? 10 A. No. 11 Q. I want to switch topics to focus on the day 12 at the print shop. 13 A. Okay. 14 Q. And I want to start where you started earlier 15 this morning about when you were in the hotel room with 16 Mr. Brockelman watching television. 17 And again, just to be clear, this was 18 March 19, 1998, the day that the press release was 19 issued? 20 A. Yes. 21 Q. And you were watching television with 22 Mr. Brockelman? 23 A. Yes. 24 Q. And it was a report on CNBC? 25 A. I believe so, yeah.</p>

<p style="text-align: right;">Page 209</p> <p>1 Q. And your recollection is it was a text 2 crawler on the bottom of the screen? 3 A. Yes. 4 Q. It was not a news report with a live 5 interview or a news person that was communicating this 6 information, to the best of your recollection? 7 A. Yeah, I think I do remember alive 8 conversation on it, but I'm not 100 percent sure. 9 Q. And you recall that the news report indicated 10 that the first quarter 1998 sales might not meet 11 analysts' expectations? That was part of the news 12 report that you remember hearing? 13 A. Honestly, I just remember early morning 14 release Sunbeam's sales reports, sales are going to be 15 below expectations. I don't remember anything specific 16 about it. 17 Q. That was my question, was whether you 18 remember whether the statement in the press release 19 about first quarter 1997 sales was part of the report 20 that you saw. 21 A. I don't remember. 22 Q. You don't remember one way or the other? 23 A. No. 24 Q. Was there any mention of Morgan Stanley in 25 the press release, the press report that you saw on</p>	<p style="text-align: right;">Page 211</p> <p>1 A. Yes. 2 Q. So this news report on CNBC was not the first 3 time you were hearing that information? 4 MR. MARKOWSKI: I'm going to object. He said 5 he can't remember whether the information about 6 the first quarter of '97 was part of the 7 announcement. 8 MR. CLARE: And I didn't ask him about that. 9 MR. MARKOWSKI: Could you read the question 10 back, please. 11 MR. CLARE: Fair enough. Now I understand 12 your objection, Bob, I'm sorry. 13 BY MR. CLARE: 14 Q. Was Mr. Brockelman present when you called 15 Mr. Harlow to ask him about the, what had happened? 16 A. Yes. 17 Q. About the press release? 18 A. Yes. 19 Q. And you said you couldn't remember whether it 20 was Mr. Harlow or Mr. Gluck that you ultimately got in 21 touch with from your hotel room? 22 A. Yes. 23 Q. Did either Mr. Harlow or Mr. Gluck read you 24 the entire press release over the phone? 25 A. I don't remember if they did or if I got it</p>
<p style="text-align: right;">Page 210</p> <p>1 CNBC? 2 A. I don't remember. 3 Q. Do you remember if there were any mention of 4 the debenture offering? 5 A. No. 6 Q. Or the pending acquisitions? 7 A. I don't recall anything, no. 8 Q. Was CNBC reporting on the reaction of the 9 stock to this news? 10 A. I believe so, yeah. 11 Q. And what do you recall was the stock price 12 that day? 13 A. I thought it went down significantly. I 14 don't remember exactly what it was. 15 Q. Is that all you remember about the press 16 report that you saw? 17 A. On TV? 18 Q. Yes. 19 A. Yes. 20 Q. And at the time that you saw the press 21 release -- sorry, withdrawn. 22 At the time that you saw the press report on 23 CNBC, you knew from your prior conversation with 24 Mr. Pastrana that Sunbeam sales for the first two 25 months of 1998 were lower than the prior year, right?</p>	<p style="text-align: right;">Page 212</p> <p>1 faxed, I don't recall. 2 Q. Did you learn from any source during that 3 phone conversation who had drafted the press release? 4 A. I don't remember. 5 Q. During that telephone conversation, was there 6 any discussion about what role, if any, Morgan Stanley 7 had in the decision to issue the press release or its 8 content? 9 A. At the hotel room, no. 10 Q. The first time you had a discussion on that 11 topic was at the print shop with Mr. Tyree? 12 A. Yes. 13 Q. During that initial telephone call that you 14 had in your hotel room, was there any discussion with 15 Mr. Harlow or Mr. Gluck about Sunbeam's ability to 16 exceed first quarter 1997 sales? 17 MR. MARKOWSKI: Could you read that back? 18 (Thereupon, a portion of the record 19 was read by the reporter.) 20 MR. MARKOWSKI: You're talking about 21 discussion other than reading the text of the 22 press release? 23 MR. CLARE: That's correct. Any discussion 24 about the achievability. 25 THE WITNESS: Not that I'm aware.</p>

Page 213

1 BY MR. CLARE:
 2 Q. Was there any discussion between you and
 3 Mr. Harlow and Mr. Gluck about whether the press
 4 release that Sunbeam had issued should be retracted or
 5 withdrawn?
 6 A. No.
 7 Q. Did you think that the press release should
 8 be retracted or withdrawn?
 9 A. No.
 10 Q. Did you think the press release was false?
 11 A. No.
 12 Q. Did you think the press release was
 13 misleading?
 14 A. Yes.
 15 Q. Did you discuss your view that the press
 16 release was misleading with either Mr. Harlow or
 17 Mr. Gluck?
 18 A. Again, at the hotel room, talking about the
 19 hotel room?
 20 Q. Yes, I am.
 21 A. Not that I'm aware of.
 22 Q. Was there any discussion about withholding
 23 Andersen's comfort letter as a result of the issuance
 24 of the press release, again focusing on the
 25 conversation in the hotel room?

Page 214

1 A. Not that I'm aware of, no.
 2 Q. Was there any discussion about what
 3 disclosure needed to be made in the offering memorandum
 4 of the press release with Mr. Harlow or Mr. Gluck?
 5 A. No.
 6 Q. So the first time that topic was raised was
 7 later at the print shop?
 8 A. Yes.
 9 Q. Was there a discussion with you and
 10 Mr. Harlow and Mr. Gluck about approaching Morgan
 11 Stanley with that question?
 12 A. No.
 13 Q. You testified that you did ask Mr. Tyree and
 14 Mr. Lurie about what would be included in the offering
 15 memorandum, correct?
 16 A. Yeah, I did that myself.
 17 Q. That was on your own initiative?
 18 A. Yes.
 19 Q. In other words, prior to that, you had not
 20 had a discussion with anybody from Andersen about
 21 asking that question?
 22 A. No.
 23 Q. Or anybody from Sunbeam?
 24 A. No.
 25 Q. You stated that you held a view that the

Page 215

1 press release was misleading.
 2 A. Yes.
 3 Q. But you never asked Sunbeam to withdraw or
 4 retract the press release, did you?
 5 A. No.
 6 Q. And you did not express that suggestion to
 7 anybody internally at Sunbeam?
 8 A. No.
 9 Q. And/or anybody internally at Andersen?
 10 A. No.
 11 Q. Or anybody at Morgan Stanley?
 12 A. No.
 13 Q. And the reason that you thought it was
 14 misleading is because you thought it was aggressive?
 15 A. Yes.
 16 Q. Is there any other reason that you thought it
 17 was misleading?
 18 A. The language about the reasons for it were I
 19 thought misleading.
 20 Q. In what way?
 21 A. Just I'd have to look at it again, but --
 22 Q. Let's pull it out. It's Exhibit Number 14.
 23 A. Just the wording, changes in inventory
 24 management and order patterns. I'm not really sure
 25 exactly how that impacts sales.

Page 216

1 Q. Could that be a reference to Sunbeam's Early
 2 Buy program?
 3 MR. MARKOWSKI: Object to the form of the
 4 question.
 5 THE WITNESS: I have no idea exactly at this
 6 point.
 7 BY MR. CLARE:
 8 Q. But is that the way you understood it?
 9 A. Yes, and then the whole comment about new
 10 products, because I don't believe that at that time any
 11 of the new products had significant sales, the new
 12 products that they talked about here.
 13 Q. Now you testified earlier that you discussed
 14 with Morgan Stanley and the Davis Polk lawyers your
 15 belief that you had that the statement in the press
 16 release was aggressive, correct?
 17 A. Yes.
 18 Q. Did you discuss with Morgan Stanley or Davis
 19 Polk these additional concerns that you had about the
 20 wording of the reasons for the softer sales?
 21 A. I don't remember specifically.
 22 Q. As you sit here today, can you recall any
 23 discussion that you had with Morgan Stanley or Davis
 24 Polk about the reasons stated in the press release for
 25 the softer sales?

Page 217

1 A. No.
 2 Q. Did you discuss that issue with Mr. Gluck or
 3 Mr. Harlow in your hotel room?
 4 MR. MARKOWSKI: That issue being the
 5 statement made in the press release?
 6 MR. CLARE: About the reasons, yes.
 7 THE WITNESS: No.
 8 BY MR. CLARE:
 9 Q. Did you raise that issue with anybody?
 10 A. The reasons in the press release? I don't
 11 remember. I just, I just remember focusing on the
 12 \$253 million number that I didn't think that was going
 13 to be met and that they should have just left it at
 14 lower, it's going to be lower basically.
 15 Q. They, Sunbeam should have just left it at
 16 that?
 17 A. Yeah.
 18 Q. Did anyone ever tell you that Morgan Stanley
 19 had been involved in drafting the press release?
 20 A. Drafting specifically, no, but Tyree
 21 mentioned that they were involved in the conversation
 22 that led up to the issuance of the release.
 23 Q. With regard to the particular wording of the
 24 press release --
 25 A. I have no idea.

Page 218

1 Q. You have no idea what role, if any, Morgan
 2 Stanley played in the drafting of the press release
 3 from any source?
 4 A. Yes.
 5 Q. Yes, you have --
 6 A. I have no idea.
 7 Q. You have no idea, thank you.
 8 When was the first time you saw a hard copy
 9 of the press release? Was it in your hotel room or at
 10 the printer?
 11 A. I think it was in my hotel room.
 12 Q. Were you informed by anyone who had decided
 13 to include the statement about expecting to exceed 1997
 14 first quarter sales in the press release?
 15 MR. MARKOWSKI: Could you read that back for
 16 me, please?
 17 (Thereupon, a portion of the record
 18 was read by the reporter.)
 19 THE WITNESS: No.
 20 BY MR. CLARE:
 21 Q. That was the portion of the press release
 22 that you objected to, correct?
 23 A. For the most part, yes.
 24 Q. And you don't have any understanding as to
 25 who put that clause in the press release?

Page 219

1 A. No.
 2 Q. Mr. Tyree didn't tell you?
 3 A. No.
 4 Q. Or Mr. Gluck or anybody?
 5 A. No.
 6 Q. I want to go back to the discussion that you
 7 had with Mr. Tyree at the print shop. So we're leaving
 8 your hotel room now, and you and Mr. Brockelman go to
 9 Global Financial Press.
 10 You said that there was a meeting that you
 11 had with the individuals present where you discussed
 12 the subscription for the bond offering, the fact that
 13 it was oversubscribed? That was the first thing that
 14 you remember when you arrived at the print shop?
 15 A. Yeah, I was very surprised it was
 16 oversubscribed.
 17 Q. Why were you surprised?
 18 A. Because we just had pretty devastating news
 19 about the results of the company and the stock price
 20 was going down significantly and the bonds were
 21 oversubscribed and they were convertible bonds into
 22 stocks, so I just thought it was ironic at best that it
 23 was, the bonds were oversubscribed.
 24 Q. And did the discussion of the press release
 25 and what should be put in the offering memo about the

Page 220

1 press release come up during that conversation?
 2 A. No.
 3 Q. When did that issue come up? Did it come up
 4 in the course of working through the offering
 5 memorandum in the manner that you described?
 6 A. No, I'd say the first 15 minutes of the
 7 conversation were about the surprise of the size of the
 8 offering, and then the conversation about what happened
 9 the night before and Dunlap yelling and screaming.
 10 The next 15 minutes were based on what was
 11 going to be put in the offering related to the
 12 disclosure of the press release.
 13 Q. Tell me about the conversation with Mr. Tyree
 14 and others about the night before. Tell me everything
 15 you remember about that discussion.
 16 A. Just that there was a lot of yelling and
 17 screaming, and Dunlap would say, "Who the hell do these
 18 guys think they are making us disclose this? We're
 19 going to lose \$100 million. They don't know our
 20 business." Those types of things.
 21 Q. So it was your understanding that Mr. Dunlap
 22 was reluctant to issue the press release?
 23 A. Yes.
 24 Q. It was your understanding that Morgan Stanley
 25 had insisted that Sunbeam issue the press release, is

<p style="text-align: right;">Page 221</p> <p>1 that what Mr. Tyree told you? 2 A. No, nothing about insisting. 3 Q. Or had suggested? 4 A. I have no idea who suggested it. 5 Q. Well, what I'm trying to get at is you 6 referenced a statement by Mr. Dunlap, "Who do these 7 guys think they are, making me lose \$100,000?" 8 A. I think they were talking about Arthur 9 Andersen. 10 Q. So it was your understanding that Mr. Dunlap 11 was upset with Andersen? 12 A. Yes. 13 Q. Now I'm a little confused, because I thought 14 to your knowledge Andersen had not played any role in 15 the decision to issue the press release or the drafting 16 of it. 17 A. No. The decision was that the information 18 needed to be disclosed to Morgan Stanley and the 19 public, or else they weren't getting that comfort 20 letter. 21 Q. Okay. And so you understood Mr. Dunlap to be 22 upset with Andersen for insisting that it be disclosed 23 to Morgan Stanley? 24 A. And the public. 25 Q. And the public?</p>	<p style="text-align: right;">Page 223</p> <p>1 caveat to the \$253 million in sales. 2 BY MR. CLARE: 3 Q. And that's the objection that you raised with 4 Morgan Stanley? 5 A. Yes. 6 Q. You didn't raise any of your other objections 7 about the wording with Morgan Stanley? 8 A. I don't remember specifically. 9 Q. You don't remember doing it? 10 A. I don't think any of it should be in other 11 than really the facts as they were. 12 Q. Which was what? 13 A. They weren't going to make the top number. 14 Q. So you didn't have any objection to that 15 information being disclosed? 16 A. No. 17 Q. You see here on the second page of CPH 18 Exhibit 14 there is a cautionary statement. 19 A. Yes. 20 Q. You're familiar with those cautionary 21 statements? 22 A. Yes. 23 Q. In the press release that you saw on 24 March 19th, the hard copy that you saw included these 25 cautionary statements?</p>
<p style="text-align: right;">Page 222</p> <p>1 A. Yes. 2 Q. And it was your understanding that unless 3 that information was disclosed to the public, that 4 Andersen would withhold its comfort letter? 5 A. Unless reasonable disclosure was made, yes. 6 Q. And that if reasonable disclosure was made, 7 that Andersen would issue its comfort letter? 8 A. That's my understanding, yes. 9 Q. In terms of the discussion about what portion 10 of the press release ought to be included in the 11 offering memorandum, you didn't have any objection to 12 including the statement that Sunbeam might miss the 13 expectation of Wall Street analysts, did you? 14 Did you have any objection to including that 15 portion of the press release in the offering 16 memorandum? 17 A. No. 18 Q. Your only objection was the clause that 19 follows that about net sales being expected to exceed 20 1997 first quarter sale? 21 MR. MARKOWSKI: Object to the form of the 22 question, mischaracterizes what he has said about 23 his views of various other statements in this. 24 MR. MOSCATO: Well, answer the question. 25 THE WITNESS: My main objection was the</p>	<p style="text-align: right;">Page 224</p> <p>1 A. Yes. 2 Q. And these are akin to the cautionary 3 statements that you wanted to be included in the 4 offering memorandum -- 5 A. Yes. 6 Q. -- to accompany the press release disclosure? 7 A. Yes. 8 Q. You didn't have any objection to including 9 those cautionary statements in the offering memorandum? 10 A. No. 11 Q. Did anyone from Morgan Stanley or Davis Polk 12 object to your suggestion that you include cautionary 13 language in the offering memorandum about 14 forward-looking statements or risk factors? 15 A. Not that I'm aware of, no. 16 Q. Do you remember anybody resisting that idea? 17 A. No. 18 Q. You testified that after this initial 19 conversation with Mr. Tyree where you raised these 20 objections, it was Mr. Lurie who said the press release 21 would be going in verbatim? 22 A. Yes. 23 Q. Did Mr. Tyree say anything during that 24 conversation that you remember? 25 A. No, not specifically.</p>

56 (Pages 221 to 224)

Page 225

1 Q. Do you have any recollection of, even without
 2 recalling his specific words, what his position on that
 3 was?
 4 A. No.
 5 Q. Did he ever say he disagreed with you?
 6 A. I don't remember.
 7 Q. You don't remember him saying that?
 8 A. No.
 9 Q. Did you have that impression that he
 10 disagreed with you?
 11 A. Yes.
 12 Q. But you can't recall what it was that he
 13 said?
 14 A. It was his counsel sitting right next to him
 15 that disagreed with me and he didn't differ his
 16 opinion, so --
 17 Q. Did Mr. Lurie explain the reasons for his
 18 statement that the press release would go in verbatim?
 19 A. That those were the company's
 20 representations.
 21 Q. So Mr. Lurie told you that these were
 22 Sunbeam's representations and that they would be
 23 included in Sunbeam's bond offering; is that a fair
 24 summary?
 25 A. Yes.

Page 226

1 Q. Did Mr. Lurie express an independent view of
 2 whether it ought to be included or not?
 3 A. He -- yes, he said he -- yes.
 4 Q. But he was -- let me put it this way. Did
 5 Mr. Lurie communicate to you whether the company
 6 believed the press release ought to be included
 7 verbatim?
 8 A. No.
 9 Q. Did you think Mr. Lurie was the final
 10 decision maker as to what would go in the offering
 11 memorandum?
 12 A. No, I thought it was the company's decision.
 13 Q. So you didn't think it was Mr. Lurie?
 14 A. No.
 15 Q. You didn't think it was anybody from Davis
 16 Polk?
 17 A. Anybody could have said the deal's not going
 18 through if we put this in. I mean it's their decision.
 19 Q. My question is different. My question is who
 20 was the, who was the final decision maker about what
 21 would be included in the Recent Development section of
 22 the offering memorandum?
 23 And I believe your testimony is you believe
 24 that it was the company's decision ultimately.
 25 A. Yeah, I believe so.

Page 227

1 Q. Okay. Did, so you didn't think it was
 2 Mr. Tyree's decision to make ultimately?
 3 A. No.
 4 Q. You testified that there were at least one
 5 and maybe more lawyers from Scadden Arps present for
 6 this discussion, correct?
 7 A. Yes.
 8 Q. And they were there as lawyers to Sunbeam?
 9 A. Yes.
 10 Q. Did they participate in this discussion?
 11 A. I don't specifically remember.
 12 Q. Do you remember any of the lawyers from
 13 Scadden expressing a view as to what ought to be
 14 included in the Recent Development section?
 15 A. No.
 16 Q. Do you remember them agreeing or disagreeing
 17 with the objection that you made?
 18 A. No.
 19 Q. Did you solicit their view?
 20 A. I'm pretty sure that I did. I don't remember
 21 specifically, though.
 22 Q. Do you have an impression about the position
 23 that the Scadden lawyers had on this issue that you
 24 were discussing with Mr. Lurie and Mr. Tyree?
 25 A. I think I was the only one in the room that

Page 228

1 had a difference of opinion about what should be in
 2 there.
 3 Q. So it wasn't just Morgan Stanley and Davis
 4 Polk. Your impression was that Sunbeam's lawyers,
 5 Scadden Arps --
 6 A. Yes.
 7 Q. -- had the same view?
 8 A. Yes.
 9 Q. Is there anything else about that discussion
 10 that we haven't talked about today --
 11 A. No.
 12 Q. -- that you can recall?
 13 A. No.
 14 Q. At that point you left the room and you went
 15 into the pool room?
 16 A. Uh huh.
 17 Q. And you called Mr. Harlow?
 18 A. (Witness nods head up and down.)
 19 Q. Is that a yes?
 20 A. Yes.
 21 Q. I'm sorry, the court reporter has to take
 22 down your verbal answers.
 23 A. Sorry, I'm eating ice.
 24 Q. And Mr. Harlow conferenced in Mr. Gluck?
 25 A. Yes.

Page 229

1 Q. How long did you talk to Mr. Harlow before he
 2 conferenced in Mr. Gluck?
 3 A. Ten minutes probably.
 4 Q. Do you remember anything that you discussed
 5 with Mr. Harlow specifically before you brought in
 6 Mr. Gluck?
 7 A. Other than the fact as we discussed earlier
 8 about my opinion not to put that in.
 9 Q. Mr. Harlow shared your view?
 10 A. Yes.
 11 Q. And why did you conference in Mr. Gluck?
 12 A. To get an understanding of the company's,
 13 what they believed what should be included, as well as
 14 to get more information on the basis for making the
 15 statement.
 16 Q. Because it was the company's decision about
 17 what would be included in the offering memorandum?
 18 A. Yes.
 19 Q. And that was the reason you went to the
 20 company for that?
 21 A. Yes.
 22 Q. Did you and Mr. Harlow attempt to or discuss
 23 conferencing in anybody else from Morgan Stanley?
 24 A. No. They were in the next room. They knew
 25 what I was doing, so they knew who I was speaking with.

Page 230

1 Q. I understand that, but you or Mr. Harlow
 2 didn't suggest to conference in somebody perhaps more
 3 senior from Morgan Stanley to discuss this issue?
 4 A. Never met anybody more senior from Morgan
 5 Stanley so --
 6 Q. That was my next question. Did you know
 7 anybody from Morgan Stanley who was working on the deal
 8 other than Mr. Tyree?
 9 A. And Tyrone Chang, no.
 10 Q. Other than what you testified to this
 11 morning, do you remember anything about the discussion
 12 that you had with Mr. Gluck?
 13 A. No.
 14 Q. And Mr. Harlow?
 15 A. No.
 16 Q. Mr. Harlow told you he was going to follow up
 17 with Mr. Fanin?
 18 A. Yes.
 19 Q. Did he say why he was going to follow up with
 20 Mr. Fanin?
 21 A. To discuss the issue and get support for the
 22 sales estimates.
 23 Q. And Mr. Gluck had not been involved in the
 24 discussion of the sales estimates the night before?
 25 A. I have no idea.

Page 231

1 Q. But you thought Mr. Fanin had --
 2 A. Yes.
 3 Q. -- some additional information on that?
 4 A. Yes.
 5 Q. And was there a consideration or discussion
 6 that the question about what should be included in the
 7 offering memorandum might have legal implications, and
 8 that's why it made sense to bring somebody from
 9 Sunbeam's legal department into the conversation?
 10 A. I don't know what the thought process was, to
 11 be honest with you.
 12 Q. Did that thought occur to you?
 13 A. No, my understanding was he was part of the
 14 discussion in the press release.
 15 Q. But did that thought occur to you that the
 16 question of what ought to be included in the offering
 17 memorandum might have legal implications for Sunbeam
 18 and therefore a Sunbeam lawyer needed to be involved in
 19 the decision making?
 20 A. Yes.
 21 Q. That thought occurred to you that night?
 22 A. As well as other counsel that were there,
 23 yes.
 24 Q. But again, it was the company's decision
 25 about what would be included in the offering

Page 232

1 memorandum?
 2 A. Yes.
 3 Q. And so it would make sense that the company's
 4 lawyers were involved in that decision?
 5 A. Correct.
 6 Q. And in fact, later in the evening it was the
 7 company's lawyers that communicated to you the
 8 company's decision to include the press release
 9 verbatim, correct?
 10 A. Yes.
 11 Q. And that was either Mr. Fanin or Miss Kelly?
 12 A. I believe it was Miss Kelly to Harlow, Harlow
 13 to me.
 14 Q. But it was your understanding that Miss Kelly
 15 was the ultimate decision-maker on including the press
 16 release verbatim?
 17 MR. MARKOWSKI: Objection, lack of
 18 foundation.
 19 THE WITNESS: My belief, it was Fanin's
 20 decision. It was legal counsel, Sunbeam's legal
 21 counsel.
 22 BY MR. CLARE:
 23 Q. Sunbeam's legal counsel?
 24 A. In-house legal counsel.
 25 Q. Just to be clear action, it's your testimony

Page 233

1 that the final decision to include the entire text of
2 the press release verbatim in the press release was
3 made by Sunbeam's in-house legal counsel?
4 A. Yes.
5 MR. MARKOWSKI: Objection to lack of
6 foundation.
7 BY MR. CLARE:
8 Q. But from your perspective, that was true?
9 A. Yes.
10 Q. You returned to the room with Mr. Brockelman
11 and Mr. Tyree and Mr. Lurie and the Scadden lawyers
12 were and you had a side bar conversation with
13 Mr. Brockelman?
14 A. Outside of the room, yes.
15 Q. And Mr. Brockelman told you that Mr. Tyree
16 was making derogatory comments to you?
17 A. Yes.
18 MR. MARKOWSKI: When you say to you --
19 THE WITNESS: Toward me.
20 BY MR. CLARE:
21 Q. Directed towards you while you were outside
22 of the room?
23 A. Yes.
24 Q. Did Mr. Brockelman tell you what he thought
25 Mr. Tyree was upset about?

Page 234

1 A. I think it was the fact that he wasn't aware
2 of the results of the sales for the first two months,
3 where the company was.
4 Q. And it was, was that your sense as well? Did
5 you share that sense that that's what Mr. Tyree was
6 upset about?
7 A. Yes.
8 Q. So Mr. Tyree, in using profanity that was
9 directed towards you outside of your presence and then
10 again to you in your presence, it was your sense that
11 he was upset about not knowing this information sooner?
12 A. Yes.
13 Q. He wasn't using this profanity in an argument
14 with you over your objection to including the text of
15 the press release?
16 A. No.
17 Q. That wasn't the context of Mr. Tyree's
18 profanity?
19 A. Not that I believe.
20 Q. How about raising his voice?
21 A. I don't think so.
22 Q. Did Mr. Tyree ever say to you during that
23 discussion after you had reentered the room that he
24 believed that the press release should be included
25 verbatim in the offering memorandum?

Page 235

1 A. I don't recall specifically him saying that.
2 Q. Do you recall him saying that in substance?
3 A. Yes.
4 Q. After you came back into the room?
5 A. Yes.
6 Q. And did he elaborate on his reasons for that?
7 A. No.
8 Q. Did Mr. Tyree ever indicate to you that it
9 was his decision to make?
10 A. No.
11 Q. Did he ever say to you, "I don't care what
12 you think, Mr. Bornstein, we're putting it in," in
13 words or in substance?
14 A. For the most part, yeah, that was the gist of
15 what was being told to me.
16 Q. And did you tell Mr. Tyree that the issue had
17 been submitted to Sunbeam's legal counsel?
18 A. He was aware of that, yes.
19 Q. Because you told him?
20 A. Yes.
21 Q. You told him that you had spoken with
22 Mr. Fanin?
23 A. I never spoke to Fanin, but someone had, yes.
24 Q. You told Mr. Tyree that Andersen had raised
25 the issue with Mr. Fanin?

Page 236

1 A. Yes.
2 Q. And at that point, what happened with regard
3 to this issue? Did everybody sit and wait for --
4 A. People kept working and it was several hours
5 later that the decision finally came back.
6 Q. So people kept working on other issues
7 related to the offering memorandum?
8 A. Yes.
9 Q. At that point in time when Mr. Tyree had this
10 discussion with you, no decision had been made about
11 what would be included in the offering memorandum?
12 A. Correct.
13 Q. During that same discussion with Mr. Tyree,
14 you indicated that he said, "Are these guys fucking
15 with me? Are they going to make their numbers or not?"
16 Is that correct?
17 A. Yes.
18 Q. Best of your recollection of what he said?
19 A. Yes.
20 Q. Who did you understand Mr. Tyree to be
21 referring to when he said these guys?
22 A. Sunbeam.
23 Q. So he wasn't saying Andersen? He wasn't
24 referring to Andersen?
25 A. No.

Page 237

1 Q. And he wasn't suggesting that you or
2 Mr. Brockelman might be fucking with him about the
3 numbers?
4 A. Correct.
5 Q. He seemed to be directing his anger towards
6 Sunbeam in raising this question?
7 A. Yeah. It was these guys, so it wasn't you.
8 Q. Okay. And you understood him to be referring
9 to Sunbeam?
10 A. Yes.
11 Q. Did you -- what did you understand him to be
12 asking, less colloquially, when he asked you that
13 question?
14 A. If I thought they were going to be able to
15 make these numbers.
16 Q. Did you think it was appropriate for him to
17 ask that question?
18 A. Yes.
19 Q. Did you think it was legitimate for Mr. Tyree
20 and Morgan Stanley to want to know that information?
21 A. Yes.
22 Q. Did he appear sincere to you in wanting to
23 know that information?
24 A. He seemed very upset and nervous about it.
25 Q. Did he appear to you to be concerned that

Page 238

1 Sunbeam's management was fucking with him about their
2 ability to meet the numbers?
3 A. He had a concern, yes.
4 Q. And did you think that, in asking that
5 question, Mr. Tyree was being diligent in wanting to
6 find out that information?
7 MR. MOSCATO: I object to that.
8 BY MR. CLARE:
9 Q. Did you have an impression about that?
10 A. No. I don't think he was being diligent
11 about it.
12 Q. But you thought it was appropriate for him to
13 ask that question?
14 A. Sure.
15 Q. And what did you tell him in response to that
16 question?
17 A. I told him what I said before. I didn't
18 think -- I thought it was a stretch.
19 Q. Did you tell him in words or in substance
20 that Sunbeam was lying to Morgan Stanley about its
21 sales objectives for the quarter?
22 A. No.
23 Q. Did you think that Sunbeam was lying to
24 Morgan Stanley about its sales objectives for the
25 quarter?

Page 239

1 A. I thought it was aggressive.
2 Q. But did you think that Sunbeam's management
3 was lying to Morgan Stanley about its sales objectives?
4 A. No.
5 Q. Did you have any basis to suspect that that
6 was the case?
7 A. No.
8 Q. Did Mr. Tyree discuss with you in any detail
9 the schedule of sales that's been marked at least in
10 form as CPH Exhibit 121?
11 A. No.
12 Q. Did you have any discussions about these
13 numbers beyond you expressing the view that they were
14 aggressive?
15 A. I believe I mentioned that I think they were
16 numbers on a page and they were aggressive at this
17 point in time.
18 Q. Did Mr. Tyree tell you where this document
19 had come from?
20 A. No.
21 Q. Was there any discussion about the fact that
22 Morgan Stanley had spent several hours on the phone the
23 night before going through this document with Sunbeam's
24 management?
25 A. No.

Page 240

1 Q. Was there any discussion about the fact that
2 Mr. Uzzi and several members of Sunbeam's sales team
3 had given a presentation to Morgan Stanley about this
4 document?
5 A. No.
6 Q. Was there any discussion about Sunbeam's
7 confidence in meeting these numbers that are reflected
8 on the buildup, CPH 121?
9 A. Not that I recall.
10 Q. Did Mr. Harlow ever tell you that Mr. Uzzi
11 was very confident about exceeding the first quarter
12 1997 numbers?
13 A. I believe he did toward later in the night.
14 Q. So later in the evening Mr. Harlow reported
15 back to you that as a result of his additional
16 inquiries, he had been informed that Mr. Uzzi was very
17 confident that Sunbeam would exceed its first quarter
18 1990 sales numbers?
19 MR. MARKOWSKI: You said 1990 again.
20 MR. CLARE: Okay. I apologize.
21 THE WITNESS: I believe that the board got
22 back to Phil. I don't know who he spoke to
23 specifically. I don't know, I don't think he
24 spoke to Uzzi directly.
25

Page 241

1 BY MR. CLARE:
 2 Q. Okay. Did you provide any other response to
 3 Mr. Tyree about the sales buildup document except for
 4 what you just testified about to say that it was
 5 aggressive?
 6 MR. MARKOWSKI: Other than what he testified
 7 about this morning?
 8 MR. CLARE: Well, let me ask you that.
 9 BY MR. CLARE:
 10 Q. Did you tell Mr. Tyree that you believed,
 11 having seen this document, that it was even more
 12 aggressive for Sunbeam to be projecting these sales?
 13 A. I don't know about more aggressive, but I, as
 14 I testified to earlier, I said if they are going to
 15 make it, they are going to make it legitimately,
 16 because I'm going to do additional procedures to ensure
 17 that they do.
 18 Q. We're going to get to that part of the
 19 conversation in just a second. I just want to focus on
 20 CPH Exhibit 121 and the sales buildup sheet.
 21 A. Okay.
 22 Q. Let me know when you have that in front of
 23 you.
 24 A. Okay.
 25 Q. You testified a moment ago that you told

Page 242

1 Mr. Tyree that you believed the numbers on CPH
 2 Exhibit 121 were just numbers on a page; is that right?
 3 A. For lack of a better definition, yeah,
 4 because I didn't see support for it.
 5 Q. Okay. But you didn't know, Mr. Tyree didn't
 6 tell you that he had additional support beyond this
 7 document --
 8 A. No.
 9 Q. -- from Sunbeam sales force?
 10 A. No.
 11 Q. I want to get as close as I can to the exact
 12 word that you told Mr. Tyree in response to this
 13 document. Can you tell me what your best recollection
 14 is?
 15 A. I think I've already testified to that.
 16 Q. Okay. Can you tell me again, please.
 17 A. That I thought it was aggressive and a bunch
 18 of numbers on a page.
 19 Q. Now this morning, in response to a question
 20 from Mr. Markowski, you testified to a belief that you
 21 had after seeing this document, that it was even more
 22 aggressive.
 23 And I want to know, did you communicate that
 24 belief to Mr. Tyree that your skepticism about the
 25 numbers escalated after having seen the sales buildup

Page 243

1 that's CPH 121?
 2 A. I don't recall specifically.
 3 Q. Do you recall at all discussing that issue
 4 with Mr. Tyree?
 5 A. That it was escalated above where it was
 6 before? No.
 7 Q. Did you provide Mr. Tyree or any of the Davis
 8 Polk lawyers with any information about any of the
 9 customers that are listed here on CPH Exhibit 121?
 10 A. No.
 11 Q. For example, did you tell Morgan Stanley
 12 anything that you or Arthur Andersen knew about
 13 potential orders at Wal-Mart?
 14 A. No.
 15 Q. Or past sales to that customer?
 16 A. No.
 17 Q. Or ordering patterns?
 18 A. No.
 19 Q. Or trends?
 20 A. No.
 21 Q. Did you have this information in your mind
 22 about any of the customers that are listed here on CPH
 23 Exhibit 121?
 24 A. No.
 25 Q. Did you have any specific information about

Page 244

1 the sales or ordering patterns for these customers that
 2 night on March 19, 1998?
 3 A. No.
 4 MR. MOSCATO: Is it possible to take 30
 5 seconds and hunt up a cup of coffee?
 6 MR. CLARE: Sure, let's go off the record.
 7 THE VIDEOGRAPHER: We are now going off video
 8 record. The time on the monitor, 3:01 p.m.
 9 (Thereupon, a recess was taken.)
 10 THE VIDEOGRAPHER: We are now back on video
 11 record. The time on the monitor is 3:11 p.m.
 12 BY MR. CLARE:
 13 Q. Mr. Bornstein, before the break we were
 14 talking about your discussions with Mr. Tyree at the
 15 print shop on the evening of March 19th.
 16 You testified that you told Mr. Tyree you
 17 were skeptical of Sunbeam's abilities to exceed first
 18 quarter 1997; is that correct?
 19 A. Yes.
 20 Q. Other than the word skeptical, did you use
 21 any other word with Mr. Tyree to describe your views
 22 about the achievability of that sales objective?
 23 A. I might have used the word conservative.
 24 Q. In referring to yourself as a conservative
 25 accountant?

Page 245

1 A. I believe so, yes.
 2 Q. And did you tell Mr. Tyree in words or in
 3 substance that it was impossible for Sunbeam to exceed
 4 its first quarter 1997 sales objective, of exceeding --
 5 let me rephrase.
 6 Did you tell Mr. Tyree in words or in
 7 substance that it would be impossible for Sunbeam in
 8 the first quarter of 1998 to exceed first quarter 1997
 9 sales?
 10 A. I don't believe I used the word impossible.
 11 I think I used the words logistically difficult.
 12 Q. Okay. So we have skeptical and logistically
 13 difficult.
 14 A. I think those are the words I used.
 15 Q. Are there any other words that you used in
 16 talking to Mr. Tyree to describe your view of the
 17 achievability of that sales objective?
 18 MR. MARKOWSKI: He already -- are you
 19 excluding what he already testified to this
 20 morning? Just to get him to repeat it as a memory
 21 test? Because he testified on this.
 22 BY MR. CLARE:
 23 Q. No, I'm asking you whether you remember using
 24 any other exact words. I'm asking you for exact words.
 25 A. I don't remember the exact words, to be

Page 246

1 honest with you, so many years.
 2 (Thereupon, a cellphone rang.)
 3 MR. CLARE: Let's go off the record.
 4 THE VIDEOGRAPHER: We are now going off the
 5 video record. The time on the monitor is
 6 3:12 p.m.
 7 (Discussion held off the record.)
 8 THE VIDEOGRAPHER: We are now back on video
 9 record. The time on the monitor, 3:18 p.m.
 10 BY MR. CLARE:
 11 Q. Mr. Bornstein, before the break I was asking
 12 you to the best of your ability to tell me the exact
 13 words that you used with Mr. Tyree and Mr. Lurie in
 14 describing your views on the achievability of Sunbeam's
 15 objective to exceed first quarter 1997 sales.
 16 And can you testify beyond what you've
 17 already told me that you used the word skeptical and
 18 logistically difficult to describe your exact words?
 19 A. Healthy skepticism. I did the math for them,
 20 and I think I testified to everything else I've said.
 21 Q. As you sit here today, other than just do the
 22 math, skepticism or healthy skepticism and logistically
 23 difficult, do you remember any of the exact words that
 24 you used with Mr. Tyree or with Mr. Lurie?
 25 A. No.

Page 247

1 Q. Now when you said you did the math for them,
 2 that was basis for your skepticism; is that correct,
 3 the gap that existed at that point in time between
 4 sales to date and the number of days left in the
 5 quarter? Is that the math that you're referring to?
 6 A. Yes.
 7 Q. And you went through that with Mr. Tyree and
 8 Mr. Lurie?
 9 A. Yes.
 10 Q. Other than that calculation that you did, let
 11 me ask you this. Did you actually physically do it out
 12 on paper with Mr. Lurie and Mr. Tyree?
 13 A. No. I did it in my head.
 14 Q. And that's your testimony where you said they
 15 would have to ship between 10 and \$15 million a day for
 16 the rest of the quarter?
 17 A. Correct.
 18 Q. And that was the basis for your statements to
 19 Mr. Tyree and Mr. Lurie about your skepticism?
 20 A. That, and I've been to every location
 21 throughout the country and thought it would be
 22 difficult to ship that much product --
 23 Q. Okay.
 24 A. -- so quickly.
 25 Q. Was it based on anything else besides that?

Page 248

1 A. No.
 2 Q. Had you done any study or analysis of sales
 3 trends at Sunbeam?
 4 MR. MOSCATO: You mean like a formal study or
 5 analysis or any kind of understanding?
 6 MR. CLARE: Any kind of understanding.
 7 THE WITNESS: Yes.
 8 BY MR. CLARE:
 9 Q. And what had you done?
 10 A. Just looked at quarterly results and looked
 11 at sales by month.
 12 Q. Did you have an understanding that there was
 13 a history at Sunbeam of sales being back-ended at the
 14 end of the quarter?
 15 MR. MARKOWSKI: Object to the form of the
 16 question.
 17 THE WITNESS: There was a recent history,
 18 yes.
 19 BY MR. CLARE:
 20 Q. An uptake of sales in the last few days or
 21 weeks of a quarter?
 22 A. Yes.
 23 Q. And you knew that on March 19th?
 24 A. Yes.
 25 Q. Was your skepticism based on anything you

Page 249

1 knew about a particular customer of Sunbeam's?
 2 A. No.
 3 Q. You didn't have any additional information
 4 about a customer?
 5 A. No.
 6 Q. Did you know anything, did you have any
 7 additional information about the likelihood of the
 8 sales coming in based on a particular customer or
 9 conversation that you had had with a customer?
 10 A. No.
 11 Q. Or with a member of Sunbeam's sales staff?
 12 A. No.
 13 Q. You testified that you told Mr. Tyree and
 14 Mr. Lurie and, in the Scadden lawyer's presence, that
 15 you were going to be conducting some additional
 16 procedures at the end of the quarter, correct?
 17 A. Yes.
 18 Q. And I believe you said that your statement
 19 was something to the effect that if they are going to
 20 make their revenue number, they are going to make it,
 21 because I'm going to be sending people out to every
 22 shipping dock all over the country at midnight at the
 23 end of the quarter, correct?
 24 A. Yes.
 25 Q. Those were the additional procedures that you

Page 250

1 were describing?
 2 A. Yes.
 3 Q. And those are the procedures that you
 4 discussed with Mr. Markowski this morning?
 5 A. Yes.
 6 Q. What was your intent of telling that to
 7 Morgan Stanley? Why did you tell Morgan Stanley you
 8 were going to be doing that?
 9 A. Because I was skeptical that they were going
 10 to be able to make the numbers.
 11 Q. And you wanted to take additional steps to
 12 make sure that the first quarter 1998 sales numbers
 13 that Sunbeam reported were right; is that correct?
 14 A. Yes.
 15 Q. And that was due in part to the pressure that
 16 you believed management was putting on the sales staff
 17 to get product out the door?
 18 A. Yes, for the most part, my decision to do
 19 that was made at that point in time because of the way
 20 I was being treated by the people in the room and my
 21 conservatism and wanting to make sure that it was
 22 actually going to be achieved.
 23 Q. Because you wanted the numbers that Sunbeam
 24 reported at the end of the quarter to be right?
 25 A. Yes.

Page 251

1 Q. And you meant it when you said it, right?
 2 A. I meant it.
 3 Q. And you actually followed through on it?
 4 A. Yes.
 5 Q. And did anybody from Morgan Stanley or Davis
 6 Polk object to Andersen conducting those additional
 7 procedures?
 8 A. Not that I'm aware of, no.
 9 Q. Well, did they say anything to you in
 10 response to your statement that you intended to carry
 11 out those additional procedures?
 12 A. No, they didn't say a word.
 13 Q. But they didn't object?
 14 A. No.
 15 Q. Do you think it would be fair for the people
 16 in the room to believe that you were serious about
 17 wanting to carry through on that statement?
 18 A. I have no idea what they wanted to believe or
 19 not.
 20 Q. But you said it in a serious way, you weren't
 21 joking around?
 22 A. Right.
 23 Q. Did you, in doing the math with Mr. Tyree and
 24 Mr. Lurie, did you ever indicate a particular number
 25 that you believed could be shipped on a per-day basis

Page 252

1 through the end of the quarter by Sunbeam?
 2 A. No.
 3 Q. And did you have a particular number in your
 4 mind about how much could be shipped by Sunbeam on a
 5 per-day basis through the end of the first quarter?
 6 A. No.
 7 Q. So you didn't say that for the Neosho
 8 facility?
 9 A. I don't remember specifically talking about
 10 any specific facility other than I visited, I think I
 11 specifically listed off the names of the locations I
 12 had visited.
 13 Q. Well, that's why I'm asking you the question,
 14 because you testified you told Morgan Stanley that you
 15 had been to Neosho.
 16 A. Yes.
 17 Q. Did you ever tell Morgan Stanley that the
 18 Neosho facility can only ship x dollars' worth of
 19 product per day?
 20 A. No. Specifically, no.
 21 Q. Generally?
 22 A. No.
 23 Q. How about the Hattiesburg facility?
 24 A. No.
 25 Q. Did you ever tell anyone from Morgan Stanley

Page 253

1 that you believed that only x dollars' worth of product
 2 could be shipped from the Hattiesburg facility on a
 3 per-day basis?
 4 A. No.
 5 Q. You testified that you said that night at the
 6 printer that "I hope to God they do make their sales
 7 numbers; otherwise, you're all going to get sued."
 8 A. Yes.
 9 Q. Do you recall that testimony?
 10 A. Yes.
 11 Q. That statement is not documented in your
 12 March 31st, 1998, memo.
 13 A. Correct.
 14 Q. And you previously testified that this was an
 15 off-the-cuff comment that you had made.
 16 A. Yes.
 17 Q. Do you think the people in the room
 18 understood it that way in the context of the discussion
 19 that you had?
 20 A. I have no idea.
 21 Q. Is that the way you intended it to be taken,
 22 was as an off-the-cuff comment?
 23 A. Yes.
 24 Q. Did you really think that everybody was going
 25 to get sued?

Page 254

1 A. Possibility if the numbers didn't come in,
 2 yeah.
 3 Q. And did you tell anyone at Andersen of your
 4 belief that everybody was going to get sued if the
 5 numbers didn't come in?
 6 Did you discuss that with anyone internally
 7 at Andersen?
 8 A. Not before making that comment, no.
 9 Q. How about afterwards?
 10 A. I don't recall specifically.
 11 Q. You didn't tell Mr. Harlow that?
 12 A. I'm sure at some point in time I did, that I
 13 made the comment, but I don't remember specifically.
 14 Q. At that point in time, March 19, 1998, did
 15 you think it was necessary to delay the bond offering
 16 as a result of Sunbeam's sales performance to date in
 17 the first quarter of 1998?
 18 A. In March?
 19 Q. Uh huh.
 20 A. What part of March?
 21 Q. On March 19th, that night at the print shop.
 22 A. No, I didn't know it was a decision that I
 23 needed to make, to be honest with you.
 24 Q. Did you, did that thought ever occur to you
 25 that the bond offering should be delayed as a result of

Page 255

1 the slower sales performance through that point in the
 2 quarter?
 3 A. I was surprised that the bond offering was
 4 going forward that night, and I made that perfectly
 5 clear to people.
 6 Q. How did you make that perfectly clear?
 7 A. Just surprised how, that the bond offering
 8 was continuing to go on and that the amount was much
 9 higher given the recent developments.
 10 Q. Okay. But I want to be clear.
 11 You said you were surprised that the bond
 12 offering was going forward because of the announcement
 13 that had been made that day.
 14 A. Yes.
 15 Q. And it was bad news that was announced,
 16 correct?
 17 A. Yes.
 18 Q. It was an early warning to the markets about
 19 Sunbeam's financial performance?
 20 A. Yes.
 21 Q. And you were surprised that the pricing and
 22 the subscription of the bonds had gone as well as it
 23 did in light of that news?
 24 A. Yes.
 25 Q. Were you surprised that Sunbeam was

Page 256

1 continuing to go forward with the bond offering?
 2 That's a separate question.
 3 A. Not surprised that Sunbeam was, no.
 4 Q. Were you surprised that Sunbeam decided to
 5 continue, given the fact that it had a fully subscribed
 6 bond offering?
 7 A. No, I was surprised that Morgan Stanley was
 8 continuing with it, not Sunbeam.
 9 Q. Did you tell Morgan Stanley that you were
 10 surprised they were continuing with it?
 11 A. Yes.
 12 Q. What did you say?
 13 A. That I was surprised that things were
 14 proceeding the way they were, given what was going on.
 15 Q. Okay. Tell me exactly what you told Morgan
 16 Stanley in that regard.
 17 MR. MOSCATO: If you remember the exact
 18 words, use the exact words. If you remember in
 19 substance, just give the substance.
 20 THE WITNESS: That was in the first 15
 21 minutes of the conversation, we talked about the
 22 oversubscriptions of the bonds and what happened
 23 that night. I don't know the exact words.
 24 BY MR. CLARE:
 25 Q. But I want to be clear. Your testimony is

<p style="text-align: right;">Page 257</p> <p>1 that you told Morgan Stanley that the bond offering 2 should be cancelled or delayed in light of the Sunbeam 3 sales situation? 4 A. No. 5 MR. MOSCATO: I object. 6 THE WITNESS: I said I was surprised that it 7 was continuing to go on. I never said it should 8 be cancelled or delayed. 9 BY MR. CLARE: 10 Q. Did you think it should be cancelled or 11 delayed? 12 MR. MOSCATO: I thought he answered that a 13 couple of minutes ago. I mean you keep getting 14 yourself in this because you ask the same question 15 five times. 16 Larry, answer the question again, please. 17 I would really ask you for your sake, if 18 nothing else, not to keep covering the same 19 territory again and again. It's not helpful. 20 BY MR. CLARE: 21 Q. Well, I'm entitled to understand the surprise 22 that you expressed. And I understand and I'm not, have 23 no intention to ask you more questions about your 24 surprise that the bond offering was oversubscribed, 25 okay? We've covered that.</p>	<p style="text-align: right;">Page 259</p> <p>1 have an opinion other than being surprised. 2 Q. And as you sit here today, you don't have an 3 opinion one way or the other about whether Morgan 4 Stanley should have delayed or cancelled the bond 5 offering? 6 A. As I sit here today, my opinion is they 7 should have, yes. 8 Q. With the benefit of hindsight. 9 A. Yes. 10 Q. As you sat there in the conference room on 11 March 19, 1998, did you have an opinion as to whether 12 Morgan Stanley should have cancelled or delayed the 13 bond offering? 14 A. No. 15 Q. That opinion was formed after Sunbeam 16 imploded? 17 A. Yes. That's a good way to put it. 18 Q. Do you need to attend to your -- 19 A. No, I'm okay. I'll do it on the next break. 20 Q. You testified that you received a telephone 21 call later that evening from somebody informing you 22 that a decision had been made to include the press 23 release verbatim in the offering memorandum? 24 A. Yes. 25 Q. Up until that point in time, the group was</p>
<p style="text-align: right;">Page 258</p> <p>1 A. Okay. 2 Q. And I understand that you were surprised that 3 the bonds had been priced the way they were, right? 4 A. Right. 5 Q. And you were surprised that the bond offering 6 had been oversubscribed. 7 A. Yes. 8 Q. Were you surprised that Morgan Stanley had 9 decided to go forward with the bond offering apart from 10 those two points? 11 A. Yes. 12 Q. Why were you surprised? 13 A. Just was, given that the stock price went 14 down and the recent announcement of the information of 15 the sales of not meeting their original forecast. 16 Q. So what did you think Morgan Stanley should 17 have done? 18 MR. MOSCATO: Objection. Did you have a 19 feeling as to what Morgan Stanley should do or 20 were you just surprised? 21 THE WITNESS: I was just surprised. 22 BY MR. CLARE: 23 Q. Did you have a feeling what Morgan Stanley 24 should have done? 25 A. No, I've never sold bonds myself, so I didn't</p>	<p style="text-align: right;">Page 260</p> <p>1 working on other aspects of the offering memo. 2 A. Yes. 3 Q. You received a telephone call? 4 A. Yes. 5 Q. And then you came back into the room? 6 A. I don't remember if I left the room or not. 7 Q. And did you inform those present that the 8 decision had been made? 9 A. Yes. 10 Q. And what did you say? 11 A. That the decision has been made to use the 12 press release verbatim. 13 Q. And did you inform those present who had made 14 that decision? 15 A. Yes. 16 Q. And what did you say? 17 A. That it was made by Janet Kelly. I have 18 no -- don't remember if they corroborated that or not 19 directly with them. 20 Q. Was there any other discussion beyond your 21 informing the room about Miss Kelly's decision? 22 A. Other than to make sure that the 23 forward-looking statement information was cross 24 referenced. 25 Q. And do you know who physically accomplished</p>

<p style="text-align: right;">Page 261</p> <p>1 that?</p> <p>2 In other words, who put in the</p> <p>3 forward-looking statement cross referencing that you</p> <p>4 had asked to be included?</p> <p>5 A. I think I pulled the information and gave it</p> <p>6 to, I think Todd Freed was the guy that was taking</p> <p>7 control of what was getting put into the printer and</p> <p>8 taken out.</p> <p>9 Q. Mr. Freed was an attorney at Scadden?</p> <p>10 A. Yes.</p> <p>11 Q. Later in the morning you signed and delivered</p> <p>12 a comfort letter to Morgan Stanley?</p> <p>13 A. Yes.</p> <p>14 Q. Did you disagree with the decision of</p> <p>15 Andersen to issue a comfort letter in connection with</p> <p>16 the bond offering?</p> <p>17 A. No.</p> <p>18 Q. Did you disagree with the decision that was</p> <p>19 made by Miss Kelly to include the press release</p> <p>20 verbatim in the offering memorandum?</p> <p>21 A. I think I've already said that I disagreed</p> <p>22 that it shouldn't have been in there.</p> <p>23 Q. Was it your understanding that your</p> <p>24 objections to that conclusion had been overruled by the</p> <p>25 company?</p>	<p style="text-align: right;">Page 263</p> <p>1 bond offering to go forward.</p> <p>2 MR. MOSCATO: I don't think there is anything</p> <p>3 in the record that the bond offering, that that</p> <p>4 somehow was a prerequisite to the bond offering</p> <p>5 going forward.</p> <p>6 BY MR. CLARE:</p> <p>7 Q. Did you understand that Morgan Stanley had</p> <p>8 requested a comfort letter from Andersen in connection</p> <p>9 with the bond offering?</p> <p>10 A. Yes.</p> <p>11 Q. Did you understand that the offering</p> <p>12 memorandum would include Sunbeam's audited financials?</p> <p>13 A. Yes.</p> <p>14 Q. Did you understand that that bond offering</p> <p>15 memorandum would be registered at some later point in</p> <p>16 time?</p> <p>17 A. Portions of it would have.</p> <p>18 Q. Including the portions that included the</p> <p>19 audited financials?</p> <p>20 A. The audited financials would definitely be</p> <p>21 included. I'm not sure about the rest of it.</p> <p>22 Q. And you knew that evening on, at the print</p> <p>23 shop that Andersen would have to issue its consent to</p> <p>24 allow those audited financials to be included in that</p> <p>25 registered memorandum, correct?</p>
<p style="text-align: right;">Page 262</p> <p>1 A. Yes.</p> <p>2 Q. And is that why you were comfortable in</p> <p>3 issuing the press release, that your objections had</p> <p>4 been considered and then rejected by the company?</p> <p>5 MR. MOSCATO: I'm sorry, in issuing the press</p> <p>6 release?</p> <p>7 MR. CLARE: In issuing the comfort letter.</p> <p>8 MR. MOSCATO: Why don't you start again?</p> <p>9 BY MR. CLARE:</p> <p>10 Q. Is that the reason why you were comfortable</p> <p>11 in issuing the comfort letter, because your objections</p> <p>12 had been considered by the company and overruled?</p> <p>13 MR. MOSCATO: I don't understand the</p> <p>14 question.</p> <p>15 BY MR. CLARE:</p> <p>16 Q. Here's what I'm getting at.</p> <p>17 You disagreed with the conclusion of the</p> <p>18 press release in the offering memorandum. We've</p> <p>19 covered that.</p> <p>20 A. Yeah.</p> <p>21 Q. But you signed and delivered a comfort letter</p> <p>22 to Morgan Stanley on behalf of Arthur Andersen that</p> <p>23 allowed the bond offering to go forward.</p> <p>24 MR. MOSCATO: I object to that.</p> <p>25 THE WITNESS: I don't know if it allowed the</p>	<p style="text-align: right;">Page 264</p> <p>1 A. Yes.</p> <p>2 Q. So did you believe that Andersen should have</p> <p>3 withheld its consent for the offering memorandum to be</p> <p>4 finalized with the audited financials that night at the</p> <p>5 print shop?</p> <p>6 MR. MOSCATO: Objection, he didn't give his</p> <p>7 consent to this offering memorandum. They just</p> <p>8 didn't. So I object. No foundation to your</p> <p>9 question.</p> <p>10 BY MR. CLARE:</p> <p>11 Q. You didn't have an objection to giving the</p> <p>12 comfort letter to Morgan Stanley that evening?</p> <p>13 A. No.</p> <p>14 Q. And you knew when you delivered the comfort</p> <p>15 letter to Morgan Stanley that Andersen audited</p> <p>16 financial statements would be included in that offering</p> <p>17 memo?</p> <p>18 A. Yes.</p> <p>19 Q. And you knew that Andersen's name was going</p> <p>20 to be used in the offering memorandum as Sunbeam's</p> <p>21 auditor?</p> <p>22 A. Yes.</p> <p>23 Q. And you had looked at those pages that night</p> <p>24 at the print shop?</p> <p>25 A. The audited financials?</p>

66 (Pages 261 to 264)

Page 265

1 Q. Yes.
 2 A. Yes.
 3 Q. And in fact, you read through the offering
 4 memorandum and made cross preferences, you had been
 5 working on that for the last couple of days leading up
 6 to that, correct?
 7 A. Correct, but you're not opining on the
 8 information on the front of the document.
 9 Q. But again, you knew that Andersen's name was
 10 in the offering memorandum?
 11 A. Yes.
 12 Q. And you knew that that document was going to
 13 be provided to the debenture investors?
 14 A. Yes.
 15 Q. And you knew that at some later point in time
 16 portions of that offering memorandum would be
 17 registered?
 18 A. Yes.
 19 Q. In fact, you worked on the registration
 20 process in June, didn't you?
 21 A. Yes.
 22 Q. And you knew that as part of the registration
 23 process, Andersen would have to issue a consent?
 24 A. Yes.
 25 THE WITNESS: I need to get this faxed.

Page 266

1 MR. CLARE: Go off the video record.
 2 THE VIDEOGRAPHER: We are now going off the
 3 video record. The time on the monitor is
 4 3:39 p.m.
 5 (Discussion held off the record.)
 6 THE VIDEOGRAPHER: We are now back on video
 7 record. The time on the monitor, 3:42 p.m.
 8 BY MR. CLARE:
 9 Q. Mr. Bornstein, after the last conversation
 10 that we discussed, the one where you informed the
 11 participants in the room that night that a decision had
 12 been made about the Recent Development section, did you
 13 work amicably with Mr. Tyree for the rest of the
 14 evening?
 15 A. For the most part, yeah.
 16 Q. There were no other issues, no other issues
 17 that you can recall as you sit here today that came up
 18 that night?
 19 A. Three o'clock in the morning, they wanted to
 20 change the way that we put our debits and credits in
 21 the pro formas, and I said no. That was the only other
 22 issue I know that came up. It just never would have,
 23 you know, just never would have gotten done.
 24 Q. Other than that, is there anything else that
 25 you remember?

Page 267

1 A. No.
 2 Q. When you left the print shop that night, did
 3 you take with you a copy of the document CPH
 4 Exhibit 121 in that form, the buildup that was provided
 5 to you?
 6 A. I believe so, yes.
 7 Q. And what, if anything, did you do with it
 8 after leaving the print shop?
 9 A. I don't remember specifically what I did with
 10 it.
 11 Q. Generally.
 12 A. Put it in a file.
 13 Q. Did you discuss it with anybody at Sunbeam?
 14 A. I don't remember.
 15 Q. Did you perform any additional procedures or
 16 testing on this document, CPH Exhibit 121?
 17 A. No, not that I'm aware of.
 18 Q. Putting aside the document, did you have any
 19 discussions with anybody from Sunbeam after you left
 20 the print shop about Sunbeam's first quarter 1998
 21 sales?
 22 MR. MARKOWSKI: Ever?
 23 MR. CLARE: Between March 19th or 20th, 1998,
 24 and the end of the quarter.
 25 THE WITNESS: Yeah.

Page 268

1 BY MR. CLARE:
 2 Q. Who did you talk to?
 3 A. Bob Gluck. I don't remember if it was before
 4 or after the end of the quarter, but before anything
 5 was released, Al LaFever, Lee Griffith, Russ Kersh. I
 6 believe counsel from Scadden Arps on the Coleman issue,
 7 extra two days of sales before the end of the quarter,
 8 a few people.
 9 Q. Specifically in any of those conversations
 10 did you discuss your skepticism that Sunbeam would
 11 exceed its first quarter 1997 sales in the first
 12 quarter of 1998?
 13 MR. MARKOWSKI: Can you read back the prior
 14 question and answer please for me? Sorry.
 15 (Thereupon, a portion of the record
 16 was read by the reporter.)
 17 MR. MARKOWSKI: Now your question was about
 18 Sunbeam. Mr. Bornstein gave you an answer that
 19 included people other than Sunbeam.
 20 Your follow-up question concerns what now,
 21 Tom? Sunbeam conversations?
 22 MR. CLARE: Yes. My follow-up question is
 23 any conversations between March 19th and the end
 24 of the first quarter with anyone from Sunbeam
 25 about Sunbeam's ability to exceed first quarter

<p style="text-align: right;">Page 269</p> <p>1 1997 sales.</p> <p>2 THE WITNESS: Not specifically that I can</p> <p>3 recall between that period of time.</p> <p>4 The Coleman stuff we talked about. The sales</p> <p>5 were probably after March 31st.</p> <p>6 BY MR. CLARE:</p> <p>7 Q. You are aware that Andersen issued a</p> <p>8 bring-down letter to Morgan Stanley, and the date of</p> <p>9 that was March 25th, 1998, correct?</p> <p>10 A. Yes.</p> <p>11 Q. And you looked at that. At any point between</p> <p>12 the March 19, 1998, comfort letter and the March 25th,</p> <p>13 1998 comfort letter, did you receive from any source</p> <p>14 information about Sunbeam's progress in making sales?</p> <p>15 A. I don't remember.</p> <p>16 Q. Do you remember receiving any?</p> <p>17 A. I don't remember.</p> <p>18 Q. And then I'll ask the same question between</p> <p>19 the time of the bring-down comfort letter and the end</p> <p>20 of the quarter, do you remember receiving any</p> <p>21 information about Sunbeam's progress and making sales</p> <p>22 in the first quarter?</p> <p>23 A. No, not specifically.</p> <p>24 Q. Generally?</p> <p>25 A. I don't remember.</p>	<p style="text-align: right;">Page 271</p> <p>1 any discussions with anyone from Sunbeam before the end</p> <p>2 of the quarter about the pace at which orders were</p> <p>3 coming in?</p> <p>4 A. Not that I'm aware of, no.</p> <p>5 Q. Or that shipments were being made?</p> <p>6 A. Not that I'm aware of, no.</p> <p>7 Q. So the next information that you had about</p> <p>8 that was not until after the end of the quarter and</p> <p>9 after the additional procedures were done by either of</p> <p>10 your colleagues to do the sales cutoff testing; is that</p> <p>11 right?</p> <p>12 A. Sorry, can you repeat that? Losing my train</p> <p>13 of thought here.</p> <p>14 (Thereupon, a portion of the record</p> <p>15 was read by the reporter.)</p> <p>16 MR. MOSCATO: What do you mean by that? What</p> <p>17 is that?</p> <p>18 MR. CLARE: About Sunbeam, about the amount</p> <p>19 of product that was being shipped by Sunbeam.</p> <p>20 MR. MARKOWSKI: Tom, why don't you ask at</p> <p>21 this point a cohesive question so it's clear in</p> <p>22 the record what you're asking.</p> <p>23 MR. CLARE: Sure.</p> <p>24 BY MR. CLARE:</p> <p>25 Q. At any point after -- let me put it this way.</p>
<p style="text-align: right;">Page 270</p> <p>1 Q. During that time period, again, before the</p> <p>2 end of the first quarter, in any of your conversations</p> <p>3 with Sunbeam, did you ever have them in words or in</p> <p>4 substance what was the basis for their expectation that</p> <p>5 was expressed in the press release about exceeding</p> <p>6 first quarter 1997 sales?</p> <p>7 A. This was basically it at the time.</p> <p>8 Q. That was your understanding as to what it</p> <p>9 was?</p> <p>10 A. Yes.</p> <p>11 Q. Did you ask anybody from Sunbeam about that</p> <p>12 document, the document you just indicated, CPH</p> <p>13 Exhibit 121?</p> <p>14 A. Specifically, no, but specifically about</p> <p>15 sales I know between -- you know, you asked</p> <p>16 specifically, but generally, you know, we were informed</p> <p>17 after this they were going to continue to do both bill</p> <p>18 and hold. So there was conversation about that and</p> <p>19 procedures that needed to be done to ensure that that</p> <p>20 was in accordance with the rules, and confirmations</p> <p>21 were going to be signed off, et cetera.</p> <p>22 Q. And that the bill and hold sales that Sunbeam</p> <p>23 did would be accounted for properly?</p> <p>24 A. Correct.</p> <p>25 Q. But putting aside that question for a moment,</p>	<p style="text-align: right;">Page 272</p> <p>1 At any point before the end of the first</p> <p>2 quarter, did you have any other information besides</p> <p>3 what is reflected here on CPH Exhibit 121 about actual</p> <p>4 or potential sales by Sunbeam in the first quarter?</p> <p>5 A. I think we got information on the bill and</p> <p>6 hold sales that were going to take place prior to the</p> <p>7 end of the quarter.</p> <p>8 Q. But other than the bill and hold sales, did</p> <p>9 you have any other information?</p> <p>10 A. Not that I'm aware of.</p> <p>11 Q. And when did you first learn that Sunbeam had</p> <p>12 not in fact exceeded its first quarter 1997 sales in</p> <p>13 the first quarter of 1998?</p> <p>14 A. Wasn't there a second press release that was</p> <p>15 sent out? Does anyone have a copy of that?</p> <p>16 Q. Yes, I can show it to you, but was that the</p> <p>17 first time you were informed?</p> <p>18 A. I think it was and I believe that -- I don't</p> <p>19 believe that that press release was shown to Arthur</p> <p>20 Andersen either, to be honest with you, so I think that</p> <p>21 was the time that the company decided that they weren't</p> <p>22 going to -- I don't know what they said.</p> <p>23 MR. MOSCATO: So in answer to his question,</p> <p>24 the April 3rd press release is the first time you</p> <p>25 learned that Sunbeam in fact was not going to</p>

Page 273

1 exceed in first quarter 1998 its first quarter
 2 1997 sales figures?
 3 THE WITNESS: Yes.
 4 MR. CLARE: Let's mark that press release.
 5 (MS Exhibit No. 58 was marked for
 6 identification.)
 7 BY MR. CLARE:
 8 Q. Mr. Bornstein, I'm showing you what's been
 9 marked as Exhibit 58. It's a multi-page document. I
 10 recognize the first page is a fax cover sheet that you
 11 probably have never seen before.
 12 A. No. Can I read it, though?
 13 Q. Sure.
 14 A. I don't want to really read this whole thing,
 15 to be honest with you.
 16 MR. MOSCATO: Just answer the question.
 17 THE WITNESS: What was the question?
 18 MR. MOSCATO: Quickly and succinctly, please.
 19 MR. CLARE: Well, I do want a complete answer
 20 to my questions.
 21 MR. MOSCATO: Well, succinctly does imply
 22 completeness.
 23 BY MR. CLARE:
 24 Q. Mr. Bornstein, I've handed you what's been
 25 marked as Morgan Stanley Exhibit 58. It's a fax cover

Page 274

1 sheet. Attached to it is an April 3rd, 1997 press
 2 release by Sunbeam. Have you seen that?
 3 A. Yes.
 4 Q. Have you ever seen this entire document
 5 before; in other words, with the cover sheet on it?
 6 A. No.
 7 Q. But you have seen the press release that's
 8 attached to it before?
 9 A. I don't -- I remember -- I don't remember
 10 seeing the press release. I remember hearing or
 11 reading the first paragraph about it.
 12 Q. What was your reaction to hearing that news?
 13 A. That these guys were all a bunch of fucking
 14 morons. How's that?
 15 Q. Which guys are you referring to?
 16 A. Mostly the people from Sunbeam and their
 17 attorneys.
 18 Q. Because they had issued the prior press
 19 release?
 20 A. Right, and they did, they had the same
 21 moronic caveat again that we're not going to make this
 22 number, but they are still going to make this number.
 23 Q. Was it your understanding that -- withdrawn.
 24 The April 3rd press release reports that
 25 Sunbeam sales expected to be approximately 5 percent

Page 275

1 below first quarter of '97. Do you see that?
 2 A. Yes.
 3 Q. Did you think, did you have a reaction to
 4 that figure?
 5 A. Yeah. I, I wasn't sure at that point in time
 6 if that was accurate or not.
 7 Q. The five percent figure?
 8 A. Yes.
 9 Q. Why not?
 10 A. Because they hadn't closed their books for
 11 March yet.
 12 Q. Okay. Did you have a reaction as to whether
 13 or not you thought that Sunbeam would even be able to
 14 get that close to '97 numbers, given where they were on
 15 March 19th when you had these discussions with
 16 Mr. Tyree?
 17 A. At what point in time? In April?
 18 Q. Yes.
 19 A. I didn't know, I didn't -- it was the same
 20 rationale and thought process. I wasn't sure until --
 21 I wasn't sure whether or not they would or would not.
 22 Work was still being done.
 23 Q. Did you ever get any information as to how
 24 close Sunbeam had come at the end of the first quarter
 25 to achieving first quarter 1997 sales?

Page 276

1 A. At what point in time?
 2 Q. In April of '97.
 3 A. Eventually I did, yes.
 4 Q. And do you recall in order of magnitude what
 5 percentage they were close to reaching first quarter
 6 '97 sales?
 7 A. At that point in time, no.
 8 Q. Mr. Bornstein, I'm handing you what we
 9 previously marked yesterday as Morgan Stanley
 10 Exhibit 42 and ask that you take a look at it.
 11 Do you recognize this document?
 12 A. No.
 13 Q. Do you recognize this form of document?
 14 A. No.
 15 Q. Is the signature on the third page over
 16 engagement partner or manager, is that your signature?
 17 A. Yes.
 18 Q. So you don't recognize this document at all
 19 or this form of document, what it was used for at
 20 Andersen? That's going to be my question.
 21 A. No, I believe it's a document that you sign
 22 after you had a document referenced. Any document
 23 where it was issued by Andersen that was needed to be
 24 referenced by an independent person to make sure that
 25 the form of the letter is in accordance with the rules

<p style="text-align: right;">Page 277</p> <p>1 and the numbers tie back, et cetera.</p> <p>2 Q. And does this document, Morgan Stanley 42,</p> <p>3 appear to be the form for the documentation of those</p> <p>4 procedures for the comfort letter dated March 19, 1998?</p> <p>5 A. Appears that way, yes.</p> <p>6 Q. Do you recall that comfort letter being</p> <p>7 referenced in the manner that you described?</p> <p>8 A. I don't remember specifically, no.</p> <p>9 Q. Do you know who the person is whose initials</p> <p>10 appear on pages two and apparently performed these</p> <p>11 procedures?</p> <p>12 A. Yes.</p> <p>13 Q. Who is that?</p> <p>14 A. Her name was Patricia Rich.</p> <p>15 Q. And did you work with Miss Rich on the</p> <p>16 March 19th, '98 comfort letter?</p> <p>17 A. She referenced it. I don't remember</p> <p>18 specifically working with her on it.</p> <p>19 Q. And when you say she referenced it, can you</p> <p>20 describe for those not familiar with that procedure</p> <p>21 what that means?</p> <p>22 A. You would read the document, make sure it's</p> <p>23 in accordance with the specific language that's</p> <p>24 required by -- I don't know what rules they are</p> <p>25 anymore, to be honest with you, and then to make sure</p>	<p style="text-align: right;">Page 279</p> <p>1 A. Those are the letters that we looked at</p> <p>2 earlier that were on Sunbeam letterhead issued to</p> <p>3 Arthur Andersen.</p> <p>4 Q. And as part of Andersen's work on comfort</p> <p>5 letters, Andersen requests a management representation</p> <p>6 letter for the items that are discussed in the comfort</p> <p>7 letter; is that correct, at least some of them?</p> <p>8 A. Some of them, yeah.</p> <p>9 Q. And would Andersen be able to issue a comfort</p> <p>10 letter unless it had a management representation</p> <p>11 letter?</p> <p>12 In other words, did Andersen procedures allow</p> <p>13 that, to your knowledge?</p> <p>14 A. I don't believe so, but I'm not certain.</p> <p>15 Q. Have you ever been involved in issuing a</p> <p>16 comfort letter where there wasn't a management</p> <p>17 representation letter that would back it up?</p> <p>18 A. Not that I recall.</p> <p>19 Q. What role does Andersen have in drafting</p> <p>20 management representation letters typically?</p> <p>21 A. They draft quite a bit of it.</p> <p>22 Q. So the initial draft of a management</p> <p>23 representation letter is done at Andersen, worked on,</p> <p>24 and then at some point provided to management for</p> <p>25 review, approval and signature?</p>
<p style="text-align: right;">Page 278</p> <p>1 that the numbers tie back to the supporting work papers</p> <p>2 at Andersen's work.</p> <p>3 Q. And it was Miss Rich that performed those</p> <p>4 procedures for the March 19th comfort letter, to the</p> <p>5 best of your recollection?</p> <p>6 A. Yes, what it says here.</p> <p>7 Q. You don't have a recollection of working with</p> <p>8 her on that?</p> <p>9 A. No.</p> <p>10 Q. Do you have a recollection of Miss Rich</p> <p>11 raising any issues with you in her work done</p> <p>12 referencing the March 19th comfort letter?</p> <p>13 A. I don't recall one way or the other.</p> <p>14 Q. On the second page, item number four,</p> <p>15 procedure states that "If applicable, trace information</p> <p>16 regarding contingencies, litigation or uncertainties to</p> <p>17 the financial statements and to legal or management</p> <p>18 representation letters or other source documents in the</p> <p>19 working papers."</p> <p>20 Do you see that?</p> <p>21 A. Yes.</p> <p>22 Q. Is that one of the referencing procedures</p> <p>23 that you just described?</p> <p>24 A. That's what it says here.</p> <p>25 Q. What's a management representation letter?</p>	<p style="text-align: right;">Page 280</p> <p>1 A. I don't know the procedure, but if it's at</p> <p>2 Andersen or at the client, but yeah.</p> <p>3 Q. Do you recall that being done in connection</p> <p>4 with these comfort letters and these management</p> <p>5 representation letters that were in March of 1998 in</p> <p>6 connection with the bond offering?</p> <p>7 A. I don't recall specifically, but I'm sure</p> <p>8 that that is what happened.</p> <p>9 Q. I'm going to hand you the next document that</p> <p>10 was marked yesterday as Morgan Stanley Exhibit 43.</p> <p>11 A. This is a good one.</p> <p>12 MR. MOSCATO: I'll give you my copy.</p> <p>13 THE WITNESS: Keep that for my files. Okay.</p> <p>14 BY MR. CLARE:</p> <p>15 Q. I've handed you what's been marked as Morgan</p> <p>16 Stanley Exhibit 43, a document entitled Post Audit</p> <p>17 Review for Subsequent Material Transactions and Events</p> <p>18 After the Date of the Auditor's Report.</p> <p>19 Do you see that title on the page?</p> <p>20 A. Yes.</p> <p>21 Q. And do you recognize the handwriting on the</p> <p>22 bottom of the first page to be yours?</p> <p>23 A. For the most part, yeah. Phil Harlow, looks</p> <p>24 like he signed it also.</p> <p>25 Q. So there is some handwriting and then there</p>

<p style="text-align: right;">Page 281</p> <p>1 is a signature by you and a date? 2 A. Yeah, the handwriting is mine. 3 Q. And then there is a signature by Mr. Harlow? 4 A. Correct. 5 Q. And the writing there appears to be the date, 6 is that a three, is that March '98? 7 A. Yes. 8 Q. What is this document and how is it used 9 internally at Andersen? 10 A. It's a checklist that's done to go through 11 their requirements to do a post audit review and allow 12 Andersen to issue a consent to update their opinion. 13 Q. And a document like this and the procedures 14 that are described in this document are used in 15 connection with -- 16 A. The registration statement, I think a 133 17 registration statement, or 33 Act registration 18 statement. 19 Q. It was your understanding in March of '98 20 that the Sunbeam convertible debenture offering would 21 be registered in that way? 22 A. Eventually, yes. 23 Q. And did you prepare or mark on this document 24 in March of 1998 in anticipation of that work on the 25 registration?</p>	<p style="text-align: right;">Page 283</p> <p>1 Q. Is that the date that you would have made 2 that notation on the document? 3 A. I don't know what I, if I reviewed it the 4 same day or not. 5 Q. Would this document have to be completed 6 under Andersen's internal procedures before a comfort 7 letter like the one on March 19th could be issued to 8 Morgan Stanley? 9 A. The form might not necessarily have to be 10 filled out, but the work should have been done. 11 Q. So that these procedures that are described 12 here in Morgan Stanley Exhibit 43 would need to be 13 completed in March of 1998 before the offering 14 memorandum could be completed? 15 MR. MOSCATO: The offering memorandum or the 16 comfort letter? 17 BY MR. CLARE: 18 Q. Well, let's start with the comfort letter. 19 Before the comfort letter could be issued? 20 A. Yes. 21 Q. And before the offering memorandum would be 22 finalized? 23 A. I don't recall specifically about that. 24 Q. Your handwriting here indicates that the post 25 audit work and AP187 work was done in its entirety as</p>
<p style="text-align: right;">Page 282</p> <p>1 A. No. 2 Q. The handwriting at the bottom of the first 3 page, can you read that as best you can for me? 4 A. Says, "No consent required on section 144 5 offering; however, PAR," which means post audit review, 6 "work and AP 187 work done in its entirety as the 7 firm's name appears in the financial statements 8 included with this document. Work done herein 9 sufficient as if we were to issue our consent." 10 Q. What are you communicating here? 11 MR. MOSCATO: I object. It's perfectly 12 clear. 13 Are you communicating anything other than 14 what's written in the plain wording of this note? 15 THE WITNESS: No. 16 BY MR. CLARE: 17 Q. And you wrote those words in March of 1998? 18 A. Yes. 19 Q. And you signed your name below those words in 20 March of 1998? 21 A. Yes. 22 Q. And the date on the front of the document 23 that discusses post audit review having been completed 24 is March 16, 1998, do you see that? 25 A. Yes.</p>	<p style="text-align: right;">Page 284</p> <p>1 the firm's name appears in the F1. 2 Can you tell me what AP187 -- 3 A. That's financial statements. 4 Q. Appears in the financial statements included 5 with this document. 6 A. Yeah. 7 Q. Can you tell me what AP187 refers to? 8 A. This document. If you look on the bottom 9 left-hand corner, it says AA & Company, AP187. 10 Q. I see. So you're stating here in the 11 handwritten notation that the post audit work that was 12 done by Andersen and the procedures that were performed 13 that are described in Morgan Stanley Exhibit 43 were 14 done as if Andersen would be issuing a formal consent 15 for the inclusion of its audited financials in the 16 financial offering memorandum; is that correct? 17 A. Yes. 18 Q. So the standard of care that Andersen used in 19 going through its internal procedures was the same as 20 if it were required to issue a formal consent? 21 A. Yes. 22 Q. That's what you're communicating here in 23 March of 1998? 24 A. Yes. 25 THE VIDEOGRAPHER: We have to change the</p>

Page 285

1 tape.
 2 We are now going off video record on tape
 3 number three. We'll be back on tape number four.
 4 The time on the monitor, 4:09 p.m.
 5 (Discussion held off the record.)
 6 THE VIDEOGRAPHER: We are now back on video
 7 record, tape number four. The time on the monitor
 8 is 4:10 p.m.
 9 BY MR. CLARE:
 10 Q. Mr. Bornstein, I want to have you turn over
 11 to the second page of Exhibit 43. And the first
 12 procedure, I'd like to ask you to read that, please, to
 13 yourself.
 14 A. Okay.
 15 Q. And this procedure requires that somebody
 16 from Andersen read the entire registration statement
 17 including the prospectus and perform certain
 18 procedures, correct?
 19 A. Yes.
 20 Q. And it requires Andersen to cross reference
 21 amounts in the narrative section to similar amounts in
 22 the audited financials, correct?
 23 A. Correct.
 24 Q. And ascertain that there are no
 25 inconsistencies or conflict between the narrative

Page 286

1 section and the audited financials, correct?
 2 A. Yes.
 3 Q. And your initials are listed to the right?
 4 A. Yes.
 5 Q. And did you perform those procedures with
 6 regard to the offering memorandum?
 7 A. Yes.
 8 Q. And you performed those procedures in March
 9 of 1998?
 10 A. Yes.
 11 Q. On March 19th, 1998, or before? In other
 12 words, before the offering memorandum was finalized or
 13 printed at Global Financial Press?
 14 A. Before and during.
 15 Q. Those procedures were not carried out any
 16 time after that evening at the printer?
 17 A. They were performed after, but on different
 18 documents.
 19 Q. Correct, but with respect to the offering
 20 memorandum, those procedures were performed before you
 21 left the printer that morning?
 22 A. Yes.
 23 Q. I'm going to hand you the next exhibit.
 24 That's Morgan Stanley Exhibit 44.
 25 This is another copy of the March 16, 1998

Page 287

1 management representation letter that you looked at
 2 this morning with Mr. Markowski.
 3 A. Is it exactly the same or is it different?
 4 Q. It's another copy.
 5 A. Okay.
 6 Q. And you see it's signed on page three by the
 7 same group of individuals that you discussed this
 8 morning.
 9 A. Okay.
 10 Q. What role did you personally play in drafting
 11 the management representation letters for the comfort
 12 letters that were issued to Morgan Stanley in the first
 13 quarter of 1998?
 14 A. I don't remember specifically.
 15 Q. Do you remember having seen drafts?
 16 A. Yes.
 17 Q. Before they were issued and commenting on
 18 them?
 19 A. I believe so, yes.
 20 Q. Did you discuss as part of your work on the
 21 management representation letters with Sunbeam
 22 management the contents of the letter?
 23 A. I don't remember specifically myself doing
 24 that.
 25 Q. Who was working with you on the management

Page 288

1 representation letter?
 2 A. I believe Dennis Pastrana.
 3 Q. Did, as far as you know and can recall, did
 4 you have any discussions with Mr. Pastrana about what
 5 Sunbeam management would or would not be willing to
 6 represent in the management letter?
 7 A. No.
 8 Q. Did you have any conversations with anyone in
 9 Sunbeam management about what Sunbeam management would
 10 be willing or not willing to represent in a management
 11 letter?
 12 A. Not that I recall.
 13 Q. I hand you the next document, Morgan Stanley
 14 Exhibit 45. Just let me know when you're ready.
 15 A. Okay.
 16 Q. This is an undated draft, appears to be an
 17 undated draft of the management representation, of a
 18 management representation letter. Do you see that?
 19 A. Yes.
 20 Q. If you look in format and style, it's similar
 21 to the representation letter that we just looked at.
 22 A. Okay.
 23 Q. If you turn over and look at the second page
 24 of the document on item eight, there is a table of
 25 information there. Do you see that?

Page 289

1 A. Table of information?
2 Q. Well, there is net sales and net income
3 information for two different time periods.
4 A. I'm sorry, what page?
5 Q. On the second page.
6 A. Right, okay.
7 Q. Okay? And you discussed with Mr. Markowski
8 this morning that net income and loss information was
9 one item that would be included in the management
10 representation letter; do you see that?
11 A. Right.
12 Q. Are you able to place this draft of the
13 management representation letter in time in any way by
14 looking at this?
15 A. No.
16 Q. And you recall that there were two different
17 management representation issues issued? There was one
18 in connection with the first comfort letter and then a
19 second one that was issued in connection with the
20 bring-down letter?
21 Do you remember that from this morning?
22 A. Yes.
23 Q. Are you able to recognize this as a draft of
24 the second management comfort letter?
25 MR. MOSCATO: One way or the other? Yes or

Page 290

1 no.
2 THE WITNESS: This is a draft of the second?
3 BY MR. CLARE:
4 Q. Yes.
5 A. No, I can't.
6 Q. You can't tell which version it's a draft of?
7 MR. MARKOWSKI: I'm sorry, I missed the
8 thread here. Are you asking whether this is a
9 version of the March 25?
10 MR. CLARE: I'm asking if he can place it in
11 time as to whether it's a draft of the initial
12 March 16th management representation letter or
13 whether it's a draft of the March 25
14 representation letter.
15 MR. MARKOWSKI: Actually I guess it's
16 March 23. I'm sorry to mislead you. I think it
17 was March 23.
18 THE WITNESS: I have no idea one way or the
19 other.
20 BY MR. CLARE:
21 Q. Okay. If you turn to the last page of the
22 document -- next-to-the-last page, page marked Bates
23 number CPH 00441653, item ten.
24 A. Right.
25 Q. It states, "Despite the decrease in net sales

Page 291

1 described in the preceding paragraph, management
2 believes that net sales for the first quarter of fiscal
3 1998 will exceed net sales of the first quarter of
4 fiscal 1997."
5 Do you see that?
6 A. Yes.
7 Q. And that's a similar statement to the one
8 that was included in the press release?
9 A. Correct.
10 Q. Do you recall in your work on the management
11 representation letter discussing that provision?
12 A. No, I don't. Sorry.
13 Q. Do you recall any discussion about whether
14 Andersen wanted a representation, an affirmative
15 representation from Sunbeam's management that it had
16 that expectation?
17 A. It was already made in the press release. I
18 don't believe so.
19 MR. MOSCATO: The answer is yes or no. It's
20 getting late in the day.
21 THE WITNESS: I think the answer was no. Can
22 you answer -- read the question again.
23 (Thereupon, a portion of the record
24 was read by the reporter.)
25 THE WITNESS: I don't, I don't remember.

Page 292

1 BY MR. CLARE:
2 Q. I'm going to hand you the next exhibit that's
3 Morgan Stanley Exhibit 46. It appears to be another
4 draft of the management representation letter. Do you
5 see that?
6 A. Uh huh.
7 Q. And this document, Exhibit 46, has a fax line
8 across the top of the page indicating it was faxed on
9 March 23rd, 1998. Do you see that?
10 A. Yes.
11 Q. Do you recognize that fax number?
12 A. Yeah, I, it looks vaguely familiar. I don't
13 know exactly where it is.
14 Q. It appears that this fax was sent by somebody
15 on March 23rd, 1998.
16 Is this your handwriting on Morgan Stanley
17 Exhibit 46?
18 A. On page one it is, but not on page four, I
19 guess, on the top.
20 Q. So the edit that's made on the first page is
21 an edit that you made, correct?
22 A. Yes.
23 Q. And the edit that was made to paragraph ten,
24 somebody else's handwriting?
25 A. Right.

Page 293

1 Q. Do you know whose handwriting that is? Do
 2 you recognize it?
 3 A. No.
 4 Q. Again, on the last page. The edited
 5 paragraph ten.
 6 A. No.
 7 Q. I'd like you to keep that in front of you for
 8 just a minute while I hand you the next document,
 9 Morgan Stanley Exhibit 47, which is the March 23rd,
 10 1998 management representation letter.
 11 A. Okay.
 12 Q. Now we've looked at a couple of drafts of
 13 representation letter, Exhibits 45 and 46, that
 14 included a paragraph --
 15 A. Right.
 16 Q. -- stating that management believed it would
 17 exceed first quarter sales in 1997. Correct?
 18 A. I'm sorry, just give me one minute so I can
 19 get my bearing here. Say it again.
 20 Q. The drafts that we've been looking at,
 21 Exhibits 45 and 46, have a paragraph ten that states an
 22 expectation by management regarding net sales in the
 23 first quarter of 1998 exceeding net sales in the first
 24 quarter of 1997.
 25 A. Right.

Page 294

1 Q. But that paragraph does not appear in the
 2 March 23rd, 1998 representation letter as it was
 3 finally signed.
 4 Do you have any knowledge or information
 5 about how that paragraph got deleted?
 6 A. Actually I, it's actually coming back to me
 7 what happened here.
 8 I remember, I remember getting -- I do
 9 remember getting this fax and starting to review it.
 10 Q. Okay. Just to be clear --
 11 A. Fax, I remember getting the fax that's dated
 12 whatever it is, 3/23/98.
 13 Q. Morgan Stanley Exhibit 46?
 14 A. Yeah.
 15 Q. Okay. I remember reading the first page, I
 16 read the first paragraph, and then basically just
 17 stopping and calling and saying we've already done a
 18 rep letter dated March 16th. You guys are pulling from
 19 the wrong file. I remember I stopped reviewing this.
 20 Follow me?
 21 There is a rep letter dated the 16th.
 22 Q. Right.
 23 A. We had updated the 23rd. So whoever started
 24 working on this pulled a different file to start
 25 updating.

Page 295

1 MR. MOSCATO: You mean this was -- what you
 2 wanted someone to do was do a draft of the
 3 bring-down, and they pulled the comfort instead?
 4 THE WITNESS: No, no. What I'm saying is we
 5 did a rep letter, March 16th.
 6 MR. MOSCATO: I'm sorry.
 7 THE WITNESS: So I know we did a rep letter
 8 the 16th with the \$2 billion on there, or whatever
 9 the number was.
 10 And I remember reviewing this one and it
 11 showing 1.3 million, which was the original
 12 amount.
 13 So after reading the first paragraph, I just
 14 said this is the wrong one. You must be updating
 15 the wrong file. And I never reviewed the rest of
 16 it.
 17 BY MR. CLARE:
 18 Q. Okay. Well, the March 16th rep letter that
 19 you have in front of you, which is Morgan Stanley
 20 Exhibit 44, as the final version also does not contain
 21 that paragraph that we were looking at in drafts.
 22 A. Yeah, I never saw that paragraph before.
 23 Q. So you don't have any information about who
 24 put it in?
 25 A. No.

Page 296

1 Q. Or why it was taken out?
 2 A. No.
 3 Q. Or why it does not appear in the March 16th
 4 version of the rep letter?
 5 A. None whatsoever.
 6 Q. Or the March 23rd version?
 7 A. No.
 8 Q. Now you worked on the 1997 audit?
 9 A. Yes.
 10 Q. Do you believe as you sit here today that
 11 Sunbeam withheld material information from you in
 12 connection with the 1997 audit?
 13 A. As I sit here today? Yes.
 14 Q. And now those subjects, the audit and the
 15 work that was done on the restatement were covered in
 16 detail in your prior depositions, and I'm not going to
 17 ask you to go through them in detail, but in general,
 18 do you believe that Sunbeam withheld material
 19 information from Andersen regarding its reserves?
 20 MR. MOSCATO: I'm going to make an objection.
 21 Years ago in front of the SEC he gave exhaustive
 22 testimony about what he thought Sunbeam had
 23 misrepresented and concealed from him and what
 24 they didn't.
 25 I really think it's unfair and really not

<p style="text-align: right;">Page 297</p> <p>1 terribly productive to get into it again now. 2 There is a full, complete record of his testimony 3 on that subject when it was a lot closer to the 4 events. 5 And my concern is any testimony he gives now 6 will necessarily be incomplete. I don't believe 7 he has reviewed any of that testimony, and it's 8 been six years now. 9 MR. CLARE: Okay. 10 MR. MOSCATO: That's my objection. So, you 11 know, I guess I'll let him answer, but under the 12 caveat that I can't imagine he is capable of 13 giving anything close to a complete answer at this 14 time. 15 MR. CLARE: Okay, I will accept that, and as 16 I mentioned to you at the outset of this 17 questioning, I'm not going to belabor the point. 18 I've read that prior testimony and I believe that 19 it is a complete recount, recitation of your 20 testimony in this regard, and I'm not intending to 21 replow it and I'm not trying to play gotcha with 22 you and identify other areas. 23 I'm just trying to understand the general 24 subject areas, we talked about a number of them 25 today, in connection with what information Morgan</p>	<p style="text-align: right;">Page 299</p> <p>1 A. Yes. 2 Q. And you did a number of additional 3 procedures? 4 A. Yes. 5 Q. And those interviews and those additional 6 procedures resulted in you and Andersen having 7 information about Sunbeam that it didn't have in 8 connection with the 1997 audit; is that correct? 9 A. Yes. 10 Q. A lot more information? 11 A. Yes. 12 Q. Okay. And those interviews and those 13 additional procedures also resulted in Andersen and you 14 having information about Sunbeam that it didn't have in 15 the first quarter of 1998? 16 A. Yes. 17 Q. And it was at that point that you concluded 18 that Sunbeam had withheld material information from 19 Andersen? 20 MR. MOSCATO: That point being during the 21 restatement process? 22 MR. CLARE: During the restatement process. 23 THE WITNESS: For the most part, yes. 24 BY MR. CLARE: 25 Q. Is that a fair statement?</p>
<p style="text-align: right;">Page 298</p> <p>1 Stanley asked about and what information we had 2 when we, Morgan Stanley, were doing the due 3 diligence. 4 BY MR. CLARE: 5 Q. So I guess let me just ask you this general 6 question. 7 As you sit here today, do you have any reason 8 to know that Morgan Stanley had more information than 9 Andersen in the first quarter of 1998? 10 MR. MARKOWSKI: On what subject? 11 MR. CLARE: Well, on any subject. 12 THE WITNESS: I have no idea what they had or 13 didn't have. 14 BY MR. CLARE: 15 Q. You felt, though, that Sunbeam had withheld 16 material information from Andersen on a number of 17 different areas, correct? 18 MR. MOSCATO: Objection, can you please pin 19 down when he came to that frame of mind? 20 BY MR. CLARE: 21 Q. You worked on the restatement investigation, 22 correct? 23 A. Yes. 24 Q. And as part of the restatement investigation, 25 you conducted interviews of Sunbeam employees?</p>	<p style="text-align: right;">Page 300</p> <p>1 A. That made it pretty iron clad that that was 2 the case, yes. 3 Q. Did you consider the information that was 4 withheld by Sunbeam from Andersen to be material? 5 A. Yes. 6 Q. And as you sit here today, do you consider 7 the information that was withheld by Sunbeam from 8 Andersen to be important to an understanding of 9 Sunbeam's business? 10 A. Yes. 11 Q. And as you sit here today, do you have any 12 reason to believe as a result of your work on the 13 restatement investigation that Morgan Stanley had 14 information about Sunbeam that was withheld from 15 Andersen? 16 A. I have no idea. 17 Q. Do you have any information that occurs to 18 you today as a result of your work on the restatement 19 investigation where you said Morgan Stanley knew x 20 facts and we, Andersen, did not? 21 MR. MOSCATO: Larry, the question is do you 22 have any information? So the answer is either 23 yes, you do have information, or no, you don't 24 have information. 25 THE WITNESS: I think there is information --</p>

Page 301

1 I've come to understand that there was information
 2 given to Morgan Stanley that wasn't given to
 3 Arthur Andersen. Is that your question?
 4 BY MR. CLARE:
 5 Q. Sure. Now tell me what that information was.
 6 A. Just reading the -- you know, I can't tell
 7 you if it's true or not. Reading the complaints.
 8 Q. Oh, the complaints that were filed in this
 9 lawsuit?
 10 A. Right.
 11 Q. So putting aside the allegations that are
 12 made in the complaints that were filed in this lawsuit,
 13 and I want you to exclude them from your mind, because
 14 those are legal allegations that were made and have not
 15 been proven and there is no evidence has been submitted
 16 yet to support them, but based than your own personal
 17 knowledge and recollection of the events --
 18 A. I think --
 19 MR. MOSCATO: Let him finish.
 20 BY MR. CLARE:
 21 Q. Based on your own personal knowledge and
 22 events, involved in these events, are you aware of any
 23 information that Morgan Stanley had in 1997 or the
 24 first quarter of 1998 that Andersen did not?
 25 A. I believe there were, there is correspondence

Page 302

1 and documentation of previous meetings with Coleman and
 2 Al Dunlap, and I recall specifically after going
 3 through all of the documents that were furnished to the
 4 SEC.
 5 Q. I'm not sure I understand your answer.
 6 A. Well, I believe that there were documents. I
 7 reviewed all the documents that were given to the SEC
 8 by everybody, all of Sunbeam, whatever, first, second,
 9 third phase.
 10 And there was documentation on various
 11 meetings and conversations and initial meeting,
 12 conversation with Dunlap and representatives of
 13 Coleman. I don't remember specifically, but I believe
 14 there were also people from Morgan Stanley at those
 15 meetings.
 16 Q. You're saying that these were documents that
 17 related to negotiations between Sunbeam and Coleman for
 18 the acquisition?
 19 A. Before the contemplated acquisition in March,
 20 there was I think another series of conversations
 21 before the end of the year. That's all I can recall
 22 specifically.
 23 Q. Okay. So putting aside information that
 24 related to the acquisition, and I want to focus on your
 25 work on the restatement investigation, you reviewed the

Page 303

1 restatement report that was issued by Andersen?
 2 A. Yes.
 3 Q. Are you generally familiar with the areas in
 4 which a restatement of Sunbeam's financial statements
 5 were done?
 6 A. Generally, yes.
 7 Q. Bill and hold transactions and reserves and
 8 supplier rebates, those type of areas?
 9 A. Correct.
 10 Q. In any of the areas that were covered by the
 11 restatement investigation and the subsequent
 12 restatement report, did you learn any information that
 13 Morgan Stanley had that was not available to Andersen?
 14 A. I believe there were forecasts and detailed
 15 information that was given to Morgan Stanley that we
 16 didn't get copies of.
 17 Q. Can you identify them?
 18 A. Not specifically. I remember meetings with,
 19 having meetings with Lisa Galbarth, I think her name
 20 was, or I think the -- I forget the name of the other
 21 one, a number of documents to go through the forecast
 22 and as such to get ready for the bank syndicate.
 23 So there were a lot of documents that we
 24 never saw, but that we knew were supplied to Morgan
 25 Stanley.

Page 304

1 Q. What about information that related to the
 2 specific restatement items? Putting aside the fact
 3 that Andersen -- that Sunbeam may have provided
 4 documents that were different than the documents that
 5 were provided to Andersen, was there any information
 6 relevant to your restatement inquiry that Morgan
 7 Stanley had that Andersen did not?
 8 A. I have no idea.
 9 Q. You don't recall any as you sit here today?
 10 A. No.
 11 Q. As part of the work that you did on the
 12 restatement, did you discover any evidence or
 13 information that Morgan Stanley was involved in any of
 14 the accounting judgments that led to the restatement?
 15 A. No.
 16 Q. Or any of the individual transactions that
 17 are described in the restatement report?
 18 A. I don't believe so, no.
 19 Q. We've talked about a couple of them today,
 20 EPI and Encore and some of those. Did you uncover any
 21 information that Morgan Stanley was involved in any of
 22 those transactions?
 23 A. No.
 24 Q. As part of the work that you did on the
 25 restatement, you interviewed Sunbeam employees,

<p style="text-align: right;">Page 305</p> <p>1 correct?</p> <p>2 A. Some.</p> <p>3 Q. And you participated in a number of those</p> <p>4 interviews?</p> <p>5 A. Yes.</p> <p>6 Q. You've seen more than 30 interviews. Can you</p> <p>7 estimate how many of those you participated in?</p> <p>8 A. I don't know, six to twelve maybe.</p> <p>9 Q. And those interviews were conducted in</p> <p>10 connection, in conjunction with the attorneys at</p> <p>11 Scadden Arps?</p> <p>12 A. Among others, yes.</p> <p>13 Q. And they were conducted after Al Dunlap had</p> <p>14 been fired?</p> <p>15 A. Yes.</p> <p>16 Q. And after Kersh was gone?</p> <p>17 A. I believe so, yes.</p> <p>18 Q. This was after Mr. Levin had been installed</p> <p>19 as the CEO?</p> <p>20 A. Yes.</p> <p>21 Q. After Mr. Levin had instituted what became</p> <p>22 known as the amnesty program?</p> <p>23 A. Yes.</p> <p>24 Q. Are you familiar with the amnesty program</p> <p>25 that Mr. Levin instituted generally?</p>	<p style="text-align: right;">Page 307</p> <p>1 A. I don't know.</p> <p>2 Q. We've seen reports in the production showing</p> <p>3 that you spent more than 1,000 hours on the restatement</p> <p>4 investigation. Does that sound about right?</p> <p>5 A. Probably.</p> <p>6 Q. And in addition to the interviews that we</p> <p>7 described, you did additional accounting procedures?</p> <p>8 A. Yes.</p> <p>9 Q. One of the interviews that you conducted was</p> <p>10 Deborah MacDonald?</p> <p>11 A. Yes.</p> <p>12 Q. Were you present for that interview?</p> <p>13 A. I believe so, yes.</p> <p>14 Q. Do you recall Miss MacDonald telling you that</p> <p>15 the only contact that people from Sunbeam had with</p> <p>16 investment bankers was through Mr. Kersh and</p> <p>17 Mr. Goudis?</p> <p>18 A. Sounds familiar, but I'm not 100 percent</p> <p>19 sure.</p> <p>20 MR. CLARE: Mark this as the next exhibit,</p> <p>21 please.</p> <p>22 (MS Exhibit No. 59 was marked for</p> <p>23 identification.)</p> <p>24</p> <p>25</p>
<p style="text-align: right;">Page 306</p> <p>1 A. I think I might have been the first one to</p> <p>2 let an employee know about it.</p> <p>3 Q. But the --</p> <p>4 A. Speak now or forever hold your peace type</p> <p>5 thing.</p> <p>6 Q. The purpose was to encourage employees to be</p> <p>7 candid with Andersen and Scadden in conducting these</p> <p>8 interviews as part of the restatement?</p> <p>9 A. Yes.</p> <p>10 Q. Because Andersen wanted to get as much</p> <p>11 information as possible from Sunbeam about what was</p> <p>12 really going on?</p> <p>13 A. Yes.</p> <p>14 Q. Can you describe just generally what your</p> <p>15 role was in the restatement?</p> <p>16 A. To help coordinate the efforts, to interview</p> <p>17 the people you mentioned, to do some additional work</p> <p>18 myself, to deal with Deloitte & Touche, Scadden Arps,</p> <p>19 the management team, and basically review and look for</p> <p>20 items, things that were withheld from Arthur Andersen.</p> <p>21 Q. And you discovered items that were withheld</p> <p>22 from Arthur Andersen, correct?</p> <p>23 A. Yes.</p> <p>24 Q. How much time did you spend, roughly, on the</p> <p>25 restatement investigation?</p>	<p style="text-align: right;">Page 308</p> <p>1 BY MR. CLARE:</p> <p>2 Q. I've handed you what's been marked as Morgan</p> <p>3 Stanley Exhibit 60.</p> <p>4 A. Okay.</p> <p>5 Q. It's a July 24th, 1998, memo from Donald</p> <p>6 Denkhaus to the files, memorializing an interview</p> <p>7 conducted with Deborah MacDonald.</p> <p>8 Have you seen this document before?</p> <p>9 A. Yes.</p> <p>10 Q. The document states in the first paragraph</p> <p>11 that "On July 21st, 1998, Larry Bornstein and Chris</p> <p>12 Malloy, attorney with Scadden Arps, and Mr. Denkhaus</p> <p>13 conducted an interview."</p> <p>14 Do you recall being present in the interview</p> <p>15 with Miss MacDonald?</p> <p>16 A. Yes.</p> <p>17 Q. Flip to page five of the interview memo.</p> <p>18 Top of the page says, "MacDonald indicated that the</p> <p>19 only contact that the investment bankers, Morgan</p> <p>20 Stanley, had with the company was through Kersh and</p> <p>21 Goudis."</p> <p>22 Do you see that?</p> <p>23 A. Yes.</p> <p>24 Q. Do you recall Miss MacDonald telling you</p> <p>25 that?</p>

<p style="text-align: right;">Page 309</p> <p>1 A. Not specifically, no. 2 Q. Do you recall generally her telling you that? 3 A. No. 4 Q. In the course of the work that you did on the 5 restatement investigation, did you learn that Morgan 6 Stanley had contact with Sunbeam employees other than 7 Mr. Kersh and Mr. Goudis? 8 A. No, not specifically, no. 9 Q. Is what Miss MacDonald -- let me withdraw 10 that. 11 It's reported here in the interview memo, 12 Miss MacDonald's statement, that all the information 13 for Morgan Stanley had to go through Mr. Kersh and 14 Mr. Goudis. 15 Is that consistent -- well, I don't want 16 to -- is that consistent with what you learned in the 17 restatement investigation about how Sunbeam's 18 management controlled information from outsiders? 19 MR. MARKOWSKI: Object to the form of the 20 question. 21 MR. MOSCATO: I have to object. 22 THE WITNESS: Are you going to object? 23 MR. MOSCATO: I already did object. 24 THE WITNESS: Sorry about that. 25</p>	<p style="text-align: right;">Page 311</p> <p>1 so internally inconsistent, I'm not sure what 2 generalizations you can make out of this document 3 and I'm not sure how you can generalize the 4 generalizations in this document to what happened 5 with Andersen. I just think it's very confusing 6 and I don't think it's a fair question as posed. 7 MR. CLARE: Well, I'm not trying to confuse. 8 All I'm trying to get at is if this were in fact 9 the case. 10 MR. MOSCATO: I'm sorry, what? 11 THE WITNESS: If it was the case. 12 BY MR. CLARE: 13 Q. Were you surprised, are you surprised to 14 learn that Sunbeam employees thought that information 15 they had was withheld from Morgan Stanley? 16 Does that surprise you based on what you 17 heard in the restatement investigation? 18 MR. MARKOWSKI: Object to the form of the 19 question. 20 MR. MOSCATO: You can answer that question. 21 THE WITNESS: No. 22 BY MR. CLARE: 23 Q. Why doesn't that surprise you? 24 A. Based on where we sit today, what happened. 25 Q. Okay. Is one of the reasons it doesn't</p>
<p style="text-align: right;">Page 310</p> <p>1 BY MR. CLARE: 2 Q. Here's my question. You testified before 3 that material information had been withheld from 4 Andersen during 1997 and the first quarter of 1998, 5 correct? 6 A. Yes. 7 Q. And that information was withheld from 8 Andersen by members of Sunbeam management, right? 9 A. In some cases, yes. 10 Q. Okay. And information that was known to 11 other employees at Sunbeam was shielded from Andersen, 12 correct? 13 A. In some cases, yes. 14 Q. So you, as part of the restatement 15 investigation, you concluded that Sunbeam employees had 16 information that was not provided to Andersen. And 17 what I'm asking is what Miss MacDonald is reporting 18 here, that information had to be channeled through 19 senior management to go to Morgan Stanley, is that 20 consistent with what, the conclusion you formed about 21 how Sunbeam controlled information from outsiders? 22 MR. MARKOWSKI: Object to the form of the 23 question. 24 MR. MOSCATO: I have to object to it. I even 25 object to -- I don't know, the memo itself is just</p>	<p style="text-align: right;">Page 312</p> <p>1 surprise you is because information was also withheld 2 from Andersen? 3 A. Yes. 4 Q. As part of the restatement investigation, did 5 Andersen ultimately reach an opinion as to whether 6 Sunbeam's internal controls were adequate in 1997 and 7 the first quarter of 1998? 8 A. As part of the restatement? I believe they 9 did. 10 Q. And do you recall what that opinion was? 11 A. Not specifically, no. 12 Q. And as part of the restatement investigation, 13 did Andersen reach an opinion as to whether Sunbeam was 14 able to produce accurate financial statements in 1997 15 and the first quarter of 1998? 16 A. I believe we did, yes. 17 Q. And do you know what that opinion was? 18 A. Which opinion is this? 19 Q. Regarding Sunbeam's ability to produce 20 accurate financial statements in 1997, in the first 21 quarter of -- 22 A. I don't remember specifically what the 23 opinion said. 24 Q. Isn't it true that Sunbeam concluded -- 25 strike that.</p>

Page 313

1 Isn't it true that Andersen concluded at the
 2 conclusion of the restatement investigation that
 3 Sunbeam's internal controls were inadequate in 1997 and
 4 the first quarter of 1998?
 5 A. I believe so, yes.
 6 Q. And isn't it true that Andersen concluded at
 7 the end of the restatement investigation that Sunbeam
 8 was unable to produce accurate financial statements in
 9 1997 and the first quarter of 1998?
 10 MR. MARKOWSKI: Object to the form.
 11 THE WITNESS: I'm not sure exactly if that's
 12 the way it -- I know there was a restatement, so I
 13 don't remember what the opinion says.
 14 MR. CLARE: I'm going to hand you the next
 15 exhibit we'll mark as Morgan Stanley 61.
 16 THE REPORTER: 60.
 17 MR. MARKOWSKI: If that's right, you might
 18 want to adjust the numbering, because he was
 19 testifying about a document you were calling 60
 20 already, so you might want to make this one 59 and
 21 that one 60.
 22 THE WITNESS: The Deborah MacDonald document
 23 was 59.
 24 MR. MARKOWSKI: But it was referred to in the
 25 transcript as 60.

Page 314

1 MR. MOSCATO: Why don't we just correct the
 2 transcript then.
 3 MR. MARKOWSKI: Either one, one way or the
 4 other.
 5 MR. CLARE: Let's mark this as 61.
 6 (MS Exhibit No. 60 was marked for
 7 identification.)
 8 MR. MARKOWSKI: What are we doing about the
 9 MacDonald exhibit?
 10 MR. CLARE: We'll correct it in the
 11 transcript.
 12 THE WITNESS: She put 60 on here.
 13 MR. CLARE: Let's re-mark the October 16,
 14 1998 management letter as Morgan Stanley
 15 Exhibit 61.
 16 (Thereupon, the document was re-marked 61.)
 17 THE REPORTER: So there is no 60?
 18 MR. CLARE: Not yet. And let's re-mark the
 19 Deborah MacDonald interview memo as Exhibit 60 to
 20 conform with testimony.
 21 (MS Exhibit No. 60 was marked for
 22 identification.)
 23 BY MR. CLARE:
 24 Q. Mr. Bornstein, I'm handing you what has now
 25 been marked as Morgan Stanley Exhibit 61, a document,

Page 315

1 first page says Sunbeam Corporation Management Letter,
 2 October 16, 1998.
 3 Have you seen this document before?
 4 A. Yes.
 5 Q. And if you turn to the third page of the
 6 exhibit, it's a letter dated October 16, 1998, from
 7 Andersen addressed to the board of directors,
 8 management of Sunbeam Corporation.
 9 A. Yes.
 10 Q. If you look at page two of the letter, which
 11 is Bates number CPH 0084409, second full paragraph, I
 12 ask you to read that to yourself.
 13 A. Okay.
 14 Q. The last sentence there expresses the opinion
 15 that "The company's design and effectiveness of its
 16 internal controls were inadequate to detect material
 17 misstatements in the preparation of the company's 1997
 18 annual and quarterly financial statements."
 19 Do you see that?
 20 A. Yes.
 21 Q. That was a conclusion that Andersen reached
 22 in October of 1998?
 23 A. Yes, that's what it says here.
 24 Q. Okay. This was at the conclusion of the
 25 restatement investigation?

Page 316

1 A. I believe so.
 2 Q. And did you share that conclusion in
 3 October 1998?
 4 A. I don't specifically remember if I did or
 5 didn't, but I was part of the engagement team, so --
 6 Q. In 1997 while you were working on the Sunbeam
 7 audit, did you have any reason based on the work that
 8 you performed to question the design or effectiveness
 9 of Sunbeam's internal controls?
 10 A. In some areas, yes.
 11 Q. Can you tell me what they were?
 12 A. There was a draft of a management letter that
 13 was, I don't think it was ever issued, but given to
 14 people from Sunbeam that probably had several of these
 15 in there.
 16 Q. This was provided to Sunbeam management in
 17 19, in connection with the 1997 audit?
 18 A. Yes.
 19 Q. And did you believe that the conditions that
 20 were described in the draft management letter were
 21 material weaknesses as that term is defined in Morgan
 22 Stanley Exhibit 61?
 23 A. Not at that time, no.
 24 Q. At that time those were suggestions by
 25 Andersen on how internal control could be improved?

Page 317

1 A. Yes.
 2 Q. But the conclusion that there was a material
 3 weakness was not reached by you or Andersen until
 4 October 1998; is that correct?
 5 A. I don't know the specific date, but that's
 6 when the report was given.
 7 Q. The report here identifies -- you can flip
 8 through it -- a number of areas that are identified as
 9 material weaknesses. Do you see that?
 10 A. I do.
 11 Q. Okay. Were any of the material weaknesses
 12 that are identified as material weaknesses in this
 13 report known to you in 1997?
 14 A. Any of the material weaknesses known to me
 15 during when?
 16 MR. MOSCATO: Any material weaknesses?
 17 MR. CLARE: Correct.
 18 BY MR. CLARE:
 19 Q. I'm asking you while you were working on the
 20 1997 audit, were you aware of anything that rose to the
 21 level of a material weakness of Sunbeam's internal
 22 controls?
 23 MR. MOSCATO: I thought he answered that.
 24 MR. CLARE: The answer is no?
 25 THE WITNESS: That's what I answered a few

Page 318

1 minutes ago.
 2 BY MR. CLARE:
 3 Q. In the first quarter of 1998, were you aware
 4 of any material weaknesses in Sunbeam's internal
 5 controls?
 6 A. No.
 7 Q. In 1997, did you believe that Andersen -- I'm
 8 sorry, did you believe that Sunbeam was incapable of
 9 producing reliable financial statements?
 10 A. No.
 11 Q. Did you believe that in the first quarter of
 12 1998?
 13 A. No.
 14 Q. Did you have any reason in the first quarter
 15 of 1998 to believe that Sunbeam was incapable of
 16 producing reliable financial statements?
 17 MR. MOSCATO: I object. I just don't see the
 18 difference between that question and one he just
 19 answered two minutes ago. I'm really, I have to
 20 object in the strongest terms of repeating the
 21 same thing over and over.
 22 We're getting near the eight-hour limit, and
 23 I'd ask you to be just a little less repetitive in
 24 your questioning. And I do that in all respect.
 25 I think you're conducting a very professional

Page 319

1 examination. I just think it's a little
 2 repetitive.
 3 MR. CLARE: This is my last question in this
 4 area and I plan to move on, so the objection took
 5 longer than the repetitive questioning.
 6 MR. MOSCATO: I think it needs to be said,
 7 though, but go on.
 8 MR. CLARE: Can you reread my question,
 9 please. We'll get an answer and move on to the
 10 next topic.
 11 (Thereupon, a portion of the record
 12 was read by the reporter.)
 13 THE WITNESS: No.
 14 BY MR. CLARE:
 15 Q. In August of 1998 were you aware of a
 16 settlement between Sunbeam and MacAndrews & Forbes?
 17 A. No.
 18 Q. Did you have any involvement in --
 19 A. Actually, say that again, in August of --
 20 Q. 1998, were you aware of a settlement that
 21 took place in that time period between Sunbeam and
 22 MacAndrews & Forbes?
 23 A. Generally I did, yeah.
 24 Q. And this was a settlement whereby MacAndrews
 25 and Forbes received warrants to purchase additional

Page 320

1 shares of Sunbeam stock?
 2 A. I believe so.
 3 Q. Did you have any involvement or do any work
 4 on behalf of Sunbeam in connection with that
 5 settlement?
 6 A. No.
 7 Q. Did you have any involvement in valuing those
 8 warrants?
 9 A. No.
 10 Q. Or disclosing that settlement in Sunbeam's
 11 financial statements?
 12 A. No.
 13 Q. Have you ever seen any documents or reports
 14 relating to the valuation of those warrants?
 15 A. No.
 16 Q. You were involved in drafting the disclosures
 17 that were in the 1997 10K, weren't you, some of them?
 18 A. Yes.
 19 Q. And specifically you were involved in the
 20 drafting of disclosures in the 10K about Sunbeam's bill
 21 and hold sales?
 22 A. I don't know about drafting, but recommending
 23 that something be put in there.
 24 Q. Okay. At one of your prior depositions you
 25 said that you were involved in at least reviewing and

<p style="text-align: right;">Page 321</p> <p>1 commenting on the disclosures. Is that correct? 2 A. Yeah, I think that's fair. 3 Q. And the deposition you indicated that you 4 thought those disclosures were very good disclosures. 5 MR. MARKOWSKI: Object to the form of the 6 question. 7 THE WITNESS: I don't know if they were very 8 good, I don't remember what I said, very good or 9 good, but -- 10 BY MR. CLARE: 11 Q. But you thought they were either very good or 12 good? 13 A. Well, they were reasonable. 14 Q. Okay. And at the time were you aware of any 15 bill and hold transactions beyond those that had been 16 disclosed in the 1997 10K? 17 A. No. 18 Q. And do you think that the disclosures that 19 you reviewed and that ultimately ended up in the 1997 20 10K adequately informed investors that Sunbeam had 21 engaged in hold sales? 22 MR. MARKOWSKI: Object to the form of the 23 question. 24 THE WITNESS: Yes. 25</p>	<p style="text-align: right;">Page 323</p> <p>1 BY MR. CLARE: 2 Q. If you look at the document, the Bates number 3 at the bottom, CPH 1409071. 4 A. Okay. 5 Q. The paragraph at the top of the page, 6 carryover paragraph, if you just read that to yourself. 7 My question is going to be whether you had any 8 involvement in drafting this disclosure. 9 THE WITNESS: I don't remember having any 10 specific involvement in that specific paragraph. 11 BY MR. CLARE: 12 Q. Do you recognize that paragraph as in part a 13 disclosure of the Sunbeam's Early Buy program and the 14 risks associated with the Early Buy program? 15 A. One of the risks. 16 Q. And that risk is that it increases the 17 company's risk of collecting accounts receivable? 18 A. Correct. 19 Q. And this is, this disclosure is contained in 20 the section labeled Cautionary Statements of the 10K? 21 A. Couldn't tell you. There is like eight 22 different fonts here. 23 Q. If you look at the page before, page seven? 24 MR. MOSCATO: I object. You don't need 25 Mr. Bornstein to say where in a publicly-filed</p>
<p style="text-align: right;">Page 322</p> <p>1 BY MR. CLARE: 2 Q. Are you aware that the 1997 10K includes 3 disclosures about Sunbeam's Early Buy program? 4 A. Yes. 5 Q. You were involved in drafting those 6 disclosures, too? 7 A. I don't remember specifically. 8 Q. Did you play a similar role as you just 9 described with regard to bill and hold? 10 A. I don't remember. 11 Q. This morning Mr. Markowski asked you some 12 questions about the Early Buy program and the, what it 13 means to accelerate sales from one quarter into an 14 earlier quarter. Do you recall that? 15 A. Yes. 16 Q. Do you recall that that subject, the 17 possibility of sales being advanced into an earlier 18 quarter, was among the information contained in the 19 disclosures? 20 MR. MARKOWSKI: Object to the form of the 21 question, lack of foundation. 22 THE WITNESS: I'd have to look at it. 23 MR. CLARE: Let's look at what was previously 24 marked as Morgan Stanley Exhibit 12. 25</p>	<p style="text-align: right;">Page 324</p> <p>1 document with the SEC a particular paragraph 2 exists. This is really becoming abusive now. 3 Can you please ask him factual questions 4 other than identifying that particular words exist 5 in a particular document that's publicly filed. 6 BY MR. CLARE: 7 Q. Do you see on page seven it says the words 8 Cautionary Statements? 9 A. Yes. 10 Q. So the disclosure that you just read appears 11 in that section? 12 A. Yes. 13 Q. If you turn to the next page, two pages 14 later, page nine of the 10K, the third bullet from the 15 bottom, the bullet that begins "Sales of certain of the 16 company's products," do you see that? 17 A. Yes. 18 Q. Read that bullet to yourself, and I'm going 19 to ask you if you were involved in drafting that 20 disclosure. 21 A. I don't remember having any involvement in 22 drafting that. 23 Q. The discussion that you had with 24 Mr. Markowski this morning about accelerating sales in 25 one quarter or one financial period into an earlier</p>

<p style="text-align: right;">Page 325</p> <p>1 period --</p> <p>2 A. Yes.</p> <p>3 Q. Is the paragraph that you just read on page</p> <p>4 nine of the 10K, is that a disclosure that, of that</p> <p>5 phenomena that you were describing?</p> <p>6 A. I have no idea. I can read it 100 times.</p> <p>7 It's too late in the day to give you a conclusion on</p> <p>8 that.</p> <p>9 Q. Well, this morning, in response to questions</p> <p>10 from Mr. Markowski, you testified that in looking at</p> <p>11 various iterations of the comfort letter --</p> <p>12 A. The comfort letter?</p> <p>13 Q. Yes. There was a discussion there about</p> <p>14 reasons for the shortfall --</p> <p>15 A. Right, right.</p> <p>16 Q. -- in January and February of 1998. Do you</p> <p>17 recall that?</p> <p>18 A. Yes.</p> <p>19 Q. And you testified this morning about the</p> <p>20 impact of an Early Buy program and how one of the</p> <p>21 reasons identified in the comfort letter was the</p> <p>22 acceleration of sales into an earlier time period.</p> <p>23 Do you recall that?</p> <p>24 A. Right.</p> <p>25 Q. And my question is does this disclosure that</p>	<p style="text-align: right;">Page 327</p> <p>1 A. I'm not sure about him. Mr. Lurie was.</p> <p>2 Q. Mr. Lurie was also on the call?</p> <p>3 A. He was physically present.</p> <p>4 Q. And he was physically present with you in New</p> <p>5 York.</p> <p>6 And the only in-person meeting that you had</p> <p>7 with Morgan Stanley was the one at Global Financial</p> <p>8 Press in New York?</p> <p>9 A. Several meetings, yes.</p> <p>10 Q. A series of meetings?</p> <p>11 A. And Scadden Arps.</p> <p>12 MR. CLARE: Let's take a two-minute break and</p> <p>13 I think we may be done or close to done.</p> <p>14 THE VIDEOGRAPHER: We are now going off video</p> <p>15 record. The time on the monitor is 5:05 p.m.</p> <p>16 (Thereupon, a recess was taken.)</p> <p>17 THE VIDEOGRAPHER: We are now back on video</p> <p>18 record. The time on the monitor, 5:11 p.m.</p> <p>19 BY MR. CLARE:</p> <p>20 Q. Mr. Bornstein, I appreciate your patience. A</p> <p>21 few final items for now.</p> <p>22 You discussed earlier in your testimony the</p> <p>23 decision by Sunbeam to extend first quarter of 1998, do</p> <p>24 you recall that?</p> <p>25 A. Yes.</p>
<p style="text-align: right;">Page 326</p> <p>1 we've just looked at in the middle of page nine, is</p> <p>2 that the same phenomena that you were discussing with</p> <p>3 Mr. Markowski this morning, to your knowledge?</p> <p>4 MR. MARKOWSKI: Objection, asked and</p> <p>5 answered, and object to the form of the question.</p> <p>6 THE WITNESS: It could be similar.</p> <p>7 BY MR. CLARE:</p> <p>8 Q. The statement specifically that such a</p> <p>9 program, meaning the Early Buy program, could have a</p> <p>10 negative impact on future financial performance.</p> <p>11 THE WITNESS: Yes, you can read that well.</p> <p>12 Same thing I read.</p> <p>13 BY MR. CLARE:</p> <p>14 Q. You don't have a view one way or the other as</p> <p>15 to whether that's the same phenomena that you were</p> <p>16 describing with Mr. Markowski?</p> <p>17 A. Similar.</p> <p>18 Q. Similar. Did you ever have an in-person</p> <p>19 meeting with Morgan Stanley in the state of Florida?</p> <p>20 A. No.</p> <p>21 Q. The accounting due diligence call that you</p> <p>22 participated in, you participated in from New York?</p> <p>23 A. Yes.</p> <p>24 Q. Was Mr. Tyree with you physically at the</p> <p>25 printer during that due diligence call?</p>	<p style="text-align: right;">Page 328</p> <p>1 Q. Did you have any discussions with Morgan</p> <p>2 Stanley on that subject?</p> <p>3 A. Bob Lurie and I did, but not Morgan Stanley.</p> <p>4 Q. And this conversation with Mr. Lurie, was</p> <p>5 that after Global Financial Press?</p> <p>6 A. Yes.</p> <p>7 Q. That issue didn't arise until closer to the</p> <p>8 end of the quarter?</p> <p>9 A. Yes.</p> <p>10 Q. And tell me about your conversation with</p> <p>11 Mr. Lurie.</p> <p>12 A. I don't remember specifics about it, to be</p> <p>13 honest with you.</p> <p>14 Q. Did you have an understanding one way or the</p> <p>15 other about whether Morgan Stanley had a position on</p> <p>16 extending the quarter?</p> <p>17 A. No.</p> <p>18 Q. You described this morning in response to</p> <p>19 questions from Mr. Markowski and again in response to</p> <p>20 questions by me this afternoon about the additional</p> <p>21 procedures, the sales cutoff testing that was done at</p> <p>22 your direction.</p> <p>23 A. Yes.</p> <p>24 Q. At the end of the first quarter. Do you</p> <p>25 recall that?</p>

Page 329

1 A. Yes.

2 Q. Do you recall either from the documents that

3 we looked at today or from your recollection whether

4 there were any inconsistencies or irregularities that

5 were reported to you as a result of that cutoff

6 testing?

7 A. Not, no irregularities. There was nothing

8 that wasn't resolved.

9 Q. So the additional procedures that you asked

10 to be performed were in fact performed?

11 A. Yes.

12 Q. To your satisfaction?

13 A. Yes.

14 Q. And Mr. Kistler or the other individuals that

15 were informed in those procedures never advised you

16 specifically of an issue with regard to the cutoff

17 testing that led you to believe that Sunbeam's cutoff

18 had been done improperly?

19 A. No.

20 MR. CLARE: Those are all the questions that

21 I have for now.

22 THE WITNESS: Okay.

23 REDIRECT (Lawrence Bornstein)

24 BY MR. MARKOWSKI:

25 Q. Mr. Bornstein, hopefully just a few brief

Page 330

1 items.

2 Do you have Morgan Stanley Exhibit 58 in

3 front of you? It's the April 3 press release

4 announcing the fact that Sunbeam had missed

5 accomplishing first quarter 1997 sales levels.

6 MR. CLARE: Take this one, Larry.

7 THE WITNESS: Okay.

8 BY MR. MARKOWSKI:

9 Q. Do you see the first paragraph purports that

10 Sunbeam expected to be approximately five percent below

11 1997's first quarter net sales result?

12 A. Yes.

13 Q. And I think you testified that the books had

14 been close at that point, correct?

15 A. Correct.

16 Q. Do you recall that the actual shortfall was

17 greater than five percent?

18 A. At that point, at the end of the day, you

19 mean?

20 Q. At the end of the day do you recall that the

21 actual shortfall was something greater than

22 five percent?

23 A. It depend how it was defined.

24 Q. That's what I was going to get at next.

25 Whatever the shortfall was, do you recall that Sunbeam

Page 331

1 in its first quarter 1998 net sales results was

2 including Coleman Company sales?

3 A. Yes.

4 Q. For the three-day or two-day period at the

5 end of the quarter after the closing of the Coleman

6 transaction, correct?

7 A. Yes.

8 Q. So there was an amount of sales that didn't

9 come from Sunbeam's business, but yet came from the

10 business that Sunbeam had acquired Coleman Company,

11 correct?

12 A. Correct.

13 Q. Do you recall approximately how many millions

14 of dollars that was?

15 A. No.

16 MR. CLARE: Objection, foundation.

17 BY MR. MARKOWSKI:

18 Q. But you recall that was part of what Sunbeam

19 claimed at its first quarter sales results, correct?

20 A. Yes.

21 Q. And that was as a result of extending the

22 quarter?

23 A. Yes.

24 Q. And there were additional days of Sunbeam

25 sales included first quarter results too, correct?

Page 332

1 A. Yes.

2 Q. Do you recall as you sit here today what the

3 shortfall from 1997 first quarter results was if

4 Sunbeam had not extended the quarter, thereby including

5 Coleman Company sales and additional days of Sunbeam

6 sales?

7 A. No.

8 Q. But the shortfall would be even greater as a

9 result of that adjustment, correct?

10 A. I don't even know if it was a shortfall. I

11 don't know what the numbers were.

12 Q. Well, this press release announces that there

13 is a shortfall.

14 A. Five percent lower, yeah, right.

15 Q. Without waiving my objection to the questions

16 that Mr. Clare asked on these subjects, you recall that

17 he asked you questions concerning whether you had

18 information indicating that Morgan Stanley had been

19 involved in committing a fraud on my client.

20 Do you recall those questions?

21 A. Yes.

22 Q. With respect to that, do you have any

23 knowledge, sir, concerning the statements that Morgan

24 Stanley made to my client concerning the success of

25 Sunbeam's turnaround?

Page 333

1 A. That Morgan Stanley -- can you read that
 2 back?
 3 Q. Let me ask it again.
 4 Do you have any knowledge, Mr. Bornstein, of
 5 the statements that were made by Morgan Stanley to my
 6 client concerning the success of Mr. Dunlap's
 7 turnaround of Sunbeam?
 8 A. No.
 9 Q. You don't have any knowledge of what Morgan
 10 Stanley said to my client on that subject, do you?
 11 A. No.
 12 Q. Do you have any knowledge of what Morgan
 13 Stanley said to my client on Sunbeam's performance in
 14 the first quarter of 1998?
 15 A. No.
 16 Q. Or that Sunbeam said to my client concerning
 17 its performance in the first quarter of 1998 in Morgan
 18 Stanley's presence?
 19 A. No idea.
 20 Q. Do you have any knowledge of the statements
 21 that were made by Morgan Stanley to my client about
 22 Sunbeam's prospects for 1998?
 23 A. No.
 24 Q. Do you have any knowledge of the statements
 25 made in Morgan Stanley's presence by Sunbeam concerning

Page 334

1 Sunbeam's prospects for the full fiscal year 1998?
 2 A. No.
 3 Q. When you left -- Mr. Clare asked you some
 4 questions about the statement that you made to
 5 Mr. Tyree that you hoped to God that Sunbeam at least
 6 accomplished sales equal to first quarter 1997 sales or
 7 otherwise people should expect to be sued.
 8 Do you recall the questions on that, relating
 9 to this comment?
 10 A. Yes.
 11 Q. You did make a comment to that effect during
 12 the session at Global Financial Press on March 19,
 13 correct?
 14 A. Yes.
 15 Q. And you made that comment to Mr. Tyree,
 16 correct?
 17 A. Yes.
 18 Q. When you made it, were you joking?
 19 A. No.
 20 Q. Was Mr. Tyree laughing?
 21 A. No.
 22 Q. Was it said in jest?
 23 A. No.
 24 Q. When you said it was an off-the-cuff
 25 statement, was it something that you didn't understand

Page 335

1 to be a real risk at that point in time?
 2 A. No.
 3 Q. And that's the way you meant it when you said
 4 it to Mr. Tyree, correct?
 5 A. Yes.
 6 Q. You said, sir, that you found it amazing that
 7 Morgan Stanley during the course of its communications
 8 with you or contacts with you didn't inquire about the
 9 status of Sunbeam's first quarter sales results.
 10 Do you recall that testimony today?
 11 A. Yes.
 12 Q. Why did you find it amazing that Morgan
 13 Stanley didn't make that inquiry during the various
 14 times it was in contact with you or others from Arthur
 15 Andersen?
 16 A. Should have been the first question on the
 17 list.
 18 Q. And why did you think that, sir?
 19 A. Why did I think that?
 20 Q. Why did you think it was the first question
 21 that Morgan Stanley should have been asking you?
 22 A. Because they were selling bonds based on
 23 current and future performance.
 24 Q. Now we're getting a document that I want to
 25 use for another question, sir.

Page 336

1 Mr. Clare asked you whether Morgan Stanley
 2 objected during, to your statement, during the session
 3 at the printer on March 19, to your statement that you
 4 intended to implement special procedures to monitor
 5 Sunbeam's end-of-the-quarter shipments.
 6 Do you recall that?
 7 A. That they objected?
 8 MR. MOSCATO: I'm sorry, say that again?
 9 BY MR. MARKOWSKI:
 10 Q. Do you recall that Mr. Clare asked you
 11 whether Morgan Stanley objected when you told Mr. Tyree
 12 that you intended to implement special procedures to
 13 monitor Sunbeam's shipments at the end of the first
 14 quarter? Do you recall that question?
 15 MR. CLARE: I object to the form.
 16 THE WITNESS: I remember the question, yes.
 17 BY MR. MARKOWSKI:
 18 Q. Did Morgan Stanley say to you when you told
 19 Mr. Tyree -- strike that.
 20 Did Mr. Tyree say to you when you told him
 21 that that was your intention that he thought that was a
 22 good idea and that you should for sure go ahead and do
 23 that?
 24 A. No, they were silent.
 25 Q. Did the lawyers from Davis Polk say that's a

Page 337

1 great idea, go ahead and do that?
 2 A. No. Silent.
 3 Q. That list of, the sales buildup that you were
 4 shown for -- let me see if I can get it in front of
 5 me -- that you were provided at the printer on
 6 March 19th, the one-page list of potential sales, do
 7 you recall that?
 8 MR. MOSCATO: Does he need it in front of him
 9 for this question?
 10 THE WITNESS: I have it here.
 11 MR. MARKOWSKI: Let me see if I can find it.
 12 MR. MOSCATO: He's got it.
 13 BY MR. MARKOWSKI:
 14 Q. Have you got it?
 15 A. Yeah.
 16 Q. Did -- one of the things you said you told
 17 Mr. Tyree was he should just do the math with respect
 18 to trying to determine whether this was a reasonable
 19 forecast of Sunbeam's sales expectations for the first
 20 quarter, correct?
 21 A. Yes.
 22 Q. Mr. Clare asked you this morning or this
 23 afternoon questions concerning the fiscal capability of
 24 Sunbeam's facilities to ship a certain level of product
 25 per day.

Page 338

1 A. Yes.
 2 Q. Do you recall those questions?
 3 Did the fact that some substantial portion,
 4 approximately \$86 million, as I read this chart, of
 5 these potential sales had not been booked as orders by
 6 this point in time have an effect on your thinking with
 7 respect to the feasibility of Sunbeam being able to
 8 accomplish this level of sales in the remaining days of
 9 the quarter?
 10 MR. CLARE: Object to the form.
 11 MR. MOSCATO: I object to that too.
 12 THE WITNESS: I don't remember specifically
 13 if that was my thought process.
 14 BY MR. MARKOWSKI:
 15 Q. Well, if the sales had all been in and
 16 recorded at that point in time, would you have had a --
 17 strike that. Let me put it this way.
 18 When you read this chart, did you understand
 19 that Sunbeam was going to be able to divide into equal
 20 daily segments the amount of product that needed to be
 21 shipped out each day in order to accomplish at least
 22 \$254 million in sales?
 23 MR. CLARE: I object to the form.
 24 MR. MOSCATO: I object.
 25 THE WITNESS: I did a straight line division,

Page 339

1 calculation in my head, yes.
 2 BY MR. MARKOWSKI:
 3 Q. Okay. Do you know whether that was in fact
 4 what Sunbeam would be able to do based on where it
 5 stood with respect to having booked orders for product?
 6 Did you know that one way or the other?
 7 MR. MOSCATO: Objection.
 8 THE WITNESS: No.
 9 BY MR. MARKOWSKI:
 10 Q. I don't think we need to mark this as an
 11 exhibit, sir, but I want to show you your, a transcript
 12 of your testimony before the, your prior testimony on
 13 October 13, 1999, in connection with related
 14 proceedings.
 15 MR. MOSCATO: Counsel, for what purpose are
 16 you showing him the document?
 17 MR. MARKOWSKI: There is just one question I
 18 want to show him to see if I can refresh his
 19 recollection to a particular aspect of the
 20 testimony.
 21 MR. MOSCATO: If you can ask the question
 22 first.
 23 MR. MARKOWSKI: It was asked. I'll ask it
 24 again.
 25

Page 340

1 BY MR. MARKOWSKI:
 2 Q. Do you recall, sir, that Mr. Tyree, when you
 3 told him your views concerning whether the substance of
 4 the press release should be put in the offering
 5 memorandum, that Mr. Tyree said to you --
 6 MR. MOSCATO: Wait, Larry, don't look at
 7 anything yet.
 8 BY MR. MARKOWSKI:
 9 Q. "You know, this is going in. I don't care
 10 what you say. This is going in."
 11 A. As I sit here, I don't recall him saying
 12 that, but if I said that, if it's in the testimony from
 13 four or five years ago, it's a lot closer to the time.
 14 Q. Let me give you a chance to take a look at
 15 that specific question and answer. It's on page 492
 16 and 493, if you could just read.
 17 MR. MOSCATO: You're asking him to refresh
 18 his recollection?
 19 MR. MARKOWSKI: Right.
 20 MR. MOSCATO: Okay.
 21 MR. MARKOWSKI: Whether he recalls today
 22 Mr. Tyree in fact saying those words to him.
 23 MR. MOSCATO: Read it, Larry, then close it
 24 up, and then testify as to whether or not that
 25 actually refreshes your recollection.

Page 341

1 MR. CLARE: I'm sorry, what page are you
 2 asking him to read?
 3 MR. MARKOWSKI: The questioning starts at
 4 492, carries over onto 493 at the top.
 5 THE WITNESS: Okay.
 6 MR. MOSCATO: Wait for a question.
 7 BY MR. MARKOWSKI:
 8 Q. Sir, does that refresh your recollection that
 9 in response to your objection to including the press
 10 release in the offering memorandum, the March 19 press
 11 release in the offering memorandum, that Mr. Tyree said
 12 to you, "You know, this is going in. I don't care what
 13 you say, this is going in."
 14 A. It doesn't refresh my memory.
 15 Q. Did I accurately read that statement from
 16 your prior testimony?
 17 A. Yes.
 18 Q. And that testimony was given at a point in
 19 time closer to the events than today, correct?
 20 A. Yes.
 21 Q. Do you have any reason to believe your
 22 testimony at that time was inaccurate on that point?
 23 A. No.
 24 MR. MARKOWSKI: I don't have any further
 25 questions.

Page 342

1 RE-CROSS (LAWRENCE BORNSTEIN)
 2 BY MR. CLARE:
 3 Q. Mr. Bornstein, you responded to a question
 4 from Mr. Markowski about Morgan Stanley's due
 5 diligence. He asked you why you were amazed at Morgan
 6 Stanley's due diligence. Do you recall that?
 7 A. Yes.
 8 Q. Let me ask you the same question that he
 9 asked you with regard to inquiries from Nafco,
 10 MacAndrews and Forbes and Coleman (Parent) Holdings.
 11 And you told me earlier that you were surprised that
 12 you didn't receive any inquiries from Coleman (Parent)
 13 Holdings or its representatives in connection with the
 14 acquisition, correct?
 15 A. Yes.
 16 Q. And was your statement that an inquiry about
 17 how the company was doing should have been the first
 18 question on the list, does that apply equally to
 19 inquiries that you would have expected to receive from
 20 Coleman (Parent) Holdings?
 21 A. No.
 22 Q. Would you have expected that to be
 23 unimportant question that you would receive?
 24 A. That me personally would receive? I wasn't
 25 with them, so the answer is no.

Page 343

1 Q. But my question is in terms of your surprise
 2 at not receiving any inquiries, would that question,
 3 how is the company doing, be among the inquiries that
 4 you would have expected to receive in connection with
 5 diligence that was done by Coleman (Parent) Holdings?
 6 A. If any questions were asked, that would have
 7 been one of them that I would have believed should have
 8 been asked.
 9 Q. It would have been on the list?
 10 A. It would have been on the list.
 11 Q. And it would have been an important question
 12 on the list?
 13 A. Yes.
 14 MR. CLARE: That's all I have.
 15 MR. MARKOWSKI: One more question.
 16 REDIRECT (LAWRENCE BORNSTEIN)
 17 BY MR. MARKOWSKI:
 18 Q. Mr. Bornstein, do you know whether -- excuse
 19 me, do you know what my client, Coleman (Parent)
 20 Holdings, asked Sunbeam and asked Morgan Stanley on the
 21 subject of how Sunbeam was doing in the first quarter
 22 of 1998 and what my client was told by them?
 23 A. No.
 24 MR. MARKOWSKI: Thank you.
 25 THE VIDEOGRAPHER: This is the conclusion of

Page 344

1 the videotape deposition of Mr. Bornstein. We are
 2 now going off video record. The time on the
 3 monitor is 5:30 p.m.
 4 (Witness excused.)
 5 (Deposition was concluded.)
 6
 7
 8
 9
 10
 11
 12
 13
 14
 15
 16
 17
 18
 19
 20
 21
 22
 23
 24
 25

Page 345

1 THE STATE OF FLORIDA)
 2 COUNTY OF PALM BEACH)
 3
 4 I, the undersigned authority, certify that the
 5 witness personally appeared before me and was duly sworn.
 6
 7 WITNESS my hand and official seal this 19th day
 8 of January, 2004.
 9
 10
 11
 12 Rachel W. Bridge, RMR, CRR
 Notary Public - State of Florida
 My Commission Expires: 1/15/07
 My Commission No.: DD164752
 13
 14
 15
 16
 17
 18
 19
 20
 21
 22
 23
 24
 25

Page 347

1 CERTIFICATE
 2 - - -
 3
 4 THE STATE OF FLORIDA
 5 COUNTY OF PALM BEACH
 6
 7 I hereby certify that I have read the
 8 foregoing deposition by me given, and that the
 9 statements contained herein are true and correct to the
 10 best of my knowledge and belief, with the exception of
 11 any corrections or notations made on the errata sheet,
 12 if one was executed.
 13
 14 Dated this ____ day of _____,
 15 2004.
 16
 17
 18
 19
 20
 21 _____
 Lawrence A. Bornstein
 22
 23
 24
 25

Page 346

1 CERTIFICATE
 2 THE STATE OF FLORIDA)
 3 COUNTY OF PALM BEACH)
 4 I, Rachel W. Bridge, Registered
 Professional Reporter and Notary Public in and for
 5 the State of Florida at Large, do hereby certify
 that the aforementioned witness was by me first duly
 6 sworn to testify the whole truth; that I was
 authorized to and did report said deposition in
 7 stenotype; and that the foregoing pages are a true
 and correct transcription of my shorthand notes of
 8 said deposition.
 I further certify that said deposition was
 9 taken at the time and place hereinabove set forth
 and that the taking of said deposition was commenced
 10 and completed as hereinabove set out.
 I further certify that I am not attorney or
 11 counsel of any of the parties, nor am I a relative or
 employee of any attorney or counsel of party connected
 12 with the action, nor am I financially interested in the
 13 action.
 The foregoing certification of this transcript
 14 does not apply to any reproduction of the same by any means
 15 unless under the direct control and/or direction of the
 certifying reporter.
 16
 IN WITNESS WHEREOF, I have hereunto set my
 17 hand this 19th day of January, 2004.
 18
 19
 20 Rachel W. Bridge, RMR, CRR
 Notary Public State of Florida
 My Commission Expires: 1/15/07
 My Commission No.: DD164752
 21
 22
 23
 24
 25

Page 348

1 ERRATA SHEET
 2 IN RE: Coleman(Parent)Holdingsvs. Morgan Stanley
 3 DEPOSITION OF: Lawrence Bornstein TAKEN: 1-15-04
 4 DO NOT WRITE ON TRANSCRIPT - ENTER CHANGES HERE
 5 PAGE# LINE# CHANGE REASON
 6 _____
 7 _____
 8 _____
 9 _____
 10 _____
 11 _____
 12 _____
 13 _____
 14 _____
 15 _____
 16 _____
 17 Please forward the original signed errata sheet to this
 office so that copies may be distributed to all
 18 parties.
 19 Under penalty of perjury, I declare that I have read my
 deposition and that it is true and correct subject to
 20 any changes in form or substance entered here.
 21
 DATE: _____
 22
 23 SIGNATURE OF
 DEPONENT: _____
 24
 25

14

**EXHIBIT EXCLUDED WITHOUT PRIOR DETERMINATION
OF PROTECTABILITY BY COURT**

15

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR PALM BEACH COUNTY

MORGAN STANLEY & CO. INCORPORATED,
MORGAN STANLEY SENIOR FUNDING, INC.,
and MORGAN STANLEY,

Plaintiffs,

v.

ARTHUR ANDERSEN LLP (an Illinois limited liability partnership), AWSC SOCIÉTÉ COOPÉRATIVE, *en liquidation* (a Swiss cooperative corporation), ARTHUR ANDERSEN LLP (an Ontario limited liability partnership), ARTHUR ANDERSEN & CO. (a Hong Kong partnership), RUIZ, URQUIZA Y CIA, S.C. (a Mexico partnership), PORTA CACHAFEIRO, LARIA & ASOCIADOS (a Venezuela partnership), PHILLIP E. HARLOW, WILLIAM PRUITT, and DONALD DENKHAUS,

Defendants.

CASE NO. 502004CA002257XXXXMB
Division AA

DOROTHY H. WILKEN
CLERK OF CIRCUIT COURT
CIRCUIT OF PALM BEACH COUNTY

AUG 06 2004

COPY / ORIGINAL
RECEIVED FOR FILING

FIRST AMENDED COMPLAINT

In March 1998, Morgan Stanley & Co. Incorporated ("MS & Co."), Morgan Stanley Senior Funding, Inc. ("MSSF"), and Morgan Stanley — in direct reliance on certified financial statements that were audited by Defendant Arthur Andersen LLP (an Illinois limited-liability partnership) ("Andersen") with the assistance of and in coordination with the other Defendants named in this Complaint¹ — underwrote a multi-million dollar offering of convertible notes and

¹ AWSC, Société Coopérative, *en liquidation*, a Swiss cooperative corporation ("Andersen-Worldwide") (formerly known as Andersen Worldwide, Société Coopérative), Arthur Andersen LLP (an Ontario limited liability partnership) ("Andersen-Canada"), Arthur Andersen & Co. (a

CASE NO. 502004CA002257XXXMB
First Amended Complaint

provided a \$680 million loan to Sunbeam Corporation, Inc., in connection with Sunbeam's acquisition of three companies. As Sunbeam's subsequent restatement of its financial results showed, these certified financial statements grossly misrepresented Sunbeam's true financial condition. Andersen and the other Defendants had full knowledge of these misstatements, and they intended that MS & Co. and MSSF would rely on these unqualified audit opinions. Plaintiffs — as a direct consequence of this deceit — have lost hundreds of millions of dollars. Accordingly, Plaintiffs bring this action and allege the following:

Nature of Action

1. In March 1998, Sunbeam announced the acquisition of The Coleman Company, Inc., Signature Brands USA, Inc., and First Alert, Inc. In order to finance these acquisitions, Sunbeam issued \$750 million of convertible notes, which MS & Co. underwrote, and borrowed \$1.2 billion in secured financing, including a loan of \$680 million from MSSF.
2. In serving as an underwriter (which required MS & Co. to act as the initial purchaser of the convertible notes) and in agreeing to extend the loan, MS & Co. and MSSF relied on the accuracy of Sunbeam's financial statements, including its 1996 and 1997 financial statements that had been audited and certified by Andersen, as well as other representations made to them by Andersen. The Andersen-certified Sunbeam financial statements portrayed Sunbeam as a financially sound company in the midst of an extraordinary financial turnaround.

Hong Kong partnership) ("Andersen-Hong Kong"), Ruiz, Urquiza y Cia, S.C. (a Mexico partnership) ("Andersen-Mexico"), Porta Cachafeiro, Laria & Asociados (a Venezuela partnership) ("Andersen-Venezuela"), Phillip E. Harlow, William Pruitt, and Donald Denkhaus.

CASE NO. 502004CA002257XXXXMB
First Amended Complaint

3. In reality, unbeknownst to Plaintiffs, Sunbeam's "turnaround" was an illusion facilitated by the Defendants. As became apparent in the summer of 1998 and as confirmed by Sunbeam's subsequent restatement of its financial results, the 1996 and 1997 statements that Andersen had certified — and upon which MS & Co. and MSSF had relied — did not, contrary to the representations that Andersen made to MS & Co. and MSSF, conform with generally accepted accounting principles ("GAAP"). Andersen, with full knowledge of the material misstatements contained in Sunbeam's financial reports, issued unqualified audit opinions for both 1996 and 1997. In so doing, it failed to perform its audit in accordance with generally accepted auditing standards ("GAAS").

4. In fact, the statements that Andersen audited and certified as in compliance with GAAP and as representing Sunbeam's true financial condition, were replete with accounting improprieties. As a consequence, and contrary to the representations that Andersen made to MS & Co. and MSSF, Sunbeam's true financial condition was misstated by millions of dollars.

5. Andersen's fraud was knowingly caused by Harlow, Pruitt, and Denkhaus. Harlow (the Sunbeam engagement partner) and Pruitt (the Sunbeam concurring partner) were senior partners of Andersen and members of Andersen-Worldwide and undertook direct responsibility for directing, managing, and approving the work that was done on the Sunbeam audits. Denkhaus, who also was a senior partner of Andersen and a member of Andersen-Worldwide, was the Audit Division Head and manager of Andersen's audit practice for the entire South Florida region and in this role undertook responsibility for supervising and monitoring the work performed at Harlow's and Pruitt's direction. Harlow, Pruitt, and Denkhaus each knew or recklessly disregarded the accounting violations contained in Sunbeam's 1996 and 1997 financial statements. Harlow, Pruitt, and Denkhaus also knew or recklessly disregarded that the

CASE NO. 502004CA002257XXXXMB
First Amended Complaint

erroneous financial statements that they had caused Andersen to certify would be relied upon by MS & Co. in deciding to underwrite the convertible notes and by MSSF in deciding to loan Sunbeam hundreds of millions of dollars.

6. This fraud was also knowingly perpetrated by the foreign Andersen branches named in this complaint, Andersen-Canada, Andersen-Hong Kong, Andersen-Mexico, and Andersen-Venezuela (collectively, the "Foreign Andersen Branches"). Each of the Foreign Andersen Branches reviewed and audited financial statements prepared for Sunbeam's foreign subsidiaries for 1997, all of which contained significant accounting violations. Each of the Foreign Andersen Branches knew of or recklessly disregarded the fact that the financial statements that they had reviewed and audited were not prepared in accordance with GAAP or reviewed in accordance with GAAS. Each of the Foreign Andersen Branches also knew that the financial statements that they had audited would be incorporated into Sunbeam's consolidated financial statements and that lenders, such as MSSF, and underwriters, such as MS & Co., would rely on these financial statements.

7. The fraud was also knowingly perpetrated by Andersen-Worldwide through the actions of its members, including Harlow, Pruitt, and Denkhau, and its member firms, including Andersen and the Foreign Andersen Branches.

8. This fraud ultimately forced Sunbeam and several of its subsidiaries to seek relief under Chapter 11 of the Bankruptcy Code, in February 2001. As part of the bankruptcy court-approved reorganization plan, MSSF's \$680 million loan to Sunbeam was discharged in full, and MSSF received Sunbeam stock valued at a fraction of the original loan. In addition, the convertible notes issued by Sunbeam and held by MS & Co. had been rendered substantially less valuable.

CASE NO. 502004CA002257XXXXMB
First Amended Complaint

9. By this complaint, Plaintiffs seek compensatory damages of several hundreds of millions of dollars.

THE PARTIES AND OTHER RELEVANT ENTITIES

10. MS & Co. is a financial services firm that engages in underwriting, investment banking, financial advisory services, securities sales and trading, and research. In late 1997 and early 1998, MS & Co. assisted Sunbeam in identifying potential acquisition targets and served as Sunbeam's financial advisor with respect to certain aspects of Sunbeam's acquisitions of Coleman, Signature Brands, and First Alert. MS & Co. also served as the underwriter of a \$750 million offering of convertible notes that Sunbeam used to finance these acquisitions. MS & Co. is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in New York.

11. MSSF is a company that provides credit services to its clients. In 1998, MSSF entered into a credit agreement with Sunbeam under which MSSF agreed to provide a loan to Sunbeam in connection with Sunbeam's acquisition of Coleman, Signature Brands, and First Alert. Pursuant to the credit agreement, Sunbeam borrowed \$680 million from MSSF, with the borrowings used by Sunbeam to fund certain costs relating to the acquisitions. MSSF is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in New York.

12. Morgan Stanley is a financial services company. It owns 100 percent of the stock of both MS & Co. and MSSF. Morgan Stanley is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in New York.

CASE NO. 502004CA002257XXXXMB
First Amended Complaint

13. Andersen was a member in or business unit of Andersen-Worldwide. Andersen is a partnership formed under the laws of the State of Illinois. Once one of the world's largest accounting firms, almost all of its partners have left the firm. Andersen participated in and coordinated the 1996 and 1997 audits of Sunbeam and the 1998 restatement of the reports of those audits. In addition, Andersen's partners and employees provided consulting services to Sunbeam as part of due diligence work performed in conjunction with Sunbeam's acquisition of Coleman, as well as on other projects.

14. Andersen-Worldwide is a cooperative corporation organized under the laws of Switzerland. Its members included more than 2,000 individuals from 390 offices in 84 countries. Various individuals who were members of Andersen-Worldwide participated in the 1996 and 1997 audits of Sunbeam and the 1998 restatement of the reports of those audits. Andersen-Worldwide and Andersen dictated the policies and procedures to be used by Andersen members and affiliates throughout the world. Andersen and Andersen-Worldwide at all relevant times (a) held themselves out to the public as a single, integrated, full-service, professional business enterprise comprising "one firm" with "one voice" and "common values and vision," (b) completely dominated and controlled each other's assets, operations, policies, procedures, strategies, and tactics, (c) failed to observe corporate formalities, and (d) used and commingled the assets, facilities, employees, and business opportunities of each other, as if those assets, facilities, employees, and business opportunities were their own.

15. Andersen-Canada was a member in or part of Andersen-Worldwide. Andersen-Canada is a partnership organized under the laws of the province of Ontario, Canada. Andersen-Canada audited the 1996 and 1997 audits of Sunbeam's Canadian subsidiary for inclusion in

CASE NO. 502004CA002257XXXXMB
First Amended Complaint

Andersen's 1996 and 1997 audits of Sunbeam's consolidated financial statements. It also participated in the 1998 restatement of the reports of those audits.

16. Andersen-Hong-Kong was a member in or part of Andersen-Worldwide.

Andersen-Hong Kong is a partnership organized under the laws of Hong Kong. Andersen-Hong Kong audited the 1996 and 1997 audits of Sunbeam's Hong Kong subsidiary for inclusion in Andersen's 1996 and 1997 audits of Sunbeam's consolidated financial statements. It also participated in the 1998 restatement of the reports of those audits.

17. Andersen-Mexico was a member in or part of Andersen-Worldwide. Andersen-Mexico is a partnership organized under the laws of Mexico. Andersen-Mexico audited the 1996 and 1997 audits of Sunbeam's Mexican subsidiary for inclusion in Andersen's 1996 and 1997 audits of Sunbeam's consolidated financial statements. It also participated in the 1998 restatement of the reports of those audits.

18. Andersen-Venezuela was a member in or part of Andersen-Worldwide. Andersen-Venezuela is a partnership organized under the laws of Venezuela. Andersen-Venezuela audited the 1996 and 1997 audits of Sunbeam's Venezuelan subsidiary for inclusion in Andersen's 1996 and 1997 audits of Sunbeam's consolidated financial statements. It also participated in the 1998 restatement of the reports of those audits.

19. Defendant Harlow is a resident of Florida and at all times material hereto was a partner in Andersen and a member in Andersen-Worldwide. He served as the engagement partner on the audits of Sunbeam's financial statements from 1993 to 1998. As engagement partner, Harlow undertook the primary responsibility for supervising the 1996 and 1997 audits of Sunbeam, including directing and overseeing the activities with respect to the Sunbeam work

CASE NO. 502004CA002257XXXXMB
First Amended Complaint

performed by numerous persons at Andersen. Harlow also participated as a member of Sunbeam's due diligence team in connection with Sunbeam's acquisition of Coleman.

20. Defendant Pruitt is a resident of Florida and at all times material hereto was a partner in Andersen and a member of Andersen-Worldwide. He served as the concurring partner on the Sunbeam audits for at least 1996 and 1997. As such, he undertook responsibility for independently reviewing the Sunbeam audit work that had been conducted under Harlow's supervision and ensuring that it complied with GAAP and GAAS.

21. Defendant Denkhaus is a resident of Florida and at all times material hereto was a partner in Andersen and a member of Andersen-Worldwide. Denkhaus was Audit Division Head and manager of Andersen's audit practice for the entire South Florida region. As such, Denkhaus undertook responsibility for ensuring that the audit work performed by Andersen in the South Florida region was conducted in accordance with GAAP and GAAS. Denkhaus also served as the engagement partner on Sunbeam's ultimate restatement of its financial statements.

22. At all times material hereto, Sunbeam Corporation was headquartered in Palm Beach County, Florida. Sunbeam Corporation, through its operating subsidiaries and affiliates, manufactured, marketed, and distributed durable household and outdoor leisure consumer products through mass-market and other consumer channels. On February 6, 2001, Sunbeam and several of its affiliates filed a petition for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York. Sunbeam has since emerged from bankruptcy and now operates under the name American Household.

23. The Coleman Company, Inc. was a leading manufacturer and marketer of consumer products for the worldwide outdoor recreation market. Coleman was a Delaware corporation, with its principal place of business in Kansas. Prior to March 30, 1998, Coleman (Parent)

CASE NO. 502004CA002257XXXXMB
First Amended Complaint

Holdings Inc. ("Coleman-Parent") owned 44,067,520 shares (or approximately 82 percent) of Coleman. Coleman-Parent is a Delaware corporation, with its principal place of business in New York and is a wholly-owned subsidiary of MacAndrews and Forbes Holdings, Inc. ("MAFCO"). MAFCO is a global investment firm owned and operated by financier Ronald O. Perelman. Through its various subsidiaries and affiliates, MAFCO owns and/or controls a number of multi-billion dollar global corporations, including Revlon, Inc., the international consumer cosmetics company. MAFCO is a Delaware corporation, with its principal place of business in New York.

JURISDICTION AND VENUE

24. This Court has jurisdiction over the subject matter of this action pursuant to section 26.012(2)(a), Florida Statutes, because Plaintiff seeks damages in excess of \$15,000 exclusive of interest, costs, and attorneys' fees.

25. This Court has personal jurisdiction over Andersen, Andersen-Worldwide, Andersen-Canada, Andersen-Hong Kong, Andersen-Mexico, and Andersen-Venezuela pursuant to section 48.193(1)(a), (b), and (f), Florida Statutes, because each of them, directly or through its partners, members, agents, or employees, (1) operated, conducted, engaged in, or carried on a business or business venture in Florida from which the acts and injuries complained of in this action arose, (2) committed within Florida the tortious acts complained of in this action, or (3) by an act or omission outside of Florida, caused the complained-of injuries to Plaintiffs to occur within Florida at or about the time that it was engaged in service activities in Florida or that its services were used or consumed within Florida in the ordinary course of commerce, trade, or use.

26. This Court has personal jurisdiction over Defendants Harlow, Pruitt, and Denkhaus, because each of them is a resident of Florida.

CASE NO. 502004CA002257XXXXMB
First Amended Complaint

27. Venue is proper in this Court pursuant to section 47.011, Florida Statutes, because Andersen maintained an office with more than 30 employees and partners in Palm Beach County, and the cause of action accrued in Palm Beach County.

FACTUAL BACKGROUND

Andersen's and Sunbeam's Fraudulent Scheme

28. In July 1996, to address its growing financial difficulties, Sunbeam hired Albert Dunlap as Chairman and Chief Executive Officer. Dunlap was a well-known "turnaround" specialist who had a history of apparent success at other companies. He was nicknamed "Chainsaw Al" because of his practice of cutting staff and closing plants to achieve quick turnaround results.

29. Immediately after he was hired, Dunlap publicly predicted that, as a result of the Company's restructuring, Sunbeam would attain significant increases in its margins and sales. Dunlap replaced almost all of top management with his own selections, hiring Russell A. Kersh (Chief Financial Officer); Donald R. Uzzi (Vice President, Marketing and Product Development, and later Executive Vice President, Consumer Products Worldwide); Lee B. Griffith (Vice President, Sales); and Robert J. Gluck (Principal Accounting Officer).

30. Unbeknownst to the public and to Plaintiffs, Sunbeam's new senior management embarked upon a scheme designed to misrepresent Sunbeam's financial condition. Sunbeam's subsequent November 1998 restatement of its 1996 and 1997 financial statements revealed the plan that Sunbeam's management had adopted and Andersen facilitated. In 1996, Sunbeam's management, with Andersen's knowing assistance, caused Sunbeam to overstate its operating losses by at least \$40 million, thereby establishing an overly bleak financial backdrop against

CASE NO. 502004CA002257XXXMB
First Amended Complaint

which the company's performance in 1997 would be measured. In 1997, by contrast, management caused Sunbeam dramatically to overstate its earnings. When 1997 operating earnings were eventually corrected and restated, they were \$95 million less than the earnings originally reported — and approximately half of the figure that Andersen had previously certified.

31. In order to convince the public that Sunbeam's turnaround was real, Sunbeam needed an outside auditor to validate its financial reports. Andersen — desperate to retain a valuable client — stood ready to assist Sunbeam in its scheme.

32. After Dunlap assumed control of Sunbeam, Andersen had reason to fear that its relationship with Sunbeam was in jeopardy. Harlow, Pruitt, and Denkhaus knew that Dunlap had employed Coopers & Lybrand, one of Andersen's major competitors, as a financial consultant and independent auditor in past turnaround assignments. In fact, Dunlap had already engaged Coopers & Lybrand to assist in planning Sunbeam's massive restructuring.

33. Andersen had a significant stake in retaining Sunbeam, a long-time major client. Being dropped by a high-profile client such as Sunbeam would have been a severe blow to Andersen's reputation. The company generated substantial income for Andersen's Florida office, paying over \$1 million in fees for its 1995 audit alone and providing it with substantial income from lucrative consulting assignments. Indeed, Andersen was so eager to keep Sunbeam as its client that it agreed to a 30-percent reduction in its 1996 audit fees.

34. Andersen's fees were particularly important to Andersen's partners, whose incomes were dependent on the continued business from Sunbeam. Andersen tied part of its audit partners' compensation to the solicitation and marketing of non-audit consulting services, and created other revenue-sharing arrangements between audit and consulting partner groups.

CASE NO. 502004CA002257XXXMB
First Amended Complaint

35. Andersen put tremendous pressure on partners to generate more fees. A "depth chart" was developed for each audit client based upon the level of services provided to that client. Partner compensation was determined based on the additional services sold, and the ability of an Andersen partner to increase his income depended directly upon the level of fees that the partner "controlled" or sold to his or her assigned clients. These pressures led directly to a conflict of interest for the auditors on the Sunbeam engagement and were a significant factor that caused Andersen, Harlow, Pruitt, and Denkhaus, as well as the Foreign Andersen Branches, to abandon their independence, objectivity, and integrity on the Sunbeam financial statement audits and reviews.

Andersen's Worldwide Operations

36. Andersen was formed in Illinois in 1913 as an accounting and consulting partnership under the name "Arthur Andersen & Co." In 1977, as Andersen increased its global presence, it created a new structure called the "Andersen Worldwide Organization." The Andersen Worldwide Organization was overseen by Andersen-Worldwide, which acted as an umbrella organization for the Andersen, the other Andersen Worldwide Organization member firms, the members and contract partners of Andersen-Worldwide, and the individual members and partners of the Andersen Worldwide Organization member firms. The model adopted by the Andersen Worldwide Organization was intended to preserve "The Heart of Partnership Culture," including income sharing among the member firms of the Andersen Worldwide Organization and a common governance model. Thus, partners (or equivalents) in the various branches of the Andersen Worldwide Organization were also members of Andersen-Worldwide, resulting in a global partnership of more than 2,000 individuals from 390 offices in 84 different countries. In

CASE NO. 502004CA002257XXXXMB
First Amended Complaint

addition to overlapping partners and members, Andersen-Worldwide and Andersen shared officers in common. For example, the former CEO and Managing Partner of Andersen-Worldwide, Joseph Berardino, was also the CEO and Managing Partner of Andersen.

37. Andersen-Worldwide and Andersen also shared the same address. In its promotional literature, Andersen-Worldwide stated that its headquarters were located at 33 West Monroe Street, Chicago, Illinois 60603. That is the same address as the headquarters of Andersen.

38. Andersen-Worldwide set uniform professional standards for all its offices and required the members and partners in its international offices to agree to be bound by those professional standards and principles. Andersen-Worldwide coordinated the sharing of costs and allocation of revenues and profits among its members and partners and its offices around the world. Andersen-Worldwide operated under a worldwide tax structure. In addition, Andersen-Worldwide handled all borrowing on behalf of its international offices and maintained those offices' financial records, payroll, and employee health-benefits plans. All of Andersen's offices also shared global computer operations and training facilities.

39. The components of the Andersen Worldwide Organization ignored corporate formalities in referring to themselves and each other. For example, personnel affiliated with Andersen and Andersen-Worldwide regularly exchanged correspondence and e-mails that were labeled "Andersenwo" — short for "Andersen World Organization." Documents prepared by Andersen often bore the insignia and logos of Andersen-Worldwide, including "Andersen-Worldwide," "Andersen," and "Arthur Andersen." In its promotional literature, Andersen used the names "Andersen Worldwide," "Andersen," and "Arthur Andersen" interchangeably. In addition, Andersen sometimes used only the name "Andersen" when referring to all or part of the

CASE NO. 302004CA002257XXXMB
First Amended Complaint

Andersen Worldwide Organization and did not differentiate between Andersen-Worldwide and its offices around the globe.

40. In promotional literature, Andersen, Andersen-Worldwide, and the member firms of the Andersen Worldwide Organization marketed themselves as "one firm," "a single worldwide operating structure," that "think[s] and act[s] as one."

41. News releases issued by Andersen, Andersen-Worldwide, and other member firms confirmed that the Andersen Worldwide Organization and Andersen operated as a single worldwide organization:

- Andersen referred to the brand identity adopted by the member firms of the Andersen "global client service network."
- "With world-class skills in assurance, tax, consulting and corporate finance, Arthur Andersen has more than 77,000 people in 84 countries who are united by a single worldwide operating structure that fosters inventiveness, knowledge sharing, and a focus on client success."
- "Arthur Andersen is significantly different from the other firms in structure, governance and culture — differences which can be pivotal in terms of the quality of service a client company receives. Important distinctions mark our firm from the rest. We have evolved a unique organizational culture that today unites the people of Andersen Worldwide. We are the only true global firm, sharing knowledge and doing business across borders, sharing costs which fund methodologies, research and development, lines and industry groups."
- Andersen spokesman David Tabolt stated: "We conduct more than 30,000 audits around the world every year."
- "AA is already much more integrated globally than the rest of the Big Five. As Mr. Berardino [Andersen-Worldwide's former CEO, who resigned in March 2002] points out, 'there is one name over the door. We're not an alphabet soup.' The cohesiveness of AA's culture has been a source of humor to outsiders, who have labeled its bean counters 'Androids.' While some rivals are still struggling with a complicated array of national partnerships, and thus different systems for sharing pay, AA partners enjoy a single, and possibly unique, system of remuneration: they receive a list of what each of them has earned in the past year."

CASE NO. 502004CA002257XXXXMB
First Amended Complaint

- “Arthur Andersen is a global professional services organization consisting of over 100 member firms and more than 61,000 people united by a single worldwide operating structure and a common culture of innovation and knowledge sharing. This unique ‘one-firm’ approach qualifies the people of Arthur Andersen to serve clients by bringing together any of more than 40 competencies in a way that transcends geographic borders and organizational lines. Arthur Andersen’s people provide effective business solutions to over 100,000 clients in 81 countries around the world. Since its beginning in 1913, Arthur Andersen has realized 85 years of uninterrupted growth. With revenues of more than US \$6 billion, it stands today as a world leader in professional services. Arthur Andersen is a business unit of Andersen Worldwide.”

The Andersen-Worldwide website (Andersen.com) confirmed that there was a single worldwide organization:

- “Our 390 offices may be scattered amid 84 different countries, but our voice is the same. No matter where you go, or who you talk to, we act with one vision. Without boundaries.”
- “One world. One organization.”

Andersen’s recruiting brochures reflected that it was a single worldwide organization:

- “We will, in Arthur Andersen’s own words, ‘act as one firm and speak with one voice. It is a united family that operates across hierarchies, geographical boundaries, client groupings, service lines and competencies and feels the kinship of understanding and shared responsibility.”

42. Andersen-Worldwide managed its operations by practice groups, as well as by geographical region. Each practice group was headed by a global practice director who oversaw, directed, and controlled the operations of each practice group worldwide. Regional practice directors (e.g., Denkhous was the director of Andersen-Worldwide’s audit practice in South Florida) reported to the global practice director and managed the practice group within their regions.

CASE NO. 502004CA002257XXXXMB
First Amended Complaint

43. As a result of the "one firm" approach, all actions taken by members of Andersen-Worldwide, as well as all actions taken by member firms of Andersen-Worldwide, may be attributed to Andersen-Worldwide.

44. Andersen applied the "one firm" approach in its work with Sunbeam. Top partners responsible for the Sunbeam audits and restatement were partners of Andersen and members of Andersen-Worldwide, including the engagement partner on the Sunbeam audits, Harlow, the concurring partner on those audits, Pruitt, and the Audit Division Head and manager of Andersen's audit practice for the entire South Florida region, Denkhaus.

45. In addition, various international offices of Andersen-Worldwide did substantial work for Sunbeam. Sunbeam was a multinational corporation with operations in Canada, Mexico, Venezuela, and Hong Kong. The Sunbeam engagement required the participation of auditors from each of those countries and numerous American cities. Harlow, on behalf of both Andersen and Andersen-Worldwide, developed work plans that he circulated to Andersen's branches in other countries, including the Foreign Andersen Branches. Those offices worked closely with Harlow and others within Andersen and Andersen-Worldwide to complete the tasks outlined in the plans. They sent their work product to Harlow for inclusion in an Andersen-Worldwide Management Letter, as well as for incorporation in Andersen's audit work.

The Fraudulent 1996 Financial Statements

46. In 1996, after Dunlap took control of Sunbeam, Andersen permitted Sunbeam management to employ numerous accounting practices that — as Sunbeam's November 1998 restatement of its 1996 financial statements and an SEC investigation later showed — did not

CASE NO. 502004CA002257XXXXMB
First Amended Complaint

comply with GAAP. The objective of these accounting violations was to set an artificially bleak financial backdrop against which Sunbeam's 1997 performance would be judged.

47. Among other things, Sunbeam's 1996 financial statements, certified by Andersen, did not comply with the accounting principles of (1) reliability, Financial Accounting Standards Board ("FASB") Statement of Financial Accounting Concepts No. 2, §§ 58-97; Accounting Principles Board ("APB") Statement No. 4, §§ 109, 138, 189; (2) completeness, FASB Statement of Financial Accounting Concepts No. 2, §§ 79; 80; APB Statement No. 4, § 94; (3) conservatism, FASB Statement of Financial Accounting Concepts No. 2, §§ 91-97; APB Statements No. 9, §§ 35, 71; (4) neutrality, FASB Statement of Financial Accounting Concepts No. 2, §§ 98-110; or (5) relevance, FASB Statement of Financial Accounting Concepts No. 2, §§ 47, 48.

48. Among the accounting frauds that Andersen knowingly allowed was the artificial inflation of Sunbeam's reserves. Because the reserves were charged as an expense against income, this accounting practice allowed Sunbeam to overstate the 1996 loss against which its 1997 financial results would be compared.

49. For example, Sunbeam created a \$338 million reserve for "restructuring" charges. As the November 1998 restatement made clear, included in these charges were costs of redesigning product packaging; costs of relocating employees and equipment; bonuses to be paid to employees who were told that they were being laid off but were asked to stay on temporarily; advertising expenses; and certain consulting fees. Because these items benefited future activities, GAAP did not permit them to be classified as restructuring charges. Andersen also permitted Sunbeam to violate GAAP by creating a \$12 million reserve for a lawsuit alleging that

CASE NO. 502004CA002257XXXXMB
First Amended Complaint

Sunbeam was liable for cleanup costs associated with a hazardous waste site, even though Sunbeam's estimated liability was, at best, half that amount.

50. Andersen also permitted Sunbeam improperly to write down its household products inventory in 1996. In connection with the restructuring, Sunbeam had decided to eliminate half of Sunbeam's product lines and to liquidate its inventory of those product lines. Although only half of Sunbeam's product lines were eliminated, Andersen allowed Sunbeam to apply, at year-end 1996, the special accounting treatment that it had accorded the eliminated lines to its entire inventory of household products. As a result, as the November 1998 financial restatement later showed, Sunbeam understated the balance sheet value of its inventory at year-end 1996 by approximately \$2 million and overstated its 1996 loss by the same amount.

51. Andersen also allowed management improperly to recognize, as a 1996 expense, \$2.3 million in 1997 advertising expenses and related costs. In addition, Andersen permitted Sunbeam to manipulate its 1996 liabilities for "cooperative advertising." It was Sunbeam's practice to fund a portion of its retailers' costs of running local promotions. As required by GAAP, Sunbeam accrued its estimated liabilities for this expense. At year-end 1996, Sunbeam set its cooperative advertising accrual at an inflated value of \$21.8 million. According to the November 1998 restatement, this accrual was improper under GAAP because it was approximately 25 percent higher than the prior year's accrual amount, without a proportional increase in sales providing a basis for the increase. Ultimately, as the November 1998 restatement showed, \$5.8 million of that excessive accrual was used (without disclosure) to inflate Sunbeam's 1997 income.

CASE NO. 502004CA002257XXXXMB
First Amended Complaint

Andersen's 1996 Unqualified Audit Opinion

52. In the course of auditing Sunbeam's 1996 financial statements, Andersen became aware of these and other improper accounting practices. Indeed, an Andersen employee questioned a Sunbeam employee about the restructuring reserves and was told that the reserve included "everything but the kitchen sink." Harlow, the Andersen engagement partner, knew of this statement.

53. Harlow informed Kersh and Gluck, who were part of Sunbeam's senior management, that certain of the restructuring reserves that Sunbeam had established were not properly accounted for as restructuring costs under GAAP because they benefited Sunbeam's future operations. He proposed that Sunbeam reverse the accounting entries on its books and records reflecting the establishment of these reserves. However, when Kersh and Gluck refused to reverse these items, Harlow caused Andersen to acquiesce to Sunbeam's fraudulent accounting for the reserves.

54. In March 1997, Andersen issued an unqualified audit opinion regarding Sunbeam's 1996 financial statements and authorized the inclusion of its audit opinion in Sunbeam's 1996 Form 10-K filed with the SEC. A copy of the 1996 Audit Opinion is exhibit "A" attached hereto. Consistent with Andersen's internal procedures, the Audit Opinion was issued at the direction of Harlow and Pruitt. Denkhous, as Audit Division Head and manager of Andersen's audit practice for the entire South Florida region, had undertaken responsibility for supervising the audit work performed in Andersen's South Florida region and thus also bore responsibility for the issuance of this opinion.

55. Despite its knowledge of the many improper accounting practices that Sunbeam's management had employed, Andersen's opinion stated:

CASE NO. 502004CA002257XXXXMB
First Amended Complaint

We conducted our audits in accordance with generally accepted auditing standards.

Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement. An audit includes examining, on a test basis, evidence supporting the amounts and disclosures in the financial statements. An audit also includes assessing the accounting principles used and significant estimates made by management, as well as evaluating the overall financial statement presentation. We believe that our audits provide a reasonable basis for our opinion.

In our opinion, the financial statements . . . present fairly, in all material respects, the financial position of Sunbeam Corporation and subsidiaries as of December 31, 1995 and December 29, 1996, and the results of their operations and their cash flows for each of the three fiscal years in the period ended December 29, 1996 in conformity with generally accepted accounting principles.

56. Andersen also knowingly provided false descriptions of certain of Sunbeam's specific accounting practices. For example, it characterized Sunbeam's treatment of its restructuring charges in Note 2 to the audited 1996 consolidated financial statements as follows:

In conjunction with the implementation of the restructuring and growth plan, the Company recorded a pre-tax special charge to earnings of approximately \$337.6 million in the fourth quarter of 1996. This amount is allocated as follows in the accompanying Consolidated Statement of Operations: \$154.9 million to Restructuring, Impairment and Other Costs as further described below; \$92.3 million to Cost of Goods Sold related principally to inventory write-downs from the reduction in SKUs and costs of inventory liquidation programs; \$42.5 million to Selling, General and Administrative expenses principally for increases in environmental and litigation reserves (see Notes 12 and 13) and other reserve categories; and the estimated pre-tax loss on the divestiture of the Company's furniture business of approximately \$47.9 million.

In fact, however, Andersen knew that Sunbeam had improperly inflated its restructuring costs by millions of dollars.

CASE NO. S02004CA002257XXXXMB
First Amended Complaint

57. Andersen's 1996 audit violated GAAS because, among other things, Andersen failed (1) to perform the audits with an attitude of professional skepticism as required by the Statement on Auditing Standards ("SAS") No. 53; (2) to conclude that there was a significant risk that Sunbeam management would intentionally distort the company's financial statements, in violation of American Institute of Certified Public Accountants Professional Standards, AU §§ 316.10 and 316.12; (3) to recognize that the accounting policies employed by Sunbeam were not acceptable in the circumstances, in violation of AU § 316.19; (4) to obtain sufficient competent evidential matter through inspection, observation, inquiries, and confirmations to afford a reasonable basis for its opinions regarding Sunbeam's financial statements, in violation of AU § 150.02; (5) to exercise due professional care in the performance of the audit, in violation of AU § 150.02; (6) to plan the work adequately to uncover the errors and irregularities in Sunbeam's accounting information, in violation of AU § 150.02; and (7) to obtain a sufficient understanding of Sunbeam's internal control structure to plan the audits and to determine the nature, timing, and extent of tests to be performed, in violation of AU § 150.02.

58. In addition, in conducting the 1996 audit, Andersen (1) improperly relied on management representations rather than applying the auditing procedures necessary to afford a reasonable basis for an opinion on Sunbeam's financial statements, in violation of SAS No. 19 (AU § 333.02); (2) failed to recognize that misstatements resulting from misapplication of GAAP, departures from fact, and omissions of necessary information, in aggregate, caused Sunbeam's financial statements to be materially misstated, in violation of SAS No. 47 (AU § 312.04); (3) failed to issue a qualified or adverse opinion, in violation of SAS No. 47 (AU § 312.31); and (4) improperly concluded that the accounting principles applied by Sunbeam were appropriate in the circumstances and that Sunbeam's financial statements were informative

CASE NO. 502004CA002257XXXXMB
First Amended Complaint

of matters that could affect their use, understanding, and interpretation, in violation of SAS No. 69 (AU § 411.04(b) and (c)).

59. Harlow, Pruitt, and Denkhaus knew of or recklessly disregarded numerous red flags that should have caused them to prevent Andersen from certifying Sunbeam's 1996 financial statements. However, they did nothing to stop Andersen's unqualified 1996 audit opinion from being included in Sunbeam's Form 10-K filing with the SEC, despite the fact that they knew or were reckless in not knowing that the financial statements that Andersen had certified were materially misleading. Harlow, Pruitt, and Denkhaus also knew that the false financial statements that they had caused Andersen to issue would be incorporated into Sunbeam's consolidated financial statements and that lenders, such as MSSF, and underwriters, such as MS & Co., would rely on these financial statements.

60. In all, the 1996 financial statements audited by Andersen were materially false and misleading and overstated Sunbeam's operating losses for 1996 by at least \$40 million. Moreover, Andersen's unqualified audit opinion was false in at least two material respects. First, the financial statements that Andersen audited did not "fairly" present Sunbeam's financial position in conformity with GAAP, as it represented. Second, Andersen had not, as it claimed, conducted its audit in accordance with GAAS.

The Fraudulent 1997 Financial Statements

61. The accounting frauds in which Andersen permitted Sunbeam to engage in 1997 were aimed at inflating the company's earnings. To accomplish this — as the November 1998 restatement and an SEC investigation subsequently showed — Andersen allowed Sunbeam to

CASE NO. 502004CA002257XXXXMB
First Amended Complaint

record fraudulent sales, to account improperly for one-time events, and improperly to use "cookie-jar" reserves, all in violation of GAAP.

62. Among other things, Sunbeam's 1997 financial statements, certified by Andersen, did not comply with the accounting principles of (1) reliability, FASB Statement of Financial Accounting Concepts No. 2, §§ 58-97; APB Statement No. 4, §§ 109, 138, 189; (2) completeness, FASB Statement of Financial Accounting Concepts No. 2, §§ 79, 80; APB Statement No. 4, § 94; (3) conservatism, FASB Statement of Financial Accounting Concepts No. 2, §§ 91-97; APB Statements No. 9, §§ 35, 71; (4) neutrality, FASB Statement of Financial Accounting Concepts No. 2, §§ 98-110; or (5) relevance, FASB Statement of Financial Accounting Concepts No. 2, §§ 47, 48.

63. One of the revenue inflation tactics permitted by Andersen in 1997 was improper accounting for "bill-and-hold" sales. A bill-and-hold sale occurs when a seller bills a customer for a purchase while retaining the merchandise for later delivery. During 1997, Dunlap's management team offered financial incentives to various customers to purchase products. Under GAAP, revenue under bill-and-hold transactions may be recognized only if, among other things, the buyer — not the seller — requests a sale on that basis. As Andersen subsequently learned in the course of its 1997 audit, the purported bill-and-hold customers had not requested that treatment, and, in numerous cases, the risks of ownership and legal title were never passed to the customer. Sunbeam added more than \$29 million to its 1997 sales and \$4.5 million to income by improperly accounting for these transactions.

64. Another income-boosting tactic that Andersen sanctioned was Sunbeam's improper use of its inflated 1996 reserves, which artificially increased the company's 1997 income by almost \$5 million. Andersen also let Sunbeam improperly treat \$19 million that it received from

CASE NO. 502004CA002257XXXXMB
First Amended Complaint

the sale of discounted and obsolete inventory as ordinary income. Although the recognition of that revenue was permitted under GAAP, Sunbeam was required to disclose that revenue as a non-recurring event. Sunbeam failed to do so, again with Andersen's blessing.

65. In addition, Andersen and Andersen-Hong Kong allowed Sunbeam's Hong Kong subsidiary to book sales that violated applicable accounting principles because they included an unlimited right to return unsold merchandise and because the amount of future returns on such sales could not reasonably be estimated. On Andersen's and Andersen-Hong Kong's watch, Sunbeam's Hong Kong subsidiary improperly recorded sales revenue of \$8.6 million from various sales made during the fourth quarter of 1997. Andersen and Andersen-Hong Kong also permitted Sunbeam's Hong Kong subsidiary to under-provide for warranty and product liability expenses; improperly to include in 1997 net sales of \$0.5 million of goods that were not shipped until 1998; and improperly to defer 1997 advertising costs to future periods.

66. Andersen and Andersen-Canada also permitted Sunbeam's Canadian subsidiary improperly to book sales that did not meet the applicable sales recognition criteria because they included an unlimited right to return unsold merchandise and because the amount of future returns on such sales could not reasonably be estimated.

67. Andersen and Andersen-Mexico also permitted Sunbeam to employ several improper accounting tricks with respect to its Mexican subsidiary. Sunbeam's Mexican subsidiary engaged in \$900,000 in bill-and-hold transactions in 1997 that should not have been recognized as income until 1998. In addition, the subsidiary's inventory was overvalued by \$2 million, and the financial statements for Sunbeam's Mexico operations failed to include a \$3 million expense for the profit-sharing obligations of that business.

CASE NO. 502004CA002257XXXXMB
First Amended Complaint

68. Andersen and Anderson-Venezuela also permitted Sunbeam's Venezuela subsidiary improperly to value its inventory of raw materials. Its books reflected purchases of raw materials that were held at various suppliers. Andersen failed to confirm that the booked amounts represented materials that were actually in the possession of suppliers. Had it done so, it would have discovered that the materials did not exist.

69. One of the most egregious accounting abuses that Andersen permitted in 1997 was to allow Sunbeam to record a profit on a sham sale of its warranty and spare parts business to its spare parts provider, EPI Printers, Inc. Prior to 1997, EPI satisfied spare parts and warranty requests of Sunbeam customers on a fee basis. To raise additional revenue at year-end 1997, however, Sunbeam entered into a sham "sale" of the warranty and spare parts inventories already in EPI's warehouse. As a result of the transaction, management fraudulently recognized millions of dollars of bogus sales and profits in 1997.

70. The problem with the EPI transaction was that the transaction was not a sale at all, for at least three reasons. First, there was never a final agreement between Sunbeam and EPI. The closest the parties ever came to a meeting of the minds was the execution of a mere "agreement to agree." Second, by its terms, the proposed sale was to terminate on January 23, 1998, with no payment obligation on the part of EPI, absent a subsequent agreement between Sunbeam and EPI on the value of the inventory. In other words, the sale could be completely unwound just after year-end without EPI ever having paid a cent. Third, Sunbeam had agreed as part of the proposed sale to pay certain fees to EPI and to guarantee a 5-percent profit to EPI on the eventual resale of the inventory. In essence, even after the proposed sale, EPI remained a contractor compensated by Sunbeam on a fee basis for its services. In sum, the relationship between EPI and Sunbeam was not materially altered by the purported "sale."

CASE NO. 502004CA002257XXXXMB
First Amended Complaint

71. As a result of these and other violations of accounting standards, in 1997, Sunbeam reported \$186 million in income, much of which was, according to the November 1998 restatement, improper under GAAP. In all, the overstatements included over \$90 million of improper net income, including approximately \$10 million from a sham sale of inventory to a contractor, approximately \$4.5 million from non-GAAP bill-and-hold sales, approximately \$35 million in income derived from the use of non-GAAP reserves and accruals taken at year-end 1996, and approximately \$6 million from improper revenue recognition.

Sunbeam's Purchase of Coleman

72. Toward the end of 1997, Sunbeam engaged MS & Co. to advise it with respect to the possible sale of its core businesses and/or the initiation of one or more major acquisitions. Ultimately, Coleman, Signature Brands, and First Alert were identified as three companies interested in being acquired by Sunbeam.

73. On January 28, 1998, Sunbeam announced its financial results for 1997, reporting total revenues of \$1.168 billion, and total earnings from continuing operations of \$189 million (or \$1.41 per share).

74. On February 3, 1998, Harlow met with key officers of Sunbeam to discuss the acquisition of Coleman and its financial impact on Sunbeam. By that time, as a result of reviewing Sunbeam's 1997 financial statements in the course of its audit, Harlow and Andersen knew that Sunbeam's 1997 results were false.

75. On February 20, 1998, Andersen agreed to act as a Sunbeam financial advisor and perform financial due diligence in connection with Sunbeam's acquisition of Coleman, First Alert, and Signature Brands, further compromising Andersen's duty as an auditor to maintain its

CASE NO. 502004CA002257XXXXMB
First Amended Complaint

independence from its client. In agreeing to undertake that assignment, Andersen became an active member of the team working to assist Sunbeam in its acquisitions. Harlow and other Andersen employees who worked on Sunbeam's audit also served as members of Sunbeam's due diligence team.

76. On February 27, 1998, Sunbeam's Board of Directors met in New York to discuss Sunbeam's possible purchase of Coleman. During the February 27, 1998 meeting, MS & Co. provided Sunbeam's Board of Directors with a written "fairness" opinion regarding the fair acquisition price of Coleman. The opinion made clear that, even in the context of issuing a fairness opinion on the Coleman acquisition price, MS & Co. had relied upon Andersen's representations regarding Sunbeam's financial health. The fairness opinion explicitly stated that MS & Co. had reviewed "certain publicly available financial statements and other information" of Sunbeam. The opinion advised that MS & Co. had "assumed and relied upon without independent verification the accuracy and completeness of the information reviewed by us for the purposes of this opinion."

77. The Sunbeam Board of Directors approved the Coleman acquisition. That same day, Coleman-Parent — the 82-percent shareholder of Coleman — agreed to sell Coleman to Sunbeam for a purchase price of \$2.2 billion. Sunbeam agreed to provide Coleman-Parent with \$160 million in cash, to assume \$584 million in Coleman-related debt, and to provide Coleman-Parent with 14,099,749 shares of Sunbeam stock. Sunbeam also agreed to purchase Signature Brands and First Alert for approximately \$300 million.

CASE NO. 502004CA002257XXXXMB
First Amended Complaint

Andersen's 1997 Unqualified Audit Opinion

78. In the first week of March 1998, shortly after the agreement for Sunbeam's purchase of Coleman was signed, but before the transaction closed, Andersen rendered an unqualified audit opinion for Sunbeam's 1997 financial statements. With Andersen's express consent, management included that opinion in Sunbeam's 1997 Form 10-K filed with the SEC on March 6, 1998.

79. Andersen was well aware of the potential for fraud in Sunbeam's 1997 books, including the risk that Sunbeam management would attempt to claim profits and revenue on transactions before the earnings process was completed. Harlow had specifically advised Andersen's foreign offices (including Andersen-Canada, Andersen-Hong Kong, Andersen-Mexico, and Andersen-Venezuela), for example, that Dunlap had made promises to the public regarding earnings-per-share to be attained in 1997, and that management had a vested interest in achieving the promised earnings levels because management's primary form of compensation was based on the company's stock price. Harlow had also noted the presence of the possibility of a third-party purchase of the company's stock or assets.

80. In the course of its audit of Sunbeam's 1997 financial records, Andersen learned that Harlow's concerns were well-founded. It discovered that Sunbeam had improperly accounted for certain bill-and-hold sales, had misused its reserves, and had overvalued its inventories. Harlow discussed these problems with Sunbeam's senior management and proposed that Sunbeam reverse these improper entries.

81. For example, as part of Andersen's 1997 year-end audit, Harlow raised with Sunbeam's management the improper accounting treatment accorded to the EPI transaction. He proposed that Sunbeam reverse the accounting entries reflecting the revenue recognition for that

CASE NO. S02004CA002257XXXXMB
First Amended Complaint

transaction, pointing out that the profit guarantee and the indeterminate value of the contract rendered revenue recognition inconsistent with GAAP. Kersh and Gluck refused to reverse the transaction. Harlow caused Andersen to acquiesce in management's actions. As a result, Sunbeam's 1997 audited financial statements reflect almost \$10 million of false profit on the sham EPI transaction.

82. Harlow also raised with Kersh and Gluck Sunbeam's inappropriate use of reserves and recorded the full \$4.9 million of costs that Sunbeam had improperly offset against reserves on the list of proposed audit adjustments. Kersh and Gluck, however, refused to make the proposed adjustments. Harlow again failed to insist on honest, accurate accounting. Instead, he caused Andersen to acquiesce in Sunbeam's refusal to reverse these improper reductions in current-period costs, although he knew or recklessly disregarded facts indicating that this improper accounting would materially distort Sunbeam's reported results of operations. In fact, this use of reserves increased 1997 fourth-quarter income by almost 8 percent.

83. Harlow also proposed adjustments to reverse \$2.9 million related to Sunbeam's inventory overvaluation by its Mexican subsidiary and \$563,000 related to various miscellaneous terms. Kersh and Gluck refused to make appropriate adjustments, and Harlow again caused Andersen to acquiesce in their refusal to reverse these errors — despite the fact that these items added over 5.4 percent to Sunbeam's reported earnings for the fourth quarter and contributed to the larger misstatement of Sunbeam's reported results of operations stemming from the fraudulent conduct of Sunbeam's management.

84. These improper accounting techniques raised clear red flags that should have — and must have — alerted Andersen to the need for greater scrutiny regarding all of Sunbeam's revenue recognition decisions. At a minimum, Andersen should have been on guard as to all of

CASE NO. 502004CA002257XXXXMB
First Amended Complaint

the proposed audit adjustments that Harlow initially proposed but later rejected, and any previously recognized improper items that were ultimately dismissed as "immaterial."

85. Despite these clear red flags, Andersen once again gave Sunbeam a clean bill of financial health, issuing an unqualified audit opinion regarding Sunbeam's 1997 financial statements and authorized the inclusion of its audit opinion in Sunbeam's 1997 Form 10-K filed with the SEC. A copy of the 1997 Audit Opinion is exhibit "B" attached hereto. The Audit Opinion is signed by Andersen. Consistent with Andersen's internal procedures, the Audit Opinion was issued at the direction of Harlow and Pruitt. Denkhaus, as Audit Division Head and manager of Andersen's audit practice for the entire South Florida region, had undertaken responsibility for supervising the audit work performed in Andersen's South Florida region and thus also bore responsibility for the issuance of this opinion.

86. In this opinion, Andersen stated:

We conducted our audits in accordance with generally accepted auditing standards. Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement. An audit includes examining, on a test basis, evidence supporting the amounts and disclosures in the financial statements. An audit also includes assessing the accounting principles used and significant estimates made by management, as well as evaluating the overall financial statement presentation. We believe that our audits provide a reasonable basis for our opinion.

In our opinion, the financial statements . . . , present fairly, in all material respects, the financial position of Sunbeam Corporation and subsidiaries as of December 29, 1996 and December 28, 1997, and the results of its operations and its cash flows for each of the three fiscal years in the period ended December 28, 1997 in conformity with generally accepted accounting principles.

87. In fact, Andersen's 1997 audit violated GAAS because, among other things, Andersen had failed (1) to perform the audits with an attitude of professional skepticism as

CASE NO. 502004CA002257XXXXMB
First Amended Complaint

required by SAS No. 53; (2) to reach a conclusion that there existed a significant risk of intentional distortion of financial statements by Sunbeam management, in violation of AU §§ 316.10 and 316.12; (3) to recognize that the accounting policies employed by Sunbeam were not acceptable in the circumstances, in violation of AU § 316.19; (4) to obtain sufficient competent evidential matter through inspection, observation, inquiries, and confirmations to afford a reasonable basis for its opinions regarding Sunbeam's financial statements, in violation of AU § 150.02; (5) to exercise due professional care in the performance of the audit, in violation of AU § 150.02; (6) to plan the work adequately to uncover the errors and irregularities in Sunbeam's accounting information, in violation of AU § 150.02; and (7) to obtain a sufficient understanding of Sunbeam's internal control structure to plan the audits and to determine the nature, timing, and extent of tests to be performed, in violation of AU § 150.02.

88. In addition, in conducting the 1997 audit, Andersen (1) improperly relied on management representations rather than applying the auditing procedures necessary to afford a reasonable basis for an opinion on Sunbeam's financial statements, in violation of SAS No. 19 (AU § 333.02); (2) failed to recognize that misstatements resulting from misapplication of GAAP, departures from fact and omissions of necessary information, in aggregate, caused Sunbeam's financial statements to be materially misstated, in violation of SAS No. 47 (AU § 312.04); (3) failed to issue a qualified or adverse opinion, in violation of SAS No. 47 (AU § 312.31); (4) improperly concluded that the accounting principles applied by Sunbeam were appropriate in the circumstances and that Sunbeam's financial statements were informative of matters that could affect their use, understanding and interpretation, in violation of SAS No. 69 (AU § 411.04(b) and (c)); and (5) failed to report that a change in the application of accounting principles in Sunbeam's 1997 financial statements had materially affected their

CASE NO. 502004CA002257XXXXMB
First Amended Complaint

comparability with the financial statements for prior periods, especially 1996, due to a different treatment of sales and reserves in those periods, in violation of SAS Nos. 1 and 43 (AU § 420.02).

89. Harlow, Pruitt, and Denkhaus knew of or recklessly disregarded numerous red flags that should have caused them to withhold Andersen's unqualified certification of Sunbeam's 1997 financial statements. However, Harlow, Pruitt, and Denkhaus did nothing to stop Andersen's unqualified 1997 audit opinion from being included in Sunbeam's Form 10-K filing with the SEC, despite the fact that they knew or were reckless in not knowing that the financial statements that Andersen had certified were materially misleading. Harlow, Pruitt, and Denkhaus also knew that the false financial statements that they had caused Andersen to issue would be incorporated into Sunbeam's consolidated financial statements and that MSSF, as a lender, and MS & Co., as an underwriter, would rely on these financial statements.

90. The Foreign Andersen Branches also knew of or recklessly disregarded the fact that the financial statements of Sunbeam's foreign subsidiaries, which they had reviewed and audited, were not prepared in accordance with GAAP or reviewed in accordance with GAAS. The Foreign Andersen Branches nevertheless certified that their audit work complied with GAAP and GAAS. Each of the Foreign Andersen Branches also knew that the false financial statements that they had audited would be incorporated into Sunbeam's consolidated financial statements and that lenders, such as MSSF, and underwriters, such as MS & Co., would rely on these financial statements.

91. In all, the 1997 financial statements audited by Andersen reported operating income of \$186 million — an overstatement of at least 50 percent. Like its 1996 unqualified audit opinion, Andersen's 1997 opinion was false in two material respects. First, the financial

CASE NO. 502004CA002257XXXXMB
First Amended Complaint

statements Andersen audited did not "fairly" present Sunbeam's financial position in conformity with GAAP, as it represented. Second, Andersen had not, as it claimed, conducted its audit in accordance with GAAS.

**Reliance by Plaintiffs on Andersen's
Unqualified Audit Opinions**

92. After it agreed to acquire Coleman, First Alert, and Signature Brands, Sunbeam needed to raise approximately \$2.3 billion to refinance existing debt and to fund these acquisitions. To accomplish these financing objectives, Sunbeam's management elected to issue \$500 million in subordinated convertible notes (an amount later increased to \$750 million) (the "Convertible Note Offering") and to enter into a new \$2 billion senior credit agreement (later reduced to \$1.7 billion) with secured lenders (the "Bank Facility"). MS & Co. served as the lead underwriter for the Convertible Note Offering. MSSF served as the Syndication Agent for the Bank Facility and coordinated the Bank Facility with First Union and Bank of America, Sunbeam's other secured lenders.

93. Andersen, Harlow, Pruitt, and Denkhous knew of these proposed financing arrangements. Specifically, they knew that the Coleman and other acquisitions would not close unless Sunbeam secured the financing necessary to cover the acquisition prices. They knew that MS & Co. would underwrite a notes offering that Sunbeam would use to finance the transaction. Moreover, they knew that MSSF was a principal participant in the Bank Facility, and that MSSF would be relying on the representations Andersen made regarding Sunbeam's financial condition.

94. In addition, Andersen, Harlow, Pruitt, and Denkhous knew that documents issued in connection with the Convertible Note Offering clearly stated that "[Sunbeam] is currently

CASE NO. 502004CA002257XXXXMB
First Amended Complaint

negotiating the terms of the New Credit Facility with a group of banks which [Sunbeam] expects will provide for borrowings by [Sunbeam] or one or more of its subsidiaries in the aggregate principal amount of \$2.0 billion. *The New Credit Facility is being arranged by an affiliate of [Morgan Stanley].*" Andersen, Harlow, Pruitt, and Denkhaus knew that the affiliate referred to in this document was MSSF.

95. In addition to their knowledge of MS & Co.'s and MSSF's roles in Sunbeam's acquisitions, Andersen, Harlow, Pruitt, and Denkhaus had many reasons to know that MS & Co. and MSSF would rely on Sunbeam's audited financial statements. To begin with, Andersen, Harlow, Pruitt, and Denkhaus, in their substantial experience working on multi-billion dollar mergers and acquisitions, understood that Sunbeam's lenders and underwriters would rely on an auditor's certification of Sunbeam's financial condition. As would any lender engaged in a deal of this scale, MSSF looked to the financial statements provided by Sunbeam and audited by Andersen to evaluate annual cash flow and to assess Sunbeam's ability, following the acquisition, to promptly and comfortably pay interest and, ultimately, pay back the loan. Indeed, reasonable and professional lenders such as MSSF, Bank of America, and First Union would not have loaned over \$1 billion dollars to any person or entity without strong assurance that their money would be returned. Andersen, Harlow, Pruitt, and Denkhaus knew that MS & Co., the underwriter of the Convertible Note Offering, would similarly refuse to underwrite a \$750 million offering without strong assurance that Sunbeam's financial condition was sound.

96. Not only were Andersen, Harlow, Pruitt, and Denkhaus aware that any prudent business in MS & Co.'s or MSSF's position *would* rely on Andersen's financial statements, but they also knew that MS & Co. and MSSF *were* specifically relying on Andersen's certifications. In a letter dated March 11, 1998, MS & Co. wrote a letter to Andersen — to the attention of

CASE NO. 502004CA002257XXXMB
First Amended Complaint

Harlow — notifying Andersen that MS & Co. would be “reviewing certain information relating to Sunbeam that will be included in the Offering Memorandum.” MS & Co. requested that Andersen deliver to it a “‘comfort’ letter concerning the financial statements” of Sunbeam.

97. In response to this request, Andersen expressly represented to MS & Co. that Sunbeam’s financial statements were truthful and that Andersen’s unqualified audit opinions were reliable. On March 19, 1998, Andersen sent MS & Co. a “comfort” letter stating that, in Andersen’s opinion, “the consolidated financial statements [for 1996 and 1997] audited by [Andersen] and included in the Offering Memorandum comply as to form in all material respects with the applicable accounting requirements of the [Securities Act of 1933] and the related published rules and regulations.” Andersen knew that MS & Co. would rely on the comfort letters in deciding to underwrite the Convertible Note Offering. Andersen also knew that Sunbeam’s acquisitions were contingent on Sunbeam’s obtaining the necessary financing for the transactions, including the underwriting of the convertible notes. Andersen knew that, absent its representations, MS & Co. would not have underwritten the notes, and therefore the financing, including MSSF’s loan to Sunbeam, would not have gone forward. A copy of the March 19, 1998 letter is exhibit “C” attached hereto.

98. Harlow and Pruitt authorized the issuance of the March 19, 1998 comfort letter, which was signed by Andersen. Upon information and belief, Denkhaus knew of this letter and did nothing to stop its issuance.

99. In a follow-up letter to MS & Co. dated March 25, 1998, Andersen reaffirmed its previous representation, stating that it “reaffirm[ed] as of the date hereof (and as though made on the date hereof) all statements made in that letter.” Again, Andersen knew that MS & Co. would rely on the comfort letters in deciding to underwrite the Convertible Note Offering and that,

CASE NO. 502004CA002257XXXXMB
First Amended Complaint

absent its representations, the financing, including MSSF's loan to Sunbeam, would not have gone forward. A copy of the March 25, 1998 letter is exhibit "D" attached hereto.

100. Again, Harlow and Pruitt authorized the issuance of this letter, which was likewise signed by Andersen. Upon information and belief, Denkhaus also knew of this letter and did nothing to stop its issuance.

101. In addition to Andersen's written representations regarding Sunbeam's financial condition, Andersen partners and employees, including Harlow, participated in meetings and telephone calls in which they represented to MS & Co. and MSSF that Sunbeam's audited financial statements were accurate. For example, on March 12, 1998, representatives of MS & Co. participated in a conference call with Harlow and another Andersen employee to discuss Sunbeam's financial statements. In this call, Harlow assured MS & Co.'s representatives that there were no material inaccuracies in Sunbeam's financial statements. Upon information and belief, Harlow made these statements with the knowledge and approval of Pruitt and Denkhaus.

102. Andersen, Harlow, Pruitt, and Denkhaus also knew that MS & Co. had stated in a February 27, 1998 "fairness" opinion that MS & Co. had presented to Sunbeam's Board of Directors that MS & Co. had assumed and relied upon the accuracy and completeness of Sunbeam's audited financial statements that were available at that time.

103. In addition, Andersen, Harlow, Pruitt, and Denkhaus knew that Sunbeam had expressly represented, in loan negotiations with MSSF, that Andersen's audit opinions were accurate. Specifically, Andersen knew that, in the Sunbeam-MSSF credit agreement, Sunbeam had warranted that it had provided MSSF with accurate information regarding Sunbeam's consolidated statements of operations, stockholders' equity and cash flows, as well as its consolidated balance sheets. According to Sunbeam, its financial statements — certified by

CASE NO. 502004CA002257XXXMB
First Amended Complaint

Andersen --- "present[ed] fairly, in all material respects, the financial position and results of operations and cash flows . . . in accordance with GAAP."

104. Similarly, Andersen, Harlow, Pruitt, and Denkhaus knew that, in connection with the Convertible Note Offering, Sunbeam had included its 1996 and 1997 audited financial statements in its March 19, 1998, offering memorandum and had represented to MS & Co. that its audited financial statements were reliable.

105. Andersen, Harlow, Pruitt, and Denkhaus also knew that, as part of the Coleman merger agreement executed on February 27, 1998, Sunbeam had represented and warranted that all of its filings with the SEC, which included the 1996 financial statements audited by Andersen, were accurate and not misleading, and that they would continue to be accurate and not misleading as of the transaction's closing date. Sunbeam further represented that its audited financial statements were prepared in accordance with GAAP, and that at the time of the closing of the transaction, that representation would continue to be true and correct.

106. Although it knew that MS & Co. and MSSF had based multi-million dollar financing decisions on its representations, Andersen did not tell Plaintiffs' of the accounting concerns that it had raised with Sunbeam management in the course of its 1996 and 1997 audits or that Sunbeam's financial statements had not been fairly stated in 1996 and 1997.

107. On March 25, 1998, the \$750 million Convertible Note Offering closed. In justifiable reliance on Andersen's 1996 and 1997 unqualified audit opinions, on Andersen's March 19, 1998, and March 25, 1998, "comfort" letters, and on the oral representations made by Harlow and other partners, members or employees of Andersen and Andersen-Worldwide, MS & Co. underwrote this offering to finance Sunbeam's acquisitions of Coleman, Signature Brands, and First Alert.

CASE NO. S02004CA002257XXXMB
First Amended Complaint

108. Sunbeam closed its acquisition of Coleman on March 30, 1998. On that date, Sunbeam, through a wholly owned subsidiary, acquired approximately 81 percent of the then-outstanding shares of Coleman common stock. These shares were acquired by Sunbeam in exchange for 14,099,749 shares of Sunbeam's common stock and approximately \$160,000,000 in cash. In addition, Sunbeam assumed or repaid approximately \$1,016,000,000 in debt belonging to Coleman and Coleman-Parent. Included in the repaid debt portion of the transaction was an immediate cash payment by Sunbeam to Coleman-Parent of \$590 million.

109. MSSF and Sunbeam closed the Bank Facility on March 31, 1998. In accordance with the terms of the Bank Facility, MSSF — unaware of the falsity of Sunbeam's financial statements and Andersen's audit reports and in justifiable reliance on Andersen's representations — loaned Sunbeam \$680 million in immediately available funds to be used for the acquisitions. First Union, which served as the Administrative Agent for the Bank Facility, loaned Sunbeam an additional \$510 million. Bank of America, which served as the Documentation Agent for the Bank Facility, loaned Sunbeam an additional \$510 million.

110. As Andersen, Harlow, Pruitt, and Denkhaus knew, MS & Co. had relied on Sunbeam's 1996 and 1997 financial statements in deciding to underwrite the Convertible Note Offering. Andersen, Harlow, Pruitt, and Denkhaus further knew that MSSF had relied on Sunbeam's 1996 and 1997 financial statements in deciding to loan Sunbeam \$680 million. Moreover, they knew that the Sunbeam-MSSF credit agreement provided that a condition precedent to MSSF's obligations under the agreement was the absence of any event, change, or development that would have a material adverse effect on the business, results of operation, or financial condition of Sunbeam. Andersen knew that an additional condition precedent to

CASE NO. 502004CA002257XXXMB
First Amended Complaint

MSSF's obligations was the absence of any material misrepresentation or omissions in Sunbeam's SEC filings, including Andersen's 1996 and 1997 audit reports in the Form 10-Ks.

111. But for Andersen's fraud and its failure to issue qualified or adverse reports exposing the falsity of Sunbeam's financial statements, MS & Co. and MSSF would have had notice of an adverse material change affecting Sunbeam before funding, and of a material misstatement in Sunbeam's SEC filings. Not only would MS & Co. never have agreed to underwrite the Convertible Note Offering, but MSSF's obligation to loan Sunbeam \$680 million also would have been discharged by the failure of conditions precedent to its obligations under the credit agreement. Andersen's fraud directly caused the extensive losses that Plaintiffs suffered.

112. Andersen's fraud was knowingly caused by Harlow, Pruitt, and Denkhaus. Harlow, as engagement partner, and Pruitt, as concurring partner, had direct responsibility for directing, managing, and approving of the work that was done on the Sunbeam audits. They caused Andersen to represent to MS & Co. and MSSF that Sunbeam's financial statements were reliable. Denkhaus, who was a senior partner of Andersen and a member of Andersen-Worldwide, as well as the Audit Division Head and manager of Andersen's audit practice for the entire South Florida region, had undertaken responsibility for supervising and monitoring the work that was performed at Harlow's and Pruitt's direction. Harlow, Pruitt, and Denkhaus each knew of or recklessly disregarded the accounting violations contained in Sunbeam's 1996 and 1997 financial statements. They each also knew that the financial statements that they had caused Andersen to certify would be relied upon by MS & Co. in deciding to underwrite the Convertible Note Offering and by MSSF in deciding to loan Sunbeam hundreds of millions of dollars.

CASE NO. 502004CA002257XXXMB
First Amended Complaint

113. This fraud was also knowingly perpetrated by the Foreign Andersen Branches. Each of the Foreign Andersen Branches reviewed and audited financial statements prepared for Sunbeam's foreign subsidiaries for 1997, all of which contained significant accounting violations. Each of the Foreign Andersen Branches knew of or recklessly disregarded the fact that the financial statements that they had reviewed and audited were not prepared in accordance with GAAP or reviewed in accordance with GAAS, but nevertheless certified that their audit work complied with these standards. Each of the Foreign Andersen Branches also knew that the financial statements that they had audited would be incorporated into Sunbeam's consolidated financial statements and that lenders, such as MSSF, and underwriters, such as MS & Co., would rely on these financial statements.

114. The fraud was also knowingly perpetrated by Andersen-Worldwide through the actions of its members, including Harlow, Pruitt, and Denkhaus, and its member firms, including Andersen and the Foreign Andersen Branches.

Andersen's Improper Accounting and Misrepresentations Are Revealed

115. In an April 3, 1998 conference call with securities analysts, Sunbeam revealed that sales for the first quarter of 1998 were 5 percent below reported sales for the same period of the prior year.

116. On April 22, 1998, a class of Sunbeam shareholders sued Sunbeam and its senior officers in the United States District Court for the Southern District of Florida, alleging that the company had violated the securities laws by issuing materially false and misleading statements regarding Sunbeam's financial condition. Andersen was subsequently added as a defendant in that lawsuit.

CASE NO. 502004CA002257XXXXMB
First Amended Complaint

117. On June 8, 1998, an article was published in Barron's that raised serious questions regarding Sunbeam's apparent success under Dunlap, suggesting that it was the result of "accounting gimmickry." On June 15, 1998, Sunbeam's Board announced that it had removed Dunlap as Chairman and CEO. On June 17, 1998, Sunbeam received a letter from the SEC informing it that the SEC had initiated an investigation into the company.

118. Andersen continued to stand behind its fraudulent audit opinions. On June 15, 1998, Andersen allowed Sunbeam's Board of Directors to assert that Andersen had "assured the Board that Sunbeam's audited financial statements [were] accurate in all material respects." Andersen made this statement knowing that it was false. Harlow, Pruitt, and Denkhau likewise knew the statement was false, but caused Andersen to make this statement. It was not until June 25, 1998 — when Andersen withheld its consent for use of its 1997 audit opinion in a registration statement that was to have been filed with the SEC — that Andersen gave any hint that its unqualified audit opinions were unreliable.

119. On June 30, 1998, Sunbeam announced that the Audit Committee of its Board of Directors would conduct an inquiry into the accuracy of its 1997 financial statements. The Audit Committee subsequently retained Deloitte & Touche LLP to assist in the review, in addition to Andersen. Sunbeam stated that "pending the completion of the review, its 1997 financial statements and the report of Arthur Andersen LLP should not be relied upon." Sunbeam added that the review "could result in a restatement of the 1997 financial statements and the first quarter 1998 Form 10-Q."

120. On August 6, 1998, Sunbeam announced that its Audit Committee had determined that Sunbeam would be required to restate its audited financial statements for 1997 and possibly for 1996, as well as its unaudited financial statements for the first quarter of 1998. On

CASE NO. 502004CA002257XXXXMB
First Amended Complaint

October 20, 1998, Sunbeam and Andersen announced a restatement of its 1996 and 1997 financial statements.

121. Holders of the convertible notes sued Sunbeam on October 30, 1998, and Andersen was later named as a defendant in that suit.

122. On November 12, 1998, Sunbeam released its restated 1996 and 1997 financial results, again audited by Andersen. The restated 1996 financial statements reported operating losses for 1996 that were approximately \$40 million less than originally reported, losses from continuing operations that were approximately \$26 million less than previously reported and net losses that were approximately \$20 million less than previously reported.

123. For 1997, the restated financial statements reported operating earnings that were approximately \$95 million less than originally reported, earnings from continuing operations that were approximately \$70 million less than previously reported and net earnings that were approximately \$70 million less than previously reported. The new operating income figure for 1997 was approximately half the amount that Andersen had previously certified.

Sunbeam Declares Bankruptcy

124. On February 6, 2001, as a direct result of the deceit that Andersen had committed, with the knowledge and assistance of the other Defendants named in this Complaint, Sunbeam and several of its subsidiaries were forced to seek relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York. As part of the bankruptcy court-approved reorganization plan, MSSF's \$680 million loan to Sunbeam was discharged in full, and MSSF received Sunbeam stock valued at a fraction of the original loan. In addition, as a result of Andersen's actions, the convertible notes issued by Sunbeam and held

CASE NO. 502004CA002257XXXMB
First Amended Complaint

by MS & Co. had been rendered substantially less valuable. The shareholders of Sunbeam saw the value of their stock decline by over \$5 billion from its peak in early March 1998 to February 5, 2001.

Subsequent Censure of Andersen's Conduct

125. Both courts and regulators have scrutinized Andersen's facilitation of Sunbeam's fraud. In their judgments against the firm and Harlow, they have denounced Andersen's conduct.

126. In December 1999, for example, the United States District Court for the Southern District of Florida, which presided over the Sunbeam shareholders' class action securities fraud lawsuit, refused to dismiss any claims against Andersen. The court found that the plaintiff class had, by alleging the material misstatements made by Andersen in its unqualified audit opinions, describing the violations of GAAP and GAAS that had occurred, and setting forth why the statements in the audit opinions were false and misleading, pled fraud against Andersen with sufficient particularity to satisfy Federal Rule of Civil Procedure 9(b)'s pleading requirements. *See In re Sunbeam Sec. Litig.*, 89 F. Supp. 2d 1326, 1344 n.11 (S.D. Fla. 1999).

127. The *In re Sunbeam* court also rejected Andersen's argument that the plaintiffs had merely alleged that Andersen violated GAAP and GAAS and had not set forth facts sufficient to show that it acted with knowing fraudulent intent or recklessness. The court ruled that Andersen's arguments "fail[ed] to appreciate the breadth" of the plaintiffs' allegations, which described much more than "innocent auditing and accounting slip-ups." *In re Sunbeam Sec. Litig.*, 89 F. Supp. 2d at 1344. The court concluded (*id.* at 1344-45) that the following facts established that Andersen had acted with requisite scienter:

CASE NO. 502004CA002257XXXXMB
First Amended Complaint

- Andersen violated a GAAS requirement that it have a sufficient understanding of Sunbeam's internal control structure;
- Andersen failed to adhere to GAAS by not identifying numerous fraud risk factors suggesting that there was a significant risk that Sunbeam had fraudulently misstated its financials;
- Andersen was alerted by Sunbeam employees to material misstatements in Sunbeam's financial statements;
- Andersen failed to stop Sunbeam from recognizing, in violation of GAAP, revenues from guaranteed sales and consignment transactions, with the result that its sales were substantially overstated;
- Andersen ignored a June 8, 1998, Barron's article that accused Sunbeam of accounting improprieties, continued to stand behind its audit opinions, and did not give any hint that its unqualified audit opinions were unreliable until June 25, 1998, when it withheld consent to the use of its audit opinion in an SEC registration statement; and
- The sheer magnitude of the restatements of Sunbeam's financial statements indicated that Andersen was at least severely reckless not to know that its unqualified audit opinions were misleading.

128. The United States District Court for the Southern District of Florida concluded that these facts were sufficient to "demonstrate that Arthur Andersen acted with severe recklessness in issuing its misleading Unqualified Audit Opinion," and therefore supported a valid federal securities law fraud claim. *In re Sunbeam Sec. Litig.*, 89 F. Supp. 2d at 1344. Andersen subsequently settled this lawsuit in 2001 for \$110 million.

129. On May 15, 2001, the SEC filed a civil action in the United States District Court for the Southern District of Florida against five former Sunbeam officers and Harlow, Andersen's engagement partner. The SEC alleged that Harlow, by causing Andersen to issue materially incorrect audit opinions, had engaged in fraud in violation of the federal securities laws.

130. In January 2003, Harlow consented to an injunction and agreed not to contest the SEC's charges against him. In the SEC's consent order, it made numerous factual findings

CASE NO. 502004CA002257XXXXMB
First Amended Complaint

regarding Harlow's improper conduct. It concluded that Harlow had proposed, on many occasions, adjustments to rectify Sunbeam's false financial statements. After management refused to make these adjustments, Harlow improperly acceded to that decision. *In re Phillip E. Harlow*, Rcl. No. 34-47261, 2003 WL 169818, at *1-*3 (SEC Rel. Jan. 27, 2003).

131. The SEC's assessment of Harlow's conduct was damning. Among many other things, it concluded that Harlow (1) "failed to exercise professional skepticism when performing audit procedures and gathering and analyzing audit evidence," (2) "accepted uncorroborated representations of Sunbeam's management in lieu of performing appropriate audit procedures," (3) "failed to exercise due professional care in performing the audit and preparing the audit report," (4) "failed to perform sufficient audit procedures to determine whether the financial statements were in conformity with GAAP," even after he had "identified a number of audit risks and accounting issues associated with the Sunbeam engagement," and (5) "failed to obtain sufficient competent evidential matters through inspection, observation, inquiries, and confirmation to afford a reasonable basis for an audit opinion." *Id.* at *4. Based on these factual findings, the Commission concluded that the 1996 and 1997 financial statements that Harlow had audited were not in conformity with GAAP, and the audit was not performed in accordance with GAAS. *Id.* (citing AU §§ 410, 411, 508.07).

132. Other participants in the Coleman acquisition have also sued Andersen for its fraudulent conduct. On June 8, 2001, Coleman-Parent sued Andersen and Harlow for fraudulent misrepresentation, fraudulent inducement to contract (conspiracy and concerted action), and negligent misrepresentation. *See Coleman (Parent) Holdings, Inc. v. Arthur Andersen LLP*, No. 502001CA006062XXOCAN (Fla. 15th Cir. Ct., filed June 8, 2001). That case was assigned to Judge Stephen A. Rapp. Andersen and Harlow moved to dismiss. However, after an

CASE NO. 502004CA002257XXXXMB
First Amended Complaint

October 29, 2001, hearing on their motion, Andersen and Harlow answered Coleman-Parent's complaint. On March 15, 2002, the complaint in this matter was amended to add Andersen-Worldwide, Andersen-Canada, Andersen-Hong Kong, Andersen-Mexico, Andersen-Venezuela, and Andersen's United Kingdom branch as defendants. See Amended Complaint, *CPH v. Andersen* (filed Mar. 15, 2002). The Court denied Andersen-Worldwide's Motion To Dismiss on June 19, 2002, and the matter was voluntarily dismissed on January 28, 2003, after the parties had settled for an undisclosed amount.

Tolling Agreements

133. On March 8, 2001, Morgan Stanley, MSSF, and all of "their respective successors, predecessors, subsidiaries, affiliates, and assigns" executed the first of a series of tolling agreements with the Defendants. Additional tolling agreements were executed on April 4, 2001, April 19, 2001, April 24, 2001, April 23, 2002, October 16, 2002, April 10, 2003, and October 21, 2003. Copies of these Tolling Agreements are exhibits "E" through "L" attached hereto.

134. These agreements were signed by Andersen. The individuals that signed the agreements on behalf of Andersen represented that they had the "authority to bind and act on behalf of" Andersen and all of its "successors, predecessors, subsidiaries, affiliates, assigns, partners, employees, agents, officers, or directors."

135. Taken together, these agreements show that, in consideration for forbearance from commencing an action against the Defendants, Andersen agreed to toll from March 8, 2001, to March 1, 2004, the statute of limitations on all Morgan Stanley entities' claims against Andersen, its partners and agents (including Harlow, Pruitt, and Denkhau), and its affiliates (including

CASE NO. 502004CA002257XXXXMB
First Amended Complaint

140. Andersen knew that Sunbeam's financial statements were replete with accounting irregularities and that the information in Sunbeam's 1996 and 1997 financial statements and in Andersen's 1996 and 1997 unqualified audit opinions was materially false and misleading.

141. Although Andersen knew that MS & Co. and MSSF would rely and had relied on its false statements, it did not inform MS & Co. or MSSF that the unqualified audit opinions it had provided were materially false or that Sunbeam's financial statements contained numerous misstatements of material facts.

142. Andersen made its materially false representations regarding its unqualified audit opinions and the accuracy of Sunbeam's financial statements with the intent to deceive Plaintiffs.

143. Andersen knew that the false information that had been provided to Plaintiffs would be critical to Plaintiffs' decisions to participate in the financing of Sunbeam's acquisitions. But for Andersen's fraudulent representations, MS & Co. would not have underwritten the Convertible Note Offering, nor would MSSF have loaned Sunbeam \$680 million.

144. Andersen's fraud was knowingly caused by Harlow, Pruitt, and Denkhaus. Harlow, as engagement partner, and Pruitt, as concurring partner had direct responsibility for directing, managing, and approving of the work that was done on the Sunbeam audits. Denkhaus, who was a senior partner of Andersen and a member of Andersen-Worldwide, as well as the Audit Division Head and manager of Andersen's audit practice for the entire South Florida region, had undertaken responsibility for supervising and monitoring the work performed at Harlow's and Pruitt's direction. Harlow, Pruitt, and Denkhaus each knew of or recklessly disregarded the accounting violations contained in Sunbeam's 1996 and 1997 financial statements. They each also knew that the financial statements that they had caused Andersen to certify would be relied

CASE NO. 502004CA002257XXXXMB
First Amended Complaint

senior Sunbeam executives to create the appearance that Sunbeam was performing at a high level. The purpose of this conspiracy was artificially to inflate the stock price of Sunbeam and thereby to induce MS & Co. to underwrite the Convertible Note Offering and MSSF into loaning Sunbeam \$680 million to finance Sunbeam's acquisition of Coleman, First Alert, and Signature Brands. Andersen, Andersen-Worldwide, the Foreign Andersen Branches, Harlow, Pruitt, and Denkhaus agreed to become part of the conspiracy to defraud Plaintiffs and committed overt acts in furtherance of this fraudulent scheme.

150. In furtherance of the conspiracy, Dunlap, Kersh, Gluck, and the other Sunbeam executives agreed to misstate Sunbeam's true financial condition by millions of dollars in order to create the illusion that Sunbeam had undergone a radical financial turnaround. Pursuant to this scheme, Dunlap, Kersh, Gluck, and other Sunbeam executives caused Sunbeam, in 1996, to overstate its operating losses by at least \$40 million, thereby establishing an overly bleak financial backdrop against which the company's performance in 1997 would be measured. In 1997, by contrast, Dunlap, Kersh, Gluck, and the other Sunbeam executives caused Sunbeam dramatically to overstate its earnings.

151. In late 1997 to early 1998, in furtherance of the conspiracy, Dunlap, Kersh, Gluck, and the other Sunbeam executives decided to acquire Coleman, First Alert, and Signature Brands. They communicated this decision to Andersen and Harlow. Thereafter, Andersen, Andersen-Worldwide, the Foreign Andersen Branches, Harlow, Pruitt, and Denkhaus agreed to become part of the conspiracy to defraud Plaintiffs.

152. In March 1998, in furtherance of the conspiracy, Andersen and Andersen-Worldwide, through their partners/members Harlow, Pruitt, and Denkhaus, committed overt acts in furtherance of the conspiracy, including, but not limited to, issuing Andersen's false and

CASE NO. 502004CA002257XXXXMB
First Amended Complaint

provided MSSF with accurate information regarding its consolidated statements of operations, stockholders' equity and cash flows, as well as its consolidated balance sheets. They caused Sunbeam to include its 1996 and 1997 audited financial statements in its March 19, 1998, offering memorandum and to represent to MS & Co. that its audited financial statements were reliable. As part of the Coleman merger agreement executed on February 27, 1998, they caused Sunbeam to represent and warrant that all of Sunbeam's filings with the SEC, which included the 1996 financial statements audited by Andersen, were accurate, not misleading, and prepared in accordance with GAAP, and that they would continue to be accurate and not misleading as of the transaction's closing date. Andersen and the other Defendants named in this Complaint had full knowledge and approved of these false representations.

157. In reasonable and justifiable reliance on the co-conspirators' representations that Sunbeam's financial statements and Andersen's audit reports were accurate and truthful, MS & Co. agreed to underwrite the Convertible Note Offering, and MSSF agreed to loan Sunbeam \$680 million to finance Sunbeam's acquisition of Coleman. But for the co-conspirators' fraudulent representations, MS & Co. would not have underwritten the Convertible Note Offering, nor would MSSF have loaned Sunbeam \$680 million.

158. Harlow, Pruitt, and Denkhaus had full knowledge of and participated in this conspiracy. Harlow, as engagement partner, and Pruitt, as concurring partner, had direct responsibility for directing, managing, and approving of the work that was done on the Sunbeam audits. Denkhaus, who was a senior partner of Andersen and a member of Andersen-Worldwide, as well as the Audit Division Head and manager of Andersen's audit practice for the entire South Florida region, had undertaken responsibility for supervising and monitoring the work performed at Harlow's and Pruitt's direction. Harlow, Pruitt, and Denkhaus each knew of or recklessly

CASE NO. 502004CA002257XXXXMB
First Amended Complaint

disregarded the accounting violations contained in Sunbeam's 1996 and 1997 financial statements. They each also knew that the financial statements that they had caused Andersen to certify would be relied upon by MS & Co. in deciding to underwrite the Convertible Note Offering and by MSSF in deciding to loan Sunbeam hundreds of millions of dollars.

159. The Foreign Andersen Branches also knowingly participated in this scheme. Each of the Foreign Andersen Branches reviewed and audited financial statements prepared for Sunbeam's foreign subsidiaries for 1997, all of which contained significant accounting violations. Each of the Foreign Andersen Branches knew or recklessly disregarded the fact that the financial statements that they had reviewed and audited were not prepared in accordance with GAAP or reviewed in accordance with GAAS, but nevertheless certified their audit work as in compliance with these standards. Each of the Foreign Andersen Branches also knew that the financial statements that they had audited would be incorporated into Sunbeam's consolidated financial statements and that lenders, such as MSSF, and underwriters, such as MS & Co., would rely on these financial statements.

160. Andersen-Worldwide also participated in this conspiracy through the actions of its members, including Harlow, Pruitt, and Denkhaus, and its member firms, including Andersen and the Foreign Andersen Branches.

161. As a direct result of this conspiracy of fraudulent inducement, Plaintiffs have collectively suffered hundreds of millions of dollars in damages.

COUNT III

Aiding and Abetting Fraud

162. Paragraphs 1 through 135 are repeated and alleged as if set forth herein.

CASE NO. 502004CA002257XXXXMB
First Amended Complaint

163. To induce MSSF into loaning Sunbeam \$680 million to finance its acquisition of Coleman, First Alert, and Signature Brands, Sunbeam represented to MSSF in loan negotiations that Sunbeam's audited financial statements were accurate and not misleading. In the Sunbeam-MSSF credit agreement, Sunbeam warranted that it had provided MSSF with accurate information regarding its consolidated statements of operations, stockholders' equity and cash flows, as well as its consolidated balance sheets. Sunbeam included its 1996 and 1997 audited financial statements in its March 19, 1998, offering memorandum and represented to MS & Co. and MSSF that its audited financial statements were reliable.

164. As part of the Coleman merger agreement executed on February 27, 1998, Sunbeam expressly represented and warranted that all of its filings with the SEC, which included the 1996 financial statements audited by Andersen, were accurate, not misleading, and prepared in accordance with GAAP, and that they would continue to be accurate and not misleading as of the transaction's closing date. Sunbeam knew that its many representations regarding its 1996 and 1997 financial statements were materially false when made and/or made these representations with reckless disregard as to their truth. It also knew that Andersen's 1996 and 1997 unqualified audit opinions were materially false and misleading.

165. Sunbeam knew that MS & Co. would rely on Sunbeam's representations in determining whether to act as Sunbeam's underwriter and that MSSF would rely on its representations in deciding to loan Sunbeam \$680 million to finance its acquisitions. Although Sunbeam knew that MS & Co. and MSSF would rely and had relied on its false statements, it did not inform them that the unqualified audit opinions it had provided were materially false or that Sunbeam's financial statements contained numerous misstatements of material facts.

CASE NO. 502004CA002257XXXXMB
First Amended Complaint

166. Sunbeam made its materially false representations regarding its financial statements and Andersen's unqualified audit opinions with the intent to deceive MS & Co. and MSSF and to induce them to participate in the financing of Sunbeam's acquisitions.

167. Sunbeam knew that the false information that it had provided to MS & Co. and MSSF, and its intentional failure to correct the misrepresentations contained in Sunbeam's financial statements, would be critical to their decision to participate in the financing of Sunbeam's acquisitions. But for Sunbeam's fraudulent representations, MS & Co. would not have underwritten the Convertible Note Offering, nor would MSSF have loaned Sunbeam \$680 million.

168. Andersen and Andersen-Worldwide, through their partners/members Harlow, Pruitt, and Denkhaus, knowingly and substantially assisted Sunbeam in its fraud. Andersen itself expressly represented to MS & Co., in letters dated March 19, 1998, and March 25, 1998, that Sunbeam's financial statements were truthful and that Andersen's unqualified audit opinions were reliable. In addition, employees, partners, and members of Andersen and Andersen-Worldwide, including Harlow, participated in meetings and telephone calls in which they represented to MS & Co. and MSSF that Sunbeam's audited financial statements were accurate.

169. Harlow, Pruitt, and Denkhaus substantially and knowingly assisted Sunbeam's fraud. They each knew of or recklessly disregarded the accounting violations contained in Sunbeam's 1996 and 1997 financial statements. They each also knew that the financial statements that they had caused Andersen to certify would be relied upon by MS & Co. in deciding to underwrite the Convertible Note Offering and by MSSF in deciding to loan Sunbeam hundreds of millions of dollars.

CASE NO. 502004CA002257XXXXMB
First Amended Complaint

170. The Foreign Andersen Branches substantially and knowingly assisted Sunbeam's fraud. They each reviewed and audited financial statements prepared for Sunbeam's foreign subsidiaries for 1997, all of which contained significant accounting violations. Each of the Foreign Andersen Branches knew of or recklessly disregarded the fact that the financial statements that they had reviewed and audited were not prepared in accordance with GAAP or reviewed in accordance with GAAS, but nevertheless certified their audit work as in compliance with these standards. Each of the Foreign Andersen Branches also knew that the financial statements that they had audited would be incorporated into Sunbeam's consolidated financial statements and that lenders, such as MSSF, and underwriters, such as MS & Co., would rely on these financial statements.

171. As a direct result of Sunbeam's fraud, aided and abetted by Andersen, Andersen-Worldwide, the Foreign Andersen Branches, Harlow, Pruitt, and Denkhaus, MS & Co., MSSF, and Morgan Stanley collectively have suffered hundreds of millions of dollars in damages.

WHEREFORE, Plaintiffs, MS & Co., MSSF, and Morgan Stanley, demand judgment against Andersen, Andersen-Worldwide, Andersen-Canada, Andersen-Hong Kong, Andersen-Mexico, Andersen-Venezuela, Harlow, Pruitt, and Denkhaus, jointly and severally, for:

- (A) compensatory damages;
- (B) prejudgment interest;
- (C) attorneys' fees and costs; and
- (D) such other relief as may be just and appropriate.

Plaintiffs reserve the right to amend their complaint pursuant to section 768.72, Florida Statutes, to assert claims for punitive damages in excess of \$1.2 billion as allowed by law.

CASE NO. 502004CA002257XXXMB
First Amended Complaint

DEMAND FOR JURY TRIAL

Plaintiffs request a trial by jury on any and all issues raised by this complaint that are triable of right by a jury.



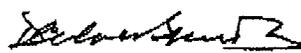
D. Culver Smith III
Florida Bar No. 105933
of
D. CULVER SMITH III, P.A.
Suite 401, Northbridge Centre
515 North Flagler Drive
West Palm Beach, FL 33401
Tel. 561-833-3772
Fax 561-833-4585
<dcs@dcsmithlaw.com>

with
Mark C. Hansen
Michael K. Kellogg
James M. Webster
Rebecca A. Beynon
all pro hac vice
of
KELLOGG, HUBER, HANSEN, TODD
& EVANS, P.L.L.C.
Sumner Square
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
Tel. 202-326-7900
Fax 202-326-7999

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned certifies that a copy hereof was furnished by regular U.S. Mail to counsel on the attached list on August 6, 2004.



D. Culver Smith III

CASE NO. 502004CA002257XXXOMB
First Amended Complaint

LIST OF COUNSEL
(Service of pleadings, etc.)

Counsel for U.S. Andersen Defendants²:

Steven L. Schwarzberg
SCHWARZBERG & ASSOCIATES
Suite 210, Esperanté
222 Lakeview Avenue
West Palm Beach FL 33401

Michael J. Moscato
CURTIS MALLET-PREVOST COLT & MOSLE LLP
101 Park Avenue
New York, NY 10178-0061

Counsel for Foreign Andersen Defendants³:

Sidney A. Stubbs, Jr.
JONES FOSTER JOHNSTON & STUBBS, P.A.
Suite 1100, Flagler Centre Tower
505 South Flagler Drive
West Palm Beach FL 33401

Counsel for Andersen Worldwide⁴:

Gerald F. Richman
RICHMAN GREER WEIL BRUMBAUGH MIRABITO
& CHRISTENSEN, P.A.
Suite 1504, One Clearlake Centre
250 Australian Boulevard South
West Palm Beach FL 33401

1037-001.list.counsel.pld

² Arthur Andersen LLP (an Illinois limited-liability partnership), Phillip E. Harlow, William D. Pruitt, Jr., and Donald Denkhau

³ Arthur Andersen LLP (an Ontario limited-liability partnership), Arthur Andersen (a United Kingdom partnership), Arthur Andersen & Co. (a Hong Kong partnership), Ruiz, Urquiza Y Cia, S.C. (a Mexican partnership), and Porta Cachafeiro, Laria & Asociados (a Venezuelan partnership)

⁴ Andersen Worldwide, Societé Cooperative (a Swiss cooperative)

16

**EXHIBIT EXCLUDED WITHOUT PRIOR DETERMINATION
OF PROTECTABILITY BY COURT**

17

**EXHIBIT EXCLUDED WITHOUT PRIOR DETERMINATION
OF PROTECTABILITY BY COURT**

18

**EXHIBIT EXCLUDED WITHOUT PRIOR DETERMINATION
OF PROTECTABILITY BY COURT**

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.

**REPLY MEMORANDUM IN SUPPORT OF MORGAN STANLEY & CO.
INCORPORATED'S MOTION FOR SUMMARY JUDGMENT**

AUTHORITIES

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar # 618349)
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5132
Facsimile: (202) 879-5200

Mark C. Hansen
James M. Webster, III
Rebecca A. Beynon
**KELLOGG, HUBER, HANSEN, TODD,
EVANS & FIGEL, P.L.L.C.**
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
Telephone: (202) 326-7900
Facsimile: (202) 326-7999

Joseph Ianno, Jr. (FL Bar # 655351)
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368

Counsel for:
Defendant Morgan Stanley & Co. Incorporated

Dated: January 7, 2005

AUTHORITIES

Cases:

1. *Abrahami v. UPC Constr. Co.*, 574 N.Y.S.2d 52 (App. Div. 1991)
2. *AES Corp. v. Dow Chemical Co.*, 325 F.3d 174 (3d Cir. 2003)
3. *Alexander v. Evans*, No. 88 Civ. 5309(MJL), 1993 WL 427409 (S.D.N.Y. Oct. 15, 1993)
4. *American Baptist Churches of Metro N.Y. v. Galloway*, 710 N.Y.S.2d 12 (App. Div. 2000)
5. *American Protein Corp. v. AB Volvo*, 844 F.2d 56 (2d Cir. 1988)
6. *Atkins Nutritionals, Inc. v. Ernst & Young, LLP*, 754 N.Y.S.2d 320 (App. Div. 2003)
7. *Banque Arabe et Internationale d'Investissement v. Maryland Nat'l Bank*, 57 F.3d 146 (2d Cir. 1995)
8. *Benjamin Shapiro Realty Co., LLC v. Kemper Nat'l Ins. Cos.*, 756 N.Y.S.2d 45 (App. Div. 2003)
9. *Bennett v. Citicorp Mortgage, Inc.*, 778 N.Y.S.2d 806 (App. Div. 2004)
10. *Bombardier Capital, Inc. v. Naske Air GmbH*, No. 02 CV 10176, 2003 WL 22137989 (S.D.N.Y. Sep. 17, 2003)
11. *Borden, Inc. v. Spoor Behrins Campbell & Young, Inc.*, 828 F. Supp. 216 (S.D.N.Y. 1993)
12. *Bryant v. Shands Teaching Hosp. & Clinics, Inc.*, 479 So. 2d 165 (Fla. 1st DCA 1985)
13. *Citibank, N.A. v. Itochu Int'l Inc.*, No. 01 Civ. 6007(GBD), 2003 WL 1797847 (S.D.N.Y. Apr. 4, 2003)
14. *Citibank, N.A. v. Plapinger*, 66 N.Y.2d 90 (Ct. App. 1985)
15. *Cohan v. Sicular*, 625 N.Y.S.2d 278 (App. Div. 1995)
16. *Compania Sud-Americana de Vapores v. IBJ Schroder Bank & Trust Co.*, 785 F. Supp. 411 (S.D.N.Y. 1992)
17. *Congress Fin. Corp. v. John Morrell & Co.*, 790 F. Supp. 459 (S.D.N.Y. 1992)
18. *Consolidated Edison, Inc. v. Northeast Utilities*, 249 F. Supp. 2d 387 (S.D.N.Y. 2003)
19. *Cromer Fin. Ltd. v. Berger*, 137 F. Supp. 2d 452 (S.D.N.Y. 2001)
20. *Curanovic v. New York Cent. Mut. Fire Ins. Co.*, 762 N.Y.S.2d 148 (App. Div. 2003)

21. *Czarnecki v. Roller*, 726 F. Supp. 832 (S.D. Fla. 1989)
22. *Dallas Aerospace, Inc. v. CIS Air Corp.*, 352 F.3d 775 (2d Cir. 2003)
23. *Danann Realty Corp. v. Harris*, 5 N.Y.2d 317 (1959)
24. *Diamond State Ins. Co. v. Worldwide Weather Trading LLC.*, No. 02 Civ. 2900 LMM GNG, 2002 WL 31819217 (S.D.N.Y. Dec. 16, 2002)
25. *Diamond v. Rosenfeld*, 511 So. 2d 1031 (Fla. 4th DCA 1987)
26. *DIMON Inc. v. Folium, Inc.*, 48 F. Supp. 2d 359 (S.D.N.Y. 1999)
27. *Diodato v. Eastchester Dev. Corp.*, 489 N.Y.S.2d 293 (App. Div. 1985)
28. *Donofrio v. Matassini*, 503 So. 2d 1278 (Fla. 2d DCA 1987)
29. *EED Holdings v. Palmer Johnson Acquisition Corp.*, No. 04 Civ. 0505(RWS), 2004 WL 2348093 (S.D.N.Y. Oct. 20, 2004)
30. *Elliot v. Nelson*, 301 F. Supp. 2d 284 (S.D.N.Y. 2004)
31. *Estevez-Yalcin v. Children's Village*, 331 F. Supp. 2d 170 (S.D.N.Y. 2004)
32. *Felfe v. CIBA Vision Corp.*, No. 03 Civ. 3357, 2004 WL 551200 (S.D.N.Y. Mar. 19, 2004)
33. *First Nationwide Bank v. 965 Amsterdam, Inc.*, 623 N.Y.S.2d 200 (App. Div. 1995)
34. *Ford v. Sivilli*, 770 N.Y.S.2d 414 (App. Div. 2003)
35. *Friedman v. Arizona World Nurseries Ltd. P'ship*, 730 F. Supp. 521 (S.D.N.Y. 1990), *aff'd*, 927 F.2d 594 (2d Cir. 1991)
36. *General Motors Corp. v. Villa Martin Chevrolet, Inc.*, Nos. 98-CV-5206, 5208, 6167 & 99-CV-3750, 2000 WL 271965 (E.D.N.Y. March 7, 2000)
37. *Goldman v. Strough Real Estate, Inc.*, 770 N.Y.S.2d 94 (App. Div. 2003)
38. *Gordon P. Getty Family Trust v. Peltz*, No. 93 Civ. 3162(DAB), 1998 WL 148425 (S.D.N.Y. Mar. 27, 1998)
39. *Greater N.Y. Mut. Ins. Co. v. White Knight Restoration, Ltd.*, 776 N.Y.S.2d 257 (App. Div. 2004)
40. *Grumman Allied Indus., Inc. v. Rohr Indus., Inc.*, 748 F.2d 729 (2d Cir. 1984)
41. *Harsco Corp. v. Segui*, 91 F.3d 337 (2d Cir. 1996)
42. *Home Town Muffler Inc. v. Cole Muffler Inc.*, 608 N.Y.S.2d 735 (App. Div. 1994)

43. *Hydro Investors Inc. v. Trafalgar Power Inc.*, 227 F.3d 8 (2d Cir. 2000)
44. *I.L.G.W.U. Nat'l Retirement Fund v. Cuddlecoat, Inc.*, No. 01 Civ. 4019(BSJ), 2004 WL 444071 (S.D.N.Y. Mar. 11, 2004)
45. *In re AHT Corp.*, 292 B.R. 734 (S.D.N.Y. 2003)
46. *In re Indep. Energy Holdings PLC Sec. Litig.*, 154 F. Supp. 2d 741 (S.D.N.Y. 2001)
47. *In re Philip Servs. Corp. Sec. Litig.*, No. 98 Civ. 0835(MBM), 2004 WL 1152501 (S.D.N.Y. May 24, 2004)
48. *JPMorgan Chase Bank v. Winnick*, No. 03 Civ. 8535(GEL), 2004 WL 1418197 (S.D.N.Y. June 23, 2004)
49. *Kalnit v. Eichler*, 99 F. Supp. 2d 327, 343 (S.D.N.Y. 2000), *aff'd*, 264 F.3d 131 (2d Cir. 2001)
50. *Karnegis v. Oakes*, 296 So. 2d 657 (Fla. 3d DCA 1974), *cert. denied*, 307 So. 2d 450 (Fla. 1975)
51. *Korea Life Ins. Co. v. Morgan Guar. Trust Co. of N.Y.*, 269 F. Supp. 2d 424 (S.D.N.Y. 2003)
52. *LaSalle Bank Nat'l Assoc. v. Citicorp Real Estate Inc.*, No. 02 Civ. 7868(HB), 2003 WL 1461483 (S.D.N.Y. Mar. 21, 2003)
53. *Linden v. Lloyd's Planning Serv. Inc.*, 750 N.Y.S.2d 20 (App. Div. 2002)
54. *Manufacturers' Hanover Trust Co. v. Yanakas*, 7 F.3d 310 (2d Cir. 1993)
55. *Marcellus Constr. Co. v. Village of Broadalbin*, 755 N.Y.S.2d 474 (App. Div. 2003)
56. *Marine Midland Bank v. Palm Beach Moorings, Inc.*, 403 N.Y.S.2d 15 (App. Div. 1978), *appeal denied*, 44 N.Y.S.2d 644 (1978)
57. *McManus v. Moise*, 691 N.Y.S.2d 166 (App. Div. 1999)
58. *Menendez v. Beech Acceptance Corp.*, 521 So. 2d 178 (Fla. 3d DCA 1988)
59. *Morse v. Swank*, 459 F. Supp. 660 (S.D.N.Y. 1978)
60. *Murphy v. Kuhn*, 90 N.Y.2d 266 (1997)
61. *Nairobi Holdings Ltd. v. Brown Bros. Harriman & Co.*, No. 02 Civ. 1230(LMM), 2003 WL 21088506 (S.D.N.Y. May 14, 2003)
62. *Onanuga v. Pfizer, Inc.*, No. 03 Civ. 5405(CM), 2003 WL 22670842 (S.D.N.Y. Nov. 7, 2003)

63. *Palm Beach County v. Trinity Indus.*, 661 So. 2d 942, 944 (Fla. 4th DCA 1995)
64. *Parts Depot Co., L.P. v. Florida Auto Supply, Inc.*, 669 So. 2d 321 (Fla. 4th DCA 1996)
65. *Pearce v. Knepper*, 53 N.Y.S.2d 845 (Sup. Ct. 1945)
66. *Peoples Gas Sys., Inc. v. Acme Gas Corp.*, 689 So. 2d 292 (Fla. 3d DCA 1997)
67. *Poe & Assoc., Inc. v. Estate of Vogler*, 559 So. 2d 1235 (Fla. 3d DCA 1990)
68. *Polycast Technology Corporation v. Uniroyal, Inc.*, 792 F. Supp. 244 (S.D.N.Y. 1992)
69. *PPI Enters. (U.S.), Inc. v. Del Monte Foods Co.*, No. 99 Civ. 3794(BSJ), 2003 WL 22118977 (S.D.N.Y. Sept. 11, 2003)
70. *Raimi v. Furlong*, 702 So. 2d 1273 (Fla. 3d DCA 1997)
71. *Rotterdam Ventures, Inc. v. Ernst & Young LLP*, 752 N.Y.S.2d 746 (App. Div. 2002)
72. *Schnell v. Conseco, Inc.*, 43 F. Supp. 2d 438 (S.D.N.Y. 1999)
73. *Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124 (2d Cir. 1994)
74. *Sidamonidze v. Kay*, 757 N.Y.S.2d 560 (App. Div. 2003)
75. *Siemens Westinghouse Power Corp. v. Dick Corp.*, 299 F. Supp. 2d 242 (S.D.N.Y. 2004)
76. *Skow v. Department of Transp.*, 468 So. 2d 422 (Fla. 1st DCA 1985)
77. *Sofia v. Mass. Mut. Life Ins. Co.*, No. 02-CV-6088T, 2004 WL 1792441 (W.D.N.Y. Aug. 10, 2004)
78. *Soule v. Norton*, 750 N.Y.S.2d 692 (App. Div. 2002)
79. *St. Lucie Harvesting & Caretaking Corp. v. Cervantes*, 639 So. 2d 37 (Fla. 4th DCA 1994)
80. *St. Paul Fire & Marine Ins. Co. v. Health Fielding Ins. Broking Ltd.*, 976 F. Supp. 198 (S.D.N.Y. 1996)
81. *Stan Winston Creatures, Inc. v. Toys "R" Us, Inc.*, No. 604183/02, 2004 WL 1949071 (N.Y. Sup. Sept. 1, 2004)
82. *Stepp v. State Farm Fire & Cas. Co.*, 656 So. 2d 494 (Fla. 1st DCA 1995)
83. *Struna v. Wolf*, 484 N.Y.S.2d 392 (Sup. Ct. 1985)
84. *THC Holdings Corp. v. Chinn*, No. 95 Civ. 4422(KMW), 1998 WL 50202 (S.D.N.Y. Feb. 6, 1998)

85. *Tradewinds Fin. Corp. v. Refco Secs., Inc.*, 773 N.Y.S.2d 395 (App. Div. 2004)
86. *Trizzano v. Allstate Ins. Co.*, 780 N.Y.S.2d 147 (App. Div. 2004)
87. *UniCredito Italiano SPA v. JPMorgan Chase Bank*, 288 F. Supp. 2d 485 (S.D.N.Y. 2003)
88. *UST Private Equity Investors Fund, Inc. v. Salomon Smith Barney*, 733 N.Y.S.2d 385 (App. Div. 2001)
89. *Vogel v. Sands Bros. & Co.*, 126 F. Supp. 2d 730 (S.D.N.Y. 2001)
90. *Waksman v. Cohen*, No. 00 Civ. 9005(WK), 2002 WL 31466417 (S.D.N.Y. Nov. 4, 2002)
91. *Wells Fargo Bank Northwest, N.A. v. TACA Int'l Airlines, S.A.*, 247 F. Supp. 2d 352 (S.D.N.Y. 2002)
92. *WIT Holding Corp. v. Klein*, 724 N.Y.S.2d 66 (App. Div. 2001)

Rules:

93. Fla. R. Civ. P. 1.510(c)

1

Supreme Court, Appellate Division, First
Department, New York.

Kenneth ABRAHAMI, et al., Plaintiffs-
Appellants,

v.

UPC CONSTRUCTION CO., INC., et al.,
Defendants,

and

Howard Lee, et al., Defendants-Respondents.

Sept. 19, 1991.

Action was brought alleging fraudulent misrepresentation of facts by defendants with respect to inducing plaintiffs to invest in corporation. Motion to dismiss two causes of action was granted in part by the Supreme Court, New York County, Fingerhood, J., and plaintiffs appealed. The Supreme Court, Appellate Division, held that: (1) complaint failed to satisfy specificity and particularity requirements with respect to pleading fraud as to all but one defendant, and (2) complaint failed to allege claim for money had and received as to moving defendants.

Affirmed.

West Headnotes

[1] Conspiracy 18
91k18

[1] Pleading 18
302k18

Complaint alleging fraud and conspiracy to commit fraud in connection with inducement of investment in corporation failed to meet particularity requirements as to all but one defendant where there were no factual allegations alleging that other defendants had made any fraudulent representations to plaintiff or allegations of fact from which it could be inferred that they had agreed or entered into an understanding with the one defendant against whom particular acts of fraud were alleged, to cooperate in any fraudulent scheme. McKinney's CPLR 3013, 3016(b).

[2] Implied and Constructive Contracts 81

205Hk81

Claim for money had and received failed to state cause of action as against those defendants as to whom no receipt of monies was alleged.

****53** Before SULLIVAN, J.P., and CARRO, MILONAS and KUPFERMAN, JJ.

MEMORANDUM DECISION.

***180** Order, Supreme Court, New York County (Shirley Fingerhood, J.), entered December 14, 1990, as amended and supplemented by order of the same court and justice, entered January 17, 1991, granting, in part, defendants' motion, pursuant to CPLR 3016(b), to dismiss the first cause of action of plaintiffs' verified complaint, and moving defendants' motion, pursuant to CPLR 3211(a)(7), to dismiss the second cause of action of the verified complaint, unanimously affirmed, without costs.

[1] Plaintiffs' verified complaint alleges, inter alia, that defendants fraudulently misrepresented facts with respect to UPC's profitability, in order to induce plaintiffs to invest \$750,000 in UPC. The Court properly dismissed the first cause of action, sounding in fraud and conspiracy to commit fraud, as against the moving defendants, except Heo Peh Lee. While Lee was alleged to have made false representations to plaintiffs on various occasions, the verified complaint failed to satisfy the specificity and particularity requirements of CPLR 3013 and 3016(b) as to the other moving defendants, since there were no factual allegations alleging that these defendants had made any fraudulent representations to plaintiff or allegations of fact from which it could be inferred that they had agreed or entered into an understanding with the other defendant (against which particular acts of fraud were alleged) to cooperate in any fraudulent scheme. (National Westminster Bank, U.S.A. v. Weksel, 124 A.D.2d 144, 147, 511 N.Y.S.2d 626, appeal denied, 70 N.Y.2d 604, 519 N.Y.S.2d 1027, 513 N.E.2d 1307; Ferguson v. Meridian Distribution Services, Inc., 155 A.D.2d 642, 548 N.Y.S.2d 233).

(Cite as: 176 A.D.2d 180, *180, 574 N.Y.S.2d 52, **53)

[2] Plaintiffs' second cause of action, alleging a claim for money had and received, was also properly dismissed, since they failed to allege receipt of moneys by the moving defendants (Steinberg v. Guild, 22 A.D.2d 775, 254 N.Y.S.2d 4, aff'd, 16 N.Y.2d 791, 262 N.Y.S.2d 715, 209 N.E.2d 887, remittur amd., 16 N.Y.2d 960, 265 N.Y.S.2d 107, 212 N.E.2d 541).

176 A.D.2d 180, 574 N.Y.S.2d 52

END OF DOCUMENT

2

Briefs and Other Related Documents

United States Court of Appeals,
Third Circuit.

AES CORP., Appellant
v.
THE DOW CHEMICAL COMPANY; Dynegy
Power Corporation f/k/a Destec Energy Inc.

No. 01-3373.

Argued May 23, 2002.
Filed April 14, 2003.

Buyer of corporation brought securities fraud action against majority shareholder of parent of acquired corporation, alleging misrepresentations concerning value of acquired corporation, and asserting various state-law claims. The United States District Court for the District of Delaware, 157 F.Supp.2d 346, Joseph J. Farnan, J., granted majority shareholder's summary judgment motion, and buyer appealed. The Court of Appeals, Stapleton, Circuit Judge, held that: (1) federal law governed issue of whether buyer had anticipatorily waived federal securities fraud claims, and (2) non-reliance clauses in confidentiality and asset purchase agreements could not be enforced so as to bar as a matter of law buyer's securities fraud claims.

Reversed and remanded.

Wallace, Senior Circuit Judge, filed concurring and dissenting opinion.

West Headnotes

[1] Securities Regulation 60.18
349Bk60.18

To state a valid claim under Rule 10b-5, plaintiff must show that defendant: (1) made misstatement or omission of material fact; (2) with scienter; (3) in connection with purchase or sale of security; (4) upon which plaintiff reasonably relied; and (5) that plaintiff's reliance was proximate cause of his or her injury. Securities Exchange Act of 1934, §

10(b), 15 U.S.C.A. § 78j(b); 17 C.F.R. §240.10b-5.

[2] Securities Regulation 60.48(1)
349Bk60.48(1)

"Reasonable reliance" element of Rule 10b-5 claim requires showing of causal nexus between misrepresentation and plaintiff's injury, as well as demonstration that plaintiff exercised diligence that reasonable person under the circumstances would have exercised to protect his own interests. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b); 17 C.F.R. §240.10b-5.

[3] Securities Regulation 60.48(1)
349Bk60.48(1)

Factors in determination of whether securities fraud plaintiff's reliance on alleged misrepresentations was reasonable include: (1) whether fiduciary relationship existed between parties; (2) whether plaintiff had opportunity to detect fraud; (3) sophistication of plaintiff; (4) existence of long standing business or personal relationships; and (5) plaintiff's access to relevant information. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b); 17 C.F.R. §240.10b-5.

[4] Securities Regulation 60.48(1)
349Bk60.48(1)

What constitutes reasonable reliance in context of Rule 10b-5 claim is governed by federal law, although terms of any agreement between parties may be among circumstances relevant to reliance and material dispute about what parties agreed to may be resolved by state contract law. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b); 17 C.F.R. §240.10b-5.

[5] Securities Regulation 60.49
349Bk60.49

Federal rather than state law governed issues of whether buyer of corporation had anticipatorily waived federal securities fraud claim against seller and whether purported anticipatory waiver was enforceable. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b); 17 C.F.R. §240.10b-5.

[6] Securities Regulation 60.48(1)
349Bk60.48(1)

[6] Securities Regulation 60.49
349Bk60.49

Under Securities Exchange Act provision prohibiting waiver of substantive obligations imposed by Act, non-reliance clauses in confidentiality and asset purchase agreements between buyer of corporation and seller, whereby seller disclaimed any representations not contained in definitive agreements, could not be enforced so as to bar as a matter of law buyer's Rule 10b-5 securities fraud claims against seller arising from alleged misrepresentations concerning value of acquired corporation; rather, clauses were among circumstances to be considered in determining reasonableness of any reliance upon alleged misrepresentations. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b); 17 C.F.R. §240.10b-5.

*175 Dennis E. Glazer, James W.B. Benkard (Argued), Frances E. Bivens, Davis, Polk & Wardwell, New York, and Michael D. Goldman, Stephen C. Norman, Potter, Anderson & Corroon, Wilmington, for Appellant.

Herbert L. Zarov, Michele L. Odorizzi (Argued), Daniel J. Delaney, Mayer, Brown, Rowe & Maw, Chicago, and David C. McBride, John W. Shaw, Young, Conaway, Stargatt & Taylor, Wilmington, for Appellee.

Before McKEE, STAPLETON and WALLACE, [FN*] Circuit Judges.

FN* Honorable J. Clifford Wallace, United States Circuit Judge for the Ninth Circuit, sitting by designation.

CLIFFORD, Senior Circuit Judge, concurring and dissenting.

OPINION OF THE COURT

STAPLETON, Circuit Judge.

I. Introduction

The AES Corporation ("AES") operates power facilities. AES alleges that Dow Chemical Company ("Dow") and its subsidiary, Destec Energy, Inc. ("Destec"), [FN1] violated Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 (the "Exchange Act") in connection with a transaction in which AES purchased the stock of one of Destec's subsidiaries, Destec Engineering, Inc. ("DEI"). DEI's sole asset was a contract to design and construct a power plant in The Netherlands (the "Elsta *176 Plant"). According to AES, Dow and Destec conspired to sell DEI at an artificially inflated price by making misrepresentations material to an evaluation of DEI.

FN1. Destec has since changed its name to Dynegy Power Corporation.

During the pendency of this case in the District Court, AES and Destec entered into a settlement agreement. Thus, only the claims against Dow remain. There has been no discovery. Dow moved for summary judgment, relying solely on documents relating to the transactions in which AES acquired DEI's stock. In response, AES filed a Rule 56(f) affidavit requesting discovery in identified areas. The District Court nevertheless granted Dow's summary judgment motion. The District Court held that certain clauses in the transaction documents rendered AES's reliance on the alleged misrepresentations unreasonable as a matter of law.

II. Background

Dow formed Destec to build and run power plants that would supply power to Dow Chemical facilities and third-party users. In 1996, after determining that it could not profitably run Destec as its subsidiary, Dow retained Morgan Stanley to perform a valuation of Destec in order to initiate a public sale.

Morgan Stanley issued a Confidential Offering Memorandum on behalf of Destec. As a precondition to receiving the Offering Memorandum, AES signed a Confidentiality

Agreement that provided in part:

We [AES] acknowledge that neither you [Destec], nor Morgan Stanley [Destec's Investment Banker] or its affiliates, nor your other Representatives, nor any of your or their respective officers, directors, employees, agents or controlling persons within the meaning of section 20 of the Securities Exchange Act of 1934, as amended, make any express or implied representation or warranty as to the accuracy or completeness of the Information, and we agree that no such person will have any liability relating to the Information or for any errors therein or omissions therefrom. We further agree that we are not entitled to rely on the accuracy or completeness of the Information and that we will be entitled to rely solely on any representations and warranties as may be made to us in any definitive agreement with respect to the Transaction, subject to such limitations and restrictions as may be contained therein.

App. at 197, ¶ 5. Dow was not a party to the Confidentiality Agreement but is alleged to have been a "controlling person" of Destec within the meaning of § 20(a) of the Exchange Act.

The Offering Memorandum included projections and estimates about the future performance of Destec's businesses, including DEI and the Elsta Plant. Like the Confidentiality Agreement, the Offering Memorandum warned readers that they were not to rely on the accuracy or completeness of information contained therein. It further stated:

[o]nly those particular representations and warranties which may be made to a purchaser in a definitive agreement, when, as, and if executed, and subject to such limitations and restrictions as may be specified in such definitive agreement, shall have any legal effect.

App. at 7 (alteration in original).

Dow and Destec provided information about Destec to potential bidders in several other ways. First, Destec officers gave a presentation to potential bidders, which AES

representatives attended. Dow and Destec also sent certain documents to potential bidders and made others available in a room at a Destec facility in Houston, *177 Texas. Further, Dow and Destec gave potential bidders a computer model to value the Destec assets. This model included assumptions about the expenses and revenues of the Elsta Plant. Lastly, Dow and Destec allowed AES, as part of its due diligence, to visit the Elsta Plant.

AES contacted Dow about the possibility of purchasing the international assets of Destec. Dow responded that it would prefer to sell all of Destec, rather than dispose of it piecemeal. As a result, AES approached NGC Corporation ("NGC") to propose submitting a joint bid for all of Destec, and a joint bid was subsequently made.

The AES/NGC joint bid was accepted by Dow. The transaction took place in two steps. First, NGC acquired all of the stock of Destec pursuant to an Agreement and Plan of Merger (the "Merger Agreement") entered into by Dow, Destec, and NGC. Second, AES purchased all of the international assets of Destec, including all of DEI's outstanding stock, pursuant to an Asset Purchase Agreement between AES and NGC.

Section 4.6 of the Merger Agreement, to which AES was not a party, provided as follows:

Except for the representations and warranties contained in this Article IV, neither Dow nor any other person makes any other express or implied representation or warranty on behalf of Dow.

App. at 235. Article IV of the Merger Agreement contained two pages of representations and warranties of Dow. It warranted that it was duly organized as a corporation; that it was authorized to enter the agreement; that the execution and consummation of the agreement would not violate the terms of any court order or Dow contract; that no government approval was necessary; and that no broker was entitled to a fee in connection with the transaction. Article IV contained no representation or

warranty with respect to the Elsta Plant.

Similarly, Section 3.4 of the Asset Purchase Agreement, signed by NGC and AES, states that "except for the representations and warranties contained in this Article III, neither NGC nor any other person (as defined in the Merger Agreement) makes any other express or implied representation or warranty on behalf of NGC." App. at 280-81, Section 3.4. The Merger Agreement defines "Person" to "mean an individual, partnership, joint venture, trust, corporation, limited liability company or other legal entity or Governmental Entity." App. at 216. Article III of the Asset Purchase Agreement contains limited representations and warranties by NGC very similar to those made by Dow in the Merger Agreement.

The Merger Agreement provided that "[t]his Agreement and the Confidentiality Agreement, and certain other agreements executed by the parties hereto as of the date of this Agreement, constitute the entire agreement, and supersedes (sic) all prior agreements and understandings (written and oral), among the parties with respect to the subject matter hereof." App. at 265, Section 9.9.

According to AES, shortly after purchasing DEI and Destec's other international assets, it realized that the Elsta Plant would cost far more to complete than its due diligence investigation had indicated and would open for operation much later than Dow and Destec had represented it would. Instead of providing the predicted \$31 million in profit, the project ultimately occasioned a \$70 million loss. AES contends that Dow knew specific facts about the Elsta Plant that contradicted the representations it had made prior to and during due diligence. Its complaint *178 alleges fourteen affirmative misrepresentations and eight material omissions upon which it relied. Some involved profit and cost projections, but others involved currently existing facts. Further, AES contends that, as part of the scheme to defraud, Dow concealed the true state of the Elsta Plant and frustrated its due diligence

efforts by causing Destec and its employees to provide false and misleading information to AES.

The District Court's opinion refers to all of the above quoted provisions of the transaction documentation and "concludes that the 'no representation/non-reliance' clauses in the agreements between Dow and AES are enforceable." App. at 15. The reference to "agreements between Dow and AES" is not clear to us, but we assume for present purposes that AES's commitment in the Confidentiality Agreement was made for the benefit of Dow and, if enforceable, is enforceable by it. In that document, AES "acknowledge[d]" that no "express or implied representations or warranty as to the accuracy or completeness of the Information" had been made and agreed (1) that Destec and Dow would not have "any liability relating to the Information" and (2) that AES would be entitled to rely solely on the representations and warranties it would be able to secure in "any definitive agreement." App. at 197, ¶ 5. In order to avoid further repetition of this acknowledgment and agreement, we will refer to them hereafter as the "non-reliance" clause.

III. Analysis

A. The Federal Law

[1] Section 10(b) of the Exchange Act prohibits the "use or employ, in connection with the purchase or sale of any security[,] ... [of] any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe." 15 U.S.C. § 78j(b). Rule 10b-5, which was promulgated to implement Section 10(b), makes it unlawful for anyone engaged in the purchase or sale of a security to:

- (a) To employ any device, scheme, or artifice to defraud,
- (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which the were made, not misleading, or
- (c) To engage in any act, practice, or course of business which operates or would operate

as a fraud or deceit upon any person[.] 17 C.F.R. § 240.10b-5. "To state a valid claim under Rule 10b-5, a plaintiff must show that the defendant 'made a misstatement or an omission of a material fact (2) with scienter (3) in connection with the purchase or the sale of a security (4) upon which the plaintiff reasonably relied and (5) that the plaintiff's reliance was the proximate cause of his or her injury.' " *Semerenko v. Cendant Corp.*, 223 F.3d 165, 174 (3d Cir.2000).

[2][3] The "reasonable reliance" element of a Rule 10b-5 claim requires a showing of a causal nexus between the misrepresentation and the plaintiff's injury, as well as a demonstration that the plaintiff exercised the diligence that a reasonable person under all of the circumstances would have exercised to protect his own interests. *Straub v. Vaisman and Co., Inc.*, 540 F.2d 591, 597-98 (3d Cir.1976). In *Straub*, we identified a non-exclusive set of factors to aid in determining whether a party's reliance was reasonable under all of the circumstances. We noted that courts may consider (1) whether a fiduciary relationship existed between the parties; (2) whether the plaintiff had *179 the opportunity to detect the fraud; (3) the sophistication of the plaintiff; (4) the existence of long standing business or personal relationships; and (5) the plaintiff's access to the relevant information. See *id.* at 598.

The District Court held that as a result of AES's contractual commitment not to rely on any representations other than those incorporated in the final agreements, its alleged reliance was unreasonable as a matter of law. AES insists that this holding is incorrect in light of Section 29(a) of the Exchange Act, 15 U.S.C. § 78cc(a). Section 29(a) provides: "Any condition, stipulation, or provision binding any person to waive compliance with any provision of this title or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void." 15 U.S.C. § 78cc(a). That is, by its terms, Section 29(a) "prohibits waiver of the substantive obligations imposed by the Exchange Act." *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 228, 107 S.Ct.

2332, 96 L.Ed.2d 185 (1987). The underlying concern of this section is "whether the [challenged] agreement weakens [the] ability to recover under the Exchange Act." *Id.* at 230, 107 S.Ct. 2332 (quotation omitted).

B. The Applicable Law

[4] AES emphasizes that the Merger and Asset Purchase agreements stipulated that Delaware law would govern their interpretation and insists that we must look to that law to determine the effect to be given the non-reliance clause. While we will not rule out the possibility that state law may play a role in some situations involving a Rule 10b-5 claim, we conclude that it has no role here. Reasonable reliance is an element of a federal law claim and what constitutes such reliance is a matter of federal law. Federal law calls for the determination of reasonableness to be made on a case-by-case basis based on all of the surrounding circumstances. The terms of any agreement between the parties may be among these relevant circumstances and, if there is a material dispute about what the parties agreed to, reliance on state contract law may be appropriate to resolve that dispute.

[5] The Delaware cases relied upon by AES, however, do not involve rules of contract interpretation. Primary reliance, for example, is placed upon *Norton v. Poplos*, 443 A.2d 1 (Del.1982), which involved a contract to sell commercial real estate in which the parties had represented that they "do not rely on any written or oral representations not expressly written in the contract." *Id.* at 6. The Delaware Supreme Court held that Delaware law will not enforce such a clause to bar a common law rescission claim based on fraudulent, or "innocent but material[,] misrepresentation by a seller." *Id.* AES and Dow dispute whether this is an across-the-board rule of Delaware law or whether its application is limited to non-negotiated contracts between unsophisticated parties. [FN2] We need not resolve that issue; the issues of what constitutes an anticipatory waiver of a federal securities claim and whether a purported anticipatory waiver of

such a claim is enforceable are matters of federal law. See *Newton v. Rumery*, 480 U.S. 386, 107 S.Ct. 1187, 94 L.Ed.2d 405 (1987) ("the agreement purported to waive a right to sue conferred by a federal statute. The question whether the policies underlying that statute may in some circumstance *180 render that waiver unenforceable is a question of federal law.").

FN2. Compare, e.g., *Progressive International Corp. v. E.I. duPont deNemours & Co.*, 2002 WL 1558382, 2002 Del. Ch. LEXIS 91 (Del. Ch., July 9, 2002), and *Great Lakes Chem. Corp. v. Pharmacia Corp.*, 788 A.2d 544 (Del.Ch.2001), with *S.C. Johnson & Son, Inc. v. Dowbrands, Inc.*, 167 F.Supp.2d 657, 674 (D.Del.2001).

C. The Role of the Non-Reliance Clause

[6] This brings us back to Section 29(a) of the Exchange Act which forecloses anticipatory waivers of compliance with the duties imposed by Rule 10b-5. We believe the conclusion inescapable that enforcement of the non-reliance clauses to bar AES's fraud claims as a matter of law would be inconsistent with Section 29(a).

As we have noted, reliance is an essential element of a Rule 10b-5 claim. It necessarily follows that, if a party commits itself never to claim that it relied on representations of the other party to its contract, it purports anticipatorily to waive any future claim based on the fraudulent misrepresentations of that party. The same is true if the commitment is more limited, e.g., a promise not to claim reliance on any representation not set forth in the agreement. The scope of the anticipatory waiver is more limited, but it is nevertheless an anticipatory waiver of potential future claims under Rule 10b-5.

We, thus, find ourselves in agreement with the conclusion of the Court of Appeals for the First Circuit in *Rogen v. Ilikon*, 361 F.2d 260 (1st Cir.1966). There, a stockholder and former officer and director of the defendant company brought suit alleging that during negotiations for the sale of his stock after his separation from the company, officers and

directors of the defendant corporation failed to disclose material information about the possibility of new prospects for the company. In the agreement to sell his stock, plaintiff represented that he was familiar with the business of the company and that he was not relying on any representations of the purchaser or its agents. In addressing the propriety of this type of contractual provision under the Exchange Act, the Court concluded:

This [type of contract clause] is not, in its terms, a "condition, stipulation, or provision binding ... [plaintiff] to waive compliance" with the Securities Act of 1934 as set forth in Section 29(a) of the Act, (15 U.S.C. § 78cc(a)). But, on analysis, we see no fundamental difference between saying, for example, "I waive any rights I might have because of your representations or obligations to make full disclosure" and "I am not relying on your representations or obligations to make full disclosure." Were we to hold that the existence of this provision constituted the basis (or a substantial part of the basis) for finding non-reliance as a matter of law, we would have gone far toward eviscerating Section 29(a). 361 F.2d at 268 (alterations in original).

As the Rogen court noted, this is not to say that a plaintiff's declaration in a contract of an intent not to rely may not be evidence that he or she did not rely on representations of the defendants. That declaration, alone or in conjunction with other evidence of non-reliance, may establish an absence of reliance and, when un rebutted, may even provide a basis for summary judgment in the defendant's favor. Thus, in this case, the non-reliance clauses are some evidence of an absence of reliance. However, the District Court did not find that the evidence of non-reliance was un rebutted. Indeed, Dow does not contend that the information provided by it and its associates played no material role in AES's decision to enter the agreement.

Dow does contend, and we understand the District Court to have held, that the non-reliance clauses establish as a matter of law that any reliance of AES was unreasonable reliance. We find the same tension between

Section 29(a) and this argument, however, as we have found between *181 Section 29(a) and the argument that the non-reliance clauses foreclose an assertion by AES that it relied. If all of the evidence bearing on the reasonableness of AES's reliance does not entitle Dow to summary judgment under traditional summary judgment principles, it would offend Section 29(a) to bar its claim based solely on a contractual commitment not to claim reliance.

IV. The Issue for Decision on Remand

This leaves for resolution the issue of whether, viewing all of the relevant circumstances and applying the reasonable reliance standard set forth in Straub, a reasonable trier of fact could only conclude that AES failed to exercise ordinary care in protecting its own interest. We decline to address that issue, however, because we conclude that it is premature to do so.

Dow did not argue to the District Court that it was entitled to summary judgment because an application of the principles of Straub to all of the relevant circumstances of this case could lead only to one conclusion. It candidly acknowledged that the record was undeveloped with respect to AES's investigation and its failure to discover the facts it learned after settlement. It insisted, however, that the record had established the only fact necessary to require summary judgment in its favor - the existence of the non-reliance clause. Stated otherwise, Dow's argument is that it is impossible for a buyer to show reasonable reliance in any case where there is a non-reliance clause. Faced with this argument, AES understandably did not file affidavits or verify its complaint, although it did file a Rule 56(a) affidavit pointing out the need for discovery.

The non-reliance clauses are, of course, among the circumstances to be considered in determining the reasonableness of any reliance here. Importantly, they reflect the fact that the seller was unwilling to vouch for the accuracy of the information it was providing and the fact that the buyer was

willing to undertake to verify the accuracy of that data for itself. Clearly, in such circumstances, a buyer who relies on seller-provided information without seeking to verify it has not acted reasonably. Clearly, a buyer in a non-reliance clause case will have to show more to justify its reliance than would a buyer in the absence of such a contractual provision. For this reason, cases involving a non-reliance clause in a negotiated contract between sophisticated parties will often be appropriate candidates for resolution at the summary judgment stage. We are unwilling, however, to hold that the extraction of a non-reliance clause, even from a sophisticated buyer, will always provide immunity from Rule 10b-5 fraud liability.

AES's complaint alleges that Dow and its subsidiaries were in exclusive control of the information necessary to accurately evaluate the Elsta Plant. It further alleges that, as a part of its fraudulent scheme to sell DEI to someone at a price far above its worth, Dow controlled release of the relevant information to AES both initially as well as during the period that it was conducting its investigation to determine the accuracy of the information initially disclosed. Much of that information involved projections and other "soft" data that a seller dealing in good faith would understandably be unwilling to guarantee. According to AES, it conducted a diligent investigation that was reasonably calculated to determine the reliability of Dow's representations but revealed no reason to suspect that Dow was intentionally misleading it. Dow allegedly saw to it that all information received by AES would reassure it of the reliability of the earlier supplied data; Dow allegedly also prevented *182 AES from securing the data in Dow's and Destec's files that would have disclosed the fraud.

In its Rule 56(e) affidavit, AES seeks discovery of information in the exclusive possession of Dow to support AES's claim that Dow and Destec intentionally concealed their fraudulent conduct, restricted its access to truthful information, and accelerated the transaction to prevent AES from discovering the true status of the construction at the Elsta

Plant.

With this as background, AES points to our observation in Straub:

[A] sophisticated investor is not barred [from] reliance upon the honesty of those with whom he deals in the absence of knowledge that the trust is misplaced. Integrity is still the mainstay of commerce and makes it possible for an almost limitless number of transactions to take place without resort to the courts.

Straub, 540 F.2d at 598 (citations omitted). AES argues that a reasonable investor, in its position, trusting in the integrity of the seller, would have understood the seller's unwillingness to guarantee the truth of the supplied data as something other than a warning that it was unreliable [FN3] and would have been willing to rely upon an unimpeded investigation of its own.

FN3. In Semerenko, 223 F.3d at 181, we upheld the dismissal of some of the plaintiffs' Rule 10b-5 claims against the accounting firm of Ernst & Young on the ground that the plaintiffs could not reasonably have relied upon its audit opinions after the company publicly announced the discovery of accounting irregularities and warned investors not to rely on its prior financial statements and audit reports. Dow cites Semerenko for the proposition that there is no need here to consider all of the circumstances in determining the reasonableness of plaintiff's reliance. The cases are not analogous, however. Dow was not saying to potential investors that it was supplying unreliable data that should not be relied upon. Rather, it was communicating only that it was not willing to absorb the risk of guaranteeing the data it was tendering to potential investors for use in evaluating DEI without having been paid for doing so as part of the contract price.

While AES may have an uphill battle here and summary judgment for the defendants may be appropriate at some point, we decline to give controlling significance to the existence of a non-reliance clause in a vacuum. We fully appreciate that the avoidance of costly discovery is one of the objectives of negotiating such clauses. Nevertheless, to hold that a buyer is barred from relief under

Rule 10b-5 solely by virtue of his contractual commitment not to rely would be fundamentally inconsistent with Section 29(a). Given this legislative directive, parties in Dow's position will have to rely upon discovery management and the summary judgment process to ameliorate the discovery burden.

In reaching this conclusion, we have not been unmindful of the decision of the Court of Appeals for the Second Circuit in Harsco Corp. v. Segui, 91 F.3d 337 (2d Cir.1996). The court there affirmed the dismissal of a Rule 10b-5 security fraud claim based on a stipulation in the stock purchase agreement that the sellers were "not [to] be deemed to have made ... any representation or warranty other than as expressly made by" the sellers in the agreement. *Id.* at 342. The Harsco court rejected the purchaser's argument that the District Court's dismissal had violated Section 29(a). Although acknowledging that "the underlying concern of § 29(a) is 'whether the agreement weakens the ability to recover under the Exchange Act' " and that the agreement before it could accurately be described as doing precisely that, the Court nevertheless found the "no other representation" clause enforceable:

Thus, the Agreement can be described as weakening Harsco's ability to recover *183 under § 10(b) of the Exchange Act. We think, however, that in the circumstances of this case such a "weakening" does not constitute a forbidden waiver of compliance. Here there is a detailed writing developed via negotiations among sophisticated business entities and their advisors. That writing, we conclude, defines the boundaries of the transaction. Harsco brings this suit principally alleging conduct that falls outside those boundaries.

* * * * *

Harsco bought Section 2.04's fourteen pages of representations. Unlike a contractual provision which prohibits a party from suing at all, the contract here reflects in detail the reasons why Harsco bought Multi-Serv-in essence, Harsco bought the representations

and, according to Sections 2.05 and 7.02, nothing else. This means that there are fourteen pages of representations, any of which, if fraudulent, can be the basis of a fraud action against the sellers. But Harsco specifically agreed that representations not made in those fourteen pages were not made. Thus, it is not fair to characterize Sections 2.05 and 7.02 as having prevented Harsco from protecting its substantive rights. Harsco rigorously defined those rights in Section 2.04.

This analysis becomes a question of degree and context. Harsco has not waived its rights to bring any suit resulting from this deal. Each representation in Section 2.04 is a tooth which adds to the bite of Sections 2.05 and 7.02. In different circumstances (e.g., if there were but one vague seller's representation) a "no other representations" clause might be toothless and run afoul of § 29(a). But not here.
Id. at 343, 344.

We find Harsco's reasoning unpersuasive. Section 29(a) is not intended to protect substantive rights created by contract. It is designed to protect rights created by the Exchange Act, and it expressly forecloses contracting parties from "defin[ing] the boundaries of the[ir] transaction" in a way that relieves a party of the duties imposed by that Act. We do not dispute that there may be economic efficiency in allowing private parties the freedom to fashion their own bargains. But Congress has made a decision to limit that freedom when it comes to anticipatory waivers of Exchange Act claims. Accordingly, we conclude that we must side with the First Circuit Court of Appeals in Rogen rather than with the Harsco court. [FN4]

FN4. The Harsco court distinguishes Rogen on the grounds that it did not involve sophisticated parties or as detailed an agreement as that before it. We do not understand Rogen to turn on these factors. Nor do we believe § 29(a) to be susceptible of reading that would make an exception for sophisticated parties and detailed agreements.

In addition to Harsco, Dow relies on *One-O-One Enters., Inc. v. Caruso*, 848 F.2d 1283

(D.C.Cir.1988), *Jackvony v. RIHT Finan. Corp.*, 873 F.2d 411 (1st Cir.1989), and *Rissman v. Rissman*, 213 F.3d 381 (7th Cir.2000). None of these cases address § 29(a). Moreover, as we read them, each provides some support for the approach we hold that the District Court should have taken here - treat the existence of the non-reliance clause as one of the circumstances to be taken into account in determining whether the plaintiff's reliance was reasonable. See the analysis of these decisions in *Rissman*, 213 F.3d at 387-389 (Rovner, J., concurring). As the District of Columbia Court of Appeals has observed in commenting on *One-O-One*, a contrary reading "would leave swindlers free to extinguish their victims' *184 remedies simply by sticking in a bit of boilerplate." Id. at 388.

V. Conclusion

The judgment of the District Court will be reversed and this matter will be remanded for further proceedings consistent with this opinion.

CLIFFORD, Senior Circuit Judge.

I agree the case should be reversed, but disagree on the evidentiary use of the stipulations and waivers on remand.

Section 29(a), 15 U.S.C. § 78cc(a), states, "Any ... stipulation ... binding any person to waive compliance with [the Securities Exchange Act] ... shall be void." AES and Dow's stipulations are waivers of compliance, and under the express terms of section 29, they are "void." The majority holds that the void stipulation can nonetheless be evidence of the reasonableness of AES's reliance. I write separately because I cannot join in the majority's interpretation of the word "void."

A void clause is "of no effect whatsoever." BLACK'S LAW DICTIONARY 1568 (7th ed.1999). It is "an absolute nullity." ID. It is "ineffective," "useless," "having no legal force or validity." THE AMERICAN HERITAGE DICTIONARY 911 (4th ed.2001). If we permit the void stipulation to have evidentiary value, it is no longer a nullity, ineffective, or useless.

Instead, it becomes a very potent weapon in the 10b-5 defendant's arsenal. This is precisely what section 29(a) prohibits.

END OF DOCUMENT

At its core, section 29 seeks to prevent parties from contractually avoiding the requirements of Rule 10b-5. If the void stipulation may be evidence in a later Rule 10b-5 claim, how likely is it that the seller of securities will lose the 10b-5 claim? Imagine the mountains of evidence the 10b-5 plaintiff will need to compete with the evidence of the stipulation. Realistically, how will a plaintiff convince a reasonable juror that he reasonably relied on a representation when he signed a provision that stated otherwise? To permit the void stipulation to serve as evidence of a lack of reasonable reliance would be to take the teeth out of section 29. It would make a 10b-5 claim logically possible, but essentially hopeless. Congress meant more when it enacted section 29(a).

Briefs and Other Related Documents (Back to Top)

THE AES CORPORATION, Plaintiff-Appellant, v. THE DOW CHEMICAL COMPANY, and Dynegy Power Corp., formerly known as Destec Energy, Inc., Defendants-Appellees., 2001 WL 34557163 (Appellate Brief) (C.A.3 December 4, 2001), Brief of Plaintiff-Appellant the Aes Corporation

THE AES CORPORATION, v. THE DOW CHEMICAL COMPANY and Dynegy Power Corp., formerly known as Destec Energy, Inc., 2002 WL 32514192 (Appellate Brief) (C.A.3 January 22, 2002), Brief of Defendant-Appellee the Dow Chemical Company

THE AES CORPORATION, Plaintiff-Appellant, v. THE DOW CHEMICAL COMPANY, and Dynegy Power Corp., formerly known as Destec Energy, Inc., Defendants-Appellees., 2002 WL 32514193 (Appellate Brief) (C.A.3 February 8, 2002), Reply Brief of Plaintiff-Appellant the Aes Corporation

325 F.3d 174, Fed. Sec. L. Rep. P 92,401

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Wo

Westlaw®

16div002044

3

United States District Court, S.D. New York.

Leslie ALEXANDER, Plaintiff,

v.

Thomas Mellon EVANS, Evans & Co., Inc.,
Medi-Rx America, Inc., Sidney M.
Karabel, Burton Zweigenhaft, Gary Takata,
Ronald M. Urvater, Rajan K. Pillai
and Pillai, Brick & Roseman, Defendants.
Thomas Mellon EVANS and Evans & Co.,
Inc., Cross-Claimants and Third-Party
Plaintiffs,

v.

Sidney M. KARABEL, Burton Zweigenhaft,
Gary Takata, Rajan K. Pillai and
Pillai & Roseman, f/k/a Pillai, Brick &
Roseman, Cross-Claim Defendants,
and
Albert Barbara, Third-Party Defendant.

No. 88 Civ. 5309 (MJL).

Oct. 15, 1993.

Christopher Lovell, P.C., New York City, for
plaintiff.

Skadden, Arps, Slate, Meagher & Flom, by
Steven J. Kolleeny, New York City, for
defendants/cross-claimants/third-party
plaintiffs Thomas Mellon Evans and Evans &
Co., Inc.

D'Amato & Lynch, New York City, for
defendants Rajan K. Pillai and Pillai, Brick &
Roseman.

OPINION AND ORDER

LOWE, District Judge.

*1 Before this Court are motions for summary judgment filed February 28, 1992 by Thomas Mellon Evans and Evans & Co., Inc. (together the "Evans defendants"), and March 2, 1992 by Rajan K. Pillai and Pillai, Brick & Roseman (together the "Pillai defendants"). [FN1] Also before the Court is the motion filed February 11, 1993 by plaintiff Leslie L. Alexander ("Alexander") for permission to file a reply to defendants' opposition to

Alexander's objections to Magistrate Judge Buchwald's Report & Recommendation ("R & R"). For the following reasons, Alexander's motion for permission to file a reply is denied, and the defendants' motions for summary judgment are granted in part and denied in part according to the terms of the opinion and conclusions below.

BACKGROUND

Defendants' summary judgment motions were referred to Magistrate Judge Naomi Reice Buchwald, and her R & R was entered on October 23, 1992. Plaintiff filed objections to the R & R pursuant to 28 U.S.C. § 636(b)(1), and defendants filed oppositions to plaintiffs' objections. The R & R contains a detailed account of the undisputed facts in this case. A brief review will suffice.

A. The Parties

Medi-Rx America, Inc. ("Medi-Rx") was a start-up company in the field of mail order prescriptions, a promising field in the late 1980s. The remaining defendants are identified in the R & R as follows:

Medi-Rx was founded by defendants Sidney Karabel, who served as its Chairman and Chief Executive Officer; Burton Zweigenhaft, who served as its President and Chief Operating Officer; Gary Takata, who served as its Secretary; and Ronald Urvater, who served as its Treasurer. Defendant [Evans & Co., Inc. was] a New York City brokerage firm, which served as the underwriter for [Medi-Rx's] Initial Public Offering and as the placement agent for [Medi-Rx's] private placement, pursuant to which plaintiff invested his funds in the company. Defendant Thomas Mellon Evans is the founder and chairman of [Evans & Co., Inc.], as well as its largest shareholder. Defendant Pillai, Brick & Roseman ... is a New York City law firm, which served as counsel for Medi-Rx during the period at issue, and defendant Rajan K. Pillai ... was the partner at [Pillai, Brick & Roseman] in charge of Medi-Rx. Third-party defendant, Albert Barbara, sued by the Evans

Defendants for contribution and indemnity, was the broker at [Evans & Co.] who handled the Medi-Rx underwriting.

R & R at 5.

B. The Rise of Medi-Rx: Capital Attraction and Representations

Medi-Rx raised capital on several different occasions: first, it raised about \$770,000 in a private placement in March 1986; second, it raised about \$4,400,000 in a public offering between August and October 1986; and third, it raised \$1,000,000 in a private placement in February 1986. Alexander participated in the second and third of these transactions, purchasing over \$960,000 worth of Medi-Rx common stock in the public offering, and investing \$1,000,000 in the later private placement.

*2 Representations were made during these fundraising efforts about the officers of the company and about the company's prospects for the future. Generally, the officers were depicted as having reassuringly strong and unblemished credentials, and the company's prospects were depicted as uncertain but potentially rewarding.

1. Officers' Backgrounds

The officers' backgrounds were first described in a private placement memorandum ("PPM") associated with the first private placement. The PPM stated that company president Burton Zweigenhaft ("Zweigenhaft") "had never been an officer or director of a company which filed for bankruptcy protection," and otherwise attributed only positive characteristics to Zweigenhaft and chairman and chief executive officer Sidney Karabel ("Karabel"). Second Am.Compl. ¶¶ 19, 21; R & R at 6. The prospectus accompanying the public offering essentially continued this respectable portrait. Kolleeny Aff.Ex. 3 at 15. Finally, regulatory filings did not revise the portrait between the time of the public offering and the time of the second private placement.

A July 1987 article in Forbes magazine--after all three transactions were complete--raised serious questions about the existing portraits of Zweigenhaft and Karabel, and thus about the adequacy of disclosure in the transactions. Kolleeny Aff.Ex. 6. Specifically, the article reported prior business failings of Zweigenhaft and Karabel, and suggested that they might be involved in "drug diversion"--a practice of dubious legality. [FN2]

Evans Co. employee Albert L. Barbara ("Barbara") read an advance copy of the Forbes article to Alexander by telephone on or before July 10, 1987. Barbara also read to Alexander a Medi-Rx press release denying the allegations of drug diversion. Alexander alleges that Evans & Co. representatives offered further general reassurances that the Forbes article was baseless. Pl.'s R. 3(g) Counterstatement, Alexander Aff. ¶ 4(e).

2. Company Prospects

Medi-Rx issued statements on the company's financial condition and prospects. The prospectus accompanying the public offering stated that "[t]he company expects to fund its marketing operations and other capital needs for approximately the next two years from existing funds and the proceeds of this offering." Kolleeny Aff.Ex. 3 at 4. [FN3] The public offering was reported in the company's next quarterly SEC filing, and the opinions on the company's prospects were reiterated:

The net proceeds of the offering amounted to \$4,248,000. At that time, management anticipated that the proceeds of the offering would allow the company to continue operations for a period of approximately two years. During the three month and six month periods ended September 30, 1986, the Company utilized approximately \$500,000 and \$1,060,000, respectively for purchases of capital equipment, inventory and other operating and marketing expenses. These expenses are in keeping with management's projection as set out in the Company's prospectus.

*3 Second Am.Compl. ¶ 39 (quoting Form

10-Q filed Nov. 14, 1986). Two years from the public offering would have been August 1988. As it turned out, Medi-Rx was acquired by another pharmaceutical company in December 1987, and filed for bankruptcy in June 1988. And even that duration was managed only with the help of an additional \$1,000,000 raised by the February 1987 private placement, and another \$500,000 raised in August 1987 as discussed below.

C. The Fall of Medi-Rx

The Forbes article in July 1987 had a minor impact on the price of Medi-Rx stock. The price dropped temporarily, but then recovered. Medi-Rx's prospects further improved in August 1987, when the company entered an agreement with two other companies that were to invest \$2,500,000 in Medi-Rx. One of those companies invested an initial \$500,000 that month. The rest of the deal, however, collapsed in October 1987.

The price of Medi-Rx stock declined rapidly in November and December 1987. Alexander actually bought additional shares during this period, but then sold all of his shares in December 1987. In December 1987, Flex Rx Pharmacy Services, Inc. ("Flex Rx") acquired Medi-Rx, "essentially in exchange for ... assuming Medi-Rx's debt." R & R at 13. Medi-Rx filed for bankruptcy six months later.

D. This Action

Alexander filed suit on July 29, 1988. He alleges violations of several federal statutes: the Securities Act of 1933 ("the 1933 Act"), the Securities Exchange Act of 1934 ("the 1934 Act"), and the Racketeer Influenced and Corrupt Organizations Act ("RICO"). He also brings claims under State law for fraud, negligence, and breach of fiduciary duty.

The original and amended complaints both alleged that Alexander first became aware of the failure to disclose material information on July 30, 1987 as a result of the Forbes article. In an earlier opinion in this case, The Honorable John M. Walker denied a motion to dismiss because a question of fact existed

concerning the reasonableness of Alexander's alleged unawareness before July 30, 1987. *Alexander v. Evans*, No. 88 Civ. 5309, 1989 U.S. Dist. LEXIS 9041 (S.D.N.Y. Aug. 4, 1989).

After additional discovery, defendants filed the present motions for summary judgment on the grounds that Alexander's 1933 Act and 1934 Act claims are time-barred; that Alexander's allegations regarding financial projections are not actionable; that Alexander's allegations regarding the officers' backgrounds are not actionable; that causation has not been sufficiently alleged; that Evans was not a controlling person; that the Pillai defendants do not meet the requirements for either primary violators or aiders and abettors; that Alexander failed to state a claim under RICO or for common law fraud; and for lack of jurisdiction over the State law claims.

The summary judgment motions were referred to Magistrate Judge Naomi Reice Buchwald pursuant to a prior Order of Reference assigning to her all substantive motions in the case. Magistrate Judge Buchwald held oral argument on the motions on August 11, 1992, and entered her R & R on October 23, 1992, recommending that defendants' motions be granted in their entirety and that the action be dismissed.

*4 Alexander filed timely objections to the R & R. Six general objections are made in Alexander's submission: (1) that the R & R erroneously recommends a finding that no material issue of fact exists regarding causation; (2) that the R & R erroneously recommends a finding that Alexander's 1933 Act claims are time-barred; (3) that the R & R erroneously recommends a finding that the financial projections are not actionable as a matter of law; (4) that the R & R erroneously recommends a finding that Evans lacks control person liability; (5) that the R & R erroneously recommends a finding that the complaint fails to state a claim for a RICO violation; and (6) that the R & R contains miscellaneous errors, including failure to mention certain evidence, erroneous characterization of Judge Walker's prior

opinion, and improper findings of fact. [FN4]

The Evans defendants and the Pillai defendants filed oppositions to Alexander's objections. Alexander then filed his motion seeking permission to file a reply to defendants' oppositions.

DISCUSSION
I. THE MOTION FOR PERMISSION TO
FILE A REPLY

The R & R was entered on October 23, 1992. Objections were timely filed. Opposition papers were received. Alexander moves for permission to file another set of papers in reply to the opposition papers.

The Federal Rules of Civil Procedure clearly contemplate the filing of objections to a report and recommendation, and opposition to those objections. Whether the rule should be read to permit the filing of a reply to opposition papers is less clear. Rule 72(b) states:

Within 10 days after being served with a copy of the recommended disposition, a party may serve and file specific, written objections to the proposed findings and recommendations. A party may respond to another party's objections within 10 days after being served with a copy thereof. The district judge to whom the case is assigned shall make a de novo determination upon the record, or after additional evidence, of any portion of the magistrate's disposition to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate with instructions.

Fed.R.Civ.P. 72(b).

No explicit provision is made for reply papers. The rule permits a judge to accept additional evidence, and in that instance it would make sense to permit additional argument. But the rule is permissive rather than mandatory. A judge has discretion whether to receive further evidence, and therefore further argument. See Pan Am.

World Airways, Inc. v. International Bhd. of Teamsters, 894 F.2d 36, 40 n. 3 (2d Cir.1990). [FN5]

The Court has reviewed the R & R, the objections, and the opposition to the objections, and finds no need for additional evidence or argument--especially in view of the exceedingly voluminous submissions already available. Alexander's motion for permission to file a reply to the opposition to the objection to the R & R is denied.

II. THE MOTIONS FOR SUMMARY
JUDGMENT, THE REPORT AND
RECOMMENDATION, AND THE
OBJECTIONS

*5 The standards for deciding a summary judgment motion are well-settled. A court may grant summary judgment only when it is clear that no genuine issue of material fact remains to be resolved at trial and the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56; Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). Ambiguities must be resolved against the movant. Lopez v. S.B. Thomas, Inc., 831 F.2d 1184, 1187 (2d Cir.1987) (citing United States v. Diebold, Inc., 369 U.S. 654, 655 (1962)). Summary judgment is granted "only where the entire record would inevitably lead a rational trier of fact to find for the moving party." National R.R. Passenger Corp. v. City of New York, 882 F.2d 710, 713 (2d Cir.1989).

The party opposing summary judgment, however, "may not rest upon mere allegation or denials of his pleading." Anderson, 477 U.S. at 256; see Fed.R.Civ.P. 56(e). Rather, that party "must set forth specific facts showing that there is a genuine issue for trial." Id. The mere existence of a factual issue does not preclude summary judgment. Only a genuine issue precludes summary judgment--that is, one that would permit a reasonable jury to return a verdict for the nonmoving party. Anderson, 477 U.S. at 248. No reasonable jury could return a verdict for a nonmoving party who fails to offer "any significant probative evidence tending to support" factual contentions. First Nat'l

Bank v. Cities Serv. Co., 391 U.S. 253, 290 (1968).

A. Objection No. 1: [FN6] Actionability of Financial Projections

Alexander objects to the R & R's recommended finding that the financial projections are not actionable as a matter of law. The R & R cites a number of cases demonstrating that financial projections are rarely actionable when they are accompanied by sufficient warnings about the uncertainty of future performance. R & R at 28-29. The reason for this rule is obvious; as Magistrate Judge Buchwald explained, "[t]he mere fact that projections ultimately prove to be inaccurate does not mean that they were fraudulent." R & R at 29.

Projections are nevertheless actionable in cases where a plaintiff " 'point[s] to ... facts suggesting that the difference [between projections and actual performance] is attributable to fraud.' " R & R at 29 (quoting *DiLeo v. Ernst & Young*, 901 F.2d 624, 627-28 (7th Cir.), cert. denied, 111 S.Ct. 347 (1990)). Fraud has been equated with a statement made without genuine belief or reasonable basis. See, e.g., *Barrios v. Paco Pharmaceutical Servs., Inc.*, 816 F.Supp. 243, 251 (S.D.N.Y.1993); see also 17 C.F.R. § 230.175(a) (stating that a forward-looking statement "shall be deemed not to be a fraudulent statement ... unless it is shown that such statement was made or reaffirmed without a reasonable basis or was disclosed other than in good faith.").

This Court doubts whether lack of a "reasonable basis" alone can support a § 10(b) violation. The Supreme Court ruled in *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976), that the securities laws do not regulate negligent behavior. The Second Circuit, for its part, has never endorsed a reasonable basis test except to the extent that lack of a reasonable basis permits an inference that the conclusions drawn were known to be false. See *Luce v. Edelstein*, 802 F.2d 49, 57 (2d Cir.1986) (holding that claims "relating to projections or expectations offered to induce

investments must allege particular facts demonstrating the knowledge of the defendants at the time that such statements were false") (emphasis added); *Rolf v. Blyth, Eastman Dillon & Co.*, 570 F.2d 38, 46 n. 13 (2d Cir.) (noting that New York law permits a finding of fraud in the case of "an opinion based on grounds so flimsy as to lead to the conclusion that there was no genuine belief in its truth"), cert. denied, 439 U.S. 1039 (1978). [FN7] Knowing falsehood and ungenueine belief are terms of rather high scienter and not (like reasonableness) terms of negligence.

*6 The Court nevertheless will entertain Alexander's "reasonable basis" arguments as an exercise in caution against premature summary judgment. The question, then, is whether Alexander has offered evidence sufficient to permit a jury to find that the projections were made without genuine belief or reasonable basis. The Court finds that he has not.

1. Projections in the August 1986 Prospectus

Alexander contends that the two year expected life of Medi-Rx was not genuinely believed. He supports that contention with references to deposition testimony. Pl.'s Obj. at 66-67. But that testimony does not support the conclusion that Medi-Rx personnel did not believe the two year estimate. It simply illustrates that the personnel were constantly concerned with the financial viability of the company, as might well be expected in any start-up company.

Alexander contends that the two-year expected life of Medi-Rx had no reasonable basis. He contends that neither party has come forward with evidence of what the basis of the projections was, and that in such a circumstance, the Court should find that an issue of fact exists regarding reasonableness. Pl.'s Obj. at 70 ("[N]o record exists of what was done, and the traditional reasonable negative inference from the failure by defendants to produce documents in their possession, is that nothing was done.").

Alexander's contention that no evidence

exists regarding the basis for the projections is belied by his own argument that the projections lacked a reasonable basis. [FN8] For example, Alexander criticizes Medi-Rx's expectation regarding capital outlays for telephone equipment. Pl.'s Obj. at 72-75. More important, the record contains extensive evidence that Medi-Rx personnel ran numerous financial projections. Pl.'s Exs. 37-39, 41, 42, 46, 48; Kolleeny Reply Aff.Ex. 5 at 230-37, 399-403, 646-47 (testimony of Sidney Karabel). Those projections were reviewed by Evans & Co. and found acceptable. See, e.g., Kolleeny Reply Aff.Ex. 3 at 508-09 (testimony of Albert L. Barbara). Medi-Rx official Sidney Karabel testified:

When we made a projection, it was our best estimate of what would occur. But as I told you, we spent more money than planned after going into the offering to meet the requirements of the market. So we certainly, I believe, have the right as management of the company to allocate resources to generate revenues to maximize stockholder return in the best interests of the company.

We reviewed our situation and decided again to speed up expenditures to meet business condition environments, so if we needed additional cash, it was against our plan, spending additional, and we certainly weren't hiding it from anyone. It was reflected in the income statements, balance sheets on a quarterly basis. So I don't think the projections were false, misleading or unreasonable.

Kolleeny Reply Aff.Ex. 5 at 646-47. See also Kolleeny Reply Aff.Ex. 7 at 258-59 (testimony of Ronald M. Urvater).

*7 Alexander does not refute this testimony. Instead, he selects ambiguous quotes from other deposition testimony, such as Medi-Rx official Gary Takata's statement that the company "was always undercapitalized, from day one." Pl.'s Ex. 16 at 228. Closer inspection reveals the ambiguity of this "damning" admission. Takata was asked: "Was there some point, in your memory, where you thought that Medi-Rx had financial difficulties?" He replied: "Well, it depends

on how you define financial difficulties. I am talking about, when I say financial difficulties, I mean the company was always undercapitalized, from day one." Id.

The Court finds this (and the other evidence before the Court) insufficient to establish a genuine issue whether fraud was committed in the use of the financial projections in the public offering. Medi-Rx may have been undercapitalized, but that does not mean it had no life expectancy. The question is what the life expectancy was, or more accurately, whether the two year estimate was genuinely held and had a reasonable basis. The evidence just does not permit a negative conclusion to that question. Capital--the lifeblood of a start-up company--is exhausted at a rate that depends upon the aggressiveness of management. Karabel testified (and Alexander has not refuted) that the company's strategy changed and became more aggressive. Capital is necessarily exhausted more quickly in such circumstances. The only reasonable conclusion in this case is that capital was consumed more rapidly than had been expected, not that the expectations lacked any reasonable basis.

The expectation was that the company would last twenty-four months [FN9] with existing funds and the proceeds of the public offering--about \$4,400,000 altogether. As it turned out, the company raised and spent at least \$1,500,000 extra and lasted only sixteen months. This is a significant discrepancy, but fraud is not contingent upon fortune.

Numerous precedents in this circuit inveigh against claims of fraud based on financial projections where, as here, projections are accompanied by provisos that "bespeak caution." Luce, 802 F.2d at 56; Barrios, 816 F.Supp. 243; Haggerty v. Comstock Gold Co., 765 F.Supp. 111, 114 (S.D.N.Y.1991). A narrow exception is available for projections that are not genuinely believed, and perhaps for those that have no reasonable basis. Alexander has not submitted evidence that would permit a reasonable factfinder to conclude that either of those exceptions apply to the projections in the August 1986

prospectus.

2. Projections in the November 1986 10-Q

Alexander also alleges misrepresentation in the November 1986 10-Q filing, which stated:

At that time [when the prospectus was issued in August 1986], management anticipated that the proceeds of the offering would allow the Company to continue operations for a period of approximately two years. During the three month and six month periods ended September 30, 1986, the Company utilized approximately \$500,000 and \$1,060,000, respectively for purchases of capital equipment, inventory and other operating and marketing expenses. These expenses are in keeping with management's projection as set out in the Company's prospectus. Management expects only such decreases in liquidity as would result from further projected expenditures towards purchase of equipment, inventory and funding of operating and marketing efforts of the Company.

*8 Pl.'s R. 3(g) Counterstatement ¶ 49. According to Alexander, the 10-Q statements were false and misleading because "revenues were far less than had been projected, ... costs were far higher than had been projected, Medi-Rx was doing much worse than had been projected, and its liquidity was worse than had been projected." *Id.* ¶ 50. Alexander supports this allegation by quoting Medi-Rx official Gary Takata, who testified that "[t]he company was not doing as well [from September--December 1986] as had been projected." *Id.*

Alexander's evidence does not support his claims. How "well" the company was doing does not bear on whether the 10-Q was truthful in stating that expenses were in keeping with projections. And the company's performance from September to December 1986 is mostly irrelevant to analysis of the 10-Q for the period ended September 30, 1986. Alexander attempts to attribute certain higher costs to the relevant month of September, [FN10] but he neither pins them to September

1986 nor establishes that they rendered baseless the reaffirmed projection. [FN11] A 10-Q is a formal document, and its terms must be read literally. Alexander cannot attack the 10-Q on the basis of several cost overruns during September 1986 and a few others that had not even been incurred yet.

Alexander has failed to submit evidence from which a reasonable jury could conclude that the 10-Q filing was inaccurate, much less fraudulent.

3. Projections in the February 1987 Private Placement

Alexander claims that the financial projections are actionable insofar as they were not corrected in the February 1987 Proposal for Private Placement ("PPP"). The PPP referred to the prospectus for a "detailed description of the Company's business and its management team, audited financial statements for the fiscal year ending March 31, 1986 and unaudited financial statements for the quarter ended June 30, 1986," and referred to the November 1986 10-Q filing for "[u]naudited financial statements for the quarter ended September 30, 1986." Second Am. Compl. Ex. E.

Medi-Rx's plans rapidly changed in the fall of 1986. Expenses increased in accordance with a revised business plan that foresaw larger contracts. The company developed a faster "burn rate"--it spent money more rapidly--at the same time it sought additional capital. These facts were eventually and accurately reflected in the company's April 1987 10-K filing. But at the time of the PPP, the available documents did not reflect the changed condition of Medi-Rx.

Securities laws apply to omissions as well as misrepresentations. Alexander presents evidence that Medi-Rx underwent substantial material changes in its financial condition during the fall of 1986, and that the financial projections in the August 1986 prospectus were no longer genuinely believed by the time of the private placement. See, e.g., Pl.'s Ex. 19 at 424-25 (testimony of Sidney Karabel);

Pl.'s Ex. 14 at 238-39 (testimony of Rajan K. Pillai). A reasonable factfinder could conclude that an investor like Alexander should have been informed of those changes, not simply sent copies of the old, outdated materials.

*9 Alexander further alleges that Evans & Co. made oral representations to him that Medi-Rx was meeting or surpassing its projections and that Evans & Co. would perform due diligence for him in connection with the private placement. Pl.'s R. 3(g) Counterstatement, Alexander Aff. ¶¶ 4(a)-(c), 12. The Evans defendants (and the Pillai defendants) deny these allegations. See Evans Defs.' R. 3(g) Statement ¶¶ 9-10; Pillai Defs.' R. 3(g) Statement ¶¶ 28-29. They assert that Alexander was thoroughly informed about the condition of the company.

The Court cannot resolve these issues of fact on a motion for summary judgment. The differences present a genuine issue of material fact.

Defendants insist that the PPP, the prospectus, and the 10-Q were not the only information given or available to Alexander. They point to the private placement agreement ("PPA") that Alexander signed, which contains the following statement:

Purchaser ... acknowledges that the Company has provided Purchaser with, or given Purchaser access to, full and fair disclosure of all material information including, without limitation, a copy of its Registration Statement ... as well as copies of its reports on Form 10-Q and Forms 8-K filed in September, November and December, 1986, respectively. Purchaser further acknowledges that the Company has given Purchaser access to any and all information regarding the Company requested by Purchaser....

Second Am.Compl.Ex. F at 4.

Several decisions have held that defendants can rebut a plaintiff's claim of reliance on misrepresentations or omissions by demonstrating that the plaintiff had "access to

and knowledge of the omitted information." *Wollins v. Antman*, 638 F.Supp. 989, 995 (E.D.N.Y.1986) (citing *Fisher v. Plessey Co.*, 103 F.R.D. 150, 156 (S.D.N.Y.1984)). On the other hand, the Second Circuit has stated that the obligation to "state all material facts necessary to make other statements not misleading ... is not discharged merely by giving the purchaser access to company records and letting him piece together the material facts if he can." *Metro-Goldwyn-Mayer, Inc. v. Ross*, 509 F.2d 930, 933 (2d Cir.1975) (citations omitted).

The PPA's disclaimer is evidence that Alexander was fully informed, but it cannot bar a suit for violation of the securities laws. See 15 U.S.C. § 78cc(a) (voiding "[a]ny condition, stipulation, or provision binding any person to waive compliance" with the securities laws). Alexander alleges that material information about the company's officers and financial condition was omitted and misrepresented. Defendants disagree. A genuine issue of fact exists. The allegations will have to be overcome by convincing a factfinder that they are false, or that the information was not actually relied upon because Alexander had access and knowledge. The allegations cannot be overcome simply by invoking the disclaimer.

In sum, the Court finds no genuine issue of material fact regarding the financial representations in connection with the August 1986 public offering. Summary judgment is granted on those claims. The Court does, however, find genuine issues of material fact in connection with the February 1987 private placement.

B. Objection No. 2: 1933 Act and Statute of Limitations

*10 Alexander objects to the R & R's recommended finding that Alexander's 1933 Act claims are time-barred. [FN12] The R & R recommends a finding that the claims are barred by the one year statute of limitations that runs from the time that a plaintiff "should have discovered the general fraudulent scheme." *Arneil v. Ramsey*, 550

F.2d 774, 780 (2d Cir.1977) (quoting *Berry Petroleum Co. v. Adams & Peck*, 518 F.2d 402, 410 (2d Cir.1975)).

Alexander contends that the statute of limitations issue depends on whether he exercised reasonable diligence in discovering the fraud, and that a factfinder must resolve the question of reasonable diligence. Pl.'s Obj. at 46-49. He further contends that he was lulled into acquiescence by the defendants' assurances that the Forbes article was false, and that in any event, the Forbes article could have put him on notice regarding only the allegedly misrepresented backgrounds of Zweigenhaft and Karabel, not the allegedly fraudulent financial projections.

1. Backgrounds of Zweigenhaft and Karabel

The R & R relied on the Forbes article as conclusive evidence that Alexander had discovered the possibility of fraud with respect to the backgrounds of Zweigenhaft and Karabel. The Court agrees that the article constituted notice for purposes of the limitations period applicable to 1933 Act claims. No reasonable person could have required more information about the backgrounds of Zweigenhaft and Karabel to become aware that important omissions might have been made in the offering documents and public filings.

2. Financial Projections

The R & R cites the Forbes article and Medi-Rx public filings as conclusive evidence that, over one year before filing suit, Alexander discovered or should have discovered the possibility of fraud in the alleged representations regarding Medi-Rx's financial status. The Court concerns itself only with the alleged representations in the February 1987 private placement, because summary judgment has been found appropriate on all other financial projection claims.

Alexander alleges that he was fraudulently induced into the private placement by misrepresentations and omissions concerning the financial performance and prospects of

Medi-Rx. Specifically, he alleges misrepresentations and omissions concerning the company's performance and prospects during the period between the public offering in August 1986 and the private placement in February 1987. Alexander alleges that the defendants misrepresented that the company expected to grow without Alexander's investment and to grow even faster with it, Pl.'s Obj. at 75, and that "Medi-Rx was faring better financially than had been projected when, in fact, it was faring much worse." Pl.'s Obj. at 76. Alexander alleges that the August 1986 prospectus and November 1986 10-Q should have been supplemented to reflect the changed condition of the company.

The R & R recommends a finding that the possibility of these alleged misrepresentations and omissions should have been discovered as a result of the Forbes article and the pre-July 1987 public filings that reported the company's financial condition. The Court adopts the recommendation of the R & R. Alexander claims he was misled regarding the financial status of the company. Any divergence between his expectations and reality was made clear upon filing of Medi-Rx's 1986 annual report on Form 10-K in April 1987, *Kolleeny Aff.Ex. 21*; its 1987 first quarter report on Form 10-Q in May 1987, *Kolleeny Aff.Ex. 22*; and the Forbes article that repeated the company's financial straits and poor first quarter performance. [FN13]

3. Lulling

*11 Alexander maintains that he was lulled into inaction by denials of the Forbes article and by "rosy press releases" and other "statements that Medi-Rx's business was good." Pl.'s Obj. at 76. The R & R recommends a finding that Alexander--or any other investor--cannot rely on the representations of those who are implicated in the alleged fraud. R & R at 18 (citing *Gilck v. Berk & Michaels*, No. 90 Civ. 4230, 1992 WL 178621, at *3, 1992 U.S. Dist. LEXIS 10056, at *8-*9 (S.D.N.Y. July 10, 1992)). Alexander insists that Evans & Co. was not implicated in the fraud at that point. The Court finds that

argument specious, especially in view of the central role that Alexander now alleges the Evans defendants to have played in the public offering and private placement. Besides, the positive statements cited by Alexander did not detract from the hard facts reported in the 10-K filing, the 10-Q filing, and the Forbes article.

Alexander's 1933 Act claims are barred by the statute of limitations.

C. Objection No. 3: Causation

Alexander objects to the R & R's recommended finding that no material issue of fact exists regarding causation. The R & R recommends a finding that Medi-Rx equities lost value because the October 19, 1987 crash of the stock market caused the collapse of additional financing for Medi-Rx. R & R at 11-12 (citing *Kolleeny Aff.Ex. 1* at 310-11, 316 (testimony of Leslie L. Alexander)). Alexander maintains that a genuine issue of fact exists regarding the cause of the decline in late 1987, and in any event, claims damages not only for the loss in late 1987 but for the artificially high price he paid in the first place.

The Court finds that the issue of causation cannot entirely be resolved on a motion for summary judgment. Alexander advances three separate theories of causation. First, he submits that the price he paid in the public offering would have been less had he and the rest of the market known the true facts regarding Medi-Rx management, and that the price he paid in the private placement would similarly have been less had he known the true facts regarding the company's financial condition and Evans & Co.'s alleged failure to perform due diligence. Second, Alexander submits that the failure of Medi-Rx and the lost value of Medi-Rx securities in late 1987 are attributable to the facts that were concealed or misrepresented. Third, he submits that the value of Medi-Rx securities dropped in late 1987 more than it would have if the concealed or misrepresented facts were known.

The Court agrees with the R & R that the value lost in late 1987 is so clearly attributable to other factors that no reasonable factfinder could conclude that the loss was due to the alleged misrepresentations and omissions. The R & R recommends a finding that the operative event precipitating the decline of Medi-Rx stock in October 1987 was the withdrawal of prospective investors from Medi-Rx. Alexander offers the alternative explanation that the investors withdrew not because they had been crippled by the crash, but because of the information available in the five month old Forbes article and the many public filings documenting the company's dubious financial progress. The Court agrees with the R & R that no reasonable factfinder could accept Alexander's explanation. As the R & R states, the record is "devoid of evidence from which a reasonable jury could conclude that, absent defendants['] alleged misrepresentations and omissions, the price of Medi-Rx stock would not have plummeted in October 1987." R & R at 27. Crucially, Alexander fails to show any contemporaneous attention to the alleged misrepresentations and omissions that could explain the lost value as a function of his preferred (and perhaps not by coincidence, likely more lucrative) theory.

*12 The Court nevertheless believes that the R & R should have more seriously considered the claim that the alleged misrepresentations and omissions caused Alexander to pay an inflated price for his securities. The R & R recommended rejection of this theory because a plaintiff who buys a security as a result of fraud should not be permitted to claim loss when: (1) the fraud is discovered; (2) the security can be sold for at least the purchase price; and (3) the plaintiff does not sell and recoup the purchase price. The R & R thus recommends that a plaintiff be required to mitigate damages.

Alexander counters that the R & R cites no authority for such a rule of decision, and that established authority holds to the contrary. Thus, he cites *Voegel v. Ackerman*, 364 F.Supp. 72, 73 (S.D.N.Y.1973), for the proposition that an increase in the price of a

(Cite as: 1993 WL 427409, *12 (S.D.N.Y.))

stock after it is purchased is irrelevant to the question of damages for fraudulently induced purchase. Defendants respond by citing *Marbury Management, Inc. v. Kohn*, 470 F.Supp. 509 (S.D.N.Y.1979), aff'd in pertinent part, 629 F.2d 705 (2d Cir.), cert. denied, 449 U.S. 1101 (1980), where it is stated that "if the plaintiff continues to hold the stock after the discovery of the fraud, he can be deemed to have made a 'second investment decision' based on the total mix of information now available." *Id.* at 516 n. 13 (citation omitted).

Alexander certainly held his securities well beyond the point at which he became responsible for the information he claims was denied him when he purchased. The facts of management background were substantially revealed by the *Forbes* article, and the facts regarding financial performance were revealed in the 1987 quarterly statements and other public filings. This Court agrees with the "second investment decision" approach as applied to damages occurring after fraud is revealed. See *Morgan, Olmstead, Kennedy & Gardner, Inc. v. Schipa*, 585 F.Supp. 245, 249-50 (S.D.N.Y.1984) ("[W]here one receives actual notice that he has been injured as a result of another party's fraudulent conduct, he will be disabled from recovering for injuries occurring thereafter which he could have avoided in the exercise of reasonable diligence."). Alexander's conscious decision in this case to hold the securities after the alleged fraud was discovered constituted a new decision on his investments. The law does not insure his investments against loss. He made a fully informed decision to retain his investment.

But the mitigation principle cannot dispose of Alexander's claims for out-of-pocket damages. Mitigation applies only when damage is incomplete and the plaintiff can still do something to cut losses. The Morgan court referred to notice and to damages "occurring thereafter." 585 F.Supp. at 249-50. Out-of-pocket damage--the amount by which the price paid exceeds true value--is done at the time of purchase. It cannot be mitigated. *Sirota v. Solitron Devices, Inc.*, 673 F.2d 566, 577 (2d Cir.), cert. denied, 459 U.S. 838 (1982);

Voegel, 364 F.Supp. at 73; 5D Arnold S. Jacobs, *Litigation and Practice Under Rule 10b-5* § 260.03[f][iv], at 11-171--11-173 (1992).

*13 In addition, the portion of Alexander's holdings that was acquired through the private placement was restricted. Pl.'s Obj. at 44. No market existed in which he could have sold his interest and mitigated his damages. See Jacobs, *supra*, at 11-175 ("A plaintiff cannot mitigate by buying or by selling securities of a privately held company on an established market. It follows that no duty to mitigate should be imposed if the fraud involves securities which are not publicly held at the time that duty would otherwise exist.").

Summary judgment is denied to the extent that Alexander alleges out-of-pocket damages, and granted to the extent of all other theories of causation.

D. Objection No. 4: Control Person Liability

Alexander objects to the R & R's recommended finding that Evans lacks control person liability. According to the R & R, "no issue of fact is in dispute with respect to Mr. Evans's involvement.... [P]laintiff fails, in the many thousands of pages submitted in opposition to highlight a single fact indicative of meaningful or culpable involvement in the underwriting." R & R at 31.

The R & R correctly explains the law in this circuit. "In order to prove a controlling person claim plaintiff must show a primary violation of the securities laws and demonstrate that Mr. Evans: (1) had the ability to control the primary wrongdoer, and (2) was 'i[n] some meaningful sense' a 'culpable participant' in the alleged conduct." R & R at 30 (quoting *Lanza v. Drexel & Co.*, 479 F.2d 1277, 1299 (2d Cir.1973) (en banc)).

Alexander argues that "numerous recent cases hold[] that 'culpable participation' is not an element of control person liability." Pl.'s Obj. at 89. Alexander is mistaken. The recent cases do not substitute a "control status" standard for the "culpable

participation" standard. Rather, the cases affect the pleading requirement and burden allocation. Alexander's primary authority, *Borden, Inc. v. Spoor Behrins Campbell & Young*, 735 F.Supp. 587 (S.D.N.Y.1990), takes care to explain that permitting a plaintiff to state a claim based on control status "does not conflict with the statute's aim to hold liable only those controlling persons 'who are in some meaningful sense culpable participants in the fraud perpetrated by controlled persons.'" *Id.* at 590 (quoting *Lanza*, 479 F.2d at 1299).

The present motion is for summary judgment. *Borden*, by contrast, involved a motion to dismiss for failure to state a claim, and indeed distinguished itself from cases involving summary judgment. *Id.* at 590 (distinguishing *Index Fund, Inc. v. Hagopian*, 609 F.Supp. 499 (S.D.N.Y.1985)). A defendant still can prevail on a control person issue by pointing out that there is an absence of evidence to permit a reasonable factfinder to conclude that the defendant was a culpable participant in the alleged fraud. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Evans has carried that burden here.

*14 Alexander recites a litany of powers and responsibilities held by Evans at Evans & Co. Pl.'s Obj. at 82-83 (quoting Pl.'s R. 3(g) Counterstatement ¶¶ 35-36). Few of these allegations involve Evans specifically in the Medi-Rx dealings: Evans approved the overall deal, as he did for every underwriting pursued by Evans & Co., Pl.'s R. 3(g) Counterstatement ¶ 35(a); Evans appeared at a Medi-Rx due diligence meeting, although "he did not stay," Pl.'s Ex. 15 at 223 (testimony of Albert L. Barbara, Dec. 11, 1991); and Evans reviewed the Medi-Rx file and approved renewed support for the company after the Forbes article. The Evans defendants themselves note that Evans had one fifteen or twenty minute meeting about the public offering with Albert L. Barbara, who was primarily responsible for the Medi-Rx deals at Evans & Co. *Kolleeny Aff.Ex. 4* at 211-12 (testimony of Albert L. Barbara).

The Evans defendants do not view the

foregoing as culpable participation. They further note that Evans was retired before the events at issue in this suit, Def.'s Opp'n to Obj. at 34; that Alexander never met or even spoke with Evans, *Kolleeny Aff.Ex. 1* at 73-74; that Evans had no meeting whatsoever with Barbara about the private placement, *id.* at 262-63; [FN14] and that it was Barbara who was responsible for, and who put into place, due diligence arrangements. *Kolleeny Aff.Ex. 4* at 196-99, 203-06 (testimony of Albert L. Barbara); *Kolleeny Aff.Ex. 30* at 134-35 (testimony of Caesar Fraschilla).

The Court agrees with the R & R that the allegations cannot support a finding that Evans was a control person with respect to the Medi-Rx dealings. Evans had only superficial involvement, not culpable participation, in Medi-Rx transactions. His review of the company file after the Forbes article does not support a finding of culpable participation in the alleged violations. Cf. *Griffin v. McNiff*, 744 F.Supp. 1237, 1252 (S.D.N.Y.1990) ("[A]llegations of post-purchase activity alone are insufficient to establish liability as either a primary violator or an aider and abettor."). The R & R's recommendation on control person liability is adopted, and summary judgment is granted in favor of defendant Thomas Evans.

E. Objection No. 5: RICO

Alexander objects to the R & R's recommended finding that the complaint fails to state a claim for a RICO violation.

As the R & R explained, a plaintiff under RICO "must demonstrate '(1) that the defendant (2) through the commission of two or more acts (3) constituting a pattern (4) of racketeering activity (5) directly or indirectly invests in, or maintains an interest in, or participates in (6) an enterprise (7) the activities of which affect interstate or foreign commerce.'" R & R at 32 (quoting *Moss v. Morgan Stanley, Inc.*, 719 F.2d 5, 17 (2d Cir.1983), cert. denied sub nom. *Moss v. Newman*, 465 U.S. 1025 (1984)).

The present case turns on the "pattern"

(Cite as: 1993 WL 427409, *14 (S.D.N.Y.))

requirement. The pattern requirement does not require proof of multiple illegal schemes, only multiple illegal acts. *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 236 (1989). But " 'while two acts are necessary, they may not be sufficient.' " *Id.* at 237 (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 n. 14 (1985)). A pattern requires both a relationship between alleged racketeering acts, and also that the acts "themselves amount to, or that they otherwise constitute a threat of, continuing racketeering activity." *Id.* at 240. Continuing activity can be either "a closed period of repeated conduct, or ... past conduct that by its nature projects into the future with a threat of repetition." *Id.* at 241.

*15 The Pillai defendants contend that the alleged acts connected with the August 1986 public offering and the February 1987 private placement are insufficient to support a RICO violation. The Court agrees. Alexander alleges that the Pillai defendants assisted in the omission of information concerning the backgrounds of Zweigenhaft and Karabel in the August 1986 public offering; that they repeated that omission when they sent the prospectus and 10-Q filing in connection with the private placement; and that they assisted in the misrepresentation of the company's financial condition and prospects in connection with the private placement. These three acts clearly meet the relatedness requirement for a RICO pattern. But they are insufficient to support a finding of continuous activity.

"A pattern is not formed by 'sporadic activity.' " *Id.* at 239 (quoting S.Rep. No. 617, 91st Cong., 1st Sess. 158 (1969)). The present case involves nothing more than a few sporadic predicate acts "extending over a few ... months and threatening no future criminal conduct." *Id.* at 242. The alleged omissions and misrepresentations concerning Medi-Rx's condition and prospects in late 1986 and early 1987 were limited; the truth of the company's condition was inevitably revealed soon thereafter in further public filings. The information about Zweigenhaft and Karabel similarly was revealed upon publication of the *Forbes* article. The few sporadic repetitions

of that same omission do not, in this case, support a pattern of racketeering activity. See *Airlines Reporting Corp. v. Aero Voyagers, Inc.*, 721 F.Supp. 579, 584 (S.D.N.Y.1989) ("Although the defendants allegedly committed some fifty racketeering acts of mail fraud, those acts were identical to one another.").

The Pillai defendants further assert that Alexander has not submitted evidence of a conspiracy, so summary judgment should be granted on his RICO conspiracy claim. Pillai Defs.' Mem. in Supp. of Summ.J. at 53-55 (citing *Andreo v. Friedlander, Gaines, Cohen, Rosenthal & Rosenberg*, 651 F.Supp. 877 (D.Conn.1986)). The conspiracy claim falls with the primary RICO claim, but summary judgment would be proper anyway. The Second Circuit has held in the context of a motion to dismiss that a complaint must allege "some factual basis for a finding of a conscious agreement among the defendants." *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 26 n. 4 (2d Cir.1990). Alexander responds to Hecht by discussing matters other than the "conscious agreement" element. Pl.'s Mem. in Opp'n to Summ.J. at 125-27. He cites no evidence of a conscious agreement.

Summary judgment on Alexander's RICO claims will be granted.

F. Objection No. 6: Miscellaneous Errors

Alexander objects to the R & R on several miscellaneous grounds: first, that the R & R failed to mention certain evidence; second, that the R & R erroneously characterized Judge Walker's prior opinion in this case; and third, that the R & R improperly found facts. The Court has considered the submissions *de novo*. There is no need to question the R & R's analysis on these points in the wake of the present Opinion and Order.

G. Other Objections and Grounds for Summary Judgment

1. Other Objections: Common Law Fraud Claims

*16 Alexander objects to the R & R's recommendation that the common law fraud claims be dismissed. The Evans defendants moved for summary judgment on those claims based on an asserted absence of factual issues regarding loss causation. The R & R agreed with the Evans defendants, and recommended that summary judgment be granted on all claims, including the common law claims. R & R at 25-28. This Court, however, has determined that summary judgment cannot be granted to the extent that Alexander claims "out-of-pocket" damages. Summary judgment therefore cannot be granted on the common law claims.

2. Other Grounds for Summary Judgment: Materiality, Causation and Reliance

a. Materiality

The Evans defendants and the Pillai defendants assert that the information about Zweigenhaft and Karabel was immaterial. The Court does not agree that the issue is so clear as to be resolvable on a motion for summary judgment.

Materiality is a mixed question of law and fact, and a complaint may not properly be dismissed pursuant to Rule 12(b)(6) (or even pursuant to Rule 56) on the ground that the alleged misstatements or omissions are not material unless they are so obviously unimportant to a reasonable investor that reasonable minds could not differ on the question of their importance.

Goldman v. Belden, 754 F.2d 1059, 1067 (2d Cir.1985).

The Evans defendants break down the Zweigenhaft and Karabel background information into three parts: two lawsuits against Zweigenhaft; the bankruptcy of a company at which Zweigenhaft served as an officer and Karabel and Rajan K. Pillai ("Pillai") were principal stockholders; and congressional hearings that mentioned Zweigenhaft's companies, with which Karabel was associated, in connection with drug diversion. Each of these matters, according to the Evans defendants, is immaterial. Evans

Defs.' Mem. in Supp. of Summ.J. at 53-57.

The Evans defendants correctly observe that Securities and Exchange Commission ("SEC") regulations, as far as they shed light upon these matters, suggest that disclosure was not required. Bankruptcies are to be disclosed if they are less than five years old. 17 C.F.R. § 229.401(f)(1). Lawsuits against a director or executive officer are to be disclosed if the suits are less than five years old, involved securities, and resulted in an unfavorable judgment. 17 C.F.R. § 229.401(f)(5). The regulations do not address congressional hearings. The Evans defendants cite GAF Corp. v. Heyman, 724 F.2d 727, 739-40 (2d Cir.1983), to support their position that the regulations should guide the Court's decision.

Alexander, on the other hand, maintains that materiality is a question that cannot be resolved simply by referring to the regulations. This view is supported by the GAF decision. 724 F.2d at 739 ("In our view, the regulation's emphasis ... strongly suggests that ... unadjudicated allegations ... should not automatically be deemed material."). The Court doubts the materiality of the alleged omissions, but is not certain of the opinion that a reasonable investor would hold. [FN15] Summary judgment cannot be based upon lack of materiality.

b. Causation and Reliance

*17 The Pillai defendants assert that Alexander has failed to allege facts supporting causation or reliance with respect to the common law fraud claims. Causation was addressed above, and the Court finds no merit in the reliance argument.

The Pillai defendants assert that Alexander should not have relied on their alleged misrepresentations and omissions because he is a sophisticated investor who could have discovered the truth himself. Pillai Defs.' Mem. in Supp. of Mot. for Summ.J. at 36-37. It may be true that "[t]he securities laws were not designed to protect sophisticated businessmen from their own errors of judgment." Hirsch v. DuPont, 553 F.2d 750,

763 (2d Cir.1977). But it is equally true that the reliance requirement was not designed to shield perpetrators of fraud by forcing investors to conduct exhaustive research every time they invest money, lest the seller be manipulative or deceptive. The Court cannot say as a matter of law that Alexander's alleged reliance was unreasonable. Summary judgment cannot be granted on Alexander's common law fraud claims.

3. Other Grounds for Summary Judgment: The Pillai Defendants

The Pillai defendants assert that they cannot be held liable as either primary wrongdoers or aiders and abettors of the alleged fraud. This, too, is an issue that cannot be resolved on summary judgment. Although an attorney generally has no obligation to disclose information to third parties with whom the attorney has no relationship, Alexander has adduced evidence showing that Pillai was aware of the background information concerning Zweigenhaft and Karabel prior to issuance of the prospectus, Pl.'s Ex. 21 at 218-38; Pl.'s Ex. 19 at 97-114; Pl.'s Ex. 23 at 33-44, and that Pillai was aware at the time of the private placement that Medi-Rx could not meet the earlier financial projections. Pl.'s Ex. 14 at 238-39.

The Pillai defendants cite *Schatz v. Rosenberg*, 943 F.2d 485 (4th Cir.1991), cert. denied, 112 S.Ct. 1475 (1992), which held that "a lawyer or law firm cannot be held liable for misrepresentation under section 10(b) for failing to disclose information about a client to a third party absent some fiduciary or other confidential relationship with the third party." *Id.* at 490. This Court finds such a strict rule incompatible with the prevailing view in this circuit. "In appropriate circumstances, an attorney can be subject to liability for aiding and abetting. Although an attorney cannot be held liable merely for failing to 'tattle' on his clients, silence consciously intended to facilitate a fraud can create secondary liability." *SEC v. Forma*, 117 F.R.D. 516, 526 (S.D.N.Y.1987) (citations omitted). [FN16]

The concern is not that the Pillai defendants merely failed to edify themselves about Medi-Rx and to pass along the gained knowledge to the investing public. The concern is that the Pillai defendants might have known of specific misstatements or omissions and yet willingly assisted in their dissemination. Cf. *Morin v. Trupin*, 747 F.Supp. 1051, 1072 (S.D.N.Y.1990) (finding no support for law firm liability where "firm was unaware of the facts" when private placement memorandum was prepared); *Friedman v. Arizona World Nurseries, Ltd.*, 730 F.Supp. 521, 534 (S.D.N.Y.1990) (finding no scienter where attorneys had no knowledge of falsity of statements), *aff'd*, 927 F.2d 594 (2d Cir.1991). A genuine issue of fact exists regarding whether the Pillai defendants are liable, as either primary or secondary violators, for the alleged misrepresentations and omissions.

*18 Summary judgment cannot be granted with respect to the claims against the Pillai defendants.

CONCLUSION

Alexander's motion for permission to file a reply to the opposition to Alexander's Objections to the R & R is denied.

Defendants' motions for summary judgment are granted with respect to the 1933 Act and RICO claims.

Defendants' motions for summary judgment are denied with respect to the State common law claims.

Defendants' motions for summary judgment with respect to the § 10(b) claims are resolved as follows: (1) summary judgment is denied to the extent that the § 10(b) claims are based upon alleged omission or misrepresentation of the backgrounds of Zweigenhaft and Karabel in connection with the August 1986 public offering and the February 1987 private placement; (2) summary judgment is denied to the extent that the § 10(b) claims are based upon alleged omission or misrepresentation of Medi-Rx's financial condition or prospects in connection with the February 1987 private

placement; and (3) summary judgment is granted to the extent that Alexander's § 10(b) claims rest on all other factual bases.

Summary judgment is granted with respect to the surviving § 10(b) and state law claims to the extent they rest on a theory of causation other than "out-of-pocket" damages.

The Evans defendants' motion for summary judgment is granted with respect to Alexander's claims against Thomas Mellon Evans.

The parties are directed to submit their Joint Pre-Trial Order on or before November 15, 1993.

It Is So Ordered.

FN1. Defendant Burton Zweigenhaft moved for summary judgment on March 17, 1992, for the reasons stated in the Evans defendants' and Pillai defendants' motions.

FN2. The Forbes article described drug diversion as follows: "A drug has been diverted if it has not been obtained directly from the manufacturer or from an authorized distributor. Diverted drugs can be subpotent, outdated or, worse, outright ineffectual counterfeits." Kolleeny Aff.Ex. 6 at 2. Medi-Rx took measures to correct the impression left by the Forbes article. Zweigenhaft resigned (purportedly for the good of the company and not as any admission of impropriety) and Medi-Rx hired the accounting firm of Deloitte Haskins & Sells ("Deloitte") to ascertain whether drug diversion had taken place. A press release at the end of July 1987 stated that the Deloitte audit confirmed "that Medi-Rx ha[d] purchased all pharmaceutical products directly from U.S. based manufacturers or U.S. based licensed and authorized wholesalers and distributors." Second Am.Compl.Ex. G at 2.

FN3. The prospectus also contained a somewhat different estimate: The proceeds of this offering will be used to purchase inventory of approximately \$700,000 and additional property and equipment of approximately \$1,050,000. In addition, approximately \$350,000 of the proceeds of this offering will be used to open a branch marketing

office and an additional dispensing facility. The remainder will be added to working capital, and combined with existing funds, are expected to fund operations until approximately the end of March 1988. Kolleeny Aff.Ex. 3 at 8 (emphasis added). The prospectus thus contained a projection of well under two years.

FN4. Alexander structures a background section of his Objections around thirteen alleged misleading statements. Pl.'s Obj. at 3-22. The "thirteen statements" are ill-defined, and virtually useless as a framework for discussion.

FN5. The rule is even less clear if no additional evidence has been submitted. In the present case, Alexander submits three new affidavits with his proposed reply papers.

FN6. This Opinion's numeration of Alexander's objections differs from the numeration used in his submission. The change is one of sequence, not substance.

FN7. Some decisions cite Virginia Bankshares, Inc. v. Sandberg, 111 S.Ct. 2749 (1991), as support for the reasonable basis requirement. E.G., Schwartz v. System Software Assocs., Inc., 813 F.Supp. 1364, 1366 (N.D.Ill.1993); In re AnnTaylor Stores Sec. Litig., 807 F.Supp. 990, 1000 (S.D.N.Y.1992). But Virginia Bankshares is not so clear on the point. That case involved rule 14a-9, which prohibits misleading statements. The Court observed that statements recommending a stock buyout price as "fair" and "high value" can be "reasonably understood to rest on a factual basis that justifies them as accurate, the absence of which renders them misleading." 111 S.Ct. at 2758. The Court did not say how indefensible a factual basis must be to support a finding of fraud under § 10(b). If § 10(b) is violated when a projection has an unreasonable basis, then plaintiffs like Alexander are free to engage in a rather wide-open second-guessing game. This Court suspects that the correct formulation would require not just an unreasonable basis, but a grossly unreasonable basis, or a basis so lacking as to permit an inference that the projection was known to be false—that is, not genuine.

FN8. Alexander heavily relies on an expert witness affidavit (the Zofnass Affidavit) challenging the

reasonableness of the company's financial estimates. That affidavit was not before Magistrate Judge Buchwald, and will not be considered here for its substance. Pan Am., 894 F.2d at 40 n. 3.

FN9. Again, it should be noted that the prospectus also contained a substantially shorter estimate as well. See supra note 3.

FN10. The Court is referred to a phone system that cost \$134,000 rather than \$70,000, an unbudgeted security system that cost \$60,000, software that cost \$250,000 more than expected--a nearly \$500,000 "variance in capital requirements." Pl.'s Rule 3(g) Counterstatement at 31; Pl.'s Ex. 19 at 342 (testimony of Sidney Karabel).

FN11. The testimony on the cited costs revolved around a budget dated September 22, 1986. Pl.'s Ex. 44; Pl.'s Ex. 19 at 308-12 (testimony of Sidney Karabel). Most of the items had not been purchased, and Alexander has not offered any evidence that \$500,000 had been spent by September 30, 1986. The extra costs that had been incurred as of September 22, 1986, as far as the evidence shows, add up to \$78,180. Pl.'s Ex. 44. The charge that the 10-Q was false and misleading is therefore a bit misleading itself.

FN12. Magistrate Judge Buchwald recommended a finding that the 1934 Act claims are not barred by the applicable statute of limitations. Defendants have not objected to that recommendation.

FN13. Uncontested evidence indicates the Forbes article was read to Alexander on or before July 10, 1987, the 10-K was filed April 1987 and the 10-Q was filed May 1987. All three events were more than one year prior to filing suit on July 29, 1988.

FN14. The Evans defendants suggest, with some support from Alexander's own arguments, that Evans is named as a defendant only because he is a "deep pocket"--indeed, one of the only pockets, now that Evans & Co. and Medi-Rx are defunct. See Pl.'s Mem. in Opp'n to Summ.J. at 39.

FN15. The Court notes that the release of the Forbes article precipitated a drop in Medi-Rx stock. Although the price recovered, and the dramatic effect of a well-written article must not be underestimated, the effect on the market at least

suggests that materiality is not a matter for the Court to adjudge.

FN16. The Pillai defendants contend that "something more than an ordinary business purpose is required to allege substantial assistance in aiding and abetting securities fraud." Pillai Defs.' Mem. in Supp. of Mot. for Summ.J. at 44 (citing *Thornock v. Kinderhill Corp.*, 749 F.Supp. 513, 517 (S.D.N.Y.1990)). But the Thornock decision begins by recognizing that " 'substantial assistance' [always] exists where the alleged aider and abettor has played an active role in furthering the securities violation." *Thornock*, 749 F.Supp. at 516. Motive becomes important only when the alleged assistance is in the form of a refusal to act. *Id.* at 517 (emphasized alteration added).

1993 WL 427409 (S.D.N.Y.), Fed. Sec. L. Rep. P 97,795, RICO Bus.Disp.Guide 8434

END OF DOCUMENT

4

Supreme Court, Appellate Division, First
Department, New York.

AMERICAN BAPTIST CHURCHES OF
METROPOLITAN NEW YORK, et al.,

Plaintiffs-
Appellants,

v.

T. Eric GALLOWAY, et al., Defendants-
Respondents.

May 9, 2000.

Not-for-profit corporation and two of its subsidiaries brought action against former officer, a consultant hired to help corporation develop a facility for Acquired Immune Deficiency Syndrome (AIDS) patients, and directors of a rival corporation, alleging that defendants had wrongfully seized control of a corporate project. The Supreme Court, New York County, Ira Gammerman, J., dismissed the plaintiffs' claims, and they appealed. The Supreme Court, Appellate Division, Rosenberger, J.P., held that: (1) as a matter of first impression, corporation could sustain compensable damages from the loss of a corporate opportunity, and (2) corporation's allegations were sufficient to state claims for misappropriation of a corporate opportunity, breach of his fiduciary duty of loyalty and good faith, fraud, and tortious interference with prospective contractual relations.

Affirmed as modified.

West Headnotes

[1] Corporations 319(5)
101k319(5)

Not-for-profit religious corporation's two wholly-owned subsidiaries were not real parties in interest in corporation's action against former officer who allegedly misappropriated a corporate opportunity by seizing control of a corporate project, where the subsidiaries were not involved in the project, and any proceeds received in connection with the project would have inured to the benefit of the corporation alone.

[2] Corporations 315
101k315

Not-for-profit corporation could sustain compensable damages from the loss of a corporate opportunity.

[3] Corporations 3
101k3

"Not-for-profit corporation" is not the same as a corporation that loses money; it is simply a corporation that devotes whatever proceeds it receives from its operations to charitable causes rather than disbursing the funds as dividends to shareholders and compensation to executives. McKinney's N-PCL § 102(a)(5).

[4] Corporations 319(6)
101k319(6)

Not-for-profit religious corporation's allegations that, as result of former officer's misconduct in seizing control of a corporate project, it lost a \$144,000 development fee and \$1.2 million from its planned sale of tax credits were sufficient allegations of monetary damage to support its claim against the former officer for misappropriation of a corporate opportunity.

[5] Corporations 319(6)
101k319(6)

Not-for-profit religious corporation's allegation that former officer secretly created a competing organization to seize control of a corporate project and exploit work already done by the corporation on developing the project was sufficient to state claim against the former officer for breach of his fiduciary duty of loyalty and good faith.

[6] Principal and Agent 69(1)
308k69(1)

Agent may not divert or exploit for his own benefit an opportunity that is an asset of his principal, nor may he make use of the principal's resources or proprietary information to organize a competing business.

[7] Brokers 43(2)
65k43(2)

Statute requiring contract to procure a loan or negotiate a real estate purchase to be in

writing did not apply to not-for-profit religious corporation's contract with consultant to assist corporation in developing a facility for Acquired Immune Deficiency Syndrome (AIDS) patients and possibly another property. McKinney's General Obligations Law § 5-701.

[8] Fraud 16
184k16

Cause of action for fraud may be based on a fiduciary's intentional concealment of a material fact.

[9] Religious Societies 31(4)
332k31(4)

Not-for-profit religious corporation's allegations that its former officer, a consultant, and the consultant's executive director concealed actions that were adverse to its interest in facility the consultant was hired to develop, including the creation of a competing entity and the alteration of a purchase contract, alleged the defendants' misrepresentations with sufficient detail to support a fraud claim.

[10] Religious Societies 31(4)
332k31(4)

Not-for-profit religious corporation's allegations that its former officer, a consultant, and the consultant's executive director, in furtherance of their scheme to divert and delay a corporate project, relied on their prior relationship with the owner of property on which the project was to be located to induce the owner to renege on its previous intention to sell to the corporation at an affordable price sufficiently alleged causation to support corporation's fraud claim.

[11] Corporations 319(6)
101k319(6)

Not-for-profit religious corporation's allegations that rival corporation was incorporated under false pretenses, for no purpose other than to help its organizers seize control of a corporate project were sufficient to establish the elements of a veil-piercing claim against the organizers.

[12] Torts 12
379k12

Not-for-profit religious corporation's allegation that its former officer, a consultant, and the consultant's executive director used deceptive actions in derogation of their fiduciary duties to induce a property owner not to sell property to the corporation on previously agreed terms was sufficient to state a claim against the defendants for tortious interference with prospective contractual relations.

[13] Religious Societies 31(4)
332k31(4)

Not-for-profit religious corporation's allegations that rival corporation was formed months before corporation's scheduled closing on a property and immediately moved to take over the corporation's project when one of its officers resigned was sufficient to state claim against the rival corporation's organizers for aiding and abetting former officer's breach of fiduciary duty, diversion of corporate opportunity and fraud, on theory that the organizers acted in concert.

[14] Conspiracy 1.1
91k1.1

While in New York there is no separate tort of conspiracy, allegations of conspiracy are permitted to connect the actions of separate defendants with an otherwise actionable tort.

[15] Corporations 319(6)
101k319(6)

Not-for-profit corporation's allegations that the directors of a rival not-for-profit corporation formed that corporation to assist an officer in seizing control of a corporate project precluded determination that the directors were entitled to statutory immunity as a matter of law. McKinney's N-PCL § 720-a.

****13 *95** James M. Hirschhorn, of counsel (William J. Tinsley, Jr., on the brief, Sills Cummis Radin Tischman Epstein & Gross, P.A., attorneys) for plaintiffs-appellants.

Howard Zelbo, of counsel (Marco A. Lau and Papaya Van Dyke, on the brief, Cleary, Gottlieb, Steen & Hamilton, attorneys) for defendants-respondents.

(Cite as: 271 A.D.2d 92, *95, 710 N.Y.S.2d 12, **13)

ERNST H. ROSENBERGER, J.P.,
RICHARD W. WALLACH, RICHARD T.
ANDRIAS and DAVID FRIEDMAN, JJ.

****14** ROSENBERGER, J.P.

This action involves the alleged misappropriation of a corporate opportunity by an officer of a charity, who was retained to help the charity develop an AIDS care facility but seized control of the project himself. The main issue presented is whether the IAS court erred in dismissing the complaint on the grounds that a not-for-profit corporation could never sustain compensable damages from the loss of a corporate opportunity.

Plaintiff American Baptist Churches of Metropolitan New York ("ABC Metro") is a not-for-profit religious corporation whose charitable work includes operating Flemister House, an outreach program for AIDS patients, through two wholly-owned subsidiaries ("the Flemister plaintiffs"). ABC Metro had retained defendant Settlement Housing Fund ("SHF") in 1994 as a consultant to help develop an additional facility similar to Flemister House, namely the Noah House project at issue in the instant case.

Defendant T. Eric Galloway was first employed by SHF and later hired by ABC Metro in 1995 as Executive Director of the Flemister entities. One of his chief duties was to spearhead the Noah House project. When he was still employed by SHF, both *96 Galloway and SHF Executive Director Carol Lamberg had developed contacts with Great Wall Development Corp, which owned a site that appeared suitable for Noah House. ABC Metro directed Galloway to proceed with negotiations and Galloway reached an oral agreement with Great Wall to purchase the property for \$250,000.

Galloway also aided ABC Metro in obtaining all the necessary government approvals and securing financing for the Noah House project. Some funding was to come from a \$5.6 million loan from New York City. Additionally, a private investor agreed to invest \$1.8 million in return for the right to take advantage of

ABC Metro's Federal income tax credits. Of these proceeds, \$1.2 million would be available to ABC Metro for use in its charitable work. (As a developer of low-income housing, ABC Metro was entitled to Federal income tax credits, but it could not use them directly because it pays no Federal income taxes, so it planned to sell them to an investor in exchange for a partnership interest in the project.) ABC Metro also expected to receive a \$144,000 developer's fee at closing.

By May 1996, the approvals and financing were in place. The closing of the loan from the City was contingent on a signed contract to purchase the property from Great Wall. According to the complaint, once Galloway had completed all the development work on ABC Metro's behalf, he embarked on a scheme to seize control of the Noah House project and cut ABC Metro out of the transaction entirely. Without telling ABC Metro or the Flemister plaintiffs, Galloway instructed ABC Metro's legal counsel to incorporate Community Lantern Corp. ("CLC"), a not-for-profit corporation, with himself and defendants Carol Lamberg and Craig Harwood as directors. Then, once again without plaintiffs' consent, Galloway instructed the law firm to substitute CLC's name for ABC Metro's on the purchase contract with Great Wall, and to tell Great Wall's counsel to delay the purchase.

On July 7, 1996, Galloway informed plaintiffs that he was resigning and that CLC was taking control of the Noah House project. Because of his prior relationship with Great Wall, he claimed, the property owner would not sell to ABC Metro against Galloway's wishes. Indeed, Great Wall did refuse to go through with the sale, not wishing to be caught in the dispute between CLC and ABC Metro. Great Wall subsequently offered to sell the property to ABC Metro for \$350,000 if defendants approved, but ABC Metro could not finance the transaction at this substantially higher price.

*97 The Noah House project never came to fruition. Without a signed contract, ABC **15 Metro could not obtain the loan from the

City. ABC Metro alleges that as a result, it lost the \$144,000 development fee and the use of \$1.2 million in proceeds from the transfer of the Noah House tax credits.

Plaintiffs then brought this action alleging fraud, breach of fiduciary duty, misappropriation of corporate opportunity, and tortious interference with prospective contractual relations. In addition to challenging the sufficiency of the 17 causes of action in the Amended Complaint on substantive grounds, defendants also argued that the Flemister plaintiffs had no standing because they had no interest in the Noah House project. The IAS court agreed, and dismissed the Flemister entities from the lawsuit on this basis. With respect to ABC Metro, the IAS court dismissed all its claims on the sole grounds that "[a]s a not-for-profit corporation, ABC Metro cannot satisfactorily allege damages, which would otherwise be based on lost profits." The court cited no legal authority for this proposition.

[1] The Flemister plaintiffs were properly dismissed from the action. Since they were not involved in the Noah House project, any proceeds received in connection with the project, such as the New York City loan or the developer's fee, would have inured to the benefit of ABC Metro alone. Thus, they were not real parties in interest (see, *Columbus Nat'l Leasing Corp. v. Perkin-Elmer Corp.*, 177 A.D.2d 1035, 578 N.Y.S.2d 50).

[2][3] However, the order below should be modified to reinstate all but two of ABC Metro's claims. The IAS court erred in concluding that a not-for-profit corporation could never sustain compensable damages. First of all, as a matter of public policy, it would be unfair and counterproductive for a charitable organization to have no recourse against a dishonest fiduciary who thwarts the organization's endeavors and renders futile the expenditures of time and money invested in developing the project. Second, the IAS court's ruling rests on a fundamental misunderstanding of the nature of a not-for-profit corporation. A not-for-profit corporation is not the same as a corporation

that loses money. It is simply a corporation that devotes whatever proceeds it receives from its operations to charitable causes rather than disbursing the funds as dividends to shareholders and compensation to executives. Just as the goal of a for-profit corporation is to make money for its investors, the goal of a not-for-profit is to make money that can be spent on furthering its social welfare objectives. Both types of *98 companies have suffered an injury when a fiduciary's misconduct frustrates these goals.

The foregoing analysis is supported by the New York Not-For-Profit Corporation Law, which clearly contemplates that not-for-profit corporations may receive income and even make an incidental profit. What distinguishes a not-for-profit is not whether it receives money, but what it does with the money. Not-For-Profit Corporation Law § 102(a)(5) defines a not-for-profit as a corporation which is organized "exclusively for a purpose or purposes, not for pecuniary profit or financial gain," and "no part of the assets, income or profit of which is distributable to, or enures to the benefit of, its members, directors or officers except to the extent permitted under this statute" (emphasis added). Section 508 allows a not-for-profit to earn an "incidental profit" from fees or charges, so long as such profits are "applied to the maintenance, expansion or operation of the lawful activities of the corporation," and not "divided or distributed in any manner whatsoever among the members, directors, or officers of the corporation."

Not-for-profit corporations in New York routinely bring actions seeking damages for breach of contract, breach of fiduciary duty and fraud (e.g., *Nate B. & Frances Spingold Foundation v. Wallin, Simon, Black & Co.*, 184 A.D.2d 464, 585 N.Y.S.2d 416; *Cobble Hill Nursing Home v. Henry and Warren Corp.*, 196 A.D.2d 564, 568-569, 601 N.Y.S.2d 334, lv. denied 83 N.Y.2d **16 756, 614 N.Y.S.2d 386, 637 N.E.2d 277). While no New York case appears to have dealt with a not-for-profit's claim for diversion of a corporate opportunity, a number of cases from other states recognize that a not-for-profit may

bring such a claim (e.g., *White Gates Skeet Club v. Lightfine*, 276 Ill.App.3d 537, 213 Ill.Dec. 115, 658 N.E.2d 864; *Valle v. North Jersey Automobile Club*, 141 N.J.Super. 568, 359 A.2d 504 [N.J.App.], modified 74 N.J. 109, 376 A.2d 1192; *Lutherland, Inc. v. Dahlen*, 357 Pa. 143, 53 A.2d 143). By contrast, there is no case law supporting the IAS court's contrary conclusion.

[4] Here, ABC Metro pleaded at least two specific items of monetary damage flowing from defendants' alleged misconduct: the loss of ABC Metro's expected \$144,000 development fee and the loss of the \$1.2 million from the planned sale of Noah House's tax credits. Defendants dispute whether ABC Metro satisfied the conditions precedent to receiving these funds, but these are questions for the trier of fact. In addition, ABC Metro alleges that it has lost the money it expended to develop a project that never came to fruition because of defendants' interference. These allegations are sufficient to withstand a motion to dismiss.

*99 Turning now to the merits of the individual causes of action, we conclude that the first through ninth and the eleventh through sixteenth causes of action asserted by ABC Metro should be reinstated.

[5] Most of the claims encompass essentially the same allegations, phrased differently. The first cause of action alleges that Galloway breached his fiduciary duty of loyalty and good faith by secretly creating a competing organization to seize control of Noah House and exploiting the work already done by ABC Metro on developing the project. The second cause of action alleges that SHF and its Executive Director Lamberg, as consultants hired by ABC Metro, breached their duty of good faith in that, after being involved in negotiating for the purchase of the property from Great Wall, SHF and Lamberg attempted to take control of both the project and the property. The third cause of action asserts a breach of contract claim against SHF based on the same allegations. The fourth and fifth causes of action are asserted against Galloway and against SHF and Lamberg,

respectively, for diversion of corporate opportunity.

[6] An agent may not divert or exploit for his own benefit an opportunity that is an asset of his principal (*Alexander & Alexander of N.Y. v. Fritzen*, 147 A.D.2d 241, 246, 542 N.Y.S.2d 530). Nor may he make use of the principal's resources or proprietary information to organize a competing business (*Schneider Leasing Plus v. Stallone*, 172 A.D.2d 739, 741, 569 N.Y.S.2d 126, lv. dismissed 78 N.Y.2d 1043, 576 N.Y.S.2d 211, 582 N.E.2d 594). It would be a breach of fiduciary duty if an agent of a corporation secretly established a competing entity so as to divert opportunities away from his principal (*Wolff v. Wolff*, 67 N.Y.2d 638, 641, 499 N.Y.S.2d 665, 490 N.E.2d 532).

In support of dismissal, Galloway argues that he owed no fiduciary duty to ABC Metro because he was an employee of the Flemister entities, not of ABC Metro. To the contrary, the facts as alleged in the complaint indicate that he was acting as ABC Metro's agent with respect to Noah House, in addition to whatever services he performed for the Flemister entities. Moreover, he cannot have it both ways: to defeat the Flemister plaintiffs' standing, he asserts that they had no relation to his work on Noah House, but to defeat ABC Metro's claims, he asserts that he was the Flemisters' agent. At the very least, this inconsistency concerning the relationship between the parties must be resolved in further proceedings.

[7] SHF argues that the contract with ABC Metro is void under General Obligations Law § 5-701 because a contract to procure a loan or negotiate a real estate **17 purchase must be in writing. However, the complaint alleges that SHF's role was broader *100 than this, namely that SHF was employed as a paid consultant to assist in developing Noah House and possibly another property. Thus, the claim for breach cannot be dismissed at this stage.

[8][9][10] The sixth and seventh causes of action allege that Galloway, Lamberg and

(Cite as: 271 A.D.2d 92, *100, 710 N.Y.S.2d 12, **17)

SHF committed fraud. Defendants argue that the complaint does not list the alleged misrepresentations in sufficient detail, and that, in any event, the loss of the project was proximately caused by Great Wall's decision to raise the purchase price, not by defendants' actions (see, *Williams v. Upjohn Health Care Servs.*, 120 A.D.2d 729, 730, 503 N.Y.S.2d 68 [requiring causal link between misrepresentations and injury]). However, a cause of action for fraud may be based on a fiduciary's intentional concealment of a material fact (see, *Mobil Oil Corp. v. Joshi*, 202 A.D.2d 318, 609 N.Y.S.2d 214). Here, ABC Metro has adequately alleged that defendants concealed a series of actions that were adverse to ABC Metro's interest in Noah House, including the creation of CLC and the alteration of the purchase contract. As to causation, the complaint alleges that in furtherance of defendants' scheme to divert and delay the project, they relied on their prior relationship with Great Wall to induce Great Wall to renege on its previous intention to sell to ABC Metro at an affordable price.

[11] The eighth cause of action seeks to pierce the corporate veil against Galloway, Lamberg and Harwood, on the grounds that CLC was incorporated under false pretenses, for no purpose other than to help them seize control of Noah House. These allegations establish the elements of a veil-piercing claim, namely that the owners completely dominated the corporation and that such domination was used to commit a wrong against the plaintiff (*Morris v. N.Y. State Dep't of Taxation & Finance*, 82 N.Y.2d 135, 141, 603 N.Y.S.2d 807, 623 N.E.2d 1157). Nothing in the record indicates any other purpose for CLC's existence.

[12] The ninth cause of action against all defendants for tortious interference with prospective contractual relations should also be reinstated. ABC Metro has alleged that defendants used wrongful means, namely deceptive actions in derogation of their fiduciary duties, to induce Great Wall not to sell the property on the previously agreed terms (see, *Guard-Life Corp. v. Parker Hardware Mfg. Corp.*, 50 N.Y.2d 183, 191, 428

N.Y.S.2d 628, 406 N.E.2d 445). This is not a situation where an arm's-length competitor uses ordinary free-market means to persuade a third party not to transact business with the plaintiff. However, the tenth cause of action for tortious interference with existing contractual relations *101 was properly dismissed because no contract for the sale of the property was ever signed (see, *NBT Bancorp v. Fleet/Norstar Financial Group*, 87 N.Y.2d 614, 620-621, 641 N.Y.S.2d 581, 664 N.E.2d 492).

[13] The eleventh through sixteenth causes of action charge the defendants other than Galloway with aiding and abetting his breach of fiduciary duty, diversion of corporate opportunity and fraud. Defendants argue that these causes of action are deficient because the complaint does not contain sufficient allegations that they knew or should have known about Galloway's misconduct, nor that they rendered substantial assistance to him. However, the pleadings support a theory that all defendants acted in concert. According to the complaint, CLC was formed by the individual defendants months before ABC Metro's scheduled closing date on the Noah House project, and immediately moved to take over the project when Galloway resigned. Defendants also allegedly exploited Great Wall's prior relationship with SHF to frustrate the sale. In any event, what the parties actually knew is a matter for discovery, since much of the information is in defendants' control.

**18 [14] Finally, the seventeenth cause of action for civil conspiracy was properly dismissed because it was redundant. While in New York there is no separate tort of conspiracy, allegations of conspiracy are permitted "to connect the actions of separate defendants with an otherwise actionable tort" (*Alexander & Alexander of N.Y. v. Fritzen*, 68 N.Y.2d 968, 969, 510 N.Y.S.2d 546, 503 N.E.2d 102). Here, ABC Metro's other claims have already pleaded these torts and defendants' alleged collusion to commit them.

[15] With respect to all causes of action asserted against them in their capacity as

directors of CLC, Lambert and Harwood argue that they have immunity under Not-For-Profit Corporation Law § 720-a as uncompensated directors of a not-for profit corporation. Yet, the statute contains an exception where the director's harmful conduct was grossly negligent or intentional. It would be premature to find that Lamberg and Harwood have immunity as a matter of law, since ABC Metro has alleged in detail that these defendants formed CLC so as to assist Galloway's deceptive scheme and appropriate the Great Wall property for themselves. This would come within the statutory exception for intentional misconduct.

Accordingly, the order of the Supreme Court, New York County (Ira Gammerman, J.), entered November 13, 1998, granting defendants' motion to dismiss the amended complaint, should be modified, on the law, to reinstate the first through ninth and the eleventh through sixteenth causes of action, only *102 to the extent asserted by plaintiff American Baptist Churches of Metropolitan New York, and otherwise affirmed, without costs.

Order, Supreme Court, New York County (Ira Gammerman, J.), entered November 13, 1998, modified, on the law, to reinstate the first through ninth and the eleventh through sixteenth causes of action, only to the extent asserted by plaintiff American Baptist Churches of Metropolitan New York, and otherwise affirmed, without costs.

All concur.

271 A.D.2d 92, 710 N.Y.S.2d 12, 2000 N.Y.
Slip Op. 04756

END OF DOCUMENT

5

United States Court of Appeals,
Second Circuit.

AMERICAN PROTEIN CORPORATION,
Plaintiff-Appellee,

v.

AB VOLVO and Volvo Lastvagnar AB, as
successors in interest to Beijerinvest AB,
Beijer Industries, Inc. and Bo Lycke,
Defendants-Appellants.

No. 331, Docket 87-7560.

Argued Dec. 3, 1987.
Decided April 8, 1988.

Plaintiff, an American corporation, brought suit arising out of contract with American subsidiary of Swedish parent corporation. The United States District Court for the Southern District of New York, Howard B. Turrentine, J., awarded plaintiff \$3 million in damages in varying amounts against defendants for breach of contract, tortious interference of contract and negligent misrepresentation, and defendants appealed. The Court of Appeals, Cardamone, Circuit Judge, held that: (1) existence of interlocking directorates was insufficient to pierce corporate veil between original contracting party and its great-grandparent; (2) evidence was insufficient to establish that president of original contracting party made any guaranty of original contracting party's performance; (3) decision of corporate executives to "wind down" affairs of subsidiary did not constitute tortious interference with plaintiff's contract with subsidiary; and (4) even assuming that contracting party's president's statements were negligently spoken, there was no cause of action for negligent misrepresentation.

Reversed.

West Headnotes

[1] Corporations 1.7(2)
101k1.7(2)
Issue of whether to pierce corporate veil is generally submitted to the jury.

[2] Corporations 1.6(2)
101k1.6(2)

Under New York law, existence of interlocking directorates was insufficient to pierce corporate veil between original contracting party and its great-grandparent, with respect to claim of breach of express written contract, where separate corporate and financial records were maintained, independent board meetings were held and separate corporate offices were maintained, and there was no evidence to suggest that great-grandparent used subsidiary to commit fraud or wrong causing plaintiff to suffer unjust loss.

[3] Guaranty 25(3)
195k25(3)

Under New York law, evidence was insufficient to establish that president of original contracting party made any guaranty of original contracting party's performance.

[4] Federal Civil Procedure 2602
170Ak2602

Motion for judgment n.o.v. after jury's verdict generally may be made only when motion for directed verdict has been made at close of all evidence and before case is sent to jury. Fed.Rules Civ.Proc.Rule 50(b), 28 U.S.C.A.

[5] Federal Civil Procedure 2602
170Ak2602

Failure to renew directed verdict motion at close of evidence did not preclude motion for judgment n.o.v., where trial court had indicated it was not necessary to move in order to preserve the right since motion was not denied until end of all the evidence, and nonmoving party had notice after it rested that moving parties believed their proof was deficient. Fed.Rules Civ.Proc.Rule 50(b), 28 U.S.C.A.

[6] Torts 2
379k2

New York law applied to tortious interference claim, where acts constituting alleged tort occurred in New York and New York corporation, the original contracting party, was implicated.

[7] Torts 12
379k12

Decision of corporate executives to "wind down" affairs of subsidiary, for the legitimate business reason that it was losing money, did not constitute tortious interference with plaintiff's contract with subsidiary, under New York law.

[8] Torts 2
379k2

Under New York conflicts law, New York law applied to claim charging president of New York corporation with fraud and negligent misrepresentations, many of which originated in New York.

[9] Fraud 13(3)
184k13(3)

Even assuming that contracting party's president's statements were negligently spoken, there was no cause of action, under New York law, for negligent misrepresentation, absent allegation of special relationship between plaintiff and contracting party before contract was signed.

*57 Frederick L. Whitmer, Morristown, N.J. (Dinah H. Bourne, Betsy L. Weiss, Pitney, Hardin, Kipp & Szuch, Morristown, N.J., of counsel), for defendants-appellants AB Volvo, Volvo Lastvagnar AB, and Bo Lycke.

Daniel A. Pollack, New York City (Pollack & Kaminsky, New York City, of counsel), for plaintiff-appellee American Protein Corp.

Milton D. Andrews, Washington, D.C. (Lance E. Tunick, D. Bruce Sewell, Charles H. Lockwood, II, Gen. Counsel, John T. Whatley, Asst. Gen. Counsel, Schnader, Harrison, Segal & Lewis, Washington, D.C., of counsel), filed a brief on behalf of the Automobile Importers of America, Inc. as amicus curiae.

Before NEWMAN, CARDAMONE, and PIERCE, Circuit Judges.

CARDAMONE, Circuit Judge:

We are presented on this appeal with the issue of when the contractual default of a

subsidiary corporation may be visited upon its parents. The question takes on added importance because the parents are Swedish corporations without a presence in New York but nonetheless were held liable for the obligations of their New York subsidiary. Legal liability was fastened on one foreign parent in part because the corporate veil between it and its subsidiary was pierced. The primary liability of the parents was based on the fact that two of one parent's officers and directors--also directors of the subsidiary--came to New York and voted at the subsidiary's Board of Directors meeting to "wind down" the subsidiary's affairs, resulting in the subsidiary's default on a contract. Of course, it is entirely appropriate for directors of a parent corporation to serve as directors of its subsidiary, and that fact alone may not serve to expose the parent corporation to liability for its subsidiary's acts. Here, other facts in addition to interlocking directorates are alleged.

BACKGROUND

A. Facts

This diversity case arises from the breach of a contract for the sale of edible dried blood derived from the slaughter of cattle and pork. Plaintiff, American Protein Corporation (American Protein), brought the instant action in the Southern District of New York against the defendants AB Volvo and Volvo Lastvagnar AB (Lastvagnar) (formerly Beijerinvest AB), Beijer Industries, Inc., and Bo Lycke.

American Protein is an Iowa corporation with its principal place of business at Lytton, Iowa. Defendant Volvo is Sweden's largest corporation, with its principal place of business in Gothenburg, Sweden. In May 1982 Volvo acquired Beijerinvest AB *58 and changed its name to Volvo Lastvagnar AB which, operating as a wholly owned subsidiary of Volvo, is located in Stockholm. Lastvagnar (f/k/a Beijerinvest) owns 100 percent of the stock of Beijer, Handel & Industri, a Swedish corporation which owns 100 percent of the stock of defendant Beijer Industries, Inc., a New York corporation. Beijer, Inc.--also a

New York corporation--was, in turn, a wholly-owned subsidiary of Beijer Industries. Volvo is therefore the parent of all the members of the Beijer family of corporations.

Walter Lauridsen, an agronomist living in Iowa, had for 20 years been interested in utilizing the blood run-off from the slaughter of cattle and pork as a source of protein for humans. Over the years he had developed a concept of spray-drying the blood into a powdered form which, when combined with water, creates a bouillon-like food fit for human consumption. To effectuate his ideas, Mr. Lauridsen organized American Protein. In 1980 he contacted Beijer, Inc. with his idea. The principals of that company expressed interest in his project and invited him to New York City to discuss it further. There he met with defendant Lycke, president of Beijer, Inc., who, according to Lauridsen, told him that Beijer's Swedish parent would back a contract, take all of his output, and use its world-wide marketing capacity to distribute the dried blood product.

Prior to signing a contract Lauridsen asked for a written guarantee from Beijer, Inc.'s (great grand)parent corporation, Beijerinvest, for the performance of Beijer, Inc.'s obligation. Lycke told Lauridsen that no such guarantee could be given. Subsequently, on March 2, 1982 American Protein and Beijer, Inc. entered into a three-year, fixed price, outputs contract for the sale of edible dried blood. The agreement provided practically all of American Protein's business as Beijer, Inc. was to purchase the entire output of blood products from American Protein's Lytton, Iowa plant. Lauridsen put up his own and borrowed funds--totalling nearly \$1 million--to convert an old dairy into a sanitary spray-drying plant capable of producing a product fit for human consumption and made commitments to buy the blood run-off from a slaughterhouse. The March 2d contract forms the basis of the instant action.

About two months after Beijer, Inc. contracted with American Protein--on May 11, 1982--Volvo purchased Beijerinvest and, therefore, the Beijer family of companies.

After a number of months of performing the contract--and continuously losing money--Beijer, Inc. ran out of cash and stopped buying and paying for the dried blood product. On October 19, 1982 the Board of Directors of Beijer, Inc. met in New York and discussed the corporation's finances and business prospects. At the same meeting, the status of the dried blood project and Beijer, Inc.'s general marketing efforts were reviewed. As a result, the Board decided not to take on any new business, but instead voted to "wind down" Beijer, Inc.'s activities. All of the members of the Board--Bo Lycke, as Beijer, Inc.'s president; Pehr Gyllenhammar, chief executive officer of Volvo; and Ulf Linden, another high ranking officer of Volvo--were present.

On December 31, 1982 Lycke sold Beijer, Inc. to a company controlled by Lyster Carney, a former employee of Beijer, Inc. for \$1,000 plus a \$2 million note. Carney, in turn, went to Lauridsen and told him that if he would not renegotiate the blood products contract and take over the marketing function Carney would have to declare bankruptcy. Lauridsen attempted without success to obtain redress in Iowa against Carney's company.

B. Proceedings Below

American Protein then sued Volvo, Lastvagnar, and Lycke in the instant action. In a seven-count complaint filed in 1984 plaintiff sought recovery of damages from defendants Volvo, Lastvagnar, and Beijer Industries for breach of express written contract (Count I), from Volvo and Lastvagnar for breach of express oral contract (Count II), for breach of implied contract (Count III), for breach of an alleged quasi-contract (Count IV), and for tortious interference *59 with contractual relations (Count V), and from defendant Lycke for fraud (Count VI) and negligent misrepresentation (Count VII).

The case was tried before district court Judge Howard B. Turrentine (formerly Chief Judge for the Southern District of California) and a jury from May 21 to May 26, 1987. At the close of the evidence the trial court

dismissed the claim for quasi-contract (Count IV). It also dismissed the contract claims alleged in Counts I, II and III against Volvo. No cross-appeal has been taken by plaintiff from those dismissals. All the other claims were submitted to the jury. The jury returned a \$3 million verdict for the plaintiff against Volvo for tortious interference with the contract (Count V), against Lastvagnar for breach of contract (Counts I, II and III) and for tortious interference (Count V), and against Lycke for negligent misrepresentation (Count VII), but not for fraud (Count VI). Beijer Industries, the parent of Beijer, Inc. was charged only in Count I and none of the damages awarded plaintiff were assessed against Beijer Industries. Compensatory damages were awarded plaintiff in the amount of \$1 million against Volvo, \$1.8 million against Lastvagnar and \$200,000 against Lycke.

On May 29, 1987 all defendants moved unsuccessfully for judgment n.o.v. or, in the alternative, for a new trial. A judgment was entered on June 1, 1987 and an amended judgment was entered on June 16, 1987 that computed prejudgment interest in accordance with Iowa law. Defendants appealed this adverse judgment on June 26, 1987.

DISCUSSION

Defendants raise a number of arguments. Volvo and Lastvagnar claim that plaintiff lacked jurisdiction over them and that the evidence does not support the verdict finding them liable for tortious interference with plaintiff's contract; Lastvagnar contends that the issue of piercing the corporate veil should have been decided by the trial court rather than the jury, and that, in any event, there was insufficient evidence to submit this issue to a jury; Lycke claims that he was erroneously found liable for misrepresentation; and, finally, all argue that the damage award lacks a sound basis. Analysis of these issues will be set forth in a discussion of Counts I, II, III, V and VII of the complaint.

I

The first three counts charged defendant Lastvagnar with breach of an express written, an express oral, and an implied contract. Plaintiff's success on these three counts is evidenced by the \$1.8 million verdict it obtained against Lastvagnar, the (great grand)parent of the now-defunct Beijer, Inc., the original contracting party. The predicate for success on the express written contract count (Count I) resulted from the trial court's submitting to the jury the question of whether the corporate veil between Beijer, Inc. and Lastvagnar should be pierced.

[1] Lastvagnar's first contention is that piercing the corporate veil, as an equitable remedy, must be decided by the court and not the jury, as occurred in the trial below. Such is not the law. Granted, the relief is equitable in nature, that is, imposing the remedy redresses a wrong by the expedient of ignoring the legal fiction that a corporation's existence is separate from that of its owner. Yet Lastvagnar cites no case to support its position and, in fact, the issue of corporate disregard is generally submitted to the jury. See, e.g., *Walter E. Heller & Co. v. Video Innovations, Inc.*, 730 F.2d 50, 53 (2d Cir.1984) (listing appropriate criteria for jury to decide whether corporate veil should be pierced); *FMC Fin. Corp. v. Murphree*, 632 F.2d 413, 421 & n. 5 (5th Cir.1980) (collecting cases); see generally *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 537, 78 S.Ct. 893, 900, 2 L.Ed.2d 953 (1958) (jury resolution of disputed question of fact in diversity cases favored). Accordingly, submission of this issue to the jury was not error.

Turning to appellant's second argument, that the evidence on the issue of piercing *60 the corporate veil was insufficient to go to the jury, we begin with several legal propositions. A corporation is an entity that is created by law and endowed with a separate and distinct existence from that of its owners. Because a principal purpose for organizing a corporation is to permit its owners to limit their liability, there is a presumption of separateness between a corporation and its owners, see, e.g., *Crown Cent. Petroleum v. Cosmopolitan Shipping Co.*, 602 F.2d 474, 476 (2d Cir.1979),

which is entitled to substantial weight. Further, disregarding corporate separateness as an equitable remedy is one that differs with the circumstances of each case. See *FMC Fin. Corp.*, 632 F.2d at 422.

Because the arguments in this diversity case are made under New York law, we look to that forum to see when a parent may be held liable for the acts of its subsidiary. Control is the key. The parent must exercise complete domination "in respect to the transaction attacked" so that the subsidiary had "at the time" no separate will of its own, and such domination must have been used to "commit fraud or wrong" against plaintiff, which proximately caused plaintiff's injury. *Lowendahl v. Baltimore & Ohio R.R.*, 247 A.D. 144, 157, 287 N.Y.S. 62 (1st Dept.), *aff'd*, 272 N.Y. 360, 6 N.E.2d 56 (1936), quoted with approval in *Gorrill v. Icelandair/Flugleidir*, 761 F.2d 847, 853 (2d Cir.1985). To satisfy the control element, American Protein must have demonstrated by a preponderance of the evidence that Beijer, Inc. was controlled and dominated by Lastvagnar with respect to its contract for dried blood to such an extent that it had no separate will of its own or, stated another way, that Beijer, Inc. was a mere instrumentality of its parent. To meet the second element, plaintiff must show that Beijer, Inc. was used by Lastvagnar to commit a fraud or wrong that caused American Protein unjustly to suffer a loss. See *Williams v. McAllister Bros.*, 534 F.2d 19, 21 (2d Cir.1976).

[2] Factors indicating that a parent corporation controls its subsidiary include lack of normal corporate formality in the subsidiary's existence, under-capitalization, and personal use of the subsidiary's funds by the parent or owner. See *Walter E. Heller & Co.*, 730 F.2d at 53. The record reveals that none of these factors were present in the instant case. Beijer, Inc. maintained its own corporate and financial records, held independent board meetings, and maintained separate corporate offices. While concededly Lastvagnar supplied its subsidiary with working capital from time to time, there is no evidence that Beijer, Inc. received such

financing specifically for the dried blood project. Nor did Lastvagnar make use of Beijer, Inc.'s corporate funds for its own benefit.

The strongest piece of evidence to support control was the existence of interlocking directorates. This commonplace circumstance of modern business does not furnish such proof of control as will permit a court to pierce the corporate veil. See *Berger v. Columbia Broadcasting Sys.*, 453 F.2d 991, 995 (5th Cir.) (subsidiary's board's being completely comprised of employees of parent is insufficient basis to pierce corporate veil), *cert. denied*, 409 U.S. 848, 93 S.Ct. 54, 34 L.Ed.2d 89 (1972). Beyond that, American Protein presented no evidence to suggest that Lastvagnar used Beijer, Inc. to commit a fraud or wrong causing American Protein to suffer an unjust loss. Without more reasons to disregard corporate separateness than those shown here, a subsidiary's default may not cast its shadow of liability on its parent. Accordingly, we reverse the verdict against Lastvagnar on Count I.

II

[3] Lastvagnar's liability on Counts II (breach of express oral contract) and III (breach of implied oral contract) was predicated on the theory that Lycke guaranteed to American Protein that Beijerinvest would guarantee Beijer's performance of the contract. Under Count II, Lycke allegedly acted on behalf of Beijerinvest. Under Count III, Beijerinvest's knowledge of Lycke's action created an implied contract without resort to an agency theory. Overlooking the inherent logical contradiction in *61 a finding of liability on both of these counts, the evidence was insufficient to establish that Lycke made any guarantee to American Protein. A contrary conclusion cannot stand in light of the facts that Lauridsen requested that Beijerinvest guarantee Beijer, Inc.'s performance and that Lycke informed him that no such guarantee could be given. The verdict against Lastvagnar on Counts II and III therefore is also reversed.

III

We turn now to Count V, which alleged that Volvo and Lastvagnar tortiously interfered with American Protein's contract with Beijer. The jury found such interference by both parties and awarded plaintiff \$1 million against Volvo and, presumably, a portion of the total \$1.8 million verdict against Lastvagnar. Before analyzing the merits of this claim, a threshold issue must be considered. American Protein argues that the defendants are not entitled to raise this issue on appeal because they failed to move for a directed verdict at the close of all the evidence pursuant to Fed.R.Civ.P. 50(b).

A. Compliance With Fed.R.Civ.P. 50(b)

[4] Rule 50(b) provides "[w]henver a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion." A motion for judgment n.o.v. after the jury's verdict generally may be made under this Rule only when a motion for a directed verdict has been made at the close of all the evidence and before the case is sent to the jury. See Fed.R.Civ.P. 50(b) advisory committee's note. One of the main reasons for the rule, of course, is to give the nonmoving party notice of defects in its proof so that it can cure the deficiencies before the case is submitted.

It is undisputed on this record that defendants made an appropriate motion for a directed verdict of dismissal at the close of the plaintiff's evidence on the same grounds as those later asserted in their judgment n.o.v. motion, including the tortious interference ground. After plaintiff rested and defendants made the motion to dismiss, the trial judge reserved decision. Later, it ruled on the motion at the close of all the evidence, specifically denying the motion with regard to the tortious interference claim. When defendants made the judgment n.o.v. motion the experienced district judge stated to defendants' counsel that he "thought" they had "preserved [their] right" to make the

postjudgment motion, despite their failure to renew their motion for a directed verdict at the close of all the evidence.

[5] Professor Moore's treatise observes that a postjudgment motion as a general rule may be made even when the moving party has failed to renew a directed verdict motion at the close of all the evidence provided two criteria are met: the trial court indicates it is not necessary to move in order to preserve the right, and the nonmoving party's evidence following the unrenewed motion was "brief and inconsequential." See 5A J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 50.08 (2d ed. 1987). In *Ebker v. Tan Jay Int'l, Ltd.*, 739 F.2d 812 (2d Cir.1984), we adopted Professor Moore's first criterion, but reformulated his second one. Instead of evaluating whether evidence subsequent to the unrenewed motion was "brief and inconsequential," the trial court should determine whether the nonmoving party could reasonably believe it was safe to rest on its oars. Or, as we put it in *Ebker*, whether the party having notice of a motion directed against the sufficiency of its proof could reasonably believe in light of the proof following the unrenewed motion that it need do nothing further to be free from the risk of judgment n.o.v. *Id.* at 823-24; see *Best Brands Beverage, Inc. v. Falstaff Brewing Corp.*, 842 F.2d 578, 587 n. 3 (2d Cir.1987). Although in *Ebker* the nonmoving party did not object to the district court's entertaining the postverdict motion, while here counsel for American Protein vigorously disputed the propriety of the trial court's entertaining defendants' postverdict *62 judgment n.o.v. motion, we believe *Ebker's* approach appropriate. Since the grounds of the motion were the same as those spelled out in the unrenewed motion for a directed verdict, plaintiff is not prejudiced here by defendants' failure to renew at the close of all the evidence. *Ebker*, 739 F.2d at 824.

Drawing from the trial court's comments, it is plain that the first criterion was met. The *Ebker* approach is particularly appropriate here since the motion for a directed verdict at the end of the plaintiff's case was not denied until the end of all the evidence. It would be

a pointless formality to require a defendant at that point to renew the motion. We think the second criteria as amended by Ebker has also been satisfied. American Protein had notice after it rested that defendants believed its proof on the tortious interference count deficient. Detailed arguments on appellants' motion at the close of plaintiff's case were entertained and decision was reserved by the trial court. Defendants' evidence in no way strengthened plaintiff's case. More importantly, American Protein claimed neither that it would have nor that it could have presented any additional evidence to compensate for deficiencies in its proof. As a consequence, defendants' right to make a postjudgment motion was preserved.

B. Merits of Jurisdiction/Tortious Interference

1. Jurisdiction: Having hurdled the procedural obstacle, we now turn to the substance of the jurisdiction/tortious interference issue. We consider jurisdiction first. Jurisdiction over Volvo must be established by American Protein by a preponderance of the evidence. In this diversity case New York provides the applicable law. *Arrowsmith v. United Press Int'l*, 320 F.2d 219, 223 (2d Cir.1963) (en banc). Jurisdiction apparently was based on N.Y.Civ.Prac. L. & R. 302(a)(2) (McKinney 1972), which provides that a New York court may exercise jurisdiction over any nondomiciliary who in person or through an agent "commits a tortious act within the state." The jury found that Volvo committed a tortious act within New York when its two executives attended the October Beijer, Inc. Board of Directors meeting in New York City and at that meeting ordered its subsidiary to "wind down" its affairs. Beijer, Inc. then breached the contract with plaintiff, allegedly with Volvo's approval, constituting a tortious interference by Volvo and Lastvagnar with performance of Beijer, Inc.'s contract with American Protein. Jurisdiction is thus intertwined with the merits of Volvo's liability. See *United States v. Montreal Trust Co.*, 358 F.2d 239, 242 (2d Cir.), cert. denied, 384 U.S. 919, 86 S.Ct. 1366, 16 L.Ed.2d 440 (1966). Volvo argues that its executives who

were also Beijer, Inc. directors were merely performing their duties as corporate fiduciaries and that their actions were justified under New York law.

These contentions frame two issues: (1) did the decision of the Volvo executives to "wind down" the affairs of Beijer, Inc. constitute tortious interference with American Protein's contract, and (2) if so, are the actions of these executives attributable to Volvo or did they act solely in their capacities as directors of Beijer, Inc.? Since, as will appear, we conclude that no tortious interference occurred, we need not consider the somewhat metaphysical question of whether a person serving as director of both a subsidiary and a parent corporation can subject the parent to liability by voting at a meeting of the subsidiary's board.

[6] 2. Tortious Interference: Turning to the merits of the tortious interference claim, we must apply New York conflicts law in this diversity action, see *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496, 61 S.Ct. 1020, 1021-22, 85 L.Ed. 1477 (1941), which holds that the law of the forum with the most paramount interest in the application of its law should be selected, see *Knieriemen v. Bache Halsey Stuart Shields Inc.*, 74 A.D.2d 290, 293, 427 N.Y.S.2d 10 (1st Dep't), appeal dismissed, 50 N.Y.2d 1021, 431 N.Y.S.2d 812, 410 N.E.2d 745 (1980). This forum clearly is New York, as the acts constituting the alleged tort occurred in New York and a New York corporation (Beijer, Inc.) was *63 implicated. Accordingly, the trial court properly applied New York law to the tortious interference claim.

The law of New York provides an applicable rule when a possible conflict arises between a director's duty to honor corporate contractual obligations and simultaneously to protect the stockholders' best interests. In such an event, directors of parent companies are released from liability for the contract's dishonor when it results from an effort to protect stockholders, absent a malicious motive. *Felsen v. Sol Cafe Mfg. Corp.*, 24 N.Y.2d 682, 686, 301 N.Y.S.2d 610, 249 N.E.2d 459 (1969).

In *Felsen* the New York Court of Appeals--reversing a judgment on a claim similar to the instant one--explained that the plaintiff could not recover unless it established that the defendant's actions were "motivated by malice toward the plaintiff rather than by the preservation of its own economic interest...." *Id.* at 686-87, 301 N.Y.S.2d 610, 249 N.E.2d 459. In adopting that proposition, the court continued, an individual with an economic stake in the business of another may interfere with a contract that the other business has with a third person if the purpose is to protect the individual's own stake. In other words, terminating a corporate contract in furtherance of an equally important right to act in its own economic interests justifies what would otherwise be actionable. *Id.* at 687, 301 N.Y.S.2d 610, 249 N.E.2d 459.

[7] There is no evidence on the record before us of malice toward American Protein on the part of either Volvo or Lastvagnar. Plaintiff failed to establish a prima facie case of tortious interference with contractual relations because the evidence showed only that Volvo executives on the board of Beijer, Inc. endorsed terminating Beijer, Inc.'s contract with plaintiff for the legitimate business reason that it was losing money. Consequently, the verdicts against Volvo and Lastvagnar for tortious interference with a contractual relationship under Count V of plaintiff's complaint must fail as a matter of law. Those verdicts are reversed.

IV

We consider finally Counts VI and VII of the complaint, which charged Lycke with fraud and negligent misrepresentation. The jury exonerated Lycke of fraud, but awarded American Protein \$200,000 for negligent misrepresentation.

Here the alleged misrepresentations submitted for the jury's assessment by the trial court--unfortunately not in interrogatory form--were as follows:

(1) Beijer, Inc. was a division of a worldwide network of companies operated by Beijerinvest and that Beijerinvest funded

the projects undertaken by these companies;
(2) Beijerinvest intended to fund the project and to insure Beijer, Inc. satisfied its obligations under the blood products contract;
(3) Beijer, Inc. had wide experience in marketing food products;
(4) Beijer, Inc. would be able to market all of American Protein's projected output under the blood products contract for three years; and
(5) Beijerinvest's other food companies in Sweden could alone absorb one-third of American Protein's projected output under the blood products contract.

[8] Under New York conflicts law, a court must apply the substantive tort law of the state having the most significant relationship with the occurrence and with the parties. *Babcock v. Jackson*, 12 N.Y.2d 473, 482, 240 N.Y.S.2d 743, 191 N.E.2d 279 (1963); see *Machleder v. Diaz*, 801 F.2d 46, 51 (2d Cir.1986), cert. denied, --- U.S. ---, 107 S.Ct. 1294, 94 L.Ed.2d 150 (1987). Given that Lycke is president of a New York corporation and that many of the alleged misrepresentations originated in New York, we conclude that New York law applies. The law of negligent misrepresentation, as enunciated in New York, recognizes that "generally there is no liability for words negligently spoken" but that "there is an exception when the parties' relationship suggests a closer degree of trust and reliance than that of the ordinary buyer and seller." *Coolite Corp. v. American Cyanamid Co.*, 52 A.D.2d 486, 384 N.Y.S.2d 808, 811 (1st Dep't 1976). The speaker must be "bound by some relation of duty, arising out of contract or otherwise." *White v. Guarente*, 43 N.Y.2d 356, 363, 401 N.Y.S.2d 474, 478, 372 N.E.2d 315, 319 (1977). See *Mallis v. Bankers Trust Co.*, 615 F.2d 68, 81-82 (2d Cir.1980), cert. denied, 449 U.S. 1123, 101 S.Ct. 938, 67 L.Ed.2d 109 (1981). If in the course of contract negotiations an employee of one party makes a fraudulent misrepresentation, of course a fraud claim is available, but here the jury rejected APC's fraud claim. In the absence of fraud and in the absence of a special relationship giving rise to a duty, it is

up to the party hearing words he deems important to make them part of the contract.

[9] Even assuming that the statements set out above were negligently spoken, no cause of action exists under the facts of the instant case. APC fails to allege that there was a special relationship between it and Beijer, Inc. before the contract was signed. Rather, APC took the risk that all contracting parties face: that the other party to the contract might end up in bankruptcy. Since APC alleges nothing more than ordinary arm's length negotiations, its negligent misrepresentation claim fails as a matter of law. Accordingly, the jury award on Count VII of the complaint must be reversed.

Finally, our resolution of the counts above obviates the need for addressing appellants' argument that the jury's overall damage award was inconsistent.

CONCLUSION

In sum, the verdict against Lastvagnar on Count I on a theory of piercing the corporate veil, and on Counts II and III is reversed. The verdict against Volvo and Lastvagnar for tortious interference with plaintiff's contract with Beijer, Inc. under Count V is reversed. The verdict against Lycke for negligent misrepresentation under Count VII is also reversed.

Judgment reversed.

844 F.2d 56, 10 Fed.R.Serv.3d 1165

END OF DOCUMENT

6

Supreme Court, Appellate Division, Second
Department, New York.

ATKINS NUTRITIONALS, INC., et al.,
Respondents-Appellants,

v.

ERNST & YOUNG, LLP, Appellant-
Respondent,
Cap Gemini Ernst & Young U.S., LLC,
Appellant.

Jan. 21, 2003.

Customer brought contract action against accounting firm, its successor in interest, and overseer of implementation of computer accounting system for distribution center. The Supreme Court, Suffolk County, Costello, J., denied accounting firm's motion to dismiss. On appeal, the Supreme Court, Appellate Division, held that: (1) New York law would not recognize cause of action to recover damages for professional malpractice by computer consultants; (2) fiduciary relationship would not exist between customer and accounting firm; and (3) customer failed to state consequential damages claim.

Affirmed as modified.

West Headnotes

[1] Negligence 321
272k321

New York law would not recognize cause of action to recover damages for professional malpractice by computer consultants.

[2] Accountants 9
11Ak9

Fiduciary relationship would not exist between customer and accounting firm which provided customer with computer consulting system, although accounting firm performed personal accounting services for a principal of customer, where the parties had a conventional business relationship regarding the computer consulting services.

[3] Accountants 9
11Ak9

Computer consulting services customer could not recover damages for negligent misrepresentation against accounting firm which provided the services, absent a special relationship distinct from and independent of the consulting contract.

[4] Torts 12
379k12

Simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated.

[5] Damages 22
115k22

[5] Damages 23
115k23

Customer of computer consulting service failed to state consequential damages for alleged breach of contract against service, absent allegations that those damages were the natural and probable consequence of the breach and were contemplated at the time the contract was executed.

[6] Damages 22
115k22

[6] Damages 23
115k23

To recover consequential damages on contract claim, the plaintiffs were required to plead that those damages were the natural and probable consequences of the breach, and were contemplated at the time the contract was executed.

[7] Fraud 32
184k32

To support customer's fraudulent misrepresentation claims against overseer of implementation of computerized accounting system for distribution center, alleged fraudulent representations must have been designed to induce customer to enter into overseer contract; the alleged fraudulent representations related to overseer's intention to perform its obligations under the contract.

****321** Mayer Brown Rowe & Maw, New York, N.Y. (Hector Gonzalez, Sanford I. Weisburst, Dennis P. Orr, and Bruce M. Cormier of counsel), for appellant-respondent.

Winston & Strawn, New York, N.Y. (Robert S. Fischler, Michael Rasnick, and Alexis A. Lury of counsel), for appellant.

Ruskin Moscou Faltischek, P.C., Uniondale, N.Y. (Lauren M. Gray and Mark S. Mulholland of counsel), for respondents-appellants.

NANCY E. SMITH, J.P., CORNELIUS J. O'BRIEN, GABRIEL M. KRAUSMAN and REINALDO E. RIVERA, JJ.

***547** In an action, inter alia, to recover damages for breach of contract, the defendant Ernst & Young, LLP, appeals, as limited by its brief, from so much of an order of the Supreme Court, Suffolk County (Costello, J.), dated December 17, 2001, as denied those branches of its motion pursuant to CPLR 3016(b) and CPLR 3211(a)(7) which were to dismiss the plaintiffs' second, fifth, and sixth causes of action insofar as asserted against it and so much of the third cause of action as sought consequential damages, the defendant Cap Gemini Ernst & Young U.S., LLC, separately appeals, as limited by its brief, from so much of the same order as denied those branches of its motion pursuant to CPLR 3016(b) and CPLR 3211(a)(7) which were to dismiss so much of the plaintiffs' fourth cause of action as sought consequential damages, and the sixth cause of action insofar as asserted against it, and the plaintiffs cross-appeal from so much of the same order as granted that branch of the motion of the defendant Ernst & Young, LLP, which was to dismiss the first cause of action pursuant to CPLR 3211(a)(7).

ORDERED that the order is modified by (1) deleting the provision thereof denying those branches of the motion of the defendant Ernst & Young, LLP, which were to dismiss the second cause of action, the fifth cause of action, so much of the third ***548** cause of action as sought consequential damages, and

so much of the sixth cause of action as sought punitive damages, and substituting therefor a provision granting those branches of the motion, and (2) deleting the provision thereof denying those branches of the motion of the defendant Cap Gemini Ernst & Young U.S., LLC, which were to dismiss the fourth cause of action insofar as it sought consequential damages and the sixth cause of action insofar as asserted against it and substituting therefore a provision granting those branches of the motion; as so modified, the order is affirmed insofar as appealed and cross-appealed from, with one bill of costs to Cap Gemini Ernst & Young U.S., LLC, payable by the plaintiffs.

The plaintiff Atkins Nutritionals, Inc. (hereinafter Atkins), entered into an agreement with the accounting firm Ernst & Young, LLP (hereinafter E & Y), in which E & Y was to assist Atkins in selecting a computer accounting system for its new distribution center. In April 2000, E & Y recommended that Atkins acquire a computer software system called Cayenta. In May 2000 E & Y sold its consulting services component to Cap Gemini, S.A., and acquired shares in the new entity Cap Gemini Ernst & Young U.S., LLC (hereinafter CGEY).

In June 2000 E & Y recommended that Atkins engage CGEY to oversee implementation of the Cayenta system. Atkins and CGEY entered into such an agreement in August 2000. After numerous problems with the Cayenta system, Atkins and its majority shareholder Dr. Robert Atkins commenced this action against E & Y and CGEY.

[1][2] The Supreme Court properly dismissed the first cause of action asserted ****322** against E & Y, as it alleged a claim to recover damages for malpractice in the selection and implementation of a computer system. E & Y was acting as a computer consultant, and the courts of this state do not recognize a cause of action to recover damages for professional malpractice by computer consultants (see Richard A. Rosenblatt & Co. v. Davidge Data Sys. Corp., 295 A.D.2d 168, 743 N.Y.S.2d 471).

Even though E & Y is an accounting firm, it had a conventional business relationship with Atkins with respect to the computer consulting services which did not create a fiduciary relationship independent of the contract (see *RKB Enters. v. Ernst & Young*, 182 A.D.2d 971, 582 N.Y.S.2d 814). The fact that E & Y performed personal accounting services for Dr. Atkins did not give rise to a fiduciary relationship with Atkins, the corporate entity.

[3][4] The lack of a special relationship distinct from and independent of the contract also precludes the second cause of action against E & Y to recover damages for negligent misrepresentation *549 (see *WIT Holding Corp. v. Klein*, 282 A.D.2d 527, 724 N.Y.S.2d 66; *Andres v. LeRoy Adventures*, 201 A.D.2d 262, 607 N.Y.S.2d 261; *RKB Enters. v. Ernst & Young*, supra; cf. *Kimmell v. Schaefer*, 89 N.Y.2d 257, 652 N.Y.S.2d 715, 675 N.E.2d 450). "It is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated" (*Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co.*, 70 N.Y.2d 382, 389, 521 N.Y.S.2d 653, 516 N.E.2d 190). Similarly, an arms-length business relationship does not give rise to a fiduciary duty. Therefore, the fifth cause of action sounding in breach of a fiduciary duty asserted against E & Y should have been dismissed (see *WIT Holding Corp. v. Klein*, supra).

[5][6] E & Y and CGEY argue that the breach of contract causes of action should be dismissed insofar as the plaintiffs seek consequential damages. In order to recover consequential damages, the plaintiffs were required to plead that those damages were the natural and probable consequences of the breach, and were contemplated at the time the contract was executed (see *Kenford Co. v. County of Erie*, 73 N.Y.2d 312, 540 N.Y.S.2d 1, 537 N.E.2d 176; *Rose Lee Mfg. v. Chemical Bank*, 186 A.D.2d 548, 588 N.Y.S.2d 408). As the complaint failed to allege that those damages were within the contemplation of the parties at the time the contract was executed, the claim for consequential damages should be

dismissed. Moreover, CGEY's contract with Atkins limited its liability to the fees paid to it, and the contract should be enforced according to its terms (see *Sommer v. Federal Signal Corp.*, 79 N.Y.2d 540, 583 N.Y.S.2d 957, 593 N.E.2d 1365; *Peluso v. Tauscher Cronacher Professional Engrs.*, 270 A.D.2d 325, 704 N.Y.S.2d 289).

[7] The sixth cause of action to recover damages for fraud should also have been dismissed insofar as it was asserted against CGEY. The claimed fraudulent representations related to CGEY's intention to perform its obligations under the contract and were not designed to induce Atkins to enter into that contract. Therefore, Atkins cannot maintain both a fraud and breach of contract cause of action against CGEY (see *WIT Holding Corp. v. Klein*, supra; *Gordon v. Dino De Laurentiis Corp.*, 141 A.D.2d 435, 529 N.Y.S.2d 777).

The Supreme Court properly denied that branch of the motion of E & Y which was to dismiss the sixth cause of action to recover damages for fraud insofar as asserted against it, as the allegations in the complaint sufficiently state a cause of action **323 for fraud in the inducement (see *WIT Holding Corp. v. Klein*, supra; *RKB Enters. v. Ernst & Young*, supra). However, the claim for punitive damages should have been dismissed, as the plaintiffs failed to allege facts sufficient to demonstrate that the conduct of E & Y rose to the level of moral culpability which must be reached to support a claim for punitive damages (see *550 *Rose Lee Mfg. v. Chemical Bank*, supra; *RKB Enters. v. Ernst & Young*, supra).

301 A.D.2d 547, 754 N.Y.S.2d 320, 2003 N.Y. Slip Op. 10388

END OF DOCUMENT

7

United States Court of Appeals,
Second Circuit.

BANQUE ARABE et INTERNATIONALE
D'INVESTISSEMENT, Plaintiff-Appellant-
Cross-
Appellee,

v.

MARYLAND NATIONAL BANK, Defendant-
Appellee-Cross-Appellant,
1 East 93 Associates; 36 East 64th Associates;
51st Owners Corp.; 55 West
89th Associates; 107 East 63rd Owners Corp.;
405 East 72nd Owners; 57 West
89th Associates; 342 East 67th Owners Corp.,
Defendants.

Nos. 817, 982, Dockets 94-7571, 94-7595.

Argued Jan. 19, 1995.
Decided May 11, 1995.

Assignee of participating bank brought action against lead lender for rescission of participation agreement. The United States District Court for the Southern District of New York, Robert J. Ward, J., 819 F.Supp. 1282, granted motions for summary judgment in part and, 850 F.Supp. 1199, entered judgment for lead bank. Assignee of participating bank appealed. The Court of Appeals, Jacobs, Circuit Judge, held that: (1) under New York law, assignment transferred tort claims arising from contract as well as contractual interests, but (2) lead bank had no duty to disclose facts surrounding delay and regulatory approval of borrower's condominium conversion plan.

Affirmed.

West Headnotes

[1] Assignments 73
38k73

[1] Assignments 90
38k90

Participating bank's assignment of loan participation agreement to its parent included related tort claims so that parent had standing to seek rescission; language of assignment

transferred all "rights, title and interest" in the participation agreement, and in the participating bank's participation in the loan.

[2] Assignments 31
38k31

[2] Assignments 73
38k73

Under New York law, assignment of right to assert contract claims does not automatically entail right to assert tort claims arising from that contract; however, New York law does not require specific boilerplate language to accomplish transfer of causes of action sounding in tort, and any acts or words are sufficient which show intention of transferring chose in action to the assignee.

[3] Fraud 3
184k3

[3] Fraud 17
184k17

To prove common law fraud under New York law, plaintiff must show that defendant made material false representation, that defendant intended to defraud plaintiff thereby, that plaintiff reasonably relied upon representation, and that plaintiff suffered damage as result of such reliance; in addition, to establish fraudulent concealment, plaintiff must also prove that defendant had duty to disclose material information.

[4] Fraud 58(1)
184k58(1)

Under New York law, each element of fraud claim must be shown by clear and convincing evidence.

[5] Contracts 94(8)
95k94(8)

Lead lender had no duty to disclose to participating bank state Attorney General's objections to borrower's condominium conversion plan; objections took relatively little time to resolve, bore no reflection on borrower, and, therefore, were not material, and participation agreement expressly absolved lead bank of any duty to provide information relevant to independent credit

analysis and funding decision.

[6] Contracts 94(2)
95k94(2)

State Attorney General's objections to borrower's condominium conversion plan were not "material" to participating bank's decision to join in loan agreement, for purposes of determining whether lead bank's failure to disclose such objections warranted rescission of participation agreement, where such objections were resolved in relatively short period of time and did not reflect on borrower's character or capacity.

[7] Fraud 17
184k17

In business negotiations, affirmative duty to disclose material information may arise from need to complete or clarify one party's partial or ambiguous statement or from fiduciary or confidential relationship between the parties.

[8] Fraud 17
184k17

Disclosure obligations may be modified by contract.

[9] Contracts 94(8)
95k94(8)

Lead bank did not have such superior knowledge of facts surrounding regulatory delay in approval of borrower's condominium conversion plan as would have created duty to disclose the issue to participating bank, absent showing that lead bank knew that participating bank acted in reliance on mistaken knowledge regarding the issue or that lead bank also deemed issue critical to its investment decision.

[10] Contracts 94(5)
95k94(5)

Participating bank could not have reasonably relied on lead bank to disclose facts surrounding incremental delay in regulatory approvals for borrower's condominium conversion plan, where prospect of such delay was a known and disclosed risk and information regarding status of conversion plan was readily accessible to any interested party who cared to make inquiries;

accordingly, nondisclosure did not amount to fraudulent concealment warranting rescission of the participation agreement.

[11] Fraud 13(3)
184k13(3)

Under New York law, plaintiff may not recover for negligent misrepresentation absent special relationship of trust or confidence between the parties.

[12] Banks and Banking 100
52k100

Generally, banking relationships are not viewed as special relationships giving rise to heightened duty of care.

[13] Banks and Banking 100
52k100

No such special relationship existed between lead bank and participating bank with regard to loan participation agreement as would have given rise to heightened duty of care and subjected lead bank to liability for negligent misrepresentation, where banks engaged in arm's length negotiations and participation agreement explicitly disclaimed any reliance by participating bank on lead bank's information regarding its credit analysis and funding decision.

*147 John K. Carroll, New York City (Joseph H. Levie, Mark Holland, Donald E. Griffith, Shannon R. Clark, Rogers & Wells, of counsel), for plaintiff-appellant-cross-appellee.

James A. Moss, New York City (Darlene Fairman, Jonathan S. Lawlor, Herrick, Feinstein, of counsel), for defendant-appellee-cross-appellant.

Before: WALKER, JACOBS, and CALABRESI, Circuit Judges.

JACOBS, Circuit Judge:

In 1988, Maryland National Bank ("MNB") financed a real estate venture for the conversion of several New York City apartment buildings to cooperative or condominium ownership, and sold participations in that \$35 million mortgage

loan to other banks. A \$10 million participation was sold to BAII Banking Corporation ("BAII"), an American subsidiary of Banque Arabe et Internationale D'Investissement ("Banque Arabe"). Banque Arabe, as transferee from BAII, asserts (among other things) that MNB fraudulently failed to disclose that the developer was experiencing a regulatory delay in obtaining necessary approvals for the conversions at the time Banque Arabe made its funding decision. On a motion for summary judgment, the United States District Court for the Southern District of New York (Ward, J.) dismissed Banque Arabe's claim for negligent misrepresentation, among others. We affirm the dismissal of the negligent misrepresentation claim. Following a bench trial on the sole remaining count--common law fraud--Judge Ward determined that Banque Arabe lacked standing as a transferee to assert the fraud claim and that, in any event, Banque Arabe failed to prove scienter or fraudulent intent. Judgment was entered dismissing the complaint. We affirm the dismissal of the fraud claim and the judgment; *148 however, we do so on the somewhat different ground that, as a matter of law, MNB had no duty under the terms of Banque Arabe's participation to disclose the current regulatory status of the conversions, and that Banque Arabe could not have relied reasonably on MNB for readily available information concerning a disclosed regulatory risk.

I. Background

A detailed account of the events and transactions in this case is set forth in Judge Ward's opinion granting in part and denying in part MNB's motion for summary judgment, *Banque Arabe et Internationale D'Investissement v. Maryland Nat'l Bank*, 819 F.Supp. 1282 (S.D.N.Y.1993) (Banque Arabe I), and in Judge Ward's opinion granting judgment in favor of MNB, *Banque Arabe et Internationale D'Investissement v. Maryland Nat'l Bank*, 850 F.Supp. 1199 (S.D.N.Y.1994) (Banque Arabe II). We iterate only those facts that bear upon and are necessary to resolve the issues raised on appeal.

On June 23, 1988, MNB extended a mortgage loan in the principal amount of \$35 million to eight real estate partnerships owned and controlled by Robert K. Marceca (the "Marceca Loan"). The loans were secured by mortgages on eight rent-controlled or rent-stabilized apartment buildings in New York City (the "Marceca Properties"). The proceeds of the loans were to be used to refinance, renovate and convert the buildings to cooperative or condominium ownership. After packaging the loans, MNB arranged the sale of four participation interests, totalling \$25 million, to other unaffiliated banks. The fourth and last participation agreement, in the principal amount of \$10 million, was sold on September 29, 1988 to BAII, which was then Banque Arabe's American subsidiary (the "Participation Agreement").

MNB had first approached BAII concerning the Marceca Loan in May 1988. The following month, as part of the ensuing arm's length negotiations, MNB gave BAII a projected loan repayment schedule prepared by Marceca. Both parties understood that the projected principal payments were to be funded out of the proceeds of converting the Marceca Properties to cooperative or condominium ownership. In addition, BAII was aware that the repayment schedule was based on a number of assumptions, including: (a) that the first projected repayment allocable to each building would be made at the time of the closing of the conversion of the building to either cooperative or condominium ownership; and (b) that the closing of the conversion of each building would occur approximately 90 days after an offering plan for the conversion was accepted for filing by New York State's Department of Law ("Department of Law"). [FN1]

FN1. The Department of Law for the State of New York is the division of the Attorney General's Office responsible for regulating New York's real estate market, including the conversion of properties to cooperative ownership.

In June and July, BAII conducted its own due diligence and credit analysis of the Marceca Loan. Officers of BAII reviewed

documents provided by MNB, conducted numerous conversations with MNB, and met individually with Marceca. After completing its due diligence on or about July 13, BAII decided to purchase the \$10 million participation interest and so advised MNB. As a condition to its participation, however, BAII required that the Marceca Loan be "cross-collateralized" such that the proceeds from the sale of each apartment in any building would be applied fractionally to all of the eight partnerships. The cross-collateralization negotiations lasted nearly two months. At no time during its due diligence investigation or subsequent negotiations did BAII request any information or documents from MNB, Marceca or the Department of Law concerning the progress in obtaining regulatory approvals for converting the Marceca Properties.

No apartment building may be converted to cooperative ownership in New York State until the conversion plan has been accepted for filing by the Department of Law. As detailed in the district court opinions, the conversion occurs in several steps. First, the sponsor submits a draft proposal, referred to as a "red herring," to which the Department of Law must respond within six months. The Department of Law can accept *149 it in the form proposed, reject it outright, or issue a deficiency letter and allow the sponsor an opportunity to cure. Once the Department of Law determines that the conversion plan fully and fairly discloses the nature of the transaction and satisfies other regulatory and statutory requirements, the sponsor is notified that the plan will be accepted upon submission of the final corrected version, called a "black book". The conversion plan does not become final, however, until a designated percentage of a building's occupants enter into subscription agreements to acquire their apartments. Once that percentage is achieved, the sponsor files an amendment with the Department of Law, the conversion is declared effective, and the closing on the conversion may then take place. After the conversion plan is accepted, a minimum of 90 days typically elapses before the closing.

At the time the Marceca Loan closed on June 23, 1988, Marceca had submitted red herrings for two of the eight properties. As of July 13, the date BAII completed its due diligence, the regulatory status of the Marceca Properties was unchanged. On August 9, however, the Department of Law issued a deficiency letter informing Marceca that, because the mortgage agreement afforded MNB the right to approve the terms of the conversion plan, MNB was deemed a "co-sponsor" and should have been identified as such in the red herring's disclosure of sponsorship. This deficiency is referred to hereinafter as "the co-sponsorship issue". Marceca informed MNB of the co-sponsorship issue soon thereafter. On August 18, MNB wrote to the Department of Law explaining that MNB was a lender and was not actively involved with the conversion of the Marceca Properties. In mid-September, Marceca informed MNB that the Department of Law would be considering the co-sponsorship issue at a hearing scheduled for September 22 and that Marceca expected the issue to be resolved quickly. The co-sponsorship issue, however, remained unresolved until January 1989, when MNB agreed to modify the loan documents to eliminate the offending term of the mortgage.

On September 29, 1988, BAII executed the Participation Agreement committing it to purchase \$10 million of the Marceca Loan. The Participation Agreement specifically addressed issues of disclosure and due diligence:

The Participant [BAII] acknowledges that it has reviewed all such relevant documents and financial statements as it deemed appropriate or necessary at the time and has had access to all of the records of the Borrowers and of the Lender [MNB] it wished to have, and an opportunity to make such inquiry of the Lender as to the Borrowers' financial conditions and as to the arrangements between the Borrowers and the Lender, and, has, in fact, made inquiry of the Lender in connection therewith to the extent the Participant felt such inquiry necessary or appropriate.

* * * * *

The Participant acknowledges that it has, independently and without reliance upon the Lender and based on such documents and information as the Participant has deemed appropriate or necessary, made its own credit analysis and decision to enter into this Participation Agreement. The Participant acknowledges that it has not relied upon any investigation performed by the Lender or upon any financial summaries, or credit memoranda or appraisals prepared by or on behalf of the Lender.... The Participant further acknowledges that it will, independently and without reliance upon the Lender and based on such documents and information as the Participant shall deem appropriate or necessary at the time, continue to make its own credit decisions in taking or not taking action under the Participation Agreement.

Paras. 1.2 and 5.3 (emphasis added). The Participation Agreement became effective on October 3, 1988 when BAI transferred \$10 million to MNB.

Between Banque Arabe's completion of its due diligence review on July 13 and the October 3 transfer of the \$10 million, BAI sought no information from anyone about the status of the proposed conversions. On the other hand, neither MNB nor Marceca volunteered information to Banque Arabe about the co-sponsorship issue or delays in obtaining the necessary regulatory approvals. On *150 August 24, however, MNB sent a revised status report (dated August 17) to those participants who had already funded the project, reporting that the Department of Law had been provided with new sponsor and refinancing information. The district court found that, if BAI had contacted the Department of Law to inquire about the status of the Marceca Properties, BAI would have been: (1) advised whether red herrings had been submitted to the Department of Law; (2) advised whether submitted red herrings had been accepted or rejected; and upon request, (3) provided with copies of red herrings submitted, all revisions and supporting documentation, and any deficiency letters and other correspondence between the Department

of Law and the borrowers.

On November 10, 1988, MNB sent BAI an updated repayment schedule for the Marceca Loan, reflecting a four month delay in the principal payments. The November 10 letter attributed the delay to the fact that the Department of Law "failed to complete its review of the Red Herring Offering Plan ... in the statutorily required period of time (six months)." MNB did not tell BAI the reason for the delay, or mention the co-sponsorship issue by name, until January 19, 1989, when MNB sent BAI and the other participants a memorandum announcing that the issue had been resolved.

The New York City real estate market underwent a severe battering during the year 1989. As required by the Participation Agreement, BAI received monthly interest payments from October 3, 1988 to December 31, 1989. However, by reason of the regulatory delays caused by the co-sponsorship issue, as well as the industry's economic slide, the year 1989 ended without any of the Marceca Properties having been converted to tenant ownership. As a result, Marceca defaulted in January 1990. MNB foreclosed on the Marceca Properties in April 1991, and BAI received its pro rata share of the sale proceeds.

Early in 1990, Banque Arabe, BAI's French parent company, decided to transfer the assets of its American subsidiary and dissolve the BAI entity. On May 31, 1990, BAI executed an assignment agreement (the "Assignment") transferring its interests in the Participation Agreement to Banque Arabe. [FN2] As the party in interest, Banque Arabe commenced this action on October 3, 1990.

FN2. The Assignment provided, in relevant part, that: [A]s of May 31, 1990 [BAI] ("Assignor") ... has sold, assigned, transferred, and conveyed, and by these presents does sell, assign, transfer and convey unto [Banque Arabe] ("Assignee"), without recourse to the Assignor, all of [BAI's] rights, title and interest in (a) the Participation Agreement ... and (b) [BAI's] participation in a loan made by [MNB] on or about June 23, 1988 to [the Marceca

Properties] ... in the original principal amount of \$35,000,000 Together with all of [BAII's] rights and interest in the transaction described in Paragraphs (a) and (b) above....

The complaint alleged numerous claims for relief against MNB, including: (1) rescission of the Participation Agreement on the ground of common law fraud and deceit; (2) negligent misrepresentation; (3) breach of contract; (4) gross negligence; and (5) breach of fiduciary duty. After Banque Arabe completed discovery, MNB moved for summary judgment. The district court granted summary judgment to MNB on all counts except Banque Arabe's claim for rescission. See *Banque Arabe I*, 819 F.Supp. at 1296. MNB contended that Banque Arabe lacked standing to assert the fraud claim underlying the demand for rescission, because the Assignment did not explicitly transfer tort claims to Banque Arabe. The district court expressly deferred ruling on that question, however, and proceeded to trial.

At the six-day bench trial, Banque Arabe pursued two theories of common law fraud: fraudulent misrepresentation and fraudulent concealment of material information. After trial, Judge Ward concluded that Banque Arabe lacked standing to raise a claim for rescission based upon fraud. Nevertheless, Judge Ward went on to address the merits of Banque Arabe's claim. As to fraudulent misrepresentation, the district court concluded that there was insufficient evidence of an affirmative misrepresentation, and no appeal is taken from that ruling. See *Banque Arabe *151 II*, 850 F.Supp. at 1216. As to fraudulent concealment, Judge Ward concluded that Banque Arabe failed to prove that MNB had the requisite intent to defraud. In summary, Judge Ward found: (1) that MNB had a duty to disclose the existence of the co-sponsorship issue by reason of its "superior knowledge"; (2) that the co-sponsorship issue was material to BAII's funding decision and relevant to BAII's assessment of Marceca's creditworthiness; (3) that BAII reasonably relied on MNB's failure to disclose the co-sponsorship issue, which, if disclosed, would have been important to

BAII's assessment of Marceca's character and ability to convert the properties; (4) that the delay in conversion attributable to the co-sponsorship issue was the proximate cause of the loss that BAII sustained; but (5) that Banque Arabe failed to prove by clear and convincing evidence that MNB intended to defraud BAII. Judge Ward declined to infer fraudulent intent from the fact that every dollar of BAII's participation reduced MNB's financial exposure in the Marceca transaction, and held that MNB's conduct was at worst an "error of judgment".

II. Discussion

Banque Arabe challenges two crucial rulings: (1) that Banque Arabe lacked standing to pursue a claim of rescission against MNB; and (2) that, in any event, Banque Arabe failed to establish that MNB had the requisite intent to defraud. In addition, Banque Arabe challenges the district court's grant of MNB's motion for summary judgment and the dismissal of Banque Arabe's claim for negligent misrepresentation. On cross-appeal, MNB challenges the following findings: (1) that MNB had a duty to disclose based on its alleged "superior knowledge" of the existence of the co-sponsorship issue; (2) that the co-sponsorship issue was material to Banque Arabe's funding decision and to its assessment of Marceca's creditworthiness; (3) that Banque Arabe reasonably relied on MNB's failure to disclose the co-sponsorship issue; and (4) that the delay in conversion due to the co-sponsorship issue was the proximate cause of the damages sustained by Banque Arabe. Since we hold that Banque Arabe has standing as transferee to seek rescission, we reach the merits of the claim. In so doing, however, we do not address the vexed issue of scienter, because we conclude as a matter of law that MNB had no duty to disclose the co-sponsorship issue and that Banque Arabe could not have reasonably relied on MNB for the disclosure of such information.

A. Standing

[1] The district court held that Banque Arabe lacked standing to assert BAII's tort

claims against MNB, because, although the May 31, 1990 Assignment clearly transferred BAII's rights and interests in the Participation Agreement (and therefore any claims grounded in contract), the Assignment did not make an explicit assignment of BAII's claims in tort. We conclude that the Assignment transferred all of BAII's rights to Banque Arabe, tort as well as contract.

[2] Under New York law, the assignment of the right to assert contract claims does not automatically entail the right to assert tort claims arising from that contract. The district court relied principally on *Fox v. Hirschfeld*, 157 A.D. 364, 142 N.Y.S. 261 (1913), for the proposition that the assignment of fraud claims must be explicit. In *Fox*, the First Department held that the plaintiff-assignor had not relinquished his right to pursue claims for rescission or fraudulent misrepresentation notwithstanding his subsequent assignment to his wife of the real property at issue. *Id.* 142 N.Y.S. at 262-63. *Fox* has been construed to mean that, in the absence of an explicit assignment of a cause of action based on fraud, "only the ... assignor may rescind or sue for damages for fraud and deceit; the representations were made to [the assignor] and [the assignor] alone had the right to rely upon them." *Nearpark Realty Corp. v. City Investing Co.*, 112 N.Y.S.2d 816, 817 (N.Y.Sup.Ct.1952). We assume that the doctrine expressed in *Fox* remains the law of New York and is not limited to real estate transactions.

As the district court recognized, New York law does not require specific boilerplate language to accomplish the transfer of causes of action sounding in tort. Rather, "any act or *152 words are sufficient which 'show an intention of transferring the chose in action to the assignee.'" *Miller v. Wells Fargo Bank Int'l Corp.*, 540 F.2d 548, 557 (2d Cir.1976) (quoting *Advance Trading Corp. v. Nydegger & Co.*, 127 N.Y.S.2d 800, 801 (N.Y.Sup.Ct.1953)). The district court concluded that the recitation transferring all "rights, title and interest" did not reflect a clear intention to transfer to Banque Arabe any tort claims arising out of either the

Marceca Loan or the Participation Agreement. The district court therefore went on to consider extrinsic evidence. Officials of both BAII and Banque Arabe testified that they intended to transfer any and all rights, remedies and causes of action as part of the Assignment; however, on a subsequent occasion, when BAII sought to transfer existing litigation claims to an American parent holding company, BAII explicitly referenced such causes of action in the assignment agreement. [FN3] Judge Ward decided that BAII never "specifically and consciously" agreed to transfer its tort claims.

FN3. In an Assignment and Assumption Agreement dated April 10, 1992, BAII transferred all its litigation claims involving the accounts of Will Petroleum to BAII American Holding Corp. The Agreement stated: "The Liquidating Bank [BAII] hereby grants, assigns and conveys unto [BAII American Holding Corp.] all claims, accounts, actions, debts, causes of action and rights to pursue recovery of all sums...." Appellant asserts that the Will Petroleum Assignment was distinguishable because it referenced tort claims that had already been commenced and described the nature of each claim and the parties involved. Here, by contrast, when BAII executed the Assignment on May 31, 1990, there were no identified or existing claims between BAII and MNB.

We conclude that language in the Assignment alone is sufficient to demonstrate BAII's intent to transfer all of their rescission and fraud claims. Contract interpretation is generally a question of law and is subject to de novo review. See *Goodheart Clothing Co. v. Laura Goodman Enters., Inc.*, 962 F.2d 268, 272 (2d Cir.1992); *Network Publishing Corp. v. Shapiro*, 895 F.2d 97, 99 (2d Cir.1990). A contract is not deemed ambiguous unless "it is reasonably susceptible of more than one interpretation, and a court makes this determination by reference to the contract alone." *Burger King Corp. v. Horn & Hardart Co.*, 893 F.2d 525, 527 (2d Cir.1990); *Breed v. Insurance Co. of N. Am.*, 46 N.Y.2d 351, 413 N.Y.S.2d 352, 385 N.E.2d 1280, 1282 (1978).

The May 31, 1990 Assignment transferred "all of [BAII's] rights, title and interest in (a)

the Participation Agreement." Standing alone, as the district court considered it, this reference to the contract may be deemed insufficient under Fox to transfer claims for rescission or fraud in the inducement. [FN4] However, the same provision of the Participation Agreement effects the transfer of all rights, title and interest in "(b) [BAII's] participation in [the Marceca Loan]." In order to ascribe meaning, if possible, to all of the contract terms, subparagraph (b) must be read to transfer something more than BAII's rights, title and interest in the Participation Agreement, as referenced in subparagraph (a). See *United States Naval Inst. v. Charter Communications*, 875 F.2d 1044, 1049 (2d Cir.1989) (citing *Spaulding v. Benenati*, 57 N.Y.2d 418, 456 N.Y.S.2d 733, 736, 442 N.E.2d 1244, 1247 (1982)). Elsewhere, the Assignment recites that transfer is being made of "all of [BAII's] rights and interest in the transaction described in Paragraphs (a) and (b)." (Emphasis added). We construe this interest in the "transaction" to be broader than an interest in the contract, and we predict that the New York Court of Appeals would deem this language sufficient to effect the assignment of tort claims based on fraud.

FN4. The language of the assignment agreement transferring the property from Fox to his wife stated: "For value received, I hereby sell, assign, transfer, and set over unto Melinea H. Fox all my right, title, and interest in and to the within contract." Fox, 142 N.Y.S. at 262. (Emphasis added).

In both Fox and Nearpark, the allocation of rights was a live issue because the question presented was whether the assignor or the assignee was the proper party to bring suit for rescission based on fraud. In this case, BAII drafted the Assignment in anticipation that BAII would be dissolved. The overall design and express commercial purpose of the Assignment transaction thereby reinforces our conclusion that the Assignment *153 contemplated the transfer of BAII's tort claims to Banque Arabe. A party about to become defunct has little incentive to reserve transactional rights when transferring its interests to its surviving parent corporation.

This conclusion is also consistent with the general trend in New York toward adopting principles of free assignability of claims, including those of fraud. See N.Y.Gen.Oblig.Law §§ 13-105 & 13-107 (McKinney 1978); see also *ACLI Int'l Commodity Servs., Inc. v. Banque Populaire Suisse*, 609 F.Supp. 434, 441-42 (S.D.N.Y.1984).

Because we conclude that the Assignment was effective, Banque Arabe is the real party in interest in this appeal. To this point, we have distinguished between BAII and Banque Arabe as separate entities. For the remainder of this discussion, however, we will refer to them without distinction as Banque Arabe.

B. Common Law Fraud

The district court concluded that Banque Arabe, having established every other element of its fraudulent concealment claim, failed to prove that MNB had the requisite intent to defraud when it withheld information concerning the co-sponsorship issue. [FN5] Banque Arabe argues on appeal that scienter need not always be shown to sustain a claim under New York law for rescission based on fraud. MNB's cross-appeal challenges the district court's conclusion, among others, (1) that MNB's "superior knowledge" created a duty to disclose the existence of the co-sponsorship issue, and (2) that Banque Arabe reasonably relied on MNB's failure to disclose the co-sponsorship issue.

FN5. Banque Arabe does not contest the district court's ruling that it failed to prove its claim of fraudulent misrepresentation.

[3][4] To prove common law fraud under New York law, a plaintiff must show that (1) the defendant made a material false representation, (2) the defendant intended to defraud the plaintiff thereby, (3) the plaintiff reasonably relied upon the representation, and (4) the plaintiff suffered damage as a result of such reliance. See *Keywell Corp. v. Weinstein*, 33 F.3d 159 (2d Cir.1994); *Katara v. D.E. Jones Commodities, Inc.*, 835 F.2d 966,

970-71 (2d Cir.1987); see also *Albert Apartment Corp. v. Corbo Co.*, 182 A.D.2d 500, 582 N.Y.S.2d 409, 410 (1992). To establish fraudulent concealment, a plaintiff must also prove that the defendant had a duty to disclose the material information. See *Brass v. American Film Technologies, Inc.*, 987 F.2d 142, 152 (2d Cir.1993); *Gurnee v. Hasbrouck*, 267 N.Y. 57, 195 N.E. 683 (1935). Under New York law, each element of a fraud claim must be shown by clear and convincing evidence. *Leucadia, Inc. v. Reliance Ins. Co.*, 864 F.2d 964, 971 (2d Cir.1988) (citing *Hutt v. Lumbermens Mut. Casualty Co.*, 95 A.D.2d 255, 466 N.Y.S.2d 28 (1983), cert. denied, 490 U.S. 1107, 109 S.Ct. 3160, 104 L.Ed.2d 1023 (1989)).

1. Scienter

On appeal, the parties dispute whether in New York scienter is a necessary element of a contract rescission claim premised on one party's withholding material information from the other. Banque Arabe relies on a line of cases involving "innocent misrepresentation." See, e.g., *Seneca Wire & Mfg. Co. v. A.B. Leach & Co.*, 247 N.Y. 1, 159 N.E. 700 (1928). These cases generally hold that equitable considerations dictate that "an innocent misrepresentation of a material fact permits rescission even though made without the intent to deceive." *Stern v. Satra Corp.*, 539 F.2d 1305, 1308 (2d Cir.1976); see also *Seneca Wire*, 247 N.Y. at 7-8; *D'Angelo v. Bob Hastings Oldsmobile, Inc.*, 89 A.D.2d 785, 453 N.Y.S.2d 503 (1982), aff'd, 59 N.Y.2d 773, 464 N.Y.S.2d 724, 451 N.E.2d 471 (1983); *West Side Fed. Sav. & Loan Ass'n of N.Y. City v. Hirschfeld*, 101 A.D.2d 380, 476 N.Y.S.2d 292, 295 (1984), appeal denied, 65 N.Y.2d 605, 493 N.Y.S.2d 1028, 482 N.E.2d 1230 (1985). The district court characterized these "innocent misrepresentation" cases as a variant of the doctrine of mutual mistake: because both parties act under a false assumption (transmitted by one party) regarding a material issue of fact, rescission or reformation is available without a showing of scienter.

*154 The district court treated Banque

Arabe's allegations as a case of unilateral mistake, however, and held that Banque Arabe was therefore required to show either scienter or "wrongful conduct" on the part of MNB. See *Allen v. WestPoint-Pepperell, Inc.*, 945 F.2d 40, 44 (2d Cir.1991). Banque Arabe cites *Sheridan Drive-In, Inc. v. State of New York*, 16 A.D.2d 400, 228 N.Y.S.2d 576 (1962), for the proposition that "there is a right of rescission for a unilateral mistake if the mistake was known to the other party at the time of the negotiation of the contract and was not corrected by it." *Id.* 228 N.Y.S.2d at 582. MNB responds that the facts in *Sheridan* describe the very type of "wrongful conduct" that the district court found lacking in this case.

[5] The cases we have reviewed do not allow us to predict with confidence how the New York Court of Appeals would reconcile these lines of cases on the facts presented. We decline to guess, and see no reason to certify the question, because (among other reasons) we can affirm the judgment of the district court on grounds pressed in MNB's cross-appeal. We hold that, under the circumstances of this case, MNB had no duty to disclose that the co-sponsorship issue might incrementally delay the approval of the conversion proposal for the Marceca Properties, and that Banque Arabe's reliance on MNB to disclose such information was not reasonable.

2. Materiality

[6] It is difficult to discuss MNB's duty to disclose, and the reasonableness of Banque Arabe's reliance on MNB's non-disclosure, without brief consideration of the undisclosed information-identified by the district court and Banque Arabe as the co-sponsorship issue-and its materiality to Banque Arabe's investment decision. [FN6] The co-sponsorship issue was ultimately resolved in January 1989 by MNB's agreement to modify the loan documents by relinquishing its right to approve certain aspects of the conversion plan. The problem was therefore remediable, and the remedy lay in the power of MNB, which had a great stake in the success of the

transaction. There is therefore no reason to believe that the co-sponsorship issue would have been permitted to threaten MNB's investment or that of the participant banks.

FN6. The district court came to the diluted conclusion that had Banque Arabe possessed knowledge of the co-sponsorship issue it "would have been hesitant about funding." Banque Arabe II, 850 F.Supp. at 1224.

The materiality and significance of the co-sponsorship issue to Banque Arabe's funding decision has never been obvious. The complaint alleged that concealment of the co-sponsorship issue materially altered the June 1988 projected repayment schedule. Banque Arabe argued that these projections informed its credit analysis and were critical to its decision to fund. The district court, however, disagreed and squarely held that reliance on the June projections was unreasonable. See Banque Arabe II, 850 F.Supp. at 1222-23. At trial, Banque Arabe revised its theory of materiality, contending that the co-sponsorship issue was critical to its evaluation of Marceca's "character and capacity." The district court accepted Banque Arabe's altered theory of reliance, but we cannot see how the co-sponsorship issue would materially impact Banque Arabe's assessment of Mr. Marceca.

The co-sponsorship issue involved MNB's role in the conversion process, specifically, MNB's contractual power to approve the terms of the conversion plan. The Department of Law's concern about this arrangement had no moral overtone and shed no light on Marceca's character. Banque Arabe does not allege (nor is there any evidence) that Marceca consciously concealed from anyone that the Department of Law had raised the co-sponsorship issue or had issued a deficiency letter. To the contrary, Marceca informed MNB of both facts shortly after he received the letter. Nor is there any evidence that Marceca attempted to conceal the letter's effects. When asked by MNB, Marceca revised the projected repayment schedule on August 17, 1988 to reflect any delay that may be occasioned by the co-sponsorship issue. Marceca did not directly relay any information

to Banque Arabe, but the district court found that this was because *155 Marceca did not think that the issue was material to the overall transaction. Id. at 1218-19.

Banque Arabe also contends that the co-sponsorship issue impacted its assessment of Marceca's capacity, meaning his "ability to convert" the properties to cooperative ownership based on his extensive experience in a "rather specialized form of property development," his "marketing savvy," and his "negotiating skills." Id. at 1224. Evaluation of this skill set, however, would not be affected by a relatively short incremental delay in receiving regulatory approvals: in fact, Marceca's ability to shepherd the conversion proposals through the regulatory process is one reason that he was entrusted with the conversion effort. His ability to resolve the co-sponsorship issue in four months is as much a tribute to his skill as evidence of any impaired capacity.

In short, the co-sponsorship issue was of doubtful materiality, a conclusion that bears upon the two related questions on which we decide this appeal: MNB's duty to disclose and the reasonableness of Banque Arabe's reliance.

3. Duty to Disclose

[7] In business negotiations, an affirmative duty to disclose material information may arise from the need to complete or clarify one party's partial or ambiguous statement, see Brass, 987 F.2d at 150 (citing Junius Constr. Corp. v. Cohen, 257 N.Y. 393, 400 (1931)), or from a fiduciary or confidential relationship between the parties, see id. (citing Allen v. WestPoint-Pepperell, Inc., 945 F.2d 40, 45 (2d Cir.1991)). Such a duty may also arise—as claimed here by Banque Arabe—where: (1) one party has superior knowledge of certain information; (2) that information is not readily available to the other party; and (3) the first party knows that the second party is acting on the basis of mistaken knowledge. See id. (citing Aaron Ferer & Sons Ltd. v. Chase Manhattan Bank, N.A., 731 F.2d 112, 123 (2d Cir.1984)); accord Young v. Keith, 112

A.D.2d 625, 627, 492 N.Y.S.2d 489 (1985).

[8] Of course, disclosure obligations may be modified by contract. See, e.g. *Grumman Allied Indus. Inc. v. Rohr Indus., Inc.*, 748 F.2d 729, 734-35 (2d Cir.1984) (citing *Danann Realty Corp. v. Harris*, 5 N.Y.2d 317, 184 N.Y.S.2d 599, 157 N.E.2d 597 (1959)). In this case, Banque Arabe expressly recited in the Participation Agreement that it was not relying on MNB for information relevant to its independent credit analysis and funding decision, and would not so rely in the future. [FN7] "[W]here a party specifically disclaims reliance upon a representation in a contract, that party cannot, in a subsequent action for fraud, assert it was fraudulently induced to enter into the contract by the very representation it has disclaimed." *Id.* The Participation Agreement therefore operates as a waiver absolving MNB of responsibility to make affirmative disclosures concerning the financial risks of the Marceca Loan. See *Banco Espanol de Credito v. Security Pac. Nat'l Bank*, 973 F.2d 51, 53, 56 (2d Cir.1992), cert. denied, 509 U.S. 903, 113 S.Ct. 2992, 125 L.Ed.2d 687 (1993). As the district court noted, however, even such an express waiver or disclaimer "will not be given effect where the facts are peculiarly within the knowledge of the party invoking it." *Stambovsky v. Ackley*, 169 A.D.2d 254, 572 N.Y.S.2d 672, 677 (1991) (citing *Danann*, 5 N.Y.2d at 322, 184 N.Y.S.2d 599, 157 N.E.2d 597).

FN7. In pertinent part, the Participation agreement recited that Banque Arabe had "independently and without reliance upon [MNB] ... made its own credit analysis and decision to enter into this Participation Agreement." Banque Arabe further acknowledged it would "independently and without reliance upon [MNB] ... continue to make its own credit decisions in taking or not taking action under the Participation Agreement."

[9] In this light, the district court held that MNB's "superior knowledge" created a duty to disclose the co-sponsorship issue to the extent that such information "was not readily available to [Banque Arabe] and was peculiarly within MNB's knowledge." *Banque Arabe II*, 850 F.Supp. at 1217. In order to

recover on that ground, however, Banque Arabe was required to show that MNB knew that Banque Arabe was acting in reliance on mistaken knowledge regarding that issue. See *Frigitemp Corp. v. Financial Dynamics *156 Fund, Inc.*, 524 F.2d 275, 283 (2d Cir.1975). In the context of this case, Banque Arabe cannot make that showing.

MNB was a participant in the Marceca Loan as well as the loan syndicator, and therefore had every incentive to promote the success of the real estate venture. In so doing, MNB would necessarily keep its eye on the same set of factors and risks that the other participant banks would consider in evaluating the financial viability of the conversion project. We therefore cannot conclude that MNB "knew" that co-sponsorship-caused delay was critical to Banque Arabe unless we first conclude that MNB also deemed that issue critical to its own investment in the Marceca Loan. The record is uncontested, however, that MNB and Marceca considered the co-sponsorship issue unimportant, and did not expect its resolution to materially affect the timing of the pay-down schedule. *Banque Arabe II*, 850 F.Supp. at 1218-19. At any point after the issuance of the deficiency letter in August 1988, MNB had the power to cure the defect simply by deleting one paragraph from the conversion proposal, as it in fact did in January 1989. Although regulatory delay will sooner or later threaten this kind of real estate transaction, MNB could not have viewed with alarm a situation it could cure at will, and cannot be deemed to have "known" that Banque Arabe would attach so much greater importance to the delay.

Banque Arabe contends that MNB's economic interests were not in fact aligned with those of Banque Arabe, because MNB was the lead syndicating bank for the Marceca Loan. Thus Banque Arabe charges that MNB adopted a strategy to fraudulently induce Banque Arabe to participate in order to lay off \$10 million of MNB's financial exposure (generating significant fee income at the same time). However, Banque Arabe does not explain why, if MNB was alarmed about the co-sponsorship issue, it would proceed to lay

off part of its risk on an unsuspecting participant--and suffer the loss of its own remaining investment-- rather than simply cure the deficiency in the way it ultimately did. In any event, this sinister explanation of MNB's conduct is foreclosed by the district court's finding that MNB lacked scienter, and by the district court's refusal to infer any wrongdoing from the fact that MNB's loss was reduced by Banque Arabe's participation. [FN8] See *id.* at 1226.

FN8. The district court also found that MNB did not exhibit a conscious disregard of the truth when it failed to disclose the co-sponsorship issue. *Banque Arabe II*, 850 F.Supp. at 1226.

In summary, although the district court found that MNB had a duty to disclose the co-sponsorship issue, there is no basis in the record for concluding that MNB knew that Banque Arabe was either relying on MNB for that information or acting on the basis of mistaken information. Such knowledge is a prerequisite to a duty to disclose based upon superior knowledge and is therefore an indispensable element of Banque Arabe's claim. See *Brass*, 987 F.2d at 150.

4. Reasonable Reliance

[10] To prevail on its theory of fraudulent concealment, Banque Arabe was also required to establish that it actually relied on the disclosure or lack thereof, and that such reliance was reasonable or justifiable. See e.g., *Harris v. Camilleri*, 77 A.D.2d 861, 431 N.Y.S.2d 65, 68 (1980). Since the Participation Agreement expressly recited that Banque Arabe would not rely on information from MNB in making its "credit decisions" or in "taking or not taking action under the Participation Agreement," Banque Arabe could only rely on MNB to disclose information that was "peculiarly within the knowledge" of MNB. *Stamovsky*, 572 N.Y.S.2d at 677; see also *Royal American Managers, Inc. v. IRC Holding Corp.*, 885 F.2d 1011, 1016 (2d Cir.1989) ("Where the representation relates to matters that are not peculiarly within the other party's knowledge and both parties have available the means of

ascertaining the truth, New York courts have held that the complaining party should have discovered the facts and that any reliance under such circumstances therefore would be unjustifiable."); *Mallis v. Bankers Trust*, 615 F.2d 68, 80-81 (2d Cir.1980), cert. denied, 449 U.S. 1123, 101 S.Ct. 938, 67 L.Ed.2d 109 (1981). We conclude that Banque Arabe could not have reasonably relied on MNB to *157 disclose the co-sponsorship issue because the prospect of an incremental delay in the regulatory approvals needed for converting those properties was a known and disclosed risk, and because information regarding the status of the conversion proposal for the Marceca Properties was readily accessible to any interested party who cared to make inquiry.

The deficiency letter was not a bolt from the blue, such as news that one of the apartment buildings under conversion had burned down, or that Marceca had died or filed for bankruptcy. The letter did not reject the conversion plan outright; it merely augured some lengthening of a regulatory process that would in no event be short and could not be expected to proceed without some active oversight or input by the Department of Law. The co-sponsorship issue, which was not by nature intractable or fatal, and was in fact disposed of simply by the renunciation of a non-essential contract provision, did not disrupt the calculus of known risks.

The district court treats the co-sponsorship issue specifically, and the delay attendant to that issue, as an unanticipated event. While no one apparently anticipated that the Department of Law would fix upon that specific issue, delay caused by regulatory oversight was a known risk. The regulatory process for converting apartments to cooperative ownership was disclosed by MNB and understood by Banque Arabe. Maurice Nahn, the Vice President responsible for conducting Banque Arabe's credit analysis, testified that he was fully aware of the mechanics of the regulatory procedures required to obtain approvals for conversion from the Department of Law. Nahn further testified that he had a basic understanding of

the time it would take to obtain the approvals, and appreciated the risk that the Department of Law might issue a deficiency letter and that the sponsor would then be given time to respond and to cure the deficiency. At his deposition, Nahn stated that he was aware in June 1988 that obtaining the required regulatory approvals from the Department of Law was a "lengthy process." In describing the June 1988 projections, Nahn stated that they were premised on an aggressive estimate that the conversion of each building would take approximately nine months from the submission of the red herring to the closing.

No one could reasonably assume that the regulatory scrutiny of this complex transaction would be quick and free from incident, but only Banque Arabe could gauge how much regulatory delay or risk it could tolerate. Ultimately, Banque Arabe's position is untenable because the more it argues that the current regulatory status of the conversion plans was crucial to its funding decision, the more unaccountable becomes its failure to inquire about it.

Information concerning the co-sponsorship issue was not "peculiarly within the knowledge" of MNB, see *Stambovsky*, 572 N.Y.S.2d at 677, because it was readily available to Banque Arabe or any interested party who cared to ask. The district court found that had Banque Arabe contacted the Department of Law and inquired about the status of the Marceca Properties, the Department of Law

(a) would have advised [Banque Arabe] whether red herrings had been submitted and for which buildings; (b) advised [Banque Arabe] whether red herrings submitted to the Department of Law had been accepted or rejected; and (c) made available for review and copying by [Banque Arabe] the red herrings submitted by the Marceca borrowers, any revised versions thereof, any supporting documentation submitted by the Marceca borrowers to the Department of Law, and any deficiency letters and other correspondence between the Department of Law and the borrowers or their counsel and the Department of Law concerning any

plans that had been rejected. See *Banque Arabe II*, 850 F.Supp. at 1204 (emphasis added). [FN9] The deficiency letter *158 would have told Banque Arabe--or alerted it to--all it needed to know. Banque Arabe also had private channels for inquiry concerning the status of the regulatory approvals. As part of Banque Arabe's due diligence, Nahn participated in meetings and conference calls with representatives of MNB and met individually with Marceca to discuss the transaction. Banque Arabe therefore had direct or indirect access to the people most familiar with the building conversions and the current status of regulatory approvals. At no time, however, during its due diligence investigation or subsequent negotiations did Banque Arabe request any information or documents from MNB or Marceca concerning the status of the conversion or the Marceca Properties.

FN9. In discussing the scope of MNB's duty to disclose, the district court stated the following: Clearly, MNB had to relay to [Banque Arabe] the existence of the co-sponsorship issue. [Banque Arabe] could not have learned of this information from the Department of Law, which does not comment publicly on a matter referred to the Enforcement Division. Even more definitely, [Banque Arabe] could not have received this information through communication with Marceca. *Banque Arabe II*, 850 F.Supp. at 1216-17. We find this conclusion to be clearly erroneous in light of the district court's finding of fact that Banque Arabe could have received a copy of the deficiency letter directly from the Department of Law detailing the objection to MNB's co-sponsorship of and participation in the conversion of the Marceca Properties.

In short, incremental regulatory delay was a known risk, the particulars of which at any given time Banque Arabe could have learned by inquiry from any of several sources. It was therefore unreasonable for Banque Arabe to rely on MNB to intuit Banque Arabe's sensitivity on this issue and volunteer information that Banque Arabe was not seeking. See, e.g., *Grumman*, 748 F.2d at 739 (rejecting plaintiff's claim of a duty of disclosure because plaintiff had access to the

alleged omitted information).

C. Negligent Misrepresentation

Banque Arabe alleges that the district court improperly dismissed its claim of negligent misrepresentation.

[11] Under New York law, a plaintiff may not recover for negligent misrepresentation in the absence of a special relationship of trust or confidence between the parties. See *Congress Financial Corp. v. John Morrell & Co.*, 790 F.Supp. 459, 474 (S.D.N.Y.1992); accord *White v. Guarente*, 43 N.Y.2d 356, 363, 401 N.Y.S.2d 474, 372 N.E.2d 315 (1977); *Coolite Corp. v. American Cyanamid Co.*, 52 A.D.2d 486, 384 N.Y.S.2d 808, 811 (1976).

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). We review a district court's grant of summary judgment de novo, viewing the evidence "in a light most favorable to ... the non-moving party, and draw[ing] all reasonable inferences in his favor." *Aslanidis v. United States Lines, Inc.*, 7 F.3d 1067, 1072 (2d Cir.1993).

[12][13] Generally, banking relationships are not viewed as special relationships giving rise to a heightened duty of care. See *Aaron Ferer*, 731 F.2d at 122 (stating that the usual relationship of a bank and its customer is not a fiduciary one, but simply that of debtor and creditor). In the case of arm's length negotiations or transactions between sophisticated financial institutions, no extra-contractual duty of disclosure exists. See *Banco Espanol de Credito v. Security Pac. Nat'l Bank*, 763 F.Supp. 36, 44 (S.D.N.Y.1991); see also *Banco Espanol*, 973 F.2d at 56. This same principle applies to loan participation agreements, in which there is deemed to be no fiduciary relationship unless expressly and unequivocally created by contract. See *Banco Espanol*, 763 F.Supp. at

45; see also *First Citizens Fed.Sav. & Loan Ass'n v. Worthen Bank & Trust Co.*, 919 F.2d 510, 513-14 (9th Cir.1990). Here, Banque Arabe and MNB engaged in arm's length negotiations and the Participation Agreement explicitly disclaims any reliance by Banque Arabe on MNB for information regarding its credit analysis and funding decision. Furthermore, as discussed above, access to the supposedly concealed information was in fact available to Banque Arabe in the course of its due diligence, and thereafter.

Because no "special relationship" exists between Banque Arabe and MNB, the district court properly dismissed Banque Arabe's claim for negligent misrepresentation.

*159 Conclusion

For the foregoing reasons, we affirm the district court's judgment.

57 F.3d 146

END OF DOCUMENT

8

Supreme Court, Appellate Division, First
Department, New York.

The BENJAMIN SHAPIRO REALTY
COMPANY, LLC, Plaintiff-Appellant,
v.
KEMPER NATIONAL INSURANCE
COMPANIES, et al., Defendants-Respondents.

March 18, 2003.

Landlord brought action against tenant's insurance broker, asserting negligent misrepresentation and negligence claims arising from broker's alleged issuance of certificates of insurance indicating landlord as additional insured even though there was no additional coverage for landlord's benefit. The Supreme Court, New York County, Karla Moskowitz, J., granted broker's motion for summary judgment and denied landlord's motion for leave to serve second amended complaint. On landlord's appeal, the Supreme Court, Appellate Division, held that: (1) insurance broker had no duty to landlord, and (2) trial court properly denied motion for leave to serve second amended complaint.

Affirmed.

West Headnotes

[1] Insurance 1655
217k1655

[1] Insurance 1672
217k1672

Insurance broker for tenant had no duty to landlord, as required to support landlord's negligent misrepresentation or negligence claims arising from broker's alleged issuance of certificates of insurance indicating landlord as additional insured and contained rental coverage insurance for landlord's benefit, although such coverage was not included in policy; insured and broker had no contractual relationship and landlord's contact with broker did not give rise to sort of relationship approaching that of privity.

[2] Insurance 1672

217k1672

[2] Insurance 3424
217k3424

Where certificates of insurance contain disclaimers that they are for information only, they may not be used as predicates for a claim of negligent misrepresentation.

****46** Louis M. Atlas, for Plaintiff-Appellant.

Kenneth R. Feit, for Defendants-Respondents.

MAZZARELLI, J.P., ANDRIAS, SAXE,
ELLERIN, and WILLIAMS, JJ.

***245** Order, Supreme Court, New York County (Karla Moskowitz, J.), entered on or about January 25, 2002, which, inter alia, granted the motion of defendant Tanenbaum-Harber Co. for summary judgment dismissing the complaint as against it, and denied plaintiff's cross motion for leave to serve a second amended complaint alleging additional causes of action against Tanenbaum-Harber Co., unanimously affirmed, without costs.

[1][2] The motion court properly held that defendant Tanenbaum-Harber Co., the insurance broker of plaintiff landlord's tenant, was under no duty to plaintiff and, accordingly, was not liable to plaintiff for negligent misrepresentation or negligence by reason of Tanenbaum's issuance of certificates of insurance representing that the tenant's insurance policy, naming plaintiff as an additional insured, contained rental coverage insurance for plaintiff's benefit, even though such coverage was not included in the policy. Plaintiff and Tanenbaum had no contractual relationship and the fact that plaintiff had contact with Tanenbaum in the course of obtaining the certificates of ***246** insurance did not give rise to the sort of relationship, i.e., one approaching that of privity, requisite to the imposition of liability for negligent misrepresentation (see *Credit Alliance v. Arthur Andersen & Co.*, 65 N.Y.2d 536, 493 N.Y.S.2d 435, 483 N.E.2d 110). Moreover, where, as here, certificates of insurance

(Cite as: 303 A.D.2d 245, *246, 756 N.Y.S.2d 45, **46)

contain disclaimers that they are for information only, they may not be used as predicates for a claim of negligent misrepresentation (see *St. George v. W.J. Barney Corp.*, 270 A.D.2d 171, 706 N.Y.S.2d 24; see also *Am. Ref-Fuel Co. of Hempstead v. Resource Recycling, Inc.*, 248 A.D.2d 420, 423, 671 N.Y.S.2d 93). Nor was any triable issue presented as to whether plaintiff had enforceable rights as a third-party beneficiary of a contract between the tenant and Tanenbaum.

Since the causes that plaintiff sought to add against Tanenbaum were plainly without merit, the motion court properly denied plaintiff's cross motion for leave to serve a second amended complaint (see *Koss v. Bd. of Trustees of the Fashion Inst.*, 281 A.D.2d 200, 727 N.Y.S.2d 303).

303 A.D.2d 245, 756 N.Y.S.2d 45, 2003 N.Y. Slip Op. 11998

END OF DOCUMENT

9

Supreme Court, Appellate Division, Fourth
Department, New York.

Matthew P. BENNETT and Jodi L. Bennett,
Plaintiffs-Respondents,
v.
CITICORP MORTGAGE, INC., Commonfund
Mortgage Corporation, Defendants-
Respondents,
and
Audrey Edelman & Associates, Defendant-
Appellant.

June 14, 2004.

Background: Purchasers sued listing agent for fraud and negligent misrepresentation after discovering that deed conveyed fewer acres than they expected. The Supreme Court, Cayuga County, Peter E. Corning, A.J., denied agent's motion for summary judgment. Agent appealed.

Holding: The Supreme Court, Appellate Division, held that any reliance by purchasers on listing agent's alleged misrepresentation was not reasonable.

Reversed.

West Headnotes

Brokers 102
65k102

Any reliance by purchasers on listing agent's alleged misrepresentation that vendor had 15 acres to sell and that all 15 acres were included in purchase was not justified or reasonable, precluding claims of fraud or negligent misrepresentation, since vendor's ownership of only five acres was matter of public record, readily ascertainable from abstract of title provided to purchasers' attorney for her review prior to closing, and purchasers were chargeable with notice of discrepancies that their attorney failed to disclose to them.

*807 Sugarman Law Firm, LLP, Syracuse (Sherry R. Bruce of Counsel), for Defendant-Appellant.

Michele R. Driscoll, Auburn, for Plaintiffs-Respondents.

Hiscock & Barclay, LLP, Syracuse (Thomas B. Cronmiller of Counsel), for Defendant-Respondent Citicorp Mortgage, Inc.

Costello, Cooney & Fearon, LLP, Syracuse (David Sebastian Grasso of Counsel), for Defendant-Respondent Commonfund Mortgage Corporation.

PRESENT: GREEN, J.P., WISNER,
SCUDDER, GORSKI, AND LAWTON, JJ.

MEMORANDUM:

Supreme Court erred in denying the motion of defendant Audrey Edelman & Associates (Edelman) seeking summary judgment dismissing the complaint and cross claims against it. This action arises from the purchase of real estate by plaintiffs from defendant Citicorp Mortgage, Inc. (Citicorp) in a transaction in which Edelman was the listing agent and defendant Commonfund Mortgage Corporation was the mortgagee. Plaintiffs commenced this action after discovering that the deed conveyed fewer acres than they expected. Plaintiffs seek damages from Edelman for fraud and negligent misrepresentation based on alleged misrepresentations by Edelman that Citicorp had 15 acres to sell and that all 15 acres were included in the purchase.

We agree with Edelman's contention that any reliance by plaintiffs upon those alleged misrepresentations was not justified or reasonable. Citicorp's ownership of only five acres was a matter of public record, readily ascertainable from the abstract of title provided to plaintiffs' attorney for her review prior to the closing. Indeed, the deed accurately sets forth the description and boundaries of the property. Plaintiffs "had the means available to [them] of knowing, by the exercise of ordinary intelligence, the truth concerning the description and boundar[ies] of the land ... [and, because they] failed to make use of such means, [they] will not be heard to

complain that [they were] induced to enter into the purchase by misrepresentation" (Kurz v. Nicolo, 125 A.D.2d 993, 993, 510 N.Y.S.2d 390; see Mosca v. Kiner, 277 A.D.2d 937, 938, 716 N.Y.S.2d 543; Parkway Woods v. Petco Enters., 201 A.D.2d 713, 608 N.Y.S.2d 314). We reject the contention of plaintiffs that they are not charged with notice of the discrepancies *808 that their attorney failed to disclose to them (see Otsego Aviation Serv. v. Glens Falls Ins. Co., 277 App.Div. 612, 618, 102 N.Y.S.2d 344). We therefore grant the motion of Edelman and dismiss the complaint and cross claims against it.

It is hereby ORDERED that the order so appealed from be and the same hereby is unanimously reversed on the law without costs, the motion is granted and the complaint and cross claims against defendant Audrey Edelman & Associates are dismissed.

8 A.D.3d 1050, 778 N.Y.S.2d 806, 2004 N.Y. Slip Op. 04996

END OF DOCUMENT

10

Only the Westlaw citation is currently available.

United States District Court,
S.D. New York.

BOMBARDIER CAPITAL INC., Plaintiff,

v.

NASKE AIR GMBH; Erbgemeinschaft/
Ortwin R. Naske (Lidija Naske, Tanja Naske
and Pascale Naske); and Wilmington Trust
Company, As Owner Trustee, Defendants.

No. 02 CV 10176 DLC.

Sept. 17, 2003.

Lender of funds for purchase of aircraft sued borrower, seeking recovery of amount due. Borrower counterclaimed, alleging fraud and misrepresentation. Lender moved to dismiss counterclaims. The District Court, Cote, J., held that: (1) lender did not fraudulently induce borrower to buy aircraft at inflated price; (2) borrower failed to state fraud claim with required degree of particularity; (3) lender did not engage in negligent misrepresentation.

Motion granted.

West Headnotes

[1] Banks and Banking 100
52k100

Lender of funds used to acquire aircraft did not fraudulently induce borrower to buy aircraft at inflated price, under New York law, by failing to disclose true value; there was no fiduciary relation of trust or confidence between lender and borrower, as required before lender was required to disclose true valuation information.

[2] Federal Civil Procedure 636
170Ak636

Borrower of funds for purchase of aircraft failed to state with degree of particularity required of fraud allegations under federal procedure rule, claim that lender fraudulently induced borrower to take out loan through misrepresentations regarding aircraft, even

though borrower claimed that death of its key negotiator obviated particularity requirements, and as facts were now particularly within knowledge of lender, misrepresentations could be alleged on information and belief. Fed. Rules Civ. Proc., Rule 9(b).

[3] Banks and Banking 100
52k100

There was no special relationship between lender of funds to purchase airplane and borrower, as required under New York law before borrower could rely on lender's alleged negligent misrepresentations regarding aircraft.

Andrew J. Ryan, Robert F. D'Emilia,
Salisbury & Ryan, LLP, New York, New
York, for Plaintiff.

Bennett H. Last, Frederic P. Rickles,
Gilbride, Tusa, Last & Spellane, LLC, New
York, New York, for Defendant.

OPINION AND ORDER

COTE, J.

*1 Plaintiff Bombardier Capital, Inc. ("BCI") brought this diversity action on December 24, 2002 against defendants Naske Air GMBH ("Naske Air"), Erbgemeinschaft/Ortwin R. Naske ("Naske Estate") and Wilmington Trust Company, as Owner Trustee ("Wilmington Trust") (collectively, "Borrowers"), for a collection of debt. BCI alleges that Naske Air defaulted under a loan agreement executed in connection with the purchase of an aircraft. BCI seeks monetary damages from Naske Air and the Naske Estate, and an order directing Wilmington Trust, as the aircraft's owner trustee, to relinquish possession of the aircraft.

On March 19, 2003, Borrowers filed an answer and counterclaim against BCI. BCI now moves to dismiss Borrowers' counterclaims and related affirmative defenses. For the reasons stated below, the motion is granted.

Background

The parties' pleadings allege the following. BCI is in the business of financing the purchase of commercial equipment, including aircraft. On or about May 9, 2001, Naske Air entered into a loan agreement with BCI ("Loan Agreement") in which BCI financed Naske Air's purchase and refurbishment of a 1981 Bombardier CL-600-1A11 aircraft ("Aircraft") for \$6,075,000. The loan to Naske Air was guaranteed by Ortwin Naske ("Naske"), Naske Air's principal, pursuant to a Guaranty ("Guaranty") also dated the same day. Both the Loan Agreement and the Guaranty contained New York choice of law provisions, and named the United States District Court for the Southern District of New York as the proper venue for any legal action arising from the contracts.

In the summer of 2001, Naske died in an airplane crash. After Naske's death, Naske Air ceased making loan payments, and subsequently informed BCI orally and in writing that it would make no further payments. BCI demanded payment from the Naske Estate as Naske's successor under the Guaranty. The Naske Estate refused orally and in writing to make any payments to BCI.

In their answer, Borrowers assert counterclaims of fraudulent inducement, negligent misrepresentation, and breach of fiduciary duty. Borrowers allege that BCI fraudulently induced Naske Air to purchase the Aircraft at inflated prices because BCI, as the main creditor of the Aircraft's then-owner, had "an interest in substituting a more creditworthy entity, such as Naske Air, to take over the payment obligations for the Aircraft." Because of its expertise in the valuation of aircraft, BCI knew or should have known that the price paid by Naske Air was too high. Borrowers allege "upon information and belief" that "[BCI] ... was aware of the Aircraft's condition and fair market value." BCI made affirmative representations to the Borrowers with the intent to create reliance that the Aircraft was of sufficient value to collateralize the loan. BCI was under a duty to disclose the actual value of the Aircraft, and

its failure to do so was fraudulent.

Borrowers' claim for negligent misrepresentation alleges that BCI's representations and omissions regarding the value of the Aircraft were made in a negligent, careless, and/or reckless manner, and that Naske Air relied upon such misrepresentations to their detriment. Finally, Borrowers allege that BCI breached its fiduciary duty to act in good faith and in a commercially reasonable manner by preventing Naske Air from reselling the Aircraft. Upon Naske's death, Borrowers entered into a binding contract with a creditworthy third-party purchaser for a sale at a reasonable price. As part of the contract of sale, the third-party purchaser required that BCI allow it to assume the existing financing arrangement for the Aircraft. BCI, through one of its agents, agreed to this condition, but, after much delay, rescinded its promise. As a result, the third party purchaser withdrew its offer, and Naske Air was unable to complete the sale of the Aircraft.

*2 BCI has moved to dismiss Borrowers' three counterclaims on the following grounds: (1) the fraudulent inducement and negligent misrepresentation counterclaims are defectively pled in that they lack the specificity required under Rule 9(b), Fed.R.Civ.P., (2) the negligent misrepresentation counterclaim fails to allege the existence of a "special relationship" with Naske Air, as required by New York law for claims of negligent misrepresentation, and (3) the fiduciary duty claim fails as a matter of law because BCI owed them no such duty.

Discussion

A motion to dismiss is governed by Rule 12(b)(6), Fed.R.Civ.P. To dismiss a claim pursuant to Rule 12(b)(6), a court must determine that "it appears beyond doubt, even when the [claim] is liberally construed, that the [moving party] can prove no set of facts which would entitle him to relief." *Jaghory v. New York State Dep't of Educ.*, 131 F.3d 326, 329 (2d Cir.1997) (citation omitted). In construing a pleading, the court must "accept

all factual allegations in the [claim] as true and draw inferences from those allegations in the light most favorable to the [pleader]." *Id.* "Given the Federal Rules' simplified standard for pleading, a court may dismiss a [claim] only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 514, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002) (citation omitted). The court need not credit general conclusory allegations that "are believed by more specific allegations of the [pleading]." *Hirsch v. Arthur Andersen & Co.*, 72 F.3d 1085, 1092 (2d Cir.1995).

The Federal Rules of Civil Procedure require that a pleading contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Rule 8(a)(2), Fed.R.Civ.P. Pleadings are to give "fair notice" of a claim in order to enable the opposing party to answer and prepare for trial, and to identify the nature of the case. *Simmons v. Abruzzo*, 49 F.3d 83, 86 (2d Cir.1995); *Salahuddin v. Cuomo*, 861 F.2d 40, 42 (2d Cir.1988). "Rule 8(a)'s simplified pleading standard applies to all civil actions, with limited exceptions." *Swierkiewicz*, 534 U.S. at 513.

One of the exceptions to Rule 8's simplified pleading standard applies to claims of fraud. Claims of fraud are governed by Rule 9(b), Fed.R.Civ.P. Although "[m]alice, intent, knowledge, and other condition of mind of a person may be averred generally," *Kalnit v. Eichler*, 264 F.3d 131, 138 (2d Cir.2001), Rule 9(b) requires allegations of fraud to be stated with particularity. See *Ganino v. Citizens Utils. Co.*, 228 F.3d 154, 168 (2d Cir.2000). The purpose behind Rule 9(b)'s heightened pleading requirement is to provide fair notice of a claim, to safeguard a party's reputation from improvident charges of wrongdoing, and to protect against the institution of a strike suit. See *Acito v. IMCERA Group, Inc.*, 47 F.3d 47, 52 (2d Cir.1995). To comply with the requirements of Rule 9(b), an allegation of fraud must specify: "(1) those statements the plaintiff thinks were fraudulent, (2) the speaker, (3) where and when they were made,

and (4) why plaintiff believes the statements fraudulent." *Koehler v. Bank of Bermuda (New York) Ltd.*, 209 F.3d 130, 136 (2d Cir.2000).

Fraudulent Inducement

*3 [1] The Borrowers' claim of fraudulent inducement rests on two alternative theories. First, Borrowers assert that BCI's failure to disclose the "true value" of the Aircraft is a fraud by omission. Second, Borrowers allege misrepresentations by BCI that the "Aircraft was of sufficient value to fully collateralize the loan proceeds at the time of the sale to Naske." Under either theory, the claim of fraudulent inducement must be dismissed.

Under New York law, in order for an omission to be fraudulent, the party accused of fraud must have had a duty to speak. *Progressive Casualty Ins. Co. v. C.A. Reaseguradora Nacional de Venezuela*, 991 F.2d 42, 47 (2d Cir.1993). Such a duty "ordinarily arises where the parties are in a fiduciary or other relationship signifying a heightened level of trust." *Remington Rand Corp. v. Amsterdam-Rotterdam Bank, N.V.*, 68 F.3d 1478, 1483 (2d Cir.1995). For example, a duty to disclose may arise if "one party possesses superior knowledge, not readily available to the other, and knows that the other is acting on the basis of mistaken knowledge." *Id.* at 1484. See also *Ceribelli v. Elghanayan*, 990 F.2d 62, 64 (2d Cir.1993). The relationship between debtor and creditor is not, absent special circumstances, a fiduciary relationship. In *Re Mid-Island Hospital, Inc.*, 276 F.3d 123, 130 (2d Cir.2002); *Wiener v. Lazard Freres & Co.*, 241 A.D.2d 114, 672 N.Y.S.2d 8, 14 (1st Dept.1998). "When parties deal at arms length in a commercial transaction, no relation of trust or confidence sufficient to find the existence of a fiduciary relationship will arise absent extraordinary circumstances." In *Re Mid-Island*, 276 F.3d at 130.

The Borrowers have not pleaded sufficient facts from which to infer the existence of a fiduciary relationship between themselves and BCI. In particular, Borrowers fail to plead

sufficient facts to show how BCI's knowledge of the value of the Aircraft was superior to their own. Borrowers' only allegation of superior knowledge is that "upon information and belief" BCI is an "expert" in the "evaluation of the market for various aircraft [sic]," while Naske Air "had no comparable expertise." These allegations are insufficient to support the necessary imbalance in light of the pleadings' averments that Naske Air is itself an airline company and the absence of any allegation that Naske Air was denied an opportunity to inspect the Aircraft. The claim of fraudulent inducement, to the extent it is based on an omission theory, is dismissed.

[2] Borrowers' alternative theory of fraudulent inducement is based upon a misrepresentation theory. Because a fraudulent inducement claim necessarily involves allegations of fraud, it must meet Rule 9(b)'s heightened pleading requirements. See *Hoffenberg v. Hoffman & Pollok*, 248 F.Supp.2d 303, 310-11 (S.D.N.Y.2003). Borrowers' conclusory allegations are not sufficient to meet Rule 9(b)'s pleading requirements. Borrowers fail to identify the allegedly fraudulent statements made by BCI, the speaker or speakers of the allegedly fraudulent statements, or when and where the statements were made.

*4 Borrowers admit that their fraudulent inducement claim is not pled with sufficient particularity, but contend that Naske's death entitles them to relief from the strictures of Rule 9(b) since Naske was the only person who had contact with BCI in negotiating the loan. They rely on the principle that facts peculiarly within the opposing party's knowledge may be pled on information and belief despite Rule 9(b)'s heightened pleading requirements. See *IUE AFL-CIO Pension Fund v. Herrmann*, 9 F.3d 1049, 1058 (2d Cir.1993) (need not plead those facts to which plaintiff was never privy); *Wexner v. First Manhattan Co.*, 902 F.2d 169, 172 (2d Cir.1990) (exception is not a license for speculation). Even when facts are exclusively within the other party's control, however, a complaint must still contain specific facts supporting a strong inference of fraud. See, e.g., *Wexner*, 902 F.2d at 172; *Elliott Assocs.*,

L.P. v. Covance, Inc., No. 00-C4115 (SAS), 2000 WL 1752848, at *6 (S.D.N.Y. Nov.28, 2000) (citing *Devaney v. A.P. Chester*, 813 F.2d 566, 569 (2d Cir.1987)). Naske's death does not relieve Borrowers of their obligation to plead the specific representations that constitute the fraud and to identify the speaker and date of the representations. Without such basic information, the allegations constitute little more than speculation. Borrowers' failure to plead any specific facts to support the claim of fraudulent inducement requires that this counterclaim and its associated affirmative defenses be dismissed.

Negligent Misrepresentation

[3] Under New York law, a claim for negligent misrepresentation requires proof that

(1) the defendant had a duty, as a result of a special relationship, to give correct information; (2) the defendant made a false representation that he or she should have known was incorrect; (3) the information supplied in the representation was known by the defendant to be desired by the plaintiff for a serious purpose; (4) the plaintiff intended to rely and act upon it; and (5) the plaintiff reasonably relied on it to her detriment.

Hydro Investors, Inc. v. Trafalgar Power Inc., 227 F.3d 8, 20 (2d Cir.2000). A "special relationship" is akin to a fiduciary relationship, but need not rise to that same level. See *Lehman Bros. Commercial Corp. v. Minmetals Intern. Non-Ferrous Metals Trading Co.*, 179 F.Supp.2d 118 (S.D.N.Y.2000). Liability for negligent misrepresentation is imposed only on those "who possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified." *Kimmel v. Schaefer*, 89 N.Y.2d 257, 263, 652 N.Y.S.2d 715, 675 N.E.2d 450 (1996). In commercial cases, there must be an "identifiable source of a special duty of care." *Id.* at 264, 652 N.Y.S.2d 715, 675 N.E.2d 450. "Whether the nature and caliber of the relationship between the parties is such that

the injured party's reliance on a negligent misrepresentation is justified generally raises an issue of fact." *Id.* In determining whether justifiable reliance exists in a particular case, a fact finder should consider "whether the person making the representation held or appeared to hold unique or special expertise; whether a special relationship of trust or confidence existed between the parties; and whether the speaker was aware of the use to which the information would be put and supplied it for that purpose." *Id.*

*5 Using Kimmel's three-part analysis, Borrowers fail to plead justifiable reliance on BCI's misrepresentations. Although Borrowers allege that BCI had superior knowledge in the valuation of aircraft, that Borrowers had no comparable expertise, and that BCI obtained an independent appraisal listing the true value of the Aircraft as substantially less than Borrowers paid for it, in light of the entire pleading, these allegations do not suggest that BCI's expertise was sufficiently unique or special. As already noted, Naske Air is identified as an airline company and there is no allegation that it was denied an opportunity to inspect or appraise the Aircraft. Borrowers also fail to plead the existence of a special relationship of trust and confidence with BCI. Borrowers do allege that BCI made representations that the Aircraft was of sufficient value to collateralize the loan, and that BCI knew that Borrowers would rely on its expertise. Their adequate pleading of one of the three Kimmel factors, however, is insufficient to survive a motion to dismiss. See *Suez Equity Investors, L.P. v. Toronto-Dominion Bank*, 250 F.3d 87, 103-104 (2d Cir.2001) (adequate pleading of two of the three Kimmel factors sufficient to overcome a motion to dismiss).

Breach of Fiduciary Duty

As discussed supra, the counterclaims fail to plead that BCI and Borrowers were in a fiduciary relationship. Consequently, Borrowers' counterclaim for breach of fiduciary duty fails as a matter of law. Borrowers make only bare assertions of the existence of such a relationship between

Naske Air and BCI. Conclusory assertions that one party is acting in a fiduciary capacity for another is not sufficient to plead the existence of a fiduciary relationship when the pleadings also contain allegations that the parties were in a borrower/lender relationship. Because the Borrowers do not adequately allege a fiduciary relationship, it is unnecessary to discuss whether BCI's failure to approve the third-party purchaser's application for credit constitutes a breach of fiduciary duty.

Conclusion

The motion by Bombardier Capital Inc. to dismiss the counterclaims and their associated affirmative defenses is granted.

SO ORDERED:

2003 WL 22137989 (S.D.N.Y.)

END OF DOCUMENT

11

United States District Court,
S.D. New York.

BORDEN, INC., Alfred S. Cummin, A.S.
D'Amato, Ann Forrestal and W. Donald
Nyland as Executors of the Estate of Frank V.
Forrestal, Deceased, Robert
Gutheil, Jon Hettinger, David Kelly, Walter
Kocher, Augustine Marusi, Ruth
Marusi, Allan Miller, Bernard Nemtzow,
Herman Peed, Edward I. Piernick, Joseph
Saggese, Eugene Sullivan and Gloria
Sullivan, Plaintiffs,

v.

SPOOR BEHRINS CAMPBELL & YOUNG,
INC.; First Interstate Bank, Ltd.; First
Interstate Investment Services, Inc.; Kenneth
R. Behrins, T. Richard Spoor;
Robert L. Campbell and Michael D. Young,
Defendants.

No. 89 Civ. 8645 (WCC).

July 30, 1993.

As Amended Aug. 30, 1993.

Investors brought suit against investment advisor, claiming securities fraud and RICO violations arising out of investments in limited partnership. Parties moved for summary judgment. The District Court, William C. Conner, J., held that: (1) material issues of fact, precluding summary judgment for investors, existed as to whether advisor had failed to disclose that it was receiving commissions from partnerships, and (2) material issues of fact, precluding summary judgment for parent of advisor, existed as to whether parent could be found to have conspired with advisor in withholding information to investors.

Motions denied.

West Headnotes

[1] Federal Civil Procedure 2465.1
170Ak2465.1

Regardless of whether trial of case is to be before judge or jury, standard for granting summary judgment remains the same, and is

available only when, after drawing all reasonable inferences in favor of party opposing motion, no reasonable trier of fact could find for nonmoving party.

[2] Federal Civil Procedure 2511
170Ak2511

Material issues of fact, precluding summary judgment on behalf of investors, existed as to whether sellers of interests in investment had disclosed that they received commissions from promoters of investments; writings indicating that payments were made by promoters to seller used terms such as "fees," which were ambiguous and could be interpreted to mean either commissions for sales or fees in connection with other services, such as due diligence. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b); 18 U.S.C.A. § 1961 et seq.

[3] Federal Civil Procedure 2511
170Ak2511

Material issues of fact, precluding summary judgment, existed as to whether investment advisor providing advice to executives of corporation had violated terms of agreement with corporation, by acting as seller of investment opportunities in limited partnerships while violating representation made to corporation that advisor was not seller of financial instruments; question whether advisor was seller would turn on whether advisor had received commissions from partnerships, issue which was "hotly contested." Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b); 18 U.S.C.A. § 1961 et seq.

[4] Racketeer Influenced and Corrupt Organizations 15
319Hk15

Conspiracies involving securities fraud may serve as predicate acts for RICO claims, even though there is some authority that no private rights of action for conspiracy exist for violations of Rule 10b-5. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b); 18 U.S.C.A. § 1961 et seq.

[5] Conspiracy 2

91k2

Corporation was not entitled to summary judgment on conspiracy charges, based on claim that it could not have conspired with its subsidiary to defraud investors in limited partnerships being touted by subsidiary; alleged conspiracy involved third parties in addition to subsidiary.

[6] Conspiracy 2

91k2

To sustain conspiracy claim, plaintiff need show only that conspirators agreed on common purpose, and need not show that every conspirator conspired directly with every other member of conspiracy.

[7] Conspiracy 19

91k19

Direct proof of conspiracy is seldom available, therefore an illicit agreement may be shown by circumstantial evidence.

[8] Conspiracy 19

91k19

Proof of tacit, as opposed to explicit, understanding is sufficient to show agreement to conspire, and among factors fact finder may consider in inferring conspiracy are relationship of parties, proximity of time and place of acts, and duration of actors' joint activity.

[9] Conspiracy 2

91k2

To demonstrate conspiracy plaintiffs need not show that each conspirator agreed to every detail of conspiracy, but only that each agreed on essential nature of plan.

[10] Conspiracy 21

91k21

Material issues of fact, precluding summary judgment, existed as to claim by parent corporation of investment advisor firm that it was unaware that advisor was receiving commissions from limited partnership investments which it was touting and had consequently not engaged in conspiracy with subsidiary to defraud investors; there was evidence that subsidiary had provided parent with detailed information regarding each

investment in question, showing that commission income was being received.

[11] Conspiracy 9

91k9

Term "placement fee" was synonymous with term "commissions" for purposes of determining whether parent of investment advisor, who had received information that advisor had been given "placement fee" in connection with investment in limited partnership, was participant in conspiracy to conceal from investors fact that partnerships had given advisor "commissions" for having touted investment.

[12] Conspiracy 19

91k19

There was evidence to support determination that parent of subsidiary which was investment advisor had committed acts in furtherance of conspiracy with advisor to keep investors from discovering that limited partnerships in which investments had been made upon advisor's recommendation were paying commissions to advisor; parent had omitted from filings with Securities and Exchange Commission any discussions of subsidiary's sales of those limited partnership interests.

*217 Bressler, Amery & Ross, New York City, for plaintiffs (Bernard Bressler, David J. Olesker, Daniel Baldwin, and Noel C. Crowley, of counsel).

Sullivan & Cromwell, New York City, for defendants (Philip L. Graham, Jr., John B. Reid-Dodick, and Lisa J. Laplace, of counsel).

***218 OPINION AND ORDER**

WILLIAM C. CONNER, District Judge:

Plaintiffs Borden, Inc., et al. bring this action against Spoor Behrins Campbell & Young, Inc. ("SBCY"), each of SBCY's principals (T. Richard Spoor, Kenneth R. Behrins, Robert L. Campbell, and Michael D. Young), First Interstate Investment Services, Inc. ("FIIS"), and First Interstate Bank, Ltd. ("FIB") for violations of section 10(b) of the

Securities and Exchange Act of 1934, 15 U.S.C. § 78j(b), and SEC Rule 10b-5 promulgated thereunder; [FN1] violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 et seq.; and for numerous common law violations. The action is presently before the Court on the parties' cross motions for partial summary judgment. The motions are denied.

FN1. Plaintiffs state claims for direct securities fraud, aiding and abetting, control person liability, and conspiracy to commit securities fraud.

BACKGROUND

SBCY is a personal financial planning boutique established in 1978 which was acquired by FIB, through FIB's subsidiary FIIS, on May 25, 1983, and operated as a wholly owned subsidiary from that date until the end of 1987. On February 2, 1979, Borden, Inc. ("Borden") retained SBCY to provide financial advice to a selected group of its executives ("the individual plaintiffs") for a period of one year, and the contract was renewed annually through the end of 1985. During the course of this relationship, SBCY recommended that these Borden executives purchase interests in a number of limited partnerships as tax shelters. The gravamen of the complaint is that by failing to disclose payments SBCY received from each of these partnerships, defendants fraudulently induced 51 purchases by the individual plaintiffs of interests in 20 separate limited partnerships.

In support of the instant motions, plaintiffs argue that the undisputed facts show that SBCY received undisclosed commissions on 40 of their purchases in 15 of the limited partnership at issue, [FN2] and defendants FIB and FIIS ("the FIB defendants") argue that they can not be held liable for SBCY's alleged fraudulent behavior that occurred prior to their acquisition of SBCY. Both summary judgment motions are denied.

FN2. Investments in the following limited partnerships are the subject of this motion: Holiday Assoc. of Marathon Key ("Marathon Key"); Triangle Professional Assoc. ("Triangle"); Holiday

Assoc. of Mt. Vernon ("Mt. Vernon"); Holiday Assoc. of Lake Placid, Florida ("Lake Placid"); Transpac 1982-5, 1982-8; Transpac 1983-II; Historic Inns of Annapolis L.P. ("Historic Inns"); Mt. Ida Assoc. ("Mt. Ida"); Marbury Hotel Assoc. of Georgetown Ltd. ("Marbury"); Frick Building Investors. Ltd. ("Frick"); Holiday Assoc. of Sebring ("Sebring"); Market Street Investors L.P. ("Market St."); Searay Partners L.P. ("Searay"); 200 Main St., State Street ("200 Main St."); and T.W. Decisions. Pls.' Br. in Sup. at 5-6.

DISCUSSION

I. Plaintiffs' Motion For Partial Summary Judgment

[1] Plaintiffs seek partial summary judgment on the following claims: Rule 10b-5, (direct, aiding and abetting, and control person liability) (Counts I, II, XVI), RICO (Counts XIV, XV), common law fraud (Count IV), breach of fiduciary duty (Count VIII); aiding and abetting common law tort (Count XIII); breach of contract (Count VI); and imposition of a constructive trust (Count XII). [FN3] In urging us to grant their motion, plaintiffs argue that summary judgment in this case is particularly appropriate because if the case were to go to trial, the Court and not a jury would sit as the finder of fact. Pls.' Br. in Reply at 7. Contrary to plaintiffs' counsel's insinuation, the standard for granting summary judgment under Rule 56, Fed.R.Civ.P., remains the same whether a jury trial or a bench trial is anticipated. In either case summary judgment may be *219 granted only when, after drawing all reasonable inferences in favor of the party opposing the motion, no reasonable trier of fact could find for the nonmoving party. *Lund's, Inc. v. Chemical Bank*, 870 F.2d 840, 844 (2d Cir.1989). A summary judgment is not appropriate where material factual matters are in dispute. *National Union Fire Ins. Co. v. Turtur*, 892 F.2d 199, 203 (2d Cir.1989). In support of their motion, plaintiffs contend that the undisputed facts demonstrate that SBCY received undisclosed commissions on the investments at issue. However, a review of the discovery materials submitted pursuant to this motion reveals that

the matter of SBCY's alleged commissions is hotly contested. Since only the finder of fact at trial may weigh the credibility of contradictory evidence, the submissions of plaintiffs' counsel are not the stuff of which summary judgments are made. [FN4]

FN3. It is not completely clear from plaintiffs' submissions which claims are subject to this motion. The claims for negligence and receiving commercial bribes (Counts VII, X) appear in some, but not all, of plaintiffs' headings but are not analyzed in the argument, while the claim for aiding and abetting common law tort (Count XIII) is not mentioned in the headings but is analyzed in the argument. We address only those claims that plaintiffs analyze in their discussion.

FN4. Defendants SBCY, T. Richard Spoor, Kenneth R. Behrins, Robert L. Campbell, and Michael D. Young do not file a memorandum of law in opposition to plaintiffs' motion, and counsel for these defendants has expressed a desire to rest on those arguments made in the brief filed by the FIB defendants. Although under local rule 3(b) failure to submit a memorandum of law may be deemed sufficient cause to grant a motion in default, it would be inappropriate to do so in this case where arguments and authority have been presented to the Court which require that plaintiffs' motion be denied as to all defendants.

A. There Is A Question Of Fact As To Whether SBCY Received Undisclosed Commissions.

[2] Defendants do not dispute that SBCY received fees from a number of the limited partnerships at issue for various types of services and, at trial, plaintiffs may contend that there was inadequate disclosure of each of these payments which created a conflict of interest for SBCY. However, plaintiffs' basis for the instant motion is much narrower. The evidence presented by plaintiffs shows only that, for the subset of investments at issue, SBCY did not disclose that it would receive any fees in the form of commissions. Plaintiffs unsuccessfully attempt to show from undisputed evidence that SBCY received commissions on these investments.

1. SBCY's Disclosure Of Payments Received From The Partnerships At Issue.

Pursuant to this motion the totality of SBCY's fee disclosure is not before the Court. Each of the 15 limited partnerships that are the subject of this motion was distributed pursuant to a private placement memorandum ("PPM"). However, out of these lengthy documents, plaintiffs submit only the two or three selected pages which discuss the commission, if any, that would be paid to purchasing representatives. As plaintiffs point out, none of the PPMs discloses commissions paid to SBCY. [FN5] In addition, purchasing questionnaires were executed by the individual plaintiffs in connection with a number of the limited partnerships at issue, and plaintiffs selectively cite these documents as well. The placement questionnaires for two of the limited partnerships are attached as exhibits to the motion, and plaintiffs' counsel purports to have copied into plaintiffs' brief selected paragraphs from the questionnaires for seven other limited partnerships. [FN6] Every excerpt plaintiffs cite from *220 SBCY's disclosure documents is designed to show that SBCY represented to plaintiffs that it would not receive commissions on their investments. Plaintiffs' limited analysis of SBCY's disclosure narrows the scope of this motion. In order to prevail, plaintiffs must demonstrate from the uncontested facts that SBCY received commissions pursuant to each investment at issue.

FN5. The PPMs for the Historic Inns, Mt. Ida, and 200 Main St. limited partnerships state that no commissions will be paid from the proceeds of the investments. See Pls.' Ex. 33, 34, 44 respectively. The PPM for the Triangle limited partnership is somewhat ambiguous. It states that no syndication fees will be paid and if any are incurred, they will be paid by the general partner, not by the partnership. See Pls.' Ex. 41 at note [3]. The remainder of the PPMs disclose some selling commissions but none states specifically that SBCY will receive any commission. See Pls.' Ex. 35-39, 41-43, 45-47; and Defs.' Ex. in Sup. 23.

FN6. Plaintiffs include Bernaro Nemtzow's purchasing questionnaire in the Frick limited

partnership in which SBCY discloses that it will receive fees for due diligence, travel, and investment surveillance and Augustine Marusi's purchasing questionnaire for the Market St. limited partnership in which SBCY discloses that it will receive undetermined but substantial fees for financial consultation services. Pls.' Ex. 40. Plaintiffs quote from the purchasing questionnaires used in the Marathon Key, Lake Placid, Mt. Vernon, Sebring, Triangle, Marbury, and Transpac 1983-11 limited partnerships to show that SBCY only disclose fees received for due diligence, travel, and investment surveillance. These quotations are made to support plaintiffs' position that SBCY did not disclose any commission payments. Pursuant to a summary judgment motion it may be inappropriate to consider documents quoted in plaintiffs' brief that are not submitted as exhibits. However, since plaintiffs have failed to show that SBCY received commissions on the investments in question, we need not reach this issue.

2. The Undisputed Facts Do Not Show That SBCY Received Commissions On The Investments At Issue.

Plaintiffs fail to present the Court with undisputed evidence that SBCY received commissions on the investments that are the subject of this motion. Kenneth Behrins, the SBCY principal responsible for negotiating the fees with the general partners and promoters, and Michael Young, another SBCY principal, maintain that the fees received from the limited partnerships were paid for due diligence, surveillance, and monitoring, and therefore did not constitute commissions. Behrins Dep. at 163, 359; Young Dep. at 80-83. [FN7] Defendants also provide the Court with SBCY's response to plaintiffs' interrogatory in which SBCY lists the non-sales services performed for each limited partnership. Defs.' Ex. in Op. 47. The fact that plaintiffs submit a multitude of documents, in an attempt to impeach the evidence put forth by defendants, confirms the existence of a fundamental factual dispute which compels us to deny plaintiffs' motion. Nevertheless, we discuss plaintiffs' submissions and show why they fail to establish conclusively that SBCY received commissions on the investments at issue.

FN7. James Fox, CEO of FIIS and Dale Welton, CFO of FIIS, also understood that the fees were paid for non-sales services. Fox Dep. at 66-67; Welton Dep. at 54.

Many of the documents cited by plaintiffs use ambiguous terms such as "investment fees", Pls.' Ex. 15, or "placement fees" [FN8] to describe the payments that SBCY received from the limited partnerships. Nonetheless plaintiffs' counsel argues that these documents constitute undisputed evidence that SBCY received commissions on the investments in question. However, Kenneth Behrins' deposition states that the term "placement fees" was not intended to be synonymous with "commission", [FN9] and therefore these documents merely reveal a disputed issue of fact.

FN8. The term "placement fee" is used to describe SBCY's non-financial planning revenue in Pls.' Ex. 17, 21, 24, 25, 26, 27, 28.

FN9. Kenneth Behrins testified as follows at his deposition: Q. What do you think "placement fees" means? A. That was a term that I believe First Interstate used to distinguish the fees that we received for due diligence, surveillance, so forth from our financial counseling fees ... Behrins Dep. at 120.

Further, many of the documents that plaintiffs cite describe SBCY's aggregate revenue stream and thus fail unambiguously to support the conclusion that SBCY received commissions on the specific investments at issue. For example, plaintiffs make much of documents associated with Covington & Burling's (FIB's outside counsel) analysis of whether SBCY's activities required it to register as a broker/dealer. The first of these are some handwritten notes attributed to Phyllis Thompson, a Covington & Burling associate, which state that SBCY received fees for, among other things, finding investors for the general partners in limited partnerships. Pls.' Ex. 9. Thompson also received a letter from Young of SBCY that described the payments from the limited partnerships as investment management fees. Pls.' Ex. 6. Young's letter explained that the magnitude

of these fees was dependent on two factors; first, the amount of time, travel, and expenses which would be incurred over the life of the investment, and second the amount the general partner would have received for placing the equity absent SBCY's services. [FN10] Id. Thompson then *221 wrote a memorandum which analyzed whether an investment advisory firm, which received commissions for acting as a purchasing representative for its clients' limited partnership tax shelter investments, was required to register as a broker/dealer. Pls.' Ex. 16. Even if we were to conclude that these documents demonstrate that SBCY had some commission income, there is no evidence that those commissions were received in connection with the investments that are the subject of the instant motion. Properly disclosed commissions may have been received by SBCY from a number of sources. Plaintiffs represent only about 10% of SBCY's total client base, [FN11] and commission revenue on SBCY's balance sheet may have resulted from commissions on investments by other SBCY clients. Moreover, SBCY may have received properly disclosed commissions on some of the plaintiffs' investments which are not part of this motion. For example plaintiffs do not seek summary judgment for their investments in the Virginia Square limited partnership, and plaintiffs admit that the PPM for this investment disclosed that SBCY would receive a 6% commission on the sale of each partnership interest. Pls.' Br. in Sup. at 17. [FN12] Thus, even if plaintiffs' evidence demonstrated that SBCY had some revenue from commissions, this does not support the conclusion that SBCY received commissions on the small subset of investments that are presently before the Court. [FN13]

FN10. Behrins disputes the accuracy of this portion of the letter, Behrins Dep. at 359, and Young explained at his deposition that the amount the general partner would otherwise receive was used only as a yardstick to assure that fees for due diligence, travel etc. would be paid out of the general partner's funds without dipping into the investors' contributions. Young Dep. at 82-83.

FN11. SBCY had 233 active clients, only 24 of which were obtained through its contract with Borden. See Pls.' Ex. 15.

FN12. Plaintiffs' counsel notes he hopes to demonstrate at trial that the portion of the Virginia Square PPM that disclosed SBCY's commission was redacted in the PPM's sent to plaintiffs. Pls.' Br. in Sup. at 17 n. 10.

FN13. Plaintiffs also cite the following documents which, either directly or indirectly, refer to SBCY's aggregate revenue stream: auditors' reports which discuss the revenue that SBCY received from "placement fees" (Pls.' Ex. 17, 21); a letter from Spoor of SBCY to Fox of FIIS breaking down SBCY's fee revenue to 65% financial planning fees and 35% "investment fees" (Pls.' Ex. 15); a hand written budget which predicts SBCY's "placement fee" revenue (Pls.' Ex. 24); and revenue projections for SBCY which break SBCY's fee revenue into various categories one of which is "placement fees" (Pls.' Ex. 27).

The few documents that specifically characterize the fees paid to SBCY by partnerships which are the subject of this motion do not conclusively establish that the payments were commissions. SBCY's cash receipts ledgers for 1985 and 1986 show that SBCY received \$150,000 from the Searay limited partnership and \$3,400 from the T.W. Decisions limited partnership both of which were entered under the column for "placement fees". Pls.' Ex. 25, 26; see also Pls.' Ex. 28 (discussing "placement fees" from the T.W. Decision limited partnership). However, as discussed above, defendants provided evidence that the term "placement fees" is not synonymous with the term "commissions". Behrins Dep. at 120. Similarly, there is a handwritten memorandum from Behrins of SBCY to Dale Welton, a financial officer of FIIS, in which Behrins states that SBCY expects to receive payments from the Transpac, Mt. Ida, Marbury, and Frick limited partnerships in early 1984, and Behrins asks Welton if this income might be looked upon as earned in 1983 for purpose of a calculation that was to be made with regard to FIB's acquisition of SBCY. Welton agreed to discuss the matter with James Fox, President and

CEO of FIIS. Pls. Ex. 18. Welton's follow up memorandum to Fox describes these payments as "commissions/fees". Pls.' Ex. 19. The fact that Welton used the term "commissions/fees" suggests his uncertainty as to the actual nature of the fees; Welton's deposition states that the fees discussed in his memorandum were for due diligence and other similar services. Welton Dep. at 54. Therefore, this document is not unambiguous support for the conclusion that these payments were commissions as opposed to some other type of fee. [FN14] Even if it were, the *222 evidence would have to be weighed by the finder of fact against denials by Behrins and Young that any commissions were received by SBCY. Behrins Dep. at 163, 359; Young Dep. at 80-83.

FN14. The only unambiguous statement that SBCY received commissions was provided by Walter Kocher, General Counsel of Borden, who testified at his deposition that the general partner of the Historic Inns limited partnership told him that the partnership paid commissions to SBCY. Pls.' Ex 10 at 153. However, this hearsay may not be considered as evidence in support of plaintiffs' motion. *Beyah v. Coughlin*, 789 F.2d 986, 989 (2d Cir.1986).

The weakness of plaintiffs' motion is most clearly evident in their reply brief. Plaintiffs' counsel cites Behrins' deposition testimony discussing the various non-sales services provided in exchange for the fees received from the Historic Inns, Mt. Ida, and Searay limited partnerships. Pls.' Ex. R 35, 36, 33. Plaintiffs' counsel then contends that the Court should disbelieve this evidence because Behrins is an interested party and suggests that we draw a negative inference from defendants' failure to corroborate Behrins' statement with affidavits from the promoters of the limited partnerships. Pls.' Br. in Reply at 45-46. In resolving this motion we are required to draw all factual inferences in defendants' favor; plaintiffs' impeachment of Behrins' credibility must be reserved for the finder of fact at trial. As discussed above, whether SBCY received commissions pursuant to plaintiffs' investments in the limited partnerships at issue is a question of fact that

may not be resolved upon summary judgment. [FN15]

FN15. Plaintiffs point out that the fees were not likely to have been paid for future services because SBCY did not put aside a reserve fund from which the costs of future services might have been paid. See Pls.' Br. in Sup. at 15-18. This evidence is submitted to impeach defendants' contention that the payments were not commissions but were paid for due diligence, surveillance, and monitoring. Behrins Dep. at 163, 359. As stated above, plaintiffs' cross examination evidence will be weighed at trial.

B. Since The Undisputed Facts Do Not Show That SBCY Received Undisclosed Commissions, Plaintiffs' Motion Must Be Denied.

Inadequate disclosure lies at the core of each claim on which plaintiffs seek summary judgment, and since plaintiffs have failed to show from the undisputed facts that SBCY received undisclosed commissions, their motion is denied. Plaintiffs' Rule 10b-5 and common law fraud claims obviously require some central fraudulent conduct, and fraud is also at the heart of the predicate acts supporting the RICO claims. Thus plaintiffs' motion must be denied as to these claims. Further, plaintiffs have failed to demonstrate SBCY's breach of fiduciary duty or any basis upon which to establish a constructive trust in plaintiffs' favor as a matter of law.

[3] Borden's breach of contract allegation against SBCY and its principals is the only claim that requires more analysis. Borden entered into a written agreement with SBCY to provide a number of its executives with financial planning services. Pls.' Ex. 2. Although the terms of this contract did not preclude SBCY from receiving payments from limited partnerships, SBCY represented in its initial letter to Borden that it was not a seller of financial instruments, and plaintiffs argue that this representation should be incorporated into the agreement. Pls.' Ex. 1. Even if we were to accept plaintiffs' interpretation of the agreement, summary judgment would not be appropriate because

plaintiffs fail to show from the uncontested facts that SBCY received commissions from the limited partnerships and thus plaintiffs cannot demonstrate that SBCY "sold" securities to Borden executives in breach of this agreement. Plaintiffs' motion is therefore denied in full. [FN16]

FN16. Earlier in these proceedings, defendants moved the Court to rule that the statute of limitations on a number of plaintiffs' claims had lapsed. Our decision denied defendants' motion in part and noted some disputed issues of fact on which the timeliness of plaintiffs' claims depended. *Borden, Inc. v. Spoor Behrins Campbell & Young, Inc.*, 778 F.Supp. 695, 700 (S.D.N.Y.1991). Plaintiffs' counsel now contends that the undisputed facts support the resolution of these matters in plaintiffs' favor. We need not reach this argument because the analysis above disposes of plaintiffs' motion. Similarly, defendants argue that we should deny plaintiffs' motion because plaintiffs' counsel has failed to proffer undisputed evidence supporting causation (both loss and transaction causation) and establishing plaintiffs' reliance on the alleged misstatements. Further, the FIB defendants argue that an issue of fact remains as to whether they had the requisite mental state to support summary judgment in plaintiffs' favor on a number of the claims. Again, pursuant to the analysis above we need not reach defendants' well-argued contentions.

***223 II. The FIB Defendants' Motion For Partial Summary Judgment**

The FIB defendants make their own motion for partial summary judgment. Of the 20 limited partnerships which are the subject of this action, nine were fully funded prior to FIB's, May 23, 1983, acquisition of SBCY. The FIB defendants seek partial summary judgment as to these investments. As movant, the FIB defendants now face the same obstacles that led to the denial of plaintiffs' motion. All inferences which our prior analysis made in defendants' favor now cut against granting defendants' motion because summary judgment is appropriate only if no reasonable fact finder could find for the nonmoving party. *Lund's*, 870 F.2d at 844.

[4] The conspiracy counts embody plaintiffs' primary theory for extending liability to the FIB defendants for pre-acquisition claims. [FN17] Plaintiffs contend that beginning in 1979, SBCY and the general partners and promoters of the various limited partnerships at issue formed a conspiracy to defraud investors, and that the FIB defendants joined this conspiracy on or about the time of their acquisition of SBCY and thereby became responsible for all of the conspiracy's past and future civil liabilities. Pls.' Br. in Op. at 29-31. [FN18] The FIB defendants do not contest the application of the "late joinder" rule to the case at bar, and argue only that parent and subsidiary corporations may not conspire with each other as a matter of law and, alternatively, that the undisputed facts do not support a finding that they conspired to defraud plaintiffs.

FN17. Plaintiffs set out the following conspiracy-based causes of action: conspiracy to violate Rule 10b-5 (count III); conspiracy to violate RICO and conspiratorial predicate acts to support their RICO claim (count XV); and a number of common law conspiracies (conspiracy to breach a fiduciary duty (count IX), conspiracy to commit common law fraud (count V), and conspiracy to cause SBCY to receive commercial bribes (count XI)). The FIB defendants point out that some courts have found that there is no private right of action for conspiracy to violate Rule 10b-5 and therefore count V of plaintiffs' complaint may not serve as a separate basis for relief. *Huang v. Sentinel Gov't Sec.*, 709 F.Supp. 1290, 1295-96 (S.D.N.Y.1989); *Kaliski v. Hunt Int'l Resources Corp.*, 609 F.Supp. 649, 653 (N.D.Ill.1985); but see *Deppe v. Tripp*, 863 F.2d 1356, 1367 (7th Cir.1988). However, the issue at this point is somewhat academic because conspiracies involving securities fraud may serve as predicate acts for plaintiffs' RICO claim. *United States v. Weisman*, 624 F.2d 1118, 1123-24 (2d Cir.), cert. denied, 449 U.S. 871, 101 S.Ct. 209, 66 L.Ed.2d 91 (1980) (the language of 18 U.S.C. § 1961(1)(D) is certainly broad enough on its face to include conspiracies involving securities fraud). Although *Weisman* was a criminal RICO case, conspiracy to commit securities fraud may support a civil RICO claim as well. *Zola v. Gordon*, 685 F.Supp. 354, 376 n. 28 (S.D.N.Y.1988); *First Fed. Sav. and Loan v. Oppenheim, Appel, Dixon &*

Co., 629 F.Supp. 427, 445 (S.D.N.Y.1986); Kronfeld v. First New Jersey Nat'l Bank, 638 F.Supp. 1454, 1472-73 (D.N.J.1986).

FN18. Plaintiffs also contend that their aiding and abetting and control person claims against the FIB defendants extend to three of the nine limited partnerships which are the subject of this motion because a reasonable fact finder may conclude that the FIB defendants' control over SBCY extended all the way back to the letter of intent executed with SBCY on July 1, 1982. However, we need not reach this point because defendants' motion for summary judgment on the conspiracy claims is denied.

A. A Finding That The FIB Defendants Conspired With Their Subsidiary Is Not Precluded As A Matter Of Law.

[5][6] The FIB defendants point to the parent-subsidiary relationship that existed between themselves and SBCY and argue that this eliminates the possibility of a conspiracy between defendants. To support their position, the FIB defendants largely rely on the Supreme Court's holding in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984). We are not convinced that Copperweld's reasoning should be extended to the securities fraud, RICO, and common law conspiracies at bar; even if it were so extended, plaintiffs point to a number of third parties-with no corporate relationship to defendants-with whom a reasonable fact finder might find that defendants conspired.

In *Copperweld*, the Supreme Court held that a conspiracy in restraint of trade, in violation of section 1 of the Sherman Antitrust Act, could not be found where the players included only a parent corporation and its wholly owned subsidiary. The court *224 noted that vigorous competition, which is at the base of our free market economy, is dependent upon the ability of firms to execute unitary corporate policy and therefore concluded that concerted action within a firm or between a firm and its wholly owned subsidiary is not constrained by section 1 of the Sherman Act. Id. at 769-774, 104 S.Ct. at 2740-2743. Since

we see no similar social benefit flowing either from agreements to commit securities fraud or to establish and maintain racketeering enterprises, or from joint tortious behavior, we question whether *Copperweld* should be extended to these contexts. Other courts have acknowledged that *Copperweld*'s reasoning is specific to the antitrust context and have not applied it to RICO conspiracies. *Rouse v. Rouse*, 1990 WL 160194, *13 (N.D.N.Y.1990); *Ashland Oil, Inc. v. Arnett*, 875 F.2d 1271, 1281 (7th Cir.1989); *Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162, 1166-67 (3d Cir.1989); *Curley v. Cumberland Farms Dairy, Inc.*, 728 F.Supp. 1123, 1135 (D.N.J.1989); see *Haroco, Inc. v. American Nat'l Bank and Trust Co.*, 747 F.2d 384, 403 n. 22 (7th Cir.1984), *aff'd* on other grounds, 473 U.S. 606, 105 S.Ct. 3291, 87 L.Ed.2d 437 (1985). The FIB defendants do not cite, nor have we discovered, any reliable authority stating whether New York law permits finding civil conspiracies between parent and subsidiary corporations. [FN19] There is some logic in the position that entities, which are made distinct by state corporate law, are also separate entities capable of entering into illicit agreements under state civil conspiracy law. However, we need not reach this issue because the conspiracy at bar includes participants with no corporate relationship to defendants.

FN19. The only case cited by the FIB defendants in support of their position is *Valdan Sportswear v. Montgomery Ward & Co.*, 591 F.Supp. 1188 (S.D.N.Y.1984) which held that agents of a corporation taking action on its behalf can not be held liable for a common law conspiracy. Id. at 1191. This language does not support a holding that a parent corporation can not conspire with its subsidiary. The only other case cited by the FIB defendants does not apply New York law. *Bunch v. Artec Int'l Corp.*, 559 F.Supp. 961 (S.D.N.Y.1983) (applying Pennsylvania and Oregon law).

Plaintiffs present a conspiracy which involved not only FIB, FIIS, and SBCY, but also the general partners and promoters of the various limited partners at issue. There is some evidence that the FIB defendants knew

of, and agreed to participate in, a concerted action between SBCY and the partnership administrators to defraud plaintiffs. [FN20] The FIB defendants argue that they could not have engaged in such a conspiracy because they had no direct contact with the limited partnership promoters, participating in the affair only through their subsidiary, SBCY. However, to sustain a conspiracy claim, plaintiffs need show only that the conspirators "agreed on a common purpose" and need not show that every conspirator conspired directly with every other member of the conspiracy. *United States v. Nerlinger*, 862 F.2d 967, 973 (2d Cir.1988); *United States v. Friedman*, 854 F.2d 535, 562 (2d Cir.1988), cert. denied, 490 U.S. 1004, 109 S.Ct. 1637, 104 L.Ed.2d 153 (1989). [FN21] Since, as shown below, a reasonable fact finder may conclude that, through an agreement with SBCY, the FIB defendants conspired with third parties to defraud plaintiffs, the conspiracy claims are not invalid as a matter of law.

FN20. The FIB defendants contend that the undisputed evidence supports the conclusion that they did not conspire with SBCY, but this contention is analyzed below at length and rejected.

FN21. To refute plaintiffs' "chain conspiracy" theory, the FIB defendants argue that the holding in *Copperweld* dictates that a wholly owned subsidiary can not serve as the "link in the chain" which connects a parent corporation to a conspiracy with unrelated third parties. However, in this argument the FIB defendants stretch *Copperweld* beyond even its application in the antitrust context. Counsel for the FIB defendants seem to contend that under *Copperweld*, a parent corporation could conspire with its wholly owned subsidiary to establish a cartel among various unrelated firms, and as long as the parent corporation had no direct contact with the third party conspirators, it would be beyond the reach of section 1 of the Sherman Act. This contention is patently meritless. *Copperweld* holds only that, in the antitrust context, a parent and a subsidiary alone do not a conspiracy make. It does not stand for the proposition that a parent corporation can not conspire with third parties through its subsidiary.

***225 B. The Undisputed Facts Do Not**

**Preclude A Finding That The FIB Defendants
Conspired To Defraud Plaintiffs.**

The FIB defendants argue that the undisputed facts demonstrate that they did not conspire with SBCY to defraud plaintiffs. A conspiracy is an agreement between two or more persons to accomplish an unlawful purpose. *Morse v. Weingarten*, 777 F.Supp. 312, 318 (S.D.N.Y.1991). The FIB defendants primarily argue that they did not know that SBCY was receiving undisclosed commissions and therefore could not have entered into an illicit agreement to defraud plaintiffs by concealing this fact; alternatively, they contend that even if they knew of SBCY's scheme to defraud, there is no evidence that they agreed to further these wrongful goals. *Abrams v. Painewebber, Inc.*, 1991 WL 218106 (D.Conn.1991). Since the undisputed facts do not support these arguments, the FIB defendants' summary judgment motion is denied.

[7][8][9] As a preliminary matter, we point out that direct proof of a conspiracy is seldom available, and therefore an illicit agreement may be shown via circumstantial evidence. *H.L. Moore Drug Exch. v. Eli Lilly and Co.*, 662 F.2d 935, 941 (2d Cir.1981), cert. denied, 459 U.S. 880, 103 S.Ct. 176, 74 L.Ed.2d 144 (1982). Proof of tacit, as opposed to explicit, understanding is sufficient to show agreement, and among the factors a fact finder may consider in inferring a conspiracy are the relationship of the parties, proximity in time and place of the acts, and the duration of the actors' joint activity. *Diduck v. Kaszycki & Sons Contractors, Inc.*, 774 F.Supp. 802, 813 (S.D.N.Y.1991), aff'd in part, rev'd in part on other grounds, 974 F.2d 270 (2d Cir.1992). Further, to demonstrate a conspiracy, plaintiffs need not show that each conspirator agreed to every detail of the conspiracy but only that each agreed on the "essential nature of the plan". *United States v. Rosenblatt*, 554 F.2d 36, 38 (2d Cir.1977).

[10][11] The FIB defendants first contend that they had no knowledge of SBCY's fraud but admit that they knew that SBCY was receiving fees from the limited partnerships in

which plaintiffs invested. In addition, because Dale Welton wrote a memorandum to James Fox in which he referred to SBCY fee income as income for "commissions/fees" and because the FIB defendants' outside counsel wrote a memorandum in which it analyzed whether SBCY's "commission" income would require SBCY to file with the SEC as a broker/dealer, a reasonable fact finder could also conclude that the FIB defendants knew that SBCY received commissions from the partnerships. See supra 11, 9. Thus, the FIB defendants argue only that they were not aware of SBCY's inadequate disclosure and always believed that SBCY was fully disclosing to its clients the commissions it received.

To support their position, the FIB defendants point to the depositions of James Fox (president and CEO of FIIS), Dale Welton (senior vice president and CFO of FIIS), and William Bogaard (executive vice president and general counsel of FIB) in which each states that, relying completely on oral representation by SBCY principals, he believed that SBCY was fully disclosing the fees received from the partnerships. Fox Dep. at 29; Welton Dep. at 83-84; Bogaard Dep. at 96. However, Michael Young testified at deposition that when he told representatives of the FIB defendants that the fees were fully disclosed, he was asked to provide documents to corroborate this representation, and in response he provided the FIB defendants with the file on every limited partnership containing SBCY's disclosure documents and its revenue data. Young Dep. 114-15. As plaintiffs have demonstrated in support of their motion a review of these documents would have revealed that SBCY was not disclosing the commissions it received on plaintiffs' investments, [FN22] and Young stated that pursuant to FIB's acquisition of SBCY a number of FIB's agents reviewed these documents. *226 Young Dep. 137. The FIB defendants contend that since Young admits he was not present during the review of these documents, Young Dep. 119, 138-39, his statements are not sufficient to show that any representative of the FIB defendants read the documents and detected the fraud.

However, given that these files were provided at the request of the FIB defendants, and in the context of a discussion of the adequacy of SBCY's fee disclosures, we believe a reasonable fact finder would be justified in concluding that representatives of FIB examined these documents with an eye towards the adequacy of SBCY's fee disclosures. [FN23]

FN22. See supra 219-20. As discussed in our analysis of plaintiffs' summary judgment motion, the question of whether SBCY perpetrated a fraud upon plaintiffs is dependent upon questions of fact to be resolved at trial. Therefore for the purposes of the FIB defendants' summary judgment motion we will assume that SBCY perpetrated these frauds unless the FIB defendants show otherwise from the uncontested facts.

FN23. In addition, Bogaard stated that he viewed disclosure as "critically important" which lends additional support to the conclusion that the FIB defendants were not likely to rely solely on the oral representations of SBCY to assure themselves that the fee disclosure was adequate. Bogaard Dep. at 96.

Further, as an investment advisor, SBCY was required to file ADV forms with the SEC and, after the acquisition, FIB undertook the responsibility of completing and filing these forms for SBCY. Pls.' Ex. 76 (Young Dep. at 104). In the ADV forms filed for 1986 and 1987 FIB made the following representation:

From time to time the applicant may have a financial interest through its advisory services rendered to an entity selling investment products to applicant's clients. In every such case a full written disclosure statement is provided to the client indicating the nature and extent of the potential conflict of interest and the extent of the financial interest.

Defs.' Ex. 32, 33 (emphasis added). The FIB defendants would have the Court rule that although FIB represented, in documents filed with the SEC, that SBCY disclosed the nature and extent of every conflict of interest through a "full written disclosure statement", no reasonable fact finder could conclude that FIB

read these written disclosure statements. We find that a reasonable fact finder might easily draw the contrary inference that FIB read these documents pursuant to its preparation of these SEC filings.

The FIB defendants' argument that they knew of the existence and the nature of SBCY's commission revenue, but never knew that the revenue was inadequately disclosed, is undermined by the FIB defendants' detailed review of the disclosure documents in the Searay limited partnership. The FIB defendants admit that they examined the disclosure documents in the Searay limited partnership, and although the Searay PPM discloses substantial fees to be paid to SBCY, the fees are characterized not as commissions but as financial consultation fees. See Defs.' Ex. in Sup. 23. If a fact finder concludes, as one might, that the fees paid pursuant to the Searay limited partnership were commissions [FN24] and if the fact finder concludes that the FIB knew that the fees SBCY received from the limited partnerships were actually commissions, see supra 11, 9, the FIB defendants may then be found to have known of SBCY's fraudulent behavior.

FN24. Plaintiffs supply SBCY's cash receipt ledgers for 1985 and 1986 showing \$150,000 received from the Searay limited partnership and categorized as "placement fees". Pls.' Ex. 25, 26. We feel that the plain meaning of the term "placement fee" is sufficiently similar to the term "commissions" that a reasonable fact finder may determine that the two are synonymous despite defendants Behrins' statements to the contrary. Behrins Dep. at 120.

[12] The FIB defendants contend that, even if they knew of the fraud perpetrated by SBCY, there is no evidence that they supported the conspiracy's illicit goal. Abrams, 1991 WL 218106; see *In re Investors Funding Corp. of N.Y. Sec. Litig.*, 523 F.Supp. 550, 557 (S.D.N.Y.1980) (conspiracy requires a showing of knowing participation in and attachment to the conspiracy). The undisputed facts do not support this conclusion. The ADV forms filed by FIB represented that the only type of products "sold" by SBCY were financial planning

packages for which SBCY received periodic fixed fees. Pls.' Ex. 56. FIB omitted from these filings any discussion of SBCY's sales of limited partnership interests and the commission income received therefrom. At trial, the fact finder may determine that these omissions evidence FIB's desire to conceal SBCY's fraud from the investing public, and therefore the omissions may be found to constitute *227 actions by FIB in furtherance of a conspiracy to defraud plaintiffs. [FN25] Cf. *Newburger, Loeb & Co., Inc. v. Gross*, 563 F.2d 1057, 1074 (2d Cir.1977), cert. denied, 434 U.S. 1035, 98 S.Ct. 769, 54 L.Ed.2d 782 (1978) (civil conspiracy found where corporation knowingly acquiesced in wrongful transfer of partnership assets).

FN25. In addition, FIB filed an application with the Federal Reserve Board ("the Fed") to obtain approval of its acquisition of SBCY. Defs.' Ex. in Op. 1. Although this application and the subsequent addendum to the application discuss the services provided by SBCY, they do not mention the sales services provided by SBCY to the tax shelter partnerships. See Defs.' Ex. in Op. 1, 12. These documents may not evidence an intent to mislead the Fed because Covington & Burling contemporaneously advised FIB as follows: We believe that services as an offeree representative (pursuant to a fee arrangement whereby the issuer pays a commission to the offeree representative) is so common an activity for investment advisory firms that our application to the [Fed] describing [SBCY] as an investment advisor fairly covers similar activity by [SBCY]. Pls.' Ex. 16 at 3. However, these documents are evidence that FIB was somewhat reluctant to use the word "commissions" in relation to SBCY in public documents, and may provide additional support for a finding that FIB wanted to conceal SBCY's fraudulent conduct.

In sum, there are sufficient facts to support a finding that the FIB defendants knew that SBCY was receiving commissions on plaintiffs' limited partnership investments, and that they knew those commission were inadequately disclosed to SBCY's clients. This, coupled with evidence that FIB actively attempted to conceal this fraud from the general public, is sufficient to support a

finding that the FIB defendants conspired to defraud plaintiffs. Whether this evidence is sufficiently persuasive to produce a verdict in plaintiffs' favor on the conspiracy counts is a matter that may only be resolved at trial. However, as our analysis above indicates, plaintiffs have raised sufficient factual issues to defeat the FIB defendants' summary judgment motion.

CONCLUSION

For the foregoing reasons, the parties' cross motions for summary judgment are denied.

SO ORDERED.

828 F.Supp. 216, Fed. Sec. L. Rep. P 97,696

END OF DOCUMENT

12

District Court of Appeal of Florida,
First District.

Joseph Louis BRYANT, Sinatria E. Williams,
Donald Jackson, Thomas Hicks and
Frederick D. Goston, Appellants,
v.
SHANDS TEACHING HOSPITAL AND
CLINICS, INC., et al., Appellees.

No. BE-490.

Nov. 20, 1985.

Former employees of teaching hospital brought action against hospital following their dismissal. The Circuit Court, Alachua County, R.A. Green, Jr., J., granted hospital partial summary judgment, and employees appealed. The District Court of Appeal, Smith, J., held that: (1) statute relating to teaching hospital's transfer from public control to private control did not create statutory exception to at will employment doctrine, and (2) teaching hospital was not bound by personnel policies which allegedly gave employees right to dismissal only for cause.

Affirmed.

West Headnotes

[1] Health 266
198Hk266
(Formerly 204k4 Hospitals)
Statute relating to teaching hospital's transfer from public control to private control, by directing State Board of Education to insure "orderly transition" of hospital employees, West's FSA § 240.513(3)(b)(2), did not create statutory exception to at will employment doctrine in favor of hospital employees who transferred their employment to private corporation. West's F.S.A. § 240.513(3)(b)2.

[2] Constitutional Law 70.1(7.1)
92k70.1(7.1)
(Formerly 92k70.1(7))
While it is true that legislature may carve out exceptions to at will employment doctrine,

District Court of Appeal is not free to identify additional statutory modifications of the at will doctrine unless legislature renders clear statement of its intent to do so.

[3] Health 266
198Hk266
(Formerly 204k4 Hospitals)

Teaching hospital was not bound by personnel policies which allegedly gave employees right to dismissal only for cause, absent showing that the alleged policies were based on explicit mutual promises necessary to create a binding contractual term rather than employees' mere unilateral expectations.

*165 Stephen N. Bernstein of Avera, Bernstein & Perry, Gainesville, for appellants.

Thomas M. Gonzalez and William E. Sizemore of Thompson, Sizemore & Gonzalez, P.A., Tampa, for appellees.

SMITH, Judge.

The issue on this appeal is whether Section 240.513(3)(b)2, Florida Statutes (1979), abrogates the at will employment doctrine for employees of Shands Teaching Hospital and Clinics, Inc. (Shands), a private non-profit corporation. The circuit court granted partial summary judgment in favor of Shands. We affirm.

Appellants, former employees of Shands Teaching Hospital and Clinics at the time the hospital was operated by the State Board of Education, became employees of appellee Shands in July 1980, when control of the hospital was transferred to Shands pursuant to Section 240.513, Florida Statutes (1979). Appellants were all terminated from their employment with the newly constituted employer, Shands, in February 1981, following an investigation conducted by Shands into the theft of hospital property. Criminal charges which were initially filed in the Circuit Court for the Eighth Judicial Circuit, Alachua County, as a result of the investigation were nolle prossed prior to trial. Seeking redress for their alleged wrongful

termination from employment, appellants filed suit. Appellants' identical seven-count amended complaints sought relief based on theories of negligence, malicious prosecution, false arrest and imprisonment, defamation, breach of contract, and misrepresentation. Count 6 of the amended complaints alleged that appellants' dismissal from Shands was improper since Shands had purportedly adopted certain personnel policies which mandated that employees could be terminated only for "cause."

As previously noted, the statute delineating the transfer process was Section 240.513, Florida Statutes (1979). Section 240.513(3)(b)2, provided that the State Board of Education was to enter into a lease or other contract with the non-profit corporation that was to begin operating Shands to:

[provide for] [t]he orderly and just transition of hospital employees from state to corporate employment with the same or equivalent seniority, earnings, and benefits....

Prior to their transfer to Shands Hospital and Clinics, Inc., appellants each signed a document styled "offer of employment." This document listed the appellants' annual, weekly and hourly salary, but contained no specific term of employment. The document further carried an endorsement, purportedly applying to appellants as prospective Shands employees, stating that they had received information concerning employment benefits, wages, and seniority under the new Shands from their supervisors in the previous Shands organization. The endorsement indicated that certain benefits accrued under their former employer would be brought forward into the new Shands, as well as contemplated wage increases. Finally, the endorsement stated:

I acknowledge that I am fully aware of my wages, job title, benefits, and employment practices of the corporation, and wish to become a permanent member of [Shands]....

Shands moved for summary judgment, attaching in support an affidavit from Bryce A. Malsbary, director of personnel at Shands during all relevant times involved in this litigation. In his affidavit, Malsbary stated

that Shands had no formal personnel policies, including procedures covering dismissals, until November 1980. Therefore, Malsbary's affidavit stated, appellants' former supervisors would not have been able to discuss personnel policies with their employees who contemplated continuing employment under the new Shands at the time the employees, including appellants, signed the "offer of employment" documents. Malsbary specifically averred that neither he nor any other management-level employee of Shands negotiated with prospective employees concerning grievance procedures that would be effective in the new Shands organization.

Appellants filed no documentary or other evidence in opposition to Shands' motion for summary judgment. In his order granting partial summary judgment in favor of Shands, the circuit judge found it undisputed that the contract of employment signed by appellants upon joining the *167 new Shands did not establish a definite term of employment between the parties. Noting Florida case law that, absent such an agreement, either party was free to terminate the employment contract at will, either with or without cause, the circuit judge found that appellants had failed to state a cause of action on their breach of contract claim. Accordingly, he granted Shands' motion as to Count 6 of the amended complaint. [FN1]

FN1. The order also notes that appellants conceded that there was no genuine issue of material fact as to Count 7 of the complaint, concerning breach of an employment contract via misrepresentation, and thus granted Shands' motion as to Count 7 as well. Appellants do not here challenge the correctness of this action by the trial court; therefore, we will not consider this point on appeal.

[1] Appellants challenge the circuit court's order on two separate grounds. First, they contend that Section 240.513(3)(b)2, directing the State Board of Education to insure the "orderly transition" of hospital employees constitutes a legislatively-mandated exception to the at will doctrine. Specifically, appellants assert that the term "benefits" as found in subsection (3)(b)2 indicates a

legislative intent to transfer the "cause only" dismissal limitation existing by virtue of appellants' status as career service employees as a "benefit" of their status as employees of the new Shands. Alternatively, appellants contend that the trial court erroneously found no disputed issues of material fact regarding the existence of personnel policies dealing with "just cause" dismissal which, according to appellants, were a part of the contracts of employment they signed with the new Shands. On this latter point, appellants cite *Falls v. Lawnwood Medical Center*, 427 So.2d 361 (Fla. 4th DCA 1983). We find both arguments to be without merit.

Generally, an employee may be terminated at will, that is, without a showing of cause, where the employment contract between the parties is indefinite as to the period of employment. *Perri v. Byrd*, 436 So.2d 359, 361 (Fla. 1st DCA 1983); *DeMarco v. Publix Supermarkets, Inc.*, 360 So.2d 134 (Fla. 3d DCA 1978), cert. den., 367 So.2d 1123 (Fla.1979), approved 384 So.2d 1253 (Fla.1980). Here, the "offer of employment" documents attached to appellants' amended complaint did not state a particular term of employment; therefore, the trial court correctly found that appellants' circumstances fall squarely within the rule recited above. [FN2]

FN2. Although appellants claim to be "permanent employees" as defined by certain personnel policy statements promulgated by Shands in November 1980, the mere fact that an employee is classified as permanent does not change operation of the at will doctrine where, as here, the employee's term of employment remains indefinite. *Russell & Axon v. Handshoe*, 176 So.2d 909 (Fla. 1st DCA 1965), cert. den., 188 So.2d 317 (Fla.1966).

[2] While it is true that the legislature may carve out exceptions to the at will doctrine, see *Smith v. Piezo Technology & Professional Administrators*, 427 So.2d 182 (Fla.1983), this court is not free to identify additional statutory modifications of the at will doctrine unless the legislature renders a clear statement of its intent to do so. *Maguire v. American Family Life Assurance Company of*

Columbus, 442 So.2d 321, 323 (Fla. 3d DCA 1983), pet. for rev. den., 451 So.2d 849 (Fla.1984). Compared, for example, to the language found in Section 440.205 [FN3] (see *Smith, supra*), Section 240.513(3)(b) 2 can hardly be said to constitute a "clear statement" of another legislative exception to the at will doctrine carved out for former employees of the old Shands. Appellants offer nothing in the way of legislative history of the statute or otherwise indicating that the legislature contemplated requiring the new employer *168 to adopt a "just cause" termination policy. [FN4] Appellants' counsel conceded as much at oral argument, but urged this court to read such an intent into the statute in the interests of fairness since, it was argued, the failure to do so would allow Shands to terminate them without just cause, a result contrary to their alleged expectations in joining the new organization.

FN3. Section 440.205. Coercion of Employees. No employers shall discharge, threaten to discharge, intimidate, or coerce any employee by reason of such employee's valid claim for compensation or attempt to claim compensation under the workers' compensation laws. (emphasis supplied)

FN4. In fact, the statutory provision under consideration places the duty to assure a "just and orderly transition" of employee benefits, seniority, and wages on the State Board of Education, see Section 240.513(3)(b), and not on Shands, as appellants claim. In light of our disposition of this cause, we do not address Shands' argument that appellants did not name the proper party-defendant in their complaints. We do note, however, that the statutory language of Section 240.513(3)(b) does not purport to limit the Board of Education in its treatment of those employees who chose to transfer to the new employer.

We must reject appellants' suggestion that this court may act as a "law giver" out of some nebulous sense of fairness or equity. See *Maguire, supra*, 442 So.2d at 323. The law concerning the at will doctrine is well entrenched in the jurisprudence of this state, and may not be modified on any basis but a clear statutory abrogation of the rule. *Smith*

v. Piezo Technology & Professional Administrators, 427 So.2d 182, 184 (Fla.1983); accord, Hartley v. Ocean Reef Club, Inc., 476 So.2d 1327 (Fla. 3d DCA 1985) (no cause of action for retaliatory discharge allegedly contravening public policy). Other "equitable" arguments for a total or partial abrogation of the rule have been rejected, including the alleged unequal bargaining power between an employer and employee, Muller v. Stromberg Carlson Corp., 427 So.2d 266, 269-270 (Fla. 2d DCA 1983) and an employer's "bad motives" in terminating the employee. See DeMarco v. Publix Supermarkets, Inc., supra; see also Ponton v. Scarfone, 468 So.2d 1009 (Fla. 2d DCA 1985). Accordingly, we hold that Section 240.513(3)(b)2, Florida Statutes (1979) does not create a statutory exception to the at will doctrine in favor of employees of Shands Hospital and Clinics who transferred their employment to Shands Hospital and Clinics, Inc. As a result, the circuit court correctly granted partial summary judgment in favor of appellees on the basis of the at will doctrine.

[3] We also reject appellants' contention that we should remand this case to the trial court for a consideration of appellants' alternative argument that Shands, at the time of transfer, operated under certain personnel policies that gave appellants the right to dismissal only for cause. It is well-recognized that the non-moving party faced with a summary judgment motion supported by appropriate proof may not rely on bare, conclusory assertions found in the pleadings to create an issue and thus avoid summary judgment. Instead, the party must produce counter-evidence establishing a genuine issue of material fact. Jones v. Hartford Accident & Indemnity Company, 109 So.2d 582 (Fla. 1st DCA 1959); Johnson v. Gulf Life Insurance Company, 429 So.2d 744 (Fla. 3d DCA 1983). Here, appellants proffered no evidence contrary to the affidavit of Bryce Malsbary that no explicit personnel policies existed in July 1980, the date appellants signed their contracts of employment with the new Shands. In such circumstances, the circuit court was entitled to find, as it implicitly did, that appellants' assertions that the alleged personnel policies

were part of their contract of employment with the new Shands were mere unilateral expectations, rather than the explicit mutual promises necessary to create a binding contractual term. Berrian v. National Railroad Passenger Corp., 429 So.2d 1381 (Fla. 2d DCA 1983); Muller v. Stromberg Carlson Corp., 427 So.2d 266 (Fla. 2d DCA 1983). Falls v. Lawnwood Medical Center, relied on by appellants, is distinguishable in that a factual dispute existed concerning the existence of a "just cause" dismissal policy as part of the contract of employment involved in that case. No such genuine evidentiary uncertainty exists here.

For the reasons stated, the judgment appealed from is AFFIRMED.

MILLS and THOMPSON, JJ., concur.

479 So.2d 165, 10 Fla. L. Weekly 2565

END OF DOCUMENT

13

United States District Court,
S.D. New York.

CITIBANK, N.A. and Citibank Canada,
Plaintiffs,

v.

ITOCHU INTERNATIONAL INC., and III
Holding Inc. f/k/a Copelco Financial
Services Group, Inc., Defendants.

No. 01 Civ. 6007(GBD).

April 4, 2003.

Background: Purchasing corporation brought action against selling corporation and its officers and directors alleging violation of federal securities laws and state law.

Holdings: On defendants' motion to dismiss, the District Court, Daniels, J., held that: (1) indemnification clause was void to extent that it only provided one remedy; (2) purchaser stated common law fraud claim, and federal securities fraud claim under Private Securities Litigation Reform Act (PSLRA), with sufficient particularity; (3) purchaser adequately pleaded scienter against sellers; (4) punitive damages were not available to purchaser; and (5) purchaser could not state cause of action for negligent misrepresentation against sellers for failure to allege special relationship; (6) purchaser stated cause of action for breach of implied covenant of good faith and fair dealing; and (7) purchaser could not maintain claim for unjust enrichment.

Motion granted in part and denied in part.

West Headnotes

[1] Securities Regulation 35.24
349Bk35.24

Indemnification clause in agreement to purchase stock of corporation was void to extent that it only provided one remedy, although parties contracted for exclusive remedy provision; under New York law, parties could not use contractual limitation of liability clauses to shield themselves from

liability for their own fraudulent conduct, and federal securities laws had anti-waiver provision which specifically made void any contractual clause that allowed party to waive compliance with federal securities laws. Securities Exchange Act of 1934, § 29(a), 15 U.S.C.A. § 78cc(a).

[2] Federal Civil Procedure 636
170Ak636

[2] Securities Regulation 60.53
349Bk60.53

Purchasing corporation stated common law fraud claim under New York law, and federal securities fraud claim under Private Securities Litigation Reform Act (PSLRA), with sufficient particularity against sellers of stock of acquired corporation, on allegations that sellers warranted that financial statements were prepared in accordance with generally accepted accounting principles (GAAP) and past accounting practices of acquired corporation, and, instead, sellers devised and used accounting plan that was contrary to GAAP, and proffered inflated financial results to purchasers with intent to defraud them. Securities Exchange Act of 1934, § 21D, as amended, 15 U.S.C.A. § 78u-4; Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.

[3] Securities Regulation 60.51
349Bk60.51

Purchasing corporation adequately pleaded scienter against sellers of stock of acquired corporation in accordance with Private Securities Litigation Reform Act (PSLRA), in that purchaser described set of facts and circumstances that, if proven, would have given rise to strong inference of fraud. Securities Exchange Act of 1934, § 21D, as amended, 15 U.S.C.A. § 78u-4; Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.

[4] Corporations 121(7)
101k121(7)

Punitive damages were not available under New York law to purchasing corporation, for alleged fraud of sellers of acquired corporation, since alleged fraud was not aimed at public generally.

[5] Corporations 118
101k118

Purchasing corporation could not state cause of action for negligent misrepresentation under New York law against sellers of stock in acquired corporation, for failure to allege special relationship between parties; although relationship of confidence developed between parties during negotiation process and purchasers trusted sellers' representations to be accurate, purchasers' relationship with sellers was merely ordinary business relationship.

[6] Corporations 118
101k118

Purchasing corporation stated cause of action for breach of implied covenant of good faith and fair dealing under New York law against sellers of stock in acquired corporation, on allegations that sellers used accounting plan that was contrary to generally accepted accounting principles (GAAP) and past accounting practices of acquired corporation, that sellers knew such plan was artificially inflating acquired corporation's financial figures, and that purchasing corporation relied on sellers' representations.

[7] Implied and Constructive Contracts 55
205Hk55

Purchasing corporation could not maintain claim for unjust enrichment under New York law against sellers of stock in acquired corporation, since valid, enforceable contract governed dispute; although purchaser argued that there could have been grounds for rescission of contract, purchaser did not include rescission as remedy in its complaint.

MEMORANDUM OPINION AND ORDER

DANIELS, J.

*1 Plaintiffs brought suit against defendants alleging violations of §§ 10(b) and 20(a) of the Securities Exchange Act of 1934, and pendent state law claims in connection with plaintiffs' purchase from defendants of all the common stock of Copelco Capital, Inc. Defendants thereafter filed a motion to dismiss. Plaintiffs oppose that motion. For the following reasons,

defendants' motion to dismiss is granted in part, and denied in part.

Discussion

Federal Rule of Civil Procedure 12(b)(6) allows a party to move to dismiss a Complaint where the Complaint "fail[s] ... to state a claim upon which relief can be granted[.]" Fed. R. Civ. P. 12(b)(6). In reviewing a motion to dismiss, this Court accepts the allegations in the Complaint as true and draws all reasonable inferences in favor of the non-moving party. See *Patel v. Searles*, 305 F.3d 130, 134-35 (2d Cir.2002). However, bald contentions, unsupported characterizations, and legal conclusions are not well-pleaded allegations, and will not suffice to defeat a motion to dismiss. See *Leeds v. Meltz*, 85 F.3d 51, 53 (2d Cir.1996). Here, a motion to dismiss will only be granted if the plaintiffs can prove no set of facts in support of their claims that would entitle them to relief. See *Citibank, N.A. v. K-H Corp.*, 968 F.2d 1489, 1494 (2d Cir.1992). A court may look at the Complaint and any documents attached to, or incorporated by reference in, the Complaint. See *Dangler v. New York City off Track Betting Corp.*, 193 F.3d 130, 138 (2d Cir.1999).

Defendants contend that plaintiffs' securities fraud, common law fraud, and negligent misrepresentation claims are based upon statements defendants made in documents other than the Securities Purchase Agreement (the "Agreement"). Defendants argue that these claims must fail as a matter of law because the Agreement explicitly precludes plaintiffs from relying on any representations except those included in the Agreement.

By the plain language of the Agreement, plaintiffs are precluded from asserting reliance on any other statements made by defendants except those contained in the Agreement. Section 4.08 of the Agreement states that "Sellers [defendants] make no representation or warranties with respect to ... any other information or documents made available to Buyer [plaintiffs] or its counsel, accountants or advisors ... except as expressly

set forth in this Agreement." Agreement at § 4.08. Plaintiffs are sophisticated business entities who were represented by counsel, and negotiated the Agreement at arm's length. This Court, therefore, will hold plaintiffs to the agreement to which they bargained. Plaintiffs' securities fraud, common law fraud, and negligent misrepresentation claims cannot be based upon representations outside of the Agreement.

Nevertheless, plaintiffs contend that their securities fraud, common law fraud, and negligent misrepresentation allegations still survive as their Complaint, in fact, also alleges violations of the Agreement. Section 3.08 of the Agreement warrants that Copelco's financial statements were prepared in conformity with Generally Accepted Accounting Principles ("GAAP"), while § 3.09 of the Agreement warrants that the financial statements were prepared consistent with past Copelco practices. At paragraph 21 of the Complaint, plaintiffs quote § 3.08 of the Agreement and then allege that defendants "knew, or should have known, that the 1999 audited financial statements had not been prepared in conformity with GAAP and did not fairly represent the financial position of Copelco." Complaint at ¶ 21. Further, the Complaint alleges in the next paragraph that "[d]efendants' conduct also rendered other statements made by Itochu International in the Stock Purchase Agreement deliberately false and misleading." *Id.* at ¶ 22. The Complaint then quotes the portion of § 3.09 of the Agreement where defendants warrant that the financial statements were prepared in accordance with past Copelco practices as an example of one such allegedly false and misleading statement in the Agreement. *Id.* Consequently, plaintiffs have sufficiently alleged violations of the Agreement, itself. Defendants' motion to dismiss the securities fraud, common law fraud, and negligent misrepresentation claims on the grounds that the Complaint does not allege a violation of the Agreement is therefore denied. [FN1]

FN1. As will be discussed later, plaintiffs' negligent misrepresentation claim ultimately fails on other grounds.

*2 [1] Next, defendants contend that plaintiffs' allegations are subject to the Agreement's exclusive remedy provision, which only provides for indemnification as a remedy in the event of a breach. Plaintiffs do not dispute the existence of the exclusive remedy provision. Rather, they argue that, regardless, a party may not contract out of liability for its own fraud.

Section 11.07 of the Agreement provides that "Sections 8.06 and 11.02 will provide the exclusive remedy for any misrepresentation, breach of warranty, covenant or other agreement ... or other claim arising out of this Agreement or the transactions contemplated hereby." Agreement at § 11.07. In turn, §§ 8.06 and 11.02 of the Agreement both provide only for indemnification in the event of a breach, and the terms which trigger such indemnification. See Agreement at §§ 8.06 and 11.02.

Although the parties contracted for this exclusive remedy provision, it is well settled that "parties cannot use contractual limitation of liability clauses to shield themselves from liability for their own fraudulent conduct." *Turkish v. Kasenetz*, 27 F.3d 23, 27-28 (2d Cir.1994). Further, the federal securities laws have an anti-waiver provision which specifically makes void any contractual clause that allows a party to waive compliance with the federal securities laws. Pursuant to 15 U.S.C. § 78cc(a), "[a]ny condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void." 15 U.S.C. § 78cc(a).

The Second Circuit has had occasion to address the scope of the federal anti-waiver policy. In *McMahan & Co. v. Warehouse Enter., Inc.*, 65 F.3d 1044 (2d Cir.1995), the Second Circuit analyzed the effect of a "no-action" contractual clause upon the plaintiffs' securities fraud claims. The "no-action" clause at issue provided that the plaintiffs could not bring suit against defendants unless certain procedural steps were followed, such as providing written notice to the defendants of a

default. Plaintiffs failed to follow the procedural steps outlined, and defendants therefore claimed that plaintiffs waived their right to bring suit under the 1933 and 1934 Securities Exchange Acts. However, the Second Circuit upheld the district court's nullification of the "no-action" clause and found that "[t]he statutory framework of the 1933 and 1934 Acts compels the conclusion that individual security holders may not be forced to forego their rights under the federal securities laws due to a contract provision." McMahan, 65 F.3d at 1051.

Defendants rely on *Harsco Corp. v. Segui*, 91 F.3d 337 (2d Cir.1996) for the proposition that a waiver clause is permissible under the federal securities laws. However, defendants mischaracterize Harsco. Harsco did not involve a waiver clause that prohibited any and all fraud suits under the federal securities laws or under the common law. It involved a contract that specifically outlined the representations that plaintiff was relying upon when it bought defendant's company. That plaintiff's fraud claim was based upon representations made outside the contract.

*3 The Second Circuit was careful to distinguish the facts of Harsco from a contract provision which prohibits a party from suing at all under the federal securities laws. The court found that, in light of the carefully negotiated provision in the contract detailing the representations plaintiff relied upon, plaintiff may only bring a securities fraud suit based upon those specific representations included in the contract, and not based upon representations made outside the contract. The court found that "it is not fair to characterize [the representations agreed upon in the contract] as having prevented [plaintiff] from protecting its substantive rights. [Plaintiff] rigorously defined those rights in [the contract]." *Harsco*, 91 F.3d at 344. The Court found that "[plaintiff] has not waived its rights to bring any suit resulting from this deal." *Id.* Rather, plaintiff only waived its right to bring a federal securities suit based upon representations made outside the contract. See *id.*

Unlike the situation in *Harsco*, defendants here would have this court find that plaintiffs waived their right to bring any and all suits for fraud, even a suit concerning representations made within the contract. Such a broad-sweeping waiver clause is exactly the type of contractual provision that § 78cc(a) and the case law forbid. Therefore, the indemnification clause in the Agreement is void to the extent that it only provides one remedy, and defendants' motion to dismiss the securities fraud, common law fraud, and negligent misrepresentation claims based upon the indemnification clause is denied.

[2][3] Next, defendants argue that plaintiffs' fraud claims fail because the Complaint failed to both plead fraud with particularity, and adequately plead scienter, as required by Fed.R.Civ.P. 9(b) and the Private Securities Litigation Reform Act ("PSLRA"). It is well settled that a Complaint asserting securities fraud must satisfy the pleading requirements of Rule 9(b). [FN2] See *Ganino v. Citizens Utilities Co.*, 228 F.3d 154, 167 (2d Cir.2000). Rule 9(b) requires that "the circumstances constituting fraud or mistake shall be stated with particularity." Fed. R. Civ. P. 9(b). Fraud allegations in a Complaint therefore must: "(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." *Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1128 (2d Cir.1994).

FN2. Generally, Rule 8(a)'s liberal pleading standard applies. However, where fraud is alleged, a court must evaluate the allegations under Rule 9(b)'s heightened pleading standard. See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002).

Further, a Complaint alleging fraud must also allege that the defendants acted with scienter. See *Novak v. Kasaks*, 216 F.3d 300, 306 (2d Cir.2000). A plaintiff must allege facts that give rise to a strong inference of fraudulent intent. See *Shields*, 25 F.3d at 1128; *Novak*, 216 F.3d at 311. A "strong inference" may be established "either (a) by

alleging facts to show that defendants had both motive and opportunity to commit fraud, or (b) by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness." Ganino, 228 F.3d at 168-69, quoting Shields, 25 F.3d at 1128. The inference may also arise where the Complaint sufficiently alleges that the defendants: "(1) benefitted in a concrete and personal way from the purported fraud; (2) engaged in deliberately illegal behavior; (3) knew facts or had access to information suggesting that their public statements were not accurate; or (4) failed to check information they had a duty to monitor." Novak, 216 F.3d at 311 (internal citations omitted).

*4 In this case, plaintiffs allege in their Complaint that they purchased from defendant Itochu International ("Itochu") in May 2000 all the common stock of Copelco. Plaintiffs allege that in purchasing Copelco, plaintiffs relied upon the accuracy of §§ 3.08 and 3.09 of the Agreement, which warranted that Copelco's financial statements and accounting practices were done in accordance with GAAP and consistent with past Copelco practices. Plaintiffs contend that after the closing, plaintiffs discovered that the accounting methods used by defendants artificially inflated Copelco's financial condition, in violation of GAAP and past Copelco practices.

Specifically, plaintiffs contend that, beginning in 1998 through May 16, 2000, Copelco's Chief Financial Officer and its Chief Operating Officer authorized and managed an accounting scheme by which uncollectible lease receivables were subjected to an internal charge-off limitation (the "Cap") above which no further receivables would be charged-off. Plaintiffs contend that the Cap was in violation of both GAAP and past Copelco accounting practices. The effect of the Cap was to appear to maintain Copelco's compliance with the rolling three month loss-to-liquidation rate required by its funding agreements with its various lenders. Failure to comply with this rate would have permitted Copelco's lenders to stop funding and, correspondingly, would have placed Copelco's

access to financing with its various lenders at risk of termination, thereby potentially adversely impacting the value of Copelco's stock. Simply put, plaintiffs allege that lease receivables that should have been charged-off, in compliance with GAAP and past Copelco accounting practices, were not. Plaintiffs then contend that collections managers at Copelco engaged periodically in "horse-trading," where the total available charge-offs under the Cap were divided between the business groups. As a result of the Cap, plaintiffs contend that the overall collectibility of lease receivables was impaired.

Plaintiffs contend that the use of the Cap served not only to misrepresent actual rolling three month loss-to-liquidation rates, but also to overstate Copelco's income for the relevant period. Plaintiffs contend that the alleged misrepresentations caused Copelco's historical losses to be understated by at least \$47 million at the time of the closing. Finally, plaintiffs contend that at all times relevant to the Complaint, defendants, by and through Copelco's officers and directors, knew that the Cap produced inflated numbers, and that plaintiffs relied upon the inaccurate information provided in the Agreement.

Plaintiffs' allegations are sufficiently pled to survive a motion to dismiss. First, plaintiffs have pled their fraud claims with particularity, in accordance with Rule 9(b). The Complaint identifies Copelco's allegedly fraudulent statements, namely §§ 3.08 and 3.09 which warranted that the financial statements were prepared in accordance with GAAP and past Copelco accounting practices. Those statements were clearly made in the Agreement, itself. The speakers are the defendants, the direct signatories to the Agreement. Plaintiffs have further explained why the statements are allegedly fraudulent, in that the CFO and COO of Copelco authorized the Cap plan, knew the Cap plan was contrary to GAAP and past Copelco accounting practices, and proffered the inflated numbers produced to plaintiffs with the intent to defraud them. Therefore, the requirements of Rule 9(b) have been met. Plaintiffs have also adequately pled scienter

in accordance with the PSLRA, in that plaintiffs have described a set of facts and circumstances that, if proven, give rise to a strong inference of fraud. Therefore, defendants' motion to dismiss the securities fraud, and common law fraud claims is denied. [FN3]

FN3. Defendants' motion to dismiss with respect to plaintiffs' vicarious liability claim brought pursuant to § 20(a) of the Securities Exchange Act is premised solely upon their assertion that the underlying securities fraud offense, § 10(b) of the Securities Exchange Act, also fails. As discussed above, plaintiffs have met the pleading standards for their § 10(b) claim, and therefore, this Court accordingly denies defendants' motion to dismiss plaintiffs' § 20(a) claim.

*5 [4] With respect to the common law fraud claim, defendants alternatively argue that even if it survives, plaintiffs' demand for punitive damages should nevertheless be stricken as the alleged fraud was not aimed at the public generally. Punitive damages are available in a fraud claim where the plaintiff demonstrates that the harm was directed at the public generally. See *Rocanova v. Equitable Life Assurance Society*, 643 N.E.2d 940, 943 (N.Y.1994) (in cases evincing "a high degree of moral turpitude, and demonstrating such wanton dishonesty as to imply a criminal indifference to civil obligations, punitive damages are recoverable if the conduct was aimed at the public generally.") (internal quotation marks omitted); *Manning v. Utilities Mutual Ins. Co., Inc.*, 254 F.3d 387, 400 (2d Cir.2001) (quoting *Racanova*). Here, plaintiffs have failed to allege any conduct aimed at the public generally. This was a contract between two private parties, where the alleged harm befell one of the parties. Defendants' motion to strike plaintiffs' demand for punitive damages with respect to the common law fraud claim is therefore granted.

[5] Defendants, further, argue that plaintiffs' claim for negligent misrepresentation fails as a matter of law because plaintiffs have not alleged a "special relationship" between plaintiffs and defendants. Plaintiffs, however,

argue that a "special relationship" existed in that a relationship of confidence developed between the parties during the negotiation process and that plaintiffs trusted defendants' representations to be accurate.

In a negligent misrepresentation claim, a plaintiff must establish that the defendant had a duty to use reasonable care to convey correct information due to the existence of a "special relationship," that the information provided was incorrect or false, and that the plaintiff reasonably relied upon the information. See *Fleet Bank v. Pine Knoll Corp.*, 290 A.D.2d 792, 736 N.Y.S.2d 737, 795 (App.Div.2002). "To that end, a special relationship requires a closer degree of trust than an ordinary business relationship." *Id.* (internal quotation marks omitted), quoting *Busino v. Meachern*, 270 A.D.2d 606, 704 N.Y.S.2d 690, 693 (App.Div.2000); *Butvin v. Doubleclick, Inc.*, No. 99civ 4727, 2000 WL 827673, at *10 (S.D.N.Y. June 26, 2000) ("a plaintiff may only recover for negligent misrepresentation where the defendant owes him a fiduciary duty"). Here, the plaintiffs' relationship with defendants was merely an ordinary business relationship. There is no allegation in the Complaint to support a finding that a "special relationship" existed. Therefore, defendants' motion to dismiss the negligent misrepresentation claim is granted.

[6] Defendants next argue that plaintiffs' claim for breach of the implied covenant of good faith and fair dealing should be dismissed on the grounds that there was no breach in the course of contract performance. The implied covenant of good faith and fair dealing encompasses the concept that "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *Dalton v. Educational Testing Serv.*, 87 N.Y.2d 384, 639 N.Y.S.2d 977, 663 N.E.2d 289, 291 (N.Y.1995), quoting *Kirk La Shello Co. v. Paul Armstrong Co.*, 263 N.Y. 79, 188 N.E. 163, 167 (N.Y.1933). Plaintiffs have alleged that defendants engaged in an accounting plan that was contrary to GAAP and past Copelco accounting practices, that defendants knew the Cap plan was artificially

inflating Copelco's financial figures, and that plaintiffs relied on defendants' representations. If these allegations are proven true, it can fairly be said that defendants' conduct had the effect of destroying or injuring plaintiffs' right to enjoy the fruits of the contract. Plaintiffs have sufficiently alleged, at this stage of the proceeding, a cause of action for breach of implied covenant of good faith and fair dealing and defendants' motion to dismiss this claim is therefore denied.

2003 WL 1797847 (S.D.N.Y.), Fed. Sec. L.
Rep. P 92,403

END OF DOCUMENT

*6 [7] Lastly, defendants argue that plaintiffs' claim for unjust enrichment should be dismissed on the grounds that an unjust enrichment claim can not be maintained where there is a valid, enforceable agreement that governs the dispute. Plaintiffs argue, on the other hand, that an unjust enrichment claim can be maintained where there are grounds for rescission of the contract. "Under New York law, unjust enrichment is a quasi contractual claim that ordinarily can be maintained only in the absence of a valid, enforceable contract. Where a contract governs the subject matter involved, however, a claim for unjust enrichment should be dismissed ." *Ohio Players, Inc. v. Polygram Records, Inc.*, No. 99 civ 0033, 2000 WL 1616999, at *4 (S.D.N.Y. Oct.27, 2000) (citations omitted). In this case, a valid, enforceable contract (the Agreement) governs this dispute. Although plaintiffs have argued in their opposition brief to defendants' motion to dismiss that there could be grounds for rescission of the contract, they did not include rescission as a remedy in their Complaint. Therefore, defendants' motion to dismiss plaintiffs' claim for unjust enrichment is granted.

Conclusion

For the foregoing reasons, defendants' motion to dismiss is GRANTED as to plaintiffs' negligent misrepresentation and unjust enrichment claims, as well as to plaintiffs' demand for punitive damages under the common law fraud claim. The motion to dismiss is DENIED with respect to all remaining claims.

14

Citibank, N. A., et al., Respondents,
v.
Allan R. Plapinger et al., Appellants.

Court of Appeals of New York

Argued September 3, 1985;

decided October 22, 1985

SUMMARY

Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered January 22, 1985, which, by a divided court, affirmed a judgment of the Supreme Court (William P. McCooe, J.), entered in New York County, (1) striking defendants' affirmative defenses and counterclaims, (2) granting a motion by plaintiffs for summary judgment, and (3) awarding plaintiffs damages against defendants, jointly and severally, in the total sum of \$19,211,889.14.

Citibank v Plapinger, 107 AD2d 627, affirmed.

HEADNOTES

Suretyship and Guarantee--Absolute and Unconditional Guarantee--Fraud in Inducement by Oral Representation as Defense--Misrepresentation by Guarantors--Applicability of Condition Precedent Rule (1) Fraud in the inducement of a guarantee by defendant corporate officers of the corporation's indebtedness is not a defense to an action on the guarantee when the guarantee recites that it is absolute and unconditional irrespective of any lack of validity or enforceability of the guarantee, or any other circumstance which might otherwise constitute a defense available to a guarantor in respect of the guarantee, those recitals being inconsistent with the guarantors' claim of reliance upon an oral representation that the plaintiff lending banks were committed to extend to the corporation an additional line of credit; thus, summary judgment was properly granted plaintiff banks because defendant guarantors were foreclosed from establishing

reliance. The rule that fraud in the inducement vitiates a contract is subject to exception where the person claiming to have been defrauded has by his own specific disclaimer of reliance upon oral representations himself been guilty of deliberately misrepresenting his true intention; to permit defendants to rely on the claim that they were fraudulently induced to sign the guarantee by plaintiff banks' oral promise of an additional line of credit would in effect condone defendants' own fraud in deliberately misrepresenting their true intention when putting their signatures to their "absolute and unconditional" guarantee. Moreover, defendants may not rely upon the denial of the additional line of credit as a failure of a condition precedent because the alleged condition would contradict the express terms of the written agreement and, therefore, could not be proved by parol evidence.

Judgments--Summary Judgment--Triable Issue--Fraud in Inducement (2) In an action on the guarantee by defendant corporate officers of the corporation's indebtedness, where the guarantee recited that it is absolute and unconditional irrespective of any lack of validity or enforceability of the guarantee, or any other circumstance which might otherwise constitute a defense available to a guarantor in respect of the guarantee, the defendant guarantors' affidavits *91 contained evidence, uncontradicted by plaintiff lending banks, sufficient to raise a triable issue concerning fraud in the inducement, and, therefore, summary judgment should not have been granted plaintiffs based upon the insufficiency of defendants' evidence in opposition. However, the language of disclaimer in the guarantee is sufficiently specific to foreclose as a matter of law the defenses and counterclaims based on fraud, negligence or failure to perform a condition precedent asserted against plaintiff banks; accordingly, summary judgment was properly granted to plaintiffs on that ground.

POINTS OF COUNSEL

Owen McGivern, George S. Leisure, Jr., Eric

J. Lobenfeld and Robin Kaufman for appellants. I. Defendants' uncontradicted proof of fraud was more than sufficient to preclude summary judgment. (*Rotuba Extruders v Ceppos*, 46 NY2d 223; *Strychalski v Mekus*, 54 AD2d 1068; *Becker-Fineman Camps v Public Serv. Mut. Ins. Co.*, 52 AD2d 656; *Baker's Serv. v Robinson*, 85 AD2d 811; *Tahini Invs. v Bobrowsky*, 99 AD2d 489; *Hladczuk v Epstein*, 98 AD2d 990; *National Bank v Chu*, 64 AD2d 573, 47 NY2d 946; *Millerton Agway Coop. v Briarcliff Farms*, 17 NY2d 57; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395; *Rexford Plumbing, Heating & Hardware Co. v City of Johnstown*, 89 AD2d 1035.) II. Defendants were erroneously barred from proving their defenses. (*Crowell-Collier Pub. Co. v Josefowitz*, 5 NY2d 998; *Sabo v Delman*, 3 NY2d 155; *Millerton Agway Coop. v Briarcliff Farms*, 17 NY2d 57; *Spencer Co. v New York Review*, 282 App Div 659; *Pease & Elliman v Stewart*, 50 Misc 2d 330, 332; *Danann Realty Corp. v Harris*, 5 NY2d 317; *Barash v Pennsylvania Term. Real Estate Corp.*, 26 NY2d 77; *Magi Communications v Jac-Lu Assoc.*, 65 AD2d 727; *Forest Bay Homes v Kosinski*, 50 AD2d 829; *Galgani v Fleming*, 56 AD2d 644.) III. Dismissal of the counterclaims was erroneous. (*Millerton Agway Coop. v Briarcliff Farms*, 17 NY2d 57; *General Rubber Co. v Benedict*, 215 NY 18; *Kono v Roeth*, 237 App Div 252, 238 App Div 775; *Meyerson v Franklin Knitting Mills*, 185 App Div 458; *Banker's Trust Co. v Steenburn*, 95 Misc 2d 967; *Illinois McGraw Elec. Co. v John J. Walters, Inc.*, 7 NY2d 874; *Albi S.A.R.L. v American Textramics*, 64 AD2d 552.)

George J. Wade and Stanley S. Arkin for respondents. I. As a matter of law, the guarantors may not evade liability under the terms of their unequivocal and unconditional guarantee. (*Bank of Suffolk County v Kite*, 49 NY2d 827; *Fleck v Bank of Suffolk County*, 67 AD2d 676; *Chemical Bank v Nattin Realty*, 61 AD2d 921; *Rusch Factors v Sheffler*, 58 AD2d 557; *Silbert v Silbert*, 85 AD2d 661; *Bank of N. Y. v Cariello*, 69 AD2d 805; *Millerton Agway Coop. v Briarcliff Farms*, 17 NY2d 57; *Community Natl. Bank *92 & Trust Co. v Intercoastal Trading Corp.*, 55 AD2d 525;

Seaman-Andwall Corp. v Wright Mach. Corp., 31 AD2d 136, 29 NY2d 617; *Wittenberg v Robinov*, 9 NY2d 261.) II. The guarantors may not counterclaim for damages. (*Vincel v White Motor Corp.*, 521 F2d 1113; *Niles v New York Cent. & Hudson Riv. R. R. Co.*, 176 NY 119; *Silver v Chase Manhattan Bank*, 44 AD2d 797; *Carvel Farms Corp. v Bartomeo*, 50 Misc 2d 1073.)

OPINION OF THE COURT

Meyer, J.

(1, 2) Fraud in the inducement of a guarantee by corporate officers of the corporation's indebtedness is not a defense to an action on the guarantee when the guarantee recites that it is absolute and unconditional irrespective of any lack of validity or enforceability of the guarantee, or any other circumstance which might otherwise constitute a defense available to a guarantor in respect of the guarantee, those recitals being inconsistent with the guarantors' claim of reliance upon an oral representation that the lending banks were committed to extend to the corporation an additional line of credit. The order of the Appellate Division should, therefore, be affirmed, with costs.

I

Defendants are officers and directors of and own all the voting stock of United Department Stores, a holding company with a number of retail department store subsidiaries. Plaintiff, Citibank, N. A., and the other four plaintiff banks provided United with a \$15,200,000 line of credit. After default by United, discussions took place concerning restructuring of the indebtedness as a term loan guaranteed by the defendants and the extension to United of an additional line of credit of \$8,000,000. On August 10, 1981, the \$15,200,000 term loan transaction closed, but the line of credit was never funded.

On January 25, 1982, United filed a voluntary petition in bankruptcy. Plaintiff banks then declared the term loan principal and interest due and brought the present

action against defendants on the guarantee. Defendants' answer set up defenses of fraud in the inducement, negligent misrepresentation and failure of a condition precedent and asserted counterclaims based upon fraud, negligent misrepresentation and breach of contract. On motion of plaintiff banks, Special Term struck the affirmative defenses and counterclaims and directed entry of judgment in favor of plaintiffs, holding that by the specific language of the unconditional guarantee defendants waived their right to assert the defenses and counterclaims. *93

On appeal to the Appellate Division, that court affirmed, the Presiding Justice dissenting. The majority found the evidence of fraud in the inducement contained in defendants' affidavits to consist of "shadowy and conclusory statements," but, also, as evidenced by its citation to page 138 of its own decision in *Seaman-Andwall Corp. v Wright Mach. Corp.* (31 AD2d 136, affd 29 NY2d 617), apparently held the disclaimer in the guarantee sufficiently specific to bar consideration of the defenses in any event. The Presiding Justice disagreed on both points. We agree with him that defendants' affidavits contained evidence, uncontradicted by plaintiffs, sufficient to raise a triable issue concerning fraud in the inducement, but also agree with Special Term and the Appellate Division majority that the language of disclaimer in the guarantee is sufficiently specific to foreclose as a matter of law the defenses and counterclaims [FN*] based on fraud, negligence or failure to perform a condition precedent asserted against plaintiff banks, under the rule of *Danann Realty Corp. v Harris* (5 NY2d 317). We therefore affirm.

FN* A further reason for dismissal of the counterclaims is that defendants lack standing to sue for an injury to the corporation even though it results in depreciation in the value of their shares of the corporation's stock. Normally a shareholder has no individual right of action for such an injury (*Niles v New York Cent. & Hudson Riv. R. R. Co.*, 176 NY 119). Although exceptions to that rule have been recognized (*Kono v Roeth*, 237 App Div 252, lv denied 238 App Div 775; see, *General Rubber Co. v Benedict*, 215 NY 18; *Vincel v White*

Motor Corp., 521 F2d 1113), the counterclaim in the instant case alleges nothing that would bring defendants within the exception.

II

(2) Defendants' papers on the summary judgment motion contain evidence in admissible form which, with the inferences that could reasonably be drawn therefrom, was sufficient to raise a triable issue of fact. The affidavit of Allan R. Plapinger states that before the commitment letter for the term loan was signed, he advised Froehler, the Citibank officer who was negotiating on behalf of all the banks, that neither he nor the other stockholders would sign the letter until the line of credit was agreed to and that "Froehler promised that we had the line," that the line of credit would be funded half by Citibank and half by National Bank of Detroit, that National Bank prepared papers for its share of the line of credit including a note which was signed on behalf of United by one of the defendants, that the Citibank officer who then took over the negotiations imposed additional conditions as to the line of credit which were accepted by United and defendants, that defendants relied on those representations and would not have entered into the guarantee had they not been made, and *94 that the representations were false when made or were recklessly made. In an unverified reply, Citibank, National Bank of Detroit and Equibank deny that they entered into the oral contract for the line of credit alleged in defendants' answer but filed no affidavit in support of that denial. People's Trust and Broad Street National, in a verified reply, likewise deny the allegations of the counterclaims and in an attorney's affidavit point out that their representatives are not alleged to have made any representations or been present when representations were made as to the line of credit, nor did defendants allege that they were to be participants in the line of credit. The undenied statement that defendants were told that they had the line of credit was a representation of present fact, not of future intent (*Sabo v Delman*, 3 NY2d 155), the falsity of which, in the absence of explanation, can reasonably be inferred from

the refusal to extend the promised credit, and the attorney's affidavit submitted on behalf of People's Trust and Broad Street National does no more than raise a fact question concerning whether, in making the representation he is alleged to have made in order to obtain defendants' guarantee, the Citibank officer was acting in behalf of those banks. Summary judgment should not have been granted plaintiffs, therefore, based upon the insufficiency of defendants' evidence in opposition.

III

(1) Summary judgment was properly granted plaintiffs, however, because defendants were foreclosed by the rule of *Danann Realty Corp. v Harris* (5 NY2d 317, supra) from establishing reliance. In that case, expounding on our prior decision in *Cohen v Cohen* (13 NY2d 813, affg 1 AD2d 586, 588-589) and distinguishing our prior holding in *Sabo v Delman* (3 NY2d 155, supra) that a general merger clause is ineffective to exclude parol evidence of fraud in the inducement, we held the rule that fraud in the inducement vitiates a contract to be subject to exception where the person claiming to have been defrauded has by his own specific disclaimer of reliance upon oral representations himself been "guilty of deliberately misrepresenting [his] true intention" (5 NY2d, at p 323). And in later cases we have adhered to that rule (*Seaman-Andwall Corp. v Wright Mach. Corp.*, 29 NY2d 617, affg 31 AD2d 136, supra; *Wittenberg v Robinov*, 9 NY2d 261) or distinguished the language involved as a general merger clause rather than a specific disclaimer (*Barash v Pennsylvania Term. Real Estate Corp.*, 26 NY2d 77, 86). *Millerton Agway Coop. v Briarcliff Farms* (17 NY2d 57), relied on by defendants, is not to the contrary for, as examination of the record in that case reveals, the *95 guarantees there involved contained neither a general merger clause nor a specific disclaimer. *Millerton* held no more than that summary judgment should not have been granted plaintiffs in that case, defendants' affidavits having presented sufficient evidence of reliance on the claimed fraudulent representation to require a trial.

The Danann rule has been criticized as encouraging the use of boilerplate and likely to result in more verbose merger clauses (*Calamari and Perillo, Contracts* § 9-21 [2d ed]; Note, 47 Cornell LQ 655), a sounder distinction being between a negotiated clause and a standard form clause (*Calamari and Perillo, loc. cit., supra*). Here it cannot be said, as in *Danann*, that the defendants have "in the plainest language announced and stipulated that [they were] not relying on any representations as to the very matter [the additional line of credit] as to which [they] now [claim they were] defrauded" (5 NY2d, at p 320). But here we do not have the generalized boilerplate exclusion referred to by the commentators. Rather, following extended negotiations between sophisticated business people, what has been hammered out is a multimillion dollar personal guarantee proclaimed by defendants to be "absolute and unconditional." It is unrealistic in such circumstances to expect an express stipulation that defendants were not relying on a separate oral agreement to fund an additional multimillion dollar line of credit, when they themselves have denominated their obligation unconditional, and have reinforced that declaration by their agreement that the "absolute and unconditional" nature of their guarantee was "irrespective of (i) any lack of validity * * * of the * * * Restated Loan Agreement * * * or any other agreement or instrument relating thereto", or "(vii) any other circumstance which might otherwise constitute a defense" to the guarantee.

Though not the explicit disclaimer present in *Danann*, the substance of defendants' guarantee forecloses their reliance on the claim that they were fraudulently induced to sign the guarantee by the banks' oral promise of an additional line of credit. To permit that would in effect condone defendants' own fraud in "deliberately misrepresenting [their] true intention" (*Danann Realty Corp. v Harris*, 5 NY2d, at p 323) when putting their signatures to their "absolute and unconditional" guarantee.

Finally, to the extent that defendants rely upon the denial of the additional line of credit

as a failure of a condition precedent, it is necessary only to note that in light of the above-quoted provisions the condition precedent rule is inapplicable because the alleged *96 condition would contradict the express terms of the written agreement and, therefore, could not be proved by parol evidence (*Hicks v Bush*, 10 NY2d 488, 491; *Meadow Brook Natl. Bank v Bzura*, 20 AD2d 287, 289; see, *Long Is. Trust Co. v International Inst. for Packaging Educ.*, 38 NY2d 493, 497).

Accordingly, the order of the Appellate Division should be affirmed, with costs.

Chief Judge Wachtler and Judges Jasen, Simons, Kaye, Alexander and Titone concur.

Order affirmed, with costs. *97

Copr. (c) 2004, Randy A. Daniels, Secretary of State, State of New York.

N.Y. 1985.

CITIBANK v PLAPINGER

END OF DOCUMENT

15

Supreme Court, Appellate Division, Second
Department, New York.

Stephen Louis COHAN, et al., Appellants,
v.
Leon SICULAR, et al., Respondents.

April 17, 1995.

Purchasers of real property sued vendor, vendor's attorney and brokers for fraud, breach of contract and rescission of contract, alleging oral misrepresentation as to amount of real estate taxes and utility costs. Motions of defendants for summary judgment and to dismiss were granted by the Supreme Court, Nassau County, Levitt, J., and purchasers appealed. The Supreme Court, Appellate Division, held that merger clause precluded recovery against vendor and his attorney, but not against brokers who were not parties to the real estate contract.

Modified and affirmed.

West Headnotes

[1] Fraud 36
184k36

While general merger clauses are ineffective to exclude parol evidence of fraud in the inducement, specific disclaimer destroys allegations that agreement was executed in reliance on contrary oral misrepresentation.

[2] Attorney and Client 26
45k26

[2] Fraud 36
184k36

Merger clause in real estate contract precluded purchasers' recovery against vendor and his attorney for alleged oral misrepresentation as to amount of real estate taxes and utility costs, though clause did not specifically reference real estate taxes or utility costs, where it did specifically state that "after full investigation, neither party [is] relying on any statement made by anyone else that is not set forth in this contract," and contract was negotiated at arm's length between parties who were represented by

counsel.

[3] Brokers 102
65k102

Merger clause in real estate contract did not protect brokers, and thus purchaser sufficiently stated cause of action in fraud against brokers by allegation that they confirmed vendor's alleged misrepresentation as to amount of annual real estate taxes, where brokers were not parties to the real estate contract and commission agreement established contractual relationship between the purchasers and the brokers.

****279** Arthur L. Beneventi, Garden City, for appellants.

Sheldon Feinstein, P.C., Bayside, for respondent Leon Sicular and respondent pro se.

L'Abbate & Balkan, Garden City (Lewis A. Bartell, of counsel), for respondents Prudential Long Island Realty, Burr Affiliates, Inc., Grace Slezak, and Thomas Tullo.

Raymond A. McGrath, Melville, for respondents Daniel Gale Associates, Inc., and Elyse Underberg.

Before ROSENBLATT, J.P., and THOMPSON, PIZZUTO and SANTUCCI, JJ.

MEMORANDUM BY THE COURT.

***637** In an action to recover damages for fraud, breach of contract, and rescission of the contract, the plaintiffs appeal, from an order of the Supreme Court, Nassau County (Levitt, J.), dated November 30, 1993, which (1) granted the motion of the defendants, Leon Sicular and Sheldon Feinstein, for summary judgment dismissing the complaint insofar as it is asserted against them, (2) granted the motions of the defendants, Prudential L.I. Realty, Burr Affiliates, Inc., Grace Slezak, Thomas Tullo, Daniel Gale Associates, Inc., and Elyse Underberg to dismiss the complaint insofar as it is asserted against them, and (3) denied the branch of the plaintiffs' cross motion which was to direct the escrow agent,

Sheldon Fienstein, to retain the contract deposit pending service of an amended complaint.

***638** ORDERED that the order is modified by deleting the provision thereof which granted the motions of the defendants, Prudential L.I. Realty, Burr Affiliates, Inc., Grace Slezak, Thomas Tullo, Daniel Gale Associates, Inc., and Elyse Underberg to dismiss the complaint, and substituting therefor a provision denying those motions; as so modified, the order is affirmed, without costs or disbursements.

On December 15, 1992, the defendant, Leon Sicular (hereinafter the seller), the owner of a house in Lattingtown, New York, entered into a contract to sell the house to the plaintiffs Louis and Linda Cohan (hereinafter the buyers). The seller was represented by the defendant, Sheldon Feinstien, Esq. On the same date the buyers entered into a commission agreement with the remaining defendants who are the real estate brokerage companies and the individual listing and selling brokers involved in the transaction (hereinafter the brokers). The buyers allege that prior to executing the contract and commission agreement the seller told them, and the brokers confirmed, that the annual real estate taxes on the property were approximately \$16,000 and the annual utility costs were approximately \$6,000. Subsequent to their execution of the contract, and after receipt of the title search, the buyers learned that the real estate taxes were actually in excess of \$21,000 and the utility costs were approximately \$14,000. The buyers refused to close and thereafter brought suit against the seller, his attorney, and the brokers. The buyers alleged fraud in the inducement and sought rescission of the contract and the commission agreement, return of their down payment and consequential damages. The Supreme Court dismissed the complaint against all of the defendants holding that the contract's merger clause prohibited the buyers from introducing parol evidence to prove their claim.

[1][2] It is well-settled that "[w]hile general

merger clauses are ineffective to exclude parol evidence of fraud in the inducement ****280** * *
* a specific disclaimer destroys allegations that the agreements were executed in reliance upon contrary oral misrepresentations' " (LaBarbera v. Marion, 192 A.D.2d 697, 698, 597 N.Y.S.2d 137; see also, Citibank v. Plapinger, 66 N.Y.2d 90, 495 N.Y.S.2d 309, 485 N.E.2d 974; Sabo v. Delman, 3 N.Y.2d 155, 162, 164 N.Y.S.2d 714, 143 N.E.2d 906; Glenfed Fin. Corp., Commercial Fin. Div. v. Aeronautics & Astronautics Servs., 181 A.D.2d 575, 581 N.Y.S.2d 62; Marine Midland Bank v. Cafferty, 174 A.D.2d 932, 571 N.Y.S.2d 628). Although the language of the merger clause in the contract at bar was general in nature, it did specifically state that "after full investigation, neither party [is] relying upon any statement made by anyone else that is not set forth in this contract". Furthermore, the contract was ***639** one which was negotiated at arm's length between parties who were represented by counsel. Therefore, it cannot be said that the merger clause failed to put the buyer on notice as to its intended effect simply because it did not specifically reference the real estate taxes or the utility costs (see, 198 Avenue B. Assocs. v. Bee Corp., 155 A.D.2d 273, 547 N.Y.S.2d 35; cf., Hi Tor Indus. Park v. Chemical Bank, 114 A.D.2d 838, 839, 494 N.Y.S.2d 751). Accordingly, the seller was entitled to summary judgment dismissing the buyers' complaint insofar as it is asserted against him and his attorney.

[3] However, the brokers were not entitled to summary judgment dismissing the complaint insofar as it is asserted against them based upon the merger clause since they were not parties to the real estate contract. Moreover, since the commission agreement established a contractual relationship between the buyers and the brokers, and since the buyers allege that the brokers confirmed the seller's alleged misrepresentation as to the amount of annual real estate taxes, the buyers have sufficiently stated a cause of action sounding in fraud against the brokers (cf., Hauser v. Lista, 201 A.D.2d 873, 607 N.Y.S.2d 516).

214 A.D.2d 637, 625 N.Y.S.2d 278

END OF DOCUMENT

16

United States District Court,
S.D. New York.

COMPANIA SUD-AMERICANA de
VAPORES, S.A., Plaintiff,
v.
IBJ SCHRODER BANK & TRUST
COMPANY, Defendant.

No. 90 Civ. 7220 (SWK).

Feb. 24, 1992.

Chilean company engaged in shipping goods internationally sued United States bank claiming fraud, breach of fiduciary duty, breach of contract and violations of Racketeer Influenced and Corrupt Organizations Act (RICO) with respect to foreign currency exchange transactions. Bank moved for summary judgment. The District Court, Kram, J., held that: (1) under New York law, company failed to establish justifiable reliance with respect to bank's representations as to rates so as to establish fraud; (2) under New York law, company failed to establish that bank intended not to perform alleged promise to apply favorable rates at time promise was made so as to prove fraudulent intent; (3) confirmation slips were not part of scheme to defraud; (4) where fraudulent scheme was premised upon inadequate fraud claim, allegations of mail and wire fraud, as predicate acts for RICO violation, also failed; (5) bank did not owe company fiduciary duty; and (6) genuine issue of material fact as to whether oral agreement existed between bank and company regarding management by bank of conversion program for company's currencies precluded summary judgment in favor of bank on breach of contract claim.

Motion granted in part; denied in part.

West Headnotes

[1] Fraud 20
184k20

Under New York law, to establish fraud plaintiff must establish that his reliance was justifiable, both in sense that party claiming

to have been defrauded was justified in believing representation and that he was justified in acting upon it.

[2] Fraud 23
184k23

Under New York law, plaintiff will be deemed to have been practically faced with facts so as to preclude justifiable reliance on defendant's representations if he has access to critical information.

[3] Banks and Banking 100
52k100

Under New York law, plaintiff had access to critical information underlying its fraud claim against bank with respect to alleged misrepresentations as to rates it would charge for currency exchanges and, had it exercised ordinary intelligence or made simple inquiries, it would have been able to discover alleged misrepresentations, and thus, plaintiff failed to establish justifiable reliance, where plaintiff did not compare bank's rates with published interbank rate, did not ask other banks for quotations, and made no effort to inquire as to underlying facts despite availability of such information.

[4] Banks and Banking 100
52k100

Plaintiff failed to prove that bank intended not to perform alleged promise to apply favorable currency exchange rates at time promise was made so as to establish fraudulent intent under New York law, where evidence established that bank charged favorable rates from 1979-1984, and there was no evidence that promises were to last indefinitely.

[5] Banks and Banking 100
52k100

Under New York law, confirmations sent to plaintiff by bank with respect to currency exchanges a fortiori could not be part of any scheme to defraud, where there was no dispute that confirmations truthfully and accurately stated terms of foreign exchange contracts, which was all they were required to do, every confirmation slip contained rate of exchange

and that rate was actual rate at which each currency exchange was executed, plaintiff would have discovered prevailing market rate of exchange and uncovered facts underlying alleged scheme to defraud if it had exercised ordinary intelligence or made simple inquires as required by New York law, and extent to which defendant's rate of exchange exceeded market rate was merely subtraction problem.

[6] Action 27(1)
13k27(1)

Under New York law, failing to disclose breach of promise does not transform contract action into one for fraud.

[7] Banks and Banking 100
52k100

Under New York law, slips confirming currency exchanges were not fraudulent because slips did not disclose that bank was no longer applying favorable rates promised earlier or that bank was no longer in compliance with alleged promises made to plaintiff.

[8] Racketeer Influenced and Corrupt Organizations 6
319Hk6

[8] Racketeer Influenced and Corrupt Organizations 7
319Hk7

Predicate acts necessary for violation of Racketeer Influenced and Corrupt Organizations Act (RICO) are acts indictable or punishable under various federal criminal statutes, and acts chargeable under certain state criminal laws; these include murder, kidnapping, arson, robbery, bribery, extortion, dealing in narcotics, securities fraud, mail fraud and wire fraud. 18 U.S.C.A. §§ 1341, 1343, 1961(1), 1962(c).

[9] Postal Service 35(2)
306k35(2)

[9] Telecommunications 362
372k362

Offenses of both mail and wire fraud require proof of same two elements: that defendant participated in scheme to defraud; and

knowingly used mails (or wires) to further scheme.

[10] Postal Service 35(5)
306k35(5)

[10] Telecommunications 362
372k362

Proof of fraudulent scheme as element of mail or wire fraud requires evidence showing specific intent to defraud, which can be shown by proof that scheme was reasonably calculated to deceive persons of ordinary prudence and comprehension.

[11] Racketeer Influenced and Corrupt Organizations 10
319Hk10

Where fraudulent scheme underlying mail and wire fraud allegations is premised upon inadequate common-law fraud claim, allegations of mail and wire fraud fail as predicate acts for civil liability under Racketeer Influenced and Corrupt Organizations Act (RICO). 18 U.S.C.A. §§ 1341, 1343, 1961(1), 1962(c).

[12] Racketeer Influenced and Corrupt Organizations 70
319Hk70

Because common-law fraud claim against bank with respect to currency exchange agreement was dismissed, there were no valid allegations of fraud to underpin allegations of mail and wire fraud as predicate acts for civil liability under Racketeer Influenced and Corrupt Organizations Act (RICO). 18 U.S.C.A. §§ 1341, 1343, 1961(1), 1962(c).

[13] Postal Service 49(11)
306k49(11)

[13] Telecommunications 363
372k363

Plaintiffs failed to establish that bank had specific intent to defraud with respect to currency exchanges so as to establish fraudulent scheme under mail and wire fraud statutes, as predicate acts for civil violation of Racketeer Influenced and Corrupt Organizations Act (RICO); alleged fraudulent omissions in confirmation slips and fraudulent

misrepresentations as to rates were not reasonably calculated to deceive persons of ordinary prudence and comprehension. 18 U.S.C.A. §§ 1341, 1343, 1961(1), 1962(c).

[14] Banks and Banking 100
52k100

Under New York law, no fiduciary relationship existed between plaintiff and bank arising out of currency exchanges, where both plaintiff and bank were sophisticated parties and there was not a scintilla of evidence that agreements between parties were result of unequal bargaining power or that bank acquired any influence over plaintiff; mere fact that plaintiff and bank had long-standing business relationship of 50 years was insufficient to establish fiduciary relationship.

[15] Banks and Banking 100
52k100

"Nostro accounts" (foreign currency accounts) were not "special accounts" which turned debtor-creditor relationship between bank and plaintiff based on foreign currency exchanges into fiduciary one under New York law.

[16] Banks and Banking 100
52k100

Under New York law, fiduciary relationship was not established between bank and customer because bank held customer's currencies in "nostro accounts" (foreign currency accounts) for benefit of customer.

[17] Federal Civil Procedure 2487
170Ak2487

Genuine issue of material fact as to whether oral agreement existed between customer and bank regarding management by bank of conversion program for customer's foreign currencies precluded summary judgment in favor of bank on customer's breach of contract claim.

[18] Contracts 9(2)
95k9(2)

Under New York law, oral agreement for currency exchange between bank and customer was not too vague and indefinite to be enforceable, even though customer made

varying claims as to what exchange rate was required by agreement, where customer was entitled to most favorable rate which could be determined by court by reference to interbank rates, fair profit margins, and rate bank gave to others.

[19] Sales 10
343k10

Under New York law, overarching management agreement between bank and customer with respect to currency exchanges was in essence contract for sale of goods subject to Article II of Uniform Commercial Code, where bank rendered services in connection with agreement only to facilitate sales and purchases of foreign currency, making provision of services incidental to contracts for sale of goods. N.Y.McKinney's Uniform Commercial Code §§ 2-101 et seq., 2-102, 2-105 comment.

[20] Sales 10
343k10

Under New York law, in order to determine whether contract is for sale of goods, or for services, court must look at essence or main objective of agreement; if provision of services or rendition of other performance predominates and is not merely incidental or collateral to sale of goods, then Uniform Commercial Code does not apply. N.Y.McKinney's Uniform Commercial Code §§ 2-101 et seq., 2-102, 2-105 comment.

[21] Evidence 400(3)
157k400(3)

Under New York law, confirmation slips representing conversions of currency could not be deemed integration intended as final expression of oral currency exchange agreement between bank and customer so as to preclude evidence of oral management agreement pursuant to parol evidence rule, where confirmation slips were not intended to reflect terms of alleged overriding agreement pursuant to which in excess of 1,000 transactions were conducted, nor to reflect single transaction to which both parties had orally agreed, there was no negotiation of terms that were later set forth in written confirmations nor any prior agreement to

terms by customer, and customer never signed nor otherwise assented to written confirmations sent by bank. N.Y.McKinney's Uniform Commercial Code § 2-202.

[22] Evidence 397(2)
157k397(2)

Under New York law, determination as to whether writing was intended as complete and exclusive statement of agreement is function of court; in making this determination, court is to measure completeness of written instrument itself, rather than subjective attitude of parties.

[23] Limitation of Actions 119(3)
241k119(3)

Under New York law, action is commenced when summons is served on defendant. N.Y.McKinney's CPLR 203(b), par. 1.

[24] Federal Courts 427
170Bk427

When claim asserted in federal court is on right created by state law, provisions of state statute of limitations as to how action is commenced, rather than Rule 3 of Federal Rules of Civil Procedure, control in federal court. Fed.Rules Civ.Proc.Rule 3, 28 U.S.C.A.

[25] Limitation of Actions 21(1)
241k21(1)

Under New York law, action for breach of contract must be brought within four years of its accrual. N.Y.McKinney's Uniform Commercial Code § 2-725(1).

*414 Curtis, Mallet-Prevost, Colt & Mosle, New York City by Eliot Lauer, for plaintiff.

Winthrop, Stimson, Putnam & Roberts, New York City by Edwin J. Wesely and Frederick A. Brodie, for defendant.

MEMORANDUM OPINION AND ORDER

KRAM, District Judge.

In this case concerning foreign currency exchange transactions, plaintiff Compania Sud-Americana de Vapores ("CSAV") seeks to recover more than \$1.5 million, *415 claiming

fraud, breach of fiduciary duty, breach of contract and violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c) against defendant IBJ Schroder Bank & Trust Company ("Schroder"). Presently, Schroder moves for an order, pursuant to Rule 56 of the Federal Rules of Civil Procedure, granting it summary judgment on the grounds that CSAV's four claims are defective as a matter of law. [FN1]

FN1. In connection with Schroder's motion for summary judgment, the following officers of CSAV, its wholly-owned U.S. subsidiary Chilean Line, Inc., and Schroder, have been deposed, and their testimony will be referred to as necessary: Barry F. Geis--Chief Financial Officer of Chilean Line, Inc. since 1979 ("Geis Tr."); Patricio Grez--President of Chilean Line, Inc. since June of 1990 and, from 1982 to 1990, Manager of the Finance Division of CSAV in Chile ("Grez Tr."); Henrietta Suttie--Chief Accountant of Chilean Line, Inc. ("Suttie Tr."); Frederick Seeley--former head of the Latin American Division at Schroder and currently a paid advisor and consultant to CSAV ("Seeley Tr."); Edward Hamway--Senior Executive Vice President of Schroder and Acting President and Chief Executive Officer of Schroder from August 3, 1990 until January 1, 1991 ("Hamway Tr."); Paul Wan--Executive Vice President and, since 1986, Treasurer of Schroder ("Wan Tr."); Kevin Raphael--Head Foreign Exchange Trader at Schroder from 1984 to 1986 ("Raphael Tr."); Rodolfo Espinosa--Vice President and Head Foreign Exchange Trader at Schroder since 1987 ("Espinosa Tr."); Sara Settembrini--First Vice President at Schroder and from 1982 to 1985 account officer with responsibility for CSAV ("Settembrini Tr."); Horst Hasselbach--Assistant Vice President and Head of the Foreign Exchange Operations Department at Schroder ("Hasselbach Tr.").

I. Background

CSAV is a Chilean company engaged in shipping goods to North and South America, Northern and Southern Europe and Asia. Its 1989 assets were worth \$500 million dollars. Schroder is a banking institution with its principal place of business in New York. For many years, Schroder was one of CSAV's

leading U.S. banks providing CSAV with credit and deposit services. CSAV also conducted foreign currency transactions with Schroder for more than forty years. At least between 1984 and 1990, these transactions between the parties proceeded as follows:

(1) Upon receipt of foreign currencies [FN2] in payment for CSAV's shipping services, CSAV's European agents remitted the funds to local European banks ("correspondent banks") where Schroder maintained foreign currency accounts ("nostro accounts").

FN2. According to the complaint, the principal foreign currencies received and converted by Schroder on behalf of CSAV were: the Belgian franc, the German deutsche mark, the Dutch guilder, the Danish krone, the Spanish peseta, the British pound sterling, the Norwegian krone, and the Swedish krona.

(2) The correspondent banks, upon crediting Schroder's "nostro accounts" with CSAV's foreign currencies, would notify Schroder of the remittance by means of an interbank telex called a "SWIFT."

(3) Upon receipt of the SWIFT, Schroder's back office would notify a Schroder foreign exchange trader who would determine the rate that would be applied to the conversion.

(4) After determining the exchange rate, an internal transaction ticket would be completed, and the foreign exchange trader would generally place a phone call to a designated person, usually Henrietta Suttie, the Chief Accountant in the Finance Department of Chilean Line, Inc. ("Chilean Line"), CSAV's wholly-owned New York subsidiary. [FN3]

FN3. Chilean Line acted as CSAV's agent with regard to the currency conversions at issue in this case. Thus, both CSAV and Chilean Line will be referred to as CSAV.

(5) In the phone call to Chilean Line, the Schroder trader informed CSAV of the contract number, the amount of foreign currency involved, the exchange rate to be

applied, the U.S. dollar amount to be credited, and the "maturity date" or "value date" on which the U.S. dollars would be received.

*416 (6) After receiving the phone call from Schroder, Chilean Line would send the information about the transaction to CSAV's head office in Chile by telex.

(7) Schroder sent written confirmations of each foreign exchange transaction to both CSAV in Chile and Chilean Line in New York. These confirmations included the amount of foreign currency, the exchange rate, the U.S. dollar amount and the value date.

(8) When the conversion was completed, Schroder paid CSAV the U.S. dollar proceeds of these foreign currency exchange transactions by depositing the dollar proceeds into CSAV's demand deposit account ("DDA account") at Schroder in New York.

(9) CSAV routinely transferred those dollars out of its account at Schroder and into its operations account at Chase Manhattan Bank ("Chase"). CSAV directed Schroder to wire-transfer funds to Chase an average of once a day.

According to the complaint, between 1984 and 1990, 1,087 foreign currency transactions were executed by Schroder on CSAV's behalf. Complaint, at ¶ 23. These transactions continued until mid-1990. In June 1990, however, CSAV decided to ask other European and American banks for quotations on foreign currency exchanges. After discovering that other banks had superior exchange rates, and complaining to Schroder about its foreign currency exchange rates, [FN4] CSAV took its foreign exchange business elsewhere, specifically to Deutsche Bank Hamburg, in July or August of 1990.

FN4. On June 14, 1990, Barry Geis ("Geis"), Chilean Line's chief financial officer since 1979, and Patricio Grez ("Grez"), recently promoted from Manager of CSAV's Finance Division in Chile to President of Chilean Line, met with Schroder officials to complain about Schroder's foreign currency exchange rates. Grez Tr., at 240-246;

Geis Tr., at 307-09, 313-14.

The instant action arises out of the above foreign currency exchange transactions. CSAV alleges that between January 1, 1984 and May 31, 1990, Schroder charged an exchange rate for the conversion of foreign currency into dollars that was "unreasonably and grossly in excess of the prevailing market rate of exchange at the time, and well in excess of rates and margins being charged by other banking institutions." Complaint, at ¶ 18. According to CSAV, between January 1, 1984 and May 31, 1990, Schroder executed 175 separate conversions of the Belgian franc into dollars, [FN5] and the difference between the market rate and the rate charged by Schroder for this currency rose steadily throughout this period. For example, in 1984 Schroder charged an average of 1.35% above the New York Interbank rate (the "market rate" or "interbank rate"), the rate that applies between banks, for conversions of the Belgian franc. By 1990, the difference between the average Schroder rate and the market rate had escalated to 12.96%. Complaint, at ¶ 19. As a result, CSAV alleges common law fraud, breach of contract, breach of fiduciary duty and violations of civil RICO, 18 U.S.C. § 1962.

FN5. Discovery in this case, prior to disposition of this motion, has been limited to transactions involving the Belgian franc.

II. Standards for Summary Judgment

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). In testing whether the movant has met this burden, the Court must resolve all ambiguities against the movant. *Lopez v. S.B. Thomas, Inc.*, 831 F.2d 1184, 1187 (2d Cir.1987) (citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 994, 8 L.Ed.2d 176 (1962)).

The moving party bears the initial burden of

demonstrating the absence of a genuine issue of material fact. *Adickes v. S.H. Kress and Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 1608, 26 L.Ed.2d 142 (1970). The movant may discharge this burden by demonstrating to the Court that there is an absence of evidence to support the non-moving party's case on which that party *417 would have the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). [FN6] The non-moving party then has the burden of coming forward with "specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). The non-movant must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). Speculation, conclusory allegations and mere denials are not enough to raise genuine issues of fact. To avoid summary judgment, enough evidence must favor the non-moving party's case such that a jury could return a verdict in its favor. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986) (interpreting the "genuineness" requirement).

FN6. The moving party may rely on the evidence in the record to point out the absence of genuine issues of material fact. *Celotex*, supra, 477 U.S. at 323, 106 S.Ct. at 2552. The moving party does not have the burden of providing evidence to negate the non-moving party's claims. *Id.* As the Supreme Court recently noted, "whether the moving party accompanies its summary judgment motion with affidavits, the motion may, and should, be granted so long as whatever is before the court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56(c), is satisfied." *Id.*

III. CSAV's Claims [FN7]

FN7. In its Memorandum of Law in support of its Motion for Summary Judgment ("Def.Mem."), Schroder contends that portions of each of CSAV's claims are barred by the applicable statute of limitations. Def.Mem., at 39-41. Although courts generally address statute of limitations issues before substantive matters, in this case the Court will first

examine the more substantive issues. The Court has taken this approach because Schroder's statute of limitations arguments apply only to portions of each of CSAV's claims, and thus even if Schroder's contentions are correct, it will still be necessary to address the substantive challenges raised by Schroder. Further, the Court has determined that it is not possible to address the statute of limitations issues without first analyzing the substantive claims themselves.

A. Common Law Fraud

The five elements of an action for common law fraud are "representation of material fact, falsity of that representation, scienter, reliance and damages." *Mallis v. Bankers Trust Co.*, 615 F.2d 68, 80 (2d Cir.1980), cert. denied, 449 U.S. 1123, 101 S.Ct. 938, 67 L.Ed.2d 109 (1981); accord *Jo Ann Homes at Bellmore, Inc. v. Dworetz*, 25 N.Y.2d 112, 119, 302 N.Y.S.2d 799, 803, 250 N.E.2d 214, 217 (1969). CSAV contends that it has established these elements, and that Schroder's motion for summary judgment on its fraud claim must therefore be denied. The Court disagrees.

1. CSAV's Contentions

CSAV's basic contention is that it was fraudulent for Schroder to promise that it would give CSAV favorable exchange rates and then charge rates significantly above the prevailing market rate.

a. Elements of Common Law Fraud

(i) Schroder's Representations

Between 1979 and 1981, Geis had a series of "good will" meetings with Schroder's foreign exchange traders in New York. According to CSAV, Geis was told by Schroder's traders that "CSAV was considered a preferred client within the bank ... and that CSAV was given preferential treatment within the [foreign exchange] department." Geis Tr., at 48. The nature of the preferential treatment was that CSAV's foreign currency remittances "[were] given rates normally credited to larger amounts," Geis Tr., at 48, and the rate applied

to CSAV's conversions was the "million dollar rate." Id. at 65-66. Geis was also told that the "million dollar rate" was Schroder's best rate for corporate accounts, and was at or near the interbank rate. Id. at 48, 65-66, 78, 93, 310-11, 378.

Based on this testimony and the affidavit of Claude Tygier, Schroder's chief foreign exchange trader from June 1979 through January 1984, CSAV asserts that Schroder made the following representations to CSAV: (a) that CSAV was a preferred customer, Geis Tr., at 45-48, 83-84; (b) that the manner in which Schroder converted foreign currencies for CSAV was "unique" *418 and, unlike a trading relationship, was actually a currency management service, Affidavit of Claude Tygier ("Tygier Aff."), sworn to on October 31, 1991, at ¶¶ 3, 7; Hamway Tr., at 175-78; Exhibit "I" to DiNatale Affidavit ("DiNatale Aff."), sworn to on November 11, 1991; (c) that Schroder was obligated to provide CSAV with rates commensurate with CSAV's status as a preferred customer, Tygier Aff. at ¶¶ 3e, 4, 5; and (d) that the rates Schroder would apply to CSAV's conversions--variously referred to as the "million dollar rate," "spot rate," "preferred customer rate," and "interbank rate"--were at least as good as the best rates Schroder gave its corporate customers and at or near the rates banks applied in transactions among themselves. Geis Tr., at 48, 65-66, 78, 93, 310-11, 378.

(ii) CSAV's Reliance

CSAV also contends that it relied upon Schroder's representations that CSAV would receive favorable exchange rates. CSAV argues that an internal Schroder memorandum specifically describes CSAV's reliance upon Schroder's representations. This memorandum states:

Barry [Geis] also informs that all CSAV agents are instructed to remit to Schroder, New York and we have converted such payments for CSAV at the spot rate ... Exhibit "H" to DiNatale Aff. According to CSAV, this memorandum establishes that CSAV expected Schroder to convert foreign currencies for CSAV at the "spot price," which

was equivalent to the "million dollar rate," at or near the interbank rate and Schroder's best rate for corporate accounts. Geis Tr., at 48, 93, 310-11, 378. In addition, CSAV contends that reliance is established as it continued to remit its European currencies exclusively to Schroder for conversion.

(iii) Scienter

CSAV contends that the scienter requirement is established because Schroder knew that CSAV was relying upon Schroder to convert CSAV's currencies at or near the interbank rate, and not treat CSAV as a trading partner, see, e.g., Exhibit "H" to DiNatale Aff. ("Barry [Geis] informs me that ... we have converted such payments for CSAV at the spot rate"); Suttie Tr., at 96 ("you know we never trade"), and despite this knowledge, Schroder converted CSAV's currency at grossly unfavorable rates. [FN8]

FN8. For purposes of this motion, there is no dispute that Schroder, in converting currencies on behalf of CSAV, did not apply rates at or near the interbank rates. With respect to the Belgian franc, the only currency subject to discovery prior to this motion, the rate of conversion increased steadily from an average of 1.35% above the interbank rate in 1984 to an average of 12.96% above the rate in 1990. Complaint, at ¶ 19.

b. The Confirmations Were Part of the Scheme to Defraud

CSAV also alleges that as part of its scheme to defraud, Schroder failed to advise CSAV, and omitted from its written confirmations, the prevailing market rate of exchange, the actual rate at which Schroder executed each trade with its correspondent banks, the amount or percentage of Schroder's margin or profit, the extent to which Schroder's rate of exchange exceeded the market rate, and any administrative and other expenses Schroder incurred on CSAV's behalf. Complaint, at ¶ 35.

Further, in response to Schroder's argument that there is no fraud because each confirmation sent to CSAV truthfully and

accurately reflected the rate that had been applied to each conversion, CSAV argues that it is irrelevant that the confirmations reflected the actual numerical rates at which the conversions were accomplished, because Schroder knew that CSAV expected that the rates disclosed on the confirmations were what Schroder had represented the rates would be-- i.e., at least as good as Schroder's best corporate account rates and at or near the interbank rates.

2. Discussion

The Court disagrees with CSAV's contentions and finds, as a matter of law, that Schroder is entitled to summary judgment on CSAV's common law fraud claim.

*419 a. Absence of Justifiable Reliance

[1] Under New York law, a plaintiff must establish that his reliance was justifiable, both in the sense that the party claiming to have been defrauded was justified in believing the representation and that he was justified in acting upon it. 2 New York Pattern Jury Instructions, PJI 3:20, commentary, at 95 (Supp.1991). Thus, the question becomes under what circumstances is a plaintiff's reliance justified. It is well established that when matters are peculiarly within the knowledge of the defendant, a plaintiff may rely on defendant's representations without prosecuting an investigation, as he has no independent means of ascertaining the truth. *Mallis v. Bankers Trust Co.*, 615 F.2d 68, 80 (2d Cir.1980), cert. denied, 449 U.S. 1123, 101 S.Ct. 938, 67 L.Ed.2d 109 (1981); see e.g. *Tahini Investments, Ltd. v. Bobrowsky*, 99 A.D.2d 489, 490, 470 N.Y.S.2d 431, 433 (2d Dept.1984) (defendant did not disclose that drums of industrial waste had been buried underground at 93 acre farm; no need for plaintiff to investigate if drums were peculiarly within the seller's knowledge); *Todd v. Pearl Woods, Inc.*, 20 A.D.2d 911, 248 N.Y.S.2d 975 (2d Dept.1964), aff'd, 15 N.Y.2d 817, 257 N.Y.S.2d 937, 205 N.E.2d 861 (1965) (failure to check defendant's representations against public records no bar to fraud claim). By contrast, when misrepresentations concern

matters that are not peculiarly within the defendant's knowledge, as in this case, New York courts have rejected claims of justifiable reliance because:

[if plaintiff] has the means of knowing, by the exercise of ordinary intelligence, the truth, or the real quality of the subject of the representation, he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentations (Citations Omitted).

Mallis v. Bankers Trust Co., 615 F.2d at 80-81 (citing *Schumaker v. Mather*, 133 N.Y. 590, 598, 30 N.E. 755, 757 (1892)); see also *Heineman v. S & S Machinery Corp.*, 750 F.Supp. 1179, 1186-87 (E.D.N.Y.1990) (fraud "cannot be based on a failure to make simple inquiries" where the information allegedly not disclosed could have been easily obtained through "duly diligent inquiry," or by the exercise of "ordinary intelligence").

[2] In an effort to explain the above standard, the Second Circuit stated in *Mallis* that reliance on misrepresentations is not justified if "plaintiff was placed on guard or practically faced with the facts." *Id.* at 81 (citing *Danann Realty Corp. v. Harris*, 5 N.Y.2d 317, 184 N.Y.S.2d 599, 157 N.E.2d 597 (1959) (buyer may not rely on misrepresentations in face of contract clause eschewing such reliance); *Sylvester v. Bernstein*, 283 A.D. 333, 127 N.Y.S.2d 746, *aff'd* 307 N.Y. 778, 121 N.E.2d 616 (1954) (landlord may not rely on tenants' representation that apartment would not be used for residential purposes)). However, under New York law, a plaintiff will be deemed to have been "practically faced with the facts" if he has access to the critical information. Both the Second Circuit and New York state courts have recognized the principle that access [to material information] "bars claims of reliance on misrepresentations." *Grumman Allied Industries, Inc. v. Rohr Industries, Inc.*, 748 F.2d 729, 737, n. 13 (2d Cir.1984) (where sophisticated businessmen engaged in major transactions enjoy access to critical information but fail to take advantage of that access, New York courts are particularly

disinclined to entertain claims of justifiable reliance).

[3] In this case, there is no basis to dispute that CSAV had access to the critical information underlying its fraud claim and, had it exercised ordinary intelligence or made simple inquiries, CSAV would have been able to discover the alleged misrepresentations. Thus, CSAV cannot establish justifiable reliance.

CSAV's claim is based upon the difference between the rate charged by Schroder and the interbank rate, the rate allegedly promised by Schroder. At all relevant times, CSAV had access to both relevant rates. The rate charged by Schroder was *420 confirmed in writing to CSAV, [FN9] Complaint, at ¶ 13; *Grez Tr.*, at 27; *Geis Tr.*, at 126-27; *Seeley Tr.*, at 142-43, and the interbank foreign exchange rates were available in daily newspapers. *Grez Tr.*, at 33-34, 71-72, 120-21, 203; *Geis Tr.*, at 196-97, 280-81; *Seeley Tr.*, at 27, 98. Further, it is undisputed that Chilean Line subscribed to both *The Wall Street Journal* and the *New York Times*. *Grez Tr.*, at 33-34. Moreover, it has been established that during the relevant period, Geis, the agent of CSAV in charge of dealing with Schroder, read the *New York Times* and *The Wall Street Journal* and Grez read *El Mercurio*, all of which publish currency exchange rate tables. *Geis Tr.*, at 279-281; *Grez Tr.*, at 72. In fact, Geis testified that he has read *The Wall Street Journal* on a daily basis for more than fifteen years and has read the foreign exchange tables in *The Wall Street Journal* on a regular basis since at least 1979. *Geis Tr.*, at 278-80. Thus, as even CSAV's witnesses concede, CSAV could at any time have compared Schroder's rates to the interbank rate published in the newspaper. *Grez Tr.*, at 71-72, 203; *Geis Tr.*, at 196-97; *Seeley Tr.*, at 27; Exhibit "AO" to Def. Appendix. [FN10]

FN9. Schroder confirmed each foreign exchange transaction in writing to both CSAV in Chile and Chilean Line in New York. The confirmations included the amount of foreign currency, the exchange rate, the U.S. dollar amount and the value

date. See Exhibit "D" to Appendix of Pleadings and Exhibits submitted in Connection with Defendant's Motion for Summary Judgment ("Def. Appendix").

FN10. CSAV contends that Schroder was committed to apply not the "interbank rate," but, rather, a rate at or near the interbank rate that was at least as good as the rate Schroder gave other corporate accounts. Plaintiff's Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment (Pl.Mem.), at 23. And since those rates were not public information and were not disclosed by Schroder to CSAV, CSAV claims that it is irrelevant that CSAV's employees read newspapers which included foreign exchange tables. The Court disagrees. CSAV's entire complaint is based on Schroder having charged rates above the published interbank or market rate. Complaint, at ~ ¶ 18, 19, 20. Further, in calculating its alleged damages CSAV used the rate charged by Schroder and the published interbank rate. Complaint, at ¶ 21, 22, 23, 24. Thus, CSAV cannot now claim that it had no knowledge of the rate Schroder was committed to apply.

In addition to consulting newspapers, CSAV could have discovered the alleged misrepresentations by calling other banks and obtaining quotations, as it did in June of 1990. Grez testified that:

[T]he foreign exchange market is the biggest market in the world; huge quantities are transacted. It's the most-if there is a perfect market, that's the foreign exchange market. It's very transparent. Rates are available to whoever wants to look at them on the screens....

Grez Tr., at 56. Moreover, Geis' testimony indicates that CSAV was quite familiar with obtaining foreign exchange quotations from other institutions. Geis testified that after he was employed as Chilean Line's top financial officer in 1979, for two or three weeks "whenever we got an advice that Schroder had converted a currency for us, I matched the rate against a quote that I would get from one or more other banks." Geis Tr., at 49. In addition, in 1988 and 1989 when CSAV sought to purchase currency futures in the Japanese yen, Geis solicited quotes from Chase and First Maryland and purchased from whichever

bank provided the better rate. Geis Tr., at 113, 179, 182-83, 185-86, 194; Exhibit "AC" to Def. Appendix. Finally, it is clear that CSAV obtained quotes from other banks in June of 1990. In fact, it was the superiority of these other quotes that led CSAV to discontinue its relationship with Schroder.

Further, CSAV's reliance is unjustified because CSAV officials recognized that they were responsible for checking the prices on foreign exchange transactions to make sure they were acceptable. Geis testified that CSAV was ultimately responsible for monitoring the prices at which foreign exchange transactions with Schroder were undertaken. Geis Tr., at 125. Grez testified that as manager of the Finance Division he was directly responsible for overseeing CSAV's foreign exchange activities, and it was his duty to make sure that CSAV got a fair market price for its foreign exchange activities. Grez Tr., at *421 18-19. Grez also testified that "if [Geis] found out that we had not received proper market rates, he would force the bank or ask the bank--I don't recall, of course, the exact words--to refund the company the proper difference." Grez Tr., at 54, 60.

Since CSAV did not compare Schroder's rates with the published interbank rate, did not ask other banks for quotations, and made no effort to inquire as to the underlying facts of its claim prior to June 1990, despite the availability of such information, the Court finds, as a matter of law, that CSAV's reliance on Schroder's alleged misrepresentations was unreasonable.

b. Absence of scienter or fraudulent intent

[4] CSAV's fraud claim is premised on statements made to Geis by Schroder foreign exchange traders during a series of "goodwill" meetings between 1979 and 1981. CSAV claims that during these meetings Geis was told that "CSAV was considered a preferred client within the bank ... and that CSAV was given preferential treatment within the [foreign] exchange department." Pl.Mem., at 11; Geis Tr., at 48. Geis was also told that

"the rate applied to CSAV's conversions was the million dollar rate." Pl.Mem., at 11; Geis Tr., at 65-66. Construing these statements as promises or representations by Schroder that CSAV was getting Schroder's best rates, CSAV alleges that "[p]romising a favorable rate and charging another is a clear cut fraud." Pl.Mem., at 17. The Court disagrees.

First, the evidence establishes that from 1979-1984 Schroder did not promise favorable rates and charge other rates. In fact, the record indicates that for many years Schroder applied favorable rates. Geis testified that when he started working at Chilean Line in 1979 he checked the foreign exchange rates at various other banks and found that Schroder's rates were competitive. Geis Tr., at 66, 236. In addition, the fact that CSAV's fraud claim seeks damages for excessive rates charged by Schroder between January 1, 1984 and June 1990, indicates that Schroder applied favorable rates prior to January of 1984.

Second, there is no evidence that these promises by Schroder were to last indefinitely. See Geis Tr., at 50-51. [FN11] But even if the statements made to Geis between 1979 and 1981 are construed as promises by Schroder to apply favorable rates indefinitely, Schroder's failure to continue applying these preferable rates does not constitute fraud under New York law as the record contains no evidence that Schroder intended not to perform its alleged promises at the time they were made. It is well settled that "fraudulent intent not to perform a promise cannot be inferred merely from the fact of nonperformance." *Deligiannis v. Pepsico, Inc.*, 757 F.Supp. 241, 254 (S.D.N.Y.1991) (citing *Brown v. Lockwood*, 76 A.D.2d 721, 733, 432 N.Y.S.2d 186, 195 (2d Dept.1980)). Indeed, this Court has held that "nonperformance of a promise alone does not support an inference that it was fraudulent when uttered." *Zola v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, CCH Fed.Secur.L.Rep. ¶ 93, 159 at 95, 721-22, 1987 WL 7742 (S.D.N.Y.1987). In order to properly allege a fraud claim, a defrauded party "must allege specific facts showing that the promisor intended not to honor his obligations at the

time the promise was made." *National Westminster Bank v. Ross*, 130 B.R. 656, 664 (S.D.N.Y.1991) (citing *Songbird Jet Ltd., Inc. v. Amax Inc.*, 581 F.Supp. 912 (S.D.N.Y.1984), *aff'd*, 812 F.2d 713 (2d Cir.1987)).

FN11. Aside from the longstanding relationship between CSAV and Schroder, CSAV has produced no evidence which indicates that the statements made to Geis were anything more than promises to give favorable rates between 1979 and 1981, when the statements were made. Although Geis testified that he believed the preferable rates would apply "ad infinitum," he could not recall anyone from Schroder making such a statement. In fact, he testified that it "was merely the impression I had." Geis Tr., at 50-51.

Since CSAV has offered no evidence that Schroder intended not to perform the alleged promise to apply favorable rates at the time the promise was made, and the record establishes that Schroder applied preferable rates from 1979-1984, the Court *422 finds, as a matter of law, that CSAV has failed to prove fraudulent intent.

c. The Confirmation Slips Were Not Part of A Scheme to Defraud

[5] Since the Court has found that CSAV alleges no actionable fraud, the confirmations sent to CSAV by Schroder a fortiori cannot be part of any scheme to defraud. But, even if the Court had not made the above two findings, CSAV's theory that each confirmation slip was part of a scheme to defraud is untenable.

In the complaint, CSAV alleges that:

As part of its scheme to defraud CSAV, Schroder wilfully and intentionally failed to advise CSAV and omitted from its written confirmations the prevailing market rate of exchange, the actual rate at which Schroder executed each trade with its correspondent banks, the amount or percentage of Schroder's margin or profit, the extent to which Schroder's rate of exchange exceeded the market rate, and any administrative and other expenses Schroder incurred on CSAV's behalf.

Complaint, at ¶ 35. For the following reasons, however, the Court finds that the confirmations were not a part of a scheme to defraud. First, there is no dispute that the confirmations truthfully and accurately stated the terms of the foreign exchange contracts, which is all they were required to do. See Pl.Mem., at 18. CSAV has presented no evidence that the confirmations were designed to include the allegedly omitted information. In fact, the evidence indicates that the purpose of the confirmations was to confirm particular transactions between CSAV and Schroder.

Second, there is no basis for CSAV's allegation that Schroder omitted "the actual rate at which Schroder executed each trade with its correspondent banks." Every confirmation slip contained the rate of exchange, see, e.g., Exhibit "D" to Def. Appendix, at 1, and that rate was the actual rate at which each currency exchange was executed with CSAV, the only other principal in each transaction. See Grez Tr., at 49-51; Seeley Tr., at 36.

Third, if CSAV had exercised ordinary intelligence or made simple inquiries as required by New York law, it would have discovered the prevailing market rate of exchange and uncovered the facts underlying the alleged scheme to defraud. Moreover, CSAV has presented no evidence that Schroder was required to disclose the prevailing market rate on the confirmations. In fact, the Second Circuit has stated that "there is no duty to disclose information to one who reasonably should already be aware of it," *Seibert v. Sperry Rand Corp.*, 586 F.2d 949, 952 (2d Cir.1978), and has rejected fraud claims based on the omission or nondisclosure of market rates. *Hafner v. Forest Laboratories, Inc.*, 345 F.2d 167, 168 (2d Cir.1965) (plaintiff was not "misled" by defendant's non-disclosure of market price information because "current price information on [defendant's] stock was available to the public in the National Daily Quotations Sheets"); *Klamberg v. Roth*, 473 F.Supp. 544, 552 (S.D.N.Y.1979) (no duty to disclose existed because "all of the factual information was readily available to plaintiff,

especially since, as the complaint itself concedes, [the stock in question] was at all material times traded on the New York Stock Exchange").

Fourth, the "extent to which Schroder's rate of exchange exceeded the market rate" is merely a subtraction problem. Because CSAV knew the Schroder rate and the interbank or market rate was readily available, CSAV only had to subtract one from the other to find the allegedly omitted information.

Fifth, the remaining alleged omissions cited by CSAV are irrelevant and immaterial, and there is no evidence that Schroder had a duty to disclose such information.

Finally, even if there was a duty to disclose, the Court would not find that the confirmations were part of a fraudulent scheme because it was unreasonable for CSAV to rely on the confirmations as representing that Schroder was applying rates at or near the interbank rate when CSAV itself had access to the interbank rate in the daily newspapers.

*423 In an effort to revitalize its theory that the confirmations were part of a scheme to defraud, CSAV changes tactics. In opposition to the motion, CSAV argues that the confirmations were part of the scheme to defraud because "Schroder knew CSAV expected and understood that the rates disclosed on the confirmations were what Schroder represented the rates would be--i.e., at least as good as Schroder's best corporate account rates and at or near the interbank rates." Pl.Mem., at 18-22. In other words, although the confirmations were themselves accurate, they were part of a fraudulent scheme because they "represented that the rates applied were at or near the interbank rate when that was not the case." Pl.Mem., at 22.

Essentially, CSAV is claiming two things. First, that Schroder was required to disclose additional information so CSAV would know that the rates applied were not "at or near the

interbank rate." As discussed above, this claim is without merit. CSAV had access to all material information, and there has been no evidence presented that Schroder had a duty to disclose additional information.

[6][7] Second, CSAV is claiming that unless the slips disclosed that Schroder was no longer applying the favorable rates promised, or that Schroder was no longer in compliance with the alleged promises made to CSAV between 1979 and 1981, the confirmation slips were part of the fraudulent scheme. However, failing to disclose a breach of promise does not transform a contract action into one for fraud. *Rodgers v. Roulette Records, Inc.*, 677 F.Supp. 731, 738 (S.D.N.Y.1988) (citing *Brignoli v. Balch Hardy and Scheinman, Inc.*, 645 F.Supp. 1201, 1207 (S.D.N.Y.1986) (a claim that defendant "intentionally and falsely represented that it was abiding by the alleged contract" was insufficient to support a fraud claim)); *Robehr Films, Inc. v. American Airlines, Inc.*, No. 85 Civ. 1072 (RPP), 1989 WL 111079, *4 (S.D.N.Y. Sept. 19, 1989) ("it is simply not a tort to fail to advise that the contract has been, or is being, breached"), aff'd 902 F.2d 1556 (2d Cir.1990). Thus, the Court finds that the confirmation slips were not part of the scheme to defraud.

Accordingly, the Court concludes, as a matter of law, that Schroder is entitled to summary judgment on CSAV's common law fraud claim.

B. RICO

[8] CSAV also alleges that Schroder violated § 1962(c) of the Racketeer Influenced and Corrupt Organizations Act, which provides that:

It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(c). The offenses which underlie "racketeering activity" are the

predicate acts necessary for a RICO violation. They are defined in 18 U.S.C. § 1961(1) as acts "indictable" or "punishable" under various federal criminal statutes, and acts "chargeable" under certain state criminal laws. See *Equitable Life Assurance Society v. Alexander Grant & Co.*, 627 F.Supp. 1023, 1027 (S.D.N.Y.1985). These include murder, kidnapping, arson, robbery, bribery, extortion, dealing in narcotics, securities fraud, mail fraud and wire fraud. In this case, the predicate acts alleged in the complaint are violations of the mail fraud statute, 18 U.S.C. § 1341, and the wire fraud statute, 18 U.S.C. § 1343. According to CSAV, between 1984 and 1990, Schroder engaged in hundreds of separately indictable acts of federal mail and wire fraud. [FN12]

FN12. CSAV also appears to allege, although not in its complaint, that non-disclosure by a fiduciary may constitute the predicate for a RICO violation. *Pl.Mem.*, at 63-64. According to CSAV, "the concealment by a fiduciary of material information which he is under a duty to disclose to another under circumstances where the non-disclosure could or does result in harm to another is a violation of the [mail fraud] statute." *United States v. Bronston*, 658 F.2d 920, 926 (2d Cir.1981), cert. denied, 456 U.S. 915, 102 S.Ct. 1769, 72 L.Ed.2d 174 (1982). Because the Court finds that no fiduciary relationship existed between the parties, it is unnecessary to address CSAV's contentions. See *infra* 424-27.

[9][10] *424 The offenses of both mail and wire fraud require proof of the same two elements: [FN13] (1) that defendant participated in a scheme to defraud; and (2) knowingly used the mails (or wires) to further the scheme. *United States v. Rodolitz*, 786 F.2d 77, 80 (2d Cir.1986), cert. denied, 479 U.S. 826, 107 S.Ct. 102, 93 L.Ed.2d 52 (1986) (citations omitted). Additionally, "proof of a fraudulent scheme requires evidence showing a specific intent to defraud," *id.* (quoting *United States v. Gelb*, 700 F.2d 875, 879 (2d Cir.1983), cert. denied, 464 U.S. 853, 104 S.Ct. 167, 78 L.Ed.2d 152 (1983)), which can be shown by proof that the scheme was reasonably calculated to deceive persons of ordinary prudence and comprehension.

Virden v. Graphics One, 623 F.Supp. 1417, 1422 (C.D.Cal.1985).

FN13. See *United States v. Von Barta*, 635 F.2d 999, 1005 n. 11 (2d Cir.1980) (courts have uniformly given the language of both statutes the same construction), cert. denied, 450 U.S. 998, 101 S.Ct. 1703, 68 L.Ed.2d 199 (1981), overruling on other grounds recognized by, 841 F.2d 450 (2d Cir.1988).

[11] Before the Court can determine whether CSAV can establish these elements, it must first determine whether a plaintiff can ever satisfy the requirements of mail or wire fraud when its common law fraud claim has been dismissed. The Second Circuit has not yet considered whether the elements of common law or state statutory fraud must be satisfied to establish the predicate act of mail or wire fraud for civil RICO liability, and decisions within this district have been inconsistent. Some courts have held that the plaintiff's inability to plead common law fraud does not preclude a RICO claim based upon a scheme to defraud under the mail fraud statute. See e.g., *Scharff v. Claridge Gardens, Inc.*, 1990 WL 186879, 1990 U.S. Dist. LEXIS 15776 (S.D.N.Y.1990); *Shaw v. Rolex Watch U.S.A., Inc.*, 726 F.Supp. 969, 972 (S.D.N.Y.1989); *GLM Corp. v. Klein*, 684 F.Supp. 1242, 1244-45 (S.D.N.Y.1988). However, other courts have dismissed RICO claims "based upon the predicate act of mail fraud where the complaint pleads a scheme to defraud under the mail fraud statute that does not state a claim for common law fraud." *Scharff*, 1990 WL 186879 at *3, 1990 U.S. Dist. LEXIS at *8 (citing *Morin v. Trupin*, 711 F.Supp. 97, 105 (S.D.N.Y.1989); *Long Island Lighting Co. v. Transamerica Delaval, Inc.*, 646 F.Supp. 1442, 1453 (S.D.N.Y.1986); *River Plate Reinsurance Co. v. Jay-Mar Group, Ltd.*, 588 F.Supp. 23, 26-27 (S.D.N.Y.1984)).

Although there is no requirement in the text of the mail fraud statute that common law or state statutory fraud controls the sufficiency of a scheme to defraud under the mail fraud statute, and it is indeed well established that the reach of the mail fraud statute is not limited to common law or state statutory

definitions of fraud, see *Scharff*, 1990 WL 186879 at *3, 1990 U.S. Dist. LEXIS at *8 (citing numerous cases), the Court holds that the better view is that where the fraudulent scheme is premised upon an inadequate fraud claim, allegations of mail and wire fraud must generally also fail. See *Morin*, 711 F.Supp. at 105.

[12] Thus, CSAV's predicate act claim must fail, for, as set forth above, CSAV fails to adduce evidence that Schroder engaged in any "fraud" or "fraudulent scheme." *Id.* "Because the common law fraud [claim] is dismissed, there are no valid allegations of 'fraud' to underpin the ... RICO allegations and those claims must be dismissed as well." *Id.*

[13] However, even if the Court accepted the view that dismissal of the common law fraud claim does not preclude a RICO claim based upon a scheme to defraud under the mail and wire fraud statutes, the RICO claim in this case would still be dismissed as a matter of law because CSAV cannot establish the elements of either mail fraud or wire fraud. Proof of a fraudulent scheme requires evidence showing a specific intent to defraud, and, as discussed *425 above, CSAV cannot prove that Schroder had a specific intent to defraud. In this case, moreover, the alleged fraudulent omissions in the confirmation slips and fraudulent misrepresentations as to what rates Schroder would charge, were not reasonably calculated to deceive persons of "ordinary prudence and comprehension." Since Schroder knew that CSAV had access to both the rates charged by Schroder and the prevailing market rate, and since it is unreasonable to assume that Schroder was unaware of the facility with which an ordinary person might calculate that Schroder's rates were above the interbank rate, the Court finds, as a matter of law, that there is no proof of a fraudulent scheme reasonably calculated to deceive persons of ordinary prudence and comprehension.

For the aforementioned reasons, Schroder's motion for summary judgment as to CSAV's RICO claim is granted.

C. Breach of Fiduciary Duty Claim

[14] CSAV contends that the evidence establishes a fiduciary relationship, and that Schroder breached its fiduciary duty by charging CSAV rates in excess of the alleged promised rates. As support for its claim that a fiduciary relationship existed between Schroder and CSAV, CSAV points to their longstanding relationship of fifty years, and Schroder having deemed "CSAV and its subsidiaries [one] our oldest and most respected client relationships," and indeed, one of Schroder's leading clients in Latin America. Seeley Tr., at 208; see, e.g., Exhibit "O" to DiNatale Aff., at S00213; Exhibit "P" to DiNatale Aff., at S00187.

As further support for its claim, CSAV alleges that the relationship between Schroder and CSAV in connection with currency conversions was special and unique. Schroder's former President and former C.E.O. Hamway said the relationship was an "international cash management service" not provided to others. Hamway Tr., at 175-78. In addition, Tygier states that, unlike currency transactions with its other corporate accounts, Schroder did not trade with CSAV. Tygier Aff., at ¶ 3. Instead, "Schroder acted as a fiduciary and managed CSAV's foreign currency exchange activity for CSAV, and automatically converted or exchanged foreign currency on CSAV's behalf." Tygier Aff., at ¶ 3. Tygier also states that "Schroder acted in the capacity of a manager and fiduciary of CSAV's currency conversions in that CSAV and Schroder were in a unique relationship of trust." Tygier Aff., at ¶ 7.

Finally, CSAV claims that every CSAV witness testified that, by reason of the longstanding relationship and the manner in which foreign exchange business had been conducted, CSAV reposed trust and confidence in Schroder and relied upon Schroder to give CSAV the best rates. Geis Tr., at 383-85, 411-12; Grez Tr., at 47-49, 202; Suttie Tr., at 98-99; Seeley Tr., at 87-88.

Contrary to CSAV's assertions and Tygier's unjustified, conclusory statements about the

existence of a fiduciary relationship, the Court finds, as a matter of law, that no fiduciary relationship existed between CSAV and Schroder; therefore there could be no breach of fiduciary duty.

Although "the exact limits of the term 'fiduciary relation' are impossible of statement," G. Bogert, *The Law of Trusts and Trustees*, § 481 (2d Ed.Rev.1984), broadly speaking,

[a] fiduciary relationship is one founded on trust or confidence reposed by one person in the integrity and fidelity of another. The term is a very broad one. It is said that the relation exists, and that relief is granted in all cases in which influence has been acquired and abused, in which confidence has been reposed and betrayed. The origin of the confidence and the source of the influence are immaterial. The rule embraces both technical fiduciary relations and those informal relations which exist whenever one man trusts in and relies upon another. Out of such a relation, the laws raise the rule that neither party may exert influence or pressure upon the other, take selfish advantage of his trust or deal with the subject matter of the trust in such a way as to benefit himself or prejudice the other except in the exercise of utmost good faith.... A fiduciary relation exists when confidence is reposed on one side and there is resulting superiority and influence on the other.

Mobil Oil Corporation v. Rubinfeld, 72 Misc.2d 392, 339 N.Y.S.2d 623, 632 (1972), rev'd on other grounds, 48 A.D.2d 428, 370 N.Y.S.2d 943 (1975); accord, *CBS, Inc. v. Ahern*, 108 F.R.D. 14 (S.D.N.Y.1985) (citing *United States v. Reed*, 601 F.Supp. 685, 707 (S.D.N.Y.1985); *Penato v. George*, 52 A.D.2d 939, 942, 383 N.Y.S.2d 900, 904-05 (2d Dept.1976), appeal dismissed, 42 N.Y.2d 908, 397 N.Y.S.2d 1004, 366 N.E.2d 1358 (1977)).

New York law is also quite clear, however, that "a conventional business relationship, without more, does not become a fiduciary relationship by mere allegation." *Oursler v. Women's Interart Center, Inc.*, 170 A.D.2d 407, 566 N.Y.S.2d 295 (1st Dept.1991).

Indeed, New York Courts have rejected the proposition that a fiduciary relationship can arise between parties to a business transaction, *National Westminster Bank, U.S.A. v. Ross*, 130 B.R. 656, 679 (S.D.N.Y.1991) (citing *Beneficial Commercial Corp. v. Murray Glick Datsun*, 601 F.Supp. 770, 772 (S.D.N.Y.1985)), and have concluded that "where parties deal at arms length in a commercial transaction, no relation of confidence or trust sufficient to find the existence of a fiduciary relationship will arise absent extraordinary circumstances." *National Westminster Bank*, 130 B.R. at 679 (citations omitted).

In this case, CSAV has failed to set forth evidence that the dealings between the parties were not arms-length, or that there were extraordinary circumstances that would give rise to a fiduciary relationship between the parties. In fact, the record conclusively establishes that CSAV and Schroder were parties with equivalent knowledge engaged in mutually beneficial, arms-length commercial transactions.

First, it is clear from the record that both Schroder and CSAV were sophisticated parties. CSAV and Chilean Line were run by individuals who very knowledgeable about the foreign currency market. They participated in complex foreign exchange "swap" operations with the Central Bank of Chile, *Grez Tr.*, at 138; bought and sold Chilean debt in the market to profit from favorable dollar/peso exchange rates, *Grez Tr.*, at 135; purchased yen futures from Chase, *Geis Tr.*, at 111; engaged in dollar/yen "forward swaps" and "reconversions" with First Maryland, *Geis Tr.*, at 113; were "absolutely" familiar with the process of "hedging" their foreign currency exposure, *Grez Tr.*, at 126; and investigated sophisticated hedging devices such as the "Philadelphia option," *Geis Tr.*, at 87-92.

Second, even if the Court finds that Schroder provided CSAV with an unique international cash management service, did not trade with CSAV as to each currency transaction, and promised to convert CSAV's currency at favorable rates, there is no evidence to support

CSAV's allegation that this was a fiduciary relationship rather than an arms-length relationship. There is not a scintilla of evidence that the agreements between the parties were a result of unequal bargaining power or that Schroder acquired any influence over CSAV. In fact, the record establishes that this was a typical arms-length relationship designed to further the interests of the respective parties. In 1988, despite its longstanding ties to CSAV, Schroder told CSAV not to count on any credit from Schroder in the future, *Grez Tr.*, at 192; Exhibit "46" to Def.App., and basically terminated its relationship with CSAV in all areas except foreign exchange because it was no longer profitable to maintain Latin American banking relationships. Moreover, although CSAV employees testified that they believed that they were not free to take their business elsewhere, *Geis Tr.*, at 52, the abrupt termination of the relationship by CSAV in June 1990 indicates that this was an arms-length relationship that would continue until CSAV found that it could get superior rates elsewhere.

CSAV is correct when it argues that there are circumstances where a fiduciary relationship might be found to exist "based upon prior business dealings", *Apple Records, Inc. v. Capitol Records, Inc.*, 137 *427 A.D.2d 50, 57, 529 N.Y.S.2d 279, 283 (1st Dep't 1988) (quoting *Penato v. George*, 52 A.D.2d 939, 942, 383 N.Y.S.2d 900, 904-05 (2d Dep't 1976), appeal dismissed, 42 N.Y.2d 908, 397 N.Y.S.2d 1004, 366 N.E.2d 1358 (1977)); see also, *Gittes v. Cook International*, 598 F.Supp. 717, 723 (S.D.N.Y.1984), but CSAV has not established that such circumstances are present in this case. In *Apple Records*, the court's decision was based largely on the fact that plaintiffs' breach of fiduciary duty claim was inextricably linked to their cognizable claims for fraudulent concealment and fraudulent representation. *Apple Records*, 529 N.Y.S.2d at 283 ("it can be said that from such a long enduring relationship was borne a special relationship of trust and confidence, one which existed independent of the contractual duties, and one which plaintiffs argue was betrayed by fraud in secretly

selling records claimed as scrapped and in diluting the market and exploiting the Beatles' popularity with excessive distribution of promotional copies to benefit other aspects of defendants' business.") (emphasis added). Even the format of the opinion indicates the link as plaintiffs' claims for fraud and breach of fiduciary duty are discussed by the court in an almost interchangeable manner. *Id.* 529 N.Y.S.2d at 283. It is also clear that the court upheld the breach of fiduciary duty cause of action in *Apple Records* because the plaintiffs alleged that defendants breached their duty as bailees, a claim that is not asserted by CSAV in the case at hand. Thus, the court did not uphold the breach of fiduciary claim merely because the parties had a close 26 year business relationship. [FN14]

FN14. *Gittes v. Cook International*, 598 F.Supp. at 723, is also distinct from the present case. In that case the court dealt with a situation involving corporate directors and the duties they owe to minority shareholders. Further, in that case the court determined that no fiduciary relationship arose from the business relationship. *Id.*

[15][16] Further, CSAV establishes no other basis for the existence of a fiduciary relationship. CSAV's allegations that the "nostro accounts" were "special accounts" which turn a debtor-creditor relationship into a fiduciary one, are unfounded, and its assertion that a fiduciary relationship was established because Schroder held CSAV's currencies in its "nostro accounts" for the benefit of CSAV, is without foundation. [FN15] In addition, CSAV evinces no evidence to establish that Schroder owed it fiduciary duties as either an agent or a trustee.

FN15. This case is markedly different from *SEC v. American Board of Trade, Inc.*, 654 F.Supp. 361 (S.D.N.Y.1987), *aff'd in part*, 830 F.2d 431 (2d Cir.1987), *cert. denied*, 485 U.S. 938, 108 S.Ct. 1118, 99 L.Ed.2d 278 (1988), where the court found a fiduciary relationship to exist based upon the defendant financial institution having arranged special "safekeeping accounts" for its T-bill customers. In *American Board of Trade*, the accounts were used to hold money for investment or in trust, whereas in this case the relationship was

essentially one between buyer and seller. When Schroder received notification from the nostro bank, it purchased the foreign currency from CSAV. Plaintiff's 3(g) statement, at ¶ 4(b)-(e); Defendant's 3(g) statement, at ¶ 23(b)-(e). The written confirmations sent to CSAV by Schroder, which explicitly stated that "WE HAVE BOUGHT" and "WE HAVE SOLD," are strong evidence that Schroder was indeed purchasing the foreign currency from CSAV. Exhibit "D" to Def.App.; see also *Banco Fonsecas & Burnay v. Prudential-Bache Securities, Inc.*, No. 87 Civ. 2308 (RO), 1990 WL 145150 at *2 (S.D.N.Y. Sept. 22, 1990), *aff'd*, 930 F.2d 910 (2d Cir.1991) (no fiduciary duty in transaction between purchaser and seller in government bond market). Similarly, in *CBS, Inc. v. Ahern*, 108 F.R.D. 14, 25 (S.D.N.Y.1985), in which the court held that the allegations support the imposition of fiduciary duties, the money held in "special accounts" was to be "invested and reinvested from time to time" in securities selected by an investment advisor.

Thus, the Court concludes that CSAV's allegations that it reposed trust and confidence in Schroder and relied upon Schroder to give CSAV the best rates are merely an effort to avoid the repercussions of its lack of diligence in monitoring the rates at which conversions were made for over six years, and finds that Schroder is entitled to summary judgment on CSAV's breach of fiduciary duty claim.

D. Breach of Contract Claim

1. CSAV's Contentions

CSAV claims that the evidence establishes that there was an oral agreement between *428 Schroder and CSAV regarding the management by Schroder of a conversion program for CSAV's currencies. CSAV contends that under this contract, it was obligated to remit all of its European currencies to Schroder's "nostro accounts," and Schroder was required to automatically convert those currencies to U.S. dollars and give CSAV a rate at or near the interbank rate. CSAV also contends that Schroder breached this agreement when it applied rates far in excess of the rates it agreed to apply.

2. Schroder's Contentions

Schroder contends that CSAV has produced no written contract which governs all of the parties' currency transactions, nor has any witness testified that such an agreement existed. See Grez Tr., at 34-35; Geis Tr., at 120; Suttie Tr., at 129, 135-36; Seeley Tr., at 29-30, 32; Wan Tr., at 300-01; Raphael Tr., at 60; Espinosa Tr., at 170-71; Hasselbach Tr., at 351. Thus, if any contract exists it must be an oral, unwritten agreement, as CSAV concedes. According to Schroder, however, CSAV's claim of the existence of an oral contract ignores the legal effect of the written confirmations that it regularly received. Because the specific terms of every foreign currency exchange, including the price term, were confirmed in writing to CSAV, Schroder argues that the parol evidence rule precludes CSAV from contradicting those written terms based on an alleged oral agreement. Moreover, Schroder claims that even if evidence of the alleged oral agreement was not barred by the parol evidence rule, the oral agreement is not an enforceable contract as a matter of law because "[it] is vapor." Def.Mem., at 18. None of CSAV's witnesses has any first-hand knowledge about the alleged oral agreement, its terms, the individuals who negotiated it, or when it was made. In addition, Schroder's witnesses have no knowledge of any oral agreement with CSAV respecting foreign exchange rates. Further, it is unenforceable because there is substantial confusion on the part of CSAV as to what the purported contract requires. On the strength of these arguments, Schroder moves for summary judgment on CSAV's breach of contract claim.

For the reasons set forth below, the Court denies Schroder's motion for summary judgment on CSAV's breach of contract claim.

3. Discussion

a. Oral Agreement

[17] It is undisputed that there was no written contract which governed all of the foreign currency exchange transactions

between the parties. However, the record establishes at least a genuine issue of material fact as to whether an oral agreement existed between Schroder and CSAV regarding the management by Schroder of a conversion program for CSAV's currencies.

In order to determine whether the parties entered into an oral agreement and the terms of such an agreement,

it is necessary to look ... to the objective manifestations of the intent of the parties as gathered by their expressed words and deeds. In doing so disproportionate emphasis is not to be put on any single act, phrase or other expression, but, instead, on the totality of all of these, given the attendant circumstances, the situation of the parties, and the objectives they were striving to attain.

Brown Brothers Electrical Contractors, Inc. v. Beam Construction Corp., 41 N.Y.2d 397, 399-400, 393 N.Y.S.2d 350, 352, 361 N.E.2d 999, 1001 (1977) (citations omitted). Further, "[it] is necessary that the totality of all the acts of the parties, their relationship and their objectives be considered in order to determine whether they entered into an oral agreement...." P.J. Carlin Construction Co. v. Whiffen Electric Co., Inc., 66 A.D.2d 684, 411 N.Y.S.2d 27, 29 (1st Dept.1978).

In this case, the most compelling evidence for the existence of an oral agreement is the absence of other explanation for the relationship that developed between CSAV and Schroder. It is implausible that Schroder set up accounts in Europe to accept CSAV's European currencies, converted those currencies to U.S. dollars automatically *429 and without prior consultation with CSAV, [FN16] and CSAV agents remitted their European currencies exclusively to Schroder, without the existence of any overarching oral agreement between the parties.

FN16. It is undisputed that there was no negotiation between Schroder and CSAV as to the rates to be applied to individual conversions of CSAV's currencies. See Def.Reply Mem., at 23 n. 14; Suttie Tr., at 96-99; Tygier Aff., at ¶ 3, 4, 7.

Further evidence for the existence of an agreement is provided by both CSAV and Schroder witnesses. CSAV witnesses have testified that CSAV was obligated to remit all of its European currencies to Schroder for conversion, and that Schroder was obligated to give CSAV the best available rates. Specifically, Grez stated that Geis and three other CSAV executives each described the contract to him. Grez Tr., at 35-36. Each of the executives told Grez that CSAV was bound to remit its European currencies to Schroder, and Schroder would give "special consideration" to CSAV. In addition, Schroder would automatically convert the currencies into U.S. dollars at "the best possible exchange rate," to be determined by reference to a benchmark such as the "Reuters, Frankfurt or New York" interbank rates. Grez Tr., at 35-38, 41-45, 56, 248. Moreover, Suttie testified that she was told by a Schroder employee that "because of the monies we put through the account[,] [Schroder] would give us the best rate in the market." Suttie Tr., at 54-55. She also testified that CSAV had an "exclusive arrangement" whereby "all European currencies must go to Schroder," Suttie Tr., at 146, and because of the exclusivity, "Schroder was working on [CSAV's] behalf, [and] they were getting us an honest rate." Id. at 52. [FN17] Finally, Geis has testified that he was told that "for years--nobody knew when--all of CSAV's European currencies were remitted to Schroder for conversion," Geis Tr., at 52, and that, in return, Schroder "converted [the currencies] and credited our account" and gave CSAV "preferential rates." Geis Tr., at 48-50.

FN17. As Schroder points out, Suttie points to no specific basis for her belief that an oral agreement existed. She testified that she "just ... believed" an oral agreement existed because it was "just something that you feel [exists]." Suttie Tr., at 131-32. However, in light of the testimony of other CSAV employees and Schroder employees, and the lack of another explanation for the complex relationship that developed between the parties, the Court finds that CSAV has raised a genuine issue of material fact as to the existence of an oral agreement.

Schroder witnesses have also provided testimony which tends to corroborate the existence of an oral agreement. Tygier has stated that Schroder "agreed to manage" and did manage the foreign currency activities for CSAV and was "committed" to give CSAV a rate at or near the interbank rate. Tygier Aff., at ¶¶ 2, 3, 5. Further, Schroder's former Chairman Hamway has testified that he believed Schroder was providing CSAV with an international cash management service that was not provided to any other Schroder client. Hamway Tr., at 175-177.

That none of CSAV witnesses has first-hand information about the oral agreement, its terms, the individuals who negotiated it or when it was made, does not warrant a finding that there was no oral agreement as a matter of law. It simply indicates that the alleged agreement was in existence prior to the involvement of the present witnesses.

Based on the circumstances of the relationship between Schroder and CSAV, and the testimony of both Schroder and CSAV witnesses, the Court finds that a jury could conclude that the parties were operating pursuant to an overarching agreement which provided that CSAV remit all of its European currencies to Schroder and Schroder convert these currencies at preferential rates. [FN18]

FN18. Schroder argues that since the overarching agreement between CSAV and Schroder could only be deduced by looking at the "totality" of the parties' acts, their relationship, objectives, and "the manner in which the conversion program was operated," Pl.Mem., at 30-31, 34, it must be a contract "implied in fact." *Baltimore & Ohio R.R. Co. v. United States*, 261 U.S. 592, 597, 43 S.Ct. 425, 426, 67 L.Ed. 816 (1923) (an agreement implied in fact, "although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding"). Schroder argues, however, that in this case, it is improper for the Court to resort to implication. See Def.Reply Mem., at 29-31. The Court need not consider whether Schroder's contentions are correct because there is not sufficient evidence to establish that the oral

agreement at issue must be a contract "implied in fact." Although it is clear that no express written contract exists, there is a genuine issue of material fact as to whether an express oral agreement regarding the conversion of currency existed between the parties. See *supra*, 417-18, 428-29.

[18] *430 Schroder argues, however, that even if the Court finds that an oral agreement exists, the inability of CSAV's witnesses to articulate the terms of the alleged oral understanding make the contract unenforceable. According to Schroder, CSAV's claimed entitlement to numerous and inconsistent rates makes the contract too vague and indefinite to be enforceable. As support for its position, Schroder cites the various rates claimed by CSAV employees at different times. At a meeting with Schroder officials in June 1990, Grez claimed the company was contractually entitled to "the best possible exchange rate." Grez Tr., at 246-48. A month later, CSAV claimed that the contract entitled it to "market rates no less favorable to us than those which would have been available to us from other first class international banks." Grez Tr., at 267; Exhibit "20" to Def.App. In a letter to the Court dated March 29, 1991, CSAV's counsel claimed that Schroder agreed to give CSAV a rate "equal to or better than that given to other customers." To further emphasize the confusion over what the contract purportedly required, Schroder highlights the inconsistencies in Geis' testimony. At varying times, Geis testified that CSAV's contractual rate could be higher than some market rates, Geis Tr., at 380; that CSAV had previously received the "million dollar rate" from Schroder, Geis Tr., at 65-66; that the "best possible rate" was the same as the "million dollar rate," Geis Tr., at 378; that the "best possible rate" equalled the interbank rate, Geis Tr., at 310-11; that the "million dollar rate" differed from the interbank rate, Geis Tr., 237-38; that CSAV was entitled to the "spot rate," Geis Tr., at 93; that he understood the "spot rate" to mean the "million dollar rate," Geis Tr., at 93; and that he now understands "spot rate" to refer to any exchange rate in a transaction maturing within two days. Geis Tr., at 101, 341.

It is well established that

[A] price term is not necessarily indefinite because the agreement fails to specify a dollar figure, or leaves fixing the amount for the future, or contains no computational formula. Where at the time of the agreement the parties have manifested their intent to be bound, a price term may be sufficiently definite if the amount can be determined objectively without the need for new expressions by the parties; a method for reducing uncertainty to certainty might, for example, be found within the agreement, or ascertained by reference to an extrinsic event, commercial practice, or trade usage.

Cobble Hill Nursing Home, Inc. v. Henry & Warren Corp., 74 N.Y.2d 475, 483, 548 N.Y.S.2d 920, 923, 548 N.E.2d 203, 206 (1989), cert. denied, 498 U.S. 816, 111 S.Ct. 58, 112 L.Ed.2d 33 (1990). Thus, if the parties "specify a practicable method by which the price can be determined by the court without any new expressions by the parties themselves," the agreement is enforceable. In *re McManus*, 83 A.D.2d 553, 554, 440 N.Y.S.2d 954, 957 (2d Dept.1981), *aff'd*, 55 N.Y.2d 855, 447 N.Y.S.2d 708, 432 N.E.2d 601 (1982).

In this case, CSAV has submitted sufficient evidence so that the Court could determine the price without any new expressions by the parties. Although there have been slight variations in the testimony as to what rate the agreement requires, a jury could determine that CSAV was simply entitled to the best rate Schroder gave, and thus the price can be determined by reviewing the interbank rates, fair profit margins and rates Schroder and other banks gave to preferred customers

b. Parol Evidence Rule

[19][20] As codified in Article 2 of New *431 York's Uniform Commercial Code, [FN19] the parol evidence rule states:

FN19. The provisions of Article 2 governing "transactions in goods," N.Y.U.C.C. § 2-102, also apply to foreign currency transactions where, as here, foreign currency is traded as a commodity. See *Intershoe, Inc. v. Bankers Trust Co.*, 77

N.Y.2d 517, 521, 569 N.Y.S.2d 333, 336, 571 N.E.2d 641, 644 (1991) ("[t]here seems to be no question that the U.C.C. applies to foreign currency transaction"); accord N.Y.U.C.C. § 2-105 official comment 1 (U.C.C.'s definition of "goods" is intended to cover the sale of money when money is being treated as a commodity). However, Article 2 only applies to contracts for the sale of goods. It does not apply to contracts for services. See N.Y.U.C.C. § 2-102. Thus, CSAV contends that Article 2 does not apply because the contract at issue, the management agreement that governs all the individual conversions, is a contract for services. According to CSAV, it did not just order goods, rather, it entrusted Schroder with the management of its European currency conversion program. In order to determine whether a contract is for the sale of goods, or for services, a court must look at the "essence" or main objective of the agreement. If the provision of services or rendition of other performance predominates and is not merely incidental or collateral to the sale of goods, then the U.C.C. does not apply. *Dynamics Corp. of America v. International Harvester Co.*, 429 F.Supp. 341, 346 (S.D.N.Y.1977); *North American Leisure Corp. v. A & B Duplicators, Ltd.*, 468 F.2d 695, 697 (2d Cir.1972); *Schenectady Steel Co., Inc. v. Bruno Trimpoli General Construction Co., Inc.*, 43 A.D.2d 234, 350 N.Y.S.2d 920, 922 (3d Dept.), *aff'd*, 34 N.Y.2d 939, 359 N.Y.S.2d 560, 316 N.E.2d 875 (1974). In this case, the Court finds that even if CSAV is correct and it is the overarching management agreement that is at issue, the contract is in "essence" a contract for the sale of goods. Schroder rendered services only to facilitate sales and purchases of foreign currency, making the provision of services incidental to the contract(s) for the sale of goods. As CSAV's fact witness, Frederick Seeley testified, "Schroder bought and sold foreign exchange to CSAV" and "[t]hat's what happened" between the parties. Seeley Tr., at 35-36. Further, CSAV cites no evidence to suggest that Schroder rendered any management services for any purpose aside from facilitating the sales and purchases of currency. The record indicates that the sole reason Schroder provided CSAV with any services was to facilitate the transactions in goods. See Hamway Tr., at 176 (goal of envisioned cash management arrangement was for CSAV to "engage in F/X conversions and get dollars available to them on the most efficient, fast basis"); *Hasselbach Tr.*,

at 362 (nostro accounts used by CSAV were selected to "expedite the payment" on foreign exchange transactions so as to move "dollars quicker to the client's accounts"). Thus, the Court finds that Article 2 of the U.C.C. applies to the relationship between the parties. Since the parol evidence rule set forth in Article 2, however, is substantially similar to the common law parol evidence rule, this determination has implications primarily for Schroder's contention that a portion of CSAV's contract claim is barred by the statute of limitations. See *infra*, at 433-34.

Final Written Expression: Parol or Extrinsic Evidence Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement....

N.Y. U.C.C. § 2-202. [FN20]

FN20. The statute includes two exceptions for evidence by which written terms "may be explained or supplemented," but CSAV has not contended that either exception applies to the present case.

[21] Schroder's principal defense to CSAV's breach of contract claim is that evidence of the oral "management" agreement is precluded by the parol evidence rule because, as a prior oral agreement, it cannot serve to vary or contradict the price terms of more than one thousand written contracts evinced by confirmation slips. Specifically, Schroder claims that each of the individual conversions must be viewed as an independent contract, separate and apart from the management agreement pursuant to which all conversions were effectuated. Viewed as such, Schroder argues that because it sent CSAV a written confirmation of each conversion, setting forth the actual numerical rate at which the particular conversion was made, the parol evidence rule precludes CSAV from contradicting those written terms and arguing that the excessive rates charged by Schroder breached the alleged oral agreement. For this proposition, Schroder relies almost

exclusively on *Intershoe, Inc. v. Bankers Trust Co.*, 77 N.Y.2d 517, 569 N.Y.S.2d 333, 571 N.E.2d 641 (1991), a 1991 New York Court of Appeals case which, according to Schroder, applied N.Y. U.C.C. § 2-202 to written foreign exchange confirmations similar to Schroder's.

In *Intershoe*, the plaintiff ("Intershoe") was a shoe importer that used foreign currencies in transacting its business. On March 13, 1985, Intershoe entered into a foreign currency transaction over the phone with defendant Bankers Trust Co. ("Bankers"), involving Italian lira. Following the telephone conversation, Bankers sent Intershoe a written confirmation which stated: "WE HAVE BOUGHT FROM YOU ITL 537,750,000" and "WE HAVE SOLD TO YOU USD 250,000.00." The confirmation also reflected the rate at which the transaction was completed, and stated that delivery of the lira was scheduled to take place some 7 and 1/2 months later. Intershoe's treasurer subsequently signed the confirmation and returned it to Bankers. *Intershoe*, 77 N.Y.2d at 520, 569 N.Y.S.2d at 334-35, 571 N.E.2d at 642-43.

Seven months later, as the value date arrived, Intershoe claimed that the confirmation it had signed mistakenly reflected that it was selling lira when the oral agreement had actually provided for Intershoe to purchase lira. Intershoe refused to pay the lira to Bankers, and Bankers was forced to purchase lira in the open market. *Intershoe*, 77 N.Y.2d at 520, 569 N.Y.S.2d at 335, 571 N.E.2d at 643.

The New York Court of Appeals held that the parol evidence rule prevented Intershoe from claiming that the deal was actually a purchase and not a sale of lira. The court reasoned that the essential terms of the transaction were plainly set forth in the confirmation slip which Intershoe had signed and returned, signifying its acceptance of those terms. *Intershoe*, 77 N.Y.2d at 522, 569 N.Y.S.2d at 336, 571 N.E.2d at 644. The court also stated that "it is difficult to imagine words which could more clearly demonstrate

the final expression of the parties' agreement than 'WE HAVE BOUGHT FROM YOU ITL 537,750,000' and 'WE HAVE SOLD TO YOU USD 250,000.00.' " *Id.* Finally, the court concluded that:

Where as here, the form and content of the confirmation slip suggest nothing other than that it was intended to be the final expression of the parties' agreement as to the terms set forth and where there is no evidence indicating that this was not so, U.C.C. 2-202 bars parol evidence of contradictory terms.

Id.

Schroder contends that since the confirmations at issue in the current case contain the same key language, the Court should similarly conclude that they were intended to be final expressions of the parties' agreement, barring parol evidence of contradictory terms.

[22] The determination as to whether a writing was intended as a complete and exclusive statement of an agreement is a function of the court. See *FMC Corp. v. Seal Tape Ltd., Inc.*, 90 Misc.2d 1043, 396 N.Y.S.2d 993, 996 (1977) (citing *Pennsylvania Gas Co. v. Secord Brothers, Inc.*, 73 Misc.2d 1031, 343 N.Y.S.2d 256 (1973), *aff'd*, 44 A.D.2d 906, 357 N.Y.S.2d 702 (1974)). In making this determination, the court is to measure the completeness of the written instrument itself, rather than the subjective attitude of the parties. *Phillip Brothers, etc. v. El Salto, S.A.*, 487 F.Supp. 91, 94 (S.D.N.Y.1980).

While it is true that Schroder's confirmations contained the same key language relied upon by the court in *Intershoe*, and Schroder has produced evidence to indicate that each written confirmation stated the terms of a contract for the purchase and sale of currency, see *Grez Tr.*, at 66; *Geis Tr.*, at 128; *Suttie Tr.*, at 65, 67; *Seeley Tr.*, at 44, the Court finds that in this case, the confirmations cannot be deemed an integration intended as a final expression of the parties' agreement.

In *Intershoe*, which involved a single

transaction, it was undisputed that the written confirmation was intended to reflect the individual transaction to which the parties had orally agreed. Indeed, Intershoe had unequivocally signified its acceptance of the terms set forth in the confirmation by signing and returning it to Bankers. In this case, by contrast, the confirmations were not intended to reflect the terms of the alleged overriding agreement pursuant *433 to which in excess of one thousand transactions were conducted. Nor were they intended to reflect a single transaction to which both parties had orally agreed. Rather, each confirmation was intended to reflect the terms at which one of hundreds of currency conversions contemplated by the oral agreement had been completed. Grez Tr., at 195.

In addition, here there was no negotiation of the terms that were later set forth in the written confirmations, nor was there any prior agreement to the terms by CSAV. And whereas in Intershoe the parties specifically agreed to the terms that were confirmed in writing, in this case Schroder executed the currency conversions without prior input or agreement from CSAV, Geis Tr., at 154-58, 352-53; Grez Tr., at 48-49, 52-54; Suttie Tr., at 36-37, 43, 50-52, 98-99; Tygier Aff., at ¶¶ 3, 4, 7, and then merely informed CSAV of the details of the transaction via the written confirmations.

Furthermore, it is undisputed that in this case CSAV never signed or otherwise assented to the written confirmations sent by Schroder. It is true that Schroder's written confirmations stated that "[t]his confirmation is valid without signature," see Exhibit "D" to Def. Appendix, but the absence of CSAV's signature on the written confirmations further distinguishes this case from Intershoe and makes it impossible for the Court to determine, as a matter of law, that these confirmations were intended to be "the final expression of the parties' agreement as to the terms set forth." Intershoe, 77 N.Y.2d at 522, 569 N.Y.S.2d at 336, 571 N.E.2d at 644. [FN21]

FN21. It appears that Schroder also contends that

CSAV's acceptance of the U.S. dollars and its failure to register any complaint about the rates are equivalent to CSAV's signature as they indicate assent to each transaction. CSAV's assent, however, is not the issue. The issue is whether the written confirmations were intended to be the final expression of the parties' agreement, and CSAV's actions do not indicate that these confirmations were so intended. Whereas, in Intershoe, the signature on the confirmation provided such evidence.

Finally, the circumstances of the parties' longstanding relationship indicates that the confirmations should not be considered the complete and exclusive statement of the parties' agreement. The fact that Schroder set up accounts in Europe to accept CSAV's European currencies, and CSAV remitted its currencies exclusively to Schroder establish that the agreement between the parties had much more to it than was reflected in the confirmations sent to CSAV. As such, the Court finds that evidence of the oral agreement is not barred by the parol evidence rule. [FN22]

FN22. Because the Court has determined, as a matter of law, that the confirmations were not intended to be the final expression of the parties' agreement, it is not necessary to address the secondary issue of whether evidence of the oral agreement would contradict the price terms set forth in writing on each confirmation.

Accordingly, the Court concludes that Schroder's motion for summary judgment on CSAV's breach of contract claim should be denied.

IV. Statute of Limitations

Because only CSAV's breach of contract claim remains, it is only necessary to discuss whether a portion of that claim is barred by the applicable statute of limitations as Schroder contends.

[23][24] As a preliminary matter, the Court must determine when CSAV's action was commenced for purposes of the relevant statute of limitations. CSAV filed the instant action on November 9, 1990 and served

Schroder on November 13, 1990. Since New York law provides that an action is commenced when the summons is served on the defendant, [FN23] CSAV's breach of contract claim was commenced on November 13, 1990. New York Civil Practice *434 and Rules ("CPLR") § 203(b)(1) (McKinney 1972).

FN23. When the claim asserted in federal court is on a right created by state law, provisions of the state statute of limitations as to how the action is commenced, rather than Rule 3 of the Federal Rules of Civil Procedure, control in the federal court. See Ragan v. Merchants Transfer & Warehouse Company, 337 U.S. 530, 69 S.Ct. 1233, 93 L.Ed. 1520 (1949); 4 C. Wright & A. Miller, Federal Practice and Procedure §§ 1056-56 (1987).

[25] Article 2 of the U.C.C. [FN24] provides that an action for breach of contract must be brought within four years of its accrual. N.Y. U.C.C. § 2-725(1). Thus, CSAV's breach of contract claim is barred, as a matter of law, insofar as it alleges any breach occurring prior to November 13, 1986.

FN24. As discussed above, the provisions of Article 2 apply to all aspects of the parties' relationship.

Conclusion

For the reasons set forth above, Schroder's motion, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for an order granting it summary judgment is granted as to CSAV's common law fraud, RICO, and breach of fiduciary duty claims, and denied as to CSAV's breach of contract claim. However, CSAV's contract claim is barred by the applicable statute of limitations to the extent that it alleges any breach occurring prior to November 13, 1986.

SO ORDERED.

785 F.Supp. 411, RICO Bus.Disp.Guide
7956, 17 UCC Rep.Serv.2d 1050

END OF DOCUMENT

17

United States District Court,
S.D. New York.

CONGRESS FINANCIAL CORPORATION,
Plaintiff,
v.
JOHN MORRELL & CO., Defendant.

No. 90 Civ. 7191 (RPP).

April 20, 1992.

Finance company for seller of corporate assets brought action against buyer of assets, and buyer filed counterclaim. On motions for summary judgment, the District Court, Robert P. Patterson, Jr., J., held that: (1) genuine issue of fact existed as to meaning of "no offset" provision in agreement between buyer and finance company; (2) buyer could not have justifiably relied on any misrepresentations by finance company; (3) there was no special relationship between finance company and buyer; and (4) implied covenant of good faith and fair dealing did not impose upon the finance company a duty to continue to extend financing to the seller regardless of the seller's collateral position.

Motion granted in part and denied in part.

West Headnotes

[1] Federal Civil Procedure 2510
170Ak2510

Different interpretations by finance company and purchaser of corporate assets as to whether "no offset" provision in agreement precluded all offsets, including claims of the purchaser directly against the finance company, or only precluded offsets by the purchaser against the finance company based on claims against the seller raised a genuine issue of fact precluding summary judgment.

[2] Evidence 397(2)
157k397(2)

Parol evidence rule bars extrinsic evidence of prior or contemporaneous oral agreement when offered to contradict, vary, add to, or subtract from the clear and unambiguous terms of a valid, integrated written

agreement.

[3] Evidence 434(1)
157k434(1)

New York law recognizes limited exception to the parol evidence rule and actions to rescind a contract on the ground of fraud.

[4] Contracts 238(2)
95k238(2)

Under New York law, parol evidence offered to modify fully integrated agreement which stated that it could be modified only in writing was inadmissible.

[5] Evidence 397(1)
157k397(1)

Proffered oral agreement which was an absolute promise by finance company to continue financing seller of corporate assets after closing at a loan level comparable to preclosing level was inconsistent with written requirement that funds be advanced pursuant to a particular formula, and thus was inadmissible parol evidence.

[6] Fraud 3
184k3

Elements of actual fraud under New York law are false representation, scienter, materiality, expectation of reliance, justifiable reliance, and damage.

[7] Fraud 64(4)
184k64(4)

Whether discrepancies in loan collateral report of seller of corporate assets was material to buyer was to be determined by jury.

[8] Fraud 23
184k23

Because buyer of corporate assets had unrestricted access to the same sources of information about seller as did seller's finance company, buyer could not have justifiably relied on alleged misrepresentations about that information by the finance company.

[9] Fraud 16
184k16

Elements of fraudulent concealment under

New York law are a relationship between contracting parties that creates a duty to disclose, knowledge of material facts by party bound to make such disclosures, nondisclosure, scienter, reliance, and damage.

[10] Fraud 17
184k17

Under New York law, duty to disclose material facts arises when there is fiduciary relationship between the parties, or where one party possesses knowledge which is not readily available to the other and knows that the party is acting on the basis of mistaken knowledge.

[11] Fraud 17
184k17

In order to invoke the special facts doctrine so as to give rise to duty on the part of one party to inform the other of certain information, one party must have superior knowledge, that knowledge must not be readily available to the other party, and the party with the knowledge must know that the other party is acting upon the basis of mistaken knowledge.

[12] Fraud 16
184k16

Where buyer of corporate assets had unrestricted access to all of the seller's books and records, facilities, and personnel and the means seller's to utilize that access, it could not claim fraudulent concealment by seller's finance company.

[13] Fraud 13(3)
184k13(3)

New York courts do not recognize causes of action for negligent misrepresentation in the absence of special relationship of trust or confidence between the parties.

[14] Fraud 13(3)
184k13(3)

Ordinary contractual relationship alone is insufficient to constitute special relationship which will support claim for negligent misrepresentation under New York law, as special relationship implies a closer degree of trust, confidence, or reliance, such as a previous or continuing relationship between

the parties.

[15] Fraud 13(3)
184k13(3)

Relationship between finance company and borrower, as to which purchaser of corporate assets from the borrower was, at most, a third-party beneficiary, did not give rise to special relationship between the finance company and the buyer so as to support claim for negligent misrepresentation.

[16] Contracts 194
95k194

Implied covenant of good faith and fair dealing in agreement between finance company and purchaser of corporate assets was not a promise by the finance company to continue to make loans to the seller irrespective of its collateral position.

*460 Otterbourg, Steindler, Houston & Rosen, P.C. by Bernard Beitel, Richard Haddad, New York City, for plaintiff.

Townley & Updike by Jerome P. Coleman, Zvi N. Raskin, Robert A. Isler, New York City, for defendant.

*461 OPINION AND ORDER

ROBERT P. PATTERSON, JR., District Judge.

This is an action for damages alleging breach of contract. Having completed discovery, Plaintiff moves pursuant to Rule 56 of the Federal Rules of Civil Procedure for summary judgment on its first claim. For the reasons set forth below, Plaintiff's motion is granted.

BACKGROUND

I. INTRODUCTION

The key figures in this action are Plaintiff Congress Financial Corporation ("Congress"), a factoring and financing company; Defendant John Morrell & Co. ("Morrell"), a meat packer; and non-party Dinner Bell Foods, Inc. ("Dinner Bell"), [FN1] a meat

packer with principal operations in Defiance and Troy, Ohio.

FN1. On October 3, 1990 Dinner Bell changed its name to B.J. Packing, Inc.

In June 1988, a corporation controlled by Joshua Leibovitz, with financial support from Citicorp Venture Capital, Ltd. ("Citicorp"), acquired control of Dinner Bell in a leveraged buy-out. Institutional financing for Dinner Bell was provided by a term loan from Glenfed Financial Corporation ("Glenfed") and by a three year revolving credit facility supplied by Congress. Glenfed's term loan was secured by a first lien on Dinner Bell's fixed assets, including its equipment, machinery, real estate, patents, and trademarks. Congress' revolving credit facility was secured by a first lien on Dinner Bell's accounts receivable, inventory, work in process, and other miscellaneous assets. Congress and Glenfed each received a junior lien on the collateral pledged by Dinner Bell to the other.

The Congress revolving credit facility commenced on June 3, 1988 with a "credit line," or upward limit, set at \$15 million. [FN2] The actual funding available to Dinner Bell at any given time was calculated by a formula which factored in certain collateral on hand at Dinner Bell (the "Advance Formula"). The Advance Formula permitted loans to Dinner Bell equal to the sum of 85% of its eligible accounts receivable, 65% of its eligible product inventory, and 30% of its eligible supplies. To assist Congress in its calculation of funds available under the Advance Formula, Dinner Bell provided Congress with daily "Loan Collateral Reports," which set forth Dinner Bell's outstanding loan balance, its accounts receivable, its product inventory, and its supplies inventory. Because these amounts varied from day to day, Dinner Bell's financing eligibility varied on a daily basis. [FN3] The Advance Formula remained in effect and unchanged until Dinner Bell filed for bankruptcy on October 17, 1990.

FN2. The credit line was later reduced to \$12 million.

FN3. For example, in the month of September 1990, the advances ranged from a high of \$855,247.29 on September 14 to a low of \$75,704.30 on September 27.

II. THE DINNER BELL-MORRELL ACQUISITION

After the leveraged buy-out, Dinner Bell's business declined substantially, and financial difficulties resulted. In the Spring of 1990, Dinner Bell began seeking a purchaser for certain of its assets, and Citicorp, Dinner Bell, and Morrell began negotiations toward such a sale. Pursuant to those negotiations, on July 25, 1990, Morrell issued Dinner Bell a "Letter of Intent" for the purchase of Dinner Bell's plant in Wilson, North Carolina and all of the intellectual property used in connection with Dinner Bell's business. On August 1, 1990, a team of Morrell representatives commenced an on-site review of Dinner Bell's business and operations. Although this review was denominated in a Morrell document as "Due Diligence," [FN4] Morrell disputes *462 whether this review was sufficiently thorough to constitute "due diligence."

FN4. An August 1, 1990 Morrell memorandum setting forth the information which Morrell wanted to gather during its review of Dinner Bell is entitled "Dinner Bell Due Diligence." Reply Affidavit of Edwin Stern, sworn to on January 22, 1992 ("Stern Rep. Aff.") Exh. B.

The transaction formally closed on October 2, 1990, at which time the following agreements were signed by Dinner Bell, Morrell, and Congress.

A. Asset Acquisition Agreement

Dinner Bell and Morrell entered into an "Asset Acquisition Agreement" wherein Morrell purchased Dinner Bell's Wilson, North Carolina plant, all of the intellectual property used in connection with Dinner Bell's business, and certain other assets. The purchase price consisted of \$3,990,000 in cash to be delivered on closing; \$500,000 to be paid on the first anniversary of the closing date, less any amounts owing from Dinner Bell to

Morrell resulting from Dinner Bell's breach of any agreement with Morrell; and a five cent (\$.05) per pound royalty on all processed meat sales subsequently made by Morrell under the Dinner Bell name up to a maximum of \$12 million.

B. Co-Pack Agreements

Morrell and Dinner Bell entered into two separate "Co-Pack Agreements" involving the post-closing purchase by Morrell of Dinner Bell products. The Co-Pack Agreements were to remain in effect while Morrell transferred Dinner Bell's packing operations to its own plants. One Co-Pack agreement was to terminate in 60 days; the other was to remain in effect indefinitely, but could be terminated with notice after 120 days.

C. Congress/Morrell Agreement

Congress, Dinner Bell, and Morrell entered into the "Congress/Morrell Agreement." In consideration for the release by Congress of its security interests in and liens upon the Dinner Bell intellectual property and related assets sold by Dinner Bell to Morrell, Morrell acknowledged that Congress had a perfected security interest in and liens upon Dinner Bell's collateral for the revolving credit facility, including Dinner Bell's accounts receivable and inventory. Morrell agreed, inter alia, to pay to Congress within four days of receipt all invoices rendered by Dinner Bell for products purchased, received, and re-sold by Morrell, without offset, claim, counterclaim, or deduction.

D. Financing Amendment

Congress and Dinner Bell also signed a letter agreement entitled "Amendment to and Termination of Financing Agreements" (the "Financing Amendment") reflecting the terms pursuant to which Congress would continue to extend financing to Dinner Bell until November 30, 1990.

III. EVENTS SURROUNDING THE PARTIES' CLAIMS

On September 29, 1990, just prior to the closing, Dinner Bell conducted its customary fiscal year-end (September 30) inventory at its two Ohio plants. The memorandum setting forth the procedures to be followed during the inventory included procedures specifically requested by Morrell. Dinner Bell representatives did the actual inventory count, and Dinner Bell's accountants, Ernst & Young, were present observing. Both Congress and Morrell also sent representatives to observe the inventory. Morrell sent a four person team headed by its Assistant Corporate Controller to the Defiance plant. A second Morrell team headed by Morrell's Cost Controller went to the Troy plant. Pl. 3(g) Stmt. ¶¶ 35-36. Because no Congress personnel were available, Congress engaged Richard J. Kaminski, an accountant and former employee of a Congress subsidiary, as its representative. Mr. Kaminski was present at the Defiance plant on September 29, and he went to the Troy plant the following day. Affidavit of Edwin E. Stern, sworn to on November 14, 1991 ("Stern Aff."), ¶ 19; Pl. 3(g) Stmt. ¶ 36.

On Monday, October 1, 1990, Mr. Kaminski returned to the Defiance plant to meet with Dinner Bell's controller, Bob Kenhast, to familiarize himself with the pricing information that would be reflected in the year-end inventory report to be finalized by Dinner Bell a few weeks after the scheduled closing on October 2, 1990. While waiting to see Mr. Kenhast, Mr. Kaminski *463 proceeded to do a "rough reconciliation" of a prior month's inventory to make himself familiar with the records. For this purpose, Dinner Bell provided him with its internal August month-end priced physical inventory report and the August 31, 1990 Loan Collateral Report which had been sent to Congress. Deposition of Richard Kaminski of August 13, 1991 ("Kaminski Dep.") at 104-5. He also received Dinner Bell's unaudited September 1, 1990 financial statement, which Dinner Bell had sent to Morrell on September 19, 1990. Stern Aff. ¶ 20; Affidavit of Bernard Beitel, sworn to on November 14, 1991, Exh. 8.

Mr. Kaminski was unable to reconcile his calculation of "priced" inventory as stated on the internal inventory report with the Loan Collateral Report, finding that the figure on the Loan Collateral Report exceeded that on the internal inventory report by \$501,000. Kaminski Dep. at 108.

That afternoon, Mr. Kaminski called Edwin Stern, a Senior Vice President of Congress, related that he was unable to reconcile the inventory as priced, and reported that he had asked a Dinner Bell employee, Dave Beck, for a reconciliation. Mr. Kaminski testified that he did not state to Mr. Stern that Dinner Bell had overstated its inventory on the Loan Collateral Report, but rather, "I told him I had inability to reconcile these numbers and we both agreed to give it to Dave Beck to have him reconcile it by the time we got back or I got back." Kaminski Dep. at 108-9.

Mr. Stern states that after speaking with Mr. Kaminski, he placed a telephone call to Richard Mayberry of Citicorp and advised him of Mr. Kaminski's inability to reconcile the August month-end reports. Stern Aff. With Mr. Stern still on the telephone, Mr. Mayberry placed a telephone call to Stan Frieze, a "crisis manager" who was then running Dinner Bell's operations and who was in Ohio for the closing. Mr. Mayberry instructed Mr. Frieze to follow up on the matter and to provide the reconciliation to Congress. Mr. Stern states that he "did not reach any conclusion about the quantity of the inventory on October 1, 1990 because of the question raised by Kaminski." Stern Rep. Aff. ¶¶ 19-23.

Mr. Frieze testified that Mr. Stern did not tell him that there were overstatements of inventory by Dinner Bell on the Loan Collateral Reports, but only that an auditor had noticed a discrepancy between the two reports. He testified that the matter was referred to the Dinner Bell controller to resolve the discrepancy. Nowhere in his deposition does Mr. Frieze indicate that prior to the closing either he or anyone from Morrell concluded that Dinner Bell had been overstating its inventory on the Loan

Collateral Reports. Deposition of Stan Frieze of April 22, 1991 ("Frieze Dep.") at 69-71.

On October 1, 1990, Congress advanced Dinner Bell \$528,000, and on October 2, 1990, the day of the closing, it advanced Dinner Bell \$101,000 based on the Loan Collateral Reports sent on those days. On October 3, 1990, the day after the closing, Mr. Frieze sent a memo to Dinner Bell's owners reporting Dinner Bell's discovery that for over a year its former chief financial officer had been systematically overstating Dinner Bell's inventory on the Loan Collateral Reports sent to Congress. Affidavit of Jerome Coleman, sworn to on January 15, 1992, Exh. 6. This information was communicated to Congress and Morrell that same day. When Dinner Bell adjusted the inventory level reported on the Loan Collateral Reports to account for this overstatement, the level of financing for which Dinner Bell was eligible under the Advance Formula was reduced substantially. Dinner Bell received only about \$18,000 from Congress on the day after the closing. Congress did not, however, modify the Advance Formula, and it continued to advance funds to Dinner Bell. For example, on October 10, 1990, Congress advanced some \$100,000 to Dinner Bell.

Morrell paid Dinner Bell \$3,900,000 on the day of the closing. That money was used by Dinner Bell as follows: \$2,500,000 was delivered to Glenfed; approximately \$1.1 million was used to pay selected past due accounts payable and to repay selected other debts; the balance of approximately *464 \$400,000 was to be used by Dinner Bell as working capital, but was withdrawn by Chemical Bank to cover overdrafts on Dinner Bell's checking account. Pl. 3(g) Stmt. ¶ 42. It is not disputed that Congress was not to receive, and did not receive, any portion of the Morrell payments at the closing. Pl. 3(g) Stmt. ¶ 41.

Despite this influx of cash, as a result of its deteriorated financial condition Dinner Bell was unable to continue to purchase raw materials needed for production. On October 17, 1990, Dinner Bell declared bankruptcy,

ceased operations, and stopped performing its Co-Pack Agreements with Morrell.

Before declaring bankruptcy, however, Dinner Bell had processed its remaining inventory and delivered finished products to its former customers for the account of Morrell. The 34 invoices for these products totalled \$2,706,854.36, and Dinner Bell billed Morrell for this amount. Pursuant to the revolving credit facility and the Congress/Morrell Agreement, Dinner Bell assigned the invoices to Congress. Under the Congress/Morrell Agreement, payment was due to Congress from Morrell four days after receipt of the invoices.

On October 5, 1990, Morrell Senior Vice President Mark Littman notified Mr. Stern that Morrell had verified receipt of \$450,428.38 in products from Dinner Bell and was wire transferring that amount to Congress. This represented the amount due from one invoice. During the next several days, Mr. Stern spoke to Mr. Littman and inquired about further payments due from Morrell. Mr. Littman responded that Morrell had not yet verified receipt of additional products. By October 15, 1990, when Congress had not received any further payments from Morrell, and Mr. Stern was unable to ascertain from Morrell when payment of the balance was forthcoming, Congress served a demand for payment on Morrell. On October 16, 1990, Morrell responded that it was refusing to pay any of the other invoices. Congress instituted this action immediately thereafter. Whether Morrell continued to receive the benefit and profits of deliveries of Dinner Bell products to Morrell customers, but failed to disclose to Congress its intent not to pay for those products is not established.

Congress charges that after applying certain credits, there remains a balance due from Morrell of \$1,876,809.31. Congress now moves for summary judgment against Morrell with respect to this claim. [FN5] Morrell offers no evidence that this balance is incorrect, but instead maintains that it has valid offsets and counterclaims against Congress.

FN5. In its second cause of action, Congress charged that Morrell was required to and failed to purchase certain additional inventory valued at over \$400,000. Congress does not move for summary judgment with respect to this claim.

IV. MORRELL'S DEFENSES AND COUNTERCLAIMS

In its answer, Morrell alleged as affirmative defenses and counterclaims: that prior to the closing, and at least once in September 1990, Congress conducted an examination of Dinner Bell's inventory; that Congress learned that Dinner Bell's inventory was less than Dinner Bell had represented to Morrell; that Congress did not disclose to Morrell that Dinner Bell had overstated its inventory to Morrell; that this failure to disclose caused Morrell to enter into a transaction it would not have entered into had it known the inventory was overstated; and that this failure to disclose constituted negligence, fraud, or breach of the implied covenant of good faith and fair dealing in the Congress/Morrell Agreement.

Congress moved for summary judgment with respect to the defenses and counterclaims asserted in Morrell's answer. Morrell's answering papers on this motion provide no support for essential elements of the claims asserted in its answer: that Congress conducted an examination of Dinner Bell's inventory, that Congress learned that Dinner Bell's inventory was less than Dinner Bell had represented to Morrell, and that Dinner Bell's inventory was in fact overstated in reports to Morrell. The Dinner Bell-Morrell transaction did not involve the purchase of Dinner Bell's inventory by *465 Morrell, and Thomas Davis, a Morrell Senior Vice President, states that Morrell was "not particularly interested in the [Dinner Bell] inventory levels." Deposition of Thomas Davis of May 16, 1991 ("Davis Dep.") at 22.

In its motion papers, however, Morrell sets forth a different theory from that asserted in its answer. [FN6] Morrell maintains that Congress' discovery of the discrepancy in the priced inventory reported in the August 31,

1990 Loan Collateral Report was material information in light of an alleged oral agreement between Congress and Morrell that Congress' level of financing of Dinner Bell after the closing would be comparable to its level prior to the closing. Def. Br. at 5-7. Morrell asserts that the continued financing of Dinner Bell by Congress was essential to ensure that Dinner Bell could continue its operations and comply with the terms of the Dinner Bell-Morrell Co-Pack Agreements. Mr. Davis states that:

FN6. For purposes of this motion, the Court deems Morrell's answer amended to conform with the allegations set forth in connection with this motion.

A crucial element in the success of the co-pack agreements was Congress' continued financing of Dinner Bell so as to allow Dinner Bell to have sufficient working capital to purchase raw materials for production and sale.

While Congress did not initially not want to continue providing such financing to Dinner Bell, I-and other Morrell personnel-informed Congress and Dinner Bell on several occasions that Morrell would not continue to pursue the deal if Congress' financing of Dinner Bell did not remain intact after the closing on October 2, 1990. These discussions were between Mark Littman, Henry Thoman and me, for Morrell, and Edwin Stern and Robert Miller for Congress, and Stanley Frieze, for Dinner Bell.

* * * * *

After intense negotiations on this issue of continued financing by Congress, Congress relented and agreed to provide the continued financing of the type and amounts regularly advanced in order to allow the co-pack agreement to succeed.

Affidavit of Thomas Davis, sworn to on January 13, 1992 ("Davis Aff.") ¶¶ 8-11 (emphasis added). Morrell argues that it would never have executed the closing agreements if Congress' financing was not to be maintained at a level sufficient to allow

Dinner Bell to continue to operate throughout the duration of the Co-Pack Agreements. [FN7] Def. Br. at 7. Morrell also states that had it been aware of the inventory overstatement or discrepancy in the August 31, 1990 Loan Collateral Report, it would not have gone ahead with the transaction. Davis Aff. ¶ 27; Affidavit of Mark Littman, sworn to on January 13, 1992 ("Littman Aff."), ¶ 10.

FN7. This would mean that Congress was effectively guaranteeing the Co-Pack arrangement.

In support of Morrell's claims, Mr. Davis asserts that during the October 1, 1990 Stern-Mayberry-Frieze telephone conference, it was decided not to disclose the discrepancy in the August 31, 1990 Loan Collateral Report to Morrell. Davis Aff., ¶¶ 25-26. Mr. Davis was not present during that conversation, and none of the affidavits or exhibits submitted provides any support for his conclusory statement.

Morrell also supplied transcripts of two telephone conversations which took place on October 3, 1990, the day after the closing, one between Mr. Littman and Mr. Stern, and the other between Mr. Littman and Mr. Leibovitz of Dinner Bell. Nowhere in those conversations do Mr. Stern or Mr. Leibovitz indicate that Congress had knowledge prior to the closing that the priced inventory reported on the Loan Collateral Reports was in fact overstated by Dinner Bell. As reflected in those conversations, Congress' concern prior to the closing appears to have been whether the possibility that Dinner Bell had overpriced its product inventory on the Loan Collateral Reports meant that there were insufficient secured assets at Dinner Bell for Congress *466 to enter into the extension of credit reflected in the Financing Amendment. [FN8]

FN8. The affidavits also reflect that in August 1990, Congress questioned Dinner Bell's chief financial officer about a product inventory item on the Loan Collateral Reports termed "EST. NOT TAKEN." This item, valued at about \$500,000, represented inventory in transit to Dinner Bell. When Congress was unable to verify those amounts, it told Dinner Bell that inventory in transit

was no longer eligible as loan collateral. Accordingly, the parties agreed to reduce Dinner Bell's eligible product inventory at a rate of \$20,000 per day. By October 2, 1990, the "EST. NOT TAKEN" item had been reduced to \$60,000. Stern Rep. Aff. ¶ 18. With regard to this inventory adjustment, Mr. Littman states, "Congress was aware of an inventory discrepancy at least as early as August, 1990." Littman Aff. ¶ 8. There is, however, no basis in the record for this assertion. The "inventory discrepancy" upon which Morrell bases its affirmative defenses and counterclaims is the discrepancy in the August 31, 1990 Loan Collateral Report, a matter different from and unrelated to the August inventory adjustment. There is no evidence that information regarding the August inventory adjustment was concealed from Morrell. Not revealed, however, is the extent to which this adjustment accounted for the August 31, 1990 discrepancy between Dinner Bell's internal inventory report and its Loan Collateral Report.

Congress denies having entered into any agreement with Morrell, oral or otherwise, regarding the continued financing of Dinner Bell. Stern Rep. Aff. ¶ 7. The Congress/Morrell Agreement, which is a fully integrated document, [FN9] contained no provision that Congress would continue to finance Dinner Bell after the closing at a loan level comparable to the pre-closing level. Furthermore, it is undisputed that at no time did Congress breach the terms of the revolving credit facility or the Financing Amendment with Dinner Bell.

FN9. Paragraph 6 of the Congress/Morrell Agreement provides: This Agreement sets forth the entire agreement of the parties hereto with respect to the subject matter hereof. Neither this Agreement nor any term hereof may be changed, modified, altered, waived, discharged or terminated except by written instrument executed by the party to be charged. Stern Aff., Exh. E.

Morrell argues that Congress did not disclose the discrepancy in the August 31, 1990 Loan Collateral Report because it was eager to have Morrell enter into the various arrangements, because "[w]ith Morrell's deep pocket now involved, Congress could be sure its loans to Dinner Bell ... would be fully

repaid by Morrell." Def. Mem. at 3. As a preliminary matter, the Court notes that there is no evidence to support this position and that Morrell's premise is illogical. Congress was an asset-based lender, and thus secured by its liens on Dinner Bell's accounts receivable and inventory. There has been no showing that Congress benefitted in any way from the closing of the Dinner Bell-Morrell transaction, and Congress obtained no payments from Dinner Bell or Morrell at the October 2, 1990 closing.

DISCUSSION

I. STANDARD FOR SUMMARY JUDGMENT

"Summary judgment is appropriate when, after drawing all reasonable inferences in favor of the party against whom summary judgment is sought, no reasonable trier of fact could find in favor of the non-moving party." *Horn & Hardart Co. v. Pillsbury Co.*, 888 F.2d 8, 10 (2d Cir.1989). The substantive law governing the case [FN10] will identify the facts that are material, and "[o]nly disputes of fact that might affect the outcome of the suit under governing law will properly preclude entry of summary judgment ..." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986).

FN10. The parties agree that the substantive issues in this case are governed by New York law.

The movant for summary judgment "always bears the initial responsibility of informing the district court of the basis for the motion" and identifying which materials "demonstrate the absence of a genuine issues of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). Once this showing has been made, the burden then shifts to the non-movant who "must set forth facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at *467 250, 106 S.Ct. at 2511. "Conclusory allegations will not suffice to create genuine issues of material fact. There must be more than a scintilla of evidence and more than some metaphysical doubt as to the material

facts." Delaware & Hudson Ry. v. Consolidated Rail Corp., 902 F.2d 174, 178 (2d Cir.), cert. denied, 500 U.S. 928, 111 S.Ct. 2041, 114 L.Ed.2d 125 (1990) (citations omitted).

II. CONGRESS' CLAIM FOR \$1,876,809.31

In support of its motion for summary judgment, Congress presents a detailed accounting of the goods received by Morrell and its customers and the credits and adjustments which have been applied, leaving a balance due of \$1,876,809.31. Stern Aff. ¶¶ 18-20. Morrell has not presented any affidavit, deposition or other evidence showing that the products were not received, that the balance claimed by Congress has been paid, or that Congress' accounting is inaccurate. Rather, in its Statement pursuant to Local Rule 3(g), counsel for Morrell provides bare denials, unsupported on this motion by any affidavit or other evidence. Such conclusory allegations do not create a genuine issue of fact precluding summary judgment. Delaware & Hudson Ry., 902 F.2d at 178. Congress' motion for summary judgment must therefore be granted unless Morrell has a valid affirmative defense or counterclaim offsetting or invalidating Congress' claim.

III. "NO OFFSET" PROVISIONS

Congress argues that Morrell is barred from asserting any counterclaims or defenses against Congress because of the "no offset" provisions in the Congress/Morrell Agreement. "No offset" provisions appear in the agreement several times. First, a specific clause labeled "No Offset" provides, in part:

(a) Except as expressly permitted hereunder, Morrell agrees that in no event shall Morrell or any person claiming by, through, or under Morrell, assert against Congress, as the assignee of, or secured party in respect of, the present and future Accounts of Dinner Bell arising from sales to Morrell or other sums payable by Morrell to Dinner Bell under the Co-Pack Agreements, any offset, claim, counterclaim or deduction which Morrell may have against Dinner Bell for any amounts due to Morrell from Dinner

Bell for any reason, including, but not limited to amounts due Morrell pursuant to the Purchase Agreement or the Co-Pack Agreements.

Stern Aff., Exh. E, ¶ 2(a) (emphasis added). The phrase "without offset, claim, counterclaim or deduction" occurs several other times in the agreement without the modifying language "against Dinner Bell." Stern Aff., Exh. E., ¶ 3(a), 3(c).

[1] Congress argues that the "no offset" provisions were intended to bar Morrell from asserting against Congress any and all offsets whatsoever. By contrast, one of Morrell's negotiators of the contract maintains that he understood all the "no offset" provisions were intended to bar Morrell only from asserting against Congress those offsets which Morrell might have against Dinner Bell. Littman Aff. ¶ 4. Morrell asserts that because its defenses and counterclaims allege wrongdoing by Congress itself, not by Dinner Bell, these claims may be asserted despite the "no-offset" provisions.

The different interpretations asserted by Congress and Morrell raise a genuine issue of fact as to whether Morrell is barred by the "no-offset" provisions from asserting offsets or counterclaims arising from Congress' acts. Accordingly, the "no-offset" provisions are not a ground for disposing of Morrell's defenses and counterclaims, and the Court will address those defenses and counterclaims in turn.

IV. FRAUD

The Court reads Morrell's motion papers to set forth two theories of fraud different from the position taken in its answer. The first theory is that Congress' misrepresentation or failure to disclose its knowledge of the discrepancy in Dinner Bell's August *468 31, 1990 Loan Collateral Report constituted fraud in light of the alleged oral agreement by Congress to continue financing Dinner Bell after the closing at a loan level comparable to the pre-closing level. The second theory is that, notwithstanding the alleged oral agreement, Congress' misrepresentation or

failure to disclose its knowledge of the discrepancy in the August 31, 1990 Loan Collateral Report was fraudulent in light of the written agreements executed at the closing, and that Morrell would not have entered into the transaction had it known of the discrepancy. The two theories are addressed separately below.

A. Fraud Based on the Oral Agreement

Morrell argues that Congress' misrepresentation or omission regarding its knowledge of the discrepancy in the Loan Collateral Report was fraudulent when considered in light of the alleged oral agreement by Congress to continue financing Dinner Bell after the closing at a loan level comparable to the pre-closing level. Congress denies having made any agreement with Morrell regarding the financing of Dinner Bell, and argues that because the parol evidence rule bars proof of the alleged oral agreement, Morrell cannot support its claim of fraud.

[2] The parol evidence rule bars extrinsic evidence of a prior or contemporaneous oral agreement when offered to contradict, vary, add to, or subtract from the clear and unambiguous terms of a valid, integrated written instrument. See, e.g., *Hicks v. Bush*, 10 N.Y.2d 488, 225 N.Y.S.2d 34, 180 N.E.2d 425 (1962); *Wallace Steel, Inc. v. Ingersoll-Rand Co.*, 739 F.2d 112, 115 (2d Cir.1984). The Congress/Morrell Agreement is a valid, integrated, written agreement, and falls within the ambit of the rule. Morrell argues, however, that the parol evidence rule does not bar proof of the oral agreement because (1) evidence of the oral agreement is offered in connection with a claim of fraud, and (2) the written agreements between the parties are not contradicted by the alleged oral agreement.

[3][4] New York law recognizes a limited exception to the parol evidence rule in actions to "rescind a contract on the ground of fraud." *Sabo v. Delman*, 3 N.Y.2d 155, 164 N.Y.S.2d 714, 717, 143 N.E.2d 906, 908 (1957) (emphasis in original). Parol evidence will

only be admitted to show fraud where it indicates "the intention of the parties that the entire contract was to be a nullity ..." *Bersani v. General Accident Fire & Life Assur. Corp.*, 36 N.Y.2d 457, 369 N.Y.S.2d 108, 112, 330 N.E.2d 68, 71 (1975). Here, where the parol evidence is offered to modify a fully integrated agreement, one which states explicitly that it can be modified only in writing, that evidence will not be permitted. See *Hong Kong Deposit and Guaranty Co., Ltd. v. Hibdon*, 611 F.Supp. 224, 229 (S.D.N.Y.1985) (in fraud claim where parol evidence would not destroy the contract, but only modify certain provisions, no exception to parol evidence rule applies). If Morrell were permitted to offer evidence of the oral agreement, the parol evidence rule would be rendered void. Any defendant in a claim for breach of contract could avoid summary judgment merely by alleging fraud in connection with an oral agreement.

[5] Morrell also claims that the parol evidence rule does not apply because the oral agreement does not contradict the terms of the written agreements between the parties. As alleged by Morrell, the oral agreement was an absolute promise by Congress to continue financing Dinner Bell after the closing at a loan level comparable to the pre-closing level. Thus, the oral agreement required Congress to provide Dinner Bell with a certain level of financing irrespective of Dinner Bell's collateral position and regardless of its loan eligibility under the Advance Formula. That agreement is plainly inconsistent with the requirement that funds be advanced pursuant to the Advance Formula, a requirement embodied in the Congress-Dinner Bell revolving credit facility and the Financing Amendment, which are referenced in the Congress/Morrell Agreement. *Stern Aff.*, Exh. E. Furthermore, an agreement by Congress to make loans regardless of Dinner Bell's available collateral would contravene *469 ordinary and prudent business practice and would effectively make Congress a guarantor of Dinner Bell's performance under the Co-Pack Agreements. No reasonable trier of fact could accept that Congress entered into such an agreement, or that Morrell would not

have required such an agreement to be in writing.

Accordingly, the parol evidence rule bars proof of the alleged oral agreement, and Morrell's claim of fraud in connection with that oral agreement must fail.

B. Fraud Based on the Closing Agreements

Morrell's second theory of fraud appears to be that notwithstanding any oral agreement, Congress' failure to disclose the inventory report discrepancy was fraud in light of the written agreements executed at the closing. The essence of this theory, which is gleaned from Morrell's motion papers and the affidavits of Mr. Davis and Mr. Littman, is that if the four closing agreements are read together as a single integrated transaction, then Morrell relied on Congress's agreement in the Financing Amendment to continue to make financing available to Dinner Bell until November 30, 1990 (subject to the same general terms and conditions which existed prior to the closing). Thus, after the closing, Dinner Bell's eligibility for financing would be determined by reference to the Advance Formula, which in turn depended in part on the level of the priced inventory as reported in the Loan Collateral Reports. The possibility that the priced inventory in the Loan Collateral Reports was overstated meant the possibility of a reduced level of financing to Dinner Bell and reduced cash flow. Dinner Bell had long been in financial difficulty, and reduced cash flow would impact on its ability to obtain supplies from creditors, to continue production, and to comply with its obligations to Morrell under the Co-Pack Agreements. Success of the Co-Pack Agreements was an element of the transaction which was important to Morrell. Thus, Morrell argues that Congress's knowledge of a discrepancy in the inventory reported on the August 31, 1990 Loan Collateral Report was material information which would have effected its decision to enter into the transaction. Morrell charges that Congress's misstatement of or failure to disclose that information constitutes actionable fraud.

Fraud by affirmative misrepresentation, or actual fraud, and fraud by omission, or fraudulent concealment, are different causes of action and demand different elements of proof under New York law. Accordingly, Morrell's actual fraud claim and its fraudulent concealment claim are addressed separately.

1. Actual Fraud

[6] The elements of actual fraud under New York law are a false representation, scienter, materiality, expectation of reliance, justifiable reliance, and damage. *Morse Diesel, Inc. v. Fidelity and Deposit Co. of Maryland*, 715 F.Supp. 578, 585 (S.D.N.Y.1989). *Accord Cumberland Oil Corp. v. Thropp*, 791 F.2d 1037, 1044 (2d Cir.), cert. denied 479 U.S. 950, 107 S.Ct. 436, 93 L.Ed.2d 385 (1986). The failure of any single element will void the claim. *Conan Properties, Inc. v. Mattel, Inc.*, 712 F.Supp. 353, 366-67 (S.D.N.Y.1989). Assuming arguendo that Congress made an affirmative representation to Morrell and that Morrell was damaged thereby, the other elements of actual fraud must be explored.

a. Scienter

Fraud requires proof of "scienter," which means "knowledge of the falsity of a representation or knowing that one does not have a basis for asserting the truth of a representation with the intention that another party rely on the representation." *In re Lilco Secur. Litigation*, 625 F.Supp. 1500, 1504 (E.D.N.Y.1986). None of the witnesses from Dinner Bell, Morrell, or Congress give testimony showing that Congress had actual knowledge prior to the closing that Dinner Bell had overstated or overvalued its inventory on the Loan Collateral Reports. While Morrell charges that Congress did have actual knowledge, it has failed to adduce any direct or circumstantial evidence tending to support such a *470 conclusion. Nevertheless, the Court is reluctant to dismiss Morrell's claim based on an issue which depends largely on the credibility of Congress' witnesses since the issue relates to the state-of-mind of those witnesses. Accordingly, Morrell barely raises an issue of fact

regarding scienter, and Morrell's fraud claim will not be dismissed on this basis.

b. Materiality

[7] The basic test of materiality is whether "a reasonable man would attach importance [to the fact misrepresented] in determining his choice of action in the transaction in question." *List v. Fashion Park, Inc.*, 340 F.2d 457, 462 (2d Cir.), cert. denied 382 U.S. 811, 86 S.Ct. 23, 15 L.Ed.2d 60 (1965). Morrell asserts that it would not have entered into the transaction had it known of the discrepancy in the August 31, 1990 Loan Collateral Report.

Congress maintains that it had no reason to believe that its discovery of a possible discrepancy in the priced inventory reported on the August 31, 1990 Loan Collateral Report was material information to Morrell. The closing did not involve the purchase by Morrell of Dinner Bell's inventory, and Mr. Davis admits that Morrell was "not particularly interested in the inventory levels." Davis Dep. at 22. On October 1, 1990, the day Mr. Kaminski raised the discrepancy, that discrepancy was believed to be an August discrepancy of \$501,000. During August and September 1990, Dinner Bell and Congress had been writing down inventory of approximately the same amount, apparently without any impact on Dinner Bell's continued viability. [FN11] Furthermore, at that time Dinner Bell had accounts receivable of some \$4.5 million to \$5 million and inventory reported at over \$3 million. Deposition of Edwin Stern of August 8, 1991 at 37. Thus, it seems unlikely that any rational trier of fact could find that the discovery of a possible discrepancy of \$501,000 in priced inventory as reported on a month-old Loan Collateral Report was material information to Morrell on the day prior to the closing. Nevertheless, whether such a discrepancy was material to Morrell should be determined by a jury after hearing all of the evidence.

FN11. See note 8, supra.

c. Expectation of Reliance

The transaction at issue here involved the sale of certain assets by Dinner Bell to Morrell. Congress participated in the transaction in two limited ways. First, in the Congress/Morrell Agreement, Congress released its liens on certain assets which were being conveyed by Dinner Bell to Morrell pursuant to the Asset Acquisition Agreement. Second, in the Financing Amendment, Congress agreed with Dinner Bell to extend its asset based financing until November 30, 1990. In light of the role that Congress played, the contention that Congress expected Morrell to rely on it to advise Morrell about any possible problems with Dinner Bell's inventory level is untenable. If Morrell had wanted affirmative representations regarding Dinner Bell's inventory level, which apparently it did not, the only reasonable approach would have been for Morrell to rely on Dinner Bell to provide such representations. No such representations were required of Dinner Bell in the closing agreements. Nor is there anything in those agreements indicating Congress had reason to believe that Morrell was relying on it to provide that information.

The issue of expectation of reliance highlights the implausibility of Morrell's fraud claim. Nevertheless, the Court is reluctant to dismiss Morrell's fraud claim on this failure of proof.

d. Justifiable Reliance

[8] Because Morrell had unrestricted access to the same sources of information about Dinner Bell as Congress, Morrell's claim of justifiable reliance on the alleged misrepresentations made by Congress does not stand.

The principle that access bars claims of justifiable reliance on misrepresentations is well established and has been recognized by numerous courts. For example, in *Shappirio v. Goldberg*, 192 U.S. 232, 241-42, 24 S.Ct. 259, 261, 48 L.Ed. 419 (1904), the Supreme Court stated:

*471 When the means of knowledge are open and at hand, or furnished to the purchaser or his agent, and no effort is made

to prevent the party from using them, and especially where the purchaser undertakes examination for himself, he will not be heard to say that he has been deceived to his injury by the misrepresentations of the vendor.

Similarly, in *Danann Realty Corp. v. Harris*, 5 N.Y.2d 317, 184 N.Y.S.2d 599, 603, 157 N.E.2d 597, 600 (1959), New York's highest court ruled:

If the facts represented are not matters peculiarly within the party's knowledge, and the other party has the means available to him of knowing, by the exercise of ordinary intelligence, the truth, or the real quality of the subject of the representation, he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentations.

In *Grumman Allied Indus., Inc. v. Rohr Indus. Inc.*, 748 F.2d 729 (2d Cir.1984), the plaintiff purchased the assets of the defendant's subsidiary, including two hand-built prototypes of a bus which later went into production. Problems later developed in production models of the bus, forcing a recall. Upon discovery that the same problems were revealed in prototype testing prior to the sale, plaintiff sued for fraud. The Second Circuit rejected the fraud claim for lack of justifiable reliance, emphasizing the plaintiff's sophistication and its unrestricted access to the misrepresented information:

We believe Grumman's claim of justifiable reliance was properly rejected by the district court in light of the undisputed evidence demonstrating that Grumman enjoyed unfettered access to Flxible's plants, personnel and documents, and that it possessed the legal, technical and business expertise necessary to make effective use of that access.

* * * * *

Where sophisticated businessmen engaged in major transactions enjoy access to critical information but fail to take advantage of that access, New York courts are

particularly disinclined to entertain claims of justifiable reliance. [FN12]

FN12. In the written contract in *Grumman*, the plaintiff "made specific disclaimers of reliance on [the defendant's] representations concerning the testing of the [prototype]." 748 F.2d at 734. Here, however, Congress was not the seller of the assets conveyed in the transaction or of the products sold pursuant to the Co-Pack Agreements. In the two contracts it signed, Congress made no representations concerning inventory or level of financing. Morrell did not require Congress to verify in part or in whole Dinner Bell's financials or inventories which were made part of the Asset Acquisition Agreement. Accordingly, no disclaimer of reliance by Morrell was called for.

Grumman, 748 F.2d at 737.

Similarly, in *Marine Midland Bank v. Palm Beach Moorings, Inc.*, 61 A.D.2d 927, 403 N.Y.S.2d 15, 17 (1st Dep't 1978), in granting a motion for summary judgment, the court rejected a claim of justifiable reliance on the grounds that the defendant "had the opportunity to examine the corporate records before assuming the obligations reflected in the agreement of purchase." In such a situation, the court relied on the principle of *Dannan Realty* and rejected a claim of fraud based on misrepresentation. See also *Frigitemp Corp. v. Financial Dynamics Fund, Inc.*, 524 F.2d 275, 282 (2d Cir.1975) (rejecting claim of justifiable reliance on the ground that "if the plaintiff has been furnished with the means of knowledge and he is not prevented from using them he cannot say that he has been deceived by the misrepresentations of the other party"); *Aaron Ferer & Sons, Ltd. v. Chase Manhattan Bank, N.A.*, 731 F.2d 112, 123 (2d Cir.1984) (rejecting claim of justifiable reliance because "all of the information that plaintiffs now claim was concealed from them was either a matter of public record, was not pursued by plaintiffs, or was disclosed, at least in part," by defendant).

Morrell had unrestricted access to Dinner Bell's plants, personnel, and documents. An acquisition team of Morrell representatives arrived at Dinner Bell on August 1, 1990 to

begin a pre-acquisition *472 review. Davis. Dep. at 14; Frieze Dep. at 37. Morrell does not deny that:

The acquisition team was given unlimited access to the Dinner Bell facilities as well as its books and records. Those records included financial reports consisting of income statements, balance sheets, working capital statements, accounts payable records, etc., as well as agreements between Dinner Bell and Congress and the loan collateral reports.

* * * * *

Dinner Bell representatives supplied the Morrell acquisition team with copies of any and all Dinner Bell books and records that Morrell requested.

Pl. 3(g) Stmt. ¶¶ 25-26.

The undisputed evidence also shows that Morrell is a sophisticated entity which possessed the ability and expertise to make effective use of that access. Morrell is a large corporation with annual sales of approximately \$1.8 billion. Its parent corporation, Chiquita Brands International, has annual sales in excess of \$4 billion. Pl. 3(g) Stmt. ¶ 3. The Morrell acquisition team consisted of between 10 and 20 people, was headed by Mr. Davis, then the Director of Operations Support for Morrell, and included "financial people, operations people, and salespeople." Davis Dep. at 14; Frieze Dep. at 37. Morrell also had two separate teams observing Dinner Bell's year-end inventory. Pl. 3(g) Stmt. 35-36.

Thus, Morrell had access to the allegedly misrepresented information and the ability to utilize that access. There is no evidence suggesting that Congress participated in the overstatements of inventory by Dinner Bell's former chief financial officer, or that Congress in any way interfered with Morrell's ability to discover that information. In such a situation, Morrell cannot show justifiable reliance, and its actual fraud claim is deficient.

2. Fraudulent Concealment

[9] The elements of fraudulent concealment under New York law are a relationship between contracting parties that creates a duty to disclose, knowledge of material facts by a party bound to make such disclosures, nondisclosure, scienter, reliance, and damage. *Leasing Service Corp. v. Broetje*, 545 F.Supp. 362 (S.D.N.Y.1982). Because Morrell cannot show that Congress had a duty to disclose the discrepancy in the August 31, 1990 Loan Collateral Report, its fraudulent concealment claim must be rejected as a matter of law. *Chiarella v. United States*, 445 U.S. 222, 235, 100 S.Ct. 1108, 1118, 63 L.Ed.2d 348 (1980) ("when an allegation of fraud is based upon nondisclosure, there can be no fraud absent a duty to speak").

[10] Under New York law, a duty to disclose material facts arises (1) where there is a fiduciary relationship between the parties, or (2) where one party possesses superior knowledge, not readily available to the other, and knows that the other party is acting on the basis of mistaken knowledge. *Aaron Ferer & Sons*, 731 F.2d at 123. Morrell does not argue that there was a fiduciary relationship between it and Morrell, but instead relies on the second theory, often termed the "special facts" doctrine. See *Chiarella*, 445 U.S. at 248, 100 S.Ct. at 1124.

In *Beneficial Commercial Corp. v. Murray Glick Datsun, Inc.*, 601 F.Supp. 770, 773 (S.D.N.Y.1985), the court explained the special facts doctrine, noting:

the growing trend to impose a duty to disclose in many circumstances where silence used to suffice; Steps have been taken toward application of the "special facts" doctrine in a broader array of contexts where one party's superior knowledge of essential facts renders a transaction without disclosure inherently unfair.

Id. (citing *Chiarella*, 445 U.S. at 248, 100 S.Ct. at 1124). Morrell relies on *Gaines Service Leasing Corp. v. Carmel Plastic Corp.*, 105 Misc.2d 694, 432 N.Y.S.2d 760 (Civ.Ct., Kings Cty.1980), *aff'd* 113 Misc.2d 752, 453

N.Y.S.2d 391 (App.Term.1981). There, mistakenly believing that payment in full had been received, the plaintiff's employees delivered a van to the defendant. The defendant accepted delivery of the van but refused to pay the balance due. Relying on the special facts doctrine, the *473 court held that the defendant had breached its duty of disclosure:

The equal availability to both sides of the facts as to payment in the present case does not excuse defendant's silence. For defendants had to know plaintiff was relying on a basic misconception. Nor could plaintiff's error be seen by defendants as a matter of judgment or opinion. The only intention consistent with defendant's action was the fraudulent one which the jury found.

* * * * *

It is no longer acceptable, if ever it was, to conclude in knowing silence, a transaction damaging to a party who is mistaken about its basic factual assumptions when, like the present plaintiff, he "would reasonably expect a disclosure."

432 N.Y.S.2d at 762-63 (citations omitted). Morrell argues that like the defendant in Gaines, Congress concluded the transaction with Morrell in "knowing silence," while Morrell was mistaken about a "basic factual assumption" which it reasonably expected Congress would disclose.

Morrell also relies on *Heineman v. S. & S. Machinery Corp.*, 750 F.Supp. 1179 (E.D.N.Y.1990), where the court accepted the rationale of Gaines, holding that defendants had a duty to disclose information regarding the financial stability of a company which was acquiring an 80% share of plaintiff's company and assuming 80% of its outstanding debt. Similarly, Morrell claims that because Congress knew that Morrell would rely upon Congress' inventory audit of Dinner Bell, [FN13] as well as Congress' detailed examination of Dinner Bell's collateral through the duration of the revolving credit facility, Congress had a duty to disclose its representative's inability to reconcile the

discrepancy in the August 31, 1990 Loan Collateral Report.

FN13. The Court can find no factual basis for the assertion that Congress conducted an inventory audit of Dinner Bell. The evidence shows only that a Congress representative, as well as two teams of Morrell representatives, observed Dinner Bell's year-end inventory.

[11] Three specific elements must be shown to invoke the special facts doctrine: (1) one party must have superior knowledge, (2) that knowledge must not be readily available to the other party, and (3) the party with the knowledge must know that the other party is acting on the basis of mistaken knowledge. *Aaron Ferer & Sons*, 731 F.2d at 123. Failure of any single element bars application of the doctrine.

In *Grumman*, for example, because the plaintiff had access to the alleged omitted information, the court rejected plaintiff's claim of a duty of disclosure. The court noted, "In light of the unrestricted access to Flexible's facilities, personnel and records, as well as Grumman's arsenal of legal and technical talent, we find the claim that Rohr possessed superior knowledge (that was not readily available to Grumman) to be without merit." 748 F.2d at 739.

In *Frigitemp*, a corporation and certain of its shareholders alleged fraud against purchasers of stock based on the purchasers' alleged failure to disclose the amount of stock they held and their intent to purchase most of the stock issued in a certain offering. The court found that the purchasers did not have a duty to disclose information regarding their holdings because that information was available in the corporation's records. That availability entitled the purchasers to assume that the plaintiffs were not acting on the basis of mistaken knowledge. Without notice that the plaintiffs were acting on a mistaken belief, there was no duty of disclosure under the special facts doctrine. 524 F.2d at 282-83.

In *Aaron Ferer & Sons*, the court rejected an argument that there was a duty of disclosure

based on superior knowledge "because all of the information that plaintiffs now claim was concealed from them was either a matter of public record, was not pursued by plaintiffs, or was disclosed, at least in part, by [defendant]." See also *United States Steel & Carnegie Pension Fund, Inc. v. Orenstein*, 557 F.2d 343, 345 (2d Cir.1977) (sustaining dismissal of securities fraud claims where plaintiff was in a position to discover the allegedly withheld *474 information; customer contracts and regularly prepared account control documents were available for inspection and plaintiff simply failed to review them).

[12] As in *Grumman, Frigitemp, Aaron Ferer & Sons, and Orenstein, Morrell* cannot make out all of the required elements of the special facts doctrine. As noted above, Morrell had unrestricted access to all Dinner Bell books and records, facilities, and personnel. Where Morrell had such access and the means to utilize that access, but failed to exercise diligence to discover the allegedly omitted information, Congress had no duty of disclosure, and Morrell cannot claim fraudulent concealment.

V. NEGLIGENT MISREPRESENTATION

[13] Based on the same facts set forth in connection with its fraud claim, Morrell charges Congress with negligent misrepresentation. New York courts do not recognize a cause of action for negligent misrepresentation in the absence of a special relationship of trust or confidence between the parties. *Accusystems, Inc. v. Honeywell Information Systems, Inc.*, 580 F.Supp. 474 (S.D.N.Y.1984). *Accord American Protein Corp. v. AB Volvo*, 844 F.2d 56, 63-64 (2d Cir.), cert. denied 488 U.S. 852, 109 S.Ct. 136, 102 L.Ed.2d 109 (1988). Morrell argues that a special relationship existed between Morrell and Congress because Morrell relied on Congress's promises in the oral agreement and in the Financing Amendment to continue the financing of Dinner Bell. Proof of a special relationship as embodied in the oral agreement between Congress and Morrell is barred by the parol evidence rule. The Financing Amendment between Congress and

Dinner Bell is also insufficient to constitute a "special relationship" between Congress and Morrell.

[14][15] Courts generally find that an ordinary contractual relationship alone is insufficient to constitute a special relationship. See *Accusystems, supra*. The special relationship implying a closer degree of trust, confidence, or reliance, is generally a previous or continuing relationship between the parties. See *Rosen v. Spanierman*, 711 F.Supp. 749, 758 (S.D.N.Y.1989). The relationship allegedly contemplated in the Financing Amendment was between Congress and Dinner Bell as borrower and lender, with Morrell, at most, as a third-party beneficiary. Banking relationships (i.e. that between Dinner Bell and Congress) are generally not viewed by courts as special relationships giving rise to a heightened duty of care. See *Aaron Ferer & Sons*, 731 F.2d at 122 (under New York law the usual relationship of a bank and customer is not a fiduciary relationship, but one simply of debtor and creditor); *In re W.T. Grant Co.*, 699 F.2d 599, 609 (2d Cir.), cert. denied 464 U.S. 822, 104 S.Ct. 89, 78 L.Ed.2d 97 (1983) (relationship of debtor and creditor did not lead to a duty of disclosure); *Banco Espanol de Credito v. Security Pacific Nat'l Bank*, 763 F.Supp. 36, 45 (S.D.N.Y.1991) (no fiduciary relationship in arms-length loan participation transactions between large financial institutions unless created in the participation agreement).

Furthermore, where a future relationship between the parties is the basis of a special relationship, the duration of that relationship must generally be long term. *Coolite Corp. v. American Cyanamid Co.*, 52 A.D.2d 486, 384 N.Y.S.2d 808 (1st Dep't 1976) (long-term distributorship agreement); and *Mathis v. Yondata Corp.*, 125 Misc.2d 383, 480 N.Y.S.2d 173 (Sup.Ct., N.Y.Cty.1984) (long-term service contract). The Financing Amendment would have been effective for only 60 days, too short a period to constitute a long-term relationship.

In support of its claim, Morrell relies primarily on *Banker's Trust Co., Co. v. Steenburn*, 95 Misc.2d 967, 409 N.Y.S.2d 51

(Sup.Ct.Chataqua Cty.1978), aff'd 70 A.D.2d 786, 418 N.Y.S.2d 723 (4th Dep't 1979); *White v. Guarante*, 43 N.Y.2d 356, 401 N.Y.S.2d 474, 372 N.E.2d 315 (1977); *Coolite Corp.*, supra; and *Mathis*, supra. In each of these cases, the court found a special relationship sufficient to support a claim of negligent misrepresentation. An examination of these cases highlights the *475 weakness of Morrell's claim. See *Sanitoy, Inc. v. Shapiro*, 705 F.Supp. 152, 155 (S.D.N.Y.1989).

In *Banker's Trust*, the court found a special relationship between a bank and a borrower where there was an agreement to lend funds confirmed by the bank's executive vice-president. After the borrowers formed a corporation and incurred substantial personal indebtedness in reliance on the bank's promise, the bank refused to make the agreed upon loans. The court concluded there was a special relationship, in part because the bank officer had actively solicited the borrower's business, and the borrower had sought the bank officer's "advice and assistance." 409 N.Y.S.2d at 67. Here, by contrast, there is no suggestion that Congress had any role in inducing Morrell to purchase Dinner Bell's assets or that Morrell sought out or relied upon Congress' advice or counsel. Rather, the evidence reveals two sophisticated parties bargaining at arms-length for individual protection.

In *White*, the court found a special relationship between a limited partner of a partnership and the partnership's accounting firm. The ruling was based largely on the court's finding that the accountants owed a duty of care to third-party beneficiaries of the service contract to audit the partnership. 372 N.Y.S.2d at 320. The issue before the *White* court, therefore, was whether to extend a recognized fiduciary duty to include limited partners. Here, by contrast, there is no allegation that Congress owed a fiduciary duty to Dinner Bell which could be extended to apply to Morrell. In fact, the evidence supports the conclusion that because Congress and Dinner Bell were parties to an arms-length transaction, there was no fiduciary

relationship. See *Compania Sud-Americana de Vapores, S.A. v. IBJ Schroder Bank & Trust Co.*, 785 F.Supp. 411, 426 (S.D.N.Y.1992).

In *Coolite*, the court found a special relationship between a distributor and a distributee because the defendant had required the plaintiffs to form a new company before agreeing to enter a long term distributorship agreement. The court found that the plaintiff's investment of \$500,000 attested that the parties relationship was "intrinsically a more intimate relationship association, at least in terms of reliance and trustworthiness, than that of the commonly encountered buyer and seller." 384 N.Y.S.2d at 811. By contrast, the alleged agreement here did not require any additional effort or investment by Morrell which would indicate that Congress' relationship was "more intimate" than the ordinary contractual relationship.

Mathis can also be distinguished. There, the defendants had agreed to supply the plaintiffs with data processing services. A year later, defendants attempted to induce the plaintiffs not to cancel the contract by promising to sell them computer equipment and to develop software necessary for the plaintiffs' business. The court held that the promises, representations, and warranties related to this long-term service contract created a special relationship between the parties. 480 N.Y.S.2d at 178. Here, Morrell does not even allege the existence of a long-term relationship accompanied by detailed warranties and representations from Congress.

Accordingly, because there is no evidence that the Congress-Morrell relationship was a special relationship with a closer degree of trust and confidence than the ordinary contractual relationship, Morrell's claim of negligent misrepresentation is denied as a matter of law.

VI. VIOLATION OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

[16] In *Cross & Cross Properties, Ltd. v. Everett Allied Co.*, 886 F.2d 497, 502 (2d Cir.1989), the Second Circuit stated:

Courts applying New York law repeatedly have recognized the duty of good faith and fair dealing, the "implied obligation to exercise good faith not to frustrate [a] contract into which [one has] entered." Since the duty of good faith and fair dealing is implied in every contract, contracting parties' fields of discretion under a contract are bounded by the parties' *476 mutual obligation to act in good faith. The boundaries set by the duty of good faith are generally defined by the parties' intent and reasonable expectations in entering the contract (citations omitted).

Morrell argues that it was improper for Congress to enter into the Congress/Morrell Agreement having conveyed to Morrell the understanding "both in numerous conversations and in explicit written agreements" that Congress would continue to extend financing to Dinner Bell, while Congress knew that it would drastically reduce that financing the day after the closing. Def. Br. at 21. Morrell asserts that such behavior deprived it of the benefits of the transaction and constituted a breach of the implied covenant of good faith and fair dealing in the Congress/Morrell Agreement.

To the extent that Morrell's claim relies on promises made by Congress in the alleged oral agreement, proof of that claim is barred by the parol evidence rule. To the extent that Morrell's claim relies on promises made by Congress in the Financing Amendment, it is equally deficient. In *Metropolitan Life Ins. Co. v. RJR Nabisco, Inc.*, 716 F.Supp. 1504 (S.D.N.Y.1989), the court refused to apply the implied covenant of good faith in an indenture to create additional benefits which were not bargained for the express agreement between the parties. The court held:

While the Court stands ready to employ an implied covenant of good faith to ensure that such bargained for rights are performed and upheld, it will not, however, permit an implied covenant to shoehorn into an indenture additional terms plaintiffs now

wish had been included.

716 F.Supp. at 1519. Likewise, here Morrell attempts to transform the implied covenant in the Congress/Morrell Agreement into an additional promise by Congress to continue to make loans to Dinner Bell irrespective of Dinner Bell's collateral position. That simply was not a term bargained for in the written agreement between the parties. All Congress agreed to do in the Financing Amendment was to continue to make funds available to Dinner Bell pursuant to the Advance Formula. There is no allegation that Congress breached that agreement. Accordingly, Morrell's claim must be rejected as a matter of law.

CONCLUSION

Because no reasonable trier of fact could find in favor of Morrell with regard to its defenses and counterclaims, Congress' motion for summary judgment on its claim for \$1,876,809.31 is granted.

IT IS SO ORDERED.

790 F.Supp. 459

END OF DOCUMENT

18

United States District Court,
S.D. New York.

CONSOLIDATED EDISON, INC., Plaintiff/
Counterclaim Defendant

v.

NORTHEAST UTILITIES, Defendant/
Counterclaim Plaintiff.

No. 01 CIV.1893(JGK).

March 21, 2003.

Parties filed cross-motions for partial summary judgment in suit arising out of the failed multi-billion dollar merger between New York and Massachusetts utilities. The District Court, Koeltl, J., held that: (1) specific disclaimer in parties' confidentiality agreement combined with the merger clause in their merger agreement precluded any claim of reasonable reliance on the extra-contractual representations made by Massachusetts utility's representatives, and therefore New York utility could not establish a valid claim under New York law for fraudulent inducement or negligent misrepresentation; (2) summary judgment was precluded in favor of either party on claims arising from alleged failure to perform condition precedent under merger agreement; (3) summary judgment in favor of New York utility was precluded on Massachusetts utility's counterclaim alleging material breach of merger agreement; and (4) Massachusetts utility had standing to recover its shareholders' lost premium.

Plaintiff's motion denied; defendant's motion granted in part and denied in part.

West Headnotes

[1] Fraud 3
184k3

To state a claim for fraud under New York law, a plaintiff must demonstrate (1) a representation of material fact; (2) falsity; (3) scienter; (4) reasonable reliance; and (5) injury.

[2] Fraud 20

184k20

To plead fraudulent inducement under New York law, contracting party must allege that it reasonably relied on false representations made by defendant.

[3] Fraud 36
184k36

Specific disclaimer in parties' confidentiality agreement, combined with the merger clause in their merger agreement, precluded any claim of reasonable reliance on the extra-contractual representations made by Massachusetts utility's representatives, and therefore New York utility could not establish a valid claim under New York law for fraudulent inducement or negligent misrepresentation; alleged oral representations made during due diligence were disclaimed by the confidentiality and merger agreements, and merger agreement went on to provide that the merger agreement and the confidentiality agreement were the entire agreement between the parties and superseded all prior understandings, both written and oral.

[4] Fraud 36
184k36

Under New York law, where a party specifically disclaims reliance upon a particular representation in a contract, that party cannot, in a subsequent action for common law fraud, claim it was fraudulently induced to enter into the contract by the very representation it has disclaimed reliance upon.

[5] Fraud 36
184k36

Under New York law, a general merger clause does not preclude a claim for fraudulent inducement.

[6] Fraud 13(3)
184k13(3)

Elements of a claim for negligent misrepresentation under New York law are that (1) the defendant had a duty, as a result of a special relationship, to give correct information; (2) the defendant made a false representation that he or she should have

known was incorrect; (3) the information supplied in the representation was known by the defendant to be desired by the plaintiff for a serious purpose; (4) the plaintiff intended to rely and act upon it; and (5) the plaintiff reasonably relied on it to his or her detriment.

[7] Fraud 20
184k20

To prove negligent misrepresentation under New York law the plaintiff must prove reasonable reliance on the alleged misrepresentation.

[8] Fraud 13(3)
184k13(3)

Under New York law, a claim for negligent misrepresentation is not actionable without a special relationship of trust or confidence.

[9] Federal Civil Procedure 2509
170Ak2509

Genuine issue of material fact existed as to whether violation of merger agreement did or did not occur, precluding summary judgment in favor of either party on claims arising from alleged failure to perform condition precedent under utilities' merger agreement; subsidiary fact questions existed as to whether there was a failure to follow past practice, and whether that excused New York utility from performance.

[10] Federal Civil Procedure 2492
170Ak2492

Where contract language used is susceptible to differing interpretations, each of which may be said to be as reasonable as another, then the interpretation of the contract becomes a question of fact and cannot be resolved on a motion for summary judgment.

[11] Federal Civil Procedure 2509
170Ak2509

Differing interpretations of the financial data and the competing testimony of the parties' experts created genuine issues of material fact as to whether there was a failure of a condition precedent to New York utility's obligations under merger agreement, precluding summary judgment in favor of New York utility on contract claim against

Massachusetts utility.

[12] Federal Civil Procedure 2509
170Ak2509

Genuine issues of material fact existed as to whether termination provision of merger agreement was the exclusive means to obtain consequential damages, as to the intent of the parties in requiring a "willful and material breach" and whether such an event had occurred, precluding summary judgment in favor of New York utility on Massachusetts utility's counterclaim alleging material breach of merger agreement.

[13] Contracts 187(2)
95k187(2)

Since merger agreement explicitly made Massachusetts utility's shareholders third party beneficiaries of New York utility's promise to pay the merger consideration, Massachusetts utility had standing to recover its shareholders' lost premium, which resulted from New York utility's repudiation of merger agreement.

[14] Contracts 187(1)
95k187(1)

[14] Contracts 187(2)
95k187(2)

Under New York law, a corporation's shareholders are intended, rather than incidental, beneficiaries of a merger agreement if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either (1) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or (2) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance. Restatement (Second) of Contracts § 302.

[15] Compromise and Settlement 16(1)
89k16(1)

New York utility, which repudiated merger agreement, failed to establish that Brody settlement agreement encompassed claims by Massachusetts utility to the merger premium; while the settlement agreement released New

York utility from responsibility for injuries arising from the allegedly faulty joint proxy, the settlement did not speak to the later injuries caused by New York utility's repudiation of merger agreement.

[16] Release 1
331k1

A release is a type of contract and is governed by principles of contract law.

[17] Federal Courts 412.1
170Bk412.1

In determining the scope and validity of a release, courts should apply state law.

[18] Contracts 147(2)
95k147(2)

Under New York law, courts must discern the intent of the parties to the extent their intent is evidenced by their written agreement.

[19] Contracts 114
95k114

Under New York law, a release that absolves one party from liability receives the closest of judicial scrutiny.

[20] Damages 117
115k117

Under New York law, revenues due a plaintiff because of a breached contract must be offset by any amount plaintiff saved as a result of the breach.

***390 AMENDED OPINION AND ORDER**

KOELTL, District Judge.

This case arises out of the failed multi-billion dollar merger between the plaintiff and counterclaim defendant Consolidated Edison, Inc. ("Con Edison") and the defendant-Northeast Utilities ("NU"). Pursuant to the Merger Agreement between the parties, Con Edison was to pay \$3.6 billion for the outstanding shares of NU. [FN1] The merger did not proceed amid mutual recriminations. Central to this lawsuit are Con Edison's claims that NU fraudulently induced it to enter into the Merger Agreement and thereafter breached various provisions of that

Agreement, particularly the representation that there had been no material adverse change to NU's condition or prospects. NU in turn charges that Con Edison failed to proceed with the merger as it was required to do under the terms of the Merger Agreement and thereby breached that Agreement. NU claims that Con Edison did not proceed with the merger, not because there had been any material adverse change, but rather because Con Edison believed that the price required by the Merger Agreement was no longer warranted and because NU refused to negotiate a substantially lower price than that set forth in the Merger Agreement.

FN1. For purposes of this motion, Con Edison will be referred to as the "plaintiff" and NU will be referred to as the "defendant."

In the Amended Complaint ("Complaint"), Con Edison sues NU on claims for breach of contract, failure of conditions precedent, fraudulent inducement, and negligent misrepresentation. NU has filed a counterclaim for breach of contract. Con Edison now moves for partial summary judgment pursuant to Fed.R.Civ.P. 56 on its First, Third, Fifth and Sixth claims for relief in the Complaint, as well as on NU's Counterclaim including certain affirmative defenses to the Counterclaim. NU has filed a motion for summary judgment on Con Edison's First, Second, Third, Fourth Sixth and Seventh claims for relief.

I.

The standard for granting summary judgment is well established. Summary judgment may not be granted unless "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); see also *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Gallo v. Prudential Residential Servs., Ltd. Partnership*, 22 F.3d 1219, 1223 (2d Cir.1994). "The trial *391 court's task at the

summary judgment motion stage of the litigation is carefully limited to discerning whether there are genuine issues of material fact to be tried, not to deciding them. Its duty, in short, is confined at this point to issue-finding; it does not extend to issue-resolution." Gallo, 22 F.3d at 1224.

The moving party bears the initial burden of "informing the district court of the basis for its motion" and identifying the matter that "it believes demonstrate[s] the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 323, 106 S.Ct. 2548. The substantive law governing the case will identify those facts which are material and "only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). In determining whether summary judgment is appropriate, a court must resolve all ambiguities and draw all reasonable inferences against the moving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962)); see also Gallo, 22 F.3d at 1223.

If the moving party meets its burden, the burden shifts to the nonmoving party to come forward with "specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). With respect to the issues on which summary judgment is sought, if there is any evidence in the record from any source from which a reasonable inference could be drawn in favor of the nonmoving party, summary judgment is improper. *Chambers v. TRM Copy Ctrs. Corp.*, 43 F.3d 29, 37 (2d Cir.1994).

II.

The following facts are undisputed or are matters of public record.

Con Edison, a New York corporation with its principal place of business in New York, New York, is one of the nation's largest investor-

owned electric and gas utilities; it serves the greater New York metropolitan area. (Def.'s Rule 56.1 St. ¶ 1; Pl.'s Resp. Rule 56.1 St. ¶ 1; Compl. ¶ 10.) Con Edison has extensive knowledge and experience in the field of electric generation, transmission, and distribution. (Def.'s Rule 56.1 St. ¶ 2; Pl.'s Resp. Rule 56.1 St. ¶ 2.) Con Edison is also a sophisticated commercial entity with experience in merger and acquisition transactions, including the associated due diligence. (Def.'s Rule 56.1 St. ¶ 2; Pl.'s Resp. Rule 56.1 St. ¶ 2.)

Northeast Utilities is a holding company or business trust organized and existing under the laws of the Commonwealth of Massachusetts, with its principle place of business in Massachusetts. (Def.'s Rule 56.1 St. ¶ 3; Pl.'s Resp. Rule 56.1 St. ¶ 3; Agreement and Plan of Merger dated Oct. 13, 1999 as amended Nov. 1, 2000 ("Merger Agreement") § 3.01(a) attached as Ex. 1 to Declaration of Douglas M. Kraus Supp. NU Mot. Summ. J. dated May 8, 2002 ("Kraus Decl. Supp.")). NU owns three regulated electric utility subsidiaries, including Connecticut Light & Power Company ("CL & P"), as well as a regulated gas subsidiary. (Def.'s Rule 56.1 St. ¶ 4; Pl.'s Resp. Rule 56.1 St. ¶ 4.) NU also owns several unregulated businesses, including Select Energy, Inc. ("Select"), an energy marketing company that principally sells electricity to large energy users on a wholesale basis. (Def.'s Rule 56.1 St. ¶ 4; Pl.'s Resp. Rule 56.1 St. ¶ 4.) Two of Select's competitors, Con Ed Energy and Con Ed Solutions, are unregulated subsidiaries *392 owned by Con Edison. (Def.'s Rule 56.1 St. ¶ 5; Pl.'s Resp. Rule 56.1 St. ¶ 5.)

In June 1999, Con Edison approached NU about acquiring the latter company and NU agreed to further discussions. (Def.'s Rule 56.1 St. ¶ 6; Pl.'s Resp. Rule 56.1 St. ¶ 6.) On July 29, 1999, Con Edison and NU executed a written Confidentiality Agreement. (Def.'s Rule 56.1 St. ¶ 7; Pl.'s Resp. Rule 56.1 St. ¶ 7; Confidentiality Agreement ("Confid.Agr.") attached as Ex. 3 to Declaration of John Gueli Supp. Con Edison Mot. Summ. J. dated May 10, 2002 ("Gueli Decl. Supp.")). The

Confidentiality Agreement governed the due diligence period during which Con Edison could learn more about NU and further evaluate the potential merger.

NU contends that Con Edison conducted an "extensive due diligence investigation of NU's regulated and unregulated businesses" between July 29 and October 13, 1999. (Def.'s Rule 56.1 St. ¶ 9.) Con Edison allegedly organized its due diligence into two categories, or "tiers": Tier 1 consisted of information concerning NU's regulated utility businesses which were "value impacting" and thus of greatest importance to Con Edison. (Def.'s Rule 56.1 St. ¶ 10.) Tier 2 comprised information about other matters, including NU's unregulated businesses such as Select. (Def.'s Rule 56.1 St. ¶ 10.) Con Edison takes issue with NU's characterization of the Tier 2 information as non-value impacting. (Pl.'s Resp. Rule 56.1 St. ¶ 10.) Con Edison Chief Financial Officer Joan Freilich ("Freilich") testified in her deposition that, "[o]bviously subsidiary operations ... were value impacting, very high value impacting." (Deposition of Joan Freilich dated Dec. 18, 2001 ("Freilich Dep. Kraus") at 56 attached as Ex. 63 to Kraus Decl. Supp.)

The due diligence process involved a large number of Con Edison's officers and employees, as well as in-house and outside counsel, experts in due diligence investigations, and the investment banking firm Salomon Smith Barney ("SSB"). (Def.'s Rule 56.1 St. ¶ 11; Pl.'s Resp. Rule 56.1 St. ¶ 11.) Con Edison requested and received numerous documents from NU and conducted a series of meetings between representatives of both parties. (Def.'s Rule 56.1 St. ¶ 12.) NU claims that at no time during due diligence did NU refuse to provide Con Edison or its advisors with any information that Con Ed requested. (Def.'s Rule 56.1 St. ¶ 13.)

Con Edison presents a different version of due diligence: Con Edison claims that NU limited the documents provided to Con Edison because of confidentiality concerns about sharing competitively sensitive information. (Pl.'s Resp. Rule 56.1 St. ¶ 9.) Instead, Con

Edison contends, NU insisted that Con Edison rely upon discussions and presentations by senior NU representatives in order to obtain requested information about Select. (Pl.'s Resp. Rule 56.1 St. ¶¶ 9, 12-13.)

Con Edison's claims in this case rely substantially on a four-year fixed price contract between Select and CL & P, known as the CL & P Standard Offer Contract ("CL & P Contract" or "Standard Offer Contract"), pursuant to which Select was obligated to supply electricity to CL & P for half of the total electricity needed for CL & P's retail customers for four years at a fixed price. The parties do not dispute that Con Edison knew that Select intended to enter into the four-year supply commitment months before signing the Merger Agreement in October 1999. (Def.'s Rule 56.1 St. ¶ 14, 62; Pl.'s Resp. Rule 56.1 St. ¶ 14, 62.) Both parties also agree that Select's prior experience in managing large standard offer contracts was extremely limited and was characterized by Joan Freilich as "quite negative." *393 (Def.'s Rule 56.1 St. ¶¶ 71-73; Pl.'s Resp. Rule 56.1 St. ¶¶ 71-73; Deposition of Joan Freilich dated Dec. 10, 2001 ("Freilich Dep. Gueli") at 40 attached as Ex. 71 to Declaration of John Gueli Opp. NU Mot. Summ. J. ("Gueli Decl. Opp.") sworn June 7, 2002.)

Under a fixed price contract, the buyer (CL & P) agrees to pay the seller (Select) a predetermined fixed amount for electricity to be supplied at a future date. Thus, in order to make a profit, Select had to secure supply below the price that it negotiated with CL & P. The seller is at risk of significant financial losses if the market price of energy increases to such a level that the contractual commitment can no longer be met profitably.

According to Con Edison, the parties discussed Select's risk management policies and expected profit margins during meetings on August 26-27, 1999 in Hartford, Connecticut, including the risk policies as they applied to the CL & P Standard Offer Contract. (Deposition of Luther Tai dated Nov. 20, 2001 ("Tai Dep. Nov. 20") at 31, 35-38, 40-41, 65-66 attached as Ex. 93 to Gueli

Decl. Opp.; Tai Notes and Observations of August 26-27 Meeting dated Aug. 28, 1999 attached as Ex. 10 to Gueli Decl. Opp.; Deposition of Charles Weliky dated Nov. 2, 2001 ("Weliky Dep.") at 41, 45-48, 248, 254-55 attached as Ex. 97 to Gueli Decl. Opp.) A subsequent meeting took place on September 23, 1999 among Gary Simon ("Simon"), NU Senior Vice President of Enterprise Development and Analysis, Charles Weliky ("Weliky"), President of Con Ed Energy and Con Ed Development, and Timothy Frost ("Frost"), a Director in Con Edison's Corporate Planning Department. (Pl.'s Rule 56.1 St. ¶ 2; Def.'s Resp. Rule 56.1 St. ¶ 2) The parties disagree about the degree to which Simon, Weliky, and Frost discussed NU's risk management policies, particularly with respect to Select. (Pl.'s Rule 56.1 St. ¶¶ 2-3; Def.'s Resp. Rule 56.1 St. ¶¶ 2-3.)

Con Edison claims that over the course of due diligence NU represented that it had covered the CL & P Contract, specifically that Select had purchased enough energy to meet its obligations over the four years of the contract. (Pl.'s Resp. Rule 56.1 St. ¶¶ 62, 70). In fact, when NU signed the CL & P Contract on November 2, 1999, after Con Edison and NU signed the Merger Agreement, Select had acquired sufficient electricity to cover only its obligations during the first two years of the contract (2001-2002). (Def.'s Rule 56.1 St. ¶¶ 68-69; Pl.'s Resp. Rule 56.1 St. ¶¶ 68-69.) Select was thus "uncovered" for 2002-2003. (Def.'s Rule 56.1 St. ¶ 69; Pl.'s Resp. Rule 56.1 St. ¶ 69.) Select maintained the open position believing that it could acquire the necessary electricity to supply the latter half of the contract at a lower price because a large number of new power plants were set to open in New England which would drive down prices. (Def.'s Rule 56.1 St. ¶ 70.)

Con Edison contends that at the September 23, 1999 meeting between Simon, Weliky, and Frost, NU's Simon represented that "Select had supplied to cover the standard offer contract for Connecticut Light and Power ... that locked down the profit margins for that part of the business." (Deposition of Timothy Frost dated Oct. 15, 2001 ("Frost Dep.") at 109

attached as Ex. 61 to Gueli Decl. Supp.) Simon denies saying that the Standard Offer Contract was fully covered and claims that, to the contrary, it was clear to him "from [the] conversation on September 23, 1999 that Messrs. Weliky and Frost understood very well that Select had not secured sufficient power for the last two years of the CL & P Standard Offer *394 Contract." (Declaration of Gary Simon sworn June 6, 2002 ("Simon Decl.") ¶¶ 10-11.) Moreover, Simon directed the Con Edison representatives to John Forsgren ("Forsgren"), NU's Chief Financial Officer and Chairman of Select's Risk Oversight Council ("ROC") for any further questions about risk management. (Simon Decl. ¶ 6.)

The parties disagree about whether Con Edison pursued further information on Select and its risk management strategies, as well as whether NU provided such information in a forthright and complete manner. Con Edison claims that employees with relevant expertise reviewed the risk management policies and discussed Select's risk management policies with senior NU management, including Simon and Forsgren. (Pl.'s Resp. Rule 56.1 St. ¶¶ 81-83.) The parties do agree that prior to signing the Merger Agreement, Con Edison requested a copy of Select's risk management policies in response to which NU provided a copy of such a policy dated August 5, 1999 ("August Policies"). (Pl.'s Rule 56.1 St. ¶¶ 5-6; Def.'s Resp. Rule 56.1 St. ¶¶ 5-6; August Policies attached as Ex. 4 to Gueli Decl. Supp.) It is clear that Mr. Weliky only reviewed the August Policies after the September 23, 1999 meeting with Mr. Simon. (Weliky Dep. at 72, 267.)

Con Edison contends that the August Policies were already "the subject of review" and "in the process of undergoing major revision" although no such changes were disclosed to Con Edison. (Pl.'s Rule 56.1 St. ¶ 11.) For example, Con Edison argues, NU and Select senior management considered the volumetric limits in the August Polies "unrealistic," "obsolete," "too constraining," "not feasible," and lacking "good business sense." (Pl.'s Rule 56.1 St. ¶ 12.)

NU, however, asserts that NU constantly reviews, evaluates and upgrades Select's risk management policies and that in September 1999, when the August Policies were turned over, Select was merely contemplating making appropriate revisions to meet the growth in Select's portfolio. (Def.'s Resp. Rule 56.1 St. ¶ 11; Forsgren Dep. at 168.) NU also claims that Con Edison never inquired into whether Select was or would be making changes to its risk management policies despite the fact that Con Edison should have been aware of the possibility because NU informed Con Edison that it was going to be Select's business practice to hold substantial open positions in order to build its business, thereby requiring at minimum an exception to the August Policies. (Def.'s Resp. Rule 56.1 St. ¶ 12.) John Forsgren, the person with primary responsibility for risk management at Select and to whom Simon had referred Weliky and Frost for additional questions, stated under oath that "[a]t no time during the due diligence period did anyone at Con Ed ask me any questions regarding Select's risk management policies." (Declaration of John H. Forsgren sworn May 1, 2002 ("Forsgren Decl.") ¶¶ 13, 14.)

NU also contends that during due diligence, Con Edison never discussed the August Policies or any aspect of risk management with any officer or employee of Select. (Def.'s Rule 56.1 St. ¶ 83.) Nor did Con Edison request or review any of the written reports that Select prepared about its open, uncovered positions on its supply contracts or any of the minutes or reports of Select's ROC. (Def.'s Rule 56.1 St. ¶ 83.) Moreover, documents existed from which Con Edison could have verified whether Select's expected supply obligations under the Standard Offer Contract were fully matched, or "covered." (Def.'s Rule 56.1 St. ¶¶ 75-77.) NU claims that Con Edison in fact ignored the advice of *395 one of its own employees to review the way in which Select implemented its policies in practice, because they appeared appropriate on paper. (Def.'s Rule 56.1 St. ¶¶ 81-82.) Nor did Con Edison attempt to place any restrictions in the Merger Agreement on NU's right to grant exceptions to or otherwise modify the August

Policies. (Def.'s Rule 56.1 St. ¶ 82.)

The parties entered into an Agreement and Plan of Merger (the "Merger Agreement") on October 13, 1999. The terms of the document were negotiated by officers and employees from both parties as well as their respective legal and financial advisors. (Def.'s Rule 56.1 St. ¶ 15; Pl.'s Resp. Rule 56.1 St. ¶ 15.) On or about February 29, 2000 Con Edison and NU issued a Joint Merger Proxy Statement ("Joint Proxy") through which they sought shareholder approval of the merger. (Def.'s Rule 56.1 St. ¶ 16; Pl.'s Resp. Rule 56.1 St. ¶ 16; Joint Proxy attached as Ex. 2 to Kraus Decl. Supp.)

The merger price to be paid by Con Edison, half in cash and half in Con Edison stock, was expected to be \$26.50 per share of NU common stock assuming that the merger closed on December 31, 2000, by which time the parties anticipated receipt of the remaining regulatory approvals. (Def.'s Rule 56.1 St. ¶ 17; Pl.'s Resp. Rule 56.1 St. ¶ 17.; Joint Proxy at 6.) The merger price comprised three parts: 1) a \$25 base price; 2) an additional \$1 to be paid if, as expected (and as actually occurred), NU entered into a binding agreement to sell its Millstone nuclear power station to an unaffiliated third party; and 3) an "adjustment" payment of \$0.0034 per day (or about \$.10 per month) for each day from August 5, 2000 until the merger closed. (Def.'s Rule 56.1 St. ¶ 18; Pl.'s Resp. Rule 56.1 St. ¶ 18; Merger Agr. §§ 2.01(b)(i)(A), 2.05.)

The \$26.50 anticipated merger price represented a premium of more than 40 percent over the "unaffected" \$18.56 price at which NU's shares were trading prior to the time that rumors of the transaction began circulating in the marketplace. (Def.'s Rule 56.1 St. ¶ 19; Pl.'s Resp. Rule 56.1 St. ¶ 19.) The premium constituted more than \$1 billion of the total \$3.6 billion that Con Edison expected to pay for NU's 137 million then outstanding shares. (Def.'s Rule 56.1 St. ¶ 20; Pl.'s Resp. Rule 56.1 St. ¶ 20.) By the time Con Edison cancelled the merger on March 5, 2001, the \$0.0034 per NU share, per day,

adjustment payment rendered the merger price over \$26.70 per share, and the premium had grown to over \$1.1 billion. (Def.'s Rule 56.1 St. ¶ 21; Pl.'s Resp. Rule 56.1 St. ¶ 21.)

The parties dispute the reasons why Con Edison agreed to pay this premium and the degree to which Con Edison sought to downplay the price of the transaction when making the merger public. (Def.'s Rule 56.1 St. ¶¶ 22-23; Pl.'s Resp. Rule 56.1 St. ¶¶ 22-23.) As evidence of Con Edison's desire to make the price of the merger appear low, NU cites an e-mail from Freilich to a group of Con Edison employees in which she wrote, "[NU] can be expected to want [various factors] expressed in a way that makes the price sound higher--and we will want it to sound lower.... I know you all know how to lie in front of a truck ... this is one on which we may have to go through this exercise. Just remember who is buying whom...." (E-mail from Joan S. Freilich dated Oct. 12, 1999 attached as Ex. 46 to Kraus Decl. Supp.)

NU claims that Con Edison was willing to pay the substantial premium because the companies' similar businesses and adjacent service areas promised a smooth integration of their respective operations. *396 (Def.'s Rule 56.1 St. ¶ 23.) Thus, NU and Con Edison made a good "fit". (Def.'s Rule 56.1 St. ¶ 23; Pl.'s Resp. Rule 56.1 St. ¶ 23.) Moreover, NU claims, because Con Edison viewed NU as an attractive acquisition target, offering a full price at the outset could preempt competing bidders. (Def.'s Rule 56.1 St. ¶ 24; Pl.'s Resp. Rule 56.1 St. ¶ 24.)

Con Edison contends that it offered only what it thought NU was worth in combination with Con Edison. (Def.'s Rule 56.1 St. ¶ 24.) Con Edison also disputes NU's characterization of the premium as "substantial", and notes that it perceived the parties to be a good match in the fall of 1999 because synergies would be readily achievable and because Con Edison believed that NU had a similar risk tolerance to Con Edison. (Pl.'s Resp. Rule 56.1 St. ¶ 23.) Both parties agree that no other bidders emerged after Con Edison and NU announced their proposed

merger. (Def.'s Rule 56.1 St. ¶ 25; Pl.'s Resp. Rule 56.1 St. ¶ 25.)

During the due diligence, the parties jointly retained the accounting firm of Deloitte & Touche LLP ("Deloitte & Touche") to estimate the amount of savings, or "synergies", that might be achieved by combining Con Edison and NU. (Def.'s Rule 56.1 St. ¶ 28; Pl.'s Resp. Rule 56.1 St. ¶ 28.) Deloitte & Touche projected that if the companies combined they could save \$1.3 billion and \$180 million in their regulated and unregulated businesses respectively over a 10-year period. (Def.'s Rule 56.1 St. ¶¶ 29-30; Pl.'s Resp. Rule 56.1 St. ¶¶ 29-30.) After the parties signed the Merger Agreement, a joint transition team comprising personnel from both companies revised the estimated savings for the merged regulated businesses to \$1.574 billion over ten years. (Def.'s Rule 56.1 St. ¶ 31; Pl.'s Resp. Rule 56.1 St. ¶ 31.) Con Edison Expert Kenneth Lehn estimates that the present value (as of April 13, 2001) of the combined regulated and unregulated synergies is \$707 million. (Def.'s Rule 56.1 St. ¶ 33; Pl.'s Resp. Rule 56.1 St. ¶ 33; Expert Report and Disclosures of Kenneth M. Lehn ("Lehn Report") ¶ 37 n.14 attached as Ex. 61 to Gueli Decl. Opp.) The parties disagree as to the percentage of synergies that they would actually retain. (Def.'s Rule 56.1 St. ¶¶ 34-35; Pl.'s Resp. Rule 56.1 St. ¶¶ 34-35.)

The Merger Agreement itself contains a series of representations and warranties by NU, (Merger Agr. § 3.01), as well as numerous covenants circumscribing NU's conduct between the execution of the Merger Agreement and closing. (Merger Agr. § 4.01.) Included in the Merger Agreement is NU's commitment that "[e]xcept as otherwise expressly contemplated by this Agreement or as consented to in writing by [Con Edison], during the period from the date of this Agreement to the [time of closing], NU shall, and shall cause the NU Subsidiaries to, carry on their respective businesses in the ordinary course consistent with past practice...." (Merger Agr. § 4.01.) The Merger Agreement's representations, warranties, and covenants do not mention Select's risk management policies

that Con Edison claims NU misrepresented during due diligence. (Def.'s Rule 56.1 St. ¶ 27; Pl.'s Resp. Rule 56.1 St. ¶ 27.)

Con Edison argues that on May 4, 2000, Select adopted new risk management policies ("May Policies"), which Select's President, William V. Schivley, described as "substantially modify[ing] the requirements that we had in the previous policies and procedures." (Deposition of William V. Schivley dated Nov. 1, 2001 ("Schivley Dep.") at 159 attached as Ex. 80 to Gueli Decl. Supp.) Con Edison claims that NU never told Con Edison about the new policies *397 until December 2000. (Pl.'s Rule 56.1 St. ¶ 19.) The May Policies no longer required a hedge ratio, no longer set a one million megawatt limit on fixed price energy commitments, and no longer required that Value at Risk ("VaR") not exceed \$20 million. (Schivley Dep. at 159-61; Pl.'s Rule 56.1 St. ¶¶ 17-18.) Con Edison argues that if the merger had actually been consummated, Con Edison's own risk management policies would have required Con Edison to close Select's open position at a cost of \$400 million, a fact and figure that NU contests. (Pl.'s Rule 56.1 St. ¶ 22; Def.'s Resp. Rule 56.1 St. ¶ 22.)

NU objects to characterizing the May Policies as "new", and instead describes the May Policies as revising the August Policies and deems the changes "replacements" rather than wholesale eliminations of portions of the August Policies. (Def.'s Resp. Rule 56.1 St. ¶¶ 14, 17-18.) NU also argues that Simon, Frost, and Weliky discussed the fact that Select was short on the CL & P Contract and that it "should have been obvious to anyone who [subsequently] read the policies that, at a minimum, an exception would be required for the Standard Offer Contract [with CL & P] and that other revisions would be required to accommodate the growth and changing nature of Select's business." (Def.'s Resp. Rule 56.1 St. ¶ 19.)

The parties dispute the degree to which rumors and the announcement of the proposed merger caused a subsequent decline in Con Edison's stock price. (Def.'s Rule 56.1 St. ¶¶

36-38; Pl.'s Resp. Rule 56.1 St. ¶¶ 36-38.) However, in January 2000, Salomon Smith Barney, Con Edison's financial advisor, recommended to Con Edison potential modifications to the Merger Agreement. (Def.'s Rule 56.1 St. ¶¶ 39-40; Pl.'s Resp. Rule 56.1 St. ¶¶ 39-40.) The parties disagree about whether Con Edison sought out that advice or whether it came unsolicited. (Def.'s Rule 56.1 St. ¶ 39; Pl.'s Resp. Rule 56.1 St. ¶¶ 39-40.)

The parties filed a Joint Application for Approval of Change of Control by Connecticut Department of Public Utility Control with the Connecticut Department of Public Utility ("DPUC") on or about January 20, 2000. (Def.'s Rule 56.1 St. ¶ 41; Pl.'s Resp. Rule 56.1 St. ¶ 41.) The DPUC issued a Draft Decision approving the proposed merger on or about September 22, 2000, and issued a final approval approximately one month later. (Def.'s Rule 56.1 St. ¶¶ 42-43; Pl.'s Resp. Rule 56.1 St. ¶¶ 42-43.) In mid-February 2001, the United States Department of Justice granted the last of the principal regulatory approvals required to consummate the merger. (Def.'s Rule 56.1 St. ¶ 44; Pl.'s Resp. Rule 56.1 St. ¶ 44.) Both parties expected the Securities and Exchange Commission ("SEC") to approve the merger as required by the Public Utility Holding Company Act of 1935. (Def.'s Rule 56.1 St. ¶ 44; Pl.'s Resp. Rule 56.1 St. ¶ 44.)

On February 16, 2001, Con Edison's Chairman and Chief Executive Officer ("CEO") Eugene McGrath ("McGrath") advised Michael Morris ("Morris"), Chairman and CEO of NU, that Con Edison would not proceed with the merger on the terms set forth in the Merger Agreement and would only go forward at a substantial, unquantified discount to the previously agreed upon price. (Def.'s Rule 56.1 St. ¶ 47; Pl.'s Resp. Rule 56.1 St. ¶ 47.) During the meeting and subsequently, Con Edison identified several "material adverse changes" ("MACs") under the Merger Agreement that allegedly warranted the discount. (Def.'s Rule 56.1 St. ¶ 48; Pl.'s Resp. Rule 56.1 St. ¶ 48.) NU disputed Con Edison's entitlement to renegotiate the merger price. (Def.'s Rule 56.1 St. ¶ 49; Pl.'s Resp. Rule 56.1 St. ¶ 49.)

NU *398 contends that by mid-February of 2001, worsening market conditions meant that there was virtually no chance that a competing bidder would emerge who would pay close to the price agreed to by Con Edison. (Def.'s Rule 56.1 St. ¶¶ 45-46.) Moreover, NU claimed that it was a stronger company in 2001 than it was in October 1999 when the parties executed the Merger Agreement. (Def.'s Rule 56.1 St. ¶ 49.) Con Edison disputes this assertion. (Pl.'s Resp. Rule 56.1 St. ¶ 49.)

On February 27, 2001, one of NU's financial advisors, Morgan Stanley Dean Witter ("Morgan Stanley") made a presentation to NU's Board of Trustees. (Pl.'s Rule 56.1 St. ¶ 23; Def.'s Resp. Rule 56.1 St. ¶ 23; Morgan Stanley February 27, 2001 Presentation to NU ("MS Feb. Presentation") attached as Ex. 39 to Gueli Decl. Supp.) Con Edison claims that Morgan Stanley's presentation showed that NU's current forecasted earnings for 2001-2005 had fallen to \$1.094 billion from a total of \$1.458 billion in earnings forecasted in October 1999 for that same period. (Pl.'s Rule 56.1 St. ¶ 24.) Morgan Stanley also presented a discounted cash flow analysis that Con Edison claims showed a drop in NU's value between October 1999 and February 2001 from a range of \$18.25-\$23.50 per share to \$15.25-\$18.50. (Morgan Stanley Presentation to NU Board of Trustees dated Oct. 11, 1999 ("MS Oct. Presentation") at 33 attached as Ex. 12 to Gueli Decl. Supp.; MS Feb. Presentation at 4.) NU argues that the earnings forecasts cannot be compared as Con Edison has done because of differences in the ways that the figures were calculated. (Def.'s Resp. Rule 56.1 St. ¶¶ 24-25.) NU also contends that Morgan Stanley's discounted cash flow analysis was based on an inaccurate and unrealistic projection of NU's future earnings. (Def.'s Resp. Rule 56.1 St. ¶ 25.)

On February 28, 2001, NU made a formal written demand on Con Edison to provide reasonable assurances that Con Edison would comply with its contractual obligations and consummate the merger in accordance with the terms of the Merger Agreement. (Def.'s Rule 56.1 St. ¶ 51; Pl.'s Resp. Rule 56.1 St. ¶

51.) Con Edison responded by letter dated March 2, 2001 that, "Con Edison fully intends to abide by its obligations under the Merger Agreement and believes that it is and at all times has been in compliance with the terms of the Merger Agreement. Con Edison therefore is ready, willing, and able to close the transaction provided Northeast Utilities is able to satisfy all of the conditions precedent to closing." (Letter from Eugene McGrath to Michael Morris dated Mar. 2, 2001 attached as Ex. 51 to Gueli Decl. Opp.) Mr. McGrath of Con Edison subsequently advised Mr. Morris of NU on March 5, 2001 that Con Edison would not proceed on the terms set forth in the Merger Agreement, and that it would not pay NU more than \$22.50 per share. (Def.'s Rule 56.1 St. ¶ 52; Pl.'s Resp. Rule 56.1 St. ¶ 52.) Con Edison contends that it could not agree to the previously offered price because NU had suffered a MAC that dramatically lowered NU's valuation. (Pl.'s Resp. Rule 56.1 St. ¶ 52.)

NU's Board of Trustees considered the \$22.50 offer and unanimously rejected it, concluding, based on the advice of their financial and legal advisors, that Con Edison had no grounds to renegotiate the merger terms. (Def.'s Rule 56.1 St. ¶ 53; Pl.'s Resp. Rule 56.1 St. ¶ 53.) NU announced thereafter that Con Edison had rejected its request for reasonable assurances and that NU was treating this rejection as an anticipatory repudiation of the Merger Agreement. (Def.'s Rule 56.1 St. ¶ 54; Pl.'s Resp. Rule 56.1 St. ¶ 54.) NU declared that it would take appropriate *399 action to recover the benefits of the merger for its shareholders. (Def.'s Rule 56.1 St. ¶ 54; Pl.'s Resp. Rule 56.1 St. ¶ 54.)

Con Edison filed its original Complaint in this action on March 6, 2001 seeking a declaratory judgment that NU had breached the Merger Agreement and that, consequently, Con Edison was excused from performing its obligations thereunder. NU filed a separate action in this Court on March 12, 2001 asserting a claim for breach of the parties' Merger Agreement but later withdrew the action and asserted the claim as a counterclaim in this litigation.

Con Edison subsequently filed its Amended Complaint (the "Complaint") that asserts the following seven claims for relief: First, breach of contract based on NU's alleged breach of the covenants in Section 4.01 of the Merger Agreement; Second, breach of contract based on NU's alleged breach of the representation in Section 3.01(i) concerning the absence of certain material adverse changes or events; Third, failure of condition precedent under Section 6.02(b) of the Merger Agreement that NU had performed in all material respects all its obligations required to be performed under the Merger Agreement, specifically NU's obligations under Section 4.01 of the Merger Agreement; Fourth, alleged failure of condition precedent under Section 6.02(a) of the Merger Agreement that NU's representations and warranties were correct when made and as of the closing date; Fifth, alleged failure of condition precedent under Section 6.02(d) of the Merger Agreement based on NU's having suffered a "Material Adverse Change"; Sixth, fraudulent inducement; and Seventh, negligent misrepresentation. NU's Counterclaim charges Con Edison with breach of contract because Con Edison allegedly repudiated its obligation under the Merger Agreement by refusing to proceed with the merger as it was required to do.

This Court has jurisdiction based on the complete diversity of citizenship of the parties. See 28 U.S.C. § 1332(a).

The Merger Agreement is governed by New York law, (Merger Agr. § 8.07), and the parties agree that New York law governs all claims in this action.

Both parties have now moved for summary judgment on various claims.

III.

[1][2] NU moves for summary judgment dismissing Con Edison's claim for fraudulent inducement, the Sixth Claim for Relief. To state a claim for fraud under New York law, Con Edison must demonstrate (i) a representation of material fact; (ii) falsity; (iii) scienter; (iv) reasonable reliance; and (v)

injury. See *Wells Fargo Bank Northwest, N.A. v. Taca Int'l Airlines, S.A.*, 247 F.Supp.2d 352, 363 (S.D.N.Y.2002) (citing *Manning v. Utilities Mut. Ins. Co., Inc.*, 254 F.3d 387, 400 (2d Cir.2001)); see also *Computerized Radiological Servs. v. Syntex Corp.*, 786 F.2d 72, 76 (2d Cir.1986). To plead fraudulent inducement, Con Edison must allege that it reasonably relied on false representations made by NU. See *Wells Fargo*, 247 F.Supp.2d at 363 (collecting cases). Con Edison must prove each of the elements by clear and convincing evidence. *Syntex*, 786 F.2d at 76.

The Complaint alleges that:

NU represented to Con Edison that Select's fixed-price contractual supply obligations to CL & P were or would be sufficiently matched, or that other appropriate risk management techniques would be employed, so that Select could realize specified margins on *400 the CL & P Standard Offer. Further, NU represented to Con Edison that Select adhered to defined risk management policies that precluded Select from maintaining more than a specified limited number of megawatt hours in unmatched fixed-price contractual supply commitments in any given year....

(Compl.¶ 78.) Con Edison claims that these representations were false. (Compl.¶ 78.) The alleged representations were purported to have been made orally by NU personnel during due diligence and not as part of the representations and warranties contained in the Merger Agreement.

[3] NU contends that Con Edison cannot prove the element of reasonable reliance and thus cannot establish a valid claim for fraudulent inducement. NU denies making such representations, but that disputed issue of fact could not be a basis for summary judgment. Rather, NU claims that it is entitled to summary judgment because reasonable reliance on the extra-contractual representations in this case is foreclosed as a matter of law. NU bases this claim on the provisions of the Confidentiality Agreement and the Merger Agreement, and on allegedly well settled law.

First, NU argues, the Confidentiality Agreement's express disclaimer of reliance on any representations made during due diligence bars Con Edison's claim that it can and did rely on the alleged representations about Select's risk management policies. The Confidentiality Agreement's integration clause reads, "Only those representations and warranties made in a Definitive Agreement and subject to such limitations and restrictions as may be specified therein will have any legal effect." (Confid.Agr.¶ 6.) The Confidentiality Agreement also provides, in part:

The Parties (i) acknowledge that neither Party nor any Representative of either Party makes any representation or warranty, either express or implied, as to the accuracy or completeness of any Evaluation Material, and (ii) agree, to the fullest extent permitted by law, except as may be provided in a Definitive Agreement ... that neither Party nor any Representative of either Party shall have any liability to the other Party or any of the other Party's Representatives on any basis ... as a result of the Parties' participation in evaluating a possible Transaction, the review by either Party of the other Party or the use of the Evaluation Material by either Party or its Representatives in accordance with the provisions of this Agreement. Each Party agrees that it is not entitled to rely on the accuracy or completeness of the Evaluation Material....

(Confid.Agr. ¶ 6 (emphases added).) [FN2] NU claims that the terms of the Confidentiality Agreement thus expressly bar Con Edison from relying on exactly the type of representations they allege. Therefore, Con Edison cannot support a claim of reasonable reliance. See, e.g., *Banner Indus., Inc. v. Schwartz*, 204 A.D.2d 190, 612 N.Y.S.2d 861 (1994) (upholding dismissal of causes of action for fraud because disclaimers in confidentiality agreement barred the relevant reliance on oral misrepresentations).

FN2. The Confidentiality Agreement defined the term "Evaluation Material" as "as all data, reports, interpretations, forecasts and records (whether oral or in written form, electronically stored or

otherwise) containing or otherwise reflecting information" concerning one party and supplied by that party to the other. (Confid.Agr.¶ 1.) A "Definitive Agreement" provides for a transaction and has been executed and delivered. (Confid.Agr. ¶ 6.)

*401 Second, NU represents that the Merger Agreement's integration clause, combined with the document's representations, warranties, and covenants, bars reliance on any representations not explicitly set forth in the Merger Agreement. The Merger Agreement's integration clause provides that the "Agreement ... and the Confidentiality Agreement ... (i) constitutes [sic] the entire agreement, and supersedes [sic] all prior agreements and understandings, both written and oral, among the parties with respect to the subject matter of this Agreement...." (Merger Agr. § 8.06.) The Merger Agreement contains no representations or warranties about Select's risk policies. Thus, NU contends, Con Edison cannot successfully assert its claim for fraudulent inducement.

[4] Third, NU argues, Con Edison's purported reliance on any representations outside of the Merger Agreement is unreasonable as a matter of law. See *Emergent Capital Investment Mgmt., LLC v. Stonepath Group, Inc.*, 165 F.Supp.2d 615 (S.D.N.Y.2001) (hereinafter *Emergent Capital I*) (finding that the plaintiff could not reasonably rely on statements not incorporated into a fully integrated, unambiguous stock purchase agreement); see also *Emergent Capital Investment Mgmt., LLC v. Stonepath Group, Inc.*, 195 F.Supp.2d 551, 562 (S.D.N.Y.2002) (hereinafter *Emergent Capital II*) [FN3] ("when the contract states that the defendant makes no representations other than those contained in another more exhaustive clause of the contract, a fraud claim may be precluded"). "Under New York law, where a party specifically disclaims reliance upon a particular representation in a contract, that party cannot, in a subsequent action for common law fraud, claim it was fraudulently induced to enter into the contract by the very representation it has disclaimed reliance

upon." Emergent Capital II, 195 F.Supp.2d at 561 (internal citations and quotation marks omitted) (collecting cases).

FN3. The Court will use the title "Emergent Capital" when referring to the facts of the case as a whole but will cite to the specific decisions in Emergent Capital I and Emergent Capital II.

[5] Con Edison replies that the integration clauses in Section 8.06 of the Merger Agreement and Paragraph 6 of the Confidentiality Agreement use general language and thus do not bar its claim of reasonable reliance. Con Edison is correct that under New York law, a general merger clause does not preclude a claim for fraudulent inducement. See, e.g., *Manufacturers Hanover Trust Co. v. Yanakas*, 7 F.3d 310, 315 (2d Cir.1993); *Citibank, N.A. v. Plapinger*, 66 N.Y.2d 90, 495 N.Y.S.2d 309, 485 N.E.2d 974, 976 (1985); *Danann Realty Corp. v. Harris*, 5 N.Y.2d 317, 184 N.Y.S.2d 599, 157 N.E.2d 597, 598-99 (1959). Con Edison asserts that the sole exception to this rule is for contracts containing a disclaimer addressing the specific representation at issue in the case. See, e.g., *Danann*, 184 N.Y.S.2d 599, 157 N.E.2d at 599.

In this case, the specific disclaimer in the Confidentiality Agreement combined with the merger clause in the Merger Agreement defeat any claim of reasonable reliance on the alleged oral statements in the course of due diligence and the written August Policies. All of the oral statements were made during the course of due diligence and the August Policies were provided pursuant to the Confidentiality Agreement. The Confidentiality Agreement unambiguously provides that "Each party agrees that it is not entitled to rely on the accuracy or completeness of the Evaluation Material" supplied during due diligence. (Confid.Agr.¶ 6.) The alleged oral representations by NU employees and *402 the August Policies constitute such Evaluation Material. (Confid.Agr.¶ 1.) [FN4]

FN4. This fact distinguishes this case from *Suez Equity Investors, L.P. v. Toronto-Dominion Bank*,

250 F.3d 87 (2d Cir.2001), on which Con Edison relies. In *Suez*, the Second Circuit Court of Appeals reversed the district court's dismissal of a negligent misrepresentation claim on a motion to dismiss. The Court of Appeals found, in part, that the defendants could not rely on relevant portions of a confidentiality agreement that disclaimed any reliance on the accuracy or completeness of certain information transmitted from the defendants to the plaintiffs. *Id.* at 104. However, in that case, the alleged conflicting oral statements would not have been covered by the confidentiality agreement and thus the court found that the tension between the oral statement and the agreement could not be resolved on the pleadings. *Id.* Unlike *Suez*, there is no question that the alleged representations upon which Con Edison claims to have relied were Evaluation Materials as defined by the Confidentiality Agreement. Moreover, unlike the present case, *Suez* did not involve a Confidentiality Agreement followed by a Merger Agreement with a merger clause where the parties had the opportunity to include any representations or warranties on which they purported to rely.

The Merger Agreement went on to provide that the Merger Agreement and the Confidentiality Agreement were the entire agreement between the parties and superseded all prior understandings, both written and oral. Con Edison, advised by sophisticated financial and legal advisors in a multi-billion dollar transaction, was specifically advised that it could not rely on the oral representations and documents provided in due diligence. If it did believe that any such statements or documents were significant, it could have made them a basis for a specific representation and warranty in the Merger Agreement but it failed to do so. Pursuant to the documents in this case, Con Edison cannot establish that it reasonably relied on the alleged oral representations or the August Policies. See *Harsco Corp. v. Segui*, 91 F.3d 337, 343-48 (2d Cir.1996); *Emergent Capital II*, 195 F.Supp.2d at 562.

This case is an even stronger case for barring any finding of reasonable reliance than *Harsco* where the Court of Appeals found no basis for claims of fraud and negligent misrepresentation brought by an acquiring

company, Harsco, against various officers and directors of MultiServ, the acquiree, because reasonable reliance could not be established. The plaintiff alleged that a "no other representations" clause in the parties' merger agreement used general terms that were insufficient to bar a claim for reasonable reliance. Harsco, 91 F.3d 337 at 345. [FN5] Harsco claimed that during a 14-day confirmatory due diligence, the defendants represented that one of their manufacturing plants in Russia would be operational within approximately six months while knowing that the foundation for the plant had not even been poured. *Id.* at 346. Like this case, no specific representations about the Russian plant were included in the relevant sections of the merger agreement (§§ 2.01-2.04). Despite this fact, the Court of Appeals found that, "We think Harsco should be treated as if it meant what it said when it agreed ... that there *403 were no representations other than those contained in Sections 2.01 through 2.04 that were part of the transaction." *Id.* The court concluded, "relying on the sophisticated context of this transaction, we hold that Harsco must be held to its agreement." *Id.*

FN5. A portion of Section 2.05 of the agreement stated that the Defendants "make no representation or warranty to Harsco regarding (a) any projections, estimates or budgets heretofore delivered to or made available to Purchaser of future revenues, expenses or expenditures, future results of operations ..., future cash flows or future financial condition ... of MultiServ or the future business of MultiServ; or (b) any other information or documents made available to Harsco or its counsel, accountants or advisors with respect to MultiServ or the business and operations of MultiServ, except as expressly covered by a representation and warranty contained in Sections 2.01 through 2.04 hereof." Harsco, 91 F.3d 337 at 345 (internal quotation marks and alterations omitted).

As in Harsco, the August Policies and the alleged oral representations that NU gave Con Edison during due diligence were not mentioned by name in the Confidentiality Agreement or the Merger Agreement. But the Court of Appeals in Harsco found such explicit

language unnecessary in part because "the exhaustive nature of the [Agreement's] representations adds to the specificity of [the Agreement's] disclaimer of other representations." *Id.* The same conclusion can be reached in this case because the Confidentiality Agreement made clear that neither party could rely on representations made in the course due diligence and the Merger Agreement provided that it and the Confidentiality Agreement were the entire agreement between the parties and superceded all other understandings. Like Harsco, the Confidentiality Agreement's disclaimer, as well as the integration clause in the Merger Agreement, are strengthened by the extensive and exclusive representations and warranties made in the Merger Agreement which failed to include the representations on which Con Edison now seeks to rely.

Similarly, in *Emergent Capital*, in dismissing a claim of fraudulent inducement, Judge Sweet of this court pointed to the 29 separate representations and warranties, and 16 separate covenants, favoring the plaintiff that were contained in the Stock Purchase Agreement at issue. *Emergent Capital I*, 165 F.Supp.2d at 622; see also *Emergent Capital II*, 195 F.Supp.2d at 562 ("If [the] merger clause stood alone, there would be no question that it would not by itself preclude reasonable reliance as a matter of law. In addition to the merger clause, however, the Stock Purchase Agreement makes 29 separate representations and warranties and 16 separate covenants in favor of [the plaintiff].") [FN6] Again, similar to this case, the Stock Purchase Agreement did not include any representations or warranties specifically addressing the subject matter of the alleged fraudulent representation. Nonetheless, the court found, "Even in the absence of a specific disclaimer, a fraudulent inducement claim will be barred whenever an express provision in a written contract contradicts the claimed oral representations in a meaningful fashion." *Emergent Capital II*, 195 F.Supp.2d at 561 (internal quotation marks omitted) (collecting cases). [FN7] Moreover, "[e]ven if an integration *404 clause is general, a fraud

claim will not stand where the clause was included in a multimillion dollar transaction that was executed following negotiations between sophisticated business people and a fraud defense is inconsistent with other specific recitals in the contract." Emergent Capital I, 165 F.Supp.2d at 622.

FN6. The merger clause at issue read, "This Agreement, together with the exhibits and schedules hereto and ancillary Agreements, contains the entire understanding and agreement between or among [the signatories], and supersedes all prior understandings or agreements between or among any of [the signatories] with respect to the subject matter hereof." Emergent Capital II, 195 F.Supp.2d at 562.

FN7. Con Edison relies on JPMorgan Chase Bank v. Liberty Mutual Ins. Co., 189 F.Supp.2d 24 (S.D.N.Y.2002), in which Judge Rakoff denied a motion for summary judgment on the grounds of fraudulent inducement and/or fraudulent concealment in part because the broad disclaimer language in that case did not preclude a finding of reasonable reliance. However, the facts of this case more closely resemble those of Citibank, N.A. v. Plapinger, 66 N.Y.2d 90, 495 N.Y.S.2d 309, 485 N.E.2d 974 (1985), which the court in JPMorgan used to distinguish the facts of that case from those in which the New York Court of Appeals found that a disclaimer agreement barred a claim of reasonable reliance. In Plapinger, despite broad disclaimer language, the disclaimers of reliance were signed during the same negotiations during which certain relied upon promises were allegedly made. As Judge Rakoff explained, because of the proximity between the disclaimer and the alleged oral representations, "in agreeing to the disclaimers, the corporate officers had to know that, at a minimum, the disclaimers precluded reliance on any specific oral promises made during the defendants' negotiations with the [plaintiffs]." JPMorgan, 189 F.Supp.2d at 27. Similarly, the disclaimers in the Confidentiality Agreement in this case explicitly addressed the information provided to Con Edison during due diligence and Con Edison must have known, in agreeing to that provision, that it was giving up the right to rely on the August Policies turned over during due diligence or any alleged oral statements made during that same period unless Con Edison chose to include specific representations and

warranties in the subsequent definitive agreement that covered those alleged representations.

Con Edison urges the Court to disregard Emergent Capital in view of the Second Circuit Court of Appeals' decision in Caiola v. Citibank, 295 F.3d 312 (2d Cir.2002). However, Caiola is not inconsistent with Emergent Capital or Harsco and is distinguishable from this case.

In Caiola, the plaintiff brought federal securities fraud and state law claims against the defendant, Citibank, which the district court dismissed under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Caiola, a sophisticated investor and major client of Citibank, undertook high volume equity trading and entrusted funds to Citibank which in turn engaged various outside brokerage firms. *Id.* at 315. As Caiola's trades grew, Citibank proposed synthetic trading as a way for Caiola, who was heavily concentrated in large positions of a single stock, to reduce the risks associated with large-volume trading. *Id.* at 316. Caiola took Citibank's advice and the parties documented the resulting transactions through an International Swap Dealers Master Agreement ("ISDA Agreement") dated March 25, 1994, which governed the overall synthetic trading relationship. *Id.* The ISDA Agreement contained an integration clause stating, in part, "This Agreement constitutes the entire agreement and understanding of the parties with respect to its subject matter and supersedes all oral communication and prior writings with respect thereto." *Id.* at 318. Each synthetic transaction was governed by an individualized Confirmation containing a number of disclaimers. *Id.* at 317. One such disclaimer provided that each party represented to the other that "it is not relying on any advice, statements or recommendations (whether written or oral) of the other party." *Id.*

In October 1998, Citibank's parent company merged with another corporation and Caiola feared that Salomon Smith Barney ("SSB"), an affiliate of that corporation, would become involved in his account. *Id.* When Citibank

informed Caiola that this would in fact happen, Caiola threatened to terminate his relationship with Citibank. *Id.* In response, Citibank assured Caiola that SSB would not interfere and that his synthetic trading relationship with Citibank would remain unchanged. *Id.* Moreover, Citibank told Caiola that it would continue to control risks through delta hedging, a strategy that provides protection against small changes of an underlying asset over a short time period. *Id.* at 317, 330. Caiola allegedly relied on these assurances and continued doing business with Citibank.

Within approximately six months, Caiola discovered that Citibank had ceased treating *405 his investments synthetically as early as November 1998. *Id.* at 319. Instead, at SSB's direction, many of his trades had been executed on the physical market. *Id.* at 319. Caiola claims that he lost tens of millions of dollars in March 1999 alone because Citibank had secretly and unilaterally terminated synthetic trading. *Id.* The Court of Appeals rejected Citibank's argument that a reasonable investor of Caiola's sophistication would not have relied on the defendant's alleged oral misrepresentations in view of the disclaimers in the ISDA Agreement and Confirmation. *Id.* at 330.

The disclaimers in Caiola differ significantly from those contained in the Confidentiality Agreement and the Merger Agreement in this case. First, the ISDA Agreement was executed almost exactly five years before Caiola discovered that Citibank had stopped synthetic trading. Second, the ISDA Agreement governed the parties' relationship as a whole rather than the specific, relatively brief due diligence period governed by the Confidentiality Agreement in this case. Moreover, the disclaimer in the Confirmation in Caiola fell "well short of tracking the particular misrepresentations alleged by Caiola." *Id.* The Court of Appeals found that the Confirmation at issue in Caiola stated "only in general terms that neither party relies 'on any advice, statements or recommendation (whether written or oral) or the other part.'" *Id.* The disclaimer

demonstrated no connection to Citibank's practice of delta hedging. In comparison, the Confidentiality Agreement in this case specifically disclaimed reliance on any Evaluation Material, which would include oral statements and the August Policies, supplied during due diligence. The Merger Agreement subsequently disclaimed reliance on any statement or information not memorialized in that document. The documents and transactions in Caiola are thus very different from those at issue in this case.

"In evaluating justifiable reliance, the plaintiff's sophistication and expertise is a principal consideration." *Emergent Capital I*, 165 F.Supp.2d at 623 (collecting cases). *Con Edison*, a sophisticated party advised by sophisticated financial and legal advisors, had ample opportunity during due diligence to obtain any necessary information about *Select*, and has not shown that *NU* ever denied access to such information. Nor has *Con Edison* demonstrated that it made sufficient efforts to obtain the type of information about *Select* and *NU*'s risk management policies that it now claims were integral to the decision to merge with *NU*. See *Lazard Freres & Co. v. Protective Life Ins. Co.*, 108 F.3d 1531, 1543 (2d Cir.1997) ("Where, as here, a party has been put on notice of the existence of material facts which have not been documented and he nevertheless proceeds with a transaction without securing the available documentation or inserting appropriate language in the agreement for his protection, he may truly be said to have willingly assumed the business risk that the facts may be not as represented.") (quoting *Rodas v. Manitaras*, 159 A.D.2d 341, 343, 552 N.Y.S.2d 618 (1990)). See also *Banque Arabe et Internationale D'Investissement v. Maryland Nat'l Bank*, 57 F.3d 146, 157 (2d Cir.1995) (affirming summary judgment dismissing a fraud claim when plaintiff could not prove reasonable reliance on a known and disclosed risk that was "readily available to [the plaintiff] or any interested party who cared to ask"); *Grumman Allied Indus., Inc. v. Rohr Indus., Inc.*, 748 F.2d 729, 737-38 (2d Cir.1984) (plaintiff's expertise, unfettered access to

relevant information, and failure to take advantage of that access precluded plaintiff's claim of justifiable reliance on alleged misrepresentations). "Where sophisticated businessmen engaged in major *406 transactions enjoy access to critical information but fail to take advantage of that access, New York courts are particularly disinclined to entertain claims of justifiable reliance." Grumman, 748 F.2d at 737.

The plaintiff could have asked NU for additional documents as it saw fit, such as underlying Select contracts, but there is no evidence that Con Edison did so or that NU failed to provide any requested material. For example, Con Edison's Charles Weliky testified as follows at his deposition:

Q: Was there anything that you asked for that you didn't get [in order to evaluate Select's position from a volume or risk management perspective]?

A: Yes.

Q: What was that?

A: The actual documents, the contracts, actual documents.

Q: Which contracts are you referring to?

A: All contracts that Select had.

Q: Who did you ask?

A: I didn't--that's the type of thing that we needed.

Q: Did anyone at Con Ed ask for that?

A: I don't know.

(Weliky Dep. at 36.) Moreover, Con Edison employee John Perkins, Director of Financial Administration for Con Edison Company of New York, testified that Con Edison never expected to review Select's actual contracts in order to determine if the company was in compliance with its risk management policies. (Deposition of John Perkins dated Feb. 1, 2002 ("Perkins Dep.") at 19-20 attached as Ex. 86 to Gueli Decl. Opp.) Perkins explained:

I mean, from my own experience, contracts of that type ... are generally considered confidential, so it's not something that we, for example, would typically give to anybody else.... It's really you have to go and ask what contracts you're engaged in, what you are covering. It's unlikely, extremely unlikely that someone would go across the confidentiality barrier and give you the

contract.
(Perkins Dep. at 19-20.)

Moreover, multiple high level Con Edison employees testified that NU never denied Con Edison any requested information during due diligence. Weliky testified that no one from Select ever told him that they would not supply Con Edison with the Select contracts. (Weliky Dep. at 38.) Nor did Weliky hear from anyone at Con Edison that such a request had been refused. (Id.) Weliky admitted that after meeting with Simon and Frost on September 23, 1999, he did not recall ever discussing the risk management policies with anyone at Select or NU. (Id. at 42.)

Joan Freilich's experience appears consistent with Weliky's and she testified at her deposition as follows:

Q: During the course of the due diligence process, was there any information that you had asked for that Northeast Utilities didn't provide?

A: Some of it may have been provided in discussion or informally as opposed to formally, but I don't recall that we specifically asked for any information that was not provided at all, or that at least we didn't have an explanation that we weren't able to accept as to why it might not be provided.

Q: So do you recall that there was information that wasn't provided, but there was an acceptable explanation that went along with it?

A: I don't recall specifically, but there might have been.

(Freilich Dep. at 36-37.)

And Finally, Luther Tai, the Vice President of Corporate Planning at Con Edison, *407 who maintained significant control over Con Edison's due diligence at Select, (Deposition of Luther Tai dated Nov. 28, 2001 ("Tai Dep. Nov. 28") at 29-30 attached as Ex. 88 to Kraus Decl. Supp.), testified as follows:

Q: Did it ever come to your attention that NU held back from Con Ed information that it thought was competitively sensitive?

A: I don't recall specifically.

Q: Do you have even a general recollection

of something like that happening?

A: No.

(Tai Dep. Nov. 28 at 61.)

Con Edison has not demonstrated that it sought the information about how the Standard Offer Contract was covered or Select's risk management policies that it now claims was crucial to its decision to merge with NU. Nor has Con Edison pointed to evidence that NU ever denied such information to Con Edison. [FN8] (Deposition of Joseph Cunha dated Oct. 26, 2001 at 57 attached as Ex. 59 to Kraus Decl. Supp.; Deposition of Howard Kelley dated Aug. 20, 2001 at 100 attached as Ex. 72 to Kraus Decl. Supp.)

FN8. In spite of the testimony cited above, Con Edison contends that, "Because of confidentiality concerns, concerns about sharing potentially sensitive information, and concerns about potential leaks, NU limited the documents it would directly provide to Con Edison, and insisted that Con Edison's diligence respecting Select rely on discussions with and presentations by senior representatives of NU, such as John Forsgren and Gary Simon, to obtain the requested information." (Pl.'s Resp. Rule 56.1 St. ¶ 9.) However, the deposition testimony that Con Edison cites in support of this contention fails to identify any specific instances in which Con Edison actually requested specific information or documents and had that request denied due to confidentiality or other concerns. (Deposition of John D. McMahon dated Nov. 21, 2001 at 27-30 attached as Ex. 83 to Gueli Decl. Opp.; Freilich Dep. Gueli at 33-34, 64-66, 126-28; Weliky Dep. 36-38, 67-71, 129-30; Frost Dep. at 35-36, 81; Deposition of Nicholas Galletti dated Nov. 15, 2001 ("Galletti Dep.") at 88, 101-02, 106-07 attached as Ex. 74 to Gueli Decl. Opp.) There is limited deposition testimony cited by the plaintiff that alludes somewhat more clearly to information that NU did not provide. (Weliky Dep. at 88-89, 135-36; Frost Dep. at 136-37; Galletti Dep. at 195-96.) Even this testimony falls short of evidence that Con Edison asked for specific documents that NU refused to provide, particularly in view of the deposition testimony from Con Edison's own witnesses cited in the text. In any event, it would have been unreasonable in a multi-billion dollar transaction to have relied on oral

representations about contracts that were not produced, particularly in the face of a Confidentiality Agreement that said no reliance could be placed on such representations and when no representations about the allegedly withheld contracts were included in the Merger Agreement. If the plaintiff was in fact concerned about its inability to view any contracts, this is exactly the type of concern that it could have hedged against by including a pertinent representation or warranty in the Merger Agreement.

If NU had refused to provide any information that Con Edison sought, Con Edison, a sophisticated party, could have structured the Merger Agreement to include additional representations and warranties addressing any reservations Con Edison maintained over risk management policies at Select or, for that matter, any other relevant concerns. Instead, Con Edison chose to enter into an agreement without including such language or specifically including any representations or warranties with respect to the August Policies or alleged oral representations made during due diligence, both of which were disclaimed by the Confidentiality and Merger Agreements. "Sophisticated parties to major transactions cannot avoid their disclaimers by complaining that they received less than all information, for they could have negotiated for fuller information or *408 more complete warranties." *DynCorp v. GTE Corp.*, 215 F.Supp.2d 308, 322 (S.D.N.Y.2002). "It is not the role of the courts to relieve sophisticated parties from detailed, bargained-for contractual provisions that allocate risks between them, and to provide extra-contractual rights or obligations for one side or the other." *Id.*

Ultimately, Con Edison's claim that the disclaimers in the Confidentiality and Merger Agreements are too general to bar reasonable reliance is unpersuasive. The Confidentiality Agreement explicitly disclaimed reliance on the exact type of due diligence representations made in the August Policies and allegedly made orally by NU employees. The parties subsequently agreed to an integration clause in the Merger Agreement that barred reliance

on any representations or information that was not specifically covered by the extensive and detailed representations, warranties and covenants in that contract. The Confidentiality Agreement facilitated the production of documents and information subject to the condition that such materials could not be relied upon unless they were specifically included in the subsequent definitive agreement. Considering the combined force of these two documents, no reasonable jury could conclude that Con Edison reasonably relied on the alleged misrepresentations. The sophistication of the parties, the arms-length nature of the transaction, and the inclusion of numerous representations and warranties covering other aspects of the merger all support this conclusion.

Because Con Edison cannot sustain a claim of reasonable reliance, NU's motion for summary judgment on Con Edison's fraudulent inducement claim is granted. Count VI of the Complaint is therefore dismissed.

Con Edison also seeks summary judgment on its claim that NU fraudulently induced Con Edison into entering into the Merger Agreement by misrepresenting Select's risk management policy. For the reasons already explained, Con Edison cannot demonstrate reasonable reliance to succeed on this claim. Therefore, Con Edison's motion for summary judgment on Count VI is denied.

IV.

NU seeks summary judgment dismissing Con Edison's Seventh Claim for Relief for negligent misrepresentation. Con Ed alleges that:

NU negligently misrepresented to Con Edison that Select was or would be matched on, or otherwise would employ appropriate risk management techniques with respect to, its fixed-price contractual supply obligations to CL & P and adhered to defined risk management policies that precluded Select from maintaining more than a specified limited number of megawatt hours in

unmatched fixed-price contractual supply commitments in any given year. (Compl.¶ 83.) Con Edison contends that it factually and reasonably relied on those representations to its detriment in deciding to enter into the Merger Agreement and seeks declaratory judgment that the Merger Agreement is void or voidable, as well as money damages. (Compl.¶¶ 84-86.)

[6][7] The elements of a claim for negligent misrepresentation under New York law are that "(1) the defendant had a duty, as a result of a special relationship, to give correct information; (2) the defendant made a false representation that he or she should have known was incorrect; (3) the information supplied in the representation was known by the defendant to be desired by the plaintiff for a serious purpose; (4) the plaintiff intended to rely and act upon it; and (5) the plaintiff reasonably relied *409 on it to his or her detriment." *Hydro Investors, Inc. v. Trafalgar Power Inc.*, 227 F.3d 8, 20 (2d Cir.2000). Thus, to prove negligent misrepresentation under New York law the plaintiff must prove reasonable reliance on the alleged misrepresentation. For the reasons explained in Part III, Con Edison cannot demonstrate the necessary element of reasonable reliance. NU's motion for summary judgment on Con Edison's negligent misrepresentation claim is therefore granted.

[8] NU also alleges that Con Edison's negligent misrepresentation should be dismissed because there is no special relationship between the parties. Under New York law, a claim for negligent misrepresentation is not actionable without a special relationship of trust or confidence. See *Suez*, 250 F.3d at 102-03; *Banque Arabe*, 57 F.3d at 158; *Village on Canon v. Bankers Trust Co.*, 920 F.Supp. 520, 531-32 (S.D.N.Y.1996). The determination of whether a special relationship existed is a factual inquiry. *Suez*, 250 F.3d at 103.

The Complaint alleges that "there existed between the parties a close degree of trust and reliance in connection with the due diligence process." (Compl.¶ 83.) Con Edison contends

that NU violated this relationship by failing to provide correct information about Select, failing to make full, complete and accurate disclosures, and by remaining silent about Select's risk management policies despite a duty to speak that resulted from NU's superior knowledge of Select. NU argues, by contrast, that the parties were both sophisticated investors engaged in an arms' length transaction that did not give rise to a special relationship. See *Village on Canon*, 920 F.Supp. at 531; Cf. *Suez*, 250 F.3d at 103-04.

In this case, it is unnecessary to reach the question of whether a special relationship existed between the parties because Con Edison cannot prove the essential element of reasonable reliance, and therefore Con Edison cannot prevail on its Seventh Claim for Relief. NU's motion for summary judgment dismissing Con Edison's negligent misrepresentation claim is therefore granted.

V.

[9] Both parties move for summary judgment on Con Edison's First and Third Claims for Relief. The first count alleges that "Northeast has breached or failed to perform in a material respect its obligations under Section 4.01 of the Agreement." (Compl.¶ 52.) Con Edison seeks monetary damages on this claim. (Compl.¶ 55.) The third claim alleges the failure of a condition precedent under Section 6.02(a) of the Merger Agreement which provides that it is a condition of Con Edison's obligations that the "representations and warranties of NU set forth herein shall be true and correct both when made and at and as of the Closing Date...." (Merger Agr. § 6.02(a).) The third claim alleges "Northeast has failed to perform or caused to be performed in all material respects all obligations required to be performed by it and its subsidiaries under Section 4.01 of the Agreement." (Compl.¶ 62.) "By reason of the foregoing, there has been a failure of a condition precedent to Con Edison's obligation to proceed with and consummate the mergers contemplated by the Agreement." (Compl.¶ 64.) Con Edison seeks equitable relief on this claim. (Compl.¶ 65.)

Section 4.01 of the Merger Agreement provides that between the execution of the Merger Agreement on October 13, 1999 and the closing of the merger, "NU shall, and shall cause the NU Subsidiaries to, carry on their respective businesses in the ordinary course consistent with past practice...." (Merger Agr. § 4.01.) Con Edison *410 claims that NU's failure to do so constitutes a breach of the Merger Agreement and a failure of a condition precedent under Section 6.02. Thus, Con Edison argues, it may justifiably terminate the merger under Section 7.01(c) of the Merger Agreement.

Con Edison alleges, more specifically, that Select administered the CL & P Standard Offer Contract in violation of its past practices as set forth in the August Policies by failing to secure electricity supply for the duration of the contract. [FN9] Moreover, in further violation of Section 4.01, Select then adopted a new risk management policy on May 4, 2000, without informing Con Edison. (Select Energy Policies dated May 4, 2000 ("May Policies") attached as Ex. 20 to Gueli Decl. Supp.) Con Edison contends that the May Policies deleted key volumetric and VaR limits and that these changes allowed Select to carry large uncovered positions that vastly exceeded anything that would have been allowed under the disclosed Policy.

FN9. The August Policies provided, in part, that "[t]he approved hedge ratio is 70-100% for NU's future energy commodities associated with fixed price energy commitments, integrated over the life of the portfolio. Additionally, in no year can more than one million MWh of fixed price energy commitments remain unhedged." (August Policies at 5.) The August Policies set forth volumetric limits regarding specific types of energy products and obligations in particular markets. (August Policies at 6-8.) They also provided that Select's risk exposure would be limited to a value at risk ("VaR") of no more than \$20 million. (August Policies at 9.) However, the Policies also stated that "[t]hese Policies will be reviewed at regular intervals and changes will be approved by the Risk Oversight Council (ROC)." (August Policies at 2 (emphasis added).)

NU opposes Con Edison's motion and moves for summary judgment on the claims on the ground that NU's actions were in fact consistent with past practice. NU asserts that it did not adopt new policies in May 1999, but that the new document merely reflected modifications to the August Policies. Such changes were consistent with Select's risk management strategy because both the new and old policies state at the outset that "[t]hese Policies will be reviewed at regular intervals and changes will be approved by the Risk Oversight Council (ROC)." (August Policies at 2; May Policies at 2.) Thus, NU claims, it was fully consistent with past practice for Select to modify its risk management policies in accordance with changing business needs.

Moreover, NU argues, Select's short position was not inconsistent with past practice. The extent of Select's experience with standard offer contracts consisted of managing one requirements contract with Boston Edison beginning in 1998. As Con Edison knew, this contract had in fact proved "quite negative" for NU because Select was short electricity at a time when prices experienced an upward spike, resulting in a loss of over \$20 million on the contract in the first half of 1999. (Freilich Dep. at 40; Deposition of John Forsgren dated Dec. 13, 2001 ("Forsgren Dep. Kraus") at 30-33 attached as Ex. 62 to Kraus. Decl. Supp.) Hence, NU's limited experience with standard offer contracts included the maintenance of short positions.

NU also alleges that Con Edison knew of NU's short position yet never protested prior to trying to renegotiate the Merger Agreement. For example, NU's Form 10-Q public filing with the SEC dated March 30, 2000 and filed May 15, 2000, stated:

The servicing of CL & P's standard offer load is a significant risk for Select Energy, as this contract is for a 4-year period at a fixed price. This risk is somewhat mitigated by Select Energy *411 entering into purchase contracts with other energy providers to supply a portion of the standard offer requirement. If Select Energy is unable to source this load requirement at

prices below the standard offer contract price as a result of energy price increases, Select Energy's earnings would be impacted by these market fluctuations.

(NU Form 10-Q for Quarterly Period Ending March 31, 2000 at 15-16 attached as Ex. 21 to Gueli Decl. Supp.) NU claims that Con Edison must have been aware of the risks facing Select.

[10] Based on competing interpretations of the Merger Agreement, both parties ask the Court to resolve the question of whether Select failed to follow its past practice, potentially excusing Con Edison from performance. "Where the language used is susceptible to differing interpretations, each of which may be said to be as reasonable as another, then the interpretation of the contract becomes a question of fact" and cannot be resolved on a motion for summary judgment. *Bourne v. Walt Disney Co.*, 68 F.3d 621, 629 (2d Cir.1995)(internal alterations and quotation marks omitted); see also *Bank of America Nat'l Trust and Savings Assoc. v. Gillaizeau*, 766 F.2d 709, 715 (2d Cir.1985) ("Where contract language is ambiguous, the differing interpretations of the contract present a triable issue of fact. Summary Judgment is therefore inappropriate.") The Court cannot determine as a matter of law that the contract is unambiguous. See *Bourne*, 68 F.3d at 629 ("If the language of the contract is 'unambiguous and conveys a definite meaning,' then the interpretation of the contract is a question of law for the court.") (quoting *Sayers v. Rochester Tel. Corp. Supplemental Mgmt. Pension Plan*, 7 F.3d 1091, 1094 (2d Cir.1993)).

The Court cannot determine as a matter of law whether a violation of Section 4.01 of the Merger Agreement did or did not occur. Questions of fact remain for a jury. As a result, the parties' cross-motions for summary judgment on the first and third claims are both denied.

VI.

[11] Con Edison moves for summary judgment on its Fifth Cause of Action alleging

that there was a failure of a condition precedent to Con Edison's obligations pursuant to Section 6.02(d) of the Merger Agreement. Section 6.02(d) provides that "[f]rom and after the date of this Agreement, no Material Adverse Change with respect to NU (including the discovery of, any deterioration in, or any worsening of, any change, effect, event, occurrence or state of facts existing or known as of the date of the Agreement) shall have occurred." A Material Adverse Change ("MAC") is "any change, effect, event, occurrence or state of facts ... that is, or would reasonably be expected to be, materially adverse to the business, assets, properties, condition (financial or otherwise), results of operations or prospects of [NU] and its subsidiaries taken as a whole...." (Merger Agr. § 8.03(b).) Con Edison alleges that the MAC constitutes a failed condition precedent under Section 6.02(d) of the Merger Agreement and excuses Con Edison from performance.

Con Edison argues that Morgan Stanley's February 27, 2001 presentation to NU's Board of Trustees demonstrated that NU suffered a MAC, particularly that portion of the MAC definition that refers to NU's "prospects." [FN10] (MS Feb. Presentation.) *412 According to Con Edison, Morgan Stanley represented that NU's consolidated forecasted earnings for the five year period from 2001 through 2005 fell from \$1.458 billion to \$1.094 billion between October 1999 and September 2000. (MS Feb. Presentation at 3.) Morgan Stanley also allegedly dropped NU's per share valuation range from \$18.25-\$23.50 to \$15.25-\$18.50 between its October 1999 and February 2001 presentations to NU's Board. (MS Oct. Presentation at NU 235246; MS Feb. Presentation at MS 2273.) Con Edison also cites a report by NU Treasurer David McHale in which he noted "that between October 1999 and September 2000, Select lowered their average profit margins substantially, from 8.1% to 4.5%." (Report by David McHale to John Forsgren dated Jan. 6, 2001 at NU-182459 attached as Ex. 35 to Gueli Decl. Supp.) Taken together, Con Edison claims, the evidence demonstrates a drastic decline in NU's financial condition and prospects. In

other words, the company had undergone a material adverse change.

FN10. Con Edison claims to have relied on the opinions of Morgan Stanley, NU's own bankers, in making this motion in order to avoid a factual dispute over the accuracy of the analysis of Con Edison's bankers, SSB. Nevertheless, genuine questions of material fact still exist.

NU denies suffering a MAC and argues that such a determination presents quintessential issues of fact for a jury to decide. Demonstrating that questions of fact remain, Dan More, the Managing Director of Mergers and Acquisitions at Morgan Stanley who actually gave the February 2001 presentation to NU's Board, offered a different view of the presentation's meaning. (Deposition of Dan More dated Nov. 30, 2001 ("More Dep.") at 6 attached as Ex. 135 to Kraus Decl. Opp.) More attested that when asked by NU management, the NU Board of Trustees, and in conversations with SSB personnel, More was "emphatic that there was no material adverse change [at NU]." (More Dep. at 69.)

NU also offers a report by its own expert witness, Donna M. Hitscherich ("Hitscherich"), Adjunct Professor in the Finance and Economics Department at Columbia University's Graduate School of Business, concerning the meaning and effect of Morgan Stanley's February presentation. (Rebuttal Report of Donna M. Hitscherich dated Mar. 18, 2002 ("Hitscherich Rebuttal") attached as Ex. 146 to Kraus Decl. Supp.) NU asked Hitscherich to respond to the assertion of Con Edison's expert that:

Analyses prepared by Morgan Stanley, NU's own financial advisor, and presented to NU's board of trustees support the conclusion that NU's prospects changed substantially and materially from October 1999 to early 2001 and that a reasonable acquirer would consider the changes in the level and mix of NU's projected profits, as reflected in Morgan Stanley's February 2001 analysis to be a significant development. From a business and economic perspective, a change of this magnitude would constitute a material adverse change in the prospects of

the acquiree.
(Hitscherich Rebuttal at 1-2 (internal alterations and quotation marks omitted).) Hitscherich found the contention that changes in NU's earning forecasts between October 1999 and early 2001 constitute a MAC to be "superficial and unsupportable" and that "no proper or meaningful analysis of NU's business prospects can be based on the mere mathematical differences in the numbers contained in the [Morgan Stanley] Presentation, and ... no reasonable acquirer would view those numbers in such a summary manner" as Con Edison's expert *413 had done. (Hitscherich Rebuttal at 3, 19-20.)

NU also challenges Con Edison's conclusions about NU's comparative financial prospects discussed above because John Forsgren allegedly explained to Joan Freilich that the information in the October 1999 forecast was "aspirational, optimistic and certainly should not be relied on." (Forsgren Decl. ¶ 5.) Forsgren also explained that Con Edison cannot make a valid comparison between the October 1999 forecast and Morgan Stanley's February 2001 presentation because the latter document was "prepared outside of the customary process by which NU compiles its official 5-year earnings projections" and was "created only for the limited purpose of deciding whether Select should make a \$480 million investment" in certain other assets. (Forsgren Decl. ¶ 10.) Finally, NU notes that the price of NU's common stock as traded on the New York Stock Exchange was in fact slightly higher after Con Edison announced its withdrawal from the Merger Agreement than it was before rumors of the merger could affect NU's stock price. (Rebuttal Report of Gregg A. Jarrell dated Mar. 20, 2002 ¶¶ 10-12 attached as Ex. 93 to Kraus Decl. Supp.) Accordingly, no MAC was reflected in the trading price of NU's stock.

The parties present differing interpretations of NU's evolving financial condition and prospects. Each party has presented expert reports, deposition testimony from those involved in the merger, and various other documents purporting to support their case. The differing interpretations of the financial

data and the competing testimony of the parties' experts create genuine issues of material fact that cannot be resolved on this motion for summary judgment. Therefore, Con Edison's motion for summary judgment on the Fifth Cause of Action is denied.

VII.

[12] Con Edison moves for summary judgment dismissing NU's counterclaim which alleges that Con Edison materially breached the Merger Agreement by repudiating its obligations under the contract and by refusing to proceed with the merger on the terms set forth in the Merger Agreement. (Counterclaim ¶ 60.) NU contends that the material breach occurred on or about March 5, 2001 when Con Edison notified NU that it would not proceed with the merger on the terms set forth in the Merger Agreement. (Counterclaim ¶ 7.) This breach allegedly caused NU and its shareholders substantial damages, including but not limited to the loss of the acquisition premium in the Merger Agreement; the difference between the merger consideration as established by the Merger Agreement and the current market value of NU's common stock; the expenditure of NU's time, money, and other resources in seeking regulatory approval of the merger and in preparing for consolidation of NU and Con Edison after consummation of the merger; and lost business opportunities during the time that NU's operations were restricted by provisions of the Merger Agreement. (Counterclaim ¶ 61.)

According to Con Edison, NU cannot obtain consequential damages for any alleged breach of contract because the Merger Agreement requires that such recovery be preceded by a "willful" breach which Con Edison claims did not occur. Section 7.02 of the Merger Agreement provides that in the event of termination of the Agreement by either party "as provided in Section 7.01," the Merger Agreement "shall forthwith become null and void and have no effect, without any liability or obligation on the part of [either party] [other than pursuant to certain sections *414 not here relevant]" Consequential damages

are only available:

to the extent that such termination results from the willful and material breach by a party of any of its representations, warranties, covenants or agreements set forth in this Agreement, in which case such termination shall not relieve any party of any liability or damages resulting from its willful and material breach of this Agreement....

(Merger Agr. § 7.02 (emphasis added).) Con Edison argues that the sole way in which NU can obtain consequential damages for breach of contract is by satisfying the conditions of Section 7.

Con Edison defines "willful" breach as conduct undertaken with malice and in bad faith in accordance with the New York Court of Appeals decision in *Metropolitan Life Ins. Co. v. Noble Lowndes Int'l, Inc.*, 84 N.Y.2d 430, 618 N.Y.S.2d 882, 643 N.E.2d 504 (1994). At issue in *Metropolitan Life* was a contractual provision limiting liability for actions other than those involving "intentional misrepresentations, or damages arising out of [defendant's] willful acts or gross negligence." *Id.* 618 N.Y.S.2d 882, 643 N.E.2d at 506 (emphasis omitted) (alteration in the original). See also *Kalisch-Jarcho, Inc. v. City of New York*, 58 N.Y.2d 377, 461 N.Y.S.2d 746, 448 N.E.2d 413, 416-17 (1983) (finding an exculpatory clause unenforceable when the misconduct for which it granted immunity was "fraudulent, malicious or prompted by the sinister intention of one acting in bad faith.")

Con Edison contends that NU can point to no evidence of willful conduct or bad faith by Con Edison. Instead, Con Edison claims, it failed to go through with the merger due to the type of economic self-interest that *Metropolitan Life* held not to be willful. In support of this claim, Con Edison cites statements by two NU executives who testified that they thought Con Edison refused to go forward with the merger because of genuine financial concerns, and that Con Edison CEO McGrath acted in good faith in negotiating the merger. (Deposition of John Forsgren dated Dec. 13, 2001 ("Forsgren Dep. Gueli") at 330 attached as Ex. 59 to Gueli

Decl. Supp.; Deposition of Michael G. Morris dated Dec. 20, 2001 at 219 attached as Ex. 74 to Gueli Decl. Supp.) At oral argument, counsel for NU characterized these statements as made without the benefit of full discovery and in accordance with deponents' desires to avoid accusing Con Edison of bad acts. (Tr. at 60.) Counsel also argued that the meaning of such statements should properly be fleshed out on cross examination at trial. (Tr. at 60.)

NU argues correctly that the definition of willful acts in *Metropolitan Life* is of little use in determining what constitutes a "willful and material breach" under Section 7.02 of the Merger Agreement. In *Metropolitan Life*, the New York Court of Appeals concluded that "the term willful acts as used in this contract was intended by the parties to subsume conduct which is tortious in nature, i.e., wrongful conduct in which defendant willfully intends to inflict harm on plaintiff at least in part through the means of breaching the contract between the parties." *Metropolitan Life*, 618 N.Y.S.2d 882, 643 N.E.2d at 508 (emphasis added). The Court of Appeals examined the entire contract in that case and concluded that the parties "intended to narrowly exclude from protection truly culpable, harmful conduct, not merely intentional nonperformance of the Agreement motivated by financial interest." *Id.* Under the contractual interpretation tool of "ejusdem generis", the court found that "willful acts" as used by the parties to the contract should be interpreted as "referring to conduct similar in nature to the *415 'intentional misrepresentation' and 'gross negligence' with which it was joined as exceptions to defendant's general immunity from liability for consequential damages." *Id.*

There is no evidence that the parties in this case intended a definition based on tort law to apply to Section 7.02 of the Merger Agreement. See *VTech Holdings Ltd. v. Lucent Technologies Inc.*, 172 F.Supp.2d 435, 441-42 (S.D.N.Y.2001). In this case willfulness is tied only to a material breach of the contract and not to tort concepts such as "intentional misrepresentation" and "gross negligence." The terms of the Merger

Agreement are not so unambiguous that the Court can determine that Con Edison's interpretation is correct as a matter of law or that Con Edison's actions do not rise to the level of willfulness required to recover consequential damages.

NU also argues that Section 7.02 simply does not govern its breach of contract claim and therefore it need not prove a willful breach to recover consequential damages. Section 7 of the Merger Agreement is a termination clause rather than a general provision for breach of contract damages, and applies "[i]n the event of termination of this Agreement by either NU or [Con Edison] as provided in Section 7.01." (Merger Agr. § 7.02.) Section 7.01 provides the conditions under which the Merger Agreement can be terminated. The actual procedures for termination are outlined in Section 7.05, which states that termination pursuant to Section 7.01:

shall, in order to be effective, require, in the case of NU, action by its Board of Trustees or the duly authorized committee or designee of its Board of Trustees to the extent permitted by law and the Trust Agreement and, in the case of [Con Edison], action by its Board of Directors or the duly authorized committee or designee of its Board of Directors to the extent permitted by law and its certificate of incorporation.

(Merger Agr. § 7.01.) NU argues that neither NU's Board of Trustees nor Con Edison's Board of Directors took any "action" to terminate the Merger Agreement and thus Section 7.02 does not apply to the Counterclaim. (See, e.g., Deposition of Michael J. Delguidice dated July 16, 2001 at 212-14 attached as Ex. 61 to Kraus. Decl. Supp.; Deposition of Joan Freilich dated Dec. 11, 2001 at 436 attached as Ex. 63 to Kraus Decl. Supp.; Deposition of Ellen V. Futter dated Nov. 9, 2001 at 97-98, 213 attached as Ex. 66 to Kraus. Decl. Supp.)

Con Edison attacks this assertion on two primary grounds. First, Con Edison argues that NU has defeated its claim for consequential damages by alleging that neither party terminated the Merger

Agreement. Con Edison contends that such damages are available only if there is both a breach and a subsequent termination, which counsel for Con Edison stated would occur after a breach. (Tr. at 8.) It is true that the Merger Agreement contains no provision for relief in the event of a breach of contract without a valid termination. And it is possible that the parties intended Section 7's termination provisions to provide the exclusive coverage of the parties' liabilities in case of a breach.

Second, Con Edison argues that it did in fact terminate the Merger Agreement when McGrath informed Morris on March 5, 2001 that Con Edison would not proceed with the merger. Con Edison contends that NU conceded the fact of Con Edison's termination when Morris wrote to McGrath that same day that "Con Edison's unwillingness to proceed effectively terminates our Merger Agreement." (Letter from Morris to McGrath dated Mar. 5, 2001 ("Morris-McGrath Letter") attached as Ex. 41 to Gueli Decl. Supp.) The letter *416 also stated: "NU considers Con Edison's refusal to proceed with the merger at the agreed-upon price to constitute an anticipatory repudiation and breach of our Merger Agreement." (Morris-McGrath Letter.) As further evidence of termination, Con Edison cites an NU press release which stated that because Con Edison failed to provide assurances that it would abide by the terms of the Merger Agreement, "the agreement has effectively been terminated." (NU News Release dated Mar. 5, 2001 attached as Ex. 43 to Gueli Decl. Supp.) At oral argument, NU alleged that the uses of "terminates" and "terminated" in the above instances were merely colloquial and were not meant as contractual terms of art. (Tr. at 58.)

There are issues of fact as to the interpretation of Section 7 of the Merger Agreement. It is not clear that Section 7, which provided for a regularized method of termination of the Merger Agreement, provided the sole basis for a party to obtain damages if the other party breached the Merger Agreement by failing to abide by its terms. NU's argument is that Con Edison

breached the Merger Agreement by failing to proceed with the merger in accordance with the terms of the Merger Agreement. There are also disputed issues whether the termination provision was substantially complied with. In any event, even if Section 7 were the exclusive means to obtain consequential damages, there would be issues of fact as to the intent of the parties in requiring a "willful and material breach" and whether such an event had occurred. Therefore, Con Edison's motion to dismiss NU's Counterclaim for breach of contract is denied.

VIII.

[13] Con Edison also moves for summary judgment dismissing NU's counterclaim for lack of standing to the extent that NU seeks to recover its shareholders' lost premium. Paragraph 61 of the counterclaim alleges, in part, "As a result of Con Ed's breach of the Merger Agreement, NU and its thousands of public shareholders have suffered substantial damages, including but not limited to the loss of the acquisition premium in the Merger Agreement...." (Counterclaim ¶ 61 (emphasis added).) The parties agree that NU could recover the takeover premium on behalf of its shareholders if they are intended third party beneficiaries of the Merger Agreement. However, Con Edison and NU disagree about whether this is the case.

According to Con Edison, Section 8.06 of the Merger Agreement makes explicit that there are no intended third party beneficiaries of the contract. Section 8.06 provides that "except for the provisions of Article II ... [the Merger Agreement is] not intended to confer upon any person other than the parties any rights or remedies." (Merger Agr. § 8.06.) Article II of the Merger Agreement outlines what would happen when Con Edison and NU merge (the "Effective Time"), including provisions for Con Edison to pay the merger consideration to NU shareholders. (Merger Agr. Art. 2.)

[14] NU can sue on behalf of its shareholders if they are intended third party beneficiaries of the Merger Agreement. See Associated

Teachers of Huntington, Inc. v. Bd. of Educ., 33 N.Y.2d 229, 351 N.Y.S.2d 670, 306 N.E.2d 791, 794 (1973) ("the promisee has an undisputed right to enforce the contract made for the benefit of third parties"). Under New York law, NU's shareholders are intended (rather than incidental) beneficiaries of the Merger Agreement "if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either (a) the performance *417 of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance...." *Levin v. Tiber Holding Corp.*, 277 F.3d 243, 248 (2d Cir.2002) (quoting Restatement (Second) Contracts § 302). "An incidental beneficiary ... is not an intended beneficiary." *LaSalle Nat'l Bank v. Ernst & Young LLP*, 285 A.D.2d 101, 729 N.Y.S.2d 671, 676 (2001). While the Merger Agreement negated the existence of third party beneficiaries, it explicitly excepted Article II, thus creating third party beneficiaries in accordance with Article II. By its terms, the Merger Agreement thus explicitly made NU's shareholders third party beneficiaries of Con Edison's promise to pay the merger consideration.

Con Edison would limit third party beneficiary rights for the shareholders solely to the time after the merger had been completed, NU had ceased to exist, and the former NU shareholders were the only parties who could sue if they were not paid the merger consideration. However, there is no such limitation in the Merger Agreement. NU argues that the provision is in fact a common provision which is added to agreements precisely to permit a corporation to sue for damages when a merger has not been completed and where the bulk of damages will be the damages the shareholders suffered because the merger was not completed. (Tr. at 67-68.) There is no question under the Merger Agreement that the NU shareholders were third party beneficiaries and there is no basis in the Merger Agreement to limit their third party beneficiary status solely to the time after the

merger had been completed. [FN11]

FN11. NU argues that provisions such as this were drafted to allow corporations to sue for the merger consideration for their shareholders after it was found that, without such a provision, shareholders were not third party beneficiaries. See *In re Gulf Oil/Cities Service Tender Offer Litigation*, 725 F.Supp. 712, 733 (S.D.N.Y.1989); *Cities Serv. Co. v. Gulf Oil Corp.*, 797 P.2d 1009, 1011-12 (Okla.App.1990). As NU points out, the Effective Time never materialized because the merger was never completed. Where NU alleges that Con Edison unilaterally and unlawfully breached the Merger Agreement, Con Edison cannot avoid responsibilities that it may have to NU's shareholders relying on the argument that the Effective Time has not come to pass. See *In re Enron Corp. No. 02 Civ. 4159 (AKH)*, 2002 WL 31374717, at *5 (S.D.N.Y. Oct.22, 2002).

[15] Con Edison makes an independent argument that NU cannot recover damages on behalf of its shareholders because the shareholders released Con Edison from any and all claims relating to the merger in *Brody v. Cleveland*, No. 00 Civ. 2400 (S.D.N.Y. filed Mar. 29, 2000). [FN12] (Class Action Complaint filed Mar. 29, 2000 (Brody Complaint) attached as Ex. 52 to Gueli Decl. Supp.) Brody was a class action suit brought by NU shareholders against Con Edison, NU, and others for alleged violations of the federal proxy rules based on disclosures in the Proxy Statement issued by Con Edison and NU, as well as a claim against NU's trustees for breach of fiduciary duty. (Brody Complaint.) Brody terminated in a settlement agreement between the parties. (Order of Final Approval of Settlement and Final Judgment, and Order of Dismissal filed July 13, 2001 ("Brody Settlement") attached as Ex. 53 to Gueli Decl. Supp.) The plaintiffs (defined for purposes of the class as NU shareholders who were eligible to vote at an April 14, 2000 special shareholders meeting) agreed to release the "Released Claims," defined by the parties in a draft settlement agreement in January 2001 as:

FN12. The Honorable Denny Chin presided over *Brody v. Cleveland*.

*418 the allegations, claims and causes of action that have been asserted against the Released Persons in the [Brody litigation], as well as all claims that might have been or might be asserted that arise or potentially arise out of or relate in any way to the Merger Agreement, the merger of Con Edison and Northeast, the Initial Proxy and/or any of the transactions described in the Initial Proxy, other than those claims [for breach of fiduciary duty] asserted in Count II of the [Brody] Complaint.

(Declaration of Thomas J. Groark, Jr. sworn June 5, 2002 ("Groark Decl.") ¶ 10.) The Brody settlement also dismissed "all claims that might have been or might be asserted that arise or potentially arise out of or relate in any way to the Merger Agreement, the merger of Con Edison and Northeast, the Initial Proxy and/or any of the transactions described in the Initial Proxy...." (Brody Settlement ¶ 6.) The settlement provided that NU and Con Edison would mail their shareholders a supplement to their earlier Joint Proxy making certain additional disclosures. The plaintiffs received no monetary compensation from the settlement although Con Edison agreed to pay \$600,000 for the class' attorneys' fees. (Groark Decl. ¶ 11.) [FN13]

FN13. The court dismissed Count II of the Complaint alleging breach of fiduciary duty as moot by Order filed March 30, 2001.

The settlement agreement was embodied in a Stipulation and Order dated April 5, 2000 which was endorsed by Judge Chin on April 11, 2000. (Groark Decl. ¶ 6.) When the parties reached their settlement, Con Edison had not advised NU that it would not proceed with the merger, an event that only occurred in March 2001. The parties negotiated over the amount of the attorney's fees to be paid and reported to Judge Chin in November 2000 that they had fully resolved all issues among them. (Groark Decl. ¶ 9.) The ultimate settlement was approved on July 13, 2001 and Judgment was entered.

[16][17][18][19] A release is a type of contract and is governed by principles of contract law.

Golden Pacific Bancorp v. Federal Deposit Ins. Corp., 273 F.3d 509, 514 (2d Cir.2001) (internal quotation marks omitted). In determining the scope and validity of a release, courts should apply state law. See *Olin Corp. v. Consolidated Aluminum Corp.*, 5 F.3d 10, 15 (2d Cir.1993); *Prunella v. Carlshire Tenants, Inc.*, 94 F.Supp.2d 512, 517 (S.D.N.Y.2000). Under New York law, courts must "discern the intent of the parties to the extent their intent is evidenced by their written agreement." *Olin Corp.*, 5 F.3d at 15 (internal quotation marks omitted); see also *Golden Pacific*, 273 F.3d at 515. "Whether a contract is ambiguous is a question for the court. The interpretation of an unambiguous contract--including a release--is also a question of law for the court. Where the contract language is ambiguous, the differing interpretations of the contract present a triable issue of fact." *Golden Pacific*, 273 F.3d at 514-15 (internal quotation marks omitted). Moreover, a release that absolves one party from liability receives the "closest of judicial scrutiny." *Id.* at 515 (quoting *Abramowitz v. N.Y. Univ. Dental Ctr., Coll. of Dentistry*, 110 A.D.2d 343, 345, 494 N.Y.S.2d 721 (N.Y.App.Div.1985)).

NU argues that the Counterclaim does not constitute a Released Claim from Brody because the Released Claims related to alleged illegalities in the Joint Proxy. In other words, while the settlement agreement released Con Edison from responsibility for injuries arising from the allegedly *419 faulty Joint Proxy, the Brody settlement did not speak to the later injuries caused by Con Edison's repudiation of the Merger Agreement. Moreover, NU claims, the parties in Brody could not have anticipated the counterclaim brought in this action when signing the stipulation and order dismissing the Proxy-related claims in April 2000, approximately one year before Con Edison refused to proceed with the merger. (Stipulation and Order dated Apr. 5, 2000, filed May 2, 2000 attached as Ex. 97 to Kraus Decl. Supp.)

There is no evidence that Con Edison or NU intended the Brody settlement to have the

preclusive effect advocated by Con Edison. Brody addressed violations of federal securities laws regarding statements in the Joint Proxy and an alleged breach of fiduciary duties by NU's Board of Trustees. It did not concern the alleged breach of contract by Con Edison. The litigation before this Court attempts to resolve issues arising from the subsequent failed merger between Con Edison and NU. Moreover, the plaintiffs in Brody settled that case without receiving any monetary award for the shareholders whereas over \$1 billion is at stake in the current litigation. Indeed, Con Edison's failure to raise the affirmative defense of settlement or release before proceeding through discovery, with all the accompanying costs, undercuts Con Edison's assertion that its intent in Brody was for the Release in that case to cover claims of the NU shareholders to the merger consideration.

If Con Edison seriously thought that its non-monetary resolution of the Brody litigation was disposing of the claims of the NU shareholders to the alleged hundreds of millions of dollars in damages from the failed merger, that would raise a host of additional issues. It is sufficient at this point to find that Con Edison has not shown that it is entitled to summary judgment dismissing any claims by NU to the merger premium based on the Brody settlement.

NU also contends that Con Edison cannot rely on the Brody release at this stage of the litigation because Con Edison did not plead the affirmative defense in its answer. See *Fed.R.Civ.P.* 8(c); *HCC, Inc. v. R H & M Machine Co.*, 96 Civ. 4920 (PKL), 1998 WL 765176, at *1 (S.D.N.Y. Nov.2, 1998) (an affirmative defense not raised in an answer cannot form the basis for a dispositive motion). In fact, at the time that Con Edison answered the Counterclaim, on June 8, 2001, the Final Judgment in the Brody action had not been entered. However, Con Edison never moved to amend its Answer, nor asserted this affirmative defense to the Court in any form prior to the motion for summary judgment. At oral argument, counsel for Con Edison asked the Court to treat the motion for summary

judgment as a motion for leave to amend its Answer to the counterclaim. (Tr. at 32.) See *Monahan v. New York City Dept. of Corrections*, 214 F.3d 275, 283 (2d Cir.2000) (district court has discretion to entertain defense of res judicata when raised in a motion for summary judgment by construing the motion as one to amend an answer). Con Edison never raised this argument in its papers and the application is of sufficient significance to warrant separate briefing supported by affidavits if Con Edison chooses to pursue this argument. The oral application to amend is denied without prejudice to a written motion to amend the Answer.

IX.

NU moves for summary judgment dismissing the First and Second counts of Con Edison's Complaint which seek "compensatory, consequential and incidental damages" for breach of Sections 4.01 and *420 3.01(i) of the Merger Agreement. (Compl. ¶¶ 52, 55, 57, 60.) In response to interrogatories asking Con Edison to quantify its damages from NU's alleged breach of the Merger Agreement, Con Edison answered:

The professional fees and expenses incurred by Con Edison in negotiating and attempting to consummate the Merger Agreement totaled at least \$32.1 million. The damages suffered by Con Edison in the form of lost synergy savings equal the present value of Con Edison's approximately 82% share of (1) the expected \$1,574,000,000 in synergy savings to be realized in the regulated businesses ... and (2) the expected \$180,000,000 in synergy savings to be realized in the unregulated businesses....

(Con Edison's Resp. to [3d] Set of Interrog. dated Jan. 22, 2002 ("Interrog.Resp.") at 2-3 attached as Ex. 7 to Kraus Decl. Supp.) [FN14] NU contends that Con Edison is not entitled to such damages as a matter of law.

FN14. NU refers to these Interrogatories as the Third Set of Interrogatories and Con Edison states the same in the text of its Objections and Responses. However, the document title reflects that it relates to NU's Second Set of Interrogatories.

[20] NU claims that Con Edison cannot recover purported lost synergy savings because Con Edison has not suffered any legally cognizable damages net of acquisition costs. "[W]hen computing damages for a defendant's wrongful conduct, if any benefit or opportunity for benefit appears to have accrued to the plaintiff because of the breach, a balance must be struck between the benefit and loss, and the defendant is only chargeable with the net loss." *Indu Craft, Inc. v. Bank of Baroda*, 47 F.3d 490, 495 (2d Cir.1995) (internal quotation marks omitted). Thus, "revenues due a plaintiff because of a breached contract must be offset by any amount plaintiff saved as a result of the breach." *Id.*

NU's argument is premised on the assertion that Con Edison's agreement to pay \$26.50 per share would have resulted in Con Edison vastly overpaying for NU. Because the Joint Proxy identified the unaffected price of NU shares at \$18.56, (Joint Proxy at 34), NU contends that Con Edison would have paid a premium of at least \$7.94 per share. When multiplied by roughly 137 million shares outstanding, (Merger Agr. § 3.01(c)), the premium would have amounted to approximately \$1 billion in present value terms according to NU's calculations. (Report of Gregg A. Jarell dated Feb. 8, 2002 ¶¶ 39, 88 attached as Ex. 92 to Kraus Decl. Supp.) Thus, Con Edison would have had to pay this premium before capturing any "lost synergies." Because \$1 billion greatly exceeds the \$707 million in net merger savings estimated by Con Edison's own expert, (Expert Report and Disclosures of Kenneth M. Lehn dated Feb. 8, 2002 ¶ 37 n.14 attached as Ex. 94 to Kraus Decl. Supp.), (only 82% of which would accrue to Con Edison, or roughly \$579.7 million) NU argues that Con Edison sustained no legally cognizable damages with respect to lost synergies.

Con Edison contends that any difference between NU's actual value and the \$26.50 offered merger price is a question of fact for the jury to decide. In demonstrating the issues of fact precluding summary judgment, Con Edison argues that NU's intrinsic value

to the company was much higher than its unaffected trading price. Thus, Con Edison's offer constituted exactly what it thought NU was worth in combination with Con Edison rather than greatly exceeding the value of NU's stock. For example, SSB calculated a value per NU share as high as \$30.25, not including synergies. (Proxy Statement at 37.) If this *421 value were taken as correct it would clearly exceed NU's unaffected trading price, as well as the merger price offered by Con Edison.

NU also claims that Con Edison cannot recover the "professional fees and expenses incurred ... in negotiating and attempting to consummate the Merger Agreement" that it seeks. (Interrog. Resp. at 3.) The parties agreed that "[e]xcept as provided in this Section 5.09, all fees and expenses incurred in connection with the Mergers, this Agreement and the transactions contemplated by this Agreement shall be paid by the party incurring such fees and expenses, whether or not the Mergers are consummated...." (Merger Agr. § 5.09(a) (emphasis added).) The limited exceptions to this rule require a termination of the Merger Agreement pursuant to Section 7.01. (Merger Agr. § 5.09.)

NU asserts that Con Edison never terminated the Merger Agreement and cannot recover its fees or expenses. In support of this argument and in Con Edison's opposition papers the parties reargue the points discussed in Part VII. As the Court explained above, the question of whether a termination of the Merger Agreement occurred is one for the jury and cannot be decided on a motion for summary judgment. Because the motion for summary judgment dismissing the first and second counts of the Complaint present questions of fact and contract interpretation, the motion is denied.

X.

NU seeks summary judgment dismissing counts Two and Four of the Complaint which allege that NU breached Section 3.01(i) of the Merger Agreement, thus causing a failure of a condition precedent under Section 6.02(a).

Section 3.01(i) provides that between December 31, 1998 and October 13, 1999, when the parties signed the Merger Agreement, "(i) NU and each of the NU Subsidiaries have conducted their respective businesses only in the ordinary course of business consistent with past practice and (ii) there has not been, and no fact or condition exists which, individually or in the aggregate, would have a Material Adverse Effect on NU."

NU argues that even if Con Edison could prove that Select failed to operate in the "ordinary course of business consistent with past practice," such a violation could not have occurred between December 31, 1998 and October 13, 1999, the period covered by § 3.01(i). NU bases this assertion on the fact that Select signed the CL & P Standard Offer Contract on November 2, 1999, approximately three weeks after the date of the Merger Agreement. Furthermore, NU argues, to the extent that the second and fourth counts of the Complaint are premised on alleged MACs to NU's business or prospects, none of the events identified by Con Edison as constituting or contributing to a MAC occurred during the relevant time period. (See Compl. ¶¶ 42, 44-48.)

Con Edison counters NU's argument with a timeline of its own. Even though the CL & P Standard Offer Contract was not signed until November 2, 1999, Con Edison argues that Select's past practice was changed prior to October 13, 1999 by which time NU had already decided that Select would take on substantially greater risk than had been allowed previously. Con Ed claims not to have known about the policy change. To prove that the change preceded October 13, 1999, Con Edison contends that under Select's risk management policies in place on December 31, 1998, Select could not hold open positions on fixed-price energy obligations exceeding one million MWh in a given year. (NU Board of Trustees Wholesale Marketing *422 Overview dated Apr. 14, 1998 at NU-29479 attached as Ex. 1 to Gueli Decl. Opp.) Thus, prior to signing the CL & P Standard Offer Contract, NU knew that doing so would violate its current risk management policy. To support

this contention, Con Edison cites Select's August Position Report which noted the upcoming CL & P Standard Offer Contract and stated that Select's "energy position is substantially short to the tune of 23 million MW/hrs." (Cover Memo to August Position Report dated Sept. 30, 1999 at NU-183307 attached as Ex. 14 to Gueli Decl. Opp.) Con Edison contends that in light of the evidence, a reasonable jury could conclude that Select altered its past practice prior to October 13, 1999.

END OF DOCUMENT

The events embodying or leading to alleged MACs cited by Con Edison raise issues of fact that cannot be decided on this motion for summary judgment. The Court cannot say as a matter of law that NU's alleged breach of Section 3.01(i) of the Merger Agreement could not have occurred, if it occurred at all, between December 31, 1998 and October 13, 1999. For this reason, the motion for summary judgment on counts Two and Four is denied.

CONCLUSION

The remaining arguments of the parties are either moot or without merit. For the reasons explained above: (1) NU's motion for summary judgment on Con Edison's fraudulent inducement claim is granted and Count VI of the Complaint is dismissed. Con Edison's motion for summary judgment on its fraudulent inducement claim is denied. (2) NU's motion for summary judgment on Con Edison's negligent misrepresentation claim is granted and Count VII is dismissed. (3) The parties' cross-motions for summary judgment on Counts I and III are denied. (4) Con Edison's motion for summary judgment on Count V of the Complaint declaring that a MAC occurred is denied. (5) Con Edison's motion to dismiss NU's counterclaim on all asserted grounds is denied. (6) NU's motion for summary judgment dismissing Counts I, II, and IV is denied.

SO ORDERED.

249 F.Supp.2d 387

19

United States District Court,
S.D. New York.

CROMER FINANCE LTD. and Prival N.V., et
al., Plaintiffs,

v.

Michael BERGER, Fund Administration
Services (Bermuda) Ltd., Ernst & Young
International, Ernst & Young Bermuda,
Kempe & Whittle Associates Limited,
Deloitte & Touche (Bermuda), Deloitte Touche
Tohmatsu, Deloitte & Touche
L.L.P., Bear Stearns & Co., Inc., Bear Stearns
Securities Corp., Financial
Asset Management, Inc., and John Does 1-100,
Defendants.

ARGOS et al., Plaintiffs,

v.

Michael BERGER, Financial Asset
Management, Inc., Fund Administration
Services
(Bermuda) Ltd., Ernst & Young International,
Deloitte Touche, Deloitte Touche
Tohmatsu, Deloitte & Touche L.L.P., Bear
Stearns & Co., Inc., and Bear Stearns
Securities Corp., Defendants.

Nos. 00 CIV. 2284(DLC), 00 CIV. 2498
(DLVC).

April 17, 2001.

Investors in an off-shore investment fund managed from New York brought securities fraud class action against the Bermuda accounting firms that served as the fund's administrators or auditors, as well as American and international affiliates of those Bermuda entities. Upon defendants' motions to dismiss, The District Court, Cote, J., held that: (1) court had personal jurisdiction over Bermuda-based fund administrators; (2) court had subject matter jurisdiction over claims against fund administrators; (3) federal securities fraud claims against one former fund administrator were time-barred but that administrator was subject to personal jurisdiction in New York on claims of common law fraud, aiding and abetting common law fraud, and negligent misrepresentation; (4) complaint adequately stated claim of

controlling person liability against American accounting firm which owned Bermuda-based administrators; (5) investors failed to state claims under New York law for common law fraud, negligence, gross negligence, professional malpractice, negligent misrepresentation, aiding and abetting common law fraud and aiding and abetting breach of fiduciary duty against American accounting firm; and (6) investors failed to adequately allege under New York law aiding and abetting common law fraud and breach of fiduciary duty claims against American accounting firm, which was affiliated with Bermuda-based auditor.

Motions granted in part and denied in part.

West Headnotes

[1] Federal Civil Procedure 636
170Ak636

Complaint alleging securities fraud must comport with rule setting forth special pleading requirements for claims involving fraud. Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.

[2] Federal Civil Procedure 636
170Ak636

To comply with rule setting forth special pleading requirements for claims involving fraud in alleging the misstatement, an allegation of fraud must specify: (1) those statements the plaintiff thinks were fraudulent, (2) the speaker, (3) where and when they were made, and (4) why plaintiff believes the statements fraudulent. Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.

[3] Securities Regulation 60.51
349Bk60.51

In pleading a securities fraud violation, a complaint must allege that a defendant acted with scienter. Securities Exchange Act of 1934, § 21D(b)(2), as amended, 15 U.S.C.A. § 78u-4(b)(2).

[4] Securities Regulation 60.51
349Bk60.51

To satisfy scienter requirement in pleading a

securities fraud violation, a complaint may (1) allege facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness, or (2) allege facts to show that defendants had both motive and opportunity to commit fraud. Securities Exchange Act of 1934, § 21D(b)(2), as amended, 15 U.S.C.A. § 78u-4(b)(2).

[5] Fraud 42
184k42

A plaintiff alleging fraud may sufficiently plead conscious misbehavior through allegations of deliberate illegal conduct.

[6] Fraud 13(3)
184k13(3)

To plead recklessness, a plaintiff alleging fraud must allege facts showing conduct that was highly unreasonable, representing an extreme departure from the standards of ordinary care to the extent that the danger was either known to the defendant or so obvious that the defendant must have been aware of it.

[7] Securities Regulation 60.51
349Bk60.51

To plead facts supporting a strong inference of the requisite scienter by showing motive and opportunity, a securities fraud plaintiff must allege facts showing concrete benefits that could be realized by one or more of the false statements and wrongful nondisclosures alleged, and the means and likely prospect of achieving the concrete benefits by the means alleged. Securities Exchange Act of 1934, § 21D(b)(2), as amended, 15 U.S.C.A. § 78u-4(b)(2).

[8] Fraud 30
184k30

To state a claim for aiding and abetting fraud under New York law, a plaintiff must plead facts showing: (1) the existence of a fraud; (2) defendant's knowledge of the fraud; and (3) that the defendant provided substantial assistance to advance the fraud's commission.

[9] Fraud 30
184k30

Elements for a claim of aiding and abetting a

breach of fiduciary duty under New York law are: (1) a breach by a fiduciary of obligations to another, and (2) that the defendant knowingly induced or participated in the breach.

[10] Federal Courts 409.1
170Bk409.1

In a federal question action, a court looks to federal common law choice of law rules to decide which state's law governs the various legal claims.

[11] Fraud 25
184k25

With regard to claim for aiding and abetting a breach of fiduciary duty under New York law, substantial assistance requires the plaintiff to allege that the actions of the aider/abettor proximately caused the harm on which the primary liability is predicated; "but-for" causation is insufficient, rather, aider and abettor liability requires the injury to be a direct or reasonably foreseeable result of the conduct.

[12] Brokers 102
65k102

A clearing broker does not provide "substantial assistance" to or "participate" in a fraud when it merely clears trades.

[13] Brokers 102
65k102

A broker's failure to enforce margin requirements, or continuing to execute trades despite margin violations does not constitute substantial assistance for purposes of claim for aiding and abetting a fund manager's breach of fiduciary duty under New York law; furthermore, executing trades in order to reduce a loan of money under margin is insufficient to create liability.

[14] Securities Regulation 45.20
349Bk45.20

There is no private right of action for a violation of margin regulations, which are designed to protect the viability of brokerage houses and not to protect investors.

[15] Brokers 102

65k102

While Ponzi scheme may only have been possible because of clearing broker's actions, or inaction, clearing broker was not liable for aiding and abetting a breach of fiduciary duty under New York law since its conduct was not a proximate cause of the Ponzi scheme.

[16] Federal Courts 417
170Bk417

Where a case is brought pursuant to federal question jurisdiction and a defendant resides outside the forum state, a federal court applies the forum state's personal jurisdiction rules if the federal statute does not specifically provide for national service of process.

[17] Federal Courts 14.1
170Bk14.1

Pursuant to the doctrine of pendent personal jurisdiction, a district court can assert personal jurisdiction over parties on related state law claims where a federal statute authorizes nationwide service of process, and the federal and state claims derive from a common nucleus of operative fact, even where personal jurisdiction is not otherwise available.

[18] Federal Courts 86
170Bk86

Bermuda-based affiliates of United States-based accounting firm had continuous and systematic general business contacts with the United States sufficient to support a finding of general jurisdiction since affiliates acted as fund administrators of off-shore investment fund, which was managed from New York and which traded United States securities, and regularly solicited business in United States.

[19] Federal Courts 86
170Bk86

Specific jurisdiction existed over Bermuda-based administrators of off-shore investment fund, which was managed from New York and which traded United States securities, in suit alleging violations of the federal securities laws in connection with management of fund; administrators sent subscription documents to individuals in the United States soliciting investors for the fund, sent bills to fund

manager in New York for approval prior to payment by the fund and received from the United States all of the information from which it prepared the statements it disseminated as fund administrators, and made countless mailings to investors or to the agents of investors residing in the United States.

[20] Federal Courts 86
170Bk86

Subjecting Bermuda-based administrators of off-shore investment fund to personal jurisdiction in United States in suit alleging violations of the federal securities laws in connection with management of fund would not be unreasonable; litigation would not impose undue burden on administrators, each of whom had substantial contacts with the United States and was part of a global enterprise managed from New York City.

[21] Federal Courts 207
170Bk207

[21] Securities Regulation 67.11
349Bk67.11

Effects test, which is one of two tests for determining whether court should entertain subject matter jurisdiction over a particular transnational securities fraud claim, looks to the effect of the fraudulent conduct that impacts on stock registered and listed on an American national securities exchange and is detrimental to the interests of American investors; impact on investors resident in the United States, whatever their nationality, is the focus of the effects test.

[22] Federal Courts 207
170Bk207

[22] Securities Regulation 67.11
349Bk67.11

A federal court has subject matter jurisdiction over a particular transnational securities fraud claim under the conduct test if (1) the defendant's activities in the United States were more than merely preparatory to a securities fraud conducted elsewhere, and (2) those activities or culpable failures to act within the United States directly caused the

claimed losses; goal of the conduct test is to prevent the United States from being used as a base for manufacturing fraudulent security devices for export, even when these are peddled only to foreigners.

[23] Federal Courts 207
170Bk207

[23] Securities Regulation 67.11
349Bk67.11

Where defendants have undertaken significant steps in the United States in furtherance of a fraudulent scheme, United States courts have jurisdiction over suits arising from that conduct even if the final transaction occurs outside the United States and involves only foreign investors. Restatement (Second) of Foreign Relations Law of the United States § 416(d).

[24] Federal Courts 207
170Bk207

[24] Securities Regulation 67.11
349Bk67.11

Court had subject matter jurisdiction over suit alleging violations of the federal securities laws in connection with management of offshore fund; although the named plaintiffs were foreign citizens, and the fund operated as an offshore-fund, the fraud was run from the United States and it was the decisions made in the United States that led directly to the investors' losses.

[25] Securities Regulation 67.13
349Bk67.13

Investors adequately alleged a securities fraud claim against Bermuda-based administrators of off-shore investment fund; complaint alleged that administrators knowingly and/or recklessly used false data from fund manager, despite concurrent receipt of accurate financial statements from clearing broker, to prepare inflated NAV (net asset value) statements and disseminate them to investors who relied upon the information in their investment decisions regarding the fund and thereby suffered injury, and administrators further used the false NAV figures to process new subscriptions, issue new shares of the fund,

and price investor redemptions. Securities Act of 1933, § 17(a), 15 U.S.C.A. § 77q(a); Securities Exchange Act of 1934, § 10(b), as amended, 15 U.S.C.A. § 78j(b); 17 C.F.R. § 240.10b-5.

[26] Securities Regulation 60.40
349Bk60.40

A primary violator of Section 10(b) is any actor who participated in the fraudulent scheme. Securities Act of 1933, § 17(a), 15 U.S.C.A. § 77q(a); Securities Exchange Act of 1934, § 10(b), as amended, 15 U.S.C.A. § 78j(b); 17 C.F.R. § 240.10b-5.

[27] Securities Regulation 60.40
349Bk60.40

[27] Securities Regulation 60.41
349Bk60.41

While private civil liability under Section 10(b) applies only to those who engage in the manipulative or deceptive practice and not to those who aid and abet the violation, a finding that the defendant communicated the misrepresentation directly to the plaintiff is not necessary; it is necessary, however, for the misrepresentation to have been attributed to the defendant at the time of dissemination; the necessity for that requirement is premised on the plaintiff's obligation to show reliance on the defendant's misstatement or omission to recover under 10b-5. Securities Act of 1933, § 17(a), 15 U.S.C.A. § 77q(a); Securities Exchange Act of 1934, § 10(b), as amended, 15 U.S.C.A. § 78j(b); 17 C.F.R. § 240.10b-5.

[28] Limitation of Actions 100(6)
241k100(6)

[28] Securities Regulation 134
349Bk134

Securities claims must be brought within one year of discovery of a violation and within three years of the actual violation.

[29] Securities Regulation 136
349Bk136

Federal securities fraud claims against former fund administrator were time-barred where investors failed to allege any material misrepresentation made by administrator

within the statute of limitations period that was relied upon by the investors and thus failed to allege that administrator was a primary violator of the securities laws after it was replaced as fund's administrator.

[30] Courts 12(2.15)
106k12(2.15)

Under New York long-arm statute, a claim "arises out" of a party's transaction of business if it is sufficiently related to the business transacted that it would not be unfair to deem it to arise out of the transacted business, that is, if an articulable nexus exists between the claim and the transaction, and the defendant has purposefully availed itself of the privilege of conducting activities within New York and thereby invoked the benefits and protections of its laws. N.Y.McKinney's CPLR 302(a), par. 1.

[31] Federal Courts 86
170Bk86

Bermuda-based administrator of off-shore investment fund was subject to personal jurisdiction in New York on claims of common law fraud, aiding and abetting common law fraud, and negligent misrepresentation; administrator won the right to work as the administrator through face-to-face negotiations with fund manager in New York, allegedly ignored accurate financial statements received from clearing broker in New York and took direction from manager in New York for a fund managed in New York and trading securities on New York exchanges, and administrator solicited fund investors and/or their agents at New York addresses, and regularly sent NAV statements and other fund documents to investors or their managers in New York. N.Y.McKinney's CPLR 302(a), par. 1.

[32] Securities Regulation 35.15
349Bk35.15

To establish a prima facie case of controlling person liability under Securities Exchange Act, a plaintiff must show: (1) a primary violation by a controlled person; (2) control of the primary violator by the defendant; and (3) that the controlling person was in some meaningful sense a culpable participant in the

primary violation. Securities Exchange Act of 1934, § 20(a), as amended, 15 U.S.C.A. § 78t(a); 17 C.F.R. § 240.12b-2.

[33] Securities Regulation 35.15
349Bk35.15

Actual control over the wrongdoer and the transactions in question is necessary for control person liability. Securities Exchange Act of 1934, § 20(a), as amended, 15 U.S.C.A. § 78t(a); 17 C.F.R. § 240.12b-2.

[34] Securities Regulation 60.51
349Bk60.51

A plaintiff seeking to plead a prima facie case of controlling person liability under Securities Exchange Act must state with particularity facts giving rise to a strong inference that the controlling person in some meaningful sense culpably participated in the controlled person's primary violation; burden is satisfied if plaintiff pleads facts giving rise to a strong inference that the controlling person knew or should have known that the controlled person was engaging in fraudulent conduct, but took no steps to prevent the primary violation. Securities Exchange Act of 1934, § 20(a), as amended, 15 U.S.C.A. § 78t(a); 17 C.F.R. § 240.12b-2.

[35] Securities Regulation 60.51
349Bk60.51

Complaint adequately stated claim of controlling person liability against American accounting firm which owned Bermuda-based administrators of off-shore investment fund, which allegedly were primary violators of securities laws; investors alleged that administrators were the vehicles through which firm provided administrative services to its clients and that firm controlled administrators by exercising "direct, daily supervision, oversight and control" through common personnel and shared offices, and complaint was peppered with specific allegations of participation by firm's personnel in the fraud including, preparation of false NAV statements, and failure to investigate either the discrepancies between fund manager's statements and those received from clearing broker or the suspicious appearance of fund manager's statements on their face.

Securities Exchange Act of 1934, § 20(a), as amended, 15 U.S.C.A. § 78t(a); 17 C.F.R. § 240.12b-2.

[36] Securities Regulation 60.40
349Bk60.40

Fact that Bermuda-based administrators of off-shore investment fund were affiliates of American accounting firm was not sufficient to connect firm to the dissemination of false statements by fund administrators.

[37] Federal Courts 18
170Bk18

Even where the sole defendant with federal claims against it is dismissed from the case, the court still has power to exercise supplemental jurisdiction over the state claims against remaining defendants, provided the state and federal claims derive from a common nucleus of operative fact.

[38] Principal and Agent 79(4)
308k79(4)

Investors failed to state claims under New York law for common law fraud, negligence, gross negligence, professional malpractice, negligent misrepresentation, aiding and abetting common law fraud and aiding and abetting breach of fiduciary duty against American accounting firm which owned Bermuda-based affiliates which acted as administrators of off-shore investment fund, complaint contained no specific allegations as to the conduct of accounting firm necessary to give rise to any of the elements of their state claims and failed to state their claims under an agency theory.

[39] Principal and Agent 96
308k96

[39] Principal and Agent 99
308k99

Under New York law, an agent must have authority, whether apparent, actual or implied, to bind his principal.

[40] Principal and Agent 99
308k99

Under New York law, actual authority arises from a manifestation from principal to agent.

[41] Principal and Agent 8
308k8

[41] Principal and Agent 14(2)
308k14(2)

Under New York law, consent for actual authority may be either express or implied from the parties' words and conduct as construed in light of the surrounding circumstances.

[42] Principal and Agent 99
308k99

For apparent authority to exist under New York law, there must be words or conduct of the principal, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction on behalf of the principal.

[43] Principal and Agent 25(1)
308k25(1)

Equitable estoppel doctrine can bind the principal under New York law where the third party reasonably relies on the principal's knowing misrepresentations.

[44] Principal and Agent 166(1)
308k166(1)

[44] Principal and Agent 171(1)
308k171(1)

Under New York law, principal can be deemed to ratify an unauthorized transaction after the fact where the principal retains the benefit with knowledge of the material facts.

[45] Corporations 388(1)
101k388(1)

[45] Partnership 24
289k24

A corporation may be held liable under New York law under a partnership by estoppel theory. N.Y.McKinney's Partnership Law § 27.

[46] Federal Courts 86
170Bk86

Specific jurisdiction existed over Bermuda-based auditor of off-shore investment fund, which was managed from New York and

which traded United States securities, in suit alleging violations of the federal securities laws in connection with management of fund; auditor used information it knew emanated from the United States to prepare its allegedly fraudulent audit reports, auditor relied in part on help from its United States based affiliates, who gathered information to mark the fund's securities to market, and auditor understood that its allegedly fraudulent audits would be mailed to fund's shareholders and would reach United States residents.

[47] Federal Courts 409.1
170Bk409.1

In addressing choice of law rules in a federal question case, the court should invoke federal common law choice of law analysis only where significant federal policy, calling for the imposition of a federal conflicts rule, exists; need for uniformity is not, by itself, a sufficient justification for displacing state choice of law rules.

[48] Accountants 9
11Ak9

[48] Negligence 204
272k204

Under New York choice of law rules, New York law governed aiding and abetting common law fraud and gross negligence claims against Bermuda-based auditor of off-shore investment fund which was managed from New York; while plaintiff investors were domiciled in the British Virgin Islands and the Netherland Antilles, a substantial portion of the fraudulent conduct occurred in New York, and the allegedly false audit reports were based on financial information emanating from New York and were disseminated to fund shareholders in many countries, including shareholders who either resided in the United States or whose affairs were managed from the United States.

[49] Securities Regulation 60.45(3)
349Bk60.45(3)

Use of American accounting firm's name on audit documents allegedly containing misleading information was, by itself, insufficient to constitute scienter for purposes

of establishing securities fraud claim.

[50] Accountants 10.1
11Ak10.1

Investors failed to adequately allege under New York law aiding and abetting common law fraud and breach of fiduciary duty claims against American accounting firm, which was affiliated with Bermuda-based auditor of off-shore investment fund, under a partnership by estoppel theory; while the complaint alleges that each audit report displayed the American accounting firm's logo as well as its name, it failed to allege either that firm or anyone with its consent represented that firm was a "partner in an existing partnership" with Bermuda-based auditor, or that investors "gave credit" to any such representations in making their investment decisions. N.Y.McKinney's Partnership Law § 27.

[51] Negligence 202
272k202

[51] Negligence 273
272k273

[51] Negligence 321
272k321

Under New York law, a prima facie case of negligence, gross negligence, or professional malpractice requires the plaintiff to show: (1) a duty to the plaintiff; (b) a breach of duty; (c) a reasonably close causal connection between the contact and the resulting injury; and (d) actual loss, harm or damage.

[52] Accountants 9
11Ak9

Under New York law, an accountant owes a duty of care for services relied upon by plaintiffs who are part of a specific and identifiable group rather than a faceless or unresolved class of persons; conduct constitutes "linking conduct" if it is some form of direct contact between the accountant and the plaintiff, such as face-to-face conversation, the sharing of documents, or other substantive communication between the parties.

[53] Accountants 9
11Ak9

American accounting firm, which was affiliated with Bermuda-based auditor of off-shore investment fund, could not be held liable under New York law for negligence, gross negligence, or professional malpractice based on auditor's alleged preparation of audit documents containing misleading information since there was no privity between American accounting firm and the investors, or even any allegation that firm knew that its name and logo were used on the specific audit reports.

[54] Brokers 106
65k106

[54] Securities Regulation 306
349Bk306

Investors' allegations were sufficient to state claims under New York law against introducing broker for aiding and abetting common law fraud & aiding and abetting breach of fiduciary duty in connection with securities fraud committed by manager of off-shore fund; allegations that broker shared its offices with fund manager and collected "substantial commission income" gave rise to a fair inference that broker knew of manager's fraud, and investors also alleged that broker received the accurate financial statements as well as audit confirmation requests but ignored instructions to transmit audit confirmation responses directly to auditor and complied with manager's "highly irregular" request to send them to him.

*460 Richard L. Stone, Jeffrey H. Squire, Mark A. Strauss, Kriby, McInerney & Squire, LLP, New York City, for Plaintiffs Cromer Finance, Ltd. et al.

Steven S. Honigman, Richard P. Swanson, Jonathan E. Polonsky, Veronica E. Rendon, Alexandra Khlyavich (admission pending), Thelen Reid & Priest LLP, New York City, for Plaintiffs Cromer Finance, Ltd. et al.

Steven E. Greenbaum, Scott M. Berman, Berlack, Israels & Liberman LLP, New York City, for Plaintiffs Argos et al.

Daniel J. Kramer, Harry S. Davis, Adam J. Freedman, Schulte Roth & Zabel LLP, New

York City, for Defendants Bear Stearns Securities Corp. and Bear Stearns & Co., Inc.

Gregg L. Weiner, Fried, Frank, Harris, Shriver & Jacobson, New York City, for Defendants Fund Administration Services (Bermuda), Ltd., Kempe & Whittle Associates Limited, and Ernst & Young Bermuda.

Richard A. Martin, Manuel A. Mercader, Heller Ehrman White & McAuliffe LLP, New York City, for Defendant Ernst & Young International.

Michael J. Dell, Gregory Horowitz, Susan D. Hawkins, Kramer Levin Naftalis & Frankel LLP, New York City, for Defendant Deloitte & Touche Bermuda.

John T. Behrendt, Mark B. Holton, Gibson, Dunn & Crutcher LLP, New York City, for Deloitte Touche Tohmatsu.

Timothy P. Harkness, Davis Polk & Wardwell, New York City, for Defendant Deloitte & Touche LLP.

Martin I. Kaminsky, Edward T. McDermott, Pollack & Kaminsky, New York City, for Defendant Financial Asset Management, Inc.

Roger Marting, Circleville, OH, for Defendant Financial Asset Management, Inc.

OPINION AND ORDER

COTE, District Judge.

These actions arise from alleged violations of the federal securities laws as well as related state law claims. Plaintiffs Cromer Finance Ltd. ("Cromer") and Prival N.V. ("Prival") (collectively, the "Cromer Plaintiffs") filed a class action complaint on March 24, 2000. Plaintiffs in the Argos action (collectively, the "Argos Plaintiffs") filed a complaint on April 3, 2000. The cases were accepted by this Court as related to SEC v. Berger, 00 Civ. 333.

The plaintiffs were investors in an off-shore investment fund managed from New York by

Michael Berger ("Berger"). That fund traded United States securities, and the plaintiffs allege enormous losses based on Berger's fraudulent management of the fund. They have sued, among others, the Bermuda accounting firms that served as the fund's administrators or auditors, as well as American and international affiliates of those Bermuda entities. All of the defendants except Berger have moved to dismiss the complaints in these two actions. [FN1] The affiliates of the Bermuda accounting *461 firms do not contest that there is personal jurisdiction over them, but they do deny any involvement with Berger's fund or the fraud and contend that they have been sued in a search for "deeper pockets." The Bermuda entities argue, among other things, that there is neither subject matter jurisdiction over the claims against them nor personal jurisdiction over them individually.

FN1. After the motions were fully submitted, the Cromer plaintiffs and those defendants moving to dismiss based on lack of personal jurisdiction were permitted to submit additional briefing and record evidence regarding the allegations in the Cromer Complaint that defendant Fund Administration Services (Bermuda) Ltd. sent Net Asset Value statements to investors, investors' agents, or prospective investors in the Manhattan Investment Fund, Ltd. located in the United States.

The motions to dismiss by the affiliates of the Bermuda entities, as well as the United States clearing broker for the fund's trading, are granted. In brief, there are insufficient allegations that these defendants knew of or assisted in the alleged fraud. Each of the many theories asserted by the plaintiffs to impose derivative liability on them for the alleged misdeeds of Berger and the Bermuda-based entities fail. In addition, certain claims against one of the Bermuda-based fund administrators is dismissed as barred by the statute of limitations, and for other reasons. The remaining motions to dismiss the Cromer action are largely denied. In particular, the Court concludes it has both subject matter and personal jurisdiction over the Bermuda-based defendants. The parties shall have ten days in which to notify the Court why the analysis

in this Opinion does not resolve the motions to dismiss the claims in the Argos Complaint as well.

BACKGROUND [FN2]

FN2. The information in this section derives primarily from the Complaint in the Cromer action, and "plaintiffs" refers to the Cromer Plaintiffs. The facts and allegations in the Argos action are substantially similar.

This lawsuit is brought as a securities class action on behalf of purchasers of securities of the Manhattan Investment Fund, Ltd. ("Fund") during the class period, defined as October 1, 1995, through January 18, 2000. As a result of the defendants' conduct, plaintiffs [FN3] and Class members have allegedly suffered damages of approximately \$400,000,000.

FN3. The Cromer action has two proposed lead plaintiffs: Cromer, a British Virgin Islands registered investment corporation, and Prival, a Netherlands Antilles corporation. Both lead plaintiffs purchased shares in the Fund. Plaintiffs in the Argos action are twenty-eight Fund shareholders, each of whom invested between \$400,000 and \$16,000,000 in the Fund.

The facts alleged in the Complaint include the following. Berger, a 28 year-old investment manager, established the Fund as an "open end investment company" in or about December 1995, under the laws of the British Virgin Islands. The Fund was designed for foreign investors and United States tax-exempt investors (e.g., pension funds and trusts). Through his wholly-owned company, Manhattan Capital Management, Inc. ("MCM"), Berger served as the investment manager and advisor for the Fund. The Fund had no offices, employees or operations of its own. Berger made investment decisions at MCM's offices in New York, and all of the Fund's assets were held in custody in New York by defendants Bear Stearns & Co., Inc. and Bear Stearns Securities Corp. (collectively, "Bear Stearns"), an investment bank and registered broker dealer. [FN4]

FN4. At the Fund's inception, Berger opened an account in the Fund's name with the Bank of Bermuda as a depository for new investor monies. Moneys deposited in the account were transferred to the Fund's clearing account at Bear Stearns almost every month.

***462** According to its confidential offering memorandum ("Offer Memo"), the Fund's investment objective was to "achieve capital appreciation, consistent with the preservation of capital" by investing "primarily in highly liquid listed issues." The Offer Memo informed investors that the Fund's investment technique included "short-selling" as well as the use of "leverage" or "margin." [FN5] It also explained that the Fund's administration services were provided by "Fund Administration Services (Bermuda) Limited, an affiliate of Ernst & Young International" or "Kempe & Whittle Associates Limited, an affiliate of Ernst & Young International," and that the Fund had retained "Deloitte & Touche" at a Bermuda address, as independent auditors. [FN6] The plaintiffs contend that defendants Ernst & Young International ("EYI"), Ernst & Young Bermuda ("EYB"), Kempe & Whittle Associates Ltd. ("K & W"), and Fund Administration Services (Bermuda) Ltd. ("FASB") held themselves out and functioned as "a single, unified company that performed administrative services on behalf of the Fund." Likewise, the plaintiffs allege that defendants Deloitte & Touche (Bermuda) ("DTB"), Deloitte Touche Tohmatsu ("DTT"), and Deloitte & Touche LLP ("DTUS") functioned as a "unified, multi-national accounting firm" in this case.

FN5. The Complaint alleges that the Federal Reserve Board ("FED") and the New York Stock Exchange ("NYSE"), of which Bear Stearns is a member, regulate the use of margin debt. Under Regulation T, the FED sets the amount of margin credit which may be extended in connection with the initial purchase of a security, while NYSE Rule 431 regulates the "maintenance margin," or the minimum equity that must be maintained in a customer's account. The Complaint also alleges that the Offer Memo states that the Fund will use "concentration limitations," in that no more than

25% of the portfolio would be invested in a single sector and individual issues would never account for more than 15-20% of the portfolio's value. Finally, Bear Stearns, in its role as sole custodian of the Fund's assets, enforced its own maintenance margin requirement set initially at 35% of the Fund's total assets, subject to adjustment.

FN6. Contrary to the Complaint, the Fund's Offer Memo does not identify "Deloitte & Touche" generally as the Fund's independent auditor or "Ernst & Young" generally as the Fund's administrators.

The Fund commenced trading operations in or about Spring 1996, with an investment strategy that primarily involved the "concentrated short selling of securities of United States technology companies, including Internet companies, on the theory that those companies were trading at over-valued prices and were due for a correction." After an initial offering at \$100 per share, with a minimum investment of 250 shares, the Fund offered its shares at a net asset value ("NAV") computed "to the penny" and determined on the basis of the listed prices on major securities exchanges of the securities held by the Fund. The NAV was calculated by EYB, K & W, and later FASB, on a monthly basis, based on daily, monthly, and yearly statements prepared by Bear Stearns. As sole custodian of the Fund's assets, Bear Stearns cleared all securities transactions. While Berger utilized many brokers, Bear Stearns was the only broker to extend margin credit in connection with the clearing and settlement of the Fund's trades. As of January 2000, the Fund had more than 200 investor accounts.

Berger utilized defendant Financial Asset Management, Inc. ("FAM") as an "introducing broker" which cleared all of its trades through Bear Stearns. Berger and FAM shared office space in New York, and the Complaint alleges that FAM collected "substantial commission income" as a result of its role in the Fund.

***463 The Fraud**

The plaintiffs allege that the fraudulent scheme began almost immediately after the

Fund began trading operations in or about Spring 1996. According to the Bear Stearns monthly account statements and daily trading reports, Berger began losing money on a regular basis from the Fund's inception. [FN7] Rather than accurately reporting these losses, Berger created "fictitious monthly account statements, purportedly in the name of FAM, which showed profitable performance for the Fund." These actions continued until early 2000, when Berger, after the United States Securities and Exchange Commission ("SEC") had initiated an investigation of the Fund, released a statement admitting to the fraud.

FN7. For example, the Bear Stearns statement for June 1996, reveals a loss of approximately \$700,000, or almost 30% of the Fund's value in that month. In September 1996, the Fund lost over \$5,000,000, an amount "equal to more than half the Fund's equity." In October and November 1996, the Fund lost 15% and 40% of the Fund's equity, respectively.

1. Involvement of Bear Stearns

Plaintiffs allege that Bear Stearns: (1) extended margin credit to the Fund which comprised "atypical, extraordinary and non-routine financing transactions" and exceeded the margin regulations established by the FED, NYSE, and Bear Stearns' own rules discussed above, and (2) tipped certain investors with whom Bear Stearns had social or business relationships as to the Fund's problems. As a result of these actions, Bear Stearns made "substantial profits" on margin interest and fees, enabled the Fund to continue its operations by obtaining new funds from investors and avoiding redemptions of investments, and assisted their own customers in withdrawing money from the Fund at the expense of remaining investors.

The plaintiffs allege that Bear Stearns' over-extension of margin credit to the Fund enabled Berger to trade on margin credit in excess of applicable margin rules throughout the Class Period and to violate the concentration limitations applied by Bear Stearns and set forth in the Offer Memo. [FN8] Even when Berger had outstanding

unsatisfied margin calls, Bear Stearns extended "intra-day" margin credit to him which at times exceeded 100% of the Fund's capital. Because the margin deficits were not satisfied within the prescribed regulatory periods, Regulation T and Rule 431 required Bear Stearns to freeze the Fund's account. Bear Stearns failed to freeze the Fund. Bear Stearns further failed to apply Rule 431 by not enforcing the shorter periods given to cover margin calls by Rule 431 for day traders like Berger, allowing Berger to maintain the account in an under-margined state, and allowing Berger to meet margin calls by liquidating margined positions. In sum, Bear Stearns' actions contributed to a "cycle" in which Bear Stearns extended excessive margin credit to the Fund, Berger used the credit to trade and generate substantial losses, and those losses further increased the margin debt. Bear Stearns then agreed to await an influx of new investor monies to satisfy the debt, and once the new money was used to pay down the margin debt, the cycle recommenced. As a result of these activities, Bear Stearns earned "significant fees and margin interest" on the Fund's account.

FN8. For example, at one point the Fund was short 150% of the Fund's capital in a single stock, Earthlink.

The plaintiffs further note that Bear Stearns knew or was reckless in not knowing that new investors in the Fund, whose money was being used to satisfy pre-existing margin deficits and to mask Berger's *464 high trading losses, were unaware of the true financial condition of the Fund. [FN9] As a result, Bear Stearns enabled Berger to raise money from unsuspecting investors to pay off the Fund's margin debts, thereby gaining substantial profits for itself in the form of interest income on margin debt as well as commissions and fees on trading activity.

FN9. The plaintiffs allege that Bear Stearns' "risk control department" was aware of the Fund's "precarious position" both because of daily contact with Berger regarding the Fund's margin violations and as a result of an internal e-mail message dated December 28, 1999, which demonstrated long-time

knowledge of the violations. Bear Stearns, however, only moved to require compliance with the margin rules in late December 1999.

The plaintiffs also allege that Bear Stearns used non-public material information regarding the Fund's inflated NAV--information known to Bear Stearns by virtue of its custody of the Fund--in order to warn those Fund investors with whom Bear Stearns and Bear Stearns executives shared "business and social relationships." Bear Stearns continued to over-extend margin credit to the Fund in order to keep the Fund liquid long enough to enable those investors to withdraw their money at artificially inflated NAVs. The plaintiffs allege that Bear Stearns thereby "enhanced its position" at the expense of "unsuspecting investors" who remained in the Fund, including plaintiffs and other Class members, whose interests were diluted as a result of the redemptions at artificially inflated NAVs.

2. Involvement of EYI, EYB, K & W, and FASB

The plaintiffs allege that the "Ernst & Young Defendants" used the fictitious statements created by Berger on FAM letterhead to prepare materially inflated NAV calculations and disseminate them to investors, despite receiving from Bear Stearns daily, monthly, and yearly statements accurately reflecting the Fund's losses and despite the Offer Memo's representation that Bear Stearns--and not FAM [FN10]--would have custody of all of the Fund's assets. For example, the NAV calculation overstated the market value of the Fund's assets by roughly \$400,000,000 in August 1999. Plaintiffs allege that they and other Class members relied on the fictitious reports and "would not have purchased or maintained their shares in the Fund" if they had known that the monthly NAV statements were materially false and misleading.

FN10. The plaintiffs allege that if the Ernst & Young personnel had made "the most rudimentary inquiry" into FAM, they would have learned that FAM was a one-broker operation, with only

\$1,000,000 in assets, which cleared all of its clients' trades through Bear Stearns and that FAM did not meet the National Association of Securities Dealers ("NASD") requirements for broker-dealers concerning clearing trades and holding custody of third-party assets.

These defendants initially prepared an "apparently accurate NAV" in September 1996, reflecting the Fund's losses, which they sent to Berger. When one of Berger's employees asked them to "hold off" on the NAV issuance, the Ernst & Young defendants complied and then used Berger's fictitious statements to publish a revised--and inaccurate--NAV statement. This was contrary to the Ernst & Young defendants' own "checklist" of procedures for NAV calculation, which required an examination of the Bear Stearns account statement and provided a box to check once the task was completed. In addition, the fictitious statement prepared by Berger was "suspicious on its face" in that it was prepared using a plain spreadsheet on an ordinary wordprocessor without any *465 identifying letterhead, used the same account number as the Fund's account at Bear Stearns, and, unlike the Bear Stearns statements, contained no daily trading activity information or almost any other information aside from the purported equity in the account. The plaintiffs allege that these defendants continued to use the fictitious statements and to issue shares to new investors and redeem shares of existing investors at the inflated NAV even though they had concerns regarding possible fraud as early as Summer 1998. [FN11]

FN11. For example, the Argos plaintiffs allege that a shareholder asked FASB in September 1999, to "address certain questions concerning the Fund's NAV." FASB sent a letter to the Argos plaintiffs indicating that it had "received month-end position listings from the Fund's broker," which plaintiffs allege implied that the reported NAVs were consistent with the Bear Stearns statements.

3. Involvement of DTT, DTB, and DTUS

The plaintiffs allege that "Deloitte" issued

"clean," unqualified auditing reports for the years 1996-1999, attesting to the accuracy of the Fund's financial statements and including a statement that "[i]n our opinion, such financial statements represent fairly, in all material respects, the financial position of the [Fund], in conformity with accounting principles generally accepted in the United States of America." The audit reports, discussed in the Complaint with an example attached as an exhibit, bear the names and logos of DTT as well as "Deloitte & Touche" with an accompanying Bermuda address. They are addressed to "the Shareholders" of the Fund and signed "Deloitte & Touche," in a cursive signature. The plaintiffs allege that Deloitte "pretended to have knowledge where it actually had none, and therefore its audits amounted to no audits at all." In particular, the Deloitte opinions were "materially inaccurate" and Deloitte failed to conduct its audits in accordance with United States generally accepted auditing standards ("GAAS"), failed to plan and perform its audits to obtain "reasonable assurances that the Fund's financial statements were free of material misstatements," and did not include procedures "reasonably designed and conducted to obtain confirmation of the securities purportedly owned by the Fund."

The plaintiffs allege that Deloitte had "full and complete access" to the books and records of the Fund as maintained by the Ernst & Young defendants and therefore had access to the fictitious financial statements as well as the accurate Bear Stearns statements. The plaintiffs further allege that Deloitte ignored numerous warning signs regarding the Fund's financial difficulties. For example, the fictitious statements were inconsistent with the Bear Stearns statements, but Deloitte "recklessly followed Berger's unorthodox and suspicious instructions to ignore the accurate statements sent by Bear Stearns" which, according to Berger, did not reflect the Fund's entire portfolio while the fictitious statements did (emphasis in original). In addition, Deloitte noticed a discrepancy during its first audit between the Bear Stearns and fictitious financial statements, yet simply accepted Berger's direction to ignore the Bear Stearns

statements without checking directly with Bear Stearns or with FAM to investigate further. Further, Deloitte accepted audit confirmation requests from Berger, instead of insisting and ensuring that they came directly from FAM, thus violating one of the "most basic responsibilities of an auditor." Finally, the fictitious statements represented that the securities were "held at FAM," which directly contradicted the Offer Memo. As with the Ernst & Young defendants, plaintiffs allege that if the Deloitte defendants *466 had made "even a rudimentary inquiry" into FAM, they would have discovered it to be incapable of serving as the clearing house for or custodian of the Fund's assets.

The plaintiffs also allege that even after Deloitte was "specifically alerted" to discrepancies and the possibility of fraud, it failed to take necessary investigative steps. The head of Bear Stearns' prime brokerage operations called a partner at DTUS in February 1999, to warn him of a discrepancy from what would be expected if the Fund were selling short internet stocks. While the DTUS partner sent a warning e-mail to partners in other offices and spoke to the DTB partner in charge of the Fund's audits, no follow up occurred and Deloitte completed and signed off on a "clean, unqualified" audit opinion in March 1999. Because shares of the Fund were not publicly traded, investors and prospective investors had "no independently verified third-party financial information" other than Deloitte's audit report and the audited financial statements. The plaintiffs allege that Deloitte "knew or should have known that its clean audit reports were material to investors' decisions to purchase shares in the Fund and to refrain from redeeming their investments, and that investors were placing substantial reliance on Deloitte's clean audit reports."

4. Involvement of FAM

FAM is a "relatively small brokerage firm" with its principal place of business in Ohio. Plaintiffs allege that FAM served as one of the Fund's introducing brokers, placing trades for customers which were then cleared or settled

through Bear Stearns. Plaintiffs further allege that Berger had previously worked as a consultant for FAM in developing European clients and trading strategies and therefore had a prior relationship with FAM and its principal, James Rader ("Rader"). Berger continued his relationship when he established the Fund, sharing office space with FAM in New York and enabling the small firm to collect "substantial commission income." The Complaint alleges that when Deloitte requested that FAM reply directly to it concerning an audit confirmation, FAM instead complied with Berger's "highly irregular request" to provide its confirmation to him. FAM further provided Berger with an open, pre-addressed Airborne Express envelope and bill made out to DTB, falsely showing FAM in Ohio as the sender. Because it was receiving monthly account statements for the Bear Stearns account, FAM knew that the Fund was experiencing large losses but that investors were continuing to invest additional monies with the Fund.

Exposure of the Fraud

The plaintiffs allege that the defendants' fraudulent acts continued until the SEC initiated an investigation of the Fund in November 1999. On January 7, 2000, Deloitte withdrew its audit reports for the years ending December 31, 1996, 1997, and 1998, stating that the investors could no longer rely on the reports. On January 13, 2000, the Ernst & Young defendants resigned as the Fund's administrator. The following day Berger admitted to the fraud and was subsequently charged with violations of Title 17 of the securities laws and with fraud under the Investment Adviser's Act. The SEC also commenced an action in this Court, alleging that Berger, MCM, and the Fund violated various anti-fraud provisions of the federal securities laws.

Causes of Action

The Cromer plaintiffs bring twenty-one causes of action. Against all defendants submitting motions to dismiss, plaintiffs allege aiding and abetting both common *467

law fraud and breach of fiduciary duty. [FN12] Against FAM, the plaintiffs additionally allege gross negligence and negligence. Against all defendants except Bear Stearns and FAM, plaintiffs additionally allege violation of Section 10(b) of the Securities Exchange Act ("Exchange Act"), violation of Rule 10b-5, common law fraud, gross negligence, negligence, and professional malpractice. Against EYI, EYB, K & W, and FASB, plaintiffs additionally allege negligent misrepresentation. Finally, against EYI, EYB, and DTT, plaintiffs additionally allege violation of Section 20(a) of the Exchange Act under a "controlling person" theory. [FN13]

FN12. These claims represent the entirety of claims alleged against Bear Stearns.

FN13. The Argos plaintiffs bring eight causes of action, substantially similar to the Cromer allegations with the following differences: (1) EYB and K & W are not defendants in the Argos action; (2) As against FASB and EYI, the Argos plaintiffs additionally allege breach of fiduciary duty but do not allege gross negligence or professional malpractice; (3) As against EYI, the Argos plaintiffs do not allege violation of Section 20(a); (4) As against DTT, DTB, and DTUS, the Argos plaintiffs do not allege gross negligence, negligence, or professional malpractice; and (5) As against FAM, the Argos plaintiffs do not allege gross negligence or negligence.

LEGAL STANDARDS FOR DISMISSAL

The defendants bring their motions to dismiss pursuant to one or more of Rules 12(b)(1), (b)(2), and (b)(6) and 9(b), Fed.R.Civ.P.

A. Rule 12(b)(1)

To determine jurisdiction in federal question cases, the court need only ask "whether--on its face--the complaint is drawn so as to seek recovery under federal law or the Constitution. If so, [the court should] assume or find a sufficient basis for jurisdiction, and reserve further scrutiny for an inquiry on the merits." *Nowak v. Ironworkers Local 6 Pension Fund*, 81 F.3d 1182, 1189 (2d Cir.1996). The standard is a "modest" one,

allowing for subject matter jurisdiction so long as "the federal claim is colorable." *Savoie v. Merchants Bank*, 84 F.3d 52, 57 (2d Cir.1996) (citing *Bell v. Hood*, 327 U.S. 678, 682-83, 66 S.Ct. 773, 90 L.Ed. 939 (1946)).

In assessing a motion to dismiss for lack of subject matter jurisdiction, a court must "accept as true all material factual allegations in the complaint," *Shipping Fin. Serv. Corp. v. Drakos*, 140 F.3d 129, 131 (2d Cir.1998) (citing *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974)), but refrain from "drawing from the pleadings inferences favorable to the party asserting [jurisdiction]." *Id.* (citing *Norton v. Larney*, 266 U.S. 511, 515, 45 S.Ct. 145, 69 L.Ed. 413 (1925)). Courts evaluating Rule 12(b)(1) motions "may resolve the disputed jurisdictional fact issues by reference to evidence outside the pleadings, such as affidavits." *Zappia Middle East Constr. Co. v. Emirate of Abu Dhabi*, 215 F.3d 247, 253 (2d Cir.2000). Where jurisdiction is "so intertwined with the merits that its resolution depends on the resolution of the merits," the court should use the standard "applicable to a motion for summary judgment" and dismiss only where "no triable issues of fact" exist. *London v. Polishook*, 189 F.3d 196, 198-99 (2d Cir.1999) (citation omitted); see also *Europe and Overseas Commodity Traders, S.A. v. Banque Paribas London*, 147 F.3d 118, 121 n. 1 (2d Cir.1998).

B. Rule 12(b)(2)

It is well established that on a Rule 12(b)(2) motion to dismiss for lack of personal *468 jurisdiction, "the plaintiff bears the burden of showing that the court has jurisdiction over the defendant." *Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 566 (2d Cir.1996). The plaintiff's burden depends on the procedural posture of the litigation. Where there has been no discovery, "a plaintiff may defeat a motion to dismiss based on legally sufficient allegations of jurisdiction." *Id.* But where there has been discovery regarding personal jurisdiction, the plaintiff's burden is to make a prima facie showing which "must include an averment of facts that, if credited by the ultimate trier of

fact, would suffice to establish jurisdiction over the defendant." *Id.* at 567 (citation omitted); *SEC v. Euro Sec. Fund, Coim SA*, No. 98 Civ. 7347(DLC), 1999 WL 76801, at *2 (S.D.N.Y. Feb. 17, 1999).

C. Rule 12(b)(6)

A court may dismiss an action pursuant to Rule 12(b)(6) only if "it appears beyond doubt, even when the complaint is liberally construed, that the plaintiff can prove no set of facts which would entitle him to relief." *Jaghory v. New York State Dep't of Educ.*, 131 F.3d 326, 329 (2d Cir.1997) (citation omitted). The court must "accept all factual allegations in the complaint as true and draw inferences from those allegations in the light most favorable to the plaintiff." *Id.* The court is generally prohibited from considering matters outside the pleadings. *Tewksbury v. Ottaway Newspapers*, 192 F.3d 322, 325 n. 1 (2d Cir.1999). The court may consider, however, "any written instrument attached to [the Complaint] as an exhibit or any statements or documents incorporated in it by reference, ... and documents that the plaintiffs either possessed or knew about and upon which they relied in bringing the suit." *Rothman v. Gregor*, 220 F.3d 81, 88 (2d Cir.2000) (citation omitted). "General, conclusory allegations need not be credited, however, when they are belied by more specific allegations of the complaint." *Hirsch v. Arthur Andersen & Co.*, 72 F.3d 1085, 1092 (2d Cir.1995).

D. Rule 9(b)

[1][2] Rule 9(b) sets forth special pleading requirements for claims involving fraud, and it is "well-settled" that a complaint alleging securities fraud must comport with Rule 9(b). *Ganino v. Citizens Utilities Co.*, 228 F.3d 154, 168 (2d Cir.2000). Rule 9(b) requires that when alleging fraud "the circumstances constituting fraud ... must be stated with particularity," although "[m]alice, intent, knowledge, and other condition of mind of a person may be averred generally." See also *id.* at 168. To comply with the requirements of Rule 9(b) in alleging the misstatement, an allegation of fraud must specify: "(1) those

statements the plaintiff thinks were fraudulent, (2) the speaker, (3) where and when they were made, and (4) why plaintiff believes the statements fraudulent." *Koehler v. Bank of Bermuda (New York) Ltd.*, 209 F.3d 130, 136 (2d Cir.2000).

[3][4] In pleading a securities fraud violation, a complaint must allege that a defendant acted with scienter. *Novak v. Kasaks*, 216 F.3d 300, 306 (2d Cir.2000) (collecting cases). When pleading scienter, "with respect to each act or omission" alleged to violate the securities laws, the complaint must "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2). To satisfy this scienter requirement, "a complaint may (1) allege facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness, or (2) allege facts to show that defendants had both motive and opportunity to commit fraud." *Rothman*, 220 F.3d at 90; see also *469 *Ganino*, 228 F.3d at 168-69; *In re Carter-Wallace Sec. Litig.*, 220 F.3d 36, 39 (2d Cir.2000). The Second Circuit has cautioned, however, that we should not be "wedded to" the "motive and opportunity" standard in light of Congress' failure to include this specific language in its recent amendment to the securities laws. *Novak*, 216 F.3d at 310.

[5][6] A plaintiff may sufficiently plead conscious misbehavior through allegations of deliberate illegal conduct. See *id.* at 308. To plead recklessness, a plaintiff must allege facts showing conduct that was "highly unreasonable, representing an extreme departure from the standards of ordinary care to the extent that the danger was either known to the defendant or so obvious that the defendant must have been aware of it." *Rothman*, 220 F.3d at 90 (citation omitted). Recklessness has been sufficiently pled where there are specific allegations that a defendant knew of facts or had access to information contradicting his public statements, or where he failed to review information that he had a duty to monitor, or where he ignored obvious signs of fraud. *Novak*, 216 F.3d at 308. "Where plaintiffs contend [a] defendant [] had

access to contrary facts, they must specifically identify the reports or statements containing this information." *Id.* at 309.

[7] To plead facts supporting a strong inference of the requisite scienter by showing motive and opportunity, a plaintiff must allege facts showing "concrete benefits that could be realized by one or more of the false statements and wrongful nondisclosures alleged," and "the means and likely prospect of achieving the concrete benefits by the means alleged." *Press v. Chemical Inv. Serv. Corp.*, 988 F.Supp. 375, 390 (S.D.N.Y.1997) (quoting *Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1129 (2d Cir.1994)). General allegations of motive "possessed by virtually all corporate insiders" are insufficient to raise a strong inference of fraudulent intent. [FN14] *Novak*, 216 F.3d at 307.

FN14. For example, acting to "sustain the appearance of corporate profitability, or of the success of an investment" or to "maintain a high stock price in order to increase executive compensation" is not sufficient to show that a defendant possesses the requisite motive, while publicly misrepresenting facts regarding company performance in order to inflate stock price and profit personally from insider sales is sufficient. *Novak*, 216 F.3d at 307-08 (internal quotation omitted).

In its recent decision in *Novak v. Kasaks*, 216 F.3d 300, after summarizing prior case law, the Second Circuit explained that a complaint pleads facts sufficient to raise a "strong inference" of fraudulent intent where it sufficiently alleges that defendants:

(1) benefitted in a concrete and personal way from the purported fraud ...; (2) engaged in deliberately illegal behavior ...; (3) knew facts or had access to information suggesting that their public statements were not accurate ...; or (4) failed to check information they had a duty to monitor.

Id. at 311.

DISCUSSION

A. Bear Stearns

Bear Stearns brings its motion to dismiss pursuant to Rule 12(b)(6), arguing that plaintiffs fail to state their only claims against Bear Stearns—that it aided and abetted Berger's fraud and breach of fiduciary duty. Bear Stearns asserts that, under the facts alleged by the plaintiffs, Bear Stearns' actions did not "substantially assist" Berger's fraud but rather made it more difficult to accomplish. As the *470 Complaint acknowledges, the reports issued by Bear Stearns accurately described the Fund's trading.

[8][9][10] To state a claim for aiding and abetting fraud under New York law, [FN15] a plaintiff must plead facts showing: (1) the existence of a fraud; (2) defendant's knowledge of the fraud; and (3) that the defendant provided substantial assistance to advance the fraud's commission. *Wight v. Bankamerica Corp.*, 219 F.3d 79, 91 (2d Cir.2000). The elements for a claim of aiding and abetting a breach of fiduciary duty under New York law are: (1) a breach by a fiduciary of obligations to another, and (2) that the defendant knowingly induced or participated in the breach. *Id.*

FN15. In a federal question action, a court looks to federal common law choice of law rules to decide which state's law governs the various legal claims. *Fromer v. Yogel*, 50 F.Supp.2d 227, 239 (S.D.N.Y.1999) (citing *Corporacion Venezolana de Fomento v. Vintero Sales Corp.*, 629 F.2d 786, 795 (2d Cir.1980)). The Second Circuit applies the law "of the jurisdiction with the greatest interest in the substantive legal claim at hand." *Id.* (citing *Corporacion Venezolana de Fomento*, 629 F.2d at 795). Except as noted below in the discussion of DTB's motion to dismiss, all of the parties discussing state law claims cite to and rely on New York law. Additionally, as discussed below, New York has the greatest interest in adjudicating this claim arising as a result of a fraud created in and managed from New York.

[11] New York law has defined both "substantial assistance" and "participation" to exist where a defendant "affirmatively assists, helps conceal, or by virtue of failing to act when required to do so enables the fraud to

proceed." *Nigerian Nat'l Petroleum Corp. v. Citibank, N.A.*, No. 98 Civ. 4960(MBM), 1999 WL 558141, at *8 (S.D.N.Y. July 30, 1999) (citation omitted) (substantial assistance); see also *Diduck v. Kaszycki & Sons Contractors, Inc.*, 974 F.2d 270, 284 (2d Cir.1992) (participation); *Estate of Ginor v. Landsberg*, 960 F.Supp. 661, 671 (S.D.N.Y.1996) (participation); *Kolbeck v. LIT Am., Inc.*, 939 F.Supp. 240 (S.D.N.Y.1996) (defining "participation" as "substantial assistance"). Substantial assistance requires the plaintiff to allege that the actions of the aider/abettor proximately caused the harm on which the primary liability is predicated. *Diduck*, 974 F.2d at 284; *Kolbeck*, 939 F.Supp. at 249. "But-for" causation is insufficient; aider and abettor liability requires the injury to be a direct or reasonably foreseeable result of the conduct. *Kolbeck*, 939 F.Supp. at 249. Inaction is "actionable participation only when the defendant owes a fiduciary duty directly to the plaintiff." *Id.* at 247.

There is no dispute regarding the first and second prongs of these tests. Bear Stearns does not deny the existence of an underlying fraud or that Berger breached his fiduciary duty to the plaintiffs, nor does it contest for the purposes of these motions that it had actual knowledge of those wrongs. Rather, the parties disagree as to whether the plaintiff has adequately alleged the "substantial assistance" and "participation" elements which, as discussed above, share largely identical requirements.

[12] A clearing broker does not provide "substantial assistance" to or "participate" in a fraud when it merely clears trades. "The simple providing of normal clearing services to a primary broker who is acting in violation of the law does not make out a case of aiding and abetting against the clearing broker." *Greenberg v. Bear, Stearns & Co.*, 220 F.3d 22, 29 (2d Cir.2000). The plaintiffs have attempted to allege that Bear Stearns did more than just clear trades.

*471 [13] To meet their obligation to plead that Bear Stearns provided substantial assistance to the fraud, the plaintiffs have

alleged that, in violation of the margin regulations of the FED, the NYSE, and its own institutional rules, it over-extended margin credit to Berger and permitted him to violate the concentration limitations ordinarily applied by Bear Stearns and described in the Offer Memo, and instead of freezing the Fund's account when it was required by regulations to do so, it allowed Berger to continue to trade. A failure to enforce margin requirements, or continuing to execute trades despite margin violations, however, does not constitute substantial assistance. *Dillon v. Militano*, 731 F.Supp. 634, 637, 639 (S.D.N.Y.1990); *Stander v. Fin. Clearing & Serv. Corp.*, 730 F.Supp. 1282, 1287 (S.D.N.Y.1990). Similarly, executing trades in order to reduce "a loan of money under margin" is insufficient to create liability. *Ross v. Bolton*, 639 F.Supp. 323, 327 (S.D.N.Y.1986).

None of the cases on which the plaintiffs rely are sufficient to overcome these long established principles. Neither *IIT v. Cornfeld*, 619 F.2d 909, 922 (2d Cir.1980), nor the other cases cited by the plaintiffs permit allegations of heightened scienter to substitute for adequately alleged substantial assistance. Even the recent decision in *Primavera Familienstiftung v. Askin*, 130 F.Supp.2d 450, 510-13 (S.D.N.Y.2001), upon which the plaintiffs place particular reliance, does not change this conclusion. In *Primavera*, the court denied summary judgment for Kidder, Peabody & Co. ("Kidder") on the ground that there was a genuine issue of material fact as to whether Kidder had substantially assisted the alleged fraud. Kidder and other brokers created the mortgage-backed securities sold to the plaintiff's funds. Kidder also loaned the funds the purchase price for the securities, using the securities as collateral. By creating and selling the securities and financing the transactions, Kidder reaped huge profits. Investors were sent monthly performance reports which included Kidder's valuation of the securities, which were particularly important since the securities were not traded on any public exchange. Kidder revised its valuation 86 times based on requests from the

person who issued the monthly performance reports. The court found that there were material issues of fact as to whether the revised valuations were fraudulent and material to investors. The court rebuffed Kidder's request to segregate the allegations concerning the "valuation" fraud from the "operations" fraud, noting that "[s]ubstantial assistance can take many forms," and that the allegations should be considered together. *Id.* at 511. Thus, the court's observation that "[e]xecuting transactions, even ordinary course transactions, can constitute substantial assistance under some circumstances, such as where there is an extraordinary motivation to aid in the fraud," *id.*, must be understood in context. Moreover, nothing in the opinion suggests that the court intended any relaxation to the requirement of a showing of proximate cause.

The remaining cases cited by the plaintiffs are also readily distinguished. *Graham v. SEC*, 222 F.3d 994 (D.C.Cir.2000), addressed the obligations of a retail broker, and not a clearing broker. The cases on which the plaintiffs rely for the general proposition that "non-routine" financial transactions can constitute substantial assistance involve conduct far more nefarious and with more direct involvement in the underlying fraud than that alleged here. In *Monsen v. Consolidated Dressed Beef Co.*, 579 F.2d 793, 803 (3d Cir.1978), a bank "insisted" that the wrongdoer continue the fraud. In *ABF Capital Management v. Askin Capital Management, L.P.*, 957 F.Supp. 1308, 1329-30 (S.D.N.Y.1997), the *472 brokers were charged with creating "volatile and virtually unmerchantable securities," inducing their sales force to market the securities by multiplying their normal commission rates, and providing false and inflated "performance marks" to their customer for dissemination to investors. Finally, in *In re Gas Reclamation, Inc. Securities Litigation*, 659 F.Supp. 493, 504 (S.D.N.Y.1987), the brokers participated in the creation of the document which contained the false statements. Others substantially assisted the fraud by reviewing and approving that document, devising the marketing and financial scheme for the fraud,

and engaging in "atypical" financing transactions. In sum, the plaintiffs have failed to point to any authority for holding a clearing broker liable to investors for aiding and abetting a fraud because it violated margin requirements or over-extended credit.

[14][15] The plaintiffs are unable to cure the defect in their pleading of substantial assistance by emphasizing that the alleged fraud included a Ponzi scheme that could not have functioned but for the extension of credit and margin violations. It is well established that there is no private right of action for a violation of margin regulations, which are designed to protect the viability of brokerage houses and not to protect investors. See *Bennett v. U.S. Trust Co. of New York*, 770 F.2d 308, 312 (2d Cir.1985); *Gruntal & Co. v. San Diego Bancorp*, No. 94 Civ. 5366(DC), 1996 WL 343079, at *4 (S.D.N.Y. June 21, 1996). Nor can the plaintiffs circumvent this principle by recasting their argument as one based on common law fraud. See *Furer v. Paine, Webber, Jackson & Curtis, Inc.*, 1982 WL 1309, at *2 (C.D.Cal. Apr. 20, 1982). In any event, the plaintiffs have still failed to allege substantial assistance under this theory. While the Ponzi scheme may only have been possible because of Bear Stearns' actions, or inaction, Bear Stearns' conduct was not a proximate cause of the Ponzi scheme. [FN16] Bear Stearns' motion to dismiss is granted.

FN16. While *Fromer* could be read to relieve a plaintiff of the burden of showing proximate cause for aiding and abetting a breach of fiduciary duty, the court explicitly addressed the issues of proximate causation only in the context of a fiduciary's breach. 50 F.Supp.2d at 248. Given the sound reasons for imposing a heightened standard for a secondary actor's liability, see *ABF Capital*, 957 F.Supp. at 1331 n. 5, this court will follow those courts that have required allegations sufficient to support a finding of proximate causation not only for aiding and abetting a fraud, but also for aiding and abetting a breach of fiduciary duty. See, e.g., *Kolbeck*, 939 F.Supp. at 249.

B. EYB, FASB, and K & W

FASB, K & W, and EYB bring their joint motion to dismiss pursuant to Rules 9(b) and 12(b)(1), (b)(2), and (b)(6), Fed.R.Civ.P., and the Private Securities Litigation Reform Act of 1995 ("PSLRA"), 15 U.S.C. § 78u-4(b)(1) et seq. Alternatively, if the motion is denied, FASB, K & W, and EYB move for a more definite statement pursuant to Rule 12(e), Fed.R.Civ.P. These defendants make the following arguments: (1) This Court lacks personal jurisdiction over them because they lack the substantial, continuous and systematic contacts with the United States necessary to exercise personal jurisdiction over a foreign defendant; (2) This Court lacks subject matter jurisdiction over the plaintiffs' securities law claims because foreign plaintiffs purchasing securities in a foreign fund outside the United States cannot assert a claim under United States securities laws against a foreign entity that is not alleged to have taken any action within the United States material to the completion of the fraud; (3) The securities claims are insufficient under Rule 9(b), and the PSLRA *473 because the plaintiffs fail to plead specific facts giving rise to a strong inference that the defendants acted with scienter; (4) The securities laws claims against K & W are time-barred; (5) After the dismissal of the securities laws claims, the Court should decline to exercise subject matter jurisdiction over the common law claims. Finally, EYB further argues that the plaintiffs have failed to state a claim for controlling person liability.

1. Personal Jurisdiction

a. Legal Standard

[16] The Exchange Act "permits the exercise of personal jurisdiction to the limit of the Due Process Clause" *SEC v. Unifund SAL*, 910 F.2d 1028, 1033 (2d Cir.1990). [FN17] The due process jurisdictional inquiry has two parts, the "minimum contacts" inquiry and the "reasonableness" inquiry. *Metropolitan Life Ins.*, 84 F.3d at 567. The minimum contacts analysis is governed by *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), and its progeny. While *International Shoe* dealt with minimum

contacts with the forum state,

FN17. The parties incorrectly apply New York law to the personal jurisdiction issue. Where a case is brought pursuant to federal question jurisdiction and "a defendant resides outside the forum state, a federal court applies the forum state's personal jurisdiction rules 'if the federal statute does not specifically provide for national service of process.' " *PDK Labs, Inc. v. Friedlander*, 103 F.3d 1105, 1108 (2d Cir.1997) (citation omitted).

where, as here, the United States, and not the State of New York, is the only sovereign whose power to adjudicate is in question, it logically follows that the relevant 'minimum contacts' ... should be the defendant's contacts with the United States, and not his contacts with the State of New York.

SEC v. Softpoint, Inc., No. 95 Civ. 2951(GEL), 2001 WL 43611, at *3 (S.D.N.Y. Jan. 18, 2001); see also *Chew v. Dietrich*, 143 F.3d 24, 28 n. 4 (2d Cir.1998). Each defendant's contacts with the forum "must be assessed individually." *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 n. 13, 104 S.Ct. 1473, 79 L.Ed.2d 790 (1984).

Two types of jurisdiction should be analyzed in determining whether there are sufficient minimum contacts, specific jurisdiction and general jurisdiction.

Specific jurisdiction exists when "a State exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum"; a court's general jurisdiction, on the other hand, is based on the defendant's general business contacts with the forum state and permits a court to exercise its power in a case where the subject matter of the suit is unrelated to those contacts.

Metropolitan Life Ins., 84 F.3d at 567-68 (citing *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 414-16 & nn. 8-9, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984)); see also *Aerogroup Int'l, Inc. v. Marlboro Footworks, Ltd.*, 956 F.Supp. 427, 439 (S.D.N.Y.1996).

To find specific jurisdiction, the Court must determine that "the defendant has 'purposefully directed' his activities at

residents of the forum, and the litigation results from alleged injuries that 'arise out of or relate to' those activities." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985). Although courts look to whether it was foreseeable to the defendant that its actions would cause injury in the forum State, the Supreme Court has made clear that foreseeability requires that " 'the defendant's conduct and connection with the forum State are such that he should reasonably *474 anticipate being haled into court there.' " *Id.* at 474, 105 S.Ct. 2174 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980)). In sum, a defendant must have " 'purposefully avail[ed] itself of the privilege of conducting activities within the forum State.' " *Burger King Corp.*, 471 U.S. at 475, 105 S.Ct. 2174 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958)). This requirement "ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts." *Burger King Corp.*, 471 U.S. at 475, 105 S.Ct. 2174. See also *Agency Rent A Car Sys., Inc. v. Grand Rent A Car Corp.*, 98 F.3d 25, 32 (2d Cir.1996).

To find general jurisdiction, the defendant must have "continuous and systematic general business contacts" with the jurisdiction. *Helicopteros*, 466 U.S. at 416, 104 S.Ct. 1868. This is a fact-specific inquiry that requires courts to assess the defendant's contacts "as a whole." *Metropolitan Life Ins.*, 84 F.3d at 570 (emphasis in original). Moreover, "[b]ecause general jurisdiction is not related to the events giving rise to the suit, courts impose a more stringent minimum contacts test" than that applicable to specific jurisdiction. *Id.* at 568; see also *Aerogroup*, 956 F.Supp. at 439.

The second part of the due process personal jurisdiction test is determining the reasonableness of the exercise of jurisdiction. In undertaking this analysis, the Supreme Court has identified the following factors:

- (1) the burden that the exercise of jurisdiction will impose on the defendant;
- (2) the interests of the forum state in

adjudicating the case; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of the controversy; and (5) the shared interest of the states in furthering substantive social policies.

Metropolitan Life Ins., 84 F.3d at 568 (citing *Asahi Metal Indus. Co. v. Superior Court of California, Solano County*, 480 U.S. 102, 113-14, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987)); see also *SEC v. Euro*, 1999 WL 76801, at *3.

[17] Finally, pursuant to the doctrine of "pendent personal jurisdiction," a district court can assert personal jurisdiction over parties on related state law claims where "a federal statute authorizes nationwide service of process, and the federal and state claims 'derive from a common nucleus of operative fact' " even where personal jurisdiction is "not otherwise available." *IUE AFL-CIO Pension Fund v. Herrmann*, 9 F.3d 1049, 1056 (2d Cir.1993) (quoting *United Mine Workers v. Gibbs*, 383 U.S. 715, 725, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966)).

b. Application to K & W, FASB and EYB

2. Minimum Contacts Analysis

[18][19] K & W, FASB and EYB are alleged to have served as Fund administrators. K & W served as the Administrator beginning in September 1995, pursuant to an agreement signed by Berger and Jan Spiering, President of K & W and Managing Partner of EYB. FASB replaced K & W in February 1997, pursuant to an agreement signed by Berger and Derek Stapley, an EYB principal. These agreements provided that the Administrator would, among other things, maintain records of Fund transactions, disburse payments of the Fund's costs and expenses, collect subscription payments, keep the Fund's accounts and those records required by law, prepare monthly financial statements, file *475 any necessary tax returns, and allow the Fund's auditor to inspect the register and any other records. Plaintiffs allege that EYB, K & W, and FASB used fictitious statements received from Berger to prepare and disseminate materially

inflated NAV calculations to investors, ignoring the accurate financial statements prepared by Bear Stearns.

The plaintiffs have shown through discovery that each of these defendants functions as an integrated member of the international Ernst & Young enterprise. During the period of the scheme alleged in the Complaint, this enterprise sought to develop brand recognition around the world for the name Ernst & Young, to coordinate the work of all the offices, and to market their work with the promise of effectively coordinated international work. EYI organizes the Ernst & Young enterprise from its executive office in New York. It functions as a Member Association. The Articles of Association, adopted in 1997, provide for "coordination and facilitation of the development of global strategies and initiatives ... [and] of investments and resources allocation." Members are urged to "promote an international identity" and to refer work to other Members. The "Member's Pledge" commits each member to market itself as part of an integrated entity capable of providing services around the globe. It reads, in part,

As a Member of Ernst & Young International, Ltd. (the "Company") we have bound ourselves to use our best efforts to carry out the purposes and follow the policies of the Company and to cooperate with the Company. [Members agree to] prepare regional and country strategic plans that conform to the international plan ... To promote an international identity, including adopting of the Ernst & Young name (wherever permitted by law) as soon as practicable ... To participate in worldwide initiatives ... to accept a commitment of worldwide resources and the establishment of fees for multinational engagements by multinational-client service executives, with appropriate communication and consultation ... to obtain work for the network of Members, to the extent practicable. (Emphasis added).

Jurisdictional discovery revealed that Ernst & Young is in the process of further integrating its various entities around the

world. Jan Spiering, President of K & W and FASB and Managing Partner of EYB, described the integration as a process "to get more of a one firm, centralized firm approach." In March 1999, a "global advertising campaign" was launched in order to further "consistency of brand image." A "knowledge management initiative" aims "to insure as much information as possible is maintained on computers" from which the various Ernst & Young offices can "draw information." In addition, the Ernst & Young Global Site Project, as described in a 1999 Manual, aims to coordinate 35 different web sites in order to "unify the Ernst & Young Web presence to consistently support and build our global brand." The Project Overview cites the importance of a "consistent experience" for the audience such that "[f]rom the moment a person visually identifies our logo to the experience they have working with us, each point of contact we have with our many audiences must sing the same Ernst & Young song." Finally, the Global Exchange Program enables individuals from one global office to relocate temporarily to another office "almost anywhere in the world."

Despite this strong evidence of integration, coordinated from the New York offices of EYI, each of these defendants *476 argues that it is a foreign entity operating exclusively in Bermuda with no offices, employees or agents in the United States and further points out that it has no bank accounts, is not registered to do business, and pays no taxes in the United States. To the extent that personnel visit the United States, each defendant asserts that it is "on a limited and sporadic informational and solicitation basis." Each of these defendants further argues that its activities in relation to the Fund were "expressly limited and foreign based," in that they signed and performed service agreements outside of the United States, communicated with investors from Bermuda, dealt with bankers and auditors in Bermuda, maintained all record keeping and made all NAV calculations in Bermuda, and met with no investors in the United States. In effect, they ask this Court, in determining whether they have the minimum contacts with this country

necessary to assert personal jurisdiction over them, to ignore their integration with a global firm, an integration on which they rely each day both to attract international business and to provide the resources necessary to perform that work.

Through jurisdictional discovery, however, the plaintiffs have established facts supporting a prima facie case that each Bermuda-based Ernst & Young defendant has the minimum contacts with the United States sufficient to support personal jurisdiction. Those facts in summary form include the following.

FASB

The plaintiffs have presented prima facie evidence of the existence of general jurisdiction over FASB. FASB provides administrative services principally for funds which are created, managed and operated from the United States. Between 66% and over 90% of FASB's annual revenues derive from funds with United States investment managers. As part of their services as fund administrators, FASB regularly calls investors or their advisors in the United States and sends them materials, including copies of monthly account valuations. Further, FASB's marketing materials emphasize that it has "[a]ccess to EYI's staff support and industry specialists" as well as "direct download connections with U.S. brokers." These facts--which constitute a prima facie showing of continuous and systematic general business contacts with the United States--are sufficient to support a finding of general jurisdiction.

The plaintiffs have also carried their burden of showing specific jurisdiction over FASB. As the Offer Memo described, the Fund was to be available to United States investors, specifically "U.S. entities subject to the Employee Retirement Income Security Act of 1974, as amended ("ERISA") or other entities exempt from U.S. tax," as well as foreign investors. Consequently, FASB sent approximately 80 letters on FASB letterhead with enclosed subscription documents to individuals in the United States soliciting

investors for the Fund. As important, FASB signed a contract to serve as the administrator of a Fund which, while technically operating as an offshore-fund, was entirely managed out of New York by Berger. FASB well understood that the "decisionmaking authority was vested in" Berger in New York. Burger King Corp., 471 U.S. at 480, 105 S.Ct. 2174. Berger, through MCM, invested the Fund's assets in United States' securities traded on American exchanges. FASB sent bills to Berger in New York for approval prior to payment by the Fund and received from the United States all of the information from which it prepared the statements it disseminated as Fund administrators. In that role it made countless mailings to investors or to the *477 agents of investors residing in the United States. Given these activities, it is difficult to imagine how the Fund's administrator would lack the sufficient contacts with the United States to justify finding specific jurisdiction. These facts apply also to the existence of specific jurisdiction over K & W, [FN18] which FASB replaced in 1997, as the contracted administrator for the Fund, and EYB which, as discussed below, was heavily involved with the Fund through its intertwined relationship with FASB and K & W. None of these entities can credibly assert that the quality and nature of their relationship with the United States, arising out of their work for the Fund, was random, fortuitous or attenuated. *Id.*

FN18. In support of specific jurisdiction, the plaintiffs produced through discovery roughly 20 letters on K & W letterhead soliciting investors in the United States for the Fund with enclosed subscription documents.

K & W

Although the showing here is substantially weaker, the plaintiffs have also presented prima facie evidence sufficient to support a finding of general jurisdiction over K & W. First, as a fund administrator, K & W regularly calls investors and their advisors in the United States and sends them copies of monthly account valuations as well as other materials. Further, K & W signed the

Member Pledge as well as a license agreement with EYI, by which K & W agreed to comply with EYI's rules and procedures, including quality control procedures, and allowed EYI to review its services to ascertain compliance with rules and procedures. [FN19] Further, K & W held itself out as part of Ernst & Young's international network. For example, in response to Berger's complaints about confusion stemming from faxes bearing the "Ernst & Young" letterhead rather than that of K & W, K & W stated: "My only mitigating comment in this regard is that [K & W] is part of Ernst & Young's international affiliation." Because of K & W's systematic solicitation of business in the United States, and its dependent and intertwined relationship with EYI, a United States run organization, prima facie evidence exists of continuous and systematic general business contacts with the United States.

FN19. The Pledge was signed: "Kempe and Whittle which also practices as Ernst & Young in Bermuda." The license includes a choice of law provision indicating that the license is "governed by and construed in accordance with the laws of the State of New York, U.S.A."

EYB

The plaintiffs have also produced prima facie evidence to warrant a finding of general jurisdiction over EYB. First, EYB regularly sends letters to individuals in the United States with promotional materials, soliciting them as new clients for EYB's offshore administrative service. EYB actively involves itself in the Ernst & Young international network. For example, as part of the Global Exchange Program, it has received two employees from United States offices who were maintained on the US-based payroll. More significantly, roughly 30% of EYB's business is for multinational clients where the overall account relationship is managed by a "global account partner" outside of Bermuda, some of whom are in the United States. The global account partner sets the final fee. When the Managing Partner of EYB serves as the global account partner in Bermuda, he travels to the United

States with other EYB personnel for meetings. This has occurred at least five times in the last three years. Another EYB principal indicated in his affidavit that he travels to the United States approximately five times per year to meet with companies which *478 provide services to clients of EYB, FASB, and K & W and to attend industry conferences. Finally, since at least 50 EYB clients are audited in accordance with U.S. GAAP, EYB regularly consults various Ernst & Young offices in the United States on issues relating to U.S. GAAP, U.S. GAAS, U.S. income taxes, and U.S. securities laws. At least five EYB clients are public reporting companies that file their financial statements with the SEC. In many other cases, an EYB audit is consolidated with another Ernst & Young audit and filed as a consolidated statement with the SEC. These jurisdictional facts constitute continuous and systematic general business contacts with the United States sufficient to support a finding of general jurisdiction.

Finally, although EYB was not named as the Fund administrator, its intertwined relationship with FASB and K & W, and indeed its control of these entities, meant that it had its own significant and direct involvement with the Fund. Discovery revealed that these Bermuda defendants effectively function as a single entity. The Managing Partner of EYB is the President of K & W and FASB; the partners of EYB are the shareholders of K & W and FASB. K & W and FASB share offices with EYB and their employees are on the EYB payroll. The name plate for their common reception area reads only "Ernst & Young." Time and billing systems for the three entities are merged and a combined management report is generated on a monthly basis. Compensation is set by overall performance in the three entities. FASB and K & W identify themselves as interchangeable with or owned by EYB: K & W signed the Member's Pledge as "Kempe and Whittle which also practices as Ernst & Young in Bermuda," and FASB identified itself in two separate documents addressed to Berger as a "Bermuda incorporated company owned by the partners of EYB" and as an "affiliate of

EYB."

Despite EYB's contention that it had "no contractual, working or other relationship or connection with the Fund" or with Berger, discovery has shown the opposite. EYB has even identified itself to Berger as the entity in charge of the Fund's work. A letter sent in February 1997, by Spiering in his capacity as Managing Partner of EYB, informed Berger that FASB would replace K & W "as the corporate vehicle through which we provide fund accounting and administration services to existing and future clients" and discusses "our current services" and "our client base" (emphasis added). Discovery has shown numerous telephone calls and correspondence from EYB personnel to Berger in New York as well as four substantive business meetings in New York between Berger and EYB personnel. In February 1995, their joint discussions included the structure of the Fund, services available to clients, and fee negotiations. In a follow-up letter to Berger, an EYB employee emphasized that "our affiliation with Ernst & Young international network allows us to draw on the expertise both within our own Investment Fund Audit teams and the rest of our worldwide offices We can also draw on our other offices to assist with staffing requirements should the need arise." At a second meeting in New York in June 1996, the Investment Management Agreement was signed, allowing Berger to make trading and investment decisions on behalf of the Fund, and arrangements were discussed for the direct downloading of information from Bear Stearns in New York to the Ernst & Young computer system in Bermuda. Berger and the EYB representatives again discussed management and incentive fees. Two other New York meetings, in November 1996 and in 1999, included conversations about procedures *479 and fund administration services as well as requests of information from Berger.

In addition to the meetings in New York, EYB used Ernst & Young personnel in the United States for a variety of tasks related to the Fund. In March 1995, Spiering wrote to an individual in the "New York office," asking

him if he knew of Berger or FAM, and whether he was "aware of any reasons which would influence our decision whether or not to accept appointment." In May 1999, EYB personnel requested that the investigative practice group at Ernst & Young in the United States do a review of FAM. In response, a partner at the office of "Ernst & Young, LLP," in Ohio visited the Columbus offices of FAM, and another "Ernst & Young, LLP" employee sent several e-mails to Derek Stapley relating to an investigation of FAM. Taken together, this evidence constitutes prima facie evidence that EYB purposefully directed its activities to residents of the United States such that it should have anticipated being haled into courts of this country to answer on claims arising out of the Fund's operations and its work for the Fund.

3. Reasonableness Inquiry

[20] K & W, FASB and EYB each argue that subjecting them to personal jurisdiction would be unreasonable because, among other things, jurisdiction would be unduly burdensome and the United States has little or no inherent interest in adjudicating the plaintiffs' claims. Their arguments are unconvincing. New York has a substantial interest in litigating a fraud which was conceived of and managed in New York. The United States has a substantial interest in the enforcement of its securities laws and the protection of investors in United States securities markets, even those who invest through participation in a fund. The plaintiffs reside in many countries such that the choice of the Southern District of New York for litigation provides both a convenient forum and one with expertise in this kind of litigation. The litigation will not impose undue burden on these defendants, each of whom has substantial contacts with the United States and is part of a global enterprise managed from New York City.

4. Subject Matter Jurisdiction

The securities laws are silent regarding the issue of extraterritorial application. In analyzing transnational frauds, courts must determine "whether Congress would have

wished the precious resources of the United States courts' to be devoted to such transactions." *Alfadda v. Fenn*, 935 F.2d 475, 478 (2d Cir.1991) (quoting *Psimenos v. E.F. Hutton & Co.*, 722 F.2d 1041, 1045 (2d Cir.1983)); see also *Carr v. Equistar Offshore, Ltd.*, No. 94 Civ. 5567(DLC), 1995 WL 562178, at *6 (S.D.N.Y. Sept. 21, 1995). The Second Circuit has developed two tests to determine whether the Court should entertain subject matter jurisdiction over a particular transnational securities fraud claim, the conduct test and the effects test. *Itoba Ltd. v. Lep Group PLC*, 54 F.3d 118, 121-22 (2d Cir.1995). The two tests need not be applied "separately and distinctly," and "an admixture or combination of the two often gives a better picture of whether there is sufficient United States involvement to justify the exercise of jurisdiction by an American court." *Id.* at 122. Indeed, certain facts, such as making telephone calls or sending investment information to the United States, can be "characterized as either conduct or effects in the United States." *Banque Paribas*, 147 F.3d at 128 & n. 13.

[21] The effects test looks to the effect of the fraudulent conduct that "impacts on *480 'stock registered and listed on [an American] national securities exchange and [is] detrimental to the interests of American investors.'" *Itoba*, 54 F.3d at 124 (citation omitted). The impact on investors resident in the United States, whatever their nationality, is the focus of the effects test. *Banque Paribas*, 147 F.3d at 128 n. 12.

[22][23] A federal court has subject matter jurisdiction under the conduct test "if (1) the defendant's activities in the United States were more than 'merely preparatory' to a securities fraud conducted elsewhere, and (2) these activities or culpable failures to act within the United States 'directly caused' the claimed losses." *Itoba*, 54 F.3d at 122 (citations omitted); see also *Banque Paribas*, 147 F.3d at 129 (holding these factors to constitute the "key element" of the conduct test). The goal of the conduct test is to prevent the United States from being "used as a base for manufacturing fraudulent

security devices for export, even when these are peddled only to foreigners.' " Itoba, 54 F.3d at 122 (quoting Psimenos, 722 F.2d at 1045). Consequently, where defendants have undertaken significant steps in the United States in furtherance of a fraudulent scheme, United States courts have jurisdiction over suits arising from that conduct even if the final transaction occurs outside the United States and involves only foreign investors. Alfadda, 935 F.2d at 478-79 (citing Restatement (Second) of Foreign Relations Law of the United States § 416(d) (1987)). The Second Circuit has found jurisdiction over a "predominantly foreign" securities transaction where, "in addition to communications with or meetings in the United States, there has also been a transaction on a U.S. exchange, economic activity in the U.S., harm to a U.S. party, or activity by a U.S. person or entity meriting redress." Banque Paribas, 147 F.3d at 130.

[24] The plaintiffs have alleged facts sufficient to withstand a motion to dismiss for lack of subject matter jurisdiction. Although the named plaintiffs are foreign citizens, and the Fund operated as an offshore-fund, the fraud was run from the United States and it was the decisions made in the United States that led directly to the investors' losses. Specifically, the plaintiffs allege that the fraud was conceived and executed in New York by Berger, who implemented the scheme through his wholly-owned company, MCM, a Delaware corporation with its principal place of business in New York. The Offer Memo advertises the Fund to "U.S. entities subject to the Employee Retirement Income Security Act of 1974, as amended ("ERISA") or other entities exempt from U.S. tax," among others. Berger's investment strategy principally involved the concentrated short selling on American exchanges of securities of United States technology companies. The Fund's securities transactions were cleared in New York by Bear Stearns and all of the Fund's assets were in Bear Stearns' custody in New York. Berger then prepared the fictitious financial statements, which were sent offshore to the Fund's administrators and auditors, and then re-transmitted back into this country and

abroad to prospective investors, current shareholders, and their agents.

The defendants argue that courts cannot aggregate defendants' conduct and look at the scheme as a whole when analyzing subject matter jurisdiction but rather must look to the conduct of each defendant individually. Even were this Court to accept the defendants' argument, the result would be the same. Against EYB, FASB, and K & W in particular, the plaintiffs allege that as the Fund Administrators, these defendants disseminated materially inflated NAV statements to the Fund's shareholders *481 or to prospective investors, including addresses in the United States, a fact which K & W and FASB concede in their memorandum of law. Jurisdictional discovery revealed that recipients of monthly NAV statements included American residents who invested in the Fund through offshore vehicles but who received their NAV statements in the United States, either directly or through their investment managers. See *Leasco Data Processing Equipment Corp. v. Maxwell*, 468 F.2d 1326, 1338 (2d Cir.1972) (analyzing effect in the United States by looking at beneficial owner rather than off-shore vehicle used to purchase securities). Plaintiffs further allege that in addition to trips from Bermuda to New York for substantive business meetings with Berger, EYB, FASB, and K & W personnel were in regular, often daily, telephone/fax or correspondence contact with Berger seeking approval for NAV calculations, redemption requests, or other matters, or to negotiate additional fees.

5. Failure to Plead Section 10(b) Claim with Particularity

Section 10(b) and Rule 10b-5 prohibit fraudulent activities in connection with the purchase or sale of securities. The proscriptions of Section 10(b) and Rule 10b-5 were meant to be broad and inclusive. See, e.g., *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1466 (2d Cir.1996). To state a cause of action under Section 10(b) and Rule 10b-5, "a plaintiff must plead that in connection with the purchase or sale of securities, the

defendant, acting with scienter, made a false material representation or omitted to disclose material information and that the plaintiff's reliance on defendant's action caused plaintiff injury." Rothman, 220 F.3d at 89 (citation omitted). Securities fraud claims are subject to the pleading requirements discussed above.

[25] Plaintiffs have adequately alleged a securities fraud claim against EYB, FASB, and K & W. As discussed above, the Complaint alleges that these defendants knowingly and/or recklessly used false data from Berger--despite concurrent receipt of accurate financial statements from Bear Stearns--to prepare inflated NAV statements and disseminate them to plaintiffs who relied upon the information in their investment decisions regarding the Fund and thereby suffered injury. These defendants further used the false NAV figures to process new subscriptions, issue new shares of the Fund, and price investor redemptions. Several examples of specific allegations adequately pleading at the very least reckless behavior on the part of these defendants are detailed in the background discussion and need not be repeated here.

[26][27] EYB asserts that because only FASB and K & W signed service agreements with the Fund to serve as administrators, the plaintiffs have failed to specify any statement made by EYB which is alleged to have been misleading and therefore make EYB a primary violator. A primary violator of Section 10(b) is any actor who "participated in the fraudulent scheme." SEC v. U.S. Env'tl., Inc., 155 F.3d 107, 112 (2d Cir.1998) (citation omitted). While it is clear from the Supreme Court's decision in Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 167, 114 S.Ct. 1439, 128 L.Ed.2d 119 (1994), that private civil liability under Section 10(b) applies only to those who "engage in the manipulative or deceptive practice" and not to those "who aid and abet the violation," a finding that the defendant communicated the misrepresentation directly to the plaintiff is not necessary. It is necessary, however, for the misrepresentation to have *482 been attributed to the defendant

at the time of dissemination. Wright v. Ernst & Young LLP, 152 F.3d 169, 175 (2d Cir.1998). The necessity for this requirement is premised on the plaintiff's obligation to "show reliance on the defendant's misstatement or omission to recover under 10b-5." Central Bank, 511 U.S. at 180, 114 S.Ct. 1439.

The plaintiffs have presented documents to support a claim against EYB as a primary violator of Section 10(b). For example, FASB's mailings to investors were on letterhead that read "Fund Administration Services (Bermuda) Ltd., An Affiliate of Ernst & Young, Bermuda." At the bottom of the page, the document explained that FASB "is a company owned by the partners of" EYB. These statements are sufficient to tie EYB to each of the false NAVs disseminated by FASB through such mailings and to justify an investor's reliance on not just FASB but also EYB for the accuracy of the information contained in the mailings. "Any person or entity, including a lawyer, accountant, or bank, who employs a manipulative device or makes a material misstatement (or omission) on which a purchaser or seller of securities relies may be liable as a primary violator under 10b-5, assuming all of the requirements for primary liability under Rule 10b-5 are met." Id. at 191, 114 S.Ct. 1439 (emphasis in original). To the extent there is insufficient specificity in their first amended complaint, the plaintiffs will be permitted to cure the deficiency.

6. Statute of Limitations Bar to Section 10(b) Claim against K & W

[28] Securities claims must be brought within one year of discovery of a violation and within three years of the actual violation. Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 360, 111 S.Ct. 2773, 115 L.Ed.2d 321 (1991); Rothman, 220 F.3d at 96. K & W argues that the plaintiffs' securities law claims against it are time barred because the Complaint was filed more than three years after February 1, 1997, the date on which the Complaint alleges that K & W was replaced by FASB as the Fund's

administrator. Plaintiffs assert that because the Complaint alleges both that K & W is part of the single, unified "Ernst & Young" firm and that all of the defendants therefore acted as one entity from the inception through the discovery of the fraud, it is irrelevant for statute of limitations purposes that FASB replaced K & W in 1997.

[29] The Second Circuit has treated motions to dismiss based on statute of limitations under the same standard as motions to dismiss for failure to state a claim. *Harris v. City of New York*, 186 F.3d 243, 250 (2d Cir.1999). The plaintiffs have, however, failed to allege any material misrepresentation made by K & W within the statute of limitations period that was relied upon by the investors and have thus failed to allege that K & W was a primary violator of the securities laws after FASB replaced K & W as the Fund's administrator in February 1997. FASB and K & W's motion to dismiss the securities claims against K & W on statute of limitations grounds is granted. Similarly, three of the state law claims alleged against K & W, namely negligence, gross negligence, and professional malpractice, are dismissed based on three year statutes of limitations.

Because the federal claims against K & W have been dismissed, it may be held in this action for common law fraud, aiding and abetting common law fraud, and negligent misrepresentation, all of which have six year statutes of limitations under New York law, [FN20] only if the plaintiffs have sufficiently alleged that K & W is amenable to service of process under New York's long-arm statute, in addition to the federal due process test discussed above. *Kernan v. Kurz-Hastings*, 175 F.3d 236, 240 (2d Cir.1999).

FN20. The parties have not addressed whether any other jurisdiction's statute of limitations must be considered under New York's borrowing statute.

[30] The plaintiffs have adequately met their burden under Section 302(a)(1), N.Y. C.P.L.R. (McKinney 1990), whereby a defendant is subject to personal jurisdiction in New York if it "transacts any business within the state"

and the cause of action "arises out of" that transaction. *PDK Labs, Inc. v. Friedlander*, 103 F.3d 1105, 1109 (2d Cir.1997). A claim "arises out" of a party's transaction of business if it is " 'sufficiently related to the business transacted that it would not be unfair to deem it to arise out of the transacted business,' " *id.* 1109 (citation omitted), that is, if an " 'articulable nexus' " exists between the claim and the transaction, *Credit Lyonnais Sec. (USA), Inc. v. Alcantara*, 183 F.3d 151, 153 (2d Cir.1999) (citation omitted), and the defendant has " 'purposefully availed [itself] of the privilege of conducting activities within New York and thereby invoc[ed] the benefits and protections of its laws.' " *Fort Knox Music Inc. v. Baptiste*, 203 F.3d 193, 196 (2d Cir.2000) (citation omitted).

[31] K & W argues that this Court lacks jurisdiction because its contacts with New York were infrequent. Even if that were true, as discussed in the very case on which K & W relies, it is not the "quantity of contacts with New York, but rather the nature and quality of the contacts" that are the focus of the Section 302(a)(1) analysis. *Lawrence Wisser & Co. v. Slender You, Inc.*, 695 F.Supp. 1560, 1563 (S.D.N.Y.1988). K & W won the right to work as the administrator of the Fund through face-to-face negotiations with Berger in New York. K & W allegedly ignored accurate financial statements received from Bear Stearns in New York and took direction from Berger in New York for a Fund managed in New York and trading securities on New York exchanges. Jurisdictional discovery also produced roughly 20 letters from K & W soliciting Fund investors and/or their agents at New York addresses. It regularly sent NAV statements and other Fund documents to investors or their managers in New York. Looking at the "totality of the circumstances concerning [K & W's] connections to [New York]," *id.*, and given K & W's conduct and connection to New York as discussed earlier in this Opinion, it should reasonably have anticipated being haled into court here. [FN21] Accordingly, the claims of common law fraud, aiding and abetting common law fraud, and negligent misrepresentation against K & W remain in this action.

FN21. As discussed above, the plaintiffs have met their jurisdictional burden against K & W under a due process analysis.

7. Section 20(a) Claim: Controlling Person Liability

[32] EYB argues in abbreviated form that the plaintiffs have failed to allege adequately a claim for controlling person liability. To establish a prima facie case of controlling person liability under Section 20(a) of the Exchange Act, 15 U.S.C. § 78t(a), a plaintiff must show:

(1) a primary violation by a controlled person; (2) control of the primary violator by the defendant; and (3) "that the controlling person was in some meaningful sense a culpable participant" in the primary violation.

*484 *Boguslavsky v. Kaplan*, 159 F.3d 715, 720 (2d Cir.1998) (quoting *SEC v. First Jersey*, 101 F.3d at 1472); see also *In re Livent*, 78 F.Supp.2d 194, 221 (S.D.N.Y.1999).

[33] The second element, or control over a primary violator, may be established by showing that "the defendant possessed 'the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.'" *SEC v. First Jersey*, 101 F.3d at 1473 (quoting 17 C.F.R. § 240.12b-2); see also *Gabriel Capital, L.P. v. NatWest Fin., Inc.*, 122 F.Supp.2d 407, 426 (S.D.N.Y.2000). Actual control over the wrongdoer and the transactions in question is necessary for control person liability. See *In re Blech Sec. Litig.*, 961 F.Supp. 569, 586-87 (S.D.N.Y.1997). Thus, officer or director status alone does not constitute control. See *In re Livent*, 78 F.Supp.2d at 221 (collecting cases). A plaintiff "need only plead facts supporting a reasonable inference of control" to survive a motion to dismiss. *Gabriel Capital*, 122 F.Supp.2d at 426-27.

[34] The third element--the culpable participation element--is subject to the PSLRA's heightened pleading standard. That is, plaintiffs must "state with particularity facts giving rise to a strong inference that [the

controlling person] in some meaningful sense culpably participated in [the controlled person's] primary violation." *Gabriel Capital*, 122 F.Supp.2d at 427. This burden is satisfied if plaintiffs plead facts "giving rise to a strong inference that the controlling person knew or should have known that [the controlled person] was engaging in fraudulent conduct," but "took no steps to prevent the primary violation." *Gabriel Capital*, 122 F.Supp.2d at 428-29.

[35] The Complaint adequately alleges both actual control and culpable participation. In particular, the plaintiffs allege that EYB identified FASB and K & W as "the corporate vehicle[s] through which" EYB provided administrative services to its clients and that EYB "owned and controlled" FASB and K & W by exercising "direct, daily supervision, oversight and control" through common personnel and shared offices. Further, the Complaint is peppered with specific allegations of participation by EYB personnel in the fraud including, among other examples noted throughout this Opinion, the preparation of false NAV statements by two EYB personnel alleged to be overseeing administration services for the Fund, and their failure to investigate either the discrepancies between Berger's statements and those received from Bear Stearns or the suspicious appearance of Berger's statements on their face. Accordingly, EYB's motion to dismiss plaintiffs' claim of controlling person liability is denied.

Finally, the motion brought by the three Bermuda entities pursuant to Rule 12(e) for a more definite statement is granted. Any amended pleading must identify the specific defendant or defendants against whom an allegation is being made, and may not rely on collective assertions.

C. EYI

EYI moves to dismiss the actions pursuant to Rules 9(b) and 12(b)(6). [FN22] EYI argues that the Cromer plaintiffs fail to state a claim for a violation of federal securities law as either a primary violator or under a theory of

controlling person liability. In particular, EYI argues that the plaintiffs have attempted to hold it liable through a *485 "single, unified company" theory, grouping EYI with EYB, FASB, and K & W and ignoring the "separate legal identity" of EYI. EYI argues that it is not a professional services firm which provides accounting, auditing or other professional services to clients, but rather a "membership association" of separately organized accounting firms throughout the world which agree to conduct their individual practices in accordance with EYI's Articles of Association. Finally, EYI argues that the Court should not exercise jurisdiction over the pendent claims should the federal securities claims be dismissed.

FN22. EYI initially moved for both dismissal and summary judgment. In its reply brief, however, EYI limited its motion to the dismissal arguments.

1. Federal Claims

[36] The plaintiffs have failed to state a claim against EYI for securities fraud. First, the plaintiffs have failed to state a claim for securities fraud as a primary violator. As discussed above, a secondary actor may be held liable for securities fraud where "the misrepresentation [is] attributed to that specific actor at the time of public dissemination, that is, in advance of the investment decision," Wright, 152 F.3d at 175. While the plaintiffs have alleged that EYI was part of the global Ernst & Young enterprise, the sole allegation linking EYI to this fraud was the Offer Memo's indication that FASB or K & W, the identified administrators of the Fund, were "affiliates of EYI." That alone is not sufficient to connect EYI to the dissemination of false statements by FASB or K & W. [FN23] Unlike EYB, there was no reference to EYI in the documents in which the false statements were contained. Accordingly, EYI's motion to dismiss the Section 10(b) claim against it is granted.

FN23. Plaintiffs argue that, in the alternative, EYI may be held liable for securities fraud through a piercing-the-veil theory. Even if this theory remains valid in the aftermath of Central Bank, the

plaintiffs have not alleged facts sufficient to hold EYI liable under this theory. Under New York law, plaintiffs may pierce the corporate veil where they show: "(i) that the owner exercised complete domination over the corporation with respect to the transaction at issue; and (ii) that such domination was used to commit a fraud or wrong that injured the party seeking to pierce the veil." Thrift Drug, Inc. v. Universal Prescription Adm'rs, 131 F.3d 95, 97 (2d Cir.1997) (emphasis in original) (citation omitted). Complete domination has been found where the dominated company held no shareholder meetings, maintained no records of directors' meetings, was inadequately capitalized, or lent money to the dominated company without corporate purpose, or where the dominated company/individual was the sole shareholder and director of the dominated company. *Id.* Using domination to commit fraud has been interpreted to require a showing that "the owners, through their domination, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against that party such that a court in equity will intervene." *Id.* While the plaintiffs have alleged that Ernst & Young operated as a global, financially interdependent enterprise and that EYI provided executive management and strategic direction for its members, it has not alleged that FASB, K & W or EYB lacked any corporate form or that EYI used its control to perpetrate a fraud.

The elements of a prima facie case of controlling person liability are discussed above. The plaintiffs have failed to allege "culpable participation" by EYI with the particularity required under the law. The plaintiffs point to the Complaint's allegations that an e-mail sent in February 1999, from a DTB partner to a DTUS partner stated: "Having spoken to the Administrator (it is Ernst & Young Fund Administration Company) here in Bermuda. Off the record, the Administrator advised that they had heard something similar [about fraudulent conduct] via an U.S. Ernst & Young Partner." This allegation is insufficient to support a "strong inference" that EYI knew or should have known that the other Ernst & Young defendants were engaging in fraud. The plaintiffs' claim for *486 controlling person liability against EYI is dismissed.

2. State Law Claims

[37] EYI argues that without a claim of federal securities fraud, the plaintiffs' state claims against EYI should be dismissed for lack of jurisdiction, or alternatively for failure to state a claim under Rule 12(b)(6) and, for claims sounding in fraud, for failure to meet Rule 9(b) pleading requirements. Where no federal claims exist against a defendant, the Court may nonetheless exercise jurisdiction over a pendent state claim, where

[t]he state and federal claims ... derive from a common nucleus of operative fact. If, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then there is power in federal courts to hear the whole.

Baylis v. Marriott Corp., 843 F.2d 658, 664 (2d Cir.1988) (quoting United Mine Workers, 383 U.S. at 725-26, 86 S.Ct. 1130). Even where the sole defendant with federal claims against it is dismissed from the case, the court still has power to exercise supplemental jurisdiction over the state claims against remaining defendants, provided the state and federal claims derive from a common nucleus of operative fact. Mizuna, Ltd. v. Crossland Federal Sav. Bank, 90 F.3d 650, 657 (2d Cir.1996).

Here, the plaintiffs' surviving federal claims against other defendants and state claims against EYI derive from a common nucleus of operative facts. They each stem from the preparation and dissemination of the Fund's allegedly fraudulent NAV statements. The plaintiffs, however, fail to allege adequately their state law claims against EYI.

[38] The plaintiffs have asserted seven state law claims against EYI: common law fraud, negligence, gross negligence, professional malpractice, negligent misrepresentation, aiding and abetting common law fraud and aiding and abetting breach of fiduciary duty. The Complaint contains no specific allegations as to the conduct of EYI--apart from the inadequate, generalized references to the "Ernst & Young Defendants"--necessary to

give rise to any of the elements of their state claims. Further, the plaintiffs have failed to state their claims under an agency theory.

[39][40][41] Under New York law, "an agent must have authority, whether apparent, actual or implied, to bind his principal." Merrill Lynch Interfunding, Inc. v. Argenti, 155 F.3d 113, 122 (2d Cir.1998). Actual authority "arises from a manifestation from principal to agent." Carte Blanche (Singapore) PTE., Ltd. v. Diners Club Int'l, Inc., 758 F.Supp. 908, 919 (S.D.N.Y.1991); see also Empire Communications Consultants, Inc. v. Pay TV, 126 A.D.2d 598, 510 N.Y.S.2d 893, 895 (2d Dep't 1987). The consent for actual authority may be "either express or implied from 'the parties' words and conduct as construed in light of the surrounding circumstances.'" Carte Blanche, 758 F.Supp. at 919 (quoting Riverside Research Inst. v. KMGa, Inc., 108 A.D.2d 365, 489 N.Y.S.2d 220, 223 (1st Dep't 1985)).

[42] For apparent authority to exist, there must be "'words or conduct of the principal, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction'" on behalf of the principal. Standard Funding Corp. v. Lewitt, 89 N.Y.2d 546, 656 N.Y.S.2d 188, 191, 678 N.E.2d 874 (1997) (quoting Hallock v. State, 64 N.Y.2d 224, 485 N.Y.S.2d 510, 513, 474 N.E.2d 1178 (1984)). "In such circumstances, the third party's reasonable *487 reliance upon the appearance of authority binds the principal." Id.; see also Marfia v. T.C. Ziraat Bankasi, 100 F.3d 243, 251 (2d Cir.1996).

[43][44] A related equitable estoppel doctrine can also bind the principal where the third party reasonably relies on the principal's knowing misrepresentations. Cinema N. Corp. v. Plaza At Latham Assocs., 867 F.2d 135, 141 (2d Cir.1989). Similarly, the principal can be deemed to ratify an unauthorized transaction after the fact "where the principal retains the benefit ... with knowledge of the material facts." Standard Funding Corp., 656 N.Y.S.2d at 191, 678 N.E.2d 874; see also New Haven Radio, Inc.

v. Meister (In re Martin-Trigona), 760 F.2d 1334, 1341 (2d Cir.1985).

The Complaint alleges no facts to support the existence of actual authority bestowed upon the Bermuda entities by EYI. While the Complaint points to a letter indicating that K & W and FASB functioned as the "corporate vehicle[s] through which" EYB and EYI provided administrative services to its clients, the letter itself, incorporated in the Complaint by reference, identifies only EYB, not EYI. Specifically, its heading reads "Ernst & Young" accompanied by a Bermuda address and it is signed by a managing partner of EYB. The conclusory allegations that the entities "are each agents and/or mere departments of the other," that EYI "owned and controlled [EYB], FASB, and [K & W]," and that EYI's "office in Bermuda is defendant [EYB]" are insufficient to allege actual authority.

The plaintiffs also fail to allege adequately apparent authority. The Complaint alleges that the four Ernst & Young defendants "held themselves out" as a single global entity but do not specify any express or implied communication by EYI to third parties giving the appearance that the Bermuda entities were acting on behalf of EYI as Fund administrator. The plaintiffs argue that investors understood from the Offer Memo that "an affiliate of Ernst & Young International" would provide services for the Fund. The Offer Memo, however, was a communication by the Fund to the investors, not from EYI to investors. While the plaintiffs do allege a common marketing and advertising scheme in the name of "Ernst & Young," including a global website at "www.ey.com," they do not allege that this advertising scheme was orchestrated by EYI. Even if it were, however, the allegation of a general advertising scheme is not sufficient to create the appearance of authority for EYB, FASB, or K & W to act for EYI as the Fund's administrator.

The only New York case cited by the plaintiffs, *Fogel v. Hertz Int'l, Ltd.*, 141 A.D.2d 375, 529 N.Y.S.2d 484 (1st Dep't 1988),

involved not only a general advertising scheme by the principal, in this case Hertz, but also the making of a reservation through Hertz and the identification of Hertz on the agent's contract with the plaintiff. *Id.* at 485. Other cases cited by the plaintiff also involve more than the advertising that is alleged in the Complaint. In *Wood v. Holiday Inns, Inc.*, 508 F.2d 167 (5th Cir.1975), *Holiday Inns, Inc.* exercised such control over the appearance and operation of its franchisee that there was "virtually no way [the plaintiff] could have known that the servants in the [local] facility were servants of [the franchisee], not of *Holiday Inns, Inc.*" *Id.* at 176. In *Gizzi v. Texaco, Inc.*, 437 F.2d 308, 310 (3d Cir.1971), in addition to national advertising by Texaco, Texaco exercised control over the local service station and the Texaco insignia and slogan were "prominently *488 displayed" there. [FN24]

FN24. The plaintiffs also cite cases where customers were "led to believe" through logos or advertisements that they were dealing with the principal. See *Drexel v. Union Prescription Ctrs., Inc.*, 582 F.2d 781, 795 (3d Cir.1978); *Momen v. United States*, 946 F.Supp. 196, 203 (N.D.N.Y.1996). These cases, however, involved logos or advertisements at retail locations or on products. The Cromer plaintiffs do not allege that EYI's logo appeared on any NAV statements disseminated by the Bermuda entities. Allegations that specific letters went out on "Ernst & Young" letterhead are insufficient. Many of those documents are incorporated by reference into the Complaint, all of which reveal letterhead that reads "Ernst & Young" accompanied by a Bermuda address.

[45] The plaintiffs also fail to allege sufficiently the state common law claims against EYI under a partnership by estoppel theory. Pursuant to Section 27 of New York's Partnership Law, when

a person by words spoken or written or by conduct, represents himself, or consents to another representing him to any one, as a partner in an existing partnership ..., he is liable to any such person to whom such representation has been made, who has, on the faith of such representation, given credit

to the actual or apparent partnership. (emphasis supplied). See also *Milano v. Freed*, 64 F.3d 91, 98 (2d Cir.1995). A corporation may be held liable under Section 27. *Ranieri v. Leavy*, 180 A.D.2d 723, 580 N.Y.S.2d 366, 367 (1992). A person has "given credit" to the partnership not only where he has "extended financial credit, but also [where he] has relied on another party's representations regarding the existence of a partnership." *Four Star Capital Corp. v. Nynex Corp.*, 183 F.R.D. 91, 105 (S.D.N.Y.1997).

The plaintiffs have alleged that, together with EYB, FASB, and K & W, EYI is part of a "unified global pro[fe]ssional services firm" which "function[s] essentially as a global partnership." The Complaint alleges that this partnership is "financially interdependent," globally allocates certain revenues and expenses, shares clients, abides by common operational policies, and uses one another to render services in other jurisdictions. Through common marketing and advertising, Ernst & Young is alleged to represent itself to the public as a unified firm. Further, according to the Complaint, the Offer Memo led investors to believe that they were dealing with an "affiliate of [EYI]." An affiliate, however, is not necessarily a partner. These allegations are insufficient to allege either that EYI represented itself or consented to another representing it as a "partner in an existing partnership" with any of the Bermuda entities, or that the investors "gave credit" to any representations of partnership in making decisions regard to the Fund. Accordingly, EYI's motion to dismiss the entire Complaint against it is granted.

D. DTB

DTB moves to dismiss these actions pursuant to Rules 12(b)(1), (b)(2) and (b)(6). DTB makes the following arguments: (1) This Court lacks personal jurisdiction over DTB because DTB does not engage in continuous and systematic business in the United States, did not have sufficient contact with the United States in connection with the Fund, and cannot be subject to jurisdiction by virtue of

its relationship with DTUS and DTT; (2) This Court lacks subject matter jurisdiction because the Exchange Act does not apply to activities occurring outside of the United States with only a tangential effect inside the United States; and (3) New York choice of law requires this Court to apply Bermuda law to the plaintiffs' claims of aiding and abetting common law fraud and gross negligence, *489 under which these claims do not exist.

1. Personal Jurisdiction

DTB served as the Fund's auditor. Pursuant to the engagement letter signed for each of the years 1996-1999, "Deloitte & Touche" agreed to audit the Fund "to evaluate the fairness of presentation of the statements in conformity with the accounting principles generally accepted in the United States of America." The plaintiffs allege that while DTB issued "clean" reports each year, the audits were materially inaccurate and were issued without reasonable assurances that the Fund's financial statements were free of material misstatements.

Before discussing the jurisdictional facts as they relate to DTB individually, it should be noted that DTB functions as an integrated member of the international Deloitte & Touche enterprise. DTB is a "member firm" of DTT, a Swiss Verein with executive offices in New York. The "Articles of the Verein," dated October 1999, detail the Verein's purposes, including,

to further international alignment, cooperation, and cohesion among the Member Firms; to assure that Member Firms' practices conform to professional standards of the highest quality; to advance the international and national leadership of the Member Firms in rendering Professional Services; to foster the shared beliefs, mission, and common vision for the Member Firms.

The Articles direct Member Firms to "align national plans, strategies, businesses, and operations with global plans, strategies, business, and operations" and to contribute toward the Verein's operating expenses and "make every reasonable effort" to refer

business to other Member Firms. The Verein's Board of Directors is to address "global strategies [and] major transactions" and to "determine the major policies of the Verein." The CEO is invested with the duty of "setting [the Verein's] strategic course" and reviewing and consolidating Member Firms' business and operating plans as well as with reviewing Member Firms' partner compensation processes in order to "ensure consistency with global strategies and goals." If a Member Firm withdraws or is expelled from the Verein, it must "cooperate ... in arranging for the orderly transfer of clients from which it was the receiving Member Firm to another Member Firm." Discovery revealed that over 50% of DTB's business constitutes such "received" business.

DTT's "Globalization Prospectus," dated April 1999, discusses the goal of becoming a "true global firm." It describes the integration process as "evolutionary," having begun in 1989, and proceeding through stages. In a section entitled "Economic Interdependence," the prospectus discusses how aligned practices will "participate in global cost-savings programs to capture savings and facilitate greater uniformity and compatibility throughout the global firm." DTB signed a Global Alignment Resolution in April 1999, pledging to "transform our international organization into a truly global firm."

Finally, a press release issued in December 1999, on the DTT website (www.deloitte.com) counted "advancing its globalization strategy" as one of the "key factors contributing to Deloitte's growth in 1999," and touted its own "seamless, consistent services wherever our clients operate." On a 1999 copyrighted version of its website (www.bermuda.bm), DTB describes itself as "the Deloitte Touche Tohmatsu practice in Bermuda" and boasts of "more than 90,000 people in over 130 countries" delivering "seamless, consistent services wherever our clients operate."

*490 DTB argues that it is not subject to personal jurisdiction because it has no office, telephone number or mailing address in the

United States, is not authorized to do business in the United States, and has no bank account, pays no taxes and owns no property in the United States. DTB further argues that its personnel travel infrequently to the United States in connection with client work and render services almost entirely in Bermuda.

In addition to evidence of DTB's participation in the worldwide DTT Verein, however, the plaintiffs have offered additional facts in support of a finding of general jurisdiction. DTB partners, for example, travel to the United States for business-related meetings. [FN25] At least 50% of DTB's work is for "exempt companies," which are majority-controlled by another company located outside of Bermuda. Over 50% of those exempt companies are located in the United States. DTB audits a captive insurance company located in Bermuda for DTUS' clients and passes the audit to DTUS, which consolidates it with the parent corporations' financial statements and files the papers with the SEC. Further, U.S. GAAS mandates that an auditor have an actuary under the auditor's control to review reserves. Until 1998, DTB had no actuary on staff and "most often" used DTUS for those services. Even after hiring an actuary, DTB has continued to use DTUS actuaries. Based on bills for actuarial consulting and other services, the plaintiffs represent that between 1997 and 2000, DTUS billed DTB over \$350,000 for actuarial services and over \$2.5 million for substantive services, such as assistance in common control presentations, tax consultation, and consultation regarding financial statements. As a member of the Verein, DTB was required to participate in a practice review which was conducted by a "team leader" located in Wilton, Connecticut. DTT acts as a purchasing agent for DTB for such things as office supplies, subscriptions, conferences, and software licenses, and DTB uses telephone-based technical support in Wilton, Connecticut, for U.S. GAAP and U.S. GAAS assistance. Finally, DTB regularly solicits business from the United States. The solicitation letter sent to Berger was a "template" used for solicitation of "Bermuda-domiciled funds that had U.S. investment

managers." It is unnecessary, however, to decide whether this is prima facie evidence of continuous and systematic general business contacts with the United States, since the plaintiffs have made such a showing in support of a finding of specific jurisdiction over DTB.

FN25. According to DTB materials sent to Berger, Bill Jack, a "Deloitte & Touche" partner in Bermuda, "regularly attends international conferences and is in constant contact with our network of Investment company specialists in the U.S. to ensure that we are abreast of current developments in the industry." Another partner of "Deloitte & Touche" in Bermuda regularly travels to Miami for meetings of partners assigned to the Deloitte Latin American, Caribbean Regional Organization within DTT, of which DTB is a part. He also attended a "Best Practices" meeting in New York in 1997, between smaller Deloitte entities and DTT representatives, as well as an annual world meeting of Member Firms in San Francisco in 1998.

[46] For many of the same reasons discussed in connection with the parallel motion by the Bermuda-based Ernst & Young entities, the work for the Fund was tied directly to Berger in New York, and impacted United States residents, among others. DTB sent its "Proposal of Professional Services" to Berger in New York. The proposal identified "Deloitte & Touche" as "part of Deloitte Touche Tohmatsu International" with partners and offices worldwide. While DTB argues that *491 it did not receive the various financial statements it used to complete the audits directly from Berger or Bear Stearns but rather from FASB, DTB was using information it knew emanated from the United States to prepare its allegedly fraudulent audit reports. To perform its work, DTB relied in part on help from its United States based affiliates, who gathered information to mark the Fund's securities to market. DTB next argues that it sent its audits to FASB for dissemination to shareholders, and did not directly mail any of them to the United States. The Offer Memo, however, promised that "Deloitte & Touche," located at a Bermuda address, would be the

Fund's independent auditors and explained that the Fund would be marketed to certain classes of United States investors, among others. The audits DTB prepared for the Fund, which the plaintiffs allege contained material misrepresentations about the Fund's financial health, are addressed to "the Shareholders of the Manhattan Investment Fund Ltd." DTB understood that its allegedly fraudulent audits would be mailed to the Fund's shareholders and would reach United States residents. To ignore this reality and focus exclusively on which entity placed the envelope in the mailbox would only serve to elevate form over substance. Finally, the Complaint alleges that a DTB partner spoke with and e-mailed a DTUS partner in February 1999, about a report from Bear Stearns regarding discrepancies in the Fund, and discovery revealed records of phone calls from DTB personnel to FAM and Berger in December 1999, just after the SEC commenced its investigation of the Fund in November 1999, and shortly before Deloitte withdrew its audit reports for 1996-1998 in January 2000. Also in December 1999, at least one DTB partner traveled to meet with Berger in New York to investigate the Fund. While these activities, occurring as they do at the very end of the alleged fraud, would not by themselves create jurisdiction, they do serve to underscore DTB's understanding from the beginning of its work that it was serving a fund managed entirely from New York. Taken together, these facts constitute prima facie evidence of Fund-connected activity purposefully directed at the United States. Again, as with the Ernst & Young Bermuda-based entities, DTB would be hard-pressed to argue that its relationship with the United States, or even with New York state, arising out of its work auditing the Fund, was random, fortuitous or attenuated. *Burger King Corp.*, 471 U.S. at 480, 105 S.Ct. 2174.

2. Subject Matter Jurisdiction

The law governing subject matter jurisdiction is discussed above, as are the fraud's connection to the United States and DTB's communications with the United States. The plaintiffs have alleged facts

adequate to find subject matter jurisdiction over DTB under the conduct and effects test.

3. Aiding and Abetting Common Law Fraud & Gross Negligence Claims

DTB argues that Bermuda law applies to the claims of aiding and abetting common law fraud and gross negligence and that Bermuda law does not recognize such causes of action. [FN26] Plaintiffs contend that under a choice of law analysis, New York law governs.

FN26. Claims of aiding and abetting common law fraud and gross negligence are brought only by the Cromer plaintiffs.

[47] In addressing choice of law rules in a federal question case, the court should ***492** invoke federal common law choice of law analysis only where "significant federal policy, calling for the imposition of a federal conflicts rule, exists." *In re Gaston & Snow*, 243 F.3d 599, 2001 WL 266058, at *6 (2d Cir. Mar. 19, 2001). The need for uniformity is not, by itself, a sufficient justification for "displacing" state choice of law rules. *Id.* Accordingly, New York choice of law analysis governs this action.

[48] New York first analyzes whether there is a conflict between the laws of the states. *Curley v. AMR Corp.*, 153 F.3d 5, 12 (2d Cir.1998). If there is, New York undertakes a choice of law analysis. *Id.* The plaintiffs and DTB have submitted evidence regarding Bermuda law. Bermuda, a common law jurisdiction, apparently has no authority directly addressed to the common law negligence and fraud claims asserted here, but would follow British law and to a lesser extent United States law. Based primarily on an analysis of British precedent, and the degree to which Bermuda courts adhere to it, it appears that there would be liability under Bermuda law for a claim of negligence against DTB for their audits of the Fund if the plaintiff alleged that DTB knew that its audits would be communicated to the plaintiffs individually or as an identifiable class in connection with a specific transaction, such as, an investment in the Fund, and also knew

that those audits would very likely be relied upon by those persons in deciding whether to engage in the transaction. A claim for aiding and abetting fraud would only survive in Bermuda if the pleading alleged that DTB had conspired with Berger or procured or induced his fraud or that DTB joined in the common design of the fraud, none of which is alleged here. It is necessary, therefore, to perform a choice of law analysis for at least the claim that DTB aided and abetted the fraud.

New York law employs an "interest analysis" in choice of law analysis of tort claims, under which courts apply "the law of the jurisdiction having the greatest interest in the litigation." *Curley*, 153 F.3d at 12 (applying New York law). The significant contacts are generally the parties' domiciles and the locus of the tort. *Id.* In particular, for claims based on fraud, a court's "paramount" concern is the locus of the fraud, that is, " 'the place where the injury was inflicted,' as opposed to the place where the fraudulent act originated." *Rosenberg v. Pillsbury Co.*, 718 F.Supp. 1146, 1150 (S.D.N.Y.1989) (citing *Sack v. Low*, 478 F.2d 360, 365-66 (2d Cir.1973) (interpreting New York law)). The place in which the injury is deemed to have occurred "is usually where the plaintiff is located." *Odyssey Re (London) Ltd. v. Stirling Cooke Brown Holdings Limited*, 85 F.Supp.2d 282, 292 (S.D.N.Y.2000) (citation omitted).

DTB argues that Bermuda law should govern because the Cromer plaintiffs as well as DTB are domiciled outside the United States and the locus of DTB's alleged torts is Bermuda. The Cromer plaintiffs contend that because a number of countries have limited and dispersed contacts with the fraud, the Court should apply New York law as the jurisdiction where the fraud originated and where substantial activities in furtherance of the fraud were committed. This Court agrees that New York law should be applied.

Because the Cromer plaintiffs are domiciled in the British Virgin Islands and the Netherland Antilles, injury has occurred in locations with only limited connection to the conduct at issue, while a substantial portion of

the fraudulent conduct has occurred in New York. DTB's actions were in furtherance of a fraud created and perpetuated in--with its "locus" in--New York. DTB's audit reports were based on *493 financial information emanating from New York and were disseminated to Fund shareholders in many countries, including shareholders who either resided in the United States or whose affairs were managed from the United States. Finally, as discussed above, jurisdictional discovery revealed DTB to be a member of an international verein whose global strategy and policies are set in New York. DTB relies on its membership in the verein to generate business, submits to review by the verein, and the logo of the verein's leader, DTT, appeared on each of DTB's audit reports for the Fund. While it is true, as DTB argues, that Bermuda has an interest in regulating the conduct of its domiciliary, New York also has a strong interest in regulating the conduct of an entity which relies in its marketing and in the performance of its work on the implicit representation that it has conformed its conduct to the standards set in New York at the executive offices of the verein. Given the extent to which DTB's business course is determined by decisions made in New York, it is appropriate to apply New York law to these claims. DTB does not contend that the Complaint's state law causes of action are deficient when analyzed under New York law.

E. DTT

DTT argues that plaintiffs have failed to state a claim for violation of Section 10(b), for controlling person liability, and for the common law claims of common law fraud, aiding and abetting common law fraud and breach of fiduciary duty, gross negligence, negligence, and professional malpractice. [FN27]

FN27. The claims of gross negligence, negligence, and professional malpractice are asserted only by the Cromer plaintiffs.

1. Federal Claims

DTT argues that the plaintiffs have failed to

allege adequately that DTT itself is a "primary violator" of Section 10(b) and, in light of the Supreme Court's decision in *Central Bank N.A. v. First Interstate Bank of Denver*, 511 U.S. 164, 114 S.Ct. 1439, 128 L.Ed.2d 119 (1994), cannot rely on allegations against "Deloitte" generally to hold DTT individually liable for securities fraud claims. DTT is correct.

The Cromer Complaint alleges that the audit reports materially misrepresented the financial condition of the Fund, that DTT's name and logo were affixed to the audit reports "in knowing or reckless disregard that such audit reports were materially false or misleading and/or omitted to state material facts necessary in order to make the statements made ... not misleading," that the plaintiffs would not have purchased the securities of the Fund had they known the audit reports were false, and that they were thereby damaged. While the Complaint does allege that "DTT affixed its name and logo to the audit reports," this conclusory statement is not asserted as a factual allegation but as a legal conclusion.

[49] The plaintiffs have not alleged that DTT knew that the audit reports contained false information, and their allegations are insufficient to infer that DTT was reckless. The Complaint does not allege that DTT was even aware of the reports, much less aware that its name and logo were included on the audit reports. There are no allegations that it failed to review or check information that it had a duty to monitor, that it was aware of any danger that the audit reports included misleading information, or that it was on notice of such a danger. See *Novak*, 216 F.3d at 308. The use of DTT's name on the audit *494 reports was undoubtedly of great importance to investors, providing a well-respected international organization's imprimatur on the audits and lending credence to the work of a small, relatively unknown Bermuda entity. Nonetheless, the use of a defendant's name on a document containing misleading information is, by itself, insufficient to constitute scienter. In the absence of sufficient allegations of

scienter, DTT's motion to dismiss the securities fraud claims is granted. For these same reasons, the plaintiffs have failed to allege adequately that DTT was a "culpable participant" in the primary violation and the Section 20(a) claim must be dismissed.

2. State Law Claims

a. Common Law Fraud

The elements of common law fraud under New York law are "essentially the same" as those required to state a claim under Section 10(b) and Rule 10b-5. *Gabriel Capital*, 122 F.Supp.2d at 425-26 (citation omitted). The elements of a fraud claim under New York law are as follows: (1) defendant made "a material, false representation;" (2) defendant intended to defraud the plaintiff thereby; (3) plaintiff reasonably relied upon the representation; and (4) plaintiff suffered damage as a result of the reliance. *Chanayil v. Gulati*, 169 F.3d 168, 171 (2d Cir.1999) (citation omitted). Because plaintiffs have failed to allege an intent to defraud, DTT's motion to dismiss the common law fraud claim is granted.

b. Aiding and Abetting Common Law Fraud & Aiding and Abetting Breach of Fiduciary Duty

The elements required to state a claim for aiding and abetting common law fraud or breach of fiduciary duty are listed above. DTT does not dispute the existence of an underlying fraud or breach of fiduciary duty. Rather, it contends that plaintiffs have not adequately alleged the knowledge and substantial assistance/participation elements.

To satisfy the knowledge requirement of these claims, New York law requires that a defendant have "actual knowledge" of the underlying fraud. [FN28] *A.N. Wight*, 219 F.3d at 91 (noting that New York law requires "knowledge of the underlying wrong" for claims of aiding and abetting fraud and breach of fiduciary duty); see also *Renner v. Chase Manhattan Bank*, No. 98 Civ. 926(CSH), 2000 WL 781081, at *6 (S.D.N.Y. June 16, 2000)

(fraud); *Kolbeck*, 939 F.Supp. at 246 (fiduciary duty). The defendant's knowledge and intent, however, need only be "averred generally." *A.N. Wight*, 219 F.3d at 91 (citing Rule 9(b), Fed.R.Civ.P.). A plaintiff satisfies the scienter pleading requirement where it identifies "circumstances indicating conscious behavior by the defendant," *Dreieck Finanz AG v. Sun*, No. 89 Civ. 4347(MBM), 1990 WL 11537, at *4 (S.D.N.Y. Feb. 9, 1990) (quoting *Beck v. Manufacturers Hanover Trust Co.*, 820 F.2d 46, 50 (2d Cir.1987)), or a clear opportunity and a motive to aid the fraud, *A.N. *495 Wight*, 219 F.3d at 92 (New York law). Ordinary economic motive, however, is insufficient to support the latter alternative. *Primavera Familienstiftung v. Askin*, 173 F.R.D. 115, 127-28 (S.D.N.Y.1997) (citing *Shields*, 25 F.3d at 1130). The plaintiffs have failed to plead that DTT had actual knowledge of the fraud.

FN28. Plaintiffs argue that the knowledge requirement is satisfied with a lesser standard, such as recklessness. The cases relied upon, however, seem largely to be based on claims of aiding and abetting securities fraud, which is no longer viable in light of the Supreme Court's decision in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 167, 114 S.Ct. 1439, 128 L.Ed.2d 119 (1994). See *Kolbeck*, 939 F.Supp. at 246-47 (collecting cases). The plaintiffs also rely on *Diduck v. Kaszycki & Sons Contractors, Inc.*, 974 F.2d 270, 283 (2d Cir.1992), which premised its knowledge discussion on federal common law and ERISA law. See *Kolbeck*, 939 F.Supp. at 246 (noting that the *Diduck* rule of constructive knowledge does not apply to cases under New York common law).

[50] The plaintiffs have also failed to allege adequately the aiding and abetting claims under a partnership by estoppel theory. The law of partnership by estoppel is discussed above. The plaintiffs have alleged that DTT is part of a "single unified global professional services firm" operating under the name "Deloitte & Touche" and functioning as a "global partnership." The various Deloitte offices are "financially interdependent," reporting assets and liabilities together, globally allocating certain revenues and

expenses, using other Deloitte offices as agents for various services, abiding by common operational policies, and engaging in quality cross-checks of one another. Through a common marketing and advertising scheme, the Deloitte entities portray themselves as a unified multinational practice. While the Complaint further alleges that each audit report displayed the DTT logo as well as "Deloitte & Touche," it fails to allege either that DTT or anyone with its consent represented that DTT was a "partner in an existing partnership" with DTB, or that investors "gave credit" to any such representations in making their investment decisions. Accordingly, DTT's motion to dismiss the aiding and abetting claims is granted.

c. Negligence, Gross Negligence and Malpractice

[51] Under New York law, a prima facie case of negligence, gross negligence, or professional malpractice requires the plaintiff to show: (1) a duty to the plaintiff; (2) a breach of duty; (3) "a reasonably close causal connection between the contact and the resulting injury;" and (4) "actual loss, harm or damage." *Integrated Waste Servs., Inc. v. Akzo Nobel Salt, Inc.*, 113 F.3d 296, 299 (2d Cir.1997) (negligence); see *Hydro Investors, Inc. v. Trafalgar Power Inc.*, 227 F.3d 8, 15 (2d Cir.2000) (noting that New York law labels professional malpractice a "'species of negligence' ") (citation omitted); *Renner*, 2000 WL 781081, at *21 (negligence); *Scone Invs., L.P. v. American Third Mkt. Corp.*, No. 97 Civ. 3802(SAS), 1998 WL 205338, at *10 (S.D.N.Y. Apr. 28, 1998) (negligence). To constitute gross negligence, "the act or omission must be of an aggravated character, as distinguished from the failure to exercise ordinary care." *Curley*, 153 F.3d at 13 (citation omitted). That is, gross negligence "is conduct that evinces a reckless disregard for the rights of others or smacks of intentional wrongdoing." *Id.* (citation omitted).

[52] The Second Circuit has held that plaintiffs alleging negligent misrepresentation [FN29] under New York law against a

professional with whom they have no contractual relationship--and thus no privity giving rise to a duty--must establish the following elements: "(1) the accountant must have been aware that the reports would be used for a particular purpose; (2) in furtherance of which a known party was intended to rely; and (3) some conduct by the accountant 'linking' him or her to that known party." *Securities Investor Protection Corp. v. BDO Seidman, *496 LLP*, 222 F.3d 63, 73 (2d Cir.2000); see also *Vanguard Mun. Bond Fund, Inc. v. Cantor, Fitzgerald, L.P.*, 40 F.Supp.2d 183, 190 (S.D.N.Y.1999). Plaintiffs are "known parties" if they are members of "a known group possessed of vested rights, marked by a definable limit and made up of certain components." *Securities Investor Protection Corp.*, 222 F.3d at 74 (citation omitted). An accountant owes a duty of care for services relied upon by plaintiffs who are part of a specific and identifiable group rather than "a faceless or unresolved class of persons." *Id.* (quoting *White v. Guarente*, 43 N.Y.2d 356, 401 N.Y.S.2d 474, 372 N.E.2d 315, 318-19 (1977)). [FN30] Conduct constitutes "linking conduct" if it is "some form of direct contact between the accountant and the plaintiff, such as face-to-face conversation, the sharing of documents, or other 'substantive communication' between the parties." *Id.* at 75 (citation omitted).

FN29. While the plaintiffs do not specifically allege negligent misrepresentation against DTT, the substance of their negligence-related claims is that DTT's negligent conduct led to audit reports which misrepresented the Fund's financial condition.

FN30. The Court of Appeals in *White* specifically held that, where plaintiffs are members of a "limited class whose reliance on the audit ... was, or at least should have been, specifically foreseen," then a duty "is imposed by law and it is not necessary to state the duty in terms of contract or privity." *White*, 372 N.E.2d at 319.

[53] There was no privity between DTT and the plaintiffs, and as already discussed, no allegation that DTT even knew that its name and logo were used on the specific audit reports at issue here. Consequently, there

was no substantive communication between DTT and the investors to constitute conduct linking DTT to an identifiable class of persons. DTT's motion to dismiss is granted. [FN31]

FN31. DTT argues that the plaintiffs' claims of negligence and gross negligence are also precluded by the Martin Act, N.Y. Gen. Bus. Law., art. 23-A, §§ 352 et seq. Because DTT raised this argument for the first time in its reply brief it will not be considered. See *Strom v. Goldman, Sachs & Co.*, 202 F.3d 138, 142 (2d Cir.1999) (holding that it would not consider arguments raised in a reply brief because "[w]e repeatedly have said that we will not consider contentions first advanced at such a late stage.")

F. DTUS

DTUS moves to dismiss the securities fraud claim as well as each of the state law claims brought against it for failure to state a claim. The elements necessary to state a cause of action for securities fraud are discussed above. The plaintiffs have not alleged that DTUS made any misstatements on which they relied. As such, DTUS' motion to dismiss the securities fraud claim is granted. [FN32]

FN32. Plaintiffs argue that, in the alternative, DTUS may be held liable for securities fraud through a piercing-the-veil theory. The elements of a piercing-the-veil cause of action are discussed above. The plaintiffs have not alleged that DTB lacked any corporate form, or that DTUS used its control of DTB to perpetrate a fraud.

The standards for adequately pleading the state law claims against DTUS are discussed above. The plaintiffs' common law fraud claim suffers from the same infirmities as their Section 10(b) claim. Again, plaintiffs have failed to allege any misrepresentation by DTUS upon which they reasonably relied. Nor have plaintiffs succeeded in alleging their common law fraud claim against DTUS under an agency argument. Plaintiffs point to no manifestation from DTUS to DTB indicating bestowal of authority to DTB nor to any express or implied communication by DTUS to a third party from which it would be

reasonable to infer that DTB had DTUS' authority to perform its audits. [FN33]

FN33. For the reasons elucidated in the discussion of DTT's motion to dismiss, the plaintiffs have failed to state a claim for this or any other state claim against DTUS under a partnership by estoppel theory.

*497 Similarly, plaintiffs have insufficiently pled aiding and abetting both common law fraud and breach of fiduciary duty because they have not alleged that DTUS substantially assisted the perpetration of that fraud. Finally, plaintiffs' negligence, gross negligence and malpractice claims fail. The plaintiffs contend that investors were "entitled to presume" that DTUS issued the audits because the reports are signed "Deloitte & Touche" and represented that the audits had been conducted in conformity with U.S. GAAS and GAAP regulations. As discussed above, however, neither the Offer Memo nor the audit reports mention DTUS or include its logo. Accordingly, all claims against DTUS are dismissed.

G. FAM

FAM argues generally that as a small broker who served only as an executing broker for some of the Fund's trades, its role was too small and too tangential to subject it to liability by the plaintiffs. While it brings its motion to dismiss under Rules 12(b)(1) and (b)(6), and 9(b), FAM makes two main arguments: (1) Plaintiffs have failed adequately to allege the "actual knowledge" and "substantial assistance" required for aiding and abetting both common law fraud and breach of fiduciary duty; and (2) Plaintiffs' negligence and gross negligence claims should be dismissed because of failure to allege that FAM owed a duty to the plaintiffs or that its actions caused any damage to them. FAM also argues that the Court should decline to exercise supplemental jurisdiction over FAM as a pendent party should the Court dismiss the other parties in this action. This argument, however, is mooted by the decisions already rendered here.

1. Aiding and Abetting Common Law Fraud & Aiding and Abetting Breach of Fiduciary Duty

[54] FAM argues that as a small broker, serving as an executing broker for some of the Fund's trades, it neither knew of nor played a substantial role in Berger's fraud. The plaintiffs have, however, alleged that FAM received the accurate Bear Stearns statements as well as audit confirmation requests from Deloitte. Because the Deloitte audits were based on Berger's fictitious financial statements, they materially misrepresented the Fund's financial condition and differed from the Bear Stearns statements. Plaintiffs have also alleged that Berger shared its offices with FAM and that, as the introducing broker, FAM collected "substantial commission income." These facts give rise to a fair inference that FAM knew of Berger's fraud.

Further, the plaintiffs allege that FAM ignored Deloitte's instructions to transmit its audit confirmation responses directly to Deloitte and complied with Berger's "highly irregular" request to send them to him. FAM sent unsealed Airborne Express envelopes to Berger, together with waybills made out to DTB and falsely showing FAM as the sender. According to the plaintiffs, Berger subsequently replaced the Bear Stearns financial statements with his own fraudulent statements before sending them on to DTB. While FAM contests the seriousness of these actions, they are sufficient at the pleading stage to show that FAM affirmatively and substantially assisted Berger in committing his fraud on the plaintiffs.

2. Negligence and Gross Negligence

The necessary elements for pleading negligent misrepresentation in the absence of a contractual relationship are discussed above. Plaintiffs have failed to allege any conduct linking FAM to the investors. Accordingly, the negligence and gross negligence claims against FAM are dismissed.

For the reasons discussed above, the motions by Bear Stearns & Co., Inc., Bear Stearns Securities Corp., Ernst & Young International, Deloitte Touche Tohmatsu, and Deloitte & Touche LLP to dismiss the Cromer action are granted in their entirety. The negligence and gross negligence claims are dismissed against Financial Asset Management, Inc. The federal claims and the claims of negligence, gross negligence, and professional malpractice are dismissed against Kempe & Whittle Associates Ltd.

The remaining motions to dismiss the Cromer action are denied. The parties shall have ten days in which to notify the Court why the analysis in this Opinion does not resolve the motions to dismiss the claims in the Argos Complaint as well.

SO ORDERED.

137 F.Supp.2d 452, 189 A.L.R. Fed. 593,
Fed. Sec. L. Rep. P 91,434

END OF DOCUMENT

*498 CONCLUSION

20

Supreme Court, Appellate Division, Third
Department, New York.

Anton CURANOVIC, Appellant,

v.

NEW YORK CENTRAL MUTUAL FIRE
INSURANCE COMPANY et al., Respondents.

July 3, 2003.

Insured homeowner brought action against homeowner's insurer and independent insurance agent, after fire totally destroyed home and its contents, alleging breach of contract against insurer, and negligent misrepresentation against agency. The Supreme Court, Broome County, Rumsey, J., granted summary judgment in favor of defendants. Insured appealed. The Supreme Court, Appellate Division, Kane, J., held that: (1) insured was bound by the information he provided in his application for homeowner's insurance; (2) affidavits of insurer's employees and agent were insufficient to establish that misrepresentations in application were material; and (3) special relationship did not exist between insured and agent, barring negligent misrepresentation claim.

Affirmed in part, and reversed in part.

West Headnotes

[1] Insurance 1968
217k1968

[1] Insurance 2959
217k2959

Rescission of an insurance policy is available even if a material misrepresentation by the insured was innocently or unintentionally made to insurer in applying for insurance. McKinney's Insurance Law § 3105(a, b).

[2] Contracts 93(2)
95k93(2)

The signer of a contract is conclusively bound by it regardless of whether he or she actually read it.

[3] Insurance 2954

217k2954

[3] Insurance 2959
217k2959

An insured cannot remain silent while cognizant that his insurance application contains misleading or incorrect information; rather the insured has a duty to review the entire application and to correct any incorrect or incomplete answers provided to insurer.

[4] Insurance 2988
217k2988

Insured homeowner who could not read or write English was bound by the information he provided in his application for homeowner's insurance, even though some information was inaccurate, where he failed to ask anyone to read or explain the completed application to him after he provided the information, and he failed to correct the inaccuracies after he discovered them.

[5] Insurance 2958
217k2958

Misrepresentations made by an insured in an insurance application must be proven material before the insurer can avoid payment under the policy. McKinney's Insurance Law § 3105(a, b).

[6] Insurance 2980
217k2980

Conclusory statements by insurer's employees, unsupported by documentary evidence, are insufficient to establish materiality of an insured's misrepresentation in an insurance application, as a matter of law, in order for insurer to avoid payment under the policy. McKinney's Insurance Law § 3105(a, b).

[7] Judgment 185.3(12)
228k185.3(12)

Affidavits of homeowner's insurer's employees and affidavit of independent insurance agent were insufficient to establish that misrepresentations made by insured homeowner in his application for homeowner's insurance regarding prior losses were material, for purpose of insurer's motion for summary judgment, in homeowner's breach of

contract claim, where insurer had no written underwriting policies on topic of insured misrepresentations. McKinney's Insurance Law § 3105(a, b).

[8] Insurance 1669
217k1669

[8] Insurance 1671
217k1671

Insurance agents generally are not liable for anything more than obtaining the requested coverage, unless there is a special relationship with the insurance customer justifying reliance on the agent's speech.

[9] Insurance 1672
217k1672

Special relationship did not exist between insured homeowner and insurance agent, barring insured's action against agent for negligent misrepresentation, arising out of homeowner's insurer's failure to pay damages after home was destroyed in fire, on grounds that insurance application contained inaccuracies; insured's only encounter with insurer was single appointment to obtain the policy, insured made no payments beyond the premium, and insured did not inform agent that he was unable to read English.

[10] Trial 140(1)
388k140(1)

Although credibility questions are generally reserved for the jury, in certain circumstances credibility may be properly determined by the court as a matter of law.

****149** Douglas R. Dollinger, Warwick, for appellant.

O'Connor, Gacioch, Pope & Tait L.L.P., Binghamton (Hugh B. Leonard of counsel), for New York Central Mutual Fire Insurance Company, respondent.

Lustig & Brown L.L.P., Buffalo (Troy S. Flascher of counsel), for Partners Insurance Agency, respondent.

Before: SPAIN, J.P., CARPINELLO, ROSE, LAHTINEN and KANE, JJ.

***435** KANE, J.

Appeal from an order of the Supreme Court (Rumsey, J.), entered July 1, 2002 in Broome County, which granted defendants' motions for summary judgment dismissing the complaint.

436** In November 1997, plaintiff sustained a fire at his house, which had been uninsured *150** for several months. A code enforcement officer determined that certain structural and electrical repairs needed to be completed and inspected before the house could be occupied. Plaintiff completed the electrical repairs and, on December 17, 1997, an inspector authorized reoccupancy of the premises. Prior to and after this fire, plaintiff had been staying with his sons at a home deeded to plaintiff as custodian for his minor son. In December 1997, plaintiff and one of his sons went to the offices of defendant Partners Insurance Agency to obtain homeowner's insurance. Partners' insurance agent, Mary Oliver, asked plaintiff questions and typed the answers on an application for insurance with defendant New York Central Mutual Fire Insurance Company. Plaintiff can neither read nor write English, but did not inform Oliver of this. Oliver handed plaintiff the completed application, asked him to read and sign it if no corrections were necessary, then plaintiff signed it. An insurance binder was issued. Shortly after leaving the office, plaintiff's son told plaintiff that there were some inaccurate answers on the application. One was the negative answer to the question, "[A]ny losses, whether or not paid by insurance, during the last 3 years, at this or any other location?" Oliver later admitted that when she read this question, she merely asked whether there were any losses in the prior three years. Many other misstatements by plaintiff were also alleged. Plaintiff never spoke to Oliver again and these misstatements were never corrected.

On January 18, 1998, plaintiff's house and its contents were totally destroyed by a fire. New York Central denied plaintiff's claim on the bases that it was arson and there were material misrepresentations on plaintiff's

(Cite as: 307 A.D.2d 435, *436, 762 N.Y.S.2d 148, **150)

policy application. Plaintiff commenced this action against New York Central for breach of contract and against Partners for negligent misrepresentation. Both defendants moved for summary judgment dismissing the complaint. Plaintiff appeals from Supreme Court's order granting both motions.

[1][2][3][4] Plaintiff first argues that New York Central was required to show that any misrepresentation was intentional and material in order to void the policy. An insurer may avoid an insurance contract if the insured made a false statement of fact as an inducement to making the contract and the misrepresentation was material (see Insurance Law § 3105[a], [b]). "Rescission is available even if the material misrepresentation was innocently or unintentionally made" (Nationwide Mut. Fire Ins. Co. v. Pascarella, 993 F.Supp. 134, 136 [1998] [citation omitted]; see Holloway *437 v. Sacks & Sacks, 275 A.D.2d 625, 713 N.Y.S.2d 162 [2000], lv. denied 95 N.Y.2d 770, 722 N.Y.S.2d 473, 745 N.E.2d 394 [2000]; Meagher v. Executive Life Ins. Co. of N.Y., 200 A.D.2d 720, 720, 607 N.Y.S.2d 361 [1994]; Tennenbaum v. Insurance Corp. of Ireland, 179 A.D.2d 589, 592, 579 N.Y.S.2d 351 [1992]; see also Mutual Benefit Life Ins. Co. v. JMR Elecs., 848 F.2d 30, 32 [1988]). Despite plaintiff's claims that the misrepresentations were innocent, he signed the application indicating that all information was correct. The signer of a contract is conclusively bound by it regardless of whether he or she actually read it (see Maines Paper & Food Serv. v. Adel, 256 A.D.2d 760, 761, 681 N.Y.S.2d 390 [1998]). The inability to understand the English language is insufficient to avoid this general rule (see *id.* at 761, 681 N.Y.S.2d 390). Here, although portions of the application were read to plaintiff by Oliver, he made no effort to have someone else read or explain the entire document to him. "An insured cannot remain silent while cognizant that his insurance application contains misleading or incorrect information" (North Atl. Life Ins. Co. of Am. v. **151 Katz, 163 A.D.2d 283, 284, 557 N.Y.S.2d 150 [1990] [citations omitted]), but "ha[s] a duty to review the entire application and to correct any incorrect or incomplete

answers" (*id.* at 285, 557 N.Y.S.2d 150). Whether or not plaintiff intended to provide inaccurate statements or misrepresentations at the time he filled out the application is irrelevant, as he was bound by those answers and swore to their accuracy by signing the application although he knew he could not read it, yet did not ask Oliver or his son to read the completed application to him. Additionally, when he discovered inaccuracies shortly after leaving Partners' office, he failed to comply with his duty to correct that information (compare *Holloway v. Sacks & Sacks*, *supra* at 626, 713 N.Y.S.2d 162).

[5][6] While it is clear that plaintiff's application contained misrepresentations, as found by Supreme Court, those misrepresentations must be proven material before New York Central can avoid payment under the contract. Materiality is generally a question of fact (see *Carpinone v. Mutual of Omaha Ins. Co.*, 265 A.D.2d 752, 754, 697 N.Y.S.2d 381 [1999]). To establish materiality of misrepresentations as a matter of law, the insurer must present documentation concerning its underwriting practices, such as underwriting manuals, bulletins or rules pertaining to similar risks, to establish that it would not have issued the same policy if the correct information had been disclosed in the application (see *id.* at 754, 697 N.Y.S.2d 381; see also Insurance Law § 3105[c]; *Iacovangelo v. Allstate Life Ins. Co. of N.Y.*, 300 A.D.2d 1132, 1133, 750 N.Y.S.2d 920 [2002]). Conclusory statements by insurance company employees, unsupported by documentary evidence, are insufficient to establish materiality as a matter of law (see *Carpinone v. Mutual of Omaha Ins. Co.*, *supra* at 755, 697 N.Y.S.2d 381; but cf. *North Atl. Life Ins. Co. of Am. v. Katz*, *supra* at 285, 557 N.Y.S.2d 150).

[7] *438 Here, New York Central has no written underwriting policies on the topic of plaintiff's misrepresentations and the conclusory affidavits by its employees are insufficient. The affidavit of the independent insurance broker is likewise deficient since it, like the affidavits of the employees and the testimony of Oliver, neither identifies a

written underwriting policy nor does it identify any specific applicants with similar histories that were denied coverage (see *Iacovangelo v. Allstate Life Ins. Co. of N.Y.*, supra at 1133, 750 N.Y.S.2d 920; *Church of Transfiguration v. New Hampshire Ins. Co.*, 207 A.D.2d 1039, 1039, 616 N.Y.S.2d 843 [1994], lv. denied 1994 WL 712777 [4th Dept.1994]; *Alaz Sportswear v. Public Serv. Mut. Ins. Co.*, 195 A.D.2d 357, 358, 600 N.Y.S.2d 63 [1993]). Thus, there is a question of fact regarding the materiality of the misrepresentations here which requires denial of the insurer's motion for summary judgment.

[8][9] Plaintiff further contends that Partners is liable for negligent misrepresentation because a special relationship existed. Insurance agents generally are not liable for anything more than obtaining the requested coverage, unless there is a special relationship with the insurance customer justifying reliance on the agent's speech (see *Murphy v. Kuhn*, 90 N.Y.2d 266, 270, 660 N.Y.S.2d 371, 682 N.E.2d 972 [1997]; *Catalanotto v. Commercial Mut. Ins. Co.*, 285 A.D.2d 788, 790, 729 N.Y.S.2d 199 [2001], lv. denied 97 N.Y.2d 604, 736 N.Y.S.2d 308, 761 N.E.2d 1035 [2001]). New York courts disfavor finding such a relationship, but can recognize an additional duty in exceptional situations, for example where the agent receives compensation for consultation beyond the premium payments, the insured relies on expertise of the agent regarding a raised question of **152 coverage, or there is an extended course of dealing sufficient to put objectively reasonable agents on notice that their advice was being specially relied upon (see *Murphy v. Kuhn*, supra at 272, 660 N.Y.S.2d 371, 682 N.E.2d 972). Plaintiff's only encounter with Oliver was the single appointment to obtain the subject policy; he made no payments beyond the premium and he never informed her that he could not read English even when she asked him to read over the application, so this was akin to a normal insurance agent/customer relationship. Plaintiff is bound by the application after signing it and his duty to correct inaccuracies once discovered applies to Partners as well as

New York Central.

[10] Plaintiff also contends that there are questions of fact regarding his attempts to notify Oliver of the misstatements on his application and correct them. Plaintiff's deposition testimony indicated that he believed he and his son called Partners several times but Oliver was never available, that they left messages for Oliver and told the receptionist there were mistakes *439 on the application, and they informed the receptionist of inaccuracies when plaintiff dropped off another document at Partners' office. His son, however, testified at his deposition that he never spoke to or called anyone at Partners after the application appointment, and he was not present when plaintiff later went to Partners' office. Additionally, Partners' records contain no mention of any contact by or on behalf of plaintiff regarding any inaccuracies. Although credibility questions are generally reserved for the jury, in certain circumstances credibility may be properly determined as a matter of law (see *Bushman v. Di Carlo*, 268 A.D.2d 920, 922, 702 N.Y.S.2d 426 [2000], lv. denied 94 N.Y.2d 764, 708 N.Y.S.2d 53, 729 N.E.2d 710 [2000]; *Home Mut. Ins. Co. v. Lapi*, 192 A.D.2d 927, 929, 596 N.Y.S.2d 885 [1993]; *Rickert v. Travelers Ins. Co.*, 159 A.D.2d 758, 759, 551 N.Y.S.2d 985 [1990], lv. denied 76 N.Y.2d 701, 557 N.Y.S.2d 878, 557 N.E.2d 114 [1990]). Supreme Court properly determined that plaintiff's statements were self-serving and incredible on these points, permitting summary judgment in favor of Partners.

ORDERED that the order is modified, on the law, without costs, by reversing so much thereof as granted defendant New York Central Mutual Fire Insurance Company's motion for summary judgment; said motion denied; and, as so modified, affirmed.

SPAIN, J.P., CARPINELLO, ROSE and LAHTINEN, J.J., concur.

307 A.D.2d 435, 762 N.Y.S.2d 148, 2003 N.Y. Slip Op. 15779

762 N.Y.S.2d 148
(Cite as: 307 A.D.2d 435, *439, 762 N.Y.S.2d 148, **152)

Page 238

END OF DOCUMENT

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Wo

Westlaw®

16div002272

21

United States District Court,
S.D. Florida,

Miami Division.

Robert CZARNECKI, Plaintiff,

v.

Laurence ROLLER, Woods and Oviatt, Inc.,
Merrill-Stevens Dry Dock Co., Jack
Reynolds, Inc., New Horizons Marine
Surveyors, Defendants.

No. 88-1667-CIV.

Nov. 15, 1989.

Buyer of yacht that was ultimately determined to have sustained damage as result of earlier sinking brought action against brokerage that facilitated purchase and against seller, asserting claims for fraudulent misrepresentation, fraudulent concealment, conspiracy, and breach of warranties of merchantability and fitness for particular purpose. On motions for summary judgment, the District Court, Spellman, J., held that: (1) buyer could not have reasonably relied on alleged misrepresentations in view of his own independent investigation; (2) inasmuch as brokerage acted in fiduciary capacity, material fact issues existed with respect to fraudulent concealment claim and brokerage's alleged knowledge of yacht's history and condition; but (3) buyer did not have viable fraud or warranty claim against seller.

Summary judgment granted in part, denied in part.

West Headnotes

[1] Brokers 38(4)
65k38(4)

In context of buyer's claim under Florida law for fraudulent misrepresentation against brokerage that facilitated purchase of yacht, buyer failed to demonstrate justifiable reliance upon alleged misrepresentation about yacht's earlier sinking; purchase contract

stated that brokerage could not guarantee accuracy of any information passed on by sellers and that buyer would make own independent investigation, and purchase decision was in fact based on buyer's own inspections, sea trials, and acceptable independent marine surveys.

[2] Brokers 19
65k19

Under Florida law, brokerage acted in fiduciary capacity when it undertook to facilitate buyer's purchase of yacht, and it was incumbent upon brokerage to act in utmost good faith and make full disclosure at all times of any matters that might adversely affect buyer.

[3] Federal Civil Procedure 2490
170Ak2490

Genuine issues of material fact existed under Florida law regarding yacht brokerage's alleged superior knowledge of yacht's history and condition at time it acted in fiduciary capacity in facilitating purchase, precluding summary judgment for brokerage on buyer's claim that it fraudulently concealed earlier sinking.

[4] Brokers 19
65k19

Under Florida law, broker stands as fiduciary to buyer when he undertakes to act on behalf of buyer, and such relationship demands utmost good faith and full disclosure.

[5] Fraud 18
184k18

Under Florida law, failure to disclose mere possibilities cannot constitute failure to disclose material facts sufficient to support action for fraudulent misrepresentation.

[6] Conspiracy 1.1
91k1.1

(Formerly 91k1)

Under Florida law, an act which does not constitute basis for an action cannot serve as basis for conspiracy claim.

[7] Brokers 22

65k22

Under Florida law, buyer of yacht that was ultimately determined to have sustained damage as result of earlier sinking did not have viable claim for negligence against brokerage that facilitated purchase for failing to discover such circumstance; brokerage did not have duty to investigate each and every item of information provided by seller or seller's broker regarding yacht's condition and history, and buyer had benefit of independent marine surveyors' reports, which did not reveal evidence of prior sinking.

[8] Fraud 58(2)
184k58(2)

Buyer of yacht that was ultimately determined to have sustained damage as result of earlier sinking failed to establish prima facie case of fraudulent misrepresentation against seller under Florida law; all buyer's allegations related to what seller did not say rather than to any fraudulent representations he made.

[9] Fraud 23
184k23

Buyer of yacht that was ultimately determined to have sustained damage as result of earlier sinking did not have viable claim for fraudulent misrepresentation against seller because buyer's investigation, including independent marine surveys and sea trials, foreclosed a claim of detrimental reliance.

[10] Sales 272
343k272

Yacht seller was not "merchant" for purposes of imposing liability for breach of implied warranty of merchantability either by virtue of fact that he may have sold five boats during one-year period or that he hired broker to facilitate sale of yacht. West's F.S.A. § 672.314(1); U.C.C. § 1-101 et seq.

[11] Sales 273(3)
343k273(3)

Yacht buyer did not have viable claim against seller under Florida warranty for fitness for particular purpose; even if buyer intended to use yacht for particular purpose, he failed to

adduce evidence that seller knew of such purpose or that he relied on seller's skill or judgment. West's F.S.A. §§ 672.314, 672.315.

*833 Alex F. Lankford, III, Mobile, Ala., Michael R. Karcher, Miami, Fla., for plaintiff.

Rae M. Crowe, Mobile, Ala., G. Morton Good, Richard J. McAlpin, Miami, Fla., Jack Reynolds, Sunrise, Fla., Roger L. Shaffer, Ft. Lauderdale, Fla., for defendants.

*834 MEMORANDUM OPINION; ORDER
GRANTING IN PART AND DENYING IN
PART
MERRILL-STEVENS DRY DOCK
COMPANY'S MOTION FOR SUMMARY
JUDGMENT; AND ORDER
GRANTING LAURENCE ROLLER'S
MOTION FOR PARTIAL SUMMARY
JUDGMENT

SPELLMAN, District Judge.

THIS CAUSE comes before the Court upon Defendant Merrill-Stevens Dry Dock Company's [hereinafter referred to as "Merrill-Stevens"] Motion for Summary Judgment filed with this Court on May 30, 1989, and Defendant Laurence Roller's Motion for Partial Summary Judgment filed with this Court on September 8, 1989.

Merrill-Stevens seeks summary judgment as to Count I [fraudulent misrepresentation]; Count II [fraudulent concealment]; Count III [conspiracy as it pertains to fraudulent misrepresentation and fraudulent concealment]; Count IV [negligence]; and Count V [breach of fiduciary duty]. [FN1] Upon review of Merrill-Stevens' Motion for Summary Judgment, Plaintiff's Memorandum in Opposition, and Merrill-Stevens' Reply thereto, it is the opinion of this Court that partial summary judgment should be entered in favor of Merrill-Stevens.

FN1. While Merrill-Stevens' Motion for Summary Judgment is directed towards all counts of the Complaint, its brief in support of its Motion for Summary Judgment fails to address Plaintiff's claim for negligence and breach of fiduciary duty.

Laurence Roller seeks summary judgment as to Count I; Count III [conspiracy as it pertains to fraudulent misrepresentation]; and Count VII [breach of implied warranty of merchantability and breach of warranty for a particular purpose]. Upon careful review of Roller's Motion for Partial Summary Judgment, Plaintiff's Memorandum in Opposition, and Roller's Reply thereto, it is the opinion of this Court that Roller is entitled to summary judgment as to Counts I, III and VII. [FN2]

FN2. By Order dated August 7, 1989, this Court granted partial summary judgment as to Counts I and III in favor of Roller's co-Defendant, Woods and Oviatt, Inc. The very same issues of fact and law now raised in Roller's Motion for Partial Summary Judgment were also raised in Woods and Oviatt's Motion. Accordingly, based on the findings of fact and conclusions of law made by this Court in said Order, and for the reasons more fully set forth below, this Court finds that Roller is entitled to partial summary judgment.

BACKGROUND

This is a diversity action arising out of the purchase of a Bertram yacht, the M/V IMPULSE/XANADU, [FN3] by Plaintiff Robert Czarnecki. The controversy between the parties revolves around a prior sinking or submersion of the yacht which Plaintiff learned of subsequent to the sale. [FN4] Plaintiff *835 instituted this action against Roller, the previous owner of the M/V IMPULSE/XANADU; Woods and Oviatt, Inc., and Merrill-Stevens, yacht brokerage firms; and against Jack Reynolds, Inc., and New Horizons, independent marine surveyors.

FN3. At the time of its sinking and at the time of Plaintiff's purchase, the yacht was named XANADU. Plaintiff changed the name to IMPULSE after completing the sale.

FN4. According to the affidavits of Michael Myles and Richard Carmack, the M/V IMPULSE/XANADU sank in September of 1985 in Soldiers Creek, a saltwater inlet located in Baldwin County, Alabama, near the municipality of Orange Beach, Alabama. The yacht took on water through a

broken off fathometer transducer and sank to the bottom. The water level was slightly above the deck level in the main salon covering the yacht's twin diesel engines, generator and auxiliary equipment. The recessed cabin was flooded to approximately three feet above the deck. The yacht was subsequently raised and hauled out of the water at Orange Beach Marina in Orange Beach, Alabama. The submersion of the yacht caused extensive damage which required repairs estimated as high as \$171,000.00. In November of 1986, Roller purchased the yacht from its owner, German Town Savings Bank. Roller was aware of the prior sinking of the yacht and had the yacht cleaned, the engines reconditioned, and made some minor repairs. The yacht was subsequently transported to South Florida where Roller listed the yacht for sale with Woods and Oviatt, Inc., a yacht brokerage company in Fort Lauderdale, Florida. After completing a survey and sea trials of the yacht, the yacht was sold to Plaintiff. The yacht thereafter spent several days at Merrill-Stevens' repair yard undergoing various repairs totally approximately \$20,000.00. Plaintiff and his family subsequently transported the yacht to Mobile, Alabama expecting to travel up the Tombigbee waterway to their home in Pennsylvania. During the course of the voyage, Plaintiff experienced a number of mechanical difficulties with the yacht and put in at Dog River Marina in Mobile to have repair work performed. It was at Dog River Marina where Plaintiff was informed for the first time by Marina personnel that the M/V IMPULSE/XANADU had previously sank near Orange Beach, Alabama.

STANDARD FOR MOTIONS FOR SUMMARY JUDGMENT

Rule 56(c), Federal Rules of Civil Procedure, provides that summary judgment shall be rendered "forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." A ruling on a summary judgment motion should be guided by the substantive evidentiary standard of proof that would apply at the trial on the merits. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d

202 (1986). Summary judgment is mandated against a party who, after adequate time for discovery and upon motion, fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

In ruling on a motion for summary judgment, it is the Court's obligation to view the facts in the light most favorable to the non-moving party and to allow the non-moving party the benefit of all reasonable inferences to be drawn from the evidence. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 1608, 26 L.Ed.2d 142 (1970); *Thrasher v. State Farm Fire & Cas. Co.*, 734 F.2d 637, 638 (11th Cir.1984). If there is no genuine issue of material fact, summary judgment is proper because it avoids needless and costly litigation and promotes judicial efficiency. *Trustees of Plumbers Local No. 519 Health and Welfare Trust Fund v. Garcia*, 677 F.Supp. 1554, 1556 (S.D.Fla.1988). However, because summary judgment is an extreme remedy, it should not be granted unless the moving party has established the right to judgment beyond controversy.

FACTS

This Court finds that there is no genuine issue of material fact as to the following:

1. Woods and Oviatt, Inc., listed the yacht M/V IMPULSE/XANADU for sale on behalf of Laurence Roller.
2. Plaintiff approached Merrill-Stevens requesting assistance in the purchase of a pleasure yacht.
3. Merrill-Stevens located the M/V IMPULSE/XANADU for Plaintiff.
4. Merrill-Stevens showed Plaintiff the M/V IMPULSE/XANADU.
5. Plaintiff negotiated the purchase of the yacht through Scott Hasselbring, a broker

with Merrill-Stevens, and Roller negotiated through Jeff Stanley, a broker with Woods and Oviatt.

6. Plaintiff hired independent surveyors, Jack Reynolds, Inc., and New Horizons Marine Surveyors, to survey the M/V IMPULSE/XANADU.

7. Jack Reynolds and New Horizons, as independent surveyors, inspected the hull and machinery of the yacht and submitted survey reports to Plaintiff.

8. No evidence of sinking was specifically looked for by the surveyors.

9. According to these survey reports, neither Jack Reynolds nor New Horizons detected any evidence that the yacht had sank or had been partially submerged, nor did the reports suggest that the yacht had previously been submerged.

10. Plaintiff submitted a bid to purchase the yacht.

11. Negotiations followed and an agreement upon a sale price was reached.

12. Plaintiff's contract to purchase the yacht was contingent upon a successful sea trial and survey.

*836 13. Plaintiff or his agents, subsequently caused sea trials to be performed on the yacht.

14. The yacht performed to the satisfaction of both Plaintiff and the marine surveyors.

15. Plaintiff personally inspected the yacht, and based on his independent inspections, the inspections by the independent marine surveyors, and successful sea trials, found the yacht to be acceptable and completed the transaction.

16. Laurence Roller made no misrepresentations to Plaintiff regarding the history or condition of the yacht.

17. Plaintiff's decision to purchase the yacht was not made in reliance on any representation made by Merrill-Stevens, Laurence Roller, or Roller's broker, Woods and Oviatt, regarding the history or condition of the vessel.

MERRILL-STEVENS' MOTION FOR
SUMMARY JUDGMENT
Count I--Fraudulent Misrepresentation

[1] Plaintiff is unable to establish a prima facie case of fraudulent misrepresentation against Merrill-Stevens. To establish a cause of action for fraudulent misrepresentation, Plaintiff must demonstrate that: (1) Merrill-Stevens knowingly made false statements concerning material facts; (2) that Plaintiff relied on these statements; and (3) that Plaintiff was damaged as a result of relying upon these false representations. *Hauben v. Harmon*, 605 F.2d 920 (5th Cir.1979); *Stowell v. Ted S. Finkel Inv. Servs., Inc.*, 641 F.2d 323 (5th Cir.), reh'g denied, 647 F.2d 1123 (1981). [FN5]

FN5. In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

There is a genuine issue of material fact whether Merrill-Stevens knowingly made false representations regarding the history or condition of the M/V IMPULSE/XANADU. Plaintiff adduces evidence that during the course of negotiations, Jeff Stanley, a broker employed with Woods and Oviatt, advised Merrill-Stevens' broker, Scott Hasselbring, of the yacht's prior sinking. [FN6] Stanley purportedly learned this through conversations with Michael Myles at Orange Beach Marina. [FN7]

FN6. Stanley's deposition reads in pertinent part:
Q. What did you tell Mr. Hasselbring about the boat, other than the asking price? A. I told him that there had been a rumor that the boat had been sunk.
Q. You heard that rumor? A. Yes, I had. Q. Who did you hear that rumor from? A. I don't know.
When a person has his boat listed with hundreds of

different brokers, you know, it could have come from anyone. It was just talk in the business.

* * *

Q. Do you recall specifically what your discussions were with Mr. Hasselbring about, about this rumor about the boat previously sinking? A. Basically just what I just said, that I heard rumor that the boat had sunk, and I didn't believe it. Stanley Deposition, p. 22, 24 (emphasis added).

FN7. The substance of their conversation was as follows: Sometime in the Spring of 1986, I received a call from a boat broker named Jeff Stanley with Woods & Oviatt in Fort Lauderdale. He told me that he understood that Orange Beach Marine had done work on a Bertram boat that they were brokering called the XANADU owned by Laurence Roller. I told Mr. Stanley that the vessel had been sunk and that Orange Beach Marine had nothing to do with any engine work on the vessel and that the vessel had been basically "patched up" by Roller in the yard at Orange Beach Marina. Our conversation was very brief since I did not want to have anything to do with this boat, however, I definitely told Mr. Stanley that the boat had been sunk. Affidavit of Michael Myles, p. 2-3 (emphasis added).

While the M/V IMPULSE/XANADU was undergoing sea trials, Plaintiff purportedly overheard Stanley and Hasselbring discussing the sinking of a boat. Plaintiff approached them and asked whether they were discussing the M/V IMPULSE/XANADU and whether the M/V IMPULSE/XANADU had ever sunk before. Hasselbring denied that the M/V IMPULSE/XANADU had previously sunk. Plaintiff described the conversation as follows:
*837 Prior to the purchase of the vessel, at the Merrill-Stevens Boat Yard, Fort Lauderdale, Florida, I overheard Scott Hasselbring, Merrill-Stevens, and Jeff Stanley, Woods and Oviatt, discussing the sinking of a boat. I asked both men whether the vessel XANADU had ever sunk. Scott Hasselbring stated no, that they were talking about another boat. This statement was made in the presence of Jeff Stanley who said nothing. I only asked whether my boat had previously been sunk when I

overheard the conversation and simply wished to assure myself that my boat had never sunk.

Plaintiff Interrogatory Response No. 1 (emphasis added).

Plaintiff also refers to the deposition of Scott Hasselbring, wherein he states unequivocally that Plaintiff asked him directly whether the M/V IMPULSE/XANDADU had ever sank. The deposition reads in pertinent part:

Q: Do you recall if Mr. Czarnecki ever asked you, prior to the phone call of May 2, 1988, had the boat ever sunk?

A: Yes, I do.

* * *

Q: Do you recall specifically what Mr. Czarnecki asked you?

A: Yes, I do.

Q: What was that?

A: Had this boat been sunk.

Q. Do you recall your answer to him?

A. I did not make an answer, as I have no knowledge that it did; but the surveyor who had inspected the vessel would be in a position to render more of an opinion. That why he's there.

Hasselbring Deposition, pp. 39-40 (emphasis added).

Merrill-Stevens asserts that its yacht broker, Scott Hasselbring, never represented that the M/V IMPULSE/XANADU had not previously been sunk or submerged. It does, however, concede that Plaintiff approached Hasselbring and Jeff Stanley after overhearing them converse about the sinking of a vessel. But Merrill-Stevens contends that Plaintiff merely inquired whether they were referring to the M/V IMPULSE/XANADU, whereupon he was told they were referring to a different vessel. Merrill-Stevens bases this contention on Plaintiff's deposition which reads in pertinent part:

A. No, I only brought that [the sinking] up once, I think that I can remember.

Q. Where was that?

A. That was before we went out on the sea trial, while the boat was sitting on land, and I overheard Scott Hasselbring and Jeff

Stanley talking, and I heard them say something about a boat being sunk, and I asked Scott Hasselbring, "You are not talking about this boat being sunk, are you." He said "No we are talking about a boat that sunk either on the Gulf Coast or West Coast," and when he said that I said, "Good" and I dropped it.

Czarnecki Deposition, p. 37 (emphasis added).

Merrill-Stevens contends that based on Plaintiff's deposition, it is clear that Merrill-Stevens, nor its broker, Scott Hasselbring, knowingly made false representations regarding the history or condition of the M/V IMPULSE/XANADU. Rather, according to Merrill-Stevens, Plaintiff was merely advised that the conversation which he had overheard did not relate to his yacht. This Court must disagree with Merrill-Stevens' interpretation of Hasselbring's response to Plaintiff's inquiry.

A reasonable interpretation of Hasselbring's statements is that his response, at a minimum, implicitly denied that the M/V IMPULSE/XANADU had previously sank. Hence, genuine issues of material fact exist as to whether Plaintiff asked Hasselbring whether the M/V IMPULSE/XANADU had previously sank, and if so, whether Hasselbring explicitly or implicitly denied that it previously sank.

Even though this Court finds that genuine issues of material fact exist as to whether Merrill-Stevens knowingly made false representations regarding the sinking of the M/V IMPULSE/XANADU, Plaintiff fails to demonstrate justifiable reliance upon these alleged misrepresentations. *838 Detrimental reliance is an essential element in stating a cause of action for fraudulent misrepresentations. *Fote v. Reitano*, 46 So.2d 891, 892 (Fla.1950). Failure to demonstrate justifiable and detrimental reliance upon the alleged misrepresentations constitutes sufficient basis for entering summary judgment against Plaintiff. *Id.*

In the instant action the evidence conclusively demonstrates that Plaintiff did

not rely upon representations made by Merrill-Stevens' broker, Scott Hasselbring, regarding the history or condition of the M/V IMPULSE/XANADU. Facts adduced in support of Merrill-Stevens' Motion for Summary Judgment demonstrate that Plaintiff based his decision to purchase the M/V IMPULSE/XANADU upon his own inspections, sea trials, and acceptable marine surveys.

The purchase contract for the yacht signed by Plaintiff stated that the broker could not guarantee the accuracy of any information regarding the yacht passed on by the sellers, and that the buyer would make his own independent investigation of such details as he might desire. [FN8] Plaintiff understood precisely the investigation contemplated in the purchase agreement and availed himself of the opportunity to obtain surveys and to conduct sea trials. Any damages which he may have suffered were clearly the result of his own exercise of business judgment following the surveys and sea trials and not the result of any independent representation of the yacht's history or condition made by Hasselbring.

FN8. The contract provided that: The Broker offers details of the vessel in good faith but cannot guarantee the accuracy of this information nor warrant the condition of the vessel. It is understood and agreed that the Purchaser may instruct his agents or surveyors to investigate such details as the Purchaser desires validated.

In actions such as this, where the decision to engage in a transaction is the result of independent inspection and evaluation, rather than an alleged misrepresentation, no claim for fraudulent misrepresentation will lie. *H & W Enter., Inc. v. Ellis*, 467 So.2d 790, 793 (1st DCA 1985) (maker of a fraudulent misrepresentation is not liable where the decision to engage in a transaction is the result of independent investigation by another).

Addressing this issue under facts identical to those of the instant case, the former Fifth Circuit held in *Coon v. Charles W. Bliven &*

Co, 534 F.2d 44 (5th Cir.), cert. denied, 429 U.S. 980, 97 S.Ct. 491, 50 L.Ed.2d 588 (1976), that where a buyer had secured the services of an independent marine surveyor who examined the vessel and submitted his report to the buyer, neither the broker nor the seller were liable for any misrepresentations regarding the condition of the vessel.

The Restatement (Second) of Torts (1976) specifically addresses situations where an individual's decision to engage in a transaction is based upon independent investigation made by him or her. Section 547 of the Restatement provides in pertinent part:

Recipient Relying on His Own Investigation

(1) Except as stated in subsection (2), the maker of a fraudulent misrepresentation is not liable to another whose decision to engage in the transaction that the representation was intended to induce is not caused by his belief in the truth of the representation but is the result of an independent investigation made by him.

(2) The fact that the recipient of a fraudulent misrepresentation is relying upon his own investigation does not relieve the maker from liability if he by false statement, or otherwise intentionally prevents the investigation from being effective.

With regards to subsection (2), this Court finds that any misrepresentation which Merrill-Stevens may have made regarding the previous sinking of the M/V IMPULSE/XANADU would not have prevented Plaintiff from thoroughly and effectively surveying the yacht. Plaintiff has not claimed, nor is there evidence, that Merrill-Stevens prevented Plaintiff from inquiring from anyone else about this fact, nor is there evidence that Merrill-Stevens prevented Plaintiff from personally inspecting or surveying the yacht. At most, Plaintiff can claim that knowledge of the prior sinking *839 would have sparked a more thorough investigation of the yacht. Notwithstanding this fact, this Court finds that neither Plaintiff nor the independent surveyors which he employed were prevented from thoroughly and effectively inspecting the yacht. Accordingly, Merrill-Stevens is entitled

to summary judgment as to Plaintiff's claim for fraudulent misrepresentation on the basis, that in purchasing the M/V IMPULSE/XANADU, Plaintiff could not have justifiably relied on any material misrepresentations made by Merrill-Stevens.

Count II--Fraudulent Concealment

[2][3] Summary judgment must be denied as to Count II, for genuine issues of material fact exist regarding Merrill-Stevens' knowledge of the yacht's history and condition. To establish a cause of action for fraudulent concealment, Plaintiff must demonstrate the existence of a fiduciary relationship or superior knowledge on the part of Merrill-Stevens. *Ramel v. Chasebrook Constr. Co.*, 135 So.2d 876, 882 (Fla. 2d DCA 1962). Plaintiff has sufficiently alleged that Merrill-Stevens owed a fiduciary duty to Plaintiff, and has further demonstrated that a genuine issue of material fact exists whether Merrill-Stevens had superior knowledge regarding the yacht's history and condition.

[4] The law in Florida is that when a broker undertakes to act on behalf of a buyer he stands as a fiduciary to this client. This relationship demands the utmost good faith and full disclosure. *Bush v. Palermo Realty, Inc.*, 443 So.2d 104 (Fla. 4th DCA 1983); *Van Woy v. Willis*, 153 Fla. 189, 14 So.2d 185 (Fla.1943); and *Chisman v. Moylan*, 105 So.2d 186 (Fla. 2d DCA 1958). In *Chisman*, the District Court of Appeal stated that:

The Supreme Court of Florida has indicated the high standard demanded of a broker as being comparable to that of a lawyer or banker in that his relationship to the public exacts the highest degree of trust and confidence.... Because of the close relationship which calls for trust and confidence, the broker must act in good faith and with loyalty towards his principal.... A broker has imposed upon him during the period of such relationship with his principal the legal obligation to inform with fairness, promptness, and completeness, concerning all facts within his knowledge which are or may be material to the situation in connection with which he is employed.

105 So.2d at 189.

It is the opinion of this Court that Merrill-Stevens acted in a fiduciary capacity, such that it was incumbent upon Merrill-Stevens to act in utmost good faith and at all times make full disclosure of any matters that might have adversely affected Plaintiff as its principal. Merrill-Stevens gladly accepted its position as Plaintiff's broker and will now be held to the standard set forth above.

Secondly, this Court finds that a genuine issue of material facts exists whether Merrill-Stevens had superior knowledge regarding the history and condition of the M/V IMPULSE/XANADU, specifically, whether the yacht had previously sank or been submerged. Superior knowledge requires that one be aware of a fact or condition that is not discernible by ordinary observation. Statements of a party having exclusive or superior knowledge may be regarded as statements of fact although they would be considered opinion if the parties were dealing on equal terms. *Ramel*, 135 So.2d at 882. Both Plaintiff and Merrill-Stevens have presented conflicting evidence as to whether Merrill-Stevens had knowledge superior to that of Plaintiff regarding the sinking of the M/V IMPULSE/XANADU.

Plaintiff has adduced the deposition of Michael Myles, formerly with the Orange Beach Marina, wherein he states that he informed Jeff Stanley, prior to the sale of the M/V IMPULSE/XANADU, that this yacht had been sunk. [FN9] In addition, Jeff Stanley stated unequivocally in his deposition that, prior to the sale, he discussed the previous sinking of the M/V IMPULSE/ *840 XANADU with Scott Hasselbring, a broker with Merrill-Stevens. [FN10]

FN9. Affidavit of Michael Myles, p. 3.

FN10. Stanley Deposition, p. 22.

Merrill-Stevens contends that Hasselbring at most heard a "rumor" that the M/V IMPULSE/XANADU had previously sank, and that Hasselbring saw absolutely no evidence to support this rumor and, in fact,

was given every indication to the contrary. Merrill-Stevens asserts that Roller and Stanley advised Hasselbring prior to the purchase of the yacht that the yacht's engines had been rebuilt due to water having "gone up the exhaust." In addition, Merrill-Stevens points out that Hasselbring had not seen the yacht prior to showing it to Plaintiff and apart from the surveys and sea trials, Hasselbring was entirely dependent upon information received from the seller and his broker regarding the yacht's history and that he advised Plaintiff of this fact and helped arrange the surveys.

According to the affidavit of Earle Long, [FN11] a rumor or reputation in the boating industry that a vessel has previously sunk is a critical and material fact which a buyer should be aware of as it typically bears heavily upon the market value of the vessel. In fact, the reputation or rumor about the vessel may be as important as the actual sinking of the vessel in the way it affects the market value of the vessel. According to Long, this is a fact that any prudent broker should disclose to his client and is customary in the industry.

FN11. Earle Long is president of Bluewater Yacht Sales and Service, Inc., an authorized Bertram dealer, located in Mobile, Alabama. Long has worked in the yacht sales and brokerage business for approximately seventeen years.

It is undisputed that the yacht itself did not exhibit the rust or corrosion which follows from a sinking, and that its appliances were not recently replaced, indicating possible earlier submersion damage. In addition, neither of the surveys reports produced by Reynolds and New Horizons contained any suggestion that the yacht had previously sank. Merrill-Stevens maintains that based on the foregoing information and condition of the yacht, Hasselbring refrained from discussing the unsubstantiated rumor that the vessel had previously sank.

[5] Under Florida law, a failure to disclose mere possibilities cannot constitute a failure to disclose material facts sufficient to support an action for fraudulent misrepresentation.

Hauben, 605 F.2d at 925. However, upon careful review of the record, this Court finds that there is a genuine issue of material fact as to whether Hasselbring had superior knowledge regarding the previous sinking of the yacht by way of either actual knowledge, or a reason to believe the yacht had sank, and whether he intentionally concealed this fact from Plaintiff. Accordingly, summary judgment must be denied as to Count II.

Count III-Conspiracy

[6] Count III states a claim against Merrill-Stevens and other Defendants, for conspiracy to conceal and misrepresent material facts. Civil conspiracy is a derivative of the underlying claims which form the basis of the conspiracy. The "gist of a civil conspiracy is not the conspiracy itself but the civil wrong which is done through the conspiracy which results in injury to the Plaintiff." *Buckner v. Lower Florida Keys Hosp. Dist.*, 403 So.2d 1025, 1027 (Fla. 3d DCA 1981). An act which does not constitute a basis for an action cannot serve the basis for a conspiracy claim. *Id.*

Inasmuch as Count I fails to state a claim against Merrill-Stevens for fraudulent misrepresentation, Count III must be dismissed to that extent. *Renpak, Inc. v. Oppenheimer*, 104 So.2d 642 (Fla. 3d DCA 1958); *Coon*, 534 F.2d 44. However, Count III states a claim for conspiracy to the extent that Count II states a cause of action against Merrill-Stevens for fraudulent concealment.

Plaintiff has adduced evidence that Stanley obtained actual knowledge of the yacht's prior sinking and discussed the question of the sinking with Hasselbring, both during the time of negotiations and on the deck of the M/V IMPULSE/XANADU during its sea trials, when they were confronted *841 by Plaintiff on this matter. It is therefore open to the trier of fact to infer from these circumstances that Merrill-Stevens and Woods and Oviatt had a meeting of the minds and reached an understanding that they would conceal the prior sinking from Plaintiff. This inference could be made in light of the fact that at the time Plaintiff inquired, there was a clear

motive in not disrupting a deal which was about to be consummated and which would have allowed both Stanley and Hasselbring to pocket a sizeable brokerage fee.

Count IV--Negligence

[7] There is no legal basis for Plaintiff's claim for negligence against Merrill-Stevens for allegedly failing to discover that the yacht had previously sank. Plaintiff has not set forth, nor can this Court unearth, any legal basis upon which to impose on Merrill-Stevens a duty to investigate each and every item of information provided by Roller or his broker, Woods and Oviatt, regarding the yacht's condition and history. Rather, given that the surveyors' reports prepared for Plaintiff did not reveal evidence of a prior sinking, and if in fact they should have discovered highwater marks, rust, or corrosion, consistent with a sinking, then Plaintiff may have a claim against the surveyors for negligence. However, any claim for negligence against Merrill-Stevens would be misdirected. Accordingly, summary judgment must be granted as to Count IV.

Count V--Breach of Fiduciary Duty

In light of this Court's finding that Merrill-Stevens owed a fiduciary duty to Plaintiff, and that a genuine issue of material fact exists whether it breached such duty by either knowingly making false representations regarding the prior sinking of the yacht, or by concealing this fact, Merrill-Stevens' Motion for Summary Judgment shall be denied as to Count V.

LAURENCE ROLLER'S MOTION FOR
PARTIAL SUMMARY JUDGMENT
Count I--Fraudulent Misrepresentation

Plaintiff is unable to establish a prima facie case of fraudulent misrepresentation against Laurence Roller. As previously stated, to establish a cause of action for fraudulent misrepresentation, Plaintiff must demonstrate that: (1) Laurence Roller knowingly made false statements concerning material facts; (2) that Plaintiff relied on these statements; and

(3) that Plaintiff was damaged as a result of relying upon these false representations. Hauben, 605 F.2d 920; Stowell, 641 F.2d 323.

[8] These is no genuine issue of material fact whether Laurence Roller knowingly made false representations regarding the history or condition of the M/V IMPULSE/XANADU. Facts adduced in support of Roller's Motion for Partial Summary Judgment conclusively establish that Roller made no misrepresentations to Plaintiff regarding the history or condition of the yacht. Roller directs this Court to Plaintiff's deposition which reads in pertinent part:

Q. During the course of that sea trial, did you have any conversation with Mr. Roller where nobody else was present?

A. No.

Q. Somebody else was present when you talked to Mr. Roller?

A. Yes.

Q. And you did not talk to Mr. Roller about the sinking of the vessel at all?

A. No.

Q. Did that topic ever come up during your conversations?

A. No.

* * *

Q. And you never mentioned anything about the sinking of the vessel with Mr. Roller on the sea trials?

A. No.

* * *

Q. You specifically recall Mr. Roller telling you about the new starters and generator during the sea trial?

*842 A. I am not positive, but it was small talk, we were making small talk, nothing.

Q. Do you recall any other specifics about this small talk with Mr. Roller during the sea trial?

A. I said very little to Mr. Roller.

Q. Do you recall any specifics at all about that small talk?

A. No.

* * *

Q. Did Mr. Roller make any specific representations to you regarding the condition of the Xanadu?

A. I do not remember if he did or did not.

Q. So you cannot say whether you relied on any representations he may have made in the purchase of the boat?

A. I don't know what he said, to be truthful. He didn't say much, that is what I am trying to say, the man said very little.

Czarnecki Deposition, pp. 110, 127, 128, 135-36 (emphasis added). Plaintiff fails to adduce any evidence to the contrary. Rather than attempting to demonstrate that Roller made false representations, Plaintiff restricts his argument to what Roller did not say. Accordingly, summary judgment is proper on this basis alone.

[9] Even if this Court were to assume *arguendo*, that Roller did in fact misrepresent material facts to Plaintiff regarding the history or condition of the yacht, summary judgment would still be warranted based upon Plaintiff's failure to demonstrate reliance upon such misrepresentations. In confusing fraudulent misrepresentation with fraudulent concealment, Plaintiff fails to address the reliance requirement for fraudulent misrepresentation. Detrimental reliance is an essential element in stating a cause of action for fraudulent misrepresentation. *Fote*, 46 So.2d at 892. Plaintiff's failure to demonstrate justifiable and detrimental reliance upon said misrepresentations constitutes sufficient basis for entering summary judgment in favor of Roller. *Id.*

As previously stated, the evidence conclusively establishes that Plaintiff did not rely upon any misrepresentations made by Roller regarding the history or condition of the M/V IMPULSE/XANADU. As with Merrill-Stevens' Motion for Summary Judgment, facts adduced in support of Roller's Motion for Partial Summary Judgment demonstrate that Plaintiff based his decision to purchase the M/V IMPULSE/XANADU upon his own inspections, sea trials, and acceptable marine surveys. Accordingly, any damages which he may have suffered were clearly the result of his own exercise of business, and not the

result of any independent representation of the yacht's history or condition made by Roller.

Count III--Conspiracy

Count III fails to state a claim against Roller for conspiracy to misrepresent material facts. As previously stated, civil conspiracy is a derivative of the underlying claims which form the basis of the conspiracy, and an act which does not constitute a basis for an action cannot serve the basis for a conspiracy claim. *Buckner*, 403 So.2d 1025. Inasmuch as Count I fails to state a claim against Roller for fraudulent misrepresentation, Roller is entitled to partial summary judgment on Count III. *Renpak*, 104 So.2d 642; *Coon*, 534 F.2d 44.

Count VII--Breach of Implied Warranty of Merchantability and Breach of Warranty for Fitness for a Particular Purpose

Plaintiff fails to set forth sufficient facts to support his claims for breach of implied warranty of merchantability and breach of warranty for fitness for a particular purpose.

implied warranty of merchantability

[10] Under the Uniform Commercial Code, a claim for implied warranty of merchantability requires that the seller be a merchant. Section 672.314(1), Fla.Stat., provides in pertinent part:

Unless excluded or modified, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to the goods of that kind....

*843 Section 672.104(1), Fla.Stat., defines a "merchant" as:

a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

Plaintiff directs this Court to Jeff Stanley's deposition wherein he states that Roller sold five boats over the three, four or five years that Stanley has known Roller. [FN12] However, notwithstanding this fact, this Court finds that Plaintiff has failed to adduce evidence that Roller was a "merchant" for purposes of imposing liability for breach of implied warranty of merchantability under the Commercial Code.

FN12. Stanley Deposition, pp. 7-11.

The concept of a "merchant" is broad, and although it is somewhat nebulous in that there is no bright line separating those who are merchants from those who are not, this Court is of the opinion that even if Roller had sold five boats during one-year's time, this alone is an insufficient basis upon which to find that Roller was a merchant. The Uniform Commercial Code provides that:

A person making an isolated sale of goods is not a "merchant" within the meaning of the full scope of this section and, thus, no warranty of merchantability would apply.

U.C.C. § 2-314 official comment 3. A person who buys a boat and sells their old boat once a year is not a merchant. See *Joyce v. Combank/Longwood*, 405 So.2d 1358 (Fla. 5th DCA 1981) (bank was held not to be merchant by having sold five repossessed cars in one year); see also *Donald v. City Nat'l Bank of Dothan*, 295 Ala. 320, 329 So.2d 92 (Ala.1976) (holding that a seller of a boat was not a merchant).

Finally, Plaintiff argues that by hiring a broker (Woods and Oviatt), Roller became a merchant. However, if this Court were to agree with this premise, then everyone who listed their house or boat for sale with a broker would be a merchant. Such a rule would render Section 672.314, Fla.Stat., meaningless. Accordingly, this Court finds that Roller was not a merchant for purposes of imposing liability for breach of implied warranty of merchantability, and that Roller is entitled to summary judgment as to this claim.

breach of warranty for fitness for a particular

purpose

[11] Plaintiff fails to state a claim for breach of warranty for fitness for a particular purpose. The applicable Florida Statute reads in part:

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

Fla.Stat. § 672.315 (emphasis added). In *Royal Typewriter Co. v. Xerographic Supplies Corp.*, 719 F.2d 1092 (11th Cir.1983), the Eleventh Circuit Court of Appeals stated that "[a] 'particular purpose' differs from an ordinary purpose in that it envisages a specific use by the buyer which is peculiar to the nature of his business." *Id.* at 1100. The record in the instant action reveals that Plaintiff did not purchase the M/V IMPULSE/XANADU for any particular purpose other than to use it as a pleasure craft. Although after buying the yacht, Plaintiff intended to take a long trip aboard it, this amounts to nothing more than ordinary use.

Even if Plaintiff had intended to use the yacht for a "particular purpose," Plaintiff fails to adduce evidence that Roller knew of such purpose for which the yacht was going to be used, or that he relied on Roller's skill or judgment. Plaintiff's conversations with Roller were confined to "small talk" [FN13], and based his decision to purchase the yacht on his own inspections, *844 sea trials, and acceptable marine surveys. Accordingly, for the foregoing reasons, Roller is entitled to summary judgment as to the claim for breach of warranty for fitness for a particular purpose.

FN13. Czarnecki Deposition, p. 128.

Based on the above and foregoing, it is hereby

ORDERED AND ADJUDGED as follows:

1. Defendant Merrill-Stevens' Motion for Summary Judgment is GRANTED IN PART

and DENIED IN PART in that

A. Summary judgment is GRANTED as to Count I.

B. Summary judgment is DENIED as to Count II.

C. Summary judgment is GRANTED IN PART and DENIED IN PART as to Count III insofar as Plaintiff states a claim for conspiracy to conceal material facts.

D. Summary judgment is GRANTED as to Count IV.

E. Summary judgment is DENIED as to Count V.

2. Summary judgment is GRANTED in favor of Laurence Roller as to:

A. Count I.

B. Count III as it pertains to fraudulent misrepresentation.

C. Count VII.

DONE AND ORDERED.

726 F.Supp. 832, 1990 A.M.C. 2110, 11 UCC
Rep.Serv.2d 829

END OF DOCUMENT

22

United States Court of Appeals,
Second Circuit.

DALLAS AEROSPACE, INC., Plaintiff-
Counter-Defendant-Appellant,
v.
CIS AIR CORPORATION, Defendant-
Counter-Claimant-Appellee.

Docket No. 02-9347.

Argued Oct. 7, 2003.
Decided Dec. 19, 2003.

Background: Buyer of aircraft engine sued seller for breach of contract, fraudulent misrepresentation, negligent misrepresentation and unconscionability. The United States District Court for the Southern District of New York, Barbara S. Jones, J., 2002 WL 31453789, granted summary judgment for seller, and buyer appealed.

Holdings: The Court of Appeals, John M. Walker, Jr., Chief Judge, held that: (1) purchase order, which buyer sent to seller when it wired payment to seller, "materially altered" the parties' contract as to warranties, without express consent of seller, and thus modification contained in purchase order was ineffective; (2) seller's acceptance of payment for engine did not constitute unambiguous overt admission that the parties' contract had been modified by terms of buyer's purchase order, so as to overcome New York's statute of frauds; (3) even if modification in purchase order satisfied statute of frauds, modification was not based on agreement between the parties to modify, and thus it was not enforceable; (4) buyer could not show justifiable reliance on seller's alleged misrepresentation that engine was airworthy, as required for fraudulent misrepresentation claim; (5) provisions of sale agreement disclaiming warranties were not procedurally or substantively unconscionable under New York law; and (6) buyer did not establish negligent misrepresentation claim.

Affirmed.

West Headnotes

[1] Aviation 14
48Bk14

Purchase order which buyer of aircraft engine sent to seller when it wired payment to seller "materially altered" the parties' contract as to warranties, without express consent of seller, and thus modification contained in purchase order was ineffective under New York's Uniform Commercial Code (UCC). N.Y.McKinney's Uniform Commercial Code § 2-207(2)(b).

[2] Frauds, Statute Of 131(1)
185k131(1)

Seller's acceptance of payment for aircraft engine from buyer did not constitute unambiguous overt admission that the parties' contract had been modified by terms of purchase order that buyer purportedly sent when it wired payment, so as to overcome New York's statute of frauds and make modification effective; seller's acceptance of payment was entirely consistent with its pre-existing obligations under the parties' contract. N.Y.McKinney's Uniform Commercial Code §§ 2-201(3)(c), 2-209.

[3] Aviation 14
48Bk14

Even if modification of contractual warranties contained in purchase order, which buyer of aircraft engine sent to seller when it wired payment to seller, satisfied New York's statute of frauds, modification was not based on agreement between the parties, and thus it was not enforceable under New York's Uniform Commercial Code (UCC); seller, by accepting payment for engine, did not engage in course of conduct indicating its assent to modify contract. N.Y.McKinney's Uniform Commercial Code §§ 2-201(3)(c), 2-209.

[4] Sales 89
343k89

Under New York law, parties may modify a contract for sale of goods by another agreement, by course of performance, or by conduct amounting to waiver or estoppel.

[5] Contracts 236
95k236

Fundamental to establishment of contract modification, under New York law, is proof of each element requisite to formulation of a contract, including mutual assent to its terms.

[6] Contracts 236
95k236

Under New York law, for course of performance to demonstrate mutual assent to contract modification, it must be "unequivocally referable" to modification.

[7] Estoppel 52.10(3)
156k52.10(3)

[7] Estoppel 78(1)
156k78(1)

Under New York law, for conduct to amount to waiver or estoppel, it must not otherwise be compatible with agreement as written, rather conduct of the parties must evidence indisputable mutual departure from written agreement.

[8] Fraud 3
184k3

To succeed on theory of fraudulent misrepresentation under New York law, plaintiff must show that defendant made false representation of material fact to plaintiff and that plaintiff suffered injury as result of justifiable reliance upon that fact.

[9] Fraud 58(1)
184k58(1)

Under New York law, each element of fraud claim must be proven by clear and convincing evidence.

[10] Aviation 13
48Bk13

Buyer of aircraft engine could not demonstrate that it justifiably relied on seller's alleged misrepresentation that engine was airworthy, as required for fraudulent misrepresentation claim under New York law, given the parties had signed agreement wherein seller explicitly disclaimed any representations regarding airworthiness of engine, and airworthiness of engine was not information

that was peculiarly within seller's knowledge.

[11] Fraud 36
184k36

Although under New York law, general boilerplate disclaimer of a party's representations cannot defeat a claim for fraud, a party cannot justifiably rely on representation that is specifically disclaimed in agreement.

[12] Fraud 36
184k36

Under New York law, if allegedly misrepresented facts are peculiarly within misrepresenting party's knowledge, even specific disclaimer will not undermine another party's allegation of reasonable reliance on misrepresentations.

[13] Aviation 13
48Bk13

Under New York law, whether buyer of aircraft engine was reckless or on inquiry notice to investigate airworthiness of engine was not relevant to its action for fraudulent misrepresentation against seller, given buyer had signed agreement containing disclaimer of very representation alleged to have been fraudulently made.

[14] Sales 1(1)
343k1(1)

While decisions about unconscionability of contract for sale of goods are for court to decide as matter of law, under New York law, the parties must be afforded reasonable opportunity to present evidence as to a contract term's commercial setting, purpose and effect to aid court in making determination. N.Y.McKinney's Uniform Commercial Code § 2-302(2).

[15] Aviation 14
48Bk14

Provisions of aircraft engine sale agreement disclaiming warranties were not procedurally unconscionable under New York law, though the engine was not airworthy, where the parties to the agreement were two sophisticated entities of equal bargaining power and agreement specifically and

conspicuously disclaimed any warranties about airworthiness of engine.

[16] Aviation 14
48Bk14

Provisions of aircraft engine sale agreement disclaiming any representations by seller regarding airworthiness of engine were not substantively unconscionable under New York law, even though engine was not airworthy; engine was neither worthless nor a good of essentially no value, despite fact that it was not airworthy, and if buyer ended up with contract it did not like, it was "real-world" consequence of its own failure to complete adequate inquiry into engine.

[17] Fraud 13(3)
184k13(3)

Under New York law, elements of negligent misrepresentation are: (1) carelessness in imparting words, (2) upon which others were expected to rely, (3) and upon which they did act or failed to act, (4) to their damage, and (5) the declarant must express the words directly, with knowledge or notice that they will be acted upon, to one to whom declarant is bound by some relation or duty of care.

[18] Fraud 17
184k17

[18] Fraud 23
184k23

Under New York law, not all representations made by a seller of goods will give rise to a duty to speak with care, but instead law of negligent misrepresentation requires closer degree of trust between the parties than that of ordinary buyer and seller in order to find reliance on such statements justified.

[19] Aviation 13
48Bk13

Buyer of aircraft engine could not recover from seller for negligent misrepresentation under New York law, absent showing that the parties had a special relationship, which caused buyer to rely on seller's representations.

*778 Stuart A. Jackson, R e, Parser &

Partners, New York, NY, for Plaintiff-Appellant.

Patrick P. Salisbury, Salisbury & Ryan, New York, NY, for Defendant-Appellee.

Before: WALKER, Chief Judge, NEWMAN and CARDAMONE, Circuit Judges.

JOHN M. WALKER, Jr., Chief Judge.

Plaintiff-appellant Dallas Aerospace, Inc. ("Dallas"), a buyer of a used jet engine from defendant-appellee CIS Air Corporation ("CIS"), appeals from the judgment of the United States District Court for the Southern District of New York (Barbara S. Jones, District Judge), granting summary judgment to CIS.

Dallas and CIS are both corporations in the business of buying, selling, and leasing aircraft and aircraft engines. The various claims at issue in this appeal arose out of CIS's sale to Dallas of a JT8D engine in August 1997 under a written agreement. Months after the purchase, Dallas discovered that the engine had been involved in a hard landing years earlier that rendered the engine not "airworthy." "Airworthy" is a term of art in the aviation industry indicating that an engine is safe and that it comports with FAA requirements. Dallas brought this diversity action alleging various claims under New York law to recover the \$1.15 million it paid for the engine.

The district court agreed with CIS that there was no genuine issue of material fact precluding a grant of summary judgment in CIS's favor and concluded that, as a matter of law: (1) for the purposes of Dallas's breach of contract claim, the agreement between Dallas and CIS, which disclaimed all representations about the engine, had not been modified; (2) for the purposes of its fraud claim, Dallas could not show it justifiably relied on any purported misrepresentation under the contract because (a) the contract specifically disclaimed the very representation alleged to be fraudulent, and (b) the truth of the allegedly misrepresented matter was easily

discoverable by Dallas; (3) the contract terms were not unconscionable; and (4) no special relationship existed between the parties that would trigger a duty to disclose *779 on CIS's part, for the purposes of Dallas's negligent misrepresentation claim.

I. BACKGROUND

A Japan Air Systems ("JAS") aircraft experienced a hard landing in Japan in April 1993. While the ensuing fire substantially destroyed the aircraft, the engine remained intact and was salvaged from the wreckage. The insurance company that took title to the engine sold it to Charlotte Aircraft Corporation ("Charlotte"). In 1996, American Air Ventures, Inc. ("AAV"), a broker, negotiated the sale of the engine to CIS and took title from Charlotte pursuant to a separate contract before transferring it to CIS for \$425,000, which was paid directly by CIS to Charlotte. CIS paid AAV a finder's fee of \$10,000.

CIS understood that it would have to overhaul the engine to get it back into "serviceable" condition under guidelines established by the engine's manufacturer, Pratt & Whitney ("P & W"), for returning a used engine to service in compliance with FAA regulations. CIS claims that it had no specific knowledge of the hard landing, however, and undertook a less expensive overhaul that was appropriate for used, but not incident-related, engines. CIS sent the engine for overhaul to ST Aerospace ("ST"), a reputable repair shop authorized by the FAA, with overhaul instructions that had been provided by AAV. CIS asserts that it relied on AAV because CIS has no internal technical staff. CIS paid approximately \$350,000 for the overhaul and, in due course, ST returned the engine to CIS, certifying it--mistakenly as it turned out--as airworthy. ST was not aware of the engine's incident-related status, which, under the P & W guidelines, would have necessitated a \$500,000 overhaul.

Upon return of the engine to CIS, CIS found Dallas as a willing buyer in August 1997, and the two parties quickly reduced their

agreement to a written contract, subject to Dallas's inspection of the engine and its records. While the contract between Charlotte and AAV expressly stated that the engine had been involved in an accident, neither the contract between AAV and CIS, nor the one between CIS and Dallas contained any such provision. The extent of CIS's own knowledge about the hard landing and CIS's corporate relationship with AAV are both disputed. It is undisputed, however, that Dallas was not told prior to its purchase about the hard landing in Japan or that ST's overhaul was other than adequate. Dallas's extensive baroscopic physical inspection of the engine prior to purchase revealed no defects and its month-long "back-to-birth" review of the engine's records did not bring the fact of the JAS accident to light. Accordingly, Dallas consummated its purchase of the engine from CIS.

Dallas's contract with CIS, dated August 26, 1997, (the "Agreement") disclaimed that CIS had made any representations regarding the engine. It specifically disclaimed any representation as to the engine's airworthiness in Paragraph 8 and obligated plaintiff to accept delivery of the engine and its records "as-is, where-is" in Paragraph 7. All of the exclusions and disclaimers in the Agreement were "conspicuous," as required by § 2-316 of the Uniform Commercial Code ("UCC"), [FN1] and the Agreement contained an integration clause stating that "no warranties, representations or undertakings have been made by either party except as expressly set forth herein." On August 29, 1997, Dallas signed the Agreement as well as an Engine Delivery Receipt, which recited *780 that Dallas "accepted delivery of" the engine and "confirms its acceptance of the [engine], in 'AS IS' 'WHERE IS' condition."

FN1. Throughout this opinion we discuss provisions of the UCC, all of which have been adopted by New York, effective September 27, 1964.

Dallas did not pay for the engine until September 9, 1997 or thereabout. Dallas claims that at the time it wire-transferred payment, it also delivered to CIS a purchase

order that, after stating that "[a]ll the terms and conditions of this purchase are stated in the contract dated August 28, 1997," purported to modify the contract by requiring CIS to deliver a serviceable and airworthy engine that had "not been subjected to extreme stress or heat as in a major engine failure[,] accident, incident or fire." The status of the purchase order is a disputed issue and is discussed more fully in connection with Dallas's breach of contract claim below.

Dallas subsequently leased the engine to Sky Trek Airlines, and the engine was flown in daily service for several months without incident. In 1999, Dallas attempted to sell the engine, but the prospective buyer walked away from the negotiations after informing Dallas that the engine was incident-related. P & W confirmed this information to Dallas; P & W had always known about the engine's history because it keeps records on every engine it manufactures, including data related to incidents and accidents. While just who had access to the P & W records at the time of Dallas's negotiations with CIS is disputed, it is not disputed that both JAS and Charlotte knew about the engine's incident-related history and would not have withheld the information if they had been asked about it by Dallas at any time.

After unsuccessfully trying to recover its purchase price from CIS, Dallas filed suit against CIS for breach of contract, fraudulent misrepresentation, and negligent misrepresentation in the district court. Applying New York law, pursuant to the Agreement of the parties, the district court granted summary judgment in favor of CIS on all of Dallas's claims. This appeal followed.

II. DISCUSSION

A. Standard of Review

We review a grant of summary judgment *de novo*. Summary judgment is appropriate only if there is no genuine issue as to any material fact and the moving party is entitled to summary judgment as a matter of law. Fed.R.Civ.P. 56(c); see *Celotex Corp. v.*

Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). When ruling on a summary judgment motion, the district court must construe the facts in the light most favorable to the non-moving party and must resolve all ambiguities and draw all reasonable inferences against the movant. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

B. The Breach of Contract Claim

Dallas alleges that CIS breached their agreement by delivering an engine that was falsely represented as airworthy based on an airworthiness inspection for non-incident-related engines performed by ST. CIS responds that two clear and unambiguous contractual provisions in the Agreement disclaim any representation as to airworthiness. Paragraph 8 of the Agreement states (with emphasis in the original):

DISCLAIMER OF WARRANTY Seller has not made and does not make, nor shall Seller be deemed to have made or given, and hereby expressly disclaims, any warranty, guaranty or representation, express or implied, as to ... the [engine's] title, airworthiness, design, value, operation, condition, quality, *781 durability, suitability, merchantability or fitness for a particular purpose

Paragraph 13D of the Agreement states:

This Agreement contains the entire understanding of the parties with respect to the purchase and sale of the [e]ngine, and no warranties, representations or undertakings have been made by either party except as expressly set forth herein. Any other previous oral or written communications, representations, agreements or understanding between the parties are no longer of any force and effect, and are superseded and replaced in their entirety by the provisions of this Agreement.

Dallas asserts that the foregoing disclaimer provisions were nullified by a subsequent purchase order it claims to have delivered to CIS with its payment on September 9, 1997. The record, however, contains no affirmative

testimonial or documentary evidence that the purchase order was ever sent by Dallas or that it was ever received by CIS. While we assume that it was sent and received for the purposes of summary judgment, Dallas's claim still fails as a matter of law.

The district court applied the standard "battle of the forms" analysis set forth in UCC § 2-207. [FN2] Accordingly, the district court rejected Dallas's purported modification because the new contract term contained in the purchase order "materially alter[ed]" the contract "without the express consent of [d]efendant;" it was therefore ineffective pursuant to UCC § 2-207(2)(b). Dallas argues that the district court erred in applying § 2-207 to construe the purported modification, and that the applicable provision is UCC § 2-209.

FN2. Section 2-207 reads, in relevant part, as follows: (1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms. (2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless: (a) the offer expressly limits acceptance to the terms of the offer; [or] (b) they materially alter it

We need not decide whether § 2-207 or § 2-209 is the proper provision under which Dallas's purchase order should be construed; [FN3] under either provision the purported modification was ineffective.

FN3. Indeed, the answer to this question is not entirely clear under New York law. Compare *Lorbrook Corp. v. G & T Indus., Inc.*, 162 A.D.2d 69, 562 N.Y.S.2d 978, 980 (1990) (applying § 2-207 to determine if purchase order modified "pre-existing binding contract"); *Marcus Bros. Textiles, Inc. v. Avondale Mills, Inc.*, 78 A.D.2d 800, 433 N.Y.S.2d 114, 115-16 (1980) (applying § 2-207 to determine if confirmation orders modified signed "sales notes" that constituted "valid contracts"), with *CT Chems. (U.S.A.) Inc. v. Vinmar Impex,*

Inc., 81 N.Y.2d 174, 597 N.Y.S.2d 284, 613 N.E.2d 159, 162 (1993) (holding that "[o]nce a contract is formed, ... we look to UCC [§§] 2-208 and 2-209, not 2-207," to determine if alleged modifications are enforceable); *Marlene Indus. Corp. v. Carnac Textiles, Inc.*, 45 N.Y.2d 327, 408 N.Y.S.2d 410, 380 N.E.2d 239, 241 (1978) (explaining that § 2-207 is "intended to include at least two distinct situations:" (1) where the parties have reached a prior oral contract and the writing containing the additional term is a confirmation of that contract; and (2) where no actual contract has yet formed and the writing containing the additional term is an acceptance of an outstanding offer).

1. UCC § 2-207

[1] Dallas does not dispute the district court's conclusion that under § 2-207 the additional terms contained in its purchase order "materially altered" the terms of the Agreement, and thus were ineffective absent *782 CIS's express assent. Nor could it, given that the terms contained in the purchase order voided the express disclaimers contained in the Agreement, thereby altering the allocation of risk expressly agreed upon by the parties.

Lorbrook Corp. v. G & T Indus., Inc., 162 A.D.2d 69, 562 N.Y.S.2d 978 (App.Div.1990), cited by the district court, reinforces the point. There, a party's attempt to add a forum non conveniens clause by means of a purchase order that was issued without the express consent of the other party was held to be an ineffective material alteration under § 2-207. As was the case in *Lorbrook*, Dallas's attempt here to undo the agreed-upon disclaimer of representations can only be considered "an unsuccessful ploy ... unilaterally to add a term not covered by the preexisting binding contract." *Id.* at 980.

2. UCC § 2-209

[2] UCC § 2-209, entitled "Modification, Rescission and Waiver," states, in relevant part:

- (1) An agreement modifying a contract within this Article needs no consideration to be binding.
- (2) A signed agreement which excludes

modification or rescission except by a signed writing cannot be otherwise modified or rescinded

(3) The requirements of the statute of frauds section of this Article (Section 2-201) must be satisfied if the contract as modified is within its provisions.

As Dallas notes, the Agreement does not exclude modifications, so § 2-209(2) does not apply. However, because the Agreement as purportedly modified is a sale of goods for \$500 or more, it does fall within UCC § 2-201, the statute of frauds. The relevant portions of UCC § 2-201 read:

(1) Except as otherwise provided in this section a contract for the sale of goods for the price of \$500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought ...

...

(3) A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable ... (c) with respect to goods for which payment has been made and accepted or which have been received and accepted

Dallas argues that the modification satisfies § 2-201 because although CIS did not sign the modification embodied in the purchase order after it purportedly received it, CIS accepted payment for the engine after it received the purchase order with the modification, signifying its intention to be bound by it under § 2-201(3)(c). Thus, Dallas urges, §§ 2-209 and 2-201(3)(c), when applied together, give effect to the terms of the purchase order.

This argument is misguided. The function of § 2-201(3)(c) is to preclude a party from raising a statute of frauds defense where the parties have already performed their obligations under the alleged contract. The rationale underlying the exception is that "[r]eceipt and acceptance either of goods or of the price constitutes an unambiguous overt admission by both parties that a contract actually exists." N.Y. UCC § 2-201, Official Comment ¶ 2. Accordingly, partial performance of contractual obligations

validates a contract, but only to the extent of such partial performance. *Id.* Here, however, because acceptance of payment for the engine was entirely consistent with CIS's pre-existing rights and obligations under the unmodified Agreement, it cannot be said that CIS's performance "constitute[d] an unambiguous *783 overt admission" that the contract had been modified.

[3] But even if the purchase order did satisfy § 2-201(3)(c), that fact is insufficient alone to render it an enforceable modification under § 2-209. Compliance with § 2-201 is only one of the requirements a purported modification must meet; its purpose is solely "to remove the bar of the [s]tatute of [f]rauds." *Bazak Int'l Corp. v. Mast Indus., Inc.*, 73 N.Y.2d 113, 538 N.Y.S.2d 503, 535 N.E.2d 633, 637 (1989); N.Y. UCC § 2-201, Official Comment ¶ 3.

[4][5] To be enforceable under § 2-209, the purported modification must still be based on an agreement to modify, as required under § 2-209, as well as be "valid in other respects," as required under § 2-201. Under New York law, parties may modify a contract "by another agreement, by course of performance, or by conduct amounting to a waiver or estoppel." *CT Chems. (U.S.A.) Inc. v. Vinmar Impex, Inc.*, 81 N.Y.2d 174, 597 N.Y.S.2d 284, 613 N.E.2d 159, 162 (N.Y.1993); see *Martin v. Peyton*, 246 N.Y. 213, 158 N.E. 77, 78 (1927). Indeed, "[f]undamental to the establishment of a contract modification is proof of each element requisite to the formulation of a contract, including mutual assent to its terms." *Beacon Terminal Corp. v. Chemprene, Inc.*, 75 A.D.2d 350, 429 N.Y.S.2d 715, 718 (1980); see also *Becker v. Faber*, 280 N.Y. 146, 19 N.E.2d 997, 998 (1939) (holding that contractual obligations cannot be modified without the consent of the party that has assumed the obligation).

Dallas does not contend that the purchase order constituted a mutual agreement to modify. Instead, it argues that CIS's course of performance demonstrated mutual assent to the modification. Dallas relies primarily on *Hunt Oil Co. v. FERC*, 853 F.2d 1226, 1240-41 (5th Cir.1988), where the court applied

UCC § 2-209 together with § 2-201(3)(c) and held that a contract modification was enforceable under Mississippi and Texas law. There, however, the parties' subsequent course of performance of the contract confirmed a prior oral modification. Here, Dallas concedes that there was no oral modification. Rather, it contends that CIS's acceptance of payment amounted to a course of performance signifying its assent. However, a single act of accepting payment is not a course of performance sufficient to demonstrate mutual assent. See UCC § 2-208(1); 1 James J. White & Robert S. Summers, Uniform Commercial Code, § 1-6(c), at 48 & n. 39 (4th ed.1995); cf. CT Chems., 597 N.Y.S.2d 284, 613 N.E.2d at 162 (requiring "repeated occasions for performance and opportunity for objection") (emphasis added).

[6][7] Moreover, for a course of performance to demonstrate mutual assent to a modification, it must be "unequivocally referable" to the modification. *Rose v. Spa Realty Assocs.*, 42 N.Y.2d 338, 397 N.Y.S.2d 922, 366 N.E.2d 1279, 1283 (1977); *All-Year Golf, Inc. v. Prods. Investors Corp.*, 34 A.D.2d 246, 310 N.Y.S.2d 881, 885 (1970). Similarly, for conduct to amount to a waiver or estoppel, it "must not otherwise be compatible with the agreement as written;" rather, "the conduct of the parties [must] evidence [] an indisputable mutual departure from the written agreement." *Rose*, 397 N.Y.S.2d 922, 366 N.E.2d at 1283. Here, because CIS's acceptance of payment after having delivered the engine was wholly consistent with the Agreement, it fails to demonstrate mutual assent to the modification. See *Beacon Terminal*, 429 N.Y.S.2d at 717-18 (fact that defendant paid bills charging higher rate did not demonstrate mutual assent to higher rate).

While we have assumed for summary judgment purposes that the purchase order *784 was sent and received at some point, that assumption cannot be used to bootstrap a finding of mutual assent absent some evidence that CIS received it prior to accepting payment and issuing the bill of sale. See *Celotex*, 477 U.S. at 323-24, 106 S.Ct. 2548 ("One of the principal purposes of the

summary judgment rule is to isolate and dispose of factually unsupported claims or defenses"). Because Dallas's payment was sent by wire transfer, the purchase order was necessarily sent through other channels. Dallas's witness testified that, as a general matter, Dallas "mailed [purchase orders] out. [It] often fax[es] them out beforehand." Thus, even if we assumed that the purchase order and payment were sent simultaneously, there is no evidence to support a finding that CIS received the purchase order prior to its accepting payment and issuing the bill of sale the next day. In any case, Dallas signed an Engine Delivery Receipt on August 29, 1997 representing that it accepted the engine "WHERE-IS," rendering the purchase order an attempt to accept anew, with a new condition, something it had already accepted more than a week before; Dallas plainly doesn't contend that it revoked its acceptance of August 29, 1997.

Finally, we note that while CIS's course of conduct was at all times consistent with the terms of the Agreement, Dallas's own conduct was inconsistent with the belief that the Agreement had been modified. As noted by the district court, Dallas did not assert that the Agreement had been modified until it filed its opposition to CIS's motion for summary judgment, some twenty-one months after the litigation began. In addition, Dallas's Complaint admitted that the Agreement was the contract between the parties; numerous witnesses for Dallas acknowledged that its contract with CIS was the one announced in the Agreement, without mentioning the purported modification; and Dallas's inventory receipt of September 16, 1997--well after CIS accepted payment--makes reference to the purchase order but still recites that the terms and conditions associated with the engine are contained in the Agreement of August 1997. While this conduct falls largely beyond the course of contract performance, it reinforces our conclusion here that the asserted modification was ineffective. Cf. *CT Chems.*, 597 N.Y.S.2d 284, 613 N.E.2d at 162 (refusing to enforce alleged modification where parties' subsequent course of conduct was inconsistent with terms of modification).

Under all of the circumstances, no reasonable jury could find that the parties agreed to modify the Agreement so as to nullify its disclaimer provisions. Accordingly, for all the foregoing reasons, the district court's grant of summary judgment on the appellant's breach of contract claim is affirmed.

C. The Fraudulent Misrepresentation Claim

[8][9][10] To succeed on a theory of fraudulent misrepresentation under New York law, a plaintiff must show that the defendant made a false representation of a material fact to the plaintiff and that the plaintiff suffered injury as a result of justifiable reliance upon that fact. See *Sec. Investor Prot. Corp. v. BDO Seidman, L.L.P.*, 95 N.Y.2d 702, 723 N.Y.S.2d 750, 746 N.E.2d 1042, 1047 (2001); *Brackett v. Griswold*, 112 N.Y. 454, 20 N.E. 376, 379 (1889) ("[The] elements ... requisite to sustain an action for [fraud are] ... a false representation, known [by defendant] to be such, made by the defendant, calculated and intended to influence the plaintiff, and which came to his knowledge, and in reliance upon which he, in good faith, ... [suffered] the injury of which he complains."). Under New York law, each element of a fraud claim must be proven by *785 clear and convincing evidence. See *Hutt v. Lumbermens Mut. Cas. Co.*, 95 A.D.2d 255, 466 N.Y.S.2d 28, 30 (1983).

Dallas alleges that "[w]hen CIS Air delivered to [plaintiff] the [e]ngine [r]ecords, CIS Air knew that the [e]ngine [r]ecords falsely certified the [e]ngine as airworthy." Plaintiff's Complaint ¶ 25. Dallas offers evidence, hotly disputed by CIS, that CIS knew the engine was involved in a hard landing, though there is no dispute that CIS failed to disclose that fact. For the purposes of this appeal and CIS's motion for summary judgment, we accept as true Dallas's elaborate conspiracy theory--that CIS and AAV were in cahoots to defraud Dallas--and we thus assume that CIS made a material misrepresentation. Dallas's fraud claim founders, nevertheless, because Dallas cannot demonstrate justifiable reliance on the misrepresentation given the Agreement's explicit disclaimers and Dallas's

ability to discover the truth about the misrepresentation.

[11] For the reasons discussed in connection with Dallas's breach of contract claim, we conclude that the relevant agreement on the fraud claim is the Agreement signed by both parties in August 1997, unmodified by Dallas's purchase order. That Agreement precludes Dallas from claiming reliance on any asserted misrepresentation because a party cannot justifiably rely on a representation that has been disclaimed by agreement. See *Danann Realty Corp. v. Harris*, 5 N.Y.2d 317, 184 N.Y.S.2d 599, 157 N.E.2d 597, 599 (1959). To be sure, it is well established that a general, boilerplate disclaimer of a party's representations cannot defeat a claim for fraud. See *id.* at 598-99 (citing *Bridger v. Goldsmith*, 143 N.Y. 424, 38 N.E. 458 (1894)). However, a party cannot justifiably rely on a representation that is specifically disclaimed in an agreement, as occurred here. *Id.* In this case, the Agreement, in Paragraph 8, explicitly disclaims any representations about the airworthiness of the engine. In addition to Paragraph 8, 'the Agreement's integration clause, Paragraph 13D, specifies that the written Agreement "supersede[s] and replace[s] in their entirety" "[a]ny other previous oral or written communications, representations, agreements or understanding between the parties." Moreover, the Engine Delivery Receipt contains a conspicuous "'AS IS' 'WHERE IS' " acknowledgment of receipt of the engine in its then-current condition, a receipt the Agreement required Dallas to execute at Paragraph 7. Section 2-316(3)(a) of the UCC provides that the term "as is," when used in a contract for the sale of goods, negates all implied warranties concerning the condition of the goods. See also UCC § 2-316(3), Official Comment ¶ 7. As we recognized in *Grumman Allied Indus., Inc. v. Rohr Indus., Inc.*, 748 F.2d 729, 735 (2d Cir.1984), Danann "stands for the principle that where the parties to an agreement have expressly allocated risks, the judiciary shall not intrude into their contractual relationship."

[12] Dallas argues that its case comes within

a recognized exception to Danann for misrepresented facts that are "peculiarly within" the knowledge of the declarant. See Warner Theatre Assocs. Ltd. P'ship v. Metro. Life Ins. Co., 149 F.3d 134, 136 (2d Cir.1998); Danann, 184 N.Y.S.2d 599, 157 N.E.2d at 600. "That exception holds that if the allegedly misrepresented facts are peculiarly within the misrepresenting party's knowledge, even a specific disclaimer will not undermine another party's allegation of reasonable reliance on the misrepresentations." Warner Theatre, 149 F.3d at 136.

This exception raises the question of what it means for a fact to be "peculiarly within" someone's knowledge, a question *786 that New York case law does not clearly answer. The district court agreed with Dallas that to defeat the "peculiarly within" exception, the plaintiff must have a means to ascertain the truth underlying a misrepresentation that has been made by the defendant.

Dallas claims that it could not have directly obtained P & W's Engine Event History ("EEH") because they were exclusively accessible only to owners at the relevant time period at issue. Therefore, Dallas argues, it should be irrelevant that the P & W report exposed the fact that the engine was incident-related. We are inclined to agree with Dallas (and disagree with the district court) that the EEH's direct availability to Dallas presented an open factual question that could not be resolved on summary judgment. Nevertheless, the existence of this factual dispute does not defeat CIS's entitlement to summary judgment because Dallas had independent means of learning about the engine's history. As Dallas conceded at oral argument, both Charlotte and JAS knew about the hard landing and would have disclosed it to anybody if asked. Of course, Dallas knew of their prior ownership of the engine. Finally, even if Dallas is correct that only owners could procure the P & W reports, Dallas could have asked CIS to procure one for it. Accordingly, we agree with the district court that the hard landing was not "peculiarly within" CIS's knowledge because Dallas had "available the means of

ascertaining the truth," which "was readily accessible to any interested party who cared to make inquiry." Banque Arabe et Internationale D'Investissement v. Maryland Nat'l Bank, 57 F.3d 146, 156-57 (2d Cir.1995) (internal quotation marks omitted).

[13] Dallas counters that it was not put on inquiry notice about the misrepresentation and, therefore, that it was not "reckless" in failing to investigate further the airworthiness of the engine. Under the law of New York, however, whether Dallas was reckless or on inquiry notice is not relevant in this buyer-seller context involving a signed agreement containing a disclaimer of the very representation alleged to have been fraudulently made. The "recklessness" standard invoked by Dallas is drawn from the Section 10b-5 securities fraud context; it is inapposite in the context of an ordinary fraud action between two experienced and sophisticated parties. See, e.g., Royal Am. Managers, Inc. v. IRC Holding Corp., 885 F.2d 1011, 1015-16 (2d Cir.1989) (using the "recklessness" standard in the context of a securities fraud action). Moreover, even the cases involving the recklessness standard in the securities fraud context do not involve a signed disclaimer for the very representation alleged to have been fraudulent. Indeed, the disclaimer in the Agreement alone would satisfy an inquiry notice requirement if there were one. Dallas's failure to discover a fact that it reasonably could have brought to light with minimal effort, when combined with the fact that Dallas signed an agreement disclaiming that any representations as to airworthiness had been made, defeats its claim for fraudulent misrepresentation. We thus affirm the district court's grant of summary judgment to CIS on the fraud claim.

D. The Unconscionability Claim

[14][15] Dallas also filed a claim asserting that the Agreement with CIS is unenforceable because the disclaimer provisions were (or are) unconscionable. We agree with the district court that this claim lacks merit. While decisions about unconscionability are for the court to decide as a matter of law, the parties

must be afforded a reasonable opportunity to present evidence as to a contract term's "commercial setting, purpose and effect to aid the court in making the determination." UCC § 2- *787 302(2). We conclude that Dallas, having been given such an opportunity, has presented no basis for declaring any aspect of the Agreement unconscionable.

The district court ruled that the disclaimers could not be found unconscionable because of the "sophisticated" nature of the parties and their "equal bargaining power." Appellant suggests that this ruling was an error of law because the district court failed to make specific findings about "procedural" and "substantive" unconscionability. Since our review is de novo, we may fill any gaps left by the district court's analysis.

In *Gillman v. Chase Manhattan Bank, N.A.*, 73 N.Y.2d 1, 537 N.Y.S.2d 787, 534 N.E.2d 824, 828 (1988), the New York Court of Appeals held that in order to determine whether there has been procedural unconscionability in the contract formation process, a court must assess such factors as: (1) the size and commercial setting of the transaction; (2) whether there was a "lack of meaningful choice" by the party claiming unconscionability; (3) the "experience and education of the party claiming unconscionability;" and (4) whether there was "disparity in bargaining power." *Id.* The court added that "deception," "high-pressured tactics," and the "use of fine print" were also appropriate factors to consider in the analysis. *Id.*

As the district court observed, the Dallas-CIS transaction was between two sophisticated parties, both of whom had meaningful choice and relevant experience and education. Furthermore, there was little disparity in their relative bargaining power; if anything, Dallas had an advantage in its technical ability to investigate an engine and its history because it had a technical department and knew that CIS did not. Dallas properly argues that any alleged "misrepresentation and fraud on the part of the seller" should be considered in determining whether the disclaimer was

unconscionable. However, the Agreement's conspicuous and specific provisions disclaiming any representation as to airworthiness, the very thing about which appellant alleges a misrepresentation, render it especially difficult to find procedural unconscionability under New York law. Indeed, the case Dallas relies upon, *Price Bros. Co. v. Olin Constr. Co.*, 528 F.Supp. 716, 720 (W.D.N.Y.1981), states that " 'if the written contract included a specific disclaimer of the very representation later alleged to be the foundation for rescission ... proof [of the misrepresentation is to] be barred.' " *Id.* (quoting *Centronics Fin. Corp. v. El Conquistador*, 573 F.2d 779, 782 (2d Cir.1978)).

[16] Nor is there merit in Dallas's claim that the contract provision disclaiming CIS's representations is substantively unconscionable. Dallas claims that contractual terms may be rejected for substantive unconscionability alone when "the terms of a bargain are unconscionable in their actual, real-world application or effects." But *Gillman* emphasizes that it is only in the truly "exceptional case[]" that substantive unconscionability alone can vitiate a contractual duty. 537 N.Y.S.2d 787, 534 N.E.2d at 829. This is not such a case.

Assuming, however, that we should look to real-world effects, we note that Dallas cannot rebut CIS's assertion that the engine was neither "worthless" nor a "good[] of essentially no value," as Dallas asserts. Because Dallas itself leased the engine to Sky Trek Airlines for several months, Dallas was able to recoup a part of the purchase price. Moreover, the engine-related costs to CIS were substantial: \$425,000 for its own purchase of the engine, approximately \$350,000 for the overhaul, and \$200,000 in other costs. CIS's net profit of 18 percent on its investment plainly does not rise to the level of substantive unconscionability. *788 If Dallas ended up with a contract it does not like, that is the "real-world" consequence of its own failure to complete an adequate inquiry into an engine that it agreed to accept in an " 'AS-IS' 'WHERE-IS' " condition.

In any event, the UCC's unconscionability provision, UCC § 2-302, explicitly states that unconscionability is to be assessed "at the time" of the contract. UCC § 2-302(1). Dallas offers *Industralease Automated & Scientific Equip. Corp. v. R.M.E. Enters., Inc.*, 58 A.D.2d 482, 396 N.Y.S.2d 427, 432 (1977), for the proposition that, notwithstanding the express provisions of § 2-302, we may assess unconscionability by considering later developments. Treatises dutifully cite *Industralease* as the lone exception to the general rule set forth in § 2-302, see, e.g., E. Allan Farnsworth, *Contracts*, § 4.28 n. 52 (2d ed.1990), and a search for other cases applying this exception in New York has yielded only a single decision issued by a small claims court. See *La Vere v. R.M. Burritt Motors, Inc.*, 112 Misc.2d 225, 446 N.Y.S.2d 851 (1982). But even if we were to accept Dallas's invitation to examine later developments in assessing substantive unconscionability, this approach would be unavailing because, as *Industralease* makes clear, the plaintiff still must demonstrate a level of procedural unconscionability, something we have found it cannot show.

Accordingly, we affirm the grant of summary judgment on Dallas's unconscionability claim.

E. The Negligent Misrepresentation Claim

[17][18][19] Finally, we turn to Dallas's claim of negligent misrepresentation. It is settled New York law that the elements of negligent misrepresentation are: (1) carelessness in imparting words; (2) upon which others were expected to rely; (3) and upon which they did act or failed to act; (4) to their damage. *White v. Guarente*, 43 N.Y.2d 356, 401 N.Y.S.2d 474, 372 N.E.2d 315, 319 (1977). Most relevant, the action requires that (5) the declarant must express the words directly, with knowledge or notice that they will be acted upon, to one to whom the declarant is bound by some relation or duty of care. *Id.* In New York, "not all representations made by a seller of goods ... will give rise to a duty to speak with care." *Kimmell v. Schaefer*, 89 N.Y.2d 257, 652

N.Y.S.2d 715, 675 N.E.2d 450, 454 (1996). Instead, the law of negligent misrepresentation requires a closer degree of trust between the parties than that of the ordinary buyer and seller in order to find reliance on such statements justified. *Id.*

Dallas urges that Kimmell enunciated a new standard, exacting liability whenever the relationship between the parties is "such that in morals and good conscience the one has the right to rely upon the other for information." *Id.* This is a misreading of the case. The court did not depart from the traditional understanding that "liability for negligent misrepresentation has been imposed only on those persons who possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party." *Id.* Indeed, the assertedly "new" standard stated in Kimmell was a quotation from a New York Court of Appeals decision that preceded it by seven decades. See *Int'l Prods. Co. v. Erie R.R. Co.*, 244 N.Y. 331, 155 N.E. 662, 664 (1927), quoted in Kimmell, 652 N.Y.S.2d 715, 675 N.E.2d at 454. Thus, Kimmell can hardly be understood to be novel or to have shifted New York law. In sum, Kimmell, which has since been limited by the New York Court of Appeals, see, e.g., *Murphy v. Kuhn*, 90 N.Y.2d 266, 660 N.Y.S.2d 371, 682 N.E.2d 972, 974-76 (N.Y.1997), does nothing to undermine the basic requirement *789 of a "special relationship" for a negligent misrepresentation tort action.

It is also worth noting that Kimmell's finding that the defendant in that case was liable because there was a special relationship between the parties rested largely on the fact that the defendant testified that "he expected plaintiffs to rely on [his] projections," that he informed plaintiffs "that he could provide 'hot comfort' should plaintiff[s] entertain any reservations about investing," and that he "represented" his projections as "reasonable." 675 N.E.2d at 454-55. No similar fact pattern is alleged in the case before us here. To the contrary, CIS disclaimed any representations and made reasonable efforts to alert Dallas of its intention to make no representation as to

airworthiness. Moreover, as we have stated, Dallas cannot claim it relied on CIS's special expertise because it is clear that Dallas itself had the relevant expertise at issue.

Accordingly, we also affirm the grant of summary judgment to CIS on Dallas's negligent misrepresentation action.

III. CONCLUSION

For the foregoing reasons, the district court's grant of summary judgment in favor of appellee CIS is affirmed.

352 F.3d 775, 52 UCC Rep.Serv.2d 295

END OF DOCUMENT

23

Danann Realty Corp., Respondent,
v.
David A. Harris et al., Appellants.

Court of Appeals of New York

Argued November 12, 1958;

decided March 5, 1959.

HEADNOTES

Fraud--oral fraudulent representations--contract of sale of lease of building provided that purchaser had examined premises, that seller had not made representations as to matters affecting premises, that purchaser agreed to take premises "as is", that all agreements were merged in contract and that neither party relied upon any representations not embodied in contract--complaint in action in which plaintiff alleged it was induced to enter into contract by false oral representations of defendants as to operating expenses and profits dismissed--specific disclaimer destroys allegations that agreement was executed in reliance upon contrary, oral representations. (1) In the first cause of action, plaintiff alleged that it was induced to enter into a contract of sale of a lease of a building held by defendants because of oral representations, falsely made by defendants, as to the operating expenses of the building and as to the profits to be derived from the investment. The contract contained the following provisions: "The Purchaser has examined the premises agreed to be sold and is familiar with the physical condition thereof. The Seller has not made and does not make any representations as to the physical condition, rents, leases, expenses, operation or any other matter or thing affecting or related to the aforesaid premises, except as herein specifically set forth, and the Purchaser hereby expressly acknowledges that no such representations have been made, and the Purchaser further acknowledges that it has inspected the premises and agrees to take the premises 'as is' * * * It is understood and agreed that all understandings and agreements *318 heretofore had between the parties hereto are merged in this contract,

which alone fully and completely expresses their agreement, and that the same is entered into after full investigation, neither party relying upon any statement or representation, not embodied in this contract, made by the other. The Purchaser has inspected the buildings standing on said premises and is thoroughly acquainted with their condition." An order of the court at Special Term dismissing the complaint is reinstated. (2) Plaintiff has, in the plainest language, stated that it is not relying on any representations as to the very matter as to which it now claims it was defrauded. Such a specific disclaimer destroys the allegations in the complaint that the agreement was executed in reliance upon contrary, oral representations.

Danann Realty Corp. v. Harris, 6 A D 2d 674, reversed.

SUMMARY

Appeal, by permission of the Appellate Division of the Supreme Court in the First Judicial Department, from an order of said court, entered May 13, 1958, which (1) reversed, on the law, an order of the Supreme Court at Special Term (Owen McGivern, J.), entered in New York County, granting a motion by defendants for an order dismissing the first cause of action pursuant to rule 106 of the Rules of Civil Practice, and (2) denied the motion. The following question was certified: "Does the first cause of action in the complaint state facts sufficient to constitute a cause of action?"

POINTS OF COUNSEL

George E. Netter, Morris A. Marks and Milton Waxenfeld for appellants. I. The Appellate Division erred in refusing to follow its own holding and that of this court in *Cohen v. Cohen*(3 N Y 2d 813), which is directly applicable to this case. *Sabo v. Delman*(3 NY2d 155), relied on by the Appellate Division, is not applicable. (*Goldsmith v. National Container Corp.*,287 N. Y. 438; *Merry Realty Co. v. Shamokin & Hollis Real Estate Co.*,230 N. Y. 316.) II. There is no

authority which supports the holding of the Appellate Division herein. (Bridger v. Goldsmith, 143 N. Y. 424; Ernst Iron Works v. Duralith Corp., 270 N. Y. 165; Angerosa v. White Co., 248 App. Div. 425, 275 N. Y. 524; Kamerman v. Curtis, 285 N. Y. 221; Jackson v. State of New York, 210 App. Div. 115.) III. Sound public policy requires a reversal of the holding of the Appellate Division herein. (Fogelson v. Rackfay Constr. Co., 300 N. Y. 334; Becker v. Colonial Life Ins. Co., 153 App. Div. 382.)

David Haar for respondent. I. Counsel has misconstrued the language of this court in the case of Sabo v. Delman (3 NY2d 155). (Goldsmith v. National Container Corp., 287 N. Y. *319 438; Vail v. Reynolds, 118 N. Y. 297.) II. Appellant's contention, that this action at law for damages, because of fraud in the inducement, constitutes an affirmation of the whole contract and is virtually an estoppel on the claim of fraud, is contrary to law. (Sager v. Friedman, 270 N. Y. 472; 422 W. 15th St. v. Estate of Johnson, 258 App. Div. 227; Benedict Co. v. McKeage, 201 App. Div. 161; Bennett v. Burch-Buell Motor Corp., 221 App. Div. 517.) III. The argument that "sound public policy requires a reversal" of the order of the Appellate Division in this case is contrary to a ruling by this court in a similar situation. (Sabo v. Delman, 3 NY2d 155; Fogelson v. Rackfay Constr. Co., 300 N. Y. 334; Cohen v. Cohen, 1 A D 2d 586, 3 NY2d 813; Crowell- Collier Pub. Co. v. Josefowitz, 5 NY2d 998.)

OPINION OF THE COURT

Burke, J.

The plaintiff in its complaint alleges, insofar as its first cause of action is concerned, that it was induced to enter into a contract of sale of a lease of a building held by defendants because of oral representations, falsely made by the defendants, as to the operating expenses of the building and as to the profits to be derived from the investment. Plaintiff, affirming the contract, seeks damages for fraud.

At Special Term, the Supreme Court sustained a motion to dismiss the complaint. On appeal, the Appellate Division unanimously reversed the order granting the dismissal of the complaint. Thereafter the Appellate Division granted leave to appeal, certifying the following question: "Does the first cause of action in the complaint state facts sufficient to constitute a cause of action?"

The basic problem presented is whether the plaintiff can possibly establish from the facts alleged in the complaint (together with the contract which was annexed to the complaint) reliance upon the misrepresentations (Cohen v. Cohen, 1 A D 2d 586, affd. 3 NY2d 813).

We must, of course, accept as true plaintiff's statements that during the course of negotiations defendants misrepresented the operating expenses and profits. Such misrepresentations are undoubtedly material. However, the provisions of the written contract which directly contradict the allegations of oral representations are of equal importance in our task of reaching a decisive answer to the question posed in these cases. *320

The contract, annexed to and made a part of the complaint, contains the following language pertaining to the particular facts of representations: "The Purchaser has examined the premises agreed to be sold and is familiar with the physical condition thereof. The Seller has not made and does not make any representations as to the physical condition, rents, leases, expenses, operation or any other matter or thing affecting or related to the aforesaid premises, except as herein specifically set forth, and the Purchaser hereby expressly acknowledges that no such representations have been made, and the Purchaser further acknowledges that it has inspected the premises and agrees to take the premises 'as is' * * * It is understood and agreed that all understandings and agreements heretofore had between the parties hereto are merged in this contract, which alone fully and completely expresses their agreement, and that the same is entered into after full investigation, neither party

relying upon any statement or representation, not embodied in this contract, made by the other. The Purchaser has inspected the buildings standing on said premises and is thoroughly acquainted with their condition." (Emphasis supplied.)

Were we dealing solely with a general and vague merger clause, our task would be simple. A reiteration of the fundamental principle that a general merger clause is ineffective to exclude parol evidence to show fraud in inducing the contract would then be dispositive of the issue (*Sabo v. Delman*, 3 NY2d 155). To put it another way, where the complaint states a cause of action for fraud, the parol evidence rule is not a bar to showing the fraud -- either in the inducement or in the execution -- despite an omnibus statement that the written instrument embodies the whole agreement, or that no representations have been made. (*Bridger v. Goldsmith*, 143 N. Y. 424; *Angerosa v. White Co.*, 248 App. Div. 425, *affd.* 275 N. Y. 524; *Jackson v. State of New York*, 210 App. Div. 115, *affd.* 241 N. Y. 563; 3 Williston, *Contracts* [Rev. ed.], § 811A.)

Here, however, plaintiff has in the plainest language announced and stipulated that it is not relying on any representations as to the very matter as to which it now claims it was defrauded. Such a specific disclaimer destroys the allegations in plaintiff's complaint that the agreement was executed in reliance *321 upon these contrary oral representations (*Cohen v. Cohen*, *supra*). The *Sabo* case (*supra*) dealt with the usual merger clause. The present case, as the *Cohen* case, additionally, includes a disclaimer as to specific representations.

This specific disclaimer is one of the material distinctions between this case and *Bridger v. Goldsmith* (*supra*) and *Crowell-Collier Pub. Co. v. Josefowitz* (5 NY2d 998). In the *Bridger* case, the court considered the effect of a general disclaimer as to representations in a contract of sale, concluding that the insertion of such a clause at the insistence of the seller cannot be used as a shield to protect him from his fraud. Another material distinction is that nowhere

in the contract in the *Bridger* case is there a denial of reliance on representations, as there is here. Similarly, in *Crowell-Collier Pub. Co. v. Josefowitz* (*supra*), decided herewith, only a general merger clause was incorporated into the contract of sale. Moreover, the complaint there additionally alleged that further misrepresentations were made after the agreement had been signed, but while the contract was held in escrow and before it had been finally approved.

Consequently, this clause, which declares that the parties to the agreement do not rely on specific representations not embodied in the contract, excludes this case from the scope of the *Jackson*, *Angerosa*, *Bridger* and *Crowell-Collier* cases (*supra*). (See *Foundation Co. v. State of New York*, 233 N. Y. 177.)

The complaint here contains no allegations that the contract was not read by the purchaser. We can fairly conclude that plaintiff's officers read and understood the contract, and that they were aware of the provision by which they aver that plaintiff did not rely on such extra-contractual representations. It is not alleged that this provision was not understood, or that the provision itself was procured by fraud. It would be unrealistic to ascribe to plaintiff's officers such incompetence that they did not understand what they read and signed. (Cf. *Ernst Iron Works v. Duralith Corp.*, 270 N. Y. 165, 171.) Although this court in the *Ernst* case discounted the merger clause as ineffective to preclude proof of fraud, it gave effect to the specific disclaimer of representation clause, holding that such a clause limited the authority of the agent, and hence, *322 plaintiff had notice of his lack of authority. But the larger implication of the *Ernst* case is that, where a person has read and understood the disclaimer of representation clause, he is bound by it. The court rejected, as a matter of law, the allegation of plaintiffs "that they relied upon an oral statement made to them in direct contradiction of this provision of the contract." The presence of such a disclaimer clause "is inconsistent with the contention that plaintiff relied upon the misrepresentation and was led

thereby to make the contract." (Kreshover v. Berger, 135 App. Div. 27, 28.)

It is not necessary to distinguish seriatim the cases in other jurisdictions as they are not, in the main, in point or, in a few instances, clash with the rule followed in the State of New York. The marshaling of phrases plucked from various opinions and references to generalizations, with which no one disagrees, cannot subvert the fundamental precept that the asserted reliance must be found to be justifiable under all the circumstances before a complaint can be found to state a cause of action in fraud. We must keep in mind that "opinions must be read in the setting of the particular cases and as the product of preoccupation with their special facts" (Freeman v. Hewit, 329 U. S. 249, 252). When the citations are read in the light of this caveat, we find that they are generally concerned with factual situations wherein the facts represented were matters peculiarly within the defendant's knowledge, as in the cases of Sabo v. Delman (supra) and Jackson v. State of New York (supra).

The general rule was enunciated by this court over a half a century ago in Schumaker v. Mather (133 N. Y. 590, 596) that "if the facts represented are not matters peculiarly within the party's knowledge, and the other party has the means available to him of knowing, by the exercise of ordinary intelligence, the truth or the real quality of the subject of the representation, he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentations. (Baily v. Merrell, Bulstrode's Rep. Part III, p. 94; Slaughter v. Gerson, 13 Wall. 383; Chrysler v. Canaday, 90 N. Y. 272.)"

Very recently this rule was approved as settled law by this court in the case of Sylvester v. Bernstein (283 App. Div. 333, affd. 307 N. Y. 778). *323

In this case, of course, the plaintiff made a representation in the contract that it was not relying on specific representations not embodied in the contract, while, it now

asserts, it was in fact relying on such oral representations. Plaintiff admits then that it is guilty of deliberately misrepresenting to the seller its true intention. To condone this fraud would place the purchaser in a favored position. (Cf. Riggs v. Palmer, 115 N. Y. 506, 511, 512.) This is particularly so, where, as here, the purchaser confirms the contract, but seeks damages. If the plaintiff has made a bad bargain he cannot avoid it in this manner.

If the language here used is not sufficient to estop a party from claiming that he entered the contract because of fraudulent representations, then no language can accomplish that purpose. To hold otherwise would be to say that it is impossible for two businessmen dealing at arm's length to agree that the buyer is not buying in reliance on any representations of the seller as to a particular fact.

Accordingly, the order of the Appellate Division should be reversed and that of Special Term reinstated, without costs. The question certified should be answered in the negative.

Fuld, J.

(Dissenting). If a party has actually induced another to enter into a contract by means of fraud -- and so the complaint before us alleges -- I conceive that language may not be devised to shield him from the consequences of such fraud. The law does not temporize with trickery or duplicity, and this court, after having weighed the advantages of certainty in contractual relations against the harm and injustice which result from fraud, long ago unequivocally declared that "a party who has perpetrated a fraud upon his neighbor may [not] * * * contract with him in the very instrument by means of which it was perpetrated, for immunity against its consequences, close his mouth from complaining of it and bind him never to seek redress. Public policy and morality are both ignored if such an agreement can be given effect in a court of justice. The maxim that fraud vitiates every transaction would no longer be the rule but the exception." (Bridger

v. Goldsmith,143 N. Y. 424, 428.) It was a concern for similar considerations of policy which persuaded Massachusetts to repudiate the contrary rule which it had initially espoused. "The *324 same public policy that in general sanctions the avoidance of a promise obtained by deceit", wrote that state's Supreme Judicial Court in *Bates v. Southgate*(308 Mass. 170, 182), "strikes down all attempts to circumvent that policy by means of contractual devices. In the realm of fact it is entirely possible for a party knowingly to agree that no representations have been made to him, while at the same time believing and relying upon representations which in fact have been made and in fact are false but for which he would not have made the agreement. To deny this possibility is to ignore the frequent instances in everyday experience where parties accept * * * and act upon agreements containing * * * exculpatory clauses in one form or another, but where they do so, nevertheless, in reliance upon the honesty of supposed friends, the plausible and disarming statements of salesmen, or the customary course of business. To refuse relief would result in opening the door to a multitude of frauds and in thwarting the general policy of the law."

It is impossible, on either principle or reasoning, to distinguish the present case from the many others which this court has decided. (See, e.g., *Bridger v. Goldsmith*,143 N. Y. 424, 428, supra.; *Jackson v. State of New York*,210 App. Div. 115, affd. 241 N. Y. 563; *Ernst Iron Works v. Duralith Corp.*, 270 N. Y. 165, 169; *Angerosa v. White Co.*,248 App. Div. 425, 431, affd. 275 N. Y. 524; *Sabo v. Delman*,3 NY2d 155, 162; *Crowell-Collier Pub. Co. v. Josefowitz*,5 NY2d 998, also decided today.) As far back as 1894, we decided, in the *Bridger* case (143 N. Y. 424, supra), that the plaintiff was not prevented from bringing an action for fraud, based on oral misrepresentations, even though the written contract provided that it was "understood and agreed" that the defendant seller had not made,

"for the purpose of inducing the sale * * * or the making of this agreement * * * any statements or representations * * * other

than" the single one therein set forth (pp. 426-427). And, just today, we are holding, in the *Crowell-Collier Publishing* case, that the plaintiffs were not barred from suing the defendants for fraud in inducing them to make the contract, despite its recital that *325

"This Agreement constitutes the entire understanding between the parties, [and] was not induced by any representations * * * not herein contained".

In addition, in *Jackson v. State of New York*(210 App. Div. 115, affd. 241 N. Y. 563, supra), the contract provided that

the contractor (plaintiff's predecessor in interest) agreed that he had satisfied himself by his own investigation regarding all the conditions of the work to be done and that his conclusion to enter into the contract was based solely upon such investigation and not upon any information or data imparted by the State.

It was held that even this explicit disavowal of reliance did not bar the plaintiff from recovery. In answering the argument that the provision prevented proof either of misrepresentation by the defendant or reliance on the part of the plaintiff, the Appellate Division, in an opinion approved by this court, wrote: "A party to a contract cannot, by misrepresentation of a material fact, induce the other party to the contract to enter into it to his damage and then protect himself from the legal effect of such misrepresentation by inserting in the contract a clause to the effect that he is not to be held liable for the misrepresentation which induced the other party to enter into the contract. The effect of misrepresentation and fraud cannot be thus easily avoided" (pp. 119-120).

Although the clause in the contract before us may be differently worded from those in the agreements involved in the other cases decided by this court, it undoubtedly reflects the same thought and meaning, and the reasoning and the principles which the court deemed controlling in those cases are likewise controlling in this one. Their application, it

seems plain to me, compels the conclusion that the complaint herein should be sustained and the plaintiff accorded a trial of its allegations.

It is said, however, that the provision in this contract differs from those heretofore considered in that it embodies a specific and deliberate exclusion of a particular subject. The quick answer is that the clause now before us is not of such a sort. On the contrary, instead of being limited, it is all-embracing, encompassing every representation that a seller could possibly make about the property being sold and, instead of representing *326 a special term of a bargain, is essentially "boiler plate." (See Contract of Sale, Standard N. Y. B. T. U. Form 8041; Bicks, Contracts for the Sale of Realty [1956 ed.], pp. 79-80, 94-95.) The more elaborate verbiage in the present contract cannot disguise the fact that the language which is said to immunize the defendants from their own fraud is no more specific than the general merger clause in *Sabo v. Delman* (3 NY2d 155, supra) and far less specific than the provision dealt with in the *Jackson* case (210 App. Div. 115, affd. 241 N. Y. 563, supra) or in *Crowell-Collier*.

In any event, though, I cannot believe that the outcome of a case such as this, in which the defendant is charged with fraud, should turn on the particular language employed in the contract. As Judge Augustus Hand, writing for the Federal Court of Appeals, observed, "the ingenuity of draftsmen is sure to keep pace with the demands of wrongdoers, and if a deliberate fraud may be shielded by a clause in a contract that the writing contains every representation made by way of inducement, or that utterances shown to be untrue were not an inducement to the agreement," a fraudulent seller would have a simple method of obtaining immunity for his misconduct. (*Arnold v. National Aniline & Chem. Co.*, 20 F. 2d 364, 369.)

The guiding rule -- that fraud vitiates every agreement which it touches -- has been well expressed not only by the courts of this state, but by courts throughout the country and by the House of Lords in England. And, in recognizing that the plaintiff may assert a

cause of action in fraud, the courts have not differentiated between the type or form of exculpatory provision inserted in the contract. It matters not, the cases demonstrate, whether the clause simply recites that no representations have been made or more fully stipulates that the seller has not made any representations concerning certain enumerated subjects and that the purchaser has made his own investigation and has not relied upon any representation by the seller, not embodied in the writing. (See, e.g., *Sabo v. Delman*, 3 N Y 2d 155, 161-162, supra.; *Ernst Iron Works v. Duralith Corp.*, 270 N. Y. 165, 169, supra.; *Bridger v. Goldsmith*, 143 N. Y. 424, 428, supra.; *Angerosa v. White Co.*, 248 App. Div. 425, 431, affd. 275 N. Y. 524, supra.; *Jackson v. State of New York*, 210 App. Div. 115, affd. 241 N. Y. 563, supra.; *Pearson* *327 & *Son v. Dublin Corp.*, [1907] A. C. 351, 353-354, 362; *Arnold v. National Aniline & Chem. Co.*, 20 F. 2d 364, 369, supra.; *Lutfy v. Roper & Sons Motor Co.*, 57 Ariz. 495, 506; *Omar Oil Co. v. MacKenzie Oil Co.*, 33 Del. 259, 289-290; *Jordan v. Nelson*, 178 N. W. 544 [Iowa]; *Bryant v. Troutman*, 287 S. W. 2d 918, 921 [Ky.]; *Bates v. Southgate*, 308 Mass. 170, 182, supra.; *Ganley Bros. v. Butler Bros. Bldg. Co.*, 170 Minn. 373, 376-377; *Brown v. Ohman*, 42 So. 2d 209, 212-213 [Miss.]; *Martin v. Harris*, 121 Neb. 372; *Blacknall v. Rowland*, 108 N. C. 554, 557-558; *Pennsylvania Turnpike Comm. v. Smith*, 350 Pa. 355, 361-362; *Dallas Farm Mach. Co. v. Reaves*, 307 S. W. 2d 233, 239 [Texas]; *Dieterich v. Rice*, 115 Wash. 365; see also, 3 *Williston, Contracts* [Rev. ed., 1936], §§ 811, 811A; *Corbin, Contracts* [1951], Vol. 3, § 578; Vol. 6, § 1516; *Restatement of Contracts*, § 573.)

In England, in the *Pearson* case ([1907] A. C. 351, supra), the contract to perform certain construction work provided that

the contractor "should satisfy himself" as to various specified items connected with the job and that the defendant corporation "did not hold itself responsible for the accuracy of [such] information" (p. 351).

After performing the contract, the plaintiffs

brought a deceit action, claiming damages for false representations as to the very items concerning which they had agreed they would satisfy themselves. The House of Lords reversed the judgment directed for the defendants and held that the action could be maintained; the Lord Chancellor, after noting that "The contract contained clauses * * * to the effect that the contractors must not rely on any representation * * * but must ascertain and judge of the facts for themselves" (p. 353), went on to say (pp. 353-354):

"Now it seems clear that no one can escape liability for his own fraudulent statements by inserting in a contract a clause that the other party shall not rely upon them."

Lord Ashbourne, concurring with the Lord Chancellor, pointed out that the clause relied upon "might in some cases be part of a fraud, and might advance and disguise a fraud" (p. 360) and Lord Hereford, also concurring, declared (p. 362) that, if the "protecting clause" be inserted fraudulently, *328

"When the fraud succeeds, surely those who designed the fraudulent protection cannot take advantage of it. Such a clause would be good protection against any mistake or miscalculation, but fraud vitiates every contract and every clause in it."

In the Dieterich case (115 Wash. 365, supra), the contract contained the provision that

"The land is sold to [the plaintiff buyer] * * * with the understanding that he has personally and carefully inspected said premises, and is purchasing the same by said inspection and not from any other sayings or inducements by [the seller] * * * and there has been no other inducements other than recited herein".

Despite this explicit disclaimer of reliance and inducement, the Washington Supreme Court decided that the recital did not bar the plaintiff from showing "the fraudulent nature of the contract" (p. 373) and, in the course of its opinion, observed (p. 368) that the contention of the defendants to the contrary

was "effectually answered by the court of appeals of New York, in the case of Bridger v. Goldsmith, 143 N. Y. 424".

In Martin v. Harris (121 Neb. 372, supra), the agreement recited:

"There have been no representations of the reasonable value of any of the properties herein described made by or to either party to this contract. Each party is relying upon his own judgment of such values after a personal inspection of the properties."

The plaintiff, alleging that the defendant fraudulently misrepresented the value of the property, sought damages. Again, despite the explicit statement that such a representation had not been made and the specific disavowal of reliance thereon, the court upheld the plaintiff's right to bring the action (p. 376).

In the Ganley case (170 Minn. 373, supra), too, the disclaimer was quite specific, reading in this way:

"The [plaintiff] contractor has examined the said contracts * * * and the specifications and plans forming a part thereof, and is familiar with the location *329 of said work and the conditions under which the same must be performed * * * and is not relying upon any statement made by the company in respect thereto."

In deciding that a defendant could not protect himself against liability for fraud by such a provision or, indeed, by any language, the court wrote in no uncertain terms (p. 377):

"The law should not and does not permit a covenant of immunity to be drawn that will protect a person against his own fraud. Such is not enforceable because of public policy. Industrial & General Trust, Ltd. v. Tod, 180 N. Y. 215 * * *. Language is not strong enough to write such a contract. Fraud destroys all consent. It is the purpose of the law to shield only those whose armor embraces good faith. Theoretically, if there is no fraud the rule we announce is harmless. If there is fraud the rule we announce is

wholesome. Whether the rule is effective depends upon the facts. Public interest supports our conclusion."

And, said the court, while the argument that a party should have the right "to let his work to a certain person because the other will therein agree that he relies and acts only upon his own knowledge and not upon the representations of his adversary", might on first thought seem plausible, it does not stand analysis. "It may be desirable in dealing with unscrupulous persons to have this clause as a shield against wrongful charges of fraud. But, if there is no fraud, that fact will be established on the trial. The merits of defendant's claim reach only the expense and annoyance of litigation. But every party should have his day in court. * * * We are unable to formulate a rule of law sustaining defendant's contention which would not at the same time give opportunities for the commission of fraud for which the wronged party would have no redress" (p. 376).

And in the Lutfy case (57 Ariz. 495, supra), the contract of sale contained as specific a disavowal of reliance upon a particular representation as could be written:

"It is understood and agreed that there is no representation or warranty that the 'year model' of said *330 property, as hereinbefore stated, correctly states the year in which said property was manufactured, but is merely used by the parties hereto for convenience in describing it. * * * Purchaser agrees that he has made an independent investigation of the property and has relied solely upon his own investigation with reference thereto in entering into this contract, and has placed no reliance and acted upon no representations or warranties upon the part of the Seller."

The plaintiff, suing for damages, alleged that the defendant had falsely represented the year model of the automobile which he purchased, and the high court of Arizona held that he could prove that such a representation had been made and that he had relied upon it, notwithstanding the contract's most explicit recital to the contrary (p. 506):

"If binding upon [plaintiff] appellant, it would protect appellee from the consequences of any fraudulent misrepresentations it might have made to appellant to induce him to sign the contract and, as we see it, any provision in a contract making it possible for a party thereto to free himself from the consequences of his own fraud in procuring its execution is invalid and necessarily constitutes no defense."

The cases cited -- all upholding the sufficiency of a complaint based on fraud no matter how the exculpatory language in the contract is phrased -- show how firmly established the rule is, and the passages quoted show how compelling are the reasons for the rule. Nor is their force or value weakened or impaired by the decisions upon which the court now appears to rely. Except for *Cohen v. Cohen* (3 NY2d 813), no one of them has anything to do with the adequacy of the complaint as a pleading; two are concerned with the proof adduced at the trial (*Schumaker v. Mather*, 133 N. Y. 590; *Ernst Iron Works v. Duralith Corp.*, 270 N. Y. 165, supra), while the third deals with the subject of *res judicata* (*Sylvester v. Bernstein*, 283 App. Div. 333, affd. 307 N. Y. 778).

In the *Ernst Iron Works* case, the appeal was, as I have noted, taken after trial and was concerned with the proof and not, as is the present appeal, with the sufficiency of the complaint. *331 The contract contained both a blanket merger clause and a recital that the defendant "makes no representation regarding previous sales" in Buffalo, where the plaintiff did business. Notwithstanding that provision, the plaintiff claimed that he had relied upon a representation by the defendant's salesman that the product had not been sold in that city, and testimony to that effect was received at the trial. The court did reverse the judgment for the plaintiff, but not on any theory that the specific disclaimer clause barred suit or that the evidence was inadmissible because of it. It was the court's conclusion, based on the evidence adduced at the trial, first, that the false representation attributed to the defendant had not been made (270 N. Y., at pp. 169-170); second, that, in any event, the

defendant's salesman did not have authority to make such a representation and the plaintiff knew this (pp. 170-171); and, finally, that "it [was] clear [from the proof at the trial] that the plaintiff did not rely upon the statement" (pp. 171-172). And, most significantly, the court did not question the general principle but affirmed it, stating that "A rogue cannot protect himself from liability for his fraud by inserting a printed clause in his contract" (270 N. Y., at p. 169).

As to *Cohen v. Cohen*, I dissented from the decision there made and still consider it to have been wrongly decided. Constrained to accept it, I do so, but I cannot subscribe to extending its application beyond its own peculiar fact setting. A husband and wife had separated; there were bitter mutual recriminations followed by three separate lawsuits. The parties were ultimately reconciled and their lawyers drew a settlement agreement, which they executed, reciting that the husband had not made any representations "as to the continuation of the marital status". The wife sometime later brought another action, alleging that her husband had falsely represented that he "would effect a reconciliation with [her], return to live with her * * * permanently, and permanently resume their marital relationship". As is quite evident, the *Cohen* case is a most unusual one, not only because it involved an agreement designed to settle pending marital litigation, but because of the extraordinary and promissory nature of the misrepresentation alleged. Indeed, the only resemblance claimed for the cases -- that is, and the present one -- is that in both *332 there is a specific disclaimer by the plaintiff of the very representations charged against the defendant. However, as noted above (pp. 325-326), since the provision in the contract before us encompasses every representation which a seller of real estate could possibly have made, including those alleged, even the asserted similarity does not in fact exist.

Contrary to the intimation in the court's opinion (p. 323), the nonreliance clause cannot possibly operate as an estoppel against the plaintiff. Essentially equitable in nature, the

principle of estoppel is to be invoked to prevent fraud and injustice, not to further them. The statement that the representations in question were not made was, according to the complaint, false to the defendant's knowledge. Surely, the perpetrator of a fraud cannot close the lips of his victim and deny him the right to state the facts as they actually exist. Indeed, the contention that a person, such as the defendant herein, could urge an estoppel was considered and emphatically disposed of in *Bridger v. Goldsmith* with this statement: "The question now is whether [the no-representation non-inducement clause] can be given the effect claimed for it by the learned counsel for the defendant, to preclude the plaintiff from alleging fraud in the sale and pursuing in the courts the remedies which the law gives in such cases. It cannot operate by way of estoppel for the obvious reason that the statements were false to the defendant's knowledge. He may, indeed, have relied upon its force and efficacy to protect him from the consequences of his own fraud, but he certainly could not have relied upon the truth of any statement in it. A mere device of the guilty party to a contract intended to shield himself from the results of his own fraud, practiced upon the other party, cannot well be elevated to the dignity and importance of an equitable estoppel" (143 N. Y. 424, 427-428, emphasis supplied; see, also, *Angerosa v. White Co.*, 248 App. Div. 425, 433-434, *affd.* 275 N. Y. 524, *supra*).

The rule heretofore applied by this court presents no obstacle to honest business dealings, and dishonest transactions ought not to receive judicial protection. The clause in the contract before us may lend support to the defense and render the plaintiff's task of establishing its claim more difficult, but it should not be held to bar institution of an action for fraud. Whether *333 the defendants made the statements attributed to them and, if they did, whether the plaintiff relied upon them, whether, in other words, the defendants were guilty of fraud, are questions of fact not capable of determination on the pleadings alone. The plaintiff is entitled to its day in court.

Chief Judge Conway and Judges Desmond, Dye, Froessel and Van Voorhis concur with Judge Burke; Judge Fuld dissents in a separate opinion.

Order reversed, etc.

Copr. (c) 2004, Randy A. Daniels, Secretary of State, State of New York.

N.Y. 1959.

Danann Realty Corp., Respondent, v. David A. Harris et al., Appellants.

END OF DOCUMENT

24

Only the Westlaw citation is currently available.

United States District Court,
S.D. New York.

DIAMOND STATE INSURANCE
COMPANY, Plaintiff,

v.

WORLDWIDE WEATHER TRADING LLC
and Harold Mollin, Defendants.

No. 02 Civ.2900 LMM GWG.

Dec. 16, 2002.

Insurance company sued weather derivative trading company and company's owner, alleging fraud, conversion, and other offenses in connection with defendants' purported scheme to enter "weather derivative" contracts on behalf of plaintiff. Defendant company filed motion to dismiss. The District Court, McKenna, J., held that, under New York law: (1) plaintiff stated a claim for vicarious liability against defendant company; (2) plaintiff adequately alleged fraud, as well as a conspiracy to commit fraud; (3) plaintiff stated a claim for aiding and abetting fraud; (4) plaintiff's allegations satisfied the specificity requirements for pleading fraud; (5) plaintiff sufficiently pleaded the basis of its claim against defendant company for tortious interference with contractual relations; (6) plaintiff stated a claim for conspiracy to commit conversion; (7) plaintiff set forth sufficient facts to support its claim for aiding and abetting conversion; and (8) plaintiff failed to state a claim against defendant company for unjust enrichment.

Motion granted in part and denied in part.

West Headnotes

[1] Corporations 360(1)
101k360(1)

Allegations that defendant weather derivative trading company's owner, who was also the chairman of its board of directors, made material misrepresentations and concealed material facts from plaintiff insurance

company while acting in the scope of his employment, that, specifically, owner issued 11 "dummy" commercial inland marine weather insurance policies while engaged in the business of defendant company, and that owner's actions were done in furtherance of defendant company's business, stated a claim for vicarious liability under New York law.

[2] Insurance 1648
217k1648

Allegations that defendant weather derivative trading company's owner and chairman of the board falsely represented that he would not produce or would strictly limit weather derivative business, with the intent that plaintiff insurance company would rely on this representation, that defendant company and owner issued "dummy" policies to conceal unauthorized reinsurance policies, which, in effect, covered weather derivative contracts, and that, as a result of these actions, plaintiff suffered economic injury, stated a claim for fraud under New York law.

[3] Conspiracy 9
91k9

[3] Conspiracy 18
91k18

Allegations that defendant weather derivative trading company, its owner, and insurance agency specializing in weather-related business each rendered substantial assistance to one another in committing fraud, that there was an agreement among defendant company, owner, and agency in furtherance of a common objective, to issue and hide unauthorized reinsurance policies on behalf of plaintiff insurance company in order to collect premiums and commissions they would otherwise have been unable to receive, that, in order to accomplish this goal, "dummy" policies were issued, fraudulently using third party's money in order to obtain the policies, and that defendant company knowingly agreed to pay any sums received under the dummy policies to third party, stated a claim for conspiracy to commit fraud under New York law.

[4] Insurance 1648

217k1648

Allegations that defendant weather derivative trading company's owner and chairman of the board falsely represented that he would not produce or would strictly limit weather derivative business, with the intent that plaintiff insurance company would rely on this representation, that defendant company and owner issued "dummy" policies to conceal unauthorized reinsurance policies, which, in effect, covered weather derivative contracts, that, as a result of these actions, plaintiff suffered economic injury, that defendant company had knowledge of the fraud, and that defendant company knowingly agreed to pay any proceeds obtained under the dummy policies to third party in order that plaintiff would never know about the reinsurance policies, stated a claim for aiding and abetting fraud under New York law.

[5] Federal Civil Procedure 636
170Ak636

Allegations which stated the time, place, speaker, and content of the alleged misrepresentations, as well as each defendant's alleged participation, satisfied the specificity requirements for pleading fraud. Fed.Rules Civ.Proc.Rules 8(a), 9(b), 28 U.S.C.A.

[6] Torts 12
379k12

Allegations that plaintiff insurance company had a contractual agreement with insurance agency specializing in weather-related business, that pursuant to the agreement, agency's owner was to produce weather-related business on behalf of plaintiff, that weather derivative business was not to be written, that defendant weather derivative trading company had knowledge of this agreement and its restrictions, that defendant company and owner intentionally and improperly induced agency to breach the agreement and issue unauthorized reinsurance policies in order to collect premiums and commissions that were otherwise unattainable, and that, as a result of these actions, plaintiff suffered economic injury, stated a claim for tortious interference with contractual relations under New York law.

[7] Conspiracy 8
91k8

[7] Conspiracy 18
91k18

Allegations that insurance agency specializing in weather-related business was contractually and legally obligated to remit premiums to plaintiff insurance company for the issuance of plaintiff's policies, and that agency, its owner, and defendant weather derivative trading company allegedly conspired and assisted each other in hiding unauthorized reinsurance policies and did not remit premiums collected under those policies to the rightful possessor, plaintiff, stated a claim for conspiracy to commit conversion under New York law.

[8] Insurance 1649
217k1649

Allegations that individual who owned both insurance agency specializing in weather-related business and defendant weather derivative trading company, who was the primary wrongdoer, allegedly misrepresented to plaintiff insurance company that only weather-related insurance business, and not weather derivative business, would be produced, that, upon issuing unauthorized reinsurance policies, the primary wrongdoer apparently hid those policies by issuing similar policies to another entity that would effectually cover the same losses as the reinsurance policies, that plaintiff did not know of the existence of the policies, so the premiums collected for those policies were never properly transferred to the rightful owner, that defendant company and primary wrongdoer had actual knowledge of the conversion of the premiums obtained by agency, and that they actively participated in the conversion of those premiums, stated a claim for aiding and abetting conversion under New York law.

[9] Implied and Constructive Contracts 81
205Hk81

Insurance company failed to state unjust enrichment claim against weather derivative trading company based on fraudulent scheme purportedly engaged in by company and its owner, by failing to establish that defendant

company retained an enrichment at insurance company's expense; insurance company asserted in its own complaint that the subject \$7.4 million premium was paid by third party to insurance agency, not to defendant company, and that, although the money should have been returned to defendant company, insurance company did not know what was done with the money.

MEMORANDUM AND ORDER

MCKENNA, J.

*1 Defendant, Worldwide Weather Trading LLC ("WWT"), brings this motion to dismiss the complaint brought by Diamond State Insurance Company ("Diamond State") alleging vicarious liability, conspiracy to commit fraud, aiding and abetting fraud, tortious interference with contractual relations, conspiracy to commit conversion, aiding and abetting conversion and unjust enrichment. The motion is brought pursuant to Federal Rule of Civil Procedure 12(b)(6), and with respect to the fraud allegations, pursuant to Federal Rule of Civil Procedure 9(b). For the reasons set forth below, WWT's motion is granted in part and denied in part.

BACKGROUND

A. The Agreement Between CWW Agency and Diamond State

The following factual allegations, as stated in Diamond State's amended complaint, are assumed to be true for the purpose of considering this motion. [FN1] Harold Mollin ("Mollin") was the owner of Customized Worldwide Weather Insurance Agency, Inc. ("CWW Agency"), an insurance agency specializing in weather-related business. (Am.Compl.¶¶ 6, 7.) Diamond State, an insurance company, entered into a Program Administration Agreement (the "agreement") with CWW Agency authorizing CWW Agency to act as its agent. (Id. ¶ 8, Ex. A.) Mollin led Diamond State to believe that he would produce "weather-related business," as opposed to "weather derivative business," on behalf of Diamond State. (Id. ¶ 11, 15; Ex. C,

"Multiple Line Quota Share Reinsurance Contract" § II, at 1 (describing business covered as "weather-related inland marine or property insurance"). "Weather-related business" generally covers outdoor concerts, snow removal programs, hurricane risks and weather-related promotions that are vulnerable to cancellation or rescheduling due to adverse weather conditions. (Id. ¶ 11.) "Weather derivative business" generally involves a trader who, in exchange for a fee, agrees to pay an energy-related company a specified amount if the temperature in a geographic area averages above or below a certain specified temperature during a period of time. (Id. ¶ 14.)

FN1. When considering a motion to dismiss, the allegations in the complaint are assumed to be true. See *Kopec v. Coughlin*, 922 F.2d 152, 153 (2d Cir.1991).

B. Mollin and WWT

Mollin also either owned or was a principal owner of WWT, a weather derivative trading company. (Id. ¶¶ 3, 29.) He was Chairman of WWT's Board of Directors as well, and therefore authorized to act on WWT's behalf. (Id. ¶ 28.) WWT brokers weather derivative contracts and sometimes acts as the trader on weather derivative trades. (Id. ¶ 29.) When the agreement between Mollin and Diamond State was entered into, Diamond State did not know of WWT's existence. (Id.)

C. The Alleged Scheme

As described below, Diamond State alleges that Mollin, CWW Agency and WWT participated in a scheme to enter "weather derivative" contracts on behalf of Diamond State. This would enable the parties to collect lucrative commissions and premiums beyond those received if only producing "weather-related business." They accomplished this by issuing two series of policies: (1) Reinsurance Policies and (2) "dummy" policies.

1. The Reinsurance Policies

*2 The first step in the alleged scheme was

to have CWW Agency, as Diamond State's agent, issue a series of "Facultative Reinsurance Policies" ("Reinsurance Policies") to Platinum Indemnity Ltd. ("Platinum"). (Id. ¶ 17.) In effect, these policies reinsured weather derivative contracts. (Id. ¶¶ 17, 20, 21, 23.) CWW Agency, Mollin and WWT intended to hide the unauthorized Reinsurance Policies from Diamond State, and never turned over to Diamond State the \$7.4 million premium allegedly received from Platinum. (Id. ¶¶ 24, 31-39.)

2. The Dummy Policies

The next step in the alleged scheme was to bind Diamond State to eleven "Commercial Inland Marine Weather Insurance Policies" (the "dummy policies"), with an entity Mollin called "Worldwide Weather," covering precisely the same risks as the Platinum Reinsurance Policies. (Id. ¶¶ 32, 33, Ex. E.) Unlike the Reinsurance Policies, Mollin did not attempt to hide the dummy policies from Diamond State. However, Diamond State did not learn about the specifics of the policies, including the fact that WWT was the actual insured, until Diamond State conducted an audit in February 2000. (Id. ¶ 33.)

Under the scheme, the premium sent to Diamond State for the dummy policies was actually the premium that Mollin had collected for the Platinum Reinsurance Policies. (Id. ¶ 34.) Hence, WWT never actually paid any premium for the dummy policies. If a loss occurred under the Reinsurance Policies, CWW Agency, Mollin and WWT planned to have Diamond State billed for that loss under a WWT dummy policy, and not a Platinum Reinsurance Policy. (Id. ¶ 36.) Diamond State would then pay out money for the loss to "Worldwide Weather," the listed insured on the dummy policy. (Id. ¶ 36, Ex. E.) Subsequently, monies collected by WWT, through the dummy policies, would be sent to Platinum for the same loss under the Reinsurance Policy. (Id. ¶ 36.) Platinum would therefore be paid for any losses covered by the Reinsurance Policies, without Diamond State knowing that the Reinsurance Policies existed.

In February 2000, Diamond State audited CWW Agency and found the dummy policies. (Id. ¶ 33.) When asked about the policies, Mollin revealed to Diamond State that the insured listed as "Worldwide Weather" was actually WWT. (Id. ¶¶ 33, 38.) Mollin offered to cancel all eleven dummy policies flat, therefore rendering them void ab initio. (Id. ¶ 38.) After cancellation endorsements were issued for the dummy policies, Diamond State, unaware of the Reinsurance Policies, returned the \$7.4 million premium for the WWT dummy policies to CWW Agency. (Id. ¶ 39.) Presumably, this money should have been returned to WWT, but Diamond State does not know what was done with it, and Mollin has apparently fled the country. (Pl.'s Memo. at 7.)

D. Platinum's Demand To Diamond State

Two months later, in April 2000, Platinum sent to Diamond State a demand for reimbursement for losses under the Reinsurance Policies. (Am.Compl.¶ 17.) This was the first time Diamond State learned of the alleged Reinsurance Policies. (Id. ¶ 18.) Through the demand for reimbursement, Diamond State also found out that an additional ten Reinsurance Policies had been issued to Platinum, on Diamond State's behalf, after Diamond State suspended CWW Agency and Mollin's authority. (Id. ¶ 40, Ex. G.) Platinum has since sued Diamond State in order to collect under some of the alleged Reinsurance Policies. (Id. ¶ 39, Ex. D.) Diamond State contends that CWW Agency, Mollin and WWT knew, or should have known, that CWW Agency was not authorized to issue the Reinsurance Policies. (Id. ¶ 30.) Nonetheless, they acted in a concerted effort to issue and hide these policies in order to receive premiums and commissions from Platinum to which they would otherwise not be entitled. (Id. ¶ 31.)

STANDARD OF REVIEW

*3 When considering a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6), the court must accept the allegations of plaintiff's complaint as true and draw all reasonable inferences in plaintiff's favor. Irish Lesbian &

Gay Org. v. Giuliani, 143 F.3d 638, 644 (2d Cir.1998). The question is not whether plaintiff will ultimately prevail, but whether plaintiff is entitled to offer evidence to support the claims. *Todd v. Exxon Corp.*, 275 F.3d 191, 198 (2d Cir.2001) (citation omitted). "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).

When alleging fraud, the circumstances constituting the fraud "shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally." Fed.R.Civ.P. 9(b). This particularity requirement must be read together with Fed.R.Civ.P. 8(a). See *DiVittorio v. Equidyne Extractive Indus., Inc.*, 822 F.2d 1242, 1247 (2d Cir.1987). Rule 8(a) states that a pleading should contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a).

"Rule 9(b) pleadings cannot be based upon information and belief." *DiVittorio*, 822 F.2d at 1247. The exception to this rule is that "fraud allegations may be so alleged as to facts peculiarly within the opposing party's knowledge, in which event the allegations must be accompanied by a statement of the facts upon which the belief is based." *Id.* (citations omitted). "[F]raud allegations ought to specify the time, place, speaker, and content of the alleged misrepresentations" and "inform each defendant of the nature of his alleged participation." *Id.* (citations omitted).

DISCUSSION

A. Vicarious Liability

[1] Diamond State contends that WWT is vicariously liable for the actions of Mollin who, as an owner of WWT, as well as Chairman of the Board of Directors, made material misrepresentations and concealed material facts from Diamond State while acting in the scope of his employment. (Am.Compl. ¶¶ 3, 28, 29, 51-56.) WWT

contends, however, that the "adverse interest" exception to vicarious liability is applicable here. (Def.'s Memo. at 12-14.)

For WWT to be found vicariously liable for Mollin, Diamond State must show that Mollin's underlying acts were: (1) performed while engaged generally in the business of WWT, or (2) reasonably necessary or incidental to his employment with WWT. See *Smith v. Midwood Realty Assocs.*, 289 A.D.2d 391, 734 N.Y.S.2d 237, 238 (App.Div.2001).

As a general rule, "knowledge acquired by an agent acting within the scope of his agency is imputed to his principal and the latter is bound by such knowledge although the information is never actually communicated to it." *Center v. Hampton Affiliates, Inc.*, 66 N.Y.2d 782, 784, 497 N.Y.S.2d 898, 488 N.E.2d 828 (1985) (citations omitted); see also *Adams v. New York City Transit Auth.*, 88 N.Y.2d 116, 119, 643 N.Y.S.2d 511, 666 N.E.2d 216 (1996) ("employers are held vicariously liable for their employees' torts only to the extent that the underlying acts were within the scope of the employment"). This general rule is due to an underlying presumption that the "agent has discharged his duty to disclose to his principal all the material facts coming to his knowledge with reference to the subject of his agency." *Center*, 66 N.Y.2d at 784, 497 N.Y.S.2d 898, 488 N.E.2d 828 (internal quotation and citations omitted).

*4 However, courts have recognized an "adverse interest" exception to the general rule. The exception has been described as follows:

[W]hen an agent is engaged in a scheme to defraud his principal, either for his own benefit or that of a third person, the presumption that knowledge held by the agent was disclosed to the principal fails because he cannot be presumed to have disclosed that which would expose and defeat his fraudulent purpose.

Id. (citations omitted). For the exception to apply, "the agent must have totally abandoned his principal's interests and be acting entirely for his own or another's

purposes. It cannot be invoked merely because he has a conflict of interest or because he is not acting primarily for his principal." *Id.* at 784-85, 497 N.Y.S.2d 898, 488 N.E.2d 828 (citations omitted). Therefore, if Mollin was acting to further the interests of WWT, then the adverse interest doctrine would not be applicable, even though Mollin's own interests or those of a third party were also being advanced through the alleged scheme.

Here, Mollin issued the eleven WWT dummy policies while engaged in the business of WWT, his principal. Allegedly, this was done in furtherance of WWT business. (Am.Compl.¶ 53, 55.) If Diamond State can prove the truth of these allegations, then the exception would not apply because the scheme also benefitted WWT. See *Center*, 66 N.Y.2d at 784-85, 497 N.Y.S.2d 898, 488 N.E.2d 828. Therefore, the Court will allow the action for vicarious liability to proceed.

B. Conspiracy To Commit Fraud & Aiding and Abetting Fraud

1. Conspiracy To Commit Fraud

In order for there to be a valid claim for conspiracy to commit fraud, there must be a valid underlying fraud claim. See *Missigman v. USI Northeast, Inc.*, 131 F.Supp.2d 495, 517 (S.D.N.Y.2001). To find fraud, one must have knowingly made a false representation or intentionally concealed material facts with the intent that another would rely on such to his detriment. See *Baker v. R.T. Vanderbilt Co.*, 260 A.D.2d 750, 688 N.Y.S.2d 726, 729 (App.Div.1999). Additionally, the elements of a conspiracy claim are: (1) an agreement among two or more parties, (2) a common objective, (3) acts in furtherance of the objective and (4) knowledge. See *United States v. De Biasi*, 712 F.2d 785, 793 (2d Cir.1983).

[2] Diamond State has adequately alleged fraud. It has alleged that Mollin falsely represented that he would not produce or would strictly limit weather derivative business, with the intent that Diamond State would rely on this representation. (Am.Compl.¶¶ 11, 15, 58.) In addition,

Diamond State alleges that WWT and Mollin issued the dummy policies to conceal the unauthorized Reinsurance Policies, which, in effect, covered weather derivative contracts. (Id. ¶¶ 17-39, 58, Ex. C.) Finally, Diamond State contends that as a result of these actions, it has suffered economic injury. (Id. ¶ 60.)

[3] Diamond State also claims that Mollin, CWW Agency and WWT each rendered substantial assistance to one another in committing the fraud. Allegedly, there was an agreement among Mollin, CWW Agency and WWT in furtherance of a common objective--to issue and hide unauthorized Reinsurance Policies on behalf of Diamond State in order to collect premiums and commissions they would otherwise be unable to receive. (Id. ¶¶ 30-39, 57-59.) In order to accomplish this goal, dummy policies were issued to "Worldwide Weather," fraudulently using Platinum's money in order to obtain the policies, and WWT knowingly agreed to pay any sums received under the dummy policies to Platinum. (Id. ¶¶ 3, 31-34, 58, 59.)

*5 Diamond State has adequately alleged a conspiracy to commit fraud and may therefore go forward with its claim.

2. Aiding and Abetting Fraud

[4] The elements of an aiding and abetting fraud claim are: "(1) a fraud, (2) defendant's knowledge of the fraud, and (3) defendant's knowing rendition of substantial assistance thereto." *In re Investors Funding Corp. of New York Sec. Litig.*, 523 F.Supp. 533, 545 (S.D.N.Y.1980).

As noted above, Diamond State has adequately alleged a fraud claim. Furthermore, WWT allegedly had knowledge of the fraud since it knew that the Reinsurance Policies were unauthorized and that the premiums sent for the dummy policies were not its own monies, but those of Platinum's. (Am.Compl.¶¶ 61, 62, 64.) Finally, WWT knowingly agreed to pay any proceeds obtained under the dummy policies to Platinum in order that Diamond State would

never know about the Reinsurance Policies. (Id. ¶ 63.) The Court will allow Diamond State to prove the truth of these allegations.

3. Specificity Requirements for Pleading Fraud

[5] The Court also notes that Diamond State's allegations satisfy the specificity requirements for pleading fraud. See Fed.R.Civ.P. 8(a) & 9(b). As described above, the time, place, speaker, content of the alleged misrepresentations and each defendant's alleged participation have been stated. Further details that may be peculiarly within the opposing party's knowledge do not need to be pleaded at the complaint stage. See DiVittorio, 822 F.2d at 1247.

C. Tortious Interference With Contractual Relations

[6] The elements of a tortious interference claim are: "(a) that a valid contract exists; (b) that a 'third party' had knowledge of that contract; (c) that the third party intentionally and improperly procured the breach of contract; and (d) that the breach resulted in damage to the plaintiff." *Finley v. Giacobbe*, 79 F.3d 1285, 1294 (2d Cir.1996) (citing *Israel v. Wood Dolson Co.*, 1 N.Y.2d 116, 120, 151 N.Y.S.2d 1, 134 N.E.2d 97 (1956)).

Diamond State had a contractual agreement with CWW Agency. (Am.Compl., Ex. A.) Pursuant to the agreement, Mollin was to produce weather-related business on behalf of Diamond State. (Id. ¶ 11, 151 N.Y.S.2d 1, 134 N.E.2d 97.) Diamond State further contends weather derivative business was not to be written. (Id. ¶ 15, 151 N.Y.S.2d 1, 134 N.E.2d 97.) WWT had knowledge of this agreement and its restrictions. (Id. ¶¶ 30, 68, 151 N.Y.S.2d 1, 134 N.E.2d 97.) It is further alleged that WWT and Mollin intentionally and improperly induced CWW Agency to breach the agreement and issue the unauthorized Reinsurance Policies in order to collect premiums and commissions that were otherwise unattainable. (Id. ¶ 17-39, 69, 70, 151 N.Y.S.2d 1, 134 N.E.2d 97.) As a result of these actions, Diamond State has suffered

economic injury. (Id. ¶ 71, 151 N.Y.S.2d 1, 134 N.E.2d 97.)

Therefore, Diamond State has sufficiently pleaded the basis of its claim against WWT for tortious interference with contractual relations.

D. Conspiracy To Commit Conversion

[7] To sustain a claim for conspiracy to commit conversion, Diamond State would have to set forth facts supporting an allegation that WWT either conspired to unlawfully convert property or consciously assisted in the unlawful conversion. See *Primex Plastics Corp. v. Lawrence Prods., Inc.*, No. 89 Civ. 2944(JSM), 1991 WL 183367, at *5 (S.D.N.Y. Sept.12, 1991).

*6 CWW Agency was contractually and legally obligated to remit premiums to Diamond State for the issuance of Diamond State policies. (Am.Compl.¶ 79.) CWW Agency, Mollin and WWT allegedly conspired and assisted each other in hiding the Platinum Reinsurance Policies and did not remit premiums collected under those policies to the rightful possessor, Diamond State. (Id. ¶¶ 24, 80.) The details of this scheme were previously mentioned.

The motion to dismiss Diamond State's conspiracy to commit conversion claim is denied.

E. Aiding and Abetting Conversion

[8] To state a claim for aiding and abetting conversion, Diamond State must show: (1) the existence of wrongful conduct by the primary wrongdoer; (2) WWT's knowledge of the wrongful conduct; and (3) WWT's substantial assistance in achieving the wrongdoing. See *Liberian v. Worden*, No. 601357/97, 1998 N.Y. Misc. LEXIS 717, at *9 (Sup.Ct. July 23, 1998); see also *Williams v. Bank Leumi Trust Co. of New York*, No. 96 Civ. 6695(LMM), 1997 WL 289865, at *4 (S.D.N.Y. May 30, 1997). New York law requires actual knowledge of the wrongful conduct. See *Liberian*, 1998 N.Y. Misc. LEXIS 717, at *9;

see also Williams, 1997 WL 289865, at *5. Constructive knowledge and/or allegations that WWT "recklessly disregarded" or "should have known" of the wrongdoing will not withstand a motion to dismiss. See Williams, 1997 WL 289865, at *5; Liberman, 1998 N.Y. Misc. LEXIS 717, at *9-10.

In this case, Mollin, the primary wrongdoer, allegedly misrepresented to Diamond State that only weather-related insurance business, and not weather derivative business, would be produced. (Am.Compl. ¶¶ 11, 15.) Then, upon issuing unauthorized Reinsurance Policies, the primary wrongdoer apparently hid those policies by issuing similar policies to "Worldwide Weather" that would effectually cover the same losses as the Reinsurance Policies. (Id. ¶ 17, 20, 21, 23, 31-39.) Because Diamond State did not know of the existence of the policies, the premiums collected for those policies were never properly transferred to the rightful owner. (Id. ¶¶ 24, 83.) Diamond State alleges that WWT and Mollin had actual knowledge of the conversion of the premiums obtained by CWW Agency and that WWT and Mollin actively participated in the conversion of those premiums, as evidenced by the detailed scheme. (Id. ¶ 84.) Thus, Diamond State has set forth sufficient facts to support its claim.

F. Unjust Enrichment

[9] The elements of an unjust enrichment claim are: "(1) the defendant was enriched; (2) enrichment was at plaintiff's expense; and (3) the defendant's retention of the benefit would be unjust." *Dubai Islamic Bank v. Citibank, N.A.*, 126 F.Supp.2d 659, 669 (S.D.N.Y.2000) (internal quotations and citations omitted).

Should Diamond State be found liable for the Platinum Reinsurance Policies, it requests that the \$7.4 million premium for those policies be paid by WWT in order to prevent WWT from being unjustly enriched. (Am.Compl. ¶¶ 87, 88.) The Court, however, does not find that WWT has retained an enrichment at Diamond State's expense.

*7 Diamond State asserts in its own

complaint that the \$7.4 million premium was paid by Platinum to CWW Agency, not WWT. (Id. ¶ 24 .) Furthermore, the complaint also states that the subsequent return of the \$7.4 million as a result of the dummy policies being cancelled flat, was sent to and received by CWW Agency, not WWT. (Id. ¶ 39.) Diamond State further admits that although the money should have been returned to WWT, it does not know what was done with the money. (Pl.'s Memo. at 7.) Therefore, there is no basis for the claim that WWT was enriched in the amount of \$7.4 million and that retention of that money in the event that Diamond State should be found liable for the losses under the Reinsurance Policies would be unjust. The Court therefore dismisses the claim brought against WWT for unjust enrichment.

CONCLUSION

For the foregoing reasons, WWT's motion to dismiss the claims of vicarious liability, conspiracy to commit fraud, aiding and abetting fraud, tortious interference with contractual relations, conspiracy to commit conversion, and aiding and abetting conversion is denied. Diamond State is permitted to proceed with these claims. WWT's motion to dismiss the unjust enrichment claim brought against it is granted for failure to state a claim upon which relief may be granted.

2002 WL 31819217 (S.D.N.Y.)

END OF DOCUMENT

25

District Court of Appeal of Florida,
Fourth District.

Fannie Gordon DIAMOND, Appellant,
v.
Herman ROSENFELD and Rose Rosenfeld,
Appellees.
Herman ROSENFELD and Rose Rosenfeld,
Appellants,
v.
Leslie J. HENION and Elizabeth S. Henion,
Appellees.

Nos. 4-86-1204, 4-86-1221.

Aug. 5, 1987.
On Motion for Rehearing
Sept. 23, 1987.

Action was instituted for civil conspiracy, malicious prosecution, and intentional infliction of emotional distress, resulting from seven-year squabble between neighbors. The jury found for plaintiffs on all counts, and awarded damages. All defendants moved for judgment n.o.v. on all counts. The Circuit Court, Palm Beach County, R. William Rutter, Jr., J., granted motion of one set of defendants, but denied other defendant's motion. Plaintiffs and other defendant both appealed, and appeals were consolidated. The District Court of Appeal, Webster, Peter D., Associate Judge, held that: (1) there was insufficient evidence to support intentional infliction of emotional distress and conspiracy claims; (2) there was sufficient evidence to support malicious prosecution actions; and (3) where verdict form did not differentiate adequately, the "two-issue" rule did not apply, requiring new trial for damages.

Affirmed in part; reversed in part;
remanded with instructions.

West Headnotes

[1] Conspiracy 19
91k19

Evidence was insufficient to support judgment for civil conspiracy to maliciously prosecute, where circumstantial inference did not

outweigh all reasonable inferences to the contrary.

[2] Damages 192
115k192

Evidence was insufficient to support judgment for intentional infliction of emotional distress in connection with alleged harassment of plaintiffs by neighbors, where conduct was not shown to be so extreme and outrageous as to go beyond all bounds of decency.

[3] Malicious Prosecution 64(1)
249k64(1)

Evidence was sufficient to support judgment on malicious prosecution claim in favor of retired man who had been acquitted of hitting neighbors, despite contrasting evidence.

[4] Conspiracy 19
91k19

Where evidence was insufficient to support verdict of conspiracy to maliciously prosecute as to two out of three defendants, consistency required conclusion it was insufficient to support verdict against third.

[5] Malicious Prosecution 69
249k69

Award of \$20,000 was not excessive for malicious prosecution of plaintiff on claims he hit neighbors.

[6] New Trial 39(5)
275k39(5)

A new trial on damages was necessary where verdict form did not differentiate between malicious prosecution damages and intentional infliction of emotional distress damages, where each claim was distinct and had separate measure of damages, and evidence sustained verdict against defendants for malicious prosecution only; the "two-issue" rule did not apply.

*1032 Frank G. Cibula, Jr., of Cibula, Gaunt & Pratt, West Palm Beach, for appellant Diamond.

Kevin J. Carroll of Davis, Critton, Hoy & Diamond, West Palm Beach, for appellees/

appellants Rosenfeld.

Richard A. Kupfer of Cone, Wagner, Nugent, Johnson, Roth & Romano, West Palm Beach, for appellees Henion.

WEBSTER, PETER D., Associate Judge.

These two consolidated appeals have their genesis in a dispute among neighbors. All are elderly, and all resided in the same condominium.

In 1979, shortly after the Rosenfelds moved to the condominium, the Henions complained about the Rosenfelds' dog's barking. The Rosenfelds gave the dog away, but this proved to be only the beginning of the dispute. Mr. Rosenfeld, a retired cabinet maker, did woodworking, as a hobby, in his laundry room. The Henions complained about the noise generated by the woodworking, eventually bringing the matter before the board of the condominium association. At a meeting of the association, the board agreed to allow Mr. Rosenfeld to continue his hobby, subject to certain restrictions.

According to the Henions and Mrs. Diamond, as the parties were leaving the association meeting, Mr. Rosenfeld struck Mr. Henion without provocation, causing Mr. *1033 Henion to fall to the ground. A criminal complaint was made against Mr. Rosenfeld, alleging a battery. The ensuing criminal trial resulted in an acquittal. The Henions then filed a civil action against Mr. Rosenfeld, alleging a battery. It ended with a jury verdict in favor of Mr. Rosenfeld. Mrs. Diamond testified at both trials that Mr. Rosenfeld had hit Mr. Henion.

About six months after the Henion civil trial, Mrs. Diamond filed a criminal complaint against Mr. Rosenfeld, alleging that he struck her repeatedly as she was leaving the Henions' condominium. At the criminal trial that followed, Mr. Rosenfeld was again acquitted. Mrs. Diamond then filed a civil action against Mr. Rosenfeld, which ended with a jury verdict in favor of Mr. Rosenfeld. Mrs. Henion testified in both trials that Mr.

Rosenfeld had hit Mrs. Diamond.

The present appeals are from round five of the litigation. The Rosenfelds sued the Henions and Mrs. Diamond. The complaint was in six counts. In Counts I and II, Mr. Rosenfeld sought damages from the Henions for malicious prosecution. In Counts III and IV, Mr. Rosenfeld sought damages from Mrs. Diamond for malicious prosecution. In Count V, Mr. Rosenfeld sought damages from the Henions and Mrs. Diamond for conspiracy to prosecute him maliciously. Finally, in Count VI, the Rosenfelds sought damages from the Henions and Mrs. Diamond for intentional infliction of emotional distress.

At trial, the evidence was in conflict on virtually all issues. On the malicious prosecution claims against the Henions, there was testimony that Mr. Rosenfeld deliberately and without provocation struck Mr. Henion. However, there was also testimony that Mr. Rosenfeld never touched Mr. Henion but that, rather, Mr. Henion tripped and fell. Similarly, on the malicious prosecution claims against Mrs. Diamond, there was testimony that Mr. Rosenfeld struck Mrs. Diamond. However, there was also testimony that Mr. Rosenfeld never touched her. Essentially the same evidence was relied on to support the claim that the Henions and Mrs. Diamond had conspired to prosecute Mr. Rosenfeld maliciously, together with the inferences Mr. Rosenfeld argued could be drawn from the evidence.

On the claim for intentional infliction of emotional distress, there was evidence that Mr. Henion had threatened to shoot the Rosenfelds' dog; that the Henions repeatedly complained about noise from the Rosenfelds' apartment; that the Henions made anti-Semitic remarks about the Rosenfelds; and that the Henions succeeded in alienating some of the neighbors from the Rosenfelds. However, most of the evidence regarding this Count involved Mrs. Diamond. There was evidence that Mrs. Diamond constantly harassed Mr. Rosenfeld, calling him a cripple and a criminal and accusing him of having tried to rape her; that she repeatedly made

threatening and/or harassing telephone calls to the Rosenfelds; that she cursed the Rosenfelds and their children; that she directed prayers for the dead at the Rosenfelds, their children and grandchildren; and that, in general, she did her best to make the lives of the Rosenfelds, and of Mr. Rosenfeld in particular, as miserable as possible.

By special verdict, the jury found for the Rosenfelds on all claims. With respect to the claims against the Henions, it awarded each of the Rosenfelds \$5,000; and with respect to the claims against Mrs. Diamond, it awarded Mr. Rosenfeld \$20,000 and Mrs. Rosenfeld \$15,000.

The Henions and Mrs. Diamond moved for entry of judgments notwithstanding the verdict. As to the Henions, the trial court concluded that it should have directed a verdict in their favor at the close of the evidence because "there was insufficient evidence upon which the jury could have rendered a verdict against these Defendants." Accordingly, the trial court entered a judgment notwithstanding the verdict in favor of the Henions on all claims. However, the trial court denied Mrs. Diamond's motion for judgment notwithstanding the verdict, as well as her motions for new trial and for a remittitur.

The Rosenfelds have appealed the judgment notwithstanding the verdict in favor of the Henions, and Mrs. Diamond has appealed the judgment against her. She argues that there was no evidence to support the intentional infliction of emotional distress claim and that, therefore, the trial court should have directed a verdict on that claim; that the damages awarded were not supported by the evidence, and were excessive; and that, because the trial court granted a judgment notwithstanding the verdict in favor of the Henions, the jury's verdict has become inconsistent. The two appeals have been consolidated.

First, addressing the Rosenfelds' appeal of the trial court's judgment notwithstanding the

verdict, the standard of review is as follows:

When, after the entry of a jury verdict, the trial court grants a motion for judgment in accordance with the movant's prior motion for directed verdict, the ruling constitutes a deferred decision on the earlier motion for a directed verdict.... Accordingly, our task in reviewing the propriety of an order granting such a motion is identical to that where an ordinary motion for directed verdict is involved. Presented with such a motion, the court must view all of the evidence in a light most favorable to the non-movant, and, in the face of evidence which is at odds or contradictory, all conflicts must be resolved in favor of the party against whom the motion has been made.... Similarly, every reasonable conclusion which may be drawn from the evidence must also be construed favorably to the non-movant.... Only where there is no evidence upon which a jury could properly rely, in finding for the plaintiff, should a directed verdict be granted.

Collins v. School Board of Broward County, 471 So.2d 560, 563 (Fla. 4th DCA 1985). Applying this standard, we are of the opinion that the trial court correctly granted the Henions a judgment notwithstanding the verdict on the conspiracy and the intentional infliction of emotional distress claims.

[1] As to the conspiracy claim, all of the evidence was circumstantial. "[C]ircumstantial evidence is sufficient, if it meets the standards required in civil cases generally, to sustain a verdict for a plaintiff in an action for damages arising out of an alleged conspiracy." *Anheuser-Busch, Inc. v. Campbell*, 306 So.2d 198, 200 (Fla. 1st DCA 1975). However, in a civil case, a fact may be established by circumstantial evidence alone only when the inference sought to be created by such circumstantial evidence outweighs all reasonable inferences to the contrary. *Tucker Brothers, Inc. v. Menard*, 90 So.2d 908 (Fla.1956). The circumstantial evidence offered to establish a conspiracy to prosecute Mr. Rosenfeld maliciously fails to create such an inference.

[2] As to the intentional infliction of

emotional distress claim, the facts must be " 'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency.' " Metropolitan Life Ins. Co. v. McCarron, 467 So.2d 277, 279 (Fla.1985). "[I]t is for the court to determine, in the first instance, whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery." Scheller v. American Medical International Inc., 502 So.2d 1268, 1271 (Fla. 4th DCA 1987). The trial court correctly concluded that, viewed in a light most favorable to the Rosenfelds, as a matter of law, the evidence presented did not satisfy this test.

[3] However, we believe that it was error to grant a judgment notwithstanding the verdict in favor of the Henions on the malicious prosecution claims. True, the evidence was in sharp conflict. However, viewed in a light most favorable to Mr. Rosenfeld, there was sufficient evidence from which the jury might conclude, as it did, that the criminal and civil actions instituted by the Henions amounted to malicious prosecution.

We next address Mrs. Diamond's appeal of the judgment entered against her pursuant to the jury's verdict. We agree, first, that the trial court should have directed a verdict in her favor on the intentional infliction of emotional distress claim. While it is true that, viewed in a light most favorable to the Rosenfelds, Mrs. Diamond's conduct *1035 was reprehensible, we do not believe that her conduct can be said to have been " 'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency.' " Metropolitan Life Ins. Co. v. McCarron, 467 So.2d 277, 279 (Fla.1985). All of the appellate decisions in this State addressing the tort of intentional infliction of emotional distress have clearly suggested that it be narrowly construed and applied only when the facts would be sufficient to arouse such overwhelming aversion in the average person that he or she would exclaim, "Outrageous!" No decision has extended this tort to fact situations such as that presented here; nor are we prepared to do so.

[4] Mrs. Diamond argues that, when the trial court granted the Henions a judgment notwithstanding the verdict on the conspiracy claim, it created an inconsistency in the verdict because there was no longer anyone with whom she could have conspired. Because we believe that the trial court was correct in its conclusion that there was insufficient evidence to support the jury's verdict against the Henions on the conspiracy claim, it becomes necessary, for purposes of consistency, to likewise conclude that there was insufficient evidence to support the jury's verdict on that claim as to Mrs. Diamond. Therefore, it was error for the trial court to decline to grant a judgment notwithstanding the verdict in favor of Mrs. Diamond on that claim.

[5] We come next to Mrs. Diamond's arguments regarding the amount of damages awarded. There was ample evidence to support the jury's verdict that she had maliciously prosecuted Mr. Rosenfeld. The jury awarded Mr. Rosenfeld \$20,000 in damages. We do not find this amount excessive on the facts, despite Mrs. Diamond's argument to the contrary. However, there is another, much more troubling, problem regarding damages. It is created by the form of the verdict.

The verdict form had six questions. The first three related to the claims against Mrs. Diamond, and the last three related to the claims against the Henions; otherwise, the first three questions and the last three questions were identical. Questions 1 and 4 asked whether Mrs. Diamond and the Henions, respectively, had "maliciously and without probable cause institut[e]d or continue[d] or conspire[d] to institute or continue any of the legal proceedings against HERMAN ROSENFELD." The jury answered both questions in the affirmative. Questions 2 and 5 asked whether Mrs. Diamond and the Henions, respectively, had "wrongfully and outrageously inflict[ed] emotional distress on HERMAN ROSENFELD and ROSE ROSENFELD." Again, the jury answered both questions in the affirmative. Finally, questions 3 and 6

asked for "the total amount of damages ... sustained by PLAINTIFFS HERMAN ROSENFELD AND ROSE ROSENFELD" as a result of the actions of Mrs. Diamond and the Henions, respectively. The jury answered question 3 by awarding \$20,000 to Mr. Rosenfeld and \$15,000 to Mrs. Rosenfeld, and question 6 by awarding \$5,000 to Mr. Rosenfeld and \$5,000 to Mrs. Rosenfeld.

[6] As we have already indicated, only the malicious prosecution claims of Mr. Rosenfeld against Mrs. Diamond and the Henions should have been presented to the jury. The problem arises because the verdict form does not differentiate between damages awarded for malicious prosecution and damages awarded for intentional infliction of emotional distress, although each claim is distinct and has a separate measure of damages. In a very recent decision involving a similar problem, the Supreme Court has held that, in such a situation, the "two-issue rule" [see *Colonial Stores, Inc. v. Scarbrough*, 355 So.2d 1181 (Fla.1977)] does not apply, and that reversal is required. *First Interstate Development Corp. v. Ablanedo*, 511 So.2d 536 (Fla.1987). There, the Supreme Court said:

This rule [i.e., the "two-issue rule"] applies to those actions that can be brought on two theories of liability, but where a single basis for damages applies. For instance, in products liability, the claim can be brought on both negligence and *1036 breach of implied warranty, but the measure of damages for the resulting personal injury is the same. That is not the circumstance in the instant case. Here, the fraud claim for failure to construct a nature trail and the claim for damages because of reduction in value of respondents' properties for the failure to complete the trail is distinct from the claim of diminished property values for the misrepresentation of the project as oceanfront. Each claim is distinct and has a separate measure of damages. Finding liability on one claim does not entitle the respondents to receive the total amount of damages attributable to both theories of liability. We will not presume that petitioners were not prejudiced by the improper submission of the nature trail

issue to the jury. Consequently, the jury's compensatory damage award must be reversed.

511 So.2d at 538. Thus, while we do not believe that the awards of \$20,000 and \$5,000 against Mrs. Diamond and the Henions, respectively, are excessive on the malicious prosecution claims, because First Interstate Development Corp. appears to be on point, we are constrained to remand the malicious prosecution claims against both Mrs. Diamond and the Henions for a new trial on damages.

In summary, regarding the Henions, we affirm the trial court's judgment notwithstanding the verdict on the conspiracy and the intentional infliction of emotional distress claims; reverse the judgment notwithstanding the verdict on the malicious prosecution claims; and remand for a new trial on damages as to the latter claims. Regarding Mrs. Diamond, we reverse the trial court's denial of a directed verdict on the conspiracy and the intentional infliction of emotional distress claims and remand with directions that a judgment be entered in favor of Mrs. Diamond on those claims; affirm the denial of a directed verdict on the malicious prosecution claims; and remand the latter claims for a new trial on damages.

AFFIRMED IN PART; REVERSED IN PART; and REMANDED, with directions.

GUNTHER and STONE, JJ., concur.

ON MOTION FOR REHEARING

WEBSTER, PETER D., Associate Judge.

In its opinion in these two consolidated appeals, filed on August 5, 1987, the Court, inter alia, reversed in part the trial court's judgment notwithstanding the verdict in favor of appellees Mr. and Mrs. Henion. Reversing the judgment notwithstanding the verdict on the malicious prosecution claims only, we held that, "viewed in a light most favorable to Mr. Rosenfeld, there was sufficient evidence from which the jury might conclude, as it did, that the criminal and civil actions instituted by the

Henions amounted to malicious prosecution." Because the special verdict returned by the jury did not segregate damages attributable to the malicious prosecution claims from damages attributable to other claims which should not have been submitted to the jury, we directed that a new trial be held, limited to the issue of damages sustained by virtue of the malicious prosecution.

In their motion for rehearing, the Henions have for the first time brought to the Court's attention the fact that, in addition to their motion for judgment notwithstanding the verdict which the trial court granted, they had filed a motion for new trial addressed to all claims, which was not ruled upon by the trial court. They request that we modify our opinion so that, on remand, the trial court will be free to consider and to rule upon their motion for new trial.

The Henions' request appears meritorious. See, e.g., *Kilburn v. Davenport*, 286 So.2d 241 (Fla. 3d DCA 1973); *McCloskey v. Louisville & Nashville R.R. Co.*, 122 So.2d 481 (Fla. 1st DCA 1960). Accordingly, we are constrained to amend our previous opinion to the extent that, in *Rosenfeld v. Henion*, Case No. 4-86-1221, on remand the trial court should first consider and rule upon the Henions' motion for new trial. If it decides to deny that motion, it should then proceed with a new trial on the issue of damages only arising from the *1037 malicious prosecution claims, consistent with our original opinion.

We feel that it is appropriate to point out that the preferred approach when granting a motion for judgment notwithstanding the verdict in an action in which a motion for new trial has also been filed is to alternatively rule upon the motion for new trial as well. Such an approach avoids the need for piecemeal appeals, thereby promoting judicial economy. See *Frazier v. Seaboard System R.R., Inc.*, 508 So.2d 345 (Fla.1987); *Ligman v. Tardiff*, 466 So.2d 1125 (Fla. 3d DCA 1985); *Stupp v. Cone Brothers Contracting Co.*, 135 So.2d 457 (Fla. 2d DCA 1961).

The Henions have raised an additional point

in their motion for rehearing, which we find is without merit and does not require discussion.

The Henions' motion for rehearing in Case No. 4-86-1221 is GRANTED IN PART and the original opinion is modified to the extent that, on remand, the trial court should first consider and rule upon the Henions' motion for new trial.

GUNTHER and STONE, JJ., concur.

511 So.2d 1031, 12 Fla. L. Weekly 1896, 12 Fla. L. Weekly 2302

END OF DOCUMENT

26

United States District Court,
S.D. New York.

DIMON INCORPORATED, et ano., Plaintiffs,
v.
FOLIUM, INC., et al., Defendants.

No. 98 Civ. 6732(LAK).

May 3, 1999.

Buyer of stock of corporation sued sellers, and individuals controlling sellers, alleging that it was fraudulently induced to pay too much for corporation by sophisticated accounting scheme that resulted in overstatement of earnings and net worth. Various motions to dismiss were made. The District Court, Kaplan, J., held that: (1) corporation, based in Zimbabwe, had consented to suit in federal district court sitting in New York; (2) court had personal jurisdiction over persons who controlled sellers, living in South Africa, United Kingdom and Zimbabwe; (3) buyer had not signed release precluding suit; (4) information tending to show existence of accounting scheme would be deemed exclusive knowledge of sellers, precluding claim under New York law that buyer had contractually surrendered right to rely on financial condition representation not expressly stated in agreement; (5) buyer stated claim of common law fraud, under New York law; (6) buyer stated claim of negligent misrepresentation, under New York law; and (7) breach of fiduciary duty claim could be made by buyer against controlling persons of sellers who were currently in employ of buyer.

Motions granted in part, denied in part.

West Headnotes

[1] Federal Civil Procedure 392
170Ak392

Failure to grant leave to amend complaint, to add or subtract parties, is an abuse of discretion in absence of prejudice to remaining defendants. 28 U.S.C.A. § 1332.

[2] Federal Courts 306

170Bk306

Court would recognize plaintiff's voluntary dismissal of claims, undertaken in order to provide diversity of citizenship on both sides for jurisdictional purposes, although better practice was to move to drop plaintiff under rule governing misjoinder of parties. Fed.Rules Civ.Proc.Rules 21, 41, 28 U.S.C.A.

[3] Federal Courts 95
170Bk95

Corporation incorporated and having its principal place of business in Zimbabwe consented to suit in district court in New York, by signing coordinating agreement, covering sale of its assets and stock of related corporation, which provided for suit in New York for actions arising out of, relating to or contemplated by coordinating agreement, and which further recited that objects of agreement were coordination of related stock and asset purchase agreements.

[4] Federal Courts 86
170Bk86

Federal district court sitting in New York had personal jurisdiction over individuals living in South Africa, United Kingdom and Zimbabwe, in suit alleging breach of contract, fraud and related theories in connection with sale of stock and assets of corporations controlled by them; individuals participated in New York negotiations leading to sales in questions, and there was nexus between subject matter of negotiations and claims raised in suit. N.Y.McKinney's CPLR 302(a), par. 1.

[5] Release 33
331k33

Buyer of stock of corporation was not foreclosed from suing sellers, alleging existence of accounting scheme resulting in overstatement of earnings and net worth of corporation, even though seller signed stock purchase agreement providing for adjustment of sales price in event final net worth of corporation did not reach specified sum, and adjustment was made pursuant to that provision; there was no language in provision consistent with release of all claims, and buyer alleged accounting ruse was unknown at time agreement was signed.

[6] Fraud 36
184k36

Under New York law, even when the parties have executed a specific disclaimer of reliance on a seller's representations, a purchaser may not be precluded from claiming reliance if the facts allegedly misrepresented are peculiarly within the seller's knowledge.

[7] Fraud 36
184k36

Under New York law, rule that party to contract may rely on representations of other party even when there is contractual disclaimer of representations, applies not only when the facts allegedly misrepresented literally were within the exclusive knowledge of the defendant, but also when the truth theoretically might have been discovered, though only with extraordinary effort or great difficulty.

[8] Fraud 36
184k36

Under New York law, degree to which party to contract may rely upon representations of other party, despite contractual disclaimers of liability, when knowledge needed to verify representations is not exclusively under control of defendant but is difficult to obtain, depends upon sophistication of relying party and availability of access to information underlying representation.

[9] Fraud 36
184k36

Buyer of stock of corporation stated reliance element of fraud claim against sellers, under New York law, by alleging misrepresentations as to net worth and earnings of corporation, despite signing stock purchase agreement containing provision disclaiming all representations other than those expressly made in agreement; exception to nonliability due to disclaimer of reliance, when information needed to verify representation was in control of party making representation or was difficult to obtain, was applicable, as extremely sophisticated accounting scheme under which recognition of expenses was avoided was ultimately discovered only after complex computer program was applied to

financial statements and corresponding accounting journals.

[10] Federal Civil Procedure 636
170Ak636

Pleading of scienter requirement for common-law fraud, under New York law, can be accomplished by alleging facts tending to show that defendant had both motive and opportunity to commit fraud, or by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness. Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.

[11] Federal Civil Procedure 636
170Ak636

Buyer of stock of corporation alleged common-law fraud by sellers and their principals under New York law with sufficient particularity; buyer explained in detail undisclosed fraudulent accounting scheme artificially inflating net worth and earnings of corporation, and sellers' and principals' participation in misrepresentations of value, and motive for their conduct was palpable. Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.

[12] Fraud 13(3)
184k13(3)

In order to recover on claim of negligent misrepresentation, under New York law, a plaintiff must establish that (1) the parties stood in some special relationship imposing a duty of care on the defendant to render accurate information, (2) the defendant negligently provided incorrect information, and (3) the plaintiff reasonably relied upon the information given.

[13] Fraud 13(3)
184k13(3)

In order to state claim of negligent misrepresentation arising out of sale of business, under New York law, parties must enjoy a relationship of trust and reliance closer than that of the ordinary buyer and seller.

[14] Fraud 7
184k7

[14] Fraud 13(3)
184k13(3)

Requirement for stating claim of negligent misrepresentation under New York law, that there be special relationship between parties, was satisfied in suit by buyer of stock of corporation alleging misrepresentations by sellers with exclusive knowledge of facts showing representations to be false, who accepted buyer's debentures as part payment, and whose representatives assumed some managerial positions with buyer after sale was complete.

[15] Corporations 215
101k215

Buyer of corporation could maintain breach of fiduciary duty claim against employees who formerly controlled corporation, based upon nondisclosure after they became employees of fraud allegedly perpetrated upon buyer prior to sale.

***361** Robert Brooks, Robert Merhige, Richmond, VA, Benjamin V. Madison, III, Norfolk, VA, Jack Wilson, III, Richmond, VA, Robert M. Tata, Norfolk, VA, Benita Ellen, Hunton & Williams, Richmond, VA, for Plaintiff.

Charles W. Gerdts, III, Orrick, Herrington & Sutcliffe LLP, New York City, for Defendant Folium, Inc.

James E. Tolan, Catherine A. Duke, Dechert Price & Rhodes, New York City, for Defendant Blair Investments (Private) Ltd.

Matthew Gluck, Mara Leventhal, Fried, Frank, Harris, Shriver & Jacobson, New York City, for Defendants Anthony, Charles and Paul Taberer.

John C. Canoni, Whitman Breed Abbott & Morgan LLP, New York City, for Tabacalera S.A.

MEMORANDUM OPINION

KAPLAN, District Judge.

Plaintiff DIMON Incorporated ("DIMON")

and a wholly owned subsidiary purchased all of the stock of Intabex Holdings Worldwide, S.A. ("Intabex") and the assets of Tabex (Private) Limited, now Blair Investments (Private) Limited ("Tabex") in April 1997 for a total of \$264,190,000. DIMON now alleges it was fraudulently induced to overpay for the acquisition and brings this action against the sellers for breach of contract, fraud, negligent misrepresentation, civil conspiracy, breach of duty of loyalty and breach of warranty. Defendants in various permutations move to dismiss many of the claims.

Background

In the fall of 1996, the shareholders of Intabex, a leaf tobacco merchant, began efforts to sell their stock in combination ***362** with the tobacco assets of Tabex. [FN1] Intabex then was owned 63.6 percent by Folium, Inc. ("Folium"), 31.8 percent by Tabacalera S.A. ("Tabacalera"), and 4.6 percent by Leaf Management Investments Ltd. ("LMI"). Tabex was a wholly owned subsidiary of Folium. [FN2] Folium allegedly is an investment vehicle for the benefit and control of Anthony, Charles and Paul Taberer, [FN3] who allegedly controlled Intabex and Tabex through Folium. [FN4] LMI allegedly held shares of Intabex on behalf of key management within Intabex. [FN5] Tabacalera, according to the complaint, was an outside investor with no relationship to the Taberers external to Intabex.

FN1. Sec. Am. Cpt. ¶ 24.

FN2. Id. ¶¶ 33, 53.

FN3. Id. ¶ 37-39.

FN4. Id. ¶ 39, 53.

FN5. Id. ¶ 52.

In their pursuit of an acquirer, Intabex and Tabex hired the New York investment banking firm, CS First Boston, and provided it with financial information that was used in the preparation of an offering memorandum that was made available to potential buyers.

[FN6] Upon learning that Intabex was on the market, DIMON, an international leaf tobacco merchant based in Danville, Virginia, [FN7] began negotiations to acquire Intabex and the tobacco related assets of Tabex. [FN8] Thus commenced a sequence of meetings and conversations, lasting from October 1996 through the closing of the deal in April 1997, and involving numerous representatives of DIMON, Intabex, Folium, Tabacalera, Tabex, and Anthony and Paul Taberer. [FN9]

FN6. Id. ¶¶ 25, 28, 144.

FN7. Id. ¶¶ 3, 20.

FN8. Id. ¶ 24.

FN9. Id. ¶¶ 161, 166, 173, 174, 178, 182, 185.

The negotiations culminated in a series of agreements: (1) the Stock Purchase Agreement ("SPA") among DIMON and the shareholders of Intabex, (2) the Asset Purchase Agreement ("APA") between Dibrell Brothers Zimbabwe (Private) Limited ("Dibrell"), a wholly owned subsidiary of DIMON, and Tabex, and (3) the Coordinating Agreement ("CA") between and among DIMON, Dibrell, Intabex, Folium, LMI, Tabex and Tabacalera. [FN10] Pursuant to those agreements, DIMON and Dibrell purchased all of the stock of Intabex and the assets of Tabex in April 1997, respectively, for a total of \$264,190,000. The purchase price was paid in the form of 1.7 million shares of DIMON common stock, \$140 million in 10-year, 6.25% DIMON convertible subordinated debentures, and \$86,120,000 in cash.

FN10. Id. ¶ 61; see Brooks Decl. in Support of Prelim. Inj. Exs. A(SPA), B(APA), C(CA).

The complaint asserts that DIMON and Dibrell were tricked into paying more than the stock and assets were worth because the financial statements provided to them did not accurately reflect the financial performance of Intabex. Specifically, DIMON alleges, inter alia, that the Taberers-through their control of Folium and its control of Intabex-operated a carefully masked accounting scheme which

led to the overstatement of Intabex's earnings and net worth.

The most critical aspect of the alleged fraud was that certain expenses of Intabex S.A. ZUG ("Intabex S.A."), Intabex's primary trading company [FN11], were debited during the fiscal years 1995-96 and 1996-97 to a so-called "Blank Account" instead of to the appropriate expense accounts, [FN12] thus artificially inflating income and net worth. [FN13] The complaint alleges that Intabex's income for the year ended March 31, 1996 and its net worth at that date consequently were overstated by \$22.7 million *363 and \$58.7 million, respectively. [FN14] The operation of this Blank Account, according to DIMON, was that it was carefully concealed and discovered only with great effort after the closing of the acquisition.

FN11. Sec. Am. Cpt. ¶ 87.

FN12. Id. ¶ 95.

FN13. Id. ¶ 106.

FN14. Id.

At the outset of this action, DIMON and Dibrell sought damages of more than \$110 million for alleged breaches of the SPA and APA, violation of Section 10(b) of the Securities Exchange Act of 1934 [FN15] and Rule 10b-5 thereunder, [FN16] violation of the Racketeering Influenced and Corrupt Organizations Act ("RICO"), [FN17] common law fraud, negligent misrepresentation, and breach of fiduciary duty. Subject matter jurisdiction was alleged to rest on diversity of citizenship and the federal questions presented by the RICO claim. Defendants moved to dismiss the complaint.

FN15. 15 U.S.C. § 78j(b).

FN16. 17 C.F.R. § 240.10b-5.

FN17. 18 U.S.C. § 1961 et seq.

In response to the motions to dismiss, Dibrell took a voluntary dismissal, and

DIMON dropped its federal securities law and RICO claims. DIMON filed a second amended complaint which contains six causes of action, with jurisdiction premised exclusively on alienage. [FN18] With the agreement of the parties, the motions to dismiss the earlier pleadings have been deemed applicable to the second amended complaint, and the parties were given an opportunity to brief any new issues raised by that pleading. At this point, Tabex and the Taberers seek dismissal of the entire action as to them. Folium and LMI concede the sufficiency of the indemnification and injunctive relief claims, but seek dismissal of the common law tort claims. The motions now are ripe for decision.

FN18. See 28 U.S.C. § 1332(a)(2).

Discussion

Subject Matter Jurisdiction

DIMON is a citizen of Virginia. Dibrell and all of the defendants are aliens. [FN19] Tabex and the Taberer defendants initially maintained that the three causes of action arising under federal statutes were insufficient as a matter of law and that the rest of the case therefore should have been dismissed for lack of subject matter jurisdiction, as the presence of aliens on both sides destroys complete diversity.

FN19. Dibrell is incorporated, and has its principal place of business, in Zimbabwe, Am. Cpt. ¶ 5; Folium and LMI are incorporated, and have their principal places of business, in the British Virgin Islands, Sec. Am. Cpt. ¶¶ 4, 6; Tabacalera is incorporated, and has its principal place of business, in the Kingdom of Spain, id. ¶ 5; Tabex is incorporated, and has its principal place of business, in Zimbabwe, id. ¶ 7; Anthony C.B. Taberer resides in South Africa, id. ¶ 8; Paul A.B. Taberer resides in the United Kingdom, id. ¶ 9; and Charles M.B. Taberer resides in Zimbabwe, id. ¶ 10.

[1] The presence or absence of jurisdiction under 28 U.S.C. § 1332 ordinarily is assessed as of the filing of the complaint.

Nevertheless, the rule is not without exceptions, and federal courts have the power to permit the addition or deletion of parties where necessary to preserve jurisdiction. [FN20] Leave is freely granted. Indeed, the failure to grant leave absent prejudice to the remaining defendants is an abuse of discretion. [FN21]

FN20. E.g., *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 109 S.Ct. 2218, 104 L.Ed.2d 893 (1989); *Cooper v. Parsky*, 140 F.3d 433, 442 (2d Cir.1998).

FN21. E.g., *Samaha v. Presbyterian Hospital in the City of New York*, 757 F.2d 529, 531 (2d Cir.1985).

[2] Here, defendants have failed to show any prejudice from the dropping of Dibrell as a plaintiff. In consequence, while the better course would have been for plaintiffs to move pursuant to Rule 21 to drop Dibrell, [FN22] the Court treats Dibrell's *364 notice of dismissal pursuant to Rule 41 as such an application and grants the motion.

FN22. See *Sheldon v. PHH Corp.*, No. 96 Civ. 1666(LAK), 1997 WL 91280, at *3 & nn. 6-7 (S.D.N.Y. Mar. 4, 1997), aff'd, 135 F.3d 848 (2d Cir.1998).

The dismissal of Dibrell leaves DIMON as the only remaining plaintiff. As DIMON's citizenship is diverse from that of all of the defendants, subject matter jurisdiction exists with respect to all of DIMON's claims.

Personal Jurisdiction

Tabex and the Taberers question the existence of personal jurisdiction over them. While DIMON ultimately will bear the burden of establishing in personam jurisdiction, its only obligation at this pleading stage is to demonstrate a prima facie case. [FN23] This it has done.

FN23. E.g., *Kernan v. Kurz-Hastings, Inc.*, 175 F.3d 236, 239-40 (2d Cir.1999).

[3] First, Tabex has consented to suit here.

The CA, in which Tabex irrevocably consented to suit in this Court "for any actions, suits or proceedings arising out of or relating to this Agreement and the transactions contemplated hereby," recites that its objects include coordinating "the performance of the Stock Purchase Agreement and the Asset Purchase Agreement and to provide for certain additional obligations of Tabex ..." [FN24] While Tabex asserts in entirely conclusory fashion that the claims against it "do not relate to, or arise out of, the" CA, [FN25] its argument elides the critical words from the CA clause submitting to jurisdiction. Tabex submitted to jurisdiction in this Court not only with respect to claims relating to or arising out of the CA, but also with respect to claims relating to or arising out of "the transactions contemplated" by the CA. [FN26] DIMON's purchase of the shares of Intabex undeniably was one of the transactions contemplated by the CA.

FN24. CA at 1.

FN25. Blair Mem. 12. In light of the fact that each party now has submitted each motion paper in duplicate, the Court refers to the initial filings simply as "Mem.," and the supplemental filings as "Supp. Mem."

FN26. See CA at 1.

[4] Second, N.Y. CPLR § 302(a), subd. 1, provides in substance that there is personal jurisdiction under New York law with respect to claims arising out of the transaction of business in New York, directly or through an agent, by a non-domiciliary. [FN27] Here, DIMON alleges that the Taberers, through Intabex and Tabex, retained a New York firm, CS First Boston, to market this deal, that the offering memorandum by which the transaction was promoted contained the Taberers' recommendation that the acquirer of Intabex acquire also the assets of Tabex, that important preparations and primary negotiations occurred here, that Anthony and Paul Taberer personally participated in negotiations in New York in their respective corporate capacities and in their own behalf, and that these activities ultimately resulted,

among other things, in Anthony Taberer being elected to the DIMON board and Paul and Charles Taberer receiving management positions with DIMON. [FN28]

FN27. N.Y. CPLR § 302(a)(1) (McKinney 1990).

FN28. Sec. Am. Cpt. ¶¶ 25, 28-32, 147, 166-72.

In these circumstances, DIMON manifestly has alleged that Tabex and the Taberers have transacted business in New York. [FN29] And the question whether the claims arise out of this transaction of business here is not troublesome. The dispositive question is whether there is "some articulable nexus between the business *365 transacted and the cause of action sued upon" [FN30]

FN29. See *Kreutter v. McFadden Oil Corp.*, 71 N.Y.2d 460, 467, 527 N.Y.S.2d 195, 198-99, 522 N.E.2d 40 (1988) (CPLR 302(a)(1) "is a 'single act statute' and proof of one transaction in New York is sufficient to invoke jurisdiction ... so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted.").

FN30. *Beacon Enterprises, Inc. v. Menzies*, 715 F.2d 757 (2d Cir.1983) (quoting *McGowan v. Smith*, 52 N.Y.2d 268, 272, 437 N.Y.S.2d 643, 645, 419 N.E.2d 321 (1981)).

The essence of the tort claims asserted here against Tabex and the Taberers is that they were culpable participants in a scheme to defraud DIMON in the sale of Intabex shares--a transaction which involved extensive activities, including negotiations, in New York. In particular, DIMON claims that Tabex and the Taberers conspired with others in the effort to misrepresent, or at the very least negligently misrepresented, the financial condition of Intabex and its relationship with Tabex, inducing DIMON to consummate the sale.

"A cause of action can be said to arise from transaction of business in New York when ... the New York business discussions were essential to the birth of the contract and fiduciary relationship that [allegedly] have ...

been breached." [FN31] DIMON alleges that was the case here. Plaintiff thus has articulated the requisite connection between its tort claims and the business defendants transacted in New York to ground this Court with personal jurisdiction over these claims. Whether it can prove this at trial remains to be seen, but the allegations are sufficient at this stage of the case.

FN31. National Cathode Corp. v. Mexus Co., 855 F.Supp. 644, 647 (S.D.N.Y.1994) (quoting Nee v. HHM Fin. Serv., Inc., 661 F.Supp. 1180, 1185 (S.D.N.Y.1987)).

The Alleged Release

[5] Folium, LMI and Tabacalera contend that DIMON's entire case "is premised on the assertion that DIMON was induced to pay more for Intabex than Intabex was really worth" and that its case therefore is barred by a 1997 release given in connection with a purchase price adjustment under the SPA. [FN32]

FN32. Folium Mem. 23.

The SPA provided in substance that the purchase price set forth in the agreement would be reduced in the event the final net worth of Intabex was less than \$142 million, as adjusted, and set out a procedure pursuant to which a proposed balance sheet would be tendered to DIMON, an opportunity for objections afforded, and any dispute resolved. [FN33] A proposed balance sheet was prepared, DIMON voiced objections, and the parties resolved the dispute by entering into an agreement dated as of August 14, 1997 and denominated Agreement and Amendment No. 1 to Stock Purchase Agreement (the "SPA Amendment"). The SPA Amendment provided for the payment by Folium, LMI and Tabacalera to DIMON of \$18,850,000 as well as other consideration. It provided also that "[t]he parties intend and agree that this Agreement shall constitute a full and final settlement with respect to Section 1.05 of the [SPA] regarding payments in respect of the Final Net Worth of [Intabex] and each party waives any and all rights to seek a further

adjustment to the Purchase Price based on the Final Net Worth of" Intabex. [FN34] It went on to state that "[n]o claim may be asserted under Article XII of the [SPA] or otherwise by DIMON based on factual allegations made by DIMON to support its proposed net worth adjustments" with certain exceptions not here relevant. [FN35] It is this agreement upon which Folium, LMI and Tabacalera rest their position. There are, however, a number of problems with this contention.

FN33. SPA §§ 1.05, 9.01(a).

FN34. SPA Amend. § 7.01(a).

FN35. Id. §§ 7.01(b), 7.01(c).

Defendants' argument depends in significant part upon the false premise that the outcome of the purchase price adjustment mechanism, whether by compromise or by determination of a contested matter, was, or was intended to be, a determination of "what Intabex was really worth." The purchase price here was a negotiated figure *366 which may or may not have been a function of the accounting book value. While the purchase price was subject to a reduction in the event the accounting book value turned out to be less than a specific amount, the fact that the parties reached an agreement as to the accounting book value thus may have only a tangential bearing on whether DIMON overpaid for the shares of Intabex by reason of the alleged breaches of warranty and fraud. Certainly it cannot be said at this stage that the agreement they reached necessarily forecloses DIMON's present claim. And this conclusion is borne out by the language of the release. The parties agreed only that the SPA Amendment "shall constitute a full and final settlement with respect to Section 1.05 of the [SPA] regarding payments in respect of the Final Net Worth of" Intabex--not that it settled any and all claims relating to the acquisition.

This result is supported also by another line of analysis. While it is well settled that a general release ordinarily bars even claims of which the releasor was unaware when the release was executed, [FN36] the rule is

inapplicable in cases of fraud or where the releasee "is silent after becoming aware that the releasor is acting upon a mistaken belief as to a material fact." [FN37] Here the release was limited, not general, and its language did not clearly release claims (a) of which the releasor was unaware, or (b) arising from matters other than the historical book value of the company. Indeed, the second amended complaint clearly relies upon alleged fraud as to a number of matters other than net worth, including the quite different issue of profitability. [FN38] Moreover, to the extent that the second amended complaint relies on misrepresentations as to net worth, it alleges fraud. And although it does not in terms allege that the balance sheet that was tendered following the closing as part of the purchase price adjustment determination was fraudulent, it does allege that the "Blank Account" and other irregularities first were discovered in 1998 and that most of the defendants intentionally misrepresented the financial condition of Intabex to induce DIMON to accept the settlement of the purchase price adjustment. [FN39] Hence, the plaintiff at least implicitly asserts that the final financial statements tendered on behalf of the defendants were fraudulent as well. [FN40]

FN36. E.g., *Pickwick Comm., Inc. v. Weinberg*, No. 91 Civ. 1642(AGS), 1994 WL 620950 (S.D.N.Y. Nov. 8, 1994); *Barrett v. United States*, 622 F.Supp. 574, 584 (S.D.N.Y.1985), aff'd, 798 F.2d 565 (2d Cir.1986); *Lucio v. Curran*, 2 N.Y.2d 157, 161-62, 157 N.Y.S.2d 948, 952, 139 N.E.2d 133 (1956); *Mergler v. Crystal Prop. Assoc. Ltd.*, 179 A.D.2d 177, 583 N.Y.S.2d 229 (1st Dept.1992); *G.S.C. Holding Corp. v. Cervoni*, 69 A.D.2d 809, 810, 415 N.Y.S.2d 57, 58 (2d Dept.), leave to appeal denied, 47 N.Y.2d 710, 419 N.Y.S.2d 1026, 393 N.E.2d 1049 (1979); *St. James Church, City of Brooklyn, Rector, Church Wardens & Vestrymen Of v. City of New York*, 261 A.D. 614, 617, 26 N.Y.S.2d 762, 764 (2d Dept.1941).

FN37. *Barrett*, 622 F.Supp. at 584; see also *Mangini v. McClurg*, 24 N.Y.2d 556, 563, 301 N.Y.S.2d 508, 513, 249 N.E.2d 386 (1969) (inapplicable where fraud alleged); *G.S.C. Holding*

Corp., 69 A.D.2d at 810, 415 N.Y.S.2d at 58 (same).

FN38. E.g., *Sec. Am. Cpt.* ¶¶ 144-154.

FN39. *Id.* ¶¶ 82-118, 221.

FN40. The Court notes that the financial statements on the basis of which the purchase price adjustment were to be determined were to be prepared as of the closing date. SPA §§ 1.05, 9.01(a) (definitions of Final Financial Statements and Closing Date). In view of the allegation that Tabex transferred \$37 million in cash to Intabex and that Intabex wrote off a payable of \$6.5 million owed to Tabex after the closing in order to eliminate the debit balance in the blank account (*Sec.Am.Cpt.*¶ 114), the clear suggestion is that the balance sheet as of the Closing Date, and hence the final financial statements, overstated the net worth of Intabex as of that date.

In all the circumstances, the situation is too murky to permit dismissal on the basis of the release at this stage of the proceedings.

***367 Fraud and Negligent
Misrepresentation**

Tabex

To begin with, the common law fraud claims brought against Tabex as a principal are insufficient. Tabex is not alleged to have made any material misrepresentations or omissions with regard to Intabex. DIMON merely alleges that the offering memorandum prepared by CS First Boston stated that it "was prepared 'from materials supplied to CS First Boston by Intabex Holdings Worldwide S.A.... and Tabex.'" [FN41] But this is not enough. Representations regarding Tabex's financial condition are irrelevant in light of Dibrell's voluntary dismissal. And apart from the conspiracy theory set forth in the civil conspiracy claim, DIMON has advanced no basis for holding Tabex responsible for the alleged fraud or negligent misrepresentation with respect to Intabex. Accordingly, DIMON's fraud and negligent misrepresentation claims must be dismissed insofar as they are brought against Tabex.

[FN42]

FN41. Sec. Am. Cpt. ¶ 146.

FN42. DIMON fails also to allege sufficiently the requisite special relationship between it and Tabex to support the negligent misrepresentation claim. See *Silva Run Worldwide Ltd. v. Gaming Lottery Corp.*, No. 96 CIV. 3231(RPP), 1998 WL 167330, *11 (S.D.N.Y.1998).

Reasonable Reliance

Folium, LMI and the Taberers seek dismissal of DIMON's claims for fraud and negligent misrepresentation on the ground that reasonable reliance is an element of both of these claims and that DIMON cannot establish it.

Section 3.13 of the SPA recited that DIMON had conducted its own review of Intabex. It went on to provide in pertinent part that:

"In entering into this Agreement, [DIMON] has relied solely upon its own investigation and analysis and the representations and warranties contained herein, and [DIMON]

"(a) except as otherwise set forth in this Agreement, acknowledges that none of [Intabex], its Subsidiaries, the Shareholders [Folium, LMI and Tabacalera] or any of their respective directors, offices, employees, Affiliates, agents or representatives makes any representation or warranty, either express or implied, as to the accuracy or completeness of any of the information provided or made available to [DIMON] or its agents or representatives prior to the execution of this Agreement; and

* * * * *

"(c) agrees, to the fullest extent permitted by law, that none of [Intabex], its Subsidiaries, the Shareholders or any of their respective directors, officers, employees, Affiliates, agents or representatives shall have any liability or responsibility whatsoever to [DIMON] on any basis (including, without limitation, in contract or tort ...) based upon any information provided or made available, or statements made, to [Intabex] prior to the

execution of this Agreement, except that the foregoing limitations shall not apply to [Intabex] or any Shareholder to the extent [Intabex] or such Shareholder makes the specific representations and warranties set forth in this Agreement and in the Disclosure Schedule, but always subject to the limitations and restrictions contained in this Agreement and in the Disclosure Schedule."

In other words, all of those covered by Section 3.13 are protected from liability except to the extent that an individual or entity made specific representations set forth in the SPA. The Taberers allegedly controlled Folium and Tabex, and Folium allegedly controlled Intabex, [FN43] so the Taberers are Affiliates of Intabex and thus within Section 3.13 as well. [FN44]

FN43. Sec. Am. Cpt. ¶¶ 33-34, 53.

FN44. SPA § 9.01(a), at 33.

DIMON essentially acknowledges that its disclaimer of reliance on any representations *368 other than those made in the SPA forecloses its fraud and negligent misrepresentation claims relating to events prior to the execution of the SPA under *Danann Realty Corp. v. Harris* [FN45] and *Harsco Corp. v. Segui* [FN46] unless it can bring itself within some exception to the *Danann-Harsco* rule. [FN47] It argues, however, that its claim is sufficient on the theory that "even a specific disclaimer will not undermine another party's allegation of reasonable reliance" if the allegedly misrepresented facts "are peculiarly within the misrepresenting party's knowledge." [FN48]

FN45. 5 N.Y.2d 317, 184 N.Y.S.2d 599, 157 N.E.2d 597 (1959).

FN46. 91 F.3d 337 (2d Cir.1996).

FN47. It does not contend that the disclaimer is insufficiently specific to come within *Danann*.

FN48. Pl. Mem. 14 (quoting *Warner Theatre Assoc. Ltd. Partnership v. Metropolitan Life Ins.*

Co., 149 F.3d 134, 136 (2d Cir.1998)).

[6] The peculiar knowledge exception to the Danann-Harsco doctrine holds that "even where the parties have executed a specific disclaimer of reliance on a seller's representations, a purchaser may not be precluded from claiming reliance on any ... misrepresentations if the facts allegedly misrepresented are peculiarly within the seller's knowledge" [FN49] It finds its theoretical basis in the premise that "[w]hen matters are ... peculiarly within the defendant's knowledge, ... plaintiff may rely without prosecuting an investigation, as he has no independent means of ascertaining the truth." [FN50] And the inquiry as to whether the defendant has peculiar knowledge of the facts at issue, of course, goes to the reasonableness of the plaintiff's reliance [FN51]-if the plaintiff has the means of learning the facts and disclaims reliance on the defendant's representations, there simply is no reason to relieve it of the consequences of both its failure to protect itself and its bargain to absolve the defendant of responsibility. On the other hand, if the plaintiff has conducted the appropriate due diligence and reasonably believes that it has corroborated the defendant's representations, then a different result may be warranted.

FN49. *Tahini Investments, Ltd. v. Bobrowsky*, 99 A.D.2d 489, 470 N.Y.S.2d 431, 433 (2d Dept.1984).

FN50. *Lazard Freres & Co. v. Protective Life Ins. Co.*, 108 F.3d 1531, 1542 (2d Cir.), cert. denied, 522 U.S. 864, 118 S.Ct. 169, 139 L.Ed.2d 112 (1997) (quoting *Mallis v. Bankers Trust Co.*, 615 F.2d 68, 80 (2d Cir.1980)); see also *Tahini*, 99 A.D.2d at 490, 470 N.Y.S.2d at 432-33.

FN51. See *Lazard*, 108 F.3d at 1541.

[7][8] The New York cases recognize that the peculiar knowledge exception applies not only where the facts allegedly misrepresented literally were within the exclusive knowledge of the defendant, but also where the truth theoretically might have been discovered, though only with extraordinary effort or great

difficulty. [FN52] As the peculiar knowledge inquiry addresses the reasonableness of a plaintiff's claimed reliance, this makes a good deal of sense; the effort necessary to discover the truth bears on the reasonableness of a plaintiff's reliance on a defendant's statements. [FN53] And the factors relevant to this inquiry include the buyer's (1) level of sophistication and (2) access to the information underlying the alleged misrepresentation. *369 [FN54] While not articulating it in these terms, the case law intimates the need for inquiring into these matters. [FN55]

FN52. See, e.g., *Tahini*, 99 A.D.2d 489, 470 N.Y.S.2d at 432-33 (reliance arguably justified where plaintiff had no practical way of knowing that purchased land had been used as industrial waste dump); *Todd v. Pearl Woods, Inc.*, 20 A.D.2d 911, 248 N.Y.S.2d 975, 977 (2d Dept.1964), aff'd, 15 N.Y.2d 817, 257 N.Y.S.2d 937, 205 N.E.2d 861 (1965) (facts discoverable by review of public records held peculiarly within defendant's knowledge), aff'd, 15 N.Y.2d 817, 257 N.Y.S.2d 937, 205 N.E.2d 861. 15 N.Y.2d 817, 257 N.Y.S.2d 937, 205 N.E.2d 861 (1965). See also *Lazard*, 108 F.3d at 1542 & n. 9.

FN53. See *Warner Theatre Assoc.*, 149 F.3d 134 (citing *Yurish v. Sportini*, 123 A.D.2d 760, 507 N.Y.S.2d 234, 235 (2d Dept.1986)).

FN54. See *Grumman Allied Industries, Inc. v. Rohr Industries, Inc.*, 748 F.2d 729 (2d Cir.1984) (justifiable reliance rejected in light of unfettered access to information and buyer's sophistication to make use of that access).

FN55. In general, the more sophisticated the buyer, the less accessible must be the information to be considered within the seller's peculiar knowledge. See, e.g., *Jackson v. State*, 210 A.D. 115, 205 N.Y.S. 658 (4th Dept.1924) (although a sophisticated buyer, access was limited); *Tahini Investments*, 99 A.D.2d 489, 470 N.Y.S.2d 431 (a triable issue of fact whether buyer could have ascertained that industrial waste drums were buried on the property bought); *Yurish*, 123 A.D.2d 760, 507 N.Y.S.2d 234 (gross receipts of delicatessen business in the peculiar knowledge of sellers where buyer alleged it had "virtually no way of confirming" seller's representations); *Todd*, 20

A.D.2d 911, 248 N.Y.S.2d 975 (reliance justified notwithstanding that information ascertainable in public records); *OnBank & Trust Co. v. F.D.I.C.*, 967 F.Supp. 81, 86 (W.D.N.Y.1997) (although a sophisticated buyer, a question of fact whether information was made available during due diligence and whether the loan irregularities would have been detected anyway); *Patell Indus. Mach. Co., Inc. v. Toyoda Machinery U.S.A., Inc.*, 880 F.Supp. 96, 98 (N.D.N.Y.1995) (a question of fact whether in peculiar knowledge where substantial cost to fly out to inspect machinery and inspection might not have disclosed problem); *Compania Sud-Americana de Vapores, S.A. v. IBJ Schroder Bank & Trust Co.*, 785 F.Supp. 411 (S.D.N.Y.1992) (information not in seller's peculiar knowledge where plaintiff had access to the information and would have been able to discover the alleged misrepresentations with ordinary due diligence).

[9] This case involves extremely sophisticated parties. DIMON had or had access to the resources and specialized skills necessary to conduct a quite thorough review of the financial records of Intabex and Tabex. Both sides were represented by able counsel who carefully crafted an extraordinarily detailed agreement in which the disclaimer in Section 3.13 obviously reflected bargained-for language agreed to by parties of comparable bargaining power as opposed to boilerplate imposed by a clearly dominant party upon a much weaker one.

It appears also that DIMON had complete access to the books and records of Intabex and Tabex prior to entering into the controlling agreements or, at least, could have declined to go forward with the transactions if such access had been denied. In consequence, it seems reasonable to assume that a sufficiently intensive review prior to the signing of the agreements would have revealed that which was discovered later. But the fundamental question is whether the difficulty of conducting a sufficiently intensive review, given the information otherwise available, was so great that reliance upon the defendants' representations was reasonable notwithstanding the disclaimer.

At first blush, DIMON's sophistication and

the theoretical discoverability of the alleged fraud prior to the closing militate strongly in favor of holding that any reliance by DIMON on any oral or written representations by the defendants was unjustified as a matter of law. [FN56] But it must be borne in mind that this is a motion to dismiss, not even a motion for summary judgment. The test here is whether it now can be said with certainty that plaintiff could prove no facts under this pleading that would permit a recovery. [FN57] And it is not clear that that is the case.

FN56. Section 3.13 does not preclude reliance as against Intabex and the selling shareholders (Folium, LMI and Tabacalera) on the representations by each of them, respectively, made in the SPA. But the fraud and negligent misrepresentations claims against the defendants on those counts do not seek recovery for misrepresentations by them in the SPA.

FN57. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).

The complaint details the manner in which the chief irregularity complained of was discovered after the transaction closed. Under Article XII of the SPA, DIMON was entitled to indemnification from Folium, Tabacalera and LMI through *370 September 30, 1998 for losses resulting from breaches of the representations and warranties in the SPA. [FN58] Following the closing, DIMON embarked on an intensive search for such breaches. During that period, DIMON found that the accounting system of Intabex S.A. allowed entries to be "audited-off." That is, the transaction detail for entries so treated no longer was available for review in the general ledger or in the account analysis. Moreover, the audited-off entries were stored in a data file that was virtually inaccessible without special access codes. [FN59]

FN58. Sec. Am. Cpt. ¶ 73, 74. The SPA provided that any losses or liabilities would be set off against \$90 million of the convertible debentures. *Id.* ¶¶ 75, 82.

FN59. *Id.* ¶ 89.

To understand the purpose and effect of the "audited off entries," DIMON required accounting personnel to review journal entries and other source documents and to reconstruct accounting entries. [FN60] It then contacted the software consultant who had serviced the Intabex S.A. accounting system, and the consultant ultimately was able to restore the entries for certain periods through a complicated computer process. [FN61] The restoration of the general ledger in turn led to the discovery of the so-called Blank Account and to the fact that there had been substantial activity in the account despite the fact that it previously reflected no beginning balance and no activity. [FN62] The activity had been concealed by crediting the Blank Account at the end of each fiscal year in aggregate amounts sufficient to eliminate the debit balance created by charging expenses to that account and recording fictitious debits to supplier payable accounts or customer advance accounts. [FN63] Shortly after the end of each fiscal year, after the outside auditors had completed their work, the Blank Account was "revived" by reversing the March 31 transactions. [FN64]

FN60. Id. ¶ 90.

FN61. Id. ¶ 91.

FN62. Id. ¶¶ 92, 94.

FN63. Id. ¶ 96.

FN64. Id. ¶ 98.

One would expect that the discovery of such a fraud shortly after the closing, if not earlier, would have been inevitable, notwithstanding the measures detailed above, because the large debit balance carried in the Blank Account presumably would have made it impossible to reconcile the reported balance sheet with the general ledger accounts. [FN65] But the complaint details the manner in which this allegedly was avoided. According to DIMON, the Taberers shortly before the closing eliminated the balance in the Blank Account by fraudulently generating accounts receivable from parties related to them.

[FN66] These fraudulent receivables then were "paid" at or about the time of the closing. [FN67] And while these payments eliminated the net worth deficiency that had been created by the defendants' activities, they allegedly were insufficient to avoid the damage complained of because DIMON already had been induced by false and misleading financial statements to pay more for Intabex than it otherwise would have. [FN68]

FN65. See id. ¶ 109.

FN66. Id. ¶ 110.

FN67. Id. ¶¶ 111-14.

FN68. Id. ¶ 114. The principal claim appears to be that the payment of the fraudulent receivables cured the balance sheet shortfall but did not undo the misleading impression as to the profitability of Intabex created by the earlier fraudulent income statements.

In the last analysis this Court must decide if the allegations of the complaint, construed in the light most favorable to DIMON, permit the conclusion that the alleged accounting scheme detailed above was within the peculiar knowledge of the Intabex shareholders. That is, taking into consideration DIMON's level of sophistication *371 and access to the financial records of Intabex, might a trier of fact be permitted to find that it was reasonable for DIMON not to discover the alleged Blank Account fraud?

Defendants argue that Lazard Freres & Co. v. Protective Life Insurance Co. [FN69] dictates a negative answer to that question. In Lazard, an insurance company agreed to purchase \$10 million of bank debt from a New York investment bank. [FN70] The representative for the buyer orally agreed to the transaction while on vacation after an eleven minute telephone conversation with the seller during which the seller described the contents of a report concerning the securities, a report the buyer never had seen, and told the buyer that it would have to act right away, before the report became public,

in order to buy at an advantageous price. [FN71] The Circuit assumed that the buyer was bound upon its oral commitment and, in consequence, that the pivotal report then was within the peculiar knowledge of the seller. [FN72] It nevertheless held, in light of the buyer's sophistication, that the buyer's failure to protect itself by insisting that its examination of the report be made a condition of its obligation to close rendered its reliance unjustified as a matter of law [FN73] noting that:

FN69. 108 F.3d 1531.

FN70. *Id.* at 1534.

FN71. *Id.*

FN72. *Id.* at 1542.

FN73. *Id.* at 1543.

"[w]here, as here, a party has been put on notice of the existence of material facts which have not been documented and he nevertheless proceeds with a transaction without securing the available documentation or inserting appropriate language in the agreement for his protection, he may truly be said to have willingly assumed the business risk that the facts may not be as represented." [FN74]

FN74. *Id.* (citing *Rodas v. Manitaras*, 159 A.D.2d 341, 552 N.Y.S.2d 618, 620 (1st Dept.1990)).

Lazard does not go nearly as far as the defendants contend. Although DIMON, like the buyer in Lazard, was sophisticated and had a duty to protect itself, the cases are not entirely parallel. The buyer in Lazard knew that it was going forward on the basis of the seller's summary of an important report, yet failed to protect itself against the possibility that the representations were false. DIMON, however, allegedly thought it had full access to the information underlying the defendants' representations and that the information corroborated them. Its alleged reliance therefore was not knowingly blind, as was that of the buyer in Lazard. Moreover, unlike

the buyer in Lazard, DIMON did seek to protect itself against possible misrepresentations. It bargained for a post-closing adjustment in the event the accounting net worth of Intabex proved to be at variance with the sellers' representations. [FN75] Moreover, it obtained an indemnity from the Intabex shareholders, secured by \$90 million in debentures, "for any misrepresentation, breach of warranty or breach of any covenant or agreement contained in" the SPA. [FN76]

FN75. See SPA § 1.05 and Article XII. The Court does not fail to note that the alleged misrepresentations were made by Foliium, Tabex and the Taberers, and that DIMON's protection was against misrepresentations made by Intabex. This, however, is of no moment. As discussed *infra*, there was, in fact, little distinction in identity between Intabex, Foliium, Tabex and the Taberers.

FN76. *Id.* § 12.04.

In the last analysis, the facts here cut both ways. On the one hand, DIMON's sophistication, the language and carefully crafted nature of the disclaimer, and the finely honed contractual remedies for breach of warranties and representations offer substantial support for defendants' contention that DIMON knowingly bargained away some of the protections that otherwise might have been available to it, *372 that DIMON did not rely on the alleged misrepresentations and, in any case, that it did not do so justifiably. On the other hand, the allegations, if proved, might permit a trier of fact to find that the fraud was so well concealed that the truth must be regarded as having been within the exclusive knowledge of the defendants notwithstanding DIMON's sophistication and access to the Intabex books. Among other things, the complaint suggests the likelihood that Intabex's 1995 and 1996 financial statements had been audited by Ernst & Young, [FN77] whose apparent failure to detect the scheme lends credence to DIMON's contention that the scheme was so well concealed that DIMON was justified in relying on the information provided to it. Only a more extensive development of the facts will permit a fully informed judgment. As the

Court on this record cannot exclude the possibility that plaintiff might prove facts under the current pleading that would entitle it to relief, [FN78] defendants' motion to dismiss these claims must be denied at this stage.

FN77. Sec. Am. Cpt. ¶ 25.

FN78. See, e.g., Conley, 355 U.S. at 45-46, 78 S.Ct. 99.

Particularity of Fraud Claims

Folium and the Taberer defendants next contest the particularity with which DIMON has pleaded its common law fraud claims. Specifically, they argue that DIMON has not alleged with particularity any connection between the fraudulent activity and defendants. [FN79] The Court disagrees.

FN79. Folium contends that "DIMON's pleading still provides no specific basis for its allegations that Folium had a role in the alleged fraudulent conduct or any knowledge that any of Intabex's financial information was incorrect." Folium Supp. Mem. 14.

[10][11] Rule 9(b) requires that "the circumstances constituting fraud ... be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally." [FN80] Plaintiffs must provide actual fraudulent statements or conduct and a basis for its allegations of scienter. [FN81] The latter can be accomplished by "(1) alleging facts to show that defendant[] had both motive and opportunity to commit fraud, or by (2) alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness." [FN82] Here, DIMON sufficiently alleges fraud against Folium and the Taberers.

FN80. fed. R. Civ. P. 9(b).

FN81. E.g., *Stevelman v. Alias Research Inc.*, No. 97-9544, 1999 WL 187646, *4 (2d Cir. Apr.5, 1999); *Chill v. General Elec. Co.*, 101 F.3d 263, 267 (2d Cir.1996) (citations omitted).

FN82. *S.Q.K.F.C., Inc. v. Bell Atlantic TriCon Leasing Corp.*, 84 F.3d 629, 634 (2d Cir.1996).

DIMON has detailed the alleged fraudulent activity regarding Intabex's manipulation of its accounting system [FN83] and the dissemination of the fraudulent financial statements via CS First Boston. [FN84] DIMON alleges also that the Taberers made statements in New York regarding the false financial statements in their capacities as representatives of Folium despite their knowledge of the operation of the Blank Account. [FN85]

FN83. Sec. Am. Cpt. ¶¶ 73-114.

FN84. Id. ¶¶ 25, 146, 148, 161-65. Defendants argue that they cannot be held responsible for the information in the offering memorandum because of a specific disclaimer of reliance on the first page of the document. This argument fails, at least at this stage, for the reasons discussed above with respect to DIMON's disclaimer of defendants' extra-contractual representations. The Court finds no reason to accord less force to a disclaimer made and signed by DIMON in the SPA than to a disclaimer in CS First Boston's offering memorandum unacknowledged by DIMON.

FN85. Id. ¶¶ 166-172.

Defendants argue that DIMON has alleged nothing more than that they "must have known of alleged Intabex accounting *373 irregularities," [FN86] even assuming as we must that the foregoing allegations are accepted as true. But this simply is not the case. First, DIMON alleges a nexus between the alleged fraud and these defendants, detailing throughout the second amended complaint Folium's control of Intabex, and the Taberers' control of Folium. [FN87] According to these allegations, the Taberers, through Folium, directed the accounting practices detailed above. [FN88] Second, the fraudulent activity alleged here includes the intentional misrepresentation by Folium and the Taberers of "the condition of Intabex Worldwide and its subsidiaries to induce DIMON to purchase the stock of Intabex Worldwide." [FN89] Third, the Taberers motive to engage in the alleged

fraud is palpable. In consequence, DIMON has alleged with adequate particularity that Folium and the Taberers engaged in fraudulent activity.

FN86. Folium Supp. Mem. 15.

FN87. Sec. Am. Cpt. ¶¶ 33-51, 56-59, 107-110.

FN88. Id. ¶¶ 107-08.

FN89. Id. ¶ 220.

Alleged Absence of a Special Relationship

[12] Defendants Folium and the Taberers next move to dismiss DIMON's negligent misrepresentation claim for failure to state a claim. In order to recover on such a claim, a plaintiff must establish that (1) the parties stood in some special relationship imposing a duty of care on the defendant to render accurate information, (2) the defendant negligently provided incorrect information, and (3) the plaintiff reasonably relied upon the information given. [FN90] Defendants, at this stage, do not contest that the information was incorrect and relied upon by plaintiff. The issue is whether a special relationship existed between defendants and DIMON prior to the sale of Intabex.

FN90. E.g., Pappas v. Harrow Stores, Inc., 140 A.D.2d 501, 504, 528 N.Y.S.2d 404, 407 (2d Dept.1988).

[13] The essential aspects of the requisite special relationship, as Judge Walker wrote not long ago, "may not be precisely defined." [FN91] "[T]he parties must enjoy a relationship of trust and reliance 'closer ... than that of the ordinary buyer and seller,' " [FN92] and an "arm's length business relationship is not enough." [FN93] But little more can be said in the way of articulating a rule of broad application; the matter is one "for case-by-case analysis." [FN94] Moreover, at least two cases have found sufficient complaints alleging the existence of a special relationship between buyer and seller in corporate acquisitions involving lengthy negotiations. [FN95]

FN91. Polycast Technology Corp. v. Uniroyal, Inc., No. 87 Civ. 3297(JMW), 1988 WL 96586, *10 (S.D.N.Y. Aug.31, 1988).

FN92. Id. (citing Coolite Corp. v. American Cyanamid Co., 52 A.D.2d 486, 384 N.Y.S.2d 808, 811 (1st Dept.1976)); see also American Protein Corp. v. AB Volvo, 844 F.2d 56, 63 (2d Cir.), cert. denied, 488 U.S. 852, 109 S.Ct. 136, 102 L.Ed.2d 109 (1988) (special relationship required for a negligent misrepresentation claim is one that "suggests a closer degree of trust and reliance than that of the ordinary buyer and seller").

FN93. United Safety of Am., Inc. v. Consolidated Edison Co., 213 A.D.2d 283, 623 N.Y.S.2d 591, 593 (1st Dept.1995).

FN94. Polycast, at *10.

FN95. Id.; Delta Holdings, Inc. v. Nat'l Distillers & Chem. Corp., No. 85 Civ. 3439(JFK), 1988 WL 36330 (S.D.N.Y. Apr.11, 1988).

[14] This transaction was more than a simple sale. The parties engaged in lengthy negotiations prior to the acquisition of Intabex in which the defendants allegedly made representations-based on their superior information-regarding Intabex's financial condition. [FN96] Moreover, as *374 part of the purchase price, DIMON issued to the Intabex shareholders \$90 million of DIMON convertible subordinated debentures, thus creating at least the possibility of a long-term involvement between the shareholders and DIMON. Paul, Charles and Anthony Taberer received positions of trust within DIMON, thus establishing a continued relationship with DIMON. [FN97] For all these reasons, the Court cannot exclude at this early stage the possibility that the relationship among the parties was sufficient to impose a duty of due care upon the defendants in making representations about the subjects of the transaction. In consequence, the motion to dismiss the negligent misrepresentation claim is denied.

FN96. Polycast Technology Corp. v. Uniroyal, Inc., No. 87 Civ. 3297(JMW), 1988 WL 96586, at *12 (S.D.N.Y. August 31, 1988) (special

relationship existed where extended negotiation period between the parties before purchase of seller's subsidiary, seller vouched for the earnings projections and had superior information regarding the subsidiary throughout the negotiation).

FN97. Sec. Am. Cpt. ¶ 235.

Alleged Breach of Fiduciary Duty

[15] The Taberers next argue that DIMON has not stated a claim for breach of fiduciary duty because they owed DIMON no duty at the time of the alleged breach. [FN98] But DIMON's allegation is not limited to breaches prior to the Taberers' affiliation with DIMON. DIMON alleges that the Taberers breached their fiduciary duties after they became employees of or consultants to DIMON by "failing to reveal to DIMON that the value of Intabex had been overstated and by permitting DIMON to make decisions and filings based on that fraud" even though they were aware of it. [FN99]

FN98. See Paul and Charles Taberer were hired by DIMON, and Anthony Taberer received a seat on DIMON's Board of Directors, following DIMON's acquisition of Intabex. Sec. Am. Cpt. ¶¶ 30-32.

FN99. Pl. Supp. Mem. 15; Sec. Am. Cpt. ¶ 236.

On this record the Court cannot say to a legal certainty that no breach occurred if, in fact, the Taberers withheld knowledge regarding Intabex's accounting system which affected--as plaintiff contends--DIMON's corporate decisions and filings.

The Conspiracy Claim

Defendants' final contention is that DIMON's civil conspiracy claim must be dismissed for failure to state an underlying tort.

New York does not recognize a claim for conspiracy in the abstract. [FN100] Nevertheless, "[a]llegations of conspiracy are permitted ... to connect the actions of separate defendants with an otherwise actionable tort." [FN101] As discussed above, DIMON

adequately has pleaded underlying torts against Folium and the Taberers. DIMON alleges also that Tabex conspired and acted in concert with Folium and the Taberers in effectuating those torts. In consequence, this branch of defendants' motion is without merit.

FN100. *Alexander & Alexander of New York, Inc. v. Fritzen*, 68 N.Y.2d 968, 969, 510 N.Y.S.2d 546, 547, 503 N.E.2d 102 (1986) (citations omitted).

FN101. *Id.*

Conclusion

In sum, the defendants' motions to dismiss are denied in all respects except that Counts II and III of the second amended complaint are dismissed as to defendant Blair Investments (Private) Ltd.

SO ORDERED.

48 F.Supp.2d 359

END OF DOCUMENT

27

Supreme Court, Appellate Division, Second
Department, New York.

Frank DIODATO, et al., Respondents,
v.
EASTCHESTER DEVELOPMENT
CORPORATION, et al., Appellants.

May 20, 1985.

Purchasers brought action against development corporation and others to recover damages for fraud in inducement to enter into contract, for breach of that contract, and for specific performance. The Supreme Court, Westchester County, Delaney, J., refused to dismiss fraud claim, and defendants appealed. The Supreme Court, Appellate Division, held that contractual provision concerning purchaser's reliance on vendor's representation could be reasonably interpreted to allow such reliance instead of prohibiting it and, thus, ambiguity was to be construed against party who drafted contract, namely vendor.

Affirmed.

West Headnotes

[1] Fraud 41
184k41

Allegations that defendants falsely promised to equip new residence with elevator at no extra charge and that this misrepresentation was designed to and did in fact induce plaintiffs to sign contract of sale were sufficient to state cause of action to recover damages for fraud in inducement, notwithstanding contractual provision concerning representations of seller.

[2] Vendor and Purchaser 46
400k46

Contractual provision concerning purchaser's reliance on vendor's representation could be reasonably interpreted to allow such reliance instead of prohibiting it and, thus, ambiguity was to be construed against party who drafted contract, namely vendor.

[3] Contracts 155

95k155

Ambiguous clause which appears in contract is to be construed against party who drafted it.

****293** Goodhue Banks Arons & Pickett, Mount Kisco (John L. Arons, Mount Kisco, of counsel), for appellants.

John C. Wirth, Jr., White Plains (Maria Joy Frank, White Plains, of counsel), for respondents.

Before TITONE, J.P., and BRACKEN, RUBIN and LAWRENCE, JJ.

MEMORANDUM BY THE COURT.

In an action, inter ***304** alia, to recover damages for fraud in the inducement to enter into a contract, to recover damages for breach of that contract, and for specific performance thereof, defendants appeal, as limited by their brief, from so much of an order of the Supreme Court, Westchester County, entered August 16, 1983, as denied that branch of their motion which was to dismiss the plaintiffs' cause of action to recover damages for fraud in the inducement.

****294** Order affirmed insofar as appealed from, with costs.

[1][2][3] The plaintiffs' allegations that defendants falsely promised to equip their new residence with an elevator at no extra charge, and that this misrepresentation was designed to and did in fact induce plaintiffs to sign a contract of sale, were sufficient to state a cause of action to recover damages for fraud in the inducement. We reject defendants' contention that the fraud action is barred by the following clause which appeared in the contract of sale:

"16. LIMITATION ON REPRESENTATIONS AND PURCHASER'S RELIANCE--Purchaser represents to the Seller that the Purchaser knows, has examined and has investigated to the full satisfaction of the Purchaser the plans or the model (less any displayed EXTRAS) house type and the lot to be sold; that neither the Seller nor any agent,

(Cite as: 111 A.D.2d 303, *304, 489 N.Y.S.2d 293, **294)

officer, employee or representative of the Seller has made any representation whatsoever regarding the subject matter of this sale or any part thereof or of any matter or thing pertaining thereto, or concerning any right, privilege or license in connection therewith, and the Purchaser in executing, delivering and/or performing this Agreement does not rely upon any statement and/or information except the list of displayed EXTRAS to whomsoever made or given, directly or indirectly, verbally or in writing by advertisement, except the Offering Plan for TOWNHOUSES AT LAKE ISLE ASSOCIATION, INC., incorporated herein by reference. The parties further agree that this instrument contains the entire agreement of the parties and that there shall be no modifications hereof or agreements for changes in construction allowances on account of the purchase price or otherwise, in favor of Purchaser, unless in writing duly signed" (emphasis added).

Although defendants urge that we interpret this clause as a disclaimer by plaintiffs of any reliance on verbal representations concerning "extras", we find that the clause could also be reasonably interpreted to allow such reliance instead of prohibiting it (i.e., that plaintiffs were entitled to rely on any verbal list of extras). Since it is susceptible to two reasonable interpretations, we find the above clause ambiguous. It is a well-settled rule of law that an ambiguous clause which appears in a contract is to be construed against that party who drafted it, in this *305 case the defendant Eastchester Development Corporation (see, *Rentways, Inc. v. O'Neill Milk & Cream Co.*, 308 N.Y. 342, 126 N.E.2d 271; *Interested Underwriters at Lloyds v. Ducor's, Inc.*, 103 A.D.2d 76, 478 N.Y.S.2d 285; *Tougher Heating & Plumbing Co. v. State of New York*, 73 A.D.2d 732, 423 N.Y.S.2d 289). Therefore, Special Term properly denied the motion to dismiss plaintiffs' fraud in the inducement claim as a matter of law.

In any event, the purported disclaimer would not inure to the benefit of defendant L'Hommedieu as he was not a party to the

contract (see, *Wittenberg v. Robinov*, 9 N.Y.2d 261, 213 N.Y.S.2d 430, 173 N.E.2d 868). We have reviewed the remaining contentions raised by the defendants and find them to be without merit.

111 A.D.2d 303, 489 N.Y.S.2d 293

END OF DOCUMENT

28

District Court of Appeal of Florida,
Second District.

Dorothy DONOFRIO, Appellant,
v.
Pasquale MATASSINI, Robert E. Rodriguez,
and Howard Bernstein, Appellees.

No. 85-2726.

Jan. 28, 1987.
Rehearing Denied March 11, 1987.

Shareholder brought action against two other shareholders and purchaser of corporate assets alleging that they conspired to deprive her of the value of her stock. The Circuit Court for Hillsborough County, Ralph Steinberg, J., granted directed verdicts in favor of two other shareholders and purchaser, and appeal was taken. The District Court of Appeal held that: (1) whether two other shareholders and purchaser participated in scheme to deny shareholder any compensation for her interest in corporation was question for jury; (2) trial court erred in concluding that action was time barred because it should have been brought within three years of corporation's dissolution; and (3) shareholder could bring action personally and was not required to bring it as shareholder's derivative suit.

Reversed and remanded.

West Headnotes

[1] Conspiracy 13
91k13

Conspirator need not take part in planning, inception, or successful conclusion of conspiracy; conspirator need only know of scheme and assist it in some way to be held responsible for all of acts of his coconspirators.

[2] Conspiracy 19
91k19

Existence of conspiracy and individual's participation in it may be inferred from circumstantial evidence.

[3] Conspiracy 21
91k21

Whether two corporate shareholders and purchaser of corporate assets participated in scheme to deny third shareholder compensation for her interest in corporation was question for jury in third shareholder's conspiracy action.

[4] Corporations 630(2)
101k630(2)

In corporate shareholder's action alleging conspiracy to deprive her of value of her stock, trial court erred concluding that suit was time barred because suit had to be filed within three years of corporation's dissolution, as statute providing for three-year limitations period affects only those claims existing prior to dissolution and as shareholder's cause of action accrued after corporation's dissolution. West's F.S.A. § 607.271(5).

[5] Corporations 190
101k190

Shareholder could personally maintain action against two other shareholders for conspiracy to deprive her of value of her stock, and was not required to bring action as derivative suit on behalf of corporation, as at time corporation was dissolved involuntarily by order of Department of State shareholder lacked authority to apply for reinstatement of corporation necessary to institute suit on corporation's behalf.

*1279 Stevan T. Northcutt of Levine, Hirsch, Segall, Northcutt & Hanlon, P.A., Tampa, for appellant.

Pasquale Matassini, pro se.

Thomas A. Smith, Tampa, for appellee Rodriguez.

Michael A. Linsky of Linsky, Reiber & Scruggs, Tampa, for appellee Bernstein.

PER CURIAM.

Appellant Dorothy Donofrio, plaintiff below, seeks reversal of the directed verdicts granted

in favor of appellees, defendants in the trial court. Because appellant attacks the trial court's entry of directed verdicts, we review and recite the facts in the light most favorable to her.

Throja, Inc. was a Florida corporation which owned one asset, a parcel of commercial real estate located in Tampa, Florida, encumbered by a first mortgage. Appellant Dorothy Donofrio and appellees Pasquale Matassini and Robert E. Rodriguez each owned one-third of the stock in Throja. They were also sole officers and directors of Throja. Throja's parcel of real estate was leased to Deep South Plantation Foods, Inc., which operated a bar on the premises. The stock in Deep South was owned equally by Matassini, Rodriguez, and Donofrio's husband, James.

In late 1973 and early 1974, discord arose among the parties. James Donofrio had been convicted of a felony, and this resulted in the revocation of Deep South's license to sell alcoholic beverages. Without the liquor license, Deep South was unable to make rental payments to Throja which, in turn, was unable to make the mortgage payments on its property. Additionally, the Donofrios had been unwilling to invest capital or work in either Throja or Deep South throughout the existence of these two corporations.

In June 1974, Matassini and Rodriguez formed Hillsborough Investments, Inc., each owning one-half of the stock and being its sole officers and directors.

In July 1974, Matassini and Rodriguez removed Mrs. Donofrio as a director and officer of Throja. Her removal was admittedly motivated by the desire of Matassini and Rodriguez to exclude her from subsequent transactions. In September of that year, Matassini and Rodriguez caused Throja to sell and Hillsborough Investments to buy the real estate owned by Throja on which Deep South had operated the bar. A total purchase price of \$110,000 was agreed upon, which included Hillsborough Investments assuming a \$14,000 first mortgage, and executing an \$88,000 purchase money second

mortgage and a \$7,400 unsecured note to Throja.

In October 1974, Throja was involuntarily dissolved for failure to file its annual report with the Secretary of State.

Hillsborough Investments made monthly payments on the mortgage to Throja by depositing the monies into a Throja bank account on which Rodriguez and Matassini were the sole signatories. In February 1976, Matassini and Rodriguez caused Throja to purchase two \$5,000 certificates of deposit. Thereafter, Matassini and Rodriguez each obtained a \$5,000 personal loan, using Throja's certificates of deposit as collateral. These loans were not repaid, and on April 1, 1976, the bank redeemed the certificates of deposit.

In March 1976, Rodriguez sold his shares in Deep South, Throja, and Hillsborough Investments to appellee Howard Bernstein. Bernstein replaced Rodriguez as a director and officer in the three corporations. Thereafter, Hillsborough Investments ceased making payments on its mortgage to Throja. On April 2, 1976, Matassini withdrew about \$4,300 which remained in Throja's bank account.

*1280 As a part of the transaction to purchase the corporate shares from Rodriguez, Bernstein approached Joseph Licata, Jr., who is not a party to this appeal. Licata agreed to transfer a liquor license he owned to the property and operate a bar with Bernstein and Matassini. These three then proceeded to arrange for the purchase of the property from Hillsborough Investments. Bernstein had been under the impression that Matassini and Rodriguez were to "take care of" the mortgage to Throja so that Hillsborough Investments would own the real estate free and clear of any obligations. He agreed to complete the purchase provided he could review a title binder. Because the title binder reflected Throja's mortgage as an encumbrance against the property, it was necessary to obtain a satisfaction of that mortgage before Bernstein and Licata would agree to proceed with the

transaction. A satisfaction of mortgage was presented by Bernstein and executed on behalf of Throja by Matassini and Rodriguez as its officers. At this point, Rodriguez was apparently no longer an officer of Throja, although he had not yet received remuneration from Bernstein for his shares in Deep South, Throja, and Hillsborough Investments. Later, Rodriguez, on advice of counsel, marked this satisfaction "void," and on April 15, 1976, Matassini executed a new satisfaction as president of Throja. Bernstein witnessed Matassini's signature on the second satisfaction. Bernstein was aware that no money was paid to Throja in exchange for the satisfaction.

On April 20, 1976, Matassini and Bernstein caused Hillsborough Investments to transfer the real estate to Bernstein and his wife, Licata and his wife, and Matassini's son in trust for Matassini. The property was valued at \$225,000 for purposes of the sale; however, Bernstein and Matassini paid no consideration. Licata paid \$25,000 in cash and transferred his liquor license to the property. The cash was apparently used for repair and improvement of the bar. The owners began operating a bar on the property but it failed, and the property was eventually sold to a third party for \$225,000. Net proceeds from this sale were divided among Matassini, the Bernsteins, and the Licatas.

The net effect of the series of transactions was that Mrs. Donofrio, who retained a one-third interest in Throja, received nothing.

Mrs. Donofrio was unaware of these events until 1977. In November of that year, more than three years after dissolution of Throja, she filed her lawsuit for compensatory and punitive damages, alleging the existence of a conspiracy to deprive her of the value of her stock in Throja, and seeking imposition of an equitable lien against the property to compensate her for her losses.

Following several amendments to the initial complaint, the case came on for jury trial in 1985 on the conspiracy theory. [FN1] At the conclusion of Mrs. Donofrio's case, the trial

judge granted a directed verdict in favor of Bernstein on the ground that there was insufficient evidence to show his participation in the alleged conspiracy. Rodriguez and Matassini rested without presenting any evidence. The trial judge granted directed verdicts in their favor on the theory that Mrs. Donofrio's suit was actually a stockholder's derivative claim that by law should have been filed within three years of Throja's dissolution. The judge further ruled that the evidence was insufficient to show Rodriguez and Matassini participated in any alleged conspiracy. On this appeal, Mrs. Donofrio challenges the trial court's entry of these directed verdicts.

FN1. The property was sold to a third party while the lawsuit was pending. Therefore, the equitable lien theory was not tried.

Mrs. Donofrio argues that there was sufficient evidence of appellees' participation in the alleged scheme to render her Throja stock worthless to withstand their motions for directed verdict. Additionally, she asserts that she has a personal cause of action against appellees which was timely filed. We agree with her contentions.

We believe the trial court erred in granting motions for directed verdict on the evidence. *1281 Matassini admitted that the reason for removing Mrs. Donofrio as an officer and director of Throja was to force her and her husband out of the business. Hillsborough Investments was created by Matassini and Rodriguez to eliminate any interest the Donofrios had in the bar operated on the premises. Rodriguez and Matassini secured personal loans collateralized by certificates of deposit owned by Throja, resulting in Throja assets being used to pay their personal debts. Moreover, Matassini withdrew the balance of funds remaining in Throja's bank account.

A jury could infer that Rodriguez signed the satisfaction of the Throja mortgage to defraud Mrs. Donofrio in order to receive payment from Bernstein. In addition, Matassini attempted to justify his signing the satisfaction of mortgage on behalf of Throja

without receiving consideration by saying he was only getting even with the Donofrios for the loss of Deep South's liquor license and resulting failure of that business.

Turning to the claim against Bernstein, the evidence is conflicting concerning his participation in the alleged conspiracy. Reviewing the evidence in the light most favorable to Mrs. Donofrio, Bernstein testified that at the time he became an officer, director, and stockholder in Throja he was aware of the existence of a controversy between the Donofrios and Matassini and Rodriguez. Matassini told Bernstein that the satisfaction of mortgage was being recorded without consideration to Mrs. Donofrio because of the economic loss to Deep South caused by Mr. Donofrio. Bernstein acted to help secure the satisfaction of mortgage. Thus, there was evidence that Bernstein had direct knowledge of the scheme to deprive Throja of its sole asset which would effectively render Mrs. Donofrio's shares in Throja worthless and that he participated in the scheme. Furthermore, as a result of the satisfaction being issued, Bernstein received an interest in the property unencumbered by the Throja mortgage.

[1][2][3] From the evidence presented, a jury could infer Bernstein, Matassini, and Rodriguez participated in a scheme to deny Mrs. Donofrio any compensation for her interest in Throja. A conspirator need not take part in the planning, inception, or successful conclusion of a conspiracy. The conspirator need only know of the scheme and assist in it in some way to be held responsible for all of the acts of his coconspirators. *Karnegis v. Oakes*, 296 So.2d 657 (Fla. 3d DCA 1974), cert. denied, 307 So.2d 450 (Fla.1975). The existence of a conspiracy and an individual's participation in it may be inferred from circumstantial evidence. *Northwestern National Insurance Co. v. General Electric Credit Corp.*, 362 So.2d 120 (Fla. 3d DCA 1978), cert. denied, 370 So.2d 459 (Fla.1979).

When ruling on a motion for directed verdict, the trial court must evaluate the evidence in the light most favorable to the

nonmoving party and must indulge all inferences in that party's favor. *Cutchins v. Seaboard Air Line Railroad Co.*, 101 So.2d 857 (Fla.1958); see *Reinhart v. Seaboard Coast Line Railroad Co.*, 422 So.2d 41 (Fla. 2d DCA 1982), petition for review denied, 431 So.2d 989 (Fla.1983). Based on the evidence recited above, we believe Mrs. Donofrio's case was sufficient to withstand appellees' motions for directed verdict grounded on insufficiency of the evidence.

We next address the issue of whether Mrs. Donofrio's action was time barred. As a starting point, we deem her cause of action to have accrued in April 1976. It was then that Throja suffered a loss of the certificates of deposit and corporate funds withdrawn by Matassini, and the satisfaction of mortgage was executed. This latter event caused Throja's interest in the property, which was the corporation's only asset, to vanish and Mrs. Donofrio's stock to be rendered valueless.

The trial court ruled that the suit was time barred on the basis of section 607.297, Florida Statutes (1985), which provides:

The dissolution of a corporation either:

- (1) By the issuance of a certificate of dissolution by the Department of State;
- (2) By a decree of court; or
- (3) By expiration of its period of duration

*1282 shall not take away or impair any remedy available to or against such corporation or its directors, officers, or shareholders for any right or claim existing, or any liability incurred, prior to such dissolution if action or other proceeding thereon is commenced within 3 years after the date of such dissolution. Any such action or proceeding by or against the corporation may be prosecuted or defended by the corporation in its corporate name. The shareholders, directors, and officers shall have power to take such corporate or other action as shall be appropriate to protect such remedy, right, or claim. If such corporation was dissolved by the expiration of its period of duration, such corporation may amend its articles of incorporation at any time during such period of 3 years so as to extend its period of duration.

[4] This statute by its terms affects only those claims existing prior to dissolution. As we have observed, Mrs. Donofrio's cause of action accrued in April 1976 when corporate irregularities occurred, which was long after dissolution of the corporation. Consequently, the trial court erred in concluding that Mrs. Donofrio's suit had to have been filed within three years of dissolution of the corporation.

[5] The trial court ruled that Mrs. Donofrio's claim was in the nature of a shareholder's derivative suit and should have been brought on behalf of the corporation. We agree that it was a corporate cause of action. See *Alario v. Miller*, 354 So.2d 925 (Fla. 2d DCA 1978). *Throja*, however, was dissolved in 1974, and to have instituted suit on behalf of it, it would have been necessary to reinstate the corporation. See *Cosmopolitan Distributors, Inc. v. Lehnert*, 470 So.2d 738 (Fla. 3d DCA 1985), review denied, 486 So.2d 596 (Fla.1986). Section 607.271(5), Florida Statutes (Supp.1984), provides that any corporation dissolved involuntarily by order of the Department of State "may be reinstated by the Department of State at any time upon approval of an application for reinstatement signed by an officer or director of the dissolved corporation." At the time of *Throja's* dissolution, Mrs. Donofrio was neither an officer nor a director, having been earlier removed from those positions by Rodriguez and Matassini. Therefore, she had no authority to apply for reinstatement of *Throja*. Consequently, we hold that Mrs. Donofrio could personally maintain the claim. To rule otherwise would leave Mrs. Donofrio without a remedy and allow Matassini and Rodriguez to take advantage of their removing Mrs. Donofrio as an officer and director of *Throja*.

We reverse the trial court's judgment and remand for further consideration consistent with this opinion.

GRIMES, A.C.J., and SCHEB and LEHAN,
JJ., concur.

503 So.2d 1278, 12 Fla. L. Weekly 427

END OF DOCUMENT

29

Only the Westlaw citation is currently available.

United States District Court,
S.D. New York.

EED HOLDINGS, Plaintiff,
v.
PALMER JOHNSON ACQUISITION CORP.
and Andrew J. McKelvey, Defendants.

No. 04 Civ. 0505(RWS).

Oct. 20, 2004.

Friedman, Wittenstein & Hochman, New York, NY, By: Stuart I. Friedman, Ivan O. Kline, for Plaintiff, of counsel.

Levi Lubarsky & Feigenbaum, New York, NY, By: Steven B. Feigenbaum, for Defendants, of counsel.

OPINION

SWEET, J.

*1 The defendants Palmer Johnson Acquisition Corp. ("PJAC") and Andrew J. McKelvey ("McKelvey") (collectively the "Defendants") have moved under Fed.R.Civ.P. 12(b)(6) and 9(b) to dismiss the complaint of plaintiff EED Holdings ("EED") against McKelvey and under Rule 12(b)(2), Fed.R.Civ.P., to dismiss the claim against PJAC for lack of jurisdiction, and, alternatively, under 28 U.S.C. § 1404(a) to transfer the claim to the Eastern District of Wisconsin. For the reasons set forth below, the motion to dismiss the claims against McKelvey is granted in part and denied in part. The motion to dismiss PJAC for lack of jurisdiction is denied with leave to move for summary judgment after jurisdictional discovery.

I. Prior Proceedings

This diversity action was filed on January 22, 2004. On that day, a complaint was filed against defendants McKelvey and PJAC by EED, a Cayman Island corporation whose

chief asset is a Cayman Island flag vessel. The above-referenced motions were heard and marked as fully submitted on June 2, 2004.

II. Facts Alleged In The Complaint

The allegations of the complaint, which are accepted as true for the purpose of these motions, describe the relationship of the parties and the nature of the dispute.

For several decades prior to 2000, Palmer Johnson, Inc. ("PJI") constructed yachts in Wisconsin. (Compl.¶ 7). In 2000, McKelvey formed PJAC, and on September 29, 2000, PJAC acquired 100% of the stock of PJI and two other Palmer Johnson companies (the "PJAC Acquisition"). (Compl.¶ 8). McKelvey has at all times been the sole shareholder and director of PJAC. (Compl.¶ 9).

For some time prior to the PJAC Acquisition, PJI had experienced considerable financial and operating difficulties. (Compl.¶ 8). Following the acquisition, PJI's condition worsened. PJI incurred operating losses in the amounts of approximately \$1.7 million during the last three months of 2000, and \$8.5 million during 2001. (Compl.¶ 11). In addition, during 2001, PJI was required to recognize a loss of approximately \$12.4 million, consisting of 100% of its goodwill, so that PJI's total loss for 2001 was approximately \$20.9 million. (Compl.¶ 11).

In the spring of 2001, Marc Goldman ("Goldman"), the sole owner of EED, met with McKelvey at the New York Yacht Club in Manhattan. Goldman, who was considering several yacht construction companies, discussed with McKelvey the type of yacht he wanted. (Compl.¶¶ 13, 14). McKelvey was then aware that PJI was undercapitalized, was facing significant financial difficulties, and would not be able to properly perform under a yacht construction agreement. (Compl.¶ 15). Nonetheless, in order to convince Goldman to contract with PJI, McKelvey spoke at length about the attributes of PJI, and specifically stated that it had the capability and wherewithal to properly construct in a timely manner the yacht Goldman sought. (Compl.¶

14). McKelvey also assured Goldman that PJI would be building the "greatest boats" and that he was personally "committed to PJI." Id. In reliance on these representations, Goldman decided to have EED contract with PJI. (Compl.¶ 16).

*2 EED entered into a Yacht Construction and Sale Agreement (the "Construction Agreement") with PJI on August 3, 2001, pursuant to which PJI agreed to construct and deliver to EED, on or before November 30, 2002, an aluminum alloy motor yacht (the "Yacht") in accordance with specifications and plans for a fixed price of \$10,785,000. The Construction Agreement provided that if PJI failed to complete the Yacht on time, it would owe EED liquidated damages of \$2,000 per day for each day of delay in delivery of the Yacht, beginning on the thirty-first day following the due date. (Compl.¶ 16).

The Construction Agreement contained a number of warranties by PJI, including a warranty to repair or replace any defects in workmanship and/or materials for a period of thirty-six months following delivery of the Yacht, and warranties with respect to the speed of the Yacht. (Compl.¶ 17). The Construction Agreement further provided for the sale of an existing yacht (the "Interim Vessel") to EED for use while the Yacht was being constructed. (Compl.¶ 18). EED paid \$2.2 million to PJI for the Interim Vessel, which was delivered to EED after execution of the Construction Agreement. (Compl.¶ 18). The Construction Agreement provided that EED would return the Interim Vessel for repurchase by PJI when the Yacht was complete or near completion, and EED would thereupon receive a \$2.2 million credit to be applied to the last several payments by EED to PJI for the Yacht. (Compl.¶ 18).

In order to further induce EED to contract with PJI, PJAC executed a Parent Guaranty dated August 3, 2001 (the "Guaranty"), pursuant to which PJAC unconditionally and irrevocably guaranteed to EED the performance of, and compliance with, all obligations, covenants, warranties, and undertakings of PJI in the Construction

Agreement. (Compl.¶ 19). The Guaranty provided that PJAC's liability to EED would not be affected as a result of any agreement entered into by EED and PJI, or by the cessation for any reason of the liability of PJI to EED, other than through completion and delivery of the Yacht pursuant to the Construction Agreement. Id.

After a number of months, PJI fell behind on its performance. (Compl.¶ 20). By the end of 2002, PJI was in default on various obligations under the Construction Agreement, and by early 2003, it was unable to continue to work on the Yacht without EED making additional payments not owed under the terms of the Construction Agreement. (Compl.¶ 21).

In February 2003, a representative of PJI advised Goldman that PJI would likely soon be in bankruptcy, and suggested that EED agree to immediately accept title to the Yacht, release PJI from further obligations under the Construction Agreement, and then contract with PJI to continue work on the Yacht on a time and material basis. (Compl.¶ 22). To effectuate this, EED assigned all of its rights, title, and interest in and to the Construction Agreement to MG Vessel Construction LLC ("MG Vessel"), a limited liability company owned by Goldman (Compl.¶ 23), and PJI transferred title to the Yacht to MG Vessel in satisfaction of its obligations to MG Vessel under the Construction Agreement. (Compl.¶ 24). Notably, PJAC consented to the assignment, acknowledged and agreed that PJI was in default under the Construction Agreement, and irrevocably agreed that the Guaranty would remain "in full force and effect." (Compl.¶ 23).

*3 On March 6, 2003, an involuntary petition under the Bankruptcy Code was filed against PJI in the United States Bankruptcy Court for the Eastern District of Wisconsin. (Compl.¶ 25). MG Vessel thereafter contracted with PJI for the completion of the Yacht on a time and material basis, with MG Vessel making certain payments to PJI and other payments directly to third party vendors. (Compl.¶ 26). In late April 2003, the Yacht,

although still not completed, was floated at Sturgeon Bay, and brought to a facility in Michigan for further work by PJI. On or about July 1, 2003--approximately six months after the completion date in the Construction Agreement as extended by change orders--MG Vessel took possession of the Yacht from PJI in Michigan, though additional work was still required. (Compl. ¶ 27). [FN1]

FN1. MG Vessel subsequently transferred title to the Yacht to EED and assigned to EED its rights under the Guaranty. (Compl. ¶ 33).

Because of PJI's financial condition, it was not able to accept the return of the Interim Vessel and provide a credit to EED or MG Vessel in the amount of \$2.2 million as provided in the Construction Agreement. (Compl. ¶ 28). Instead, EED was forced to retain possession of the Interim Vessel, and incurred additional expenses in connection therewith after it had the use of the Yacht. *Id.* In December 2003, EED was able to sell the Interim Vessel, but for less than half of the \$2.2 million credit that was to have been provided by PJI. (Compl. ¶ 29).

The Yacht, as delivered, failed to meet certain specifications and warranties in the Construction Agreement, including some for which the agreement provides liquidated damages. PJI has also not complied with its warranty for the repair of defects, thereby requiring EED to make further payments to third parties. (Compl. ¶ 30). As a result of PJI's numerous breaches, including those related to the Interim Vessel, EED has incurred damages in excess of \$2.45 million. (Compl. ¶¶ 31, 32).

III. Discussion

Four causes of action have been asserted by EED in the complaint: (1) a breach of guaranty claim against PJAC (Compl. ¶¶ 35-39), (2) a claim of piercing the corporate veil and alter ego liability against McKelvey (Compl. ¶¶ 40-46), (3) a fraud claim against McKelvey, (Compl. ¶¶ 47-50), and (4) a negligent misrepresentation claim against McKelvey (Compl. ¶¶ 51-53).

As stated above, defendants PJAC and McKelvey have moved under Fed.R.Civ.P. 12(b)(6) and 9(b) to dismiss EED's complaint against McKelvey and under Fed.R.Civ.P. 12(b)(2) to dismiss the claim against PJAC for lack of jurisdiction, and, alternatively, under 28 U.S.C. § 1404(a) to transfer the claim to the Eastern District of Wisconsin.

A. Standard of Review

A motion to dismiss pursuant to Rule 12 must be denied "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). For purposes of a Rule 12 motion, all well pleaded allegations are accepted as true, and all inferences are drawn in favor of the pleader. *Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1174 (2d Cir.1993).

B. Dismissal Of PJAC For Lack Of Personal Jurisdiction Denied

*4 Co-defendant PJAC has moved for dismissal of EED's contract claim against it on the grounds that this Court lacks personal jurisdiction over PJAC. In a diversity action, the law of the state in which the district court sits governs personal jurisdiction over a nonresident defendant. Fed.R.Civ.P. 4(k)(1)(A), *United States v. First National City Bank*, 379 U.S. 378, 381-82 (1965). Here, EED argues that the defendants are amenable to suit under New York's corporate presence doctrine and under its long arm statute. See N.Y. C.P.L.R. §§ 301, 302(a)(1). [FN2]

FN2. For the reasons discussed below, it is not necessary to consider EED's argument that personal jurisdiction exists because PJAC is merely McKelvey's alter ego.

1. Corporate Presence Doctrine

Pursuant to caselaw codified by section 301 of New York's Civil Practice Law and Rules ("CPLR"), an unlicensed foreign corporation is subject to the general personal jurisdiction of

the courts of New York if such corporation is "doing business" in the state. See *Landoil Resources Corp. v. Alexander & Alexander Servs., Inc.*, 77 N.Y.2d 28, 33, 563 N.Y.S.2d 739, 741, 565 N.E.2d 488, 490 (1990); accord *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 95 (2d Cir.2000). A defendant corporation is deemed to be "doing business" in New York if it has engaged in "such a continuous and systematic course of [business] here that a finding of its 'presence' in this jurisdiction is warranted[.]" *Landoil*, 77 N.Y.2d at 33, 563 N.Y.S.2d at 741, 565 N.E.2d at 490 (citing *Laufer v. Ostrow*, 55 N.Y.2d 305, 309-310, 449 N.Y.S.2d 456, 458, 434 N.E.2d 692, 694 (1982); *Delagi v. Volkswagenwerk AG*, 29 N.Y.2d 426, 430-31, 328 N.Y.S.2d 653, 655-56, 278 N.E.2d 895, 896 (1972); *Frummer v. Hilton Hotels Int'l*, 19 N.Y.2d 533, 536, 281 N.Y.S.2d 41, 43, 227 N.E.2d 851, 853 (1967).

PJAC argues that it cannot be found to have been "doing business" in New York because it possessed "none of the factors indicative of presence" in New York. *Mareno v. Rowe*, 910 F.2d 1043, 1046 (2d Cir.1990). That is, PJAC states that it had no offices, employees, banking accounts, or activities in the state. Furthermore, PJAC argues that McKelvey merely resided in New York during the relevant time period, and that such conduct is insufficient, as a matter of law, to support a finding that PJAC was doing business in-state. See *Fremay, Inc. v. Modern Plastic Mach. Corp.*, 15 A.D.2d 235, 241-42, 222 N.Y.S.2d 694, 700-01 (1st Dept.1961) (holding that for the purpose of determining whether defendant corporation was doing business in New York, it was of "no particular moment" that (1) the defendant's corporate officers resided in New York and (2) that such officers used their personal offices for incidental transactions relating to their status as officers/investors.)

EED argues that it has made a prima facie showing that PJAC was "doing business" in New York by its allegations that McKelvey, PJAC's sole shareholder and director, lives and works in New York. EED argues that under applicable corporate law, Del. CODE ANN. tit. 8 § 141(a) (2004), the responsibility

for managing PJAC's affairs rests with its board of directors. Since McKelvey was PJAC's only director, EED argues, PJAC was necessarily managed in New York, thereby subjecting it to New York's corporate presence doctrine.

2. Long Arm Jurisdiction

*5 CPLR section 302(a)(1) gives the courts of New York personal jurisdiction over a cause of action involving a nondomiciliary defendant who, in person or through an agent, "transacts any business within the state [,]" provided that the cause of action arises from such transaction. For the purpose of determining whether a given foreign corporation defendant transacted business in New York, "what counts is not the quantity of contacts with New York, but rather the nature and quality of the contacts." *Lawrence Wissner & Co., Inc. v. Slender You, Inc.*, 695 F.Supp. 1560, 1563 (S.D.N.Y.1988). This inquiry focuses on whether the defendant " 'engaged in some purposeful activity [here] ... in connection with the matter in suit.' " *Parke-Bernet Galleries, Inc. v. Franklyn*, 26 N.Y.2d 13, 16, 308 N.Y.S.2d 337, 340, 256 N.E.2d 506, 507 (1970) (quoting *Longines-Wittnauer Watch Co. v. Barnes & Reinecke*, 15 N.Y.2d 443, 457, 261 N.Y.S.2d 8, 18-19, 209 N.E.2d 68, 75 (1965)).

With respect to long arm jurisdiction, EED argues that the Court must conclude, for the purposes of this motion, that PJAC transacted business in New York because (1) McKelvey, who is alleged to live and work in New York, approved the Guaranty and (2) the initial discussions between McKelvey and Goldman concerning the Construction Agreement occurred in-state at the New York Yacht Club. In opposition, PJAC argues that EED has failed to allege that PJAC transacted any business related to the Guaranty in New York. In particular, PJAC states that McKelvey and Goldman did not discuss the possibility of a PJAC guaranty during the course of their 2001 meeting at the New York Yacht Club.

3. Jurisdictional Discovery Is Warranted

It is well established in this circuit that prior to discovery, plaintiff can avoid Rule 12(b)(2) dismissal by making a prima facie showing that personal jurisdiction exists. *Jazini by Jazini v. Nissan Motor Co.*, 148 F.3d 181, 184 (2d Cir.1998) (quoting *Ball v. Metallurgie Hoboken-Overpelt, S.A.*, 902 F.2d 194, 197 (2d Cir.1990)); *Hoffritz for Cutlery, Inc. v. Amajac, Ltd.*, 763 F.2d 55, 57 (2d Cir.1985).

Based on the properly-pleaded allegations contained in the complaint, which this Court must accept as true for the purpose of this motion, EED appears to have made a prima facie showing that PJAC either (1) was doing business in New York pursuant to CPLR section 301 or (2) transacted business in New York pursuant to CPLR section 302(a)(1).

In light of the foregoing, it is appropriate to deny PJAC's 12(b)(2) motion and to grant EED's request for jurisdictional discovery. Once jurisdictional discovery is completed, PJAC may choose to move for summary judgment, pursuant to Fed.R.Civ.P. 56, for lack of personal jurisdiction.

C. The Veil Piercing/Alter Ego Claim Is Dismissed

The New York Court of Appeals [FN3] has described the doctrine of piercing the corporate veil:

FN3. Although the law of the state of incorporation, here Delaware, ordinarily governs whether to disregard the corporate form, New York and Delaware law on that issue are substantially similar. See *Harrison v. NBD Inc.*, 990 F.Supp. 179, 184 (E.D.N.Y.1998) (stating that a plaintiff asserting a veil-piercing claim under Delaware law must show "that the controlling corporation wholly ignored separate status of controlled corporation and so dominated and controlled its affairs that separate existence was a sham.")

The doctrine ... is typically employed by a [claimant] seeking to go behind the corporate existence in order to circumvent the limited liability of the owners and to hold them liable for some underlying

corporate obligation [citations omitted]. The concept is equitable in nature and assumes the corporation itself is liable for the obligation sought to be imposed [citation omitted]. Thus, an attempt of a [claimant] to pierce the corporate veil does not constitute a cause of action independent of that against the corporation; rather it is an assertion of facts and circumstances which will persuade the court to impose the corporate obligation on its owners [citation omitted].

*6 *Matter of Morris v. New York State Dep't of Taxation and Fin.*, 82 N.Y.2d 135, 140-41, 603 N.Y.S.2d 807, 810, 623 N.E.2d 1157, 1160 (1993). The Second Circuit has stated that veil piercing is a narrow exception to the doctrine of limited liability for corporate entities, and that courts should permit veil-piercing only under "extraordinary circumstances." *Murray v. Miner*, 74 F.3d 402, 404 (2d Cir.1996).

Under New York law, a party seeking to pierce the corporate veil must generally show that: "(1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury." *Matter of Morris*, 82 N.Y.2d at 141, 603 N.Y.S.2d at 810-11, 623 N.E.2d at 1160-61 (1993). The New York Court of Appeals has held that both of these elements must be established in order to justify application of the veil-piercing doctrine. See *TNS Holdings, Inc. v. MKI Secs. Corp.*, 92 N.Y.2d 335, 339, 680 N.Y.S.2d 891, 893, 703 N.E.2d 749, 751, 703 N.E.2d 749, 751 (1998) ("Evidence of domination alone does not suffice without an additional showing that it led to inequity, fraud or malfeasance.") (citing *Matter of Morris*, 82 N.Y.2d 135 at 140-41, 603 N.Y.S.2d 807 at 810, 623 N.E.2d at 1160).

In this district, veil-piercing claims are subject to the pleading requirements imposed by Fed.R.Civ.P. 8(a), which requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." See *Rolls-Royce Motor Cars, Inc. v. Schudroff, BBS*, 929 F.Supp. 117, 122 (S.D.N.Y.1996); see also *In re Currency Conversion Fee Antitrust Litig.*, 265 F.Supp.2d 385, 426 (S.D.N.Y.,

2003) ("[W]here ... veil-piercing claims are not based on allegations of fraud, the liberal 'notice pleading' standard of Rule 8(a) applies.") To avoid dismissal, a party seeking application of the doctrine must come forward with factual allegations as to both elements of the veil-piercing claim. See, e.g., *JSC Foreign Econ. Ass'n Technostroyexport v. Int'l Dev. & Trade Servs.*, 295 F.Supp.2d 366, 379 (S.D.N.Y.2003) (stating that both elements of a veil-piercing claim must be alleged); *Zinaman v. USTS New York, Inc.*, 798 F.Supp. 128, 131 (S.D.N.Y.1992) (same). Furthermore, it is well established that "purely conclusory allegations cannot suffice to state a claim based on veil-piercing or alter-ego liability, even under [Rule 8(a)'s] liberal notice pleading standard ." In *re Currency Conversion Fee Antitrust Litig.*, 265 F.Supp.2d at 426; see also *De Jesus v. Sears, Roebuck & Co.*, 87 F.3d 65, 70 (2d Cir.1996) (dismissing alter-ego claim where complaint was "devoid of any specific facts or circumstances supporting" plaintiff's conclusory allegations concerning defendant's domination of its subsidiary); *Zinaman*, 798 F.Supp. at 132 (S.D.N.Y.1992) (dismissing alter ego claim on the grounds that "[c]omplaint [was] conclusory at best and fail[ed] to plead to requisite elements of an alter ego theory"). [FN4]

FN4. It should be noted that in its motion papers, EED appears to suggest, via citation to two cases from this district, that conclusory allegations as to the elements of veil-piercing may be sufficient to avoid dismissal for failure to state a claim. However, in both of these cases, the court's refusal to dismiss a veil-piercing claim was based on its determination that sufficient facts, and not mere conclusions, had been alleged. See *Rolls-Royce Motor Cars Inc. v. Schudroff, BBS*, 929 F.Supp. 117, 122 (S.D.N.Y.1996) ("Plaintiff has alleged the fact of complete domination and the use of that domination to commit a wrong against creditors.") (emphasis added); *Citicorp Int'l Trading Co. v. Western Oil & Refining Co.*, 771 F.Supp. 600, 608 (S.D.N.Y.1991) (holding that party seeking veil-piercing had set forth "a short and concise statement of facts which are necessary to support their claim to pierce the veil") (emphasis added).

*7 EED has adequately alleged the first

element of a veil-piercing claim--i.e., that McKelvey dominated PJAC. The complaint contains factual allegations concerning how McKelvey dominated PJAC (see Compl. ¶¶ 9, 42, 44), how he "used PJAC to further his own interest, at the expense of creditors of PJAC and its subsidiaries" (id. at ¶ ¶ 9, 42, 43), and how he "directed PJI to conceal information from EED as to its operating difficulties and delays." (id. ¶ 20).

However, EED has failed to properly allege the second element of the veil-piercing claim--i.e., that McKelvey used his domination over PJAC to commit a fraud or wrong against EED that which resulted in plaintiff's injury. To satisfy this element, EED alleges only that McKelvey "knowingly undercapitalized [PJAC and PJI] to avoid obligations that would arise from their operations, including the obligations to EED under the Construction Agreement and the Guaranty," (Compl.¶ 41). However, EED fails to provide any factual allegations as to why the undercapitalization of PJAC, which undertook the Guaranty, defrauded or otherwise harmed EED. EED has similarly failed to allege that either McKelvey or PJAC had anything to do with the PJI's construction of EED's Yacht. According to the complaint, this yacht construction, the subject of the Guaranty, was done by others at PJI's facilities in Wisconsin. Without such allegations concerning the undercapitalization of PJAC, EED's veil piercing/alter ego claim fails to establish that McKelvey's domination of PJAC was the means by which wrong was done to EED. See, e.g., *TNS Holdings*, 92 N.Y.2d at 340, 680 N .Y.S.2d at 893, 703 N.E.2d at 751 (dismissing alter ego claim for lack of "showing that through its domination [defendant] misused the corporate form for its personal ends so as to commit a fraud or wrongdoing or avoid any of its obligations." [citation omitted]).

None of the decisions cited by plaintiff--all of which support the proposition that both elements of a veil-piercing claim must be properly alleged in order to defeat a 12(b)(6) motion--warrant a different result. [FN5]

FN5. See *JSC Foreign Econ. Ass'n*

Technostroyexport v. International Dev. & Trade Servs., Inc., 295 F.Supp.2d 366, 379 (S.D.N.Y.2003) (denying 12(b)(6) motion on the grounds that the complaint contained factual allegations as to both elements of the veil-piercing claim); Fugazy Int'l Travel Group, Inc. v. Stargazer, Ltd., No. 02 Civ. 3373(HB), 2003 WL 115220 at *3 (S.D.N.Y. Jan. 10, 2003) (holding that corporate officer who knowingly causes a trademark infringement is personally liable "without regard to piercing the corporate veil") (emphasis in original); Accordia Northeast, Inc. Thesesus Int'l Asset Fund, N.V ., 205 F.Supp.2d 176, 182 (S.D.N.Y.2002) (denying dismissal that plaintiff had plead facts as to both elements of the veil-piercing claim); Rolls-Royce, 929 F.Supp. at 122 (same); Citicorp Int'l Trading Co. v. Western Oil & Ref. Co., 771 F.Supp. at 608 (same).

D. The Fraud Claim Against McKelvey Survives

The New York Court of Appeals has stated that:

[i]n an action to recover damages for fraud, the plaintiff must prove a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury[.]

Lama Holding Co. v. Smith Barney, Inc., 88 N.Y.2d 413, 421; 646 N.Y.S.2d 76, 80; 668 N.E.2d 1370, 1373 (1996) (citing New York Univ. v. Continental Ins. Co., 87 N.Y.2d 308, 318, 639 N.Y.S.2d 283, 289, 662 N.E.2d 763, 769 (1995); Channel Master Corp. v. Aluminium Ltd. Sales, Inc., 4 N.Y.2d 403, 406-07, 176 N.Y.S.2d 259, 262, 151 N.E.2d 833, 835 (1958)); see also 60A William H. Danne, Jr., N.Y. Jur. § 14 (2d ed. 2003) ("N.Y.Jur.") (The elements of the fraud cause of action are "representation of a material fact, falsity, scienter, reliance, and injury or damage.").

*8 McKelvey has moved for dismissal of EED's fraud claim on the following grounds: (1) that the allegedly fraudulent statements are non-actionable "puffery," (2) that the fraud claim violates the economic loss rule, (3) that

the fraud claim is indistinguishable from the breach of contract claim, and (4) that the complaint fails to allege scienter with sufficient particularity pursuant to Fed. R. Civ. P 9(b). A review of the complaint in light of relevant authority leads to the conclusions that (1) McKelvey's statement as to PJI's present wherewithal was not puffery, (2) the economic loss rule does not apply to this allegedly fraudulent statement, (3) the fraud claim is distinguishable from plaintiff's contract claim, and (4) the complaint has adequately plead scienter.

1. McKelvey's Statement Concerning PJI's Present Wherewithal are Actionable

EED alleges that McKelvey made three fraudulent statements at the 2001 New York Yacht Club meeting: (1) that PJI "would be building the 'greatest boats'" (Compl.¶ 14); (2) that PJI "had the capability and wherewithal to properly construct the yacht sought by Goldman in a timely manner" (id.); and (3) that McKelvey "was personally 'committed to PJI.'" (id.). McKelvey argues that all three of these statements are non-actionable puffery.

It is well established in New York that "a seller's mere general commendations of the product sought to be sold, commonly known as 'dealer's talk,' 'sales talk,' or 'puffery,' do not amount to actionable misrepresentations[.]" 60A William H. Danne, Jr., N.Y. Jur. § 34 (2d ed. 2003) ("N.Y.Jur.") (collecting cases). However, the doctrine of non-actionability for puffery does not apply "to false representations of material facts which are in their nature calculated to deceive and are made with the intent to deceive." 60A N.Y. Jur. § 34 (collecting cases).

The first and third of the statements allegedly made by McKelvey during the course of the 2001 New York Yacht Club meeting are not actionable because they are mere expressions of advertising, a well recognized form of puffery. See, e.g., Quasha v. American Natural Beverage Corp., 171 A.D.2d 537, 567 N.Y.S.2d 257 (1st Dep't 1991) (dismissing fraud claim where documents withheld from plaintiff "contain nothing more

than speculation, advertising puffery and the defendants' hopes for the future of the company"); *Simon v. Cunard Line Ltd.*, 75 A.D.2d 283, 288, 428 N.Y.S.2d 952, 955 (1st Dep't 1980) (representation that the QEII was "the greatest ship in the world" was "mere puffing and not actionable").

In contrast, the second of the three statements involves McKelvey's alleged misrepresentation as to the present condition of defendant PJI's finances and operations. As such, this statement is not mere puffery. It is actionable as fraud. See e.g., *Cohen v. Koenig*, 25 F.3d 1168, 1172 (2d Cir.1994) (stating that under New York law, defendant's alleged intentional overstatements of its net income and the value of its current and capital assets were actionable as fraud); *Channel Master Corp.*, 4 N.Y.2d 403, 407, 176 N.Y.S.2d 259, 262 (1958) (holding that defendant's allegedly false statement that it had the capacity to sell to plaintiff 400,000 pounds of aluminum was actionable as fraud).

*9 The cases cited by the defendants to support their puffery argument all involved types of statements that are analytically distinct from the one at issue here. One group of cases cited by the defendants addressed the actionability of general claims made in the context of advertisements to the general public. See, e.g., *Sample, Inc. v. Pendleton Woolen Mills, Inc.*, 704 F.Supp. 498, 505 (S.D.N.Y.1989) (defendant's advertisement offering "relationships that last a lifetime" constituted non-actionable puffery); *Serbalik v. General Motors Corp.*, 246 A.D.2d 724, 726 667 N.Y.S.2d 503, 504 (3d Dep't 1998) (defendant's advertisement claiming that car "would perform excellently" constituted mere puffery); *Scaringe v. Holstein*, 103 A.D.2d 880, 881, 477 N.Y.S.2d 903, 904 (3d Dep't 1984) (defendant's advertisement claiming that car was in "excellent condition" constituted puffery). A second group of cases cited by the defendants holds that projections of future earnings are not generally actionable. See *Rombach v. Chang*, 355 F.3d 164, 174 (2d Cir.2004) (holding that a financial analyst's earning projections were non-actionable under federal securities law); *Shields v. Citytrust*

Bancorp., Inc., 25 F.3d 1124, 1129 (2d Cir.1994) (stating that under federal securities law, forward-looking statements are not actionable merely because they turn out to be misguided); *Highlands Insurance Co. v. PRG Brokerage, Inc.*, No. 01 Civ. 2272(GBD), 2004 U.S. Dist. LEXIS 83, at *12 (S.D.N.Y. Jan. 5, 2004) (holding that defendants' promises concerning future profitability are not actionable as fraud under New York law); *Sheth v. New York Life Insurance Co.*, 273 A.D.2d 72, 74, 709 N.Y.S.2d 74, 75 (1st Dep't 2000) (holding that claims based on "conclusory" statements and opinions of "future expectations" are not actionable as fraud); *Quasha*, 171 A.D.2d 537, N.Y.S.2d 257 (holding that statements concerning "hopes for the future of the company" are not actionable as fraud). [FN6]

FN6. Defendants also cite two cases involving omissions of facts, see *Elghanian v. Harvey*, 249 A.D.2d 206, 206-07 671 N.Y.S.2d 266 (1st Dep't 1998); *Lesavoy v. Lane*, 304 F.Supp.2d 520, 530 (S.D.N.Y.2004), in support of an argument that McKelvey had no duty to disclose PJI's financial difficulties to Goldman/EED. Regardless of whether such a duty existed, this argument ignores the fact that EED's fraud claim is premised on McKelvey's affirmative misrepresentations. Furthermore, once McKelvey made claims as to PJI's wherewithal, he was Obligated not to omit material facts. See *Banque Arabe Et Internationale D'Investissement v. MD. Nat'l Bank*, 57 F.3d 146, 155 (2d Cir.1995) ("In business negotiations, an affirmative duty to disclose material information may arise from the need to complete or clarify one party's partial or ambiguous statement.").

In short, McKelvey's specific misrepresentations concerning the wherewithal of PJI is a proper basis for a fraud claim.

2. The Fraud Claim Does Not Violate the Economic Loss Rule

New York's economic loss rule restricts "plaintiffs who have suffered 'economic loss,' but not personal or property injury, to an action for the benefits of their bargain. If the damages suffered are of the type remediable

in contract, a plaintiff may not recover in tort." *Carmania Corp., N.V. v. Hambrecht Terrell Int'l*, 705 F.Supp. 936, 938 (S.D.N.Y.1989); see also *Schiavone Constr. Co. v. Elgood Mayo Corp.*, 56 N.Y.2d 667, 669, 436 N.E.2d 1322, 1323, 451 N.Y.S.2d 720, 721 (1982) (holding that under the economic loss rule, if an alleged product malfunction is alleged to have caused purely economic loss, then the end-purchaser is limited to contract claims against the manufacturer and may not seek damages in tort).

McKelvey argues that pursuant to the economic loss rule, plaintiff cannot assert a fraud claim alongside a contract claim unless personal injury or property damage has been alleged. In support of this premise, McKelvey relies heavily on a single decision from this district, *Orlando v. Novurania of Am., Inc*, 162 F.Supp.2d 220, 225 (S.D.N.Y.2001). In *Orlando*, the disappointed buyer of a boat that developed cracks in its hull sued the seller/manufacturer, asserting, *inter alia*, both contract and fraud claims. With regard to the fraud claim, the plaintiff alleged that the defendant's false representations prior to the time that the sales contract was entered induced the purchase of the boat. The *Orlando* court held that plaintiff's fraud claim, which it determined to be "separate and distinct" from the contract claim, *id.* at 225, was nonetheless barred by New York's economic loss rule. However, the *Orlando* court failed to identify any New York cases addressing the applicability of the economic loss rule to a fraud claim. Rather, it reasoned that since New York courts had failed to carve out any applicable exceptions to the rule, it must be interpreted to bar a fraud claim for pure economic loss. *Id.* at 226.

*10 This Court has previously declined to adopt the *Orlando* court's reasoning, holding instead that "[i]n the absence of any articulation to the contrary by the New York courts, the economic loss doctrine will not be presumed to extend to fraud claims." *CompuTech Int'l Inc. v. Compaq Computers Corp.*, No. 02 Civ. 2628(RWS), 2004 WL 1126320 at *10 (S.D.N.Y. May 21, 2004) (observing that "[t]he parties have not cited to

any case in the New York courts applying the economic loss doctrine to an intentional tort, nor has one been found by the Court. [citations omitted]"). McKelvey has failed to point to any such cases, [FN7] and this Court's renewed canvas of New York cases once again reveals no authority for the application of the economic loss doctrine to claims, such as this one, that sound in fraud.

FN7. The cases cited by defendants on this point all stand for the uncontroversial (and entirely irrelevant) proposition that the economic loss rule prevents the assertion of negligence or strict liability claims where plaintiff's injury is purely economic. See *PPI Enterprises (U.S.), Inc. v. Del Monte Foods Co.*, No. 99 Civ. 3794(BSJ), 2003 WL 22118977 at * 27 (S.D.N.Y. Sept. 11, 2003) (dismissing negligence claim for failure to claim personal injury or property damage); *Robehr Films, Inc. v. American Airlines, Inc.*, No. 85 CIV. 1072(RPP), 1989 WL 111079 (S.D.N.Y. Sept. 19, 1989) (denying motion to amend complaint to add negligence claim alleging economic loss only); *Carmania Corp.*, 705 F.Supp. at 939 (dismissing malpractice and negligent misrepresentation claims based on pure economic loss); *Schiavone*, 56 N.Y.2d at 669, 436 N.E.2d at 1323, 451 N.Y.S.2d at 721 (reversing grant of leave to amend to add strict liability claim for pure economic injury).

Moreover, as discussed in greater detail below, New York courts have routinely permitted fraud and contract claims to proceed in tandem for the purpose of recovering pure economic loss. See, e.g., *Deerfield Comm. Corp. v. Cheseborough-Ponds, Inc.*, 68 N.Y.2d 954, 956, 502 N.E.2d 1003, 1004, 510 N.Y.S.2d 88, 89 (1986) (affirming lower court's denial of motion to dismiss fraudulent concealment counterclaim where another counterclaim sounded in contract and the only alleged damages were purely economic); *First Bank of Americas v. Motor Car Funding, Inc.*, 257 A.D.2d 287, 291, 690 N.Y.S.2d 17, 21-22 (1st Dep't 1999); *Steigerwald v. Dean Witter Reynolds, Inc.*, 107 A.D.2d 1026, 1027, 486 N.Y.S.2d 516, 518 (4th Dep't 1985).

Based on the foregoing, the Court concludes that the economic loss rule presents no bar to the assertion of EED's fraud claim.

3. The Fraud and Breach of Contract Claims are Distinguishable

Defendants argue that Plaintiff's tort claims should be dismissed because the fraud claim is indistinguishable from the breach of guaranty claim. Under New York law, a fraud cause of action generally does not arise where the alleged fraud merely relates to a breach of contract. *Salvador v. Uncle Sam's Auctions & Realty, Inc. ex rel. Passonno*, 307 A.D.2d 609, 611, 763 N.Y.S.2d 360, 362 (3d Dep't 2003); *River Glen Assocs., Ltd. v. Merrill Lynch Credit Corp.*, 295 A.D.2d 274, 275, 743 N.Y.S.2d 870, 871 (1st Dep't 2002); *Bazerman v. Edwards*, 295 A.D.2d 115, 742 N.Y.S.2d 822 (1st Dep't 2002). However, this general rule is subject to the corollary that "a party who has breached a contract may be charged with separate tort liability for fraud arising from a breach of duty that is distinct from, or in addition to, the breach of contract." 60A N.Y. Jur. § 7 (citing *Freedman v. Pearlman*, 271 A.D.2d 301, 304 706 N.Y.S.2d 405, 408 (1st Dep't 2000); *Licette Music Corp. v. A.A. Records, Inc.*, 196 A.D.2d 467, 601 N.Y.S.2d 297, 297-98 (1st Dep't 1993); *Steigerwald*, 107 A.D.2d at 1027, 486 N.Y.S.2d at 518 (4th Dep't 1985); *Bernstein v. Polo Fashions, Inc.*, 55 A.D.2d 530, 531, 389 N.Y.S.2d 368, 370 (1st Dep't 1976)).

*11 In particular, it is well established that a misrepresentation of present fact which is the inducement for a contract is collateral to said contract, and can support a separate fraud claim. See, e.g., *Deerfield*, 68 N.Y.2d at 956, 502 N.E.2d at 1004, 510 N.Y.S.2d at 89; see also *Primavera Familienstiftung v. Askin*, 130 F.Supp.2d 450, 491, reconsidered on other grounds, 137 F.Supp.2d 438 (S.D.N.Y.2001) (stating that "a false representation that induces one to enter into a contract supports a fraud claim"); *First Bank of Americas v. Motor Car Funding*, 257 A.D.2d 287, 292, 690 N.Y.S.2d 17, 21 (1st Dep't 1999) ("[A] misrepresentation of present facts is collateral to the contract (though it may have induced the plaintiff to sign the contract) and therefore involves a separate breach of duty.").

Here, the contract claim seeks to recover the

damages sustained by EED as a result of the breaches of the Construction Agreement by PJI, based on the Guaranty executed by PJAC. (See Compl. ¶¶ 36-38). In contrast, the fraud claim seeks to recover the damages EED has allegedly sustained as a result of being induced to enter into the Construction Agreement by McKelvey's alleged misrepresentations of fact concerning the present conditions of PJI's finances and operations. These statements, which allegedly were made to induce the contract, are collateral to the actual terms of the contract. Furthermore, the damages that EED seeks to recover in its fraud claim are distinct from the "benefit of the bargain" damages sought in the contract claim. While there is no specification of these damages in the complaint, no such specification is required. See *G-I Holdings Inc. v. Baron & Budd*, 179 F.Supp.2d 233, 269 (S.D.N.Y.2001). [FN8]

FN8. In *G-I Holdings*, this Court stated that, to sustain a claim for fraudulent inducement alongside a claim for breach of contract, one must plead any one of the following: (i) a legal duty separate from the duty to perform under the contract; or (ii) a fraudulent misrepresentation collateral or extraneous to the contract; or (iii) special damages that are caused by the misrepresentation and unrecoverable as contract damages. 179 F.Supp.2d at 269 (emphasis added) (citing *Blank v. Baronowski*, 959 F.Supp. 172, 180 (S.D.N.Y.1997)).

4. The Fraud Claim Satisfies Rule 9(b)

Fed.R.Civ.P. 9(b) states that "in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." The Second Circuit "has read Rule 9(b) to require that a complaint '(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent.'" *Rombach*, 355 F.3d at 170 (quoting *Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1175 (2d Cir.1993)).

With respect to the alleged misrepresentations concerning PJI's present

financial and operational capacity, McKelvey does not dispute that the complaint satisfies the first three requirements set forth in Mills. Rather, McKelvey contends only that the complaint does not meet the fourth requirement, arguing that EED has not alleged facts that "give rise to a strong inference of fraudulent intent," as required by Second Circuit decisions. See, e.g., *San Leandro Emergency Med. Group Profit Sharing Plan v. Philip Morris Cos.*, 75 F.3d 801, 812 (2d Cir.1996). However, the "strong inference" requirement is tempered by the recognition that a plaintiff "cannot be expected to plead a defendant's actual state of mind[,] and thus need not allege the defendant's requisite intent with any great specificity. *Chill v. General Elec. Co.*, 101 F.3d 263, 267 (2d Cir.1996); *Cohen*, 25 F.3d at 1173 (stating that under Rule 9(b), (" 'plaintiffs have the burden of pleading circumstances that provide at least a minimal factual basis for their conclusory allegations of scienter")) (quoting *Connecticut National Bank v. Fluor Corp.*, 808 F.2d 957, 962 (2d Cir.1987)); *Jordan (Bermuda) Inv. Co. v. Hunter Green Invs. Ltd.*, 154 F.Supp.2d 682, 692 (S.D.N.Y.2001) (stating that "Rule 9(b) requires that a plaintiff plead the intent element of fraud only in general terms").

*12 Although EED has suggested in its papers that McKelvey intended a Ponzi scheme (EED's Memorandum of Law, p. 13), that allegation is absent from the complaint. However, a plaintiff can establish a strong inference of fraudulent intent "by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness." *Chill*, 101 F.3d at 267 (quoting *Shields*, 25 F.3d at 1128). Here, the complaint contains specific allegations (1) that PJI was experiencing financial difficulties and undercapitalization at the time of McKelvey's meeting with Goldman, and (2) that McKelvey had knowledge of such difficulties. (Compl. ¶¶ 11-12, 15). Such allegations satisfies the scienter pleading requirement. See *Degulis v. LXR Biotechnology, Inc.*, 928 F.Supp. 1301, 1312 (S.D.N.Y.1996) (holding that the scienter pleading requirement was satisfied simply by alleging that the defendants were directors of

companies that disseminated misleading financial information); *Sperber Adams Assoc. v. JEM Management Assoc. Corp.*, No. 90 Civ. 7405(JSM), 1992 WL 138344 at *4 (S.D.N.Y. Jun. 4, 1992) (holding that scienter was adequately plead where private placement memoranda and investment summaries were alleged to contain material omissions and defendants were alleged to have prepared such documents) (citing *ITT v. Cornfeld*, 619 F.2d 909, 923-24 (2d Cir.1980) (holding that scienter was sufficiently plead where the complaint included both general allegations of knowledge of a fraud and specific allegations of misrepresentations)).

Therefore, EED has adequately pled a fraud claim against McKelvey arising out of the statement relating to PJI's present financial and operational wherewithal.

E. The Negligent Misrepresentation Claim Is Dismissed

Under New York law, the elements of a claim for negligent misrepresentation are that:

- (1) the defendant had a duty, as a result of a special relationship, to give correct information;
- (2) the defendant made a false representation that he or she should have known was incorrect;
- (3) the information supplied in the representation was known by the defendant to be desired by the plaintiff for a serious purpose;
- (4) the plaintiff intended to rely and act upon it; and
- (5) the plaintiff reasonably relied on it to his or her detriment.

Greenberg v. Chrust, 198 F.Supp.2d 578, 584 (S.D.N.Y.2002) (citing *Hydro Investors, Inc. v. Trafalgar Power Inc.*, 227 F.3d 8, 20 (2d Cir.2000)).

Defendants have moved for dismissal of EED's negligent misrepresentation claim on the grounds that (1) there was no privity or near privity between McKelvey and EED and (2) that there was no special relationship between these parties.

The New York Court of Appeals has held that "a special duty giving rise to a negligent

misrepresentation claim must arise out of a contract or some ... relationship approaching ... privity of contract." *Id.* (citing *Parrot v. Coopers & Lybrand, L.L.P.*, 95 N.Y.2d 479, 483 718 N.Y.S.2d 709, 711 741 N.E.2d 506, 508 (2000)). The Court of Appeals has set forth the following criteria for determining the existence of a "near privity" relationship: (1) defendant's awareness that the statement in question was to be used for a particular purpose, (2) reliance on the statement by some identifiable parties in furtherance of that purpose, and (3) some conduct linking defendant to the parties and evincing defendant's awareness of their reliance. *Ossining Union Free School Dist. v. Anderson*, 73 N.Y.2d 417, 425, 541 N.Y.S.2d 335, 339; 539 N.E.2d 91, 95 (1989). Applying this criteria to EED's allegations concerning the meeting between McKelvey and Goldman at the New York Yacht Club, EED has sufficiently plead the existence of a near-privity relationship. It should be noted that the case cited by defendants in support of the proposition that EED has failed to satisfy this pleading requirement is inapposite because it addresses the separate question of whether a plaintiff had come forward with sufficient proof to avoid summary judgment. See *Security Pac. Bus. Credit, Inc. v. Peat Marwick Main & Co.*, 79 N.Y.2d 695, 705, 586 N.Y.S.2d 87, 92, 597 N.E.2d 1080, 1085 (1992).

*13 The next step in New York's negligent misrepresentation analysis is to determine whether this near-privity relationship imparted a duty on McKelvey to provide correct information. Under New York law, a statement made in the context of an arms-length commercial transaction, without more, cannot give rise to such a duty. See *Kimmell v. Schaefer*, 89 N.Y.2d 257, 263, 652 N.Y.S.2d 715, 719, 675 N.E.2d 450, 454 (1996). [FN9] Rather, an arms-length commercial transaction can only give rise to a negligent misrepresentation claim if a special relationship exists between the parties such that plaintiff's reliance on defendant's representation was justifiable. *Id.* A special relationship can arise where the defendant either (1) possesses "unique or specialized

expertise" or (2) occupies a "special position of confidence and trust" with the injured party. *Id.*

FN9. The *Kimmell* court made clear that the vast majority of arms-length commercial transactions, which are comprised of "casual statements and contacts" will not give rise to negligent misrepresentation claims. See *Kimmell*, 89 N.Y.2d at 263, 652 N.Y.S.2d at 719, 675 N.E.2d at 454. Since *Kimmell*, New York courts have followed the general rule of non-actionability for negligent misstatements made in the context of arms-length business transactions. See, e.g., *Sheridan v. Trustees of Columbia Univ.*, 296 A.D.2d 314, 316, 745 N.Y.S.2d 18, 19 (1st Dep't 2002) (negligent misrepresentation claim dismissed "since, at the time of the alleged misrepresentation, the parties were clearly acting at arm's length"), leave to appeal denied, 99 N.Y.2d 505, 755 N.Y.S.2d 711, 785 N.E.2d 733, cert. denied, 539 U.S. 904 (2003); *WIT Holding Corp. v. Klein*, 282 A.D.2d 527, 529, 724 N.Y.S.2d 66, 68 (2d Dep't 2001) (modifying court order to dismiss negligent misrepresentation claim on grounds that arm's length business relationship had not given rise to special relationship.).

EED has relied on *Kimmell* as authority to establish that McKelvey possessed unique and special expertise with regard to the PJI/EED transaction. The *Kimmell* court upheld a judgment against a corporate officer/director on the grounds that he made negligent misrepresentations to investors that he had solicited into a limited partnership. *Kimmell*, 89 N.Y.2d at 266, 652 N.Y.S.2d at 720, 675 N.E.2d at 455. The false statements at issue were a series of written and oral profit projections provided by the defendant to the plaintiffs. *Kimmell*, 89 N.Y.2d at 261, 652 N.Y.S.2d at 717-18, 675 N.E.2d at 452-53. The defendant apparently urged the plaintiffs on multiple occasions to rely on the accuracy of these projections. *Id.*

The *Kimmell* defendant was an attorney and certified public accountant ("CPA") who had formerly served as chief financial officer ("CFO") for Pepsico. *Id.* During the relevant time period, he served as chair and CFO of Cogenic Energy Systems, Inc ("CESI"). *Id.*

Furthermore, the plaintiffs knew that defendant had been the general partner in similar previous ventures and apparently assumed that he possessed unique business and operational knowledge concerning the venture that the plaintiffs had been recruited into. *Kimmell*, 89 N.Y.2d at 265, 652 N.Y.S.2d at 719, 675 N.E.2d at 454.

Based on these facts--i.e., defendant's calculated and repeated efforts to disseminate his statements to the plaintiffs, his efforts to induce reliance on these statements, and plaintiffs' knowledge of defendant's unique professional skills and business experience--the *Kimmell* court determined that a special relationship had arisen between the parties.

McKelvey is not alleged to have any special professional training or past business experience that would have given him the type of unique expertise possessed by the *Kimmell* defendant. The complaint does not allege that he was personally involved in the operations of PJI, or that he claimed to have expertise in the design, construction, or financing of yachts or any aspect of yacht-building. There is no allegation that EED believed that McKelvey had unique professional ability or expertise. Furthermore, McKelvey's alleged casual statement to Goldman is analytically distinct from the *Kimmell* defendant's communications campaign, which was calculated to induce reliance.

*14 Because no special relationship has been adequately alleged, the negligent misrepresentation claim is dismissed.

F. The Motion To Transfer Is Denied

The PJAC motion, pursuant to 28 U.S.C. § 1404(a), to transfer this action to the Eastern District of Wisconsin, where PJI constructed the yacht for Goldman, raises the customary issue of balancing:

(1) the plaintiff's choice of forum; (2) the locus of the operative facts; (3) the convenience and relative means of the parties; (4) the convenience of witnesses; (5) the availability of process to compel the

attendance of witnesses; (6) the location of physical evidence, including documents; (7) the relative familiarity of the courts with the applicable law; (8) the interests of justice, including the interests of trial efficiency.

Billings v. Commerce One, Inc., 186 F.Supp.2d 375, 377 (S.D.N.Y.2002). It appears that as between these parties, the balance tips slightly in PJAC's favor at this early stage of the action. However, since the fraud claim against McKelvey remains and since McKelvey has not sought transfer, such transfer is not warranted. See *Chrysler Credit Corp. v. Country Chrysler, Inc.*, 928 F.2d 1509, 1518 (2d Cir.1991) (stating that "[s]ection 1404(a) only authorizes the transfer of an entire action, not individual claims.").

The motion to transfer is therefore denied.

Conclusion

The motion to dismiss the Guaranty cause of action against PJAC for want of personal jurisdiction is denied at this time with leave to move for summary judgment after jurisdictional discovery has been completed. The motion to dismiss the veil piercing/alter ego cause of action is granted. The motion to dismiss the fraud cause of action against McKelvey as to his statement concerning PJI's wherewithal is denied but granted as to the remaining statements. The motion to dismiss the negligent misrepresentation cause of action is granted. The motion to transfer is denied.

EED is granted leave to replead within twenty (20) days.

It is so ordered.

2004 WL 2348093 (S.D.N.Y.)

END OF DOCUMENT

30

United States District Court,
S.D. New York.

John H. ELLIOT, Plaintiff,
v.
James L. NELSON, Orbit Capital
Corporation, and Orbitex Management, Inc.,
Defendants.

No. 03 Civ. 5653(VM).

Jan. 29, 2004.

Background: Fired capital corporation executive filed state court action against corporation and director under theories of negligent misrepresentation and promissory estoppel, alleging that director lured executive into accepting position with false assurance that corporation was close to raising \$40 million venture capital fund. Action was removed to federal court on basis of diversity jurisdiction. Defendants moved for summary judgment.

Holdings: The District Court, Marrero, J., held that: (1) employer did not engage in negligent misrepresentation, as alleged representations were not false when made and executive's alleged reliance on those representations was unreasonable, and (2) executive also could not prevail on promissory estoppel theory.

Motion granted.

West Headnotes

[1] Fraud 13(3)
184k13(3)

Under New York law, elements for negligent misrepresentation claim are that (1) defendant had duty, as result of special relationship, to give correct information, (2) defendant made false representation that he or she should have known was incorrect, (3) information supplied in representation was known by defendant to be desired by plaintiff for serious purpose, (4) plaintiff intended to rely and act upon it, and (5) plaintiff reasonably relied on it to his or her detriment.

[2] Fraud 13(3)
184k13(3)

[2] Fraud 23
184k23

Under New York law, director of capital corporation did not engage in negligent misrepresentation to lure executive into accepting position with false assurance that corporation was close to raising \$40 million venture capital fund, as alleged representations were not false when made and executive's alleged reliance on those representations was unreasonable; director and corporation took steps toward raising money such as preparing detailed private placement memorandum under consultation with elite Manhattan firm, distributing that memorandum to many potential investors and hiring several employees thought to have good contacts with potential investors, and executive's employment contract specifically contemplated possibility that full amount of fund would not be raised.

[3] Fraud 13(3)
184k13(3)

Although promises of future conduct are not actionable under New York law as negligent misrepresentation, promise made with preconceived and undisclosed intention of not performing it constitutes misrepresentation of material existing fact.

[4] Federal Civil Procedure 2539
170Ak2539

Party may not create issue of fact by submitting affidavit in opposition to summary judgment motion that, by omission or addition, contradicts affiant's previous deposition testimony. Fed.Rules Civ.Proc.Rule 56(f), 28 U.S.C.A.

[5] Fraud 23
184k23

Under New York law, where there is meaningful conflict between written contract and prior oral representations, party will not be deemed to have justifiably relied on the prior oral representations.

[6] Estoppel 85

156k85

Reasonable reliance is necessary element of promissory estoppel.

***285** Jeffrey J. Mirman, Farmington, CT, for Plaintiff.

Daniel L. Schwartz, Day, Berry & Howard, L.L.P., Stamford, CT, for Defendants.

DECISION AND ORDER

MARRERO, District Judge.

Plaintiff John Elliot ("Elliot") alleges that defendant James Nelson ("Nelson"), a director of defendant Orbit Capital Corporation ("Orbit"), lured him into accepting an executive position at Orbit with the false assurance that Orbit was close to ***286** raising a \$40 million venture capital fund. Orbit never raised the funds and ultimately fired Elliot, who now seeks to recover damages against Nelson, Orbit, and Orbitex Management, Inc., ("Orbitex," and collectively, "Defendants") under the theories of negligent misrepresentation and promissory estoppel. Defendants move for summary judgment. The motion is granted.

I. BACKGROUND [FN1]

FN1. The factual summary derives from (1) the complaint; (2) Elliot's Local Rule 56.1 statement ("Elliot 56.1"); and (3) Defendants' Local Rule 56.1 statement, as well as the affidavits and exhibits attached to those documents. Except where necessary, the Court will not cite these sources further.

Orbit was a venture capital firm that invested in Internet start-up companies. Beginning in February 1999, Paul Stefunek ("Stefunek"), an executive recruiter, began discussing with Elliot the possibility of placing him in an executive position with Orbit. Stefunek gave Elliot a "position profile" for the position of General Partner. That document stated that Orbit was affiliated with "the Orbitex Group of Companies," which had "over \$1.2 billion under management." Elliot 56.1 Ex. B. It also stated that Orbit had "potential to access over \$400 million in

venture funding." *Id.* Stefunek, relying on Nelson's representations to him, told Elliot that Orbit was close to raising a \$40 million venture capital fund.

Elliot and Nelson met on June 9, 1999, and Nelson reassured Elliot that Orbit was close to raising the \$40 million. Nelson also highlighted the intimate relationship between Orbit and Orbitex (which apparently had access to vast capital), leading Elliot to believe that there would be no problem raising the money. On June 29, Nelson faxed Elliot an employment agreement, under which Orbit would have paid Elliot an annual salary of \$200,000. Orbit rescinded the offer the next day, however, because Orbitex officials did not want Orbit to fill the position until the venture capital fund was raised. Elliot met with Nelson again on July 2, 1999, to see about reviving the possibility of his employment. Nelson again assured Elliot that there would be no problem raising the money. Elliot agreed to accept a reduced salary of \$100,000, which would be elevated to the original \$200,000 when the venture capital fund was raised. By entering the employment agreement with Orbit, Elliot passed up at least one other firm offer of employment with another internet company.

Elliot's employment contract permitted either Elliot or Orbit to terminate the agreement, with 30 days' notice, if the venture capital fund was not raised within five months of the contract date. Under those circumstances, the contract obligated Orbit to pay Elliot 60 days' salary and benefits. Five months later, Orbit had not raised the fund and exercised its option to terminate its employment agreement with Elliot.

Elliot brought this lawsuit in Connecticut state court, seeking damages against Defendants on the basis of negligent misrepresentation and promissory estoppel. Defendants removed the case to federal court on the basis of diversity jurisdiction, and the District Court in Connecticut transferred the case to this district. Defendants now move this Court for summary judgment on all claims.

II. STANDARD FOR A SUMMARY JUDGMENT MOTION

The Court may grant summary judgment only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party *287 is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The Court must first look to the substantive law of the action to determine which facts are material; "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Even if the parties dispute material facts, summary judgment will be granted unless the dispute is "genuine." *Id.* at 249, 106 S.Ct. 2505. "The mere existence of a scintilla of evidence in support of the [non-moving party's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-moving party]." *Id.* at 252, 106 S.Ct. 2505.

Throughout this inquiry, the Court must view the evidence in the light most favorable to the non-moving party and must draw all reasonable inferences in favor of that party. See *Hanson v. McCaw Cellular Communications, Inc.*, 77 F.3d 663, 667 (2d Cir.1996).

III. DISCUSSION

[1][2] "Under New York law, the elements for a negligent misrepresentation claim are that (1) the defendant had a duty, as a result of a special relationship, to give correct information; (2) the defendant made a false representation that he or she should have known was incorrect; (3) the information supplied in the representation was known by the defendant to be desired by the plaintiff for a serious purpose; (4) the plaintiff intended to rely and act upon it; and (5) the plaintiff reasonably relied on it to his or her detriment." *Hydro Investors, Inc. v. Trafalgar Power Inc.*, 227 F.3d 8, 20 (2d Cir.2000). Elliot's negligent misrepresentation claim

fails as a matter of law because, first, Defendants' alleged representations were not false when made, and, second, Elliot's alleged reliance on those representations was unreasonable.

[3] Although "[p]romises of future conduct are not actionable as negligent misrepresentations," *Murray v. Xerox Corp.*, 811 F.2d 118, 123 (2d Cir.1987) (applying New York law), a promise "made with a preconceived and undisclosed intention of not performing it ... constitutes a misrepresentation of 'a material existing fact.'" *Sabo v. Delman*, 3 N.Y.2d 155, 164 N.Y.S.2d 714, 143 N.E.2d 906, 908 (1957) (citation omitted). Here, Elliot casts Defendants' assurances that Orbit would raise the venture capital fund as assertions that Defendants intended to try to raise the money. These assurances were false, according to Elliot, because Defendants actually made no efforts to raise the fund, thereby indicating that Defendants never intended to raise any money at the time they were pursuing Elliot. Elliot highlights the fact that Orbit did not actually raise any money towards the venture capital fund, nor did Orbit actually create the legal entity which would have held the money.

The Court disagrees with Elliot's argument because the uncontradicted record evidence demonstrates that Defendants did take steps, although ultimately unfruitful, towards raising money. For instance, Orbit prepared a detailed private placement memorandum under consultation with an elite Manhattan law firm, and Nelson distributed that memorandum to many potential investors. Nelson also hired several employees whom he thought would have good contacts with potential investors. In light of this evidence, no reasonable juror would conclude that Orbit had lured Elliot into the elaborate and expensive ruse of pretending to raise capital while intending not to do so, for no apparent purpose.

*288 [4] Elliot is correct that alleged representations that Orbit was "close" to raising the money would be actionable in the ordinary case. That representation would

suggests that Orbit had raised at least some funds towards the \$40 million goal. However, this allegation directly contradicts Elliot's deposition testimony from eight months earlier:

Q: And did Mr. Nelson make any representations to you on July 2, 1999 as to what the current status was of the efforts to raise the Venture Capital Fund?

A: Not that I recall.

Q: Did you have any reason to believe that as of July 2, 1999 any money had been raised for the Venture Capital Fund?

A: I had no idea how much money was raised at that time for the Venture Capital Fund.

Q: So it's fair to say that you didn't know if any money had been raised as of July 2, 1999.

A: Yes.

See Reply in Support of Defendants' Motion for Summary Judgment, Ex. A at 174-75. Elliot has not identified anywhere in his deposition where any Defendant told him that Orbit was "close" to raising the venture capital fund, or otherwise indicated to him any particular amount of money which had actually been raised. A "party may not create an issue of fact by submitting an affidavit in opposition to a summary judgment motion that, by omission or addition, contradicts the affiant's previous deposition testimony." Hayes v. New York City Dept. of Corr., 84 F.3d 614, 619 (2d Cir.1996); see also Perma Research & Dev. Co. v. Singer Co., 410 F.2d 572, 578 (2d Cir.1969) ("If a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact.").

[5] Alternatively, the Court concludes that any alleged reliance upon the Defendants' statements would be unreasonable as a matter of law. Elliot certainly should not have relied on assurances that Orbit would raise the full amount of the venture capital fund because his employment contract specifically contemplated the possibility that it would not. Where there is a "meaningful" conflict

between a written contract and prior oral representations, a party will not be deemed to have justifiably relied on the prior oral representations. Bango v. Naughton, 184 A.D.2d 961, 584 N.Y.S.2d 942, 944 (3d Dep't 1992) ("[T]he conflict between the provisions of the written contract and the oral representations negates the claim of reliance upon the latter."). To the extent that Elliot claims to have justifiably relied on the implicit assertion that Defendants intended to raise money, the Court, for the same reasons discussed above, concludes that the uncontradicted evidence demonstrates that Defendants did intend to raise the money.

[6] It follows that Elliot's claim for relief under a theory of promissory estoppel must fail, as well. Reasonable reliance is "a necessary element of promissory estoppel," Tri-Land Properties, Inc. v. 115 West 28th Street Corp., 238 A.D.2d 206, 656 N.Y.S.2d 863, 864 (1st Dep't 1997), and, for the reasons discussed, Elliot's alleged reliance was unreasonable as a matter of law.

IV. ORDER

For the reasons stated, it is hereby

ORDERED that the motion of defendants James Nelson, Orbit Capital Corporation, and Orbitex Management, Inc. (collectively, *289 "Defendants") for summary judgment is granted and the case is dismissed with prejudice. The Clerk of Court is directed to enter judgment on Defendants' behalf.

The Clerk of Court is directed to close this case.

SO ORDERED.

301 F.Supp.2d 284

END OF DOCUMENT

31

United States District Court,
S.D. New York.

Claudia ESTEVEZ-YALCIN, individually and
as parent and natural guardian of
N.M., an infant, and J.M., an infant,
Plaintiffs,

v.

The CHILDREN'S VILLAGE, Westchester
County Health Care Corporation, and Samuel
Toffel, Defendants.

No. 01 Civ. 8784(JGK).

Aug. 11, 2004.

Background: Parent brought action alleging that her children had been sexually abused by volunteer of county juvenile treatment and rehabilitation centers. County moved for summary judgment.

Holdings: The District Court, Koeltl, J., held that: (1) county did not negligently hire volunteer; (2) county did not negligently retain or supervise volunteer; and (3) county was not liable for sexual abuse committed after victim was transferred from its facility.

Motion granted.

West Headnotes

[1] Infants 273
211k273

Under New York law, failure of county health care facility to conduct background check on volunteer before hiring him at its juvenile treatment and rehabilitation center did not amount to negligent hiring, even though volunteer later sexually molested children he met at center, absent evidence that routine background check would have revealed that volunteer had propensity to harm children.

[2] Infants 273
211k273

Under New York law, county health care facility did not have sufficient notice of volunteer's dangerous propensities towards children to render it liable for negligent retention or supervision of volunteer at

juvenile treatment and rehabilitation center, even though volunteer on one occasion played with children other than those with whom staff member had told him to play, and volunteer later sexually molested children he met at center, where children never told anyone about inappropriate physical contact between him and volunteer at center, and there was no indication that anyone saw, or should have seen, that physical contact.

[3] Infants 273
211k273

Under New York law, county health care facility was not liable for sexual abuse committed by former volunteer at its juvenile treatment and rehabilitation center, even though volunteer met victims at center, where volunteer's abuse of victims occurred after they had been transferred to another facility, and after volunteer had quit work at center to work at other facility.

[4] Infants 273
211k273

Under New York law, county health care facility did not negligently misrepresent that volunteer at its juvenile treatment and rehabilitation center was safe and commendable person, and thus could not be held liable on that basis for volunteer's subsequent sexual abuse of children he met at center, absent evidence that facility had any reason to know that volunteer had propensity for injurious conduct, or that it knew children's mother would use any of its representations to give volunteer access to children.

[5] Federal Civil Procedure 2553
170Ak2553

Party resisting summary judgment on grounds that party needs additional discovery must submit affidavit showing: (1) what facts are sought to resist motion and how they are to be obtained, (2) how those facts are reasonably expected to create genuine issue of material fact, (3) what effort affiant has made to obtain them, and (4) why affiant was unsuccessful in those efforts. Fed.Rules Civ.Proc.Rule 56(f), 28 U.S.C.A.

*171 David Gilman, Gilman & Schneider, New York City, for plaintiffs.

Gregory F. Meehan, General Counsel, Elizabeth T. Hill, Sr. Assistant General Counsel, Office of the General Counsel, Hawthorne, NY, for defendants.

OPINION and ORDER

KOELTL, District Judge.

This diversity action arises out of the alleged sexual abuse of two minor children, N.M. and J.M., by defendant Samuel Toffel ("Toffel"). The children's mother, Claudia Estevez-Yalcin ("Estevez-Yalcin"), brought this action on behalf of herself and on behalf of N.M. and J.M. against Toffel, The Children's Village ("CV"), and Westchester County Health Care Corporation ("WCHCC"). Toffel was a volunteer at both WCHCC and CV at times when N.M. was a patient at each of the institutions.

The Amended Complaint asserts nine claims for relief against the defendants. WCHCC is named only in the fifth claim for relief, which asserts that WCHCC and CV are liable, jointly and severally, for negligently hiring, retaining, and supervising Toffel. In their opposition papers to the current motion, the plaintiffs contend that they have also fairly asserted a claim for negligent misrepresentation against WCHCC in connection with Toffel's transfer from WCHCC to CV as a volunteer. CV asserts a cross-claim against WCHCC for contribution and indemnity.

WCHCC moves pursuant to Federal Rule of Civil Procedure 56 for summary judgment on all claims pending against it. The plaintiffs and CV both oppose the motion. As part of their opposition to the motion, the plaintiffs and CV move pursuant to Rule 56(f) for additional discovery.

I

The standard for granting summary judgment is well established. Summary

judgment may not be granted unless "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); see also *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Gallo v. Prudential Residential Services Ltd. P'ship*, 22 F.3d 1219, 1223 (2d Cir.1994). "The trial court's *172 task at the summary judgment motion stage of the litigation is carefully limited to discerning whether there are genuine issues of material fact to be tried, not to deciding them. Its duty, in short, is confined at this point to issue-finding; it does not extend to issue-resolution." *Gallo*, 22 F.3d at 1224. The moving party bears the initial burden of "informing the district court of the basis for its motion" and identifying the matter that "it believes demonstrate[s] the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 323, 106 S.Ct. 2548. The substantive law governing the case will identify those facts which are material and "only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

In determining whether summary judgment is appropriate, a court must resolve all ambiguities and draw all reasonable inferences against the moving party. See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962)); see also *Gallo*, 22 F.3d at 1223. Summary judgment is improper if there is any evidence in the record from any source from which a reasonable inference could be drawn in favor of the nonmoving party. See *Chambers v. TRM Copy Ctrs. Corp.*, 43 F.3d 29, 37 (2d Cir.1994). If the moving party meets its burden, the burden shifts to the nonmoving party to come forward with "specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e).

The nonmoving party must produce evidence in the record and "may not rely simply on conclusory statements or on contentions that the affidavits supporting the motion are not credible." *Ying Jing Gan v. City of New York*, 996 F.2d 522, 532 (2d Cir.1993); see also *Scotto v. Almenas*, 143 F.3d 105, 114-15 (2d Cir.1998) (collecting cases).

II

Unless otherwise noted, the following facts are not in dispute. WCHCC is a public benefit corporation created in 1977 under the New York State Public Authorities Law. (WCHCC's Rule 56.1 St. ¶ 1; Pl.'s Resp. 56.1 St. ¶ 1; CV's Resp. 56.1 St. ¶ 1.) CV is a New York not-for-profit corporation located in Dobbs Ferry, New York, that provides residential treatment and rehabilitation programs for male juveniles with psychological problems. (WCHCC's Rule 56.1 St. ¶ 2; Pl.'s Resp. 56.1 St. ¶ 2; CV's Resp. 56.1 St. ¶ 2.) N.M. and J.M. are brothers, and they were born on December 15, 1985 and March 14, 1993, respectively. (WCHCC's Rule 56.1 St. ¶¶ 3, 6; Pl.'s Resp. 56.1 St. ¶¶ 3, 6; CV's Resp. 56.1 St. ¶¶ 3, 6.) N.M. and J.M. currently reside in Florida, but both resided in New York when the majority of the alleged injuries occurred. (Id.) Estevez-Yalcin is the mother of N.M. and J.M., and she also currently resides in Florida, although she resided in New York when the majority of the alleged injuries occurred. [FN1] *173 (WCHCC's Rule 56.1 St. ¶ 7; Pl.'s Resp. 56.1 St. ¶ 7; CV's Resp. 56.1 St. ¶ 7.)

FN1. Estevez-Yalcin is no longer a plaintiff in the action against WCHCC because she failed to file a timely Notice of Claim against WCHCC. (WCHCC's Rule 56.1 St. ¶ 7; Pl.'s Resp. 56.1 St. ¶ 7; CV's Resp. 56.1 St. ¶ 7.) Estevez-Yalcin has appealed the order of the New York State Supreme Court denying her petition to file a late Notice of Claim, and that appeal is still pending. At the argument of the current motion, the parties informed the Court that WCHCC has appealed that part of the order of the New York State Supreme Court granting the petition by J.M. and N.M. to file a late Notice of Claim, and that appeal is also still pending.

From February 11, 1997 to June 30, 1997, N.M. was an in-patient at WCHCC's Psychiatric Institute. (WCHCC's Rule 56.1 St. ¶ 4; Pl.'s Resp. 56.1 St. ¶ 4; CV's Resp. 56.1 St. ¶ 4.) From June 30, 1997 to August 27, 1998 and from October 29, 1998 to June 25, 1999, N.M. was a resident at CV. (WCHCC's Rule 56.1 St. ¶ 5; Pl.'s Resp. 56.1 St. ¶ 5; CV's Resp. 56.1 St. ¶ 5.) J.M. was never a patient at WCHCC and was never a resident at CV. (WCHCC's Rule 56.1 St. ¶ 6; Pl.'s Resp. 56.1 St. ¶ 6; CV's Resp. 56.1 St. ¶ 6.)

N.M. was an in-patient on the pediatric ward at WCHCC from February 11, 1997 to June 30, 1997. (WCHCC's Rule 56.1 St. ¶ 18; Pl.'s Resp. 56.1 St. ¶ 18; CV's Resp. 56.1 St. ¶ 18.) Toffel was a volunteer at WCHCC from approximately January 24, 1997 until the end of December 1997. (WCHCC's Rule 56.1 St. ¶ 19; Pl.'s Resp. 56.1 St. ¶ 19; CV's Resp. 56.1 St. ¶ 19.) WCHCC concedes that it did not do a background check on Toffel before it hired him as a volunteer. (WCHCC's Response to Interrogatories attached as Ex. N to Pl.'s Resp. Rule 56.1 St., at 1, 4.) WCHCC contends that Toffel was trained as a volunteer by two recreational therapists on staff at WCHCC and that Toffel was rarely, if ever, left alone with patients. (WCHCC's Rule 56.1 St. ¶ 20.) The plaintiffs, however, contend that Toffel was neither trained nor supervised at WCHCC, and that Toffel was left alone with N.M. for substantial periods of time. (Pl.'s Resp. 56.1 St. ¶ 20.)

N.M. testified that while at WCHCC he was alone with Toffel on three occasions either in the living room at WCHCC or on walks around the building. (WCHCC's Rule 56.1 St. ¶ 22; Pl.'s Resp. 56.1 St. ¶ 22; CV's Resp. 56.1 St. ¶ 22; Deposition of N.M. attached as Ex. D to Pl.'s Resp. 56.1 St. ("N.M.Dep.") at 38, 42, 192.) On more than one occasion, Toffel periodically rubbed N.M.'s shoulder and neck while talking to N.M. (N.M. Dep. at 39-40.) On one occasion, Toffel touched N.M. on his leg at the thigh while N.M. was seated next to him at a table. (Id. at 40-41, 193.) During at least one of the walks outside the building, Toffel rubbed N.M. on the shoulder. (Id. at 42-43.) N.M. did not tell anyone about

the three incidents of physical contact he had with Toffel at WCHCC. (WCHCC Rule 56.1 St. ¶ 22; Pl.'s Resp. Rule 56.1 St. ¶ 22.) N.M. testified that while he was at WCHCC he "didn't really know [Toffel]," and that Toffel "was like a counselor that I had to see..." (N.M. Dep. at 39.)

On June 26, 1997, Estevez-Yalcin signed a Voluntary Placement Agreement transferring custody and care of N.M. to the Commissioner of Social Services of the City of New York. (WCHCC's Rule 56.1 St. ¶ 25; Pl.'s Resp. 56.1 St. ¶ 25; CV's Resp. 56.1 St. ¶ 25.) On June 30, 1997, N.M. was discharged from WCHCC and delivered into the care of a case worker for the New York City Administration for Social Services. (WCHCC's Rule 56.1 St. ¶ 26; Pl.'s Resp. 56.1 St. ¶ 26; CV's Resp. 56.1 St. ¶ 26.) Also on June 30, 1997, N.M. was committed to CV by the New York City Department of Social Services. (WCHCC's Rule 56.1 St. ¶ 28; Pl.'s Resp. 56.1 St. ¶ 28; CV's Resp. 56.1 St. ¶ 28.) Estevez-Yalcin testified that she met Toffel for the first time on the day that N.M. was transferred to CV, and that a WCHCC staff member who "looked like a nurse" said that Toffel was a "nice guy" who had been helping N.M. as a volunteer at WCHCC and would continue to do so at CV. (Deposition of Claudia Estevez-Yalcin attached as Ex. I to WCHCC Rule 56.1 St. ("Estevez-Yalcin Dep.") at 82-83, 181.)

On July 9, 1997, Toffel submitted an application to CV for a position as a volunteer; *174 none of the references on the application are people employed at WCHCC. (WCHCC's Rule 56.1 St. ¶ 31; Pl.'s Resp. 56.1 St. ¶ 31; CV's Resp. 56.1 St. ¶ 31.) There is no evidence in the record that CV sought from WCHCC, or that WCHCC actually provided, a reference or recommendation for Toffel as part of his application to be a volunteer at CV. (WCHCC's Rule 56.1 St. ¶¶ 29-33; Pl.'s Resp. 56.1 St. ¶¶ 29-33; CV's Resp. 56.1 St. ¶ 29-33.) However, Estevez-Yalcin testified that when she and N.M. arrived at CV, a CV staff member informed her that Toffel was a volunteer who would be working with N.M. and that Toffel had been "recommended from" WCHCC. (WCHCC's Rule 56.1 St. ¶ 34; Pl.'s

Resp. 56.1 St. ¶ 34; Estevez-Yalcin Dep. at 178.) Toffel was discharged by WCHCC as a volunteer in December 1997 because he contacted a parent, conduct that constituted a breach of patient confidentiality under WCHCC rules. (Deposition of Maribeth Abrenica dated Sept. 29, 2003 attached as Ex. A to Affirmation of Barbara F. Kukowski dated Nov. 9, 2003, at 63-66.)

Toffel sexually molested N.M. while N.M. was a resident at CV. (WCHCC's Rule 56.1 St. ¶ 13; Pl.'s Resp. 56.1 St. ¶ 13; CV's Resp. 56.1 St. ¶ 13.) The abuse continued throughout N.M.'s stay at CV, often when N.M. went for overnight visits to Toffel's apartment. (WCHCC's Rule 56.1 St. ¶ 40; Pl.'s Resp. 56.1 St. ¶ 40; CV's Resp. 56.1 St. ¶ 40; N.M. Dep. 88, 91-94.) During this time, Toffel developed a relationship with Estevez-Yalcin, through which he gained access to J.M., whom Toffel also sexually molested. (WCHCC's Rule 56.1 St. ¶ 43; Pl.'s Resp. 56.1 St. ¶ 43; CV's Resp. 56.1 St. ¶ 43.) Toffel later pleaded guilty to an indictment charging him with sexually molesting N.M. during the time when N.M. was a resident at CV and with sexually molesting J.M. during the time after N.M.'s release from CV. (WCHCC's Rule 56.1 St. ¶ 8; Pl.'s Resp. 56.1 St. ¶ 8; CV's Resp. 56.1 St. ¶ 8.)

III

WCHCC first moves for summary judgment on the plaintiffs' negligent hiring, retention, and supervision claims. The plaintiffs claim that WCHCC's alleged negligence in hiring, retaining, and supervising Toffel renders WCHCC liable for the injuries that Toffel allegedly inflicted on N.M. at WCHCC, as well as for Toffel's sexual abuse of N.M. and J.M. after N.M. was transferred to CV. The plaintiffs do not assert that WCHCC is liable for Toffel's conduct under theories of respondeat superior or vicarious liability. Rather, the plaintiffs assert that WCHCC is liable, jointly and severally with CV, for negligently hiring, retaining, and supervising Toffel. [FN2] See *Kenneth R. v. Roman Catholic Diocese of Brooklyn*, 229 A.D.2d 159, 654 N.Y.S.2d 791, 793 (2d Dep't 1997) ("In

instances where an employer cannot be held vicariously liable for its employee's torts, the employer can still be held liable under theories of negligent hiring, negligent retention, and negligent supervision.")

FN2. The parties agree that New York law governs this action.

However, a necessary element of causes of action for negligent hiring, retention, and supervision "is that the employer knew or should have known of the employee's propensity for the conduct which caused the injury." *Kenneth R.*, 654 N.Y.S.2d at 793-94 (collecting cases); see also *Gomez v. City of New York*, 304 A.D.2d 374, 758 N.Y.S.2d 298, 299 (1st Dep't 2003); *Oliva v. City of New York*, 297 A.D.2d 789, 748 N.Y.S.2d 164, 166 (2d Dep't 2002). "There is no common-law duty to institute specific procedures for hiring employees unless the employer knows of facts that would lead a reasonably *175 prudent person to investigate the prospective employee." *Kenneth R.*, 654 N.Y.S.2d at 795; see also *Doe v. Whitney*, 8 A.D.3d 610, 779 N.Y.S.2d 570, 571-72 (2d Dep't 2004) (reversing denial of summary judgment where "the plaintiffs failed to raise a triable issue of fact showing that the School was aware of facts that would have led a reasonably prudent person to further investigate [the defendant]"). "An employer is under no duty to inquire as to whether an employee has been convicted of crimes in the past. Liability will attach on such a claim only when the employer knew or should have known of the employee's violent propensities." *Yeboah v. Snapple, Inc.*, 286 A.D.2d 204, 729 N.Y.S.2d 32, 33 (1st Dep't 2001); see also *Day v. J. Vlachos Hellenic Service Station*, 2 A.D.3d 482, 767 N.Y.S.2d 893, 893 (2d Dep't 2003); *T.W. v. City of New York*, 286 A.D.2d 243, 729 N.Y.S.2d 96, 97-98 (1st Dep't 2001) ("[A]n employer has a duty to investigate a prospective employee when it knows of facts that would lead a reasonably prudent person to investigate that prospective employee."). Therefore, "recovery on a negligent hiring and retention theory requires a showing that the employer was on notice of the relevant tortious propensities of the wrongdoing

employee." *Gomez*, 758 N.Y.S.2d at 299.

[1] In this case, WCHCC concedes that it did no background check on Toffel before it hired him as a volunteer. However, without some evidence that WCHCC knew or should have known that Toffel posed a risk of injury to children, WCHCC's failure to investigate Toffel further was not negligent. See, e.g., *Gomez*, 758 N.Y.S.2d at 298 (affirming summary judgment dismissing complaint for negligent hiring and retention where defendants failed to submit evidence that the moving defendants had knowledge of the relevant tortious propensities of the wrongdoing employee); *Oliva*, 748 N.Y.S.2d at 166 (reversing denial of summary judgment on negligent hiring claim where defendant Police Athletic League did not know or have reason to know of youth counselor's propensity to cause plaintiff's injury).

Moreover, the plaintiffs have not shown that WCHCC would have discovered anything indicating Toffel's propensity to engage in the alleged tortious conduct had WCHCC actually carried out a background check on him. See *Murray v. Research Found. of State Univ. of N.Y.*, 283 A.D.2d 995, 723 N.Y.S.2d 805, 807 (4th Dep't 2001) ("Contrary to plaintiff's contention, there is no evidence in the record that a routine background check would have revealed that [the defendant employee] had a propensity to harm children."); *Koran I. v. New York City Bd. of Educ.*, 256 A.D.2d 189, 683 N.Y.S.2d 228, 230 (1st Dep't 1998) ("Whether or not the principal could have been more thorough in checking [the abuser's] background, his actions do not support a claim of negligent hiring because a routine background check would not have revealed his propensity to molest minors."). No reasonable jury could find that, at the time WCHCC hired Toffel, WCHCC knew or should have known that Toffel had a propensity for the injurious conduct alleged in this case or that a background check would have revealed such a propensity. Therefore, no reasonable jury could find that WCHCC was negligent in hiring Toffel as a volunteer, and summary judgment should be granted to WCHCC on the plaintiffs' negligent hiring claim.

[2] The plaintiffs contend that WCHCC was sufficiently on notice of Toffel's dangerous propensities after Toffel began working as a volunteer at WCHCC, such that it should be liable for negligent retention or supervision of Toffel. The plaintiffs maintain that WCHCC knew that Toffel was someone who flouted the rules. They note that on at least one occasion *176 Toffel was told by a WCHCC staff member to engage in recreation with particular children but that he did so with entirely different children. (Pl. Mem. Opp. at 10.) They also contend that someone at WCHCC should have seen Toffel touch N.M. on the shoulders and neck, physical contact that could not have been hidden beneath a table, as when Toffel allegedly touched N.M.'s leg. However, none of this alleged conduct was sufficient to put WCHCC on notice that Toffel had the propensity to engage in the injurious conduct alleged in this case. The fact that Toffel on one occasion played with children other than those with whom a staff member had told him to play would not put a reasonable person on notice that Toffel posed a danger of sexual assault or battery of children. Moreover, N.M. testified that he never told anyone about the physical contact between him and Toffel at WCHCC, and there is no indication in the record that anyone saw, or should have seen, that physical contact. See Gomez, 758 N.Y.S.2d at 299-300. No reasonable jury could conclude based on the record in this case that WCHCC knew or should have known facts that would lead a reasonable person to suspect that Toffel posed a risk to children. Therefore, summary judgment should be granted in favor of WCHCC on the plaintiffs' negligent retention and supervision claim. See Murray, 723 N.Y.S.2d at 807 (affirming summary judgment dismissing complaint against employer for negligent retention of employee where the employer neither knew nor had reason to know that the employee posed a risk to children).

The plaintiffs contend that WCHCC should be held to a higher standard of care because WCHCC had children in its care. The existence of a heightened duty would not change the outcome in this case, however,

because the injuries allegedly incurred by N.M. were not reasonably foreseeable by WCHCC. See *N.X. v. Cabrini Med. Center*, 280 A.D.2d 34, 719 N.Y.S.2d 60, 66 (1st Dep't 2001) ("[W]hether there is a heightened duty or not, liability may not ensue unless it can be said that the harm was foreseeable.") The parties agree that any injury N.M. suffered while at WCHCC resulted when Toffel allegedly touched N.M. on his neck, shoulders, and thigh. [FN3] For the reasons explained above, Toffel's conduct was not reasonably foreseeable by WCHCC. There is nothing in the record to suggest that WCHCC knew or should have known that Toffel had a propensity to engage in such conduct. For this reason as well, therefore, WCHCC is entitled to summary judgment on the claims of negligent hiring, retention, and supervision. See *N.X.*, 719 N.Y.S.2d at 64-65 ("[A] mere possibility of improper conduct is insufficient to impose liability since, historically, liability for negligence has been determined by what is probable, not merely by what is possible.... Here, the possibility that a surgical resident with no history of sexual misconduct would enter a surgical recovery room and assault a patient is too remote to be considered legally foreseeable."); see also *Cornell v. State of New York*, 60 A.D.2d 714, 401 N.Y.S.2d 107, 108 (3d Dep't 1977) (affirming dismissal of negligence claim against state after trial where sexual assault on child by attendant *177 at state hospital was not reasonably foreseeable where state neither knew nor should have known of attendant's dangerous propensity), *aff'd*, 46 N.Y.2d 1032, 416 N.Y.S.2d 542, 389 N.E.2d 1064 (1979).

FN3. The parties dispute whether Toffel's physical contact with N.M. at WCHCC constituted sexual abuse. The plaintiffs maintain that Toffel touched N.M. on his neck, shoulders, and thigh in a "familiar" and "sexualized" way. WCHCC, however, contends that, as a matter of New York law, such contact does not amount to sexual abuse. However, it is not necessary to decide whether Toffel's conduct constituted sexual abuse or no injury at all, because the unconsented physical contact between Toffel and N.M. was not reasonably foreseeable.

[3] The plaintiffs' claims for negligent hiring, retention, and supervision also cannot provide a basis for liability against WCHCC for the injuries suffered by N.M. and J.M. after N.M. left WCHCC. It is undisputed that Toffel sexually abused N.M., and then J.M. as well, after N.M. had been transferred to CV. However, the injuries caused by Toffel at CV were not proximately caused by any negligent hiring, retention, or supervision by WCHCC. Even though N.M. first met Toffel at WCHCC, Toffel's abuse of N.M. at CV was outside the scope of Toffel's employment with WCHCC. The abuse occurred while N.M. was in the custody of CV and while Toffel was under CV's supervision, and primarily during N.M.'s overnight visits to Toffel's apartment. Toffel's abuse of J.M. occurred after Toffel developed a relationship with Estevez-Yalcin at CV in such a way that he was able to gain access to J.M. Because of the intervening independent acts of CV, Estevez-Yalcin, and Toffel, as well as the separation in time and place, Toffel's abuse of N.M. and J.M. following N.M.'s departure from WCHCC could not have been proximately caused by any negligence by WCHCC in its hiring, retention, and supervision of Toffel. See *Anonymous v. Dobbs Ferry Union Free School*, 290 A.D.2d 464, 736 N.Y.S.2d 117, 118 (2d Dep't 2002) (reversing denial of summary judgment on negligent hiring and supervision claims where school district, superintendent, and principal established that "any nexus between [abusive teacher's] employment at the District and his alleged sexual molestation of the infant plaintiffs was severed by time, distance, and the intervening independent actions of their parents," where parents invited teacher to attend New Year's Eve party and then to stay overnight in their home); *Cardona v. Cruz*, 271 A.D.2d 221, 705 N.Y.S.2d 368, 369 (1st Dep't 2000) ("As the officer was not acting within the scope of his employment or under the City's control, any alleged deficiency in its hiring or training procedures could not have proximately caused plaintiff's injuries."); *Koran I.*, 683 N.Y.S.2d at 230 ("Here, though it happened that plaintiff first met [his abuser] through the school, plaintiff's personal encounters with his abuser were not set up through school channels, and occurred in [the

abuser's] apartment after his volunteer work at the school had ceased. Accordingly, defendant cannot be held liable because any nexus between [the abuser's] volunteer activities at the school and his assault upon plaintiff was severed by time, distance and [the abuser's] intervening independent actions." (internal citations omitted)); *Lemp v. Lewis*, 226 A.D.2d 907, 641 N.Y.S.2d 158, 159 (3d Dep't 1996) (tavern's negligent hiring of bouncer was not proximate cause of plaintiff's injuries where bouncer punched plaintiff 20 miles from bar, 30 minutes after bouncer left bar, and when bouncer was no longer within scope of his employment or under bar's supervision and control).

IV

WCHCC also moves for summary judgment on the plaintiffs' negligent misrepresentation claim. This claim is not set forth explicitly in the Amended Complaint, but the plaintiffs contend that it can fairly be inferred from the factual allegations in the Amended Complaint. The plaintiffs contend that, in granting Toffel access to both N.M. and J.M., Estevez-Yalcin justifiably relied on WCHCC's alleged misrepresentation that Toffel was a safe and commendable person.

To prevail on a claim of negligent misrepresentation, "a plaintiff must establish *178 that, because of some special relationship with the defendant which generally implies a closer degree of trust than the ordinary buyer-seller relationship, the law imposes on that defendant a duty to use reasonable care to impart correct information, that the information is false or incorrect, and that the plaintiff reasonably relied upon the information given." *Pappas v. Harrow Stores, Inc.*, 140 A.D.2d 501, 528 N.Y.S.2d 404, 407 (2d Dep't 1988). The negligent statement upon which the plaintiff relies "must also be a proximate cause of the injury for which he or she seeks recovery." *Id.*

The New York Court of Appeals has explained that the determination of whether defendant, by negligent misrepresentation, breached a

duty to plaintiff and proximately caused the injury turns on the reasonableness of both parties' conduct. Defendant must have imparted the information under circumstances and in such a way that it would be reasonable to believe plaintiff will rely upon it; plaintiff must rely upon it in the reasonable belief that such reliance is warranted.

Heard v. City of New York, 82 N.Y.2d 66, 603 N.Y.S.2d 414, 623 N.E.2d 541, 546 (1993). A prima facie case for negligent misrepresentation can be made out, for example, "when one familiar with a hazard offers direct assurances of safety to one who is unfamiliar with the hazard and who foreseeably relies upon those assurances." *Id.* at 545. It is well established, however, that "[t]he mere recommendation of a person for potential employment is not a proper basis for asserting a claim of negligence where another party is responsible for the actual hiring." *Cohen v. Wales*, 133 A.D.2d 94, 518 N.Y.S.2d 633, 634 (2d Dep't 1987); see also *Jurgens v. Poling Transp. Corp.*, 113 F.Supp.2d 388, 398 (E.D.N.Y.2000); *Koran I.*, 683 N.Y.S.2d at 230.

[4] On the record in this case, the plaintiffs cannot prevail on a negligent misrepresentation claim. Even assuming a special relationship between the plaintiffs and WCHCC, there is no evidence to support a finding that WCHCC made a negligent misrepresentation, or that WCHCC knew that the plaintiffs intended to rely upon its representations concerning Toffel, or that the plaintiffs reliance on the representations was reasonable.

For the reasons explained above, WCHCC was not on notice, at the time it made any alleged misrepresentations, that Toffel had a propensity for the injurious conduct alleged in this case. Because WCHCC did not know, and did not have reason to know, that Toffel posed any risk of danger to the plaintiffs, WCHCC's words and conduct suggesting that Toffel was safe and commendable could not have constituted a negligent misrepresentation. As explained above, WCHCC was under no obligation to investigate Toffel any further

than it did, and even if it had done so, there is no evidence that WCHCC would have learned any facts that would have put it on notice concerning Toffel's dangerous propensities. For these reasons, no reasonable jury could find that WCHCC made a statement to the plaintiffs that it knew or should have known was false or incorrect. Moreover, the fact that WCHCC employed Toffel as a volunteer and may have encouraged his interaction with N.M. is insufficient to support a finding of liability on the part of WCHCC for the injuries inflicted by Toffel, because a mere recommendation does not support a finding of liability. See *Koran I.*, 683 N.Y.S.2d at 230 ("[P]laintiff seeks to hold the Board vicariously liable for the alleged negligence of plaintiff's teachers and school principal in recommending [an abusive volunteer], availing themselves of his volunteer services, and encouraging the relationship between him and plaintiff. This cause of *179 action must fail."); see also *Cohen*, 518 N.Y.S.2d at 634.

The evidence also would not support a finding that WCHCC knew that any representations concerning Toffel would be used by Estevez-Yalcin in deciding to give Toffel access to N.M. and J.M. Nor would the evidence support a finding that any reliance on Estevez-Yalcin's part was reasonable. Estevez-Yalcin testified that someone from WCHCC told her on the day that N.M. was transferred from WCHCC to CV that Toffel was a "nice guy" and that he had been helping N.M. at WCHCC and would continue to do so at CV. [FN4] Although these statements were allegedly made on June 30, 1997, the day that N.M. was discharged from WCHCC, Toffel did not apply to become a volunteer at CV until July 9, 1997. Moreover, it is clear from Estevez-Yalcin's testimony that the statements, if indeed they were made, were made by way of introducing Estevez-Yalcin to Toffel, not in order to induce her reliance on the statements in deciding whether to give Toffel access to her sons. (See *Estevez-Yalcin Dep.* at 82-83.) For the same reason, any reliance by Estevez-Yalcin on these statements would not have been reasonable. Estevez-Yalcin also claims that she relied on the fact that a reputable institution like

WCHCC had employed Toffel as a volunteer in deciding to give Toffel access to her sons. But there is no evidence that WCHCC employed Toffel as a volunteer knowing that Estevez-Yalcin would rely on that fact in making the particular decision she made in giving Toffel access to her sons. For the same reason, any reliance by Estevez-Yalcin on that fact would have been unreasonable. Because there is no evidence that WCHCC's words or conduct actually constituted a misrepresentation, or that its words and conduct could reasonably be construed as inducing Estevez-Yalcin's reasonable reliance in granting Toffel access to N.M. and J.M., summary judgment must be granted to WCHCC on the plaintiffs' negligent misrepresentation claim.

FN4. WCHCC maintains that this testimony contains inadmissible hearsay, but the issue need not be decided because, even if admissible, the testimony would not support a claim for negligent misrepresentation.

Furthermore, for the reasons explained above, the plaintiffs could not succeed on their negligent misrepresentation claim because they cannot establish that the alleged misrepresentations proximately caused their injuries. See *Hayes v. Baker*, 232 A.D.2d 371, 648 N.Y.S.2d 158, 159 (2d Dep't 1996) (town not liable on negligent misrepresentation claim for injuries caused to child by babysitter referred by town's community service referral program because no showing of a special relationship and no showing that injuries were proximately caused by alleged misstatement).

V

Because WCHCC cannot be held liable for the injuries suffered by the plaintiffs, WCHCC must also be granted summary judgment on CV's cross-claim for contribution or indemnity. See *Patterson v. New York City Transit Auth.*, 5 A.D.3d 454, 773 N.Y.S.2d 417, 419-20 (2d Dep't 2004); *Cochrane v. Warwick Assocs., Inc.*, 282 A.D.2d 567, 723 N.Y.S.2d 506, 508 (2d Dep't 2001).

VI

The plaintiffs and CV move pursuant to Rule 56(f) to request that the Court defer deciding WCHCC's summary judgment motion pending further discovery. The request is denied.

[5] It is well-established that a party resisting summary judgment on the grounds that the party needs additional *180 discovery must submit an affidavit showing (1) what facts are sought to resist the motion and how they are to be obtained, (2) how those facts are reasonably expected to create a genuine issue of material fact, (3) what effort affiant has made to obtain them, and (4) why the affiant was unsuccessful in those efforts. See *Gurary v. Winehouse*, 190 F.3d 37, 43 (2d Cir.1999); *Cooney v. Consolidated Edison*, 220 F.Supp.2d 241, 247-48 (S.D.N.Y.2002), *aff'd*, 63 Fed.Appx. 579, 2003 WL 21105351 (2d Cir.2003). Neither the plaintiffs nor CV indicate any facts that, if obtained, would create a genuine issue of material fact concerning WCHCC's liability to the plaintiffs. The issues that the plaintiffs and CV seek to pursue further concerning Toffel's hiring, supervision, and subsequent discharge from WCHCC have been fully developed on the existing record. [FN5] WCHCC, for example, concedes that it did no background check at all on Toffel, so further discovery on that issue is unnecessary. The plaintiffs merely speculate that further discovery concerning Toffel's retention and supervision at WCHCC would create a genuine issue of material fact with respect to WCHCC's knowledge of Toffel's dangerous propensities. CV's request for further information concerning Toffel's discharge from WCHCC is equally unsupported and conclusory. See *Smith v. Keane*, No. 96 Civ. 1629, 1998 WL 146225, at *7 (S.D.N.Y. Mar. 25, 1998) ("Rule 56(f) is not a device for a fishing expedition or a means to avoid summary judgment on the mere hope that further evidence will develop."). Therefore, the application by the plaintiffs and CV to deny the motion by WCHCC or to stay it pending further discovery is denied.

FN5. In a scheduling order dated June 2, 2003, Magistrate Judge Eaton required that all fact

discovery in this case be completed by September 19, 2003. (Ex. C to affidavit of John D. Katz, Esq., dated Oct. 31, 2003 ("Katz Aff.")). In an order dated September 9, 2003, Magistrate Judge Eaton extended the deadline to September 30, 2003, to permit the plaintiffs and CV to depose Maribeth Abrenica, but he declined the plaintiffs' and CV's request to extend the deadline by sixty days and to allow about fifteen further depositions. The Magistrate Judge also set a briefing schedule for WCHCC's motion for summary judgment and stayed discovery pending the disposition of that motion. (Ex. E to Katz Aff.) In an order dated October 8, 2003, Magistrate Judge Eaton denied a further request by the plaintiffs and CV for additional discovery and adhered to the previous schedule for WCHCC's motion for summary judgment. (Ex. F. to Katz Aff.)

CONCLUSION

Defendant WCHCC's motion for summary judgment dismissing the claims against it is granted.

SO ORDERED.

331 F.Supp.2d 170

END OF DOCUMENT

32

Only the Westlaw citation is currently available.

United States District Court,
S.D. New York.

Peter FELFE, Plaintiff,

v.

CIBA VISION CORPORATION, Defendant.

No. 03 Civ.3357 LAK JCF.

March 19, 2004.

REPORT AND RECOMMENDATION

KAPLAN, Magistrate J.

*1 The plaintiff, Peter Felfe, brings this action alleging that CIBA Vision Corporation ("CIBA") engaged in intentional and negligent misrepresentation in connection with a settlement agreement reached between CIBA and a third party, Detlev Baur-Krey. The agreement concerned Mr. Baur-Krey's claims against CIBA for royalties from the sale of contact lenses. The plaintiff alleges that CIBA misrepresented the value of those claims in a letter issued to Mr. Baur-Krey, and that the plaintiff relied on CIBA's misrepresentation to settle his own claims against Mr. Baur-Krey for a lower amount than what he was entitled to receive.

CIBA has moved to dismiss the Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim for relief. For the reasons that follow, I recommend that the defendant's motion be granted.

Background

The plaintiff, a patent attorney, provided legal representation in the late 1970's to a predecessor of CIBA, a German company. [FN1] (Amended Complaint ("Am.Compl."), ¶¶ 8, 12). At the time, Mr. Baur-Krey was a personal acquaintance of the plaintiff, providing consultation to foreign pharmaceutical companies that sought to obtain regulatory approvals from the United

States. (Am.Compl., ¶ 13). Mr. Felfe introduced Mr. Baur-Krey to the defendant in exchange for an agreement that the plaintiff would receive one-third of any commissions, royalties, or other profits that Mr. Baur-Krey might garner by serving as a consultant to CIBA. (Am.Compl., ¶ 14).

FN1. The defendant does not appear to dispute the successor relationships between CIBA and the predecessor companies named in the Complaint. Accordingly, both CIBA and its predecessors-in-interest will be referred to as "CIBA" or "the defendant."

On or about August 18, 1978, Mr. Baur-Krey entered into a separate agreement with CIBA entitling him to receive royalties from the sale of various products, including soft contact lenses made from CIBA's "Weicon-38" material. (Am.Compl., ¶ 16). The "Weicon-38" contact lenses proved to be a popular product, and as the sales of those lenses increased, so did the value of Mr. Baur-Krey's royalties. (Am.Compl., ¶ 17).

In 1983, CIBA offered to provide Mr. Baur-Krey a lump sum payment in exchange for terminating his right to continued royalties. (Am.Compl., ¶ 20). Following a series of negotiations, Mr. Baur-Krey ultimately agreed to a one-time payment of \$3.4 million, and a settlement agreement was signed on March 22, 1985 ("the 3/22/85 Settlement"). (Am.Compl., ¶ 26).

On March 21, 1985, the defendant issued a letter to Mr. Baur-Krey ("the 3/21/85 Letter") stating the following:

As requested we confirm that, in our negotiations concerning the buy-out of Baur-Krey Associates, Inc. from the contract of 18 August 1978, which we had taken up in June 1984, we represented that the discounted present value of the commission claims of Baur-Krey Associates for the contact lenses made from WEICON 38 material and sold in the USA was to be estimated at U.S. \$799,000.00 in consideration of all relevant circumstances. (Am. Compl., ¶ 31 & Exh. 6).

Following his settlement with the defendant, Mr. Baur-Krey represented to Mr. Felfe that the amount of the settlement was \$1.8 million. (Am.Compl., ¶ 33). Mr. Baur-Krey showed the plaintiff a copy of the 3/21/85 Letter, and he stated that the difference between \$1.8 million and the \$799,000 cited in the letter was attributable to amounts due to him other than for the royalties. (Am.Compl., ¶ 33). Mr. Baur-Krey stated that confidentiality provisions in the settlement agreement prevented him from disclosing the terms of the settlement to Mr. Felfe. (Am.Compl., ¶ 40). Mr. Felfe thereafter settled his claims against Mr. Baur-Krey for \$288,000, or roughly one-third of \$799,000. (Am.Compl., ¶ 35).

*2 Nearly 15 years later, in September 2000, Mr. Felfe was told by Mr. Baur-Krey's estranged wife that Mr. Baur-Krey had lied to the plaintiff about the amount of his settlement with the defendant. (Am.Compl., ¶ 42). Upon further investigation, the plaintiff obtained evidence suggesting that Mr. Baur-Krey had received over \$3 million from the defendant. (Am.Compl., ¶ 43). He commenced a lawsuit against Mr. Baur-Krey in August 2001. (Am.Compl., ¶ 44).

Beginning in October 2000, the plaintiff communicated with the defendant's in-house counsel, seeking to obtain information relating to the 3/22/85 Settlement. (Am.Compl., ¶ 48). In response to a subpoena issued on January 11, 2002, the defendant produced, among other papers, internal documents and notes reflecting the defendant's valuations of Mr. Baur-Krey's royalty claims during the period of January to June 1985. (Am. Compl., ¶¶ 52, 53 & Exhs. 1-5). The plaintiff commenced this action on May 12, 2003.

Discussion

In considering a motion to dismiss pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, the court must accept as true all factual allegations in the complaint and must draw all inferences in favor of the plaintiff. *Leatherman v. Tarrant County Narcotics*

Intelligence and Coordination Unit, 507 U.S. 163, 164 (1993); *York v. Association of the Bar of the City of New York*, 286 F.3d 122, 125 (2d Cir.2002); *Hernandez v. Coughlin*, 18 F.3d 133, 136 (2d Cir.1994). Accordingly, the complaint may not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (footnote omitted).

A. Adequacy of the Pleadings

1. Intentional Misrepresentation

The defendant contends that the plaintiff's pleadings are inadequate in alleging the falsity of CIBA's representation and reasonable reliance by the plaintiff. (Memorandum of Law in Support of Defendant CIBA Vision Corporation's Motion to Dismiss the Amended Complaint ("Def.Memo.") at 14-18).

a. Falsity

Under New York law, the elements of a fraud claim premised on an intentional misrepresentation are that: (1) the defendant made a false statement of material fact, (2) with knowledge of its falsity, (3) and with intent to defraud the plaintiff, (4) the plaintiff reasonably relied on the misrepresentation, and (5) the plaintiff suffered damages as a result of the misrepresentation. See *Kaye v. Grossman*, 202 F.3d 611, 614 (2d Cir.2000). The "circumstances constituting fraud" must be pled with particularity. Fed.R.Civ.P. 9(b).

The defendant contends that its statement in the 3/21/85 Letter is not false because it merely sets forth a "negotiating position" taken by the defendant during its settlement discussions with Mr. Baur-Krey, not the ultimate amount of the 3/22/85 Settlement or any "internal beliefs or estimates" by CIBA. (Def. Memo. at 14). The plaintiff asserts that the 3/21/85 Letter reflects the defendant's internal valuation of Mr. Baur-Krey's royalties at \$799,000 as of the date of the letter, and that the falsity of CIBA's

statement is shown by the fact that just two months earlier, CIBA had valued the royalties at \$3.06 million. (Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss the Amended Complaint ("Pl.Memo.") at 20-21; Am. Compl., ¶ 23 & Exh. 2).

*3 The dispute over the proper interpretation of the 3/21/85 Letter need not be resolved because, under either interpretation, the plaintiff has adequately alleged the falsity of the defendant's statement in that letter. The theory of Mr. Felfe's case is not that CIBA directly misrepresented the amount of the 3/22/85 Settlement-i.e., the figure on which the plaintiff's own settlement with Mr. Bours-Krey was based-but that it falsely stated an alternative figure (either a prior negotiating position or prior valuation of royalties by CIBA) that enabled Mr. Bours-Krey to misrepresent the settlement amount and induce Mr. Felfe into a reduced settlement. (Am.Compl., ¶¶ 33-34). The allegation of falsity is based on an inference that the plaintiff draws from CIBA's internal documents, which purportedly show that CIBA did not value Mr. Bours-Krey's royalties in the range of \$799,000 around the time of the 3/22/85 Settlement; the inference, therefore, is that contrary to its statement in the 3/21/85 Letter, CIBA never represented to Mr. Bours-Krey during their settlement negotiations that it valued the disputed royalties at \$799,000, nor did CIBA ever take a "negotiating position" at that level. Therefore, the plaintiff's theory of the case is consistent with either party's interpretation of the 3/21/85 Letter. Even if the plaintiff ultimately fails to prove his theory at trial, his allegations of falsity are sufficient at this stage of litigation. See *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 511 (2002) ("The issue [at the pleading stage] is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.") (citation omitted).

b. Reasonable Reliance

The plaintiff's allegations, however, are insufficient on the issue of reasonable

reliance. Under New York law, "[w]hen matters are held to be peculiarly within defendant's knowledge, it is said that plaintiff may rely without prosecuting an investigation, as he has no independent means of ascertaining the truth." *Lazard Freres & Co. v. Protective Life Insurance Co.*, 108 F.3d 1531, 1542 (2d Cir.1997) (quoting *Mallis v. Bankers Trust Co.*, 615 F.2d 68, 80 (2d Cir.1980)). However, even if a party does not have access to information, a sophisticated plaintiff is "under a further duty to protect itself from misrepresentation":

[W]here, as here, a party has been put on notice of the existence of material facts which have not been documented and he nevertheless proceeds with a transaction without securing the available documentation or inserting appropriate language in the agreement for his protection, he may truly be said to have willingly assumed the business risk that the facts may not be as represented. Succinctly put, a party will not be heard to complain that he has been defrauded when it is his own evident lack of due care which is responsible for his predicament.

Id. at 1543 & n.11 (quoting *Rodas v. Manitaras*, 159 A.D.2d 341, 343, 552 N.Y.S.2d 618, 620 (1st Dep't 1990)) (emphasis omitted); see also *Emergent Capital Investment Management, LLC v. Stonepath Group, Inc.*, 343 F.3d 189, 195-96 (2d Cir.2003).

*4 Here, Mr. Felfe principally contends that he had no means of verifying the defendant's statement in the 3/21/85 Letter because the statement related to information solely within CIBA's control and possession, namely, CIBA's internal valuations of Mr. Bours-Krey's royalties. (Pl. Memo. at 25). Also, Mr. Bours-Krey purportedly told the plaintiff that the confidentiality provisions of the 3/22/85 Settlement prevented him from disclosing the settlement documents to the plaintiff. (Pl. Memo. at 25-26).

While all this may be true, the plaintiff was also a sophisticated party with respect to business matters, as he was a patent attorney representing large companies like CIBA and its predecessors-in-interest. (Am.Compl., ¶ 12).

Moreover, the plaintiff was obviously on notice that the amount of the 3/22/85 Settlement was a material fact relevant to his claims against Mr. Baur-Krey; indeed, Mr. Felfe's very assertion here is that he settled his claims based on the amount Mr. Baur-Krey had purportedly received in royalties as part of the 3/22/85 Settlement. (Am.Compl., ¶¶ 33-35). Yet, the plaintiff chose to rely solely on Mr. Baur-Krey's oral representations as to that amount, and on CIBA's statement in the 3/21/85 Letter, which Mr. Baur-Krey allegedly portrayed to be documentary evidence of the royalty amount. [FN2]

FN2. As noted above, Mr. Baur-Krey allegedly represented to the plaintiff that the difference between the \$799,000 cited in the 3/21/85 Letter and \$1.8 million, the purported amount of the settlement, was attributable to sums due to Mr. Baur-Krey other than for the royalties. (Am.Compl., ¶ 33). The plaintiff therefore settled his claims for \$288,000, roughly one-third of \$799,000. (Am.Compl., ¶ 35).

Mr. Felfe's reliance on CIBA's representation was unreasonable as a matter of law because he made no efforts to verify the amount of Mr. Baur-Krey's royalties or to "insert[] appropriate language in the agreement for his protection." Lazard, 108 F.3d at 1543 (quotation marks and citation omitted). For instance, the plaintiff could have conditioned his settlement on Mr. Baur-Krey's obtaining permission to disclose the amount of the 3/22/85 Settlement to him, or he could have negotiated a lump sum mark-up on his own settlement as compensation for the lack of disclosure. Instead, the plaintiff chose to rely on the 3/21/85 Letter, which he concedes does not directly report the amount of the 3/22/85 Settlement and which merely reiterates a representation about estimated royalties made by CIBA during its negotiations with Mr. Baur-Krey. [FN3] These circumstances demonstrate that Mr. Felfe "willingly assumed the business risk that the facts may not be as represented." *Id.* Moreover, in the absence of a fiduciary relationship, the personal friendship between the plaintiff and Mr. Baur-Krey does not render Mr. Felfe's reliance on the 3/21/85

Letter reasonable. *Emergent Capital*, 343 F.3d at 196.

FN3. The defendant's contention that he had no direct relationship with CIBA and therefore could not have protected himself from CIBA's misrepresentations (Def. Memo. at 25) misses the point because it is the amount of the 3/22/85 Settlement, not CIBA's internal valuations, that was material to the plaintiff's settlement with Mr. Baur-Krey. The plaintiff relied on CIBA's letter insofar as it suggested to him--and as it was portrayed by Mr. Baur-Krey as showing--the amount Mr. Baur-Krey received in royalties as part of the 3/22/85 Settlement.

2. Negligent Misrepresentation

To prove negligent misrepresentation under New York law, a plaintiff must show that: (1) the defendant had a duty to give correct information pursuant to a "special relationship" with the plaintiff, (2) the defendant made a false statement that it should have known was incorrect, (3) the defendant knew that the plaintiff wanted the information for a serious purpose, (4) the plaintiff intended to rely and act on the information, and (5) the plaintiff reasonably relied to his detriment. *Hydro Investors, Inc. v. Trafalgar Power Inc.*, 227 F.3d 8, 20 (2d Cir.2000).

*5 For the same reasons stated above, the plaintiff's pleadings do not adequately allege that Mr. Felfe reasonably relied on CIBA's representation in the 3/21/85 Letter. Accordingly, the plaintiff's negligent misrepresentation claim fails.

B. Statute of Limitations

The defendant also contends that the plaintiff's claims of intentional and negligent misrepresentation are untimely as they were not brought within six years of the alleged misrepresentation or, alternatively, within two years of the plaintiff's discovery of fraud. (Def. Memo. at 6-13). Having found that Mr. Felfe's pleadings are inadequate to state a claim for relief on both of his claims, the issue of timeliness need not be reached.

Conclusion

For the reasons set forth above, I recommend that the defendant's motion be granted and that the plaintiff's Amended Complaint be dismissed in its entirety. Pursuant to 28 U.S.C. § 636(b)(1) and Rules 72, 6(a), and 6(e) of the Federal Rules of Civil Procedure, the parties shall have ten (10) days from this date to file written objections to this Report and Recommendation. Such objections shall be filed with the Clerk of the Court, with extra copies delivered to the chambers of the Honorable Lewis A. Kaplan, Room 1310, and to the chambers of the undersigned, Room 1960, 500 Pearl Street, New York, New York 10007. Failure to file timely objections will preclude appellate review.

2004 WL 551200 (S.D.N.Y.)

END OF DOCUMENT

33

Supreme Court, Appellate Division, First
Department, New York.

FIRST NATIONWIDE BANK, Plaintiff-
Appellant,

v.

965 AMSTERDAM, INC., Defendant-
Respondent,

and

Cornelia Associates, et al., Defendants.

Feb. 23, 1995.

Lender sought to foreclose on property after borrower defaulted on mortgage. Borrower counterclaimed, alleging that lender fraudulently induced it to purchase property. The Supreme Court, New York County, Lehner, J., denied lender's summary judgment motion and dismissed counterclaims. Lender appealed. The Supreme Court, Appellate Division, held that borrower failed to prove it reasonably relied on lender's alleged representation that property was sound investment.

Reversed and remanded.

West Headnotes

[1] Contracts 94(2)
95k94(2)

[1] Contracts 94(3)
95k94(3)

[1] Contracts 94(5)
95k94(5)

To make out defense of fraud, party must establish that material representation, which is known to be false, has been made with intention of inducing reliance on misstatement, and that the false representation caused it to reasonably rely on misrepresentation, as result of which it sustained damage.

[2] Fraud 20
184k20

For purposes of proving fraudulent inducement to purchase property, borrower was precluded from establishing reliance on

lender's alleged misrepresentation that borrower's use of loan proceeds to purchase property was sound investment where lender expressly stated that it would rely on borrower's representations as to income and condition of property when it determined whether to extend loan.

[3] Fraud 20
184k20

While general merger clause will not operate to bar parol evidence of fraud in the inducement, if party alleging fraud has made its own specific representation indicating that it is not relying on alleged inducement, it is foreclosed from establishing its asserted reliance on ground that it has misrepresented its true intention.

****200** A.M. Calamari, for plaintiff-appellant.

J.R. Butterman, for defendant-respondent.

Before SULLIVAN, P.J., and WALLACH,
RUBIN, ROSS and TOM, JJ.

***469** MEMORANDUM DECISION.

Order of the Supreme Court, New York County (Edward H. Lehner, J.), entered May 31, 1994 which, inter alia, denied plaintiff's motion seeking summary judgment and dismissal of the defenses and counterclaims interposed by defendant 965 Amsterdam, Inc., unanimously reversed, on the law, the motion granted, with costs, and the matter remanded to Supreme Court for assignment to a Special Referee for an assessment of damages.

Defendant 965 Amsterdam, Inc. acquired the subject premises as the assignee of co- ****201** defendant Amsterdam Realty Associates, the purchaser under a contract of sale from co-defendant Cornelia Associates dated June 12, 1986. The purchase by 965 Amsterdam was facilitated by pre-approved and pre-packaged financing brokered by Gelt Funding Corp. and underwritten by plaintiff First Nationwide Bank. The bank extended a non-recourse, first-mortgage loan under a consolidation, modification and extension agreement and

(Cite as: 212 A.D.2d 469, *469, 623 N.Y.S.2d 200, **201)

issued a promissory note in the principal amount of \$700,000 dated September 26, 1986. After making payment for nearly four years, 965 Amsterdam, Inc. defaulted on the loan, and plaintiff invoked the acceleration clause of its note. The sum due on the instrument at the commencement of this action was \$684,016.31, together with interest from June 1, 1990. This action was commenced in October 1990. The debtor interposed, as its sole defense to the amended verified complaint, the assertion that it was fraudulently induced to acquire the property.

965 Amsterdam, Inc. does not contend that plaintiff made any material misrepresentation upon which it relied in making the purchase. The fraudulent utterances are ascribed to the seller and particularly the mortgage broker, Gelt Funding *470 Corp., and its principal, Allen I. Gross, who is alleged to have misrepresented the operating revenues of the property. The debtor's fraud theory against plaintiff is predicated upon plaintiff's approval of financing for the transaction, the availability of which is asserted to have induced 965 Amsterdam, Inc. to make the purchase.

Before proceeding with an analysis of the debtor's novel theory, it is pertinent to note that plaintiff commenced its own action (First Nationwide Bank v. Gelt Funding Corp., 820 F.Supp. 89 [S.D.N.Y.], *affd.* 27 F.3d 763 [2 nd Cir.], *cert. denied* 513 U.S. 1079, 115 S.Ct. 728, 130 L.Ed.2d 632) in the United States District Court for the Southern District of New York, against Gelt Funding Corp., Gross and others, alleging that the bank was induced to extend some \$900,000,000 in non-recourse loans to purchasers of commercial property represented by Gelt Funding Corp., as commercial mortgage broker. The complaint, predicated on the Racketeer Influenced and Corrupt Organizations Act (18 U.S.C. § 1962[c]; [d]) asserted that 31% of these loans are in default, as opposed to 9.5% of loans extended to other commercial borrowers by the bank. It alleged that Gelt Funding Corp. misrepresented net operating revenues, concealed "flip" transactions and failed to disclose additional financing secured by the

properties. Of 30 loans specifically identified in the complaint, the alleged misrepresentations were claimed to have resulted in a loss to First Nationwide Bank of approximately \$4.2 million on 10 loans that were foreclosed, sold or restructured. An additional \$10.2 million was said to be required to cure outstanding defaults on the other 20 loans, which were not foreclosed sold, or restructured. Federal Court substantially attributed the losses sustained to the collapse of the real estate market in 1990 and dismissed the complaint for failure to state a cause of action (27 F.3d 763, 772).

The gravamen of the defense to this mortgage foreclosure action seems to be the proposition that by allowing Gelt Funding Corp., in the person of Allen I. Gross, to induce it to extend non-recourse loans based upon fraudulent misrepresentations, plaintiff is therefore answerable to a mortgagor who obtained such a loan, upon the mortgagor's default in payment. Supreme Court credited the debtor's argument on the rationale that "a principal is liable to third parties for the acts of an agent operating within the scope of his authority even if the agent commits fraud and acts solely to benefit himself" (citing, *American Socy. of Mech. Engrs. v. Hydrolevel Corp.*, 456 U.S. 556, 566, 102 S.Ct. 1935, 1942, 72 L.Ed.2d 330).

[1][2][3] To make out a defense of fraud, a party must establish that *471 a material representation, known to be false, has been made with the intention of inducing its reliance on the misstatement, which caused it to reasonably rely on the misrepresentation, as a result of which it sustained damages (*Megaris Furs v. Gimbel Bros.*, 172 A.D.2d 209, 213, 568 N.Y.S.2d 581). The record on appeal contains two affidavits dated September 26, 1986, subscribed by defendant debtor's principal, Mr. Robert Danial, containing representations as to the condition of the property **202 and its revenue, together with the explicit acknowledgement that plaintiff will rely on the statements in the affidavit in extending the loan. Under these circumstances, any misrepresentation is attributable to the borrower (see, *First City*

(Cite as: 212 A.D.2d 469, *471, 623 N.Y.S.2d 200, **202)

Fed. Sav. Bank v. Dennis, 680 F.Supp. 579, 585 [S.D.N.Y.]

Under the circumstances of this matter, the Court is constrained to grant summary judgment to plaintiff because defendant debtor is precluded from establishing reliance on the claimed misrepresentation. While a general merger clause will not operate to bar parol evidence of fraud in the inducement (*Sabo v. Delman*, 3 N.Y.2d 155, 164 N.Y.S.2d 714, 143 N.E.2d 906), where the party alleging fraud has made its own specific representation indicating that it is not relying on the alleged inducement, it is foreclosed from establishing its asserted reliance on the ground that it has misrepresented its true intention (*Citibank, N.A. v. Plapinger*, 66 N.Y.2d 90, 94-95, 495 N.Y.S.2d 309, 485 N.E.2d 974, citing *Danann Realty Corp. v. Harris*, 5 N.Y.2d 317, 323, 184 N.Y.S.2d 599, 157 N.E.2d 597). Having expressly stated that plaintiff bank would rely on its representations as to the income and condition of the property, the debtor is precluded from attempting to demonstrate the contrary proposition that it relied upon representations made by the bank or its asserted agent, Allen I. Gross.

Defendant debtor attaches great significance to allegations contained in the bank's complaint in its federal action against Gelt Funding Corp. First Nationwide's complaint states, in its ninth cause of action, that Gross was "a fiduciary and attorney" and that he is guilty of breaching a duty of undivided loyalty to the bank. While the exact nature of his relationship to First Nationwide is not entirely clear, given Gross's interest in securing financing for clients of Gelt Funding Corp., it seems highly irregular that the bank would place him in a fiduciary capacity with respect to the underwriting of mortgage loans to those same clients. Be that as it may, merely because the bank might have been improvident in relying on representations made by Gross with respect to the evaluation of a credit risk does not render it liable to a purchaser that may have employed similar criteria in reaching *472 the decision to acquire a property. There is no suggestion that First Nationwide Bank, in making a

favorable assessment of creditworthiness, thereby intended to make any warranty to the purchaser that the property was a sound investment (see, *Prudential Ins. Co. v. Dewey, Ballantine, Bushby, Palmer & Wood*, 80 N.Y.2d 377, 384, 590 N.Y.S.2d 831, 605 N.E.2d 318). The failure of defendant debtor to make an independent analysis of the suitability of the property for its purpose is governed by the doctrine of caveat emptor, and the instant appeal does not present circumstances that fall within the narrow exception to the application of the doctrine recognized by this Court (*Stambovsky v. Ackley*, 169 A.D.2d 254, 572 N.Y.S.2d 672).

We conclude that the debtor's counterclaim sounding in fraud is deficient (CPLR 3013; 3016[b]). Furthermore, the record is devoid of allegations from which a court could infer that the bank entered into an agreement with Gross or others at Gelt Funding Corp. to participate in a fraudulent scheme, so as to permit defendant mortgagor to proceed under a conspiracy theory (*Abrahami v. UPC Constr. Co.*, 176 A.D.2d 180, 574 N.Y.S.2d 52). Neither is there any allegation from which it might be inferred that the bank was aware of any scheme to defraud 965 Amsterdam, Inc. so as to be liable on a theory of aiding and abetting fraud (*National Westminster Bank USA v. Weksel*, 124 A.D.2d 144, 147, 511 N.Y.S.2d 626, lv. denied 70 N.Y.2d 604, 519 N.Y.S.2d 1027, 513 N.E.2d 1307). The magnitude of losses alleged to have been sustained by the bank as a result of lending funds to the clientele of Gelt Funding Corp. strongly suggests that First Nationwide was unaware that the bank itself, let alone its borrower, was the object of a fraudulent scheme (see, *Quintel Corp. v. Citibank*, 606 F.Supp. 898, 913 [S.D.N.Y.]). Finally, this can hardly be said to be an appropriate matter warranting equitable intervention to impose the full burden of loss due to fraud upon plaintiff (see, e.g., *Curiale v. AIG Multi-Line Syndicate*, 204 A.D.2d 237, 238-239, 613 N.Y.S.2d 360).

212 A.D.2d 469, 623 N.Y.S.2d 200

END OF DOCUMENT

34

Supreme Court, Appellate Division, Second
Department, New York.

George FORD, et al., appellants,

v.

Philip SIVILLI, et al., defendants,
Michael Gregory, et al., respondents.

Dec. 29, 2003.

Background: Real estate purchasers sued vendors, architect who prepared drawings of extensions to home, and contractor hired by architect to expedite certificate of occupancy for extensions to home prior to sale, seeking to recover damages for fraud and negligent misrepresentation after portion of roof on extensions collapsed. The Supreme Court, Nassau County, Phelan, J., granted motion to dismiss for failure to state a claim filed by contractor and architect, and purchasers appealed.

Holdings: The Supreme Court, Appellate Division, held that: (1) purchasers were not known parties to architect and contractor, and thus, purchasers' claim of negligent misrepresentation was not cognizable, and (2) purchasers' allegations that defects in extensions built to house were known to architect and individual failed to include particularized factual assertion that supported inference of scienter, as required to state claim of fraud against individual and architect.

Affirmed.

West Headnotes

[1] Fraud 13(3)
184k13(3)

The elements of a cause of action sounding in negligent misrepresentation include: (1) an awareness by the maker that the statement is to be used for a particular purpose; (2) reliance by a known party on the statement in furtherance of that purpose; and (3) some conduct by the maker of the statement linking it to the relying party and evincing its understanding of that reliance.

[2] Fraud 21
184k21

Real estate purchasers were not known parties to architect and contractor hired by architect to expedite application for certificate of occupancy for extensions added to house by vendors 40 years earlier, as required to support purchasers' claim of negligent misrepresentation against architect and contractor based on allegation that certificate of occupancy issued by town certifying that extensions were in compliance with building code was based on false plans submitted to town; purchasers were at best part of an indeterminate class of persons who presently or in the future could rely upon alleged misrepresentations of architect and contractor, which was not the equivalent of known parties.

[3] Fraud 42
184k42

An allegation of fraud that repeats an assertion of negligence and adds a general claim of reckless disregard of the facts or actual knowledge is insufficient to plead scienter.

[4] Pleading 18
302k18

Real estate purchasers' allegations, that defects in extensions built to house were known to architect and contractor hired by architect to expedite an application for certificate of occupancy for vendors from town, failed to include particularized factual assertion that supported inference of scienter, as required to state claim of fraud against contractor and architect when roof over extension collapsed after purchasers took title; purchasers merely alleged that defects in structure were known or should have been known by contractor and architect had they performed their duties of obtaining certificate and visually inspecting extensions built 40 years earlier with due care, while contractor and architect disclosed to purchasers that they relied on information provided by vendors.

**415 Beck, Gewurz and Strauss, PLLC,
Uniondale, NY, (Leland Stuart Beck of

counsel), for appellants.

Miller, Rosado & Algois, LLP, Mineola, NY,
(Neil A. Miller and Christopher Rosado of
counsel), for respondents.

MYRIAM J. ALTMAN, J.P., GLORIA
GOLDSTEIN, STEPHEN G. CRANE, and
WILLIAM F. MASTRO, JJ.

*773 In an action, inter alia, to recover
damages for fraud, the plaintiffs appeal from
an order of the Supreme Court, Nassau
County (Phelan, J.), dated March 17, 2003,
which granted the motion of the defendants
Michael Gregory and Michael A. Angelone to
dismiss the complaint insofar as asserted
against *774 them pursuant to CPLR
3211(a)(7) for failure to state a cause of action.

ORDERED that the order is affirmed, with
costs.

During the course of negotiations in July
2002 to sell their house in Oceanside to the
plaintiffs, the defendant owners Philip Sivilli
and Antoinette Sivilli (hereinafter the owners)
hired the defendant Michael Gregory to
expedite their application for a certificate of
occupancy for extensions to their house. The
owners had built the extensions
approximately 40 years earlier. Gregory hired
the defendant Michael A. Angelone, an
architect, to prepare architectural drawings.
In August 2002 the drawings were submitted
to the Town of Hempstead with a letter signed
by both Gregory and Angelone, stating that
the extensions were built by the owners
"approximately 40 years ago," the drawings
were based upon visual inspection of the
finished structures with "non-destructive
testing," and the owners "provided some
insight into the dimensions of some
questionable hidden members."

On September 4, 2002, the plaintiffs and the
owners entered into a contract of sale which
required the owners to provide the plaintiffs
with a certificate of occupancy or certificate of
zoning compliance at the closing. Thereafter,
on October 8, 2002, the Town issued a
certificate stating that its Department of

Buildings had inspected the structures and
found them "to be substantially in compliance
with the provisions of the Town of Hempstead
Buildings Zone Ordinance." Shortly after the
plaintiffs took title to the property, a roof on
the extensions collapsed and the plaintiffs
commenced this action to recover damages for
fraud and negligent misrepresentation
alleging, inter alia, that Gregory and
Angelone submitted false plans to the Town
and either knew of their falsity or should have
known of their falsity "had they performed
their duties honestly and with due care."

[1][2] The elements of a cause of action
sounding in negligent misrepresentation
include: (1) an awareness by the maker that
the statement is to be used for a particular
purpose, (2) reliance by a known party on the
statement in furtherance of that purpose, and
(3) some conduct by the maker of the
statement linking it to the relying party and
evincing its understanding of that reliance
(see *Securities Investor Protection Corp. v.*
BDO Seidman, 95 N.Y.2d 702, 711, 723
N.Y.S.2d 750, 746 N.E.2d 1042; *Parrott v.*
Coopers & Lybrand, 95 N.Y.2d 479, 484, 718
N.Y.S.2d 709, 741 N.E.2d 506; *Prudential*
Ins. Co. of Am. v. Dewey, Ballantine, Bushby,
Palmer & Wood, 80 N.Y.2d 377, 384, 590
**416 N.Y.S.2d 831, 605 N.E.2d 318). At
best, the plaintiffs were part of an
"indeterminate class of persons who, presently
or in the future" may rely upon Gregory and
*775 Angelone's alleged misrepresentations,
which are not the equivalent of known parties
(*Marcellus Constr. Co. v. Village of*
Broadalbin, 302 A.D.2d 640, 641, 755
N.Y.S.2d 474; see *Westpac Banking Corp. v.*
Deschamps, 66 N.Y.2d 16, 19, 494 N.Y.S.2d
848, 484 N.E.2d 1351; *Metral v. Horn*, 213
A.D.2d 524, 526, 624 N.Y.S.2d 177).

[3][4] The plaintiffs' cause of action sounding
in fraud required "a particularized factual
assertion which supports the inference of
scienter" (*Houbigant Inc. v. Deloitte &*
Touche, 303 A.D.2d 92, 98, 753 N.Y.S.2d 493).
An allegation that repeats an assertion of
negligence and adds a general claim of
reckless disregard of the facts or actual
knowledge is insufficient to plead scienter (see

Credit Alliance Corp. v. Andersen & Co., 65 N.Y.2d 536, 554, 493 N.Y.S.2d 435, 483 N.E.2d 110). The plaintiffs' allegations that "the defects in the structure were known" to Gregory and Angelone or "should have been known" by them "had they performed their duties honestly and with due care" were insufficient to state a cause of action sounding in fraud. Further, the documentary evidence established that Gregory and Angelone relied upon information provided by the owners and disclosed their reliance.

2 A.D.3d 773, 770 N.Y.S.2d 414, 2003 N.Y. Slip Op. 19957

END OF DOCUMENT

35

United States District Court,
S.D. New York.

Sheldon FRIEDMAN, et al., Plaintiffs,
v.
ARIZONA WORLD NURSERIES LIMITED
PARTNERSHIP, et al., Defendants.
Roger L. FROST, et al., Plaintiffs,
v.
ARIZONA WORLD NURSERIES LIMITED
PARTNERSHIP, et al., Defendants.
F.N. LaCORTE, et al., Plaintiffs,
v.
ARIZONA WORLD NURSERIES LIMITED
PARTNERSHIP, et al., Defendants.
K.G. MILLS, et al., Plaintiffs,
v.
ARIZONA WORLD NURSERIES LIMITED
PARTNERSHIP, et al., Defendants.
John Casey CLARK, Plaintiffs,
v.
ARIZONA WORLD NURSERIES LIMITED
PARTNERSHIP, et al., Defendants.

Nos. 86 Civ. 9834(KC), 88 Civ. 2212(KC), 88
Civ. 6306(KC), 88 Civ. 8795(KC) and
89 Civ. 5194(KC).

Jan. 24, 1990.

Investors in limited partnership sued accountants, attorneys and other defendants involved in sale of limited partnership interests, alleging violation of federal securities laws, RICO and state common law. Defendants moved to dismiss. The District Court, Conboy, J., held that: (1) § 10(b) claim against accountants involved in preparation of documents accompanying offering memorandum failed to adequately plead element of scienter; (2) element of scienter was also inadequately pled against attorneys who prepared offering memorandum; (3) allegations were also inadequate to attribute particular misrepresentation or fraudulent act to corporation which received finders' fee for selling business assets which made up limited partnership from group of defendants to another; (4) § 10(b) fraud allegations were pleaded with sufficient particularity with respect to other defendants; (5) allegations

failed to show reliance upon projections in offering memorandum so as to state § 10(b) claim, but allegations regarding then-existing condition and value of nursery business forming limited partnership were sufficient; (6) attorneys, corporation that received finders' fee, and accountants could not be deemed statutory sellers for purposes of action under § 12(b) of Securities Act; (7) § 12(2) claims commenced more than three years after sale of securities were untimely; (8) fraudulent concealment and diligence in discovering fraud were adequately plead with respect to claims that were not brought within one year of sale; (9) no implied private cause of action existed under § 17(a) of Securities Act; (10) predicate acts of racketeering activity stated claim under § 1962(c) of RICO; and (11) RICO conspiracy claim and claim that injury was somehow caused by investment of racketeering proceeds were insufficient.

Ordered accordingly.

West Headnotes

[1] Federal Civil Procedure 636
170Ak636

Fraud complaint must apprise each individual defendant of specific nature of his or her participation in fraud, particularly where there are multiple defendants. Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.

[2] Federal Civil Procedure 636
170Ak636

Although complaint need only aver intent generally, it must nonetheless allege facts which give rise to strong inference that defendants possessed requisite fraudulent intent--either intent to defraud, knowledge of falsity, or reckless disregard for truth. Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.

[3] Federal Civil Procedure 636
170Ak636

Specific requirements for pleading fraud regarding exactly what statements were made, and when, where and by whom are "somewhat relaxed" when complaint is based on offering memorandum. Fed.Rules

Civ.Proc.Rule 9(b), 28 U.S.C.A.

[4] Securities Regulation 60.30
349Bk60.30

Counsel who draft offering memorandum are not ordinarily liable for general statements in offering memorandum absent attribution of specific misstatements or omissions to them. Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.; Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b).

[5] Securities Regulation 60.45(3)
349Bk60.45(3)

Accountants who prepared financial projections and compilation reports as well as tax opinion letter analyzing tax implications of investment in limited partnership could not be held liable for securities fraud under § 10(b) where element of scienter was adequately plead; no indication was given that accountants knew of alleged "unreasonableness" of assumptions contained in appraisal of business, "falsity" of appraisal, and "fact" that underlying business was "failing," nor was there any indication of either gross negligence or recklessness, and alternative method for demonstrating scienter--motive--was not established by mere allegation that accountants were compensated for their professional services. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b).

[6] Securities Regulation 60.30
349Bk60.30

Professionals.

Complaint did not state § 10(b) securities fraud claim against attorneys who prepared offering memorandum for limited partnership, where individual attorneys were not given notice of specific allegations against them individually or against firm and no specific misrepresentations were attributed to attorneys; misrepresentations and conduct not tied to offering memorandum also were deficient with regard to time, place and content of alleged misrepresentations; even assuming arguendo that attorneys could be deemed insiders, allegations were insufficient with respect to scienter element, since there were no facts which would fairly support

strong inference that any of attorneys acted with intent to defraud or with reckless disregard for truth. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b); Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.

[7] Securities Regulation 302
349Bk302

Investor's complaint against attorney whose law firm prepared allegedly misleading offering memorandum in connection with limited partnership did not state claim against attorney under New York law where they did not allege that he worked on offering memorandum or that other attorneys in his firm, who did work on memorandum, were under his direct supervision or control. N.Y.McKinney's Business Corporation Law § 1505(a).

[8] Securities Regulation 60.40
349Bk60.40

Investors' complaint against attorney whose law firm prepared allegedly misleading offering memorandum regarding limited partnership investment did not state claim under federal vicarious liability principles against attorney to hold him liable as "control person" absent facts supporting inference of knowledge or reckless disregard of fraud; complaint alleged that other attorneys in firm worked on offering memorandum but did not allege that defendant attorney participated in work or that other attorneys worked under his direct supervision or control. Securities Exchange Act of 1934, § 20(a), 15 U.S.C.A. § 78t(a).

[9] Federal Civil Procedure 636
170Ak636

Investor's complaint against corporation that received finder's fee for selling assets to defendants who offered them as limited partnership investment was insufficient to state securities fraud claim under § 10(b) in the absence of any facts and complaint from which inference could be drawn that corporation knew of any fraud in offering of limited partnership investment to public. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b); Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.

[10] Federal Civil Procedure 636
170Ak636

Investors' § 10(b) fraud claims against managers or owners of businesses pleaded fraud with sufficient particularity in alleging that owners engaged in scheme to defraud as parties to purchase and sale of businesses, in which investors eventually purchased limited partnership interests, in order to realize immediate profit and to mollify earlier investors in businesses. Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.; Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b).

[11] Federal Civil Procedure 1831
170Ak1831

Federal district court was not precluded from deciding reliance issue involved in § 10(b) claims as matter of law on motion to dismiss for failure to state claim and was not required to wait until summary judgment phase of case where requisite documents necessary to decide motion were attached to and incorporated in complaint by reference. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.; Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b).

[12] Securities Regulation 60.27(5)
349Bk60.27(5)

Limited partnership investors failed to state § 10(b) securities fraud claims based on alleged misrepresentations of limited partnership's future expectations and performance contained in offering memorandum or its attachments, where warnings and disclaimers contained in those documents limited degree to which investors could rely on documents as forecast of future, and resulted in no assurances being made regarding such things as availability of income tax deductions or accuracy of appraisal. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.; Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b).

[13] Securities Regulation 60.27(5)
349Bk60.27(5)

Limited partnership investors stated § 10(b) claim for misrepresentations, omissions, and fraudulent conduct against sellers regarding

then-existing condition in value of nursery business sold to limited partnership where disclamatory language contained in offering memorandum and accompanying documents stated that projections contained in memorandum were based on appraisal procured by sellers and on assumptions provided by general partner. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.; Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b).

[14] Securities Regulation 60.30
349Bk60.30

Professionals.

Limited partnership investors did not state § 10(b) claim against either accountants or attorneys who assisted in preparation of offering memorandum and accompanying documentation for alleged misrepresentations, omissions and fraudulent conduct regarding then-existing condition and value of nursery business in which limited partnership was engaged, given limited role, if any, such defendants had regarding documentation and authentication of then-existing conditions in value and fact that scienter element was not properly pleaded with respect to them. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.; Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b).

[15] Securities Regulation 25.62(1)
349Bk25.62(1)

Under § 12(2) of Securities Act, there is no need for plaintiff to establish causal connection between misrepresentation and damage suffered, if any. Securities Act of 1933, § 12(2), 15 U.S.C.A. § 771(2).

[16] Securities Regulation 25.61(2)
349Bk25.61(2)

"Statutory seller" under § 12(2) of Securities Act is one who is alleged to have sold, offered to sell, or solicited sale of securities for financial gain. Securities Act of 1933, § 12(2), 15 U.S.C.A. § 771(2).

[17] Securities Regulation 25.62(1)
349Bk25.62(1)

There is no need to prove scienter or loss causation in order to hold statutory seller

liable under § 12(2) of Securities Act. Securities Act of 1933, § 12(2), 15 U.S.C.A. § 771 (2).

[18] Securities Regulation 25.61(9)
349Bk25.61(9)

Limited partnership investors failed to state claim under § 12(2) of Securities Act against attorneys who prepared offering memorandum, accountants who prepared supporting documentation, or corporation eligible to receive "finders' fee" for introducing original owners and managers to intermediate buyers of partnership assets where there were no allegations showing that any of those defendants solicited sale of limited partnership interests within meaning of Securities Act; to extent that it was alleged that attorneys rendered "assistance" to brokers in sale of interests, or that accountants engaged in "high degree of effort to sell" securities through identified partners, allegations were insufficient to show either when or where such aid was rendered, statements made, or time and place of efforts. Securities Act of 1933, § 12(2), 15 U.S.C.A. § 771 (2); Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.

[19] Securities Regulation 134
349Bk134

To satisfy statute of limitations for bringing claim under § 12(2) of Securities Act, in addition to setting forth time and circumstance of discovery of allegedly fraudulent statements or omissions, plaintiffs must plead facts demonstrating efforts they made to discover alleged fraud and reasons why they could not have done so sooner. Securities Act of 1933, §§ 12(2), 13, 15 U.S.C.A. § 771 (2), 77m.

[20] Securities Regulation 134
349Bk134

Claims under § 12(2) of Securities Act that were commenced more than three years after sale of securities were untimely due to absolute three-year statute of limitations, regardless of whether limited partnership investors discovered alleged fraudulent statements or omissions with due diligence. Securities Act of 1933, § 12(2), 13, 15 U.S.C.A.

§ 771 (2), 77m.

[21] Federal Civil Procedure 636
170Ak636

Allegations of fraudulent concealment for purposes of tolling statute of limitations, like all fraud allegations, must be pled with particularity. Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.

[22] Federal Civil Procedure 636
170Ak636

If plaintiffs allege that discovery of fraud was delayed by actions of particular defendant, they must set forth in complaint essential facts supporting such allegations. Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.

[23] Federal Civil Procedure 636
170Ak636

Limited partnership investors adequately pleaded fraudulent concealment by defendants of alleged misstatements and omissions in offering memorandum to explain their failure to discover alleged fraud within one year following sale of securities. Securities Act of 1933, §§ 12(2), 13, 15 U.S.C.A. §§ 771 (2), 77m.

[24] Federal Civil Procedure 636
170Ak636

Where limited partnership investors' complaint properly pleaded fraudulent concealment of alleged misstatements and omissions in offering memorandum, claims under § 12(2) of Securities Act would not be dismissed for failure to adequately plead due diligence with respect to investors' efforts to discover fraud by reason of their failure to identify which investors actually engaged in acts that tended to show diligence; however, further motion practice by defendants on timeliness of claim would be appropriate with respect to individual investors after discovery had been concluded and record was complete. Securities Act of 1933, §§ 12(2), 13, 15 U.S.C.A. §§ 771 (2), 77m.

[25] Securities Regulation 27.27
349Bk27.27

There is no implied private right of action under § 17 of Securities Act of 1933. Securities Act of 1933, § 17, 15 U.S.C.A. §

77q.

[26] Postal Service 35(2)
306k35(2)
(Formerly 83k82.72)

[26] Securities Regulation 60.51
349Bk60.51

Limited partnership investors failed to state RICO claim for relief against attorneys and accountants who assisted in preparing offering memorandum for legal partnership interests due to their failure to adequately plead securities fraud or mail fraud predicates against such defendants. 18 U.S.C.A. § 1962(c).

[27] Postal Service 35(2)
306k35(2)

In order to state claim for mail fraud, plaintiffs must allege existence of scheme to defraud, defendant's knowing or intentional participation in that scheme, and use of interstate mails in furtherance of fraudulent scheme.

[28] Postal Service 35(2)
306k35(2)
(Formerly 83k82.72)

Investors in limited partnership adequately pleaded predicate act of mail fraud to support RICO claim against certain defendants involved in sale of limited partnership interests. 18 U.S.C.A. § 1962(c).

[29] Racketeer Influenced and Corrupt Organizations 11
319Hk11
(Formerly 83k82.71)

Securities violations against 70 individual investors in limited partnership each constituted one predicate act for purposes of RICO cause of action. 18 U.S.C.A. § 1962(c).

[30] Racketeer Influenced and Corrupt Organizations 31
319Hk31
(Formerly 83k82.72)

[30] Racketeer Influenced and Corrupt Organizations 32
319Hk32

(Formerly 83k82.72)

Limited partnership investors sufficiently alleged that predicate crimes were related to and amounted to, or posed threat of, continuity such that they constituted pattern of racketeering activity, where acts consisted of alleged mail fraud, whereby defendants transmitted offering memorandum to each of individual investors, which was unquestionably related to alleged fraud in connection with sale of securities to each investor, with each acting temporarily proximate to others; continuity could be inferred from all surrounding circumstances where, although specific acts alleged in complaint related to sale of interests in one particular investment vehicle, complaint also clearly alleged that defendants were involved in business of selling similar interests to public on continuing basis and that those offerings were also fraudulent. 18 U.S.C.A. § 1962(c, d).

[31] Conspiracy 18
91k18

Limited partnership investors did not adequately allege conspiracy claim under RICO where they did not adequately allege that each defendant personally agreed to two or more predicate acts in connection with alleged fraudulent offering of limited partnership units. 18 U.S.C.A. § 1962(d).

[32] Racketeer Influenced and Corrupt Organizations 16
319Hk16
(Formerly 83k82.72)

Limited partnership investors failed to state RICO claim under section prohibiting use or investment of income received from pattern of racketeering activity in acquisition, establishment or operation of enterprise arising out of investment due to alleged securities and mail fraud where they did not adequately allege damages other than loss of their investments, since it was clear that those injuries arose out of commission of predicate acts, and not from investment by defendants of racketeering proceeds. 18 U.S.C.A. § 1962(a, c, d).

*526 Beigel & Sandler, Ltd., Lewis S.

Sandler and Marilyn Neiman, New York City, for plaintiffs.

Morrison Cohen Singer & Weinstein, Malcolm I. Lewin and Donald Chase, New York City, for Western defendants.

Gold & Wachtel, Elliot Silverman and Anthony Pennachio, New York City, for World defendants.

Jones Day Reavis & Pogue, Barry R. Satine and Carl F. Goodman, New York City, for Partnership defendants.

Rosenman & Colin, Arthur S. Linker and Terri L. Weiss and Fulbright Jaworski & Reavis McGrath, Marc S. Dreier and Glen Banks, New York City, for Friedman & Shaftan defendants.

Stein, Zauderer, Ellenhorn, Frischer & Sharp, Sidney H. Stein, Robin Kaufman and Eric M. Schmidt, New York City, for Andersen defendants.

Chekow & Kisner, Ronald Kisner, Great Neck City, for defendant Bryce Corp.

OPINION AND ORDER

CONBOY, District Judge:

I. BACKGROUND

Plaintiffs, seventy in all, have brought this action against the twenty-nine named defendants, claiming that their investment in defendant Arizona World Nurseries Limited Partnership ("AWNLP") was induced by the assertedly misleading Private Placement Memorandum (the "Memorandum" or "Offering Memorandum"), appended to which were the allegedly misleading Tax Opinion Letter and Financial Projections and Compilation Reports (the "Financial Projections"), which documents were prepared by some or all of the defendants. Plaintiffs have alleged violations of the Federal Securities laws, including Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78j(b), and Rule 10b-5

promulgated thereunder, 17 C.F.R. 240.10b-5, Sections 12(2) and 17(a) of the Securities Act of 1933 ("Securities Act"), the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961 et seq., and claims of common law fraud, negligence, and breach of fiduciary responsibility, and seek injunctive as well as declaratory relief in addition to the imposition of a constructive trust.

All of the defendants have moved to dismiss the Consolidated Complaint pursuant to Rules 9(b) and 12(b)(6) of the Federal Rules of Civil Procedure.

A. PROCEDURAL HISTORY

The procedural history of this litigation is long and complex. The action entitled Friedman, et al. v. Arizona World Nurseries Limited Partnership, et al., 86 Civ. 9834(EW) was commenced on or about December 24, 1986 on behalf of 24 plaintiffs. In lieu of responding to various motions to dismiss, plaintiffs in Friedman filed an amended complaint on or about May 24, 1987, adding new plaintiffs and defendants as well as its equitable claims for relief. Various defendants renewed their motions to dismiss. At oral argument before the late Honorable Edward Weinfeld, to whom this matter was assigned prior to his death, plaintiffs' application for leave to file another amended complaint was granted. A Second Amended Complaint, on behalf of fifty-five plaintiffs, was served on or about October 1, 1987, adding another defendant and furnishing additional detail regarding the plaintiffs' claims.

On or about October 8, 1987, another action was filed in this Court entitled Schumate, et al. v. Arizona World Nurseries Limited Partnership, et al., 87 Civ. 7237(EW), the complaint of which, with the exception of the 15 new plaintiffs, was identical to the Second Amended Complaint in the Friedman action. On November 13, *527 1987, plaintiffs in Schumate amended their complaint as of right to add still more parties and to amend various allegations regarding the plaintiffs' discovery

of the alleged fraud. On January 12, 1988, after Judge Weinfeld had granted a motion to consolidate, the Consolidated Complaint, upon which the defendants' pending motions are directed, was filed. As stated above, the Consolidated Complaint was filed on behalf of seventy plaintiffs and added still more details to the allegations in the original complaint.

In addition to these actions, four other actions were filed with complaints substantially similar to the Consolidated Complaint herein, with the exception of the naming of additional plaintiffs. Frost, et al. v. Arizona World Nurseries Limited Partnership, et al., 88 Civ. 2212(KC), LaCorte, et al. v. Arizona World Nurseries Limited Partnership, et al., 88 Civ. 6306(KC), Mills, et al. v. Arizona World Nurseries Limited Partnership, et al., 88 Civ. 8795(KC), and Clark v. Arizona World Nurseries Limited Partnership, et al., 89 Civ. 5194(KC). The parties in each of these actions have stipulated that our decision with respect to the Friedman Consolidated Complaint shall be binding upon them.

B. THE ALLEGATIONS

The voluminous Consolidated Complaint, which we will hereafter refer to simply as the complaint, comprises 93 pages and 171 paragraphs and incorporates by reference the Memorandum and the exhibits that were attached to it, including the tax opinion letter and the financial projections. We will attempt to briefly summarize the allegations, which, for the purposes of the pending Rule 12(b)(6) motions, [FN1] we must accept as true and which must be construed in the light most favorable to the plaintiffs. Airlines Reporting Corp. v. Aero Voyagers, Inc., 721 F.Supp. 579, 581 (S.D.N.Y.1989); see Scheur v. Rhodes, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974); Dacey v. New York County Lawyers' Assoc., 423 F.2d 188, 191 (2d Cir.1969), cert. denied, 398 U.S. 929, 90 S.Ct. 1819, 26 L.Ed.2d 92 (1970).

FN1. In its recent opinion in *Cosmas v. Hassett*, 886 F.2d 8, 11 (2d Cir.1989), the Second Circuit has stated that the standard for Rule 9(b) motions is

similar to the standard for Rule 12(b)(6) motions, that is "that on motions to dismiss, complaints should be read generously, and all inferences drawn in favor of the pleader." *Id.*

Plaintiffs are individuals who have invested various sums totalling \$3,552,500 in defendant Arizona World Nurseries Limited Partnership ("AWNLP"). ¶¶ 3-4. [FN2] We will sometimes refer to the plaintiffs as the limited partners.

FN2. Paragraph references herein to the Consolidated Complaint are designated by "¶ ___".

The complaint alleges that all twenty-nine defendants participated in a "scheme to defraud" and attempts to categorize the defendants into several groups. First, there are the so-called "Western defendants" which are a number of individuals and entities who were the former owners and/or managers of the nursery business. The plaintiffs allege the "Western defendants" include the following: Beardsley Holdings, Inc., Western United Nurseries, Inc., Sonora Nursery Sales, Inc., Fountainhead Nurseries Inc., Diversified Agronomics, Ltd., Phoenix Sunbelt Nurseries, Ltd., Great western Nurseries Ltd., Arizona United Nurseries, Ltd., Phoenix Sunbelt Nurseries II, Ltd., Phoenix Sunbelt Nurseries III, Ltd., White Tanks Nurseries, Ltd., Western Group Nurseries, Tyrone Kinder, Joseph Tyler, Bryce Corporation and Sonora Nursery Management, Inc. ¶ 6. The defendant Bryce Corporation has filed a motion to dismiss separate from the rest of the Western defendants. Accordingly, for the purposes of this opinion, "Western defendants" refers to all of the Western defendants except Bryce. [FN3] Next, there are *528 the "World defendants" who acquired the nursery business from the Western defendants and sold it two weeks later to the AWNLP. ¶ 5. Counsel representing these defendants have broken down the group further: the "World defendants" are defined as World Nurseries, Inc., Worldco Services Group, Inc., M & J Holding Corp., Herman Finesod and James Haber; and the "Partnership defendants" are defined as AWNLP and its general partner, Harvey Minars. All of these defendants are

alleged to be the promoters of Awnlp. ¶ 6.

FN3. There seems to be some confusion over whether Harold Schwartz, the president of the Bryce Corporation, is a defendant in this action. Some of the defendants have stated in their memoranda of law that he is a defendant, e.g., Western Defendants' Memorandum of Law at 7; Friedman & Shaftan Defendants' Memorandum of Law at 7, however, he is not in the caption of the complaint. In addition, counsel for plaintiffs, in its memorandum addressed to the motion of Bryce, does not contend that Schwartz is a defendant. Accordingly, we conclude that the Schwartz is not a defendant in the case and was only carelessly referred to as such.

Finally, there are what have been referred to as the professional defendants. The first of these are the accountants, the accounting firm Arthur Andersen & Co. and one of its partners, Ivan Faggen (the "Andersen defendants"), who prepared the tax opinion letter and certain financial projections for Awnlp. ¶ 7. The other professional defendants are the law firm of Friedman & Shaftan, P.C., and some of the firm's lawyers, Wilfred T. Friedman, Michael E. Greene, and Marcia Shaftan, as the executrix of the Estate of Robert P. Shaftan (the "Friedman & Shaftan defendants"), who are alleged to have been counsel for the Awnlp and to have drafted the Memorandum, including the Federal Income Tax Factors section and the legal opinion. ¶ 8.

The complaint alleges that all of the foregoing parties entered into a "scheme" to sell an unsuccessful nursery business in Arizona to Awnlp at an inflated price. The scheme was purportedly conceived by defendants Tyler and Kindor (who allegedly controlled the Western defendants), as the nursery business which the Western defendants allegedly owned and operated, and in which various limited partnership interests had been sold, was failing, so the investors needed to be "mollified." ¶ 40. Thus, Kindor and Tyler allegedly arranged for the Andersen defendants to prepare various financial projections and a "favorable tax opinion letter" and to structure a sale to

provide apparent tax write-offs that Kindor thought necessary to induce investors to purchase interests in Awnlp. ¶¶ 7B, 19, 44. Kindor gave Harold Schwartz, the president of the defendant Bryce Corporation, a memorandum of selling points that was prepared by Kindor, purportedly on the advice of the Andersen defendants, and Schwartz agreed to try to locate a purchaser, for which service he would receive a finder's fee. ¶¶ 43, 44. Schwartz, in turn, gave the proposal to his son-in-law, defendant Haber, who was employed by defendant Finesod, the asserted "control person" of the World defendants. ¶ 45.

Sometime in November of 1984, the World defendants are alleged to have agreed "to join Tyler, Kindor and Arthur Andersen in endeavoring to sell the nursery business to Awnlp through the intermediary purchaser" World Nurseries. ¶ 46. All allegedly agreed to structure the sale of the nursery business from the Western sellers to Awnlp "at an inflated purchase price through the use of a false appraisal and the use of World Nurseries as a sham intermediary purchaser." ¶ 47. Thus, pursuant to the purported "scheme," the Western defendants, in mid-December, sold the nursery business to World Nurseries for a total purchase price of \$22 million, paid in the form of a \$3 million "cash note" and a \$17 million non-recourse note which was payable only from nursery income. Another \$2 million was paid out of net sales of the nursery's "plant materials." ¶ 70. Then, on December 31, 1984, World Nurseries "contemporaneously" sold the business to Awnlp for approximately \$33 million-\$6.57 million in cash and a \$26.43 million partnership note that was "wrapped around" the note given by World nurseries to the Western defendants. ¶ 71. Plaintiffs apparently admit that the offering memorandum provided to each of them fully disclosed the details of this transaction, including the \$11 million step-up in purchase price from World Nurseries to *529 Awnlp, as they cite to the offering memorandum itself in the complaint. ¶ 70B.

Plaintiffs purchased their limited

partnership interests in AWNLP sometime in December 1984. ¶ 3A. Plaintiffs claim to have done so in reliance on certain misrepresentations in, and omissions from, the Memorandum and the exhibits appended thereto. ¶¶ 88-94. The alleged misrepresentations include (a) the overvaluation of the nursery stock and plant materials; (b) representation of a tax deduction in a year prior to eligibility; (c) unreasonably high sales projections; (d) unreasonably low expense projections; and (e) representation of reliance on an independent inspection. ¶ 88. The alleged omissions include the failure to disclose that the appraisal referred to was "arbitrary" and "unreasonable"; that the purchase price of the nursery stock was "inflated"; that the projections were based on unreasonable assumptions; that the investment in AWNLP had no real economic substance; that the sale was structured so as to leave control and benefits of ownership with the Western defendants; that the nursery business had an unprofitable history; that certain orders recorded in the books and records were fictitious; that much of the inventory was unmarketable; that the Western defendants had a poor reputation; that the business was "in jeopardy of collapse"; that the defendants knew that the projections were improper; that the defendants had falsified records and inflated receivables; that prior businesses run by the Western defendants had failed to meet their obligations to creditors and limited partners; that the defendants had previously structured similar limited partnerships which had been denied deductions by the IRS; that tax opinion letters for the prior partnerships in which the deductions had been disallowed had been prepared by the Friedman & Shaftan defendants; and that AWNLP was controlled not by the designated general partner but by Finesod who had been the promoter of other limited partnerships in which the deductions were disallowed. ¶ 93.

The plaintiffs further allege that the "Western Sellers have contended in various litigation ... that each limited partner assumed personal liability on AWNLP's note to World Nurseries in proportion to each

limited partner's share of interest in AWNLP." ¶ 74. They do not, however, forthrightly concede what some of the defendants allege and what is readily apparent from the offering documents: that each limited partner was required to guarantee a pro rata portion of the partnership's note in order to obtain the tax deductions that were the goal of their investment. See, e.g., Andersen Defendants' Memorandum of Law at 7.

Plaintiffs claim to have been damaged "in the amount of their investments." E.g., ¶¶ 119, 127, 131, 138, 143, 152.

II. ANALYSIS

In their motions, all of the defendants essentially assert that plaintiffs have attempted to charge all 29 defendants with a failure to disclose that the purchase price of the nursery business was too high and, hence, that the business could not make a profit. This "excessive" price was based on a appraisal of the value of the business which the plaintiffs claim all of the defendants should have known was not a true and fair appraisal. ¶ 61. We will proceed to analyze each defendant's liability, first under Section 10(b) and Rule 10b-5, then under Section 12(2), then under Section 17(a), then under RICO, and finally under the common law.

A. LIABILITY UNDER SECTION 10(B)

It is well settled that in order to state a claim under Section 10(b) of the Securities Exchange Act, 15 U.S.C. § 78j(b) (1982) or Rule 10b-5, promulgated thereunder, 17 C.F.R. § 240.10b-5 (1986), the first of plaintiffs' causes of action that we will consider, six elements must be established. These necessary elements are: (1) a material misstatement or omission, (2) indicating an intent to deceive or defraud (*scienter*), (3) in connection with the purchase or sale of any security, (4) through the use of interstate commerce or a national securities exchange, (5) upon which the plaintiff detrimentally *530 relied, and (6) that the fraud in fact caused the injuries. *Luce v. Edelstein*, 802

F.2d 49, 55 (2d Cir.1986); *Feinman v. Schulman Berlin & Davis*, 677 F.Supp. 168, 170 (S.D.N.Y.1988); *First Federal Savings & Loan Ass'n v. Oppenheim, Appel, Dixon & Co.*, 629 F.Supp. 427, 438 (S.D.N.Y.1986).

The motions to dismiss the Section 10(b) claims are founded on two grounds. First, the defendants, primarily the Andersen defendants, assert that the plaintiffs cannot state a claim under Section 10(b) because any misrepresentations in the offering materials are negated by the express language of the offering memorandum itself, the tax opinion letter and the report on the projections. While the Western defendants have also moved to dismiss for failure to state a claim, [FN4] they and all of the other groups of defendants have focussed primarily on the second ground for dismissal--that the plaintiffs have not adequately alleged the element of scienter as to each defendant or group of defendants, which will require us to examine the complaint pursuant to Fed.R.Civ.P. 9(b). We will examine the 9(b) arguments first.

FN4. The World and Partnership defendants in the last page of their primary memorandum of law have adopted the arguments of all the other defendants which are not inconsistent with their own.

1. Rule 9(b) Motions

[1] Rule 9(b) requires that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Motive, intent, knowledge, and other conditions of mind of a person may be averred generally." The specificity requirement of Rule 9(b) has been found to serve several purposes: "(1) to provide a defendant with fair notice of the plaintiff[s]' claims, (2) to protect a defendant from harm to his or her reputation or goodwill, and (3) to reduce the number of strike suits." *Cosmas v. Hassett*, 886 F.2d 8, 11 (2d Cir.1989); (quoting *Stern v. Leucadia Nat'l Corp.*, 844 F.2d 997, 1003 (2d Cir.), cert. denied, 488 U.S. 852, 109 S.Ct. 137, 102 L.Ed.2d 109 (1988)). Although each determination of compliance with Rule 9(b) "necessarily rests on its particular facts,"

Denny v. Barber, 576 F.2d 465, 470 (2d Cir.1978), as a general rule, courts in this circuit have required that:

[P]laintiff must specify: (1) precisely what statements were made in what documents or oral misrepresentations or what omissions were made, (2) the time and place of each such statement and the person responsible for making (or, in the case of omissions, not making) the same, (3) the context of such statements and the manner in which they misled the plaintiffs, and (4) what the defendants obtained as a consequence of the fraud.

Todd v. Oppenheimer & Co., Inc., 78 F.R.D. 415, 420-21 (S.D.N.Y.1978); see also *Posner v. Coopers & Lybrand*, 92 F.R.D. 765, 769 (S.D.N.Y.1981), aff'd, 697 F.2d 296 (2d Cir.1982); *Fidenas A.G. v. Honeywell, Inc.*, 501 F.Supp. 1029 (S.D.N.Y.1980); *Gross v. Diversified Mortg. Investors*, 431 F.Supp. 1080, 1087-88 (S.D.N.Y.1977), aff'd, 636 F.2d 1201 (2d Cir.1980). A fraud complaint must also apprise each individual defendant of the specific nature of his or her participation in the fraud, *Sanderson v. Roethenmund*, 682 F.Supp. 205, 207 (S.D.N.Y.1988), particularly where there are multiple defendants. *DiVittorio v. Equidyne Extractive Indus. Inc.*, 822 F.2d 1242, 1247 (2d Cir.1987). These requirements have been applied stringently, especially where allegations of securities fraud are involved. *Tobias v. First City Nat'l Bank and Trust Co.*, 709 F.Supp. 1266, 1276-77 (S.D.N.Y.1989) (collecting cases). However, the Second Circuit has recently repeated its admonition that "a court must read the complaint generously, and draw all inferences in favor of the pleader." *Cosmas v. Hassett*, supra, 886 F.2d at 11, 12.

[2] Although under the second sentence of Rule 9(b) a complaint need only aver intent generally, it must nonetheless allege facts which give rise to a strong inference that the defendants possessed the requisite fraudulent intent--either intent to defraud, knowledge of falsity, or reckless disregard *531 for the truth. *Beck v. Manufacturers Hanover Trust Co.*, 820 F.2d 46, 50 (2d Cir.1987), cert. denied, 484 U.S. 1005, 108 S.Ct. 698, 98

L.Ed.2d 650 (1988), overruled on other grounds, *United States v. Indelicato*, 865 F.2d 1370 (2d Cir.1989) (en banc), cert. denied, 493 U.S. 811, 110 S.Ct. 56, 107 L.Ed.2d 24 (1989). There are essentially two ways to establish a strong inference of scienter. A plaintiff may allege facts showing a motive for committing fraud and a clear opportunity for doing so. *Beck*, 820 F.2d at 50. Or, "[w]here motive is not apparent, it is possible to plead scienter by identifying circumstances indicating conscious behavior by the defendant, though the strength of the circumstantial allegations must be correspondingly greater." *Id.*

[3] The specific requirements regarding exactly what statements were made, and when, where and by whom are "somewhat relaxed" when the complaint is based on an offering memorandum. *Stevens v. Equidyne Extractive Indus.* 1980, 694 F.Supp. 1057, 1061 (S.D.N.Y.1988). The memorandum "satisfies 9(b)'s requirements as to identification of the time, place, and content of the alleged misrepresentation ... Furthermore, no specific connection between fraudulent representations in the Offering Memorandum and particular defendants is necessary where ... defendants are insiders or affiliates participating in the offer of the securities in question." *Luce v. Edelstein*, supra, 802 F.2d at 55 (citations omitted). While it is clear that general partners offering limited partnerships are considered insiders for purposes of Rule 9(b), the standard is less clear with respect to other types of defendants, particularly professional defendants. *Stevens*, 694 F.Supp. at 1061.

[4] There is, however, authority for the proposition that where counsel drafted the offering memorandum and were acting on behalf of the general partner, they are not, without more, corporate insiders or affiliates to whom the relaxed pleadings standards are applicable. See *DiVittorio*, supra, 822 F.2d at 1249; *Stevens*, 694 F.Supp. at 1062. Thus, they are not ordinarily liable for the general statements in the offering memorandum but rather plaintiffs must specifically attribute misstatements or omissions to them.

(a) The Andersen defendants

[5] Utilizing this as the standard for both groups of professional defendants, see *Stevens*, 694 F.Supp. at 1062, we determine that plaintiffs have specifically attributed statements to the Andersen defendants such that the time and place elements of 9(b) are satisfied. For example, the Andersen defendants performed two tasks in connection with the AWNLP offering memorandum: they prepared financial projections and compilation reports (based upon assumptions provided by the general partner) as well as a tax opinion letter analyzing the tax implications of the investment. Plaintiffs contend that both the tax opinion letter and the projections were materially false and misleading at the time they were made. The Andersen defendants argue, however, that plaintiffs have failed to allege facts which give rise to a strong inference of scienter, as required in this Circuit. Reading the complaint generously, we agree that plaintiffs have not alleged facts which give rise to a strong inference that the Andersen defendants possessed the requisite fraudulent intent. Taking the allegations as true that the Andersen defendants, in preparing the tax opinion letter and the projections, failed to disclose (1) the falsity of the World Information Systems ("W.I.S.") appraisal of the nursery business sold to AWNLP, ¶ 93(1); (2) the unreasonableness of the assumptions upon which the projections were based, ¶ 93(f); (3) the formulas and methods of calculation of the projections, ¶ 93(g), (4) the fact that the nursery business was failing at the time of the sale to the AWNLP, ¶ 93(r), (t), (u), and (5) the large projected operational expenses for 1985, ¶ 93(cc), we believe that the allegations as to the Andersen defendants' state of mind are merely conclusory and that there are no factual allegations which indicate that they knew of the alleged "unreasonableness" of the assumptions, the "falsity" of the appraisal, and the *532 "fact" that the nursery business was "failing."

There is no indication in the complaint of how or when either the Andersen firm or defendant Faggen supposedly knew that the

projections were indeed based upon unreasonable assumptions and that the appraisal was incorrect and misleading. While the complaint repeatedly alleges that all of the defendants knew or should have known that the appraisal of the nursery business was inaccurate "because of each defendant's experience, skill, expertise and training," ¶¶ 61, 62A, 63 and 94, it does not allege that Andersen or Faggen had anything to do with the appraisal, or indeed, that they had any reason to know or believe that it was inaccurate. For example, it is not alleged that they had access to specific information showing that the appraisal was wrong. Nor is it alleged that they conducted an audit from which they should have learned that the appraisal or other documents provided by the general partner were false. Although it is alleged that the accounting firm of Peat Marwick conducted an examination in November of 1983 of the financial condition of the nursery business as of the year ending 1982, which examination was not completed, and that Peat Marwick's work papers show that Peat Marwick found some accounting irregularities, ¶¶ 54, 57, significantly, plaintiffs have not alleged that Andersen ever reviewed Peat Marwick's work papers. Even if the Andersen defendants had conducted a full audit, it is well settled that an inference of fraud does not arise from the mere fact that an auditor reported on allegedly inaccurate data. *The Limited, Inc. v. McCrory Corp.*, 683 F.Supp. 387, 394 (S.D.N.Y.1988); see *Dannenberg v. Dorison*, 603 F.Supp. 1238, 1241 (S.D.N.Y.1985); *Ross v. Warner*, 480 F.Supp. 268, 272 (S.D.N.Y.1979). Furthermore, a purported failure to investigate "[does] not rise above the level of negligence, which is legally insufficient." *O'Brien v. National Property Analysts Partners*, 719 F.Supp. 222, 229 (S.D.N.Y.1989) (quoting *The Limited, Inc.*, 683 F.Supp. at 394).

Although proof of reckless conduct will satisfy the scienter requirement, see *Goldman v. McMahon, Brafman, Morgan & Co.*, 706 F.Supp. 256, 259 (S.D.N.Y.1989), and despite the fact that "an egregious refusal to see the obvious, or to investigate the doubtful may, in

some cases, give rise to an inference of gross negligence which can be the functional equivalent of recklessness," see *id.*, we do not believe there are any allegations in the complaint from which we can infer either gross negligence or recklessness.

Furthermore, as to the alleged failure to disclose some of the operating expenses, there is no indication that these figures were provided by the general partner to the Andersen defendants in the first place, and thus we cannot infer that the Andersen defendants knowingly failed to disclose them to the limited partners. The same can be said with respect to the allegation that the Andersen defendants knowingly failed to disclose the prior unsuccessful history of the nursery business.

Finally, with respect to the Andersen defendants' intent, we find that the alternative method of demonstrating scienter--motive--has not been established. Plaintiffs contend that the Andersen defendants were motivated to participate in the fraud because of personal gain. However, they have alleged no gain other than the fact that the Andersen firm was compensated for its professional services. It would defy common sense to hold that the motive element of the Beck scienter analysis would be satisfied merely by alleging the receipt of normal compensation for professional services rendered, because to do so would effectively abolish the requirement, as against professional defendants in a securities fraud action, of pleading facts which support a strong inference of scienter. Cf. *Wilson v. Saintine Exploration and Drilling Corp.*, 872 F.2d 1124 (2d Cir.1989) (holding that professional defendants who merely perform their usual professional functions and receive their normal compensation are not liable under the "draconian" provisions of Section 12(2)). Accordingly, the Section 10(b) claim is dismissed with respect to the Andersen defendants for *533 failure to adequately plead the element of scienter. [FN5]

FN5. Dismissal of the primary liability on the ground of failure to allege adequately the requisite

fraudulent intent also requires us to dismiss the aiding and abetting claim. As stated in *Bloor v. Carro, Spanbock, Londin, Rodman & Fass*, 754 F.2d 57, 62 (2d Cir.1985), a plaintiff bringing an aiding and abetting claim must show: (1) the existence of a securities law violation by the primary (as opposed to the aiding and abetting) party; (2) "knowledge" of this violation on the part of the aider and abettor; and (3) "substantial assistance" by the aider and abettor in the achievement of a primary violation. Plaintiffs must satisfy the 9(b) requirements when pleading aiding and abetting of securities fraud, see *Goldman v. McMahon, Brafman, Morgan & Co.*, 706 F.Supp. at 260. As plaintiffs failed to show a sufficient basis to support an inference that the Andersen defendants were, at least, reckless in their preparation of the projections or the opinion letter, they likewise fail to satisfy the knowledge element necessary to predicate a claim for aiding and abetting. See *id.* Furthermore, the common law conspiracy allegations must also be dismissed for this same deficiency. In order to establish liability for a conspiracy to commit fraud, "a plaintiff must plead and prove (1) an agreement between the conspirator and the wrongdoer; and (2) a wrongful act committed in furtherance of the conspiracy." *Bresson v. Thomson McKinnon Securities Inc.*, 641 F.Supp. 338, 348 (S.D.N.Y.1986). "[A] bare bones statement of 'conspiracy' ... without any supporting facts permits dismissal." *Heart Disease Research Foundation v. General Motors Corp.*, 463 F.2d 98, 100 (2d Cir.1972). Accordingly, "[a] claim of conspiracy to defraud must allege, inter alia, facts sufficient to support a finding of an agreement among those alleged to be a part of the conspiracy." *Troyer v. Karcagi*, 476 F.Supp. 1142, 1153 (S.D.N.Y.1979). " 'Conspiracy liability will require knowledge plus an agreement with the wrongdoer.' " *Id.* (citation omitted); see also *Terra Resources I v. Burgin*, 664 F.Supp. 82, 89 (S.D.N.Y.1987) (conspiracy to defraud requires knowledge of the underlying scheme). Thus, even if we assume *arguendo* that an agreement is sufficiently pled, because plaintiffs did not adequately allege the scienter of the Andersen defendants, they cannot be held liable as co-conspirators.

(b) The Friedman & Shaftan defendants

[6] As to the other professional defendants,

the attorneys, we conclude that the Section 10(b) claims are also not adequately pled pursuant to Rule 9(b) of the Federal Rules of Civil Procedure.

First, plaintiffs have not satisfied the rule that each of the Friedman & Shaftan defendants be given notice of the specific allegations against him, her or it. *DiVittorio*, supra, 822 F.2d at 1247. Although plaintiffs have sued the Friedman firm itself (Friedman & Shaftan, P.C.), plaintiffs have also joined the professional services corporations' shareholders, Wilfred T. Friedman, Michael E. Greene and Marcia Shaftan as executrix of the Estate of Robert P. Shaftan. The complaint, however, constantly refers to "Friedman & Shaftan" without indicating who did what and when. Furthermore, where the plaintiffs have attempted to identify acts of the individual defendants, they were unsuccessful in so doing. For example, in paragraph 26, it is alleged that Friedman & Shaftan, through Shaftan and Greene, "engaged in a high degree of individual effort to sell interests in AWNLP" and that they answered plaintiffs' inquiries and assured plaintiffs of the bona fides, inducing them to purchase interests. However, even if we assume that the attorney defendants are "insiders" for Luce purposes, this paragraph alleges misrepresentations and conduct not tied to the offering memorandum, and therefore, specificity as to time, place and the content of the alleged misrepresentations is required. See *Tobias v. First City Nat'l Bank and Trust Co.*, 709 F.Supp. 1266, 1277 (S.D.N.Y.1989). Since paragraph 26 contains no such specificity, we conclude that these allegations are inadequately pled.

With regard to the allegations concerning the preparation of the offering memorandum itself, as we stated above, counsel who merely draft the memorandum cannot be held liable for the general statements in the offering memorandum not specifically attributed to them. See supra at 531. Thus, plaintiffs must plead the time, place and content requirements of Rule 9(b). Plaintiffs do not attribute any specific misrepresentations to counsel; indeed, with respect to the tax assistance letter and the opinion regarding the

legality of the partnership units provided by the law firm, the only parts of the memorandum which arguably *534 contain representations from Friedman & Shaftan to the limited partners, no breach is alleged.

Even if we assume *arguendo* that the attorneys are insiders for Luce purposes, the allegations are deficient with respect to the scienter element. Plaintiffs have not pled facts which would fairly support a strong inference that any of the attorney defendants, either the firm itself or the named individuals, acted with an intent to defraud, or at least with reckless disregard for the truth. *Beck*, supra, 820 F.2d at 50. Assuming that the offering memorandum contained false and misleading information, plaintiffs do not allege any specific facts as to how and when any of the Friedman & Shaftan defendants learned that the offering memorandum contained such false and misleading information. *Devaney v. Chester*, 813 F.2d 566, 568-69 (2d Cir.1987); *Vereins-Und Westbank AG v. Carter*, 639 F.Supp. 620, 623 (S.D.N.Y.1986). There are no allegations that they had any specific communications or that they had met with any specific individuals, which facts would have created the necessary strong inference that each of the attorney defendants had the requisite fraudulent intent. *Schwartz v. Novo Industries, A/S*, 658 F.Supp. 795, 799 (S.D.N.Y.1987). We will not assume that clients as a matter of course communicate their allegedly fraudulent schemes, in whole or in part, to their attorneys. Furthermore, the mere fact that the Friedman firm had worked with the defendant Finesod on other offerings in the past does not raise a strong inference of fraud here in that plaintiffs do not allege that the Friedman & Shaftan defendants were ever accused of or determined to have committed any wrongdoing with respect to any of the prior tax shelters. *Dannenberg v. Dorison*, 603 F.Supp. 1238, 1241 (S.D.N.Y.1985). [FN6]

FN6. The aiding and abetting and conspiracy allegations against the attorney defendants fail for the same reasons articulated with reference to the Andersen defendants, supra footnote 5.

[7][8] In addition, we conclude that the entire complaint does not state a claim against Wilfred Friedman under either New York or federal vicarious liability principles. New York's Business Corporation Law § 1505(a) provides that "[e]ach shareholder, employee or agent of a professional service corporation shall be personally and fully liable and accountable for any negligent or wrongful act or misconduct committed by him or by any person under his direct supervision and control while rendering professional services on behalf of such corporation." (*McKinney's* 1986). While plaintiffs allege that defendants Shaftan and Greene worked on the offering memorandum and/or participated in the offering, they do not allege any such work by attorney Friedman or any direct supervision or control by him over the others. Accordingly, reading the plain words of the statute, *We're Associates v. Cohen, Stracher & Bloom*, 65 N.Y.2d 148, 151, 490 N.Y.S.2d 743, 744, 480 N.E.2d 357 (1985), the complaint does not state a claim under New York law on the part of Wilfred Friedman. Federal law, 15 U.S.C. § 78t(a), dictates the same result, for in order to be held liable as a "control person" there must be facts alleged supporting an inference of knowledge or reckless disregard of the fraud, see *Harrison v. Enventure Capital Group, Inc.*, 666 F.Supp. 473, 478-79 (W.D.N.Y.1987); *O'Connor & Assocs. v. Dean Witter Reynolds, Inc.*, 529 F.Supp. 1179, 1195 (S.D.N.Y.1981), and the defendant must "in some meaningful sense" be a culpable participant in the fraud perpetrated. See *Lanza v. Drexel & Co.*, 479 F.2d 1277, 1299 (2d Cir.1973) (en banc).

To summarize, the Section 10(b) claims are dismissed as to all of the Friedman & Shaftan defendants for failure to plead scienter, and the entire complaint is dismissed as to Wilfred Friedman for failure to plead facts alleging supervision or control.

(c) The Bryce Corporation

[9] As to the defendant Bryce Corporation, we also conclude that the plaintiffs' complaint is inadequately pleaded pursuant to Rule 9(b). The only specific allegations in the complaint

directed at Bryce are in paragraphs 6F, 42, 43, and 45. These allegations *535 do not, however, attribute any particular misrepresentation or fraudulent act or omission to defendant Bryce. Furthermore, the plaintiffs concede that Bryce is not a "Western Seller," ¶ 6A, and therefore the allegations regarding fraud by the Western Sellers are not applicable to Bryce. Moreover, accepting the allegations against Bryce as true, there are no facts in the complaint from which we could draw any inference, let alone a strong one, that Bryce knew of any fraud. As eloquently stated by Judge Leisure, "plaintiffs cannot satisfy Rule 9(b) by masking the lack of factual allegations against each defendant through broad allegations which combine the acts of several defendants to create the impression that all engaged in every aspect of the alleged fraud." *O'Brien v. National Property Analysts Partners*, 719 F.Supp. 222, 229 (S.D.N.Y.1989). Therefore, we reject plaintiffs' attempt in their memorandum in opposition to insert the name "Bryce" where the complaint does not do so and where the complaint indicates involvement of parties other than Bryce, such as the Western Sellers. Accordingly, the section 10(b) claims against Bryce are dismissed.

(d) The Western, World and Partnership defendants

[10] With regard to the Western defendants, we conclude that the Section 10(b) claims are adequately pleaded. Plaintiffs allege that defendants Kindor and Tyler, who are alleged to control the rest of the Western defendants, conceived the scheme to defraud because they needed to mollify other investors. ¶ 40. Kindor and Tyler are alleged to have persuaded Finesod, Haber and Minars (of the World and Partnership defendants) to join in a fraudulent scheme, ¶ 46, whereby the nursery business would be resyndicated to a new limited partnership. ¶ 41. Specifically, plaintiffs allege that all of the above parties agreed to structure the sale of the nursery business from the Western Sellers to AWNLP "at an inflated purchase price through the use of a false appraisal and the use of World Nurseries as a sham intermediary purchaser."

¶ 47. Each of these defendants was motivated by the ability to earn immediate cash profits and the Western defendants were further motivated by the ability to "mollify" their other investors. Furthermore, we find that there was a clear opportunity to commit fraud. Beck, *supra*, 820 F.2d at 50.

Although the Western defendants claim that they had no duty to disclose anything to the plaintiffs and therefore that they cannot be held liable under Section 10(b), we conclude that they may indeed be held liable for they are alleged to be parties to the purchase or sale, to have substantially participated in the concealment of material facts, or in the alternative to have been aiders and abettors to the sale. See *Murphy v. McDonnell & Co., Inc.*, 553 F.2d 292, 295 (2d Cir.1977). For example, the Western Sellers are alleged to have created the scheme, and despite their protestations to the contrary, to have assisted in the preparation of the offering materials. They are also alleged to have knowingly provided the sham appraisal and other false information, which they knew were either to be the basis for the projections or actually used in the offering memorandum. Furthermore, paragraph 93 is replete with allegations of their acts or omissions from which we can infer that the Western defendants acted with the requisite fraudulent intent both with respect to the projections and other fraud. For example, paragraph 93(m) essentially alleges that the Western defendants "cooked the books" by including sham purchase orders. Paragraph 93(o) alleges that the Western Sellers prematurely shifted plants to over-sized containers for sale to AWNLP to inflate their market value. Paragraph 93(w) accuses the Western defendants of artificially inflating receivables. Paragraphs 93(n) and (s) allege that the Western Sellers prepared the sham customer list attached to the offering memorandum. Accordingly, the Western defendants motion to dismiss pursuant to Rule 9(b) is denied.

As to the World and Partnership defendants, many allegations described above also support an inference that the World and Partnership defendants acted with the *536 requisite

fraudulent intent, particularly the fact that Finesod and Haber were able to realize an immediate cash profit of \$3.57 million, ¶¶ 53, 48, in the resale to AWNLP without any risk and without performing any function. ¶ 93(j). Beck, supra, 820 F.2d at 50 (inference of scienter where motive and clear opportunity to commit fraud). While it is true that the allegations regarding the procurement of the appraisal, ¶ 59, could probably be more particularly stated, we find that they are sufficient to give the World, Western and Partnership defendants notice of the acts for which plaintiffs seek to hold them liable. Furthermore, while it is true that these groups of defendants actually comprise over twenty individuals or entities, we cannot, at this point, in view of our obligation to accept the allegations in the complaint as true, dismiss any of these entities as not being controlled by or affiliates of either Kindor and Tyler or Haber and Finesod. Accordingly, in light of all of the foregoing and in view of the fact that the Partnership and World defendants are insiders, we find that the Section 10(b) fraud allegations are pleaded with the particularity required by Rule 9(b).

2. Rule 12(b)(6)

We will now address the Andersen, Western and World defendants' motions to dismiss pursuant to Rule 12(b)(6). In challenging the sufficiency of the complaint under rule 12(b)(6), the defendants bear the burden of proving that under no interpretation of the facts set forth in the complaint can the plaintiffs succeed. Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-02, 2 L.Ed.2d 80 (1957). As expressed above, supra at 527, for the purposes of this motion, all of the plaintiffs' allegations are accepted as true, and no claim can be dismissed "unless it appears beyond doubt that the plaintiff[s] can prove no set of facts in support of [their] claim which would entitle [them] to relief." Id.; Hughes v. Rowe, 449 U.S. 5, 10, 101 S.Ct. 173, 176, 66 L.Ed.2d 163 (1980).

In these motions, the defendants assert that the plaintiffs cannot state a claim under Section 10(b) because any misrepresentations

in the offering memorandum are negated by the express language of the offering memorandum itself, the tax opinion letter and the report on the projections. These defendants assert that there is a line of cases in this Circuit which holds that, as a matter of law, extensive cautionary language in the offering documents will preclude Section 10(b) claims based on those documents. Luce v. Edelstein, 802 F.2d 49, 56-57 (2d Cir.1986); see also Feinman v. Schulman Berlin & Davis, 677 F.Supp. 168, 170 (S.D.N.Y.1988); Andreo v. Friedlander, Gaines, Cohen, Rosenthal & Rosenberg, 651 F.Supp. 877, 881 (D.Conn.1986). While we do not agree with the assertion that this line of cases precludes all claims of misrepresentation, we do recognize that it mandates dismissal of many of the Section 10(b) claims alleged here, specifically, those founded upon the projections and other expectations which were expressed in the offering memorandum or in the attachments thereto.

[11] Plaintiffs have requested that we defer this motion until the summary judgment phase of the case, citing Devaney v. Chester, 813 F.2d 566 (2d Cir.1987). Devaney, however, does not so require; it merely stands for the proposition that courts should not consider the reasonableness of plaintiffs' reliance on a Rule 9(b) motion, as the issue goes to the merit of the plaintiffs' claims. Id. at 569. Devaney does not preclude a court from deciding the reliance issue as a matter of law on a motion pursuant to Rule 12(b)(6). Indeed, it is well settled that although a Rule 12(b)(6) motion is addressed to the face of the pleading, the pleading has been interpreted by the Second Circuit as "includ[ing] any document attached to it as an exhibit or any document incorporated in it by reference." Goldman v. Belden, 754 F.2d 1059, 1065-66 (2d Cir.1985) (citations omitted). Here, the Memorandum is attached to the complaint as Exhibit A, to which, in turn, the tax opinion letter and the financial projections are appended as Exhibits B and F, respectively. It is clear from the papers submitted in this action that all parties *537 consider these voluminous documents to be part of the complaint, as do we.

Before we examine the arguments made by the defendants, we believe it is necessary to highlight the relevant portions of the offering memorandum and its attachments which will be applicable to such examination.

(a) The Offering Materials

On the front page of the Offering Memorandum, in large bold and block letters, the following statement appears:

**THESE SECURITIES INVOLVE A HIGH
DEGREE OF RISK
(See "Risk Factors")**

The next four pages of the Memorandum, which we will label the "foreword" section and which are paginated i-iv, contain very specific warnings, all of which are repeated in greater detail in the Memorandum itself. These cautionary instructions are also in block letters, and we will set forth those that are most germane to the instant action. For example, on page i, it is stated that "AN INVESTMENT IN THE PARTNERSHIP ENTAILS SIGNIFICANT RISKS." SEE "RISK FACTORS," AND "FEDERAL INCOME TAX FACTORS." This admonition continues by listing seven of the potential risks, including:

4. SUBSTANTIAL COMPENSATION WILL BE PAID TO WORLD NURSERIES AND ITS AFFILIATES IN CONNECTION WITH THIS OFFERING AND THE ACQUISITION OF THE NURSERY ASSETS BY THE PARTNERSHIP, INCLUDING SUBSTANTIAL COMPENSATION PAID FROM THE PROCEEDS OF THIS OFFERING.

5. POTENTIAL CONFLICTS OF INTEREST EXIST BETWEEN THE PARTNERSHIP AND THE GENERAL PARTNER, WORLD NURSERIES, BEARDSLEY AND THEIR AFFILIATES AND COUNSEL TO THE PARTNERSHIP.

7. THERE ARE OTHER SUBSTANTIAL RISKS RELATING TO THE AVAILABILITY AND AMOUNT OF TAX

BENEFITS RESULTING FROM AN INVESTMENT IN THE PARTNERSHIP. NO RULINGS HAVE BEEN SOUGHT FROM THE INTERNAL REVENUE SERVICE ("SERVICE") WITH RESPECT TO ANY OF THE TAX MATTERS DESCRIBED IN THIS MEMORANDUM. IF FOR FEDERAL INCOME TAX PURPOSES [one or more of seven enumerated events occurs], ALL OR A SUBSTANTIAL PART OF THE TAX BENEFITS DESCRIBED HEREIN WOULD NOT BE AVAILABLE TO THE INVESTORS. IN ADDITION, OTHER AUDIT ADJUSTMENTS MAY AFFECT BOTH THE TIMING AND THE AMOUNT OF THE TAX BENEFITS AVAILABLE.

Offering Memorandum at ii.

After these statements, specific and detailed warnings with reference to the tax opinion letter appear, after which the following, also in block letters, appears:

THE TAX OPINION IS NOT BINDING ON THE SERVICE OR ANY COURT OF LAW.

NO REPRESENTATION OR WARRANTIES OF ANY KIND ARE MADE OR INTENDED, WITH RESPECT TO THE ECONOMIC RETURN OF THE TAX BENEFITS WHICH MAY ACCRUE TO INVESTORS. NO ASSURANCE CAN BE GIVEN THAT EXISTING TAX LAWS WILL NOT BE CHANGED OR INTERPRETED ADVERSELY. A CHANGE IN OR ADVERSE INTERPRETATION OF EXISTING TAX LAWS MAY DENY THE INVESTORS ALL OR A PORTION OF THE TAX BENEFITS CONSIDERED HEREIN. EACH INVESTOR MUST CONSULT WITH HIS OWN COUNSEL AND OTHER ADVISERS WITH RESPECT TO THE TAX AND OTHER CONSEQUENCES OF AN INVESTMENT IN THE PARTNERSHIP, AND MUST REPRESENT THAT HE HAS DONE SO *538 PRIOR TO THE PURCHASE BY HIM OF ANY UNITS.

Offering Memorandum at iii.

The final cautionary words in the "foreword" section of the Memorandum relate to representations made by the general partner and other than the general partner. Basically, it is stated that only the general partner, and no one else, is authorized to supply potential investors with information. Further, there is a disclaimer that

ANY INFORMATION NOT SO SUPPLIED OR ANY STATEMENT NOT CONTAINED HEREIN CANNOT BE RELIED UPON AS HAVING BEEN AUTHORIZED BY THE PARTNERSHIP OR THE GENERAL PARTNER, ANY AFFILIATES OF THEM OR ANY PROFESSIONAL ADVISERS THERETO.

Offering Memorandum at iii. In addition, regarding the statements and representations made, there is a disclaimer that

THE STATEMENTS CONTAINED HEREIN ARE BASED ON INFORMATION BELIEVED BY THE GENERAL PARTNER TO BE RELIABLE. NO WARRANTY CAN BE MADE AS TO THE ACCURACY OF SUCH INFORMATION OR THAT CIRCUMSTANCES MAY NOT HAVE CHANGED SINCE THE DATE SUCH INFORMATION WAS SUPPLIED.

Offering Memorandum at iii-iv.

The "Risk Factors" section of the Offering Memorandum outlines in considerable detail (eleven pages), the potential risks of investing in the partnership. A number of the risks are then enumerated in further detail in other sections of the memorandum. In this section, the admonition is repeated that there is no representation made, nor can any be inferred, regarding the accuracy or completeness of the financial projections or the underlying assumptions. Offering Memorandum at 19. It is also stated in this section that there was no audit of the Partnership's financial statement performed by independent accountants, *id.* at 21, that there are or may be significant conflicts of interest between the "General Partner, the Partnership, World Nurseries, Beardsley, the Manager, and their

respective Affiliates and their counsel," *id.* at 18, that there are significant tax risks, *id.* at 22-27.

Regarding the existing or potential conflicts of interest, these are delineated, in detail, in one and one-half pages of the memorandum. Specifically relevant for the purpose of the pending motions is the statement therein that "[t]he terms of the [agreement between World Nurseries and the Partnership for the acquisition of the Nursery Assets by the Partnership] are not the result of arm's length bargaining, although certain terms included therein are based on the Western Agreement which was negotiated at arm's length between the Western Group and World Nurseries." Offering Memorandum at 51 (emphasis added). Also germane is the paragraph regarding the defendant Friedman & Shaftan's role, It provides in part that:

Friedman & Shaftan, P.C. is acting as counsel to the Partnership in connection with this Offering and may render future legal services to the Partnership. Friedman & Shaftan, P.C. has acted as counsel to World Nurseries and its Affiliates. No independent counsel representing solely the Limited Partners has been involved in the negotiation of this offering or of the transaction proposed hereby and the partnership does not intend to retain such counsel in the future.

Id. at 52 (emphasis added).

The actual Tax Opinion Letter issued by the defendant Arthur Andersen contained the following statement:

The tax analysis with which we concur is not binding on the Internal Revenue Service and there can be no assurance that the service will not take a position contrary to any of the opinions expressed therein or that if the Service took such a position, it would not be sustained by the courts. In addition, prospective investors are urged to seek the advice of their personal tax advisors. (emphasis added)

Id. Furthermore, on the subject of expected tax benefits, it was expressly stated in the

introduction to the Federal Income Tax *539 Factors section of the Memorandum, on which the tax opinion is, in large part, based, that "there can be no assurance that some of the deductions and credits claimed by the partnership will not be challenged by the Service.... A PROSPECTIVE INVESTOR SHOULD OBTAIN PROFESSIONAL GUIDANCE FROM HIS OWN TAX ADVISER IN EVALUATING THE TAX RISKS INVOLVED." Offering Memorandum at 53 (emphasis in original). In this "Tax Factors" section of the memorandum, which comprises thirty four pages, numerous potential risks are enumerated and discussed in detail, and several possible resolutions by the IRS for each issue are presented. *Id.* at 53-86.

As for the Financial Projections prepared by the Andersen defendants, they contain the express admonition that they were generated based on these assumptions and upon appraisals of the nursery items as well as the sales of the nursery items. Some assumptions may not materialize, and unanticipated events and circumstances may occur subsequent to the date of the projections. Accordingly, the actual results achieved during this projection period may vary from the projections and the variations may be substantial.

Id. The cover letter which accompanied the projections, dated December 14, 1984, likewise states that the projections "are based on appraisals, assumptions and estimates which were made by the representatives of Arizona World Nurseries Limited Partnership...." The letter further states that Andersen's sole undertaking with respect to the projections was to satisfy itself "as to the mathematical accuracy of the projections and that they fairly reflect the estimates and assumptions contained therein." The letter then recites extremely explicit warnings as to the accuracy and achievability of the projections:

The selection of estimates and assumptions requires the exercise of judgment and is subject to uncertainties relating to the effect that changes in legislation or economic or other circumstances may have on future

events. There can be no assurance that the assumptions or data upon which they are based are accurate. Variations of such assumptions could significantly affect the projections. To the extent that the assumed events do not occur, the outcome may vary significantly from that projected. Accordingly, we express no opinion on the achievability of the results presented in the projections, and no representation to the contrary may be made or implied. (emphasis added)

The Subscription Agreement, located at Exhibit J to the Offering Memorandum, signed by each of the plaintiffs, contains the following relevant representations and warranties by the investors: "I have been informed that my investment is a high risk investment, and in evaluating such investment I have consulted with my own investment and/or legal and/or tax advisor" ¶ 2(c); "With respect to the tax and other legal aspects of my investment I have relied solely upon the advice of my own tax and legal advisors" ¶ 2(i); and "I recognize that the Partnership is newly organized and has no history of operations or earnings and is a speculative venture ...," ¶ 2(j).

Finally, we note that the Offering Memorandum fully discloses the details of the sale of the nursery from the Western Sellers to World Nurseries and the subsequent sale, two weeks later, by World Nurseries to the Partnership, including the \$11 million step-up in purchase price from World Nurseries to the Partnership. Offering Memorandum at 36-37. In fact, plaintiffs' complaint pleads the details of the sale and cites to the offering memorandum, thus implicitly conceding that there was indeed full disclosure of the sales.

(b) Analysis

[12] In view of all of the foregoing warnings and cautionary language contained in the tax opinion letter, the projections, and the offering memorandum itself (particularly the foreword and tax factors sections), we conclude that Luce and its progeny are applicable here so as to preclude liability for misrepresentations

regarding expected or future tax benefits or *540 profits. In fact, Luce specifically involved allegations that statements in the offering memorandum regarding financial projections of future cash flow and expected tax benefits were materially misleading. Luce v. Edelstein, 802 F.2d at 56-57. The projections in Luce, like those in issue here, contained warnings that they were "necessarily speculative in nature," that "[n]o assurance [could] be given that these projections [would] be realized," and that "[a]ctual results may vary from the predictions and that these variations may be material." Luce, supra, at 56. Accordingly, the Luce court stated that it "was not inclined to impose liability on the basis of statements that clearly 'bespeak caution' ". Id.

Relying on Luce, the court in *Feinman v. Schulman Berlin & Davis*, 677 F.Supp. 168, 170-71 (S.D.N.Y.1988), rejected plaintiffs' Section 10(b) claims relating to projected tax benefits. There, after detailing the cautionary language in the offering memorandum, which we note is quite similar to that in issue here, the court stated that the "offering memorandum warned plaintiffs not to rely on the misrepresentations which the defendants allegedly made. Plaintiffs' reliance on these representations, if made, was unjustified and dismissal is appropriate." Id. at 171. See also *Andreo v. Friedlander, Gaines, Cohen, Rosenthal & Rosenberg*, 651 F.Supp. 877, 881 (D.Conn.1986) (dismissing Section 10(b) claims because "the language of the document in question limited the degree to which investors should rely on it").

The projections in issue here make clear that they "are based upon assumptions made by Arizona World Nurseries Limited Partnership of the income and expenses and cash flow from the operations of the nursery." Offering Memorandum, Ex. F: "Notes and Assumptions" section of the Financial Projections at 1. Furthermore, the projections expressly cautioned that they were based upon these assumptions and appraisals, and that some of the assumptions may not materialize, and thus, that the actual results achieved could then vary from the projections

substantially. In addition, the cover letter which accompanied the projections made clear the limited role that the Andersen defendants assumed with reference to the projections (that they did not perform an audit and that they did not verify the assumptions provided by the general partner), and once again, explicitly warned, as set out above, as to the accuracy and achievability of the projections. Certainly, then, no misrepresentation claim can be predicated upon the fact that the projections did not bear out. Luce, supra, at 57; *Feinman*, supra, at 170-71; *Andreo*, supra, at 881-82.

Likewise, the tax opinion letter states only that Andersen had "reviewed" the material in the private offering memorandum, and particularly the "Federal Income Tax Factors" section (which we note includes a lengthy discussion of the deductibility of the purchase price of the nursery stock and the potential challenges by the IRS). Based on this review, Andersen had determined that, in its opinion, "all material Federal tax issues have been considered and have been fully and fairly discussed," that "the Partnership will more likely than not prevail on each material tax issue presented," and that "in the aggregate the tax benefits of an investment in the Partnership will more likely than not be realized." Offering Memorandum, Ex. B. Andersen never stated that the limited partners were certain to receive their desired tax deduction; rather, the accountants issued warnings to the contrary, as set forth in full above. It is clear, from the tax opinion letter, the Tax Factors section of the offering memorandum, and the warning pages in block letters in the "foreword" section of the memorandum, that no assurances were made by the Andersen defendants regarding the availability of the deductions or the accuracy of the appraisal.

Furthermore, as can be seen from the warnings in the front of the offering memorandum also quoted above, as well as the "Tax Risks" section of the Memorandum, and as stated on page two of the tax opinion letter, Andersen relied on the factual information provided to it by the management

of the partnership. Tax Opinion Letter at 2 (Andersen "relied on management and their legal counsel for business and *541 legal matters"); Offering Memorandum at 22 ("INVESTORS ARE CAUTIONED THAT THE CONCLUSIONS IN THE TAX OPINION ARE BASED UPON CERTAIN REPRESENTATIONS TO ARTHUR ANDERSEN BY THE GENERAL PARTNER"). We conclude that, given all of the cautionary language, Andersen's tax opinion cannot be read to mean that Andersen undertook to make representations of any kind regarding the value of the nursery stock. Furthermore, we find that, to the extent that plaintiffs relied on the tax opinion letter as representing otherwise, such reliance was not reasonable. Thus, plaintiffs cannot state a claim based upon the fact that the IRS disallowed the deductions.

Accordingly, those Section 10(b) claims that must be, and are hereby, dismissed against all the defendants are the claims of misrepresentation based on the future expectations and performance of the limited partnership contained in the offering memorandum or its attachments. The warnings and disclaimers discussed above clearly limited the degree to which an investor could reasonably rely on these documents as a forecast of the future. *Luce v. Edelstein*, 802 F.2d at 56-57.

[13][14] We believe, however, that there are several asserted misrepresentations that can not be dismissed on the instant record. For example, the cautionary language may not be sufficient to disclaim liability on the part of either the World, Partnership or Western defendants for the misrepresentations, omissions and fraudulent conduct regarding the then-existing condition and value of the nursery business, to wit: the nursery stock and plant materials, the equipment, the customer lists and so forth, as the disclamatory language quoted above states that the projections were based on the appraisal procured by the World and Western defendants and on assumptions provided by the general partner. All of the Section 10(b) claims regarding then-existing

misrepresentations are, however, dismissed as to the Andersen defendants, see *Andreo*, 651 F.Supp. at 881, as well as the *Friedman & Shaftan* defendants and the *Bryce Corporation*, because of both the limited role, if any, these defendants had regarding the documentation and authentication of the then-existing conditions and value, and our conclusion above that the scienter element was not properly pleaded with respect to these three groups of defendants. On the other hand, claims of misrepresentation relating to then-existing conditions and value are sustained for the purposes of the present motion as to the *World, Partnership, and Western* defendants.

B. LIABILITY UNDER SECTION 12(2) OF THE SECURITIES ACT

[15] Section 12(2) of the Securities Act provides purchasers with a cause of action against a person who "offers or sells a security" by means of a defective prospectus. 15 U.S.C. § 771 (2). If a security is sold "by means of" a misstatement or omission, the purchaser may tender the security to the seller and recover the purchase price plus interest, less income, or if the purchaser no longer owns the security, he or she may recover equivalent rescissory damages. *Randall v. Loftsgaarden*, 478 U.S. 647, 655-56, 106 S.Ct. 3143, 3148-49, 92 L.Ed.2d 525 (1986). There is no need for reliance by the plaintiffs on the misrepresentation, *L. Loss, Fundamentals of Securities Regulation* 889 (2d ed. 1988) (citing, inter alia, *Wigand v. Flo-Tek, Inc.*, 609 F.2d 1028, 1034 (2d Cir.1979)), and there is no need for plaintiffs to establish a causal connection between the misrepresentation and the damage suffered, if any. *Loss, supra*; see also *Wilson v. Saintine Exploration and Drilling Corp.*, 872 F.2d 1124, 1127 (2d Cir.1989).

Plaintiffs here allege that all of the defendants are statutory sellers of the limited partnership interests, or in the alternative, that they are aiders and abettors to a statutory seller. The Second Circuit has held that "persons who do not meet the Pinter test for statutory sellers may not be held liable under Section 12 as aiders and abettors."

Wilson, supra, 872 F.2d at 1127 (construing Pinter v. Dahl, 486 U.S. 622, 108 S.Ct 2063, 2083, 100 L.Ed.2d 658 (1988) (which interpreted Section 12(1))). Accordingly, unless we find a defendant or a *542 group of defendants to be a "statutory seller," the definition of which has been expanded by the Second Circuit in its interpretation of Pinter v. Dahl, the Section 12(2) claims ought to be dismissed as to that defendant or group of defendants. In addition, most of the defendants claim that the Section 12(2) claims are not timely, another issue which we must address.

1. Statutory Seller

[16][17] A statutory seller under Section 12(2) is one who is alleged to have sold, offered to sell, or solicited the sale of the securities for financial gain. Wilson, 872 F.2d at 1126 (applying the Section 12(1) analysis of Pinter to Section 12(2)). There is no need to prove scienter or loss causation in order to hold a statutory seller liable. Id. Thus, it is clear that any person or entity that passes title or offers to pass title in a security for value may be found liable. The question of when a party will be liable for solicitation is somewhat murkier. As stated in Wilson,

it is not solicitation to recommend the purchase of a security to benefit the buyer. "[L]iability extends only to the person who successfully solicits the purchase, motivated at least in part by a desire to serve his own financial interests or those of the securities owner." Id. at 2079 (emphasis added) [quoting Pinter, 108 S.Ct. 2063, 2079]. It also is clear that mere participation in the solicitation by another is not solicitation, id. at 2081 n. 27, which is why the lawyers performing "only ... their professional services" are not liable under § 12. Id. at 2081. The proper focus of the analysis appears to be on the "defendant's relationship with the plaintiff-purchaser", rather than "the defendant's degree of involvement in the securities transaction and its surrounding circumstances." Id.

Wilson, 872 F.2d at 1129 (Timbers, J., dissenting).

[18] Under this analysis, we conclude, for the reasons immediately following, that the plaintiffs have not stated a claim under this section as against the Andersen defendants, the defendant Bryce, or the Friedman & Shaftan defendants.

With respect to the Andersen defendants, only paragraph 19B of the complaint could possibly be construed to allege solicitation. However, neither relevant subparagraph, (i) or (iii), does so with the particularity required by Rule 9(b), the standards of which were set out above. For example, it is alleged that certain Andersen partners assisted the brokers in the sale of the interests; however, when or where such "assistance" was rendered and to whom exactly is not alleged. Essentially, this assertion constitutes an allegation that the Andersen defendants assisted the solicitation efforts of another, which the Supreme Court has held to be insufficient to allege seller status. Pinter v. Dahl, 108 S.Ct at 2081 n. 27 (interpreting Section 12(1), but applied by the Second Circuit to Section 12(2)).

Furthermore, although it is alleged that "Andersen engaged in a high degree of effort to sell the securities through the [] identified partners, and was in actual contact with investors and their representative", this allegation fails since it does not identify the statements themselves, the time and place they were made, or the investors. We do not even know that any of the plaintiffs in this action comprise the investors purportedly in contact with the Andersen defendants. Finally, plaintiffs have not satisfied the element in Wilson that requires the solicitation "for a financial gain." Id. at 1126. The Wilson court stated that "the draconian provisions of Section 12 must not be extended to include [professionals] who have performed only their usual professional functions in preparing documents for an offering." Id. Other than the usual fees for professional services rendered in connection with the provision of the tax opinion letter and the projections, no financial gain, i.e., commissions or finders' fees, is alleged. Accordingly, we dismiss the Section 12(2) claim as to the Andersen defendants.

As to the defendant Bryce Corporation, the foregoing analysis also applies. Although Bryce is alleged to have been eligible to receive a finders' fee from the Western *543 defendants for "finding" the World defendants, ¶¶ 42, 43, there are no allegations that Bryce in any way sold limited partnership interests to, or solicited such sales of, any of the plaintiffs. Therefore, the Section 12(2) claim is dismissed as against Bryce.

The above analysis is also germane with respect to the Friedman and Shaftan defendants. Although plaintiffs attempt to allege "solicitation for financial gain" by the allegation in paragraph 109 that "Friedman & Shaftan received sales commissions in connection with its finding investors to become limited partners in AWNLP," this paragraph, like paragraph 26 discussed supra, at 533-34, is not sufficiently particular under Rule 9(b) as there are no facts alleged which support it. For example, plaintiffs have not alleged that any of the Friedman & Shaftan defendants introduced any of the plaintiffs to the general partner or actually "brokered" the sale of any of the AWNLP interests. This is information which the plaintiffs have access to and which should have been alleged. Accordingly, we dismiss the Section 12(2) claim against the Friedman & Shaftan defendants. [FN7]

FN7. Even if we were to find these allegations of "solicitation for financial gain" sufficient, the Section 12(2) claim against the Friedman & Shaftan defendants would not pass muster under the analysis of Section 13, *infra* at 543-44, as plaintiffs have not sufficiently implicated them in the fraudulent concealment.

It is clear that the Section 12(2) claim cannot be dismissed against either the World or Partnership defendants on the grounds that they were not statutory sellers. In fact, these defendants have not addressed the claim in their briefs (save for the footnote to the conclusion that they join in the motions made by the other parties where they are applicable), indicating by their silence that they recognize that they could not prevail on the argument. Nor do the Western

defendants argue that they are not statutory sellers [FN8]; rather, they argue only that the claim is pleaded deficiently in that the requirements of Section 13 of the Securities Act have not been met. Thus, we must now examine this assertion before we can determine whether the plaintiffs have stated section 12(2) claims against the World, Partnership, and Western defendants.

FN8. Whether or not these defendants are statutory sellers is a question we will leave for another day when the issue has been properly briefed.

2. Statute of Limitations

Section 13 of the Act provides that Section 12(2) allegations, even if otherwise sufficient, can state a cognizable claim only if they establish on their face that the claim was "brought within one year after the discovery of the untrue statement or omission or after such discovery should have been made by the exercise of reasonable diligence.... In no event shall any action be brought ... more than three years after the sale." It has been held that plaintiffs have the burden of pleading compliance with statute of limitations in Section 13, *Krome v. Merrill Lynch & Co. Inc.*, 637 F.Supp. 910, 914, vacated in part on other grounds, 110 F.R.D. 693 (S.D.N.Y.1986), and that a complaint which does not adequately do so is subject to dismissal. *Id.* at 913-15; see *Quantum Overseas N.V. v. Touche Ross*, 663 F.Supp. 658, 662 (S.D.N.Y.1987).

[19][20] To satisfy Section 13, in addition to setting forth (1) the time and circumstances of the discovery of the allegedly fraudulent statements or omissions, plaintiffs must (2) plead facts demonstrating the efforts they made to discover the alleged fraud and (3) the reasons why they could not have done so sooner. *Sanderson v. Roethenmund*, 682 F.Supp. 205, 208 (S.D.N.Y.1988); *Quantum*, 663 F.Supp. at 662. Plaintiffs allege that they purchased their partnership interests, in reliance upon the allegedly false offering memorandum, in or around December 1984. ¶ 3. Thus, because more than one year from the commission of the fraud elapsed prior to plaintiffs' filing of this action, plaintiffs must

plead their diligence. *Boley v. Pineloch Assocs., Ltd.*, 700 F.Supp. 673, 676 (S.D.N.Y. *544 1988). As a preliminary matter, we observe that the Section 12(2) claims in the actions commenced after December 1987, three years after the sale of the securities, are untimely due to the absolute three year statute of limitations provided by Section 13. *Miller v. Grigoli*, 712 F.Supp. 1087, 1091 (S.D.N.Y.1989); see also *Krome v. Merrill Lynch & Co. Inc.*, supra, 637 F.Supp. at 914 ("Where the very statute that creates the cause of action also contains a limitations period, the statute of limitations not only bars the remedy but also destroys the liability."). Thus, the Section 12(2) claims in the *Frost*, *LaCorte*, *Mills*, and *Clark* actions are time-barred. They are also time-barred under the one year provision of Section 13 as the latest date plaintiffs claim to have discovered the fraud is November of 1986. ¶ 112.

[21][22] As to the plaintiffs in the original *Friedman* and *Schumate* actions (on whose behalf the consolidated complaint was filed), only twenty eight of these plaintiffs commenced an action in December 1986, two years after they purchased their interests in AWNLP by means of the allegedly fraudulent offering memorandum. All of the plaintiffs in the consolidated complaint assert that they failed to discover the fraud within one year of the sale because of the defendants' so-called "fraudulent concealment" as alleged in paragraphs 111-19. Allegations of fraudulent concealment, like all fraud allegations, must be stated with particularity. *Sanderson*, 682 F.Supp at 208 n. 7. If plaintiffs allege that discovery of the fraud was delayed by the actions of a particular defendant, they must set forth in the complaint the essential facts supporting such allegations. *Krome*, 637 F.Supp. at 914. Thus, the complaint must show that a particular defendant "took positive steps after the commission of the initial fraud to keep it concealed." *Id.*

[23] We conclude that the plaintiffs have arguably satisfied the above standards of pleading fraudulent concealment against the *Western*, *Partnership* and *World* defendants due to the allegations in paragraphs 111, 113-

116. These paragraphs specifically delineate how these defendants allegedly concealed the fraud from the plaintiffs. For example, although the allegations in paragraphs 111(a), 115, and 116 concern offerings in investment vehicles allegedly controlled by the *Western* defendants or the *World* defendants other than AWNLP, it is alleged that these investments were promoted to the plaintiffs. ¶ 111(a). Plaintiffs adequately explain why the offering memoranda for these investments precluded them from discovering the facts upon which their claims are predicated. Although certain of the allegations, such as those in paragraph 111(b), could be more precise, we believe that the fraudulent concealment section, taken as a whole, gives the *World*, *Partnership*, and *Western* defendants fair notice as to the plaintiffs' contentions and the grounds upon which they rest.

[24] We acknowledge that we may not decide on a motion to dismiss whether or not the plaintiffs were indeed diligent, yet we must decide whether the issue has been properly pleaded. *Krome*, supra at 914; *Hill, N. Der*, 521 F.Supp. 1307 1388-89 (D. Del. 1981). -89. Although we have concluded that fraudulent concealment is properly pleaded, we do not believe that plaintiffs have literally satisfied the other requirements of Section 13, as their allegations with respect to their efforts to discover the fraud are quite vague. For instance, it is not specifically alleged which plaintiffs "read information" sent by which defendants or what the information was, which plaintiffs actually visited the nursery and what those individuals saw that misled them in what way, and which retained "legal and financial advisors" and what the plaintiffs were told by them. Furthermore, it strains credulity to believe that all seventy plaintiffs performed all of these acts. Assuming for a moment that these allegations were adequately alleged and that a handful of the plaintiffs did all of these things, we cannot permit all of the plaintiffs to profit from the diligent efforts of but a few. At this point, however, we decline to dismiss the Section 12(2) claims against the *Western*, *World* and *Partnership* defendants on this ground, in light of *545 the fact that the fraudulent

concealment is properly pleaded. E.g., In re Gas Reclamation, Inc. Securities Litigation, 659 F.Supp. 493, 508 (S.D.N.Y.1987); see Boley, supra, 700 F.Supp. at 677. We also recognize that the plaintiffs' own pleadings indicate several different dates that they could have discovered the fraud, to wit: February 7, 1986, the "middle of 1986", November of 1986, and December of 1986. Thus, although we decline to dismiss the Section 12(2) claims against them at this time, we anticipate further motion practice by the Western, World and Partnership defendants on the timeliness of this claim with respect to each plaintiff after discovery has concluded and the record is complete.

In sum, the Section 12(2) claims are dismissed with prejudice as against the Bryce, Andersen and remaining Friedman & Shaftan defendants, but retained as against the Western, World and Partnership defendants.

C. LIABILITY UNDER SECTION 17(A)

[25] We have previously been confronted with the question of whether Section 17 of the Securities Act of 1933 provides for a private cause of action. In Tobias v. First City Nat'l Bank and Trust Co., 709 F.Supp. 1266, 1274-76 (S.D.N.Y.1989), we recognized the split in authority in both the Circuit courts as well as the courts within the Southern District. After carefully reviewing the cases, we held that there is no implied right of action provided under Section 17. *Id.* We see no reason to depart from this conclusion at this time, and accordingly, plaintiffs' Section 17(a) claims are dismissed with prejudice.

D. LIABILITY UNDER RICO

Plaintiffs' sixth claim for relief alleges violations of RICO, specifically 18 U.S.C. § 1962(a), (c) and (d), by all of the defendants. "The law surrounding the RICO statutory frame is a rapidly shifting, evolving corpus, whose practical interpretation presents a continual challenge to the courts." *Goldman v. McMahon, Brafman, Morgan & Co.*, 706 F.Supp. 256, 261 (S.D.N.Y.1989). Because *Beauford v. Helmsley*, 865 F.2d 1386 (2d

Cir.1989) (en banc), vacated for further consideration, 492 U.S. 914, 109 S.Ct. 3236, 106 L.Ed.2d 584 (1989), upheld by Order of September 15, 1989, cert. denied, 493 U.S. 992, 110 S.Ct. 539, 107 L.Ed.2d 537 (1989) and *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 109 S.Ct. 2893, 1899, 106 L.Ed.2d 195 (1989), redefined and recharacterized the standards for the enterprise, the pattern and continuity, we asked the parties to rebrief the portions of their motions concerning RICO in light of these changes.

Addressing first the claim under section 1962(c), it is well established that to state a cause of action under this section plaintiffs must show "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Sedima S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496, 105 S.Ct. 3275, 3284, 87 L.Ed.2d 346 (1985) (footnote omitted). Racketeering activity is the commission of certain predicate acts, specified in the statute, for which a defendant could be convicted, *id.* at 488, 105 S.Ct. at 3280, and a pattern of activity requires proof of at least two such acts, 18 U.S.C. § 1961(5), "that were related and that amounted to, or threatened the likelihood of, continued criminal activity." *H.J. Inc. v. Northwestern Bell Telephone Co.*, 109 S.Ct. at 1899.

All of the defendants originally based their motions to dismiss the RICO claims on (1) their assertions that plaintiffs had failed to adequately allege any predicate acts and (2) that the enterprise element was not adequately alleged. [FN9] In light of *Beauford* and *H.J. Inc.*, they continue to argue the former and, apparently conceding that the enterprise element is met, now claim that the pattern element is not alleged satisfactorily.

FN9. Only the Friedman & Shaftan and World and Partnership defendants specifically addressed the other RICO claims alleged under Sections 1962(a) and (d).

[26][27] Regarding the first argument for dismissal, we find that some of the defendants' motions must be denied and some must be

granted. We reach this result *546 based upon our conclusion that plaintiffs have stated some securities fraud violations only against some of the defendants, and because the plaintiffs allege that these violations (in addition to allegations of mail fraud) constitute the predicate acts of racketeering activity. Accordingly, the motions, made by the Western, World, and Partnership defendants, to dismiss the RICO claims for failure to adequately plead the predicate acts are denied, as plaintiffs have adequately pleaded the securities fraud predicates against these defendants. However, as we have dismissed plaintiffs' securities law claims against the Friedman & Shaftan defendants, the Andersen defendants and the Bryce defendants, and because we find that the elements of mail fraud [FN10] have not been adequately pleaded as against these defendants in that plaintiffs have not alleged facts giving rise to a strong inference of intentional fraud on the part of these defendants, see *Beck v. Manufacturers Hanover Trust Co.*, supra, 820 F.2d at 49, we dismiss the Section 1962(c) claims against the Bryce, Andersen and Friedman & Shaftan defendants. *Moss v. Morgan Stanley Inc.*, 719 F.2d 5, 17-19 (2d Cir.1983), cert. denied, 465 U.S. 1025, 104 S.Ct. 1280, 79 L.Ed.2d 684 (1984).

FN10. In order to state a claim for mail fraud, plaintiffs must allege (1) the existence of a scheme to defraud; (2) defendant's knowing or intentional participation in that scheme; and (3) use of the interstate mails in furtherance of the fraudulent scheme. See *Beck v. Manufacturers Hanover Trust Co.*, 820 F.2d 46, 49 (2d Cir.1987), overruled on other grounds, *United States v. Indelicato*, 865 F.2d 1370 ((2d Cir.) (en banc), cert. denied, 493 U.S. 811, 110 S.Ct. 56, 107 L.Ed.2d 24 (1989); *United States v. Von Barta*, 635 F.2d 999, 1005 n. 14 (2d Cir.1989), cert. denied, 450 U.S. 998, 101 S.Ct. 1703, 68 L.Ed.2d 199 (1981); *Soper v. Simmons Int'l, Ltd.*, 632 F.Supp. 244 (S.D.N.Y.1986).

[28] We turn now to the defendants' other chief ground for dismissal--that the plaintiffs have failed to allege predicate offenses possessing the "continuity" needed to

establish a pattern of racketeering activity. We have already concluded that the Section 12(2) and certain of the Section 10(b) securities fraud predicates can not be dismissed as against the Western, World and Partnership defendants. Plaintiffs have alleged, in addition, that these defendants also committed mail fraud by "transmitt[ing] the Private Placement Memorandum to the plaintiffs at their residences or offices in the States hereinabove stated [in ¶ 4] in December, 1984." ¶ 147. [FN11] We find that the predicate acts of mail fraud are not deficient as against these same defendants, in light of our previous determination that plaintiffs have adequately pleaded scienter against these defendants, and our conclusion that plaintiffs have also adequately pleaded the other requirements of mail fraud--the existence of a fraudulent scheme and the use of the mails to further the scheme. [FN12]

FN11. Although plaintiffs also allege wire fraud, they do not specify any such wire transmissions. Because allegations of wire fraud must be pleaded with the specificity required by Rule 9(b), and in light of the fact that the time, place and content of such alleged wire transmissions have not been pleaded, we conclude that the wire fraud claims are deficient.

FN12. "Where one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he 'causes' the mails to be used." *Pereira v. United States*, 347 U.S. 1, 8-9, 74 S.Ct. 358, 362-63, 98 L.Ed. 435 (1954).

[29] Although none of the defendants have raised the issue of whether there are at least two predicate acts charged, we believe it incumbent upon us to do so in light of a recent case in this district. In *Polycast Technology Corporation v. Uniroyal, Inc.*, 728 F.Supp. 926 (S.D.N.Y.1989), the Court, examined, apparently for the first time in this Circuit, the issue of whether two separate violations of the securities laws which arise from a single act, such as misrepresentations made in one document in connection with the purchase or sale of securities, can be regarded as charging

two predicate acts. Finding no authority in this Circuit, the Court looked to cases in other circuits, and was persuaded by two cases in the Eighth and Ninth Circuits. *United States v. Walgren*, 885 F.2d 1417, 1425 (9th Cir.1989); *United States v. Kragness*, 830 F.2d 842, 861 (8th *547 Cir.1987). Although neither of these cases involved fraud in the sale of securities, it is true that both these cases stand for the proposition that it is not proper under RICO to charge two predicate acts where one action violates two statutes. *Walgren*, 885 F.2d at 1425; *Kragness*, 830 F.2d at 861. The Polycast opinion does not, however, discuss the cases in other circuits where the courts have held otherwise. See, e.g., *United States v. Watchmaker*, 761 F.2d 1459, 1475 (11th Cir.1985) (the standard is "whether each act constitutes a separate violation of the [state or federal] statute governing the conduct in question. If distinct statutory violations are found, the predicate acts will be considered distinct irrespective of the circumstances under which they arose."), cert. denied, 474 U.S. 1100, 106 S.Ct. 880, 88 L.Ed.2d 917 (1986); see also *United States v. Licavoli*, 725 F.2d 1040, 1046 (6th Cir.1984), cert. denied, 467 U.S. 1252, 104 S.Ct. 3535, 82 L.Ed.2d 840 (1984).

If we were to follow the position adopted in Polycast, then the Section 12(2) and Section 10(b) violations could be construed as only one predicate act in that they are both arguably based on the same set of misrepresentations in the offering memorandum. However, even assuming arguendo that these two violations only support one predicate act, there nonetheless appear to be at least two predicate acts charged in the consolidated complaint. First, we observe that in Polycast, there was only one plaintiff, i.e., victim. Here, we have over seventy plaintiffs/victims (including those in the related cases), each of whom alleges securities fraud violations. Thus, even if there is only one predicate act per plaintiff for the securities violations, there are still more than seventy different predicate acts. See *United States v. Kaplan*, 886 F.2d 536, 541-42 (2d Cir.1989) (bribes offered to two persons in a conversation with one of them stated two predicate acts) petition for cert. filed, 58

U.S.L.W. 3431 (U.S. December 13, 1989) (No. 89-1000); *Beauford v. Helmsley*, 865 F.2d 1386, 1391-92 (2d Cir.1989) (en banc), vacated for further consideration, --- U.S. ---, 109 S.Ct. 3236, 106 L.Ed.2d 584 (1989), upheld by Order of September 15, 1989 (finding each act of fraudulent mailing, over 8,000 of them, separately indictable and therefore sufficient to support independent predicate acts); *United States v. Indelicato*, 865 F.2d 1370, 1381-85 (2d Cir.) (en banc) (nearly simultaneous shooting and killing of three persons constituted more than one predicate act), cert. denied, --- U.S. ---, 110 S.Ct. 56, 107 L.Ed.2d 24 (1989). Second, as discussed above, the consolidated complaint does not merely allege securities fraud violations; there are also cognizable mail fraud violations. *Beauford*, supra. Accordingly, we conclude that the requirement of charging at least two predicate acts is satisfied.

[30] We must now consider whether these predicates are sufficiently related and amount to, or pose a threat of, continuity such that they constitute a pattern of racketeering activity. *H.J. Inc.*, 109 S.Ct. at 2900. Adopting a provision from the Dangerous Special Offender Sentencing Act, 18 U.S.C. § 3575, et seq., the Supreme Court defined "relatedness" as "'criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.'" *H.J. Inc.*, 109 S.Ct. at 2901 (quoting 18 U.S.C. § 3575(d)). Thus, the necessary relationship between predicate acts may be established in a number of ways, including "temporal proximity, or common goals, or similarity of methods, or repetitions." *United States v. Indelicato*, 865 F.2d 1370, 1382 (2d Cir.) (en banc), cert. denied, 493 U.S. 811, 110 S.Ct. 56, 107 L.Ed.2d 24 (1989).

Clearly, the requirement of relatedness is satisfied. The alleged mail fraud, whereby defendants transmitted the offering memorandum to each of the plaintiffs, is unquestionably related to the alleged fraud in connection with the sale of securities to each plaintiff, with each act being temporally

proximate to the others. Similarly, the purposes of the acts as well as the methods of commission were the same.

*548 The question of continuity is much more difficult. The Supreme Court, in *H.J. Inc.*, recognized the difficulty of defining the concept of "continuity," and offered the following guidance:

"Continuity" is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition.... It is, in either case, centrally a temporal concept- and particularly so in the RICO context, where what must be continuous, RICO's predicate acts or offenses, and the relationship these predicates must bear one to another, are distinct requirements. A party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time. Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement: Congress was concerned in RICO with long-term criminal conduct. Often a RICO action will be brought before continuity can be established in this way. In such cases, liability depends on whether the threat of continuity is demonstrated....

H.J. Inc., 109 S.Ct. at 2902 (citations omitted) (emphasis in original). Continuity may be inferred from all of the surrounding circumstances, including the acts themselves or the nature of the enterprise. *H.J. Inc.*, 109 S.Ct. at 2902; see *Beauford*, 865 F.2d at 1391-92 (inferring threat of continuity from the acts); *Indelicato*, 865 F.2d at 1384 (inferring threat of continuity from the enterprise).

Although the specific acts charged in the Consolidated Complaint relate to the sale of interests in one particular investment vehicle, the complaint also clearly alleges that the World, Western and Partnership (save the AWNLP itself which is bankrupt) defendants are involved in the business of selling similar

interests to the public on a continuing basis and that these offerings are also alleged to be fraudulent. See, e.g., ¶ 8G (allegations of fraudulent offerings prior to the AWNLP offering), ¶¶ 6I and 111, 150-51 (allegations relating to the attempted fraudulent resyndication of the AWNLP nursery business), and ¶¶ 115-16 (allegations for fraudulent offerings since the AWNLP offering). Thus, despite the fact that the particular predicate acts complained of spanned only a few months, we conclude that the plaintiffs have sufficiently alleged at least the threat of continuity by demonstrating that the predicates are a part of these defendants' regular way of doing business. *H.J. Inc.*, 109 S.Ct. at 2902; *Amsler v. Corwin Petroleum Corp.*, 715 F.Supp. 103, 103-04 (S.D.N.Y.1989); see also *Reinfeld v. Ricklis*, 722 F.Supp. 1077, 1083 (S.D.N.Y.1989) (threat of continuity found from allegations that relatively short-lived scheme was part of a larger pattern of misconduct). Accordingly, the Section 1962(c) claims cannot be dismissed against the World, Partnership and Western defendants.

[31] Turning now to the determination of whether the RICO conspiracy is adequately alleged, we conclude that it is not. In order to properly plead such a conspiracy under Section 1962(d), plaintiffs must allege that the " 'defendant himself at least agreed to commit two or more predicate crimes.' " *United States v. Teitler*, 802 F.2d 606, 613 (2d Cir.1986) (quoting *United States v. Ruggiero*, 726 F.2d 913, 921 (2d Cir.), cert. denied, 469 U.S. 831, 105 S.Ct. 118, 83 L.Ed.2d 60 (1984)). The commission of the acts is not necessary; only the agreement is required. *Teitler*, 802 F.2d at 613. Furthermore, "the commission of the acts is distinct from an agreement to commit them, and a violation of § 1962(d) requires different proof than a violation of § 1962(c)." *United States v. Bonanno Organized Crime Family*, 683 F.Supp. 1411, 1441 (E.D.N.Y.1988), appealed from on other grounds and aff'd, 879 F.2d 20 (2d Cir.1989) (citations omitted). While plaintiffs allege that each of the defendants committed two or more of the predicate acts, ¶ 146, the complaint merely states that

[c]ommencing in or about November 1984, the defendants and each of them, conspired to and did participate in the *549 conduct of the above enterprise's affairs through a pattern of racketeering activity as alleged in hereinabove, in violation of 18 U.S.C. Sections 1962(c) and 1962(d).

¶ 151. The complaint does not adequately allege that each defendant personally agreed to commit two or more of the predicate acts. *Reinfeld v. Ricklis*, 722 F.Supp. at 1084 (emphasis added). It is not enough to agree that the crimes should be committed by others. *Zola v. Gordon*, 685 F.Supp. 354, 377 (S.D.N.Y.1988). Accordingly, the motions to dismiss the Section 1962(d) claims are granted. [FN13]

FN13. We note that even if an agreement had been properly alleged, the Bryce, Andersen and Friedman & Shaftan defendants could not be held to be RICO conspirators. Mere allegations of agreement are not enough to support a charge of RICO conspiracy. *Morin v. Trupin*, 711 F.Supp. 97, 111 (S.D.N.Y.1989). Plaintiffs must also show that the "defendants understood the scope of the enterprise and knowingly agreed to further its affairs through the commission of various offenses." *Id.* (citation omitted). No facts are set forth supporting the contention that these defendants "knowingly agreed" to commit the predicates, see *supra* at 531-35 (finding that the plaintiffs were unable to demonstrate that these defendants had the requisite fraudulent intent). Accordingly, even if we had found that the RICO conspiracy was properly alleged, the Section 1962(d) claims against these defendants would have to be dismissed nonetheless. *Department of Economic Development v. Arthur Andersen & Co.*, 683 F.Supp. 1463, 1482 (S.D.N.Y.1988); *Andreo v. Friedlander, Gaines, Cohen, Rosenthal & Rosenberg*, 660 F.Supp. 1362, 1372 (D.Conn.1987); *Laterza v. American Broadcasting Co.*, 581 F.Supp. 408, 413 (S.D.N.Y.1984).

[32] Finally, we address the defendants' argument that the Section 1962(a) claim must be dismissed. Section 1962(a) prohibits the use or investment of income received from a pattern of racketeering activity in the acquisition, establishment or operation of an

enterprise. Thus, the violation under 1962(a) is not the engaging in a pattern of racketeering activity, but rather it consists in using or investing the proceeds derived from such a pattern of activity. The World and Partnership as well as the Friedman & Shaftan defendants argue that plaintiffs have not alleged, as they must, that their injury has somehow been caused by the investment of the racketeering proceeds. See *In re Gas Reclamation Inc. Securities litigation*, 659 F.Supp. 493, 511 (S.D.N.Y.1987); *DeMuro v. E.F. Hutton*, 643 F.Supp. 63, 66 (S.D.N.Y.1986). We agree. As the complaint does not adequately allege any damages other than the loss of their investments, and since it is clear that these injuries arise out of the commission of the predicate acts, and not from any investment by the defendants of the racketeering proceeds, see *DeMuro v. E.F. Hutton*, 662 F.Supp. 308 (S.D.N.Y.1986), the Section 1962(a) claims are dismissed.

To summarize our disposition of the RICO claims, we dismiss the Section 1962(c) claims against the Bryce, Andersen and Friedman & Shaftan defendants, but sustain them against the World Partnership and Western defendants. We dismiss the Section 1962(a) and (d) claims.

E. OTHER CLAIMS FOR RELIEF

Plaintiffs' third, fourth and fifth claims assert common law claims for damages for fraud, negligent misrepresentation and fiduciary duty respectively. Plaintiffs' ninth claim for relief seeks a declaration that all of the defendants hold the proceeds from plaintiffs' investments in constructive trust for the benefit of the plaintiffs. Assuming that all of the federal claims would be dismissed, all of the defendants moved to dismiss these claims [FN14] for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. Almost all the briefs cite the language of the Supreme Court in *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966) that "[c]ertainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the

state claims should be dismissed as well." *Id.* at 726, 86 S.Ct. at 1139 (citations omitted).

FN14. The Western defendants also moved to dismiss the seventh and eighth claims, which seek declaratory and injunctive relief only against the Western defendants, on the same grounds.

None of the defendants briefed the result that we have reached today: dismissing the federal claims against only some of *550 the defendants. Nonetheless, regarding those defendants against whom we have sustained federal claims, it is clear that we have pendent-claim jurisdiction over the nonfederal claims against each which "derive from a common nucleus of operative fact." *Gibbs*, 383 U.S. at 725, 86 S.Ct. at 1138. The difficulty arises regarding those defendants (the Andersen, Friedman & Shaftan, and Bryce defendants) who were successful on their motions to dismiss. Plaintiffs have not and cannot base subject matter jurisdiction on diversity of citizenship, for it is indisputable that the requirement of complete diversity cannot be established. *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 373-74, 98 S.Ct. 2396, 2402, 57 L.Ed.2d 274 (1978) (diversity jurisdiction requires that each defendant be a citizen of a different state than each of the plaintiffs). Accordingly, as to these defendants, we must examine the doctrine of pendent-party jurisdiction: "jurisdiction over parties not named in any claim that is independently cognizable by the federal court." *Finley v. United States*, 490 U.S. 545, 109 S.Ct. 2003, 2006, 104 L.Ed.2d 593 (1989).

"The doctrine of pendent-party jurisdiction provides a much narrower basis for jurisdiction than the doctrine of pendent-claim jurisdiction...." *640 Broadway Renaissance Co. v. Cuomo*, 714 F.Supp. 686, 689 (S.D.N.Y.1989). Indeed, although the Supreme Court, in its recent pronouncement on the subject, did not explicitly reject the doctrine, as set forth in its prior opinion in *Aldinger v. Howard*, 427 U.S. 1, 96 S.Ct. 2413, 49 L.Ed.2d 276 (1976), it certainly cast negative aspersions on it, holding that pendent-party jurisdiction is not permissible

in cases arising under the Federal Tort Claims Act, 28 U.S.C. § 1346(b). *Finley v. United States*, 109 S.Ct. at 2009-10; see also *Bruce v. Martin*, 724 F.Supp. 124, 128-30 (S.D.N.Y.1989) (discussing the "negative implications" of *Finley* on the doctrine). Indeed, our Circuit Court recently stated, in dicta, that "pendent-party jurisdiction is apparently no longer a viable concept," citing *Finley*. *Staffer v. Bouchard Transportation Co.*, 878 F.2d 638, 643 n. 5 (1989).

Because of the complexity of this area of the law, and in light of all of the nuances relating to each of the common law claims alleged and the fact that the parties did not brief the issue, we will allow the parties to supplement their papers on this question. Specifically, we would like the parties to address the question according to the insightful three-tier analysis of Judge Walker in *640 Broadway Renaissance Co. v. Cuomo*, 714 F.Supp. at 690, looking first, at whether we have Article III power to exercise jurisdiction over the claims; second, at whether Congress, in the statutes conferring jurisdiction, has not expressly or by implication negated the existence of jurisdiction; and third, at whether, there are discretionary considerations which indicate that jurisdiction should or should not be exercised. The submissions of the defendants should be filed within 30 days of the date of this Order, with the plaintiffs' submission being due 30 days thereafter.

With regard to the Western defendants' motion to dismiss plaintiffs' seventh and eighth claims for relief, wherein declaratory and injunctive relief is sought against the Western defendants, we deny the motion without prejudice to renew, as we are not apprised of the status of the prior actions that were commenced in Arizona and, thus, are unable to adjudicate the motion at this time. Furthermore, we observe that the issues appear not to have been fully briefed, again we surmise in anticipation of complete success on their federal claims. If the Western defendants so desire, the motion shall be renewed in accordance with the schedule set out in the above paragraph.

III. CONCLUSION

The motions of the Andersen, Friedman & Shaftan, and Bryce defendants to dismiss the federal securities fraud claims, pursuant to Section 10(b) of the 1934 Act, Section 12(2) and Section 17 of the 1933 Act, and the RICO claims are granted in their entirety. The motions of the World, Partnership and Western defendants to dismiss the claims pursuant to Section 12(2) and 18 U.S.C. § 1962(c) are denied, but the *551 motions to dismiss the Section 17(a) claims and the RICO claims pursuant to 18 U.S.C. § 1962(a) and (d) are granted, and the motions to dismiss the Section 10(b) claims are granted in part and denied in part, as explained supra at 35-40. In light of the fact that the present incarnation of the complaint represents plaintiffs' fourth attempt to adequately state federal causes of action, we believe that it would be inappropriate to allow plaintiffs to replead yet another time. See *Armstrong v. McAlpin*, 699 F.2d 79, 93-94 (2d Cir.1983) (district court's refusal to give plaintiffs a fourth attempt to restate defective allegations was proper); *Decker v. Massey-Ferguson, Ltd.*, 681 F.2d 111, 115 (2d Cir.1982) (district court's refusal to give plaintiffs a third attempt to restate defective allegations was proper); *Denny v. Barber*, 576 F.2d 465, 470-71 (2d Cir.1978) (same). Accordingly, all of the above dismissals are with prejudice.

The Andersen, Friedman & Shaftan, and Bryce defendants have thirty days to renew their motions to dismiss the remaining claims for lack of subject matter jurisdiction or on discretionary grounds, and the Western defendants have thirty days to renew their motion to dismiss the equitable claims for relief.

SO ORDERED.

730 F.Supp. 521, Fed. Sec. L. Rep. P 94,902,
RICO Bus.Disp.Guide 7423

END OF DOCUMENT

36

Only the Westlaw citation is currently available.

United States District Court, E.D. New York.

GENERAL MOTORS CORP., Plaintiff,

v.

VILLA MARIN CHEVROLET, INC.,
Defendant.

ARGONAUT HOLDINGS, INC., Plaintiff,

v.

VILLA MARIN GMC, INC., Defendant.
VILLA MARIN CHEVROLET, INC., Villa
Marin GMC, Inc., Plaintiffs,

v.

GENERAL MOTORS CORP., Argonaut
Holdings, Inc., Defendants.

VILLA MARIN CHEVROLET, INC., Villa
Marin GMC, Inc., Spencer Hondros,
Plaintiffs,

v.

Ronald C. SCHLEMMER, Building Analytics,
Inc., L & A Architects, Inc.,
Defendants.

Nos. 98-CV-5206 (JG), 98-CV-5208 (JG), 98-
CV-6167 (JG), 99-CV-3750 (JG).

March 7, 2000.

Thomas G. Russomano, the Margolis Law
Firm, PA, Verona, NJ, for Villa Marin
Chevrolet, Inc., and Villa Marin GMC, Inc.

Daniel L. Goldberg, Bingham Dana LLP,
Boston, MA, for General Motors Corp. and
Argonaut Holdings, Inc.

Suzanne M. Berger, Robinson Silverman
Pearce Aronsohn & Berman LLP, New York,
New York, for Ronald C. Schlemmer.

Lon Hughes, Newman Fitch Altheim
Meyers, PC, New York, New York, for
Building Analytics, Inc.

Glen Kennedy, Gogick Byrne & O'Neill,
New York, New York, for L & A Architects,
Inc.

MEMORANDUM AND ORDER

GLEESON, J.

*1 The above-captioned actions arise out of a complex business transaction between an automobile manufacturer, General Motors Corporation ("GM"), and its dealers, Villa Marin Chevrolet, Inc. ("VMC") and Villa Marin GMC, Inc. ("VMGMC"), of Staten Island, New York. In November 1996, the parties executed a series of agreements by which VMC voluntarily terminated its Chevrolet franchise, GM appointed VMGMC to be a Buick and Pontiac dealer, and VMGMC subleased business premises from GM's wholly-owned subsidiary, Argonaut Holdings, Inc. ("Argonaut"), to house a new Buick-Pontiac-GMC dealership. Soon thereafter, VMGMC began to complain about the physical condition of the property. The parties' relationship subsequently deteriorated and these lawsuits ensued. First, GM initiated a declaratory judgment action seeking a declaration that it lawfully terminated VMC's Chevrolet franchise. Second, Argonaut commenced suit against VMGMC for nonpayment of rent. Third, VMC and VMGMC (collectively "Villa Marin") sued GM and Argonaut for, among other things, damages arising out of GM's termination of VMC's Chevrolet franchise and the condition of VMGMC's subleased premises. Lastly, VMC, VMGMC, and Spencer Hondros, a Villa Marin principal, brought suit against Ronald C. Schlemmer, the president of the entity that owns the subleased premises, and L & A Architects, Inc. ("L & A") and Building Analytics, Inc. ("BA"), the engineering and architectural firms that evaluated the premises, for damages related to the condition of the premises. Currently before the Court are GM's and Argonaut's motion for summary judgment in all actions in which they are parties, L & A's and BA's motions for summary judgment, and Schlemmer's motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6). For the reasons set forth below, the motions are granted.

BACKGROUND

Prior to 1996, VMC and VMGMC were franchised Chevrolet and GMC Truck dealers,

respectively, on Staten Island, New York. David Villamarin, Louis Villamarin, and Spencer Hondros were the shareholders of both dealerships.

A. GM's Plan to Consolidate Dealerships

In 1996, GM sought to consolidate three independent Buick, Pontiac, and GMC dealerships on Staten Island into one dealership under the control of a single franchisee on Hylan Boulevard. As noted, VMGMC already had the GMC dealership. GM had previously taken steps to make the Buick franchise available for consolidation. Accordingly, in order to provide the third piece of the new triple dealership, GM turned its attention to Pontiac. In early 1996, Jerry Walton of GM commenced negotiations with Ronald C. Schlemmer, the president of Star Pontiac ("Star"), regarding the acquisition of Star's Pontiac assets and the use of its business premises on Hylan Boulevard ("Hylan premises") as the location for the proposed Buick-Pontiac-GMC dealership. GM sought to have (1) Star transfer its Pontiac dealership assets to GM and (2) C & R Realty of Richmond, Inc. ("C & R"), which was controlled by Schlemmer and owned the Hylan premises, lease the Hylan premises to Argonaut, a wholly-owned subsidiary of GM. (See Statement of Undisputed, Material Facts in Support of Motion of General Motors Corporation and Argonaut Holdings, Inc. for Summary Judgment ("GM and Argonaut 56.1 Stmt.") ¶¶ 7, 8, 10; Responding Statement of Material Facts of Villa Marin Chevrolet and Villa Marin GMC in Opposition to the GM Motion for Summary Judgment ("Villa Marin 56.1 Resp.") ¶¶ 7, 8, 10.) GM further contemplated that Argonaut would sublease the Hylan premises to the new, consolidated dealer--VMGMC.

B. GM's Pre-Contract Representations to Villa Marin

*2 In April 1996, Walton initiated discussions with the principals of Villa Marin regarding the proposed triple dealership. Walton asked whether VMGMC would be interested in executing an agreement whereby

GM would appoint VMGMC to be an authorized Buick and Pontiac dealer in exchange for VMC's voluntary termination of its Chevrolet franchise. Under the proposed agreement, VMC would receive a credit of \$600,000 from GM for its Chevrolet franchise, which GM would apply toward VMGMC's Buick and Pontiac appointments. VMGMC would also sublease the Hylan premises from Argonaut for the new triple dealership. (See GM and Argonaut 56.1 Stmt. ¶¶ 11-14; Villa Marin 56.1 Resp. ¶¶ 11-14.)

The parties began to carry out this proposed transaction. On August 29, 1996, C & R and Argonaut executed an Agreement to Lease ("Agreement to Lease") the Hylan premises. This document set forth the rights and duties of C & R and Argonaut concerning the inspection of the premises prior to the execution of the Prime Lease. (See Joint Summary Judgment Appendix ("J.A.") Tab 27.) Among other things, the Agreement to Lease provided that Argonaut had the right to inspect the premises and that C & R had to deliver a certificate of occupancy to Argonaut. [FN1]

FN1. More specifically, the Agreement to Lease stated that Argonaut had a right to inspect the premises for 90 days; that C & R had to deliver to Argonaut all permits, such as certificates of occupancy, engineering plans, and all other materials related to the physical condition of the property by September 8, 1996; that C & R had received no notice that the premises were not in compliance in all respects with applicable statutes, ordinances, rules, and regulations; that until closing C & R was required to notify Argonaut of any violation of any law, ordinance, regulation, or law; and that Argonaut would not be obligated to close the transaction unless C & R's representations and warranties were true and C & R had performed all of its obligations as of closing. (See J.A. Tab 27 ¶¶ 2.2, 3.2.3, 3.3, 5.5, 7.2.3, 8.1.2, 8.1.5.)

Villa Marin asserts that, even though VMGMC would be subleasing the Hylan premises from Argonaut, Argonaut prohibited VMGMC from engaging its own experts to examine the premises. (See Counter Statement of Material Facts of Villa Marin

Chevrolet and Villa Marin GMC in Opposition to the GM Motion for Summary Judgment ("Villa Marin Counter 56.1 Stmt.") ¶ 8-9.) However, Villa Marin concedes that VMGMC's principals toured the premises on a Sunday afternoon in August when Star was closed, and that David Villamarin observed that the building was "old" and "rundown." Still unsatisfied with their minimal access to the premises they would be leasing, the VMGMC principals met with Schlemmer approximately two to three weeks later "to evaluate independently the status of the facility and Star's business operations." Villa Marin claims to have relied on Schlemmer's representations when VMGMC later executed the Sublease with Argonaut. (GM and Argonaut 56.1 Stmt. ¶ 15-16, 18-19; Villa Marin 56.1 Resp. ¶ 15-16, 18-19; see also Deposition of David Villamarin of July 28, 1999 ("Villamarin Dep.") at 157-58, 172-73, located at J.A. Tab 2; Deposition of Spencer Hondros of Oct. 20, 1999 ("Hondros Dep.") at 393, 405-06, located at J.A. Tab 39.) Prior to closing, VMGMC also received detailed dealership operating reports for the years 1995 and 1996. Although the name of the dealership was redacted, VMGMC presumed that the reports related to Star's Pontiac operations. (See GM and Argonaut 56.1 Stmt. ¶ 17; Villa Marin 56.1 Resp. ¶ 17.)

C. The Transaction

The parties closed the transaction on November 21, 1996. Throughout the negotiations, VMC and VMGMC were represented by their outside counsel of fourteen years, John Marangos, and their outside accountant of seven years, Michael Koteen. Prior to the closing, Marangos reviewed and negotiated the provisions of the various agreements. (See GM and Argonaut 56.1 Stmt. ¶¶ 20-21; Villa Marin 56.1 Resp. ¶¶ 20-21.)

*3 The transaction consisted of the following agreements:

1. The Termination and Release Agreement

VMC signed and delivered the Termination

and Release Agreement ("TRA") by which VMC agreed to voluntarily terminate its Chevrolet franchise as of September 30, 1997 (or earlier, by written notice of either party) in exchange for VMGMC's appointment to be a Buick and Pontiac dealer. (See GM and Argonaut 56.1 Stmt. ¶ 26; Villa Marin 56.1 Resp. ¶ 26.) The TRA provides, in relevant part, that:

In consideration of [VMC's] execution and delivery to GM of this Termination and Release Agreement, and [VMC's] voluntary termination of the Chevrolet Dealer Agreement in accordance with Article 14.2 thereof (as set forth in Paragraph 2 of this Termination and Release Agreement), GM, by separate agreements, shall (a) enter into a Dealer Sales and Service Agreement with [VMGMC] for the sale and service of Buick motor vehicles on Staten Island, NY, and (b) enter into a Dealer Sales and Service Agreement with [VMGMC] for the sale and service of Pontiac motor vehicles on Staten Island, NY.... [VMC] hereby expressly agrees that GM's agreement to enter into the Buick and Pontiac Dealer Agreements with [VMGMC] will result in a direct benefit to the shareholders of [VMGMC], who are also the shareholders of [VMC], and, therefore, GM's agreement to enter into the Buick and Pontiac Dealer Agreements is valid and sufficient consideration for [VMC's] execution and delivery of this Termination and Release Agreement.

(J.A. Tab 4 ¶ 1.) The TRA further provides that VMC has reviewed the agreement "with its legal, tax or other advisors, and is fully aware of all of its rights and alternatives" and that "its decisions and actions are entirely voluntary and free from any mental, physical, or economic duress." (Id. ¶ 5.) GM appointed VMGMC to be an authorized Pontiac and Buick dealer on the same day the TRA was executed, November 21, 1996. (See GM and Argonaut 56.1 Stmt. ¶ 29; Villa Marin 56.1 Resp. ¶ 29.) This was accompanied by the execution of a Buick Motor Division Dealer Sales and Service Agreement, (see J.A. Tab 34), and a Pontiac Division Dealer Sales and Service Agreement, (see J.A. Tab 35), both of which incorporate by reference a document entitled "Standard Provisions of the Dealer

Sales and Service Agreement" ("GM Standard Provisions"), (see J.A. Tab 12; J.A. Tab 34 pt. 11; J.A. Tab 35 pt. 2).

2. The Prime Lease

As contemplated by the Agreement to Lease, C & R and Argonaut executed a Prime Lease of the Hylan premises. Pursuant to the Prime Lease, C & R covenants that Argonaut shall have quiet and peaceful possession of the premises and that Argonaut shall not use or occupy the premises in a manner which would violate the certificate of occupancy. (See J.A. Tab 36 § 2.5, 5.) In addition, C & R is required to make repairs resulting from ordinary wear and tear and its own negligence. (See *id.* §§ 6.2, 6.3.) Argonaut, however, has the right to perform such repairs, after ten days' notice or in case of emergency, and to deduct the costs incurred from the rent due. (See *id.* §§ 18.1, 18.2.)

3. The Sublease

*4 Argonaut simultaneously subleased the Hylan premises to VMGMC. Section 2.2 of the Sublease provides that VMGMC inspected the Hylan premises to its satisfaction, that it would take the premises "as is," and that Argonaut did not make any representation or warranty as to the condition of the premises. Specifically, section 2.2 states the following in all capital letters:

Landlord leases and tenant takes the premises as is. Tenant acknowledges that, except as expressly set forth in section 2.3, [FN2] neither landlord nor any landlord affiliate (as hereinafter defined) has made any warranty or representation, express or implied, with respect to any of the premises, including any warranty or representation as to (i) its fitness, design or condition for any particular use or purpose, (ii) the quality of the material or workmanship therein, (iii) the existence of any defect, latent or patent, (iv) compliance with laws, (v) location, (vi) use, (viii) operation or (ix) the existence of any hazardous substance; and all risks incident thereto are to be borne by tenant. Tenant acknowledges that the premises have been investigated and inspected by

tenant and are satisfactory to tenant. In the event of any defect or deficiency in any of the premises of any nature, whether latent or patent, landlord shall not have any responsibility or liability for any damages, including incidental or consequential damages. Tenant expressly waives any right of rescission hereunder and releases and discharges landlord from any and all claims or causes of action that tenant may now have or hereafter have against landlord, and tenant shall indemnify, protect, defend and hold landlord and all landlord affiliates harmless from and against all costs, claims, or causes of action, arising in connection with or out of the condition of the premises. Tenant's waivers and indemnification obligations hereunder shall survive the termination of this lease.

FN2. Section 2.3 states: "Landlord represents and warrants to Tenant that Landlord is validly seized of a leasehold estate in the Premises, free and clear of all matters affecting title except for the Permitted Exceptions and the provisions of the Prime Lease." (J.A. Tab 5 § 2.3.) (J.A. Tab 5 § 2.2 (footnote added).)

The Sublease also contains provisions regarding rent and improvements. In section 3.1, VMGMC agrees to pay basic rent on the first day of the month "without setoff, counterclaim, or deduction of any kind." (*Id.* § 3.1.) Argonaut promises that it will improve the premises by adding a showroom as well as other renovations to bring the premises in compliance with the GM image requirements. (See *id.* §§ 5.1-5.4.) The Sublease states that Argonaut "shall bear the hard and soft costs" of developing the plans and constructing the improvements "up to a maximum amount of \$700,000," but that such costs constitute a loan and shall be repaid by VMGMC, pursuant to a 19-year note, as an increase in its monthly rent once the improvements are completed. (See *id.* § 5.5.)

Lastly, the Sublease contains an integration clause. Section 21.4 provides:

This Lease and any documents executed by Tenant on or about the effective date hereof at Landlord's request constitute the entire agreement between the parties and supercede all prior understandings and agreements, whether written or oral, between the

parties relating to the Premises and the transactions provided for herein. Landlord and Tenant are business entities having substantial experience with the subject matter of this Lease and have each fully participated in the negotiation and drafting of this Lease. Accordingly, this Lease shall be construed without regard to the rule providing that ambiguities in a document are to be construed against the drafter.

*5 (Id. § 21.4.)

4. The Assignment

In addition to the aforementioned documents, GM and VMGMC executed an Assignment by which GM assigned to VMGMC the Pontiac assets (vehicles, parts, and accessories) GM acquired from Star. The Assignment also states that VMGMC takes Argonaut's rights against and obligations to C & R under the Agreement to Lease and the Prime Lease. Section 8 provides, in relevant part:

As of closing, [VMGMC] accepts the obligations and receives the rights under a certain Agreement to Lease and Lease between C & R Realty of Richmond, Inc. as Landlord and Argonaut Holdings, Inc. as Tenant by assignment and agrees to perform all the obligations of Argonaut Holdings, Inc. pursuant to that Agreement to Lease and Lease. (J.A. Tab 28 § 8.) Pursuant to this section and the integration clause in the Sublease, Villa Marin now claims that VMGMC may enforce the Agreement to Lease and the Prime Lease.

D. The Post-Contract Events

1. The Buick-Pontiac-GMC Dealership at the Hylan Premises

On January 7, 1997, approximately six weeks after the closing, VMGMC notified Walton that it intended to stop paying rent because it was unsatisfied with the condition of the computer system at the Hylan premises. VMGMC resumed its payment schedule four months later. (See GM and Argonaut 56.1 Stmt. ¶¶ 38-39; Villa Marin 56.1 Resp. ¶¶ 38-39.)

In August of that year, VMGMC advised GM and Argonaut that the Hylan premises lacked a valid certificate of occupancy due to the owner's previous alterations. On August 21, 1997, however, the City of New York issued a "no-objection letter," allowing

VMGMC's operations to continue for one year. (See GM and Argonaut 56.1 Stmt. ¶¶ 40-41; Villa Marin 56.1 Resp. ¶¶ 40-41.)

VMGMC again stopped paying rent in December 1997. According to VMGMC, nonpayment was justified because Argonaut owed VMGMC reimbursements that far exceeded the rental amounts due. (See GM and Argonaut 56.1 Stmt. ¶ 42; Villa Marin 56.1 Resp. ¶ 42.) It is undisputed that VMGMC owes Argonaut \$257,177 in unpaid and delinquent rent, late charges, and default interest for the period up to December 8, 1999. [FN3] Villa Marin contends, however, that Argonaut owes VMGMC amounts in excess of \$258,000 for repairs and improvements that Argonaut was obligated to perform pursuant to the Sublease. As of February 2000, VMGMC continues to occupy the Hylan premises and sell and service Buick, Pontiac, and GMC vehicles from that location. (See GM and Argonaut 56.1 Stmt. ¶¶ 42-44; Villa Marin 56.1 Resp. ¶¶ 42-44.)

FN3. The parties cannot agree as to the amount of rent, late charges, and default interest that has accrued since that time.

2. VMC's Chevrolet Franchise

Meanwhile, GM's Chevrolet Motor Division extended the effective date of VMC's termination from September 30, 1997 to June 30, 1998. (See J.A. Tab 13.) Shortly before the extended termination date, VMC relocated its Chevrolet sales operations. VMC's Chevrolet Dealer Agreement provides that VMC may not change the location of its operations without Chevrolet's "prior written authorization." After learning of the relocation, Chevrolet notified VMC that it was in default of its obligations under the Chevrolet Dealer Agreement and requested certain information in order to evaluate the new location. VMC neither submitted the requested information nor received Chevrolet's written approval to relocate. Chevrolet ultimately terminated VMC's Chevrolet franchise on August 15, 1998. (See GM and Argonaut 56.1 Stmt. ¶¶ 46-50; Villa Marin 56.1 Resp. ¶¶ 46-50.)

E. Procedural History

1. The Actions

*6 On August 13, 1998, GM commenced a declaratory judgment action against VMC for a declaration that it lawfully terminated VMC's Chevrolet franchise. See *General Motors Corp. v. Villa Marin Chevrolet, Inc.*, No. 98-CV-5206 (E.D.N.Y. filed Aug. 13, 1998). On the same date, Argonaut brought suit against VMGMC for back rent. See *Argonaut Holdings, Inc. v. Villa Marin GMC, Inc.*, No. 98-CV-5208 (E.D.N.Y. filed Aug. 13, 1998). VMC and VMGMC brought counterclaims in both actions. Then, on October 5, 1998, VMC and VMGMC initiated an action against GM, Argonaut, and C & R in state court in Staten Island, alleging various breach of contract claims. See *Villa Marin Chevrolet, Inc. v. General Motors Corp.*, No. 98-CV-6167 (E.D.N.Y. removed Oct. 8, 1998). GM and Argonaut removed the case to this Court on October 8, 1998, based on diversity of citizenship. On June 24, 1999, VMC, VMGMC, and Spencer Hondros (a Villa Marin principal) commenced an action against Schlemmer (the owner and principal of C & R), L & A, and BA (engineering and architectural firms) alleging claims of misrepresentation, fraud, prima facie tort, and breach of contract as against Schlemmer and claims of negligent misrepresentation as against L & A and BA. See *Villa Marin Chevrolet, Inc. v. Schlemmer*, No. 99-CV-3750 (E.D.N.Y. filed June 24, 1999).

2. The Prior Rulings

Villa Marin moved to remand its action, *Villa Marin Chevrolet, Inc. v. General Motors Corp.*, No. 98-CV-6167, back to state court, claiming that diversity of citizenship does not exist because Villa Marin and C & R are both citizens of the State of New York. In an opinion dated October 21, 1998, I held that because there was no possibility that Villa Marin could articulate a cause of action against C & R, Villa Marin fraudulently joined C & R to defeat diversity jurisdiction. Accordingly, I denied the motion to remand. Soon thereafter, on December 23, 1998, the parties stipulated to the dismissal of C & R with prejudice. [FN4]

FN4. Villa Marin had asserted two claims against C & R: (1) damages for breach of the Prime Lease between Argonaut and C & R; and (2) rescission of the Prime Lease based on fraudulent inducement. I concluded that Villa Marin failed to allege sufficient factual foundations to support either of those claims because Villa Marin is neither a party to nor an intended third-party beneficiary of the Prime Lease. I therefore denied the motion to remand. See *Villa Marin Chevrolet, Inc. v. General Motors Corp.*, No. 98-CV-6167 (E.D.N.Y. Oct. 20, 1998). Villa Marin did not assert, and thus I was not aware, that it arguably had a right to enforce the Prime Lease against C & R by virtue of the Assignment. (The Assignment confers on VMGMC all of Argonaut's rights and obligations under the Agreement to Lease and the Prime Lease. Thus, the Assignment may have provided VMGMC with a basis to sue C & R for breach of those documents.) Villa Marin now contends, in opposition to Schlemmer's motion to dismiss on res judicata grounds (No. 99-CV-3750), that it was unaware of the Assignment in October 1998 because GM and Schlemmer fraudulently concealed the document. (See Brief in Opposition to the Motion to Dismiss of Defendant Ronald Schlemmer at 10-12.) When questioned at oral argument on January 14, 2000, counsel for Villa Marin claimed that, although a Villa Marin principal executed the Assignment on November 21, 1996, GM and Argonaut never provided Villa Marin with a copy of the document. However, Villa Marin's principal, and presumably its counsel at closing, were on notice as to the existence of the Assignment on November 21, 1996. In addition, when Villa Marin's current counsel became aware of the Assignment (sometime prior to August 25, 1999, when Villa Marin attached the document as Exhibit E to its First Amended Complaint), no application was made for reconsideration of my conclusion that Villa Marin could not sue C & R. Therefore, I reject Villa Marin's contention that GM and Argonaut fraudulently concealed the document and reaffirm my prior ruling.

On August 25, 1999, Villa Marin filed its First Amended Complaint in that action, alleging among other things breaches of contract, fraud, misrepresentation, and violations of the federal and state automobile dealers' acts. GM and Argonaut moved to dismiss the fraud and misrepresentation claims, which was granted on November 18,

1999. See *Villa Marin Chevrolet, Inc. v. General Motors Corp.*, No. 98-CV-6167, 1999 WL 1052494 (E.D.N.Y. Nov. 18, 1999).

Finally, in *General Motors Corp. v. Villa Marin Chevrolet, Inc.*, No. 98-CV-5206, Villa Marin sought a preliminary injunction prohibiting GM from establishing another Chevrolet dealership on Staten Island. The theory of the application was that GM's action for a declaratory judgment that it had lawfully terminated Villa Marin's Chevrolet dealership estopped GM from altering the status quo until the declaratory judgment action was resolved. I denied the motion in an order dated December 2, 1999. See *General Motors Corp. v. Villa Marin Chevrolet, Inc.*, No. 98-CV-5206 (E.D.N.Y. Dec. 2, 1999).

3. The Pending Motions

*7 GM and Argonaut now move for summary judgment as to all claims in all three lawsuits in which they are parties. [FN5] In the fourth action, L & A and BA move for summary judgment on the negligent misrepresentation claims and Schlemmer moves to dismiss all of the claims against him for failure to state a claim upon which relief can be granted pursuant to Fed.R.Civ.P. 12(b)(6). [FN6] The following discussion addresses each of these motions in turn.

FN5. At oral argument on January 21, 2000, Villa Marin clarified that it has withdrawn its counterclaims for intentional interference with contracts and intentional interference with business relations. (See No. 98-CV-5206 Answer and Counterclaims ¶¶ 79-86; Transcript of January 21, 2000, at 49-52). Villa Marin confirmed the withdrawal of its counterclaim for intentional interference with business relations in a letter to the Court dated January 24, 2000. The letter made no mention, however, of Villa Marin's other counterclaim for intentional interference with contracts. In light of Villa Marin's agreement to withdraw such claim at oral argument on January 21, 2000, I assume that the letter's omission was merely an oversight.

FN6. Villa Marin consents to the dismissal of prima facie tort claim, but contests the dismissal of the

remaining counts.

DISCUSSION

I.

GM AND ARGONAUT

A. The Summary Judgment Standard

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). In determining whether material facts are in dispute, courts must resolve all ambiguities and draw all inferences in favor of the non-moving party. See *Kerzer v. Kingly Mfg.*, 156 F.3d 396, 400 (2d Cir.1998).

The moving party bears the initial burden of demonstrating the absence of any genuine issues of material fact. See *Gallo v. Prudential Residential Servs., L.P.*, 22 F.3d 1219, 1223 (2d Cir.1994). "When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. In the language of the Rule, the nonmoving party must come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (quoting Fed.R.Civ.P. 56(e)) (citations and footnote omitted). The non-moving party cannot survive a properly supported motion for summary judgment by resting on its pleadings without offering "any significant probative evidence tending to support the complaint." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) (quoting *First Nat'l Bank v. Cities Serv. Co.*, 391 U.S. 253, 290 (1968)). Moreover, the moving party is not required to affirmatively disprove unsupported assertions made by the non-movant. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). "Conclusory allegations, conjecture, and speculation ... are insufficient to create a genuine issue of fact." *Kerzer*, 156 F.3d at 400 (citing *D'Amico v. City of New York*, 132 F.3d 145, 149 (2d Cir.), cert. denied,

524 U.S. 911 (1998)).

B. The Termination and Release Agreement

GM seeks a declaratory judgment that it has lawfully terminated VMC's Chevrolet franchise pursuant to the terms of the Termination and Release Agreement ("TRA"). Villa Marin likewise asks for a summary resolution of this issue, claiming that GM has breached the TRA by failing to perform a condition precedent to performance of the contract. GM is entitled to summary judgment on this issue.

Under New York law, [FN7] a court must give effect to the intent of the parties as indicated by the clear and unambiguous language used in a contract. See *Breed v. Insurance Co. of N. Am.*, 46 N.Y.2d 351, 355 (1978). Such intent is clear if the contract conveys a distinct idea with plain language and there is no reasonable basis for a difference of opinion. See *Chimart Assocs. v. Paul*, 66 N.Y.2d 570, 573 (1986). In such circumstances, a court should not look beyond the four corners of the agreement to extrinsic evidence. See *Teitelbaum Holdings, Ltd. v. Gold*, 48 N.Y.2d 51, 56 (1979). Indeed, "[a] court may neither rewrite, under the guise of interpretation, a term of the contract when the terms is clear and unambiguous, nor redraft a contract to accord with its instinct for the dispensation of equity upon the facts of a given case." *Cruden v. Bank of New York*, 957 F.2d 961, 976 (2d Cir.1992) (citations omitted). Further, when a contract is executed by sophisticated, counseled business persons, "a presumption that a deliberately prepared and executed agreement manifests the true intention of the parties ... appl[ies] with even greater force." See *Quantum Chem. Corp. v. Reliance Group, Inc.*, 580 N.Y.S.2d 275, 276 (1st Dep't 1992) (per curiam) (citations omitted).

FN7. The parties agree that New York law governs all of the common law claims.

*8 The TRA provides that VMC agrees to voluntarily terminate its Chevrolet Dealer Agreement in exchange for GM's agreement to

appoint VMGMC to be a Buick and Pontiac dealer. Specifically, the TRA states:

Villa Marin hereby expressly agrees that GM's agreement to enter into the Buick and Pontiac Dealer Agreements with [VMGMC] will result in a direct benefit to the shareholders of [VMGMC], who are also the shareholders of [VMC], and, therefore, GM's agreement to enter into the Buick and Pontiac Dealer Agreements is valid and sufficient consideration for [VMC's] execution and delivery of this [TRA].

(J.A. Tab 4 ¶ 1.) Further, the TRA provides that, in the absence of written notice by GM or VMC establishing an earlier effective date, the termination of the Chevrolet Dealer Agreement shall be effective on September 30, 1997, (see id. ¶ 2), a date that was later extended to June 30, 1998. Lastly, VMC represented in the agreement that it "has reviewed this [TRA] with its legal, tax, and other advisors, and is fully aware of all of its rights and alternatives" and acknowledges that "its decisions and actions are entirely voluntary and free from any mental, physical, or economic duress." (See id. ¶ 5.) It is undisputed that GM delivered Buick and Pontiac appointments to VMGMC on November 21, 1996, the same day VMC executed and delivered the TRA. (See GM and Argonaut 56.1 Stmt. ¶ 29; Villa Marin 56.1 Resp. ¶ 29.) The parties also agree that VMC's Chevrolet franchise was ultimately terminated on August 15, 1998--approximately six weeks after the June 30, 1998 effective date. (See GM and Argonaut 56.1 Stmt. ¶ 50; Villa Marin 56.1 Resp. ¶ 50.)

I find that the terms of the TRA are clear and unambiguous. The parties, sophisticated and counseled businesses with a prior course of dealing with each other, plainly contracted to terminate VMC's Chevrolet franchise in exchange for VMGMC's appointment to be a Buick and Pontiac dealer. Their agreement is not susceptible to any other reasonable interpretation. There is no dispute that GM fully performed its appointment obligation and timely terminated the Chevrolet franchise. No rationale juror could conclude that GM breached the TRA by terminating VMC's Chevrolet Dealer Agreement on

August 15, 1998.

In response, Villa Marin argues that GM may not enforce the TRA because of the nonoccurrence of a condition precedent. [FN8] Taking the argument from the beginning, Villa Marin asserts that the TRA incorporates by reference the Buick and Pontiac Dealer Sales and Service Agreements ("Dealer Agreements"), which in turn incorporate by reference the GM Standard Provisions. Thus, the argument continues, GM's promise to appoint VMGMC to be a Buick and Pontiac dealer is conditioned on VMGMC fulfilling the requirements in the GM Standard Provisions that the dealer (VMGMC) provide facilities of appropriate appearance and quality for the dealership. Section 17 of the Sublease also provides that Argonaut may terminate the Sublease if VMGMC is not the holder of valid dealer agreements on November 21, 1996. Therefore, Villa Marin continues, because a conforming premises is a prerequisite to the Dealer Agreements, which are allegedly incorporated by reference into the TRA, and franchise approval is a prerequisite to the Sublease, GM is somehow obliged to provide VMGMC with a lawful, improved business premises and that obligation is a condition precedent to GM's ability to enforce the TRA. Accordingly, Villa Marin concludes, GM's failure to provide such premises constitutes a nonoccurrence of a condition precedent which goes to the "heart" of the transaction, and, thus, GM has no authority under the TRA to terminate VMC's Chevrolet franchise.

FN8. "A condition precedent is an act or event, other than a lapse of time, which, unless the condition is excused, must occur before a duty to perform in the agreement arises." *Oppenheimer & Co. v. Oppenheim, Appel, Dixon & Co.*, 86 N.Y.2d 685, 690 (1995) (internal quotation marks and citation omitted).

*9 To state this convoluted argument is to defeat it. Villa Marin's tortured reading of the documents does not establish that GM's acquisition of conforming business premises is a condition precedent to GM's enforcement of the TRA. First, the TRA, by its express terms, does not condition termination on anything,

let alone GM obtaining business premises for VMGMC. Second, even accepting the dubious assertion that the Dealer Agreements (and the GM Standard Provisions) have been "incorporated by reference" into the TRA, [FN9] thus incorporating some obligation to acquire suitable facilities, such burden is squarely on VMGMC, not GM. The documents require the dealer--not the manufacturer--to provide suitable premises. [FN10] Third, even if those documents were incorporated by reference into the TRA and even if they conditioned the appointment of a dealership on GM's provision of suitable premises (or on VMGMC's acquisition of them), GM and VMGMC clearly waived any such requirement by nonetheless going forward with the appointment of VMGMC to be a Buick and Pontiac dealer. See *T.G.I. E. Coast Constr. Corp. v. Fireman's Fund Ins. Co.*, 600 F.Supp. 178, 181 (S.D.N.Y.1985) (noting that conduct inconsistent with enforcement impliedly waives a condition precedent). Finally, to the extent that GM's obligation stems from the Sublease, Villa Marin has offered no explanation as to how GM, a non-party to that agreement, has any duties thereunder. In sum, I conclude that GM's acquisition of conforming business premises was not a condition precedent to GM's ability to terminate the Chevrolet franchise under the TRA. Accordingly, Villa Marin has failed to raise a genuine issue of material fact as to whether GM breached the TRA.

FN9. In this regard, the TRA states only that: "General Motor's entry into such Dealer Sales and Service Agreements shall be subject to [VMGMC's] agreement to such terms and conditions as are established by the Buick Motor Division and Pontiac-GMC Division of General Motors...." (J.A. Tab 4 § 1.) This is not an incorporation by reference.

FN10. The Buick Dealer Agreement provides: "Dealer, therefore, agrees to provide facilities which are consistent in appearance and environment with Buick's reasonable requirements." (J.A. Tab 34 pt. 6.) The Pontiac Dealer Agreement states: "Dealer therefore agrees to provide facilities that meet, in appearance and quality, PONTIAC's reasonable requirements." (J.A. Tab 35 pt. 9.) The

GM Standard Provisions incorporated into both provide: "Dealer therefore agrees that its Premises will be properly equipped and maintained, and that the interior and exterior retail environment and signs will comply with any reasonable requirements Division may establish to promote and preserve the image of Division and its dealers." (J.A. Tab 12 art. 4.4.4.)

C. The Sublease

1. Rent

Argonaut has initiated an action for back rent under the Sublease and for a declaratory judgment that the Sublease is enforceable. Villa Marin claims, in response, that VMGMC is entitled, pursuant to the Prime Lease, to set off the cost of repairs from the rent due under the Sublease.

First, to the extent Villa Marin seeks to deduct the cost of repairs from rent due under the Sublease, it is expressly forbidden from doing so by the Sublease's terms. Section 3.1 of the Sublease provides that VMGMC shall pay rent "without setoff, counterclaim, or deduction of any kind." (J.A. Tab 5 § 3.1.) In addition, it is well-settled that the obligation to pay rent is independent of a covenant to make repairs. See *Thomson-Houston Elec. Co. v. Durant Land Improvement Co.*, 144 N.Y. 34, 43-44 (1894); *S.E. Nichols, Inc. v. American Shopping Ctrs., Inc.*, 515 N.Y.S.2d 638, 639 (3d Dep't 1987); *Drago v. Mead*, 51 N.Y.S. 360, 360-61 (2d Dep't 1898). Thus, a landlord's failure to perform a covenant to make repairs or improvements does not excuse or relieve a tenant from his obligation to pay rent and, likewise, a tenant's default in rent is not a defense to an action for damages arising out the landlord's breach of the covenant to repair. See *Nichols*, 515 N.Y.S.2d at 639.

*10 Here, it is undisputed that pursuant to the Sublease VMGMC owes Argonaut at least \$257,177, of which \$245,594 is unpaid and delinquent rent and \$11,583 is late charges and default interest. [FN11] (See *Homic Aff.* ¶ 6; *GM and Argonaut* 56.1 Stmt. ¶¶ 42-44; *Villa Marin* 56.1 Resp. ¶¶ 42-44.) As Argonaut's alleged breach of its obligation to

make improvements under the Sublease is no defense to its action for back rent, VMGMC has breached the Sublease by withholding rent.

FN11. As discussed supra, the parties dispute the precise amount of rent, interest, and taxes due under the terms of the Sublease. There is no dispute, however, that Villa Marin has withheld rent.

Second, to the extent that Villa Marin seeks to deduct the cost of repairs pursuant to the terms of the Prime Lease from the rent due under the Sublease, it has no authority to do so. Section 8 of the Assignment provides that VMGMC "accepts the obligations and receives the rights" under the Agreement to Lease and Prime Lease between C & R and Argonaut and "agrees to perform all the obligations of Argonaut" pursuant to those documents. (J.A. Tab 28 § 8.) Under the Prime Lease, C & R is required to make repairs resulting from ordinary wear and tear and its own negligence. (See J.A. Tab 36 §§ 6.2, 6.3.) Argonaut, however, has the right to perform such repairs, after ten days' notice or in the case of emergency, and to deduct the costs incurred from the rent due. [FN12] (See *id.* §§ 18.1, 18.2.) Thus, pursuant to the rights VMGMC acquired under the Assignment, Villa Marin contends that VMGMC has properly deducted the cost of repairs from the rent due.

FN12. Section 18.1 states: "Notwithstanding any provision hereof to the contrary, each party shall have the right at any time, after ten (10) days notice to the other party or without notice in case of emergency (or in case any fine, penalty, interest, cost or expense may otherwise be imposed or incurred), to make any payment including but not limited to Taxes or perform any act required of such other party under any provision of this Lease, and in exercising such right, to incur necessary or incidental costs and expenses, including reasonable counsel fees. Nothing herein shall imply any obligation on the part of either party to make any payment or perform any act required of the other party, and the exercise of the right to do so shall not constitute a release of any obligations or a waiver of any default." (J.A. Tab 36 § 18.1.)

Section 18.2 provides: "All payments made and all costs and expenses incurred in connection with any exercise of such right shall be reimbursed by the other party to the party making or incurring the same within ten (10) days after notice, together with interest at the Default Rate from the respective dates of the making of such payments or the payment of such costs and expenses. In addition to any other rights and remedies available to either party, Landlord shall have, in respect of Tenant's failure to make reimbursement of any amount as aforesaid, the same rights and remedies as in the case of default by Tenant in the payment of the Rent, and Tenant shall have, in respect of Landlord's failure to make reimbursement of any amount as aforesaid, the right to deduct such amount from Rents due and payable or to become due and payable hereunder." (Id. § 18.2.)

If the parties had observed the terms of the Assignment in this regard, VMGMC would have paid rent directly to C & R under the Prime Lease, eliminating Argonaut as the middleman. However, the parties' relationships do not appear to have been governed by the Assignment. [FN13] Since November 21, 1996, VMGMC has paid rent only to Argonaut under the Sublease and has demanded that Argonaut make repairs. Argonaut, in turn, has paid rent only to C & R under the Prime Lease. (See Transcript of Feb. 8, 2000.) Thus, VMGMC has made no rent payment under the Prime Lease from which it may deduct the cost of repairs. Accordingly, the Prime Lease's deduction provisions are irrelevant to VMGMC's obligation to pay rent to Argonaut under the Sublease. Argonaut is, therefore, entitled to summary judgment for its back rent and declaratory judgment claims.

FN13. This may account for Villa Marin's belated reliance on the Assignment. As set forth in footnote four, *supra*, Villa Marin failed even to mention the Assignment until after C & R had been dismissed from the case.

2. Improvements

Villa Marin also claims (both as a counterclaim and as a direct claim in its own action) that Argonaut breached the Sublease. Although a tenant may not defend an action

for rent by alleging a breach of covenant of the lease, a tenant may recover damages by bringing a counterclaim to that action or by commencing an independent suit. See *Goelet v. Goldstein*, 242 N.Y.S. 586, 588 (1st Dep't 1930) (*per curiam*). As mentioned, Villa Marin has done both. Because these claims are redundant, I will address them both in the context of Villa Marin's direct claim for breach of the Sublease.

Villa Marin claims that Argonaut has breached the Sublease in three different respects. First, it contends that Argonaut breached section 2.2 of the Sublease by failing to provide VMGMC with a premises that lawfully could be used and occupied. In relevant part, section 2.2 states in all capital letters:

*11 Tenant acknowledges that, except as expressly set forth in section 2.3, neither landlord nor any landlord affiliate (as hereinafter defined) has made any warranty or representation, express or implied, with respect to any of the premises, including any warranty or representation as to (i) its fitness, design or condition for any particular use or purpose, ... (iv) compliance with laws, ... (vi) use, ... and all risks incident thereto are to be borne by tenant.

(J.A. Tab 5 § 2.2.) Section 2.3 provides: "Landlord represents and warrants to Tenant that Landlord is validly seized of a leasehold estate in the Premises, free and clear of all matters affecting title except for the Permitted Exceptions and the provisions of the Prime Lease." (Id. § 2.3.) According to Villa Marin, the term "leasehold estate" means an "asset which represents the tenant's right to use the leased premises." Thus, the argument continues, the carve-out of section 2.3 from section 2.2 establishes an affirmative representation and warranty by Argonaut that Argonaut and VMGMC are entitled to use and occupy the premises as provided in the Prime Lease. The Prime Lease, in turn, provides that the tenant (Argonaut) must use and occupy the premises in a lawful manner and not in any way that would violate the certificate of occupancy. (See J.A. Tab 36 §§ 5.1, 5.2.) On the basis of these provisions, Villa Marin contends that Argonaut is in breach of the

Sublease because Villa Marin is using and occupying the premises in an unlawful manner.

I find this labored attempt to reconstruct the Sublease--and by doing so to construct a breach of it--unavailing. In interpreting a written agreement under New York law, a court must consider the entire contract and attempt to reconcile provisions to avoid any inconsistency. See *Laba v. Carey*, 29 N.Y.2d 302, 308 (1971). Moreover, "[i]t is a generally accepted rule of construction that an agreement must be construed to accord a meaning and purpose to each of its parts" and to avoid "an interpretation which renders a clause absolutely meaningless." *Kahn v. New York Times Co.*, 503 N.Y.S.2d 561, 565 (1st Dep't 1986) (per curiam) (quoting *Graphic Scanning Corp. v. Citibank, N.A.*, 499 N.Y.S.2d 712, 714 (1st Dep't 1986)). It is plain that the carve-out of section 2.3 from the specific and detailed disclaimer in section 2.2 does not establish an affirmative warranty about the use or occupancy of the premises. By its unambiguous terms, section 2.3 provides that Argonaut has a leasehold estate in the premises. In other words, the section warrants that Argonaut, who is not the owner of the property, has an interest in the property such that it may sublease the premises to VMGMC. This section does not make any warranty about the premises's use, fitness, or compliance with laws. Indeed, if I were to give effect to Villa Marin's construction, the detailed disclaimer in section 2.2 would be rendered meaningless. Accordingly, I conclude that Argonaut is not in breach of section 2.2 of the Sublease.

*12 Second, Villa Marin asserts that Argonaut breached the Sublease by neglecting to perform due diligence of the premises. In support of this argument, Villa Marin points to the Agreement to Lease, which provides that Argonaut may inspect the premises, (see J.A. Tab 27 §§ 2.2, 3.3), that C & R shall deliver to Argonaut all permits, such as a certificate of occupancy (see id. § 3.2.3(d)), and that Argonaut shall not be obligated to close the transaction unless it has obtained all necessary permits upon closing (see id. §

8.1.4). Moreover, as VMGMC was not permitted to conduct its own due diligence, Villa Marin argues, Argonaut had the exclusive obligation to perform due diligence on VMGMC's behalf. Therefore, according to Villa Marin, Argonaut's failure to obtain an certificate of occupancy breached the Sublease.

Again, I am not persuaded. As an initial matter, the Sublease does not create any obligation on the part of Argonaut to conduct due diligence for VMGMC. Moreover, even if the Agreement to Lease was somehow incorporated into the Sublease, the Agreement to Lease only provides Argonaut with the right and opportunity to conduct due diligence on its own behalf. Pursuant to its terms, Argonaut had the right to inspect and receive a certificate of occupancy from C & R prior to closing the transaction on November 21, 1996. It also had the right to refuse to close the transaction if it had not obtained the permits necessary to use the premises as an automobile dealership. None of these terms imposes any affirmative obligation on Argonaut. Indeed, once Argonaut executed the Prime Lease without exercising its right to inspect and receive the certificate of occupancy under the Agreement to Lease, the option was arguably waived. See *DeFreitas v. Holley*, 461 N.Y.S.2d 351, 352 (2d Dep't 1983) (per curiam) ("It is well established that a party for whose benefit a provision is inserted in a contract may waive that provision and accept performance of the contract as is."). Accordingly, Argonaut's alleged failure to conduct due diligence does not breach the Sublease.

Lastly, Villa Marin claims that Argonaut breached the Sublease by failing to make initial improvements to the premises by 1997. It is undisputed that Argonaut has failed to make any improvements on the premises. Villa Marin's claim for breach turns on whether Argonaut's obligation to perform has come due or whether it may be excused. As set forth above, under New York law, a tenant's failure to pay rent does not ordinarily relieve the landlord of an obligation to make repairs or improvements on the premises. The covenant to make repairs and the covenant to

pay rent are independent of one another. See Nichols, 515 N.Y.S.2d at 639. Just as "a failure to repair is not a valid defense to an action for rent," "[t]here would seem to be no reason why the converse of the proposition should not be equally true." Drago, 51 N.Y.S. at 360.

*13 Argonaut contends, however, that the parties have explicitly contracted around the doctrine of independent covenants. Section 21.3 states, in relevant part: "Landlord shall have no obligation to perform any act required hereunder if an Event of Default has occurred and is then existing." (J.A. Tab 5 § 21.3.) Under section 15.1, an "Event of Default" is defined as a "Failure to Pay Rent" where "Tenant fails to pay any Rent payable by Tenant under the provisions of this Lease within five (5) days following written notice to Tenant that such payment was not made when due." (Id. § 15.1(a).) Thus, Argonaut argues, because the parties have expressly conditioned the landlord's covenant to make repairs on the tenant's covenant to pay rent, Argonaut was under no contractual obligation to perform any improvements once VMGMC defaulted by failing to pay rent.

Here, VMGMC first notified Walton on January 7, 1997 that it intended not to pay rent when due that month. (See J.A. Tab 6.) On January 24, 1997, Argonaut's counsel responded that VMGMC's "failure to pay basic rent within five (5) days following written notice may be deemed a default under the Lease." (J.A. Tab 7.) The letter further stated that "[n]otice is hereby given that rent for the month of January, 1997 is overdue." (Id.) It is undisputed that VMGMC did not pay rent for four months thereafter, and that it again stopped paying rent in December 1997. (See GM and Argonaut 56.1 Stmt. ¶¶ 38-39, 42; Villa Marin 56.1 Resp. ¶¶ 38-39, 42.) VMGMC, therefore, defaulted under the Sublease as of January 29, 1997, by failing to pay rent within five days following written notice, and Argonaut had no obligation to perform its covenant to make improvements so long as that "Event of Default" remained "then existing." (J.A. Tab 5 § 21.3.) Accordingly, Argonaut's breach, if any, could

only have occurred between November 21, 1996 (the execution of the Sublease) and January 29, 1997 (VMGMC's default).

Presumably recognizing that VMGMC's early failure to pay rent substantially limited the scope of Argonaut's duty to make improvements, Villa Marin contends that Argonaut breached the Sublease by failing to perform two work items by 1997. According to Villa Marin, at least two items in the exhibit attached to the Sublease, items 7 and 8, were to be completed by 1997. [FN14] Villa Marin apparently reached this conclusion because there is a "1996" notation in the exhibit's margin next to those work items, notwithstanding the absence of any elaboration in the Sublease or any other document as to the meaning of that notation. Villa Marin thus concludes that Argonaut is in breach the Sublease by failing to perform those items by 1997. In response, Argonaut claims that these items only were to be included in proposed plans, and were not required to be performed by a specific deadline. I agree.

FN14. Item 7 states: "Provide an allowance for service work on the service area, body shop, and toilet room fans. Operations personnel were unsure of their condition." (J.A. Tab 5 Ex. C.) Item 8 states: "Modify showroom area toilet to be accessible. The toilet room requires enlargement, new finishes and accessible hardware, and accessories. Provide concrete disabled ramp at the double showroom door. Renovate the employee toilet." (Id.) Although item number 5 also lists the year 1996, Villa Marin does not rely on that item in its defense of this summary judgment motion.

Section 5 of the Sublease provides that the initial improvements shall consist of a new showroom and other "improvements necessary to bring existing buildings ... into compliance with the GM image requirements." [FN15] (J.A. Tab 5 § 5.1.) The Sublease further states that Argonaut shall have prepared "complete finished, detailed architectural and engineering plans and specifications for construction" of the improvements, and such plans "shall, in any event, include items 2-8 set forth in Exhibit C hereto." (Id. § 5.2.) The

Sublease does not establish any specific deadline for completion of the improvements or the plans. Section 5.3 merely states that Argonaut "shall commence construction of the Initial Improvements in accordance with the Plans after completion of the Plans." (Id. § 5.3.) Section 21.3 also provides: "Any act that Landlord is permitted to perform under this Lease may be performed at any time and from time to time by Landlord or any Person designated by Landlord." (Id. § 21.3.)

FN15. Specifically, section 5.1 states: Landlord and Tenant acknowledge that Landlord shall, at its sole cost and expense, develop the Premises with Buildings and related Improvements (together, the "Initial Improvements") in accordance with the Plans (as hereinafter defined) for operation of a General Motors Corporation authorized automobile and/or truck dealership and related purposes. The Initial Improvements shall consist of (a) a showroom of approximately 2,500 square feet (the "New Showroom"); and (b) improvements necessary to bring the existing buildings (including, without limitation, the existing showroom and the exterior of the existing buildings) into compliance with the GM image requirements. (J.A. Tab 5 § 5.1.)

*14 On the basis of these provisions, I conclude that the only reasonable construction of the Sublease is that Exhibit C simply sets forth proposed improvements to be included in the final plans, not items Argonaut must complete by a specific deadline. Indeed, the Sublease only states that the plans shall include items 2-8 and that construction shall begin upon completion of the plans. These provisions plainly do not impose any obligation on Argonaut to perform items 7 and 8 by 1997. Nor could they, as Argonaut executed the Sublease on November 21, 1996--only five weeks before the supposed deadline for completion. I, therefore, conclude that no reasonable jury could find that Argonaut breached the Sublease by failing to perform items 7 and 8 by December 31, 1996.

D. The Agreement to Lease and the Prime Lease

Villa Marin claims that GM and Argonaut

breached the Agreement to Lease and the Prime Lease. Villa Marin has previously attempted to enforce these documents by pointing to the Assignment, which provides that VMGMC takes all of Argonaut's rights and duties under the Agreement to Lease and Prime Lease. (See J.A. Tab 28 § 8.) Thus, as I previously discussed in footnote 5 of GM's and Argonaut's motion to dismiss, the Assignment confers upon VMGMC only those rights Argonaut has against C & R. [FN16] It does not provide an independent basis on which Villa Marin may sue GM and Argonaut.

FN16. See *Villa Marin Chevrolet, Inc. v. General Motors Corp.*, No. 98-CV-6167, 1999 WL 1052494, at *5 n. 5 (E.D.N.Y. Nov. 18, 1999).

GM and Argonaut have moved for summary judgment on these claims for precisely the same reasons. Villa Marin has failed to respond to this argument in its opposition brief. Thus, although I remain convinced that Villa Marin may not assert these claims, in any event, they are deemed abandoned.

E. The Standard Provisions of the Chevrolet Dealer Sales and Service Agreement

Villa Marin also claims that GM breached the GM Standard Provisions incorporated by reference into the 1992 Chevrolet Dealer Sales and Service Agreement by refusing to provide VMC with motor vehicles necessary to fulfill fleet contracts that were outstanding on the effective date of termination, August 15, 1998. Again, I disagree.

On February 14, 1992, GM and VMC entered into a Dealer Sales and Service Agreement for its Chevrolet franchise. Article 14.7.2 of the GM Standard Provisions incorporated into that agreements provides:

If this Agreement is voluntarily terminated by Dealer ..., Division will use its best efforts consistent with its distribution procedures to furnish Dealer with Motor Vehicles to fill Dealer's bona fide retail orders on hand on the effective date of termination or expiration, not to exceed, however, the total number of Motor Vehicles invoiced to Dealer for retail sale during the

three months immediately preceding the effective date of termination.

(J.A. Tab 12 art. 14.7.2.) On November 21, 1996, however, GM and VMC executed the TRA, by which VMC voluntarily terminated its Chevrolet franchise. (See J.A. Tab 4.) In that agreement, VMC released all claims against GM with only three exceptions. Paragraph 3 states:

*15 Villa Marin, for itself, its agents, successors, and assigns, hereby releases, settles, cancels, discharges, and acknowledges to be fully satisfied any and all claims, demands, damages, debts, liabilities, obligations, costs, expenses, liens, actions, and causes of action of every kind and nature whatsoever, whether known or unknown, foreseen or unforeseen, suspected or unsuspected ("Claims"), which Villa Marin or anyone claiming through or under Villa Marin may now or hereafter have against GM, or any officer, director, employee, agent, or affiliate of GM, arising out of or relating to the Chevrolet Dealer Agreement, or any predecessor agreement thereto, or to the relationship between GM and Villa Marin relating to the Chevrolet Dealer Agreement, or any predecessor agreement thereto, provided, however, that the foregoing release shall not extend to (a) reimbursement to Villa Marin of unpaid warranty claims, (b) the payment to Villa Marin of any incentives currently owing to Villa Marin, any amounts currently owing to Villa Marin in its Open Account (after set-off of any amounts owing to GM or its affiliates), or any amounts due or to become due to Villa Marin in connection with its return of Eligible items pursuant to Article 15.2 of the Chevrolet Dealer Agreement [relating to the Purchase of Personal Property], or (c) any Claims of Villa Marin pursuant to Article 17.4 of the Chevrolet Dealer Agreement [relating to Indemnification by General Motors].

(Id. ¶ 3.) None of the enumerated exceptions concerns VMC's right to have GM fill its outstanding retail orders under article 14.7.2. Pursuant to the TRA, GM terminated VMC on August 15, 1998. [FN17]

FN17. The Chevrolet Motor Division notified VMC

of its termination by letter, dated August 17, 1998. Specifically, the letter states: "This will confirm that your Chevrolet Dealer Sales and Service Agreement was terminated effective August 15, 1998, pursuant to Article 4.2 thereof, as provided by the Termination and Release Agreement dated November 21, 1996, as subsequently extended." (J.A. Tab 23.) Article 4.2 of the GM Standard Provisions, however, only refers to the area of the dealer's primary responsibility and was not referenced in the TRA. (See J.A. Tab 12 art. 4.2.) Therefore, I assume the letter meant to cite to article 14.2 of the GM Standard Provisions, which provides for voluntary termination by agreement and was cited to in the TRA. (See *id.* art. 14.2; J.A. Tab 5 ¶¶ 1, 2.)

It is well-settled under New York law that "a valid release which is clear and unambiguous on its face and which is knowingly and voluntarily entered into will be enforced as a private agreement between parties." *Thailer v. LaRocca*, 571 N.Y.S.2d 569, 571 (2d Dep't 1991) (per curiam) (quoting *Appel v. Ford Motor Co.*, 490 N.Y.S.2d 228, 229-30 (2d Dep't 1985) (per curiam)). This is true even if the parties later claim to have intended something else. See *id.* Here, the TRA release is clear and unambiguous. By its express terms, VMC released all claims against GM with only three detailed exceptions, none of which is applicable here. Moreover, VMC also attested that it was "fully aware of all of its rights and alternatives" and that "its decisions and actions are entirely voluntary and free from any mental, physical, or economic duress." (J.A. Tab 4 ¶ 5.) Accordingly, enforcing the express terms of the release, as I must, I conclude that Villa Marin has failed to raise a genuine issue as to whether GM breached article 14.7.2 of the GM Standard Provisions incorporated by reference into the 1992 Chevrolet Dealer Sales and Service Agreement.

F. The Duty of Good Faith and Fair Dealing

Villa Marin also claims that Argonaut breached the duty of good faith and fair dealing implied in the Prime Lease, which was owed to VMGMC by virtue of the

Assignment. Specifically, Villa Marin contends that Argonaut has breached this duty by failing to assert its right to have C & R repair the Hylan premises.

*16 Under New York law, every contract implies a duty of good faith and fair dealing between the parties, see *Dalton v. Educational Testing Serv.*, 87 N.Y.2d 384, 389 (1995); see also *Wood v. Duff-Gordon*, 222 N.Y. 88, 92 (1917) (implied duty of best efforts), and an implied covenant that neither party will prevent the other from receiving the fruits of the contract, see *Dalton*, 87 N.Y.2d at 389 (quoting *Kirke La Salle Co. v. Armstrong Co.*, 263 N.Y. 79, 87 (1933)). The duty of good faith and fair dealing may not be implied under certain circumstances, however, where it would be inconsistent with the other terms of the contract. See *Murphy v. American Home Prods. Corp.*, 58 N.Y.2d 293, 304 (1983).

Assuming arguendo that there is an implied duty of good faith and fair dealing in the Prime Lease, that duty runs between Argonaut and C & R (the parties to the Prime Lease). However, pursuant to the Assignment, VMGMC accepted Argonaut's rights and obligations under the Prime Lease. [FN18] As previously discussed, however, that assignment only confers on VMGMC Argonaut's rights against and obligations to C & R. Therefore, having been assigned Argonaut's rights, VMGMC could only have a cause of action against C & R, not Argonaut, for breach of the implied duty of good faith and fair dealing. Accordingly, no reasonable jury could conclude that Argonaut has breach any implied duty owed to VMGMC under the Prime Lease.

FN18. Section 8 of the Assignment states, in relevant part: "As of closing, [VMGMC] accepts the obligations and receives the rights under a certain Agreement to Lease and Lease between C & R Realty of Richmond, Inc. as Landlord and Argonaut Holdings, Inc. as Tenant by assignment and agrees to perform all the obligations of Argonaut Holdings, Inc. pursuant to that Agreement to Lease and Lease." (J.A. Tab 28 § 8.)

G. Rescission and Reformation

Villa Marin has also brought claims for rescission and reformation. Initially, Villa Marin sought to rescind the entire November 21, 1996 transaction due to GM's and Argonaut's alleged fraud, misrepresentation, and breach of contract. (See No. 98-CV-6167 First Am. Compl. ¶ 158.) Now, however, Villa Marin insists that its rescission claim is premised entirely on the aforementioned breaches of contract. (See Brief of Villa Marin Chevrolet and Villa Marin GMC in Opposition to the GM Motion for Summary Judgment at 20.) Accordingly, I will only address the rescission claim as such. In addition, because Villa Marin has not offered any defense to the motion for summary judgment on its reformation claim, I will deem it abandoned.

Under New York law, a breach of contract may be grounds for rescission. However, rescission "may be obtained only for breaches that are material and willful, or, if not willful, so substantial or fundamental as to strongly tend to defeat the object of the contract ." *United States Postal Serv. v. Phelps Dodge Refining Corp.*, 950 F.Supp. 504, 514 (E.D.N.Y.1997) (citing *K.L.M. Labs., Ltd. v. Hopper*, 830 F.Supp. 159, 163 (E.D.N.Y.1993)). The plaintiff need not establish that the defendant failed to perform in every respect, but must demonstrate " 'a failure which leaves the subject of the contract substantially different from what was contracted for .'" *Hopper*, 803 F.Supp. at 163 (quoting *Callanan v. Keeseville, A.C. & L.C.R.*, 199 N.Y. 268, 284 (1910)).

*17 Here, Villa Marin has failed to establish a genuine issue of material fact as to whether GM and Argonaut committed any breach, let alone a material and willful breach. Moreover, the evidence establishes that the fundamental purpose of the transaction-to create a new Buick-Pontiac-GMC dealership-has been achieved. GM has appointed VMGMC to be a Buick and Pontiac dealer and Argonaut has subleased VMGMC the Hylan premises. All of those events have occurred and VMGMC continues to operate the combined dealership on the Hylan premises to date. Indeed, at oral argument on January 21, 2000, counsel for Villa Marin announced that "we are the

number one dealer in our zone." (Transcript of Jan. 21, 2000, at 39.) I conclude, therefore, that Villa Marin's claim for rescission premised on breach of contract must likewise fail.

H. The Federal and State Automobile Dealers' Acts

1. Automobile Dealers' Day in Court Act

The Automobile Dealers' Day in Court Act, 15 U.S.C. § 1222 (1994), provides a dealer a federal cause of action against an automobile manufacturer who has failed to act in good faith regarding a franchise. [FN19] Specifically, § 1222 states:

FN19. The parties do not dispute that (1) VMC and VMGMC are automobile dealers; (2) GM is an automobile manufacturer engaged in commerce; and (3) the Chevrolet and GMC Dealer Agreements are franchises within the meaning of the statute. See 15 U.S.C. § 1221 (1994).

An automobile dealer may bring suit against any automobile manufacturer ... and shall recover damages by him sustained and the cost of suit by reason of the failure of said automobile manufacturer ... to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise with said dealer: Provided, That in any such suit the manufacturer shall not be barred from asserting in defense of any such action the failure of the dealer to act in good faith.

15 U.S.C. § 1222. Good faith, as defined in § 1221, requires the manufacturer and the dealer

to act in a fair and equitable manner toward each other so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party: Provided, That recommendation, enforcement, exposition, persuasion, urging or argument shall not be deemed to constitute lack of good faith.

15 U.S.C. § 1221(e) (1994). Interpreting this statute, the Second Circuit has noted that the term "good faith" has a "narrow, restricted

meaning." *Empire Volkswagen, Inc. v. World-Wide Volkswagen Corp.*, 814 F.2d 90, 95 (2d Cir.1987) (citing *Autohaus Brugger, Inc. v. Saab Motors, Inc.*, 567 F.2d 901, 911 (9th Cir.1978)). Evidence of "coercion and subsequent termination for failure to submit" is insufficient. See *id.* (quoting *Autowest, Inc. v. Peugeot, Inc.*, 434 F.2d 556, 561 (2d Cir.1970)). Rather, a dealer will succeed only "where there is evidence of a wrongful demand enforced by threats of coercion or intimidation ." ' *Id.* 95-96 (quoting *McDaniel v. General Motors Corp.*, 480 F.Supp. 666, 676 (E.D.N.Y.1979), *aff'd*, 628 F.2d 1345 (2d Cir.1980) (unpublished table opinion)). In other words, a plaintiff must establish both that the manufacturer's demand is unfair and inequitable and that sanctions will result if the demand is not complied with. See *Autohaus, 567 F.2d at 911* (citing *Randy's Studebaker Sales, Inc. v. Nissan Motor Corp.*, 533 F.2d 510, 514 (10th Cir.1976)).

*18 Resolving all ambiguities and drawing all inferences in favor of Villa Marin, as I must, I conclude that Villa Marin has failed to raise a genuine issue both as to whether GM made a "wrongful" demand and as to whether its demand was enforced by threats or coercion.

a. The Absence of a Wrongful Demand

As an initial matter, GM's proposed transaction was not unfair or inequitable. The First Circuit has identified the following considerations as relevant in determining a demand's wrongfulness:

[T]here is an important difference between two kinds of improper conditions that a manufacturer might impose and back up by threats. Particularly suspect under the act are conditions which benefit only, or primarily, the manufacturer--for example, requirements that a dealer purchase large stocks of vehicles, spare parts, special tools or advertising matter--as distinguished from requirements that would tend to work to the mutual advantage of both parties, for example, that the dealer improve its service, or managerial efficiency. The manufacturer can easily extort demands of the first sort,

increasing its own profit at the expense of the dealer's; the act's legislative history indicated that this was of particular concern to the Congress. The latter sort, even if the demands may be thought excessive under the circumstances, should not, without more, indicate that the manufacturer is taking advantage of the dealer, or using the franchise as a weapon for extortion, since the manufacturer stands to profit from his demands only if the dealer profits as well.

Volkswagen Interamericana, S.A. v. Rohlsen, 360 F.2d 437, 442 (1st Cir.1966). Consistent with this theory, courts have recognized liability where the manufacturer's demand is disadvantageous to the dealer. Compare Randy's Studebaker, 533 F.2d at 516 (affirming jury's finding that manufacturer's demand that dealer engage in retail price fixing and make substantial capital expenditures was wrongful), and K & H Kawasaki, Inc. v. Yamaha Motor Corp., Case. No. 95-CV-1824, 1997 WL 204315, at *5 (N.D.N.Y. April 14, 1997) (denying motion to dismiss on ground that manufacturer's demand that dealer take on unwanted inventory was wrongful), with Empire Volkswagen, 814 F.2d at 96-97 (affirming summary judgment for manufacturer on ground that its demand that dealer construct separate facility--a valid contractual provision--was not wrongful), and Salco Corp. v. General Motors Corp., 517 F.2d 567, 575 (10th Cir.1975) (affirming summary judgment for manufacturer on ground that manufacturer's refusal to approve relocation of dealership was in good faith).

Here, counseled parties negotiated a sophisticated business transaction at arms' length. Villa Marin concedes that the purpose of the transaction "was to bring designated GM franchises into conformity with GM's Plan 2000 and GM Dealer Network Strategy objectives." (Villa Marin Counter 56.1 Stmt. ¶ 1.) Villa Marin, thus, does not contend that GM proposed the transaction in order to single out Villa Marin. Most significantly, Villa Marin does not argue that it received inadequate consideration for VMC's agreement to voluntarily terminate its Chevrolet franchise. In exchange for

Chevrolet, VMGMC (the shareholders of which are also shareholders of VMC) acquired Buick and Pontiac franchises. (J.A. Tab 4 ¶ 1.) I conclude, therefore, that the transaction worked to the mutual benefit of the parties and was not wrongful.

*19 Indeed, to this day, the essence of Villa Marin's dissatisfaction has not been that GM's "demand" that Villa Marin go from a Chevrolet and GMC Truck dealer to a Buick-Pontiac-GMC Truck dealer was "wrongful" in the sense required by the statute. To the contrary, the morass of litigation before me had its genesis in Villa Marin's complaint that the Hylan premises are not suitable for Villa Marin's triple dealership. Villa Marin was not without remedy for that state of affairs before it stopped paying rent, see supra, Part I.C.2, and may not be without remedy in the future (an issue I need not address here). However, it may not seek redress by retroactively squeezing the entire transaction, as defined supra, into the "narrow, restricted" category of quasi-extortion prohibited by the statute. See Empire Volkswagen, 814 F.2d at 95.

b. The Absence of Threats or Coercion

Moreover, even assuming that the demand was somehow unfair, Villa Marin has failed to raise a genuine issue of material fact as to whether the demand was enforced by threats or coercion. The statute provides that "recommendation, enforcement, exposition, persuasion, urging or argument shall not be deemed to constitute lack of good faith." 15 U.S.C. § 1221. An actionable threat, rather, is established by evidence of an "either-or" attempt at coercion or intimidation." Fray Chevrolet Sales, Inc. v. General Motors Corp., 536 F.2d 683, 685 (6th Cir.1976). In addition, the plaintiff must demonstrate such coercion by objective evidence--the dealer's subjective belief of coercion is insufficient. See Wallace Motor Sales, Inc. v. American Motor Sales Corp., 780 F.2d 1049, 1056 (1st Cir.1985).

In its defense of the motion, Villa Marin points to two types of alleged coercion. First, Villa Marin claims that Jerry Walton, GM's representative, threatened that GM would put

another GMC dealership on Staten Island to compete with VMGMC. The depositions of Villa Marin's principals, however, belie that assertion. According to David Villamarin, Walton represented only that GM would establish a combined Pontiac-Buick-Isuzu franchise on Hylan Boulevard if Villa Marin declined the deal. Indeed, Villamarin testified that Walton never even implied otherwise. [FN20] (See Villamarin Dep. at 151-152.) Spencer Hondros's testimony is consistent with Villamarin's account. According to Hondros, Walton never stated that GM would add another GMC dealership on Staten Island. [FN21] (See Hondros Dep. at 20-21.) This testimony merely establishes that GM planned to open a triple franchise (with Buick, Pontiac, and one other franchise) on Hylan Boulevard with or without Villa Marin, and does not suggest that Walton ever threatened to establish another GMC dealership on Staten Island. [FN22] I conclude, therefore, that this evidence fails to raise a genuine issue of material fact as to whether Walton threatened Villa Marin.

FN20. David Villamarin gave the following testimony on July 28, 1999: Q. What happened at the next meeting? A. Jerry said I am going to give you one more opportunity now. It is going, going, gone. I will give you one more opportunity. I said one more opportunity, Jerry. We are set on this. We like you, we love you. He said I am going to give you one more opportunity. And we said why? He said because we are going to do the deal with you or without you. Q. Those were his exact words? A. Yes. So I asked Jerry, what does that mean? He said with you or without you. He said I don't need you. I will make it a Pontiac Buick and Isuzu franchise. I said, "Jerry, you wouldn't do that." Q. What did he say? A. He wouldn't do it. I said it doesn't make good business sense because we talked about value of the franchise. The most valuable part of the franchise is GMC and that wasn't part of the equation. Q. What did Mr. Walton say? A. We are doing it. Q. Mr. Walton never said that they were going to add another GMC truck dealer down there, did he? A. He didn't imply that.... Q. But Mr. Walton didn't say anything to imply that that was going to happen? He was talking about a Pontiac Buick Isuzu dealership? A. Yes. Q. And he never said

anything about adding another GMC truck franchise on Staten Island? A. No. (Villamarin Dep. at 151-53.)

FN21. Spencer Hondros testified on October 20, 1999, as follows: Q. Did Mr. Walton ever tell you that GM intended to appoint another GMC Truck dealer on Hylan Boulevard if you declined the deal? A. Mr. Walton said there would be another triple on Hylan Boulevard if we decided not to take the deal. Q. But did he ever say that there would be a GMC Truck dealership? A. Not specifically, not that I can recall. Q. Did Mr. Walton ever say that he intended to have a Pontiac-Buick-Isuzu triple on Hylan Boulevard? A. The way I understood it was that there was going to be someone on Hylan Boulevard. I don't remember if Mr. Walton, I don't believe he really defined what it was going to be, but that it was going to be. (Hondros Dep. at 20-21.)

FN22. On December 22, 1999, Hondros provided the following contradictory testimony in a sworn affidavit: "Walton also advised me that while VMGMC would continue to be a GMC dealer, if VMGMC did not go through with the TRANSACTION, GM would place a second GMC dealer on Hylan Boulevard." (Affidavit of Spencer Hondros of Dec. 22, 1999 ("Hondros Aff.") ¶ 15, located at Brief of Villa Marin Chevrolet and Villa Marin GMC in Opposition to the GM Motion for Summary Judgment Tab 3; see also *id.* ¶¶ 22-23.) It is well established, however, that "a party's affidavit which contradicts his own prior deposition testimony should be disregarded on a motion for summary judgment." *Mack v. United States*, 814 F.2d 120, 124 (2d Cir.1987) (collecting cases). Otherwise, "a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony," thus "diminish[ing] the utility of summary judgment as a procedure for screening out sham issues of fact." *Perma Research & Dev. Co. v. Singer Co.*, 410 F.2d 572, 578 (2d Cir.1969). Accordingly, I will disregard Hondros's conflicting testimony. In a last ditch attempt to raise a genuine issue of material fact as to whether GM threatened to open a Buick-Pontiac-GMC dealership without Villa Marin, Villa Marin points to the fact that Walton later told Hondros that the Isuzu franchise had been sold. (See Hondros Dep. at 185.) According to Villa Marin, Walton could

have never intended to proceed with a Buick-Pontiac-Isuzu triple franchise since he admitted later that the Isuzu component had been sold. Thus, Villa Marin argues, Walton must have meant to coerce Villa Marin by threatening to open a triple with a GMC component. Villa Marin has not provided any evidence, however, that the Isuzu franchise was in fact unavailable at the time of the alleged threat. Therefore, this argument is entirely speculative and fails to raise a genuine issue as to any threatening conduct on the part of Walton or GM.

Second, Villa Marin contends that Walton threatened not to renew Villa Marin's Chevrolet and GMC franchises if it did not consent to the transaction. In support of this argument, it cites to the testimony of David Villamarin and Spencer Hondros. Specifically, Villamarin stated:

*20 F. And you agreed to consider trading back Chevrolet?

A. Not we considered it, [Walton] told us. We always hit him with the option that we want Chevrolet out of the picture, separate Chevrolet completely and he would never get away from that.

Q. At some point you agreed to do that?

A. At some point we did because we all walked away with the feeling we had no choice. What we got from Jerry, from numerous meetings, if you don't take the \$600,000--again, \$600,000 is better than nothing--you're going to have nothing.

Q. How did he indicate you would have nothing?

A. We will not be renewed.

Q. Did Mr. Walton say that to you?

A. He didn't say you will not be renewed, no. Did he imply we would not be renewed? Yes.

Q. What did he do that you took as him implying that you would not be renewed?

A. That \$600,000 is better than nothing.

Q. Did he say that to you?

A. Yes.

Q. He said those words exactly?

A. Yes.

(Villamarin Dep. at 112-14; see also id. at 121-22, 153-54 .) In addition, Spencer Hondros testified:

Q. Did you ever indicate to [Walton] that you weren't willing to proceed with the

transaction under those criteria?

A. I don't think--I think in any business deal that you enter into, there are times when both parties may try to flex their muscles, O.K. And, yes, I did tell that to Mr. Walton, I said to him, "You know, today I have Chevrolet and today I have GMC, you know, what if I don't want to do the deal?" Then he said, "That's right, today you have them, nothing says we are going to renew them in the future."

Q. Did he say that specifically?

A. He said specifically that renewals were coming up.

Q. Did he say anything else?

A. He said, "Today you have them."
(Hondros Dep. at 63-64.)

These statements cannot constitute threats or coercion. Upon review of the record as a whole, drawing all inferences in favor of Villa Marin, no reasonable juror could conclude that GM threatened not to renew Villa Marin's Chevrolet and GMC franchises. In his deposition, David Villamarin was repeatedly questioned about whether Walton ever threatened him. At each instance, Villamarin unequivocally denied any coercion or threats by Walton. (See Villamarin Dep. at 149-50, 200-01, 410-11.) For example, he states:

Q. [Walton] didn't make any threats, did he?

A. No.

Q. He basically tried to encourage you to do the deal?

A. Well, again, Jerry is a great salesman.

Q. I understand.

....

Q. He tried to sell you the deal?

A. Sure.

....

Q. Did you see anything wrong with that?

A. No.

Q. He was negotiating?

A. No problem.

Q. He was not intimidating you?

A. No.

Q. He wasn't threatening you?

A. No.

Q. He wasn't coercing you?

A. No.

Q. He was encouraging you to go forward with the deal?

A. Yes. (Id. at 149-50.) Moreover, Hondros admitted that Chevrolet and GMC would not be up for renewal until 1999 or 2000. (See Hondros Dep. at 65-66.) Therefore, any perceived implied threat of nonrenewal in 1996 would have been further tempered by the fact that Villa Marin had a contractual right to their existing franchises for another three to four years. Walton's alleged nonrenewal threat is also discredited by the fact that although Hondros took voluminous notes during all of the meetings between Walton and the principals (including the April 19, 1999 meeting where the alleged nonrenewal threat occurred), the notes do not reflect any threats or coercion. (See id. at 67-83.) Lastly, there is no evidence of any threat or retaliation following the Villa Marin principals' short-lived decision to walk away from the deal in the summer of 1996. (See Villamarin Dep. at 148-50.) This point is particularly salient in light of the claims by Villamarin and Hondros that the alleged threats occurred in the spring of that year. (See Hondros Dep. at 51, 64-66; Villamarin Dep. at 107, 112-13.) It would be unreasonable to conclude that the November 21, 1996, transaction was coerced by implied threats made more than six months prior to closing when neither the threats nor any adverse action related to them occurred when the deal was actually rejected that summer.

***21** In sum, I conclude that Villa Marin has not raised a genuine issue of material fact as to whether GM failed to act in good faith. [FN23]

FN23. Villa Marin also claims two additional bases on which to find that it was threatened or coerced: (1) GM acted in bad faith by refusing to approve VMC's plans for a new Chevrolet facility; and (2) GM attempted to coerce VMC into reaffirming the TRA in June and July of 1998 and then terminated VMC in August in retaliation for its refusal to do so. These arguments are meritless. As to the first argument, Villa Marin relies on Hondros's affidavit. According to Hondros, Walton stated in April 1996 that GM did not approve VMC's prior plans for a new Chevrolet facility because it anticipated VMC would be terminated later pursuant to the transaction. (See Hondros Aff. ¶ 21.) Accepting this

assertion as true, Villa Marin has nonetheless failed to raise a genuine issue of material fact as to whether GM acted in bad faith by refusing to approve VMC's plans. On February 14, 1992, at the same time VMC executed its original Chevrolet Dealer Agreement, GM and VMC executed a "Letter Agreement" in which VMC agreed that (1) its current facility did not comply with the terms of the Dealer Agreement and (2) it would establish a separate facility (for both sales and service) within two years. (See Reply Affidavit of Roland J. Walton of Jan. 5, 2000 ("Walton Reply Aff.") Ex. B, located at Reply Memorandum in Support of Motion of General Motors Corporation and Argonaut Holdings, Inc. for Summary Judgment Tab 2.) On April 4, 1996, VMC accepted GM's offer to extend that deadline until February 13, 1997. (See Walton Reply Aff. Ex. C.) In his deposition, Hondros admitted that VMC never submitted any plans to GM for approval that provided for separate Chevrolet sales and service. (See Hondros Dep. at 54.) Therefore, GM had a good faith basis for refusing to approve the plans--non-compliance with the terms of the written agreements. See *Empire Volkswagen, Inc. v. World-Wide Volkswagen Corp.*, 814 F.2d 90, 96 (2d Cir.1987) (holding that a manufacturer's insistence on a term of the franchise was not wrongful and did not violate the federal automobile dealers' act); *Autowest, Inc. v. Peugeot, Inc.*, 434 F.2d 556, 561 (2d Cir.1970) (noting that the use of coercion to insist on valid contractual provisions does not violate the federal automobile dealers' act). In support of the second argument, Villa Marin points to the testimony of Daniel Durkin, the Zone Manager of Chevrolet Motor Division, who admitted that he intended to allow VMC to continue its Chevrolet operations (beyond the termination date provided in the TRA) until he secured a replacement dealer, but that he eventually terminated VMC before a replacement was found because VMC "was taking the position that they were no longer bound under the terms of the [TRA]." (Deposition of Daniel Durkin of July 15, 1999, at 137-39, located at J.A. Tab 16; see also Hondros Dep. at 186-87; Hondros Aff. ¶¶ 59-61.) As I have previously concluded, the TRA's execution was not coerced by threats and it remains a valid and enforceable agreement. By its express terms, VMC agreed to terminate its Chevrolet franchise voluntarily in exchange for substantial consideration. On June 26, 1998, the Chevrolet

Motor Division offered to extend the effective date of termination under the TRA in exchange for VMC's reaffirmation of the TRA and information regarding VMC's proposed dealership relocation. (See J.A. Tab 13, at 1.) After VMC declined that offer and relocated its Chevrolet dealership, GM terminated the franchise on August 15, 1998. GM had every right to ask for some consideration from VMC in exchange for the extension of the termination date. That is not coercion--it is an offer to contract that VMC rejected. Therefore, because the extended termination date of June 30, 1998 had already expired, GM properly enforced the agreement and terminated the franchise.

2. New York Franchised Motor Vehicle Act

Villa Marin raises claims under three provisions of the New York Franchised Motor Vehicle Act, N.Y. Veh. & Traf. Law §§ 463(2)(b), 463(2)(c), 463(2)(d)(1) (McKinney 1996). These claims fail as a matter of law. I will address each in turn.

Section 463(2)(b) prohibits a manufacturer from coercing a dealer to enter into an agreement or to act in a manner contrary to its economic interests by threatening to cancel an unexpired contractual agreement. [FN24] Courts have yet to define coercion in the context of this section. However, at least one court has looked to the federal automobile dealers' statute for guidance and applied the standard, cited supra, that "[c]oercion or intimidation must include a wrongful demand which will result in sanctions if not complied with." See *K & H Kawasaki, Inc. v. Yamaha Motor Corp.*, Case No. 95-CV-1824, 1997 WL 204315, at *4 (N.D.N.Y. April 14, 1997) (internal quotation marks omitted). Accordingly, Villa Marin claims, in essence, that all of the aforementioned allegations of GM's coercive tactics and lack of good faith equally violate New York's Franchised Motor Vehicle Act.

FN24. Under section 463(2)(b), it shall be unlawful for any franchisor "[t]o directly or indirectly coerce or attempt to coerce any franchised motor vehicle dealer to enter into any agreement with such franchisor or officer, agent or other representative thereof, or to do any other act prejudicial to the

monetary interests or property rights of said dealer by threatening to cancel any unexpired contractual agreement existing between such franchisor and said dealer. Provided, however, that good faith notice to any franchised motor vehicle dealer of said dealer's violation of any terms or provisions of such franchise shall not constitute a violation of this article." N.Y. Veh. & Traf. Law § 463(2)(b). The parties concede that GM is a franchisor and VMC and VMGMC are franchised motor vehicle dealers within the meaning of the statute. See N.Y. Veh. & Traf. Law § 462 (McKinney 1996).

Again, I disagree. GM is not charged with coercing Villa Marin to enter into the November 21, 1996 transaction by threatening to cancel its dealerships. As previously discussed, the only allegation of coercion concern alleged threats of nonrenewal. Thus, this provision is inapplicable on its face to the facts alleged here. Even assuming that there was some suggestion of cancellation, not nonrenewal, I nonetheless rely on my prior conclusion that Villa Marin has failed to establish a genuine issue of material fact as to either the "wrongfulness" of GM's demand or as to its use of coercion to implement it.

Section 463(2)(c) prohibits a manufacturer from conditioning a franchise renewal on a dealer making substantial renovations or constructing a new facility, except in limited circumstances. [FN25] Villa Marin has relegated its discussion of this claim, and of its claim under section 463(2)(d), to a mere footnote. It asserts: GM coerced "VMC to participate in the transaction, and thereafter to waive the rights of VMGMC with respect to Argonaut's breach of the sublease." (Brief of Villa Marin Chevrolet and Villa Marin GMC in Opposition to the GM Motion for Summary Judgment at 24 n. 45.) Although this treatment of this claim suggests that it has been abandoned, I will address its merits nonetheless.

FN25. Section 463(2)(c) provides that it shall be unlawful for any franchisor "[t]o condition the renewal or extension of a franchise on a franchised motor vehicle dealer's substantial renovation of the dealer's place of business or on the construction, purchase, acquisition or rental of a new place of

business by the franchised motor vehicle dealer unless the franchisor has advised the franchised motor vehicle dealer in writing of its intent to impose such a condition within a reasonable time prior to the effective date of the proposed date of renewal or extension (but in no case less than one hundred eighty days) and provided the franchisor demonstrates the need for such change in the place of business and the reasonableness of such demand in view of the need to service the public and the economic conditions existing in the automobile industry at the time such action would be required of the franchised motor vehicle dealer. As part of any such condition the franchisor shall agree, in writing, to supply the dealer with an adequate supply of automobiles to meet the sales levels necessary to support the increased overhead incurred by the dealer by reason of such renovation, construction, purchase or rental of a new place of business." N.Y. Veh. & Traf. Law § 463(2)(c).

Villa Marin could have made two possible arguments in support of its claim under section 463(2)(c): (1) GM improperly conditioned VMC's renewal on its acquisition or construction of a separate facility; and (2) GM improperly conditioned VMGMC's renewal on its sublease of the Hylan premises. Neither of these arguments, however, would have any merit.

*22 VMC entered into its Chevrolet Dealer Sales and Service Agreement on February 14, 1992. On that day, the parties executed a "Letter Agreement" which stated that VMC's proposed business premises for Chevrolet did not meet the minimum standards established in the Dealer Agreement and that VMC had two years to acquire acceptable premises. (See Walton Reply Aff. Ex. B.) Thus, GM's request that VMC acquire suitable business premises originated with VMC's original franchise agreement and never constituted a condition imposed on renewal. Turning to the second argument, there is no evidence that GM ever conditioned VMGMC's renewal on its sublease of the Hylan premises. Moreover, even if VMGMC's appointment to be a Buick and Pontiac dealer was conditioned on its entering into the Sublease, a manufacturer's conditioning of a franchise appointment (not a

renewal) is not prohibited by this section. Accordingly, Villa Marin's claim fails as a matter of law.

Lastly, section 463(2)(d)(1) prohibits a manufacturer from refusing to renew a franchise except for "due cause" and after proper notice and at least ninety days before termination. [FN26] The statute does not define due cause. However, one court has held that the "due cause" requirement is "not satisfied unless the franchisor both has good cause and acts in good faith." Bronx Auto Mall, Inc. v. American Honda Motor Co., 934 F.Supp. 596, 611 (S.D.N.Y.1996), aff'd per curiam, 113 F.3d 329 (2d Cir.1997). Villa Marin claims that GM violated this section by terminating VMC without ninety days' notice.

FN26. Section 463(2)(d) provides that it is unlawful for any franchisor "[t]o terminate, cancel or refuse to renew the franchise of any franchised motor vehicle dealer except for due cause, regardless of the terms of the franchise. A franchisor shall notify a franchised motor vehicle dealer, in writing, of its intention to terminate, cancel or refuse to renew the franchise of such dealer at least ninety days before the effective date thereof, stating the specific grounds for such termination, cancellation or refusal to renew. In no event shall the term of any franchise expire without the written consent of the franchised motor vehicle dealer involved prior to the expiration of at least ninety days following such written notice except as hereinafter provided." N.Y. Veh. & Traf. Law § 463(2)(d)(1).

GM's termination of VMC did not violate section 463(2)(d)(1). This provision plainly prohibits involuntary terminations without due cause and proper notice. VMC's termination, on the other hand, was voluntary and pursuant to a written contract. I conclude, therefore, that this section is inapplicable to VMC's termination.

For the foregoing reasons, GM and Argonaut's motion for summary judgment is granted.

II.
BUILDING ANALYTICS AND L & A
ARCHITECTS

L & A Architects, Inc. ("L & A") is the engineering and architectural firm retained by Argonaut to assess the physical condition of the Hylan premises. Argonaut and/or L & A, in turn, hired Building Analytics, Inc. ("BA") to investigate the premises and issue a report. Villa Marin claims that L & A and BA negligently misrepresented the condition of the Hylan premises. L & A and BA have each moved for summary judgment. However, because I have not considered any evidence outside of the complaint, I construe their motions to seek judgment on the pleading pursuant to Fed.R.Civ.P. 12(c).

The following allegations are relevant to these motions. According to Villa Marin, Walton represented that Argonaut had assumed sole responsibility for conducting due diligence of the Hylan premises. (See No. 99-CV-3750 Compl. ¶ 29.) Walton and an Argonaut representative then allegedly advised VMGMC that Argonaut had retained an engineering firm to inspect the premises and issue a report, and that VMGMC would receive a copy of the report as soon as it became available. (See *id.*) According to Villa Marin, BA performed such an inspection and issued its report on August 23, 1996. (See *id.* ¶ 31.) Argonaut allegedly received this report, but did not share its contents with Villa Marin because it was "spurious and misrepresented the condition of the [Hylan premises]." (*Id.* ¶ 39.) Villa Marin concedes, however, that it eventually received a copy of the report on the date of closing, November 21, 1996. (See *id.* ¶ 38.)

A. The Judgment on the Pleadings Standard

***23** The standard for deciding a motion pursuant to Rule 12(c) is the same as the one applicable to a motion to dismiss under Rule 12(b)(6). See *Irish Lesbian and Gay Org. v. Giuliani*, 143 F.3d 638, 644 (2d Cir.1998). "Under that test, a court must accept the allegations contained in the complaint as true, and draw all reasonable inferences in favor of the non-movant." *Sheppard v. Beerman*, 18 F.3d 147, 150 (2d Cir.1994). A court "should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no

set of facts in support of his claim which would entitle him to relief." *Id.* (internal quotation marks omitted). In making this determination, the Court may also consider any exhibits attached to the complaint or documents incorporated into the complaint by reference. See *Kramer v. Time Warner, Inc.*, 937 F.2d 767, 773 (2d Cir.1991).

B. Negligent Misrepresentation

Villa Marin contends that it may maintain a cause of action for negligence against L & A and BA notwithstanding the fact that neither was retained by Villa Marin. The argument relies on a line of New York cases that enlarges the scope of liability for pecuniary losses caused by negligent misrepresentations to persons beyond those with whom the defendant is in contractual privity. The argument fails for two reasons. First, that enlargement of liability is not nearly as great as Villa Marin suggests. For example, New York law does not, as Villa Marin contends, impose a duty whenever a third party's reliance on negligent misrepresentations is foreseeable to the defendant. Second, the factual allegations here describe a relationship between Villa Marin and these defendants that falls far short of the close relationship required to sustain this narrow theory of liability.

The New York Court of Appeals has stated the governing rule as follows: "[B]efore a party may recover in tort for pecuniary loss sustained as a result of another's negligent misrepresentations there must be a showing that there was either actual privity of contract between the parties or a relationship so close as to approach that of privity." *Prudential Ins. Co. v. Dewey, Ballantine, Bushby, Palmer & Wood*, 80 N.Y.2d 377, 382 (1992) (emphasis added). In determining whether Villa Marin's relationships with L & A and/or BA were "so close" that they "approach" privity of contract, a review of the New York cases in which the standard was established and applied is instructive.

The first is generally regarded to be Judge Cardozo's opinion in *Glanzer v. Shepard*, 233

N.Y. 236 (1922). There the defendants were public bean weighers, retained by the bean seller to weigh the beans and to provide a copy of the weight certificates to the buyer. The weighers made a mistake, causing a loss to the plaintiff buyer. Notwithstanding the absence of privity between the weighers and the plaintiff, the Court of Appeals found a duty because the buyer's reliance on the weighers' misrepresentations was "the end and aim of the transaction." The buyer's use of the weighers' certificates was not an "indirect or collateral consequence" of the weigher's contract with the seller; rather, the representations in the certificates were made "for the very purpose of inducing action" by the buyer. *Id.* at 238-39.

*24 Nine years later, Chief Judge Cardozo authored *Ultramares Corp. v. Touche*, 255 N.Y. 170 (1931), a case that placed in clear relief how narrowly *Glanzer* had expanded liability to nonprivies for negligent misrepresentations. The defendants in *Ultramares* were public accountants who prepared a year-end certified balance sheet for a rubber importer. The accountants knew that the balance sheet would be exhibited in the ordinary course of their client's business to banks and other creditors, and they supplied 32 copies for that purpose. The plaintiff was a factoring company that made substantial advances to the rubber importer against accounts receivable certified by the accountants. The rubber importer went bankrupt, and the factor sued the accountants, alleging, *inter alia*, that they negligently prepared the balance sheet. See 255 N.Y. at 175-76. In rejecting the plaintiff's negligent misrepresentation claim, Judge Cardozo distinguished *Glanzer* by observing that the bean buyer in that case was "in effect, if not in name, a party to the contract" between the seller and the weighers. *Id.* at 183. In *Ultramares*, by contrast, the accountants' service was "primarily for the benefit" of the rubber importer and only "incidentally or collaterally for the use of those to whom" it chose to distribute the balance sheet, including the plaintiff. *Id.* at 183. That such uses were foreseeable to the accountants did not make them liable for negligence. See *id.*

More recently, the Court of Appeals has revisited the issue and established a three-step test for determining whether a duty is owed to third parties. In *Credit Alliance Corp. v. Arthur Andersen & Co.*, 65 N.Y.2d 536, amended by 66 N.Y.2d 812 (1985), the plaintiff was a financial services company that extended credit on multiple occasions to L.B. Smith, Inc. ("Smith"), on the strength of financial statements certified by Arthur Anderson & Co. ("Arthur Anderson"). When Smith filed for bankruptcy, the plaintiff sued Arthur Anderson, alleging that it had negligently certified the financial statements and knew, or should have known, that they were being used to induce lenders to extend credit. In rejecting the claim, the Court of Appeals identified three criteria that must be satisfied before accountants can be held liable in negligence to third parties who rely on the accountants' work: (1) the accountants must have been aware that the financial reports were to be used for a particular purpose; (2) in furtherance of which a known party was intended to rely; and (3) there must have been some conduct on the part of the accountants that links them to that party and evinces the accountants' understanding of that party's reliance. See *id.* at 551. The court emphasized that, although these criteria "permit some flexibility in the application of the doctrine of privity to accountants' liability," they do not represent a departure from the principles in *Glanzer* and *Ultramares* and in fact were "gleaned" from those cases. [FN27] *Id.*

FN27. In addition to *Glanzer* and *Ultramares*, the Court cited *White v. Guarente*, 43 N.Y.2d 356 (1977). In that case the defendant accountants were retained by a limited partnership to audit its tax returns, and were found to owe a duty to certain members of the limited partnership, who "would necessarily rely on or make use of the audit and tax returns of the partnership." *Id.* at 361. As the Court of Appeals observed in *Credit Alliance*, *White* might just as well have been decided on the ground that individual members of a limited partnership are in actual privity with the partnership's accountants. See 65 N.Y.2d at 550 n. 9.

*25 The court held that the plaintiff in *Credit Alliance* failed to satisfy the first and

third criteria. There was no allegation that Arthur Andersen had been employed to prepare reports with the particular purpose of inducing plaintiff to lend to Smith. Moreover, Arthur Andersen was not alleged to have dealt directly with plaintiff, or to have specifically agreed with Smith to prepare the report for plaintiff's use or according to its requirements, or even to have agreed to provide a copy to plaintiff. See *id.* at 553-54.

Credit Alliance thus reconfirmed that the mere foreseeability of a third party's reliance on a professional's representations is insufficient to establish a duty to that party that will support a negligence action for pecuniary loss. In a companion case decided the same day, the court shed light on what else is required. In *European American Bank & Trust Co. v. Strauhs & Kaye*, 65 N.Y.2d 536 (1985), the plaintiff, like the plaintiff in *Credit Alliance*, made a series of loans to a corporate borrower based on financial statements prepared by the defendant accountant firm, and sued for negligent misrepresentation when the borrower defaulted. However, the plaintiff in *European American Bank* alleged that the accountants had multiple direct communications, orally and in writing, with the plaintiff during the audit work, had discussed the borrower's financial position with the plaintiff, and made representations on that subject directly to the plaintiff. The Court of Appeals held that these allegations satisfied the three *Credit Alliance* criteria and stated, echoing Judge Cardozo, that the defendant was aware that providing its financial information to the plaintiff was a primary "end and aim" of auditing the client. *Id.* 65 N.Y.2d at 554.

Ossining Union Free School District v. Anderson La Rocca Anderson, 73 N.Y.2d 417 (1989), applied the *Credit Alliance* test in a setting more analogous to the present case. In *Ossining*, the plaintiff school district hired an architectural firm to evaluate school buildings. The architectural firm in turn retained two engineering consulting firms to assist in the evaluation. The engineers' allegedly negligent reports of structural weaknesses in a particular school property

caused the plaintiff to close that property and obtain other facilities at substantial expense. The school district sued the engineers for negligence and malpractice.

Chief Judge Kaye's opinion first held that engineers, like accountants, may well be held liable to nonprivies for negligent misrepresentations. However, such a defendant owes a duty of care, the court emphasized, that the court has defined "narrowly, more narrowly than other jurisdictions." *Id.* at 424.

Applying that test in *Ossining*, the court held that the allegations were sufficient to withstand the engineers' motion to dismiss. First, as in *Glanzer*, the plaintiff's reliance on the defendants' reports "was the very purpose of defendants' engagement." *Id.* at 425. In addition, the engineers had various contacts directly with the school district; one of the defendant firms billed the school district directly; the retention of both was specifically authorized by the school board; and the work the engineers performed was "for the school district alone." *Id.* In those circumstances, the court held that the engineers, like "the bean weighers in *Glanzer*, ... allegedly rendered their reports with the objective of thereby shaping [the school district's] conduct, and thus they owed a duty of diligence established in our law at least since *Glanzer* not only to [the architect] who ordered but also to the school district who relied." *Id.* at 426.

*26 The two most recent Court of Appeals cases dealing with this issue are *Security Pacific Business Credit, Inc. v. Peat Marwick Main & Co.*, 79 N.Y.2d 695 (1992), and *Prudential Insurance Co. v. Dewey, Ballantine, Bushby, Palmer & Wood*, 80 N.Y.2d 377 (1992). *Security Pacific* was yet another action against a borrower's accountants by a lender who extended credit based on the accountants' unqualified audit opinion and financial statements. The plaintiff's allegations included a direct contact, by telephone, between the plaintiff's vice president and the accounting firm partner in charge of the audit. See 79 N.Y.2d at 698-99. Notwithstanding that direct contact, the

Court of Appeals found the allegations insufficient as a matter of law to establish a relationship between the lender and the accountants "sufficiently approaching privity." *Id.* at 705. There was no evidence that the accountant had (1) been retained for the specific purpose of inducing the plaintiff to extend credit; (2) specifically agreed with the client to prepare the report for plaintiff's use; (3) shaped its audit opinion to meet the needs of the plaintiff; or (4) directly supplied its report to the plaintiff. See *id.* at 705-06. Citing Ossining's observation that the duty to nonprivies is defined "narrowly," the court held that the mere foreseeability of the plaintiff's use of the audit opinion, even buttressed by a direct contact with the plaintiff during the audit, could not support a claim of negligent misrepresentation. *Id.* at 708.

Although Security Pacific has been criticized as virtually eliminating the theory of negligence liability alleged here, [FN28] Prudential demonstrates otherwise. That case involved an action against a shipping company's attorneys, who had been retained to provide an opinion letter to Prudential Insurance Company of America ("Prudential") as part of its agreement to restructure a \$93 million debt owed to it by the shipping company. The attorneys, at the request of their client, sent to Prudential an opinion letter stating that certain mortgage documents were legal and binding obligations that would adequately secure Prudential's interest. Unfortunately, one of the documents misplaced a decimal point in the amount secured, thereby reducing Prudential's security by more than \$91 million. The shipper then went bankrupt. Prudential, naturally, sued the attorneys for negligently misrepresenting the extent of its security interest. See 80 N.Y.2d at 380-82.

FN28. See *Security Pacific*, 79 N.Y.2d at 709, 719 (Hancock, J., dissenting) (asserting that the majority opinion "significantly limits Credit Alliance" and creates a new rule for accountant's liability that "erects one of the most forbidding legal barriers in the country" to such liability); see also Richard J. Holahan, Jr., Note, *Security Pacific Business*

Credit, Inc. v. Peat Marwick Main & Co.: Just In Case You Had Any Doubts--There Is No Tort of Negligent Misrepresentation in New York, 13 Pace L.Rev. 763, 805 (1993) ("[T]he practical significance of *Security Pacific* is that in New York, in order for a nonclient to successfully assert negligent misrepresentation against an accountant, it must show that it is a third-party beneficiary to the audit contract.")

Applying the Credit Alliance criteria, the Court of Appeals found that the attorneys owed a duty to Prudential. The attorneys were aware that "the end and aim of the opinion letter was to provide Prudential with the financial information it required;" Prudential's receipt of the opinion was a condition precedent to closing the restructuring transaction; and the letter was sent directly to Prudential by the attorneys. 80 N.Y.2d at 385. [FN29]

FN29. Although the Court of Appeals found a duty to exist, it went on the hold that it had not been breached, in that the opinion letter itself did not set forth a specific dollar amount as securing the debt and was otherwise accurate. See *Prudential*, 80 N.Y.2d at 386.

*27 Villa Marin's allegations fail to sustain this narrow of theory of liability with regard to either L & A or BA. L & A was retained by Argonaut to conduct inspections and issue a report to Argonaut. (See No. 99-CV-3750 Compl. ¶¶ 29, 31-32.) BA was retained, according to the complaint, by either Argonaut or L & A to assist in that task, i.e., the issuance of the report to Argonaut. (See *id.* ¶¶ 110, 120.) Although Villa Marin alleges that L & A and BA were aware that Villa Marin (as well as Argonaut) would rely on the report to Argonaut (see *id.* ¶¶ 112-13, 122-23), there is no allegation that Villa Marin's claimed reliance was "the end and aim," *Glanzer*, 233 N.Y. at 238-39, or the "particular purpose," *Credit Alliance*, 65 N.Y.2d at 551, of the retention of L & A or BA. In *Glanzer*, *Ossining* and *Prudential*, the precise, unambiguous purpose of the defendant professionals' retention was to make representations to the plaintiff for it to rely on before consummating a transaction with the

retaining party. Put another way, although those defendants were not retained by the plaintiff, they were retained for the particular purpose of performing due diligence for the plaintiff. [FN30] Here, Villa Marin alleges a fundamentally different, and nearly opposite, relationship. Far from claiming that L & A and BA were hired by Argonaut to perform due diligence for Villa Marin, the complaint alleges that Argonaut sought to deprive Villa Marin of due diligence. (See No. 99-CV-3750 Compl. ¶ 27 (Argonaut stated that it assumed "sole responsibility" for due diligence); see id. ¶ 33 (Argonaut only permitted VMGMC a brief view of the premises), see id. ¶¶ 34-35 (unhappy with Argonaut's "prohibition of VMGMC conducting its own due diligence," VMGMC bypassed Argonaut and met directly with Schlemmer at the premises); see id. ¶ 38 (VMGMC only received a copy of the report--three months after its issuance--on the date of closing, November 21, 1996).) Against the backdrop of those allegations, it is not surprising that the complaint fails to allege that Argonaut's particular purpose in retaining the engineers was to edify Villa Marin. And even if that were Argonaut's purpose, there is no basis in the complaint to conclude that L & A and BA were aware of it at the time the BA report was completed.

FN30. The same is true in *Kidd v. Havens*, 577 N.Y.S.2d 989 (4th Dep't 1991), on which Villa Marin relied heavily at oral argument. In that case the defendant was a title company that had been retained by the seller of real property to certify title to the plaintiff purchaser. See id. at 990.

The other attributes of relationships "so close" that they approach privity of contract are also missing here. It is not alleged that the engineers' report at issue was provided directly by L & A and BA to Villa Marin or that there was any contact at all between Villa Marin and either of those defendants. Put another way, there was no conduct on the part of the defendants linking them to Villa Marin and evincing their understanding of Villa Marin's reliance. See *Credit Alliance*, 65 N.Y.2d at 551.

At oral argument, counsel for Villa Marin

asserted that L & A and BA owed a duty to Villa Marin because its reliance on the BA report to Argonaut was foreseeable to them. As noted above, that argument was explicitly rejected by *Credit Alliance* as contrary to New York law. See 65 N.Y.2d at 553; see also *Ossining*, 73 N.Y.2d at 424-25 ("[W]e have declined to adopt a rule permitting recovery by any 'foreseeable' plaintiff who relied on the negligently prepared report, and have rejected even a somewhat narrower rule that would permit recovery where the reliant party or class of parties was actually known or foreseen by the defendants." (citing *Credit Alliance*, 65 N.Y.2d at 553 & n. 11)).

*28 Villa Marin and Argonaut negotiated and executed a contract at arms' length. Argonaut hired an engineer to assist it in that process. Villa Marin chose not to do the same; more precisely, it alleges that it was not really permitted to, but went ahead and signed the contract anyway. That Villa Marin was allowed to see the BA report before signing the contract did not make Villa Marin, "in effect, if not in name," the engineers' client. *Ultramares*, 255 N.Y.2d at 183. Accordingly, they owed him no duty, and they are entitled to judgment on the pleadings.

III.

RONALD C. SCHLEMMER

Villa Marin has brought claims of fraud, misrepresentation, and breach of the Agreement to Lease against Schlemmer, the owner and principal of C & R (the entity that owns the Hylan premises). Schlemmer has moved to dismiss for failure to state a claim upon which relief may be granted pursuant to Fed.R.Civ.P. 12(b)(6). [FN31]

FN31. The standard for a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6) is set forth in the previous section.

The following allegations are relevant to this motion. Villa Marin alleges that Schlemmer forbade anyone other than representatives of GM and Argonaut from inspecting the Hylan premises prior to the completion of the proposed transaction

because he believed that such activity would arouse suspicion among his employees that a sale was imminent. (See No. 99-CV-3750 Compl. ¶¶ 24, 28.) However, according to Villa Marin's complaint, Argonaut allowed VMGMC to visit the premises on a Sunday afternoon in August when Star was closed. (See *id.* ¶ 33.) Still unsatisfied with their limited access to the premises that GM wanted them to lease, the principals of Villa Marin sought and received permission from GM to meet with Schlemmer directly to discuss their concerns about the condition of the property. (See *id.* ¶ 34.) During their meeting, on August 15, 1996, the Villa Marin representatives told Schlemmer that they were concerned because they had not received any information regarding Star's business operations, the condition of the Hylan premises, and whether the premises could be subdivided to accommodate a separate showroom for the Buick franchise. In response, Schlemmer allegedly represented that Star's business operations were "good," that VMGMC was "getting a great deal" because they were "receiving the best location and best facility in Staten Island," that he had obtained all the necessary licences and permits, as required by municipal, city, and state law, including a certificate of occupancy, and that he had received municipal approval to subdivide the current tax lot into two lots to permit construction of a separate Buick showroom. When asked about the condition of the Hylan premises, Schlemmer allegedly stated that the "building was in very good condition and compliant" with the law. (*Id.* ¶ 35.) Villa Marin asserts that it relied on Schlemmer's representations "at all times" in entering into the proposed transaction. (*Id.* ¶ 36.) In February 1997, VMGMC learned for the first time that no certificate of occupancy existed for the Hylan premises and that the premises could not lawfully be occupied. (See *id.* ¶ 44.)

A. Misrepresentation and Fraud

***29** In *Villa Marin Chevrolet, Inc. v. General Motors Corp.*, No. 98-CV-6167, I issued an order on November 18, 1999, granting GM's and Argonaut's motion to

dismiss the fraud and misrepresentation claims Villa Marin had alleged against them. Here, Villa Marin's fraud and misrepresentation claims against Schlemmer fail for substantially the same reasons. [FN32]

FN32. Schlemmer argues that Villa Marin's claims of fraud and misrepresentation are barred by doctrine of *res judicata*, or, more specifically, claim preclusion. Schlemmer arrives at this conclusion by pointing to (1) my October 1998 denial of Villa Marin's motion to remand, wherein I concluded that Villa Marin could not state claims against C & R for breach of the Prime Lease and for rescission based on fraudulent inducement, and (2) the December 1998 stipulation of dismissal with prejudice of the claims against C & R. I decline to reach this issue, but note that "[w]hen a litigant files consecutive lawsuits against separate parties for the same injury, the entry of judgment in the prior action does not bar the claims against the other potentially liable parties." *Northern Assurance Co. of Am. v. Square D Co.*, No. 99-7153, 2000 WL 19245, at *4, 201 F.3d 84 (2d Cir. January 13, 2000) (quoting *Central Hudson Gas & Elec. Corp. v. Empresa Naviera Santa S.A.*, 56 F.3d 359, 367 (2d Cir.1995)). Schlemmer was not a party to the proceedings on which his claim of preclusion relies.

In New York, the elements of fraudulent misrepresentation and fraud are identical. They require the plaintiff to establish by clear and convincing evidence that the defendant (1) made a material misrepresentation of fact; (2) with knowledge of its falsity; (3) with an intent to defraud; (4) upon which the plaintiff reasonably relied; and (5) and that caused injury to the plaintiff. See *Keywell Corp. v. Weinstein*, 33 F.3d 159, 163 (2d Cir.1994) (fraudulent misrepresentation); *Banque Arabe et Internationale D'Investissement v. Maryland Nat'l Bank*, 57 F.3d 146, 153 (2d Cir.1995) (fraud).

Villa Marin alleges that it relied on two representations made by Schlemmer in entering into the transaction. First it claims that Schlemmer misrepresented that he had obtained a certificate of occupancy for the Hylan premises. Upon discovering that there was in fact a certificate of occupancy, Villa

Marin has adjusted its claim--it now asserts that Schlemmer misrepresented that there was a valid certificate of occupancy. Second, Villa Marin alleges that Schlemmer falsely represented that he had sought and received municipal approval to subdivide the current tax lot to permit construction of a separate Buick showroom. (See 99-CV-3750 Compl. ¶ 35.) Villa Marin may not reasonably rely on either of these representations.

It is well-established that, "if the facts represented are not matters peculiarly within the party's knowledge, and the other party has the means available to him of knowing, by the exercise of ordinary intelligence, the truth or the real quality of the subject of the representation, he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentations." *Danann Realty Corp. v. Harris*, 5 N.Y.2d 317, 322 (1959) (quoting *Schumaker v. Mather*, 133 N.Y. 590, 596 (1892)). Thus, a plaintiff cannot reasonably rely on representations the accuracy of which is easily ascertainable.

The Appellate Division applied this principle in *Jordache Enterprises, Inc. v. Gettinger Associates*, 575 N.Y.S.2d 58 (1st Dep't 1991) (per curiam), the facts of which are closely related to the instant case. In *Jordache*, the plaintiff, an assignee of four separate commercial leases, sought to rescind the lease agreements on the ground that the defendant fraudulently represented that one floor of the premises had a certificate of occupancy permitting that floor to be used for storage purposes. See *id.* at 59. Affirming the trial court's dismissal of the complaint, the Appellate Division held that the plaintiff's reliance was unreasonable because "the terms of the certificate of occupancy, a public record, were not within the exclusive knowledge of the defendant." *Id.* at 59. Similarly, in *Chan v. Bay Ridge Hill Realty Co.*, 623 N.Y.S.2d 896 (2d Dep't 1995) (per curiam), the plaintiff purchaser brought an action for fraud alleging that the seller misrepresented that he was the sole owner of the property. The Appellate Division affirmed the grant of summary judgment for the defendant and noted that

"since the ownership of the property was a matter of public record, the information was not peculiarly in the [defendant's] knowledge and could have been ascertained by the plaintiff in the exercise of ordinary intelligence." *Id.* at 898 (citing *Danann*, 5 N.Y. at 322); see also *Simms v. Biondo*, 816 F.Supp. 814, 822 (E.D.N.Y.1993) ("Facts which are ascertainable as a matter of public record bar a claim of justifiable reliance necessary to sustain a cause of action for fraud."); *Sirota v. Langtry*, 612 N.Y.S.2d 526, 526 (4th Dep't 1994) (per curiam) ("Where the assessment of a particular piece of property is a matter of public record, a party may not rely upon an increase in assessment during the pendency of a purchase contract to support a fraud cause of action."); *Zeid v. Kaldawi*, 538 N.Y.S.2d 42, 45 (2d Dep't 1989) (per curiam) (misrepresentation regarding ownership of adjacent property could not constitute an independent basis on which to rescind the conveyance where record ownership was easily discoverable).

*30 In the instant case, Villa Marin could have investigated whether a certificate of occupancy had been issued for the Hylan premises and whether the Department of Buildings had granted Schlemmer's request to subdivide the tax lot, but it failed to do so. Neither of those items of information, or the documents evidencing them, were peculiarly within Schlemmer's knowledge or control. As the Appellate Division held in *Jordache*, a certificate of occupancy, a public record, is not information within the exclusive control of the lessor. See 579 N.Y.S.2d at 59. Thus, it was not reasonable for Villa Marin to have failed to investigate whether this document existed. [FN33] Similarly, municipal approval to subdivide a tax lot is also a public record which Villa Marin could have obtained. Indeed, Villa Marin demonstrates this fact by appending to its complaint the Department of Buildings' 1993 denial of a request to subdivide the Hylan premises. (See 99-CV-3750 Compl. Ex. J.) Therefore, I conclude that Villa Marin's reliance is unreasonable as a matter of law.

FN33. As noted above, Villa Marin now concedes

that the certificate of occupancy did in fact exist, but asserts that it was invalid. It argues that its reliance was reasonable because only an engineer or an expert (not a person of ordinary intelligence) could have determined the accuracy of Schlemmer's representation. Putting aside whether this argument would defeat Villa Marin's fraudulent misrepresentation and fraud claims by suggesting that Schlemmer, a lay person, might not have had the requisite knowledge of the falsity of his alleged misrepresentation concerning the certificate of occupancy, I disagree with the argument on the merits. Villa Marin does not argue that the basis of the certificate of occupancy's invalidity was information peculiarly within Schlemmer's knowledge. Rather, it merely contends that its own principals, in exercise of their ordinary intelligence, would not have been able to ascertain the certificate's validity if they had looked. Villa Marin has not pointed to any authority in support of this distinction, nor could I find any. Simply put, the cases holding that a plaintiff may not reasonably rely on a representation that is verifiable in the public record do not distinguish between records that a lay person can readily understand and those as to which a professional's help is ordinarily needed. Accordingly, I conclude that Villa Marin's reliance remains unreasonable as a matter of law.

In response, Villa Marin cites to *Todd v. Pearl Woods, Inc.*, 248 N.Y.S.2d 975 (2d Dep't 1964) (per curiam), aff'd mem., 15 N.Y.2d 817 (1965). In *Todd*, the plaintiffs contracted to purchase individual properties in a housing development in reliance on the developers' representation that there was a complete city sewer system installed and paid for in the development. See *id.* at 977. According to the plaintiffs, the developers had only paid for the installation of sewer lines and had paid nothing toward the capital construction costs of the sewer district. The developers argued, in a motion for summary judgment, that the plaintiffs could not reasonably rely on their representations regarding the sewer system because the information was available in the public record. The Appellate Division affirmed the denial of summary judgment and held that "where, as here alleged, the facts were peculiarly within the knowledge of the defendants and were willfully misrepresented, the failure of the plaintiffs to ascertain the

truth by inspecting the public records is not fatal to their action." *Id.*

This case does not alter my conclusion that the plaintiffs' reliance was unreasonable. First, the plaintiff in *Todd* was an individual purchaser in a housing development. Here, in contrast, VMC, VMGMC, and Hondros are sophisticated parties who were represented by counsel throughout a complex commercial transaction. Unsatisfied with their limited access to the Hylan premises, they arranged for a walk-through of the premises and a meeting with Schlemmer, (see No. 99-CV-3750 Compl. ¶¶ 33-35), but then failed to investigate and verify any of Schlemmer's representations regarding information in the public record. See *Grumman Allied Indus., Inc. v. Rohr Indus., Inc.*, 748 F.2d 729, 737 (2d Cir.1984) ("Where sophisticated businessmen engaged in major transactions enjoy access to critical information but fail to take advantage of that access, New York courts are particularly disinclined to entertain claims of justifiable reliance.")

*31 Second, the *Todd* court specifically rested its holding, without explaining its basis for doing so, on the finding that the facts related to the sewer system were peculiarly within the knowledge of the defendants. Addressing the issue of justifiable reliance, the Second Circuit has placed *Todd* in a line of cases where the plaintiff did not have access to the relevant information to verify the alleged misrepresentation. See *Lazard Freres & Co. v. Protective Life Ins. Co.*, 108 F.3d 1531, 1542 (2d Cir.1997). *Tahini Investments Ltd. v. Bobrowsky*, 470 N.Y.S.2d 431 (2d Dep't 1984) (per curiam), a case identified by the Second Circuit in this grouping, is a classic example of the information access problem. In *Tahini*, the plaintiff purchaser discovered drums containing hazardous material buried on the property. Reversing the grant of summary judgment in favor of the defendant, the Appellate Division held that if the plaintiff had no way of knowing about the existence of the waste his reliance may have been justifiable. See *id.* at 433. Thus, *Tahini* and *Todd* both concern information within the peculiar knowledge of the defendant.

Although Todd suggests that the information does not have to be absolutely unknowable before reliance may be justified, see *Lazard Freres*, 108 F.3d at 1542 n. 9, the holding is nonetheless premised on some degree of information disparity. Here, there is simply no evidence that the certificate of occupancy and the tax lot approval were peculiarly within Schlemmer's knowledge or control. Both documents were readily available for inspection and Villa Marin failed to do so. Without any information as to the basis of the holding in Todd, and in light of the relatively recent decision in *Jordache* regarding reliance on a certificate of occupancy, I cannot conclude that Villa Marin's reliance is justifiable.

Even if Schlemmer's representations did not concern matters of public record, Villa Marin's reliance is nonetheless unreasonable in light of section 2.2 of the Sublease. Reasonable reliance is precluded when "an express provision in a written contract contradicts a prior alleged oral representation in a meaningful fashion." *M.H. Segan L.P. v. Hasbro, Inc.*, 924 F.Supp. 512, 527 (S.D.N.Y.1996) (internal quotation marks and citations omitted). Thus, any "conflict between the provisions of the written contract and the oral representations negates the claim of reliance upon the latter." *Bango v. Naughton*, 584 N.Y.S.2d 942, 944 (3d Dep't 1992) (collecting cases).

Section 2.2 of the Sublease states that VMGMC takes the Hylan premises "as is" and that VMGMC investigated and inspected the premises and found them to be satisfactory. (No. 99-CV-3750 Compl. Ex. O.) These statements substantially contradict the Villa Marin's claim of reliance on Schlemmer's representations. [FN34]

FN34. I recognize that VMGMC's specific disclaimer of reliance on any express or implied representation by Argonaut or its affiliates regarding the Hylan premises' fitness, condition, or compliance with laws does not include Schlemmer, the owner and principal of C & R. (No. 99-CV-3750 Compl. Ex. O ¶ 2.2.) However, this distinction does not alter my conclusion of unjustified reliance. First, the plaintiffs do not claim

that they specifically reserved reliance on Schlemmer's representations in section 2.2. Rather, they merely claim that Schlemmer may not "enforce" the Sublease because he is not a party to it. As Schlemmer does not seek to enforce the Sublease, this argument is irrelevant. Second, C & R is repeatedly insulated from liability throughout the Sublease. (See No. 99-CV-3750 Compl. Ex. O. ¶¶ 4.2, 4.5, 4.6.) Thus, the Sublease contains no indication that VMGMC intended to preserve any reliance on representations by C & R or Schlemmer. Third, the statements in the Sublease that VMGMC takes the premises "as is" and that it conducted a full inspection to its satisfaction are sufficient to render Villa Marin's alleged reliance unreasonable even in the absence of a disclaimer as to Schlemmer. As it is unreasonable, as a matter of law, for a party to claim that it was fraudulently induced to enter into a contract by a prior representation of another party where reliance was specifically disclaimed in the agreement, see *Harsco Corp. v. Segui*, 91 F.3d 337, 345 (2d Cir.1996), it is unreasonable, a fortiori, to claim reliance on a non-party to that agreement.

As the Second Circuit stated in *Lazard Freres*:

"[W]here, as here, a party has been put on notice of the existence of material facts which have not been documented and he nevertheless proceeds with a transaction without securing the available documentation or inserting the appropriate language in the agreement for his protection, he may truly be said to have willingly assumed the business risk that the facts may not be as represented. Succinctly put, a party will not be heard to complain that he has been defrauded when it is his own evident lack of due care which is responsible for his predicament."

*32 108 F.3d at 1543 (quoting *Rodas v. Manitaras*, 552 N.Y.S.2d 618, 620 (1st Dep't 1990) (per curiam)). Thus, I find that Villa Marin's alleged reliance is unreasonable as a matter of law. Accordingly, Villa Marin's claims of misrepresentation and fraud are dismissed.

C. Breach of Contract

Villa Marin also claims that Schlemmer

breached various provisions of the Agreement to Lease--the document between C & R and Argonaut memorializing the proposed execution of the Prime Lease. Although Villa Marin concedes that it is not a party to this document, it asserts that VMGMC is a third party beneficiary. I decline to reach this issue and assume the plaintiffs' third-party beneficiary status for the purpose of argument.

"It is well established that individual officers or directors are not personally liable on contracts entered into on behalf of a corporation if they do not purport to bind themselves individually." *Ridgeline Constructors, Inc. v. Elmira Glass Tech. Corp.*, 583 N.Y.S.2d 633, 635 (3d Dep't 1992); see also *Westminster Constr. Co. v. Sherman*, 554 N.Y.S.2d 300, 301 (2d Dep't 1990) (per curiam). A director may be liable, however, if he "acted in bad faith or committed a tort in connection with the performance of the contract." *Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1177 (2d Cir.1993).

Schlemmer did not sign the Agreement to Lease in his personal capacity. Rather, he signed the contract on behalf of C & R. Thus, Schlemmer is only liable for breach of contract if Schlemmer acted in bad faith or committed a tort in connection the contract's performance. Here, Villa Marin asserts that Schlemmer committed a tort by fraudulently representing the existence of a certificate of occupancy and subdivision approval. However, as previously discussed, Villa Marin's claims of fraud and misrepresentation against Schlemmer fail as a matter of law. I conclude, therefore, that Villa Marin has failed to allege a breach of contract claim against Schlemmer in his personal capacity. Accordingly, Schlemmer's motion to dismiss is granted.

CONCLUSION

For the aforementioned reasons, GM's and Argonaut's motion for summary judgment, BA's and L & A's motions for judgment on the pleadings, and Schlemmer's motion to dismiss are granted.

In Case No. 98-CV-5206, summary judgment is granted to GM with respect to (1) GM's declaratory judgment action seeking declarations that it lawfully terminated VMC's Chevrolet franchise pursuant to (a) the TRA, (b) the Automobile Dealers' Day in Court Act, 15 U.S.C. §§ 1221-1222, (c) the New York Franchised Motor Vehicle Dealer Act, N.Y. Veh. & Traf. Law §§ 460-472, and (d) the Chevrolet Dealer Sales and Service Agreement (counts 1-4), and (2) Villa Marin's counterclaims for violations of N.Y. Veh. & Traf. Law §§ 460-472 (counterclaim 1), and breach of the Sublease (counterclaim 2).

In Case No. 98-CV-5208, summary judgment is granted to Argonaut with respect to (1) Argonaut's claims for breach of the Sublease (count 1) and a declaratory judgment that the sublease is enforceable (count 2), and (2) Villa Marin's claims for breach of the Sublease (counterclaim 1) and rescission of the Sublease (counterclaim 2). The issue of Argonaut's damages will be the subject of a hearing, as set forth below.

***33** In Case No. 98-CV-6167, summary judgment is granted to GM and Argonaut with respect to Villa Marin's claims for breach of the Termination and Release Agreement (count 4), breach of the Agreement to Lease (count 5), breach of the Prime Lease (count 6), breach of the Sublease (count 7), breach of the GM Standard Provisions of the Chevrolet Dealer Sales and Service Agreement (count 8), breach of the duty of good faith and fair dealing (count 9), rescission and reformation of the transaction (counts 12 and 13), and violations of the New York Franchised Motor Vehicle Dealer Act and the Automobile Dealers' Day in Court Act (counts 1-3 and 14).

In Case No. 99-CV-3750, judgment on the pleadings is granted to L & A and BA with respect to Villa Marin's claims for professional negligence and malpractice (counts 5 and 6). Finally, Schlemmer's motion to dismiss is granted as to Villa Marin's claims of fraud, misrepresentation, prima facie tort, and breach of contract (counts 1-4).

With the exception Argonaut's damages for

breach of the Sublease, this order disposes of all issues in all four of the captioned cases. However, because I believe appellate review of these decisions will be most efficient if the cases are consolidated at that level, the Clerk is directed to delay the entry of judgment in all of these cases pending the resolution of that remaining issue.

The hearing on Argonaut's damages will occur on April 5, 2000, at 10:00 a.m., unless the parties stipulate to the amount of damages before that date. Argonaut shall file a pre-hearing submission outlining the facts it intends to prove, and how it intends to prove them, by March 17, 2000. Villa Marin shall file its response to that submission (which shall include a like description of the evidence it intends to elicit) by March 27, 2000.

2000 WL 271965 (E.D.N.Y.)

END OF DOCUMENT

37

Supreme Court, Appellate Division, Second
Department, New York.

Karen F. GOLDMAN, et al., appellants,
v.
STROUGH REAL ESTATE, INC., et al.,
respondents.

Dec. 22, 2003.

Background: Landowners brought action against real estate brokers, asserting causes of action for fraud and negligent misrepresentation based on allegations that defendants misrepresented that owner of adjacent property would not develop the property in a manner that would interfere with their southerly view. The Supreme Court, Suffolk County, Klein, J., granted defendants' motion for summary judgment, and landowners appealed.

Holding: The Supreme Court, Appellate Division, held that landowners were not justified in relying on defendants' representations, and thus could not recover for negligent misrepresentation or fraud.

Affirmed.

West Headnotes

[1] Brokers 34
65k34

Landowners were not justified in relying on representations of real estate brokers that owner of adjacent property would not develop property in a manner that would interfere with their southerly view, and thus could not recover against brokers for negligent misrepresentation or fraud; landowners were experienced business persons, had access to public records to ascertain limits and status of neighboring developments, and could have discovered that adjoining parcel could be developed in a manner which would obstruct their view.

[2] Fraud 20
184k20

[2] Fraud 25
184k25

To recover damages for negligent misrepresentation or fraud, plaintiffs must demonstrate that they were justified in relying on the information supplied, and as a consequence, suffered damages.

[3] Fraud 11(1)
184k11(1)

[3] Fraud 12
184k12

Representations that are mere expressions of opinion of present or future expectations are not to be considered promises when examining the issue of fraud in the inducement.

[4] Fraud 12
184k12

Fraud is not a case of prophecy and prediction of something which it is merely hoped or expected will occur in the future.

****94** Stephen R. Steinberg, Southampton, N.Y., appellant pro se and for appellant, Karen F. Goldman.

Michael G. Walsh, Water Mill, N.Y., for respondents.

FRED T. SANTUCCI, J.P., WILLIAM D. FRIEDMANN, WILLIAM F. MASTRO, and REINALDO E. RIVERA, JJ.

***677** In an action to recover damages for fraud and negligent misrepresentation, the plaintiffs appeal from an order of the Supreme Court, Suffolk County (Klein, J.), entered May 15, 2002, which granted the defendants' motion for summary judgment dismissing the complaint.

ORDERED that the order is affirmed, with costs.

The plaintiffs commenced this action against the defendant real estate brokers alleging that they misrepresented that the owner of an adjacent parcel would not develop the property in a manner that would interfere with their

(Cite as: 2 A.D.3d 677, *677, 770 N.Y.S.2d 94, **94)

southerly view. **95 The Supreme Court properly granted the defendants' motion for summary judgment dismissing the complaint, as no triable issue of fact precluded summary judgment on the causes of action to recover damages for fraud (see *Channel Master Corp. v. Aluminium Ltd. Sales*, 4 N.Y.2d 403, 176 N.Y.S.2d 259, 151 N.E.2d 833; *Busino v. Meachem*, *678 270 A.D.2d 606, 704 N.Y.S.2d 690) or negligent misrepresentation (see *International Products Co. v. Erie R.R. Co.*, 244 N.Y. 331, 155 N.E. 662, cert. denied 275 U.S. 527, 48 S.Ct. 20, 72 L.Ed. 408; *Pappas v. Harrow Stores*, 140 A.D.2d 501, 504, 528 N.Y.S.2d 404).

[1][2] To recover damages for negligent misrepresentation or fraud, the plaintiffs must demonstrate, inter alia, that they were justified in relying on the information supplied, and as a consequence, suffered damages (see *Channel Master Corp. v. Aluminium Ltd. Sales*, supra; *International Products Co. v. Erie R.R. Co.*, supra; *Pappas v. Harrow Stores*, supra). Contrary to the plaintiffs' assertions, the defendants' alleged representation pertaining to the future development of the adjoining parcel did not amount to the perpetration of fraud or negligent misrepresentation (see *Crossland Sav. v. SOI Dev. Corp.*, 166 A.D.2d 495, 560 N.Y.S.2d 782; *International Products Co. v. Erie R.R. Co.*, supra; *Pappas v. Harrow Stores*, supra).

[3][4] "Representations that are mere expressions of opinion of present or future expectations are not to be considered promises when examining the issue of fraud in the inducement" (*Crossland Sav. v. SOI Dev. Corp.*, supra). Fraud is "not a case of prophecy and prediction of something which it is merely hoped or expected will occur in the future" (*Channel Master Corp. v. Aluminium Ltd. Sales*, supra at 408, 176 N.Y.S.2d 259, 151 N.E.2d 833).

The defendants' alleged misrepresentations pertaining to the future development of an adjoining parcel of land constituted a future expectation (see *Crossland Sav. v. SOI Dev. Corp.*, supra). Since the plaintiffs were

experienced business persons, and had access to public records to ascertain the limits and status of neighboring developments, they could have discovered that the adjoining parcel could be developed in a manner that would obstruct their southerly view. Therefore, the plaintiffs were not justified in relying upon the defendants' predictions concerning how the adjoining parcel would be developed (see *Channel Master Corp. v. Aluminium Ltd. Sales*, supra; *International Products Co. v. Erie R.R. Co.*, supra; *Pappas v. Harrow Stores*, supra).

Moreover, the plaintiffs failed to establish that they suffered damages (see *Channel Master Corp. v. Aluminium Ltd. Sales*, supra; *International Products Co. v. Erie R.R. Co.*, supra; *Pappas v. Harrow Stores*, supra). The plaintiffs admitted a resale value of the property which was greater than what it cost them to purchase and develop it.

2 A.D.3d 677, 770 N.Y.S.2d 94, 2003 N.Y. Slip Op. 19713

END OF DOCUMENT

38

Only the Westlaw citation is currently available.

United States District Court, S.D. New York.

The Gordon P. Getty Family Trust, Plaintiff,
v.
Nelson PELTZ, Peter W. May, Leon Kalvaria,
Mountleigh Holdings--NP I, Inc.,
Mountleigh Holdings--NP II, Inc., and
Mountleigh Holdings--PWM I, Inc.,
Defendants.

MOUNTLEIGH HOLDINGS--NP I, INC.,
Mountleigh Holdings--NP II, Inc., and
Mountleigh Holdings--PWM I, Inc.,
Counterclaim-Plaintiffs,

v.
The Gordon P. Getty Family Trust,
Counterclaim-Defendant.
Nelson PELTZ, Peter W. May, et al., Third-
Party Plaintiffs,

v.
Marc E. LELAND, Third-Party Defendant.

No. 93 CIV. 3162(DAB).

March 27, 1998.

Debevoise & Plimpton, New York, Of
Counsel John S. Kiernan, Kyra K. Bromley,
Berwin Leighton, New York, Of Counsel
Jeffrey E. Glen, for Plaintiff.

Paul, Weiss, Rifkind, Wharton & Garrison,
New York, Of Counsel Max Gitter, Stephen L.
Saxl, Lynn B. Oberlander, for Defendants,
Counterclaim Plaintiffs, and Third-Party
Plaintiffs.

MEMORANDUM AND ORDER

BATTS, District J.

*1 This action arises out of a 1991 purchase by Plaintiff, The Gordon P. Getty Family Trust (the "Trust"), of approximately \$44.5 million in shares of Mountleigh Holdings ("Mountleigh"), followed by an additional purchase of approximately \$28 million in shares, less than one year before Mountleigh went into receivership. In relation to that transaction, Plaintiff alleges common law

fraud, negligence, and breach of contract under New York State law. Defendants have counterclaimed for breach of contract by the Trust and third-party plaintiff Marc Leland. Defendants now move for summary judgment pursuant to Rule 56(c) of the Federal Rules of Civil Procedure.

For the reasons discussed below, the Court denies Defendants' summary judgment motion.

I. BACKGROUND

A. Factual Background

The Getty Trust, a California trust with approximately \$1 billion in assets, is managed by Gordon Getty as Managing Trustee. (Defs.' 3(g) ¶¶ 4-5). [FN1] Marc Leland ("Leland"), the chief financial advisor to the Getty Trust since 1984, also served as the Trust's attorney-in-fact in connection with its investment in Mountleigh. (Defs.' 3(g) ¶¶ 6, 8). The Trust made its decision to purchase Mountleigh shares on the recommendation of Leland, who in turn claims to have relied on representations of Defendant Leon Kalvaria ("Kalvaria"). (Leland Aff. ¶¶ 3, 6).

FN1. As of April 15, 1997, the rule governing Statements of Material Fact on motions for summary judgment is Local Rule 56.1. The above referenced 3(g) statements were submitted to this Court before April 15, 1997, and thus the Court will refer to the parties' submissions as Local 3(g) Statements ("3(g) Stmt.") throughout this Memorandum and Order.

Mountleigh was a public limited company that developed and traded commercial property in Europe and owned and operated Galerias Preciados ("Galerias"), a retail business located in Spain. (Defs.' 3(g) ¶ 1). Mountleigh's shares were traded on the London Stock Exchange. (Id.) Defendants Nelson Peltz ("Peltz") and Peter W. May ("May") were appointed respectively as Chairman and Joint Managing Director of Mountleigh in November, 1989. (Id. ¶¶ 10, 12). In November, 1989 and January, 1990, Peltz and May made several purchases of

Mountleigh shares through holding companies, resulting in their ownership of approximately 22% of Mountleigh's equity. (Id. ¶ 23).

By May, 1991, Mountleigh Holdings-NP I, Inc. and Mountleigh Holdings-NP II, Inc., both wholly owned by Peltz, collectively controlled approximately 15% of Mountleigh's outstanding ordinary shares. (Am.Compl.¶ 6). Mountleigh Holdings-PWM I, Inc., wholly owned by May, owned approximately 7% of Mountleigh's outstanding ordinary shares during the same period. (Am.Compl.¶ 9). Thus, the three institutional Defendants (collectively, the "Holding Companies") owned a total of approximately 22% of Mountleigh's outstanding ordinary shares in 1991, with Peltz constituting Mountleigh's single largest shareholder. (Defs.' 3(g) ¶ 23). The Getty Trust purchased approximately half of the Holding Companies' shares in May, 1991. (Id. ¶ 31).

1. Mountleigh's Status

While the Trust transaction was negotiated, Mountleigh was a troubled company attempting to arrange a debt restructuring with its lending banks. (Pl.'s 3(g) ¶ 87). In April, 1991, Mountleigh's financial advisor and underwriter, UBS Phillips & Drew, prepared an internal report on Mountleigh predicting that the company would run out of cash by June, 1991 unless it engineered an equity infusion of at least 50 million. (Id. ¶¶ 22, 40; Pl.'s Ex. 37 at 23). This report also found that an acceleration of asset sales would be necessary, as even a cash infusion of 100 million would only provide breathing space until February, 1992. (Id.).

*2 One of Mountleigh's most attractive assets appeared to be its group of Spanish properties comprised by Galerias. According to Plaintiff, Defendants assured Leland that the value of the Spanish properties could be easily realized to provide Mountleigh with needed funds. (Id. ¶ 40). Under Spanish law, however, redundancy payments were required to be made to any employees terminated when Spanish assets were sold, rendering the

Galerias properties more of a drain than an asset and forcing Mountleigh to sell properties in the United Kingdom instead. (Id. ¶¶ 72 n. 1, 73-74).

2. Relationship Between the Parties

Leon Kalvaria is described by Plaintiff as "the principal spokesperson for Peltz and May in communicating with the Trust." (Am.Compl.¶ 11). Prior to the events of 1991, Leland and Kalvaria enjoyed a relationship characterized by Leland as "both professionally and personally close." (Leland Aff. ¶¶ 3, 5-8). In 1988, Kalvaria served as an investment banking advisor to the Trust, and worked closely with Leland over an investment decision. (Id. ¶ 6). From this interaction, Leland states that Kalvaria learned that the Trust preferred transactions where its investment would be "co-extensive with that of another investor having comparable financial resources but also having the investment banking and other financial resources to evaluate the investment in detail," as the Trust would "rely heavily on that other investor and its advisors" since their interests were aligned. (Id.). Leland discussed this approach with Kalvaria on numerous occasions. (Id.).

Since that time, Kalvaria approached Leland on occasion with investment suggestions for the Trust. (Defs.' 3(g) ¶ 25). Kalvaria proposed a transaction involving the Trust, Peltz and May as early as 1989. (Pl.'s 3(g) ¶ 25; Leland Aff. ¶ 5). Leland first met Peltz in the summer of 1990. (Defs.' 3(g) ¶ 24). In February, 1991, Leland convened with Peltz, May, and Kalvaria to discuss a potential investment involving the merger of Mountleigh with another entity. (Id. ¶ 26). Leland ultimately rejected this transaction as unsuitable to the Trust's purposes, because "it did not contemplate a coequal investment by Peltz and May of the type favored by the Getty Trust." (Leland Aff. ¶ 10).

In the first week of May, 1991, Kalvaria suggested to Leland the possibility of the Trust purchasing half of Peltz and May's Mountleigh shares. [FN2] (Defs.' 3(g) ¶ 28).

Kalvaria told Leland that the rules of the London Stock Exchange governing when Peltz and May could sell their shares dictated that the contemplated sale occur by mid-May. (Pl.'s 3(g) ¶ 34). A basic principle of the London Stock Exchange Model Code requires that "dealings should not normally take place for a minimum period" preceding publication of a company's annual operating results. (See Model Code for Securities Transaction by Directors of Listed Companies (1991), at 5.42.) [FN3] Defendants referred to the Model Code's prohibition of such sales within the 60 days preceding the release of annual results as justification for the original May 15 deadline for closing of the sale. [FN4] (Id. ¶ 34). In order to meet this deadline, Leland believed "a decision whether to go forward had to be made by about May 9." (Leland Aff. ¶ 14).

FN2. The Complaint identifies this date as "on or about May 7, 1991 ." (Am.Compl.¶ 13.) Leland specifies May 7 as the date on which he first heard of the proposed investment in a telephone call from Kalvaria. (Leland Aff. ¶ 11.)

FN3. Rule 3.1 of the Model Code prohibits a director from dealing in securities for "two months immediately preceding the preliminary announcement of the company's annual results ... unless the circumstances are exceptional." (See Def.'s Appendix, Vol 1, Model Code at 5.45). The London Stock Exchange's public announcement censuring Peltz and May for violation of the Model Code stated that "[t]he basic principles referred to preclude directors from dealing for a minimum period (normally two months) prior to announcement of regularly recurring information such as results." (Pl.'s 3(g) ¶ 125; Def.'s Exh. 62, at G05693).

FN4. This date was later revised to May 17, and, finally, to May 19. (Pl.'s 3(g) ¶ 34.)

*3 Between May 7, 1991, and the closing date, Kalvaria made a number of oral representations to Leland regarding Mountleigh's status. (Id. ¶¶ 12-13). In addition, Kalvaria sent Leland a series of documents providing written information on Mountleigh, the current state of the British property market, and Galerias. (Defs.' 3(g) ¶

34). On May 15, Kalvaria sent Plaintiff a letter and financial presentation of current and projected outlook for Mountleigh, noting in the letter that the results were before "write-offs" of >60 million, however, this figure was later to be revised upwards to more than 80 million. (Pl.'s 3(g) ¶ 51; Def.'s Ex. 10). During mid-May, Plaintiff was also furnished with an "Information Pack" which included a presentation to Mountleigh's banks. (Defs.' 3(g) ¶ 34). The first copy of this bank presentation faxed to Leland on May 16, contained only a partial cashflow forecast for Mountleigh. (Pl.'s 3(g) ¶ 34). The hard copy sent that day, did contain a complete cashflow forecast through 1992-93, but it did not arrive until after the initial closing date. (Id. ¶ 34; Leland Aff. ¶ 28.)

The extent and content of Defendants' disclosures prior to the transaction regarding Mountleigh's net asset value, Mountleigh's fiscal year-end losses, Mountleigh's cash situation, the status of Mountleigh's Spanish properties, and the nature of Mountleigh's relationship with its financing banks, are contested by the parties. Plaintiff asserts that Defendants misrepresented the significance of Mountleigh's debt restructuring as a source of breathing room to sell properties in the United Kingdom at a later date, and that Defendants did not disclose that such sales were in fact required to stay afloat. (See Pl.'s 3(g) ¶ 103). Plaintiff further asserts that Kalvaria told Leland that Mountleigh was under no pressure to sell properties in the United Kingdom in 1991-92, and that financing had already been arranged with the banks. (Id. ¶ 43). [FN5] In addition, Kalvaria portrayed Peltz and May's participation in the additional purchase of Mountleigh shares as "voluntary," when this arrangement was later revealed to have been a condition required by Mountleigh's financing banks. (Leland Aff. ¶ 27).

FN5. The parties also dispute whether the timetable of financing set forth in the written materials provided to Leland contradicted this representation. (See Pl.'s 3(g) ¶ 43; see also Def.'s Ex. 10 at G02564).

Plaintiff asserts that Defendants' written representations deliberately concealed Mountleigh's illiquidity as of May 1991, as Mountleigh's anticipated cashflow statements failed to indicate the urgency of Mountleigh's cash situation, and underestimated the cashflow deficit by a factor of 10. (Pl.'s 3(g) ¶ 40). Plaintiff asserts that Defendants knew at the time of the transaction that, even with large infusions of funds, the Spanish properties--described by Kalvaria as Mountleigh's "crown jewel"--would not generate needed cash for two years, but represented to Plaintiff that the sale of the Galerias properties would be sufficient to pay off Mountleigh's debts. (Pl.'s 3(g) ¶ 102; Leland Aff. ¶ 18). Although the documents furnished to Leland indicated planned sales of property in the United Kingdom, Plaintiff argues that these sales were not portrayed as necessary, but merely as a source of "fresh equity" desired to realize value. (Pl.'s 3(g) ¶ 102).

*4 As to the redundancies required under Spanish law, Plaintiff admits to having been informed of the law on this subject, but states that Defendants failed to disclose the difficulties posed by the projected sales of Spanish assets. (See Pl.'s 3(g) ¶¶ 72-74). Defendants argue, on the other hand, that the documents provided to Leland in the Information Pack disclosed sufficient information to clarify the situation with the Spanish properties and to counteract any statements made orally by Kalvaria. (Def.'s 3(g) ¶¶ 72-74).

3. Completion of the Transaction

According to Defendants, Mountleigh's Board "met" on the transaction prior to its undertaking. (Def.'s 3(g) ¶ 30). Plaintiff asserts, however, that the Board did not formally approve the sale. (Pl.'s 3(g) ¶ 30). On May, 19, 1991, a Stock Purchase Agreement was executed between the Getty Trust and Peltz and May. (Defs.' 3(g) ¶ 29). The Agreement contained several warranties. Section 2.2 of the Agreement, entitled "Non-Contravention," represented that the transaction would not "conflict with or result

in any breach or violation of ... any law, statute, regulation, order, judgment or decree applicable to [[[Mountleigh]."

 (Am.Compl.¶ 36.) Section 2.3 of the Agreement asserted that there had been no material adverse change since 1990 in Mountleigh's "assets, properties, business, operations or condition (financial or otherwise)." (Am.Compl.¶ 28.) Section 2.4 provided that none of the documents provided by Defendants to Plaintiff in connection with the stock purchase contained material omissions or misrepresentations. (Am.Compl.¶ 35.)

On May 19, 1991, The Trust wired cash funds in the amount of \$44,077,190.98 and, on May 20, acquired approximately 11% of Mountleigh's equity from the Holding Companies at a purchase price above the then prevailing market price. (Def.'s 3(g) ¶¶ 31-32). [FN6] Leland was under the impression that a later offering of rights to existing shareholders would provide the Trust with an opportunity to buy additional shares at a below-market rate. (Leland Aff. ¶ 27). Peltz and May had also committed to participate coequally in this projected 100 million rights offering to Mountleigh shareholders (Id. ¶¶ 12, 27). In accordance with the terms of the Stock Purchase Agreement, the Trust made an additional investment of over \$28 million on August 27, 1991. (Am.Compl.¶ 21).

FN6. Beginning on May 20, 1991, Leland served on Mountleigh's board for approximately one year. (Id. ¶ 9).

The sale of Mountleigh shares to the Trust was later found to have violated the Model Code. Mountleigh's fiscal year ended on April 30, and typically, the company's year-end results were reported in mid- to late July. (Defs.' 3(g) ¶ 2). However, the 1991 final results were released on July 5, 1991. (Id. ¶ 50).

Since the release date was less than two months after the sale of shares to the Trust, the London Stock Exchange issued a public announcement on August 15, 1991, censuring Peltz and May for the sale of Mountleigh's securities within the 60-day "closed period"

prior to release of its operating results and while in possession of unpublished price-sensitive information. (Pl.'s 3(g) ¶¶ 110-111). The Stock Exchange letter adverted to a "clear risk that shareholders and potential investors would be given a misleading impression by the announcement on May 20 that directors of Mountleigh had sold shares at a significant premium to the market price" when the contemplated refinancing had not yet been revealed. (Id. ¶ 114).

*5 In May, 1992, after the sale of a large property in the United Kingdom fell through and Mountleigh failed to negotiate further concessions from the banks, Mountleigh was placed in receivership. (Defs.3(g) ¶¶ 57-61). All Mountleigh equity investors lost their investments: Peltz and May suffered a loss of nearly \$150 million, while the Trust lost about \$72.5 million. (Id.).

B. Procedural Background

Plaintiff commenced this action in 1993. Defendants subsequently brought counterclaims alleging that Plaintiff violated the Stock Purchase Agreement between the parties and seeking indemnification for attorneys' fees. In April 1995, this Court granted Defendants permission to move for summary judgment before the completion of discovery.

II. DISCUSSION

A. Standard

The principles applicable to summary judgment are familiar and well-settled. Summary judgment may be granted only when there is no genuine issue of material fact remaining for trial, and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); see also *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Corselli v. Coughlin*, 842 F.2d 23 (2d Cir.1988). "[T]he plain language of Rule 56(c) mandates the entry of summary judgment, ... against a party who fails to make a showing sufficient to establish the existence of an element essential

to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

As a general rule, all ambiguities and all inferences drawn from the underlying facts must be resolved in favor of the party contesting the motion, and all uncertainty as to the existence of a genuine issue for trial must be resolved against the moving party. *LaFond v. General Physics Servs. Corp.*, 50 F.3d 165, 171 (2d Cir.1995). As is often stated, "[v]iewing the evidence produced in the light most favorable to the nonmovant, if a rational trier could not find for the nonmovant, then there is no genuine issue of material fact and entry of summary judgment is appropriate." *Binder v. LILCO*, 933 F.2d 187, 191 (2d Cir.1991).

B. Common Law Fraud Claim

Plaintiff alleges common law fraud on the part of Defendants, claiming, inter alia, that Defendants misrepresented Mountleigh's financial state, its position with respect to the sale of properties in the United Kingdom, and the status of its relationship with its banks. Defendants move for summary judgment on the grounds that Plaintiff cannot establish the elements of this claim.

To sustain a claim of common law fraud under New York law, a plaintiff must show that (1) the defendant made a material false representation, (2) the defendant intended to defraud the plaintiff thereby, (3) the plaintiff reasonably relied upon the representation, and (4) the plaintiff suffered damage as a result of such reliance. See *Bridgestone/Firestone, Inc. v. Recovery Credit Servs., Inc.*, 98 F.3d 13, 19 (2d Cir.1996); *Banque Arabe et Internationale D'Investissement v. Maryland Nat'l Bank*, 57 F.3d 146, 153 (2d Cir.1995); *The Pits, Ltd. v. American Express Bank Int'l*, 911 F.Supp. 710, 719 (S.D.N.Y.1996).

*6 "Common law fraud claims must be supported by factual allegations demonstrating the plaintiff's actual, direct reliance on the misrepresentation or

omission." *Redtail Leasing, Inc. v. Bellezza*, No. 95 Civ. 5191, 1997 WL 603496, *6, *7 (S.D.N.Y. Sept.30, 1997) (citing to *Golden Budha Corp. v. Canadian Land Co.*, 931 F.2d 196, 202 (2d Cir.1991), and distinguishing common law fraud claims from action where reliance on a material omission is presumed). Each element of the fraud cause of action must be shown by clear and convincing evidence. See *Banque Arabe*, 57 F.2d at 152.

In the instant case, the Court finds that facts essential to the claim of common law fraud are in dispute. As noted supra, the extent of Defendants' oral and written disclosures prior to the transaction are contested by the parties: whether or not certain information was omitted, whether such omissions were material, and whether Plaintiff relied upon the incomplete disclosures, are determinative of this claim. For instance, the record does not clearly show what Plaintiff knew of Mountleigh's earnings, whether Defendants misrepresented this figure, and whether Mountleigh's earnings were material to the Trust's decision to make the investment or whether the Trust's interest in Mountleigh was based solely on its assets. See Pl.'s 3(g) ¶¶ 38-39, 91. Similarly, the record is also unclear over whether Leland was misled by an understatement of Mountleigh's imminent cashflow problems and failure to disclose the urgent need to sell property for cash, or whether the information provided was sufficient to place Plaintiff on notice of the actual status of Mountleigh's affairs. See Defs.' 3(g) ¶¶ 81, 86.

Notwithstanding the above areas of dispute, Defendants contend that Plaintiff, as a sophisticated investor, had sufficient knowledge to have been put on notice of material omissions which it failed to investigate. See Def.'s Mem. Law at 5. It appears, however, that Plaintiff's time to make a decision was very limited. There were a mere eight days between Kalvaria's first suggestion of the transaction on May 7, and the original closing date of May 15. [FN7] In light of the extreme time pressure imposed on Plaintiff in making its decision, "[t]o assert that [Leland]'s efforts to verify the

information he received were insufficient to make his reliance reasonable is tantamount to asserting that he should have suspected fraud from the start." *Freschi v. Grand Coal Venture*, 767 F.2d 1041, 1049 (2d Cir.1985), vacated on different grounds, 478 U.S. 1015, 106 S.Ct. 3325, 92 L.Ed.2d 731 (1986) (where plaintiff made investment a mere two weeks following its proposal). See also *Stratford Group v. Interstate Bakeries Corp.*, 590 F.Supp. 859, 864 (S.D.N.Y.1984)(finding question of reliance raised issue of fact for trial in part due to severe time constraints on the transaction); *Alexander v. Evans*, No. 88 Civ. 5309, 1993 WL 427409, *1, *17 (S.D.N.Y., Oct.15, 1993) (denying summary judgment on common law fraud action in part because, although plaintiff was a sophisticated investor, the reliance element "was not designed to shield perpetrators of fraud by forcing investors to conduct exhaustive research every time they invest money, lest the seller be manipulative or deceptive"). Given the evident time constraints imposed by Defendants on this sophisticated investor, the question of whether Plaintiff was reasonable in relying on certain representations is a question to be determined by a trier of fact.

FN7. Indeed, the time to agree to the transaction may have been as short as two days, as Leland asserts that he believed the Trust's decision needed to be reached by approximately May 9 to meet the original target date for execution of the Stock Purchase Agreement. (See Leland Aff. ¶ 14).

*7 Defendants further argue that Plaintiff cannot support its claims of justifiable reliance on oral representations by Kalvaria to Leland because such statements were contradicted by the written materials Leland received before making the investment decision. See Def.'s Mem. Law at 4. The cases cited by Defendants in support of this argument are distinguishable on the facts, particularly for the absence of time constraints that will affect access to information and the importance of omissions, and subsequently, the reasonableness of the buyer's reliance on oral representations made by a person arguably in a position of confidence and trust. See e.g. *Grunman Allied Industries v. Rohr Indus.*, 748

F.2d 729, 738 (2d Cir.1984) (granting summary judgment on finding that buyer failed to inquire into discrepancies, enjoyed "undisputed access to the corporate records necessary to confirm or disprove the substance of the verbal assurance," and no showing that relationship between parties triggered duty of disclosure) (emphasis added); Treacy v. Simmons, No. 89 Civ. 7052, 1991 WL 67474, *1, *4-*6 (S.D.N.Y., Apr.23, 1991) (granting summary judgment where plaintiff admits that did not read written offering materials that were replete with warnings of risk, and plaintiff "failed to set forth any evidence to overcome this glaring unjustifiable reliance on [the seller's] statements in light of the disclosure in the offering materials."). In the instant case, there are specific points of apparent conflict between what Kalvaria said, and what the documents provided by Kalvaria appeared to say: for example, as to the status of Mountleigh with the financing banks in May, 1991, the oral representations were that financing was already firmly arranged, whereas the written documentation included a "timetable" for the completion of the financing agreement. Whether Leland was justified in relying on Kalvaria's statement despite the indications from the documentation, considering the context of a time pressured deal arrived at between business associates with a prior relationship, is again a genuine issue of material fact.

Therefore, the foregoing issues and the uncertainty they raise regarding Defendants' representations of Mountleigh's financial conditions and the reasonableness of Plaintiff's reliance, render it impossible to find that Plaintiff's fraud claims fail as a matter of law. Thus, the Court denies Defendants' motion for summary judgment on the claim of common law fraud.

C. Negligent Misrepresentation Claim

To support a claim of negligent misrepresentation under New York law, a plaintiff must establish "(1) carelessness in imparting words (2) upon which others were expected to rely (3) upon which they did act or failed to act (4) to their damage; further, (5)

the author must express the words directly, with knowledge they will be acted upon, to one whom the author is bound to by some relation [of] duty or care." The Pits, 911 F.Supp. at 720; see also ABF Capital Management v. Askin Capital Management, L.P., 957 F.Supp. 1308, 1333 (S.D.N.Y.1997); In re JWP Inc. Sec. Litig., 928 F.Supp. 1239, 1253 (S.D.N.Y.1996). "Under New York law, it is well established that a defendant is not liable for negligent misrepresentation unless a prior relationship existed between the defendant and plaintiff." ABF Capital Management, 957 F.Supp. at 1333 (citing *Toto v. McMahan, Brafman, Morgan & Co.*, No. 93 Civ. 5894, 1995 WL 46691, *1, at *12 (S.D.N.Y. Feb.7, 1995) (internal quotations omitted)).

*8 "In the commercial context, a duty to speak with care exists when the relationship of the parties [is] such that in morals and good conscience the one has the right to rely upon the other for information." *Kimmell v. Schaefer*, 89 N.Y.2d 257, 263, 652 N.Y.S.2d 715, 719, 675 N.E.2d 450 (N.Y.1996). The *Kimmell* Court acknowledged that not all representations made by a seller will give rise to a duty to speak with care, since there must be a "special relationship" creating "an exceptional duty regarding commercial speech and justifiable reliance on such speech." *Id.* [FN8] The relevant factors for this determination are the seller's unique or special expertise on the matter at hand, or the appearance thereof; the existence of a relationship of trust or confidence between the parties; and whether the speaker was aware of the use to which the information would be put, and supplied it for that purpose. *Id.* This inquiry into the existence of a special relationship is, by necessity, highly fact specific. See *Gruber v. Victor*, No. 95 Civ. 2285, 1996 WL 492991, *1, *17-18 (S.D.N.Y., Aug.28, 1996); *In re JWP Inc. Sec. Litig.*, 928 F.Supp. at 1253.

FN8. In *Kimmell*, the Court distinguished representations made by a seller in a commercial transaction without "obligations arising from the speaker's professional status," from those made by a speaker who, by virtue of his or her training and

expertise, is considered to have a special relationship of confidence and trust with their clients. 89 N.Y.2d at 263, 652 N.Y.S.2d at 719, 675 N.E.2d 450 (citing as examples, lawyers, engineers, and accountants).

Defendants contend that Plaintiff's negligent misrepresentation claim must be dismissed as a matter of law, since the transaction was conducted at arms-length. The Court disagrees. Plaintiff has asserted that a special relationship grew out of Kalvaria's prior role as the Trust's investment banking advisor and his subsequent knowledge of the Trust's investment philosophy, that Kalvaria's expertise with respect to Mountleigh was relied upon because of his position and the time constraints imposed, and that Kalvaria's oral representations to Leland regarding the proposed transaction were made with full knowledge of the confidence he enjoyed. Looking at these assertions in the light most favorable to Plaintiff, there has been a sufficient showing to set the instant case apart from a strictly arms-length commercial transaction. Compare *Banque Arabe*, 57 F.3d 146, 158-9 (finding no special relationship as a matter of law where negotiations were at arms-length, agreement disclaimed reliance, and buyer's due diligence would have provided access to allegedly concealed information); with *Polycast Tech. Corp. v. Uniroyal, Inc.*, 792 F.Supp. 244, 269-270 (S.D.N.Y.1992)(denying summary judgment because allegations of defendants' repeated reassurances that earning projections were accurate, and of incomplete access to defendants' books and their superior knowledge of transaction, allowed inference of relationship "closer" than that of buyer and seller). Whether Kalvaria was indeed obligated to speak with care is not clear as a matter of law, and is therefore a question for a trier of fact.

D. Breach of Warranty Claim

To prevail on a claim for breach of warranty under New York law, a plaintiff must show damage suffered from the breach of an express warranty that plaintiff relied upon as part of a

contract. *Metromedia Co. v. Fugazy*, 983 F.2d 350, 360 (2d Cir.1992); *CBS Inc. v. Ziff-Davis Publ'g Co.*, 75 N.Y.2d 496, 503-4, 554 N.Y.S.2d 449, 453, 553 N.E.2d 997 (N.Y.1990). Regarding the "reliance" element, the New York Court of Appeals has stated that the critical question is whether the buyer believed he or she was purchasing the seller's promise as to the truth of the warranted information. *CBS Inc.*, 75 N.Y.2d at 503, 554 N.Y.S.2d at 452-53, 553 N.E.2d 997. A claim for breach of warranty does not require a showing that plaintiff believed that the actual assurances in the warranty would be fulfilled, but rather a showing that the warranty was bought and breached. *Id.* See also *Metromedia*, 983 F.2d at 360.

*9 The extent and source of the buyer's knowledge about the truth of what the seller is warranting, is still relevant to the this claim. "Where a buyer closes on a contract in the full knowledge and acceptance of facts disclosed by the seller which would constitute a breach of warranty under the terms of the contract, the buyer should be foreclosed from later asserting the breach." *Galli v. Metz*, 973 F.2d 145, 151 (2d Cir.1992). Moreover, the Second Circuit has recently stated "where a seller discloses up front [to the buyer] the inaccuracy of certain of his warranties, it cannot be said that the buyer-absent the express reservation of his rights-believed he was purchasing the seller's promise as to the truth of the warranties." *Rogath v. Siebenmann*, 129 F.3d 261, 265 (2d Cir.1997). If, however, the buyer's knowledge that the warranted facts are false comes from a source independent of the seller, the buyer is not foreclosed from later claiming a breach since "it is not unrealistic to assume that the buyer purchased the seller's warranty as insurance against any future claims." *Id.* at 265.

Plaintiff claims that Defendants breached warranties set forth in Sections 2.2, 2.3, and 2.4 of the Stock Purchase Agreement through violation of the non-contravention provision, withholding of information regarding a material adverse change in Mountleigh's condition, and failure to disclose material facts. [FN9] The record before the Court

reflects that facts critical for the determination of this claim, remain in dispute.

FN9. Plaintiff also seeks indemnification from the Holding Companies pursuant to Section 7 of the Stock Purchase Agreement, and recovery under the Guarantees executed by Peltz and May for the performance of the Holding Companies under the Stock Purchase Agreement. See Am. Compl. ¶¶ 61-72. However, these grounds have not been presented on the motion for summary judgment.

The parties disagree, as an initial matter, over whether they intended to include regulations such as the London Stock Exchange Model Code in the non-contravention provision. See Def.'s Mem. Law at 38; Pl.'s Mem. Law at 40. Further, the parties dispute the source and extent of Plaintiff's awareness of potential problems with the London Stock Exchange before the agreement was signed, whether Plaintiff consented to proceed with the transaction despite the possibility of such censure, and whether such participation by Plaintiff, if it existed, effectuated a waiver of the non-contravention provision. See 3(g) Stmts. ¶¶ 113-149. [FN10]

FN10. As a tangential matter, Defendants question the validity of the London Stock Exchange's reaction, see Defs.' 3(g) ¶ 115, n .7, and also appear to question whether a censure actually occurred, id. ¶ 110, 652 N.Y.S.2d 715, 675 N.E.2d 450 (referring to a "public announcement [of the London Stock Exchange] "purporting" to censure Peltz and May for the Trust transaction).

Defendants claim that Plaintiff waived the warranties set forth in sections 2.2 and 2.4 of the Stock Purchase Agreement because the parties "discussed" the legal issues posed by the Model Code prior to the transaction. Despite the fact that Section 8.4 of the Stock Purchase Agreement requires a written waiver of any express warranties, Defendants argue that under Galli, Plaintiff's knowledge of the Model Code rules forecloses this claim. See Defs.' Mem. Law at 39. See also Galli, 973 F.2d at 151. The Court disagrees. Unlike the situation in Galli, the parties here

had not expressly agreed prior to the sale that conditions rendering the warranty false existed. There is a fundamental difference between knowledge of the Model Code prohibition against the sale of shares during the "closed" period, and knowledge that the results would actually be released within that time. Moreover, the Rogath standard requires that the source of the buyer's information be also factored into the equation. These two points--whether Plaintiff knew of the projected release date of the results, and the source of that knowledge, are questions of fact in dispute.

*10 Indeed, the Court acknowledges that Plaintiff has put forth evidence tending to show that the Defendants' promise as to the truth of the warranted facts was part of Plaintiff's bargain. For example, Leland stated that in the face of uncertainty engendered by the opposing views expressed by advising counsel to the Trust, Mountleigh, Peltz and May, he acquiesced to the strategy of not consulting the London Stock Exchange in advance on the transaction, "so long as the sellers contractually undertook to shoulder all risks of any harm to the Getty Trust's interests in the event that their view turned out to be wrong." See Leland Aff. ¶ 47. [FN11]

FN11. The Court notes that Defendants' argument that Leland's subsequent service as one of Mountleigh's directors operated to waive the non-contravention provision retroactively is unpersuasive. See Defs.' Mem. Law at 41-42.

Regarding the warranty against material omissions in Section 2.4, the parties argue over whether the year-end accounting adjustments made to Mountleigh's estimated operating profit constituted a material misrepresentation that therefore violated this warranty. See 3(g) Stmts. ¶ 95. The disagreement over the materiality of the write-off amount in the investment decision, is a factual inquiry related to the parties' expectations at the time. See 3(g) Stmts. ¶¶ 100, 101. Such matters cannot be resolved on summary judgment.

Finally, Defendants claim that Plaintiff's alleged damages are too remote from the alleged violation of the Stock Purchase agreement to constitute a chain of causation. See Def.'s Mem. Law at 44. Plaintiff asserts that the London Stock Exchange censure precipitated Peltz and May's resignations from Mountleigh's board and the subsequent "unwilling[ness] to commit the necessary resources to saving Mountleigh from failure," resulting in a drop in market price and the Trust's loss of its investment. See *id.* ¶¶ 148-49 & n. 8. As a result, Plaintiffs claim that Mountleigh's stock price dropped significantly beneath its projected level by the time of the rights issue. *Id.* Looking at the facts in the light most favorable to Plaintiff, and again considering that full discovery of Mountleigh's downward spiral has not yet been completed, such a chain of events is not so attenuated that this Court can say, as a matter of law, causation cannot be found.

E. Defendants' Counterclaim for Breach of Contract

Defendants also seek summary judgment on their Counterclaim against Plaintiff for breach of contract based on the alleged violation of Section 1.4 of the Stock Purchase Agreement. [FN12]

FN12. This provision stated that Plaintiff was to pay an additional purchase price based on dividends paid by the Mountleigh shares for 1991 and on tax credits refunded to the Trust. See Counterclaim, ¶¶ 7-22.

Defendants argue that since Plaintiff's defenses to the Counterclaim echo the allegations of the Complaint, and since those allegations fail as a matter of law, Plaintiff has no defense to the Counterclaim. See Def.'s Mem. Law at 44-45. This argument is wholly contingent upon the success of the remainder of Defendants' motion. Since the Court has not found that Defendants' should prevail as a matter of law on any of the above grounds, summary judgment on the Counterclaim must also be denied.

III. CONCLUSION

For the foregoing reasons, this Court finds that genuine issues of material fact exist on Plaintiff's claims of common law fraud, negligent misrepresentation and breach of warranty under New York law. Accordingly, Defendants' motion for summary judgment on these claims is hereby DENIED.

*11 Defendants' motion for summary judgment on the Counterclaim relied upon a finding that the allegations of the Complaint fail as a matter of law. Since such a finding was not made, Defendants' motion for summary judgment on the counterclaim is hereby DENIED.

The Court hereby DIRECTS that the parties appear before this Court on Friday, May 1, 1998 for a conference to schedule the completion of discovery and pre-trial submissions in this matter.

SO ORDERED.

1998 WL 148425 (S.D.N.Y.)

END OF DOCUMENT

39

Supreme Court, Appellate Division, First
Department, New York.

**GREATER NEW YORK MUTUAL
INSURANCE COMPANY, Plaintiff-**
Appellant-Respondent,

v.

**WHITE KNIGHT RESTORATION, LTD., et
al., Defendants-Respondents-Appellants,**
The Charter & Oak Fire Insurance Company,
Defendant,

Levitt-Fuirst Associates, Ltd., et al.,
Defendants-Respondents.

Greater New York Mutual Insurance
Company, Plaintiff-Appellant,

v.

White Knight Restoration, Ltd., et al.,
Defendants,

R.A.S. Contracting Corp., etc., et al.,
Defendants-Respondents.

May 6, 2004.

Background: Property owner and contractor sued subcontractor's insurance broker, seeking damages for broker's failure to procure coverage naming them as additional insureds, and for producing certificates of insurance that incorrectly indicated they had been so named. The Supreme Court, New York County, Charles Edward Ramos, J., dismissed complaint. Plaintiffs appealed.

Holdings: The Supreme Court, Appellate Division, held that: (1) broker was under no duty to property owner and contractor, and (2) lack of reasonable reliance precluded claims of fraud and negligent misrepresentation.

Affirmed.

West Headnotes

[1] Insurance 1671
217k1671

Subcontractor's insurance broker was under no duty to property owner and contractor, as required to support claim that broker failed to procure coverage naming them as additional insureds.

[2] Insurance 1672
217k1672

Regardless of whether subcontractor's insurance broker acted recklessly in producing certificates of insurance that incorrectly indicated that property owner and contractor had been named as additional insureds, it was unreasonable to rely on certificates, precluding claims for fraud and negligent misrepresentation, in face of disclaimer language.

****257** Thomas D. Hughes, New York (Richard C. Rubinstein of counsel), for appellant-respondent/appellant.

Jaffe & Asher LLP, New York (Marshall T. Potashner of counsel), for R.A.S. Contracting Corp., respondent-appellant/respondent, and Liberty Mutual Insurance Company, respondent.

****258** Lawrence, Worden & Rainis, P.C., Melville (Roger B. Lawrence of counsel), for Levitt-Fuirst Associates, Ltd., respondents.

NARDELLI, J.P., SAXE, WILLIAMS,
FRIEDMAN, JJ.

***293** Judgment, Supreme Court, New York County (Charles Edward Ramos, J.), entered May 29, 2003, dismissing the complaint, all cross claims and all counterclaims, unanimously affirmed, without costs. Appeals from orders, same court and Justice, entered June 11 and December 19, 2002, and February 19, 2003, unanimously dismissed, without costs, as subsumed in the appeals from the judgment. Appeal by defendant White Knight Restoration unanimously dismissed, without costs, as abandoned.

[1][2] In this action seeking, inter alia, damages for failure to procure coverage naming the property owner and the contractor as additional insureds, and for producing certificates of insurance that incorrectly indicated they had been so named, summary judgment was properly granted to the subcontractor's insurance broker, defendant Levitt-Fuirst Associates, dismissing the claims

(Cite as: 7 A.D.3d 292, *293, 776 N.Y.S.2d 257, **258)

for breach of contract and negligence, since the broker was under no duty to the property owner and contractor (see *Federal Ins. Co. v. Spectrum Ins. Brokerage Servs.*, 304 A.D.2d 316, 317, 758 N.Y.S.2d 21). Regardless of whether the broker acted recklessly, the causes of action for fraud and negligent misrepresentation, based on the inaccurate certificates, were properly dismissed because it was unreasonable to rely on them for coverage in the face of their disclaimer language and, with respect to the negligent misrepresentation claim, because of the absence of a relationship approximating privity (see *Benjamin Shapiro Realty Co. v. Kemper Natl. Ins. Cos.*, 303 A.D.2d 245, 756 N.Y.S.2d 45, lv. denied 100 N.Y.2d 573, 764 N.Y.S.2d 382, 796 N.E.2d 473). In view of the foregoing, it is unnecessary to address the parties' other contentions with regard to these claims.

In clarifying its initial order, the motion court properly dismissed the claims against R.A.S., since plaintiff was covered by its own policy and failed to allege any recoverable loss (see *Inchaustegui v. 666 5th Ave. Ltd. Partnership*, 96 N.Y.2d 111, 725 N.Y.S.2d 627, 749 N.E.2d 196).

Further discovery would not have assisted plaintiff in opposing Liberty Mutual's motion for summary judgment. The claim for reformation of the policy was properly dismissed since it was not substantiated by the requisite high order of proof (see *New York First Ave. CVS v. Wellington Tower Assoc.*, 299 A.D.2d 205, 750 N.Y.S.2d 586, *294 lv. denied 100 N.Y.2d 505, 763 N.Y.S.2d 811, 795 N.E.2d 37).

7 A.D.3d 292, 776 N.Y.S.2d 257, 2004 N.Y. Slip Op. 03692

END OF DOCUMENT

40

Briefs and Other Related Documents

United States Court of Appeals,
Second Circuit.

GRUMMAN ALLIED INDUSTRIES, INC.
and Grumman Corporation, Plaintiff-
Appellants,
v.
ROHR INDUSTRIES, INC., Defendant-
Appellee.

No. 89, Docket 84-7402.

Argued Oct. 3, 1984.
Decided Oct. 31, 1984.

Plaintiff, which purchased assets of defendant's subsidiary, brought an action for fraud and misrepresentation based on allegation that defendant failed to disclose material facts relating to the testing of a prototype bus. The United States District Court for the Eastern District of New York, Jacob Mishler, J., granted summary judgment in favor of defendant, and plaintiff appealed. The Court of Appeals, Irving R. Kaufman, Circuit Judge, held that action could not be maintained where plaintiff contractually disclaimed reliance upon the representations at issue and enjoyed absolute access to all relevant information necessary to confirm validity of those representations.

Affirmed.

West Headnotes

[1] Contracts 267
95k267

Disclaimer provisions of agreement relating to design and testing of prototype bus sold by defendant's subsidiary were sufficiently specific and unambiguous and therefore buyer, which contractually disclaimed reliance upon the representations at issue, could not maintain action for fraud and misrepresentation on basis of allegation that defendant failed to disclose material facts relating to testing of the bus where the disclaimer was not procured by fraud.

[2] Fraud 23
184k23

Buyer's right to unrestricted access and its failure to inquire precluded, as a matter of law, its claim of reliance on defendant's alleged misrepresentations and therefore buyer could not maintain action for fraud and misrepresentation based on allegation that defendant failed to disclose material facts relating to the testing of a prototype bus.

*729 Francis J. O'Toole, P. David Richardson, Fried, Frank, Harris, Shriver & Kampelman, Washington, D.C., Alexander R. Sussman, Howard B. Levi, New York City (on the brief), Fried, Frank, Harris, Shriver & Jacobson, New York City, for plaintiff-appellants.

Frederick R. Wirtz, J. Anthony Sinclitico, III, Gibson, Dunn & Crutcher, San Diego, Cal., Gregory A. Markel, John A. Redmon, New York City (of counsel), Davis, Markel, Dwyer & Edwards, New York City, for defendant-appellee.

730 Before KAUFMAN and WINTER, Circuit Judges and WYZANSKI, Senior District Judge. [FN]

FN* The Honorable Charles E. Wyzanski, Jr., Senior District Judge, District of Massachusetts, sitting by designation.

IRVING R. KAUFMAN, Circuit Judge:

On January 3, 1978, Grumman Allied Industries (Grumman), a subsidiary of the Grumman Corporation, acquired all the plants, books, records, and other assets of The Flxible Company (Flxible), a subsidiary of the Rohr Corporation. The price paid was \$55 million, and among the assets purchased were two hand-built prototypes—Proto I and Proto II—of a new bus known as the Model 870, and the right to use the design for these prototypes. After the sale was consummated, and after Flxible had sold more than 2,600 Model 870 buses, structural defects arose, and these buses were removed from operation. The dispute before us concerns the propriety of granting Rohr's motion for summary

judgment and the dismissal of Grumman's complaint alleging Rohr's misrepresentation and failure to disclose material facts relating to the testing of the Model 870. We affirm the lower court's holding because Grumman contractually disclaimed reliance upon the representations at issue and enjoyed absolute access to all relevant information necessary to confirm the validity of those representations. In so concluding, we merely give effect to what we perceive to be a clear manifestation of the parties' intentions concerning the allocation of risks in the purchase of Flxible's business. Furthermore, we believe that our result comports with modern precepts regarding freedom of contract and limited judicial intervention into private contractual relationships.

Because the intricate factual setting of this case is critical to its resolution, we set forth the facts in some detail.

I.
The Sale of Flxible

The roots of this dispute can be traced to May of 1976, at which time Rohr experienced serious financial difficulties and considered selling one of its subsidiaries, Flxible. To determine the feasibility of selling a bus manufacturing company, Rohr retained the investment banking firm of White Weld & Co., which prepared and circulated to a number of potential buyers a memorandum describing Flxible. Grumman received a copy of this memorandum, and in mid-1976 expressed an interest in acquiring Flxible.

The following fifteen months (May 1976 to September 1977) saw Grumman affirmatively pursue that interest. Armed with an arsenal of seasoned negotiators, sophisticated engineers, experienced executives and capable attorneys and accountants, Grumman sought to uncover all information relevant to its potential acquisition. To this end, Grumman representatives repeatedly toured the Flxible plants and, while there, were accorded unrestricted access to all personnel and records. During this period, Grumman representatives were shown a promotional

film containing representations, some of which related to the testing of the Model 870. [FN1]

FN1. This film was sent to Grumman's Board of Directors in June 1977. Among the statements made in the sound track of the film were the following: Like all Flxible buses, the 870 has been thoroughly tested. It's been hit ... it's been dropped ... it's been slammed and subjected to exhaustive endurance and fatigue tests on Rohr's private test track at the Riverside International Raceway in California.... During this test, the 870 was driven over a series of torturing obstacles, almost 250 feet of 6-inch deep chockholes, and 75 feet of raised parallel strips spaced 2 inches apart in a signwave pattern. This rigorous testing of the 870 culminates a 5-year transit vehicle research and development program that involved all of the 870's predecessors, Hi Value, Metro and federally sponsored Transbus. These vehicles also were tested at Riverside ... the result--the tough and ready 870. Before the 870 was road-tested, it was subjected to a series of suspension tests carrying the equivalent of a full standee load. These tests simulated thousands of miles of street driving.

*731 On September 29, 1977, and for the following three months, Grumman and Rohr engaged in formal negotiations. In these negotiations, both sides were represented by experienced businessmen, engineers and attorneys. Both parties formulated, reviewed and modified the several draft agreements that were exchanged and discussed during this period. Indeed, Grumman appointed an acquisition team and a negotiating team to review engineering and financial matters and negotiate a contract that would protect Grumman's best interests. Grumman's acquisition team was comprised of fourteen persons, including three lawyers and at least four trained engineers. The "acquisition" personnel traveled to Flxible's facilities, interviewed its employees and reviewed its documents and products. Grumman's negotiating team was led by Robert Loar, a former Chairman of the Board of Grumman; Robert Landon, who was to become President of Grumman Flxible; Robert Somerville, an experienced engineer who was President of Grumman; and Thomas Genovese, General Counsel to Grumman.

Grumman's negotiating team and Rohr's negotiating team held four formal meetings between September 29, 1977 and December 1, 1977. On September 29, 1977, the rear A-frame of the Proto II cracked during endurance testing and all testing was suspended. Although Grumman had learned that the testing of the Model 870 design was not complete as of July 1977, and that a 10,000 mile endurance test was scheduled, neither the negotiating team nor the acquisition team requested the results of the testing.

After the negotiating teams had agreed on the general terms of sale, Genovese, Grumman's counsel, prepared the initial draft of what ultimately was to become the Final Agreement. Thereafter, revisions were made in a series of drafts, the drafts were subjected to extensive and intensive internal review by Grumman, and their content was discussed by Grumman and Rohr representatives at face-to-face meetings convened in various locations throughout the United States. Genovese acknowledged he had read all seven drafts of the contract, some of them more than once; Somerville, who executed the contract on behalf of Grumman, stated he had read "through all of its iterations" before signing the Agreement.

The Agreement

The fruition of these extensive negotiations and investigations was an 85 page Agreement that was signed on December 15, 1977, executed on December 23, 1977 and closed on January 3, 1978. In this Agreement, the parties set forth the representations they had made to each other and disclaimed representations as to specific matters. In particular, the Agreement provided that (i) Grumman has "made a lengthy, detailed, and independent investigation regarding ... [Rohr's] Model 870 bus design and specifications," [§ 4.3(b) [FN2]]; *732 (ii) "neither the Construction in Progress nor the Model 870 manufacturing techniques have yet been tested by [Rohr], and accordingly no representations and warranties concerning such have been or are hereby made, implied or

given" [§ 4.3(b)]; (iii) "except for the warranties and representations set forth in this Agreement ... no other statement, warranty, representation or information, verbal or written, shall be legally binding upon any party or shall be the basis for reliance by the other party" [§ 4.3(b)]; (iv) Rohr shall continue to accord Grumman access to all Flexible facilities and records and "do everything reasonably necessary to enable [Grumman] to make a complete examination of the assets and properties of [Rohr] and the condition thereof" [§ 3.4(b) [FN3]]; (v) "neither party is relying upon any warranty or representation of the other not fully set forth herein" [§ 6.11 [FN4]]; (vi) Rohr's "sole representation and warranty regarding the know-how" (defined in § 1.1(i) to include "design") was that Rohr "has the right to use such" [§ 4.1(h) [FN5]]; and (vii) Rohr disclaims "any warranty, guarantee or liability expressed by law or otherwise, specifically including a disclaimer of the implied warranties of title, merchantability and fitness for intended use" [§ 2.1(b) [FN6]].

FN2. Section 4.3(b) provides in pertinent part: [T]he parties have agreed that except for the warranties and representations set forth in this Agreement and said Exhibits and Schedules, no other statement, warranty, representation or information, verbal or written, shall be legally binding upon any party or shall be the basis for reliance by the other party. Not by way of limitation of the foregoing, Seller specifically disclaims any representation or warranty regarding the marketability of its Model 870 bus or that it will be salable for any specified length of time (Buyer understanding that the position of the U.S. Department of Transportation is that a new group of specifications for its Transbus will be required for all buses let for bid after September 30, 1979, and Buyer further recognizing that, due to the unknown nature of future specifications of the Transbus, the Model 870 may or may not be adaptable to meet Transbus specifications), or regarding the level of profitability of the current model bus or predicting profitability for its Model 870 bus (including Bids therefore already made or Customer Contracts already made) or the current model bus, it being further understood that in the introduction of any new product, and in particular in the case of the

utilization of the Model 870 new manufacturing techniques, that predictions of profitability and manufacturing and mass production efficiency are uncertain. Buyer recognizes that work on the Construction in Progress and on the Model 870 Tooling is behind schedule, that Seller's existing prototype Model 870 buses (which are being transferred hereunder) have been manufactured 'by hand' rather than by use of Model 870 Tooling, and that neither the Construction in Progress nor the Model 870 manufacturing techniques have yet been tested by Seller, and accordingly, no representations and warranties concerning such have been or are hereby made, implied or given. There are no other warranties or representations, oral or written, except as set forth in this Agreement or the Exhibits and Schedules hereto. Buyer is experienced in the bus manufacturing business generally and the regulations and requirements of the Department of Transportation and the Urban Mass Transit Authority ("UMTA"), and with the use of aluminum manufacturing specifically, and has made a lengthy, detailed and independent investigation regarding the Properties, Assets and Business generally regarding Seller's Model 870 bus design and specifications, specifically, including the use not only of Buyer's managerial, manufacturing and quality assurance representatives, but also numerous persons in the accounting, legal and tax professions.

FN3. Section 3.4(b) of the Agreement provides as follows: [Seller shall] continue to afford Buyer, its representatives, agents and employees, at all reasonable times and in a manner and under circumstances which will not cause unreasonable interference with the operation of Seller's business, access to, and facilities to use in connection with such access to, all of the Properties, Assets and Business and all of Seller's books, files, records, tax returns, summary written descriptions of Seller's insurance policies, and other corporate books and records relating thereto, for the purpose of audit inspection examination and copying thereof, and will do everything reasonably necessary to enable Buyer to make a complete examination of the assets and properties of Seller and the condition thereof and to obtain risk analysis information and other insurance underwriting data necessary to protect the Bus Business after the Closing date.

FN4. Section 6.11 provides as follows: This Agreement and the Schedule and Exhibits thereto,

together with all documents concurrently executed or effective, constitute the entire understanding between the parties hereto, with respect to their subject matter, and supersede all prior negotiations and agreements. Neither party is relying upon any warranty or representation of the other not fully set forth herein. No party hereto shall be bound by any communications between them on the subject matter hereof unless such are in writing and bear a date contemporaneous with or subsequent to the date hereof and are executed in accordance with the provisions of this Agreement.

FN5. Section 4.1(h) provides in pertinent part: As the sole representation and warranty in this Agreement regarding the Know-how [defined in Exhibit A to include, among other things, 'all engineering, technical data ... relating to the Bus Business, including designs'], to the best of Seller's knowledge it has the right to use such, unrestricted by any person whose rights would materially and adversely affect the Properties, Assets and Business.

FN6. Section 2.1(b) provides as follows: Buyer accepts the Properties, Assets and Business as is, where is, whether at the Plants, at various job sites, or at vendors' suppliers', subcontractors', or consignees' places of business as of the Closing Date without warranty as to their condition, fitness, sufficiency for intended use, or compliance with applicable laws or regulations, including without limitation the Occupational Safety and Health Act of 1970, as amended ("OSHA"), or similar state and local laws or regulations, except for any matter which as of the Closing Date was the subject of Pending Litigation shown at Schedule 11, and Seller also disclaims (except as specifically provided in this agreement) any warranty, guarantee or liability expressed by law or otherwise, specifically including a disclaimer of the implied warranties of title, merchantability and fitness for intended use, and Buyer assumes liability for all compliance by the Properties, Assets and Business with all state, federal and local laws, ordinances, regulations and orders, including but not limited to those related to environment, safety (specifically including OSHA), equal opportunity, labor matters, and land use, and Buyer agrees to hold Seller harmless from any Claims and Fees in connection therewith, whether or not any noncompliance or alleged noncompliance occurred before or after the Closing Date.

***733 Post-Acquisition Activities**

At the time the sale was closed on January 3, 1978, the endurance testing of the Model 870 remained incomplete, and records accurately disclosing the defects that surfaced during testing were turned over to Grumman. The endurance testing of Proto II was completed under the auspices of Grumman in April of 1978.

Upon completion of the testing, the Chief Engineer of Grumman, Edward Kravitz, apprised Somerville of the A-frame's failure during the endurance runs. Somerville did nothing. Indeed, between April 1978 and November 1980, he authorized the manufacture and sale of the Model 870 without any additional testing. After more than 2,600 Model 870 buses were produced and sold to transit agencies throughout the United States, a widely publicized A-frame [FN7] failure occurred in New York City in December 1980, necessitating the Model 870's removal from service.

FN7. The A-frame is a component of the rear suspension understructure.

The District Court Proceedings

On April 19, 1983--more than two years after the New York A-frame failure, Grumman brought suit against Rohr in the United States District Court for the Eastern District of New York, alleging Rohr had misrepresented and failed to disclose material facts relating to the testing of the Model 870's design. In support of these claims, Grumman cited representations made in the soundtrack of the marketing film and in the preliminary prospectus prepared by White Weld & Co., as well as oral statements made by certain flexible personnel. Grumman's complaint sought \$250 million in compensatory damages, and \$250 million in punitive damages.

On December 2, 1983, Rohr moved for summary judgment, asserting that Grumman contractually disclaimed reliance on Rohr's alleged misrepresentations, that Grumman enjoyed access to all relevant information

relating to the Model 870's testing (vitiating its claim of justifiable reliance) and that Rohr's relationship with Grumman did not trigger a duty to disclose any facts not covered by the express terms of the agreement or already known by or available to Grumman. On April 4, 1984, Judge Mishler granted Rohr's summary judgment motion. The judge concluded that given undisputed facts establishing Grumman's pre-acquisition investigatory activities, Grumman's expertise and sophistication, the accessibility of Rohr's plants, personnel and records, the arm's-length nature of the negotiations, and the plain language of the Agreement, Grumman's reliance on Rohr's alleged misrepresentations was unjustifiable as a matter of law. In addition, Judge Mishler concluded that Rohr owed Grumman no duty of disclosure upon which Grumman could premise a claim of fraud by omission.

II.

Essential to understanding the propriety of the district court's grant of summary judgment is an appreciation of the limited function of the judiciary in interposing its will into the private contractual realm. Much has been written about the tension between classical and modern norms of contract interpretation. [FN8] Adherents of the *734 classical approach, animated by a belief that a contractual agreement manifests the intent of the parties in a completely integrated form, favor the construction of contracts by reference to the explicit textual language. Modern or "neo-classical" interpretation, on the other hand, seems to derive from the premise that a contextual inquiry is a necessary and proper prerequisite to an understanding of the parties' intent. Although this battle has been waged in legal journals and courts for decades, we need not enter the fray. Both schools of thought agree that a contextual inquiry is not necessary to determine the meaning of a term where that term is clear on the face of the contract. [FN9] By giving effect to explicit contractual terms, a court has a better chance to carry out the intentions of the parties. Particularly where the two sides are sophisticated, their allocation of risk and

potential benefit is properly treated as supreme to any conflicting understanding we may have. We believe there exists a point at which clear contractual language must be read to control a dispute. [FN10] And we deem the language of this Agreement to be suitably unambiguous.

FN8. See Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 *Nw.U.L.Rev.* 854 (1978); Farnsworth, "Meaning" in the *Law of Contracts*, 76 *Yale L.J.* 939, 946-47 (1967).

FN9. Although neoclassical partisans would suggest that such an inquiry is necessary even to settle the question whether the terms are clear in the first instance, we do not agree.

FN10. We note that the judiciary's function in interpreting contracts differs markedly from its role in construing statutes. Unlike contracts, statutes are formulated by collective political bodies, not individual parties. Moreover, they are generally crafted broadly to encompass as many variegated factual situations as possible. Consequently, statutory provisions are often detached from the facts of a particular case and provide courts with minimal assistance in resolving the dispute. Judicial explication is not only proper in such circumstances, it is mandated.

Mindful of these precepts, we turn to Grumman's contention that its misrepresentation claim is not barred despite its specific disclaimers of reliance on Rohr's representations concerning the testing of the Model 870. We believe such an assertion ignores basic contractual principles, as well as the controlling decisional law.

In *Danann Realty Corp. v. Harris*, 5 N.Y.2d 317, 184 N.Y.S.2d 599, 157 N.E.2d 597 (1959), the New York Court of Appeals [FN11] held that where a party specifically disclaims reliance upon a representation in a contract, that party cannot, in a subsequent action for fraud, assert it was fraudulently induced to enter into the contract by the very representation it has disclaimed. In *Danann*, a buyer of a lease to a building claimed he had

been fraudulently induced to make the purchase by false oral representations as to the "operating expenses of the building and as to the profits to be derived from the investment." 5 N.Y.2d at 319, 184 N.Y.S.2d at 601, 157 N.E.2d at 598. In their contract, however, the parties agreed as follows:

FN11. Section 6.5 of the Agreement provides that it "shall be construed and interpreted according to the law of the State of New York."

"The Purchaser has examined the premises agreed to be sold and is familiar with the physical condition thereof. The Seller has not made and does not make any representations as to the physical condition, rents, leases, expenses, operation or any other matter or thing affecting or related to the aforesaid premises, except as herein specifically set forth, and the Purchaser hereby expressly acknowledges that no such representations have been made, and the Purchaser further acknowledges that it has inspected the premises and agrees to take the premises "as is".... It is understood and agreed that all understandings and agreements heretofore had between the parties hereto are merged in this contract, which alone fully and completely expresses their agreement, and that the same is entered into after full investigation, neither party relying upon any statement or representation, not embodied in this contract, made by the other. The Purchaser has inspected the buildings standing on said premises and is thoroughly acquainted with their condition." (Emphasis supplied by Court.)

*735 5 N.Y.2d at 320, 184 N.Y.S.2d at 601, 157 N.E.2d at 598. The seller of the lease moved to dismiss the purchaser's action for fraudulent misrepresentation based on the terms of the Agreement. The Court of Appeals granted the motion and dismissed the buyer's complaint, noting the issue was "whether the plaintiff [buyer] can possibly establish ... reliance upon the misrepresentations." 5 N.Y.2d at 319, 184 N.Y.S.2d at 601, 157 N.E.2d at 598. By reference to the contractual provisions, the Court concluded that:

[P]laintiff has in the plainest language announced and stipulated that it is not relying on any representations as to the very matter as to which it now claims it was defrauded. Such a specific disclaimer destroys the allegations in plaintiff's complaint that the agreement was executed in reliance upon these contrary oral representations"

Id. at 320-21, 184 N.Y.S.2d at 602, 157 N.E.2d at 599. Pointedly, the Court announced: "If the plaintiff has made a bad bargain he cannot avoid it in this manner." Id. at 323, 184 N.Y.S.2d at 604, 157 N.E.2d at 600. Danann therefore stands for the principle that where the parties to an agreement have expressly allocated risks, the judiciary shall not intrude into their contractual relationship. [FN12] Animated by principles of traditional contract interpretation, the rule of Danann has exhibited great resilience in the face of efforts to delimit its expanse. The instant dispute concerns Grumman's multi-faceted attempt to circumvent the Danann doctrine. As we will explain, however, its efforts at semantical legerdemain are unavailing.

FN12. The rule of Danann has been cited with approval by both Williston and Corbin. See 5 S. Williston, A Treatise on The Law of Contracts § 811 at 893 (3d ed. 1961); 6 Id. § 873 at 337; 13 Id. § 1540 at 62-63 ("where the written agreement stated that no representations not contained in the contract had been made and that the party had conducted his own investigation, he was precluded from alleging and proving the falsity of certain representations included therein"); 3 A. Corbin, Contracts § 578 at 404 (2d ed. 1960).

A.

[1] Grumman asserts that the relevant disclaimer provisions in the Agreement lack the clarity and specificity necessary to trigger the rule of Danann. To support this claim, Grumman cites the following two representations: "the Model 870 had been thoroughly tested for 10,000 miles on an endurance test track at Riverside, California" and "the technological risks associated with the Model 870 were minimal." The latter representation addresses the efficacy of the

Model 870's design, and any reliance on the design was explicitly disclaimed in Sections 1.1(i), 2.1(b) and 4.3(b) of the Agreement. Grumman's claim of reliance on the former representation is somewhat more problematic, insofar as reliance on the Model 870's testing was not expressly disclaimed by Grumman in the Agreement. Upon closer examination, however, we believe it is clear that the testing representation could have been material to Grumman only as a means of validating the design of the bus. Indeed, Grumman's President noted that the purpose of "testing is to find out the efficacy of your design in order to have some--a feeling of security that the design will indeed meet the requirements."

For Grumman's argument to be persuasive, then, Danann must be read to require the existence of a precise identity between the misrepresentation and the particular disclaimer. Neither Danann nor its progeny supports such a reading, however. Indeed, quite the opposite conclusion is gleaned from the case law. The Danann rule operates where the substance of the disclaimer provisions tracks the substance of the alleged misrepresentations, notwithstanding semantical discrepancies. That these principles continue to retain their vibrancy was made clear last year in Galvatron Industries Corp. v. Greenberg, 96 A.D.2d 881, 466 N.Y.S.2d 35 (2d Dept.1983). There, the court held that Danann precludes reliance where a party acknowledged " 'full familiarity with the financial condition ... of the Corporation' and disclaimed 'reliance on any representations *736 ... made by any other party hereto.' " Id. A similar conclusion was reached in Barnes v. Gould, 83 A.D.2d 900, 442 N.Y.S.2d 150 (2d Dept.1981), aff'd, 55 N.Y.2d 943, 449 N.Y.S.2d 192, 434 N.E.2d 261 (1982), where the court found a disclaimer of reliance upon representations as to the "physical condition" of a business premises to be sufficiently specific to bar plaintiff's action for fraud regarding the repair of a boiler. Mindful of the principles enunciated in the cases cited above, we believe, as a matter of law, that the disclaimer provisions in the Agreement relating to design and testing are sufficiently specific and unambiguous to

invoke the Danann rule.

B.

In addition, Grumman asserts that Danann is inapposite in light of Section 2.3(d) of the Agreement, which reserves Grumman's right to seek rescission of the contract on the basis of a knowing and intentional "false representation by the Seller which was material to the determination of Buyer to consummate the transaction herein." Upon closer examination, Grumman's argument can be bifurcated. Grumman claims that the Agreement's disclaimer language (set forth in Sections 2.1(b), 4.3(b) and 6.11), when viewed in conjunction with Section 2.3(d), becomes ambiguous and lacks the requisite clarity to trigger the Danann rule. Furthermore, Grumman argues that Section 2.3(d) removes this case entirely from the ambit of the Danann doctrine because Grumman has not disclaimed all reliance on Rohr's representations, but rather has expressly reserved the right to bring an action for fraudulent misrepresentation.

The fallacy of both arguments is revealed by reference to fundamental principals of contract interpretation. Grumman's construction of Section 2.3(d) is expressly at odds with the unambiguous terms of Sections 2.1(b) and 4.3(b), as well as Section 6.11, which provides that "neither party is relying upon warranties or representations of the other not fully set forth herein." Moreover, Section 2.3(d) refers to false representations within the Agreement. Nowhere in Section 4.1, which defines "Representations of the Seller," can the material representations alleged by Grumman be found. Grumman's interpretation of Section 2.3(d) would nullify not only the effect of the disclaimer provisions, but also vitiate the clear language of Section 6.11. The principle that "contracts must be viewed so that its terms may have effect rather than be destroyed" militates against such a construction. See *Zdanok v. Glidden Co.*, 288 F.2d 99, 104 (2d Cir.1961), *aff'd*, 370 U.S. 530, 82 S.Ct. 1459, 8 L.Ed.2d 671 (1962); *Corhill Corp. v. S.D. Plants, Inc.*, 9 N.Y.2d 595, 598-99, 217 N.Y.S.2d 1, 3, 176 N.E.2d 37, 38

(1961); Restatement (Second) of Contracts, § 203 comment b (1981). In effect, Grumman would have us ignore this most venerable of contract norms. This we are not prepared to do.

C.

Furthermore, Grumman attempts to carve out a limited exception to the Danann rule in instances where the disclaimer provisions were induced by fraud. In framing this argument, Grumman claims that Rohr officials explicitly assured the members of the Grumman negotiating team that the disclaimer language of Section 4.3(b) did not encompass the design and testing of the Model 870. Grumman alleges that its acceptance of this provision was secured only by Rohr's fraudulent assurance. We believe such an argument must fail as a matter of law.

The genesis of the "procured by fraud" exception may be found in the following passage from Danann:

"The complaint here contains no allegations that the contract was not read by the purchaser. We can fairly conclude that plaintiff's officers read and understood the contract, and that they were aware of the provision by which they aver that plaintiff did not rely on such extra-contractual representations. It is not alleged that this provision was not understood, or that the provision itself *737 was procured by fraud. It would be unrealistic to ascribe to plaintiff's officers such incompetence that they did not understand what they read and signed. Cf. *Ernst Iron Works v. Duralith Corp.*, 270 N.Y. 165, 171, 200 N.E. 683, 685 ... [T]he larger implication of the Ernst case is that, where a person has read and understood the disclaimer of representation clause, he is bound by it. The court rejected, as a matter of law, the allegation of plaintiffs' 'that they relied upon an oral statement made to them in direct contradiction of this provision of the contract.' "

5 N.Y.2d at 321-22, 184 N.Y.S.2d at 602, 157 N.E.2d at 599. In light of the foregoing, we construe the "procured by fraud" language to

refer only to a situation where the party against which the disclaimer is asserted is entirely unaware of the existence of the disclaimer--for example, where the disclaimer is inserted surreptitiously into the final draft of the contract. Nothing in the cases cited by Grumman suggests a contrary reading. See *Cohen v. Tenney Corp.*, 318 F.Supp. 280 (S.D.N.Y.1970); *Goostree v. P. Lorillard Co.*, 26 Misc.2d 109, 202 N.Y.S.2d 456 (N.Y.Cnty.1960). Grumman has offered no evidence that it was unaware of the disclaimer's existence. Accordingly, the "procured by fraud" exception is inapplicable as a matter of law, and we are impelled to the conclusion that this case is controlled squarely by *Danann*.

III.

[2] The second pillar of Grumman's argument is that the district court erred in holding that Grumman could not claim reliance on Rohr's representations concerning the testing and design of the Model 870. We believe Grumman's claim of justifiable reliance was properly rejected by the district court in light of undisputed evidence demonstrating that Grumman enjoyed unfettered access to Flxible's plants, personnel and documents; and that it possessed the legal, technical and business expertise necessary to make effective use of that access.

The Supreme Court has stated:

When the means of knowledge are open and at hand, or furnished to the purchaser or his agent, and no effort is made to prevent the party from using them, and especially where the purchaser undertakes examination for himself, he will not be heard to say that he has been deceived to his injury by the misrepresentations of the vendor.

See *Shappirio v. Goldberg*, 192 U.S. 232, 241-42, 24 S.Ct. 259, 261, 48 L.Ed. 419 (1904). [FN13] The principle that access bars claims of reliance on misrepresentations has been expressly recognized by this Court, see *Aaron Ferer & Sons, Ltd. v. Chase Manhattan Bank, N.A.*, 731 F.2d 112, 123 (2d Cir.1984); *Frigitemp Corp. v. Financial Dynamics Fund, Inc.*, 524 F.2d 275, 282 (2d Cir.1975), and New

York State courts, see *Most v. Monti*, 91 A.D.2d 606, 456 N.Y.S.2d 427, 428 (2d Dept.1983); *Danann*, supra, 5 N.Y.2d at 322, 184 N.Y.S.2d at 603, 157 N.E.2d at 599; *Marine Midland Bank v. Palm Beach Moorings, Inc.*, 61 A.D.2d 927, 928, 403 N.Y.S.2d 15, 17 (1st Dept.1978).

FN13. The New York Court of Appeals reiterated this principle in *Danann*: [I]f the facts represented are not matters peculiarly within the party's knowledge, and the other party has the means available to him of knowing, by the exercise of ordinary intelligence, the truth, or the real quality of the subject of the representation, he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentation. 5 N.Y.2d at 322, 184 N.Y.S.2d at 603, 157 N.E.2d at 600.

Where sophisticated businessmen engaged in major transactions enjoy access to critical information but fail to take advantage of that access, New York courts are particularly disinclined to entertain claims of justifiable reliance. In *Palm Beach Moorings*, for example, the court, in granting a motion for summary judgment, rejected a claim of justifiable reliance, noting that to rule otherwise would require a finding that "an experienced businessman, assuming *738 a controlling interest in a corporation and incurring heavy financial obligations, did so on the basis of verbal assurances given to him by the seller and a bank official." See *Palm Beach Moorings*, supra, 403 N.Y.S.2d at 17. This the court was not prepared to do, particularly given its finding of undisputed access to the corporate records necessary to confirm or disprove the substance of the verbal assurances. See also *Most v. Monti*, supra, (summary judgment proper where an experienced businessman claimed he justifiably relied on a mere verbal assurance, prompting him to incur a substantial financial obligation).

Grumman--the allegedly defrauded plaintiff--is a Fortune 500 company, renowned worldwide for its engineering expertise. The transaction at issue is a \$55 million corporate acquisition. At all stages, Grumman was

represented by a sophisticated group of counsel, executives and engineers. Grumman enjoyed unrestricted access to all the facilities, personnel and records of Rohr, and despite its knowledge that the Model 870 was undergoing endurance testing in late 1977, Grumman neither inquired into the results of that testing, nor asked to scrutinize testing reports. In light of the unambiguous case law and the undisputed facts, we agree with Judge Mishler that Grumman did not rely solely upon Rohr's representations as to the design and testing of the Model 870. If it did, such reliance was plainly unjustifiable given its extensive inquiries and investigations.

To preserve its claim of justifiable reliance, Grumman contends that its duty to investigate hinges on whether the information required to confirm or disprove the validity of the design and testing representations was peculiarly within Rohr's knowledge. In support of this assertion, Grumman cites *Mallis v. Bankers Trust Co.*, 615 F.2d 68 (2d Cir.1980), cert. denied, 449 U.S. 1123, 101 S.Ct. 938, 67 L.Ed.2d 109 (1981) and *Tahini Investments, Ltd. v. Bobrowsky*, 99 A.D.2d 489, 470 N.Y.S.2d 431 (2d Dept.1984). We find these cases, however, to be inapposite. In *Mallis*, a bank that was holding securities as collateral did not inform the purchaser of these securities—even upon direct inquiry—of restrictions on their transfer. See *Mallis*, supra, 615 F.2d at 73. In *Tahini*, the purchaser of a 93-acre horse farm failed to discover—despite an inspection of the farm—ten drums of buried chemicals. 99 A.D.2d at 490, 470 N.Y.S.2d at 432. Unlike the case before us, [FN14] in *Mallis* and *Tahini*, the allegedly undisclosed information was only known by—and indeed only available to—the defendants, and incapable of discovery by the plaintiff, no matter how diligent its investigation.

FN14. The district court expressly found that "Grumman's experienced lawyers, engineers and negotiators had full and fair opportunity to investigate [and discover] the matters concerning the design of the understructure of the Model 870, the testing methods and the defects revealed through testing."

Accordingly, Grumman's right to unrestricted access and its failure to inquire preclude, as a matter of law, its claim of reliance on Rohr's alleged misrepresentations.

IV.

The final prong of Grumman's argument is that the district court erred in holding that Rohr had no duty to disclose to Grumman material facts regarding the testing of the Model 870. We find this argument to be unavailing for all the reasons proffered in Sections II and III of our opinion, because the alleged material omissions are nothing more than affirmative misrepresentations about the testing and design of the Model 870. As such, they are subject to the Agreement's plain disclaimers as well as Grumman's unrestricted access and concomitant duty to investigate.

Moreover, this Court has expressly held that, under New York law, a duty to disclose material facts is triggered: "first, *739 where the parties enjoy a fiduciary relationship ... and second, where one party possesses superior knowledge, not readily available to the other, and knows that the other is acting on the basis of mistaken knowledge." *Aaron Ferer & Sons, Ltd.*, supra, 731 F.2d at 123; see also *Frigitemp Corp. v. Financial Dynamics Fund*, supra, 524 F.2d at 283. We hold that neither condition is present in this action. Grumman's attempt to transmute its ordinary arms-length business relationship with Rohr into a fiduciary relationship is unpersuasive. The fact that Rohr has sold aircraft components to a subsidiary of Grumman in no way alters our conclusion. Grumman has completely failed to offer any evidence indicating that the parties placed sufficient trust and confidence in each other to trigger a duty of disclosure. See *Aaron Ferer & Sons, Ltd.*, supra, 731 F.2d at 122 (close debtor-creditor relationship does not establish a fiduciary duty); *Frigitemp Corp.*, supra, 524 F.2d at 279. Indeed, throughout the course of this transaction, Grumman's representatives confirmed that they were relying upon the advice and counsel of their own engineers, lawyers, and executives to protect Grumman's

best interests--not upon a special relationship with Rohr.

As this Court concluded in *Aaron Ferer & Sons, Ltd.*, supra, 731 F.2d at 123, a party's knowledge is not superior where the relevant information "was either a matter of public record, was not pursued by plaintiffs, or was disclosed at least in part" In light of the undisputed evidence establishing Grumman's unrestricted access to Flxible's facilities, personnel and records, as well as Grumman's arsenal of legal and technical talent, we find the claim that Rohr possessed superior knowledge (that was not readily available to Grumman) to be without merit.

V.

It is against this legal backdrop that we turn to the precise issue presented on appeal--the propriety of the district court's grant of summary judgment. On a motion for summary judgment, we are mindful of the maxim "the court cannot try issues of fact; it can only determine whether there are issues to be tried." *Heyman v. Commerce and Industry Ins. Co.*, 524 F.2d 1317, 1319-20 (2d Cir.1975). Moreover, the court must resolve all ambiguities and draw all reasonable inferences in favor of the party against whom summary judgment is sought, see *id.* at 1320, with the burden on the moving party to demonstrate the absence of any material issue genuinely in dispute, see *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 1608, 26 L.Ed.2d 142 (1970). Summary judgment is appropriate where the factual predicates of each legal question are undisputed.

The issue whether, under the rule of *Danann*, the specific disclaimers in the Agreement precluded Grumman from asserting it had been defrauded by Rohr is a legal question that can be resolved by reference to settled principles of contract interpretation. See *Tokio Marine & Fire Ins. Co. v. McDonnell Douglas Corp.*, 617 F.2d 936, 940 (2d Cir.1980). Once Rohr set forth facts sufficient, pursuant to Fed.R.Civ.P. 56(c), [FN15] to make a prima facie showing that the

rule of *Danann* was applicable, Fed.R.Civ.P. 56(e) [FN16] required Grumman *740 to offer specific facts demonstrating the disclaimers were procured by fraud. We agree with the district court that "[n]o evidence of fraud in the inducement was offered by Grumman."

FN15. Rule 56(c) states, in pertinent part: The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

FN16. Rule 56(e) states, in pertinent part: When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

By proffering evidence demonstrating that Grumman enjoyed access to Flxible's facilities, personnel and documents and proof that Grumman possessed the legal, technical and business expertise necessary to make effective use of that access, Rohr met its Rule 56(c) burden of establishing no genuine issues of material fact. The burden then shifted to Grumman to set forth specific facts raising triable issues. We agree with Judge Mishler that Grumman's conclusory statement that "Rohr controlled the flow of information between [itself] and Grumman," absent any factual support, was insufficient to satisfy this burden.

Our conclusion that the district court properly granted summary judgment is bolstered by Grumman's extensive and intensive discovery, spanning a number of years and yielding tens of thousands of pages of corporate documents. As such, the factual development necessary to the principled resolution of this complex dispute was not terminated prematurely. We are confident that summary judgment was appropriately

granted in this case.

Accordingly, the judgment of the district court is affirmed.

Briefs and Other Related Documents (Back to Top)

GRUMMAN ALLIED INDUSTRIES, INC. and Grumman Corporation, Plaintiff-Appellants, v. ROHR INDUSTRIES, INC., Defendant-Appellee., 1984 WL 566307 (Appellate Brief) (C.A.2 June 11, 1984), Brief of Plaintiff-Appellants Grumman Allied Industries, Inc. and Grumman Corporation

GRUMMAN ALLIED INDUSTRIES, INC. and Grumman Corporation, Plaintiff-Appellants, v. ROHR INDUSTRIES, INC., Defendant-Appellee., 1984 WL 566308 (Appellate Brief) (C.A.2 July 9, 1984), Brief of Defendant-Appellee Rohr Industries, Inc.

GRUMMAN ALLIED INDUSTRIES, INC. and Grumman Corporation, Plaintiff-Appellants, v. ROHR INDUSTRIES, INC., Defendant-Appellee., 1984 WL 566309 (Appellate Brief) (C.A.2 July 23, 1984), Reply Brief of Plaintiff-Appellants Grumman Allied Industries, Inc. and Grumman Corporation

GRUMMAN ALLIED INDUSTRIES, INC. and Grumman Corporation, Plaintiff-Appellants, v. ROHR INDUSTRIES, INC., Defendant-Appellee., 1984 WL 566310 (Appellate Brief) (C.A.2 November 15, 1984), Plaintiff-Appellants' Petition for Rehearing and Suggestion for Rehearing in Banc

748 F.2d 729

END OF DOCUMENT

41

United States Court of Appeals,
Second Circuit.

HARSCO CORPORATION, Plaintiff-
Appellant,

v.

Rene SEGUI, Defendant,
MHC Holding Corp.; Dyson-Kissner-Moran
Corp.; DKM-MLP Limited Partnership and
Adler & Shaykin Fund II, L.P., Defendants-
Appellees.

No. 1073, Docket 95-7929.

Argued March 25, 1996.
Decided Aug. 1, 1996.

Buyer of company sued various former officers and owners of the purchased company, alleging securities fraud, common-law fraud, breach of contract, and other claims. The United States District Court for the Southern District of New York, Lawrence M. McKenna, J., dismissed complaint for failure to state a claim, and buyer appealed. The Court of Appeals, Parker, Circuit Judge, held that: (1) disclaimer in purchase agreement precluded federal securities claims; (2) disclaimer precluded state law fraud and negligent misrepresentation claims; (3) district court should have declined jurisdiction over state law claims for breach of contract and indemnification; and (4) district court acted within its discretion in dismissing claims for breach of fiduciary duty.

Affirmed.

West Headnotes

[1] Federal Courts 763.1
170Bk763.1

[1] Federal Courts 794
170Bk794

On appeal from dismissal for failure to state a claim, Court of Appeals reviews only adequacy of complaint, assuming truth of plaintiff's factual allegations. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[2] Federal Courts 776
170Bk776

Dismissal of complaint for failure to state a claim is reviewed de novo. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[3] Federal Civil Procedure 1773
170Ak1773

Dismissal for failure to state a claim is only proper when it appears beyond doubt that there are no set of facts in support of plaintiff's claim which would entitle plaintiff to relief. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[4] Federal Courts 794
170Bk794

In reviewing dismissal of complaint for failure to state a claim, complaint is to be construed in light most favorable to plaintiff. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[5] Federal Courts 794
170Bk794

In reviewing dismissal of complaint for failure to state a claim, appellate court must accept as true all factual allegations in complaint. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[6] Securities Regulation 60.48(1)
349Bk60.48(1)

Generally, reasonable reliance must be proved as element of securities fraud claim. Securities Exchange Act of 1934, § 10(b), as amended, 15 U.C.S.A. § 78j(b); 17 C.F.R. § 240.10b-5.

[7] Fraud 20
184k20

Reasonable reliance must be proved under New York law to recover for fraud and negligent misrepresentation.

[8] Securities Regulation 35.24
349Bk35.24

Stipulation that waives compliance with duty under Securities Exchange Act is void, whether voluntary or not. Securities Exchange Act of 1934, § 29(a), as amended, 15 U.S.C.A. § 78cc(a).

[9] Securities Regulation 35.24
349Bk35.24

Provision of agreement for purchase of company, whereby sellers disclaimed representations that were not in the agreement, and merger clause of agreement precluded buyer from establishing reasonable reliance required for securities fraud claim based on representations outside that contract, where parties were sophisticated business entities negotiating at arm's length, and buyer further protected itself by negotiating for two weeks of confirmatory due diligence; contract clearly delineated what representations had been made. Securities Exchange Act of 1934, § 29(a), as amended, 15 U.S.C.A. § 78cc(a).

[10] Fraud 20
184k20

Under New York law, where party specifically disclaims reliance upon particular representation in contract, that party cannot, in subsequent action for common-law fraud, claim it was fraudulently induced to enter into the contract by the very representation it has disclaimed reliance upon.

[11] Fraud 36
184k36

Alleged representations by seller of company that "plants in Italy, Germany, the United Kingdom, France and Austria would experience a financial turnaround in 1993," that company "would place new emphasis on developing its core steel business" and "phase out" other businesses, that company "expected growth in new areas of the world," and that plants in China and Slovakia "would be fully operational in 1993 with no significant start up problems" were "projections of ... future business and operations" within meaning of provision of purchase agreement disclaiming representations not made in the agreement, precluding claims under New York law of fraud and negligent misrepresentation.

[12] Fraud 13(2)
184k13(2)

Under New York law, fraud liability may attach when person states that something was to be done when he knows all the time it was

not to be done and that his representations were false.

[13] Fraud 20
184k20

Under New York law, claim that seller of company knew that Russian Plant was not going to get built and represented otherwise was barred by provision of purchase agreement whereby seller disclaimed representations that were not in the agreement; disclaimer put buyer on sufficient notice that representations regarding the Russian Plant could not reasonably be relied on.

[14] Fraud 36
184k36

Under New York law, claim that sellers of company failed to disclose their knowledge of misconduct by president of company's French subsidiary was barred by provision of purchase agreement whereby seller disclaimed representations that were not in the agreement.

[15] Fraud 36
184k36

Under New York law, claim that sellers of company misrepresented that company owned intellectual property rights in certain technology was barred by provision of purchase agreement whereby seller disclaimed representations that were not in the agreement.

[16] Fraud 36
184k36

Under New York law, claim that sellers of company misrepresented that company would acquire Belgium plant by certain date was barred by provision of purchase agreement whereby seller disclaimed representations that were not in the agreement.

[17] Federal Civil Procedure 636
170Ak636

Complaint did not explain why representation that company's internal auditor was unavailable was fraudulent, as required to plead such claim with requisite particularity. Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.

[18] Contracts 332(2)
95k332(2)

To state claim for breach of contract under New York law, complaint need only allege existence of agreement, adequate performance of contract by plaintiff, breach of contract by defendant, and damages.

[19] Federal Courts 18
170Bk18

Having properly dismissed federal securities laws claims prior to any responsive pleadings, district court should have declined jurisdiction over state law claims for breach of contract and indemnification.

[20] Federal Courts 18
170Bk18

District court acted well within its discretion when, after dismissing federal claims, it also chose to dismiss claims for breach of fiduciary duty.

***339** James J. Hagan, New York City (Joseph M. McLaughlin, Nancy L. Swift, Simpson Thacher & Bartlett, New York City, of counsel), for Plaintiff-Appellant.

Alvin B. Davis, Miami, FL (Jeffrey L. Kravetz, Steel Hector & Davis, Miami, FL, of counsel), for Defendants-Appellees MHC Holding Corp., Dyson-Kissner-Moran Corp. and DKM-MLP Limited Partnership.

Yosef J. Riemer, New York City (Aitken Thompson, Kirkland & Ellis, New York City, Darrell K. Fennell, Philip M. Chiappone, Fennell & Chiappone LLP, New York City, of counsel), for Defendant-Appellee Adler & Shaykin Fund II, L.P.

Before: NEWMAN, Chief Judge,
FEINBERG and PARKER, Circuit Judges.

PARKER, Circuit Judge.

The central issue in this case is whether parties who negotiate at arm's length for the sale and purchase of a company can define the transaction in a writing so as to preclude a claim of fraud based on representations not made, and explicitly disclaimed, in that

writing. The United States District Court for the Southern District of New York (Lawrence M. McKenna, Judge) answered this question affirmatively in dismissing plaintiff's complaint for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. We agree and affirm the dismissal of plaintiff's fraud claims. We also agree that plaintiff's other causes of action should be dismissed.

I. BACKGROUND

Plaintiff, the Harsco Corporation ("Harsco"), a Delaware corporation, sued various officers and shareholders of MultiServ, a Netherlands corporation which Harsco purchased. All of Harsco's claims arise out of its purchase of MultiServ.

Harsco's complaint contained eight counts. Count I charged all defendants with federal securities fraud under Rule 10b-5, 17 C.F.R. § 240.10b-5. Count II charged some defendants with breach of the written Purchase Agreement ("Agreement"). Count III sought indemnification from certain defendants stemming from the breach of contract claimed in count II. Count IV charged all defendants with common law fraud. Count V charged all defendants with common law negligent misrepresentation. Count VI charged two defendants with breach of fiduciary duty. And counts VII and VIII charged certain defendants under the theory of respondeat superior for the acts of other defendants.

The district court explained its dismissal of all counts in a Memorandum and Order dated April 4, 1995. The court dismissed the two fraud claims (counts I and IV) and the claim for negligent misrepresentation (count V), concluding from the complaint that Harsco would be unable to prove reasonable reliance--a required element of each claim. The court dismissed the breach of contract claim (count II), holding that the complaint failed to allege a breach of any specific representation. The indemnification claim (count III) was dismissed because it was contingent on the breach of contract claim. The court dismissed



the breach of fiduciary duty claim (count VI), declining to hear a case over which the court had only supplemental jurisdiction when all federal claims had already been dismissed. Lastly the court dismissed the respondeat superior claims (counts VII and VIII) because the dismissal of their underlying theories of liability eliminated the prospect of vicarious liability.

The district court's substantive analysis of the various common law claims assumed that New York law applies. That assumption is not contested by the parties.

*340 As discussed in greater detail below, the district court offered Harsco the opportunity to replead its theories of fraud and breach of contract in so far as those claims related to specific statements in the Agreement. Harsco declined the invitation to amend its complaint. Instead Harsco sought and received an order dismissing its case in order to take this appeal.

[1] Because this is an appeal from a Rule 12(b)(6) dismissal, we review only the adequacy of the complaint, assuming the truth of plaintiff's factual allegations. *Allen v. WestPoint-Pepperell, Inc.*, 945 F.2d 40, 44 (2d Cir.1991). Accordingly, the following factual summary is culled entirely from the complaint.

Harsco "engaged in domestic and international manufacturing and marketing of diverse goods and industrial services, principally for steel, industrial, commercial construction and infrastructure." ¶ 7. In early 1993, Harsco was interested in expanding its business internationally. ¶ 15. MultiServ's business, which was also connected to the steel industry, fit with Harsco's interest in international expansion. ¶ 15.

In April 1993, representatives of Harsco and MultiServ met to discuss the possibility of the purchase of MultiServ by Harsco. ¶ 17. One issue discussed during this meeting was a projection of future earnings contained in an offering memorandum, prepared by Morgan

Stanley & Co., an investment banking firm. ¶ 17. At this meeting MultiServ's representatives stated that these projections reflected conservative economic assumptions and accounted for the prospects of "questionable plants." ¶ 17. The offering memorandum prompted Harsco to continue negotiations. ¶ 18. As part of the negotiating process, Harsco representatives were given access to MultiServ's chief financial officer during three days in May 1993. During this period of "exploratory due diligence," Harsco made numerous inquiries into the affairs of MultiServ. However, some of the documents which Harsco asked to see were not provided by MultiServ. ¶¶ 17-18.

On July 8, 1993, Harsco and MultiServ entered into the written "Agreement." ¶ 20. Harsco attached the Agreement to the complaint. Thus the Agreement became part of the complaint pursuant to Rule 10(c) of the Federal Rules of Civil Procedure. The Agreement is a sixty-plus page, single-spaced document, consisting of seven "articles" which in turn consist of numerous subsections, a definitions Section, and other schedules and attachments.

The Agreement's second article details the "Representations and Warranties" of the parties involved in the transaction. The only portion of the Agreement's second article which the complaint cites is "Section 2.04." ¶¶ 33, 34, 102, 107, 108. Section 2.04 is fourteen pages, single spaced, and consists of seventeen subsections, which in turn consist of numerous sub-paragraphs. Section 2.04 constitutes the defendants' "Representations and Warranties." A partial list of the numerous topics relating to the representations contained in Section 2.04 includes the capitalization of MultiServ, MultiServ's financial statements, MultiServ's liabilities, the ownership and condition of MultiServ's assets, MultiServ's litigation exposure, taxes, contracts, and environmental matters. Significantly, Harsco's complaint nowhere draws the court's or the defendants' attention to any specific portion or passage of Section 2.04.

Pursuant to the Agreement, Harsco agreed to buy all of MultiServ's outstanding stock and some of MultiServ's subordinated debt. The Agreement made the purchase of MultiServ contingent on fourteen days of "confirmatory due diligence." ¶ 22. The fourteen days of confirmatory due diligence occurred from July 8 to July 23, 1993. Section 1.04 of the agreement explained the terms of the confirmatory due diligence. ¶ 26. Section 1.04, which consists of only two paragraphs, states that

purchaser and its accountants, consultants, and advisers shall be permitted ... to review the premises, facilities, books and records and Contracts of [MultiServ], and to conduct interviews with Senior MultiServ Officers ... regarding the business, *341 operations, financial condition and results of operations of [MultiServ], for the purpose of confirming the accuracy of the representations and warranties of the [sellers] contained in Article II hereof.

Section 1.04 also provided that Harsco's advisor, Coopers & Lybrand, would be allowed to review materials which MultiServ deemed confidential, such as pricing information, in order to determine MultiServ's overall profitability. However, Section 1.04 made clear that "Coopers & Lybrand shall not disclose any such [confidential] information to [Harsco]."

If Harsco learned that any of the seller's representations were not true during the fourteen days of confirmatory due diligence, then Harsco could terminate the deal. ¶ 25. Section 1.06(a) of the Purchase Agreement stated that if Harsco "determined, as a result of its Confirmatory Due Diligence, that the representations and warranties of the [Sellers] set forth in Article II hereof shall not have been, or shall not be, true and correct in all material respects ... then [Harsco] shall have the right to terminate" the sale during the fourteen days of confirmatory due diligence. Harsco did not terminate the deal, and the purchase closed on August 31, 1993. ¶ 28. The purchase required cash payments totalling \$216 million and the acquisition of roughly \$164 million in MultiServ debt. ¶ 29.

In a separate document, also dated July 8, Adrian Bowden, the CEO of MultiServ wrote a letter to Harsco stating that he was unaware of any significant problems facing MultiServ. [FN1] ¶ 24.

FN1. This letter, though cited to and described in the complaint, was not attached to the complaint. We may nonetheless review the letter in its entirety. *San Leandro Emergency Medical Group Profit Sharing Plan v. Philip Morris Cos., Inc.*, 75 F.3d 801, 808-09 (2d Cir.1996). Doing so reveals that this letter concluded with a postscript which alerted the reader that the letter was to be of no legal effect.

Harsco claims generally that "the representations and warranties made in Section 2.04 of the Agreement, and other representations made by [the sellers] contained misrepresentations and omissions of material facts." ¶ 34. Harsco alleges that because the purchase price was \$380 million less the amount of certain debt, including project finance debt, the seller had a motive to misrepresent the extent to which new projects were completed. ¶¶ 41-43. Against the background of this general allegation, Harsco tried to plead various discrete factual strains of fraud relating to, among other things, MultiServ's conduct during due diligence, the status of plant construction, the financial prospects for MultiServ operations, and the status of intellectual property rights. These factual theories of fraud are described in greater detail in part II.B.3. of this opinion.

II. DISCUSSION

A. Standard of Review

[2] We review Rule 12(b)(6) dismissals de novo.

[3][4][5] Dismissal under Rule 12(b)(6) is only proper when it appears beyond doubt that there are no set of facts in support of plaintiff's claim which would entitle plaintiff to relief. *Conley v. Gibson*, 355 U.S. 41, 46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957). "A complaint should not be dismissed simply because a plaintiff is unlikely to succeed on

the merits." *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974). In reviewing the dismissal of a complaint for 12(b)(6) insufficiency, the complaint is to be construed in the light most favorable to the plaintiff. 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1357 (1990). Furthermore, the appellate court "must accept as true all the factual allegations in the complaint." *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 164, 113 S.Ct. 1160, 1161, 122 L.Ed.2d 517 (1993).

B. Reasonableness of Reliance

As mentioned above, Count I of Harsco's complaint charged all defendants with violating *342 Sections 10(b) [FN2] and 20(a) [FN3] of the Securities Exchange Act, and with violating Rule 10b-5 [FN4] promulgated pursuant to § 10(b). Counts IV and V charged all defendants with common law fraud and negligent misrepresentation.

FN2. Section 10(b), 15 U.S.C. § 78j(b), states It shall be unlawful for any person, directly or indirectly ... [t]o use or employ, in connection with the purchase or sale of any security ... any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

FN3. Section 20(a) creates vicarious liability based on violations of § 10(b) and is not at issue independent of § 10(b).

FN4. Rule 10b-5, 17 C.F.R. § 240.10b-5, provides that, in connection with the sale of securities, it is unlawful for a person (a) To employ any device, scheme, or artifice to defraud, (b) To make any untrue statement of material fact or to omit to state a material fact necessary in order to make the statements made, in the light of circumstances under which they were made, not misleading, or (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person[.]

[6][7] The general rule is that reasonable

reliance must be proved as an element of a securities fraud claim. [FN5] See *Azrielli v. Cohen Law Offices*, 21 F.3d 512, 517 (2d Cir.1994) (Rule 10b-5 "makes unlawful any misrepresentation that would cause reasonable investors to rely thereon") (internal quotation marks omitted). See also *Paracor Finance, Inc. v. General Elec. Capital Corp.*, 79 F.3d 878, 886 (9th Cir.1996) ("Justifiable reliance is a limitation on a rule 10b-5 action which insures that there is a causal connection between the misrepresentation and the plaintiff's harm.") (internal quotation marks omitted); *Harrison v. Dean Witter Reynolds, Inc.*, 79 F.3d 609, 618 (7th Cir.1996) ("The fact of reliance ... is not enough by itself; that reliance must be justifiable, or reasonable."); *One-O-One Enter., Inc. v. Caruso*, 848 F.2d 1283, 1286 (D.C.Cir.1988) ("plaintiffs' allegations must indicate that their reliance on the allegedly fraudulent representations was reasonable") (citing *Kennedy v. Josephthal & Co.*, 814 F.2d 798, 804 (1st Cir.1987)). Reasonable reliance must also be proved under New York law to recover for fraud and negligent misrepresentation. See *Channel Master Corp. v. Aluminium Ltd. Sales, Inc.*, 4 N.Y.2d 403, 407, 176 N.Y.S.2d 259, 262, 151 N.E.2d 833 (1958) (fraud); *Heard v. City of New York*, 82 N.Y.2d 66, 75-76, 603 N.Y.S.2d 414, 419, 623 N.E.2d 541, 546 (1983) (negligent misrepresentation).

FN5. The exceptions to this rule relate to circumstances where there are unusual "problems of proof." *Feinman v. Dean Witter Reynolds*, 84 F.3d 539, 541-42 (2d Cir.1996) (discussing *Basic Inc. v. Levinson*, 485 U.S. 224, 108 S.Ct. 978, 99 L.Ed.2d 194 (1988), a class action in which the integrity of the market is alleged to have been compromised, and *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 92 S.Ct. 1456, 31 L.Ed.2d 741 (1972), where total non-disclosure of material information was alleged, as exceptions to the requirement to prove reliance).

The district court held that Sections 2.05 and 7.02 of the Agreement preclude Harsco from establishing reasonable reliance. Section 2.05 specifically disclaims representations that are not in the agreement.

It provides that the sellers shall not be deemed to have made to Purchaser any representation or warranty other than as expressly made by [the sellers] in Sections 2.01 through 2.04 hereof... Without limiting the generality of the foregoing, and notwithstanding any otherwise express representations and warranties made by the [sellers] in Sections 2.01 through 2.04 hereof ..., the [sellers] make no representation or warranty to Purchaser with respect to:

(a) any projections, estimates or budgets heretofore delivered to or made available to Purchaser of future revenues, expenses or expenditures, future results of operations, [etc.]; or

(b) any other information or documents made available to Purchaser or its counsel, accountants, or advisors with respect to [MultiServ], except as expressly covered by a representation and warranty *343 contained in Sections 2.01 through 2.04 hereof.

Section 7.02 is a merger clause, which states that the Agreement "contains the entire agreement between the parties hereto with respect to the transactions contemplated by this Agreement and supersedes all prior arrangements or understandings with respect thereto."

Harsco argues that Sections 2.05 and 7.02 should not be treated as a bar to establishing reasonable reliance for three reasons. First Harsco claims that giving Sections 2.05 and 7.02 such effect contravenes § 29(a) of the Securities Exchange Act of 1934. Second, Harsco argues that under *Turkish v. Kasenetz*, 27 F.3d 23 (2d Cir.1994), these Sections of the purchase agreement reflect an impermissible attempt to insulate the defendants from their own fraud. Third, Harsco argues that Sections 2.05 and 7.02 are not sufficiently specific to justify the district court's reliance on them. We reject each of these arguments.

1. Section 29(a)

[8] Section 29(a) of the Exchange Act, 15 U.S.C. § 78cc(a), states that Any condition, stipulation, or provision

binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or any rule of an exchange required thereby shall be void.

"What the antiwaiver provision of § 29(a) forbids is enforcement of agreements to waive 'compliance' with the provisions of the statute." *Shearson/American Express Inc. v. McMahan*, 482 U.S. 220, 228, 107 S.Ct. 2332, 2338, 96 L.Ed.2d 185 (1987). The underlying concern of § 29(a) is "whether the agreement weakens [the] ability to recover under the Exchange Act." *Id.* at 230, 107 S.Ct. at 2339 (citations and quotation marks omitted). Furthermore, the voluntariness of an agreement is irrelevant to whether § 29(a) forbids it. *Id.* "[I]f a stipulation waives compliance with a statutory duty, it is void under § 29(a), whether voluntary or not." *Id.* Thus the question here boils down to whether Sections 2.05 and 7.02 of the Agreement weaken Harsco's ability to recover under § 10(b) of the Exchange Act in a way that § 29(a) prohibits. [FN6]

FN6. We note that Harsco's § 29 argument, if successful, would only warrant reversal on the federal securities fraud claims. Section 29's affect, if any, does not extend to the common law claims.

[9] There can be no question that the Agreement "weakens" Harsco's ability to recover under the Act. As the district court observed the Agreement "outline[s], with great specificity, the representations and warranties that Harsco agreed to rely upon-- and not rely upon--in purchasing all of MultiServ's outstanding stock." According to the district court, the Agreement limited the bases upon which a fraud action could be brought.

Thus, the Agreement can be described as weakening Harsco's ability to recover under § 10(b) of the Exchange Act. We think, however, that in the circumstances of this case such a "weakening" does not constitute a forbidden waiver of compliance. Here there is a detailed writing developed via negotiations among sophisticated business entities and their advisors. That writing, we conclude, defines the boundaries of the transaction.

Harsco brings this suit principally alleging conduct that falls outside those boundaries.

Harsco relies heavily on *Rogen v. Iikon Corp.*, 361 F.2d 260 (1st Cir.1966). In *Rogen*, the plaintiff, an individual shareholder of the defendant company, sued under § 10(b), alleging that he was induced to sell shares of a company back to the company at an unfair price by nondisclosure of positive information regarding the company's prospects. *Id.* at 263. The first circuit reversed the district court's summary judgment for defendants. The district court granted summary judgment in part because the sales agreement at issue stated that plaintiff

[was] fully familiar with the business and prospects of the corporation, [was] not relying on any representations or obligations to make full disclosure with respect thereto, and ha[s] made such investigation thereof as [plaintiff] deem[s] necessary.

*344 *Id.* at 265. The court held that § 29(a) rendered such a contract provision void.

[O]n analysis, we see no fundamental difference between saying, for example, 'I waive any rights I might have because of your representations or obligations to make full disclosure' and 'I am not relying on your representations or obligations to make full disclosure.' Were we to hold that the existence of this provision constituted the basis (or a substantial part of the basis) for finding non-reliance as a matter of law, we would have gone far toward eviscerating Section 29(a).

Id. at 268 (footnote omitted). Defendants analogize the contractual provision and the circumstances of *Rogen* to this case.

The analogy fails. First, the court in *Rogen* emphasized the disparity in bargaining power between the plaintiff, an individual whom a jury could conclude was "overtrusting," and the defendant corporation. See *id.* at 267-68. In contrast, it is apparent from the complaint and the Agreement in this case that both Harsco and defendants were sophisticated business entities negotiating at arm's length. The Agreement here reflects this relative parity. There is nothing in the first circuit's detailed opinion which suggests the presence

in *Rogen* of anything like Sections 2.04, 2.05 and 7.02. In this case, Harsco was apparently content that the detailed disclosures and representations of Section 2.04 were sufficiently complete. Harsco further protected itself by negotiating for two weeks of confirmatory due diligence--the purpose of which was to confirm the accuracy of MultiServ's disclosures. If Harsco had been unable to confirm the truth of the representations in Section 2.04 during the due diligence period, Harsco could have terminated the deal. In short there is nothing in the complaint or the Agreement that indicates that Harsco was duped into waiving the protections of the securities laws.

Harsco bought Section 2.04's fourteen pages of representations. Unlike a contractual provision which prohibits a party from suing at all, the contract here reflects in detail the reasons why Harsco bought MultiServ--in essence, Harsco bought the representations and, according to Sections 2.05 and 7.02, nothing else. This means that there are fourteen pages of representations, any of which, if fraudulent, can be the basis of a fraud action against the sellers. But Harsco specifically agreed that representations not made in those fourteen pages were not made. Thus, it is not fair to characterize Sections 2.05 and 7.02 as having prevented Harsco from protecting its substantive rights. Harsco rigorously defined those rights in Section 2.04.

This analysis becomes a question of degree and context. Harsco has not waived its rights to bring any suit resulting from this deal. Each representation in Section 2.04 is a tooth which adds to the bite of Sections 2.05 and 7.02. In different circumstances (e.g., if there were but one vague seller's representation) a "no other representations" clause might be toothless and run afoul of § 29(a). But not here.

2. Policy Against Fraud

Harsco also argues that Sections 2.05 and 7.02 should not be given effect because doing so would run afoul of the policy of deterring fraud which we recognized in *Turkish v.*

Kasenez, 27 F.3d 23 (2d Cir.1994). But Turkish does not help Harsco. In Turkish the contract (which was a settlement agreement) stated that the parties "have had full and complete access to all books, documents, records, litigation files and other sources of information affecting all litigations[.]" 27 F.3d at 25. Elsewhere the contract stated that certain representations were based on the advice of accountants, and that in the event those representations proved to be untrue, then plaintiff would only have one remedy (i.e., getting the loans repaid by the defendant). *Id.* at 25. The fraud alleged was that accountants never reviewed the accuracy of any of the representations. *Id.* at 27. We held the "full disclosure" clause to be no bar to suit. We emphasized that "plaintiffs do not claim that they relied on defendant's oral representations; rather, they claim that they relied on written representations in the contract itself." *Id.* at 28. We further distinguished a contract (such as the one here) which "specifically disclaims the existence of" the representations which *345 plaintiffs claim are fraudulent. *Id.* Because here Harsco claims that the representations outside the contract were fraudulent, and because the contract clearly delineates what representations have been made, Turkish does not apply.

3. Specificity of Disclaimer

[10] Harsco's last claim is that the "no other representations" clause of Section 2.05 is not so specific as to put Harsco on notice of what it could not reasonably rely on. Harsco correctly states the rule announced by the New York Court of Appeals in *Danann Realty Corp. v. Harris*, 5 N.Y.2d 317, 184 N.Y.S.2d 599, 157 N.E.2d 597 (1959): where a party specifically disclaims reliance upon a particular representation in a contract, that party cannot, in a subsequent action for common law fraud, claim it was fraudulently induced to enter into the contract by the very representation it has disclaimed reliance upon. We have recognized a similar principle in the securities fraud context. See *Brown v. E.F. Hutton Group, Inc.*, 991 F.2d 1020, 1033 (2d Cir.1993) (disclosure of risks in prospectus

forecloses suit under 10b-5 claiming that the security was unsuited to plaintiff's investment objectives).

In *Danann* the contract (for the purchase of a lease on a building) stated that the seller had not "made ... any representations as to the ... expenses [or] operation ... [of the building] and the Purchaser hereby expressly acknowledges that no such representations have been made." 5 N.Y.2d at 320, 184 N.Y.S.2d 599, 157 N.E.2d 597. The New York Court of Appeals held that this language "destroys the allegations in plaintiffs complaint that the agreement was executed in reliance upon ... contrary oral representations." *Id.* at 320-21, 184 N.Y.S.2d 599, 157 N.E.2d 597.

Applying the *Danann* rule to the present circumstances, our task is to compare the language in Sections 2.04, 2.05, and 7.02 to the representations which Harsco claims are fraudulent, keeping in mind the arm's length nature of the negotiation and the sophistication of the parties. The purpose in making this comparison is to determine whether once Harsco entered into the Agreement, it became unreasonable to rely on the allegedly fraudulent representations.

To aid this analysis, we restate here the most relevant portion of Section 2.05. After reaffirming representations in article II (including the fourteen pages of Section 2.04 immediately preceding), Section 2.05 states that Defendants "make no representation or warranty to" Harsco regarding

(a) any projections, estimates or budgets heretofore delivered to or made available to Purchaser of future revenues, expenses or expenditures, future results of operations (or any component thereof), future cash flows or future financial condition (or any component thereof) of [MultiServ] or the future business and operations of [MultiServ]; or

(b) any other information or documents made available to [Harsco] or its counsel, accountants or advisors with respect to [MultiServ] or the business and operations of [MultiServ], except as expressly covered by a representation and warranty contained in Sections 2.01 through 2.04 hereof.

In light of this language, we review Harsco's various factual theories of fraud.

a. General Business Prospects

[11] Paragraphs 48 and 49 of the Complaint asserted that the following allegations, made during the three days of preliminary due diligence in May 1993, were fraudulent: that "plants in Italy, Germany, the United Kingdom, France and Austria would experience a financial turnaround in 1993"; that MultiServ "would place new emphasis on developing its core steel business" and "phase out" other businesses; that MultiServ "expected growth in new areas of the world"; and that plants in China and Slovakia "would be fully operational in 1993 with no significant start up problems." On their face, these representations are "projections of ... future business and operations"--exactly what Section 2.05 disclaims. In light of Sections 2.05 and 7.02, there is nothing in the Complaint which allows an inference of reasonable reliance on these representations. *346 The district court correctly dismissed the claims relating to these representations.

b. The Russian Plant

[12][13] In paragraph 52 the Complaint alleges that certain defendants represented in July 1993, during confirmatory due diligence, that "the Russian Plant would be operating in the fourth quarter of 1993," and that those same defendants knew or should have known at that time that the main foundations for the Russian Plant had not been poured. [FN7] The question is whether the disclaimer of "information ... with respect to ... operations of [MultiServ], except as expressly covered by a representation and warranty contained in Sections 2.01 through 2.04 hereof" put Harsco on sufficient notice that representations regarding the Russian Plant could not reasonably be relied on. This is a closer call than the allegations contained in paragraph 48. Unlike relatively vague expectations of future performance complained of in that paragraph, here the allegation is more detailed: defendants knew the Russian Plant was not going to get built and represented

otherwise.

FN7. On its face, this representation as well as some of those discussed in the previous paragraph appear to be merely an unactionable statement of an opinion regarding future events. However, fraud liability may attach when a person "state[s] that something was to be done when he kn [ows] all the time it was not to be done and that his representations were false." *Channel Master Corp. v. Aluminium Ltd. Sales, Inc.*, 4 N.Y.2d 403, 408, 176 N.Y.S.2d 259, 263, 151 N.E.2d 833, 836 (1958). Furthermore, a representation that a plant will be built is readily distinguishable from statements of " 'expectation' of higher sales" which we have held unactionable under the Rule 10b-5. *Decker v. Massey-Ferguson, Ltd.*, 681 F.2d 111, 117 (2d Cir.1982).

Nevertheless, and again relying on the sophisticated context of this transaction, we hold that Harsco must be held to its agreement. There was no representation whatsoever about the Russian Plant in Sections 2.01 through 2.04. We think Harsco should be treated as if it meant what it said when it agreed in Section 2.05 that there were no representations other than those contained in Sections 2.01 through 2.04 that were part of the transaction. Here, as in our analysis of § 29(a) of the Exchange Act, a less detailed Section 2.04 might lead to a different result. But the exhaustive nature of the Section 2.04 representations adds to the specificity of Section 2.05's disclaimer of other representations. We can see no reason not to hold Harsco to the deal it negotiated. Claims relating to the Russian Plant were also properly dismissed.

c. French Self Dealing

[14] The complaint alleges numerous instances of improper conduct by the president of MultiServ's French subsidiary and accuses certain defendants of failing to disclose their knowledge of that misconduct. ¶¶ 57-68. The district court properly held that this portion of the complaint was deficient because Harsco's complaint failed to connect the alleged duty to disclose the French self-dealing with any representation from Section 2.04. The district

court afforded Harsco an opportunity to fix its pleading. Harsco opted not to.

The pleading needed fixing because, again, we hold Harsco to the Agreement it negotiated and entered into. Under the circumstances of this case, "no other representations" means no other representations.

Ironically, in this instance there was a Section 2.04 representation which appears sufficiently inconsistent with the allegations of French impropriety to have allowed this claim to continue past the Rule 12(b)(6) stage. Section 2.04(i)(1) states that MultiServ was not "in violation ... of any Law ... where failure to be in compliance would have a Material Adverse Effect." Harsco's general citation to Section 2.04 does not suffice to invoke this small subset of the fourteen pages contained therein. As discussed below, fraud must be pleaded with particularity. Fed.R.Civ.P. 9(b). That requirement is not met by citing to fourteen pages of representations when only a few lines among those fourteen pages consist of a representation which plaintiff claims to be deceitful.

d. Rights to Scarfing Technology

[15] Scarfing is the process by which surface defects are removed from slabs cast from liquid steel, before those slabs are *347 rolled. Scarfing is important to maintain the quality of the product. ¶ 69. The offering memorandum stated that MultiServ owned the intellectual property rights to the "Androfer" scarfing technology. ¶ 70. The sellers also represented that the Androfer technology is superior to other scarfing methods. ¶ 70. In reality, the rights to the Androfer technology were in dispute. ¶¶ 71-75. Harsco claims that defendants were aware of this reality and misrepresented it to Harsco. ¶ 76. The self-declared owner of the Scarfing technology has since offered the Androfer rights to Harsco for \$3 million. ¶ 79.

Notably, other than the general invocation of Section 2.04, Harsco's complaint nowhere directs the reader's attention to any provision in the Agreement that relates to the status of

MultiServ's intellectual property rights. Accordingly, this claim was also properly dismissed.

As with the claims relating to French improprieties, here too there is a short passage within Section 2.04, Section 2.04(k)(2)(A), which appears sufficiently inconsistent with the allegations relating to the state of the Androfer patent to warrant this claim continuing past a 12(b)(6) motion. Noting this, the district court allowed Harsco an opportunity to replead claims relating to intellectual property rights. Harsco declined in order to take this appeal.

e. The Belgium Acquisition

[16] Harsco claims that two defendants "represented that MultiServ would acquire the [Belgium] Plant in June or July of 1993 for approximately \$13 million," ¶ 80, and that this representation was fraudulent. Section 2.04(o) (3) of the Agreement incorporated Exhibit 2.04(o)(3) to the Agreement. Exhibit 2.04(o)(3) states that the Belgium acquisition "is not expected to be completed until September or October of 1993." Sections 2.05 and 7.02, if they mean anything, mean that the representations in Section 2.04 trump representations outside the Agreement. Here again Harsco's complaint belies any suggestion of reasonable reliance. Dismissal under Rule 12(b)(6) was proper.

4. Claim Relating to Conduct During Due Diligence

[17] There is one other factual strain of fraud that fails pursuant to Fed.R.Civ.P. 9(b), notwithstanding any of the above analyses. Rule 9(b) requires that allegations of fraud be pleaded with particularity. Thus we have explained that when a complaint charges fraud, it must (1) detail the statements (or omissions) that the plaintiff contends are fraudulent, (2) identify the speaker, (3) state where and when the statements (or omissions) were made, and (4) explain why the statements (or omissions) are fraudulent. *Shields v. Citytrust Bancorp., Inc.*, 25 F.3d 1124, 1128 (2d Cir.1994); *Ouaknine v.*

MacFarlane, 897 F.2d 75, 79 (2d Cir.1990). The policy behind Rule 9(b) is (1) to provide a defendant with fair notice of plaintiff's claim, (2) to safeguard a defendant's reputation from "improvident charges of wrongdoing" and (3) to protect against the institution of a strike suit. *Acito v. IMCERA Group, Inc.*, 47 F.3d 47, 52 (2d Cir.1995).

Harsco's allegations relating to due diligence consist of the following: During the confirmatory due diligence, MultiServ's CEO (Bowden), took an "extended vacation." ¶ 44. Harsco did not know Bowden was going to go away during this time. ¶ 44. Also, other "key employees," including MultiServ's Comptroller, were "absent for substantial parts of the Due Diligence period." ¶ 44. Harsco's requests to speak with MultiServ's internal auditor during due diligence were met with a response that the auditor was unavailable. ¶ 45. MultiServ denied Harsco's requests to see and/or copy certain documents during this period as well. ¶ 46. Lastly, Harsco asked for access to MultiServ's books seven days a week during the due diligence period; MultiServ gave access for only six days a week. ¶ 47.

The only representation mentioned in this portion of the Complaint is that the auditor was unavailable. There is no explanation regarding why that representation may be fraudulent. Furthermore it cannot be said that denial of a request to see documents could constitute fraud, unless that denial suggested falsely and deceitfully that those documents did not exist (of which there is no *348 suggestion here). In short, the complaint's recitation of particulars relating to due diligence fall far short of the requirements of Rule 9(b).

In sum, all of the fraud and negligent misrepresentation claims were properly dismissed.

C. Contract Claims

The district court also dismissed the claims for breach of contract and indemnification. We affirm the dismissal of these claims on an

alternative basis. See *Leecan v. Lopes*, 893 F.2d 1434, 1435 (2d Cir.) (affirming on alternative grounds), cert. denied, 496 U.S. 929, 110 S.Ct. 2627, 110 L.Ed.2d 647 (1990).

The district court dismissed the breach of contract claims because "Harsco does not ... allege a breach of any specific representation and warranty contained within § 2.04." The district court may have applied an overly strict pleading standard to Harsco's breach of contract claim. Cf. *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168, 113 S.Ct. 1160, 1163, 122 L.Ed.2d 517 (1993) (Fed.R.Civ.P. 9(b) applies only to allegations of fraud and mistake).

[18] To state a claim in federal court for breach of contract under New York law, a complaint need only allege (1) the existence of an agreement, (2) adequate performance of the contract by the plaintiff, (3) breach of contract by the defendant, and (4) damages. *Tagare v. Nynex Network Sys. Co.*, 921 F.Supp. 1146, 1149 (S.D.N.Y.1996). See also 5 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1235 (1990). Here paragraph 102 of the Complaint states

In Section 2.04 of the Agreement, [certain defendants] made representations and warranties of material facts to Harsco concerning aspects of MultiServ's ... compliance with laws [and] proprietary rights. [Those same defendants] breached the Agreement and the provisions of Section 2.04 by reason of the material misrepresentations and omissions of facts alleged herein.

The complaint also alleges Harsco's performance under the Agreement and damages. ¶¶ 103, 105. These pleadings may be adequate to state a breach of contract claim based on the Agreement. Similarly, count III of the complaint, which alleges a claim for indemnification based on breach of contract, might also state a claim upon which relief can be granted.

We do not decide whether these portions of the complaint satisfy the requirements of notice pleading. While a prudent plaintiff

complaining of a breach of contract should allege what representations or warranties were breached, it is not clear that notice pleading requires such specificity.

[19] Nevertheless, we affirm the dismissal of the breach of contract and indemnification claims. The district court could not have properly exercised supplemental jurisdiction over these claims. The district court lacked diversity jurisdiction in this case. [FN8] Thus, the only basis for hearing the state law claims was under a theory of supplemental jurisdiction, assuming there were also federal claims. As discussed above, the federal securities law claims were properly dismissed prior to any responsive pleadings. In light of the early stage of this litigation, we affirm the dismissal of the breach of contract claims because the district court should have declined jurisdiction over them. We note that our reasoning, unlike that of the district court, leaves Harsco the possibility of bringing these claims in some state court (consistent with the requirements of state court procedures). Cf. *Morse v. University of Vermont*, 973 F.2d 122, 127-28 (2d Cir.1992) (holding it an abuse of discretion to decide novel state law claim under theory of supplemental jurisdiction after dismissal of federal claim).

FN8. Both Harsco and at least one defendant, MHC Holding Corp., are Delaware corporations. Thus complete diversity is lacking. See 28 U.S.C. § 1332(c)(1) ("A corporation shall be deemed to be a citizen of any State by which it has been incorporated."); *Cushing v. Moore*, 970 F.2d 1103, 1106 (2d Cir.1992) ("28 U.S.C. § 1332 requires complete diversity between all plaintiffs and all defendants.").

*349 D. Other Claims

[20] The district court acted well within its discretion when, after dismissing the federal claims, it also chose to dismiss the claims for breach of fiduciary duty. Furthermore, there being no surviving underlying theory of liability, the respondeat superior claims were also properly dismissed.

III. CONCLUSION

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Wo

Accordingly, we affirm the dismissal of Harsco's complaint. However, because our reasoning is different than the district court's regarding the dismissal of the state law breach of contract and indemnification claims, Harsco may be able to bring that claim in state court, if state court procedure so allows. Similarly, there may also be a forum in which Harsco's claim for breach of fiduciary duty may be heard, but that forum is not federal court.

91 F.3d 337, Fed. Sec. L. Rep. P 99,276

END OF DOCUMENT

Westlaw®

16div002508

42

Supreme Court, Appellate Division, Third
Department, New York.

HOME TOWN MUFFLER INC., Appellant,
v.
COLE MUFFLER INC. et al., Respondents.

March 10, 1994.

Distributor of automobile parts brought action against competitor and supplier, alleging violation of General Business Law's antitrust provision and tortious interference with contract. The Supreme Court, Broome County, Fischer, J., granted summary judgment against distributor, and distributor appealed. The Supreme Court, Appellate Division, Cardona, P.J., held that: (1) distributor failed to prove antitrust claim in connection with supplier's deletion of distributor from its mailing list, and (2) evidence that competitor may have persuaded supplier to discontinue distributor as customer was insufficient to establish claim of tortious interference.

Affirmed.

West Headnotes

[1] Monopolies 12(1.3)
265k12(1.3)

Party claiming violation of General Business Law's antitrust provision must identify relevant product market, describe nature and effects of alleged conspiracy, describe how economic impact of conspiracy restrained trade in market in question, and identify conspiracy or reciprocal relationship between two or more parties. McKinney's General Business Law § 340, subd. 1.

[2] Monopolies 28(7.5)
265k28(7.5)

Distributor of automobile products failed to prove claim against supplier and competitor under General Business Law's antitrust provision in connection with supplier's deletion of distributor from its mailing list; distributor presented only assertions and legal conclusions, at most showing that competitor

may have complained to supplier, and supplier pointed to other reasons for terminating distributor as customer. McKinney's General Business Law § 340, subd. 1.

[3] Monopolies 28(7.1)
265k28(7.1)

[3] Monopolies 28(7.5)
265k28(7.5)

Terminating distributor in response to complaints by other distributors is not sufficient to withstand summary judgment motion in action under General Business Law's antitrust provision; agreement will not be inferred from such actions, and they do not indicate concerted behavior; there must be evidence that tends to exclude possibility that alleged conspirators were acting independently. McKinney's General Business Law § 340, subd. 1.

[4] Torts 12
379k12

Evidence that automobile parts distributor's competitor may have persuaded their mutual supplier to discontinue distributor as customer was insufficient to establish claim of tortious interference with contract; distributor at most showed existence of future contractual relations or contract terminable at will, and to recover damages for interference in that situation, distributor had to show that competitor used "wrongful means," such as physical violence, fraud, misrepresentation, civil suits, criminal prosecution or some degree of economic pressure which did not include persuasion alone, even if knowingly directed at interfering with contract.

****736** Coughlin & Gerhart (Peter H. Bouman, of counsel), Binghamton, for appellant.

Hancock & Estabrook (Thomas C. Buckel Jr., of counsel), Syracuse, for Cole Muffler Inc., respondent.

Levene, Gouldin & Thompson (John H. Hartman, of counsel), Binghamton, for AP Parts Mfg. Inc., respondent.

Before CARDONA, P.J., and MIKOLL, CREW and WEISS, JJ.

***764** CARDONA, Presiding Justice.

Appeal from an order of the Supreme Court (Fischer, J.), entered February 17, 1993 in Broome County, which granted defendants' motions for summary judgment dismissing the complaint.

Plaintiff was a retail establishment engaged in the installation of mufflers, shocks, struts and springs in the City of Binghamton, Broome County. Defendant Cole Muffler Inc. was one of plaintiff's competitors. Defendant AP Parts Manufacturing Inc. was a supplier of various exhaust system products, shock absorbers and brake parts. Cole was a major and long-time customer of AP. At the time plaintiff was initially formed in November 1988, it ordered only shock absorbers from AP and ordered its other parts from another supplier. Thereafter, in the spring of 1989, plaintiff was deleted from AP's mailing list. As a consequence of this termination, ***765** plaintiff commenced this suit against defendants alleging that they had entered into an "agreement, arrangement or combination" whereby AP refused to sell its products to plaintiff, resulting in the restraint of the free exercise of plaintiff's retailing activities in violation of General Business Law § 340(1). Plaintiff also asserted a cause of action against Cole alleging that Cole tortiously interfered with plaintiff's contract with AP. Defendants answered and, after conducting discovery, separately moved for summary judgment. Supreme Court granted the motions and dismissed the complaint, prompting this appeal by plaintiff.

We affirm. In so doing, we initially note that defendants carried their initial burden of demonstrating their defenses as a matter of law to warrant summary judgment in their favor (see, *Friends of Animals v. Associated Fur Mfrs.*, 46 N.Y.2d 1065, 1067-1068, 416 N.Y.S.2d 790, 390 N.E.2d 298). The question therefore distills to whether plaintiff adduced sufficient evidence in support of its claims to require a trial (see, *id.*). An examination of

the record reveals that plaintiff did not make the requisite showing and therefore summary judgment was properly granted to defendants.

[1] We turn first to plaintiff's claim that defendants violated the antitrust provision of ****737** General Business Law § 340(1). A party claiming a violation of this statute, which was modeled after the Federal Sherman Antitrust Act (15 U.S.C. § 1; see, *State of New York v. Mobil Oil Corp.*, 38 N.Y.2d 460, 463, 381 N.Y.S.2d 426, 344 N.E.2d 357), must (1) identify the relevant product market, (2) describe the nature and effects of the alleged conspiracy, (3) describe how the economic impact of the conspiracy restrained trade in the market in question, and (4) identify a conspiracy or reciprocal relationship between two or more parties (*Creative Trading Co. v. Larkin-Pluznick-Larkin, Inc.*, 136 A.D.2d 461, 462, 523 N.Y.S.2d 102; see, *International Tel. Prods. v. Twentieth Century-Fox Tel. Div.*, 622 F.Supp. 1532).

[2] The record reveals that after plaintiff ordered the shock absorbers from AP in November 1988, AP sent plaintiff a credit application which plaintiff never completed. According to AP it deleted plaintiff from its mailing list in part due to plaintiff's failure to complete the credit application, but also because plaintiff had not placed any orders since the first order and AP was having doubts about plaintiff's ability to successfully operate its business. Although plaintiff claimed it placed several telephone orders for parts to AP, it produced no documentation to support this claim. Plaintiff also alleged that without access to AP parts it could not compete with ***766** Cole. One of plaintiff's representatives admitted, however, that although plaintiff could have initially received AP muffler and exhaust parts, plaintiff declined and limited its order to shock absorbers. Plaintiff argued that it limited its order because it had heard that Cole had put pressure on AP not to sell to plaintiff. Plaintiff reasoned that it would be safe to order other parts from AP if AP continued to sell it shocks. Supreme Court noted the inconsistency of plaintiff's logic and properly rejected it as conjecture. Rather than state with specificity how the economic

impact of the alleged agreement restrained trade in the market, plaintiff presented only assertions and legal conclusions.

[3] It is true that direct evidence of a conspiracy is rarely available and must be proven by inferences from the behavior of the alleged conspirators (see, *H.L. Hayden Co. of N.Y. v. Siemens Med. Sys.*, 879 F.2d 1005, 1012). Nevertheless, plaintiff at most has shown that Cole may have complained to AP. Terminating a distributor in response to complaints by other distributors is not sufficient to withstand a summary judgment motion (see, *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 759, 104 S.Ct. 1464, 1468, 79 L.Ed.2d 775). An agreement will not be inferred from such actions and they do not indicate concerted behavior (*id.*). There has to be evidence that tends to exclude the possibility that the alleged conspirators were acting independently (*id.*; see, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538). Such evidence is lacking in this case. As Supreme Court noted, AP pointed to other reasons for terminating plaintiff as a customer. Thus, the court properly granted summary judgment to defendants on plaintiff's antitrust claim.

[4] Turning to plaintiff's claim for tortious interference, it was required to establish (1) the existence of a contract between it and AP, (2) Cole's knowledge of the contract, (3) Cole's intentional inducement of AP to breach the contract, and (4) damages (see, *Kronos, Inc. v. AVX Corp.*, 81 N.Y.2d 90, 94, 595 N.Y.S.2d 931, 612 N.E.2d 289). At most plaintiff showed the existence of future contractual relations or a contract terminable at will. In order to recover damages for interference in such a situation, plaintiff was required to show that Cole used "wrongful means". These include physical violence, fraud, misrepresentation, civil suits, criminal prosecution or some degree of economic pressure which does not include persuasion alone, even if knowingly directed at interfering with the contract (see, *Guard-Life Corp. v. Parker Hardware Mfg. Corp.*, 50 N.Y.2d 183, 191, 428 N.Y.S.2d 628, 406

N.E.2d 445; see also, *Yan's Video v. Hong Kong TV Video Programs*, 133 A.D.2d 575, 520 N.Y.S.2d 143). Here, the evidence showed only that Cole may have persuaded *767 AP to discontinue plaintiff as a customer, which was not enough to withstand defendants' motions.

In sum, plaintiff has relied on surmise and speculation and has failed to establish the existence of facts of sufficient import to create **738 triable issues (see, *Shaw v. Time-Life Records*, 38 N.Y.2d 201, 207, 379 N.Y.S.2d 390, 341 N.E.2d 817; see also, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, *supra*, 475 U.S. at 585-586, 106 S.Ct. at 1355-1356). Plaintiff's remaining contentions have been considered and rejected as unpersuasive.

ORDERED that the order is affirmed, with costs.

MIKOLL, CREW and WEISS, JJ., concur.

202 A.D.2d 764, 608 N.Y.S.2d 735, 1994-1 Trade Cases P 70,554

END OF DOCUMENT

43

Briefs and Other Related Documents

United States Court of Appeals,
Second Circuit.

HYDRO INVESTORS, INC., Plaintiff-
Counter-Defendant-Appellant,
Lawrence Taft, Plaintiff-Counter-Defendant,

v.

TRAFALGAR POWER INC., Marina
Development, Inc., and Arthur Steckler,
Defendants-Counter-Claimants-Appellees.
Trafalgar Power Inc., Plaintiff-Appellee-Cross-
Appellant,

v.

Neal Dunlevy and Stetson-Harza Corp.,
Defendants-Appellants-Cross-Appellees.

Nos. 99-9198(L), 99-9206(XAP), 99-9202(CON),
99-9204(CON).

Argued: June 23, 2000
Decided: Sept. 15, 2000

Owners of hydroelectric power plants brought malpractice action against engineering firm and engineer employed by firm. Following jury verdict in favor of plaintiffs, defendants moved for judgment notwithstanding the verdict or new trial, and plaintiffs moved to amend judgment to add prejudgment interest. The United States District Court for the Northern District of New York, David N. Hurd, J., 63 F.Supp.2d 225, entered order denying motions, and appeal was taken. The Court of Appeals, Miner, Circuit Judge, held that: (1) engineer's professional malpractice, in failing to properly calculate drop in height of water at site of proposed hydroelectric plants, with result that its estimate of energy outputs for plants were extremely optimistic, qualified as proximate cause of damages plaintiffs sustained in proceeding with development project; (2) "economic loss" rule did not apply to limit plaintiffs' damages; (3) engineer's overly optimistic estimates of projected energy outputs were mere promises of future output, as opposed to present representations of existing fact, which would not support negligent misrepresentation claim; and (4) difficulty of calculating prejudgment interest

did not warrant ignoring the mandate of New York interest statute.

Affirmed in part; vacated in part and remanded.

West Headnotes

[1] Federal Courts 776
170Bk776

Court of Appeals reviews de novo district court's denial of post-trial motion for judgment as matter of law. Fed.Rules Civ.Proc.Rule 50, 28 U.S.C.A.

[2] Federal Courts 765
170Bk765

[2] Federal Courts 801
170Bk801

Court of Appeals will reverse denial of post-trial motion for judgment as matter of law only if, after making all credibility assessments and drawing all inferences in favor of non-moving party, reasonable juror would be compelled to accept view of movant. Fed.Rules Civ.Proc.Rule 50, 28 U.S.C.A.

[3] Federal Courts 825.1
170Bk825.1

Court of Appeals reviews for abuse of discretion the denial of motion for new trial. Fed.Rules Civ.Proc.Rule 59, 28 U.S.C.A.

[4] Negligence 321
272k321

Under New York law, professional malpractice is species of negligence, whose general elements are: (1) negligence, (2) which is proximate cause of (3) damages.

[5] Negligence 400
272k400

[5] Negligence 1240
272k1240

Under New York law, engineer's professional malpractice, in failing to properly calculate drop in height of water at site of proposed hydroelectric plants and in misapprehending bypass flow requirements for plants, with result that its estimate of energy outputs for

plants were extremely optimistic, qualified as proximate cause of damages that power company sustained in proceeding with development of plants, when energy outputs were far less than those projected by engineer.

[6] Negligence 380
272k380

[6] Negligence 422
272k422

Proximate cause determination does not require jury to identify the liable party as sole cause of harm; it only asks that identified cause be a substantial factor in bringing about injury.

[7] Negligence 463
272k463

[7] Negligence 1251
272k1251

Under New York law, "economic loss" rule did not apply to prevent power company that proceeded with development of hydroelectric plants in reliance upon engineer's negligent estimate of projected energy outputs from recovering damages, in professional malpractice action, based upon its lost revenues.

[8] Products Liability 17.1
313Ak17.1

"Economic loss" rule was developed by New York courts as means of enforcing dictates of privity in products liability actions, and of preventing tort remedies from eliminating customary limitations involved in cases addressing sale of goods.

[9] Negligence 463
272k463

While doctrine of economic loss survives under New York law, despite increasing relaxation of privity rules, it is not always applied in negligence cases.

[10] Negligence 463
272k463

[10] Torts 5
379k5

Continued role of "economic loss" rule under New York law is based primarily upon recognition that relying solely on foreseeability to define extent of liability in cases involving economic loss, while generally effective, can result in some instances in liability so great that, as matter of policy, courts will be reluctant to impose it; to prevent such open-ended liability, courts apply "economic loss" rule to prevent recovery of damages that are inappropriate because they actually are in nature of breach of contract as opposed to tort.

[11] Federal Courts 634
170Bk634

It was not for tortfeasors to argue for first time upon appeal that jury's damages award for tortfeasors' professional malpractice, in failing to properly estimate projected energy outputs of hydroelectric plants, was based on profits which were never recoverable under real world conditions, where tortfeasors had made precisely the opposite argument before jury, in contending that their energy output estimates were attainable.

[12] Damages 208(1)
115k208(1)

Proper calculation of damages, in professional malpractice case arising out of engineer's failure to properly estimate projected energy outputs of hydroelectric plants, was factual question, which was properly submitted for resolution by jury.

[13] Damages 184
115k184

Damages need not be calculated with mathematical precision.

[14] Federal Civil Procedure 2265
170Ak2265

District court's failure to make findings of fact and conclusions of law, in dismissing claims for accounting and imposition of constructive trust once litigant's breach of contract claims had failed before jury, was not error, where district court's failure to make findings of fact and conclusions of law did not inhibit ability of Court of Appeals to review dismissal order, which was clearly justified once underlying

breach of contract claim was rejected.

[15] Negligence 1636
272k1636

Decision to allow evidence as to engineer's alleged conflict of interest, as owner of company which was to participate in joint venture for development of hydroelectric plants and as employee of engineering firm that estimated projected energy outputs from plants, was not abuse of discretion in professional malpractice case arising out of firm's failure to properly estimate projected energy outputs; evidence was relevant and only minimally prejudicial.

[16] Federal Courts 896.1
170Bk896.1

Even assuming that district court erred, in professional malpractice case arising out of engineering firm's malpractice in failing to properly estimate projected energy outputs, when court admitted evidence of engineer's alleged conflict of interest, any such error was not so gross as to require vacatur of jury's verdict and judgment.

[17] Fraud 13(3)
184k13(3)

Under New York law, elements of negligent misrepresentation claim are: (1) that defendant had duty, as result of special relationship, to give correct information; (2) that defendant made false representation that he or she should have known was incorrect; (3) that the information supplied in the representation was known by defendant to be desired by plaintiff for serious purpose; (4) that plaintiff intended to rely and act upon it; and (5) that plaintiff reasonably relied on it to his or her detriment.

[18] Fraud 11(1)
184k11(1)

[18] Fraud 12
184k12

In order to support negligent misrepresentation claim under New York law, alleged misrepresentation must be factual in nature, and not promissory or relating to future events that might never come to

fruition.

[19] Fraud 12
184k12

Engineer's overly optimistic estimates of projected energy outputs from proposed hydroelectric plants were mere promises of future output, as opposed to present representations of existing fact, which would not support negligent misrepresentation claim under New York law when power company went ahead with construction of proposed plants and was unable to achieve projected energy outputs.

[20] Fraud 20
184k20

Even assuming that engineer's overly optimistic estimates of projected energy outputs from proposed hydroelectric plants qualified as the kind of representations that might support negligent misrepresentation claim under New York law, power company could not recover on negligent misrepresentation theory for damages that it sustained when it went ahead with construction of proposed plants and could not achieve projected energy outputs, where power company possessed adequate knowledge that project's financial success was unlikely and went ahead with construction of plants in question in hopes of scoring a payday with other plants that were bundled with these known losers; requisite reliance was lacking.

[21] Negligence 1662
272k1662

[21] Negligence 1672
272k1672

Professional malpractice claims against engineer were properly dismissed for lack of proof, where plaintiff presented no expert testimony thereon.

[22] Interest 39(2.50)
219k39(2.50)

Under New York law, court must award prejudgment interest as matter of right, where defendant's act or omission deprives or otherwise interferes with title to, or possession or enjoyment of, property. N.Y.McKinney's

CPLR 5001(a).

[23] Interest 39(2.50)
219k39(2.50)

Difficulty of calculating prejudgment interest, in suit arising out of engineering firm's failure to properly estimate projected energy outputs from proposed hydroelectric plants, with result that power company was injured when it proceeded with proposed construction and could not achieve these projected outputs, did not warrant ignoring the mandate of New York statute, which requires award of prejudgment interest as matter of right when defendant's conduct deprives or otherwise interferes with title to, or possession or enjoyment of, property. N.Y. McKinney's CPLR 5001(a).

*11 David Rabinowitz Moses & Singer LLP, New York, NY (Roger L. Waldman, Moses & Singer LLP, New York, NY, on the brief) for Plaintiff-Counter-Defendant-Appellant.

Carolyn Elefant, Law Offices of Carolyn Elefant, Bethesda, MD, for Defendant-Appellant-Cross-Appellee Neal Dunlevy.

John Glover Roberts, Jr. Hogan & Hartson L.L.P., Washington, DC (Catherine E. Stetson, Hogan & Hartson, Washington, DC; Richard E. Alexander, Harter, Secrest & Emery, Rochester, NY, on the brief) for Defendant-Appellant-Cross-Appellee Stetson-Harza Corp.

Paul J. Yesawich, III, Harris Beach & Wilcox, LLP, Rochester, NY (Laura W. Smalley, Rochester, NY, on the brief) for Defendants-Counter-Claimants-Appellees and Plaintiff-Appellee-Cross-Appellant.

Before: MINER and STRAUB, Circuit Judges, and TRAGER, District Judge. [FN*]

FN* The Honorable David G. Trager, of the United States District Court for the Eastern District of New York, sitting by designation.

MINER, Circuit Judge:

This case consists of consolidated actions by various individuals and entities involved in

the development, construction, and/or operation of six hydroelectric plants located in upstate New York. The attempted development of these sites has resulted in financial disaster, extensive litigation before the district court, and the appeal before us.

Plaintiff-counter-defendant-appellant Hydro-Investors, Inc. ("HII") appeals from an order denying its post-trial motion for an accounting and the imposition of a constructive trust. Defendant-appellant-cross-appellee Neal Dunlevy ("Dunlevy") and defendant-appellant-cross-appellee Stetson-Harza ("Stetson-Harza") appeal from a judgment, following a jury verdict, imposing joint and several liability on them in the amount of \$7.6 million for damages stemming from their professional malpractice with regard to the hydroelectric plants at Ogdensburg and Forestport. Dunlevy and Stetson-Harza also appeal from the district court's denial of their post-trial motions for a new trial and/or for judgment as a matter of law.

*12 Defendants-counter-claimants-appellees Trafalgar Power, Inc., Marina Development, Inc. ("Marina Development"), and Arthur Steckler ("Steckler") (collectively "TPI") cross-appeal from (1) a pre-trial order dismissing their negligent misrepresentation claim with respect to the Adams and Kayuta Lake sites; (2) orders entered at trial dismissing their professional malpractice claims with respect to Adams and Kayuta Lake; (3) orders entered at trial dismissing breach of contract claims with respect to the Adams, Kayuta Lake, Forestport, and Ogdensburg sites; and (4) a post-trial order dismissing their motion to amend the judgment to include an award of prejudgment interest.

For the reasons that follow, we affirm in part and vacate in part the judgment and orders of the district court and remand for additional proceedings consistent with this opinion.

BACKGROUND

Stetson-Harza is an engineering firm based in Utica, New York. At certain times

pertinent to this appeal, Dunlevy, an engineer, worked at Stetson-Harza. Dunlevy also served as the principal and sole shareholder of HII. In the 1980s, Dunlevy met Steckler, a Canadian businessman who was the sole owner of Marina Development. Steckler also controlled TPI, a wholly owned subsidiary of Marina Development.

In 1984, Dunlevy suggested to Steckler that hydroelectric plants in upstate New York could be profitably developed. Dunlevy also suggested that Steckler provide the capital to develop the plants and that Dunlevy, via HII or Stetson-Harza, would contribute hydroelectric expertise. Steckler apparently believed these projects would be a good financial opportunity because oil prices were nearing an all-time high and Congress had passed legislation favoring alternative energy. As a result of their discussions, Dunlevy and Steckler decided to enter the hydroelectric power plant business together. Consequently, TPI eventually retained Stetson-Harza and HII to perform work associated with TPI's licensing and possible development of six hydroelectric plants in upstate New York: Herkimer, Cranberry Lake, Kayuta Lake, Adams, Forestport, and Ogdensburg.

On August 1, 1985, Steckler (via TPI) and Dunlevy (via HII) entered into an agreement that called for TPI to provide the capital while HII would identify the sites to be developed. The specific sites were not identified in the agreement. The agreement did contain attached schedules that conditioned HII's participation in each project on a number of factors, including construction within the budget and meeting the expected energy output. Despite the existence of this agreement, Dunlevy's activities for TPI were not limited to his work through HII. Indeed, the liability asserted against Dunlevy in this action stems from his role as chief engineer of the Water Resources Department at Stetson-Harza.

As part of TPI's effort to obtain financing for the projects, Steckler asked Stetson-Harza to prepare an analysis that could be used by potential lenders to evaluate whether to invest

in the projects. That analysis, dated October 27, 1986, included an assessment of the energy to be generated by each project as well as the costs of construction.

By November 1986, TPI was fully committed to the project, having decided to develop six projects at an anticipated cost of approximately \$23 million. Pursuant to this commitment, TPI had purchased multi-million dollar turbines for the Ogdensburg, Forestport, Adams, and Kayuta Lake sites. It also had located a lender that was willing to make an equity contribution of nearly \$7.5 million and had launched the Federal Energy Regulatory Commission ("FERC") licensing approval process.

The plants were constructed in 1987 and have proven to be financial disasters. At the time of this appeal, TPI has not received *13 any profits from the plants. No equity has been returned to the investors and no cash distributions have taken place. Apparently, the losses are only likely to increase in the future as legislation favoring alternative power sources expires. The primary problems associated with the development of these plants are construction cost overruns and inadequate energy production.

As a result of claimed deficiencies arising out of the financial difficulties associated with these projects, HII asserted claims in 1989 for breach of contract against TPI, seeking specific performance, an accounting, and the imposition of a constructive trust. TPI in turn sued Stetson-Harza, Dunlevy, and HII alleging breach of contract, gross negligence, negligence and/or professional malpractice, gross misrepresentation, intentional misrepresentation, negligent misrepresentation, and fraud. Plaintiff-counter-defendant Lawrence Taft ("Taft") also sued TPI, seeking (1) specific enforcement of an alleged agreement providing that TPI transfer an ownership right in the Adams, Kayuta Lake, and Forestport sites back to Taft; (2) an accounting; (3) the imposition of a constructive trust; and (4) damages for TPI's and Steckler's alleged fraud. Taft's claims were later settled out of court. By pretrial

order, the United States District Court for the Northern District of New York (Kahn, J.) granted summary judgment to Stetson-Harza, Dunlevy, and HII on the fraud, negligent misrepresentation, and gross negligence claims asserted by TPI. The rest of the case proceeded to a jury trial that consumed approximately 10 days in March and April 1999.

The evidence at trial, taken in the light most favorable to the prevailing party, revealed that although Dunlevy held himself and Stetson-Harza out as experts in hydroelectric engineering both had little experience with such projects. The evidence showed that Dunlevy's primary expertise was in computer applications and that Dunlevy acted primarily as a salesman; recent college graduates performed most of the engineering analysis. TPI's evidence also indicated that, even under the best conditions, the energy output estimates provided by Stetson-Harza and Dunlevy were overly optimistic. The disparity between the estimated and actual output largely resulted from Stetson-Harza and Dunlevy improperly calculating Ogdensburg's head (the drop in height of water, from the reservoir down to the tailrace at the plant's powerhouse) and misapprehending the actual FERC bypass flow requirements for Forestport.

After TPI presented its case, the United States District Court for the Northern District of New York (Hurd, J.) entered judgment as a matter of law dismissing (1) TPI's claims for breach of contract and professional malpractice based on the Adams and Kayuta Lake sites and (2) the breach of contract claims with regard to Forestport and Ogdensburg. The rest of the claims proceeded to a jury verdict. The jury found (1) TPI not liable for breach of contract with regard to the Ogdensburg, Herkimer, Cranberry Lake, Kayuta Lake, Adams, and Forestport plants and (2) Stetson-Harza and Dunlevy jointly and severally liable in the amount of \$7.6 million for damages stemming from their engineering malpractice in connection with the licensing and/or development of the Ogdensburg and Forestport plants. After trial, the district

court (Hurd, J.) denied (1) HII's motion to set aside the verdict, for judgment as a matter of law, and for a new trial based on the jury's allegedly inconsistent verdicts; (2) Stetson-Harza's motion for judgment as a matter of law or for a new trial on the ground that TPI failed to adequately prove professional malpractice and the damages arising therefrom; and (3) TPI's motion to amend the judgment to include prejudgment interest pursuant to N.Y. C.P.L.R. § 5001(a).

This appeal followed.

*14 DISCUSSION

Stetson-Harza presents the following arguments on appeal: (1) the judgment against it should be reversed because TPI failed to prove proximate cause; (2) TPI was not entitled to lost revenues from an energy output prediction "that was impossible to achieve under real-world conditions"; (3) the economic loss rule precludes TPI from recovering for lost revenues on the negligence claim; and (4) Stetson-Harza is entitled to a new trial because "the plaintiff's flawed damages theory infected the entire case."

HII argues: (1) that the dismissal of its claim for an accounting must be reversed because the lower court failed to make findings of fact and conclusions of law pursuant to Fed.R.Civ.P. 52 and the evidence presented supported an accounting; (2) that the dismissal of HII's equitable claims for a constructive trust must be reversed because the court failed to make findings of fact and conclusions of law; and (3) that the jury verdict with respect to HII's breach of contract claim should be reversed because of the admission of allegedly highly prejudicial evidence concerning Dunlevy's conflict of interest.

Dunlevy contends that there is insufficient proof of professional malpractice liability to support the judgment below. Dunlevy also makes a number of arguments addressed to the question of damages. He argues that (1) TPI is not entitled to any damages because of New York's economic loss rule for tort actions;

(2) the cost of repairing the power plants provides the appropriate measure of damages; (3) calculating damages based on differences in "gross profits" is an error of law; and (4) even accepting TPI's method of measuring damages, the jury verdict is clearly erroneous. Dunlevy further asserts that (1) the conflict of interest evidence presented by TPI was irrelevant, highly prejudicial, inflammatory, and confusing and (2) if he is held to have committed malpractice as a manager versus as an engineer, then he is protected from liability by an exculpatory clause.

TPI replies to these various attacks on the judgment below with several arguments of its own in support of the judgment and then cross-appeals on several issues. In reply to the appellants' arguments, TPI contends that (1) there was overwhelming evidence that Dunlevy and Stetson-Harza were negligent and that Dunlevy's negligence proximately caused TPI's damages; (2) the damages award accurately represents the actual damages that were foreseeable; (3) the economic loss rule does not preclude recovery for lost profits; (4) the jury's verdict was supported by the evidence and accordingly a new trial is not appropriate; and (5) the district court correctly dismissed HII's claim for an accounting and the imposition of a constructive trust. In the cross-appeal, TPI argues that the district court erred (1) in not granting TPI's request for prejudgment interest on the negligence claim; (2) by dismissing, prior to trial, the negligent misrepresentation claim relating to Adams and Kayuta Lake; (3) by dismissing, at trial, TPI's breach of contract and professional malpractice claims relating to Adams and Kayuta Lake for insufficient evidence; and (4) by dismissing, at trial, TPI's breach of contract claims for the Forestport and Ogdensburg sites.

I. The Professional Malpractice Liability of Stetson-Harza and Dunlevy with Respect to the Ogdensburg and Forestport sites

Stetson-Harza and Dunlevy both contend that the jury's special verdict findings of liability for engineering malpractice in

connection with the licensing or development of the Ogdensburg and Forestport plants are unsustainable. Consequently, they urge us to find that the district court erred in denying their post-trial motion for judgment as a matter of law or for a new trial pursuant to Rules 50 and 59 of the Federal Rules of Civil Procedure.

*15 [1][2][3] Our review of the denial of a Rule 50 motion is de novo. See *Martinelli v. Bridgeport Roman Catholic Diocesan Corp.*, 196 F.3d 409, 425 (2d Cir.1999). "We ... will reverse the denial of judgment as a matter of law 'only if, notwithstanding making all credibility assessments and drawing all inferences in favor of [TPI], a reasonable juror would be compelled to accept the view of [Stetson-Harza and Dunlevy].'" *Gordon v. Matthew Bender & Co.*, 186 F.3d 183, 184 (2d Cir.1999) (quoting *EEOC v. Ethan Allen, Inc.*, 44 F.3d 116, 119 (2d Cir.1994)); see also *Weissman v. Dawn Joy Fashions, Inc.*, 214 F.3d 224, 227 (2d Cir.2000). We review the denial of the parties' Rule 59 motion for a new trial for abuse of discretion. See *Metromedia Co. v. Fugazy*, 983 F.2d 350, 363 (2d Cir.1992).

[4][5] Under New York law, "professional malpractice[] is a species of negligence. As such, its general elements are (1) negligence, (2) which is the proximate cause of (3) damages." *Marks Polarized Corp. v. Solinger & Gordon*, 124 Misc.2d 266, 476 N.Y.S.2d 743, 744 (1984). Stetson-Harza's appeal is based on its contention that TPI failed to prove that the alleged acts of malpractice were the proximate cause of its injury, since "negligent measurements of the flow and head at Forestport and Ogdensburg did not cause those plants to generate less energy." Stetson-Harza's Br. at 24. Stetson-Harza asserts that it was "[t]he low head of the river, the surrounding terrain, and (with respect to Forestport) FERC's decision to require 140[cfs] of bypass flow [that] caused the lower energy output--and thus [TPI]'s lower revenues." *Id.*

[6] We reject this reasoning as specious. It was not merely the failure of the plants, based on their physical characteristics, to generate the desired amount of energy that caused

TPI's damage. The legal cause of TPI's injury was Dunlevy's failure to adequately convey the realities of Ogdensburg and Forestport with a level of professional care that would have allowed TPI to make its business decisions with respect to those sites based on reasonably reliable technical information. The physical traits of the sites only served to provide the conditions precedent to the malpractice committed by Dunlevy. A proximate cause determination does not require a jury to identify the liable party as the sole cause of harm; it only asks that the identified cause be a substantial factor in bringing about the injury. See *AUSA Life Ins. Co. v. Ernst & Young*, 206 F.3d 202, 215 (2d Cir.2000); *Fane v. Zimmer, Inc.*, 927 F.2d 124, 128 (2d Cir.1991); *Voss v. Black & Decker Mfg. Co.*, 59 N.Y.2d 102, 107, 463 N.Y.S.2d 398, 450 N.E.2d 204 (1983). Once the jury was convinced that the minimal standard of professional care was not met in this case, the proximate cause of TPI's injury could easily be construed to be the carelessness of Dunlevy, and, through the doctrine of respondeat superior, his employer Stetson-Harza.

Dunlevy's appeal advances a number of arguments with respect to the findings of malpractice liability. Upon an examination of these arguments, we find that while these arguments may have had merit before a jury, we are constrained to accept the jury's resolution of these factual issues.

We further note that Dunlevy's contention that he should be relieved of liability due to certain negligent acts by the plaintiffs--e.g., Steckler's decision to purchase large turbines despite Dunlevy's November 1986 suggestion that smaller turbines might be purchased in anticipation of lower flows, or TPI's decision not to excavate the tailrace at Ogdensburg--is adequately accounted for by the jury's special verdict apportioning 20% of the liability to the plaintiffs in comparative fault and in the consequent pro rata reduction of the plaintiffs' damages award.

II. The Economic Loss Rule

[7] Stetson-Harza and Dunlevy contend that the district court improperly permitted *16 TPI to obtain a damage award based on "lost revenues" in violation of the economic loss rule found in New York cases. They posit that even if the evidence supported a finding of professional malpractice, the damages awarded below reflect the quintessential expectation damages found in breach of contract actions as opposed to the compensatory awards customarily found in tort actions. In response, TPI contends that the appellants waived this argument by failing to raise it before the trial court and that TPI's professional malpractice claim falls within the narrow category of claims exempt from the New York economic loss restriction.

We begin by addressing TPI's argument that Stetson-Harza and Dunlevy waived this issue by failing to raise it below. While the appellants may very well have waived this contention by failing to raise it below, see *Commander Oil Corp. v. Barlo Equip. Corp.*, 215 F.3d 321, 332 (2d Cir.2000) ("*Commander Oil* argues that it is entitled to contractual indemnification from Barlo.... However, *Commander Oil* failed to raise the issue below in a timely manner and it is therefore waived for purposes of this appeal."); *Austin-Westshore Constr. Co. v. Federated Dep't Stores, Inc.*, 934 F.2d 1217, 1222-23 (11th Cir.1991), we find it unnecessary to resolve the argument here because, even assuming arguendo that they may raise the argument here, we find no merit in it.

[8] The economic loss rule was adopted by the New York Court of Appeals in *Schiavone Construction Co. v. Elgood Mayo Corp.*, 56 N.Y.2d 667, 668-69, 451 N.Y.S.2d 720, 436 N.E.2d 1322 (1982), rev'g on dissent below, 81 A.D.2d 221, 227-234, 439 N.Y.S.2d 933 (1981) (Silverman, J., dissenting). See *5th Ave. Chocolatiere, Ltd. v. 540 Acquisition Co.*, 712 N.Y.S.2d 8, 11 (N.Y.App.Div.2000). The rule developed as a way of enforcing the dictates of privity in product liability law and preventing tort remedies from eliminating the customary limitations involved in cases addressing the sale of goods. See *id.* at 11-12. "[T]he majority of cases enunciating the economic

loss rule [have] arise[n] in the context of product liability, where the economic losses are essentially contractual in nature, and therefore the risk may be allocated by the parties, as reflected in the purchase price, UCC warranties or insurance...." *Id.* at 11; See also *Saratoga Fishing Co. v. J.M. Martinac & Co.*, 520 U.S. 875, 885, 117 S.Ct. 1783, 138 L.Ed.2d 76 (1997) ("In *East River S.S. Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858, 106 S.Ct. 2295, 90 L.Ed.2d 865 (1986), we adopted as part of admiralty law the so-called 'economic loss' rule, which denies the purchaser of a defective product a tort action against the seller or manufacturer for purely economic losses sustained as a result of the product's failure.") (Scalia and Thomas, JJ., dissenting) (parallel citation omitted).

[9][10] Although the doctrine survives in today's caselaw despite the increasing relaxation of privity rules, it is not always applied in negligence cases. See 5th Ave. Chocolatiere, 712 N.Y.S.2d at 12. Primarily, its continuing role is based on the recognition that "[r]elying solely on foreseeability to define the extent of liability [in cases involving economic loss], while generally effective, could result in some instances in liability so great that, as a matter of policy, courts would be reluctant to impose it." *Id.* at 12. To prevent such open-ended liability, courts have applied the economic loss rule to prevent the recovery of damages that are inappropriate because they actually lie in the nature of breach of contract as opposed to tort. See 532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc., 271 A.D.2d 49, 711 N.Y.S.2d 391, 393 (2000) ("[P]ure economic losses (without property damage or personal injury) are not recoverable in a negligence action, and ... a claimant suffering purely financial losses is restricted to an action in contract for the benefit of its bargain."). The difficulty in our case is determining where to draw the line: TPI contends that the professional malpractice *17 of Stetson-Harza and Dunlevy requires the damages awarded below, and the appellants argue that these damages are an improper award of expectation damages truly stemming from breach of contract.

In *Sommer v. Federal Signal Corp.*, 79 N.Y.2d 540, 548, 583 N.Y.S.2d 957, 593 N.E.2d 1365 (1992), the New York Court of Appeals considered whether the economic loss rule applied in an action against a fire alarm company for negligent services resulting in extensive property damage. The fire alarm company's employee erred in shutting off the fire alarm system at a 42-story skyscraper in New York City. Seven to nine minutes after the alarm was shut off, the fire alarm company started receiving fire signals from the skyscraper. However, the technician on duty at the fire alarm company ignored the calls. A four-alarm fire was eventually reported directly to the authorities, but all of the parties acknowledged that the alarm company could have alerted the authorities minutes earlier. The fire resulted in millions in damages and led to a spate of lawsuits. See *id.* at 548-49, 583 N.Y.S.2d 957, 593 N.E.2d 1365.

The Court of Appeals began its discussion by analyzing whether the company owning the skyscraper could pursue a tort claim against the fire alarm company, or whether the skyscraper's owner was limited to breach of contract remedies. Explaining its difficulty in resolving the case, the New York Court of Appeals recalled the following statement from one of its prior cases:

Between actions plainly *ex contractu* and those as clearly *ex delicto* there exists what has been termed a border-land, where the lines of distinction are shadowy and obscure, and the tort and the contract so approach each other, and become so nearly coincident as to make their practical separation somewhat difficult.

Id. at 550-51, 583 N.Y.S.2d 957, 593 N.E.2d 1365 (quoting *Rich v. New York Cent. & Hudson River R.R. Co.*, 87 N.Y. 382, 390 (1882)).

After discussing the various ways in which a claim may be contractual or tort-like, the court concluded that the claims of the skyscraper owner were not limited to breach of contract theories, but could also sound in tort. See *id.* at 552, 583 N.Y.S.2d 957, 593 N.E.2d 1365. It looked to several factors: (1) that the

fire alarm company's duty of care derived not only from contract but from the nature of its services; (2) that the fire alarm stations are franchised and regulated by the City; (3) that the fire alarm company served a significant public interest; (4) that the breach of the fire alarm company's duties could have catastrophic consequences; (5) the nature of the fire alarm company's relationship with the skyscraper owner; and (6) the sudden manner of the loss. See *id.* at 552-53, 583 N.Y.S.2d 957, 593 N.E.2d 1365.

The record in the present case does not call for us to apply the economic loss rule to bar TPI's damages. The circumstances here indicate that TPI's professional malpractice claim is one sounding in tort and not a contractual dispute disguised as a tort. Although the parties may have entered into contracts governing some aspects of their relationship, the damages awarded below were for a harm distinct from those contracts, a harm arising out of the failure of Dunlevy and Stetson-Harza to provide proper estimates of energy output, adequately gauge the impact of government regulations, and more generally provide appropriate services. See *17 Vista Fee Assocs. v. Teachers Ins. & Annuity Assoc. of Am.*, 259 A.D.2d 75, 83, 693 N.Y.S.2d 554 (N.Y.App.Div.1999) ("[I]n claims against professionals, [a] legal duty independent of contractual obligations may be imposed by law as an incident to the parties' relationship. Professionals ... may be subject to tort liability for failure to exercise reasonable care, irrespective of their contractual duties." (quoting *Sommer*, 79 N.Y.2d at 551, 583 N.Y.S.2d 957, 593 N.E.2d 1365) (first alteration added; *18 second alteration in original); *Robinson Redevelopment Co. v. Anderson*, 155 A.D.2d 755, 757, 547 N.Y.S.2d 458 (N.Y.App.Div.1989) ("We conclude that the contractual and professional relationship of plaintiff and defendants gave rise to two distinct wrongs, one contractual and the other grounded in professional malpractice, recoverable at law."); *Commerce & Industry Ins. Co. v. Vulcraft, Inc.*, No. 97 Civ. 2578, 1998 WL 823055, at *12 (S.D.N.Y. Nov.20, 1998) (rejecting the application of the economic loss rule and stating that "[t]he

premise for the third-party claim ... is in substance one for professional malpractice, and that obligation is distinct from any contract into which the parties may have entered").

While we recognize that some cases have applied the economic loss rule to bar recovery where the only loss claimed is economic in nature, see *County of Suffolk v. Long Island Lighting Co.*, 728 F.2d 52, 62 (2d Cir.1984), and still others have applied that rule to professional malpractice cases, see *Joseph v. David M. Schwarz/Architectural Servs., P.C.*, 957 F.Supp. 1334, 1339-40 (S.D.N.Y.1997), the better course is to recognize that the rule allows such recovery in the limited class of cases involving liability for the violation of a professional duty. To hold otherwise would in effect bar recovery in many types of malpractice actions. See *17 Vista Fee Assocs.*, 259 A.D.2d at 83, 693 N.Y.S.2d 554 ("[T]he fact that 17 Vista suffered pecuniary losses only is of no significance in this malpractice claim against a professional. Many types of malpractice actions, such as those against an accountant or attorney, will frequently result in economic loss only." (internal citations omitted); *Robinson Redevelopment Co.*, 155 A.D.2d at 757, 547 N.Y.S.2d 458 (stating that because "[m]ost malpractice claims against professionals 'regularly arise out of a contractual relationship and involve injury to property or pecuniary interests only,' " strict application of the economic loss rule to such claims "would eliminate the availability of malpractice claims against professionals such as architects where the damages are essentially pecuniary in nature") (quoting *Video Corp. of Am. v. Frederick Flatto Assoc., Inc.*, 85 A.D.2d 448, 451-52, 448 N.Y.S.2d 498 (1982)).

Accordingly, we approve of the district court's resolution of this issue.

III. The Calculation of Damages Proximately Flowing From the Malpractice

[11] Stetson-Harza and Dunlevy also argue that even if the recovery sought by TPI is not barred by the economic loss rule, the damages

award is based on profits that were never recoverable under real world conditions. TPI argues that the appellants waived this argument by making precisely the opposite contention before the jury--that their energy output estimates were always attainable. TPI points out that although Stetson-Harza and Dunlevy may now object to the jury's calculation of damages, they should have presented those arguments before the jury, not on appeal.

[12][13] The proper measure of damages is a factual question that was properly submitted for resolution by the jury. Thus, the only issue properly before us is whether the jury's calculation of damages is sustainable. The jury heard evidence that the output predictions for the Forestport plant were possible absent the negative impact of the FERC bypass restrictions. It also heard evidence that TPI suffered substantial damages as a result of Dunlevy's and Stetson-Harza's violation of their professional duties. Under the circumstances, it is not for tortfeasors to dispute for the first time on appeal a seemingly reasonable measure of TPI's damages. See *Matter of Rothko*, 43 N.Y.2d 305, 322-23, 401 N.Y.S.2d 449, 372 N.E.2d 291 (1977); *Curiale v. Peat, Marwick, Mitchell & Co.*, 214 A.D.2d 16, 24-25, 630 N.Y.S.2d 996 (N.Y.App.Div.1995); *Cohen v. Hallmark Cards, Inc.*, 45 N.Y.2d 493, 498-99, 410 N.Y.S.2d 282, 382 N.E.2d 1145 *19 (1978); see also *Mirand v. City of New York*, 84 N.Y.2d 44, 50-51, 614 N.Y.S.2d 372, 637 N.E.2d 263 (1994) (examining a jury verdict to assess whether it was irrational); *Rowe v. Board. of Educ. of Chatham Cent. Sch. Dist.*, 120 A.D.2d 850, 851, 502 N.Y.S.2d 294 (N.Y.App.Div.1986). It is well established that damages need not be calculated with mathematical precision. See *Matter of Rothko*, 43 N.Y.2d at 323, 401 N.Y.S.2d 449, 372 N.E.2d 291; *Gilroy v. American Broad. Co.*, 58 A.D.2d 533, 534-35, 395 N.Y.S.2d 658 (1977) ("Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person.... [I]t will be enough if the evidence

show[s] the extent of the damages as a matter of just and reasonable inference, although the result be only approximate.' ") (quoting *Story Parchment Co. v. Paterson Co.*, 282 U.S. 555, 563, 51 S.Ct. 248, 75 L.Ed. 544 (1931)). Accordingly, we find sufficient evidence to support the jury's resolution of this issue.

IV. The Dismissal of the Claims for an Accounting and the Imposition of a Constructive Trust

[14] HII argues that the district court incorrectly dismissed its claims for an accounting and the imposition of a constructive trust and, furthermore, failed to make the findings of fact and conclusions of law required by Rule 52 of the Federal Rules of Civil Procedure. TPI responds that (1) HII cannot raise this issue on appeal after failing to raise it in its post-trial motions; (2) the record supports the district court's decision; and (3) in any event, the standard of review is extremely high--for clear error only.

Implicit in the district court's action was its recognition that once the claims for breach of the joint venture contract failed before the jury, the accounting and constructive trust claims were pointless. The district court's failure to make formal findings of fact and conclusions of law does not inhibit our ability to review the dismissal and is therefore not error. See *Devices for Medicine, Inc. v. Boehl*, 822 F.2d 1062, 1068 (Fed.Cir.1987) ("The record fully supports each challenged exercise of the district court's discretion, [including the dismissal of certain claims based on a jury's findings as to other issues,] and it was unnecessary for the district court to have stated what is obvious to one with knowledge of the record and the law."); *Grover Hill Grain Co. v. Baughman-Oster, Inc.*, 728 F.2d 784, 792-93 (6th Cir.1984). Moreover, even if we found the district court's action insufficient under Rule 52, we could still review the dismissal to see if it could be affirmed under Rule 50 as a judgment as a matter of law. See *Burger v. New York Inst. of Tech.*, 94 F.3d 830, 835 (2d Cir.1996). Under the facts of this case, that Rule's standard has certainly been met. After the jury's verdict it was clear to

all concerned that the accounting and constructive trust claims could not lie. Accordingly, we affirm the district court's rejection of HII's equitable claims and hold that it was not reversible error to do so without making formal findings of fact and law.

V. The Allegedly Improper Presentation of Evidence Regarding Dunlevy's Conflict of Interest

[15][16] Dunlevy and HII argue that the district court erred in allowing the presentation of evidence concerning Dunlevy's alleged conflict of interest between his duties as an employee of Stetson-Harza and as an owner of HII. Dunlevy and HII argue that this was not only error, but highly prejudicial error that requires vacatur of the jury verdict. Given the broad discretion afforded to a trial judge concerning the admission of evidence, see *Perry v. Ethan Allen, Inc.*, 115 F.3d 143, 150 (2d Cir.1997) ("Evidentiary rulings ordinarily will not be overturned absent an abuse of discretion.") (citations omitted), we are not persuaded that the district *20 court erred in deciding to admit this relevant and minimally prejudicial evidence. We also note that even if we assume *arguendo* that the district court erred in admitting this evidence, we cannot conceive how such error would be so gross as to require us to vacate the jury's verdict and the judgment. See *id.* (vacatur is only required when the admission of prejudicial evidence likely affected the outcome of the case); *In re Martin-Trigona*, 760 F.2d 1334, 1344 (2d Cir.1985) (reviewing for manifest error); see also *Fed.R.Civ.P.* 61.

VI. TPI's Claims for Negligent Misrepresentation, Breach of Contract, and Professional Malpractice with Regard to Adams and Kayuta Lake

A. Negligent Misrepresentation

TPI cross-appeals from the district court's grant of summary judgment to Stetson-Harza and Dunlevy on the negligent misrepresentation claim. TPI argues that the negligent misrepresentation claim is

supported by facts showing that (1) Stetson-Harza and Dunlevy owed TPI a duty of care due to a "special relationship"; (2) Stetson-Harza and Dunlevy knew or should have known that their representations were false; (3) Stetson-Harza and Dunlevy knew or should have known that the cross-appellants would rely on those misrepresentations; and (4) the cross-appellants in fact relied on those misrepresentations to their detriment.

In response, Stetson-Harza and Dunlevy contend that the district court correctly concluded that "only 'misrepresentations of present facts' are actionable under a negligent misrepresentation theory." Stetson-Harza's Reply Br. at 24 (quoting Judge Kahn and citing *Murray v. Xerox Corp.*, 811 F.2d 118, 123 (2d Cir.1987)) (emphasis in original). They assert that the alleged negligent misrepresentations only dealt with the sites' expected output and consequently were merely promises about future events. Additionally, Dunlevy argues that the alleged misrepresentations were not negligent (i.e., did not violate a duty of care); that the cross-appellants did not rely on any representations to their detriment; and that Steckler was well aware of the questionable financial viability of Kayuta Lake and Adams, but went ahead because these plants were packaged with the plant that he really wanted, Forestport.

The district court determined that the negligent misrepresentation claim should be dismissed on summary judgment. In its analysis, the court reasoned that the alleged misrepresentations related to future events and were promissory in nature rather than factual, and that therefore these statements could not support a claim for negligent misrepresentation under New York law. In support the court cited to *U.S. West Financial Services, Inc. v. Tollman*, 786 F.Supp. 333, 344 (S.D.N.Y.1992) and *Murray*, 811 F.2d at 118. The court concluded that "[a]ll of [the] alleged misrepresentations identified by Steckler in his opposition papers [were] promissory in nature and thus insufficient to support this theory of recovery."

[17][18] The district court correctly resolved

this issue. Under New York law, the elements for a negligent misrepresentation claim are that (1) the defendant had a duty, as a result of a special relationship, to give correct information; (2) the defendant made a false representation that he or she should have known was incorrect; (3) the information supplied in the representation was known by the defendant to be desired by the plaintiff for a serious purpose; (4) the plaintiff intended to rely and act upon it; and (5) the plaintiff reasonably relied on it to his or her detriment. See *King v. Crossland Savs. Bank*, 111 F.3d 251, 257-58 (2d Cir.1997) (citing *Eiseman v. State of New York*, 70 N.Y.2d 175, 187, 518 N.Y.S.2d 608, 511 N.E.2d 1128 (1987); *International Prods. Co. v. Erie R. Co.*, 244 N.Y. 331, 338, 155 N.E. 662 (1927)). However, the alleged misrepresentation must be factual in nature and not promissory or relating to future events *21 that might never come to fruition. See *Murray*, 811 F.2d at 123 ("Promises of future conduct are not actionable as negligent misrepresentations."); *Sheth v. New York Life Ins. Co.*, 709 N.Y.S.2d 74, 75 (N.Y.App.Div.2000) ("The purported misrepresentations relied upon by plaintiffs may not form the basis of a claim for fraudulent and/or negligent misrepresentation since they are conclusory and/or constitute mere puffery, opinions of value or future expectations.") (citations omitted); *Bango v. Naughton*, 184 A.D.2d 961, 963, 584 N.Y.S.2d 942 (N.Y.App.Div.1992) (negligent misrepresentation claim was properly dismissed for failure to state a claim because the alleged representations were "mere expressions of future expectation") (internal quotation and citation omitted); *Margrove Inc. v. Lincoln First Bank of Rochester*, 54 A.D.2d 1105, 1107, 388 N.Y.S.2d 958 (N.Y.App.Div.1976) ("The alleged negligent misstatements all relate to promised future conduct, if misstatements they be, and there is a lack of any element of misrepresentation as to an existing material fact so as to come within the doctrine of negligent misrepresentation...."); *Glanzer v. Shepard*, 233 N.Y. 236, 242, 135 N.E. 275 (1922) (Cardozo, J.) (holding a defendant liable for a negligent misstatement of material existing fact).

[19] In the present case, the negligent misrepresentation claim fails because the energy output predictions were mere promises of future output as opposed to present representations of existing fact. The alleged misrepresentations identified by the district court, relating to the energy output predictions, are just the sort of representations about future events that cannot support a claim for negligent misrepresentation. [FN1]

FN1. *Kimmell v. Schaefer*, 89 N.Y.2d 257, 652 N.Y.S.2d 715, 675 N.E.2d 450 (1996), relied on by the cross-appellants, is inapposite. First, although *Kimmell* dealt with projections, those projections were calculated based on known and existing utility rates that the defendant applied incorrectly. Second, the projections at issue in *Kimmell* dealt with energy cogeneration plants already in existence, in contrast to our case, where the plants had not yet been built at the time of the alleged misrepresentation. Third, the issue before the Court of Appeals was whether the relationship between the defendant and plaintiff would support a negligent misrepresentation claim, not whether the alleged statements qualified as representations of existing fact or future promises. Fourth, although the Appellate Division in *Kimmell* found that future predictions/projections could qualify as the basis for a negligent misrepresentation claim, see *Kimmell v. Schaefer*, 224 A.D.2d 217, 218, 637 N.Y.S.2d 147 (1996), that finding is contrary to the great weight of authority. See *supra*.

[20] Additionally, even if *Stetson-Harza* and *Dunlevy* made misrepresentations sufficient to support such a claim, TPI possessed adequate knowledge that the project's financial success was unlikely and in any event it should have known not to rely on the energy output estimates. [FN2] *Steckler*, the key player in TPI, had already been active in the real estate business in Canada and had even purchased a property containing a hydroelectric power plant. Moreover, Mr. *Flichter* of *BayBank*, whom *Steckler* consulted about financing the acquisition of these plants, warned *Steckler* that *Adams* was too remote. There is also evidence that TPI went ahead with the *Kayuta Lake* and *Adams* plants in hopes of scoring a payday with the other two plants that were bundled with these two known

losers. For example, Steckler admitted that "[t]he Forestport site was the prize...."

FN2. We note that the district court was very generous to construe the amended complaint filed by TPI, Marina Development, and Steckler as encompassing a negligent misrepresentation claim.

Consequently, the reliance element of this claim is lacking. See *Schlaifer Nance & Co. v. Estate of Andy Warhol*, 119 F.3d 91, 101 (2d Cir.1997) ("Generally, sophisticated businessmen's reliance on the misrepresentations of a party is unreasonable when the businessmen are engaged in major transactions with access to critical information *22 and fail to take advantage of that access.") (internal quotation and brackets omitted); *Keywell Corp. v. Weinstein*, 33 F.3d 159, 164 (2d Cir.1994) (If the plaintiff "has the means of knowing, by the exercise of ordinary intelligence, the truth ... of the representation, ... he will not be heard to complain" (citation omitted)); *Grumman Allied Indus., Inc. v. Rohr Indus., Inc.*, 748 F.2d 729, 737-38 (2d Cir.1984) (stating that New York courts are disinclined to entertain negligent misrepresentation claims when business persons fail to take advantage of access to critical information).

Under the circumstances, we reject the negligent misrepresentation claim and affirm the district court's decision.

B. Breach of Contract and Professional Malpractice

[21] TPI also cross-appeals from the district court's judgment as a matter of law finding no merit in the breach of contract and professional malpractice claims with respect to Adams and Kayuta Lake. However, we find TPI's argument unconvincing. TPI presented no expert evidence concerning professional malpractice at these two sites and, accordingly, the district court correctly dismissed these claims for lack of proof. [FN3] TPI also failed to establish a breach by Dunlevy or Stetson-Harza of any contract regarding these two plants. TPI's service contracts with Dunlevy and Stetson-Harza

simply did not include a contractual guarantee that any particular site would produce a particular amount of energy. See *J.A. 1289-90*.

FN3. We note that the trial court specifically asked TPI's counsel whether TPI's expert would provide any testimony regarding liability at Adams, Kayuta Lake, and Cranberry Lake. Counsel responded, "No, your Honor. And I'm not going to offer any damages proof." Tr. 1892.

VII. Prejudgment Interest

TPI argues that the district court erred in failing to amend the judgment to award prejudgment interest. TPI argues that under New York law, it is entitled to prejudgment interest as a matter of right. Stetson-Harza and Dunlevy both contend that prejudgment interest is inappropriate here because such an award might improperly include interest on future damages and any attempt to separate out the prejudgment interest based on when damages accrued would necessarily result in "pure speculation." Stetson-Harza Br. at 22 (internal quotation omitted).

[22][23] TPI is correct that New York law instructs courts to award prejudgment interest as a matter of right when a defendant's "act or omission depriv[es] or otherwise interfer[es] with title to, or possession or enjoyment of, property." N.Y. C.P.L.R. § 5001(a) (McKinney 2000); see *Mallis v. Bankers Trust Co.*, 717 F.2d 683, 693-94 (2d Cir.1983); *Spector v. Mermelstein*, 485 F.2d 474, 481-82 (2d Cir.1973). While Stetson-Harza and Dunlevy properly raise concerns about an award of prejudgment interest based on future damages, see *Gordon v. Matthew Bender & Co.*, 186 F.3d 183, 186 (2d Cir.1999), we are confident that the district court will ably resolve these issues on remand. This may be done for instance by separately calculating prejudgment interest for each year that damages accrue/accrued or by calculating interest from a reasonable intermediate date. See, e.g., *Manhattan Fuel Co. v. New England Petroleum Corp.*, 439 F.Supp. 959, 971 (S.D.N.Y.1977), *aff'd* 578 F.2d 1368 (2d Cir.1978) (calculating interest per month

based on when the action for damages accrued); *Falcone v. EDO Corp.*, 141 A.D.2d 498, 500, 529 N.Y.S.2d 123 (N.Y.App.Div.1988) (computing interest under § 5001(b) from a "reasonable date"). Difficulties in calculation do not warrant ignoring the mandate of the state's statute. See *Cruz v. Local Union Number 3*, 34 F.3d 1148, 1157 (2d Cir.1994) (difficulty in calculating backpay under Title VII should not result in the denial of a reasonable estimate); *Falcone*, *23 141 A.D.2d at 500, 529 N.Y.S.2d 123. See also *Slicker v. Jackson*, 215 F.3d 1225, 1229-30 (11th Cir.2000) (compensatory damages for violation of constitutional rights may be awarded despite difficulty in calculating the monetary value of injury) (citing *Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299, 307, 106 S.Ct. 2537, 91 L.Ed.2d 249 (1986)).

VIII. TPI's Claims for Breach of Contract with Respect to Forestport and Ogdensburg

In light of our resolution of TPI's claim for professional malpractice with respect to these two hydroelectric power plants, we need not resolve its contentions in this portion of the cross-appeal. See TPI Br. at 56 n.18 ("To the extent this Court affirms TPI's damage award on its malpractice claim, this issue may be academic.").

CONCLUSION

In accordance with the foregoing, we affirm in part and vacate and remand in part for further proceedings consistent with this opinion.

Briefs and Other Related Documents (Back to Top)

TRAFALGAR POWER, INC., Appellee/Cross-Appellant, v. Neal DUNLEVY, Stetson-Harza, Appellants/Cross-Appellees. HYDRO INVESTORS, INC., Appellant, v. TRAFALGAR POWER, INC., et. al., Appellees., 2000 WL 34003862 (Appellate Brief) (C.A.2 March 15, 2000), Appellant Dunlevy's Final Brief (including citations to Joint Appendix)

HYDRO INVESTORS, INC., Plaintiff-Counter-Defendant-Appellant, Lawrence TAFT, Plaintiff-Counter-Defendant, v. TRAFALGAR POWER INC., Marina Development, Inc., and Arthur Steckler, Defendants-Counter-Claimants-Appellees. TRAFALGAR POWER INC., Plaintiff-Appellee-Cross-Appellant, v. Neal DUNLEVY and Stetson-Harza, Defendants-Appellants-Cross-Appellees., 2000 WL 34003867 (Appellate Brief) (C.A.2 March 17, 2000), Brief of Defendant-Appellant-Cross-Appellee Stetson-Harza

HYDRO INVESTORS, INC., Plaintiff-Counter-Defendant-Appellant, Lawrence TAFT, Plaintiff-Counter-Defendant, v. TRAFALGAR POWER INC., Marina Development, Inc., and Arthur Steckler, Defendants-Counter-Claimants-Appellees. TRAFALGAR POWER INC., Plaintiff-Appellee-Cross-Appellant, v. Neal DUNLEVY and Stetson-Harza, Defendants-Appellants-Cross-Appellees., 2000 WL 34003866 (Appellate Brief) (C.A.2 March 20, 2000), Brief of Plaintiff-Counter-Defendant-Appellant Hydro Investors, Inc.

HYDRO INVESTORS, INC., Plaintiff-Counter-Defendant-Appellant, Lawrence TAFT, Plaintiff-Counter-Defendant, v. TRAFALGAR POWER INC., Marina Development, Inc., and Arthur Steckler, Defendants-Counter-Claimants-Appellees. TRAFALGAR POWER, INC., Plaintiffs-Appellee-Cross-Appellant, v. Neal DUNLEVY and Stetson-Harza, Defendants-Appellants-Cross-Appellees., 2000 WL 34003864 (Appellate Brief) (C.A.2 May 9, 2000), Reply Brief of Defendant-Appellant-Cross-Appellee Neal Dunlevy

HYDRO INVESTORS, INC., Plaintiff-Counter-Defendant-Appellant, Lawrence TAFT, Plaintiff-Counter-Defendant, v. TRAFALGAR POWER INC., Marina Development, Inc., and Arthur Steckler, Defendants-Counter-Claimants-Appellees. TRAFALGAR POWER INC., Plaintiff-Appellee-Cross-Appellant, v. Neal DUNLEVY and Stetson-Harza, Defendants-Appellants-Cross-Appellees., 2000 WL 34003865

(Appellate Brief) (C.A.2 May 16, 2000), Reply
Brief of Plaintiff-Counter-Defendant-
Appellant Hydro Investors, Inc.

HYDRO INVESTORS, INC., Plaintiff-
Counter-Defendant-Appellant, Lawrence
TAFT, Plaintiff-Counter-Defendant, v.
TRAFALGAR POWER INC., Marina
Development, Inc., and Arthur Steckler,
Defendants-Counter-Claimants-Appellees.
TRAFALGAR POWER INC., Plaintiff-
Appellee-Cross-Appellant, v. Neal DUNLEVY
and Stetson-Harza, Defendants-Appellants-
Cross-Appellees., 2000 WL 34003863
(Appellate Brief) (C.A.2 May 17, 2000), Reply
and Opposition to Cross-Appeal of Defendant-
Appellant-Cross-Appellee Stetson-Harza

227 F.3d 8

END OF DOCUMENT

44

Only the Westlaw citation is currently available.

United States District Court,
S.D. New York.

I.L.G.W.U. NATIONAL RETIREMENT
FUND; Edgar Romney and Arnold Harris and
their

successors as trustees of the I.L.G.W.U.
National Retirement Fund, Plaintiffs,

v.

CUDDLECOAT, INC.; Warren Corporation;
Warren Leasing Corporation and Loro
Piana & C., Inc., Defendants.

WARREN CORPORATION; Warren Leasing
Corporation and Loro Piana & C., Inc.,
Third-Party Plaintiffs,

v.

NEW YORK COAT, Suit, Dress, Rainwear &
Allied Workers Union, Local 89-22-1,
Unite, AFL-CIO and Lewis, Greenwald,
Clifton & Nikolaidis, P.C., Third-Party
Defendants.

No. 01 Civ. 4019(BSJ).

March 11, 2004.

Opinion

JONES, J.

*1 Before the Court are Third-Party Defendants' motion to dismiss Third-Party Plaintiff's Complaint pursuant to Federal Rules of Civil Procedure 9(b) and 12(b)(6) and Plaintiffs' motion for reconsideration of this Court's Order vacating the previously entered default judgment against Defendant Cuddlecoat, Inc. ("Cuddlecoat"). For the reasons set forth below, Third-Party Defendants' motion to dismiss is GRANTED in part and DENIED in part and Plaintiffs' motion for reconsideration is DENIED.

BACKGROUND

Defendant Warren Corporation ("Warren") is a private company engaged principally in the manufacture of fabrics and clothing. Defendant Cuddlecoat, until 1996, was

engaged in the business of finishing fabrics and manufacturing clothing. Certain of Cuddlecoat's employees were members of the International Ladies' Garment Workers' Union, and Cuddlecoat was required to make payments to Plaintiff I.L.G.W.U. National Retirement Fund ("the Fund") pursuant to the Employee Retirement and Income Security Act ("ERISA").

Cuddlecoat was a customer of Warren and entered into a series of security and other agreements with Warren. In 1995, Warren commenced suit against Cuddlecoat, seeking to foreclose on its security. In January 1996, while the suit between Warren and Cuddlecoat was still pending, an involuntary Chapter 11 bankruptcy petition was filed against Cuddlecoat. The Fund and the New York Coat, Suit Dress, Rainwear & Allied Workers Union, Local 89-221-1, UNITE, AFL-CIO ("the Union") each filed separate claims in the bankruptcy proceeding.

After the bankruptcy petition was filed, Warren and Cuddlecoat settled their individual litigation in an agreement under which Warren became the sole shareholder of Cuddlecoat. The timing and operation of that agreement remain in dispute between the parties to this action. The committee of unsecured creditors brought an adversary proceeding in the bankruptcy action seeking to hold Warren responsible for various creditors' claims against Cuddlecoat. Warren negotiated a settlement of the creditors committee's claims, and exchanged mutual releases with the Union. Warren did not obtain a release from the Fund, and the Union's release did not name the Fund as an entity included in the release.

Warren alleges that it did not obtain a specific release from the Fund because David Greenwald, an associate with Defendant Lewis, Greenwald, Clifton & Nikolaidis, P.C. ("Lewis Greenwald"), stated that the Union's release would bind the Fund. Lewis Greenwald represented the Union in the settlement negotiations. Cuddlecoat was formally dissolved on September 23, 1998 and the bankruptcy proceeding was dismissed

eleven months later.

In 2001, the Fund filed this action seeking to recover money owed to the Fund pursuant to ERISA. [FN1] In response, Warren asserted a counter-claim against the Fund and filed a third-party action against the Union and Lewis Greenwald. Defendant Cuddlecoat failed to answer Plaintiff's Complaint and failed to appear or otherwise move with respect to the Complaint. Plaintiffs moved for default judgment against Cuddlecoat on or about October 17, 2001. The Court granted the motion for default judgment on October 25, 2001.

FN1. Plaintiffs are seeking to recover for essentially the same claim they brought against Cuddlecoat in the bankruptcy proceeding--a claim for withdrawal liability pursuant to ERISA.

*2 On October 26, 2001, the Court received a letter from Defendant Warren, asking that the Court either deny Plaintiff's motion for default judgment against Cuddlecoat or, in the alternative, grant Warren an extension of time to answer on Cuddlecoat's behalf. Upon learning that the Court had granted Plaintiffs' motion for default judgment, Warren moved, pursuant to Local Rule 6.3, for reconsideration of the default judgment entered against Cuddlecoat. In a telephone conference on January 25, 2002, the Court granted Warren's motion and vacated the default judgment. Plaintiffs now move for reconsideration of that decision.

In or about March 2002, Warren moved pursuant to Fed.R.Civ.P. 15 and 21 to file and serve an amended answer, counterclaim, and third-party complaint. Plaintiffs opposed this motion. In a Memorandum and Order, dated June 3, 2002, Magistrate Judge Eaton granted the motion. Third-Party Plaintiffs now move to dismiss Warren's Third-Party Complaint.

DISCUSSION

I. MOTION TO DISMISS

Warren's Third-Party Complaint ("Warren Complaint") brings claims against the Union

and Lewis Greenwald for fraud, negligent misrepresentation, and civil conspiracy. Essentially, Warren claims that the Third-Party Defendants--the Union and their counsel Lewis Greenwald--purposely misrepresented that the Settlement Agreement and releases resolved all claims by the Fund. The Warren Complaint also claims that the Union breached the 1997 Settlement Agreement with Warren by failing to provide a release for all "affiliates"--i.e. the Fund--as required by the Settlement Agreement.

A. Negligent Misrepresentation

"A claim for negligent misrepresentation can only stand where there is a special relationship of trust or confidence, which creates a duty for one party to impart correct information to another, the information given was false, and there was reasonable reliance upon the information given." *Hudson River Club v. Consolidated Edison Co.*, 275 A.D.2d 218, 220 (1st Dep't 2000). Warren relies on the New York Court of Appeal's decision in *Kimmell v. Schaefer*, 89 N.Y.2d 257 (1996), to argue that discovery must be conducted to determine whether a non-fiduciary relationship existed between Warren and the Third-Party Defendants that nonetheless gave rise to a duty to speak truthfully in the course of the settlement negotiations. [FN2] However, *Dallas Aerospace, Inc. v. CIS Air Corp.*, 352 F.3d 775 (2d Cir.2003), explains that Kimmell did not eliminate the requirement of a "special relationship" for a negligent misrepresentation tort action.

FN2. In making this argument, Warren also relies upon Magistrate Judge Eaton's June 3, 2002 Memorandum and Order allowing Warren to file its Third-Party Complaint, in which Magistrate Judge Eaton noted that *Kimmell v. Schaefer* did not include the word "fiduciary" in describing the relationship between parties that may give rise to a duty to speak with care. However, Magistrate Judge Eaton's Memorandum and Order pre-dated the Second Circuit's Opinion in *Dallas Aerospace, Inc. v. CIS Air Corp.*, 352 F.3d 775, 788 -789 (2d Cir.2003), which has clarified that Kimmell did not eliminate the basic requirement of a "special relationship" for a negligent misrepresentation tort

action.

[Plaintiff] urges that Kimmell enunciated a new standard, exacting liability whenever the relationship between the parties is "such that in morals and good conscience the one has the right to rely upon the other for information." This is a misreading of the case. The court did not depart from the traditional understanding that "liability for negligent misrepresentation has been imposed only on those persons who possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party." Indeed, the assertedly "new" standard stated in Kimmell was a quotation from a New York Court of Appeals decision that preceded it by seven decades. See *Int'l Prods. Co. v. Erie R.R. Co.*, 244 N.Y. 331, 155 N.E. 662, 664 (1927). Thus, Kimmell can hardly be understood to be novel or to have shifted New York law. In sum, Kimmell, which has since been limited by the New York Court of Appeals, see, e.g., *Murphy v. Kuhn*, 90 N.Y.2d 266, 660 N.Y.S.2d 371, 682 N.E.2d 972, 974-76 (1997), does nothing to undermine the basic requirement of a "special relationship" for a negligent misrepresentation tort action.

*3 *Dallas Aerospace, Inc. v. CIS Air Corp.*, 352 F.3d 775, 788-789 (2d Cir.2003) (some internal citations omitted).

The "special relationship" required for a negligent misrepresentation tort has been described as "either actual privity of contract between the parties or a relationship so close as to approach that of privity." *Prudential Ins. Co. v. Dewey Ballantine, Bushby, Palmer & Wood*, 80 N.Y.2d 377, 382 (1992). Warren has not alleged the existence of such a relationship, therefore the claim of negligent misrepresentation is DISMISSED.

B. Fraud Claim

In order to state a claim for fraud, a plaintiff must allege: (1) a material misrepresentation of fact, (2) made with knowledge of its falsity, (3) with intent to deceive, (4) justifiable reliance, and (5) damages. *Mergler v. Crystal*

Properties Assoc., Ltd., 179 A.D.2d 177, 181 (1st Dep't 1992). Here, Warren cannot show, as a matter of law, that it justifiably relied on any statements by opposing counsel, Lewis Greenwald, regarding the binding effect of the Settlement Agreement and the releases on the Fund. Therefore the motion to dismiss is GRANTED.

"[I]t is a well-settled principle that neither a party nor his attorney may justifiably rely on the legal opinion or conclusions of his or her adversary's counsel." *Aglira v. Julien & Schlesinger, P.C.*, 214 A.D.2d 178, 185 (1st Dep't 1995); see also *Karsanow v. Kuehlewein*, 232 A.D.2d 458, 458-459 (2d Dep't 1996) ("plaintiffs' allegation that they consented to the inclusion of a non-recourse clause in the extension agreements because [defendant's attorney] assured them that such a provision was 'customary' is insufficient to establish a claim for fraud. The plaintiffs could not reasonably rely on the legal opinions or conclusions of their adversary's counsel.").

In response, Warren argues that *Kimmell v. Schaefer* recognized that "a duty to speak truthfully may arise in a commercial context and in relationships that are not 'traditional' fiduciary relationships." (Warren Mem. at 6-7). Warren argues that, in light of *Kimmell*, discovery will be required to determine whether a duty to speak truthfully existed between Warren and the Third-Party Defendants. Warren appears to argue that, if such a duty existed, Warren was justified in relying upon Lewis Greenwald's statements. (Warren Mem. at 7). However, as explained above, the Second Circuit has examined and rejected Warren's interpretation of *Kimmell*. See *Dallas Aerospace, Inc. v. CIS Air Corp.*, 352 F.3d 775, 788-789 (2d Cir.2003). Therefore, *Kimmell* does not alter the established New York law that neither a party nor his attorney may justifiably rely on the legal opinion or conclusions of his or her adversary's counsel. The motion to dismiss Warren's fraud claim is GRANTED.

C. Civil Conspiracy

It is well settled under New York law that

there is no substantive tort of conspiracy. See *Goldstein v. Siegel*, 19 A.D.2d 489, 493 (1st Dep't 1963). "In order to state a claim for conspiracy, therefore, there must be allegations of an independent actionable tort." *Antonios A. Alevizopoulos & Assocs. v. Comcast Int'l Holdings, Inc.*, 100 F.Supp.2d 178, 187-188 (S.D.N.Y.2000). Here, the Court has dismissed all of Warren's claims that sound in tort, therefore, the claim of civil conspiracy must also be DISMISSED. See *Demalco, Ltd. v. Feltner*, 588 F.Supp. 1277, 1278 (S.D.N.Y.1984) ("the gravamen of a claim of conspiracy is the underlying independent tort, and if the independent tort has not been adequately pleaded, the conspiracy claim will also fail").

D. Breach of Contract

*4 Warren alleges that the Union breached the Settlement Agreement by failing to deliver a release that complied with paragraph 6 of the agreement. Paragraph 6 states that:

Simultaneously with the execution of this Agreement, each of the Secured Creditor and the Union will execute and deliver mutual releases (the form and substance of each of which has been mutually agreed to by the parties) of any and all claims or causes of action that any party to this Settlement ever had, now has or hereafter can, shall or may have, against any other such party (including claims by or against each such parties' affiliates, subsidiaries, officer, directors, employees, agents representatives, controlling entities, legal and other retained professionals) for, upon, or by reason of any matter, cause or thing whatsoever from the beginning of the World to the date of this Agreement.

(Warren Compl. Ex. B) (emphases added).

As Judge Eaton explained in his June 3, 2002 Memorandum and Order, this claim turns upon the meaning of the word "affiliates," as used in paragraph 6, and upon the process by which the word "affiliates" was omitted from the releases. As there appear to be factual issues regarding this claim, the motion to dismiss is DENIED.

II. Motion for Reconsideration

Plaintiffs move for reconsideration of this Court's Order, dated January 25, 2002 ("January 25 Order"), vacating the default judgment previously entered against Defendant Cuddlecoat. Plaintiffs contend that the Court overlooked controlling legal authority, which allows the entry of default judgment against a dissolved corporation, when issuing the January 25 Order. However, the Court did not base its decision to vacate the default judgment on the mere fact that Cuddlecoat was a dissolved corporation. While the Court did consider the dissolved status of Cuddlecoat, the Court explicitly stated that its decision was "based on considerations in all of the letters that I have seen." (1/25/02 Tr. at 4).

Rule 55(c) of the Federal Rules of Civil Procedure provides that "for good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b)." Relief from default is to be granted at the discretion of the court upon consideration of the individual circumstances of the case and the credibility and good faith of the parties. See *Enron Oil Corp. v. Diakuhara*, 10 F.3d 90, 95 (2d Cir.1993). In deciding a motion to vacate a default judgment, the Court focuses on three considerations with regard to the meaning of "good cause": (1) the willfulness of the default; (2) the potential prejudice to the adversary; and (3) the presentation of a meritorious defense. See *In re Chalasani*, 92 F.3d 1300, 1307 (2d Cir.1996). Other factors that may be considered include whether the failure to follow a rule of procedure was a mistake made in good faith and whether the entry of default would bring about an unfair result. See *Enron Oil*, 10 F.3d at 96.

*5 Here, the Court does not believe that Cuddlecoat's default was willful, but rather it was directly attributable to its dissolved status. The vacatur of the default judgment does not prejudice Plaintiffs, [FN3] and permitting Warren to answer or retain counsel on Cuddlecoat's behalf would allow for the presentation of Cuddlecoat's possible defenses

and thus a decision on the merits. To the extent that Plaintiffs may wish to argue that Warren-Cuddlecoat's dissolving shareholder--may not answer or retain counsel on Cuddlecoat's behalf, the Court directs Plaintiffs to submit supplemental briefing, limited to this issue, no later than 30 days from the date of this Opinion. Warren's response, if any, shall be filed no later than two weeks after any brief submitted by Plaintiffs. Lastly, the Court has reviewed the submissions by the parties and is convinced that one or more of Warren's defenses may be meritorious.

FN3. Plaintiffs argue that the vacatur will result in prejudice because, "without such a default judgment, the Fund is unable to conduct the post-judgment discovery necessary to satisfy its statutorily imposed fiduciary duty to the Fund's beneficiaries." (Pl. Mem. at 6-7). This argument is not persuasive. Plaintiff's will be permitted to conduct post-judgment discovery in the event they obtain judgment on the merits. See *Davis v. Musler*, 713 F.2d 907, 916 (2d Cir.1983) ("delay alone is not a sufficient basis for establishing prejudice.... Rather, it must be shown that delay will result in the loss of evidence, create increased difficulties of discovery, or provide greater opportunities for fraud and collusion.").

The Court finds that there was "good cause" to vacate the previously entered default judgment. Moreover, the Second Circuit strongly prefers dispute determination on the merits and directs district courts to resolve any doubts regarding vacatur of a default in favor of a trial on the merits. See *Shah v. New York State Dept. of Civil Service*, 168 F.3d 610, 615 (2d Cir.1999). Therefore, Plaintiffs' motion for reconsideration is DENIED.

CONCLUSION

Third Party Defendants' motion to dismiss is GRANTED with respect to Warren's fraud, negligent misrepresentation and civil conspiracy claims and DENIED with respect to Warren's breach of contract claim. Plaintiffs' motion for reconsideration of the Order vacating default judgment against Cuddlecoat is DENIED. Plaintiffs' brief on the

issue of whether Warren may answer or retain counsel on Cuddlecoat's behalf must be submitted within 30 days from the date of this Opinion. Warren's response, if any, is due two weeks thereafter.

The parties are further directed to inform the Court in writing of the status of this action no later than 30 days from the date of this Opinion.

SO ORDERED:

2004 WL 444071 (S.D.N.Y.)

END OF DOCUMENT

45

United States District Court,
S.D. New York.

In re AHT CORPORATION, et al., Debtor.
AHT Corporation, Plaintiff,

v.

BioShield Technologies, Inc., AHT Acquisition
Corp., Timothy C. Moses, Jacques
Elfersy, Scott Parliament, and Geoffrey Faux,
Defendants.

No. M-47B(CM).
Bankruptcy No. 00-14446(ASH).
Adversary No. CIV. 00-2935.

April 4, 2003.

Corporate debtor that was forced to file for Chapter 11 relief after merger that it had negotiated with another corporation failed to take place brought adversary proceeding against this other corporation and its officers for fraudulent and/or negligent misrepresentations allegedly made during merger discussions. On defendants' motion for summary judgment, the Bankruptcy Court, Adlai S. Hardin, Jr., J., entered proposed findings of fact and conclusions of law recommending that motion be granted. On *ne novo* review, the District Court, McMahan, J., held that: (1) debtor, a sophisticated business enterprise that was represented by both general and outside counsel in its prepetition merger negotiations with other company, failed to show that it justifiably relied on misrepresentations allegedly made by other company's representatives that all of its shareholders were on board in supporting merger; and (2) other company involved in arms-length negotiations with debtor over proposed merger did not stand in any special relationship to debtor, of kind required to render it liable under New York law for any negligent misrepresentations made during merger discussions.

Motion granted.

West Headnotes

[1] Corporations 582
101k582

Chapter 11 debtor, a sophisticated business enterprise that was represented by both general and outside counsel in its prepetition merger negotiations with other company, failed to show that it justifiably relied on misrepresentations allegedly made by other company's representatives that all of its shareholders were on board in supporting merger, and could not recover in fraud when such support failed to materialize and merger did not proceed, where debtor was aware that co-founder and 21% shareholder of this other company was leaving corporate management due to his disagreement over direction that company was taking, that co-founder and 21% shareholder had not participated in single negotiating session or important event in connection with merger, and that other company refused to give debtor a shareholder voting agreement, such that no shareholder was legally bound to vote in favor of merger; under the circumstances, debtor should have made direct inquiry to ascertain whether all shareholders supported merger, and its failure to do so precluded any finding of justifiable reliance.

[2] Fraud 20
184k20

To prevail on fraud claim under New York law, plaintiff must show that its reliance on defendant's misstatement was justifiable under all the circumstances.

[3] Corporations 582
101k582

Having failed to demonstrate that it justifiably relied upon misrepresentations allegedly made during merger discussions between itself and another corporation, as required to establish any actionable fraud under New York law, debtor could not recover on its claim against third party for aiding and abetting this fraud.

[4] Fraud 30
184k30

Under New York law, for plaintiff to prevail on claim of aiding and abetting fraud, he/she must establish three things: (1) that some third party perpetrated a fraud; (2) that defendant had actual knowledge of existence

of fraudulent scheme; and (3) that defendant provided substantial assistance to third party in advancing the underlying fraud.

[5] Corporations 335
101k335

Mere fact that co-founder and 21% shareholder of corporation involved in prepetition merger negotiations with Chapter 11 debtor had continued to do some work for company after resigning from its board of directors, by advising it on patent, technological and scientific matters, was insufficient to raise inference as to his knowledge of fraudulent misrepresentations allegedly made during merger negotiations, as required to hold him liable for aiding and abetting fraud, especially where he played no part in these negotiations.

[6] Fraud 30
184k30

Under New York law, in order to adequately plead scienter required for an aiding and abetting fraud claim, plaintiff must allege sufficient facts to support strong inference of fraudulent intent: (1) by alleging facts showing motive for participating in fraudulent scheme and clear opportunity to do so; or (2) by identifying circumstances indicative of conscious behavior.

[7] Fraud 30
184k30

Under New York law, ordinary economic motives are insufficient to support the scienter element of an aiding and abetting fraud claim.

[8] Courts 99(3)
106k99(3)

Prior order denying defendants' motion to dismiss complaint merely established that debtor would be given opportunity to present evidence in support of its claims, not that it would succeed in doing so, and did not preclude court under law of the case doctrine from subsequently entering summary judgment in defendants' favor.

[9] Fraud 13(3)
184k13(3)

Under New York law, in order to prevail on negligent misrepresentation theory, plaintiff

must establish that defendant had duty, based on special relationship, to give correct information to plaintiff, and that plaintiff reasonably relied to its detriment on false information provided by defendant.

[10] Corporations 582
101k582

Chapter 11 debtor, a sophisticated business enterprise that was represented by both general and outside counsel in its prepetition merger negotiations with other company, failed to show that it reasonably relied on representations allegedly made by other company's representatives that all of its shareholders were on board in supporting merger, and could not recover on negligent misrepresentation theory when such support failed to materialize and merger did not proceed, where debtor was aware that co-founder and 21% shareholder of this other company was leaving corporate management due to his disagreement over direction that company was taking, that he had not participated in single negotiating session or important event in connection with merger, and that other company refused to give debtor a shareholder voting agreement, such that no shareholder was legally bound to vote for merger; debtor's failure, under the circumstances, to make any direct inquiry to ascertain where shareholders stood precluded a finding of reasonable reliance.

[11] Corporations 582
101k582

Other corporation involved in arms-length negotiations with company over proposed merger, during which both companies were represented by their own attorneys and financial advisers, did not stand in any special relationship to first company, of kind required to render it liable under New York law for any negligent misrepresentations made during merger discussions.

[12] Fraud 13(3)
184k13(3)

Under New York law, liability for negligent misrepresentation is imposed only on those persons who possess unique or specialized expertise, or who are in special position of

confidence and trust with injured party.

*736 Andrew D. Manitsky, Gravel and Shea, Burlington, VT and Tracy L. Klestadt, Klestadt & Winters, LLP, New York, NY, for Plaintiff-Appellant.

Fred D. Weinstein, Kurzman Eisenberg Corbin Lever & Goodman, LLP, White Plains, NY, for Defendant-Appellee Timothy C. Moses.

Theodore L. Hecht, Layton Brooks & Hecht LLP, New York, NY, for Defendant-Appellee Jacques Elfersy.

Mark S. Tulis, Oxman Tulis Kirkpatrick Wyatt & Geiger, White Plains, NY, for Defendant-Appellee Scott Parliament.

DECISION AND ORDER GRANTING
INDIVIDUAL DEFENDANTS' MOTION
FOR SUMMARY JUDGMENT
DISMISSING COUNTS IV, V AND VI

MCMAHON, District Judge.

This matter comes before me on plaintiff-debtor's appeal from the proposed findings of fact and conclusions of law prepared by The Hon. Adlai S. Hardin, U.S.B.J., on a motion for summary judgment by defendants Timothy Moses, Jacques Elfersy and Scott Parliament. The Bankruptcy Court heard the motion, but did not determine it, as the proceeding against these defendants did not raise "core" claims. [FN1] This Court reviews Judge Hardin's proposed findings of fact and conclusions of law (F & C) in light of the objections lodged thereto pursuant to Bankr.Rule 9033. [FN2] Review by the district court is de novo, and I have the power to accept, reject or modify the proposed findings of fact or conclusions of law. I also have the power to hear further evidence--which in this case is entirely unnecessary--and to recommit the matter to Judge Hardin. Bankr.Rule 9033(d).

FN1. Judge Hardin ruled that the claims against the individual defendants in this adversary proceeding were not core claims. (F & C at 5-8) AHT does not object to this ruling. I, therefore, adopt Judge

Hardin's analysis on the point.

FN2. Judge Hardin made his findings of fact and conclusions of law last July. Unfortunately, the Clerk of the Court erred in sending the objections to the wrong judge--Judge Conner, not Judge McMahon--and until Judge Conner's chambers discovered the error (which was quite recently) no one was aware that objections had been lodged to Judge Hardin's ruling. This accounts for the inordinate delay in ruling on the objections.

The Court has reviewed Judge Hardin's proposed findings and conclusion, as well as the objections lodged thereto by AHT, the opposition to the objections filed by each of the moving defendants, and AHT's reply to those opposition papers. Upon de novo consideration of the entire record, I conclude that the defendants' motion for summary judgment should be granted, on *737 the ground that plaintiff has not raised a genuine issue of material fact concerning justifiable reliance, thus entitling defendants to judgment as a matter of law. FED. R. CIV. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

While there are a number of factual disputes raised by the papers, the material facts of this matter are largely undisputed. Though I modify Judge Hardin's findings in some minor respects, the parties will find that they are largely intact. Like Judge Hardin, I draw my findings of fact from the Complaint, AHT's "Statement of Fact" contained in the Joint PreTrial Order, and documents relied on by AHT in opposing summary judgment. In all cases, the facts are viewed most favorably to AHT, the non-moving party. United States v. Diebold Inc., 369 U.S. 654, 655, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962); Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); Leberman v. John Blair & Co., 880 F.2d 1555, 1559 (2d Cir.1989).

Findings of Fact

AHT is a Delaware corporation with its

principal place of business in Tarrytown, New York. AHT was "a national provider of internet-based clinical e-commerce among physicians, other healthcare providers, and healthcare organizations," which focuses on automating laboratory and prescription transactions--two of the most frequent clinical transactions initiated by physicians.

During the summer of 1999, AHT sought potential merger partners and retained a financial advisor, which contacted twenty two potential acquirers for AHT. Three parties, including defendant BioShield, submitted preliminary indications of interest.

BioShield is a Georgia corporation which, in 1999, began an expansion of its business operations by creating a new subsidiary known as "eMD," an internet project involving pharmaceutical healthcare. BioShield was co-founded in 1995 by individual defendants Moses and Elfersy. At all relevant times, Moses was the President and Chief Executive Officer of BioShield and a member of its Board of Directors. Until mid-2000, Elfersy was co-chairman of the Board, Senior Vice President, Secretary and Treasurer. In addition, Moses and Elfersy were principal stockholders of BioShield, holding 20% and 21.6% of the company's shares, respectively.

Defendant Parliament was the Chief Financial Officer of BioShield from February 2000 until December 2000. He acted as one of the primary negotiators on behalf of BioShield in connection with the transaction that underlies this lawsuit.

On May 3, 2000, Dr. Jonathon T. Edelson, AHT's Chairman, President and CEO, and Jeffrey M. Sauerhoff, its Chief Financial Officer, spoke with representatives from BioShield, including Moses and Parliament. Two days later, the parties executed a mutual non-disclosure agreement designed to facilitate the exchange of non-public financial information.

In connection with the merger negotiations, AHT was represented, not only by Edelson and Sauerhoff, but by its General Counsel,

Eddy Friedfeld; its outside counsel, the firm of O'Sullivan, Graev & Karabell (now known as O'Sullivan LLP); its Chief Information Officer, Robert Alger; and its investment bank, Chase H & Q.

In connection with the merger negotiations, BioShield was represented by Moses, Parliament, and Gruntal & Co. Elfersy *738 did not participate in any of the merger negotiations. He did not have any direct communication with any representative of AHT or make any personal representation to any representative of AHT about any subject touching on the merger.

The merger negotiations were conducted against a background of AHT's financial difficulties. During the period between March 31 and June 30, 2000, AHT's shareholder equity decreased by almost 50%, due in significant part to operating losses incurred by AHT during that quarter. From the earliest meetings, the parties openly discussed AHT's limited cash resources, which was the reason it was seeking a merger partner.

On May 12, 2000, BioShield sent a letter, signed by Moses, containing an initial, non-binding indication of interest in purchasing AHT at a price of \$3.50 to \$5 per share. The letter advised that, "[t]his preliminary indication of interest has been vetted with the board of BioShield ..., which has approved the submission of this letter to you" The letter advised AHT to communicate with BioShield through Moses, Parliament or Roger Kahn of Gruntal & Co.

Further meetings followed, and BioShield conducted due diligence. On June 8, 2000, after reviewing certain non-public information, BioShield indicated that it would pay only \$1.25 per share for AHT's stock. AHT rejected that offer as too low. Following further negotiations, and on June 12, 2000, BioShield made a third offer to pay \$1.75 per share in a stock, or \$20 million, in a stock rather than cash deal. The \$20 million set price meant that, if BioShield's stock price fell following execution of the Merger Agreement, AHT shareholders would receive more shares

of BioShield stock.

By June 18 the parties were exchanging drafts of a merger agreement. As is customary in these situations, they haggled over terms, and each side asked for inclusions that the other was not prepared to give. BioShield sought a "due diligence out" pursuant to which it could cancel the deal following execution of the Merger Agreement if its review of AHT's financial statements caused it to change its mind. AHT refused to agree to such a term.

AHT for its part wanted some assurance that if it went forward, the merger was likely to close. It asked that BioShield management and shareholders enter into a "voting agreement," which would bind them to vote their shares in favor of the merger. BioShield refused to agree to such a term.

It is the circumstances of that refusal that gives rise to this lawsuit.

On or about June 28 (the day before the Merger Agreement was finalized and approved by both sides), as the parties were in final negotiations, BioShield filed a Form 8-K with the Securities and Exchange Commission ("SEC"), disclosing that "Jacques Elfersy has announced his intention to semi-retire from both BioShield Technologies, Inc and EMD.com [Electronic Medical Distribution, Inc.] ..., thus tendering his resignation as on officer of both companies." The background to this announcement was as follows: on June 21, 2000, at a meeting of BioShield's Board, a motion was made to elect Moses as sole Chairman of the company. Elfersy, who had no advance notice of the motion, said, "You know what? If that's what you want to do, that's fine." Without further ado, he left the meeting (accompanied by another director) and did not return. Moses was elected the sole Chairman, and the Board adopted a resolution terminating Elfersy's employment.

Elfersy immediately hired an attorney to negotiate the terms of any continuing relationship he was to have with the company.
*739 The record does not disclose that he

submitted a resignation from the Board of Directors at that time, either orally or in writing, so he was technically a member of the Board during the period June 28-30, 2000. I reject AHT's suggestion that walking out of a Board meeting in a fit of pique (justified or not) is the same thing as tendering a resignation. However, Elfersy by his own admission did not "act as a board member" after he left the room on June 21. In particular, he did not attend the Board meeting at which the AHT merger was considered.

AHT representatives were aware of the filing of the Form 8-K. Indeed, on June 29--the day that both companies' boards met to consider the Merger Agreement--Edelson met with Moses and was told that Elfersy had resigned as an officer of the corporation because of disagreement over the direction of BioShield's business. Domonick DeChiara, the attorney at O'Sullivan in charge of the transaction, learned that Elfersy's status had changed, and that he was no longer an officer, prior to the execution of the Merger Agreement. Parliament met with his counterpart sometime during the June 29-30 time frame and indicated that Elfersy was in the process of resigning. While the record does not disclose that anyone from BioShield told anyone from AHT that Elfersy was no longer a member of the Board--which at that time would not have been a true statement, since Elfersy had not yet tendered his resignation from the Board--AHT representatives knew before they signed the Merger Agreement that Elfersy, who owned 21.6% of BioShield's stock and whose support was critical to the success of the merger, was at odds with company management.

On or about June 28--as the news about Elfersy's changing status was becoming public--BioShield also rejected AHT's request for a voting agreement. Viewing the facts most favorably to AHT, in rejecting the proposal, Moses told Edelson that no such agreement was needed because he and Elfersy, as Board members, were both voting in favor of the deal, and so were other employees, who had smaller holdings.

On June 29, 2000, both Boards met to consider the merger. The Boards approved the merger by unanimous vote of those in attendance, constituting a quorum. Elfersy, although listed as a director in the draft minutes of the June 29 meeting (which, technically, he was), did not attend the BioShield Board meeting and did not vote to approve the merger.

On June 30, 2000, both sides executed the Agreement and Plan of Merger. The preamble to that document stated that the Boards of Directors of each party thereto (BioShield, its wholly-owned subsidiary AHT Acquisition Corp., and AHT) had unanimously approved the deal and deemed it to be in the best interest of its shareholders. The key terms of the Merger Agreement, for our purposes, were as follows:

The Merger Agreement required that the shareholders of both AHT and BioShield approve the deal as a condition precedent to the Merger; failure by either company's shareholders to approve the deal would result in the termination of the Agreement. No shareholder of either company was subject to any sort of voting agreement or other restriction. However, BioShield agreed to take "all necessary action" to permit issuance of the shares required to effectuate the merger, that it would "use its best efforts" to cause the shares to be issued, and that it would "take, or cause to be taken, all actions and to[sic], or cause to be done, all other things necessary, proper and advisable to consummate and make effective as promptly *740 as practicable the transactions contemplated by this Agreement." The Merger Agreements further provided that BioShield's "board of directors shall recommend the issuance of [BioShield] Common Stock to the holders of [AHT] Common Stock pursuant to this Agreement to holders of [BioShield] Common Stock" thus obligating the directors to recommend the deal to the shareholders.

At no time prior to signing the Merger Agreement did anyone representing AHT contact Elfersy to clarify his status or check on

his support for the proposed merger. There was no agreement in place that would have prevented AHT's representatives from so doing.

Following the execution of the Merger Agreement, attorneys began to draft a Registration Statement, SEC Form S-4. An early draft of that Registration Statement, dated July 17, 2000 and produced from the files of the O'Sullivan firm (AHT's lawyers), omits Elfersy from the list of BioShield directors and describes Elfersy as "former co-chairman of the board, senior vice president, secretary, treasurer and director." The final version, which was filed with the SEC on August 2, 2000, also omitted Elfersy from the list of BioShield's "Directors, Executive Officers and Significant Employees."

And indeed, by the time the S-4 was filed, Elfersy had finally resigned from the Board. On or about August 1, 2000, Elfersy entered into a formal written agreement regarding the terms of his departure from BioShield's management. That agreement required Elfersy to resign as an officers and director of BioShield. By the terms of the agreement, his resignation was deemed effective as of June 21, 2000--although the resignation was not formally tendered until some six weeks after that date.

The Merger Agreement contained a warranty by AHT that it had not experienced a "Company Material Adverse Effect" since March 31, 2000, and that AHT had disclosed all pending or threatened legal actions that could have a material adverse effect. In a letter addressed to Edelson on August 11, 2000, Moses stated that BioShield believed that AHT had breached those warranties and representations and indicated the BioShield believed it had the right to terminate the Merger Agreement.

Also on August 11, Elfersy sent Moses a letter stating that he would not vote in favor of the proposed acquisition. Although the Agreement required AHT and BioShield to "consult with each other before issuing, and provide each other the opportunity to review

and comment on any press release," BioShield issued a press release on August 14, 2000, without consulting AHT. The press release stated that BioShield had received "preliminary indications from shareholders holding more than 50% of the Company's common stock that they intend to vote their shares against the proposed merger with AHT"

AHT's stock plunged 33% in the immediate aftermath of the BioShield press release.

Following the issuance of the press release, Moses refused to speak with AHT and rejected requests by AHT's management to meet with BioShield's shareholders. Therefore, on August 18, 2000, AHT informed BioShield in writing that its issuance of the August 14 press release, its refusal to support the merger in discussions with shareholders, its refusal to join AHT in a meeting with BioShield shareholders and Moses' refusal to meet or speak with representatives of AHT constituted a breach of the Merger Agreement.

*741 Thereafter representatives of the two sides did meet, but BioShield refused to renegotiate the deal or amend the Merger Agreement. Instead, on August 25, 2000, BioShield offered to purchase the assets of AHT in a Chapter 11 bankruptcy.

On September 7, 2000, AHT commenced an action against BioShield, Acquisition Corp., Moses, Elfersy, Parliament and Faux in the Superior Court of Fulton County, Georgia, alleging fraud, civil conspiracy and negligent misrepresentation against all defendants except Acquisition Corp., aiding and abetting against Elfersy, breach of the merger agreements and breach of implied covenant of good faith and fair dealing against BioShield and Acquisition Corp., and seeking \$20 million in compensatory damages, \$50 million in punitive damages, plus attorney's fees and the expenses of litigation in connection with the action for "bad faith and [being] stubbornly litigious."

The Georgia Action was conditionally settled several weeks later. As part of that

settlement, AHT filed its Chapter 11 petition on September 22, 2000, and on the same day filed an Asset Purchase Agreement in which BioShield agreed to acquire the assets of AHT for \$15 million. However, in November 2000, BioShield advised the Bankruptcy Court that it could not conclude the deal because it could not obtain the necessary financing. AHT's assets were eventually surrendered to its secured creditor, Cybear, Inc., which bid in its secured claim of approximately \$4 million at a sale held November 21, 2000.

THE INSTANT ADVERSARY PROCEEDING

On November 24, 2000, AHT filed this instant complaint. Count I alleges that BioShield and Acquisition Corp. breached the Merger Agreement by (1) falsely representing that the BioShield Board, including Elfersy, had unanimously voted in favor of the merger and agreed to support the merger, (2) refusing to promptly prepare and file the Form S-4, (3) refusing to publicly support the Merger Agreement, (4) refusing to use all reasonable efforts to cause the merger to be approved, (5) refusing to permit AHT representatives to meet with BioShield shareholders to discuss the merits of the transaction, and (6) issuing the August 14, 2000 press release and making public comments to a newspaper without providing AHT an opportunity to review and comment. (AHT's Compl. ¶ 63). AHT also asserted claims against BioShield and Acquisition Corp. for breach of the Asset Purchase Agreement (Count II) (See AHT's Compl. ¶ 65-69); breach of the implied covenant of good faith and fair dealing "by engaging in a scheme to induce AHT to enter into the Merger Agreement based on false and misleading representations and then attempting to obtain AHT's assets for less than the consideration provided for in the Merger Agreement...." (Count III) (AHT's Compl. ¶ 74); fraud (Count IV) (See AHT's Compl. ¶ 76-84) and negligent misrepresentation (Count VI) (See AHT's Compl. ¶ 90-97). AHT demands that the post-petition superpriority claim granted to BioShield be equitably subordinated or expunged.

These claims are not at issue on this motion.

What is at issue are the claims against the individual defendants. Count IV of the Complaint alleges fraud against all defendants, on the ground that they (1) "had a motive and an opportunity to make false and misleading representations to AHT and its public shareholders to induce AHT to bind itself exclusively to BioShield so that BioShield could thereafter maximize its leverage against a cash-constrained AHT," which motive led them to make (2) "false and misleading representations that *742 the BioShield board of directors, including Elfersy, unanimously approved the Merger Agreement and were committed to the transaction ... with the intent to deceive AHT and its public shareholders, and to induce AHT to enter into the Merger Agreement," all to AHT's detriment. (AHT's Compl. ¶ 77-78). AHT also alleged that the defendants (including the moving defendants) knew or should have known that the statements were false when made but made them nonetheless "with the intent to falsely depress the value of AHT's common stock and to impede AHT's ability to seek alternative financing or business arrangements, as part of BioShield's ongoing scheme to obtain AHT's assets for next to nothing." (AHT's Compl. ¶ 81-82). AHT asserts that the false representations, along with the repeated refusal to perform under the Merger Agreement or to support the merger, its public and unilateral announcement that its shareholders would reject the merger, and its meritless assertion that it had grounds to terminate the Merger Agreement all create the strong inference of conscious misbehavior or recklessness.

Count V is asserted against Elfersy, for "aiding and abetting" fraud. It states, in substance, that he provided substantial assistance and encouragement to BioShield's fraudulent conduct by failing to appear and vote at the June 29 meeting and then failing to correct statements that he was a member of the Board. (AHT's Compl. ¶ 87).

Count VI asserts a claim for negligent misrepresentation, alleging that defendants

(1) made false and misleading representations both orally and in the Merger Agreement, Form S-4 and press releases, on which they knew AHT would rely, and upon which AHT did rely, and (2) acted with conscious indifference to the consequences of their actions and with specific intent to cause harm to AHT. (AHT's Compl. ¶ 90-97).

As Judge Hardin correctly found, AHT's claims against BioShield and Acquisition Corp for breach of the Merger Agreement in Count I rely on the same core of facts as the claims against the individual defendants in Counts IV, V and VI--the refusal to perform under the Merger Agreement or to support the merger, the public announcement about shareholder dissatisfaction with the merger, and the refusal to meet with AHT or permit AHT to meet with BioShield's shareholders. The assertion that the defendants made false and misleading representations concerning the Board's unanimity and Elfersy's participation in the vote is contained or incorporated by reference in Counts I, IV, V and VI.

MODIFIED CONCLUSIONS OF LAW

Judge Hardin's analysis focused on whether AHT's claims against the individual defendants merely restated its breach of contract claim against the corporate defendants. He concluded that they did, and thus recommends granting summary judgment to the defendants. I agree with the result, but find it less complicated to rule on a different ground; AHT cannot prove fraud or negligent misrepresentation claims against the individual defendants because it cannot prove, as a matter of law, that it justifiably relied on any of the allegedly false and fraudulent representations. Indeed, as to Elfersy, it cannot prove that he made any representation at all--indeed, it is undisputed that he did not.

Count IV Must Be Dismissed as to All Moving Defendants

[1] Count IV, which is pleaded against all defendants, alleges that a number of statements were falsely and fraudulently *743

made to AHT prior to the execution of the merger agreement concerning Elfersy's participation in and support for the merger.

To the extent that plaintiff purports to assert Count IV against Elfersy, the claim must be dismissed because there is no evidence in this record that Elfersy ever made any statement, on any subject, to any representative of AHT--or for that matter was ever asked to do so. (See analysis of Count V, *infra*.)

[2] As to the other two moving defendants: New York law requires that reliance on a statement must be found to be justifiable under all the circumstances or no fraud claim lies. *Granite Partners, L.P., v. Bear, Stearns & Co., Inc.*, 58 F.Supp.2d 228, 259 (S.D.N.Y.1999), *Danann Realty Corp. v. Harris*, 5 N.Y.2d 317, 322, 184 N.Y.S.2d 599, 157 N.E.2d 597 (1959).

A party entering into a transaction has a duty to conduct an independent appraisal of the risk it is assuming and a duty to investigate the nature of its business transaction. Reasonable reliance may be found wanting where the plaintiff failed to conduct its own diligent research into the risks or benefits of a particular transaction. Sophisticated parties may well be under a duty to make affirmative efforts to protect themselves from misrepresentations, and cannot be heard to complain when they fail to make diligent inquiries. *Granite Partners, L.P.*, 58 F.Supp.2d at 259 (citations omitted).

The lynchpin of AHT's fraud theory is that AHT was led to believe that Elfersy supported the merger and would vote his stock in favor of the deal. The basis for this belief was Moses' June 28 statement to Edelson, made in the context of explaining why no tie-up agreement was necessary, and the statements in the Merger Agreement and in the various public announcements that the Board had approved the deal "unanimously," with no caveat about absences.

However, the undisputed evidence is that AHT--led by a sophisticated management

team, represented by experienced merger lawyers and advised by investment bankers--knew all of the following before it bound itself to the deal by signing the Merger Agreement:

- (1) Elfersy, a co-founder of the company and a 21% shareholder, was resigning as an officer of the company and changing his status with the company, and a public announcement to that effect had been filed with the SEC on June 28;
- (2) Elfersy, per Moses, was leaving company management due to disagreements over the direction the company was taking; (Edelson EBT at 343-352)
- (3) Elfersy's status as a member of the Board was unclear; Parliament told AHT representatives sometime during the June 29-30 period that Elfersy might be leaving the Board;
- (4) Elfersy had not participated in a single negotiating session or important event in connection with the merger;
- (5) Shareholder approval was a pre-condition to the consummation of the merger;
- (6) BioShield, through Moses, refused to give AHT the shareholder voting agreement it had sought, which meant that no shareholder was legally bound to vote in favor of the merger.

In the circumstances, a legally sophisticated party such as AHT should hardly have been inclined to put much stock in Moses' statement that Elfersy was on board for the deal. Indeed, a reasonable person, knowing only that a 21% shareholder had differences with Moses and *744 that his status within the company was changing as a result, would have been expected to contact Elfersy in order to see where he stood. Yet no one representing AHT did that. Nor did anyone inquire whether Elfersy--whose changing status was the subject of an SEC filing at a critical juncture in the negotiations--had been present at the June 29 Board meeting where the merger was discussed. Nothing in this record suggests that talking to Elfersy was out of bounds, or that Moses refused to continue negotiations if AHT contacted Elfersy directly. Therefore, AHT's failure to make direct inquiry is unreasonable as a matter of law, and precludes any finding of justifiable

reliance.

In *Abrahami v. UPC Construction Co., Inc.*, 224 A.D.2d 231, 638 N.Y.S.2d 11 (1st Dep't 1996) the plaintiffs asserted that the defendant made misrepresentations in the form of balance sheets and financial statements performed by the defendant's accounting firm concerning the financial status of the defendant company. *Id.* at 12-13. Based on these representations, the plaintiffs invested a substantial amount of money in the defendant company. *Id.* at 12. The court found that the plaintiffs' reliance on the representations was not justified, thereby rendering their claim of fraud invalid. *Id.* at 13. Since the plaintiffs were experienced businesspeople, they had a duty to exercise ordinary diligence and conduct an independent appraisal of the risk they were assuming, which they failed to do. *Abrahami*, 638 N.Y.S.2d at 13. Furthermore, the plaintiffs had the means to discover the true nature of the transaction they were about to enter, and they should have used those means to conduct an independent audit of the defendant company which would have shed light on the reality of the proposed transaction. *Id.* at 13-14. Not only did the plaintiffs have a duty and the means to investigate the defendant's financial condition, they were also on notice of the defendant's possible precarious financial condition and certainly should have investigated the proposed transaction further. *Id.* at 14. For these reasons, the court did not find the plaintiffs' reliance justified.

Similar to the plaintiffs' reliance in *Abrahami*, AHT's reliance is not justified. First, AHT was clearly on notice that Elfersy, a stockholder owning more than 20% of the stock, had recently resigned and that his status within the company he had co-founded was changing. AHT was aware that the merger was conditioned on a shareholder vote. AHT obviously had apprehensions about the merger; it had asked for a voting agreement in order to tie up the principal shareholders. AHT's affairs were conducted by sophisticated businesspeople; they were under a duty to exercise ordinary diligence and to make independent inquiries about whether Elfersy

was still on board. AHT surely had the means to investigate Elfersy's disposition towards the merger; it only entailed calling Elfersy to discuss the matter with him.

Schlaifer Nance & Company v. Estate of Andy Warhol, 119 F.3d 91 (2d Cir.1997) is particularly instructive here. In *Schlaifer*, the plaintiff filed a complaint alleging fraud against the Estate of Andy Warhol, arguing that the Estate misled the plaintiff by misrepresenting that it had exclusive control of Warhol's assets, and by not explaining that many of Warhol's works had fallen into the public domain. *Id.* at 96. The plaintiff had entered an agreement with and licensed certain rights from the Warhol Estate. The Estate assured the plaintiff that it (the Estate) controlled all rights to Warhol's works when such was clearly not the case. *Id.* at 99. The Second Circuit found that although the Estate had, in fact, made misrepresentations to *745 the plaintiff, the latter's reliance on such misrepresentations was not reasonable. *Id.* at 98-99. Since reasonable reliance is a necessary element to fraud, the plaintiff's claim could not prevail. *Id.* at 99. Plaintiff's reliance was unreasonable for several reasons. First, the parties involved were sophisticated businesspeople involved in a major transaction. Secondly, the plaintiff was informed that Warhol did not own copyrights on all of his images. Thirdly, the plaintiff's attorney admitted that she had apprehensions as to whether Warhol (and his Estate) owned copyrights for all of his works because of (1) the magnitude of his works, and (2) since he was a commercial artist he often sold the rights to a commissioned work, thus surrendering the copyright. Fourthly, the plaintiff's counsel was aware that if Warhol's prints were issued without a copyright, then it was likely that such works had become a part of the public domain and could have no copy right protection. Finally, even the language of the parties' licensing agreement suggested that the Estate did not have exclusive control over Warhol's work. *Schlaifer Nance & Company v. Estate of Andy Warhol*, 119 F.3d at 98-100. The Second Circuit concluded that plaintiff's reliance on the misrepresentation made to him by one of the combatants was

unreasonable as a matter of law. *Id.* at 101.

In Schlaifer, the fact that the parties were experienced businesspeople involved in a major transaction, that the plaintiff was aware that not all of Warhol's images had copyrights, the plaintiff's lawyers apprehensions and knowledge that Warhol's works had likely become part of the public domain, and the language of the agreement were deemed sufficient to put the plaintiff on notice that it should do further due diligence before it could reasonably rely on the Estate's representations that it owned all rights to every Warhol work. Here, the combination of Elfersy's publicly-announced resignation, Moses's statement that Elfersy's resignation was due to difference relating to the operation of BioShield and BioShield's refusal to tie the hands of its principal shareholders when it came to voting on the merger was certainly "notice that would have led any reasonably diligent attorney or corporate officer" to inquire of Elfersy whether he was planning to support the deal. In Schlaifer, the plaintiff was clearly on notice that Warhol's Estate did not own all of the rights to every Warhol work and, therefore, could not have reasonably relied on the Estate's representations that it did. Similarly, AHT was on notice that the representation that the BioShield board of directors, including Elfersy, unanimously approved the Merger Agreement and were committed to the transaction was or could be false and, therefore, could not have reasonably relied on a representation that it knew (or should have known by performing an investigation) was false.

For that reason alone, Count IV must be dismissed as to all defendants.

Count V Must Be Dismissed as to Elfersy

[3] In Count V, AHT alleges that Elfersy aided and abetted the fraud perpetrated by the other defendants. Obviously, he did not do so by making misrepresentations to them, since it is conceded that he never spoke to them and was never asked to do so. It appears that plaintiff contends that Elfersy aided and abetted Moses and the other BioShield

defendants after the merger agreement was executed by declining to vote his shares in favor of the deal.

[4] In order to prevail on a claim of aiding and abetting fraud, AHT must establish three things: that BioShield perpetrated a fraud; that Elfersy had actual *746 knowledge of the existence of the fraudulent scheme; and, Elfersy provided substantial assistance to the other defendants in advancing the underlying fraud. *Wight v. Bankamerica Corp.*, 219 F.3d 79, 91 (2d Cir.2000). AHT cannot prevail as a matter of law on its aiding and abetting claim because it cannot get over the first hurdle. Since reliance on Moses' statement that Elfersy supported the merger was unreasonable as a matter of law, there was no fraud.

[5][6][7] Moreover, assuming arguendo that reasonable reliance could be proved, there is no evidence in this record that Elfersy had actual knowledge of the fraudulent scheme to subvert the merger. In order to adequately plead scienter in an aiding and abetting fraud claim, the plaintiff must allege sufficient facts to support a strong inference of fraudulent intent. *Primavera Familienstiftung v. Askin*, 173 F.R.D. 115, 127 (S.D.N.Y.1997) (citations omitted). Plaintiffs may raise such an inference in one of two ways: (1) by alleging facts showing a motive for participating in a fraudulent scheme and a clear opportunity to do so; or (2) by identifying circumstances indicative of conscious behavior. *Id.* The only "evidence" cited by AHT in its objection is the fact that Elfersy continues to do some work for BioShield after his resignation from the Board of Directors and as an officer. And so he did--by agreement with the company, he continued to advise BioShield on patent, technological and scientific matters. But no reasonable juror could draw from that fact an inference that Elfersy was aware of Moses's alleged pre-execution misstatements, or that Elfersy and Moses ever discussed, let alone conspired to subvert, the proposed merger--even after the market drop in BioShield stock. Furthermore, the fact that Elfersy had his own economic interests in mind is not sufficient to satisfy the scienter requirement. "Ordinary economic

motives are insufficient to support the scienter element of an aiding and abetting claim." *Id.* at 127. As Elfersy points out, he had an absolute legal right to protect his economic interests--no voting agreement bound him to the deal and he personally had never voted to support it.

Count V is dismissed.

Count VI Must Be Dismissed as against All Defendants

The last count that is the subject of the instant motion is Count VI, which alleges negligent misrepresentation against all defendants.

[8] I reject the notion that any ruling by Judge Hardin binds me, as a reviewing court, under the law of the case doctrine. However, the doctrine would not apply here in any event. AHT argues that the Bankruptcy Court's decision denying the defendants' motion to dismiss the complaint, and all the claims therein, precludes an award of summary judgment dismissing that claim. But a decision denying a motion to dismiss does not mean that a claim has merit and will ultimately succeed. If it did, we could simply enter judgment for the plaintiff at the same time we denied the motion to dismiss for failure to state a claim and spare ourselves a lot of unnecessary aggravation. The complaint no doubt pleads a claim sufficiently to withstand a pre-answer motion. But the question before Judge Hardin this go round--and now before me--is whether AHT has adduced any evidence tending to prove that claim, which must happen if the claim is to survive this post-discovery motion.

AHT has not done so.

As to Elfersy, the case is quite clear. Since everyone agrees that he never made any statement to any representative of AHT, he cannot be held liable on a theory of negligent misrepresentation--which requires *747 that a defendant make some statement "expressed directly" to the plaintiff. *Suzy Phillips Originals, Inc. v. Coville, Inc.*, 939 F.Supp.

1012, 1016 (E.D.N.Y.1996), *aff'd* 125 F.3d 845 (2d Cir.1997); *White v. Guarente*, 43 N.Y.2d 356, 362-63, 401 N.Y.S.2d 474, 372 N.E.2d 315 (1977).

[9][10] As to the other moving defendants: in order to prevail on a negligent misrepresentation theory, a plaintiff must establish that the defendants had a duty, based upon a "special relationship," to give correct information to AHT, and that AHT reasonably relied on the false information to its detriment. *Hydro Investors, Inc., v. Trafalgar Power, Inc.*, 227 F.3d 8, 20 (2d Cir.2000); *White v. Guarente*, 43 N.Y.2d 356, 363, 401 N.Y.S.2d 474, 372 N.E.2d 315 (1977). I have already ruled that AHT could not have reasonably relied on any representation concerning Elfersy's support for the merger, given his precipitous withdrawal from his management role at the company at a crucial moment in the negotiations, so the claim fails for that reason alone.

[11][12] Additionally, AHT has not established that the moving defendants had any special relationship with it that would give rise to a "special duty of care." Liability for negligent misrepresentation "has been imposed only on those persons who possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party" *Kimmell v. Schaefer*, 89 N.Y.2d 257, 652 N.Y.S.2d 715, 675 N.E.2d 450 (1996). AHT was a sophisticated party, the defendants' contra party in a merger negotiation and was represented at all times during the negotiation by counsel and investment advisers. It was conducting its own due diligence on all matters material to the merger. It stood in the position of an ordinary seller, with BioShield an ordinary buyer, in an arms' length commercial transaction. That is the antithesis of a "relationship of special trust and confidence." See *Kimmell*, 89 N.Y.2d at 263, 652 N.Y.S.2d 715, 675 N.E.2d 450 (professionals, such as lawyers and engineers, by virtue of their training and expertise, may have special relationships of confidence and trust with their clients); *Fleet Bank v. Pine Knoll Corp.*, 736 N.Y.S.2d 737 (3d Dep't 2002) (a special

relationship requires a closer degree of trust than an ordinary business relationship for that reason, there typically is no fiduciary relationship between a borrower and a bank); *Andres v. LeRoy Adventures*, 201 A.D.2d at 262, 607 N.Y.S.2d 261 (1st Dep't 1994) (holding that a special relationship giving rise to a duty to impart correct information could not be discerned from the arm's length dealings between the plaintiff, a potential customer, and the defendant, a restaurant owner).

AHT contends that a relationship of special trust arises because BioShield and its officers were in a better position to know whether Elfersy was on the Board and whether he and Moses actually supported the merger. However, I have already ruled that it was unreasonable as a matter of law for AHT to rely on Moses' representation about Elfersy's support for the merger, so it is not possible that a relationship of special trust could exist as to those statements. And AHT has not adduced even a scintilla evidence that Moses did not in fact support the merger at the time he made the alleged misrepresentations--i.e., prior to the execution of the Merger Agreement. That he changed his mind as the summer wore on is indisputable, but that hardly supports an inference that Moses's statements, whether about Elfersy or about the Board's support for the deal, were false when they were made. To the extent that AHT complains of post-Merger Agreement conduct by Moses and others, it is not complaining about misrepresentations *748 on which it relied in entering into the Merger Agreement.

As Judge Hardin correctly concluded, AHT's claim for breach of the contract lies in breach of contract, which cannot be characterized as misrepresentation of intent to perform under the contract. See *Best Western Int'l Inc. v. CSI Int'l Corp.*, 1994 WL 465905 at *4 (S.D.N.Y. Aug.23, 1994) ("The majority of the [New York] courts, including the Appellate Division, have held that simply dressing up a breach of contract claim by further alleging that the promisor had no intention, at the time of the contract's making, to perform its

obligation thereunder, is insufficient to state an independent tort claim").

CONCLUSION

The moving defendants' motions for summary judgment are granted in all respects: Count IV is dismissed as to Timothy Moses, Jacques Elfersy, and Scott Parliament; Count V is dismissed as to Elfersy; and Count VI is dismissed as against Moses, Elfersy, and Parliament. [FN3]

FN3. Having elected to dispose of these motions on the alternate grounds propounded by defendants, I need not and do not reach the issue of whether the various fraud and misrepresentation claims are or are not coterminous with the breach of contract claim, or whether the misrepresentations alleged are or are not collateral to the Merger Agreement.

This constitutes the decision and order of the Court.

292 B.R. 734

END OF DOCUMENT

46

sources must be identified, there is no requirement that they be named, provided they are described in the complaint with sufficient particularity to support the probability that a person in the position occupied by the source would possess the information alleged. In both of these situations, the plaintiffs will have pleaded enough facts to support their belief, even though some arguably relevant facts have been left out.

Id. at 314. The Court then observed that "a complaint can meet the new pleading requirement imposed by paragraph (b)(1) by providing documentary evidence and/or a sufficient general description of the personal sources of the plaintiffs' beliefs." Id.

While Novak categorically rejected the notion that securities fraud complaints must name confidential sources as a general matter, it was rather less precise about what types of "other facts" may satisfy the particularity requirement of paragraph (b)(1). Several district courts in the Second Circuit have interpreted Novak narrowly to hold that, although plaintiffs need not name their confidential sources, they nevertheless must provide a description of the sources, either documentary or personal, of their information and beliefs allegations to survive dismissal. See, e.g., *In re MSC Indus. Direct Co., Inc. Sec. Litig.*, 283 F.Supp.2d 838, 847 (E.D.N.Y.2003); *Fadem v. Ford Motor Co.*, 02 Civ. 0686(CSH), 2003 U.S. Dist. LEXIS 16898, at *23 (S.D.N.Y. Sept. 24, 2003); *In re Globalstar Sec. Litig.*, 01 Civ. 1748(SHS), 2003 U.S. Dist. LEXIS 22496, at *19-20 (S.D.N.Y. Dec. 12, 2003).

I decline to read Novak that narrowly for several reasons. First, as the Second Circuit itself acknowledged in Novak, paragraph (b)(1) "requires plaintiffs to plead only facts and makes no mention of the sources of these facts." 216 F.3d at 313. Moreover, the opinion states that a complaint "can" satisfy the PSLRA's particularity requirement by identifying documentary or personal sources; it does not require that a complaint do so. Novak, 216 F.3d at 314. Indeed, as the Second Circuit noted, the purposes of paragraph (b)(1)

"can be served as long as [plaintiffs] supply sufficient facts to support their allegations." Id. For example, the level of factual specificity or the corroborative nature of other facts alleged in a securities fraud complaint might be enough to place defendants on notice of the misconduct alleged and permit them to defend against the charge. See *Adams v. Kinder-Morgan, Inc.*, 340 F.3d 1083, 1101-02 (10 th Cir.2003). Last, requiring plaintiffs to identify the sources of their factual allegations would, in effect, compel them to plead evidence in their complaint, thereby undoing the principle of notice pleading that underlies the Federal Rules of Civil Procedure. See id. at 1101 (noting that although the PSLRA requires securities fraud plaintiffs to allege certain facts with greater precision, it "did not ... purport to move up the trial to the pleadings stage"); *In re Cephalon Sec. Litig.*, 96 Civ. 0633, 1997 U.S. Dist. LEXIS 13840, at *2 (E. D.Pa. Aug. 29, 1997) ("Clearly, the [PSLRA] requires some precision in alleging facts, however, it does not require pleading all of the evidence and proof thereunder supporting a plaintiff's claim."). Had the Second Circuit chosen to interpret the PSLRA as importing an evidentiary requirement into securities fraud complaints, it would have done so more explicitly. See *Kinder-Morgan*, 340 F.3d at 1101.

*13 For the above reasons, I believe Novak should not be read to require that securities fraud complaints identify documentary or personal sources. Instead, I join a handful of courts that read Novak as endorsing a broader approach to the particularity requirement of paragraph (b)(1). See, e.g., *In re Cabletron Sys., Inc.*, 311 F.3d 11, 29-30 (1 st Cir.2002); *In re Initial Public Offering*, 241 F.Supp.2d at 358-59. See also *Kinder-Morgan*, 340 F.3d at 1101-03 (declining to adopt position, attributed to Novak, that PSLRA requires securities fraud complaint to identify sources of allegations based on information and belief). [FN10] Under this approach, the court looks to whether the factual allegations, considered in the whole, "provide an adequate basis for believing that the defendants' statements were false," Novak, 216 F.3d at 314, without adding the requirement that the

complaint identify the source of the factual allegations. This interpretation of Novak recognizes, as I believe the Second Circuit did, that requiring disclosure of sources in all securities fraud complaints is too restrictive a response to the PSLRA's particularity requirement.

FN10. In *Kinder-Morgan*, the Tenth Circuit interpreted Novak as requiring securities fraud complaints to describe the personal or documentary sources of allegations based on information and belief, and purported to adopt a different, less rigid approach to the PSLRA's particularity requirement. For the reasons described in the text, I decline such an interpretation of Novak, and believe that the Tenth Circuit's "alternative" approach to evaluating the sufficiency of fraud allegations is consistent with the language of the Novak opinion.

In *re Cabletron Systems*, one of the cases cited above that adopts a broader reading of Novak, addressed what types of "other facts" might satisfy the particularity requirement of paragraph (b)(1). In that case, the First Circuit endorsed the following approach for resolving whether fraud allegations satisfy the particularity requirement of paragraph (b)(1):

The approach we take, similar to Novak, is to look at all of the facts alleged to see if they 'provide an adequate basis for believing that the defendants' statements were false.' Novak, 216 F.3d at 314. This involves an evaluation, inter alia, of the level of detail provided by the confidential sources, the corroborative nature of the other facts alleged (including from other sources), the coherence and plausibility of the allegations, the number of sources, the reliability of the sources, and similar indicia.

In *re Cabletron*, 311 F.3d at 29-30. See also *Kinder-Morgan*, 340 F.3d at 1102-03 (recommending that courts consider, inter alia, coherence, plausibility and specificity of the allegations, whether sources are disclosed and reliability of those sources, and "any other factors that might affect how strongly the facts alleged support a reasonable belief that the defendant's statements were false or misleading"). Thus, while the disclosure of sources may strengthen a complaint pleaded on information and belief, it is not necessary if

the facts otherwise support a reasonable belief that the alleged fraud occurred. In short, "[w]hat facts and what level of particularity are sufficient to support a plaintiff's beliefs will vary from case to case.... The critical threshold is that the allegations must be made in a way that satisfies the court that plaintiff's charge of fraud is not 'unwarranted.'" ' In *re Initial Public Offering*, 241 F.Supp.2d at 359.

*14 In the present case, the factual allegations describing Deloitte's role in the alleged fraud are sufficiently numerous and detailed to meet the particularity requirement of paragraph (b)(1). To take one example, the allegations concerning the Petrochem losses specify the division of Philip at which the improper accounting occurred (the Petrochem facility), people at Deloitte and Philip complicit in the fraud (Woodsford, Boughton, and Woodcroft), and the amount of the losses at issue (\$8 million). "Overall, the accumulated amount of detail the [Complaint] provides tends to be self-verifying; these are not conclusory allegations of fraud, but specific descriptions of the precise means through which it occurred..." In *re Cabletron Sys.*, 311 F.3d at 30. Such particularized allegations "provide an adequate basis for believing that [Deloitte's] statements were false," and make it unnecessary for plaintiffs to disclose the sources of their beliefs at the pleading stage.

In sum, the Complaint alleges sufficient facts on which plaintiffs' beliefs are formed to satisfy the PSLRA's particularity requirement. Viewed in their entirety, the allegations put Deloitte on fair notice of plaintiffs' claims and their factual basis. Accordingly, the Complaint is "not frivolous or conclusory and deserves to proceed to the next stage of litigation." *Kinder-Morgan*, 340 F.3d at 1105.

B. Section 11 of the Securities Act

The third, sixth, and ninth claims are asserted against Deloitte, Haynes and Knauss under Section 11 of the Securities Act. Section 11 permits an action by any person who acquired a security in reliance on a

registration statement that contained a material misstatement, as against, among others,

- (1) every person who signed the registration statement;
- (2) every person who was a director of (or person performing similar functions) or partner in, the issuer at the time of the filing of the part of the registration statement with respect to which his liability is asserted;
- (4) every accountant ... who has with his consent been named as having prepared or certified any part of the registration statement, or as having prepared or certified any report or valuation which is used in connection with the registration statement, with respect to the statement in such registration statement, report, or valuation, which purports to have been prepared or certified by him....

15 U.S.C. § 77k(a).

Because intent to defraud is not an element of a Section 11 claim, " 'only a material misstatement or omission [in a registration statement] need be shown to establish a prima facie case...." ' In re Initial Public Offering, 241 F.Supp.2d at 343 (citation omitted). See also In re CINAR Corp. Sec. Litig., 186 F.Supp.2d 279, 306 (E.D.N.Y.2002) ("[A] plaintiff does not need to allege the manner in which a material misstatement on a securities filing was made--innocently, negligently, fraudulently or otherwise--because Section 11 provides for strict liability.") (citation omitted). However, the Second Circuit has ruled recently that, where Section 11 (or Section 12(a)(2)) claims are based on underlying allegations of fraud, the complaint must satisfy the heightened pleading requirements of Rule 9(b). See *Rombach v. Chang*, 355 F.3d 164, 171 (2d Cir.2004).

*15 In *Rombach*, the Second Circuit noted that although fraud "is not an element or a requisite to a claim under Section 11 or Section 12(a)(2)," those claims "may be--and often are--predicated on fraud," and that the allegations underlying Section 10(b) claims and Section 11 claims are often the same. *Id.* [FN11] The Court observed that the

considerations for applying Rule 9(b) to a conventional fraud claim "apply with equal force" to Section 11 (or Section 12(a)(2)) claims sounding in fraud. *Id.* (citation omitted). Accordingly, it held that the heightened pleading standards of Rule 9(b) apply to Section 11 (or Section 12(a)(2)) claims insofar as such claims as premised on underlying allegations of fraud. *Id.* As discussed above, the Second Circuit has interpreted Rule 9(b) to require that a securities fraud complaint allege, inter alia, facts giving rise to "a strong inference of fraudulent intent" and state with particularity the facts constituting the alleged fraudulent conduct.

FN11. The Second Circuit noted also that "a plaintiff need allege no more than negligence to proceed under Section 11...." 355 F.3d at 171. Given the well-settled interpretation of Section 11 as a strict liability provision and the lack of further discussion in *Rombach* about whether to read a state of mind requirement into Section 11 generally, I decline to interpret the decision as introducing a state of mind element for Section 11 claims absent underlying fraud allegations.

Applying *Rombach*, I must consider whether plaintiffs' Section 11 claims sound in fraud and, if so, whether the underlying allegations of fraud satisfy the pleading requirements of Rule 9(b). I examine the claims against Deloitte, and Haynes and Knauss separately, because the facts underlying those claims vary significantly.

1. Deloitte

The Complaint asserts Section 11 claims against Deloitte based on its consent to the republication of the "false and misleading" 1996 audit opinion in the November 1997, Allwaste, and Serv-Tech Registration Statements. Deloitte seeks dismissal of the Section 11 claims on the ground that they are premised on fraud allegations and fail to satisfy Rule 9(b)'s heightened pleading requirements. (Deloitte's Supp. Mem. at 7-9; Deloitte's Supplemental Memorandum of Law in Further Support of its Motion to Dismiss, dated 1/20/04, passim; Deloitte's Reply Memorandum of Law Concerning the Impact

of Rombach v. Chang, passim)

Plaintiffs argue at the threshold that Deloitte waived any objections to the Section 11 claims because (1) Deloitte conceded the sufficiency of the Section 11 claims in its initial set of motion papers and raised its objections for the first time in a supplemental memorandum that the parties had agreed was meant only to address recent case law with respect to pleading standards under the PSLRA; and (2) Deloitte should not be permitted to circumvent Fed.R.Civ.P. 12(g), which bars a party from submitting more than one pre-answer motion to dismiss under Rule 12(b). (Plaintiffs' Reply to Deloitte's Supplemental Memorandum of Law in Support of its Motion to Dismiss at 1-3; Plaintiffs' Second Supplemental Memorandum of Law in Opposition to the Motions of Deloitte, Haynes and Knauss ("Pls.' 2d Supp. Mem. in Opp'n to the Motions of Deloitte, Haynes and Knauss") at 4-5) Neither argument has merit. First, I am not bound by the terms of a stipulation between parties to a dispute. See *United States ex rel. Terry v. Henderson*, 462 F.2d 1125, 1131 n. 13 (2d Cir.1972); *Am. Fed. of State, County and Municipal Employees, AFL-CIO v. New York*, 599 F.Supp. 916, 919 n. 1 (S.D.N.Y.1984). Second, because I have not yet ruled on that part of Deloitte's motion to dismiss based on failure to state a claim, Deloitte's "newly-raised" objections as to the Section 11 claims cannot properly be characterized as a second pre-answer motion to dismiss. Accordingly, this court has jurisdiction to consider Deloitte's objections to the Section 11 claims.

*16 Turning to the merits of Deloitte's objections, it is plain that the Section 11 claims asserted against it sound in fraud: not only do allegations of Deloitte's fraud permeate the Complaint, but also the claims asserted under Section 11 are premised on the allegations supporting the Section 10(b) claim against Deloitte. (See, e.g., Compl. ¶ 386 ("Deloitte consented to the inclusion of its auditor's opinions in the Registration Statement. Deloitte's audit opinions with respect to Philip's 1995 and 1996 financial statements were false and misleading when

the November 1997 Registration Statement was declared effective by the SEC.")) Accordingly, Rule 9(b) applies. See *Rombach*, 355 F.3d at 172 (applying Rule 9(b) where "the wording and imputations of the complaint are classically associated with fraud"); In re *Ultrafem, Inc. Sec. Litig.*, 91 F.Supp.2d 678, 690 (S.D.N.Y.2000) (applying Rule 9(b) where "plaintiffs [made] little, if any, effort to differentiate their asserted negligence claims from the fraud claims which permeate the Complaint"). However, because I have already found, in connection with the Section 10(b) claim, that those underlying allegations are sufficiently pleaded to satisfy Rule 9(b) and the PSLRA, Deloitte's motion to dismiss the Section 11 claims on this ground is denied.

Deloitte argues as a fallback position that it cannot be held liable under Section 11 for misstatements in the registration statements attributable to parties other than Deloitte. (Deloitte's Mem. at 43-44) I do not read the Complaint to assert Section 11 claims against Deloitte for misstatements made by other parties, and plaintiffs have verified in their papers that they will pursue Section 11 claims against Deloitte only for misstatements that it prepared or certified. (Pls.' Mem. in Opp'n to Deloitte's Mot. to Dismiss at 38) Nevertheless, to the extent Deloitte seeks assurance that it cannot be held liable under Section 11 for information in the registration statements it did not prepare or certify, the terms of the statute provides ample guidance: an accountant may be held liable only for statements that "purport [] ... to have been prepared or certified by him." 15 U.S.C. 77(k)(a)(4). See also *Herman & Maclean v. Huddleston*, 459 U.S. 375, 386 n. 22 (1983) (holding that accountants "cannot be reached by a Section 11 action ... with respect to parts of registration statement which they are not named as having prepared or certified").

2. Haynes and Knauss

The Section 11 claim against Haynes and Knauss is based on their having signed the November 1997 registration statement in their capacity as Philip directors. According to the Complaint, Haynes and Knauss, among

others, attended a board of directors meeting at which the participants discussed Philip's improperly recorded earnings for the 1997 third quarter amounting to \$ 24.2 million. (Compl. ¶¶ 236-238) Nevertheless, Haynes and Knauss later signed the November 1997 registration statement, which did not disclose the fraudulent nature of the earnings. (Id. ¶¶ 60-61, 238) Plaintiffs concede that their Section 11 claim against Haynes and Knauss sounds in fraud, but argue that the underlying allegations satisfy the heightened pleading requirements of Rule 9(b). (Pls.' 2d Supp. Mem. in Opp'n to the Motions of Deloitte, Haynes and Knauss, *passim*; Plaintiff's Reply Memorandum of Law in Further Opposition to the Motions to Dismiss of Haynes and Knauss, *passim*)

*17 Haynes' and Knauss' principal objection is that the Complaint does not sufficiently allege their participation in making the fraudulent statements in the November 1997 registration statement, and thus fails to plead fraud with sufficient particularity under Rule 9(b). (Haynes' and Knauss' Memorandum of Law in Support of their Motion to Dismiss ("Haynes' and Knauss' Mem.") at 18-19; Haynes' and Knauss' Supplemental Memorandum of Law in Support of their Motion to Dismiss ("Haynes' and Knauss' Supp. Mem.") at 13-14; Haynes' and Knauss' Second Supplemental Memorandum of Law in Support of their Motion to Dismiss ("Haynes' and Knauss' 2d Supp. Mem.") at 3) The Second Circuit has held that, in order to satisfy the fraud particularity requirement of Rule 9(b), a complaint must "inform each defendant of the nature of his or her alleged participation in the fraud." DiVittorio, 822 F.2d at 1247 (citation omitted). However, plaintiffs here are relieved of the burden of having to identify the specific roles of Haynes and Knauss in the alleged fraud under the so-called "group pleading doctrine." That doctrine applies where, as here, the directors or officers of a company participate in the preparation and dissemination of group-published documents, such as registration statements. See *In re Oxford Health Plans, Inc. Sec. Litig.*, 187 F.R.D. 133, 142 (S.D.N.Y.1999) (noting that "group-pleading doctrine allows plaintiffs to

'rely on a presumption that statements in prospectuses, registration statements, annual reports, press releases, or other group-published information, are the collective work of those individuals with direct involvement in the everyday business of the company" ') (citation omitted); *Geiger v. Solomon-Page Group, Ltd.*, 933 F.Supp. 1180, 1188 n. 7 (S.D.N.Y.1996) ("The defendants ... protest that the Amended Complaint fails to specify the particular omission attributable to each of the Individual Defendants. When an alleged fraudulent omission occurs in an offering memorandum filed with the SEC signed by each of the Individual Defendants, however, there is no requirement that the complaint be any more particular to comply with Rule 9(b) in this respect.") (citing DiVittorio, 822 F.2d at 1247).

That Haynes and Knauss were outside directors of Philip and were appointed to the company's board only three months before issuance of the November 1997 registration statement is of no consequence because, as the Complaint alleges, they had access to insider information concerning Philip's improperly recorded earnings for the 1997 third quarter. See *Sperber Adams Assocs. v. JEM Mgmt. Assocs. Corp.*, 90 Civ. 7405(JSM), 1992 U.S. Dist. LEXIS 8301, at *5 (S.D.N.Y. June 4, 1992) (outside director who prepared and distributed offering materials is insider for purposes of Rule 9(b) particularity inquiry); *Schnall v. Annuity and Life Re (Holdings), Ltd.*, 3:02 Civ. 2133(GLG), 2004 U.S. Dist. LEXIS 1601, at *11 (D.Conn. Feb. 4, 2004) ("[O]utside directors, although almost by definition excluded from the day-to-day management of a corporation, can fall within the group pleading presumption when, by virtue of their status or a special relationship with the corporation, they have access to information more akin to a corporate insider.") (citing *In re XOMA Corp. Sec. Litig.*, C-912252, 1991 U.S. Dist. LEXUS 20051, at *6) (N.D.Cal. Dec. 27, 1991). Notwithstanding Haynes' and Knauss' assertion to the contrary, the enactment of the PSLRA did not undermine the group pleading doctrine in the Second Circuit. See *In re Complete Mgmt.*, 153 F.Supp.2d at 326 n. 7 (citing *In re*

American Bank Note Holographics, Inc. Sec. Litig., 93 F.Supp.2d 424, 442 (S.D.N.Y.2000)); In re Oxford Health Plans, 187 F.R.D. at 142.

*18 Haynes and Knauss argue that the Section 11 claim should be dismissed also because the Complaint fails to allege facts creating a strong inference of their fraudulent intent. (Haynes' and Knauss' Mem. at 18; Haynes' and Knauss' 2d Supp. Mem. at 3) However, the Complaint alleges that Haynes and Knauss attended a board meeting at which the participants were told about Philip's improperly recorded earnings for the 1997 third quarter, but they nevertheless executed the November 1997 registration statement. Such allegations are enough to sustain a strong inference at the pleading stage that Haynes and Knauss knowingly committed securities fraud by signing that registration statement.

Haynes and Knauss ask the court in the alternative to strike from the Complaint any claim against them of joint and several liability because, they argue, the PSLRA requires plaintiffs asserting joint and several liability claims under Section 11 to allege defendants' knowing violation of the securities laws, and plaintiffs fail to do so here. (Haynes' and Knauss' 2d Supp. Mem. at 3-5) This argument fails on two grounds. First, the statute that Haynes and Knauss cite in support of this argument concerns the level of scienter that the "trier of fact" must find in order for a defendant to incur joint and several liability; it has no bearing on plaintiffs' minimum pleading requirements. See 15 U.S.C. § 78u-4(f)(3)(A) ("Any covered person against whom a final judgment is entered in a private action shall be liable for damages jointly and severally only if the trier of fact specifically determines that such covered person knowingly committed a violation of the securities laws."). Second, even presuming the statute were applicable at this stage in the litigation, for the reasons discussed above, the Complaint sufficiently alleges facts creating a strong inference that Haynes and Knauss knowingly committed securities fraud.

C. Section 20(a) of the Exchange Act and

Section 15 of the Securities Act

The second and fifth claims assert "control person" liability claims against Haynes and Knauss under Section 20(a) of the Exchange Act and Section 15 of the Securities Act. In effect, the Complaint alleges that Haynes and Knauss, as Philip directors, held power and influence over the company's actions and, therefore, are liable for its fraudulent misrepresentations.

Section 20(a) of the Exchange Act

Section 20(a) imposes liability on "every person who, directly or indirectly, controls any person liable under any provision of this chapter or of any rule or regulation thereunder ..., unless the controlling person acted in good faith and did not ... induce the ... violation." 15 U.S.C. § 78t(a). In order to state a prima facie claim under Section 20(a), a plaintiff must show: "(1) a primary violation by a controlled person, (2) control of the primary violator by the defendant, and (3) 'that the controlling person was in some meaningful sense a culpable participant' in the primary violation." *Boguslavsky v. Kaplan*, 159 F.3d 715, 720 (2d Cir.1998) (quoting *Sec. & Exch. Comm'n v. First Jersey Securities, Inc.*, 101 F.3d 1450, 1472 (2d Cir.1996)).

*19 Plaintiffs' allegations in furtherance of the Section 20(a) claim, though sparse, are sufficient to avoid dismissal. The first element is satisfied with the allegation that Philip committed multiple violations of Section 10(b) of the Exchange Act. (Compl.¶¶ 369-376) Because no party has challenged the sufficiency of that allegation, I assume that plaintiffs have adequately pleaded a primary violation. See *In re Scholastic Corp. Sec. Litig.*, 252 F.3d 63, 77-78 (2d Cir.), cert. denied, 534 U.S. 1071 (2001) (primary violation element of a Section 20(a) claim was satisfied where plaintiffs adequately pleaded Section 10(b) claim). [FN12]

FN12. In their initial brief, Haynes and Knauss contend that plaintiffs should not be permitted to circumvent the pleading requirements of a Section

10(b) claim by instead bringing a Section 20(a) claim against them. (Haynes' and Knauss' Mem. at 2) However, whether or not plaintiffs bring a Section 10(b) claim against Haynes and Knauss is irrelevant to the Section 20(a) analysis. To assert a Section 20(a) claim against Haynes and Knauss, plaintiffs must allege that a controlled person (here, Philip, not Haynes and Knauss) committed a Section 10(b) violation. See *Suez Equity Investors, L.P.*, 250 F.3d at 101 ("Controlling-person liability is a form of secondary liability, under which a plaintiff may allege a primary § 10(b) violation by a person controlled by the defendant and culpable participation by the defendant in the perpetration of the fraud."); *In re Initial Public Offering*, 241 F.Supp.2d at 392 n. 178 ("Primary liability of the controlling person is not a necessary predicate to a section 20(a) claim. Section 20 is typically used to sue defendants who do not have primary liability.").

To establish the second element--control--a plaintiff must show that the defendant "possessed 'the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.'" *First Jersey Securities*, 101 F.3d at 1472-73 (quoting 17 C.F.R. § 240.12b-2). "A short, plain statement that gives the defendant fair notice of the claim that the defendant was a control person and the ground on which [that claim] rests ... is all that is required." Schnall, 2004 U.S. Dist. LEXIS 1601, at *25 (citing *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 512 (2002) and *In re Initial Public Offering*, 241 F.Supp.2d at 352).

Haynes' and Knauss' status as directors, standing alone, is insufficient to establish their control over Philip. See *Food & Allied Service Trades Dep't, AFL-CIO v. Millfield Trading Co.*, 841 F.Supp. 1386, 1391 (S.D.N.Y.1994) ("While courts in this circuit have not always agreed on just how much beyond status as a director must be alleged to plead a Section 20(a) claim, ... they have agreed that a bare allegation of director status, without more, is insufficient."); *In re CINAR*, 186 F.Supp.2d at 309 ("It is well accepted that merely alleging that a particular defendant is a director or an officer of a company is not sufficient to allege

control.") (citations omitted). However, the Complaint alleges not only that Haynes and Knauss were directors of Philip, but also that they signed the November 1997 registration statement. (Compl.¶¶ 60-61) While there is case law suggesting that a defendant's execution of a fraudulent SEC filing is insufficient by itself to establish control, see *Jacobs*, 1999 U.S. Dist. LEXIS 2102, at *51 (S.D.N.Y. Feb. 26, 1999) (citing cases), I share the view that it "comport[s] with common sense to presume that a person who signs his name to a report has some measure of control over those who write the report." *Id.* See also *In re Indep. Energy Holdings PLC Sec. Litig.*, 154 F.Supp.2d 741, 772 (S.D.N.Y.2001) (allegations that defendants were directors, held substantial equity stake in company and signed prospectus were sufficient to establish control); *In re Ouintel Entm't Sec. Litig.*, 72 F.Supp.2d 283, 298 (S.D.N.Y.1999) (allegations that defendants had "access to [the company's] internal reports, press releases, public filings, and had the ability to prevent the issuance or correct the statements" were sufficient to establish control). That Haynes and Knauss were required by law to sign the November 1997 registration statement, far from absolving them of responsibility for the misstatements therein, "charges [them] with power over the document[] and represents to the corporation, its shareholders, and the public that [they have] performed [their] role with sufficient diligence that [they are] willing and able to stand behind the information contained in [the] document[]." *In re Worldcom, Inc. Sec. Litig.*, 294 F.Supp.2d 392, 420 (S.D.N.Y.2003). See also *In re Livent*, 151 F.Supp.2d 371, 437 (S.D.N.Y.2001) ("An outside director and audit committee member who is in a position to approve a corporation's financial statements can be presumed to have 'the power to direct or cause the direction of the management and policies of' the corporation, at least insofar as the 'management and policies' referred to relate to ensuring a measure of accuracy in the contents of company reports and SEC registrations that they actually sign.") (quoting 17 C.F.R. § 240.12b-2).

*20 The Second Circuit has not defined the

phrase "culpable participation"--the third element--other than to say that "a determination of section 20(a) liability requires an individual determination of a ... defendant's particular culpability." Boguslavsky, 159 F.3d at 720, and district courts in the Circuit are split as to what exactly the phrase means. Some district courts assume that "culpable participation" requires proof of state of mind, and thus conclude that plaintiffs must allege the controlling person's scienter to state a prima facie Section 20(a) claim. See, e.g., *In re Oxford Health Plans*, 187 F.R.D. at 143; *In re Deutsche Telekom AG Sec. Litig.*, 00 Civ. 9475(SHS), 2002 U.S. Dist. LEXIS 2627, at *17-18 (S.D.N.Y. Feb. 20, 2002); *Mishkin v. Ageloff*, 97 Civ. 2690(LAP), 1998 U.S. Dist. LEXIS 14890, at *67-72 (S.D.N.Y. Sept. 23, 1998). Other district courts have reasoned that there is no basis for equating "culpable participation" with scienter, so that plaintiffs asserting a Section 20(a) claim need allege only an underlying primary violation and control person status. See, e.g., *In re Initial Public Offering*, 241 F.Supp.2d at 394 n. 182 (noting that culpable conduct "can be blameworthy though it was done unintentionally or unknowingly" and that "the scienter-free definition of 'culpable' is particularly appropriate when it modifies 'participation,' which means 'to take part in something (as an enterprise or activity) usually in common with others.'") (citations omitted). [FN13] I need not resolve this debate because, even assuming "culpable participation" entails scienter, plaintiffs have pleaded it here.

FN13. Such is the propensity among certain courts to equate "culpable participation" with scienter that ordinarily they do not even use the term "scienter" and the intra-circuit debate is framed as one over whether "culpable participation" is a required element of a Section 20(a) claim. See, e.g. *Burstyn v. Worldwide Xceed Group, Inc.*, 01 Civ. 1125(GEL), 2002 U.S. Dist. LEXIS 18555, at *22 (S.D.N.Y. Sept. 30, 2002) ("The district courts in this Circuit have divided as to the prima facie requirements of a Section 20(a) claim, or more specifically as to whether plaintiffs must plead culpable participation."). However, as noted in the

text above, the Second Circuit has held that a plaintiff must plead culpable participation in order to state a Section 20(a) claim. See *Boguslavsky*, 159 F.3d at 720. Therefore, the debate is properly understood not as whether "culpable participation" is a requirement of a Section 20(a) claim, but what the phrase "culpable participation" means.

If scienter is an element of a Section 20(a) claim, the PSLRA's pleading requirements apply, and plaintiffs must plead with particularity facts giving rise to a strong inference that the control person knew or should have known that the primary violator was engaging in fraudulent conduct. See *Cromer Finance Ltd. v. Berger*, 137 F.Supp.2d 452, 484 (S.D.N.Y.2001); *In re Deutsche Telekom*, 2002 U.S. Dist. LEXIS 2627, at *22 (citations omitted). Here, the Complaint sufficiently alleges Haynes' and Knauss' scienter by asserting that (1) they attended a board meeting at which participants discussed Philip's improperly recorded earnings for the third quarter of 1997, and (2) they later signed the November 1997 registration statement that reported the false earnings. (Compl.¶¶ 236-238) Haynes and Knauss may prefer a more particularized description of what was discussed at the board meeting and their states of mind with respect to those discussions, but such facts are peculiarly within Haynes' and Knauss' own knowledge, and plaintiffs should not be expected to plead them in the Complaint.

Haynes and Knauss next contend that the Section 20(a) claim should be dismissed because plaintiffs seek to hold them jointly and severally liable to class members who purchased Philip's stock before Haynes and Knauss became associated with the company, and thus before they had the requisite control status for Section 11 liability. (Haynes' and Knauss' Supp. Mem. at 12) I agree that Haynes and Knauss cannot be held liable under Section 20(a) for Philip's misconduct during that part of the class period before they acquired control status, see *Whirlpool Fin. Corp. v. GN Holdings, Inc.*, 873 F.Supp. 111, 120 (N.D.Ill.1995) ("[C]ontrol person liability attaches only to a person who was in control at the time that the liability of the controlled

person accrued, not to someone who later takes control.") (citing 9 Louis Loss & Joel Seligman, Securities Regulation 4472 (3d ed.1992)); *Adair v. Hunt Int'l Resources Corp.*, 79 Civ. 4206, 1982 U.S. Dist. LEXIS 11045, at *10-11 (N.D.Ill. Feb. 22, 1982) (declining to ascribe control person status to defendants who acquired ownership interests in company after complained-of transactions occurred), but plaintiffs' failure to particularize in the Complaint Haynes' and Knauss' proportional liability does not warrant dismissal of the entire Section 20(a) claim. [FN14] Instead, that claim is dismissed only insofar as it is premised on Haynes' and Knauss' liability for Philip's fraudulent conduct before August 7, 1997, the date on which they became directors of the company. [FN15] Haynes' and Knauss' motion to dismiss the Section 20(a) claim is otherwise denied.

FN14. To the extent Haynes and Knauss assert that the PSLRA requires plaintiffs to plead with particularity outside directors' proportional liability, that assertion is baseless. The portion of the PSLRA relating to "proportionate liability," 15 U.S.C. § 78u-4(f), requires the trial court to instruct the jury to make ultimate findings concerning the proportional liability of outside directors; nothing in that provision requires plaintiffs to allege the extent of Haynes' and Knauss' proportional liability at the pleading stage. See also 15 U.S.C. § 78u-4(f)(1) ("Nothing in this subsection shall be construed to create, affect, or in any manner modify, the standard for liability associated with any action arising under the securities laws.").

FN15. Plaintiffs do not allege any independent basis for inferring Haynes' and Knauss' control in the period before they became directors of Philip.

Section 15 of the Securities Act

***21** Section 15 of the Securities Act attaches liability to "every person who, by or through stock ownership, agency, or otherwise, ..., controls any person liable under Section 11, or 12, ..., unless the controlling person had no knowledge of or reasonable ground to believe in the existence of the facts by reason of which the liability of the controlled person is alleged to exist." 15 U.S.C. § 77o. Plaintiffs asserting

a Section 15 claim must plead an underlying primary violation of Section 11 (or Section 12(a)(2)) of the Securities Act and control over the primary violator by the targeted defendant. See *In re Initial Public Offering*, 241 F.Supp.2d at 352 (citation omitted). However, as with control person liability claims under Section 20(a) of the Exchange Act, district courts in the Second Circuit are split over whether plaintiffs asserting Section 15 claims must plead scienter (what courts generally refer to as "culpable participation"). See *In re Asia Pulp & Paper Sec. Litig.*, 293 F.Supp.2d 391, 395-96 (S.D.N.Y.2003); *In re CINAR*, 186 F.Supp.2d at 309-10; *Dorchester Investors v. Peak Trends Trust*, 99 Civ. 4696(LMM)(FM), 2003 U.S. Dist. LEXIS 1446, at *10-11 (S.D.N.Y. Feb. 3, 2003) (all citing cases). [FN16] Again, I need not resolve the intra-circuit debate because, even if scienter is required, all three elements of a Section 15 claim are sufficiently pleaded here. The Complaint alleges that Philip committed violations of section 11 of the Securities Act in relation to the November 1997 public offerings (Compl.¶¶ 382-391), and no party has challenged the sufficiency of those allegations. Moreover, as discussed above in connection with the Section 20(a) claim, plaintiffs have sufficiently alleged Haynes' and Knauss' control status and their "culpable participation" in Philip's fraud. Accordingly, Haynes' and Knauss' motion to dismiss the Section 15 claim is denied.

FN16. Some courts holding that plaintiffs asserting a Section 15 claim need not plead "culpable participation" have reasoned that, because the requisite underlying Section 11 (or Section 12(a)(2)) violation sounds in strict liability and does not require defendants' knowledge of the misrepresentations, it makes "little sense to compel plaintiffs to allege a culpable state of mind in order to state a claim under Section 15." *In re CINAR*, 186 F.Supp.2d at 310 (citing *In re Indep. Energy Holdings*, 154 F.Supp.2d at 770 and *In re Twinlab Corp. Sec. Litig.*, 103 F.Supp.2d 193, 208 (E.D.N.Y.2000)). See also *In re Sterling Foster & Co. Sec. Litig.*, 222 F.Supp.2d 216, 282 (E.D.N.Y.2002); *In re Deutsche Telekom AG*, 2002 U.S. Dist. LEXIS 2627, at *16-17. I need not decide whether I agree, though I note that the

Second Circuit's recent decision in Rombach, discussed in the text above, casts at least some doubt on its continued force in cases where the underlying Section 11 (or Section 12(a)(2)) claim is based on fraud.

* * *

For the reasons stated above, Deloitte's motion to dismiss is denied as to all claims. Haynes' and Knauss' motion to dismiss is denied as to all claims except that their motion to dismiss the Section 20(a) claim is granted insofar as the claim is based on their liability for underlying primary violations occurring before August 7, 1997.

SO ORDERED:

2004 WL 1152501 (S.D.N.Y.), Fed. Sec. L. Rep. P
92,836

END OF DOCUMENT

48

Only the Westlaw citation is currently available.

United States District Court,
S.D. New York.

JPMORGAN CHASE BANK, in its capacity
as Administrative Agent under the Credit
Agreement, Plaintiff,

v.

Gary WINNICK, Dan J. Cohrs, Lodwick M.
Cook, Hank Millner James C. Gorton,
Joseph Clayton, Thomas J. Casey, S. Wallace
Dawson Jr., Susan Dullabh, Thomas
Robershaw, David A Walsh Joseph P. Perrone,
Robin Wright, Patrick Joggerst,
Brian Fitzpatrick, David Carrey, Jackie
Armstrong, Mark Attanasio, David L.
Lee, Geoffrey J.W. Kent, Eric Hippeau,
Norman Brownstein, William E. Conway,
Jr., Defendants.

No. 03 Civ. 8535(GEL).

June 23, 2004.

Ralph C. Ferrara, Colby A. Smith, Jonathan
E. Richman, Jeffrey S. Jacobson, Debevoise &
Plimpton, New York, N.Y. for defendants.

Michael L. Hirshfeld, Andrew E. Tomback,
Allan S. Brilliant, Millbank, Tweed, Hadley &
McCloy, for plaintiff.

OPINION AND ORDER

LYNCH, J.

*1 This action presents another strand in the web of litigation surrounding the alleged accounting fraud and eventual bankruptcy of the telecommunications company Global Crossing, Ltd. ("GC"). Plaintiff JP Morgan Chase Bank brings this action on behalf of a syndicate of commercial banks ("the Banks") against various officers, directors, and employees of GC in connection with a series of loans extended to GC between August 17, 2001, and September 28, 2001, pursuant to a credit agreement entered into in August 2000 (the "Credit Agreement"). The Banks claim that GC made intentional and negligent

misrepresentations to the Banks regarding the company's compliance with certain financial covenants in the Credit Agreement in order to mislead the Banks into continuing to extend the company credit. Plaintiffs seek \$1.7 billion in damages. Defendants now move for dismissal of, or in the alternative, for summary judgment against, the plaintiffs' claims. For the reasons set forth below, the motion to dismiss will be granted in part; as to the remaining claims, the motion for summary judgment will be denied.

BACKGROUND

The relevant facts, which are drawn from the complaint except where otherwise noted, are as follows. On August 10, 2000, the Banks entered into a Credit Agreement with GC to extend a total of \$2.25 billion of credit to GC, \$1.7 billion of which was in the form of a credit facility (or line of credit) (the "Credit Facility") and the remainder of which was in the form of a term loan. Under the terms of the Credit Agreement, the Banks agreed to extend credit to GC up to the \$1.7 billion limit provided in the Credit Facility, provided a GC officer certified that the company was in compliance with the covenants and the other terms of the Credit Agreement at the time of each borrowing. Failure to comply with the covenants in the agreement would result in a default, terminating GC's line of credit and causing all of its debt under the Credit Agreement (including the term loan and any amount extended under the Credit Facility) to come immediately due. Under the agreement, each loan request was "deemed" a "representation and warranty" by GC that no "event of default" had occurred. (See Jacobson Decl. Ex. A, Credit Agreement § 4.02.) The Banks also secured the right under the Credit Agreement to inspect GC's books and records "upon reasonable prior notice ... and as often as reasonably requested." (Id. § 5.07.)

Whether or not the company was in compliance with its covenants was to be determined in part by calculating its "Total Leverage Ratio," or the ratio of its debt to a specific measure of its earnings styled as "four-quarter trailing consolidated earnings

before interest, taxes, depreciation and amortization" ("Consolidated EBITDA"). GC was required to maintain a Total Leverage Ratio below 4.75 during the relevant time period, meaning that GC's debt could not exceed 4.75 times its Consolidated EBITDA. Consolidated EBITDA, as defined in the Credit Agreement, included regular recurring income booked under Generally Accepted Accounting Principles ("GAAP"), as well as "deferred revenue," which consisted of income received that could not, in accordance with GAAP, be booked in the current accounting period. The use of Consolidated EBITDA as a measure was significant in that a main source of GC's revenue was sales of "indefeasible rights of use" ("IRU"), the right to use capacity on its fiber-optic network for a specified time period. Under GAAP, revenue from IRU sales could not be booked up front, but rather, had to be amortized over the life of the IRU. By including deferred revenue in Consolidated EBITDA, the company was able to report revenue from the IRU sales up front, thus increasing its total reported income and decreasing its Total Leverage Ratio.

*2 The complaint alleges that following a slowdown in the telecommunications industry in late 2000 due to a glut of capacity on the market, GC began engaging in "improper reciprocal trades of IRUs with other distressed participants in the industry." (Compl. ¶ 14.) These reciprocal transactions, or "swaps" of capacity, would typically involve a sale of capacity to another telecom provider in exchange for that provider's agreement to purchase capacity from GC of an equivalent stated value; each company would then be able to book the revenue from the sale. In fact, the complaint alleges, these transactions were "of little to no value to [GC]," as the capacity purchased was unnecessary and the income created by the sales was artificial; they were entered solely in order to create the appearance of revenue, to inflate the Consolidated EBITDA, and thus to meet the company's debt covenants and the financial expectations of the securities markets.

Reporting revenue from the improper swaps up front and including it in its Consolidated

EBITDA successfully deceived the Banks into believing that GC was financially solvent, when in fact it was on the brink of financial collapse. "The artificial revenue became a significant enough portion of [GC's] Consolidated EBITDA to make the Defendants' certifications false" beginning with financial statements submitted at the end of the fourth quarter of 2000 (Compl. ¶ 15), and allowed the company to continue to draw on its Credit Facility until it had reached the \$1.7 billion maximum under the agreement at the end of September 2001. On the basis of GC's inclusion of revenue from swaps in its 2000 annual report on Form 10-K and in its quarterly reports for the first three quarters of 2001, the Banks now bring claims against defendants for intentional and negligent misrepresentation, as well as related claims of conspiracy and aiding and abetting. Defendants move for dismissal of all claims for failure to allege any actionable misrepresentations, and in the alternative, for summary judgment on grounds that the plaintiffs could not reasonably have relied on the defendants' misrepresentations.

DISCUSSION

I. MOTION TO DISMISS

A. Legal Standard on a Motion to Dismiss

On a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6), the Court must accept as true all well-pleaded factual allegations in the complaint and view them in the light most favorable to the plaintiff, drawing all reasonable inferences in its favor. *Leeds v. Meltz*, 85 F.3d 51, 53 (2d Cir.1996). The Court will not dismiss a complaint for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Beyond the facts in the complaint, the Court may consider "any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference." *Cortec Indus., Inc. v. Sum Holding, L.P.*, 949 F.2d 42, 47 (2d Cir.1991).

B. Actionable Misrepresentations

*3 The defendants' principal argument on their motion to dismiss plaintiffs' claims, and their sole argument on plaintiffs' fraud claims in particular, is that the plaintiffs have failed to allege any actionable misrepresentation on the part of the defendants. In order to state a claim for fraud under New York law, the plaintiff must allege that the defendant made a "material misrepresentation or omission of fact." *Schlaifer Nance & Co. v. Estate of Andy Warhol*, 119 F.3d 91, 98 (2d Cir.1997). [FN1] Defendants claim that their forms 10-Q for the first and second quarters of 2001, which were provided to the Banks at the time the loans were sought, specifically and truthfully disclosed the existence of reciprocal swap transactions. (See D. Br. 7-8; Jacobson Decl. Ex. MM at 11, 16; OO at 21.) [FN2] This should have put the Banks on notice "of the very information they claim not to have had when they made the loans," and should have "superseded whatever was said or was not said about such transactions" in the 2000 10-K. (D.Br.8.)

FN1. Defendants do not challenge the plaintiffs' pleading on the other elements of a claim for fraud under New York law on their motion to dismiss. Those elements are knowledge of falsity, intent to defraud, reasonable reliance, and causation. *Schlaifer Nance*, 119 F.3d at 98. Defendants do, however, challenge the reasonableness of plaintiffs' reliance in their motion for summary judgment, discussed below. See *infra* Part II.

FN2. Defendants also reference disclosures made in press releases issued prior to the time-period of the loans. These documents are outside of the evidentiary record, and are not attached to or incorporated by reference in the complaint. As such, they cannot properly be considered on a motion to dismiss.

The defendants' arguments on this front are unconvincing, because disclosure of these transactions did not put the plaintiffs on notice of the underlying fraud. Plaintiffs do not claim that the defendants failed to disclose the existence of reciprocal capacity trades; indeed, as plaintiffs concede, the existence of

such transactions was known to the Banks when they entered into the Credit Agreement in August 2000. (P. Opp.5.) Nor do they claim that reciprocal transactions are intrinsically improper: the Banks do not contest that, as the defendants have argued, such arrangements could serve the legitimate business purpose of allowing telecommunications companies to avoid unnecessary capital construction costs by engaging in mutual trades of capacity. Rather, the gravamen of plaintiffs' claim is that beginning in the fourth quarter of 2000, GC's transactions had no purpose other than to create the appearance of revenue. As such, they had no legitimate business justification, and GC's reporting of the revenue derived from them was inherently false and misleading. It is therefore immaterial that defendants' first and second quarter 10-Qs disclosed the existence of reciprocal transactions, as that is not what plaintiffs allege them to have misrepresented. [FN3]

FN3. The defendants' argument that the revelations in the first and second quarter 10-Qs "superseded" any falsehoods in the 2000 10-K by revealing the existence of swaps is therefore irrelevant. Even if the quarterly statements corrected any past non-disclosure of existing swaps, this would not have made a difference because, as stated above, the issue was the nature of the swaps and not their existence.

As a matter of pleading, plaintiffs have adequately alleged that the defendants' financial statements in their 2000 10-K and their first and second quarter 10-Qs included revenue figures that were materially false and misleading (or, stated differently, that they omitted the material fact that the transactions in question were shams), and that these falsehoods were perpetrated in order to preserve the company's ability to draw on a line of credit that was increasingly necessary for its day-to-day survival. The motion to dismiss plaintiffs' claims on these grounds is therefore denied. [FN4]

FN4. Defendants have not raised any defenses specific to plaintiffs' claims for aiding and abetting fraud (third cause of action) or conspiracy to

commit fraud (fourth cause of action), but have merely argued that these claims "cannot survive if the underlying claims are deficient." (D.Br.9.) Because plaintiffs' underlying claims for fraud withstand the motion to dismiss, these ancillary claims survive as well.

C. Claims against "Reporting Defendants"

*4 Defendants next challenge the plaintiffs' claims (second and sixth causes of action) against two of the so-called "Reporting Defendants," Susan Dullabh and Thomas Robershaw, for fraudulent and negligent misrepresentations based on their signing of GCs borrowing requests submitted over the two-month period in question. The plaintiffs allege that because each borrowing requests was "deemed" a representation by GC that it remained in compliance with its covenants, when in fact it was not, the individual officers signing such requests should be liable for those false representations. Defendants argue that because the borrowing requests "do not make any representations at all [but] simply asked for money," and because they do not contain any "facial inaccuracies," the requests cannot constitute actionable misrepresentations. (D. Br. 12; Reply 10.) They further argue that because Dullabh and Robershaw were not parties to the Credit Agreement that created the provision "deeming" the requests to be a representation about GC's financial condition, this provision cannot create an actionable tort claim against them.

If defendants were correct, the provision of the Credit Agreement deeming the borrowing requests to be representations about the company's financial condition would be meaningless. This provision represented a bargained-for agreement between two sophisticated business entities. By allowing the Banks to rely on each borrowing request as a renewed representation that GC's covenants remained satisfied, these requests served as a proxy for a more thorough, and undoubtedly more onerous, reporting requirement. This clearly operated to GC's benefit in terms of ease of drawing on its credit. In turn, it provided important

protection for the Banks in the event that such representations should prove false. Having so clearly benefitted from this provision, GC cannot now escape from its burdens by resort to the lame argument that the borrowing requests did not amount to a "facial misrepresentations." Nothing in the law of misrepresentation requires courts to ignore the context in which a representation was made, or the fact that it was only considered a "representation" pursuant to a separate contract between the parties. The Banks had every right to rely on these requests at the time they were made as "representations," as they were understood under the Credit Agreement's terms, and to have them legally construed as such in a subsequent tort claim for fraud. [FN5]

FN5. The fact that the reports did not contain "facial misrepresentations" is, however, relevant to the question of whether the Banks were on inquiry notice of the fraud. See *infra* Part II.C.2.

Defendants' further argument that Dullabh and Robershaw cannot be held liable because they were not parties to the Credit Agreement, and therefore did not agree to "deem" the requests representations of compliance, is equally devoid of support. The one case defendants cite, *Lerner v. Amalgamated Clothing & Textile Workers Union*, 938 F.2d 2, 5 (2d Cir.1991), does not, as defendants claim, stand for the broad proposition that "a contract with [a] corporation does not bind [its] officer" (D.Br.12); rather, *Lerner* simply held that an officer does not become personally bound to perform a contract (there, to pay employee wages and benefits) merely by signing it. As plaintiffs correctly point out, a corporation may only act through its agents, *Suez Equity Investors, L.P. v. Toronto-Dominion Bank*, 250 F.3d 87, 101 (2d Cir.2001), and under New York law, "[o]fficers and directors of a corporation may be held liable for fraud if they participate in it or have actual knowledge of it." *Cohen v. Koenig*, 25 F.3d 1168, 1173 (2d Cir.1994) (citations omitted). [FN6] Dullabh and Robershaw were not low-ranking employees; they were the Vice President Treasury and the Director of Capital

Markets, respectively. At the pleading stage, it is appropriate to allow the plaintiffs' claims to proceed against these defendants on the assumption that persons occupying such positions in the company would have knowledge of both the fraud and the substantive terms of the Credit Agreement when they signed the borrowing requests. Cf. *In re Symbol Techs. Secs. Litig.*, 762 F.Supp. 510, 515 (E.D.N.Y.1991) (holding that inference of outside directors' knowledge of fraud should be allowed at the pleading stage for purposes of establishing "demand futility" because such knowledge, "along with information about when and how [the director] received it, is peculiarly within the possession of the defendants and cannot be known to plaintiff prior to discovery"). [FN7] Defendants' motion to dismiss plaintiffs' second and sixth claims against them on these grounds will therefore be denied.

FN6. Defendants' attempt to distinguish *Cohen* is unavailing. Defendants argue that the Banks have not alleged that Dullabh and Robershaw had knowledge of the fraud, as plaintiffs have "acknowledge[d] was required in *Cohen v. Koenig*." (D. Reply 10 .) But *Cohen* states that "[o]fficers and directors of a corporation may be held liable for fraud if they participate in it or have actual knowledge of it." 25 F.3d at 1173 (emphasis added). Plaintiffs have sufficiently alleged these defendants' participation in the fraud. (See Compl. ¶¶ 25-26.)

FN7. Defendants also attempt to distinguish *In re Symbol Technologies Securities Litigation*, 762 F.Supp. 510 (E.D.N.Y.1991) and *Marine Midland Bank v. John E. Russo Produce Co.*, 50 N.Y.2d 31 (1980), also cited by plaintiffs, on grounds that the defendants in this case were not "outside directors" as they were in those cases. (D. Reply 10.) The fact that Dullabh and Robershaw were in fact inside officers cuts against, rather than for, defendants' argument, since as insiders they would likely have been more directly involved in the day-to-day activities of the corporation than the defendants in *Marine Midland* and *Symbol Technologies*.

D. Negligent Misrepresentation and Related Claims

*5 In addition to arguing that plaintiffs fail to assert an actionable misrepresentation for purposes of any of its claims, defendants further assert a specific challenge to plaintiffs' negligent misrepresentation claims. Defendants argue that these claims are deficient for two related reasons; first, that no "special relationship" existed between the Banks and the defendants such that the defendants were under a legal duty to speak with care, and second, that a purely contractual relationship cannot support a negligent misrepresentation claim. Defendants are correct.

Under New York law, in order to state a claim for negligent misrepresentation, a plaintiff is required to allege that the speaker is bound to the other party "by some relation or duty of care." *Dallas Aerospace, Inc. v. CIS Air Corp.*, 352 F.3d 775, 788 (2d Cir.2003). [FN8] In ordinary commercial contexts, liability does not attach as a matter of course for merely negligent statements; rather, it is imposed "only on those persons who possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified." *Kimmell v. Schaefer*, 89 N.Y.2d 257, 263 (1996). As courts have noted, such specialized knowledge usually arises due to the speaker's status as a professional, such as an accountant or an engineer, with a particular background in the subject of the alleged misrepresentation. *Kimmell*, 89 N.Y.2d at 263; *Doehla v. Wathne Limited, Inc.*, No. 98 Civ. 6087(CSH), 1999 WL 566311, at *19 (S.D.N.Y. Aug. 3, 1999). A special relationship may be brought about by "either privity of contract between the parties or a relationship so close as to approach that of privity." *I.L.G.W.U. Nat'l Retirement Fund v. Cuddlecoat*, No. 01 Civ. 4019(BSJ), 2004 WL 444071, at *3 (S.D.N.Y. Mar. 11, 2004), quoting *Prudential Ins. Co. of America v. Dewey, Ballantine, Bushby, Palmer & Wood*, 80 N.Y.2d 377, 382 (1992). However, where the duty arises in commercial contexts in which a contract exists, the duty attendant to that special relationship "must spring from circumstances extraneous to, and not

constituting elements of the contract, although it may be connected with and dependent upon the contract." *Clark-Fitzpatrick, Inc. v. Long Island RR Co.*, 70 N.Y.2d 382, 389 (1987). In other words, "[i]f the only interest at stake is that of holding the defendant to a promise, the courts have said that the plaintiff may not transmogrify the contract claim into one for tort." *Hargrave v. Oki Nursery, Inc.*, 636 F.2d 897, 899 (2d Cir.1980).

FN8. Defendants do not challenge plaintiffs' pleadings with respect to the other elements of the tort of negligent misrepresentation, which are "(1) carelessness in imparting words; (2) upon which others were expected to rely; (3) and upon which they did act or failed to act; (4) to their damage." *Dallas Aerospace*, 352 F.3d 775, 788 (2d Cir.2003).

Plaintiffs argue that the Credit Agreement itself established the elements of a "special relationship" required by New York law:

(1) an awareness by the maker of the statement that it is to be used for a particular purpose; (2) reliance by a known party on the statement in furtherance of that purpose; and (3) some conduct by the maker of the statement linking it to the relying party and evincing its understanding of that reliance.

*6 *Doehla*, 1999 WL 566311, at *20, citing *Prudential*, 80 N.Y.2d at 384. They assert that defendants were aware that their statements would be used to satisfy the Banks of GC's financial condition and induce them to extend loans, that the Banks relied on such representations, and that the defendants knew that the Credit Agreement required these assurances and themselves provided them "in order to cause the Banks to rely on them and advance funds." (P. Opp.10.) However, the plaintiffs fail to show how these factors were in any way distinct from the defendants' obligations under the terms of the Credit Agreement itself. "[T]he contract itself is the sole basis for the imposition of a special duty, but that duty only extends as far as the contract's scope--the reasonable disclosure of information by [defendants] to [plaintiffs]." *PPI Enters. (U.S.), Inc. v. Del Monte Foods Co.*, No. 99 Civ. 3794(BSJ), 2003 WL

22118977, at *25-*26 (S.D.N.Y. Sept. 11, 2003). Without the obligation imposed under the terms of the Credit Agreement, the defendants would be under no obligation to use special care to provide accurate financial information to the Banks; indeed, if not for the existence of the contract, they would have had no relationship to the Banks whatsoever. Plaintiffs may not "transmogrify the contract claim into one for tort." *Hargrave*, 636 F.2d at 899; see also *LaSalle Bank v. Citicorp Real Estate*, No. 02 Civ. 7868(HB), 2003 WL 1461483, at *3-*6 (S.D.N.Y. Mar. 21, 2003) (holding that no special relationship existed between a mortgage loan seller and purchaser where duty to provide accurate information about financial status of companies subject to mortgage arose solely from the operative purchase agreement).

Kimmel, relied on by plaintiffs, is not to the contrary. Kimmell explains that "[i]n a commercial context, a duty to speak with care exists when 'the relationship of the parties, arising out of contract or otherwise, [is] such that in morals and good conscience the one has the right to rely upon the other for the information.'" *Kimmell*, 89 N.Y.2d at 263, quoting *International Prods. Co. v. Erie R.R. Co.*, 244 N.Y. 331, 338 (1927) (alteration in original). But, as other courts have noted, Kimmell did not represent a departure from the traditional understanding that a special relationship is required in order to state a claim for negligent misrepresentation. See *Dallas Aerospace*, 352 F.3d at 788-89; *I.L.G.W.U.*, 2004 WL 444071, at *2. In *Kimmell*, the New York Court of Appeals upheld an award against the C.E.O. of an energy company for negligent misrepresentations to investors regarding the company's financial prospects based on out-of-date utility rates. There, the duty did not arise simply from the existence of the contract or from its terms, but rather, from the particular factual circumstances underlying the plaintiffs' decision to invest. In upholding the award, the court emphasized that the defendant had personally sought out the individual investors, had earned a commission for inducing them to invest, and had "personally requested 'updated' projections [to

give to plaintiffs], which he represented were reasonable and generated after a 'thorough discussion with our West Coast administrator,' even though they were not based on the utility rate structure in effect at the time." 89 N.Y.2d at 264-65. "[U]nder these circumstances," the court concluded that there was sufficient evidence in the record to support a finding that "the defendant owed a duty of care to plaintiffs here." *Id.* at 265. Thus, Kimmell neither abolished the requirement of a special relationship nor loosened the requirement that such relationship must arise due to some factor extraneous to the contract's terms.

*7 Plaintiffs also argue, however, that they have met the requirement of pleading a special relationship by alleging that the defendants "possessed specialized expertise, knowledge, and experience concerning [GC's] accounting and actual financial condition." (P. Opp.10.) According to plaintiffs, because the defendants were "far more knowledgeable about the fiber optic cable business, and particularly the structure and specific capacity needs of [GC's] fiber optic network" than the Banks, the Banks were "absolutely entitled to rely upon Defendants' representations in this regard." (*Id.* at 11.) But this amounts to nothing more than knowledge of the particulars of the company's business--and of the true situation underlying the misrepresentations pertaining to that business. This does not constitute the type of "specialized knowledge" that is required in order to impose a duty of care in the commercial context; if it were, every bank would have a claim against every borrower who failed to exercise due care in the context of commercial bank loans. See *LaSalle*, 2003 WL 1461483, at *3-*4 (no duty arose from seller's "unique knowledge or access to information" about mortgage status). Borrowers will almost always have "specialized" knowledge of the particulars of their businesses, and indeed, of the facts underlying any misrepresentations made in support of desired loans. That is why banks, which are in the business of assessing lending risks posed by potential borrowers, have sophisticated means of assessing those risks that cut across industries and areas of

technical expertise. The relationship between a bank and a borrower is the very epitome of an arm's length commercial transaction: the borrower must comply with the negotiated terms of its contract, and may not defraud the lender by deliberate falsehood, but it is not liable in tort for mere carelessness about its representations.

Finally, plaintiffs argue that at the very least, the question of whether a special relationship exists is a question of fact. It is true that several cases have so characterized it. See, e.g., *Suez Equity Investors*, 250 F.3d at 103-04; *Wells Fargo Bank Northwest, N.A. v. Taca Int'l Airlines, S.A.*, 247 F.Supp.2d 352, 366-67 (S.D.N.Y.2002); *Kimmell*, 89 N.Y.2d at 264; *Knight Securities L.P. v. Fiduciary Trust Co.*, 774 N.Y.S.2d 488, 489 (1st Dept.2004). But these cases were decided on different facts. For example, in *Suez Equity Investors*, a case involving alleged misrepresentation between investors and a healthcare financing venture, the court specifically found that "plaintiff's complaint implies a relationship between the parties that extended beyond the typical arm's length business transaction: defendants initiated contact with plaintiffs, induced them to forebear from performing their own due diligence, and repeatedly vouched for the veracity of the allegedly deceptive information." 250 F.3d at 103. Similarly, in *Wells Fargo*, which involved a dispute between the lessee and lessor of an aircraft, the complaint alleged that several of the defendant's agents "made expert representations about maintenance costs," "had unique expertise in the intended conversion of Airbus 300 aircraft from passenger to cargo use," and "misrepresented the historical maintenance costs and the good mechanical condition of the planes." *Wells Fargo*, 247 F.Supp.2d at 366-67. On these facts, the court assumed that "these somewhat sparse allegations suffice, at least at the pleading stage" to withstand a motion to dismiss, "[s]ince the determination of whether a special relationship exists is essentially a factual inquiry." *Id.* at 367.

*8 In each of these cases, the facts alleged in the complaint could fairly be read to justify a

finding of a special relationship of trust and confidence, above that created by the contracts involved. [FN9] By contrast, where no such allegations have existed, courts have not hesitated to dismiss negligent representation claims on motions to dismiss. For instance, In LaSalle Bank, a mortgage loan purchaser charged that the seller had misrepresented the status of various mortgages purchased. The court rejected the argument that the defendant had a duty, "separate and distinct from its contractual one, to impart correct information based on [its] unique knowledge or access to information" about the mortgage loans in question. 2003 WL 1461483, at *3. The contract, which represented "a complex transaction between two sophisticated entities," could not form the basis of for the plaintiff's reliance. *Id.* at *5. The court dismissed the case on the ground that "the factual predicates of [defendant's] negligent misrepresentation claim are elements of and not extraneous to [the contract], and thus ... do not create an independent duty on [defendant]." *Id.* at *3. See also *I.L.G.W.U.*, 2004 WL 444071, at *2-*3 (dismissing negligent misrepresentation claim where the third-party plaintiff failed to allege existence of special relationship between union and clothing manufacturer); *Doehla*, 1999 WL 566311, at *20 (dismissing negligent misrepresentation claim against lawyer by non-client where lawyer did not "hold himself out to be an expert" and "reliance on [his] opinion by the third-party [was not the] 'end and aim' of the engagement of the lawyer"); *Clark-Fitzpatrick*, 70 N.Y.2d at 390 (dismissing gross negligence claim by contractor against railroad where duty to use due care in designing the project was "clearly within the contemplation of the written agreement").

FN9. The other case cited by plaintiff, *Goodman Mfg. Co. L.P. v. Raytheon Co.*, No. 98 Civ. 2774(LAP), 1999 WL 681382, at *15 (S.D.N.Y. Aug. 31, 1999), did not reach the question of whether a special relationship existed, because the court found that the plaintiffs had failed to allege reasonable reliance.

Such is the case here. Plaintiffs have failed

to allege either a relationship that is in any way distinct from that between a plain vanilla borrower and lender, or a duty of care arising from any source external to the Credit Agreement. The law does not impose liability for negligent misrepresentations in such a context. Plaintiffs' claims for negligent misrepresentation, along with their ancillary claims of "aiding and abetting" such misrepresentations (plaintiffs' fifth through seventh causes of action), must therefore be dismissed.

Because plaintiffs' fraud claims survive, the Court will now turn to defendants' motion for summary judgment on these remaining claims.

II. MOTION FOR SUMMARY JUDGMENT

A. Standard for Summary Judgment

For their summary judgment motion, which was filed prior to discovery, defendants rely solely on financial reports and other documents available in the public record. [FN10] Summary judgment is appropriate when no genuine issues of material fact are in dispute and when, viewing the evidence in a light most favorable to the nonmoving party, no reasonable trier of fact could disagree as to the outcome of the case. See *Nabisco, Inc. v. Warner-Lambert Co.*, 220 F.3d 43, 45 (2d Cir.2000). While all ambiguities in the evidentiary record must be resolved in favor of the nonmoving party, "the nonmoving party may not rely on conclusory allegations or unsubstantiated speculation." *Scotto v. Almenas*, 143 F.3d 105, 114 (2d Cir.1998). To establish a genuine issue of material fact, the party opposing summary judgment "must produce specific facts indicating' that a genuine factual issue exists." *Scotto*, 143 F.3d at 114, quoting *Wright v. Coughlin*, 132 F.3d 133, 137 (2d Cir.1998); see also *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The court "is not to weigh the evidence but is instead required to view the evidence in the light most favorable to the party opposing summary judgment, to draw all reasonable inferences in favor of that party, and to eschew credibility assessments." *Weyant v. Okst*, 101 F.3d 845,

854 (2d Cir.1996). Summary judgment is then appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits ... show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c).

FN10. The evidence relied upon is limited to the text of the Credit Agreement; certain GC disclosures during 2001; certain press reports during the same period; securities analysts' reports about GC; the market prices of GC's stock and the stocks of other telecom companies; and the GC Plan of Reorganization filed with the Bankruptcy Court. (See D. Br. 13; D. Rule 56.1 Statement of Undisputed Facts).

B. Fraud Claims

*9 With respect to plaintiffs' fraud claims, defendants assert that the plaintiffs cannot demonstrate reliance on the alleged misrepresentations. The crux of their argument is that, even accepting *arguendo* that the financial reports provided to the Banks were in themselves sufficiently false and misleading to survive the motion to dismiss, the plaintiffs' claims would fail because the Banks had access to information sufficient to put them on notice of the alleged falsehoods. Such access would have triggered a "duty to inquire" negating the reasonableness of the Banks' reliance on those representations. The Banks' information, according to defendants, derived from two sources: (1) GC's financial statements themselves, which disclosed the existence of swaps, and (2) reports publicly issued by various financial analysts assessing the financial status of GC for the purpose of educating potential investors. [FN11] Plaintiffs dispute both the legal question of when a duty to inquire is triggered under New York law and the factual assertion that the information available was sufficient to put them on notice of the fraud.

FN11. Defendants argue that the service of a JP Morgan officer, Maria Elena Lagomasino, on GC's audit committee during the relevant time period

should have put the Banks on notice of the alleged fraud. This argument is without merit. First, the complaint does not charge Lagomasino with any particular knowledge. Second, there is no allegation that Lagomasino served on the GC board in her capacity as a JP Morgan officer. On the contrary, plaintiffs have provided evidence in the form of an email from an official at JP Morgan specifying the parameters of her roles with respect to the two companies: namely, that she would "not be serving at the request of [JP Morgan], but rather independently," that her "fiduciary obligations as a director of Global and a [JP Morgan] executive are distinct from one another," and that she "may not share with [JP Morgan] nonpublic information relating to Global ... acquired in [her] capacity as a Global director." (Tomback Decl. Ex. A.) Any information that she might have known was therefore not chargeable to the Banks. See *New York Marine & General Ins. Co. v. Tradeline (L.L.C.)*, 266 F.3d 112, 122 (2d Cir.2001) ("[K]nowledge acquired by an agent acting within the scope of its agency is imputed to the principal." (emphasis added)); *Martinson v. Massachusetts Bay Ins. Co.*, 947 F.Supp. 124, 129 (S.D.N.Y.1996) (holding that under New York agency law, notice given to individual could not be imputed to defendant corporation where it was undisputed that individual was not acting as defendant's agent).

1. Test for Reliance and the Duty to Inquire

In order to prevail on a claim for fraudulent misrepresentation under New York law, plaintiffs must show that the defendants made a false representation of a material fact to the plaintiffs, and that the plaintiffs were injured as a result of justifiable reliance upon that representation. *Dallas Aerospace*, 352 F.3d at 784. Reliance is necessary in order to demonstrate causation; where a plaintiff actually knew at the time a representation was made that it was false, she cannot claim to have relied on the truth of that representation, and any injury she suffers is therefore not attributable to the defendant. See *Christophedes*, 106 F.3d 22, 26-27; *Stolow v. Greg Manning Auctions Inc.*, 258 F.Supp.2d 236, 249 (S.D.N.Y.2003); *Greenberg v. Christ*, 282 F.Supp.2d 112, 119 (S.D.N.Y.2003).

As a threshold matter, plaintiffs assert that

the proper test for reliance is not "reasonable" reliance, but "justifiable" reliance, which they argue is a less demanding burden. Although it is true that some cases use the language of "justifiable" reliance," see e.g., *Christophedes*, the distinction is hardly clear. Rather, it appears that the cases use these terms somewhat interchangeably. See, e.g., *Banque Arabe Et Internationale D'Investissement v. Maryland Nat'l Bank*, 57 F.3d 146, 156 (2d Cir.1995) ("[The plaintiff is] required to establish that it actually relied on the disclosure or lack thereof, and that such reliance was reasonable or justifiable."); also compare *Schlaifer Nance*, 119 F.3d at 98, and *DIMON*, 48 F.Supp.2d 359, 367 (S.D.N.Y.1999) (reasonable), with *Christophedes*, 106 F.3d at 26-27, and *Lazard Freres*, 108 F.3d at 1531 (justifiable), but see *id.* at 1543 (reasonable). However, the Court need not decide which standard applies because factual questions remain that preclude summary judgment even under the purportedly more stringent "reasonableness" standard.

*10 In assessing whether reliance on allegedly fraudulent misrepresentations is reasonable or justifiable, New York takes a contextual view, focusing on the level of sophistication of the parties, the relationship between them, and the information available at the time of the operative decision. "Ordinarily there is no duty to exercise due diligence, and [courts] have described the necessary showing of care as 'minimal diligence' or 'negating its own recklessness.'" *Banque Franco-Hellenique de Commerce Int'l et Maritime, S.A. v. Christophides*, 106 F.3d 22, 26-27 (2d Cir.1997) (citations omitted). However, sophisticated business entities are held to a higher standard. As Judge Friendly explained, where the plaintiff "has the means of knowing, by the exercise of ordinary intelligence, the truth, or the real quality of the subject of the representation, he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentations." *Mallis v. Bankers Trust Co.*, 615 F.2d 68, 80-81 (2d Cir.1980) (quoting *Schumaker v. Mather*, 133 N.Y. 590, 596

(1892). Therefore, "where sophisticated businessmen engaged in major transactions enjoy access to critical information but fail to take advantage of that access, New York courts are particularly disinclined to entertain claims of justifiable reliance." *Schlaifer Nance*, 119 F.3d at 98, quoting *Grumman Allied Indus. v. Rohr Indus., Inc.*, 748 F.2d 729, 737 (2d Cir.1984).

In addition, "[a] heightened degree of diligence is required where the victim of fraud had hints of its falsity." *Christophides*, 106 F.3d at 26-27. This rule applies where the "[c]ircumstances [are] so suspicious as to suggest to a reasonably prudent plaintiff that the defendants' representations may be false"; in such cases, a plaintiff "cannot reasonably rely on those representations, but rather must 'make additional inquiry to determine their accuracy.'" *Schlaifer Nance*, 119 F.3d at 98, quoting *Keywell Corp. v. Weinstein*, 33 F.3d 159, 164 (2d Cir.1994). Once the duty to inquire is triggered, as defendants claim it was here, a plaintiff is foreclosed from bringing a claim for false representations if no inquiry is made. *Giannacopoulos v. Credit Suisse*, 37 F.Supp.2d 626, 632-33 (S.D.N.Y.1999).

The parties' legal dispute concerns the precise circumstances that trigger this duty to inquire. At oral argument and in a subsequent round of supplemental briefing on this subject (and to a lesser degree in their motion papers), defendants have argued that the duty to inquire is triggered as soon as a plaintiff has nay "hints of falsity," or any information indicating that the statements "may be false." (See D. Reply 6, citing *Christophides*, 106 F.3d 22, 26-27; supplemental letter-brief from Ralph C. Ferrara, dated April 19, 2004 [hereinafter "Ferrara Letter."]) Under this standard, the argument goes, the Banks, as sophisticated lenders, had sufficient "hints" that the information GC had presented was false, and should therefore be foreclosed from complaining; the duty to inquire was triggered here by both GC's financial reports themselves, which disclosed the existence of swaps, and analysts' reports questioning the quality of the revenue such swaps produced.

The Banks counter that the duty to inquire is not triggered by a mere "hint" of falsity, but rather, requires more direct and definitive notice, and further, that no such duty exists where the plaintiffs would not have been able to ascertain the truth even had they made an inquiry.

*11 With respect to the appropriate legal standard, it is true that the language in some of the cases cited is quite strong. See, e.g., *Grumman*, 748 F.2d at 737 ("Where sophisticated businessmen engaged in major transactions enjoy access to critical information but fail to take advantage of that access, New York courts are particularly disinclined to entertain claims of justifiable reliance."); *Abrahami v. UPC Constr. Co., Inc.*, 638 N.Y.S.2d 11, 14 (1st Dept.1996) ("[W]here a party has means available to him for discovering, by the exercise of ordinary intelligence, the true nature of a transaction he is about to enter into, he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentation." (internal citations and quotations omitted)); *Gianappolis*, 37 F.Supp.2d at 632-33 ("Parties cannot demand judicial protection when they could have protected themselves with a reasonable inquiry into any misrepresented facts."). However, this does not mean that any bright line rule exists. To the contrary, the Second Circuit has characterized the inquiry into what constitutes reasonable reliance as "always nettlesome because it is so fact-intensive." *Schlaifer Nance*, 119 F.3d at 98. A closer analysis of the facts of the cases hinging on reliance indicates that the standard is not as unforgiving as defendants make it out to be.

These cases fall into two rough categories. The first are those in which a sophisticated party performs no independent investigation whatsoever, even when the context or background information available should arouse suspicion. As Judge Friendly noted, "[d]ecisions holding that reliance on misrepresentations was not justified are generally cases in which plaintiff was placed on guard or practically faced with the facts."

Mallis, 615 F.2d at 81. For example, in *Abrahami*, 638 N.Y.S.2d 11, the plaintiffs, who were private investors, sued a construction company in which they had invested after the defendant had made false representations about the company's "excellent business prospects." *Id.* at 12. The court held that plaintiffs' reliance on the representations was not justified because they had been "put on notice of UPC's possible precarious financial condition, and the need to conduct an investigation, by the initial reporting of only \$54 of cash on hand," and yet had conducted no independent investigation. *Id.* at 14. Had they exercised their right to perform an audit, the court found, the truth would have been available to them. *Id.* Similarly, in *Waksman v. Cohen*, No. 00 Civ. 9005(WK), 2002 WL 31466417 (S.D.N.Y. Nov. 4, 2002), a partner in a real estate brokerage sued his partners for fraudulently concealing the status of a real-estate property that was the subject of litigation and thus inducing him to settle his claims. The court held that reliance was not justifiable when, in the context of settlement negotiations conducted "in the wake of contentious litigation," the plaintiff failed to make any independent inquiry into the status of the property, despite being empowered to do so under New York partnership law. *Id.* at *6.*9. See also *PPI Enterprises*, 2003 WL 22118977, at *21 (no justifiable reliance where stock seller "failed to pursue or failed to reasonably incorporate into its own analysis of its Del Monte stock's value a series of disclosures made by Del Monte").

*12 The second group of cases are those in which a term of a contract central to the plaintiff's claim explicitly disavows or contradicts any representation on the subject of the supposed misrepresentation. For example, in *Dallas Aerospace*, 352 F.3d 775, the plaintiff, a buyer of used aircraft engines, sued the seller of an engine for falsely concealing that the engine had been involved in a "hard landing." The Second Circuit held that the existence of a "conspicuous 'AS IS WHERE IS' ' clause in the contract of sale explicitly "negate[d] all implied warranties concerning the condition of the goods." *Id.* at

785. Under these circumstances, the plaintiff was obligated to conduct an independent inquiry into the history of the engine, which would have been available from various other sources. *Id.* at 786. In *Schlaifer Nance v. Estate of Andy Warhol*, 927 F.Supp. 650 (S.D.N.Y.1996), the licensee of various works in the estate of the artist Andy Warhol sued the estate for misrepresentations about whether certain of the works subject to the licensing agreement had entered the public domain or were held by third parties. The district court found that the licensing agreement itself incorporated documents that indicated third-party ownership or otherwise "contemplated the possibility that the warranties were inaccurate" as to particular artworks. *Id.* at 663. Because the licensee had "conducted no due diligence to speak of," under these circumstances, it could not claim reasonable reliance. *Id.* at 662. In affirming the district court's finding, the Second Circuit noted that these numerous "red flags" had led to the "clear message [that] exclusive ownership of copyrights to all of Warhol's known artwork was an impossibility." 119 F.3d 91, 99. See also *Siemens Westinghouse Power Corp. v. Dick Corp.*, 299 F.Supp.2d 242, 247-48 (S.D.N.Y.2004) (reliance not justified in claim for misrepresentation over delays in installation of turbine where liquidated damage clause in contract anticipated delays, and where claimant could have discovered potential problems with turbine from public documents); *Valassis Communications, Inc. v. Weimer*, 758 N.Y.S.2d 311, 312 (1st Dept.2003) (no reasonable reliance where plaintiff failed to verify accuracy of information in extra-contractual representation, despite specific contract provision disclaiming reliance on such representations); *Societe Nationale D'Exploitation Industrielle Des Tabacs Et Allumettes v. Salomon Bros. Int'l Ltd.*, 702 N.Y.S.2d 258, 259 (1st Dept.2000) ("[The] claim of justifiable reliance is ... conclusively refuted by the disclaimer of representations of value contained in the ... provision setting forth the general terms governing the parties' transactional relationship.").

Viewed together, the facts of these cases do

not support the interpretation that a duty to inquire is necessarily triggered as soon as a plaintiff has the slightest "hints" of any "possibility" of falsehood. In each of these cases, the notice to the plaintiff was clear and direct: it was either provided by plaintiff's own direct knowledge of the fraud, by the terms of an operative contract, or by circumstances surrounding the parties' relationship (e.g. litigation) that would normally arouse suspicion. In each of these circumstances, the plaintiff may be said to have been "placed on guard or practically faced with the facts" of the complained of fraud, *Mallis*, 615 F.2d at 81, and fulfilling the duty to inquire was a necessary precondition to proceeding with a misrepresentation claim. Thus, whether a duty to inquire is triggered is a context-specific and fact-based inquiry, rather than a bright-line rule, as defendants argue. See *Schlaifer Nance*, 119 F.3d at 98; *Doehla*, 1999 WL 566311, at *10. The outcome on this summary judgment motion therefore turns on the factual question of whether, when faced with the available information, the plaintiffs should necessarily have inquired further.

2. Information Available in GC's Books and Records

*13 Defendants' first argument is that the Banks, as sophisticated lenders with the "means" to discover the alleged falsehood, are foreclosed from claiming reasonable reliance because GC's financial records should themselves have put the plaintiffs on notice of the fraud. Their argument is not that the Banks failed to perform a sufficient initial investigation into the company's finances at the time they entered the Credit Agreement in August 2000--their due diligence on this front is not in dispute. Nor do defendants appear to claim that the Banks actually knew at the time the financial reports were made that they were false. Rather, their argument is that the financial reports on which the contract was based and the reports submitted subsequently should have aroused suspicion about GC's financial health at the time the loans were extended in August and September 2001.

This case is therefore distinguishable from those cases in which the plaintiff utterly failed to examine the defendants' representations or to perform due diligence in entering the challenged transaction in the first place. See, e.g., *Lazard Freres & Co. v. Protective Life Insurance Co.*, 108 F.3d 1531, 1543 (2d Cir.1997) (no reasonable reliance where broker-dealer failed to examine relevant report before entering contract); *Miller v. Doniger*, 707 N.Y.S.2d 170, 170-71 (1st Dept.2000) (no reasonable reliance where buyers failed to verify financial reports that were expressly based on sellers' own unverified representations); *Abrahami*, 638 N.Y.S.2d at 14; *Waksman*, 2002 WL 31466417, at *6-*9. It is undisputed that the Banks expressly bargained not only for the right to examine GC's books and records, but also for the provision of the Agreement deeming each borrowing request to be a representation that GC remained in compliance with its debt covenants at the time the request was made. Under these circumstances, it cannot be argued that the Banks failed to bargain for adequate safeguards to establish, at least initially, the basis for their reliance on the defendants' representations. Rather, this case deals with post-contract misrepresentations that the defendants claimed should have triggered the Banks' duty to inquire further before extending any loans under the Credit Facility.

Defendants effectively argue that GC's own financial statements, which claimed to show that the company was in compliance with its covenants, were so transparently false--or at least, that the assumptions on which they were based were so apparently questionable--that no reasonable banker would have lent GC a penny without conducting further inquiry into their accuracy. That argument cannot, on this record, support summary judgment. A reasonable fact-finder could conclude that the financial documents provided would not, on their face, have alerted the Banks to potential fraud. Just as disclosing the existence of reciprocal transactions does not amount to disclosure of the underlying fraud, neither would it necessarily have put the plaintiffs on notice that they should have investigated

whether the reciprocal transactions were shams. Financial reports disclosing revenue from reciprocal transactions are quite different from those reports or documents held in other cases to have put plaintiffs on notice, such as the financial report in *Abrahami* showing "\$54 cash on hand." 638 N.Y.S.2d at 14. There, the report itself demonstrated blatantly and directly the precariousness of the company's cash flow. Here, in stark contrast, GC's reports showed healthy revenues; discovering the falsity of those claims would have required an inquiry into the quality of the revenue reported. While it is true that the company's public financials had prompted some analysts to raise these very questions, see *infra*, the Court cannot say that the reports themselves should necessarily have generated sufficient doubt on the part of the Banks to trigger a duty to inquire as a matter of law.

*14 Moreover, even had the Banks exercised their right to inspect GC's books, there is no evidence on the present record that they necessarily had the means to discover the fraud. Under New York law, a plaintiff is not precluded from claiming reliance if the facts allegedly misrepresented are "peculiarly within the [defendant's] knowledge." *Mallis*, 615 F.2d at 80. Under such circumstances, "it is said that plaintiff may rely without prosecuting an investigation, as he has no independent means of ascertaining the truth." *Id.*; accord *Lazard Freres*, 108 F.3d at 1542; *DIMON Inc. v. Folium, Inc.*, 48 F.Supp.2d at 368-71; *Doehla*, 1999 WL 566311, at *13. The entire complaint is based on the theory that GC "cooked the books" to make it appear that the reciprocal transactions had a justifiable business purpose, and that they had carefully concealed the truth from the Banks as well as the public at large. It is not at all apparent on this sparse, pre-discovery record, that the true nature of the swaps would have been revealed upon inspection. Perhaps further evidence will emerge in discovery or at trial indicating that, had the Banks performed even a cursory inquiry, they would have been able to ascertain that these transactions were shams. No such evidence exists at present. Moreover, even if the truth could have been discovered, there is no way of knowing what effort this

would have taken. "New York cases recognize that the peculiar knowledge exception applies not only where the facts allegedly misrepresented literally were within the exclusive knowledge of the defendant, but also where the truth theoretically might have been discovered, though only with extraordinary effort or great difficulty." DIMON, 48 F.Supp.2d at 368; see also Lazard Freres, 108 F.3d at 1542 & n.9 (noting that New York law does not require that the information be "available only to the defendant and absolutely unknowable by the plaintiff before reliance can be deemed justified"); Mallis, 615 F.2d at 80 ("[I]ndeed some cases have imposed liability in situations in which plaintiff could have determined the truth with relatively modest investigation."). Factual questions therefore remain as to whether or not the Banks had access to the truth, and even if they did, as to what it would have taken to discover it. See Doehla, 1999 WL 566311, at *14.

Finally, defendants argue that reasonable reliance is impossible, because the Banks had bargained for the right to examine GC's books and records but failed to exercise that right. There is no such bright-line rule, even where sophisticated entities are concerned. Under defendants' reasoning, whenever a party bargains for a right which, if exercised, might provide the means to discover a concealed falsehood, it must exercise that right in every instance or risk extinguishing its remedies. Such a rule would not be realistic. Rather, the obligation to exercise the right of inspection must be understood as contingent on either "indisputable access to truth-revealing information," Doehla, 1999 WL 566311, at *11 (emphasis in original), or some suspicious event or information triggering the duty to inquire. The mere existence of the right to inquire, without more, is not dispositive. [FN12]

FN12. Plaintiffs argue that the Banks actually could not have exercised their right to inspect GC's books, despite their contractual guarantee of that right, for fear of being sued, because they were "contractually obligated to lend--period--upon the presentation by [GC] of facially compliant

documentation." (P. Opp.23.) This cannot be the case; if it were, the bargained for right to inspect the company's books would be meaningless. "Under New York law an interpretation of a contract that has the effect of rendering at least one clause superfluous or meaningless ... will be avoided if possible." Galli v. Metz, 973 F.2d 145, 149 (2d Cir.1992) (internal quotation and citation omitted); see also Restatement (Second) Contracts § 203 (1979) ("[A]n interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable ... or of no effect.").

3. Information in Analysts' Reports

*15 The defendants argue that information external to the financial reports themselves, namely the company's plummeting stock price and negative public reports on GC issued during the relevant time period by financial analysts, should have raised sufficient questions about the swaps to trigger the Banks' duty to inquire. This argument is more persuasive, and if defendants' bright-line "hints of falsehood" test were the correct legal standard, the duty to inquire might well have been triggered. Information was readily available from a variety of credible and knowledgeable public sources casting doubt on both the value of the reported swap revenue and the company's financial prospects overall. But, as established above, that is not the standard. Rather, the reasonableness of the plaintiffs' reliance hinges on whether, on these facts, a reasonable lender of equivalent experience should have inquired further. To prevail on summary judgment, defendants must establish that only one answer to this question is possible.

The most obvious indicator of impending troubles was GC's stock price, which had plummeted from \$29.19 a share at the time the Agreement was finalized to \$4.98 a share, an 83% decline, when the Banks began lending money to GC under the Credit Facility on August 17, 2001; by the date of the last loan, it had declined to \$1.80, a 94% decline. In addition, during the six weeks in which the Banks made their loans, GC's bonds lost between 35 and 55% of their value. (Id.

Ex. DD, EE.) This decline was mirrored by a similar decline in stock prices in the telecommunications industry in general, which had declined by a median of 86% between the date of the Agreement and September 30, 2001. (Id. Ex. HH.)

Analysts' reports, too, raised significant red flags. For example, on August 3, 2001, a Lehman Brothers report explained, "[t]he optimistic view of [swaps] is that [GC] needed the capacity ... in parts of the world where its network wasn't built out, and the \$358M supplants capex that would have been spent to build out the network. The pessimistic view is that [GC] needs to spend this cash to solicit the business of other carriers, without which it would not be able to hit its numbers." (Jacobson Decl. Ex. F.) Under the heading "2Q Results Weak: Lowering Rating to Hold From a Buy," Credit Suisse First Boston described "disappointing recurring [revenues], and increased dependence on [revenues] derived from capacity swaps," and noted, "given that swap revenues are difficult to equate to market price levels and, this quarter, were so large (21% of rev[enues]), we are concerned that the quality of revenues was weaker than we had anticipated." (Id. Ex. B.) Merrill Lynch commented, "[w]hile we see capacity sales as staying stronger than many analysts have predicted, the fact that capacity/IRU sales make up a larger proportion of total revenues will nonetheless raise concerns over future growth rates and also cash flows.... Note also that capacity sales seemed to include a substantial contribution for capacity exchanged with other carriers." (Id. Ex. I.) During the same period, Moody's, Merrill Lynch, Credit Suisse First Boston, and Standard and Poors all either downgraded GC stock or reviewed it for possible downgrade. (Id. Ex. E, I, J.)

*16 However, as plaintiffs are quick to point out, the news on the street was not entirely negative, and many analysts' reports were either steadfastly positive or distinctly mixed. First Union Securities, for example, commented that GC "views its commitments to purchase services as capex spending for reasonably priced network elements it would

otherwise build. We believe that this is a reasonable explanation, however, we approach intercarrier revenue or swaps with what we believe is an appropriate amount of skepticism, as it is difficult to determine how much [of GC's] spending is in direct exchange for other carriers' decision to purchase services on [GC's] network." (Id. Ex. C.) In response to GC's disclosure of a particular capacity trade, Piper Jaffray Equity Research Notes remarked that "[t]he market has viewed this transaction as a capacity swap rather than a true sale of capacity. While we disagree, the market does not seem to care, as it is looking for the bad in every telecom services earnings report and ignoring any good news." (Id. Ex. G.) On August 13, Goldman Sachs wrote:

In response to the quarter, some concerns were also raised about revenues that [GC] collects from operators from which [GC] also purchases various types of network capacity (representing capital expenditures.) Critics term these transactions "swaps" and discount the quality of these revenues. Their concern is that the transaction only occurs as a way to fabricate revenues.... Our view is that these transactions for [GC] make sense, they are a normal part of operations (all carriers buy and sell to one another)[,] they will continue for [GC] and the industry, and that the accounting is correct.... [GC] is rare in actually disclosing what portion of its revenues is negotiated in connection with capex purchases that it makes. So its disclosure goes beyond standard accounting practices, and sheds a bright light on its operations.... Yes, Global Crossing is using, like most carriers, capacity purchases as an incentive to drive revenues. We've spoken to other carriers that explicitly put capacity purchase requirements in RFPs, in order to sell their own capacity as they fulfill their network requirements with other service providers. While transactions between carriers raises [sic] the potential for abuse in the reporting of revenue, we see none of that in [GC's] operations.

(Id. Ex. H.) In conclusion, Goldman Sachs gave GC an "[o]verall positive rating." (Id.) On August 24, under the heading "Unreasonable Low Valuation Despite Superb Industry Positioning," Deutsche Banc noted that

"unfortunately, every carrier uses swaps or pseudo swaps to create their network over time. In [GC's] case, the 'swaps' number was high, which the company acknowledged and disclosed. We note no other companies have done this.... We believe the lesser of two evils is swapping to create a network versus increasing CapEx to build from scratch." (Id. Ex. K.) It reiterated its "[v]ery positive rating." (Id.) Thus, even while some analysts had raised serious questions, their conclusions were ultimately mixed.

*17 A reasonable jury could conceivably find that the prevailing view among analysts was negative, and that the totality of the circumstances should have put the plaintiffs on inquiry notice. But the appropriate reaction of a lending institution under these circumstances, when confronted with GC's official declaration of substantial revenue and continued representations that it was in compliance with its covenants, is for a jury to determine. Although the company's stock and bond prices had foundered, this was part of an industry-wide decline, and was not necessarily indicative of fraud. Companies presumably apply for credit in part in order to prepare for precisely such down-turns. While the market was clearly skeptical of reciprocal transactions, several analysts had concluded that such doubts were unfounded and had persevered in their positive ratings. Markets are fickle by nature, and analysts prone to disagree. It would hardly be to the benefit of either Banks or those in need of credit to hold that Banks must conduct an investigation into the accuracy of the financial statements of any company that seeks a loan while its stock price is declining. Finally, the analysts' reports are completely extraneous to the contractual relationship between GC and the Banks. Certainly, their conclusions are relevant to whether the Banks were on inquiry notice of the alleged fraud, but defendants have failed to cite a single misrepresentation case, and the Court has found none, in which "background noise" of this variety has been held as a matter of law to have put a plaintiff on inquiry notice of fraud.

On balance, the question of what a sophisticated lender should have done when faced with the available information is one about which reasonable people could easily differ. Even if the Banks had launched an inquiry, it is not clear on the present facts that they could have discovered the alleged fraud. Defendants continue to dispute that there was any fraud to discover, and would surely have taken the same position had inquiry been made in 2001; no doubt, the truth will still be in dispute after extensive investigation through the discovery phase of this action. Under these circumstances, the Court cannot say as a matter of law that the Banks' reliance was unreasonable (or unjustified) because a sophisticated lender could have protected itself by making reasonable inquiries. Where "the reasonableness of reliance depends upon factual determinations that are not plain from a review of the complaint and its attachments or that remain in dispute after discovery, the fraud claim should not be summarily dismissed on that ground." Doehla, 1999 WL 566311, at *12; see also id. (listing cases refusing to summarily dismiss such claims). The issue of whether the Banks' reliance was reasonable or justifiable is a factual question inappropriate for summary adjudication. The motion for summary judgment must therefore be denied.

CONCLUSION

*18 Defendants' motion to dismiss the complaint is granted as to plaintiffs' negligent misrepresentation claims (fifth, sixth, and seventh causes of action), and denied as to plaintiffs' fraud claims (first through fourth causes of action). Defendants' motion for summary judgment on these remaining claims is denied.

SO ORDERED:

2004 WL 1418197 (S.D.N.Y.)

END OF DOCUMENT

49

United States District Court,
S.D. New York.

Richard L. KALNIT, Plaintiff,
v.

Frank M. EICHLER, Robert L. Crandall,
Charles P. Russ, III, Pierson M. Grieve,
Louis A. Simpson, Allan D. Gilmour, Charles
M. Lillis, Grant A. Dove, John
Slevin, Kathleen A. Cote, Daniel W.
Yohannes, and Mediaone Group, Inc.,
Defendants.

No. 99 Civ. 3306(SAS).

March 24, 2000.

Investor who sold shares brought securities fraud action against corporation and its directors, alleging that nondisclosure of fact that shareholder had been released from standstill agreement prohibiting him from soliciting acquisition offers for corporation artificially depressed selling price of shares. The District Court, 85 F.Supp.2d 232, granted defendants' motion to dismiss for failure to plead scienter with particularity, with leave to replead. Following amendment of complaint, defendants renewed motion. The Court, Scheindlin, J., held that: (1) nondisclosure did not raise inference of fraudulent intent toward investors; (2) directors' alleged desire to realize personal benefits did not give rise to inference of fraudulent intent; (3) alleged desire to avoid liability did not give rise to inference of fraudulent intent; (4) Court would deny further leave to amend complaint; but (5) sanctions against investor were not warranted.

Motion granted.

West Headnotes

[1] Federal Civil Procedure 1832
170Ak1832

In deciding motion to dismiss for failure to state claim, district court must limit itself to facts stated in complaint, documents attached to complaint as exhibits or documents incorporated in complaint by reference.

Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[2] Securities Regulation 142
349Bk142

In securities fraud actions, on motion to dismiss, court may review and consider public disclosure documents required by law to be and which actually have been filed with Securities and Exchange Commission (SEC).

[3] Securities Regulation 60.51
349Bk60.51

Under Private Securities Litigation Reform Act (PSLRA), in securities fraud actions scienter may not be averred generally; rather, plaintiff must state with particularity facts giving rise to a strong inference that defendant acted with required state of mind. Securities Exchange Act of 1934, §§ 10(b), 21D(b)(3)(A), as amended, 15 U.S.C.A. §§ 78j(b), 78u-4(b)(3)(A); 17 C.F.R. § 240.10b-5; Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.

[4] Securities Regulation 60.15
349Bk60.15

[4] Securities Regulation 60.18
349Bk60.18

To state a claim under §10(b) and Rule 10b-5, plaintiff must allege that in connection with purchase or sale of securities: (1) defendant made a false material representation or omitted to disclose material information; (2) defendant acted with scienter; and (3) plaintiff detrimentally relied upon defendant's fraudulent acts. Securities Exchange Act of 1934, § 10(b), as amended, 15 U.S.C.A. § 78j(b); 17 C.F.R. § 240.10b-5.

[5] Securities Regulation 60.51
349Bk60.51

Strong inference of fraudulent intent required to constitute adequately particular pleading of scienter in securities fraud action may be established by alleging: (1) facts that demonstrate defendant's motive and opportunity to commit fraud, or (2) facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness. Securities Exchange Act of 1934, §§ 10(b), 21D(b)(2), as amended, 15 U.S.C.A. §§ 78j(b),

78u-4(b)(2); 17 C.F.R. § 240.10b-5; Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.

[6] Securities Regulation 60.45(1)
349Bk60.45(1)

Directors' concealment, following merger agreement with prospective purchaser containing "no shop" clause, of fact that directors had released shareholder from standstill agreement in order to allow shareholder to pursue more favorable bids, did not raise inference of fraudulent intent toward investors, as required to support investors' securities fraud action alleging that concealment artificially depressed premerger share price; at most, concealment was attempt to defraud prospective purchaser, since there was no allegation of insider trading and both directors and investors stood to benefit from keeping proposed merger intact until better deal was signed. Securities Exchange Act of 1934, § 10(b), as amended, 15 U.S.C.A. § 78j(b); 17 C.F.R. § 240.10b-5.

[7] Corporations 582
101k582

Under Delaware law, "no shop" clause in merger agreement prohibiting solicitation of competing transaction is not per se illegal, but is invalid and unenforceable to extent that it purports to require board to act or not act in such a fashion as to limit exercise of fiduciary duties.

[8] Securities Regulation 60.45(1)
349Bk60.45(1)

Corporation's directors' alleged desire to realize personal benefits as result of merger could not give rise to inference of intent to defraud investors required to establish scienter element of securities fraud action. Securities Exchange Act of 1934, §§ 10(b), 21D(b), as amended, 15 U.S.C.A. §§ 78j(b), 78u-4(b); 17 C.F.R. § 240.10b-5.

[9] Securities Regulation 60.45(1)
349Bk60.45(1)

Corporation's directors' alleged desire to avoid liability for breach of proposed merger agreement's "no shop" clause, via concealment of efforts to solicit higher bid, could not give rise to inference of intent to defraud investors;

motive to protect corporation could be imputed to any director and thus was inadequately particular, as well as being in best interests of investors, and there was no possibility that proposed purchaser could sue directors personally. Securities Exchange Act of 1934, §§ 10(b), 21D(b), as amended, 15 U.S.C.A. §§ 78j(b), 78u-4(b); 17 C.F.R. § 240.10b-5.

[10] Securities Regulation 60.25
349Bk60.25

Investor failed to state "fraud on the market" claim against corporation's directors based on alleged concealment of efforts to secure higher bid than that contained in merger agreement with proposed purchaser, where complaint on one hand alleged that concealment artificially depressed premerger share price by hiding fact that better deal was in offing, and on other hand, asserted fraudulent motive based on contention that pursuit of better deal may have been impossible without concealment; second theory undermined first. Securities Exchange Act of 1934, §§ 10(b), 21D(b), as amended, 15 U.S.C.A. §§ 78j(b), 78u-4(b); 17 C.F.R. § 240.10b-5.

[11] Securities Regulation 60.45(1)
349Bk60.45(1)

Fraudulent motive required to support securities fraud action was not shown by allegation that corporation's directors took steps to artificially depress premerger stock price so that expected higher bidder's offer would be clearly superior to previous offer; allegation depended upon speculation and flouted assumption that directors would act in their own economic self-interest. Securities Exchange Act of 1934, §§ 10(b), 21D(b), as amended, 15 U.S.C.A. §§ 78j(b), 78u-4(b); 17 C.F.R. § 240.10b-5.

[12] Securities Regulation 60.45(1)
349Bk60.45(1)

In securities fraud context, recklessness is conduct which is highly unreasonable and which represents an extreme departure from standards of ordinary care. Securities Exchange Act of 1934, §§ 10(b), 21D(b), as amended, 15 U.S.C.A. §§ 78j(b), 78u-4(b); 17 C.F.R. § 240.10b-5.

[13] Federal Civil Procedure 828.1
170Ak828.1

Although within district court's discretion, refusal to grant leave to amend complaint must be based on a solid ground. Fed.Rules Civ.Proc.Rule 15(a), 28 U.S.C.A.

[14] Federal Civil Procedure 851
170Ak851

Futility provides a solid ground on which to deny leave to amend complaint. Fed.Rules Civ.Proc.Rule 15(a), 28 U.S.C.A.

[15] Federal Civil Procedure 851
170Ak851

Court would deny leave to amend securities fraud complaint on futility grounds where previous two attempts failed to allege element of scienter and there was no reason to believe another attempt would succeed. Securities Exchange Act of 1934, § 10, as amended, 15 U.S.C.A. § 78j; 17 C.F.R. § 240.10b-5; Fed.Rules Civ.Proc.Rule 15(a), 28 U.S.C.A.

[16] Securities Regulation 157.1
349Bk157.1

Private Securities Litigation Reform Act (PSLRA) does not alter substantive standards for finding violation of Rule 11, but rather reduces courts' discretion in choosing whether to conduct Rule 11 inquiry at all and whether and how to sanction party once violation is found. Securities Exchange Act of 1934, § 21D(c)(3)(A)(i, ii), as amended, 15 U.S.C.A. § 78u-4(c)(3)(A)(i, ii); Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A.

[17] Securities Regulation 157.1
349Bk157.1

No sanctions were warranted against plaintiff investor whose first securities fraud complaint had been dismissed without prejudice for failure to allege scienter, and who then filed amended complaint which also failed to allege scienter; there was no evidence of improper purpose, original complaint had adequately alleged elements of fraudulent act and reliance and thus was not frivolous, and difficulty of scienter element weighed against finding of no chance of success. Securities Exchange Act of 1934, §§ 10(b), 21D(c)(3)(A)(i, ii), as amended, 15 U.S.C.A. §§ 78j, 78u-

4(c)(3)(A)(i, ii); 17 C.F.R. § 240.10b-5; Fed.Rules Civ.Proc.Rule 11(b), 28 U.S.C.A.

***329** Lee Squitieri, Stephen J. Fearon, Jr., Abbey, Gardy & Squitieri, LLP, New York City, for plaintiff.

Dennis J. Block, James M. Halper, Cadwalader, Wickersham & Taft, New York City, for defendants.

OPINION AND ORDER

SCHEINDLIN, District Judge.

This is an uncertified securities fraud class action brought by plaintiff Richard L. Kalnit against MediaOne Group Inc. ("MediaOne") and its eleven directors. [FN1] Plaintiff alleges that defendants violated section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78j(b), and Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5, by fraudulently failing to disclose material information in connection with a proposed merger between MediaOne and Comcast Corporation ("Comcast"). Plaintiff and the purported class members seek money ***330** damages claiming that, as a result of defendants' alleged fraud, they sold shares of MediaOne at an artificially deflated price.

FN1. The MediaOne defendant directors are Frank M. Eichler, Robert L. Crandall, Charles P. Russ III, Pierson M. Grieve, Louis A. Simpson, Allan D. Gilmour, Charles M. Lillis, Grant A. Dove, John Slevin, Kathleen A. Cote and Daniel W. Yohannes (collectively, the "Directors" or "individual defendants").

Plaintiff filed his original class action complaint on May 6, 1999. On October 7, defendants moved to dismiss the original complaint pursuant to Federal Rules of Civil Procedure 12(b)(6) and 9(b) and the Private Securities Litigation Reform Act of 1995 ("PSLRA"), 15 U.S.C. § 78u-4. By opinion dated December 22, this Court granted defendants' motion in its entirety, finding that plaintiff failed to adequately allege the required element of scienter. See Kalnit v. Eichler, 85 F.Supp.2d 232 (S.D.N.Y. 1999).

Dismissal was granted with leave to amend. See id.

On January 13, 2000, plaintiff filed an amended class action complaint ("Amended Complaint"). Defendants now move to dismiss the Amended Complaint contending that plaintiff's allegations of scienter are still inadequate to sustain a claim for relief under the federal securities laws. For the reasons that follow, defendants' motion is granted in its entirety.

I. Legal Standard

Defendants' motion to dismiss the Amended Complaint, like its motion to dismiss the original complaint, is brought pursuant to Rule 12(b)(6), for failure to state a claim upon which relief may be granted, and Rule 9(b) and the PSLRA, for failure to plead fraud with particularity.

[1][2] Dismissal of a complaint for failure to state a claim pursuant to Rule 12(b)(6) is proper only where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Harris v. City of N.Y.*, 186 F.3d 243, 247 (2d Cir.1999). "The task of the court in ruling on a Rule 12(b)(6) motion is merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof." *Cooper v. Parsky*, 140 F.3d 433, 440 (2d Cir.1998) (internal quotations omitted). Thus, to properly rule on such a motion, the court must accept as true all material facts alleged in the complaint and draw all reasonable inferences in the nonmovant's favor. See *Harris*, 186 F.3d at 247. Nevertheless, "[a] complaint which consists of conclusory allegations unsupported by factual assertions fails even the liberal standard of Rule 12(b)(6)." *De Jesus v. Sears, Roebuck & Co.*, 87 F.3d 65, 70 (2d Cir.1996) (internal quotations omitted). In deciding a Rule 12(b)(6) motion, the district court must limit itself to facts stated in the complaint, documents attached to the complaint as exhibits or documents incorporated in the complaint by reference. See *Dangler v. New York City Off Track*

Betting Corp., 193 F.3d 130, 138 (2d Cir.1999). However, in securities fraud actions, the court "may review and consider public disclosure documents required by law to be and which actually have been filed with the SEC...." *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47 (2d Cir.1991).

Rule 9(b) sets forth additional pleading requirements with respect to allegations of fraud. Rule 9(b) requires that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." But, under Rule 9(b), "[m]alice, intent, knowledge and other condition of mind of a person may be averred generally."

[3] Securities fraud actions are subject to the requirements of Rule 9(b). See *Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1127 (2d Cir.1994). However, the PSLRA heightened that Rule's requirement for pleading scienter. See 15 U.S.C. § 78u-4(b)(3)(A); see also *Press v. Chemical Inv. Servs. Corp.*, 166 F.3d 529, 537-38 (2d Cir.1999). As a result, in securities fraud actions, scienter may not be averred generally. Rather, plaintiffs must "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." *Press*, 166 F.3d at 538 (quoting 15 U.S.C. § 78u-4(b)(3)(A)); see also *Chill v. General Elec. Co.*, 101 F.3d 263, 268-69 (2d Cir.1996).

II. Background

A. Factual Background [FN2]

FN2. The background of this case is largely set forth in the December 22 opinion. See *Kalnit*, 85 F.Supp.2d at 234-35. However, plaintiff's original complaint was poorly drafted and failed to include many basic factual allegations that have since been added to the Amended Complaint. Accordingly, I review the facts in some detail above, both because they are relevant to the instant motion and because many are pleaded for the first time.

The facts set forth below are taken from the Amended Complaint. They are presumed true for purposes of this motion.

MediaOne is a Delaware corporation that provides telecommunications services. Amended Complaint ¶ 29. In 1996, MediaOne purchased a company called Continental Cablevision ("Continental"). Id. ¶ 49. As part of its acquisition of Continental, MediaOne entered into a publicly-disclosed shareholder's agreement with Continental's co-founder, Amos Hostetter. Id. This agreement included a "standstill restriction" which limited Hostetter's ability to propose mergers involving MediaOne. Id. At all relevant times, Hostetter owned approximately 56.32 million MediaOne shares (or 9.33% of all outstanding MediaOne shares). Id. ¶ 50.

On March 22, 1999, MediaOne announced that it had entered into a definitive merger agreement with Comcast whereby Comcast would acquire MediaOne for approximately \$48 billion in an all-stock deal ("Comcast Agreement"). Id. ¶ 51. The Comcast Agreement called for each MediaOne shareholder to receive 1.1 shares of Comcast Class A Special Common Stock, or \$80.16 per share. See id. ¶ 2; MediaOne 3/22/99 Form 8-K, Ex. B to 2/28/00 Affidavit of Dennis Block ("Block Aff."), at 99.1.

Under the Comcast Agreement, MediaOne had forty-five days within which to accept a superior proposal, subject to the payment of a \$1.5 billion termination fee to Comcast. Id. ¶ 55. The Comcast Agreement also included a "No Shop" provision which prohibited MediaOne and its Directors from soliciting competing merger proposals. Id. ¶¶ 52-53. The No Shop provision, set forth in section 6.03 of the Comcast Agreement, stated:

From the date hereof until the termination hereof, MediaOne will not, and will cause the MediaOne Subsidiaries and the officers, directors, employees, investment bankers, attorneys, accountants, consultants or other agents or advisors of MediaOne and the MediaOne Subsidiaries not to, directly or indirectly: (i) take any action to solicit, initiate, facilitate or encourage the submission of any Acquisition Proposal; and (ii) other than in the ordinary course of business and not related to an Acquisition

Proposal, engage in any discussions or negotiations with, or disclose any non-public information relating to MediaOne or any MediaOne Subsidiary or afford access to the properties, books or records of MediaOne or any MediaOne Subsidiary to, any Person who is known by MediaOne to be considering making[,] or has made, an Acquisition proposal.

Id. ¶ 52. Thus, although MediaOne could accept a superior proposal within forty-five days of the scheduled closing of the MediaOne/Comcast merger, it could not directly or indirectly solicit such proposals. Section 10.1 of the Comcast Agreement permitted Comcast to terminate the proposed merger in the event MediaOne breached its No Shop obligations. Id. ¶ 54.

On March 25, 1999, Hostetter sent a letter to the Directors sharply criticizing the terms of the Comcast Agreement and seeking to be released from the 1996 standstill restriction so that he could pursue and develop a superior merger proposal. Id. ¶ 57. The text of Hostetter's March 25 letter reads in pertinent part as follows:

*332 It appears that the proposed acquisition of MediaOne by Comcast will result in the Roberts family, with less than a 1% economic interest in the combined companies, controlling more than 80% of all voting power. Because MediaOne stockholders would give up voting stock for non-voting stock in an entity controlled by the Roberts family, this transaction constitutes a sale of control with the result that your duty is to maximize the price for stockholders, who under the proposed transaction will lose any further opportunity to realize a control premium for their shares. As best I can determine, you have failed to secure any protections to assure MediaOne stockholder participation in any subsequent sale of control; those in control of Comcast could turn around after the proposed merger and auction off their voting control of MediaOne or the combined entity at a huge premium.... In addition, the proposed sale of control at an uncollared value has been advantaged prematurely and excessively by defensive

deal protections such as the no solicitation provisions and the \$1.5 billion termination fee payable to Comcast. These might have been sustainable as post-auction measures if needed to preserve maximized value, but they are entirely inappropriate as pre-auction measures, given their deterrent effect on other offers and the dollar-for-dollar reduction in benefit to stockholders if a topping offer were to be made.

I am advised that, as the Delaware Supreme Court stated in its Revlon decision and reiterated in its Paramount/QVC ruling, once you took steps to sell control of MediaOne and to protect that sale rather than to maximize value for shareholders, all defensive measures became moot. Your duty was and is to be especially active and diligent to get the best price for MediaOne stockholders.

Accordingly, I request that the board of directors on behalf of the Company agree that any and all standstill restrictions in the Shareholders Agreement dated February 27, 1996 ... are now null and void and of no further effect, and that the board on behalf of the Company consent to the waiver of all such terms in order to permit me to publicly express my view that this sale of control is inadvisable and work with others to develop a superior proposal. I am prepared to enter into a confidentiality agreement with the Company on terms no less favorable to the Company than those previously agreed to by Comcast.

Although time is limited, I believe that you have a duty under these circumstances to permit me to seek superior value and terms.

...
Id. ¶ 57 (quoting text of 3/25/99 letter from Hostetter to Directors) (emphasis added).

Defendant Eichler, MediaOne's President, Legal Counsel and Secretary, responded to Hostetter's request on behalf of the Directors in a letter dated March 31, 1999. Id. ¶¶ 31, 63. In their March 31 letter, the Directors agreed to release Hostetter from the 1996 standstill restriction. Id. ¶ 63. The Directors also acknowledged and accepted Hostetter's agreement " 'not to make any public announcement of [his] efforts to develop a

superior proposal without the Directors' written consent, and to respond with 'no comment' if a press inquiry is made.' " Id. (quoting 3/31/99 letter from Eichler to Hostetter). Following his release from the standstill restriction, Hostetter immediately entered into discussions with third parties regarding the acquisition of MediaOne. Id. ¶ 69.

On April 5, 1999, MediaOne filed a Proxy Statement pursuant to section 14(a) of the Exchange Act. Id. ¶ 65. Although the April 5 Proxy Statement discussed the proposed Comcast merger, it made no reference to the March 25 and March 31 letters. Id. ¶ 66. Nor did the Proxy *333 Statement disclose the Directors' release of Hostetter from the 1996 standstill restriction. Id.

Plaintiff sold 1,820 shares of MediaOne stock at \$65 7/16 per share on April 16, 1999. Id. ¶ 68. On April 22, AT & T Corporation ("AT & T") publicly proposed an acquisition of MediaOne for approximately \$58 billion; the AT & T proposal was \$9 billion more than the Comcast proposal. Id. ¶ 70. That same day, Hostetter filed a Schedule 13D with the Securities and Exchange Commission disclosing the March 25 and March 31 letters. Id. ¶ 71. The Schedule 13D also states that the AT & T merger proposal was a direct result of Hostetter's efforts to procure a superior offer for MediaOne. Id. ¶ 72.

On April 22, the date of both the AT & T announcement and the disclosure of the Hostetter letters, MediaOne's stock was valued at \$69.50 per share. Id. ¶ 74. The following day, April 23, MediaOne's stock closed at \$77.375 per share. Id. Four days later, on April 27, MediaOne's stock closed at \$81.8125 per share. Id. ¶ 75.

On May 1, the individual defendants unanimously agreed to terminate the Comcast Agreement and to accept the AT & T proposal. Id. ¶ 76. Because of its decision to accept a superior offer, MediaOne was obligated to pay Comcast \$1.5 billion. Id. ¶ 77. In addition, AT & T and Comcast reached a separate agreement pursuant to which Comcast agreed

not to interfere with the AT & T/MediaOne merger in exchange for certain valuable cable properties. *Id.* ¶ 78. MediaOne officially terminated the Comcast Agreement on May 6, the same day Kalnit filed his original class action complaint. *Id.* ¶ 80.

B. Allegations of the Amended Complaint

The original complaint asserted violations of section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder. I dismissed the original complaint because plaintiff failed to sufficiently allege a required element of securities fraud, namely that defendants acted with scienter. [FN3] On January 13, 2000, plaintiff filed the Amended Complaint. In the Amended Complaint, plaintiff seeks to represent a class of persons who sold MediaOne shares between March 31 and April 22, 1999. *Id.* ¶ 41. Similar to the original complaint, the Amended Complaint asserts a single claim against all defendants pursuant to section 10(b) and Rule 10b-5. *Id.* § 57 94-103. [FN4]

FN3. In his original complaint, plaintiff also asserted a claim against the individual defendants for controlling person liability pursuant to section 20(a) of the Exchange Act, 15 U.S.C. § 78t(a). In the December 22 opinion, I dismissed plaintiff's section 20(a) claim finding that, among other things, defendants were not "control persons" within the meaning of the statute. See Kalnit, at 245.

FN4. The Amended Complaint does not include a claim against the individual defendants for controlling person liability under section 20(a).

The theory of liability set forth in the original complaint and the Amended Complaint is the same. Plaintiff contends that defendants' failure to disclose Hostetter's authorization to seek superior merger proposals artificially depressed the market for MediaOne shares causing plaintiff and other class members to sell their MediaOne shares at a deflated price. *Id.* ¶¶ 17, 24, 48, 81, 101. Specifically, plaintiff alleges that defendants had a duty to publicly disclose information regarding Hostetter's release from the 1996 standstill agreement. *Id.* ¶ 93. Plaintiff

further alleges that because defendants concealed the fact that Hostetter was actively pursuing superior merger proposals--something MediaOne and its Directors could not do--the market undervalued MediaOne stock. *Id.* ¶¶ 17, 24, 47-48, 101. As a result, the Amended Complaint asserts, when plaintiff and the purported class members sold their stock prior to April 22, they sold their stock for less than it was worth. *Id.* [FN5]

FN5. Plaintiff sets forth a "fraud on the market" theory, asserting that he and the purported class members relied on the integrity of the securities market when they sold their MediaOne shares, and that defendants' fraudulent actions compromised the integrity of that market. See Amended Complaint ¶¶ 47-48; Kalnit, 85 F.Supp.2d at 240-41.

*334 III. Discussion

[4] To state a claim under section 10(b) and Rule 10b-5, plaintiff must allege that in connection with the purchase or sale of securities: (i) defendants made a false material representation or omitted to disclose material information; (ii) defendants acted with scienter; and (iii) plaintiff detrimentally relied upon defendants' fraudulent acts. See *Press*, 166 F.3d at 534. In addition, as discussed *supra* Part I, plaintiff must allege elements one and two--fraudulent acts and scienter--with particularity in order to meet the heightened pleading requirements set forth in Rule 9(b) and the PSLRA.

In his original complaint, plaintiff adequately alleged the elements of fraudulent acts and detrimental reliance. See Kalnit, 85 F.Supp.2d at 240-42. [FN6] However, I dismissed the original complaint because plaintiff failed to sufficiently allege the element of scienter. *Id.* at 245. Accordingly, the sole issue to be resolved on this motion is whether the Amended Complaint cures the defects of the original complaint by adequately alleging defendants' scienter.

FN6. My conclusions with respect to plaintiff's allegations of fraudulent acts and detrimental reliance are set forth fully in the December 22 opinion and will not be repeated here.

A. Scierter: Generally

The gravamen of plaintiff's fraud claim is that because defendants failed to disclose Hostetter's release from the 1996 standstill, the market price for MediaOne shares was artificially depressed and, as a result, plaintiff sold his shares of MediaOne on April 16 for less than they were worth. In the December 22 opinion, I found that plaintiff had sufficiently--although just barely--pleaded that the failure to disclose Hostetter's release was a "fraudulent act" for purposes of section 10(b). [FN7]

FN7. Specifically, I determined that plaintiff adequately alleged the materiality of, and a corresponding duty to disclose, Hostetter's release because "a reasonable juror could arguably find that the 'total mix' of information changed when Hostetter was permitted to actively seek and develop a superior merger proposal, something MediaOne and its board could not do." Kalnit, 85 F.Supp.2d at 240. However, the materiality of Hostetter's release presented a difficult and close question in light of the fact that MediaOne expressly disclosed that it could accept superior proposals received within forty-five days of its March 22 Comcast merger announcement. See *id.* at 239. As stated in this Court's prior opinion: The March 22 disclosure was sufficient to put reasonable investors on notice that MediaOne was "in play" among corporations and investment bankers seeking merger opportunities during a limited time-period; it is hard to imagine how information regarding Hostetter's ability to also seek merger opportunities for MediaOne during that time period would significantly alter the "total mix". That said, I decline to find at this preliminary stage that "no reasonable jury could determine that the undisclosed [information regarding Hostetter] would have assumed actual significance in the deliberations" of investors. *Press*, 166 F.3d [at] 538 (internal quotations omitted). Kalnit, 85 F.Supp.2d at 239.

It is a well-settled principle that "not every instance of financial unfairness constitutes fraudulent activity under [section] 10(b)." *Chiarella v. United States*, 445 U.S. 222, 232, 100 S.Ct. 1108, 63 L.Ed.2d 348 (1980) (citing *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 463, 97 S.Ct. 1292, 51 L.Ed.2d 480 (1977)).

"In particular, no private cause of action for damages will lie under section 10(b) and Rule 10b-5 'in the absence of an [] allegation of scierter--intent to deceive, manipulate, or defraud.'" *Gross v. Damon Corp.*, 94 Civ. 4457, 1995 WL 138612,*3 (S.D.N.Y. Mar. 29, 1995) (quoting *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193, 96 S.Ct. 1375, 47 L.Ed.2d 668 (1976)); see also *Santa Fe Indus.*, 430 U.S. at 463, 97 S.Ct. 1292 ("The language of § 10(b) gives no indication that Congress meant to prohibit any conduct not involving manipulation or deception."). *335 Therefore, although plaintiff has sufficiently alleged a fraudulent act (defendants' failure to disclose Hostetter's release) and a resulting harm (plaintiff's sale of his MediaOne shares at a deflated price), such allegations, in and of themselves, are insufficient to state a claim for fraud under federal securities law because plaintiff must allege that defendant acted with scierter.

[5] As stated above, see *supra* Part I, in order to properly assert scierter under the heightened pleading requirements set forth in the PSLRA, a complaint must "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2). See also *Press*, 166 F.3d at 537-38. Accordingly, a plaintiff cannot plead scierter based upon speculation and conclusory allegations, but "must allege facts that give rise to a strong inference of fraudulent intent." *Chill*, 101 F.3d at 267 (internal quotations omitted). A "strong inference" of fraudulent intent may be established by alleging (i) facts that demonstrate defendants' motive and opportunity to commit fraud; or (ii) facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness. See *Press*, 166 F.3d at 538.

B. Scierter: Motive and Opportunity

The first method of pleading scierter is by alleging both motive and opportunity to commit fraud. It is undisputed that the individual defendants, as Directors of MediaOne, had the opportunity to commit fraudulent acts. The critical issue is whether

they were motivated to do so.

"Motive" to commit fraud "entail[s] concrete benefits that could be realized by one or more of the false statements and wrongful disclosures alleged." See *Shields*, 25 F.3d at 1130. Fraudulent motive is generally demonstrated through allegations of insider trading or some other type of pecuniary gain by company insiders at the expense of shareholders.

For example, motive was adequately pleaded in a class action suit in which shareholders alleged that a corporation and its CEO made misleading statements in violation of section 10(b) in order to manipulate the price of the company's stock so that the CEO could sell his shares at inflated prices. See *Stevelman v. Alias Research, Inc.*, 174 F.3d 79, 85 (2d Cir.1999). In another recent class action suit, shareholders similarly alleged that the corporation and its eight directors violated section 10(b) by making misleading statements regarding the company's performance in order to inflate the price of the company's stock so that the directors could subsequently profit from insider sales. See *In re Quintel Entertainment Inc. Sec. Litig.*, 72 F.Supp.2d 283, 296-97 (S.D.N.Y.1999). Noting that the large number of defendants making insider trades indicated unusual insider trading activity, the court found that the plaintiffs had adequately demonstrated scienter. See *id.*

Plaintiff's original complaint failed to set forth any allegations of insider trading. Indeed, the original complaint made no mention of any motive by defendants to defraud MediaOne shareholders. As stated in this Court's prior opinion:

[T]he [original complaint] is utterly silent on the question of motive. Nowhere in the [original complaint] does plaintiff allege that defendants benefitted from the alleged misrepresentation and omission. Nor are there any facts from which an inference of motive can be drawn. Put simply, there is no indication that defendants profited from their alleged material omissions.
Kalnit, 85 F.Supp.2d at 243.

In contrast to the original complaint, the Amended Complaint is far from "silent" on the question of motive. Indeed, plaintiff's current pleading includes an entire section entitled "Additional Motive Allegations" which is comprised of numerous theories as to how defendants could have profited from their failure to disclose Hostetter's release from the 1996 standstill. Amended *336 Complaint ¶¶ 82-93. Despite the volume of "additional" motive allegations, however, plaintiff fails to cure the defects of the original complaint. Not only have plaintiff's new allegations of motive been routinely rejected by courts in the Second Circuit as insufficient evidence of scienter, they simply do not--even under the most generous of readings--give rise to a "strong inference" of defendants' intent to deceive, manipulate or defraud MediaOne shareholders.

Plaintiff's new motive allegations can be grouped into two general claims. First, plaintiff contends that defendants concealed the Hostetter release in order "to avoid being declared in breach of the Comcast Agreement." Amended Complaint ¶¶ 83-84. Second, plaintiff contends that defendants concealed the Hostetter release in order to depress the price of MediaOne stock and to thereby "make it easier" to accept a superior AT & T offer. *Id.* at ¶¶ 88-89. These claims are addressed in turn below.

1. Desire to Avoid Being Declared in Breach of the Comcast Agreement

Similar to the original complaint, the Amended Complaint makes no allegations of insider trading by the individual defendants. For example, unlike the plaintiffs in *Stevelman* and *Quintel*, plaintiff here does not contend that the Directors concealed Hostetter's release in order to depress MediaOne stock so that they could purchase shares of MediaOne at deflated prices and then sell those shares at a profit when the value of MediaOne stock increased in the wake of the AT & T and Hostetter announcements. In short, there is no claim that the Directors bought or sold MediaOne stock during the relevant period. Instead, the

bulk of plaintiff's motive allegations concern "the substantial concrete benefits [stemming from] MediaOne's merger with Comcast which defendants sought to preserve." Plaintiff's Memorandum of Law in Opposition to Defendants' Motion to Dismiss Plaintiff's Amended Class Action Complaint ("Pl.Opp.") at 14.

Plaintiff claims that "[d]efendants concealed the Hostetter Waiver Letters in order to avoid being declared in breach of the Comcast Agreement, which specifically prohibited defendants from 'directly or indirectly ... tak [ing] any action to solicit, initiate, facilitate or encourage the submission of any Acquisition Proposal' ". Amended Complaint ¶ 83. According to plaintiff, "[h]ad defendants disclosed the existence of the Hostetter Waiver Letters, Comcast could terminate the Comcast Agreement, subjecting defendants to significant liability for breach of contract, subjecting MediaOne to a \$1.5 billion termination fee, and depriving defendants of their ability to realize substantial personal profit as a result of the Comcast Merger." *Id.* In addition, plaintiff contends that "had the disclosure of the Hostetter Waiver Letters caused Comcast to determine that MediaOne was in breach of the Comcast Agreement, Hostetter may not have [been] able to pursue the AT & T Agreement thereby depriving the defendants and Hostetter of a superior offer for their stock and the stock of the other MediaOne shareholders." *Id.* ¶ 84.

Stated succinctly, plaintiff alleges that by concealing Hostetter's release from the standstill restriction, the individual defendants hoped to prevent Comcast from terminating the proposed merger and to thereby realize the following four concrete benefits: (i) substantial personal profit as a result of the Comcast merger; (ii) avoidance of personal liability for breach of the Comcast Agreement; (iii) avoidance of an obligation to pay a \$1.5 billion termination fee; and (iv) the ability to pursue a more lucrative merger with AT & T. Plaintiff contends that the Directors' desire to receive these four benefits gives rise to a "strong inference" that the Directors' intended to defraud MediaOne shareholders.

[6] Before turning to an individualized discussion of these alleged concrete benefits, it is important to note a subtle but *337 fundamental flaw in plaintiff's first theory of scienter; namely, that with respect to preservation of the Comcast Agreement, the interests of MediaOne and its shareholders were aligned rather than adverse. In other words, because preservation of the Comcast Agreement benefitted both the Directors and the MediaOne shareholders, it is difficult to infer an intent to defraud those shareholders absent some allegation of stock manipulation or insider trading by the Directors. [FN8]

FN8. In connection with plaintiff's first theory of scienter, not only are there no allegations of insider trading, but plaintiff does not allege that defendants' depressed or manipulated MediaOne stock in order to preserve the Comcast Agreement. The only allegation of stock manipulation is in connection with plaintiff's second theory of scienter in which plaintiff claims that defendants' sought to depress the price of MediaOne stock in order to make it easier for them to accept the AT & T proposal. See *infra* Part III.B.2.

Under the Comcast Agreement, Comcast promised to acquire MediaOne for \$48 billion. The Amended Complaint does not allege that the Comcast Agreement was poor or unfavorable in any way to MediaOne shareholders. Nor does the Amended Complaint allege that plaintiff or any MediaOne shareholder other than Hostetter was unhappy with the terms of the Comcast/MediaOne deal.

[7] The Amended Complaint does allege that on March 25, 1999, Hostetter wrote a letter to the Directors sharply criticizing the terms of the Comcast Agreement. In particular, Hostetter told the Directors: "Your duty was and is to be especially active and diligent to get the best price for MediaOne stockholders." *Id.* ¶ 57 (quoting 3/31/99 letter from Eichler to Hostetter (emphasis added)). [FN9] According to Hostetter, in order for the Directors to properly fulfill their duty to MediaOne shareholders, they needed to release him from the 1996 standstill so that he could solicit superior merger proposals. As Hostetter

stated in his letter: "I believe that you have a duty under these circumstances to permit me to seek superior value and terms." Id. Thus, taking the allegations of the Amended Complaint as true, MediaOne released Hostetter from the 1996 standstill so that he could attempt to procure a better deal for MediaOne shareholders. Accordingly, there can be little question that the release of Hostetter was, at minimum, for the benefit of both MediaOne Directors and MediaOne shareholders. [FN10]

FN9. Indeed, in his March 31 letter, Hostetter invokes the seminal fiduciary duty cases of *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del.1985) and *Paramount Communications Inc. v. QVC Network Inc.*, 637 A.2d 34 (Del.1994). See supra Part II.A. In *QVC*, the Delaware Supreme Court stated: "In the sale of control context, the directors must focus on one primary objective--to secure the transaction offering the best value reasonably available for the stockholders--and they must exercise their fiduciary duties to further that end." 637 A.2d at 44. Similarly, in *Revlon*, the Delaware Supreme Court held that "[t]he duty of the board ... [is] the maximization of the company's value at a sale for the stockholders' benefit", and that "obtaining the highest price for the benefit of stockholders should [be] the central theme guiding director action." 506 A.2d at 182. Notably, both *Revlon* and *QVC* state that although "no shop" provisions such as the one included in the Comcast Agreement are not per se illegal, they are "invalid and unenforceable" to the extent they "purport[] to require a board to act or not act in such a fashion as to limit the exercise of fiduciary duties." *QVC*, 637 A.2d at 51; see also *Revlon*, 506 A.2d at 184 ("The no-shop provision ... while not per se illegal, is impermissible ... when a board's primary duty becomes that of an auctioneer responsible for selling the company to the highest bidder.").

FN10. According to the Amended Complaint, Hostetter was at all relevant times MediaOne's largest shareholder. Amended Complaint ¶ 50.

The hotly contested issue, of course, is the Directors' agreement with Hostetter not to "make any public announcement of [Hostetter's] efforts to develop a superior

proposal without the Directors' written consent." Id. ¶ 63 (quoting 3/31/99 letter from Eichler to Hostetter). Again, the gravamen of plaintiff's fraud claim is that *338 defendants' failure to disclose information regarding Hostetter's release caused plaintiff to sell his shares for less money than they were worth. As set forth above, however, plaintiff must allege not just that defendants and Hostetter agreed to conceal Hostetter's release, but also that the concealment was motivated by an intent to defraud shareholders.

In an effort to plead the required state of mind, plaintiff claims that the Directors' decision to conceal Hostetter's release was motivated by MediaOne's desire to keep this information from Comcast in order to prevent Comcast from terminating its agreement to acquire MediaOne prior to MediaOne's receipt of a more lucrative merger proposal. The Amended Complaint expressly states: "A disclosure of the Hostetter Waiver Letters would have revealed that MediaOne was in breach of the No Shop provision which would have cost MediaOne \$1.5 billion and jeopardized the Comcast merger before MediaOne had a chance to secure a superior proposal." Id. ¶ 12 (emphasis in original). Thus, plaintiff himself concedes that the Directors were trying to keep the Comcast deal in place until such time as Hostetter procured a superior offer. Plaintiff alleges that this tactic benefitted the Directors in the four ways stated above. Under plaintiff's theory of motive, however, this tactic also benefitted MediaOne shareholders--including plaintiff.

To illustrate, plaintiff alleges that upon disclosure of the March 25 and March 31 letters, Comcast would have (i) terminated the Comcast Agreement; (ii) sued MediaOne and its Directors for breach of contract; (iii) demanded a payment of \$1.5 billion from MediaOne; and (iv) somehow prevented Hostetter from pursuing a deal with AT & T. Id. ¶¶ 83-84. Thus, pursuant to plaintiff's theory, if defendants had disclosed the Hostetter release immediately on March 31, then Comcast would have walked away from

the merger on that date or soon thereafter, leaving MediaOne without a superior merger proposal or the prospect of a superior merger proposal. In addition, according to plaintiff, MediaOne and its Directors would have been subjected to costly litigation as well as obligated to pay Comcast \$1.5 billion. The combined effect of these occurrences would certainly have caused the value of MediaOne's stock to decrease, and possibly even to plummet. MediaOne shareholders would have suffered accordingly.

In contrast, by concealing the March 25 and March 31 letters, MediaOne managed to preserve the Comcast Agreement and to stave off plaintiff's alleged parade of horrors until it received a superior offer from AT & T, at which point the Directors revealed to Comcast and the public their release of Hostetter. In this fashion, MediaOne shareholders received the "best price" for their shares with, according to plaintiff's theory, the least possible risk.

At first glance, it may appear that concealment of the Hostetter release benefitted only those MediaOne shareholders who held their MediaOne stock until after the April 22 announcement. However, based upon the allegations in the Amended Complaint, even shareholders like plaintiff who sold MediaOne stock prior to April 22 benefitted from concealment of the release. For example, if defendants had disclosed the Hostetter release on March 31 and Comcast had withdrawn from the merger agreement, initiated suit and demanded payment of \$1.5 billion, then when plaintiff sold his shares two weeks later, it is likely those shares would have been worth far less than the \$65 per share plaintiff received. In other words, when plaintiff sold his shares on April 16, he too benefitted from the fact that the Comcast Agreement was still intact. [FN11] Moreover, even if plaintiff had not benefitted in any way from defendants' concealment of the Hostetter *339 release, the relevant issue is not whether defendants' failure to disclose harmed plaintiff, but whether plaintiff has alleged facts which give rise to a strong inference that defendants' failure to disclose was motivated

by an intent to deceive, manipulate and defraud shareholders. Here, accepting all the allegations of the Amended Complaint as true, the only "strong inference" that can be drawn is an intent by defendants to defraud Comcast for the benefit of MediaOne and its shareholders. Any inference that the Directors intended to defraud their own shareholders is both speculative and unreasonable because it ignores facts that plaintiff himself sets forth. [FN12]

FN11. As set forth supra note 5, plaintiff has alleged a fraud on the market theory of causation in which the harm suffered stems from the market's undervaluation of MediaOne stock, not plaintiff's decision to sell that stock.

FN12. Part of the difficulty of pleading scienter where the alleged fraud involves a corporate merger is that mergers subject corporate officers to a unique code of conduct and fiduciary duties. For example, as stated supra note 9, under Delaware state law, "[i]n the sale of control context the directors must focus on one primary objective—to secure the transaction offering the best value reasonably available for the stockholders." QVC, 637 A.2d at 44. As a result, it is difficult to parse through actions motivated by legitimate fiduciary obligations and actions motivated by fraudulent intent absent clear allegations of fraudulent activity such as insider trading.

Keeping in mind the inherent difficulty in any allegation of scienter based upon the Directors' desire to preserve the Comcast Agreement, I briefly address additional reasons why the four concrete benefits asserted by plaintiff cannot give rise to an inference of fraudulent intent.

a. Substantial Personal Profit as a Result of the Comcast Merger

Plaintiff asserts that the Directors desired to conceal Hostetter's release in order to prevent Comcast from terminating the proposed merger and to thereby avoid "losing the substantial benefits that they would personally receive under the Comcast Agreement." *Id.* ¶ 84. Specifically, plaintiff claims that the individual defendants hoped to

protect "the significant payments they would receive under the change in control provisions in their employment contracts as a result of the Comcast Merger." *Id.*; see also *id.* ¶ 85. In addition, plaintiff asserts that four of the Directors hoped to protect "lucrative executive and directorial positions that they negotiated as part of the Comcast Agreement." *Id.* ¶¶ 86-87.

Plaintiff's allegations regarding the Directors' desire to realize personal benefits under the Comcast Agreement are neither implausible nor unreasonable. A jury could certainly find that the Directors hoped to receive increased compensation, lucrative executive positions and other corporate perquisites as a result of the Comcast merger. [FN13] In fact, the reasonableness of plaintiff's allegations is precisely the problem. Every corporate director in America hopes to receive personal benefits when his or her company enters into a merger agreement. Thus, to recognize an inference of fraudulent intent based upon a corporate director's desire to realize personal benefits in connection with a merger would subject corporate directors to claims of securities fraud following every corporate merger or other business combination. Not surprisingly, courts in the Second Circuit and elsewhere have routinely found that such generalized allegations of motive are insufficient to plead the element of scienter.

FN13. Similarly, accepting as true the allegations of the Amended Complaint, it is a reasonable position that Comcast might consider the Directors' release of Hostetter an "indirect" solicitation of competing merger proposals and a breach of MediaOne's No Shop obligations. Thus, a reasonable juror could find that upon learning of defendants' waiver of Hostetter's standstill restriction, Comcast would choose to exercise its rights under the Comcast Agreement and to walk away from the proposed merger with MediaOne.

For example, in *Acito v. IMCERA Group, Inc.*, 47 F.3d 47, 54 (2d Cir.1995), the plaintiffs alleged that corporate officers of IMCERA Group "were motivated to inflate the value of IMCERA stock because *340 the increase in

stock price had a direct effect on their executive compensation." The Second Circuit rejected the plaintiffs' allegation as insufficient to plead scienter:

Plaintiffs' allegation that defendants were motivated to defraud the public because an inflated stock price would increase their compensation is without merit. If scienter could be pleaded on that basis alone, virtually every company in the United States that experiences a downturn in stock price would be forced to defend securities fraud actions. Incentive compensation can hardly be the basis on which an allegation of fraud is predicated. Therefore, we hold that the existence, without more, of executive compensation dependent upon stock value does not give rise to a strong inference of scienter.

Id. (internal quotations and citations omitted). The plaintiff in *Shields* also attempted to plead scienter based upon generalized allegations of motive, including the defendants' desire "to induce plaintiff and the other members of the Class to purchase Citytrust common stock ... at artificially inflated prices so that individual defendants could protect their executive positions and the compensation and prestige they enjoy thereby." 25 F.3d at 1130 (alteration in original). The Court of Appeals rejected the plaintiff's allegation of fraudulent intent stating that

[t]o allege a motive sufficient to support the inference [of fraudulent intent], a plaintiff must do more than merely charge that executives aim to prolong the benefits of the positions they hold.... If motive could be pleaded by alleging the defendant's desire for continued employment ... the required showing of motive would be no realistic check on aspersions of fraud....

Id.

More recently, in *Chill*, the Second Circuit held that a "generalized motive, one which could be imputed to any publicly-owned, for-profit endeavor, is not sufficiently concrete for purposes of inferring scienter." 101 F.3d at 268. The *Chill* court rejected the plaintiff's attempt to plead scienter based upon the defendants' alleged desire to maintain the

appearance of corporate profitability finding that "[i]f we accept this as sufficient motive, then we must accept as motive that every publicly-held corporation desires its stock to be priced highly by the market. At that point, the motive requirement becomes meaningless." *Id.* at 268 n. 5.

[8] Because the desire to realize personal benefits as a result of a merger can be imputed to any corporate officer, such motive cannot legally give rise to a "strong inference" of the Directors' intent to defraud MediaOne shareholders. See *Phillips v. LCI Int'l, Inc.*, 190 F.3d 609, 623 (4th Cir.1999) ("Similar situations arise in every merger; thus, allowing a plaintiff to prove a motive to defraud by simply alleging a corporate defendant's desire to retain his position with its attendant salary, or realize gains on company stock, would force the directors of virtually every company to defend securities fraud actions every time that company effected a merger or acquisition." (citing Second Circuit law)); *San Leandro Emergency Med. Group Profit Sharing Plan v. Philip Morris Cos.*, 75 F.3d 801, 813-14 (2d Cir.1996) (finding "company's desire to maintain a high bond or credit rating" insufficient motive for fraud because such motive could be imputed to any company); *Leventhal v. Tow*, 48 F.Supp.2d 104, 115 (D.Conn.1999) ("[T]he allegation that the defendants artificially inflated Citizens' stock price in order to 'protect and enhance their executive positions' and 'negotiate as favorable a deal as possible' on a pending employment contract also fail to give rise to a strong inference of scienter. This motive has been rejected routinely."); *Herzog v. GT Interactive Software Corp.*, 98 Civ. 0085, 1999 WL 1072500, *9 (S.D.N.Y. Nov. 29, 1999) (defendant's "'desire to consummate [a] corporate transaction does not constitute a motive for securities fraud' "); *341 *Thacker v. Medaphis Corp.*, 97 Civ. 2849, 1998 WL 684595, *3 (S.D.N.Y. Sept. 30, 1998) (finding plaintiff's claim that defendant was motivated by a desire to eliminate competitors and to acquire related companies insufficient to plead scienter because such motive could be imputed to any corporate officer); *Salinger v. Projectavision, Inc.*, 934 F.Supp. 1402, 1414

(S.D.N.Y.1996) (finding "generalized interest in executive compensation tied to stock performance" and desire "to maintain perquisites of corporate rank do[] not support a strong inference of fraud").

b. Avoidance of Liability for Breach of the Comcast Agreement

Plaintiff next alleges that defendants were motivated to defraud MediaOne shareholders based on their desire to avoid "significant liability" for breach of the Comcast Agreement. It is unclear from the face of the Amended Complaint whether plaintiff is referring to the Directors' desire to avoid "personal" liability for their alleged breach of the Comcast Agreement or to a more general desire to protect MediaOne from such a suit. To the extent plaintiff is referring to the individual defendants' desire to protect MediaOne from protracted and costly litigation, such allegation is insufficient to plead scienter both because it is a motive that can be imputed to any corporate director and because it is a motive that is in the best interests of MediaOne shareholders for the reasons stated above. See *supra* Part III.A.1.

[9] To the extent plaintiff alleges that the Directors desired to avoid personal liability, it is patently unreasonable to conclude that Comcast could or would sue the Directors personally in the event MediaOne violated the No Shop provision. Nowhere in the Amended Complaint does plaintiff allege that the Comcast Agreement permitted Comcast to bring suit for breach of contract against either the Directors or MediaOne for violation of section 6.03. Nor is it reasonable to assume that Comcast could somehow pierce the corporate veil and subject the Directors to "significant liability" as a result of their alleged breach. As set forth by plaintiff himself, the Comcast Agreement explicitly provided for a single remedy in the event MediaOne breached its No Shop obligations-termination of the merger agreement. Plaintiff's conclusory and unsupported allegations regarding additional actions that Comcast might take to remedy breach of the No Shop provision such as bringing suit

against the Directors (or MediaOne) cannot, as a matter of law, form the basis for an inference of scienter. As the Second Circuit has repeatedly stated, plaintiffs do not "enjoy a 'license to base claims of fraud on speculation and conclusory allegations [of scienter].'" San Leandro, 75 F.3d at 813 (quoting Wexner v. First Manhattan Co., 902 F.2d 169, 172 (2d Cir.1990)).

c. \$1.5 Billion Termination Fee

Plaintiff's allegation that defendants concealed the Hostetter release in order to avoid payment of a \$1.5 billion fee for breach of the No Shop provision is equally speculative. The Amended Complaint merely alleges that, pursuant to section 10.01, Comcast may terminate the Comcast Agreement in the event MediaOne breaches its No Shop obligations. The Amended Complaint does not allege that if MediaOne breaches the contract, Comcast is entitled to both walk away from a merger with MediaOne and to receive a payment of \$1.5 billion from MediaOne. The only reference to a \$1.5 billion fee is with respect to MediaOne's decision to accept a superior proposal. [FN14]

FN14. MediaOne in fact paid Comcast \$1.5 billion upon its decision to accept the superior AT & T proposal.

d. Merger with AT & T

[10] Plaintiff also alleges, without any basis in law or fact, that "had the disclosure *342 of the Hostetter Waiver Letters caused Comcast to determine that MediaOne was in breach of the Comcast Agreement, Hostetter may not have been able to pursue the AT & T Agreement, thereby depriving the defendants and Hostetter of a superior offer for their stock and the stock of the other MediaOne shareholders." Amended Complaint ¶ 84. Plaintiff fails to explain why or how Comcast's determination that MediaOne was in breach of the No Shop provision would preclude Hostetter from pursuing merger discussions with AT & T. Plaintiff's allegation is purely speculative and must be rejected on that basis alone.

The more fundamental problem, however, is that plaintiff's allegation of motive based upon the Directors' supposed desire to protect Hostetter's ability to pursue a deal with AT & T conflicts with plaintiff's allegation of reliance and harm. As explained above and in the December 22 Opinion, plaintiff proceeds via a fraud on the market theory, claiming that defendants' failure to disclose Hostetter's release caused the market to undervalue MediaOne stock. Plaintiff's fraud on the market theory is premised on the idea that Hostetter's authorization to shop the company made it more likely that MediaOne would receive a superior merger offer during the waiting period. Accordingly, if the market had been informed that Hostetter was in fact permitted to solicit competing proposals, it would have valued MediaOne stock more highly.

Now, however, plaintiff claims that if Hostetter's release were disclosed, Comcast would withdraw from the deal and "Hostetter may not have been able to pursue the AT & T Agreement". Amended Complaint ¶ 84. If upon disclosure of his release, Hostetter were precluded from pursuing superior offers, then there would be no reason for the market to have increased the value of MediaOne stock and the basis for plaintiff's assertion of a fraud on the market theory disappears.

2. Desire to Depress the Price of MediaOne Stock

[11] Plaintiff's second claim of scienter alleges that defendants "were motivated to conceal the Hostetter Waiver Letters and to keep the price of MediaOne depressed so that, if Hostetter was able to obtain a competing acquisition proposal for MediaOne, defendants would be better able to exercise the 'fiduciary out' provision in the Comcast Agreement by more easily determining that the competing offer was 'superior.'" Id. ¶ 88. According to plaintiff, before the Directors could terminate the Comcast Agreement and accept an alternative merger proposal, "defendants were required to obtain the 'advise [sic] of a financial advisor of nationally recognized reputation' that the competing proposal 'is

more favorable to MediaOne's stockholders than the [Comcast] Merger.' " Id. ¶ 89. Plaintiff claims that "[o]ne major fact that the financial advisor would consider in its analysis would be the amount by which the value under the 'Superior Proposal' exceeded the value provided to MediaOne shareholders in the Comcast Transaction." Id. Accordingly, plaintiff concludes, by depressing MediaOne's stock price, defendants would "make it easier for themselves to exercise the 'fiduciary out' " and accept the AT & T proposal. Id. Plaintiff's theory is both speculative and illogical.

First, plaintiff contends, based on nothing but conclusory allegations, that a financial analyst would evaluate the relative merits of competing merger proposals based upon the market value of MediaOne common stock on any given day. This is simply inaccurate. Financial analysts evaluate competing merger proposals based upon the various terms of the proposed deals. Here, for example, an analyst would consider, among other things, the fact that AT & T's proposed purchase price was \$9 billion more than Comcast's proposed purchase price. A sophisticated analyst would not base its decision to recommend the AT & T proposal on the mere fact that "when AT & T announced its *343 offer and the market first learned about the Hostetter Waiver Letters on April 22, 1999, MediaOne's stock rose approximately \$8.00 per share." Id.

Second, "[i]n looking for a sufficient allegation of motive, we assume that the defendant is acting in his or her informed economic self-interest." Shields, 25 F.3d at 1130. Thus, where "[p]laintiff's view of the facts defies economic reason, ... it does not yield a reasonable inference of fraudulent intent." *Atlantic Gypsum Co. v. Lloyds Int'l Corp.*, 753 F.Supp. 505, 514 (S.D.N.Y.1990); see also Shields, 25 F.3d at 1130. In the instant case, plaintiff's theory regarding the individual defendants' desire to depress MediaOne stock defies economic reason. The Directors' self-interest lies in securing the best deal possible for the sale of MediaOne. Thus, if the AT & T proposal were inferior to the Comcast proposal, it would be in the Directors' informed self-interest to reject the AT & T

offer and to consummate a merger with Comcast. As a result, there is no sensible reason why the Directors would want to depress MediaOne stock in order to make an inferior AT & T offer appear more valuable. Such a tactic could only result in the Directors' accepting an inferior proposal to their economic detriment. Because it is not in the Directors' informed economic self-interest to depress MediaOne stock in order to disguise an inferior proposal, plaintiff's theory of motive is implausible.

C. Scierer: Recklessness

[12] As set forth above, fraudulent intent can also be established by alleging facts which constitute "strong circumstantial evidence" of conscious misbehavior or recklessness. *Chill*, 101 F.3d at 268-69. In the securities fraud context, recklessness is "conduct which is 'highly unreasonable' and which represents 'an extreme departure from the standards of ordinary care.'" *SEC v. McNulty*, 137 F.3d 732, 741 (2d Cir.1998) (quoting *Rolf v. Blyth, Eastman, Dillon & Co.*, 570 F.2d 38, 46 (2d Cir.1978)).

The Amended Complaint, like the original complaint, fails to set forth any particularized facts which would support a "strong inference" of recklessness and corresponding fraudulent intent. As I stated in my prior opinion, "there is simply no way that a reasonable jury could consider defendants' conduct reckless behavior." *Kalnit*, 1999 WL 1243868, *11.

Plaintiff ignores this Court's previous holding with respect to recklessness and advances the same argument that was previously rejected, namely that the mere fact that defendants consciously concealed Hostetter's release demonstrates that defendants acted recklessly. See Pl. Opp. at 16-21. Plaintiff's argument is no more convincing the second time around. [FN15]

FN15. The only new argument plaintiff advances in support of his allegations of recklessness is based on Delaware caselaw concerning the fiduciary obligations owed by directors to shareholders. See Pl. Opp. at 17. Plaintiff cites these cases for the

proposition that "[d]efendants' duty of candor required them to describe all material information to the corporation's shareholders." Pl. Opp. at 17 (citing *Malone v. Brincat*, 722 A.2d 5, 10 (Del.1998)). Thus, plaintiff concludes, the Directors' failure to disclose material information--that is, the Hostetter release--constitutes reckless behavior. Plaintiff's contention again ignores the plain language of my prior opinion. The mere failure to disclose material information does not in and of itself constitute reckless behavior. See *Kalnit*, at 244. In a case such as this one where the materiality of the Hostetter release is highly debatable at best, see *supra* note 7, the failure to disclose that release simply cannot lead to a finding of recklessness. See *Kalnit*, at 244; see also *L.L. Capital Partners, L.P. v. Rockefeller Ctr. Properties, Inc.*, 921 F.Supp. 1174, 1183 (S.D.N.Y.1996) (finding plaintiff's allegations of recklessness "manifestly insufficient" because "[t]he materiality of the one alleged nondisclosure that is sufficient to survive a motion to dismiss is highly debatable, which indicates that the nondisclosure itself is not a sufficient basis from which to infer conscious misbehavior.").

* * * * *

***344** Because plaintiff has again failed to plead either (i) motive and opportunity or (ii) circumstantial evidence of recklessness, he has not sufficiently alleged scienter and his section 10(b) and Rule 10b-5 claims must be dismissed pursuant to Rule 9(b) and the PSLRA.

IV. Leave to Amend

[13][14] Under Federal Rule of Civil Procedure 15(a), "leave to amend shall be freely granted when justice so requires." Fed.R.Civ.P. 15(a). "Although the decision whether to grant leave to amend is within the discretion of the district court, refusal to grant leave must be based on a solid ground." *Oliver Sch., Inc. v. Foley*, 930 F.2d 248, 253 (2d cir.1991). "Futility" provides a solid ground on which to deny leave to amend. See *Chill*, 101 F.3d at 272; *Cortec Indus., Inc.*, 949 F.2d at 48.

[15] This Court has twice considered

plaintiff's allegations of scienter and twice found them to be insufficient. I do not believe that plaintiff could ever successfully plead scienter in the instant case. As a result, any additional attempts to amend the complaint would be futile. Accordingly, the Amended Complaint is dismissed without leave to amend.

V. Findings Regarding Rule 11 Sanctions

[16] Section 21D(c) of the PSLRA, entitled "Sanctions for abusive litigation", provides:

In any private action arising under this chapter, upon final adjudication of the action, the court shall include in the record specific findings regarding compliance by each party and each attorney representing any party with each requirement of Rule 11(b) of the Federal Rules of Civil Procedure as to any complaint, responsive pleading, or dispositive motion.

15 U.S.C. § 78u-4(c)(1). If the court determines that there has been a violation of Rule 11, section 21D(c)(2) imposes mandatory sanctions and adopts a rebuttable presumption that the appropriate sanction for noncompliance "is an award to the opposing party of the reasonable attorneys' fees and other expenses incurred." 15 U.S.C. § 78u-4(c)(3)(A)(i)-(ii). "The PSLRA thus does not in any way purport to alter the substantive standards for finding a violation of Rule 11, but functions merely to reduce courts' discretion in choosing whether to conduct the Rule 11 inquiry at all and whether and how to sanction a party once a violation is found." *Simon DeBartolo Group, L.P. v. Richard E. Jacobs Group, Inc.*, 186 F.3d 157, 167 (2d Cir.1999). Because this dismissal with prejudice constitutes a "final adjudication" of an action arising under the PSLRA, this Court's Rule 11 findings with respect to plaintiff's complaint and Amended Complaint are set forth below.

Rule 11(b) states:

By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the

person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,--

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically *345 so identified, are reasonably based on a lack of information or belief.

Fed.R.Civ.P. 11(b).

[17] In resolving defendants' motions to dismiss, I have thoroughly reviewed plaintiff's complaint and Amended Complaint. I find no indication that Rule 11 sanctions are warranted. First, there is no evidence that plaintiff filed his original complaint or his Amended Complaint for "an improper purpose" such as to harass defendants or to cause unnecessary delay. Second, although plaintiff's original complaint for securities fraud was ultimately dismissed for failure to plead scienter, I concluded that plaintiff adequately alleged the remaining elements of a section 10(b) claim--fraudulent acts and detrimental reliance. Accordingly, I cannot find that the original complaint was wholly "frivolous".

Third, despite the fact that plaintiff chose to file an Amended Complaint rather than to withdraw the action following the first dismissal, sanctions for such amendment would be inappropriate here. To begin, in dismissing the original complaint, I expressly granted plaintiff leave to file an amended complaint provided he could cure the defects of the initial pleading. See Kalnit, 85

F.Supp.2d 232, 245. Thus, "[t]his is certainly not a case where the Court has admonished plaintiffs that Rule 11 sanctions could be imposed upon amendment." Clifford v. Hughson, 992 F.Supp. 661, 671 (S.D.N.Y.1998).

Finally, under the law of this Circuit, "[a]n argument constitutes a frivolous legal position for purposes of Rule 11 sanctions if, under an objective standard of reasonableness, it is clear ... that there is no chance of success and no reasonable argument to extend, modify or reverse the law as it stands." Morley v. Ciba-Geigy Corp., 66 F.3d 21, 25 (2d Cir.1995) (internal quotations omitted). Although I find, for the reasons set forth above, that plaintiff's amended allegations of scienter are without merit, this does not mean that plaintiff's attempts to replead scienter were unreasonable and had absolutely "no chance" of success. The element of scienter is often the most difficult and controversial aspect of a securities fraud claim. In the instant case, plaintiff adequately pleaded that he was harmed by defendants' failure to disclose the Hostetter waiver. I cannot conclude that plaintiff's subsequent efforts to demonstrate that defendants acted with bad intent were frivolous as a matter of law.

VI. Conclusion

For the foregoing reasons, defendants' motion to dismiss is granted without leave to amend and without imposition of sanctions under Rule 11. The Clerk of the Court is directed to close this case.

99 F.Supp.2d 327, Fed. Sec. L. Rep. P 90,933

END OF DOCUMENT

50

District Court of Appeal of Florida, Third
District.

James G. KARNEGIS, Appellant,
v.
Charles OAKES et al., Appellees.

Nos. 74--47, 74--48.

June 26, 1974.
Rehearing Denied July 18, 1974.

Majority stockholder in company which had been involved in litigation with minority stockholder brought action against minority stockholder and another for damages for alleged act of violence against him carried out pursuant to an alleged conspiracy. Defendants' motions for summary judgment were granted by the Circuit Court, Dade County, Jack M. Turner, J., and majority stockholder appealed. The District Court of Appeal, Pearson, J., held that evidence did not preclude finding that one defendant had engaged in a conspiracy, even though he had not participated in the actual assault; but that minority stockholder's uncontradicted testimony that he knew nothing of the conspiracy or the planned assault precluded recovery against him.

Affirmed in part, reversed in part and remanded.

West Headnotes

[1] Judgment 185.3(21)
228k185.3(21)

Evidence that one defendant discussed with two others his belief that minority stockholder who was involved in litigation with majority stockholders would be grateful if somebody scared one of the majority stockholders, that the three discussed how they could scare a majority stockholder, that defendant stated that they could probably get \$21,000 for doing so, that one of the two called defendant later that evening and asked him how to spell majority stockholder's name and that majority stockholder was assaulted by the two others later that evening was sufficient to preclude summary judgment for defendants.

[2] Conspiracy 19
91k19

In absence of any substantial evidence to connect minority stockholder with assault on majority stockholder which allegedly resulted from conspiracy of three others, majority stockholder could not recover under claim for conspiracy against the minority stockholder.

*658 Hendricks & Hendricks, Miami, for appellant.

Bollas, Goodwin, Ryskamp & Welcher,
Alfred Gustinger, Thomas N. Balikes, Miami,
for appellees.

Before PEARSON, CARROLL and
HAVERFIELD, JJ.

PEARSON, Judge.

The appellant, James G. Karnegis, appeals a summary final judgment for defendants Daniel Edgington and Aristides Lazzo. The appellant's action was against these two defendants and others claiming damages against all of the defendants for an alleged act of violence to plaintiff carried out pursuant to an alleged conspiracy among the defendants. After the entry of the summary final judgment for Edgington and Lazzo, the plaintiff appealed. We reverse the summary final judgment entered in favor of the defendant, Daniel Edgington, but affirm the summary final judgment entered in favor of the defendant Aristides Lazzo.

The following statement of fact is necessary for an understanding of the basis of our holdings.

[1] The defendant, Lazzo, is a minority stockholder in Royal Baking Company, Inc., a Florida corporation. The plaintiff and his father, George D. Karnegis, and mother, Theodora Karnegis, are the majority stockholders. Civil litigation has been in progress and still exists between Lazzo and the Karnegises.

In April 1972, the defendant, Oakes, came to Miami from Denver with Herbert Edgington

and met and worked with John Edgington and Dan Edgington on construction jobs on several occasions and was working with Daniel Edgington for approximately two weeks prior to the shooting incident. Daniel Edgington discussed with Oakes and Herbert Edgington that he thought Mr. Lazzo would be grateful if someone scared the hell out of the kid (plaintiff). The three of them discussed how they would scare him, including suggested phone calls and shooting at him from a block away with a rifle. Daniel knew of Oakes' criminal record. The scare incident was to be for money and Herbert Edgington quoted a figure of *659 \$21,000.00 stating it would be \$7,000.00 apiece with the understanding that the money would come from Harry Lazzo. This discussion took place on September 10, 1972, and later that evening Daniel Edgington knew that Oakes and Herbert Edgington were going to do something because Herbert called Daniel in Oakes' presence to find out how to spell the plaintiff's name.

After obtaining the telephone number and address of the plaintiff, Oakes telephoned and had a conversation with the plaintiff to ascertain whether the plaintiff was the correct party.

Later in the same evening, Herbert Edgington and Oakes, armed with a pistol loaded by Herbert, drove to the home of the plaintiff, who answered a knock on his door, and upon opening the door, was asked by Oakes if his name was James Kernegis. Upon receiving an affirmative reply, Oakes asked plaintiff to step outside and upon plaintiff's refusal, Oakes, who was about one foot away from the plaintiff, fired six shots at him from a pistol, plaintiff being hit in the fact by splinters from the door and powder burns on his glasses.

Oakes was arrested and subsequently charged with assault with intent to commit murder with a premeditated design to effect the death of the plaintiff, and with shooting into a dwelling occupied by the plaintiff and his family.

Aristides Lazzo, by deposition, testified that

he did not know Oakes but was acquainted with Herbert Edgington, that he had discussed with his son-in-law, Danny, the problems and difficulties that he was having in litigation and that he had kept Danny generally abreast of the status of the proceedings in the case. Lazzo denies that he ever discussed the idea of having the plaintiff killed or sacred so that it would be easier for him to deal with the father and denied that he had paid any monies to Daniel Edgington, Herbert Edgington or Oakes directly or indirectly.

The rule as to summary judgments for defendants has too often been stated to need repetition here. See *Basden v. Lowery*, Fla.App.1966, 182 So.2d 265.

Applying these principles to the record before us, it is apparent that by giving the benefit of all inferences to the plaintiff the evidence is such that it does not refute the existence of a conspiracy in which the appellee Daniel Edgington participated. We therefore reverse the summary final judgment for the appellee Daniel Edgington.

[2] Upon the other hand, a review of the same facts show that there is no substantial evidence of any sort to connect the defendant Aristides Lazzo with a conspiracy which may have existed. It is further clear the plaintiff has no evidence to overcome Lazzo's testimony that he knew nothing of the project. To speculate that he may have participated because he might ultimately have received some benefit from the assault is not sufficient. The pleadings, affidavits, depositions and admissions before the trial court clearly demonstrate that plaintiff's claim that the appellee Lazzo participated in a conspiracy against him is pure speculation. Therefore, the summary final judgment for the defendant Aristides Lazzo is affirmed.

Affirmed in part, reversed in part and remanded for further proceedings.

296 So.2d 657

END OF DOCUMENT

51

United States District Court,
S.D. New York.

KOREA LIFE INSURANCE CO., LTD. and
Morning Glory Investment (L) Limited,
Plaintiffs,

v.

MORGAN GUARANTY TRUST COMPANY
OF NEW YORK, Defendant.

No. 99 Civ.12175 AKH.

July 1, 2003.

Korean life insurance company brought action against investment bank to recover losses incurred as result of unhedged risk of depreciation of foreign currency. On bank's motion for summary judgment, the District Court, Hellerstein, J., held that: (1) insurer did not reasonably rely on bank in deciding to enter into contract; (2) insurer's guaranty of special purposes entity's (SPE) obligations was not voidable; but (3) bank was obligated to honor SPE's invocation of stop loss clause.

Motion granted in part, and denied in part.

West Headnotes

[1] Fraud 3
184k3

To prove fraud under New York law, plaintiffs must show: (1) defendant made material false representation, (2) defendant intended to defraud plaintiffs thereby, (3) plaintiffs reasonably relied upon representation, and (4) plaintiffs suffered damage as result of such reliance.

[2] Fraud 13(3)
184k13(3)

To prove negligent misrepresentation under New York law, plaintiffs must show that: (1) defendant had duty, as result of special relationship, to give correct information; (2) defendant made false representation that it should have known was incorrect; (3) information supplied in representation was known by defendant to be desired by plaintiffs for serious purpose; (4) plaintiffs intended to rely and act upon that representation; and (5)

plaintiffs reasonably relied on it to their detriment.

[3] Banks and Banking 100
52k100

Under New York law, Korean life insurance company did not reasonably rely on investment bank in deciding to enter into transactions containing unhedged risk of depreciation of foreign currency, and thus bank was not liable for insurer's losses under fraud or negligent misrepresentation theories, despite insurer's contention that bank's agent misrepresented nature of transaction, where insurer's equity and international departments prepared independent analyses of transaction that fairly identified risks involved, and insurer restructured transaction in response to analyses to reduce insurer's risks.

[4] Contracts 101(1)
95k101(1)

In cases alleging violation of foreign law, existence of illegality is to be determined by local law of jurisdiction where illegal act is done, while effect of illegality upon contractual relationship is to be determined by law of jurisdiction which is selected under conflicts analysis. Restatement (Second) of Conflict of Laws § 202.

[5] Guaranty 16(1)
195k16(1)

Under Korean law, insurer's promise in letter of commitment (LOC) to bank to subscribe to additional shares in special purposes entity (SPE) created by insurer if SPE defaulted on its obligation to repay loan to bank constituted "guaranty," and thus violated Korean Business Insurance Law, even though parties' obligations did not exactly mirror one another, where purpose of promise to subscribe to additional shares was to infuse money into SPE in order to enable it to pay debt SPE owed to bank.

[6] Contracts 129(1)
95k129(1)

Under New York conflicts analysis, choice of law agreed to by parties is to be given presumptive effect.

[7] Contracts 103
95k103

[7] Contracts 136
95k136
Under New York law, illegal contract malum in se is unenforceable and will be voided.

[8] Contracts 136
95k136

[8] Contracts 139
95k139
Under New York law, contract that is illegal because performance is malum prohibitum may be voided if: (1) contract is still executory; or (2) parties are not in pari delicto.

[9] Contracts 138(1)
95k138(1)
In determining enforceability of allegedly illegal contract under New York law, court must ascertain if statute that was violated was enacted to protect public health and safety, and whether party seeking to assert defense of illegality is part of class of persons intended to be protected by that statute.

[10] Guaranty 16(2)
195k16(2)
Under New York law, contracts made by Korean insurer and investment bank and their respective affiliates, by which insurer attempted to avoid Korean regulation, were "malum prohibitum," not malum in se, for purposes of determining contracts' enforceability, even if insurer's agreement to guarantee its affiliate's debt to bank violated Korean insurance law.

[11] Contracts 136
95k136
Under New York law, malum prohibitum contract that is executory may be invalidated.

[12] Contracts 139
95k139
Under New York law, malum prohibitum contract generally will be voided only when parties to illegal transaction are not equally guilty.

[13] Guaranty 18
195k18
Under New York law, Korean insurer's promise in letter of commitment (LOC) to bank to subscribe to additional shares in special purposes entity (SPE) created by insurer if SPE defaulted on its obligation to repay loan to bank was not voidable, even if insurer's promise constituted "guaranty" in violation of Korean Business Insurance Law, where both insurer and bank intended to engage in transaction in violation of Korean law, and endeavored to escape eyes of regulators by setting up off-shore shell corporations and structuring transaction as to be virtually impossible to understand to party not familiar with it.

[14] Gaming 62
188k62
Derivative transactions, forward contracts, and swap agreements in currencies and commodities did not constitute illegal gambles, and thus do not violate New York's gambling statute. N.Y.McKinney's General Obligations Law § 5-401.

[15] Banks and Banking 96
52k96
Under New York law, total return swap confirmation agreements between Korean bank and American investment bank and between Korean bank and special purposes entity (SPE) created by Korean insurer constituted single contract, and thus lack of privity did not relieve American bank of its obligation to honor stop-loss provision in SPE's agreement, even though there was no such provision in its agreement and both agreements contained integration clauses, where American bank and insurer structured transaction in complex manner to disguise speculative, offshore transaction that posed unreasonably large risk, and was inappropriate and possibly illegal for regulated Korean insurer to enter into, Korean bank was to earn only modest banking fee as accommodation party, agreements were executed at same time and were all prepared by American bank, and American bank was aware of insurer's insistence upon stop loss clause.

[16] Federal Civil Procedure 2552
170Ak2552

District judge, presented with motion for summary judgment, is entitled to search record and, if no genuine issues of material fact exist, to determine motion in favor of party entitled to summary judgment, regardless whether party is moving, or responding, party. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

*426 John David Lovi, McDermott, Will & Emery, New York City, for Plaintiffs.

Robert H. Baron, Frederick AO Schwartz, Jr., Gravath, Swaine & Moore, LLP, New York City, for Defendant.

OPINION AND ORDER GRANTING
SUMMARY JUDGMENT TO DEFENDANT,
DISMISSING COUNTS
ONE, TWO, THREE, FIVE, AND SIX; AND
GRANTING SUMMARY JUDGMENT TO
PLAINTIFFS ON
COUNT FOUR

HELLERSTEIN, District Judge.

This is a case of disappointed expectations. It involves forward, one-year contracts in foreign currencies, elaborate hedges, and a substantial, unhedged risk of depreciation of one of the currencies, the *427 Thai baht. The real parties in interest are a Korean life insurance company—the oldest and third largest in Korea—and a major investment bank. The transactions they made were filtered through their specially created, offshore entities, and documented by fragmented and complicated instruments, intended to disguise their dealings from Korean regulators. As it happened, the unhedged risk came to pass, an extraordinary loss occurred, and the Korean life insurance company honored its resulting debt. It brought this lawsuit to obtain the return of its payment.

In January 1997, an affiliate of Morgan Guaranty Trust Company of New York ("Morgan") raised \$25 million of debt from European lenders for the purpose of providing

an opportunity for an above-market return to benefit plaintiff, Korea Life Insurance Company ("Korea Life" or "KLI"). Korea Life, however, was not to be the direct recipient or custodian of the funds. The deal involved special purpose entities that were to be formed in off-shore jurisdictions, to handle and deploy the Morgan-raised funds and to mask the transaction from Korean regulators.

Morgan's affiliate promised to repay the \$25,000,000 to the European investors after one year, with interest at the London Interbank Offered Rate ("LIBOR"). During the year, a special purpose entity ("SPE") that Korea Life was to create would have the use and benefit of the funds, in order to purchase a dollar-denominated certificate of deposit. At the end of the year, at maturity, Korea Life's SPE was to repay Morgan according to formulae reflecting changes in the ratios among the dollar, the Thai baht, and the Japanese yen. If the baht and the yen appreciated against the dollar, KLI would be responsible for less than the \$25,000,000 it owed to Morgan, and might not have had to pay Morgan at all. However, if the baht depreciated, Korea Life's SPE would have to pay Morgan five times the deteriorated rate of the baht relative to the dollar, plus the discount of \$25,000,000. Since Korea Life's SPE had no capital aside from the \$25,000,000 that had been lent to it, Korea Life promised to contribute the capital that might be needed to repay Morgan.

As it turned out, the Thai baht collapsed during the investment year. Korea Life, honoring its commitment, paid Morgan, in cash and credit, \$66,304,746, plus the agreed-to discount of \$25 million—approximately \$90,487,500 in all. It brought this lawsuit to regain all or part of its payment. Its claim, essentially, is for money unlawfully had and received by Morgan, because of its alleged fraud or, alternatively, negligent misrepresentations, the illegality or ultra vires nature of the transactions and their violation of New York's anti-gambling statutes, the commercial impracticability of the transactions, or Morgan's unjust enrichment. Korea Life also claims that

Morgan breached a clause in the agreement which required it to unwind the transaction upon demand by Korea Life's SPE, thus preventing Korea Life from mitigating its losses according to the stop-loss feature of the agreement.

After extensive discovery conducted in three continents, Morgan moves for summary judgment. Both sides have submitted extensive affidavits and briefs, and I have engaged the parties in several arguments, evidentiary hearings, and supplemental submissions on the topics of Korean law and the notice that was given pursuant to the unwind provision in the agreements. [FN1] I now rule in this opinion *428 on all issues, dismissing all but the breach of contract count against Morgan, and granting Korea Life summary judgment on that breach of contract count in an amount to be determined in further proceedings.

FN1. I heard oral argument on June 20 and July 29, 2002, and conducted evidentiary hearings on September 4 and 5, 2002.

THE EVIDENTIARY RECORD

A. The Parties

Plaintiff KLI is Korea's oldest and third-largest life insurance company. It was organized in 1946 under the laws of the Republic of Korea. As of March 30, 1996, it had more than \$12 billion in assets and \$8 billion in revenue. Its net equity was \$48 million. In March 1999, it entered receivership, under the supervision of the Korean government.

Plaintiff Morning Glory Investment (L) Limited ("Morning Glory") is a limited liability investment company. KLI created Morning Glory under the laws of Malaysia on November 27, 1996, as its special purpose entity to engage in the transactions at issue.

Defendant Morgan is a commercial bank incorporated under the laws of the State of New York, with its principal place of business in New York City.

B. The Morning Glory Transactions

On January 15, 1997, a series of agreements were executed, providing for the money flow just described. As step one, Morgan set up a special purpose entity in the English Channel islands, Frome Company Limited ("Frome"). By a private placement memorandum dated January 15, 1997, [FN2] Frome issued one-year notes to European investors, raising \$25 million. The notes were guaranteed by Morgan, [FN3] and promised the lenders repayment with interest at LIBOR. [FN4]

FN2. The memorandum bears the date of January 15, 1996. The context makes clear that the actual date was January 15, 1997.

FN3. The guaranty was in the form of a swap agreement between Frome and Morgan. Morgan agreed to provide funds to Frome adequate to repay its obligations under the notes. Frome agreed to deliver, in exchange, the 2.5 million shares of Morning Glory acquired in step two of the transaction.

FN4. LIBOR is an acronym for London Interbank Offered Rate. The one-year rate, as of January 15, 1997, was about 5.95 per cent.

As step two, Frome contributed the \$25 million it raised to Morning Glory, in exchange for 2.5 million of Morning Glory's common shares. Simultaneously, Morning Glory purchased a one-year \$25 million certificate of deposit issued by Korea Exchange Bank ("KEB"), maturing in one year and paying interest at 6.05 per cent, and paid a fee of \$70,000 to KEB.

The next steps were to occur a year later, at maturity, January 30, 1998. Morning Glory was entitled to receive \$26,512,500 in principal and interest on the certificate of deposit issued by Korea Exchange Bank, and obligated to redeem its shares that it had issued to Frome by paying Frome's parent, Morgan either (a) 96.75 per cent of the \$25 million Frome had contributed, that is, \$24,187,500 or, (b) depending on conditions relating to the rise or fall of the Thai baht in relation to the Japanese yen, the agreed-to

discount of \$25 million, plus or minus the product of two inter-related formulae quantifying those currency relationships. The formulae were set out in two Total Return Swap Confirmation Agreements, one between Morning Glory and KEB ("the Morning Glory/KEB agreement"), and the other between KEB and Morgan ("the KEB/Morgan agreement"). The same formulae are used in both agreements, and in this way the agreements work in tandem so that *429 any amount Morning Glory was obligated to pay to KEB under the Morning Glory/KEB agreement, KEB would owe to Morgan under the KEB/Morgan agreement. Likewise, any amount Morgan would be obligated to pay to KEB under the KEB/Morgan agreement, KEB would in turn owe to Morning Glory under the Morning Glory/KEB agreement. KEB, in other words, was the intermediary linking the two agreements.

Morning Glory's obligation to pay KEB at the January 30, 1998 maturity date, and KEB's obligation to pass through that amount to Morgan, was expressed in the formulae as a "Yen Payment Amount" and a "Baht Payment Amount." The formulae took into account five conditions: an appreciating, and a depreciating, yen relative to the dollar; an appreciating, and a depreciating, baht relative to the dollar; and a fixed ratio of yen to baht of one-to-five. If the yen depreciated, Morgan would be obligated to pay KEB, and KEB to pay Morning Glory, an amount provided for by the formulae, but if the yen appreciated, no amount would have to be paid by any party. If the baht depreciated, Morning Glory would be obligated to pay KEB, and KEB to pay Morgan, an amount provided for by the formulae, but if the baht appreciated, Morgan would have to pay KEB, and KEB, in turn, Morning Glory, an amount calculated according to the formulae, but not more than \$25 million.

How did these formulae work together? The formulae were calculated on the basis of the relationship between the baht and the yen, which tended to travel together. Historically, when the yen appreciated, the baht appreciated, and when the yen depreciated,

the baht depreciated, generally at a ratio of about five baht to one yen. Taking this relationship into account, the formulae were structured so that the yen would ostensibly function as a hedge against the baht. According to these formulae, if, at maturity, the yen and the baht both depreciated, Morning Glory was obligated to pay a "Baht Payment Amount" to KEB, and KEB was obligated to pay the same amount to Morgan, but at the same time, Morgan was obligated to pay KEB, and KEB to pay Morning Glory, a "Yen Payment Amount," serving as a hedge to Morning Glory's risk. The relationship between these amounts reflected the five-to-one ratio: the "Baht Payment Amount" was equal to the absolute value of \$125 million times the difference between the value of the baht as provided in the agreement and the value of the baht on the maturity date, divided by the value of the baht on the maturity date, while the "Yen Payment Amount" was equal to the value of \$25 million (1/5 of \$125 million) times the difference between the value of the yen on the maturity date and the value of the yen as provided in the agreement, divided by the value of the yen on the maturity date. [FN5] Thus, if the baht and yen both depreciated at the historical five-to-one ratio, Morning Glory would owe money to KEB, and KEB to Morgan, but any amount owed would be cancelled out by the amount Morgan owed to KEB, and KEB to Morning Glory.

FN5. These formulae are represented in the agreements as: Yen Payment Amount = Notional Amount x (YenMat--YenSpot)/YenMat Baht Payment Amount = Notional Amount x 5 x (ThbSpot--ThbMat)/ThbMat The "Notional Amount" was designated as \$25,000,000; the "YenMat" and "ThbMat" the value of the yen and baht, respectively, at maturity; the "YenSpot" was designated as 116.00; and the "ThbMat" was designated as 25.624.

If, however, the yen and the baht, instead of depreciating, were both to appreciate, a different scheme was to govern. If the yen were to appreciate, no payment *430 obligation would be due from either party to the other. But if the baht were to appreciate,

Morgan would have to pay KEB, and KEB, in turn, would have to pay Morning Glory an amount proportional to the baht's appreciation, up to \$25,000,000. In other words, Morning Glory stood to gain by the baht's appreciation: (a) the interest gain on the one-year certificate of deposit (\$25,000,000 x.0605), less Morning Glory's fees to KEB (\$70,000), plus (b) the repayment discount (\$25,000,000 x.0325), or \$2,255,000, plus (c) an uncertain amount, up to \$25,000,000, according to how much the baht might appreciate against the dollar. Thus, if the baht would be worth more against the dollar on January 30, 1998 (the maturity date) than it was worth as designated in the agreements, Korea Life might find that some or all of its repayment obligation of \$25,000,000 would be excused. And all this on borrowed funds and without any commitment of capital.

There was a catch, however. If the baht depreciated during the investment year, and the yen remained stable against the dollar or appreciated, there would be no hedge. Morning Glory's obligation to pay KEB, and KEB's obligation, in turn, to pay Morgan was "absolute."

The Morning Glory/KEB Total Return Swap Agreement contained a clause, clause 2(e), to guard against that contingency of a depreciating baht losing its historically-fixed ratio of five-to-one against the yen. Under clause 2(e), Morning Glory was given the right to demand, upon two days' written notice, that its forward position be unwound. [FN6]

FN6. The requirement of a writing was incorporated into the Swap Agreement by reference to another, unexecuted Master agreement, the form provided by the International Swaps and Derivatives Association, Inc. (the "ISDA Master Agreement" or "ISDA form").

To recapitulate and elaborate: Under the Total Transaction Return Swap Transaction agreement at maturity:

(a) Morning Glory was to receive interest at the rate of 6.05 per cent of \$25,000,000, in the amount of \$1,512,500; plus a discount of its

repayment obligation at the rate of 3.25 per cent of \$25,000,000, in the amount of \$812,500; less \$70,000 in a fee to KEB; or a total interest rate profit, in dollars, of \$2,255,000, plus the possibility of additional gain if the baht were to appreciate in relation to the dollar. Morning Glory, Korea Life's SPE, had this profit possibility on the basis entirely of borrowed funds, all off-shore and away from the scrutiny of Korea Life's regulators, and without having to commit any capital to the transaction.

(b) If, however, the baht were to depreciate against the dollar, requiring more baht at maturity to purchase a dollar than at inception, Morning Glory was to pay "the absolute value of the Baht Payment." That is, Morning Glory would be required to purchase as many baht as would be required to purchase five times \$25,000,000. Furthermore, if it lacked sufficient assets to pay the liability, Korea Life committed by a separate Letter of Commitment to KEB and to Morning Glory that, "subject to any restrictions under Korean Law ... it shall subscribe for, or cause to be subscribed for, additional Shares in the amount sufficient to ... pay all liabilities of [Morning Glory]" to KEB and through KEB, to Morgan. Thus, the real risk inherent in the swap transactions was to be incurred by Morning Glory, if the baht depreciated in value against the dollar.

(c) The Morning Glory/KEB agreement, however, provided a limit to this "absolute" risk. Section 2(e) of that agreement provided that Morning Glory "has the *431 right as of any Business Day on a full two-way payments basis to terminate the Transaction at the prevailing market value, as determined by the Calculation Agent in a reasonable and fair commercial manner, on at least two (2) Business Days prior notice." The "Calculation Agent" is defined in the confirmation agreement as Morgan. In other words, Morning Glory had a stop-loss provision, enabling it to demand settlement two days after notice, at any time during the one-year period of the transaction. The counterpart agreement between KEB and Morgan, however, did not contain a like provision, and

the parties offered no explanation to account for this omission.

C. Documents Comprising the Agreement

The two Total Return Swap Transaction confirmation agreements providing the formulae comprising the transaction described above were to be "governed by and construed in accordance with the laws of the State of New York," and were to "supplement, form a part of, and be subject to" a Master Agreement, in the form published by the International Swaps and Derivatives Association, Inc. ("ISDA Master Agreement" or "ISDA form"). The ISDA Master Agreement in use when the Morning Glory Transactions were executed includes an integration clause, providing that the Master Agreement "constitutes the entire agreement and understanding of the parties with respect to its subject matter and supersedes all oral communication and prior writings with respect thereto." The Master Agreement also requires that any notice or other communication be in writing. The parties never actually signed the Master Agreement.

The parties (Morning Glory, KEB and Morgan) also entered into a Security Agreement, and KLI executed and delivered a Letter of Commitment ("LOC") to Morning Glory and KEB, on January 15, 1997, in connection with the Total Return Swap Agreements. The Security Agreement required Morning Glory to satisfy KEB's obligations under KEB's swap agreement with Morgan. The LOC committed KLI to contribute capital to Morning Glory by purchasing additional of its shares, to the extent Morning Glory could not pay KEB, or if Morning Glory's "Net Asset Value" fell below 100 percent of its liabilities under the swap. KLI represented, in its LOC, that it was "duly incorporated and validly existing under the laws of the Republic of Korea as a limited company, [had] full power, authority and legal right to enter into and perform [its] obligations under this letter and ha[d] taken all necessary action (corporate and otherwise) to authorize the execution, performance and delivery" of the LOC, and that the LOC "ha[d]

been duly authorized, executed and delivered by us and constitutes our valid and binding obligation."

All of these documents—the Security Agreement, the LOC, and the Total Return Swap Transaction confirmation agreements—were preceded by an Indicative Term Sheet, delivered by Morgan and executed by KLI and KEB on January 10, 1997, with KEB acting in the transactions "for and on behalf of Morning Glory Investment Limited." The term sheet set out the transactions that were later separately reflected in the two Total Return Swap Agreements, one between Morning Glory and KEB, and the second between KEB and Morgan; KLI's obligations were later expressed separately in the LOC and the Security Agreement.

D. Background to the Total Return Swap Agreements

The agreements discussed were entered into after extensive contacts and negotiations *432 between the parties. Early in 1996, Dr. Chang Hyun Chi, an officer of Promax International ("Promax"), a Korean company which marketed and sold Morgan's financial products, approached Chae Wook Noh of KLI to suggest that KLI enter into derivative financial transactions based on "synthetic low-cost yen financing." The idea conveyed by Chi to Noh (from Morgan's agent to KLI) was to simulate a borrowing of yen in order to capture low interest rates charged by Japanese financial institutions, and to use such a borrowing as leverage in purchasing common stocks.

Dr. Chi's proposals evolved from such leveraged stock purchases to currency proposals, and to a yen-financed set of forward contracts for the Thai baht as hedges against possible fluctuations in the yen. Dr. Chi proposed that KLI's investment should amount to \$100 million, and suggested that there would be little or no risk involved in the transaction. His expressed assumption was that the Thai baht was a stable currency, tied to other stable currencies at a fixed exchange rate, and that the Thai government and its

central banking policies defended that stability by purchases and sales on international currency markets. Dr. Chi proposed that KLI could benefit by a rate of return of as much as 16 per cent, for an investment that was substantially risk-free. Dr. Chi's proposal also recognized that Korea's insurance regulators might look askance at an unconventional investment, not high-grade debt securities that Korean regulatory policies mandated for regulated life insurance companies. Dr. Chi proposed that the transaction need not be disclosed if it was done entirely through off-shore special purpose entities.

The proposal was attractive to Mr. Noh and his colleagues at KLI. KLI would be 50 years old in 1996, and was the oldest, and the third largest, life insurance company in Korea. Its management in 1996 prided itself on its rapid growth, on a 30.7 percent increase in new business, and a 25.2 percent increase in premium income, compared to the preceding year. It had assets of \$12,360,000,000 but liabilities almost as much-\$12,312,000,000. Its capital stood at \$38 million, but its income was disproportionately low, \$7 million for the year ended March 31, 1996, and \$8 million the previous year. Its earned surplus as of March 31, 1996 was only \$10 million.

KLI's management stated in its annual report for the year ended March 30, 1996 that it sought "maximum return" for policyholders, and to "guaranty the best and most affluent life possible for [its] clients." However, KLI's annual report also stated that KLI was operating in a field of "boundless competition," as Korea liberalized its financial markets and as "banking, securities firms, investment trust companies and other financial institutions began overlapping with each other," introducing downward pressure on interest rate returns. Clearly, such downward pressure could frustrate the goals expressed by KLI management.

Hence, Dr. Chi's proposals to Mr. Noh were interesting to KLI. But KLI's International Department, after reviewing the proposals, expressed concern about the risks.

KLI's "International Department" was a small department, and had responsibility for KLI's limited foreign investments. In a short memorandum of December 17, 1996 directed to the "Director of the Stock Department" ("the International Department Memo"), the Department expressed concerns that the proposed size of the Morning Glory transaction, \$100 million, and its involvement with foreign financial institutions would attract the scrutiny of Korean regulators and the government auditing *433 agency. The memorandum was also critical of the exchange risks that would be borne by KLI:

The current deal is based on the anticipation of a stable trend that Japanese Yen and Thai Baht will change in the same direction, and assumes the multiple factor for the change rate of both currencies as 5. The pertaining calculation is based on the purchase of 5 forward products that are discounted by 3.2%. However, recently, the increase of the current account deficit of Thailand and instability of its economic condition is causing more demand for changes in the system determining the exchange rate for the Thai Baht and for devaluation. Therefore, it should not be overlooked that there is a possibility that the multiple relationship of the change rate for these two currencies may become lower or the direction of changes may reverse.... In case that the devaluation rate for the Baht against the Yen becomes greater than 1/5, it may result in losses at maturity and a risk of wiping out the profit (7.8%) from the difference in interest rates.

The memorandum warned that the proposed transaction was not cancelable before maturity if market conditions became unfavorable.

Promax and Dr. Chi responded the next day, on December 18, 1996. In response to the concerns about the attitude of Korean regulators, Promax stated that "we can manipulate the process in many ways so that it won't be conspicuous even to market experts not to mention the supervisory agencies," and that as to the complexity of the deal, the "structure of the deal only looks complex to ensure the safety and confidentiality of the

deal." As for the concern that KLI would bear substantial risk, Promax explained that there would be "a certain degree of currency risk" in return for increased return. As to the risk of baht devaluation, Promax pointed out that the Thai government had defended the baht in the past, and would be unlikely to make drastic changes in currency policy: "Even if the government indeed abandons the existing currency strategy, devaluation of the Baht would be an extremely radical measure." An article from the October 22, 1996 Asian Wall Street Journal was appended, which noted deterioration in Thailand's trade balance and other potential pressures on its currency, but which concluded that concerns about shifts in the Thai government's currency policy were perhaps overstated. Promax concluded with its opinion that "[t]he anticipated rate of return for this deal is 16% and the only risk is the devaluation of Baht. Considering the Baht exchange rate and the economic outlook, the possibility for devaluation is extremely low." Finally, Promax commented that if market conditions shifted, the transaction could be undone by executing a "reversing transaction."

KLI's Equity Department agreed that the transaction should be executed, but based on the concerns of the International Department, concluded that it should reduce the borrowed amount from \$100 million to \$25 million. In addition, section 2(e) to the Morning Glory/KEB swap confirmation, giving Morning Glory the right to cause the settlement date of the transaction to be accelerated, from January 30, 1998 to two days after Morning Glory's demand to KEB, was added as a "reversing transaction" in response to the International Department's worries about not being able to cancel the transaction before maturity.

E. The Value of the Thai Baht Plummet

As of January 1997, and for years previous to that, the Thai government had *434 maintained a policy of protecting the exchange rate of the baht relative to a "basket" of foreign currencies, including the U.S. dollar, the Japanese yen and the German mark. The

Bank of Thailand had allowed the baht to trade within a specified "band" of value relative to the basket of currencies.

The stable baht marked growing prosperity of the southeast Asian economies, a prosperity which, towards the end of 1996, had shown signs of weakening. On July 2, 1997, the Thai government dramatically changed its currency policy, unhinged the relationship of the baht relative to the fixed basket of currencies and allowed it to float free on international currency markets, resulting in a substantial devaluation of the baht relative to the dollar.

The baht's precipitous and substantial decline (from a stable value of approximately 26 baht to the dollar in early 1997 to a value of over 50 baht to the dollar in January 1998) generated a large potential liability for Morning Glory under the baht formula of the swap agreements. Ultimately, due to the baht's decline, the "Baht Payment Amount" owed under the swap formulas by Morning Glory to KEB, and in turn owed by KEB to Morgan, amounted to approximately \$66 million, in addition to the 96.75 percent of the \$25 million notional amount that Morning Glory was obligated to repay. Under the LOC and Security Agreement, KLI, by its obligation to purchase sufficient shares of Morning Glory to enable Morning Glory to satisfy its debt to KEB, and KEB, its debt to Morgan, was the guarantor of this \$90 million obligation of Morning Glory, through KEB, to Morgan.

F. Morning Glory's Demand to Unwind the Swap Agreements.

Beginning on or about July 8, 1997, KLI began requesting that Morgan unwind the transaction, first orally and then, on October 16, 1997, by written demand by Morning Glory and KLI to KEB pursuant to clause 2(e) of the Morning Glory/KEB Agreement. Morgan, in response to the initial oral demands, expressed concern about unwinding the transaction because of inadequate liquidity in the baht currency market, and instructed KLI to send any request to unwind to KEB. Following these instructions, on

October 16, 1997, B.C. Kim, of KLI, on behalf of I-Soo Joe, the Director of KLI's International Department and a director at Morning Glory, gave written demand by telefax to Joongseok Ahn of KEB, requesting that the baht part of the transaction be unwound. KEB relayed KLI's telefax to Morgan. Neither KEB nor Morgan acted on Morning Glory's demand, then or in the conversations and meetings that followed. Morgan blamed KEB, and KEB blamed Morgan, as the party refusing to unwind the transaction.

G. Baht Leg of Swaps Actually Unwound On January 7, 1998

On January 7, 1998, 23 days before the termination date of the Morning Glory Transactions, Morgan executed an unwind of Morning Glory's baht positions, at the value of 54.57 Thai baht to the U.S. dollar. On January 27, 1998, Morgan made demand on KLI, that KLI pay the entire amount due--\$66,304,746 under the formulae, plus 96.75 percent of the \$25 million borrowing, or \$90,492,246 in all. As payment, KLI/Morning Glory, KEB, and Morgan entered into a Loan Facility Agreement, pursuant to which KLI (through Morning Glory) (a) repaid the 96.75 percent of the original \$25 million borrowed; (b) repaid another \$16.3 million (approximately) in cash; and (c) borrowed \$50 million from Morgan at an interest rate of LIBOR plus 700 points (7 per cent over *435 LIBOR), payable semi-annually each year until the maturity date of January 30, 2000, thereby repaying the \$90,492,246.

KLI now sues for a return of the sum it paid, on the bases, alternatively, of fraud, negligent misrepresentation, illegality, violation of New York's anti-gambling statute, breach of contract, unjust enrichment, and commercial frustration or impracticability. After extensive discovery, Morgan moved for summary judgment, contending that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law on all of plaintiffs' claims.

DISCUSSION

(C) 2005 Thomson/West. No Claim to Orig. U.S. Govt. Wo

A. Summary Judgment Standards

Summary judgment is warranted if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits ... show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). A "genuine issue" of "material fact" exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Although all facts and inferences therefrom are to be construed in favor of the party opposing the motion, see *Harlen Assocs. v. Village of Mineola*, 273 F.3d 494, 498 (2d Cir.2001), the non-moving party must raise more than just "metaphysical doubt as to the material facts," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). "[M]ere speculation and conjecture is insufficient to preclude the granting of the motion." *Harlen*, 273 F.3d at 499. "If the evidence is merely colorable or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249-50, 106 S.Ct. 2505 (citations omitted). I find that there are no genuine issues of material fact on plaintiffs' fraud, negligent misrepresentation, unjust enrichment, frustration, impracticability, illegality, and gambling claims, and, therefore, on these claims, summary judgment is granted to defendant. Likewise, there are no genuine issues of material fact on plaintiffs' breach of contract claim, and on the undisputed evidence presented by the parties, I find that summary judgment on that claim is appropriately granted to plaintiffs. [FN7]

FN7. Although plaintiffs have not moved for summary judgment, a motion for summary judgment authorizes the district judge to search the record, and to grant summary judgment to the party entitled thereto, regardless whether that party was the moving party. See *Coach Leatherware Co. v. AnnTaylor, Inc.*, 933 F.2d 162, 167 (2d Cir.1991); *Project Release v. Prevost*, 722 F.2d 960, 969 (2d Cir.1983).

B. Plaintiffs' Fraud and Negligent Misrepresentation Claims

Plaintiffs allege in their complaint that Morgan, through Dr. Chi and Promax, fraudulently induced plaintiffs to enter into the Morning Glory transactions by misrepresenting the stability of the Thai baht. Plaintiffs also allege that Dr. Chi and Morgan did not use reasonable care in explaining to plaintiffs the nature and risks of the Morning Glory transactions, and that this lack of reasonable care constituted negligent misrepresentation.

[1][2] To prove fraud, plaintiffs must show: (1) the defendant made a material false representation, (2) the defendant intended to defraud the plaintiffs thereby, (3) the plaintiffs reasonably relied upon the representation, and (4) the plaintiffs suffered damage as a result of such reliance. *Banque Arabe et Internationale D'Investissement* *436 v. *Maryland Nat'l Bank*, 57 F.3d 146, 153 (2d Cir.1995). To prove negligent misrepresentation, plaintiffs must show that (1) the defendant had a duty, as a result of a special relationship, to give correct information; (2) the defendant made a false representation that it should have known was incorrect; (3) the information supplied in the representation was known by the defendant to be desired by the plaintiffs for a serious purpose; (4) the plaintiffs intended to rely and act upon that representation; and (5) the plaintiffs reasonably relied on it to their detriment. *Hydro Investors, Inc. v. Trafalgar Power, Inc.*, 227 F.3d 8, 20 (2d Cir.2000).

[3] Central to both of these claims is that plaintiffs actually and reasonably relied on Morgan's representations in deciding to enter into the Morning Glory transactions. Without such reliance, there is no cause of action for fraud or negligent misrepresentation. See *Kregos v. Associated Press*, 3 F.3d 656, 665 (2d Cir.1993). The evidence shows that plaintiffs could not reasonably have relied on Dr. Chi and Promax's representations about the nature of the transaction or the stability of the Thai baht, and without this reliance, plaintiffs' claims of fraud and of negligent

representation must fail.

KLI argues that Dr. Chi misrepresented that the nature of the swap transaction was a hedge against yen appreciation, but it is plain that plaintiffs did not rely on this alleged misrepresentation in deciding whether to enter into the transaction. Plaintiffs did not enter into the transaction in reliance on the belief that they were entering into a synthetic low-cost yen-financing deal. The memoranda between Promax and KLI make it clear that both parties understood that the transaction was structured in a way as to appear to be yen-financing, when its focus was a bet on the stability, or instability, of the baht. For example, Promax's memo stated that "the Thai Baht portion [of the deal] corresponds to the income and risk" of the deal. Moreover, it cannot be said that KLI did not understand the nature of the transaction; both its Equity Department and the International Department did analyses of the transaction, and fairly identified the risks involved. And the terms of the Total Return Swap Agreements that KLI reviewed and executed provided notice that the baht might not hold its value and that the nature of the transaction was speculative. The agreements provided that if the value of the baht fell proportionately more than the yen, Morning Glory would have to pay KEB an amount in U.S. dollars that would vary directly and by multiples according to how much decrease would be experienced in the baht's value in relation to the yen and the dollar. In agreeing to take part in the Morning Glory transactions, plaintiffs were on notice that the Thai baht could fall. Indeed, the only way to understand the Morning Glory Transactions is as a bet that the baht would not decrease more than the yen, in relation to the dollar, between January 21, 1997 and January 30, 1998.

Furthermore, although KLI had not before taken part in a total return swap transaction, and the transaction was complicated and difficult to comprehend, the parties to the transaction were sufficiently sophisticated to understand it. They understood that currencies fluctuate. Indeed, notwithstanding

opinions by Dr. Chi, on behalf of Morgan, that the Thai government probably would not eliminate the tie between the baht and the basket of stable currencies, the possibility of a substantial devaluation of the Thai baht within the year of the proposed transaction was a risk in the transaction that some employees of KLI considered inappropriate for a life insurance company. Thus, KLI's International *437 Department recommended that KLI not take part in the transaction because of concern about the current account deficit of Thailand and a perceived instability of its economic condition. These concerns caused KLI to reduce the size of the proposed transaction, from \$100 million to \$25 million.

Promax itself, in responding to the KLI International Department Memo, conceded that there was "a certain degree of currency risk," while minimizing the possibility that the Thai government would untie the baht. The Asian Wall Street Journal article of October 22, 1996, which was attached to Promax's memo, reported deteriorations in the stability of the Thai economy and its currency and differing opinions of financial analysts, some expecting a "financial meltdown" in Thailand, and some expressing the view that a devaluation was unlikely. The memorandum concluded that "it is difficult to make any predictions" about the currency situation.

There is therefore no merit to KLI's contention that it was deceived by Promax and Morgan. It was clear to KLI that Dr. Chi's representations were opinions incident to a selling effort, that others disagreed with his opinions, and that there could not have been justifiable reliance by KLI on Dr. Chi's opinions concerning the continuing financial strength of the Thai baht. See *Dooner v. Keefe, Bruyette & Woods, Inc.*, 157 F.Supp.2d 265, 278 (S.D.N.Y.2001) ("A representation with respect to an unreckonable future phenomenon ... in circumstances that could neither be foreseen with certainty nor controlled with precision is too heavily freighted with prophecy, speculation and chance to support a cause of action for fraud.") (internal citation omitted); *Channel Master Corp. v. Aluminium Ltd. Sales*, 4 N.Y.2d 403,

176 N.Y.S.2d 259, 151 N.E.2d 833, 836 (1958); *Shoucair v. Read*, 88 A.D.2d 718, 451 N.Y.S.2d 281, 283 (3d Dep't 1982).

In sum, KLI could not reasonably have relied on any of the representations made by Morgan, directly or through Dr. Chi or Promax. Plaintiffs' claims alleging fraud and negligent misrepresentation cannot succeed. Counts One and Two are dismissed.

C. Plaintiffs' Illegality Claim

Plaintiffs argue that KLI's obligation to pay Morgan under the Letter of Commitment and Security Agreement that it executed in favor of Morgan was illegal, as a guaranty forbidden by the Korean laws pertaining to life insurance companies. [FN8] Plaintiffs seek the return of the \$66.3 million in cash and notes that KLI paid Morgan. Plaintiffs cite Article 19 of the Korean Business Insurance Act and Article 61 of the Insurance Supervision Regulations in support of their position.

FN8. Although plaintiffs' submissions and contentions focused on the Letter of Commitment alone, the Security Agreement should be read together with the LOC. The LOC required KLI, in the event that Morning Glory lacked funds to discharge its obligation to KEB, and KEB to discharge its obligation to Morgan, to contribute funds to Morning Glory sufficient to enable Morning Glory to pay KEB, and KEB to pay Morgan. The Security Agreement assured Morgan that Morgan would be the beneficiary of the payment obligations of the LOC, and Morning Glory, KEB, and Morgan were all parties to the Security Agreement. The two documents together make it clear that KLI had obligated itself to contribute the funds that were to be used to enable the obligors of Morgan to discharge their debts to and for the benefit of Morgan. KLI's obligation was that of a guarantor, to assure the payment owed to Morgan by Morgan's direct and indirect obligors.

Article 19 of the Korean Business Insurance Act requires an insurer, in operating its property, to "work to ensure the safety, profitability, liquidity and public interest."

***438** Article 61 of the Insurance Supervision Regulations, promulgated by the Insurance Regulatory Authority pursuant to the Business Insurance Act, provides that "[a]n insurance company shall not provide its assets as security for a third party or guaranty an indebtedness of a third party." KLI argues that the Letter of Commitment (and the Security Agreement), by providing that KLI would contribute funds to Morning Glory sufficient to enable Morning Glory to pay its debt to KEB, and thereby enable KEB to pay its counterpart debt to Morgan, amounted to a guaranty of the Total Return Swap Agreements that was ultra vires and, therefore, null and void. KLI further contends that because the LOC (and the Security Agreement) are illegal and cannot be enforced against KLI, Morgan should be required to repay its alleged gain as money it unlawfully had and received.

[4] In cases alleging a violation of foreign law, the existence of illegality is to be determined by the local law of the jurisdiction where the illegal act is done, while the effect of illegality upon the contractual relationship is to be determined by the law of the jurisdiction which is selected under conflicts analysis. Restatement (Second) of Conflict of Laws § 202 cmt. c (1971); *Dornberger v. Metropolitan Life Ins. Co.*, 961 F.Supp. 506, 533 (S.D.N.Y.1997). Thus, whether the LOC was an illegal contract must be determined under Korean law. Much expert testimony has been provided on this issue, by affidavits, depositions, and direct and cross-examinations at an evidentiary hearing before me. I am authorized to resolve the issues of Korean law as a matter of law, and I may consider any relevant material or source, whether or not admissible under the Federal Rules of Evidence. Fed.R.Civ.P. 44.1; *Curley v. AMR Corp.*, 153 F.3d 5, 13 (2d Cir.1998).

The experts dispute whether the LOC constitutes a "guaranty" in violation of Article 61 of the Business Insurance Act and, if it is a guaranty, whether Korean law requires that a transaction based on such a guaranty should be invalidated.

The LOC provides that if the Net Asset value of Morning Glory falls below "100 percent of the Liabilities on any Valuation Date," that KLI, "subject to any restrictions under Korean law, shall subscribe for ... additional Shares at the Net Asset Value per Share ... so that the New Asset Value of [Morning Glory] shall exceed 102 percent of the Liabilities." The LOC also requires that if Morning Glory has insufficient assets to pay its liabilities in full on the due date, KLI will subscribe for additional shares in an amount sufficient to enable Morning Glory to pay all liabilities in full. The purpose of the LOC was to assure that Morning Glory would have sufficient funds on January 30, 1998, when the Total Return Swap transactions came due, or on any other Valuation Date, to pay KEB, and thus to enable KEB to fulfill its obligation under its Total Return Swap Agreement with Morgan.

Morgan's expert, Dr. Jin Su Yune, a Professor of Law at Seoul National University who specializes in the Korean Civil Code, testified that in his opinion the LOC was not a guaranty and that, even if it were, Korean law would not invalidate the agreement. Dr. Yune expressed the opinion that, since "guaranty" was not defined by the Business Insurance Law, the definition of the Civil Code, Article 428(1), should be followed: one who is "liable to perform the obligation that the principal obligor has failed to perform." Dr. Yune argued that since Morning Glory's obligation to KEB was to pay money, while KLI's obligation under the LOC was to subscribe for additional shares of Morning ***439** Glory, the obligations were not identical, and do not constitute a guaranty.

Dr. Yune expressed the opinion, based on a 1989 decision of the Korea Supreme Court, that even if the LOC did constitute a guaranty, Korean law would not invalidate it. That decision held that while an insurance company's guaranty of \$2 million violated the Business Insurance Act, the guaranty did not have a "clear anti-social or unethical nature," and did not have to be invalidated in order to achieve the purpose of the business insurance law. 88 DaKa 2233 (S.Ct. Korea 1989). Thus,

according to Dr. Yune, even if a guaranty violates Article 61, it will not necessarily be invalidated by a Korean Court.

KLI's expert, Dr. Kon Sik Kim, a Professor of Law at Seoul National University who specializes in corporate law, securities regulations, insurance law, and commercial law, testified in disagreement with Dr. Yune. Dr. Kim expressed the opinion that the LOC constituted a guaranty. In his opinion, the obligation in the LOC requiring KLI to subscribe for additional shares of Morning Glory in order to specifically allow Morning Glory to perform its obligation to KEB constituted a payment of money to fulfill the debt of the obligor to the obligee, and was indistinguishable from a guaranty. And the guaranty, Dr. Kim concluded, put KLI in the position of being responsible for up to \$125 million in liabilities, exactly the kind of transaction-one that would expose an insurance company to serious financial risk-that Article 61 sought to avoid. Dr. Kim distinguished the 1989 Supreme Court case upon which Dr. Yune relied as involving a guaranty of only \$2 million, which did not implicate the integrity of a financial institution of the size and prominence of KLI.

Dr. Kim supported his view with a 2002 decision of the Korea Supreme Court, invalidating a guaranty of a mutual financing company. The case, decided under the Korean Savings and Loan Act, held that "a mutual financing company cannot make borrowings in excess of its equity," and that, if it did so, any such undertaking would violate the law and be deemed void. 2000 Da 42625 (S.Ct. Korea 2002). Dr. Kim analogized this case to the instant one, opining that the Savings and Loan Act, which prevents savings and loan associations from borrowing in excess of shareholders' equity, expressed the same policy as that which informed the Business Insurance Act, and that the LOC should be nullified pursuant to Article 103 of the Korean Civil Code, which provides that "[a] juristic act which has for its object such matters as are contrary to good morals and other social order shall be null and void."

A disagreement of the experts as to an issue of foreign law does not foreclose the granting of a motion for summary judgment. See Fed. R.Civ.P. 44.1; *Merican, Inc. v. Caterpillar Tractor Co.*, 596 F.Supp. 697, 700 (E.D.Pa.1984).

[5] A "guaranty" is a promise to answer for the payment of some debt, or the performance of some duty, in case of the failure of another who is liable in the first instance. Black's Law Dictionary 712 (7th ed.1999). The LOC was intended to obligate KLI to subscribe for additional Morning Glory shares in the event of Morning Glory's default, thus infusing money into Morning Glory to enable it to pay, as obligor, the debt it owed to Morgan, through KEB. The Security Agreement made Morgan the beneficiary of those funds, thus providing a direct link between KLI and Morgan by which KLI was to satisfy Morning Glory's debt to KEB, and KEB's debt to Morgan. Clearly, KLI's promise, under the Letter of Commitment it executed and delivered to Morgan and the Security Agreement, was a promise to *440 answer for the debt of Morning Glory, for the benefit of Morgan. Under Article 428(1) of the Civil Code, the promise of KLI in the LOC made KLI "liable to perform the obligation that the principal obligor [Morning Glory] has failed to perform," by infusing money into Morning Glory to enable it to pay KEB, and KEB to pay Morgan. Effectively, KLI was liable under the LOC to perform the obligation that Morning Glory was to perform, even if the obligation technically had formal differences. KLI's undertaking in the LOC was the functional equivalent of a guaranty. And as a guaranty, it violated Article 61 of the Business Insurance Law.

The question then becomes whether or not the LOC should be invalidated. In the 1989 case, the Korean Supreme Court held that the guaranty did not "lack [a] clear anti-social or unethical nature," that Article 61 was regulatory in nature and did not give rise to a private right of action and, accordingly, the lower court could refuse to void the guaranty under Article 61, even if it violated the law. But Dr. Yune's broad reading of the decision,

that Article 61 should never be applied to invalidate a decree, goes too far. I believe that Dr. Kim's explanation, that the more "anti-social or unethical" the nature of the guaranty and the greater the effect on the solvency of the issuer, the more violative of the purpose behind the Business Insurance Act, and the more likely a court would invalidate it, is the better understanding of what the Korean Supreme Court would hold. Dr. Kim's interpretation better reflects the policy of the statute, to protect the interest of "insurance policy holders, insurance policy beneficiaries, and other interested parties through efficient guidance and supervision of the insurance business," and to avoid putting these insurance policy holders and beneficiaries at risk by a profligate commitment of guaranty. See 88 DaKa 2233.

However, it is unclear what the effect of Section 2(e) would be on this analysis. Section 2(e), by inserting a stop-loss provision into the agreement with KEB, and, by implication, into KEB's swap agreement with Morgan (see discussion, next section), served to mitigate Morning Glory's, and thus KLI's, exposure, and limited the open-ended feature of KLI's guaranty.

I asked Dr. Kim if section 2(e) of the Morning Glory/KEB agreement might affect the outcome in this case. Dr. Kim had not considered the question before testifying but, after reviewing the question overnight, expressed the opinion that the guaranty still violated Article 61 because it depended, for its application, on the willingness of employees of an insurance company to concede that they had improperly committed to a guaranty that the law did not authorize, and the main purpose of Article 61 was to prevent such a guaranty altogether.

[6] A district judge in New York should hesitate to declare his opinion on such a difficult and disputed point of foreign law. Fortunately, it is not required that I do so, for the effect of illegality upon a contractual relationship is determined, not by Korean law, but by the law of the jurisdiction which is selected under conflicts analysis. Dornberger,

961 F.Supp. at 533. Because this is a diversity case, the conflicts law to be applied is that of New York. *Wm. Passalacqua Builders, Inc. v. Resnick Developers S., Inc.*, 933 F.2d 131, 137 (2d Cir.1991); *Fuchsberg & Fuchsberg v. Chicago Ins. Co.*, No. 00 CIV. 3118, 2001 WL 484013, at *4 (S.D.N.Y. May 7, 2001). Here, the swap agreements contained a clause providing that New York law was to govern disputes among the parties. Under New York conflicts analysis, the choice of law agreed to by the parties is to be given presumptive effect. *441 *Roby v. Corp. of Lloyd's*, 996 F.2d 1353, 1362 (2d Cir.1993) ("[C]hoice of law clauses are presumptively valid where the underlying transaction is fundamentally international in character."); see *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972). Both parties have cited to New York law in support of their respective contentions about the effects of invalidity, recognizing that the issue, whether an allegedly invalid contract can be enforced, must be determined by New York law. *The Bremen*, 407 U.S. at 15, 92 S.Ct. 1907; see also *Fricke v. Isbrandtsen Co.*, 151 F.Supp. 465 (S.D.N.Y.1957); Restatement (Second) of Conflict of Laws § 187 (1989). I thus proceed to consider if the LOC would be invalidated under New York law.

[7][8][9] Under New York law, an illegal contract *malum in se* is unenforceable and will be voided. *Tracy v. Talmage*, 14 N.Y. 162, 179 (1856). A contract that is illegal because performance is *malum prohibitum* may also be voided if: (1) the contract is still executory; or (2) the parties are not in *pari delicto*. See *id.* at 181-82; see also *Spring Co. v. Knowlton*, 103 U.S. 49, 57-58, 13 Otto 49, 26 L.Ed. 347 (1880); *Farrington v. Stucky*, 165 F. 325, 330-31 (8th Cir.1908). New York courts will also ascertain if the statute that was violated was enacted to protect public health and safety, and whether the party seeking to assert the defense of illegality is part of the class of persons intended to be protected by that statute. *United States SBA v. Citibank, N.A.*, No. 94 Civ. 4259, 1997 WL 45514, at * 10 (S.D.N.Y. Feb. 4, 1997); *Lloyd Capital Corp. v. Henchar*, 80 N.Y.2d 124, 589 N.Y.S.2d 396, 603 N.E.2d 246, 248 (N.Y.1992). [FN9]

FN9. I need not reach the issue whether the Korean Insurance Laws were enacted to protect public health and safety. As explained by Dr. Kim, the protections of the Korean Insurance Laws were intended to benefit, not only shareholders and beneficiaries of insurance companies, but also the public interest in a sound economy as affected by Korean financial institutions, and to assure the public generally of reliable life insurance protection. However, Korea Life brings suit on behalf of itself, and not on behalf of its beneficiaries or the general public. Because Korea Life is not of the class protected by the Korean Insurance Laws, it cannot rely on the defense of illegality as a grounds to nullify its contract. United States SBA, 1997 WL 45514, at *10; Richards Conditioning Corp. v. Oleet, 21 N.Y.2d 895, 289 N.Y.S.2d 411, 236 N.E.2d 639, 640 (1968); John E. Rosasco Creameries v. Cohen, 276 N.Y. 274, 11 N.E.2d 908, 909 (1937).

[10] The transactions made by KLI and Morgan and their respective affiliates, and the documents that reflected them, were not evil in themselves (*malum in se*). The purpose of the parties to evade Korean regulation and to enter into an inappropriate transaction may have been questionable, but it does not amount to moral turpitude. The transactions and related documents may be characterized as *malum prohibitum*. The issue regarding enforceability of such transactions is whether or not they remain executory, and whether or not the parties were in *pari delicto*.

[11] New York courts will invalidate a contract that is executory, on the theory that where the illegal contract is incomplete, there is still a *locus penitentiae*, so that a disaffirmance of the illegal conduct by the court is appropriate. See *Spring Co.*, 103 U.S. at 60, 103 U.S. 49. When the contract has been executed, however, a New York court will not invalidate it. *Id.* at 58; *Tracy*, 14 N.Y. at 181. Here, KLI fulfilled its obligation under the LOC, paying in full its debts under the agreement. The contract was no longer executory.

[12][13] Furthermore, in New York, a contract generally will be voided only when the parties to the illegal transaction *442 are

not equally guilty. *Tracy*, 14 N.Y. at 181 (distinguishing between "those illegal contracts where both parties are equally culpable, and those in which, although both have participated in the illegal act, the guilt rests chiefly upon one"). Although KLI claims that it was the naive, innocent party in this transaction, the evidence shows that both KLI and Morgan intended to engage in a transaction in violation of Korean law, and endeavored to escape the eyes of regulators by setting up off-shore shell corporations and structuring the transaction as to be virtually impossible to understand to a party not familiar with it. Thus, KLI entered the deal notwithstanding its International Department's warning that the deal could be subjected to auditing by regulators, and Promax's memo to KLI advised that the structure of the deal was meant to "look complex to ensure the safety and confidentiality of the deal." Promax's memo advised KLI that there was "no way for any third party to know the specifics of the deal unless it is announced by the parties to the deal," and that KLI would have "no part" in the offshore transactions. This exchange plainly shows that KLI and Morgan were looking to evade Korean insurance regulations, and that both parties were culpable in taking part in a transaction that they knew was constructed specifically to do so.

Moreover, it is clear that both parties agreed to the terms of the LOC and the Security Agreement, and that KLI was not tricked into engaging in a transaction that was illegal. Indeed, KLI represented and warranted in the LOC that it had the "full power, authority and legal right to enter into and perform" the obligations it undertook thereunder, despite the fact that such obligations violated Korean law. As the Korean party to the agreement, KLI could be charged with at least as much familiarity, if not more, with Korean law as Morgan, and in making its representations, should have been aware of the potential illegality of its guaranty. Under such circumstances, the LOC will not be invalidated. Morgan's motion for summary judgment on this claim is granted, and KLI's

illegality claim is dismissed.

D. Plaintiffs' Gambling Claim

[14] Plaintiffs' sixth cause of action alleges that the transactions at issue were "bets" in violation of the New York Anti-Gambling Statute. See N.Y. G.O.L. § 5-401. Although I have characterized KLI's swap agreements as "bets" and "speculations" on currency fluctuations, the transactions were in the form of forward contracts, swaps and derivatives. Derivatives transactions, forward contracts and swap agreements in currencies and commodities are not considered illegal gambles, and do not violate New York's gambling statute. See *General Elec. Co. v. Metals Res. Group*, 293 A.D.2d 417, 741 N.Y.S.2d 218, 219 (1st Dep't 2002) (holding that a commodities swap agreement is "not an illegal contract to gamble ... [and is] exempt from the strictures of ... § 5-401"). As such, summary judgment is granted to defendant on this claim.

E. Plaintiffs' Contract Claims

The Total Return Swap Transaction Confirmation Agreement between KEB and Morning Glory contained a stop-loss provision giving Morning Glory "the right as of any Business Day on a full two-way payments basis to terminate the Transaction at the prevailing market value, as determined by the Calculation Agent in a reasonable and fair commercial manner, on at least two (2) Business Days prior notice." Thus, Morning Glory, upon notice to KEB, could demand that its forward contracts for baht and yen be unwound, at market prices determined by Morgan, the Calculation Agent designated under the *443 Agreement. There was no correlative provision, however, in the KEB/Morgan Total Return Swap Transaction Confirmation Agreement.

KLI alleges that, on or before October 16, 1997, it gave written notice to KEB and to Morgan, demanding that its forward contracts be unwound, and that both failed and refused to do so. The yen forward contract was unwound on October 9, 1997, without material

financial consequence. However, the baht forward contract transaction was not unwound until January 7, 1998, by which time the value of the baht had depreciated considerably, almost doubling KLI's loss from the date of demand.

On October 16, 1997, B.C. Kim, a KLI manager in its Fixed Income Department, sent a telefax to Joongseok Ahn, a general manager of KEB, requesting that the baht part of the transaction be unwound. The telefax was sent following numerous telephone calls and meetings between KLI and Morgan, by which KLI pressed Morgan to unwind the baht forward contracts, only to meet resistance by Morgan. Morgan maintained that the baht contracts could not be sold because of concerns about the liquidity of the baht and because the back-to-back transactions, between Morning Glory and KEB, and KEB and Morgan, required that written demand be made on KEB. Kim's October 16, 1997 telefax, which was sent to KEB on behalf of I-Soo Joe, a director of Morning Glory and KLI's International Department, followed. Joongseok Ahn, who received the fax, understood that it was from KLI and Morning Glory, since he was the general manager of the KEB department that managed Morning Glory's positions in baht, yen and dollars.

Kim called Ahn to confirm that KEB had received KLI's written demand. Ahn confirmed receipt, but told Kim that the unwind had not occurred, and that Morgan, the Calculation Agent, had not supplied a market value figure. Kim called Morgan, but Morgan disclaimed having received written notice from KEB. Kim called KEB again, and KEB confirmed that it had, in fact, conveyed KLI's notice to Morgan, but that Morgan had stated that it would not execute KLI's demand to unwind. Kim called Morgan, and Morgan stated that it would not execute KLI's demand because KEB did not want the transaction to be unwound.

Morgan does not dispute these facts, and must concede, therefore, that it knew, by reason of both KLI's written and oral notices, that KLI wanted its baht position unwound,

and that it was Morgan's decision not to comply with the demand. Clearly, Morgan had actual knowledge, and therefore is deemed to have notice that KLI made demand pursuant to the unwind provision, section 2(e) of the Morning Glory/KEB swap agreement. *Leasing Serv. Corp. v. Diamond Timber, Inc.*, 559 F.Supp. 972, 978 (S.D.N.Y.1983) (holding that notice occurs when party charged with having notice has actual knowledge or when "from all the facts and circumstances known to him at the time in question, he has reason to know that it exists") (internal citation omitted).

Morgan's position is that it owed no duty to honor KLI's demand to unwind, since there was no stop-loss provision comparable to section 2(e) in the KEB/Morgan swap agreement. And, since there was no comparable clause to section 2(e) in the swap agreement between KEB and Morgan, KEB had no right to demand that Morgan unwind baht positions before the maturity date, January 30, 1998.

[15] However, the two swap agreements, between KLI and KEB, and between KEB and Morgan, were not intended to be independent. They were tied *444 counterparts. The Morning Glory/KEB swap agreement provided the methodology of Morning Glory's investment of the \$25,000,000 contributed to it by Morgan's affiliate, Promax, and the first leg of Morning Glory's repayment obligation, a payment to KEB. Clearly, KEB had no real-party interest, once it redeemed the \$25,000,000 letter of credit deposited by Morning Glory. KEB's interest was that of an intermediary, between Morning Glory and Morgan or, alternatively, as was characterized in the parties' Indicative Term Sheet of January 10, 1997, the agent of Morning Glory, acting "for and on behalf of Morning Glory Investment (L) Limited." [FN10] The KEB/Morgan swap agreement was intended to complete the circle, to provide the completion of repayment of the \$25,000,000 to Morgan, to enable Morgan, in turn, to repay Frome, and Frome to repay the European investors who had originally put up the \$25 million investment a year earlier. KEB's interest was

to earn a modest banking fee of \$70,000, as an accommodation party and not as a party intending to assume the large speculative risk of forward bets on currency fluctuations.

FN10. The Indicative Tem Sheet had been delivered to the parties by Morgan on January 10, 1997, and was executed by KEB, Morning Glory and KLI. It was replaced by the two Total Return Swap Agreements, and the LOC and the Security Agreement, all executed on January 15, 1997.

Morgan prepared the counterparts, not as a single, understandable agreement, but, as Dr. Chi of Morgan explained to the concerned representatives of KLI, in pieces, so the "process ... won't be conspicuous even to market experts not to mention the supervisory agencies." Dr. Chi structured the deal so that it "looks complex," to ensure its "safety and confidentiality," and to "manipulate the process." One law firm, Kim & Chang of Seoul, represented all parties, even though there were other Korean law firms with competence and capacity. All the agreements were executed at the same time, on January 15, 1997, and all were prepared by Morgan, in separate pieces and with disparate formulae to disguise the transaction and evade Korean regulatory review.

Morgan, even as it seeks to use the argument of privity as a sword, made sure that it had an adequate shield to prevent KLI from making use of that same argument to avoid liability. Morgan had KLI execute a Letter of Commitment, to provide Morning Glory with funds if the Thai baht were to depreciate against the dollar and the \$25,000,000 of invested funds would be inadequate to pay KEB, to enable KEB to have the funds necessary to pay Morgan. Morgan also had Morning Glory execute a Security Agreement, binding Morning Glory to secure Morgan in the event that KEB was unwilling or unable to deliver funds to Morgan sufficient to pay Morgan the entire debt owed by Morning Glory. The Letter of Commitment and the Security Agreement provided a direct relationship of privity between KLI and Morgan, assuring Morgan that both Morning Glory and KEB would fully

and completely discharge the contractual obligations owed to Morgan under both the Morning Glory/KEB and the KEB/Morgan Total Return Swap Agreements.

The structure of the transactions, and a fair understanding of all the documents, including how they should be carried out, make it clear that the parties intended one integrated set of transactions. See *Consarc Corp. v. Marine Midland Bank, N.A.*, 996 F.2d 568, 572-73 (2d Cir.1993) (discussing that, under New York law, a written contract may be formed from more than one writing, and that "the relevant *445 writings creating a contract may consist of letters bearing the signature of only one party or even memoranda unsigned by either party"); *Houbigant, Inc. v. ACB Mercantile (In re Houbigant, Inc.)*, 914 F.Supp. 964, 994 (S.D.N.Y.1995) ("[W]here two or more writings are executed as part of the same general transaction, they are to be read together as part of the same agreement."); *Crabtree v. Elizabeth Arden Sales Corp.*, 305 N.Y. 48, 110 N.E.2d 551, 553 (1953). In such instances, the instruments should be read as one in order to carry out their intent. See 3 *Corbin on Contracts*, Sec. 549, pp. 188-190 (1960) (stating that "the terms of [a contract] agreement may be expressed in two or more separate documents.... These documents should be interpreted together, each one assisting in determining the meaning intended to be expressed by the others. This is true whether the documents are all executed by a single party or by two or more parties, and whether some of the documents are executed by parties who have no part in executing the others."). The separately executed documents, executed at the same time for an integrated purpose, should be understood to constitute the "same bargain." *Serralles v. United States*, 46 Fed. Cl. 773 (2000); see also *Williams v. Mobil Oil Corp.*, 83 A.D.2d 434, 445 N.Y.S.2d 172, 175 (2d Dep't 1981).

Indeed, there is no way to look at these instruments other than as pieces of one agreement, structured to disguise a speculative, offshore transaction that posed an unreasonably large risk, and was inappropriate and possibly illegal for a

regulated Korean life insurance company to enter into. The special purpose entities and intermediaries that were made parties to the contracts were not intended as the real parties in interest. The real parties in interest were KLI and Morgan, and just as KLI owed duties to pay Morgan, Morgan had duties to cooperate with KLI should it wish to mitigate its growing losses and demand an unwind, through the clause 2(e) that KLI insisted on as a precondition of its entering into the deal. See *Dalton v. Educ. Testing Serv.*, 87 N.Y.2d 384, 639 N.Y.S.2d 977, 663 N.E.2d 289, 292 (1995) (holding that a promisor impliedly pledges that it shall not do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the promise). Morgan executed the documents with clear knowledge of KLI's insistence on the addition of such a "stop loss" clause in the agreements, and cannot hide behind a false argument of lack of privity as its rationale for first ignoring, and then refusing to heed, KLI's and Morning Glory's demands to unwind, see *Skrabalak v. Rock*, 208 A.D.2d 1100, 617 N.Y.S.2d 912, 914 (3d Dep't 1994) (an obligee may not increase the liability of a guarantor, or otherwise substantially change the nature of the guaranty), especially in light of the fact that Morgan drafted the agreement and designated itself as Calculation Agent. The December 18, 1996 memorandum of Morgan's agent, Promax, which directly persuaded KLI to enter the deal, represented to KLI that if market conditions relating to the stability of the baht shifted, a "reversing transaction" was available to undo the transaction. Given such circumstances, a false defense of lack of privity cannot excuse Morgan's assertion of rights, but refusal to perform correlative duties, expressed in the related instruments.

Morgan argues that the integration clause of the form ISDA agreement, incorporated into both Total Return Swap Agreements, prevents recourse to earlier swap agreement iterations or parol evidence as proof of an overarching agreement. Morgan's argument is without merit. The integration clause provides that *446 the ISDA Master Agreement "constitutes the entire agreement and understanding of

the parties with respect to its subject matter and supersedes all oral communication and prior writings with respect thereto." Yet the parties did not execute the ISDA form, and it does not itself describe the parties' agreement or understanding. The two Total Return Swap Agreements merely incorporated by reference the ISDA form. The agreement and understanding of the parties was expressed not in the ISDA Master Agreement with its integration clause, but in the two Total Return Swap Agreements, and the Security Agreement and the Letter of Commitment executed contemporaneously with the swap agreements. Clearly, all the agreements have to be read together, not separately.

The parties have made substantial submissions on this motion, presenting to me all the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits that they consider relevant, on all the issues raised by defendant's motion for summary judgment, including plaintiff's breach of contract claim. See Fed.R.Civ.P. 56(c). Defendant's position is that there are no material issues of fact to try. Both sides have represented that there are no further relevant facts to present. Plaintiffs, however, did not move for summary judgment, and argued that there are triable issues, including whether the Indicative Term Sheet, rather than the two Total Return Swap Agreements, should be considered the agreement.

[16] A district judge, presented with a motion for summary judgment, is entitled to search the record and, if no genuine issues of material fact exist, to determine the motion in favor of the party entitled to summary judgment, regardless whether the party is the moving, or the responding, party. *Coach Leatherware Co. v. AnnTaylor, Inc.*, 933 F.2d 162, 167 (2d Cir.1991) (holding that district court's sua sponte grant of summary judgment to non-moving party is "an accepted method of expediting litigation"); *Project Release v. Prevost*, 722 F.2d 960, 969 (2d Cir.1983) ("[A] district judge may grant summary judgment to a non-moving party, if no genuine issues of material fact have been shown.").

I conclude, from my search of the record, that there are no triable issues of fact, that the facts are clear that the Total Return Swap Agreements must be read together, and that Morgan was obligated to honor the demand of KLI and Morning Glory to stop the losses accruing from the deteriorating value of the baht and to unwind Morning Glory's obligation. KLI and Morning Glory, not Morgan, are entitled to summary judgment on the claim that Morgan breached its obligation to honor plaintiffs' demand that Morning Glory's baht position be unwound.

Morning Glory's baht obligation was ultimately not unwound until January 7, 1998, yielding an obligation from Morgan of \$66,304,746. Using published exchange values of the baht to the dollar as of October 20, 1997, two business days after KLI's demand, I calculate that an unwind of the baht forward contract executed on that date would have yielded \$39,847,800. [FN11] Thus, had the unwind been executed as demanded, and assuming that amount of \$39,847,800, rather than \$66,304,746, is the correct amount of loss, KLI overpaid Morgan the difference, or \$26,456,946, which Morgan should be obligated to credit, or repay, to plaintiffs.

FN11. This amount is calculated using an exchange rate of 37.615 THB per USD, quoted by the Bank of Thailand for October 20, 1997.

*447 But liquidation values of forward currency contracts for deteriorating currencies are not so easily derived. Liquidations of fluctuating assets are often subject to substantial discounts, especially if the asset has been depreciating. Expert proofs are much more appropriate than arithmetical calculations from published currency tables. In addition, the Swap Agreements also provided that Morgan had a payment obligation to KEB, and KEB to Morning Glory, if the yen depreciated against the dollar, and there appeared to have been a relatively small depreciation: from 116 on January 10, 1997 ("YenSpot," as the Swap Agreement characterized it); to 121.18 on October 9, 1997, the date that Morgan

liquidated the yen forward contracts; to 127.1 on January 30, 1998, the maturity date of the Swap Agreements ("YenMat"). The correct amounts have to be ascertained.

I will require further submissions from the parties with regard to the amount of damage plaintiffs may recover, in the form of a repayment obligation from Morgan. I will meet with the parties on July 17, 2003 at 10:00 AM in a case management conference to define the issues, and regulate such further proceedings as may be required.

F. Plaintiffs' Remaining Claims

Plaintiffs' remaining claims for unjust enrichment and commercial frustration and impracticability are derivative claims. The unjust enrichment claim, which sounds in quasi-contract, *Piccoli A/S v. Calvin Klein Jeanswear Co.*, 19 F.Supp.2d 157, 166 (S.D.N.Y.1998), must be dismissed, as I have already found that there is a valid and enforceable written contract governing the subject matter in dispute. See *Clark-Fitzpatrick, Inc. v. Long Island R.R.*, 70 N.Y.2d 382, 521 N.Y.S.2d 653, 516 N.E.2d 190 (1987) ("The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter."). Moreover, the claim, which is based on the contention that plaintiffs were not aware of the risks involved in the transaction so that when the baht was pulled from the currency basket, Morgan realized an unbargained-for windfall, cannot be sustained. As already discussed, the risk involved in the transaction was patent, and a claim for unjust enrichment cannot be premised on a known risk. See *Resolution Trust Corp. v. 53 W. 72nd St. Realty Assocs.*, No. 91 Civ. 3299, 1992 WL 183741, at *3 (S.D.N.Y. July 22, 1992) (holding a claim for unjust enrichment could not be sustained where "known risk" would "merely prevent [the party's] business expenditures from generating the return on investment which had been hoped for").

Plaintiffs' claims based on theories of

commercial frustration and impracticability also must fail. The potential devaluation of the Thai baht was a risk of the deal, and not a ground of rescission. See Restatement (Second) of Contracts §§ 261 & 265 (1981); *Health-Chem Corp. v. Baker*, 737 F.Supp. 770, 776 (S.D.N.Y.1990). Morgan's motion for summary judgment with regard to these claims is granted, and the claims are dismissed.

G. Conclusion

For the reasons stated, Morgan's motion for summary judgment is granted in part, and I order that counts one, two, three, five, and six of plaintiffs' Second Amended Complaint be dismissed. I deny Morgan's motion for summary judgment with regard to count four, the count alleging breach of contract, and grant summary judgment to plaintiffs on that count, with the amount of *448 judgment to be determined in further proceedings.

SO ORDERED.

269 F.Supp.2d 424

END OF DOCUMENT

52

Only the Westlaw citation is currently available.

United States District Court,
S.D. New York.

LASALLE BANK NATIONAL ASSOC.
Plaintiff,
v.
CITICORP REAL ESTATE INC. Defendant.

No. 02 Civ. 7868(HB).

March 21, 2003.

OPINION AND ORDER

BAER, J.

*1 Two motions in this case are before the Court. Citicorp Real Estate Inc. ("Citicorp") has moved to dismiss LaSalle Bank National Association's ("LaSalle") claim of negligent misrepresentation, while LaSalle has moved to dismiss Citicorp's counterclaims for breach of contract and breach of the implied covenant of good faith and fair dealing. For the following reasons, Citicorp's motion is granted, and LaSalle's motion is granted in part and denied in part.

I. INTRODUCTION

A. Standard of Review Under Fed.R.Civ.P. 12(b)(6)

On these motions to dismiss, "the court must accept as true the factual allegations in the complaint, and draw all reasonable inferences in favor of the plaintiff." *Bolt Electric Inc. v. City of New York*, 53 F.3d 465, 469 (2d Cir.1995) (citations omitted). Further, "[t]he district court should grant such a motion only if, after viewing plaintiff's allegations in this favorable light, 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Id.* (quoting *Walker v. City of New York*, 974 F.2d 293, 298 (2d Cir.1992), and *Ricciuti v. New York Transit Auth.*, 941 F.2d 119, 123 (2d Cir.1991)). "The issue is not whether a plaintiff is likely to prevail

ultimately, 'but whether the claimant is entitled to offer evidence to support the claims.'" *Gant v. Wallingford Board of Ed.*, 69 F.3d 669, 673 (2d Cir.1995) (quoting cases). When deciding a motion to dismiss, a court may consider not only the complaint, but also "any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference." See *Cortec Indus. Inc., v. Sum Holding L.P.*, 949 F.2d 42, 47 (2d Cir.1991).

B. Facts

With certain exceptions, the facts are generally not in dispute. What is in dispute is the significance of certain events and the meaning of a few provisions in a very large and complex contract.

On April 1, 1998, LaSalle and Citicorp and several other entities that are not parties to this litigation signed a Pooling and Services Agreement ("PSA") for the purchase by LaSalle of \$1.3-billion worth of mortgages loans, which were to be included in a Real Estate Mortgage Investment Conduit (REMIC) [FN1] Trust. See Complaint ¶ 16. LaSalle was and remains the Trustee and Administrator of the REMIC Trust, and Citicorp was the Mortgage Loan Seller. See *id.* ¶ 1 & n. 1. Citicorp, as the Mortgage Loan Seller, made several warranties in the PSA, two of which are relevant to the dispute here. First, Citicorp warranted that "[t]he origination, servicing and collection practices used with respect to such Mortgage Loan have been in all material respects legal and have met generally accepted servicing standards for similar commercial and multifamily mortgage loans." See *id.* ¶ 17 (quoting PSA § 2.05(d)(xxxiv)). Second, Citicorp warranted that "[t]here is no material default, breach or event of acceleration existing under the related Mortgage Note..." See *id.* (quoting PSA § 2.05(d)(xxv)). The PSA also requires that within 90 days of discovering or learning of a breach of its warranties and representations, Citicorp is obligated to either cure the defective mortgage loan or repurchase it. See *id.* ¶ 22 (citing PSA § 2.03(a)). Although executed on April 1, the

PSA provided that the "Closing Date" was to be May 6, 1998. See id. ¶ 18.

FN1. "A REMIC Trust represents a pool of mortgages, the beneficial ownership of which has been sold to various investors in the form of certificates representing their undivided ownership interest in the total pool." See Complaint ¶ 1 n. 1. If the Trust complies with IRS regulations, mortgage payments made to the Trust may be passed through to certificate holders free of federal taxes. See id.

*2 The mortgage loan from this bundle that is at the center of the present dispute is what I will refer to as the Brock Suite Loan, as the parties have done. On December 24, 1997, Brock Suite Greenville, Inc. ("Brock Suite") obtained a \$6.75-million loan, which it secured with a promissory note, a mortgage, and an assignment of leases and rents. See id. ¶ 7. That very same day, the lender transferred the Brock Suite Loan to Citicorp. See id. ¶ 9. The mortgaged property included a hotel, which was operated as a franchise of Residence Inn by Marriott, pursuant to a franchise agreement entered into in 1985 for a 15-year term. See id. ¶ 8.

On March 31, 1998--i.e., the day before the PSA was executed--Marriott sent a Notice of Default to one Mel Melle, with copies to seven other individuals. See Complaint ¶ 12. This letter indicated the hotel was in default of the franchise agreement because its customer service performance was below the threshold required by Marriott and gave Brock Suite one year to cure the defect. See id. In its counterclaim, Citicorp alleges that none of these eight addressees was an employee of either the original lender nor Citicorp during the period of December 1997 through May 6, 1998. See Counterclaims ¶ 15. Brock Suite failed to correct the problem and, pursuant to an early termination agreement dated September 28, 1998, between Brock Suite and Marriott, the franchise agreement was terminated in March 1999--which, as Citicorp notes, is five months earlier than the originally indicated August 1, 1999 date. See Complaint ¶ 12; Counterclaims ¶ 17. In January 1999--after this early termination

agreement but before termination--Brock Suite requested LaSalle's consent to a change in the franchise, causing LaSalle to transfer the Brock Suite Loan from the Master Servicer under the PSA to the Special Servicer. [FN2] See Complaint ¶¶ 13, 15. Despite learning about this default in January 1999, LaSalle did not contact Citicorp about it until February 5, 2001, when the Special Servicer [FN3] sent Citicorp a notification of Brock Suite's default of its franchise agreement with Marriott and demanded that Citicorp repurchase the mortgage. See id. ¶ 23. Citicorp alleges that the Special Servicer, acting on LaSalle's behalf and without notifying Citicorp, foreclosed on the Brock Suite Loan in January 2001. See Counterclaims ¶ 23.

FN2. Under the terms of the PSA, the Special Servicer is responsible for servicing and administering certain mortgage loans, such as those that are in default under the related loan documents. See Counterclaim ¶ 8. The current Special Servicer, ARCap Special Servicing, Inc. ("ARCap"), is prosecuting this lawsuit on LaSalle's behalf. See Complaint ¶ 1.

FN3. The Special Servicer at that time was ORIX Real Estate Capital Markets, LLC. See Complaint ¶ 23. On May 1, 2002, ARCap, as the Special Servicer, sent Citicorp a second notice of the default by Brock Suite and consequently Citicorp's breach of its representations and warranties. See id.

On October 1, 2002, LaSalle sued, claiming that because of these defects in this mortgage loan, Citicorp was in breach of the warranties and representations in the PSA, and thus is obligated under the PSA either to cure the defect or to repurchase the mortgage loan. See Complaint ¶¶ 29-31, 32-39. Specifically, Count I of LaSalle's Complaint alleges that contrary to Citicorp's representations in the PSA, the Brock Suite Loan was in default on the day the PSA was executed (April 1, 1998) and on the Closing Date (May 6, 1998) because Brock Suite was in default of its franchise agreement with Marriott. Count II alleges that contrary to Citicorp's representations the Brock Suite Loan was not originated and serviced in accordance with generally accepted

servicing standards because of the failure to account for the facts that a) the franchise agreement for the hotel was due to expire in 2 years and b) the hotel required extensive renovations. Count III of LaSalle's complaint alleges that Citicorp negligently misrepresented the condition of the Brock Suite Loan because the representations that the underlying loan was not in default and was originated and serviced in accordance with generally accepted standards allegedly were false when made. See Complaint at ¶ 38. Citicorp counterclaimed, alleging that LaSalle breached the contract and/or breached the implied covenant of good faith and fair dealing by failing to timely notify Citicorp of the defect in the Brock Suite Loan and thus depriving Citicorp of the right to elect between cure and repurchase.

II. DISCUSSION

A. Citicorp's Motion to Dismiss LaSalle's Negligent Misrepresentation Claim

*3 Citicorp has moved to dismiss LaSalle's claim for negligent misrepresentation, arguing that 1) it is duplicative of the breach-of-contract action and 2) LaSalle has failed to allege the requisite elements of negligent misrepresentation. Because LaSalle has failed to demonstrate that Citicorp owed LaSalle a duty independent of the contract, its claim for negligent misrepresentation (Count III) is duplicative of its breach-of-contract claims and will be dismissed. I also find that LaSalle has not sufficiently shown the existence of a special relationship such that Citicorp owed LaSalle a duty to speak with care.

1. Existence of duty independent of contract

As both LaSalle and Citicorp acknowledge, under New York law "a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated." *Clark-Fitzpatrick, Inc. v. Long Island R.R.*, 70 N.Y.2d 382, 389 (1987) (affirming dismissal of claim for gross negligence where plaintiff failed to allege a violation of a duty independent of a contract). "This legal duty must spring from

circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the contract." *Id.* LaSalle contends that Citicorp had a duty, separate and distinct from its contractual one, to impart correct information, based on Citicorp's unique knowledge or access to information about the Brock Suite Loan, information which LaSalle did not have. See LaSalle's Memorandum of Law in Opposition to Defendant's Motion to Dismiss Count III of the Complaint [hereinafter "LaSalle Count III Memo"] at 8, 11-12. Relying on two cases where claims for negligent misrepresentation and breach of contract apparently have co-existed--*Fleet Bank v. Pine Knoll Corp.*, 290 A.D.2d 792 (N.Y.App.Div.2002), and *Nielsen Media Research, Inc. v. Microsystems Software, Inc.*, No. 99 Civ. 10876, 2002 WL 31175223 (S.D.N.Y. Sept. 30, 2002)--LaSalle contends that if it shows there was a special relationship between Citicorp and LaSalle, its claim for negligent misrepresentation is not duplicative because the special relationship necessarily creates a duty independent of the contract. See LaSalle Count III Memo at 8. Assuming arguendo that a special relationship existed--an issue discussed infra--I conclude that LaSalle's proposition is unsupported by the case law. More significantly, I conclude that the factual predicates for LaSalle's negligent misrepresentation claim are elements of and not extraneous to the PSA and thus, in accordance with the holding in *Clark-Fitzpatrick*, do not create an independent duty on Citicorp.

LaSalle does not cite any cases that expressly hold that a special relationship, such as the one alleged between the parties here, creates a duty independent of the contractual duty, but instead points to several cases that appear to imply it. On close inspection, these cases do not support any such proposition. In *Fleet Bank*, defendant agreed to allow plaintiff, Fleet Bank, to take over a Small Business Administration loan and sent the bank a business plan that consisted of two phases of financing. See 290 A.D.2d at 792. Defendant told the bank that both phases were necessary for the business to become

profitable and the bank assured her that all the funds would be forthcoming. The bank made the first loan but not the second, despite additional assurances that the second loan would be made. See *id.* at 792-93. Without this second loan, defendant was forced to use her own personal assets and eventually she stopped making payments on the loan, at which time the bank foreclosed. See *id.* at 794, 796. Although the defendant in *Fleet Bank* counterclaimed for both negligent misrepresentation and breach of contract, the court granted plaintiff's motion for summary judgment on the breach-of-contract claim, and thus did not either explicitly or implicitly conclude that two different duties arose out of the same transaction. See *id.* at 794-95.

*4 Nielsen too fails to support LaSalle's position. There the court did not need to reach the Clark-Fitzpatrick issue because the negligent misrepresentation claim, though related to the contract, sprang from circumstances extraneous to, and not constituting elements of, the contract. There the negligent misrepresentation claim pertained to alleged misrepresentations Microsystems made about itself and its software in the discussions leading to the contract, while the breach pertained to Microsystem's alleged failure to perform. See 2002 WL 31175223, at *10-*11. Nielsen is similar to other cases where claims for negligent misrepresentation and breach of contract properly co-exist. See *Anglo-Iberia Underwriting Management Co. v. Lodderhose*, 224 F.Supp.2d 679, 683 (S.D.N.Y.2002) (misrepresentations were made by an intermediary to the parties and pertained to the authority of an agent to act for a party and the nature of the party's business); *Schroders, Inc. v. Hogan Systems, Inc.*, 522 N.Y.S.2d 404 (Sup.Ct.1987); [FN4] cf. *Fleet Bank*, 290 A.D.2d at 795-96 (although contract claim was dismissed, negligent misrepresentation related to repeated exhortations related to but outside any contract). This showing that Citicorp's duty to speak with care is "extraneous to, and not constituting elements of, the contract" is a second hurdle LaSalle fails to clear.

FN4. This masterfully reasoned decision sustained a cause of action for negligent misrepresentation where the plaintiff also alleged a breach-of-contract claim, based on facts similar to *Nielsen*, in that a computer-programming company made false representations about their technical prowess and ability to implement a given software program, which induced the plaintiffs to enter into contracts which, it would later turn out, defendants were unable to perform. See *Schroders*, 522 N.Y.S.2d at 405. Not this case.

LaSalle contends that Citicorp made the misrepresentations at three different times--1) during the negotiations, 2) the day the PSA was executed, and 3) the day specified in the PSA that Citicorp's warranties and representations were effective (i.e., the Closing Date) [FN5]--and that the duty each time was different. See LaSalle Count III Memo at 2, 9. First, even giving LaSalle the benefit of all reasonable inferences required for a 12(b)(6) motion, I disagree with LaSalle that Citicorp made these representations during negotiations. Although it is possible, even probable, that the representations and warranties in the PSA reflect similar representations and warranties made during negotiations, LaSalle's complaint does not say this, [FN6] and it is axiomatic that a party opposing a motion to dismiss cannot amend its complaint through its briefs. See *Lorentzen v. Curtis*, 18 F.Supp.2d 322, 328 (S.D.N.Y.1998). Second, even assuming allegations that Citicorp made these representations separately from the contract, the problem of invoking tort law for claims that sound in contract remains. See *Robehr Films, Inc. v. American Airlines, Inc.*, No. 85 Civ. 1072, 1989 WL 111079, at *2 (S.D.N.Y. Sept. 19, 1989) ("If the only interest at stake is that of holding the defendant to a promise, the courts have said that the plaintiff may not transmogrify the contract claim into one for tort." (quoting *Hargrave v. Oki Nursery, Inc.*, 636 F.2d 897 (2d Cir.1980))). The misrepresentations that LaSalle points to for its claim of negligent misrepresentation are the allegedly false representations and warranties that Citicorp made at § 2.05(d)(xxv) and (xxxiv) of the PSA--the same statements it points to for its breach-of-

contract claim.

FN5. LaSalle also finds significance in the fact that the PSA was signed on April 1 but the representations and warranties were effective as of the Closing Date, on May 6. Whatever significance there may be in these different dates on Citicorp's duties to LaSalle, LaSalle has not demonstrated that the duty springs from anything external to the contract.

FN6. The paragraph of the Complaint which LaSalle points to (Complaint ¶ 38) does not expressly refer to any negotiations. This paragraph states: Citicorp, in violation of its duty to LaSalle, misrepresented certain characteristics of the Mortgage Loan, including the imminent expiration of the Franchise Agreement and the extensive required renovations, the default under the terms of the Mortgage, and the default under the Franchise Agreement, which characteristics made the Mortgage Loan unsatisfactory for transfer into the Trust. The structure of the transaction evidenced by the PSA is based on each of the mortgage loans complying with the representations and warranties contained therein, and LaSalle accepts the mortgage loans in justifiable and reasonable reliance on the truth and accuracy of the representations and warranties. LaSalle, to its detriment, justifiably and reasonably relied on Citicorp's deliberate and false representations about the characteristics of the Mortgage Loan and purchased the Mortgage Loan from Citicorp. This paragraph comes closest to implying that these same representations were made during negotiations when it states "[t]he structure of the transaction evidenced by the PSA." However, since the complaint refers extensively to the PSA and nowhere mentions negotiations, it is unreasonable to infer from this paragraph that Citicorp made these alleged misrepresentations during negotiations.

2. Failure to Plead Elements

*5 The elements of negligent misrepresentation under New York law are 1) duty, as a result of a special relationship, to give correct information; 2) representation that was false and that was known or should have been known to be false, 3) knowledge that the information was desired for a serious purpose, 4) knowledge of plaintiff's intention

to rely on the information, and 5) plaintiff's reasonable and detrimental reliance. [FN7] See *Anglo-Iberia Underwriting Management Co. v. Lodderhose*, 224 F.Supp.2d 679, 687 (S.D.N.Y.2002) (quoting *Hydro Investors, Inc. v. Trafalgar Power, Inc.*, 227 F.3d 8, 19 (2d Cir.2000)). Citicorp contends that LaSalle has failed to allege any of the elements of negligent misrepresentation, and urges that a recent decision is dispositive of the issue.

FN7. Citing *DVCI Technologies v. Timessquaremedia.com, Inc.*, No. 00 Civ. 0207, 2000 WL 33159189, at *4 (S.D.N.Y. Nov. 29, 2000), Citicorp provides a slightly different formulation of the elements of negligent misrepresentation: 1) carelessness in imparting words, 2) expectation of reliance on words, 3) justifiable reliance, 4) detriment, 5) expression of words directly to someone bound by some relation or duty of care. See also *LaSalle Bank National Assoc.*, 2002 WL 31729632, at *11.

Under New York law, a court decides as a matter of law the nature of a duty between an injured party and the alleged tortfeasor. See *Kimmell v. Schaefer*, 89 N.Y.2d 257, 263 (1996). In *Kimmell*, the New York Court of Appeals wrote that "In a commercial context, a duty to speak with care exists when 'the relationship of the parties, arising out of contract or otherwise, [is] such that in morals and good conscience the one has the right to rely upon the other for information.'" *Id.* The court differentiated between a casual informal statement or response and a deliberate representation made by "persons who possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified." *Id.* Although *Kimmell* indicated that "whether a particular defendant owes a duty to a particular plaintiff is a question of fact," see *id.*, I conclude, as Judge Schwartz did on nearly identical facts, that LaSalle's pleadings fail to raise a question of fact touching the requisite special relationship because there, as here, LaSalle had no right to rely "in morals and good conscience" with respect to Citicorp's representations. See *LaSalle Bank National Assoc. v. Citicorp Real Estate, Inc.*, No. 01

Civ. 4389, 2002 WL 31729632, at *11 (S.D.N.Y. Dec. 5, 2002) (holding that there was no special relationship between LaSalle and Citicorp relating to a different PSA and dismissing negligent misrepresentation claim).

Finally, the cases where courts have found a special relationship--or at least found that there was a fact question about whether the party's reliance was justified--are distinguishable. First, unlike in Fleet Bank, where the borrower had a right to rely "in morals and good conscience" on the bank's representations given the apparent disparity in the parties' positions, the PSA here was a complex transaction between two sophisticated entities. Second, LaSalle does not allege that Citicorp urged LaSalle to rely on the misrepresentations, as was the case in Kimmell and Fleet Bank, [FN8] nor that Citicorp affirmatively misrepresented its own capabilities and competency, as occurred in Nielsen, Schrodgers, and Anglo-Iberia Underwriting. Third, since LaSalle has a viable contract-based cause of action for any harm it claims to have suffered, it is not without a remedy. Cf. Kimmell, 89 N.Y.2d at 260 (no contract claim); Fleet Bank, 290 A.D.2d at 795 (defendant's cross-claim for breach of contract dismissed). The negligent misrepresentation claim is dismissed.

FN8. The Kimmell court's decision that the plaintiff's reliance was justified was based on the defendant's concerted efforts to solicit plaintiffs' investment, such as giving plaintiffs erroneous projections which he claimed were reliable and which he expected plaintiffs to rely on. See 89 N.Y.2d at 264-65. In Fleet Bank, the bank repeatedly assured the defendant-borrower, a small-business owner, that she was to receive a second loan and thus induced her to further invest in a business which, she claims, failed because she never received this promised loan. See Fleet Bank, 290 A.D.2d at 795.

B. LaSalle's Motion to Dismiss Citicorp's Counterclaims

*6 Citicorp claims that LaSalle's "clandestine resort to extra-contractual self

help" and "secret failure to properly exercise its rights as Lender" constitute breaches under the PSA's "sole remedy" provision of § 2.03(e). See Memorandum of Law of Citicorp in Opposition to LaSalle's Motion to Dismiss Defendant's Counterclaims [hereinafter "Citicorp Counterclaim Memo"] at 1. LaSalle contends that the PSA imposed no duty on LaSalle to disclose any defects to Citicorp and thus its failure to notify Citicorp is not a breach. Further, LaSalle argues that the PSA expressly provides that any delay by LaSalle in notifying of Citicorp of its breach does not waive the rights. The Court concludes that Citicorp should be able to proceed with its counterclaim for breach of the PSA, but not on the theory advanced by Citicorp. The Court further finds that Citicorp's counterclaim for breach of the duty of good faith and fair dealing is duplicative of its breach-of-contract claim and is dismissed.

1. Breach of Contract Counterclaim

With respect to Citicorp's counterclaim for breach of contract, the parties argued in their briefs and at oral argument, 1) whether § 2.03(a) and (c) of the PSA imposes a duty on LaSalle to notify Citicorp, and 2) whether § 7.05, which provides that a delay in exercising a right does not impair the remedy, applies.

a. Breach of § 2.03 of the PSA

Citibank argues that the PSA imposes on LaSalle a duty to notify Citicorp of any breach LaSalle discovers so that Citicorp can elect from among the two remedies set out in § 2.03(a). Section 2.03(a) of the PSA obligates Citicorp to cure or repurchase a mortgage loan upon learning or being notified of a breach involving one of the mortgage loans. [FN9] Section 2.03(e) further provides: "This Section 2.03 provides the sole remedies available to the Certificateholders, or to the Trustee [i.e., LaSalle] on behalf of the Certificateholders, respecting any Document Defect or any breach of any representation or warranty set forth in Section 2.05(d) hereof." Citicorp contends that "[i]n order for Citicorp's option to either cure or repurchase to be at all meaningful, Citicorp must be made aware ... of the facts alleged to

constitute a breach while the opportunity to elect the alternative of curing is still available." See Counterclaim Opp. at 10 (emphasis in original). Citicorp argues that LaSalle failed to preserve the option and in fact terminated the Franchise Agreement with Marriott.

FN9. Section 2.03(a) of the PSA provides in relevant part that "Within 90 days of the earlier of discovery or receipt of notice by [Citicorp], of a Document Defect ... or a breach of any representation or warranty set forth in Section 2.05(d) in respect of any Mortgage Loan, which Document Defect or breach ... materially and adversely affects the value of such Mortgage Loan or the interests of the Certificateholders therein, the Responsible Party shall cure such Document Defect or breach ... or repurchase ... the affected Mortgage Loan at the applicable Purchase Price."

LaSalle argues that these provisions expressly and explicitly impose obligations only on Citicorp, and I agree. Citicorp places great weight on the words "either ... or," arguing that this language is "surplusage" unless Citicorp has the choice from among the two. See Citicorp Counterclaim Memo at 10. However, to give these words the meaning that Citicorp urges would require an illogical reading of the far more important words in this sentence, namely the subject and verb: Citicorp shall either cure or repurchase. The plain meaning of this provision is to place an obligation on and solely on Citicorp. In no way does this provision state or imply an obligation on LaSalle's part.

b. Applicability of § 7.05

*7 The parties disagree over the applicability of § 7.05, which provides in part that "no delay or omission to exercise any right or remedy shall impair any such right or remedy." LaSalle argues that § 7.05 further shows that the PSA imposed no duty on LaSalle to notify Citicorp of any defects LaSalle was aware of. Citicorp argues that § 7.05 does not apply here, because it is entitled "Additional Remedies of Trustee Upon Event of Default" and enumerates 12 specific "Events of Default," none of which pertains to

Citicorp, as the Mortgage Loan Seller. I disagree with both Citicorp's and LaSalle's reading of this provision.

Citicorp's error is in selectively quoting the provision. When one reads the entire sentence where the clause appears, it plainly means to encompass more than just the 12 Events of Default: "Except as otherwise expressly provided in this Agreement, no remedy provided for by this Agreement shall be exclusive of any other remedy, and each and every remedy shall be cumulative and in addition to any other remedy, and no delay or omission to exercise any right or remedy shall impair any such right or remedy or shall be deemed to be a waiver of any Event of Default." PSA § 7.05 (emphasis added ed). Furthermore, Citicorp's construction conflicts with § 11.08 of the PSA, which states that "The article and section headings herein are for convenience of reference only, and shall not limit or otherwise affect the meaning hereof." Meanwhile, LaSalle's error stems from interpreting 7.05 to mean that because LaSalle has no duty to immediately seek a remedy, it therefore follows that LaSalle also has no duty to notify. If there were no express provision about LaSalle's duty to timely notify, this argument might hold up, but it must fail since there is such a provision, as will be discussed next.

c. Section 2.05(e)

Although Citicorp fails to direct it to my attention, the PSA appears to describe LaSalle's obligations in the event it learns of a breach of the representations and warranties. Section 2.05(e) states: "Upon discovery by any of the parties hereto ... of a breach of any of the representations and warranties set forth in subsection (d) above which materially and adversely affects the value of any Mortgage Loan or the interests therein of the Certificateholders, the party discovering such breach shall give prompt written notice to each of the other parties hereto[.]" Strange, at least to me, this language is essentially the same as the language in other portions of the PSA which LaSalle's counsel argued impose a duty to timely notify. [FN10] The

representations and warranties that LaSalle has alleged Citicorp breached appear in § 2.05(d). Citicorp points out--indeed LaSalle admits--that although LaSalle learned of Brock Suite's default under its franchise agreement with Marriott no later than January 28, 1999, LaSalle did not notify Citicorp of this default until February 5, 2001. Because the PSA obligates LaSalle to give Citicorp prompt written notice of any material breaches of Citicorp's warranties and representations and because LaSalle failed to give written notice of this default for more than 2 years, Citicorp has stated a claim for breach of the PSA by LaSalle.

FN10. At oral arguments, counsel for LaSalle identified §§ 204(b), 206(b), 207(b) and 208(b) as provisions in the PSA in which other parties "bargained for the right to get notice promptly in writing if there was a breach." See Transcript of Oral Arguments on Jan. 28, 2003, at 23. Section 2.04, for example, provides: "Upon discovery by any of the parties hereto of a breach of any of the foregoing representations and warranties which materially and adversely affects the interests of the Certificateholders or any party hereto, the party discovering such breach shall give prompt written notice to each of the other parties hereto." The obligation to give timely notice is the same in substance in these four subsections as it is in § 2.05(e).

2. Breach of Duty of Good Faith and Fair Dealing Counterclaim

*8 LaSalle argues that Citicorp's counterclaim charging a breach of the duty of good faith and fair dealing by LaSalle is duplicative of its breach-of-contract counterclaim, while Citicorp argues that it has sufficiently plead additional predicate facts for its good-faith-and-fair-dealing counterclaim so that it is not duplicative of its breach-of-contract claim. [FN11] Citicorp's theory for breach of the implied duty of good faith and fair dealing was premised on LaSalle's "unreasonably withholding notice" to Citicorp of defects in the Brock Suite Loan for over two years. Because I have concluded that Citicorp can state a claim for breach of contract based on its failure to give prompt notification, its

counterclaim for breach of the duty of good faith and fair dealing is duplicative. See, e.g., *EUA Cogenex Corp. v. North Rockland Cent. Sch. Dist.*, 124 F.Supp.2d 861, 873 (S.D.N.Y.2000) (dismissing claim for breach of the covenant of good faith and fair dealing as duplicative since it relied on same factual allegations as made in a claim for breach of contract); *Houbigant, Inc. v. ACB Mercantile, Inc.*, 914 F.Supp. 964, 989 (S.D.N.Y.1995) (same).

FN11. Citicorp also argues that N.Y. courts recognize simultaneous breach of contract and breach of the duty of good faith and fair dealing in "appropriate circumstances." Although citing several cases, Citicorp fails to point out what "appropriate circumstances" are and how they apply here.

III. CONCLUSION

For the foregoing reasons, Citicorp's motion to dismiss LaSalle's claim for negligent misrepresentation and LaSalle's motion to dismiss Citicorp's counterclaim for breach of the implied covenant of good faith and fair dealing are granted. LaSalle's motion to dismiss Citicorp's counterclaim for breach of contract is denied. Per the pre-trial scheduling order of December 20, 2002, this matter will be tried in September 2003.

IT IS SO ORDERED.

2003 WL 1461483 (S.D.N.Y.)

END OF DOCUMENT

53

Supreme Court, Appellate Division, First
Department, New York.

Bonnee LINDEN, Plaintiff-Appellant,

v.

LLOYD'S PLANNING SERVICE, INC., et al.,
Defendants,

Cigna Insurance Company, Defendant-
Respondent.

Bonnee Linden, Plaintiff-Appellant,

v.

Lloyd's Planning Service, Inc, et al.,
Defendants,

Nationwide Insurance Company, et al.,
Defendants-Respondent.

Bonnee Linden, Plaintiff-Appellant,

v.

Lloyd's Planning Service, Inc, et al.,
Defendants,

Janice Alkire, et al., Defendants-Respondents.

Nov. 14, 2002.

Former condominium unit owner brought action against board members and insurers to recover for breach of contract, breach of warranty of habitability, civil conspiracy, and failure to provide the condominium's books and records. The Supreme Court, New York County, Alice Schlesinger, J., dismissed complaint. Former owner appealed. The Supreme Court, Appellate Division, held that: (1) no cognizable claim exists for breach of warranty of habitability against a condominium; (2) members were not liable in their individual capacities; and (3) former owner lacked standing to seek damages for the board members' neglect or refusal to furnish condominium financial records.

Affirmed.

West Headnotes

[1] Contracts 205.35(3)
95k205.35(3)

No cognizable claim exists for breach of warranty of habitability against a condominium.

[2] Condominium 8

89Ak8

Condominium board members were not liable to former unit owner in their individual capacities for breach of contract.

[3] Conspiracy 1.1
91k1.1

A plaintiff who has no viable underlying claim for fraud or any other tort has no civil conspiracy claim.

[4] Condominium 8
89Ak8

Former condominium unit owner who lost unit in foreclosure lacked standing to seek damages for the board members' neglect or refusal to furnish condominium financial records.

****20** Bonnee Linden, pro se.

Audrey A. Barr, for Defendant-Respondent.

Brendan T. Fitzpatrick, for Defendants-Respondent.

Scott S. Greenspun, for Defendants-Respondent.

ANDRIAS, J.P., SAXE, BUCKLEY,
ROSENBERGER, and MARLOW, JJ.

217** Order, Supreme Court, New York County (Alice Schlesinger, J.), entered August 16, 2001, and orders, same court and Justice, entered August 24, 2001, which, to the extent appealed from as limited by the brief, granted the motions of defendants Nationwide Insurance, Inc. and Scottsdale *21** Insurance Co., Cigna Property and Casualty, Janice Alkire, Bruce ***218** Slavens and Sandra Jacoby to dismiss the amended complaint as against them, and denied plaintiff's cross motions to amend the complaint, unanimously affirmed, without costs.

Plaintiff seeks to recover damages sustained as a result of the 1998 foreclosure of her condominium unit for her failure to pay common charges. The complaint alleges, inter alia, that she withheld payment of the

common charges because the individual moving defendants, among others, failed properly to repair water damage to the condominium and asserts claims against condominium board members Alkire, Slavens and Jacoby, individually, for breach of contract, breach of warranty of habitability, civil conspiracy, and failure to provide plaintiff with the condominium's books and records from 1979 to the present.

[1][2][3][4] Plaintiff's claims against the individual board members for breach of the condominium's contractual obligations and for breach of the warranty of habitability were properly dismissed since there is no cognizable claim for breach of warranty of habitability against a condominium (see *Frisch v. Bellmarc Mgt., Inc.*, 190 A.D.2d 383, 597 N.Y.S.2d 962). In any event, plaintiff's claims would not lie against the board members in their individual capacities. In addition, since plaintiff has no viable underlying claim for fraud or any other tort, her civil conspiracy claim was properly dismissed (see *Alexander & Alexander of New York, Inc. v. Fritzen*, 68 N.Y.2d 968, 969, 510 N.Y.S.2d 546, 503 N.E.2d 102). Finally, since plaintiff's condominium unit was foreclosed, she is without standing to seek damages for the individual defendants' neglect or refusal to furnish her with condominium financial records.

Since plaintiff was not an insured of any of the movant insurers and there is no claim that she obtained a judgment against any 'insured' under the insurance contracts at issue, her claims against the movant insurers were properly dismissed (see 294 A.D.2d 114, 116, 743 N.Y.S.2d 65).

We have considered plaintiff's remaining arguments and find them unavailing.

299 A.D.2d 217, 750 N.Y.S.2d 20, 2002 N.Y. Slip Op. 08251

END OF DOCUMENT

54

Briefs and Other Related Documents

United States Court of Appeals,
Second Circuit.

MANUFACTURERS HANOVER TRUST
COMPANY, Plaintiff-Appellee,

v.

Nicholas YANAKAS, Defendant-Appellant,
Charles Buonincontri and Camille
Buonincontri, Defendants.

No. 1512, Docket 92-9148.

Argued June 14, 1993.
Decided Oct. 18, 1993.

Banks sued guarantor to enforce personal guaranty of certain loans to debtor-corporation. The United States District Court for the Southern District of New York, John F. Keenan, J., ordered guarantor to pay bank \$1,036,381.42 on its claim after dismissing guarantor's affirmative defenses and counterclaims alleging fraudulent inducement and breach of fiduciary duty. Guarantor appealed. The Court of Appeals, Kearse, Circuit Judge, held that: (1) guaranty that stated it was absolute and unconditional did not preclude guarantor's claims of fraudulent inducement, and (2) bank had no fiduciary duty to accept or respond promptly to guarantor's proposal to restructure debtor's debts.

Affirmed in part; vacated in part and remanded.

West Headnotes

[1] Guaranty 42(1)
195k42(1)

[1] Guaranty 72
195k72

Language of guaranty agreement stating that it was absolute and unconditional was not sufficiently specific, under New York law, to bar guarantor's affirmative defenses of fraudulent inducement, where guaranty form was one that bank used routinely, rather than product of negotiations between parties,

agreement did not purport to waive any defenses to its own validity, and agreement did not address particular representations that formed basis of fraudulent inducement claims.

[2] Evidence 397(2)
157k397(2)

[2] Evidence 434(1)
157k434(1)

Under New York law, if contract recites that all parties' agreements are merged in written document, parol evidence is not admissible to vary, or permit escape from, terms of integrated contract; however, such general merger clause is ineffective to preclude parol evidence that party was induced to enter contract by means of fraud.

[3] Evidence 434(1)
157k434(1)

Under New York law, even when contract contains omnibus statement that written instrument embodies whole agreement, or that no representations have been made, party may escape liability under contract by establishing that he was induced to enter contract by fraud.

[4] Contracts 94(5)
95k94(5)

Under New York law, when contract states that contracting party disclaims existence or reliance upon specified representations, that party will not be allowed to claim that he was defrauded into entering contract in reliance on those representations.

[5] Guaranty 36(2)
195k36(2)

[5] Guaranty 72
195k72

Under New York law, guarantor's claim of fraudulent inducement based upon bank's failure to disclose to guarantor, on date it obtained guarantee, its same-day procurement of \$550,000 note signed by part owner of debtor-corporation whose debt was being guaranteed was barred by guaranty, where guaranty expressly covered all corporation's debts "whether now existing or hereafter

incurred" and expressly waived any and all notice of creation of said obligations.

[6] Banks and Banking 100
52k100

Bank's rejection of, and failure to respond promptly to, guarantor's proposal to restructure borrower's debt by having bank purchase second bank's security interest was not breach of fiduciary duty under New York law; guarantor failed to allege any facts sufficient to convert bank's position with respect to debtor from that of creditor-debtor into that of fiduciary absent allegations that bank controlled assets or operations of debtor or that bank otherwise exercised powers beyond those of typical lender-creditor, bank had not agreed to provide borrower with any certain amount of financing, and there was no allegation that borrower's agreements with bank precluded borrower from searching for such financing from others or that bank failed to give proper notice of his decision to cease providing financing.

[7] Banks and Banking 100
52k100

Under New York law, though in unusual circumstances, fiduciary relationship may arise even between bank and customer if there is either confidence reposed which invests person trusted with advantage in treating with person so confiding, mere fact that corporation has borrowed money from same bank for several years is insufficient to transform relationship into one in which bank is fiduciary.

*311 Jamie M. Brickell, New York City (Pryor, Cashman, Sherman & Flynn, Manuel W. Gottlieb, on the brief), for plaintiff-appellee.

*312 David A. Field, New York City (Ira A. Turret, Field, Lomenzo, Turret & Blumberg, on the brief), for defendant-appellant.

Before: KEARSE, PRATT, and MINER,
Circuit Judges.

KEARSE, Circuit Judge:

Defendant Nicholas Yanakas appeals from a final judgment of the United States District Court for the Southern District of New York, John F. Keenan, Judge, ordering him to pay plaintiff Manufacturers Hanover Trust Company ("MHT" or the "Bank") \$1,036,381.42 on its claim for enforcement of Yanakas's personal guarantee of certain loans. The district court (a) dismissed three of Yanakas's affirmative defenses and counterclaims, which asserted that Yanakas had been fraudulently induced to sign the guarantee, on the ground that the guarantee stated that it was "absolute and unconditional," (b) dismissed Yanakas's remaining affirmative defenses and counterclaims, which asserted that the Bank had breached its fiduciary duty, on the ground that the answer failed to show the existence of such a duty, and (c) granted summary judgment in favor of the Bank. On appeal, Yanakas contends that the district court erred in dismissing his affirmative defenses and counterclaims and in granting summary judgment against him. For the reasons below, we affirm in part, vacate in part, and remand for further proceedings with respect to the defenses of and counterclaims for fraudulent inducement.

I. BACKGROUND

The present lawsuit arises out of loans from MHT to Advance Ring Manufacturers, Inc. ("ARM"), which, prior to December 1986, was owned in part by defendant Charles Buonincontri ("Buonincontri") and in part by one Arthur Abraham. Since this appeal centers on the sufficiency of Yanakas's affirmative defenses and counterclaims, we take the allegations of the defenses and counterclaims as true. The following description of the events is taken largely from those allegations.

A. The Events

In December 1986, Buonincontri and Abraham entered into an auction to determine which of them would purchase the other's interest in ARM. Buonincontri won the auction and became president of ARM. Prior

to the auction, Yanakas had made a loan of \$250,000 to ARM to help Buonincontri finance his proposed purchase of Abraham's shares. In June 1987, Yanakas converted his initial loan to capital and paid ARM an additional \$250,000, thereby acquiring a 25% interest in the company. In 1988, he made further loans and capital contributions totaling \$500,000 and acquired an additional 25%; in October of that year, he became the owner of all issued and outstanding shares of ARM.

MHT had entered into a lending relationship with ARM in 1985. At the time of the December 1986 auction, ARM was indebted to MHT in an amount that the Bank places at \$700,000. In April 1987, the Bank loaned ARM an additional \$350,000 (the "1987 loan"), in connection with which it obtained financial information and personal guarantees from Buonincontri and his wife, defendant Camille Buonincontri.

In 1987 and part of 1988, ARM obtained financing from both MHT and National Westminster Bank ("NatWest"). Initially, both banks were unsecured creditors. Yanakas asserts that in early 1988, however, NatWest surreptitiously obtained the signature of Buonincontri to a document that, unbeknownst to Yanakas, Buonincontri, and ARM, converted NatWest's unsecured position into one secured by the assets of ARM.

On March 31, 1988, MHT told Yanakas that the Bank would call its loans to ARM and would cease to finance ARM's operations unless Yanakas signed a personal guarantee of the loans and paid down part of ARM's outstanding balance. In reliance on these representations and on the Bank's promise to continue financing ARM if he complied with its demands, Yanakas (a) paid \$100,000 of ARM's 1987 loan, (b) invested an additional \$200,000 in ARM, and (c) executed a personal guarantee of all of ARM's obligations to MHT, agreeing, in part, as follows:

[Yanakas] hereby absolutely and unconditionally guarantees to Bank the prompt *313 payment of claims of every nature and description of Bank against Borrower ... and any and every obligation

and liability of Borrower to Bank or another or others of whatsoever nature and howsoever evidenced, whether now existing or hereafter incurred, originally contracted with Bank and/or with another or others and now or hereafter owing to or acquired in any manner, in whole or in part, by Bank, or in which Bank may acquire a participation, whether contracted by Borrower alone or jointly and/or severally with another or others, whether direct or indirect, absolute or contingent, secured or not secured, matured or not matured. (All of foregoing are hereinafter referred to as "Obligations").

....

Guarantor waives any and all notice of acceptance of this guarantee or the creation or accrual of any of said Obligations.... This guarantee shall be a continuing, absolute and unconditional guarantee of payment regardless of the validity, regularity or enforceability of any of said Obligations or purported Obligations....

(Guarantee of All Liability and Security Agreement, dated March 31, 1988 ("Guarantee"), at 1 (emphasis added).) Unbeknownst to Yanakas, on the day that he executed the Guarantee, MHT also got Buonincontri, as ARM's president, to execute a new demand promissory note to MHT in the amount of \$550,000 (the "1988 note").

In April 1988, after learning of NatWest's security interest in ARM's assets, Yanakas urged MHT to purchase that interest, for which Yanakas would put up \$700,000, roughly the amount of the debt to NatWest, as security. Yanakas stressed the need for a prompt response in order to allow ARM to process orders for the 1988 Christmas season. The Bank promised to consider the proposition but delayed acting on it, and eventually rejected it. Shortly after acquiring Yanakas's Guarantee, the Bank ceased funding ARM's operations and demanded repayment of all ARM loans.

ARM was ultimately unable to obtain adequate financing for the 1988 Christmas season, and it filed for bankruptcy.

B. The Present Lawsuit and the Opinion

Below

In 1990, MHT commenced the present action against Yanakas and the Buonincontri as guarantors of its loans to ARM. MHT sought \$210,000, the outstanding balance on the 1987 loan, plus interest, and \$550,000 plus interest on the 1988 note. Yanakas, while denying knowledge of the precise details of ARM's indebtedness to the Bank, asserted five affirmative defenses and counterclaims against the Bank. His first three affirmative defenses and counterclaims alleged that MHT had induced him to sign the Guarantee (1) by affirmatively representing that if Yanakas complied with its demands, the Bank would not call its loans to ARM and would continue to finance ARM's operations, and (2) by concealing from him material information, including (a) the fact that on the day it extracted the Guarantee from Yanakas, the Bank had Buonincontri sign the 1988 note for \$550,000, (b) the fact that the Bank had discovered that, beginning in late 1986, the Buonincontris had misrepresented their financial circumstances, and (c) the fact that the Bank had no intention of continuing to provide financing to ARM:

31. Upon information and belief, at the time Yanakas' guarantee was requested; (a) the Bank had discovered that NatWest had been given a secured position in the assets of ARM; (b) the Bank had also discovered that Charles and Camille had given the Bank a false financial statement in late 1986, which did not reflect [a \$1,000,000] mortgage on their home; (c) the Bank had decided to terminate the loans to ARM and not to continue financing ARM but to seek Yanakas' guarantee before it made its position public; (d) the Bank had assigned ARM's loans to its "workout" department which, upon information and belief, was for problem loans which the Bank wanted to liquidate rather than continue; and (e) the Bank had previously released Abraham's guarantee.

*314 32. None of the foregoing significant and material facts were made known by the Bank to Yanakas prior to the time that Yanakas signed the guarantee. Had Yanakas been advised of any of said facts,

he would not have signed the guarantee.
(Answer ¶¶ 31, 32.)

Yanakas's fourth and fifth affirmative defenses and counterclaims alleged that the Bank controlled the finances of ARM, that Yanakas had no other financial options, and that a relationship of trust and confidence therefore existed between MHT and ARM. Yanakas alleged that the Bank had breached its fiduciary duty to ARM and Yanakas by not responding promptly to, and by then rejecting, Yanakas's proposal that MHT purchase NatWest's position. He alleged that while delaying its response, the Bank never had any intention of forbearing from calling ARM's loans or of continuing to finance its operations; that the Bank had already taken an internal step toward liquidation of those loans; and that

[t]he Bank acted in a heavy-handed, commercially unreasonable and grossly negligent manner without regard to the rights of Yanakas or ARM, in bad faith, and willfully and maliciously by not accepting the aforesaid proposal, in delaying in acting on the proposal, and in demanding payment of the loans to ARM. The Bank's acts caused ARM to file for bankruptcy resulting in a total loss of Yanakas' investment and loans to ARM.

(Answer ¶ 48.)

Yanakas requested rescission of the Guarantee, \$300,000 in compensatory damages on account of his payment of \$100,000 on ARM's loans and his last capital contribution of \$200,000, and \$7.5 million in compensatory damages because the Bank's actions caused ARM to terminate its business, depriving Yanakas of his investment and his expected profits. He also requested \$7.5 million in exemplary damages.

MHT moved pursuant to Fed.R.Civ.P. 12(b)(6) to dismiss Yanakas's counterclaims for failure to state a claim on which relief can be granted. It moved pursuant to Fed.R.Civ.P. 12(f) to strike his affirmative defenses as immaterial. In an Opinion and Order dated February 20, 1992, 1992 WL 35880, ("Dismissal Order"), the district court granted

MHT's motions. Citing *Citibank, N.A. v. Plapinger*, 66 N.Y.2d 90, 495 N.Y.S.2d 309, 485 N.E.2d 974 (1985), the court dismissed Yanakas's first three affirmative defenses and counterclaims, ruling that "under New York law fraudulent inducement is not a valid defense to enforcement of a [] guarantee which, by its terms, is 'absolute and unconditional.'" Dismissal Order at 6. "Because the guarantee that Yanakas signed states that it [is] 'absolute and unconditional,' the defense of fraudulent inducement is unavailable to Yanakas." *Id.* at 6-7. The court also dismissed Yanakas's fourth and fifth affirmative defenses and counterclaims, rejecting his contention that the debtor-creditor relationship between ARM and the Bank was fiduciary in nature, and concluding that Yanakas had failed to allege any facts that would have created a duty on the part of MHT to respond to or accept Yanakas's April 1988 proposal within a particular period of time. *Id.* at 9.

MHT promptly moved for summary judgment on its claim against Yanakas. In an Opinion and Order dated July 31, 1992, 1992 WL 196789, ("Summary Judgment Decision"), the district court granted the motion, stating that despite his affirmative defenses Yanakas had "admit[ted] all relevant allegations upon which [his alleged] liability is premised," and had "fully acknowledged his guarantee of ARM's outstanding debt to MHT." Summary Judgment Decision at 3. Since the affirmative defenses had been stricken, the court concluded that Yanakas's "[a]dmission of this debt and the execution of a guarantee for the full extent of that debt le[ft] no unresolved genuine issue of material fact to be addressed." *Id.* at 3-4. Further finding no genuine issue to be tried as to the amount of the debt, the court ruled that MHT was entitled to judgment against Yanakas for \$1,036,381.42, representing a total of \$760,000 outstanding on the two ARM debts, plus accrued interest.

Noting that the Buonincontris had filed for bankruptcy, thereby delaying the resolution of any claims against them, the court ordered that a final judgment be entered in favor of

*315 MHT against Yanakas pursuant to Fed.R.Civ.P. 54(b). This appeal followed.

II. DISCUSSION

On appeal, Yanakas contends principally that the district court erred in ruling (1) that the fact that his Guarantee stated that it was "absolute and unconditional" precluded his claims of fraudulent inducement, and (2) that the Bank had no fiduciary duty to accept or respond promptly to his proposal to restructure ARM's debts. For the reasons below, we agree in part with the first contention but reject the second.

A. The Claims of Fraudulent Inducement

[1][2] Under New York law, which by the terms of the Guarantee governs this diversity action, if a contract recites that all of the parties' agreements are merged in the written document, parol evidence is not admissible to vary, or permit escape from, the terms of the integrated contract. See, e.g., *Fogelson v. Rackfay Construction Co.*, 300 N.Y. 334, 340, 90 N.E.2d 881, 884 (1950). Such a general merger clause is ineffective, however, to preclude parol evidence that a party was induced to enter the contract by means of fraud. See, e.g., *Sabo v. Delman*, 3 N.Y.2d 155, 161-62, 164 N.Y.S.2d 714, 717-19, 143 N.E.2d 906 (1957); *Bridger v. Goldsmith*, 143 N.Y. 424, 428, 38 N.E. 458, 459 (1894) (general rule is that "fraud vitiates every transaction"). Thus, even when the contract contains "an omnibus statement that the written instrument embodies the whole agreement, or that no representations have been made," a party may escape liability under the contract by establishing that he was induced to enter the contract by fraud. *Danann Realty Corp. v. Harris*, 5 N.Y.2d 317, 320, 184 N.Y.S.2d 599, 601-02, 157 N.E.2d 597, 598-99 (1959) ("Danann"); see also *id.* at 320-21, 184 N.Y.S.2d at 601-02 (citing, *inter alia*, *Sabo v. Delman* and *Bridger v. Goldsmith*).

[3] When, however, the contract states that a contracting party disclaims the existence of or reliance upon specified representations, that

party will not be allowed to claim that he was defrauded into entering the contract in reliance on those representations. See *Citibank, N.A. v. Plapinger*, 66 N.Y.2d 90, 94-95, 495 N.Y.S.2d 309, 311, 485 N.E.2d 974, 976 ("Plapinger"); *Danann*, 5 N.Y.2d 317, 320-21, 184 N.Y.S.2d 599, 602, 157 N.E.2d 597, 599. In *Danann*, the purchaser of a lease on a building sought damages for fraud, claiming that it had entered into the contract of sale as a result of the selling defendants' false representations "as to the operating expenses of the building and as to the profits to be derived from the investment." *Id.* at 319, 184 N.Y.S.2d at 600, 157 N.E.2d at 598. The contract itself, however, stated that "[t]he Seller has not made ... any representations as to the ... expenses [or] operation ... [of] the aforesaid premises ... and the Purchaser hereby expressly acknowledges that no such representations have been made" *Id.* at 320, 184 N.Y.S.2d at 601, 157 N.E.2d at 598 (emphasis in *Danann*). The contract also stated that all of the parties' understandings and agreements were merged in the contract, "neither party relying upon any statement or representation, not embodied in this contract, made by the other." *Id.* (emphasis in *Danann*). The *Danann* court, after noting that a general and vague merger clause would not bar parol evidence to support a fraud claim, ruled that the fraud claim in the case before it was barred by the purchaser's express disclaimer in the contract of any reliance on that specific representation. "[P]laintiff has in the plainest language announced and stipulated that it is not relying on any representations as to the very matter as to which it now claims it was defrauded. Such a specific disclaimer destroys the allegations in plaintiff's complaint that the agreement was executed in reliance upon these contrary oral representations..." *Id.* at 320-21, 184 N.Y.S.2d at 602, 157 N.E.2d at 599.

In *Plapinger*, the court applied the *Danann* principle to an "absolute and unconditional" guarantee of a company's debts given by corporate officers in connection with an agreement by the plaintiff banks to restructure the company's indebtedness. The

guarantee stated that its " 'absolute and unconditional' " nature was " 'irrespective of (i) any lack of validity ... of the ... Restated Loan Agreement ... or any other agreement or *316 instrument relating thereto', or '(vii) any other circumstance which might otherwise constitute a defense' to the guarantee." *Plapinger*, 66 N.Y.2d at 95, 495 N.Y.S.2d at 312, 485 N.E.2d at 977. Following a default by the corporation, the banks brought suit to enforce the guarantee against the officers. The officers sought to defend by alleging that they had been induced to enter into the guarantee agreement by the plaintiff banks' fraudulent representation that the banks had committed themselves to providing the corporation an additional line of credit.

The *Plapinger* court, while confirming the traditional principle that a general merger clause is insufficient to bar a defense of fraud in the inducement, see *id.* at 94-95, 495 N.Y.S.2d at 311, 485 N.E.2d at 976, affirmed the dismissal of the guaranteeing officers' fraud defense on the ground that it was inconsistent with their specific recitals in the contract. First, though noting that the guarantee before it was "not the explicit disclaimer present in *Danann*," the *Plapinger* court observed that the guarantee was by no means a generalized boilerplate clause but rather was a "multimillion dollar personal guarantee" that was signed "following extended negotiations between sophisticated business people." 66 N.Y.2d at 95, 495 N.Y.S.2d at 312, 485 N.E.2d at 977.

Second, the court found that the "substance" of the guarantee encompassed not only the financing agreements for the debtor corporation, but also " 'any other agreement or instrument relating thereto,' " which included the guarantee itself. *Id.* Thus, the officers had agreed that their guarantee was "absolute and unconditional irrespective of any lack of validity or enforceability of the guarantee," *id.* at 92, 495 N.Y.S.2d at 309, 485 N.E.2d at 974 (emphasis added), and "irrespective of ... any other circumstance which might otherwise constitute a defense" with respect to the guarantee, *id.* The court concluded that if it were to allow the officers

to plead fraudulent inducement of the guarantee, it would in effect condone a fraudulent representation by the officers themselves of their own intentions vis- a-vis the guarantee. See *id.* at 95, 495 N.Y.S.2d at 312, 485 N.E.2d at 977; see also *Danann*, 5 N.Y.2d at 323, 184 N.Y.S.2d at 604, 157 N.E.2d at 600 (same).

Following *Danann* and prior to *Plapinger*, this Court noted that in order to be considered sufficiently specific to bar a defense of fraudulent inducement under *Danann*, a guarantee must contain explicit disclaimers of the particular representations that form the basis of the fraud-in-the-inducement claim. See *Grumman Allied Industries, Inc. v. Rohr Industries, Inc.*, 748 F.2d 729 (2d Cir.1984). We stated that "[t]he *Danann* rule operates where the substance of the disclaimer provisions tracks the substance of the alleged misrepresentations." 748 F.2d at 735. Given the *Plapinger* court's emphasis on the fact that the defendants there had negotiated an agreement in which they expressly waived any challenge to the validity of the guarantee itself, we are of the view that the ruling in *Plapinger* does not materially alter the principle established by *Danann*.

This view is supported by many state court decisions since *Plapinger* that have ruled that the mere general recitation that a guarantee is "absolute and unconditional" is insufficient under *Plapinger* to bar a defense of fraudulent inducement, and that the touchstone is specificity. Thus, where specificity has been lacking, dismissal of the fraud claim has been ruled inappropriate. See, e.g., *Zaro Bake Shop, Inc. v. David*, 176 A.D.2d 721, 721, 574 N.Y.S.2d 803, 804 (2d Dep't 1991) (mem.) (" 'absolutely and unconditionally' liable ... language, in and of itself, was ... insufficient to preclude ... proof of fraud in the inducement"); *DiFilippo v. Hidden Ponds Associates*, 146 A.D.2d 737, 737-38, 537 N.Y.S.2d 222, 223-24 (2d Dep't 1989) (mem.) (contract provision not a bar to fraud-in-inducement claim where contract provision "[d]id not specifically disclaim reliance on any oral representation concerning the particular matter as to which plaintiff now claims he was

defrauded"); *GTE Automatic Electric Inc. v. Martin's Inc.*, 127 A.D.2d 545, 546-47, 512 N.Y.S.2d 107, 108 (1st Dep't 1987) (mem.) (recitation that underlying notes are absolute and unconditional does not bar proof of fraud in inducement of guarantee since there was "not ... a specific disclaimer, *317 as in both *Plapinger* and *Danann Realty* and, therefore, the principle of those cases does not apply"); *Goodridge v. Fernandez*, 121 A.D.2d 942, 945, 505 N.Y.S.2d 144, 147 (1st Dep't 1986) (mem.) (defendant *Fernandez*, sued on his guarantee, not barred from asserting fraud-in-inducement defense because, "in sharp contrast to the guarantee in [*Plapinger*], [*Fernandez's* guarantee] contains no specific disclaimer of defenses available to the guarantor with respect to the guarantee").

Where the fraud claim has been dismissed, the disclaimer has been sufficiently specific to match the alleged fraud. See, e.g., *Manufacturers Hanover Trust Co. v. Restivo*, 169 A.D.2d 413, 414, 564 N.Y.S.2d 141, 141 (1st Dep't) (mem.) (claims that "MHT representative fraudulently represented that [defendants'] guarantees were temporary and conditional upon MHT's advancing sufficient funds to consummate a business merger are barred by the language of the guarantees stating that they were continuing and unconditional " (emphasis added)), appeal dismissed, 77 N.Y.2d 989, 571 N.Y.S.2d 914, 575 N.E.2d 400 (1991); *First City National Bank & Trust Co. v. Heaton*, 165 A.D.2d 710, 711-12, 563 N.Y.S.2d 783, 783-84 (1st Dep't 1990) (mem.) (guarantee barred fraud-in-inducement defense that was "in direct contradiction to the [] specific acknowledgement" made in the guarantee); *Marine Midland Bank, N.A. v. CES/Compu-Tech, Inc.*, 147 A.D.2d 396, 397, 537 N.Y.S.2d 818, 819-20 (1st Dep't 1989) (mem.) (contractual disclaimer in which defendant expressly "waive[d] ... the right to assert defenses, setoffs and counterclaims ... in any action or proceeding in any court arising on, out of, under, by virtue of, or in any way relating to this Note or the transactions contemplated hereby " (emphasis added) was "sufficiently specific to foreclose the defense of fraudulent inducement"). But see *Bank*

Leumi Trust Co. v. Block 3102 Corp., 180 A.D.2d 588, 589, 580 N.Y.S.2d 299, 300 (1st Dep't) (mem.) ("The language of the guarantees specifies that they are absolute and unconditional, negating the claim of fraudulent inducement....") (precise language of guarantees not disclosed in opinion), appeal denied, 80 N.Y.2d 754, 587 N.Y.S.2d 906, 600 N.E.2d 633 (1992).

[4] In the present case, Yanakas's Guarantee is, for the most part, significantly different from the guarantee at issue in Plapinger. First, there is no indication that the Yanakas Guarantee, which is in a preprinted form, is anything but a generalized boilerplate exclusion. The form was one that MHT apparently used routinely; an affidavit submitted by MHT's counsel in support of the Bank's motion to dismiss the affirmative defenses and counterclaims attached copies of an identical MHT guarantee form executed by others in connection with financing unrelated to ARM. There was no evidence that the scope or character of the Guarantee was the product of any negotiations between the parties.

More importantly, the Yanakas Guarantee does not purport to waive any defenses to its own validity. Rather, the Guarantee states that Yanakas "absolutely and unconditionally guarantees" all "obligation[s] and liability[ies] of Borrower to Bank or another or others," and states that the "guarantee shall be a continuing, absolute and unconditional guarantee of payment regardless of the validity, regularity or enforceability of any of said Obligations " (emphasis added). The term "Obligations" is explicitly defined in the Guarantee with reference only to obligations of ARM. Thus, the Yanakas Guarantee contains no disclaimer as to the validity, regularity, or enforceability of the Guarantee itself. It also contains no disclaimer of the existence of or reliance upon representations by MHT, no express reference to any promise of continued financing, and no blanket disclaimer of the type found in Plapinger as to "any other circumstance which might otherwise constitute a defense" to the Guarantee.

[5] One of Yanakas's bases for claiming fraud in the inducement, however, is barred by the Guarantee. Yanakas alleged that the Bank had failed to disclose to him its same-day procurement of the \$550,000 note signed by Buonincontri. The Guarantee, however, expressly covers ARM debts "whether now existing or hereafter incurred," and expressly "waives any and all notice of ... the creation ... of any of said Obligations." These terms are sufficiently specific to preclude *318 any claim that the Bank defrauded Yanakas by failing to disclose the existence or imminence of the 1988 note.

In other respects, the Guarantee given by Yanakas does not, in words or substance, contain disclaimers of the representations that formed the basis of his claim of fraudulent inducement. Accordingly, the decision of the district court to dismiss the first three affirmative defenses and counterclaims must be vacated. The court's ruling that MHT was entitled to summary judgment against Yanakas, premised as it was on the dismissal of those defenses, must likewise be set aside.

B. The Remaining Counterclaims

[6] Yanakas's fourth and fifth affirmative defenses and counterclaims, which center on his April 1988 proposal to restructure ARM's debt by having MHT purchase NatWest's security interest, asserted that MHT's rejection of, and failure to respond promptly to, his proposal constituted a breach of MHT's fiduciary duty. His challenge to the district court's dismissal of these claims is without merit.

[7] Under New York law, the "usual relationship of bank and customer is that of debtor and creditor," *Aaron Ferer & Sons Ltd. v. Chase Manhattan Bank, N.A.*, 731 F.2d 112, 122 (2d Cir.1984); see *Bank Leumi Trust Co. v. Block 3102 Corp.*, 180 A.D.2d at 589, 580 N.Y.S.2d at 301, "and does not create a fiduciary relationship between the bank and its borrower or its guarantors," *id.* Though in unusual circumstances, a fiduciary relationship may arise even between a bank and a customer if there is either "a confidence

reposed which invests the person trusted with an advantage in treating with the person so confiding," *Fisher v. Bishop*, 108 N.Y. 25, 28, 15 N.E. 331, 332 (1888), or an assumption of control and responsibility, see, e.g., *Gordon v. Bialystoker Center & Bikur Cholim, Inc.*, 45 N.Y.2d 692, 698, 412 N.Y.S.2d 593, 596, 385 N.E.2d 285, 287-88 (1978), the mere fact that a corporation has borrowed money from the same bank for several years is insufficient to transform the relationship into one in which the bank is a fiduciary, see *Aaron Ferer & Sons Ltd. v. Chase Manhattan Bank, N.A.*, 731 F.2d at 122.

Seeking to avoid the application of this well-established principle, Yanakas relies on *K.M.C. Co. v. Irving Trust Co.*, 757 F.2d 752 (6th Cir.1985) ("K.M.C."). His reliance is misplaced. *K.M.C.* involved an agreement by Irving Trust Co. ("Irving") to extend the debtor a \$3.5 million line of credit, in consideration of which the debtor assigned all of its business receipts to an account to which only Irving had access. Thus, the debtor had an express agreement for a certain sum of credit, and Irving had control over assets of the debtor, impeding the debtor from seeking new financing. The Sixth Circuit held that, in these circumstances, Irving's termination of the line of credit without advance notice breached an implied covenant of good faith. This Court has held that the fiduciary obligation found in *K.M.C.* is not present where a bank has "never represented that credit of a certain amount would be provided, and [the borrower] had no reasonable expectation of continued, much less expanded, credit." *Fasolino Foods Co. v. Banca Nazionale del Lavoro*, 961 F.2d 1052, 1058 (2d Cir.1992).

Yanakas's answer did not allege any facts sufficient either to convert MHT's position from that of creditor into that of fiduciary or to liken his circumstances to those in *K.M.C.* The answer did not allege that MHT controlled the assets or operations of ARM or that MHT otherwise exercised powers beyond those of a typical lender-creditor. Yanakas did not allege that MHT had agreed to provide ARM with any certain amount of financing.

He did not allege any agreement by MHT to Yanakas's proposed restructuring of ARM's debt, nor any representations by MHT suggesting that it would agree to that proposal. Though Yanakas alleged that ARM was unable to find financing elsewhere, there was no allegation that ARM's agreements with MHT precluded ARM from making a search for such financing or that the Bank failed to give proper notice of its decision to cease providing financing. We agree with the district court that Yanakas failed to allege any facts showing a fiduciary duty on the part of the Bank.

*319 CONCLUSION

We have considered all of the contentions of the parties in support of their respective positions on this appeal and, except as indicated above, have found them to be without merit. We vacate so much of the judgment of the district court as dismissed Yanakas's first three affirmative defenses and counterclaims and granted judgment in favor of MHT; we affirm so much of the judgment as dismissed the fourth and fifth affirmative defenses and counterclaims; and we remand to the district court for further proceedings not inconsistent with the foregoing.

No costs are awarded at this time. In the event that Yanakas ultimately prevails on any of his affirmative defenses or counterclaims, the district court may award him the costs of the present appeal.

Briefs and Other Related Documents (Back to Top)

MANUFACTURERS HANOVER TRUST COMPANY, Plaintiff-Appellee, v. Nicholas YANAKAS, Defendant-Appellant, Charles Buonincontri and Camille Buonincontri, Defendant., 1992 WL 12013075 (Appellate Brief) (C.A.2 April 21, 1992), Brief of Plaintiff-Appellee Manufacturers Hanover Trust Company

MANUFACTURERS HANOVER TRUST COMPANY, Plaintiff-Appellee, v. Nicholas YANAKAS, Defendant-Appellant, Charles

Buonincontri and Camille Buonincontri,
Defendants., 1993 WL 13011719 (Appellate
Brief) (C.A.2 March 18, 1993), Brief for
Defendant-Appellant Nicholas Yanakas

MANUFACTURERS HANOVER TRUST
COMPANY, Plaintiff-Appellee, v. Nicholas
YANAKAS, Defendant-Appellant, Charles
Buonincontri and Camille Buonincontri,
Defendants., 1993 WL 13011720 (Appellate
Brief) (C.A.2 April 30, 1993), Reply Brief for
Defendant-Appellant Nicholas Yanakas

7 F.3d 310

END OF DOCUMENT

55

Supreme Court, Appellate Division, Third
Department, New York.

MARCELLUS CONSTRUCTION COMPANY,
INC., Respondent,

v.

VILLAGE OF BROADALBIN et al.,
Defendants,

and

McDonald Engineering, P.C., Appellant.

Feb. 6, 2003.

Contractor that successfully bid on village sewer project brought action against village and engineer that provided design information in connection with the project. The Supreme Court, Fulton County, Sise, J., dismissed contractor's fraud and negligent performance claims against the engineer, but denied engineer's summary judgment motion with regard to contractor's negligent misrepresentation claim, and engineer appealed. The Supreme Court, Appellate Division, Kane, J., held that: (1) contractor and engineer did not have relationship approaching privity, so as to permit contractor to recover from engineer for its alleged negligent misrepresentations concerning preexisting subsurface site conditions, and (2) even if contractor and engineer had relationship approaching privity, contractor failed to show that engineer made negligent misrepresentations.

Affirmed as modified.

West Headnotes

[1] Fraud 29
184k29

Before a party may recover in tort for pecuniary loss sustained as a result of another's negligent misrepresentations, there must be a showing that there was either actual privity of contract between the parties or a relationship so close as to approach that of privity.

[2] Fraud 29
184k29

Contractor that successfully bid on village sewer project and engineer that provided technical data concerning the project did not have relationship approaching privity, so as to permit contractor to recover from engineer for its alleged negligent misrepresentations concerning preexisting subsurface site conditions; although engineer was aware that purpose of its design plans was to assist contractors in preparation of bids, its contract with village provided that its acts would not give rise to any duty to contractors, and it did not discuss subsurface conditions in its pre-award meeting with contractor.

[3] Fraud 13(3)
184k13(3)

Even if contractor that successfully bid on village sewer project had relationship approaching privity with engineer that provided technical data concerning the project, contractor failed to show that engineer made negligent misrepresentations concerning preexisting subsurface site conditions; engineer's only representations with respect to subsurface conditions were results of 28 test borings, and there was no evidence that engineer misrepresented results of those borings or that the borings were negligently performed.

****475** Fox, Charles & Kowalewski L.L.P.,
Clifton Park (Suzanne H. Charles of counsel),
for appellant.

Bond, Schoeneck & King L.L.P., Albany
(Carl Rosenbloom of counsel), for respondent.

Before: CREW III, J.P., SPAIN,
CARPINELLO, LAHTINEN and KANE, JJ.

***640** KANE, J.

Appeal from an order of the Supreme Court (Sise, J.), entered December 13, 2001 in Fulton County, which partially denied a motion by defendant McDonald Engineering, P.C. for summary judgment dismissing the complaint against it.

In July 1994, defendant McDonald

(Cite as: 302 A.D.2d 640, *640, 755 N.Y.S.2d 474, **475)

Engineering, P.C. was retained by defendant Village of Broadalbin to provide planning, design and construction phase engineering services for a sewage collection system in the Village. Pursuant to its contract, McDonald prepared the bid documents that included information on subsurface conditions. As the low bidder, plaintiff was awarded the contract by the Village. Upon commencing work, plaintiff encountered subsurface conditions, such as boulders and mislocated utility lines, that plaintiff alleges varied from the descriptions in the "technical data" provided by McDonald. As a result, plaintiff incurred additional expense for which it sought and was denied payment by McDonald. Plaintiff subsequently commenced this action against defendants, alleging, inter alia, that McDonald negligently performed its engineering services, and committed fraud and negligent misrepresentation concerning preexisting subsurface site conditions. Supreme Court granted McDonald's motion for summary judgment dismissing plaintiff's claims as to fraud and negligent performance. However, the court denied the motion as to the claim of negligent misrepresentation, holding that there was a relationship so close as to be the functional equivalent of privity between plaintiff and McDonald, allowing plaintiff to maintain a claim of negligent misrepresentation against McDonald. This appeal followed.

[1][2] "[B]efore a party may recover in tort for pecuniary loss sustained as a result of another's negligent misrepresentations, there must be a showing that there was either actual privity of contract between the parties or a relationship so close as to approach that of privity" (Prudential Ins. Co. of Am. v. Dewey, Ballantine, Bushby, Palmer & Wood, 80 N.Y.2d 377, 382, 590 N.Y.S.2d 831, 605 N.E.2d 318; see CFJ Assoc. of N.Y. v. Hanson Indus., 274 A.D.2d 892, 895, 711 N.Y.S.2d 232). * * * "Where, as here, no privity of contract exists between the parties, the Court of Appeals has identified three criteria for imposing liability upon the maker of a negligent misrepresentation: '(1) an awareness by the maker of the statement that it is to be used for a particular purpose; (2)

reliance by a known party on the statement in furtherance of that purpose; and (3) some conduct by the maker of the statement *641 linking it to the relying party and evincing its understanding of that reliance' " (Rayco of Schenectady v. City of Schenectady, 267 A.D.2d 664, 665, 699 **476 N.Y.S.2d 594, quoting Prudential Ins. Co. of Am. v. Dewey, Ballantine, Bushby, Palmer & Wood, supra at 384, 590 N.Y.S.2d 831, 605 N.E.2d 318; see Yanas v. Albany Med. Ctr. Hosp., 294 A.D.2d 769, 771, 744 N.Y.S.2d 514). In applying these principles to the facts herein, we conclude that plaintiff has failed to tender admissible proof of a relationship which is tantamount to that of privity.

Since McDonald's design of the project was part of the final bid package for all interested construction bidders, we conclude that the first prong of the tripartite test has arguably been satisfied. Clearly, the record before us sustains plaintiff's allegations that McDonald was aware that one of the purposes of its design plans was to assist construction companies in preparing their bids for the project (see Ossining Union Free School Dist. v. Anderson La Rocca Anderson, 73 N.Y.2d 417, 424, 541 N.Y.S.2d 335, 539 N.E.2d 91).

As to the second prong, however, the contract between plaintiff and the Village provided that McDonald was to act as "owner's representative" and that the acts of McDonald would not "create, impose or give rise to any duty owed by ENGINEER to CONTRACTOR" (see McNar Indus. v. Feibes & Schmitt, Architects, 245 A.D.2d 993, 994, 667 N.Y.S.2d 88, lv. denied 91 N.Y.2d 812, 672 N.Y.S.2d 848, 695 N.E.2d 717). Nor do we consider plaintiff a "known party" merely because it was a potential bidder (see e.g. Reliance Ins. Co. v. Morris Assoc., 200 A.D.2d 728, 729, 607 N.Y.S.2d 106) or that McDonald knew that plaintiff was "part of a definable class which would rely on the plans" (id. at 729, 607 N.Y.S.2d 106). Rather, we find plaintiff to be part of an "indeterminate class of persons who, presently or in the future, might [act] * * * in reliance on [McDonald's plans]" (IT Corp. v. Ecology & Env'tl. Eng'g, 275 A.D.2d 958, 960, 713 N.Y.S.2d 633, lv. denied 96

N.Y.2d 702, 722 N.Y.S.2d 794, 745 N.E.2d 1016, quoting *Ultramares Corp. v. Touche*, 255 N.Y. 170, 183, 174 N.E. 441). The fact that there was a pre-award meeting between plaintiff and McDonald does not compel a different result as, inter alia, at the time of the meeting, plaintiff had already submitted its bid for the project.

Finally, with respect to the third prong, we find no conduct between plaintiff and McDonald evincing McDonald's understanding that plaintiff had, in fact, relied on McDonald's subsurface information in preparing its bids. To the contrary, there was no discussion of the subsurface information at the pre-award meeting. Most significantly, the bidders' instructions unequivocally advised bidders that they were required to conduct their own investigation concerning site conditions. Here, the record indicates that plaintiff understood that another bidder conducted subsurface explorations prior to submitting a bid on the project, but plaintiff elected not to do so. *642 Furthermore, the contract signed by plaintiff clearly states that the soil boring information is not part of the contract documents nor is the information guaranteed. Although Supreme Court may be correct in its reasoning that the bid documents were prepared to provide information to plaintiff as opposed to the Village, neither the preparation of the documents, nor the pre-award meeting between plaintiff and McDonald, "evinces [McDonald's] understanding of [plaintiff's] reliance" upon the technical data and site descriptions exclusively in the preparation of its bid (*Yanas v. Albany Med. Ctr. Hosp.*, 294 A.D.2d 769, 771, 744 N.Y.S.2d 514, supra, quoting *Credit Alliance Corp. v. Andersen & Co.*, 65 N.Y.2d 536, 551, 493 N.Y.S.2d 435, 483 N.E.2d 110). Accordingly, we find no relationship approaching privity between plaintiff and McDonald sufficient to withstand a motion for summary judgment (see **477 *Parrott v. Coopers & Lybrand*, 95 N.Y.2d 479, 483, 718 N.Y.S.2d 709, 741 N.E.2d 506).

[3] Even if plaintiff had established a relationship with McDonald "so close as to approach that of privity" (*Prudential Ins. Co.*

of *Am. v Dewey, Ballantine, Bushby, Palmer & Wood*, supra at 382, 590 N.Y.S.2d 831, 605 N.E.2d 318), McDonald's motion should have been granted. A review of the record discloses that the only representations made by McDonald with respect to subsurface conditions were the results of the 28 test borings performed in 1996. In response to McDonald's motion for summary judgment, plaintiff failed to set forth any facts demonstrating that McDonald misrepresented in any way the results of the 28 test borings or that said borings were in some manner negligently performed. Having failed to set forth any proof of a negligent misrepresentation, plaintiff's cause of action for same must fail (see *Depot Constr. Corp. v. State of New York*, 19 N.Y.2d 109, 114, 278 N.Y.S.2d 363, 224 N.E.2d 866; *Bilotta Constr. Corp. v. Village of Mamaroneck*, 199 A.D.2d 230, 232, 604 N.Y.S.2d 966).

ORDERED that the order is modified, on the law, with costs to defendant McDonald Engineering, P.C., by reversing so much thereof as partially denied said defendant's motion; motion granted in its entirety, summary judgment awarded to said defendant and complaint dismissed against it; and, as so modified, affirmed.

CREW III, J.P., SPAIN, CARPINELLO and LAHTINEN, JJ., concur.

302 A.D.2d 640, 755 N.Y.S.2d 474, 2003 N.Y. Slip Op. 10728

END OF DOCUMENT

56

Supreme Court, Appellate Division, First
Department, New York.

MARINE MIDLAND BANK, Plaintiff-
Respondent,

v.

PALM BEACH MOORINGS, INC., et al.,
Defendants-Appellants.

March 16, 1978.

Bank brought action to recover on an unsecured time note executed by defendant corporation and by individual defendant as guarantor. The Supreme Court, New York County, Oliver C. Sutton, J., granted in part plaintiff's motion for summary judgment, and defendants appealed. The Supreme Court, Appellate Division, held that defendant, who assumed a controlling interest in corporation and signed as personal guarantor on its note, could not defeat liability as guarantor on asserted theory that he had been induced into transaction by bank official misrepresentations, where defendant had opportunity to examine corporate records before assuming obligations and, after buying controlling interest in corporation, defendant had unlimited access to relevant financial records before causing corporation to discharge previous obligations and before he became personal guarantor on note.

Order and judgment affirmed.

West Headnotes

Guaranty 20
195k20

Defendant, who assumed a controlling interest in corporation and signed as personal guarantor on its note, could not defeat liability as guarantor on asserted theory that he had been induced into transaction by bank official's misrepresentations, where defendant had opportunity to examine corporate records before assuming obligations and, after buying controlling interest in corporation, defendant had unlimited access to relevant financial records before causing corporation to discharge previous obligations and before he became personal guarantor on note.

***16** R. L. Ellis, New York City, for
plaintiff-respondent.

M. N. Nessen, New York City, for
defendants-appellants.

***928** Before LUPIANO, J. P., and LANE,
MARKEWICH and SANDLER, JJ.

***927** MEMORANDUM DECISION.

Order and judgment (2 papers), Supreme Court, New York County, entered November 16, 1977, granting in part plaintiff's motion for summary judgment, unanimously affirmed. Respondent shall recover of appellant \$60 costs and disbursements.

In affirming the order and judgment at Special Term granting plaintiff in part summary judgment, the ***928** court does so for reasons other than those stated in the opinion at Special Term.

The underlying action by the plaintiff was to recover on an unsecured time note in the sum of \$385,000 executed by the defendant Palm Beach Moorings, Inc. (Palm Beach) and guaranteed by the defendant Paul. In resisting the motion for summary judgment, the defendants contended that the note in question was a renewal of prior similar notes, which in turn derived from still earlier notes totalling \$725,000 executed by the defendant Palm Beach and endorsed by the previous controlling stockholder of that corporation, one Abraham Wolosoff, father-in-law of defendant Paul.

It was further contended that Paul had been asked by his father-in-law to buy the controlling interest in Palm Beach and as part of that proposed purchase to arrange for the discharge of the previous corporate obligations of \$725,000, or alternatively, to replace Wolosoff as a guarantor on the note; that he was introduced to a vice president of the plaintiff bank who told him that the loans had been extended for construction purposes and had been so used which statements were inaccurate, either intentionally or made without an adequate basis; and that he relied

(Cite as: 61 A.D.2d 927, *928, 403 N.Y.S.2d 15, **16)

upon those statements in entering into the agreement to acquire the controlling interest of the corporation and in guaranteeing later notes.

As to the defendant Palm Beach, it is immediately apparent that nothing approaching an issue of fact was presented. On the version of the transaction presented in the papers by the defendants, it is obvious that Palm Beach, as of the time of the conversation with the bank official, was already obligated to plaintiff in the sum of \$725,000 and nothing said by the bank official to Paul could conceivably have had any bearing on that obligation.

As to the defendant Paul, we need not determine here if enough is presented in the papers to raise a triable issue as to whether the statements attributed to the bank official were intentionally untrue or were made without an adequate basis for believing them to be true.

Nor need we decide whether defendant Paul's claim that he relied upon those statements, presented in conclusory fashion, is sufficient to present an issue of fact, although the total circumstances make the **17 claim of reliance not an easy one to accept. The thesis advanced requires a finding that an experienced business man, assuming a controlling interest in a corporation and incurring heavy financial obligations, did so on the basis of verbal assurances given to him by the seller and a bank official.

The inference that the defendant Paul assumed these burdens after having made, or caused to be made on his behalf, a careful examination of the relevant books and records of the corporation is a powerful one indeed. The strength of this conclusion is buttressed by the striking fact that in a meticulously prepared affidavit the defendant does not say whether he did or did not make or cause to be made an examination of the corporation's books and records.

In any event, it is not denied that the defendant Paul had the opportunity to

examine the corporate records before assuming the obligations reflected in the agreement of purchase. It is also clear that after buying the controlling interest in the corporation he had unlimited access to the relevant financial records before he caused the corporation to discharge the previous obligations and before he became a personal guarantor on any note. Here, surely, is a situation which calls for application of the principle articulated by the Court of Appeals in *Danann Realty Corp. v. Harris*, 5 N.Y.2d 317, 322, 184 N.Y.S.2d 599, 603, 157 N.E.2d 597, 600:

"If the facts represented are not matters peculiarly within the party's knowledge, and the other party has the means available to him of knowing, by the exercise of ordinary intelligence, the truth, or the real quality of the subject of representation, he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentations."

61 A.D.2d 927, 403 N.Y.S.2d 15

END OF DOCUMENT

57

Supreme Court, Appellate Division, Second
Department, New York.

Joseph B. McMANUS, et al., appellants,
v.
Frantz N. MOISE, et al., respondents.

June 7, 1999.

Home buyers brought action against sellers for fraud based on alleged concealment of extent of termite damage to home. The Supreme Court, Nassau County, Feuerstein, J., granted sellers' motion for summary judgment. Buyers appealed. The Supreme Court, Appellate Division, held that buyers did not have viable cause of action for fraud.

Affirmed.

West Headnotes

[1] Fraud 22(1)
184k22(1)

In contract for sale of real property, if facts represented are not matters peculiarly within party's knowledge, and other party has means available to him of knowing, by exercise of ordinary intelligence, the truth or real quality of subject of representation, he must make use of those means, or he will not be heard to complain that he was induced to enter into transaction by misrepresentations.

[2] Fraud 22(1)
184k22(1)

Home buyers could not be heard to complain that they were defrauded by sellers' alleged concealment of extent of termite damage to home, where buyers were aware, prior to contract, that house had visible, structural termite damage as well as potentially more extensive damage behind walls, but buyers nevertheless agreed to second inspection procedure which, by its very terms, prevented their adequately investigating problem, and buyers then purchased property without even availing themselves of second inspection.

[3] Fraud 36
184k36

Contract of sale disclaimer stating that home buyers acknowledged they examined premises, that sellers did not make any representations as to physical condition of premises, that buyers expressly acknowledged that no such representations were made, and that house was being sold in "as is" condition was sufficiently specific to preclude buyers' reliance on any alleged pre-sale misrepresentations by sellers concerning existence of, or extent of, termite damage or infestation.

****167** Schupbach Williams & Pavone, L.L.P., Garden City, N.Y. (Arthur C. Schupbach of counsel), for appellants.

Alan Ross, Plainview, N.Y., for respondents.

CORNELIUS J. O'BRIEN, J.P., FRED T. SANTUCCI, MYRIAM J. ALTMAN and HOWARD MILLER, JJ.

MEMORANDUM BY THE COURT.

***370** In an action, inter alia, to recover damages for fraud, the plaintiffs appeal from an order of the Supreme Court, Nassau County (Feuerstein, J.), entered May 12, 1998, which granted the defendants' motion for summary judgment dismissing the complaint and denied their cross motion for summary judgment.

ORDERED that the order is affirmed, with costs.

In 1997 the plaintiffs purchased a house from the defendants. Prior to executing the contract of sale, the plaintiffs received a professional termite inspection report which, inter alia, indicated that the property had suffered extensive structural damage from termite infestation. The report also stated that there was "[p]ossible hidden termite damage behind sheet rock wall" and "strongly advise[d] further examination". Thereafter the plaintiffs' attorney added a rider to the contract which provided that the plaintiffs could conduct a second inspection "without removing the sheetrock" within 25 days after

(Cite as: 262 A.D.2d 370, *370, 691 N.Y.S.2d 166, **167)

the execution of the contract, and that if such inspection revealed termite damage that would cost more than \$3,000 to repair, they could cancel the contract and their down payment would be refunded. There is no evidence that the plaintiffs ever conducted a second inspection, and the parties closed on the property on June 10, 1997.

The plaintiffs claim that in July 1997 they discovered extensive termite damage throughout the house which would cost approximately \$50,000 to repair. They commenced the instant action, inter alia, alleging that the defendants fraudulently misrepresented the extent of the termite damage which was intentionally concealed.

[1][2] *371 The Supreme Court properly dismissed the complaint. It is well settled that in a contract for the sale of real property, "if the facts represented are not matters peculiarly within the party's knowledge, and the other party has the means available to him of knowing, by the exercise of ordinary intelligence, the truth or the real quality of the subject of the representation, he [or she] must make use of those means, or he [or she] will not be heard to complain that he [or she] was induced to enter into the transaction by misrepresentations" (Schumaker v. Mather, 133 N.Y. 590, 596, 30 N.E. 755; see, Danann Realty Corp. v. Harris, 5 N.Y.2d 317, 322, 184 N.Y.S.2d 599, 157 N.E.2d 597; see also, Bando v. Achenbaum, 234 A.D.2d 242, 651 N.Y.S.2d 74). The plaintiffs were aware, prior to contract, that the house had visible, structural termite damage as well as potentially more extensive damage behind the walls. Nevertheless, **168 they agreed to a second inspection procedure which, by its very terms, prevented their adequately investigating the problem, and they then purchased the property without even availing themselves of the second inspection. Under these circumstances, the plaintiffs cannot now be heard to complain that they have been defrauded. It was their own lack of diligence that is responsible for their current predicament (see, Rodas v. Manitaras, 159 A.D.2d 341, 552 N.Y.S.2d 618; Bando v. Achenbaum, supra).

[3] We further note that the contract of sale contained a disclaimer whereby the plaintiffs acknowledged that they had "examined the premises"; the defendants did not make "any representations as to the physical condition" of the premises; the plaintiffs "expressly acknowledge[d] that no such representations [had] been made", and that the house was being sold in an "as is" condition. These provisions were sufficiently specific to preclude the plaintiffs' reliance on any alleged pre-sale misrepresentations by the defendants concerning the existence of, or extent of, termite damage or infestation (see, Citibank v. Plapinger, 66 N.Y.2d 90, 495 N.Y.S.2d 309, 485 N.E.2d 974; Barnes v. Gould, 55 N.Y.2d 943, 449 N.Y.S.2d 192, 434 N.E.2d 261; Couch v. Schmidt, 204 A.D.2d 951, 612 N.Y.S.2d 511).

262 A.D.2d 370, 691 N.Y.S.2d 166, 1999 N.Y. Slip Op. 05150

END OF DOCUMENT

58

District Court of Appeal of Florida,
Third District.

Guillermo MENENDEZ, Appellant,
v.
BEECH ACCEPTANCE CORPORATION,
Appellee.

No. 86-2419.

Feb. 9, 1988.

Rehearing Denied March 23, 1988.

After remand, 496 So.2d 251, in which bank was determined to have priority over chattel mortgage holder, chattel mortgage holder amended suit to include acceptance corporation and sought to have acceptance corporation's security interest subordinated to his chattel mortgage. The Circuit Court, Dade County, Leonard Rivkind, J., granted acceptance corporation summary judgment. On appeal, the District Court of Appeal, Ferguson, J., held that: (1) acceptance corporation's actions protected its own security interest; (2) no evidence demonstrated that acceptance corporation participated in civil conspiracy; (3) not a scintilla of evidence demonstrated acceptance misappropriated holder's property; and (4) holder was not entitled to amend his petition to include allegation of negligence.

Affirmed.

West Headnotes

[1] Trusts 95
390k95

Holder of chattel mortgage in aircraft was not entitled to priority over security interest of acceptance corporation on basis of constructive trust, upon holder's allegations of fraud, undue influence or abuse of confidence, for acceptance corporation's failure to protect chattel mortgage holder's interest from being subordinated to bank's security interest, where acceptance corporation had competing financial interest with chattel mortgage holder, and no fiduciary relationship existed between them, as acceptance corporation's

failure to protect chattel mortgage holder's interest thereby protected its own security interest.

[2] Torts 12
379k12

Conduct engaged in for legitimate business purposes, even if tinged with animosity and malice, does not give rise to cause of action for interference with a contractual relationship.

[3] Trusts 95
390k95

Holder of chattel mortgage in aircraft was not entitled to priority over security interest of acceptance corporation, on theory of constructive trust arising out of civil conspiracy, for acceptance corporation's failure to protect chattel mortgage holder's interest from being subordinated to bank's security interest, where no evidence indicated that acceptance corporation knew of or participated in scheme to subordinate holder's chattel mortgage.

[4] Judgment 185.3(21)
228k185.3(21)

Some proof of a civil conspiracy and participation in it by alleged tort-feasor must be shown to survive motion for summary judgment.

[5] Trusts 95
390k95

Holder of chattel mortgage in aircraft was not entitled to priority over that of acceptance corporation, which also held security interest in aircraft, on theory of constructive trust, arising from allegations of civil theft, for acceptance corporation's failure to protect chattel mortgage holder's interest from being subordinated to bank's security interest in aircraft, where not a scintilla of evidence demonstrated that acceptance corporation knowingly obtained, used, or endeavored to obtain or use property of chattel mortgage holder or that acceptance corporation deprived holder of a right to its property, or appropriated holder's property to corporation's own use or to use of another person, as required under civil theft statute. West's

F.S.A. § 812.014(1).

[6] Trusts 95
390k95

Holder of chattel mortgage in aircraft was not entitled to priority over security interest of acceptance corporation, on basis of constructive trust, upon allegations of negligence, for acceptance corporation's failure to protect chattel mortgage holder's interest from being subordinated to bank's security interest, where no fiduciary relationship existed between corporation and holder, and corporation owed no duty to holder.

*179 Neil J. Berman, Miami, for appellant.

Thornton, David & Murray and Terry L. Redford, Miami, for appellee.

Before HUBBART, FERGUSON and JORGENSON, JJ.

FERGUSON, Judge.

In a previous appearance of this case we affirmed a summary judgment finding that Founders Financial Corporation's security interest in an aircraft had priority over Menendez's chattel mortgage. Menendez *180 v. Founders Fin. Corp., 496 So.2d 251 (Fla.3d DCA 1986). On remand, with Founders no longer in the case, Menendez amended his complaint to add Beech as a defendant, alleging that its security interest in the aircraft was subordinated to Founders' security interest because of Beech's wrongful conduct. Having thoroughly examined the record, we again find no basis for disturbing the judgment.

[1][2] No right to have a constructive trust imposed was established because no facts were adduced to support the allegations of fraud, undue influence, or abuse of confidence. Beech had no fiduciary duty to Menendez; in fact they each had competing financial interests to be protected, and in not vigorously protecting Menendez's financial interest, Beech was effectively protecting its own interest. Such conduct engaged in for

legitimate purposes, even if tinged with animosity and malice, does not give rise to a cause of action for interference with a contractual relationship. *Ethyl Corp. v. Balter*, 386 So.2d 1220 (Fla.3d DCA 1980), rev. denied, 392 So.2d 1371 (Fla.), cert. denied, 452 U.S. 955, 101 S.Ct. 3099, 69 L.Ed.2d 965 (1981).

[3][4] Menendez claimed that Beech conspired with others to conceal facts which would have placed Menendez on notice of a threat to his security interest. There are no facts, however, tending to show that Beech knew of or participated in a scheme to render Menendez's security interest subordinate to Founders' interest. Some proof of knowledge of a conspiracy, and participation in it by the alleged tortfeasor, must be shown in order to survive a motion for summary judgment. *Karnegis v. Oakes*, 296 So.2d 657 (Fla.3d DCA 1974), cert. denied, 307 So.2d 450 (1975).

[5] Neither is there a scintilla of evidence that Beech knowingly obtained, used, or endeavored to obtain or use property of Menendez, or that Beech deprived Menendez of a right to his property or appropriated the property to its own use or to the use of another person-essential elements under the civil theft statute. § 812.014(1), Fla.Stat. (1985). Summary judgment was thus correctly entered on the civil theft cause of action.

[6] Lastly, no abuse of discretion is shown in the trial court's denial of Menendez's motion for leave to file an amended complaint alleging negligence. Since the record reflects that there was an arm's length, competing business relationship between the parties which gave rise to no contractual duty of Beech to protect Menendez's financial interest, there can be no cause of action based on a breach of duty. See *Robertson v. Deak Perera (Miami), Inc.*, 396 So.2d 749 (Fla.3d DCA), rev. denied, 407 So.2d 1105 (1981).

Affirmed.

521 So.2d 178, 13 Fla. L. Weekly 410

END OF DOCUMENT

59

United States District Court, S. D. New York.

Marvin W. MORSE, Plaintiff,

v.

SWANK, INC., Pierre Cardin, S.A.R.L. de
Gestion Pierre Cardin, Max J. Bellest,
and Coordinating Office, Inc., Defendants.

No. 77 Civ. 5185 (CHT).

Oct. 10, 1978.

Prospective licensee brought action against foreign licensor, independent contractor which supervised licensing in United States and competitor charging violation of antitrust laws, breach of contract, tortious interference with contract, fraud and negligence. On defendants' motion for summary judgment, the District Court, Tenney, J., held that: (1) fact issue existed as to whether there was a combination or conspiracy to bar prospective licensee from marketing designer lighters in United States and whether it had intent or effect of restraining competition in marketing of lighters, precluding summary judgment on antitrust claim; (2) fact issue existed as to whether prospective licensee and licensor intended binding licensing agreement, precluding summary judgment on breach of contract claim; (3) fact issue existed as to whether there was tortious interference with licensing negotiations, precluding summary judgment, and (4) independent contractor was not liable for negligent or fraudulent misrepresentations.

Motion granted in part and denied in part.

West Headnotes

[1] Federal Civil Procedure 2552
170Ak2552

On motion for summary judgment, court cannot try issues of fact but can only determine whether there are issues to be tried. Fed.Rules Civ.Proc. rule 56, 28 U.S.C.A.

[2] Federal Civil Procedure 2543
170Ak2543

[2] Federal Civil Procedure 2544

170Ak2544

In determining motion for summary judgment, court must resolve ambiguities against movant and draw reasonable inferences in favor of opponent with burden on movant of establishing that there are no genuine issues of material fact to be tried. Fed.Rules Civ.Proc. rule 56, 28 U.S.C.A.

[3] Assignments 121
38k121

Challenges that assignment to plaintiff of claim from his partners or coventurers failed to identify cause of action and business to which assignment referred, failed to include alleged necessary party and failed to indicate assignment as basis for instant suit merely pointed to factual matters unclear on the record and were insufficient, under New York law, to demonstrate invalidity of assignment as matter of law so as to render plaintiff not real party in interest. General Obligations Law N.Y. §§ 13-101, 13-105.

[4] Monopolies 17(2.2)
265k17(2.2)

Licensor or manufacturer may refuse to begin new relationship or terminate an old one, notwithstanding harm to distributor or prospective distributor, providing that there is no combination or conspiracy restraining competition. Sherman Anti-Trust Act, § 1 as amended 15 U.S.C.A. § 1.

[5] Federal Civil Procedure 2484
170Ak2484

Fact issues existed as to whether there was a combination or conspiracy to bar prospective licensee from marketing designer lighters in the United States and whether it had intent or effect of restraining competition in marketing of such lighters, precluding summary judgment on prospective lighter licensee's claim of antitrust violation. Sherman Anti-Trust Act, § 1 as amended 15 U.S.C.A. § 1.

[6] Federal Civil Procedure 2492
170Ak2492

Fact issue existed as to intent of prospective licensee and licensor to create binding agreement for issuance of license to sell certain designer lighters in United States,

precluding summary judgment on prospective licensee's claim of breach of license agreement.

[7] Contracts 15
95k15

Parties may withdraw from contract negotiations with impunity.

[8] Contracts 15
95k15

Absence of a formal contract and continuing negotiation as to prospective suppliers of lighters did not preclude meeting of minds necessary to constitute binding agreement for license to sell designer lighters in United States.

[9] Torts 12
379k12

Tortious interference prohibition extends to mere negotiations.

[10] Torts 12
379k12

He who has a reasonable expectancy of a contract has a property right which may not be invaded maliciously or unjustifiably.

[11] Federal Civil Procedure 2492
170Ak2492

Factual question existed as to whether there was malicious interference with prospective licensee's negotiations or contract with licensor for license to sell designer lighters in United States, precluding summary judgment on prospective licensee's claim of tortious interference.

[12] Fraud 13(3)
184k13(3)

Scienter includes not only knowing misrepresentations but also reckless indifference to error, pretense of knowledge and misrepresentation of material fact susceptible of accurate knowledge but stated as true on personal knowledge of representor.

[13] Federal Civil Procedure 2515
170Ak2515

Factual issues existed as to circumstances surrounding misrepresentations about

licensor's ability to grant license to sell lighters in United States and scienter, precluding summary judgment on prospective licensee's claim of fraudulent misrepresentations relative to granting of license.

[14] Fraud 21
184k21

A cause of action for negligent misrepresentations may lie when parties' relationship suggests closer degree of trust and reliance than that of ordinary buyer and seller.

[15] Federal Civil Procedure 2515
170Ak2515

Fact issue existed as to whether relationship between prospective licensee who sold designer lighters in duty-free shops in United States and sought license to expand sales to reach American market generally and licensor which had superior knowledge as to a prior contract relationship with prospective licensee's competitor gave rise to a duty on part of licensor not to make negligent representations relative to its ability to grant license to market lighters in United States, precluding summary judgment on prospective licensee's claim of negligent misrepresentations.

[16] Fraud 28
184k28

Prospective licensee's assumption that there were no existing licenses permitting anyone to sell designer lighters in United States arising from licensing agent's advice for prospective licensee to deal directly with foreign licensor did not give rise to cause of action against licensing agent for fraud or negligent misrepresentation as to licensor's ability to grant license to sell designer lighters in United States.

*662 Solin & Breindel, New York City, by Howard Breindel, Daniel R. Solin, New York City, for plaintiff.

Greenbaum, Wolff & Ernst, New York City, for defendants Pierre Cardin, S.A.R.L. de Gestion Pierre Cardin, Max J. Bellest, and

Coordinating Office, Inc.; Sydney J. Schwartz,
New York City, of counsel.

MEMORANDUM

TENNEY, District Judge.

This is an action brought by Marvin W. Morse that charges violations of the antitrust laws, breach of contract, tortious interference with a contract, fraud, and negligence. In the instant motion, defendants Max J. Bellest and Coordinating Office, Inc. ("Bellest defendants") and Pierre Cardin and S.A.R.L. de Gestion Pierre Cardin ("Cardin defendants") ask for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure ("Rules"). Defendant Bellest individually moves for a stay of deposition. For the reasons set forth below, summary judgment is granted in favor of the Bellest defendants on the fourth and fifth causes of action only; it is denied as to all other defendants on all causes of action and denied as to the Bellest defendants on the other causes of action against them. Bellest's motion to stay his deposition is also denied.

The Parties

Plaintiff Morse is a New York citizen who negotiated with the Cardin defendants to obtain a license for the sale of Pierre Cardin lighters. Defendant Pierre Cardin is a French citizen and is a world-famous designer of men's and women's clothing, jewelry, and related product lines. Defendant S.A.R.L. de Gestion Pierre Cardin ("SARL"), also a French citizen, is the designer in corporate form. Defendant Max Bellest is a New York citizen. He is employed by and is the sole shareholder of Bellest Corporation, a New York entity that, as an independent contractor, represents SARL in the United States and Canada by supervising licensing agreements between Cardin and the Canadian and American licensees. Defendant Coordinating Office, Inc. ("CO"), incorporated at Bellest's suggestion, is likewise a New York corporation that coordinates promotions, advertising, and merchandising by American licensees of Pierre Cardin trademarked products.

Defendant Swank, Inc. is incorporated in Delaware and has its executive offices in New York. Swank manufactures, distributes, and sells jewelry and related items under the Pierre Cardin trademark. It has exclusive distribution rights in the United States on some items of men's and women's jewelry and leather accessories.

Background

Late in 1975, plaintiff Morse began selling Pierre Cardin lighters in duty-free shops in the United States through an unexplained arrangement with Cardin. Based on his success in selling the lighters in this market, Morse decided to expand to reach the American market generally. In August 1977 he contacted CO to begin negotiating for such a Pierre Cardin license. CO referred Morse to the Cardin office in Paris. During the next several months, Morse and Herve Duquesnoy of SARL negotiated over terms of the prospective license; however, in a letter dated March 24, 1977, Duquesnoy informed Morse that the negotiations were at an end because the license had been promised to defendant Swank. Letter from Herve Duquesnoy to Mr. Morse (sic), appended as Exhibit I of Affidavit of Howard Breindel, sworn to February 16, 1978 ("Breindel Affidavit").

In his letter terminating negotiations with Morse, Duquesnoy referred to a long-standing relationship between Cardin and Swank that began at least as early as October 13, 1967 when those two parties entered a licensing agreement for the manufacture and sale of men's jewelry and related product lines. The term jewelry was understood to include lighters. The agreement *663 gave Swank exclusive rights to market the specified items except, as is relevant here, "to jewelry manufactured of precious metals or containing precious stones, retailing at a price in excess of \$75.00 per item." Cardin-Swank Agreement, dated October 13, 1967, P 1, appended to Cardin Defendants' Motion for Summary Judgment ("1967 Agreement").[FN1] However, while Swank began exploring the marketing of Cardin lighters in 1975, See Affidavit of John A.

Tulin, sworn to April 1978, Exhibits A, B (letters from prospective suppliers of Cardin lighters providing requested prices) ("Tulin Affidavit"), not until March 8, 1977 did Marshall Tulin, vice-president of Swank, write Pierre Cardin to tell him of Swank's decision to consider the sale of lighters as provided for in the 1967 Agreement. Two weeks later, SARL, through Duquesnoy, terminated further negotiations with Morse.

FN1. An agreement amending the original agreement was reached on May 25, 1976. Although the new agreement altered the terms of the exclusivity, it retained a price demarcation between exclusive and nonexclusive items. The penultimate sentence of P 1 of the 1967 Agreement (quoted in the text, *Supra*) was amended to read: Notwithstanding the foregoing, the license hereby granted with respect to sterling silver men's jewelry is hereby limited to exclude such jewelry retailing at normal mark-up for \$55 or more during the period ending April 12, 1978, \$60 or more during the period April 13, 1978 through April 12, 1980, and \$65 or more after April 12, 1980. Swank-Cardin Amended Agreement, dated May 25, 1976, P 1(d), at 3, appended to Bellest Defendants' Motion for Summary Judgment.

The Complaint

The amended complaint [FN2] alleges five causes of action. The first is founded on an antitrust theory wherein Morse sues all five defendants under Section 1 of the Sherman Act, 15 U.S.C. s 1 (as amended). He alleges a combination and conspiracy in unreasonable restraint of trade to bar him from marketing Pierre Cardin lighters and thereby competing with Swank, claiming that Cardin's breached agreement, refusal to deal, and consummation of "the Swank Contract" were all acts in pursuit of the combination and conspiracy to restrain trade. Morse claims injury to himself, restrained competition in the distribution and sale of Pierre Cardin lighters and in the use of the Pierre Cardin trademark, and reduced consumer choice.

FN2. The original complaint was amended to correct the title of Coordinating Office, Inc.

Morse's second cause of action appears to be aimed at Pierre Cardin alone. [FN3] He alleges that on or about March 10, 1977 Morse and Cardin entered an agreement for the distribution of Pierre Cardin lighters and that Cardin breached that agreement shortly thereafter. This cause of action relates to the third, which alleges that Swank, Bellest, and CO tortiously interfered with the Morse-Cardin agreement.

FN3. The amended complaint directs the second cause of action against defendant Cardin alone, Amended Complaint P 24 (heading), but in his papers, plaintiff states that the second cause of action is against Cardin and SARL. Affidavit of Howard Breindel, sworn to February 16, 1978, P 6 ("Breindel Affidavit").

The fourth and fifth causes of action are pleaded alternatively to each other and only if the Swank contract is found to have been executed prior to the purported agreement with Morse. On one theory, Morse charges that Pierre Cardin and the Bellest defendants defrauded him by making materially false statements as to Cardin's trademark rights. Alternatively, Morse alleges injury by the same defendants through negligent misrepresentations.

Jurisdiction over the antitrust cause of action is founded on Sections 4 and 16 of the Clayton Act, 15 U.S.C. ss 15, 26 (as amended). Jurisdiction over the second through the fifth causes of action is founded in diversity, 28 U.S.C. s 1332, and in the doctrine of pendent jurisdiction.[FN4]

FN4. The Bellest defendants' arguments that as to them the Court lacks jurisdiction over the third, fourth, and fifth causes of action are without merit. While they rightly assert that there is no diversity between Morse and them, the causes of action are pendent to the antitrust claim, and the pendent claims survive in this Court at least as long as the antitrust claim remains viable. *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966).

*664 The Cardin and the Bellest defendants have filed separate motions for summary

judgment, but they join in most contentions. Their version of the facts centers on an alleged "mistake" by Herve Duquesnoy, a young Frenchman in the SARL organization: according to the defendants, Duquesnoy negotiated with Morse over the license to sell Pierre Cardin lighters without realizing that Cardin had previously licensed Swank to sell such lighters, and when Duquesnoy became aware of the other agreement, he so informed Morse and referred him to Swank for any further discussions.

This innocent explanation is buttressed by several legal arguments, particularly that the record establishes that the plaintiff is not the real party in interest; that the defendants never restrained trade nor conspired to, but that Cardin acted within his trademark rights in refusing to grant another lighter license; that the Morse-Cardin negotiations never ripened into an agreement and, accordingly, no agreement was breached; that no defendant induced a breach of any agreement; and that any mistakes by anyone in the Cardin organization do not constitute fraud or negligent misrepresentation.

Discussion

Summary Judgment

[1][2] The standards for summary judgment in the Second Circuit have changed over time. Compare *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946) (deny summary judgment if there is the "slightest doubt" as to the facts), With *Beal v. Lindsay*, 468 F.2d 287, 291 (2d Cir. 1972) (when movant shows adversary's claim is baseless, opponent "must adduce factual material which raises a substantial question of the veracity or completeness of the movant's showing or presents countervailing facts"), And *Dressler v. MV Sandpiper*, 331 F.2d 130, 132-33 (2d Cir. 1964) (respondent's vague and conclusory allegations would not be sufficient under Rule 56 to deny summary judgment). Even with the more liberal interpretation of Rule 56, however, the "fundamental maxim" remains, as Chief Judge Kaufman pointed out, that "the court cannot on such motions try issues of fact; it

can only determine whether there are issues to be tried." *Heyman v. Commerce and Industry Insurance Co.*, 524 F.2d 1317, 1319-20 (2d Cir. 1975). A court must resolve ambiguities against the movant and draw reasonable inferences in favor of the opponent, with the burden on the moving party of establishing that there are no genuine issues of material fact to be tried. *Id.* at 1320 (citations omitted).

Real Party in Interest

[3] Defendants contend that Morse is not the real party in interest because the Morse negotiations for a Cardin license were allegedly on behalf of Morse Typewriter Co. or a group of joint venturers, but not with Morse individually. Affidavit of Sydney J. Schwartz, sworn to February 28, 1978, P 5(a) ("Schwartz Affidavit"). In response, Morse offers an assignment of claims from his apparent partners or co-venturers,[FN5] an assignment which the Bellest defendants, in turn, challenge for lack of specificity (citing failure to identify the cause of action and the business to which the assignment refers), failure to include a third venturer and failure to indicate the assignment as the basis for this suit. Bellest Defendants' Memorandum at 5-6. Their charges are insufficient, however, to demonstrate the invalidity of the assignment *665 as a matter of law. New York law, to which the Court must look to measure the effectiveness of the assignment, does not take a rigid view of assignments. As long as the claim can be transferred, "the transfer . . . passes an interest, which the transferee may enforce by an action." N.Y.Gen. Oblig. Law s 13-105 (McKinney 1978). "Any claim or demand can be transferred," *Id.* s 13-101, unless it runs afoul of certain exceptions that defendants have not shown to be applicable. At best the challenges to the assignment merely point to factual matters unclear on the record.

FN5. The assignment states that the assignors hereby assign to the assignee their entire, (sic) right, title and interest in and to that certain incorporated business formed to distribute Pierre Cardin lighters in the United States, including but

not limited to certain causes of action against Pierre Cardin, Pierre Cardin (USA), Pierre Cardin Distributing Office Swank, Inc. (sic) and other related entities and individuals. The assignment includes "all actions, causes of action, suits, debts, dues, sums of money, damages, judgments, agreements, promises, claims and demands whatsoever." Assignment of Claims to Marvin W. Morse, dated July 1, 1977, appended as Exhibit K to Breindel Affidavit.

Antitrust Cause of Action

Morse sues all five defendants for a violation of Section 1 of the Sherman Act, 15 U.S.C. s 1 (as amended).[FN6] To show such a violation, Morse relies partly on the alleged breach of the purported Morse-Cardin agreement, a breach allegedly committed at the request of and pursuant to an agreement with Swank, Morse's prospective competitor. Breindel Affidavit P 4. The defendants deny not only any combination or inducement to breach, but also the very existence of a Morse-Cardin agreement. Cardin Defendants' Memorandum at 4; Bellest Defendants' Memorandum at 3-4. In rebuttal, Morse notes the absence of affidavits from, among others, Cardin and Duquesnoy, those in the best position to refute the existence of a Morse-Cardin agreement. Breindel Affidavit P 13.

FN6. Section 1 reads in pertinent part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

Morse further bolsters his claim that Swank was acting behind the scenes to bar him from competition by emphasizing Swank's belated interest in selling Pierre Cardin lighters, an interest that purportedly arose only after the alleged Morse-Cardin agreement and ten years after Swank could have begun to merchandise lighters. Swank shows its long-standing interest in selling that product by offering price lists obtained from potential suppliers of lighters; both lists are dated before the Morse-Cardin negotiations. Tulin Affidavit, Exhibits A, B.

Giving Morse the benefit of all inferences on the record, as the Court must do on a motion for summary judgment, Swank's interest, although aroused earlier than Morse alleged, may possibly have ripened only in response to Morse's preparing to sell and selling Pierre Cardin lighters in or to duty-free shops in the United States; indeed, as of this complaint, Swank has not yet sold Pierre Cardin lighters in the United States. Cardin Defendants' Reply Memorandum at 5. What motivated Swank's renewed interest is an issue of fact not resolved on the record as it stands.

The defendants rely principally on the 1967 Swank-Cardin Agreement to establish that the Cardin defendants were bound to Swank on the lighter license; from this they argue that they acted innocently, pursuant to agreement, and not in anticompetitive collusion to bar Morse from the market in Pierre Cardin lighters. Morse responds, however, that because the 1967 Agreement is nonexclusive as to high-priced items i. e., jewelry, including lighters, to retail for more than \$75.00, 1967 Agreement P 1 Cardin could have granted a license to Morse without violating the 1967 Swank-Cardin Agreement. Breindel Affidavit PP 15-16.

[4] Defendants also support their antitrust defense by asserting that Cardin can license whomever he wishes to exploit the Pierre Cardin trademark. They are correct to the extent that a licensor or manufacturer may refuse to begin a new relationship or to terminate an old one notwithstanding harm to the distributor or prospective distributor providing that there is no combination or conspiracy restraining competition. E. g., *United States v. Colgate*, 250 U.S. 300, 307, 39 S.Ct. 465, 63 L.Ed. 992 (1919); *Oreck Corp. v. Whirlpool Corp.*, 579 F.2d 126, 133 (2d Cir. 1978) (En banc); *House of Materials, Inc. v. Simplicity Pattern Co.*, 298 F.2d 867 (2d Cir. 1962); *Bay City-Abrahams Brothers, Inc. v. Estee *666 Lauder, Inc.*, 375 F.Supp. 1206, 1214-17 (S.D.N.Y.1974), and cases cited therein. One prohibition under the "restraining competition" rubric is a combination or conspiracy to restrain Competitors. *United States v. General Motors*

Corp., 384 U.S. 127, 140, 86 S.Ct. 1321, 16 L.Ed.2d 415 (1966); *Bowen v. New York News, Inc.*, 522 F.2d 1242, 1257 (2d Cir. 1975), Cert. denied, 425 U.S. 936, 96 S.Ct. 1667, 48 L.Ed.2d 177 (1976); *Jacobson & Co. v. Armstrong Cork Co.*, 433 F.Supp. 1210, 1213-14 (S.D.N.Y.1977).[FN7]

FN7. The Cardin defendants make an oblique allegation that the sale or non-sale of Cardin lighters could not affect prices in the market. Cardin Defendants' Reply Memorandum at 5. The import of the allegation is unclear, but it is incorrect to the extent that it suggests that the apparent absence of the price competition factor removes this case from the reach of the Sherman Act. See *United States v. General Motors Corp.*, supra (restraint upon price competition inherent in the combination was an additional factor in condemning defendants' actions). That price competition not now implicated in the instant case, however, will preclude resort to the Per se rule, at least on the basis of price, and make Morse's problems of proof far more difficult. See *General Motors*, supra, 384 U.S. at 147, 86 S.Ct. 1321; *Oreck Corp. v. Whirlpool Corp.*, supra, at 130. *Oreck Corp.*, a recent En banc decision of the Second Circuit, mandates resort to rule of reason, rather than Per se, analysis in cases of vertical agreements to protect distributors from competition. In *Oreck Corp.*, Whirlpool, manufacturer of vacuums, and Sears, Roebuck & Co. ("Sears"), Whirlpool's principal distributor, allegedly agreed that the agreement with Oreck, another distributor, should be terminated. The court of appeals concluded that the vertical agreement, even with the purpose or effect of removing Sears' competitor, could not alone amount to a violation of Section 1 of the Sherman Act. To do so, the agreement must be "anticompetitive in purpose or effect," a phrase the Second Circuit interprets to refer to its effect on the industry as a whole, not the effect on the excluded competitor alone. *Id.*, at 133. To have shown a violation, *Oreck Corp.* would have to have established that the alleged agreement to exclude it either promoted a Whirlpool monopoly in the vacuum cleaner industry or gave Sears a market position that enabled it to raise prices even with interbrand competition. *Id.* at 130 n. 5. Whether *Oreck Corp.* can be properly distinguished from the case at bar depends on the record as it evolves in this case.

[5] On the factual questions whether there was a combination or conspiracy and whether it had the intent or effect of restraining competition, Morse has so far provided meager support. The Court is mindful, however, of the Supreme Court's caution concerning summary judgment in antitrust cases: "We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot." *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473, 82 S.Ct. 486, 491, 7 L.Ed.2d 458 (1962) (footnote omitted). The instant case cannot be thought of as complex antitrust litigation, but motive and intent are key questions, and the answers are in the hands of the alleged coconspirators. Accordingly, Morse should have the opportunity to pursue his claims through discovery, and the defendants' motions for summary judgment on the antitrust cause of action are denied with leave to renew after completion of discovery. Morse, by further discovery, including but not limited to depositions of Swank officials and Max Bellest, shall "set forth specific facts" as to the alleged combination or conspiracy among the defendants. A fortiori, the motion to vacate the notice of deposition of Bellest is denied.

Breach of Contract

[6][7][8] Summary judgment is also denied on the breach of contract cause of action. The principal question whether the parties intended a binding agreement, *C. M. Gridley & Sons, Inc. v. Northeastern Consolidated Co.*, 36 A.D.2d 1001, 321 N.Y.S.2d 171 (3d Dep't 1971) is unclear on the record. Although parties may withdraw from mere negotiations with impunity, *Brause v. Goldman*, 10 A.D.2d 328, 199 N.Y.S.2d 606 (1st Dep't 1960), Aff'd, 9 N.Y.2d 620, 210 N.Y.S.2d 225, 172 N.E.2d 78 (1961), this Court cannot say as a matter of law that the Morse-Cardin negotiations had not ripened into a contract. The absence of a formal contract and the continuing negotiation, at least as to the prospective suppliers of the Pierre Cardin lighters, on which basis the *667 Cardin defendants attack

this cause of action, do not preclude the meeting of minds necessary to constitute a binding agreement. References to the parties' choice of terms in the correspondence between them do not clearly establish whether or not an agreement had been reached. The defendants have provided no authority that disposes of this question.

Tortious Interference

[9][10] As to Morse's third cause of action, the Bellest defendants suggest elliptically that there can be no tortious interference because of the 1967 Swank-Cardin Agreement, Schwartz Affidavit, sworn to January 11, 1978, P 4, apparently reasoning that because of that allegedly exclusive agreement, Cardin and Morse could not have reached a separate agreement, and ergo that there could not have been a Morse-Cardin agreement with which to interfere. Assuming arguendo that is the case, the cause of action is viable because the tortious interference prohibition extends to mere negotiations. *Union Car Advertising Co. v. Collier*, 263 N.Y. 386, 401, 189 N.E. 463, 469 (1934); *Muller v. Star Supermarkets, Inc.*, 49 App.Div.2d 696, 370 N.Y.S.2d 768 (4th Dep't 1975); *Hardy v. Erickson*, 36 N.Y.S.2d 823, 825 (Sup.Ct.1942). "The principle underlying the rule is that he who has a reasonable expectancy of a contract has a property right which may not be invaded maliciously or unjustifiably." *Id.* at 826.

[11] Whether the Bellest defendants and Swank maliciously interfered with Morse's negotiations or contract with Cardin is a factual question. The answer rests in the hands of the defendants; Morse should have the opportunity through discovery to gain what proof he needs to establish his claim. The proof that will make or break his cause of action may well be revealed in deposing the defendants on the antitrust theory and its conspiracy element. Morse must attempt to establish, if defendants did interfere, whether they did so maliciously and by what means, See *Susskind v. Ipco Hospital Supply Corp.*, 49 A.D.2d 915, 373 N.Y.S.2d 627 (2d Dep't 1975), and whether they had justification for interfering. See *Felsen v. Sol Cafe*

Manufacturing Corp., 24 N.Y.2d 682, 301 N.Y.S.2d 610, 249 N.E.2d 459 (1969). Questions of fact remaining to be addressed, summary judgment on this cause of action is denied.

Fraud and Negligent Misrepresentations

[12][13] Finally, as to the causes of action based on fraudulent or negligent misrepresentations, summary judgment is denied as to Pierre Cardin, but granted as to the Bellest defendants. The Cardin defendants deny an intent to defraud; they argue that a mistake was made. Cardin Defendants' Memorandum at 9. *Scienter*, however, includes not only knowing misrepresentations, but also reckless indifference to error, a pretense of knowledge, and the misrepresentation of a material fact susceptible of accurate knowledge, but stated as true on personal knowledge of the representor. *Coolite Corp. v. American Cyanamid Co.*, 52 A.D.2d 486, 384 N.Y.S.2d 808 (1st Dep't 1976); *Burgundy Basin Inn, Ltd. v. Watkins Glen Grand Prix Corp.*, 51 A.D.2d 140, 145-46, 379 N.Y.S.2d 873, 879 (4th Dep't 1976); *Bailey v. Diamond International Corp.*, 47 A.D.2d 363, 367 N.Y.S.2d 107 (3d Dep't 1975); *Skrine v. Staiman*, 30 A.D.2d 707, 292 N.Y.S.2d 275 (2d Dep't 1968), *Aff'd*, 23 N.Y.2d 946, 298 N.Y.S.2d 727, 246 N.E.2d 529 (1969). The circumstances surrounding the representations by Herve Duquesnoy, the SARL employee, and by Cardin himself, as communicated by Duquesnoy, See Breindel Affidavit, Exhibit E, do not reveal themselves on the record. Those circumstances and the defendants' scienter remain factual questions unclear on the record. Defendants' arguments to the effect that the failure to perform an agreement is not fraud, Cardin Defendants' Memorandum at 9, miss the gravamen of Morse's claim and need not be addressed.

[14][15] As to the negligence claim, the Cardin defendants assert that the cause of action must fail because the defendants owed no duty to Morse. Cardin Defendants' Memorandum at 10-11. A cause of *668 action for negligent misrepresentations may

lie, however, "(w)hen the parties' relationship suggests a closer degree of trust and reliance than that of ordinary buyer and seller." *Coolite Corp. v. American Cyanamid Co.*, supra, 52 A.D.2d at 488, 384 N.Y.S.2d at 811 (citations omitted). In *Coolite Corp.*, the court held that the formation of a new corporation created for the sole purpose of marketing a new product attested to a more intimate relationship, at least in terms of reliance and trustworthiness, than that of the ordinary buyer and seller. Morse's relationship with Cardin based on the former's lighter sales in duty-free shops, Morse Affidavit P 2, the superior knowledge of the Cardin defendants as to Cardin's precise contractual relationship with Swank, and Morse's plan to form a new company to market the Pierre Cardin lighters, Morse Affidavit P 8; Breindel Affidavit, Exhibit D, may support the inference of an "intimate relationship" that would invoke more rigorous obligations. They are at least sufficient bases to deny summary judgment as to the Cardin defendants.

[16] However, summary judgment is granted the Bellest defendants on the fourth and fifth causes of action. Morse has shown only that CO referred Morse to the Cardin office in Paris to negotiate a lighter license, Morse Affidavit PP 3, 9-10, and that Bellest confirmed to Morse that the Cardin defendants had terminated negotiations with Morse. Morse asserts that "(a)s a result of Mr. Wargo (sic) (of CO) advising me to deal directly with the Pierre Cardin office in Paris I assumed that there were no existing licenses permitting anyone to sell Pierre Cardin lighters in the United States." Morse Affidavit P 3. Morse's assumption is too tenuous to give rise to a cause of action in fraud or negligent misrepresentation. No actual misrepresentations are even alleged as to these defendants, and they owed Morse no duty. Further discovery on these claims would serve no useful purpose because any intimate relationship with these defendants and any alleged misrepresentations by them would be well known to Morse and not within the peculiar knowledge of the defendants.

In summary, the defendants' motions for

summary judgment and a stay of deposition are denied as to all defendants on all causes of action, except that the Bellest defendants' motion for summary judgment on the fourth and fifth causes of action is granted.

So ordered.

459 F.Supp. 660

END OF DOCUMENT

60

Thomas Murphy et al., Appellants,
v.
Donald C. Kuhn et al., Respondents.

Court of Appeals of New York

Argued June 4, 1997

Decided June 27, 1997

SUMMARY

Appeal, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department, entered September 27, 1996, which affirmed an order of the Supreme Court (Robert J. Lunn, J.), entered in Monroe County, granting a motion by defendants for summary judgment and dismissing the complaint.

Murphy v Kuhn, 231 AD2d 865, affirmed.

HEADNOTES

Insurance--Agents and Brokers--Liability for Failure to Advise Insured of Possible Additional Insurance Needs (1) In an action against an insurance agent by a former customer for tortious misrepresentation and breach of implied contract arising from the failure of the defendant insurance agent to advise plaintiff as to possible additional insurance coverage needs and predicated upon an asserted special relationship and special level of advisory responsibility, defendant was correctly granted summary judgment because no special relationship was established on the record. Generally, insurance agents have a common-law duty to obtain requested coverage for their clients within a reasonable time or inform the client of the inability to do so; however, they have no continuing duty to advise, guide or direct a client to obtain additional coverage. Even assuming the general applicability of the "special relationship" theory in the customer-agent automobile insurance coverage setting, the relationship between these parties was insufficiently established to warrant or justify this case surviving a defense summary

judgment motion. As a matter of law, this record does not rise to the high level required to recognize the special relationship threshold that might superimpose on defendants the initiatory advisement duty, beyond the ordinary placement of requested insurance responsibilities. Rather, the record in the instant case presents only the standard consumer-agent insurance placement relationship, albeit over an extended period of time. Exceptional and particularized situations may arise in which insurance agents, through their conduct or by express or implied contract with customers and clients, may assume or acquire duties in addition to those fixed at common law; however, whether such additional responsibilities should be recognized and given legal effect is governed by the particular relationship between the parties and is best determined on a case-by-case basis.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Insurance, §§ 138, 139. *267

NY Jur 2d, Insurance, §§ 437, 440, 444.

ANNOTATION REFERENCES

See ALR Index under Insurance Agents and Brokers.

POINTS OF COUNSEL

Faraci, Lange, Johns, Regan & Schwarz, L. L. P., Rochester (Paul K. Lange and Matthew F. Belanger of counsel), for appellants. I. The courts below erred by ignoring applicable New York law which holds that the existence of a special relationship between parties can result in the assumption of legal duties not existing at common law. (Wied v New York Cent. Mut. Fire Ins. Co., 208 AD2d 1132; Erwig v Cook Agency, 173 AD2d 439; Hardt v Brink, 192 F Supp 879; United Safety v Consolidated Edison Co., 213 AD2d 283; Kimmell v Schaefer, 89 NY2d 257; Pellegrini v Landmark Travel Group, 165 Misc 2d 589; Ricciardi v Frank, 163 Misc 2d 337; Cohen v

Heritage Motor Tours, 205 AD2d 105; Florence v Goldberg, 44 NY2d 189; Parvi v City of Kingston, 41 NY2d 553.) II. The overwhelming majority of States which have addressed this issue have held that the existence of a special relationship between an insurance agent and his client can result in the assumption of a legal duty to advise the client on coverage matters. (Hardt v Brink, 192 F Supp 879.) III. The courts below erred in granting summary judgment to Kuhn because a jury properly instructed as to the elements of a special relationship could find that Kuhn breached an assumed duty to advise Murphy about his insurance coverage.

Lustig & Brown, L. L. P., Buffalo (Maurice L. Sykes and Katherine A. Fijal of counsel), for respondents. I. Defendants-respondents were under no duty to advise, guide or direct plaintiffs to obtain coverage other than that provided. (Hjemdahl-Monsen v Faulkner, 204 AD2d 516; Rogers v Urbanke, 194 AD2d 1024; Blonsky v Allstate Ins. Co., 128 Misc 2d 981; Harnish v Naples & Assocs., 181 AD2d 1012; Callahan v American Motorists Ins. Co., 56 Misc 2d 734; Downey v Allstate Ins. Co., 638 F Supp 322; Erwig v Cook Agency, 173 AD2d 439; Wied v New York Cent. Mut. Fire Ins. Co., 208 AD2d 1132; Barco Auto Leasing Corp. v Montano, 215 AD2d 617.) II. Based on sound policy considerations which mitigate against imposing a duty based on a special relationship, New York courts do not recognize a special relationship between insurance agent and his or her customer. (Wied v New York Cent. Mut. Fire Ins. *268 Co., 208 AD2d 1132; Video Corp. v Flatto Assocs., 85 AD2d 448, 58 NY2d 1026; Flora's Card Shop v Krantz & Co., 111 Misc 2d 907, 91 AD2d 938; Blonsky v Allstate Ins. Co., 128 Misc 2d 981; Sanitoy, Inc. v Shapiro, 705 F Supp 152; Erwig v Cook Agency, 173 AD2d 439; Callahan v American Motorists Ins. Co., 56 Misc 2d 734; Chaim v Benedict, 216 AD2d 347; Brown v Stinson, 821 F Supp 910; Mathis v Yondata Corp., 125 Misc 2d 383.) III. If this Court chooses to revise well-settled New York law and acknowledge a special relationship may exist between a customer and an insurance agent, a special relationship did not exist under the facts of this case. (Congress

Fin. Corp. v Morrell & Co., 790 F Supp 459; American Protein Corp. v AB Volvo, 844 F2d 56; Polycast Tech. Corp. v Uniroyal, Inc., 792 F Supp 244; Accusystems, Inc. v Honeywell Information Sys., 580 F Supp 474; Sanitoy, Inc. v Shapiro, 705 F Supp 152.) IV. Webster Golf Course, Inc. does not have standing to maintain a suit against defendants. (Sierra Club v Morton, 405 US 727.)

OPINION OF THE COURT

Bellacosa, J.

The question for this case is whether an insurance agent should be liable to a former customer for tortious misrepresentation and breach of implied contract. The alleged wrongdoing is a failure of the defendant insurance agent to advise plaintiff Thomas Murphy as to possible additional insurance coverage needs. The theory of the lawsuit and the asserted duty is a special relationship and special level of advisory responsibility.

The Appellate Division affirmed an order of Supreme Court, which granted defendants' motion for summary judgment and dismissed the complaint. Plaintiffs appeal pursuant to leave granted by this Court. We affirm the order of the Appellate Division because no special relationship was established on this record.

Plaintiffs Thomas Murphy and Webster Golf Course, Inc. sued defendants Donald C. Kuhn, Kuhn & Pedulla Agency, Inc., and its predecessor Roman A. Kuhn Agency, alleging professional negligence and breach of implied contract. This dispute originates in a 1991 automobile accident in Florida involving Murphy's son. One person died and several others suffered serious injuries as a result of the accident. At that time, the title to the son's car was in his father's name and the personal insurance was placed under the commercial automobile policy covering Murphy's business, Webster Golf Course, Inc. After exhausting the \$500,000 policy limit to settle the car *269 accident claims, Thomas Murphy assertedly paid an additional \$194,429.50 plus \$7,500 in attorneys' fees.

Then, he sued these defendants to recover the additional sums he had to pay personally.

Defendants began providing the property, casualty and liability insurance to plaintiffs in 1973 in connection with their golf business. Beginning in 1977, defendant Donald Kuhn also handled all of Murphy's personal insurance needs, providing him with both homeowners insurance and personal automobile coverage. In 1979, plaintiff Thomas Murphy and his partner, Edward Rieflin, completed their purchase of the Happy Acres Golf Course and formed Webster Golf Course, Inc. Happy Acres had been a client of the Roman A. Kuhn Agency since 1957.

In 1990, Kuhn placed personal automobile coverage for Murphy with The Hartford, as insurer. Later that year, Hartford notified Murphy that his coverage was in danger of cancellation due to the poor driving records of his children. Murphy then transferred the insurance covering his son's car, which was registered and titled in Murphy's name, from Murphy's personal policy to Webster Golf Course's commercial automobile insurance policy. Murphy testified at his deposition that it was his standard arrangement to place title and register his children's cars in his name. From 1984 until the time of the accident, the liability limits on the commercial policy were \$250,000 per person and \$500,000 total per accident. Murphy never requested higher liability coverage for his personal and family automobile insurance needs, which were subsumed within the commercial automobile liability policy.

Supreme Court concluded that, absent a request by the customer, an insurance agent "owes no continuing duty to advise, guide or direct the customer to obtain additional coverage." Therefore, acknowledging that on this record plaintiffs never specifically requested defendants to increase the liability limits on the commercial automobile policy, the court held that defendants owed no special duty of affirmative advisement to plaintiffs. The court also declined to adopt plaintiffs' "special relationship" theory.

Plaintiffs propose that insurance agents can assume or acquire legal duties not existing at common law by entering into a special relationship of trust and confidence with their customers. Specifically, plaintiffs contend that a special relationship developed from a long, continuing course of business between plaintiffs and defendant insurance agent, generating *270 special reliance and an affirmative duty to advise with regard to appropriate or additional coverage.

Generally, the law is reasonably settled on initial principles that insurance agents have a common-law duty to obtain requested coverage for their clients within a reasonable time or inform the client of the inability to do so; however, they have no continuing duty to advise, guide or direct a client to obtain additional coverage (see, *Wied v New York Cent. Mut. Fire Ins. Co.*, 208 AD2d 1132, 1133; *Hjemdahl-Monsen v Faulkner*, 204 AD2d 516, 517; *Rogers v Urbanke*, 194 AD2d 1024, 1025; *Harnish v Naples & Assocs.*, 181 AD2d 1012, 1013; *Erwig v Cook Agency*, 173 AD2d 439). Notably, no New York court has applied plaintiffs' proffered "special relationship" analysis to add such continuing duties to the agent-insured relationship (see, *Wied v New York Cent. Mut. Fire Ins. Co.*, 208 AD2d 1132, 1133-1134, *supra*).

Recently, however, this Court recognized a special relationship in a commercial controversy, involving no generally recognized professional relationship (see, *Kimmell v Schaefer*, 89 NY2d 257, 260). We held that the relationship between the parties "under the circumstances [there] required defendant to speak with care" (*id.*, at 260). *Kimmell* cautions, however, that "liability for negligent misrepresentation has been imposed only on those persons who possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified" (*id.*, at 263). For example, "[p]rofessionals, such as lawyers and engineers, by virtue of their training and expertise, may have special relationships of confidence and trust with their clients, and in certain situations we have

imposed liability for negligent misrepresentation when they have failed to speak with care" (id., at 263, citing *Ossining Union Free School Dist. v Anderson LaRocca Anderson*, 73 NY2d 417 [engineering consultants]; *White v Guarente*, 43 NY2d 356 [accountants]; *Ultramares Corp. v Touche*, 255 NY 170 [accountants]; *Glanzer v Shepard*, 233 NY 236 [public weighers]).

The Court concluded that given "the absence of obligations arising from the speaker's professional status" in the commercial context, "there must be some identifiable source of a special duty of care" in order to impose tort liability (id., at 264). "The existence of such a special relationship may give rise to an exceptional duty regarding commercial speech and justifiable reliance on such speech" (id.). We determined, to be *271 sure, that "[w]hether the nature and caliber of the relationship between the parties is such that the injured party's reliance on a negligent misrepresentation is justified generally raises an issue of fact" (id.). It is important to note that *Kimmell* is significantly distinguishable from the instant case, which involves an insurance agent-insured relationship and an alleged failure to speak. We therefore allude to *Kimmell* for its general relevance and disclaim any implication of a direct, precedential applicability in the insurance relationships context.

Even assuming the general applicability of the "special relationship" theory in the customer-agent automobile insurance coverage setting, we conclude that the relationship between these parties was insufficiently established to warrant or justify this case surviving a defense summary judgment motion. As a matter of law, this record does not rise to the high level required to recognize the special relationship threshold that might superimpose on defendants the initiatory advisement duty, beyond the ordinary placement of requested insurance responsibilities. Rather, the record in the instant case presents only the standard consumer-agent insurance placement relationship, albeit over an extended period of time. Plaintiffs' plight does not warrant

transforming his difficulty into a new, expanded tort opportunity for peripheral redress. The record does not support plaintiffs' effort in this manner to shift to defendant insurance agent the customer's personal responsibility for initiating, seeking and obtaining appropriate coverage, without something more than is presented here.

We note in this respect that *Murphy* never asked *Kuhn* to increase the liability limits on the *Webster Golf Course* commercial automobile policy. In fact, there is no indication that *Murphy* ever inquired or discussed with *Kuhn* any issues involving the liability limits of the automobile policy. Such lack of initiative or personal indifference cannot qualify as legally recognizable or justifiable reliance. Therefore, there was no evidence of reliance on the defendant agent's expertise, as sharply distinguished from *Kimmell* (contrast, *Kimmell v Schaefer*, supra, 89 NY2d, at 264).

The absence of reliance is further reflected in *Murphy's* deposition testimony that it was his standard procedure to simply register his children's cars in his name. Additionally, *Murphy's* deposition description of his relationship with *Kuhn* concerning the golf course's general insurance matters shows that he had not met personally with *Kuhn* to discuss the insurance needs of *Webster Golf Course, Inc.* for approximately 12 *272 years preceding the accident in question. Rather, his partner *Rieflin* was the one actively and personally involved in handling the insurance needs of the golf course.

We also note that *Murphy's* contention that he mistakenly believed that the commercial policy had a \$1,000,000 liability limit on all covered vehicles can be given no weight in resolving this dispute on this theory. The liability coverage had remained the same since 1984 and *Murphy's* deposition testimony failed to establish the basis for his plainly unfounded assumption. Therefore, plaintiffs are not entitled to advance beyond the summary judgment stage of this lawsuit because they failed to establish the existence of a legally cognizable special relationship

with their insurance agent in this standard set of circumstances.

Plaintiffs-appellants urge this Court to avoid generally absolving insurance agents from legal principles which subject other individuals to duties beyond those rooted in the common law. They overstate the concern and effect of this decision and the principle that emanates from it. Our decision today does not break any new ground and does not immunize insurance brokers and agents from appropriately assigned duties and responsibilities. Exceptional and particularized situations may arise in which insurance agents, through their conduct or by express or implied contract with customers and clients, may assume or acquire duties in addition to those fixed at common law. As with *Kimmell*, the issue of whether such additional responsibilities should be recognized and given legal effect is governed by the particular relationship between the parties and is best determined on a case-by-case basis (see, *Kimmell v Schaefer*, 89 NY2d 257, 264, supra).

Notably, other jurisdictions have recognized such an additional duty of advisement in exceptional situations where, for example, (1) the agent receives compensation for consultation apart from payment of the premiums (see, *Sandbulte v Farm Bur. Mut. Ins. Co.*, 343 NW2d 457, 464 [Iowa]; *Nowell v Dawn-Leavitt Agency*, 127 Ariz 48, 51, 617 P2d 1164, 1168), (2) there was some interaction regarding a question of coverage, with the insured relying on the expertise of the agent (see, *Trupiano v Cincinnati Ins. Co.*, 654 NE2d 886, 889 [Ind] [applying Michigan law]); or (3) there is a course of dealing over an extended period of time which would have put objectively reasonable insurance agents on notice that their advice was being sought and specially relied on (see, *Trotter v State Farm Mut. Auto. Ins. Co.*, 297 SC 465, 377 SE2d 343). In these circumstances, *273 insureds bear the burden of proving the specific undertaking (id.). The relationship established in the instant case does not rise to the level of these exceptional situations and we refrain from determining when the special

relationship analysis may apply in the insurance context.

We do, however, take note that the uniqueness of customary and ordinary insurance relationships and transactions is manifested by "the absence of obligations arising from the speaker's professional status" with regard to the procurement of additional coverage (*Kimmell v Schaefer*, supra, 89 NY2d, at 264). As stated, it is well settled that agents have no continuing duty to advise, guide, or direct a client to obtain additional coverage (see, *Wied v New York Cent. Mut. Fire Ins. Co.*, 208 AD2d 1132, 1133, supra). No doubt, therefore, public policy considerations will have to be weighed on the question of whether to override this settled principle by recognizing additional advisement duties on insurance agents and brokers (see, *Farmers Ins. Co. v McCarthy*, 871 SW2d 82, 85-86 [Mo]). But we do not reach that question here.

Insurance agents or brokers are not personal financial counselors and risk managers, approaching guarantor status (see, id.). Insureds are in a better position to know their personal assets and abilities to protect themselves more so than general insurance agents or brokers, unless the latter are informed and asked to advise and act (id.). Furthermore, permitting insureds to add such parties to the liability chain might well open flood gates to even more complicated and undesirable litigation. Notably, in a different context, but with resonant relevance, it has been observed that "[u]nlike a recipient of the services of a doctor, attorney or architect ... the recipient of the services of an insurance broker is not at a substantial disadvantage to question the actions of the provider of services" (*Video Corp. v Flatto Assocs.*, 85 AD2d 448, 456, mod 58 NY2d 1026).

Accordingly, the order of the Appellate Division should be affirmed, with costs.

Chief Judge Kaye and Judges Titone, Smith, Levine, Ciparick and Wesley concur.

Order affirmed, with costs. *274

90 N.Y.2d 266
(Cite as: 90 N.Y.2d 266, *274)

Page 11

Copr. (c) 2005, Randy A. Daniels, Secretary of
State, State of New York.

N.Y. 1997.

MURPHY v KUHN

END OF DOCUMENT

61

Only the Westlaw citation is currently available.

United States District Court,
S.D. New York.

NAIROBI HOLDINGS LIMITED, Plaintiff,
v.
BROWN BROTHERS HARRIMAN & CO. and
Lawrence Tucker, Defendants.

No. 02 Civ. 1230(LMM).

May 14, 2003.

Investor in telecommunications company that went bankrupt brought § 10(b) securities fraud action against investment advisor and partner of advisor who was on board of company. Following dismissal in part and leave to replead claims investor raised in original complaint, 2002 WL 31027550, investment advisor and partner moved to dismiss investor's amended complaint for failure to state a claim under the Private Securities Litigation Reform Act (PSLRA). The District Court, McKenna, J., held that: (1) one-year statute of limitations applicable to investors' claims arising out of initial investment began to run on date that knowledge of company's solvency was imputed to investors who were on inquiry notice but failed to act; (2) complaint failed to plead claim of fraudulent concealment with sufficient particularity, as required to toll one-year statute of limitations; (3) complaint failed to allege that investment advisor and had motive to commit fraud by misrepresenting company's solvency to investors, as required to state scienter for claim for common law fraud under New York law; and (4) investors' claims that misrepresentations caused them to make second investment in company accrued when misrepresentations were made, and were not barred by one-year statute of limitations.

Motion granted.

West Headnotes

[1] Limitation of Actions 100(11)
241k100(11)

In determining whether investor in telecommunications company that went bankrupt could maintain § 10(b) securities fraud action against investment advisor and partner of advisor who was on board of company, court had to determine whether investor should have been put on inquiry notice that company's acquisitions greatly increased its debt load and created threat to company's liquidity and solvency, and if so, date upon which duty to inquire arose; more than one year passed between date investors were allegedly put on inquiry notice and date they filed complaint. Securities Exchange Act of 1934, §§ 9(e), 10(b), 15 U.S.C.A. §§ 78i(e), 78j(b).

[2] Limitation of Actions 100(11)
241k100(11)

One-year statute of limitations applicable to investors' § 10(b) securities fraud action began to run on claims of alleged misrepresentations about company's solvency on date that knowledge of company's acquisitions of three entities was imputed to investors who were on inquiry notice but failed to act; company made numerous public announcements about its acquisitions of three entities having history of significant net operating losses, company's announcements disclosed amounts of debt company would assume as a result, and public announcements took place after investors' initial investment in company. Securities Exchange Act of 1934, §§ 9(e), 10(b), 15 U.S.C.A. §§ 78i(e), 78j(b).

[3] Limitation of Actions 100(11)
241k100(11)

One-year statute of limitations applicable to investors' § 10(b) securities fraud action began to run on claim alleging that advisor and company board member did not inform investors about existence in bond indenture's trigger clause executed in connection with company's acquisition of entity, on date that company publicly announced actual triggering of trigger clause; investors were on inquiry notice because announcement occurred after investors' initial purchase of company's stock, and investment advisor allegedly assured investors that debt would not become due until several years later. Securities Exchange

Act of 1934, §§ 9(e), 10(b), 15 U.S.C.A. §§ 78i(e), 78j(b).

[4] Limitation of Actions 179(2)
241k179(2)

Complaint failed to plead claim of fraudulent concealment with sufficient particularity, as required to state claim that one-year statute of limitations applicable to investors' § 10(b) securities fraud claims was equitably tolled by fraudulent concealment of investment advisor and partner on board of telecommunications company who allegedly induced investors to purchase stock of company before it went bankrupt. Securities Exchange Act of 1934, §§ 9(e), 10(b), 15 U.S.C.A. §§ 78i(e), 78j(b).; Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.

[5] Fraud 42
184k42

Complaint failed to allege that investment advisor and partner of advisor who was on board of telecommunications company had motive to commit fraud by misrepresenting company's solvency to investors, as required to state scienter for claim for common law fraud under New York law based on claim that misrepresentations caused investors' initial investment in company before it went bankrupt; only possible financial motives advisor and partner had were to increase investment fees by promoting company's stock and to inflate value of company's stock, desire to artificially inflate stock was not alone evidence of improper motive, and complaint did not allege that stock was sold for profit, identify professional reputational interest that motivated advisor and partner, or allege sufficient facts to support conscious misbehavior or recklessness. Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.

[6] Limitation of Actions 100(12)
241k100(12)

Investors' § 10(b) securities fraud claims against investment advisor and partner of advisor who was on board of telecommunications company, alleging that misrepresentations made about company's solvency and equities caused investors to make second investment in company, accrued when misrepresentations regarding actual

level of company's cash reserves and marketable securities were made, and were not barred by one-year statute of limitations. Securities Exchange Act of 1934, §§ 9(e), 10(b), 15 U.S.C.A. §§ 78i(e), 78j(b).

MEMORANDUM AND ORDER

MCKENNA, J.

*1 In its original complaint, plaintiff Nairobi Holdings Limited ("NHL") asserted claims against corporate defendant Brown Brothers Harriman & Co. ("BBH") and individual defendant Lawrence Tucker ("Tucker") alleging federal securities fraud under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j ("Section 10(b)") and Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5 ("Rule 10b-5"), a violation of Section 206 of the Investment Advisers Act of 1940, 15 U.S.C. § 80b-6 (the "IAA"), and various state tort law claims. In a previous decision, the Court dismissed certain of these claims with leave to replead. *Nairobi Holdings Ltd. v. Brown Bros. Harriman & Co.*, No. 02 Civ. 1230, 2002 WL 31027550 (S.D.N.Y. Sept. 10, 2002) ("NHL I"). Presently before the Court is a motion brought by defendants to dismiss the Amended Complaint pursuant to Federal Rules of Civil Procedure 12(b)(6) ("Rule 12(b)(6)") and 9(b) ("Rule 9(b)") and the Private Securities Litigation Reform Act (the "PSLRA"). For the reasons set forth below, the motion to dismiss is granted in part without prejudice.

Background

The facts in the Amended Complaint are virtually the same as those set out by the Court in *NHL I*. 2002 WL 31027550, at *1-3. Plaintiff alleges that defendants made "fraudulent misrepresentations" and "actionable omissions of material information" that "fraudulently induced NHL to invest" in a telecommunications company named World Access Inc. ("WAXS"). (Am.Compl.¶¶ 3, 13.) The alleged purpose of the misrepresentations and omissions was to hide from plaintiff "the rapidly deteriorating condition of WAXS during 2000 and early

2001, prior to WAXS' declaration of bankruptcy in April 2001." (Id. ¶ 3.)

Plaintiff's Amended Complaint differs from the original in several ways. First, plaintiff has omitted certain state law claims that were dismissed in NHL I. 2002 WL 31027550, at *10 (New York's Martin Act precludes claims of negligent misrepresentation and breach of fiduciary duty in the context of sales of securities). Second, plaintiff has removed any claims as to its retention of any investments in WAXS stock, and instead alleges claims based only on its purchases of WAXS stock. (Compare Am. Compl. ¶ 3 with Compl. ¶ 3; Am. Compl. ¶ 76 with Compl. ¶ 55; and Am. Compl. ¶ 77 with Compl. ¶ 56). [FN1] Specifically, on or about February 11, 2000, plaintiff purchased 459,777 WAXS shares in a private placement at a price of \$10 million (the "February 2000 investment"). (Am. Compl. ¶ 36.) Between September 2, 2000 and December 11, 2000, plaintiff purchased 520,230 shares of WAXS at a total cost of \$3,105,230.59 (the "post-September 2000 investment"). (Id. ¶ 46.) Third, plaintiff has revised and re-asserted a previously dismissed claim for securities fraud arising out of defendants' representation that, as of September 2000, "it was a particularly propitious time to make additional investments in WAXS' equities..." (Id. ¶ 53.) Finally, the Amended Complaint propounds a new claim for securities fraud resulting from certain alleged misrepresentations and omissions made by defendants in or about January 2000 that allegedly induced plaintiff's February 2000 investment. (Id. ¶¶ 24-36, 53-58.) Specifically, defendants allegedly "omitt[ed] to inform NHL of (i) imminent acquisitions that would and did greatly increase WAXS' debt load and the threat to WAXS' liquidity and solvency and (ii) the existence of the 'trigger clause' in the bond indenture executed in connection with the acquisition [by WAXS] of FCI [in August 1999], even when representatives of NHL specifically questioned defendants regarding WAXS' prospective ability to carry its already heavy debts in January 2000...." (Id. ¶ 53.) In addition to these omissions, a Managing Director of BBH, Stephen Owen ("Owen"),

allegedly made specific representations to plaintiff in January 2000 that: a) "the FCI debt would not come due until 2008" (Am. Compl. ¶¶ 26, 56); b) "WAXS would be able to carry its debt load with no meaningful risk to WAXS' liquidity and solvency" (id. ¶ 26); and c) "[s]uch debt ... would be 'no problem' for WAXS." (id. ¶¶ 26, 56.)

FN1. In its opposition, plaintiff attempts to argue that it has asserted "a common-law fraud claim for damages ... because plaintiff was fraudulently induced to retain its holdings in WAXS." (Opp'n at 1, n. 1.) However, the Court is unable to find any such allegation in the Amended Complaint and plaintiff did not provide any citation.

*2 Defendants have moved to dismiss the Amended Complaint, focusing particularly upon the claims relating to the February 2000 investment. (Defs. Memo. at 6-21.) Defendants move to dismiss these claims as barred by the one-year statute of limitations and as being unable to meet the specificity requirements of Rule 9(b) and the PSLRA. (Id.) In addition, defendants argue that plaintiff's statutory claims based on the post-September 2000 investment are barred by the statute of limitations because "plaintiff's new factual allegations constitute an acknowledgment by plaintiff that it was on notice, well before February 14, 2001--the date one year before the filing of plaintiff's original Complaint--of the facts about which it alleges defendants made misrepresentations and omissions in September 2000...." (Defs. Memo. at 2.)

Standard of Review

Under Rule 12(b)(6), a complaint will be dismissed if there is a failure "to state a claim upon which relief can be granted." Fed.R.Civ.P. 12(b)(6). The Court must read the complaint generously accepting the truth of and drawing all reasonable inferences from well-pleaded factual allegations. *Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1174 (2d Cir.1993). "A court should only dismiss a suit under Rule 12(b)(6) if 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Valmonte v. Bane*, 18 F.3d 992,

998 (2d Cir.1994) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)).

On a Rule 12(b)(6) motion, courts may consider "any written instrument attached to [the complaint] as an exhibit or any statements or documents incorporated in it by reference, as well as public disclosure documents required by law to be, and that have been, filed with the SEC, and documents that the plaintiffs either possessed or knew about and upon which they relied in bringing the suit." *Rothman v. Gregor*, 220 F.3d 81, 88-89 (2d Cir.2000) (citations omitted).

Discussion

I. February 2000 Investment: Statute of Limitations

[1] Defendants argue that plaintiff's statutory claims relating to its February 2000 investment are time-barred because more than one year passed between plaintiff being on notice of these alleged claims and its filing of the original complaint on February 14, 2002. (Defs. Memo. at 6-18.) Section 9(e) of the Securities Exchange Act of 1934 provides that "[n]o action shall be maintained to enforce any liability created under this section, unless brought within one year after the discovery of the facts constituting the violation and within three years after such violation." 15 U.S.C. § 78i(e); see also *Rothman*, 220 F.3d at 96 (Section 9(e) applies to Section 10(b) and Rule 10b-5 claims). This same limitations period is also applied to claims for rescission under the IAA. *Kahn v. Kohlberg, Kravis, Roberts & Co.*, 970 F.2d 1030, 1039 (2d Cir.), cert. denied, 506 U.S. 986, 113 S.Ct. 494, 121 L.Ed.2d 432 (1992).

*3 The Second Circuit has said that "discovery of for the purposes of this statute of limitations 'includes constructive or inquiry notice, as well as actual notice.'" *Rothman*, 220 F.3d at 96 (quoting *Menowitz v. Brown*, 991 F.2d 36, 41-42 (2d Cir.1993)). "[W]hen the circumstances would suggest to an investor of ordinary intelligence the probability that she has been defrauded, a duty of inquiry

arises...." *Dodds v. Cigna Secs., Inc.*, 12 F.3d 346, 350 (2d Cir.1993), cert. denied, 511 U.S. 1019, 114 S.Ct. 1401, 128 L.Ed.2d 74 (1994). With regard to this duty to inquire, the Second Circuit has stated:

If the investor makes no inquiry once the duty arises, knowledge will be imputed as of the date the duty arose. However, if the investor makes some inquiry once the duty arises, we will impute knowledge of what an investor 'in the exercise of reasonable diligence, should have discovered' concerning the fraud, and in such cases the limitations period begins to run from the date such inquiry should have revealed the fraud.

LC Capital Partners, LP v. Frontier Ins. Group, Inc., 318 F.3d 148, 154 (2d Cir.2003) (citation and quotation omitted.)

In assessing whether a plaintiff should have been put on inquiry notice, courts examine, among other things, "any financial, legal, or other data, including public disclosures in the media about the financial condition of the corporation ... available to the plaintiff providing him 'with sufficient storm warnings'...." *Dietrich v. Bauer*, 76 F.Supp.2d 312, 343 (S.D.N.Y.1999) (quotation omitted).

Because plaintiff does not allege in the Amended Complaint that it made any inquiry, the only issue to be resolved is the date the duty to inquire arose. [FN2]

FN2. Plaintiff argues in its opposition papers that it exercised reasonable diligence "promptly after August 2000" by "asking its fiduciary advisor and partner [BBH,] about WAXS' financial condition in early September and receiving in response defendants' fraudulent statements of September 2000...." (Opp'n at 13.) However, this is not, despite plaintiff's assertion to the contrary, alleged in the Amended Complaint. The stated purpose of any discussions held between plaintiff and defendants in or about mid-September 2000 was "to explore the possibility of [plaintiff] investing another \$5,000,000 directly in WAXS equities." (Am.Compl.¶ 42.) There is no mention in the Amended Complaint of any investigation.

A) Alleged Omission of WAXS' Debt

Acquisition

[2] It is difficult to discern from the Amended Complaint which specific WAXS acquisitions plaintiff claims were omitted by defendants. It appears that plaintiff is referring to three particular companies acquired by WAXS: 1) Star Telecommunications, Inc. ("Star"); 2) TelDaFax A.G. ("TelDaFax"); and 3) Communication Telesystems International (d/b/a WorldxChange Communications) ("WorldxChange"). [FN3] (Am.Compl.¶¶ 30-32.) Plaintiff's theory for this claim appears to be contained in paragraphs 33-34 of the Amended Complaint which states that:

FN3. Plaintiff cannot be referring to WAXS' acquisitions of FCI and LDI because plaintiff alleges that in January 2000, they were already "concerned about the debt assumed by WAXS in connection with the recent acquisitions of FCI and LDI" (Am.Compl.¶ 26, 56) and that defendants omitted to inform NHL of "several additional acquisitions." (Id. ¶ 28, 58.)

WAXS' June 2000 10-Q [FN4] filing correctly stated that the Star, WorldxChange, and TelDaFax acquisitions would 'dramatically increase the business and financial risks [WAXS] must overcome to execute its strategy. Star, WorldxChange and TelDaFax all have a history of significant net operating losses, and [WAXS] is expected to assume approximately \$300.0 million in debt upon the consummation of these acquisitions.' However, defendants omitted to inform NHL in any fashion of these imminent acquisitions, and of the increased debt load and threat to WAXS' solvency resulting therefrom, at any time before February 11, 2000.

FN4. The Court believes that plaintiff may have mistakenly stated the date as June 2000, when it is truly referring to the 10-Q filed by WAXS on August 14, 2000. (Id. ¶¶ 33-34.)

*4 It is clear that plaintiff had a duty to inquire by at least August 2000. All three acquisitions and the amounts of debt to be assumed were publicly disclosed on numerous occasions after the February

2000 purchase and well before the February 11, 2001 deadline for filing. For example, the 10-Q filed by WAXS on August 14, 2000, ("the August 2000 10-Q") explicitly stated that: "Star, WorldxChange and TelDaFax all have a history of significant net operating losses, and the Company is expected to assume approximately \$300.0 million in debt upon the consummation of the acquisitions." (Harper Decl. Ex. J at 16.) The August 2000 10-Q also stressed the heightened risks involved with these acquisitions: "[a]lthough the STAR, WorldxChange and TelDaFax acquisitions are expected to provide significant benefits to the Company, they also dramatically increase the business and financial risks the Company must overcome to execute its strategy." (Id.)

The WorldxChange acquisition was announced in a press release on February 14, 2000 which also stated that WAXS would "assume approximately \$225 million in WorldxChange debt." (Harper Decl. Ex. E at 1.) On February 29, 2000, WAXS filed an 8-K mirroring its press release. (Harper Decl. Ex. F.) In the Amended Complaint, plaintiff admits that BBH informed it of the WorldxChange acquisition through the Annual Review of the 1818 Fund III, LLP ("the Fund") that was released in April 2000. (Am.Compl.¶ 39.) The Annual Review also clearly stated that this transaction entailed "the assumption [by WAXS] of \$225 million of debt." (Harper Decl. Ex. M at 3.) Finally, the August 2000 10-Q, stated that WAXS "is expected to assume approximately \$225.0 million of net debt in connection with the WorldxChange merger." (Harper Decl Ex. J at 13.)

The Star acquisition was announced in a press release issued February 14, 2000, and WAXS filed an 8-K on February 29, 2000. (Harper Decl. Ex. H.) Again, plaintiff concedes that the Annual Review released in April 2000 "described the Star merger and for the first time noted Star's \$100 million of remaining debt." (Am.Compl.¶ 38.) The August 2000 10-Q stated that WAXS "expected to assume approximately \$75.0 million of net debt in connection with the Star merger." (Harper Decl Ex. J at 12.)

The TelDaFax acquisition was announced in a press release issued June 14, 2000 and WAXS filed an 8-K on June 26, 2000. (Harper Decl. Ex. I.) The press release stated that "[a]s of March 31, 2000, TelDaFax had ... essentially no debt." (Id. at 7.)

The August 2000 10-Q provided that "[a]s of June 30, 2000, TelDaFax had ... essentially no debt." (Harper Decl. Ex. J at 13.)

Thus, all three acquisitions and the amount of debt being assumed were publicly announced by August 2000 at the latest and plaintiff had a duty to inquire. Having failed to inquire, such knowledge is imputed to them.

B) Alleged Omission of the FCI Bond Indenture "Trigger Clause"

*5 [3] Plaintiff alleges that Owen and defendant Tucker "omitted to inform NHL of the existence of the 'trigger clause' in the bond indenture executed in connection with the acquisition of FCI, which allowed bondholders to put their debt to WAXS prior to 2008 upon the occurrence of certain events." (Am.Compl. ¶ 58.) Also, Owen allegedly assured NHL that "the FCI debt would not come due until 2008...." (Id. ¶ 56.)

The Court finds that plaintiff had a duty to inquire about these alleged omissions and misrepresentations by August 2000 at the latest. The existence of and the actual triggering of the "trigger clause" was publicly disclosed after the February 11, 2000 purchase of WAXS stock and well before the February 11, 2001 deadline for filing. In the August 2000 10-Q, it was revealed that the trigger clause had actually been triggered and that WAXS was required to pay \$160 million to the bondholders by January 2, 2001. (Harper Decl. Ex. J at 26.) A reasonable investor would have inquired.

C) Fraudulent Concealment

[4] In its opposition papers, plaintiff attempts to assert a fraudulent concealment defense in order to equitably toll the statute of limitations. (Opp'n at 5-7.) It is well-settled law that such a defense must be pled with particularity in accordance with Rule 9(b). *Armstrong v. McAlpin*, 699 F.2d 79, 88-90 (2d Cir.1983); *Salinger v. Projectavision, Inc.*, 972 F.Supp. 222, 231-32 (S.D.N.Y.1997). Let alone being pled with particularity, in this case, plaintiff has not even asserted the defense in the Amended Complaint. It is also highly questionable as to whether such a defense is even permitted when dealing with the limitations period in Section 9(e).

See *Rothman*, 220 F.3d at 96, 98 n. 1 (quoting *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363, 111 S.Ct. 2773, 115 L.Ed.2d 321 (1991)).

Accordingly, defendants' motion to dismiss the statutory claims relating to its alleged January 2000 misrepresentations and omissions which allegedly induced plaintiff to purchase WAXS stock in February 2000 is granted. The dismissal, however, is without prejudice.

II. February 2000 Investment: Common Law Fraud and Rule 9(b)

Because the statutory claims relating to plaintiff's February 2000 investment have been dismissed, the only claim left with regard to this investment is that of common law fraud. Defendants moved to dismiss all of plaintiff's claims stemming from the February 2000 investment--the statutory and common law fraud claims--for failure to meet the requisite standard for pleading scienter. The Court will now consider defendants' scienter arguments in relation to the remaining claim for common law fraud.

The requirements for proving a claim of common law fraud under New York law are essentially the same as those for a claim of securities fraud under Section 10(b) and Rule 10b-5: 1) that a defendant made a material false representation or a material omission of fact; 2) that a defendant intended to defraud the plaintiff thereby; 3) that a plaintiff reasonably relied on the representation; and 4) that a plaintiff suffered damages as a result of such reliance. See *Lama Holding Co. v. Smith Barney Inc.*, 88 N.Y.2d 413, 421, 646 N.Y.S.2d 76, 668 N.E.2d 1370 (1996); *Benjamin v. Kim*, No. 95 Civ. 9597, 1999 WL 249706, at *15 (S.D.N.Y. Apr.28, 1999). A complaint asserting common law fraud must meet the heightened pleading requirement of Federal Rule of Civil Procedure 9(b), which requires fraud to be alleged with particularity. Fed.R.Civ.P. 9(b) ("In all averments of fraud ..., the circumstances constituting fraud ... shall be stated with particularity."). The requisite intent of the defendant, however, need not be alleged with great specificity. *Id.* ("Malice, intent, knowledge, and other condition of mind of a person may be averred generally.")

A) Scienter

*6 [5] Despite Rule 9(b)'s lower standard for scienter, it is well-settled that the relaxation of Rule 9(b)'s specificity requirement regarding condition of mind is not a "license to base claims of fraud on speculation and conclusory allegations." *Acito v. Incera Group, Inc.*, 47 F.3d 47, 52 (2d Cir.1995) (quoting *Wexner v. First Manhattan Co.*, 902 F.2d 169, 172 (2d Cir.1990)). As a result, the Second Circuit has held that "plaintiffs must allege facts that give rise to a strong inference of fraudulent intent." *Id.* (citations omitted.) "The requisite 'strong inference' of fraud may be established either (a) by alleging facts to show that defendants had both motive and opportunity to commit fraud, or (b) by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness." *Id.* (quotation omitted.)

1) Motive and Opportunity

There is no dispute that there was opportunity for defendants to commit fraud in this case. The key question is motive. Plaintiff must plead motive allegations that "entail concrete benefits that could be realized by one or more of the false statements and wrongful nondisclosures alleged." *Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1130 (2d Cir.1994). The Second Circuit has stated as follows:

Motives that are generally possessed by most corporate directors and officers do not suffice; instead, plaintiffs must assert a concrete and personal benefit to the individual defendants resulting from the fraud. Insufficient motives ... can include (1) the desire for the corporation to appear profitable and (2) the desire to keep stock prices high to increase officer compensation. On the other hand, we have held motive sufficiently pleaded where plaintiff alleged that defendants misrepresented corporate performance to inflate stock prices while they sold their own shares. *Kalnit v. Eichler*, 264 F.3d 131, 139 (2d Cir.2001) (citations omitted). In addition, the motive alleged must be sufficiently particularized. *Rothman*, 220 F.3d at 93.

(i) Potential Financial Motives

The only possible strictly financial motives actually contained in the complaint [FN5] are: a) defendants' desire, as WAXS' investment banker, to increase investment fees from promoting WAXS' stock

(Am.Compl.¶ 70); and b) defendants' desire to inflate the value of WAXS stock due to its substantial holdings of WAXS stock as General Partner of the Fund. (*Id.* ¶ 2, 70.)

FN5. Plaintiff argues in its opposition that the artificial inflation of stock price in the context of corporate acquisitions can, in certain circumstances, be a sufficient motive for pleading scienter. (Opp'n at 18); see *Rothman*, 220 F.3d at 93. However, this is not alleged in the Amended Complaint as a motive for defendants' purported fraud. Plaintiff further argues that defendants' concrete economic motive was BBH's receipt of "carried interest" of approximately 20% of any capital gains realized upon any sale by the Fund of WAXS investments. (Opp'n at 18-19.) Again, however, this is not contained in the Amended Complaint.

As for defendants' alleged desire to increase their investment fees, courts in this district have consistently held that a defendant's desire to artificially inflate stock in order to realize greater transaction fees alone cannot show an improper motive. See *In re Indep. Energy Holdings PLC Sec. Litig.*, 154 F.Supp.2d 741, 765-66 (S.D.N.Y.2001); *Vogel v. Sands Bros. & Co.*, 126 F.Supp.2d 730, 739 (S.D.N.Y.2001); *Schnell v. Conseco, Inc.*, 43 F.Supp.2d 438, 449 (S.D.N.Y.1999); *Fisher v. Offerman & Co.*, No. 95 Civ. 2566, 1996 WL 563141, at *6-7 (S.D.N.Y. Oct.2, 1996).

*7 And, defendants could hardly have been motivated by considerations of profit from sales of WAXS stock. The Second Circuit has recognized that "unusual insider trading activity during the class period may permit an inference of bad faith and scienter." *Rothman*, 220 F.3d at 94 (quoting *Acito*, 47 F.3d at 54). Yet, plaintiff does not allege that defendants sold any of their WAXS stock, let alone engaged in any unusual trading. In fact, the Fund's entire \$70 million investment in WAXS was written off on March 31, 2001, three weeks before WAXS filed for bankruptcy. (Am.Compl.¶¶ 16, 52.) Furthermore, BBH, on behalf of the Fund, invested another \$20 million in WAXS stock on June 8, 2000, four months after plaintiff's February transaction. (Am.Compl.¶ 41.)

(ii) Reputational Motives

Plaintiff also attempts to identify a professional reputational interest specific to defendants "owing to grave conflicts of interest under which they labored ... as both promoters of the company's equities and corporate insiders...." (Opp'n at 19.) BBH was the General Partner of the Fund, Tucker was a partner in BBH and the executive responsible for management of the Fund, a WAXS board member, an investment advisor to NHL and a promoter of WAXS stock in the market. (Am.Compl. ¶ 2.) Plaintiff's theory, then, appears to be that defendants were "so closely associated with WAXS and its management as to have a reputational interest in the value of WAXS' shares." (Am.Compl. ¶ 2.)

This is an interesting theory and one that defendants did not attempt to refute in their reply papers. Plaintiff cites no case law to support its theory, and the closest that the Court could find to support it is *Varljen v. H.J. Meyers, Inc.*, No. 97 Civ. 6742, 1998 WL 395266, at *1, 4-5 (S.D.N.Y.1998). In *Varljen*, the court refused to dismiss plaintiffs' claims where the alleged motive of a brokerage house to commit fraud was, *inter alia*, to enhance its underwriting business by keeping the prices of stocks of companies for which it performed underwriting business at artificially elevated levels to dispel the notion that it was a penny stock brokerage and to bolster the credibility of its research department. *Id.* at *4-5. Yet, in that case, the complaint laid out extremely specific and detailed allegations to support its theory for motive. In the case at bar, plaintiff has included only one sentence in the entire Amended Complaint to support its theory. (See Am. Compl. ¶ 2.) Furthermore, although it has not specifically ruled on such a reputational theory, the Second Circuit appears to frown upon such intangible types of motive allegations. See *Chill v. G.E. Co.*, 101 F.3d 263, 268 (2d Cir.1996) ("The motive to maintain the appearance of corporate profitability, or of the success of an investment, will naturally involve benefit to a corporation, but does not 'entail concrete benefits.'" (citations omitted)). Thus, plaintiff

has not sufficiently satisfied the motive portion of the scienter pleading requirements.

2) Conscious Misbehavior or Recklessness

*8 With regard to the February 2000 investment discussed above, the Amended Complaint also does not sufficiently allege facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness. As the Second Circuit has explained, to establish reckless conduct or conscious misbehavior, the facts pled must allege "at the least, conduct which is highly unreasonable and which represents an extreme departure from the standards of ordinary care to the extent that the danger was either known to the defendant or so obvious that the defendant must have been aware of it." *Kalnit*, 264 F.3d at 142 (quotation omitted.)

Plaintiff again emphasizes the "grave conflicts of interest" of BBH and Tucker. (Opp'n at 17.) Yet, these alleged conflicts were well-known to plaintiff and as such, can certainly not be considered an extreme departure from the standards of ordinary care. Further, plaintiff argues that because Tucker admitted in February 2001 that he had lost confidence in management in Fall 2000, that the Court should relate such conscious misbehavior back to defendants' alleged state of mind in making the alleged misrepresentations and omissions in January 2000. (*Id.*) The Court agrees with defendants that Tucker's purported admission regarding defendants state of mind in Fall 2000 is irrelevant to defendants' state of mind in January 2000. (Reply at 8.)

Having failed to properly allege scienter in relation to the February 2000 investment, the common law fraud claim is dismissed without prejudice.

III. Plaintiff's Post-September 2000 Investment

[6] Defendants also move to dismiss plaintiff's statutory claims relating to the post-September 2000 investment as barred by

the statute of limitations. (Defs. Memo at 2.) They reason that plaintiff's claims relating to these investments are merely "variations on its fundamental theme that defendants failed to disclose that WAXS was overleveraged" and because the Court has found that plaintiff should have been on inquiry notice concerning WAXS' level of debt, plaintiff also should have been on inquiry notice of defendants alleged September 2000 misrepresentations. (Defs' Memo. at 21-24) This is simply not a tenable argument.

As the Court discussed in NHL I with regard to the original complaint, the Amended Complaint alleges specific misrepresentations made by defendants regarding the actual level of WAXS' reserves of cash and marketable securities, the performance of WAXS' management, and of WAXS' position in the European telecommunications market. 2002 WL 31027550, at *4-7. These alleged misrepresentations are clearly distinct from those discussed above in relation to plaintiff's February 2000 investment. Motion denied.

Conclusion

For the foregoing reasons, the Court grants defendants' motion to dismiss plaintiff's claims relating to its February 2000 investment in part with leave for plaintiff to replead, consistently with Fed.R.Civ.P. 11, within 30 days of the date of this Memorandum and Order. However, this will be plaintiff's last chance to replead. As Judge Koeltl would say, "[t]hree bites at the apple is enough." Salinger, 972 F.Supp. at 236. Defendants' motion is otherwise denied.

*9 So Ordered.

2003 WL 21088506 (S.D.N.Y.)

END OF DOCUMENT

62

Only the Westlaw citation is currently available.

United States District Court,
S.D. New York.

Adebowale Christiana ONANUGA,
Individually on Behalf of and As
Administrator of
the Estate of Ebenezer Adebayo Onanuga
Plaintiff,
v.
PFIZER, INC. and Merrill Lynch & Co., Inc.,
Defendants.

No. 03 Civ. 5405(CM).

Filed July 21, 2003.
Nov. 7, 2003.

Widow, individually and as administrator of deceased husband's estate, brought action against husband's former employer and company that administered former employer's stock options program, asserting claims for, inter alia, breach of contract, negligence, and conversion in connection with alleged mishandling of husband's stock options. Former employer moved to dismiss all but one claim, and company moved to dismiss claims against it. The District Court, McMahon, J., held that: (1) widow's second breach of contract claim against former employer was duplicative of first, and had to be dismissed; (2) former employer was not liable for promissory estoppel; (3) former employer was not liable in negligence; (4) former employer was not liable for negligent misrepresentation; (5) neither former employer nor company was liable for conversion; and (6) company was not liable for breach of contract under third-party beneficiary theory.

Motions granted.

West Headnotes

[1] Federal Civil Procedure 675.1
170Ak675.1

Second cause of action for breach of contract asserted by widow against deceased husband's former employer had to be dismissed as

duplicative to first cause of action when widow pleaded essentially the same facts in both claims and sought same relief.

[2] Implied and Constructive Contracts 55
205Hk55

Claim for quasi-contractual relief cannot be maintained where there is an express contract.

[3] Estoppel 85
156k85

Former employer was not liable to widow of former employee or former employee's estate for promissory estoppel when widow did not allege that either former employee or his estate forbore from exercising former employee's stock options earlier in the mistaken belief, engendered by former employer's alleged misstatements, that options were still good, so as to show requisite detrimental reliance through a change in position made based on former employer's misstatements.

[4] Torts 12
379k12

Claim for tortious breach of contract is not recognized under New York law.

[5] Action 27(1)
13k27(1)

[5] Negligence 210
272k210

Former employer's duties to retired employee to ensure that qualified professionals were hired to maintain its systems and that accurate statements regarding retired employee's stock options were mailed arose pursuant to former employee's options contract and did not constitute legal duty independent of contract, such that breach would give rise to tort claim, and therefore former employer's alleged mishandling of retired employee's stock options was not actionable on negligence theory under New York law.

[6] Fraud 13(3)
184k13(3)

Life-long employment relationship between retired employee and former employer did not

give rise to special relationship of trust or confidence required to establish claim for negligent misrepresentation under New York law.

[7] Fraud 25
184k25

Former employer was not liable to former employee's estate or widow for alleged negligent misrepresentation of status of former employee's stock options, under New York law, given absence of allegations showing that widow, estate, or former employee actually relied on former employer's alleged misstatements to their detriment.

[8] Trover and Conversion 17
389k17

Under New York law, former employee did not have possessory interest in stock or claim to cash value of that stock by virtue of his vested stock options, which merely gave former employee right to exercise options by buying stock at stated price, and therefore neither former employee's widow nor his estate had sufficient possessory interest in stock or its cash value to maintain claim for conversion under New York law against former employer or company that administered former employer's stock options program, based on alleged mishandling of former employee's stock options.

[9] Contracts 187(1)
95k187(1)

Company that was administering former employer's stock options program during time period in which widow and former employee's estate attempted to exercise former employee's stock options was not liable to widow and estate for breach of contract, under third-party beneficiary theory, inasmuch as services agreement between company and former employer contained provision expressly disavowing any obligations to third-party beneficiaries, including grantees, and contract governed claim as the one in place when widow and estate sought to exercise options.

[10] Federal Civil Procedure 1832
170Ak1832

In deciding motion to dismiss for failure to

state claim, district court could consider and rely on contract provided by defendant, even though it was not attached to amended complaint, inasmuch as contract was referenced in and relied upon in drafting complaint and formed basis for allegations of breach of contract in complaint. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[11] Damages 117
115k117

Proper measure of damages for breach of contract arising out of stock options is the difference between the market value of the stock and the option price as of the date of the breach.

Solomon Oluseyi Bankole, Law Office of Solomon O. Bankole, Laurel, MD, for Adebowale Christiana Onanuga, individually on behalf of and as administrator of the estate of Ebenezer Adebayo Onanuga, plaintiff.

Peter J. Engstrom, Baker & McKenzie, New York, NY, Susan Rigmor Knox, Baker & McKenzie, New York, NY, Grant Aram Hanessian, Baker & McKenzie, New York, NY, Peter J. Engstrom, Baker & McKenzie, San Francisco, CA, for Pfizer Inc., defendant.

Brian A. Herman, Morgan, Lewis & Bockius, L.L.P., New York, NY, for Merrill Lynch & Co. Inc., defendant.

DECISION AND ORDER GRANTING
PFIZER'S MOTION TO DISMISS COUNTS
TWO THROUGH SIX OF THE AMENDED
COMPLAINT AND MERRILL LYNCH'S
MOTION TO DISMISS COUNTS SEVEN
AND EIGHT OF THE AMENDED
COMPLAINT

MCMAHON, J.

*1 Plaintiff, Adebowale Christiana Onanuga brings this action against Pfizer and Merrill Lynch on behalf of herself and in her capacity as an Administrator of her husband, Ebenezer Adebayo Onanuga's Estate. Plaintiff is a citizen of the Federal Republic of Nigeria and has brought this action against Defendants seeking relief for Defendants alleged

mishandling of her husband's stock options. Invoking theories of breach of contract, negligence and conversion, she seeks damages of more than \$300,000. Defendants are Delaware corporations that have their principal places of business within this district. The Court has diversity jurisdiction pursuant to 28 U.S.C. § 1332.

I. Facts

Plaintiff's decedent (her husband) was employed by Pfizer Pharmaceuticals Group in Lagos, Nigeria from October 1974 until his retirement in May 1997. Mr. Onanuga began his career as a Management Accountant and by his retirement had become Company Secretary. During this period, he received stock options from Pfizer. Plaintiff has alleged that as of March 31, 2000, he held options to purchase 10,404 shares of Pfizer stock worth an estimated \$400,000 (Am.Cmplt.¶ 9), [FN1] in March 1998, about a year after his retirement, Mr. Onanuga exercised other options and received Pfizer stock at the option price. Plaintiff alleges that her decedent received statements as recently as the year 2000 indicating that the remainder of the stock options would expire between 2003-2005.

FN1. I note that elsewhere in the Amended Complaint (¶¶ 25, 29) Plaintiff asserts that the value of the stock as of March 31, 2000 was \$309,668; however, this inconsistency does not affect the Court's decision on these motions.

Mr. Onanuga did not attempt to exercise any other options between March 1998 and August 27, 2001 when he passed away. The Amended Complaint alleges that Plaintiff's decedent, in his will, directed his estate to exercise the remainder of the options before they expired.

In February 2002, the estate contacted the Country Manager of Pfizer Nigeria to redeem the cash value of the remaining stock options. On or about March 28, 2002, Pfizer told the estate that it should contact Merrill Lynch to obtain a vesting kit. The estate requested the vesting kit from Merrill Lynch in January 2003. Shortly thereafter, Pfizer sent Plaintiff

a letter asserting that an error had been made and explaining that Plaintiff's decedent's stock options had in fact expired in 1997 (Am. Cmplt ¶¶ 14-16) and the request to exercise would not be honored. [FN2]

FN2. According to the Defendants, Mr. Onanuga's stock options expired as early as May 1997 when the plant with which he was associated closed. However, due to system errors, company records mistakenly indicated that he was still entitled to stock options during his retirement when in fact they had been terminated in 1997. (Pl. Mem. in Opp., Ex. A). Allegedly because of this error, Mr. Onanuga was able to exercise some of his options in March 1998, and Pfizer continued to send Mr. Onanuga statements that indicated that the options would terminate in 2003, 2004 and 2005. All of this information is de hors the record on a Rule 12(b)(6) motion to dismiss which assumes the allegations of the complaint to be true.

Plaintiff alleges that the defendants are liable for breach of contract, conversion and misrepresentation for refusing to allow Plaintiff to exercise the stock options on behalf of her husband's estate. Both defendants have moved for dismissal pursuant to F.R.C.P. 12(b)(6). Pfizer moves to dismiss all claims against it except the First Cause of Action, for Breach of Contract. Merrill Lynch moves to dismiss both claims asserted against it (Counts VII and VIII).

II. Standard for Motion to Dismiss

Rule 12(b)(6) provides for dismissal of a complaint that fails to state a claim upon which relief can be granted. The standard of review on a motion to dismiss is heavily weighted in favor of the plaintiff. The court is required to read a complaint generously, drawing all reasonable inferences from the complaint's allegations. The court must deny the motion "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Stewart v. Jackson & Nash*, 976 F.2d 86, 87 (2d Cir.1992) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)).

III. Argument

Pfizer's Motion to Dismiss Count II Alleging "Breach of Contract--Detrimental Reliance" is Granted

*2 [1] In Count I, Plaintiff alleges that Pfizer breached its contract with her husband, which entitled him (or his Estate) to exercise stock options through 2005. In Count II, Plaintiff alleges the same thing--that Pfizer breached its contract with her husband which entitled him (or his Estate) to exercise stock options through 2005. In connection with both claims, Plaintiff alleges that her husband's options did not expire in 1997, and that Pfizer's post-1997 behavior (in honoring his 1998 request to exercise options), as well as its representations as provided in statements sent to Mr. Onanuga, are evidence that Plaintiff was still contractually entitled to exercise the options when the Estate attempted to do so. Plaintiff seeks the "cash value of the vested stock" as damages on both counts. See ¶¶ 36 and 42.

Plaintiff has pled essentially the same facts in both the first and second cause of action and seeks the same relief. The second cause of action must, therefore, be dismissed as duplicative to the first. See *Durante Bros. and Sons, Inc. v. Flushing Nat. Bank*, 755 F.2d 239, 251 (2d Cir.1985) (upholding dismissal of one count on grounds that it was duplicative of others).

[2][3] To the extent that Count Two is read as asserting an alternative theory, based on something like promissory estoppel (as Plaintiff argues in her Opposition to Pfizer's motion at page 5), it still fails. First, a claim for quasi-contractual relief cannot be maintained where there is an express contract as in the present case. See *Foxley v. Sotheby's Inc.*, 893 F.Supp. 1224 (S.D.N.Y.1995). Second, Plaintiff has not pled the elements of promissory estoppel.

To maintain a claim for promissory estoppel, the Plaintiff must show that there was (i) a promise; (ii) reasonable and foreseeable reliance by the promisee on that promise; (iii) an injury to the promisee; and (iv) an injustice

if the promise is not enforced. *Devlin v. Empire Blue Cross and Blue Shield*, 274 F.3d 76, 85 (2d Cir.2001). Plaintiff is required to plead specific facts showing that the decedent or she relied to their detriment--that is, that they either took some action or refrained from taking some action in reliance on Pfizer's statements that led to the Estate's being damaged.

Plaintiff does not plead that either her decedent or the Estate forbore from exercising the options earlier in the mistaken belief (engendered by the misrepresentations) that the options were still good. The only view of the facts pled in the Amended Complaint is that the Estate exercised the options while believing--due to the statements--that it had a contractual right to exercise them. In other words, the only "promise" here was the contract promise. If Plaintiff's decedent did have a contract right to exercise his options through 2003, 2004 and 2005, then the Estate must proceed under a theory of breach of contract. If it did not have such a right, there is no possible claim of unjust enrichment or promissory estoppel, because a mistaken belief that a contract right exists, without more, is not detrimental reliance. Detrimental reliance by its terms means that the Plaintiff changed her position in reliance on the statements. Here, Plaintiff does not allege that she or her decedent actually changed their position.

*3 Count II of the Amended Complaint must, therefore, be dismissed.

Pfizer's Motion to Dismiss Count III Alleging "Tortious Breach of Contract" is Granted

[4] Plaintiff's third cause of action against Pfizer alleges tortious breach of contract. There is no such thing as a tortious breach of contract under New York law. And a breach of contract claim is not actionable in tort unless Plaintiff can identify an independent duty--outside of the contract--which Pfizer owed her or her husband. See *Clark-Fitzpatrick, Inc. v. Long Island Rail Road Co.*, 70 N.Y.2d 382, 389, 521 N.Y.S.2d 653, 656-657, 516 N.E.2d

190 (1987); *Orlando v. Novurania of America, Inc.*, 162 F.Supp.2d 220, 224 (S.D.N.Y.2001). She has not done so. Therefore, Count III of the Amended Complaint is dismissed.

Pfizer's Motion to Dismiss Count IV Alleging Negligence is Granted

[5] Under New York law, it is a well established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated. *Id.* Plaintiff's Amended Complaint alleges that Pfizer owed Plaintiff's husband a duty to ensure qualified professionals were hired to maintain its systems and ensure accurate statements regarding his stock options were mailed. (Am.Cmplt. ¶ 56). However, these duties arose pursuant to the options contract and do not constitute a legal duty independent of the contract. This is not a case in which the nature of the contract and the public's interest in seeing it performed with reasonable care give rise to a duty of care in performance of the contractual obligation, such that the breach of that independent duty of care will give rise to a tort claim. See *Sommers v. Federal Sign Corp.*, 79 N.Y.2d 540, 583 N.Y.S.2d 957, 962, 593 N.E.2d 1365 (1992); *Logan v. Empire Blue Cross and Blue Shield*, 275 A.D.2d 187, 714 N.Y.S.2d 119 (2d Dep't.2000). Rather, this involves an agreement between private parties and raises issues with relevance to those parties and not the public as a whole. Therefore, Defendant's motion to dismiss Count IV is granted.

Pfizer's Motion to Dismiss Count V Alleging Negligent Misrepresentation is Granted

[6] Plaintiff's fifth cause of action alleging negligent misrepresentation is also dismissed. New York courts do not recognize a cause of action for negligent misrepresentation in the absence of a special relationship of trust or confidence between the parties. See *Stewart v. Jackson & Nash*, 976 F.2d 86, 90 (2d Cir.1992). Plaintiff's allegation that her husband was a life-long employee of Pfizer does not plead any special relationship. This Court has previously held that an employer-

employee relationship is not fiduciary in nature, and without alleging further facts from which to infer such a relationship existed that cause of action must be dismissed. See *Madera v. Metropolitan Life Ins. Co.*, 99 Civ. 4005, 2002 WL 1453827 (S.D.N.Y., Jul 03, 2002)(MBM). See also *Ellis v. Provident Life & Accident Ins. Co.*, 3 F.Supp.2d 399, 411 (S.D.N.Y.1998); *Lind v. Vanguard Offset Printers, Inc.*, 857 F.Supp. 1060, 1067 (S.D.N.Y.1994).

*4 [7] Moreover, as discussed above, Plaintiff has not alleged any facts to show that she, the estate or her husband actually relied on these statements to their detriment. In fact, as Plaintiff acknowledges in paragraph 67 of the Amended Complaint, her husband actually benefitted from the alleged system error when he redeemed some of his options in March 1998. The Amended Complaint alleges no other facts suggesting that anyone changed his position in reliance on those statements, which is fatal to her claim for negligent misrepresentation.

Pfizer's Motion to Dismiss Count VI Alleging Conversion and Merrill Lynch's Motion to Dismiss Count VIII Alleging Conversion are Granted

[8] Conversion is the "unauthorized exercise of dominion or control over property by one who is not the owner of the property which interferes with and is in defiance of a superior possessory right of another party." *Messe v. Miller*, 79 A.D.2d 237, 436 N.Y.S.2d 496 (N.Y.1981). Plaintiff cannot hold either Pfizer or Merrill Lynch liable for conversion of the Estate's "vested stock" because Plaintiff's husband did not have a possessory interest in the stock with which either defendant could interfere.

Plaintiff alleges that, upon the vesting of the options, Plaintiff's husband had "possessory and proprietary rights and interest in the cash value of the vested stock." (Am.Cmplt. ¶¶ 78, 92). Plaintiff is incorrect. When options vest, the holder of those options has the right to exercise the options-meaning he can buy the stock at the stated price. Until

the option is exercised, however, the holder has neither a possessory interest in the underlying stock nor any claim to the cash value of that stock. Thus, Plaintiff lacks a sufficient possessory interest in the stock to maintain the action. See *McDougal v. Apple Bank for Sav.*, 200 A.D.2d 418, 606 N.Y.S.2d 215 (1st Dep't.1994) (dismissing claim for conversion in action arising from stock option agreement).

Counts VI and VIII are dismissed as to defendants Pfizer and Merrill Lynch respectively.

Merrill Lynch's Motion to Dismiss Count VII is Granted

[9] Plaintiff alleges that Merrill Lynch is liable for breach of contract. Plaintiff argues that her husband was a third party beneficiary to the Merrill Lynch-Pfizer contract, and Merrill Lynch breached its obligation under the contract by not paying out on his options when requested.

Merrill Lynch has moved to dismiss Count VII on the grounds that Plaintiff cannot maintain an action against it for breach of contract because the contract between Merrill Lynch and Pfizer specifically disavows any obligations to third party beneficiaries. Merrill Lynch is correct.

[10] Plaintiff has not attached, or even identified, the contract under which she claims third party beneficiary status. However, she references a contract between Pfizer and Merrill Lynch (Am.Cmplt.¶¶ 83, 84), and Merrill Lynch has attached that contract-entitled "Agreement for Services" and made between Pfizer, Inc. and Merrill Lynch, Pierce, Fenner & Smith, Inc. on December 22, 2000--to its moving papers. (Declaration of Brian A. Herman, Ex. A). Although Plaintiff did not attach the Agreement to the Amended Complaint, I may consider it on a motion to dismiss, because this contract was referenced in and relied upon in the drafting the Complaint, and forms the basis for the allegations set forth in paragraph 83. See *Chambers v. Time Warner, Inc.*, 282 F.3d 147,

153 (2d Cir.2002).

*5 Plaintiff urges the court to look at the "spirit and intent of the contract" between Merrill Lynch and Pfizer, which she says demonstrates an "express intent" to create a third party beneficiary contract. (Pl. Mem. in Opp. to Merrill Lynch p. 6). This argument is untenable. Under New York law, the intention to benefit a third party must be found within the four corners of the contract, and the contract must clearly evince an intention to benefit the third person who seeks its protection. *Travelers Indemnity Co. of Conn. v. Losco Group, et al.*, 150 F.Supp.2d 556, 561 (S.D.N.Y.2002). Section 8.14 of the Agreement states "This Agreement is for the benefit of Pfizer and Merrill Lynch and not for any other person, including any Grantee", thereby specifically disavowing any obligations to any third party beneficiary, especially Mr. Onanuga who was the grantee of options from Pfizer.

Plaintiff tries to avoid the application of § 8.14 by arguing that the contract is not applicable to her husband because it was entered into after his "stock vesting dates" and was applicable as of December 22, 2000. This argument is without merit. As described in paragraphs 83-85 of the Amended Complaint, Merrill Lynch has been sued because it was administering Pfizer's stock options program during the period when Plaintiff attempted to exercise the options. Plaintiff has sued Merrill Lynch precisely because, pursuant to whatever agreement existed between Pfizer and Merrill Lynch at the time she tried to exercise the options, Merrill Lynch refused to honor that exercise.

Plaintiff has identified no other contract as being applicable to her case against Merrill Lynch, and the Merrill Lynch-Pfizer contract clearly disavows any obligations to third party beneficiaries. Therefore, there is no set of facts under which Plaintiff can maintain an action against Merrill Lynch for breach of contract. Count VII is dismissed.

Damages

[11] Pfizer has also moved to strike sections of Plaintiff's prayer for relief on the grounds that they are not recoverable under law. The motion to strike prayers (a) through (f) is granted for the following reasons. In light of my dismissal of Plaintiff's tort claims, Plaintiff's prayer for punitive damages on each of these causes of action (sections (c) through (f)) must also be dismissed. And Plaintiff's claim for specific performance and consequential damages (sections (a) and (b)) is also dismissed because in *Hermanowski v. Acton Corp.*, 729 F.2d 921 (2d Cir.1984), the Second Circuit held that the proper relief in actions for breach of contract arising out of stock options is "the difference between the market value of the stock and the option price" as of the date of the breach. 729 F.2d at 922. Assuming Plaintiff has any claim at all--that is, assuming (as I must at this stage) that Plaintiff's decedent's options did not lapse in 1997--that is all she can recover.

IV. Conclusion

The Clerk of the Court is directed to dismiss the Amended Complaint as to Defendant Merrill Lynch, and to dismiss Counts II-VI as to Defendant Pfizer. All dismissals are with prejudice. We will proceed to discovery on Count I.

*6 This constitutes the decision and order of the Court.

2003 WL 22670842 (S.D.N.Y.)

END OF DOCUMENT

63

District Court of Appeal of Florida,
Fourth District.

PALM BEACH COUNTY, a political
subdivision of the State of Florida, Appellant,
v.

TRINITY INDUSTRIES, INC., a Delaware
corporation, Appellee.

No. 94-3510.

Oct. 25, 1995.

After contractor on county construction project became insolvent, subcontractor sued county to collect for materials it had supplied. The Circuit Court, Palm Beach County, Harold J. Cohen, J., entered summary judgment in favor of subcontractor. County appealed. The District Court of Appeal, Gunther, C.J., held that county was required by statute to ensure that contractor post payment and performance bond for the protection of subcontractors before construction commenced.

Affirmed.

West Headnotes

[1] Public Contracts 44
316Ak44

Statute requiring contractors on public projects worth \$200,000 or more to post payment and performance bond is remedial in nature and therefore entitled to a liberal construction, within reason, to effect its purpose of protecting subcontractors and suppliers by providing them with an alternative remedy to mechanic's liens on public projects. West's F.S.A. § 255.05(1)(a).

[2] Public Contracts 41
316Ak41

Statute requiring contractors on public projects worth \$200,000 or more to post payment and performance bond prior to commencing construction places a corresponding duty on public agency to see that a bond is in fact posted for protection of subcontractors. West's F.S.A. § 255.05(1)(a).

[3] Judgment 181(19)
228k181(19)

When the determination of the issues of a lawsuit depends upon construction of a written instrument and the legal effect to be drawn therefrom, the question at issue is essentially one of law only and determinable by entry of summary judgment.

[4] Judgment 181(1)
228k181(1)

[4] Judgment 181(2)
228k181(2)

Summary judgment is appropriate where the material facts are not in dispute and the judgment is based on the legal construction of documents.

[5] Judgment 185(2)
228k185(2)

The standard for reviewing entry of summary judgment requires that moving party must conclusively show the absence of any genuine issue of material fact.

[6] Judgment 185(2)
228k185(2)

Trial court, in determining whether party moving for summary judgment has conclusively shown absence of a genuine issue of material fact, must draw every reasonable inference in favor of nonmoving party.

[7] Counties 129
104k129

County was liable to subcontractor which had supplied materials for public guardrail project where estimated annual amount of guardrail contract was \$250,000, where county failed to ensure that contractor post a payment and performance bond before construction commenced, and where contractor had become insolvent, making it impossible for subcontractor to collect on default judgment against contractor. West's F.S.A. § 255.05(1)(a).

*943 Anne' Desormier-Cartwright and Denise J. Bleau, West Palm Beach, for appellant.

Paul A. Turk, Jr. of Paul A. Turk, Jr., P.A.,
West Palm Beach, for appellee.

GUNTHER, Chief Judge.

Appellant, Palm Beach County, defendant below (the County), appeals a final judgment entered after the trial court granted Appellee's, Trinity Industries, Inc., plaintiff below (Trinity), motion for summary judgment as to liability. Because no genuine issue of material fact exists as to liability, we affirm the final judgment.

The County posted a notice of bid for a contract for the furnishing and/or installing of guardrail for various job sites at any location within Palm Beach County. In the bid specifications, the scope provided that the term of the contract should be for dates certain to run twelve months with an option to renew for an additional twelve months. The bid specifications also revealed that the estimated annual expenditure would be \$245,000.00.

Subsequently, the Palm Beach County Board of County Commissioners entered into a price agreement with Palm Beach Guardrail and Erosion Control (Palm Beach Guardrail) that set forth the duration of the agreement to run from August 20, 1991 through August 22, 1992 and the estimated dollar value at \$247,000.00. Trinity entered this scenario as a subcontractor who provided materials to Palm Beach Guardrail for installation at one of the County's significant job sites. When Palm Beach Guardrail could no longer provide services to the County under the price agreement, the County entered into a price agreement with Rawls & Associates, Inc. to "complete the term of the original price agreement with Palm Beach Guardrail."

In sum, Palm Beach Guardrail performed work for the County worth \$196,565.84 pursuant to the price agreement. In fulfilling the time remaining in the original contractual agreement, Rawls & Associates, Inc., provided services to the County in the amount of \$39,701.99. Thus, the total work received by the County pursuant to their notice of bid for the furnishing and/or installing of guardrail

was in the amount of \$236,267.83.

*944 Trinity obtained a default judgment against Palm Beach Guardrail. However, collection of that judgment proved unsuccessful because Palm Beach Guardrail lacked assets. Trinity then filed an action against the County alleging that the County had failed to require Palm Beach Guardrail to post a bond in accordance with section 255.05, Florida Statutes (1991). In the parties' undisputed statement of facts, it is conceded that the County did not require the contractor, Palm Beach Guardrail, to submit a payment and performance bond under section 255.05(1)(a). The parties also stipulated that the estimated annual amount of the guardrail contract between the County and Palm Beach Guardrail was for \$250,000.00.

Section 255.05(1)(a), Florida Statutes (1991), requires, in pertinent part:

Any person entering into a formal contract with the state or any county, city, or political subdivision thereof, ... for the construction of a public building or public work shall be required, before commencing the work, to execute, deliver to the public owner, and record in the public records of the county where the improvement is located, a payment and performance bond with a surety insurer authorized to do business in this state as surety....

The statute further exempts those contractors whose contracts fall under \$200,000.00 from obtaining a bond:

At the discretion of the official or board awarding such public authority, any person entering into such a contract which is for \$200,000 or less may be exempted from executing the payment and performance bond.

[1] This court has noted that the above statute is remedial in nature and therefore, entitled to a liberal construction, within reason, to effect its intended purpose. *Fidelity and Deposit Co. of Maryland v. Waldron's Inc.*, 608 So.2d 119, 120 (Fla. 4th DCA 1992). Historically, the purpose of this section is to protect subcontractors and suppliers by providing them with an alternative remedy to

mechanic's liens on public projects. *School Bd. of Palm Beach County v. Vincent J. Fasano, Inc.*, 417 So.2d 1063, 1065 (Fla. 4th DCA 1982); see also *Gorman Co. of Fort Lauderdale, Inc. v. Frank Maio Gen. Contractor, Inc.*, 438 So.2d 1018, 1019 (Fla. 4th DCA 1983); *Winchester v. Florida Elec. Supply, Inc.*, 161 So.2d 668, 669 (Fla. 2d DCA 1964).

[2] In following the Florida Supreme Court in *Warren v. Glens Falls Indem. Co.*, 66 So.2d 54 (Fla.1953), this court has explained that section 255.05 places a corresponding duty on the public agency, as well as the contractor, to see that a bond is in fact posted for the protection of the subcontractors before construction commences. *Pavex Corp. v. Broward County Bd. of County Com'rs*, 498 So.2d 1317, 1318 (4th DCA), rev. dismissed, 509 So.2d 1118 (Fla.1987).

[3][4][5][6] Where the determination of the issues of a lawsuit depends upon the construction of a written instrument and the legal effect to be drawn therefrom, the question at issue is essentially one of law only and determinable by entry of summary judgment. *Angell v. Don Jones Ins. Agency Inc.*, 620 So.2d 1012, 1014 (Fla. 2d DCA 1993). Moreover, a summary judgment is appropriate where the material facts are not in dispute and the judgment is based on the legal construction of documents. *Ball v. Florida Podiatrist Trust*, 620 So.2d 1018 (Fla. 1st DCA 1993). The standard for reviewing the entry of a summary judgment requires that a party moving must conclusively show the absence of any genuine issue of material fact. *Moore v. Morris*, 475 So.2d 666 (Fla.1985). The trial court must then draw every reasonable inference in favor of the non-moving party. *Id.*; *Lenhal Realty, Inc. v. Transamerica Commercial Fin. Corp.*, 615 So.2d 207 (Fla. 4th DCA 1993).

[7] In the instant case, we find that the evidence presented no genuine issue of material fact. The parties' statement of undisputed facts clearly reveals the County's approval to award Palm Beach Guardrail a guardrail contract to provide for countywide

guardrail requirements for an estimated annual amount of \$250,000.00. In addition, the statement of undisputed facts establishes that the contract between the parties was for one year. There exists no genuine issue of material fact that Palm Beach Guardrail became *945 insolvent, making it impossible for Trinity to collect against its default judgment. Furthermore, we find that the legislature, by enacting section 255.05, intended to protect the subcontractor, or materialman, from precisely this type of occurrence. Clearly, the contract between the County and Palm Beach Guardrail exceeded the \$200,000.00 exemption, thus requiring the County to ensure that Palm Beach Guardrail "execute, deliver to the public owner, and record in the public records ... a payment and performance bond...." § 255.05(1)(a), Fla.Stat. (1991). Accordingly, we affirm the final judgment and summary judgment entered by the trial court in favor of Trinity.

AFFIRMED.

DELL and STEVENSON, JJ., concur.

661 So.2d 942, 20 Fla. L. Weekly D2379

END OF DOCUMENT

64

District Court of Appeal of Florida,
Fourth District.

PARTS DEPOT COMPANY, L.P., By and
Through its general partner PARTS DEPOT
COMPANY, INC., Appellant,

v.

FLORIDA AUTO SUPPLY, INC., d/b/a
Florida Auto Supply and J.C. Impellitier,
individually, Appellees.

Nos. 94-1582, 94-2633.

March 13, 1996.

Warehouse distributor of auto parts sued jobber for nonpayment on account, and jobber counterclaimed for antitrust violations. Jury in the Circuit Court for Indian River County, Charles E. Smith, J., returned verdict for jobber on counterclaim, and distributor appealed. The District Court of Appeal, Warner, J., held that: (1) evidence of termination of sales by distributor to plaintiff jobber following complaints from other unnamed jobbers was insufficient to establish horizontal conspiracy in restraint of trade, and (2) evidence showing only effect of refusal to sell on plaintiff's financial picture and not that the price or supply of goods in the market was affected was insufficient to show illegal vertical conspiracy under the rule of reason.

Reversed and remanded.

West Headnotes

[1] Trial 178
388k178

In ruling on motion for judgment in accordance with prior motion for directed verdict, all evidence must be construed, and inferences drawn, in light most favorable to non-moving party.

[2] Trial 139.1(12)
388k139.1(12)

Jury's role as finder of fact does not entitle it to return verdict based only on confusion, speculation or prejudice; its verdict must be reasonably based on evidence presented at

trial.

[3] Monopolies 12(1.8)
265k12(1.8)

"Vertical restraints" on competition are those imposed by persons or firms on a different level of the distribution system than the levels of the persons or firms receiving impact of the restraints, while "horizontal restraints" are those imposed within the same distribution level, and encompass situation where dealers conspire to induce manufacturer to refuse to deal with a particular dealer. West's F.S.A. § 542.18.

[4] Monopolies 12(1.8)
265k12(1.8)

Manufacturer's mere receipt of complaints from its wholesalers or agents who compete with plaintiff, standing alone, does not constitute conspiracy in restraint of trade, and even where termination follows receipt of complaints, there is no basis for inferring existence of concerted action absent some other evidence of tacit understanding or agreement. West's F.S.A. § 542.18.

[5] Monopolies 12(1.8)
265k12(1.8)

[5] Monopolies 12(1.14)
265k12(1.14)

Horizontal conspiracy in restraint of trade was not shown in decision of warehouse distributor of auto parts to cease doing business with particular jobber, despite evidence that a few other unnamed jobbers had complained that distributor was selling to plaintiff, which was mistakenly believed to part of chain of auto parts stores, and even if business reason given by distributor for terminating plaintiff jobber was undermined, it still did not justify inference that conspiracy occurred absent some proof of that conspiracy. West's F.S.A. § 542.18.

[6] Monopolies 17(1.8)
265k17(1.8)

Only those vertical conspiracies which set prices constitute per se violations of the antitrust laws; nonprice violations are

governed by "rule of reason," which requires plaintiff to prove that restrictive practice constitutes unreasonable restraint on competition. West's F.S.A. § 542.18.

[7] Monopolies 17(2.2)
265k17(2.2)

Auto parts jobber failed to show vertical conspiracy in restraint of trade, in violation of state antitrust law, in decision of warehouse distributor, on which plaintiff jobber had relied for overnight delivery of parts, to no longer do business with plaintiff, where plaintiff did not show what effect its removal from the overnight delivery market had on availability or price of overnight delivery in the area, but only showed effect on its own financial picture, and there was evidence that customers were still able to obtain overnight services from at least two sources and no proof that the prices were higher. West's F.S.A. § 542.18.

[8] Monopolies 12(1.2)
265k12(1.2)

Antitrust laws are for protection of competition, and not for protection of individual competitors. West's F.S.A. § 542.18.

[9] Monopolies 12(1.4)
265k12(1.4)

Three elements must be alleged and proven under the rule of reason test for illegal conspiracy in restraint of trade: that there is specifically defined market; that defendants possessed ability to affect price or output; and that the plaintiff's exclusion from the market did affect or was intended to affect the price or supply of goods in that market. West's F.S.A. § 542.18.

***322** Consolidated appeals from the Circuit Court for Indian River County; Charles E. Smith, Judge.

Mark S. Mucci of Benson, Moyle & Chambers, Fort Lauderdale, and Irene C. Keyse-Walker of Arter & Hadden, Cleveland, Ohio, for appellant.

G. Ware Cornell, Jr., of G. Ware Cornell,

Jr., P.A., Fort Lauderdale, for appellees.

WARNER, Judge.

When the appellant sued the appellee for nonpayment on an account, the appellee, Florida Auto Supply, counterclaimed against the appellant, Parts Depot, for antitrust violations, alleging that Parts Depot, a warehouse distributor of auto parts, and Vero Beach Auto Parts, an auto parts "jobber," conspired to damage Florida Auto Supply as a competitor of Vero Beach Auto Parts. On the first day of trial, the trial court allowed the appellee to amend its counterclaim alleging that others conspired with Vero Beach Auto Parts in further violation of antitrust laws. After trial on the merits, the jury returned a verdict in favor of the appellee. Because we find that the appellee did not prove either a horizontal or vertical conspiracy in restraint of trade, we reverse.

In April 1989, J.C. Impellitier opened Florida Auto Supply as an independent jobber in Vero Beach after years of working at Bennett Auto Supply (Bennett), a chain of auto parts stores. Ben Clair, Inc., the warehouse distributor arm of Bennett, supplied Florida Auto Supply with start-up inventory in exchange for cash and a promissory note, which was secured by a lien on the inventory. Shortly thereafter, Steego Parts Corporation (Steege) began supplying Florida Auto Supply with auto parts and offered overnight delivery.

In the auto parts business, most orders from garages are placed with a distributor in the morning. Most parts warehouses offer same day delivery of morning orders to the distributors who can then deliver to the garages. If an order comes in after 9:30 a.m., the "same day" warehouse deliveries cannot fill the order that day and must deliver the next day, but the delivery would not arrive until the afternoon. Overnight delivery allows orders placed in the afternoon to arrive at the distributor before the morning, so that the part is available when the garage opens up. Steege offered this service as a way of ***323** attracting customers. When Florida

Auto Supply obtained overnight delivery, it marked up its price to its customers by 50 percent. There was no testimony as to the amount of Florida Auto Supply's mark-up on same day service.

In November 1989, Steego sold its assets to Parts Depot, including the account receivable from Florida Auto Supply. On December 15, 1989, the manager of Parts Depot informed Florida Auto Supply that it would no longer do business with Florida Auto Supply. According to Impellitier, this came out of the blue. A day or two later, Impellitier phoned Don Thompson of Parts Depot, a friend of Impellitier, and asked him to look into the termination. Thompson was informed by the Parts Depot president that some independent jobbers had complained that Parts Depot was selling to a Bennett store, thus hurting Parts Depot's independent jobber customers. Thompson told the Parts Depot president that Florida Auto Supply was not a Bennett store and suggested that this could be proven by checking to see if Ben Clair, Inc. or Bennett had filed a UCC lien to protect their inventory. There was a UCC statement on file from Ben Clair. Thompson called Impellitier and told him that because Ben Clair held a UCC lien on Florida Auto Supply, they believed Florida Auto Supply was a Bennett store, even though denied by Florida Auto Supply.

Impellitier testified that being cut off from overnight delivery hurt his business reputation, causing economic problems. For a while in 1992, he found another overnight supplier but that supplier opened its own store in the Vero Beach area and stopped supplying him. He admitted that overnight delivery could be provided by United Parcel Service (UPS), but that service was expensive and would put him at a competitive disadvantage with other retailers.

Vero Beach Auto Parts continued to be serviced by Parts Depot. It was owned by the son of the president of Parts Depot, with a minority share being held by the president. One of Florida Auto Supply's employees testified that he had heard the son state that

he would drive Florida Auto Supply out of business. Yet Florida Auto Supply and Vero Beach Auto Parts continued to do business with each other, buying available parts from each other as needed. There were also other jobbers in Vero Beach, some of whom were served by Parts Depot. Three customers of Florida Auto Supply testified that while they used Florida Auto Supply for most of their purchases because it had the lowest prices, they went to other jobbers when they wanted overnight delivery. This was for customer convenience, however, not because of price. Two of the customers testified that they used Vero Beach Auto Parts, and one testified that he used Kirby Auto Parts, when overnight delivery was required. None testified that overnight service was more expensive as a result of Florida Auto Supply's departure from that segment of the market.

In response, the president of Parts Depot testified that the decision not to sell to Florida Auto Supply was prompted by the existence of the UCC filing statement on the inventory of the store. Parts Depot had experienced a competitor removing inventory of one of its customers based on a UCC lien, thereby threatening Parts Depot's security interest on its own account with that customer. Since Ben Clair had filed a UCC lien on Florida Auto Supply's inventory, Parts Depot did not want to be placed in a financially insecure position with a customer again. The president of Parts Depot denied that his decision to refuse Florida Auto Supply an account was because it was in competition with Vero Beach Auto Parts.

Other than the testimony of Thompson that the president of Parts Depot had stated that some independent jobbers had complained about Parts Depot's supplying to Florida Auto Supply, there was no testimony from any independent jobber about any complaints, threats, or agreements with Parts Depot.

The jury returned a verdict for Florida Auto Supply for \$28,000, which the trial court trebled pursuant to section 542.22, Florida Statutes (1989). From the final judgment, the appellant takes this appeal.

[1][2] The appellant claims that the trial court erred in denying the motion for judgment in accordance with its prior motion for *324 directed verdict, because the appellee failed to prove its case. In ruling on the motion, all evidence must be construed, and all inferences drawn, in the light most favorable to the non-moving party. See, e.g., *Collins v. School Bd. of Broward County*, 471 So.2d 560, 563 (Fla. 4th DCA 1985), writ dismissed, 491 So.2d 280 (Fla.1986). Nevertheless, "[t]he jury's role as the finder of fact does not entitle it to return a verdict based only on confusion, speculation or prejudice; its verdict must be reasonably based on evidence presented at trial." *H.L. Moore Drug Exch. v. Eli Lilly & Co.*, 662 F.2d 935, 941 (2d Cir.1981) (quoting *Michelman v. Clark-Schwebel Fiber Glass Corp.*, 534 F.2d 1036, 1042 (2d Cir.), cert. denied, 429 U.S. 885, 97 S.Ct. 236, 50 L.Ed.2d 166 (1976)), cert. denied, 459 U.S. 880, 103 S.Ct. 176, 74 L.Ed.2d 144 (1982).

While the appellee sued under section 542.18, Florida Statutes (1989), which prohibits conspiracies in restraint of trade, the Legislature has directed courts to rely on comparable federal antitrust statutes in construing this statute. § 542.32, Fla.Stat. (1989). Therefore, we look to federal cases to elucidate what is an agreement in restraint of trade and what proof constitutes a conspiracy.

[3] Case law has categorized restraints on competition as being either vertical or horizontal:

"Vertical" restraints upon competition are those imposed by persons or firms on a different level of the distribution system than the level of the persons or firms receiving the impact of the restraints, e.g., resale price fixing may involve a manufacturer dictating the price at which a dealer sells a product. On the other hand, "horizontal" restraints are those imposed within the same distribution level, e.g., by some dealers refusing to sell to other dealers.

St. Petersburg Yacht Charters, Inc. v. Morgan Yacht, Inc., 457 So.2d 1028, 1031 (Fla. 2d DCA 1984). Horizontal restraints also

encompass the situation where dealers conspire to induce the manufacturer to refuse to deal with a particular dealer. *Id.* at 1040.

In "distributor-termination cases" concerning vertical restraints, the Supreme Court has established several important distinctions.

First there is the basic distinction between concerted and independent action--a distinction not always clearly drawn by parties and courts. Section 1 of the Sherman Act requires that there be a "contract, combination ... or conspiracy" between the manufacturer and other distributors in order to establish a violation. 15 U.S.C. § 1. Independent action is not proscribed. A manufacturer of course generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently....

The second important distinction in distributor-termination cases is that between concerted action to set prices and concerted action on nonprice restrictions. The former have been per se illegal since the early years of national antitrust enforcement. The latter are judged under the rule of reason, which requires a weighing of the relevant circumstances of a case to decide whether a restrictive practice constitutes an unreasonable restraint on competition.

Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761, 104 S.Ct. 1464, 1469, 79 L.Ed.2d 775, 783-84 (1984) (citations omitted).

In the instant case, the appellee has alleged both a vertical and a horizontal conspiracy. Neither have been proven in accordance with antitrust law.

[4] The allegations which form the basis for the horizontal conspiracy or group boycott consist of the complaints by other jobbers, none of whom were named, that Parts Depot was selling to a Bennett store. A manufacturer's mere receipt of complaints from its wholesalers or agents who compete with the plaintiff, standing alone, does not constitute a conspiracy. *H.L. Moore Drug Exch.*, 662 F.2d at 941; *Oreck Corp. v.*

Whirlpool Corp., 639 F.2d 75, 80 (2d Cir.1980), cert. denied, 454 U.S. 1083, 102 S.Ct. 639, 70 L.Ed.2d 618 (1981).

Even where a termination follows the receipt of complaints from wholesalers or agents, there is no basis for inferring the *325 existence of concerted action, absent some other evidence of a tacit understanding or agreement with them. Finally, the mere fact that a business reason advanced by a defendant for its cut-off of a customer is undermined does not, by itself, justify the inference that the conduct was therefore the result of a conspiracy. Even if a manufacturer or supplier, acting independently, gave a false or inaccurate reason for its action, whether because of a desire to avoid controversy or some other consideration, this would not violate any legal obligation to the customer, absent proof of a conspiracy or breach of contract.

H.L. Moore Drug Exch., 662 F.2d at 941 (citations omitted).

[5] In the instant case, the only evidence of a horizontal conspiracy was the testimony of Thompson that a few jobbers complained that Parts Depot was selling to a Bennett store. There were no threats or allegations of concerted action between Parts Depot and these unnamed jobbers. Under H.L. Moore Drug Exchange, the evidence was insufficient to prove a conspiracy. Moreover, while the appellee sought to demonstrate that the appellant's alleged business reason for cutting off Florida Auto Supply--the UCC lien filed against its inventory--was not credible due to discrepancies in the testimony of the president of Parts Depot, even if the business reason given for terminating the appellee was undermined, it still does not justify an inference that a conspiracy occurred absent some proof of that conspiracy. *Id.* Thus, what we have are two evidentiary facts, neither of which can circumstantially prove, either alone or considered together, that a conspiracy occurred.

The policy reason for why this conduct does not constitute a conspiracy in violation of antitrust laws has been expressed by the Supreme Court in *Monsanto*:

Permitting an agreement to be inferred merely from the existence of complaints, or even from the fact that termination came about "in response to" complaints, could deter or penalize perfectly legitimate conduct.

As *Monsanto* points out, complaints about price-cutters "are natural--and from the manufacturer's perspective, unavoidable--reactions by distributors to the activities of their rivals." Such complaints, particularly where the manufacturer has imposed a costly set of nonprice restrictions, "arise in the normal course of business and do not indicate illegal concerted action." Moreover, distributors are an important source of information for manufacturers. In order to assure an efficient distribution system, manufacturers and distributors constantly must coordinate their activities to assure that their product will reach the consumer persuasively and efficiently. To bar a manufacturer from acting solely because the information upon which it acts originated as a price complaint would create an irrational dislocation in the market. In sum, "[t]o permit the inference of concerted action on the basis of receiving complaints alone and thus to expose the defendant to treble damage liability would both inhibit management's exercise of independent business judgment and emasculate the terms of the statute." *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 111, n. 2 (CA3 1980), cert. denied, 451 U.S. 911, 101 S.Ct. 1981, 68 L.Ed.2d 300 (1981).

465 U.S. at 763-64, 104 S.Ct. at 1470 (citations and footnote omitted).

[6][7][8] Instead of a group boycott, the proof shows two conspirators, Parts Depot and Vero Beach Auto Parts. Because these companies are on different functional levels in the distribution scheme, this at best would be a vertical conspiracy, not a horizontal one. Only vertical conspiracies to set prices constitute per se violations of antitrust laws. *Monsanto*, 465 U.S. at 761, 104 S.Ct. at 1469. Other violations are governed by the "rule of reason," which requires the plaintiff to prove that a restrictive practice constitutes an unreasonable restraint on competition. *Id.* The appellee produced no evidence on this

issue. It did not show what the net economic effect of its removal from the "overnight delivery of auto parts" market had on the availability or price of overnight delivery in Vero Beach. See, e.g., *Oreck Corp. v. Whirlpool Corp.*, 579 F.2d 126, 128 (2d Cir.), cert. denied, 439 U.S. 946, 99 S.Ct. 340, 58 L.Ed.2d 338 (1978). Instead, it showed what *326 effect Parts Depot's refusal to sell to Florida Auto Supply had on its financial picture. That is not sufficient. Antitrust laws are for the protection of competition, not for the protection of individual competitors. See *St. Petersburg Yacht*, 457 So.2d at 1047.

In this case, the restraint was Parts Depot's termination of Florida Auto Supply thus eliminating it from its overnight service. Because non-price vertical restraints are governed by the rule of reason, in order to prove a violation, a plaintiff must show that the action actually amounted to an unreasonable restraint on competition. *St. Petersburg Yacht*, 457 So.2d at 1035-1036. "Under [the rule of reason], the fact-finder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49, 97 S.Ct. 2549, 2557, 53 L.Ed.2d 568, 580 (1977).

[9] Three elements must be alleged and proved under the rule of reason test: 1) that there is a specifically defined market; 2) that the defendants possessed the ability to affect price or output; and 3) that plaintiff's exclusion from the market did affect or was intended to affect the price or supply of goods in that market. *Greenberg v. Mount Sinai Medical Ctr.*, 629 So.2d 252, 257 (Fla. 3d DCA 1993). "It is not enough to allege that plaintiffs were injured; there must be an allegation of harm to competition in general." *Id.*

Although the appellee alleged a harm to the market, there was no proof of it. The evidence showed that while Florida Auto Supply was unable to deliver parts overnight, its customers were still able to obtain such service from at least two sources (Vero Beach

Auto Parts and Kirby Auto Supply). Moreover, Florida Auto Supply itself could have delivered overnight service by using UPS. It chose not to because it was too costly to use. However, the fact that Florida Auto could not deliver the service as cheaply as others is not evidence of harm to the market. "The antitrust laws are not intended to support artificially firms that cannot effectively compete on their own. It is only when the market is being distorted by anticompetitive conduct that the antitrust laws should be invoked." *Seagood Trading Corp. v. Jerrico, Inc.*, 924 F.2d 1555, 1573 (11th Cir.1991). Here there was no proof that prices were higher as a result of Florida Auto Supply's failure to compete in the market or that the supply was diminished. Thus, there was no evidence from which a jury could find harm to the market. Harm to Florida Auto Supply is not equated with harm to the market actionable under the antitrust laws.

For the foregoing reasons, we hold that the trial court erred in denying the motion for judgment notwithstanding the verdict. There was no evidence of a horizontal conspiracy, and as to the alleged vertical conspiracy there was no evidence of any distortion in the market caused by Parts Depot's refusal to sell to Florida Auto Supply. We therefore reverse and remand for a judgment in favor of the appellant on the counterclaim. For the same reasons, we also reverse the award of attorney's fees in favor of the appellee in the consolidated appeal.

GLICKSTEIN and STONE, JJ., concur.

669 So.2d 321, 1996-1 Trade Cases P
71,342, 21 Fla. L. Weekly D633

END OF DOCUMENT

65

Supreme Court, New York County, New York,
Special Term.

PEARCE et al.
v.
KNEPPER et al.

Feb. 24, 1945.

Action by Henry Pearce and another, doing business as partners under the firm name and style of Pearce & Mayer, licensed real estate brokers, and another against Ada L. Knepper and another for breach of a brokerage agreement, malicious inducement of such breach and conspiracy to effect breach thereof. On defendants' motion to dismiss the complaint.

Motion denied.

West Headnotes

[1] Brokers 63(2)
65k63(2)

A provision in brokerage agreement that no commission should be considered earned, if deal were not consummated and title to property involved not passed for any reason, did not absolve owner from liability to brokers for breach of contract by arbitrarily refusing to consummate deal.

[2] Contracts 154
95k154

A court will endeavor, wherever possible, to avoid such construction of contract as would place one party thereto at another's mercy.

[3] Contracts 108(2)
95k108(2)

A contract which will relieve a party thereto from consequences of his fraud or bad faith cannot be validly entered into.

[4] Conspiracy 8
91k8

The fact that brokers' agreement is terminable by parties at will for any cause does not deprive brokers of cause of action against stranger to agreement or both such stranger and other party thereto for

conspiracy to induce such party's breach of agreement.

*846 Saul Pearce, of New York City, for plaintiffs.

Karl Propper, of New York City, for defendants.

SHIENTAG, Justice.

This is a motion by the defendants to dismiss the four causes of action in the complaint on the ground that each of them is insufficient in law.

The first cause of action alleges a brokerage agreement with the defendant Ada Knepper, the performance by plaintiff of the terms of the employment, and then alleges that the defendant Ada L. Knepper 'unlawfully, arbitrarily, capriciously, without reasonable cause, in bad faith and for the purpose of depriving and defrauding plaintiffs of their commissions failed and refused to consummate the transaction, and to convey the said property to the purchaser upon the terms prescribed by the said defendant.' The second cause alleges the same facts but asserts in addition that the agreement was in writing. The third cause is against both defendants on the ground that the defendant Herman Knepper wrongfully and maliciously induced the other defendant, his daughter-in-law, to breach the agreement; the fourth cause is also against both defendants, plaintiff claiming that they conspired to effect the breach of the agreement which plaintiff had with the defendant Ada Knepper.

[1][2] The first two causes are assailed on the ground that the agreement contains an exculpatory provision from liability which reads: 'Should the deal not be consummated and title not passed for any reason whatsoever, there shall be no commission considered earned.' It is therefore argued by the defendants that the words quoted should be interpreted to mean that the defendant Ada Knepper could arbitrarily, capriciously, fraudulently or in bad faith refuse to consummate the deal. No such interpretation

is warranted by the language of the parties and the court wherever possible will endeavor to avoid a construction which would result in placing one party to a contract at the mercy of another. *Reliable Press v. Bristol Carpet Cleaning Co.*, 261 App.Div. 256, 25 N.Y.S.2d 70; *Stern v. Gepo Realty Corporation*, 289 N.Y. 274, 275, 45 N.E.2d 440, 441; *Amies v. Weskofske*, 255 N.Y. 156, 174 N.E. 436, 73 A.L.R. 918; see also *Greenwald v. Rosen*, 61 Misc. 260, 261, 113 N.Y.S. 764, 765.

53 N.Y.S.2d 845

END OF DOCUMENT

[3] Indeed it may safely be asserted that no contract could ever be entered into which would relieve a party thereto from the consequences of his fraud or bad faith. The first and second causes of action therefore are sufficient as matter of law.

[4] The third and fourth causes of action are challenged by defendants on the ground that since the agreement pleaded in the second cause of action was under their interpretation terminable at will, for *847 any cause, plaintiff could not have a cause of action against the defendant Herman Knepper or both defendants for conspiracy to induce the breach of the agreement between Ada Knepper and plaintiff. There is no authority for the position taken by the defendants. See *Lurie v. New Amsterdam Casualty Co.*, 270 N.Y. 379, 1 N.E.2d 472; and *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229, 38 S.Ct. 65, 62 L.Ed. 260, L.R.A.1918C, 497, Ann.Cas.1918B, 461. In the last-cited case the Supreme Court of the United States said that 'the fact that the employment is at the will of the parties, respectively, does not make it one at the will of others. The employe has manifest interest in the freedom of the employer to exercise his judgment without illegal interference or compulsion, and, by the weight of authority, the unjustified interference of third persons is actionable although the employment is at will.' 245 U.S. at pages 251, 252, 38 S.Ct. at page 72, 62 L.Ed. 260, L.R.A.1918C, 497, Ann.Cas.1918B, 461.

Accordingly, the third and fourth causes of action are sufficient and the defendants' motion is in all respects denied.

66

District Court of Appeal of Florida,
Third District.

PEOPLES GAS SYSTEM, INC. and People
Gas Co. f/u/b/o American Home Assurance
Co., Appellants,

v.

ACME GAS CORPORATION; Atlantic Gas
Corporation; Boye's Gas, Inc.; City Gas
Company of Florida; Delta Gas Company d/b/
a Universal Gas Corporation;
Dolphin Gas System; Home Gas Corporation;
Metrogas Inc.; Miller Gas
Company; Petrolane Gas Service; Public Gas
Company; Siegal Gas Corporation;
BJD Energy Development Company d/b/a Sun
Gas Corporation of Florida; Weeks
Bottle Gas and Appliance Company; Miramar
Gas Company; Liberty Gas Company;
Palm Gas Service Company; and Blau Gas of
Florida, Inc., Appellees.

Nos. 95-1282, 95-1942.

Jan. 15, 1997.

Rehearing Denied March 19, 1997.

Residential customer brought personal injury action against natural gas local distribution companies (LDC), including designated responder under emergency response system, arising from gas explosion in customer's home. After settlement releasing defendants and members of system, responder brought third-party action for contribution and indemnity against fellow members of system. Members moved for summary judgment. The Circuit Court, Dade County, Michael H. Salmon, J., granted motions, and awarded attorney fees and costs to certain members, based upon responder's rejection of members' offers of judgment. Responder appealed. The District Court of Appeal, Green, J., held that: (1) question of whether system could be deemed partnership, joint venture, or unincorporated association was irrelevant and, thus, allegation that question could only be determined by jury did not preclude summary judgment against responder on third-party action; (2) responder was not acting within scope of its duties for system when it

responded to neighbors' telephone call concerning gas-like odor and, thus, members were not liable to responder for contribution and indemnity based on responder's discharge of purportedly common liability; (3) indemnity agreements executed by members did not render them liable in indemnity to responder, even assuming that neighbors' call was system call; and (4) trial court could award attorney fees and costs to members whose offers of judgment for \$2,500 were rejected by responder, despite contention that offers were meager and not made in good faith.

Affirmed.

West Headnotes

[1] Judgment 181(15.1)
228k181(15.1)

Question of whether gas companies' emergency response system could be deemed partnership, joint venture, or unincorporated association was irrelevant and, thus, allegation that question could only be determined by jury did not preclude summary judgment against designated responder under system on responder's third-party action for contribution and indemnity against fellow members of system in personal injury action brought against responder, arising from gas explosion; unless neighbors' telephone call to responder was deemed a response system emergency, members would have no liability to responder, regardless of whether system was characterized as partnership, joint venture, or unincorporated association. West's F.S.A. § 620.585; F.S.1989, §§ 620.62, 620.63(1).

[2] Associations 1
41k1

"Unincorporated associations" are generally created and formed by voluntary action of a number of individuals in associating themselves together under common name for accomplishment of some lawful purpose.

[3] Contribution 5(6.1)
96k5(6.1)

[3] Indemnity 65
208k65

(Formerly 208k13.2(4.1))

Natural gas local distribution company (LDC) which was designated responder under emergency response system was not acting within scope of its duties for system when it responded to neighbors' telephone call concerning gas-like odor and, thus, fellow members of system were not liable to responder for contribution and indemnity as to claims of residential customer in personal injury action arising from gas explosion in customer's home, based on responder's discharge of purportedly common liability; neighbors' call was made to responder's personal telephone number as result of responder's advertisement in telephone directory, and responder's actions at neighbors' residence mainly did not correspond with system's agreed-upon procedures for handling emergency calls. Restatement of Restitution § 86.

[4] Judgment 181(15.1)
228k181(15.1)

Bare self-serving assertions made by natural gas local distribution company (LDC), which was designated responder under emergency response system, that it was acting on system's behalf when it responded to neighbor's call, without more, were insufficient to defeat summary judgment for fellow system members on responder's third-party action for contribution and indemnity against members in gas explosion action. West's F.S.A. RCP Rule 1.510(c).

[5] Indemnity 33(1)
208k33(1)

(Formerly 208k8(2.1))

Indemnity agreements executed by fellow members of emergency response system did not render members liable in indemnity to natural gas local distribution company (LDC), that was designated responder under system, as to residential customer's gas explosion claim, even assuming that neighbors' call to responder concerning gas-like odor was system call, where hold harmless agreements executed between responder and members called for indemnity only from gas company

whose property was involved in emergency, and that would be member that was not party in instant case.

[6] Parties 56
287k56

Trial court did not abuse its discretion when it denied request of natural gas local distribution company (LDC), that was designated responder under emergency response system, to amend its third-party complaint against fellow members of system to plead count for equitable contribution, in gas explosion action in which responder had sought contribution and indemnity against members.

[7] Costs 194.50
102k194.50

Trial court could award attorney fees and costs to fellow members of emergency response system whose filed offers of judgment for \$2,500 were rejected by natural gas local distribution company (LDC), which was designated responder under system, as to responder's third-party action against members for indemnity and contribution in gas explosion action, despite contention that offers were not made in good faith since members had reason to know their meager offers would be rejected by responder; members had reasonable basis to make nominal offers, as record strongly indicated they had no exposure in case, and fact that members might have believed responder would reject their offers was not determinative of issue of good faith. West's F.S.A. § 768.79(1), (7)(a).

[8] Costs 194.50
102k194.50

Reasonableness of plaintiff's rejection of offer of judgment is irrelevant to question of fee entitlement, for purposes of statute governing award of costs and attorney fees for defendant whose offer of settlement was rejected. West's F.S.A. § 768.79(1), (7)(a).

[9] Costs 42(2)
102k42(2)

[9] Costs 194.50

102k194.50

Obligation of good faith in statute governing award of costs and attorney fees for defendant whose offer of settlement was rejected merely insists that offeror have some reasonable foundation on which to base offer. West's F.S.A. § 768.79(7)(a).

[10] Costs 42(2)
102k42(2)

[10] Costs 194.50
102k194.50

For purposes of statute governing award of costs and attorney fees for defendant whose offer of settlement was rejected, mere belief that figure offered or demanded will not be accepted does not necessarily suggest either absence of good faith or presence of bad faith, at least where offeror fully intends to conclude settlement if offer or demand is accepted as made, and amount of offer or demand is not so widely inconsistent with known facts of case as to suggest on its face the sole purpose of creating right to fees if it is not accepted. West's F.S.A. § 768.79(1), (7)(a).

***294** Nicklaus & Wicks, P.A. and William R. Wicks, Coral Gables, for appellants.

Pyszka, Kessler, Massey, Weldon, Catri, Holton & Douberley, P.A. and Gerard E. Pyszka, Miami, and Cindy J. Mishcon, North Miami Beach, for appellee Public Gas Company.

Kubicki Draper and Elizabeth M. Rodriguez, Miami, for appellees Acme Gas Corporation, Atlantic Gas Corporation, City Gas Company of Florida, Delta Gas Company d/b/a Universal Gas Corporation, Dolphin Gas System, Home Gas Corporation, Miller Gas Company, BJD Energy Development Company d/b/a Sun Gas Corporation of Florida, Weeks Bottle Gas and Appliance Company and Palm Gas Service Company.

Knecht & Knecht and Michael R. Kirby, Miami, for appellees Metrogas, Inc. and Siegal Gas Corporation.

Ponzoli, Wassenberg & Sperkacz, P.A. and

Richard L. Wassenberg, Miami, for appellee Blau Gas of Florida, Inc.

Fowler, White, Burnett, Hurley, Banick & Strickroot, P.A. and Steven E. Stark, Miami, for appellee Petrolane Gas Service.

Before NESBITT, JORGENSON and GREEN, JJ.

GREEN, Judge.

I

Peoples Gas System, Inc. and People Gas Co. f/u/b/o American Home Assurance Co. (collectively "Peoples Gas") appeal an adverse final summary judgment entered in ***295** their third-party action for contribution and indemnity against appellees, all of whom were fellow members of a former emergency response system known as "Gas Central." Peoples Gas also appeals an award of attorney's fees and costs to two of the appellees, Metrogas, Inc. and Siegal Gas Corp., based upon Peoples Gas' rejection of their respective offers of judgment. We affirm the summary judgment as a matter of law based upon the undisputed facts set out below as well as the award of attorney's fees and costs to Metrogas, Inc. and Siegal Gas Corp.

GAS CENTRAL

Gas Central was a non-profit organization formed in the late 1960s by various independent gas companies throughout Dade and Broward counties. Its sole purpose was to provide qualified gas personnel after normal business hours to assist fire and police departments in emergency situations involving gas leaks. Essentially, Gas Central's members agreed to designate one member to field and respond to all incoming emergency calls from the fire and/or police departments in Dade and Broward counties. The responding gas company would then go to the scene and report to the police or fire officer in charge. The company would also secure the immediate vicinity from danger by turning off or disconnecting the gas supply. It was agreed, however, that the responding

company would make no repairs unless its own gas line was involved. Rather, the responding company was specifically charged with the task of identifying the Gas Central member which owned the leaking gas line and immediately calling that company to the scene to make the necessary repairs.

The prerequisites for membership in Gas Central were that each member: 1) maintain its own liability insurance policy in an agreed amount; 2) execute a hold harmless agreement absolving the responding gas company from any liability incurred at the scene on behalf of the particular Gas Central member; [FN1] and 3) regularly provide the responding gas company with the names and phone numbers of its personnel members who were available to handle after-hours emergency matters. Whenever the designated company responded to an emergency scene with its personnel and equipment, it was entitled to bill the particular gas company whose line caused the leak for services rendered. The *296 amount paid to the responding company was not shared with the remaining Gas Central members.

FN1. Each such agreement stated in relevant part that:

* * * * *

WHEREAS, each of the parties are independent gas companies who are members of Gas Central, an informal association, organized as a cooperative effort of all the gas companies in Broward and Dade Counties, State of Florida, for the sole purpose of providing voluntary emergency assistance in these counties, and WHEREAS, Gas Central provides assistance to area rescue programs specifically assisting police and fire officers in shutting off gas supplies to buildings or areas endangered by fire or other hazards, and WHEREAS, the telephone for Gas Central is located on the premises of Indemnitee and is answered by its employees and agents, and WHEREAS, circumstances may require Indemnitee to dispatch one of its own employees on a call made to Gas Central to

assist local authorities in shutting off the gas in Indemnitor's gas lines and necessitate Indemnitee's entry upon and operation of Indemnitor's property. IT IS HEREBY AGREED, in consideration of One Dollar (\$1.00) and other valuable consideration paid to Indemnitor by Indemnitee, receipt of which is hereby acknowledged, 1. Indemnitor hereby indemnifies and holds harmless Indemnitee from any and all liability, loss or damage Indemnitee may suffer as a result of any or all claims, demands, costs or judgments against it arising out of the activities of Indemnitee for Gas Central with respect to property of Indemnitor such as real estate, machinery, gas lines, equipment or otherwise, whether the liability loss or damage is caused by, or arises out of, the negligence of Indemnitee or of its officers, agents, employees or otherwise. 2. Indemnitor agrees to defend against any claims brought or actions filed against Indemnitee with respect to the subject of the indemnity contained herein, whether such claims or actions are rightfully or wrongfully brought or filed. In case a claim should be brought or an action filed with respect to the subject of the indemnity herein, Indemnitor agrees it will employ attorneys to appear or defend the claim or action on behalf of the indemnitee at the expense of Indemnitor. 3. Indemnitor agrees to reimburse Indemnitee for any necessary expenses, attorneys fees or other costs incurred in the enforcement of any part of this indemnity agreement thirty (30) days after receiving written notice that Indemnitee has incurred them.

* * * * *

Gas Central was an informal organization which had no officers and/or directors. Other than its agreed-upon procedures for handling emergency calls, it operated without bylaws, articles of incorporation, or a charter. Gas Central further had no budget, bank account, insurance policy, office space or letterhead of its own. Nor did the participating members fund the organization with the payment of any dues. In fact, the only things that Gas Central had were two hotline telephones with unlisted numbers for Dade and Broward counties. These unlisted numbers were made

available only to the fire and police departments in Dade and Broward counties.

From 1973 until the date of the incident in question, Peoples Gas was the gas company designated to receive and field emergency Gas Central calls in its office from the fire and police departments. In addition to the unlisted Dade and Broward hotline telephones for Gas Central emergencies in its offices, Peoples Gas also had a telephone with a published number in the directory for the public to report gas leaks. Pursuant to Gas Central's established procedures, [FN2] Peoples Gas generally fielded approximately 15 to 18 Gas Central emergency calls per month. For its services, Peoples Gas routinely billed the individual Gas Central member involved when Peoples Gas dispatched its employees and/or equipment to the scene.

FN2. The relevant procedures required to be followed in handling a Gas Central emergency matter were as follows: "When a serviceman responds to a Gas Central call, he will: 1. Report on the scene to the fire officer in charge. 2. Make safe (by turning off or disconnecting gas supply). 3. Evaluate the situation and advise Gas Central if additional help or specialized equipment is required to cope with the situation. 4. Advise the fire officer in charge regarding proper handling or protection of gas equipment, the severity of any gas problem that cannot be made immediately safe and any further steps to protect life and property. The Serviceman will make no investigation or repairs, other than to make safe unless he is employed by the serving gas company. If he represents the serving gas company he will adhere to their policies concerning investigation or repair. In all cases where it is feasible geographically, Gas Central will attempt to dispatch a serviceman from the serving gas company. The responding serviceman will remain on the scene until released by the fire officer in charge."

THE EXPLOSION

Peoples Gas' third-party action against appellees arose from a complaint filed by Thomas Googe against Peoples Gas and All State Gas Co. of Fla., Inc. d/b/a "All-Pro Gas"

("All-Pro") for injuries sustained by Googe on July 1, 1989 in a gas explosion at his home. The genesis of this incident actually began the day before, on June 30, 1989 when Googe's back yard neighbors, Diane and Daniel Riefler, detected a gas-like odor in their backyard. Although the Rieflers did not utilize gas or have gas lines on their property, they decided to call a local gas company to alert them of the odor.

Mr. Riefler then combed the yellow pages of the local telephone directory to find a gas company. He ultimately selected Peoples Gas because it "was in a bigger box than the rest." He telephoned the company to alert it of the gas odor. In response, Peoples Gas dispatched several of its employees to the Riefler residence. Upon their arrival, Peoples Gas' employees took readings from a combustible gas indicator ("C.G.I."), a device used to detect gas leaks. Peoples Gas' employees received what they perceived to be a dangerously high positive reading from the C.G.I. In fact, they classified the leak as "Grade 1" which they defined as "a leak that represents an existing or probable hazard to persons or property and that taking into account the location of the leak, requires prompt action until conditions are no longer hazardous." These employees also got even higher positive gas readings as they walked away from the back of the Rieflers' home toward the property line fence which separated the Rieflers' home and Googe's residence. Despite this fact, however, Peoples Gas' employees never extended their investigation into Googe's backyard.

*297 Rather, Peoples Gas employees dug a small ventilation ditch at the corner of the Rieflers' house where the high gas reading was obtained. Despite their classification of the leak as "Grade 1," Peoples Gas' employees did not evacuate the neighborhood or warn its residents of the dangerous reading. Nor did they notify the fire and/or police departments of their findings.

At some point, someone in the area informed Peoples Gas that All-Pro, another Gas Central member, had gas lines in the area. Peoples Gas notified All-Pro to come to the scene.

Upon All-Pro's arrival to the scene, Peoples Gas' employees departed with no further involvement. All-Pro's employees did a cursory inspection of the Rieflers' property and attempted to detect the presence of gas by merely sniffing the area with their noses. [FN3] When All-Pro's employees did not smell the gas, they apparently concluded that the area was safe and left the scene approximately two and a half hours after their arrival. Because the Rieflers still insisted that they smelled gas, one of All-Pro's employees later returned to the scene and again attempted to detect for the presence of gas with his nose. When he again could not smell the gas, he departed the scene without further investigation. None of the other Gas Central members had any involvement with or knowledge of this incident at the time.

FN3. All-Pro did not bring a C.G.I. or other equipment to the scene to detect the presence of gas.

Later on July 1, 1989, Googe was severely burned over 90% of his body in a gas explosion that occurred in his bathroom. The explosion occurred when Googe lit a match to smoke a cigarette. The match ignited gas fumes which had apparently permeated into Googe's residence. Although Googe survived the incident, he endured extensive personal injuries.

UNDERLYING MAIN LITIGATION

On September 12, 1989, Googe filed the main personal injury action below solely against All-Pro and Peoples Gas. Googe thereafter entered into a \$2 million settlement with All-Pro's insurance carrier. This settlement, however, released only All-Pro's individual qualifiers and its employees who were dispatched to the scene. The settlement did not, however, release All-Pro itself. [FN4] Thus, at this point, All-Pro remained a defendant in the main action.

FN4. Googe refused to release All-Pro because he was concerned that a release of All-Pro would foreclose his claim of vicarious liability against Peoples Gas for All-Pro's negligence.

Early on in the litigation, Googe successfully moved for partial summary judgment against Peoples Gas on the issue of whether Peoples Gas had vicarious liability for All-Pro's negligence in failing to make the area of the gas leak safe. Peoples Gas' carrier thereafter settled this case with Googe for \$3.5 million. In addition to Peoples Gas, the settlement agreement released All-Pro and its employees and individual qualifiers, as well as all other members of Gas Central. There is no record evidence that appellees ever requested or expected Peoples Gas to procure a release on their behalf. Nor is there record evidence that appellees were even invited to participate in the settlement negotiations or were even aware that they were taking place. Upon the execution of the settlement and release agreement, the main action below was brought to a conclusion.

When the other Gas Central members subsequently refused to contribute to the \$3.5 million settlement as requested, Peoples Gas filed the instant third-party action for contribution and/or indemnity against all of the members except All-Pro. [FN5] Peoples Gas sought contribution against appellees based upon its characterization of Gas Central as a general partnership, joint venture or unincorporated association. It further sought indemnity from appellees based upon the hold harmless agreements executed by each in favor of Peoples Gas. The Gas Central members in this third-party action jointly moved for summary judgment on all issues presented based upon their arguments that: (1) the Riefler call was not a Gas Central matter; *298 (2) the nature of Gas Central did not satisfy the legal requirements necessary to establish liability under a partnership, joint venture or unincorporated association theory; and (3) the express language of the hold harmless agreements executed by each Gas Central member calls for indemnity only from the company whose property was involved in the emergency, which in this case was All-Pro. Shortly thereafter, Peoples Gas sought to amend its third-party complaint to plead three counts of equitable contribution based upon its characterization of Gas Central as a partnership, joint venture or unincorporated

association against the Gas Central members. Prior to the hearing on these joint motions, appellees Metrogas, Inc. and Siegal Gas Corp. each filed offers of judgment in the amount of \$2,500.00. The trial court granted the joint motions for summary judgment and thereafter entered a judgment awarding Metrogas and Siegal Gas attorney's fees and costs each in the amount of \$8,797.55. This appeal was taken from these judgments.

FN5. In a separate action not before this court, Peoples Gas is seeking indemnification against All-Pro pursuant to the hold harmless agreement. See supra note 1.

II

[1][2] Peoples Gas asserts that the entry of summary judgment was error where a genuine issue of material fact remained as to the precise nature of the Gas Central entity (i.e. whether it was a partnership, joint venture or unincorporated association) which could only be determined by a jury. See *Spencer v. Young*, 63 So.2d 334 (Fla.1953) (stating it is within the province of the factfinder to determine existence of partnership); *Knepper v. Genstar Corp.*, 537 So.2d 619, 622-23 (Fla. 3d DCA 1988) (stating that whether an entity is a joint venture is a question for the jury), rev. denied, 545 So.2d 1367 (Fla.1989). We disagree. We find that the question of whether Gas Central may be deemed a partnership, [FN6] joint venture [FN7] or an unincorporated association [FN8] is really irrelevant in this case. That is because unless the Rieflers' telephone call is deemed a Gas Central emergency, appellees would have no liability to Peoples Gas whether Gas Central is characterized as: (1) a partnership, see §§ 620.62, 620.63(1), Fla. Stat. (1989); *Lewis v. Horne*, 495 So.2d 780, 781 (Fla. 3d DCA 1986) (where partner not doing partnership business during commission of tort, no liability for remaining partners), rev. denied, 504 So.2d 767 (Fla.1987); *Soden v. Starkman*, 218 So.2d 763, 764-65 (Fla. 3d DCA 1969) (same); (2) a joint venture, see *Florida Rock & Sand Co. v. Cox*, 344 So.2d 1296, 1298 (Fla. 3d DCA 1977) (deciding negligence of one joint venturer committed within the scope of the joint

venture may be imputed to co-joint adventurers); *Florida Tomato Packers*, 296 So.2d at 539 (holding that joint adventurers are liable for each other's torts committed within the course and scope of the undertaking); or (3) an unincorporated association, see *Guyton v. Howard*, 525 So.2d 948, 956 (Fla. 1st DCA 1988) (drawing a distinction between such associations for business purposes and for fraternal or social purposes and finding in the former, individual liability to be governed by partnership law and in the latter, individual liability to be based upon tortious acts which the member individually commits, participates in, or authorizes, assents to or ratifies).

FN6. A "partnership" is defined in Florida's adaptation of the Uniform Partnership Act as "an association of two or more persons to carry on a business for profit as co-owners." *Myers v. Brown*, 296 So.2d 121, 123 (Fla. 1st DCA) (citing § 620.585, Fla. Stat.), cert. denied, 305 So.2d 203 (Fla.1974).

FN7. The elements of which have been defined as "(1) a community of interest in the performance of the common purpose, (2) joint control or right of control, (3) a joint proprietary interest in the subject matter, (4) a right to share in the profits and (5) a duty to share in any losses which may be sustained." *McKissick v. Bilger*, 480 So.2d 211, 212 (Fla. 1st DCA 1985) (quoting *Kislak v. Kreedian*, 95 So.2d 510, 515 (Fla.1957)); *Campbell v. Jacksonville Kennel Club, Inc.*, 66 So.2d 495, 496-97 (Fla.1953); *Arango v. Reyka*, 507 So.2d 1211, 1212 (Fla. 4th DCA 1987); *Navarro v. Espino*, 316 So.2d 646, 648 (Fla. 3d DCA 1975); *Florida Tomato Packers, Inc. v. Wilson*, 296 So.2d 536, 539 (Fla. 3d DCA 1974), cert. denied, 327 So.2d 32 (Fla.1976); 8 Fla. Jur.2d, Business Relationships § 682 (1978).

FN8. Generally "created and formed by the voluntary action of a number of individuals in associating themselves together under a common name for the accomplishment of some lawful purpose." 4 Fla. Jur.2d Associations & Clubs §§ 1, 2 (1994); see also *Penrod Drilling Co. v. Johnson*, 414 F.2d 1217, 1222 (5th Cir.1969), cert. denied, 396 U.S. 1003, 90 S.Ct. 552, 24 L.Ed.2d 495 (1970).

*299 [3][4] We think that the appropriate inquiry before us is Peoples Gas' next argument--whether there is any genuine factual issue in the record as to whether Peoples Gas was acting within the scope of its duties for Gas Central when it responded to the Rieflers' telephone call. We conclude that there is not and that summary judgment was properly entered in favor of the appellees. The bare self-serving assertions made by Peoples Gas that it was acting on Gas Central's behalf in the Riefler incident, without more, are insufficient to defeat a summary judgment. E.g., *Landers v. Milton*, 370 So.2d 368, 370 (Fla.1979); *Hernando County v. Budget Inns, Inc.*, 555 So.2d 1319, 1320 n. 1 (Fla. 5th DCA 1990). Indeed, the record evidence conclusively refutes Peoples Gas' assertions.

First of all, Gas Central was established solely as a centralized emergency response system to calls placed by the police and/or fire departments. It is undisputed that the Riefler call to Peoples Gas was not such a call. The Rieflers' telephone report of the gas leak was made to Peoples Gas' personal telephone number as a result of Peoples Gas' advertisement in the yellow pages. Moreover, there is no record evidence which remotely suggests that appellees ever agreed to treat (or actually treated) consumer reports of gas leaks to Peoples Gas on Peoples Gas' public telephone number as Gas Central emergencies. Hence, there is no record evidence to even create an issue of fact as to Peoples Gas' implicit or apparent authority to so act. See R. 1.510(c), Fla. R. Civ. P.; *Landers*, 370 So.2d at 370; see also *Lewis*, 495 So.2d at 781 (approving directed verdict on grounds that tortious activity by partner of defendant was outside scope of partnership business).

The unrefuted evidence also reflects that Peoples Gas' actions at the Rieflers' residence for the most part did not correspond with Gas Central's agreed upon procedures for handling emergency calls. See *supra* note 2. Although Peoples Gas classified the gas leak as a "Grade 1", it never notified either the fire or police departments of this dangerous

condition. Peoples Gas never made the area "safe" as defined in Gas Central's procedures by turning off or disconnecting gas supply. Indeed, contrary to Gas Central's established directive that the designated company make no repairs unless its own lines were involved in the emergency, Peoples Gas attempted to alleviate the gas odor by digging holes in the Riefler's backyard to provide ventilation for the gas fumes. Moreover, and most importantly, none of the appellees had any involvement in this incident. There is thus simply no record evidence to support Peoples Gas' assertion that this was a Gas Central emergency so as to afford it with an opportunity to seek contribution from appellees for discharging a common liability. E.g., *Albertson's, Inc. v. Adams*, 473 So.2d 231, 233 (Fla. 2d DCA 1985) (stating action for contribution does not lie in absence of joint and several liability), *rev. denied*, 482 So.2d 347 (Fla.1986); *Touche Ross & Co. v. Sun Bank*, 366 So.2d 465, 467-68 (Fla. 3d DCA) (denying relief where party seeking contribution was not a joint tortfeasor, nor jointly and severally liable, with the contribution defendant), *cert. denied*, 378 So.2d 350 (Fla.1979); see also *Restatement of Restitution* § 86 at 389-90 (1937) (noting need for common liability to trigger right of contribution); accord § 768.31, Fla. Stat. (1991) (providing for statutory contribution among joint tortfeasors).

[5] Moreover, we find that Peoples Gas' claim for indemnity from appellees to be specifically belied by the unambiguous and express language found in each of the hold harmless agreements drafted by Peoples Gas. Even assuming, *arguendo*, that the Riefler matter could somehow be deemed a Gas Central call, the hold harmless agreements executed between Peoples Gas and each of the appellees call for indemnity only from the gas company whose property was involved in the emergency. In this case that would be only All-Pro. Thus, none of the appellees would be liable for indemnity to Peoples Gas under their respective executed indemnity agreements in any event.

[6] Finally, based upon the undisputed

record before the court, we cannot conclude that the trial court abused its discretion when it denied Peoples Gas' request to amend the third party complaint to plead a count for equitable contribution. Cf. *Bondu *300 v. Gurvich*, 473 So.2d 1307, 1310 n. 2 (Fla. 3d DCA 1984) (stating that abuse of discretion occurs where amendment sought would state a viable claim different than one pleaded in the original complaint), rev. denied, 484 So.2d 7 (Fla.1986).

For these reasons, we affirm the entry of summary judgment.

III

[7] Having concluded that appellees have no liability to Peoples Gas and that summary judgment was appropriately entered, we address Peoples Gas' remaining contention on appeal, that the trial court erred in awarding Metrogas and Siegal Gas attorney's fees and costs. Pursuant to section 768.79(1), Florida Statutes (1991) [FN9], Metrogas and Siegal Gas each filed offers of judgment for \$2,500.00 in this third-party action. Peoples Gas declined to accept either of these offers of judgment. Consequently, when summary judgment was entered in favor of Metrogas and Siegal Gas on the issue of liability, the trial court awarded \$8,797.55 as attorney's fees and costs to each of these entities in accordance with that part of section 768.79(1) which states:

FN9. That section provides: In any civil action for damages filed in the courts of this state, if a defendant files an offer of judgment which is not accepted by the plaintiff within 30 days, the defendant shall be entitled to recover reasonable costs and attorney's fees incurred by him or on his behalf pursuant to a policy of liability insurance or other contract from the date of filing of the offer if the judgment is one of no liability or the judgment obtained by the plaintiff is at least 25 percent less than such offer, and the court shall set off such costs and attorney's fees against the award. Where such costs and attorney's fees total more than the judgment, the court shall enter judgment for the defendant against the plaintiff for the amount of the costs and fees, less the amount of the plaintiff's

award.

[I]f a defendant files an offer of judgment which is not accepted by the plaintiff within 30 days, the defendant shall be entitled to recover reasonable costs and attorney's fees incurred by him or on his behalf ... if the judgment is one of no liability....

Peoples Gas nevertheless asserts that this was error pursuant to section 768.79(7)(a) [FN10] because neither of these offers were made in good faith where both Metrogas and Siegal Gas had reason to know that their meager offers would be rejected by Peoples Gas. Peoples Gas essentially argues that its rejection of both of these offers was reasonable where combined, these offers only totaled approximately ".00142857%" of the \$3.5 million settlement amount it sought in its third-party complaint.

FN10. Section 768.79(7)(a), Florida Statutes (1991) provides that: If a party is entitled to costs and fees pursuant to the provisions of this section, the court may, in its discretion, determine that an offer was not made in good faith. In such case, the court may disallow an award of costs and attorney's fees.

[8][9][10] Peoples Gas' argument has, however, been specifically rejected by the supreme court's recent decision in *Knealing v. Puleo*, 675 So.2d 593 (Fla.1996). In *Knealing*, the court approved the Fourth District's decisions in *Puleo v. Knealing*, 654 So.2d 148 (Fla. 4th DCA 1995) and *Schmidt v. Fortner*, 629 So.2d 1036 (Fla. 4th DCA 1993) which held that "the right to an award [of attorney's fees and costs] depends only on the amount of the rejected offer and the amount of the later judgment." 675 So.2d at 595. "[T]he reasonableness of the plaintiff's rejection is irrelevant to the question of fee entitlement." *Id.* Here, where neither Metrogas or Siegal Gas was found to have any liability to Peoples Gas, they were clearly entitled to recover an award of reasonable attorney's fees and costs pursuant to section 768.79(1). "The obligation of good faith [found in section 768.79(7)(a)] merely insists that the offeror have some reasonable foundation on which to base an offer." *Schmidt*, 629 So.2d at 1039. We conclude that where the undisputed record

strongly indicated that they had no exposure in this case, Metrogas and Siegal Gas had such a reasonable basis to make nominal offers to Peoples Gas. Moreover, the fact that Metrogas and Siegal Gas may have believed that Peoples Gas would reject their nominal offers is not determinative of the issue of good faith:

A mere belief that the figure offered or demanded will not be accepted, on the other hand, does not necessarily suggest to *301 us either the absence of good faith or the presence of bad faith--at least where the offeror fully intends to conclude a settlement if the offer or demand is accepted as made, and the amount of the offer or demand is not so widely inconsistent with the known facts of the case as to suggest on its face the sole purpose of creating a right to fees if it is not accepted.

Schmidt, 629 So.2d at 1040 n. 5.

We, therefore, affirm the order awarding attorney's fees and costs to Metrogas and Siegal Gas.

Affirmed.

689 So.2d 292, 22 Fla. L. Weekly D205

END OF DOCUMENT

67

District Court of Appeal of Florida,
Third District.

POE & ASSOCIATES, INC., Appellant,
v.
ESTATE OF Ronald VOGLER, deceased,
Ronald W. Vogler, P.A., and Leopoldo
Hernandez, Appellees.

No. 89-390.

April 3, 1990.
Rehearing Denied May 18, 1990.

Insurance agent appealed from an order of the Circuit Court, Dade County, Sidney B. Shapiro, J., which granted summary judgment declaring it liable to plaintiffs for its unauthorized cancellation of legal malpractice insurance coverage for its insured. The District Court of Appeal, Baskin, J., held that in view of policy provision extending coverage until discharge of insured's executor or administrator, insurance agent, upon learning of insured's death, should have waited for instructions from the estate prior to cancelling insured's legal malpractice insurance policy; agent should not have acted on instructions of insured's clerical staff, as neither bookkeeper nor secretary had authority to issue instructions to insurance agent.

Affirmed.

West Headnotes

[1] Principal and Agent 48
308k48

[1] Principal and Agent 50
308k50

An agent owes his principal obligation of high fidelity, and he may not proceed without or beyond his authority.

[2] Insurance 1944
217k1944
(Formerly 217k238.1, 217k238(1))

In view of policy provision extending coverage until discharge of insured's executor or administrator, insurance agent, upon learning

of insured's death, should have waited for instructions from the estate prior to cancelling insured's legal malpractice insurance coverage; agent should not have acted on instructions of insured's clerical staff, as neither bookkeeper nor secretary had authority to issue instructions to insurance agent.

*1236 Arthur J. Morburger, Alvan N. Weinstein, Miami, for appellant.

Evan J. Langbein, Miami, for appellees.

Before BASKIN, FERGUSON and
JORGENSEN, JJ.

BASKIN, Judge.

Poe & Associates, Inc., [Poe] appeals a final summary judgment declaring it liable to Leopoldo and Merida Hernandez [collectively "Hernandez"] for its unauthorized cancellation of insurance coverage for Ronald W. Vogler [Vogler] and Ronald W. Vogler, P.A. [P.A.]. We affirm.

Hernandez sued Vogler's professional association and his estate for damages arising from Vogler's alleged legal malpractice. Pacific Employers Insurance Company [Pacific], Vogler's malpractice insurance carrier, was joined as a party because it had cancelled Vogler's coverage without first ascertaining whether any claims were pending against Vogler. Pacific moved for summary judgment, attaching in support of the motion a copy of a letter it had received from Poe, the P.A.'s insurance agent, requesting cancellation of the policy. The trial court granted summary judgment. As a consequence, Hernandez moved to add Poe as a defendant on the ground that Poe, as insurance agent for Vogler and the P.A., had cancelled the coverage without the personal representative's permission, when it knew, or should have known, of Hernandez's claim. Poe claimed that it acted on the instructions of a bookkeeper or secretary. The malpractice claim proceeded to trial and culminated in the entry of final judgment against the P.A. and

Vogler's estate. The court resolved Hernandez's claim against Poe, severed at Poe's request, by the entry of a final summary judgment in favor of Hernandez. Poe appeals.

[1][2] "It has long been well settled that an agent owes his principal the obligation of high fidelity, and that he may not proceed without or beyond his authority." Crawford v. DiMicco, 216 So.2d 769, 772 (Fla. 4th DCA 1968); United States Fire Ins. Co. v. Johnston, 431 So.2d 1018, 1021 (Fla. 4th DCA 1983). Poe was Vogler's insurance agent, and Vogler and the P.A. were the named insureds. In view of the policy provision extending coverage until the discharge of the insured's executor or administrator, Poe, upon learning of Vogler's death, should have waited for instructions from the estate; it should not have acted on the instructions of Vogler's clerical staff, as neither the bookkeeper nor the secretary had authority to issue instructions to Poe. Thus, the trial court correctly ruled that Poe should not have cancelled the insurance policy. Under the circumstances of this case, where the material facts were undisputed, summary judgment was appropriate. Moore v. Morris, 475 So.2d 666 (Fla.1985); Holl v. Talcott, 191 So.2d 40 (Fla.1966); Paul v. Brumby, 548 So.2d 286 (Fla. 3d DCA 1989); Braidi Trading Co. v. Anthony R. Abraham Enterprises, Inc., 469 So.2d 955 (Fla. 3d DCA 1985); Mejiah v. Rodriguez, 342 So.2d 1066 (Fla. 3d DCA 1977).

Poe's remaining points on appeal were not raised in the trial court and may not be considered here for the first time in an *1237 appeal. Dober v. Worrell, 401 So.2d 1322 (Fla.1981); Ashley v. Ocean Roc Motel, Inc., 518 So.2d 943 (Fla. 3d DCA 1987), review denied, 528 So.2d 1181 (Fla.1988); Abrams v. Paul, 453 So.2d 826 (Fla. 1st DCA 1983).

Affirmed.

559 So.2d 1235, 15 Fla. L. Weekly D876

END OF DOCUMENT

68

United States District Court,
S.D. New York.

POLYCAST TECHNOLOGY CORPORATION
and Uniroyal Plastics Acquisition
Corp., Plaintiffs,

v.

UNIROYAL, INC., CDU Holding, Inc., Joseph
P. Flannery, John R. Graham,
Alexander R. Castaldi, Robert Alvine, Donald
L. Nevins, Jr., Alfred Weber,
Clayton & Dubilier, Inc., the Clayton &
Dubilier Private Equity Fund Limited
Partnership, Clayton & Dubilier Associates
Limited Partnership, Martin H.
Dubilier, Joseph L. Rice III, and Alan R.
Elton, Martin H. Dubilier, Joseph P.
Flannery, John R. Graham, and Joseph L.
Rice III as Trustees of CDU Holding,
Inc. Liquidating Trust, Defendants.

No. 87 Civ. 3297.

May 4, 1992.

Purchaser of corporation brought action against parties involved in sale alleging violation of securities law, common-law fraud, and Racketeer Influenced and Corrupt Organizations Act (RICO). The District Court, Haight, J., held that: (1) genuine issues of material fact existed precluding summary judgment on securities fraud claims and claim for controlling liability; (2) purchaser failed to establish RICO claim; and (3) issues of fact existed precluding summary judgment on claim of negligent misrepresentation under New York law.

Ordered accordingly.

West Headnotes

[1] Federal Civil Procedure 2470
170Ak2470

On motion for summary judgment, court's responsibility is to assess whether there are any factual issues to be tried, while resolving ambiguities and drawing reasonable inferences against moving party. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

[2] Federal Civil Procedure 2470.1
170Ak2470.1

While party resisting summary judgment must show dispute of fact, fact must also be material fact in light of substantive law. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

[3] Securities Regulation 60.18
349Bk60.18

To establish claim for securities fraud, plaintiff must allege and prove that, in connection with purchase or sale of securities, defendant, acting with scienter, made false material representation or omitted to disclose material information and that plaintiff's reliance on defendant's actions caused him injury. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b).

[4] Securities Regulation 144
349Bk144

In securities cases plaintiff's burden of proof is preponderance of the evidence standard generally applicable in civil actions.

[5] Securities Regulation 60.27(5)
349Bk60.27(5)

Economy estimates, forecasts or projections are not insulated from claims for securities fraud if they were put forward in bad faith, with awareness of their inaccuracy, and intent to deceive.

[6] Federal Civil Procedure 2511
170Ak2511

Genuine issue of material fact existed as to whether officers of corporation selling wholly owned subsidiary and officers of wholly owned subsidiary deliberately concocted false earnings forecasts to provide to purchaser, precluding summary judgment in securities fraud action.

[7] Federal Civil Procedure 2511
170Ak2511

Genuine issue of material fact existed as to whether purchaser of wholly owned subsidiary relied on earnings estimate made by officers of wholly owned subsidiary and its parent in deciding to purchase corporation and whether reliance was reasonable based on later

earnings projections, precluding summary judgment in securities fraud action. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b).

[8] Federal Civil Procedure 2511
170Ak2511

Genuine issue of material fact existed as to whether failure to disclose to purchaser of corporation that corporation had contract cancelled was material to decision to buy corporation, precluding summary judgment in securities fraud action. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b).

[9] Federal Civil Procedure 2511
170Ak2511

Genuine issue of material fact existed as to whether later earnings forecasted for corporation being sold were based on earlier alleged false forecasts, precluding summary judgment in securities fraud action. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b).

[10] Federal Civil Procedure 2511
170Ak2511

Genuine issue of material fact existed as to whether misrepresentations made during sale of corporation caused cognizable damages to purchaser, precluding summary judgment in securities fraud action. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b).

[11] Securities Regulation 154.1
349Bk154.1
(Formerly 349Bk154)

Out-of-pocket loss to purchaser's stock is not exclusive measure of compensatory damages in securities fraud action. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b).

[12] Federal Civil Procedure 2511
170Ak2511

Genuine issue of material fact existed as to whether two members of board of directors of corporation who were also general partners of entities which held 32.5 percent equity interest in corporation which was selling wholly owned subsidiary were involved in formulation of subsidiary's allegedly false

earnings projections, whether members were insiders or outsiders in conduct of affairs of corporation, and whether they participated in sale of subsidiary or acted with disregard of fraud of others, precluding summary judgment in securities fraud action. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b).

[13] Securities Regulation 60.45(1)
349Bk60.45(1)

Motive based upon personal gain is recognized circumstance from which intent to commit securities fraud may be inferred. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b).

[14] Federal Civil Procedure 2511
170Ak2511

Genuine issue of material fact existed as to whether general partners in entities which held 32.5 percent equity interest in corporation which was selling wholly owned subsidiary were controlling persons liable for securities fraud, precluding summary judgment. Securities Exchange Act of 1934, § 20(a), 15 U.S.C.A. § 78t(a).

[15] Securities Regulation 35.15
349Bk35.15

Controlling person liability under Securities Act of 1933 does not require proof of scienter; liability attaches if there was a primary violation, control of primary violator by defendant and defendant's culpable participation in actions forming predicate for securities law violation. Securities Exchange Act of 1934, § 20(a), 15 U.S.C.A. § 78t(a).

[16] Securities Regulation 25.62(1)
349Bk25.62(1)

[16] Securities Regulation 25.62(2)
349Bk25.62(2)

Liability under Securities Act section rendering persons liable who offer or sell security by means of prospectus or oral communication which contains untrue statement of material fact or omits to make statement is broader than liability for fraud; such statutory sellers may be liable whether or not scienter or loss causation is shown.

Securities Act of 1933, § 12(2), 15 U.S.C.A. § 771 (2).

[17] Securities Regulation 25.56
349Bk25.56

Plaintiff claiming sale or offer of security by means of prospectus or oral communication which contains untrue statement of material fact or omits to make statement must still prove that defendant sold security by means of prospectus or oral communication to recover under the Securities Act. Securities Act of 1933, § 12(2), 15 U.S.C.A. § 771 (2).

[18] Federal Civil Procedure 2511
170Ak2511

Genuine issue of material fact existed as to whether estimate of earnings for corporation being sold was related to prospectus or initial offering, precluding summary judgment in action under Securities Act section which renders liable those people who offer or sell security by means of prospectus or oral communication which contains untrue statement of material fact or omits to make statement. Securities Act of 1933, § 12(2), 15 U.S.C.A. § 771 (2).

[19] Securities Regulation 25.62(1)
349Bk25.62(1)

Stock purchase agreement's general merger clause did not bar buyers' claim under Securities Act section rendering liable those people who offer or sell security by means of prospectus or oral communication which contains untrue statement of material fact or omits to make statement; earnings projections which were related to prospectus were not extracontractual and hence were properly subject of negligent misrepresentation claim. Securities Act of 1933, § 12(2), 15 U.S.C.A. § 771 (2).

[20] Federal Civil Procedure 2511
170Ak2511

Genuine issue of material fact existed as to whether officers of corporation which was selling its wholly owned subsidiary were statutory sellers under Securities Act section rendering liable sellers who offer or sell security by means of prospectus or oral communication which contains untrue

statement of material fact or omits to make statement. Securities Act of 1933, § 12(2), 15 U.S.C.A. § 771 (2).

[21] Racketeer Influenced and Corrupt Organizations 28
319Hk28

"Pattern of racketeering activity" under Racketeer Influenced and Corrupt Organizations Act (RICO) requires combination of predicate acts related to each other and continuity of conduct. 18 U.S.C.A. § 1962(c).

[22] Courts 99(7)
106k99(7)

District court's ruling on motion to dismiss Racketeer Influenced and Corrupt Organizations Act (RICO) claim did not constitute law of the case precluding contrary ruling on motion for summary judgment by different judge. 18 U.S.C.A. § 1961 et seq.

[23] Courts 99(1)
106k99(1)

[23] Courts 99(7)
106k99(7)

Policies underlying law of the case doctrine are by no means absolute bar to reconsideration of prior ruling by district judge who made ruling or different judge to whom case may have been reassigned.

[24] Racketeer Influenced and Corrupt Organizations 32
319Hk32

Alleged fraudulent scheme connected with sale of corporation, extending over a period of limited duration of a matter of months, which intended to achieve, and did achieve, single contract, i.e., stock purchase agreement, did not satisfy continuity requirement of Racketeer Influenced and Corrupt Organizations Act (RICO) claim. 18 U.S.C.A. § 1962(c).

[25] Fraud 13(3)
184k13(3)

Under New York law, law of negligent misrepresentation recognizes that generally there is no liability for words negligently

spoken but that there is an exception when parties' relationship suggests closer degree of trust and reliance than that of ordinary buyer and seller.

[26] Fraud 13(3)
184k13(3)

To be liable for negligent misrepresentation under New York law, speaker must be bound by some relation of duty, arising out of contract or otherwise.

[27] Fraud 13(3)
184k13(3)

Elements of fraud need not be proven to establish claim for negligent misrepresentation under New York law.

[28] Federal Civil Procedure 2515
170Ak2515

Genuine issue of material fact existed as to whether there was special relationship between seller of corporation and purchaser, precluding summary judgment on purchaser's claim of negligent misrepresentation in connection with the sale under New York law.

[29] Corporations 121(3)
101k121(3)

Warranty and indemnity claims of purchaser of corporation were timely where notice of those claims were given to sellers within date specified in stock purchase agreement.

[30] Federal Civil Procedure 2501
170Ak2501

Genuine issue of material fact existed as to whether claims of purchaser of corporation now made were embraced within letter sent to sellers within period specified in stock purchase agreement for bringing such claims, precluding summary judgment on warranty and indemnity claims.

[31] Fraud 60
184k60

Purchaser of corporation which subsequently claimed it was defrauded could not recover as consequential damages interest it had been paying on increasing rate notes that it issued to finance portion of purchase price of corporation; there was no suggestion that

sellers' misrepresentations played direct part in form or conditions of debt purchaser incurred, or that purchaser did not obtain what it bargained for in borrowing money.

[32] Securities Regulation 155
349Bk155

[32] Securities Regulation 309
349Bk309

Punitive damages are not recoverable in securities fraud action but may be recovered under pendent state claims. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b).

*247 Paul, Weiss, Rifkind, Wharton & Garrison, New York City (Martin London, George P. Felleman, Carey R. Ramos, Walter Rieman, Carol Salem, Jonathan J. Freedman, Elizabeth J. Holland, Laura Farina, of counsel), and Stein, Zauderer, Ellenhorn, Frischer & Sharp, New York City (Sidney H. Stein, of counsel), for plaintiffs.

Debevoise & Plimpton, New York City (John H. Hall, Daniel M. Abuhoff, Joseph P. Moodhe, T. Edward Tighe, of counsel), for defendants.

Friedman & Kaplan, New York City (Edward A. Friedman, Andrew W. Goldwater, Eric Seiler, of counsel), for defendant Alfred Weber.

MEMORANDUM OPINION AND ORDER

HAIGHT, District Judge:

The genesis of this action is the sale and purchase of a corporation. The purchaser repents of its bargain, and seeks to undo it and recover compensatory and punitive damages. Subject matter jurisdiction in this Court is founded upon claims under the federal securities laws and the civil RICO statute, to which state and common law claims are appended. Following extensive discovery, defendants move under Rule 56, Fed.R.Civ.P., for summary judgment dismissing the complaint.

Background

The action was originally assigned to District Judge Walker (as he then was). Much of the factual background appears in his two prior opinions, reported at [1988-89 Transfer Binder] Fed.Sec.L.Rep. (CCH) ¶ 94,005, 1988 WL 96586 (S.D.N.Y. Aug. 25, 1988) and 728 F.Supp. 926 (S.D.N.Y.1989), familiarity with which is assumed.

The litigation arises from the allegedly fraudulent sale by defendant Uniroyal, Inc. ("Uniroyal") of its wholly-owned subsidiary Uniroyal Plastics Company, Inc. ("Plastics") to plaintiffs Polycast Technology Corporation ("Polycast") and Uniroyal Plastics Acquisition Corp. ("UPAC"), a company formed by Polycast to consummate the sale. I will refer to the plaintiffs collectively as "Polycast." In substance, Polycast alleges that in valuing and pricing the shares of Plastics and in consummating the transaction, it relied on materially misleading information furnished by defendants with respect to the financial status, earnings potential, and operating condition of Plastics, and that as a result it paid a grossly excessive price for the stock.

Judge Walker's prior opinions dealt with challenges to the legal sufficiency of various pleadings. Since that time the parties have completed extensive discovery. All defendants now move for summary judgment dismissing all of plaintiffs' claims against them.

The operative pleading is plaintiffs' fourth amended complaint (hereinafter the "Complaint"). The defendants are Uniroyal; its parent, CDU Holding, Inc.; six officers of Uniroyal and Plastics; Clayton & Dubilier, Inc., its two principals and related investment entities (the "C & S defendants"); and the trustees of the CDU Holding, Inc. Liquidating Trust.

CDU Holding, Inc. owned all of Uniroyal's common stock from September 24, 1985 to December 2, 1986. CDU Holding, *248 Inc. Liquidating Trust is the successor in interest to Uniroyal and CDU Holding, Inc.

The trustees of the CDU Holding, Inc. Liquidating Trust are the individual defendants Alan R. Elton, Martin H. Dubilier, Joseph P. Flannery, John R. Graham, and Joseph L. Rice III.

At the pertinent times Flannery was chairman of the board, chief executive officer, and president of Uniroyal, as well as a stockholder. Flannery is also alleged to be a beneficiary of the Liquidating Trust.

Defendant Graham was chief financial officer and a stockholder of Uniroyal, and is a beneficiary of the Liquidating Trust. Defendant Alexander R. Castaldi was vice-president, controller, and a stockholder, and a beneficiary of the Liquidating Trust.

Defendant Elton was vice-president and general counsel of Uniroyal. He is named as a defendant in this action solely in his capacity as a trustee of the Liquidating Trust.

Defendant Robert Alvine was group vice-president of the Engineered Products Group-Worldwide of Uniroyal, a Uniroyal stockholder, and president of Plastics until October 31, 1986. He is a beneficiary of the Liquidating Trust.

Defendant Donald L. Nevins, Jr., was controller of the Engineered Products Group of Uniroyal.

Defendant Alfred Weber was vice-president and the general manager of Plastics until November 1, 1986, a stockholder of Uniroyal, and is a beneficiary of a Liquidating Trust.

The "C & D defendants," as they are collectively referred to in the litigation, consist of Clayton & Dubilier, Inc., the Clayton & Dubilier Private Equity Limited Partnership, the Clayton & Dubilier Associates Limited Partnership, and the individual defendants Dubilier and Rice. The relationship of the C & D defendants to Uniroyal and Plastics came about in this fashion. Confronted with a hostile tender offer in 1985, Uniroyal executed a merger agreement later that year with CDU

Acquisition, Inc. and CDU Holding, Inc. A leveraged buyout was consummated through a merger transaction. Following completion of that transaction, all of Uniroyal's common stock was held by CDU Holding, Inc., whose shareholders included Flannery, Graham, and Weber. But the largest beneficial shareholder of CDU Holding, Inc. was the Clayton & Dubilier Private Equity Fund Limited Partnership ("C & D Private Equity"), which held 32.5% of the common stock of CDU Holding, Inc. The general partner of C & D Private Equity was Clayton & Dubilier Associates Limited Partnership ("C & D Associates"). Dubilier and Rice were the general partners of C & D Associates.

At the times pertinent to this litigation, Uniroyal's three-man executive committee consisted of Flannery, Rice and Dubilier.

Defendants Flannery, Graham, Castaldi, Alvine, Clayton & Dubilier, Inc., the Clayton & Dubilier Private Equity Fund Limited Partnership, the Clayton & Associates Limited Partnership, Dubilier and Rice are alleged to have been at the pertinent times controlling persons of Uniroyal and of CDU Holding, Inc. under section 15 of the Securities Act of 1933, 15 U.S.C. § 770 and section 20 of the Securities Exchange Act of 1934, 15 U.S.C. § 78t.

Polycast agreed to purchase Plastics from Uniroyal in a Stock Purchase Agreement (hereinafter "SPA") dated as of July 23, 1986. The transaction closed on October 31, 1986. Plaintiffs now regret that purchase, regard themselves as the victims of fraud, and commenced this action which they summarize in their brief at 2:

The core of this case is a fraud claim--that defendants deliberately misrepresented what [Plastics] would earn in 1986 and subsequent years and that plaintiffs relied upon those false representations in purchasing Plastics for \$110 million.

That core finds expression in nine claims for relief set forth in the complaint, as follows:

The first claim, against all defendants,

alleges violations of section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5. Complaint, ¶¶ 34-148.

*249 The second claim, against all defendants, alleges violation of section 12(2) of the Securities Act of 1933, 15 U.S.C. § 77l(2). Complaint, ¶¶ 149-159.

The third claim, against the C & D defendants, charges them as principals in violating section 12(2) of the Securities Act. Complaint, ¶¶ 160-161.

The fourth claim, against all defendants, charges violations of the RICO statute, 18 U.S.C. § 1962(c). Complaint, ¶ 162-181.

The fifth claim, against all defendants, alleges common law fraud. Complaint, ¶¶ 182-189.

The sixth claim, against all defendants, alleges negligent misrepresentation. Complaint, ¶¶ 190-195.

The seventh claim, against Uniroyal and the trustees of the Liquidating Trust, alleges breach of warranty. Complaint, ¶¶ 196-202.

The eighth claim, against Uniroyal and the trustees of the Liquidating Trust, is for indemnity. Complaint, ¶¶ 203-208.

The ninth claim, against Uniroyal and the trustees of the Liquidating Trust, is for reformation of the purchase agreement. Complaint, ¶¶ 209-225.

In their prayers for relief, pleaded in the alternative, plaintiffs seek rescission or reformation of the contract, and compensatory and punitive damages, with compensatory damages to be trebled under RICO.

The parties have engaged in extensive discovery. The deposition transcripts and documents produced are voluminous. It is difficult to imagine that trial will give rise to additional evidentiary material of any

significance. All defendants now move for summary judgment.

Discussion

[1][2] Under Fed.R.Civ.P. 56(c), the moving party is entitled to summary judgment if the papers "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." On such a motion, "a court's responsibility is to assess whether there are any factual issues to be tried, while resolving ambiguities and drawing reasonable inferences against the moving party." *Coach Leatherware Co., Inc. v. Ann Taylor, Inc.*, 933 F.2d 162, 167 (2d Cir.1991) (citing *Knight v. U.S. Fire Insurance*, 804 F.2d 9 (2d Cir.1986), cert. denied, 480 U.S. 932, 107 S.Ct. 1570, 94 L.Ed.2d 762 (1987)). The responding party "must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). "The non-movant cannot 'escape summary judgment merely by vaguely asserting the existence of some unspecified disputed material facts,' ... or defeat the motion through 'mere speculation or conjecture.'" *Western World Ins. Co. v. Stack Oil, Inc.*, 922 F.2d 118, 121 (2d Cir.1990) (citations omitted). While the party resisting summary judgment must show a dispute of fact, it must also be a material fact in light of the substantive law. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). That is because "a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986).

The Fraud Claims

I will first consider plaintiffs' claims for securities fraud and common law fraud. While defendants' brief discusses plaintiffs' section 12(2) claims under the fraud heading, that is inappropriate given the quite different

theory of liability that obtains, and I will discuss the section 12(2) claims separately.

As noted, the "core" of plaintiffs' fraud claim is that defendants deliberately misrepresented "what Plastics would earn in 1986 and subsequent years," namely 1987-1990; and that plaintiffs relied upon those false representations in purchasing Plastics for \$110 million.

With respect to Plastics' 1986 earnings, plaintiffs place particular emphasis upon *250 an earnings forecast of \$13.3 million which they allege that Castaldi and Alvine, "in the presence of ... Rice and acting on behalf of all defendants other than Elton," communicated to Polycast's officers at a meeting on September 5, 1986, going on to represent, among other assertions, that this \$13.3 million earnings estimate "was a rock bottom number which could be taken to the bank." Complaint at ¶ 112. Particularly relying upon that representation, "plaintiffs decided to submit a revised bid for Plastics." *Id.* at 114.

The complaint's reference to a "revised bid" requires some review of the events leading up to the purchase, which in significant measure are not disputed.

Plastics was one of several wholly owned subsidiaries of Uniroyal. Uniroyal decided to sell Plastics pursuant to an auction process conducted by Drexel, Burnham, Lambert, Inc. of New York ("Drexel"). Uniroyal and Drexel produced an offering memorandum which Drexel circulated to potential purchasers, including Polycast. The offering memorandum included a projection that Plastic's income for 1986 would be approximately \$24 million. Uniroyal delivered the offering memorandum to potential purchasers in March 1986.

In a meeting on May 8, 1986 at Uniroyal's headquarters in Oxford, Connecticut, Alvine, Nevins and Weber met with representatives of Polycast and told them that Uniroyal had lowered its 1986 earnings forecast for Plastics from \$24.0 million to \$22.5 million.

Complaint at ¶ 60.

On June 12, 1986, Uniroyal informed Polycast that Uniroyal had again lowered its 1986 earnings forecast for Plastics, this time from \$22.5 million to \$20.5 million. Id. at ¶ 67. On June 24, 1986, Uniroyal informed Polycast that Uniroyal now estimated 1986 earnings for Plastics to be \$17.6 million. Id. at ¶ 69.

On or about July 23, 1986 Polycast submitted to Uniroyal the winning bid of \$134 million to purchase Plastics. The SPA was executed that date. It was accompanied by a disclosure letter in which Uniroyal reiterated a 1986 earnings forecast for Plastics of \$17.5 million. Id. at ¶¶ 79-81.

On August 27, 1986, Castaldi, Alvine and Weber informed Polycast that Uniroyal had again lowered its forecast of Plastics' 1986 earnings to approximately \$15.5 million. Polycast, in accordance with its rights under the SPA, withdrew its offer to purchase Plastics and terminated the SPA.

This set the stage for the September 5, 1986 meeting, at which the representatives for Uniroyal and Plastics told Polycast of the \$13.3 million "rock bottom" 1986 earnings forecast for Plastics. Further negotiations between the parties ensued. Eventually, on September 23, 1986, Polycast agreed to purchase Plastics for \$111.6 million. The SPA was amended on that date to reflect the new purchase price and a new closing date. Id. at 122.

The purchase price was reduced one more time following a telephone conversation on October 27, 1986, between Weber and Richard Schneider, Polycast's president. In that conversation Weber acknowledged that Plastics would not achieve its sales forecast for the month of October 1986. Polycast then negotiated a reduction in the purchase price from \$111.6 to \$110 million. The parties executed a further amendment to the SPA reflecting that reduction. Unlike the prior amendment reducing the purchase price to \$111.6 million, the amendment did not refer

to or change Uniroyal's previous 1986 earnings forecast for Plastics. The transaction closed on October 31, 1986, at the \$110 million purchase price. Id. at ¶ 123.

As for the projections of Plastics' earnings for 1987 through 1990, the complaint alleges at ¶ 72 that on or about July 2, 1986, Donald A. Ware, the assistant corporate controller of Uniroyal, sent to Drexel documents forecasting Plastics' earnings before interest and taxes of \$17.6 million during 1986, and forecasts of \$20.7 million, \$22.7 million, \$24.9 million, and \$27.0 million for 1987, 1988, 1989, and 1990 respectively. Plaintiffs allege that these forecasts for the later years were based in part on the then-existing \$17.6 million forecast for 1986, which defendants knew to be false. Complaint at ¶ 74.

*251 The third specific area of fraud plaintiffs allege concerns a contract Plastics had to supply the Northrop Corporation with fuel cells for the F/A-18 military fighter plane. The presentations made by Uniroyal and Plastics representatives to Polycast projected sales by Plastics to Northrop of these fuel cells. In mid-September 1986, Northrop cancelled its contract with Plastics. Uniroyal and Plastics did not advise Polycast of that cancellation and Polycast did not learn of it until after the closing. Polycast alleges that defendants engaged in the fraudulent non-disclosure of a material fact. Complaint at ¶¶ 106-111.

Plaintiffs place primary emphasis upon the \$13.3 million estimate of Plastics' 1986 earnings articulated at the September 5, 1986 meeting. All defendants argue that as a matter of law Polycast cannot establish reliance, cognizable damages or loss causation with respect to that earnings estimate. The C & D defendants also argue that they are entitled to summary judgment on the element of scienter.

The appropriateness of summary judgment depends in part upon the "governing law," Anderson at 250, 106 S.Ct. at 2511. The trial judge must "view the evidence through the prism of the substantive evidentiary burden."

Id. at 254, 106 S.Ct. at 2513.

[3][4] In order to establish a claim for securities fraud under section 10(b) of the 1934 Act, a plaintiff must allege and prove "that, in connection with the purchase or sale of securities, the defendant, acting with scienter, made a false material representation or omitted to disclose material information and that plaintiff's reliance on defendant's actions caused him injury." *Bloor v. Carro, Spanbock, Londin, Rodman & Fass*, 754 F.2d 57, 61 (2d Cir.1985). In federal securities cases the plaintiff's burden of proof is the "preponderance-of-the-evidence standard generally applicable in civil actions." *Herman and MacLean v. Huddelston*, 459 U.S. 375, 390, 103 S.Ct. 683, 691, 74 L.Ed.2d 548 (1983). As the Second Circuit observed in *Weinberger v. Kendrick*, 698 F.2d 61, 78 (2d Cir.1982), cert. denied, 464 U.S. 818, 104 S.Ct. 77, 78 L.Ed.2d 89 (1983), "the plaintiff's burden of proof in a common law fraud case--clear and convincing evidence--is more demanding than in a Rule 10b-5 case." (construing New York law).

[5][6] Defendants at bar acknowledge that the forecasts of Plastics' 1986 earnings were given "in connection with the purchase or sale of securities," namely, the Plastics stock which Polycast bought. Defendants argue, however, that the September 5, 1986 forecast of \$13.3 million in 1986 earnings was a forecast, and not a guarantee. Defendants cite Second Circuit authority for the propositions that "[e]conomic prognostication, though faulty, does not, without more, amount to fraud," *Decker v. Massey-Ferguson, Ltd.*, 681 F.2d 111, 117 (2d Cir.1982) (quoting *Polin v. Conductron Corp.*, 552 F.2d 797, 805 (8th Cir.), cert. denied, 434 U.S. 857, 98 S.Ct. 178, 54 L.Ed.2d 129 (1977)); and "[t]he sole factual elements of a projection should be that it represents management's view, that it was reached in a rational fashion and that it is a sincere view." *Marx v. Computer Sciences Corp.*, 507 F.2d 485, 490 n. 7 (9th Cir.1974). However, as the cases cited by defendants themselves suggest, economic estimates, forecasts or projections are not insulated from claims for fraud if they were put forward in

bad faith, with awareness of their inaccuracy, and an intent to deceive. "Liability may follow where management intentionally fosters a mistaken belief concerning a material fact, such as its evaluation of the company's progress and earnings prospects in the current year." *Elkind v. Liggett & Myers, Inc.*, 635 F.2d 156, 164 (2d Cir.1980).

Defendants do not suggest that the \$13.3 million earnings forecast was not a material fact in the context of the proposed purchase. There is sufficient evidence to permit a jury to find that a number of Uniroyal and Plastics officers deliberately concocted false earnings forecasts, including the \$13.3 million estimate, in order to induce Polycast to purchase Plastics. Defendants argue in their briefs that these charges of falsity and scienter depend solely on the testimony of T. Oliver Kirrane, a *252 former Plastics officer. In point of fact, there is more evidence in plaintiffs' favor on the issues than that; but even if plaintiffs' case depended entirely upon the testimony of Kirrane, who the jury could find refused to go along with the fraud, his credibility would be for the jury to evaluate.

Sensibly enough, defendants do not press these points. Rather, they focus upon reliance and causation.

[7] Defendants argue that Polycast did not rely on the \$13.3 million estimate. They find support for that proposition in disclaimers Polycast included in a private placement memorandum it prepared in October 1986 with a view towards financing its purchase of Plastics. Polycast included in that memorandum the earnings projections provided by Plastics and Uniroyal, and said of them:

The projections are based upon estimates and assumptions about circumstances and events that have not yet taken place, are subject to customary uncertainties inherent in making projections and may be materially affected by changes in circumstances and numerous other variables, many of which are difficult to predict and beyond the control of Polycast and Uniroyal Plastics. Therefore, the actual

results achieved will vary from the projections, these variation may be material and there can be no assurance that the projected results will be attained.

Secondly, defendants rely upon communications between Uniroyal and Plastics on the one hand and Polycast on the other between September 5, 1986 and the October 31, 1986 closing. Fulfillment of the \$13.3 million estimated earnings during 1986 depended in part upon Plastics' earnings during September and October 1986. Defendants point to the allegation in ¶ 123 of the complaint that "[i]n response to repeated inquiries from plaintiffs, during October 1986 Uniroyal disclosed to plaintiffs certain preliminary financial information purporting to record business activity at Plastics during September 1986", which "suggested that Plastics had not met certain financial targets for September." Defendants in their main brief at 33 omit the next sentence from ¶ 123 of the complaint, which reads: "However, defendants did not withdraw Uniroyal's 1986 earnings forecast for Plastics of \$13.3 million and failed to disclose that Plastics' earnings would be materially lower than \$13.3 million." That omitted language undermines the effectiveness of any admission that might otherwise be derived from the pleading.

On the reliance issue, defendants stress particularly the telephone conversation on October 27, 1986, between Weber and Schneider. In the October 27, 1986 telephone conversation between Schneider and Weber, Weber told Schneider that Plastics anticipated a shortfall of approximately \$2 million in projected sales for October, with a corresponding decline of approximately \$760,000 in earnings that month. Weber and Schneider did not discuss the \$13.3 million estimate in their October 27 conversation. Schneider became angry. He told Weber that Polycast was paying too much for Plastics and would "take the price down." Weber Dep. at 1782. On October 29, 1986 Polycast demanded and ultimately received a \$1.6 million reduction on the purchase price for Plastics: from \$111.6 million to \$110 million, the figure at which the deal closed on October

31. Polycast advised its potential investors that the reduction in the purchase price resulted from reductions in Plastics' projected earnings.

These facts are for the most part undisputed. The question is whether, as defendants contend, they establish that Polycast did not rely on the \$13.3 estimate conveyed on September 5, 1986 in deciding to purchase Plastics at the reduced price of \$110 million on October 31. Defendants say that "as a result of information provided by Uniroyal for days before the closing, Polycast did not in fact rely upon the \$13.3 million projection." Reply Brief at 5.

The jury could find that Uniroyal and Plastics officers fraudulently concocted the \$13.3 million forecast, which bore no resemblance to economic reality, for the express purpose of luring Polycast into going through with the deal. The jury could find this to be a modus operandi, infecting and *253 tainting the prior earning estimates. For example, there is evidence from which the jury could find that in August 1986 Flannery threatened to fire Weber after Weber told Polycast at a meeting that Plastics would earn less than the then existing estimate, and that Flannery explicitly rejected the advice of house counsel, including Elton, that all business data be disclosed to Polycast.

The jury could further find, as plaintiffs argue in their briefs, that Plastics earned only \$5.2 million in 1986, and that had plaintiffs known of the depth of the deception practiced upon them, they would not have closed the deal.

I do not say that the jury will make these findings. However, viewing the evidence in the light most favorable to the non-moving party, as required by the cases, the jury could do so.

What does "reliance" mean in this context? No rational jury could find that at the time of closing plaintiffs relied on the \$13.3 million projection as "bankable", in the sense represented during the September 5 meeting:

"not subject to reduction." That perception could not, and did not, survive Schneider's October 27 conversation with Weber. Schneider, content to pay \$111.6 million for Plastics on the basis of the September 5 \$13.3 million projection, was content no longer. Concern for the earnings projection fueled that discontent, and led to a reduced purchase price.

But the jury could find that at the time of closing Polycast believed that the \$13.3 million projection, while no longer "bankable" in that precise amount, had nonetheless been calculated and communicated in good faith by Uniroyal and Plastics. The jury could find, in other words, that Polycast continued to rely on the integrity of the process, although it no longer relied on the particular end figure. The distinction is pragmatic and accords with common sense. Plaintiffs' fraud claim is not so much that the particular \$13.3 million was inaccurate, but that the process producing the projection was corrupt: a conclusion the jury could easily reach if it accepts the testimony of Kirrane, arguably corroborated by other evidence.

Polycast was entitled to rely on the defendants' good faith in projecting Plastics' earnings. It was entitled to rely on the integrity of the \$13.3 million projection, even if probable cause had arisen to doubt its accuracy. If Polycast had known then what discovery has arguably revealed about the corruption of the process, it is not fanciful to suggest that plaintiffs would have cancelled the deal. At least the jury could draw that inference. Therefore, in a real sense, Polycast continued to rely on the \$13.3 million estimate; or so a jury could find.

Was that continued reliance reasonable? "Whether or not reliance was justifiable is ordinarily a question of fact to be determined by the trier of fact on all of the facts and circumstances proven at trial." *Stratford Group Ltd. v. Interstate Bakeries*, 590 F.Supp. 859, 865 (S.D.N.Y.1984) (construing New York law). The contentions of the parties with respect to reliance raise issues of fact for trial.

[8] As for cancellation of the Northrop contract, Uniroyal and Plastics chose not to disclose the cancellation to Polycast before the closing. Accordingly "positive proof of reliance is not a prerequisite for recovery. All that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them important in the making of [the] decision." *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 153-54, 92 S.Ct. 1456, 1472, 31 L.Ed.2d 741 (1972). The jury could find that cancellation of the Northrop contract was material. The jurors could consider the doomsday expressions of alarm voiced by Plastics and Uniroyal officers when contemplating the possibility of a cancellation. To be sure, defendants now contend that the Northrop cancellation was a blessing in disguise because the contract was losing Plastics money. Plaintiffs dispute that proposition. The question is one of considerable cost accounting and economic complexity. It poses a triable issue of fact.

[9] *254 As for the estimates of Plastics' 1987-1990 earnings, Judge Walker recognized in one of his prior opinions that plaintiffs allege these later forecasts were " 'based in part' on the allegedly false 1986 forecasts." 728 F.Supp. at 942-43. Plaintiffs' fraud claim arising out of these later estimates poses triable issues of fact.

Defendants argue that since plaintiffs' investment bankers at the Boston office of Drexel Burnham Lambert formulated their own reduced projection for 1987 through 1990 earnings, Polycast cannot be said in law to have relied upon the higher estimates furnished by defendants on July 2, 1986. It is true that Drexel Boston performed such calculations in connection with the private placement memorandum issued by plaintiffs in October 1986. But the jury could find that all plaintiffs and their advisers did was to reduce the 1987-1990 forecasts proportionately to Uniroyal's reduction of Plastics' 1986 earnings to \$13.3 million, so that in practical effect defendants were also responsible for these later projections by the other side.

[10] Next the defendants argue that plaintiffs cannot prove causation. With respect to the \$13.3 million 1986 estimate, they argue, first, that the estimate did not cause Polycast any "cognizable damages"; and second, that even if damages occurred, plaintiffs cannot prove loss causation.

On the first of these contentions, defendants rely upon particular declarations made by or on behalf of plaintiffs which they regard as admissions against interest. In February 1987 Schneider met with officers of the Continental Illinois Bank and Trust Company of Chicago, a potential lender, and said according to contemporaneous documentary evidence that the \$110 million purchase price paid "is fair from an historical earnings viewpoint but can be considered a bargain price if the future potential of the company is considered."

Secondly, defendants point to consolidated financial statements in UPAC's Form 10K for the year ended September 1987. Those financials included an entry for \$75 million of goodwill arising from the acquisition of Plastics, which defendants say "reflects the difference between the \$110 million purchase price, plus contingent liabilities recorded, less the value of Plastics' assets." Main brief at 38. The SEC staff, responding to that Form 10K, noted that while UPAC recognized and recorded on its balance sheet in September 27, 1987 \$75 million in goodwill resulting from the acquisition of Plastics, it had also disclosed that Polycast had commenced suit against Uniroyal for not less than \$75 million in damages caused by misrepresentations concerning Plastics' financial state, earnings potential and operating conditions. The SEC staff regarded these statements as inconsistent and asked for an explanation. Defendants contend that the reference to goodwill demonstrates as a matter of law that the purchase of Plastics caused plaintiffs no cognizable damage, as that concept is defined in section 10(b) actions by *Randall v. Loftsgaardan*, 478 U.S. 647, 661-662, 106 S.Ct. 3143, 3152, 92 L.Ed.2d 525 (1986) (out-of-pocket measure of damages consists of the difference between the fair value of all that

the purchaser received and the fair value of what he would have received had there been no fraudulent conduct).

Plaintiffs respond that Schneider's statements to the Continental Illinois Bank as reflected in the pertinent exhibit could not have been made later than February 1987, when Schneider made his presentation to that potential investor. Schneider told the bank that, based upon his then existing impressions, Plastics would earn \$10 million in 1986 and \$17 million in 1987. These amounts were less than defendants had represented. More significant to the present question, plaintiffs say without contradiction that the field work on the audit of Plastics' financial statements for the ten months ended October 31, 1986 was not completed until May 1987; and it was not until then that Polycast learned that Plastics only earned \$3.709 million for those 10 months. Plaintiffs say that Schneider's statements to the bank in February 1987 prove nothing more than the depth of defendants' deception.

*255 As for UPAC's correspondence with the SEC staff, plaintiffs point out that eventually the SEC concluded there was no inconsistency between the lawsuit's claims against Uniroyal and the goodwill entry in the Form 10K. That was because UPAC had allocated the goodwill to Plastics' profitable businesses, which were expected to generate sufficient pre-tax income to allow amortization of the allocated goodwill over 14 years. At the conclusion of the correspondence, the SEC was content to require UPAC and Polycast to agree that they would credit any recovery from the litigation to goodwill.

These declarations are admissible against plaintiffs under Rule 801(d)(2), F.R.Evid. However, they fall well short of establishing as a matter of law that plaintiffs suffered no cognizable economic loss, particularly since economic loss in section 10(b) cases may in certain circumstances be measured by "out-of-pocket loss, the benefit of the bargain, or some other appropriate standard." *Osofsky v. Zipf*, 645 F.2d 107, 111 (2d Cir.1981). Conceptually at least, a party's admissions may

demonstrate beyond cavil that it has suffered no economic loss; but plaintiffs' explanations for and interpretations of the declarations upon which defendants rely pose triable issues.

Defendants also note that Polycast sold three of Plastics' businesses for amounts totalling \$91 million, and indicated to the SEC that it had received offers for others. Defendants say that accordingly the total proceeds of the divestiture of Plastics' businesses "would far exceed the price Polycast paid for Plastics," main brief at 40, so that Polycast suffered no loss. Plaintiffs respond that these gross sales prices were acquired at the cost of plaintiffs assuming "immense liabilities" under the SPA, such as unfunded pension liabilities (estimated at approximately \$75 million before tax or \$54 million net of tax) and environmental liabilities (estimated at \$13 million). Defendants reply that nonetheless, Polycast has realized a net gain (that is, the price exceeded the cash cost and the liabilities assumed) on the businesses it has sold. Reply brief at 21 n. 13.

[11] I decline to hold this record or in response to these arguments that plaintiffs cannot establish a cognizable economic loss as a matter of law. Defendants confine their analysis to out-of-pocket loss, but this is not an exclusive measure of compensatory damages, as the Second Circuit held in *Osofsky*. Benefit-of-the-bargain is a possible alternative measure of compensatory damages. In *Levine v. Seilon, Inc.*, 439 F.2d 328, 334 (2d Cir.1971), Judge Friendly said in dictum that in section 10(b) cases a defrauded buyer of securities "is entitled to recover only the excess of what he paid over the value of what he got, not, as some other courts had held, the difference between the value of what he got and what it was represented he would be getting." More recently the Second Circuit has extended the benefit-of-the-bargain measure of damages under the 1934 Act to the "limited situation" where "misrepresentation is made in the tender offer and proxy solicitation materials as to the consideration to be forthcoming upon an intended merger." *Osofsky* at 114. But see

Freschi v. Grand Coal Venture, 588 F.Supp. 1257, 1259 (S.D.N.Y.1984) (limiting *Osofsky* to its facts and applying out-of-pocket measure of loss to section 10(b) claim).

On this motion for summary judgment, I need not further consider the present state of appellate authority on the measures of compensatory damages available to buyers under the 1934 Act because plaintiffs at bar also assert claims for common law fraud. In *Osofsky* the Second Circuit said that "the benefit-of-the-bargain measure of compensatory damages is recognized as the preferable measure in common law fraud actions." Citing Prosser's text and the Restatement (Second) of Torts (1977) for that proposition, Judge Oakes went on to say at 114:

Thus, the Restatement (Second) of Torts § 549(2) (1977) provides, in the case of a fraudulent misrepresentation in a business transaction, for the recovery of "damages sufficient to give [the recipient] the benefit of his contract with the maker, if these damages are proved with reasonable certainty." Though out-of- *256 pocket loss may be the usual and logical form of compensatory relief in tort actions, Comment g on section 549(2) explains that this measure of damages does not always afford "just and satisfactory" compensation when the plaintiff has made a bargain based on fraudulent representations by the defendant. Therefore "the great majority of the American courts [have adopted] a broad general rule giving the plaintiff, in an action of deceit, the benefit of his bargain with the defendant in all cases, and making that the normal measure of recovery in actions of deceit." *Id.* Otherwise, in situations such as that involved in the instant case, "the defendant [would be] enabled to speculate on his fraud and still be assured that he [could] suffer no pecuniary loss," *id.* at Comment i.

That analysis applies squarely to the present plaintiffs' common law fraud claim, which a jury could conclude had been shown by clear and convincing evidence.

Even if the analysis be confined to out-of-

pocket compensatory damages, plaintiffs' expert witness is prepared to testify that "Plastics was worth approximately \$60 million on October 31, 1986." Plaintiff's brief at 67. If the jury accepts that figure, the \$110 million purchase price establishes an out-of-pocket losses. To be sure, expert evaluations are subject to cross-examination and challenge; but that is the function of plenary trials, not summary dispositions.

Defendants are not entitled to summary judgment on the basis that plaintiffs suffered no cognizable damage as a matter of law. In reaching that conclusion, I have considered all of the evidence culled by the defendants from the extensive discovery record in support of their contentions, whether or not specifically addressed supra.

[12] The C & D defendants require separate consideration. They contend that even if "there is sufficient evidence as to misrepresentation and loss causation to go to the jury," defendants' brief at 88 (and there is), nonetheless the fraud claims must be dismissed as to the C & D defendants because there is no evidence suggesting they were involved in the formulation of Plastics' earning projections, including the \$13.3 million projection upon which plaintiffs' fraud claims are primarily based, or that the C & D defendants had the intent to deceive plaintiffs.

In his opinion reported at 728 F.Supp. 926, Judge Walker held that Polycast's third amended complaint (identical to the present pleading in this respect) sufficiently alleged scienter on the part of the C & D defendants. Judge Walker focused upon the alleged participation of Rice and Dubilier in the events surrounding the offering of Plastics for sale and the ultimate consummation of the sale to Polycast. Judge Walker concluded his discussion on the point by saying: "Polycast's allegations of Rice and Dubilier's beneficial interest in Uniroyal's assets implicitly established a motive for committing fraud. The allegations of their involvement in the preparation of the offering memorandum demonstrate an opportunity for doing so and support the inference of knowledge on their

part." *Id.* at 936.

The C & D defendants now argue that the allegations sufficient to support an inference of scienter have been proven hollow by the evidence, or lack of evidence, adduced during discovery. They pray for summary judgment dismissing the fraud claims against them for that reason. Consistent with the authorities cited supra, my proper function is to assess whether the C & D defendants' scienter (obviously a material fact under the governing law) presents a genuine issue requiring trial. In answering that question, I resolve all ambiguities in the evidence and draw all reasonable inferences in favor of plaintiffs and against the C & D defendants.

The motive of Rice and Dubilier to commit fraud upon a purchaser of a Uniroyal asset such as Plastics is manifest. Rice and Dubilier managed all the C & D Entities. Those entities held a 32.5% equity interest in Uniroyal. The leveraged buyout had saddled Uniroyal with \$900 million in debt. To maximize a return to the C & D entities, it was necessary to maximize the *257 sale price of a Uniroyal asset like Plastics. These economic truths are illustrated by a post-closing cash distribution which occurred in December 1986. At that time C & D Private Equity received 32.5% of the cash distribution, or \$60,206,250; C & D Associates received \$6 or \$7 million; and Rice and Dubilier each received approximately 45% of that amount.

A section 10(b) plaintiff must prove its case by a preponderance of the evidence only, and not by clear and convincing evidence. See *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390-91, 103 S.Ct. 683, 692, 74 L.Ed.2d 548 (1983). As for scienter the Court said at 390 n. 30, 103 S.Ct. at 692 n. 30:

The Court of Appeals also noted that the proof of scienter required in fraud cases is often a matter of inference from circumstantial evidence. If anything, the difficulty of proving the defendant's state of mind supports a lower standard of proof. In any event, we have noted elsewhere that circumstantial evidence can be more than sufficient. (citing cases).

[13] Motive based upon personal gain is a recognized circumstance from which intent to commit fraud may be inferred. Rice and Dubilier had that motive to commit fraud upon a purchaser of Plastics.

Another circumstance is whether Rice and Dubilier should be regarded as "insiders" or "outsiders" in the conduct of Uniroyal's affairs.

At the pertinent times Rice and Dubilier, together with Flannery, Uniroyal's chairman, chief executive officer and president, comprised the company's three-man executive committee. Nonetheless, Rice and Dubilier say they should not be considered Uniroyal insiders. They cite *Lanza v. Drexel & Co.*, 479 F.2d 1277, 1306 (2d Cir.1973) for that proposition. In *Lanza* the Second Circuit adopted an academic definition of "outside directors-i.e., directors who are not full-time employees of the corporation." *Id.* at 1306 (quoting Bishop, *Sitting Ducks and Decoy Ducks: New Trends in the Indemnification Of Corporate Directors and Officers*, 77 Yale L.J. 1078, 1092 (1968)).

More recently, the Second Circuit has said in evaluating a pleading of fraud under Rule 9(b), Fed.R.Civ.P. that no specific connections between fraudulent representations and particular defendants are necessary where "defendants are insiders or affiliates participating in the offer of the securities in question." *Luce v. Edelstein*, 802 F.2d 49, 55 (2d Cir.1986). See also *DiVittorio v. Equidyne Extractive Industries, Inc.*, 822 F.2d 1242, 1247 (2d Cir.1987) (citing and applying *Luce*).

Applying that somewhat expanded definition of "insider" to the proof developed through discovery, I conclude that a jury could rationally regard Rice and Dubilier as Uniroyal "insiders or affiliates participating in the offer" of Plastics for sale. Accordingly the status of Rice and Dubilier is also a circumstance which the jury may consider on the issue of scienter.

The membership of Rice and Dubilier on the three-man Uniroyal Executive Committee is

not determinative of the issue, although certainly it is probative. As defendants observe, between meetings of the full board of directors its powers were delegated to the executive committee; "Rice and Dubilier were never officers of Uniroyal or Plastics, and they played no role in the day-to-day management of either company." Reply Brief at 33-34. True enough, if by "day-to-day management" we mean the shipping of orders, collection of bills, and controlling inventory. But the issue is whether Rice and Dubilier were "insiders or affiliates participating in the offer" of Plastics for sale and the consummation of that sale to Polycast. There is sufficient evidence to allow that characterization. On some occasions Dubilier, on other occasions Rice attended meetings or engaged in conversations with officers of Uniroyal concerning forecasts to be included in the offering memorandum, as well as subsequent reductions in the 1986 Plastics earnings estimate, and what should be done about those reductions in the context of the ongoing negotiations with Polycast. These and other meetings and conversations *258 gave rise to contemporaneous notes or testimonial recollections the import of which the parties dispute, but to the extent they militate in favor of plaintiffs must on this motion be construed in their favor. For example, it is common ground that on February 26, 1986 Dubilier had a conversation with Graham about the offering memorandum's references to Uniroyal's projected financials. Graham made a contemporaneous note of that conversation which reads: "M. Dubilier. Tone down the language or increase the forecast." Graham, also a defendant in the case, testified that Dubilier said that the language in the offering memorandum was "too optimistic" because "it doesn't correspond with the numbers. So if the numbers are what they are, you better tone the language down because it's too positive." Graham Dep. at 258. Defendants say in their brief at 95 that "the only reasonable inference" to be drawn from Graham's testimony "is that Dubilier wanted the offering memorandum to be as accurate as possible, and took what steps were necessary to insure that it was." The trouble is that Graham's testimony dealt with only part of

what his note records Dubilier as having said, namely, "tone down the language or increase the forecast." A jury could rationally regard the alternative suggested solution, namely increasing the forecast to square with the "positive" language, as a badge of fraud. The jury could also accept the testimony of Jonathan Furer, a Polycast officer, that at the crucial September 5, 1986 meeting where the \$13.3 million projected 1986 earnings for Plastics was put forward as a rock bottom figure, Rice uttered reassurances purported by based upon his own prior experience in similar situations.

To be sure, there is no evidence in the record directly establishing that either Rice or Dubilier knew that the \$13.3 million projection was false, or that they had expressed the specific intent to defraud Polycast. But there need not be, given the holding in *Herman & Maclean v. Huddelston*, supra, that scienter may be and often is proved by inferences from circumstantial evidence. Viewing the evidence in the light most favorable to plaintiffs, as I am required to do, I conclude that the scienter of the C & D defendants is for the jury.

Plaintiffs are also entitled to have the jury consider their alternative theory of section 10(b) liability, that Rice and Dubilier acted with reckless disregard of the fraud of others. Even outside directors may be liable if they "failed or refused, after being put on notice of a possible material failure of disclosure, to apprise themselves of the facts where they could have done so without any extraordinary effort." *Lanza v. Drexel & Co.*, supra, at 479 F.2d 1306 n. 98. Rice and Dubilier acknowledged that they knew of Uniroyal's several reductions in the Plastics earnings forecasts during 1986. Rice said he made no effort to find out only the forecasts were reduced, but conceded that "I could pick up the telephone any time I wanted to and call [Flannery] and say, what did the earnings do." Rice Dep. at 329-30. The ability of Rice and Dubilier to get to the bottom of the forecast reductions is inherent in their positions as members of Uniroyal's executive committee. Accepting for the sake of this analysis that

Rice & Dubilier knew nothing about the reasons for the reductions in forecasts, there is evidence from which the jury could find that without "extraordinary effort" they could have discovered that Uniroyal officers were engaging in fraud.

[14][15] Lastly the liability of the C & D defendants, or at least of Rice and Dubilier as controlling persons of Uniroyal, presents a triable issue. As Judge Walker has held in the case at bar, controlling person liability under § 20(a) does not require proof of scienter. Liability attaches if there was a primary violation, control of the primary violator by the defendant and the defendant's culpable participation in the actions forming the predicate for the securities law violation. [1988-89 Transfer Binder] Fed.Sec.L.Rep. (CCH) ¶ 94,005 at 90,695-96, 1988 WL 96586. Whether or not in the particular circumstances of this case it is the C & D defendants' burden to prove good faith, cf. *Marbury Management, Inc. v. Kohn*, 629 F.2d 705, 716 (2d Cir.), cert. denied sub nom *Wood Walker & Co. v. *259 Marbury Management, Inc.*, 449 U.S. 1011, 101 S.Ct. 566, 66 L.Ed.2d 469 (1980), the issues of the control Rice and Dubilier exercised over Uniroyal in the conduct of the sales negotiations, and the propriety of that conduct, give rise to triable issues.

I deny the motions of all defendants for summary judgment dismissing the section 10(b) and common law fraud claims.

The Section 12(2) Claim

Plaintiffs' second and third claims allege violation of section 12(2) of the Securities Act of 1933, 15 U.S.C. § 771(2). The second claim charges all defendants with violating that section. Some are charged as principals, others as aiders and abettors or controlling persons. The third claim charges the C & D defendants as principals.

All defendants contend that section 12(2) is inapplicable to the transaction alleged in the complaint.

Section 12(2) of the 1933 Act provides in pertinent part:

Any person who ... offers or sells a security ... by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission, shall be liable to the person purchasing such security from him ... (emphasis added).

[16] Section 12 deals with the liability of "statutory sellers" of securities. See *Pinter v. Dahl*, 486 U.S. 622, 108 S.Ct. 2063, 100 L.Ed.2d 658 (1988) (construing section 12(1)). Section 12 liability is broader than liability for fraud. Statutory sellers "may now be liable under section 12 whether or not scienter or loss causation is shown." *Wilson v. Saintine Exploration and Drilling Corp.*, 872 F.2d 1124, 1126 (2d Cir.1989) (applying *Pinter* rationale to a section 12(2) claim). See also *Capri v. Murphy*, 856 F.2d 473, 478 (2d Cir.1988) (under section 12(2), sellers' "material misrepresentations and omissions render them strictly liable to plaintiffs"); *Ballay v. Legg Mason Wood Walker, Inc.*, 925 F.2d 682, 689 (3rd Cir.1991) (in contrast to section 10(b), section 12(2) "makes actionable negligent misrepresentation absent proof of scienter or fraud").

[17] Notwithstanding these less demanding standards for liability, a section 12(2) plaintiff must still prove that the defendants sold the security "by means of a prospectus or oral communication." "Prospectus" has a recognized meaning. Congress did not define the words "oral communication" in the 1933 Act. In *Ballay* the Third Circuit applied to the phrase "prospectus or oral communication" the maxim *noscitur a sociis*, that a word is known by the company it keeps, and construed the phrase to mean "that buyers may recover for material misrepresentations made in a

prospectus or in an oral communication related to a prospectus or initial offering." 925 F.2d at 688. *Ballay* went on to hold that section 12(2) did not apply to a broker-seller of securities in the secondary market.

While defendants at bar rely on *Ballay*, plaintiffs correctly observe that the transaction in suit does not involve the secondary market, but rather the direct sale of securities (the outstanding shares of *Plastics*) as part of the sale of that company to *Polycast*. Nonetheless, *Ballay* is instructive in its implicit requirement that the prospectus or oral communication have something to do with the challenged sale.

The Second Circuit had previously made that requirement explicit in *Jackson v. Oppenheim*, 533 F.2d 826 (2d Cir.1976). The Second Circuit held that while a section 12(2) plaintiff need not prove the particular kinds of causation required in fraud claims, nevertheless "he must still prove that the challenged sale was effected 'by means of' the communication viewed as a whole. That is to say, the communication as a whole must have been instrumental in the sale" of the securities. *Id.* at 829-30. Expanding on that concept, the court of appeals *260 said that where the defendant's liability is based on a sale of securities

Section 12(2) requires there to be some causal relationship between the challenged communication and the sale, even if not "decisive." In short, the communication must have been intended or perceived as instrumental in effecting the sale. *Id.* at 830 n. 8.

The inquiry is fact-specific, as illustrated by Judge Tenney's opinion in *Eriksson v. Galvin*, 484 F.Supp. 1108-1125 (S.D.N.Y.1980):

The Court concludes, as in *Jackson*, that neither the challenged communications nor the so-called omissions were responsible for the plaintiff's conduct. "[T]here was an abundance of evidence of the matters the plaintiff really considered important in entering this face to face transaction," *Titan Group, Inc. v. Faggen*, 513 F.2d 234, 239 (2d Cir.), cert. denied, 423 U.S. 840, 96 S.Ct. 70,

46 L.Ed.2d 59 (1975), and Eriksson was well aware of the opportunities and risks inherent in his agreement with the defendants. See *Seibert v. Sperry Rand Corp.*, 586 F.2d 949, 952 (2d Cir.1978); *Spielman v. General Host Corp.*, 538 F.2d 39, 41 (2d Cir.1976). Accordingly, a section 12(2) claim has not been established because the alleged misrepresentations and omissions were not "instrumental in effecting the sale." *Jackson v. Oppenheim*, supra, 533 F.2d at 830 n. 8.

In the case at bar, plaintiffs allege that the false or misleading statements of material facts giving rise to section 12(2) liability appear in the earnings projections for Plastics described in the complaint at ¶¶ 54-55, 60-61, 67-68, 70-71, 72-74, 80-82, 87, 104-105, 112-113 and 122. See Complaint at ¶ 150. These specified allegations trace the reductions in earning projections from the offering memorandum (¶¶ 54-55) through the May 8, 1986 lowering of the 1986 earnings forecast from \$24.0 million to \$22.5 million (¶¶ 60-61), to the June 12, 1986 lowering from \$22.5 to \$20.5 million (¶¶ 67-68), to the June 24, 1986 lowering to \$17.6 million (¶¶ 70-71), together with the forecasted earnings for 1987, 1988, 1989, and 1990 (¶¶ 72-74), to the September 5, 1986 lowering of the 1986 forecast to \$13.3 million. From these allegations plaintiffs argue in their brief at 84 that section 12(2) is implicated because the sale of the Plastics shares "was accomplished by means of a prospectus, the offering memorandum, and numerous oral communications."

[18] Only the statements made on September 5, 1986 with respect to the 1986 \$13.3 million earnings projection can arguably sustain a section 12(2) claim. Plaintiffs cannot be heard to say that the offering memorandum delivered in March 1986 was "intended or perceived" by plaintiffs "as instrumental in effecting the sale" because the SPA executed on July 23, 1986 specifically provided that it superseded "all other prior ... communications of the parties, oral or written, respecting such subject matter." By the same token, the pre-September 5, 1986 earnings projections cannot be regarded as instrumental in effecting the

sale. On the contrary, those repeatedly lowered forecasts caused plaintiffs to reject the sale by terminating the SPA.

The \$13.3 million 1986 earnings projection Uniroyal presented to Polycast at the September 5, 1986 meeting stands on a different footing. The jury could find that Polycast terminated the SPA in late August 1986, returned to the bargaining table in early September, received Uniroyal's assurances that, unlike the earlier forecasts, the \$13.3 million 1986 earnings estimate were really and truly reliable, and agreed to purchase Plastics for \$111.6 million on September 23. Notwithstanding the further purchase price reduction to \$110 million, a jury could find that the September 5 earnings estimate was "related to a prospectus or initial offering," Ballay, and was "intended [by Uniroyal] or perceived [by Polycast] as instrumental in effecting the sale," Jackson.

[19] Accordingly the September 5, 1986 earnings estimate gives rise to a triable issue of section 12(2) liability unless, as defendants argue in their main brief at 52, the general merger clause in the SPA bars the claim.

*261 Article 10, Section 10.12 of the SPA provides:

Entire Agreement. This Agreement, including the Letter, the Schedules hereto and the other documents delivered pursuant to this Agreement, and the confidentiality Agreement, contain all of the terms, conditions and representations and warranties agreed upon by the parties relating to the subject matter of this Agreement and supersede all other prior agreements, negotiations, correspondence, undertakings and communications of the parties, oral or written, respecting such subject matter.

Defendants argue that by this language, Polycast agreed "that any prospectus (like the Offering Memorandum) and oral communications were not part of its bargain with Uniroyal."

In one of his prior decisions, Judge Walker

considered Section 10.12 within the somewhat analogous context of plaintiffs' common law claim for negligent misrepresentation. Judge Walker said that Section 10.12 is a "general merger clause ... which bars extra-contractual commitments of any kind." [1988-1989 Transfer Binder] Fed.Sec.L.Rep. (CCH) ¶ 94,005 (S.D.N.Y. Aug. 25, 1988) at 90,699. After reviewing the SPA and its accompanying documents, Judge Walker concluded that the alleged misrepresentations concerning Plastics' earnings projections (including the September 5, 1986 \$13.3 million estimate) "were not extracontractual and hence are properly the subject of a negligent misrepresentation claim." *Ibid.* I will refer again to Judge Walker's construction of Section 10.12 of the contract, which defendants did not see fit to mention in their 103-page main brief, when I consider plaintiffs' negligent misrepresentation claim *infra*. Suffice it to say at this juncture that I agree with him; and because I do, and for the other reasons stated, I reject defendants' contention that section 12(2) is entirely inapplicable to this transaction. The September 5, 1986 "oral communication" falls within the statute.

[20] Defendants Weber and Nevins make the alternative argument that they were not statutory sellers. Section 12(2) liability extends to a person "who successfully solicits the purchase, motivated at least in part by a desire to serve his own financial interests or those of the securities owner." *Cortec Industries, Inc. v. Sum Holding L.P.*, 949 F.2d 42, 48 (2d Cir.1991), citing and quoting *Pinter v. Dahl*. Whether Weber or Nevins may be so characterized presents triable issues of fact. So does the issue of whether the C & D defendants exercised reasonable care, upon which those defendants will bear the burden of proof at trial.

I deny defendants' motion for summary judgment dismissing the section 12(2) claims.

The RICO Claim

In their fourth claim, plaintiffs charge all defendants with violating the RICO statute,

18 U.S.C. § 1962(c). They seek treble damages under § 1964(c). Defendants move to dismiss the RICO claim on the ground that their alleged conduct does not fall within the statute.

18 U.S.C. § 1962(c) makes it unlawful for persons employed by or associated with enterprises engaged in interstate or foreign commerce to conduct the affairs of such an enterprise "through a pattern of racketeering activity ..." In *H.J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989), the Supreme Court undertook to identify and define the ingredients and boundaries of a "pattern of racketeering activity." Justice Brennan's opinion commanded only a 5-4 majority, but it represents the Court's most recent articulation of the governing principles.

[21] *H.J.* holds that a "pattern of racketeering activity" requires the combination of predicate acts related to each other and continuity of conduct. 492 U.S. at 239, 109 S.Ct. at 2900.

As for relatedness, the *H.J.* majority derived from Title X of the Organized Crime Control Act of 1970, of which RICO formed Title IX, the rule that to be related, predicate acts must have "the same or similar purposes, results, participants, victims, or *262 methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." *Id.* at 240, 109 S.Ct. at 2901.

However, the Court continued, the relatedness of racketeering activities is not sufficient to satisfy § 1962's "pattern" element. "To establish a RICO pattern it must also be shown that the predicates themselves amount to, or that they otherwise constitute a threat of, continuing racketeering activity." *Ibid.* (emphasis in original). As to continuity, the *H.J.* majority wrote:

"Continuity" is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition. See *Barticheck v. Fidelity Union Bank/First*

National State, 832 F.2d 36, 39 (CA3 1987). It is, in either case, centrally a temporal concept-and particularly so in the RICO context, where what must be continuous, RICO's predicate acts or offenses, and the relationship these predicates must bear one to another, are distinct requirements. A party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time. Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement: Congress was concerned in RICO with long-term criminal conduct. Often a RICO action will be brought before continuity can be established in this way. In such cases, liability depends on whether the threat of continuity is demonstrated. See S.Rep. No. 91-617, at 158. Id. at 241-42, 109 S.Ct. at 2902 (emphasis in original).

The civil complaint in H.J. alleged that at different times over the course of at least a six-year period telephone company officers and employees gave members of a state regulatory commission bribes in order to obtain approval of unfair and unreasonable utility rates. The Court noted plaintiff's "claim that the racketeering predicates occurred with some frequency at least over a six-year period, which may be sufficient to satisfy the continuity requirement." Id. at 250, 109 S.Ct. at 2906 (emphasis added). The case was remanded to the district court for further proceedings consistent with the Court's opinion.

In *Beauford v. Helmsley*, 865 F.2d 1386 (2d Cir.) (en banc), vacated and remanded, 492 U.S. 914, 109 S.Ct. 3236, 106 L.Ed.2d 584, original decision adhered to, 893 F.2d 1433 (2d Cir.1989), plaintiffs alleged that defendants made a number of material misrepresentations in an offering plan for the conversion of an apartment complex into condominiums. The plan was mailed to more than 800 addressees. The complaint alleged additional facts sufficient to justify an inference that defendants would in the future

be making further, equally fraudulent amendments to the offering plan. The Second Circuit held these allegations sufficient to describe a pattern of racketeering activity. The en banc majority and the three dissenting judges in *Beauford* agreed that the concepts of "relatedness" and "continuity" were crucial; and, in a departure from prior Second Circuit authority, observed that "our analysis of relatedness and continuity has shifted from the enterprise element to the pattern element." 865 F.2d at 1391. That shift presaged the Supreme Court's analysis in *H.J.*, which had not yet been decided.

In *Beauford* the Second Circuit defined Congress' goal in defining "pattern of racketeering activity" as to exclude from the reach of RICO criminal acts that were merely "isolated" or "sporadic." Consequently, Judge Kearse wrote for the en banc majority, "we must determine whether two or more acts of racketeering activity have sufficient interrelationship and whether there is sufficient continuity or threat of continuity to constitute such a pattern." Id. at 1391. Where the enterprise itself is associated with organized crime, that fact alone is sufficient to "tend to belie any notion that the racketeering acts were sporadic or isolated." *United States v. Indelicato*, 865 F.2d 1370, 1384 (2d Cir.1989) (en banc, decided with *Beauford*).

*263 When, however, there is no indication that the enterprise whose affairs are said to be conducted through racketeering acts is associated with organized crime, the nature of the enterprise does not of itself suggest that racketeering acts will continue, and proof of continuity of racketeering activity must thus be found in some factor other than the enterprise itself. *Beauford* at 1391.

The complaint in *Beauford* was legally sufficient for these reasons:

In sum, read with ordinary charity, the amended complaint alleged that on each of several occasions defendant had mailed fraudulent documents to thousands of persons and that there was reason to believe that similarly fraudulent mailings would be made over an additional period of years.

These allegations sufficed to set forth acts that cannot be deemed, as a matter of law, isolated or sporadic.
Id. at 1392.

The Supreme Court granted certiorari in *Beauford*, vacated the Second Circuit's judgment, and remanded the case to that court for further consideration in light of *H.J.* 492 U.S. 914, 109 S.Ct. 3236, 106 L.Ed.2d 584 (1989). The Second Circuit gave *Beauford* that mandated further consideration and adhered to its en banc decision. 893 F.2d 1433 (2d Cir.1989).

See also *Jacobson v. Cooper*, 882 F.2d 717, 720 (2d Cir.1989) (continuity is sufficiently alleged where related predicates extend over "a matter of years."); *Official Publications, Inc. v. Kable News Co.*, 884 F.2d 664, 666-68 (2d Cir.1989) (allegedly fraudulent acts occurred "pursuant to a longstanding contract, over a considerable period of time"; contracts in suit were dated 1974 and 1980); *Procter & Gamble v. Big Apple Industrial Buildings, Inc.*, 879 F.2d 10, 18 (2d Cir.1989) ("the complaint must provide allegations sufficient to infer that an enterprise exists, and that the acts of racketeering were neither isolated nor sporadic;" allegations sufficient which claimed "that defendants engaged in at least five separate fraudulent schemes"). In *Creative Bath Products, Inc. v. Connecticut General Life Insurance Co.*, 837 F.2d 561, 564 (2d Cir.1988), the Second Circuit followed its own precedent and anticipated *H.J.* in holding that the plaintiffs failed to allege RICO "continuity" where their case "consisted of the proposition that defendants had made three fraudulent representations in pursuit of a single short-lived goal," i.e., the sale of four insurance policies on the lives of two individuals. See also *United States v. Gelb*, 881 F.2d 1155, 1163-64 (2d Cir.1989) ("The requirement of continuity is satisfied; the schemes were conducted for about five years, and but for their discovery surely would have continued"); *Executive Photo, Inc. v. Norrell*, 765 F.Supp. 844, 846 (S.D.N.Y.1991) ("Congress was concerned in RICO with long-term criminal conduct... Plaintiff's allegations of a scheme extending over more

than two and one-half years ... fall within the scope of that concern," "citing and quoting *H.J.* at 492 U.S. 242, at 109 S.Ct. 2902).

In his opinion allowing *Polycast* to amend its complaint a fourth time, Judge Walker concluded that the allegations sufficiently pleaded a RICO claim. 728 F.Supp. at 941-49. Judge Walker considered the Supreme Court's decision in *H.J.*, and concluded that the allegations concerning "defendants' issuance of the fraudulent \$13.3 million earnings forecast, misrepresentation of *Plastics'* 1987-90 earnings forecast, and failure to disclose the cancellation of the *Northrop* contract," conduct allegedly taking place "over a period of eight and one half months" in furtherance of "a complex, multi-faceted conspiracy to defraud executed by numerous officers and stockholders," sufficiently established at the pleading stage a "pattern" of racketeering activity. Id. at 948. Adjudicating a motion to dismiss, Judge Walker read the facts alleged in the complaint in the light most favorable to the plaintiffs. *Ibid.*

[22][23] A threshold question arises as to whether Judge Walker's ruling on the motion to dismiss constitutes the law of the case, precluding a contrary ruling on the *264 present motion for summary judgment. I conclude that the law of the case doctrine does not preclude this Court's evaluation of plaintiffs' RICO claim. The policies underlying the law of the case doctrine are by no means an absolute bar to reconsideration of a prior ruling, by the district judge who made the ruling or a different judge to whom the case may have been reassigned.

"It is well established that the interlocutory orders and rulings made pre-trial by a district judge are subject to modification by the district judge at any time prior to final judgment, and may be modified to the same extent if the case is reassigned to another judge." *In re United States*, 733 F.2d 10, 13 (2d Cir.1984). "[T]here is no imperative duty to follow the earlier ruling—only the desirability that suitors shall, so far as possible, have reliable guidance how to conduct their affairs." *Dictograph Products*

Co. v. Sonotone Corp., 230 F.2d 131, 135 (2d Cir.1956) [L. Hand, J.]. Prior rulings may be re-considered in the light of now prevailing legal standards and a more complete factual record developed during discovery. See Group Health Inc. v. Blue Cross Association, 739 F.Supp. 921, 929-30 (S.D.N.Y.1990).

[24] In the case at bar, I conclude that the facts as developed during discovery do not establish the requisite element of continuity. There is no basis for a finding of open-ended continuity. The sale by Uniroyal of Plastics to Polycast was a one-shot, non-recurring deal, and the shot has been fired. It cannot be said of the conduct of the defendants at bar that, as frequently occurs in criminal cases, "by their very nature these acts threaten repetition and thereby satisfied the continuity prong of the pattern requirement." United States v. Simmons, 923 F.2d 934, 951 (2d Cir.1991).

Accordingly the element is satisfied, if at all, by the concept of closed-end continuity. Plaintiffs allege a single scheme (albeit with a number of predicate acts and participants) to defraud a single victim in a single transaction. As Judge Walker observed, a "single victim-single injury scheme" may under H.J. satisfy "the continuity prong of the pattern requirement." *Id.* at 948 n. 5. But these considerations remain pertinent to a determination of whether the defendants' conduct falls within the scope of congressional concern for "long-term criminal conduct."

Plaintiffs allege as RICO predicate acts violations of the securities laws and of the mail and wire fraud statutes. The first securities violation plaintiffs allege in the fourth amended complaint occurred on or about July 2, 1986, when the "defendants" (unspecified) communicated to Polycast false earnings forecasts for Plastics for 1987, 1988, 1989 and 1990. ¶ 166. The second securities predicate act is alleged to be defendants' failure to advise Polycast that Northrop had cancelled its contract with Plastics. ¶ 167. Northrop cancelled the Plastics contract in September 1986. ¶ 168. The third securities law predicate act alleged relates to the September 5, 1986 representation of the \$13.3

million 1986 earnings estimate, an estimate repeated in the letter agreement dated September 23, 1986. ¶¶ 168, 169. The fourth securities law violation alleged as a predicate act is the selling of Plastics' shares to plaintiffs on October 31, 1986. ¶ 170. Lastly, plaintiffs allege as securities law violations by defendants the issuance, placing and sale by plaintiffs of debt securities in reliance upon defendants' misrepresentations. ¶ 171.

As for mail and wire fraud, the predicate acts alleged begin with a telephone conversation on February 13, 1986, between Dubilier and Castaldi, Alvine, and Nevins concerning the inclusion of expense information about Plastics in the Plastics Offering Memorandum. ¶¶ 174, 176. The last mail or wire fraud predicate act alleged occurred on September 18, 1989, when Kirrane sent a copy to Castaldi of a facsimile transmission Kirrane had received on September 16, 1986 from Nevins with respect to 1986 Plastics' earnings forecast, whose contents are alleged to be fraudulent. ¶¶ 120, 121.

When Judge Walker considered the legal sufficiency of plaintiffs' RICO claim in their proposed amended pleading, he rejected *265 plaintiffs' effort to allege earlier earnings estimates as predicate acts. It is useful to quote Judge Walker's reasoning on that point:

Polycast's allegations of fraud in the revised earnings forecasts do not satisfy these requirements and are deficient as separate section 10(b) claims. Polycast states in its complaint that it relied on the final \$13.3 million forecast in entering its final, successful bid for Plastics. Proposed Amended Complaint at ¶ 122. Plaintiffs cannot maintain that they ultimately relied on both the earlier, higher estimates and the final, reduced forecast simultaneously. While plaintiffs may have relied on the earlier forecasts in deciding to pursue the bidding process with Uniroyal, this reliance is not actionable under section 10(b) which gives private plaintiffs a right of action only if that reliance culminates in an actual sale or purchase of securities. Although Polycast did ultimately purchase securities, they

purchased in reliance on the \$13.3 million forecast, not the earlier projections. Where a claim of fraud under section 10(b) is deficient for failure to adequately allege causation, it cannot serve as a predicate act for a civil RICO claim.

728 F.Supp. at 941-42.

The temporal boundaries in plaintiffs' amended pleading following Judge Walker's opinion, their fourth amended complaint, reflect the limitations properly imposed by the judge's analysis.

In their brief on the present motion, plaintiffs now argue that "[d]iscovery has proven that defendants' fraudulent scheme actually lasted well over a year." Brief at 93. The scheme began, according to plaintiffs' present contention, in October 1985, when Uniroyal and Plastics prepared a budget, also known as the "profit plan", for Plastics. Brief at 7. Plaintiffs say that "Uniroyal dictated a forecast figure of \$24.9 million" for inclusion in that profit plan, which in turn became "the basis for the \$24 million forecast in the offering memorandum." *Id.* at 94. Plaintiffs cite deposition testimony from Weber and Kirrane to the effect that they believed the \$24.9 million forecast was overstated when included in the profit plan.

Plaintiffs further argue in their present brief that the fraudulent scheme continued well after the closing. Specifically, plaintiffs say that on January 30, February 13, March 11, and March 24, 1987 "defendants" (unspecified) "mailed letters to plaintiffs demanding payments they alleged were due under the Purchase Agreement." *Id.* at 95. These mailings, plaintiffs say, constitute separate acts of mail fraud which could serve as predicate acts under RICO.

Judge Walker's opinion granting plaintiffs leave to file a fourth amended complaint asserting a RICO claim was dated November 21, 1989. Plaintiffs say that in a letter dated June 30, 1989, their counsel advised Judge Walker that plaintiffs could plead these additional predicate acts if, "in light of H.J.,

the allegations of the complaint were not sufficient to make out a pattern under RICO." Plaintiffs say they never pleaded those additional predicate acts because Judge Walker held that the allegations in the proposed pleading were sufficient to fulfill the pattern requirement. Nevertheless, plaintiffs argue on the present motion, these acts "may properly be considered as proof in deciding whether plaintiffs have met the RICO pattern requirement," citing *United States v. Alkins*, 925 F.2d 541 (2d Cir.1991). [FN1]

FN1. In *Alkins*, a criminal case, the court of appeals considered testimony of conduct beyond "the acts charged as predicates in the indictment" in concluding that open-ended continuity had been proven: "The evidence indicates that this activity would have continued but for its discovery." 925 F.2d at 552-53. There is no comparable evidence in the case at bar.

Lastly, in an effort to extend the life of the alleged scheme, plaintiffs say in their brief at 96:

During the time that defendants committed these unpleaded predicate acts, their fraudulent scheme was kept alive by defendant Alfred Weber, who stayed on as President of Plastics after the closing and eventually entered into an employment *266 contract with Plastics. Unbeknownst to Polycast, during the months following the closing, Weber continued to supply Polycast with fraudulent forecasts. He also concealed the fact that the forecasts that had been given to Polycast by Uniroyal were fraudulent and that he had personally participated in the fraud.

Weber and the other conspirators have kept close ties since the closing. Defendants Alvine, Nevins and Weber are in business together at Charter Power, a company they set up. Defendant Flannery now works for defendants Rice and Dubilier at C & D. Certain of the defendants remain together as trustees of the Liquidating Trust. Thus, the RICO enterprise has not disbanded.

I will assume for this discussion that plaintiffs may offer a brief as the functional equivalent of moving under Rule 15 for leave

to file a fifth amended complaint for the purpose of alleging additional predicate acts. Considering those allegations on their merits, they do nothing to extend the duration of the fraudulent scheme, as alleged in the fourth amended complaint, or as revealed by the proof (viewing the latter in the light most favorable to plaintiffs).

As for the asserted earlier starting date of the scheme, plaintiffs are foreclosed by Judge Walker's prior analysis from relying upon October 1985 events resulting in the \$24 million Plastics earning forecast first appearing in the profit plan and then in the offering memorandum. Plaintiffs argued before Judge Walker that the C & D defendants' role in the deception "began in December 1985 when they began preparing the allegedly fraudulent offering memorandum upon which Polycast relied in purchasing Plastics and continued until the sale of Plastics closed on October 31, 1986." 728 F.Supp. at 933. But Judge Walker held that the earlier projections could not form the basis for a claim of fraud under section 10(b), and consequently could not serve as predicate acts for a RICO claim. I adopt Judge Walker's reasoning on that point, not because of the law of the case, but because it is manifestly correct. The same result obtains with respect to mail or wire communications generated in the course of producing those earlier projections.

Plaintiffs' efforts to extend the duration of the alleged scheme after the closing are equally unavailing. The four letters Uniroyal sent to Polycast in January, February and March 1987 related to Polycast's obligation, disputed by the parties, to pay taxes under the SPA for the first ten months of 1986. Such correspondence, while generated by the purchase, contained no fraudulent statements or omissions resulting in the purchase, which had closed on October 31, 1986. These subsequent mailings, innocent in themselves and only tangentially related to the underlying and previously accomplished fraud, play no part in continuity analysis. See *Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1414, 1417-18 (3d Cir.1991) ("But the

continuity test requires us to look beyond the mailings and examine the underlying scheme or artifice.... [A] defendant's deceptive actions are more important to the continuity analysis than otherwise innocent mailings. Thus, the relevant criminal conduct occurred during the initial eight month period, when the misrepresentations were made."); *United States Textiles, Inc. v. Anheuser-Busch Companies, Inc.*, 911 F.2d 1261, 1268 (7th Cir.1990) (where "each allegation of mail fraud and wire fraud apparently relates back to the extortion allegedly achieved by the December, 1980 contract," subsequent mail and wire transactions "and the length of time over which those transactions occurred was pure happenstance in light of the underlying concern which is the 'continuity' of the criminal activity.").

Nor do the post-closing activities of Weber and certain other defendants serve to extend the duration of the scheme. Plaintiffs say of Weber that for a time after the closing he continued as president of Plastics, continued to issue fraudulent forecasts, and "concealed" (that is, did not admit) the falsity of the prior earnings forecasts and the part he played in them. Plaintiffs also say that Alvine, Nevins and Weber are now in business together, Flannery works at C & D, and certain of the *267 defendants remain as trustees of the Liquidating Trust. Thus, plaintiffs say ominously, "the RICO enterprise has not disbanded."

As for Weber's post-closing activities as president of Plastics, plaintiffs do not say whether he "continued to supply Polycast with fraudulent forecasts" by means of mail or wire communications, so as to lay the basis for further predicate acts in considering continuity. By definition, Weber's failure to say anything about prior fraud does not implicate the mail fraud and wire fraud statutes, which deal with communications, not silence. Assuming for this discussion that Weber mailed or wired to Polycast post-closing fraudulent forecasts of Plastics' earnings, there is authority in criminal cases considering the statute of limitations for the proposition that attempts to "lull" the

defrauded party into believing that no fraud has occurred fall within the statutes prohibiting mail or wire fraud. See *United States v. Lane*, 474 U.S. 438, 451-52, 106 S.Ct. 725, 733, 88 L.Ed.2d 814 (1986); *United States v. Elkin*, 731 F.2d 1005, 1008 (2d Cir.), cert. denied, 469 U.S. 822, 105 S.Ct. 97, 83 L.Ed.2d 43 (1984) (a fraudulent verification letter sent to the Defense Department some two years after the defendant had received improperly obtained money from the government was a part of the scheme to defraud the government); *United States v. Rubin*, 609 F.2d 51 (2d Cir.1979), aff'd., 449 U.S. 424, 101 S.Ct. 698, 66 L.Ed.2d 633 (1981). But even assuming that plaintiffs could somehow take advantage of this line of authority, Polycast had learned enough of the alleged fraud to give Uniroyal a written notice of claim under the SPA on December 10, 1986. See discussion of plaintiffs' seventh and eighth claims, *infra*. That notice of claim stated that Plastics' actual earnings in 1986 would be "materially less" than the \$13,300,000 projected on September 23, 1986, as the result of a number of specified factors "known by a Responsible Officer [of Uniroyal] and wilfully withheld from [Polycast]." Thus any "lulling" effect of Weber's post-closing conduct had been dissipated not later than December 10, 1986, and the duration of the fraudulent scheme must be measured in months, not years.

If the reference in plaintiffs' brief to the present associations among certain defendants is intended to suggest the threat of repetition of the alleged scheme, thereby satisfying open-ended continuity, I find the suggestion to be entirely without substance. There is no suggestion that these defendants are proposing to sell other Uniroyal divisions to other purchasers in a comparably fraudulent manner. Nor can these defendants be said to have formed a "long-term association that exists for criminal purposes." H.J. at 242-243, 109 S.Ct. at 2902.

In consequence, the scheme of which plaintiffs may complain for RICO purposes began in February 1986 and was brought to a successful conclusion on October 31, 1986, or at the very latest on December 10, 1986. The

scheme was intended to achieve, and did achieve, a single contract: the SPA by which plaintiffs purchased Plastics from Uniroyal.

Such a transaction, extending over a period of such limited duration, does not satisfy the continuity requirement of a RICO claim. That would be true even if, contrary to my conclusions just expressed, the duration of the scheme at bar had a duration somewhat in excess of one year, rather than eight months. I agree with the analysis of the Seventh Circuit in *United States Textiles*, *supra*, which after discussing H.J. said at 1269:

If the concern is "continuity", however, and the price for that "continuity" is treble damages, costs and reasonable attorneys fees, see 18 U.S.C. § 1964, a natural and common sense approach to the pattern element of RICO would instruct that identical economic injuries suffered over the course of two years stemming from a single contract were not the type of injuries which Congress intended to compensate via the civil provisions of RICO.

See also *Kehr Packages*, *supra* at 1418 ("an eight-month period of fraudulent activity directed at a single entity does not constitute a pattern, absent a threat of *268 future criminal acts."); *Continental Realty Corporation v. J.C. Penney Company*, 729 F.Supp. 1452, 1454-1455 (S.D.N.Y.1990) ("long-term criminal conduct" requirement of H.J. not satisfied by allegations that defendants "committed several acts of mail and wire fraud over a period of more than one year" in furtherance of a scheme "narrowly directed toward a single allegedly fraudulent goal."); *Airlines Reporting Corp. v. Aero Voyagers, Inc.*, 721 F.Supp. 579, 585 (S.D.N.Y.1989) (repeated acts of mail fraud occurring "over thirteen months" insufficient to establish closed-end continuity). See also as the unreported district court cases cited in defendants' reply brief at 42.

The case at bar falls squarely within the holding in H.J. that "[p]redicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy [the continuity] requirement: Congress

was concerned in RICO with long-term criminal conduct." 492 U.S. at 242, 109 S.Ct. at 2902.

Plaintiffs' RICO claim will be dismissed.

Negligent Misrepresentation Claim

Plaintiffs' sixth claim, against all defendants, charges them with a failure to exercise reasonable care in making representations to plaintiffs concerning the financial status, earnings potential, and operating condition of Plastics. In aid of that claim plaintiffs allege that the defendants were under a duty to exercise reasonable care in making those representations which arose from "their relationship of trust and reliance with plaintiffs," Complaint, ¶ 192. The individual defendants Elton, Dubilier, Flannery, Graham, and Rice are sued only in their capacities as trustees of the Liquidating Trust for the negligent misrepresentations of Uniroyal and CDU Holding, Inc.

[25][26][27] This claim is governed by New York law. The law of negligent misrepresentation, as declared by New York courts, recognizes that "generally there is no liability for words negligently spoken" but that "there is an exception when the parties' relationship suggests a closer degree of trust and reliance than that of the ordinary buyer and seller." *American Protein Corp. v. AB Volvo*, 844 F.2d 56, 63-64 (2d Cir.), cert. denied 488 U.S. 852, 109 S.Ct. 136, 102 L.Ed.2d 109 (1988) (citing and quoting *Coolite Corp. v. American Cyanamid Co.*, 52 A.D.2d 486, 384 N.Y.S.2d 808, 811 (1st Dept.1976)). To be liable for negligent misrepresentation, the speaker must be "bound by some relation of duty, arising out of contract or otherwise." *White v. Guarante*, 43 N.Y.2d 356, 363, 401 N.Y.S.2d 474, 478, 372 N.E.2d 315, 319 (1977). By definition, the elements of fraud need not be proven to establish a claim for negligent misrepresentation. However, the existence of a duty to exercise reasonable care in making representations depends in turn upon a special relationship between the parties. "In the absence of fraud and in the absence of a special relationship giving rise to

a duty, it is up to the party hearing words he deems important to make them part of the contract." *American Protein Corp.* at 64.

An early articulation of the tort of negligent misrepresentation in New York appears in *International Products Co. v. Erie R.R. Co.*, 244 N.Y. 331, 155 N.E. 662, cert. denied, 275 U.S. 527, 48 S.Ct. 20, 72 L.Ed. 408 (1927). In *International Products* the New York Court of Appeals said that to state a claim for negligent misrepresentation, in addition to the other elements of the tort,

the relationship of the parties, arising out of contract or otherwise, must be such that in morals and good conscience the one has the right to rely upon the other for information, and the other giving the information owes a duty to give it with care [citations omitted]. An inquiry made of a stranger is one thing; of a person with whom the inquirer has entered or is about to enter into a contract concerning the goods which are or are to be its subject is another.... When such a relationship as we have referred to exists may not be precisely defined. All that may be stated is the general rule.

244 N.Y. at 338, 155 N.E. at 664 (emphasis added).

[28] *269 In the case at bar, defendants move for summary judgment dismissing plaintiffs' negligent misrepresentation claim on two grounds. First, defendants say that no special relationship of trust and reliance existed between Polycast and Uniroyal. Second, defendants say that the provisions of the SPA "preclude recovery for extra-contractual representations of any kind," Main Brief at 59.

At the pleading stage, defendants made both these arguments to Judge Walker, who rejected them both in his August 25, 1988 opinion reported in the CCH service. Defendants make no reference to that decision in their lengthy main brief in support of the present motion. That omission left it to plaintiffs to cite and quote from Judge Walker's opinion in opposing defendants' motion for summary judgment. Defendants then had the last word on the subject in their

reply brief, having deprived plaintiffs of the opportunity to address defendants' contentions in the summary judgment context by leaving Judge Walker's decision out of their main brief. While defendants' views of Judge Walker's opinion, first expressed in the reply brief, presumably came as no surprise to plaintiffs, nevertheless this tactic on the part of defendants' counsel smacks of sharp practice and I do not appreciate it.

On the special relationship issue, Judge Walker said during a careful review of the New York cases that he was "persuaded that Polycast enjoyed a relationship with defendants that was closer than that of buyer and seller." *Id.* at 90, 697. Of course that cannot be regarded as a finding of fact; Judge Walker was dealing only with the legal sufficiency of the proposed amended pleading, a distinction which the judge made clear later in his opinion when he wrote that "the Court, at the pleading stage, rejects defendants' argument that the claim must be dismissed because the parties enjoyed no special relationship." *Id.* at 90, 698-99.

The Coolite case stated that the requisite closer degree of trust and reliance is not found between "the ordinary buyer and seller," a choice of words suggesting that there may be extraordinary circumstances, even in the context of a negotiated contract for purchase and sale. The International Products case made that clear over 60 years ago; the inquiry is intensely fact specific. Judge Walker characterized as "a case with strikingly similar facts" Judge Keenan's decision in *Delta Holdings, Inc. v. National Distillers and Chemical Corp.*, [1988-1989 Transfer Binder] Fed.Sec.L.Rep. (CCH) ¶ 93, 700 at 98, 221, 1988 WL 36330 (S.D.N.Y. April 8, 1988), which involved a negligent misrepresentation claim by a plaintiff who had purchased defendant's subsidiary and thereafter contended that the subsidiary's net worth was much less than the figure its balance sheet carried at the time the deal was struck. Judge Keenan denied a motion to dismiss the claim for negligent misrepresentation, notwithstanding that the underlying stock purchase agreement was

entered into after months of negotiation and investigation by outside experts. Judge Keenan did not regard the fact that the parties had entered into a negotiated commercial relationship as dispositive. He relied on the language I have quoted from *International Products* to conclude that "such a black-letter rule is inappropriate. The 'special relationship' concept must be adaptable to numerous contexts, and turns on the facts of each case." *Id.* at 98, 228.

Not surprisingly, the New York cases generally hold that "[t]he issue of whether a 'special relationship' exists sufficient to make out a cause of action for negligent representation should ... be left to the finder of fact." *AFA Protective Systems v. American Telephone and Telegraph Co.*, 57 N.Y.2d 912, 914, 456 N.Y.S.2d 757, 758, 442 N.E.2d 1268, 1269 (1982) (in action by central station alarm company to recover damages for alleged misrepresentations by suppliers of private telephone lines essential to company's security alarms systems, summary judgment properly denied on issue of whether a "special relationship" existed between the parties). See also *Hutchins v. Utica Mutual Insurance Co.*, 107 A.D.2d 871, 484 N.Y.S.2d 686 (3rd Dept.1985) (whether "special relationship" existed between claimants and an insurance *270 adjuster sufficient to impose a duty upon the adjuster to provide correct information as to applicable law gave rise to question of fact precluding summary judgment); *Raymond Corp. v. Coopers & Lybrand*, 105 A.D.2d 926, 482 N.Y.S.2d 377, 380 (3rd Dept.1984) (Special Term's grant of summary judgment dismissing third-party claim for negligent misrepresentation against an individual who stated that corporation's financial records were accurate reversed; "[t]he existence of such a 'special relationship' presents a question of fact, not to be resolved at this preliminary stage of the proceedings"). *Hutchins* and *Raymond* both cite and follow *AFA Protective Systems*. [FN2]

FN2. In *Mallis v. Bankers Trust Co.*, 615 F.2d 68, 81 n. 12 (2d Cir.1980), the Second Circuit, undertaking to construe New York law, said: "Whether a relationship exists between the parties

that will bring the negligent misrepresentation doctrine into play ... is generally treated as a question of law for the courts." The court of appeals cited to a comment in the 1974 edition of N.Y. Pattern Jury Instructions. AFA Protective Systems, which the New York Court of Appeals decided in 1982 and its progeny clearly establish a contrary view.

In his August 25, 1988 opinion, after reviewing a number of New York cases, Judge Walker said:

Polycast has alleged that during an extended negotiation period, defendants repeatedly vouched for their projections of Plastics' earnings, knowing that such earnings were critical to Polycast's willingness to consummate the transaction. Indeed, in August 1986, Polycast went so far as to withdraw from the Purchase agreement precisely because earnings expectations were lowered, only to agree to the deal again upon defendant's reassurances that this time earnings projection was accurate. Further, Polycast has alleged that defendants had superior information about Plastics throughout the negotiation period, and that it only gained complete access to the books after the deal was consummated. Additionally, in order to effect the transaction, Polycast formed a new corporation capitalized with \$35 million of stock and \$95 million in debt. From these facts, a relationship closer than the ordinary buyer-seller relationship can be inferred. *Id.* at 90,698.

I agree with Judge Walker that if such allegations are sustained by the evidence, the jury would be permitted in law to find the existence of that special relationship necessary to a claim for negligent misrepresentation. The question on defendants' present motion for summary judgment is whether the evidence adduced on discovery shows that there is a genuine issue requiring trial as to the material fact of the existence *vel non.* of the special relationship. It bears repeating that I must resolve any ambiguities in the evidence against the defendants, as well as drawing any reasonable inferences against them. Having performed those exercises, I

conclude without difficulty that the nature of the relationship between Polycast and the defendants presents an issue requiring trial. As Judge Walker recognized, the accuracy of Plastics' earnings projections lies at the heart of the case. I am mindful of defendants' argument that the special relationship and the reliance Polycast seeks to derive from that relationship are inconsistent with the amount of due diligence Polycast performed prior to the closing, with the assistance of experts of various kinds, shapes and sizes. This is a perfectly respectable argument but it is for the jury. The record also contains declarations of witnesses, admissible against Polycast, which could be read to suggest that the special relationship did not exist and Polycast did not place upon the earnings projections that reliance which a viable claim for negligent misrepresentation requires. Again, these arguments demonstrate triable issues of fact, but do not entitle the defendants to a summary disposition.

Alternatively, defendants claim that provisions in the SPA preclude any claim for negligent misrepresentation. As I noted during discussion during the section 12(2) claim, defendants made that argument based upon the general merger clause, Section 10.12, to Judge Walker, who rejected it in his August 25, 1988 opinion at 90,699. Judge Walker considered the SPA and the *271 other documents which together form the parties' agreement. He concluded that the 1986 earnings projection for Plastics formed a part of the parties' agreement and consequently was not affected by the general merger clause, whose function was to bar reliance upon extra-contractual commitments of any kind. Unlike plaintiff's RICO claim, where between defendants' motion to dismiss and their motion for summary judgment the law evolved and the facts were developed during discovery, the purchase documents which were before Judge Walker are the same which are before me, and there have been no pertinent developments in the law. I decline defendants' invitation to read the contract differently than did Judge Walker. I think he was right. Nor does the modification clause, SPA Section 10.2, which states that the

agreement that "shall not be amended or modified except by a writing duly executed" by the parties, add anything of substance to defendants' argument.

Defendants' motion for summary judgment dismissing plaintiff's negligent misrepresentation claim will accordingly be denied.

Contract Claims

Polycast's seventh and eighth claims sound in contract. The SPA is the contract governing the parties' rights and obligations. The parties negotiated that contract. They exchanged drafts. Polycast's drafts expanded its rights and Uniroyal's obligations. Uniroyal's drafts contracted them. The SPA evolved. The parties executed it.

The seventh claim alleges breaches of warranties Uniroyal gave in the SPA. In the eighth claim Polycast seeks indemnity under the SPA for the alleged breaches of warranty.

Article 3 of the SPA, captioned "Representations and Warranties of Seller," contains the warranties Polycast says Uniroyal breached. § 3.9 provides:

Absence of Undisclosed Liabilities. Except for liabilities reflected or reserved against in the Financial Statements, reflected in the Letter, or incurred in the ordinary course of business subsequent to the Balance Sheet Date, the Company and its Subsidiaries do not have any liabilities or obligations of any nature, whether absolute, accrued, contingent or otherwise, which liabilities would be material to the business, operations or financial condition of the Company and the Subsidiaries taken as a whole.

The "Financial Statements" referred to in this section include Plastics' balance sheet as of December 29, 1985. The "Letter" is a Disclosure Letter furnished by Uniroyal which accompanied the SPA.

Section 3.10 provides in pertinent part:
Absence of Certain Changes or Events.

Since the Balance Sheet Date, all operations and business of the Company and each Subsidiary have been conducted in all respects only in the ordinary course, and there has not been: (a) any material adverse change in the business, operations, properties, financial condition or prospects of the Company and the Subsidiaries taken as a whole; ...

Section 3.19 provides:

Completeness of Disclosure. No representation or warranty by Seller in this Agreement contains or on the date of the Closing will contain any untrue statement of material fact or omits or on the Closing date will omit to state a material fact necessary to make the statements made not misleading. (emphasis added).

The parties agree that the effect of the italicized language is to "bring forward" the Section 3.9 and 3.10 warranties to the closing. The closing occurred on October 31, 1986.

Article 8 is captioned "Indemnification." Section 8.1 provides in its entirety:

Non-Survival of Representations and Warranties. All representations and warranties contained in Article 3 and 4 or made pursuant thereto shall not survive but shall expire upon the Closing and be of no further force or effect thereafter and subsequent to the Closing, no party shall have any liability to any other party with respect thereto, except that (a) the representations and warranties in the *272 last sentence of Section 3.2(c), in the second sentence of Section 3.7, and in the first three sentences of Section 3.16 shall survive until December 31, 1987; and (b) the representations and warranties in Section 3.9 and 3.10, in the first sentence of Section 3.12 and in Section 3.14 shall survive until December 10, 1986; provided, however, that Buyer shall not be entitled to be indemnified under Section 8.2 for a breach of any representation or warranty in Section 3.9, 3.10 (except for 3.10(b)), 3.12 or 3.14 unless any officer or employee of Seller or the Company designated as a Responsible Officer in the Letter had knowledge of such

breach as of the Closing Date and willfully withheld such knowledge from Buyer.

Section 8.2(a) obligates Uniroyal as Seller: to indemnify and hold harmless the Buyer Indemnitee against and in respect of any and all

(i) claim, suits, actions, proceedings (formal and informal), investigations, judgments, deficiencies, damages, settlement, liabilities, and legal and other expenses (including legal fees and expenses of attorneys chosen by the Buyer Indemnitee) as and when incurred arising out of or based upon (A) subject to Section 8.1, any breach of any representation, warranty, covenant, or agreement of Seller or the Company contained in this Agreement ...

Section 8.2(a)(ii) provides for indemnity by the Seller in respect of claims by third parties. Section 8.2(b) sets forth the indemnity obligations of Polycast as Buyer.

Section 8.2(c) provides in pertinent part: Defense of Claims. No right to indemnification under this Section 8.2 shall be available to any Buyer Indemnitee or Seller Indemnitee (an "indemnified Party") unless such Indemnified Party shall have given to a person or persons obligated to provide indemnification to such Indemnified Party (an "Indemnitor") a notice (a "Claim Notice") describing in reasonable detail the facts giving rise to any claim for indemnification hereunder within 60 days after receipt of knowledge of the facts upon which such claim is based (but the failure to so notify shall not relieve an Indemnitor from any liability he may have other than pursuant to this Section 8.2).

On December 10, 1986 Polycast gave Uniroyal written claim notice under Section 8.2(c). Polycast claimed breaches of the warranties contained in Sections 3.10 and 3.9.

As to Section 3.10, Polycast's claim notice said in part:

Seller states in the September 23, 1986 amendment included in the Agreement that actual earnings of the Company since

December 29, 1985 through August 31, 1986 and projected earnings from September 1, 1986 through December 31, 1986 are currently estimated to aggregate approximately \$13,300,000.

Actual earnings for the Company in 1986 will be materially less than \$13,300,000. In addition, projected earnings for the Company in 1987 are materially less than the projections furnished by Seller to Buyer.

Polycast went on to ascribe these earnings reductions to a number of commercial factors, withheld from it by a responsible officer of Uniroyal. Polycast contends that these earnings reductions constitute a "material adverse change" within the ambit of Section 3.10.

As to Section 3.9, Polycast's claim notice said that there existed "material liabilities" not reflected or reserved against in the financial statements. Polycast listed those liabilities in Exhibit A to the claim notice. Exhibit A stated that Polycast's review of 1986 transactions revealed understated expenses and accruals at December 29, 1985 totalling \$10,573,513. Exhibit A gave an itemized list. However, plaintiffs' brief on this motion at 122 abandons their warranty and indemnity claims with respect to the expenses and accruals listed on Exhibit A to the claim letter. Plaintiffs press warranty and indemnity claims for undisclosed and unreserved liabilities or obligations allegedly revealed by a subsequent audit of Plastics' October 31, 1986 financial statements.

***273** To these warranty and indemnity claims, Uniroyal in its main and reply briefs makes several alternative arguments (not necessarily in the following order):

1. The SPA provides at least implicitly that after the closing, indemnification would be the exclusive remedy for breaches of warranty. Accordingly no "direct" breach of warranty action is allowed and the seventh claim must be dismissed.

2. Polycast's claim notice of December 10, 1986 does not give notice of the warranty and

indemnity claims plaintiffs now assert.

3. Plaintiffs' direct claims for Section 3.9 and 3.10 breaches of warranty existing at the time of execution of the SPA are time barred because plaintiffs did not commence suit on them on or before December 10, 1986. (In making that argument, Uniroyal concedes that claims for indemnification arising out of Sections 3.9 and 3.10 breaches existing at the time of the SPA's execution were preserved by the December 10, 1986 claim letter).

4. Direct claims or indemnity claims relating to material liabilities (Section 3.9) or adverse changes (Section 3.10), arising after the execution of the SPA and known as of the closing, are time barred because such claims are governed by Section 3.19, and plaintiffs neither cancelled the contract nor sued upon the claims prior to the closing date of October 31, 1986.

5. In any event, the claims plaintiffs now assert, having been defined and refined by the discovery and motion process, do not fall within the Sections 3.9 and 3.10 warranties.

Uniroyal's first point is well taken, but makes no practical difference. While contract and tort law frequently speak of "indemnification" in the context of third-party liability, the SPA uses the word in a broader sense. Section 8.2(a)(ii) creates Uniroyal's obligation to indemnify Polycast in respect of "claims ... of persons not a party to this Agreement ..." Section 8.2(a)(i) imposes that obligation in respect of "claims ... arising out of or based upon ... any breach of any ... warranty ... of Seller of the Company contained in this Agreement ..." Thus we see that "Indemnity" is the word the parties applied to, inter alia, claims for breach of warranty. The seventh and eighth claims pleaded in the complaint are accordingly duplicitious. The distinction is technical, not substantive.

[29] The timeliness of plaintiff's warranty and indemnity claims turns upon the SPA's provisions for survival of the warranties.

Section 8.1 begins with unambiguous intimations of mortality: "[a]ll representations and warranties contained in Articles [] shall not survive, but shall expire on the Closing and be of no further force or effect thereafter and subsequent to the Closing, no party shall have any liability to any other party with respect thereto ..." That language has about it the terrible finality and clarity of the Last Trump: except that, as lawyers will, they inserted the word "except" after the language and then drafted 14 more lines of text. The language pertinent to the present issue provides that the warranties in Sections 3.9 and 3.10 "shall survive until December 10, 1986," with the proviso that Buyer shall not be indemnified under Section 8.2 for breach of Sections 3.9 or 3.10 warranties unless a responsible officer of Uniroyal or Plastics "had knowledge of such breach as of the Closing Date and willfully withheld such knowledge from Buyer." In other words, the last lines of Section 8.1 grant warranty claims a stay of execution from the closing date to December 10, 1986.

Section 8(c) conditions the Buyer's right to indemnity under Section 8.2 upon the giving of a claim notice. Polycast gave Uniroyal a claim notice on December 10, 1986.

As for the warranty provisions themselves, I agree with Uniroyal that Sections 3.9 and 3.10 speak of conditions existing at the time of execution of the SPA. That establishes the *raison d'être* of Section 3.19. It "brings forward" the Sections 3.9 and 3.10 warranties to the closing date. If Sections 3.9 and 3.10 extended by their own terms to the closing date, Sections 3.19 would have no office to perform.

*274 At this point in its argument Uniroyal cries "Gotcha!" Because Section 3.19, in contrast to Section 8.1, contains no provision for a stay of execution beyond the closing date, warranty claims in respect of conditions arising after execution of the SPA must be sued upon (not just asserted) on or before the closing date. So runs Uniroyal's argument.

The argument is too clever by half, and I

reject it. As Uniroyal points out, albeit for a different purpose, Article 8 contains the only provisions in the SPA dealing with the Buyer's remedies for breaches of warranty by the Seller. Giving the SPA a symmetrical reading which gives effect to all its provisions, the following scheme emerges. The warranties of Section 3.9 and 3.10 are brought forward to the closing date by Section 3.19. Accordingly those warranties were in full force and effect on the closing date, and extended to any conduct or circumstances arising between the execution date and the closing date. With those warranties firmly in place on the closing date, Section 8.1 goes on to provide that they survive until December 10, 1986. There was no need for Section 8.1 to refer to Section 3.19 in granting a stay of execution to the warranties until December 10, 1986. Section 3.19 had a limited office to perform. It brought the warranties forward to the closing date. At that point in time, Section 8.1 came into play and carried the warranties further forward to December 10, 1986. On that date Polycast gave the claim notice required by Section 8.2(c). Any other reading is strained, hypertechnical, and cannot be regarded as expressing the intent of the parties.

Uniroyal refers repeatedly in its brief to the "statute of limitations" expressed in the contract for asserting claims, but the SPA contains no explicit limitation upon the time within which suit must be filed. The limitation upon which Uniroyal relies arises, if at all, only from an interpretation of the contract which I reject for the reasons stated.

[30] Accordingly the question becomes whether Polycast's December 10, 1986 letter embraces the claims which plaintiff now make. Uniroyal says it does not because a series of fraudulently exaggerated earnings forecasts (the "core" of plaintiffs' case) cannot be characterized as "undisclosed liabilities" under Section 3.9 or "material adverse changes" arising in the "ordinary course" of the business under Section 3.10. There is a surface appeal to this argument, but it does not justify summary dismissal of plaintiffs' contract claims. Summary judgment is not appropriate on plaintiffs' fraud claims, for the

reasons stated supra; but plaintiffs should not suffer summary dismissal of their contract claims and be required to go to trial solely on tort theories. Contract and tort theories may interrelate. For example, defendants profess that they did not act fraudulently. At trial they may seek to justify the repeatedly lowered earnings projections by material adverse changes in the business which Uniroyal and Plastics did not disclose to Polycast, arguably in breach of the warranty. The Northrop contract is a case in point. It is common ground that Northrop cancelled its contract with Plastics prior to the closing, and that Uniroyal and Plastics did not tell Polycast of the cancellation. Arguably that cancellation constituted a "material adverse change in the business" of Plastics, as that phrase is used in Section 3.10. Certainly the appalled and horrified language with which Uniroyal's top officers described the possibility of a Northrop cancellation would support that argument. Uniroyal's position on this motion is that the loss of the Northrop contract was a blessing in disguise because it cost Plastics money. The briefs contain conflicting economic analyses of Byzantine complexity. Whether Plastics was making money or losing money on the Northrop contract poses a fact issue not appropriate for summary judgment. Depending on how the trial proof comes in, plaintiffs' contract claims may be subject to motion practice under Rule 50. But that is for a later day.

The conclusion I reach is that neither the seventh nor the eighth claims will be dismissed on summary judgment. The duplicitous nature of these contract claims can be *275 dealt with under Rule 50 or in appropriate jury instructions.

Damages Issues

Defendants include in their motion two arguments which in effect ask for rulings in limine limiting plaintiffs' damages in an event of a finding of liability.

[31] First, defendants challenge Polycast's claim that it is entitled to recover as consequential damages the interest it has

been paying on increasing rate notes ("IRNs") that it issued to finance a portion of the purchase price of Plastics. Second, defendants contend that plaintiffs' claim for punitive damages should be stricken.

The challenged item of consequential damages is embraced by the allegations in ¶ 4 of the complaint and in ¶ A of the prayers for relief, which begin on page 74 of the pleading. I gather from these portions of the pleading that plaintiffs seek to recover these particular damages under their first through third claims, which arise under the federal securities laws, and on the fifth claim, which is founded upon common law fraud.

The same test applies to both classes of fraud claims. Judge Friendly made that clear in *Zeller v. Bogue Electric Manufacturing Corp.*, 476 F.2d 795, 803 (2d Cir.), cert. denied, 414 U.S. 908, 94 S.Ct. 217, 38 L.Ed.2d 146 (1973), where he wrote: "A plaintiff seeking consequential damages for fraud, at common law or under federal securities legislation, must establish the causal nexus with a good deal of certainty." At that point a footnote was dropped from the text which said: "We would see nothing wrong in a principle varying the required degree of certainty somewhat inversely with the depth of the fraud." Judge Friendly went on to say in text that "[s]ince consequential damages are an addition to or in lieu of what would ordinarily constitute a fair recovery," it was not appropriate to apply those "liberal principles" which courts use when "some liberality is required to enable an injured plaintiff to recover anything."

Polycast financed the purchase of Plastics through the issuance of debt securities. \$75 million of the debt securities issued took the form of IRNs whose interest rates increased quarterly. Polycast says that it engaged in that type of financing only because it contemplated refinancing the IRNs with bank financing soon after the closing. However, as the extent of Plastics' 1986 earnings shortfall began to be known to Polycast, and in turn disclosed by Polycast to the banks, the banks lost interest and Polycast was unable to obtain

refinancing for the IRNs. There is evidence in the record from which the jury could find these assertions to be true.

In two securities fraud cases, the Second Circuit has rejected claims for consequential damages based upon interest charges incurred by the purchaser of securities. The first of these is *Chris-Craft Industries, Inc. v. Piper Aircraft Corp.*, 516 F.2d 172 (2d Cir.1975), rev'd on other grounds, 430 U.S. 1, 97 S.Ct. 926, 51 L.Ed.2d 124 (1977). *Chris-Craft* involved a battle for control of the Piper Aircraft Corporation. Plaintiff *Chris-Craft Industries*, which acquired significant amounts of Piper stock, successfully claimed that it had been damaged as the result of defendants' violations of the federal securities laws. Having reached that conclusion on the merits, the Second Circuit remanded the case to the district court for the calculation of damages. Judge Pollack's damages decision on remand is reported at 384 F.Supp. 507 (S.D.N.Y.1974). *Chris-Craft* "requested that the interest charges it has borne on loans which financed its Piper investment be awarded to it as consequential damages." 384 F.Supp. at 526. *Chris-Craft* contended that it had been carrying a "locked-in" Piper investment since being reduced to a minority position. Judge Pollack concluded that there was no proof *Chris-Craft* had been "locked in" so that sale of its Piper stock had been impossible. He went on to say that "[t]he cost of the use of credit or margin to acquire stock is not a proper element of damage to a purchaser's interest," and that "[c]onsequential damages are awarded only upon a clear showing of causal connection with the misconduct and the consequence claimed," citing *Zeller*. Judge Pollack rejected the *276 claim. The Second Circuit affirmed, also citing *Zeller*. 516 F.2d at 191-92. The Second Circuit said:

Absent any showing of an actual, albeit futile, attempt by CCI to sell its holdings, we find it difficult to find a "causal nexus" between its interest payments and BPC's violations "with a good deal of certainty." We affirm the district court's refusal to award such interest expense.

In *Bennett v. United States Trust Co.* of New York, 770 F.2d 308 (2d Cir.1985), the plaintiffs claimed that U.S. Trust knowingly or recklessly misrepresented to them that the Federal Reserve's margin rules did not apply to public utility stock deposited with a bank as collateral. Relying on that misrepresentation plaintiffs borrowed money from U.S. Trust to purchase public utility stock, depositing the stock with U.S. Trust as collateral. Over time the dividends generated by the stock proved insufficient to cover the interest expenses on the loans; the outstanding principal and interest on the loans increased; the market value of the stock decreased; and U.S. Trust liquidated plaintiff's account. Plaintiffs wound up losing their equity in the \$1 million in public utility stock deposited in U.S. Trust, and also owed U.S. Trust \$1.2 million on the loans.

Plaintiffs sued U.S. Trust on a number of federal and state law theories, including section 10(b) and Rule 10(b)-5. The Second Circuit affirmed the district court's dismissal of the securities fraud claim because plaintiffs "failed to establish loss causation between the alleged misrepresentation and the plaintiffs' own unwise investment decisions," 770 F.2d at 314. At that point in text the Second Circuit dropped a footnote disposing of the plaintiffs' alternative claim, for the loss resulting from the interest charges which they had to pay on the loans from U.S. Trust. The court of appeals said at 314 n. 1:

The Bennetts also argue that even if we hold that the misrepresentation did not cause the loss resulting from the decline in the stock's value, they should still be entitled to recover the loss resulting from the interest charges. We find this argument unconvincing. U.S. Trust is not alleged to have made any misrepresentation with respect to the loans; the Bennetts received the money that they sought, for the purpose desired, and under conditions that they understood and found agreeable. The interest expense would have been the same no matter how the Bennetts used the loan proceeds. Thus, we cannot accept the complaint's characterization of the interest expense as an element of damages.

A comparable concept of loss transaction is reflected in *Monetary Management Group v. Kidder Peabody & Co.*, 615 F.Supp. 1217 (D.C.Mo.1985). A management adviser brought an action against a brokerage firm alleging that the firm agreed to provide marginable bonds and that two sets of bonds plaintiff purchased were not marginable in accordance with federal reserve regulations. Plaintiff asserted that the brokerage firm's misrepresentation violated section 12(2) of the Securities Act of 1933, and also alleged violation of state law and common-law misrepresentation. The district court found a violation of section 12(2). In calculating damages, the court rejected plaintiff's request for return of the interest charges associated with the bonds in question, stating at 1223:

Defendants' objection is well-taken. The interest charges in question were incurred by MMG, because Kidder, Peabody in fact margined the bonds in question. During the period of time that MMG had an account with Kidder, Peabody, MMG received exactly what it bargained for, namely, marginable bonds or an investment on credit. In this regard, Kidder Peabody and Martin did not make any misrepresentations with respect to what MMG was receiving for its interest payments.

Plaintiffs say that *Chris-Craft* is distinguishable and rely upon *Minpeco, S.A. v. Hunt*, 686 F.Supp. 420 (S.D.N.Y.1988). That was an antitrust case in which defendants manipulated the silver market. As the result of defendants manipulation plaintiffs, who held short positions in the market, were forced to borrow money "which *277 was required to meet margin calls and close silver futures and forward positions." *Id.* at 425. Judge Lasker held that the interest plaintiffs paid on those borrowed funds was properly claimable as damages stemming from defendants' antitrust violation. He rejected defendants' argument that the interest claim was the legal equivalent of a claim for prejudgment interest, a concept defendants urged because "prejudgment interest is granted only sparingly in antitrust actions, it can only be calculated that the close of trial after damages, if any, have been established, and it

may not be included for the purposes of trebling damages." *Id.* at 426. Judge Lasker rejected the analogy to prejudgment interest and allowed the claim, denying defendants' in limine motion to preclude it.

In *Freschi v. Grand Coal Venture*, 588 F.Supp. 1257 (S.D.N.Y.1984), plaintiff invested in a limited partnership as a tax shelter. Defendants were held liable to him for violation of section 10(b) of the 1934 Act and state law fraud. Plaintiff claimed as an item of damages an interest penalty assessed by the IRS after its disallowance of plaintiff's tax deductions. Judge Sweet denied the claim, reasoning that plaintiff's use of the unpaid tax money prior to the IRS assessment approximately equalled the interest penalty. Judge Sweet said: "Accordingly, *Freschi* has failed to meet the heavy burden a Rule 10b-5 plaintiff faces in attempting to prove consequential damages, see *Zeller*, *supra*, and an award for the interest penalty is impermissible." 588 F.Supp. at 1260.

None of these cases is squarely on point. But I think that defendants have the better of the argument. *Chris-Craft* stands for the proposition that a section 10(b) plaintiff claiming consequential damages bears the heavy burden of establishing a causal nexus "with a good deal of certainty." Plaintiffs at bar say they have done so: "Because plaintiffs overpaid by \$50 million, they had to issue an extra \$50 million of IRNs. Because they issued an extra \$50 million of IRNs they have had to pay interest on them." Brief at 134. That may satisfy transaction causation, but more recent authority illustrated by *Bennett* requires loss causation as well, and there is no suggestion that defendants' misrepresentations played a direct part in the form or conditions of the debt *Polycast* incurred, or that *Polycast* did not obtain what it bargained for in borrowing the money.

I conclude that defendants' objection to this item of damages is well taken.

[32] I deny defendant's motion to strike plaintiffs' claim for punitive damages. Punitive damages are not recoverable in a

section 10(b) action, but may be recovered under pendent state claims. See *Meyers v. Moody*, 693 F.2d 1196, 1220 (5th Cir.1982), *reh'g denied*, 701 F.2d 173, *cert. denied*, 464 U.S. 920, 104 S.Ct. 287, 78 L.Ed.2d 264 (1983). Plaintiffs at bar assert state and common law claims against defendants for fraud. Under New York law, which governs, "punitive damages may be awarded when fraud is gross, wanton or willful, whether or not directed at the public generally." *Ostano Commerzanstalt v. Telewide Systems, Inc.*, 880 F.2d 642, 649 (2d Cir.1989) citing New York cases. See also *Roy Export Co. Establishment of Vaduz v. CBS, Inc.*, 672 F.2d 1095, 1106 (2d Cir.) ("New York law clearly permits punitive damages where a wrong is aggravated by recklessness or willfulness"), *cert. denied*, 459 U.S. 826, 103 S.Ct. 60, 74 L.Ed.2d 63 (1982). In *Ostano* the court of appeals confirmed an award of punitive damages on the basis of the district court's finding that defendant "entered this transaction from the outset with a clear and blatant intent to defraud." 880 F.2d at 646.

In the case at bar, plaintiffs allege that defendants deliberately exaggerated *Plastics*' projected earnings, thereby manifesting "a clear and blatant intent to defraud." That intent was implemented most recently, plaintiffs argue, when *Polycast* renounced the SPA because of the reduced earnings forecasts, only to be lured back to the negotiating table with assurances of the accuracy of the September 5, 1986 \$13.3 million projection. There is evidence in the record which would permit, although it would not require, the jury to conclude that at least certain defendants engaged in *278 "gross, wanton or willful" fraud. Accordingly I deny the motion to strike the claim for punitive damages.

Conclusion

For the foregoing reasons, defendants' motion for summary judgment dismissing plaintiffs' fourth claim under the RICO statute is granted. There being no just reason for delay, the Clerk of the Court is directed to enter judgment dismissing that claim. See Rule 54(b), Fed.R.Civ.P.

As required by the Second Circuit authority, see, e.g., *National Bank Washington v. Dolgov*, 853 F.2d 57 (2d Cir.1988), I state my reasons for certifying a judgment dismissing plaintiffs' RICO claim at this time.

Whether or not plaintiffs can satisfy the continuity requirement of the RICO claim poses a discrete question which is capable of resolution on the present record. Whether or not trebled damages are available to plaintiffs if they prevail on the merits is a question of considerable importance to all parties. An appellate ruling on the issue in advance of trial may enhance settlement negotiations.

If the parties decline to negotiate or nothing comes of settlement efforts, then the alternative to a Rule 54(b) certification on the RICO question at this time is to send the case to trial with the question unresolved at the appellate level. For the reasons stated in this Opinion, I do not think plaintiffs state a viable RICO claim. Accordingly I will not submit that claim to the jury. If my judgment on the issue is reversed by the court of appeals after what is sure to be a protracted trial, then the case will have to be tried again with the RICO claim reinstated.

There are accordingly compelling reasons of practicality and expediency for certifying a judgment under Rule 54(b) dismissing plaintiffs' RICO claim under Rule 54(b). There is recent Second Circuit authority for doing so. See *Cullen v. Margiotta*, 811 F.2d 698, 712-13 (2d Cir.1987).

Defendants' motion for summary judgment is in all other respects denied.

It is SO ORDERED.

792 F.Supp. 244, Fed. Sec. L. Rep. P 96,803,
RICO Bus.Disp.Guide 8016

END OF DOCUMENT

69

Only the Westlaw citation is currently available.

United States District Court,
S.D. New York.

PPI ENTERPRISES (U.S.), INC., Plaintiff,
v.

DEL MONTE FOODS COMPANY and
Morgan Stanley & Co., Inc., Defendants.
DEL MONTE FOODS COMPANY, Third-
party Plaintiff,

v.

W.R. HUFF ASSET MANAGEMENT CO.,
L.P., W.R. Huff Asset Management Co.,
L.L.C.,
and Charterhouse Equity Partners, L.P.,
Third-party Defendants.

No. 99 Civ. 3794(BSJ).

Sept. 11, 2003.

Shareholder brought action against corporation and its investment banker, alleging fraud, breach of contract, negligent misrepresentation, breach of fiduciary duty, and aiding and abetting breach of fiduciary duty. Defendants impleaded third-party defendants, asserting claims of contribution and indemnification. Upon defendants' and third-party defendants' motions for summary judgment, the District Court, Jones, J., held that: (1) defendants could not be held liable for common law fraud under New York law since shareholder could not establish element of reasonable reliance; (2) negligent misrepresentation claim was duplicative of shareholder's breach of contract claim; (3) summary judgment in favor of corporation was precluded on breach of contract claim; and (4) contribution was not available when the underlying claim was for breach of contract.

Corporation's motion granted in part and denied in part; investment banker's and third-party defendants' motions granted.

West Headnotes

[1] Brokers 106
65k106

[1] Corporations 186
101k186

Under New York choice of law principles, New York law applied to shareholder's fraud and misrepresentation claims against Maryland corporation and its fraud claim against corporation's investment banker; New York was not only principal place of business of both shareholder and investment banker, but was also the place of the great majority of communications at issue, and thus New York had a greater interest in the case than Delaware, where bankruptcy court proceedings resulted in order compelling auction of shareholder's stock.

[2] Action 17
13k17

Proponent of foreign law must show that it differs materially from law of forum state.

[3] Brokers 34
65k34

[3] Corporations 186
101k186

Even if corporation and its investment banker made material misrepresentations or omissions with respect to their knowledge of a pending sale of corporation or their valuations of shareholder's stock, they could not be held liable for common law fraud under New York law since shareholder could not establish element of reasonable reliance; shareholder, which was formed to acquire companies in both North and South America in order to expand the global presence of its corporate parent, was a sophisticated business entity subject to higher level of scrutiny and either failed to pursue or failed to reasonably incorporate into its own analysis of its stock's value a series of disclosures made by corporation and investment banker.

[4] Corporations 186
101k186

New York law did not permit shareholder to maintain negligent misrepresentation claim against corporation based on an alleged breach of a duty of care stemming from contractual relationship between the parties; negligent misrepresentation claim was

duplicative of shareholder's breach of contract claim based on corporation's alleged failure to reasonably respond to requests for information in good faith.

[5] Corporations 186
101k186

Even if corporation made material misrepresentations or omissions with respect to its knowledge of a pending sale of corporation or its valuations of shareholder's stock, it could not be held liable for negligent misrepresentation under New York law since shareholder could not establish element of reasonable reliance; shareholder, which was formed to acquire companies in both North and South America in order to expand the global presence of its corporate parent, was a sophisticated business entity subject to higher level of scrutiny and either failed to pursue or failed to reasonably incorporate into its own analysis of its stock's value a series of disclosures made by corporation.

[6] Federal Civil Procedure 2513
170Ak2513

Genuine issues of material fact existed as to whether requests for documents by shareholder were reasonable under Maryland law, whether corporation adequately responded to those reasonable requests, and whether corporation waived any claim that it had to enforce contractual requirement that requests for information be in writing because of its continual response to shareholder's oral requests for documents and information, precluding summary judgment in favor of corporation on breach of contract claim based on its alleged failure to reasonably respond to requests for information in good faith.

[7] Contribution 3
96k3

Under New York law, contribution was not available when the underlying claim was for breach of contract. McKinney's CPLR 1401.

[8] Indemnity 64
208k64

Where shareholder's underlying complaint charged corporation with direct liability for breach of contract and not constructive or

vicarious liability based on its relationship with other parties, there could be no third-party claim under New York law for indemnification for that breach of contract.

Opinion

JONES, J.

*1 Plaintiff PPI Enterprises (U.S.), Inc. ("PPIE") filed this action in May of 1999 against Defendant Del Monte Foods Company ("Del Monte") and Defendant Morgan Stanley & Co., Inc. ("Morgan Stanley") alleging fraud, breach of contract, negligent misrepresentation, breach of fiduciary duty, and aiding and abetting breach of fiduciary duty. Del Monte and Morgan Stanley moved to dismiss PPIE's claims pursuant to Fed.R.Civ.P. 12(c), and this Court issued an opinion on their motions in September 2000. [FN1] In the 2000 opinion, the Court granted Del Monte's motion to dismiss the breach of fiduciary duty claim, but denied its motion to dismiss the breach of contract, fraud, and negligent misrepresentation claims. With respect to Morgan Stanley's motion, the Court dismissed PPIE's claims of negligent misrepresentation and aiding and abetting a breach of fiduciary duty. It denied, though, Morgan Stanley's motion to dismiss the fraud claim. After this opinion issued, Del Monte and Morgan Stanley filed motions for summary judgment on the remaining claims. These motions are now before the Court.

FN1. The September 2000 opinion amended an earlier decision issued on August 18, 2000.

Also before the Court are motions by the Third-Party Defendants in this case, W.R. Huff Asset Management, Co., L.P., W.R. Huff Asset Management, Co., L.L.C. (collectively "Huff Asset Management"), and Charterhouse Equity Partners, L.P. ("Charterhouse"). Del Monte impleaded these Third-Party Defendants, asserting claims of contribution and indemnification. The Third-Party Defendants have moved for summary judgment as to these claims.

I. FACTUAL BACKGROUND

The following chronology of events is based on the Court's review of the extensive record in this matter. Unless otherwise indicated, all facts are undisputed.

A. Preliminary Background

PPIE was formed in May 1988 by its corporate parent, Polly Peck International PLC ("Polly Peck"), to expand Polly Peck's global presence in the produce industry. (Compl.¶ 11). In January 1990, PPIE acquired for \$12.6 million all of the outstanding shares of Series D Preferred Stock and 10,000 shares of Class A Common Stock of Del Monte Foods Company ("Del Monte"), a Maryland corporation previously known as DMPF Holdings Corp. (Compl.¶ 13). PPIE's stake in Del Monte represented approximately 2.6% of Del Monte's total common stock and 5.9% of the liquidation value of Del Monte's preferred stock, which had been issued in a number of series. Dividends on the Series D Preferred Stock (as well as the other series) were payable in-kind, and Series D Preferred Stock was, by its terms, junior in liquidation preference to the Series A and B Preferred Stock, which had been issued to other stockholders. The other major stockholders of Del Monte included Huff Asset Management Co. (which held approximately 37.7% of the liquidation value of Del Monte's total preferred stock outstanding and 24.7% of its total common stock outstanding), Charterhouse (which held approximately 18.4% of the liquidation value of Del Monte's total preferred stock outstanding and 8.2% of its total common stock outstanding), Merrill Lynch, Kikkoman Corporation and members of Del Monte management.

*2 In connection with the acquisition of the Del Monte stock, PPIE, the other stockholders and Del Monte entered into a Stockholders Agreement dated January 9, 1990 (the "Stockholders Agreement"). (Compl.¶ 14). The Stockholders Agreement placed restrictions on the transferability of the preferred stock and provided the holders of the preferred stock with veto rights with respect to certain change of control transactions. (DM Ex. 2, §§ 3, 4). In addition, the Stockholders Agreement

provided in § 2.12 that:

[Del Monte] shall, at its expense, provide to each Stockholder ... (b), as promptly as practicable, such financial statements and other information, including, without limitation, monthly management reports as such Stockholder may reasonably request. (Compl.¶ 14.).

In October 1990, Polly Peck was placed in insolvency administration, the U.K. equivalent of a bankruptcy proceeding. (Compl.¶ 20). The administrators of Polly Peck were employees of the accounting firm Coopers & Lybrand, now known as PriceWaterhouseCoopers. (Kett Dep. at 16-18). Thereafter, PPIE's primary focus was to liquidate its assets and reduce its expenses. (Compl.¶ 20). These efforts were led by Michael Herz ("Herz"), PPIE's sole employee, who was at the time based in Connecticut. [FN2] (Herz Dep. at 13, 459). In carrying out his activities, Herz apparently conferred regularly with Polly Peck's London-based administrators, primarily Anthony Kett ("Kett"). (Herz Dep. at 13-14; 33).

FN2. In November 1996, Herz moved from Connecticut to New York.

In September 1991, PPIE vacated its office space in Manhattan, despite the fact that its lease had seven years remaining. (Compl.¶ 20). The landlord, Solow Building Company, which was controlled by Shelden Solow (together "Solow"), commenced litigation against PPIE in the United States District Court for the Southern District of New York in November 1991. (Compl.¶ 20). In October 1992, Solow won a judgment against PPIE, but an assessment of damages was deferred pending a separate trial. (Compl.¶ 20).

In September 1992, PPIE asked whether Merrill Lynch, another stockholder of Del Monte, would be interested in acquiring its Del Monte stock. (Compl.¶ 16). In response to Merrill Lynch's indication that it might be interested in acquiring PPIE's Del Monte stock for approximately \$2 million and to the fact that Del Monte itself might be interested in acquiring PPIE's Del Monte stock for \$2.5

million, PPIE requested from Del Monte the opportunity to review information that would assist it in evaluating a potential sale of the Del Monte stock at these values. (Compl. ¶ 17). After executing a confidentiality agreement prepared by Del Monte, PPIE was given the opportunity to review all relevant non-public financial information in Del Monte's possession. (Compl. ¶ 17). PPIE subsequently decided not to sell its Del Monte stock at that time. (Compl. ¶ 17).

In July 1993, an investor group led by Mexican financier Carlos Cabal offered to purchase Del Monte for an equity value of \$325 million, an offer that was subsequently reduced to \$276 million. (DM Exs. 6, 7). In October 1993, Del Monte's investment banker notified Del Monte's stockholders, including PPIE, of the proposed transaction with Cabal. (Compl. ¶ 18). During the course of the negotiations that took place after the offer was made, PPIE was provided with detailed information about the proposed transaction and, subject to the confidentiality agreement, was invited to participate in negotiating sessions with Cabal and in meetings of Del Monte's Board of Directors. (Compl. ¶ 18). Thereafter, the stockholders, relying upon information provided by Del Monte, agreed among themselves about the allocation of the proposed purchase price, with PPIE to receive approximately \$10 million for its Del Monte stock. (Compl. ¶ 19). In June 1994, Del Monte entered into a merger agreement with Cabal. (DM Ex. 1). However, the transaction failed to close for reasons unrelated to this matter. (Compl. ¶ 19).

B. 1995: PPIE's Seeks to Sell Its Del Monte Stock

*3 In June 1995, Herz (PPIE's sole employee) and Kett, as representative of Polly Peck's London-based administrators, Coopers & Lybrand, met with Del Monte in an attempt to convince Del Monte and/or its other stockholders to allow PPIE to sell or transfer its Del Monte stock to Solow. (Compl. ¶ 21). Alternatively, they asked whether Del Monte or any of the other stockholders would be interested in acquiring its Del Monte stock for

a "fair price." (Compl. ¶ 21). At that meeting, Del Monte resisted any sale or transfer to Solow, and indicated that it was unlikely to be interested in acquiring PPIE's Del Monte stock for a price in excess of \$500,000, since the total equity value of the company had declined to less than \$100 million. (Compl. ¶ 12; DM Exs. 8, 9; Kett Dep. at 46; see DM Mem. at 6, DM Ex. 8 at 6414). Del Monte discussed some of the operational and financial challenges that it was currently facing and told Herz and Kett that it expected to hire Morgan Stanley as its new investment banker to advise Del Monte on its alternatives, including an operational restructuring, a potential sale of non-U.S. assets and/or a financial restructuring, with the potential for an initial public offering within two years time. (DM Ex. 8 at 6413-14).

Shortly after this meeting, Del Monte sent Kett detailed financial information, including its internal financial projections for the fiscal year ending June 30, 1996, upon condition that this information be kept confidential. (DM Ex. 13 at 6388). In late June or early July 1995, PPIE asked Prudential Securities Incorporated ("Prudential") to provide it with a "desk assessment" of the value of PPIE's Del Monte stock and to act as "financial advisor" to PPIE. (DM Ex. 14 at 6903-04). On July 7, 1995, Kett sent financial information on Del Monte, including financial projections, [FN3] to Prudential. (See DM Ex. 14). On August 1, 1995, Prudential sent a letter to Kett stating its view that the value of PPIE's stock was \$3-\$5 million to a financial buyer, but perhaps up to \$12 million if the shares could be converted into common stock and traded publicly. (DM Ex. 15 at 6963-64).

FN3. The cover letter from Kett to Prudential indicates that Del Monte's "forecast income statements for the years 1994 to 2001 as submitted to the banks" were enclosed. These forecasts are not themselves part of the record of this case. It is unclear from the record which projections were actually sent to Prudential.

In August 1995, Morgan Stanley was formally retained as Del Monte's financial advisor. [FN4] (DM Ex. 10). In October 1995,

Morgan Stanley provided Del Monte's Board of Directors with a preliminary analysis of the company's restructuring alternatives, and advised that the company pare back its non-core, non-U.S. businesses. (MS Exs. 15 at 6-7; 20 at 13). Morgan Stanley suggested that, once such restructuring steps were taken, Del Monte would be better situated for a potential sale, merger or initial public offering. (MS Ex. 15). Del Monte's Board instructed Morgan Stanley to convey to the market that Del Monte was not for sale, but would be willing to listen to unsolicited proposals. (MS Ex. 16 at 81). From November 1995 through August 1996, Del Monte streamlined its business by selling a number of non-core businesses and changed its pricing strategy, which enabled it to improve financial performance and better position itself for a potential sale, merger or initial public offering. (MS Exs. 15 at 6-7, 20 at 13).

FN4. PPIE was aware that Morgan Stanley was (or was about to be) Del Monte's investment banker as early as July 14, 1995. (See DM Ex. 11 at 6364).

C. 1996: PPIE's Continued Efforts to Sell Its Del Monte Stock

*4 On January 31, 1996, a representative of Coopers & Lybrand, acting on behalf of PPIE, offered to sell its Del Monte stock to Del Monte for \$4 million, the midpoint of the valuation range that had been suggested by Prudential. (MS Ex. 7). On March 6, 1996, Del Monte's Board of Directors authorized the company to pay up to \$2 million for PPIE's Del Monte stock, and instructed Morgan Stanley to approach PPIE with an initial offer of \$1 million. (Herz Dep. at 5). At about the same time, representatives of Texas Pacific Group ("TPG"), a financial buyer of operating businesses, expressed to Morgan Stanley and to Huff Asset Management (Del Monte's largest shareholder) its strong interest in exploring the acquisition of Del Monte. [FN5] (PPIE Ex. 50 at 962). At that time, TPG was told that Del Monte was in the midst of restructuring its operations and would not consider offers for the company until that process was complete. (PPIE Ex. 50).

FN5. The March 1996 expression of interest by TPG is referred to only in a September 1996 letter from TPG to Morgan Stanley discussed infra. No other details are part of the record in this case.

On April 4, 1996, in response to Solow's motion to set a trial date for the damages phase of its action against PPIE for breach of the lease, PPIE filed for bankruptcy in the United States Bankruptcy Court for the District of Delaware, the state of its incorporation. Despite PPIE's bankruptcy filing, negotiations among the parties regarding the possible sale of PPIE's stock to Del Monte continued.

On April 30, 1996, Kett met with Morgan Stanley and requested Del Monte's latest interim financial results. (Kett Dep. at 171-173). On May 2, 1996, Del Monte provided Kett with its interim financial results for the quarters ending September 30 and December 31, 1995 and its internal financial model dated April 30, 1996, which contained projections for the remaining two months in its fiscal year ending June 30, 1996. (DM Ex. 19 at 18669). This financial model showed projected earnings before interest, taxes, depreciation and amortization ("EBITDA") of \$85 million for the fiscal year ending June 30, 1996. (DM Ex. 19).

The aggregate value of the company was then estimated by multiplying the projected EBITDA by a multiple, which was based on an analysis of comparable companies and transactions. The company's debt was then subtracted from the aggregate value to arrive at an estimate of the equity value of the company. [FN6] (DM Ex. 19). Based on an EBITDA multiple of 6.25x and approximately \$420 million of projected debt, these materials showed a total equity value of Del Monte of \$102.5 million. (DM Ex. 19). This estimate stood in contrast to the accreted value [FN7] of the four series of preferred stock senior to the Series D Preferred Stock held by PPIE (designated Series A1, Series A2, Series B and Series C), which as of June 30, 1996, [FN8] was projected to be approximately \$384 million. (DM Ex. 19). As a result, in a liquidation scenario that generated \$102.5

million of equity value, PPIE's Series D Preferred Stock would have no "economic value." In a sale or liquidation, the Series D Preferred Stock would, however, have some "holdup" value, given its veto rights with respect to certain types of transactions.

FN6. This method of valuation, known as the EBITDA multiple method, is a widely used method of valuation. PPIE has not contested the appropriateness of this methodology.

FN7. The preferred stock paid dividends "in-kind," meaning that rather than a cash payment the holders received additional face value of preferred stock on every dividend date. As a result, the face value of the preferred stock "accreted," or increased in value, periodically.

FN8. PPIE makes reference to an April 30, 1996 analysis prepared by Morgan Stanley, which they argue shows that, in fact, PPIE's Del Monte stock could have been worth up to \$5.6 million at that time. (PPIE Mem. at 29-30). The meaning of the Morgan Stanley analysis referred to and included in the record, however, is not self-evident and there is no explanation of it, in testimony or otherwise. (See PPIE Ex. 15). The Court, therefore, places little weight on the significance of this analysis.

*5 In the May 2, 1996 cover letter to Kett that accompanied these financial materials, Del Monte's Chief Financial Officer wrote that Del Monte was projecting "a very strong performance" for its fiscal fourth quarter ending June 30, 1996, and invited Kett to call with any questions. (DM Ex. 19). Kett does not recall asking any follow-up questions or forwarding any of this material to Herz. (DM Mem. at 9). On May 7, 1996, though, Kett informed Del Monte that he intended to provide the financial information to Prudential. [FN9] Kett also requested that Del Monte send him interim financial statements for its fiscal third quarter ending March 30, 1996 when available. (Kett Dep. at 174-75). On May 22, 1996, Del Monte complied with this request by sending Kett the company's interim results for the quarter ending March 31, 1996. (DM Ex. 20).

FN9. Although Kett also indicated that he would be

authorizing Prudential to speak directly on PPIE's behalf, there is no evidence that Prudential ever actually did so.

Shortly thereafter, on June 4, 1996, Kett spoke with Robert Berner ("Berner") of Morgan Stanley [FN10] to continue the negotiations regarding Del Monte's willingness to buy back PPIE's Del Monte stock. (PPIE Ex. 7, pp. 82-84). Berner told him that he believed the total equity value of Del Monte to be between \$90-\$175 million as of June 30, 1996, based on a multiple of 6-7x projected EBITDA of \$85 million and \$420 million of projected debt. (MS Ex. 29). Berner also told him that PPIE's Del Monte stock thus had "zero economic value" because the senior series of preferred stock had an aggregate accreted value of \$384 million. (MS Ex. 29). Berner further stated that the value of the senior series of preferred stock had been increasing at a greater rate than the rate at which Del Monte's earnings were growing, thus suggesting that time was working against PPIE in the negotiations. (MS Ex. 29; Tr. 185-87).

FN10. Berner was a Principal in Morgan Stanley's Investment Banking Department, and apparently had primary senior-level responsibility for Morgan Stanley's assignments on behalf of Del Monte, which included making presentations to Del Monte's Board of Directors.

In that same conversation, Kett asked Berner whether there was "any prospect on the horizon" for a sale of Del Monte. (MS Ex. 29). Berner replied "no" and added that the company had been up for sale for a time but that there had been no buyers, particularly none in the food industry. (MS Ex. 29). However, Kett's notes of the conversation, which he adopted at his deposition, indicate that Berner went on to say that there was "likely to be a financial buyer in a year's time." (Kett Dep. at 212-213; MS Ex. 29). Notably, Kett did not inform either Prudential or Herz of Berner's statement about the likelihood of a financial buyer. [FN11] (Kett Dep. at 212-213; MS Ex. 29).

FN11. Kett explains that he did not inform

Prudential or Herz of Berner's statement because he did not take Berner's comment literally, believing instead that there was "no real prospect for a sale." (Kett Dep. at 213-215). Nonetheless, it is undisputed that Berner did tell Kett there would be a financial buyer in a year's time.

D. June--September 1996: PPIE Negotiates with Del Monte Regarding a Sale of Its Del Monte Stock and Makes Requests for Information

On June 24, 1996, Berner wrote to Kett and indicated that Del Monte was prepared to pay \$1 million for PPIE's Del Monte stock, and that this offer would remain open until July 15, 1996. (MS Ex. 9 at 6780-81). As justification for this offer, the letter stated that, using an EBITDA valuation methodology and a range of multiples of 6-7x, the total equity value of Del Monte would be in the range of \$105-\$190 million. (MS Ex. 9). The letter further stated that, at this range of equity values, PPIE's Del Monte stock had "no economic value" since the accreted value of the senior series of preferred stock was \$384 million. (MS Ex. 9). Kett forwarded this letter to Herz shortly after he received it. (Herz Dep. at 143).

*6 Herz then spoke with Philip Shantz, a Senior Vice-President at Prudential, in an apparent attempt to reconcile the \$1 million offer from Del Monte with Prudential's previous view that PPIE's Del Monte stock was worth \$3-\$5 million. (DM Ex. 26 at 2994; Herz Dep. at 254). Prudential orally replied that it was their current belief that Prudential could not sell PPIE's Del Monte stock for much more than \$1 million, and that the earlier \$3-\$5 million valuation was based on factors that were no longer present. [FN12] (DM Ex. 26 at 2995). As a result, Prudential "strongly recommended" that PPIE accept the \$1 million offer. (DM Ex. 26 at 2295). Herz did not share with Del Monte the fact that Prudential had revised its valuation downward, as Herz understood that he and Del Monte were engaged in "arm's length" negotiations regarding the sale of the Del Monte stock. (Herz Dep. at 274; 255-257).

FN12. In particular, Prudential based its conclusions on a belief that Del Monte had not achieved its targeted results for the nine months ending March 31, 1996, "[would] most likely not achieve their targeted results for the year," and that Del Monte's business volume appeared to be declining rather than growing. The record is not clear regarding what information Prudential relied upon in making these assessments.

During the summary of 1996, Herz spoke to Berner a number of times about Del Monte's \$1 million offer. (See Herz Dep. at 231). In one of their July 1996 conversations, Herz asked Del Monte for "any and all information regarding Del Monte, its affairs, in order to assist [PPIE] in determining whether or not a million dollars was a fair price and the highest and best price that [PPIE] could achieve." (Herz Dep. at 182). Herz acknowledged that he did not specify what information he wanted and that he left it to Del Monte to determine what information to send to PPIE. (Herz Dep. at 185-86). Del Monte replied that the company year-end financial statements (for the fiscal year ending June 30, 1996) would be published shortly and would be delivered to Herz at that time. (Herz Dep. at 184). On August 23, 1996, Herz again spoke to Del Monte and asked specifically for the June 30, 1996 audited financial statements. (Herz Dep. at 194). Although the final audited financial statements had not yet been completed, on August 28, 1996, Del Monte sent Herz detailed drafts of its June 30, 1996 financial statements. (DM Ex. 27). Subsequently, Herz was provided with the final audited financial statements. (MS Ex. 32).

Additionally, during their conversations that summer, Berner told Herz that PPIE's Del Monte stock had no inherent value but only had blocking or veto power. (Herz Dep. at 2993). He also told Herz several times during those months that Del Monte was regularly receiving unsolicited, general expressions of interest from potential buyers, but that there was nothing "specific." (Herz Dep. at 2993; see also Herz Dep. at 230-31). Finally, Berner informed Herz that no due diligence concerning a potential acquisition of Del Monte was occurring. (Herz Dep. at 231).

On September 4, 1996, Herz asked Berner for any other information, in addition to the June 30 financial statements which he had already received, [FN13] that Morgan Stanley could provide that would help him evaluate the \$1 million offer. (MS Ex. At 10). In response, Berner referred to the existence of an offering memorandum related to an exchange offer and agreed to send it to Herz. [FN14] (Herz Dep. at 287). Also during this September 4, 1996 conversation, Berner told Herz that Del Monte "had been in play and was on a regular basis receiving inquiries from potential interested parties." (Herz Dep. at 287, 299). Herz made no further inquiries about the identities of these interested parties, nor did he convey the fact that Del Monte had received such inquiries to Prudential, though he did convey it to Kett. (Herz Dep. at 301).

FN13. It is unclear whether Herz had received the final audited statements at this time or only the draft financial statements.

FN14. This document was provided to PPIE in November 1997 and is discussed infra.

*7 In response to PPIE's request for an extension of the deadline on Del Monte's \$1 million offer for the Del Monte stock (apparently made by Herz during this same September 4, 1996 conversation), by letter dated September 4, 1996 Berner confirmed to Herz that the deadline had been extended through September 30, 1996. (DM Ex. 28 at 2344-45). Using identical language to the language used in Berner's June 24, 1996 letter to Kett (which Herz had previously seen), this letter to Herz again estimated the equity valuation of Del Monte at \$105-\$190 million. (DM Ex. 28 at 2344-45). Herz understood that the valuation contained in the September 4 letter was based on Del Monte's EBITDA as of June 30, 1996, and therefore that the September 4 letter did not contain an updated valuation of Del Monte. (Herz Dep. at 208-09).

Then, on September 23, 1996, TPG wrote a letter to Berner of Morgan Stanley in which it reiterated its "strong interest in exploring the acquisition of Del Monte" and stated that it understood that "the Company's board is now

considering the sale of Del Monte itself." (PPIE Ex. 50 at 962). This document was not provided to PPIE.

Later that month, on September 30, 1996, Del Monte provided Huff Asset Management (its largest shareholder) with its internal financial projection model dated as of September 26, 1996. (PPIE Ex. 51 at 144-151). This model showed that Del Monte's actual EBITDA for the fiscal year ending June 30, 1996 (after adjusting for a number of non-recurring items) was \$92 million, or \$7 million higher than the \$85 million that the model provided to PPIE on June 2, 1996 had shown. [FN15] (PPIE Ex. 51 at 144-151). It also showed a projected EBITDA of \$103 million for the twelve months ending December 31, 1996 (i.e. a different time period than that used in the projections previously provided to PPIE). (PPIE Ex. 51 at 144-51) (emphasis added). Using a multiple range of 6-7x and a projected debt balance as of December 31, 1996 of \$357 million (compared to \$420 million as of June 30, 1996), Del Monte indicated that its projected total equity value as of December 31, 1996 was \$262-\$365 million. (PPIE Ex. 5 at 144-151) (emphasis added). The foregoing analysis was also not provided to PPIE. [FN16]

FN15. In calculating the \$92 million figure, Del Monte made a number of pro forma adjustments to reflect the sale of certain non-core assets that it had completed during fiscal 1996. Although PPIE had received the detailed draft of the June 30, 1996 financial statements as well as the actual audited financial statements, it is unlikely that it would have been able to arrive at the \$92 million figure on its own from these documents. However, as mentioned before, the September 4, 1996 supplement to the July 15, 1996 offering memorandum, which was provided to PPIE, stated that the company's actual operating performance in fiscal 1996 was \$6-11 million higher than earlier projected. PPIE would have been able to calculate the EBITDA at \$91 to \$97 million had they used this information.

FN16. The Court notes, however, that even at the top end of the range of values included in the analysis given to Huff Asset Management, PPIE's

Del Monte stock would still have had no "economic value."

E. October-December 1996: Del Monte Exchanges Confidential Information with Potential Acquirers and Provides Disclosure Updates to PPIE

Meanwhile, Del Monte had begun to position itself for a major structural transition: either an "equity restructuring" or a "sale/merger." (PPIE Ex. 49 at 19469). In September or October 1996, Morgan Stanley created a new project name for its work in this regard with Del Monte, which it called "Project Lodge." [FN17] (Weinberg Tr. at 15-16). The existence of this new "Project Lodge" was not divulged to PPIE. (PPIE Mem. at 14). Specifically, on October 7, 1996, Del Monte executed an engagement letter with Morgan Stanley, pursuant to which Morgan Stanley was retained to work with Del Monte "in connection with the exploration of certain strategic alternatives, including the sale, recapitalization or initial public offering" of the company. (PPIE Ex. 52 at 10736).

FN17. Morgan Stanley's previous work for Del Monte, which involved advising on the sale of certain assets and a possible refinancing of certain of its indebtedness, had been called "Project Kilimanjaro." (Weinberg Tr. at 15-16; Halpern Ex. 19, 22).

*8 At an October 22, 1996 special meeting of Del Monte's Board of Directors, Morgan Stanley informed the Board that "certain informal inquiries had been received from certain potential buyers interested in obtaining information with respect to [Del Monte's] U.S. business ." (MS Ex. 33 at 2). After discussion, the Board formally authorized Del Monte's management and Morgan Stanley to respond to these inquiries, execute confidentiality agreements and provide preliminary financial and business information to interested parties. (MS Ex. 33 at 2).

On October 28, 1996, apparently in connection with its preparation of a financial information package for distribution to

potential buyers, Del Monte provided to Morgan Stanley an updated internal financial model, showing projected pro forma EBITDA for calendar 1996 of \$115 million. [FN18] (PPIE Ex. 56 at 153). This model also showed projected pro forma EBITDA of \$120 million for the fiscal year ending June 30, 1997. [FN19] (PPIE Ex. 56 at 153). On this same date in October, Herz spoke to Del Monte's Chief Financial Officer by phone, and again inquired whether Del Monte had any additional information that could assist PPIE in evaluating the \$1 million offer for the Del Monte stock. (Compl. ¶ 33). Herz was told that no further information existed. (Compl. ¶ 33). Moreover, Del Monte made no reference to Project Lodge, to the Board's recent decision to enter into confidentiality agreements with potential buyers or to the projection model that had been provided on that date to Morgan Stanley. [FN20]

FN18. The significant difference between this figure and the \$103 million figure that had been provided to Huff on September 30, 1996 is not accounted for in the record. The Court assumes that it relates to additional or different pro forma adjustments that the company was making in order to present its best face to the market in the upcoming sale process.

FN19. This is the first reference to projections for the full fiscal year ending June 30, 1997.

FN20. As discussed *infra*, a more complete disclosure of the status of the potential sale process was provided to Herz approximately two weeks later.

Between October 28, 1996 and November 5, 1996, TPG and Hicks Muse (another financial buyer of operating assets) entered into confidentiality agreements with Del Monte and were provided with certain business and financial information about Del Monte. (DM Exs. 29 at 21413, 30). On November 7, 1996, TPG held business and financial due diligence meetings with Del Monte's management. [FN21] (PPIE Ex. 72 at 2805).

FN21. Hicks Muse held a similar meeting with Del Monte on November 19, 1997. (PPIE Ex. 72 at 2802).

On November 8, 1996, Morgan Stanley made a presentation to Del Monte's Board of Directors. (PPIE Ex. 60). Morgan Stanley reported to the Board that Del Monte's equity value had been enhanced by the restructuring of its operations and favorable business conditions, and that the timing might be right to pursue a sale of the company. (PPIE Ex. 60 at 369). Morgan Stanley's preliminary valuation analysis as of that date suggested that the equity value of Del Monte could be in the range of \$270-\$375 million. [FN22] (PPIE Ex. 60 at 377). Morgan Stanley recommended that Del Monte formally respond to the expressions of interest that had been received, and proceed to more detailed discussions and information sharing only if acceptable valuation ranges were provided. (PPIE Ex. 60 at 408).

FN22. This analysis was based on Del Monte's average pro forma EBITDA for the three years ending June 30, 1996 through June 30, 1998 of \$113 million and an estimated debt balance of \$420 million. (PPIE Ex. 60 at 378). The upper end of the valuation range was based on a discounted cash flow analysis. (PPIE Ex. 60 at 378). The Court again notes that, even at the upper end of this valuation range, PPIE's Del Monte stock would have had no economic value due to the liquidation value of the senior series of preferred stock, although, presumably, the "hold-up" value would increase with an increasing valuation range.

PPIE was not made aware of or given access to the materials presented by Morgan Stanley at this Board meeting. However, Del Monte's outside counsel and Del Monte's Chief Financial Officer called Herz immediately after the November 8 Board meeting and told Herz that potential buyers had approached Del Monte, that Del Monte's Board of Directors had authorized management to go forward with the sale process, that confidentiality agreements had been signed and that prospective purchasers were to begin due diligence. [FN23] (Samuels Dep. at 181-82). Herz asked for no additional information.

FN23. PPIE does not offer evidence to dispute that this disclosure was made and the record does contain a letter from Meyers to Herz that refers to a

November 8 phone call between them. (PPIE Ex. 30 at 5465)

*9 Rather, between November 5, 1996 and November 11, 1996, Herz and Berner continued, by phone, to negotiate the price that Del Monte was willing to pay for the stock. By November 11, 1996, the parties had agreed to a price of \$1.6 million, plus an additional \$400,000 payment if Del Monte were sold within two years. [FN24] (PPIE Ex. 33; Herz Tr. at 322, 324, 329-32, 355-60).

FN24. Although PPIE alleges in its Memorandum of Law that during these negotiations it relied on "the defendants' persistent and repeated representations that the stock had nothing more than nuisance value and that no sale of the company was in process" (PPIE Ex. 60 at 378), this claim is unsupported. The record does not contain any evidence that Morgan Stanley made any representation that PPIE's Del Monte stock had "nothing more than nuisance value" during any of these November phone calls and it reflects that Herz knew that a sale of Del Monte might be in progress.

On November 14, 1996, Del Monte's Chief Financial Officer sent Herz a draft stock purchase agreement for PPIE's Del Monte stock, which reflected the \$1.6 million agreement, along with certain "disclosure updates which I described in our telephone conversation of Friday [November 8]." (PPIE Ex. 30 at 5465). The "disclosure updates" included (1) an Offering Memorandum to the holders of certain of Del Monte's subordinated debt securities (the "Offering Memorandum"), dated July 15, 1996 with supplements dated August 22, 1996 and September 4, 1996; (2) a draft notice of redemption to be sent to the holders of certain of Del Monte's subordinated debt securities, dated November 18, 1996 (the "Draft Notice of Redemption"); (3) a copy of the audited financial statements for the fiscal year ending June 30, 1996; and (4) Del Monte's unaudited interim financial statements for the quarter ending September 30, 1996. (DM Exs. 1, 35).

These documents contained information previously disclosed to PPIE only orally. For

example, Page 7 of the Offering Memorandum stated:

The Company believes that the completion of a financial restructuring ... coupled with the focus by the Company on its core ... operations [and] divestiture of non-core operations ... will increase the Board of Directors' flexibility in reviewing its options to maximize shareholder value through a sale of the Company or an initial public offering The Board of Directors intends after the completion of the Exchange Offer ... to monitor the success of the Company's recently implemented business strategy ... and the efforts to sell Del Monte Latin America and to restructure the Company's equity, and to consider all relevant factors to determine what additional measures could be implemented to maximize shareholder value, including a sale or initial public offering, which could occur at any time.

(DM Ex. 1 at 5188) (emphasis added). Page 2 of the Draft Notice of Redemption (which contains only two pages in total) stated in a section entitled "Inquiries from Interested Parties":

The Company has recently received unsolicited inquiries from certain parties which have requested information to determine if they may be interested in pursuing an acquisition of [Del Monte]. The Company has executed confidentiality agreements with such parties and has made certain financial and business information available to them. The Board of Directors of the Company has not solicited offers and has made no determination to sell the Company.

(DM Ex. 35 at 5510) (emphasis added). The September 4, 1996 supplement to the Offering Memorandum also informed the reader that the company's actual operating performance in fiscal 1996 was \$6-\$11 million higher than previously projected. (MS Ex. 32 at 5153). The September 1997 interim financial statement, for its part, showed that Del Monte's earnings were significantly higher in the three months ending September 30, 1996 than in the comparable year-earlier period, with operating income having increased by \$16 million and gross margin increasing from 13.9% to 21.5% (DM Ex. 35 at 5514, 5518). Although the cover letter accompanying these financial

statements invited Herz to call either Del Monte or Morgan Stanley with any questions, Herz did not do so. (Herz Dep. at 348).

*10 In fact, Herz reviewed these disclosure documents only "briefly" and then filed them. He did not send these documents to Prudential and does not recall whether he had sent them to Kett or to anyone at Coopers & Lybrand. (DM Ex. Herz Dep. at 337-38). Nor does he recall reading the disclosure regarding the execution of confidentiality agreements and the commencement of due diligence. (Herz Dep. at 334-337).

Herz conceded that, had he been aware that confidentiality agreements were executed and certain parties were conducting due diligence--the very information contained in the Offering Memorandum and Draft Notice of Redemption--he would have considered it important and would have asked follow up questions of Del Monte. (Herz Dep. at 330-31). Kett testified to the same effect, i.e. that, had he seen the disclosure contained in the Offering Memorandum and Draft Notice of Redemption, he would have asked Del Monte to disclose the identities of the interested parties and to provide copies of any information provided to these parties. (Kett Dep. at 227; 502-504).

Nevertheless, on or about November 21, 1996, PPIE's bankruptcy counsel filed a motion with the Bankruptcy Court specifically asking it to approve the sale of PPIE's Del Monte stock to Del Monte on the terms contained in the draft stock purchase agreement. [FN25] (Compl.¶ 35). The draft stock purchase agreement included an express disclaimer by PPIE of reliance on any representations by Del Monte not contained in the agreement, including representations regarding the "operations, financial condition, plans, [or] prospects" of Del Monte. (PPIE Ex. 30 at 5475). In addition, the draft stock purchase agreement contained a representation by PPIE that, among other things, it was a sophisticated investor and was satisfied that all its questions had been answered. [FN26] (PPIE Ex. 30 at 5475-76).

FN25. Because PPIE had filed a bankruptcy petition, it required the approval of the Bankruptcy Court before it could enter into a binding agreement to sell its Del Monte stock.

FN26. The stock purchase agreement that PPIE executed with Solow on January 23, 1997 (discussed *infra*) contained a similar representation by PPIE.

F. December 1996--January 14, 1997: The Parties' Dealings with the Bankruptcy Court

On December 3, 1996, TPG indicated to Morgan Stanley that it did not think the total equity value of Del Monte was greater than \$100-\$150 million. (MS Ex. 6 at 43). This amount was much lower than the values projected by Morgan Stanley in its November 8, 1996 presentation to Del Monte's Board of Directors, and was considered an "insult" by Del Monte management. (MS Ex. 6 at 44, 46). Because Del Monte's Board of Directors had informed Morgan Stanley that it was unlikely to entertain offers below a \$200 million total equity value, Morgan Stanley did not regard this valuation range as potentially leading to the sale of Del Monte. (MS Ex. 44, 46). PPIE was not informed of this offer.

The following day, December 4, 1996, the Bankruptcy Court held a hearing on PPIE's proposed sale of its stock to Del Monte. PPIE told the court that it had concluded "based on valuations that had been provided [by] Del Monte ... [that] the equity [of its Del Monte stock] [wa]s worth little or nothing." (Compl. ¶ 39). Solow, PPIE's largest unaffiliated creditor, objected to PPIE's agreement to sell its Del Monte stock to Del Monte for \$1.6 million. (Peress Dep. 3/29/01 at 13-14). Consequently, at a December 19, 1996 hearing, the Bankruptcy Court ordered that PPIE's Del Monte stock be auctioned. (DM Ex. 38 at 1289). At that hearing, Del Monte's outside counsel pressed the Bankruptcy Court to require that the auction be concluded by January 15, 1997. When asked by the Bankruptcy Court for its rationale for this date, Del Monte's counsel referred to an ongoing financial restructuring of Del Monte in an attempt to ward off a potential

bankruptcy filing by Del Monte itself as well as to "other dynamics that will come into play [after January 15] which I'm not at liberty to discuss." (PPIE Ex. 85 at 559). PPIE claims that Del Monte's representations were not true, arguing that there is circumstantial evidence--namely that Del Monte was acquired in April 1997--that Del Monte wanted this January 15 date so that it could more easily proceed with that sale. Regardless, the Bankruptcy Court ordered that the auction be concluded by January 10, 1997. (DM Ex. 38 at 1287).

*11 In preparation for a Bankruptcy Court hearing scheduled for January 8, 1997 to address a motion by Solow to dismiss the bankruptcy proceeding, PPIE's bankruptcy counsel, David Peress ("Peress"), and Herz held a conference call with Del Monte's Chief Financial Officer and Berner of Morgan Stanley on January 7, 1997. (Herz Dep. at 410; Peress Dep. 3/8/01 at 44). During that call, Berner told him that Del Monte was "exploring all avenues of investment or potential investment" and that it was still "in play" but that there was "nothing in the offing or nothing that they felt [he] should be aware of." (Peress Dep. 3/8/01 at 46).

Peress took this to mean that there were "no imminent transactions ... nothing that could be identified." (Peress Dep. 3/8/03 at 46-47). Peress explained that, in his mind, the terms "offers" and "expressions of interest" were synonymous, so he was left with the impression that there had also not been any expressions of interest by potential buyers. (Peress Dep. 3/8/03 at 47). Peress did assume, however, that it was likely that interested parties had entered into confidentiality agreements and were conducting due diligence (MS Ex. 3 at 54-55). Indeed, at the time of this conversation, Peress had read in certain publicly available documents that Morgan Stanley had been retained by Del Monte "for the purposes of pursuing additional investment or transactions, such as the sale of all or part of the company." (Peress Dep. 3/8/01 at 45) (emphasis added).

On January 9, 1997, Del Monte's Board of

Directors met telephonically to discuss the potential purchase of PPIE's Del Monte stock at the upcoming auction, which had been mandated by the Bankruptcy Court. (PPIE Exs. 62, 63). At that meeting, the Board of Directors authorized Del Monte to spend up to \$15 million to purchase the Del Monte stock from PPIE. (PPIE Exs. 62, 63). A spreadsheet prepared by Morgan Stanley on that same date analyzed the allocation of Del Monte's total equity value, assuming that PPIE's Del Monte stock had been repurchased by Del Monte from PPIE, at a total equity valuation range of \$350-\$450 million. [FN27] (PPIE Ex. 70 at 2720). The Court notes that this analysis appears to contemplate scenarios in which the junior series of preferred stock would receive a partial payout before the senior series of preferred stock received a 100% payout. There is no assertion that anyone outside Morgan Stanley was sent this document, nor is there anything on the record as to what prompted its creation.

FN27. As discussed supra, on November 8, 1996 (about two months earlier) Morgan Stanley had advised Huff Asset Management that the total equity value was in the range of \$270-375 million.

By the close of business on January 10, 1997, Del Monte's \$1.6 million bid for PPIE's Del Monte stock was the only offer that had been received. (Peress Dep. 3/8/01 at 202). On that date, therefore, both Peress and Herz sought information from Del Monte and Morgan Stanley to assist PPIE in convincing the Bankruptcy Court to approve the sale at a hearing scheduled for the following Monday, January 13, 1997. (Peress Dep. 3/8/01 at 198; Peress Dep. 2/29/01 at 130-31). PPIE required this information because neither Del Monte nor Morgan Stanley was willing to make a representative available to testify at the January 13 hearing. (Peress Dep. 3/8/01 at 202).

*12 Peress asked Morgan Stanley whether it had prepared any "analyses in connection with the efforts to seek investment or possible acquisition." (Peress Dep. 3/8/01 at 203). Morgan Stanley responded that it was "in the process of working with the company to

provide and prepare analyses of value, but that there was nothing available" for PPIE to review. (MS Ex. 4 at 2-162). Peress was "suspicious" about whether or not that was true. (MS Ex. 4 at 2-162).

Herz contacted Del Monte and "requested a schedule prepared by [Del Monte's Chief Financial Officer] or somebody under his control to support the notion [before the Bankruptcy Court] that there was little or no economic value to the [PPIE's Del Monte stock]" and "to convey to the court that [PPIE was] getting the highest and best offer" for the stock. (Herz Dep. at 392, 394). Herz told Del Monte that he wanted the most current information possible in the analysis. (Herz Dep. at 392). Later that day, Del Monte's Chief Financial Officer faxed to Herz a one-page chart showing that the total equity value for all of Del Monte was \$35 million. (DM Ex. 39 at 6078-79). This chart was clearly labeled that it was based on the audited financial statements for the fiscal year 1996, which ended on June 30, 1996. (DM Ex. 39 at 6079). The chart stated that Del Monte's EBITDA for that period was \$82 million, to which was applied a multiple of 6.0x. From an aggregate enterprise value of \$492 million, debt of \$457 million was subtracted, yielding an equity value of \$35 million. [FN28] (DM Ex. 39 at 6079).

FN28. The "as of June 30, 1996" \$35 million valuation analysis differs significantly from the valuation analysis provided to Kett by Morgan Stanley on June 24, 1996 (which showed a valuation range of \$105-190 million). The June 24, 1996 analysis used an (a) EBITDA of \$85 million, (b) a range of multiples of 6-7x, and (c) an estimated debt of \$420 million.

What if any impact the receipt of this valuation had upon PPIE is unclear for two reasons. First, Herz testified that he did not consider the valuation further due diligence to use in analyzing the value of Del Monte. (Herz Dep. at 391). Second, given the large differential between the \$35 million valuation provided on January 10, 1997 and the \$105-\$190 million valuation previously provided to PPIE on June 24, 1996, it is unlikely that

PPIE actually believed that, as of January 10, 1997, the total equity value of all of Del Monte was only \$35 million.

On January 12, 1997, Herz again spoke with Del Monte's Chief Financial Officer, (Herz Dep. at 411), who told him that PPIE's Del Monte stock had no economic, veto or blocking value, and that it had only "nuisance value." (Herz Dep. at 412). Herz was left with the "general understanding" from that conversation that Del Monte was not being sold, though he does not recall specifically what words were used. (Herz Dep. at 412-13). Herz also noted that his conversations with Morgan Stanley during this time period similarly left him with the "understanding" that there "was no definitive sale of Del Monte, proposed or contemplated" and that no definitive offers had been made. (Herz Dep. at 417-421).

On or around January 12, 1997, the Bankruptcy Court received a bid from Solow of \$1.65 million for the Del Monte stock, and ordered PPIE's bankruptcy counsel to proceed with an auction between Solow and Del Monte. (Compl. ¶ 45; DM Ex. 40). The bidding continued until Del Monte bid \$10.15 million. (Compl. ¶ 48). Solow then increased his bid to \$10.6 million plus \$400,000 if Del Monte were sold within two years. At this point, the auction was adjourned for the day. (Compl. ¶ 48).

*13 On the morning of January 14, 1997, Del Monte withdrew from the bidding. (Compl. ¶ 50). Later that afternoon, the Bankruptcy Court held an in-chambers conference during which it asked Del Monte's counsel why Del Monte had been willing to pay so much more than its previous \$1.6 million offer, and whether there was a transaction or event that provided the impetus for Del Monte's bid. (Herz. Dep. at 541-42; see also Peress Dep. 3/29/01 at 47-48). Del Monte's counsel was specifically asked by Solow's attorney whether any transaction was "in prospect", to which Del Monte's counsel responded "no." (Peress Dep., 3/29/01 at 60). Del Monte's counsel further stated that there was "nothing more than that which had

already been disclosed to the court and the parties" and that Del Monte's bidding was motivated by a desire to "simplify its capital structure." (MS Ex. 4 at 2; Peress Dep. 3/29/01 at 48). Del Monte's counsel also told the court that Del Monte was undergoing a financial restructuring and that part of the financial restructuring was "seeking interest by investors or potential acquirers." (Peress Dep. 3/29/01 at 59).

At a hearing later in the afternoon of January 14, 1997, Peress told the Bankruptcy Court that:

If asked whether [PPIE] would consider holding the stock at this point, ... Mr. Herz's answer would be no; that Del Monte's fortunes have declined ... with the income trend being a downward one as profitable operations have been sold in order to raise funds ... leaving Del Monte with the ... relatively unprofitable ... canning business; that [its Del Monte Stock is subject to] the risk that Del Monte might one day have to engage in a restructuring transaction which could have the effect of further diluting ... or eliminating [PPIE's] interests. [FN29]

FN29. The Court notes that Peress's assessment is inconsistent with the interim financial statements for the quarter ending September 30, 1996 which had been provided to PPIE. (DM Ex. 4 at 35-36). The Bankruptcy Court, therefore, orally approved the sale to Solow on the afternoon of January 14, 1997. However, because Solow had not decided whether he was willing to purchase the Del Monte stock subject to the Stockholders Agreement, a written order approving the sale was not entered on that date. (DM Ex. 4 at 44-46). Thus, as of January 14, 1997, there was no final sale of the stock.

G. January 15-21, 1997: Morgan Stanley Provides Del Monte with an Updated Valuation and Solicits Firm Bids for the Company

In response to an early January 1997 request from Charterhouse (another of Del Monte's stockholders) for a valuation of its stake in Del Monte for purposes of its own efforts to raise capital, on January 15, 1997, Morgan Stanley provided Charterhouse with a written valuation stating that the total equity value of Del Monte was \$350-\$450

million. (MS Ex. 23, 24). This valuation was based on projected average EBITDA for the two fiscal years ending June 30, 1997 of \$113 million and a range of multiples of 6.5-7.5, and incorporated "values implicit in recent unsolicited indications of interest." [FN30] (MS Ex. 23 at 190, 196). The letter to Charterhouse describing this valuation referred to a "possible sale of Del Monte." (MS Ex. 23 at 190). A spreadsheet attached to this valuation shows an allocation to PPIE's Del Monte stock of \$13.3-\$23.7 million, based on a range of values of \$350-\$450 million. (MS Ex. 23 at 197). On January 21, 1997, Morgan Stanley sent an almost-identical letter to Del Monte, including a valuation of \$350-\$450 million, to be used by Del Monte for "income tax purposes ." (DM Ex. 42 at 4017, 4109).

FN30. This apparently refers to TPG's early December 1996 assessment that Del Monte's equity was worth \$100-150 million. Morgan Stanley testified that this indication caused it to reduce, rather than increase, the valuation range that it provided to Charterhouse. (See MS Ex. 6 at 119).

***14** On January 21, 1997, Morgan Stanley circulated to Del Monte a draft of a letter dated January 27, 1997 to be sent to interested parties. (MS Ex. 25). This letter instructed the interested parties to submit firm offers for Del Monte by February 12, 1997. (MS Ex. 25). Later on January 21, Del Monte's Board of Directors authorized Morgan Stanley to send out the letter and solicit firm bids. [FN31] (MS Ex. 6 at 113).

FN31. The bid solicitation letters, along with a draft Merger Agreement, were sent to TPG and Hicks Muse on January 29, 1997. (MS Mem. at 19). These letters asked for firm bids by February 12, 1997.

H. January 23, 1997: Del Monte Provides Further Disclosure to the Bankruptcy Court and the Sale to Solow is Approved

On January 23, 1997, Del Monte's counsel submitted a letter to the Bankruptcy Court and to PPIE's counsel to "supplement the information provided to the [Bankruptcy] Court on January 14, 1997 respecting Del Monte's equity restructuring and sale

process." (DM Ex. 43). The letter explained that, since that date, Del Monte had received an analysis from Morgan Stanley suggesting that the fair market value of all of Del Monte's equity was in the range of \$350-\$450 million, and that the range of values for PPIE's Del Monte Stock was \$13.3-\$23.7 million. (DM Ex. 43). The letter acknowledged that Morgan Stanley had reviewed "the values implicit in certain non-binding, unsolicited indications of interest expressed by certain potential purchasers of Del Monte." (DM Ex. 43). The letter emphasized that the values set forth were based on a possible sale of Del Monte, that such a sale may not be consummated at all or at the valuation indicated, and that the value stated was "subject to significant uncertainties." (DM Ex. 43). At the time this letter was received by the Bankruptcy Court, it had yet to enter a written order approving the sale of PPIE's Del Monte stock to Solow.

Peress discussed the letter with both Del Monte's counsel as well as with Herz immediately after it was received. (Peress Dep. 2/29/01 at 65-66). There is no evidence that either Herz nor Peress sought any clarification of the letter from Del Monte or its counsel. At the following Bankruptcy Court hearing on January 23, 1997, Peress explained that he still wanted to go through with the sale to Solow, because "it isn't like [Del Monte or its counsel] are saying we have a deal in hand that is going to return 13 million dollars." (MS Ex. 42 at 6). Peress told the court that, despite being aware that Morgan Stanley was having discussions with potential acquirers, "the record shouldn't really change in the sense that [PPIE] has gotten the highest and best offer for the [Del Monte S]tock," and he indicated his belief that there was no benefit to remarketing PPIE's Del Monte stock. (PPIE Ex. 73 at 1073). Likewise, Herz believed that "a bird in hand is always worth more than two in the bush." (Herz Dep. at 103). In addition, Del Monte's counsel explained to the Bankruptcy Court that "it [was] not Del Monte's position that the letter should alter what the Court would otherwise do." (PPIE Ex. 73 at 1075). Thus, late in the afternoon of January 23, 1997, the

Bankruptcy Court entered a written order approving the sale of the Del Monte stock to Solow for \$10.6 million, plus \$400,000 in the event that Del Monte was sold within two years. (DM Ex. 45 at 4). As part of the Stock Purchase Agreement between PPIE and Solow, PPIE signed a disclaimer similar to the one it had proposed to the Bankruptcy Court.

I. February--April 1997: Del Monte is Sold to TPG

*15 On February 12, 1997, in response to the bid solicitation letter which it had sent out, Morgan Stanley received bids for Del Monte from TPG, Hicks Muse, Dole Foods and Tri-Valley Growers, though the only bids that were not subject to further due diligence were from TPG and Hicks Muse. (DM Ex. 47-50). TPG bid for an aggregate enterprise value [FN32] of \$890 million which equated to total equity value of \$436 million), while Hicks Muse bid \$220 million total equity value. (DM Ex. 49 at 830; Ex. 48 at 1290). Morgan Stanley was "stunned" by the amount of TPG's bid, particularly given the great value differential between the TPG and Hicks Muse bids. (Bernier Dep. at 290-291; see also Meyers Dep. at 405).

FN32. Aggregate enterprise value refers to the total value to be paid for the company's business, before subtracting amounts necessary to pay off all of the company's existing indebtedness. For example, if Del Monte had \$400 million of debt and received a bid for an aggregate enterprise value of \$800 million, the total equity value would be \$400 million (\$800 million minus \$400 million).

PPIE argues that Del Monte was actually aware that TPG would bid an aggregate enterprise value of approximately \$800 million as early as January 8, 1996. It points to a January 8, 1997 presentation that TPG made to potential financing sources related to a potential bid for Del Monte for that amount. (PPIE Ex. 64; Meyers Dep. at 281-82). A copy of this presentation, prepared by TPG in connection with this meeting, was discovered in the files of Del Monte's Treasurer. (PPIE Ex. 64 at 11519). PPIE argues that because this document was found in Del Monte's files,

it must have had access to this document prior to the sale of the stock. However, Del Monte's General Counsel knew of no Del Monte employees who had attended the January 8 meeting nor any Del Monte employees who were aware of the amount that TPG would bid for the company before bids were actually received on February 12, 1997. (Sawyers Dep. at 137). Further, Thomas Gibbons, Del Monte's Treasurer since 1995, has submitted a declaration stating that "I did not receive, see or learn of this document ... until mid-April 1997, nor did I have any knowledge of the contents of that document until after February 12, 1997." [FN33] (DM Gibbons Decl. ¶¶ 2-4). Morgan Stanley also denies having had knowledge of what TPG was going to bid for the company prior to February 12, 1997.

FN33. A notation in a Morgan Stanley contact sheet indicates that Del Monte's Controller participated in a conference call with TPG on January 8, 1997. (MS Ex. 34 at 2805). However, Del Monte's Controller has submitted a declaration that, while it is possible that he participated in such a conversation, he is certain that TPG did not indicate to him prior to February 12, 1997 what it intended to bid for Del Monte. (DM French Decl. ¶ 3).

On February 14, 1997, Del Monte's stockholders (including Solow) met to discuss a possible allocation of the \$436 million of proceeds that they were to receive in the TPG transaction. (Banks Dep. at 262-63). Solow took an aggressive negotiating posture, threatening to veto the transaction if he did not receive a very favorable allocation of the proceeds. (Banks Dep. at 131-32; 263-65). The other stockholders eventually acceded to Solow's demands, and he received a \$31 million allocation, which was a higher percentage of the accreted value of his stock than was received by at least one class of preferred stock higher in seniority to the stock held by Solow. (Banks Dep. at 132, 264; DM Ex. 52-53). In mid-April 1997, TPG acquired Del Monte, with Solow receiving \$31 million for his Del Monte stock. (Compl. at ¶ 54; DM Ex. 53 at 3243).

II. SUMMARY JUDGMENT STANDARD

Federal Rule of Civil Procedure 56(c) provides that summary judgment is proper "if the pleadings, depositions, answers to the interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Mere "conclusory statements, conjecture or speculation by the party resisting the motion will not defeat summary judgment." *Kulak v. City of New York*, 88 F.3d 63, 71 (2d Cir.1996). If the moving party meets its burden of identifying those portions of the record that it believes demonstrate the absence of genuine issues of material fact, "the burden then shifts to the non-moving party to demonstrate to the court the existence of a genuine issue of material fact." *Lendino v. Trans Union Credit Info. Co.*, 970 F.2d 1110, 1112 (2d Cir.1992). To meet this burden, the nonmoving party "must come forward with affirmative evidence showing a genuine issue of material fact exists for trial." *Chandra Corp. v. Val-Ex, Inc.*, Civ.A. No.99-9061, 2001 WL 669252, at *2 (S.D.N.Y. Jun.14, 2002) (citing *Celotex*, 477 U.S. at 324)).

*16 Summary judgment is improper if "there is any evidence in the record from any source from which a reasonable inference could be drawn in favor of the nonmoving party." *Chambers v. TRM Copy Ctrs. Corp.*, 43 F.3d 29, 37 (2d Cir.1994). Nonetheless, "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

In this case, PPIE claims the evidence demonstrates disputed facts as to whether Del Monte and Morgan Stanley lied and omitted material facts when negotiating to purchase PPIE's holdings of Del Monte stock. PPIE claims, inter alia, that Del Monte failed to inform PPIE, before it sold its stock to Solow, that: (1) Del Monte had retained Morgan

Stanley to explore strategic alternatives, including the sale of Del Monte; (2) third parties had expressed an interest in purchasing Del Monte; (3) prospective purchasers were conducting due diligence of Del Monte; and (4) Del Monte's financial condition was improving. With respect to its fraud claim against Morgan Stanley, PPIE claims that Morgan Stanley (1) misrepresented that there were no prospective buyers for Del Monte at the time that Morgan Stanley was engaged in serious negotiations with several potential buyers; (2) made false representations about the value of the Series D Shares and told PPIE that the Series D shares had "no economic value" and were "worthless"; and (3) "knew to a near certainty by no later than December 1996 that Del Monte would receive offers from one or more interested purchasers that would value the equity in excess of \$350 million." (MS Ex. 43 at ¶ 68). PPIE alleges that due to these misrepresentations and omissions, it suffered approximately \$20 million in losses: the difference between the auction price of its Del Monte Stock and the price that Solow later received for the stock when TPG acquired Del Monte.

Del Monte and Morgan Stanley for their parts deny making affirmative misstatements and assert that they made appropriate disclosures to PPIE. They assert that PPIE's claims must be dismissed because the record demonstrates sufficient disclosures so as to negate the notion of misstatements or omissions. Additionally, they argue that because of their disclosures, PPIE could not justifiably rely on any purported misstatements or omissions, and to the extent that PPIE lacked information it was due to its own indifference to the information that Del Monte had provided.

III. CHOICE OF LAW

[1] Before turning to the substantive law to decide whether there are disputes as to material issues of fact in this case, this Court must determine which state law applies to the tort and contract claims. While the parties agree that Maryland law governs PPIE's

contract claim against Del Monte due to a choice of law provision in the contract at issue, they dispute which state law should govern the tort claims. [FN34] See *Lazard Freres & Co. v. Protective Life Ins. Co.*, 108 F.3d 1531, 1540 (2d Cir.1997) ("It is possible that, under New York's choice of law rules, the law of different jurisdictions can apply to the tort and contract claims in a given suit."). This case involves three sets of tort claims: a claim for fraud and a claim for negligent misrepresentation against Del Monte and a claim for fraud against Morgan Stanley. PPIE argues that either Delaware or Maryland should apply to these tort claims. Del Monte and Morgan Stanley each seek application of New York law.

FN34. It is worth noting that the contract between Del Monte and PPIE does not influence the choice of law as to the tort claims in this case. The pertinent contract provision provides that "this Agreement shall be construed and enforced in accordance with and governed by the law of the State of Maryland." Such language is too narrow to apply to the tort claims asserted by PPIE in this case. See *Krock v. Lipsay*, 97 F.3d 640, 645 (2d Cir.1996) (finding that a choice of law provision stating that the contract "shall be governed by and construed with the laws of [Massachusetts]" did not apply to the tort claims asserted by the plaintiff).

*17 "It is well-settled that, in diversity cases, federal courts must look to the laws of the forum state to resolve issues regarding conflicts of law." *Krock v. Lipsay*, 97 F.3d 640, 645 (2d Cir.1996) (citing *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941)). Since this suit was brought in the Southern District of New York, the Court must look to New York law to determine which state's law should apply. Generally, "New York law employs an 'interest analysis' in choice of law analysis of tort claims, under which courts apply 'the law of the jurisdiction having the greatest interest in the litigation.'" *Cromer Finance Ltd. v. Berger*, 158 F.Supp.2d 347, 357 (S.D.N.Y.2001) (quoting *Curley v. AMR Corp.*, 153 F.3d 5, 12 (2d Cir.1998)).

According to this principle, "fraud claims

are governed by the laws of the jurisdiction where the injury is deemed to have occurred--which usually is where the plaintiff is located." *Pinnacle Oil Co. v. Triumph Oklahoma, L.P.*, Civ.A. No.93-3434, 1997 WL 362224, at *1 (S.D.N.Y. Jun. 27, 1997) (citing *Sack v. Low*, 478 F.2d 360, 366 (2d Cir.1973) (Friendly, J.); *Cooney v. Osgood March., Inc.*, 81 N.Y.2d 66, 72, 595 N.Y.S.2d 919, 612 N.E.2d 277 (1993) ("If conflict-regulating laws are at issue, the law of the jurisdiction where the tort occurred will generally apply because that jurisdiction has the greatest interest in regulating behavior within its borders."). Indeed, "[t]he traditional view has been that ... when a person sustains loss by fraud, the place of wrong is where the loss is sustained, not where fraudulent misrepresentations are made." *Sack*, 478 F.2d at 366 (citations omitted). "For business entities such as corporations, the place of injury is the principal place of business or location of the business, as opposed to the place of incorporation or organization." *Pinnacle*, 1997 WL 362224, at * 1.

Under this traditional interest analysis, PPIE and Del Monte disagree as to whether New York or Delaware has a greater interest. [FN35] Upon review of the record, it is clear that New York law should apply. The fraud alleged in this case was committed in pertinent part from June 1995 through January 1997. During this period, PPIE has alleged that Del Monte made false statements to Herz and Kett. During those periods, Herz, PPIE's sole representative in the United States, was first based in Connecticut and, as of mid to late 1996, he relocated to New York. As he conducted business from his residence, the Court views his home as PPIE's principal place of business. Kett was either in New York or London. [FN36] In addition, New York was not only PPIE's principal place of business, but it was also the place of the great majority of communications at issue in this case, which were transmitted from California, where Del Monte's Chief Financial Officer David Meyers worked, to Herz in New York. Such communications included the myriad phone calls, faxes, and mailings described earlier.

FN35. PPIE does not argue that Maryland law should apply based on this analysis, but relies instead on the internal affairs doctrine discussed *infra*.

FN36. Neither party argues that Connecticut or British law should apply in this case. In any event, the Court would find that New York still has the greatest interest because the majority of the alleged fraud was completed in New York.

***18** Far less communication between Del Monte and PPIE occurred in Delaware, and these communications were limited to the month of January 1997, when PPIE auctioned its stock under the auspices of the Delaware Bankruptcy Court. During this month, Del Monte made specific representations to PPIE that it had no information to turn over to it that it had not already disclosed. These representations replicated earlier representations made to PPIE in New York. The other set of representations made by Del Monte in Delaware involve the January 23, 1997 letter in which Del Monte reassessed the value of PPIE's Del Monte Stock. While perhaps significant, this one letter communication does not trump the series of communications that allegedly occurred in New York. Therefore, the Court concludes that New York has the greater interest in this lawsuit.

Nevertheless, PPIE argues that Maryland law should apply due to a specialized application of the interest analysis rule: the internal affairs doctrine. See *BBS Norwalk One, Inc. v. Raccolta, Inc.*, 60 F.Supp.2d 123, 129 (S.D.N.Y.1999). The internal affairs doctrine "recognizes that only one State should have the authority to regulate a corporation's internal affairs--matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders--because otherwise a corporation could be faced with conflicting demands." *Edgar v. MITE Corp.*, 457 U.S. 624, 645-46, 102 S.Ct. 2629, 73 L.Ed.2d 269 (1982). Accordingly, PPIE maintains that since Del Monte is a Maryland corporation, Maryland laws should control the relationship between Del Monte and PPIE, one of its

shareholders. However, this doctrine appears to apply only in those cases where a corporation owed a fiduciary duty to shareholders. See, e.g., *Walten v. Morgan Stanley & Co.*, 623 F.2d 796, 798 (2d Cir.1980); *BBS Norwalk One*, 60 F.Supp.2d at 129; *Hart v. General Motors Corp.*, 129 A.D.2d 179, 185, 517 N.Y.S.2d 490 (1st Dep't 1987). In this case, though, the remaining tort claims do not involve a claim for a breach of fiduciary duty. Moreover, the allegations in this case are not peculiar to the corporate setting and could have arisen between two parties with no corporate relationship. Therefore, the internal affairs doctrine is inapplicable, and the Court will apply New York law to PPIE's claims against Del Monte.

Likewise, the Court applies New York law to PPIE's fraud claim against Morgan Stanley. As with its claims against Del Monte, PPIE argues under the interest analysis doctrine, that Delaware law should apply. However, New York has a greater interest in PPIE's claims against Morgan Stanley than Delaware. With regard to the domicile of the parties, Morgan Stanley's principal place of business was in New York at all times relevant to this action. PPIE, operating out of Herz's office in New York during the times relevant to this claim, was also domiciled in New York. The locus of the alleged tort also requires the application of New York law. Berner, the only Morgan Stanley representative to communicate with PPIE, worked out of Morgan Stanley's New York office. In November 1996, when Berner was discussing the sale of PPIE's Del Monte stock with Herz, PPIE was also domiciled in New York. (Second Herz Dep. at 480). Thus, any alleged misrepresentations made by Berner were sent from Morgan Stanley and received by PPIE in New York. By contrast, Delaware has no relationship whatsoever to PPIE's fraud claims against Morgan Stanley; Morgan Stanley did not participate in any of the Delaware Bankruptcy Court proceedings, nor did it attend the auction of PPIE's Del Monte stock. Under the circumstances, New York has the greater interest in this case, and, therefore, New York law applies.

*19 The Court also rejects the suggestion that the internal affairs doctrine dictates the application of Maryland law to PPIE's claims against Morgan Stanley. Morgan Stanley has no corporate, contractual or statutory relationship whatsoever with PPIE. PPIE's fraud claims against Morgan Stanley are separate and distinct from PPIE's relationship with Del Monte. Accordingly, the Court is not dissuaded from its conclusion that New York law should apply.

[2] Alternatively, the Court would apply New York law in this case because PPIE has not demonstrated that New York law differs significantly from either Maryland or Delaware law. The proponent of foreign law must show that it differs materially from New York law. *Dornberger v. Metropolitan Life Ins. Co.*, 961 F.Supp. 506, 530-31 (S.D.N.Y.1997) (the law of the forum state applies where there is a false conflict). The only difference that PPIE claims between New York's and Delaware and Maryland's laws focuses on the reasonable reliance element of a fraud claim, which all three states share. PPIE claims that, unlike New York, neither Delaware nor Maryland take a plaintiff's sophistication into account in deciding whether reliance is justifiable. (PPIE brief at 26-27). This, however, is not accurate.

Courts in both Delaware and Maryland do consider the sophistication of a plaintiff when considering whether reliance is justifiable. See, e.g., *Steigerwald v. Bradley*, 136 F.Supp.2d 460, 470 (D.Md.2001) ("As an experienced businessman," plaintiff could not justifiably rely); *J.A. Moore Constr. Co. v. Sussex Assocs., L.P.*, 688 F.Supp. 982, 990-91 (D.Del.1998); *Gaffin v. Teledyne, Inc.*, 611 A.2d 467, 475 (Del.1992); *Maryland Nat'l Bank v. Traenkle*, 933 F.Supp. 1280, 1285 (D.Md.1996); *Mater City Bagels, L.L.C. v. Am. Bagel Co.*, 50 F.Supp.2d 460 (D.Md.1999). Based on the similarity of the law in all three states, this Court is required to apply the tort law of New York state with respect to PPIE's claims against Del Monte.

IV. PPIE'S FRAUD CLAIMS AGAINST DEL MONTE AND MORGAN STANLEY ARE

DISMISSED

To prove common law fraud under New York law, a plaintiff must show that: (1) the defendant made a material false statement or omission; [FN37] (2) the defendant intended to defraud the plaintiff; (3) the plaintiff reasonably relied upon the representation or omission; and (4) the plaintiff suffered damage as a result of such reliance. *Banque Arabe de Internationale D'Investissement v. Maryland Nat'l Bank*, 57 F.3d 146, 153 (2d Cir.1995). Also, under New York law, the plaintiff bears the burden of proving each element of a fraud claim by clear and convincing evidence, and not a mere preponderance. See *Computerized Radiological Servs. v. Syntex Corp.*, 786 F.2d 72, 76 (2d Cir.1996) (citing *Accusystems, Inc. v. Honeywell Info. Sys. Inc.*, 580 F.Supp. 474, 482 (S.D.N.Y.1984) (citing cases)). "This evidentiary standard demands a high order of proof ... and forbids the awarding of relief whenever the evidence is loose, equivocal or contradictory." *Abrahami v. UPC Constr. Co.*, 224 A.D.2d 231, 638 N.Y.S.2d 11, 13 (1st Dep't 1996) (internal citation omitted).

FN37. To prove concealment, a plaintiff must also establish that the defendant had a duty to disclose information to the plaintiff. See *Brass v. Am. Film Tech., Inc.*, 987 F.2d 142, 152 (2d Cir.1992).

*20 [3] In this case, the question of whether Del Monte and Morgan Stanley made material misrepresentations or omissions with respect to their knowledge of a pending sale of Del Monte or their valuations of PPIE's Del Monte stock is a close one. As the factual record recounted earlier shows, there is no direct evidence, although there is some circumstantial evidence, that the companies knew that a sale of Del Monte to TPG was in the making at the time of PPIE's stock sale. More significantly, there is evidence that the two companies had increased their valuations of Del Monte, and, therefore, PPIE's Del Monte Stock. Of course, valuations of companies, by their nature, are not facts but rather are estimates of a range of values based upon assumptions. That said, the companies chose to turn over only selected portions of these valuations to PPIE. This Court, accordingly, cannot determine as a matter of

law that a reasonable juror could not find that Del Monte and Morgan Stanley made material misstatements or omissions. This is so even under New York's heightened pleading standard. Nevertheless, PPIE cannot demonstrate that it has met its burden under the third element of New York's fraud standard: reasonable reliance. The Court, therefore, turns to an analysis of this element.

A. New York's Reasonable Reliance Standard

In New York, it is well settled that a plaintiff cannot establish justifiable reliance when "by the exercise of ordinary intelligence" it could have learned of the information it asserts was withheld. *Abrahami*, 638 N.Y.S.2d at 14 (quoting *Schumaker v. Mather*, 133 N.Y. 590, 596, 30 N.E. 755 (1982)). It is equally well settled that the level of scrutiny applied to a plaintiff in fraud cases is heightened in transactions between sophisticated business entities. When sophisticated parties fail to exercise care in their affairs, they "will not be heard to complain that [they were] induced to enter into the transaction by misrepresentations." *Abrahami*, 638 N.Y.S. at 471 (quoting *Schumaker*, 133 N.Y. at 596, 30 N.E. 755); see also *Grumman Allied Indus. Inc. v. Rohr Indus., Inc.*, 748 F.2d 729, 737 (2d Cir.1984) ("Where sophisticated businessmen engaged in major transactions enjoy access to critical information but fail to take advantage of that access, New York courts are particularly disinclined to entertain claims of justified reliance."); *Lazard Freres & Co. v. Protective Life Ins. Co.*, 108 F.3d 1531, 1543 (2d Cir.1997) ("[A] party will not be heard to complain that he had been defrauded when it is his own evident lack of due care which is responsible for his predicament."); *Siemens Solar Indus. v. Atlantic Richfield Co.*, 251 251 A.D.2d 82, 673 N.Y.S.2d 674, 674 (1st Dep't 1998) ("[S]ophisticated entity's opportunities to obtain knowledge of the matters that are subjects of the alleged misrepresentations preclude its claims of reasonable reliance.").

Accordingly, even if a defendant made a misrepresentation or material omission, this is

"not enough to eliminate the [plaintiff's] duty to examine current financial statements and other information about the [defendant's] business." *Giannacopoulos v. Credit Suisse*, 37 F.Supp.2d 626, 632 (S.D.N.Y.1999). This is particularly true when a party possesses, but fails to read the very disclosures it claims were withheld from it. See *Treacy v. Simmons*, Civ.A. No. 89-7052, 1991 WL 67474, at *4-*5 (S.D.N.Y. Apr. 23, 1991) (plaintiff's reliance on a broker's alleged misrepresentations was unjustifiable because the plaintiff failed to read the investments' prospectuses); *Brown v. E.F. Hutton Group*, 735 F.Supp. 1196 (S.D.N.Y.1990) (same), *aff'd*, 991 F.2d 1020 (2d Cir.1993). In short, "The 'justifiable reliance' requirement ensures that a causal connection exists between the misrepresentation and the plaintiff's injury.... Reckless conduct by the plaintiff that rises to a level of culpability comparable to the defendant's breaks this chain of causation and renders the plaintiff's reliance unjustifiable...." *Treacy*, 1991 WL 67474, at 5 (quoting *Grubb v. Fed. Deposit Ins. Co.*, 868 F.2d 1151, 1163 (10th Cir.1989)).

B. PPIE is a Sophisticated Business Entity Subject to Higher Level of Scrutiny

*21 It is clear that PPIE qualifies under New York law as a sophisticated entity with a heightened duty to investigate and protect itself in business transactions. PPIE, incorporated in the United States, was formed in 1988 (almost ten years prior to the stock sale at issue in this case) to acquire companies in both North and South America in order to expand the global presence of its corporate parent, Polly Peck International PLC. (MS Ex. 43 at ¶ 11). Herz, PPIE's sole employee at the time of the stock sale, was a certified public accountant who had been in charge of PPIE's affairs since 1991. Additionally, during the stock negotiations, PPIE was advised by its administrators in London, Coopers & Lybrand, one of the largest accounting firms in the world. It had the further advice of Prudential, the investment bank it had hired specifically to assist it in valuing the worth of its Del Monte stock.

Notably, during its interactions with Del

Monte throughout 1996 and 1997, PPIE viewed itself as a sophisticated business entity involved in an arms-length transaction with Del Monte, the initial intended buyer of PPIE's Del Monte stock. Indeed, Herz noted that he felt he was under no obligation to reveal the information that Prudential gave to him with regard to the price of PPIE's Del Monte stock because PPIE and Del Monte were involved in an "arms-length" transaction. (Herz Dep. at 274). In fact, when PPIE submitted to the Bankruptcy Court for its approval the draft stock purchase agreement between itself and Del Monte in which it would sell its Del Monte stock for \$1.6 million, it included a section in that agreement that contained a representation by PPIE that it was a "sophisticated investor with a long-time equity interest in [Del Monte] and its business ... that it ha[d] engaged and received the advice of an investment banking firm with respect to the value of the Shares, and that [PPIE was] fully able to evaluate the merits of the transaction contemplated by this Agreement." (DM Ex. 3 at 5475-76). PPIE made a similar representation again in its stock purchase agreement with Solow. (DM Ex. 3). This record, therefore, clearly establishes that PPIE was not only a sophisticated business entity but that it viewed itself as such and professed to function in such a manner.

C. PPIE Failed to Heed Critical Information Disclosed by Del Monte and Morgan Stanley

Despite its sophistication, the record demonstrates that PPIE either failed to pursue or failed to reasonably incorporate into its own analysis of its Del Monte stock's value a series of disclosures made by Del Monte and Morgan Stanley. For example, by letter dated May 2, 1996, Meyers, Del Monte's Chief Financial Officer, sent Kett a Del Monte internal Financial Model and the Del Monte quarterly financial statements for the quarters ending September 30, 1995 and December 31, 1995. The cover letter to this package indicated Del Monte was "expecting a very strong performance in the fourth quarter, which ends June 30, 1996." By letter dated May 22, 1996, Meyers sent Kett the Del

Monte third quarter financial statements ending March 31, 1996, which showed a continuing improvement in financial performance. This improved performance was confirmed by the September 30, 1996 quarterly financial statements, which were higher in the three months ending September 30, 1996 than in the comparable year-earlier period, with operating income having increased by \$16 million. This statement also showed earnings of \$6-\$11 million higher than Del Monte's previous projections, which Del Monte had disclosed to PPIE.

*22 With this and other information, PPIE easily could have performed its own analysis of Del Monte's value to discover that the projections it had earlier received from Del Monte were no longer relevant. In fact, based upon this information, William Purcell, [FN38] Del Monte's uncontroverted expert whom the Court credits, explained that a reasonable investor "would have arrived at an independent valuation of \$350 million to \$450 million or higher for the equity value of the Company." [FN39] (DM Ex. 36, p. 17). Notably, this is the same estimate as that offered to PPIE in the January 23, 1997 letter. To reach this conclusion, Purcell used a similar analysis to that used by Prudential in August 1995 and July 1996, when PPIE had asked Prudential to conduct an independent valuation of its Del Monte stock. [FN40]

FN38. Purcell has been an investment banker for over 30 years, and was elected Managing Director at Dillon, Read & Co. Inc ("Dillon Read") in 1982. He specializes in all areas of corporate finance, especially mergers and acquisitions. Currently, he is the Managing Director of investment banking firms in Washington, D.C. Purcell has a B.A. in economics from Princeton University and an MBA from New York University.

FN39. Purcell explained that had PPIE compared the September 30, 1995 quarterly statement with the September 30, 1996 quarterly statement, PPIE would have concluded that the rolling EBITDA for Del Monte was between \$107 million and \$115 million, and with an assumption of reasonable growth of 5%-15%, could have projected a June 30, 1997 fiscal year end EBITDA of \$120 million.

(DM Ex. 36 at 17). Using the same EBITDA multiple valuation method described in Berner's June 24, 1996 letter, PPIE on its own could have easily arrived at an estimated equity of \$350 million to \$450 million.

FN40. The Court also notes, as Purcell commented in his report, that "experienced financial people clearly know that an equity valuation is not a guarantee that one can 'take to the bank,' but that it is a best estimate range based on various assumptions some of which might be inaccurate, subject to valid differences of opinion, or speculative." (DM Ex. 36, p. 6).

In fact, in September 1996, Herz "thought it important to have some third party make a determination as to the value of the [Series D Shares]." (Herz Dep. at 134). He sent the financial information he had received from Del Monte [FN41] to Prudential and requested that Prudential update the valuations it had previously performed. (Herz Dep. at 129-30). However, while Prudential had agreed to perform the previous valuation at no charge, it refused to conduct another valuation without a fee. (Herz Dep. at 130). Because PPIE did not have the funds available to pay for this valuation, Herz asked the Administrators for financial assistance, but Kett and the Administrators refused his request. (Herz Dep. at 132). Thus, despite the fact that in 1996 the Administrators thought it prudent to obtain an independent valuation before responding to Del Monte's offer to purchase PPIE's Del Monte stock (MS Ex. 17), and the fact that the Administrators received approximately \$1.5 million to \$3 million for their services to Polly Peck in 1996, (MS Ex. 5 at 324), they nonetheless refused to pay for a valuation of the Series D Shares. Therefore, before the sale of its stock to Solow, PPIE did not obtain an independent evaluation from Prudential or conduct its own valuation to update the valuations Prudential had performed in August of 1995 and July of 1996. Such neglect does not comport with the duty imposed by New York law to investigate. [FN42]

FN41. Herz did not specify which information he gave Prudential, remembering only that he sent the

most recent information that he had. (Herz Dep. at 129).

FN42. Herz's inattention is perhaps explained by the fact that the Administrators for Polly Peck had, by the fall of 1996, stopped paying Herz for his services, and by the end of 1996, were in arrears to Herz for approximately \$10,000. (Herz Dep. 315-317; 339).

Another prime example of inattention occurred on January 14, 1997, when PPIE represented to the Bankruptcy Court that Del Monte's "fortunes [had] declined ... with the income trend being a downward one...." (DM Ex. 4 at 35). This assessment was clearly wrong in light of Del Monte's September 1996 financial statements, which were in PPIE's possession as early as November 1996. The record is clear that while there may have been information upon which PPIE relied to its detriment, it did so in the face of disclosures that clearly indicated an increase in the value of Del Monte and, hence, its Del Monte stock.

Likewise, despite PPIE's claims that Del Monte and Morgan Stanley withheld information from it with regard to Del Monte's potential sale, the record demonstrates that PPIE was given numerous indications that a sale of the company was likely. The record also shows, that as with the financial projections, PPIE failed to use the information that it was given to assess the value of its Del Monte stock. For example, Kett testified that as early as June of 1996, Berner of Morgan Stanley told him that while there were no prospects on the horizon for a sale of Del Monte in the food industry, there would "likely ... be a financial buyer in a year's time." (Kett Dep. at 212-213; MS Ex. 29). Kett did not believe this information to be of significance and did not report it to Herz. Herz, for his part, testified that from his few conversations with Berner, he was aware that Morgan Stanley has been retained by Del Monte to explore strategic alternatives, including a potential sale. (Herz Dep. at 225, 226). Herz acknowledged that a sale of Del Monte "had always been a possibility" and that Berner had informed him that Del Monte was receiving unsolicited expressions of

interest. (Herz Dep. at 225-226, 228-30).

*23 Herz also admitted that later, in September 1996, Berner told him that Del Monte was "in play" and was receiving inquiries from potentially interested parties on a regular basis. (Herz Dep. at 299). Despite this disclosure, Herz neither shared this information with Kett nor did he make an effort to ascertain the identity of the potential purchasers or the status of their inquiries. (Herz Dep. at 299-300). Such conduct fails to demonstrate the level of care expected of a sophisticated party in carrying out its duty to investigate.

A series of significant disclosures were also made in November 1996. On or about November 8, Del Monte's outside counsel and Del Monte's CFO Meyers orally informed Herz that Del Monte's Board of Directors had authorized management to proceed with the sale process and that Del Monte had executed confidentiality agreements with prospective purchasers, who had already begun due diligence. (Samuels Dep. at 181-82). Also in November 1996, Del Monte provided Herz with the Offering Memorandum containing detailed financial information about Del Monte. (See DM Ex. 1). Although Herz admits Meyers sent this to him in response to Herz's request for information that could assist PPIE in deciding whether to sell the Del Monte stock, Herz only "spent a few minutes looking" at the Offering Memorandum and failed to provide it to Coopers & Lybrand, Prudential or anyone else. (Herz Dep. at 345-46). Herz's inattention caused him not to notice the pointed disclosure on page 7 that "a sale of the Company ... could occur at any time." (DM 1 at 7; Herz Dep. at 347).

He also apparently did not read the two-page November 18, 1996 draft notice of mandatory redemption that Meyers sent him in November. (Herz Dep. at 594-5). Thus, Herz did not read the paragraph--under the clear heading "Inquiries From Interested Parties"--disclosing that prospective purchasers had signed confidentiality agreements with Del Monte and were conducting due diligence. As a result, Herz

was unaware of these executed agreements. Significantly, Herz admits that had he been aware, he would have investigated further, asked who the prospective purchasers were and sought to see the due diligence material. (Herz Dep. at 330-31). Herz did none of these things, nor did he even contact Meyers or Berner of Morgan Stanley with any follow-up questions after receipt of these documents, despite Meyers' express written invitation to do so. (DM Ex. 33 at 5465; Herz Dep. at 348).

Kett acknowledged that Herz's failure to forward these documents to Coopers & Lybrand or to tell them about Del Monte's sale process might have been a mistake. (Kett Dep. at 387). Had Herz told him of these disclosures, he "would have asked questions to understand more fully what was meant by these statements" and sought the "identity of these potential third party purchasers" and "copies of information or documents that were provided to third parties pursuant to the confidentiality agreements." (Kett Dep. at 460, 504). Kett testified that had he known of these disclosures beforehand, he would not have approved the initial agreement to sell the Del Monte stock to Del Monte and would have conducted a further investigation before approving the later agreement to sell the Del Monte stock to Solow. (Kett Dep. at 461).

*24 Thus, before PPIE auctioned its stock on January 12, 1997, it had been provided with ample financial information to perform updated valuations of Del Monte and its Del Monte stock, (DM Ex. 36 at ¶¶ 30-38), but had chosen not to do so. It had also been informed about the progress of Del Monte's sale process, but had failed to read Del Monte's disclosures. Clearly, PPIE acted indifferently toward its own business (indeed, its only asset) and ignored the critical information it was given. Under these circumstances, it cannot now complain that it reasonably relied on selected segments of Del Monte's and Morgan Stanley's representations, ignoring those disclosures that contained red flags that its Del Monte stock was more valuable than previously thought.

Moreover, after PPIE had agreed to the sale

of its stock to Solow, but before finalization of that sale by the Bankruptcy Court, Del Monte made yet another disclosure to PPIE. On January 23, 1997, Samuels, Del Monte's lawyer, informed PPIE that Morgan Stanley had provided it with valuations estimating that the Del Monte stock could be worth more than double what Solow had bid. Nevertheless, Herz instructed his attorney to inform the court that PPIE still wanted to complete the sale. Herz explained at deposition his belief that it was worth seizing the "bird in the hand." (Herz Dep. at 103, 444). This is further evidence of the lack of causation between Del Monte's disclosures and PPIE's decision to sell its stock. [FN43]

FN43. Recognizing the implication of their decision to complete the sale to Solow in the face of the January 23, 1997 letter disclosure, PPIE claims that it did so for the additional reason that it feared that Solow would sue if it backed out. Significantly, PPIE does not support this claim with any evidence that it actually spent any time considering holding on to its stock, that it discussed this option and its consequences with its counsel, or even thought to raise the subject with the Bankruptcy Court. PPIE's utter failure to weigh the advantages--the potential for a higher sale price against the unsupported fear of litigation make this claim nothing more than speculation. Of course, even assuming it was PPIE's fear of litigation that motivated its decision to go through with the sale, the Court's conclusion that PPIE's reliance was unreasonable before the January 1997 letter remains unchanged.

PPIE has pointed to several cases in which courts refused to grant summary judgment against a plaintiff because they found the defendant had withheld information that was "peculiarly within defendant's knowledge." See *Mallis v. Bankers Trust Co.*, 615 F.2d 68, 80 (2d Cir.1980). It is true that under New York law, "[w]hen matters are held to be peculiarly within defendant's knowledge, it is said that plaintiff may rely without prosecuting an investigation, as he was no independent means of ascertaining the truth." *Mallis*, 615 F.2d at 80; *Lazard Freres & Co. v. Protective Life Ins. Co.*, 108 F.3d 1531, 1542 (2d Cir.1997). However, the Second Circuit has noted that the fact that information may be

peculiarly known to one entity does not end the analysis in the case of sophisticated players. *Lazard Freres*, 108 F.3d at 1543. As the Second Circuit has noted, sophisticated players must protect themselves from misrepresentations and can do so by including protective language to that effect. [FN44]

FN44. In fact, PPIE did calculate for the risk that Del Monte could be sold shortly after it sold its stock. It negotiated with Del Monte and then with Solow for an equity kicker, which provided that if Del Monte were to be sold within two years of the date of the Stock Sale Agreement, the buyer would pay PPIE an additional amount over the purchase price not to exceed \$400,000. (DM Ex. 3 at 2 ¶ 4).

In *DynCorp v. GTE Corp.*, 215 F.Supp.2d 308, 321 (S.D.N.Y.2002), the district court encountered a situation similar to the one in this case where a sophisticated plaintiff argued that the peculiar information exception should apply. In that case, the court concluded that where the plaintiff had signed a waiver of representations and knew that it was in possession of only selected information, it could not demonstrate reasonable reliance. See *DynCorp*, 215 F.Supp.2d at 321-22.

*25 Likewise, here, PPIE was on notice that it was in possession of only selected information. For example, the Offering Memorandum indicated that Del Monte had entered confidentiality agreements with potential buyers, but Del Monte did not specify to PPIE who those potential buyers were. Despite being on notice that it had received partial and not full information, however, it signed a contract with Solow in which it stated that "it [was] knowledgeable about Del Monte and its business and the industry in which Del Monte operates, that it ha[d] engaged and received the advice of an investment banking firm with respect to the value of the Shares, and that [it was] fully able to evaluate the merits on the transaction contemplated by [the Stock Sale] Agreement." (DM Ex. 3 at 5-6 at ¶ 9). [FN45] Under such circumstances, PPIE cannot now complain that it was harmed by information that Del Monte did not turn over when it was the party that failed to pursue clear disclosures.

FN45. PPIE had also been willing to sign an agreement with Del Monte when it believed that Del Monte would be the purchaser of its stock, and it had submitted this agreement to the Bankruptcy Court for approval. If signed, PPIE would have disclaimed any reliance on Del Monte's express or implied representations. It also would have acknowledged that it had "the full opportunity to ask questions of and obtain information from the Company with respect to all matters relating to the transaction contemplated by this Agreement." (PPIE Ex. 30).

Indeed, even if certain misrepresentations or omissions had been made by Del Monte, "[p]arties cannot demand judicial protection when they could have protected themselves with a reasonable inquiry into any misrepresented facts." Giannacopoulos, 37 F.Supp.2d at 632. PPIE cannot now, in hindsight, make out a claim for fraud because it regrets its decision to sell to Solow and wishes to hold Del Monte responsible for its own lack of attention and care to its business affairs. For these reasons, this Court finds that PPIE (1) was a sophisticated business entity, (2) did not heed the significant disclosures by Del Monte that indicated its stock's value was in excess of \$1.6 million and (3) did not justifiably rely on alleged misrepresentations and omissions by either Del Monte or Morgan Stanley. Indeed, "[w]here, as here, a party has been put on notice of the existence of material facts which have not been documented and [it] nevertheless proceeds with a transaction without securing the available documentation or inserting appropriate language in the agreement for his protection, [it] may truly be said to have willingly assumed the business risk that the facts may not be as represented." Lazard Freres, 108 F.3d at 1543 (2d Cir.1997) (quoting Rodas v. Manitaras, 159 A.D.2d 341, 552 N.Y.S.2d 618, 620 (1st Dep't 1990)). Accordingly, PPIE's fraud claims are dismissed.

V. PPIE'S NEGLIGENT
MISREPRESENTATION CLAIM AGAINST
DEL MONTE IS DISMISSED

[4] PPIE has brought a claim against Del

Monte for negligent misrepresentation based on an alleged breach of a duty of care stemming from the contractual relationship between the parties. PPIE claims that based on the contractual relationship, namely the Stockholders Agreement, Del Monte had a duty to disclose information to PPIE, which Del Monte violated by allegedly withholding information as well as disclosing misinformation.

In order to recover on a theory of negligent misrepresentation, a plaintiff must establish that because of some special relationship with the defendant which generally implies a closer degree of trust than the ordinary buyer-seller relationship, the law imposes on that defendant a duty to use reasonable care to impart correct information, that the information is false or incorrect, and that the plaintiff reasonably relied upon the information given.

*26 Pappas v. Harrow Stores, Inc., 140 A.D.2d 501, 528 N.Y.S.2d 404 (2d Dep't 1988) (emphasis added). As argued by PPIE, New York law does permit a finding of such a special relationship in a commercial context based upon a contract that places two parties in privity. See Kimmel v. Schaefer, 89 N.Y.2d 257, 263, 652 N.Y.S.2d 715, 675 N.E.2d 450 (1987) (citing Int'l Prods. Co. v. Erie R.R. Co., 244 N.Y. 331, 338, 155 N.E. 662 (1927)); Schrodgers, Inc. v. Hogan Systems, Inc., 137 Misc.2d 738, 522 N.Y.S.2d 404, 406 (N.Y.Sup.Ct.1987) (Baer, J).

In this case, if the Court were to find a special relationship existed between Del Monte and PPIE, the duty of care imposed upon Del Monte would be a duty of care in the disclosure of information to PPIE. This, however, is the same duty that the parties codified in the Stockholders Agreement. As noted earlier in this Opinion, the Stockholders Agreement provides in § 2.12 that Del Monte provide "as promptly as practicable, such financial statements and other information, including, without limitation, monthly management reports as such Stockholder may reasonably request." Thus, under the Stockholders Agreement, Del Monte was required to reasonably respond to requests for information in good faith. See Wootton

Enters., Inc. v. Subaru of American, Inc., 134 F.Supp.2d 698, 704 n. 5 (D.Md.2001) ("Under Maryland law, there is an implied duty of good faith and fair dealing in all contracts."). Thus, the duty of care under the negligent misrepresentation theory in this case would be no greater than the scope of the obligation arising from the contract itself.

New York law, however, does not permit a tort claim to stand when it merely duplicates an alleged breach of contract.

It is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract has been violated.... This legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent on the contract.

Clark-Fitzpatrick, Inc. v. Long Island R. Co., 70 N.Y.2d 382, 389, 521 N.Y.S.2d 653, 516 N.E.2d 190 (N.Y.1987) (citations omitted); LaSalle Bank Nat'l Assoc. v. Citicorp Real Estate Inc., CIV.A. No.02-7868, 2003 WL 1461483, at *3-*4 (S.D.N.Y. Mar.21, 2003). Indeed, "[i]f the only interest at stake is that of holding the defendant to a promise, the courts have said that the plaintiff may not transmogrify the contract claim into one for tort." Robehr Films, Inc. v. Am. Airlines, Inc., CIV.A. No.85-1072, 1989 WL 111079, at *2 (S.D.N.Y. Sept.19, 1989) (quoting Hargrave v. Oki Nursery, Inc., 636 F.2d 897, 899 (2d Cir.1980)).

Here, the contract itself is the sole basis for the imposition of a special duty, but that duty only extends as far as the contract's scope--the reasonable disclosure of information by Del Monte to PPIE. PPIE "failed to show that there was a legal duty imposed upon [Del Monte] independent of the contract itself, or that [Del Monte] engaged in tortious conduct 'separate and apart from [its] failure to fulfill [its] contractual obligations.'" D'Ambrosio v. Engel, 292 A.D.2d 564, 741 N.Y.S.2d 42, 44 (2d Dep't 2002) (quoting New York Univ. v. Cont'l Ins. Co., 87 N.Y.2d 308, 316, 639 N.Y.S.2d 283, 662 N.E.2d 763 (1995)). In other words, "[i]f [Del Monte's] conduct is evaluated

as if there were no contract here, [PPIE] clearly would not be able to claim that" Del Monte was liable for negligent misrepresentation because "the underlying foundation for such a claim would be [PPIE's] reliance on [Del Monte's duty to disclose information to it], an untenable position if not for the contract." Robehr Films, 1989 WL 111079, at *3; Edwil Indus., Inc. v. Stroba Instruments Corp., 131 A.D.2d 425, 516 N.Y.S.2d 233, 233 (2d Dep't 1987) (dismissing plaintiff's tort claim because a contract obligated the defendant to render accurate statements of sales, which was the "gravamen" of the tort claim); Maharaja Travel, Inc. v. Bank of India, CIV.A. No.94-8308, 1997 WL 154044, at *4 (S.D.N.Y. Apr.2, 1997) ("It is insufficient as a matter of law to assert a tort claim along with a breach of contract claim unless the Complaint alleges negligent misrepresentation regarding circumstances wholly collateral to the breach of contract claim or there is a legal duty independent of the contract that exists between the parties.").

*27 Moreover, the Court must consider that "New York's 'economic loss' rule restricts a claimant who has not suffered personal or property injury, but only 'economic loss,' to an action in contract for the benefit of its bargain." Robehr Films, 1989 WL 111079, at *4. New York retains this rule in order to preserve the distinction between tort and contract, in an "attempt to keep contract law 'from drown[ing] in a sea of tort.'" Carmania Corp., N.V. v. Hambrecht Terrel Intern., 705 F.Supp. 936, 938 (1989) (quoting East River S.S. Corp. v. Transamerica Delaval Inc., 476 U.S. 858, 866, 106 S.Ct. 2295, 90 L.Ed.2d 865 (1986)). Therefore, "[i]f the damages suffered are of the type remediable in contract, a plaintiff may not recover in tort ." Carmania, 705 F.Supp. at 938.

In this case, PPIE "alleges only economic loss in its proposed negligence claim. It does not claim any personal injury or damage to property, as is required to recover in tort." Robehr Films, 1989 WL 111079, at *5. This factor, therefore, also points to the fact that, although PPIE's claim sounds in tort, it is

actually a claim for a breach of contract. See *Maharaja Travel*, 1997 WL 154044, at *4 (S.D.N.Y. Apr.2, 1997) (dismissing plaintiff's fraudulent misrepresentation claim because, *inter alia*, "[a]ll damages alleged by [plaintiff] as arising from the alleged fraud are recoverable as damages under [plaintiff's] breach of contract claim"). Accordingly, PPIE's claim for negligent misrepresentation is dismissed.

[5] In any event, the Court would dismiss the negligent misrepresentation claim for the same reason that it dismissed the fraud claims: that PPIE could not have reasonably relied on the alleged misrepresentations or omissions. [FN46] The Second Circuit has explained that even where a duty to disclose may exist, it does not necessarily follow that a party, even one with a special relationship, reasonably relied on misrepresentations or omissions. *Hydro Investors, Inc. v. Trafalgar Power Inc.*, 227 F.3d 8, 21 (2d Cir.2000) (affirming summary judgment against plaintiff's negligent misrepresentation claim because plaintiff could not establish reasonable reliance); *Consol. Edison, Inc. v. Northeast Utils.*, 249 F.Supp.2d 387, 409 (S.D.N.Y.2003) (dismissing negligent misrepresentation claim despite fact that there might have been special relationship because plaintiff failed to establish reasonable reliance); *Nasik Breeding & Research Farm Ltd. v. Merck & Co., Inc.*, 165 F.Supp.2d 514, 536 (S.D.N.Y.2001) (same).

FN46. The Second Circuit has noted that omissions are "nothing more than affirmative misrepresentations" for purposes of deciding whether a party has a duty to disclose. *Grumman*, 748 F.2d at 738 (1984).

In this case, as explained above, PPIE had access to critical information, including: (1) a statement by Berner of Morgan Stanley in June 1996 that he believed that there would be a financial buyer for Del Monte within one year's time; (2) oral disclosures that Del Monte was "in play" and was on a regular basis receiving inquiries from potential interested parties; (3) Del Monte's September 1996 quarterly financial statement, which disclosed

that Del Monte's operating income in the first fiscal quarter of 1997 was \$16 million higher than the previous year; (4) Del Monte's Offering Memorandum and Draft Notice of Redemption, which indicated that potential purchasers of Del Monte who had executed confidentiality agreements were conducting due diligence of the Company; (5) a November 1997 oral disclosure by Del Monte's outside counsel and CFO to the same effect; and (6) the January 1997 letter informing PPIE and the Bankruptcy Court that Del Monte now valued PPIE's Del Monte stock at \$13.3-\$23.7 million.

*28 This information should have indicated to PPIE that the value of its Del Monte stock had likely increased since Del Monte had offered it \$1.6 million for the stock in November 1996. Therefore, PPIE's reliance on Del Monte's earlier representations and alleged omissions was not reasonable, but rather reckless, as it demonstrated that PPIE "acted in 'disregard of a risk known to [it] or so obvious that [it] must be taken to have been aware of it, and so great as to make it highly probable that harm would follow.'" *Stern & Stern Textiles, Inc. v. LBY Holding Corp.*, CIV.A. No. 84-3295, 1987 WL 6434, at *2 (S.D.N.Y. Feb.5, 1987) (quoting *Dupuy v. Dupuy*, 551 F.2d 1005 (5th Cir.1977, per Judge Wisdom) (quoting *W. Prosser, Handbook of the Law of Torts* § 34 at 185 (4th ed.1971)). Accordingly, PPIE's claim for negligent misrepresentation is dismissed both because it is duplicative of the breach of contract claim and because PPIE could not reasonably rely on the alleged misrepresentations and omissions of Del Monte as a matter of law.

VI. PPIE'S BREACH OF CONTRACT CLAIM

[6] PPIE alleges that Del Monte failed to provide information it was required to provide--upon request--under the Stockholders Agreement. As noted above, § 2.12 of the Stockholders Agreement required Del Monte to provide to PPIE all information that PPIE reasonably requested. [FN47] It is undisputed that PPIE made repeated requests for any and all information that might help it evaluate the

value of its Del Monte stock. The question is whether Del Monte satisfied its obligation once these requests were made.

FN47. Again, the precise language of the contract stated that Del Monte must provide: "as promptly as practicable, such financial statements and other information, including, without limitation, monthly management reports as such stockholder may reasonably request."

Under Maryland law, "[t]he interpretation of a written contract is ordinarily a question of law for the court..." *ABC Imaging of Washington, Inc. v. The Travelers Indem. Co. of Am.*, 150 Md.App. 390, 820 A.2d 628, 632 (Md.Ct.Spec.App.2003). Furthermore, Maryland courts adhere to the "objective interpretation of contracts" principle, under which courts give the words of a contract "their ordinary and usual meaning, in light of the context within which they are employed" as opposed to the meaning that the parties may have intended at the time. *ABC Imaging*, 820 A.2d at 633. Thus, where the terms of a contract are unambiguous, the court determines its meaning and application as a matter of law. See *Auction & Estate Representatives, Inc. v. Ashton*, 354 Md. 333, 731 A.2d 441, 444 (Md.1999) ("[T]he clear and unambiguous language of an agreement will not give way to what the parties thought the agreement meant or was intended to mean."). The Maryland Court of Appeals has also made clear that "language which is merely general in nature or imprecisely defined is not necessarily ambiguous." *Truck Ins. Exch. v. Marks Rentals, Inc.*, 288 Md. 428, 418 A.2d 1187, 1190 (Md.1980).

Nonetheless, "when there is a bona fide ambiguity in the contract's language or legitimate doubt as to its application under the circumstances ... the contract [is] submitted to the trier of the fact for interpretation." *Monumental Life Ins. Co. v. U.S. Fid. And Guar. Co.*, 94 Md.App. 505, 617 A.2d 1163, 1174 (Md. Ct. of Spec.App.1993) (citing *Board of Trustees v. Sherman*, 280 Md. 373, 373 A.2d 626 (Md.1977); 4 *Williston on Contracts* § 616 (1961)). "Ambiguity arises if, to a reasonably prudent person, the language

used is susceptible of more than one meaning and not when one of the parties disagrees as to the meaning of the subject language." *The Board of Educ. of Charles County v. Plymouth Rubber Co.*, 82 Md.App. 9, 569 A.2d 1288, 1296 (Md.Ct.Spec.App.1990) (citing *Truck Ins.*, 418 A.2d at 1187)). In such cases--where "the writing is not clear as to preclude doubt by a reasonable man of its meaning"--the interpretation function passes from the court to the jury. *Bethesda Place Ltd P'ship v. Reliance Ins. Co.*, Civ.A. No.91-1719, 1992 WL 97342, at *2 (D.Md. Apr. 22, 1992).

*29 The contract in this case "require[s] a factual determination as to what is deemed to be" a reasonable disclosure of documents by Del Monte. *Trimed, Inc. v. Sherwood Medical Co.*, 772 F.Supp. 879, 885 (D.Md.1991) (finding that the interpretation of a "best efforts" clause in a contract was properly submitted to the jury). Whether the requests for documents by PPIE were reasonable and whether Del Monte adequately responded to those reasonable requests is a question best left to a trier of fact who is "in the best position to make this factual determination, which is dependent on the circumstances of the case." *Trimed*, 772 F.Supp. at 885; see also *Wood v. Allstate Ins. Co.*, 21 F.3d 741, 747 (7th Cir.1994) (finding that whether defendant satisfied her contractual duty to respond to reasonable requests made by her insurance company was a material question of fact for the jury). The jury's decision may, of course, be influenced by evidence as to custom and usage in the industry, evidence that was not presented on this motion. See *Goodman v. Resolution Trust Corp.*, 7 F.3d 1123, 1126 (4th Cir.1993) ("If ... resort to extrinsic evidence in the summary judgment materials leaves genuine issues of fact respecting the contract's proper interpretation, summary judgment must of course be refused and interpretation left to the trier of fact.") (citing *World-Wide Rights Ltd. P'ship v. Combe Inc.*, 955 F.2d 242, 245 (4th Cir.1992)). Thus, the Court finds that the interpretation of the contract as well as its application should be referred to the jury.

Del Monte argues that the contract claim

should nonetheless be dismissed because, regardless of the meaning and application of § 2.12, its "supposed duty to provide information never came into effect." (DM Memo at 44). Del Monte points to § 6.6 of the Stockholder's Agreement, which provides that "All notices and other communications provided for herein shall be in writing and shall be delivered by hand or sent by certified mail ... to the Company." Del Monte claims that because PPIE never made a written request pursuant to § 6.6, PPIE's claim under § 2.12 must fail. [FN48]

FN48. There is in the record, however, evidence that PPIE made one written request for a copy of Del Monte's Board minutes, to which, PPIE alleges, Del Monte did not respond. (PPIE Ex. 39). Whether such a request qualifies as reasonable request under the § 2.12 is a question for the jury.

As explained above, when the language of the contract is unambiguous, it is within the province of the Court to interpret the contract. Here, § 6.6 clearly provides that "all notices and other communications" with Del Monte, which are provided for in the contract, are to be in writing. This language is unambiguous, and the Court finds that it is broad enough to incorporate those communications contemplated by § 2.12. To find otherwise, would be to disregard the plain language of § 6.6. Therefore, according to the contract, PPIE should have made requests in writing.

Nevertheless, PPIE argues that Del Monte waived any claim that it might have to enforce § 6.6 with regard to § 2.12 because of its course of conduct, namely its continual response to PPIE's oral requests for documents and information. [FN49] In response to this claim, Del Monte points to § 6.5 of the Stockholders Agreement, which states that: "[a]ny term of [the] Agreement ... may be amended and the observance of any such term may be waived ... only with the written consent of (a) the Company and (b) Stockholders holding at least 66-2/3% of the outstanding Shares held by all the Stockholders." Del Monte maintains that because the contract has a specific waiver provision requiring written waiver, it could

not have waived § 2.12 through its conduct.

FN49. There are many instances of such behavior, exemplified by the following two examples. In July of 1996, Herz orally asked Del Monte for "any and all information regarding Del Monte" that would "assist" PPIE in evaluating Del Monte's one million dollar offer. In response to this, Del Monte promised to send its June 30, 1996 financials, which would soon be completed. On August, 23, 1996, Herz again spoke to Del Monte to obtain those financials, which Del Monte did eventually send. Later, when Herz requested financial information from Del Monte that it could bring to the Bankruptcy Court to substantiate the reasonableness of Del Monte's offer, Del Monte faxed PPIE a chart showing Del Monte's total equity value at \$35 million.

*30 However, under Maryland law, parties to a contract may waive provisions of that contract by behavior that is "inconsistent with the intention to insist upon enforcing such provisions." *Parks v. CAI Wireless Systems, Inc.*, 85 F.Supp.2d 549, 555 (D.Md.2000). The Maryland Court of Appeals has defined waiver as "the intentional relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right, and may result from an express agreement or be inferred from the circumstances." *BarGale Indus., Inc. v. Robert Realty Co.*, 275 Md. 638, 343 A.2d 529, 533 (Md.1975); *Guardian Life Ins. Co. v. U.S. Tower Servs., Ltd.*, 122 Md.App. 550, 714 A.2d 204, 210-211 (Md.Ct.Spec.App.1998) (same). Moreover, parties to a contract can make an oral agreement, expressly or implicitly, that effectively waives the requirements of a written contract. See *Hoffman v. Glock*, 20 Md.App. 284, 315 A.2d 551, 554-55 (Md.Ct.Spec.App.1974); *Fantle v. Fantle*, 140 Md.App. 678, 782 A.2d 377, 382 (Md.Ct.Spec.App.2001). Notably, "[t]his is so notwithstanding a written agreement that any change to a contract must be in writing." *Univ. of Nat'l Bank v. Wolfe*, 279 Md. 512, 369 A.2d 570, 576 (Md.1977) (emphasis added) (citing *Taylor v. University Nat'l Bank*, 263 Md. 59, 282 A.2d 91, 93-94 (Md.1971)). [FN50] Such an

FN50. The University Nat'l Bank case involved a similar waiver provision to the one in this case. It provided that "[t]he rights or authority of the Bank under [the] agreement shall not be changed or terminated by said depositors or either of them except by written notice." 369 A.2d 576. The waiver provision in this case differs to the extent that it involves a third party--the other stockholders of the company. While this difference is important, Maryland law appears clearly to favor upholding the common law rule of waiver by course of conduct. Since PPIE attempts to hold only Del Monte liable based on its course of conduct, not the other stockholders, their lack of a direct stake in the action counsels against precluding a finding by the jury of waiver by course of conduct.

oral modification of a written contract may be established by a preponderance of the evidence.... Of course, if the written contract provides that it shall not be varied except by an agreement in writing, it must appear that the parties understood that this clause was waived. However, such a clause may be waived by implication as well as by express agreement.

Taylor, 282 A.2d at 93-94 (internal citations omitted) (quoting *Freeman v. Stanbern Const. Co.*, 205 Md. 71, 106 A.2d 50, 55 (Md.1954))) (emphasis added); *Battista v. Savings Bank of Baltimore*, 67 Md.App. 257, 507 A.2d 203, 209 (Md.Ct.Sp.App.1986) (noting that "the decisions permitting waiver of contractual rights despite a non-waiver clause requiring a written waiver are consistent with Maryland decisions"); *Mayor and City Council of Baltimore v. Ohio Cas. Ins. Co.*, 50 Md.App. 455, 438 A.2d 933, 936 (Md.Ct.Spec.App.1982) ("oral modification of a contract, despite a provision requiring all modifications to be in writing, is permitted in Maryland"). Therefore, it is possible under Maryland law for Del Monte to have waived both the waiver provision and the written notice provision.

The question of waiver, though, is one for the fact-finder and should therefore go to the jury. See *Battista*, 507 A.2d at 209 (stating that "the question of waiver [is] one for the jury," as the question of whether defendant intended to waive is "best left to the fact-finder"); *Ohio Cas.*, 438 A.2d at 936 (factual

disputes regarding the extent of modification are for the jury to resolve).

Finally, Del Monte argues that PPIE's breach of contract claim fails because "PPIE can point to no piece of information Del Monte withheld that would have altered the outcome one iota." (DM Memo at 46). While it may indeed be difficult to assess damages in this case, "in Maryland, [i]t is well settled that every injury to the rights of another imports damages, and if no other damages is established, the party injured is at least entitled to a verdict for nominal damages." ' *Planmatics, Inc. v. Showers*, 137 F.Supp.2d 616, 624 (D.Md.2001) (quoting *Cottman v. Dep't of Natural Res.*, 51 Md.App. 380, 443 A.2d 638, 640 (1982) (quoting *Baltimore v. Appold*, 42 Md. 442, 457 (1875)). In any event, it is a question of fact whether or not there were actual damages in this case, and, therefore, this issue too shall be left for the jury. [FN51] Accordingly, for the above reasons, Del Monte's motion for summary judgment on the breach of contract claim is denied.

FN51. Del Monte also argues that § 3.4(a)(ii) of the Stockholders Agreement restricts PPIE's breach of contract claim with respect to PPIE's assertion that Del Monte withheld information from it with respect to the potential sale of the company. Section 3.4(a)(ii) provides that a stockholder shall "provide written notice ... of such Offer to the Company and to each of the Other Stockholders not later than the thirtieth day prior to the consummation of the sale...." Del Monte argues that, based on this clause PPIE was not entitled to such information prior to thirty days before a sale of Del Monte. This interpretation of the clause, however, is inapposite to the plain language of § 3.4(a)(ii) for two reasons. First, § 3.4(a)(ii) refers to the obligation of the stockholders to inform one another and the company of a potential sale. It does not create an obligation for Del Monte. Second, the language of the clause clearly establishes the minimum time frame by which stockholders must notify one another and the company of a sale. It does not limit disclosure prior to that time frame.

VII. THE MOTIONS FOR SUMMARY JUDGMENT ON THE THIRD-PARTY

COMPLAINT

*31 As noted above, Del Monte's Third-Party Complaint impleaded Charterhouse and Huff Asset Management, Del Monte's former stockholders, alleging claims against them for indemnification and contribution for any liability it may incur with respect to PPIE's tort and contract claims against it. According to Del Monte, Charterhouse and Huff Asset Management ("Third-Party Defendants") were primarily responsible for, actively engaged in and were the parties that stood to benefit from the allegedly wrongful conduct pleaded in PPIE's Complaint. Del Monte alleges that due to the Third-Party Defendants' control of Del Monte, they owed fiduciary duties to both PPIE and Del Monte, including the duty to disclose all material information to PPIE regarding the real value of or any potential sale of Del Monte. Del Monte alleges that since the Third-Party Defendants breached their fiduciary duties, they caused PPIE's alleged damages and thus Del Monte is entitled to indemnity or contribution for any damages it may incur from PPIE's suit. Third-Party Defendants now move for summary judgment on the Third-Party Complaint.

While Del Monte initially brought claims for indemnification and contribution as to the fraud, negligent misrepresentation, and breach of contract claim, the only claim that has survived summary judgment is the breach of contract claim. The Court therefore considers whether Del Monte can bring these claims for contribution and indemnification with respect to PPIE's breach of contract claim.

[7] The contribution claim clearly falls. Under New York law, it is firmly established that contribution is not available when the underlying claim is for breach of contract. [FN52] See, e.g., *Board of Educ. of Hudson City School Dist. v. Sargent, Webster, Crenshaw & Folley*, 71 N.Y.2d 21, 28, 523 N.Y.S.2d 475, 517 N.E.2d 1360 (1987); *Rothberg v. Reichelt*, 270 A.D.2d 760, 705 N.Y.S.2d 115, 117-118 (2d Dep't 2000); *County of Chautauqua v. Pacos Constr. Co.*, 195 A.D.2d 1021, 600 N.Y.S.2d 585, 586 (4th Dep't 1993); *Lawrence Dev. Corp. v. Jobin*

Waterproofing, Inc., 167 A.D.2d 988, 562 N.Y.S.2d 902, 902-903 (4th Dep't 1990). As the New York Court of Appeals has confirmed, the principles of contribution codified by N.Y. C.P.L.R. § 1401 apply only to tort liability and no other common-law form of contribution is applicable to liability arising from contract. *Sargent*, 71 N.Y.2d at 26-29, 523 N.Y.S.2d 475, 517 N.E.2d 1360 (quoting *Lawrence Dev. Corp.*, 562 N.Y.S.2d at 902-03). Thus, "the remedy of contribution is not available to a defendant whose potential liability to the plaintiff is for economic loss resulting from an alleged breach of contract." *County of Chatauqua*, 600 N.Y.S.2d at 586. In keeping with this unambiguous rule, Del Monte's claim for contribution on PPIE's underlying claim for breach of contract is dismissed.

FN52. The parties appear to agree that New York law applies to the contribution and indemnification claims. See *Int'l Bus. Mach. Inc. v. Liberty Mutual Fire Ins. Co.*, 303 F.3d 419, 423 (2d Cir.2002).

[8] The Court next turns to Del Monte's indemnification claims. Del Monte does not allege that the Third-Party Defendants were contractually bound to indemnify Del Monte, but rests its claim on a theory of implied indemnification. Implied indemnification is available where a defendant is held vicariously liable for the tortious acts of others, or where the liability is based on a defendant's passive negligence in failing to discover or remedy the wrongdoing of another party. See *Trustees of Columbia Univ.*, 492 N.Y.S.2d at 375; *County of Westchester*, 478 N.Y.S.2d at 314; *Am. Transtech Inc. v. U.S. Trust Corp.*, 933 F.Supp. 1193, 1202 (S.D.N.Y.1996).

*32 However, where as here, a plaintiff's underlying complaint charges a defendant with direct liability for breach of contract and not constructive or vicarious liability based on its relationship with other parties, there can be no third-party claim for indemnification for that breach of contract. See *Lawrence Dev. Corp.*, 562 N.Y.S.2d at 903 ("because plaintiff seeks to hold defendant liable for its active negligence and breach of contract, defendant has no cause of action ... based upon the

theory of implied indemnity"); *Columbus v. McKinnon Corp. v. China Semiconductor Co.*, 867 F.Supp. 1173, 1178-1179 (W.D.N.Y.1994) (dismissing third-party complaint for failure to state a claim for indemnification and contribution with respect to breach of contract claims); *City of Rochester v. Holmsten Ice Rinks, Inc.*, 548 N.Y.S.3d 959, 960-61 (4th Dep't 1989) (defendants could not seek indemnity because the "complaint charge[d] [defendants] only with direct liability for breach of contract and not vicarious liability based upon their relationship to another party. Thus, there is no basis for express or implied indemnity against [third-party defendant]."); *Resolution Trust Corp. v. Young*, 925 F.Supp. 164, 169 (S.D.N.Y.1996) (dismissing indemnification claim where no contractual provision or vicarious liability alleged).

In the instant case, a finding of liability against Del Monte on any of PPIE's claims would be a finding of active misconduct, thereby precluding Del Monte's eligibility for indemnification as a matter of law. Indeed, if Del Monte were found liable to PPIE on the basis of the breach of contract, its liability would be grounded in its own breach of its § 2.12 duty to provide financial information to PPIE and its other stockholders. [FN53] Section 2.12 of the Stockholders Agreement unequivocally creates an exclusive obligation from Del Monte to its stockholders. The stockholders have no such contractual obligation to one another and none is alleged. Accordingly, indemnification is not available to Del Monte for its alleged breach of its contractual obligation to PPIE. The Third-Party complaint is therefore dismissed

FN53. Del Monte argues that indemnity is available here because any potential wrongdoing that occurred was "done by and at the direction" of Third-Party Defendants in violation of their fiduciary duty to Del Monte and because Third-Party Defendants were relatively more at fault than it. These arguments are unavailing. Although a passively negligent party may obtain indemnification from an actively negligent third-party, it is clear in this case that, if Del Monte were to be held liable, it would be for their active participation in

wrongdoing--albeit at the alleged behest of Third-Party Defendants. "[W]here the party seeking indemnification is himself at least partially at fault, indemnity will not be implied." *Columbus*, 867 F.Supp. 1178.

CONCLUSION

Del Monte's motion for summary judgment is granted with respect to PPIE's fraud and negligent misrepresentation claims and denied with respect to PPIE's breach of contract claim. Morgan Stanley's motion for summary judgment on the fraud claim is granted. Charterhouse and Huff's motion for summary judgment on the Third-Party Complaint is granted.

Del Monte and PPIE are ordered to submit a joint pre-trial order on or before October 23, 2003.

SO ORDERED:

2003 WL 22118977 (S.D.N.Y.)

END OF DOCUMENT

70

District Court of Appeal of Florida,
Third District.

Manuel RAIMI, Individually and as Co-
Personal Representative and Trustee of the
Evelyn S. Gruber Last Will and Testament
and Evelyn S. Gruber Revocable Trust
Both Dated July 8, 1994; Renee Raimi and
Frieda Pantzer, SunTrust f/k/a
SunBank/Miami, N.A.; Theresa Heidel,
Individually and as an Officer of
SunBank/Miami, N.A., Lucille Clum,
Individually and as Vice President and Trust
Officer of SunBank/Miami, N.A.; Ida Raimi
and Edward L. Schultz, Appellants,

v.

Estelle G. FURLONG, Appellee.

Nos. 96-954, 96-998, 96-1002, 96-1011 and 96-
1012.

Sept. 17, 1997.

Rehearing Denied Jan. 8, 1998.

Testator's nephew filed petition for
administration of testator's final will.
Testator's stepdaughter filed petitions to set
aside final will as product of undue influence
and for administration of earlier will.
Stepdaughter subsequently brought equitable
action against testator's sister, brother, and
nephew, testator's bank, and certain bank
officers alleging conspiracy to deprive testator
of her estate through undue influence or
breach of fiduciary duty and that testator
lacked testamentary capacity. The Circuit
Court, Dade County, Moie J.L. Tendrich, J.,
determined that there was conspiracy, found
that bank was additionally negligent in its
hiring, training, retention, and supervision of
its employees, and declined to admit final will
to probate. Appeal was taken. The District
Court of Appeal, Green, J., held that: (1)
evidence was insufficient to establish
conspiracy; (2) bank did not impliedly consent
to trial of unpled negligence theory; (3)
evidence was insufficient to establish lack of
capacity; and (4) final will was not product of
undue influence.

Reversed and remanded with directions.

West Headnotes

[1] Conspiracy 1.1
91k1.1

Civil conspiracy requires agreement between
two or more parties to do unlawful act or to do
lawful act by unlawful means, the doing of
some overt act in pursuance of conspiracy, and
damage to plaintiff as a result of acts done
under the conspiracy.

[2] Conspiracy 1.1
91k1.1

Actionable civil conspiracy requires actionable
underlying tort or wrong.

[3] Conspiracy 8
91k8

Testator's sister's telephonic request to her
son that he contact testator to render
assistance to her after her late husband's
death was insufficient to establish civil
conspiracy to deprive testator of her money
and assets during her lifetime through
exercise of undue influence or breach of
fiduciary duty.

[4] Conspiracy 19
91k19

While civil conspiracy may be proven by
circumstantial evidence, this may be done
only when inference sought to be created by
such circumstantial evidence outweighs all
reasonable inferences to the contrary.

[5] Conspiracy 19
91k19

Receipt of some benefits from testator, without
any evidence of knowledge of alleged
conspiracy to deprive testator of her money
and assets during her lifetime through
exercise of undue influence or breach of
fiduciary duty, was insufficient to establish
parties' participation in alleged conspiracy.

[6] Contracts 96
95k96

Mere affection, kindness, or attachment of one
person for another does not itself constitute
undue influence.

[7] Banks and Banking 51
52k51

[7] Pleading 427
302k427

Trial court should not have found testator's bank negligent for the hiring, retention, and supervision of its employees, in testator's stepdaughter's equitable action, as this theory was not pled or tried by consent. West's F.S.A. RCP Rule 1.190(b).

[8] Pleading 427
302k427

Testator's bank's failure to object to evidence of its failure to supervise and train employees, in testator's stepdaughter's equitable action, was not implicit consent to trial of unpled negligence theory, as evidence was also directly relevant to issue of bank's breach of fiduciary duty to testator. West's F.S.A. RCP Rule 1.190(b).

[9] Pleading 427
302k427

Failure to object cannot be construed as implicit consent to try unpled theory when evidence introduced is relevant to other issues properly being tried. West's F.S.A. RCP Rule 1.190(b).

[10] Wills 50
409k50

To execute valid will, testator need only have testamentary capacity, that is, ability to mentally understand in general way the nature and extent of property to be disposed of, testator's relation to those who would naturally claim substantial benefit from his will, and general understanding of practical effect of will as executed.

[11] Wills 36
409k36

[11] Wills 43
409k43

[11] Wills 44
409k44

Testator may still have testamentary capacity to execute valid will even though he may

frequently be intoxicated, use narcotics, have enfeebled mind, failing memory, or vacillating judgment.

[12] Wills 37
409k37

Insane individual or one who exhibits queer conduct may execute valid will as long as it is done during lucid interval.

[13] Wills 21
409k21

For valid will, it is only critical that testator possess testamentary capacity at time of execution of will.

[14] Wills 400
409k400

Appellate court will not interfere with probate court's finding of testamentary capacity unless there is absence of substantial competent evidence to support finding or unless it appears that probate court has misapprehended effect of evidence as a whole.

[15] Wills 400
409k400

It is duty of appellate court to examine all of the evidence to determine whether there is substantial and competent evidence to support probate court's finding of testamentary capacity and whether probate court may have misinterpreted legal effect of evidence as a whole.

[16] Wills 400
409k400

When probate court has misinterpreted legal effect of evidence in its entirety, its finding of testamentary capacity will not be affirmed merely because there is evidence that is contradicted on which findings may be predicated.

[17] Evidence 571(2)
157k571(2)

Neurologist's testimony that testator suffered from severe dementia was insufficient to establish lack of testamentary capacity, given that neurologist categorically testified that he was unable to offer any opinion as to testamentary capacity at any given time and

will contestant offered no evidence that testator was incompetent or not lucid at time she executed contested will.

[18] Wills 155.1
409k155.1

When will is challenged on grounds of undue influence, influence must amount to over persuasion, duress, force, coercion, or artful or fraudulent contrivances to such extent that there is destruction of free agency and willpower of testator.

[19] Wills 163(2)
409k163(2)

[19] Wills 163(8)
409k163(8)

Presumption of undue influence arises in favor of will contestant if it is established that substantial beneficiary under will occupied confidential relationship with testator and was active in procuring contested will.

[20] Wills 163(8)
409k163(8)

Once presumption of undue influence arises, burden shifts to beneficiary of will to come forward with reasonable explanation of his or her active role in preparation of decedent's will.

[21] Wills 166(1)
409k166(1)

If presumption of undue influence goes un rebutted, it alone is sufficient to sustain will contestant's burden.

[22] Wills 166(1)
409k166(1)

If presumption of undue influence is rebutted, will contestant must establish undue influence by preponderance of evidence.

[23] Wills 164(6)
409k164(6)

Any undue influence used to procure earlier will was wholly irrelevant to question of whether subsequent will was also product of undue influence.

[24] Wills 163(2)

409k163(2)

Although testator's nephew was beneficiary under challenged will and enjoyed confidential relationship with testator, presumption of undue influence was not raised, as nephew did not procure attorney for testator, nephew did not give any instructions to attorney as to preparation of challenged will, nephew did not have knowledge of dispositive provisions of will, nephew was not present at execution of challenged will, and nephew did not take possession of will after its execution.

[25] Wills 163(2)
409k163(2)

Even if presumption of nephew's undue influence had arisen in connection with contested will, presumption was rebutted by nephew's explanation that he merely facilitated testator's independent decision to change her will after her bitter dispute with stepdaughter over proceeds of treasury bill.

[26] Wills 155
409k155

Testator's final will, which disinherited her stepdaughter's family, was not product of nephew's undue influence, as testator's sole motivation for disinheriting stepdaughter's family was testator's anger and animosity towards stepdaughter due to dispute over proceeds of treasury bill.

***1275** Bunnell, Woulfe, Kirschbaum, Keller & McIntyre, P.A. and Nancy W. Gregoire, Ft.Lauderdale, for appellants Manuel Raimi, Renee Raimi and Frieda Pantzer.

Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel, P.A., and Arthur J. England, Jr., and Charles M. Auslander, and John G. Crabtree, Miami; Bergman and Jacobs, P.A. and Richard H. Bergman, Miami; Muskat, Odessky and Miller, P.A. and Robert B. Miller, North Miami Beach, for appellants SunBank/Miami, N.A., Theresa Heidel and Lucille Clum.

Deutsch & Blumberg, P.A. and James C. Blecke, Miami, for appellant Ida Raimi.

Holland & Knight, and Daniel S. Pearson,

and Lenore C. Smith, Miami, for appellant Edward L. Schultz.

Heller and Kaplan, and Daniel Neal Heller, and Dwight Sullivan, and Joseph Currier Brock, Miami, for appellee.

Before LEVY, GERSTEN and GREEN, JJ.

GREEN, Judge.

This is a consolidated appeal of five appeals from an adverse final judgment entered after a non-jury equitable action and a will contest action. In its final judgment of the equitable action, the lower court, in essence, found that all of the appellants had conspired using undue influence to deprive the decedent (Evelyn S. Gruber) of her money and assets prior to her death in March 1995 and had caused her to execute her final will in their favor which they sought to admit to probate. As a result, the lower court awarded both compensatory and punitive damages against each of the appellants in the equitable action. Further, the court refused to admit the decedent's last will to probate in favor of an earlier executed will. The appellants argue, on this appeal, that the lower court's findings and conclusions are unsupported by competent substantial evidence in the record and/or the court misapprehended the effects of the evidence. We agree for the reasons which follow and reverse.

***1276 FACTUAL BACKGROUND**

The undisputed evidence adduced at trial, taken in the light most favorable to appellee, reflects that prior to her death, the decedent, Evelyn Gruber, was the widow of Jacob Gruber. Evelyn and Jacob had been married for approximately 18 years when he died in March 1993. It had been a second marriage for both and had produced no children. Appellee, Estelle Furlong was Jacob's only child from his prior marriage and the decedent's stepdaughter. The decedent had no children of her own. Jacob and Evelyn had each amassed considerable wealth prior to their marriage to each other, Jacob as a successful New York attorney and investor

and Evelyn as a buyer for a women's clothier. Evelyn's net worth, however, was considerably more than Jacob's.

Jacob's daughter, Estelle, a practicing probate attorney in Miami, rendered legal services to her father and stepmother, which included the drafting of their respective wills. Estelle's husband, Dr. James Furlong, was the personal physician to both Evelyn and Jacob. During their lifetime, Jacob and Evelyn interacted and socialized frequently with the Furlongs and bestowed generous gifts upon the Furlongs. Evelyn rarely saw or visited her blood family members which consisted of her sister, appellant, Ida Raimi and brother, appellant, Edward L. Schultz, both of whom resided in Michigan, or her nephew (i.e., Ida's son) and his wife, appellants, Manuel ("Manny") and Renee Raimi, who resided in St. Petersburg, Florida. Despite their lack of frequent interaction, however, Evelyn did generously bestow both monetary and non-monetary gifts upon her sister Ida due to her limited financial resources. [FN1]

FN1. Evelyn's brother Edward owned a business and was financially secure in his own right.

A. "THE LOST WILL" DATED JANUARY 23, 1992

On January 23, 1992, Jacob and Evelyn executed identical wills which were prepared by Estelle Furlong. As for Jacob's will, the bulk of his estate, estimated as being between \$1.5 and \$1.8 million, was left to Evelyn. Estelle and Evelyn were named co-personal representatives of Jacob's estate. Evelyn's will similarly left the bulk of her estate, estimated at approximately \$3.3 million to Jacob. Jacob and Estelle were named co-personal representatives of Evelyn's estate. In the event that Evelyn predeceased Jacob, it was provided that 75% of the residue of Evelyn's estate (as well as 100% of her jewelry, tangible property and \$200,000) would go to Estelle Furlong and 25% of the residue would go to Evelyn's sister, Ida. [FN2] In the event that Ida predeceased Evelyn, a third of her \$1 million share would go to appellant, Manny Raimi.

FN2. In this will, Evelyn also made a \$15,000 bequest to Ida's son, Manny Raimi and his wife, Renee.

Shortly before Jacob's death in March of 1993, Evelyn asked Estelle for the original of her January 23, 1992 will. Estelle returned the original of Evelyn's will to her as requested and it was never seen again. This will, dubbed "The Lost Will" in the proceedings below, was the will ultimately admitted to probate by the lower court in the will contest action.

B. "THE BLAUSTEIN WILL" DATED APRIL 8, 1993

Approximately one week after the death of her husband Jacob, Evelyn had a friend, Rose Alpert, drive her to see Donna Blaustein, Esq., a probate attorney with the law firm of Broad and Cassel in Miami, for the purpose of procuring a new will. According to Ms. Blaustein's unrefuted testimony, Evelyn was anxious to have a new will drawn which would divide her estate equally between her sister, Ida and brother, Edward Schultz, and their heirs, and completely disinherit Estelle and Dr. Furlong. Although Ms. Blaustein had some initial concerns that Evelyn did not have a complete understanding of the size of Jacob's or her estate, [FN3] she *1277 deemed Evelyn competent to execute a new will and dispose of her estate. Ms. Blaustein explained that in her experience as a probate lawyer, it was not uncommon for elderly widows such as Evelyn not to fully comprehend probate matters.

FN3. For example, Ms. Blaustein testified that even though Jacob had left Evelyn 77% of his estate, Evelyn believed that Jacob had disinherited her. Ms. Blaustein further testified that Evelyn feared that she was going to be left destitute despite her being worth more than \$3 million dollars in her own right.

Ms. Blaustein then proceeded to draft a new will in accordance with Evelyn's instructions. In this new will, ("The Blaustein Will"), Evelyn divided her estate evenly between her brother Edward and sister Ida [FN4] and made no provisions whatsoever for the

Furlongs. Alvin Cassel was named the personal representative in this will. Evelyn executed "The Blaustein Will" on April 8, 1993, and at the time, Ms. Blaustein was satisfied that Evelyn fully understood the size of her and Jacob's estate, its income, and disbursements. Ms. Blaustein thereafter retained the original of this will for six weeks. During this period, Ms. Blaustein wrote a letter to Evelyn memorializing Evelyn's instruction that she "did not wish to waive any of [her] inheritance from [her] husband, especially since [she was not] anxious to have those assets passed directly to Estelle and her family."

FN4. In "The Blaustein Will," Evelyn's friend, Rose Alpert was made a beneficiary of a \$50,000 bequest.

Approximately one and a half months after Evelyn's execution of "The Blaustein Will," Estelle learned of its existence. Dr. Furlong testified that Estelle was upset when she learned about "The Blaustein Will" and thought it "only fair" that the Furlongs be put back into Evelyn's will. Thereafter, Estelle telephoned Ms. Blaustein to terminate her services as Evelyn's lawyer. Estelle also prepared a letter signed by Evelyn which directed Ms. Blaustein to return to Evelyn "the original interim will which you prepared for me dated April 8, 1993, which I intend to destroy."

Estelle and Evelyn picked up "The Blaustein Will" on May 24, 1993 from Ms. Blaustein's office. At that time, Ms. Blaustein gave Evelyn a letter memorializing her concern of Estelle's inherent conflict of interest in representing Evelyn where Estelle had borrowed stock from her late father which was still owed and unpaid to the estate and hence, Evelyn. Estelle's loan was documented by five notes from Jacob which instructed Evelyn to recoup the stock or deduct its value (i.e., approximately \$96,000) from Estelle's inheritance under Jacob's will. Within two days of their visit to Ms. Blaustein, Estelle drafted a disclaimer for Evelyn's signature wherein Evelyn disclaimed any interest in the stock. Evelyn executed

the disclaimer and Estelle maintained in the proceedings below that Evelyn was completely lucid and competent during this time.

Later, Estelle, as co-personal representative of her late father's estate, wrote to appellant, SunTrust Bank, formerly known as SunBank Miami, N.A., to inquire about her father's assets at the bank. Appellant, Theresa Heidel, a private banker at SunTrust responded in a letter. Later, Estelle and Evelyn, acting as co-personal representatives of Jacob's estate, then personally met with Heidel. At that time, Estelle asked to be the sole signatory of Jacob's estate to facilitate the payment of expenses as needed and Heidel explained that that would require Evelyn's written authorization. Evelyn did provide such authorization in writing.

C. "THE FURLONG WILL" DATED JUNE 1,
1993 AND THE ALLEGED INCEPTION OF
THE
CONSPIRACY

After Evelyn retrieved the original "Blaustein Will," Estelle drafted another will for Evelyn which she executed on June 1, 1993. In this will, Estelle was named as the personal representative and pursuant to its terms, the Furlongs were to receive 40% of Evelyn's estate and the remaining 60% of her estate was to be divided evenly between Evelyn's sister, Ida and brother, Edward.

At or about the time of Evelyn's execution of this will, Ida telephoned her son, Manny in St. Petersburg, Florida, to express her concern about Evelyn. According to Manny's unrefuted testimony, his mother told him that Evelyn was very depressed about Jacob's death and did not understand what Estelle was doing with Jacob's estate matters. Manny further testified that his mother wanted him to do whatever he could to *1278 help Evelyn. Shortly thereafter, Manny telephoned Evelyn at her home and re-introduced himself as he and Evelyn had not been particularly close prior to that time. He subsequently visited his aunt at her home.

According to Manny's testimony, Evelyn

asked him to review and explain some documents for her, namely, the stock disclaimer that Estelle had asked her to sign, the five stock notes, the SunTrust document designating Estelle to serve as the sole signator on Jacob's estate account, and "The Furlong Will" dated June 1, 1993. Manny stated that Evelyn was unhappy with the terms of her latest will and that Estelle had not adequately explained these documents to her. Manny detected that his elderly aunt who was 82 at the time of his arrival had "difficulty understanding documents." Manny further testified that Evelyn asked if he knew of an attorney who could draft another will for her.

D. THE BROIDA WILL DATED JULY 9,
1993

Because Manny was unfamiliar with any attorney in the Miami area, he procured an attorney and friend, Joel Broida, from his hometown of St. Petersburg to prepare a new will for Evelyn. He immediately flew back to St. Petersburg alone to meet with Mr. Broida with both Evelyn's latest will and Jacob's will in hand. [FN5] Mr. Broida drafted a new will ("The Broida Will") for Evelyn without ever meeting or speaking to her. Manny was named as the personal representative for "The Broida Will." In this will, Ida received 20% of Evelyn's estate plus 100% of all tangible property, jewelry, and autos. Manny and his wife, Renee received 19% of Evelyn's estate. Edward and Evelyn's niece each received 5% of the estate and the remaining 51% of the estate was divided among Evelyn's other family members. With the exception of the bequest of a piano, the Furlongs were completely disinherited under "The Broida Will." Manny also had Mr. Broida draft a durable power of attorney for Evelyn's signature which, among other things, gave Manny the unrestricted and unlimited power to sell and dispose of Evelyn's assets.

FN5. While he was away, Evelyn travelled with the Furlongs to Atlantic City, New Jersey to gamble and attend Dr. Furlong's 45th high school reunion.

When Manny returned to Miami with "The

Broida Will" and power of attorney, he learned that Evelyn had arranged a meeting with Estelle to discuss the return of Jacob's stock. At this meeting, held on June 25, 1993 in Estelle's office, Evelyn requested Estelle to return the stock. Estelle declined to return the stock and insisted that Evelyn had voluntarily relinquished this stock to her as a gift. During this same meeting, Manny requested Estelle, as co-personal representative of Jacob's estate, to place some of Jacob's securities into the names of Evelyn and Manny or Renee, as joint tenants with rights of survivorship. Estelle declined this request as well. Prior to the conclusion of this meeting, Manny and/or Evelyn requested the return of the original "The Furlong Will" dated June 1, 1993.

At or about this time, Evelyn executed the durable power of attorney in favor of Manny which had been prepared by Mr. Broida. Manny immediately took possession of it. At this time, Evelyn also notified Heidel of SunTrust that she wanted Jacob's personal bank account transferred into her [Evelyn's] own name. Heidel, in turn, notified Estelle who agreed to the transfer. Later, Evelyn and Manny went to see Heidel at the bank for the purpose of having Evelyn named the sole signatory on Jacob's estate account. Heidel notified Estelle of the requested change and informed Estelle that she needed to immediately fax a letter of authorization for the same as Evelyn wanted to effectuate the change without delay.

On July 9, 1993, Evelyn executed "The Broida Will," bequeathing approximately 77% of her estate to Manny and his immediate family, at SunTrust Bank where Heidel and two other bank employees served as witnesses. Heidel testified that she never detected a lack of understanding or mental incapacity on Evelyn's part when she executed this will. Manny kept the original Broida Will and power of attorney in his home in St. Petersburg. Evelyn placed a copy of the will in her safe deposit box, where Estelle later found it. During this same time, Evelyn also *1279 rescinded Estelle's authority as sole signatory on Jacob's estate account.

During the summer and fall months of 1993, Manny increasingly spent more time with Evelyn and actually stayed at her home several days per week. In addition to serving as Evelyn's chauffeur, Manny became increasingly involved in her financial affairs. For example, he wrote out checks for Evelyn's signature and reconciled her bank statements.

On or about July 14, 1993, Evelyn and Manny went to see Heidel at the bank about the purchase of some securities because Evelyn was concerned that her assets were not generating sufficient income. Heidel introduced them to Blanca Lola-Teriele, an investment consultant at the bank. Teriele believed Evelyn to be in full control of her faculties and recommended that Evelyn purchase either a Franklin Insured Tax Free Income Mutual Fund or Putnam Municipal Fund. After discussing various options, Evelyn read and signed the application completed by Teriele and purchased approximately \$450,000 in tax free securities. In purchasing these securities, Evelyn specifically requested that they be issued jointly in her name and either Ida or Manny's name so that no one else could gain control of them. Evelyn made it clear, however, that she wanted the income checks from these securities to be placed in her name alone as it was not her intent to make a present gift of the same to Ida or Manny.

Subsequently, Evelyn decided that she wanted these tax free securities to be placed in her name alone rather than jointly with Ida or Manny and informed Estelle of the same. Estelle, who had no reason to question Evelyn's competency to make this change, called Teriele at the bank to arrange for the transfer of securities. Estelle then told Ida and Manny of the requested transfer and procured their signatures on the requisite paperwork to effectuate the change. Thereafter, the securities were reregistered in Evelyn's name alone.

Sometime at or around this time period, Estelle became concerned about what she perceived as Manny's increasing influence over Evelyn's financial affairs. Estelle

testified that she went to the bank to voice her concerns to Heidel and to solicit her assistance. Specifically, Estelle warned Heidel that "there is a shark in the water." Heidel responded "oh, she's all right, they're all right." Heidel took no actions as a result of Estelle's statements or concerns.

In late August, Estelle telephoned Heidel to inquire whether Manny had been in the bank with Evelyn. When Heidel replied yes, Estelle stated that she was very concerned that "there may be overreaching going on." Heidel testified that during her 1 1/2 year interaction with Evelyn both inside and outside of the bank, Evelyn never demonstrated any lack of understanding or mental defect. She characterized Evelyn as being "sharp as a tack" and "feisty."

Thereafter, on September 2, 1993, Evelyn went to Heidel for the purpose of cashing a check in the amount of \$9,800. Heidel wrote the check for Evelyn's signature. Heidel then authorized this check to be cashed. On the next day, Evelyn again cashed another check for \$9,800 with Heidel's authorization. Heidel never questioned Evelyn about her need for any of this money. There is no record evidence of whether Manny was physically present inside of the bank with Evelyn when either of these checks were cashed.

Sometime late in the summer or early in the fall of 1993, Manny notified Dr. Furlong, Estelle's husband, that Evelyn was experiencing continuing depression and having memory problems. Dr. Furlong referred Evelyn to his friend, Dr. Peritz Scheinberg, a neurologist. On the day before her scheduled visit with Dr. Scheinberg, however, Evelyn went in to see Dr. Furlong. According to Dr. Furlong, Evelyn appeared to have understood and responded to his questions appropriately. He opined that she seemed to suffer from a type of aphasia (i.e., word forgetting) typical in octogenarians. Dr. Furlong saw no signs of Alzheimer's disease, incompetence, or dementia of any kind.

On September 2, 1993, Evelyn met with Dr. Scheinberg for a thirty minute examination.

Dr. Scheinberg asked Evelyn questions and made clinical observations. Based upon his examination, Dr. Scheinberg opined and testified at the trial below on behalf of Estelle that Evelyn was suffering from "[p]robable *1280 senile dementia of the Alzheimer's type" which impaired her judgment. Dr. Scheinberg further opined that her dementia was so severe that it pre-existed her visit to him by at least one year and that he expected this condition to progressively worsen. This opinion was based upon his experience in general with Alzheimer patients rather than his particular examination of Evelyn. Notwithstanding his general conclusions about Evelyn, Dr. Scheinberg could not opine that the dementia affected her cognitive ability to understand the extent of her estate and heirs at any given time. [FN6] He further allowed for the possibility of variations in that Evelyn could have had good days and bad days in terms of her decision-making process. [FN7]

FN6. Dr. Scheinberg testified as follows: Q. Did she have the cognitive ability to know approximately what her estate consisted of, or are you unable to venture an opinion on that? A. I can't answer that. I suspect that she had the cognitive ability to know a figure. Whether she understood the significance of that figure, I don't really know. She definitely had problems with arithmetic calculations, and with reading comprehension.

* * * * *

Q. Did she have the cognitive ability to know who her heirs were? A. I didn't ask her that question. I can't really--I can't decide that.

* * * * *

Q. Does [sic] judgment impairment prevent her from knowing what her estate consists of and who her heirs are? A. I don't think necessarily. It depends on the extent of the dementia.

* * * * *

FN7. In this regard, Dr. Scheinberg further testified

as follows: Q. Is it reasonably possible that some five, six, seven months before you saw her, that she had a far greater cognitive ability than what you saw on September 2, 1993? A. Is it possible? Q. Reasonably possible. A. What does that mean, 51 percent? Q. Okay, 51 percent. A. I would have to say that based in medical probability, that for the preceding year, that her judgment was impaired to the point that I would have viewed her as demented. Is there a possibility, yes I mean, there can be variations. Her depression might not have been as severe. And she may have been an aberrant or unusual case, I don't know, I didn't see her before.

* * * * *

Q. If some approximately six months prior to the time that you saw her she's asked a series of questions, such as when did your husband die; she answers appropriately: How long have you been married; and she answers appropriately: Where do you live; and she gives the address and the telephone number of where she lives and gives the zip code number. And is asked what her purpose in visiting the lawyer is, and she tells the lawyer that she wants to be represented in connection with her husband's estate, and she wants to prepare a new will: That she gives the lawyer her maiden name: That she tells the lawyer who her heirs are, and that she tells the lawyer how she wants her estate distributed, do you have an opinion as to whether or not that's an indication that she intellectually understood what was going on and knew what she was doing at that time? A. It suggests it. It suggests that there were--that superficially at least she knew the things which you have described. I want to remind you that my role in this process was to see her as a neurologist on a specific occasion, and then was subsequently asked to extrapolate backwards and determine how long I thought there had been the same kind of problem present. But I cannot quantitate it.

* * * * *

Dr. Scheinberg testified that after he examined Evelyn, he told Manny of his findings and gave him a copy of the medical report. Dr. Scheinberg also immediately

telephoned Dr. Furlong to apprise him as well. Dr. Furlong testified that he, in turn, withheld Dr. Scheinberg's findings about Evelyn from Estelle because Estelle was a "sick girl" and the news about Evelyn might be devastating to her health. Neither Dr. Furlong nor Manny ever told anyone at SunTrust about Dr. Scheinberg's findings. Manny later mailed a copy of Dr. Scheinberg's medical report to Manny's nephew, an internist in Michigan, to see if he could suggest any treatment. Manny's nephew informed him of a new memory drug which Dr. Furlong, at Manny's request, then prescribed for Evelyn. Evelyn never had any follow-up visits with any other doctors regarding Dr. Scheinberg's findings.

During the fall of 1993, Evelyn's relationship with the Furlongs was amicable as Evelyn, Manny, and the Furlong family dined out together frequently. It was during this period that Evelyn informed Manny that she was no longer satisfied with the terms of "The Broida Will" and the power of attorney. According to Manny's testimony, Evelyn *1281 wanted the will to be redrafted and the power of attorney destroyed.

Prior to having her will redrafted, Estelle took Evelyn to SunTrust in November 1993 to inquire about a custodial account for Evelyn. There they met with appellant Lucille Clum, a trust officer at the bank. Estelle explained to Clum that Evelyn was recently widowed and needed assistance with her checks and finances. During this meeting, Estelle told Clum that Manny had taken over Evelyn's affairs and that she "was very concerned that there might be some overreaching." Evelyn said little except that she was sad about the death of Jacob and stated that she wanted to know what the bank's role would be in a custodial account. Clum explained to her that the bank could do as much or as little as she wanted--"safe-keep the assets, collect the income, and pay ... out the income to her in whatever form she wanted." Evelyn told Clum that she would think about it and get back to her. On their way out of the bank building, Estelle and Evelyn ran into Heidel, at which time Estelle repeated her concerns

about Manny.

E. THE FURLONG WILL A/K/A "THE
HAPPY FAMILY WILL" DATED
DECEMBER 22, 1993

Sometime in late December 1993, Estelle and Evelyn went to Evelyn's safe deposit box where Estelle read "The Broida Will" and power of attorney. Estelle testified of her "shock" when she saw these documents as she was certain that they were the product of undue influence. Subsequently, she met with Evelyn and Manny to discuss the terms for a new will which Estelle intended to prepare herself. The new Furlong will ("The Happy Family Will") gave 40% of Evelyn's estate to the Furlongs, 10% to Ida, 30% to Manny, 15% to Edward and 5% to Edward's daughter. Estelle and Manny would be appointed co-personal representatives. Evelyn executed this will on December 22, 1993 in Estelle's office. Manny was not present. Prior to Evelyn's execution of the will, Estelle again explained its terms and Evelyn appeared to be contented. According to Lynee Blum, an attorney who witnessed the execution, Evelyn seemed to have understood the terms of the will and appeared to be lucid. After Evelyn's execution of this new Furlong will, Estelle testified that all of the relatives were "one big happy family." Estelle, however, never told anyone at SunTrust about this new will because "it was none of their business."

From December 1993 until May 1994, Evelyn lavished both her immediate family and the Furlong family with cash and other non-monetary gifts. Even Manny's mother-in-law, appellant Freida Pantzer, who occasionally stayed over at Evelyn's apartment, received gifts. At no time did any of the gift recipients question Evelyn's competency to make such gifts or offer to return them. With the exception of her brother Edward who was not a gift recipient, Evelyn gave gifts and cash to Manny and his family totalling approximately \$1.5 million dollars. The Furlong family received gifts and cash totalling over \$500,000. Dr. Furlong testified that Evelyn's generosity was not new as she has always been "a very

generous lady."

One of Evelyn's "gifts" to Estelle led to the ultimate rift between the two and the end of the "happy family" relationship. On or about May 20, 1994, Estelle accompanied Evelyn to the bank where Evelyn signed the proceeds of a maturing \$350,000 treasury bill over to Estelle. Estelle then deposited the same into her personal checking account. Within a few weeks thereafter, Evelyn sought the return of this money and explained to both, Estelle and Dr. Furlong, that she had mistakenly given Estelle the treasury bill and had not intended it as a gift. Estelle refused to return the money and responded that Evelyn knew exactly what she was doing when she made the gift. This exchange between Evelyn and Estelle was extremely bitter and Estelle thereafter testified that she deemed herself "out of the picture" as a result of this incident.

F. "THE BARASH WILL" DATED JULY 8,
1994

Thereafter, on June 30, 1994, Evelyn and Manny went to see Miami attorney, Jeffrey Barash, about a new will for Evelyn. Evelyn and Manny selected Barash by virtue of his ad in the telephone book and his office's proximity to Evelyn's home. When they arrived at Barash's office, Manny initially remained *1282 in the waiting room while Evelyn had her consultation with Barash. Barash testified that Evelyn told him that she had been born in Russia and when her family came to America, they settled in Detroit. She also told him about her career as a purchaser for a women's clothier, her life with Jacob, and her sadness at his passing. She further told him of her family and her deteriorating relationship with the Furlongs which was the reason that she desired a new will. Evelyn explained to Barash that the Furlongs were no longer treating her the way they had when Jacob was alive.

When Evelyn described her estate as being approximately \$2 1/2 to \$3 million dollars, Barash recommended that she have a revocable trust. Evelyn then requested that Manny be allowed in so that Barash could

explain the workings of a trust to both of them. Manny then joined this consultation. Evelyn questioned Barash about her control of the trust and how it would operate in the event of her disability. After Barash explained about the trust, Evelyn selected Manny as successor trustee. Because Manny wasn't a resident of Dade County, Barash suggested that Evelyn also appoint a local successor co-trustee such as a bank. Evelyn selected appellant, SunTrust.

On her next visit to Barash's office, Evelyn discussed the dispositive provisions of her proposed new will. Evelyn told Barash that she wanted 40% of her estate to be left to Manny and his wife, Renee; 30% to be left to Edward; and 30% to be left to Ida. She further bequeathed \$100,000 to Dr. and Mrs. Furlong and \$25,000 to each of their children. Manny was not present in the room with Evelyn and Barash at this time or at any other time when the will provisions were being discussed.

Evelyn executed the "The Barash Will and Trust" on July 8, 1994. Barash had arranged for Clum from SunTrust to serve as a witness for Evelyn's execution of the will and trust as he anticipated an attack on Evelyn's testamentary capacity by virtue of the fact that Evelyn had substantially disinherited the Furlongs. Although Manny had driven Evelyn to Barash's office, he remained outside during the execution of these documents. Prior to her execution of the documents, Barash reviewed them with Evelyn to make sure that she understood all of the provisions. Barash testified that Evelyn appeared to have fully understood what was explained to her.

After her execution of "The Barash Will and Trust," Evelyn later returned to Barash's office to express her frustration at Estelle's refusal to return the proceeds of the \$350,000 treasury bill. Barash suggested that she could compensate for the loss by merely amending her trust to further decrease her gifts to the Furlongs. Accordingly, on August 11, 1994, Evelyn executed an amendment to "The Barash Will and Trust" which reduced the bequest to the Furlongs to just \$1,000. The reason for the reduction was explicitly

stated in the amendment. "The Barash Will and Amended Trust" ultimately was the final will executed by Evelyn.

At or about the time that Evelyn was preparing to execute "The Barash Will and Trust," during the summer of 1994, Dr. Furlong contacted Evelyn's brother, Edward, to find out why Manny was sequestering Evelyn. Dr. Furlong testified that he told Edward that Evelyn could be "the victim" of stealing and financial draining by Manny. Edward thanked him for calling and told Dr. Furlong that he would get back to him within two weeks. Edward never telephoned Dr. Furlong again.

Further, during this period, Manny's mother-in-law, Frieda, increasingly spent more time with Evelyn and drove her around town. As a result of their friendship, Evelyn began to see Frieda's personal doctor, Dr. Ernest Herried, instead of Dr. Furlong. Dr. Herried found Evelyn to be mentally alert and responsive to his questions about her medical problems.

EVELYN'S FINAL MONTHS

In January 1995, Jacob's estate was closed and Estelle forwarded the closing documents to Evelyn for her signature along with the remaining \$9,400 from his estate account. Evelyn executed and returned the documents along with \$9,400 to Estelle.

Evelyn became ill in early March 1995. She went to see Dr. Harried but refused to comply with his suggestion that she be hospitalized. *1283 Evelyn died from her illness in her apartment on March 3, 1995.

I PROCEEDINGS BELOW

Approximately two weeks after Evelyn's death, Manny and SunTrust as co-personal representatives of Evelyn's estate of "The Barash Will and Amended Trust" filed a petition for administration of that will. Shortly thereafter, Estelle filed a petition for administration of "The Furlong Will" (a/k/a

"The Happy Family Will") dated December 22, 1993 and a verified petition to set aside "The Barash Will and Amended Trust" on the grounds that they had been procured through undue influence and overreaching. Edward and Ida as named beneficiaries under "The Barash Will and Amended Trust" were granted permission to intervene in this proceeding.

Subsequently, Estelle filed a "Substituted Petition for Administration" requesting that "The Lost Will" dated January 23, 1992 be admitted to probate rather than "The Happy Family Will" dated December 22, 1993. Estelle also filed a two count amended petition against appellants alleging that they conspired to deprive Evelyn of her estate through undue influence, duress, and intimidation and that Evelyn lacked testamentary capacity. [FN8] Estelle sought equitable relief in the form of an accounting, restitution, and the imposition of a constructive trust. Estelle also sought to have "The Barash Will and Amended Trust" declared void and of no effect. Later, Estelle amended these pleadings to allege that all of Evelyn's wills after "The Lost Will" dated January 23, 1992 were the products of Evelyn's incompetency and/or appellants' undue influence. Estelle never sought compensatory or punitive damages in any of her pleadings. Rather, ten days prior to trial, Estelle moved to amend her petition to assert a claim for punitive damages. The lower court did not entertain this motion to amend until two days prior to the end of the eleven day trial. When the appellants objected to the proposed amendment on the grounds that Estelle had made no threshold showing of an entitlement to punitive damages, the trial court decided to take the matter under advisement pending its final judgment in the cause. [FN9]

FN8. Specifically, Count I alleged that: [b]eginning approximately April/May, 1993 and continuing to the date of Evelyn S. Gruber's death, Manuel Raimi, Renee Raimi and Ida Raimi, enjoying a confidential and/or fiduciary relationship with Evelyn S. Gruber, conspired, using undue influence, duress and intimidation to deprive Evelyn

S. Gruber of her money and assets. That conspiracy was later joined by Frieda Pantzer, Edward Schultz, Theresa Heidel, Lucille Clum, and SunBank/Miami, N.A., each of whom also enjoyed a confidential and/or fiduciary relationship with Evelyn S. Gruber. As a result of the conspiracy, the conspirators deprived Evelyn S. Gruber of substantial monies and other assets. Count II alleged the same conspiracy and continued as follows: On July 8, 1994, in furtherance of said conspiracy, the respondents caused Evelyn S. Gruber to execute a Last Will and Testament and a Revocable Trust. On August 11, 1994, in furtherance of said conspiracy, the respondents caused Evelyn S. Gruber to execute a First Amendment to Evelyn S. Gruber Revocable Trust dated July 8, 1994. A copy of these respective documents are [sic] attached hereto as Exhibits 1, 2 and 3. On the date of the execution of Exhibits 1, 2 and 3, Evelyn S. Gruber lacked testamentary capacity. Alternatively, and/or additionally, the execution of Exhibits 1, 2 and 3 was procured by the conspirators by duress, intimidation and undue influence.

FN9. We note also that counterclaims and crossclaims for fraud, undue influence, and tortious interference were likewise filed against Estelle and Dr. Furlong which were ultimately dismissed by the lower court. Because the appellants have not elected to appeal their dismissal, we do not address the same.

II

FINAL JUDGMENT OF LOWER COURT

The trial court entered its final judgment finding that there was clear and convincing evidence that a reprehensible conspiracy had been formed by the appellants to deprive Evelyn of her money and assets during her lifetime through undue influence and in the case of the bank and its employees, through a breach of their fiduciary duty. The court found that the bank was additionally negligent in its hiring, training, retention, and supervision of its employees, Heidel and Clum. Accordingly, the lower court entered a *1284 final judgment in the equitable action in favor of Evelyn's estate and against the appellants, jointly and severally, in the amount of \$1,533,689.55, including

prejudgment interest. The court further assessed punitive damages against SunTrust Bank in the amount of \$4,500,000; Manny in the amount of \$2,000,000; Edward and Frieda each in the amount of \$1,000,000.

In the will contest litigation, the lower court declined to admit "The Barash Will and Amended Trust" to probate on the grounds that it had been procured by undue influence and overreaching by Manny and that the decedent lacked testamentary capacity to execute the same. In fact, the court declared that all of the decedent's wills executed subsequent to "The Lost Will" dated January 23, 1992 had been procured by undue influence and/or the decedent lacked testamentary capacity to execute the same. Accordingly, the lower court admitted "The Lost Will" dated January 23, 1992 to probate. This appeal followed.

III EQUITABLE CLAIMS LITIGATION

We first address the final judgment as it relates to the equitable claims litigation. Appellants assert, among other things, that the judgments entered against them must be reversed where the evidence adduced by appellee Furlong was insufficient to make a prima facie showing of any civil conspiracy to deprive the decedent of her money and assets during her lifetime through undue influence and/or breach of a fiduciary duty. The bank further asserts that the lower court erred in imposing liability against it for the negligent hiring, training, and retention of Clum and Heidel where these theories were never pled or tried by consent.

[1][2] Based upon our careful review of the record, we agree with the appellants that all of the judgments entered against them must be reversed where the evidence was insufficient to establish the existence of a civil conspiracy [FN10] in the first instance. A civil conspiracy requires: (a) an agreement between two or more parties, (b) to do an unlawful act or to do a lawful act by unlawful means, (c) the doing of some overt act in pursuance of the conspiracy, and (d) damage to

plaintiff as a result of the acts done under the conspiracy. See *Florida Fern Growers Assoc., Inc. v. Concerned Citizens of Putnam County*, 616 So.2d 562, 565 (Fla. 5th DCA 1993); *Nicholson v. Kellin*, 481 So.2d 931, 935 (Fla. 5th DCA 1985). Additionally, an actionable conspiracy requires an actionable underlying tort or wrong. See *Florida Fern Growers*, 616 So.2d at 565; *Wright v. Yurko*, 446 So.2d 1162, 1165 (Fla. 5th DCA 1984).

FN10. Our holding in this regard thus obviates our need to address the appellants' further challenge to the entry of a judgment for compensation and punitive damages in an equitable proceeding.

Thus, a cause of action for civil conspiracy exists ... only if 'the basis for the conspiracy is an independent wrong or tort which would constitute a cause of action if the wrong were done by one person.'

Blatt v. Green, Rose, Kahn & Piotrkowski, 456 So.2d 949, 951 (Fla. 3d DCA 1984) (citing *American Diversified Ins. Servs., Inc. v. Union Fidelity Life Ins.*, 439 So.2d 904, 906 (Fla. 2d DCA 1983)). In this case, the appellee apparently maintained below that the underlying actionable torts were the appellants' undue influence and the bank's breach of fiduciary duty.

[3][4][5][6] Appellee Furlong's sole proof of the inception of the conspiracy was Ida's telephonic request to her son, Manny, that he contact the decedent to render assistance to her after her late husband's death. Without more, we find this evidence to be wholly insufficient for the establishment of a conspiracy. As Manny and Ida were the only parties privy to this telephonic conversation, Furlong obviously had no direct proof of any agreement to use undue influence to loot the decedent of her assets during her lifetime. While Furlong correctly asserts that a conspiracy may be proven by circumstantial evidence, this may be done "only when the inference sought to be created by such circumstantial evidence outweighs all reasonable inferences to the contrary." *Diamond v. Rosenfeld*, 511 So.2d 1031, 1034 (Fla. 4th DCA 1987), rev. denied, 520 So.2d 586 (Fla. 1988). Here, it cannot be said that

the inference of a conspiracy outweighs all reasonable inferences to the contrary. A reasonable inference can be made that Ida's sole motivation *1285 for telephoning Manny was her sheer concern for the well-being of her elderly, recently widowed sister who had always been kind to her. The finding of the formation of a conspiracy during this telephone conversation would be pure speculation at best, and insufficient to sustain the civil judgment. Moreover, there was absolutely no evidence that the remaining appellants had knowledge of the alleged conspiracy or that they knowingly participated in it. See *James v. Nationsbank Trust Co. Nat'l Assoc.*, 639 So.2d 1031, 1033 (Fla. 5th DCA 1994) (mortgagors failed to establish bank's involvement in conspiracy where it was alleged only that bank had knowledge that development company's continuing fraud was aided if bank supplied the loan); see also *Menendez v. Beech Acceptance Corp.*, 521 So.2d 178, 180 (Fla. 3d DCA 1988) (some proof of knowledge of a conspiracy and participation by tortfeasor must be shown to survive summary judgment); *Trautz v. Weisman*, 809 F.Supp. 239, 246 (S.D.N.Y.1992) (mere knowledge of the conspiracy is insufficient; there must be an actual knowing participation). To assume or speculate, as appellee would have us do, that the remaining appellants participated in a conspiracy formed by Ida and Manny merely because they ultimately received some benefits from the decedent is insufficient for the imposition of liability against them. [FN11] See *Karnegis v. Oakes*, 296 So.2d 657, 659 (Fla. 3d DCA 1974), cert. denied, 307 So.2d 450 (Fla.1975). Thus, we find that the lower court erred in finding that the appellants participated in a conspiracy to extract gifts and benefits from the decedent during her lifetime through the exercise of undue influence or the breach of a fiduciary duty.

FN11. The entire basis for appellee's conspiracy claim appears to be that the appellants were the recipients of the decedent's generosity in some manner during her lifetime. The undisputed record evidence, however, disclosed that the decedent had a long history of being generous to others and mere affection, kindness, or attachment of one person for

another does not itself constitute undue influence. See *In re Dunson's Estate*, 141 So.2d 601, 605 (Fla. 2d DCA 1962). Ironically, if we were to follow appellee's reasoning, she and her family members would also have to be declared co-conspirators since they too were benefactors of the decedent's generosity during her lifetime.

[7][8][9] We also agree with the appellant bank that the lower court erred in finding it negligent for the hiring, retention, and supervision of appellants Heidel and Clum where this theory was never pled or tried by consent. Appellee asserts, however, that this theory was implicitly tried by consent where the bank failed to lodge an objection below. We disagree. A failure to object cannot be construed as implicit consent to try an unpled theory when the evidence introduced is relevant to other issues properly being tried. See *Bilow v. Benoit*, 519 So.2d 1114, 1116 (Fla. 1st DCA 1988); *Wassil v. Gilmour*, 465 So.2d 566, 569 (Fla. 3d DCA 1985). Here, we think that appellee's evidence of the bank's failure to supervise and train Heidel and Clum was directly relevant to the issue of the bank's breach of fiduciary duty to the decedent. Thus, the bank's failure to object to this evidence cannot properly be construed as its implicit consent to the trial of this unpled theory. Rule 1.190(b), Fla. R. Civ. P., which permits unpled issues to be expressly or implicitly tried by consent of the parties was never intended to allow one party to catch the opposing party off guard and inject new unpled issues that are relevant and related to other issues properly before the court.

For all of these reasons, we reverse all the judgments entered against the appellants and remand with instruction that final judgment be entered in their favor on the main action.

IV WILL CONTEST LITIGATION

Finally, we address that portion of the final judgment which relates to the will contest litigation. Appellants, with the exception of the bank and its employees, [FN12] urge that the lower court erred as a matter of law in admitting "The Lost Will" dated January 23, 1992 to probate upon its conclusion that the

decedent's last executed will, "The Barash Will and Amended Trust," was void due to the decedent's lack of testamentary capacity and/or Manny's undue influence. We agree and reverse this portion of the final judgment as well.

FN12. These appellants take no position on this issue.

*1286 TESTAMENTARY CAPACITY

[10][11][12][13] It has long been emphasized that the right to dispose of one's property by will is highly valuable and it is the policy of the law to hold a last will and testament good wherever possible. See *In re Weihe's Estate*, 268 So.2d 446, 451 (Fla. 4th DCA 1972), quashed on existing facts, 275 So.2d 244 (Fla.1973); *In re Dunson's Estate*, 141 So.2d at 604. To execute a valid will, the testator need only have testamentary capacity (i.e. be of "sound mind") which has been described as having the ability to mentally understand in a general way (1) the nature and extent of the property to be disposed of, (2) the testator's relation to those who would naturally claim a substantial benefit from his will, and (3) a general understanding of the practical effect of the will as executed. See *In re Wilmott's Estate*, 66 So.2d 465, 467 (Fla.1953); *In re Weihe's Estate*, 268 So.2d at 448; *In re Dunson's Estate*, 141 So.2d at 604. "A testator may still have testamentary capacity to execute a valid will even though he may frequently be intoxicated, use narcotics, have an enfeebled mind, failing memory, [or] vacillating judgment." *In re Weihe's Estate*, 268 So.2d at 448. Moreover, an insane individual or one who exhibits "queer conduct" may execute a valid will as long as it is done during a lucid interval. See *Id.* Indeed, it is only critical that the testator possess testamentary capacity at the time of the execution of the will. See *Id.*; see also *Coppock v. Carlson*, 547 So.2d 946, 947 (Fla. 3d DCA 1989) (whether testator had the required testamentary capacity is determined solely by his mental state at the time he executed the instrument), *rev. denied*, 558 So.2d 17 (Fla.1990).

[14][15][16] An appellate court will not interfere with a probate court's finding of testamentary capacity unless there is an absence of substantial competent evidence to support the finding or unless it appears that the probate court has misapprehended the effect of the evidence as a whole. See *In re Weihe's Estate*, 268 So.2d at 449. It is the duty of the appellate court to examine all of the evidence to determine whether there is substantial and competent evidence to support the findings of the probate court and whether the probate court may have misinterpreted the legal effect. Further, where the probate court has misinterpreted the legal effect of the evidence in its entirety, its findings will not be affirmed merely because there is evidence that is contradicted on which the findings may be predicated. See *Lambrose v. Topham*, 55 So.2d 557, 558 (Fla.1951) (citing *Hooper v. Stokes*, 145 So. 855, 857, 107 Fla. 607, 610 (1933)). Any rule to the contrary would render a probate court's finding of testamentary capacity virtually unassailable on appeal.

[17] In the instant case, the lower court, citing to Dr. Scheinberg's testimony, concluded that the decedent lacked the requisite testamentary capacity to execute "The Barash Will and Amended Trust." Our review of the evidence leads us to find that the lower court's conclusion in this regard was erroneous as a matter of law and that the court simply misinterpreted the legal effect of Dr. Scheinberg's testimony. Although Dr. Scheinberg opined that the decedent suffered from severe dementia which would progressively worsen, and that her judgment was significantly impaired on the date of his exam, he categorically testified that he was unable to offer any opinion as to her testamentary capacity at any given time. Moreover, Dr. Scheinberg did allow for the possibility of the decedent having "lucid intervals" in her decision-making process. The appellee offered no evidence that the decedent was incompetent or not lucid at the time she made the "The Barash Will and Amended Trust." See *Coppock* 547 So.2d at 947. In fact, the evidence was to the contrary. Given that the presumption of testamentary

capacity is so strong in Florida that it allows for a demented or insane person to execute a valid will during a "lucid interval," see *Murrey v. Barnett Nat'l Bank*, 74 So.2d 647, 649 (Fla.1954), the trial court's conclusion that the decedent lacked testamentary capacity to execute "The Barash Will and Amended Trust" simply did not comport with the evidence adduced at trial and may not stand as a matter of law.

UNDUE INFLUENCE

[18][19] The lower court additionally found that "The Barash Will and Amended Trust" was void because it was procured by "undue influence and overreaching by Manny *1287 in violation of a confidential or fiduciary relationship." When a will is challenged on the grounds of undue influence, the influence must amount to over persuasion, duress, force, coercion, or artful or fraudulent contrivances to such an extent that there is a destruction of free agency and willpower of the testator. See *In re Carpenter's Estate*, 253 So.2d 697, 704 (Fla.1971); *In re Dunson's Estate*, 141 So.2d at 605; see also *Estate of Brock*, 692 So.2d 907, 911 (Fla. 1st DCA 1996), rev. denied, 694 So.2d 737 (Fla.1997). A presumption of undue influence arises in favor of a will contestant if it is established that a substantial beneficiary under the will occupied a confidential relationship with the testator and was active in procuring the contested will. See *In re Carpenter's Estate*, 253 So.2d at 701; *Brock*, 692 So.2d at 911; *Elson v. Vargas*, 520 So.2d 76, 76 (Fla. 3d DCA), rev. denied, 528 So.2d 1181 (Fla.1988). The origin of the confidence between the benefactor and testator is immaterial and the confidential relationship is broadly defined:

The rule embraces both technical fiduciary relations and those informal relations which exist wherever one man trusts in and relies upon another.

* * * * *

The relation and the duties involved in it need not be legal. It may be moral, social, domestic, or merely personal.
In re Carpenter's Estate, 253 So.2d at 701

(citing *Quinn v. Phipps*, 113 So. 419, 421, 93 Fla. 805, 810 (1927)). As for a determination of whether a substantial beneficiary was active in the procurement of the will, our supreme court in *In re Carpenter's Estate* outlined the following nonexclusive list of factors for the court's consideration:

- a) presence of the beneficiary at the execution of the will;
- b) presence of the beneficiary on those occasions when the testator expressed a desire to make a will;
- c) recommendation by the beneficiary of an attorney to draw the will;
- d) knowledge of the contents of the will by the beneficiary prior to execution;
- e) giving of instructions on preparation of the will by the beneficiary to the attorney drawing the will;
- f) securing of witnesses to the will by the beneficiary; and
- g) safekeeping of the will by the beneficiary subsequent to execution.

253 So.2d at 702. These listed criteria are only general guidelines and a will contestant is not required to prove them all to establish active procurement. See *Id.* Each case is fact specific and the significance of any (or all) of such criteria must be determined with reference to the particular facts of the case.

[20][21][22] Once the presumption of undue influence arises, the burden shifts to the beneficiary of the will to come forward with a reasonable explanation of his or her active role in the preparation of the decedent's will. See *Brock*, 692 So.2d at 912. If the presumption goes un rebutted, it alone is sufficient to sustain the contestant's burden. See *Id.* On the other hand, if the presumption is rebutted, the contestant must establish undue influence by a preponderance of the evidence. See *Tarsagian v. Watt*, 402 So.2d 471, 472 (Fla. 3d DCA 1981).

[23] With reference to "The Barash Will and Amended Trust," the lower court found that a presumption of undue influence was created by virtue of Manny's: 1) role in finding Mr. Barash; 2) role in procuring "The Barash Will and Amended Trust"; and 3) control of the decedent's personal and financial affairs.

[FN13] The court further found *1288 that the presumption had not been rebutted by a reasonable explanation for Manny's acts and conduct. Alternatively, the lower court found that even in the absence of the presumption, Manny's undue influence had been proven by the greater weight of substantial and competent evidence. We do not agree that the evidence supports either of the lower courts' alternative conclusions.

FN13. Curiously, the lower court also justified the presumption of undue influence on Manny's role in procuring the earlier Broida will and durable power of attorney and retaining these documents for safekeeping after their execution. Assuming without deciding that the creation and execution of these documents were the products of Manny's undue influence, it is undisputed that they were both destroyed at the decedent's request a year prior to the execution of "The Barash Will and Trust." Any undue influence utilized to procure the Broida documents was wholly irrelevant to the question of whether the subsequent Barash documents were also the product of undue influence. Consequently, we think that appellee, as the contestant to the Barash documents, was required to come forth with independent evidence that "The Barash Will and Amended Trust" was likewise the product of Manny's undue influence. See *Martin v. Martin*, 687 So.2d 903, 906 (Fla. 4th DCA 1997) ("A finding that the decedent was susceptible to undue influence on one of the dates would not have been conclusive as to his state of mind on the other date."); see also *In re Dunson's Estate*, 141 So.2d at 604 (mental capacity of testator at the time he executed will is determinative factor).

[24] First of all, we do not agree that the record evidence was sufficient to create a presumption of undue influence. Although Manny was a substantial beneficiary under the challenged will and does not contest the fact that he enjoyed a confidential relationship with the decedent during her final years, there was insufficient evidence to establish that he was active in the procurement of this will. Although Manny was present when the decedent expressed her desire to revoke the Furlong "The Happy Family Will" and make a new will, the unrefuted evidence below does not support the lower court's finding that

Manny procured attorney Barash for the decedent or that Manny was even familiar with this attorney for that matter. [FN14] According to the only evidence adduced, Barash was randomly selected from the yellow pages by virtue of his proximity to the decedent and specialty. There was no evidence that Manny gave any instructions to attorney Barash as to the preparation of the challenged will and trust; nor was there any evidence that Manny had knowledge of the dispositive provisions of the decedent's proposed final will. [FN15] Further, Manny was not present at the execution of the challenged will and all of the witnesses to the decedent's execution of this will were independently procured by Barash. Finally, Manny did not see or take possession of these documents after the decedent's execution of the same.

FN14. Indeed, the unrefuted evidence was that Manny was totally unfamiliar with any attorney in the Dade County area.

FN15. Although Barash brought Manny into his office briefly to explain the mechanics of a trust, Barash testified that at no time was Manny present when the dispositive provisions of the will and trust were discussed with the decedent.

[25] Under these facts, we do not believe that a presumption of undue influence properly arose. Even assuming, arguendo, that such a presumption could be created, we find that there was a clear and reasonable explanation to rebut this presumption. The decedent expressed her desire to revoke the Furlong "Happy Family Will" and disinherit the Furlongs in the aftermath of her bitter dispute with appellee over the proceeds of the \$350,000 treasury bill. It was uncontroverted that the decedent was extremely angry because she perceived (whether correctly or incorrectly) that her stepdaughter had wrongfully taken advantage of her by misappropriating the proceeds of the treasury bill. The expressed reason given by the decedent for further diminishing her bequest to Estelle with the amendment to the challenged will was to compensate for the unreturned proceeds from the treasury bill.

Given these unrefuted facts, Manny's explanation that he merely facilitated the decedent's independent decision to change her will after her dispute with Estelle was reasonable under these circumstances. [FN16]

admitted to probate.

Reversed and remanded with directions.

702 So.2d 1273, 22 Fla. L. Weekly D2184

FN16. It is noteworthy that the decedent's decision to disinherit the Furlongs in "The Barash Will and Amended Trust" was not without precedent. Prior to Manny's arrival and alleged undue influence, the decedent had disinherited the Furlongs in the Blaustein Will. This occurred at or about the time of the decedent's dispute with appellee over the appellee's failure to repay the borrowed securities from Jacob's estate. Thus, the record evidence suggests that the decedent appears to have disinherited her stepdaughter's family during those times when she believed that they were mistreating her.

[26] In the absence of the presumption, we similarly cannot agree that appellee met her burden of establishing undue influence by the greater weight of the evidence. See *In re Carpenter's Estate*, 253 So.2d at 704-05; *Coppock*, 547 So.2d at 947. The unrefuted record evidence indicates that the decedent's sole motivation for disinheriting the appellee's family from her final will was the decedent's anger and animosity towards appellee over the treasury bill incident. Thus, the lower court's finding that the decedent was somehow "duped" into making her last will by Manny is not sustainable by the record evidence and must be reversed.

***1289** In conclusion, given the sound policy of this state to effectuate the last wishes of a decedent as expressed in his or her final will and given the dearth of substantial evidence of lack of testamentary capacity or undue influence, in this cause, we are compelled to respect the decedent's last wishes as expressed in "The Barash Will and Amended Trust." See *Coppock*, 547 So.2d at 947. Accordingly, we reverse that portion of the final judgment directing that the decedent's will dated January 23, 1992 (i.e., "The Furlong Will" or "The Lost Will") be admitted to probate and remand with instructions that the decedent's last executed will and amendment thereto, "The Barash Will and Amended Trust," be

71

Supreme Court, Appellate Division, Third
Department, New York.

ROTTERDAM VENTURES, INC., et al.,
Appellants,
v.
ERNST & YOUNG LLP, Respondent.

Dec. 26, 2002.

Investors brought action against company's auditor for negligent misrepresentation and gross negligence, alleging that they had purchased stock conversion rights based upon misleading information contained in company's financial statements. The Supreme Court, Schenectady County, Reilly Jr., J., dismissed complaint, and investors appealed. The Supreme Court, Appellate Division, Crew III, J.P., held that: (1) investors failed to plead fraud claims with sufficient particularity, and (2) investors' reliance on auditor's "comfort letter" to company was not reasonable.

Affirmed.

West Headnotes

[1] Pleading 18
302k18

Investors' claims against company's auditor for gross negligence in connection with its failure to detect company's fraudulent transactions actually sounded in fraud, and thus each element of investors' claims had to be pled with particularity. McKinney's CPLR 3016(b).

[2] Accountants 9
11Ak9

Investors did not reasonably rely on auditors "comfort" letter to company reaffirming its prior position regarding company's financial health, and thus could not base fraud claims against auditor on statements made in letter, where letters were addressed only to company, and expressly stated that they were "not to be used, circulated, quoted, or otherwise referred to for any purpose, including but not limited to the purchase or sale of securities," and investors had access to relevant financial

statements and their own means of ascertaining company's financial viability.

****746** De Angelus & De Angelus, Clifton Park (David S. Hammer of counsel), for appellants.

Heller, Ehrmann, White & McAuliffe L.L.P., New York City (Richard A. Martin of counsel) and Ernst & Young L.L.P., Washington, DC, (Bruce M. Cormier of counsel), for respondent.

Before: CREW III, J.P., CARPINELLO, MUGGLIN, ROSE and KANE, JJ.

***963** CREW III, J.P.

Appeal from an order of the Supreme Court (Reilly Jr., J.), entered August 1, 2001 in Schenectady County, which, inter alia, granted defendant's motion to dismiss the complaint for failure to state a cause of action.

This action arises out of certain investments made by plaintiffs in what was at all relevant times a publicly traded telecommunications company named AMNEX Inc. In January 1997, plaintiff Francesco Galesi acquired between one and two percent of AMNEX's stock and became a member of the company's board of directors. Shortly thereafter, in a bid to increase its available cash, AMNEX elected to make a bond ****747** offering, and HSBC Securities Inc. was selected as the underwriter. HSBC apparently expressed concern regarding the number of individuals holding stock conversion rights in AMNEX and advised the company of the need to eliminate, or at least reduce, this "market overhang." To that end, Galesi was asked to purchase and then exercise a portion of the conversion rights in order to enable the bond offering to go forward.

Prior to acquiescing to this request, Galesi asked his chief operating officer and financial advisor, David Buicko, a certified public accountant, to determine whether an investment in AMNEX was financially prudent. Upon reviewing AMNEX's 1996 10-

K or annual report, which allegedly contained a report from defendant, AMNEX's auditors, representing that such financial statements "present[ed] fairly, in all material respects, the consolidated financial position of AMNEX * * * at December 31, 1996 and 1995," Buicko recommended that Galesi go forward with the transaction if he could obtain the conversion rights for approximately one half of AMNEX's then common stock price. Galesi thereafter entered into a note purchase agreement that, insofar as is relevant to this appeal, conditioned the transaction upon AMNEX not having suffered a "material adverse change in its business or financial condition" between the date of the execution of the note purchase agreement and the scheduled September 30, 1997 closing.

Prior to closing, defendant issued two "comfort letters" to AMNEX and HSBC in September 1997 essentially reaffirming *964 its prior position regarding AMNEX's financial health. Galesi thereafter purchased the conversion rights as scheduled for approximately \$3.1 million and, together with plaintiff Rotterdam Ventures, Inc., allegedly continued to invest in and extend loans to AMNEX, totaling several million dollars, until AMNEX filed for bankruptcy in May 1999. According to plaintiffs, they entered into such transactions based upon misleading information contained in AMNEX's financial statements.

In May 2000, plaintiffs commenced this action against defendant alleging two causes of action for negligent misrepresentation and two causes of action for gross negligence. Supreme Court granted defendant's subsequent motion to dismiss the complaint for failure to state a cause of action, finding that plaintiffs' claims for negligent misrepresentation failed due to a lack of privity between plaintiffs and defendant. As to the causes of action for gross negligence, the court concluded that plaintiffs failed to satisfy the pleading requirements of CPLR 3016(b). Supreme Court also denied plaintiffs' request for additional discovery--namely, disclosure of defendant's work papers for the subject audit. This appeal by plaintiffs ensued.

[1] Plaintiffs, as so limited by their brief, contend that Supreme Court erred in dismissing the causes of action sounding in gross negligence. Preliminarily, although characterized as claims for "gross negligence," plaintiffs' causes of action in this regard actually sound in fraud in which a showing of gross negligence or recklessness will permit the trier of fact to draw the inference that a fraud was in fact perpetrated (see *State St. Trust Co. v. Ernst*, 278 N.Y. 104, 112, 15 N.E.2d 416; *Foothill Capital Corp. v. Grant Thornton L.L.P.*, 276 A.D.2d 437, 715 N.Y.S.2d 389). To plead a prima facie case of fraud, the plaintiff must allege "a material misstatement, known by the perpetrator to be false, made with an intent to deceive, upon **748 which the plaintiff reasonably relies and as a result of which he sustains damages" (*Megarix Furs v. Gimbel Bros.*, 172 A.D.2d 209, 213, 568 N.Y.S.2d 581 [emphasis omitted]), and each element must be pleaded with particularity (see CPLR 3016(b)). Specifically, "[a] complaint alleging fraud by an accountant is expected to identify the particular manner in which an item included in the financial statement relied upon has been intentionally or recklessly misrepresented" (*Lampert v. Mahoney, Cohen & Co.*, 218 A.D.2d 580, 582, 630 N.Y.S.2d 733; see, *La Salle Natl. Bank v. Ernst & Young*, 285 A.D.2d 101, 109, 729 N.Y.S.2d 671).

The crux of plaintiffs' complaint is that AMNEX engaged in four specified transactions, as a result of which AMNEX (1) overstated the goodwill valuation associated with the company's acquisition of Capital Network Systems, Inc., (2) failed to write *965 down the \$4.1 million in intangible assets recorded as part of a transaction with an entity known as Teleplus, (3) failed to write down or write off allegedly uncollectible receivables from an entity known as Microtel, and (4) recorded as an asset sale to Transaction Network Services what actually was a disguised loan to AMNEX. By failing to detect these purported "red flags," the argument continues, defendant violated Generally Accepted Auditing Standards and misrepresented the financial viability of AMNEX.

(Cite as: 300 A.D.2d 963, *965, 752 N.Y.S.2d 746, **748)

Assuming, without deciding, that plaintiffs have alleged material misrepresentations, plaintiffs have not alleged any facts suggesting that defendant was aware of the alleged problems associated with the foregoing transactions (compare *Foothill Capital Corp. v. Grant Thornton L.L.P.*, supra; *John Hancock Mut. Life Ins. Co. v. KPMG Peat Marwick*, 232 A.D.2d 283, 648 N.Y.S.2d 911, lv. denied 89 N.Y.2d 809, 655 N.Y.S.2d 889, 678 N.E.2d 502; *Simon v. Ernst & Young*, 223 A.D.2d 506, 637 N.Y.S.2d 375). Indeed, plaintiffs' argument on appeal, that they should be afforded additional discovery in order to obtain defendant's work papers and definitively ascertain what defendant knew and when defendant knew it, is a tacit acknowledgment that the complaint, on its face, is lacking in particularity on this point. To the extent that plaintiffs allege that the subject transactions at least should have placed defendant on notice of a potential problem, this constitutes nothing more than an allegation of ordinary negligence, which is insufficient to identify the specific manner in which the identified transactions were intentionally or recklessly misrepresented (see *La Salle Natl. Bank v. Ernst & Young*, supra at 109, 729 N.Y.S.2d 671). Notably, the facts and allegations underlying plaintiffs' gross negligence claims mirror those set forth in plaintiffs' causes of action for negligent misrepresentation, the dismissal of which plaintiffs have not challenged on appeal, and the case law makes clear that "[t]he mere conclusory assertion of recklessness and intent, appended to the identical set of facts as are alleged in the negligence claim, do not meet the special pleading standards required under CPLR 3016(b)" (*Marine Midland Bank v. Grant Thornton L.L.P.*, 260 A.D.2d 318, 319, 689 N.Y.S.2d 81).

[2] Finally, even assuming that plaintiffs could satisfy the additional elements of falsity and scienter, we agree with Supreme Court that plaintiffs could not, as a matter of law, establish justifiable reliance. The comfort letters issued by defendant, upon which plaintiffs so steadfastly relied, were addressed only to AMNEX and **749 HSBC and expressly stated that they were issued solely

for the benefit of such entities and were "not to be used, circulated, quoted, or otherwise referred to for *966 any purpose, including but not limited to the purchase or sale of securities." Additionally Galesi, a member of AMNEX's board of directors and a self-described "respected investor and entrepreneur," plainly had both access to the relevant AMNEX financial statements and the wherewithal, through his own financial advisors, to ascertain the financial viability of that entity (cf. *Lampert v. Mahoney, Cohen & Co.*, supra at 582-583, 630 N.Y.S.2d 733). Thus, as plaintiffs had the means to ascertain the truth of the alleged representations, they cannot prevail in an action for fraud (see *Cohen v. Colistra*, 233 A.D.2d 542, 543, 649 N.Y.S.2d 540). Plaintiffs' remaining contentions, to the extent not specifically addressed, have been examined and found to be lacking in merit.

ORDERED that the order is affirmed, with costs.

CARPINELLO, MUGGLIN, ROSE and KANE, JJ., concur.

300 A.D.2d 963, 752 N.Y.S.2d 746, 2002 N.Y. Slip Op. 09645

END OF DOCUMENT

72

United States District Court,
S.D. New York.

David SCHNELL, Plaintiff,

v.

CONSECO, INC. and Sands Brothers & Co.,
Ltd., Defendants.

No. 98 Civ. 2527.

March 31, 1999.

Shareholder sued another shareholder and investment banker, alleging violation of Racketeer Influenced and Corrupt Organizations Act (RICO) and market manipulation in violation of §10(b). Defendants moved to dismiss. The District Court, Barrington D. Parker, Jr., J., held that: (1) shareholder did not commit acts of mail or wire fraud constituting "racketeering activity" for (RICO) purposes; (2) open-ended pattern of racketeering activity was not shown; (3) closed-ended pattern of racketeering activity was not shown; (4) causality element of RICO claim was not established; (5) market manipulation claims were subject to heightened pleading requirements of Private Securities Litigation Reform Act (PSLRA); (6) averments made on information and belief were too vague to satisfy PSLRA; (7) claim that investment banker artificially increased price of shares to increase transaction fees did not establish scienter required for securities fraud claim; and (8) scienter was not established by citing to optimistic statements and comparing them to what actually happened.

Complaint dismissed.

West Headnotes

[1] Federal Civil Procedure 636
170Ak636

In order to claim mail or wire fraud, when the documents transmitted by mail or wire are not themselves misleading, pleadings must include detailed description of underlying scheme and connection therewith of mail or wire communications. Fed.Rules

Civ.Proc.Rule 9(b), 28 U.S.C.A.

[2] Postal Service 35(10)
306k35(10)

[2] Telecommunications 362
372k362

Shareholder did not commit acts of mail or wire fraud constituting "racketeering activity" for Racketeer Influenced and Corrupt Organizations Act (RICO) purposes, when shareholder provided needed additional financing to corporation in return for increasing interest in corporation, culminating in receipt of opportunity to be 86% owner; all agreements were made in conformity with applicable corporate documents and statutes, and were publicly disclosed. 18 U.S.C.A. §§ 1961(1), 1962(c).

[3] Racketeer Influenced and Corrupt Organizations 29
319Hk29

Shareholder in corporation failed to establish that another shareholder engaged in open-ended pattern of racketeering activities in connection with its efforts to gain control of corporation, for purposes of claim under Racketeer Influenced and Corrupt Organizations Act (RICO); as soon as control was achieved there would be no continued racketeering activity. 18 U.S.C.A. § 1962(c).

[4] Racketeer Influenced and Corrupt Organizations 29
319Hk29

Shareholder did not establish that another shareholder engaged in closed-ended pattern of racketeering activity, so as to liable under Racketeer Influenced and Corrupt Organizations Act (RICO); claim that accused shareholder committed series of acts, none of them inherently unlawful, over period of 23 months, for purposes of securing control over corporation, was insufficient. 18 U.S.C.A. § 1962(c).

[5] Racketeer Influenced and Corrupt Organizations 62
319Hk62

Claim that racketeering activity of

shareholder caused damages to all shareholders, as result of bankruptcy of corporation, was too speculative to satisfy causation requirement for suit under Racketeer Influenced and Corrupt Organizations Act (RICO). 18 U.S.C.A. § 1962(c).

[6] Racketeer Influenced and Corrupt Organizations 75
319Hk75

Shareholder failed to adequately plead causal connection between alleged racketeering activities of another shareholder, who obtained control over corporation by loaning it money, and decline in value of shares, as required for claim under Racketeer Influenced and Corrupt Organizations Act (RICO). 18 U.S.C.A. § 1962(c).

[7] Securities Regulation 60.53
349Bk60.53

Allegations in securities fraud complaint, reciting alleged misrepresentations claimed to have artificially inflating value of stock, were subject to specificity requirements of Private Securities Litigation Reform Act (PSLRA), even though suing investor claimed that challenged activity was market manipulation not subject to PSLRA. Securities Exchange Act of 1934, § 21D(b), as amended, 15 U.S.C.A. § 78u-4(b).

[8] Securities Regulation 60.51
349Bk60.51

Shareholder bringing securities fraud complaint did not satisfy Private Securities Litigation Reform Act (PSLRA) requirement of stating facts on which "information and belief" pleading was based, by claiming generally that investment bankers issued false and misleading research reviews, and that investment bankers used internet to send fictitious messages to potential investors falsely touting corporation's stock. Securities Exchange Act of 1934, § 21D(b), as amended, 15 U.S.C.A. § 78u-4(b).

[9] Securities Regulation 60.45(1)
349Bk60.45(1)

In assessing a defendant's fraudulent intent, for securities fraud purposes, court must

assume that the defendant is acting in his or her informed economic self-interest. Securities Exchange Act of 1934, §§ 10(b), 21D(b)(2), as amended, 15 U.S.C.A. §§ 78j(b), 78u-4(b)(2); 17 C.F.R. § 240.10b-5.

[10] Securities Regulation 60.51
349Bk60.51

Scienter required for securities fraud action can be alleged by conclusory allegations if they are supported by facts giving rise to a strong inference of fraudulent intent. Securities Exchange Act of 1934, §§ 10(b), 21D(b)(2), as amended, 15 U.S.C.A. §§ 78j(b), 78u-4(b)(2); 17 C.F.R. § 240.10b-5.

[11] Securities Regulation 60.51
349Bk60.51

Shareholder failed to show scienter on part of investment banker accused of securities fraud, through allegations tending to show motive for fraudulent behavior, by alleging that investment banker artificially inflated price of corporation's stock in order to obtain higher transaction fees. Securities Exchange Act of 1934, §§ 10(b), 21D(b)(2), as amended, 15 U.S.C.A. §§ 78j(b), 78u-4(b)(2); 17 C.F.R. § 240.10b-5.

[12] Securities Regulation 60.51
349Bk60.51

Shareholder did not state scienter element of securities fraud claim against investment banker, based upon conscious misbehavior or recklessness, by citing optimistic statements and news releases by investment banker and comparing them to what actually happened.

*440 Jill Rosell, Lowey Dannenberg Bemporad & Selinger, White Plains, NY, for plaintiff.

Walter C. Carlson, Sidney & Austin, New York City, for defendants.

MEMORANDUM DECISION AND ORDER

BARRINGTON D. PARKER, Jr., District Judge.

Plaintiff David Schnell brings this action against Conseco, Inc. ("Conseco") and Sands

Brothers & Co., Ltd. ("Sands"), on behalf of a purported class of public investors in NAL Financial Group, Inc. ("NALF") for injuries suffered as a result of Conseco's alleged fraud in violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961, et seq., (Count I), and the manipulation of the market for NALF securities allegedly committed by Sands, in violation of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5 promulgated thereunder by the Securities Exchange Commission ("SEC") (Count II). Essentially, Schnell alleges that Conseco, with the assistance of Sands, unlawfully effected a series of transactions--principally the sale of convertible debentures in NALF--to gain control of NALF by acquiring its common stock at artificially low prices to the detriment of its remaining public shareholders.

Defendants now move to dismiss plaintiff's claims against them pursuant to Fed.R.Civ.P. 12(b)(6) and 9(b). For the reasons stated below, defendants' motions are granted.

BACKGROUND

In deciding a motion pursuant to Rule 12(b), the court is, of course, obligated to construe the pleadings in the plaintiff's favor. *Cooper v. Parsky*, 140 F.3d 433, 440 (2d Cir.1998); *Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1174 (2d Cir.1993); *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1098 (2d Cir.1988). The following facts are accordingly construed.

*441 Conseco is a financial services holding company incorporated under the laws of the state of Indiana and engaged in the development, marketing, and administration of annuity, supplemental health, and individual life insurance products. Sands is an investment banking firm that is also a broker and dealer in securities.

NALF is a Delaware corporation, engaged in the purchase, securitization, and servicing of automobile finance contracts to consumers with high credit risks. Through an insurance subsidiary, NALF provides insurance and

insurance-related products to automobile dealers and their customers, and, through a remarketing subsidiary, NALF disposes of some of its repossessed and off-lease vehicles. On March 23, 1998, NALF filed a Chapter 11 petition for bankruptcy. No claims are asserted in this action against NALF.

On April 23, 1996, Beneficial Standard Life Insurance Co. ("BSLIC") and Great American Reserve Insurance Co. ("GARCO"), two Conseco subsidiaries, each acquired \$5,000,000 worth of 9% Subordinated Convertible Debentures of NALF. The debentures had a life span of eighteen months, expiring in October 1997, and were convertible at any time into NALF common stock at the lesser of \$12.00 per share or 80% of the market price of the stock on the date of conversion. NALF also issued to the subsidiaries warrants to purchase 500,000 restricted shares of NALF common stock at an exercise price of \$12.65 per share.

By late 1996, approximately \$11 million in NALF debentures with conversion features similar to the Conseco debentures were owned by other investors, including Merrill Lynch, Westminster Capital, and Michael Karp. Millions of dollars in warrants similar to those granted to the Conseco subsidiaries in April 1996 were also issued by NALF to other private investors.

Plaintiff contends that the debentures gave Conseco an incentive to artificially depress the price of NALF's stock at the end of the eighteen month conversion period so that Conseco could acquire the shares at the depressed price. In connection with Conseco's purchase of the debentures, Conseco was also allowed to designate one director to NALF's Board of Directors. Plaintiff claims that NALF's May 2, 1996 mailing of a proxy statement to its public stockholders and its electronic filing with the SEC was a result of Conseco's designation of a director to NALF's Board and was in furtherance of Conseco's scheme to defraud.

Plaintiff alleges that through phone calls to investors and dissemination of false opinions

on the value of NALF stock, Sands, who has acted as Conseco's investment banker, artificially inflated the price of NALF stock through an illegal "pump and dump" scheme to enable Sands to make increased profits on sales of NALF stock. [FN1] Plaintiff also contends that Sands, which acted as Conseco's financial advisor and received a placement fee in connection with the private placement of Conseco debentures, failed to inform public investors that Conseco itself derived substantial benefits from the Conseco debentures and was positioning itself to acquire NALF at 80% of the market price of NALF stock, which Conseco allegedly expected to be severely depressed at the end of the conversion period.

FN1. The alleged markups were based on a percentage of the purchase price paid by the investors and represented Sands' fees for the transactions.

After Conseco's purchase of NALF shares, plaintiff alleges that defendants began to position NALF to be acquired at a sharp discount by Conseco. Plaintiff contends that after selling NALF stock to the public at artificially inflated prices, Sands took NALF stock off its recommended list and stopped its aggressive efforts to market NALF shares, resulting in a precipitous decline in the stock's value.

On June 23, 1997, when NALF common stock was trading below \$2 per share, Conseco, *442 pursuant to a Credit Agreement, loaned an additional \$5,000,000 to NALF secured by a note maturing on December 31, 1997. In connection with this note, NALF issued to Conseco warrants to purchase 275,000 shares of NALF common stock at an exercise price of \$.15 per share and agreed to amend the exercise price of the Conseco warrants to \$.15 per share from \$12.625 and \$14.25 per share.

On August 21, 1997, NALF and Conseco entered into an Investment Agreement, and a first amendment to the June 23, 1997 Credit Agreement. In the Investment Agreement, Conseco acquired 5,000,000 shares of NALF stock for \$5 million, and purchased all of

NALF's outstanding convertible debentures held by third parties other than Conseco. The Investment Agreement also provided that Conseco would not "initiate or cooperate in the initiation of any reorganization or liquidation proceeding with respect to the Company under the Bankruptcy Act" until the date of Closing, which was October 1, 1997.

On October 1, 1997, Conseco converted many of the debentures it owned into NALF common stock, which resulted in Conseco's ownership of 73.6% of the company, and agreed to convert its remaining debentures into NALF common stock once the company had sufficient authorized shares available for issuance upon conversion. In addition, NALF's Board of Directors was increased from four to six members and the number of Conseco designees on the Board was raised from one to four. Conseco also agreed that it would not pursue a cash-out merger of NALF's public shareholders prior to March 23, 1998 without the approval of a majority of the company's minority stockholders, and that it would not pursue a cash-out merger prior to December 23, 1998 without the approval of a majority of disinterested NALF Directors.

Plaintiff alleges that on November 29, 1997, Conseco caused NALF to mail to its shareholders and file electronically with the SEC its November 1997 Proxy. [FN2] The proxy disclosed that NALF was continuing to experience serious difficulties, and was mailed with an amendment to the Company's Certificate of Incorporation that increased the number of authorized NALF shares from 50,000,000 to 100,000,000, allegedly to allow Conseco to convert its remaining debentures and increase its control to 86%.

FN2. This Court can take judicial notice of documents filed with the SEC on a motion to dismiss. *Kramer v. Time Warner Inc.*, 937 F.2d 767, 774 (2d Cir.1991).

On March 23, 1998, NALF filed a Chapter 11 petition for bankruptcy. Plaintiff alleges that Conseco caused the filing of this petition, and that the filing was improperly intended to enable Conseco to acquire NALF without

adequate consideration to its public shareholders.

Plaintiff alleges two claims. First, plaintiff asserts a claim against Conseco for violation of RICO on behalf of himself and a purported class of all other persons and their successors in interest who purchased NALF common stock on or after April 25, 1996, and who still own such stock. Second, plaintiff asserts a claim against Sands, for violation of Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder, on behalf of himself and a purported class consisting of purchasers of NALF common stock between April 25, 1996 and August 21, 1997. Both Conseco and Sands move pursuant to Fed.R.Civ.P. Rules 12(b)(6) and 9(b), alleging that the complaint fails to state a claim under RICO or Rule 10b-5.

DISCUSSION

I. Count I-Plaintiff's RICO Allegations

A. Mail and Wire Fraud

Conseco's challenges to the complaint's RICO allegations are essentially that they do not adequately allege a scheme to defraud, a pattern of racketeering activity, or *443 causation. In relevant part, RICO prohibits

any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(c). [FN3] A "pattern of racketeering activity" requires at least two acts of racketeering activity within the past ten years. 18 U.S.C. § 1961(5). Mail and wire fraud are included within the definition of "racketeering activity." 18 U.S.C. § 1961(1).

FN3. While plaintiff's RICO statement states that his RICO claim against Conseco is brought pursuant to 18 U.S.C. §§ 1962(b) and (c), his complaint mentions only § 1962(c). In this case, however,

the relevant analysis for both sections is the same.

The elements of a mail or wire fraud violation are (1) a scheme to defraud, (2) money or property as the object of the scheme, and (3) the use of the mails or wires to further the scheme. *United States v. Dinome*, 86 F.3d 277, 283 (2d Cir.1996) (citing *United States v. Miller*, 997 F.2d 1010, 1017 (2d Cir.1993)). Allegations of mail and wire fraud must be pleaded with particularity under Fed.R.Civ.P. 9(b). *McLaughlin v. Anderson*, 962 F.2d 187, 191 (2d Cir.1992); *A. Terzi Productions, Inc. v. Theatrical Protective Union*, 2 F.Supp.2d 485, 499 (S.D.N.Y.1998). This means that the "complaint must adequately specify the statements it claims were false or misleading, give particulars as to the respect in which plaintiffs contend the statements were fraudulent, state when and where the statements were made, and identify those responsible for the statements." *McLaughlin*, 962 F.2d at 191 (citing *Cosmas v. Hassett*, 886 F.2d 8, 11 (2d Cir.1989)). "Plaintiffs asserting mail [or wire] fraud must also identify the purpose of the mailing within the defendant's fraudulent scheme." *Id.*

[1] While it is true that mail or wire communications that contain no false information may satisfy the transmission element of the offenses, the mail or wire communications must be "incident to an essential part of the scheme." *Schmuck v. United States*, 489 U.S. 705, 712, 715, 109 S.Ct. 1443, 103 L.Ed.2d 734 (1989). In other words, in cases in which the communications are not themselves misleading, "a detailed description of the underlying scheme and the connection therewith of the mail and/or wire communications, is sufficient to satisfy Rule 9(b)." *In re Sumitomo Copper Litigation*, 995 F.Supp. 451, 456 (S.D.N.Y.1998).

[2] In this case, plaintiff does not contend that the mail and wire communications that allegedly formed the RICO predicate acts contained false or misleading information. Rather, plaintiff claims that the mails and wires were used in furtherance of the scheme to defraud. Thus, the ability of plaintiff's mail and wire fraud allegations to withstand

this motion to dismiss depends first on the adequacy of the plaintiff's pleading of the scheme to defraud.

Plaintiff cites *United States v. Trapilo*, 130 F.3d 547 (2d Cir.1997) in support of his argument that his complaint sufficiently alleges a scheme to defraud. In that case, our Court of Appeals found that smuggling came within the meaning of a "scheme to defraud," stating, "[t]he term 'scheme to defraud' is measured by a 'nontechnical standard. It is a reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general [and] business life of members of society.'" *Trapilo*, 130 F.3d at 550 n. 3 (citing *United States v. Von Barta*, 635 F.2d 999, 1005 n. 12 (2d Cir.1980)) (other citations omitted). As the *A. Terzi Productions, Inc.* court noted, however, *Trapilo* merely "underscor[ed] the accepted notion that a defendant, by his conduct alone, can intend to deceive another and engage in a scheme to defraud, even though the defendant's *444 statements themselves contain no misrepresentations." *A. Terzi Productions, Inc.*, 2 F.Supp.2d at 501. Thus, while smuggling was an inherently dishonest and deceptive act, the conduct challenged in *A. Terzi Productions, Inc.*--coercing plaintiffs into entering a labor agreement through threatening and abusive conduct--was not dishonest or deceptive, and did not constitute a scheme to defraud. [FN4] *Id.* at 500.

FN4. The cases cited by plaintiff, in which courts found schemes to defraud where inherently deceptive acts were alleged, are not to the contrary. See, e.g., *General Credit Corp. v. Goldfarb*, No. 98 Civ. 3188(DLC), 1998 WL 851592, *2 (S.D.N.Y. Dec.9, 1998) (finding scheme to defraud where defendants wrote, then disavowed, multiple checks to the congregation with which they were affiliated in attempt to defraud check factoring corporation and Internal Revenue Service; defendants' actions included submission of false affidavits of forged endorsement to the bank); *In re Sumitomo Copper Litigation*, 995 F.Supp. 451, 456-57 (S.D.N.Y.1998) (finding scheme to defraud where defendants acted in concert to manipulate copper prices over period of seven years, restricting available supply of copper, which resulted in copper

prices reaching an artificially high level).

[3] In fact, a scheme to defraud "requires 'fraudulent or deceptive means, such as material misrepresentation or concealment.'" *A. Terzi Productions, Inc. v. Theatrical Protective Union*, 2 F.Supp.2d 485, 499 (S.D.N.Y.1998) (quoting *Center Cadillac, Inc. v. Bank Leumi Trust Co.*, 808 F.Supp. 213, 227 (S.D.N.Y.1992), *aff'd*, 99 F.3d 401 (2d Cir.1995)) (other citations omitted). Here, however, plaintiff's complaint contains no allegations that Conseco employed fraudulent or deceptive means. While plaintiff alleges that Conseco moved to acquire a controlling interest by arranging to acquire NALF shares at a discount and attempting to acquire the remaining interest without paying adequate consideration, no fraudulent or deceptive actions are alleged with respect to Conseco. In addition, while plaintiff claims that Conseco caused NALF to file for bankruptcy on the first day it could contractually do so, this allegation is also insufficient to support the existence of a scheme to defraud. [FN5] And while plaintiff contends that Conseco's actions were "coercive," coercion alone does not constitute a scheme to defraud. See, e.g., *A. Terzi Productions, Inc.*, 2 F.Supp.2d at 500 (allegations of threats and abusive conduct do not constitute scheme to defraud) (citing *Fasulo v. United States*, 272 U.S. 620, 47 S.Ct. 200, 71 L.Ed. 443 (1926)).

FN5. While plaintiff states in his brief that Conseco's acquisition of NALF was undertaken without the approval of NALF's board of directors and public shareholders, and that Conseco's causing NALF to file for bankruptcy came without the approval of the non-Conseco members of NALF's board of directors, those allegations appear nowhere in plaintiff's complaint. See *O'Brien v. National Property Analysts Partners*, 719 F.Supp. 222, 229 (S.D.N.Y.1989) ("[I]t is axiomatic that the Complaint cannot be amended by the briefs in opposition to a motion to dismiss."). Further, although plaintiff suggests in his RICO statement that the required shareholder approval was not attained, he does so first only generally (RICO Statement, Resp. 2), and then qualifies his belief with the term "suspects." (RICO Statement, Resp. 4). Neither of these statements is sufficiently well-

pleaded to support the existence of a scheme to defraud.

In essence, the complaint alleges, at most, that from time to time Conseco and NALF voluntarily entered into various contractual agreements. Under those agreements, NALF received large cash infusions from Conseco, and NALF ultimately granted Conseco the express rights to obtain ownership of 86% of NALF's shares. The terms of the agreements in question were disclosed to NALF's shareholders, and Conseco's conduct in acquiring and converting debentures, in increasing its ownership of NALF stock and expanding its presence on NALF's Board of Directors were all acts consistent with the parties' agreements. The agreements expressly delineated Conseco's right to initiate NALF's reorganization in bankruptcy and there are no sufficient allegations in the complaint *445 that Conseco's actions violated the parties' agreements. However aggressive or self-interested the bargains Conseco struck for itself might have been, the fact remains that there is "nothing deceptive about the exercise of an express contractual right." *Samuels v. Old Kent Bank*, No. 96 C 6667, 1997 WL 458434, *9 (N.D.Ill. Aug.1, 1997). Since plaintiff has failed to properly allege a scheme to defraud, his RICO allegations against defendant Conseco must be dismissed.

B. Pattern of Racketeering Activity

Even if plaintiff's mail and wire fraud allegations were sufficient, plaintiff has failed to properly allege a pattern of racketeering activity. In order to plead a pattern of racketeering activity, plaintiff must allege two or more predicate acts by defendant that are sufficiently related and amount to, or pose a threat of, continued criminal activity. *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 240, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989). Showing the threat of continued criminal activity requires the allegation of either an "open-ended" (i.e., past criminal conduct with a threat of future criminal conduct) or "closed-ended" (i.e., past criminal activity extending over a substantial period of time) pattern of racketeering activity. GICC

Capital Corp. v. Technology Fin. Group, Inc., 67 F.3d 463, 466 (2d Cir.1995).

With respect to an open-ended pattern of racketeering activity, our Circuit has noted: in cases in which the acts of the defendant or the enterprise were inherently unlawful, such as murder or obstruction of justice, and were in pursuit of inherently unlawful goals, such as narcotics trafficking or embezzlement, the courts generally have concluded that the requisite threat of continuity was adequately established by the nature of the activity, even though the period spanned by the racketeering acts was short. In contrast, in cases concerning alleged racketeering activity in furtherance of endeavors that are not inherently unlawful, such as frauds in the sale of property, the courts generally have found no threat of continuing criminal activity arising from conduct that extended over even longer periods.

United States v. Aulicino, 44 F.3d 1102, 1111 (2d Cir.1995). In this case, plaintiff challenges the manner in which Conseco acquired another company, an endeavor that is not inherently unlawful. The predicate acts that plaintiff alleges are the mailings of proxy statements and the making of phone calls that were not in themselves false or deceptive. As Conseco points out, once NALF's bankruptcy petition is confirmed, Conseco's alleged scheme to gain control of NALF at the expense of its public shareholders will end. As such, the allegations in the complaint carry with them no threat of continued or future criminal activity. While plaintiff suggests that the manner in which Conseco acquired NALF is the regular way that Conseco conducts its ongoing business in the sub-prime auto lending industry, plaintiff does not allege that Conseco's acquisition of other companies came as a result of any illegal, much less racketeering activity. As such, plaintiff's speculative allegations regarding Conseco's other acquisitions do not give rise to a threat of future criminal activity. Accordingly, plaintiff's complaint fails to allege an open-ended pattern of racketeering activity.

[4] Whether a closed-ended pattern of racketeering activity exists depends on analysis of a number of non-dispositive factors, including the length of time over which the alleged predicate acts took place, the number and variety of acts, the number of participants, the number of victims, and the presence of separate schemes. *GICC Capital Corp.*, 67 F.3d at 467. Our Circuit has been sparing in finding closed-ended continuity. See *id.* (noting that since *H.J. Inc.*, the Second Circuit had found closed-ended continuity only twice). Here, plaintiff alleges that Consecos racketeering conduct began May 2, *446 1996, with the mailing of a proxy statement to NALF shareholders, and continued until March 23, 1998, with the filing of the Chapter 11 petition. That period of almost twenty-three months, plaintiff claims, is sufficient to support a finding of closed-ended continuity. See *Metromedia v. Fugazy*, 983 F.2d 350, 369 (2d Cir.1992) (finding two year period sufficient to support closed-ended continuity, stating, "Periods of 19 or 20 months ... have been held sufficient to support a finding of continuity"). While, when taken in isolation, the time period of the alleged racketeering conduct may support a finding of closed-ended continuity, such a finding is not automatic in light of the other factors to be considered. See *Feirstein v. Nanbar Realty Corp.*, 963 F.Supp. 254, 260 (S.D.N.Y.1997) (finding plaintiffs' allegations insufficient for closed-ended continuity although acts occurred over a three-year period).

Plaintiff's RICO claim alleges a scheme to defraud by a single defendant, Consecos, with the goal of seizing control of NALF at the expense of a single class of victims--NALF's public shareholders. While plaintiff's complaint alleges a number of predicate mail and wire fraud acts in furtherance of this scheme, these acts are in themselves innocuous and are not alleged to be false or misleading in any way. These acts, though allegedly undertaken over a period of 23 months, are insufficient to state a closed-ended pattern of racketeering activity. As the court in *Pier Connection, Inc. v. Lakhani*, 907 F.Supp. 72 (S.D.N.Y.1995) stated, in language equally applicable here,

the Complaint demonstrates that Defendants engaged in one scheme whose single goal was to seize control of Pier Connection's business. That Defendants used several different tactics to achieve this goal does not turn Defendants' scheme into one with multiple goals and/or victims, and does not mandate a finding of continuity sufficient to support a RICO claim.

Id. at 78. Likewise, in this case, plaintiff alleges that Consecos was engaged in one scheme, with the single goal of seizing control of NALF as cheaply as possible. Despite plaintiff's claims that the predicate acts occurred over a period of twenty-three months, the fact that Consecos allegedly used mail and wire communications that in themselves contained no deceptive or misleading statements to further its single goal does not mandate a finding of closed-ended continuity. Plaintiff's RICO allegations are deficient as a consequence of their failure to state a pattern of racketeering activity. [FN6]

FN6. As a result of its dismissal of plaintiff's RICO claims, this Court need not address Consecos's other arguments.

An additional deficiency in plaintiff's RICO allegations is his failure adequately to allege that his injury was both caused in fact, and proximately caused, by the conduct alleged to constitute the predicate acts under RICO. *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268, 112 S.Ct. 1311, 117 L.Ed.2d 532 (1992); *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 23 (2d Cir.1990). *Hecht* teaches that an injury is "proximately caused" by a RICO violation if the predicate acts "are a substantial factor in the sequence of responsible causation, and if the injury is reasonably foreseeable or anticipated as a natural consequence." *Hecht*, 897 F.2d at 23-24.

[5] Two types of potential injuries are alleged in the complaint. The first is a decline in the NALF share price as a result of defendants' conduct. The second is the anticipated future loss to all common shareholders (including plaintiff and Consecos) when, and if, a reorganization plan is

formulated, approved by the creditors, and confirmed by the bankruptcy court. But this latter injury is simply too speculative to meet the causation requirements articulated in *Holmes and Hecht* and cannot, therefore, constitute RICO injury. See, *447 e.g., *First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763, 767 (2d Cir.1994); *Hecht*, 897 F.2d at 24; *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1105-06 (2d Cir.1988).

[6] With respect to the first type of injury alleged, although the complaint asserts proximate causation in a conclusory fashion, our Court of Appeals requires that a plaintiff allege loss causation with enough particularity to permit a determination whether the factual basis for a claim, if proven, could support an inference of proximate cause. *First Nationwide Bank*, 27 F.3d at 770. Here, plaintiff's RICO claims contain no facts that, if proven, would establish a nexus between the loss in share price alleged and Consec's conduct. Even on plaintiff's version of events, NALF's share price dropped because of a fundamental deterioration in NALF's business and the reflection of that fact in its share price. "When factors other than the defendant's fraud are an intervening direct cause of plaintiff's injury, the same injury cannot be said to have occurred by reason of defendant's action." *First Nationwide Bank*, 27 F.3d at 769. See also *Powers v. British Vita, P.L.C.*, 57 F.3d 176, 189 (2d Cir.1995). Thus, in view of plaintiff's failure to allege properly a scheme to defraud, a pattern of racketeering activity, or proximate causation in either his complaint or RICO statement, plaintiff's RICO claims are dismissed with prejudice, and his motion to amend his complaint is denied.

II. Count II--Plaintiff's Security Fraud Allegations

Plaintiff also asserts claims against Sands for the alleged violation of § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5 promulgated thereunder by the SEC. Section 10(b) prohibits: "any person ... to use or employ, in connection with the purchase or sale of any security ... any

manipulative or deceptive device or contrivance in contravention of [SEC rules]." 15 U.S.C. § 78j(b); *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 471, 97 S.Ct. 1292, 51 L.Ed.2d 480 (1977). Rule 10b-5 provides:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange, (a) to employ any device, scheme, or artifice to defraud, (b) to make any untrue statement of a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, or (c) to engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5.

In 1995, Congress passed the Private Securities Litigation Reform Act (the "Reform Act"). In part, the Reform Act imposed a heightened pleading standard for § 10(b) actions that allege misrepresentations and omissions under Rule 10b-5. Thus, § 78u-4(b) of the Reform Act provides:

(b) Requirements for securities fraud actions

(1) Misleading statements and omissions

In any private action arising under this chapter in which the plaintiff alleges that the defendant--

(A) made an untrue state of a material fact; or

(B) omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances in which they were made, not misleading;

the complaint shall specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint *448 shall state with particularity all facts on which that belief is formed.

15 U.S.C. § 78u-4(b).

[7] Plaintiff contends that the terms of 15 U.S.C. § 78u-4(b) apply only to claims based

on misrepresentations and omissions under Rule 10b-5(b) and not those, as here, based on market manipulation. As Sands points out, however, plaintiff's allegations of misconduct by Sands are largely based on misrepresentations and omissions. Specifically, plaintiff alleges that Sands employed the following activities to artificially inflate the price of NALF stock: (1) Sands published and disseminated to investors two Research Reviews that apparently contained a number of misrepresentations (Complaint, ¶ 21); (2) Sands used fictitious investor names to send false opinions on the value of NALF stock to real investors (Complaint, ¶ 20); (3) Sands' brokers made cold calls to unsuspecting investors to solicit sales of NALF stock at the highest price maintainable through Sands' market-making efforts (Complaint, ¶ 20); and (4) Sands failed to inform the public that Conseco, not NALF, obtained the benefit from the Conseco Debentures and that Conseco was positioning itself to acquire NALF (Complaint, ¶ 21(b)). Because the allegations are based on Sands' claimed misrepresentations and omissions, the heightened pleading standard of the 1995 Reform Act applies. See 15 U.S.C. § 78u-4(b).

[8] Here, plaintiff's complaint is based largely on "information and belief." Consequently, in order to survive a motion to dismiss, plaintiff must "state with particularity all facts on which that belief is formed." 15 U.S.C. § 78u-4(b). Plaintiff's complaint, however, fails to meet that standard, complaining generally of, for example, Sands' "issuance of materially false and misleading Research Reviews," and its "use of the internet to send fictitious messages to potential investors in NALF stock falsely touting NALF stock." (Complaint, ¶ 52.) Such allegations, bereft of any facts on which plaintiff's belief of Sands' misconduct is based, are insufficient to withstand a motion to dismiss.

If plaintiff's claim is considered one for market manipulation, as plaintiff contends it should be, plaintiff must allege (1) damage, (2) caused by reliance on defendants' misrepresentations or omissions of material

fact, or on a scheme by the defendants to defraud, (3) scienter, (4) in connection with the purchase or sale of securities, (5) furthered by the defendants' use of the mails or any facility of a national securities exchange. *Dietrich v. Bauer*, No. 95 Civ. 7051(RWS), 1999 WL 126438, *19 (S.D.N.Y. Mar.10, 1999) (citing *Cowen & Co. v. Merriam*, 745 F.Supp. 925, 929 (S.D.N.Y.1990)). Plaintiff has failed to properly plead scienter.

[9][10] A plaintiff may plead scienter by establishing a motive to commit fraud and an opportunity to do so. *Acito v. IMCERA Group, Inc.*, 47 F.3d 47, 52 (2d Cir.1995); *Gruntal & Co., Inc. v. San Diego Bancorp*, 901 F.Supp. 607, 613 (S.D.N.Y.1995). Where motive is not apparent, a plaintiff can plead scienter by identifying circumstances indicating conscious fraudulent behavior or recklessness. *Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1129 (2d Cir.1994); *Beck v. Manufacturers Hanover Trust Co.*, 820 F.2d 46, 50 (2d Cir.1987), cert. denied, 484 U.S. 1005, 108 S.Ct. 698, 98 L.Ed.2d 650 (1988), overruled on other grounds, *United States v. Indelicato*, 865 F.2d 1370 (2d Cir.1989) (en banc). In such a case, the strength of the circumstantial allegations must be correspondingly greater. *Beck*, 820 F.2d at 50. In assessing a defendant's fraudulent intent, a court must assume that "the defendant is acting in his or her informed economic self-interest." *Laro, Inc. v. Chase Manhattan Bank*, 866 F.Supp. 132, 138 (S.D.N.Y.1994), aff'd, 60 F.3d 810 (2d Cir.1995) (quoting *Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1130 (2d Cir.1994)). "Scienter can be alleged by conclusory allegations if they are supported by facts giving rise to a strong inference of *449 fraudulent intent." In re *Blech Securities Litigation*, 961 F.Supp. 569, 579 (S.D.N.Y.1997).

[11] Here, plaintiff has not adequately pleaded Sands' motive to commit the alleged securities fraud. While plaintiff does suggest that Sands artificially inflated the price of NALF stock in order to realize greater transaction fees, these allegations alone cannot show an improper motive. See, e.g., *Acito v. IMCERA Group, Inc.*, 47 F.3d 47, 54

(2d Cir.1995); *Fisher v. Offerman & Co., Inc.*, No. 95 Civ. 2566(JGK), 1996 WL 563141, *6 (S.D.N.Y. Oct.2, 1996) ("[A]n underwriter's alleged motive to earn its underwriting fees is not alone sufficient to sustain a strong inference of fraudulent intent. If it were, every underwriter, law firm, accountant, and investment advisor whose compensation or commission depended on the completion of an initial public offering would have a motive to commit fraud, which would make Rule 9(b) wholly meaningless."). In addition, other than stating that Sands and Conseco had a close relationship, plaintiff has not otherwise explained Sands' motive in suddenly seeking to depress NALF's stock price to benefit Conseco.

[12] Nor has plaintiff pleaded circumstances indicating conscious misbehavior or recklessness on Sands' part sufficient to withstand this motion to dismiss. Rather, plaintiff cites various optimistic statements and news releases by Sands and holds them against what actually happened to show that Sands had the fraudulent intent necessary to support a claim of securities fraud. These allegations are insufficient. See *Shields*, 25 F.3d at 1129 ("[M]isguided optimism is not a cause of action, and does not support an inference of fraud. We have rejected the legitimacy of 'alleging fraud by hindsight.' ") (quoting *Denny v. Barber*, 576 F.2d 465, 470 (2d Cir.1978)). Accordingly, as plaintiff has not properly pleaded scienter, his market manipulation claim is dismissed.

CONCLUSION

For the foregoing reasons, plaintiff's complaint is dismissed. Because plaintiff has filed both a complaint and a RICO statement with respect to its RICO claim against Conseco, plaintiff's claim against Conseco is dismissed without leave to replead. With respect to plaintiff's claim against Sands, this Court is mindful of the fact that plaintiff has not yet had a chance to amend his complaint, and cannot at this point say that any amendment would be futile. Thus, dismissal of plaintiff's claim against Sands is without prejudice. This dismissal becomes "with

prejudice" unless an amended complaint is filed within thirty days of the date of this Order.

SO ORDERED.

43 F.Supp.2d 438, Fed. Sec. L. Rep. P 90,471, RICO Bus.Disp.Guide 9722

END OF DOCUMENT

73

Briefs and Other Related Documents

United States Court of Appeals,
 Second Circuit.

Sarah B. SHIELDS, Individually and as
 representative of all others similarly
 situated, Plaintiff-Appellant,

v.

CITYTRUST BANCORP, INC., George F.
 Taylor and Irwin Engelman, Defendants-
 Appellees.

No. 802, Docket 93-7738.

Argued Jan. 14, 1994.

Decided June 2, 1994.

Shareholder of bank corporation brought securities fraud action against corporation and two of its senior executives, alleging that they concealed and misrepresented corporation's financial condition, in particular, facts concerning its loan portfolio and loan loss reserves. The United States District Court for the District of Connecticut, Eginton, J., dismissed complaint for failure to plead fraud with sufficient particularity. Shareholder appealed. The Court of Appeals, Jacobs, Circuit Judge, held that: (1) shareholder failed to plead fraud with sufficient particularity, and (2) dismissal was proper, even though court did not grant shareholder leave to amend her complaint.

Affirmed.

West Headnotes

[1] Federal Courts 794
 170Bk794

In reviewing district court's grant of motion to dismiss for failure to state claim, Court of Appeals accepts facts alleged in complaint as true. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[2] Federal Courts 763.1
 170Bk763.1

Generally, Court of Appeals will uphold district court's dismissal of claim for failure to

state claim only if it appears that plaintiff can prove no set of facts upon which relief may be granted. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[3] Federal Civil Procedure 636
 170Ak636

To serve purposes of rule requiring that circumstances constituting fraud be stated with particularity, court requires plaintiffs to allege facts that give rise to strong inference of fraudulent intent. Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.

[4] Federal Civil Procedure 636
 170Ak636

Securities fraud defendants did not waive their right to invoke rule requiring fraud to be pled with sufficient particularity, despite plaintiff's claim that they answered original complaint without moving for dismissal on that ground; defendants' invocation of that rule was effort to achieve judicial resolution of controversy, not to foreclose it, and answer to original complaint pleaded "failure to plead fraud with particularity" as defense. Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.

[5] Federal Civil Procedure 636
 170Ak636

Bank corporation shareholder who sued corporation and two of its senior executives for securities fraud in connection with their alleged concealment and misrepresentation of corporation's loan portfolio and loan loss reserves, failed to plead fraud with sufficient particularity; while shareholder introduced statements by defendants predicting prosperous future and held them up against backdrop of what actually transpired, those allegations did not say that corporation's disclosures were inconsistent with current data, there was no claim that false statements were made in effort to sell off shares or to delay criminal prosecution, and court could not infer that defendants made fraudulent statements intending to inflate stock price so that they could protect their executive positions. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b); Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.

[6] Federal Civil Procedure 636
170Ak636

To allege motive sufficient to support inference that optimistic but erroneous statements were fraudulently made, securities fraud plaintiff must do more than merely charge that executives aimed to prolong benefits of positions they hold. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b); Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.

[7] Federal Civil Procedure 1811
170Ak1811

District court did not abuse its discretion in dismissing securities fraud claim for failure to plead fraud with sufficient particularity, even though court did not grant plaintiff leave to amend her complaint; plaintiff had already substantively amended her complaint once before, and she did not ask district court for leave to amend it further. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b); Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.

*1125 Mark C. Rifkin, Haverford, PA (Greenfield & Rifkin, Haverford, PA, Goodkind Labaton Rudoff & Sucharow, New York City, Gordon & Hiller, Bridgeport, CT, of counsel) for plaintiff-appellant.

Philip L. Graham, Jr., New York City (Theodore W. Rosen, Sullivan & Cromwell, New York City, of counsel) for defendants-appellees.

Before: NEWMAN, Chief Judge, WINTER and JACOBS, Circuit Judges.

JACOBS, Circuit Judge:

As the aggrieved holder of somewhat less than one share of stock in Citytrust Bancorp, Inc. ("Citytrust"), Sarah B. Shields brought this class action claiming that Citytrust and two of its senior executives concealed and misrepresented Citytrust's financial condition--in particular, facts concerning its loan portfolio and loan loss reserves--in violation of Section 10(b) of the Securities Exchange Act of 1934 (the "1934 Act"), 15 U.S.C. § 78j(b); Rule

10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5; and New York law on negligent misrepresentation. The senior executives named in the complaint, George F. Taylor and Irwin Engelman, were also sued as "controlling persons" under Section 20 of the 1934 Act. 15 U.S.C. § 78t(a). Defendants signed a stipulation, so ordered by the district court, certifying the class and designating Shields as class representative. Thereafter, Citytrust and co-defendants Taylor and Engelman moved to dismiss the Complaint pursuant to Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief can be granted, or, alternatively, pursuant to Fed.R.Civ.P. 9(b) for failure to plead fraud with particularity. On June 18, 1993, the United States District Court for the District of Connecticut (Eginton, J.) found that the Complaint failed to satisfy the pleading requirements of Rule 9(b) and dismissed. We affirm.

BACKGROUND

A. Shields's Allegations

We must accept as true all facts alleged in the Second Amended Complaint dismissed by the district court. See *Luce v. Edelstein*, 802 F.2d 49, 52 (2d Cir.1986). At all relevant times, Citytrust was a bank holding company organized under the laws of Connecticut. Citytrust's principal asset was Citytrust Bank, Connecticut's third largest commercial bank on the basis of total assets. Taylor was *1126 chairman of the board and chief executive officer of Citytrust and the Bank. Engelman was a director, president and chief operating officer of Citytrust and the Bank.

Between 1984 and 1988, Citytrust's reported assets rose from \$1.5 billion to \$2.6 billion, and its reported net income increased sixty percent. In July 1988, Citytrust announced that it expected to realize record earnings for the eleventh consecutive year, and voted a twenty cent quarterly dividend. Shields alleges that Taylor, at that time, falsely and unjustifiably stated that Citytrust's loan portfolio was "extremely healthy, as evidenced by net charge-offs of approximately 1/4 of 1 percent of loans over the past four years," a

rate "well below the average for our industry." In October 1988, Citytrust reported a 10% increase in earnings and voted another twenty cent quarterly dividend. In January 1989, Citytrust reported that it had achieved its eleventh consecutive year of record net income as expected, which Taylor called "a solid performance," and had voted yet another twenty cent dividend for the quarter.

Shields alleged that Citytrust's financial health was deteriorating throughout this period largely because, in respect of a number of loans in its portfolio, Citytrust had accepted a right to share in equity appreciation in lieu of its usual collateral. As a result of such "shared appreciation loans," Citytrust was critically vulnerable to any drop in real estate values. Shields alleged that this risk was intentionally concealed by the defendants. In April 1989, Citytrust announced another increase in net income and Taylor stated that "prospects appear bright for further gains in earnings and returns on assets and equity. Our plan calls for 1989 to be our 12th consecutive year of record earnings."

Two months later, however, on June 15, 1989, Citytrust announced that, following an "intensive review" of its loan portfolios, it was necessary to take a \$40 million charge against earnings in order to increase its loan loss reserves. Citytrust also stated that this charge would result in its reporting a loss in the second quarter of 1989, as well as for the entire 1989 fiscal year. Furthermore, Citytrust projected non-performing loans of up to \$130 million for the second quarter of 1989 (up from \$96 million in the first quarter) and noted that the amount could further increase in the second half of 1989.

The day after the June 15 announcement, Citytrust's stock dropped from \$40- 7/8 per share to \$34- 7/8, despite Taylor's declaration "that the second half of 1989 will be profitable for Citytrust because of a strong performance from the rest of our businesses and the continued underlying strength of the Company's earnings." Although Citytrust reported a net loss for the second quarter of 1989, Taylor allegedly continued his effort to

mislead the investing public by stating: "While we are concerned with the extent of our loan problems, it is important to note that the underlying earnings of the bank remain strong." He also made the alleged misrepresentation that "[t]he addition to reserves is a prudent and conservative action in view of current negative real estate market conditions. We have assessed the underlying value of the bank's real estate related assets and provided for both the current exposure and potential for further decline in value."

The first of the two plaintiff sub-classes certified by the district court is composed of purchasers of Citytrust common stock in the period between March 31, 1989 and June 16, 1989 during which the events just described took place. The second plaintiff sub-class is composed of such purchasers in the period between June 17, 1989 and December 20, 1989, the date on which Citytrust announced further unnerving developments, including the elimination of its dividend for 1990. We recount the highlights of the second sub-class period, as alleged by Shields, in the following paragraphs.

Citytrust issued a news release on August 9, 1989, in which it claimed to be "moving aggressively" to overcome its problems, in part by making a "forceful drive to expand market share." Taylor again asserted that "the underlying earnings of the bank remain firm" and claimed that Citytrust was "committed to delivering solid earnings in the third and fourth quarters despite the pressure from our non-performing loans." On August 10, 1989, Citytrust filed a Form 10-Q that stated "management believes the current *1127 level of the allowance is adequate to provide for both the current loss exposure and the potential for a further decline in value." On October 18, 1989, Citytrust declared a quarterly dividend of twenty-eight cents per share, allegedly to create an illusion of renewed financial health.

Two months later, on December 20, 1989, Citytrust announced a significant addition to its loan loss reserves, reflecting an increase in non-performing loans, which would cause it to

report a considerable loss for the fourth quarter. Citytrust also announced the elimination of its dividend for 1990. During the second sub-class period, the price of Citytrust stock declined from \$33 on June 16, 1989 to \$11 on December 20, 1989.

B. Procedural History

Shields filed her class action on June 16, 1989, the day after Citytrust's first announcement that it would take a charge against earnings in order to increase its loan loss reserves. Defendants filed their answer on July 11, 1989, pleading as defenses failure to state a claim and failure to plead fraud with the requisite particularity.

In the months that followed, Citytrust permitted Shields to review certain documents relating to her allegations and to interview one of its executives. Shields moved to amend her complaint on February 5, 1990, in the wake of Citytrust's December 20, 1989 announcement of additional loan loss reserves and a resulting substantial quarterly loss. That motion and other issues were the subject of a "Revised Stipulation and Pretrial Order No. 1," entered into by the parties on September 27, 1990, and so ordered by the district court on October 23, 1990. The stipulation and order provided that the case would proceed as a class action, with two subclasses, both represented by Shields; allowed Shields to serve and file an amended complaint; arranged for the organization of class counsel; and implemented certain housekeeping arrangements.

Shields filed the present Complaint on December 13, 1990, which included allegations relating to Citytrust's December 20 announcement and extended the class period accordingly. On February 15, 1991, Defendants moved to dismiss the Complaint and ten days later filed a motion to stay discovery pending a decision on the motion to dismiss. The district court granted the motion to stay discovery on June 21, 1991.

In August 1991, federal banking regulators declared Citytrust Bank insolvent and

appointed the Federal Deposit Insurance Company as receiver. Citytrust succeeded in converting the bankruptcy into a Chapter 11 proceeding in September 1991, and an amended plan of reorganization was confirmed by the bankruptcy court on March 27, 1992. The amended plan had the effect of dissolving the automatic stay imposed by 11 U.S.C. § 362 with respect to the present lawsuit.

On June 18, 1993, the district court ruled that Shields's allegations "do not satisfy the specificity requirements of Fed.R.Civ.P. 9(b) and, thus, fail to state a 10b-5 securities fraud claim under Fed.R.Civ.P. 12(b)(6)," and granted Defendants' motion to dismiss. The district court also dismissed Shields's claims against Taylor and Engelman for secondary liability under Section 20 of the 1934 Act, and declined to exercise supplemental jurisdiction over the asserted state law claim for negligent misrepresentation. Shields filed a timely notice of appeal.

DISCUSSION

[1][2] In reviewing a district court's grant of a motion to dismiss, we accept the facts alleged in the Complaint as true. *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974); *IUE AFL-CIO Pension Fund v. Herrmann*, 9 F.3d 1049, 1052 (2d Cir.1993). Generally, we will uphold a district court's dismissal of a claim only if it appears that the plaintiff can prove no set of facts upon which relief may be granted. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-02, 2 L.Ed.2d 80 (1957). When fraud is asserted, however, we must also view the complaint in light of Rule 9(b), which requires that "the circumstances constituting fraud ... be stated with particularity." Fed.R.Civ.P. 9(b). Securities fraud allegations under § 10(b) and Rule 10b-5 are subject to the pleading requirements of Rule 9(b), and a *1128 complaint making such allegations must "(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." *Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1175 (2d

Cir.1993) (citing *Cosmas v. Hassett*, 886 F.2d 8, 11 (2d Cir.1989)).

[3] Rule 9(b) also provides that "[m]alice, intent, knowledge, and other condition of mind of a person may be averred generally." However, since Rule 9(b) is intended "to provide a defendant with fair notice of a plaintiff's claim, to safeguard a defendant's reputation from improvident charges of wrongdoing, and to protect a defendant against the institution of a strike suit," *O'Brien v. National Property Analysts Partners*, 936 F.2d 674, 676 (2d Cir.1991) (internal quotes omitted); see also *Ross v. Bolton*, 904 F.2d 819, 823 (2d Cir.1990); *DiVittorio v. Equidyne Extractive Industries, Inc.*, 822 F.2d 1242, 1247 (2d Cir.1987), the relaxation of Rule 9(b)'s specificity requirement for scienter " 'must not be mistaken for license to base claims of fraud on speculation and conclusory allegations.' " *O'Brien*, 936 F.2d at 676 (quoting *Wexner v. First Manhattan Co.*, 902 F.2d 169, 172 (2d Cir.1990)). Therefore, to serve the purposes of Rule 9(b), we require plaintiffs to allege facts that give rise to a strong inference of fraudulent intent. See *Mills*, 12 F.3d at 1176; *O'Brien*, 936 F.2d at 676; *Ouaknine v. MacFarlane*, 897 F.2d 75, 79 (2d Cir.1990).

The requisite "strong inference" of fraud may be established either (a) by alleging facts to show that defendants had both motive and opportunity to commit fraud, or (b) by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness. See *In re Time Warner Inc. Securities Litigation*, 9 F.3d 259, 268-69 (2d Cir.1993), cert. denied, --- U.S. ---, 114 S.Ct. 1397, 128 L.Ed.2d 70 (1994); *Beck v. Manufacturers Hanover Trust Co.*, 820 F.2d 46, 50 (2d Cir.1987), cert. denied, 484 U.S. 1005, 108 S.Ct. 698, 98 L.Ed.2d 650 (1988), overruled on other grounds by *United States v. Indelicato*, 865 F.2d 1370 (2d Cir.1989) (en banc). We agree with the district court that Shields has failed to plead facts sufficient to raise a strong inference of fraud, and that the Complaint therefore must be dismissed for failure to meet the specificity requirements of Rule 9(b).

A. Waiver

[4] Shields argues that compliance with the requirements of Rule 9(b) is not in issue because the defendants waived their right to invoke that rule by answering Shields's original complaint without moving for dismissal on that ground. We see no such waiver. "It is well established that an amended complaint ordinarily supersedes the original, and renders it of no legal effect." *International Controls Corp. v. Vesco*, 556 F.2d 665, 668 (2d Cir.1977), cert. denied, 434 U.S. 1014, 98 S.Ct. 730, 54 L.Ed.2d 758 (1978); see also *O & G Carriers, Inc. v. Smith*, 799 F.Supp. 1528, 1534 (S.D.N.Y.1992). Shields relies on *Gilmore v. Shearson/American Express, Inc.*, 811 F.2d 108, 112 (2d Cir.1987), for the proposition that an amended complaint "does not automatically revive all of the defenses and objections that a defendant has waived in response to the original complaint." However, the defenses and objections that are irrevocably waived by answering an original complaint are those that "involve[] the core issue of a party's willingness to submit a dispute to judicial resolution," such as objections to "lack of personal jurisdiction, improper venue, insufficiency of process and insufficiency of service." *Id.* Defendants' invocation of Rule 9(b), however, is an effort to achieve judicial resolution of the controversy, not to foreclose it. So *Gilmore* does not argue for waiver, particularly since the answer to the original complaint pleaded "failure to plead fraud with particularity" as a defense.

B. Scienter

[5] Shields contends that defendants acted with scienter in (1) expressing confidence in the adequacy of its reserve for bad loans, (2) failing to disclose the hazards of its shared appreciation loans, and (3) issuing optimistic statements concerning future prospects. In virtually each instance, Shields cites press releases and publicly filed corporate *1129 documents to establish the statements and nondisclosures that she contends are false or reckless. She has thereby satisfied the Rule 9(b) pleading requirements concerning the "time, place, speaker, and sometimes even the

content of the alleged misrepresentation." See *Ouaknine*, 897 F.2d at 79. What is lacking from all of Shields's allegations are particularized facts to support the inference that the defendants acted recklessly or with fraudulent intent.

Shields's pleading technique is to couple a factual statement with a conclusory allegation of fraudulent intent. For example, she claims that defendants "knew or were reckless in not knowing" that the loan loss reserve was inadequate; that defendants "intentionally concealed" the vulnerability to real estate losses inherent in shared appreciation loans; that defendants "knew but concealed" the poor condition of Citytrust's loan portfolio; and that defendants "knew or should have known" that Citytrust's loan problems were growing worse and that the loan loss reserve would have to be increased a second time. However, she does not allege facts that would give rise to a strong inference that defendants knew or recklessly disregarded the fact that the loan loss reserve was inadequate, or that continuing erosion of the real estate market would render the loan portfolio precarious, or that the outlook was poor. Shields's frequent conclusory allegations--that Defendants "knew but concealed" some things, or "knew or were reckless in not knowing" other things--do not satisfy the requirements of Rule 9(b). We have held in the context of securities fraud claims that such allegations are "so broad and conclusory as to be meaningless." *Decker v. Massey-Ferguson, Ltd.*, 681 F.2d 111, 119-20 (2d Cir.1982).

1. Conscious Misconduct or Recklessness.

Nowhere in her Complaint does Shields adduce the kind of circumstantial evidence that would indicate conscious fraudulent behavior or recklessness. Shields records statements by defendants predicting a prosperous future and holds them up against the backdrop of what actually transpired. In April 1989, for example, Taylor announced that Citytrust was expecting that year to be its twelfth consecutive year of record earnings. Then, two months later, Citytrust announced that it would instead report a loss for 1989 as

a result of an increase in its loan loss reserve. Similarly, Shields claims that Citytrust filed a document in August 1989 stating that it believed its loan loss reserve was adequate. Yet the following October it turned out that the reserve was inadequate and that Citytrust would make a significant addition to it. This technique is sufficient to allege that the defendants were wrong; but misguided optimism is not a cause of action, and does not support an inference of fraud. We have rejected the legitimacy of "alleging fraud by hindsight." *Denny v. Barber*, 576 F.2d 465, 470 (2d Cir.1978).

The facts alleged in the Second Amended Complaint show a dimming of the company's prospects as subsequent reviews were conducted of the company's loan portfolio, and resulting cascades of bad news and dropping stock prices. Shields does not allege that the company's disclosures were incompatible with what the most current reserve reports showed at the time the disclosures were made. The closest she comes is to allege that "[d]efendants knew or were reckless in not knowing ... that Citytrust's reserves for loan losses were completely inadequate in light of the risks which the loan portfolio entailed, and that such reserves would have to be substantially increased" (Second Amended Complaint at ¶ 27); and that "[d]efendant Taylor ... knew or should have known that Citytrust's loan problems had worsened materially and were worsening and that it was highly likely, if not certain, that Citytrust would soon again greatly increase its loan loss reserves" (Second Amended Complaint at ¶ 34). These allegations do not say, however, that the company's disclosures were inconsistent with current data. The pleading strongly suggests that the defendants should have been more alert and more skeptical, but nothing alleged indicates that management was promoting a fraud. People in charge of an enterprise are not required to take a gloomy, fearful or defeatist view of the future; subject to what current data indicates, they can be expected to be confident *1130 about their stewardship and the prospects of the business that they manage. The district court did not err in concluding that the allegations

of the Second Amended Complaint are insufficient to support an inference of fraud.

2. Motive and Opportunity.

Scienter can also be pleaded by alleging facts that demonstrate both motive and opportunity to commit fraud. Motive would entail concrete benefits that could be realized by one or more of the false statements and wrongful nondisclosures alleged. Opportunity would entail the means and likely prospect of achieving concrete benefits by the means alleged. Shields argues that the following allegation supports the inference that Taylor and Engelman had the motive and opportunity to commit fraud:

The purpose and effect of said scheme was (i) to inflate the price of the common stock of the Company and to conceal the adverse facts concerning the Company's business, liabilities, revenues, earnings, assets, forecasts and future prospects; and (ii) to maintain artificially high market prices for the common stock of Citytrust and to induce plaintiff and the other members of the Class to purchase Citytrust common stock ... at artificially inflated prices so that individual defendants could protect their executive positions and the compensation and prestige they enjoy thereby.

[6] To allege a motive sufficient to support the inference that optimistic but erroneous statements were fraudulently made, a plaintiff must do more than merely charge that executives aim to prolong the benefits of the positions they hold. See *Ferber v. Travelers Corp.*, 785 F.Supp. 1101, 1107 (D.Conn.1991) (Nevas, J.) ("Incentive compensation can hardly be the basis on which an allegation of fraud is predicated. On a practical level, were the opposite true, the executives of virtually every corporation in the United States could be subject to fraud allegations."). In looking for a sufficient allegation of motive, we assume that the defendant is acting in his or her informed economic self-interest. See *Atlantic Gypsum Co. v. Lloyds International Corp.*, 753 F.Supp. 505, 514 (S.D.N.Y.1990) (Mukasey, J.) ("Plaintiffs' view of the facts defies economic reason, and therefore does not

yield a reasonable inference of fraudulent intent."). It is hard to see what benefits accrue from a short respite from an inevitable day of reckoning. There is no claim here that false statements were made in an effort to sell off shares held by management, or to delay a criminal prosecution. For related reasons, the Complaint fails to allege a sufficient opportunity to derive a benefit from the alleged misstatements and nondisclosures: the ordinary course of bank business would lead to the review of the loan portfolios, as it did. If motive could be pleaded by alleging the defendant's desire for continued employment, and opportunity by alleging the defendant's authority to speak for the company, the required showing of motive and opportunity would be no realistic check on aspersions of fraud, and mere misguided optimism would become actionable under the securities laws. While some fraud may go unpunished as a result of Rule 9(b)'s heightened pleading standard, we recently acknowledged that we cannot eliminate all opportunities for "unremedied fraud" without creating opportunities for "undeserved settlements." See *In re Time Warner*, 9 F.3d at 263-64.

Shields relies on *Cosmas v. Hassett*, 886 F.2d 8, 13 (2d Cir.1989), to demonstrate that she has alleged a motive sufficient to raise a strong inference of fraud. However, Shields misreads that decision. In *Cosmas*, plaintiff alleged that Inflight Services' chief executive officer touted sales to the People's Republic of China as an important new source of revenue and predicted increasing sales and per share earnings for the coming year. However, prior to these announcements, the People's Republic of China had imposed import restrictions that made such predicted sales improbable. *Id.* at 10. As it happened, the sales did not occur. The holding of *Cosmas* is that these allegations support an inference of fraud by pleading adequate circumstantial evidence to indicate conscious misconduct by the defendants, i.e., that defendants knew of the import restrictions at the time they made the allegedly fraudulent statements. *Id.* at 13. We went on, however, briefly to consider the plaintiff's allegations of motive and opportunity, *1131 a distinct and alternative

method of pleading scienter under Rule 9(b). Shields directs us to the statement in *Cosmas* that a motive was established there by allegations "that the defendants owned shares of Inflight ... and that the allegedly fraudulent statements artificially inflated or maintained the prices of Inflight securities." *Cosmas* relies on the following language and analysis of *Goldman v. Belden*, 754 F.2d 1059, 1070 (2d Cir.1985): "the ... implication of the Complaint is that the alleged failure to qualify the bullish statements was intended to permit individual defendants to profit from an inflated market price before the truth became known." Although the *Cosmas* opinion does not recite specific allegations of insider stock sales, the Goldman defendants sold tens of thousands of shares during the period that the allegedly defrauded customers were purchasing them. *Id.* at 1063. Absent some comparable allegation to explain how a defendant benefits from an inflated stock price, stock ownership does not provide sufficient motive to sustain the pleading burden under Rule 9(b). Here, Shields does not allege that defendants owned stock, but rather that defendants made fraudulent statements intending to inflate the stock price so that they "could protect their executive positions and the compensation and prestige they enjoy thereby." Following *Goldman*, we require of Shields more specific factual allegations before we will infer from defendants' positions as executives that incorrect predictions were made with fraudulent intent.

C. Additional issues.

Shields claims that the district court committed legal error by relying upon *Steiner v. Shawmut National Corp.*, 766 F.Supp. 1236 (D.Conn.1991), *Salit v. Centerbank*, 767 F.Supp. 429 (D.Conn.1990), and *Haft v. Eastland Fin. Corp.*, 755 F.Supp. 1123 (D.R.I.1991). She contends that these cases were overruled by the Supreme Court's decision in *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 111 S.Ct. 2749, 115 L.Ed.2d 929 (1991). The district court made no error in applying these cases. *Virginia Bankshares* held that a statement of reasons,

opinion or belief can be a material fact if the person who makes the statement is reasonably presumed to have expertise, to have access to internal corporate information, and to owe an obligation to exercise judgment in the interest of the stockholders. A statement of reasons, opinion or belief by such a person when recommending a course of action to stockholders can be actionable under the securities laws if the speaker knows the statement to be false. *Id.* at ---, 111 S.Ct. at 2757-60. The defect in the pleading here is not that it alleges fraudulent misrepresentation of mere opinion or belief, but that it fails adequately to allege that the expression of the opinions and beliefs was fraudulent. *Virginia Bankshares* does not address the pleading requirements of Rule 9(b), and does not alter them. The district court in this case properly found that Shields's pleading failed to satisfy those requirements.

Shields also directs our attention to a recent case from the Ninth Circuit, *In re Wells Fargo Securities Litigation*, 12 F.3d 922 (9th Cir.1993), claiming that that case takes a less demanding view of the pleading requirements in securities fraud cases, and urging us to adopt the Ninth Circuit's approach. We decline the invitation, noting that *Wells Fargo* did not discuss the pleading requirements of Rule 9(b) (although the dissent by Judge Trott did). Moreover, there is some tension between *Wells Fargo* and another Ninth Circuit case, *In re Glenfed, Inc. Securities Litigation*, 11 F.3d 843 (9th Cir.1993), which the Ninth Circuit has recently undertaken to reconsider *in banc*. The issue in that case was whether *Glenfed* misrepresented its financial condition by concealing deficiencies in how it monitored the quality and value of its assets, understating reserves for loan losses, and failing to disclose that its plan to divest subsidiaries was not feasible in the prevailing market for such transactions. *Id.* at 846-47. *Glenfed* relies on several cases from this Circuit in concluding that the real question to consider in determining whether a plaintiff has met the scienter pleading requirement of Rule 9(b) "must be whether the facts in the amended complaint would give rise to an inference that the Defendants either did not

believe the statements or knew that the statements were false." *Id.* at 849. In our view, the opinion *1132 in *Glenfed* and the dissent by Judge Trott in *Wells Fargo* are more consonant with case law in this Circuit. See *Luce v. Edelstein*, 802 F.2d 49, 57 (2d Cir.1986) (when amending their complaint to remedy deficiencies under Rule 9(b), plaintiffs "must allege particular facts demonstrating the knowledge of defendants at the time that such statements were false.").

[7] Shields further argues that, even if we decide that she has not met the requirements of Rule 9(b), we nevertheless must find that the district court abused its discretion in dismissing her claim without granting her leave to amend her complaint. We discern no abuse of discretion. Shields had already substantively amended her complaint once before. She did not ask the district court for leave to amend it further. Although federal courts are inclined to grant leave to amend following a dismissal order, we do not deem it an abuse of the district court's discretion to order a case closed when leave to amend has not been sought. See *Carl Sandburg Village Condominium Ass'n v. First Condominium Development Co.*, 758 F.2d 203, 206 n. 1 (7th Cir.1985); cf. *Luce v. Edelstein*, 802 F.2d 49, 56-57 (2d Cir.1986) (where plaintiff specifically sought leave to amend, dismissal without granting leave to amend was abuse of discretion). It is not clear that the failure of pleading could be remedied by further amendment, nor has Shields suggested how that could be done.

Finally, because we find that the primary violation asserted by Shields is not adequately pleaded and therefore properly dismissed by the district court, we also find no error in the district court's dismissal of the claims of secondary liability under § 20 of the 1934 Act against Taylor and Engelman, or in the district court's refusal to exercise jurisdiction over Shields's state law claim of negligent misrepresentation, in the absence of any remaining federal claim.

CONCLUSION

For the reasons stated above, we affirm the district court's order dismissing Shields's claims under § 10(b) and Rule 10b-5 for failure to plead fraud with the particularity required by Rule 9(b). We also affirm the district court's dismissal of the claims of secondary liability under § 20, and of the claim of negligent misrepresentation under state law.

Briefs and Other Related Documents (Back to Top)

Sarah B. SHIELDS, Individually and as representative of all others similarly situated, Plaintiff-Appellant, v. CITYTRUST BANCORP, INC., George F. Taylor and Irwin Engleman, Defendants-Appellees., 1993 WL 13036705 (Appellate Brief) (C.A.2 September 20, 1993), Brief for Plaintiff-Appellant Sarah B. Shields, Individually and as Representative of all others Sim

Sarah B. SHIELDS, Individually and as representations of all others similarly situated, Plaintiff-Appellees, v. CITYTRUST BANCORP, INC., George E. Taylor and Irwin Engleman, Defendants-Appellees., 1993 WL 13036706 (Appellate Brief) (C.A.2 November 3, 1993), Reply Brief for Plaintiff Appellant Sarah B. Shields, Individually and as Representative of all Othe

25 F.3d 1124, Fed. Sec. L. Rep. P 98,239, 29 Fed.R.Serv.3d 239

END OF DOCUMENT

74

Supreme Court, Appellate Division, First
Department, New York.

Tiemuraz SIDAMONIDZE, Plaintiff,
Zaur Glonti, Plaintiff-Appellant,

v.

Robert B. KAY, et al., Defendants-
Respondents,
Liberty Intercontinental Commercial Bank, et
al., Defendants.

April 17, 2003.

Foreign investor brought action seeking damages relating to investment in foreign business, alleging fraud and misrepresentation claims. The Supreme Court, New York County, Karla Moskowitz, J., granted defendants' motion for summary judgment. On appeal, the Supreme Court, Appellate Division, held that: (1) mere puffery did not support fraud claim, and (2) no confidential relationship existed between investor and law firm defendants.

Affirmed.

West Headnotes

[1] Fraud 11(1)
184k11(1)

[1] Fraud 11(2)
184k11(2)

[1] Fraud 12
184k12

Mere puffery, opinions of value or future expectations, did not support foreign investor's fraud claim seeking damages relating to his investment in foreign business; statements of puffery were not false statements of value.

[2] Fraud 13(3)
184k13(3)

Single meeting between foreign investor and law firm defendants was insufficient to create confidential relationship between foreign investor and defendants, as required to support investor's negligent misrepresentation claim, absent an agreement, express or

implied, to share losses.

****560** Bijan Amini, for Plaintiff-Appellant.

Gerald E. Singleton, Defendants-
Respondents.

MAZZARELLI, J.P., ANDRIAS,
FRIEDMAN, MARLOW, and GONZALEZ, JJ.

***416** Order, Supreme Court, New York County (Karla Moskowitz, J.), entered May 20, 2002, which, insofar as appealed from, granted defendants' motion for summary judgment dismissing the causes of action for fraud and negligent misrepresentation, unanimously affirmed, without costs.

[1] In this action by a foreign investor seeking damages relating to his investment in a foreign business, the motion court correctly found that the alleged misrepresentations did not support a fraud claim because they consisted of mere puffery, opinions of value or future expectations (see *Longo v. Butler Equities II, L.P.*, 278 A.D.2d 97, 718 N.Y.S.2d 30; *Sheth v. New York Life Ins. Co.*, 273 A.D.2d 72, 74, 709 N.Y.S.2d 74), rather than false statements of value (compare ****561** P.T. *Bank Central Asia v. ABN AMRO Bank, N.V.*, 301 A.D.2d 373, 754 N.Y.S.2d 245, 251). Plaintiff-appellant's attempt to set forth a new theory in opposition to summary judgment was unavailing, since the remark relied upon was taken out of context and merely stated unremarkably that shares of a closely held entity, especially one incorporated in a foreign country, are "worthless," in the sense of lacking any realistic market, unless they become publicly traded.

[2] The negligent misrepresentation cause of action was not viable in the absence of a confidential relationship imposing upon defendants a duty to speak (see *Kimmell v. Schaefer*, 89 N.Y.2d 257, 263-265, 652 N.Y.S.2d 715, 675 N.E.2d 450; *Ravenna v. Christie's, Inc.*, 289 A.D.2d 15, 734 N.Y.S.2d 21). No such relationship arose from appellant's single meeting with the law firm defendants. We reject appellant's contention

(Cite as: 304 A.D.2d 415, *416, 757 N.Y.S.2d 560, **561)

that these defendants are liable for conduct, statements or omissions by a codefendant as a result of their being co-venturers, since appellant failed to raise an issue of fact as to the existence of an agreement, express or implied, to share losses, and, thus, as to the existence of a joint venture (see *Chanler v. Roberts*, 200 A.D.2d 489, 606 N.Y.S.2d 649, lv. denied 84 N.Y.2d 903, 621 N.Y.S.2d 506, 645 N.E.2d 1204).

We have considered appellant's other contentions and find them unavailing.

304 A.D.2d 415, 757 N.Y.S.2d 560, 2003 N.Y. Slip Op. 13173

END OF DOCUMENT

75

United States District Court,
S.D. New York.

SIEMENS WESTINGHOUSE POWER
CORPORATION, Plaintiff,

v.

DICK CORPORATION, Defendant/
Counterclaim Plaintiff,
Continental Casualty Company and National
Fire Insurance Company of Hartford,
Defendants.

Dick Corporation, on Behalf of the Consortium
of Dick Corporation and Siemens
Westinghouse Power Corporation, and
Individually, Third-Party Plaintiff,

v.

AES Londonderry, L.L.C., Sycamore Ridge,
L.L.C., Stone & Webster, Inc., Limbach
Company and Sachs Electric Company, Third-
Party Defendants.

No. 03 CIV.364 VM.

Jan. 14, 2004.

Background: Equipment supplier for power plant construction project sued project's engineering, procurement, and construction services (EPC) contractor and its sureties, seeking reimbursement of liquidated damages paid to project's owners. Contractor asserted counterclaims for, inter alia, negligent misrepresentation, and also filed third-party complaint against owners, project's original EPC contractor, and subcontractors. After supplier moved for partial summary judgment, contractor sought leave to file amended answer and counterclaim and to amend third-party complaint, and third-party defendants moved to dismiss.

Holdings: The District Court, Marrero, J., held that: (1) contractor was not justified in relying on supplier's alleged assurances about operational readiness of its combustion turbines, precluding supplier's liability for alleged fraudulent concealment or negligent misrepresentation; (2) contractor's third-party claims did not satisfy rule governing third-party practice, necessitating dismissal of third-party complaint; and (3) leave to amend third-party complaint was not warranted.

Ordered accordingly.

West Headnotes

[1] Federal Civil Procedure 851
170Ak851

Although leave to amend pleading is to be freely given, and court must generally have good reason to deny motion for leave to amend, good reason to deny leave to amend exists when granting such leave would be futile. Fed.Rules Civ.Proc.Rule 15(a), 28 U.S.C.A.

[2] Federal Civil Procedure 851
170Ak851

Determinations as to futility of proposed amendment to pleading are made under the same standards that govern motions to dismiss for failure to state claim upon which relief may be granted. Fed.Rules Civ.Proc.Rules 12(b)(6), 15(a), 28 U.S.C.A.

[3] Federal Civil Procedure 636
170Ak636

Rule requiring that circumstances of fraud be pleaded with particularity applies to claims of negligent misrepresentation. Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.

[4] Fraud 20
184k20

To recover under either a theory of fraud or negligent misrepresentation under New York law, claimant must allege facts demonstrating reliance on the alleged fraud or misrepresentation, and that the reliance was justified under the circumstances.

[5] Fraud 23
184k23

Under New York law, new engineering, procurement, and construction services (EPC) contractor for power plant construction project was not justified in relying on alleged explicit or implicit assurances by project's equipment supplier concerning operational readiness of supplier's combustion turbines, given provisions in parties' agreement expressly contemplating eventuality that supplier would incur delays in performing corrective work on turbines beyond days specifically allotted for

such work, contractor's business sophistication, and absence of allegation that supplier took affirmative steps to conceal purported problems with turbines, precluding supplier's liability to contractor for alleged fraudulent concealment or negligent misrepresentation.

[6] Fraud 23
184k23

Under New York law, when there is a meaningful conflict between a written contract and prior oral representations, a party will not be deemed to have justifiably relied on the prior oral representations for purposes of liability for fraud or negligent misrepresentation.

[7] Fraud 23
184k23

Under New York law, when sophisticated businessmen engaged in major transactions enjoy access to critical information but fail to take advantage of that access, New York courts are particularly disinclined to entertain claims of justifiable reliance in support of liability for fraud or negligent misrepresentation.

[8] Federal Civil Procedure 287
170Ak287

Replacement contractor's third-party tort and contract claims against owners of power plant construction project, project's original contractor, and subcontractor were in no way contingent upon narrow question presented by equipment supplier's main claim against contractor addressing whether supplier or contractor was liable up-front for liquidated damages that were paid to project owners under terms of their consortium agreement, and therefore claims did not satisfy rule governing third-party practice, necessitating dismissal of third-party complaint, even though claims could affect ultimate apportionment of liquidated damages between supplier and contractor, and even if claims depended upon adjudication of contractor's counterclaims against supplier. Fed.Rules Civ.Proc.Rule 14(a), 28 U.S.C.A.

[9] Federal Civil Procedure 287

170Ak287

Crucial characteristic of a third-party claim is that defendant, as third-party plaintiff, is attempting to transfer to third-party defendant the liability asserted against him by original plaintiff; in other words, the outcome of the third-party claim must be contingent on the outcome of the main claim. Fed.Rules Civ.Proc.Rule 14(a), 28 U.S.C.A.

[10] Federal Civil Procedure 281
170Ak281

Mere fact that third-party claim arises from same transaction or set of facts as original claim is not enough to satisfy rule governing third-party practice. Fed.Rules Civ.Proc.Rule 14, 28 U.S.C.A.

[11] Federal Civil Procedure 851
170Ak851

Leave to amend third-party complaint was not warranted when nothing in proposed amendments remedied deficiencies in complaint, rendering proposed filing "futile."

*243 Gregory N. Chertoff, Peckar & Abramson, P.C., New York, NY, for Plaintiff.

John T. Bergin, Richard M. Preston, Seyfarth Shaw, Washington, DC, John C. *244 Sabetta, Seyfarth Shaw, New York, NY, for Defendants.

DECISION AND ORDER

MARRERO, District Judge.

Defendant and third-party plaintiff Dick Corporation ("Dick") moves this Court for leave to file a second amended answer and counterclaim for the purpose of, among other things, adding updated counterclaims of negligent misrepresentation and fraudulent concealment. Plaintiff Siemens Westinghouse Power Corporation ("SWPC") opposes the motion on the ground that the proposed amended filing would be futile with respect to those counterclaims. The Court agrees that those claims would not survive a motion to dismiss because they fail to sufficiently allege justifiable reliance upon the alleged misrepresentations and omissions. The

motion is therefore denied with respect to those proposed amendments, and, in all other respects, granted.

The Court also addresses motions to dismiss Dick's third-party complaint. Because the third-party complaint is not proper under Federal Rule of Civil Procedure 14, it is dismissed. Dick seeks to amend its third-party complaint, as well. However, the proposed new filing does not remedy the Rule 14 defect and therefore the motion to amend is denied.

I. BACKGROUND

SWPC and Dick formed a Consortium for the purpose of constructing a power plant in Londonderry, New Hampshire on behalf of global power company AES Corporation ("AES"). Two AES subsidiaries, AES Londonderry, LLC, and Sycamore Ridge Co., LLC (collectively, the "Owners"), are signatories to the relevant contracts parties to this action. Because of delays in the project, SWPC has paid extensive liquidated damages to the Owners. SWPC filed a complaint seeking reimbursement of those payments from Dick, and from Dick's sureties. SWPC moved the Court for partial summary judgment, and the Court granted, in part, SWPC's motion. See *Siemens Westinghouse Power Corp. v. Dick Corp.*, 293 F.Supp.2d 336, 2003 WL 22383284 (S.D.N.Y. Oct.14, 2003). The Court determined that, under the Consortium Agreement, Dick was responsible for paying liquidated damages to the Owners in the first instance and that the parties were to later determine, by applying certain formulas in the Consortium Agreement, SWPC's share of those damages. See *id.* at 340. Accordingly, the Court determined that, for now, Dick owed SWPC about \$15 million. *Id.* at 343-44.

In opposing that summary judgment motion, Dick asserted that the Consortium Agreement was the product of negligent misrepresentation. The Court found that defense, as stated in the first amended answer and counterclaim, to lack the particularity required under Federal Rule of Civil Procedure 9(b). See *id.* at 343. While the

summary judgment motion was in briefing, Dick filed a motion for leave to file a second amended answer and counterclaim. The proposed new filing contained, among other changes, more specific allegations of negligent misrepresentation and a related counterclaim for fraudulent concealment. Specifically, Dick alleges that SWPC, via misrepresentations and omissions, disguised the fact that a certain combustion turbine SWPC supplied to the project was still experimental and therefore not ready for commercial operation. Dick maintains that these counterclaims serve as valid defenses to SWPC's contract remedies at issue in the summary judgment motion.

The Court did not address the updated allegations because it had yet to determine *245 whether Dick was entitled to leave to amend, and because SWPC's motion related to Dick's first amended answer and counterclaim. The Court stayed entry of its judgment for the purpose of determining whether Dick was entitled to leave to amend, and if so, whether those counterclaims would suffice as defenses to defeat SWPC's motion for partial summary judgment. See *id.* This Decision and Order addresses the issue of whether Dick is entitled to leave to amend.

Dick's second amended counterclaims for negligent misrepresentation and fraudulent concealment describe the following facts, which the Court will assume are true for purposes of this motion. At the inception of the power plant project in December 1999, Stone & Webster, Inc. ("Stone & Webster") agreed with the Owners to supply engineering, procurement, and construction services (the "EPC contract") to the project. SWPC agreed to provide around \$164 million in equipment, including two combustion turbines. When Stone & Webster went bankrupt shortly thereafter, the remaining parties scrambled to find a new EPC contractor.

The Owners hoped to get SWPC to agree to be the EPC contractor, but SWPC refused. The Owners and SWPC then approached Dick in May 2000 with the prospect of joining the project. Dick "diligently attempted to

investigate the Project ..., but the time period afforded to Dick to investigate the prior design and construction efforts on the Project, as well as its overall viability, was extremely short." Proposed Second Amended Counterclaim ¶ 25. The other project participants, including SWPC, knew that time was short and that Dick would rely on their representations in deciding whether to join the project. By September 2000, Dick and SWPC agreed to complete the project as a Consortium. The Consortium Agreement incorporated SWPC's previous commitment to supply the equipment.

Dick now asserts it never would have joined the project if it had known the truth about its viability. Dick alleges that SWPC, among others, made several material misrepresentations and omissions in the period between May and September 2000, when Dick was deciding whether to participate.

The Consortium Agreement provided that SWPC would have a total of seventy-five (75) days--called "pool days"--to perform "corrective work" on certain equipment it supplied, before being responsible for any delay attributable to defects in the equipment. Dick therefore anticipated that SWPC would require around that many days in corrective work. It turns out that SWPC spent over two hundred (200) days doing corrective work, causing a massive delay in the project overall. Dick attributes the unanticipated delay to the fact that SWPC's combustion turbine was still experimental and, therefore, not commercially viable. Dick states that SWPC knew or should have known this fact, but never alerted Dick before Dick signed the Consortium Agreement.

Dick directs the Court's attention to a March 2000 bond offering prospectus for a company formed to build and operate a power plant in Pennsylvania, and for which SWPC supplied two of the exact model of combustion turbine at issue here. Under the heading "Summary of Risk Factors," that prospectus states: "The success of our project and future operations may be impaired because ... the combustion

turbine to be used in our facility has no significant operating experience, and we may incur problems relating to start-up, commissioning and performance." Second Affidavit of Keith A. Moatz, dated Dec. 4, 2004, Ex. 14, at 19. The prospectus also states that the turbines in question were to *246 become only the third and fourth ones of that make and model in operation. *Id.* at 20. SWPC's failure to inform Dick of the true nature of its combustion turbines is the essence of Dick's counterclaims for negligent misrepresentation and fraudulent concealment.

SWPC opposes the motion for leave to amend only with respect to the proposed changes regarding negligent misrepresentation and fraudulent concealment, and only upon the ground that the changes would be futile. The issue here is therefore narrow: whether Dick's proposed second amended answer and counterclaim states claims for relief for either negligent misrepresentation or fraudulent concealment.

II. DISCUSSION

A. LEAVE TO AMEND

[1][2] Although leave to amend "shall be freely given," Fed.R.Civ.P. 15(a), and the Court must generally have good reason to deny the motion, "[o]ne good reason to deny leave to amend is when such leave would be futile." *Acito v. IMCERA Group, Inc.*, 47 F.3d 47, 55 (2d Cir.1995). "Determinations of futility are made under the same standards that govern Rule 12(b)(6) motions to dismiss." *Nettis v. Levitt*, 241 F.3d 186, 194 n. 4 (2d Cir.2001).

[3] In reviewing a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the Court must accept as true the factual allegations of the non-moving party (here, counter-claimant and defendant Dick) and must draw all reasonable inferences in favor of that party. *Bernheim v. Litt*, 79 F.3d 318, 321 (2d Cir.1996). The Court may not grant the motion "unless it appears beyond doubt" that the counter-claimant "can prove no set of

facts" which would entitle it to relief. Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). Allegations of "fraud or mistake" will be dismissed unless they are stated "with particularity." Fed.R.Civ.P. 9(b). The particularity requirement of Rule 9(b) also applies to claims of negligent misrepresentation. Marcus v. Frome, 275 F.Supp.2d 496, 503 (S.D.N.Y.2003).

SWPC puts forth several reasons why the proposed counterclaims would be futile, including that Dick has failed to meet the particularity requirements of Federal Rule of Civil Procedure 9(b), and failed to allege causes of action sufficiently distinct from its breach of contract counterclaim. Without addressing all of those arguments, the Court agrees with SWPC on a point which is dispositive of this motion: Dick's proposed amended counterclaims do not allege justifiable reliance and would therefore not survive a motion to dismiss. Accordingly, to the extent Dick seeks to add these claims in an amended pleading, the motion is denied.

[4][5] To recover under either a theory of fraud or negligent misrepresentation, the plaintiff (or, in this case, the counter-claimant) must allege facts demonstrating reliance on the alleged fraud or misrepresentation, and that the reliance was justified under the circumstances. See Rotanelli v. Madden, 172 A.D.2d 815, 569 N.Y.S.2d 187, 188 (App. Div.2d Dep't 1991); Cudemo v. Al & Lou Constr. Co., Inc., 54 A.D.2d 995, 387 N.Y.S.2d 929, 930 (App. Div.2d Dep't 1976). Dick alleges it justifiably relied on SWPC's assurances that the combustion turbines did not have any major problems, and upon SWPC's implicit assurances that they could be successfully installed without delays beyond the seventy-five pool days provided in the *247 Consortium Agreement. [FN1] The Court disagrees.

FN1. Although Dick's briefing suggests that SWPC made certain affirmative representations regarding the viability of the combustion turbines, the proposed second amended complaint does not identify any particular alleged misrepresentation. Instead, it merely makes the broad assertion that

SWPC "knowingly concealed/failed to disclose" the true state of affairs. Proposed Second Amended Counterclaim ¶ 131.

[6] Where there is a "meaningful" conflict between a written contract and prior oral representations, a party will not be deemed to have justifiably relied on the prior oral representations. Bango v. Naughton, 184 A.D.2d 961, 584 N.Y.S.2d 942, 944 (2d Dep't 1992) ("[T]he conflict between the provisions of the written contract and the oral representations negates the claim of reliance upon the latter."). In this case, any reliance upon SWPC's explicit or implicit assurances was unjustified because the Consortium Agreement expressly contemplates the eventuality that SWPC would incur delays beyond the allotted pool days. Specifically, the Consortium Agreement provides a formula for SWPC's liability, in the event SWPC exceeded its pool days to perform corrective work. See Affidavit of Howard F. Jenkins, dated July 17, 2003, Ex. B, at 23-28. In fact, the Consortium Agreement specifically states that "Corrective Work" includes work performed "in connection with ... implementation of a design change in the [combustion turbine] ... which has been identified by [SWPC] as a problem with similar equipment which must be corrected or implemented prior to the operation of the [combustion turbine]" Id. at 25. In other words, the parties contemplated design modifications which would come to light because of problems with "similar equipment."

By accounting for the eventuality of delay for corrective work, these provisions implicitly contradict the alleged assurances and omissions suggesting that the combustion turbine would be operational more swiftly. Cf. Clanton v. Vagianelis, 187 A.D.2d 45, 592 N.Y.S.2d 139, 141 (App. Div.3d Dep't 1993) (holding that, even though contract language did "not expressly contradict defendants' prior alleged oral misrepresentation," the implicit conflict sufficiently precluded allegations of justified reliance) (emphasis in original). The fact that the contemplated delays ended up being allegedly much more extensive than

anticipated means only that Dick may be entitled to more relief under the Consortium Agreement, not that Dick is entitled to declare the whole agreement a fraud.

[7] Moreover, under New York law, "[w]here sophisticated businessmen engaged in major transactions enjoy access to critical information but fail to take advantage of that access, New York courts are particularly disinclined to entertain claims of justifiable reliance." *Grumman Allied Indus., Inc. v. Rohr Indus., Inc.*, 748 F.2d 729, 737 (2d Cir.1984); see also *Rudolph v. Turecek*, 240 A.D.2d 935, 658 N.Y.S.2d 769, 771 (App. Div.3d Dep't 1997) ("[W]here a party has the means, by the exercise of reasonable diligence, to ascertain the truth or falsity of material representations, he or she cannot assert justifiable reliance."). Dick does not deny that the parties to this multimillion-dollar deal are sophisticated businesses; Dick instead asserts that the combustion turbine problems were uniquely within SWPC's knowledge. However, Dick's own filings demonstrate that it was aware of several other SWPC projects involving the combustion turbine at issue. For example, Dick's proposed second amended counterclaim indicates that it based much of its pricing on the power plant project in Pennsylvania-- *248 precisely the project whose prospectus identifies the prototypical nature of the combustion turbine. Dick fails to explain why it could not obtain this prospectus--a public document--or any other relevant information about this and other SWPC power plant projects at any time between May and September 2000. Importantly, Dick does not allege that SWPC took any affirmative steps to prevent Dick from discovering these facts. If the facts are as Dick alleges, Dick will have to seek relief against SWPC under the terms of the Consortium Agreement.

Dick proposes a few more amendments to its counterclaims, and SWPC does not appear to challenge those. Accordingly, Dick's motion is granted in that regard only. Because Dick no longer has raised any valid defense to its liability to pay liquidated damages in the first instance, the Court will enter judgment on

SWPC's behalf on the terms of the Court's previous Decision and Order. See *Siemens Westinghouse Power Corp.*, 293 F.Supp.2d at 343.

B. MOTIONS TO DISMISS THIRD-PARTY COMPLAINT

[8] Limbach Company, the project's piping subcontractor, Stone & Webster, and the Owners (collectively, the "Third-Party Defendants") brought separate motions to dismiss Dick's first amended third-party complaint. Dick's first amended third-party complaint seeks, among other things, to hold liable the Third-Party Defendants for misrepresenting the nature of the project to Dick, and for various shortcomings in executing the project. The motions raise many arguments, but they share a common and dispositive argument, with which the Court agrees: the third-party claims do not meet the standard of Federal Rule of Civil Procedure 14(a) and therefore must be dismissed.

[9] Under Rule 14(a), a defendant may bring claims against any person who "is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff." Fed.R.Civ.P. 14(a). "The crucial characteristic of a Rule 14 claim is that defendant is attempting to transfer to the third-party defendant the liability asserted against him by the original plaintiff." 6 Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice and Procedure* § 1446, at 377 (2d ed.1990). In other words, "[t]he outcome of the third-party claim must be contingent on the outcome of the main claim" *Nat'l Bank of Canada v. Artex Indus., Inc.*, 627 F.Supp. 610, 613 (S.D.N.Y.1986) (emphasis added).

As explained more fully in the Court's summary judgment Decision and Order, SWPC's complaint against Dick raises the narrow issue of whether Dick must reimburse SWPC for the up-front payments of certain liquidated damages, before SWPC and Dick apportion the responsibility between each other. See *Siemens Westinghouse Power*

Corp., 293 F.Supp.2d at 341. Whether any Third-Party Defendant committed contract breaches or torts affecting the ultimate apportionment of liquidated damages is not contingent in any way upon the narrow question of which Consortium member is liable for the up-front payments under the Consortium Agreement.

[10] Even though the third-party claims involve the same power plant project as the principal complaint, "[t]he mere fact that the alleged third-party claim arises from the same transaction or set of facts as the original claim is not enough." 6 Wright, *supra*, at 377-79; see also *Int'l Paving Sys., Inc. v. Van-Tulco, Inc.*, 866 F.Supp. 682, 687 (E.D.N.Y.1994). The fact that the allegations in the third-party complaint may depend on the adjudication of Dick's own counterclaims against SWPC is *249 also insufficient because the plain language of Rule 14(a) requires the third-party claim to depend upon the "the plaintiff's claim against the third-party plaintiff." Fed.R.Civ.P. 14(a); see also *Baltimore & Ohio R. Co. v. Central Ry. Services, Inc.*, 636 F.Supp. 782, 786 (1986). Accordingly, Dick's first amended third-party complaint must be dismissed.

[11] Dick has moved to amend its first amended third-party complaint and has submitted a proposed second amended third-party complaint. The Court finds nothing in the proposed second amended third-party complaint that remedies the deficiencies identified here. Thus, the proposed new filing would be futile, and the motion is denied.

III. ORDER

For the reasons stated, it is hereby

ORDERED that the motion of defendant and third-party plaintiff Dick Corporation ("Dick") for leave to amend and file a second amended answer and counterclaim is granted in part and denied in part. To the extent Dick seeks to add or update claims or defenses of negligent misrepresentation or fraudulent concealment, the motion is denied. In all other respects the motion is granted; it is

further

ORDERED that Dick is found liable to plaintiff Siemens Westinghouse Power Corporation ("SWPC") for breach of contract in the amount of \$15,041,327.98, in accordance with the Court's Decision and Order dated October 14, 2003, and the Clerk of Court is directed to enter judgment on SWPC's behalf in that amount; it is further

ORDERED that the first amended third-party complaint of Dick is dismissed and the Clerk of Court is directed to enter judgment on behalf of third-party defendants Limbach Company, AES Londonderry, LLC, Sycamore Ridge Co., LLC, and Stone & Webster, Inc., dismissing Dick's claims against them; and it is finally

ORDERED that Dick's motion to amend its first amended third-party complaint is denied.

SO ORDERED.

299 F.Supp.2d 242

END OF DOCUMENT

76

District Court of Appeal of Florida,
First District.

Timmy SKOW and Linda Skow, Appellants,
v.
DEPARTMENT OF TRANSPORTATION,
Appellee.

No. AW-260.

May 1, 1985.

Employee of contractor who was injured while working on a bridge being constructed under contract with the Department of Transportation brought suit against Department. The Circuit Court, Leon County, Ben C. Willis, J., entered final summary judgment in favor of DOT, and employee appealed. The District Court of Appeal, Zehmer, J., held that: (1) although DOT actively participated in inspection of work done by contractor, inspection was done only to ascertain results of work and not to control method of performance or to insure contractor's compliance with safety regulations, and such supervision did not amount to an exercise of control by DOT that was legally sufficient to make it liable to employee of contractor, and (2) contract did not impose an explicit duty on DOT to monitor, inspect, and correct safety violations by contractor.

Affirmed.

Ervin, C.J., dissented with opinion.

West Headnotes

[1] Labor and Employment 3125
231Hk3125
(Formerly 255k316(1) Master and Servant)
One who hires an independent contractor is not liable for injuries sustained by that contractor's employees in their work.

[2] Bridges 23
64k23
Although Department of Transportation actively participated in inspection of work

done by independent contractor constructing bridge under contract with agency, such was done only to ascertain results of work and not to control method of performance or to insure contractor's compliance with safety regulations; instances of specific instruction given by DOT employees to contractor's employees constituted general supervision and did not amount to an exercise of control by DOT that was legally sufficient to make agency liable for injuries sustained by contractor's employee.

[3] Bridges 23
64k23

Although contract between Department of Transportation and contractor for construction of bridge provided that contractor would comply with all applicable state and federal laws governing safety and provide safeguards and safety equipment for its employees, and provided that DOT had authority to shut down jobsite for contractor's breach of such requirements, contract did not impose explicit duty on DOT to monitor, inspect, and correct violations by contractor so as to make DOT liable for injuries sustained by contractor's employee.

*423 Marilyn Sher, of Law Offices of Neil Chonin, P.A., Coral Gables, for appellants.

Donna S. Catoe, of Peters, Pickle, Flynn, Niemoeller & Downs, Miami, for appellee.

ZEHMER, Judge.

Timmy Skow, an employee of Capelletti Brothers, Inc., was injured while working on a bridge being constructed under a contract between Capelletti Brothers (Capelletti), the contractor, and the Department of Transportation (DOT). Skow was working high above the river without a safety belt when he lost his footing, slipped, and grabbed a pile driver, which crushed his hand. He and his wife, Linda Skow, appeal a final summary judgment for DOT on their claim for personal injury damages. We affirm.

[1] Appellants argue that DOT owed Timmy

(Cite as: 468 So.2d 422, *423)

Skow a legal duty to eliminate unsafe working conditions that it knew or should have known would expose workers to a substantial risk of harm. Notwithstanding the general rule that one who hires an independent contractor is not liable for injuries sustained by that contractor's employees in their work, *Van Ness v. Independent Construction Co.*, 392 So.2d 1017 (Fla. 5th DCA 1981), appellants argue that a legal duty arose because DOT assumed such detailed control over the work that the independent-contractor relationship between DOT and Capelletti ceased to exist. Additionally, appellants assert that Timmy Skow's work was inherently dangerous, that he was allowed to work without a safety belt, and that DOT breached its duty to enforce the requirements of the Capelletti/DOT contract and federal safety regulations by failing to require Capelletti *424 to provide bridge workers with safety belts.

[2] The undisputed facts in the record support the conclusion that although DOT actively participated in the inspection of work done by Capelletti, this was done only to ascertain the results of the work and not to control the method of performance or to insure Capelletti's compliance with safety regulations. DOT provided supervision only in the sense that its inspectors generally observed the work for compliance with the contract. The several instances of specific instruction given by DOT employees to Capelletti's employees constituted general supervision in this sense and did not amount to an exercise of control by DOT that is legally sufficient to take this case out of the general rule of *Van Ness*, supra.

[3] Although the contract provided that Capelletti would comply with all applicable state and federal laws governing safety and provide safeguards and safety equipment for its employees, and provided that DOT had authority to shut down the job site for Capelletti's breach of this requirement, the contract did not impose an explicit duty on DOT to monitor, inspect, and correct violations by Capelletti. There is no indication in this record that DOT, as owner, created or contributed to the dangerous

condition alleged to have caused Timmy Skow's injuries.

Since appellants' cause of action is not predicated on a showing that "the contracting owner by positive act of negligence or negligent omission on his part caused injury" to the independent contractor's employee, *Florida Power & Light Co. v. Price*, 170 So.2d 293, 297 (Fla.1964), no duty, delegable or nondelegable, was owed by DOT to Timmy Skow. *Ibid.*; *Conklin v. Cohen*, 287 So.2d 56 (Fla.1973); *Van Ness v. Independent Construction Co.*, supra.

Accordingly, the judgment is AFFIRMED.

MILLS, J., concurs.

ERVIN, C.J., dissents with written opinion.

ERVIN, Chief Justice, Dissenting.

I respectfully dissent. In my opinion, there remains a genuine issue of material fact regarding the issue of the Department of Transportation's (DOT) control over Capelletti.

First, there is testimony that a DOT representative was present at the job site on a continual basis just prior to and at the time of appellant's injury. Second, DOT representatives admitted that they had authority to stop construction at sites if a contractor, including Capelletti, was not abiding by certain specifications. Finally, the following deposition testimony of Timmy Skow clearly places at issue the question of DOT's exercise of direct control on the job site:

Q. Did you ever hear anybody from the D.O.T. give any instructions of any nature to anybody at Capeletti [sic]?

A. Certainly.

Q. What kind of instructions?

A. For instance, driving the piling, they tell you when to stop, you know, they tell you how deep.

Say, for instance, if I am the pile driver in this instance, I look at the pile hammer which is diesel, and you pull the cord to stop it or to kill the diesel, and I look at the

D.O.T. man to see when he is ready to have me stop it. It is up to him.

Q. All right. Now, these piles have to be driven a certain depth in order to be in compliance with specifications of the job; right?

A. Yes.

Q. You are saying he would have told you when the specifications of the job had been complied with and they had been driven as far as they were supposed to be?

A. Yes.

Q. Any other instructions he would give you?

A. Well, that is just one instance.

Q. Give me the instances that you can think of.

*425 A. For instance, sheet piling or something, if it is leaning out, it shouldn't be leaning out, he comes by and tells you if it is straight or not.

Q. He tells you if the work you have done is acceptable under the contract?

A. Yes, if it is acceptable or if it is not acceptable. It is up to him. It is his discretion.

Q. Generally, would it be fair to say that the communications from the D.O.T. to Capeletti's [sic] people would have related to the quality of the finished product?

A. Yes.

Q. Can you think of any times that the D.O.T. would have given instructions to Capeletti's [sic] people where the instructions would not have related to the quality of the finished product?

A. Like in the movement of barriers, they describe where to put the barriers. They tell you how fast you can move the barriers. Let's say, for instance, you are closing a lane of traffic. They will tell you.

Q. Right. Yes. Go on. Movement of barriers, where to put them.

A. What kind of equipment you can have out on the road, they tell you that.

* * *

BY MS. SHER:

Q. Mr. Skow, during the four months that you were out on this bridge project, the one on which you hurt your hand, would people

from the Department of Transportation be on that jobsite [sic] on a daily basis?

A. Certainly. There was always at least one.

Q. Did people from the Department of Transportation give you orders or directions directly on that jobsite [sic]?

A. Yes, ma'am.

Q. When they gave you directions, they did not transmit them first to your immediate supervisor, Varallo, but they gave them to you directly?

A. To me directly.

Q. Did they give directions directly to the other people who were working on the jobsite [sic] that you observed?

A. On my crew, they would have; yes.

Q. At times when you were given directions by people from the Department of Transportation, was your immediate supervisor, Lew Varallo, present?

A. Yes. Sometimes. Sometimes not.

Q. Can you give me an average as to what--for what portion of the workday somebody from the Department of Transportation would be present on the worksite [sic]?

A. Probably 80 percent minimum.

Q. Daily?

A. Daily.

Q. Did anybody from the Department of Transportation ever order you directly to remove any piles you had driven?

A. Yes.

Q. And that is in addition to what you had already told Mr. Bloomquist about the other areas of your work that were corrected by somebody from the Department of Transportation?

MR. BLOOMQUIST: Object to the form of the question. You can answer, of course.

THE WITNESS: Yes.

Q. (By Ms. Sher) Such as what? Do you call it the sheet?

A. Sheet pilings.

Q. I don't remember if you mentioned that. Did they ever correct any of your work relative to driving of the H-beams?

A. Not driving the H-beams. I had a piling corrected.

Q. And this was by someone on the jobsite [sic]?

How did you know that these were the

Department of Transportation people?
A. They all drive yellow trucks. It says
D.O.T. on the side.

In order "[t]o impose liability on ... [DOT] for retention of control over ... [Capelletti], there must be such right of supervision or direction that ... [Capelletti] is not entirely free to do the work ... *426 [its] own way." *Van Ness v. Independent Construction Co.*, 392 So.2d 1017, 1019 (Fla. 5th DCA 1981). Restated, the decisive factor in determining whether an individual has the status of an independent contractor, agent, or employee depends upon the degree of control exercised by the alleged employer. As we observed in *DeBolt v. Department of Health and Rehabilitative Services*, 427 So.2d 221, 226 (Fla. 1st DCA 1983):

If there is no question as to the existence or non-existence of a master/servant or employer/employee relationship, the issue is one then for the court to determine. If, however, the issue is unclear, it becomes a question of fact for the trier of fact to decide based on the evidence presented. See *Gregg v. Weller Grocery Co.*, 151 So.2d 450 (Fla. 3d DCA 1963).

In *DeBolt*, we reversed a summary judgment entered in an action for damages brought on behalf of a minor who had been placed in an "attention home" as a result of a contract executed between HRS and the owners of the home. The minor was injured while in custody, suit was brought, and summary judgment entered on the ground, among others, that the home's owners could not be considered employees or agents of HRS, because the owners were designated in the contract as independent contractors. We determined that the lower court should have directed its attention beyond the labels stated in the contract, and focused instead upon the indicia of control actually exercised over the home's operations by HRS. We observed that there were a number of conditions and limitations imposed by HRS upon the operators during the time the child was in their care, "which, at the very least, create a factual dispute as to their status, thus precluding summary judgment." 427 So.2d at

226-227.

Similarly, based on the foregoing testimony in the case at bar, there remain in my judgment unresolved genuine issues of material fact as to the liability of DOT; primarily the question of whether DOT retained control over Capelletti's method of performance on the job so as to constitute active participation "in the construction to the extent that ... [DOT] directly ... [influenced] the manner in which the work ... [was] performed." *Conklin v. Cohen*, 287 So.2d 56, 60 (Fla.1973).

I would reverse the summary judgment and remand the case for further trial proceedings.

468 So.2d 422, 10 Fla. L. Weekly 1121

END OF DOCUMENT

77

Only the Westlaw citation is currently available.

United States District Court,
W.D. New York.

Patricia K. SOFIA, as Executor of the Estate
of Catherine Sofia, Plaintiff,

v.

MASSACHUSETTS MUTUAL LIFE
INSURANCE COMPANY, Defendant.

No. 02-CV-6088T.

Aug. 10, 2004.

Christopher Scott Anderson, The Anderson
Law Firm, PC, Richard F. Anderson,
Rochester, NY, for Plaintiff.

Paul F. Keneally, Paul V. Nunes,
Underberg & Kessler, LLP, Rochester, NY, for
Defendant.

DECISION and ORDER

TELESCA, J.

INTRODUCTION

*1 Plaintiff Patricia K. Sofia ("plaintiff"), brings this action as executrix of the estate of her mother, Catherine M. Sofia ("Mrs. Sofia"), seeking to recover a premium Mrs. Sofia paid to defendant Massachusetts Mutual Life Insurance Company ("Mass Mutual" or "defendant") to purchase a Single Premium Immediate Annuity ("SPIA"). Mrs. Sofia purchased the SPIA shortly before her death from Michael Mooney ("Mooney"), an independent agent of Mass Mutual. Plaintiff alleges that the contract for the purchase of the SPIA between her mother and Mass Mutual was invalid because: (1) Mooney fraudulently misrepresented the terms of the SPIA to Mrs. Sofia; (2) Mooney breached his fiduciary duties to Mrs. Sofia; (3) Mooney negligently/recklessly misrepresented the terms of the SPIA to Mrs. Sofia; (4) Mrs. Sofia lacked the mental capacity to lawfully purchase the SPIA; and (5) the SPIA's terms are unconscionable.

Mass Mutual moves for summary judgment pursuant to Federal Rule of Civil Procedure 56, dismissing all of plaintiff's claims, alleging that: (1) plaintiff offers no evidence of fraud on Mooney's part; (2) as an insurance agent, Mooney owed no fiduciary duty to Mrs. Sofia; (3) Mooney could not have negligently or recklessly misrepresented the terms of the SPIA because he had no "special relationship" with Mrs. Sofia; (4) plaintiff presents no medical evidence that Mrs. Sofia was mentally incompetent; and (5) the transaction is not unconscionable because the New York State Department of Insurance expressly permits the sale of SPIAs to individuals in their eighties. For the reasons set forth below, Mass Mutual's motion for summary judgment is granted in its entirety.

BACKGROUND

On December 18, 2000, an independent representative of Massachusetts Mutual Insurance Corporation named Michael Mooney visited 81 year-old Catherine Sofia at her home. Mooney, who had previously met with Mrs. Sofia in May and November of that year, visited at her request to discuss rearranging her investments so that she could receive larger monthly income payments. At that time, Mrs. Sofia was contemplating purchasing a home near her daughter and granddaughter, and believed that she would need additional cash to make monthly mortgage payments. Mooney presented Mrs. Sofia with several investment options, including exchanging an annuity that she held which was issued by The Principal Mutual Life Insurance Company ("Principal") and valued at \$275,055.44, for a Single Premium Immediate Annuity ("SPIA") issued by Massachusetts Mutual. [FN1] The SPIA differed from Mrs. Sofia's Principal annuity in two respects. First, it would provide Mrs. Sofia with monthly income of approximately \$3,100, whereas the Principal annuity only provided her \$2,490.81 per month. Second, while it guaranteed specified monthly payments to Mrs. Sofia for her entire life, it was "non-refundable," and would pay no additional amount to her estate upon her death. Mooney explained to Mrs. Sofia that if she died within

the first seven years of the annuity that she would not recoup the entire \$275,055.44 she invested, but that if she lived seven years she would recover the entire amount, and if she lived longer than seven years she, over the life of the annuity, would receive a greater sum of money than she invested initially.

FN1. The parties concede that since Mooney was not authorized to sell Principal financial products, he presented Mrs. Sofia no information regarding the desirability or availability of various Principal investment vehicles.

*2 That day, Mrs. Sofia decided to transfer the money she held in her Principal annuity to Mass Mutual to purchase the SPIA. In so doing, she executed numerous acknowledgment and release forms required under New York State Insurance Law. Although Mooney took those forms with him when he left Mrs. Sofia's house that day, he also subsequently mailed copies to her. Principal was notified of the action, but did not attempt to retain Mrs. Sofia's business. [FN2] For his part in the sale, Mooney received a commission of \$8,001.11.

FN2. The parties advise the Court that it is common practice that upon the transfer of annuity funds from one carrier to another, the previous annuity holder is given notice of the change prior to the actual transfer date. The purpose of this notice is to allow the previous annuity holder to attempt to compete to retain the annuity, and make an offer for new terms in exchange for avoiding the transfer.

On January 18, 2001, Mass Mutual issued Mrs. Sofia her first monthly payment under the SPIA. On February 8, 2001, Mrs. Sofia acknowledged receipt of the policy detailing the SPIA. [FN3] Tragically, Mrs. Sofia was diagnosed with cancer in May 2001 and passed away June 12, 2001. She would have received her sixth payment under the SPIA on June 18, 2001. Mrs. Sofia bequeathed her entire remaining estate, totaling approximately \$800,000, to her granddaughter and her children. Mass Mutual paid no amount of the SPIA balance to Mrs. Sofia's beneficiaries upon her death. Plaintiff brings this action, claiming that, on behalf of Mrs. Sofia's

beneficiaries, they are entitled to a portion of the SPIA.

FN3. Thus, for purposes of New York State Insurance Regulations (No. 60), Mrs. Sofia's 60-day rescission period began to run on February 8, 2001.

DISCUSSION

Rule 56 of the Federal Rules of Civil Procedure provides that a party is entitled to summary judgment as a matter of law only where, "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact...." F.R.C.P. 56(c) (2003). The party seeking summary judgment bears the burden of demonstrating that no genuine issue of material fact exists, and in making the decision the court must draw all reasonable inferences in favor of the party against whom summary judgment is sought. *Ford v. Reynolds*, 316 F.3d 351, 354 (2d Cir.2003) (citing *Marvel Characters v. Simon*, 310 F.3d 280, 285-86 (2d Cir.2002)). "Summary judgment is improper if there is any evidence in the record that could reasonably support a jury's verdict for the non-moving party." *Id.*

A. Fraudulent Misrepresentation Claim

Under New York State common law, a plaintiff alleging fraudulent misrepresentation must prove five elements: (1) that the defendant misrepresented a material fact; (2) that representation was false; (3) at the time he made the representation the knew it was false; (4) plaintiff's reliance on that representation; and (5) injury to the plaintiff as a result of that reliance. *Freschi v. Grand Coal Venture*, 767 F.2d 1041, 1050 (2d Cir.1985), vacated on other grounds by *Freschi v. Grand Coal Venture*, 478 U.S. 1015, 106 S.Ct. 3325, 92 L.Ed.2d 731 (1986). Federal Rule of Civil Procedure 9(b) imposes an additional burden on a plaintiff alleging fraud, namely that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."

Fed.R.Civ.P. 9 (2004). Whereas, "[m]alice, intent, knowledge, and other condition of mind of a person" need only be averred generally. *Id.*

*3 Here, plaintiff offers no evidence that Mooney made false statements to Mrs. Sofia to induce her to purchase the SPIA. The record contains no statements or promises which could be considered fraudulent. In fact, the disclosures Mrs. Sofia executed were approved for use by the New York State Insurance Department. The only promise Mooney made to Mrs. Sofia was that she would be paid approximately \$3,100 a month until she died. She received what she bargained for. As such, plaintiff, as a matter of law, is unable to sustain a fraudulent misrepresentation claim, and thus, Mass Mutual is entitled to summary judgment in its favor on this cause of action.

B. Breach of Fiduciary Duty Claim

Under New York State law an insurance agent owes no fiduciary duty to his client aside from the common law duty to obtain the requested coverage. *Murphy v. Kuhn*, 90 N.Y.2d 266, 270, 660 N.Y.S.2d 371, 682 N.E.2d 972 (1997). "Insurance agents are not personal financial counselors and risk managers, approaching guarantor status. Insureds are in a better position to know their assets...." *Id.* at 273, 660 N.Y.S.2d 371, 682 N.E.2d 972. However, an individual who holds himself out to be a financial advisor does owe a fiduciary duty to the client because of the "special relationship" between the two. *Rasmussen v. A.C.T. Environmental Services, Inc.*, 292 N.Y.S.2d 220 (3rd Dep't.2002). A special relationship may be found where: (1) the agent receives compensation for consultation beyond any premium payments; (2) the insured relies on the expertise of the agent regarding a raised question of coverage; or (3) there is an extended course of dealing sufficient to put objectively reasonable agents on notice that their advice was being relied upon. *Murphy* at 270, 660 N.Y.S.2d 371, 682 N.E.2d 972.

While it is undisputed that the only service Mooney provided to Mrs. Sofia was the sale of

the SPIA, plaintiff contends that he held himself out to be an investment advisor, and as such, owed Mrs. Sofia a fiduciary duty. To support this claim, plaintiff offers: (1) Mooney's business card, which identifies him as a "financial services professional;" (2) a statement Mrs. Sofia made to her real estate agent that Mooney was her financial advisor; and (3) a general statement by her granddaughter that Mrs. Sofia did not understand financial arrangements.

Mass Mutual argues that Mooney's service to Mrs. Sofia never exceeded that of an insurance agent because: (1) the only payment he received from her was the commission paid for his work on the SPIA; (2) the relationship lasted only two years; (3) she had numerous investments with at least five named financial advisors; and (4) that he did not help her pay bills or balance her checkbook.

I find that no reasonable jury could conclude that Mooney's duties exceeded those of an insurance agent. First, Mooney received no fees other than the commission on the SPIA arising from his business relationship with Mrs. Sofia. Second, Mrs. Sofia was the one who recruited Mooney for help rearranging her investments. Third, he sold her an annuity, and to that end, provided her with several different options from which to choose. However, Mrs. Sofia chose which option best suited her financial needs and goals at that time. Fourth, Mr. Barberi, Mrs. Sofia's former CPA, testified at his deposition that she could understand the financial transaction options once they were explained to her. Lastly, they had only two business dealings in two years. Accordingly, defendant is entitled to summary judgment in its favor on plaintiff's breach of fiduciary duty claim.

C. Negligent/Reckless Misrepresentation Claim

*4 For plaintiff to establish a negligent or reckless misrepresentation claim, she must prove that a "special relationship" existed between Mooney and Mrs. Sofia. See *White v. Guarante*, 43 N.Y.2d 356, 401 N.Y.S.2d 474, 372 N.E.2d 315 (1977). "Liability for negligent

misrepresentation has been imposed only on those persons who possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified." *Kimmell v. Schaefer*, 87 N.Y.2d 257, 263 (1996). Since, as described above, I find that no reasonable jury could conclude that Mooney engaged in a "special relationship" with Mrs. Sofia other than as an insurance agent, plaintiff, as a matter of law, is unable to sustain her negligent misrepresentation claim. Thus, defendant is entitled to summary judgment in its favor on this cause of action as well.

D. Lack of Capacity Claim

To demonstrate that an individual lacked the capacity to enter into a business transaction under New York State law, a plaintiff must prove, "that the party did not understand the nature of the transaction at the time of the conveyance as a result of mental disability." *Lopresto v. Brizzolara*, 91 A.D.2d 952, 458 N.Y.S.2d 881, 884 (1st Dep't 1986).

Plaintiff's only evidence of her alleged diminished capacity is deposition testimony from her grandson-in-law that "she didn't look well" at Christmastime 2000.

I find that plaintiff offers insufficient evidence indicating that Mrs. Sofia suffered from any mental deficiency at the time she purchased the SPIA. First, plaintiff offers no medical evidence that Mrs. Sofia suffered from a mental deficiency. Second, while it is true that she was 81 years old, her friend Mrs. Sacheli testified that she did not have any problems getting around or taking care of herself. Third, Mooney states in his affidavit that she seemed as lucid in 2000 as she did when he first met her in 1998. [FN4] Since plaintiff presents no evidence that Mrs. Sofia lacked the mental capacity to enter into the SPIA sales contract, that cause of action is dismissed.

FN4. It should also be noted that plaintiff does not

contest the validity of gifts Mrs. Sofia made to her granddaughter around the same time that she purchased the SPIA, including an automobile and jewelry.

E. Unconscionability Claim

In New York State a business transaction is unconscionable only if it is so grossly unreasonable or unconscionable in light of the mores and business practices of the time and place according to its literal terms. Because the New York State Insurance Department allows insurance agents to sell SPIAs to 81 year-old people, this transaction can not be deemed unconscionable. Therefore, plaintiff's unconscionability claim is also denied.

F. Unsuitability Claim

Lastly, plaintiff argues that the SPIA should be rescinded because the investment was "unsuitable" for Mrs. Sofia. [FN5] Since there is no such cause of action in New York State, plaintiff may not rely on this assertion to defeat Mass Mutual's motion for summary judgment. Accordingly, plaintiff's "unsuitability" claim, to the extent that it was alleged, is dismissed.

FN5. Nowhere does plaintiff allege "unsuitability" as a cause of action in her Complaint. See Defendant's Notice of Removal, Ex. A (Doc. No. 1).

CONCLUSION

*5 For the reasons set forth above, I find that Mrs. Sofia's purchase of the Mass Mutual SPIA was a valid financial transaction. Accordingly, defendant's motion for summary judgment is granted in its entirety, and each of plaintiff's claims is dismissed with prejudice.

ALL OF THE ABOVE IS SO ORDERED.

2004 WL 1792441 (W.D.N.Y.)

END OF DOCUMENT

78

Supreme Court, Appellate Division, Fourth
Department, New York.

Carol SOULE, Debra Buchan, Olga C. Lewis,
Sarah B. Hampshire, Virginia Franck,
Linda Dudiak, Monika Kriebel, and Emile
Alfino, Plaintiffs-Appellants,

v.

Sylvia W. NORTON, M.D., Sylvia W. Norton,
M.D., P.C., Sylvia W. Norton, M.D.,
P.C., Doing Business as Jerva Eye Center, and
Visx, Inc., Defendants-
Respondents.

Nov. 15, 2002.

Laser eye-surgery patients brought medical malpractice claims against surgeon and medical clinic, and brought claims against surgeon, clinic, and manufacturer of surgical laser for negligent misrepresentation and concealment, violation of deceptive acts and practices law, and strict products liability. The Supreme Court, Onondaga County, Stone, J., granted surgeon's and clinic's motion for severance of claims of the eight patients, and granted manufacturer's motion to dismiss. Patients appealed. The Supreme Court, Appellate Division, held that: (1) severance was warranted; (2) patients failed to state claims for deceptive practices or for negligent misrepresentation and concealment; but (3) patients were entitled to replead their strict products liability claims.

Affirmed as modified.

West Headnotes

[1] Action 60
13k60

Severance was warranted as to medical malpractice claims of eight laser eye-surgery patients, against one surgeon and the surgeon's medical clinic; individual issues predominated, concerning particular circumstances applicable to each patient, and resulting and cumulative prejudice to surgeon and clinic from permitting jury, in one trial, to determine multiple claims of malpractice far outweighed benefit derived from conduct of

joint trial. McKinney's CPLR 603.

[2] Action 60
13k60

[2] Appeal and Error 949
30k949

Severance of claims is a matter of judicial discretion which will not be disturbed on appeal absent an abuse of discretion or prejudice to a substantial right of the party seeking severance. McKinney's CPLR 603.

[3] Consumer Protection 38
92Hk38

Patients of laser eye-surgeon failed to state a claim, under deceptive acts and practices law, of surgical laser manufacturer's deceptive practices, where patients failed to allege that manufacturer engaged in consumer-oriented conduct that was deceptive or misleading. McKinney's General Business Law § 349(a).

[4] Consumer Protection 4
92Hk4

[4] Consumer Protection 5
92Hk5

To establish a prima facie violation of the deceptive acts and practices law, a plaintiff must demonstrate that the defendant is engaging in "consumer oriented" conduct that is deceptive or misleading in a material way, and that plaintiff has been injured because of that conduct. McKinney's General Business Law § 349(a).

[5] Conspiracy 18
91k18

Patients of laser eye-surgeon failed to state a claim of surgical laser manufacturer's conspiracy with eye surgeon and surgeon's medical clinic to commit deceptive practices in violation of deceptive acts and practices law, where there were no allegations of fact from which it could be inferred that there was an agreement or understanding between manufacturer, surgeon, and clinic to cooperate in any fraudulent or deceptive scheme. McKinney's General Business Law § 349(a).

[6] Products Liability 46.1
313Ak46.1

Patients of laser eye-surgeon failed to state a claim of surgical laser manufacturer's negligent representations and concealment, where patients failed to allege actual privity of contract between patients and manufacturer or a relationship so close as to approach that of privity.

[7] Sales 255
343k255

Patients of laser eye-surgeon failed to state a claim against surgical laser manufacturer for breach of warranties of merchantability and fitness for particular purpose, where patients did not allege their privity with manufacturer, nor did they allege that surgeon acted as agent of manufacturer so as to constitute a claim of privity.

[8] Pleading 286
302k286

Patients of laser-eye surgeon were entitled to amend their complaint to replead their claims against surgical laser manufacturer for strict products liability, where the defects in pleading the claims may have been the result of poor draftsmanship and the patients may have possessed meritorious claims for strict products liability against the manufacturer.

****694** Carroll, Carroll, Davidson & Young, P.C., Syracuse (Eugene B. Young of Counsel), for Plaintiffs-Appellants.

Smith, Sovik, Kendrick & Sugnet, P.C., Syracuse (Mary Kendrick Gaffney of Counsel), for Defendants-Respondents Sylvia W. Norton, M.D., Sylvia W. Norton, M.D., P.C., Sylvia W. Norton, M.D., P.C., Doing Business as Jerva Eye Center.

Harris Beach LLP, Pittsford (Laura W. Smalley of Counsel), for Defendant-Respondent Visx, Inc.

***830** Present: PIGOTT, Jr., P.J., WISNER, SCUDDER, BURNS, and GORSKI, JJ.

***827** MEMORANDUM:

Plaintiffs commenced this action to recover damages for personal injuries that each sustained as a result of laser eye surgery performed by defendant Sylvia W. Norton, M.D. (Dr. Norton) using a surgical laser manufactured by defendant Visx, Inc. (Visx). The amended complaint asserts a cause of action for medical malpractice against Dr. Norton and defendants Sylvia W. Norton, M.D., P.C., and Sylvia W. Norton, M.D., P.C., doing business as Jerva Eye Center (collectively, Norton defendants), and causes of action for an alleged ***828** violation of article 22-A of the General Business Law, "negligent representations and concealment," and strict products liability and breach of warranty against all defendants.

[1][2] Contrary to plaintiffs' contention, Supreme Court did not abuse its discretion in granting the motion of the Norton defendants pursuant to CPLR 603 to sever the claims of the eight plaintiffs. "Severance, under CPLR 603, is a matter of judicial discretion which will not be disturbed on appeal absent an abuse of discretion or prejudice to a substantial right of the party seeking severance" (*Finning v. Niagara Mohawk Power Corp.*, 281 A.D.2d 844, 844, 722 N.Y.S.2d 613; see *Southworth v. Macko*, 294 A.D.2d 920, 741 N.Y.S.2d 813; *County of Chenango Indus. Dev. Agency v. Lockwood Greene Engrs.*, 111 A.D.2d 508, 509, 488 N.Y.S.2d 890). Here, the record establishes that "individual issues predominate, concerning particular circumstances applicable to each plaintiff" (*Bender v. Underwood*, 93 A.D.2d 747, 748, 461 N.Y.S.2d 301; see *Abbondandolo v. Hitzig*, 282 A.D.2d 224, 225, 724 N.Y.S.2d 26; see also *DeAngelis v. New York Univ. Med. Ctr.*, 292 A.D.2d 237, 237-238, 738 N.Y.S.2d 671). In addition, "the resulting and cumulative prejudice to [the Norton defendants] by permitting the jury, in one trial, to determine the multiple claims of malpractice at issue here, far outweighs the benefit derived from the conduct of a joint trial" (*Bender*, 93 A.D.2d at 748, 461 N.Y.S.2d 301; see *Abbondandolo*, 282 A.D.2d at 225, 724 N.Y.S.2d 26). Indeed, these eight wholly separate malpractice claims "are primarily linked by the fact that the same doctor is

(Cite as: 299 A.D.2d 827, *828, 750 N.Y.S.2d 692, **694)

charged with malpractice and that the different plaintiffs are represented by the same lawyer" (Reid v. Hafer, 88 A.D.2d 873, 874, 451 N.Y.S.2d 775). Furthermore, in view of the fact that there are eight claims, the court, in granting the motion, properly considered the potential for jury confusion (see *Abbondandolo*, 282 A.D.2d at 225, 724 N.Y.S.2d 26; *Bender*, 93 A.D.2d at 748, 461 N.Y.S.2d 301).

[3][4][5] The court also properly granted the motion of Visx to dismiss the amended complaint against it pursuant to CPLR **695 3211(a)(7) for failure to state a cause of action. The first cause of action is for an alleged violation of article 22-A of the General Business Law. Because the amended complaint alleges that defendants committed "deceptive practices," plaintiffs presumably are alleging a violation of General Business Law § 349(a). To establish a prima facie violation of that statute, a plaintiff must demonstrate that the defendant is engaging in "consumer oriented" conduct that is deceptive or misleading in a material way, and that plaintiff has been injured because of that conduct (*Gaidon v. Guardian Life Ins. Co.*, 94 N.Y.2d 330, 344, 704 N.Y.S.2d 177, 725 N.E.2d 598; see *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank*, 85 N.Y.2d 20, 24-26, 623 N.Y.S.2d 529, 647 N.E.2d 741; *St. Patrick's Home for Aged & Infirm v. Laticrete Intl.*, 264 A.D.2d 652, 655, 696 N.Y.S.2d 117). Plaintiffs failed to state a *829 cause of action under General Business Law § 349 because they failed to allege that Visx engaged in consumer-oriented conduct that was deceptive or misleading (see *St. Patrick's Home for Aged & Infirm*, 264 A.D.2d at 655, 696 N.Y.S.2d 117). Plaintiffs' allegation that Visx conspired with the Norton defendants to engage in deceptive practices is not sufficient to defeat the motion because there are no allegations of fact from which it can be inferred that there was an agreement or understanding between Visx and the Norton defendants to cooperate in any fraudulent or deceptive scheme (see *Abrahami v. UPC Constr. Co.*, 176 A.D.2d 180, 574 N.Y.S.2d 52; *National Westminster Bank v. Weksel*, 124 A.D.2d 144, 147, 511 N.Y.S.2d

626, lv. denied 70 N.Y.2d 604, 519 N.Y.S.2d 1027, 513 N.E.2d 1307). Thus, the court properly dismissed the first cause of action against Visx.

[6] The second cause of action is styled as one for "negligent representations and concealment." Assuming that the second cause of action is one for negligent misrepresentation, we conclude that plaintiffs failed to allege the requisite "actual privity of contract between [plaintiffs and Visx] or a relationship so close as to approach that of privity" (*Prudential Ins. Co. v. Dewey, Ballantine, Bushby, Palmer & Wood of Am.*, 80 N.Y.2d 377, 382, 590 N.Y.S.2d 831, 605 N.E.2d 318, rearg. denied 81 N.Y.2d 955, 597 N.Y.S.2d 940, 613 N.E.2d 972; see *Ossining Union Free School Dist. v. Anderson LaRocca Anderson*, 73 N.Y.2d 417, 424, 541 N.Y.S.2d 335, 539 N.E.2d 91; *McNar Indus. v. Feibes & Schmitt, Architects*, 245 A.D.2d 993, 994, 667 N.Y.S.2d 88, lv. denied 91 N.Y.2d 812, 672 N.Y.S.2d 848, 695 N.E.2d 717). Thus, the court properly dismissed the second cause of action against Visx (see *IT Corp. v. Ecology & Env'tl. Eng'g*, 275 A.D.2d 958, 960, 713 N.Y.S.2d 633, lv. denied 96 N.Y.2d 702, 722 N.Y.S.2d 794, 745 N.E.2d 1016).

[7] The court also properly dismissed the fourth cause of action against Visx insofar as it alleges claims for strict products liability. The allegations of plaintiffs in support of their strict products liability claims against Visx "are devoid of a factual basis and are vague and conclusory" (*Rose v. Gelco Corp.*, 261 A.D.2d 381, 382, 688 N.Y.S.2d 259). The factual allegations are also insufficient to support the claim that the surgical laser was defectively designed or manufactured (see *id.*). In addition, the court properly dismissed the fourth cause of action against Visx insofar as it alleges claims for breach of warranties of merchantability and fitness for a particular purpose. Privity of contract is an essential element of those claims (see *Martin v. Dierck Equip. Co.*, 43 N.Y.2d 583, 589-590, 403 N.Y.S.2d 185, 374 N.E.2d 97; *Antel Oldsmobile-Cadillac v. Sirius Leasing Co., Div. of Sirius Enters.*, 101 A.D.2d 688, 475 N.Y.S.2d 944; *Manufacturers & Traders **696 Trust*

(Cite as: 299 A.D.2d 827, *829, 750 N.Y.S.2d 692, **696)

Co. v. Stone Conveyor, 91 A.D.2d 849, 850, 458 N.Y.S.2d 116). There is no allegation of privity between plaintiffs and Visx, nor is there any allegation that the Norton defendants acted as the agent of Visx to constitute a claim of *830 privity (see Manufacturers & Traders Trust Co., 91 A.D.2d at 850, 458 N.Y.S.2d 116; cf. Antel Oldsmobile-Cadillac, 101 A.D.2d at 689, 475 N.Y.S.2d 944).

[8] Finally, we conclude that the court did not improvidently exercise its discretion in denying that part of the request of plaintiffs for leave to replead the first and second causes of action and that part of the fourth cause of action insofar as it alleges claims for breach of warranty (see CPLR 3211 [e]; Parlante v. Cross County Fed. Sav. Bank, 251 A.D.2d 476, 673 N.Y.S.2d 591, lv. dismissed 92 N.Y.2d 946, 681 N.Y.S.2d 476, 704 N.E.2d 229; Ott v. Automatic Connector, 193 A.D.2d 657, 658, 598 N.Y.S.2d 10). However, although the court properly concluded that the amended complaint failed to state any claims against Visx for strict products liability, the record indicates that the defects in pleading those claims may be the result of poor draftsmanship, and that plaintiffs may possess meritorious claims for strict products liability against that defendant (see Metro Envelope Corp. v. Westvaco, 72 A.D.2d 695, 695, 421 N.Y.S.2d 366). We conclude that plaintiffs should be afforded an opportunity to replead those claims (see Lambert v. Marks, 96 A.D.2d 578, 578-579, 464 N.Y.S.2d 1018; Metro Envelope Corp., 72 A.D.2d at 696, 421 N.Y.S.2d 366). We therefore modify the order in the exercise of our discretion by granting that part of plaintiffs' request for leave to replead the fourth cause of action insofar as it alleges claims for strict products liability against Visx upon condition that plaintiffs shall serve a second amended complaint within 30 days of service of a copy of the order of this Court with notice of entry.

*827 It is hereby ORDERED that the order so appealed from be and the same hereby is unanimously modified in the exercise of discretion by granting that part of plaintiffs' request for leave to replead the fourth cause of

action insofar as it alleges claims for strict products liability against defendant Visx, Inc. upon condition that plaintiffs shall serve a second amended complaint within 30 days of service of a copy of the order of this Court with notice of entry and as modified the order is affirmed without costs.

299 A.D.2d 827, 750 N.Y.S.2d 692, 2002 N.Y. Slip Op. 08285

END OF DOCUMENT

79

District Court of Appeal of Florida,
Fourth District.

ST. LUCIE HARVESTING AND
CARETAKING CORPORATION n/k/a St.
Lucie Caretaking
Corporation, and Ten Mile Creek Groves, Inc.,
a Florida corporation,
Appellants,
v.
Vicente CERVANTES, Appellee.

Nos. 92-0877, 92-1326.

April 13, 1994.

Employee of independent contractor brought action against orange grove owners for injuries sustained while driving vehicle used to pick oranges. The Circuit Court, St. Lucie County, Rupert Jason Smith, J., entered judgment for employee, and owners appealed. The District Court of Appeal, Klein, J., held that owners were not liable for employee's injuries, since they did not exercise control over independent contractor.

Reversed and remanded.

West Headnotes

[1] Automobiles 194(1)
48Ak194(1)
(Formerly 255k318(1) Master and Servant)
Orange grove owners were not liable for injuries sustained by employee of independent contractor while driving vehicle used to pick oranges; owners exercised no control over independent contractor other than to direct independent contractor in regard to amount of fruit to be harvested and from which grove, and owners had no control over what equipment was used by independent contractor, how that equipment was used, or by whom it was used.

[2] Negligence 1011
272k1011
(Formerly 272k32(2.10))

[2] Negligence 1013

272k1013
(Formerly 272k32(2.10))

Owner who hires independent contractor is not liable for injuries sustained by employees of independent contractor unless owner actively participates to extent that owner directly influences manner in which work is performed and negligently creates or allows dangerous condition to exist, resulting in injury to employee of independent contractor.

*38 Debra J. Snow and Philip D. Parrish of Stephens, Lynn, Klein & McNicholas, P.A., Miami, for appellants.

Grover, Ciment, Weinstein, Stauber, Friedman & Ennis, P.A., Miami Beach, Kerry E. Mack, Englewood, and Joel D. Eaton of Podhurst, Orseck, Josefsberg, Eaton, Meadow, Olin & Perwin, P.A., Miami, for appellee.

ON MOTION FOR REHEARING

KLEIN, Judge.

The opinion of this court filed February 23, 1994, is withdrawn and the following opinion, which is identical except for footnote 1, is substituted. Appellee's motion for rehearing is denied.

Plaintiff injured himself while using equipment owned by his employer. He sued the defendants, for whom his employer was performing services as an independent contractor, on the theory that the defendants exercised direction and control over the manner in which the independent contractor was carrying out its work and negligently caused the plaintiff's injury. The jury returned a verdict for plaintiff, and defendants appeal, arguing that they were not participating in the details of the work so as to make them liable to the employee of an independent contractor. We agree and reverse for entry of a directed verdict.

Defendants are grove owners/operators (grove owners) who employed Gordy Harvesting to pick its fruit. It is undisputed that Gordy was an independent contractor.

The independent contractor's job was to remove the fruit from the trees and get it to the edge of the orange grove, where it could be transported by another contractor to a processing factory. The independent contractor employed fruit pickers including plaintiff and owned the equipment which it used, including vehicles known as goats. A goat is a 2 1/2 ton dump truck, which has been stripped down and reconfigured by the addition of a high-lift bin and a boom. Goats have no doors or seatbelts and are specifically designed to be used in citrus groves. They are not designed for use on the highways, however, they are routinely driven on the highways.

The workers pick the fruit from the trees and put it into tubs. The goat's boom lifts the tubs and then tilts them, dumping the fruit into the goat's bin. The goat is then driven to the edge of the grove so that the fruit can be loaded onto trucks, which deliver the fruit to a processing factory. When loaded with fruit a goat has a higher center of gravity than when empty, which makes it more susceptible to rolling over in a turn.

[1] Plaintiff was injured, while driving a goat loaded with fruit from one grove to another, when he turned a corner too fast and caused the goat to roll over. His cause of action against the defendant grove owners was based on the theory that defendants' foreman negligently "directed" that this goat be moved from one grove to another, 2 1/2 miles away, without making sure that the goat was unloaded before it made the trip. Plaintiff argues that if the grove owners had a truck at the edge of the grove so that the goat could have been unloaded prior to being driven to the next grove, the center of gravity would have been lower, and it would not have rolled over.

[2] Generally one who hires an independent contractor is not liable for injuries sustained by employees of the independent contractor. In *Conklin v. Cohen*, 287 So.2d 56, 60 (Fla.1973), however, our supreme court *39 held that there was an exception to this rule where the owner actively participates "to the

extent that he directly influences the manner in which the work is performed" and negligently creates or allows a dangerous condition to exist resulting in injury to the employee of the independent contractor. Viewing the facts in a light most favorable to plaintiff, we conclude that this case falls within the general rule, and not the Conklin exception.

The specific facts relating to defendants' involvement in this accident began when the defendant grove owners' foreman told the independent contractor's foreman that enough fruit had been picked at one grove, and that the crew was to pick fruit at another grove, a few miles away. At that time the goat which the crew was using was loaded with fruit, and there was no truck at the edge of the grove into which the fruit could be loaded so that the goat could be emptied. Defendant's foreman was aware that the independent contractor was going to take this loaded goat down to the next grove. Defendant's foreman helped the crew place a cover over the fruit, which was required when it was being transported because of the possibility of spreading citrus canker.

The independent contractor's foreman testified that he normally drove the goat, but since he had to drive the van to transport the workers to the next grove, he told the plaintiff to drive the goat. The plaintiff was not experienced in driving the goat on the highway, and, during the trip, as he was making a turn from the highway onto a dirt road, the goat rolled over and injured him.

Plaintiff bottoms his claim on the fact that defendants' foreman "directed" that this loaded goat be taken to the next grove; however, the most that can be said is that defendants' foreman directed the crew to pick at another grove and was aware that the crew would take its loaded goat to the other grove. [FN1]

FN1. Throughout his brief plaintiff's counsel emphasizes that defendants' foreman "directed" that the loaded goat be taken to the next grove, with record references. For example on page four of

appellee's brief it is stated: One customary option available to Mr. O'Neal [defendants' foreman] in such a circumstance was to have Mr. Gordy's crew unload the goat into tubs at the edge of the grove, where they could be loaded into a semi-trailer at a later time (R. 951). Mr. O'Neal did not utilize this option, however. Instead, he "directed" Mr. Gordy's crew leader to move the fully-loaded goat 2 1/2 miles over a public highway to Ten Mile Creek's "Pennsylvania Grove," where an empty semi-trailer was available for unloading the goat (R. 524, 541-42, 564-66, 590-93, 606, 611-13, 647, 718, 918, 948, 954, 972-73). The use of quotes around the word directed is an indication that these were words used by someone else, and that someone else, particularly in light of the record references at the end of the sentence, was a witness. The American Heritage Dictionary of the English Language 1073 (new college ed. 1981) defines quotation marks as "a pair of punctuation marks used to mark the beginning and end of a passage attributed to another and repeated word for word." No witness testified that the defendants' foreman directed that the goat be taken to the next grove nor was there any testimony that could even loosely be interpreted as such. It is not only the use of quotation marks which is improper. With or without quotation marks this was a mischaracterization of the testimony which was central to the issue on appeal. In his motion for rehearing counsel for plaintiff points out that although the primary definition of quotation marks is as set forth above, there are secondary uses of quotation marks which do not indicate the exact words of another. He also notes that his brief contained other words in quotation marks. He says that he did not intend to mislead the court into thinking he was quoting testimony. Although we have decided, in fairness to counsel, to publish his explanation, it does not persuade us to reconsider our comment. Appellate judges should not have to wonder, when reading factual statements containing words in quotes followed by record references, what counsel intended.

In all of the cases relied on by plaintiff, including Conklin, the injury to the employee of the independent contractor occurred while work was being performed on defendant's premises and the defendant was actively participating in the direction of the work or failing to provide a safe place to work. Hogan

v. Deerfield 21 Corp., 605 So.2d 979 (Fla. 4th DCA 1992); Boatwright v. Sunlight Foods, Inc., 592 So.2d 261 (Fla. 3d DCA 1991); Life From the Sea, Inc. v. Levy, 502 So.2d 473 (Fla. 3d DCA 1987); Cadillac Fairview of Florida, Inc. v. Cespedes, 468 So.2d 417 (Fla. 3d DCA 1985); and Atlantic Coast Development Corp. v. Napoleon Steel *40 Contractors, Inc., 385 So.2d 676 (Fla. 3d DCA 1980).

In the present case, unlike those on which plaintiff relies, plaintiff was not injured because of any condition of the defendants' premises or equipment. Nor were defendants exercising any control over the manner in which this crew was performing its work. Defendants' foreman told the independent contractor's foreman when the crew had picked enough fruit at one grove, and where the crew should begin picking thereafter, but exercised no control over how the crew got to the next grove, what equipment was used, what route the crew took, how fast the crew went, or who drove the goat. The goat, which was allegedly dangerous, was owned by the independent contractor, not the defendants. The plaintiff, who was not experienced in driving the goat on the highway, was told to drive the goat by the foreman of the independent contractor, not the defendants.

In Van Ness v. Independent Construction Co., 392 So.2d 1017, 1019 (Fla. 5th DCA 1981), a wall collapsed during construction and injured the employee of an independent contractor. He sued the owner, alleging that it actively participated; however, the fifth district affirmed a summary judgment in favor of the owner because the facts reflected that there was insufficient participation by the owner, stating:

To impose liability on the owner for retention of control over an independent contractor, there must be such right of supervision or direction that the contractor is not entirely free to do the work his own way. Restatement of Torts (Second), section 414, comment (c).

In Skow v. Department of Transportation, 468 So.2d 422 (Fla. 1st DCA 1985), an employee of the general contractor

constructing a bridge for the DOT was injured when he was working without a safety belt and fell. He sued the DOT claiming that it had assumed detailed control over the work and failed to enforce safety regulations. The first district affirmed a summary judgment for the DOT because the undisputed facts reflected that the DOT only participated to the extent necessary to ascertain the results of the work, and not to control the method of performance.

In the present case the facts are undisputed that the grove owners exercised no control over the independent contractor other than to direct the independent contractor in regard to the amount of fruit to be harvested and from which grove. The grove owners had no control over what equipment was used by the independent contractor, how that equipment was used or by whom it was used.

In the Boatwright case, on which plaintiff relies, the equipment on which the independent contractor was working on the owner's premises was designed and modified by the owner. In addition, the independent contractor had requested the owner to install a guardrail around the equipment, which was up on a platform, and the owner had refused to do so. In contrast, in the present case the allegedly dangerous piece of equipment was owned and operated under the direction of the independent contractor, and when the independent contractor was directed to pick at another grove, no one gave any indication to the grove owners' foreman that moving the loaded goat was a problem. If the defendants had owned the goat and required the independent contractor's employees to use it in a dangerous manner, defendants might well have been liable. We have been cited no authority, however, which would allow recovery from the party for whom the independent contractor was performing services under the circumstances of this case.

Plaintiff argues in the alternative that *Maldonado v. Jack M. Berry Grove Corp.*, 351 So.2d 967 (Fla.1977), supports his position. In that case, which also involved an injury by a goat, the parents brought their three-year-old

child to the citrus grove and put him in an empty tub while they filled other tubs with fruit. The driver of the goat, who was employed by an independent contractor, negligently backed over the child, who had climbed out of the tub. The supreme court held that because the owner of the grove was aware that workers were bringing small children on the premises, the fact that the dangerous condition was created by an independent contractor would not shield the employer/landowner from liability *41 if the employer/landowner negligently failed to alleviate the dangerous situation. The accident in the present case did not occur on defendants' premises. These defendants could not be held liable, as the Maldonado defendant was, for failing to alleviate a known dangerous condition on their premises. Maldonado does not, therefore, provide a theory to support recovery here.

We therefore reverse and remand for entry of a directed verdict in favor of the defendants.

HERSEY and GUNTHER, JJ., concur.

639 So.2d 37, 19 Fla. L. Weekly D812

END OF DOCUMENT

80

United States District Court,
S.D. New York.

ST. PAUL FIRE AND MARINE
INSURANCE COMPANY, Plaintiff,

v.

HEATH FIELDING INSURANCE BROKING
LTD., individually and as agent for Farex
G.I.E. and American International Group,
Inc.; Farex G.I.E. and Michael P.
Kearney, Defendants.

No. 91 Civ. 0748(MJL).

April 29, 1996.

In retrocedent's action against broker for negligent misrepresentation in connection with negotiation of treaty retrocession contract, retrocedent moved for reargument of summary judgment granted in favor of broker. The District Court, Lowe, J., held that broker was not in special relationship with retrocedent and could not be held liable on theory of negligent misrepresentation.

Motion denied.

West Headnotes

[1] Federal Civil Procedure 928
170Ak928

To avoid repetitive arguments on issues already considered fully by court, rules governing reargument are narrowly construed and strictly applied. Fed.Rules Civ.Proc.Rule 59(e), 28 U.S.C.A.; U.S.Dist.Ct.Rules S.D.N.Y. Civil Rule 3(j).

[2] Federal Civil Procedure 928
170Ak928

When requisites of motion for reargument have not been met, court may address merits of movant's argument to apprise movant that, even if reargument had been permitted, it would have been unsuccessful. Fed.Rules Civ.Proc.Rule 59(e), 28 U.S.C.A.; U.S.Dist.Ct.Rules S.D.N.Y. Civil Rule 3(j).

[3] Federal Civil Procedure 928
170Ak928

Arguing point in motion for reargument is

improper if point was not raised in original motion. Fed.Rules Civ.Proc.Rule 59(e), 28 U.S.C.A.; U.S.Dist.Ct.Rules S.D.N.Y. Civil Rule 3(j).

[4] Insurance 1648
217k1648

(Formerly 217k92.1)

Under New York law, broker acting on behalf of retrocessionaire was not in special relationship with retrocedent in negotiation of treaty retrocession contract and, therefore, was not liable to retrocedent on negligent misrepresentation theory, even though broker and retrocedent engaged in face-to-face negotiations, and even though long-term relationship allegedly existed between broker and retrocedent's underwriter; retrocedent did not seek broker's advice, broker did not act on retrocedent's behalf or as intermediary between retrocedent and retrocessionaire and did not commit itself to any additional effort, expense, or warranty with regard to the contract, and fact that parties had good relationship did not evidence special relationship more intimate than ordinary business relationship.

[5] Fraud 13(3)
184k13(3)

Under New York law, there is no cause of action for negligent misrepresentation absent special relationship of trust or confidence between parties.

[6] Fraud 13(3)
184k13(3)

Under New York law, something more than trust and reliance between ordinary buyer and seller must be shown to establish special relationship necessary for negligent misrepresentation claim, and arm's length business relationship is not enough.

[7] Insurance 1648
217k1648

(Formerly 217k83(1))

Under New York law, ordinary relationship of broker to insurer does not, by itself, give rise to special relationship necessary for negligent misrepresentation claim.

[8] Insurance 1648
217k1648
(Formerly 217k92.1)

Under New York law, not all conduct by broker with regard to reinsurer that contracts with its principal results in special relationship necessary for negligent misrepresentation claim.

***199** Jonathan J. Lerner, Seth M. Schwartz, Susan Getzendanner and Thomas Kane, Skadden, Arps Slate, Meagher & Flom, New York City, Ted G. Semaya, Oppenheimer, Wolff & Donnelly, New York City, for Plaintiff.

Mark S. Fragner, Elliott M. Kroll, Kroll & Tract, New York City, for Defendants.

OPINION AND ORDER

LOWE, District Judge.

Before the Court is the motion of Plaintiff St. Paul Fire and Marine Insurance Company ("St. Paul"), pursuant to Rule 3(j) of the United States District Courts for the Southern and Eastern Districts of New York Joint Rules ("Local Rule 3(j)") and Federal Rule of Civil Procedure 59(e) ("Rule 59(e)", to reargue ***200** or to "clarify" issues decided by this Court's December 30, 1995 Opinion. Specifically, St. Paul moves to reargue the portion of the December 30, 1995 Opinion that grants summary judgment to Defendant Heath Fielding Insurance Broking Ltd. ("Heath") on St. Paul's negligent misrepresentation claim. Alternatively, St. Paul asks the Court to "clarify" the portion of the December 30, 1995 Opinion for which it seeks reargument. For the reasons discussed below, St. Paul's motion is denied.

BACKGROUND

The facts and prior proceedings in this diversity action are fully set forth in the prior opinions of this Court. See *St. Paul Fire and Marine Ins. Co. v. Heath Fielding Ins. Broking Ltd.*, 1993 WL 187778 (S.D.N.Y. May 25, 1993) ("May 1993 Opinion"); *St. Paul Fire and Marine Ins. Co. v. Heath Fielding Ins.*

Broking Ltd., 1996 WL 19028 (S.D.N.Y. December 30, 1996) ("December 1995 Opinion"). The facts relevant to the instant motion are presented below.

St. Paul, a Minnesota corporation engaged in the insurance and reinsurance business, entered into a treaty retrocession contract ("Contract") with Farex G.I.E. ("Farex") and its constituent French insurance/reinsurance companies. Heath, a United Kingdom insurance broker, negotiated the Contract on Farex's behalf. The Heath brokers were Duncan Playford ("Playford") and John MacKensie-Green ("MacKensie-Green"). Defendant Michael P. Kearney ("Kearney"), previously employed as an insurance underwriter by an affiliate of St. Paul, accepted the Contract on St. Paul's behalf. The Contract bound St. Paul to pay losses on certain property risks insured by American International Group, Inc. ("AIG") and reinsured by Farex over a two-year period.

Two years after the execution of the Contract, Farex sought payment from St. Paul of approximately \$40 million allegedly due under the Contract. Thereafter, St. Paul filed this action. St. Paul asserted fraud and negligence claims against Heath. With respect to the negligence claim, Count VI of the Original Complaint alleged, inter alia, that Heath (1) knew or should have known that Kearney acted without authority, (2) did not take proper steps to alert St. Paul, and (3) made material misrepresentations concerning the risks insured under the Contract. Original Complaint ¶¶ 59-68, 92-96. The Original Complaint further alleged that "[a] reinsurance broker owes a duty of care as a professional to all parties in the negotiation and placement of reinsurance and retrocession transactions." *Id.* ¶ 93.

Heath moved to dismiss the Original Complaint. The Court referred the motion to Magistrate Judge Barbara A. Lee pursuant to Federal Rule of Civil Procedure 636(b)(1)(B). The Magistrate Judge issued a Report and Recommendation dated November 15, 1991 ("November 1991 Report"). The November 1991 Report recommended dismissal of St.

Paul's negligence claim because St. Paul "ha[d] not identified any source of duty that could give rise to a cause of action for negligence against Heath." November 1991 Report at 62-64. St. Paul never objected to this portion of the Magistrate Judge's report.

In its May 1993 Opinion, the Court addressed various objections to a number of the rulings of the Magistrate Judge. St. Paul Fire and Marine Ins. Co., 1993 WL 187778, at *4-*8. As to the negligence claim asserted against Heath, the Court adopted the Magistrate Judge's recommendation, dismissing the claim with prejudice pursuant to Federal Rule of Civil Procedure 12(b)(6). *Id.* at *8. The Court granted St. Paul leave to amend its complaint against Heath to adequately allege fraud damages. *Id.*

In December 1993, St. Paul filed an amended complaint ("First Amended Complaint"). The First Amended Complaint expands St. Paul's claims that Heath and Farex misrepresented the risks insured under the Contract, alleging that Heath made misrepresentations to Kearney which induced him to sign the Contract. First Amended Complaint *201 ¶¶ 72-76. The First Amended Complaint adds a cause of action against Heath for negligent misrepresentation. *Id.* ¶¶ 189-95. Specifically, St. Paul alleges that Playford made false representations in November 1988 to induce Kearney to enter into the Contract on behalf of St. Paul. *Id.* at ¶¶ 48-50. The claim is based on a duty "to provide correct information" arising out of "possession of superior knowledge not available to Plaintiff; taking positive actions to conceal the true facts; knowledge that Plaintiff was acting under a mistaken belief; the duty to disclose present in every reinsurance transaction; or creating a false impression by providing some facts but concealing others." *Id.* ¶ 192.

After the completion of discovery, Heath moved for summary judgment on St. Paul's negligent misrepresentation claim. Heath argued that: (1) the Court had already ruled that Defendant owed no duty to Plaintiff to support a negligence claim, and (2) Plaintiff

failed to demonstrate a "special relationship" between it and Defendant. (See Def.'s Mem. Supp. Mot. S.J. at 29-31.) That motion was subsequently referred to Magistrate Judge Lee to issue a report and recommendation.

The Magistrate Judge issued a Report and Recommendation dated July 26, 1995 ("July 1995 Report"). The July 1995 Report recommended that the Court grant Heath's motion for summary judgment. July 1995 Report at 46. The Magistrate Judge held that this Court's prior dismissal of St. Paul's negligence claim constituted the "law of the case," barring the negligent misrepresentation claim. *Id.* at 46-52. Alternatively, the Magistrate Judge found St. Paul's negligent misrepresentation claim legally insufficient because nothing in the record showed a "special relationship" between St. Paul and Heath. *Id.* at 52-54. St. Paul objected to this portion of the July 1995 Report pursuant to Federal Rule of Civil Procedure 72.

In its December 1995 Opinion, the Court adopted the Magistrate Judge's finding that St. Paul's negligent misrepresentation claim was barred by the law of the case. St. Paul Fire and Marine Ins. Co., 1996 WL 19028, at *9. Thus, the Court declined to review the Magistrate Judge's alternate ruling concerning the sufficiency of the negligent misrepresentation claim. *Id.* at *10.

On January 31, 1996, St. Paul filed a motion, pursuant to Local Rule 3(j) and Rule 59(e), for reargument of the portion of this Court's December 1995 Opinion granting summary judgment to Heath on its negligent misrepresentation claim. St. Paul also moved for clarification of the December 1995 Opinion. For the reasons set forth below, the motion is denied.

DISCUSSION

I. St. Paul's Motion for Reargument

A. The Legal Standards of Rule 59(e) and Local Rule 3(j)

The standards governing a motion for

reargument pursuant to Local Rule 3(j) and a motion to amend judgment pursuant to Rule 59(e) are identical. [FN1] See, e.g., *Monaghan v. SZS 33 Assocs., L.P.*, 153 F.R.D. 60, 65 (S.D.N.Y.1994).

FN1. Because the standard for St. Paul's Local Rule 3(j) and Rule 59(e) motion is the same, the Court refers to the motion as a "motion for reargument."

Local Rule 3(j) provides in pertinent part: "there shall be served with the notice of motion [for reargument] a memorandum setting forth concisely the matters or controlling decisions which counsel believes the court has overlooked." S.D.N.Y. R. 3(j). In order for a court to grant reargument, a movant must demonstrate that the Court overlooked factual matters or controlling decisions put before it in the underlying motion. *Walsh v. McGee*, 918 F.Supp. 107, 110-11 (S.D.N.Y.1996); *Monaghan*, 153 F.R.D. at 65. A motion for reargument "may not advance new facts, issues, or arguments not previously presented to the court." *Walsh*, 918 F.Supp. at 110 (citing *Litton Indus., Inc. v. Lehman Bros. Kuhn Loeb, Inc.*, No. 86 Civ. 6447, 1989 WL 162315, at *3 (S.D.N.Y. Aug.4, 1989)).

[1][2] To avoid repetitive arguments on issues already considered fully by the court, *202 Local Rule 3(j) and Rule 59(e) are narrowly construed and strictly applied. In *re Houbigant, Inc.*, 914 F.Supp. 997, 1001 (S.D.N.Y.1996); *Ameritrust Co. Nat'l Ass'n v. Dew*, 151 F.R.D. 237, 238 (S.D.N.Y.1993). A motion for reargument "is not a motion to reargue those issues already considered when a party does not like the way the original motion was resolved." In *re Houbigant*, 914 F.Supp. at 1001. Moreover, as this Court has previously held, reargument is not a "forum for new theories or for 'plugging the gaps of a lost motion with additional matters.'" *CMNY Capital, L.P. v. Deloitte & Touche*, 821 F.Supp. 152, 162 (S.D.N.Y.1993) (Lowe, J.) (citing *McMahan & Co. v. Donaldson, Lufkin & Jenrette Secs. Corp.*, 727 F.Supp. 833, 833 (S.D.N.Y.1989)). Nevertheless, when the requisites of a motion for reargument have not

been met, a court may address the merits of the movant's argument to apprise the movant that, even if reargument had been permitted, it would have been unsuccessful. See, e.g., *id.*

B. St. Paul's Claims for Reargument

St. Paul essentially makes the following three claims in support of reargument: (1) the Court "inadequately considered" caselaw that negligent misrepresentation sounds in fraud, which would preclude application of this Court's dismissal of its negligence claim as the law of the case; (2) the Court overlooked caselaw that its negligent misrepresentation claim is based on a different kind of duty than the previously dismissed negligence claim; and (3) the Court overlooked the discretionary nature of the "law of the case" doctrine in light of new evidence establishing a "special relationship" between it and Heath.

1. Negligent Misrepresentation as a Fraud Claim

[3] St. Paul's assertion that its negligent misrepresentation claim is a fraud-based claim raises the very same argument previously considered and rejected by this Court in its December 1995 Opinion. *St. Paul Fire and Marine Ins. Co.*, 1996 WL 19028, at *9 n. 24. The Court held that negligent misrepresentation is not a fraud action, as its essential elements (e.g., duty of care) differ from fraud (e.g., scienter). *Id.* Because St. Paul has failed to cite any controlling decisions overlooked by the Court in the December 1995 Opinion, its motion for reargument on this ground is denied. [FN2]

FN2. In further support of this argument, St. Paul contends that this Court's May 1993 Opinion, which held that a fraud action may lie where a party has a duty to disclose information, casts doubt on its finding in the December 1995 Opinion that negligent misrepresentation is not a fraud action. (See Pl.'s Mem. Supp. Mot. Recons. at 4.) St. Paul never argued this point in its original motion. To do so in a motion for reargument is improper. See, e.g., *McMahan & Co. v. Donaldson, Lufkin & Jenrette Secs. Co.*, 727 F.Supp. 833, 834 (S.D.N.Y.1989) (denying reargument on issue not

previously raised by movant in original motion because motion cannot "plug gaps" with additional matters).

2. Duty Alleged in Negligent Misrepresentation Claim

St. Paul also seeks reargument because, it claims, a "fundamental" difference exists between the duty of a negligent misrepresentation claim (pleaded in the First Amended Complaint) and a negligence claim (pleaded in the Original Complaint). (See Pl.'s Mem. Supp. Mot. Recons. at 6-11; Pl.'s Mem. Further Supp. Mot. Recons. at 8.) St. Paul argues that the Court overlooked caselaw that its negligent misrepresentation claim is based on a different duty than the previously dismissed negligence claim. The Court, however, did not "overlook" St. Paul's "new duty" claim. To the contrary, the Court's December 1995 Opinion explicitly addressed the argument, [FN3] but simply did not agree with *203 Plaintiff's characterization. St. Paul Fire and Marine Ins. Co., 1996 WL 19028, at *10. The Court found no fundamental difference between the negligent misrepresentation claim, which was simply more detailed, and the previously dismissed negligence claim. *Id.* at *10 n. 25. The court held that the duty element of both claims "arose out of the same factual predicate." *Id.* at *10.

FN3. In fact, the December 1995 Opinion discusses the same paragraphs of the Original Complaint and the First Amended Complaint that St. Paul cites in its Memorandum of Law in Support of Motion for Reconsideration or Reclarification. Compare St. Paul Fire and Marine Ins. Co., 1996 WL 19028, at *9-*10 n. 25 (discussing ¶¶ 68, 93-94 of Original Complaint in conjunction with ¶¶ 72-75, 190, 192 of First Amended Complaint) with Pl.'s Mem. Supp. Mot. Recons. at 10-11 (comparing ¶¶ 68, 94 of Original Complaint with First Amended Complaint).

Here, once again, St. Paul offers no set of facts or caselaw overlooked by the Court in reaching its determination. [FN4] Even if the Court granted reargument on this ground, St. Paul's "new duty" claim is unavailing. In the

Original Complaint, St. Paul alleged that "[a] reinsurance broker owes a duty of care as a professional to all parties in the negotiation and placement of reinsurance and retrocession transactions." Original Complaint ¶ 93. Similarly, in its motion papers, St. Paul bases its negligent misrepresentation claim on "allegations that Heath acted as a professional independent reinsurance broker." (See Pl.'s Mem. Supp. Mot. Recons. at 7.) These claims allege the same duty, that of a "professional broker" to a reinsurer. Thus, contrary to St. Paul's argument, no new duty has been asserted.

FN4. St. Paul also argues that the Court overlooked the fact that the Original Complaint did not include a negligent misrepresentation claim and, thus, incorrectly "conclud[ed] that the new negligent misrepresentation claim was always part of St. Paul's negligence claim that had been dismissed." (See Pl.'s Mem. Supp. Mot. Recons. at 9-10.) Once again, St. Paul attempts to make arguments not previously raised in its original motion. Thus, reargument is inappropriate on this ground. In any event, St. Paul's argument is unpersuasive because it misperceives this Court's "law of the case" ruling. Contrary to St. Paul's reading of the Court's December 1995 Opinion, the Court did not find that St. Paul pled negligent misrepresentation in the Original Complaint, thereby requiring dismissal under the "law of the case" doctrine. Rather, the Court discarded St. Paul's negligent misrepresentation claim because it agreed with the July 1995 Report's finding that St. Paul "had not identified any source of a duty that could give rise to a cause of action for negligence against Heath." St. Paul Fire and Marine Ins. Co., 1996 WL 19028, at *9. This finding pertained to all negligence claims, including negligent misrepresentation. Cf. *Hudson Eng'g Assocs. v. Kramer*, 204 A.D.2d 277, 277, 614 N.Y.S.2d 157, 158 (2nd Dep't 1994) (upholding summary judgment for defendant on negligence and negligent misrepresentation claims because no triable issue of fact existed as to whether defendant owed duty of care to plaintiff).

3. Failure to Properly Exercise Discretion

St. Paul argues that the Court "failed to give proper consideration" to the discretionary nature of the law of the case doctrine in light

of new facts evidencing its "special relationship" with Heath. (See Pl.'s Mem. Supp. Mot. Recons. at 11-13.) St. Paul, however, did not make this argument before the Court in its original motion. This new assertion, therefore, does not provide a basis for reargument. See, e.g., Walsh, 918 F.Supp. at 114-15 (denying reargument because movant did not raise argument in original motion).

C. Negligent Misrepresentation Claim Would Still Fail

[4] Even if the Court granted St. Paul reargument on its "special relationship" claim, it would prove unavailing. In the July 1995 Report, Magistrate Judge Lee found St. Paul's negligent misrepresentation claim legally insufficient because the record failed to reflect a "special relationship" between St. Paul and Heath. July 1995 Report at 52-54. The Court agrees.

[5][6] Under New York law, there is no cause of action for negligent misrepresentation absent a "special relationship of trust or confidence between the parties." *American Protein Corp. v. AB Volvo*, 844 F.2d 56, 63-64 (2d Cir.), cert. denied, 488 U.S. 852, 109 S.Ct. 136, 102 L.Ed.2d 109 (1988). Something more than the trust and reliance between an ordinary buyer and seller must be established. *Id.*; *Estate of T.C. Sabarese v. First Nat'l Inv. Corp.*, No. 92 Civ. 8139(LAP), 1994 WL 573320, at *4 (S.D.N.Y.1994). Furthermore, to establish a special relationship, an "arm's length business relationship is not enough." *United Safety of Am., Inc. v. Consolidated Edison Co.*, 213 A.D.2d 283, 623 N.Y.S.2d 591, 593 (1st Dep't 1995); see, e.g., *Banque Arabe Et Int'l D'Investissement v. Maryland Nat'l Bank*, 819 F.Supp. 1282, 1292-93 (S.D.N.Y.1992) (no "special relationship" found between sophisticated financial institutions who negotiated agreement in arms-length transaction), *aff'd*, 57 F.3d 146 (2d Cir.1995). Finally, where no triable issue of fact as to the "special relationship" element exists, summary judgment on the negligent misrepresentation claim is appropriate. See, e.g., *Congress Finan. Corp. v. John Morrell &*

Co., 790 F.Supp. 459, 474 (S.D.N.Y.1992) (granting summary judgment for defendant on negligent misrepresentation claim upon finding no evidence that parties had "closer degree of trust and confidence" than ordinary contractual relationship).

[7][8] St. Paul contends that a professional "independent insurance broker owes a duty of care" to a third-party reinsurer who contracted with its principal. (See Pl.'s Mem. Supp. Mot. Recons. at 8, 13 (citing *Ambassador Ins. Co. v. Truly Nolan of Am., Inc.*, 514 F.Supp. 985 (S.D.N.Y.1981) ("Ambassador I").) St. Paul's argument fails. An ordinary relationship of broker to insurer does not, by itself, give rise to a "special relationship." See *Ambassador Ins. Co. v. Euclid Servs., Inc.*, No. 80 Civ. 1235 (CBM), 1984 WL 341 (S.D.N.Y.1984) ("Ambassador II"). [FN5] St. Paul asks this Court to extend the law to permit any conduct by a broker with regard to reinsurer who contracts with its principal to result in a "special relationship." This request has no basis in law or the facts of this case.

FN5. St. Paul's reliance on *Ambassador I* is unpersuasive, as the court subsequently dismissed plaintiff insurer's negligent misrepresentation claim on a motion for summary judgment. See *Ambassador II*, 1984 WL 341, at *4. In that case, the court held that no "special relationship" arose, as a matter of law, from the "normal relationship of broker to insurer." *Id.* Two factors convinced the court that no "special relationship" existed between the parties. First, there was no contract binding plaintiff insurer and defendant broker. *Id.* Second, "nothing in their conduct [during negotiations] created a special relationship." *Id.* Because plaintiff failed to show that defendant had assumed obligations beyond the conventional duties of a broker as in other cases, the court granted summary judgment on the negligent misrepresentation claim to defendant. *Id.* In this case, nothing in the record suggests that Heath assumed any responsibilities beyond its conventional duties as a broker.

St. Paul also argues that its "face-to-face negotiations" with Heath give rise to a "special relationship." (See Pl.'s Mem. Supp. Mot. Recons. at 13 (citing *MEI Int'l Inc. v. Schenkers Int'l Forwarders, Inc.*, 807 F.Supp.

979 (S.D.N.Y.1992); Polycast Technology Corp. v. Uniroyal, Inc., 792 F.Supp. 244 (S.D.N.Y.1992).) [FN6] Contrary to St. Paul's assertions, "ordinary arm's length negotiations" do not create a special relationship sufficient to sustain an action for negligent misrepresentation. American Protein Corp., 844 F.2d at 64; see also, Accusystems, Inc. v. Honeywell Information Sys., Inc., 580 F.Supp. 474, 481 (S.D.N.Y.1984) (finding no special relationship between plaintiff buyer and defendant seller after months of negotiations and assurances by defendant's salesmen as to quality of goods); Sanitoy, Inc. v. Shapiro, 705 F.Supp. 152, 155 (S.D.N.Y.1989) (if seller's "representation that a buyer can rely on his expertise and the buyer's reliance were enough to create the necessary special relationship, the exception would swallow the rule.").

FN6. In further support of this argument, St. Paul cites *Mallis v. Bankers Trust Co.*, 615 F.2d 68, 82-83 (2d Cir.1980), cert. denied, 449 U.S. 1123, 101 S.Ct. 938, 67 L.Ed.2d 109 (1981). The *Mallis* court applied the majority rule, derived from § 552 of the Restatement (2d) of Torts, which provides: "that the seller be acting in the course of his business, that the information be supplied for the guidance of the buyer, and that the buyer justifiably relied on it." *Id.* at 83. The Second Circuit predicted that the New York courts would adopt the Restatement test. *Id.* However, in 1989, the New York Court of Appeals rejected the Restatement test, adopting the more-restrictive limited privity rule. See *Ossining Union Free Sch. Dist. v. Anderson*, 73 N.Y.2d 417, 541 N.Y.S.2d 335, 338, 539 N.E.2d 91, 95 (1989) (defining duty element "more narrowly than other jurisdictions" and rejecting Restatement rule). Accord *Susan L. Martin, If Privity is Dead, Let's Resurrect It: Liability of Professionals to Third Parties for Economic Injury Caused By Negligent Misrepresentation*, 28 *Am. Bus. L.J.* 649, 656 (1991) (noting *Ossining*'s rejection of Restatement's actually foreseen test and adoption of limited privity rule); *Michael W. Martin, Fairness Opinions and Negligent Misrepresentation: Defining Investment Bankers' Duty to Third-Party Shareholders*, 60 *Fordham L.Rev.* 133, 153-156 (1991) (same). Thus, *Mallis* is unpersuasive.

The cases upon which St. Paul relies to support this argument are not analogous. In *205 *MEI Int'l Inc.*, the plaintiff sought the professional advice of the defendant, a customs broker that "held itself out as an expert." 807 F.Supp. at 986. The court imposed a duty of care on the defendant because the plaintiff's specific request that the defendant act as an "honest broker," as it had done on two prior occasions, created a reasonable expectation between the parties that the plaintiff would rely on the defendant's professional advice. *Id.* Here, on the other hand, Heath negotiated with St. Paul on *Farex's* behalf. There is nothing in the record to suggest that St. Paul sought Heath's advice. Nor does the evidence in the record support a finding that Heath acted as a "broker" ("honest" or otherwise) on St. Paul's behalf.

Polycast is also distinguishable. In that case, the corporate defendants sold their subsidiary to the plaintiff. *Polycast*, 792 F.Supp. at 247. In denying defendants' summary judgment motion, the court found a special relationship between the parties because the defendants "repeatedly vouched for their projections" of the earnings of the subsidiary, had superior information throughout the negotiations, and formed a new corporation capitalized with over \$100 million to effect the transaction. *Id.* at 270. In this case, by contrast, no evidence suggests, nor does St. Paul assert, that Heath made assurances, promises, or warranties to induce St. Paul to sign the Contract. No evidence in the record supports a finding that the negotiations for the Contract required any additional effort or investment by Heath to effect the transaction.

Lastly, St. Paul argues that the "long-term relationship between *Kearney* and *Heath*" gives rise to a "special relationship." (See *Pl.'s Mem. Supp. Mot. Recons.* at 14 (citing *Thomas v. N.A. Chase Manhattan Bank*, 1 F.3d 320 (5th Cir.1993).)) St. Paul's reliance on *Thomas* is misplaced. In that case, an investor, not a party to the case, hired defendant broker to locate an investment partner. *Thomas*, 1 F.3d at 322. Defendant contacted plaintiff, its business cohort on other

projects, as a prospective partner for the investor. *Id.* at 327. Defendant sought a broker's fee from plaintiff and the investor. *Id.* at 324. Plaintiff formed a partnership with the investor based on defendant's assurances that the investor was a "highly-valued client"; the relationship, however, proved ruinous. *Id.* at 322.

Plaintiff sued defendant for negligent misrepresentation and the court found a "special relationship" between the parties based on their prior dealings and evidence in the record that defendant approached plaintiff for a "broker's fee." *Id.* at 327. The court held that defendant "was not directly opposite" to plaintiff in the transaction, but instead served as an "intermediary" between plaintiff and the investor. *Id.* at 324. Here, nothing in the record suggests that Heath served in any way as a broker on St. Paul's behalf or that Heath acted as an "intermediary" between St. Paul and Farex. Thus, Thomas is inapposite.

As the foregoing discussion has demonstrated, the cases finding a "special relationship" between parties with prior or ongoing dealings involve more intimate associations than ordinary business transactions. See, e.g., *Brown v. Stinson*, 821 F.Supp. 910, 915 (S.D.N.Y.1993) (finding "special relationship" between defendant investment advisor and plaintiff because plaintiff relinquished control of her money to defendant and viewed defendant as her advisor); *Mathis v. Yondata*, 125 Misc.2d 383, 480 N.Y.S.2d 173, 178 (Sup.Ct. Monroe County 1984) (denying defendants' motion for summary judgment on negligent misrepresentation claim because detailed promises, representations, and warranties made by defendants for purpose of guiding plaintiffs in business relationship created "special relationship" between parties); *Coolite Corp. v. American Cyanamid Co.*, 52 A.D.2d 486, 384 N.Y.S.2d 808, 811 (1st Dep't 1976) (finding "intrinsically [] more intimate association" than ordinary business relationship between parties because defendant required plaintiffs to form new company with solid capitalization before

parties could enter distributorship agreement); see also *supra* pp. 204-05 (distinguishing *MEI*, *Polycast*, and *Thomas*).

Nothing in the record shows that Heath committed itself to any additional effort, expense, or warranty with regard to the Contract. As evidence of a special relationship, *206 St. Paul offers: (1) Kearney's testimony concerning his prior dealings with Heath and their discussions about the Contract, and (2) MacKensie-Green's testimony regarding his relationship with Kearney. This evidence, however, does not fall within the rubric of essential factors required by caselaw to create a "special relationship."

The portion of Kearney's deposition relied upon by St. Paul indicates the following: (1) Kearney first spoke to Heath about the Contract in mid-October 1988; (2) Kearney requested additional loss information from Heath; (3) Playford told Kearney that the lineslip was "running very well, although some of the accounts still had a way to go" before executing the renewal slip; and (4) Kearney dealt primarily with Playford and MacKensie-Green at Heath, which was one of the top five brokers providing business to St. Paul. (See Pl.'s Objections July 1995 Report at 26-27 (citing Kearney Dep. at 13, 18-19, 1250, 1283-85 attached at Ex. B, at G and H to App. Exs. Pl.'s Objections July 1995 Report ("Kearney Dep.")).) This testimony shows nothing more than an arm's length business transaction. [FN7]

FN7. A portion of the Kearney deposition which St. Paul fails to cite supports the Court's conclusion. In his testimony, Kearney made clear that St. Paul and Heath occupied "opposing" sides, negotiating vigorously to achieve their own ends. See Kearney Dep. at 21-22 (describing negotiations as "we were at opposing [sides]--it's quite normal for a broker--we call it broking, to broke an underwriter, It's how business is done."). Kearney further testified that he independently judged Heath's presentation of the Contract, which he skeptically viewed as a "broker argument." See *id.* at 32 ("I agreed with [Playford] ... that the worst case scenario ... would be about \$2-1/2 million.... Now, John's a broker.

This was part of his broker argument, but given what we were discussing, I agreed with his analysis").

It Is So Ordered.

976 F.Supp. 198

In its brief, St. Paul asserts that "MacKensie-Green and Kearney testified that they had a relationship of trust and reliance." (See Pl.'s Mem. Supp. Mot. Recons. at 14.) In fact, MacKensie-Green testified that he had a "good relationship" with Kearney. (See MacKensie-Green Dep. at 158.) The fact that the parties had a "good relationship" does not evidence that they enjoyed a special relationship more "intimate" than an ordinary business relationship.

END OF DOCUMENT

Accordingly, the court finds nothing in the record to support the existence of a special relationship between St. Paul and Heath. Thus, even if the Court were to grant reargument, Heath would again prevail on its motion.

II. St. Paul's Motion for Reclarification

St. Paul asks the Court to clarify the portion of the December 1995 Opinion that states: "[t]he Magistrate Judge found that Plaintiff failed to point to any duty owed to St. Paul by Heath." (See Pl.'s Mem. Supp. Mot. Recons. at 16 (citing St. Paul Fire and Marine Ins. Co., 1996 WL 19028, at *9.)) St. Paul claims that, without clarification, "Heath might argue that, in the context of St. Paul's fraud claim, this Court had determined that it would not have a duty to disclose omitted material facts to St. Paul...." (Id.) The Court's December 1995 Opinion, however, made clear that its prior dismissal of St. Paul's negligence claim precluded St. Paul from pleading additional negligence claims. St. Paul Fire and Marine Ins. Co., 1996 WL 19028, at *9. In no way does the December 1995 Opinion suggest that St. Paul's fraud claim is now dismissable. Thus, that portion of the December 1995 Opinion is self-explanatory and need not be clarified.

CONCLUSION

For the foregoing reasons, St. Paul's motions for reargument and clarification of its December 1995 Opinion are denied.

81

Unpublished Disposition
(Cite as: 2004 WL 1949071 (N.Y.Sup.), 2004 N.Y. Slip Op. 50969(U))

Supreme Court, New York County.

STAN WINSTON CREATURES, INC. and
Stan Winston, Plaintiffs,

v.

TOYS "R" US, INC., Warren Kornblum,
Andrew R. Gatto, Greg Staley, and John
Eyler, Defendants.

No. 604183/02.

Sept. 1, 2004.

HERMAN CAHN, J.

*1 Defendants move to dismiss the amended complaint for failure to state a cause of action, CPLR 3211(a)(7), and for failure to plead fraud and negligent misrepresentation with the requisite detail, id., 3016(b). The complaint essentially claims that defendants made false representations in order to induce plaintiffs to enter into a licensing agreement.

The Facts as Alleged:

Plaintiff Stan Winston is an award winning creator of creature-figures for the film industry. Plaintiff Stan Winston Creatures, Inc., is a production company, wholly-owned by Winston. Defendant Toys "R" Us is a retailer of toys and children's products. The individual defendants were executives at Toys "R" Us.

In the fall of 2000, plaintiffs were designing monster figures for the production of a motion picture series called "Creature Features," to be aired on the Cinemax and Home Box Office ("HBO") cable networks. The figures created for these movies were to become the basis of a new line of high-quality collectible toys.

In February 2001, the figures were displayed at a toy industry fair. They evoked significant interest from retailers (Complaint ¶ 11). At that time, plaintiffs and Toys "R" Us discussed a possible license for Toys "R" Us to market, promote, and sell the figures. A licensing agreement was entered into on July

3, 2001 between Stan Winston Creatures, Inc., and Toys "R" Us (id., ¶ 21, Ex. A).

Plaintiffs allege that defendants made fraudulent representations to induce them to enter into the agreement (Complaint ¶¶ 13-18). They allege that on April 3, 2001, defendants Eyler, Kornblum, and Staley met with Winston to discuss entering into an agreement. Eyler brought a scale model of the new Toys "R" Us store located in Times Square, to the meeting, and stated that Toys "R" Us would create a permanent Stan Winston "store within a store" at that prominent retail location (id., ¶¶ 13-14). Eyler asserted that the Winston store would "grow as the business grew" and would be in place for the opening ceremony of the new Times Square store, which was to be a major public relations extravaganza (id., ¶ 15). Plaintiffs assert that they were told by Eyler that he planned to create a new image for Toys "R" Us, and change the store from a toy supermarket to a more upscale store that sold exclusive products (id., ¶ 16). Eyler, Kornblum, and Staley are further alleged to have represented that the Winston figures would be sold in all Toys "R" Us stores (id., ¶ 17).

Kornblum is alleged to have told Winston, on a June 1, 2001 conference call with Staley and defendant Gatto, that Toys "R" Us had 708 stores in the United States and stores in 26 other countries "and that the toys would be sold in all of these countries and stores throughout the world and that hundreds of thousands of collectors came into Toys 'R' Us to buy such toys" (Complaint ¶ 18). Gatto is alleged to have claimed that Toys "R" Us "had an established customer base for the toys and that Toys 'R' Us could bring down the cost of making the toys because Toys 'R' Us had leverage with factories" (id.).

*2 The Licensing Agreement is for an initial term of three years with an option to renew, and contains (1) a general merger clause; (2) indemnification clauses for both licensee and licensor; (3) a requirement for Toys "R" Us to

make an advance payment of \$1,000,000.00 to Stan Winston Creatures, Inc.; (4) a clause stating that the territory covered by the Agreement was "[w]orldwide, in all distribution channels currently existing or hereafter developed, including, without limitation, retail stores and the internet;" (5) a provision that the licensor would source the factories to manufacture the first two series; [FN1] (6) a provision that the parties would mutually select the factories for all series thereafter, with the licensor having final approval over the selection; (6) a requirement that the licensee purchase a minimum of 125,000 units for resale in each series during the term; and (7) a termination provision for the licensee, providing that the licensor has 30 days to cure; but that if the default went uncured, the licensor would receive all accrued royalties and the licensee would obtain a partial refund of the \$1,000,000.00 original payment minus \$1.00 for each item already produced (Complaint Ex. A).

FN1. "Series" is defined as a set of related action figures pertaining to the same motion picture; the first set was required to include five figures and later series were required to consist of no less than five (Agreement at 3).

The Agreement also included a specific "Promotions" clause stating, in part, that:

Licensee shall use its best efforts to market and promote the sale of Licensed Articles, including, without limitation, conducting a public relations campaign to announce the launch of each new series of Licensed Articles, the placement of Licensed Articles on end cap display fixtures in each store in which the Licensed Articles are sold and the placement for sale of Licensed Articles in Licensee's store in Times Square, New York City after such store is open.
(Agreement at 5.)

Plaintiffs allege that after executing the Agreement, they discovered that Toys "R" Us (1) did not own or control stores outside the United States and, therefore, could not require foreign stores to sell the figures; (2) did not have a ready market for high quality collectibles or hundreds of thousands of

customers for the figures; (3) did not have leverage with factories, thereby resorting to the same manufacturer that plaintiffs had originally found; and (4) never intended to create a permanent "store within a store" for plaintiffs at its Times Square location. Plaintiffs assert that Toys "R" Us only designed their project to be temporary, and that it only briefly featured the Stan Winston figures as part of a retail exhibit (Complaint ¶ 19).

Plaintiffs further allege that Toys "R" Us refused to manufacture, market, and sell the figures, and to pay royalties and design costs (Complaint ¶ 45).

The amended complaint asserts five causes of action: (1) fraud against all defendants; (2) negligent misrepresentation against all defendants; (3) breach of contract against Toys "R" Us; (4) a demand for a declaration that the Agreement be deemed terminated due to breach by Toys "R" Us; and (5) a permanent injunction against Toys "R" Us, restraining it from any further use of plaintiffs' name in connection with the manufacturing, marketing, or sale of plaintiffs' products.

*3 Plaintiffs seek damages in excess of \$25,000,000.00.

Discussion:

On a motion to dismiss for failure to state a claim, CPLR 3211(a)(7), "the court should accept as true the facts as alleged in the complaint, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (Ark Bryant Park Corp. v. Bryant Park Restoration Corp., 285 A.D.2d 143, 150 [1st Dept 2001] [citations omitted]). "Moreover, the interpretation of an unambiguous contract is a question of law for the court, and the provisions of the contract delineating the rights of the parties prevail over the allegations set forth in the complaint" (id. [citations omitted]).

Fraud

*3 (Cite as: 2004 WL 1949071 (N.Y.Sup.), 2004 N.Y. Slip Op. 50969(U))

To plead a cause of action for fraud, plaintiffs must allege: (1) a representation of material fact; (2) the falsity of that representation; (3) knowledge by the party that made the representation that it was false when made; (4) justifiable reliance; and (5) injury (*Kaufman v. Cohen*, 307 A.D.2d 113, 119 [1st Dept 2003]). In addition, CPLR 3016(b) requires that a fraud claim be pleaded in sufficient detail to give adequate notice of the incidents complained of (*Houbigant, Inc. v. Deloitte & Touche LLP*, 303 A.D.2d 92, 97 [1st Dept 2003]; *Fort Ann Cent. School Dist. v. Hogan*, 206 A.D.2d 723, 724 [3d Dept 1994]).

Defendants respond that the alleged misrepresentations are not actionable in light of an express "Promotions" provision in the Agreement (at 5), making no mention of a permanent "store within a store." Rather, that provision obligates Toys "R" Us to implement the "placement" of the Winston figures on display fixtures, and "in Licensee's store in Times Square, New York City after such store is opened" (Complaint Ex. A at 5).

Defendants also argue that the merger clause in the Agreement (at 12) bars plaintiffs from asserting any reasonable reliance upon oral representations which may have preceded the Agreement.

Defendants' position is correct. The Agreement is permeated with details of the parties' working relationship under numerous chapter headings, including "Licensed Property," "Licensed Articles," "Territory," "Series," "Royalties," "Sourcing," "Promotions," and even a provision entitled "Stan Winston Website," which addresses the licensor's right to maintain an Internet website (Complaint Ex. A at 1-6). The Agreement also sets forth, in similar detail, matters such as "Representations," consisting of the parties' representations to each other in connection with their business relationship (*id.*, at 6-8), "Indemnification," "Insurance," and "Miscellaneous" points of agreement (*id.*, at 8-12). All the provisions are clear and unambiguous and are, therefore, enforceable no more or no less to the extent of the "plain meaning" of their terms (*Greenfield v. Philles*

Records, Inc., 98 N.Y.2d 562, 569 [2002]). "Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add or vary the writing" (*W.W.W. Assocs., Inc. v. Giancontieri*, 77 N.Y.2d 157, 162 [1990]).

*4 The Agreement contains both a no-oral-modification clause (at 11) and a merger clause (at 12). The merger clause provides:

This Agreement constitutes the entire agreement between the parties regarding the subject matter hereof and supersedes and replaces any and all prior agreements and understandings between them regarding such subject matter.

Plaintiffs' assertions of alleged pre-contractual representations, forming the foundation of the fraud claims, are not actionable because to recognize them would be to impermissibly add to the parties' written agreement, running afoul of the aforesaid principles. In addition, any possible reliance upon such representations would have been unjustified (*Kaufman v. Cohen*, *supra*) due to the fact that the Agreement clear and unambiguous as it is fully integrated, and permits of no other terms which are not expressed therein (*Pine Equity NY, Inc. v. Manhattan Real Estate Equities Group LLC*, 2 AD3d 248 [1st Dept 2003]). Indeed, this is especially so here, where the parties took pains to articulate their "Representations," which do not include the various alleged pre-contractual representations alleged herein (Complaint Ex. A at 6-8). Nor, as noted, do those representations appear in the specific provisions addressing the parties' "Business Terms and Conditions" (*id.*, at 1-6).

Distinct of the foregoing, certain of the allegations fail to make out a viable claim under the pleading requirements peculiar to fraud. For example, it is alleged that defendants falsely represented that Toys "R" Us had an established customer base for the figures and an ability to keep manufacturing costs at a minimum due to its leverage with factories. Plaintiffs allege that Toys "R" Us representatives informed them, after they entered into the Agreement, "that sales could

*4 (Cite as: 2004 WL 1949071 (N.Y.Sup.), 2004 N.Y. Slip Op. 50969(U))

not be expected to be better because Toys 'R' Us' primary demographic was not the more mature collectors of such toys but was actually 'mothers buying for 6 and 7 year olds' " (Complaint ¶ 19[b]), and that Toys "R" Us would use the same manufacturer that Winston originally used to make the figures (id., ¶ 19[c]).

It is plaintiffs' burden to provide sufficient particularized allegations of all the essential elements of fraud, including a false statement (Lovett v. Allstate Ins. Co., 86 A.D.2d 545, 546 [1st Dept 1982] ["In proving an allegation of fraud, an essential element is that the representation must have been false when it was made"], affd 64 N.Y.2d 1124 [1985]). Plaintiffs fail to plead in sufficient detail how the above representations are false.

The information regarding Toys "R" Us' primary demographic does not contradict Toys "R" Us' alleged statement of having an established customer base for the figures. Even if it were true that Toys "R" Us customers primarily consisted of mothers buying toys for their 6 and 7 year olds, and that the figures did not appeal to these type of customers, this did not necessarily mean that there was no established customer base for the figures.

*5 In like fashion, the information regarding Toys "R" Us' intention to use the same manufacturer originally located by Stan Winston, does not necessarily run afoul of defendants' alleged representation of having leverage with factories to produce the figures more profitably. More importantly, the provision entitled "Sourcing" (Agreement at 4) provides that: (1) plaintiffs were responsible for sourcing the factories to manufacture the first two series; (2) the parties would mutually select the factories for all series thereafter; and (3) plaintiffs would retain final approval rights over the selection of factories. Plaintiffs' allegations, which are contradicted by the express terms of the Agreement, cannot be presumed to be true (e.g., Skillgames, LLC v. Brody, 1 AD3d 247 [1st Dept 2003]).

Accordingly, the motion to dismiss the

causes of action for fraud is granted.

Negligent Misrepresentation

A claim for negligent misrepresentation exists where: (1) a special relationship of trust or confidence existed, thereby creating a strict duty for the defendant to impart correct information to the plaintiff; (2) the information given was false; and (3) there was reasonable reliance upon the information given (Hudson River Club v. Consolidated Edison Co., 275 A.D.2d 218, 220 [1st Dept 2000]). This claim cannot be predicated on a duty arising out of a contract; the duty must arise independent of contract (Rodin Props.-Shore Mall N.V. v. Ullman, 264 A.D.2d 367, 368 [1st Dept 1999]; Winter v. Beale, Lynch & Co., 198 A.D.2d 124, 125 [1st Dept 1993], lv denied 83 N.Y.2d 944 [1994]). CPLR 3016(b) also requires negligent misrepresentation claims to be pleaded in sufficient detail (Tarzia v. Brookhaven Natl. Lab., 247 A.D.2d 605 [2d Dept 1998]).

Plaintiffs argue that the negligent misrepresentation claim is properly pleaded, based on an asserted special relationship resulting from: (1) Toys "R" Us' superior knowledge; (2) the fact that the statements were made during face-to-face negotiations; and (3) defendants' intent to change Winston's position in reliance on those statements. In support, plaintiffs rely on R. Freedman & Son, Inc. v. A.I. Credit Corp. (226 A.D.2d 1002 [3d Dept 1996]) an action alleging nonpayment under an equipment lease. Plaintiff in that action did not claim negligent misrepresentation based on statements regarding the lease. Rather, it based the claim on defendants' statements made after the action was over, during the course of settlement negotiations. The court held that the statements made during the course of settlement negotiations established a special relationship between the parties (id., at 1003).

Here, by contrast, at the time the alleged representations were made, there was no special relationship between the parties. Plaintiffs fail to show anything more than arms' length dealing between separate

*5 (Cite as: 2004 WL 1949071 (N.Y.Sup.), 2004 N.Y. Slip Op. 50969(U))

business entities, which does not give rise to a special relationship to support a cause of action for negligent misrepresentation (*Andres v. LeRoy Adventures, Inc.*, 201 A.D.2d 262 [1st Dept 1994]; *Deven Lithographers, Inc. v. Eastman Kodak Co.*, 199 A.D.2d 9, 10 [1st Dept 1993]). Given the arms' length nature of the parties' relationship, the mere allegation that plaintiffs relied on advice received from Toys "R" Us about the production and marketing of toy figures, and that Toys "R" Us was aware of any such reliance, does not suffice to state a claim for negligent misrepresentation (*Ravenna v. Christie's Inc.*, 289 A.D.2d 15, 16 [1st Dept 2001]).

*6 Moreover, as held above, any possible reliance upon the alleged negligent representations would have been unreasonable (*Hudson River Club v. Consolidated Edison Co.*, supra) due to the fact that are inconsistent with clear, unambiguous, and fully integrated terms of the parties' written agreement (*Pine Equity NY, Inc. v. Manhattan Real Estate Equities Group LLC*, supra).

Accordingly, the motion to dismiss the causes of action for negligent misrepresentation is granted.

Breach of Contract

Defendants first move to dismiss the breach of contract claim to the extent that it is brought by Stan Winston in his individual capacity. This is based on the fact that the Agreement is executed by him, in his official capacity, on behalf of Stan Winston Creatures, Inc. (Complaint Ex. A at 12; see also, *id.*, at 1 [defining only Stan Winston Creatures, Inc., as the "Licensor"]). Only the corporation has standing to sue for breach where it, as opposed to the individuals, is party to the contract (*Laing Logging Inc. v. International Paper Co.*, 228 A.D.2d 843 [3d Dept 1996]; *Del Castillo v. Bayley Seton Hosp.*, 172 A.D.2d 796 [2d Dept 1991]). Thus, the motion to dismiss the claims asserted by Stan Winston in his individual capacity is granted.

Defendants further move to dismiss the

breach of contract claim to the extent that it seeks to recover damages in excess of those purportedly limited in the "Indemnification" section of the Agreement (at 8-9). Subdivision (iv) thereof provides:

Neither party hereto shall have any liability to the other parties pursuant to this Agreement for any indirect, incidental or consequential damages of any nature whatsoever, including without limitation loss of income, profits or savings, and this limitation of liability shall extend to the parties' indemnification obligations hereunder.

(Complaint Ex. at 9.)

The court does not construe this portion of the Indemnification provision as applying to the breach of contract claim. "The gravamen of an action for indemnity is that both parties, indemnitor and indemnitee, are subject to a duty to a third person under such circumstances that one of them, as between themselves, should perform it rather than the other" (*City of New York v. Lead Indus. Assoc., Inc.*, 222 A.D.2d 119, 125 [1st Dept 1996]). It is undisputed that defendants drafted the Agreement. Defendants fail to demonstrate how the above subdivision of the Indemnification provision waives plaintiffs' right to sue for damages sustained by defendants' own actions, as alleged, constituting breach of the contract.

Defendants further posit that certain of the allegations supporting the breach of contract claim are contradicted by the terms of the Agreement. Contrary to that position, the court finds that the first allegation that "Toys 'R' Us has failed and refused to market, promote and sell the Creatures throughout the world" is consistent with page 2 of the Agreement, which expressly defines the "Territory" covered by the Agreement as "Worldwide...." (Complaint Ex. A at 2.) By the same token, plaintiffs' second allegation that "Toys 'R' Us has failed and refused to proceed with the manufacture and production of additional series of Creatures" is consistent with the "Series" provision of the Agreement (at 3), which defines a variety of series of figures which are subject to the license

*6 (Cite as: 2004 WL 1949071 (N.Y.Sup.), 2004 N.Y. Slip Op. 50969(U))

granted by Winston to Toys "R" Us, and which, accordingly, Toys "R" Us bears a contractual duty to promote.

END OF DOCUMENT

*7 Accordingly, the motion to dismiss the breach of contract claim is denied. [FN2]

FN2. In view of the dismissal of the fraud and negligent misrepresentation claims, which were the only claims asserted against the individual defendants (Complaint at 7, 8), those defendants are severed from this action as parties (CPLR 1003).

Declaratory and Injunctive Relief

Defendants seek dismissal of the declaratory and injunctive claims to the extent that the underlying claim for breach of contract is dismissed. In light of the above disposition, this branch of the motion to dismiss is likewise denied.

Conclusion:

Accordingly, it is

ORDERED that the motion to dismiss the causes of action for fraud is granted; and it is further

ORDERED that the motion to dismiss the causes of action for negligent misrepresentation is granted; and it is further

ORDERED that the motion to dismiss the causes of action asserted by Stan Winston, individually, is granted; and it is further

ORDERED that the motion to dismiss all causes of action as to the individual defendants is granted; and it is further

ORDERED that the motion to dismiss is, in all remaining respects, denied, and the action shall continue accordingly; and it is further

ORDERED that the clerk shall enter judgment accordingly.

4 Misc.3d 1019(A), 2004 WL 1949071 (N.Y.Sup.), 2004 N.Y. Slip Op. 50969(U) Unpublished Disposition

82

District Court of Appeal of Florida,
First District.

James M. STEPP, Jr., and Alison D. Stepp,
Appellants,

v.

STATE FARM FIRE & CASUALTY
COMPANY, Appellee.

No. 93-2023.

March 17, 1995.

Rehearing Denied July 18, 1995.

Homeowners' insurer sought declaratory judgment that policy did not cover insured's shooting of police officer. The Circuit Court, Duval County, Virginia Q. Beverly, J., ruled in favor of insurer. Police officer appealed. The District Court of Appeal held that shooting of insured's gun from back seat of police car was not "accident" and, therefore, was not "occurrence" within meaning of homeowners' policy.

Affirmed.

Benton, J., dissented and filed opinion.

West Headnotes

Insurance 2275

217k2275

(Formerly 217k435.36(6))

Insured's shooting of his gun from back seat of police car was not "accident" and, therefore, was not "occurrence" within meaning of homeowners' policy; although insured allegedly appeared peaceful and intoxicated, inference that he did not intend to fire gun directly at police officer would be based on speculation and conjecture, and officer's deposition was only evidence as to how shooting occurred.

*494 Michael R. Yokan of Kattman & Eshelman, P.A., Jacksonville, for appellants.

Jack W. Shaw, Jr., Harris Brown and Reginald Luster of Osborne, McNatt, Shaw, O'Hara, Brown & Obringer, P.A.,

Jacksonville, for appellee.

PER CURIAM.

This is an appeal of a final summary judgment in which the trial court determined that the undisputed facts showed the actions of the insured decedent, Billy Joe Herald ("Herald"), in shooting appellant James Stepp ("Stepp") were not an accident and thus did not constitute an occurrence under Herald's homeowner's insurance policy, and that the policy exclusion as to the actions of an insured which cause bodily injury which are either expected or intended or are the result of willful and malicious acts of the insured was applicable, thus there was no coverage. We affirm.

Herald shot Stepp while Stepp was serving as a reserve police officer in Jacksonville. According to Stepp's deposition, upon being informed that Herald appeared to be driving while intoxicated, he stopped Herald as Herald drove his automobile away from a convenience store. Several unmarked police cars followed behind Stepp. After Herald exited the car, Officer Stevens, who was dressed in plain clothes (and apparently had been driving *495 one of the unmarked cars) took over the investigation. Eventually, Stevens placed Herald in the back seat of Stepp's patrol car. Stepp did not frisk Herald because he thought Stevens had done so. Stepp did not handcuff Herald, who had been cooperative. Stepp then sat in the front seat of his patrol car waiting for a beat car to come and pick up Herald. Herald asked Stepp if he "was going to take him home or what." Stepp said no, that they were waiting for a beat car and that officer would decide what to do. About thirty seconds later Stepp heard a loud noise and felt pain in his head, and his front windshield shattered. Stepp exited the vehicle, drew his firearm, and took cover at the corner of the convenience store. Realizing that he was bleeding, he went inside the store and asked the clerk to call 911. Stepp did not return to the patrol vehicle. He was informed later that Herald had shot himself about an hour after he shot Stepp, and that Herald had

died. Stepp later learned that Herald had a gun holster in his boot. There were no other witnesses to the shooting of Stepp.

Stepp sued Herald's estate on several theories, including negligence, alleging that while seated in the rear of the patrol car, Herald had carelessly handled the firearm, which discharged, permanently injuring Stepp. Subsequently, State Farm, which issued Herald's homeowner's insurance policy, sued for a declaratory judgment as to coverage and its duty to defend. Early in the proceedings, the two suits were consolidated for discovery only. Judge Nachman denied State Farm's motion for summary judgment in the suit for declaratory judgment, finding that State Farm had not shown that there were no genuine issues or that, as a matter of law, the shooting was intentional and not the result of negligence. The trial court also denied State Farm's motion for summary judgment, and granted Stepp's motion for partial summary judgment, on the question of State Farm's duty to defend. This court denied certiorari review of that issue. [FN1]

FN1. The order denying certiorari review stated simply that the court was "unable to conclude that the order which is the subject of the petition constitutes a clear departure from the essential requirements of law, resulting in a miscarriage of justice which could not be remedied by appeal after the entry of a final judgment."

Subsequently, the cases were consolidated for trial. State Farm again moved for summary judgment. In addition to the deposition testimony of Stepp, which had formed the basis of the first motion for summary judgment, State Farm submitted the results of Herald's autopsy, which showed a blood alcohol level of .37 at the time of his death; however, the two motions for summary judgment were virtually identical insofar as the determinative issues were concerned. Judge Beverly granted summary final judgment in favor of State Farm, finding as indicated above. On appeal the Stepps challenge the correctness of the trial court's ruling on the motion for summary judgment and the propriety of its ruling contrary to the

predecessor judge.

The operative portion of the homeowner's policy provides:

Section II--Liability Coverage
Coverage L--Personal Liability

If a claim is made or suit is brought against an insured for damages because of bodily injury or property damage to which this coverage applies, caused by an occurrence, we will:

1. Pay up to our limit of liability for the damages for which the insured is legally liable; and
2. Provide a defense at our expense by counsel of our choice.

"Occurrence" is defined as used in Section II of the policy means "accident ... which results in ... bodily injury ... during a policy period."

Section II--Exclusions

1. Coverage L and Coverage M do not apply to:
 - (a) Bodily injury or property damage:
 - (1) which is either expected or intended by the insured;
 - or
 - *496 (2) to any person or property which is the result of the wilful and malicious acts of an insured. [FN2]

FN2. Appellants represented to this court that this excerpt from the policy is correct and is the only evidence of record of what the policy states.

Appellants contend that the record is silent as to what caused Herald's gun to discharge, and therefore the trial court erred in concluding that the undisputed material facts entitle State Farm to summary judgment. Further, appellants contend the trial court implicitly held that the discharge of the firearm was an intentional act not covered by the policy, and as such, the decision is contrary to the recent opinion in *Prudential Property and Casualty Insurance Co. v. Swindal*, 622 So.2d 467 (Fla.1993). Finally, appellants contend the trial court erred

reversibly by overturning the ruling of a predecessor judge. We disagree with each of appellants' contentions.

"[T]he burden to prove the non-existence of genuine triable issues is on the moving party," *Holl v. Talcott*, 191 So.2d 40, 43 (Fla.1966). "If the pleadings, depositions, answers to interrogatories, admissions, affidavits and other evidence in the file raise the slightest doubt upon any issue of material fact than a summary judgment may not be entered." *Connell v. Sledge*, 306 So.2d 194, 196 (Fla. 1st DCA 1975), cert. dismissed, 336 So.2d 105 (Fla.1976). Appellants argue there is no evidence that the shooting was not an accident, and no evidence that Herald expected or intended to cause injury to Stepp, thus State Farm could not prevail on summary judgment.

Appellants admit that the record is silent as to what caused Herald's firearm to discharge when Stepp was shot in the head, and that Stepp's deposition testimony is the only evidence of record as to how the shooting occurred. It is also apparent in this case that, because there were no witnesses other than Stepp and Herald, and Stepp has presented his recollection of the event, no additional substantial evidence as to how the shooting occurred is available. Appellant argues the fact that Herald appeared peaceful and also extremely intoxicated would permit a jury inference that the shooting occurred by accident. [FN3] In response to questioning at oral argument, appellants mentioned the possibility of presenting evidence as to the trajectory of the bullet as a basis for inferring that Herald did not intend to fire the gun directly at Stepp; however, we agree with appellee that, in this case, such inferences would necessarily be based impermissibly on speculation and conjecture.

FN3. "The words 'accident' and 'accidental,' as used in insurance contracts, mean that which happens by chance or fortuitously, without intention or design, and which is unexpected, unusual, and unforeseen." 31 Fla. Jur.2d "Insurance" § 680.

We are cognizant of the rule that the

plaintiff does not have to prove its case in response to a motion for summary judgment, *Department of Transportation v. Spioch*, 642 So.2d 788 (Fla. 1st DCA 1994) ("the movant must carry the burden of negating the existence of any basis of liability asserted against it; the plaintiff is not required to prove its case in response to a motion for summary judgment"). However, it is also the case that "to fulfill his burden, the movant must offer sufficient admissible evidence to support his claim of the nonexistence of a genuine issue.... If he succeeds, then the opposing party must demonstrate the existence of such an issue either by countervailing facts or justifiable inferences from the facts presented." *DeMesme v. Stephenson*, 498 So.2d 673, 675 (Fla. 1st DCA 1986) (emphasis supplied). The movant is not required "to exclude every possible inference from other evidence that may have been available." *Id.* We believe appellee, as the movant, met this requirement; under the unique circumstances of this case, it is not possible to reasonably infer from the facts available that the shooting was an accident. Thus there is no genuine triable issue as to whether an accident occurred within the policy coverage, and the trial court did not err in granting final summary judgment for State Farm. See generally *Cassel v. Price*, 396 So.2d 258 (Fla. 1st DCA 1981) (court concluded no view of the facts afforded reasonable conclusion of negligence by defendant; and summary judgment "is a proper and necessary means for accomplishing the purpose of terminating litigation short of a *497 jury trial, which satisfies the constitutional 'right of access' to the courts as a means of resolving civil disputes").

For a similar reason, we believe this case is distinguishable from *Swindal*. In *Swindal*, Castellano, the insured, who also did the shooting, was available to be a witness to the events surrounding the shooting, although the victim was unable to testify. A genuine issue remained in *Swindal* as to whether the gun discharged accidentally or intentionally, and there was evidence from which the trier of fact might conclude the gun was accidentally discharged, i.e., Castellano's testimony that

he did not intend to shoot Swindal, but that the gun accidentally discharged during a struggle. [FN4] There is no such evidence in the present case, nor can any be presented, from which a jury might conclude the gun was accidentally discharged.

FN4. The central legal question in that case was whether an intentional injury exclusion in a homeowner's policy excluded "coverage for bodily injuries sustained where the insured committed an intentional act intending to cause fear, but bodily injuries may have been caused accidentally and were not expected or intended by the insured to result." The supreme court answered that question in the negative.

Appellants also argue that Judge Beverly could not grant summary judgment when Judge Nachman had refused to do so, based on *Globe Aero Ltd, Inc. v. Air & General Finance Ltd.*, 537 So.2d 628 (Fla. 3d DCA 1988), in which the district court said that where the original trial judge entered a final default judgment, a successor judge could not review and reverse on the same facts the final order and decrees of his predecessor. In *Whitlock v. Drazinic*, 622 So.2d 142 (Fla. 5th DCA 1993), however, the court said a successor judge could grant final summary judgment on an amended motion for summary judgment where the previous judge had refused to grant summary judgment. The district court's theory was that if the original judge can reconsider and vary its own interlocutory orders up until the time final judgment is entered, i.e., could grant summary judgment after initially declining to do so, then a successor judge could also vacate or vary interlocutory orders. The instant case is more similar to *Whitlock* than to *Globe*, since it involves an initial interlocutory ruling denying summary judgment. We conclude the trial judge in the present case did not err in granting summary final judgment.

AFFIRMED.

JOANOS and WOLF, JJ., concur.

BENTON, J., dissents with opinion.

BENTON, Judge, dissenting.

A successor judge may revisit interlocutory orders entered in a case to which she succeeds before final judgment has been entered. *Whitlock v. Drazinic*, 622 So.2d 142 (Fla. 5th DCA 1993) (en banc) (affirming summary judgment entered by successor judge after predecessor judge had denied motion for summary judgment).

But entry of summary judgment is never appropriate in the absence of "sufficient admissible evidence to ... [demonstrate] the nonexistence of a genuine issue [of fact]." *DeMesme v. Stephenson*, 498 So.2d 673 (Fla. 1st DCA 1986).

A motion for summary judgment may only be granted if the pleadings, depositions, answers to interrogatories and admissions on file together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fla.R.Civ.P. 1.510(c). If the record reflects the existence of any genuine issue of material fact or the possibility of any issue, or if the record raises even the slightest doubt that an issue might exist, summary judgment is improper. *Crandall v. Southwest Florida Blood Bank, Inc.*, 581 So.2d 593 (Fla. 2d DCA 1991); *Gomes v. Stevens*, 548 So.2d 1163 (Fla. 2d DCA 1989). *Grissett v. Circle K Corp.*, 593 So.2d 291, 293 (Fla. 2d DCA 1992). The factual issue here is whether Mr. Herald intended or expected to do Officer Stepp bodily harm.

The fact "that the record is silent [i.e., inconclusive] as to what caused Herald's firearm to discharge," ante 496, is the very reason that the injured policeman is entitled *498 to have a jury decide whether, as he contends, it was accidental. Recently our supreme court held that summary judgment exonerating an insurance company under the same type of policy exclusion at issue here had to be reversed where the insured

approached Swindal's car with his loaded handgun, safety off, finger on the trigger. He reached inside Swindal's car with both hands to grab what he thought was a gun.

Swindal then grabbed [the insured's] gun and, in the struggle, the gun fired... Prudential Property & Casualty Ins. Co. v. Swindal, 622 So.2d 467, 469 (Fla.1993). While the insured in Swindal "maintain[ed] that the gun accidentally discharged," at 469, and death has forever silenced Mr. Herald, the evidence surrounding the discharge of this gun is no less ambiguous.

An autopsy report revealed that Mr. Herald had a blood alcohol level of .37% at the time of his death. In contrast to the belligerent insured in Swindal, he was "very polite, very cooperative, very apologetic." Officer Stepp testified on deposition:

From what I could see in the front of my patrol car, he was trying to do everything the officers told him to do and was laughing about it and just, you know, no resistance, no argumentative points.

"[I]nsureds whose insane acts result in ... otherwise covered losses are not excluded from coverage by reason of an intentional acts exclusion." Brown v. The Travelers Insurance Co., 641 So.2d 916, 922 (Fla. 4th DCA 1994). The same rule should apply to those they injure.

For some time before the shot, Officer Stepp detected no movement, and assumed that Mr. Herald had passed out again. Except for the shot itself, nothing he detected in Mr. Herald's behavior evinced any intention to do Officer Stepp bodily harm. Officer Stepp's nonchalance as he sat within reach of Mr. Herald, although with his back to him, is eloquent evidence of this fact. Officer Stepp's deposition is the main source of record evidence about events that night. Nothing of record disproves the factual allegation that the gunshot was accidental.

The decision in Gulf Life Ins. Co. v. Nash, 97 So.2d 4 (Fla.1957) is instructive. There the insured attempted to frighten his friends by holding a gun to his own chest and pulling the trigger three times, believing all three chambers to be empty. The insured was killed when the gun discharged on the third trigger pull. The insured's "act" in pulling the trigger and attempting to

frighten his friends clearly was intentional, but the insured's injury was deemed accidental within the meaning of the special accident insurance policy because the insured never intended to cause a fatal injury even though the shot flowed from an intentional act. Accordingly, the Court held the injury was covered by the policy in which the insurer had agreed to pay if the insured should meet his death by accidental means.

Swindal, at 470. Dissenting in Nash, Justice Thomas contended

that the injury should be excluded from coverage on the ground that the injury was the foreseeable consequence of a "dangerous, foolhardy act, and although the result was not intended, the means were deliberate as distinguished from accidental." 97 So.2d at 7 (Thomas, J., dissenting in part).

Swindal, at 470. Under Nash, not even evidence of a dangerous, foolhardy and deliberate act on Mr. Herald's part would warrant summary judgment. On the authority of Swindal, Nash, Stuyvesant Ins. Co. v. Butler, 314 So.2d 567, 570 (Fla.1975) and Poole v. Travelers Ins. Co., 130 Fla. 806, 814, 179 So. 138, 141 (1937), I respectfully dissent from affirmance of a summary judgment predicated on much less.

656 So.2d 494, 20 Fla. L. Weekly D693

END OF DOCUMENT

83

Supreme Court, New York County, New York,
Special Term, Part I.

William STRUNA, Plaintiff,

v.

Erving WOLF, Daniel Wolf, Daniel Wolf, Inc.,
and The Metropolitan Museum of
Art, Defendants.

By Original Summons and DANIEL WOLF,
INC., Third-Party Plaintiff,

v.

Victor WEINER a/k/a Victor Wiener, Third-
Party Defendant,

Brought in as a Party to Answer the
Counterclaims Herein.

Jan. 15, 1985.

Action was brought against museum and buyers to recover a balance claimed to be owed upon a contract to purchase a sculpture as well as upon a promissory note and check executed in connection with the purchaser of the sculpture. Upon museum's motion for summary judgment, the Supreme Court, Special Term, New York County, David B. Saxe, J., held that: (1) no joint venture or principal-agent relationship existed as between museum and buyers with regard to purchaser of a sculpture and therefore museum, which was not a signatory to promissory note and dishonored check, could not be held liable to seller for a breach of contract and for payment of the promissory note and the check, and (2) museum could not be held liable on account of its curator's alleged negligence in appraising of a piece of artwork to an individual, who, unbeknownst to curator or museum, was not actual owner of the artwork, but rather consignee who later purchased the work for resale, purportedly in reliance upon curator's alleged negligent statements as to the artwork's authenticity and value.

Motion granted.

West Headnotes

[1] Joint Adventures 1
224k1

[1] Principal and Agent 14(1)
308k14(1)

Under the circumstances, no joint venture or principal-agent relationship existed as between museum and buyers with regard to purchase of a sculpture and therefore museum, which was not a signatory to promissory note and dishonored check, could not be held liable to seller for a breach of contract and for payment of the promissory note and the check, even though museum's curator introduced seller to buyers, who were regular benefactors of museum, and the parties may have intended that sculpture would be on display at museum. McKinney's Uniform Commercial Code § 2-201(1).

[2] Fraud 23
184k23

Museum could not be held liable on account of its curator's alleged negligence in appraising of a piece of artwork for an individual, who, unbeknownst to curator or museum, was not actual owner of the artwork, but rather consignee who later purchased the work for resale, purportedly in reliance upon curator's alleged negligent statements as to the artwork's authenticity and value, where individual was acting at arm's length in attempting sale to museum.

[3] Fraud 13(2)
184k13(2)

In order to state a claim for negligent misrepresentation or negligent appraisal it is essential that plaintiff demonstrate that defendant made his negligent statement with knowledge or notice that it will be acted upon.

****393 *1031** Robert J. Poulson, Jr., New York City, for plaintiff.

Lord, Day & Lord, New York City (Reigh F. Klann, Stephen J. Crimmins, New York City, of counsel), for defendant, Metropolitan Museum of Art.

DAVID B. SAXE, Justice.

The issue presented here is whether a museum (here, the Metropolitan Museum of Art) may be liable on account of its curator's

(Cite as: 126 Misc.2d 1031, *1031, 484 N.Y.S.2d 392, **393)

allegedly negligent appraisal of a piece of artwork to an individual, who, unbeknownst to the curator or museum, was not the actual owner of the artwork, but rather the consignee who initially purchased the work for resale, purportedly in reliance upon the curator's alleged negligent statements as to the artwork's authenticity and value.

The plaintiff has sued to recover a balance claimed to be owed upon a contract to purchase a sculpture, as well as upon a promissory note and check executed in connection with this purchase by the defendants Erving Wolf, Daniel Wolf and Daniel Wolf, Inc. The defendant, Metropolitan Museum of Art ("Museum") although not a signatory to the note or check, is also named as a defendant on the contract related claims.

In January, 1982, Lewis Sharp, the curator of the American Wing for the Metropolitan Museum of Art was contacted by an *1032 art dealer, Mr. Victor Wiener, and was told that Mr. Wiener was showing a work created by the sculptor, Elie Nadelman entitled "La Femme Assise", on behalf of the plaintiff which he thought the museum might be interested in acquiring. On February 2, 1982, Sharp viewed the sculpture.

Sharp contends that after viewing the sculpture, he relayed to Mr. Wiener that the museum would not be able to purchase the artwork, in part because the procedure for acquisitions followed by the museum would take much longer than the time in which the plaintiff wanted to sell the sculpture, but that he would contact some private collectors who he thought might be interested in acquiring it. He contends that at no time did plaintiff ask him to render any appraisal, as to either the authenticity **394 or the value of the sculpture. He thereafter contacted the Wolfs, private collectors who viewed the sculpture and agreed to purchase it for \$120,000. On February 11, 1982 the Wolfs paid plaintiff \$15,000 and executed a promissory note for the balance of \$105,000 payable February 16, 1982. These defendants also gave plaintiff a check for the same amount also dated

February 16, 1982. The \$105,000 has never been paid and the plaintiff has sued the defendants, including the museum asserting various causes of action for breach of contract and for payment of the promissory note and the check.

The plaintiff contends that the museum is liable as a party to the contract, although neither the promissory note nor the check was signed by it, because it was his understanding as communicated to him by Wiener, that the museum was the real party who was actually acquiring the sculpture with payment to be made by the museum's benefactors, collectively denominated the Wolfs. Thus, the plaintiff contends that neither Erving nor Daniel Wolf ever offered to purchase the sculpture individually, but rather throughout all negotiations and transactions, it was understood that the museum was purchasing the sculpture as a joint venture along with the Wolfs. Based on this theory of a "joint venture", the plaintiff contends that the Museum as well as the Wolfs are liable on the first three causes of action predicated on contract (Count I), on the promissory note (Count II) and on the dishonored check (Count III). He also seeks attorneys' fees in accordance with the terms of the contract (Count VI). As an alternative cause of action against the museum, the plaintiff states that the museum, at the request of the plaintiff, appraised the sculpture and advised the plaintiff that the sculpture was the genuine work of Elie Nadelman entitled "La Femme Assise"; that in reliance on said appraisal plaintiff purchased the sculpture believing it to be authentic; and that by *1033 reason of the foregoing, if the sculpture is not authentic, then the Metropolitan Museum of Art acted negligently in its appraisal causing plaintiff to sustain damages of at least \$100,000.

The Museum has moved for summary judgment on each of these causes of action. Thus, any liability of the Wolfs to the plaintiff is not in issue on this motion.

[1] I conclude that the facts do not support any liability predicated on contract law as against the Museum. First, there is no

writing indicating any such agreement to purchase the sculpture by the Museum as required by U.C.C. Sec. 2-201(1). Second, and most important, the facts as alleged do not support the conclusion that the Museum had promised to purchase the sculpture or that the plaintiff could, at any time, reasonably conclude that he could look to the Museum for payment. The plaintiff's theory of a collective agreement by the defendants based on a joint venture or principal and agent law as a vehicle for liability against the Museum is unsubstantiated and untenable. While the plaintiff accurately states the law with respect to the liability of joint venturers, the facts here support only the conclusion that the Museum's curator initially viewed the sculpture and introduced the Wolfs to the plaintiff. The fact that the parties may have intended for the sculpture to be on display at the Museum or that the Wolfs are regular benefactors of the Museum, having a gallery at the Museum named the Erving and Joyce Wolf Gallery in their honor, do not strengthen plaintiff's theory of contract liability against the Museum. Since I hold that no joint venture or principal-agent relationship existed as between the Museum and the Wolfs with regard to the purchase of the sculpture, summary judgment must be granted to the Museum dismissing not only the contract cause of action, but also the causes of action based on the promissory note and the dishonored check since the Museum was not a signatory to those instruments. Nor is the Museum liable to the plaintiff for legal fees under the agreement which it was not a party to and accordingly the Museum is granted summary judgment dismissing the cause of action seeking legal fees.

****395** [2] The assertion of a cause of action for negligent appraisal is particularly novel in this case because ordinarily it is asserted by the disappointed buyer of an item against the appraiser, rather than by the seller who, it is thought, would usually have no reason to request or rely upon an appraisal of the item which he already owns and seeks to sell. Upon closer scrutiny, the apparent reason for this deviation is that the plaintiff, at the inception of the negotiations, was not the

actual owner of the ***1034** sculpture, but rather a consignee who first purchased this piece for immediate resale to the Wolfs after the Museum's curator allegedly rendered an appraisal of the artwork.

The Museum alleges that these facts as to actual ownership of the sculpture were never disclosed to it and a review of the plaintiff's papers shows that he does not contend otherwise. The Museum further alleges that it believed that Struna was the actual owner of the sculpture.

Essentially, on this cause of action, plaintiff asserts the theory that he was a purchaser damaged by his reliance on the museum's appraisal of the artwork. Thus, whereas plaintiff stood in the shoes of a seller on the first three causes of action against the museum, the plaintiff, on the fourth cause of action now shifts his posture to that of a wronged buyer.

First, the Museum contends that it is entitled to summary judgment because it never in fact rendered an appraisal to the plaintiff. The plaintiff however vigorously disputes this fact and submits an affidavit from Victor Wiener which states that Wiener asked the Museum's curator to appraise and authenticate the sculpture for the plaintiff and that "after examining it [the curator] assured me that it was an authentic Nadelman and one of the best he'd ever seen." Based on the conflicting affidavits, a factual issue exists as to whether or not the museum appraised the sculpture. Thus, if this were the only ground urged by the Museum in support of their motion for summary judgment on this cause of action, I would be inclined to deny their motion.

The Museum, however, contends that even if it is found that there was an appraisal, dismissal of this cause of action is still warranted because: 1) there was no relationship between the Museum and Struna which would give rise to a duty of care by the Museum; and 2) the Museum had no knowledge or reason to know that Struna would act in reliance on any such appraisal.

(Cite as: 126 Misc.2d 1031, *1034, 484 N.Y.S.2d 392, **395)

A claim for negligent appraisal is in essence a claim for negligent representation. With respect to liability for negligent statements the law is:

Although it is a broad general rule that an action will not lie for negligent misrepresentations, there may be liability for damages resulting from the negligent utterance of words under certain circumstances. Thus, in some cases a negligent statement may be the basis for a recovery of damages. Liability in such cases arises only where there is a duty, if one speaks at all, to give the correct information. This involves many considerations. There must be knowledge, or its equivalent, *1035 that the information is desired for a serious purpose; that he to whom it is given intends to rely and act upon it; that, if false or erroneous, he will because of it be injured in person or property. Finally, the relationship of the parties, arising out of contract or otherwise, must be such that in morals and good conscience the one has the right to rely upon the other for information, and the person giving the information owes a duty to give it with care. Generally, therefore, negligent words are not actionable unless they are uttered directly, with knowledge or notice that they will be acted on, to one to whom the speaker is bound by some relation of duty, arising out of public calling, contract or otherwise, to act with care if he acts at all, or, as has been said, unless there is a duty, if one speaks at all, to give the correct information.

24 N.Y.Jur., Fraud and Deceit, Sec. 153; *International Products Co. v. Erie Railroad* **396 Co., 244 N.Y. 331, 155 N.E. 662 (1927), cert. denied 275 U.S. 527, 48 S.Ct. 20, 72 L.Ed. 408 (1927).

In support of its cause of action for negligent appraisal against the museum, the plaintiff cites a number of cases where an appraiser was held liable for the damages flowing from his negligent appraisal or words.

Thus, in *Oestreicher v. Simpson*, 243 N.Y. 635, 154 N.E. 636 (1924), the plaintiff hired the defendant to appraise certain jewelry

which the plaintiff had informed the defendant that he desired to purchase. The defendant appraised the jewelry for more than its actual worth; the plaintiff relied on the appraisal and consequently overpaid for the jewelry. The plaintiff sued the defendant on a theory of negligence and prevailed.

Similarly, in *Navarre Hotel & Importation Co. v. American Appraisal Company*, 156 App.Div. 795, 142 N.Y.S. 89 (1st Dept.1913), the defendant-appraiser had been hired by and rendered a written report to the plaintiff's agent with respect to the value of certain items of property. Relying on defendant's appraisal the plaintiff took a chattel mortgage in the items of property in order to secure a debt owed to the plaintiff by the owner of the property. When the debtor defaulted in his obligations to the plaintiff, and the plaintiff liquidated the assets previously appraised, it was discovered that the defendant's appraisal had been grossly excessive. The plaintiff sued contending that due to the defendant's negligence and his reliance thereon, he had been damaged. The trial court dismissed the complaint because the plaintiff was an undisclosed principal. On appeal, the First Department reversed and ordered a new trial stating: "The jury, therefore, would have been justified in finding that the loss which the plaintiff sustained was due to the negligence of the defendant." *Id.* at 798, 142 N.Y.S. 89.

*1036 In *Chemical Bank v. National Union Fire Insurance Co. of Pittsburgh*, 74 A.D.2d 786, 425 N.Y.S.2d 818 (1st Dept.1980), app. withdrawn 53 N.Y.2d 864, 440 N.Y.S.2d 187, 422 N.E.2d 832 (1981) the court relying on *White v. Guarente*, 43 N.Y.2d 356, 401 N.Y.S.2d 474, 372 N.E.2d 315 (1977) stated:

"If it be shown that a real estate appraiser, retained by a property owner to make an appraisal that he knows the owner will use to obtain financing, makes it in a grossly negligent manner so as to inordinately overstate the value, we are not, unlike the dissent, prepared to hold the appraiser exempt from liability to the damaged financing party." *Id.*, 74 A.D.2d at 787, 425 N.Y.S.2d 818.

(Cite as: 126 Misc.2d 1031, *1036, 484 N.Y.S.2d 392, **396)

I find that under the facts presented here, the requisite elements necessary for tort liability for negligent appraisal are lacking and the defendant therefore cannot be found liable as a matter of law.

As previously stated, neither the plaintiff (nor his agent) ever communicated to the defendant that the plaintiff was not the actual owner of the sculpture at the time the appraisal was allegedly requested and rendered. Specifically, nowhere does the plaintiff allege that the Museum or its curator knew or should have known that plaintiff only had the sculpture on consignment, that the plaintiff had not yet purchased it himself, or any other reason why the plaintiff might have relied on the curator's opinion as to the authenticity of the sculpture. So, the plaintiff fails to show how the Museum could have known that the plaintiff planned to act in reliance upon any statements of appraisal made by the curator.

[3] In order to state a claim for negligent misrepresentation (or negligent appraisal) it is essential that plaintiff demonstrate that the defendant made his negligent statement "with knowledge or notice that it will be acted upon." *White v. Guarente*, supra, 43 N.Y.2d at 363, 401 N.Y.S.2d 474, 372 N.E.2d 315; *Courteen Seed Co. v. Hong Kong & Shanghai Banking Corp.*, 245 N.Y. 377, 157 N.E. 272 (1927). Plaintiff has failed to show that the defendant-museum believing plaintiff to be the owner of the sculpture, knew or could have known that plaintiff would act upon his statements. Further, there is no way that **397 the defendant could have known that the plaintiff would be injured if his appraisal was erroneous. *International Products Co. v. Erie Railroad*, supra.

Moreover, the cases routinely require the existence of a "special relationship" between the parties creating a duty of care owed to the plaintiff thus entitling the plaintiff to rely upon the defendant's representations. Whether or not a "special relationship" exists depends on many considerations, but more often than not, as demonstrated in the previously discussed cases, it arises out of a

contract where the defendant was specifically *1037 employed for the purpose of rendering an appraisal to the plaintiff knowing that the plaintiff intended to rely on it. Here, on the other hand, by the plaintiff's own admission, it appeared that the plaintiff was acting at arm's length in attempting to achieve a sale of the sculpture to the museum. This relationship between the parties thus appears to be the very antithesis of the "special relationship" ordinarily required which would support holding the defendant to a higher duty of care than is otherwise required.

Therefore, I find that the Museum cannot be held liable to the plaintiff based on any claim that its curator rendered a negligent appraisal.

Motion granted.

126 Misc.2d 1031, 484 N.Y.S.2d 392

END OF DOCUMENT

84

Only the Westlaw citation is currently available.

United States District Court, S.D. New York.

THC HOLDINGS CORPORATION, Plaintiff,
v.
Geoffrey CHINN and Berwin Leighton,
Defendants.

No. 95 CIV. 4422(KMW).

Feb. 6, 1998.

OPINION and ORDER

WOOD, D.J.

*1 In this diversity action, the THC Holdings Corporation ("THC"), a corporation incorporated in Delaware, alleges that Geoffrey Chinn violated his fiduciary duties, and committed fraud and legal malpractice in his former capacities as director, secretary, and counsel for THC; THC also alleges that Berwin Leighton, the law firm in which Chinn is a partner, is also responsible for legal malpractice arising out of Chinn's activities as counsel for THC.

Defendants Chinn and Berwin Leighton move for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c). Because defendants have fashioned their motion as a motion for judgment on the pleadings prior to filing an answer to the complaint, their motion is premature. Rule 12(c) authorizes a motion for judgment on the pleadings "[a]fter the pleadings are closed." However, defendants' motion essentially serves the same function as a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). Accordingly, this Court follows the practice of treating a premature Rule 12(c) motion as a Rule 12(b) motion to dismiss. See, e.g., *Seber v. Unger*, 881 F.Supp. 323, 325 n. 2 (N.D.Ill.1995) (treating premature Rule 12(c) motion as Rule 12(b) motion); *Geir by Geir v. Educational Serv. Unit No. 16*, 144 F.R.D. 680, 686 (D.Neb.1992) (same); 2 Moore's Federal Practice 3d § 12.38 at 12-99 to 12-100 n. 4 (1997)(noting same).

Plaintiff moves to amend the complaint and consolidate this action with THC Holdings Corp. v. Tishman, et al., 93 Civ. 5393(KMW).

For the reasons stated below, I grant defendants' motion in part and deny it in part. Specifically, I dismiss plaintiff's claim that Chinn breached the fiduciary duties he owed to THC in his capacity as officer and director of THC; and I dismiss plaintiff's claim that Chinn breached the fiduciary duties he owed to THC in his capacity as counsel to THC in all respects except those that result from his alleged failure to investigate the financial insufficiency of TMLC Corp. In addition, I dismiss plaintiff's claim against Chinn for negligent representation in Chinn's capacities as officer and director of THC, but I do not dismiss this claim insofar as it relates to Chinn in his capacity as counsel to THC. I deny defendants' motion to dismiss plaintiff's claim against Chinn for fraud and plaintiff's claim against Chinn and Berwin Leighton for legal malpractice. I consolidate this action with THC Holdings Corp. v. Tishman, et al., 93 Civ. 5393(KMW), and I grant plaintiff's motion to amend the complaint. However, the claims dismissed in this Opinion and Order are also dismissed from the Revised Amended Complaint.

I. Background

Treating defendants' motion for judgment on the pleadings as a motion to dismiss, I take facts stated in the complaint as true. *Newman & Schwartz v. Asplundh Tree Expert Co.*, 102 F.3d 660, 662 (2d Cir.1996). The facts stated herein are the allegations that plaintiff makes in its complaint. [FN1]

FN1. In the midst of briefing this motion, plaintiff submitted to the Court a Revised Amended Complaint in which it proposes to consolidate this action with THC Holdings Corporation v. Alan V. Tishman, TMLC Corp., Tishman Overseas Partners Ltd., Tishman Midwest Management Corp., Pak Mac Associates, Richard A. Alexander, Jerry Lee Marcus, Jordan R. Metzger and Charles C. Quinn, 93 Civ. 5393(KMW). Because I find that the factual allegations and claims against Chinn and Berwin Leighton in the Revised Amended

Complaint are substantially the same as those in the original Complaint, and the parties based their arguments for this motion on the allegations in the original complaint, I refer throughout this opinion to the numbered allegations in the original complaint. I rule on the consolidation of these action and the proposed amendment to the complaint below.

*2 THC was incorporated in the state of Delaware in June 4, 1987 under the name Tishman Property Corporation. (Compl.¶ 7.) THC was founded to offer an opportunity, primarily to foreign investors, to invest in urban office, retail and industrial real estate in the United States. (Id. ¶ 8.) Common stock was offered pursuant to a prospectus for \$10.00 per share; the prospectus provided that if 5,000,000 shares of common stock were not fully subscribed, the offering would not close. (Id. ¶ 9.) The prospectus also provided that the entire \$10.00 offering price was not payable in full upon the purchase of the shares; rather, the purchaser would initially pay \$1.00 per share and would be obliged to pay the remaining \$9.00 upon a capital "call" by the Board of Directors. (Id. ¶ 10.)

THC's Certificate of Incorporation authorized the Board of Directors to demand payment on the common stock within thirty days of notice to the holders of common stock. (Id. ¶ 11.) All subscribers were required to sign a subscription agreement in which the subscriber represented that it was either a corporation with assets in excess of \$5 million or an "accredited investor" under Rule 501(a)(1)-(3) under the Securities Act of 1933 and that the total purchase price of the shares was less than 20 percent of the subscriber's net worth. (Id. ¶ 14.)

As of March, 1988, THC had three officers and directors: Alan Tishman functioned as Chairman of the Board, Jordan Metzger was the President, and Geoffrey Chinn was the secretary. (Id. ¶ 17.) Chinn was the managing partner of the New York office of Berwin Leighton, a British law firm. (Id. ¶¶ 3, 19.) Chinn was also counsel to THC from 1988 through at least April, 1991, (id. ¶¶ 22, 93).

Plaintiff's claims against Chinn arise primarily out of Chinn's alleged failure to disclose information about and adequately investigate a series of significant THC transactions. First, plaintiff alleges that Chinn knew or recklessly disregarded the falsity of representations in the Subscription Agreement of a subscriber, Retrico, Ltd., that Retrico had \$5,000,000 in assets, and that Chinn concealed concerns that he had about Retrico's financial insufficiency from THC. (Id. ¶¶ 24-25.) Plaintiff further alleges that Chinn falsely reassured Retrico that THC would not make a capital call for at least six months after the initial closing. (Id. ¶ 26.) THC entered into a 1,000,000 share subscription agreement with Retrico. (Id. ¶¶ 28-29.)

Second, plaintiff alleges that Chinn failed to investigate the financial sufficiency of another subscriber, TMLC Corp. who purchased 200,000 shares of THC's common stock. (Id. ¶¶ 30, 36.) THC relied on Chinn to have prudently investigated and disclosed concerns about the financial insufficiency of potential subscribers. (Id. ¶ 37.)

Third, plaintiff alleges that Chinn failed to disclose material information, and adequately perform his duties as counsel to THC concerning the purchase of two properties in the Washington, D.C. area, Ballston Commons Office Building in Arlington, Virginia ("Ballston") and Woodmont Office Center in Rockville, Maryland ("Woodmont"). Plaintiff alleges that Chinn was aware that Jerry Marcus, who was elected a director of THC at its first Board meeting in January 1989, had an agreement with THC's property broker for these two property purchases such that Marcus would receive half of the real estate commissions, but that Chinn failed to disclose this information to the other directors of THC. (Id. ¶ 49) In particular, Chinn failed to disclose this agreement in the binders at the closings for these transactions, (id. ¶ 60), and Berwin Leighton received legal fees in excess of \$200,000 for its role as counsel to the corporation in closing these transactions. (Id. ¶ 62.) Plaintiff also alleges that Chinn failed

to disclose that THC would pay a penalty of \$18,000 per day for each property if the acquisition of these properties was not finalized by January 17, 1989. THC paid the seller of these two properties \$1,080,000 because of delays in the closings that Chinn knew or recklessly disregarded the fact would result. (Id. ¶¶ 53, 55.)

*3 Fourth, plaintiff alleges that in December 1988 THC's Board of Directors made a cash call of \$3.00 per share to fund the Ballston and Woodmont property purchases. (Id. ¶¶ 65, 66.) Plaintiff alleges that Chinn failed to disclose to the THC Board that THC's president, Alan Tishman, had agreed to accommodate Retrico in meeting its obligations for the \$3.00 per share cash call, and that this accommodation caused the property purchases to be delayed. (Id. ¶¶ 70, 71.) Plaintiff also alleges that Chinn failed to disclose to THC's Board that in January 1989, TMLC Corp. had transferred more than half of its stock to friends and associates of Alan Tishman. (Id. ¶ 74.) Chinn failed to register these transfers until August, 1989. (Id. ¶ 80.)

Fourth, plaintiff alleges that Chinn knew that Alan Tishman, on behalf of TMLC Corp., and others had planned to transfer their THC shares to other entities in order to limit their liability in anticipation of THC's capital call on April 23, 1991. (Id. ¶¶ 88-90.) In particular, plaintiff alleges that Chinn failed to make any disclosure of these transfers at the April 23, 1991 THC Board meeting. (Id. ¶ 93.) Neither those to whom TMLC Corp. had transferred their shares, nor Retrico were able to meet the April 23, 1991 cash call. (Id. ¶¶ 94-95.) These entities also failed to make THC's cash calls in August, 1991, May 1992, and August 1992.

On the basis of these allegations, plaintiff brings four different claims against Chinn. First, plaintiff alleges that Chinn breach his fiduciary duties to THC and its shareholders. Second, plaintiff alleges that Chinn is liable for negligent misrepresentation in his various capacities at THC. Third, plaintiff alleges that Chinn is liable to THC for fraud. Fourth, plaintiff alleges that Chinn and Berwin

Leighton are liable to THC for legal malpractice.

II. Discussion

In considering a motion to dismiss, which is how I treat defendants' motion for judgment on the pleadings, the court "must accept as true all the factual allegations in the complaint." *Newman & Schwartz v. Asplundh Tree Expert Co.*, 102 F.3d 660, 662 (2d Cir.1996) (quoting *Leatherman v. Tarrant County Narcotics Unit*, 507 U.S. 163, 164, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993)). The court "must limit itself to facts stated in the complaint or in documents attached to the complaint or incorporated in the complaint by reference." *Id.* (quoting *Kramer v. Time Warner, Inc.*, 937 F.2d 767, 773 (2d Cir.1991)). The complaint should not be dismissed "unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Scheuer v. Rhodes*, 416 U.S. 232, 236-37, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)).

Defendants present a multitude of arguments for dismissing all of or some of plaintiff's claims. Defendants' principal arguments are: (1) that all four of plaintiff's claims are time-barred; (2) that Chinn did not breach his duty of disclosure to THC and so plaintiff's claim for breach of fiduciary duty should be dismissed; (3) that a provision of THC's Certificate of Incorporation requires dismissal of fiduciary duty claims against Chinn; (4) that plaintiff fails adequately to allege fraudulent scienter; (5) that with regard to all four claims plaintiff has failed to plead any damages that are causally related to defendants' conduct.

*4 I treat each of these arguments for dismissal in turn.

A. Timeliness of Plaintiff's Claims

Defendants argue that the three-year statute of limitations provided by 7B N.Y. Civ. Prac. L. & R. § 214(4) (McKinney's 1996)

(hereinafter references to "CPLR" and section number) governs plaintiff's first and second claims, and that Delaware's three-year statute of limitations for fraud, Del.Code Ann. tit. 10, § 8106 (1996), and for legal malpractice, *id.*, applies to plaintiff's third and fourth causes of action. Defendants contend that based on the application of these three year statutes of limitations, all plaintiff's claims are time-barred. In contrast, plaintiff claims that its first three claims are governed by the six-year statute of limitations provided by CPLR § 213(7), and that New York's six-year statute of limitations also applies to its legal malpractice claim. [FN2]

FN2. Plaintiff submits with its briefing a copy of an agreement to toll the statute of limitations from June 16, 1994 through June 16, 1995. There is no reference to this agreement in the Complaint; accordingly, I do not consider this agreement.

1. Plaintiff's Claims for Breach of Fiduciary Duty and Negligent Misrepresentation

I find that New York's CPLR § 213(7) applies to plaintiff's fiduciary duty, negligent misrepresentation, and fraud claims. CPLR § 213 provides, *inter alia*, that the following action must be commenced within six years:

7. an action by or on behalf of a corporation against a present or former director, officer of stockholder ... to procure a judgment on the ground of fraud, or to enforce a liability, penalty or forfeiture, or to recover damages for waste or for an injury to property or for an accounting in conjunction therewith.

CPLR § 213(7). In view of the specific references in this statute to claims on behalf of a corporation against a former director or officer, defendants' suggestion that the more general three-year statute of limitation in CPLR § 214(4) applies to plaintiff's first and second claims is unavailing. New York state courts apply CPLR § 213(7) to claims for the alleged breach of a fiduciary duty by a corporate director or board member. See, e.g., *Tobias v. Tobias*, 192 A.D.2d 438, 596 N.Y.S.2d 797, 798-99 (N.Y.App. Div. 1st Dep't 1993) (noting that CPLR § 213(7) applied to fraud and fiduciary breach claims against directors); see also *Resolution Trust Corp. v.*

Young, No. 93 Civ. 6531, 1995 WL 552622, at * 2 (S.D.N.Y. Sept.14, 1995) (noting that CPLR § 213(7) applied to negligence and breach of fiduciary duty claims against a thrift's directors). Accordingly, I conclude that plaintiff's first and second claims for breach of fiduciary duty and negligent misrepresentation are governed by the six-year statute of limitations in CPLR § 213(7).

Because plaintiff's breach of fiduciary duty and negligent misrepresentation claims against Chinn accrued within the six-year period preceding the filing of the complaint, I find that these claims are timely.

2. Plaintiff's Claim for Fraud

Plaintiff's claim for fraud also appears to fit squarely within the language of CPLR § 213(7). Defendants argue, however, that under New York's "borrowing statute," CPLR § 202, the Delaware statute of limitations for fraud applies to this claim. CPLR § 202 provides that when a court in New York is adjudicating claims "accruing" outside of New York, the court shall apply the foreign statute of limitations, if the foreign statute of limitations bars the action, "except where the cause of action accrued in favor of a resident of the state the time limited by the laws of the state shall apply." CPLR § 202.

*5 Contrary to defendants' suggestion, CPLR § 202 does not apply to any of plaintiff's claims, because plaintiff has alleged facts sufficient to show that THC was a New York resident until at least 1991. Plaintiff specifically alleges that THC had its principal place of business in New York until at least 1991. (See Compl. ¶ 86.) For the purposes of CPLR § 202, this allegation is sufficient to establish that THC was a "resident" of New York until at least 1991. See *Shamrock Assocs. v. Sloane*, 738 F.Supp. 109, 113 (S.D.N.Y.1990) ("The principal place of business determines residency under CPLR § 202."). Under CPLR § 202, residency is determined at the date that the action accrued. *Besser v. E.R. Squibb & Sons, Inc.*, 146 A.D.2d 107, 539 N.Y.S.2d 734, 739 (N.Y.App. Div. 1st Dep't 1989), *aff'd*, 75

N.Y.2d 847, 552 N.Y.S.2d 923, 552 N.E.2d 171 (1990). Plaintiff's allegations include claims for wrongful conduct in 1991 (see Compl. ¶¶ 93, 101, 102), and so plaintiff's claims accrued during the time that THC was a resident of New York. See *Dybowski v. Dybowska*, 146 A.D.2d 604, 536 N.Y.S.2d 838, 839 (N.Y.App. Div.2d Dep't 1989) (fraud action accrues from commission of fraud or two years from when plaintiff discovered or should have discovered fraud, whichever is later). On this basis, I reject defendants' argument that, under CPLR § 202, this Court must apply Delaware's statute of limitations with respect to plaintiff's third claim. Rather, CPLR § 213 provides a six-year statute of limitation for plaintiff's claim for fraud.

Because plaintiff's claim for fraud accrued with the six-year period preceding the filing of the complaint, I find that plaintiff's fraud claim is timely. See *Dybowski v. Dybowska*, 536 N.Y.S.2d at 839.

3. Plaintiff's Claim for Legal Malpractice

Defendants argue that New York's borrowing statute, CPLR § 202, applies to plaintiff's legal malpractice claim on the same grounds that they argue the statute applies to plaintiff's third claim. The reasons for rejecting the application of this statute to import the Delaware statute of limitations for plaintiff's fraud claim also apply to plaintiff's legal malpractice claim. For the purposes of CPLR § 202, plaintiff was a resident of New York in 1991. Plaintiff's legal malpractice claim includes allegations of malpractice during 1991 (see Compl. ¶¶ 91-92), and therefore CPLR § 202 does not require imposing a foreign statute of limitations to the detriment of the New York resident. See CPLR § 202 ("except where the cause of action accrued in favor of a resident of the state the time limited by the laws of the state shall apply."); see also *Glamm v. Allen*, 57 N.Y.2d 87, 453 N.Y.S.2d 674, 677, 439 N.E.2d 390, 393 (1982) (action for legal malpractice accrues at the date of the complained of malpractice).

Plaintiff argues that under *Santulli v. Englert, Reilly & McHugh, P.C.*, 78 N.Y.2d

700, 579 N.Y.S.2d 324, 328, 586 N.E.2d 1014, 1018-19 (1992), plaintiff's legal malpractice claim should be governed by New York's six-year statute of limitations for contract actions, see CPLR § 213, rather than the existing three-year statute of limitations for malpractice damage actions other than medical, dental or podiatric actions which was provided for by the then existing CPLR § 214(6). (Pl. Br. at 42.) In *Santulli*, as plaintiff contends, the New York Court of Appeals held that New York's six-year statute of limitations for contract actions governs legal malpractice claims "where the remedy sought is damages relating solely to the plaintiff's pecuniary or property loss and which arose out of the contractual relationship." *Santulli*, 586 N.E.2d at 1018, 579 N.Y.S.2d at 328-29.

*6 Subsequent to defendants' and plaintiff's submissions to this Court, however, the New York State Legislature amended CPLR § 214(6) to overturn the rule announced in *Santulli*. See *Limitation of Malpractice Damages Actions*, 1996 N.Y. Laws chap. 623 (S.7590) (1996) (amending CPLR § 214(6)); *Russo v. Waller*, 171 Misc.2d 707, 655 N.Y.S.2d 313 (Sup.Ct. Nassau Co.1997) ("[e]ffective September 4, 1996 the Legislature amended CPLR § 214(6) so as to repeal the judicial rule enunciated in *Santulli* "). The New York Legislature amended CPLR § 214(6) to provide a three-year statute of limitations for actions "to recover damages for malpractice, other than medical, dental or podiatric malpractice regardless of whether the underlying theory is based in contract or tort." CPLR § 214(6) (emphasis added). The effective date of the amendment is September 4, 1996, 1996 N.Y. Laws chap. 623; the legislature unambiguously stated that "[t]his act shall take effect immediately." *Id.*

In general, "statutes are applied prospectively, unless there is a clear legislative indication to the contrary." *Rubin Management Co., Inc. v. Commissioner, Dep't of Consumer Affairs*, 213 A.D.2d 185, 623 N.Y.S.2d 569, 569 (N.Y.App. Div. 1st Dep't 1995). Lower New York state courts are divided concerning whether CPLR § 214(6)

applies only prospectively, or also applies retroactively. See, e.g., *Russo v. Waller*, 655 N.Y.S.2d at 314 (retroactive application); *White of Lake George, Inc. v. Bell*, 173 Misc.2d 423, 662 N.Y.S.2d 362, 365-66 (Sup.Ct. Albany Co.1997) (prospective application only); *Ackerman v. Price Waterhouse*, N.Y.L.J. May 13, 1997 (N.Y.App. Div. 1st Dep't May 13, 1997) (prospective application only); *Garcia v. Jonathan Director and Frank Weinrib, et al.*, N.Y.L.J. Jan. 17, 1997 (N.Y.App. Div. 1st Dep't Jan. 17, 1997) (prospective application only); The New York Court of Appeals has not ruled on the issue. In these circumstances, the task of this Court is to attempt to discern how New York's highest state court would resolve this split in authority. See *Herman Miller, Inc. v. Thom Rock Realty Co. L.P.*, 819 F.Supp. 307 (S.D.N.Y.1997).

Four decisions in this district have taken on this task; all of these decisions concluded that the amendment to CPLR § 214(6) applies only prospectively. See *Keller v. Lee*, No. 96 Civ. 4168, 1997 WL 218435 at *2 (S.D.N.Y. April 30, 1997); *Estate of Joseph Re v. Kornstein Veisz & Wexler*, 958 F.Supp. 907, 914-920 (S.D.N.Y.1997); *Mason Tenders Dist. Council Pension Fund v. Messera*, 958 F.Supp. 869, 886 (S.D.N.Y.1997); *Durkin v. Shea*, 957 F.Supp. 1360, 1372-75 (S.D.N.Y.1997). In three of these decisions, courts have taken the view either that the legislative intent to apply the 1996 amendment retroactively was not sufficiently clear, or that the New York state courts have not found the legislative intent to be sufficiently clear, to merit applying the statute retroactively. See *Keller*, at *3; *Messera*, 958 F.Supp. at 887; *Durkin*, 957 F.Supp. at 1374-75. In contrast, in *Estate of Re*, Judge Sotomayor found that the New York State Legislature had explicitly articulated its intent that the 1996 amendment to CPLR § 214(6) apply retroactively, but also held that the legislature's intent in enacting an amendment should not govern the interpretation of law pre-dating the amendment's passage. 958 F.Supp. at 918-20.

*7 Judge Sotomayor based this conclusion on

(1) fundamental separation of powers principles, and (2) the prohibition on retroactive application of a reduced statute of limitations period unless parties are given a reasonable time to commence actions under the new law, a prohibition which Judge Sotomayor found to be deeply rooted in New York law. *Id.* at 918-19. I believe that Judge Sotomayor's analysis is correct, and that the New York State Court of Appeals can be expected to reach this result. Accordingly, I find that CPLR § 214(6) does not apply retroactively, and that plaintiff's legal malpractice claim for damages arising out of plaintiff's contractual relationship with defendants is governed by New York's six-year statute of limitations. Plaintiff's legal malpractice claim accrued within the six-year period preceding the filing of the complaint. Therefore, I find that plaintiff's legal malpractice claim is timely. See *Glamm*, 493 N.E.2d at 393, 453 N.Y.S.2d at 677.

B. Breach of Fiduciary Duty

Plaintiff's claim that Chinn breached the fiduciary duties that he owed to THC as its officer (that is, its secretary), director, and counsel rely almost exclusively on allegations that Chinn failed to disclose material information to THC. (See Compl. ¶ 109.) I first discuss whether plaintiff's allegations that Chinn breached his disclosure duty support a claim for breach of fiduciary duty and then I turn to plaintiff's other allegation that might also support a claim for breach of fiduciary duty by Chinn in his capacity as officer, director, or counsel to THC.

1. The Duty to Disclose

In Delaware, the duty of disclosure is "an obligation that has been characterized as a derivative of the duties of care and loyalty." *Cinerama, Inc., v. Technicolor, Inc.*, 663 A.2d 1156, 1166 (1995). However, a fiduciary obligation of disclosure is implicated only when shareholder action is sought. See *Zirn v. VLI Corp.*, 681 A.2d 1050, 1056 (1996) (duty of disclosure "inheres any time a corporate board of directors seeks stockholder action"); *Stroud v. Grace*, 606 A.2d 75, 84 (1992) (directors

have a "duty to disclose fully and fairly all material information within board's control when it seeks shareholder action"); *Bragger v. Budacz*, No. Civ. A 13376, 1994 WL 698609 * 5 (Del.Ch. Dec.7 1994) ("Since no shareholder action was sought by the Information Statement a fiduciary duty of full disclosure is not implicated.").

None of Chinn's alleged failures to disclose information to the THC Board of Directors involved action requested by the THC's Board by shareholders. Plaintiff does not allege that the initial subscription of investors (see Compl. ¶¶ 28, 36), the decision to purchase the Ballston and Woodmont properties (see id. ¶ 52), or the Board of Directors' decisions to make cash calls, involved a request for shareholder action. (See id. ¶ 10.) Accordingly, I dismiss plaintiff's claim for breach of fiduciary duty insofar as it relies on allegations that Chinn failed to disclose information to THC.

2. Other Fiduciary Duties

*8 Plaintiff also alleges that Chinn failed to adequately investigate the financial sufficiency of TMLC Corp. (Id. ¶ 36.) [FN3] Chinn's liability as a director of THC is governed by Article 9 of THC's Certificate of Incorporation, which tracks 8 Del.Code. Ann. tit. 8, § 102(b)(7) (1996). The Article provides that:

FN3. In addition, plaintiff alleges that Chinn participated in Alan Tishman's attempts to transfer TMLC Corp.'s stock to other entities (Compl. ¶ 109), but fails allege any specific facts regarding Chinn's participation in these transactions in the body of the Complaint other than that Chinn failed to disclose these transactions. (See id. ¶¶ 74-84.)

A director of the corporation shall not be personally liable to the corporation or its shareholders for monetary damages for breach of fiduciary duty as a director, except for liability (i) for any breach of the director's duty of loyalty to the corporation or its stockholders, (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing

violation of law, (iii) under Section 174 of the Delaware General Corporation Law, or (iv) for any transaction from which the director derived an improper personal benefit.

In his capacity as a director, Chinn's alleged failure to adequately investigate TMLC Corp.'s financial sufficiency could support only a breach of Chinn's duty of care, not a breach of his duty of loyalty. *Harris v. Carter*, 582 A.2d 222, 232 (Ct. Ch.1990) (treating allegations of failure to investigate as claimed breach of duty of care). But Chinn's liability in his capacity as a director based on the breach of the duty of care is clearly precluded by Article 9 of THC's Certificate of Incorporation. See *Arnold v. Society for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1287 (1994) (shielding director from liability based on plain reading of § 102(b)(7)). Further, because plaintiff's complaint fails to highlight any specific actions Chinn took as secretary (as distinct from his activities as a director) of THC, Article 9 of THC's Certificate of Incorporation also shields Chinn in his capacity as secretary to THC for his alleged failure to investigate TMLC Corp.'s financial sufficiency. See id. at 1288 (embracing view that "where a defendant is a director and officer, only those actions taken solely in the defendant's capacity as an officer are outside the purview of Section 102(b)(7)"). Accordingly, I also dismiss plaintiff's claims against Chinn for failure to adequately investigate TMLC Corp.'s financial sufficiency in his capacity as director and secretary of THC.

In sum, then, plaintiff's claim of breach of fiduciary duty is dismissed in all respects except with regard to Chinn's possible breach of fiduciary duties he owed to THC in his capacity as its counsel resulting from his alleged failure to investigate the financial sufficiency of TMLC Corp. Cf. *Deutsch v. Cogan*, 580 A.2d 100 (Ct. Ch.1990) (law firm acting as counsel to board of directors of corporation subject to fiduciary duties).

C. Negligent Misrepresentation

Plaintiff's claim for negligent

misrepresentation relies upon his assertion that Chinn failed to act with reasonable care in undertaking his duties to THC in his capacities as a director, officer, and counsel to THC. (Compl. ¶¶ 114-118.)

*9 Chinn's liability for a breach of his duty to exercise reasonable care is also precluded by Article 9 of THC's Certificate of Incorporation. See *Arnold v. Society for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1287 (1994) (shielding director from liability based on plain reading of § 102(b)(7)). Plaintiff's complaint also fails to highlight any specific actions Chinn took as secretary (as distinct from his activities as a director). Accordingly, Article 9 of THC's Certificate of Incorporation also shields Chinn in his capacity as secretary to THC for his alleged failure to exercise reasonable care in carrying out his duties as secretary to THC. See *id.* I therefore dismiss plaintiff's second claim against Chinn in his capacities as a director and secretary of THC.

Defendants do not provide any specific argument for dismissing this claim against Chinn in his capacity as counsel for THC. Accordingly, plaintiff's claim against Chinn for negligent misrepresentation in his capacity as counsel to THC remains.

D. Fraud

Defendants argue that plaintiff's third claim against Chinn for fraud should be dismissed because plaintiff failed to adequately allege scienter. Federal Rule of Civil Procedure 9(b) provides that "the circumstances constituting fraud or mistake shall be stated with particularity." The Second Circuit Court of Appeals "require[s] plaintiffs to allege facts that give rise to a strong inference of fraudulent intent." *Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1128 (2d Cir.1994). Such a "strong inference" of fraud may be established either "(a) by alleging facts to show that defendants had both motive and opportunity to commit fraud, or (b) by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness." *Id.*

Defendants argue persuasively that the plaintiff fails to allege facts sufficient to show that Chinn had a motive to commit fraud. To support a claim of motive, plaintiff's principal allegation is that Chinn's incentive to commit fraud was to "receive substantial legal fees and an annual retainer for future services." (See Compl. ¶¶ 22, 121.) A mere allegation that defendant was in a position to receive normal compensation for professional services rendered is not sufficient to support a showing of motive in the fraud scienter analysis. See *Shields*, 25 F.3d at 1130 (in circumstances of that case, to make a sufficient allegation of motive plaintiff must do more than charge that executives aim to prolong benefits of the positions they hold); *Ferber v. Travelers Corp.*, 785 F.Supp. 1101, 1107 (D.Conn.1991) (incentive of receive salary insufficient to allege motive); *Friedman v. Arizona World Nurseries Ltd. Partnership*, 730 F.Supp. 521, 532 (S.D.N.Y.1990) (incentive of receiving fee for professional service insufficient to allege motive), *aff'd*, 927 F.2d 595 (1991). If the law were otherwise, then virtually every individual compensated for his or her professional services could be subject to claims of fraud. See *Ferber*, 785 F.Supp. at 1107.

*10 However, defendants fail to argue that plaintiff has not alleged that Chinn engaged in conscious misconduct or recklessness. Because the complaint contains allegations that might support a claim that Chinn engaged in conscious fraudulent behavior or recklessness (see, e.g., Compl. ¶¶ 49, 53, 81-82), I do not dismiss plaintiff's claim of fraud at this time.

E. Damages

Defendants argue that the complaint should be dismissed on the ground that plaintiff has not alleged any damages causally related to conduct of Chinn or Berwin Leighton. Because I accept as true all the factual allegations in the complaint, see *Newman & Schwartz v. Asplundh Tree Expert Co.*, 102 F.3d 660, 662 (2d Cir.1996) (quoting *Leatherman v. Tarrant County Narcotics Unit*, 507 U.S. 163, 164, 113 S.Ct. 1160, 122

L.Ed.2d 517 (1993), I find that defendants' argument that plaintiff has failed to plead damages causally related to Chinn or Berwin Leighton's conduct is without merit. For instance, plaintiff alleges that Chinn knew or recklessly disregarded the falsity of Retrico's representation of its financial assets (Compl.¶ 24), and that THC was injured by Retrico's failure to meet its subsequent obligations to THC in a timely manner. (Compl.¶¶ 68-72.) In addition, plaintiff alleges that Chinn failed to disclose that TMLC Corp. had transferred more than half of its stock and that those to whom this stock was transferred were not able to meet THC's April 1991 cash call. (Compl.¶¶ 74, 94.) At this stage in the proceedings, allegations such as these are sufficient to plead damages causally related to Chinn and Berwin Leighton's alleged misconduct. Accordingly, I do not dismiss any claims against Chinn or against Berwin Leighton on the ground that plaintiff has failed to allege damages causally related to defendants' misconduct.

F. Consolidation and Amendment of the Complaint

Plaintiff moves to consolidate this action with THC Holdings Corporation v. Alan V. Tishman, TMLC Corp., Tishman Overseas Partners Ltd., Tishman Midwest Management Corp., Pak Mac Associates, Richard A. Alexander, Jerry Lee Marcus, Jordan R. Metzger and Charles C. Quinn, 93 Civ. 5393(KMW). Because I find that this action and THC Holdings Corporation v. Tishman, et al., 93 Civ. 5393(KMW) involve common questions of law and fact, I consolidate these actions pursuant to Federal Rule of Civil Procedure 42(a).

Plaintiff also seeks leave to amend the complaint in these consolidated actions. All of the defendants, in both the Chinn and Tishman actions, object to plaintiff's motion to amend. The defendants in the Tishman action object because the Court had previously granted their motion to dismiss plaintiff's RICO claims (see Order May 30, 1996), which plaintiff's Revised Amended Complaint repleads. The Tishman defendants also

contend that if plaintiff's Revised Amended Complaint is allowed, they must be permitted to bring a third-party action against Charterhouse Bank Ltd. and its United States affiliate. They claim that Charterhouse was responsible for investigating the financial sufficiency of potential investors. The Chinn defendants object to the Revised Amended Complaint because the allegations against the Chinn defendants are substantially similar to those in the original complaint, and they had moved for judgment on the pleadings on the original complaint.

*11 In the Second Circuit, when a motion to dismiss is granted, "the usual practice is to grant leave to amend the complaint." *Oliver Schools, Inc. v. Foley*, 930 F.3d 248, 253 (2d Cir.1991) (internal citation omitted). Where "the possibility exists that the defect can be cured and there is no prejudice to defendant, leave to amend at least once should normally be granted as a matter of course." *Id.* In this case the primary prejudice to defendants is extra litigation costs. However, such expenses, standing alone, do not suffice to warrant a denial of a motion to amend. See *United States v. Continental Illinois Nat'l Bank and Trust Co. of Chicago*, 889 F.2d 1248, 1255 (2d Cir.1989). Accordingly, the Court grants plaintiff's motion to amend. However, because I find the claims against Chinn and Berwin Leighton in the original complaint to be substantially the same as those in the Revised Amended Complaint, those claims dismissed in this Opinion and Order are also dismissed from the Revised Amended Complaint. The Court also grants the defendants in the Tishman action leave to interplead Charterhouse Bank Ltd. and its United States affiliate.

III. Conclusion

For the reasons stated above, I dismiss plaintiff's claim that Chinn breached the fiduciary duties he owed to THC in his capacity as officer and director of THC; I dismiss plaintiff's claim that Chinn breach the fiduciary duties he owed to THC in his capacity as counsel to THC in all respects except as resulting from his alleged failure to

investigate the financial insufficiency of TMLC Corp.; I dismiss plaintiff's claim against Chinn for negligent representation in Chinn's capacities as officer and director of TMLC Corp., but do not dismiss this claim insofar as it relates to Chinn in his capacity as counsel to THC. I deny defendants' motion for judgment on the pleadings with regard to plaintiff's claim against Chinn for fraud and plaintiff's claim against Chinn and Berwin Leighton for legal malpractice.

I also consolidate this action with THC Holdings Corporation v. Tishman, et al., 93 Civ. 5393(KMW). I grant plaintiff's motion to amend. However, those claims dismissed herein are also dismissed from plaintiff's Revised Amended Complaint. In addition, I grant the defendants in the Tishman action leave to interplead Charterhouse Bank Ltd. and its United States affiliate.

SO ORDERED.

1998 WL 50202 (S.D.N.Y.)

END OF DOCUMENT

85

Supreme Court, Appellate Division, First
Department, New York.

TRADEWINDS FINANCIAL
CORPORATION, etc., et al., Plaintiffs-
Appellants-
Respondents,
v.
REFCO SECURITIES, INC., etc., et al.,
Defendants-Respondents-Appellants.

March 16, 2004.

Background: Action was brought for breach of an oral agreement to extend financing for the purchase of securities, fraud, negligent misrepresentation, breach of fiduciary duty, negligent valuation of collateral, and unjust enrichment. The Supreme Court, New York County, Herman Cahn, J., granted defendants' motion for summary judgment, and appeal was taken.

Holdings: The Supreme Court, Appellate Division, held that: (1) Uniform Commercial Code (UCC) provision making statute of frauds inapplicable to contract for the sale or purchase of a security did not apply to alleged oral agreement; (2) agreement was barred by the statute of frauds; and (3) parties did not have fiduciary or confidential relationship, as required to support claims for breach of fiduciary duty or negligent misrepresentation.

Affirmed.

West Headnotes

[1] Frauds, Statute Of 84
185k84
Uniform Commercial Code (UCC) provision making statute of frauds inapplicable to contract for the sale or purchase of a security did not apply to alleged oral agreement to extend financing for the purchase of securities for a particular period. McKinney's Uniform Commercial Code § 8-113; McKinney's General Obligations Law § 5-701.

[2] Frauds, Statute Of 44(1)
185k44(1)

Alleged oral agreement to extend financing for the purchase of securities was barred by the statute of frauds; there was no possibility that it could be performed within a year. McKinney's General Obligations Law § 5-701.

[3] Fraud 7
184k7

[3] Fraud 13(3)
184k13(3)

Parties to alleged oral agreement to extend financing for the purchase of securities did not have fiduciary or confidential relationship, as required to support claims for breach of fiduciary duty or negligent misrepresentation; parties' relationship, involving non-discretionary securities accounts, was, as expressly provided in the governing documents, at arm's length.

*396 Gregory E. Galterio, for Plaintiffs-Appellants-Respondents.

James A. Moss, for Defendants-Respondents-Appellants.

TOM, J.P., ANDRIAS, SAXE, SULLIVAN, JJ.

Order, Supreme Court, New York County (Herman Cahn, J.), entered September 18, 2003, which granted defendants' motion for summary judgment insofar as to dismiss the causes of action for breach of an oral agreement, fraud, negligent misrepresentation, breach of fiduciary duty, negligent valuation of collateral, and unjust enrichment, and denied plaintiffs' cross motion for summary judgment on their causes of action for breach of written agreements, breach of fiduciary duty and negligent valuation, unanimously affirmed, with costs.

[1] While the issue, whether revised Uniform Commercial Code § 8-113 rendered the statute of frauds inapplicable to the alleged oral agreement to extend financing for the purchase of securities for a particular period, was not raised before the motion court, it presents a question of law that may be raised

for the first time at this juncture (see *Chateau D'If Corp. v. City of New York*, 219 A.D.2d 205, 209-210, 641 N.Y.S.2d 252). We conclude that the statutory revision, which was intended to bring the law into step with the prevailing mechanics of discrete securities transfers, was not intended to apply to the claimed financing agreement at issue here (see *Uniform Laws Annotated*, Vol. 2C, *Uniform Commercial Code Revised Article 8*, Notes on Scope, 2003 Pocket Part, at 80-81).

[2] The alleged oral agreement was barred by the statute of frauds (General Obligations Law § 5-701). There was absolutely no possibility that it could be performed within a year (see *Cron v. Hargro Fabrics, Inc.*, 91 N.Y.2d 362, 366, 670 N.Y.S.2d 973, 694 N.E.2d 56); plaintiffs' assertion that there was an option to cancel in exchange for payment of a penalty is, *inter alia*, unsupported by the record. The documents relied upon by plaintiffs could not be cobbled together as a writing sufficient to satisfy the statute, since material terms were missing (see *Kobre v. Instrument Sys., Corp.*, 54 A.D.2d 625, 626, 387 N.Y.S.2d 617, *affd.* 43 N.Y.2d 862, 403 N.Y.S.2d 220, 374 N.E.2d 131; see also *Adiel v. Lincoln Plaza Assocs.*, 254 A.D.2d 5, 677 N.Y.S.2d 790). Nor could the *397 agreement be salvaged by the claimed part performance (see *Stephen Pevner, Inc. v. Ensler*, 309 A.D.2d 722, 766 N.Y.S.2d 183), which, in any event, was not unequivocally referable to the claimed agreement (see *Anostario v. Vicinanza*, 59 N.Y.2d 662, 664, 463 N.Y.S.2d 409, 450 N.E.2d 215). In view of the foregoing, it is unnecessary to address the other arguments regarding the enforceability of the alleged oral agreement.

[3] The tort claims were properly dismissed as duplicative of the contract claims (see *Richbell Info. Servs., Inc. v. 529 Jupiter Partners, L.P.*, 309 A.D.2d 288, 305, 765 N.Y.S.2d 575; *River Glen Assocs., Ltd. v. Merrill Lynch Credit Corp.*, 295 A.D.2d 274, 275, 743 N.Y.S.2d 870; *Shilkoff, Inc. v. 885 Third Ave. Corp.*, 299 A.D.2d 253, 750 N.Y.S.2d 53). In addition, the fiduciary breach and negligent misrepresentation

causes of action were not viable in the absence of a fiduciary or confidential relationship between the parties (see *Sidamonidze v. Kay*, 304 A.D.2d 415, 757 N.Y.S.2d 560); the relationship here, involving non-discretionary securities accounts, was, as expressly provided in the governing documents, at arm's length (see *Fesseha v. TD Waterhouse Inv. Servs., Inc.*, 305 A.D.2d 268, 761 N.Y.S.2d 22). In light of our determination that the tort claims were properly dismissed for these several reasons, we do not address defendants' other arguments.

The cause of action seeking to recover, on the theory of unjust enrichment, the profits that defendants made upon reselling plaintiffs' securities was barred by the limitation of damages provision in the Terms and Conditions for Confirmation, as well as by the existence of a valid contract (see *Golub Assocs., Inc. v. Lincolnshire Mgt., Inc.*, 1 A.D.3d 237, 767 N.Y.S.2d 571), albeit one whose terms were in dispute.

Although defendants had the discretion to call in their margin loan to plaintiffs at any time reasonably necessary for their protection, this discretion was not unfettered since it remained subject to the implied duty of good faith (see *Richbell Information Services, Inc.*, 309 A.D.2d at 302-303, 765 N.Y.S.2d 575). Our review of the record discloses that the motion court properly found issues of fact as to defendants' good faith and the reasonableness of their conduct. This is especially so with respect to defendants' margin call.

We have considered the parties' other contentions for affirmative relief and find them unavailing.

5 A.D.3d 229, 773 N.Y.S.2d 395, 53 UCC Rep.Serv.2d 123, 2004 N.Y. Slip Op. 01705

END OF DOCUMENT

86

Supreme Court, Appellate Division, Second
Department, New York.

Nello TRIZZANO, et al., plaintiffs-
respondents,

v.

ALLSTATE INSURANCE COMPANY,
appellant-respondent,
Marinaccio & Azznara, respondent-appellant,
Christopher Marinaccio, defendant-
respondent.

May 24, 2004.

Background: Insureds sued their automobile insurer and insurance agency, alleging breach of contract, fraud, negligence, and negligent misrepresentation, and seeking to recover difference between purchase price of car and its actual cash value. The Supreme Court, Westchester County, Colabella, J., granted insureds summary judgment on contract and fraud claims against insurer, and granted insureds summary judgment against agency on claims of negligence and negligent misrepresentation. Defendants appealed.

Holdings: The Supreme Court, Appellate Division, held that: (1) insurer properly limited its offer of settlement to the purchase price; (2) agency was negligent in failing to procure requested coverage; and (3) agency was not liable for negligent misrepresentation.

Affirmed as modified.

West Headnotes

[1] Insurance 1851
217k1851

Applicable provisions of Insurance Law are deemed to be part of insurance contract as though written into it.

[2] Insurance 2719(1)
217k2719(1)

When insurer deemed car, which was damaged within 180 days after purchase, to be total loss, Insurance Department regulation allowed insurer to limit its offer of settlement to the purchase price. 11 NYCRR 216.7(c)(1)(iv).

[3] Insurance 1671
217k1671

Insurance agency was negligent in failing to procure requested automobile insurance, where insureds requested actual cash value coverage that would be effective "from day one," agency assured them that such coverage was effective immediately, but policy allowed insurer to limit its offer of settlement to the purchase price.

[4] Insurance 1671
217k1671

Insurance agents and brokers have common-law duty to obtain requested coverage for their clients within reasonable time, or to inform client of their inability to do so.

[5] Insurance 1671
217k1671

Broker may be held liable for neglect in failing to procure requested insurance; insured must show that broker failed to discharge duties imposed by agreement to obtain insurance either by proof that broker breached agreement or that it failed to exercise due care in the transaction.

[6] Insurance 1672
217k1672

There was no special relationship between insureds and insurance agency through which they purchased insurance, as required to support insureds' negligent misrepresentation claim against agency.

*148 Marjorie E. Bornes, New York, N.Y.,
for appellant-respondent.

Lustig & Brown, LLP, New York, N.Y.
(Gregory Gilmore of counsel), for respondent-
appellant.

Pirrotti Law Firm, LLC, Scarsdale, N.Y.
(Anthony Pirrotti, Jr., of counsel), for
plaintiffs-respondents.

NANCY E. SMITH, J.P., GABRIEL M.
KRAUSMAN, STEPHEN G. CRANE, and
WILLIAM F. MASTRO, JJ.

In an action, inter alia, to recover damages for breach of contract, (1) the defendant Allstate Insurance Company appeals, as limited by its brief, from so much of an order of the Supreme Court, Westchester County (Colabella, J.), entered June 11, 2003, as granted those branches of the plaintiffs' motion which were for summary judgment on the issue of liability on the *149 first and second causes of action and denied its cross motion for summary judgment dismissing the complaint insofar as asserted against it, and (2) the defendant Marinaccio & Azznara cross-appeals, as limited by its brief, from so much of the same order as granted those branches of the plaintiffs' motion which were for summary judgment on the issue of liability on the third and fourth causes of action and denied its cross motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against it.

ORDERED that the order is modified, on the law, by (1) deleting the provision thereof granting those branches of the motion which were for summary judgment on the issue of liability against the defendant Allstate Insurance Company on the first and second causes of action and against the defendant Marinaccio & Azznara on the fourth cause of action, and substituting therefor a provision denying those branches of the motion, (2) deleting the provision thereof denying the cross motion of the defendant Allstate Insurance Company for summary judgment dismissing the complaint insofar as asserted against it and substituting therefor a provision granting that cross motion, and (3) deleting the provision thereof denying that branch of the cross motion of the defendant Marinaccio & Azznara which was for summary judgment dismissing the fourth cause of action and all cross claims predicated on the fourth cause of action and substituting therefor a provision granting that branch of the cross motion; as so modified, the order is affirmed insofar as appealed and cross-appealed from, with costs payable by the plaintiffs to the defendant Allstate Insurance Company.

After purchasing a 1997 Porsche 911 Turbo S Coupe for \$82,000, the plaintiffs sought

insurance through the defendant insurance agency Marinaccio & Azznara (hereinafter M & A). M & A arranged for the defendant Allstate Insurance Company (hereinafter Allstate) to issue an insurance policy. It insured the plaintiffs for the actual cash value of their car, allegedly \$155,500. Within four months after its purchase, the car was damaged in an accident. Allstate deemed the car to be a total loss. Relying on a regulation issued by the Superintendent of Insurance (see 11 NYCRR 216.7[c][1][iv]) (hereinafter Regulation 64), Allstate tendered to the plaintiffs a check for the purchase price of the car. This regulation permits an insurer to limit an offer of settlement to the purchase price of a vehicle when a loss occurs within 180 days after the purchase. The plaintiffs commenced this action against, among others, Allstate and M & A, alleging breach of contract, fraud, negligence, and negligent misrepresentation, and seeking to recover the difference between the purchase price of the car and its actual cash value.

[1][2] The plaintiffs were not entitled to summary judgment on the issue of Allstate's liability under the first cause of action, alleging breach of contract, or the second cause of action, alleging fraud. Allstate's cross motion for summary judgment dismissing the complaint insofar as asserted against it should have been granted. Applicable provisions of the Insurance Law are "deemed to [be] part of [an] insurance contract as though written into it" (Salzman v. Prudential Ins. Co., 296 N.Y. 273, 277, 72 N.E.2d 891; see Adam v. Manhattan Life Ins. Co. of N.Y., 204 N.Y. 357, 360, 97 N.E. 740; Strauss v. Union Cent. Life Ins. Co., 170 N.Y. 349, 356, 63 N.E. 347). Regulation 64 had the same effect as a contractual provision affording Allstate the option it chose to settle the plaintiffs' insurance claim. Thus, Allstate made a prima facie showing that it did not breach its contract of insurance with the *150 plaintiffs, and the plaintiffs failed to raise a triable issue of fact in opposition. Since Regulation 64 effectively became part of the insurance policy, Allstate also established prima facie that it made no false representation in its policy. The plaintiffs

failed to raise a triable issue of fact in opposition. Therefore, Allstate was entitled to summary judgment dismissing the fraud cause of action.

[3][4][5] In the third cause of action, the plaintiffs alleged that M & A negligently failed to procure the requested insurance coverage. The Supreme Court properly denied that branch of M & A's cross motion which was for summary judgment dismissing that cause of action as M & A failed to establish its prima facie entitlement to judgment as a matter of law. By contrast, the plaintiffs established their entitlement to summary judgment on the issue of M & A's liability under the third cause of action. It is uncontested, indeed admitted by M & A, that the plaintiffs requested actual cash value coverage that would be effective "from day one" and that M & A assured them that such coverage was effective immediately. Moreover, it is uncontested that M & A was ignorant of Regulation 64. These uncontroverted facts place the third cause of action within the rule that "insurance agents and brokers have a common-law duty to obtain requested coverage for their clients within a reasonable time, or to inform the client of their inability to do so. A broker may be held liable for neglect in failing to procure the requested insurance. An insured must show that the broker failed to discharge the duties imposed by the agreement to obtain insurance either by proof that the broker breached the agreement or that it failed to exercise due care in the transaction" (Reilly v. Progressive Ins. Co., 288 A.D.2d 365, 365-366, 733 N.Y.S.2d 220 [emphasis added]; see Santaniello v. Interboro Mut. Indem. Ins. Co., 267 A.D.2d 372, 700 N.Y.S.2d 230; Associates Commercial Corp. of Delaware v. White, 80 A.D.2d 570, 571, 435 N.Y.S.2d 796; cf. Murphy v. Kuhn, 90 N.Y.2d 266, 270, 660 N.Y.S.2d 371, 682 N.E.2d 972; Erwig v. Cook Agency, 173 A.D.2d 439, 570 N.Y.S.2d 64). Thus, the Supreme Court properly granted summary judgment to the plaintiffs on the third cause of action.

[6] Finally, the Supreme Court erred in granting that branch of the plaintiffs' motion

which was for summary judgment on the issue of M & A's liability under the fourth cause of action alleging negligent misrepresentation. That branch of M & A's cross motion which was for summary judgment dismissing the fourth cause of action should have been granted. In opposition to M & A's prima facie showing of entitlement to judgment as a matter of law, the plaintiffs failed to raise a triable issue of fact as to the existence of a special relationship between them and M & A (see Murphy v. Kuhn, supra at 268, 660 N.Y.S.2d 371, 682 N.E.2d 972; Hesse v. Speece, 278 A.D.2d 368, 369, 717 N.Y.S.2d 649).

7 A.D.3d 783, 780 N.Y.S.2d 147, 2004 N.Y. Slip Op. 04181

END OF DOCUMENT

87

United States District Court,
S.D. New York.

UNICREDITO ITALIANO SPA, and Bank
Polska Kasa Opieki SA, Plaintiffs,

v.

JPMORGAN CHASE BANK, J.P. Morgan
Chase & Co., J.P. Morgan Securities Inc.,
Citibank, N.A., Citigroup, Inc., and Salomon
Smith Barney Inc., Defendants.

No. 02Civ.5328(KTS)(JCF).

Oct. 14, 2003.

Order Denying Reconsideration Nov. 12, 2003.

Sophisticated financial entities that participated in credit facilities brought cause of action against co-administrative agents and issuing bank for their alleged fraudulent concealment, fraudulent inducement, aiding and abetting borrower's fraud, negligent misrepresentation, civil conspiracy, and unjust enrichment. On motion to dismiss for failure to state claim or to plead fraud with sufficient particularity, the District Court, Swain, J., held that: (1) express disclaimer by co-administrative agents for credit facilities, as well as by issuing bank, of any duty to ascertain or inquire as to borrower's performance of any terms, covenants or conditions of any loan document, or to account therefor to sophisticated financial entities participating in loan investments, precluded such entities from establishing duty to disclose or reasonable reliance, of kind required under New York law to support fraudulent concealment, fraudulent inducement or negligent misrepresentation claim; (2) allegations in plaintiffs' complaint were sufficient to state claim under New York law for aiding and abetting fraud; (3) plaintiffs did not have claim for breach of implied covenant of good faith or unjust enrichment, to extent based on defendants' nondisclosures; and (4) allegations were sufficient to state civil conspiracy claim under New York law.

Granted in part and denied in part;
reconsideration denied.

West Headnotes

[1] Fraud 3
184k3

Elements of claim for fraud or fraudulent inducement under New York law are: (1) that defendant made material false representation, (2) with intent to defraud plaintiff; (3) that plaintiff reasonably relied on that representation; and (4) that plaintiff suffered damage as result of that reliance.

[2] Fraud 16
184k16

To state fraudulent concealment claim under New York law, plaintiff, in addition to alleging each of elements of fraud, must also allege that defendant had duty to disclose material information.

[3] Fraud 17
184k17

Duty to disclose, of kind required under New York law to support fraudulent concealment claim, arises when: (1) one party has superior knowledge of information; (2) that information is not readily available to another party; and (3) first party knows that second party is acting on basis of mistaken knowledge.

[4] Fraud 13(3)
184k13(3)

Under New York law, negligent misrepresentation claims have the following elements: (1) that defendant had duty, as result of special relationship, to give correct information; (2) that defendant made false representation that he or she should have known was incorrect; (3) that information supplied by representation was known by defendant to be desired by plaintiff for serious purpose; (4) that plaintiff intended to rely and act upon it; and (5) that plaintiff reasonably relied on it to his or her detriment.

[5] Fraud 13(3)
184k13(3)

[5] Fraud 17
184k17

In transactions between sophisticated financial institutions, no extra-contractual duty of disclosure exists, of kind required under New York law to support negligent

misrepresentation claim.

[6] Banks and Banking 100
52k100

[6] Brokers 34
65k34

Under New York law, express disclaimer by co-administrative agents for credit facilities, as well as by issuing bank, of any duty to ascertain or inquire as to borrower's performance of any terms, covenants, or conditions of any loan document, or to account therefor to sophisticated financial entities participating in loan investments, precluded such entities from establishing duty to disclose or reasonable reliance, of kind required under New York law to support fraudulent concealment, fraudulent inducement, or negligent misrepresentation claim.

[7] Contracts 1
95k1

Under New York law, sophisticated parties are held to terms of their contracts.

[8] Banks and Banking 100
52k100

[8] Brokers 34
65k34

Under New York law, "peculiar knowledge" doctrine could not be extended to permit a claim by sophisticated financial entities participating in loan investments, not against borrower itself, whose improper practices allegedly enabled it to conceal debt and to present false picture of financial soundness, but against third parties that allegedly knew of borrower's improper practices, and that acted as co-administrative agents or issuing bank on credit facilities in which these financial entities participated.

[9] Fraud 36
184k36

Under New York's "peculiar knowledge" doctrine, express waivers or disclaimers of reliance will not be given effect, so as to preclude fraud claim, when facts are peculiarly within knowledge of party invoking such a waiver or disclaimer.

[10] Fraud 36
184k36

Theoretical basis for "peculiar knowledge" doctrine, as applied by New York courts, is the premise that, when matters are peculiarly within defendant's knowledge, plaintiff may rely without prosecuting an investigation, since he has no independent means of ascertaining truth.

[11] Fraud 30
184k30

Under New York law, elements of claim for aiding and abetting fraud are: (1) existence of underlying fraud; (2) knowledge of that fraud on part of aider and abettor; and (3) substantial assistance by aider and abettor in achievement of that fraud.

[12] Fraud 30
184k30

"Substantial assistance" exists, of kind required under New York law to support claim for aiding and abetting fraud, when: (1) aider/abettor affirmatively assists, helps conceal, or by virtue of failing to act when required to do so enables fraud to proceed; and (2) actions of aider/abettor proximately cause harm on which primary liability is predicated.

[13] Banks and Banking 100
52k100

[13] Banks and Banking 226
52k226

[13] Brokers 34
65k34

Allegations in complaint filed by entities participating in loan investments, against third parties that acted as co-administrative agents or issuing bank on credit facilities, for their alleged knowing participation in prepaids and other transactions which were designed to hide borrower's true financial condition and to distort its public financial statements were sufficient to state claim under New York law for aiding and abetting fraud.

[14] Federal Civil Procedure 636
170Ak636

By identifying borrower's fraudulent

statements, i.e., the revenue and debt-to-equity figures in its public financial statements, and by specifying way in which those figures misrepresented reality of its revenues and liabilities, investors seeking to recover on aiding and abetting theory from co-administrative agents on credit facilities pled borrower's fraud with sufficient particularity to satisfy federal pleading requirements. Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.

[15] Banks and Banking 96
52k96

[15] Brokers 22
65k22

Under New York law, investors that were barred, by express contractual disclaimers, from establishing any duty to disclose or reasonable reliance, of kind required under New York law to recover on fraud theory from co-administrative agents on credit facilities, were likewise barred from asserting claim for breach of implied duty of good faith to extent that claim was premised on same alleged nondisclosures underlying fraud claim.

[16] Contracts 168
95k168

While New York law implies duty of good faith and fair dealing in every contract, no obligation can be implied that would be inconsistent with other terms of contractual relationship.

[17] Implied and Constructive Contracts 3
205Hk3

Elements of unjust enrichment claim under New York law are: (1) that defendant benefitted, (2) at plaintiff's expense; and (3) that equity and good conscience require restitution.

[18] Implied and Constructive Contracts 55
205Hk55

Under New York law, existence of a valid and enforceable written contract governing particular subject matter ordinarily precludes recovery in quasi contract, or unjust enrichment, for events arising out of same subject matter.

[19] Implied and Constructive Contracts 55
205Hk55

Under New York law, investors that were barred, by express contractual disclaimers, from establishing any duty to disclose or reasonable reliance, of kind required under New York law to recover on fraud theory from co-administrative agents on credit facilities, were likewise barred from recovering from agents, on unjust enrichment theory, for allegedly taking advantage of their "superior knowledge" of borrower's financial condition; credit facility agreements expressly provided that agents and their affiliates had no duty to account to investors for their dealings with borrowers, and had no duty to provide investors with any information in connection with payments under agreements.

[20] Conspiracy 1.1
91k1.1

Under New York law, elements of civil conspiracy are: (1) agreement between two or more persons; (2) overt act; (3) intentional participation in furtherance of plan or purpose; and (4) resulting damage.

[21] Conspiracy 1.1
91k1.1

New York law does not recognize substantive tort of civil conspiracy; such a claim is available only if there is evidence of underlying actionable tort.

[22] Conspiracy 1.1
91k1.1

Under New York law, conspiracy allegations are permitted only to connect actions of separate defendants with otherwise actionable tort.

[23] Conspiracy 18
91k18

Allegations in complaint filed by entities participating in loan investments, against third parties that acted as co-administrative agents or issuing bank on credit facilities, for their alleged knowing participation in prepaids and other transactions which were designed to hide borrower's true financial condition and to distort its public financial statements were

sufficient to state civil conspiracy claim under New York law.

[24] Federal Courts 660.20
170Bk660.20

District court would not certify its decision on dismissed claims for immediate appeal, where dismissed and remaining claims arose from essentially same factual allegations, such that judicial economy would be served if multiple appellate panels were not required to familiarize themselves with case in piecemeal appeals. Fed.Rules Civ.Proc.Rule 54(b), 28 U.S.C.A.

***488** Arnold & Porter by Charles G. Berry, Robert A. Goodman, New York City, Elliott Reihner Siedzikowski & Egan PC by Thomas J. Elliot, Mark A. Kearney, John P. Elliott, Thomas N. Sweeney, Blue Bell, PA, for Plaintiffs.

Simpson Thacher & Bartlett by Thomas C. Rice, David J. Woll, John D. Roesser, Caline Mouawad, New York City, Paul, Weiss, Rifkind, Wharton & Garrison by Jonathan Hurwitz, Michael Gertzman, Brad S. Karp, New York City, for Defendants.

OPINION AND ORDER

SWAIN, District Judge.

This action concerns loans, made by Plaintiffs to or for the benefit of the Enron Corporation, that were administered by JP Morgan Chase Bank and Citibank. Plaintiffs contend that Defendants defrauded them in connection with the formation of certain syndicated credit facilities and payments under those facilities. The Court has jurisdiction of this matter pursuant to 28 U.S.C. section 1332. Defendants now move pursuant to Rules 12(b)(6) and 9(b) of the Federal Rules of Civil Procedure for an order dismissing the Second Amended Complaint. The Court has considered thoroughly all arguments and submissions in connection with the instant motions. For the following reasons, Defendants' motions are granted in part and denied in part.

***489** BACKGROUND

The following factual recitation is drawn from the Second Amended Complaint (the "Complaint"), statements or documents incorporated in the Complaint by reference, public disclosure documents filed with the SEC, and/or documents that Plaintiffs either possessed or knew about and upon which they relied in bringing this action. See *Rothman v. Gregor*, 220 F.3d 81, 88-89 (2d Cir.2000) (and cases cited therein). All of Plaintiffs' allegations are taken as true for the purposes of this recitation.

Plaintiff UniCredito Italiano SpA ("UCI") is an Italian financial institution with headquarters in Milan, Italy. (Compl.¶ 36.) Plaintiff Bank Polska Kasa Opieki SA, also known as Bank Pekao SA ("Pekao") is a Polish financial institution with headquarters in Warsaw, Poland. (Id. ¶ 37.)

Defendant JP Morgan Chase & Co. ("JPMC & Co.") is a Delaware corporation with its principal place of business in New York. Its primary banking subsidiary is Defendant JP Morgan Chase Bank; its primary investment banking or securities subsidiary is Defendant J.P. Morgan Securities Inc. Defendant JP Morgan Chase Bank is a New York corporation, with its principal place of business in New York. Defendant J.P. Morgan Securities Inc. is a Delaware corporation with offices in New York. (Id. ¶¶ 38-40.)

Defendant Citigroup, Inc. ("Citigroup") is a Delaware corporation with its principal place of business in New York. Citigroup's primary banking subsidiary is Defendant Citibank, N.A. ("Citibank"); its primary investment banking or securities subsidiary is Defendant Salomon Smith Barney. Citibank is a national banking association with its principal place of business in New York. Defendant Salomon Smith Barney is a New York corporation with its principal place of business in New York. (Id. ¶¶ 41-43.)

Defendants' Involvement in Enron's Off-Balance-Sheet Partnerships

In 1999 Enron began to enter into business relationships with partnerships, known as the LJM partnerships, in which former Enron CFO Andrew Fastow was both the manager and an investor. (Id. ¶ 68.) These Special Purpose Entities ("SPEs") were designed to remove from Enron's balance sheet assets that had lost or were at risk of losing value, in order to give Enron the appearance of a healthier financial condition. (Id. ¶ 62.) Defendants were significant participants in transactions entered into by at least one of the LJM partnerships, an entity referred to in the Complaint as LJM2. (Id. ¶ 72.) Defendants Citigroup and JPMC & Co., directly or through their affiliates, each invested at least \$10 million in transactions with LJM2. (Id.)

A feature of many of the SPE transactions was a "trigger point" at which Enron was to issue new shares to the SPEs to cover losses in the value of the assets that had been transferred to the SPEs. (Id. ¶ 74.) The SPEs were then to sell the Enron shares issued to them in order to cover partnership losses. (Id.) By participating in the SPEs and their sale of Enron shares, Defendants generated profits for themselves and contributed to Enron's collapsing share price. (Id.)

The existence of the LJM partnerships was disclosed in Enron's publicly filed financial reports. (Id. ¶ 84.) These disclosures did not indicate the nature or extent of Fastow's financial interest in the LJM partnerships. (Id.) Defendants knew that Enron's disclosures with respect to the LJM partnerships were materially misleading, inaccurate, and inadequate, and they withheld that knowledge from Plaintiffs. Defendants knew that Plaintiffs relied *490 upon Enron's disclosures in making their decisions to participate in the credit facilities at issue. (Id. ¶ 85.)

Defendants' Involvement in Enron Prepays

"Prepays" are transactions in the commodities trading business in which parties arrange for the prepayment of commodities to be delivered at a later date. (Id. ¶ 86.) Enron used prepay transactions designed by Defendants to disguise loans to Enron. (Id. ¶

87-88, 90.) Prepay transactions were arranged in which the Defendant banks or their affiliates would agree to purchase some commodity and simultaneously to sell it back to Enron. (Id. ¶ 90.)

JP Morgan Chase Bank and the Mahonia Prepays

Enron conducted a large number of prepay transactions with the participation of Defendant JP Morgan Chase Bank through an offshore SPE called Mahonia, Ltd. JP Morgan Chase Bank paid the Channel Islands law firm of Mourant de Feu & Jeune to set up Mahonia. (Id. ¶ 97.) JP Morgan Chase Bank was aware that Enron entered into prepays with Mahonia as a means of disguising Enron's debt and received substantial revenues from Mahonia's dealings with Enron. (Id. ¶ 98.) Plaintiff quotes George Serice, a Chase officer working on the Enron account, as having remarked in an email to Jeffrey Dellapina, a Managing Director at JP, Morgan Chase Bank, that " 'Enron loves these deals as they are able to hide funded debt from their equity analysts because they (at the very least) book it as deferred rev[enue] or (better yet) bury it in their trading liabilities.' " (Id. ¶ 100.) One or more of the JP Morgan Chase defendants created marketing material for the prepay transactions. (Id. ¶ 102.) One of those marketing presentations in July 1998 noted that prepays were " 'balance sheet "friendly." ' " (Id.)

In an action brought by JP Morgan Chase Bank against certain insurance companies to enforce surety bonds related to Mahonia, the defendants have asserted that they were improperly induced to provide security for what were in effect loans. In a June 2002 filing in that action, JP Morgan Chase Bank admitted that " 'the surety bonds were part of financing transactions in which the funds advanced by JP Morgan Chase to Mahonia were ultimately used by Enron for general corporate purposes, not to secure future sources of the oil and gas to be delivered.' " (Id. ¶ 105.)

Citigroup Defendants and the Delta and

Roosevelt Prepays

Defendants Citibank and Salomon Smith Barney, with the approval of Citigroup, set up a trust called Yosemite, which transferred funds to a Citigroup-controlled SPE named Delta. (Id. ¶ 108.) Delta used funds from Yosemite to engage in purported prepays with Enron in which no commodities actually changed hands and Citigroup and the Yosemite investors received the equivalent of interest payments from Enron. (Id.)

The Citigroup Defendants also assisted Enron in keeping \$125 million in bank loans off its books in a purported prepay known as the Roosevelt transaction. (Id. ¶ 113.) In late 1998, Citigroup or its representative agreed to transfer \$500 million to Enron for six months as part of an oil and gas prepay. (Id. ¶ 114.) In April 1999, Enron asked Citigroup to extend its time to repay a substantial portion of Citigroup's funds. (Id.) Citigroup agreed to extend the date for Enron to make oil deliveries worth \$125 million and through a secret oral agreement gave Enron until September 20, 1999 to repay that amount. (Id.) As indicated in an internal email dated April 27, 1999 from senior Citigroup loan executive James F. Reilly, "the paperwork" *491 "could not reflect the extension" as that would require recategorizing the prepaid as simple debt." (Id. ¶ 115.)

The Credit Facilities

The bulk of Plaintiffs' damages claims in this action arise from losses sustained on investments in credit facilities for Enron for which the Defendant banks served as Administrative and/or Paying Agents or, in the case of JP Morgan Chase Bank with respect to a 2001 letter of credit facility, the Issuing Bank, and which were marketed by the Defendant securities subsidiaries. Defendants JP Morgan Chase Bank (through its predecessor in interest, The Chase Manhattan Bank) and Citibank were the Co-Administrative Agents for three Enron credit facilities in which Plaintiffs participated: 1) a \$1.25 billion medium-term credit facility entered into on May 18, 2000 (the "2000

Credit Facility"), 2) a \$1.75 billion short-term facility entered into on May 14, 2001 (the "2001 Credit Facility"), and 3) a \$500 million letter of credit facility entered into on May 14, 2001 (the "2001 L/C Facility") (collectively, the "Syndicated Facilities"). (Id. ¶ 118.) Citibank was also the Paying Agent for the 2000 and 2001 Credit Facilities, and The Chase Manhattan Bank was the Paying Agent and Issuing Bank for the 2001 L/C Facility. See 2000 Credit Facility Agreement, Ex. A to Gertzman Decl.; 2001 Credit Facility Agreement, Ex. B to Gertzman Decl.; 2001 L/C Facility Agreement, Ex. C to Gertzman Decl.

The agreements establishing each of the Syndicated Facilities contained disclaimer, covenant, and acknowledgment provisions identical in all relevant respects to the following provisions of the 2000 Credit Facility:

Section 7.02 Paying Agent's Reliance, Etc.
[T]he Paying Agent shall not have, by reason of this Agreement or any other Loan Document a fiduciary relationship in respect of any Bank or the holder of any Note; and nothing in this Agreement or any other Loan Document, expressed or implied, is intended or shall be so construed as to impose upon the Paying Agent any obligations in respect of this Agreement or any other Loan Document except as expressly set forth herein. Without limitation of the generality of the foregoing, the Paying Agent ... (iii) makes no warranty or representation to any Bank for any statements, warranties or representations (whether written or oral) made in or in connection with any Loan Document or any other instrument or document furnished pursuant hereto or in connection herewith; (iv) shall not have any duty to ascertain or to inquire as to the performance or observance of any of the terms, covenants or conditions of any Loan Document or any other instrument or document furnished pursuant hereto or in connection herewith on the part of the Borrower or to inspect the property (including the books and records) of the Borrower;

Section 7.03 Paying Agent and Its Affiliates
With respect to its Commitment, the Advances made by it and the Note issued to it, each Bank which is also the Paying Agent shall have the same rights and powers under the Loan Documents as any other Bank and may exercise the same as though it were not the Paying Agent; the term "Bank" or "Banks" shall, unless otherwise expressly indicated, include any Bank serving as the Paying Agent in its individual capacity. Any Bank serving as the Paying Agent and its affiliates may accept deposits from, lend money to, act as trustee under indentures of, accept investment banking engagements from and generally *492 engage in any kind of business with, the Borrower, any of the Subsidiaries and any Person who may do business with or own securities of the Borrower or any Subsidiary, all as if such Bank were not the Paying Agent and without any duty to account therefor to the Banks.

Section 7.04 Bank Credit Decision

Each Bank acknowledges that it has, independently and without reliance upon the Paying Agent or any other Bank and based on the financial statements referred to in Section 4.01(d) and such other documents and information as it has deemed appropriate, made its own credit analysis and decision to enter into this Agreement. Each Bank also acknowledges that it will, independently and without reliance upon the Paying Agent or any other Bank and based on such documents and information as it shall deem appropriate at the time, continue to make its own credit decisions in taking or not taking action under this Agreement and the other Loan Documents. The Paying Agent shall not have any duty or responsibility, either initially or on a continuing basis, to provide any Bank or the holder of any Note with any credit or other information with respect thereto, whether coming into its possession before the making of the Advances or at any time or times thereafter.

2000 Credit Facility Agreement §§ 7.02-7.04, Ex. A to Gertzman Decl., at 31-32. Sections

8.02 to 8.04 of the 2000 Credit Facility Agreement are identical in all relevant respects to Sections 7.02 to 7.04 with the substitution of the term "Co-Administrative Agents" for the term "Paying Agent." See 2000 Credit Facility Agreement §§ 8.02-8.04, Ex. A to Gertzman Decl., at 34-35. For parallel provisions in the agreements for the other credit facilities, see 2001 Credit Facility Agreement §§ 7.02-7.04, 8.02-8.04, Ex. B to Gertzman Decl. at 31-32, 34-35; and 2001 L/C Facility Agreement §§ 7.02-7.04, 8.02-8.04, Ex. C to Gertzman Decl. at 30-31, 33-34.

As noted above, JP Morgan Chase Bank was also designated as the "Issuing Bank" under the 2001 L/C Facility Agreement, which provided that the "Issuing Bank," in selling to the participating banks their pro rata share of the obligation under any letter of credit issued pursuant to the agreement, "represents and warrants to [the participating bank] that the Issuing Bank is the legal and beneficial owner of such interest being sold by it, free and clear of any liens, but makes no other representation or warranty. The Issuing Bank shall have no responsibility or liability to any other [participating bank] with respect to any [letter of credit obligation] or any such participation [.]" (2001 L/C Facility Agreement § 2.03(c), Ex. C to Gertzman Decl. at 10.) Section 7.03 of the 2001 L/C Facility Agreement provided that the Issuing Bank and its affiliates had the right to engage in transactions with Enron "with no duty to account therefor" to the participating banks, and section 7.04 contains the acknowledgment of participating banks that they had not relied on the Issuing Bank in making the decision to enter into the agreement and that they would make their continuing decisions as to whether or not to take action under the agreement or letters of credit issued under the agreement "independently and without reliance upon ... the Issuing Bank[.]" (Id. §§ 7.03-7.04, Ex. C to Gertzman Decl. at 31.)

In each of the agreements for the Syndicated Facilities, Enron (which was referred to in the agreements as the "Borrower") entered into certain covenants concerning the participating banks' due diligence rights. These covenants

were *493 identical in all relevant respects to the covenants in the 2000 Credit Facility Agreement, the pertinent provisions of which follow:

Section 5.01 Affirmative Covenants.

(a) Reporting Requirements [the Borrower will furnish to each Bank:]

(viii) such other information respecting the condition or operations, financial or otherwise, of the Borrower or any of its Subsidiaries as any Bank through the Paying Agent may from time to time reasonably request.

(f) Visitation Rights At any reasonable time and from time to time, after reasonable notice, [the Borrower will] permit the Paying Agent or any of the Banks or any agents or representatives thereof, to examine the records and books of account of, and visit the properties of, the Borrower and any of its Principal Subsidiaries, and to discuss the affairs, finances and accounts of the Borrower and any of its Principal Subsidiaries with any of their respective officers or directors.

2000 Credit Facility Agreement §§ 5.01(a)(viii), (f), Ex. A to Gertzman Decl. at 26-27. For parallel covenants in the agreements for the other credit facilities, see 2001 Credit Facility Agreement §§ 5.01(a)(viii), (f), Ex. B to Gertzman Decl. at 26-27; 2001 L/C Facility Agreement §§ 5.01(a)(viii), (f), Ex. C to Gertzman Decl. at 26-27.

Defendants Salomon Smith Barney and J.P. Morgan Securities (the "Securities Subsidiaries") were co-lead arrangers of the Syndicated Facilities. (Compl.¶ 119.) They distributed to participant banks offering memoranda and invitations to offer in connection with the Syndicated Facilities. Those documents contained and referred to publicly filed financial information about Enron. (Id.) The offering memoranda contained the following section entitled "Disclaimer":

The information contained in this Information Memorandum has been supplied

by or on behalf of Enron Corp. (the "Company"). Neither Salomon Smith Barney Inc. and Chase Securities Inc. (as "Co-Lead Arrangers") nor any of their affiliates has independently verified such information and the same is being provided by the Co-Lead Arrangers for informational purposes only. The Co-Lead Arrangers do not make any representation or warranty as to the accuracy or completeness of such information and does not [sic] assume any undertaking to supplement such information as further information becomes available or in light of changing circumstances. The Co-Lead Arrangers shall not have any liability for any representations or warranties (express or implied) contained in, or any omissions from, the Information Memorandum or any other written or oral communication transmitted to the recipient in the course of its evaluation of the proposed financing or otherwise.

The information contained herein has been prepared to assist interested parties in making their own evaluation of the proposed financing for the Company and for no other purpose. The information does not purport to be all-inclusive or to contain all information that a prospective lender may desire. It is understood that each recipient of this Information Memorandum will perform its own independent investigation and analysis of the proposed financing and the creditworthiness of the Company, based on such information as it deems relevant and without reliance on Co-Lead Arrangers. The information contained herein is not a substitute for the recipient's independent investigation and analysis.

*494 See 2000 Credit Facility Information Memorandum, Ex. D to Gertzman Decl. (no pagination); 2001 Credit and L/C Facilities Invitation to Offer, Ex. E to Gertzman Decl., at viii.

Plaintiff UCI contributed \$10,416,667.67 under the 2000 Credit Facility, \$11,666,666.67 under the 2001 Credit Facility, and \$3,333,333.33 under the 2001 L/C Facility. (Compl.¶ 120.) Plaintiff Pekao purchased a participating interest in the 2000 Credit Facility in the amount of \$6.25 million. (Id.)

In determining whether to extend credit under the Facilities, Plaintiffs conducted credit assessments that included, inter alia, a review of Enron's financial statements, including its 10-K and 10-Q Forms filed with the SEC. (Id. ¶ 122.)

If Plaintiffs had known the true facts of Enron's financial condition, especially its actual amount of debt and its actual debt-to-capitalization ratio, and the extent of the improper transactions conducted by Enron with Defendants and others, Plaintiffs would not have participated in the Facilities. (Id. ¶ 124.)

Defendants withheld information from Plaintiffs concerning Enron's debt, its inflated revenues, and Defendants' role in improper transactions that allowed Enron to fraudulently manipulate its publicly reported financial condition. (Id. ¶ 127.)

Under the agreements for the Syndicated Credit Facilities, Enron represented that it was in compliance with applicable laws, that there had been no adverse change in its financial condition since the end of its prior fiscal year, and that it had and would maintain a ratio of total senior debt to total capitalization of no more than 65%. (Id. ¶ 128.) Defendants knew that Enron's debt-to-capitalization ratio was higher than reported. (Id. ¶ 129.) A 1999 internal Citibank document revealed that Citibank was aware that Enron had a debt-to-capitalization ratio of over 65%. (Id.) Defendants also knew that Enron was in violation of securities and commodities laws. (Id. ¶ 130.)

The Defendant banks and securities subsidiaries through, inter alia, the offering memoranda and invitations to offer, directed Plaintiffs to public information regarding Enron's financial information that they knew to be materially false. (Id. ¶ 133.)

The October 25, 2001 Borrowing Requests

Under the credit agreements governing the 2000 and 2001 Credit Facilities, Enron had to satisfy certain conditions before it could

receive loan funds, including compliance with all laws and the maintenance of a 65% debt-to-capitalization ratio. (Id. ¶ 138.) On October 25, 2001, Plaintiff UCI received borrowing demands at 11:48 a.m. and 12 noon, conveyed through Citibank, for immediate payment of its shares of the 2000 and 2001 Credit Facilities, and Plaintiff Pekao received a demand at 12 noon, conveyed through Citibank, to fund immediately its share of the 2000 Credit Facility. (Id. ¶ 139.)

At 2:45 p.m., the Managing Director of JP Morgan Chase Securities, Claire O'Connor, notified UCI that Enron would explain its need for cash to redeem its commercial paper at a conference call at 3:00 p.m. (Id. ¶ 140.) The Defendant banks helped manage Enron's commercial paper program, but O'Connor did not mention their role. (Id. ¶¶ 140-41.) O'Connor falsely stated that Enron was drawing down the funds to reestablish market confidence. (Id. ¶ 141.) At the 3:00 p.m. conference call, Enron's CFO explained that Enron needed the full amounts of the 2000 and 2001 Credit Facilities so that Enron could redeem its commercial paper. (Id. ¶ 142.) The Defendant banks participated in the conference call, but said nothing *495 about Enron's defaults under the credit agreements, defaults of which they were aware. (Id. ¶ 143.)

At 4:06 p.m., UCI received a facsimile from Citibank conveying Enron's certification that its representations and warranties, including those in the credit agreements, continued to be correct, and that there was no default or event of default under the credit agreements. (Id. ¶ 144.) UCI and Pekao subsequently forwarded their respective contributions under the credit facilities to Citibank, to be conveyed to Enron. (Id. ¶ 145.)

Pursuant to section 6.01 of the credit agreements governing the 2000 and 2001 Credit Facilities, if a majority of the participating banks had determined that a default or event of default had occurred that relieved them of their obligations under the agreements, the banks could have instructed Citibank to declare the termination of each bank's obligation to make advances. (Id. ¶

148.) Defendants knew that Enron's debt-to-capitalization ratio put it in breach of the credit agreements, and their concealment of that breach prevented Plaintiffs from exercising their rights under section 6.01. (Id. ¶ 147.)

The Defendant banks, who were also participants in the 2000 and 2001 Credit Facilities, contributed their shares of the October 25, 2001 funding. (Id. ¶ 149.) The credit facilities enabled the banks to reduce their aggregate exposure and take a "smaller hit" with respect to Enron. (Id.)

On November 1, 2001, the Defendant banks announced that they were negotiating to extend \$1 billion in secured loans to Enron. Citibank conditioned its participation in that secured loan on Enron's payment of an earlier \$250 million unsecured Citibank loan. (Id. ¶ 152.)

UCI and the 2001 L/C Facility

After its October 25, 2001 payments, UCI sought from JP Morgan Chase Bank the identification of all letters of credit that had been issued under the 2001 L/C Facility and information as to the current status of those letters of credit. (Id. ¶ 154.) On November 26, 2001, JP Morgan Chase Bank identified eleven letters of credit that it said had been issued under the 2001 L/C Facility, two of which had expired. (Id. ¶ 155.) On Friday, November 30, 2001, UCI received a request to fund \$1,050,000 under a letter of credit for Enron, and made the requested payment to JP Morgan Chase Bank. (Id. ¶ 156.)

Enron filed for bankruptcy protection on Sunday, December 2, 2001. (Id. ¶ 157.) On December 3, 2001, UCI received a different list from JP Morgan Chase of letters of credit purportedly issued under the 2001 L/C Facility. The second list included a \$150 million letter of credit dated October 9, 2001 in favor of an entity called Mahonia. (Id. ¶ 158.) The Mahonia letter of credit was drawn down on December 11, 2001. (Id. ¶ 159.)

Under the agreement governing the 2001 L/

C Facility, Enron's breach of its covenants, representations, and warranties would have permitted a majority of the participating banks in that facility to demand security from Enron, including requiring Enron to deposit an amount equal to the undrawn letter of credit amounts into a cash collateral account. (Id. ¶ 163.)

Defendant JP Morgan Chase Bank has continued to demand payments from UCI under the 2001 L/C Facility, including a demand in May 2002. (Id. ¶ 165.) Plaintiff has refused to make any further payments under the 2001 L/C Facility. (Id.) On June 4, 2002, JP Morgan Chase Bank advised UCI and other participating banks that JP Morgan Chase Bank had erroneously applied letters of credit in an aggregate *496 amount exceeding the maximum authorized under that facility. (Id. ¶ 166.) UCI was advised that it would be paid its proportionate share of such excess. To date, no such payment has been made. (Id.)

UCI has made repeated requests of JP Morgan Chase Bank for information, to which UCI is entitled to as a participant in the 2001 L/C Facility and which JP Morgan Chase Bank has made available to other participating banks, about the letters of credit that have been issued under that Facility; those requests have been refused. (Id. ¶¶ 167, 260.) JP Morgan Chase Bank has failed to allow UCI to have access to a repository or central file of documents relating to the 2001 L/C Facility, including documents that UCI has specifically requested. (Id. ¶ 168.)

JP Morgan Chase Bank has submitted and continues to submit bills for legal expenses to UCI that JP Morgan Chase Bank claims are subject to indemnification under the 2001 L/C Facility. (Id. ¶ 169.)

The 2000 L/C Facility

In May 2000, the same month UCI approved its participation in the 2000 Credit Facility, it also, under a separate agreement with Enron, approved a \$10 million letter of credit facility for Enron, which was increased to \$30 million in August 2000 (the "2000 L/C Facility"). (Id.)

¶ 121.) UCI would not have taken part in the 2000 L/C Facility had it not been for Defendants' participation in falsifying Enron's financial statements, including its Form 10-K and 10-Q, specifically the disclosures concerning revenues, earning, liabilities, and debt. (Id. ¶ 170.) Defendants knew that UCI had established the 2000 L/C Facility, but they did not advise UCI of Enron's actual financial condition. (Id. ¶ 172.)

On August 31, 2000, at the direction of Enron, UCI issued a standby letter of credit in favor of CalPX Trading Services in the amount of \$10 million. On December 12, 2000, that amount was increased to \$25 million at the direction of Enron. (Id. ¶ 174.) The maturity date was extended several times at Enron's request, including by an agreement on October 24, 2001, to extend the maturity date to November 30, 2001. (Id. ¶ 175.) After the October extension, UCI and Enron began negotiations concerning Enron providing collateral for the letters of credit that UCI had issued. By the third week of November 2001, Enron had delivered to UCI a form of agreement under which Enron was to provide the collateral. (Id. ¶ 176.)

On or about November 26, 2001, UCI received a phone call from Claire O'Connor. O'Connor asked UCI if it would be interested in contributing its \$25 million exposure on the 2000 L/C Facility to a new letter of credit facility for the benefit of Enron that JP Morgan Chase Bank was proposing to arrange. (Id. ¶ 177.) UCI declined to participate, and explained that it expected to enter an agreement under which it would receive cash collateral from Enron for its 2000 L/C Facility exposure. (Id.)

UCI and Enron never executed the proposed agreement for collateral. On November 30, 2001, the letter of credit was drawn down in the full amount of \$25 million. (Id. ¶¶ 179-80.)

PROCEDURAL HISTORY

UCI commenced this action in the District of Delaware on February 7, 2002, and filed an Amended Complaint on or about March 19,

2002, adding Bank Pekaio as a plaintiff. On April 15, 2002, Defendants moved to dismiss the action pursuant to Rules 12(b)(6) and 9(b) of the Federal Rules of Civil Procedure or, in the alternative, to transfer the action to this District. *497 On June 26, 2002, the Delaware court granted Defendants' motions to transfer. See *Unicredito Italiano v. JPMorgan Chase Bank*, No. 02-104, 2002 WL 1378226 (D.Del. June 26, 2002). On November 1, 2002, Plaintiffs filed the Second Amended Complaint.

DISCUSSION

In evaluating a motion to dismiss a complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Court is obliged to take as true the facts as alleged in the complaint and draw all reasonable inferences in favor of the plaintiff. *Grandon v. Merrill Lynch & Co.*, 147 F.3d 184, 188 (2d Cir.1998). The action must not be dismissed unless " 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' " *Cohen v. Koenig*, 25 F.3d 1168, 1172 (2d Cir.1994) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)); *Ganino v. Citizens Utilities Company*, 228 F.3d 154, 161 (2d Cir.2000). The Court may consider statements or documents incorporated in the Complaint by reference, public disclosure documents filed with the SEC, and documents "that the plaintiffs either possessed or knew about and upon which they relied in bringing the suit." *Rothman v. Gregor*, 220 F.3d 81, 88-89 (2d Cir.2000) (internal citations omitted).

Choice of Law

The credit agreements for the Syndicated Facilities provide that they are governed by New York law. See 2000 and 2001 Credit Facilities § 9.07; 2001 L/C Facility § 10.07. Furthermore, the parties have presumed in their arguments that New York law governs this action. See *Tehran-Berkeley Civil Environmental Engineers v. Tippetts-Abbett-McCarthy-Stratton*, 888 F.2d 239, 242 (2d Cir.1989) ("implied consent to use a forum's

law is sufficient to establish choice of law"). Accordingly, the Court will apply New York law in rendering its decision.

Plaintiffs' Causes of Action

Plaintiffs UCI and Pekao assert common law claims against all Defendants for fraudulent concealment (Count I), fraudulent inducement (Count II), aiding and abetting fraud by Enron (Count III), negligent misrepresentation (Count IV), civil conspiracy (Count V), and unjust enrichment (Count VII). Plaintiffs assert a claim against JP Morgan Chase Bank and Citibank for breach of an implied duty of good faith in connection with the Syndicated Facilities (Count VI). Plaintiff UCI also seeks declaratory relief against Defendant JP Morgan Chase Bank with respect to the 2001 L/C Facility (Count VIII).

Plaintiffs' Fraud and Negligent Misrepresentation Claims

[1][2][3] The elements of a claim for fraud or fraudulent inducement under New York law are (1) that defendant made a material false representation, (2) with the intent to defraud the plaintiff, (3) the plaintiff reasonably relied upon the representation, and (4) the plaintiff suffered damage as a result of that reliance. *Banque Arabe et Internationale D'Investissement v. Maryland Nat'l Bank*, 57 F.3d 146, 153 (2d Cir.1995) ("Banque Arabe"). Fraudulent concealment claims have the additional element that the defendant had a duty to disclose the material information. *Id.* A duty to disclose arises where 1) one party has superior knowledge of certain information; 2) that information is not readily available to the other party; and 3) the first party knows that the second party is acting on the basis of mistaken knowledge. *Banque Arabe*, 57 F.3d at 155.

[4][5] Negligent misrepresentation claims under New York law have the following elements: (1) the defendant had a *498 duty, as a result of a special relationship, to give correct information; (2) the defendant made a false representation that he or she should have known was incorrect; (3) the information

supplied in the representation was known by the defendant to be desired by the plaintiff for a serious purpose; (4) the plaintiff intended to rely and act upon it; and (5) the plaintiff reasonably relied on it to his or her detriment. *Hydro Investors, Inc. v. Trafalgar Power, Inc.*, 227 F.3d 8, 20 (2d Cir.2000). In transactions between sophisticated financial institutions, "no extra-contractual duty of disclosure exists," *Banque Arabe* at 158, although determination of reasonable reliance also depends on whether the person making the representation held or appeared to hold unique or special expertise, and whether the speaker knew the use to which the representation would be applied and made the representation for that purpose. See *Suez Equity Investors, L.P. v. Toronto-Dominion Bank*, 250 F.3d 87, 103 (2d Cir.2001).

[6] Plaintiffs' fraud and misrepresentation claims must be dismissed because the contracts pursuant to which they made their Enron loan investments preclude them from establishing essential elements of those claims, namely, that the Defendant banks had a duty to disclose information regarding or gained from their business dealings with Enron, and that any reliance by Plaintiffs on misrepresentations by the Defendants was reasonable. See *Banque Arabe*, 57 F.3d at 155 (agreement with specific disclaimer "operate[d] as a waiver absolving [defendant] of responsibility to make affirmative disclosures concerning ... financial risks"); *DynCorp v. GTE Corp.*, 215 F.Supp.2d 308, 319 (S.D.N.Y.2002) (plaintiff's particularized disclaimers "make it impossible for it to prove one of the elements of a claim of fraud: that it reasonably relied on the representations it alleges were made to induce it to enter into the [agreement]").

Sections 7.02 and 8.02 of the 2000 Credit Facility and parallel provisions of the other operative documents provided specifically that the Defendant banks, in their capacities as Paying or Co-Administrative Agents, would have no obligations other than those expressly specified in the relevant agreements and that they had no duty "to ascertain or to inquire as to the performance or observance of any of the

terms, covenants or conditions of any Loan Document or any other [relevant] instrument or document ... on the part of Borrower." Sections 7.03 and 8.03 of that agreement and the parallel provisions of the other relevant operative documents permitted the Defendant banks, in their capacities as Paying or Co-Administrative Agent or, with respect to JP Morgan Chase Bank in connection with the 2001 L/C Facility, as Issuing Bank, and their affiliates to engage in banking and other business transactions with Enron and its affiliates, "without any duty to account therefor to the [lending] Banks." Under section 7.04 and 8.04, the lenders agreed that the bank Defendants, in their capacities as Paying or Co-Administrative Agent, would "not have any duty or responsibility, either initially or on a continuing basis, to provide any [lending] Bank or the holder of any Note with any credit or other information with respect thereto, whether coming into [their] possession before the making of the [loan] Advances or at any time or times thereafter." Section 2.03(c) of the 2001 L/C Facility Agreement further provided that, in connection with any purchase by a bank of a participation in a letter of credit issued under the facility, "the Issuing Bank represents and warrants ... that the Issuing Bank is the legal and beneficial owner of such interest being sold by it ... but makes no other representation or warranty. The Issuing *499 Bank shall have no responsibility or liability to any other [participating bank] with respect to any [letter of credit obligation]."

[7] Plaintiffs' fraudulent concealment and negligent misrepresentation claims as against Defendant banks thus must fail because, even if the bank Defendants had the knowledge the Complaint attributes to them, the banks had no duty to disclose it to Plaintiffs. Sophisticated parties such as Plaintiffs are held to the terms of their contracts. See, e.g., *Harsco Corp. v. Segui*, 91 F.3d 337, 346 (2d Cir.1996).

The operative documents also, on their face, preclude Plaintiffs from claiming that they relied reasonably on any alleged representations by the Defendants. In

addition to the above-quoted provisions disclaiming any duties on the banks' part to monitor Enron's compliance with its obligations in connection with the loan facilities and permitting the banks and their affiliates to carry on business transactions with Enron and its affiliates without accounting to the other lenders for that activity, the lenders specifically agreed that they had, and would continue to, make their own credit decisions and would not rely on the Defendant banks, either in entering into the facilities or in making decisions in the course of the performance of the relevant agreements. See 2000 Credit Facility § 7.04 and parallel provisions of other operative documents. Having failed to bargain for the right to rely on the banks as monitors of Enron's compliance with its disclosure, financial condition and other covenants, or for the right to benefit from any knowledge gained by the Defendant banks or their affiliates in connection with their own business dealings with Enron and its affiliates, Plaintiffs cannot, as a matter of law, be held reasonably to have relied on any misrepresentations or omissions by the Defendants concerning those matters. Cf. *Lazard Freres & Co. v. Protective Life Ins. Co.*, 108 F.3d 1531, 1541 (2d Cir.1997) ("It is well established that '[w]here sophisticated businessmen engaged in major transactions enjoy access to critical information but fail to take advantage of that access, New York courts are particularly disinclined to entertain claims of justifiable reliance.' "); *DynCorp*, 215 F.Supp.2d at 322 ("Sophisticated parties to major transactions cannot avoid their disclaimers by complaining that they received less than all information, for they could have negotiated for fuller information or more complete warranties.").

Counts I, II and IV of the Complaint will therefore be dismissed for failure to state a claim.

[8][9][10] Plaintiffs' invocation of the doctrine of "peculiar knowledge" does not compel a different result. Under this doctrine, express waivers or disclaimers of reliance will not be given effect "where the facts are

peculiarly within the knowledge of the party invoking [them]." *Banque Arabe*, 57 F.3d at 155 (internal quotation marks omitted). The "peculiar knowledge" doctrine relates to the reasonableness of claims of reliance, finding its theoretical basis in the premise that "[w]hen matters are ... peculiarly within the defendant's knowledge, ... plaintiff may rely without prosecuting an investigation, as he has no independent means of ascertaining the truth." ... And the inquiry as to whether the defendant has peculiar knowledge of the facts at issue, of course, goes to the reasonableness of the plaintiff's relianceif the plaintiff has the means of learning the facts and disclaims reliance on the defendant's representations, there simply is no reason to relieve it of the consequences of both its failure to protect itself and its bargain to absolve the defendant of responsibility. On the other hand, if the plaintiff has conducted *500 the appropriate due diligence and reasonably believes that it has corroborated the defendant's representations, then a different result may be warranted.

Dimon Inc. v. Folium, Inc., 48 F.Supp.2d 359, 368 (S.D.N.Y.1999) (citations and footnotes omitted). Plaintiffs contend that the "peculiar knowledge" exception applies in the instant case because Defendants were involved in the off-balance sheet partnerships and prepay transactions that enabled Enron to disguise its actual financial condition. Plaintiffs rely heavily in this regard on *Dimon*, supra. The *Dimon* plaintiff, an "extremely sophisticated" party that had purchased the stock of a company from the defendant in that case, alleged that the purchase price had been inflated artificially through a complicated accounting scheme that had effected the concealment of certain expenses. *Id.* at 361-363. The purchase agreement disclaimed the plaintiff's reliance on any representations other than those expressly included therein; those representations apparently did not include ones as to the accuracy of the information at issue. Although the agreement provided plaintiff with extensive access to company information, the concealed information was only uncovered after the closing, through complicated reconstruction of

the general ledger. *Id.* at 369-370. The court in that case refused to grant a motion to dismiss the plaintiff's fraud claims on the basis of the contractual disclaimer, recognizing that the "peculiar knowledge" doctrine, as developed in New York, applies not only where the facts allegedly misrepresented literally were within the exclusive knowledge of the defendant, but also where the truth theoretically might have been discovered, although only with extraordinary effort or great difficulty, and holding that dismissal pursuant to Rule 12(b)(6) was inappropriate because the plaintiff's allegations, "if proved, might permit a trier of fact to conclude that the fraud was so well concealed that the truth must be regarded as having been within the exclusive knowledge of defendants notwithstanding [plaintiff's] sophistication and access to the [company's] books." Relevant in this regard was the reported failure of the purchased company's auditors to detect the scheme. *Id.* at 368, 372.

Like *Dimon*, all of the other peculiar knowledge cases cited by Plaintiffs involved alleged concealment or misrepresentation of material information by counterparties in the transactions at issue. See *Brass v. American Film Technologies, Inc.*, 987 F.2d 142 (2d Cir.1993) (nondisclosure by seller of stock warrants); *Buy This, Inc. v. MCI Worldcom Communications, Inc.*, 209 F.Supp.2d 334 (S.D.N.Y.2002) (nondisclosure by purchaser of long-distance telephone minutes); *OnBank & Trust Co. v. FDIC*, 967 F.Supp. 81 (S.D.N.Y.1997) (failure to disclose by seller of mortgage pass-through certificates and servicing rights); *Doehla v. Wathne Limited, Inc.*, No. 98 Civ. 6087, 1999 WL 566311 (S.D.N.Y. Aug. 3, 1999) (misrepresentation and concealment by defendant owners of employer corporations in employment negotiations with plaintiff); *Aniero Concrete Company, Inc. v. New York City Construction Authority*, Nos. 94 Civ. 9111, 95 Civ. 3506, 1997 WL 3268 (S.D.N.Y. Jan. 3, 1997) (misrepresentations by defendant assignor and its agent relating to agreement assigning rights under construction contract to plaintiff assignee); *Stambovsky v. Ackley*, 169 A.D.2d 254, 572 N.Y.S.2d 672 (1st Dept.1991)

(nondisclosure by seller of house).

Information as to the true nature of Enron's financial condition plainly was not the exclusive province of the Defendant banks. Enron, for one, certainly possessed such information, and covenanted in the relevant agreements to provide access *501 to its books and records and to make representations concerning its financial condition. Plaintiffs argue, however, that Enron's alleged deliberate concealment of its true financial condition, including by means of the prepayment and off-balance sheet transactions described above, rendered the truth so difficult to ascertain that the "peculiar knowledge" doctrine could permit a finding of reasonable reliance by Plaintiffs on misrepresentations by the Defendants. Plaintiffs' effort is fatally flawed because they have proffered neither authority nor legal justification for the extension of the peculiar knowledge exception to third parties such as the banks or their affiliates. Plaintiffs' fundamental problem, and the alleged root of their losses, is the allegedly fraudulent conduct of the party on whose representations they agreed to rely, and to which they lent money. Defendants neither borrowed from Plaintiffs nor agreed to provide Plaintiffs, which were themselves sophisticated financial institutions, with any insight into the borrower's status. [FN1]

FN1. The structure of the transactions at issue is noteworthy in this regard. Under the 2000 and 2001 Credit Facilities, Plaintiffs' extensions of credit were made through syndicated credit facilities in which multiple banks agreed to extend credit directly to Enron or its designees. Such transactions are different from loan participations, in which one or more banks transfer to other banks portions of their pre-existing loan commitments. See *Banco Espanol de Credito v. Security Pacific National Bank*, 763 F.Supp. 36, 43 n. 5 (S.D.N.Y.1991) ("A [loan] participation, as distinguished from a multibank loan transactions (syndicated loan), is an arrangement in which a bank makes a loan to a borrower and then sells all or a portion of that loan to a purchasing bank." (quoting United States Comptroller of the Currency, Banking Circular 181 (1984))). Although the 2001 L/C Facility was apparently structured to include a

sale by the Issuing Bank of the letters of credit issued under the facility to the participating banks, the Agreement limits the Issuing Bank's representations and warranties to title to the interest being sold and Enron is responsible under the agreement for all financial information and representations.

Extension of the peculiar knowledge exception to defeat contractual allocations of risks away from the Defendant banks in this case because the principal (Enron) was particularly adept at concealment of its fraud would require at a minimum some factual basis for finding reasonable Plaintiffs' reliance on parties on whom it agreed it would not rely in any respect in making the operative decisions. Plaintiffs have failed to posit any such factual scenario, and the Court declines to extend the peculiar knowledge doctrine, which has developed in the context of fraud by counterparties to transactions, to make third parties guarantors of the integrity of such counterparties. Parties are, of course, free to bargain for such guarantees, but the parties to the transactions at issue here did not do so. Indeed, Plaintiffs here agreed that the Defendant banks and their affiliates could engage in commercial transactions with Enron (and thus have access to special knowledge of Enron's affairs) without any responsibility to account to Plaintiffs for those transactions. See 2000 Credit Facility §§ 7.03 and 8.03 and parallel provisions of other operative agreements.

UCI also fails to state a claim for fraud or misrepresentation with respect to the 2000 L/C Facility. The Complaint alleges that UCI "agreed separately" to extend Enron credit under the 2000 L/C Facility, which is described in Plaintiff's opposition memorandum as "a bilateral letter of credit facility that UCI issued directly and not as a part of any syndicate." (Compl. ¶ 170; Pl.'s Mem. at 18.) There is no allegation in the Complaint or anywhere else that any of the Defendants was a signatory to the agreement governing the 2000 L/C Facility or had any involvement *502 or connection with UCI's decisions regarding that agreement. UCI nonetheless asserts that it is entitled to

recover from Defendants for fraud or misrepresentation because Defendants knew that UCI "had put in place" the 2000 L/C Facility but failed to disclose information within their possession about Enron's true financial condition and instead "intentionally misled" UCI about Enron's finances. As the Court has explained above, even under the credit agreements to which the Defendant banks were parties the banks had no duty to disclose information about Enron's financial condition, and the disclaimer provisions in those agreements preclude any inference of reasonable reliance by UCI on Defendants with respect to credit decisions relating to those agreements. Consequently, UCI cannot establish that Defendants had a duty to disclose Enron's financial condition or that UCI reasonably relied on Defendants in connection with the 2000 L/C Facility, in which none of the Defendants even participated. Accordingly, the Complaint fails to state a fraud or misrepresentation claim with respect to the 2000 L/C facility, and Counts I, II, and IV are dismissed.

Plaintiffs' Aiding and Abetting Fraud Claim

[11][12] The elements of a claim for aiding and abetting fraud are: "(1) the existence of an underlying fraud; (2) knowledge of this fraud on the part of the aider and abettor; and (3) substantial assistance by the aider and abettor in achievement of the fraud." *Gabriel Capital, L.P. v. NatWest Finance, Inc.*, 94 F.Supp.2d 491, 511 (S.D.N.Y.2000). "Substantial assistance" exists where "(1) a defendant affirmatively assists, helps conceal, or by virtue of failing to act when required to do so enables the fraud to proceed, and (2) the actions of the aider/abettor proximately caused the harm on which the primary liability is predicated." *McDaniel v. Bear Stearns & Co., Inc.*, 196 F.Supp.2d 343, 352 (S.D.N.Y.2002).

[13][14] Plaintiffs have stated a claim for aiding and abetting fraud. Plaintiffs allege that Defendants knowingly participated in and helped structure the transactions-the prepays and the LJM2 transactions-that enabled Enron to distort its public financial

statements, specifically with respect to Enron's revenues and its ratio of balance sheet debt to balance sheet capital. Furthermore, Plaintiffs allege that Defendant's participation in those transactions contributed to Enron's collapse, and thus its inability to meet its obligations under the credit agreements. In addition, by identifying Enron's fraudulent statements, that is, the revenue and debt-to-equity figures in Enron's public financial statements, and specifying the way in which those figures misrepresented the reality of Enron's revenues and liabilities, Plaintiffs have plead Enron's fraud with sufficient particularity to satisfy the requirements of Rule 9(b) of the Federal Rules of Civil Procedure. Accordingly, Defendants' motions are denied to the extent they seek dismissal of Count III.

Plaintiffs' Claim for Breach of the Implied Duty of Good Faith and UCI's Claim for Declaratory Relief

[15][16] The express disclaimers in the credit agreements preclude Plaintiffs' claim for breach of the implied duty of good faith in those agreements to the extent that claim is premised on the allegedly fraudulent conduct addressed above. Plaintiffs allege that the failure of Defendant banks to disclose Enron's true financial condition in connection with the credit transactions prevented Plaintiffs from taking advantage of their various rights under the credit agreements. Although New York law implies a duty of good faith and *503 fair dealing in every contract, "no obligation can be implied that would be inconsistent with other terms of the contractual relationship." *Dalton v. Educational Testing Service*, 87 N.Y.2d 384, 639 N.Y.S.2d 977, 979-980, 663 N.E.2d 289 (1995) (internal quotation marks omitted). Here, as explained above, the operative contracts specifically absolve the Defendant banks from any duty to disclose financial information regarding Enron and contain Plaintiffs' undertakings to rely on their own credit analyses in making the relevant decisions. Implication of a duty, notwithstanding these provisions, of the banks to make disclosures regarding Enron's financial conditions would clearly be

inconsistent with the governing contracts. Cf. Banco Espanol de Credito, 763 F.Supp. at 44-45 ("courts do not impose an obligation which would be inconsistent with other terms of the contractual relationship and for which the parties did not bargain.... The express disclaimer provisions of the [participation agreement] preclude the common law claims [of breach of an alleged implied covenant of good faith and fair dealing, tortious misrepresentations, and claims of breach of an alleged duty to disclose based on superior knowledge] asserted by the various plaintiffs."). Count VI of the Complaint therefore fails to state a claim upon which relief can be granted to the extent it is premised on the Defendant banks' alleged failure to disclose Enron's true financial condition.

UCI also asserts a separate claim for breach of the implied duty of good faith in the 2001 L/C Facility against Defendant JP Morgan Chase Bank, as well as a claim for declaratory relief based on the same underlying factual allegations. [FN2] UCI alleges that JP Morgan Chase Bank intentionally and in bad faith submitted and continues to submit for payment letters of credit "that were not validly issued under the 2001 L/C Facility," and claims for its legal expenses that are not subject to indemnification under the 2001 L/C Facility. UCI also alleges that JP Morgan Chase Bank has deprived and continues to deprive UCI of information it has requested regarding the 2001 L/C Facility. To the extent these causes of action are premised on the allegedly fraudulent conduct by JP Morgan Chase Bank under the 2001 L/C Facility discussed above, they fail to state a claim for which relief can be granted for the reasons explained above.

FN2. UCI seeks a judgment that 1) it has no further obligations under the 2001 L/C Facility, 2) JP Morgan Chase Bank has an obligation to return all funds paid by UCI under the facility, and 3) JP Morgan Chase Bank must grant full access to UCI to any documents or other information made available to any other bank participating in the facility. (Compl. ¶ 263.)

Nevertheless, it is not clear that UCI could prove no set of facts consistent with the allegations in the Complaint that would entitle it to relief on other grounds with respect to the alleged improper issuance of letters of credit, improper expense claims and failure to provide information. To the extent, for instance, UCI seeks to assert a breach of contract claim or other claim for noncompliance with the terms of the 2001 L/C Facility Agreement, no provision in the agreement appears to preclude such a claim as a matter of law. Furthermore, an indemnification provision in the 2001 L/C Facility Agreement under which the participating banks agreed to indemnify the Co-Administrative and Paying Agents and the Issuing Bank from any and all claims or expenses incurred in connection with letters of credit explicitly excludes indemnification for claims or expenses attributable to the gross negligence or the willful misconduct of those parties. See *id.* §§ 7.07, 8.07, 9.01, Ex. C to Gertzman *504 Decl. at 32, 35, 36. Accordingly, Counts VI and VIII will be dismissed for failure to state a claim only to the extent they are premised on allegedly fraudulent conduct by JP Morgan Chase Bank. UCI will, however, be required to amend its Complaint to clarify the nature of any non-fraud based claims intended to be asserted in these Counts.

Plaintiffs' Unjust Enrichment Claim

[17][18][19] The elements of an unjust enrichment claim under New York law are that "(1) that the defendant benefitted; (2) at the plaintiff's expense; and (3) that equity and good conscience require restitution." *Kaye v. Grossman*, 202 F.3d 611, 616 (2d Cir.2000). Under New York law, "the existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract [i.e., unjust enrichment] for events arising out of the same subject matter." *MacDraw, Inc. v. CIT Group Equipment Financing, Inc.*, 157 F.3d 956, 964 (2d Cir.1998). Plaintiffs assert that Defendants "unjustly used the funds Plaintiffs paid under the agreements to reduce the debt Enron owed them.... Taking advantage of

their superior knowledge concerning Enron's actual, dire financial condition, they seized the opportunity to flood Enron [with Plaintiff's cash] in order to have their debt paid off." (Pls.' Mem. at 45.) As Plaintiffs acknowledge, the payments in question were made pursuant to the credit agreements. As to the allegation that Defendants took advantage of their "superior knowledge" of Enron's financial condition, the Court has already detailed how the credit agreements expressly provided that Defendant banks and their affiliates had no duty to account to Plaintiffs for their dealings with Enron, and the banks had no duty to provide Plaintiffs with any information in connection with payments under the agreements. Because the credit agreements govern the subject matter of Plaintiffs' unjust enrichment claim, Count VII fails to state a claim upon which relief can be granted. Accordingly, Count VII is dismissed.

Plaintiffs' Civil Conspiracy Claim

[20][21][22][23] The elements of a civil conspiracy are (1) an agreement between two or more persons, (2) an overt act, (3) an intentional participation in the furtherance of a plan or purpose and (4) resulting damage. *Official Committee of Unsecured Creditors v. Donaldson, Lufkin & Jenrette Sec. Corp.*, No. 00 Civ. 8688, 2002 WL 362794, at *13 (S.D.N.Y. Mar. 6, 2002). New York law does not recognize the substantive tort of civil conspiracy; the claim is available "only if there is evidence of an underlying actionable tort." *Missigman v. USI Northeast, Inc.*, 131 F.Supp.2d 495, 517 (S.D.N.Y.2001). Conspiracy allegations "are permitted only to connect the actions of separate defendants with an otherwise actionable tort." *Alexander & Alexander*, 68 N.Y.2d 968, 510 N.Y.S.2d 546, 547, 503 N.E.2d 102 (1986). As the Court explained in its discussion of Plaintiffs' aiding and abetting claim, Plaintiff has adequately plead fraud by Enron, and has alleged that Defendants knowingly participated in Enron's fraudulent accounting scheme. Accordingly, Plaintiffs' allegations of conspiracy serve to connect Defendants' conduct "with an otherwise actionable tort." and Count V states a claim for which relief can be granted.

CONCLUSION

Plaintiffs have already plead their claims three times. They filed the Second Amended Complaint after briefing Defendants' motions to dismiss the Amended Complaint. In light of the foregoing analysis and Plaintiffs' multiple prior opportunities to address the legal insufficiencies of *505 the claims asserted in this action, granting further leave to replead certain of Plaintiffs' claims would be futile. Accordingly, Defendants' motions are granted to the following extent, and denied in all other respects: Counts I, II, IV, and VII of the Second Amended Complaint are dismissed with prejudice pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Counts VI and VIII are also dismissed with prejudice pursuant to Rule 12(b)(6) to the extent they are premised on misrepresentations or omissions by Defendants concerning Enron's financial condition. Plaintiffs' surviving causes of action are Counts III and V, and VI and VIII to the extent not hereby dismissed. Because the Court has resolved Defendants' motions under Rule 12(b)(6), it is unnecessary for the Court to address Defendants' Rule 9(b) arguments.

Plaintiffs' objection to a July 18, 2003 Order of the MDL Panel conditionally transferring this action to the United States District Court for the Southern District of Texas is now pending. If the MDL Panel does not rescind its transfer order, Plaintiffs shall, within 21 days of the MDL Panel's decision with respect to the objection, serve and file a Third Amended Complaint reflecting the foregoing determinations. That complaint shall include allegations sufficient to make clear the nature of any non-fraud based claims intended to be asserted in Counts VI and VIII.

This case is hereby placed on the Court's suspense docket pending the MDL Panel's decision on Plaintiffs' objection.

SO ORDERED.

ORDER

Plaintiffs seek reconsideration of the portion of the Court's October 10, 2003, Opinion and Order dismissing certain of Plaintiffs' claims with prejudice or, in the alternative, entry of final judgment pursuant to Federal Rule of Civil Procedure 54(b) as to those claims. For the following reasons, Plaintiffs' motion is denied.

Plaintiffs, although purporting to set forth controlling legal precedents and factual considerations overlooked by the Court, merely reiterate arguments raised in the briefing of Defendants' motions or at oral argument. The Court considered thoroughly those arguments and related submissions in reaching its decision. *P.T. Bank Central Asia v. ABN AMRO Bank N.V.*, 301 A.D.2d 373, 754 N.Y.S.2d 245 (1st Dep't 2003), which Plaintiffs contend the Court failed to acknowledge, involved alleged fraud in the sale of a commodity by one party to another, as did the cases analyzed by the Court at pages 24-25 of the October 10, 2003, decision. Specifically, *P.T. Bank* involved the sale by a bank of a loan participation to another bank that was not a party to the original credit agreement. The court's recognition of the potential applicability of the "Special Facts" doctrine in that case, thus, arose not in connection with potential liability of a bank in its role as administrative agent with respect to a loan facility but, rather, in connection with misrepresentations allegedly made in a secondary transaction in which the defendant bank sold the plaintiff a participation in the credit it had previously extended to the defaulting borrower. Cf. Opinion at 26 n. 1 (discussing difference in structure between syndicated credit facilities and loan participations). Plaintiffs also quibble with the "counterparty"/ "third party" nomenclature used by the Court to explain the distinction between the peculiar knowledge cases cited by Plaintiffs and the facts presented here, arguing that the Court overlooked facts because the defendants banks were parties to agreements at issue in this case. As the Court's Opinion makes abundantly clear, the Court was well aware that the defendant *506 banks were parties to the credit facility agreements. The term

"third party" was used in reference to the absence of a borrower/lender role on the part of those entities with respect to the credit relationship at issue here, i.e., Plaintiffs' agreement to extend credit to Enron and/or its affiliates.

Plaintiffs further assert that the Court overlooked the various indemnification provisions of the relevant agreements, which exclude protection for gross negligence or intentional wrongdoing by the defendant banks. This argument begs the very question at issue with respect to the dismissed claims: did the defendant banks have a duty to disclose information about Enron's financial condition to the participant banks such that a failure to do so would constitute wrongdoing? Plaintiffs' invocation of the indemnification provisions amounts simply to disagreeing with the Court's decision. Plaintiffs' remaining arguments are similarly meritless.

Plaintiffs have failed to present binding precedent or other matters overlooked by the Court in reaching its October 10th decision; accordingly, Plaintiffs' request for reconsideration is denied. Moreover, even if the Court were to reconsider its decision with respect to the dismissed claims, it would nonetheless adhere to its decision to dismiss those claims with prejudice, for the reasons set forth in the October 10, 2003, Opinion and Order.

[24] Plaintiffs also seek, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, entry of final judgment with respect to the dismissed claims. Rule 54(b) provides in pertinent part that, "[w]hen more than one claim for relief is presented in an action ... the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay[.]" The circumstances of this case do not warrant Rule 54(b) certification. The dismissed and remaining claims here arise from essentially the same factual allegations; judicial economy will best be served if multiple appellate panels do not have to familiarize themselves with this case in

piecemeal appeals. Cullen v. Margiotta, 618 F.2d 226, 228 (2d Cir.1980). Furthermore, Plaintiffs have not shown any "danger of hardship or injustice through delay which would be alleviated by immediate appeal." Citizens Accord, Inc. v. Town of Rochester, 235 F.3d 126, 128 (2d Cir.2000) (internal quotation marks and citation omitted). Accordingly, Plaintiffs' request for Rule 54(b) certification is denied.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for reconsideration and Rule 54(b) certification is denied.

SO ORDERED.

288 F.Supp.2d 485

END OF DOCUMENT

88

Supreme Court, Appellate Division, First
Department, New York.

UST PRIVATE EQUITY INVESTORS FUND,
INC., et al., Plaintiffs-Appellants,
v.
SALOMON SMITH BARNEY, et al.,
Defendants-Respondents.

Nov. 15, 2001.

Purchasers of preferred stock in company that went bankrupt brought action against company's investment bankers to recover for alleged misrepresentations. The Supreme Court, New York County, Charles Ramos, J., dismissed complaint, and appeal was taken. The Supreme Court, Appellate Division, held that purchasers were sophisticated investors who could not justifiably have relied on bankers' representations.

Affirmed.

West Headnotes

[1] Securities Regulation 278
349Bk278

Sophisticated investor cannot establish that it entered into arm's length transaction in justifiable reliance on alleged misrepresentations if that investor failed to make use of means of verification that were available to it, such as reviewing files of other parties.

[2] Securities Regulation 297
349Bk297

Sophisticated investors who purchased preferred stock could not have justifiably relied on investment bankers' alleged misrepresentations regarding company's satisfaction of regulatory requirements; although bankers' offering memorandum asserted regulatory compliance, it also advised investors to do their own due diligence, bankers' access to relevant information was not superior to that of investors, and there was no evidence that bankers otherwise knew or recklessly disregarded likelihood that company was concealing material information

from investors.

****385** D. Brian Hufford, for Plaintiffs-Appellants.

A. Robert Pietrzak, Robert C. Harrison, for Defendants-Respondents.

ROSENBERGER, J.P., WILLIAMS,
ELLERIN, BUCKLEY and MARLOW, JJ.

***87** Judgment, Supreme Court, New York County (Charles Ramos, J.), entered August 10, 2000, which, upon a prior order, same court and Justice, entered on or about August 3, 2000, granting defendants' motion pursuant to CPLR 3211(a)(1) and (7) and 3016(b), dismissed the complaint, unanimously affirmed, with costs.

Plaintiffs are sophisticated investors that purchased preferred stock of AbTox, Inc. (AbTox) in a private placement that closed in March 1997. Plaintiffs allege that, prior to the closing, they conducted their own due diligence examination of AbTox, ****386** in which they received information and documents directly from AbTox, not from defendants, the investment banking firms AbTox had engaged to act as its placement agents and advisors in connection with the offering. After the closing, plaintiffs allegedly learned for the first time that AbTox's sole ***88** product, a medical sterilizer, had not been cleared for marketing by the Food & Drug Administration (FDA) in the form in which AbTox had distributed it, and the company subsequently became bankrupt.

Plaintiffs allege that, notwithstanding extensive disclaimers set forth in the offering memorandum prepared by defendants based on information provided by AbTox, plaintiffs purchased their securities in reliance on inaccurate statements in the offering memorandum and other informational materials provided to them by defendants that AbTox's product had been cleared for marketing by the FDA. Plaintiffs further allege that they did not discover the lack of clearance during their due diligence because

(Cite as: 288 A.D.2d 87, *88, 733 N.Y.S.2d 385, **386)

the existence of "deficiency letters" sent by the FDA to AbTox in May and September of 1996 had been concealed from them. Based on these allegations, plaintiffs sue defendant investment banking firms for fraud and negligent misrepresentation, as here relevant.

[1][2] We affirm the grant of defendants' motion to dismiss the complaint. As a matter of law, a sophisticated plaintiff cannot establish that it entered into an arm's length transaction in justifiable reliance on alleged misrepresentations if that plaintiff failed to make use of the means of verification that were available to it, such as reviewing the files of the other parties (see, e.g., *Stuart Silver Assocs. v. Baco Dev. Corp.*, 245 A.D.2d 96, 98-99, 665 N.Y.S.2d 415; *Abrahami v. UPC Constr. Corp.*, 224 A.D.2d 231, 234, 638 N.Y.S.2d 11; *Stuart Lipsky, P.C. v. Price*, 215 A.D.2d 102, 103, 625 N.Y.S.2d 563; *Curran, Cooney, Penney, Inc. v. Young & Koomans, Inc.*, 183 A.D.2d 742, 743-744, 583 N.Y.S.2d 478, lv. denied 80 N.Y.2d 757, 589 N.Y.S.2d 308, 602 N.E.2d 1124). In this case, the offering memorandum advised plaintiffs that defendant investment bankers could not guarantee the accuracy or completeness of the information set forth therein, and specifically directed plaintiffs to "rely upon their own examination" of AbTox and to request from AbTox whatever additional information or documents they deemed necessary to make an informed investment decision. Accordingly, as alleged by plaintiffs, the president of one of the institutional plaintiffs, in the course of the due diligence he personally conducted to verify the clearance status of AbTox's product, was provided with a chronology that made reference to, but did not include, the very documents that ultimately alerted him to the clearance problem when he received copies of them nearly a year after the closing. If plaintiffs had requested and carefully reviewed these documents during their due diligence, they would have been apprised of the clearance issue before making their investment decision. Accordingly, plaintiffs cannot claim to have justifiably *89 relied on the statements regarding clearance in the offering memorandum and other informational documents (see, e.g., *Schlaifer*

Nance & Co. v. Estate of Warhol, 2d Cir., 119 F.3d 91, 101; *Grumman Allied Indus. v. Rohr Indus.*, 2d Cir., 748 F.2d 729, 738).

We further note that the matter of the clearance of AbTox's product was not peculiarly within the knowledge of defendants, who were engaged by AbTox to act as placement agents and financial advisers, and plaintiffs have not alleged any facts from which it could logically be inferred that defendants' access to the relevant information was superior to the access afforded **387 to plaintiffs during their due diligence, or that defendants otherwise knew, or recklessly disregarded the likelihood, that AbTox was concealing material information from plaintiffs (see, CPLR 3016[b]; *Congress Fin. Corp. v. John Morrell & Co.*, 790 F.Supp. 459, 470-472).

288 A.D.2d 87, 733 N.Y.S.2d 385, 2001 N.Y. Slip Op. 09125

END OF DOCUMENT

89

United States District Court,
S.D. New York.

Robert VOGEL, Sam Vogel, Dr. John
McCracken, John Mazarra and Alan B.
Werner,
Plaintiffs,
v.
SANDS BROS. & CO., LTD., Defendant.

No. 98 Civ. 2527 BDP.

Jan. 4, 2001.

Investors brought securities fraud class action against investment banking firm, alleging that firm on behalf of its client manipulated stock price of corporation in which investors held interest, as part of scheme for client to take over corporation. The District Court, 43 F.Supp.2d 438, Barrington D. Parker Jr., J., dismissed action without prejudice, and investors amended complaint. On renewed motion to dismiss, the Court held that: (1) investors failed to state fraud claim with sufficient particularity; (2) firm's alleged motives to increase its transaction fees and maintain close relationship to client failed to raise inference of fraudulent motive; (3) corporation's and client's alleged fraudulent intentions did not establish firm's fraudulent intent; and (4) optimistic statements did not support inference of scienter.

Motion granted.

West Headnotes

[1] Securities Regulation 60.15
349Bk60.15

[1] Securities Regulation 60.18
349Bk60.18

To properly state market manipulation claim under Rule 10b-5, plaintiff must plead: (1) damage; (2) caused by reliance on defendant's misrepresentations or omissions of material facts, or on scheme by defendant to defraud; (3) scienter; (4) in connection with purchase or sale of securities; (5) furthered by defendant's use of mails or any facility of national

securities exchange. Securities Exchange Act of 1934, § 10(b), as amended, 15 U.S.C.A. § 78j(b); 17 C.F.R. § 240.10b-5.

[2] Securities Regulation 60.53
349Bk60.53

To satisfy Private Securities Litigation Reform Act's (PSLRA) and civil procedure rules' particularity requirements for fraud pleading, complaint must: (1) specify statements that plaintiff contends were fraudulent; (2) identify speaker; (3) state where and when statements were made; and (4) explain why statements were fraudulent. Securities Exchange Act of 1934, §§ 10(b), 21D(b), as amended, 15 U.S.C.A. §§ 78j(b), 78u-4(b); 17 C.F.R. § 240.10b-5; Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.

[3] Securities Regulation 60.53
349Bk60.53

Investors failed to state with sufficient particularity securities fraud claim against investment banking firm by alleging that firm engaged in specified misrepresentations to improperly inflate price of corporation's stock, but failing to identify, or misidentifying, speaker of some alleged misrepresentations, failing to specify dates of some alleged misrepresentations, and failing to state reasons why statements were false, instead relying on conclusory assertions of falsehood. Securities Exchange Act of 1934, §§ 10(b), 21D(b), as amended, 15 U.S.C.A. §§ 78j(b), 78u-4(b); 17 C.F.R. § 240.10b-5; Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.

[4] Securities Regulation 60.45(1)
349Bk60.45(1)

Scienter required in relation to securities fraud is intent to deceive, manipulate or defraud, or knowing misconduct. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b); 17 C.F.R. § 240.10b-5.

[5] Securities Regulation 60.51
349Bk60.51

To satisfy Private Securities Litigation Reform Act (PSLRA) pleading requirement for scienter, plaintiff may either allege: (1) facts to show that defendant had both motive and

opportunity to commit fraud, or (2) facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness. Securities Exchange Act of 1934, §§ 10(b), 21D(b)(2), as amended, 15 U.S.C.A. §§ 78j(b), 78u-4(b)(2); 17 C.F.R. § 240.10b-5.

[6] Securities Regulation 60.45(3)
349Bk60.45(3)

Investment banking firm's alleged motive for engaging in alleged manipulations of corporation's stock price, namely to realize greater transaction fees, combined with firm's close relationship with company allegedly scheming to take over corporation, fell short of raising strong inference of motive to commit securities fraud, and thus failed to satisfy scienter element of corporation's investors' securities fraud claim against firm. Securities Exchange Act of 1934, §§ 10(b), 21D(b)(2), as amended, 15 U.S.C.A. §§ 78j(b), 78u-4(b)(2); 17 C.F.R. § 240.10b-5.

[7] Securities Regulation 60.45(1)
349Bk60.45(1)

Where scienter element of securities fraud claim rests upon identification of circumstances indicating conscious fraudulent behavior or recklessness, rather than upon showing of motive and opportunity, strength of circumstantial allegations must be correspondingly greater. Securities Exchange Act of 1934, §§ 10(b), 21D(b)(2), as amended, 15 U.S.C.A. §§ 78j(b), 78u-4(b); 17 C.F.R. § 240.10b-5.

[8] Securities Regulation 60.45(3)
349Bk60.45(3)

Investors failed to state scienter element of securities fraud claim against investment banking firm based upon conscious misbehavior or recklessness by alleging that corporation in which investors held interest, and which was allegedly takeover target of firm's client, hid existence of convertible bonds owned by client; corporation's alleged intent to deceive and client's alleged scheme did not establish firm's intent. Securities Exchange Act of 1934, §§ 10(b), 21D(b)(2), as amended, 15 U.S.C.A. §§ 78j(b), 78u-4(b); 17 C.F.R. § 240.10b-5.

[9] Securities Regulation 60.45(1)
349Bk60.45(1)

Optimistic statements and news releases that turned out to be inaccurate were insufficient by themselves to support inference of scienter required to support securities fraud claim; showing was required that maker of statements had access to facts contradicting statements. Securities Exchange Act of 1934, §§ 10(b), 21D(b)(2), as amended, 15 U.S.C.A. §§ 78j(b), 78u-4(b); 17 C.F.R. § 240.10b-5.

*732 Jill Rosell, Thomas M. Skelton, Lowey Dannenberg Bemporad & Selinger, White Plains, NY, for plaintiffs.

Walter C. Carlson, R. Rene Pengra, Sidley & Austin, Chicago, IL, for defendant Conseco.

Richard A. Roth, Ira Meyerwitz, Littman Krooks Roth & Ball P.C., New York City, for defendant Sands Bros.

MEMORANDUM DECISION AND ORDER

BARRINGTON D. PARKER, Jr., District Judge.

By Memorandum Decision and Order dated March 30, 1999, this Court dismissed the original complaint (the "Complaint") filed by lead plaintiff David Schnell on behalf of a purported class of public investors in NAL Financial Group, Inc. ("NALF"). See Schnell v. Conseco, 43 F.Supp.2d 438 (S.D.N.Y.1999). The Complaint alleged violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961, et seq., against Conseco, Inc. ("Conseco"), and violations of § 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78j(b), and Rule 10b-5 promulgated thereunder by the Securities Exchange Commission (the "SEC"), 17 C.F.R. § 240.10b-5, against Sands Brothers & Co., Ltd. ("Sands").

The RICO claim against Conseco was dismissed with prejudice because plaintiff failed to adequately allege a scheme to defraud, a pattern of racketeering activity or causation. The § 10(b) and Rule 10b-5 claims were dismissed against Sands without

prejudice because the Complaint failed to satisfy the heightened pleading standards set forth under the Private Securities Litigation Reform Act (the "PSLRA"), 15 U.S.C. § 78u-4(b) for alleging misrepresentations and omissions, and because it failed to adequately allege scienter. This Court granted leave to amend the Complaint against Sands.

On April 29, 1999, lead plaintiffs Robert Vogel, Sam Vogel, Dr. John McCracken, John Mazarra and Alan B. Werner, [FN1] on *733 behalf of the same purported class of investors of NALF, filed an amended complaint (the "Amended Complaint") against Sands. The Amended Complaint again alleges violations of § 10(b) of the Exchange Act and Rule 10b-5. [FN2] Before this Court is defendant's motion to dismiss under Fed.R.Civ.P. 12(b)(6) and 9(b). For the reasons stated below, defendant's motion is granted.

FN1. On June 28, 1998, following motions made, Robert Vogel, Same Vogel, Dr. John McCracken, John Mazzara and Alan B. Werner were added as plaintiffs by Order of this Court. They adopted the original pleading.

FN2. On December 9, 1999, this Court denied plaintiffs' motion for leave to file a Second Amended Complaint to assert securities fraud claims against both Conseco and Sands, and the motion of Richard Scherrill to intervene as a plaintiff in a newly proposed class action. See Vogel v. Conseco, No. 98 Civ. 2527, slip op. at 3-6 (S.D.N.Y. Dec. 9, 1999).

BACKGROUND

Many of the facts relevant to this dispute are set forth in this Court's prior decision, with which familiarity is assumed. See Schnell, 43 F.Supp.2d at 438. For purposes of deciding this motion, the Court is obligated to construe the pleadings in favor of the plaintiffs, and must accept as true all factual allegations made in the Amended Complaint. See Cooper v. Parsky, 140 F.3d 433, 440 (2d Cir.1998); Serrano v. 900 5th Avenue Corp., 4 F.Supp.2d 315, 316 (S.D.N.Y.1998). All reasonable inferences must be made in plaintiffs' favor. In re Blech Securities

Litigation, 961 F.Supp. 569, 579 (S.D.N.Y.1997) (citing Hernandez v. Coughlin, 18 F.3d 133, 136 (2d Cir.), cert. denied, 513 U.S. 836, 115 S.Ct. 117, 130 L.Ed.2d 63 (1994)). The following facts are construed accordingly.

Conseco is an Indiana based financial services holding company, engaged in the development, marketing and administration of annuity, supplemental health and individual life insurance products. Sands is an investment banking firm, a broker and dealer in securities registered with the SEC, a member firm of the New York Stock Exchange and of the National Association of Securities Dealers ("NASD"). Conseco is alleged to be Sands' most valued client, and certain executive officers of Conseco are claimed to share a long-lasting relationship with Sands' co-founders, Martin and Steven Sands, spanning over fourteen years.

NALF is a Delaware corporation founded in 1991. It is engaged in the purchase and servicing of automobile loan and lease contracts. One year after becoming a public company on November 30, 1994, NALF began securitizing its loan portfolios whereby it would periodically sell an asset pool of various loan contracts to a trust. In turn, the trust would pay NALF with proceeds raised by issuing securities to investors in the form of notes and certificates backed by the assets of the trust. NALF collected payments due on the loan contracts, receiving an annual servicing fee equal to 3% of the principal of the outstanding loans.

The collections of interest and principal on the loan contracts were used to pay interest and principal due on the securities issued by the trust. Any payments in excess of those needed to service the securities and to pay other fees and expenses of the trust were deposited into a reserve account to the extent necessary to maintain a prescribed operating level. Any remaining cash was paid directly to NALF. The gains on the sale of the loan contracts under this securitization program enabled NALF to record significantly increased revenues in each of the quarters

during which a securitization was completed.

NALF's stock price remained steady throughout most of 1996, peaking at over \$16 per share. From late 1996, however, NALF's stock started to decline, particularly after a February 1997 announcement of reserve deficiencies deemed to be attributable to weak underwriting guidelines in the loan contracts from December 1995 through March 1996. On March 23, 1998, *734 NALF filed for protection pursuant to Chapter 11 of the bankruptcy laws. No claims are asserted in this action against NALF.

The gravamen of the Amended Complaint revolves around plaintiffs' theory that Conseco devised and successfully implemented a scheme to take control over NALF at the expense of its public investors. Specifically, plaintiffs allege that Conseco intended to, and did, make a nominal investment in below-market convertible debt securities of NALF. Plaintiffs allege that the purpose of these investments was to obtain effective control over NALF through "arrangements" made with its corporate insiders and controlling shareholders, to permit those insiders and controlling shareholders to cash out their investments at a profit by artificially inflating the value of NALF's stock, and to cause NALF to conduct quarterly securitizations until its financial statements were in a position to support a public offering. Plaintiffs further allege that Conseco improperly schemed to use the proceeds of the public offering to continue the securitization program until the conversion date of the debt securities, to artificially depress the stock price of NALF after the offering to permit Conseco to convert the debt securities at a market discount, and finally to force NALF into a pre-packaged bankruptcy reorganization. See Amended Complaint at ¶ 4.

According to plaintiffs, Sands helped further Conseco's scheme by making material misrepresentations and omissions about NALF's business, and by using its market-making ability to manipulate NALF's stock prices in ways favorable to Conseco's purported scheme.

Plaintiffs support their theory with the following factual allegations made in the Amended Complaint. Sometime in 1995, one of the major shareholders of NALF, Howard Appel ("Appel"), allegedly began to seek outside financing for NALF through his relationships with brokerage and investment banking firms. Appel, a former stockbroker who had been permanently barred by the NASD in 1991 from becoming affiliated with any member of the NASD, allegedly offered NALF warrants as a "reward" for introducing the company to brokerage and banking institutions.

Sands began making a market in the stock of NALF in December 1995, allegedly around the time Appel began implementing his "reward" plan. On January 29, 1996, Sands entered into an investment banking agreement with NALF (the "Investment Banking Agreement") pursuant to which Sands introduced Conseco--its most valued and long-standing client--to NALF.

On April 23, 1996, Conseco, through two of its subsidiaries, acquired \$10M in convertible debentures of NALF with a life span of eighteen months, expiring in October 1997 (the "Convertible Bonds"). At Conseco's option, the debentures were convertible into NALF common stock at the lesser of \$12.00 per share or 80% of the market price of the stock on the date of conversion. In addition, Conseco received warrants to purchase 515,000 shares of NALF (the "Conseco Warrants") at an exercise price which was reduceable in the event a subsequent public offering of NALF priced shares lower than the originally agreed-upon exercise price of the Conseco Warrants. Plaintiffs allege that the market conversion feature of the Convertible Bonds and the price protection mechanism of the Conseco Warrants provided Conseco an incentive to artificially depress the stock price of NALF.

The Investment Banking Agreement was amended in April 1996 to provide for compensation to Sands for acting as NALF's investment banker in connection with the Convertible Bonds. Under the amendment,

Sands received \$550,000 in cash, as well as warrants to purchase 160,000 shares of NALF (the "Sands Warrants")--which also included a price protection mechanism--as its placement fee. *735 Sands allegedly distributed the warrants to its individual brokers soon thereafter. According to the Amended Complaint, the cash portion of Sands' fee was "unusually high," while the warrant portion of the compensation was an "unusual form" of compensation. Amended Complaint at ¶ 35. Moreover, Sands' purported distribution of warrants to individual brokers was labeled an "unusual compensation arrangement" by plaintiffs. *Id.*

In addition, plaintiffs allege three other general problems associated with the issuance of the Convertible Bonds. First, plaintiffs contend that under NASD rules, NALF was required to--but did not--obtain shareholder approval for the issuance of the Convertible Bonds. According to plaintiffs, NASD rules provide that shareholder approval is required for the placement of below-market conversion rate securities if such securities are convertible into 20% or more of the issuer's outstanding shares of common stock before their issuance. Since the combination of the Convertible Bonds and the Conseco Warrants allegedly conferred beneficial ownership of 20.1% of the outstanding shares of NALF before their issuance, NALF's failure to obtain approval was, according to plaintiffs, a violation of NASD rules. [FN3]

FN3. NALF's stock was delisted by the NASD in December 1997 for the alleged failure to obtain the necessary shareholder approval in violation of NASD rules.

Second, because NALF relied upon the private placement exemption, § 4(2) of the Securities Act of 1933, to exempt the placement of the Convertible Bonds from the Act's registration requirements, plaintiffs contend that NALF should have filed, but failed to file, a Form D with the SEC.

Third, Robert Bartolini, Chairman of the Board and Chief Executive Officer of NALF, allegedly failed to receive the proper

authorization from NALF's board of directors to sign the purchase agreement governing the sale of the Convertible Bonds from NALF to Conseco. Plaintiffs contend that these failures by NALF in connection with the issuance of the Convertible Bonds support the existence of Conseco's illicit plan to control NALF, as well as Sands' knowledge and involvement in that plan.

After Conseco's purchase of the Convertible Bonds, the Amended Complaint alleges that Sands engaged in artificially inflating the price of NALF stock through an illegal "pump and dump" scheme to enable insiders to make increased profits on sales of NALF stock. In furtherance of this scheme, plaintiffs contend that Sands made phone calls to investors, disseminated false opinions on the valuation of NALF stock, and failed to inform public investors of Conseco's plan to exercise the 80% market conversion feature of the Convertible Bonds and acquire NALF stock at severely depressed prices. Moreover, plaintiffs allege that Sands' principal market-making activity in NALF stock, coupled with its misrepresentations and omissions concerning its valuation, enabled NALF's stock price to reach an unsustainable peak in 1996 during which time corporate insiders were able to profit at the expense of public investors.

In November 1996, the Investment Banking Agreement was amended a second time to provide for a facilitation fee to Sands in connection with its efforts on a public offering of 2.5 million shares of NALF to be issued at the end of December 1996 (the "Public Offering"). Sands received \$300,000 as its facilitation fee, less any actual underwriting fees and commissions it received from the Public Offering, up to \$150,000. Moreover, the exercise price of the Sands Warrants, as well as the Conseco Warrants, were reduced to the Public Offering price of \$7.50 pursuant to the price protection provisions provided in the warrants. NALF raised over \$21 million from the Public Offering, which was used to repay short term notes and to fund additional securitizations before the expiration date of the Convertible Bonds.

***736** At the end of February 1997, NALF disclosed reserve deficiencies attributable to weak underwriting guidelines in place regarding its loan contracts from December 1995 through March 1996. Shortly thereafter, Sands purportedly reduced its earnings estimates for NALF, blaming the nonperforming loans and general industry conditions. Further, plaintiffs contend that after the disclosure, Sands engaged in conduct designed to lower the price of NALF's stock, including ceasing all market-making activities in NALF stock, removing NALF stock from its recommended list and stopping its aggressive efforts to market NALF shares. As a consequence, NALF's stock price--already trending downward--began an accelerated descent.

Despite its financial difficulties, NALF was able to complete two more securitizations prior to the expiration of the Convertible Bonds. On July 3, 1997, Conseco loaned an additional \$5 million to NALF and received additional warrants from NALF to purchase over 250,000 shares of common stock at an exercise price of \$.15 per share. The exercise price of the Conseco warrants was also reduced to \$.15 per share. On August 21, 1997, Conseco acquired 5 million shares of Series A Preferred Stock of NALF in exchange for an additional \$5 million of short term financing. Moreover, Conseco acquired all of NALF's outstanding convertible debentures held by third parties.

On October 1, 1997, Conseco converted the acquired debentures into over 1.5 million shares of NALF common stock at conversion prices ranging from \$.30 to \$.32 per share, and converted the Convertible Bonds into over 35 million shares of NALF common stock at a conversion price of \$.32 per share, pursuant to the 80% market conversion feature. In connection with the conversion, plaintiffs allege that Conseco caused NALF to disseminate a false and misleading information statement on Schedule 14C on November 21, 1997 (the "Information Statement"). There, plaintiffs contend that rather than solicit the necessary shareholder approval for the conversion, the Information Statement falsely represented that NALF had

complied with its legal requirements and that § 203 of the Delaware General Corporation Law, requiring shareholder approval for certain business combinations with an interested shareholder, had been waived by the company. This misrepresentation, according to plaintiffs, was designed to mislead public shareholders into believing NALF had complied with Delaware law, when, in fact, it had not.

Facing a purported liquidity crisis which resulted in a slowing in the origination of receivables and a suspension of the lucrative securitization program, NALF filed a Chapter 11 petition for bankruptcy on March 23, 1998. Pursuant to a court-approved plan of reorganization, NALF's existing stock was extinguished with Conseco owning all of a new Class A shares of NALF and 80% of a new Class B shares. Other creditors received approximately 80% of the amounts owing to them.

Plaintiffs argue that the factual allegations asserted in the Amended Complaint are sufficient to allege that Sands engaged in securities fraud in violation of § 10(b) of the Exchange Act and Rule 10b-5. Sands has moved to dismiss the Amended Complaint on grounds that it fails to state a claim upon which relief could be granted and that it fails to plead fraud with particularity. See Fed.R.Civ.P. 12(b)(6) & 9(b). In particular, Sands argues, inter alia, that the Amended Complaint fails to plead allegations of fraud with particularity as required under the PSLRA, that it fails to adequately allege scienter, and that it fails to adequately allege loss causation. [FN4]

FN4. Defendant further argues that the Amended Complaint should be dismissed because leave to amend the original Complaint was granted only to plaintiff David Schnell and not to the new lead plaintiffs. Accordingly, Sands characterizes the Amended Complaint as an entirely new one, and that many of the claims asserted therein are time-barred.

***737 DISCUSSION**

Section 10(b) of the Exchange Act provides in relevant part:

It shall be unlawful for any person, directly or indirectly ...--

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. 78j(b). Similarly, Rule 10b-5 makes it unlawful for

any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange, (a) to employ any device, scheme, or artifice to defraud, (b) to make any untrue statement of a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, or (c) to engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5.

Therefore, in order to state a claim for securities fraud under § 10(b) and Rule 10b-5, "a plaintiff must plead that the defendant made a false statement or omitted a material fact, with scienter, and that plaintiff's reliance on defendant's action caused plaintiff's injury." *San Leandro Emergency Medical Group Profit Sharing Plan*, 75 F.3d 801, 807 (2d Cir.1996).

[1] Here, plaintiffs also allege that defendant engaged in manipulative practices and schemes to defraud in connection with NALF shares. See *T.H.C., Inc. v. Fortune Petroleum Corp.*, No. 96 Civ. 2690, 1999 WL 182593 at *2 (S.D.N.Y. March 31, 1999). To properly state a market manipulation claim under Rule 10b-5, plaintiffs must plead "(1) damage, (2) caused by reliance on defendants' misrepresentations or omissions of material facts, or on a scheme by the defendants to

defraud, (3) scienter, (4) in connection with the purchase or sale of securities, (5) furthered by the defendants' use of the mails or any facility of a national securities exchange." *Schnell*, 43 F.Supp.2d at 448 (citing *Dietrich v. Bauer*, 76 F.Supp.2d 312, 338 (S.D.N.Y.1999); *Cowen & Co. v. Merriam*, 745 F.Supp. 925, 929 (S.D.N.Y.1990)).

I. Pleading Fraud with Particularity

[2] Under the PSLRA, each allegation of misrepresentation or omission under Rule 10b-5 must be made with particularity--i.e., the Amended Complaint must "specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed." 15 U.S.C. § 78u-4(b). Moreover, Rule 9(b) requires that in all allegations of fraud, the circumstances constituting the fraud must be "stated with particularity." *Fed.R.Civ.P.* 9(b); see also *In re Livent, Inc. Securities Litigation*, 78 F.Supp.2d 194, 213 (S.D.N.Y.1999). In order to satisfy these heightened standards of pleading, our Court of Appeals has required that a complaint "(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." *Acito v. IMCERA, Inc.*, 47 F.3d 47, 51 (2d Cir.1995) (quoting *Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1175 (2d Cir.1993)).

[3] While the Amended Complaint does describe some of the alleged misrepresentations and omissions in greater detail than in the original Complaint, problems *738 endemic to the original have still not been resolved. Specifically, plaintiff alleges that Sands engaged in the following activities to improperly inflate the price of NALF stock: (1) Sands made statements in its cold calling sales pitches throughout 1996 and in January 1997 regarding the general benefits of the Consecor relationship, including Sands' expectation that Consecor would

ultimately buy out shares of NALF at a premium and its belief that NALF's book value was higher than its market value (Amended Complaint ¶ 57), (2) on eight occasions throughout 1996 and January 1997, Sands rated NALF a "buy" or "speculative buy" in its coverage through Bloomberg News, reporting price targets of \$20 - \$24 for NALF (Amended Complaint ¶¶ 40-42), (3) on April 25, 1996, Sands disseminated a Research Review stating, inter alia, that it saw "potential for NALF's stock trading at \$22 - \$24 per share one year forward" (Amended Complaint ¶ 58), (4) NALF disseminated a press release on April 23, 1996 disclosing Conseco's investment and quoting Conseco's chairman as stating that NALF was "well positioned to capitalize" on "significant profit opportunities" (Amended Complaint ¶ 59), (5) NALF disseminated a proxy statement on May 2, 1996 in connection with an upcoming shareholders' vote-for issues unrelated to the Convertible Bonds-stating that Conseco's beneficial ownership of NALF would be 16.75% after the issuance of the Convertible Bonds, rather than 20.1% before the issuance of the bonds (Amended Complaint ¶ 60), (6) on December 26, 1996, NALF filed a prospectus with the SEC in connection with the Public Offering where it represented that it "plan[ned] to continue to employ its securitization program as an integral component of its funding strategy and anticipates that it will generally complete securitization transactions on a quarterly basis" (Amended Complaint ¶ 66-67), and (7) Sands distributed another Research Review on December 31, 1996 opining that NALF would experience 55% earnings growth in 1997 and that "the money raised from the [Public Offering] should fulfill NALF's capital needs through 1997" (Amended Complaint ¶ 68). In each of the statements, plaintiffs allege that material misrepresentations were made, and moreover, that Sands omitted mention of the market conversion features of the Convertible Bonds and Conseco's plan to take control of NALF at depressed prices.

These allegations of misrepresentations and omissions share a variety of deficiencies. For example, the Amended Complaint fails to

identify the speaker in connection with the cold calls allegedly made by Sands throughout 1996 and early 1997, and, other than by year, fails to allege specific dates of when such calls were made. In addition, certain of the alleged misrepresentations were not made by--nor were they attributed to--Sands, including NALF's April 23, 1996 press release quoting Conseco's chairman, as well as statements made in the May 2, 1996 Proxy statement and the December 26, 1996 prospectus, which were made by NALF.

Mostly importantly, however, the Amended Complaint fails to set forth sufficient reasons "explain[ing] why the statements were fraudulent." *Acito*, 47 F.3d at 51; see also 15 U.S.C. § 78u-4(b) (Amended Complaint must "specify ... reasons why the statement is misleading," and since the allegations are made on information and belief, "the complaint shall state with particularity all facts on which that belief is formed"). The Amended Complaint does not state the reasons why any of the statements were false; rather, it couples each statement with a conclusory allegation that it was false. In addition, plaintiffs attempt to bootstrap these conclusions by relying upon the very theory they are trying to assert--namely, that because Sands must have known of Conseco's alleged plot to take control of NALF at a low market price, any statement made by Sands stating that NALF had a positive future must have been false. These *739 kinds of circular, speculative and conclusory allegations are inadequate to satisfy the PLSRA's and Rule 9(b)'s requirement of particularized pleading. See generally *In re Health Management Systems, Inc. Securities Litigation*, No. 97 Civ. 1865, 1998 WL 283286 at *4 (S.D.N.Y. June 1, 1998) ("the conclusory allegation that the opposite of a statement ... is true, without further elaboration, is insufficient").

II. Scierter

Even if the Amended Complaint satisfied the heightened pleading requirements discussed above, it must be dismissed as it fails to adequately allege scierter. Generally, securities fraud allegations under § 10(b) and

Rule 10b-5 are subject to Rule 9(b)'s scienter requirements. See *Chill v. General Elec. Co.*, 101 F.3d 263, 266 (2d Cir.1996); *Acito*, 47 F.3d at 52; *Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1127-28 (2d Cir.1994). In addition, the PSLRA mandates that a complaint "shall, with respect to each act or omission alleged to violate this title, state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2).

[4][5] The scienter required in relation to securities fraud is intent " 'to deceive, manipulate or defraud,' or knowing misconduct." *Press v. Chemical Investment Services Corp.*, 166 F.3d 529, 538 (2d Cir.1999) (quoting *Securities and Exchange Com'n v. First Jersey Securities, Inc.*, 101 F.3d 1450, 1467 (2d Cir.1996)). By enacting § 78u-4(b)(2) of the PSLRA, Congress "did not change the basic pleading standard for scienter in this circuit (except by the addition of the words 'with particularity')." *Novak v. Kasaks*, 216 F.3d 300, 311 (2d Cir.2000). Our Court of Appeals has required that as a pleading requirement under the PSLRA for scienter, a plaintiff may "either (a) allege facts to show that 'defendants had both motive and opportunity to commit fraud' or (b) allege facts that 'constitute strong circumstantial evidence of conscious misbehavior or recklessness.'" *Press*, 166 F.3d at 538 (quoting *Shields*, 25 F.3d at 1128); see also *Rothman v. Gregor*, 220 F.3d 81, 90 (2d Cir.2000) (approving of the two-part test for scienter described in *Shields*).

A. Motive and Opportunity

In reviewing the Amended Complaint's pleading of motive and opportunity, this Court is mindful that our Court of Appeals has admonished not to "create a nearly impossible pleading standard when the 'intent' of a corporation is at issue." *Press*, 166 F.3d at 538. Moreover, as explained by *Novak*, "what is required ... is not a bare invocation of 'magic words such as motive and opportunity' but an allegation of facts showing the type of particular circumstances that our case law has

recognized will render motive and opportunity probative a strong inference of scienter." *Rothman*, 220 F.3d at 90 (quoting *Novak*, 216 F.3d at 311).

[6] As was the case with the original Complaint, however, the Amended Complaint fails to adequately plead *Sands*' motive to commit the alleged securities fraud with regard to NALF's stock and its alleged takeover. For reasons discussed in this Court's previous opinion, *Sands*' alleged desire to realize greater transaction fees and its close relationship with *Conseco* are insufficient to show an improper motive. *Schnell*, 43 F.Supp.2d at 449; see also *Acito*, 47 F.3d at 54; *Ellison v. American Image Motor Co., Inc.*, 36 F.Supp.2d 628, 639 (S.D.N.Y.1999); *Fisher v. Offerman & Co., Inc.*, No. 95 Civ. 2566, 1996 WL 563141, *6 (S.D.N.Y. Oct. 2, 1996). Indeed, plaintiffs do not dispute that the Amended Complaint does not base its allegations on the motive and opportunity prong of the scienter requirements. See *Plaintiffs' Memorandum of Law in Opposition to Sands' Motion to Dismiss*, at 18.

B. Conscious Misbehavior or Recklessness

[7] In the absence of motive, a plaintiff may plead scienter by identifying circumstances *740 indicating conscious fraudulent behavior or recklessness. *Rothman*, 220 F.3d at 90; *Shields*, 25 F.3d at 1129; *Beck v. Manufacturers Hanover Trust Co.*, 820 F.2d 46, 50 (2d Cir.1987), cert. denied, 484 U.S. 1005, 108 S.Ct. 698, 98 L.Ed.2d 650 (1988), overruled on other grounds, *United States v. Indelicato*, 865 F.2d 1370 (2d Cir.1989) (en banc). In such a case, the strength of the circumstantial allegations must be correspondingly greater. *Beck*, 820 F.2d at 50. Accordingly, "[i]n order to satisfy this pleading requirement, a plaintiff must now plead specific facts that create a strong inference of either knowing misrepresentation or conscious recklessness" by the defendant. In *re Health Management Systems*, 1998 WL 283286, at * 6 (emphasis added); see also *Wexner v. First Manhattan Co.*, 902 F.2d 169, 172 (2d Cir.1990); In *re Glenayre Technologies, Inc. Securities Litigation*, 982 F.Supp. 294, 297

(S.D.N.Y.1997); In re Blech Securities Litigation, 961 F.Supp. at 579.

[8] Plaintiffs contend that the Amended Complaint alleges facts that constitute strong circumstantial evidence of Sands' actual knowledge of fraud. Plaintiffs' allegations of circumstantial evidence fall generally into four categories: (1) circumstances surrounding the Convertible Bonds, including NALF's purported disregard of the NASD rules, Delaware law and SEC filing requirements, as well as nature of the bonds' market conversion feature, (2) the timing of Sands' market-making activities and its alleged misrepresentations and receipt of fees, (3) the close relationship between Conseco and Sands, including Sands' dual roles as NALF's investment banker and placement agent for the Convertible Bonds, and (4) Appel's alleged role in his dealings with Sands. None of these assertions, taken individually or in the aggregate, provide the strong inference necessary to adequately allege scienter in a securities fraud action.

First, plaintiffs contend that circumstances surrounding the issuance of the Convertible Bonds lead to a strong inference that Sands was aware of fraudulent activity. In particular, plaintiffs refer to NALF's alleged violation of the NASD's shareholder approval requirements, the alleged failure of NALF's Chief Executive Officer to receive the proper authorization from NALF's board to sign the securities purchase agreement, NALF's alleged failure to file Form D with the SEC in connection with the placement of the Convertible Bonds, and NALF's alleged failure to obtain shareholder approval of Conseco's conversion of the Convertible Bonds in violation of Delaware law. Although plaintiffs do not state exactly how these allegations amount to fraudulent or reckless intent on the part of Sands, it is reasonable to assume that plaintiffs mean to use these instances to support the existence of Conseco's "secret" scheme to take control of NALF by characterizing them as attempts to hide the existence of the Convertible Bonds, particularly its market conversion feature, from the public shareholders. See Amended

Complaint § 93.

Any notion that Delaware law, NASD rules and SEC filing rules were purposefully violated in order to hide the existence of the Convertible Bonds is belied by the detailed description of those securities in NALF's publicly disclosed filings with the SEC. [FN5] In NALF's Quarterly Report on Form 10-Q filed May 14, 1996 ("NALF 10-Q")--less than one month after the issuance of the Convertible Bonds--the company specifically disclosed that it had raised \$10 million in convertible debt with an exercise price of the lower of \$12.00 or 80% of the market stock price. See NALF 10-Q, Notes to Consolidated Financial *741 Statements, note 5. Further, the NALF 10-Q described the Convertible Bonds in detail under the section entitled "Private Placement of Convertible Subordinated Debentures," highlighting the market conversion feature and warning that the Convertible Bonds were not redeemable by NALF at any time.

FN5. For purposes of this opinion, the Court may consider public disclosure documents filed with the SEC, as well as documents which plaintiffs rely upon in their Amended Complaint. See *Cortec Industries, Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47-48 (2d Cir.1991), cert. denied, 503 U.S. 960, 112 S.Ct. 1561, 118 L.Ed.2d 208 (1992); *I. Meyer Pincus & Assocs., P.C. v. Oppenheimer & Co.*, 936 F.2d 759, 762 (2d Cir.1991).

Similarly, the Convertible Bonds were fully disclosed in NALF's December 23, 1996 Prospectus--issued nearly a full year prior to Conseco's actual conversion of the bonds. There, under "Risk Factors," NALF clearly warned the public of the possibility of "substantial dilution from convertible securities," specifically referring to \$38.8 million outstanding in convertible debentures and cautioning that "holders of [these convertible debentures] may exercise their rights of conversion ... at prices below the trading price of the Company's Common Stock at the time of conversion." Prospectus at 13. Moreover, under the section entitled "Management's Discussion and Analysis of Financial Condition and Results of

Operation," the prospectus painfully detailed the relevant aspects of the Convertible Bonds, including the 80% market conversion feature, and the material details of NALF's outstanding warrants. See Prospectus at 29-30.

Plaintiffs' accusation that NALF knowingly dodged state, federal and exchange rules in order to keep the nature of the Convertible Bonds a secret from shareholders does not make sense in light of the full, detailed disclosure of those securities in public filings prior to the realization of Consecos alleged scheme.

Moreover, the alleged violations of Delaware, NASD and SEC rules by NALF fail to show the requisite intent on the part of Sands. To the extent they show an intent to deceive, at best they are indications of NALF's intent, not Sands'. Other than by conclusory and speculative allegations stating that Sands must have known of the violations due to its role as NALF's and Consecos investment banker, the Amended Complaint does not connect Sands with NALF's purported violations. [FN6] Such conclusory allegations are insufficient to allege scienter in the absence of facts giving strong inference of fraudulent intent. See *In re Blech*, 961 F.Supp. at 580.

FN6. Defendant attaches to its motion a number of documents--such as a legal opinion from NALF's counsel, a copy of the resolutions of NALF's board of directors, and the representations and warranties section of the securities purchase agreement--which tend to show that NALF made affirmative representations that all the required approvals and pre-conditions, including SEC filings, requisite board approvals, and shareholder approvals, had been properly received prior to the issuance of the Convertible Bonds. Plaintiffs, however, argue that this Court may not consider such documents in this stage of the proceedings. That debate need not be decided here, since--for reasons discussed above--the Court does not rely upon these documents for its conclusions on this issue.

Plaintiffs also suggest that the mere existence of the 80% market conversion

feature with regard to the Convertible Bonds leads to an inference of fraudulent intent on the part of Sands. According to plaintiffs, the holder of a security with a market conversion feature benefits from a lower stock price because the cost of conversion to equity is cheaper. This reverse market incentive, according to plaintiffs, supports the existence of Sand's knowledge of a fraudulent scheme. See Amended Complaint ¶¶ 46-48.

However, in order to exercise the conversion feature of the Convertible Bonds, Consecos would be required to forgo repayment of its \$10 million loan to NALF in exchange for the right to purchase a non-performing stock--a risky proposition at best. This reality discounts plaintiffs' notion that Consecos would expect to receive an undeserved windfall through conversion of the Convertible Bonds. Also, in addition to fully disclosing the existence of the conversion features to the public, NALF had issued, by late 1996, millions of debentures with conversion features similar to those of the Convertible Bonds to investors other than Consecos, including Merrill Lynch, Westminister Capital and Michael Karp--none of whom were alleged to be involved with Sands in any way. Merely labeling such debentures as "toxic," "death spiral" or "resembl[ing] ... a transaction with a loan shark" (Amended Complaint ¶ 48) is insufficient to allege scienter on the part of Sands.

Second, plaintiffs contend that the timing of Sands' market-making activities in NALF stock, its purported misrepresentations concerning NALF's valuation and future prospects, and its receipt of banking-related fees provide allegations of circumstantial evidence of fraudulent intent on the part of Sands.

In connection with Sands' market-making activities, the Court's review of NALF's monthly trading report provided by the NASD reveals no inference of fraudulent or reckless intent on account of such activities. [FN7] Sands was one of over thirty different sophisticated market-makers of NALF stock in between 1995 and early 1997, including

Oppenheimer, First Boston, Prudential and Smith Barney, and, in any given month, Sands' trading volume averaged around 200,000 shares, topping out at less than 400,000 shares in its most active month. In comparison, NALF's total monthly trading volume for market-making activity ranged from anywhere between over 1 million shares to more than 4 million shares, with a total of approximately 6 million to 10 million shares outstanding in NALF during the time Sands participated in market-making. Indeed, during the time that plaintiffs contend Sands was purportedly "pumping" the stock to artificially inflate it, NALF's price went from around \$15 - \$16 per share in December 1995 (the first month of Sands's market-making) to approximately \$8 - \$9 per share towards the end of December 1996, around the time of the Public Offering--a nearly 50% reduction. [FN8]

FN7. The information on the monthly trading report provided by NASD was relied upon by plaintiff in making their allegations in the Amended Complaint. Moreover, as plaintiffs themselves attached the same report to their opposition papers in connection with the dismissal of the original Complaint, it has been clearly in plaintiffs' possession for some time. Accordingly, this Court may consider the trading report in deciding this opinion. See *Cortec*, 949 F.2d at 48 (permitting a court to consider "documents that plaintiff had either in its possession" or documents which plaintiff "had knowledge of and upon which they relied in bringing suit.").

FN8. The implications of the trading report on defendant's claim that the Amended Complaint fails to allege loss causation need not be addressed here.

With regard to alleged misrepresentations on the part of Sands, as discussed earlier (supra Section I), none of those alleged statements in the Amended Complaint properly articulated reasons as to why they were false at the time they were allegedly made. See *San Leandro*, 75 F.3d at 813 ("Plaintiffs have made no showing that defendants' descriptions of [the company's] performance were not based on the facts available to the company at the time the statements were made."); *In re Health*

Management Systems, 1998 WL 283286, at *5 ("the complaint wholly fails to specify how the statements ... were false at the time they were made."). As such, the Amended Complaint "obviously fails to allege facts constituting circumstantial evidence of reckless or conscious misbehavior on the part of defendants in making the statements" for purposes of scienter. *San Leandro*, 75 F.3d at 813.

[9] Further, conceding that most of alleged misrepresentations were various optimistic statements and news releases by Sands, such statements, without more, are insufficient to support a claim for securities fraud. See *Shields*, 25 F.3d at 1129 ("misguided optimism is not a cause of action, and does not support an inference of fraud. We have rejected the legitimacy of 'alleging fraud by hindsight.'") (quoting *Denny v. Barber*, 576 F.2d 465, 470 (2d Cir.1978)); see also *Decker v. Massey-Ferguson, Ltd.*, 681 F.2d 111, 117 (2d Cir. *743 1982) ("economic prognostication, though faulty, does not, without more, amount to fraud.") (internal quotation omitted). While plaintiffs contend that defendant had access to facts that contradict these generally optimistic reports, other than by reference to plaintiffs' theory of Consecoco's scheme, plaintiffs fail to "specifically identify the reports or statements containing this information." *Novak*, 216 F.3d at 309.

In connection with the two amendments to the Investment Banking Agreement used to provide Sands with fees for the placement of the Convertible Bonds and for the Public Offering, as stated previously, there is nothing inherently fraudulent about an underwriter's motive to earn fees. See, e.g., *Acito*, 47 F.3d at 54; *Ellison*, 36 F.Supp.2d at 639; *Fisher*, 1996 WL 563141, at * 6. Sands earned these fees in connection with actual and documented transactions--e.g., the placement of the bonds and facilitation and underwriting activities for the Public Offering. Allegations that plaintiffs believe the fee amounts and arrangements to be "unusual," without more, is insufficient to plead scienter.

Third, plaintiffs contend that the

relationship between Conseco and Sands supports allegations of scienter. However, as discussed in the Court's previous opinion, allegations of a close relationship fail to establish the kind of circumstantial evidence necessary to support a claim of fraudulent or reckless intent. See Schnell, 43 F.Supp.2d at 449. In addition, a desire by Sands to maintain that relationship is not unlike its desire to earn underwriting fees, discussed supra, and, similarly, is not sufficient to satisfy the pleading requirements for scienter. Id.

126 F.Supp.2d 730, Fed. Sec. L. Rep. P
91,305

END OF DOCUMENT

Finally, plaintiffs' argue that Appel's supposed role in dealing with Sands provides circumstantial support for Sands' fraudulent intent. It is not clear to this Court how an allegation that one of NALF's major shareholders had been disciplined by the NASD helps to establish the requisite level of scienter required by the PSLRA. Even if Sands knew of Appel's problem with the NASD, this Court is not persuaded that the nature of its purported contacts with Appel, as set forth in the Amended Complaint, provides an inference that Sands may have behaved with the level of scienter required by the PSLRA.

In sum, plaintiffs' allegations in the Amended Complaint, considered either in the aggregate or individually, fail to set forth facts that "give rise to a strong inference of fraudulent intent," *In re Time Warner*, 9 F.3d 259, 268 (2d Cir.1993) (internal quotations omitted), and, consequently, are insufficient to satisfy the scienter requirements for securities fraud under 10(b) or Rule 10b-5. See *Novak*, 216 F.3d at 311; 15 U.S.C. § 78u-4(b)(2).

CONCLUSION

For the foregoing reasons, the Amended Complaint is dismissed. As plaintiffs have been provided opportunities to correct the deficiencies of the original Complaint, but have failed to do so, the dismissal is with prejudice. The Clerk of the Court is directed to dismiss the Amended Complaint with prejudice.

90

Only the Westlaw citation is currently available.

United States District Court,
S.D. New York.

Alan WAKSMAN, Plaintiff,
v.

Jerome COHEN, Bentley Blum, Marshal
Bernstein, Richard Gershmann, and Midway
Realty Associates, L.P. II, Defendants.

No. 00 Civ. 9005(WK).

Nov. 4, 2002.

Limited partner of real estate limited partnership sued other partners, alleging fraud, breach of fiduciary duty, conspiracy to breach fiduciary duty and unjust enrichment. Defendants moved to dismiss or alternatively for summary judgment. The District Court, Knapp, Senior Judge, held that: (1) limited partner did not satisfy reasonable reliance requirement for fraud claim, and (2) general release signed in connection with earlier litigation barred claim.

Judgment for defendants.

West Headnotes

[1] Partnership 366
289k366

Limited partner in real estate limited partnership did not satisfy reasonable reliance requirement, for fraudulent concealment action under New York law, arising out of general partners' sale of building which was partnership asset in transaction resulting in tax liability for limited partner with no income distribution to offset it; possibility of that result was explicitly set forth in private placement memorandum issued to limited partner before he made investment, and he chose not to read it.

[2] Release 31
331k31

Limited partner's execution and delivery of general release, covering claims known and unknown that were or could have been raised

regarding his investment in limited partnership, precluded claims of breach of fiduciary duty, conspiracy to breach fiduciary duty, and unjust enrichment against general partners arising out of nondisclosure of possibility that general partners could sell real estate that was partnership asset in transaction that would result in tax liability to limited partner without income.

Jack S. Dweck, H.P. Sean Dweck, the Dweck Law Firm, LLP, New York, NY, for Plaintiff.

Rachell Sirota, Sirota & Sirota LLP, New York, NY, for Defendant.

MEMORANDUM & ORDER

KNAPP, Senior J.

*1 In this diversity action, Alan Waksman ("Plaintiff"), alleges, inter alia, that Defendants Jerome Cohen ("Cohen"), Bentley Blum ("Blum"), Marshal Bernstein ("Bernstein"), Richard Gershman ("Gershman") and Midway Realty Associates, L.P. II (collectively the "Defendants") fraudulently concealed information pertaining to the operations of a partnership and the sale of that partnership's real estate. The Defendants have moved to dismiss the action pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure or, in the alternative, for summary judgment pursuant to Rule 56.

For the reasons set forth below, we GRANT the Defendants' motion for summary judgment.

BACKGROUND

The facts which follow are presented as alleged in the complaint and in the affidavits in opposition to the Defendants' motion (as well as the accompanying opposition brief). Since the complaint and the opposition papers refer to a prior action initiated by the Plaintiff in this Court, we also take into account the Memorandum and Order we issued in that case in October 1998. See *Waksman v. Cohen* (S.D.N.Y. Oct. 2, 1998), No. 97 Civ. 7349(WK), 1998 WL 690086. Familiarity with that

decision is assumed.

I. Events Leading Up To The Prior Lawsuit

For many years prior to the events in question in the instant lawsuit, Defendant Cohen served as the Plaintiff's attorney, accountant and financial adviser. In September 1985, Cohen recommended an investment for the Plaintiff which would enhance the Plaintiff's estate plan. This investment proposal involved a syndicated real estate partnership, known as Midway Realty Associates ("Midway I"). The investment would supposedly have appreciated in value over time and would purportedly have supplied a guaranteed stream of income in the interim. Acting on the advice of Cohen, as well as upon a cursory reading of a confidential Private Placement Memorandum ("PPM") relating to Midway I, the Plaintiff decided to purchase an interest in the Midway I limited partnership at an aggregate price of \$128,000. However, by the time the Plaintiff gave Cohen the go-ahead for the investment, all the interests in the Midway I partnership had already been purchased.

Thereafter, Cohen recommended that the Plaintiff invest in a similar limited partnership known as Midway Realty Associates L.P. II ("Midway II"). Cohen advised the Plaintiff that investing in the Midway II partnership would constitute exactly the same deal as investing in the Midway I partnership and that the Midway II investment related to real estate (which is hereinafter referred to as the "Midway II building" or the "Midway II property") on a parcel adjacent to the real estate involved in the Midway I deal. Based solely on Cohen's representations, and without reading the PPM for Midway II, the Plaintiff purchased an interest in the Midway II partnership for a total sum of \$128,000. He signed a subscription agreement for the Midway II investment on December 25, 1985. Had he read the subscription agreement, the Plaintiff would have learned that he was representing: (1) that he was aware of the "high degree of risk" involved in a "speculative" investment;

(2) that "no representations or warranties" had been made to him other than those contained in the PPM, and that he was not relying on any other representations or warranties; and (3) that he had received the PPM for Midway II (which in fact he had not, and would not until 1997), and was relying only on that document in making his investment choice.

*2 In reality, the terms for the Plaintiff's investment in the Midway II partnership were quite different from those relating to Midway I. The property purchased by the Midway II partnership was encumbered by a mortgage financed on separate terms, which was to mature in 1987 (only two years after the Plaintiff had made his investment). This meant that the Midway II partners would have to refinance the mortgage immediately, which they proceeded to do on unfavorable terms. After buying the land under the Midway II building at an inflated price and laying out legal, mortgage placement and refinancing fees, the Midway II partnership accumulated a tremendous amount of debt.

The Plaintiff learned about none of this until 1997. After signing the subscription agreement in 1985, he proceeded under the assumption that the operations and finances of the Midway II partnership were identical to those of the Midway I partnership. He made no independent inquiry into the Midway II investment. Instead, he relied exclusively on Cohen's representations, placing blind trust in his fiduciary. It was not until 1997 that the Plaintiff, finally realizing that he had received no return on his investment to date, requested the PPM for Midway II. Upon receiving this PPM for Midway II (which described the Midway II deal in detail), the Plaintiff determined that he had been defrauded.

II. The 1997 Action

Upon discovering the purported fraud which had been perpetrated upon him, the Plaintiff instituted an action in this Court, Alan Waksman v. Jerome Cohen, et al. (S.D.N.Y.) No. 97 Civ. 7349(WK), on October 2, 1997 (hereinafter the "1997 Action"). In that

proceeding, the Plaintiff asserted a variety of different claims against Defendants Cohen, Blum, [FN1] Bernstein, and Gershman, [FN2] as well as against Midway I and II. Hence, the proceeding included causes of action for fraud, the breach of a fiduciary relationship, the breach of an employment agreement, unjust enrichment, conspiracy to breach fiduciary duties, aiding and abetting the breach of fiduciary duties, and wrongful inducement to breach fiduciary duties.

FN1. Defendant Blum is allegedly the principal owner of Commodore Resources Corp. ("Commodore"), the company that owned the Midway II building until the Midway II partnership purchased the property on November 1, 1985. See Compl. ¶ 31. Defendant Blum is also an alleged business affiliate of Defendants Bernstein and Gershman. See *id.*

FN2. Defendants Bernstein and Gershman are allegedly general partners in MIIGP Associates L.P., which is itself the general partner in the Midway II partnership. See Compl. ¶ 31.

The Defendants moved to dismiss the Plaintiff's action or, in the alternative, for summary judgment. On October 2, 1998, this Court granted their motion and dismissed the Plaintiff's action in its entirety.

III. Events Leading Up To The Present Action

After we dismissed the Plaintiff's 1997 Action, he filed a Notice of Appeal on November 2, 1998. Shortly thereafter, Lisa Greenberg, Staff Counsel for the Second Circuit, held a conference attended by the parties' attorneys in an attempt to help them reach a settlement. Over the course of these settlement negotiations, the Plaintiff's attorney, at his client's specific request, asked the Defendants' attorneys about the operation and status of the Midway II partnership and the disposition of the Midway II building. In response to this inquiry, the various defense attorneys (not the Defendants themselves) indicated that they knew nothing about the status of the property. The Plaintiff "contented" himself with this answer, see

Waksman Aff. ¶ 5, and the parties ultimately agreed to settle this matter. To effectuate the settlement, they signed a Stipulation of Settlement dated December 7, 1998. Pursuant to the Stipulation of Settlement, the Defendants agreed to pay the Plaintiff the sum of \$100,000. In return, the Plaintiff agreed to discontinue his appeal and to assign all of his right, title and interest in the Midway II partnership to the Defendants. The Plaintiff also agreed to exchange releases "limited to the claims in" the 1997 "action or the underlying transaction, whether known or unknown which were or could have been raised in" the 1997 "action against the parties, their agents, partners, servants or employees." February 1, 2001 Sirota Aff., Ex. C. On December 8, 1998, the Plaintiff executed the agreed upon release of claims.

*3 The Plaintiff received the agreed upon payment from the Defendants sometime after December 21, 1998. Thereafter, he also received a K-1 statement from the Defendants which detailed the tax consequences stemming from his former interest in the Midway II partnership. Although the Plaintiff anticipated that he would sustain a \$28,000 capital loss on the sale of his interests in the Midway II partnership (which he could write-off for tax purposes), the K-1 statement instead revealed that he had received a capital gain in excess of \$500,000. Since he had never received any return on his investment in the Midway II partnership, the Plaintiff sought to examine Midway II's records. His request was denied. The Plaintiff then instituted proceedings in the Supreme Court, New York County, to obtain copies of Midway II's financial records from the period of 1985 to 1998. On December 17, 1999, Justice Elliot Wilk issued a decision wherein he directed the Defendants to disclose the relevant records.

These financial records provided information relating to the operations of the Midway II partnership. Such information had never previously been disclosed to any of the limited partners, including the Plaintiff. Certain information revealed in the records was of particular interest to the Plaintiff. First, the records disclosed that Midway II's general

partners had allegedly cancelled a previously executed rent guarantee made by Commodore, a company of which Defendant Blum was the principal owner, for no apparent reason. The rent guarantee, for which Blum's company had received a \$200,000 fee, provided that the company would guarantee a fair market rent for the Midway II building from 1993 to 1997. The cancellation of that guarantee purportedly resulted in a substantial loss of cash flow and significantly reduced the value of the Midway II property. In addition, the records revealed that the Midway II building had been sold on or about May 29, 1998, while the 1997 Action was still pending before this Court, for \$7,350,000. The general partners then purportedly used substantially all of the proceeds from this sale to repay various mortgages on the Midway II building and to repay advances that they made to the partnership even though they were allegedly entitled to such repayment only from the sale of additional interests in the Midway II partnership. Thereafter, the general partners allegedly awarded themselves a 10% commission on the sale of the Midway II building.

IV. The Present Action

The Plaintiff initiated the present action on November 27, 2000. At the outset of his new complaint (in what his attorney later refers to as "Count I" in his opposition papers to the motion at bar), the Plaintiff charges the Defendants with fraudulent concealment of the sale of the Midway II building as well as the conduct related to the sale of that property. The Plaintiff claims that the fraudulent concealment of these facts induced him to agree to the Stipulation of Settlement and release of claims and that he would not have agreed to settle the 1997 Action for \$100,000 had he been aware of such facts. The new complaint also includes additional causes of action. In Count II of the new complaint, the Plaintiff alleges that the Defendants breached fiduciary duties when they: (a) failed to disclose the sale of the Midway II building and the various details concerning the sale of the property while the litigation was pending before this Court as well as during settlement

negotiations and (b) failed to furnish the Midway II partnership's records to the Plaintiff. In Count III, he contends that the Defendants, as a direct result of the foregoing fraudulent conduct and breach, were unjustly enriched during the course of their ownership of the Midway II property. In Count IV, the Plaintiff asserts that the Defendants conspired to breach fiduciary duties.

*4 The Defendants have moved to dismiss this new action in its entirety pursuant to Federal Rule of Civil Procedure 12(b)(6) or, in the alternative, for summary judgment under Rule 56. They argue, among other things, that the Plaintiff's claims were released under the Settlement Agreement, fail to state a claim, and are barred by the doctrine of res judicata as well as by the relevant statutes of limitation.

DISCUSSION

Although we are troubled by the conduct in which the Defendants are accused of engaging, the Plaintiff here is "not an unsophisticated person who has led a sheltered life." Waksman, 1998 WL 690086, at *1. In this instance, the Plaintiff failed to use the means available to him to arm himself with the truth about the Defendants' conduct while engaging in arm's length negotiations with them arising out of contentious litigation (itself premised on accusations of fraud). As such, his own corresponding conduct demonstrates that he cannot sustain a claim for fraudulent concealment. Moreover, the express and unambiguous language set forth in the Stipulation of Settlement and release of claims now precludes the Plaintiff from proceeding on Counts II, III, and IV.

Before we address the motion at bar, we set out the applicable standard in accordance with which the motion must be considered. The Defendants have moved to dismiss the current action in its entirety pursuant to Federal Rule of Civil Procedure 12(b)(6) or, in the alternative, for summary judgment under Rule 56. As all the parties have introduced evidence outside the four corners of the original complaint in briefing or responding to the Defendants' motion and thereby treated it,

in effect, as a motion for summary judgment, we similarly treat the motion as one for summary judgment. See *Walker v. United States Drug Enforcement Administration* (S.D.N.Y. Aug. 14, 2002) No. 01 Civ. 3668(SHS), 2002 WL 1870131, at *2 ("Because both parties have submitted materials outside the pleadings ..., the Court will treat the motion [to dismiss the complaint] as one for summary judgment pursuant to Fed.R.Civ.P. 56"); *German v. Pena* (S.D.N.Y.2000) 88 F.Supp.2d 216, 219 ("As the parties have presented ample materials outside the pleadings, the Court is required to treat this motion to dismiss as a motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.") See also *In re G. & A. Book, Inc.* (2d Cir.1985) 770 F.2d 288, 295, cert. denied, *M.J.M. Exhibitors, Inc. v. Stern* (1986) 475 U.S. 1015, 106 S.Ct. 1195, 89 L.Ed.2d 310. [FN3]

FN3. Under Local Civil Rule 56.1, a party moving for summary judgment must submit a short and concise statement of material facts as to which it contends there is no genuine issue of fact to be tried. In accordance with that same rule, a party opposing such a motion must similarly submit a statement of the material facts as to which it contends there is a genuine issue of fact to be tried. While Local Civil Rule 56.1 provides that a failure to submit such a statement may constitute grounds for the denial of a motion for summary judgment, we will not deny the Defendants' motion on the basis of this technical defect as the relevant facts are apparent from both parties' briefs and affidavits and the Plaintiff has not demonstrated (nor has he even sought to demonstrate) that he was prejudiced by the Defendants' failure to submit such a statement. See *United States v. One Hundred and Thirty-Four Thousand, Seven Hundred and Fifty-Two Dollars United States Currency*, more or less (S.D.N.Y.1989) 706 F.Supp. 1075, 1082 n. 13.

"Summary judgment is appropriate where the Court is satisfied 'that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" *Celotex Corp. v. Catrett* (1986) 477 U.S. 317, 330, 106 S.Ct. 2548, 91 L.Ed.2d 265 (quoting Fed. R.Civ.P. 56(c)). "The function of the district court in

considering the motion for summary judgment is not to resolve disputed issues of fact but only to determine whether there is a genuine issue to be tried." *Eastman Machine Co., Inc. v. United States* (2d Cir.1988) 841 F.2d 469, 473. In making this determination, we must "resolve all ambiguities and draw all reasonable inferences in the light most favorable to the party opposing the motion." *Cifarelli v. Village of Babylon* (2d Cir.1996) 93 F.3d 47, 51.

*5 With this standard in mind, we turn to the merits of the motion before us.

I. The Plaintiff's Claim For Fraudulent Concealment

[1] Among other arguments, the Defendants contend that the Plaintiff has failed to state a claim for fraudulent concealment. "To sustain a cause of action for fraudulent concealment under New York law, a Plaintiff must demonstrate that: (1) defendant made an omission of material fact; (2) defendant intended to defraud the plaintiff thereby; (3) defendant had a duty to disclose to plaintiff; (4) plaintiff reasonably relied upon the omission; and (5) the plaintiff suffered damages as a result of such reliance." *Bermuda Container Line Ltd. v. Int'l Longshoremen's Ass'n* (S.D.N.Y. Feb. 8, 1999) No. 97 Civ. 1257(JFK), 1999 WL 64305, at *5, aff'd (2d Cir.1999) 192 F.3d 250. See also *Abernathy-Thomas Engineering Co. v. Pall Corp.* (E.D.N.Y.2000) 103 F.Supp.2d 582, 596. Even if we were to assume, for the sake of argument, that the Plaintiff has demonstrated that the Defendants omitted material facts where they had a duty to disclose them and did so with the intent to defraud the Plaintiff, we find that the Plaintiff cannot sustain a claim for fraudulent concealment as he cannot, as a matter of law, establish the requisite reliance.

At the outset, the Plaintiff, citing *Affiliated Ute Citizens of Utah v. United States* (1972) 426 U.S. 128, 96 S.Ct. 2062, 48 L.Ed.2d 523, *DuPont v. Brady* (2d Cir.1987) 828 F.2d 75, and *Titan Group v. Faggen* (2d Cir.1975) 513 F.2d 234, cert. denied (1975) 423 U.S. 840, 96

S.Ct. 70, 46 L.Ed.2d 59, contends that reliance should be presumed from the fact the non-disclosed information was material. However, these cases are distinguishable from the circumstances at bar. The three aforementioned cases involved claims brought under the federal Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder. See *Affiliated Ute Citizens of Utah*, 406 U.S. at 132; *DuPont*, 828 F.2d at 75-76; *Titan Group*, 513 F.2d at 236. Under that federal statute and regulation, where a plaintiff alleges fraudulent securities violations based on the non-disclosure of material information, "positive proof of reliance is not a prerequisite to recovery. All that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them important in the making of his decision." *Affiliated Ute Citizens of Utah*, 406 U.S. at 153-154.

In sharp contrast, New York courts have chosen not to abandon the requirement of reliance in common law fraud cases. [FN4] See *Strauss v. Long Island Sports, Inc.* (N.Y.App.Div.1978) 60 A.D.2d 501, 401 N.Y.S.2d 233, 237 ("Other 10b-5 cases ... do dispense with a showing of reliance provided the misrepresentation is material. But it appears from these decisions that 10b-5 cases are very much distinguishable from common-law fraud cases."); *Stellema v. Vantage Press, Inc.* (N.Y.Sup.Ct.1983) 121 Misc.2d 1058, 470 N.Y.S.2d 507, 510 ("While reliance need not be proved in [10b-5 cases] ... the requirement of a showing of reliance has not been removed in common-law fraud cases"). See also *Securities Investor Protection Corp. v. BDO Seidman, LLP* (2d Cir.2000) 222 F.3d 63, 73 ("common law fraud claims require a different analysis than those brought under the federal securities regulation scheme"). "Because common law fraud claims must be supported by a showing of direct reliance on the misrepresentation or omission, they are distinct from actions brought under the federal securities laws, which 'permit a rebuttable presumption of reliance where a plaintiff purchases his shares on the market.'" *Banque Arabe Et Internationale D'Investissement v. Maryland Nat'l Bank* (S.D.N.Y.1994) 850

F.Supp. 1199, 1221, aff'd (2d Cir.1995) 57 F.3d 146 (citation omitted). See also *Turtur v. Rothschild Registry Int'l, Inc.* (S.D.N.Y. Aug. 27, 1993) No. 92 Civ. 8710(RPP), 1993 WL 338205, at *7. As a result, in order to maintain a claim for fraudulent concealment, the Plaintiff must establish that he "actually relied on the disclosure or lack thereof." *Banque Arabe Et Internationale D'Investissement v. Maryland Nat'l Bank* (2d Cir.1995) 57 F.3d 146, 156 (hereinafter "*Banque Arabe*"). Moreover, he must also show that "such reliance was reasonable or justifiable." *Id.* See also *Bermuda Container Line Ltd. v. Int'l Longshoremen's Ass'n* (2d Cir.1999) 192 F.3d 250, 258 (to state a claim for fraudulent concealment, the plaintiff's "reliance must be reasonable or justifiable").

FN4. Fraudulent concealment is a species of common law fraud. See *Banque Arabe Et Internationale D'Investissement v. Maryland Nat'l Bank* (2d Cir.1995) 57 F.3d 146, 160.

*6 Even if the Defendants failed to tell the Plaintiff about the sale of the Midway II property (and the conduct related thereto) when they had a duty to speak and did so with the intent to defraud him, the Plaintiff could not have justifiably relied on these omissions when he decided to stipulate to the settlement and to execute the release of claims. Under New York law, "[w]here a party has the means to discover the true nature of the transaction by the exercise of ordinary intelligence and fails to make use of those means, he cannot claim justifiable reliance on defendant's misrepresentations." *Stuart Silver Associates, Inc. v. Baco Development Corp.* (N.Y.App.Div.1997) 245 A.D.2d 96, 665 N.Y.S.2d 415, 417. See also *Pinney v. Beckwith* (N.Y.App.Div.1994) 202 A.D.2d 767, 608 N.Y.S.2d 738, 739 (quoting *Schumaker v. Mather* (N.Y.1892) 133 N.Y. 590, 596, 30 N.E. 755) ("It is well settled that ... if the facts represented are not matters peculiarly within the party's knowledge, and the other party has the means available to him of knowing, by the exercise of ordinary intelligence, the truth of the real quality of the subject of the representation, he must make use of those means, or he will not be heard to complain

that he was induced to enter into the transaction by misrepresentations"). Cf. *Banque Arabe*, 57 F.3d at 156 (applying this standard in the context of a claim for fraudulent concealment under New York law); *Congress Financial Corp. v. John Morrell & Co.* (S.D.N.Y.1992) 790 F.Supp. 459, 473-474 (same).

In accordance with this principle, New York courts have repeatedly found that reasonable reliance was absent where a party failed to review available records or secure available documentation which would have otherwise armed it with the truth. For example, in *Pinney*, the Appellate Division of the New York Supreme Court found that "the element of reasonable reliance" was "absent as a matter of law" where a simple inquiry into town records (i.e. "the barest of precautions"), would have disclosed the falsity of a defendant's representations regarding the approval of a subdivision. See *Pinney*, 608 N.Y.S.2d at 739. Similarly, reliance was absent in *Marine Midland Bank v. Palm Beach Moorings, Inc.* where the party had access to a corporation's records and the opportunity to examine those records but failed to take advantage of that opportunity. See *Marine Midland Bank v. Palm Beach Moorings, Inc.* (N.Y.App.Div.1978) 61 A.D.2d 927, 403 N.Y.S.2d 15, 17, appeal denied (N.Y.1978) 44 N.Y.2d 644, 405 N.Y.S.2d 1028, 377 N.E.2d 488. See also *Banque Arabe*, 57 F.3d at 157-158 (affirming the dismissal of a fraudulent concealment claim where the plaintiff had access to sources which would have alerted it to all of the information it needed to know yet it failed to request such information); *Belin v. Weissler* (S.D.N.Y. July 14, 1998) No. 97 Civ. 8787 (RWS), 1998 U.S. Dist. LEXIS 10492, at *14-*18 (plaintiff's reliance was neither reasonable nor justified where he had the ability to secure and review relevant documentation but failed to do so); *Most v. Monti* (N.Y.App.Div.1982) 91 A.D.2d 606, 456 N.Y.S.2d 427, 428 (affirming the dismissal of plaintiffs' fraud claim where the information relating to the subject matter of the fraud was "readily available to plaintiffs upon their making reasonable inquiry" yet they unreasonably failed to investigate the

truth of the matter).

*7 The Appellate Division has even affirmed the dismissal of a complaint which had sought the rescission of agreements procured through fraud where the plaintiffs made some effort to review a corporation's records but ultimately failed to obtain the documents. See *Rodas v. Manitaras* (N.Y.App.Div.1990) 159 A.D.2d 341, 552 N.Y.S.2d 618, 620. In *Rodas*, the plaintiffs sought the rescission of sale and purchase agreements on the ground that they had been fraudulently induced to enter into those agreements. *Id.* at 619. The plaintiffs had been aware that the income of the business in question in *Rodas* was a material fact about which they had received no documentation. *Id.* at 620. Although the plaintiffs had asked to examine the business' records and had that effort rebuffed, the Appellate Division nonetheless held that the "[p]laintiffs could easily have protected themselves by insisting on an examination of the books as a condition of closing." *Id.* (emphasis added). The court therefore held that the plaintiffs could not be heard to complain that they had been defrauded as they had chosen to proceed with a transaction without, among other things, securing the available documentation. *Id.*

Here, as in the foregoing cases, the Plaintiff had the means to discover the omitted information through a review of the available documentation yet he failed to seek such a review before he executed the Stipulation of Settlement and the release of claims. First, when the Plaintiff realized in 1997 that he had received no return on his investment in the Midway II partnership, he requested and received the PPM for Midway II. See *Waksman*, 1998 WL 690086, at *2. See also Compl. ¶ 14 ("In November 1997, Plaintiff, for the first time, learned of the false and fraudulent nature of the representations made to him by Defendant Cohen, when he obtained a copy of a Private Placement Memorandum for Midway II the existence of which, up to that date, was unknown to the Plaintiff"). That PPM specifically explained that the general partners in the Midway II venture had the exclusive right to sell the Midway II

property and discussed the substantial adverse tax consequences which could result from such a sale. See *Sirota Aff.*, Ex. 1 at 40, 42, 57-58, and 1073n-7. The PPM also provided notice of the means by which the Plaintiff could arm himself with the truth about the status of the Midway II property for it explained that all partners in the Midway II venture had the right to inspect and examine the partnership's books at reasonable business times and upon reasonable prior written notice to the general partners. See *Sirota Aff.*, Ex. 1 at 1073n-10.

Indeed, the disposition of the property through a sale (and the consequences thereof) was a topic of concern to the Plaintiff. Over the course of the settlement negotiations which followed our dismissal of his 1997 Action, he specifically directed his counsel to ask the Defendants' attorneys about the status of the Midway II property in an apparent effort to determine whether he could expect a capital loss from the sale of his interests in the partnership. See *Waksman Aff.* ¶ 5. See also *Waksman Aff.* ¶ 7 ("When my attorney informed me at the [settlement] conference before staff counsel at the Circuit Court that there was an offer to acquire my two units for \$100,000, I asked my attorney to inquire of the lawyers representing the various Defendants whether there was any change in the status of the property"); *Pl.'s Opp'n Brief* at 2 ("During the negotiations before staff counsel, inquiry was made of the three attorneys representing the respective Defendants about the operation and status of the partnership and the disposition of the real estate"). The defense attorneys provided no information in response to this inquiry as they indicated that they knew nothing about the status of the property. See *Waksman Aff.* ¶ 7. See also *Waksman Aff.* ¶ 5; *Dweck Aff.* ¶ 28; *Pl.'s Opp'n Brief* at 16. Nothing in the record suggests that the Plaintiff sought to review the partnership's records to arm himself with that very information before his attorney made the aforementioned inquiry; nor does the record suggest that the Plaintiff asked to review the partnership's records to arm himself with that same information after his attorney failed to receive any informative response to that inquiry but before the

Stipulation of Settlement and release of claims were executed.

*8 In other words, the PPM describing the Midway II partnership put the Plaintiff on notice that the Midway II property could be sold at any time by the general partners and that he might not receive a disbursement from the sale (and could even incur substantial tax liabilities therefrom). In fact, the Plaintiff was sufficiently concerned about the disposition of that property that he directed his attorney to inquire about the status of the property during settlement negotiations. Although he ultimately received no information about the status of the property from the Defendants' attorneys, he nonetheless agreed to the Stipulation of Settlement and the release of claims without attempting to use the means specifically afforded to him by the PPM (or, for that matter, by New York Partnership Law §§ 42 and 99), [FN5] to arm himself with the truth about the partnership's operations and the status of the partnership's property through a review of the partnership's records. [FN6] In essence, although he had the means to discover the relevant information, he chose not to use such means and instead agreed to the settlement on nothing more than the unsubstantiated assumption that he might be able to take a capital loss on the sale of his interests in the Midway II partnership. Accordingly, as in the foregoing cases, he cannot now establish the requisite reasonable or justifiable reliance to sustain his fraudulent concealment claim.

FN5. New York Partnership Law § 42 provides as follows: "Partners shall render on demand true and full information of all things affecting the partnership to any partner or the legal representative of any deceased partner or partner under legal disability." N.Y. PARTNERSHIP LAW § 42 (emphasis added). Section 99, in pertinent part, further provides that: "A limited partner shall have the same rights as a partner to ... (b) Have on demand true and full information on all things affecting the partnership, and a formal account of partnership affairs whenever circumstances render it just and reasonable...." N.Y. PARTNERSHIP LAW § 99(1)(b) (emphasis added). See also *Millard v. Newmark & Co.* (N.Y.App.Div.1966) 24

A.D.2d 333, 266 N.Y.S.2d 254, 258 ("[A] limited partner is not in the hopeless position where he must only suffer in silence when an alleged wrong occurs. He has a right of full and free access to information contained in the partnership books, and of all things affecting the partnership, as well as a right to a formal accounting .")

FN6. In sharp contrast, after the parties had already agreed upon a settlement and the Plaintiff had executed a release of claims and transferred his interest in the Midway II partnership to the Defendants, the Plaintiff vigorously sought access, pursuant to New York Partnership Law § 99, to the relevant records which had been available to him as a limited partner in the Midway II venture. See Dweck Aff., Ex. 5.

The absence of reasonable or justifiable reliance in this case is underscored by the context in which the Plaintiff failed to use the means available to him to learn about the partnership's operations and the status of the Midway II property. Where parties have engaged in arm's length negotiations and, as here, the party claiming reliance had the opportunity to discover the purported fraud, courts are wary of finding reasonable reliance, particularly where the party claiming reliance failed to use the means available to him to arm himself with accurate information while he was represented by counsel during settlement negotiations conducted in the wake of contentious litigation. *Manley v. AmBase Corp.* (S.D.N.Y.2001) 126 F.Supp.2d 743, 758-759. In *Manley*, the defendant similarly asserted a fraudulent concealment claim premised on the concealment of information which supposedly induced it to enter into a settlement agreement. See *id.* at 755. There, the court determined that the defendant could not demonstrate reasonable or justifiable reliance as the parties had engaged in settlement negotiations through counsel after a history of contentious litigation and the defendant had failed to use the means available to it to arm itself with the truth. See *id.* at 758-759. As in *Manley*, the Plaintiff here entered into the settlement negotiations after a history of contentious litigation against these Defendants. In fact, the litigation leading up to those negotiations was itself

premised on the Plaintiff's acrimonious accusations of fraud. The Plaintiff, who we previously indicated "is [himself] not an unsophisticated person who has led a sheltered life," *Waksman*, 2002 WL 690086, at *1 (alteration added), was represented by an attorney over the course of those settlement negotiations with defense counsel and the Defendants. Having engaged in arm's length negotiations with the Defendants after a history of contentious litigation which called into question the veracity of the Defendants' conduct and having failed to use the means available to him to discover accurate information about what he contends were material facts, the Plaintiff cannot now demonstrate the reasonable or justifiable reliance necessary to sustain a claim for fraudulent concealment. [FN7]

FN7. We also note that the Plaintiff appears to indicate that he had suspicions about the Defendants' conduct even before he received the K-1 statement, although he apparently felt that he had no basis to demand the partnership's records until after his receipt of that statement (which further aroused his suspicions and supplied the Plaintiff with what he felt was the basis to compel the production of the records). See Pl.'s Opp'n Brief at 29. The Second Circuit has explained that "[a] heightened degree of diligence is required where the victim of fraud had hints of its falsity." *Banque Franco-Hellnique De Commerce Int'l et Maritime, S.A. v. Christophides* (2d Cir.1997) 106 F.3d 22, 27. Here, despite his apparent suspicions about the Defendants' purported conduct, the Plaintiff still failed to make use of the means available to him diligently to arm himself with the truth and this further undermines the reasonableness of his reliance. See *Schlaifer Nance & Co., Inc. v. Estate of Andy Warhol* (S.D.N.Y.1996) 927 F.Supp. 650, 660, *aff'd* (2d Cir.1997) 119 F.3d 91 ("A party's reliance on false statements or omissions is not reasonable or justifiable if the party has reason to believe that the representations may be false but fails to inquire into their accuracy.")

*9 Although the Plaintiff places a particular premium on the defense attorneys' disavowal of knowledge about the status of the Midway II property, he cannot establish reasonable or justifiable reliance on the basis of this

disavowal alone. Here, as we previously indicated, the Plaintiff's counsel, at his client's specific direction, asked the Defendants' attorneys "about the operation and status of the partnership and the disposition of the [partnership's] real estate." Pl.'s Opp'n Brief at 2. See also Pl.'s Opp'n Brief at 7-8, 16; Waksman Aff. ¶¶ 5, 7; Dweck Aff. ¶ 28. In response to this inquiry, the various defense attorneys (not the Defendants themselves) indicated that they knew nothing about the status of the property. See Waksman Aff. ¶ 7 ("When my attorney informed me at the conference before staff counsel at the Circuit Court that there was an offer to acquire my two units for \$100,000, I asked my attorney to inquire of the lawyers representing the various Defendants whether there was any change in the status of the property. He, thereafter, reported to me that he did make such an inquiry and that the attorneys all responded that they knew nothing about disposition of the properties.") See also Waksman Aff. ¶ 5; Dweck Aff. ¶ 28; Pl.'s Opp'n Brief at 16. Despite the fact that this answer provided no information whatsoever about the actual status of the Midway II property, the Plaintiff "contented" himself with this statement and did not pursue the matter further. See Waksman Aff. ¶ 5.

The Plaintiff cannot look to this wholly uninformative answer by the Defendants' attorneys, made during the course of settlement negotiations to the Plaintiff's counsel, to demonstrate reasonable or justifiable reliance. First, in such an arm's length negotiation where both parties are represented by attorneys, it is not reasonable for one side to rely on such a statement where it was made by the adverse party's counsel. *Healey v. Rich Products Corp.* (W.D.N.Y. Mar.2, 1992) 1992 WL 50924, at *9, vacated on other grounds (2d Cir.1992) 981 F.2d 68. See also *Verschell v. Pike* (N.Y.App.Div.1981) 85 A.D.2d 690, 445 N.Y.S.2d 489, 491. Moreover, reliance on such an uninformative statement cannot be considered reasonable and cannot support a fraudulent concealment claim. See *Healey*, 1992 WL 50924, at *9. Cf. *In re Danesi* (S.D.N.Y.1980) 6 B.R. 738, 740.

In sum, the Plaintiff has failed to demonstrate that he reasonably or justifiably relied on the omitted information in question. As such, we grant summary judgment on the fraudulent concealment claim in favor of the Defendants.

II. The Effect Of The Settlement On Counts II, III, and IV

[2] Over the course of settlement negotiations before the Staff Counsel for the Second Circuit, the Plaintiff here agreed to settle the 1997 Action. Hence, his attorney executed a Stipulation of Settlement. See *Sirota Aff.*, Ex. C. The Stipulation provided that the Plaintiff would discontinue his appeal and convey all of his interest in the Midway II partnership to the Defendants in exchange for \$100,000. According to the express terms of the Stipulation, that payment was to be made "after exchange of general and complete releases between the Plaintiff and the respective Defendants limited to the claims in this action [(i.e. the 1997 Action)] or the underlying transaction, whether known or unknown which were or could have been raised in this action against the parties, their agents, partners, servants or employees." *Sirota Aff.* , Ex. C (alteration added). Thereafter, the Plaintiff actually executed a release of claims which specifically applied "to the claims in the action brought by the Releasor against the Releasees in the United States District Court, Southern District of New York bearing Docket No. 97 Civ. 7349 or in the underlying transaction giving rise to said litigation whether known or unknown which were or could have been raised in said action against the Releasees, their agents, partners, servants, or employees." *Sirota Aff.*, Ex. F.

*10 The Defendants contend that the Stipulation of Settlement and release of claims bar the Plaintiff from pursuing the instant lawsuit. " 'Settlement agreements are strongly favored in New York and may not be lightly cast aside. Afterthought or change of mind are not sufficient to justify rejecting a settlement.' " *Hughes v. Lillian Goldman Family, LLC* (S.D.N.Y.2001) 153 F.Supp.2d

435, 445 (citation omitted). See also *Hallock v. State of New York* (N.Y.1984) 64 N.Y.2d 224, 230, 485 N.Y.S.2d 510, 474 N.E.2d 1178 ("Stipulations of settlement are favored by the courts and not lightly cast aside.")

Nonetheless, a court may relieve a party of a settlement agreement where there is sufficient cause to invalidate a contract, "such as fraud, collusion, mistake or accident." *Willgerodt ex rel. Majority Peoples' Fund for the 21st Century, Inc. v. Hohri* (S.D.N.Y.1997) 953 F.Supp. 557, 560, *aff'd* (2d Cir.1998) 159 F.3d 1347 (citation omitted) (hereinafter "Willgerodt"). See also *Rivera v. State of New York* (N.Y.App.Div.1985) 115 A.D.2d 431, 496 N.Y.S.2d 230, 231. Cf. *Morse/Diesel, Inc. v. Fidelity and Deposit Co. of Maryland* (S.D.N.Y. Mar. 30, 1992) No. 86 Civ. 1494(PKL), 1992 WL 75123, at * 4 ("[t]he equitable remedy of rescission may be exercised where a party has committed a fraudulent act,' including fraudulent concealment") (citation omitted). Hence, a party may ask the court to set aside a settlement agreement where the agreement has been procured through fraudulent concealment. See, e.g., *Nasik Breeding & Research Farm Ltd. v. Merck & Co., Inc.* (S.D.N.Y.2001) 165 F.Supp.2d 514, 520, 526, 528-529, 533-536; *A.J. Tenwood Associates, Inc. v. United States Fire Ins. Co.* (N.Y.Sup.Ct.1980) 104 Misc.2d 467, 428 N.Y.S.2d 606, 608. Similarly, "[f]raudulent concealment will vitiate a release under New York law." *Skylon Corp. v. Guilford Mills, Inc.* (S.D.N.Y.1994) 864 F.Supp. 353, 358. See also *Nasik Breeding & Research Farm Ltd.*, 165 F.Supp.2d at 526, 528-533.

However, nowhere in his complaint has the Plaintiff asked this Court to rescind the Stipulation of Settlement or release of claims. Although he has asserted a claim for fraudulent concealment, the Plaintiff seeks relief in the form of damages and not rescission. See Compl. ¶ 39; see also Compl., Ad Damnum Clause at ¶¶ 1-3. Moreover, even had the Plaintiff specifically sought to avoid the effect of the Stipulation and release by asking this Court to set them aside on the ground of fraudulent concealment, we would

not do so where, as here, the Plaintiff failed to maintain a claim for fraudulent concealment. See, e.g. *Banque Arabe*, 57 F.3d at 153-158; *Skylon Corp.*, 864 F.Supp. at 358-360.

Instead of seeking to rescind the Stipulation and release on the basis of fraud, the Plaintiff argues that they should not bar this action because he was not aware of the conduct underlying the instant lawsuit until after he had agreed to settle the 1997 Action. However, as part of the Stipulation of Settlement, the Plaintiff agreed to execute a release that would apply to all "the claims in the" 1997 Action "or the underlying transaction, whether known or unknown which were or could have been raised in this action against the parties, their agents, partners, servants or employees." *Sirota Aff., Ex. C* (emphasis added). He thereafter actually executed a release which applied to "the claims in the [1997 Action] ... or in the underlying transaction giving rise" to the 1997 Action "whether known or unknown which were or could have been raised" in the 1997 Action. *Sirota Aff., Ex. F* (emphasis added).

*11 A party which has expressly and unambiguously agreed to settle unknown claims may be precluded from asserting them at a later date even though they were not known to him at the time of the settlement. See *Leonzo v. First Unum Life Ins. Co.* (S.D.N.Y. Aug. 23, 1995) No. 93 Civ. 0535(KTD), 1995 WL 505551, at *3 (dismissing a plaintiff's claims where he "willingly, knowingly, and under the guidance of counsel, chose to discharge all claims, whether known or unknown, arising out of his injury," despite the plaintiff's assertion that he was unaware of the possibility of such a claim when he signed the release) (emphasis added); *Fay v. Petersen Publishing Co.* (S.D.N.Y. May, 17, 1990) No. 88 Civ. 6499 MBM, 1990 WL 67397, at *3 ("Although at the time of the signing [of the release] plaintiff may have had no inkling that he would bring an age discrimination claim in the future, he should have understood from the language of the agreement that he was giving up 'any known or unknown' claims against the

company related to his termination"); *Jabara v. Songs of Manhattan Island Music Co.*, a Division of Whitehaven Music Publishing Corp. (S.D.N.Y. Feb. 24, 1989) No. 86 Civ. 3412(KMW), 1989 WL 16614, at *7 ("Plaintiff attempts to escape from ... [the release] by stating that he was unaware at the time of the termination agreement that such a deduction had been made by Whitehaven for payment to Rick's Music. The general release language in paragraph 2, however, covers claims "known or unknown to me."... Thus, it is clear that any claim Jabara may have had against Whitehaven for an unauthorized payment to Rick's Music was waived by paragraph 2 of the 1981 Termination Agreement") (internal citations omitted); *Omaha Indemnity Co. v. Johnson & Towers, Inc.* (E.D.N.Y.1984) 599 F.Supp. 215, 220 ("Lack of awareness of ... the existence of a cause of action is not a mutual mistake of fact sufficient to set aside the General Release. The Release in this case bars all claims against Johnson & Towers, both known and unknown. This is dictated both by the law and the language of the Release. The result may seem harsh, but it is the result Mr. Singer bargained for.") Since he expressly and unambiguously agreed to release those claims in the 1997 Action or in the underlying transaction which could have been raised in the 1997 Action, even if they were "unknown" to him at the time of the settlement, the Plaintiff cannot now avoid the effect of the Stipulation of Settlement and release of claims by arguing that the Stipulation and release do not apply to claims which were then unknown to him.

The issue before us then is whether the Plaintiff's present causes of action were claims in the 1997 Action or stemmed from the underlying transaction giving rise to that litigation. The Plaintiff reads the Stipulation and release as if they were limited to those claims which were included in his 1997 complaint. Pl.'s Opp'n Brief at 26. However, this interpretation does not follow from the plain language of the Stipulation or release, which applies to claims that could have been raised in the 1997 "action," not merely to claims which were raised in the original complaint. The term "action" refers to a civil

proceeding generally and not to a particular pleading. See BLACK'S LAW DICTIONARY 28-29 (7th ed.1999) (defining "action" as "[a] civil or criminal judicial proceeding"); WEBSTER'S NEW WORLD DICTIONARY OF AMERICAN ENGLISH 13 (3d College ed.1994) (defining "action" as "a legal proceeding by which one seeks to have a wrong put right; lawsuit"); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 21 (1993) (defining "action" as (1) "a legal proceeding by which one demands or enforces one's right in a court of justice" and (2) "a judicial proceeding for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense"); THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 17 (3d ed.1992) (defining "action" as "[a] judicial proceeding whose purpose is to obtain relief at the hands of a court"). If the Plaintiff had intended to limit the Stipulation and release solely to those specific claims which were raised in the original complaint rather than to those which could have been raised over the course of the entire proceeding, he could have drafted the agreement accordingly. Cf. *Sibersky v. Borah, Goldstein, Altschuler & Schwartz, P.C.* (S.D.N.Y. July 22, 2002) No. 99 Civ. 3227 JGK, 2002 WL 1610923, at *5 ("If the release were intended to exclude any particular kinds of claims or disputes arising of this relationship or events, it could have easily done so, but it did not.")

*12 In the instant case, Counts II, III, and IV are grounded in the transaction underlying the 1997 litigation. According to the Plaintiff himself, the "underlying transaction" refers to the Plaintiff's investment in the Midway II partnership in 1985. See Pl.'s Opp'n Brief at 26. That investment ultimately gave rise to his initial 1997 claims when the Plaintiff failed to receive any return on his investment in that partnership and thereafter discovered that the venture did not resemble the Midway I partnership as he had purportedly been led to believe. Absent his investment in that partnership (which made him a limited partner in the Midway II venture), Count II (which alleges the breach of a fiduciary duty)

and Count IV (which alleges that the Defendants conspired to breach fiduciary duties) would be meritless; that transaction supposedly created the very fiduciary obligations which the Defendants either purportedly breached or conspired to breach. Similarly, absent his investment into the Midway II partnership, the Plaintiff would be unable to maintain his cause of action in Count II, which alleges unjust enrichment, as the Defendants supposedly enriched themselves at the expense of his investment in the Midway II partnership. [FN8]

FN8. Moreover, the Plaintiff specifically alleges that his claim for unjust enrichment has arisen "[a]s a direct result of the [Defendants'] breaches of their respective obligations as fiduciaries...." Compl. ¶ 44. As we indicated, those purported fiduciary obligations themselves supposedly arose when the Plaintiff engaged in the "underlying transaction" by investing in the Midway II partnership.

These three claims, which ultimately stem from the transaction underlying the 1997 litigation, "could have been raised" in the 1997 "action" as they could have been brought in the legal proceeding which the Plaintiff initiated in 1997. The conduct which supposedly breached the alleged fiduciary duties that arose out of the Plaintiff's investment in the Midway II partnership (and therefore serves as the basis for Counts II and IV), as well as the conduct which purportedly resulted in the Defendants' unjust enrichment at the expense of that investment (and which therefore serves as the basis for Count III), occurred while the 1997 Action was still pending before this Court. Thus, the Plaintiff could have supplemented his original 1997 complaint pursuant to Federal Rule of Civil Procedure 15(d) to include these claims and allegations before the 1997 Action was dismissed in October 1998. See Fed.R.Civ.P. 15(d) (allowing a party to submit a supplemental pleading "setting forth transactions and occurrences or events that have happened since the date of the pleading sought to be supplemented"). See also 3 James Wm. Moore et al., *Moore's Federal Practice* ¶ 15.30 (3d ed. 1999) ("[A] Plaintiff need not commence a new action when after-occurring

events demonstrate that it had a right to relief even if the original complaint was insufficient.") Even after we dismissed the 1997 Action, the Plaintiff, had he persuaded the Second Circuit to reverse our dismissal (as he hoped to do) and to remand the case to this Court, could then have supplemented his initial complaint to include Counts II, III, and IV through the procedure enumerated in Rule 15(d). See *Gomez v. Wilson* (D.C.Cir.1973) 477 F.2d 411, 417 ("[O]nce appellant is again in the District Court, he will be free to appropriately supplement his complaint. That may include allegations of recent incidents, joinder of additional parties and, of course, presentation of such legal contentions as may be indicated"); *Miller v. Air Line Pilots Ass'n Int'l* (D.D.C. Mar. 30, 2000) No. Civ.A.91-3161 NHJ, 2000 WL 362042, at *1 ("Upon remand, the appellant is free to supplement his complaint, including allegations of new incidents and joinder of additional parties"); *Bromley v. Michigan Educ. Ass'n-NEA* (E.D.Mich.1998) 178 F.R.D. 148, 153 (quoting *Texarkana v. Arkansas Gas Co.* (1939) 306 U.S. 188, 203, 59 S.Ct. 448, 83 L.Ed. 598) ("The supplementation procedure is equally applicable after remand for further proceedings.") Since the claims fall within the scope of the express language set forth in the Stipulation of Settlement and release of claims, we grant summary judgment in favor of the Defendants on Counts II, III, and IV because these causes of action are precluded by the Stipulation and release. [FN9]

FN9. Because we have already determined that the Plaintiff cannot sustain a cause of action for fraudulent concealment on other grounds, we do not address the Defendants' contention that the Stipulation and release equally bar that claim.

CONCLUSION

*13 For the foregoing reasons, we hereby grant the Defendants' motion for summary judgment with respect to the Plaintiff's claim for fraudulent concealment. We also grant the Defendants' motion for summary judgment as to Counts II, III, and IV. [FN10]

FN10. Since we grant summary judgment on the

grounds that (a) the Plaintiff has failed to establish the reasonable or justifiable reliance necessary to sustain a claim for fraudulent concealment and (b) the express language in the Stipulation and release precludes him from pursuing Counts II, III, and IV, we do not address the Defendants' remaining arguments in favor of summary judgment.

SO ORDERED.

2002 WL 31466417 (S.D.N.Y.)

91

United States District Court, S.D. New York.

WELLS FARGO BANK NORTHWEST, N.A.,
Plaintiff,

v.

TACA INTERNATIONAL AIRLINES, S.A
and JHM Cargo Express, S.A., Defendants.
Taca International Airlines, S.A and JHM
Cargo Express, S.A., Third-party
plaintiffs,

v.

C-S Aviation Services, Inc., Third-party
defendant.

No. 01 CIV.11484(GEL).

Sept. 26, 2002.

Aircraft lessor sued lessee, seeking unpaid rent. Lessee counterclaimed and brought third party action against lessor's representative, which negotiated lease. Lessor moved for partial summary judgment on its claims, and, joined by representative, for dismissal of counterclaims. The District Court, Lynch, J., held that: (1) lessor was entitled to rent, despite claim that representative materially misrepresented maintenance costs of leased aircraft; (2) rental obligation was not modified by subsequent letter agreement changing rent payment schedule; (3) lessee stated intentional misrepresentation claim with sufficient particularity; (4) lessee stated existence of special relationship between lessee and lessor, as required for negligent misrepresentation claim; but (5) lessee could not rely on any representation regarding maintenance costs, precluding misrepresentation and Racketeer Influenced and Corrupt Organizations Act (RICO) claims, due to disclaimers in lease agreement; and (6) New York consumer protection statute did not apply.

Motion granted.

West Headnotes

[1] Contracts 129(1)
95k129(1)

Parties consented to application of New York law to claims by raising no issue as to validity

or scope of choice of law provision in leases, and exclusively citing New York law in discussing claims.

[2] Federal Civil Procedure 2553
170Ak2553

In determining whether to grant summary judgment in absence of discovery, court considers: (1) whether lack of discovery was in any way due to fault or delay on part of nonmovant; (2) whether nonmovant filed sufficient affidavit explaining: (i) what facts are sought and how they are to be obtained, (ii) how those facts are reasonably expected to create genuine issue of material fact, (iii) what effort affiant has made to obtain them, and (iv) why affiant was unsuccessful in those efforts; and (3) whether nonmovant provided any basis for its belief that further discovery would alter outcome of summary judgment motion. Fed.Rules Civ.Proc.Rule 56(f), 28 U.S.C.A.

[3] Evidence 393(1)
157k393(1)

Given explicit integration clause in leases, no parol evidence could be considered in interpreting leases.

[4] Federal Civil Procedure 2553
170Ak2553

Defendants waived any claim that adjudication of plaintiff's motion for summary judgment should await further discovery, by failing to file affidavit in support of further discovery or otherwise claiming that they lack adequate information to oppose motion. Fed.Rules Civ.Proc.Rule 56(f), 28 U.S.C.A.

[5] Bailment 3
50k3

Generally, under New York law, leases containing hell or high water clauses are enforceable even in face of defaults by party seeking to enforce them.

[6] Landlord and Tenant 182
233k182

Under New York law, provision of lease stating that obligation to pay rent was "absolute and unconditional and shall not be

affected or reduced by any circumstances, including any set-off, counterclaim, recoupment, defense or other right" was enforceable.

[7] Bailment 20
50k20

Under New York law, aircraft lease agreement was not modified by letter agreement, so as to obviate obligation of lessee to pay rent, by letter agreement creating new payment schedule with rent deferrals, and containing promise of lessor to "consider" proposals for terminating leases.

[8] Federal Civil Procedure 636
170Ak636

Aircraft lessee stated claim of intentional misrepresentation on part of lessor, under New York law, with sufficient particularity, by alleging that identified representative of lessor told identified representative of lessee, prior to execution of lease, that maintenance costs of aircraft were specified amount, knowing that lessee would encounter higher costs since lessor had maintenance performed in India. Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.

[9] Fraud 13(3)
184k13(3)

Misrepresentation.

To state claim for negligent misrepresentation under New York law, plaintiff must establish that (1) defendant had duty, as result of special relationship, to give correct information; (2) defendant made false representation that he or she should have known was incorrect; (3) information supplied in the representation was known by defendant to be desired by plaintiff for serious purpose; (4) plaintiff intended to rely and act upon it; and (5) plaintiff reasonably relied on it to his or her detriment.

[10] Fraud 13(3)
184k13(3)

Aircraft lessee satisfied need to establish special relationship between parties, to state claim of negligent misrepresentation under New York law, by alleging that representative of lessor had special expertise in converting

aircraft from passenger to cargo use desired by lessee, and that lessee relied on that special expertise in executing lease, particularly relying upon representative's misleading statements regarding maintenance costs.

[11] Racketeer Influenced and Corrupt Organizations 62
319Hk62

Where mail or wire fraud is predicate act for claim under Racketeer Influenced and Corrupt Organizations Act (RICO), plaintiff must show justifiable reliance to establish causation. 18 U.S.C.A. § 1962.

[12] Fraud 36
184k36

Aircraft lessee could not reasonably rely on statements of lessor's representative, regarding maintenance costs of aircraft, as required for intentional and negligent misrepresentation actions under New York law and for Racketeer Influenced and Corrupt Organizations Act (RICO) action; leases contained clause disclaiming any representations regarding "condition," "durability," and "operation or fitness for use," and also contained clauses providing that aircraft was being leased "as is, where is," that rent would be paid regardless of existence of counterclaims, and that lease was entire agreement regarding lease of aircraft in question.

[13] Evidence 397(1)
157k397(1)

Under New York, party to contract cannot rely on oral representations where contract specifically disavows the incorporation of non-written representations.

[14] Fraud 36
184k36

Under New York law, if party to contract specifically disclaims reliance upon representation in contract, that party cannot later assert that it was fraudulently induced into signing contract by the very representation it has disclaimed.

[15] Bailment 9
50k9

Under New York law, exact words "maintenance costs" did not need to appear in disclaimer of representations and warranties in aircraft lease, in order for representations about maintenance to have been disclaimed; maintenance costs were logically an aspect of "condition," "durability," and "operation or fitness for use" listed by disclaimer.

[16] Consumer Protection 6
92Hk6

[16] Consumer Protection 33
92Hk33

Aircraft lessee did not state counterclaim against lessor, under New York consumer protection law, by alleging that lessor misrepresented maintenance costs of aircraft; suit involved specific transactions between business entities, rather than any general consumer deception. N.Y.McKinney's General Business Law § 349(a).

*355 Benjamin R. Nagi (Alan M. Unger, on the brief), Sidley Austin Brown & Wood LLP, New York, NY, for Plaintiff and Counterclaim-Defendant Wells Fargo Bank Northwest, N.A. and Third-Party Defendant C-S Aviation Services, Inc.

Michael P. Socarras (Joe R. Reeder, Timothy C. Bass, on the brief), Greenberg Traurig, LLP, Washington D.C. (Simon Miller, Jennifer Neuner, Greenberg Traurig, LLP, New York, NY, on the brief) for Defendants TACA International Airlines, S.A. and JHM Cargo Express, S.A.

OPINION AND ORDER

LYNCH, District Judge.

This dispute involves five aircraft leased to TACA International Airlines ("TACA"), a Salvadoran airline company, by Wells Fargo Bank Northwest ("Wells Fargo"), a United States bank acting solely as owner-trustee under the lease agreements ("Leases"). Third-Party Defendant C-S Aviation Services ("C-S Aviation"), a "lease management provider" of commercial aircraft, established the trusts with Wells Fargo to lease the aircraft,

negotiated and managed the Leases, and was the ultimate beneficiary of the trusts. Defendant JHM Cargo Express ("JHM Cargo"), an air cargo business and TACA subsidiary, was the original signatory on three of the Leases, and later assigned those Leases to its parent company, TACA, while expressly agreeing to remain fully liable for its obligations under the Leases.

Wells Fargo brings this lawsuit for payment of rent allegedly due under the Leases. TACA resists by asserting that it was fraudulently induced to enter the Leases, and counterclaims for (and brings a third-party action against C-S Aviation) for damages from the alleged fraud. Wells Fargo moves for partial summary judgment on its claims, and (joined by C-S Aviation) for dismissal of TACA's claims against it and C-S Aviation. The motions will be granted.

BACKGROUND [FN1]

FN1. All facts set forth below are either undisputed or taken as alleged in TACA's pleadings.

TACA does not dispute that it is party to five Leases--three that it assumed from defendant JHM Cargo for the use of three Airbus A300B4-200F aircraft and two that TACA itself executed for two additional Airbus A300B4-200F aircraft. [FN2] Each Lease contains a clause, commonly known as a "hell or high water clause." [FN3] that states:

FN2. TACA assumed the former three Leases from JHM Cargo by assignment agreements dated November 25, 1998, and January 27, 1999. (Seery Aff. Exs. 4-6.) Under the assignment agreements JHM Cargo agreed to "continue to be fully liable" to the lessor for "full and prompt payment" of its obligations under the Leases. (Seery Aff. Exs. 4-6 at ¶ 6.) The latter two Leases were executed on October 15, 1999, and February 15, 2000, between Wells Fargo and TACA. (Seery Aff. Ex. 10, 11.) All five of the Leases are essentially identical with the exception of the specific aircraft rented and the operative dates of each individual Lease.

FN3. A "hell or high water" lease is a lease where, by its terms, payment is due under any

circumstance. See, e.g., *Rhythm & Hues v. Terminal Marketing Co.*, 2002 WL 1343759 at *5 (S.D.N.Y. June 19, 2002).

The Lessee's obligation to pay all rent and all other amounts due hereunder and to perform all the terms hereof shall be absolute and unconditional and shall not be affected or reduced by any circumstances, including (1) any set-off, counterclaim, recoupment, defense or other right which the lessee may have against the lessor

***356** (Seery Aff., Exs. 1-3, 10, 11 at § 7.5.)
[FN4]

FN4. This section of the agreement, and the disclaimer of warranties quoted in the next paragraph, are among the approximately half-dozen provisions of the 87-page lease agreements and over 200 pages of attached schedules and exhibits that are printed entirely in capital letters. To facilitate reading, we do not reproduce this orthography.

The Leases also contain an express disclaimer of representations and warranties, which states in relevant part:

The aircraft is to be leased hereunder "as is, where is." Except as expressly provided in this agreement, the lessor ... specifically disclaims any representation or warranty, express or implied, as to the airworthiness, load carrying capability, value, durability, compliance with specifications, condition, design, operation, merchantability, freedom from claims of infringement or the like, or fitness for use for a particular purpose of the aircraft or as to the quality of the material or workmanship of the aircraft, the absence therefrom of latent or other defects, whether or not discoverable, or as to any other representation or warranty whatsoever, express or implied ... with respect to the aircraft

(Seery Aff., Ex. 1-3, 10, 11 at § 14.)

Finally, each Lease Agreements also contains an integration clause which reads:

This Lease is intended to be a complete and exclusive statement of the terms of the agreement of the parties hereto and this Lease supersedes any prior or contemporaneous agreements, whether oral

or in writing in relation to the leasing of the Aircraft to the Lessee. Neither this Lease nor any term of this Lease may be modified or waived except in writing signed by the parties.

(Seery Aff., Ex. 1-3, 10, 11 at § 29.7.)

Defendants claim that at some point after assuming the Leases, [FN5] they realized that the true operating costs of the aircraft exceeded \$2000 per block hour [FN6] while the maintenance estimates represented by C-S Aviation were between \$1160 and \$1355 per block hour (Countercl. at ¶¶ 10, 13, 36), Defendants allege that at a meeting on December 11, 2000, C-S Aviation revealed for the first time that its maintenance cost figures were based on engine overhauls done by Air India in India. (Bloch Aff. at ¶¶ 29, 31.) Shortly after this meeting, TACA informed C-S Aviation that it wanted to terminate all five of the Leases, but instead of doing so, it agreed to C-S Aviation's proposal that they "work together" to terminate the Leases by finding other airlines to take over the aircraft. (Bloch Aff. at ¶¶ 31-34; Exs. H, L.) These discussions eventually resulted in the signing of a letter agreement ("Letter Agreement"), which modified TACA's rent payment obligations.

FN5. It is unclear from the counterclaim precisely when this realization occurred, but the implication is that TACA discovered this fact sometime between assuming the first of the leases in November 1998 and discussing the problem with C-S Aviation in December 2000.

FN6. A "block hour" refers to the period of time measured in hours from the moment a jet bridge is removed from an aircraft at departure to the moment the jet bridge is placed back on the aircraft at arrival, or, if there is no jet bridge, from the moment an aircraft initiates push back until the brakes are finally applied at the destination. (Nagin Decl. at ¶ 14.) The airline industry apparently measures the expense of maintaining aircraft, a significant operational expense, in terms of maintenance costs per block hour.

The Letter Agreement, signed on June 21, 2001, by TACA and C-S Aviation as Wells

Fargo's "appointed aircraft manager," amends the payment plan under the *357 Leases reducing the Defendants' near-term obligations for four of the five aircraft. (Seery Aff. ¶¶ 19-20, Ex. 15, Ex 15; Answer ¶ 21.) The Letter Agreement sets a revised monthly rent for each aircraft, requires that TACA will make up for the shortfall between the revised 2001 payment schedule and the original payment schedule by increased monthly rental payments to begin in January 2002, provides that "each of the lease agreements in respect of the Aircraft ... remain in full force and effect without modification or amendment," and states that all reasonable documented legal fees resulting from the default of timely payment of outstanding rents shall be paid by TACA. (Seery Aff. Ex. 15 at ¶ 1(c), ¶ 6.) The Letter Agreement also contains a clause "reserv[ing] the right to continue working towards a solution which would allow TACA to terminate the leases ... in a manner and pursuant to conditions acceptable to C-S Aviation Services and its lenders." (Id.)

After attempts to find a substitute lessee failed, TACA ceased operating the aircraft in October 2001, and stopped paying the monthly rent on four of the aircraft as of October 2001 and on the fifth aircraft as of November 2001. (Compl.¶ 31, Answer, ¶ 31.) TACA returned four of the five planes in January 2002, and made the fifth aircraft, which was not authorized to fly due to a structural flaw, available to the Lessors in El Salvador. (Bloch Aff. at ¶¶ 62-63.) [FN7]

FN7. The instant litigation gained transnational complexity when, on November 19, 2001, Defendants TACA and JHM Cargo filed an action relating to the issues in this case in the Civil Court for the District of Zacatecoluca in El Salvador. On June 24, 2002, this Court denied a motion by Wells Fargo to enjoin Defendants from proceeding with the El Salvador action and also denied Defendants' motion to stay Plaintiff's complaint before this Court until the Salvadoran action was resolved.

DISCUSSION

I. The Parties' Contentions

Wells Fargo alleges that Defendants breached their obligations under the Leases by failing to pay the rent due, and moves for partial summary judgment on its breach of contract claims, for presently ascertainable damages of \$2,996,972.29 on the Leases and \$76,211.49 in attorney's fees plus applicable interest, [FN8] as of the date of filing this action. Wells Fargo claims that the express terms of the Leases make TACA's obligation to pay unconditional, and the defenses and counterclaims raised by Defendants neither justify nonpayment nor raise genuine issues of material fact. (Pl.'s Mem. for Partial Summ. J. at 2.)

FN8. Wells Fargo also requests that the Court grant it leave to seek additional damages for the time postdating the filing of this action.

[1] TACA and JHM Cargo respond with four counterclaims, which they maintain also operate as defenses to and set-offs against their alleged obligations to pay rent. Specifically, they claim the Leases should be rescinded under theories of (1) fraudulent inducement (2) fraudulent misrepresentation (3) negligent misrepresentation and (4) violation of New York's consumer protection law, New York General Business Law § 349. [FN9] (Nagin Aff. Ex. 2 *358 ¶¶ 65-96.) Defendants allege the same claims against C-S Aviation, in their Third-Party Complaint, except that the fraudulent inducement claim is replaced by a civil RICO claim.

FN9. The Leases contain a choice of law clause specifying that issues arising under the Leases are governed by the law of New York. (Exs. 1, 2, 3, 10, 11 at ¶ 29.9.) As neither party raises any issue as to the validity or scope of this provision, and as both parties exclusively cite New York law in discussing the counterclaims, the parties have clearly consented to the application of New York law to these particular claims. See, e.g., Golden Pacific Bancorp v. FDIC, 273 F.3d 509, 514 n. 4 (2d Cir.2001).

The gravamen of the first three defenses/counterclaims is that C-S Aviation, acting as an agent for Wells Fargo, [FN10] misrepresented the historical maintenance

costs for the aircraft to be significantly lower than they actually were--a matter that Defendants claim is critical to the profitability of operating the aircraft and, further, was known by C-S to be critical to Defendants' decision to enter the Leases--thus luring TACA, which relied on these representations, into the Leases. They also claim that whether or not the Leases contain hell or high water provisions is immaterial, as the Leases were modified by the Letter Agreement, which obliged Lessors to "work with Lessees and consider in good faith proposals for terminating the leases." (Defs.' Mem. Opp. Partial Summ. J. at 13.) In the alternative, Defendants argue that "the 'hell or high water' provisions and general disclaimers are rife with ambiguities" and, as such, summary judgment should not be granted. (Id. at 23-24.) [FN11] Hence, Defendants claim, not only can the Leases not be enforced against them, notwithstanding the disclaimer provision or the hell and high water clause, but they, in fact, are entitled to damages of \$65,000,000 from Wells Fargo and/or C-S Aviation, because of the costs resulting from the misrepresentations made to them by C-S Aviation.

FN10. Defendants maintain that "at all times, C-S was acting on behalf of Lessors" as an "authorized agent" of Wells Fargo, since C-S Aviation set up the various trusts, designated Wells Fargo to act as owner trustee for the aircraft Leases, acted as the sole negotiator and exclusive managing company for the Leases, represented Wells Fargo in negotiations for resolving the termination of the Leases, and signed the Letter Agreement on behalf of Wells Fargo. (Defs. Mem. at 12; Seery Aff. Ex. 15 at 3; Countercl. ¶¶ 11, 60) Wells Fargo does not dispute that C-S Aviation is its agent for the Leases in question. Indeed, Wells Fargo seeks rent under the Letter Agreement, which was signed only by TACA and C-S Aviation. As Wells-Fargo considered C-S Aviation capable of modifying the Leases by the Letter Agreement and now seeks rent under that Agreement, Wells-Fargo has ratified the modified contracts and there is no reason to doubt C-S Aviation's role as an agent for Wells Fargo. A third party generally has no action against an agent in a disclosed principal situation because the contract is with the principal. *Citibank v. Nyland*

Ltd., 878 F.2d 620, 624 (2d Cir.1989) (citations omitted). However, a principal is liable for an agent's fraud although the agent acts solely to benefit himself if the agent acts with apparent authority. Id. (citation omitted). Thus, as the Leases in question are held by Wells Fargo and an agency relationship exists, Wells Fargo will be held to answer for any fraud or misrepresentation relating to the Leases on the part of C-S Aviation. In effect, C-S Aviation and Wells Fargo stand in each other's shoes for purposes of these claims.

FN11. Although Defendants make this claim about both the hell or high water and disclaimer clauses, they fail to present any argument that the hell or high water clause is unclear. Their only express analysis of potential ambiguities concerns whether the disclaimer clause encompasses representations concerning the maintenance costs of the aircraft. Thus the ambiguity argument will be considered only as to the disclaimer clause.

Wells Fargo and C-S Aviation move to dismiss these claims, maintaining that the Leases were specifically designed to defeat exactly these kinds of allegations, in at least two respects. First, the hell or high water clause in the Leases requires Defendants to pay rent regardless of any defenses or set-offs. Under this clause, even if Defendants were ultimately able to establish at trial that they are entitled *359 to some recovery against Wells Fargo and/or C-S Aviation, that would not defeat Defendants' obligation to pay rent pending any such adjudication. Second, the Leases specifically disclaim any and all representations, promises and warranties of the sort that Defendants now say they relied on, and thus, as a matter of law, reasonable reliance (an essential element of Defendants' fraudulent inducement, misrepresentation, and civil RICO claims) is precluded. [FN12] In addition, Wells Fargo and C-S Aviation argue that Defendants' fraud claims fail to satisfy the requirement of Fed.R.Civ.P. 9(b) that fraud be plead with particularity, and that Defendants' claim for violation of Section 349 of the New York General Business Law fails to state a claim.

FN12. Wells Fargo and C-S Aviation also argue that the Defendants fail to allege actual

misrepresentations, since they do not allege that the historical maintenance costs were other than what C-S Aviation represented, or that Wells Fargo promised that Defendants would or could experience the same maintenance costs during the term of the Leases. (Pl.'s Mem. at 11; Third-Party Def.'s Mem. at 9.) Wells Fargo and C-S Aviation concede that Defendants may have alleged a misrepresentation of the "good mechanical condition" of the aircraft (Compl.¶ 13) but claim that, as to that representation, Defendants could not justifiably rely on representations of the planes' condition given the terms of the disclaimer. (Pl.'s Mem. for Motion to Dismiss at 11.)

For the reasons that follow, Wells Fargo's motion for partial summary judgment, its motion to dismiss Defendants' counterclaims, and C-S Aviation's motion to dismiss the Third-Party Complaint will be granted.

II. Motion for Partial Summary Judgment

A. Summary Judgment Standard

When adjudicating a motion for summary judgment, a court must resolve all ambiguities in favor of the nonmoving party, although "the nonmoving party may not rely on conclusory allegations or unsubstantiated speculation." *Scotto v. Almenas*, 143 F.3d 105, 114 (2d Cir.1998). The court "is not to weigh the evidence but is instead required to view the evidence in the light most favorable to the party opposing summary judgment, to draw all reasonable inferences in favor of that party, and to eschew credibility assessments." *Weyant v. Okst*, 101 F.3d 845, 854 (2d Cir.1996). Summary judgment is then appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits ... show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c).

To establish a genuine issue of material fact, the opposing party " 'must produce specific facts indicating' that a genuine factual issue exists." *Scotto*, 143 F.3d at 114 (quoting *Wright v. Coughlin*, 132 F.3d 133, 137 (2d

Cir.1998)); see also *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). "If the evidence [produced by the nonmoving party] is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (internal citations omitted). "The mere existence of a scintilla of evidence in support of the [non-movant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-movant]." *Pocchia v. NYNEX Corp.*, 81 F.3d 275, 277 (2d Cir.1996) (quoting *Liberty Lobby*, 477 U.S. at 252, 106 S.Ct. 2505).

While Rule 56 permits a party to move for summary judgment "at any time," Fed.R.Civ.P. *360 56(b), pre-discovery summary judgment is the exception rather than the rule and will be granted "only in the clearest of cases." *Kleinman v. Vincent*, 1991 WL 2804 *1 (S.D.N.Y. Jan.8, 1991); see *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) (summary judgment typically granted only after adequate time for discovery); *Moore's Federal Practice*, ¶ 56.15[5] at 56-308 n. 28 (1993 & Supp.1994). Under Fed.R.Civ.P. 56(f), summary judgment "may be inappropriate where the party opposing it shows ... that he cannot at the time present facts essential to justify his opposition." See *Liberty Lobby*, 477 U.S. at 250 n. 5, 106 S.Ct. 2505. What time will be adequate may vary, however, and where it is clear that the defendant cannot defeat the motion by showing facts sufficient to require a trial for resolution, summary judgment may be granted notwithstanding the absence of discovery. See *Gottlieb v. County of Orange*, 84 F.3d 511, 519 (2d Cir.1996).

[2] The Court must consider several factors in determining whether to grant summary judgment in the absence of discovery: (1) whether the lack of discovery was in any way due to fault or delay on the part of the nonmovant; (2) whether the nonmovant filed a sufficient Rule 56(f) affidavit explaining: (i) what facts are sought and how they are to be obtained, (ii) how those facts are reasonably

expected to create a genuine issue of material fact, (iii) what effort the affiant has made to obtain them, and (iv) why the affiant was unsuccessful in those efforts; and (3) whether the nonmovant provided any basis for its belief that further discovery would alter the outcome of the summary judgment motion. See *Berger v. United States*, 87 F.3d 60, 65 (2d Cir.1996); *Meloff v. New York Life Ins. Co.*, 51 F.3d 372, 375 (2d Cir.1995).

[3][4] Here, the absence of discovery does not present an obstacle to the granting of partial summary judgment on liability. None of the above factors apply here as the relevant terms of the Leases are not in controversy. What is in dispute, rather, are the legal inferences to be drawn from undisputed terms to determine the validity, meaning and scope of the two agreements: the Leases and the Letter Agreement. In addition, given the explicit integration clause in the Leases (*Seery Aff.*, Ex. 1-3, 10, 11 at § 29.7), no parol evidence, which could require fact discovery, should be considered in interpreting the Leases. [FN13] At any rate, Defendants have not filed a Rule 56(f) affidavit or otherwise claimed that they lack adequate information to oppose the motion, and thus have waived any claim that adjudication of Plaintiff's motion should await further discovery.

FN13. The parol evidence rule generally prohibits the introduction of extrinsic evidence to interpret an otherwise unambiguous contract. Only recently the Second Circuit has held that it is "well established that a court may not admit extrinsic evidence in order to determine the meaning of an unambiguous contract." *Omni Quartz v. CVS*, 287 F.3d 61, 64 (2d Cir.2002) (citing *Seiden Assocs. v. ANC Holdings*, 959 F.2d 425, 428 (2d Cir.1992)).

B. Hell or High Water Clause

As noted above, the Leases in question each include a provision that states:

The Lessee's obligation to pay all rent and all other amounts due hereunder and to perform all the terms hereof shall be absolute and unconditional and shall not be affected or reduced by any circumstances, including (I) any set-off, counterclaim,

recoupment, defense or other right which the lessee may have against the lessor

*361 (*Seery Aff.*, Exs. 1-3, 10, 11 at § 7.5.)
[FN14]

FN14. As also noted above, the parties apparently attached particular importance to this clause, as it among the handful of provisions in the lengthy contract printed entirely in upper-case type. See note 4 above.

New York law holds as a basic tenet the "eminently sensible proposition" that when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms. *Refinemet Int'l Co. v. Eastbourne N.V.*, 25 F.3d 105, 108 (2d Cir.1994) (citing *W.W.W. Assocs., Inc. v. Giancontieri*, 77 N.Y.2d 157, 162, 565 N.Y.S.2d 440, 566 N.E.2d 639 (1990)). For the purposes of a summary judgment motion, the Court must decide whether significant contractual ambiguity exists. *Echelon Int'l Corp. v. America West Airlines*, 85 F.Supp.2d 313, 317 (S.D.N.Y.2000) (citing *Giles v. City of New York*, 41 F.Supp.2d 308, 318 (S.D.N.Y.1999)). If the language of the contract is "unambiguous and conveys a definite meaning," then the interpretation of the contract is a question of law for the court. *Bourne v. Walt Disney Co.*, 68 F.3d 621, 629 (2d Cir.1995) (citations omitted). If the terms are not clear, the interpretation of the contract becomes a question of fact for the jury and extrinsic evidence of the parties' intent is admissible. *Id.* Further, a court may not draw any inference or give any construction to the terms of a written contract that may conflict with the clearly expressed language of the written agreement. See, e.g., *General Elec. v. Compagnie Euralair*, 945 F.Supp. 527, 529 (S.D.N.Y.1996) (citation omitted).

[5] As a general rule, leases containing hell or high water clauses are enforceable even in the face of defaults by the party seeking to enforce them. See, e.g., *Window Headquarters v. MAI Basic Four*, 1994 WL 673519 at * 12 (S.D.N.Y. Dec.1, 1994) (finding hell or high water clauses customary and routinely enforced in computer rental industry); *Netrix*

Leasing v. K.S. Telecom, 2001 WL 228362 at *5 (S.D.N.Y. Mar.7, 2001) (upholding hell or high water clause in third-party finance lease for telephone network equipment); Siemens Credit Corp. v. American Transit Ins., 2001 WL 40775 at *1-2 (S.D.N.Y. Jan.17, 2001) (upholding hell or high water clause in finance lease and directing summary judgment for plaintiff); Rhythm & Hues v. Terminal Marketing Co., 2002 WL 1343759 at *5 (S.D.N.Y. June 19, 2002) (stating hell or high water leases are generally enforceable). See also R. Contino, Legal and Financial Aspects of Equipment Leasing Transactions 29, 87-88 (1979) (finance leases containing hell or high water clauses are strictly enforced).

[6] The terms of the instant provision could not be clearer. The obligation to pay rent is "absolute and unconditional and shall not be affected or reduced by any circumstances, including ... any set-off, counterclaim, recoupment, defense or other right." The provision is supported by a specific disclaimer provision, discussed below, as well as an explicit merger clause, and there are no terms within the Leases that appear to conflict with this unambiguous obligation to pay rent. Therefore, under the clear terms of the Leases, the Court finds that the undisputed material facts establish that Defendants have not fulfilled their obligation to pay the rent due.

Defendants' failure to comply with the unambiguous terms of the contract accordingly requires partial summary judgment for Plaintiff unless the original contractual provisions have been materially modified by the Letter Agreement.

*362 C. The Letter Agreement

[7] Defendants maintain that even if the clauses in the original Leases are found to require Defendants to pay rent, these terms no longer apply, because the Leases were modified by the June 21, 2001, Letter Agreement in such a way as to preclude summary judgment for the rent due under the Leases. [FN15]

FN15. Wells Fargo concedes that the Letter

Agreement is a valid modification of the original Leases, indeed basing its own calculation of TACA's unpaid rent obligations on the June 21, 2001, modifications. (Pl.'s Mem. for Partial Summ. J. at 16).

As stated above, the Letter Agreement allows for reduced rent payments in the near-term and provides a modified partially-deferred rent-payment schedule. (Letter Agreement, Schedule 1.) The Letter Agreement also provides:

We acknowledge and understand the concerns expressed in paragraphs 4 of your letters of June 15, 2001 and June 18, 2001 concerning eventual arrangements in respect of the Aircraft and the MSN 142 Aircraft. We reserve the right to continue working towards a solution which would allow TACA to terminate the leases ... in a manner and pursuant to conditions acceptable to C-S Aviation Services and its lenders and we respectfully request that you consider in good faith any proposal made for such purposes.

(Seery Aff. Ex. 15 at 2)

TACA and JHM Cargo claim that evidence submitted by Federico Bloch, TACA's Chief Executive Officer, demonstrates "that C-S, and Lessors breached the June 21, 2001 Letter Agreement on June 28, 2001, by categorically refusing to consider in good faith any proposal from Lessee that involved terminating Lessees' status as lessee under the Aircraft Leases." (Defs.' Mem. Opp. Partial SJ at 12, citing Bloch Aff. at ¶ 32-34, 41 and 45.) As a consequence, they claim, they are relieved of their obligation to pay rent.

This argument is unavailing. The Letter Agreement is clear that "except as expressly modified ... each of the lease agreements ... remain[s] in full force and effect without modification or amendment." (Bloch Aff. Ex. V, ¶ 6.) Nothing in the Letter Agreement suggests a waiver of rights or rescission of the original Leases except as to those issues specifically covered in the Letter Agreement. Although the Letter Agreement defers certain specific rent payments that would otherwise have been due from Defendants, nothing in it

remotely indicates a modification of the hell or high water provisions of the original contracts, or cancels Wells Fargo's absolute right to collect the rescheduled rent payments. The fact that Wells Fargo agreed to accommodate Defendants by deferring certain payments, subject to the payment of interest and compliance with a modified payment schedule, does not abrogate any other provision of the Leases.

Nor does Wells Fargo's agreement to consider the feasibility of substituting a new lessee for the financially-strapped TACA mean that if no suitable replacement was found, Wells Fargo has forfeited its rights under the Leases. The Letter Agreement obliges Wells Fargo only "to consider in good faith any proposal" for terminating the Leases. This language places no obligation on C-S Aviation or Wells Fargo to find an alternate lessee or accept any lessee proposed by Defendants, or indeed to do anything other than consider options presented to it by Lessees. [FN16] *363 Defendants attempt to circumvent this plain language of the Letter Agreement by arguing that Wells Fargo's denial of an obligation to assist TACA in terminating the Leases was, in itself, a breach of the Agreement. (Defs.' Mem. Opp. Partial Summ. J. at 13; Bloch Aff. at ¶ 55.) But there is simply no language in the Letter Agreement requiring the Lessor to assist the Lessees in terminating the Leases.

FN16. This clear interpretation is further supported by a June 28, 2001, email sent from Jim Walsh to Federico Bloch, which explicitly states "the basis for the June 21 agreement ... was that TACA would continue to pay currently, according to the schedule outlined in the agreement ... until the leases were terminated 'in a manner and pursuant to conditions acceptable to C-S Aviation Services and its lenders.' " (Bloch Aff. Ex.W.)

Nor is there any evidence in the current record to suggest that TACA proposed any substitute lessees, or made any proposal to terminate the leases, much less that any such proposal was not considered in good faith by Lessors. Defendants' proffered evidence tends to show that C-S Aviation represented to

TACA that it was attempting to assist them in finding others to take over the Leases at issue either by sale, sublease, or direct lease (Bloch Aff. Exs. G, H, M, P) and that Wells Fargo accepted less than full payment (Seery Aff. Ex. 15 at 1). However, neither Wells Fargo's waiver of its right to full payment and agreement to accommodate Defendants by accepting less than the rent due, nor its agreement to help find a substitute lessee, entails that if those effort fail, Plaintiff has then lost the rights it would have had under the Leases. To draw such a conclusion would be inconsistent with the language of the Letter Agreement, and would attribute illogical motivations to Wells Fargo. To impose such an interpretation as a legal norm would give parties to contracts a perverse incentive not to accommodate debtors on any matter, lest they lose all that they had originally bargained for.

Accordingly, as the material terms of the Letter Agreement were not breached by Wells Fargo or C-S Aviation, and were indisputably breached by Defendants, the Leases continue to require payment of rent by Defendants. Plaintiff's motion for partial summary judgment is therefore granted.

III. Motion to Dismiss Defendants' Counterclaims and Third-Party Claims

A. Motion to Dismiss Standard

A motion to dismiss counterclaims is governed by Rule 12(b)(6) of the Federal Rules of Civil Procedure. The Court must liberally construe the claim, accepting as true the facts alleged, and dismiss the counterclaims only if it is "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Lerman v. Bd. of Elections of New York*, 232 F.3d 135, 140 (2d Cir.2000). The court is not, however, required to accept as true "conclusions of law or unwarranted deductions." *First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763, 771 (2d Cir.1994) (citations omitted). Moreover, in deciding a motion to dismiss, a court may consult the text of documents incorporated by reference or otherwise relied on in the

complaint. *Int'l Audiotext Network, Inc. v. AT&T*, 62 F.3d 69, 72 (2d Cir.1995); *Brass v. Am. Film Techs., Inc.*, 987 F.2d 142, 150 (2d Cir.1993).

B. Fraud and Misrepresentation Claims

Defendants assert several closely-related fraud claims as counterclaims against Wells Fargo or as third-party claims against C-S Aviation. Though the particular elements of these various claims differ in certain respects, and Defendants' claims survive several arguments made by Wells Fargo and C-S Aviation, all of the claims alike ultimately fail for the same reason. Each of Defendants' fraud theories requires *364 reasonable reliance on the asserted representations or omissions. Defendants, having expressly disclaimed in the text of the Leases any reliance on precisely the kinds of misstatements they now claim were made to them, cannot as a matter of law establish that they reasonably relied. Accordingly, their claims for fraudulent inducement, fraudulent misrepresentation, negligent misrepresentation, and civil RICO violations must all be dismissed.

(1) Fraudulent Inducement and Fraudulent Misrepresentation

[8] To state a claim for fraud a plaintiff must demonstrate (1) representation of a material fact (2) falsity (3) scienter (4) reasonable reliance and (5) injury. *Manning v. Utilities Mut. Ins. Co., Inc.*, 254 F.3d 387, 400 (2d Cir.2001). Thus, to plead either fraudulent misrepresentation or fraudulent inducement, Defendants must allege that they reasonably relied on false representations made by Wells Fargo or C-S Aviation. See, e.g., *Fax Telecomunicaciones Inc. v. AT & T*, 138 F.3d 479, 490 (2d Cir.1998) (New York law requires same elements for fraudulent misrepresentation and fraudulent inducement) (citing *Turtur v. Rothschild Registry Int'l*, 26 F.3d 304, 310 (2d Cir.1994) (enumerating elements of common law fraud under New York law); *Village of Chatham v. Board of Fire Comm'rs*, 90 A.D.2d 860, 456 N.Y.S.2d 494, 495 (3d Dep't 1982) (same for fraudulent

misrepresentation); *Stone v. Schulz*, 231 A.D.2d 707, 647 N.Y.S.2d 822, 823 (2d Dep't 1996) (same for fraudulent inducement); *Pinney v. Beckwith*, 202 A.D.2d 767, 608 N.Y.S.2d 738, 739 (3d Dep't 1994) (same)).

(a) As an initial matter, the Court rejects Wells Fargo's and C-S Aviation's argument that Defendants have failed to plead fraud with sufficient specificity to satisfy Fed. R. Civ. P. 9(b). Under Rule 9(b), a plaintiff alleging fraud must state "the circumstances constituting fraud ... with particularity." This exception to the generally liberal standard of pleading helps to ensure that defendants receive fair notice of allegations of fraud and to protect them from the harm to reputation or goodwill that can result from such allegations. Since "[i]t is a serious matter to charge a person with fraud," a plaintiff is not permitted to do so "unless he is in a position and is willing to put himself on record as to what the alleged fraud consists of specifically." *Segal v. Gordon*, 467 F.2d 602, 607 (2d Cir.1972). See *DiVittorio v. Equidyne Extractive Industries*, 822 F.2d 1242, 1247 (2d Cir.1987). Accordingly, except as to "matters peculiarly within the opposing party's knowledge" for which the allegations of fraud must be accompanied by "a statement of the facts upon which the belief is founded"--"[allegations of fraud cannot ordinarily be based 'upon information and belief.'" *Luce v. Edelstein*, 802 F.2d 49, 54 & n. 1 (2d Cir.1986) (internal quotation marks and citations omitted).

Instead, the complaint must specify the "particulars" of the alleged fraud--including, for example, the time, place, particular individuals involved, and specific conduct at issue. *Id.* at 54. And while Fed.R.Civ.P. 9(b) provides that "malice, intent, knowledge, or other condition of mind ... may be averred generally," this standard for allegations concerning state of mind does not give "license to base claims of fraud on speculation and conclusory allegations." *Shields v. Citytrust Bancorp*, 25 F.3d 1124, 1128 (2d Cir.1994) (internal quotation marks and citations omitted). The plaintiff still must allege facts giving rise to a "strong inference of fraudulent intent," which may be satisfied "either (a) by

alleging facts to show that defendants had both motive and opportunity to commit fraud, or (b) by alleging facts that constitute strong circumstantial evidence *365 of conscious misbehavior or recklessness." *Id.* However, a generalized profit motive that could be imputed to any for-profit company, is insufficient for purposes of inferring scienter. *Chill v. General Electric Co.*, 101 F.3d 263, 268 (2d Cir.1996).

Although the question is close, Defendants adequately allege fraud under Rule 9(b). The third-party complaint provides notice to C-S Aviation of the nature of the alleged fraud, which satisfies the core purpose of the Rule 9(b). *Cosmas v. Hassett*, 886 F.2d 8, 11 (2d Cir.1989). Defendants state, in their Third-Party Complaint, that a specific individual at C-S Aviation, one Andrew Toutt, Vice President of Technical Services, misled another named individual, Roberto Escalante, of JHM Cargo, when, beginning in January 1998, Toutt represented to Escalante maintenance costs for the aircraft of between \$1160 and \$1355 per block hour, but did not reveal that these costs were based on maintenance done in India, although Toutt knew that the costs of maintaining the aircraft elsewhere were higher; that TACA and JHM Cargo relied on these representations; and that C-S Aviation knew that maintenance costs were a significant matter to Defendants. (Third-Party Compl. at ¶¶ 9-11, 13-16, 24, 36, 39, 40, 44, 50, 53-57, 63, 94.)

(b) The argument that Defendants did not adequately plead fraud because they did not allege knowing misrepresentation of a material fact is equally unavailing. (Pl.'s Mem. for Mot. to Dismiss at 11.) In its counterclaims, TACA specifically alleges that C-S Aviation, acting as an agent for Wells Fargo, provided false or misleading information about the maintenance costs, a subject that they claim C-S Aviation both knew was crucial to their decision to lease the aircraft in order to induce TACA and JHM Cargo to sign the Leases. (Countercl.¶¶ 10, 11, 15, 16, 26, 30-34, 37-39, 50, 52, 73, 75.) TACA further claims that C-S Aviation knew that "JHM lacked expertise ... [and] would

have to look to C-S for truthful, accurate, and complete information" in making their decision. (Countercl.¶ 14.)

It is not clear whether Defendants mean to allege that the historical maintenance costs reported by C-S Aviation were literally false. (Compare Defs.' Mem. Opp. Mot. to Dismiss at 6-7 with Pl.'s Mem. for Mot. to Dismiss at 11-12; Tr. at 10-15.) While Defendants do state that the "initial representations" and "continuing representations," both of which include references to the historical maintenance costs for the aircraft reported by C-S Aviation, were "false," they appear to be arguing not that the representations were literally false statements of what the maintenance costs had been, but rather that they were misleading because C-S Aviation knew or should have known that the historical costs were only relevant insofar as they could be used to project future maintenance costs. Defendants claim that the represented historical costs were low only because engine overhaul work had been performed in India, where costs are unusually low, and that C-S Aviation knew or should have known that TACA would not be able to service the planes there due to lax maintenance standards, which would not meet regulatory obligations in the Western hemisphere. (Countercl. ¶ 45-48; Compl.¶¶ 11, 44.) [FN17] These allegations suffice to *366 meet the requirement of pleading knowing misrepresentation of a material fact for the fraud claims.

FN17. Defendants' briefs could be read to suggest a claim that the representations as to maintenance were also misleading in that C-S Aviation used historical costs for maintaining the planes for passenger transportation rather than for freight operation. (Defs.' Mem. Opp. Mot. to Dismiss at 6.) Such a claim is not clearly alleged in the counterclaim or third-party complaint, and it appears that both parties to the negotiation were aware that the aircraft in fact had only been used in the past for passenger operation, and were to be converted by TACA to cargo use.

As reasonable reliance is a required element of all of Defendants' fraud and misrepresentation claims, it will be discussed

below.

(2) Negligent Misrepresentation

[9] To state a claim for negligent misrepresentation under New York law, a plaintiff must establish that (1) the defendant had a duty, as a result of a special relationship, to give correct information; (2) the defendant made a false representation that he or she should have known was incorrect; (3) the information supplied in the representation was known by the defendant to be desired by the plaintiff for a serious purpose; (4) the plaintiff intended to rely and act upon it; and (5) the plaintiff reasonably relied on it to his or her detriment. *Hydro Investors v. Trafalgar Power Inc.*, 227 F.3d 8, 20 (2d Cir.2000). The alleged misrepresentation must also be factual in nature and not promissory or relating to future events that might never come to fruition. *Id.* (citing *Murray v. Xerox Corp.*, 811 F.2d 118, 123 (2d Cir.1987)).

[10] Plaintiff argues that Defendants' negligent misrepresentation claims must fail because Defendants have not adequately pleaded a special relationship between the parties to the Leases. The special relationship component of a negligent misrepresentation claim was discussed in *Kimmell v. Schaefer*, 89 N.Y.2d 257, 652 N.Y.S.2d 715, 675 N.E.2d 450 (N.Y.1996). In *Kimmell*, the Court of Appeals held that whether a special relationship exists between two parties is an issue of fact, to be governed by weighing three factors: whether the person making the representation held or appeared to hold unique or special expertise; whether a special relationship of trust or confidence existed between the parties; and whether the speaker was aware of the use to which the information would be put and supplied it for that purpose. 89 N.Y.2d at 257, 652 N.Y.S.2d 715, 675 N.E.2d 450; *Suez Equity Investors, L.P. v. Toronto-Dominion Bank*, 250 F.3d 87, 103 (2d Cir.2001) (citing *Kimmell*).

The relationship between unaffiliated business entities negotiating a commercial aircraft lease would seem an unlikely

candidate for being considered such a special relationship. While C-S Aviation could be found to have special expertise in aviation matters, its counterparties here are themselves specialized aviation companies. Nor do Defendants plead that the parties had any prior dealings that would have created any relationship of particular trust and confidence between them. Nevertheless, Defendants' counterclaim can be read to allege a relationship between the parties that extended beyond the typical arm's-length business transaction. TACA claims that C-S Aviation, acting as Wells Fargo's agent, made expert representations about maintenance costs and that C-S Aviation was aware that TACA would rely on those representations. Moreover, TACA asserts that C-S Aviation had unique expertise in the intended conversion of Airbus 300 aircraft from passenger to cargo use. TACA also maintains that C-S Aviation made representations to JHM Cargo's President Roberto Escalante regarding the historical maintenance costs of the aircraft knowing that JHM Cargo would rely on C-S Aviation's asserted expertise to make their decisions *367 on Leases. (Countercl.¶¶ 10, 13, 15.) It is also alleged that Andy Toult, who became C-S Aviation's Vice President of Technical Services, as well as "other agents of C-S" misrepresented the historical maintenance costs and the good mechanical condition of the planes to JHM Cargo as well as to TACA (although those who received this information within JHM Cargo or TACA are not named). (Countercl.¶ 13.) Since the determination of whether a special relationship exists is essentially a factual inquiry, we will assume for present purposes that these somewhat sparse allegations suffice, at least at the pleading stage, to survive a motion to dismiss.

Once again, however, the reasonable reliance element, discussed below, is fatal to Defendants' claim.

(3) RICO

In their Third-Party Complaint, Defendants claim that C-S Aviation's alleged misrepresentations violated the RICO statute,

18 U.S.C. § 1962(c). In support of their civil RICO claim, Defendants allege:

Beginning at least in January 1998, C-S committed multiple acts of mail and wire fraud by using facsimile machines, email accounts and the United States Postal Service facilities to deliver documents to TACA and JHM that were false and misleading including, but not limited to: (1) comparative performance models for the A300 Aircraft and DC8 Aircraft; (2) profitability analyses for Aircraft operations that include maintenance costs provided by C-S; (3) documents containing representations of maintenance costs for the Aircraft; (4) "Fact Sheets" with vital information concerning the Aircraft including maintenance programs and conversion status reports; and (5) charts that included information on maintenance reserves. In addition, agents, employees, and representatives of C-S including, but not limited to, Andy Toutt repeatedly used telephone services in the United States to communicate the above-referenced and additional false, misleading, and fraudulent information to TACA and JHM.

(Third-Party Compl. ¶ 94.) The false and misleading statements alleged effectively hinge on the same alleged misrepresentations discussed above concerning the maintenance costs associated with the aircraft.

The RICO statute makes it "unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity," 18 U.S.C. § 1962(c), and authorizes civil suits by any person injured in his person or property by such a violation, 18 U.S.C. § 1964(c). To establish a claim for a civil violation of § 1962(c), "a plaintiff must show that he was injured by defendants' (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Azzielli v. Cohen Law Offices*, 21 F.3d 512, 520 (2d Cir.1994) (internal quotations omitted). "Racketeering activity" under RICO is defined to include a host of criminal offenses, which are in turn

defined by federal and state law. See 18 U.S.C. § 1961(1).

[11] Where mail or wire fraud is the RICO predicate act, as Defendants here allege, a plaintiff must show justifiable reliance to establish causation. See *Metromedia Co. v. Fugazy*, 983 F.2d 350, 368 (2d Cir.1992). Thus, Defendants' fraud claims against C-S Aviation under RICO must meet the same standards of justifiable reliance as the various common-law claims discussed above. To that issue we now turn.

***368 (4) Reasonable Reliance**

[12] The critical issue for all of the above fraud, RICO and negligent misrepresentation claims is whether, in light of the explicit and broad disclaimers in the Leases between TACA and/or JHM Cargo and Wells Fargo, Defendants can plead the required element of reasonable reliance. Defendants claim that they relied on C-S Aviation's oral misrepresentation of maintenance costs in signing the Leases and that the disclaimer is insufficient as it does not explicitly disclaim representations as to maintenance costs. (Defs.' Mem. Opp. Mot. to Dismiss at 7-11.)

[13][14] It is well-established, however, that a party to a contract cannot rely on oral representations where a contract specifically disavows the incorporation of non-written representations. *Danann Realty Corp. v. Harris*, 5 N.Y.2d 317, 323, 184 N.Y.S.2d 599, 157 N.E.2d 597 (1959). Under New York law if "a party to a contract specifically disclaims reliance upon a representation in a contract, that party cannot ... [later] assert that it was fraudulently induced into signing the contract by the very representation it has disclaimed." *Grumman Allied Indus. v. Rohr Indus.*, 748 F.2d 729, 734 (2d Cir.1984), citing *Danann*. In *Citibank v. Plapinger*, 66 N.Y.2d 90, 495 N.Y.S.2d 309, 485 N.E.2d 974 (1985), New York extended the *Danann* rule, finding that fraud in the inducement was blocked as a defense, and affirming summary judgment for the plaintiff although the disclaimer in question did not explicitly mention the contested issue, but merely stated that the

guarantee at issue was "absolute and unconditional" irrespective of defenses. *Id.* at 94-95, 495 N.Y.S.2d 309, 485 N.E.2d 974. See also *Harsco Corp. v. Segui*, 91 F.3d 337, 346 (2d Cir.1996) (dismissing fraudulent inducement claim although disclaimer did not specifically disclaim statements about Russian business); *Lucas v. Oxigene, Inc.*, 1995 WL 520752 at *5 (S.D.N.Y. Aug.31, 1995) (parol evidence excluded where plaintiff signed disclaimer containing clause which directly contradicted the alleged oral representations). [FN18] Further, New York courts have recognized that "no particular words are needed to transform a general disclaimer into a specific one, and have excluded parol evidence even when the contract did not contain an express disavowal of reliance on oral representations." *Lucas*, 1995 WL 520752 at *4. Finally, when applying the Danann rule, we are advised that courts should consider the text of the agreement compared to the representations claimed to be fraudulent or negligent, while also considering the arm's-length nature of the negotiation and the sophistication of the parties, in order to determine whether reliance was reasonable. *Harsco*, 91 F.3d at 345.

FN18. Defendants' reliance on *Centronics Fin. v. El Conquistador Hotel*, 573 F.2d 779, 782 (2d Cir.1978), is misplaced. *Centronics* holds that under New York law, a general merger clause alone will not preclude proof by extrinsic evidence of fraud in the inducement. In that case, however, there was no disclaimer of warranties such as the one in this case. *Centronics* itself takes note of the Danann rule, which the Second Circuit has since applied in *Harsco*, 91 F.3d at 345-46, holding that where a seller disclaimed representations other than those embodied in the agreement, the disclaimer put the buyer on sufficient notice that oral representations not in the agreement could not be reasonably relied upon.

[15] Applying the Danann rule, as interpreted by *Plapinger*, it is clear that the exact words "maintenance costs" need not appear in the disclaimer in order for representations about maintenance to have been disclaimed. Defendants are correct that an overly broad disclaimer is insufficient.

Barash v. Pennsylvania Term. Real Estate Corp., 26 N.Y.2d 77, 86, 308 N.Y.S.2d 649, 256 N.E.2d 707 (1970). It *369 does not follow, however, that where a written contract specifically identifies areas that are not the subject of representations, a party can avoid its specifically-negotiated contract obligations by claiming a representation that is a slight variant of the particular language disclaimed in the contract.

Here, the disclaimer provision is simultaneously very broad and very particular. In general terms it disavows all representations not expressly made in the contract, but it is not merely a blanket denial. Rather, it specifically lists a variety of significant promises that are explicitly not made, including representations regarding airworthiness, value, durability, compliance with specifications, condition, operation, fitness for use for a particular purpose, quality of material or workmanship, and absence from defects. Although Defendants argue that the definitions of the terms disclaimed are for a jury to decide, the Court finds that maintenance costs are logically an aspect of "condition," "durability," and "operation or fitness for use." If a plane frequently breaks down or is in poor condition, its maintenance costs will obviously go up. It is thus a logical contradiction to expressly disavow any promises about how often a plane will break down, while at the same time promising that the maintenance costs will be a fixed dollar amount each month.

This conclusion is further supported by the plethora of other provisions in the Leases, including that the clause leasing the aircraft "as is, where is," the hell or high-water clause for payment of rent, and the integration clause. See *Mizuna, Ltd. v. Crossland Fed. Sav. Bank*, 90 F.3d 650, 659 (2d Cir.1996) (citation omitted) (oral representations cannot be squared with merger provision which recites that the written contract is the complete expression of the parties' agreement and explicitly disavows oral agreements).

Further, if maintenance costs were as critical to Defendants as they now claim, they

were free to negotiate for an express warranty as to that issue in the Leases. In fact, the Leases do include numerous warranties on the part of Wells Fargo for the benefit of Lessees, including, among others things, that they have the authority on behalf of the beneficiary to enter into the Lease, that they have good title to the aircraft, and that the Lease will not violate any provision of U.S. banking laws. (Seery Aff. Exs. 1-3, Ex. 11, Ex. 12 at ¶ 3.2.) Sophisticated business entities, when put on notice of the existence of material facts which have not been documented, assume the business risk that the facts may not be as represented because "a party will not be heard to complain that he has been defrauded when it is his own evident lack of due care which is responsible for his predicament." *Lazard Freres & Co. v. Protective Life Ins.*, 108 F.3d 1531, 1543 (2d Cir.1997). Here, TACA claims that the maintenance costs were critical to its decision to enter the Leases; had the true facts about the maintenance costs been revealed to them, they claim, they would not have leased the aircraft. As aviation companies with extensive experience operating airplanes, Defendants were well aware of the factors that could affect maintenance costs. Nevertheless, they apparently made no effort to investigate the conditions under which the represented historical maintenance costs had been achieved, or to demand any contractual warranties or promises as to either past or future maintenance costs. By not negotiating for a warranty for the maintenance costs, while at the same time broadly disclaiming having received or relied on closely related representations, TACA assumed the business risk that future maintenance costs may not be comparable to the historical costs orally represented to it.

Finally, these agreements, like those in *Plapinger*, are contracts executed by *370 knowledgeable parties who negotiated at arm's length. 66 N.Y.2d at 95, 495 N.Y.S.2d 309, 485 N.E.2d 974. Although the information provided in TACA's affidavit suggests that TACA may have been relatively less sophisticated in its knowledge of aircraft leasing and maintenance and may have relied upon C-S Aviation's representations in

making its decision to enter into the Leases, it is manifestly unreasonable for an airline company to avoid contractual duties by arguing that it is uninformed about the details of its own business. [FN19]

FN19. Defendants' reliance on *GTE Automatic Elec. v. Martin's Inc.*, 127 A.D.2d 545, 512 N.Y.S.2d 107 (1st Dep't 1987), is inapposite, as the promissory notes at issue in that case did not contain a specific disclaimer or other language to bar parol evidence of fraudulent misrepresentation, and the court distinguished *Danann and Plapinger* on that basis. Here, given the sufficiently specific disclaimer in the Leases, the *Danann-Plapinger* rule applies.

Defendants maintain, however, that even if the disclaimers in the Leases preclude their fraud claims against Wells Fargo, the terms of the Leases cannot benefit C-S Aviation, which was not a signatory on the Leases. (Defs.' Mem. Opp. Mot. to Dismiss at 7-8.) This argument is unpersuasive. Defendants cannot plead that they reasonably relied on representations from C-S Aviation, Wells Fargo's agent and trust beneficiary, in entering the Leases with Wells Fargo that specifically disclaim having received or relied on precisely such representations. It is irrelevant that C-S Aviation was not a signatory to the contract in which Defendants disclaimed the reliance it now says it placed.

General Motors v. Villa Marin Chevrolet, 2000 WL 271965 at *31-32 (E.D.N.Y. Mar.7, 2000), is instructive. In *General Motors*, a sublessor sued a sublessee for unpaid rent. The sublessee, in turn, sued the principal of the entity that owned the leased property, alleging that the principal had induced it to enter the lease agreement through several misrepresentations, although the principal himself was not a party to the lease agreement. Relying on *Harsco*, 91 F.3d at 345, the court concluded that it is unreasonable, as a matter of law, for a party to claim that it was fraudulently induced to enter into a contract by a prior representation of a third party where reliance was specifically disclaimed in the agreement.

The disclaimer of reliance in the instant case is analogous to General Motors. First, Defendants here, like plaintiffs in General Motors, claim that the party it charges with fraud may not rely on the disclaimer in the Leases because it was not a signatory to the Leases. Next, the sublease in General Motors did not reserve any right to rely on representations made by the principal, just as neither the Leases nor the Letter Agreement contain language preserving any reliance on representations by C-S Aviation. Finally, the close association between Wells Fargo and C-S Aviation makes this an even stronger case than General Motors for permitting C-S Aviation to benefit from the disclaimer. Defendants seek to hold Wells Fargo responsible for C-S Aviation's actions under a principal-agent theory; they may not invoke the principal-agent relationship when it suits them and ignore it when it does not. Thus, C-S Aviation, as an agent/beneficiary of Wells Fargo, can equally invoke the terms of the disclaimer in the Leases.

As TACA and JHM Cargo's claim of reasonable reliance is contradicted by the undisputed and unambiguous terms of the contracts they signed, they are foreclosed from raising fraud and misrepresentation as a defense. Accordingly, Wells Fargo's *371 and C-S Aviation's motion to dismiss TACA and JHM Cargo's claims of fraudulent inducement, fraudulent misrepresentation, negligent misrepresentation, and civil RICO violations is granted.

C. New York General Business Law § 349

[16] Defendants' final counterclaim maintains that Wells Fargo and C-S Aviation violated New York's consumer protection law, N.Y. Gen. Bus. Law § 349(a), which prohibits "deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state," and which does not require reasonable reliance. *Stutman v. Chem. Bank*, 95 N.Y.2d 24, 29, 709 N.Y.S.2d 892, 731 N.E.2d 608 (2000). Wells Fargo and C-S Aviation argue that TACA and JHM Cargo have not sufficiently alleged a deceptive practice within the

meaning of this law and that the dispute at issue is a "quintessential private business dispute," which does not implicate the public interest. (Pl.'s Mem. for Mot. to Dismiss at 23.)

To establish a claim under N.Y. Gen. Bus. Law § 349(a), a plaintiff must, at a minimum, plead and prove that the conduct at issue is consumer-oriented. *Oswego Laborers' Local 214 v. Marine Midland Bank*, 85 N.Y.2d 20, 25, 623 N.Y.S.2d 529, 647 N.E.2d 741 (1995). While the outer perimeter of § 349 permits claims for deceptions perpetrated by one business against another business that may affect the public, see, e.g., *Assocs. Capital Servs. Corp. of New Jersey v. Fairway Private Cars*, 590 F.Supp. 10, 14-15 (E.D.N.Y.1982), federal courts have held that the statute requires the sort of offense to the public interest that would trigger FTC intervention under 15 U.S.C. § 45. *Genesco Entm't v. Koch*, 593 F.Supp. 743, 752 (S.D.N.Y.1984). In other words, the typical violation contemplated by the statute involves an individual consumer who is misled by a seller of consumer goods, usually by way of false and misleading advertising. *Id.* at 751. The statute's concern with individual consumers is further evidenced by the remedies the statute provides, [FN20] the derivation of the statute, [FN21] and the case law, which demonstrates that successful plaintiffs are uniformly those that bring claims involving recurring transactions where the amount in controversy is small, *id.* at 752, and holds that business competitors have standing to rely on the statute only if they can prove that there has been harm to the public at large. *Securitron Magnalock v. Schnabolk*, 65 F.3d 256, 264 (2d Cir.1995).

FN20. Section 349(h) provides parties with the opportunity to receive the greater of actual damages or \$50.

FN21. Section 349(h) is modeled primarily on the Federal Trade Commission Act.

Defendants' claims cannot meet this standard. The transaction described in the instant claims is between two businesses, for a

limited number of specifically-negotiated transactions for substantial amounts of money. The alleged fraudulent statements attributed to C-S Aviation were not directed at the general public, and indeed concerned matters unique to the maintenance records of the specific aircraft involved in the Leases, and not matters on which the general public could in any way rely. Defendants have alleged only upon "information and belief" that C-S Aviation has made similar deceptive representations regarding maintenance costs to "at least one other potential lessee." (Countercl.¶ 93.) Nor do Defendants allege harm to the consuming public; they merely claim (somewhat dubiously) that C-S's conduct has a "potentially significant negative impact upon public safety" (emphasis added). (Countercl.¶ 94.) These few transactions between two businesses *372 entities, which have not affected the public at large does not suffice to state a claim under New York's consumer protection law.

Accordingly, the motion to dismiss this claim is also granted.

CONCLUSION

Wells Fargo's motion for partial summary judgment for rent due under the Leases as modified by the June 21, 2001, Letter Agreement is granted. Wells Fargo motion to dismiss Defendants' counterclaims and C-S Aviation's motion to dismiss Defendants' Third-Party Complaint are both granted in full. The Clerk of the Court is respectfully directed to enter judgment accordingly.

SO ORDERED.

247 F.Supp.2d 352, RICO Bus.Disp.Guide
10,356

END OF DOCUMENT

92

Supreme Court, Appellate Division, Second
Department, New York.

WIT HOLDING CORP., Respondent,
v.
Kenneth KLEIN, et al., Appellants, et al.,
Defendants.

April 9, 2001.

Investor brought suit against representative of corporation into which it had invested \$500,000, corporation, and others alleging fraud, breach of fiduciary duty and other claims. The Supreme Court, Suffolk County, Gerard, J., denied motion to dismiss certain claims, and defendants appealed. The Supreme Court, Appellate Division, held that: (1) allegations that representative of corporation made false statements to induce investor to purchase stock stated fraud claim; (2) representative did not owe fiduciary duty with respect to arms-length transaction; and (3) absent some special relationship, negligent misrepresentation claim would not lie.

Affirmed as modified.

West Headnotes

[1] Fraud 32
184k32

A cause of action alleging fraud does not lie where the only fraud claim relates to a breach of contract.

[2] Fraud 12
184k12

A present intent to deceive must be alleged and a mere misrepresentation of an intention to perform under the contract is insufficient to allege fraud.

[3] Fraud 32
184k32

Misrepresentation of material fact, which is collateral to the contract and serves as an inducement for the contract, is sufficient to sustain a cause of action alleging fraud.

[4] Fraud 24

184k24

Investor stated claim sounding in fraud by alleging that representative induced it to invest in corporation by making false representations that corporation was in full compliance with regulatory requirements and that representative was principal shareholder in corporation when he fact he still owed money to third person for purchase of that shareholder interest.

[5] Fraud 7
184k7

A fiduciary relationship may exist where one party reposes confidence in another and reasonably relies on the other's superior expertise or knowledge.

[6] Fraud 7
184k7

Arms-length business relationship does not give rise to a fiduciary obligation.

[7] Fraud 7
184k7

Representative of corporation which induced investor to purchase stock interest in corporation did not owe fiduciary duty to investor, based on past business associations with investor's principals, as parties were involved in arms-length business transaction and all were sophisticated business people.

[8] Fraud 13(3)
184k13(3)

A claim alleging negligent misrepresentation must be based on some special relationship which implies a close degree of trust between the plaintiff and the defendant.

****67 Hoffman Pollok & Pickholz, LLP, New York, N.Y. (Marvin G. Pickholz and William A. Rome of counsel), for appellants.**

Scott M. Zucker, Lake Success, N.Y. (Andrew B. Schultz of counsel), for respondent.

CORNELIUS J. O'BRIEN, J.P., SONDR
MILLER, WILLIAM D. FRIEDMANN and
ROBERT W. SCHMIDT, JJ.

(Cite as: 282 A.D.2d 527, *527, 724 N.Y.S.2d 66, **67)

*527 In an action, inter alia, to recover damages for fraud, the defendants Kenneth Klein, Paul Wasserman, First Providence Financial *528 Group, Inc., First Providence Financial Group, LLC, and Madison Avenue Associates, LLC, appeal from so much of an order of the Supreme Court, Suffolk County (Gerard, J.), dated January 24, 2000, as denied those branches of their motion which were to dismiss the first, third, fourth, fifth, sixth, and seventh causes of action in the complaint insofar as asserted against them.

ORDERED that the order is modified, on the law, by deleting the provisions thereof denying the branches of the motion which were to dismiss the third, fourth, and fifth causes of action insofar as asserted against the appellants and substituting therefor a provision granting those branches of the motion; as so modified, the order is affirmed insofar as appealed from, without costs or disbursements.

This action arises out of an agreement by the plaintiff to purchase a stock interest in First Providence Financial Group, Inc. (hereinafter FPPG). The plaintiff allegedly paid \$500,000 to FPPG and no stock was ever transferred to it. The plaintiff alleges, inter alia, that the defendant Kenneth Klein, in order to benefit himself and the defendants FPPG, Paul Wasserman, and Madison Avenue Associates, LLC, fraudulently induced it to enter into the agreement.

[1][2][3] A cause of action alleging fraud does not lie where the only fraud claim relates to a breach of contract (see, Non- **68 Linear Trading Co. v. Braddis Assocs., 243 A.D.2d 107, 675 N.Y.S.2d 5; Gordon v. De Laurentiis Corp., 141 A.D.2d 435, 529 N.Y.S.2d 777). A present intent to deceive must be alleged and a mere misrepresentation of an intention to perform under the contract is insufficient to allege fraud (see, Non-Linear Trading Co. v. Braddis Assocs., supra, at 118, 675 N.Y.S.2d 5). Conversely, a misrepresentation of material fact, which is collateral to the contract and serves as an inducement for the contract, is sufficient to sustain a cause of action alleging fraud (see, Deerfield

Communications Corp. v. Chesebrough-Ponds, Inc., 68 N.Y.2d 954, 510 N.Y.S.2d 88, 502 N.E.2d 1003; First Bank of Ams. v. Motor Car Funding, 257 A.D.2d 287, 690 N.Y.S.2d 17).

[4] The plaintiff alleges that, during discussions with the plaintiff's president, Michael Weiner, and its treasurer, Kevin Held, Klein made misrepresentations of fact to induce it to enter into an agreement with FPPG. According to the plaintiff, Klein told these representatives that he was a principal shareholder in FPPG when he still owed money to a third person for the purchase of that shareholder interest. Klein also allegedly stated that FPPG was in full compliance with regulatory requirements, when in fact, it needed an infusion of cash to meet them. Accordingly, the Supreme Court properly denied *529 that branch of the motion which was to dismiss the plaintiff's cause of action sounding in fraud (see, First Bank of Ams. v. Motor Car Funding, supra; RKB Enters. v. Ernst & Young, 182 A.D.2d 971, 582 N.Y.S.2d 814).

[5][6][7] However, the Supreme Court erred in failing to dismiss the cause of action against Klein to recover damages for breach of fiduciary duty. A fiduciary relationship may exist where one party reposes confidence in another and reasonably relies on the other's superior expertise or knowledge (see, Wiener v. Lazard Freres & Co., 241 A.D.2d 114, 672 N.Y.S.2d 8; Penato v. George, 52 A.D.2d 939, 383 N.Y.S.2d 900), but an arms-length business relationship does not give rise to a fiduciary obligation (see, Wiener v. Lazard Freres & Co., supra). In support of its claim that Klein breached a fiduciary duty to it, the plaintiff alleges that Klein, Weiner, and Held had socialized together on several occasions. They were also business acquaintances, and Weiner and Klein had worked together on a joint project while they both were part owners of and working for different brokerage firms. Under these circumstances, where the parties were involved in an arms-length business transaction involving the transfer of stocks, and where all were sophisticated business people, the plaintiff's cause of action to recover damages for breach of fiduciary duty

(Cite as: 282 A.D.2d 527, *529, 724 N.Y.S.2d 66, **68)

should have been dismissed (see, *Wiener v. Lazard Freres Co.*, supra; *L. Magarian & Co. v. Timberland Co.*, 245 A.D.2d 69, 70, 665 N.Y.S.2d 413). As there is no cause of action to recover damages for breach of fiduciary duty, the plaintiff's cause of action against Wasserman for aiding and abetting a breach of a fiduciary duty should also have been dismissed.

[8] A claim alleging negligent misrepresentation must also be based on some special relationship which implies a close degree of trust between the plaintiff and the defendant (see, *Pappas v. Harrow Stores*, 140 A.D.2d 501, 528 N.Y.S.2d 404). Accordingly, the Supreme Court erred in failing to dismiss this cause of action as well.

The appellants' remaining contentions are without merit.

282 A.D.2d 527, 724 N.Y.S.2d 66, 2001 N.Y. Slip Op. 03087

END OF DOCUMENT

93

FLORIDA RULES OF CIVIL PROCEDURE

2003 Edition

Rules reflect all changes through 773 So.2d 1098. Subsequent amendments, if any, can be found at www.flcourts.org/sct/sctdocs/index.html. The Florida Bar also updates the rules on its website at www.flabar.org (on the left side of the home page, click "Links" and then "Rules of Procedure").

CONTINUING LEGAL EDUCATION PUBLICATIONS

THE FLORIDA BAR
TALLAHASSEE, FLORIDA 32399-2300

16div002992

(c) **Final Judgment.** Final judgments after default may be entered by the court at any time, but no judgment may be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other representative who has appeared in it or unless the court has made an order under rule 1.210(b) providing that no representative is necessary for the infant or incompetent. If it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter to enable the court to enter judgment or to effectuate it, the court may receive affidavits, make references, or conduct hearings as it deems necessary and shall accord a right of trial by jury to the parties when required by the Constitution or any statute.

Court Commentary

1984 Amendment. Subdivision (c) is amended to change the method by which the clerk handles papers filed after a default is entered. Instead of returning the papers to the party in default, the clerk will now be required to file them and merely notify the party that a default has been entered. The party can then take whatever action the party believes is appropriate.

This is to enable the court to judge the effect, if any, of the filing of any paper upon the default and the propriety of entering final judgment without notice to the party against whom the default was entered.

RULE 1.510. SUMMARY JUDGMENT

(a) **For Claimant.** A party seeking to recover upon a claim, counterclaim, crossclaim, or third-party claim or to obtain a declaratory judgment may move for a summary judgment in that party's favor upon all or any part thereof with or without supporting affidavits at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party.

(b) **For Defending Party.** A party against whom a claim, counterclaim, crossclaim, or third-party claim is asserted or a declaratory judgment is sought may move for a summary judgment in that party's favor as to all or any part thereof at any time with or without supporting affidavits.

(c) **Motion and Proceedings Thereon.** The motion shall state with particularity the grounds upon

which it is based and the substantial matters of law to be argued and shall be served at least 20 days before the time fixed for the hearing. The adverse party may serve opposing affidavits by mailing the affidavits at least 5 days prior to the day of the hearing, or by delivering the affidavits to the movant's attorney no later than 5:00 p.m. two business days prior to the day of hearing. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) **Case Not Fully Adjudicated on Motion.** On motion under this rule if judgment is not rendered upon the whole case or for all the relief asked and a trial or the taking of testimony and a final hearing is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall ascertain, if practicable, what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. On the trial or final hearing of the action the facts so specified shall be deemed established, and the trial or final hearing shall be conducted accordingly.

(e) **Form of Affidavits; Further Testimony.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or by further affidavits.

(f) **When Affidavits Are Unavailable.** If it

appears from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) **Affidavits Made in Bad Faith.** If it appears to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorneys' fees, and any offending party or attorney may be adjudged guilty of contempt.

Committee Notes

1976 Amendment. Subdivision (c) has been amended to require a movant to state with particularity the grounds and legal authority which the movant will rely upon in seeking summary judgment. This amendment will eliminate surprise and bring the summary judgment rule into conformity with the identical provision in rule 1.140(b) with respect to motions to dismiss.

1992 Amendment. The amendment to subdivision (c) will require timely service of opposing affidavits, whether by mail or by delivery, prior to the day of the hearing on a motion for summary judgment.

RULE 1.520. VIEW

Upon motion of either party the jury may be taken to view the premises or place in question or any property, matter, or thing relating to the controversy between the parties when it appears that view is necessary to a just decision; but the party making the motion shall advance a sum sufficient to defray the expenses of the jury and the officer who attends them in taking the view, which expense shall be taxed as costs if the party who advanced it prevails.

RULE 1.525. MOTIONS FOR COSTS AND ATTORNEYS' FEES

Any party seeking a judgment taxing costs, attorneys' fees, or both shall serve a motion within 30 days after filing of the judgment, including a judgment of dismissal, or the service of a notice of

voluntary dismissal.

Committee Notes

2000 Adoption. This rule is intended to establish a time requirement to serve motions for costs and attorneys' fees.

Court Commentary

2000 Adoption. This rule only establishes time requirements for filing motions for costs, attorneys' fees, or both, and in no way affects or overrules the pleading requirements outlined by this Court in *Stockman v. Downs*, 573 So. 2d 835 (Fla. 1991).

RULE 1.530. MOTIONS FOR NEW TRIAL AND REHEARING; AMENDMENTS OF JUDGMENTS

(a) **Jury and Non-Jury Actions.** A new trial may be granted to all or any of the parties and on all or a part of the issues. On a motion for a rehearing of matters heard without a jury, including summary judgments, the court may open the judgment if one has been entered, take additional testimony, and enter a new judgment.

(b) **Time for Motion.** A motion for new trial or for rehearing shall be served not later than 10 days after the return of the verdict in a jury action or the date of filing of the judgment in a non-jury action. A timely motion may be amended to state new grounds in the discretion of the court at any time before the motion is determined.

(c) **Time for Serving Affidavits.** When a motion for a new trial is based on affidavits, the affidavits shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) **On Initiative of Court.** Not later than 10 days after entry of judgment or within the time of ruling on a timely motion for a rehearing or a new trial made by a party, the court of its own initiative may order a rehearing or a new trial for any reason for which it might have granted a rehearing or a new trial on motion of a party.

(e) **When Motion Is Unnecessary; Non-Jury**

2003 WL 24299377 (Fla.Cir.Ct.) (Partial Expert Testimony)
Circuit Court of Florida.
Palm Beach County

COLEMAN,
v.
Morgan STANLEY.

No. 2003CA005045 AZ.
2003.

(Partial Testimony of Blaine F. Nye, Ph.D.)

Case Type: Fraud & Misrepresentation >> Business

Case Type: Fraud & Misrepresentation >> Fraud - Fraud & Misrepresentation

Case Type: Securities >> Securities Fraud

Jurisdiction: Palm Beach County, Florida

Name of Expert: Blaine F. Nye, Ph.D.

Area of Expertise: Accounting & Finance >> Economics/Economist

Representing: Unknown

MR. SCAROLA: -Thank you, Your Honor. And the clerk has already been provided with copies of each of those exhibits.

MR. MARMER: Your Honor, CPH calls Dr. Nye.

THE COURT: Where is Dr. Nye?

Come on up, sir.

And raise your right hand.

Do you swear to tell the truth, the whole truth and nothing but the truth?

THE WITNESS: I do.

THE COURT: Thank you, sir, have a seat right here.

THEREUPON,

BLAINE F. NYE having been first duly sworn, was examined and testified as follows:

THE COURT: Can you all run up real quick?

(A bench conference occurred as follows:)

THE COURT: Can they see the notes on the podium? Can they read your notes? You might want to back it up a tad.

(The bench conference ended.)

DIRECT EXAMINATION

BY MR. MARMER:

Q. Would you please introduce yourself to the ladies and gentlemen of the jury, tell them your full name and where you reside?

A. The full name is Blaine Francis Nye, that's Frances with an I. I reside at Menlo Park, California.

Q. What is your occupation?

A. I'm a financial economist.

Q. What does that mean?

A. That's a tough one. Financial economics is, in a word, intertemporal economics. It's a demand in pricing for money over time. Basically, it's a science of investment. How much do I invest now to optimize my life time utility kind of things.

Q. Dr. Nye, please explain to the jury what you were asked to do in this litigation.

A. I was asked to estimate the damages suffered by CPH, Coleman (Parent) Holdings when they received 14.1 million shares of Sunbeam stock in partial exchange for their 44 plus million shares of -- or 82 percent interest The Coleman Company.

Q. Now, before we discuss the work that you did in this litigation, let's review briefly your background starting with college. What college did you attend?

A. I attended Stanford University as an undergraduate.

Q. What was your major?

A. Majored in physics.

Q. When did you receive your undergraduate degree from Stanford?

A. 1968.

Q. After you graduated from Stanford in 1968 what did you do?

A. For the first nine years I played professional football with the Dallas Cowboys.

Q. What position?

A. Right guard.

Q. And did you play in any Superbowls?

A. Three. Only won one of them, but we played in three of them.

Q. What was your last game?

A. The last game I played in was the January Pro Bowl in Seattle.

Q. Why did you leave professional football?

A. My kids got tired of moving. I was getting a little older and I hadn't been really hurt bad, except my feelings every once in a while. So it just seemed like it was time to move on.

Q. While you were playing football with the Cowboys, were you doing anything else from a professional point of view?

A. The first two off seasons it was basically in those days it was a July-to-January job. It wasn't all year round like it is now.

The first two off seasons I went to graduate school in physics. I was in the Ph.D program at the University of Washington and planned to be a physics Professor. So that was the first two years, but by 1970 the job market for physics faculty was just about zero. So I had a wife and a couple of kids, I decided I better go back to business school.

So for the next four years I went back to Stanford Graduate School of Business and received an MBA in 1974. Then the last two off seasons I worked as a corporate banking officer for Wells Fargo Bank. And during the season in Dallas I taught in the MBA program at the University of Dallas. And that kind of piqued my interest. And I thought maybe I'd go back -- business schools were still hiring -- maybe I'd go back, get a Ph.D, and that coincided with my retirement.

Q. Where did you go for your Ph.D?

A. Back at Stanford.

Q. What is a Ph.D?

A. It's literally a doctor of philosophy. I think basically it's studying the so-called frontiers of the discipline. It's a big word, but, anyway, learning what there is to know about the discipline and making, in the form of your dissertation, a novel or original contribution to the literature in that field.

Q. Now, did you teach while you were getting your degree?

A. Yes.

Q. And can you just briefly describe for the ladies and gentlemen of the jury the teaching experiences you had other than what you described previously?

A. Well, I taught at the University of Santa Clara while I was writing my dissertation. I was doing course work. And I taught there. I taught MBA in undergraduate in the core financial course. And then later on, I taught faculty at the University of San Francisco in the late '80s. And after a couple of years of that they made me a full professor.

And I was that for a couple of years, but then finally the consulting and the teaching was too much and I resigned. And there again, I taught the core MBA financial course, advanced corporate finance and managerial economics.

Q. Now, after you left teaching, what did you do then on a -- for your professional occupation?

A. Well, it sort of coincided with it, but basically served as a consultant for a company called the Mack Group. I joined them right as I went into the teaching work with the Ph.D.

And, again, by that time I had four kids and I was too old to be an assistant professor, so I went into consulting. The teaching was parallel with these parallel tracks. So I worked for five years with a company called the Mack Group. And they had a practice area called expert testimony and economic research. And with my credentials that's kind of where I fit into. I did that until '86. And then made active Stanford Consulting Group, my own company. And I've been there ever since.

Q. Are you the owner of Stanford Consulting Group?

A. My wife owns half of it, but, yes.

Q. How many employees does Stanford Consulting have?

A. Five full-time and payroll of 18 or 20.

Q. What are the qualifications of the people that you employ?

A. Entry people are called analysts. And they have undergraduate degrees in finance, economics, computer science, something along those lines.

Then a full-time employee -- those people tend to work for a couple of years, go to college, get a masters degree and come back, but full associate has at least a masters degree.

Q. What types of topics did you consult on?

A. Well, our product mix, I guess, if you call it that, over the last 15, 20 years has been, a big chunk of it has been securities litigation work, basically expert analysis and testimony of things like materiality, causation, market efficiency and damages in securities class actions.

Another broad area is intellectual property. Basically valuations and any damages related thereto of patent infringement, copyright infringement, trademark infringement, trade secrets, that type of thing.

Another area is insurance economics. Done a lot of competitive rate work, appropriate premium rates for different lines of insurance. I've done diagnostic studies of markets, level of competition in a market, effective taxation, optimal regulation, those kind of things. Had a number of studies in that area and a number of rate cases.

Then the fourth thing would probably be a catchall, everything else, business valuation, antitrust, those kinds of things.

Q. Have you done any work on behalf of governmental agencies?

A. Yes.

Q. What have you done just briefly?

A. We worked for the IRS quite a bit, the Internal Revenue Service. And that usually -- a lot of the work hinged around the fact that American companies tend to have offshore insurance subsidiaries. And they pay them premiums to insure their risk. And the IRS sometimes wonders if the premiums are appropriate and it isn't just an offshore funnel for profit. So I've done some work there estimating appropriate premiums and risk transfer and those kinds of things.

We worked for the state, quite a bit for the state of New Jersey in their ongoing auto insurance debacle in rate hearings, things like that. Done some work for the state of California, again, rate hearings regulation. Worked for both the California and American Life and Property Casualty trade associations.

We did have one interesting assignment. We were hired by actually the Pennsylvania Medical Association, the Pennsylvania Hospital Association and the Pennsylvania Trial Bar to do a diagnostic study of the Pennsylvania medical malpractice insurance market. And those three got together, because the Senate president in Pennsylvania ordered them to before he would act on any of their requests. So that was quite odd bed fellows. Those kinds of things.

Q. How long had you worked, consulted and taught in the field of finance and financial economics?

MR. HANSEN: Object, compound question.

THE COURT: Overruled.

You can answer it.

THE WITNESS: It's been mid '70s to now, about 30 years.

BY MR. MARMER:

Q. I'd like to turn now to your work in this matter. Have you analyzed the damages suffered by CPH in this case?

A. Yes.

Q. When were you retained to begin working on your analysis?

A. I believe it was spring of 2004.

Q. And are you being compensated for your work?

A. Yes.

Q. On what basis?

A. Hourly fees and out-of-pocket expenses.

Q. Now, before agreeing to serve as an expert witness in this case, did you have any relationship with CPH, Mr. Perelman or any company related to

Mr. Perelman?

A. No, I don't believe so.

Q. And are you anticipating after you conclude your testimony in this case having any relationship with CPH, Mr. Perelman or any company affiliated with

Mr. Perelman?

A. No plans as I sit here, no.

Q. Is there compen -- is your compensation in any way whatsoever dependent upon the outcome of this case?

A. No.

Q. Dr. Nye, have you formed an opinion within a reasonable degree of certainty within your field of expertise concerning the amount of damages that CPH has suffered?

A. Yes.

Q. And what is that opinion, sir?

A. That they have been damaged in the amount of 680 million dollars.

Q. I'd like to go through your analysis and have you explain it to the jury.

And if you would, sir, please begin by telling us what the first step is that you did in calculating your damage analysis.

A. Well, CPH received 14.1 million Sunbeam shares. The first step is to estimate the value of those shares.

Q. And so you have -- I'm sorry, 14 you said you're going to have to --

Can you see this, Your Honor?

THE COURT: Yes.

BY MR. MARMER:

Q. You're going to have to come up with the value for those shares. How did you go about figuring out what the expected value of those shares would be?

A. Well, the shares that CPH received was a share in the Sunbeam/Coleman combination, that company, Sunbeam with Coleman in it. And, basically, beginning March 2nd, when the announcement of the acquisition was made, and the days thereafter announcements that any necessary funding would be in place to make sure that the acquisition occurred, the market began to price Sunbeam as the combination of Sunbeam and Coleman.

MR. HANSEN: Could we have a date as the valuation taking place? From this witness?

THE COURT: Which?

MR. HANSEN: Estimated valuation date.

THE COURT: Well, I don't think we've gotten there yet. So I would overrule it.

MR. MARMER: We haven't gotten there yet.

BY MR. MARMER:

Q. Please continue.

A. Where was I?

The market basically valued the Sunbeam/Coleman combination. And they valued them, you know, millions of investors day by day valued this stock. And so I looked at the values from March 2nd to the date of the original acquisition announcements through March 30th, the day the deal closed, used that period, took an average value over that period as an estimate of the market value that millions of investors arrived at and used that as the estimate that investors such as Coleman and Sunbeam would have arrived at in their negotiation as to the value of the company at that point in time.

Q. You mentioned that you're looking at market values, are market values subjective or objective?

A. Market values are extremely objective, that's what you get when you sell.

Q. And why is that, why is that an objective value?

A. I mean, that's actually the value. When you say what is the value, that's what you can get for it. When you go to the marketplace, there it is, very objective, they give you the quote, you sell, you get it.

Q. You mentioned, sir, that you looked at market prices. I want to show you what is already in evidence as CPH Trial Exhibit 1296 A.

MR. HANSEN: May we approach briefly, Your Honor?

THE COURT: Sure.

(A bench conference occurred as follows:)

THE COURT: Yes, sir.

MR. HANSEN: My concern, Your Honor, is he has to provide a valuation date. Otherwise, it's not competent evidence until he says what date he provided a valuation as of. We have a serious issue about that. So unless he says he's doing it as of March 2nd, as of February 27th, as of March 30th, we can't properly object.

I object to all this testimony coming until we have the predicate. If he were to say it's March 30th, that would be a new opinion. If he were to say February 27th, which he said in his deposition, that would be a date ruled out by the Court. So we need to steer this toward the particular day so we can lodge our appropriate objection.

THE COURT: As I understand it, your objection is that eventually he has to give us a date as to which the top number is computed.

MR. HANSEN: That's right, the expected value on date X. He can't say there's a bunch of market prices and that's what people expected to get. Until we have that predicate, we can't know whether his testimony is admissible. I object to him giving the testimony until he establishes the predicate. Once he establishes, I want an opportunity to approach.

MR. MARMER: The answer is: I'd like a chance to put my examination in in my order. There's no requirement that we tell it in the sequence that Mr. Hansen requests.

THE COURT: I think that's right. You can object to any question that you think is not relevant, but I think we've got to listen to the evidence. And I think what you're saying is at the end you're still going to have a motion to strike it or a motion for directed verdict.

MR. HANSEN: Also, because I have to object on a timely basis, because he's making a subjective calculation as to what people expected they would get, which is not competent Precision Reporting of South Florida, Inc. evidence under Florida law. I believe as a predicate for the admissibility of his testimony, he has to establish, under Totale any other related cases, that on March 30th or some other competent date there was an expected value set by the marketplace not by someone's subjective hope.

THE COURT: The objection based on the average is really a motion for rehearing, which I would deny. We already spoke about that issue.

(The bench conference ended.)

BY MR. MARMER:

Q. Dr. Nye, I have handed you CPH Trial Exhibit 1296 A. And if you could describe for the ladies and gentlemen of the jury what that is?

A. 1296 A is a list of Sunbeam stock prices day by day beginning January 1st, 1996 and going through February 5th, 2001.

Q. Now, when you were calculating and figuring out a value of 14.1 million shares, what date or date ranges did you use for that purpose?

A. I used -- I took an average value of March 2nd to March 30th.

Q. Do we have a graph that demonstrates that?

A. Yes.

Q. If you would please just describe for the ladies and gentlemen of the jury what it is that we're seeing?

Can you guys see this? Is it blocking this? We can move this over.

A. It's a bar graph of Sunbeam stock prices from March 2nd through March 30th, 1998.

Q. And can you explain to the ladies and gentlemen of the jury how it is that you decided to start your analysis over here on March 2nd?

A. Well, March 2nd is the first trading day, that's the day of the announcement that the market would have valued -- begun to value Sunbeam on a combined basis. In other words, it wasn't just Sunbeam anymore, it was Sunbeam with the Coleman Company included with it. Any day before that is a different company, that's Sunbeam all by itself.

So from the 2nd on it starts the price of the combination. The first couple of days it's absorbing it, you know, the market. The acquisition is not a sure thing, maybe the funding is not in place. I'm talking about March, 2nd, 3rd, 4th, in there it's becoming used to -- the acquisition is becoming fairly certain. Then from those days thereon until March 18th it trades as, you know, as the combination. And at March 19th that's an announcement, as I recall, that Sunbeam might not make its first quarter revenues.

But they would be -- the first quarter the previous year and that long term they were okay and I think there were no announced problems with earnings. Just they might not make their first quarter revenue target. That's the first chink in the armor since this thing was announced that maybe Sunbeam fully turned around with Coleman added isn't quite as any nifty as we thought. So the market takes it down about 10 percent and pretty much stays there through the close.

Q. When you say "the close," what is the March 30 date?

A. That's the date the acquisition closes as I understand.

Q. And why didn't you use a date prior to this date?

A. Oh, that's -- the market price for Sunbeam prior to that date simply isn't what Coleman got, that's the price of Sunbeam without Coleman. It's not the price of Sunbeam combined with Coleman.

Q. Now, you mentioned the price movement in this period here. What is it that the price movement is telling you about the market's reaction to this transaction?

A. Well, the whole period tells you that the market very much approves of the transaction. I believe prior to March 2nd Sunbeam was trading 40, 41, maybe 42. And then, bang, it pops up to over 50 upon the announcement. So the market very much approved of the acquisition and what Sunbeam paid for it.

Q. Now, why is it, sir, that you decided to use an average for all of these dates?

A. According to financial principles or theory, stock prices move with the market, with the market line.

In other words, as the market goes up and down, they go up and down. And then -- and the market is fairly volatile, so that can be fairly volatile. Those price changes, those are called systematic risk.

Got a frown.

Basically, that's the marker risk, the risk you can't avoid. In addition to, the market moves every day, on each and every day the stock prices fairly and each day something new comes out about the company itself. And, obviously, if it's priced fairly, then this can be good or bad, up or down. The next day, again, it's priced fairly, more news comes out and that could be up or down.

So basically these company-specific -- this company-specific addition to the information set in the market makes the stock move up or down normally a couple percent, could be as much as 10, though.

So one of the reasons I took the -- and by the way, those company-specific deviations have an expectation of zero over the long haul. They're equally up, equally down.

The reason I took the average -- is that what this question was?

Q. Yes.

A. What I did, why I took the average was I didn't want to accidentally pick a couple of days when it was up with temporary company good news or a couple of days when it was down with company bad news. I simply averaged those all, on average they're zero. You take an average, you get the core value of the company. And that value, without any new information about the company, you know, is it well-suited through the month.

Q. And is there a chart that shows how you calculated this average?

A. I believe so.

Q. Okay. And can you just describe what this chart represents?

A. That's simply a tabular of the other chart, it's day-by-day the closing price for Sunbeam.

Q. How did you go about calculating the average? What is the actual mathematical process used?

A. I added them up and divided by 21. That's how many days there are.

Q. What does that produce?

A. I believe the average value over that period is \$48.26.

Q. Dr. Nye, again, what is this 48.26? What is it that you're trying to figure out when you're using the 48.26? It's the average, but what is the point of that?

A. I'm trying to find the value, the estimated value that Coleman and Sunbeam put on those shares when they negotiated the deal. The value they put on a value of the share of the combined company. And I'm using the market's actual valuation of the combined company, millions of investors day by day bidding on this stock and putting their two cents in and valuing it objectively.

And I'm using that estimate as the best estimates of what two other rational and reasonable investors would come to, and that would be Sunbeam and Coleman in valuing those shares as part of the acquisition.

Q. Dr. Nye, what do you then do? Once you've got the 14.1 million shares and the 48.26 average price of the shares, what is the next step in the calculation?

A. The next step is simply to multiply those two numbers together.

Q. And what is the approximate total there?

A. 14 -- I'm sorry, I was going to repeat.

680 million dollars.

Q. So you were about to say you just take --

A. 14.1 million shares, \$48.26 a piece. That's a value of 680 million dollars. 680 plus.

Q. Now, let's go back to your damage analysis again. And tell us, you were just describing how you got to the first step. So the first step was we just came up with what, 680, right?

A. Expected value of 680 million, yes.

Q. And what's the next step in your analysis, what do you do next?

A. Well, the next step is to determine the value of what CPH actually received.

Q. And how did you go about doing that?

A. My understanding is that it will be proved here in these proceedings that CPH was never able to realize any value whatsoever from any of the shares and, therefore, what they effectively got was zero.

MR. HANSEN: Objection.

May we approach, Your Honor?

(A bench conference occurred as follows:)

MR. HANSEN: Your Honor, there's been no predicate established in connection with your motion in limine ruling in terms of what Dr. Nye just said. He's assuming Your Honor said you can't use a valuation date for the value other than the closing date until there's been a factual predicate proved. Thus far there has been no such proof. So he's jumping to the conclusion of your motion in limine.

THE COURT: Is the legal objection hearsay or what?

MR. HANSEN: Incompetent expert testimony. Your Honor previously ruled that both expected and actual value have to be assessed as of the same date. Motion in limine 16, Your Honor.

THE COURT: This is whose motion in limine 16?

MR. HANSEN: Coleman.

16, Your Honor, said that unless he's purporting to do an actual value different from the date of the closing --

MR. MARMER: Just a moment.

MR. HANSEN: The point, Your Honor, is that he can't just assume and then go forward to a subsequent date.

THE COURT: Sort of jumping ahead. Isn't -- maybe I've got to go back and look at my notes. I think all he's saying is that there's going to be other evidence that what they received was zero.

MR. HANSEN: What he's going to say is he's going to go forward in time at 2001 at the time of the bankruptcy to value the shares at zero.

THE COURT: Are we going there with this witness?

MR. MARMER: Yes, but he's going to do it on an assumed basis through facts through other people. That's what experts do all the time. They take certain facts that will be proved elsewhere in the trial and they apply their skill and training. We've already done a proffer. Your Honor requested proffers from both sides. We submitted a proffer on both sides what the evidence will show on that.

THE COURT: Are you going to be offering that information into evidence?

MR. MARMER: Yes, it is already there. And some of it is going to come from Mr. Gittis, but in terms of what is already there, we already know in terms of Your Honor's orders that there was no way to do any sales prior. We have that already established. As far as I know, there is absolutely no factual dispute about the reality that we got zero dollars for our stock. This not a hotly contested issue.

MR. GORSUCH: This is a hotly contested issue as to whether they can sell it, Your Honor, and that has been fully briefed in response to the Court's orders.

THE COURT: Okay. I would overrule the objection without prejudice to your moving to strike the testimony if there isn't a factual basis laid or to move for a directed verdict.

MR. HANSEN: But, Your Honor said that he had to first establish a factual predicate. It isn't established.

THE COURT: I understand you disagree.

These are yours back, or you want me to keep them?

(The bench conference ended.)

BY MR. MARMER:

Q. Dr. Nye, we had just been talking about the CPH damages analysis and we had started with the 680 million dollar expected value. We were now at the point at looking at what CPH actually received.

Would you just again explain what it is that you did or what you assumed in order to come up with the zero?

A. Basically, my assumption was that it would be proved here that CPH was never able to receive anything of value, never realize any value from these shares. And, therefore, the value of that is zero. That's what they got. And the difference then would be the damages.

Q. So the damages, because this is a zero, the damages are basically the same?

A. Right.

Q. Now, did you look at an alternate way of calculating CPH's damages, a second way of looking at this?

A. Yes.

Q. Let's look at that. And if you would, please describe what the first step was that you used in calculating the alternate CPH damages?

A. The first step, you know, is what they expected to get, what the expected value was.

Q. And how did you do that?

A. The expected value is identical. They did indeed receive 14.1 million shares and those shares did indeed have an average value of 48.26 during the month of March. And the product of those two is what they expected to get or 680 million.

Q. So this number is the same in both of your damage?

A. Same number.

Q. What's the next step?

A. Under the next step is estimating what they received. And under this scenario I assumed -- estimate what they got. And under this scenario I assumed that Sunbeam would have been able to register the Coleman/Sunbeam shares in as timely a fashion as they registered the Coleman shares that they traded share for with the public and that registration was effective December 6th, 1999. And they actually had the shares July 6th in 2000.

Q. I'm sorry, did you say July 6th?

A. I did, didn't I? I'm sorry, January 6th, 2000. So the assumption is had the Coleman shares been registered in that timely of a way, they could have been sold uniformly over the first quarter of 2000, or at least 75 percent of them could.

Q. Why 75 percent?

A. There was a subsequent agreement in August of '98 that basically freed all the shares for sale, in other words, eliminated the lockout on 7 percent of them. But on the other hand, the remaining 25 percent were to be locked out until August of 2001, three years later.

So in this first quarter of 2000, only 75 percent would have been able to be sold.

Q. So what is approximately 75 percent of 14.1 million shares?

A. It's 10.5 to 10.6 million.

Q. And how did you go about calculating the value of the 75 percent of the 14.1 million shares which you're assuming could have been sold in the first quarter of 2000?

A. Right. I assumed they could have been sold at the average value, average share price during the first quarter, which by definition then basically just take the average share price times the number of shares.

Q. And do we have a graph showing the average share price during the first quarter of 2000?

A. Yes.

MR. HANSEN: Your Honor, may we approach? Objection.

(A bench conference occurred as follows:)

THE COURT: Yes, sir.

MR. HANSEN: Again, in compliance with your order and we believe compliant with the law, if he's going to use that date, he's not allowed to project into the future. We move to strike any testimony about sales into the future, and believe that the only testimony he could offer would be testimony about what the sale was on that date.

THE COURT: What do you want to respond?

MR. MARMER: He's allowed to make professional judgments about how those stock could be sold. And that's what he's doing. He'll explain that and I think we have discussed these issues several times.

THE COURT: Overruled.

(The bench conference ended.)

BY MR. MARMER:

Q. I think the last thing I asked you was: Is there a graph that shows the stock prices in the first quarter of 2000?

A. Yes.

Q. Would you just describe for the ladies and gentlemen of the jury what it is that this chart is showing?

A. That's just a bar chart of Sunbeam stock prices during the first quarter of 2000, the year 2000.

Q. And then how did you go about calculating the average?

A. Well, I added them up and divided by the number of trading days in the quarter.

Q. Same mathematical type of calculation you described before?

A. Simple averaging procedure.

Q. And, Dr. Nye, when you use that calculation, when you do that math, what does it turn out to be?

A. Average price is \$4.35.

Q. \$4.35.

And then what did you do with the other 25 percent?

A. The other 25 percent still was under restriction and would be until I believe August 2001, after the bankruptcy. So there would have been no realizable value from those, so zero.

Q. Now, when you're trying to do this alternate damage calculation, how do these numbers fit together?

A. Basically it's a 680 million, the value of the 14.1 million shares that they expected to get and did get less what the value they realized, were able to realize from those shares.

Q. And what is that value, what is the -- what number do we need to use to solve for that?

A. The value would be \$4.35 per share times the 10.5 to 10.6 million shares they could have sold. That number is 46 million dollars.

Q. And do the math for us, what do we come up with?

A. 680 minus 46 is 634, 634 million.

Q. Now, we've been looking at a lot of stock market data. And I wanted to ask you a question about the market, sir. Are you familiar with the term the efficient capital markets hypotheses or the efficient market hypotheses?

A. Sure.

Q. Could you describe for us what that means?

A. Well, in a nutshell, it means that market prices fully reflect all publicly available information.

Q. And how does that efficient market hypotheses concept apply, if at all, to the analysis that you've undertaken?

A. Well, basically because the market is efficient, I can be confident that the stock market estimates fully reflects all publicly available information and, therefore, is an objective, accurate price of the stock.

Q. Now, Dr. Nye, if you would, sir, I just want you to explain to the jury the differences between the two damage calculations you made. In other words, just so it's clear, what is it that you're doing the alternate damage calculation? And how is that different from what you did in the first damage calculation?

MR. HANSEN: Objection, asked and answered.

THE COURT: Overruled.

THE WITNESS: The alternative basically takes the damage under an assumption that something that didn't happen, might have happened. Basically, that they could have got the shares registered in time to sell them. I assumed they'd have to uniformly sell them over the first quarter, because, you know, a block sale at that point with a firm that dropped 50 to 31, you know, a fairly poor signal to market that maybe the captain was handing over the ship as he gets in the life boat.

Assuming they can sell them over the full quarter, at least ones they could sell and that would give them 46 million dollars and use that as an estimate.

BY MR. MARMER:

Q. That produced your alternate damage figure of what?

A. 634 million.

Q. And going back to your original damage figure, what is again the difference here from what you've just described, how does that compare to what you just --

A. This damage is the full 680 million and it basically is what happened. In March they basically had some shares that were worth 680 million dollars and they never realized a dime from them. So they basically suffered damages of 680 million dollars.

MR. MARMER: May I have a moment, Your Honor?

THE COURT: Uh-huh.

MR. MARMER: Thank you very much, Mr. Nye, no further questions.

THE COURT: Mr. Hansen, do you have questions?

MR. HANSEN: Might we take a break, Your Honor?

THE COURT: Sure, if you need to get set.

We will see you in 10 minutes. We won't talk to you, don't talk about the case. You want to bring in a snack, soda, coffee or tea, feel free.

(Jury exits courtroom.)

THE COURT: Did you want Dr. Nye to step out or not?

MR. HANSEN: Probably, Your Honor.

THE COURT: Thank you, sir.

(Witness leaves courtroom.)

MR. SCAROLA: May we begin with some time estimate regarding cross examination so that we can begin to schedule our next witness? If it's possible, now that direct has been heard, to give us any kind of estimate?

THE COURT: I thought the next witness was either Fogg depo or Mr. Gittis, I thought that's all we have left.

MR. SCAROLA: Correct.

MR. HANSEN: An hour or two, Your Honor, is my best estimate now. But I'd like to make a timely motion to strike Dr. Nye's testimony.

THE COURT: What did you want to say in support of it, sir?

MR. GORSUCH: Your Honor, I'd like to renew our motions in limine 16 and 17 as well as our renewed motion to exclude. I'll summarize it briefly orally. Happy to submit an additional writing if the Court thinks one will be helpful.

Legal deficiencies with the expected value analysis did not use, Totale, March 30th as required by law, did not use the date of the deal at all. Admitted that on the stand. Said he was using an average. And he says, frankly, in his deposition

as well he wasn't trying to estimate the value of the loss as of March 30th. Admits that. And offers no authority for using his average. No authority whatsoever, Your Honor.

So it's based on a misconception of law. It's based on an attempt to get at a subjective value, Your Honor. Capturing all of those average dates, what did they figure they'd get? That's his testimony. Can't use subjective value, Your Honor, that's misconception and should be stricken.

And, Your Honor, as to, you know, he explained the March 19th drop as a reason why he used the average. And, in fact, in his deposition he explains that was a partial revelation of the fraud. But, Your Honor, they still closed the deal on March 30th, they chose to close the deal.

He testified about market efficiency, how it captures all publicly available information, March 30th reflected all publicly available information on the date of the closing.

THE COURT: Including a little bit of the fraud.

MR. GORSUCH: Your Honor, they chose to go forward with the deal after the little bit of the fraud was disclosed. They affirmed the deal, they didn't back out of it.

THE COURT: Are you saying that that somehow gives them a right for damages based on a little bit of fraud?

MR. GORSUCH: Your Honor, they could have backed out of the deal.

THE COURT: That's what you're saying: If you get a little bit of the fraud and you choose to stand on your contract, somehow you've waived your right to damages based on a little bit of the fraud?

MR. GORSUCH: Your Honor, it's not waived anything, it's the expected value of the deal and the expected deal as required by Totale is 494.

You can look back and figure subjectively what these people originally thought they were going to get. That's the problem, once you say you can't count March 19th, can't hold that against them, you're in the line of subjective intentions about what they originally thought they were going to get, not the deal they accepted on March 30th.

THE COURT: You think if they choose to stand on your contract, they cannot recover damages because of the little bit of fraud that was revealed in that March 19th press release.

MR. GORSUCH: Your Honor, that is the law.

THE COURT: That's what you're arguing.

MR. GORSUCH: That is our position, they could have backed out of it. Totale couldn't be clearer. You have to use the date of the deal. Every securities case this gentleman has testified in he used the date of the deal. We reviewed his reports. This is a novel approach and it's done, as he admits in his deposition, over and over. I can cite you half a dozen quotes where he says the reason why he did this, the reason why he averaged is he wanted to get at what the Plaintiffs subjectively thought they were going to get when they signed the deal. They expected the run up. And that's what he was trying to capture and uses the average because after March 19th he didn't think it reflected what they subjectively thought they were going to get. And I'd be happy to hand up quotes from his deposition.

THE COURT: What else did you want to argue?

MR. GORSUCH: Your Honor, I'd like to argue as well if subjective intention on expectation values were relevant, he ignored reams of record evidence to the contrary, that it wasn't 48.26 a share. We've talked in this courtroom about them being happy with \$30 a share. There's evidence as well that he ignored the 10-Q that was filed reflecting that the expected value was 524 for the deal.

On the actual value analysis, Your Honor, he again failed to use the date of the deal as required by Totale, instead he wants to hold us responsible for consequential losses, Your Honor, that is the whole market ride down, not the losses that we proximally caused by a result of the fraud. He didn't do the events study we talked about.

Your Honor, it's true in out-of-pocket cases you can get consequential losses, benefit of the bargain, which Plaintiff has elected under the restatement, you cannot get consequential losses you can only get proximal losses, attributable to the fraud itself. And that is in section 549. It's in Totale and even in the one case they cite, they cite Silverberg, it's in the gentleman's report, that's the case they purported to rely. It does allow consequential losses of the sort here, the whole market ride down. But guess what, that's an out-of-pocket case and it specifically says in footnote 12, benefit of the bargain is measured on the date of the deal and only the date of the deal and you don't get consequential losses.

If any further confirmation were necessary, the Court last week in Dura Pharmaceuticals ruled on this.

Finally, he violated your motion in limine 16. There is no competent evidence in the record at this stage that they couldn't have sold before either December 6th or January 2001, there's no evidence at all. None.

And Your Honor, we don't believe there's going to be any competent evidence as a matter of law under section 41 -- not 144 -- 41 of the Securities Act the private sale to a competent institutional investor was possible here. And there's no dispute about that that we think that's credible as a matter of law and no fact otherwise.

Finally, they impermissibly ignored record evidence again. He ignored the fact that Plaintiff still valued its shares at 450 million dollars. He said in his deposition he was going to ignore that evidence.

THE COURT: I don't know that that point is well taken.

Any other?

MR. GORSUCH: That's it.

MR. MARMER: These are all topics we have addressed many times with the Court.

The Court has already heard this Totale argument many, many times. We've had motions to reconsider that have been denied. This is at least the third time we're now arguing the same point. We stand on our prior arguments.

Your Honor specifically directed the parties to do proffers on these subjects. We did a supplemental disclosure on that. There was no challenge to our supplemental disclosure as inadequate. I submit they waived, but it was a well-taken proffer.

MR. GORSUCH: Your Honor, Mr. Marmer misrepresents the record. The record is very clear we submitted a proffer explaining why their analysis was flawed under section 41 of the Securities Act.

Your Honor, you've now had an opportunity to see just how fragile and really unlawful this testimony is. It's novel. It's never been tested, this methodology. It's never been used in Florida. There's no record cite of any case in Florida

adopting this kind of methodology in benefit of the bargain analysis. They wanted to come in and elect out-of-pocket and seek consequential losses. In that kind of scenario they could have done that. We argued for that. They chose not to and they have absolutely no authority in law that they've ever cited to this Court that you can sustain this testimony. It's reversible error, Your Honor.

THE COURT: Okay, I would deny the motion to strike.

Do we want to take a couple of minutes and we'll be back?

(A recess was taken.)

THE COURT: Are we ready for the jurors? Who is doing the cross examination?

MR. HANSEN: I am, Your Honor.

THE COURT: That's fine. You want to get the jurors.

You don't have any papers on the podium, do you, Mr. Marmer?

MR. MARMER: No.

(Jury enters courtroom.)

THE COURT: Thank you.

Mr. Hansen, do you have some questions?

MR. HANSEN: Yes, Your Honor.

CROSS EXAMINATION

BY MR. HANSEN:

Q. Morning, Dr. Nye.

A. Morning, sir.

Q. My name is Mark Hansen. I represent Morgan Stanley. And I'd like to ask you some questions, sir.

Dr. Nye, as you've measured damages in this case you start with an expected value of Sunbeam shares, correct?

A. Correct.

Q. And then you subtract an actual value to reach a net figure of damages, correct?

A. That's correct.

Q. So if we could just, keeping track of this, call this in our expected column, you said expected value of the Sunbeam shares was 680 million dollars. And the actual value years later was zero dollars, correct?

A. Just actually what I said was that the realizable value to Coleman was zero.

Q. Did you make a calculation of what the actual value of the 14.1 million Sunbeam shares was at any point in time?

A. No.

Q. That's a no?

A. That's what I said.

Q. So you never made any effort to determine what the actual value of the shares CPH, the Plaintiff in this case, received in the transaction, correct?

A. The actual value they received when they received them was 680 million dollars.

Q. That was the actual value?

A. The actual market expected, yes.

Q. But you said that was the expected value based on all information being factored into the stock price of over some period?

A. They expected to get 14.1 million shares in Sunbeam/Coleman and the value of each of those shares as explained by the market through the month of March the average value is 48.26 cents.

Q. What was the actual value of those shares if there weren't a fraud going on at Sunbeam?

A. I'm sorry. The actual value when? They're priced daily, on any given day it's the market price times the number of shares.

Q. You believe that stock markets are efficient, correct?

A. Correct.

Q. And that means that on any given day the market, the stock market incorporates all publicly available information in setting the price for the stock, correct?

A. That's correct.

Q. And it does that virtually instantaneously?

A. Receives the information, it's incorporated in the price, the latest research shows virtually instantaneously, correct.

Q. In other words, today, this morning company A were to issue an announcement about something having to do with its prospects, almost instantaneously the stock market would factor that into the pricing of company A?

A. That's right.

Q. In fact, you even call yourself something of a market officianado, is that a term you used?

A. Let's not get crazy. That's certainly the pillar of financial theory that has withstood the tests of 30 or 40 years.

Q. You believe that Sunbeam, the Sunbeam common stock traded in an efficient market, correct?

A. I do indeed.

Q. And that means that on any given day the stock market priced the Sunbeam stock based on all the available public information?

A. Correct.

Q. So that, for example, if we go to March 30 of the year 1998. On March 30 --

JUROR #8: Would you move that podium, please?

THE COURT: I'm sorry.

MR. HANSEN: Can everybody see okay?

BY MR. HANSEN:

Q. On March 30, Dr. Nye, that was the date of the closing of the Sunbeam/Coleman transaction, correct?

A. Sure.

Q. And all of the publicly available information about that transaction had been incorporated into the price of the Sunbeam stock, correct?

A. On that day all publicly available information about Sunbeam/Coleman was in that price, that's correct.

Q. And on that day the market said that the value of Sunbeam stock was \$43.94, correct?

A. That's something like that, yes.

Q. Would you like to look at your snapshot before? Look at 85, please?

THE COURT: Can you come up one second?

(A bench conference occurred as follows:)

THE COURT: I was just handed this by the bailiff. And I don't know why he waited until after the break.

Do you want to do anything now? Do you want to address it at the break. You all tell me.

I just didn't want to have it and not brought to your attention, because I don't know if they'll be here later.

MR. HANSEN: That's appropriate, Your Honor.

MR. MARMER: I am wondering whether we ought to -- let me just have a minute.

THE COURT: Any objection to him walking it back?

MR. HANSEN: I prefer not to take a lot of time with cross examination.

THE COURT: If we're going to have to break,

I'd rather do it now than when you really get going, that's all.

MR. HANSEN: That's fine.

MR. MARMER: As long as there's no waiver, we're prepared to go now.

THE COURT: And come back and address it at the next break?

(The bench conference ended.)

THE COURT: I apologize for the interruption.

BY MR. HANSEN:

Q. Mr. Nye, on March 30th, if we go to the snapshot 85, please, just so we're clear, this is your demonstrative?

A. That's correct.

Q. And the market priced Sunbeam stock at 34.94 a share?

A. That's the one price I can't see, but I can see it here and see it there. And I agree with you.

Q. You can see that screen.

A. It's all over the place, yes.

Q. So that was the price reflecting all publicly available information on March 30, the day the transaction closed?

A. That's correct.

Q. And on March 2nd, that was the day the transaction was announced, correct?

A. Correct.

Q. On March 2nd the market priced Sunbeam stock reflecting all available public information at \$45.63, correct?

A. It reflected all publicly available information on that date.

Q. And that included the announcement that there was going to be this merger, correct?

A. It included the announcements that there was going to be a merger, but probably not 100 percent probability there would be a merger.

Q. And you've said that the market instantaneously absorbs all information and puts it in the stock price, correct?

A. But it can only absorb it as fast as it gets it. If the probability of the merger closing wasn't 100 percent, it wouldn't reflect 100 percent of the combination. It would reflect some probabilistic combination of the merger and that's why it went up that way.

Q. The announcement on March 2nd said that the parties had signed an agreement of merger, correct?

A. I think it said that, correct.

Q. So they signed a contract, correct?

A. I don't know about signing a contract. They said they announced they intended a merger. And my answer is just what I told you. The market wasn't convinced completely, necessarily, that the merger would go through. So there's some probabilistic mix of the two on the first day?

Let me ask you as a matter of fact, Dr. Nye, in forming your opinion, did you know one way or the another whether Coleman and Sunbeam had signed a merger agreement before March 2nd?

A. I think in those terms signing a merger agreement I'm sure they did, yeah.

Q. So you knew about --

THE COURT: Can you all come up one more second?

THE COURT: Go ahead and takes your seats. Thank you again for being so incredibly patient with us, and I hope you had a wonderful lunch. Are we missing somebody?

JUROR #6: Byron. We forgot Byron.

JUROR #9: Oops.

JUROR #3: He got left out.

THE COURT: That's okay. You're just keeping us on our toes, and we appreciate it.

(Juror #5 entered the courtroom.)

THE COURT: Okay. We are ready to continue. Dr. Nye, you're still under oath.

Mr. Hansen.

MR. HANSEN: May I proceed, Your Honor?

THE COURT: Yes.

MR. HANSEN: Thank you.

RESUMED CROSS-EXAMINATION

BY MR. HANSEN:

Q. Dr. Nye, good afternoon?

A. Good afternoon.

Q. Before the break you were asked some questions about your expected value analysis. Do you recall that?

A. Yes, I do.

MR. HANSEN: Your Honor, if I might approach...

THE COURT: Yes, sir.

BY MR. HANSEN:

Q. I'm going to put before you, Dr. Nye, a copy of a document.

MR. HANSEN: Your Honor, we offer 196.

THE COURT: Any objection?

MR. MARMER: One moment, please.

THE COURT: Sure.

MR. MARMER: No objection.

THE COURT: MS 196 will be in evidence.

(Defendant's Exhibit No. 196 in evidence.)

BY MR. HANSEN:

Q. Dr. Nye, MS 196 is the public announcement of the merger, correct?

A. Appears to be, yes.

Q. It says definitive agreement has been reached March 2nd, correct?

A. Would you point that out to me?

Q. Would you look at the first paragraph, please?

A. Yes, have entered into definitive agreements with Sunbeam Corporation for 100 percent acquisition, yes.

Q. Is that a document you reviewed in the course of your work, Dr. Nye?

A. I probably did, yeah.

Q. So you were aware when you wrote your report that as of the 2nd of March the parties announced to the market that they had a definitive agreement to merge, correct?

A. That's true.

Q. Now, Dr. Nye, going back to some dates here, and see if I can understand your theory a little better, on March 27 of 1998, Sunbeam and Coleman signed their merger agreement, correct?

THE COURT: I'm sorry.

BY MR. HANSEN:

Q. I'm sorry. February 27, 1998 Coleman and Sunbeam signed their merger agreement, correct?

A. If that's what it says here. That sounds about right.

Q. Were you aware of what -- the date here?

A. Well, I'll take your word for it, yeah.

Q. Well, do you know?

A. My understanding is it was somewhere around there, yeah.

Q. But you didn't know at your deposition, did you?

A. Pardon me?

Q. You did not know the date of the merger agreement at your deposition, did you?

A. If I didn't, I didn't.

Q. On the 27th of February, the market priced Sunbeam shares at \$41.75 a share, correct?

A. That's -- I think that is correct, yes.

Q. That's with all the information publicly known about Sunbeam, correct?

A. That would be a re -- reflect fully information about Sunbeam, yes.

Q. I've given you a calculator if you want to check my math. But if you took 14.1 million shares times the 41.75, \$41.75 price, that would get you about \$588 million in value, market value?

A. I'll just check you the first time and I'll take your word for it later.

Q. Please be my guest.

A. 588.67, yes.

Q. Now on the 2nd of March, the day that the transaction was announced, the market priced Sunbeam shares at \$45.46, correct?

A. I got 63, 45.63.

Q. You got 45.63?

A. I think you did earlier, too.

Q. Let's use your number, 45.63. That's reflecting all information in the public on March 2nd, the day of the announcement of the merger, the market value of Sunbeam shares at \$45.63?

A. The market value, I think you just quoted \$45.63, yes.

Q. For March 2nd?

A. For March 2nd.

Q. Taking 14.1 million shares times that market value gives you about \$643 million?

A. 643.88, yep.

Q. So the market on the day of the announcement valued Sunbeam reflecting all information or valued those 14.1 million shares at about \$643 million, right?

A. I thought I just answered that, yes.

Q. Let's move to the 30th. That was the date on which the transaction closed, correct?

A. Yes, indeed.

Q. That's when the shares traded hands?

A. It's my understanding.

Q. Mr. Perelman got his 14.1 Sunbeam shares?

A. Again, you said the shares -- yes, right.

Q. Do you know whether there was a -- the transaction closed to the extent of people trading consideration on the 30th?

A. You put it three different ways, and I agree with each one of them. I'll agree with the third one, yes. The shares exchanged shares, however you want to say it.

Q. The plaintiff received money?

A. Money or the 14.1 million shares.

Q. And Sunbeam got 44 million plus Coleman shares?

A. Correct.

Q. That all happened on the 30th of March?

A. I believe so, yes.

Q. On the 30th of March the market reflecting all available information valued Sunbeam shares at \$43.94, correct?

A. That's correct.

Q. And that means that the market valued the 14.1 million Sunbeam shares that were traded that day at approximately \$619 million?

A. That's correct.

Q. Now you in your testimony have said that you've used a price different from any of the prices on the date of the merger agreement, the merger agreement announcement, and the closing date, correct?

A. Correct.

Q. You've used a price much higher than any of those three days, right?

A. Yes, it's higher than.

Q. \$48.26, right?

A. Right.

Q. When you take that times 14.1, that gets you to \$680, correct?

A. That's what that equals.

Q. That's for your calculation of the expected value of the shares, right?

A. Exactly.

Q. And that's because you didn't do your calculation based on the market pricing of the Sunbeam shares on any particular date, correct?

A. That's correct.

Q. You instead went through a calculation to try and figure out what CPH expected to get, correct?

A. Correct.

Q. And in figuring out what CPH expected to get, you used an average of prices over the March 2nd and March 30th period, correct?

A. Correct.

Q. You did not use any single date as the date on which the expected value was assessed, correct?

A. That's correct.

Q. And that was because you were trying to figure out what subjectively the people at Coleman figured they'd get out of the deal, correct?

MR. MARMER: Objection.

THE COURT: What's the legal objection?

MR. MARMER: Assumes facts contrary to the record.

THE COURT: Overruled.

THE WITNESS: The question?

BY MR. HANSEN:

Q. Sorry, Dr. Nye?

A. I asked you what the question was again.

Q. Of course.

MR. HANSEN: Could we have it re-read, please?

(The record was read as requested.)

THE WITNESS: I was trying to provide an estimate of what do investors of Coleman and Sunbeam, what they would value a share of stock in the Sunbeam Coleman combination is what I did.

BY MR. HANSEN:

Q. You were trying to estimate what Coleman anticipated its shares would be worth when they signed the deal, correct?

A. Sure.

Q. And now you know that the parties signed the deal on February 27th of 1998, correct?

A. I know that, yes.

Q. So you were trying to estimate what Coleman was expecting in the future its shares were going to be worth; isn't that right?

A. Well, when they merged the company and they got together, its future from February 27th, yes.

Q. So your model or the damages model you're working from works from February 27th to ask the question what were the people at Coleman expecting the shares were going to be worth at some future point rather than what was the market value of the shares at this particular point, correct?

A. Well, the market value of the shares at that point is not what Coleman was going to get. That's a share value of Sunbeam.

Q. So you were projecting forward from the 27th saying, what did the people at Coleman think they're going to get for their share price at some future date, right?

A. Well, I hope you don't mean projecting forward in the prices. I'm simply saying on that date Coleman and Sunbeam both put a value on those shares as part of the transaction. And what would that value be, it would be the value of a share price of Sunbeam/Coleman stock, and the market valued that, that exact combination each and every day beginning 3-2 to 3-30 so I used those estimates so see what they expected to get.

Q. So you're telling us on the 27th Coleman expected the shares that were then trading at \$41.75 to be worth \$48.26, correct?

A. No, I'm saying that the shares that were valued at 41.75 aren't the ones they were getting.

Q. But there was no public market on the 27th that valued the Sunbeam shares at any price other than \$41.75, correct?

A. Are you trying to say Sunbeam was the only thing traded that day and Sunbeam was what valued? We agree completely. That's my point.

Q. But you're trying to tell us that -- let me withdraw the question. You're telling us that the Coleman people in their own minds believed on the 27th that the shares they were getting in Sunbeam were worth \$48.26 as opposed to the market price that day of \$41.75, correct?

A. Which, again, that isn't the market price of a share they were getting. That is the market price of Sunbeam. They were getting a share of Sunbeam/Coleman combination. And millions of investors in the marketplace came to exactly on average that \$48.26. So I've assumed that Coleman and Sunbeam as reasonable investors, would, that would be the best estimate of what they would have arrived at, yeah.

Q. There was no Sunbeam Coleman combination for a period of years after the 27th, correct, because the merger wasn't completed until then?

A. For a period of years?

Q. Do you know sitting here today when the Sunbeam Coleman merger formally was concluded?

A. Is this -- Sunbeam/Coleman they acquired on 3-30.

Q. No, that was when the shares were traded over, right? That's when Coleman got Sunbeam shares and Sunbeam got Coleman shares, right?

A. Okay.

Q. When did the companies merge their operations, do you know?

A. Oh, in terms of their operation, no, I don't know, how effectively they did it or when they did it.

Q. So you don't know, right?.

A. I just said that.

Q. On the 27th, your model of damages is based on your estimate of what the Coleman people thought the shares were going to be worth at a future time with a different kind of company, correct?

MR. MARMER: Objection. Asked and answered.

THE COURT: Sustained.

BY MR. HANSEN:

Q. On the 27th there hadn't even been an announcement yet about the merger, right?

A. That's why I don't use that price, right.

Q. On the 27th, the market price is about more than \$6 difference from your estimated price, right?

A. There is about a six and a half dollar difference between those two, yes.

Q. And your testimony is based on the subjective perception of Coleman people as to the value of what they thought they were going to get, right?

MR. MARMER: Objection; argumentative.

THE COURT: Sustained.

BY MR. HANSEN:

Q. Who at Coleman's expectations were you trying to gauge, Dr. Nye?

A. I suspect it's Mr. Perelman or whoever is in charge of, you know, handling the transaction. He is -- the owners of those Coleman shares, I guess, is CPH, you know, were giving up those shares, and they were going to get value in exchange, and, of course, they tried to do a good job of it.

Q. On the 27th, did you know whether Mr. Perelman had a position of any official sort at Coleman?

A. Like CFO or something?

Q. Like any position.

A. Well, CFO or something is any position, right?

Q. Um-hum.

A. I'm not aware of what position he had at CPH if that's what you're asking.

Q. But it's your view that the expectation you were trying to measure in your damages model was Mr. Ronald O. Perelman's, correct?

MR. MARMER: Objection; argumentative.

THE COURT: Overruled.

THE WITNESS: If indeed he's the decision maker, yes.

BY MR. HANSEN:

Q. Did you know who the decision maker was?

A. Ultimately I believe he owns CPH, so, you know, ultimately he would be the -- he or his staff or whoever he had analyze the problem.

Q. Well, what I'm interested in, sir, is what was your understanding of who the decision maker was whose expectations were being measured?

A. I didn't personalize it.

Q. You didn't attempt to find out whether there was a decision maker and assess what that person's expectations were?

A. No, I didn't.

Q. Did you ever speak to Mr. Perelman about his expectations?

A. No.

Q. Did you speak to anybody at CPH about what they expected at February 27 the market price of the Sunbeam shares would be in the transaction?

A. No.

Q. Did you ever ask to see any documents?

MR. MARMER: May we approach?

THE COURT: Sure.

SIDE BAR CONFERENCE:

THE COURT: Yes, sir.

MR. MARMER: Your Honor, my objection is now we've very clearly established several times that he is not trying to estimate what a subjective valuation was. So he has said several times now what a reasonable estimate of what a reasonable investor would be. We're now trying to sort of proffer cross-examination, trying to find out what is or is not, subjective versus objective test. It is not proper trying to note what this witness -- It is legally improper to try and develop what this expert did by using what is not available under law, and that is a subjective measure. That's where we're headed now.

MR. HANSEN: This is cross-examination, Your Honor. This witness has now testified clearly, clearly what Your Honor was waiting to hear, which is how he measured it the 27th. It was the expectation of what Coleman would get. He identified the person as Mr. Perelman. I believe he established the full predicate for exclusion of his testimony. At the very least we should be allowed to explore the limits of his own opinion where he has given it.

He has not attempted to do anything objective. He said, contrary to Florida law he said he looked at the date of the merger deal, the 27th, not at the market price that day but what it might be at some point in the future on a different set of circumstances. An expectation. He then identified the expectation as personalized to Mr. Perelman.

THE COURT: I just didn't want them to hear. I think we can argue at a later time sort of the legal effect of what he's testified to. But I think it's fair to the extent that one of the defendant's positions is he used an improper first number, I think it's fair for him to give us more information so we know if he did or not.

MR. MARMER: Okay.

END OF SIDE BAR CONFERENCE:

BY MR. HANSEN:

Q. I was asking about documents, Dr. Nye. Coleman (Parent) Holdings lawyers provided you with the documents that you reviewed as part of your work in this case, correct?

A. They provided me with the documents, yes.

Q. You didn't even read all of the documents they provided you with, correct?

A. I certainly didn't personally, no.

Q. And you didn't see anything in the documents they provided you with that said on the 27th of February Coleman expected the Sunbeam shares to be worth \$680 million, correct?

A. I don't believe I did, no.

Q. Did you see as part of your work any other documents from Coleman or Coleman's parent or related companies where they did attempt to value the expected value of the Sunbeam shares around the time of the deal?

A. Not that I recall, no.

MR. HANSEN: May I approach, Your Honor?

THE COURT: Um-hum.

MR. HANSEN: Your Honor, I'm handing up 998 and 1000 for identification. I'm going to give a copy to Mr. Nye and wait a moment.

BY MR. HANSEN:

Q. Dr. Nye, my question to you is --

MR. MARMER: Hold on one second.

THE COURT: Hold on one second.

MR. MARMER: May we approach, please?

THE COURT: Um-hum.

SIDE BAR CONFERENCE:

MR. MARMER: We object to any use of Exhibits 9698 and 1000 on multiple grounds. With regard to 998, our notes indicate it was first disclosed on April 12th. The same is true of Exhibit 1000. In addition, we have a series of other objections that we have.

MR. BRODY: It's unfairly prejudicial. As far as I know, it's an Andersen document. It's not been authenticated. And it's not a document that is admissible under any ground. They've tried to offer it with other witnesses. No foundation has been laid.

THE COURT: This is the post transaction?

MR. HANSEN: Post transaction, internal documents both from Andersen and sent to Coleman and from Coleman internally, from CPH files.

THE COURT: Just make sure you keep your voice down.

MR. HANSEN: The lawyers selected what they showed this expert. I think it's fair regardless whether these documents come into evidence, but I think they should come into evidence because we can make a very good showing they're business records.

THE COURT: Right now are you asking him if he considered these? Are you offering them into evidence?

MR. HANSEN: I will ultimately. I'm asking him if he was showed these documents.

THE COURT: Are you going to offer them into evidence with this witness?

MR. HANSEN: No.

THE COURT: We agree he won't be asked questions that elicit the contents of the document in front of the jury?

MR. HANSEN: Right, but I reserve the right to offer them subsequently. He showed a valuation of 523 or 524 million at the time of the transaction, 160 million off.

THE COURT: We're not putting any of that in front of the jury. You're going to identify them by number so later you can match them up?

MR. HANSEN: Right.

THE COURT: That's fine.

END OF SIDE BAR CONFERENCE.

BY MR. HANSEN:

Q. Dr. Nye, have you had a chance to look at 998 and 1000 for identification?

A. I've glanced through them.

Q. Were either of those two documents ever shown to you by counsel for Coleman (Parent) Holdings in the course of your work in this case?

A. I assume you mean by Coleman (Parent) Holdings through their counsel.

Q. Yes, sir.

A. Nobody at Coleman (Parent) Holdings handed me these documents. But, yeah, I've seen this one.

THE COURT: Can you tell us by which number?

THE WITNESS: I sure will. It says MS 1000 on it.

BY MR. HANSEN:

Q. You have seen that document?

A. I believe I have, yeah.

Q. Have you relied on it in forming your opinion?

A. No.

Q. Did you disregard this document that you were shown?

A. It says calculation of --

MR. MARMER: Excuse me.

THE COURT: We're not going to have you disclose the document, sir. It's yes or no questions.

THE WITNESS: I'm sorry. Yes.

THE COURT: You want to repose the question?

MR. HANSEN: Yes.

BY MR. HANSEN:

Q. Did you consider that document in forming your opinion? Did you think about it?

A. I think I said no already to that.

Q. Did you read it before giving your opinion?

A. I had looked at it before I gave my opinion here, yeah.

Q. And you disregarded the document completely?

A. Basically, yeah.

Q. And why did you disregard the document completely?

A. There's really nothing here to consider.

MR. MARMER: Objection.

THE COURT: I'm sorry. What's the legal objection?

MR. MARMER: The question calls for an answer that would impart contents of the document.

MR. HANSEN: Your Honor, we offer the document.

THE COURT: Sustained. And for the same reasons we discussed previously, I would not admit it into evidence at this juncture.

BY MR. HANSEN:

Q. Dr. Nye, you've just looked at this document from your own client's files and simply decided not to even think about it?

MR. MARMER: Objection; asked and answered.

THE COURT: Sustained.

BY MR. HANSEN:

Q. Why didn't you consider the document shown to you from your client's files?

A. I did consider it. I told you I looked at it.

Q. So you did consider this document in forming your opinion?

MR. MARMER: Objection; argumentative. Also -- that's enough.

THE COURT: Sustained.

MR. HANSEN: Your Honor, may we approach?

THE COURT: Okay.

SIDE BAR CONFERENCE:

MR. HANSEN: Two things. First of all, he said it's something different from before. First he said he didn't consider it. Now a minute ago he said he considered it.

THE COURT: No, he said he looked at it.

MR. HANSEN: He said he considered it. He used the word "consider." And he also if he had the document and deliberately chose to disregard it, that certainly goes to his credibility as an expert. We should be allowed to impeach him based on that.

THE COURT: What's the response to the latter that your client has admitted having seen MS 1000 before rendering his opinion, and they get to ask him why he chose not to depend on the information?

MR. MARMER: I think the answer to that -- well, there are two pieces here. The first is that the problem with going into that is that it's going to still run afoul of the publication issue. And that means we're going to end up backdooring in all subjective evidence. That means everything he looked at that had subjective values and he disregarded it, then all the subjective stuff is going to come flying in when we know that the purpose supposedly is to show what he did or didn't consider. What he did or didn't consider legally we're not supposed to worry about subjective evidence. This is an attempt to confuse the jury.

I would also ask that counsel stop saying it came from our client's files. There's no evidentiary predicate for that.

MR. HANSEN: CPH --

THE COURT: Keep your voice down -- that just means --

MR. HANSEN: That's their files.

THE COURT: No, because we've not accepted that for any of the evidentiary offers.

MR. MARMER: You're not supposed to be talking about Bates numbers.

MR. HANSEN: This is a search for fairness and truth here. This witness having seen this document which shows something contrary to what he's trying to testify to, he can't just ipse dixit.

THE COURT: I thought you said ipse dixit. Nevermind.

MR. HANSEN: I-p-s-e, d-i-x-i-t.

THE COURT: Couple things. First of all, I think we've been fairly consistent we're not tracing the original source of the documents by Bates stamps numbers because there's all sorts of information conveyed by them that is simply inaccurate. That said, while I do understand plaintiff's position about the inapplicability of subjective measures of value, in all honesty, some of this is going to have to be addressed in jury instructions because I think he's given sort of what can probably best be described as fuzzy testimony on that point.

I think it's fair that he be cross-examined at this juncture on MS 1000, but what I'll -- I'll admit it into evidence subject to the same instruction we've given it previously, not to show that it's true but simply to show what it says. Okay?

END OF SIDE BAR CONFERENCE.

THE COURT: Okay. I'm accepting MS 1000 into evidence, but it's the same thing I've told you on some other documents. It's not being accepted to show that the numbers are correct but simply to show what they were. Understand the distinction? Great. Thank you. Go ahead, sir.

(Defendant's Exhibit No. 1000 in evidence.)

BY MR. HANSEN:

Q. Dr. Nye, do you have Morgan Stanley 1000 before you?

A. I do.

MR. HANSEN: Can we put it up on the screen, please?

BY MR. HANSEN:

Q. You see the top part of page? Are you with me?

A. I do indeed.

Q. And this is the document you reviewed as part of your work in this case?

A. Sure.

Q. CLN Holdings, Inc. is the company that owns CPH in this case, correct?

A. I believe so.

Q. And there were calculations of acquisition costs March 30, 1998, correct?

A. That's what it appears to say.

Q. One day after the closing of the transaction?

A. Right.

Q. Purchase price, purchase price of CLN Holdings, see that?

A. I do indeed.

Q. Below that it has A, shares to Parent Coleman (Parent) Holdings. That's the plaintiff in this case, correct?

A. Correct

Q. And it lists 14,099,749 shares per contract, correct?

A. You just read it perfectly.

Q. It then says, average price per share at 2-27-98, correct?

A. It seems to.

Q. And it goes down day prior and day of announcement, correct?

A. So that is the average, 2-27, 3-2.

Q. Is that how you read it?

A. Day prior and day of announcement. It sounds like it, yeah.

Q. That's the way you have -- you average so you're not picking a single day, that's the way you've done it?

A. It's the way to pick two days and average them, yeah.

Q. It comes to purchase price of shares \$43.68, correct?

A. That's correct.

Q. It then has a discount for restrictions at 15 percent, see that?

A. That's correct.

Q. And that's because these shares were restricted and that they could not be sold right away, correct?

A. They were restricted.

Q. They had a lockup that applied to them, correct?

A. 25 percent were locked up for three months, another 25 percent for six months, and the rest for nine months.

Q. But all of those lockups expired the end of 1998, correct?

A. By the end of the year, yes.

Q. But in addition to the lockup restriction, there was also a restriction in the sense these shares were unregistered, correct?

A. That's correct.

Q. So there was a limitation on how they could be sold based on their lack of registration rights?

A. That's true.

Q. So there was a discount at 15 percent for the lack of registration, correct, or the liquidity issue?

A. Well, Sunbeam, there was an acquisition cost by Sunbeam entered of 15 percent discount for restriction.

Q. And that comes to a share price of about \$37 premerger share, correct?

A. If you take 15 percent off 43, I would imagine the mathematics is correct.

Q. And this is as of March 31, 1998, correct?

A. That's correct.

Q. It comes to a value of stock consideration of \$523,591,359, correct?

A. Correct.

Q. It's your testimony to this jury that you simply ignored this evidence of valuation in forming your opinion?

A. As I started to say before the brouhaha, I considered it, placed zero value on it and moved on.

Q. And this was an actual value placed on it by parties to the transaction before there was any litigation, correct?

MR. MARMER: Objection. Misstates the record.

THE COURT: Sustained.

BY MR. HANSEN:

Q. Did you inquire into the circumstances under which this was created?

A. I can see by the top it was calculated of acquisition cost by Sunbeam.

Q. Did you inquire into the circumstances by which this was created?

A. I think it's best just to say I don't know what you mean, but I don't think so, no.

Q. Did you ask anybody about it?

A. No.

Q. Let's go to the fax line up at the top of the document, if we could, please, and highlight that. You see a fax line at the top of the document indicating that on 4-21-1998, it was faxed either to or from Coleman Finance?

A. That's what it seems to say.

Q. Do you know what Coleman Finance is?

A. Presumably it's Coleman Finance.

Q. And that's what? That bears what relationship to the plaintiff in this case, Coleman (Parent) Holdings, do you know?

A. I'm not sure.

Q. Did you ask anyone?

A. No.

Q. Did you ask anyone whether Coleman Finance had ever passed on the reasonableness of this valuation?

A. No.

Q. Never had any curiosity about that?

A. No.

Q. Didn't want to know?

A. There was no need to know. I knew what the market value of the stock, the objective value, and I'm not even -- Who did this? It says for Sunbeam. It has a discount. I saw Coleman documents that had no discount for Coleman's purposes for liquidity. So I don't know quite where this document came from. It disagrees completely with what I consider the exact way to do this --

Q. You didn't ask --

A. -- estimate, and so I didn't consider it, no.

Q. You didn't ask your own client anything about it, correct?

A. That's correct.

Q. Dr. Nye, you have testified in a number of cases where you've been asked to value stock price in one way or another, correct?

A. In one way or another, certainly stock prices and movements of -- are a big part of what I've done, yeah.

Q. Isn't it true in the cases you've worked on you typically assess the value of a stock price at the date of the transaction?

A. Well, it depends on the purpose.

Q. How about if the case --

A. If the purpose -- would you like me to continue, or do you want to ask some more questions?

Q. Please go ahead. I didn't mean to cut you off. Go ahead.

A. If indeed the question at issue is a price movement on a particular day, then the price on that day and how it moves are at issue, so then you use the price on the day and how it changes.

Q. Do you remember testifying in something called the Oxford Health Plans case?

A. Sure.

Q. That's a case in which there was an issue about whether the plaintiffs had been sold stock that was -- had been an inflated price due to fraud.

A. As I recall, yes.

Q. And in that case, you assessed damages by figuring out the market price for the stock on the date the plaintiffs acquired it, correct?

A. The market price on the date the plaintiffs acquired it was pretty obvious. It was the market price on the date the plaintiffs acquired it so I didn't figure it out.

Q. You calculated damages by taking the same date and coming up with a true price or a fraud-free price of the same stock, correct?

A. Did calculate a true value price on that date, correct.

Q. On the same date, correct?

A. Right.

Q. What you did there was you calculated damages by saying plaintiffs bought their stock on, just to pick a date, March 2nd, at \$10, but it was really worth 8 because there was \$2 worth of fraud in the price, so their damages are two, correct?

A. That's correct.

Q. And that's also the method you used in the Obtech (phonetic) case?

A. Well, the inflation is two.

Q. The inflation is two?

A. And when they sell it, the inflation is subtracted, the inflation on the date of sale is subtracted from that inflation, and then the net is the damages.

Q. Isn't that --

A. That's a 10(b)(5) case.

Q. Is that the same method you used in something called the Obtech (phonetic) case?

A. It could easily be.

Q. Where you took the price of the stock on the date of the transaction and subtracted the fraud-free price in order to figure out the amount of the price of the market price that was represented by fraud, correct?

A. Correct.

Q. And you did those both on the same dates, the date of the acquisition of the stock, both the market price and the true value?

A. Well, they have to be on the same day. The whole point is how much was the share inflated, how much are you damaged, how much too much did you pay for the share when you bought the share, so you need to know what you paid for it less what it was worth, and that by definition is the amount you sort of overpaid.

Q. You didn't do anything to figure out what the fraud-free price of Sunbeam shares was on February 27, 1998, correct?

A. No.

Q. You didn't do anything to figure out what the fraud-free price of the Sunbeam shares was on March 2nd, 1998, correct?

A. No.

Q. Is that correct or -- you didn't do that, right?

A. You said -- I think you said you didn't do anything. I said -- oh, okay, I see.

I didn't do anything.

Q. On March 30th, you did not do anything to determine the fraud-free price of Sunbeam shares, correct?

A. That's correct.

Q. Now, Doctor Nye, I believe you said on direct that one of the reasons why you decided to average prices across the period from March 2nd to March 30th was because of what occurred on March 19th, 1998, correct?

A. That wasn't a reason I averaged it. I went ahead and averaged it March 2nd to March 30th, even though in my opinion the better -- the value of the company as envisioned by Coleman and Sunbeam on the 27th of February when they decided to go forward was really the company from March 2nd to March 18th. In other words, the fully turned around Sunbeam matched with Coleman.

And then on March 19th there was an announcement that Sunbeam wasn't -- may not make its first quarter revenues, and that was the first kind of chink in the armor of the turnaround since the announcement of the deal. So I really think they, Coleman people envisioned the company as you see it from March 2nd to March 18th, not as you see it from March 19th on. But I went ahead and arranged the whole month. Actually I was trying to avoid an argument, but...

Q. On the 19th, the stock dropped close to \$5, correct?

A. Correct.

Q. About a ten-percent drop?

A. Right.

Q. That meant for the value of Mr. Perelman's 14.1 million shares almost a \$66 million loss on paper?

MR. MARMER: Objection; relevance.

THE COURT: Sustained.

BY MR. HANSEN:

Q. Well, let me back up. Overall, the market capitalization, Mr. Perelman's shares represent about 14 percent of total shares outstanding of Sunbeam, correct?

A. 14.1 out of 107, 13, something less than 14.

Q. So the ten-percent drop on March 19th represented at least half a billion dollars in loss of market capitalization for Sunbeam, correct?

A. Five times 100 million shares, \$535 billion, right.

Q. You concluded as part of your expert opinion, Dr. Nye, did you not, that on March 19th there was basically a situation where Sunbeam revealed part of the fraud?

A. I think without the fraud there would have been no announcement, yes.

Q. So on March 19, Sunbeam revealed to the world part of the fraud and told the world about the fraud?

MR. MARMER: Objection. May we approach?

THE COURT: Sure.

SIDE BAR CONFERENCE:

THE COURT: Yes, sir.

MR. MARMER: The objection is that counsel is now trying to dispute the undisputed findings. It's quite clear what the witness has said, that is, that he's accounting for the news coming out. The questioning now is designed to try and get behind the findings. We have a conclusive finding there was a false and misleading press release, there was no truthful disclosure. And these questions are designed to cast out the undisputed facts.

THE COURT: What's the response?

MR. HANSEN: No such dispute. Mr. Perelman testified that the press release was bullish and didn't place him on any notice of a problem at Sunbeam. His expert called by him in his report, in his testimony has stated and will state here and has just stated here that, in fact, the March 19th disclosure disclosed part of the fraud. That's relevant evidence. It goes to both damages and to reliance. It's their expert. It's cross-examination. It doesn't dispute any findings in Exhibit A.

Exhibit A says nothing about whether there was partial disclosure about fraud. It says the press release was misleading. It leaves room for the argument that the world was on notice of the problem.

If we're not allowed to dispute that, Judge, then there ought to be just a directed verdict on reliance and damages, because this is -- these are the real facts not conclusively established by any prior finding by the court. This has been testified to by this expert and by Mr. Perelman. If we can't draw these things to the attention of the jury, we can't possibly function.

MR. MARMER: The answer is he can certainly establish whether he thought, the expert thought it was a good news or bad news press release. That's fair game. To try to go into these artfully phrased questions whether it's revealing the fraud is trying to get behind the findings.

THE COURT: I think what you're trying to do is convert this witness from a damages expert to a reliance expert. I do believe it's fair to ask him the effect on the marketplace of the press release and what that indicates about how the investors considered it good news or bad news.

MR. HANSEN: That it was part of fraud. Your Honor, that's why the market price falls so much. You've had all this testimony in this courtroom --

THE COURT: Please understand, he's not here as a witness on reliance. You can certainly ask him how unusual is it to have a ten-percent price drop.

MR. GORSUCH: It's trying to get at why he chose to average all these prices. His testimony is and will be they chose such a long period of averaging, two days, like plaintiff because March 19th was a partial revelation of fraud. He already explained that.

THE COURT: It was the first indication, as I understand his testimony, of a drop in the market price ultimately traced to the fraud.

MR. HANSEN: No, Your Honor. His exact wording is this was a partial disclosure of the fraud.

THE COURT: I understand that. Please understand he's not an expert witness on that point. He's simply not. He's an economist.

MR. HANSEN: It goes to damages.

MR. GORSUCH: Methodology, why he chose this crazy methodology.

THE COURT: You can ask him how the market interpreted it. To suggest he's competent to testify whether this shows a fraud is just not what he testified about on direct at all.

MR. GORSUCH: He does event studies. What he does all the time is to identify market price drops, then attributes them to either the fraud or to other causal factors. And that's what he did here. He did a partial event study. He did. He stopped in the middle of his event study.

THE COURT: You can ask him about that. The part that I think is objectionable is the attempt to sort of make the leap from negative information about the company to having it called fraud.

MR. HANSEN: That's his word. That's the significant word to him because that is why the price makes the -- and Your Honor has picked up the part of the question, he believes the price was depressed after March 19th because there will be a partial disclosure of the fraud. That's why he feels like he has to use an average.

THE COURT: But then you're jumping in that to the reliance issue.

MR. HANSEN: It's both damages --

THE COURT: Yes, you are.

MR. HANSEN: It's both, Your Honor. It's his damages model. His damages model rests on it. It's a necessary condition. That's why he testified to it in his deposition. And, secondly, if that's his conclusion, his expert conclusion, I don't know why the jury can't hear it.

THE COURT: No. Because -- I'm trying to think of how to say this. I think he is perfectly competent to testify as to based on his investigation what information caused the stock price to fall. But to sort of jump and use fraud as more of a legal term of art, which is what you're attempting to do, I think is misleading to the jury on reliance. Again, you can get the same information without coaching it in terms of fraud.

MR. HANSEN: Why can't we draw an opposition between the client, Mr. Perelman, and his own expert. Mr. Perelman says, you remember the testimony, this was good news on the 19th.

THE COURT: And you can certainly elicit the market didn't see it the same way.

MR. HANSEN: The market saw it devastatingly bad.

MR. MARMER: I can tell you in advance that this witness is not going to tell you that this press release was good news. You'll get it. You just don't have to do it in this manner.

MR. HANSEN: Your Honor, we're wasting time.

THE COURT: All I'm saying is I would agree under Exhibit A this was not disclosure of the fraud, and that's inconsistent, and so, simple answer is to the extent you're trying to say this was the disclosure of the fraud, it's not. It's certainly -- I think it's fair to say the market saw this as bad news. It did.

END OF SIDE BAR CONFERENCE.

BY MR. HANSEN:

Q. Dr. Nye, on the 19th when the stock value of Sunbeam company plunged close to a half a billion dollars, this was terribly bad news to the shareholders of Sunbeam, wasn't it?

A. It was certainly bad news, ten-percent drop.

Q. It put them on notice there were real problems at Sunbeam, didn't it?

A. It put them on notice.

MR. MARMER: Objection. Objection.

THE COURT: You want to rephrase it?

BY MR. HANSEN:

Q. It would tell the marketplace that there were serious issues at the Sunbeam company, wouldn't it?

A. Not necessarily, no.

Q. Well, you viewed it as a serious problem at Sunbeam based on your own characterization at your deposition, didn't you?

A. No, I viewed it as a revelation.

Q. Of what?

MR. MARMER: Objection.

THE COURT: Sustained.

BY MR. HANSEN:

Q. You viewed it as a revelation that there was false information that had been in the marketplace about Sunbeam, correct?

A. No. It would be best if you let me finish one sentence.

Q. Sure.

A. What I said was is that the company that CPH thought they were getting, the turned around Sunbeam in combination with Coleman is priced by the market beginning March 2nd through March 18th. But on March 19th I think it was Sunbeam announced they might not make their first quarter revenue targets. Long term they'd still be okay and earnings would still be okay. And that was not quite the shining turnaround. So it -- the point being that that wasn't the company Coleman thought they were getting. It was a company at somewhat lesser value, and, therefore, from then on it's a little bit of new information that wasn't in the pot when they negotiated the deal.

Q. This was not a turned around company, right, Dr. Nye?

A. Pardon me?

Q. According to what is now in the marketplace March 19th, the public markets knew this was not a turned around company, correct?

MR. MARMER: Objection.

THE COURT: Sustained.

BY MR. HANSEN:

Q. You previously in your report and your testimony characterized this in very negative terms, didn't you, this event?

A. Not very negative terms. It's a down. You're right, I think it's new information that wasn't part of what Coleman and Sunbeam were considering when they negotiated. It is down information, negative information.

Q. You characterized it as a partial disclosure, didn't you?

A. I think --

MR. MARMER: Objection, Your Honor. May we approach?

THE COURT: Okay.

SIDE BAR CONFERENCE:

MR. HANSEN: This witness is dodging cross-examination on the basis of this umbrella of Exhibit A where he's fencing with me. He said, he said --

THE COURT: They're going to hear.

MR. HANSEN: He said in his deposition, this is, quote, partial disclosure of the fraud.

THE COURT: Why don't you pull out the part you want to impeach, show it to Mr. Marmer, see if there's an objection.

MR. HANSEN: These are his own words.

THE COURT: You want to show it to them first?

MR. HANSEN: I can't believe we can have a trial where a witness can lie and we can't --

THE COURT: They're going to hear you. That's all.

MR. MARMER: Point me to the place where you want me to look.

MR. HANSEN: Right there.

MR. GORSUCH: It says it basically revealed part of the fraud.

THE COURT: Where are you reading from so I can read it? Hold on.

What is it that you think --

MR. HANSEN: He says it wasn't bad news. It was a little chink in the armor. His own testimony is what happened on the 19th was partial disclosure of a fraud. That goes to his damages model. It's why he uses the averages. When I asked him this, he won't fight me on it being bad news, et cetera. He then fought me on it being bad news. He said it wasn't so bad.

They were going to bounce right back up. He basically took refuge in the safe harbor of this Exhibit A ruling, and, therefore, he's being allowed to mislead the jury.

The truth is this witness in his deposition admitted that the March 19th press release was partial disclosure of the fraud. That's how bad it was. For him to get away with saying otherwise is to essentially hide him from cross-examination.

THE COURT: I would sustain the objection. In all honesty, I don't think he's testified inconsistent with that. And, again, I think the concern of having him testify to that is you get to mix the apples and the oranges, which is turning him into a reliance witness, which is not what he is. I understand you disagree.

END OF SIDE BAR CONFERENCE.

BY MR. HANSEN:

Q. Dr. Nye, you testified, I believe, at your deposition that you had read part of the testimony of a Todd Slotkin; is that right?

A. Right, right, yes.

Q. He is the CFO of CPH?

A. Correct.

Q. Did you read the part of his deposition where he said I couldn't think of any reason why the expected value would be \$680 million bucks?

A. Don't remember that part.

Q. Do you think it was in there?

A. I doubt it, but I certainly didn't read it.

Q. You only read parts of his testimony, though; is that right?

A. Part of his deposition.

Q. The parts the plaintiff's lawyer showed you?

A. I mean, I had the whole deposition. I read parts of it.

Q. Dr. Nye, these numbers we put on our demonstrative, 588, 643 and your number of 680 million, those are all pre any liquidity discount, correct?

A. I don't think you mentioned anything about putting one in there when you wrote them up there, so I would assume you'd know that. From the calculation, no, I don't think you put anything in there for that.

Q. Let's be real clear so we don't have any confusion. Your \$680 million expected value has no provision for liquidity discount, correct?

A. That's correct.

Q. And we just did the math on the March 30 number of 43.94 per share times 14.1 million to get the \$619 million, correct?

A. Correct.

Q. Unlike the document we showed you, MS 1000, didn't make a 15-percent discount for liquidity here, did we?

A. You didn't, no.

Q. So in your damages analysis you assumed that the shares CPH received, those 14.1 million shares would be freely traded, correct?

A. No.

Q. Do you recall testifying at your deposition that you thought --

THE COURT: Let me stop you. If you can give us a page and line...

MR. HANSEN: Page 205, line 17 to 25.

MR. MARMER: Which transcript, please?

MR. HANSEN: First one.

BY MR. HANSEN:

Q. Would you like a copy of your deposition, Dr. Nye?

A. I would like to read the part about where I said they could be fairly traded, if that's what you're quoting.

MR. HANSEN: Can I approach, Your Honor?

THE COURT: Sure.

BY MR. HANSEN:

Q. I'll hand you a copy of your deposition, Dr. Nye. If you would look with me at page 205, line 17 to 25...

MR. MARMER: Your Honor, I'm going to -- I think we have to approach.

THE COURT: Why don't you guys come on up.

SIDE BAR CONFERENCE:

THE COURT: May I see it?

MR. MARMER: Sure. Okay.

MR. HANSEN: He's valuing the shares measuring shares that were freely traded.

THE COURT: I think that's what he told us.

MR. HANSEN: No, I don't think so, Your Honor.

THE COURT: He did not assume they were --

MR. HANSEN: The shares were restricted, yet he valued them as if they were freely tradable. I want to establish that he basically --

THE COURT: Just make sure you keep your voice down.

MR. HANSEN: Pardon me, Your Honor. What I want to establish is that, in fact, these shares were not freely tradable, and he's previously testified as if the valuation was to the contrary, the 17 to 25.

THE COURT: That's just -- I think that's consistent with what he's told us today. I think what you're trying to elicit is whether they needed to discount because they were unregistered. But he's already told us that the values are based on the trading values, and they are restricted shares.

MR. HANSEN: I'll phrase it in a different way. I'll ask the question in a different way.

END OF SIDE BAR CONFERENCE.

BY MR. HANSEN:

Q. Dr. Nye, you valued the Coleman/Sunbeam shares for purposes of your analysis as if they were freely traded shares, correct?

A. I took no liquidity discount.

Q. So you have basically assumed that the shares could be freely traded for purposes of valuing them, correct?

A. No, I took no liquidity discount. I'm well-aware of the lockout. And there was no -- I didn't take any liquidity discount, no.

Q. You just simply --

A. There was no basis for liquidity discount.

Q. You simply used the values of the publicly freely tradable shares in setting your value, correct?

A. Exactly, right.

Q. And those shares were fully tradable with no restriction, correct?

A. The shares that were valued each and every day that month that I used as an average were pretty credible, which is, by the way, what I said at my deposition, not that the Coleman shares were freely tradable.

Q. They had no restrictions on them in the example you used, correct?

A. That's correct.

Q. Yet the shares you were valuing had two different kinds of restriction, didn't they? They had a lockup, right?

A. They were locked up for --

Q. And they were unregistered, correct?

A. And they were unregistered.

Q. And you made no provision whatsoever for those limitations on their sale in trying to value the shares, correct?

A. There were no indicated provisions to be made.

Q. And, in fact, you wouldn't be the right person to make such a valuation, would you, because you've never before valued restricted securities, have you?

A. I don't know about never, but it's sort of rare, right. I don't do it regularly, let's put it that way.

Q. Have you ever been asked to value unregistered securities in your consulting work?

A. Well, nothing pops into my head.

Q. You couldn't recall any such instance in your deposition, could you?

A. I couldn't here either, could I?

MR. HANSEN: Your Honor, would now be a good time for a break?

THE COURT: I was hoping we could go a little bit more. Do you all need a break? They didn't come in until almost 2:00 so if we can go another 15 minutes or so, that would be great. Thanks.

MR. HANSEN: Of course, Your Honor.

BY MR. HANSEN:

Q. The parties to this transaction did apply a liquidity discount to the 14.1 million restricted shares, didn't they?

MR. MARMER: Objection. Lack of foundation.

THE COURT: Sustained.

BY MR. HANSEN:

Q. Let's put up Morgan Stanley 282 in evidence, please. And go to page six, please, footnote two. Would you like a paper copy?

A. Oh, here, it popped up.

Q. I'm directing your attention to the bottom of page six to the highlighted note two. Did you consider the SEC filings of Sunbeam as part of your work in this case?

A. Am I trying to read this, or is that a separate question? Yes, okay, yes, I did.

Q. Did you see as part of your work reviewing these SEC filings that in November 1998 Sunbeam made a filing with the Securities & Exchange Commission in which Sunbeam valued the restricted shares?

A. Sunbeam on their books valued the restricted shares, is that what you're saying?

Q. Were you aware of that?

A. Pardon me?

Q. Were you aware of that?

A. I think so.

Q. And Sunbeam at this time was being run by Mr. Levin; is that right?

A. I think so.

Q. Do you know who Mr. Levin is?

A. I believe he used to be with, work with Mr. Perelman.

Q. He's one of Mr. Perelman's long-time trusted operating executives, correct?

A. That's my understanding.

Q. And the other top executives at Sunbeam at this time were -- substantially constituted of former members of the Coleman management working previously under Mr. Levin, correct?

A. Those are your words "substantially constituted." I know some people were working at Sunbeam, yes.

Q. In other words, Mr. Perelman had moved a number of the Coleman managers to work for Sunbeam by November of 1998?

A. I don't know whether Mr. Perelman moved them or simply, that, yes, there was people at Coleman did move into management at Sunbeam.

Q. Now you see here in the -- and this was an SEC filing, correct?

A. If that's what the title says, yes, okay.

Q. Why don't I just give you 282 so you can satisfy yourself if you'd like.

MR. HANSEN: Your Honor, may I approach?

THE COURT: Yes.

BY MR. HANSEN:

Q. I'm going to hand you a copy of Morgan Stanley 282 in evidence, Dr. Nye. If you'd like to take a look to satisfy yourself that that is a 10-Q A filed by the Sunbeam corporation in November 1998...

A. That's what it says at the top, yes.

Q. Now there are penalties for the filing of false SEC filings like 10-Q A's, correct?

A. I would imagine so.

Q. Corporations are required to put truthful information in them, correct?

A. I think the SEC prefers that, yes.

Q. And so here you have an SEC filing taking a valuation of the 14,099,749 shares that CPH received on March 30, 1998, correct? Is that correct, Dr. Nye?

A. Let me read what's going on here, get my bearings.

Q. Of course.

A. Yes, okay.

Q. This filing to the Securities & Exchange Commission under Mr. Levin's management, the value of the common stock issued at the date of the transaction was \$524, million, correct?

A. That's what it says there.

Q. This was done at the time before there was any litigation between the parties, correct?

A. November '98. I believe so, yeah.

Q. And the way they got to the \$524 million expected value for the Sunbeam shares was derived by using the average ending stock price as reported by the New York Stock Exchange composite tape. You know what that is?

A. Yes.

Q. What is it?

A. It's the composite tape. I mean, it's the New York Stock Exchange prices.

Q. That's what tells you what the stock prices were that particular day?

A. Right.

Q. Authoritative source?

A. I would think so.

Q. Do you know?

A. Yes, it is.

Q. For the day before and the day of the public announcement of the acquisition, so that's February 27th and March 2nd or March 3rd, wouldn't this be?

A. The day before and the day of would be February 27th and March 2nd.

Q. Discounted by 15 percent due to the restrictive nature of the securities, correct?

A. That's what it says.

Q. Now if you were to take -- you have that calculator up with you, right? If you were to take the \$619 million for the market value of the Sunbeam shares on the 30th, the day of the closing and take 15 percent off for restriction discount, what would that leave us with? Can you take 15 percent off with the calculator you've got?

A. Take 90 off. Be about 530. Maybe it's 524 if it's the same. No, it's not the average.

Q. Pretty close to what Sunbeam reported though, correct?

A. The number is in the vicinity of what's on that SEC filing, right.

Q. And did you consider this valuation as part of your work as an expert in this case?

A. Again, I considered it. I did consider it. Basically gave it no weight because this is -- in other words, it's the March 30th value, \$619 million. We already went over why I didn't use the March 30th value over and over. I don't see that there's any 15 percent -- pardon me.

Q. I didn't mean to interrupt.

MR. MARMER: Excuse a minute. That is what happened.

THE COURT: You need to let him finish this question, and then you can ask another question.

Go ahead, sir.

THE WITNESS: Did I consider it was the question? Did I consider it? I said I considered it. I looked at it. It's the March 30th, 1998 share price times the number of shares. Get that out of the Wall Street Journal or in your case off the tape, right? Totaled \$619 million. Then the only thing in addition is the 15-percent discount. In evaluating a need for any discount for restrictions, there were no identifiable cause which the SEC requires before you take that discount so I didn't use a discount. And other than that, that is simply the \$619 million value of Sunbeam on March -- or the Coleman shares on March 30th.

BY MR. HANSEN:

Q. Pardon me, sir, but is this the March 30th price or the average ending stock price for day before and the day of the public announcement?

MR. MARMER: Objection.

THE WITNESS: Average.

THE COURT: Hold on. What's the objection?

MR. MARMER: The objection is he moved between two numbers now. I think this is a confusing question.

THE COURT: Hold on one second.

THE WITNESS: Okay.

MR. MARMER: My notes show we started with 619 and now we're pointing.

THE COURT: Why don't you pose the question again.

BY MR. HANSEN:

Q. Dr. Nye, a moment ago you said this SEC filing related to a March 30th stock price with a discount. I'm asking you, sir, if that's correct. Isn't it, in fact, the case that this particular valuation is done based on the stock price on the day before and the day of the public announcement, which was March 2nd, 1998?

MR. MARMER: Objection.

THE COURT: Sustained. You know what, this probably is a good time for our break. We won't talk to you. Don't let anybody talk to you. We will see you in ten minutes. If you want to bring in snacks, soda, coffee or tea, please feel free.

(The jury left the courtroom.)

THE COURT: And, Dr. Nye, you want to meet us after the break as well?

THE WITNESS: Okay. Thank you, Your Honor.

THE COURT: Okay. My understanding of the objection is looking at the footnote, it looks like it's an attempt to value the stock as of the date of the acquisition, which would be that March 30th date but related to a value back on the date of the merger agreement discounted. Precision Reporting of South Florida, Inc. And I think that there was confusion about the question that you were posing.

MR. HANSEN: I tried to make it very clear with that question. Basically he had volunteered it was a March 30th stock price based on another exercise we had done. But this particular exercise is stated differently.

THE COURT: Put the footnote back up. I was trying to read it quickly. I think it's an attempt to value it on the date of acquisition, correct. And then it may have, but it's not the 619.

MR. HANSEN: That's what I was trying to point out.

THE COURT: He's using an earlier date. I think there was some confusion. Maybe I misunderstood it, but I understand there was confusion about the date of the stock price and the date of the valuation. And I wanted to make sure we were real clear on what was being asked. But I didn't want to clear it up in front of the jurors.

MR. MARMER: My only concern is that we tender the question clearly. It was reasonably apparently there were some ships passing in the night and it started to take an argumentative fashion.

THE COURT: I was concerned about how it was going back and forth.

MR. HANSEN: Okay. I was simply trying to ask him what it said. He volunteered it was the stock price on March 30th when, in fact, what we were talking about wasn't the stock price on March 30th.

THE COURT: You were talking about the price they used to do the calculation.

MR. HANSEN: Right. He said it was the 619 which was the price on the 30th. That simply wasn't right. He was getting him to acknowledge he had jumped to an assumption that wasn't true. Because even though it says what it says, it's based --

THE COURT: Right, but then I'm looking at it. It says the value of the common stock issued at the date of acquisition. I think that's where we're getting to the confusion. But then they used the price computed as of the date of the agreement. And I think that's where we were getting the cross focuses.

MR. HANSEN: Because that's totality. I can make that very clear. I can make that very clear, Your Honor.

THE COURT: I just wanted to make sure we were clear on that.

MR. HANSEN: A couple things. We need to know whether the deposition is going to take place. We're being told they're going to go off and take a deposition of this gentleman. As far as we're concerned, the matter is -- we think we have an unobjected motion for mistrial. It's pending. We would like to know when you're going to rule on that, because obviously much depends on your ruling. We also don't think they should be rushing off to take sworn testimony from this fellow. We think it should be referred to other authorities for investigation.

MR. IANNO: I'm the one who is going to take the deposition, so I want to know whether I'm leaving or staying for the remainder of the trial.

THE COURT: I'm not ordering a deposition. So at best a sworn statement, as I understand what you guys are telling me --

MR. IANNO: That is --

MR. SCAROLA: We have informed the court that it is our intention to take a sworn statement from Mr. Comyns. We have invited the defendant to be present if the defendant chooses to ask questions. If the defendant chooses not to be present and ask questions, that's fine.

THE COURT: Just so -- as far as I'm concerned, that's a private matter between the parties.

MR. HANSEN: I guess, Your Honor, the other point, do we have some sense of when the court is going to rule on the unobjected motion for mistrial?

THE COURT: No. But I may not rule in the next day or two or three or four or five or six or seven. I don't know. I don't know.

MR. SOLOVY: Your Honor, could I bring up a separate point? The next witness would be mine. Your Honor sustains an objection when Mr. Hansen is questioning. He persists in that line of questioning. We come up. You sustain it again. I'm going to have a big problem if he does that with my witness, Your Honor.

MR. HANSEN: I think we're anticipating problems.

MR. SOLOVY: Wait a minute, Mr. Hansen. Let me finish. Let me finish, Mr. Hansen.

THE COURT: Hold on a second. I'll give you a chance to respond. I promise.

MR. SOLOVY: Your Honor, if I'm asking a question and Your Honor sustains it, if the objection is made and Your Honor sustains the objection, I don't go back again and try to avoid that ruling by asking questions right around it. That's happened persistently in Dr. Nye's testimony, repeatedly. I'm just saying, Your Honor, if that happens with Mr. Gittis, we're going to have a lot of problems.

THE COURT: That I put in the category of chatting. You don't need to respond to it. I'll be back in a few minutes. Do you have any idea how much longer your cross is going to be?

MR. HANSEN: Another 45 minutes.

THE COURT: Are we doing Fogg?

MR. SOLOVY: Yes, Your Honor.

THE COURT: We think it's about 20 minutes?

MR. MARMER: It's about 15, we think.

THE COURT: Okay. Okay.

(A recess was taken from 3:10 p.m. to 3:20 p.m.)

THE COURT: I have some free time tomorrow at 8:00 o'clock.

MR. SCAROLA: You have a long list from Mr. Hansen things he wants to spend time discussing. If Your Honor is feeling lonely at 8:00 a.m., we're happy to be here.

THE COURT: Do we want to start doing trial Exhibit binders and depo designations at 8:00? That gives us a half hour at least.

MR. HANSEN: Sure, Your Honor.

THE COURT: Okay. That's fine.

MR. SCAROLA: We may not need to have a hearing on trial Exhibits and binders if they can provide us with a copy to review. I mean, the concept is one that we don't oppose. We'd just like to take a look and see what it is they're planning

on doing and how they wish to present it, with the understanding, obviously, that we'll have the reciprocal opportunity if we choose to avail ourselves of it.

MR. HANSEN: We plan on sending over a list tonight, Your Honor.

THE COURT: Okay. We ready to get the jurors?

MR. HANSEN: I'm sorry, Your Honor. Yes, I believe we're ready to get the jurors.

MR. MARMER: Yes.

THE COURT: Okay.

MR. SCAROLA: Since Mr. Perelman can not come in tomorrow until 10:00, does Your Honor want to bring the jury in a little later, or do you want to start something else?

THE COURT: I'd probably rather start, but remind me to talk about it. We can talk about it.

MR. SCAROLA: My thought was we might want to bring them in a little later and do that --

THE COURT: Does defendant have a feeling one way or the other?

MR. HANSEN: I do. I thought Mr. Perelman was going to be the witness first thing tomorrow.

THE COURT: They had represented he wasn't able to be here until about 10:00. We can talk about it again.

(The jury entered the courtroom.)

THE COURT: Okay. We're ready to continue. Mr. Hansen.

MR. HANSEN: May I proceed, Your Honor?

THE COURT: Yes, sir.

MR. HANSEN: Thank you.

BY MR. HANSEN:

Q. Dr. Nye, I now want to turn to your bottom number, your zero figure for actual value, okay?

A. I think that was what I called realizable, the value, they could never realize anything from them so they got back zero, yes.

Q. Now it's your belief, is it not, Dr. Nye, that if all the true facts about Sunbeam had been known by the marketplace, for example, on March 2nd, 1998, the share price would have been lower than \$45.63, correct?

A. I would presume so, yes.

Q. If on March 30th, 1998, all of the true facts about Sunbeam had been known, the share price would have been lower than \$43.94, correct?

A. I would presume so, yes.

Q. But you made no effort to calculate what the price would have been on the 30th of March if the true facts had been known, correct?

A. That's correct.

Q. You made no effort to determine the actual value of the Sunbeam shares on March 30th, correct?

A. That's correct.

Q. You made no effort to determine the actual value of the Sunbeam shares on March 2nd, correct?

A. That's correct.

Q. You, rather, made an assumption that said the stock became valueless at some point in the future, so, therefore, the realizable value of the shares was zero; is that right?

A. Not completely. I think I said earlier what I had done is, my understanding was I was asked to assume it would be proved in these proceedings that Coleman could never realize any value from their shares, and, therefore, what they got back was zero.

Q. In other words, you were asked to assume that after 3-30-98, between then and the time of bankruptcy on, was it February 5, 2001 --

A. February 5th.

Q. -- 2-5-01 there was never any opportunity for the plaintiff to realize any value from the shares, correct?

A. That's correct.

Q. So you just assumed that as the facts, correct?

A. I assumed, I think I said that originally. I said it again. Yes, I assumed they would not be able to realize, were never able to realize any value from their shares, so what they got back was nothing, right.

Q. You never did any study to verify that as fact, did you?

A. I think that goes with the word "assume."

Q. You never calculated anything under the securities laws to see whether CPH had the right to sell shares in private transactions, correct?

MR. MARMER: Objection, Your Honor.

THE COURT: Sustained.

BY MR. HANSEN:

Q. You never did any analysis of the right of CPH to conduct any sales during this period, did you?

MR. MARMER: Same objection, Your Honor.

THE COURT: Sustained.

BY MR. HANSEN:

Q. You never did any evaluation of the contractual provisions in the parties' agreements to see when and under what conditions they were allowed to sell shares, correct?

MR. MARMER: Same objection.

THE COURT: Sustained.

MR. HANSEN: May we approach?

THE COURT: Okay. It's his objection. What did you want to say in support?

MR. MARMER: The objection is he's inquiring about legal matters of the witness. This is not a legal witness, nor would he be competent. We have addressed virtually all of these things with the court and have rulings on them.

MR. HANSEN: I can't understand how when a witness comes into court to give an opinion of zero value he can't be cross-examined about the limitations of what he's done.

THE COURT: As I understand his opinion on this, he assumed it was zero. He was told to assume zero.

MR. HANSEN: But there are legitimate questions before you get to zero, Your Honor. I don't think we have to assume it was zero. I don't know why it is we can't ask him, you didn't check this --

THE COURT: Later you're going to argue they have insufficient evidence of damages because they assumed zero and there's no evidence of zero.

MR. HANSEN: I also want to exclude this witness as not a competent expert as far as his analysis. I don't believe this can be assuming away half the problem. He has to do two things. He has to come to an expected value and an actual value. Yet, he has just told us he didn't do anything on an actual value. He did something completely different.

THE COURT: There may be an appropriate time to argue that. He said he assumed it.

MR. HANSEN: The point on cross -- I do understand Your Honor's comment and ruling, but the point, Your Honor, I think that I wish to make is this: This jury should know it isn't a matter of assumption. There were legitimate issues that could have been raised, and it would bear on his credibility that he did not look at the contract for restrictions. He did not consider the appropriateness of sale at any given point in time.

THE COURT: Again, I think you're asking about legal conclusions. There's probably other ways to get the same information, but I think you are asking about legal conclusions.

MR. HANSEN: Dr. Emery, Mr. Perelman, there's been a lot of witnesses who gave their understanding of legal matters.

THE COURT: His understanding of legal matters has no -- there's no evidentiary import. It's not like Mr. --

MR. HANSEN: Okay, Your Honor. Just so I know my ground rules for proceeding, can't I ask him you did not undertake any analysis to follow through whether it was, in fact, the case that between September -- between March 30th and the bankruptcy day one truly could or could not realize any value?

THE COURT: Any objection to that?

MR. MARMER: I think that's repetitious and argumentative. He already established about three times he assumed. So all we're trying to do now is to suggest that there was something wrong about what Dr. Nye did through the intimation and the document --

THE COURT: I think that's a matter of law. I think, frankly, it's clear to the jury already there's no other date he used to calculate the second number.

MR. HANSEN: He didn't calculate the second number. It's nothing but an assumption. There's no opinion whatsoever. You were told to assume zero.

MR. MARMER: We're jumping ahead to closing arguments.

THE COURT: Okay.

END OF SIDE BAR CONFERENCE.

BY MR. HANSEN:

Q. Just so we're clear, Dr. Nye, there's no method for an expert opinion behind your testimony in this court today that the actual value was zero other than your being told by the lawyers for plaintiff that you should assume that the thing was zero because they could never sell it, correct?

A. I again was asked to assume.

MR. MARMER: Excuse me.

THE COURT: What's the objection?

MR. MARMER: Subject matter covered in the bench conference.

THE COURT: Why don't you rephrase it?

BY MR. HANSEN:

Q. Just so we're clear on what you've done and not done, Dr. Nye, there's no opinion or methodology you've applied to a determination of the actual value for Sunbeam shares received by plaintiff in this case other than simply taking as true the assumption the lawyers for plaintiff have asked you to make, that is, that the shares could never be realized for any value, correct?

A. I think -- that's true because that's exactly what I said when we started this.

Q. Dr. Nye, the period of time we're talking about, though, from the 30th of March to the 5th of February of '01, that's an almost three-year period, isn't it?

A. Sure looks like it, yeah.

Q. And over that almost three-year period much can happen to the value of securities, correct?

A. That's true.

Q. Isn't it true that many different factors influenced the pricing of securities?

A. Many different things, yes, indeed.

Q. And you didn't take any effort to try and exclude out the influence of other factors on the value of Sunbeam shares after the 30th of March, 1998, correct?

A. That's true.

Q. You didn't consider, for example, whether new management at Sunbeam lead by Mr. Perelman's hand-picked team made mistakes in running the company?

A. That's true.

Q. You didn't consider whether the stock market crash of the year 2000 affected the Sunbeam share price, correct?

A. I didn't, what was the word, the verb?

Q. You didn't consider whether the stock market crash of 2000 affected the Sunbeam share price?

A. I didn't do an analysis of how much if that's what you're asking, no.

Q. Did you do any analysis of it?

A. No.

Q. You didn't consider, for example, whether the price of Sunbeam shares was affected by very large write-offs Sunbeam had to make on some of the assets that were received from Coleman in the year 2000?

MR. MARMER: Objection, Your Honor, no factual predicate.

THE COURT: Sustained.

BY MR. HANSEN:

Q. Did you ever review the bankruptcy disclosure the Sunbeam company filed in October of 2002?

A. I may have, but not that I recall.

MR. HANSEN: Could I have Morgan Stanley 920, please?

May I approach, Your Honor?

THE COURT: Um-hum.

BY MR. HANSEN:

.Q. Dr. Nye, I'm going to place before you Morgan Stanley 920 for identification. Do you recognize that as one of the documents you reviewed in your work in this case?

A. Yeah, as I sit here, I don't recognize it. Could I have?

Q. Doesn't look familiar to you?

A. Well, it looks very familiar. All legal documents look just like this, little fine print, but, no, I don't recognize this specifically.

Q. Is what you just told us, all legal documents look the same to you?

A. They look like that, yes.

MR. HANSEN: We offer 920, Your Honor.

MR. MARMER: Objection, Your Honor.

THE COURT: You all want to come on up?

SIDE BAR CONFERENCE:

THE COURT: What's the legal objection?

MR. MARMER: The objection is this is a late disclosed document. It wasn't disclosed until April 4th and it contains hearsay.

THE COURT: What's the response?

MR. HANSEN: It's timely disclosed, we believe, under the circumstances. And in terms of hearsay, this is a public record that's being offered, Your Honor, to show, frankly, that they're trying to attribute all of these damages to us when, in fact, Sunbeam had a myriad causes for failure. The fact this expert didn't consider any of them is, in fact, probative as to his credibility, but it's also probative substantively that they're trying to pin on Morgan Stanley damages that are not properly pinned on Morgan Stanley.

THE COURT: What's the response?

MR. MARMER: The witness said he didn't consider it. We already got that information.

THE COURT: I would sustain the objection.

MR. HANSEN: Actually, he didn't say he didn't consider it. He said he couldn't recall it. He might have.

THE COURT: I would sustain the objection.

END OF SIDE BAR CONFERENCE.

BY MR. HANSEN:

Q. Did you think it important, Dr. Nye, to look into the causes of Sunbeam's bankruptcy before attributing a total loss of Sunbeam shares to the defendant Morgan Stanley in this case?

A. I told you I assumed they were never in a position to realize any value of the shares, and I was asked to assume that, therefore, they got zero.

Q. But for one to do a fair calculation of damages, wouldn't one need to ask the question what caused Sunbeam to go bankrupt and thus make shares worthless?

MR. MARMER: Objection.

THE COURT: Sustained.

BY MR. HANSEN:

Q. Is it fair in your mind, Dr. Nye, to attribute to Morgan Stanley damages that were caused by factors other than Morgan Stanley's conduct?

MR. MARMER: Objection.

THE COURT: Sustained.

BY MR. HANSEN:

Q. Dr. Nye, did you try to assess any of the evidence pertaining to what happened to the Sunbeam company at any time from 3-30-98 to 2-5-01?

MR. MARMER: Objection.

THE COURT: Overruled. You can ask that.

THE WITNESS: And the question was did I?

MR. HANSEN: Could we re-read it, please?

(The record was read as requested.)

THE WITNESS: Did I assess any evidence?

What does the word "assess" mean to you?

BY MR. HANSEN:

Q. Did you look at any of the evidence?

A. Well, sure, I'm aware that March 19 they made the announcement they might not make their first quarter results. After that there was a term, you know, worse first quarter. Then it got worse in May. Then in June Dunlap and Kersh were fired. Arthur Andersen pulled its books. There was the beginning of an SEC investigation. There were announced restatements. They actually did restate. And the SEC investigation never ended, and all during this period the shares weren't registered and couldn't be sold.

Q. Did you assess what the causes were for Sunbeam's bankruptcy?

A. No.

Q. Did you assess whether Sunbeam had been affected by taking on acquisitions at the same time?

A. Assessed?

MR. MARMER: Objection. No foundation.

THE COURT: I'm sorry. No?

MR. MARMER: Foundation.

THE COURT: Sustained.

BY MR. HANSEN:

Q. Did you consider whether Sunbeam had taken on a number of different acquisitions at the same time and that created problems?

MR. MARMER: Same objection.

THE COURT: Sustained.

BY MR. HANSEN:

Q. Did you know whether Sunbeam had taken multiple acquisitions at the same time?

MR. MARMER: Same objection.

THE COURT: Sustained.

BY MR. HANSEN:

Q. Did you know whether Sunbeam had any other acquisitions?

A. I knew they acquired Coleman and some other small companies, yeah.

Q. All at the same time, right?

A. Pretty much, yeah.

Q. Did you consider whether that acquisition of several companies at the same time created any unusual business problems that lead to problems, further problems for Sunbeam?

MR. MARMER: Objection; lack of foundation in the evidence.

THE COURT: Sustained.

BY MR. HANSEN:

Q. What problems did those acquisitions cause for Sunbeam in your analysis?

MR. MARMER: Objection; lack of foundation; assumes problems.

THE COURT: Assumes?

MR. MARMER: Problems.

THE COURT: Sustained.

BY MR. HANSEN:

Q. Were there any problems created by Sunbeam's acquisition of multiple companies at the same time in your analysis?

A. I didn't analyze, do an analysis of whether multiple companies would cause problems. It's not necessarily true multiple acquisitions cause problems.

Q. You didn't analyze the problem?

A. I didn't need to analyze it. No, I didn't analyze.

Q. Did you look at what write-offs Sunbeam had from March 30th, '98 to 2-5-01?

MR. MARMER: Objection.

THE COURT: Sustained.

BY MR. HANSEN:

Q. Do you know whether there was write-offs during that period?

MR. MARMER: Objection.

THE COURT: Sustained.

MR. HANSEN: Your Honor, may we approach?

THE COURT: Why don't you rephrase it.

BY MR. HANSEN:

Q. What, if any, analysis did you do with respect to the issue of write-offs?

A. What write-off?

Q. Write-off of assets on the books of Sunbeam.

A. You mean accounting write-offs of assets on the books of Sunbeam?

Q. Do you -- did you do any --

A. I don't believe I did an analysis of write-offs, accounting write-offs of the books of Sunbeam.

Q. Did you look into any issues surrounding goodwill at Sunbeam?

A. Surrounding the accounting goodwill of Sunbeam, no.

Q. Did you do any evaluation of whether Sunbeam's expenses went up substantially over the period of time Mr. Perelman's associates were running the company?

MR. MARMER: Objection; lack of foundation in the evidence.

THE COURT: Sustained.

BY MR. HANSEN:

Q. Did you do any valuation or analysis of the question of expenses of Sunbeam over the almost three years from the time of the closing of the acquisition to the time that bankruptcy was filed?

A. No.

Q. Did you consider any -- Did you do any valuation about the issue of administrative costs of Sunbeam over that same close to three-year period?

A. No.

Q. Do you know who Dr. Emery is?

A. I believe I've heard the name recently.

Q. Have you ever looked at his source textbook Corporate Financial Management?

A. I don't recall.

Q. Do you know whether Dr. Emery in his textbook talks about how managerial inexperience and incompetence are the leading causes of business failure?

MR. MARMER: Objection.

THE COURT: Sustained. Let me remind you that questions are not evidence.

BY MR. HANSEN:

Q. Do you know of your own experience, Dr. Nye, or your own expertise that one of the leading causes of bankruptcy is managerial inexperience and incompetence?

MR. MARMER: Objection. There's no foundation.

THE COURT: Sustained.

BY MR. HANSEN:

Q. Do you have an opinion about managerial inexperience and incompetence as a cause of bankruptcy?

A. It sure doesn't sound good and it sure sounds like it could.

Q. How about let me look at Exhibit 892 in evidence, please. Were you aware of part of your post-March 30, 1998 work that one of the analysts writing about Sunbeam had written, "Furthermore, we find it ironic that SOC or Sunbeam's second largest shareholder, Ron Perelman, could end up financially better off if Sunbeam were to enter Chapter 11 than if he had been successful selling Coleman to Sunbeam SOC as a significantly lower all-cash price as he originally attempted late last year. Were SOC to enter bankruptcy today, Mr. Perelman could recognize his presently large but unrecognizable paper, (noncash) loss in Sunbeam. Then he could potentially use this loss to offset his earnings and gains in his other profitable enterprises."

Did you review this? Did you do any analysis of this issue as part of your post March 30th, 1998 work, Dr. Nye?

MR. MARMER: Excuse me. May we approach?

THE COURT: Yes.

SIDE BAR CONFERENCE:

MR. MARMER: The objection is this is plainly not an attempt simply to find out whether he took account of this but to publish if this was true a theory and statement to the jury when there is no fact in evidence to that effect. This line of questioning is obviously having the intended effect of conveying information, and it's going to be insufficient for an instruction that says questions aren't in evidence. I think counsel ought to be given a firmer instruction about fashioning questions that avoid this problem.

MR. HANSEN: Very simple --

THE COURT: First of all, which document is this?

MR. HANSEN: A report from Prudential in the summer of 1998.

THE COURT: Was it taken for the truth of the matter?

MR. HANSEN: It was entered in evidence.

THE COURT: Lots of things have been but weren't taken for the truth of the matter asserted.

MR. HANSEN: This is a document in evidence. He lists this as a document he considered.

THE COURT: First I need to you answer the question. Was it one of the things taken for the truth of the matter in it or just to show what was said?

MR. HANSEN: I don't recall.

THE COURT: Do you know?

MR. HANSEN: We can check. This man just volunteered, Your Honor, in response to my questions, he did an analysis after the period. This is a document he claims to have relied on. I want to ask him did he do an evaluation of this, did he check on this claim, did he make any determination, because it would go to the question of realizable value. If he didn't, I think the jury is entitled to know that. If he did, I'd like to find out what it was.

THE COURT: In all honesty, he's been very clear that he didn't do any analysis at all on that.

MR. HANSEN: That's not true.

THE COURT: Why do you say that?

MR. HANSEN: He went on a litany of all the things he considered after March 30th. He considered the Dunlap firing. He considered the SEC investigation. He considered the pulling of the financials.

THE COURT: I think he said he was aware of all those things.

MR. HANSEN: He said those were all issues for the analysis he did. That was in response to my question --

THE COURT: I think you were -- you asked him were you aware of what happened in the company, and he was listing the things he was aware of.

MR. HANSEN: It's all part of his analysis.

THE COURT: I think -- we can take a break and have the court reporter read it back and see if my memory is correct. I think he's been pretty clear. He didn't do that half of the analysis.

MR. HANSEN: He purported to have knowledge relating to that period that went to his opinion.

THE COURT: No. I mean, again, I would have to go back. I think he said that he was aware of their existence but it wasn't --

MR. HANSEN: I asked him in terms of, in order to give an opinion, he has to have some basis. If he's given a zero opinion... this document is a document he considered in the report. It's listed as one of the documents he's relied on in his report. It's in evidence. I don't recall that coming in under an objection.

THE COURT: I don't know. Do we know if this was one that was limited or not?

MR. BRODY: We're pulling the transcript, Your Honor.

MR. HANSEN: I recall it coming in without an objection.

MR. MARMER: I understand Your Honor answered that question. My point is a document in evidence doesn't mean you get to do anything either by question or argument. There's no doubt what's going on here.

MR. HANSEN: The witness relies on this. If he puts it in his report as a document he relied on and it's in evidence, I'm not aware of any principle that suggests that --

THE COURT: I mean, no, I think quite honestly, I think it's fair, and we can go back and look at, but what he testified to was he did no analysis for this second half. I don't think you can then use that as a springboard to talk about everything you think he should have considered and did not.

MR. HANSEN: I don't know why not, Your Honor.

THE COURT: Because it's almost like he didn't testify on that point at all.

MR. HANSEN: He did, though. That's misleading to the jury. He offered a zero value.

THE COURT: Because he was told to assume that.

MR. HANSEN: I can say -- I'm trying to show he did --

THE COURT: I think these are appropriate things to argue maybe later to me.

MR. HANSEN: It came in under no objection.

THE COURT: That's fine. I still think we need to take a break because I need to see the portion of the evidence where he testified to the litany of things post closing that he knew about.

MR. HANSEN: Really I'm not sure I want to take your time or the jury's time, Your Honor. The only point I wish to make on this is for damages one would think he should look at some of these things.

THE COURT: I think this is argument made to me to offer an expert on damages.

MR. GORSUCH: Your Honor has not ruled as a matter of law on this so until or unless it happens --

THE COURT: That's argument made to me at a later point.

MR. GORSUCH: Until or unless it's been ruled upon, the possibility of a sale has to be left open. If a possibility of the sale has to be left open, there are alternative causal factors.

THE COURT: I understand that. But this gentleman did not opine on any of these things.

MR. GORSUCH: We're assuming a set of facts that had not yet been proven.

THE COURT: And you're going to move to strike his testimony to say there's insufficient evidence.

MR. HANSEN: The other thing I want to point out is he can say that. Isn't the proper purpose of cross-examination here to show to the jury that an expert, there was something for the expert to look at and he chose not to?- Instead of looking at the real world, he chose to take what the lawyers told him when there's a wealth of other evidence that would have been something to be looked at. If he wanted to close his eyes to it --

THE COURT: I think that doesn't have any legal relevancy. I think that's sort of a so-what. If you ask if that is a document you listed and relied on, you can ask that, but then we move on. My understanding of his testimony is he didn't do this second half of the analysis.

MR. HANSEN: Yes, Your Honor.

END OF SIDE BAR CONFERENCE.

BY MR. HANSEN:

Q. Dr. Nye, isn't it true, sir, that this is one of the documents you claimed in your report to have relied on for purposes of your analysis?

A. Could you show me the heading, what this document is?

THE COURT: Do you have a copy?

BY MR. HANSEN:

Q. Why don't I give you a copy of 282? Do you have a copy of your report?

A. No.

Q. Why don't I give you both. I'll hand you a copy of Morgan Stanley 924, which is your report, and a copy of Morgan Stanley in evidence 282, and maybe in the interest of time, Dr. Nye I'll direct you to --

THE COURT: You can take it back later. I do have that. I have too many papers already. Thanks.

BY MR. HANSEN:

Q. I'll direct you to Exhibit 3, page 4 of 4 at your report to see whether this, in fact, was one of documents you list as something you considered.

A. Exhibit 3 --

Q. Page 4 of 4?

A. Page 4 of 4.

MR. MARMER: Objection to the question.

MR. HANSEN: Please take that off the screen.

MR. MARMER: I have an objection.

THE COURT: You want to come up?

MR. MARMER: Yes.

SIDE BAR CONFERENCE:

MR. MARMER: What's happened is we're now confusing parts of the report. There's a section of the report with Exhibits identified as things he looked at for purposes of determining the market was efficient. If the question is should you have looked at this part to show that it was efficient or not, that's fine. But to try and ask this general question have you looked at anything at all for any purpose --

THE COURT: How do we know it's listed only to determine whether the market was efficient?

MR. HANSEN: I don't think it is.

THE COURT: I'm asking.

MR. BRODY: On page three, paragraph four of the report --

THE COURT: Let me read it. Let me read it first. How would we know that from reading that?

MR. BRODY: He says what's on the Exhibit we're looking at, just the Exhibit considered. The things he relied on are referenced in the report itself. I'm not aware of any reference to this document in the report itself.

MR. MARMER: What --

The court reporter just told me she couldn't hear anything I just said. In essence, I said there's no appropriate way to move from the market, segue to something else.

THE COURT: It's you can't just refer him to Exhibit 3. You have to refer him to the paragraph of his report and he can explain.

MR. HANSEN: He says his opinion --

THE COURT: He can explain to us what that paragraph means rather than jump into the Exhibit 3.

END OF SIDE BAR.

BY MR. HANSEN:

Q. Dr. Nye, can you turn to page three of your report, paragraph four?

A. Okay.

Q. Do you state there the documents you considered for purposes of your analysis were listed in Exhibit 3?

A. States it right there.

MR. MARMER: May I ask the rest of the contemporaneous paragraph be read?

MR. HANSEN: Your Honor, would you like the rest read?

THE COURT: Sure, if you don't have an objection.

BY MR. HANSEN:

Q. Why don't you go ahead and read it aloud, the whole paragraph.

A. Paragraph four, "My opinions are based upon my professional knowledge and experience, as well as on a review of documents and information relevant to this matter and analysis of data. Documents considered are listed in Exhibit 3. Documents and other materials upon which I have relied as a basis for my opinions are cited in this report and its Exhibits. All documents and materials are the type typically relied on by experts in preparing this type of report. Analyses that are bases for my opinions are described in this report in its Exhibits, and result of those analyses are contained in this report and its Exhibits."

Q. And one of the documents that you identified in Exhibit 3 is this report that we had, this 282, correct?

A. Did you find it in here somewhere?

Q. You'll see page 4 of 4, Exhibit 3?

A. Page 4 of 4.

Q. Page 4 of 4 Exhibit 3?

A. Where?

Q. Do you recognize this as a -- this is from Prudential Securities, correct?

A. Have I got something wrong here?

Q. Can you see it?

A. This is 10-Q A.

Q. Do you see 282, which is the 892? Let's give you a copy with Bates numbers so you can verify it. I'm handing you a copy of Morgan Stanley 892, which is what we just displayed on the screen. Do you see the Bates numbers from that document as one of the documents you list here on your Exhibit 3 at page 4?

A. Exhibit 3, page 4 of 4 in my report, is that what you're talking about?

Q. Yes.

A. I do not see MS 892 anywhere.

Q. You do it by Bates ranges, right?

A. Oh, okay. Bates.

Q. 1392178?

A. 139, okay.

Q. Prudential Securities report dated August 7, '98, do you see that as one of the documents you incorporate as one of the Exhibits you relied on in your report?

A. I do.

Q. What effort did you make to check out any of the information contained in that report?

MR. MARMER: Objection; insufficient predicate for the question.

THE COURT: Overruled.

THE WITNESS: This is MS 892. What did I do to, what, check out information?

BY MR. HANSEN:

Q. To investigate the assertions about the benefits of bankruptcy for Mr. Perelman.

MR. MARMER: Objection; no foundation.

THE COURT: Sustained.

BY MR. HANSEN:

Q. What efforts did you make -- what efforts did you make to check anything about the contents of that document that you relied on?

MR. MARMER: Objection; assumes a fact not in evidence.

THE COURT: Sir, did you rely on that document in issuing your report?

THE WITNESS: I certainly -- it's in here and I considered it. I mean, I'm trying to review it to see if I relied on it.

THE COURT: Okay.

THE WITNESS: And the question is did I rely on this?

BY MR. HANSEN:

Q. Actually, my question was --

A. In my opinions?

Q. My question was did you do anything to verify any of the information contained in that report as part of your report?

MR. MARMER: And I have an objection to that question.

THE COURT: What's the legal objection?

MR. MARMER: Lack of foundation.

THE COURT: Sustained.

BY MR. HANSEN:

Q. What did you do with this document when you considered it?

A. Considered it. I reviewed it.

Q. Did you ask any questions about it?

A. I don't think so, no.

Q. Did you ask anybody for the plaintiff what this business about bankruptcy was all about?

A. No.

Q. Did you do an investigation or any analysis of the issue about whether Sunbeam took on excessive debt as a consequence of these various accusations in 1998?

MR. MARMER: Objection; lack of foundation; repetitious.

THE COURT: Sustained. I think we discussed this at the bench.

BY MR. HANSEN:

Q. Dr. Nye, did you investigate the lockups, how they played in at various points in time?

A. You mean the 90-day -- yes, certainly I considered those as part of the reason I didn't use the liquidity discount.

Q. And in December of 1998, you know, sir, that all of the original lockups that had been agreed to as part of the contract in February 1998 had expired, correct?

A. All the lockups would have expired, yes.

Q. So there's no contractual reason why Mr. Perelman wasn't free to sell the shares at that point based on the lockups, correct?

MR. MARMER: Objection.

THE COURT: Sustained.

BY MR. HANSEN:

Q. The lockups were no longer an issue with respect to sales by December of '98, right?

A. The lockups themselves and the original agreements were no longer at issue. Later agreement in August of '98 extended the lockup 25 percent until August of 2001 and the shares never had been registered.

Q. And the new lockup agreement that was agreed to between Sunbeam and the plaintiff was in August of 1998?

A. I think so, yeah.

Q. That had nothing to do with anything charged against Morgan Stanley in this case, correct?

MR. MARMER: Objection; misstates the record.

THE COURT: Sustained.

BY MR. HANSEN:

Q. Did you do anything to determine whether Morgan Stanley should be charged with the consequences of a further lockup that plaintiff agreed to in August of 1998?

MR. MARMER: Objection; contrary to facts.

THE COURT: Sustained.

BY MR. HANSEN:

Q. What, if anything, did you do to investigate the circumstances of the second lockup agreement entered into by plaintiff in August of 1998?

A. What did I do? I recognized that in my second damage analysis they wouldn't be able to sell those during the first quarter of 2000.

Q. Did you do any investigation as to why that lockup agreement was entered into?

A. No.

Q. Did you know anything about the circumstances under which it arose?

A. It arose under some negotiations, I'm sure.

Q. But you didn't know what the negotiations were?

A. The negotiations in August? Presumably at least part of it was about eliminating lockout on 75 percent of the shares and extending the lockout on 25 percent of the shares until August of 2001.

Q. You're saying presumably. Are you guessing there or do you know?

A. I think I just explained to you that was the time it happened. And that's what happened. And then you asked me what happened. I said, well, I know that happened.

Q. Do you know what the plaintiff got in return for agreeing to further lockup in August 1998?

MR. MARMER: Objection, Your Honor. We have a ruling on this.

THE COURT: Sustained.

BY MR. HANSEN:

Q. Did you ask the plaintiff's side to give you all the facts and circumstances surrounding that lockup before incorporating it into your analysis?

MR. MARMER: Objection, Your Honor. We're going into the same area.

THE COURT: Sustained.

BY MR. HANSEN:

Q. With all respect, Dr. Nye, did you think as an expert you needed to get the facts and circumstances about this second lockup before incorporating that lockup into your analysis in this case?

A. I knew what the lockout prescribed, and that's how it affected my analysis, and I considered it.

Q. But you didn't feel it incumbent on you to learn all the facts and circumstances about the lockup to know whether it was appropriate to build that into your analysis?

A. I knew it was appropriate to build it into my analysis. I knew they couldn't sell them under the lockout until August of 2001.

Q. But you didn't know why they entered into the lockout?

MR. MARMER: Objection.

THE COURT: Sustained.

BY MR. HANSEN:

Q. Dr. Nye, by December of 1998 under the original lockup, there was no longer a contractual restriction on the Sunbeam shares held by Mr. Perelman, right?

A. Under the original agreement there would have been no restrictions by the end of December '98, right.

Q. Did you attempt to value the Sunbeam shares held by Mr. Perelman, the 14.1 million shares at year-end 1998?

MR. MARMER: Objection. May we approach, please?

THE COURT: Sure.

SIDE BAR CONFERENCE:

MR. MARMER: Your Honor, there has been no showing by Morgan Stanley of either of the conditions Your Honor has required before they're able to elicit testimony about needs for values. They have not established a legal right to sell the shares or that a liquidity discount could be laid, so they're trying to do it with our expert where they can't do it with theirs.

MR. GORSUCH: It's actually just the opposite. Plaintiff hasn't met its burden, motion limine 16, of establishing a date used. What we're seeking to explore is whether he looked at other dates. And, in fact, we have submitted a disclosure to Your Honor explaining just exactly how they could have sold privately as of December 31st, 1998. We have as much in the record on this if not more than they do.

MR. HANSEN: We also have evidence on that date year-end 1998 they did an internal valuation of the shares, which is what I expect to now ask him about, did he consider their own internal valuation and to show he ignored -- internal valuation of the plaintiff in this case.

MR. MARMER: When we get to that part, I'll object, too, or we can discuss it now. At the moment we're discussing whether he can ask him about valuations at points in time prior to under Your Honor's ruling where you ruled there has to be a predicate.

THE COURT: I agree there's not a predicate. Do we want to talk about the 450? It's the same issue, isn't it?

MR. MARMER: Yes. This is an attempt to turn a damage expert into a reliance expert.

MR. HANSEN: No, it is not. It is highly relevant and probative evidence as to plaintiff, Mr. Perelman, who conducts valuation under penalties of, criminal penalties of the Federal Government and he submits it to the government or submits the number to the government, and this expert comes in and talks about how he just has a zero number. I think it's absolutely appropriate and necessary to ask him if he considered this information from his own client in assessing valuation of the back end number as opposed to assuming zero. We have not only the predicate, we have uncontested evidence on this point. I expect him to be able to be asked did he consider it? Why not? Did they give it to him? They didn't. I think that goes to everything that's afoot in terms of expert testimony.

In terms of the predicate, the lockup expired. There is no showing. There is not any ability of a private sale. They're the ones that have to establish a predicate for a subsequent valuation date, not us, under, Your Honor, motion in limine. Unless we have to bring him back in our case, which I would hate to do, we want to establish he ignored the number on the 450 million value placed on year-end both 1998 and 1999.

THE COURT: What's the response?

MR. MARMER: We've argued this many times already. There is no showing of the predicate required by them. We've discussed this on three occasions. Mr. Hansen had a shot the other day. We did it when we were talking about the demonstratives, and here we are again.

THE COURT: You know, back to, I think eventually the 450 will come in. I'm not sure the relevance for this witness, other than -- as I understand -- are you presenting, are you going to argue at all he has given any expert opinion about the second half of the equation?

MR. GORSUCH: Sure.

MR. MARMER: Sure, but not in any of the areas they're questioning.

MR. GORSUCH: That's a misrepresentation. He said the bottom number should be zero or 46 million. He's rendered an opinion on those two things. Your Honor, he's done it February 5th and December 1999 without any showing or any conclusion by a court at all that they couldn't have sold before that. He picked them out of the air.

MR. HANSEN: He didn't come in and give a number valuation and give it to others to say they can't ever sell. He came in as an expert and gave two numbers. I agree there's nothing to the second number, but that's the problem with an expert getting up and giving testimony. He has to have expertise. That's what I'm trying to expose through the cross-examination. If he had offered no testimony about the bottom number, maybe we'd have a different argument. But with him saying the bottom number is zero or \$46 million, that's presented with the rubric of expertise.

MR. MARMER: Because this is expert opinion, the expert opinion is not on the topic of whether it could be sold as to which he's assumed. The economic expertise is his view that if there is no realizable value, there is a zero value associated with it. So I think we were going to hear a bunch of cross-examination questions about all the ways you can have value if you can't sell it, and this expert is prepared to say no. That's his area of expertise.

THE COURT: I think the 450 is fair to ask him about.

END OF SIDE BAR CONFERENCE.

THE COURT: You want to keep going for a bit? All right. You're going to tell us when you need a break, right?

BY MR. HANSEN:

Q. I'm directing you to December of 1998. After the first lockup expires did you receive from your client, Coleman (Parent) Holdings, evidence of its own internal valuation on the Sunbeam shares as of that date?

A. As of December 1998, their own internal valuation? Not that I recall.

MR. HANSEN: Could we put up, please, number Morgan Stanley 857 in evidence?

BY MR. HANSEN:

Q. And I'll give you a copy, Dr. Nye. I'm handing a copy of Morgan Stanley 857 in evidence. And isn't it true, sir, you were provided with a copy of this just a few weeks ago but after your report was submitted in the case?

A. Oh, sure, yes, I've seen this.

Q. And this was an internal valuation dated as of year-end 1998 of a variety of assets, including the Sunbeam shares, correct?

A. It says estimated fair value calculation at the top.

Q. Now you weren't given that --

A. That was your question, right? That's what it says.

Q. And you were not given that document by the plaintiff for part of your original work in the case before you did your report, correct?

A. I don't believe so, no.

Q. You weren't given that document until a couple of weeks ago, correct?

A. I think it was longer than that ago, but I've been here for two weeks.

Q. How long ago?

A. A monthish. Sometime recently in the last --

Q. After your report, correct?

A. After my report.

Q. After your first deposition was taken, correct?

A. I believe so.

Q. And when your deposition was taken, you said you were going to ignore this document, didn't you?

A. Did I use those exact words?

THE COURT: You can't reverse the roles. Okay?

THE WITNESS: Sorry.

BY MR. HANSEN:

Q. Do you remember?

A. No, I just didn't think I would have used those exact words, but it's possible.

Q. You said you were going to ignore it in your report, correct?

A. Could you show me where I said that?

Q. Sure. Why don't you look at your March 11 deposition, page 68, lines 1 to 18, see if that refreshes your recollection.

A. What was the page number?

Q. Page 68, lines 1 to 18.

A. Is that the little one?

Q. Yeah, the March 11 deposition.

A. Page 60, did you say eight?

Q. 68, lines 1 to 18?

A. 58.

Q. 68.

A. Okay. It says -- you ask me if I'm going to ignore it, and I say, correct, right.

Q. So you said you were going to ignore it?

A. Right.

Q. You weren't going to consider it once you were provided with it?

A. I considered it. I just -- that's looking at it. Am I going to use it or be influenced by it? That's what I mean by ignore. No, it does not change my opinion or add to its bases.

Q. You agreed that you said you were going to ignore the document, right?

A. That's what the deposition says.

Q. And you also were asked whether you were going to consider that document now that you had seen it, correct?

Lines 14 through 16, please.

A. 14 through 16 on the same page?

Q. Page 68, yes.

A. Okay. I'm trying to get the terms straight, but, no, consider it, no. I place no value on it.

Q. You said you weren't even going to consider this document, correct?

A. That's what that says, yes.

Q. Well, that's what you said, yes?

A. Yes, indeed.

Q. And this document shows that as of year-end 1998 the value placed by Mr. Perelman on the Sunbeam common, you just follow across the line, was \$450 million, correct?

MR. MARMER: Objection; misstates the record.

THE COURT: Sustained.

BY MR. HANSEN:

Q. What is the figure in the column for Sunbeam common, Dr. Nye?

A. It says -- Move to the left. Move your pointer to the left. It says Sunbeam common, 14.1 million shares, value six, market value 85 million.

Q. What is that for the adjusted 12-31-98 total?

A. I'm pointing to value. You said the actual value. The actual value is the left three columns.

Q. What's the adjusted value total?

A. Adjusted value 12-31-98 there's a 450 million there.

Q. And are you aware this \$450 million number was used by Mr. Perelman to come up with a fair value estimate for his holdings of \$5 billion that was then submitted to the Federal Government?

MR. MARMER: Objection. Misstates the record.

THE COURT: Sustained.

BY MR. HANSEN:

Q. Did you know how that \$450 million valuation for Sunbeam was used, Dr. Nye?

A. I think it's illustrated right behind you. This is all I know because this is the only place this number appears in the vast reams of documents except a year later's version. It says 450 million. Down at the bottom right corner it says, it adds it up, and that 450 is part of the 5.7 billion. Then there's a number presumably from Mr. Perelman says, "Okay to use 5 billion" for a purpose that I -- it was -- I don't believe it was reporting to the government as you implied. It was an unaudited statement in his audited financials.

Q. Do you know one way or the other, Dr. Nye, whether this \$5.0 billion figure for 1998 was used by Mr. Perelman in a financial statement that was then provided to agencies of the United States Federal Government?

MR. MARMER: Objection; relevance.

THE COURT: Sustained.

BY MR. HANSEN:

Q. What was the basis for your statement a minute ago, Dr. Nye, that you don't believe this number was submitted to any agencies of the Federal Government?

A. Because I was aware that it was an unaudited page, the famous F-3A, in their audited financial statements which included a number about this \$5 billion. I'm sorry. I just couldn't foresee the government being interested in an unaudited statement.

Q. Do you know one way or the other whether or not that page was provided to the Federal Government?

A. I don't know whether when they handed that in it was provided.

Q. So you don't know?

A. It certainly wasn't part of what was required.

Q. Well, do you know what was required?

A. Sure, an audited financial statement. And F-3A, page F-3A was unaudited.

Q. Do you know what the Pension Benefit Guarantee Corporation required that lead him to submit a paper to the Federal Government?

A. No.

Q. Do you know what the Office of the Thrift Supervision may have required?

A. I don't know what they might have required, no.

Q. Have you reviewed Mr. Perelman's testimony?

A. No.

Q. Let's go -- you said this document, this figure, this \$450 million figure appeared nowhere but in this document and then some subsequent document, correct?

A. A year later, I believe it's a year later, 12-31-99, there's -- the same number is in place.

Q. Let's go to 822, please, in evidence. Is this the document you're referring to, Dr. Nye, fair value calculation dated 12-31 -- 19 -- I think it's the second page.

A. Looks like the same document. There we go.

Q. Second page of 822, 12-31-1999. Is that the document you were referring to a minute ago in your testimony, estimated fair value calculation, the \$450 million valuation?

A. There we go. That's the later version.

Q. Is that the one you were thinking of?

A. Yes.

Q. This is a year later?

A. A year later.

Q. At this point in time based on your alternative damages model you've projected that plaintiff could sell some shares, correct?

A. In April, yeah, during the first quarter 2000, correct.

Q. You've said that the date you used was December 6, 1999 for projecting plaintiff's ability to sell, correct?

A. Basically it could have been able to sell in the first quarter is what I said, and that's based on resolution of the registration in the same timely way. it was with the public shareholders.

Q. Which resolution was December 6, 1999, correct?

A. And they got the shares January of 2000.

Q. This relates to part of the period you've covered in your alternative damages calculation, correct?

A. That's correct.

Q. And, again, in a document prepared by Mr. Perelman or his employees, the Sunbeam common has an adjusted valuation of \$450 million, correct?

A. If you look to the left -- oh, you asked that question. It does. It says under a column adjusted 12-31-99 value. Under total it says 450.0, right.

Q. And, in fact, the sum total of these adjusted values comes to \$4,736.700,000, correct, Dr. Nye?

A. It appears to.

Q. Do you know whether or not this formed the basis of a submission based on this year to governmental authorities for an aggregate fair value of \$5 billion by Mr. Perelman?

A. Yeah, I don't know that, no.

Q. These are, neither of these documents are documents that you chose to consider in doing your work, correct?

A. Well, like I said, I considered them. The value added was, there was none.

Q. You already told us at least as to the 12-31-98 document you weren't going to consider it, that was your deposition testimony, correct?

Question, are you going to consider it?

A. I think I've explained three or four times when I say now in this context I'm using the word "consider" to mean I looked at it. I saw it. If I don't choose to put any value on it, it goes no further. That applies to both of these documents.

Q. You were asked at your deposition are you going to consider it now that you've seen it, and your answer was no, correct?

A. That's correct.

Q. So if you use Mr. Perelman's valuation and the federally filed Sunbeam 10-Q A to do a damages calculation, you'd come up with \$74 million, wouldn't you, Dr. Nye?

MR. MARMER: Objection, Your Honor; misstates the record; misstates the analysis; lacks foundation in the evidence.

THE COURT: Sustained.

BY MR. HANSEN:

Q. You chose not to use either of these numbers in your work, right, Dr. Nye?

A. That's definitely correct.

Q. Dr. Nye I want to just talk to you briefly about what you did in your work on the case, and then we'll be pretty much done. You filed a report dated December 7 of 2004?

A. Sounds right.

Q. You didn't write it, though, did you?

A. You know, I -- in terms of actually typing the words, no.

Q. Your assistant, Miss Nettatimes (phonetic) typed out the words?

A. She typed out the words.

Q. You made no material changes?

A. I don't recall any material changes.

Q. You relied on the attorneys for Coleman to provide you with materials to form your opinion, correct?

A. We certainly received documents from Coleman (Parent) Holdings, and we've got some documents ourselves.

Q. You didn't even bother to review all the documents you were provided with?

A. I didn't review personally all the documents, no.

Q. You didn't bother to review Mr. Perelman's deposition before you did your report, correct?

A. I didn't personally, no.

Q. You didn't bother to talk to Mr. Perelman about his views prior to issuing your report, correct?

A. No, I did not talk to Mr. Perelman.

Q. You never met with Mr. Perelman prior to issuing your report, correct?

A. That's correct.

Q. You didn't bother to talk to Mr. Slotkin, the chief financial officer, before issuing your opinion, correct?

A. That's correct.

Q. You didn't bother to talk to Mr. Winoker, the treasurer, before you issue your report?

A. That's correct.

Q. Didn't bother to read his deposition?

A. Mr. Winoker, I don't believe so.

Q. You were retained in late 2003 or early 2004; is that right?

A. Early 2004.

Q. And you signed your report December 7, 2004?

A. That's correct.

Q. And between the time you were retained and the very end of November just before you submitted your report you had spent a total of 31 and a half hours in this case?

A. Sounds about right.

MR. HANSEN: Can -- we have one matter, Your Honor?

THE COURT: Sure.

SIDE BAR CONFERENCE:

MR. HANSEN: I was going to try to impeach Dr. Nye with cases that he previously testified in where his testimony was excluded.

MR. MARMER: We object to that. We think the law is quite clear that the rulings in other cases about why an expert should or should not come in are not properly matters to be brought in before a jury.

THE COURT: No. I appreciate you coming up.

END OF SIDE BAR CONFERENCE.

MR. HANSEN: Dr. Nye, I have no further questions.

THE COURT: Thank you. Mr. Marmer, do you have other questions?

MR. MARMER: I do.

REDIRECT EXAMINATION

BY MR. MARMER:

Q. Dr. Nye, Morgan Stanley's counsel asked you some questions about your report. Would you tell the ladies and gentleman of the jury how you go about having the report, how you had this report prepared and what, if any, role it played.

A. The standard procedure, we have a staff and we get an assignment. We had an assignment. We meet, discuss what's to be done, what analysis need to be performed, basically get rolling on those kinds of things. Then as they come through, the report starts to take shape. We discuss it, you know, as a group in meetings. And Miss Nettatimes (phonetic), she's done all but half her dissertation at the London School of Economics, and she's been with me 15 years. She in this case put pen to paper and wrote up the report. It is reviewed by the group, discussed, and then ultimately everything is subject to my approval and done under my direction.

Q. Was there anything about the preparation of this report that you did for this case that was different in kind or matter from how you typically go about handling these matters?

A. No.

Q. Dr. Nye, you were asked some questions about Morgan Stanley Exhibit -- let's start with 157. Do you have 857?

A. I had them memorized but then --

Q. Let me just see if you have 857 in front of you here.

MR. HANSEN: Do you want it displayed? I'll put it up.

MR. MARMER: That's okay. I think we'll be able to do this quickly.

BY MR. MARMER:

Q. Morgan Stanley's counsel asked you questions about the column under adjusted value, and that shows the \$450 million. What weight, if any, did you give to that number?

A. Well, basically none. I mean --

Q. Why?

A. The recognition of the actual value on 12-31-98 is in the two columns to the left at \$6 a share, so the total is 85 million. This adjusted value there's no basis for the number, no analysis, no anything. It's just a number placed here under adjusted value. And in the column to the right apparently these are the bases for the adjusted value. It simply says, capital restructuring -- capital restructuring and EBIT improvements. In other words, it's, you know, if we improve it, it will improve. It's kind of a wish list thing. It would be nice if it was worth 450, and maybe they thought if they worked real hard they could get it up to 450, but there's no basis whatsoever for at this point saying it's worth 450, 450 million.

And more to the point, it was obviously dead wrong because the company went bankrupt and never approached 450 million.

Q. Counsel also asked you questions about MS 822, the second page of MS 822. Let me see if I can help find that for you. If you could find the front page... That's 857. Do we have 822 up here or no? Here, you can borrow mine.

A. Okay.

Q. I'd like you to look at the second page of that Exhibit, which is, I believe, the page that counsel was directing your attention to, and that's the page that has the 12-31-1999 values on it.

A. Correct.

Q. And, again, Dr. Nye, this \$450 million figure appears there. And let me ask you why did you or did you not give that any weight?

A. Didn't give it any weight. Exactly the same number, 450 million out of the blue. No analysis. Same comment to the right, capital restructuring and EBIT improvements. And it's sitting next to an actual price, and it's now dropped to \$4.18, so the total value of the actual value of Sunbeam or the stock at this point, the Sunbeam stock is \$59 million.

Q. Now when counsel pointed out to you that this is roughly the same time period you looked at for your alternative damages calculation, do you recall that?

A. Yes.

Q. Just, again, very briefly, what was it you were trying to do in the alternative damages calculation? Let's see if we can get that back up here. What was it you were trying to do with this calculation?

A. Basically just under the assumption that the shares could have been registered and salable in the first quarter of 2000, that 75 percent of them could have been sold during that quarter at an average price of \$4.35.

Q. And you used an average price of \$4.35 in that calculation, right?

A. Right.

Q. What was the per share price that appears as the actual per share price on Exhibit that counsel showed you?

A. \$4 basically 19 cents rounded two decimal points.

Q. And what, if any, impact would it have been on your analysis had you used the 4.1875 number instead of the \$4.35?

A. It wouldn't have been somewhat lower, slightly lower in the damages, slightly larger.

Q. So the damages would have been what?

A. A little bit larger.

Q. Did you in any way attempt to skew your analysis by using the 4.32 instead of the 4.1875?

A. Oh, no.

Q. Now when you were looking at this analysis here and you were trying to calculate out the values, and, again, let's look back at your original damage, you said, sir, that you assumed that there was no way that CPH could sell any of its stock and actually did not sell any of its stock until it became worthless; is that right?

A. That's correct.

Q. Okay. Did you as a matter of your own judgment and analysis consider whether there was value associated with the ownership of the 14.1 million shares that CPH had if CPH could not sell or dispose of its stock?

MR. HANSEN: Objection.

THE COURT: You all want to come up?

SIDE BAR CONFERENCE:

MR. HANSEN: I thought Mr. Marmer went to great lengths to say Dr. Nye wasn't offering opinions about this period. I explored whether he missed evidence he should have considered. But he's going into now a new opinion not previously disclosed.

THE COURT: What we're asking is whether the stock had value to plaintiff even if it could not be sold?

MR. MARMER: Correct.

THE COURT: And do we think that's an opinion that was disclosed?

MR. MARMER: Yes.

THE COURT: Can you show me?

MR. MARMER: I don't know if it's in the report, but it certainly was in the deposition.

MR. HANSEN: It's not in his report. It's not disclosed.

THE COURT: Why don't we give them a five-minute stretch break because Mr. Cruz and Mr. Williams are looking sleepy.

END OF SIDE BAR CONFERENCE.

THE COURT: We're going to give you a five-minute stretch break. Don't talk to anybody. Don't talk about the case. The kitchen is closed, but if you want to bring in a soda, feel free.

(The jury left the courtroom.)

THE COURT: Dr. Nye, I'm going to ask you to wait outside as well.

THE WITNESS: Thank you.

MR. SCAROLA: If you'd like to, you can use the back room there. Your choice.

THE COURT: As long as you don't wander, you can go out that way.

Okay. Where do you think an opinion on this subject was disclosed?

MR. MARMER: We're looking for that. Let me see if we can find that. Maybe we can come back at the end of the break.

THE COURT: Scheduling, in all honesty, I think we better ask the jurors to come back at 9:30 tomorrow. I need to leave before 4:00, and I don't want to cut into the trial day any more than we have to.

MR. SOLOVY: Your Honor, I'd like to make a point while it's still fresh. Morgan Stanley filed motion, at least we got it late last night for a mistrial based on the contention that Mr. Perelman disclosed settlement information that was improper and contrary to the statute.

THE COURT: Are you talking about with Sunbeam?

MR. SOLOVY: Pardon me?

THE COURT: With Sunbeam?

MR. SOLOVY: Yes. Now with Dr. Nye on the stand -- and that happened, it didn't -- if it happened, that was as a result of questions Mr. Hansen asked Mr. Perelman. And right this afternoon with Dr. Nye sitting on the stand Mr. Hansen repeatedly asked questions about the detail of that Sunbeam settlement agreement. They can't have it both ways, Your Honor.

THE COURT: I'm not sure what the motion is. I would have to go back and look at my notes from Mr. Perelman. My recollection is the offer of that -- he offered that information without prompting.

MR. HANSEN: He did.

THE COURT: You can pull that out. We don't need to do this right now.

MR. HANSEN: We don't need to do it right now.

MR. SOLOVY: My point is he makes a motion for mistrial based upon disclosure of settlement agreement, then he's asking Dr. Nye to do the same thing.

THE COURT: We're not arguing the motion for mistrial now. You have more things for me?

MS. BEYNON: Yes.

THE COURT: Okay. Great. And we'll be back in just a couple minutes, then.

(A recess was taken from 4:31 p.m. to 4:38 p.m.)

THE COURT: Did we find what we were looking for?

MR. MARMER: We haven't been able to find what we were looking for, so I will simply abandon that question.

THE COURT: Are we ready to find Dr. Nye?

MR. MARMER: Yes. Let me see if he's back there.

THE COURT: I don't think he is. I think he went out front. So we need Dr. Nye and the jurors.

The court reporter reminded me defense counsel were not here when I asked Mr. Marmer if he had located the source of the opinion. He said he was going to abandon that. I just assumed you were in the courtroom. I apologize.

MR. HANSEN: Apologize, Your Honor.

THE COURT: No, I apologize I asked a question not realizing you all were not present.

MR. HANSEN: Do we have a sense whether we'll get through Dr. Nye in terms of juror questions?

THE COURT: Juror questions I need to think of. Probably not if they've been as prolific in the past as they have been, but I guess we'll see.

Are we ready for the jurors, then?

MR. MARMER: Yes.

MR. SCAROLA: That's what we'll be able to do between 9:30 and 10:00 o'clock.

THE COURT: Or between 8:00 and 8:30.

MR. SCAROLA: No, I mean in front of the jury.

THE COURT: Sure. Do you know how much longer you expect your redirect to be?

MR. MARMER: I'm guessing, I'm going to certainly try to do it by 5:00. Whether I get there or not, just we'll see.

(The jury entered the courtroom.)

THE COURT: Okay. We're back. Mr. Marmer.

BY MR. MARMER:

Q. Dr. Nye, Morgan Stanley's counsel showed you an internal accounting document, I believe, MS 1000. Do you have that still up there?

A. Yes.

Q. Okay. And the question is did the numbers on MS 1000 make a difference to you?

A. No.

Q. Why?

A. Well, it's a calculation of acquisition costs by Sunbeam, not by Coleman. The prices used were an average of February 27th, which is different company than the one Coleman got, and the day of the announcement, which is only one day during the period when the price would have been at the combination. And the price includes, you know, a discount for the restrictions, and my review of any discount for restrictions was that none would be appropriate.

Q. And let me just ask you --

A. Other than that, this is the number of shares times various market values. There's no information there.

Q. Dr. Nye, in terms of accounting matters, could you just describe to the ladies of the gentlemen of the jury how, if at all, accounting rules and accounting numbers do or do not impact the economic analysis that someone in your field does?

MR. HANSEN: Objection to new opinion, Your Honor.

THE COURT: Overruled.

THE WITNESS: Accounting numbers are basically a history of the ins, the money in and out of the company over the past. You keep track of your money, and it keeps balances of what the picture is looking from the past. Value is a present value of the future earnings. So there's sort of like one is the financial historian; one is a financial projection. When you buy a share of stock, you don't get the stuff that happened; you get the future earnings.

Indeed, one of the reasons you go into business in the first place is that the market value of what you start is bigger than what it costs you to start it. That's why you do it. Otherwise, you wouldn't go into business.

So with that start, obviously there are things -- things can get out of whack. If you acquire a company, it has a book value of assets, which is the market value of assets. Usually it's less. So when you have to record what you paid for it, you record -- their book value moves over, but you paid more than that so for -- so you call that goodwill so you can show the full amount you paid for the company. The amortization of that goodwill, you know, can, you know, not -- first of all, it's a tax write-off. It changes your expenses for tax purposes. Is this what you had in mind?

BY MR. MARMER:

Q. Just briefly.

A. Briefly. Basically, like I said, accounting is an attempt to try to provide a picture of the financial history, and it just, it can't always get at the real value of the enterprise and for the most part doesn't. And then throw in tax considerations, and then you've got a whole bunch of other things.

In other words, like for Sunbeam's purposes 15-percent discount is a good deal because they can write that off. You know, be less, or it would be less amortization of goodwill to write off and their earnings will look better in the future.

Q. And, Dr. Nye, you were asked some questions by Morgan Stanley's counsel about other cases in which you've given opinions. Do you recall that?

A. Yes.

Q. Now is it true, sir, that in some of those cases you valued the stock both for purposes of the actual, the value what someone paid for it that day as well as what the value was on the same day?

A. It's not technically the value of the stock. You're trying to value the inflation of the stock. What it sold for on that day, what it should have sold for, the difference is the inflation.

Q. Did you do that here?

A. No.

Q. Why not?

A. The goal here was to, my understanding was to estimate the benefit of the bargain, what did Coleman and Sunbeam, what value did they place on those 14.1 million Sunbeam shares (Coleman) that they got. Once the announcement is made, the market price is set for us. We don't have to estimate it. We don't have to add things up or look in margins.

Millions of investors worldwide bid in that marketplace, and that's the value. So we have an objective hard value of what this combination is worth. Coleman received 14.1 million shares of those shares that had an objective hard value.

Then in terms of using it, you know, an average over a period, that is to avoid, as I tried to explain earlier, it's the stocks basically each and every day have some company specific news that is revealed. It's obviously good or bad so it can plus or minus. Can't be anything else. The next day it's fair valued. Again, new stuff comes out that's either plus or minus. Those ups or downs, you know, can make a stock a little bit higher on one day, for our purposes here make it a little bit higher than it should be. The next day it will be lower because this is all information that came out since the negotiation.

So basically the idea about the average is to average out those ups and downs so that you get a good, you know, good estimate of the core value. How far did I go afield there?

Q. Let me just ask you some questions about liquidity discounts, if I may. Morgan Stanley's counsel showed you some instances where Sunbeam took a liquidity discount. Did you do so?

A. No, I didn't. I mean, neither did Coleman in reporting.

Q. When you say neither did Coleman, what do you mean?

A. Coleman (Parent) Holdings did not book the value of the Sunbeam shares they owned at a discount.

Q. Now why did you not take a liquidity discount?

A. A liquidity discount is a discount that would be necessary to cover any costs you would incur associated with these restrictions. So according to utility theory, basically the costs you would incur would be if you -- if the restrictions prevented you from optimizing your portfolio.

Q. Okay. You mentioned --

A. I'm not quite through yet.

Q. I'm sorry.

A. I was just pausing because that sounds like mud. From optimizing your portfolio. Mr. Perelman already had a very large well diversified portfolio. He was in eight different industries. He didn't have to sell any shares to optimize his portfolio. So he wasn't diversifying any risk, so there wasn't any cost associated with that. There was never any indication in the discussions I read that the restrictions, the lockout restrictions, the three months, six months and nine-month restrictions that CPH planned on doing, that they planned on doing anything with those shares in which those restrictions would cause the value to decline, in other words, they were going to invest in it, hold it. I don't think there was never an indication they were worried about having to sell or anything. So there is no cost there. Sunbeam was required to register the shares at its own expense when they came off lockout, so there's no cost there.

This is a large New York Stock Exchange company with lots of information out about it. Most of these discounts for restricted shares are with tightly held companies, owner, operator entrepreneur type of companies where you need to offer shares at a discount to get in outsiders who will monitor and signal other outsiders what's going on with the company, so you can, you know... so there's no monitoring or signaling costs here either.

So basically when you -- I mean, the SEC, the IRS, GAAP, everybody says when you look at a discount, you can't do it cookie cutter. You have to do it case by case, add up the costs and discount, and in this case there simply weren't any identifiable costs.

Q. Let me turn to another area, Dr. Nye. Morgan Stanley counsel asked you some questions about various dates that could have been selected in the damage figures.

MR. MARMER: Tim, can you put up the chart with the averages?

BY MR. MARMER:

Q. Of course, the average you used was the 48.26. I believe Morgan Stanley's attorneys asked you what would happen to the damage calculation if you had used March 2nd, 45.63. Do you remember that?

A. Yes, I do.

Q. I think he also asked you what would have happened if you used March 30 as a date, right?

A. That's correct.

Q. Let's look at some of these other dates, and I want to ask you about what would happen to your damage calculations if you used them.

MR. MARMER: Can you guys see or can you see on your screens?

BY MR. MARMER:

Q. This is your average of 48.26. We looked at March 2nd. What would happen if you had used it March 3rd as your date? Would your damages -- what would happen to your damage calculation compared to the number you actually used?

MR. HANSEN: Objection; new opinion.

THE COURT: Overruled.

THE WITNESS: Looks like it would be about a dollar and a half per share, dollar 60 per share higher, 20, 20 plus million dollars more.

BY MR. MARMER:

Q. So instead of \$680 million, what would approximately be your damage number?

A. 700 million.

Q. If you had used instead of March 3rd, March 4th, what would happen to your damage figure?

A. That would be 52, so, my goodness, that would be \$733 million.

Q. And if you had used, then, we see coming back down a little bit again, March, I think we're now down to March 5, aren't we?

A. Yes. 728 million.

Q. Rather than have you do each of these, is it fair to say, Doctor, that what -- look up to the period through March 19th. Are all of those when you look at all those numbers, other than March 2, are any of those numbers lower or higher than the 48.26? Where do they land?

A. Outside of March 2nd, they're all higher.

Q. Now you had previously said that you used the entire averaging period from March 2nd to March 30. Let me just ask you this. If you instead opted to use the period March 2 instead of March 18 and used that average, would the number you had come up with been lower than the 28.26?

A. It would obviously have been higher.

Q. Why didn't you use March 2 instead of March 18?

A. I think basically just to be conservative.

Q. When you say you're trying to be conservative, in what way is that conservative?

A. Not to be cherry picking, to include the lower prices as well as the higher prices.

Q. From March 17 to March 30, what is it -- sorry -- March 19 through March 30, what is it about those dates that causes you to believe it was just conservative to add them in?

A. Well, I think in those dates the announcement that they weren't going to make, might not make their first quarter revenues sort of was the, sort of the first negative news since the announcement of the deal, and it took a little bit of a shine off the shoes of the combination of Sunbeam and Coleman and really made it, you know, a slightly different company than what was purchased, which would be reflected in the prices from March 2nd to March 18th. This second company is a little bit different. That's information that came out since the negotiation.

Q. So, Dr. Nye, let me ask you, sir, when you chose to use March 2nd through March 30th, what is it you were trying to accomplish?

A. Basically try to average out the everyday ups and downs associated with the stock. Every day new information comes out which wouldn't be information known at the negotiation. Fortunately, it's equally likely to be good or bad, and it has an expectation of zero. So rather than catching a few days where it was high or low, basically just took an average to average it out. And the more numbers in the average, the tighter the fit.

MR. MARMER: May I have a moment, please?

THE COURT: Sure.

MR. MARMER: Thank you very much.

THE COURT: Okay. Do we have anything to shuffle?

JUROR #8: Just one.

THE COURT: It's hard to shuffle.

End of Document

© 2017 Thomson Reuters. No claim to original U.S. Government Works.

2003 WL 24299378 (Fla.Cir.Ct.) (Partial Expert Testimony)

Circuit Court of Florida.

Palm Beach County

COLEMAN,

v.

Mocgan STANLEY.

No. 2003 CA 005045 AI.

2003.

(Partial Testimony of Dr. Ross, Ph.D.)

Case Type: Fraud & Misrepresentation >> Business

Case Type: Fraud & Misrepresentation >> Fraud - Fraud & Misrepresentation

Case Type: Securities >> Securities Fraud

Jurisdiction: Palm Beach County, Florida

Name of Expert: [Dr. Ross, Ph.D.](#)

Area of Expertise: Accounting & Finance >> Economics/Economist

Representing: Unknown

?? report that we would like to use in the course of this examination. Perhaps we can move for the admission of them as they come up.

THE COURT: Absolutely.

BY MS. BEYNON:

Q. Could you take a look at Exhibit A to your report, Mr. Ross?

A. Yes. I don't believe it's labeled here as Exhibit A, but it's the resume' that follows page 15 of the text..

Q. Very well. Does that accurately state your background?

A. Yes, it does.

Q. Could you please describe your educational background for the Court?

A. Just looking at the copy here, it looks like it was copied on every other page.

THE COURT: It does.

MR. SCAROLA: Covers half his credentials.

MR. MARMER: Can I give him a complete copy?

THE COURT: I have the complete copy you guys submitted. And I've already read it.

MS. BEYNON: My apologies.

THE COURT: Sure. I'll keep the copy you sent ahead.

BY MS. BEYNON:

Q. If you could describe your background for the Court, Mr. Ross?

MR. SCAROLA: Since the Court has already read it, and to save time, we would agree that if Mr. Ross were asked appropriate questions regarding his background, training, and experience that his answers would be as reflected on that document.

THE COURT: We're agreeing if he adopts it I can mark it for identification, and that way I'll remember everything he said?

MR. SCAROLA: Correct.

MS. BEYNON: Very well.

MR. HANSEN: I'd also ask for our ability to offer the whole report just as a summary of the testimony. We understand the hearsay objection, but this is an informal proceeding. We think it would be helpful for the Court to have in one place, what we believe is a concise and clear summary, and subject to cross examination. we won't belabor it, but if the Court could have it before you proceeding forward, including the exhibits, it would save time.

THE COURT: I assume there's no objection to my marking the report as an exhibit for identification with the understanding we have it.

We will mark the whole thing, including the exhibits, for identification. And I understand he has adopted his resume' as a fair statement of his credentials. Correct, sir?

THE WITNESS: Yes.

BY MS. BEYNON:

Q. What were your areas of specialization as a graduate student, Mr. Ross?

A. As a graduate student I specialized in three areas -- financial economics, economics, and labor economics.

Q. How did you complete the specialization requirements?

A. When I was a graduate student, there were two ways to complete the specialization requirements; one was to take a certain number of courses in a particular area; the second was to pass a Ph.D. level general examination.

MR. SCAROLA: Excuse me --

THE WITNESS: With respect to economics and financial economics, I met the requirement in both ways with respect to --

MR. SCAROLA: Excuse me. May I interrupt for one moment.

In light of the court allowing an exception for the defense expert witness, may we have the Court's permission to have Dr. Nye present during Mr. Ross's testimony?

THE COURT: Any objection?

MS. BEYNON: No, Your Honor.

MR. SCAROLA: He's not here right now, but we're bringing him over.

THE COURT: Okay.

BY MS. BEYNON:

Q. Would you please describe what the area of finance is?

A. Yes. Finance is the area of economics that concerns investments, valuation, financial institutions, financial markets, corporate finance.

Q. And did you study the valuations of options and warrants while you were a student at the University of Chicago?

A. Yes, I took a course that focused entirely on options and warrants and similar financial instruments. And I also covered options and warrants in other courses that I took in finance area.

Q. I'd like to ask you about some of your professional activities. Have you ever reviewed articles that were submitted for publication in professional journals?

A. Yes, I have.

Q. Have you published any articles in the area of finance?

A. Yes, I've published several articles.

Q. Now, is there any relationship between your articles and the subject matter of your testimony in this case?

A. In a general sense. A number of my articles discuss principles of valuation; however, my articles do not focus specifically on the valuation of options and warrants.

Q. Have you lectured in any professional seminars?

A. Yes, I have.

Q. Have you ever served as a money manager?

A. Yes, in the following sense: I'm on the finance committee of the board of a major charitable institution in Chicago, and the committee as a whole is responsible for overseeing and directing the investments of the funds endowment.

Q. I'd like to ask you about some of your prior testimony and consulting experience. Have you ever been retained as an expert by the U.S. Government?

A. Yes, many times.

Q. Have you ever worked for any of the securities exchanges?

A. Yes, I've worked on two major projects for the National Association of Securities Dealers.

Q. Have you ever testified as an expert previously?

A. Yes, if you count all forms of testimony -- depositions, affidavits and trials -- approximately 70 times. If you want to count only trials or criminal proceedings, it's approximately 20 times.

Q. Have you ever testified as an expert on behalf of the U.S. Government?

A. Yes, I think on nine different occasions I've testified on behalf of the United States Government or its agencies.

Q. Have you ever testified previously regarding valuation issues?

A. Yes, on many different occasions.

Q. Have you ever testified previously regarding the valuation of options?

A. Yes, in two of the cases that went to trial, I testified about complex financial arrangements that included various types of options. And I also testified at deposition in a case involving employee stock options.

Q. Are you being compensated for your work on this case?

A. Yes. Lexecon is billing for professional services at hourly rates. We also charge for use of our computer and databases and our out-of-pocket expenses.

Q. Mr. Ross, could you please describe what you were asked to do in this case?

A. Yes. I was asked to estimate the fair market value of the warrants that Plaintiff obtained from Sunbeam as a result of its settlement of its claims against Sunbeam in this litigation. I was also asked to review some other valuation documents. And after my report was issued, I was asked to review Dr. Nye's rebuttal report.

Q. Did you reach any conclusions with regard to this assignment?

A. Yes, with respect to my initial assignment, I concluded that the fair market value of the warrants on the date of the settlement agreement was approximately 136 million dollars and that the fair market value of the warrants on the date the warrants were issued, August 24, 1998, was slightly higher, approximately 140 million dollars.

Q. Before we go into the details of those conclusions, could you please briefly describe what you did to reach those conclusions?

A. Yes. In order to estimate the fair market value of the warrants, I used standard methods in financial economics, methods that are widely used, well-recognized. I used that to develop a particular valuation method. I then used actual

market data to calibrate the valuation model, to implement the valuation model, and to check to make sure that the results of the valuation model were consistent with actual market data, including market data on call options -- very similar securities -- call options for Sunbeam that were actually traded in the market at the time the warrants were issued.

Q. First I'd like to start by asking a few questions about the concept of fair market value. What's your understanding of that term, "fair market value"?

A. My understanding is that the fair market value of an asset is the price that would be paid in a hypothetical arm's length transaction between a willing and able buyer and a willing and able seller.

Q. Are actual transactions involving a particular asset on a particular date relevant to the assessment of fair market value of that asset on that date?

A. Yes, very much so. In the case of an asset that is actually traded between willing buyers and willing sellers on a particular day, provided the transactions satisfy that standard, the willing buyer/willing seller standard, the transactions are the best evidence of the fair market value of the asset.

Q. So take an example to illustrate that point. Suppose that willing buyers and willing sellers were trading IBM stock for \$100 this morning in arm's length transactions. Under those circumstances, how would you assess the fair market value of IBM stock this morning?

A. Under those circumstances the fair market value of a share of IBM stock would be \$100 because that's the price that willing buyers are actually paying willing sellers in arm's length transactions.

Q. Suppose that on August 24th, 1998 willing buyers and willing sellers were trading Sunbeam stock for 8.81 in arm's length transactions. Under those circumstances, how would you assess the value of Sunbeam stock on August 24th, 1998?

A. It's really the exact same principle. The fair market value would be \$8.81 because that's the price that willing buyers are paying willing sellers in arm's length transactions on that date.

Q. Are events that occur after a particular date relevant to the assessments of a particular asset on that date?

A. Events that occur after a particular date are not relevant to assessing the fair market value of the asset on the particular date.

Q. Does the fact that Sunbeam filed for bankruptcy in February 2001 change your assessment of the fair market value for Sunbeam stock on August 24th, 1998?

A. No. It's just an application of the same basic principle. Events that occur after a particular date are not relevant to assessing the fair market value of the asset on a particular date because market participants, willing buyers and willing sellers, do not know that those events will occur on the date in question.

So on August 24th, 1998, while market participants recognized that there was a possibility that Sunbeam might go bankrupt, there were other possibilities as well. And market participants did not and could not have known with certainty that Sunbeam would, in fact, enter bankruptcy much later, February 2001. For that reason, the fact that it occurred does not enter into the calculation of the fair market value of Sunbeam stock on August 24th, 1998.

Q. Suppose that Sunbeam stock had increased to \$107 per share in February of 2001. Would that affect the assessment of fair market value of Sunbeam stock on August 24th, 1998?

A. No, for exactly the same reason. Willing buyers and willing sellers on August 24th, 1998 could not have known with certainty that Sunbeam stock would have traded for \$107 per share in February 2001. That event was not known at the time of the transactions, and, therefore, does not enter into the assessment of the fair market value, the price that the willing buyers will pay willing sellers for the asset on August th, 1998.

Q. Does the concept of fair market value apply to assets that cannot presently be sold?

A. Yes, of course.

Q. Would you please explain that?

A. The calculation of fair market value is to estimate the price that would be paid in a hypothetical transaction, hypothetical arm's length transaction between a willing buyer and willing seller. One can perform that calculation whether the asset can, in fact, be sold on a particular day. One can still estimate what the fair market value is.

Q. What impact, if any, do restrictions on the sale of a particular asset have on the fair market value of that asset?

A. Depends a little bit on the facts and circumstances. But often it's the case that buyers prefer assets that they are able to sell to assets that are not able to sell.

And so in the typical case, assets whose subsequent resale will be restricted trade at somewhat lower prices, a discount to the same asset that the otherwise same asset that is freely tradable.

Q. Do corporations issue securities with restrictions on sale?

A. Yes, they do. That happens quite frequently. Corporations privately place stock and other kinds of securities under the relevant regulations, Regulation D and Regulation S of the Securities Laws.

The private placements of unregistered securities are restricted because under the relevant law the stock or other securities cannot be resold in the public markets for a period of two years. And even after two years the subsequent resale of the assets is governed by Rule 144.

Q. Does the fact that these securities have restrictions on their sale mean that they have no value?

A. No.

Q. Are corporate issues of securities with restrictions on sale relevant to the assessment of discounts for marketability?

A. Yes. That's some of the best evidence there is on the effect of restrictions on marketability on the value of securities. There have been a number of published economic studies that have compared the prices that willing buyers actually pay in private placements of restricted securities with the prices that buyers actually pay in private placements of unrestricted securities in order to estimate exactly how much less that buyers will pay for the restricted securities.

So those transactions are very good evidence of the value of liquidity discounts or discounts for the lack of marketability.

Q. Can you give some other examples of assets that are valuable even though they have restrictions on their sale?

A. Yes, a large number of assets in the economy that have restrictions on sale. Many limited partnership interest cannot be resold. Real estate limited partnership interest, oil and gas limited partnership interest. Those are two examples.

Certificates of deposits, term certificates of deposits often have restrictions on resale.

Airline tickets sometimes have transfer restrictions.

Annuities usually cannot be transferred. Those are just a handful of examples. One other good example is nontransferable leases, the right to use particular space at a particular price for a particular period of time often is nontransferable.

Q. Does the possibility that a security may become worthless in the future mean that it has no present value?

A. No. The value of any asset is the discounted present value of the expected future cash flows where the expectations are conditioned on all available information. And in circumstances where there is uncertainty, there's a possibility the asset will go down in value and be worth nothing and also a possibility that it will remain in its current value or perhaps increase in value. The present value of the asset will reflect all of those possibilities weighted appropriately by the probability that each will occur.

Simple example might be a bet at a roulette table. And let's make it a fair roulette table, to ignore the house's edge. If you put a dollar on red at a roulette table, there's a 50 percent chance that you're going to win and get \$2 back. The value of that outcome is \$1, 50 percent of \$2. There's also a 50 percent chance that you'll lose. The present value of that prospect, therefore, is \$1 -- 50 percent chance of \$2 and 50 percent chance of nothing. So that's a simple circumstance where there's a chance that in the future you'll get nothing. But nevertheless, the opportunity today has value.

Q. Couple more background questions before we turn to your valuation of the warrants here. Do you have an understanding as to why the Court is interested in the valuation of the warrants?

A. Yes, I do.

Q. What is that understanding?

A. My understanding is that under the applicable law, when a jury award is made against a nonsettling defendant, the jury award must be reduced by the value of amounts that the Plaintiff received in previous settlements against other defendants. And in ' this case, the warrants were received in settlement of the claims the Plaintiff had against Sunbeam.

Q. As a matter of economics, do you think the settlement date and the issuance date are appropriate valuation dates for this purpose?

A. Yes, I do.

Q. I would like to ask you some questions about the bases for your opinion regarding the valuation of warrants. First, what are warrants?

A. Warrants are a special type of call option.

Q. And what is a call option?

A. A call option generally is the right to purchase an asset, in this case stock, at a particular price, which is known as the exercise price or the strike price, on or before a particular date, which is known as the expiration date.

Q. What, if anything, distinguishes a warrant from an ordinary call option?

A. The principal distinction is that warrants are issued by companies. So when the holder of the warrant exercises its option and pays the exercise price, the company issues new shares of stock to the holder in satisfaction of the obligation it has by virtue of having issued the warrant.

In the case of ordinary call options, which are written by third parties and sometimes traded on exchanges, as was the case for Sunbeam call options, in that case, when the option is exercised, the writer of the option purchases shares in the open market and then delivers those shares to the holder of the option in satisfaction of the claims that are created by virtue of the exercise of the option.

So that is the principal distinction.

The other distinction that is sometimes

mentioned is that warrants tend to have longer terms than options that are usually traded.

Q. Are there general factors that determine the value of warrants?

A. The general factors or the principal factors that determine the value of call options and warrants are, one, the price of the underlying stock; two, the exercise price; three, the volatility of the underlying stock or the underlying equity; and four, the term until expiration of the option of the warrant.

Those are the principal determinants of the value of the security.

Q. What is the relationship, if any, between the price of the underlying stock and the value after call option?

A. The greater the price of the underlying stock, the greater the value of the call option. That should be fairly obvious. When you exercise the option, you get the underlying stock. So if the thing that you get upon exercise is worth more, the right to get it is worth more.

Q. What is the relationship, if any, between the exercise price of the call option and the value of the call option?

A. That's an inverse relationship. The lower the exercise price, the greater the value of the option. And, again, I think that is fairly obvious. The exercise price is what you have to pay to get the underlying stock, and holding everything else constant, the less you have to pay, the more valuable the right is.

Q. You mentioned volatility was one of the factors that determines the value of a warrant. What is volatility?

A. I think the easiest way to understand value volatility is to think about it as the spread of the distribution of future potential prices. So if a stock has a value of, let's say, \$10 today, then there is a distribution of possible values of the stock, let's say, one year from now. And the expected value, the center of that distribution might be \$11 per share. Then you can image and bell curve around the expected value of \$11 a share. And the spread of the bell curve tells you the volatility of the stock. The greater the spread, the higher the potential upside. The lower the potential downside, the greater the volatility. And the more narrow the distribution, the lessor the volatility.

Q. What is the relationship, if any, between the volatility of an underlying stock and the value of a call option for that stock?

A. The greater the volatility, the greater the value of the call option. And that is a function of the exact same spread.

Consider an option to buy a stock at \$10 a share that has the distribution I just described. If the distribution of future value is very tight so that -- let's say we know for certain the stock price is going to be \$10 next year or 10.50, and you know that the option is going to be worth 50 cents; you get that for sure. But if the distribution is very spread out, there's a chance that the option will be worth much more, a chance that the stock might be 20 or 30 or 40. And in those circumstances you'll make a lot more money. As that distribution spreads out, the volatility increases the value of the option increases.

Q. What is the relationship, if any, between the expiration date of a call option and the value of a call option?

A. The longer the term to expiration, the greater the value of the call option. And that also is a function of volatility.

In the example I just gave, we were talking about the distribution of stock prices one year from now. We said it had an expected value of 11 in a particular spread. If you asked about the distribution of prices two years from now, it would have a higher expected value and a still greater spread because the risk is a function of time. So the total risk given the amount of risk per unit time is greater, and the spread is greater. So the longer time to expiration also increases the value of the option.

Q. Are you familiar with the terms "in the money" and "out of the money" as they apply to call options?

A. Yes, I am.

Q. What does it mean for an option to be in the money?

A. An option is said to be currently in the money if the price of the underlying stock exceeds the exercise price. So if the price of the underlying stock was 10 and the exercise price was, let's say, 9, that option would be considered to be currently in the money option.

Q. What does it mean for an option to be out of the money?

A. An option is considered to be currently out of the money if the reverse is true, if the stock price is below the exercise price. So to use the same example, if the exercise price was 9 and the stock price was currently 8, then that would be an option that is currently out of the money.

Q. Does the fact that an option is out of the money mean that it has no value?

A. No, it does not.

Q. Why is that?

A. Because ultimately the value of the option depends on the relationship between the stock price and the exercise price at maturity. And even an option that is currently out of the money has the possibility -- as long as we're talking about a time before maturity -- for the stock price to increase and for the option to end up in the money.

So, again, just to go back to my previous example. If the current stock price is 8 and the option has an exercise price of 9, but the option does not expire for two years, then in that distribution of future values, there will be a number of values that exceed the exercise price of 9 two years from now. And those possibilities weighted by the probability they will occur give the option substantial value today.

Q. I'd like to hand you what's been marked as MS 1088 and MS 1089.

What are these documents?

A. These are documents that we prepared at Lexecon showing the quotations for -- with respect to MS 1088 -- quotations for long-term call options on Sunbeam stock which actually traded on August 13, 1998.

MS 1089 is a similar document showing quotations on August 24, 1998. Just taking a look at MS 1088, just to explain how to read the document, the document -- first in the first column -- reports the strike or exercise price for a particular option. So 7.50 is an option that gives you the right to buy Sunbeam stock for \$7.50.

The second column is the expiration date. And here we have listed just the long-term options that were trading in Sunbeam stock on this date. These are all options that expired in January of 2001.

Then we list the quotations that were available during the day for these options. The bid is the price that market makers would pay to buy the options. And the offer is the price that market makers would require if someone wanted to -- if the market network is going to sell the options.

Then finally report the volume of trading that actually occurred on that day. Thirty refers to contracts. Thirty contracts on Sunbeam stock with an expiration price of \$7.50 and an expiration date January 2001 traded on August 13, 1998.

The other rows I think are self-explanatory. They're just for different strike prices.

Q. Taking a look at MS 1088, is this document relevant to your testimony regarding in the money and out of the money options?

A. Yes, it is.

Q. Would you please explain that?

A. Yes. The closing price of Sunbeam stock on

August 13, 1998 was approximately 8.56. So two of these options, the options with the strike price of \$10 and the options with the strike price of \$12.50, were out of the money. The exercise price exceeded the stock price on August 1998.

Nevertheless, these options have substantial value. Buyers and sellers were trading the \$10 options at prices ranging from 2 and seven-eighths to 3 and a quarter. And buyers and sellers were trading the options with an exercise price of 12.50 at prices ranging from 2 and three-eighths to 2 and three-quarters.

The options with an exercise price of \$7.50 were in the money, but not that much. The difference between the stock price of \$8.56 and the strike price of \$7.50 is about \$1.06. Even though that difference is only \$1.06, someone who exercised the option on that day would only make 1.06 if they were foolish enough to do so. You could trade that option. You could buy and sell it at prices ranging from 4 to 4 and an eighth, reflecting the possibility that the stock price could increase a lot in the future.

Q. Take a look at MS 1089. Is this document relevant to your testimony regarding in the money and out of the money options?

A. Yes.

Q. Would you please explain that?

A. August 24, 1998 Sunbeam stock was trading at about 8.81 per share. So, again, two of the options on this page, the options with the strike price of \$10 and the options with the strike price of \$12.50, were out of the money. Nevertheless, they were traded, at least with respect to the options with the strike price of \$12.50, and the prices range from 2.50 to 2 and seven-eighths.

The other two options are in the money, but the trading price -- the trading prices greatly exceed the stock price and exercise price on August 24, 1998.

Q. Where did the information that goes into MS and MS 1089 come from?

A. There's a company called Option Metrics that makes high quality options data available to market participants. And we just obtained the data on Sunbeam call options from them. I used this data both in these exhibits and some other exhibits that we'll talk about later.

Q. Is it standard and customary to use this type of data if pricing call options?

A. Yes.

MS. BEYNON: Your Honor, I move to admit MS 1088 and 1089 into evidence.

MR. MARMER: No objection.

THE COURT: Okay.

(Defendant's Exhibits 1088 & 1089 were marked in evidence.)

BY MS. BEYNON:

Q. I'd like to turn now to the methodology for valuing call options, is there a standard method?

A. Yes, it's called the Black-Sholes Formula.

Q. Could you please explain that a bit?

A. Yes. In the mid 1970s or early 1970s Professor Myron Sholes of the University of Chicago and Professor Fisher Black, who at the time I believe was at MIT, named a formula which is named after them, the Black-Sholes Formula, and was and is considered a break-through in finance.

It is a formula which tells you the price of a call option as a function of five variables: The stock price, the exercise price, the expiration date, the volatility of the underlying stock and the current interest rate.

So it's relatively unique in finance. It's a formula that tells you what a security is worth based on things you can go and look at, you can go and measure. And textbooks now in finance recognize this development as one of the seven greatest ideas in finance.

And Myron Sholes in 1977 received a Nobel Prize in economics for his role in developing the Black-Sholes Formula. And after its development the formula has been used not only to value ordinary call options on the exchanges, but also to value warrants, to value entire corporations, to value convertible securities. And the general principles behind the development of the formula have been used to develop other formulas to value other kinds of derivative securities and financial instruments. And that's what has allowed the overall market for derivatives and financial instruments to develop and explode since the early 1970s.

Q. You mentioned that the Black-Sholes methodology is used for valuing warrants. Could you please explain that a bit?

A. Yes. The Black-Sholes Formula is used in two different variations -- variations of Black-Sholes model that are used to value warrants. The first option-like warrant valuation. And in option-like warrant valuation one simply applies the Black-Sholes Formula as is to the warrants in order to obtain a value for the warrants. The second approach is what's known as the dilution adjusted Black-Sholes model. And in the dilution adjusted Black-Sholes model one makes certain adjustments to the Black-Sholes Formula, which I'll describe after we talk about the Black-Sholes Formula, in order to come up with a slightly different formula for valuing warrants.

Q. What are the inputs to the dilution adjusted Black-Sholes Formula?

A. As I mentioned in my previous answer, the inputs into the regular Black-Sholes Formula are the stock price, the exercise price, the expiration date, the volatility of the underlying stock and the risk free rate of interest. To go from the regular Black-Sholes Formula to the dilution adjusted Black-Sholes Formula three adjustments are made.

First, instead of using the stock price in the formula, one uses the equity value of the company per share of stock. The equity value of the company per share of stock is a number that is somewhat higher than the stock price.

So just stopping there for one second, making that change alone without making the other changes I'm going to talk about would result in estimated warrant values that are higher than the values you would get from the ordinary Black-Sholes Formula because you're using, in effect, a higher stock price in the formula. That's the first adjustment.

The second adjustment is that the dilution adjusted Black-Sholes Formula uses the volatility of the firm's equity instead of the volatility of the firm's stock in the formula. And, again, the effect of that adjustment is to increase the estimated values, because the volatility of the firm's equity is somewhat higher than the volatility of the firm's stock. And then finally there is a third adjustment in the dilution adjusted Black-Sholes Formula, you multiply the result by a factor that accounts for the number of additional shares that will result when the option is exercised.

So if there are N shares outstanding currently, let's say 100, and there will be M shares issued when the warrant is exercised, let's say 20, then the dilution factor is 100 divided by 120, N divided by N plus M. And that third factor counteracts the effect of the other two factors so that the results that one gets in most cases using the dilution adjusted Black-Sholes Formula are almost exactly the same as the results one gets by just doing what's called option-like warrant valuation. But both approaches are used in finance.

Q. Of these two methodologies, the option-like warrant methodology and the dilution adjusted Black-Sholes methodology, is one preferable to the other?

A. Neither is preferable provided they are both implemented correctly. However, it is much easier to implement the option-like warrant valuation methodology, because an option-like warrant valuation methodology one only needs to know the volatility of the underlying stock, whereas in the dilution adjusted Black-Sholes Formula, one has to know the volatility of the equity of the firm.

The former, the volatility of the underlying stock, is relatively easy to calculate using data on traded options that is available or using historical stock prices if traded options do not exist. The latter, the volatility of the equity cannot be calculated correctly unless the value of the warrants themselves trade. For that reason published articles in finance have recommended that in most cases, including cases that would be applicable here, the simplest thing to do is an option-like warrant valuation.

THE COURT: I want to make sure I'm understanding your testimony. When you say option-like warrant valuation, are you saying you simply apply the Black-Sholes Formula?

THE WITNESS: Yes.

THE COURT: So we're saying we're doing Black-Sholes, we understand these are warrants, there's going to be some dilution, but we think in the long run this is going to be a fair estimate?

THE WITNESS: Yes, because the effects cut in both directions. What academic research has shown is that, properly implemented, both formulas will give you the same value.

THE COURT: Are you telling me that sort of from a theoretical point of view, the dilution adjusted calculation would be better because it takes account of the dilution, but it's just hard to apply in practice because it's hard to get a volatility component for equity?

THE WITNESS: It's not any better, it's the same and it's hard to apply.

THE COURT: Well, are you saying it's the same or simply that empirically it turns out they end up being similar most often?

THE WITNESS: Well, whether it's better or not depends on what assumption one makes about the distribution of underlying stock prices and equity values. If one assumes that the distribution of underlying equity values, it's what's called log normal, then the dilution adjusted model is better, but in most cases it makes no difference.

THE COURT: You're just saying in those cases it makes no difference because we have imperfect information anyways.

THE WITNESS: Correct, if alternatively one assumes that stock prices are distributed, then the option-like valuation is better and the dilution adjusted model will give you the same answer in most cases.

BY MS. BEYNON:

Q. In your opinion, Mr. Ross, are these two valuation methodologies you've discussed applicable to the warrants here?

A. Yes, with a couple of caveats to take into account, special circumstances with respect to these warrants. There are two special circumstances that I believe have to be taken into account. First, these warrants gave the holder the right to buy a lot of stock, 23 million shares of Sunbeam stock. If these warrants had been exercised, the holder would have ended up with a large percentage block of Sunbeam stock, approximately 19 percent of the shares outstanding. That block would have been the largest single block held by any investor in Sunbeam.

There is a literature in finance which shows that on average when willing buyers and willing sellers trade large percentage blocks, the prices that get paid are substantially in excess on average of the exchange price for ordinary shares of the company's stock. In other words, blocks are worth more per share. They have a higher fair market value per share than exchange traded shares. And that is one factor that has to be taken into account in valuing the warrants.

The second special circumstance is that there were certain restrictions on the resale of these warrants. And for the reasons we discussed earlier about the effect of restrictions on the value of financial assets, I think those restrictions also have to be taken into account in valuing these warrants.

Q. I'd like to ask you a couple of questions about each of these two considerations. First, on the large block issue, how does the value of large percentage blocks compare with the value of Exchange traded shares of company stock?

A. On average, willing buyers pay willing sellers more for large percentage blocks of stock on a per share basis than what willing buyers pay willing sellers for Exchange traded shares.

And there is a particular article that I cite in my report by Professor Michael Barclay and Professor Clifford Holderness that analyzes the actual data for large block trades involving the largest percentage blocks of the firms that are traded. And they find that- on average the block premium is 20 percent. In other words, the price per share of the large percentage block is 20 percent higher than the Exchange price.

Q. In your opinion is it appropriate to apply a premium in valuing the shares of Sunbeam stock that CPH had the right to acquire upon the exercise of the warrants?

A. Yes, I do.

Q. And can you explain that a bit?

A. Yes, because of this finding in the academic literature in the Barclay and Holderness article that blocks trade at 20 percent premiums on average, I think it is appropriate to apply a premium of at least 20 percent to the value of the underlying shares when implementing the warrant valuation formulas.

THE COURT: Can I -- when you say 20 percent of the underlying shares, are you saying you used the control premium to value the warrants or to value the stock assuming the warrants were exercised?

THE WITNESS: To value the stock that the warrant holder has the right to exercise. So just to use round numbers, if the exchange traded shares were trading at \$8 a share, but the warrant holder had the right to buy a large percentage block, then the shares that the warrant holder has the right to buy are worth more than \$8 per share, worth \$9.60 per share if you use the 20 percent premium. So you should value the warrant as the right to buy shares worth \$9.60, not the right to buy shares that are worth \$8.

THE COURT: Okay, you're saying for applying Black-Sholes to value the warrants?

THE WITNESS: Correct.

THE COURT: What would be the response to the contention that if you value it that way you are assuming they're going to be exercised as a block?

THE WITNESS: I think you are assuming they will be exercised as a block, but it's in the warrant holder's interest to do that. In other words, typically large percentage blocks aren't broken up. When they trade, they trade as blocks, because if you break up a large percentage block, you dissipate the value, you create a loss that you can avoid. Same thing is true for the warrants. It's in the interest of the holder of the warrant to exercise the entire block at once.

Moreover, the way call options normally work, particularly dilution adjusted call options on a stock like Sunbeam that's not paying dividends is that the optimal strategy is to wait until maturity and then exercise all the options at once.

It's hard to come up with a scenario where putting to one side the block premium one would want to exercise part, but not all of the warrants.

THE COURT: Other than, I assume, all things being equal, the warrant holder wants to maximize his choices.

THE WITNESS: He wants to maximize the value of what he gets.

THE COURT: Right. And so you're just going to have to educate me. It would strike me that you would do some slightly lower premium than the 20 percent block premium to compensate the warrant holder for having given up, in essence, the ability to exercise fewer than all the warrants at once.

THE WITNESS: I think warrant holders always have the ability to exercise fewer than all the warrants at once, but that ability is not valuable. Because the optimal exercise strategy is always to either wait until maturity, if you want to hold the warrants, or to sell the warrants. There is no value to exercising the warrants prematurely.

THE COURT: But you're assuming, as I understand it, for all purposes the warrant holder will want to exercise all the warrants at once for purposes of valuation, that's your assumption.

THE WITNESS: And will not want to exercise early. Just like the example in the money stock options, the 7.50 stock options that were worth \$4 on the date the stock was trading at 8.56. You could exercise those options on that day, but if you did that you would cost yourself money because you could sell the options for 4, but you'd only make \$1.06 if you exercised them. That's the same choice that the warrant holder faces.

There is no value to the ability to exercise early as long as it is a dilution adjusted warrant and the company is not paying dividends. And the reason I'm making those exceptions --

THE COURT: Explain to me, just so I understand, why is it always in the warrant holders best interest to hold the option until the end of the term?

THE WITNESS: As they say in textbooks: Options are always better alive than dead. Because when they are alive you delay the payment of the exercise price until the end of the term. And there's a chance the stock price will go up further and the option will increase in value. When you exercise, you give up, you have to pay the exercise price now so it cost you more in a present value sense. If it's \$10 a share, you'd rather pay it five years from now than pay it today.

THE COURT: Is this to assume you're going to continue to hold the stock?

THE WITNESS: Your choices are either to sell the warrant or the option or to hold --

THE COURT: You're not talking about holding the warrant, you're saying you might have sold it before the end of its term.

THE WITNESS: Yes.

THE COURT: Okay, I'm sorry.

BY MS. BEYNON:

Q. Mr. Ross, have you reviewed the rebuttal report that Dr. Nye submitted in this litigation?

A. Yes, I have.

Q. Is this the report that you reviewed?

A. Yes.

Q. On page 8, paragraph 12 Dr. Nye states that he is not aware of studies of companies in a difficult or declining state where controlling shareholders are able to sell their stake at a premium?

THE COURT: I'm sorry, page 12?

MS. BEYNON: 8, paragraph 12.

THE WITNESS: It's a little confusing, because paragraph 12 starts on page 7 and there are a series of bullet points that carry over to page 8.

BY MS. BEYNON:

Q. We're looking at the bullet point where Dr. Nye writes that he is not aware of companies in a difficult or declining state where shareholders are able to sell at a premium. What's your reaction to this criticism?

A. It's what one of my professors referred to as proof by absence of counter example. It is not only a conceptually invalid method of establishing something, but you can't find a counter example, therefore, it doesn't exist, but it also turns out that it is an incorrect state, a description of the world, because I am aware of a published academic study that finds exactly this, that acquisitions occur of companies in financial distress, premiums are paid for companies that are in financial distress and in fact the premiums that are paid when companies in financial distress are acquired are approximately the same as the premiums that are paid for other companies.

Q. You referenced an article that supported your conclusion, do you recall who the authors of that article?

A. Clark and Ofek.

Q. I'd like to hand you what's been marked as MS 1087.

Is this the copy of the article that you referred to?

A. Yes, it is.

Q. Can you explain how this is relevant to your opinion?

A. Yes. Let me point out at least a few of the relevant sections. As you can see, the article is entitled Mergers as a Means of Restructuring Distressed Firms and Empirical Investigation.

And in the abstract it begins by stating that the authors examined 38 takeovers of distressed firms. There's a description of how they identify those distressed firms in the section beginning page towards the bottom of the page called sample description. And they explain that they start with a sample of all acquisitions reported in a particular source during the period from 1981 to 1998. They then impose an initial screen where they look for companies that had substantial stock price declines market adjusted either in the prior year or the prior three years. That's all described on page 543.

MR. MARMER: Your Honor, I have a hearsay objection to the witness reading this treatise in as if it's his own testimony. It's hearsay.

THE COURT: What's the response to hearsay?

MS. BEYNON: The witness is responding to how this article is relevant to his testimony. And expert witnesses are entitled to rely on hearsay in forming their opinions.

THE COURT: But can't be used as a conduit to get the hearsay. I would sustain the hearsay objection.

Why don't we take a break, we'll be back 5 minutes.

(A recess was taken.)

THE COURT: Okay. Go ahead.

MR. MARMER: Your Honor, we move to strike the testimony that began with the recitation from the treatise as hearsay and improper bolstering of an expert the testimony that began with the description from the materials on.

THE COURT: I would agree at this juncture it's hearsay and it should be stricken.

BY MS. BEYNON:

Q. Turning back to the point that we left when we broke for a few minutes we were addressing Dr. Nye's statement that he's not aware of studies of companies in a difficult or declining state where controlling shareholders were able to sell their stake at a premium. Are you aware of examples of companies in difficult circumstances that were able to sell their shares at a premium?

A. Yes.

Q. Can you think of some examples for the Court?

A. Yes, the article I mentioned previously studies 38 of them and lists some specific examples in appendix.

In addition, at Lexecon we collected a number of examples of companies that were acquired at premiums that were, at least using Dr. Nye's characterization, in difficult or declining circumstances.

Q. I'd like now to turn to the second special consideration you mentioned, restrictions on sales.

What is your understanding of the restrictions on sales of the warrants that CPH took in settlement with Sunbeam?

A. My understanding is that CPH agreed not to sell half the warrants for a period of three years from the date of the settlement agreement. And in addition, the warrants, none of the warrants were registered at the time they were at issue, although CPH received registration rights. As part of the settlement agreement they had the right to demand Sunbeam register the securities.

Q. And what date did they have the right to demand that Sunbeam register the securities?

A. I think at any time subject to the usual conditions about Sunbeam's ability to do so, certain exceptions if Sunbeam was engaged in unusual corporate transaction at the time, things of that nature.

Q. How does the value of restricted securities compare with the value of unrestricted securities?

A. In general, on average the value of restricted securities is somewhat lower than the value of unrestricted securities. There have been a number of academic studies including very recent academic studies in the last year or two that have studied this exact question. And in each of the studies they use the methodology that I described earlier, they compare the prices paid in private placements of restricted securities with the prices paid in otherwise identical private placements of unrestricted securities. And those studies report that the effect, the additional discount for restrictions ranges from approximately 7 percent to approximately 18 percent of the purchase price.

Q. Is the term liquidity discount sometimes used to describe what you just testified about?

A. Yes, sometimes the term liquidity discount is used, sometimes it's referred to as a discount for lack of marketability.

Q. In your opinion what is the liquidity discount applicable to the warrants here?

A. In this case I applied a liquidity discount of 15 percent in my calculations, which is at the high end of the range that I mentioned previously of 7 to 18 percent, but I applied the discount to all the warrants in effect not just the 50 percent of the warrants that could not be sold for three years. I think the choice of the number within that range is, by the nature of the evidence, somewhat arbitrary, but I thought it was reasonable to pick a number at the high end of the range and, if anything, be favorable to the Plaintiff in these calculations.

Q. Now, Dr. Nye also states in his report in paragraph 6 that the Black-Sholes model does not account for the possibility of bankruptcy. What is your reaction to that criticism?

A. I think that that criticism could be technically right in the sense that the Black-Sholes model is derived based on an assumption about stock prices in which the stock price never literally gets to zero, but completely irrelevant for several reasons.

First, the distribution assumption for stock prices allow stock prices to get arbitrarily low, so while stock prices cannot get to zero in the assumed distribution they can get to .0000000001. For purposes of the valuation, the Black-Sholes Formula assigns zero value to states of the world where the stock price ends up below the exercise price. So it doesn't matter whether the formula treats the possibility of bankruptcy incorrectly as the possibility of a stock price going to .000001 instead of zero. It's going to value that state of the world as zero in any event.

That's the first point.

The second point is that in -- it's a textbook finding with respect to the Black-Sholes Formula that even though this distributional assumption is not perfect, the Black-Sholes Formula does an excellent job in pricing traded options in the

real world. And traded options trade on actual companies, each of them has the possibility of going bankrupt. If the possibility of bankruptcy made the Black-Sholes model inaccurate, then you would not have this empirical finding that the Black-Sholes model does such an excellent job of pricing real world options.

Third, the way that the Black-Sholes model is implemented and the way I implemented the model, it is self-correcting for any bias, because what I did is determine the implied volatility, that is, the volatility that when used in the Black-Sholes model results in the actual prices at which market participants actually bought and sold call options on Sunbeam stock in the real world. So even if in some technical sense the Black-Sholes model, if applied using the, quote, true, end quote, volatility of Sunbeam stock would result in a miscalculation of the value of the options, by using the implied volatility, the volatility that when actually plugged into the formula results in the actual prices market participants pay, you would correct any bias.

So I believe that Dr. Nye's criticism is completely irrelevant. It has nothing to do with determining the fair market value of the warrants.

THE COURT: Can I just -- I want to make sure I understand. Explain to me the difference between two and three.

THE WITNESS: Two is that in studies that have compared Black-Sholes model valuations with the actual prices at which options trade, those studies have found that the predicted values and the actual values are very close. There's no trading strategy that you could use to take advantage of any bias in the Black-Sholes value.

And that occurs even though obviously in the real world many companies can go bankrupt, many companies do go bankrupt.

THE COURT: Are you saying empirically it seems to work so it can't be that bad of a problem?

THE WITNESS: Correct.

THE COURT: Number one you're saying, I recognize it's a problem, it's infinitesimally small, because we can get it close to zero as would make sense, so it's no big deal.

THE WITNESS: That's exactly right.

THE COURT: So for three are you just saying as applied empirically here you found the model valid?

THE WITNESS: I'm saying as long as the model is applied using what are called implied volatilities, volatilities that are calculated using actual transactions and actual options, any bias will be corrected because there will be an offsetting adjustment to the offsetting volatility. The whole purpose of the calculation of implied volatility is to find the volatility that when used in the model in the formula results in values that match actual prices.

THE COURT: Okay. So you're saying when you did that exercise here it worked, is that all you're telling me?

THE WITNESS: I'm saying here, and we haven't gotten to it yet, but the volatilities I used in the calculation are implied volatilities. So the criticism does not apply to my calculation. The criticism might apply to a calculation that uses some other measure of volatility, but not to a calculation that uses implied volatilities.

BY MS. BEYNON:

Q. I'd like to refer you to your report MS 1112. I'll hand you a complete copy, I think opposing counsel and the Court already have a copy of this.

Could you please turn to Exhibit F of that report, Mr. Ross?

A. Yes.

Q. What is this exhibit?

A. Exhibit F sets forth my calculations, my estimates of the fair market value of the warrants on the valuation date shown August 12, 1998. That's the date of the settlement agreement.

Q. You previously mentioned there were several inputs to the Black-Sholes Formula, the price of the underlying stock, the exercise price of the warrants, the expiration date of the warrants, the volatility of the underlying stock and the risk free rate of interest; is that correct?

A. That's correct.

Q. Let's start with the price of the underlying stock.

In order to value the warrants on August th, 1998, what price did you use?

A. Oddly enough, I used the price on August th, 1998, the day after August 12th, 1998 for reasons that I'm sure we'll get to.

Q. Could you explain those reasons, Mr. Ross?

A. Yes. The settlement agreement was dated August 12th, 1998, but the settlement agreement was announced publicly and disclosed to market participants after the close of trading on August 12th, 1998.

Market participants therefore could not reflect the information about the settlement agreement itself in the prices at which they were willing to trade Sunbeam stock until the next day, August 13th, 1998 when trading resumed. On that day Sunbeam stock price increased sharply by more than 20 percent. And market participants attributed the increase completely to the information which had been disclosed about what had occurred on August 12th, 1998.

Therefore, I believe that the price on August 13th, 1998 is a better estimate of the value of Sunbeam stock on August 12th, 1998, given all the available information, not only about what market participants knew when they were trading Sunbeam stock on August 12th, 1998, but also what they didn't know, the settlement agreement which wasn't disclosed until after the close of trading. So for that reason I think it is appropriate to use the August 13th, 1998 price to estimate the value of the warrants on August 12th, 1998 given all of the available information.

Q. Would you please turn to Exhibit C of your report.

What is this exhibit?

A. Exhibit C is a Dow Jones news service article on August 13th, 1998, commenting on the increase in Sunbeam stock price on news of the settlement agreement with MacAndrews & Forbes.

Q. Is Exhibit C relevant to your testimony concerning the effect of the settlement agreement of

Sunbeam stock on August 13th, 1998?

A. Yes.

Q. Could you please explain that?

A. Yes, because the exhibit describes what I stated in my previous answer that the settlement agreement was disclosed to market participants after the close of trading on August 12th, that in response to the settlement agreement the price of Sunbeam stock increased dramatically when trading resumed. I'm not aware of any other reason for the increase in Sunbeam stock price, no event that occurred on August 13th as opposed to an event that occurred on August 12th that was not disclosed to market participants until after trading on August 12th that can explain the increase in the price of Sunbeam stock on August 13th.

Q. Let's return to Exhibit F of your report, Mr. Ross, which demonstrated the valuation of the warrants on August 12th, 1998.

I notice your exhibit reports estimated values for a range of volatilities. Could you please remind us of what the term "volatility" means?

A. Yes, with respect to the option-like warrant valuation which is shown in the bottom four rows of the table, the relevant volatility is the standard deviation of the stock return. So if you look in the column labeled, for example, 65 percent, if you're looking at option-like warrant valuations, you are looking at valuations assuming a standard deviation of stock returns of 65 percent per year.

With respect to the dilution adjusted Black-Sholes method calculations, that's the middle five rows, in those calculations a relevant volatility is the volatility of the equity per share of stock. And if you were to block at values in that particular column, you would be thinking about 65 percent equity volatilities, which would be consistent with lower stock volatilities.

So if you want to compare dilution adjusted Black-Sholes calculations with option-like warrant valuations you have to use a higher volatility in the dilution adjusted Black-Sholes calculations. You can't compare down the column.

Q. Is there a reason to prefer a particular figure for volatility in the warrants that CPH took in the settlement?

A. Yes. At least with respect to the option-like warrant valuation, I think the data show that 65 percent is the best estimate for the relevant volatility, the volatility of the common stock returns as of both the date of the settlement agreement, August th, 1998 and the date the warrants were issued August th, 1998.

Q. And how did you arrive at the conclusion that 65 percent is the right number if you use the option-like warrant valuation methodology?

A. I looked at the implied volatilities as calculating reported by Option Metrics for long term call options on both dates.

Q. What is implied volatility?

A. Implied volatility is what we discussed a few minutes ago. It's the volatility that when plugged into the Black-Sholes Formula gives values from the Black-Sholes Formula that are consistent with observed market prices.

So if you know a particular option was trading at let's say \$4, you know what the stock price is, you know what the exercise price is, you know what the expiration date is and you know what the interest rate is, you can say, what volatility -- what does the volatility have to be so that the Black-Sholes Formula will give me a value of \$4 for this option? That volatility is known as the implied volatility.

Q. Would you please turn to Exhibit E of your report?

A. Yes.

Q. What is this exhibit?

A. Exhibit E reports the implied volatility of Sunbeam stock returns for various dates based on the Option Metrics data. The volatility shown are for long term 730 day or two-year call options that have what's known as a delta of 0.8. And as of August 12th, 1998 the implied volatility was 65.12; on August 13th, 1998 it was 66.72; on August 24th, 1998 it was 69.14; in December of '98, 78.07; in December of 99, 79.12.

So all of those numbers are equal or greater than 65 percent. The number that I had indicated previously was what I thought would be the best estimate to use.

THE COURT: I want to follow as we go along.

Is Black-Sholes, is the basic concept behind that that an investor is rational and he's going to buy an option at a price where given sort of volatility expected value is somewhat better than the -- explain to me the theory behind it.

THE WITNESS: The formula is derived based on an arbitrage proof that if the price didn't equal what the formula implies that it would be possible to trade either options or a combination of options and stock and bonds and make money for sure with zero risk. There would be a money machine.

THE COURT: Right.

THE WITNESS: And what the empirical studies show is that the formula works, it accurately values call options. Basically, the formula has to be right because if it wasn't right, there would be a costless opportunity to make money, you could invest zero and make money for sure.

THE COURT: When we're talking about implied volatility we're saying this is the price at which people purchase the options. We know the implied volatility rate they're applying to figure out that this is a transaction they should make.

THE WITNESS: Right. Maybe I could give an example. Suppose that you knew that the temperature outside the courtroom was always 10 degrees higher than the temperature inside the courtroom. If you measured the temperature inside the courtroom and it was 70 degrees, that would imply that the temperature outside the courtroom was 80 degrees. You're solving a formula that says outside temperature equals inside temperature plus 10.

THE COURT: But are we looking at the investor? Do we have to go back and check and see what the volatility was?

THE WITNESS: You can do that, there are studies that do that. Study by Kuras and Manster did exactly that and found that investors estimates of future volatility are pretty good. Better than the estimates you would get in using historical data and trying to project the historical data. But obviously in the real world things change, just like stock prices change, volatilities change. So while investors' estimates of future volatility are good on average, they're not right with certainty. But they are the estimates that investors actually use in deciding what prices to pay for options on a particular date.

THE COURT: Thanks.

BY MS. BEYNON:

Q. If we could take one last look at Exhibit E to your report. How is that relevant to your testimony regarding implied volatilities?

A. This I think supports my testimony that the relevant volatility used in the calculations is at least 65 percent.

Q. Turning back to Exhibit F to your report. At a volatility of 65 percent, what value did you obtain for the warrants?

A. Using the option-like warrant valuation and before application of liquidity discount, the value of the warrants is \$6.95 per share rounding. The total value of the warrants again before the liquidity discount is approximately 160 million dollars. And with the 15 percent liquidity discount that I discussed previously, the total value of the warrants is approximately 136 million dollars. And that's the number that I testified about previously. That's my best estimate of the fair market value of the warrants on August 12, 1998.

Q. You previously said that in calculating the value of the warrants using the dilution adjusted Black-Sholes model the volatility input should be higher, why is that?

A. Because in the dilution adjusted Black-Sholes model, the relevant volatility in the formula is the volatility of the equity on a per share basis not the volatility of the stock. And the firm's equity includes both its stock and its warrants, because the warrants are more volatile than the underlying stock, the equity is more volatile than the underlying stock.

And, again, this is a textbook point. And a point that is made in the literature on valuing warrants that the volatility of the equity is greater than the volatility of the stock. And that's the appropriate thing that goes into the dilution of adjusted Black-Sholes Formula.

Q. Would you please turn to Exhibit G to your report.

A. Yes.

Q. What is this exhibit?

A. Exhibit G is a calculation of the value of the warrants on August 12, 1998 assuming that no large block premium is applicable.

Q. Could you please explain the conclusions you reached that are expressed in Exhibit G?

A. Exhibit G otherwise is just like Exhibit F except that it assumes that no large block premium is applicable. And the reason I prepared Exhibit G is that you can use Exhibit G to compare the estimated value of the warrants assuming no large block premium is applicable with the actual prices at which call options on Sunbeam stock actually traded.

So it allows you to check the results of the model by comparing the estimated values with the prices of actual options.

Q. And the prices of actual options were set forth in an exhibit we looked at earlier, is that not correct, MS 1088?

A. Yes.

Q. Would you please explain for the Court the comparison between MS 1088 and Exhibit G to your report, what your opinion is in that regard?

A. Yes. The most comparable traded option as of August 13th, 1998 is the option that has a strike price of \$7.50 and an exercise price of January 2001. That option was trading for between 4 and 4 and an eighth per share on August 13, 1998.

Now, the warrants necessarily are more valuable than this option for two reasons. First, the warrants had a lower strike price. The strike price of the warrants is \$7 per share, the strike price of these options is \$7.50 per share. And as I explained previously, the lower the strike price, the greater the value.

The more important difference is the expiration date. The warrants do not expire until August of 2003, but these options expire in January 2001. When you lengthen the expiration date, you greatly increase the value of the option. So you would expect the warrants to be more valuable than these options. And that's what the calculation in Exhibit G shows. Using the volatility of 65 percent, the warrant value per share is 5.46, an amount which somewhat exceeds the value of these options at 4 and an eighth.

I also performed a calculation like Exhibit G for warrants that expire in January 2001 with an exercise price of \$7.50. And the value I obtained was slightly in excess of \$4 per share, exactly consistent with the prices of the call options.

So I believe that Exhibit G, this other calculation and MS 1088 in conjunction show that the market data confirm the reasonability of the calculations that I did.

Q. In Exhibit G, which calculates the value of the warrants assuming no large block premium, what value did you ascertain there was for a volatility of percent?

A. I'm sorry. I'm not sure I understand your question.

Q. Sure. Looking at Exhibit G, which as I understand your testimony calculates the value of the warrants assuming no large block premium; is that correct?

A. Yes.

Q. What is the value of the warrants that you obtained assuming a 65 percent volatility?

A. On a per share basis, \$5.46 approximately before liquidity discount, that's in the third row from the bottom in the 65 percent column, a total warrant value of approximately 126 million dollars before a liquidity discount. And a total value of 107 million approximately after liquidity discount.

Q. Thank you. Would you please turn to Exhibit H of your report?

A. Yes.

Q. What is this?

A. Exhibit H is like Exhibit F except the valuation date has changed. This is a valuation of the warrants as of August 24, 1998, the date on which the warrants were actually issued.

Q. Assuming a volatility of 65 percent, what value did you obtain for the warrants on August 24th, 1998?

A. The per share value before liquidity adjustment is \$7.18. The total value again before liquidity adjustment is approximately 165 million dollars. And the total value after the 15 percent liquidity discount is approximately 140 million. And, again, that's what I testified to that is my best estimate of the value of the warrants on August 24, 1998.

Q. Would you please turn to Exhibit I of your report. What is this exhibit?

A. Exhibit I is analogous to Exhibit G except that again the valuation date has changed. This is a valuation of the warrants on August 24, 1998, the date the warrants were issued assuming no large block premium is applicable.

Q. Why did you perform this calculation?

A. To do the same kind of check.

Q. And did you compare the actual values of call options to those that you calculated in Exhibit I?

A. Yes. I think earlier you handed out MS 1089, which is quotations for actual call options that were traded on August 24, 1998. There are two options that you can compare the warrants to, the \$7.50 exercise price options that expire in January 2001, you'd expect those to be worth somewhat less than the warrants and they are. The price of those ranged from 4 to 4 and three-eighths per share. The estimated warrant value is 5.65. I think you also could compare the warrants to the options with the \$5 strike price. There are two differences there. The options with the \$5 strike price have a lower strike price, so that makes those options somewhat more valuable than the warrants all else equal, but they also have a much earlier expiration date January '01 versus August '03, and that makes them less valuable. There the prices range from 2.52 to 5 and five-eighths.

Again, while it's not shown here, we did calculations like Exhibit I where we changed the expiration price to \$7.50 and the expiration date to January 2001. And the values were derived in the 65 percent volatility column using the option-like warrant valuation were within the range of actual prices for the relevant call options.

Q. So just to summarize, what's your conclusion as a result of this comparison between Exhibit I and MS 1089?

A. That actual market data on the price that willing buyers were willing to pay willing sellers for options on Sunbeam stock confirm the reasonableness of my method for valuing the warrants.

Q. I'd like to show you what has been marked as MS 513.

Your Honor, I believe you already have a copy of this. This is the document that the Deloitte and Touche witness referred to.

THE COURT: Yes.

BY MS. BEYNON:

Q. Have you previously reviewed this exhibit?

A. Yes, I have.

Q. Would you please turn to the page that is Bates labeled CPH 0647028?

A. Okay.

Q. You will see that it states that the Blackstone report estimated a value of the warrants to range from 30 million to 107 million with a mid point of 70 million. Do you see that statement?

A. Yes, I do.

THE COURT: I'm sorry, where is that?

THE WITNESS: Last full paragraph.

MS. BEYNON: Entitled Valuation of the Warrants.

BY MS. BEYNON:

Q. Do you agree with that assessment of the valuation of the warrants?

A. No, I don't.

Q. Why is that?

A. I think you need to turn to the next page, where it describes in greater detail the inputs that were used in the calculation and the reason that that result was obtained.

Blackstone, like me, used the Black-Sholes Formula. And I think it's unclear from the document whether it's the dilution adjusted Black-Sholes Formula or the option-like warrant valuation method, but I'm not sure that matters one way or the other.

But to get the 70 million dollar figure, Blackstone made particular assumptions about volatility, you can see the boxed range in the center of the page, and the preferred estimates according to Blackstone are for volatilities of 45 percent or 55 percent. And for reasons I described earlier, I believe that is too low. The correct volatility to use if it is the option-like warrant valuation is 65 percent. And if it is the dilution adjusted Black-Sholes model, something even higher.

The other thing that Blackstone did is look at a range of equity values for I believe the entire firm ranging in the boxed area from 500 million to a billion dollars.

Now, on August 13, 1998, the value of Sunbeam's shares outstanding at market value was approximately 850 million dollars. So a number between million and a billion dollars, but with a control premium of 20 percent, the number to put into the Black-Sholes Formula would be 20 percent more than that, so a number slightly in excess of the billion dollar number.

It's possible to look at other numbers in this table and derive what I believe is a better estimate of the value of the warrants. Looking, for example, at the 65 percent volatility column and the entry for an equity value of a billion dollars Blackstone derived a value for the warrants of 160 million dollars. And looking at an equity value of 1.25 billion dollars, a warrant value of 155 billion dollars, my estimate for this date of 136 million dollars is between those two numbers.

So I think their calculations confirm my calculations. And the reason their conclusion is different from mine is they used an equity value that was too low and a volatility that was too low.

Q. Could you please now turn to the second memo that is part of MS 513, CPH 0647031. It's a memo dated March 15th, 1999. Have you reviewed this memo?

A. Yes.

Q. There are two valuation analyses attached to this memo, CPH 00647034 and CPH 0647035. Have you reviewed these?

A. Yes, I have.

Q. Can you please explain these to the court?

A. Yes. They're a little bit hard to read, but I think I can.

First, with respect to CPH 0647034, this is a dilution adjusted Black-Sholes Formula method of estimating the value of the warrants. And before talking about it in greater detail, let me just explain that the second page, CPH 0647035, is an option-like valuation of the warrants.

I guess I'll start with that one. At the top of the page it lists various input variables that are used in the calculation. In the first input variable is the stock price. And the stock price shown is 6.875, 6 and seven-eighths. That's the closing price of Sunbeam stock on August 12, 1998.

For reasons I described previously I think that is the incorrect price to use for valuing the warrants on the date of the settlement agreement because the settlement agreement itself was disclosed after the close of trading on August 12th, 1998. And the stock price increased markedly in response to that disclosure on the next trading day. That's one difference between my analysis and Deloitte's.

On the same page in the fifth row there is a row entitled Annualized Volatility. And Deloitte looked at a range of annualized volatilities from 30 percent to 100 percent. As far as I can tell nothing in this document indicates what number to use in that range, but that range does include the number that I believe is appropriate, 65 percent.

There are two other differences between this calculation and mine. First, Deloitte seems to never have considered whether or not a control premium should be applied. I believe one should be applied for the reasons we discussed previously. And, second, Deloitte does not appear to discuss whether or not a liquidity discount should be applied and does not apply a liquidity discount. And I believe one should be applied for the reasons we discussed previously. Otherwise, these calculations are identical to my own. They use the exact same methodology and, again, we checked by just varying the inputs in our calculations to match these inputs and we derived exactly the same numbers.

With respect to the previous page, CPH 0647034, exactly the same comments would apply.. The only difference is this is a dilution adjusted Black-Sholes Formula calculation.

MS. BEYNON: Thank you.

Your Honor, before Mr. Ross wraps up his testimony, I would like to move for the admission of his report as an exhibit here into evidence. It is a fair summary of what he's testified to and we believe that it would be appropriate to move it into evidence as simply a summary of what he has testified here to today.

THE COURT: Is there an objection?

MR. MARMER: Yes, same objection.

THE COURT: I think it's still hearsay. But it's marked for ID.

MS. BEYNON: Move into evidence the exhibits that Mr. Ross referred to, Exhibits F, G, H, I and I to his report which set forth his valuation of the warrants on those different dates.

THE COURT: Any objection to those items?

MR. MARMER: Assuming there will be some reciprocity here, we would let his exhibits come in. Do you have any objection if we put our exhibit calculations in?

MS. BEYNON: No.

THE COURT: So F, G, H and I will be marked in evidence.

MS. BEYNON: E F G H and I.

THE COURT: Well, E is not his calculation, correct?

MS. BEYNON: E is the applied volatility.

THE COURT: Which ones are you offering into evidence?

MS. BEYNON: F, G, H and I. If counsel would agree to the admission of E as well.

MR. MARMER: How about if we do D through?

MS. BEYNON: D, E, F, G, H and I.

THE COURT: Are the ones in evidence.

(Defendant's Exhibits D, E, F, G, H & I were marked in evidence.)

THE COURT: How long do you think cross is going to be?

MR. MARMER: Maybe an hour.

THE COURT: Do you want to start now or do it all after lunch, you tell me.

MR. MARMER: Why don't we do a little bit, get started, and then we can go from there.

THE COURT: For planning purposes, do you have any other witnesses on this point?

MS. BEYNON: Just deposition testimony. And we don't have other expert witnesses.

THE COURT: How much deposition testimony is there?

MS. BEYNON: We were planning to hand that up to the court for Your Honor to read. And there are two -- three deposition transcripts, the designations that we made are brief ones and shouldn't take too long to read.

THE COURT: A few minutes, not a couple of hours?

MS. BEYNON: It's not a couple of hours. Probably if read out loud 20 to 30 minutes.

MR. WEBSTER: It's three transcripts of two witnesses.

THE COURT: For planning purposes, who are Plaintiff's witnesses? You said Dr. Nye. Who else?

MR. MARMER: Dr. Nye, Mr. Gittis and

Mr. Slotkin. And we have a deposition excerpt from Mr. Maher that's tiny.

THE COURT: How long do you think your witnesses will be?

MR. MARMER: We assume Dr. Nye will be about an hour on direct. Mr. Gittis would be --

MR. SOLOVY: 10 minutes, 15 minutes.

MR. MARMER: And Mr. Slotkin is short.

THE COURT: Go ahead.

CROSS EXAMINATION

BY MR. MARMER:

Q. Mr. Ross, we've met before, correct?

A. We have.

Q. You were first contacted, were you not, about working on the valuation of the warrants on May 19 or 20 of this year?

A. That's correct.

Q. But that was not your first work involving Sunbeam, was it?

A. No.

Q. In fact, your firm was retained by Al Dunlap and Russell Kersh to assist them in various litigation matters pending against them, isn't that right?

A. Counsel for Dunlap and Russell Kersh, correct.

Q. Your firm was retained in this case, the dispute between CPH and Morgan Stanley shortly before the start of the trial, correct?

A. As consulting experts, that's correct.

Q. And prior to this trial, you previously have worked for Morgan Stanley, isn't that right?

A. That's correct.

Q. And prior to this trial you have worked with counsel from the Kellogg Huber firm, correct?

A. That's correct.

Q. In fact, you or your firm have worked with counsel from the Kellogg Huber firm on many occasions, isn't that fair to say?

A. Yes, that's fair to say.

Q. It's true, is it not, sir, that Lexecon has hired as its counsel the Kellogg Huber firm on several matters?

A. I'm not sure about several matters, I know of at least one matter, that's correct.

Q. Well, they represented Lexecon, did they not, in a dispute involving Milberg Weiss?

A. Yes, but Lexecon was a Plaintiff.

Q. And they represented Lexecon, did they not, in connection with the Haft, H-A-F-T, litigation?

A. Not that I'm aware of.

Q. You're not aware of whether or not Lexecon was retained to help prosecute the fee -- I'm sorry, whether Kellogg Huber was retained to prosecute the fees?

A. It may be the case, I'm not aware one way or the other.

Q. At the beginning of your testimony this morning I believe you indicated to us that you were going to define fair market value. And let me just see if I have my notes correct on this. But I believe -- I believe what you said on that, sir, was you were looking at the moment that a willing and able buyer would pay in an arm's length transaction from a willing and able seller. Is that fair?

A. I had the order of the words a little differently, but close enough.

Q. I want to be sure whether I've got exactly the words right or not.

THE COURT: Let me -- I can tell you what I wrote down. You tell me if this is accurate or not. I'm not saying it is: Fair market value is a price that would be paid in a hypothetical transaction between a willing and able buyer and willing and able seller.

THE WITNESS: I had arm's length.

THE COURT: Okay. With that, is that the concept?

THE WITNESS: Yes.

BY MR. MARMER:

Q. Now, when you say hypothetical, you mean by that that you're not actually concerning yourself with whether or not THE seller really was able to sell; is that right?

A. I'm saying that any valuation is hypothetical. It's trying to estimate the price that would be paid in a transaction that did not occur.

Q. That wasn't my question, to you, Mr. Ross. My question is: Isn't it fair to say, sir, when you're measuring this hypothetical seller, you yourself don't care one way or the other whether the seller, when you say able, actually was able to sell?

A. No, that's not correct. If it's the case that there are restrictions on the sale of the securities, that will affect the fair market value.

Q. And so if it turned out, for instance, that the seller actually couldn't sell at all, then that would be something you'd want to take into account in figuring out fair market value, correct?

A. Correct.

Q. And, similarly, when you look at a buyer, have you yourself actually concerned yourself with whether or not -- whether there's an actual buyer out there prepared to buy the warrants?

A. No, again, that's not necessary. You're trying to estimate the price that would be paid in a hypothetical transaction between a willing and able buyer and willing and able seller. It is not necessary or required that one identify actual buyers.

Q. And I wasn't asking whether it was necessary or required. I want to be sure we're focused on the answer to the question I asked you.

The question I asked you was: You yourself didn't make any inquiry whatsoever to determine whether there was a buyer who could actually purchase these warrants, did you?

A. No special inquiry, but --

Q. Was there a general inquiry?

A. Well, securities markets are deep and wide trillions and trillions of dollars of transactions occur every day. So I'm confident there were many buyers that were able to engage in the transaction, this hypothetical transaction. But, again, I didn't have to make any special inquiry. It's not necessary for purposes of estimating.

Q. Well, again, we ended that with the necessary. But let's stay with the point. The point is, you didn't find a single entity that you identified as a potential purchaser and can point to as someone who actually would show up on any of the dates you looked at and say, I'm here ready, willing and able to buy these warrants at this price?

A. Correct, I made no attempt to identify any such entity.

Q. And you, in fact, thought it was irrelevant whether or not CPH actually could have sold the warrants on any of the dates that you've identified, isn't that right?

A. No, that's not right.

Q. You gave a deposition in this case, did you not, Mr. Ross?

A. Yes.

Q. And let me just ask you.

Directing your attention to page 68, lines 10 through 22. Were you asked this question, did you give this answer:

“Does your report describe in any way in which CPH could have sold the warrants on August 24th in whole or in part?”

“Answer: It doesn't speak to the mechanics of the transaction, but again, what the report calculates, just to be clear, is what a willing buyer would pay a willing seller for the warrants in an arm's length transaction on August 24th, 1998. I think whether or not CPH actually could have sold the warrants is irrelevant for purposes of answering the question about what a willing buyer would pay a willing seller for the warrants on that date or on August 13th, 1998.”

Did you give -- were you asked that question, did you give that answer to your deposition?

A. Yes, among other questions and answers.

MS. BEYNON: Objection, Your Honor, improper impeachment.

THE COURT: Overruled.

BY MR. MARMER:

Q. Now, let's spend just a couple minutes maybe looking at this August 12th date. And as I understand it, just so we have the sort of ground rules down for this. August 12th everyone agrees is the date on which the settlement agreement was reached, correct?

A. Yes.

Q. And you're using as more or less the proxy for what the value should have been on August 12th the trading price at the close of business on August 13th, correct?

A. I'm using the trading price of the stock on close of business on August 13th as an estimate of the value of the stock on August 12th, 1998 given the disclosure -- the information that was disclosed about the settlement agreement and related events on August th, after the close of trading.

Q. Just so we're clear, let me see if I've got this right or not, your basic point is that you need to look at what happened in the trading on August 13th in order to figure out what the value was on August 12th because the market didn't get the news about the settlement until after it closed on August 12th. So when you need to come up with your stock price you need to use August 13th; is that a fair summary?

A. Yes, because in this case the settlement agreement itself, which obviously the parties to the transaction knew about, was material information that affected the stock price.

Q. Now, when you looked at the August 13 stock price, did you look or attempt to isolate any of the factors that might have gone into what caused the stock to increase in price from August 12th to August 13th?

A. Yes, I looked to see whether the stock price increase was in fact attributed to the disclosure which occurred after the close of trading on August 12th. And I found that it was.

Q. Mr. Ross, I have put before you a document which we have marked as CPH trial Exhibit 1405, which was also our deposition Exhibit 1405.

Mr. Ross, is CPH trial Exhibit 1405 a true and correct copy of an event study that you performed in connection with your work for Mr. Dunlap and Mr. Kersh?

A. It was performed at Lexecon.

Q. It was performed at Lexecon --

A. And I don't believe it was done for the purpose that you stated. I'm not sure whether this document was initially prepared in connection with the retention by counsel for Dunlap and Kersh or whether that was prepared in connection with the retention as a consulting expert prior to trial in this matter.

Q. In either event, though, this is an event study that Lexecon performed, correct?

A. Correct.

Q. I'd like you to turn, if you would, to the entries that appear on August 12th, which appear at Morgan Stanley 0122067.

There you identify -- let's do the format quickly. The date of the event that you're looking at is in the left most column, right?

A. Yes.

Q. And then that's the -- is that the closing price of the stock on that date?

A. Yes.

Q. And then the volume of the stock on that date, right?

A. Reported volume, correct.

Q. What is actual return intended to signify?

A. That's the percentage change in price on a daily basis. So, for example, on August 13th the stock price increased by 24.55 percent as compared to the previous day's close.

Q. And then there's a predicted return, what is the predicted return intended to calculate?

A. The predicted return is the percentage change in price one would expect given the actual performance of the market as whole on a particular day and the historical relationship between the stock and the market.

Q. And then you're going to calculate in the next column is going to be the difference between the actual and the predicted returns, correct?

A. Correct, that's a corrected for market or excess return.

Q. And then the T stack column is designed perhaps somewhat colloquially, but just to suggest the question whether or not on a statistical basis it would be 10 percent likely that that excess return was attributed to a random feature?

A. Not quite. T statistics is a standardized measure of the size of the excess return. And a T statistics exceeds a particular value. You can use it to make statements like the one you made about statistical significance, here the probability that the price increase on August 13th, 1999 is infinitesimal.

Q. Then we see this excerpt from the Dow Jones news service from 6:25 p.m. that's the after market disclosure you referred to before, right?

A. At least a description of the after market disclosure.

Q. It's just a description, it doesn't report to be the actual text, right?

A. Yeah, I would have to look at it and look at the actual text.

Q. But just looking at the summary that Lexecon prepared, that includes a disclosure that there was a settlement that was reached, correct?

A. Correct.

Q. And then it also explains that as part of the settlement MacAndrews and Forbes will receive five year warrants to purchase 23 million shares of Sunbeam at an exercise price of \$7 a share with customary anti-dilution provisions, correct?

A. Correct.

Q. Then it goes on to say that MacAndrews will release Sunbeam from any legal claims, correct?

A. Correct.

Q. And then it says that MacAndrews has agreed to let Sunbeam keep the services of MacAndrews and Forbes executives who have been managing Sunbeam since June, including Levin, who was brought in to replace former Sunbeam chief executive Albert Dunlap, correct?

A. Correct.

Q. All of that was information the market received right after the close of trading on the 12th?

A. Correct, and all of it was potential information that wasn't reflected in the closing price on August 12th, but nevertheless affected the value of Sunbeam stock.

Q. Then on August 13th there's more news stories, people saying he might be upset because of dilution but others saying it might be a good thing, correct?

A. I'll accept your representation.

Q. It says at the beginning quoting an analyst Mr. Levy at Standard and Poor's who is saying if I was a shareholder, I'd definitely be upset. So that sounds like a disgruntled shareholder, does not it?

A. Sounds like an analyst who personally views the news as unfavorable.

Q. Then there's a quotation from Mr. Levy that says -- this is on the top of page 0122068. Quote: This may protect Sunbeam from a lawsuit by MacAndrews and Forbes, but it may open them up to lawsuits from others, right?

A. Yes, it says that.

Q. So he's saying there may be people who will fuss about this, correct?

A. Yes.

Q. Now, if you drop down to the next disclosure that begins Sunbeam up 21 percent on settlement, do you see that?

A. Yes.

Q. There's an analyst from Merrill Lynch by the name of John Gibbons who is saying this is a positive because it's at least eliminating one part of the concerning Sunbeam, right?

A. I think that's a fair characterization, yes.

Q. And then there's a quotation that continues from him that says, on the one hand it may be dilutive, on the other hand there's a silver lining for shareholders in that Jerry Levin and his top management have signed three-year employment contracts, they provide some credibility to the turnaround story, correct?

A. It says that, yes.

Q. And then going down a little further in that same entry there's a sentence that reports to the press as you're summarizing it here MacAndrews said the deal with MacAndrews and Forbes eliminating the possibility that Sunbeam creditors would force the company into Chapter 11 bankruptcy proceedings, correct?

A. Yes.

Q. All of this mix of information in your view contributed to the bump in the price on August 13th compared to the price on August 12th, correct?

A. I think the market participants' reaction to the information that was disclosed on August 12th was reflected in the price on August 13th.

Q. But you yourself in that event study made no effort whatsoever, did you, to disaggregate the impact on the stock price from on the one hand the news of the compromise of MacAndrews and Forbes' claims from the other information that's disclosed concerning the provision of long term management contracts, the signaling effect of Mr. Perelman staying in the stock. The news that this may put bankruptcy more at bay. You haven't tried to separate out those two facts?

A. No.

Q. It's your view that this is all one ball of wax and ought to be fed into the stock price, right?

A. Not quite, no.

Q. But in any event, we don't have any actual event study or any kind of economic analysis presented in any of your reports that purports to break up the bump in the price to reflect how much is attributed to one feature and how much might be attributed to a different feature?

A. No, that's not quite right either. Because the one thing that the event study does do is separate out the price movement due to changes in the market as a whole from the price movement due to information specific to Sunbeam. And with respect to the information due to the market as a whole you would have predicted a slight price decrease.

Q. That's fair, your study accounts for what would be a predicted adjustment based on the market or the anticipated distribution for this stock, correct?

A. I don't understand the latter half of your question.

Q. Let me just focus back on this one issue so that we don't have a fuzzy record here.

Leaving aside the adjustments you do for the analysis of the excess returns, you haven't done any information specific to Sunbeam analysis that purports to disaggregate what amount of the stock increase was due to the announcement that the claim was compromised from the announcement of other positive news?

A. I haven't tried to disaggregate the effects of different pieces of information that were disclosed after the close of trading on August 12th, but I have looked to see whether there is any information that any event that occurred on August 13th as opposed to occurred on August 12th that can explain what happened to the stock price. And I was unable to find any.

In fact, the stock opened way up, traded way up and closed way up. And that plus what the financial press said is consistent with my conclusion that the price increase on the 13th was caused by the information that was disclosed after the close of trading on the 12th.

Q. Now, there was an indication in these press reports that some shareholders might be disgruntled about that. Do you know whether in fact any shareholders ever sued over this transaction?

A. I don't recall.

Q. You didn't investigate one way or the other whether there was a shareholder suit or any litigation concerning this, is that right?

A. Wasn't necessary to do so.

Q. I wasn't really asking whether it was necessary. I was asking whether you did. Did you conduct such a study?

A. We did do this event study. So there may be information in the event study about some activities, but it wasn't necessary to look at them or analyze them in greater depth to value the warrants on August 12, '98 or August 24, 1998.

Q. When you were looking at it did you analyze to see what happened when the claims, if any, of the disgruntled shareholders, what the market did there, do you recall looking at that?

A. Not specifically, again, for purposes of valuing the warrants on the 12th or the 24th, subsequent events are irrelevant?

Q. But you didn't look at it to see what the impact of news of a settlement of a claim through the resolution in the form of warrants, how that would be received separate and apart from this other mix of news, did you?

A. Correct.

Q. In terms of August 13th versus August 24th closing date, it's fair to say, sir, that you have no economic preference one way or the other for either of those dates; is that correct?

A. Could you just read back your question.

Q. I'll restate it.

You have no economic preference, do you, sir, for choosing either August 12 or August 24 as a date for valuation?

A. As a valuation date for purposes of reducing the jury award, that's correct. Between those two I don't have a strong preference.

MR. MARMER: I'm about to move to volatility. There's no magic. We can break now.

THE COURT: Why don't we break now and we'll be back at 1:30.

(A lunch recess was taken.)

I signed it that we scared him off or something, so I wanted to make sure he was coming.

I'm gathering Plaintiff lost its name tags and created new ones.

MR. MARMER: Whether we lost them, we at least didn't retrieve them.

MR. IANNO: We figured you already knew who we were.

THE COURT: I know you guys.

Mr. Marmer, do you have other questions?

MR. MARMER: Thank you.

RESUMED CROSS-EXAMINATION

BY MR. MARMER:

Q. Mr. Ross, let's talk for just a little bit about volatility. One of the necessary inputs on the variables for the Black-Scholes formula is, of course, to determine the volatility of the returns for the underlying stock, correct?

A. For the option like warrant valuation, that's correct.

Q. Now, and one of the two standard approaches to estimating the volatility of the stock returns is to calculate the historic volatility of the actual returns for the underlying stock, correct?

A. When implied volatilities are not available, correct.

Q. Well, you said when they're not available. It's actually a standard process whether they're available or not; isn't that the case?

A. Certainly it can be calculated, but it's less reliable than implied volatilities. Implied volatilities are better at forecasting future volatilities.

Q. But in, for example, in your report itself you go to some lengths to point out that there are, in fact, two different approaches, and while you have a preference, on these facts, for one, the historic volatility of actual returns is a very well-recognized technique, correct?

A. Correct, because sometimes you can't calculate implied volatilities and you have to do something else.

Q. Is it your testimony, sir, that the only time that people would use historic volatility of actual returns is in the absence of the ability to calculate an implied volatility; is that your testimony?

A. No, that's not my testimony.

Q. Now in calculating historic volatilities of actual returns, one of the issues that's involved is to decide how long of a period prior to the valuation date to use; isn't that right?

A. Yes, you'd have to decide how long a period to look at. You'd have to decide a observation interval, and that's one of the problems with historic volatilities that those choices can be fairly arbitrary.

THE COURT: I'm sorry. How long is an observation interval? What's the difference between the two?

THE WITNESS: If you're looking at a historic period, you could look at, let's say, a one-year period, but within that one-year period you could use daily stock price data to estimate the volatility or weekly stock price data or monthly stock price data and that's the observation interval.

BY MR. MARMER:

Q. And sometimes the period over which the volatility is measured is set equal to the time period over which it is applied; is that not correct?

A. Yes, according to the whole tax, at least one of two things is commonly done. Either a short period prior to the period at issue is looked at, like 90 days or 180 days or sometimes a longer period equal to the term of the option is used. That's just a rule of thumb. But obviously those rules of thumb have to be understood in light of the relevant facts and circumstances.

Q. And you actually had in your report at Exhibit D some historical stock returns that you calculated, correct?

A. That we obtained from Bloomberg. Bloomberg calculated them.

Q. These are actually Bloomberg calculations, and they're just assembled here on your Exhibit D, correct?

A. Yes. Let me make sure I'm looking at the same thing you are here.

Q. Okay.

A. That's correct.

Q. Okay. Now the five-year historic volatility returns that are shown on this Exhibit D on August 12th would be where? What column would we look at, the 60 months?

A. Far right, 60 months, correct.

Q. And the 60-month historic stock volatility returns is approximately 54 percent, correct?

A. Correct.

Q. And the same is true on August 13th?

A. Correct.

Q. And the same is true on August 14th and August 24th, correct?

A. Right.

Q. And then it bumps up to about 55 when you go to December 31, 1998, correct?

A. Right.

Q. But you're not using any valuation dates for purposes of the analysis here based upon December 31, 1998, are you?

A. The only valuations I discussed were as of August 12th, '98 and August 24th, 1998, correct.

Q. Now the numbers that we see here of the 54 percent, those are obviously much lower volatility numbers than the 65 percent that you believed is the correct economic judgment to apply in using Black-Scholes on the applied volatility calculation?

A. Yes. Market purchase. And it's expected in the future the volatility of Sunbeam stock would be higher than it had been in that five-year period.

Q. Now, in fact, it's true, is it not, sir, that over time --

Well, let me back up. Stock return volatility itself can be volatile, right?

A. If you look at historic periods, estimates of volatility can change from period to period, that's correct.

Q. So, in other words, if we looked at one period on the stock's history, it might be different than the volatility for a different period, correct?

A. Correct.

Q. And depending upon what's happening in the life of the company, the volatilities may spike, that is to say, they may be unusually high or they may be unusually low, correct?

A. They may go up. Whether it's unusual on a spike or whether it's a change in circumstances that results in a permanently higher level of volatility, that depends on why it is the increase occurred.

Q. Okay. Well, Hull (phonetic) himself believes, does he not, that stock return volatility should revert to its historic norms?

A. No, not should. Tend to on average --

Q. Okay. I'm sorry.

A. -- depending on the facts and circumstances.

Q. Okay. But the phenomena that we're describing is the same, is it not, and that is, that over time one would expect to see that the stock return volatility will revert to its norm?

A. No, that's incorrect. That over time a lot of stocks on average volatilities tend to mean revert. But whether volatilities are mean reverted depends completely on why it is they increased in the first place. So you would not expect that to happen in every case. It would depend on the reason for the increase in the volatility. And market participants are aware of this phenomenon, take it into account when they implicitly determine volatilities for the purpose of pricing options.

Q. When you say market participants are aware of that, that's just based on your theoretical modeling. You haven't actually gone out and asked the people who traded in the Sunbeam call options whether they were aware the volatilities tend to be mean reverting, did you?

A. -With respect to your first question, the answer is, no, it's not just based on theoretical considerations. It's based on actual empirical data about how well option prices correspond to option value and how well implicit volatilities forecast future volatilities.

With respect to your second question about whether I've surveyed market participants, the answer is, no, I've not.

Q. That same empirical data shows that stock return volatility tends to revert to the mean, does it not?

A. No, it's data that looks at implied volatilities as opposed to a forecast and a forecast of the kind you described that volatilities revert to the mean and finds that the implied volatilities do a better job of forecasting future volatilities than a naive model of the kind that you describe.

Q. And the naive model that you're describing, that's naive because it uses historic rather than implied; is that correct?

A. It's naive because it uses only historic data. It does not use the information available to market participants that they use in deriving their forecast of future volatilities.

Q. And do you know whether that, the data you're describing, does that have anything to do with any look at the length of the implied volatility -- I'm sorry -- the length of the option that's being analyzed in connection with the assumptions of implied volatility?

A. Yes, it does.

Q. Okay. And let's just be clear for a moment about reverting to a mean. That does suggest, does it not, that if a stock has experienced a significant increase or a significant decrease that over the longer haul that should iron itself out, that's what reverting to the mean actually means; is that not correct?

A. No, it doesn't mean it should. It means it --

Q. It tends to.

A. No, it doesn't mean it tends to. Whether it tends to or not depends on the facts and circumstances. If things happen the way you describe, volatilities go down, and then they go up, and then they go back down. That phenomena would be referred to as reversion to the prior level. But there is no principle in economics that that should happen or will happen in all cases. It depends completely on why it is that the volatility increased in the first place.

Q. Now let's look at what you did.

THE COURT: Again, I just want to make sure I'm clear. What you're saying is statistically in many cases the volatility will revert to the mean, but that doesn't say anything for the individual case. Is that what you're telling me?

THE WITNESS: I think here's what's going on statistically. The way to think about it is sometimes volatility increases for random reasons, and sometimes it increases for specific reasons. When it increases for random reasons, those random reasons tend to disappear, and it tends to go back down, so in those cases you see reverse.

When an increase is for a specific reason, it doesn't go back down, there's no reason for it to go back down. Instead, there's an invasion, and it ends up at a higher level. If you looked at a lot of stocks, 100 stocks and found -- and looked across them on some of them, the volatilities would be increasing for the random reasons and some of them would be increasing for the specific reasons. So for the 100 stocks on average you would see a lot of reversions to the mean. But for the specific stocks where the volatility increased for some other reason, you would see no reversion.

THE COURT: Is it fair to say, then, in general when you have volatility, if you're looking at it in the aggregate you have more volatility for random reasons than specific reasons, and that's why if you look at the data over time it looks like in general they revert to the mean?

THE WITNESS: It's -- I think the fair thing to say is you can have increases in volatility for both reasons because both things can occur, but one of them will revert, the average price of all stocks will revert.

THE COURT: Okay.

BY MR. MARMER:

Q. You yourself did not calculate the historic stock return volatility or consult -- I'm sorry -- report the historic stock return volatility for Sunbeam for periods prior to but not including the revelation of the fraud at Sunbeam; isn't that correct?

A. That's not correct.

Q. Okay. Would you point us in Exhibit D to an analysis in there that shows us where you have calculated the historic stock returns for volatility of Sunbeam for periods prior to but not including the revelation of the fraud?

A. Your prior question was compound. You asked whether I calculated or reported. I have calculated it. It's not in the report.

Q. You haven't disclosed any analysis concerning that historic stock price return, correct?

A. That's not correct either.

Q. Okay. Where is it disclosed?

A. I believe in the backup papers that were provided to you it was disclosed, and your colleague also asked me about it at my deposition, and I answered his questions.

Q. Okay. Now let me ask you another question about what you did or didn't calculate. Did you calculate historic stock return volatility for Sunbeam for periods prior to the announcement that Mr. Dunlap was going to be hired?

A. Exclusively that period, no.

Q. And when you were looking at -- I'm sorry. Earlier today, I believe, you were asked some questions about the Deloitte & Touche analysis, MS 513.

A. Yes.

Q. Do you have that in front of you still?

A. Yes.

Q. Okay. And I believe, if I have your answers correct, you indicated that you felt that one of the problems you had in looking at Deloitte & Touche's analysis was that while they used this 48 percent volatility, they didn't give an explanation for why; is that correct?

A. No.

Q. Okay. Correct me, then. What was your critique of their 48-percent volatility?

A. I'm not sure what 48-percent volatility you're referring to.

Q. Okay. Well, let me go at it a little differently. Would you agree with me, sir, that what Deloitte & Touche did was try to ascertain what volatility, historic stock return volatilities would be if you did not look at historic periods that included the fraud at Sunbeam or at least portions of the fraud at Sunbeam?

A. I'm not really sure what you're referring to.

Q. Okay. Well, then turn, if you would, to page CPH 0647030. And if we look at the last paragraph -- I'm sorry -- the next to last paragraph, it begins: "Given the considerable uncertainties that affected the value of the company's common stock during the restatement process, we believe that the best indicator of company stock price volatility is that factor that would be derived based on trading of the company's stock subsequent to the issuance of the restated financial statements. It is that period of trading time that the market has full and accurate financial information on which to base a reasonable decision on the value of the company's stock. Accordingly, we computed the volatility factor for Sunbeam's common

stock for the period subsequent to the issuance of the restated financial statements. See attached.” The computation yields a volatility factor of 48 percent, and they say that supports the \$70 million valuation. See that?

A. Yes.

Q. It's fair to say, then, at least if one were going to look at historic stock return volatilities one of the things you might want to do is try and take the company that you're now looking at and see if it's really comparable to the company that's being measured over its historic stock price, return volatility calculations. In other words, the Sunbeam that you're looking at at whatever valuation date, whether that's August 12th or August 24 or December of 1999, you're asking is this really the same Sunbeam company that we're measuring when we look at whatever our reference period is for historic stock volatility?

A. I'm sorry. Could you rephrase your question?

Q. Sure. Do you think that one of the things that you'd need to do in looking at historic volatility of stock returns in order to determine whether they're a fair gauge of volatility for the company is to determine whether you're comparing the company's present facts and circumstances to those that existed previously?

A. I would say if one did not have implied volatilities and one was forced to rely on historic volatilities, that is one of the number of things you might want to do to try and figure out which observation interval to look at, which estimation period to look at, whether they gave some observations more weight than others there. There are a series of different ways that volatility can be calculated using historic data. It's always best to use implied volatilities when they're available. But that's one of the things you can do.

Q. Looking at the August 12 or, well, actually August 13th data that you consulted at the time of the August 13th trades that were occurring in the CPH -- I'm sorry -- in the Sunbeam call options, the people trading there didn't have the benefit yet of the restated financials for Sunbeam, did they?

A. Correct, anyone who was buying or selling securities on that day, including in a fair market valuation, any willing buyer or willing seller who would be thinking about trading the warrants wouldn't have benefit of that information. Therefore, it's irrelevant for purposes of determining the value of the warrants on that day.

Q. I understand that little add-on about relevance. I just want to be sure we're quite clear, and that is, that the actual trading in the call options at any time in August of 1998, that participants in that trading would not have yet had the benefit of the restated financial information from Sunbeam, correct?

A. Correct, because it had not yet been released.

Q. Now when we talk about stock return volatilities, sometimes those volatilities are described as a smile, right, the volatilities? Have you heard that expression before?

A. Yes, that -- what you said is not quite right, but I have heard that expression before.

Q. Okay. And when -- the reference to a volatility smile is a reference, is it not, to the graphic portrayal of volatility in the form of a curve where the tail end of the curve tends to tilt; it can be a frown instead of a smile, but that's the smiling part that's referred to in the phrase, isn't it?

A. No, it depends very much on what you are graphing. If you're graphing the relationship between implied volatilities and exercising, exercise prices, that gets typically one kind of graphical representation. If you're graphing the relationship

between implied volatilities and the term to maturity, that is a very different graphical expression. So with respect to which volatilities you're looking at, it matters a lot.

Q. The smile part of the curve, that has to do with after the fact that after you see a change it tends to come back a bit; isn't that what the smile tends to pick up?

A. No.

Q. This concept of over time a reversion?

A. No, no, no. With respect to the volatility surface as a function of expiration date, the curve looks -- I can draw it if you like, but it starts out steeply sloping and quickly flattens out and gets essentially flat once you get to reasonable lengths of maturity and comes back up. That's exactly what happened with the Sunbeam implied volatilities.

Q. Let's move to implied volatilities for just a moment here. To -- Let me just be sure I understand the process. To compute an implied volatility, you basically take the Black-Scholes formula that you use in the ordinary course, but instead of solving for the value of the option, you take an observed price of the option; and you put that number in, and then you solve for the volatility variable. Is that essentially what we're talking about?

A. Yes. But because there are a large number of options traded at any point in time, there's recognized methods of aggregating the information from all of those options and interpolating and creating what's known as a volatility surface which gives you the general relationship between either exercise price and delta and term to maturity and the implied volatility. But for any one option you can do what you said.

Q. But that's the basic concept. For one option you do it that way. Then the question becomes sort of a judgment issue about if you're going to do more than one option, you're going to have to figure out what's the appropriate sample base and what further economic analysis need to be made to come up with the calculation that you think is correct?

A. I wouldn't call it a judgment issue. The issue is that the implied volatilities are overidentified. You get a lot of information about implied volatilities because there are so many options trading at any point in time. And there are well-established well-recognized methods which are used by Option Metrics to aggregate all of that information to use every option so you don't give undue weight to any one option, to get much more reliable estimates of implied volatility.

Q. Well, let's look at MS 1088 for a moment. That's the Option Metrics chart derived from Option Metrics data with quotations for long-term call options Sunbeam traded on August 13, 1998, correct?

A. Correct.

Q. You talked about the vast amount of data points. I just want to be sure I'm reading this correctly. Under the column for volume and on the row strike price 7 and a half dollars with an expiration date of January 20, 2001, the volume is 30. And that -- am I right that means 30 contracts of 100 underlying shares each?

A. Correct, 30 contracts of this particular option traded on that day.

Q. All right. And then so that means that in total there would be roughly 3,000 shares at risk in this trade transaction, correct?

A. I'm not quite sure I understand your terminology.

Q. Okay.

A. Each contract you are right, is the rights of buyers on 100 shares.

Q. So that's 3,000 shares. Instead of expressing the volume in terms of contracts, if we express the volume in terms of shares, it would be 3,000.

A. Yes.

Q. And then the same is true when you look at the ten, the row that begins with the strike price of ten, the volume there would be 1,100 shares, correct?

A. Correct.

Q. And the last one at 12 and a half strike price, it would be 8,300, correct?

A. Correct.

Q. If we look at MS 1089, that's the Sunbeam Corporation quotations for long-term call options traded on August 24, 1998, and, again, this is an Option Metrics source, right?

A. Correct.

Q. And if we look at the volume there, one of the sources you were consulting the strike price on, the row for \$5 the volume was zero, correct?

A. Correct, there were quotations by market makers but no transactions.

Q. So we don't actually having anybody agreeing to a trade on that date, that's what this is reporting?

A. For that particular option, correct. But, however, market makers were willing to sell at five and five eighths and willing to buy at five and a quarter. Those are binding quotations.

Q. But the volume of actual trading is zero at this point?

A. Correct.

Q. When we look down at seven and a half, the volume is 27 contracts, that's 2,700 underlying shares?

A. Correct.

Q. And beneath that at ten it's, again, another zero?

A. Correct.

Q. And then underneath that 12 and a half it's a sixth, that would be \$600?

A. Correct.

Q. Now on implied volatilities you observed prices of traded 730 day call options; is that right?

A. Among other things, yes.

Q. Well, when we look at Exhibit E -- Let's go to Exhibit E on your report. When you were calculating the implied volatility of the Sunbeam stock returns, am I reading this correctly that your Option Metrics source was coming up with 700 -- with the implied volatilities based upon the 730-day call options?

A. No. Option Metrics was calculating the implied volatility of a standardized option with 730 days to maturity based on all of the data for all of the options for the January 2001 call options, like you asked me about, and all the other call and put options that were traded in Sunbeam stock on a particular day.

Q. And those implied volatilities are reported here on August 12th at 65 percent approximately; August 13, 67 percent approximately; August 24, 70 percent approximately, correct?

A. Correct.

Q. Okay. Now there were actually no traded call options that could be directly observed with a five-year term from Sunbeam; isn't that right?

A. Correct, the longest traded option, I believe, is the January -- in August of '98 is the January '01 maturities.

Q. January '01. You determined that, however, that you can look at those, those options and infer from that that there wouldn't be a marked departure if you were to have had the opportunity actually to inspect a five-year option; isn't that right?

A. Not quite, no. I looked at the volatility surface report by Option Metrics. I looked at the implied volatilities of one year, standardized options, one-and-a-half-year standardized options, two-year standardized options and realized that that was the part of the volatility surface that had essentially flattened out. There was very little difference between the implied volatilities of one-year, one-and-a-half-year and two-year options, and, therefore, I concluded that the implied volatility reported by Option Metrics for two-year options was a good proxy for longer term, implied volatilities.

Q. It's approximately, though. There was no direct observation here, correct?

A. Correct.

Q. And so when you say that we're talking what actual market traders were deciding that the market itself is setting the implied volatilities, we're not talking about anyone who's actually trading in a five-year option. We're talking about people who are trading in options of a different duration at different prices, and from that you're extrapolating what you believe to be a likely implied volatility for the warrant that's applied here, correct?

A. No, not quite correct, because, again, this feature of options is well-known, and market participants know about the shape of the volatility surface and know that the volatility surface is a function of time, that the slope flattens out, so I think it is based on actual market data. Even though Sunbeam didn't have options trading for that period of time, the volatility surface had already flattened out by that point in time, so if Sunbeam had such options, that's what you would expect.

Q. So does that mean then if we were to look at the implied volatility of Sunbeam options before Mr. Dunlap were hired and we had seen fairly long ones that we would then correctly predict that the variability -- that the implied volatility after Mr. Dunlap was hired would be the same?

A. No, it's nothing to do with that.

Q. In other words, what really happens here is that the market could have to reassess its views on volatility based upon new facts and circumstances, a point we talked about just a few moments ago?

A. Yes, every day.

Q. And so when you're observing what's happening on August 12, what you're saying is they're looking at the same body of data so they shouldn't care very much whether it's for two years or three years or five years?

A. No, I'm looking at the actual data and discovering that market participants did not expect volatility to change much after one year. The volatility surface had flattened out. And, therefore, it's reasonable to say that the volatility expectation at that point in time for the next five years was for it to be flat. In fact, the volatility ended up going up quite a bit in that period. Market participants' forecast turned out to be too low, but at the time that is the best forecast.

Q. We're talking about options here. These are all call options, correct, that you're basing your implied volatility off? They're not warrants, are they?

A. Correct.

Q. And there were no, as in zero traded Sunbeam warrants, correct?

A. As far as I know, that's correct.

Q. Okay. So you couldn't, therefore, directly observe what the market was saying about a warrant. You'd have to make some sort of inference about what would happen with a warrant if it behaved like an option, correct?

A. No. The warrants and the options are identical securities once the warrants are issued. Both the holder of the warrant and the holder of the option have the right to acquire the underlying stock at a particular price at a particular point in time. The issuance of the warrants itself will be taken into account by market participants on a forward-looking basis and pricing both the warrants and the options. But once they're outstanding from the holder's perspective, the difference between warrants and options is irrelevant. They're identical securities.

Q. Well, I thought we talked just a little while ago in your testimony, and perhaps it was during your direct that there are two different Black-Scholes formulas, are there not, one that is sort of the standard one, and one that is dilution adjusted Black-Scholes, correct?

A. Not quite. There are two different ways to use the Black-Scholes formula to value warrants. One is what's called option like warrant valuation, which just applies the Black-Scholes formula as is to the value of warrants; and one is the dilution adjusted Black-Scholes model, which makes a series of adjustments regarding the exact same warrants. And both result in the same value for warrants like the warrants at issue here.

Q. And now when solving for the implied volatility using the Black-Scholes formula, did you use the option like model or did you use the dilution adjusted like model?

A. I didn't solve for the implied volatility. I got the data from Option Metrics.

Q. Do you know whether Option Metrics used the option like Black-Scholes model or the dilution adjusted Black-Scholes model?

A. I don't think it's necessary for them to make that choice.

Q. I didn't ask you whether it was necessary, Mr. Ross. I guess I'd like an answer to the question I put, which is, do you know, sir, whether Option Metrics used the dilution adjusted Black-Scholes formula or the option like Black-Scholes formula when they chose the formula they were going to use to do the computation of implied volatility?

A. The question doesn't make any sense. They're deriving implied volatilities from call options.

Q. And so you're saying it would make sense only to use the option like one if you're pricing call options, correct?

A. If you're pricing call options and you want to derive an implied volatility for a particular option, you would use the Black-Scholes formula. But then, as I said, you have to aggregate all the information you get from all the options in order to estimate the volatility surface. That's what they do.

Q. Now does dilution always increase volatility, sir?

A. I'm not sure I understand your question.

Q. Well, let me back up just a bit. I believe earlier in your explanations on direct examination you were talking about one of the impacts of the dilution adjusted Black-Scholes formula. And I thought I understood you to say that as you increased the dilution that that would tend to increase volatility?

A. No, I didn't say that.

Q. Okay. Correct -- Okay. What is the relationship, if any, between the increase in dilution and whether volatility increases or decreases?

A. I think the only thing I said is that the volatility of the equity of a firm that has warrants and stock outstanding would be granted in the volatility of the stock of the same firm.

Q. Okay. And that's a distinction between plugging in the stock price versus the equity price in the formula?

A. No, that's a different adjustment.

Q. Let's stick with this one and then I won't confuse them. In a highly leveraged company, would the exercise of-warrants increase the amount of equity available?

A. The exercise itself?

Q. Yes. Well, the exercise with the payment of the exercise price.

A. Not necessarily, no.

Q. Okay. And that would be why? Why would wouldn't it?

A. Well, the warrants were outstanding before the exercise. They were part of the equity. And the payment of the exercise price the company gets the exercise price, but the warrants are no longer outstanding and the warrant holders get shares. So the total equity may or may not increase.

Q. All right. So you're not sure whether that would be offsetting or not?

A. I'm not sure what you mean by "offsetting."

Q. The equity --

A. It depends on the relationship between the value of the warrants before the exercise and the exercise. So let's take a situation where the warrants are worth \$10 per share and the exercise price is 5, and the warrant holder makes an irrational decision to exercise the warrants anyway, in effect giving the other shareholders a gift. Under those circumstances, the company will get the \$5. The other shareholders will benefit because the warrant holder made a bad decision.

Q. But that would be an irrational circumstance, correct?

A. I could think of unusual facts and circumstances where it might not be, but typically, yeah.

Q. But let me just be sure I understand whether we agree or disagree on this point. If the equity in a company increases, does that tend to increase or decrease the volatility of its anticipated stock returns?

A. Yeah, I'm not sure. I think it could in principle go either way. All I talk about is the relationship between the volatility of the equity of a firm that has warrants outstanding and the volatility of its stock. That relationship is unambiguous. The volatility of the equity is higher than volatility of the stock.

Q. But in a highly leveraged company, for example, as the amount of the equity were to increase, wouldn't you expect the volatility of the stock returns would decrease as the leverage was brought back into something closer to a norm?

A. Not necessarily. I can think of extreme examples where that's not the case. But if you're saying, if you're -- I think your question is if you decrease the leverage by increasing the equity here, you're thinking about selling new shares or -- I may be able to answer that question.

Q. Well, I think I've gotten an answer to my question. Let me move to a slightly different area.

I want to discuss with you just briefly the area of employee stock options. You have done work previously, have you not, in valuing employee stock options?

A. Yes, I have.

Q. In fact, you have testified as an expert witness for the husband in a divorce case half versus half, correct?

A. It was a big divorce case, yes.

Q. Okay. Now for employee stock options, would you agree, sir, that at least in some circumstances the Black-Scholes formula would produce the upper bound of value for the options and the intrinsic value would produce the lower bound for the options?

A. Yes.

Q. Okay. And when we say "intrinsic value," let's just walk that back for a moment. Intrinsic value is what?

A. For options that -- the term "intrinsic value" refers to the greater of the difference between the stock price and the exercise price and zero. If you have an option that is in the money, it's the extent to which it's in the money. If you have an option that's in the money, the intrinsic value is zero.

Q. So the point here would be that the lower bound would always be the intrinsic value which could be zero. There wouldn't be a negative value associated with it, correct?

A. I'm not sure. When you said the point here --

Q. I'm sorry. Let me omit that portion. Is it true, sir, that the lower bound for employee stock options would be the intrinsic value?

A. Depends on the facts and circumstances.

Q. Is it true, sir, that Black-Scholes can overestimate the value of employee stock options because of the stochastic life feature of the stock options?

A. Yes. I'd be happy to explain that if you want.

Q. Let me ask a question or two. When we talk about a stochastic life feature, we're talking about the fact that there is a random event that could shorten the life of the option; is that true?

A. With employee stock options, it's that the person can die before the maturity of the options, and the option agreement may specify that at that point you have to either exercise them or terminate them; or the person can be fired in which case the options disappear; or the person gets a very short period of time to exercise the options; or the person can quit the firm in which case the options may specify that he has to exercise the options in a short period of time or lose the options. All those things can shorten the effect of the life of the option.

So you could have a five-year option, but if you die in one year, it's a one-year option. If you're terminated in one year, it's a one-year option. If you leave in one year, it's a one-year option.

Q. But they're stochastic in the sense that while you can identify the specify events that could shorten the life of the option, no one is able to model what that shortening will be, and, therefore, you can't just reprice it. You can't say employee stock option that otherwise might be out there for five years now has to be treated as two years. These are events that are not capable of being modeled. They're, therefore, deemed to decrease the pricing on them; is that fair?

A. I don't think I would agree with that. I think there's been a lot of progress made in the last few years about modeling the stochastic properties of employee stock options. This is a big controversy now because corporations are required to expense employee stock options, and now under applicable rules they expense them with the Black-Scholes value. But there's some dispute about whether or not the actual value of the options is the Black-Scholes value or a different value based on the stochastic life.

Q. Well, it's the stochastic features of the employee stock options that we're focusing in on for the purposes of determining whether Black-Scholes has a tendency to overestimate; do you agree with that?

A. With respect to what I testified to, under those facts and circumstances I testified that the stochastic life of those options could result in a situation where the fair market value of those options was less than the Black-Scholes value, that's right.

Q. And that's because of the specific kinds of events you've described that could cause the option to have a somewhat random event that would shorten its life, correct?

A. Because of the particular events I described and the specific characteristics of the particular options that were reached in that case.

Q. All of which were events with the example I just offered to you, which were those were all events that could have caused those employee stock options to terminate on a nonmodeled random basis thereby resulting in an overstatement under Black-Scholes?

A. I wouldn't characterize them that way. I think there's specific kinds of events associated with employees. I don't think I can generalize it as much as you've asked me a question.

THE COURT: So I'm clear, so there is something unique about options to employees.

THE WITNESS: Very much so, Your Honor.

THE COURT: What is it as opposed to what we're talking about here which is just whether a random event that can't be modeled can affect the validity of Black-Scholes.

THE WITNESS: With employees, the rights to continue to own or exercise the option is itself tied to employment. Typically, with employee stock options, if you're fired, you lose the option entirely. If you quit, instead, the term of the option gets shortened; you no longer have the right to wait three years to exercise. You have to exercise it now or you're out of luck. So it's the specific time of the terms of the option.

THE COURT: What does that have to do with the valuation of the option?

THE WITNESS: Because when you change the terms of the option because of your employment status, that affects the value of the option.

THE COURT: Sure. And I understand that. But I don't think we're talking about why the term changes; simply that it does.

THE WITNESS: Simply that it can.

THE COURT: We're agreeing it has nothing to do with the fact you're an employee other than the terms of your employment may change so the terms of your option may change.

THE WITNESS: No, no. It's tied in, it's a specific term of the option itself.

THE COURT: Right. No, I understand that.

THE WITNESS: Let me just give a simple example just to hopefully make it clear. Suppose that an employee holds a three-year option, which if the term wasn't tied to his employment, it would be worth \$10.

THE COURT: Right.

THE WITNESS: And suppose there's a 50-percent chance the employee is going to leave in one year and the one-year option is worth, if it was just otherwise an ordinary option, is worth \$5 in my example. So in that example there's a 50-percent chance the employee in effect owns a three-year option worth 10. So that expected value is now five. There's a 50-percent chance the employee owns what is in effect a one-year option worth five. So the expected value there is 2.50. So his option, it's really neither a one or three-year option. It's an option worth 7.50 because of the uncertainty about whether it will be a one-year option or a three-year option.

THE COURT: Right. Okay.

BY MR. MARMER:

Q. Mr. Ross, would you agree, sir, that the accounting treatment for options is not relevant to their economic value?

A. Well, I think depends what the accounting treatment is. But I think I would agree that it's certainly possible to have a situation where the accounting rules require one number and the fair market value of an asset a different number.

Q. So, in other words, you won't be guided by an accounting treatment in determining what the economic value was?

A. I think it would depend what the relevant accounting rules were. But I'm certainly not surprised to see situations where economic values and fair market values differ from book values for accounting purposes.

Q. You said book values. Are book values the only occasion in which you would think there would be a discrepancy between what economic value would be and accounting values would be reported at?

A. I believe book values are synonymous with economic values for the purposes of answering your question. If you're referring to something else, I'm not quite sure what you're referring to.

Q. Let me ask you this. Would you agree that it would be fundamental economic error not to consider the effect of special characteristics of an option and to blindly apply the Black-Scholes model?

A. With respect to employee stock options, certainly. Also with respect to the warrants here, which have this feature of acquiring a large percentage block of stock and a restriction, of course. If there are special characteristics, you want to take those into account.

Q. So it's relatively clear, I take it that at least from your point of view while Black-Scholes is one of the tools that will be used, adjustments have to be made to take into account the special facts and circumstances of the actual security you're valuing, correct?

A. If there are relevant special facts and circumstances, of course.

Q. And in this case you've identified what you consider to be two of those and you've made those adjustments, right?

A. Correct.

Q. And those are the only two that you've made adjustments for, the block control premium and the liquidity discount, correct?

A. Correct.

Q. Let's look at the block premium for a minute, if we could. I believe you rely upon a 1989 article by Barclay (phonetic) in your paper; is that right? Paragraph 11, page five of your report, if that will help. I don't mean to slight Professor Holderness. The Barclay Holderness article is what you're citing to?

A. Correct.

Q. When you're referring to the study in your direct examination, this is the report that you're talking about, right?

A. This is the article, correct.

Q. Okay. Now in -- and that's the article that came up with the average of the 20-percent premium for blocks that forms one of the underpinnings for your opinion that a 20-percent premium should be applied to the value of the stock here, correct?

A. For a particular kind of block. The largest outstanding block, yes.

Q. And let's just look first at the study itself. I believe your report acknowledges itself that the Barclay study is based on data from trades that occurred between 1978 and 1982, correct?

A. Correct.

Q. And that means that as of today that data is somewhere between 23 and 27-years-old, correct?

A. Correct.

Q. And the Barclay data consists of over that period from 1978 to 1982 of 63 block trades that met the criteria of the offers imposed, right?

A. Correct.

Q. And so the Barclay data of 63 trades over roughly five years indicates you're picking up essentially if they were to be evenly distributed about one trade a month, right?

A. I'm sorry. Someone was coughing when you were asking your question. I just missed part of it.

Q. The 63 block trades over five years, that's about one trade a month?

A. If you divide 63 by 60 months, that would be an average of one trade a month. Whether there was more than one trade a particular month, I don't know.

Q. Do you know how many blocks were existing in the market from 1978 to 1982 that would fit the selection criteria being the largest block, fit the criteria of not being a takeover, but didn't actually trade?

A. No, I don't.

Q. Do you know, did Barclay and Holderness attempt in any way to measure the number of blocks that were out there in the marketplace during those five years that otherwise would fit their criteria but did not present themselves in the form of an actual trade?

A. I don't recall. I would have to check the article.

Q. Now the Barclay data showed, did it not, that two-thirds of the corporate block purchasers were in the same business as the firm whose shares they acquired or closely related one?

A. I remember the articles showing that 80 percent of the transactions involved corporate purchasers and 20 percent involved individual purchasers, but, again, I know that the article presented other data on the characteristics of purchasers, but without checking, I'm not sure.

Q. Let me see if I can refresh your recollection just with one of their examples. You remember the discussion about Mego International, a toy manufacturer buying nine percent block in Tonka Toys?

A. Not specifically.

Q. Doesn't ring a bell?

A. If you could hand me the article...

Q. That's okay. I think we'll just move along.

A. Okay.

Q. Now you don't analyze whether there were any potential purchasers for the Sunbeam warrants by any company in the same business as Sunbeam, do you?

A. I didn't do any specific analysis of that question. I mean, there were other companies in the same business that certainly had the ability to acquire Sunbeam. Whether they were willing to do so or not, I haven't analyzed that.

Q. Did you look at any of the factual materials concerning the efforts Morgan Stanley made to sell Sunbeam prior to the transaction that took place between CPH and Morgan Stanley -- and Sunbeam concerning Coleman?

A. I think I have seen some of those materials at one point. Haven't looked at them recently.

Q. Are you aware, sir, that Morgan Stanley made intense efforts for a period of time to find a buyer for Sunbeam and never could find one?

A. I don't want to characterize their efforts. I don't know what they tried to do and what they were able to do.

Q. Is it a matter of not characterizing or you're simply not aware of what they did?

A. I think I saw some of the materials you're referring to, but your question is a little bit vague. If you show me some materials, I can tell you whether it was something I saw. Honestly, I wasn't there at the time. I wasn't at Morgan Stanley. I can't really characterize what they tried to do or what they were able to do.

Q. Now the Barclay study observed no block trading parties that were institutions, such as banks, mutual funds or pension funds except for an employee stock ownership; is that correct?

A. I don't recall. I'd have to check. If you'd hand me the article, I could tell you.

Q. I just want to see what of these things -- I take it you didn't concern yourself in reaching your conclusions about a block premium here as to whether an institution might be available to purchase the warrants; is that correct.

A. I don't think that is correct. I looked at the relationship between premiums paid and the characteristics of the issuer of the block in the Barclay study and I took that into account.

Q. But the Barclay study, you can't remember one way or another whether the Barclay study observed any phenomena relating to an institution emerges as a block purchaser paying 20 percent?

A. Well, the article is 24 pages long single-spaced. I remember it did a lot of other kinds of -- provided a lot of information about blocks. The information that I focused on was the information about block premiums and about the relationship between block premiums and the characteristics of the block. But there's other interesting information in the article about characteristics of blocks.

Q. All right. But if we were --

THE COURT: I'm sorry. I really need to you listen to the question and answer the question that's asked. Okay?

THE WITNESS: I'm sorry, Your Honor.

THE COURT: That's okay Go ahead.

BY MR. MARMER:

Q. If we were going to take the Barclay study, let's start out would you agree with me that the Barclay study purports simply to describe the phenomena occurring within the block trades it's analyzing and does not purport anywhere in that study to predict a 20-percent block premium will be paid in the future for any company that presents itself?

A. Yes, I think that's fair.

Q. And if we were to try and take the criteria within the Barclay study and start applying them to the facts and circumstances of this case, at least one of those leaps would involve a contamination of a description to a predictor, correct?

A. I don't understand your question.

Q. Well, it would be a matter of, it would be an improper use of the Barclay article, would it not, to suggest that the authors are implying that you can predict from their study what will happen in the future with regard to blocks that are trading?

A. No, I don't think that is a proper use of the study. They specifically estimate the relationship between premiums paid and characteristics of blocks using a standard regression analysis, and it's well understood that such regression analyses can be used once they're estimated for prediction.

Q. But even there, sir, is it not true that they're analyzing what happened in the actual blocks that trade; they're not analyzing how that data then would be applied if you took all of the blocks available at that time. That would skew the result rather dramatically, wouldn't it?

A. I don't understand your question.

Q. Well, in other words, you've got data here that self selects. It presents itself in a rather atypical fashion, does it not? You have a subset of all of the trades that are out there, and those are the ones that actually trade. I'm sorry. All of the blocks out there are the ones that trade. You take the universe of other blocks out there that don't trade. And now if Barclay were correct, shouldn't there be a second market that exists just for block trading where anyone who has a block would know they ought to go and the bidding ought to be 20 percent?

A. Your question, respectfully, doesn't make any sense. I think you asked three or four in that line of speech.

Q. I apologize.

A. But I would say that it's not a, what was the word you used, biased selection. It's an actual sample of what willing buyers pay willing sellers in arms' length transactions and, therefore, is the best evidence about what the value of large blocks is.

Q. And it doesn't say a word about what happened to all of the other blocks and whether they would or wouldn't have traded at 20 percent; isn't that right?

A. I think it implies what would have happened if there was both a willing buyer and willing seller for the other blocks. There weren't. That's why the other blocks didn't trade.

Q. Within the Barclay study itself there's a pretty broad range of pricing among those premiums and discounts, aren't there?

A. Yes.

Q. It ranges from 60 percent discounting to over a hundred percent on the premium side; isn't that right?

A. I would have to look specifically, but that sounds right.

Q. And approximately 20 percent of the Barclay study sample involved trades that actually traded at discounts; isn't that correct?

A. That's correct.

Q. And what you're doing here is applying the average, in essence, the 20 percent as well as the --

A. The average of all the transactions including the discounts. The average premium, 80 percent of the transactions where there is a premium would be much larger than 20 percent.

Q. The Barclay study found firms in severe financial distress at the time of the block trade traded at more substantial discounts?

A. No. They provide a couple examples of firms in what I would call extreme financial distress. I believe in one case the block was in probate. In another case the firm was in bankruptcy. But more generally they provide a statistical analysis that looks into the relationship between premiums and the characteristics of a block that takes into account the financial circumstances of the issuer, and that analysis does not imply that firms that are in less extreme financial distress will trade at discounts.

Q. Now in March of 2001, Barclay and Holderness together with Shian (phonetic), published another study called the block pricing puzzle, correct?

A. Correct.

Q. And you've had a chance to look that over, correct?

A. Not quite correct. It's not published. It's an unpublished working paper.

It is circular.

Q. It's available on the website. It's something that anyone interested in the -- in this field could easily retrieve from social science research network, correct?

A. I know it's possible to retrieve it online. I'm not sure whether it's available on that particular source.

Q. Okay. It's not something you overlooked in analyzing this, is it?

A. No. I took it into account.

Q. Now, but you didn't refer to the 2001 working paper in your report, did you?

A. I don't -- I don't recall looking at it in connection with the report. I don't think it's listed on the materials reviewed in connection with the report. But I have seen it before. Your colleague asked me about it in deposition, and I have looked at it since.

Q. Now the data in the 2001 study is between 23 and 28-years-old, correct?

A. I'm sorry?

Q. It's from 1978 to 2005?

A. I don't know. I'd have to look at it.

THE COURT: 1978 until when?

MR. MARMER: It's 1978 until the -- I'm sorry. Let me restate that.

BY MR. MARMER:

Q. The Barclay study is published in 2001 -- not published but is available in 2001. And they looked at a period beginning at approximately the same time as the other study did, 1978, although they had certain samples where they had to go to 1979, correct?

A. I don't know.

Q. You just don't recall?

A. Don't recall.

Q. Okay. Now there were 204 block trades analyzed in the 2001 study, correct?

A. I'd have to look at it.

Q. Well, let's try and step out maybe more generally to see if the central conclusions of the study stick in your mind. It's true, is it not, sir, that the point where the essential argument of the 2001 study was that they were attempting to find out who actually will pay a premium and why some blocks trade at premiums and some blocks trade at discounts?

A. I don't think I'd characterize it quite that way, no.

Q. Okay. Do you think that's an unfair characterization?

A. I think parts of the subject matter relates to that.

Q. It's true, sir, is it not, that one of the conclusions of the 2001 Barclay study was that in identifying purchasers who would pay a premium, those are what the authors describe as active block holders, persons who intend to take a hands-on active role in management?

A. No. They distinguish between two types of transactions, block transactions that are a little bit like the blocks in the Barclay and Holderness article, but in the 2001 article which was by Barclay, Holderness and Shian they don't require that it's the largest block. It could be any large block. And private placements, which are different from block transactions, in that within the set of private placements they distinguish between two types of investors, active investors and passive investors.

Q. The robust portion of their findings is that it's persons who were interested in obtaining hands-on roles in management that are willing to pay a premium. That's the gist of the finding, is it not?

A. I'm not sure that's a fair characterization. I don't know why it's robust. The article has not been published, so I'm a little uncomfortable calling an unpublished finding robust when the authors haven't seen fit to publish their article.

Q. Okay. So your queasiness has to do with the fact it hasn't been published as opposed to the statistical information contained within it; is that correct?

A. First of all, I don't know if you've characterized it correctly. You haven't shown it to me. I'd like to look at it. But I don't attach the same veracity to an unpublished study as I do to a published study because you have to vet a study before you get it published.

THE COURT: As I understand the question that's being asked is you're disagreeing with Mr. Marmer's characterization of what he thinks is an essential conclusion of this article. And he's asking you why. Is it because it's unpublished or is it for some other reason?

THE WITNESS: I thought he asked me whether it was a robust conclusion. And I don't remember whether the characterization made in the conclusion is even accurate. But even --

THE COURT: How would you describe the conclusion in the article?

THE WITNESS: I'd want to look at it again.

THE COURT: Can you describe it off the top of your head or not?

THE WITNESS: I think the article was trying to solve the following puzzle, that in the block trading literature people observed that when blocks trade publicly, the trades occur at premiums on average. However, in the private placement literature, even when the private placements are unrestricted, the blocks trade at discounts on the average. And to the authors, that seems like a puzzle because in both cases it's a large block of unrestricted stock. The only difference is that one is in public transaction using the public markets, and the other is a private transaction where the issuer trades directly with the purchaser.

And the article discusses a number of potential explanations for the -- that puzzle rejects some, accepts or accepts in part others. That's what the article is about in general. But with respect to the specific conclusions, I would just want to look at it, but that's the general substance of the article.

THE COURT: Thank you.

BY MR. MARMER:

Q. Let's look at another article. You discussed briefly some research by Kent Clark and Eli Ofek concerning what happens with distressed firms in their trading. Do you recall that?

A. Yes.

Q. Now it's true, is it not, that Clark and Ofek were dealing with takeovers, not just block trades?

A. Yes, that's true.

Q. And, in fact, the research you've relied upon by Professors Barclay and Holderness, they expressly excluded takeovers from their study; isn't that right?

A. That's right.

Q. So these wouldn't be really an apples to apples comparison; fair enough?

A. They're both control transactions, but different kinds of control transactions.

Q. One of them -- when you say "control transactions," you're saying -- let me be sure I understand you -- that a large block implies the ability to control?

A. I think large percentage blocks are frequently referred to as control blocks. It's often the case that large block holders have a role in managing a company. Whether or not it confers the explicit ability to control depends on a lot of facts and circumstances.

Q. And in a takeover situation once they've acquired it, they've gotten it by definition?

A. Correct.

Q. In the Eli -- I'm sorry -- the Clark and

Ofek article, they also observe the phenomena, did they not, that takeovers were more likely to involve firms in the same industry?

A. Could you refer me to the specific reference?

Q. Sure. If you just look take a look at the abstract and look at the first sentence, maybe that will refresh your recollection on it.

A. Yes.

Q. Okay. Now we were talking just a moment ago about -- actually, before we go back let me just ask you this. I think this came out on direct and I think in response to questions from the Court, but I want to make sure I got it all clearly.

When you took the 20-percent premium, you applied that to the underlying stock price, correct?

A. Correct. I treated the option as the right to buy a control block that's worth 20 percent more than ordinary exchange trading shares.

Q. And so if we were just, for instance, just to take your charts and look at the values, the concluding values for the stock based upon with a premium -- I'm sorry. The warrants. Let me start over. I've confused that to the point of beyond recognition.

If we were to compare your two charts, charts where you're looking at the value of the warrants with a control premium and the value of the warrants without a control premium, when you look at the actual difference in valuation between those two charts where you have the control versus not, the differences are actually much larger than 20 percent, correct?

A. Smaller in dollars, greater in percentages because warrants are on percentage terms more sensitive to changes in value of a security but in dollar terms less sensitive. So it's a smaller dollar premium.

Q. But put differently, it's fair to say, is it not, that when you choose to apply the 20-percent premium at the stock price input, the effect of the calculations is to magnify that, so that the valuation turns out to be larger than 20-percent difference between the two?

A. No, it reduces it because the 20 -- if you own the stock, let's say the stock was, the exchange traded stock was \$8. Then the control block with a 20-percent premium would be worth 9.60, \$1.60 more per share. The warrants are worth more per share but less than \$1.60 more per share.

Q. So if I understand you correctly, if we were to take, for example, Exhibit F to your report which assumes a 20-percent large block premium on the trading day of August 12 and, therefore, uses a stock price that is the 813 stock price with 20-percent premium of 10.275 and if we just look over at your 65-percent volatility number and come down to the total value of the warrant, it's about \$160 million on that chart, right?

A. Without the liquidity discount?

Q. Yes.

A. Yes.

Q. And then with the -- and then if we did the same analysis with the no large block premium, that's your Exhibit, what is that, Exhibit G, correct?

A. Yes.

Q. And there the comparable number would be approximately 125.7 or 126 million, correct?

A. Correct.

Q. Now when you apply the liquidity discount, you didn't apply the liquidity discount to the underlying shares, did you?

A. No.

Q. You applied that to the total value number that you came up with, correct?

A. Correct.

Q. I want to go back and just look for a moment at some of these concepts of block premium and what the purchaser is getting. I believe you said that large blocks are sometimes referred to as control blocks and that that's at least some of the thinking behind why a premium is paid.

A. Yes, they're sometimes referred to as control blocks.

Q. And in assigning a premium to the underlying shares of the warrants here, you assumed, did you not, sir, that a purchaser would pay a premium for warrants that would entitle the purchaser to acquire on a diluted basis 19 percent of the company, correct?

A. Not quite. I calculated the fair market value of the warrant in those circumstances where the warrant is the right to buy shares that are worth more on a per share basis than exchange traded shares. And I determined that in an arm's length transaction between a willing buyer and a willing seller, those warrants would be expected to trade at a higher price than warrants were not at a control block.

Q. I'm just trying to look at this from a practical point of view and see if I understand what you're saying. Are you saying that someone who's going to be a potential purchaser of the Sunbeam warrants that CPH owned would pay a premium on August 12th to buy that warrant because then they would have the right at some point in the future when it would become economically sensible to exercise the warrant, and at that point in the future they would then have 19 percent of the common stock and that would be a bigger opportunity for control?

A. I'm saying that a willing buyer would pay more for a warrant to buy a control block of shares on a per share basis from a willing seller in an arm's length transaction on August 12, 1998 than in an otherwise comparable transaction involving warrants to buy a block that was not a large percentage block.

Q. You have no study that ever shows that that phenomena has occurred, do you?

A. With respect to warrant transactions?

Q. Correct.

A. No, I looked at the studies of stock transactions.

Q. And I believe you told us during your direct examination that generally speaking it would be economically foolhardy for the owner of a warrant to exercise it, that typically it's worth more alive than dead.

A. As long as the warrant has dilution adjustments and it's not a dividend paying stock, absent very unusual-facts and circumstances typically options are worth more alive than dead, that's correct.

Q. And the parameters you've just set describe the Sunbeam warrant here, correct?

A. The Sunbeam warrant had dilution adjustments and Sunbeam was not paying dividends, correct.

Q. Let's just explore for a moment -- Leave aside the warrant. Let's just talk about a block of stock first. Is it your view, sir, that someone would pay a 20-percent premium to acquire a 19-percent block of the common stock of Sunbeam in a circumstance where another owner would have -- let's take the owners. Michael Price would have at that point 14 percent of the company and CPH would have about 11 and a half percent?

A. I think, if anything, the best estimate is likely to be higher. That's exactly the kinds of circumstances that Barclay and Holderness studied.

Q. Well, let's just look at this. We're talking -- Let's be sure we have the numbers straight first. CPH owned 14 percent of the common stock before you assume the exercise of the warrant, correct?

A. Correct.

Q. If you assume the exercise of the warrant goes from 100 million to 123 million, that's more or less 11 and a half percent?

A. Combined with the warrants it's over 30 percent.

Q. For a moment we're going to leave out the warrant if we can.

A. Okay.

Q. So it's about 11 and a half percent; is that right?

A. Okay.

Q. All right. And Michael Price had before, out of 100 million shares he had 17 and a half percent, correct?

A. It's -- I'd have to double-check the proxy. I know it was less than 23 million shares substantially. It sounds right. I'll accept your representation.

Q. And if you assume the exercise of warrants so that you had 123 million shares in the base, that would come out to about 14 percent, correct?

A. I'll accept your math.

Q. Okay. That's always dangerous, but if you think of a reason not to, feel free to speak up.

A. Okay.

Q. It's true, is it not, that CPH and Michael Price had at least through the history of this matter once the warrant had been exercised -- are you aware of any circumstances in which the two of them disagreed or were at odds with one another?

A. I don't really have an opinion about that one way or the other.

Q. Didn't look at it at all, did you?

A. I know a little bit about some of the -- I know there's a filed trial transcript, but I haven't investigated the facts and circumstances. I certainly don't have an opinion about the relationship.

Q. Do you know how many board seats Michael Price had?

A. I don't recall.

Q. Do you know how many board seats CPH had?

A. Don't recall.

Q. It's true, is it not, sir, that Michael Price and CPH together, even assuming the exercise of the warrants, would own 31.6 percent of the common?

A. No. CPH would own more than 30 percent. Michael Price would own what he owns.

Q. You're absolutely correct. I misstated. Let me assume for a moment that CPH has sold the warrant and someone else owns the warrants.

A. Right.

Q. In that event, and let's assume further the warrants had been exercised. You with me?

A. I'm not quite sure what you're saying. You're saying CPH exercises the warrants and then sells the shares?

Q. No, CPH sold the warrant before exercising and the purchaser exercises it.

A. Okay.

Q. So we're looking at a universe there in which the purchaser of the warrant who's exercised it has 19 percent of the common, right?

A. Right.

Q. And then CPH and Michael Price together have 31.6 percent of the common, right?

A. Well, they're separate owners. If you add the two numbers together, that might be right, but the 19 percent block is the largest block.

Q. So it's the single largest block as long as you treat Michael Price and CPH as not coordinating their efforts, right?

A. As is appropriate. Whatever is reported in the proxy statement. It's not the coordination. It's the beneficial ownership.

Q. Well, yes, we're talking about beneficial ownership.

You mentioned the proxy statement. I guess in my hypothetical, Mr. Ross, we've assumed a lot of things that weren't present in the proxy, right? We wouldn't really contend the proxy was somehow false and misleading because it responds to a hypothetical sale of the warrants where the hypothetical purchaser has exercised the warrants. Michael Price and CPH decide to align themselves together. That's a little too farfetched to serve as a false misleading in the proxy, wouldn't you agree?

A. There's a lot about your hypothetical that's farfetched, but it's your hypothetical.

Q. Well, I guess the issue I have is whether you -- Let me just go at it a different way. I think we have the math out.

If someone wanted to exercise control over Sunbeam, do you think that they would want to purchase just the warrants from CPH, or do you think they'd want to purchase the warrant and the stock?

A. I'm sorry. Could you repeat the question?

Q. If someone wanted to control Sunbeam, do you think they would purchase just the warrant that CPH owned, or do you think they would want both the warrant and the stock?

A. I think it's easier to talk about what CPH would want and --

Q. But that's not what I asked you. This is one of those occasions where even if it's easier to talk about something else, let's take the more difficult one and answer the question that I asked.

MS. BEYNON: Your Honor, I object to this as an improper hypothetical.

THE COURT: Overruled.

THE WITNESS: I don't have an opinion in the abstract about -- there could be people who want to buy the warrants. There could be people who want to buy the warrants and the stock. There could be people who want to buy the stock. There could be people who don't want to buy any of those things.

BY MR. MARMER:

Q. In 1998, I take it no sensible person would purchase the warrant and the stock given the then existing trading prices, right?

A. You're talking about on August 12th or 13th?

Q. Pick any date in August 1998.

A. Absent very unusual circumstances, I think it would not make sense to exercise the warrants on those dates, correct.

Q. So if I understand you correctly, then, the hypothetical purchaser of the warrant in 1998 that's going to pay a 20-percent premium is going to do so based upon the assumption that they're going to buy the warrant which will give them the right five years later before the warrant goes dead to acquire a 19-percent block; is that right?

A. No, the warrants are what are called American type options. They have the right to exercise them at any time.

Q. And the difference between American and European options is American options you get to exercise during the entire life; European options you can only do on the end date?

A. On the expiration date, that's right.

Q. We were discussing, I thought, a moment before -- and let me know if I misunderstood you -- was that because rationally economic actors would wait until the very end before they would exercise a warrant even if it were in the money. A rational economic actor in August of 1998 would not purchase the warrant in August of 1998 with an expectation of exercising it prior to its expiration five years out?

A. I think it just depends on the facts and circumstances.

MR. MARMER: May I have a moment, please?

THE COURT: Um-hum.

MR. MARMER: Nothing further.

THE COURT: Do you have other questions?

MS. BEYNON: Yes, Your Honor.

REDIRECT EXAMINATION

BY MS. BEYNON:

Q. Mr. Ross, you testified on cross-examination that you had previously testified for Morgan Stanley; is that correct?

A. Correct.

Q. Have you ever testified adversely to Morgan Stanley?

A. Yes.

Q. And when was that?

A. Recently there was two-sided mock trial proceeding where we're currently serving as experts adverse to Morgan Stanley in approximately 40 securities fraud cases, and I testified in that proceeding.

Q. You also testified that you had in prior cases been an expert on behalf of clients represented by Kellogg Huber; is that correct?

A. That's correct.

Q. In prior cases have you testified on behalf of clients represented by Jenner & Block?

A. I haven't testified on behalf of Jenner & Block, but I've worked on cases on behalf of Jenner & Block.

Q. Have others at Lexecon testified on behalf of clients represented by Jenner & Block?

A. Yes.

Q. On cross-examination, Mr. Marmer asked you some questions about mean reverting the volatility and the mean reverting. Can you explain that a bit?

A. Yes. In general, mean reversion without reference to volatility refers to a phenomenon with certain statistical data where when there are perturbations in the data, the statistical, series whatever it is, tends to revert back to the previous level. Sometimes interest rates are described as mean reverting for that reason.

With respect to options or implied volatilities, there are two kinds of reasons that volatilities can change. One is sort of random reasons. The market gets more volatile. There's unusual trading activity in the security, something like that. And in those circumstances the volatility will revert towards the mean because nothing has changed fundamentally at the company. And what ultimately determines the volatility of the stock is the volatility of the underlying assets and the financial structure of the company. But sometimes the volatility of a stock changes because there is a fundamental change in the company. Either its assets change, say, a company that was in one type of business decides to go into a different type of business and gets riskier assets or, more than likely, the financial structure changes because the company takes on a lot more debt, like Sunbeam did here in March of '98 not only when it acquired Coleman but also when it acquired Signature and First Alert, not only that the value of its assets subsequently declined or were revealed to be much lower than what had been received previously. So the company became much more lever -- had a lot more debt and a lot less equity. So with that fundamental change in the capital structure, there would be no reason to believe that the volatilities would revert all the way to prior historic levels. You would expect the volatility to instead remain at somewhat a higher level.

Now there is some mean reversion in the Sunbeam data. If you look at the historic volatilities for 90 or 180-day periods prior to August 1998, the historic volatilities are much higher than the 65 percent volatility that I used. And they're shown in Exhibit D of my report. Whatever the Exhibit shows is that on August 12th, 1998, the 90-day historic volatility was 94.95 percent; 180-day historic volatility was 84.11 percent.

So when market participants are trading actual call options at prices that imply a volatility of 65 percent, what that's saying is market participants expect the volatility of Sunbeam stock to revert somewhat, to decrease somewhat. They do not expect the high levels which persisted in the 90 days prior to August 12, 1998 to persist. But what the 65-percent volatility, implied volatility is also telling you is that market participants do not expect the volatility to revert to the five-year historic average of 54 percent. And that's not surprising. That's at least directionally what you would expect given the enormous increase in debt and the enormous decrease in the stock price that occurred between March '98 and August '98.

Q. Thank you. Mr. Marmer asked you some questions about what he called a smile curve and asked about the applicability of the smile curve to the facts here. Could you please explain your answer a bit there?

A. Yes. There's more than one kind of what's called a smile. One can think about the relation between implied volatilities and the exercise choice of an option. One can also think about the relationship between implied volatilities and the

maturity of an option. The volatility smile, the shape that looks like a smile refers to the shape of an implied volatility curve calculated relative to the strike price of an option.

If I remember correctly, for at the money options where the stock price is currently equal to the exercise price, the implied volatilities tend to be at a minimal number. And then as you deviate from the current stock price in either direction in calculating implied volatilities, you tend to get higher numbers with lower exercise prices and higher numbers with higher exercise prices. And it looks a little bit like a person smiling.

But there's another volatility surface which relates to the relationship, to the relationship between implied volatilities and the term in maturity. So for a particular exercise price you can ask the question what is the implied volatility that's implied by a one-month option, and you'll get a number that's a fairly high number. For a two-month option, you'll get a somewhat lower number. For a three-month option, you get a somewhat lower number. And those implied volatilities drop off very quickly and then the slope of that volatility surface flattens out.

THE COURT: Okay. That's what you're relying on when you opine that the implied volatility for a five-year option here is the same as it was for one in one and a half and two years.

THE WITNESS: Correct.

BY MS. BEYNON:

Q. We don't have the data for the five-year options because we're assuming more on the flat part of the graph?

A. I checked the data from one to two.

Q. So we're assuming it's going to stay flat out five years even though we don't have that graph?

A. Correct. If you think about what market participants are doing, you get farther and farther into the future, you have obviously less and less information, so market participants don't have better information about Sunbeam than three years, four years, five years by doing two years. There's really no reason to expect they do.

Q. Mr. Marmer asked you about the valuation of stock options and some of the special considerations applicable to that valuation. Is it your opinion that any of these special considerations regarding valuation of employee stock options are relevant to your opinion here?

A. My opinion is they are not relevant here.

Q. And why is that?

A. These aren't employee stock options.

There's no provision of these options that makes it terminative if someone leaves the employ of Sunbeam, if someone is fired from Sunbeam, if someone dies. The option is just a contract that gives the holder certain rights with respect to Sunbeam. There's restrictions on the transfer of the option. But no matter who dies or who leaves Sunbeam or who quits or who is fired, that contract remains outstanding.

Q. One further question. Mr. Marmer asked you a question about your testimony that you've given in your deposition. Do you still have a copy of your testimony there?

A. I do.

Q. He directed your attention to page 68, lines 10 through 22 where you answered the question, "Does your report describe any way in which CPH could have sold the warrants on August 24th in whole or in part?"

And you testified, "I think whether or not CPH actually could have sold the warrants is irrelevant for the purposes of answering the question about what a willing buyer will pay a willing seller for the warrants on that date, or on August 13th, 1998."

Could you please explain that answer a bit more?

A. Yes. That one can determine --

MR. MARMER: Objection, Your Honor. I don't think it's proper to ask the question to explain an answer he gave at a deposition.

THE COURT: Do you want to simply rephrase it?

BY MS. BEYNON:

Q. Sure. Let's just ask the question that's asked in the deposition. Does your report describe any way in which CPH could have sold the warrants on August 24th in whole or in part? And what's your answer to that?

A. My report describes the characteristics of the warrants, a portion of which is restricted from sale, a portion of which is not.

Q. Is it relevant whether or not CPH could have sold the asset, the warrants on August 24th to your opinion?

A. No -- It affects the calculation of the fair market value, but it does not prevent me from calculating a fair market value. One can calculate a fair market value of an asset that can not be presently sold. One has to take into account the fact that it can not be presently sold in determining and estimating what a willing buyer would pay a willing seller in a hypothetical arm's length transaction. The fact that no such transaction can, in fact, occur, however, does not prevent one from performing that estimate, deriving that estimate.

Q. Mr. Marmer also asked you some questions about the event study that Lexecon performed, and I believe he directed your attention to 0122067. This is in CPH 1405. He asked you about a number of events that took place on a certain day and asked you why you didn't disaggregate the effects of those events on the valuation that you did. Can you please explain why you didn't -- you mentioned that you didn't do that. Could you please explain why you did not?

A. In order to value the rights to buy Sunbeam stock on August 12th, 1998, I wanted to have the best available estimate of the value of Sunbeam stock on August 12th, 1998 in light of all of the events that had occurred on or before August 12th, 1998. A number of events related to the settlement occurred on August 12th, 1998 but were not disclosed to market participants until after August 12th, 1998, after the close of trading on August 12th, 1998.

For that reason, I concluded that the closing stock price on August 12th, 1998 did not reflect unbiased estimate of the value of Sunbeam stock given everything that had occurred as of August 12th, 1998. Instead, I noted that there was a big increase in Sunbeam stock price on August 13th immediately upon the opening of trading, that market participants attributed that entirely to the events that occurred on the 12th and had disclosed after the close of trading on the 12th

and, therefore, I decided that the closing stock price on August 13th, which did reflect the information, the events that had occurred on August 12th was a better estimate of the value of unbeam stock on August 12th.

MS. BEYNON: No further questions, Your Honor.

THE COURT: Okay. You can step down. Thank you.

THE WITNESS: Thank you.

THE COURT: You all tell me. Do you want to publish the depo excerpts and then take a break or do you want to take a break? Break. Okay. We'll be back. Thanks.

(A recess was taken from 3:03 p.m. to 3:16 p.m.)

THE COURT: Okay. Where are we going on the depositions?

MR. WEBSTER: Your Honor, the plaintiffs would like to get Dr. Nye on and off the stand today.

THE COURT: Do you have any objection?

MR. WEBSTER: No. We would propose to hand you copies of the depositions so you can read them at your leisure overnight or in the morning so we don't have to stare at you and watch you ??

2003 WL 24303790 (Fla.Cir.Ct.) (Expert Trial Transcript)
Circuit Court of Florida.

COLEMAN,
v.
Morgan STANLEY.

No. 2003 CA 005045 AI.
2003.

(Transcript of Dr. Douglas R. Emery)

Case Type: Fraud & Misrepresentation >> Business

Case Type: Fraud & Misrepresentation >> Fraud - Fraud & Misrepresentation

Case Type: Securities >> Securities Fraud

Jurisdiction: Florida

Name of Expert: Douglas Emery, Ph.D.

Area of Expertise: Accounting & Finance >> Financial Analyst

Representing: Unknown

THE COURT: Well next time you can and you can suck on it all you want.

Okay, who will be Plaintiff's first witness?

MR. SCAROLA: Your Honor, CPH would call as its first witness Dr. Douglas Emery.

BAILIFF: Right this way.

THE COURT: Raise your right hand. Do you swear to tell the truth, the whole truth and nothing but the truth?

THE WITNESS: Yes.

THE COURT: Is there water in that pitcher?

BAILIFF: Yes.

THE COURT: And cups?

Have a seat. Take a seat.

THEREUPON,

DOUGLAS EMERY

having been first duly sworn, was examined and testified as follows:

MR. SCAROLA: May I precede, Your Honor?

THE COURT: Yes, sir.

DIRECT EXAMINATION

BY MR. SCAROLA:

Q. Dr. Emery, would you please begin by introducing yourself to the ladies and gentlemen of the jury, tell us your full name and where you live?

A. My name is Douglas R. Emery. I live in Miami, Florida.

Q. And where do you work, Dr. Emery?

A. I work at the University of Missouri -- the University of Miami. Sorry.

Q. If you would take --

A. I did once.

Q. Dr. Emery, that microphone in front of you is very directional. Unless it is pointed at your mouth, it doesn't need to be directly on your mouth, but it needs to be pointed in the direction of your mouth, otherwise it won't pick up your voice, okay?

First time you've ever testified Dr. Emery?

A. Yes, it is.

Q. Little nervous?

A. Yes.

Q. Think we can get the school where you teach right now?

A. I hope so. The university of --

Q. Let's start again, please. Tell us, if you would, where you work.

A. I work at the University of Miami.

Q. And what is your job at the University of Miami?

A. I am on the faculty in the finance department. I'm Professor of finance and chairman of the department of finance in the school of business.

Q. And how long have you held that position, sir?

A. I have been in that position for almost seven years. This summer it will be seven years.

Q. How long in total have you been teaching at the University of Miami?

A. Seven years.

Q. And tell us, if you would, please, what kind of teaching positions, if any, you held before joining the faculty at the University of Miami?

A. My career started at the University of Calgary in Alberta, Canada.

THE COURT: Remember, if you face the jury, it's fine, but then we need the microphone tipped. I want to make sure I can and they can hear you.

THE WITNESS: I started my career at the University of Calgary. I left the University of Calgary to go to Purdue University. I went from Purdue University to the University of Missouri. I spent quite a bit of time at the University of Missouri. While I was there I had short visiting appointments at Washington University in St. Louis and at Nangqen University in Nangqen, China.

In 1989 I was hired away from the University of Missouri to the State University of New York in Binghamton and I was there until 1998-when the University of Miami hired me away from them.

BY MR. SCAROLA:

Q. Solely out of curiosity, how is it that you came to be teaching in China?

A. The University of Missouri business school put together a joint program, joint MBA program with the school of business at Nangqen University in China. And the pattern was for faculty to go over and do the teaching over there. It was a very fascinating experience.

Q. Has teaching been your profession throughout your adult life?

A. It has.

Q. Could you tell us, please, the kinds of things that you have been teaching in the more recent past?

A. I've taught a wide variety of courses over my career. I teach primarily corporate finance and I've taught that at all levels, from undergraduate introductory, what we refer to as core classes, sort of a survey class, introductory finance to advanced classes.

I've taught those same sorts of classes at the graduate the level, masters program. I've also taught specialized case classes at both levels. And then finally I've taught doctoral seminars at the Ph.D level..

Q. Dr. Emery, for your comfort, there are some cups that are just over your right shoulder there and there should be water in that pitcher. And you're certainly welcome to pour yourself a drink.

And while you are doing that, tell us about your own education leading up to your teaching career. And begin if you would with your undergraduate degree.

A. My undergraduate degree was from Baker University in Baldwin City, Kansas. I majored in physics and math. I went from there to graduate school at the University of Kansas. I earned an MBA and then subsequently --

Q. That being a masters in business administration?

A. That's correct.

Q. What changed your mind to leave the math and sciences and go into your MBA program?

A. Well, I had actually always thought that I would do computers in business, some sort of quantitative things in business. And so I actually had majored in physics with the idea of learning more about math and quantitative analysis to be able to do something in business.

The real change was in being in the MBA program and deciding that I really wanted to do the Ph.D program.

Q. And when did you get your masters in business administration?

A. In 1973.

Q. And where did you then begin to pursue your doctoral degree?

A. I stayed at University of Kansas to do my Ph.D in business.

Q. Was there a particular focus within business of your Ph.D training? Any subspecialty or particular interest that you had while you were doing that work?

A. That would -- decision sciences would be the focus. We were a nondepartmentalized business school, which meant we didn't have departments in areas. And so I took classes in a variety of things, finance was one of them. But I focused in the broader area of decision sciences when I -- in my doctoral work.

Q. I have no idea what decision sciences is, could you explain that to us?

A. Essentially it focuses on making the best decisions. It focuses on methods of decision making. Frequently it has a strong quantitative aspect to it. How do you make better decisions? So we study decision making techniques.

Q. Other than coin tossing, I assume?

A. Correct.

Q. All right, sir?

A. Although, to study them we did a lot of coin tossing.

Q. All right. Dr. Emery, can you tell us, please, sir, whether you have written any books or articles about the specific subject matter of corporate finance?

A. I have. I've written a wide variety of articles over the years. And I've written, coauthored five books in corporate finance.

Q. Those volumes at the corner of our table over here look familiar to you?

A. Yes, they are, those are all books that I've coauthored.

Q. All right, sir, what are the subjects that you have dealt with in your writings?

A. Pretty much everything that would be under the rubric of corporate finance and more broadly finance.

Finance is a little bit of a surprise to people. Sometimes people think of it being related to other disciplines such as economics and accounting, and it certainly is, but finance is focused on valuation, what something is worth, and decision making, what do we do next?

So that is, in terms of the breadth, anything that would fall under that in a corporate finance sense, for example, mergers and acquisitions or investment banking, security issuance, working capital management, capital budgeting. These are all topics that would be covered.

Q. To the extent that your expertise focuses on issues of valuation, are you studying and looking at those factors that affect value within the business world?

A. Of course, absolutely.

Q. Are any of your books used as texts at either the undergraduate or graduate level?

A. Yes.

Q. You mentioned accounting and distinguished it from finance. Have you yourself ever been a certified public accountant?

A. I have not..

Q. And how is it that accounting differs from finance? If we're distinguishing those two areas of expertise, help us to understand the distinction between them.

A. What I tell my students is if you ride on the metro and get on the metro and you see that there are seats, and unlike a bus, on the metro there are seats that face forward and seats that face backwards. The seats that face forward are finance seats and the seats that face backward are accounting seats.

And what that is to say is that accountants account for what happened historically, what has happened in the past. And their main focus of the discipline is what went on in the past.

And finance is very much the opposite. We're very concerned with what's the current situation? What's the current market value? How did things stand and what do we do next? Where are we going?

So we're squarely facing into the future whereas, as a discipline, accounting focuses on accounting sort of keeping track of what has happened. So it's primarily historical. And our discipline finance is primarily forward looking.

Q. In order to understand where we are and where we're going, to what extent must finance concern itself with where we've come from?

A. Well, as with anything, if you're going to gather information, where you come from has important relevance. And you know, to project forward, we frequently look at what's happened in the past, what's happened in the more recent past and what the situation is currently. And so it requires frequently interaction with accounting.

Q. Have you edited any professional journals, Dr. Emery?

A. I have. I served as the editor of financial management, which is the signature journal of the Financial Management Association International. And I did that for six and a half years with a colleague of mine John Finnerty.

Q. What are the responsibilities of the editor of a professional journal?

A. The editing process in a professional journal revolves around what's called peer review. And authors do pieces of research, original research. They submit it to the journal. And as editor, and I would look at the paper, read it, have an idea about what it was about, its relevance to our journal. And then I would choose what are called referees or reviewers, and take the paper and send it out to those people without them having the author's name.

And then they would review it and they would say, it's this, it's that, it needs this change, whatever. They would send it back to me. Then we would sit down and I would look at it and say, do I agree with this? Is this okay? And make a decision as to whether the paper would be published as is or, as in most cases, even if it's favorable, we would ask the author to revise the paper. Or in the large majority of cases we would say, thank you very much, but, no, we're not going to publish your paper.

Q. How does one get to be the editor of a professional journal?

A. It is a -- largely a competitive process. It's kind of a combination of competition and opinion. People recommend that you be part of the process, they recommend you serve in various capacities. And there was a search committee. And the search committee encouraged John and me to put in our names and say, we'd be willing to do it, we'd like to do it. And then the search committee, after a national search, chose us to do this.

Q. Is selection for a position as the editor of a prestigious professional journal considered to be a recognition of expertise by your peers within that area?

A. Absolutely.

Q. You consider it an honor?

A. Yeah, I consider it probably the pinnacle of my career.

Q. Thank you.

Have you held memberships in any professional associations?

A. I am. I am active in quite a number of organizations, including the Decision Sciences Institute. But I am a member of the Financial Management Association, which I mentioned earlier, I'm quite active in that. I'm a member of the American Finance Association, the Eastern Finance Association, the Southern Finance Association, the Western Finance Association.

Interestingly enough, the Western Finance Association, despite its title, is actually a national organization, it's not regional.

The Eastern Finance Association I have served as president of that association. The Southern Finance Association, I've served as president of that association. I'm currently chairman of the board of trustees of the Eastern Finance Association.

I have served as a director on some of the other associations as well. And recently I was elected to be the vice-president for the 2006 annual program for the Financial Management Association, which is a successor -- it's an initial succession line to be president of that association.

Q. Do you regularly participate in association activities and conferences?

A. Yes, I do. I attend probably an average of four to five conferences per year.

Q. In addition to having the opportunity perhaps to do some travel, what is the professional value of that kind of participation?

A. I have in the department at University of Miami in the department of finance, I have 14 full-time colleagues and another 12 to 15 part-timers who work in the department. While that may seem like a sizeable number, there are thousands of people around the country who are involved in the discipline. By attending conferences, I am able to find out ideas and other things that are going on, including research ideas, including curriculum ideas. So it keeps me in tremendous touch with a large number of people around the country and at this point around the world.

Q. The ladies and gentlemen of this jury have already been told that this is a case that involves fraudulent claims of a turnaround at Sunbeam.

Has your past study and training focused upon an examination of claims of corporate turnaround, both real and fraudulent?

A. Yes, it has.

Q. Could you tell us, please, the extent to which you have involved yourself in the study of such subjects and the teaching of such subjects?

A. Well, there's a variety of things, but often in an advance classes, especially in a case class, and even in more basic classes, ideas of information. And that is one of the most important things that we study in finance is the flow of information, because we're focused on making decisions, those kinds of situations we are concerned with what is the value of the corporation. And so when we study a turnaround or a downturn, an upturn, a downturn, a change in the situation, what we're studying is how is the value changes in that particular case.

I have, before I was ever engaged in this case, I was well aware of the Sunbeam case as well as many other cases, of course. And I discussed that and other cases in class, pointing out different aspects of them, conversations with colleagues, variety of ways.

Q. When did you first become involved as an expert in this particular matter, Dr. Emery?

A. It was in early November, a week or so into November I was contacted by counsel and asked if I would be willing to be involved, what my background was. And we had some discussions and I was engaged.

Q. Did you then undertake any special effort to familiarize yourself in greater detail with the circumstances of the Sunbeam/Coleman transaction and the subsequent failure of Sunbeam?

A. Absolutely. I read through large amounts of documents. I mean, show you the box of documents, it's pretty -- it's daunting actually when you think about it. We read through financial reports, we read through financial analyst reports. I read through any number of stock price movement. We gathered information about the stock price movement day by day over that -- over the relevant time period. We looked at press releases.

Q. To what extent was it necessary for you, from your perspective, to comprehend the events that took place in late 1997 and 1998 in the context of the business world as it existed at that time? That is, was the timing of these events a matter of significance in your study?

MR. HANSEN: Objection, Your Honor. May we approach?

THE COURT: Sure.

(A bench conference occurred as follows:)

THE COURT: Yes, sir.

MR. HANSEN: This is inconsistent with the proffer that was made before we started. I had understood that we were going to be going into his background and certain terms. Now we're getting into the Sunbeam fraud which Your Honor has conclusively dealt with. And now he's going to go back into it. He's going to talk about it in the context of the world at the time.

The man has no expertise to come here having read newspaper articles. It puts me in a bad position to object in front of the jury. He represented he was going to glossary terms. I object if we're going to go down this road. And I think we ought to voir dire him and find out what he's going to testify to that's in his report.

THE COURT: As I understand it, are we now going into testimony about the corporate world being different than this is now?

MR. SCAROLA: The only thing I'm asking is whether the time in which these events took place made a difference right now.

MR. HANSEN: But it's a hanging question.

MR. SCAROLA: I clearly am going to go back to that, I'm going to ask him how it made a difference.

THE COURT: Is that in the report?

MR. SCAROLA: Yes, it is. It's also in Your Honor's order.

MR. HANSEN: I don't believe -- I believe Your Honor has indicated that corporate scandals and so on.

THE COURT: That's not consistent with the -- here's the report, perhaps you can show me the part you're relying on. That's the transcript, but I need the report.

MR. HANSEN: The deposition is irrelevant, Your Honor.

THE COURT: That is the report?

MR. SCAROLA: Yes.

MR. HANSEN: It's what's in the report.

THE COURT: You want to read the part of the transcript they were showing me, it's in there.

MR. SCAROLA: May I suggest that I would be happy to move on to the next question in order to not delay the jury.

THE COURT: Sure.

MR. HANSEN: But, Your Honor --

THE COURT: We can argue later.

(The bench conference ended.)

MR. SCAROLA: May I proceed, Your Honor?

THE COURT: Yes, sir.

BY MR. SCAROLA:

Q. Dr. Emery, we're going to go back to that question a little bit later. But right now let me ask you this before we get into the substance of your testimony.

Are you being compensated for the time that you have devoted to your analysis of these matters and the testimony that you are going to be presenting today?

A. Yes.

Q. And explain to the jury, if you would, please, how you are being compensated?

A. I'm paid for the hours that I spend involved in the case.

Q. Before agreeing to serve as an expert witness in this case, did you have any relationship at all with any Perelman related entity?

A. No, I do not.

Q. Are you anticipating having any relationship at all with any Perelman related entity except to complete your responsibilities in this case?

A. No, I do not. I'm a professor.

Q. Is your compensation in any way whatsoever dependent upon the outcome of this case?

A. No, it is not.

Q. Do you consider yourself in any respect at all to be an advocate in this case?

A. No, I do not.

Q. Dr. Emery, just shortly before your taking the witness stand Judge Maass read to the jury certain findings of fact that have been conclusively established for purposes of this case. And in those findings there were a number of words, phrases and business concepts that may not be familiar to all of us in the courtroom. And the focus of the initial part of my examination is going to be on helping us to understand those various words, phrases and business concepts.

First, can you tell us what kind of entity is Morgan Stanley?

A. Morgan Stanley is a publicly traded corporation or public corporation.

Q. And what kind of entity was Sunbeam?

A. It also was a public corporation.

Q. Are there other kinds of corporations besides publicly traded corporations?

A. Yes, there are private corporations.

Q. And distinguish for us, if you would, please, between a public corporation and a private corporation.

A. A public -- well, both corporations are subject to certain rules and legal conditions. But a public corporation has quite a few more responsibilities and requirements, regulations that they must adhere to. Not the least of which is --

MR. HANSEN: Objection, Your Honor.

THE COURT: I'm sorry, the legal?

MR. HANSEN: Objection, the legal requirements from this witness. He's not a lawyer.

MR. SCAROLA: Let me clarify that question if I could.

BY MR. SCAROLA:

Q. Dr. Emery, I didn't ask you this question, but are you a lawyer, sir?

A. No, I am not.

Q. Are you here to tell us about the law?

A. No, I am not.

Q. From the perspective of business and finance, how does a public corporation differ from a private corporation in terms of the business world responsibilities that it has?

A. Primary difference is that it must provide information, certain information regularly to the public. It does so through the Securities and Exchange Commission, commonly referred to as the SEC.

There are other requirements as well. Financial securities must be registered with the SEC. There's a whole variety of things that distinguish the public corporation, requirements that they have that are legal requirements that they must follow.

Q. Is there a distinction in ownership between a public corporation and a private corporation?

A. From a conceptual point of view, not really.

Q. Who are the owners of corporations?

A. Virtually anybody can be an owner. A very common situation with a public corporation is that many of us here have stock, which is a partial ownership, it's a proportional ownership in a company. So if you own a share of General Motors or if you have a pension plan that has in it some assets that are stock, then you would be a part owner of that corporation.

Q. All right. Let's get pretty basic then. I gather from what you have told us that the owners of a corporation are the shareholders or stockholders of the corporation; is that correct?

A. Yes.

Q. Is there a difference between talking about a stockholder and a shareholder?

A. No. They're synonymous terms.

Q. And what then is stock or shares in a corporation?

A. Stock represents a proportional ownership claim. If you think of the corporation as the assets that the corporation has, its ability to provide products and services, those assets have claims against them. And the claims that the stockholders have are what we call residual claims. They are the -- ultimately it falls back on them. So if they pay them -- as long as they meet their liabilities, then they have what's left over in the corporation. And that's apportioned out into each share of stock.

Q. Are there different kinds of stock?

A. There are. Most of the time when we talk about stock, we're referring to what is called common stock. And there are some variations, but in general what I've been talking about is common stock.

There are some other financial securities such as preferred stock, which are what we call hybrids or combinations of different concepts. So they have an element of ownership to them, but they're not primarily ownership. Whereas, common stock is essentially nothing but ownership.

Q. What is a bond and how does that differ from a stock?

A. A bond is like borrowed money. A bond is an obligation the corporation has to repay that money at some point in the future plus interest.

Q. Do bondholders have an ownership interest in the company the way shareholders or stockholders do?

A. No, they do not. We make the distinction between debt, a bond for example, one form of debt, and equity, stock. And the bondholders do not have a claim of ownership. They have a claim of liability. So they're promised a certain amount and they get that amount as long as things -- as long as the company is solvent, then the company must meet its liabilities. But if the company does not do so well or very well, the bondholders still get the same amount. Whereas, the equity holders, they get what's left over. And they're taking more risk.

Q. Do stockholders, by virtue of their ownership interest in the company, have a participation in the management of the company?

A. They can. In some cases, they do. Most, a majority of public corporations such as if you've heard the term Fortune 500, large public companies, essentially the employees running the company may own some shares, but there are large numbers of shares that are owned by people like you and me.

Q. Who does run large publicly traded companies?

A. Well, the officers are the ones who run the company. And there's a chief executive officer who is essentially the person that is the final say in corporate decisions. That person is overseen by a board of directors. Board of directors are elected by the shareholders. The board of directors do not typically involve themselves in the day-to-day operation. They may hire or fire a chief executive, a CEO, but they don't -- they don't run things day to day. The CEO and the other officers are the ones who operate the company day to day.

Q. So if we are looking at the hierarchy of authority within a corporate structure, at the top of that hierarchy we have, collectively, all of the shareholders who are the owners of the company, correct?

A. Right.

Q. And they then -- in fact, would you do this for us --

Your Honor, may I ask Dr. Emery to step down and use the flip chart here?

THE COURT: Sure.

MR. SCAROLA: Thank you very much. Let's move this a little bit closer if we could..

THE COURT: We just need to position it so Mr. Hansen can see it.

MR. SCAROLA: May I simply request that Mr. Hansen move because it's going to be a little difficult keeping it this far away and being able to read it.

THE COURT: I think if we stick it right here Mr. Hansen can see it.

MR. SCAROLA: Wherever you'd like it.

THE COURT: I assume he's going to write big enough where they can see.

Can you see it, Mr. Hansen or not?

MR. HANSEN: I can't, I'm sorry.

THE COURT: Put it parallel to this.

Can you see it? And can you see it. Okay, we're happy.

BY MR. SCAROLA:

Q. Okay. Let's start at the top of the corporate hierarchy, if we could, please, tell us, please. Who is at the top of that ladder?

A. That would be the stockholders. And they're a collective group that are not -- they don't act together. As I said, they're people like you and me. They sometimes communicate in some way, but for the most part they're just an amorphous group. They're asked to vote periodically on a set of directors. And the directors are a much more regular group. The directors meet periodically such as two, three, four times a year, sometimes more. And they review the operations of the corporation periodically.

Q. Before you go on, from a business world perspective, what responsibilities do the directors have to the shareholders who have elected them?

A. They have a fiduciary responsibility.

Q. What does that mean?

MR. HANSEN: Objection, legal testimony.

THE COURT: Sustained.

BY MR. SCAROLA:

Q. Speaking from a business perspective, what are their obligations to the shareholders?

MR. HANSEN: Same objection.

THE COURT: Overruled.

You can answer it, sir.

THE WITNESS: I'm sorry. Those words are in my books. You know. I use that term all the time. What it means is it's an obligation that is subject to certain laws. But they have to act in the best interest of the stockholders is what they're charged with doing.

BY MR. SCAROLA:

Q. All right, sir. And how does the corporate hierarchy extend down then from the board of directors?

A. Then typically, the CEO would be the key person who would keep the board of directors informed of things, but would run things day to day. From that point, from the CEO on, you could have any number of structures. You could have multiple people reporting to a CEO, you could have a single executive VP, vice-president, who would report to the CEO. You could even have a CEO and a president and then an executive vice-president. So you could have several layers.

You could have what's called a flatter organization. You could have other vice-presidents of things who report. You could have different vice-presidents who report to the CEO or report to a president. So from there, it's all bets are off. I mean, there's any number of...

Q. I've got the top over here, I'm sorry. Right on the end of the table here.

Do bondholders fit anywhere in that corporate hierarchy that we have described?

A. No, they don't. They are outside of this. If you think about -- one of the things that I would say is -- we'll probably talk briefly about a balance sheet at some point. And a balance sheet you have assets and then you have liabilities plus owner's equity. And the bondholders are the liability side. They are legally owed money. And they have to be paid before the shareholders get anything. But the obligation to run the company is through the shareholders. It's for the shareholder's benefit, because they're the ones that are taking the risk.

Q. I think I can have you take your seat again, Dr. Emery, if you would.

THE COURT: Sure, why don't we put that back, though.

THE WITNESS: Sure.

THE COURT: Thank you.

BY MR. SCAROLA:

Q. Thank you. I'm sure furniture moving wasn't in your job description, but we appreciate the help.

A. You'd be surprised.

Q. When -- in business terms we talk about an equity market, what is that?

A. When we talk about an equity market the more frequent term is the stock market. When we speak about the stock market we're actually not generally talking about one particular market. So you may have heard of the NASDAQ, you may have heard of the New York Stock Exchange. But there are quite a number of other exchanges in the country and in the world. Philadelphia Exchange, Chicago, San Francisco. And there are other securities that are traded on other exchanges.

When we talk about the equity market, we're talking about a broad number of places where stock is bought and sold, what we call traded. Because each exchange involves a purchase and a sale, right? One person -- two-sided transactions. You have one person buying, one person who is selling. So we call that a trade to get out of the problem of having to specify whether it's a sale or a purchase.

Q. So are the terms "equity market" or "stock market" or "stock exchange" synonymous terms, they basically mean the same thing?

A. Those are basically the same terms. Sometimes if you mean a particular exchange, you might identify that exchange.

Q. And that then is the forum in which ownership interest in corporations in the form of stocks are bought and sold, if I correctly understood what you've told us so far?

A. That is the most common form in which public corporation ownership changes hands. It's not the only.

Q. Now, how do those markets, the equity market or stock exchange differ from the debt market?

A. In the financial securities that they have, debt market would involve bonds and other securities, which are debt rather than equity. Equity market would involve equity securities, stock.

Q. So the equity market involves stock and the debt market then would involve bonds?

A. Right. We have experts in either market. Although, you know, there's a certain amount of overlap in terms of people dealing in the markets, but generally when you get to the individual level, you would have somebody who was focused on one versus the other.

Q. Where does the money go when someone buys a share of stock in ABC Corporation on the New York Stock Exchange?

A. The money goes to the person who sold the stock'.

Q. Does the corporation get any of that money?

A. No, that's what we call a secondary transaction. Secondary transaction: Two entities, two people or corporations, or whatever, sell shares from one to another. The corporation is not -- there's no affect on the corporation. It just has a new owner for that share of stock.

Q. What about in the debt market when a bond is sold in the debt market, does the corporation get any of that money?

A. No, it's the same thing, in the secondary markets that we've been talking about, the corporation does not have any particular -- there's no affect on the corporation to speak of.

Q. You referred to those as secondary markets. I assume then there's got to be a primary market?

A. There is. And the primary market is when they are first sold.

Q. They meaning what?

A. Financial securities. Any security when it is first created, corporation arranges to create the existence of the security. And then the corporation goes out for a first time.

And first time it's sold it's called the primary market. After that, they're all secondary transactions. And, of course, you can guess that the stuff you hear on the news every day, or whatever, when you hear about the Dow or other things, those are all secondary transactions.

Q. Some of us may have heard of something called an IPO or initial public offering, how does that relate to what you've been talking about?

A. An initial public offering is the first time that company offers stock to the public. And that is a primary market transaction.

Q. How do corporations raise money to operate using vehicles like stocks and bonds?

A. The money that's raised is generally called capital. And the capital is obtained typically through the issuance of securities, the creation of these securities. Corporations use what are called investment bankers. In almost every case, they will use an investment banker to help them issue those securities, to get those securities out to the public.

Q. I'm going to stop you again for just a moment, if I could.

How does the word "security" relate to the words "stock" and "bond"?

A. Security is a broader term that includes stocks and bonds. As well as other -- there are some others that are...

Q. I interrupted you. You were talking about how corporations raise capital. That is, raise money through the sales of securities, stocks and bonds. Continue, if you would.

A. The investment bankers, what they do in that case is they help out or facilitate, help arrange the sale of the securities, the newly created securities to investors, to the investment community. In so doing, they can do it primarily in two different ways. The most common is they will do what they call underwrite the issue, the offering, underwrite the offering.

And when they underwrite it, they actually purchase the securities, stocks or bonds, from the corporation that's issuing them, that's creating them. Then they turn around and in a very short time period, they sell them to the public.

The alternative to that would be for the investment bankers to help the company to sell the securities directly to the public. The problem with that is that there's sometimes uncertainty as to how they will sell. And companies, for planning purposes, often find it better to underwrite, to have their securities underwrite and pay the investment bankers to do that.

Q. How does an investment banker get paid under that circumstance where the investment banker is actually underwriting the security offering?

A. The primary way in which they're paid is on, typically, some sort of percentage basis. So they receive a, maybe two percent of the issue fee. So if it's 100 million dollar issue, they might get 2 million dollars. Or 1 million dollar or 3 million dollars, so it would be a percentage of that.

There's a secondary way, which is probably a little bit beyond what we want to get into. It's something called under prices. And the under pricing helps the investment banker with their customers, with their clients, so there's a benefit there.

Q. We sort of jumped right into talking about investment bankers. What is an investment bank?

A. Well, as I said earlier, investment bankers facilitate certain kind of transactions for corporations. I've mentioned issuing securities, but there are a number of other things that involve transfer of ownership. One of them would be the transfer of ownership would be an acquisition of the company. Investment bankers are active in helping companies with that process. So that if one company buys another or sells itself to another, whenever there's a transfer of ownership like that, investment bankers are frequently involved.

Q. I want to examine a little more closely this concept of an investment bank underwriting a stock offering first.

The investment bank, as I understand from your earlier testimony, actually buys that stock from the company and then resells it?

A. Yes.

Q. Now, how is it decided first how many shares a company is going to issue?

A. That's actually a very complex process.

Q. See what you can do to make it easy enough for me to understand.

A. Let's see. It, of course, starts with the company talking to the investment bankers about what they want to accomplish. From there, they will talk about what sorts of values they might be able to get. And the investment bankers would typically, they would typically make a first estimate and do the sorts of things that we talked about, value, make a valuation estimate.

Then they go out and they talk to many other people and they talk about the security. And they do what we refer to as build a book. And they try things out, sort of hypothetically talk to investors and say: You know, if we sold this stock, do you think you'd like to buy that stock? And depending on the response they get, sometimes it will be very enthusiastic and you would have what's called a hot IPO. And in those cases they might go back and instead of a \$10 stock price, they might be looking at a 12, 14, 16, 18 dollar stock price. Because there's tremendous amount of enthusiasm and tremendous expectations over the value of that stock.

That's the general process. And then ultimately, over some number of months, they reach a point where they actually make a final decision and actually sell the stock and send it out to the public.

Q. So if Mr. Solovy and Mr. Marmer and I owned ABC Corporation, one-third ownership to Mr. Solovy, who has just elected himself president, one-third ownership to Mr. Marmer, one-third ownership to me. And we decide we want to really take off with ABC Corporation and we've got all of these plans about expanding into a worldwide market. And we want to raise a lot of money to be able to do these things that we want to do. Could we go to you as the investment bank and say, we want to raise money by selling part of our ownership interest in this company in an initial public offering?

A. Absolutely.

Q. And the investment bank then does what in order to decide how much money we can raise for the piece of the company we're willing to sell?

A. They'll make extensive projections, forecasts. It might involve going out to do what's called marketing research to find out how they think the products would sell. They would do cost estimates. It would involve cost estimates of how much they think it's going to cost to produce the products or service.

So if you look at what you can sell it for, you look at what it costs you, that then gives you an idea of how much profit you can make.

Based on that, then that would come back to how much money you need to invest and how much people would want to invest.

Q. Okay. Now, let's assume that Mr. Solovy, Mr. Marmer and I don't want to give up any ownership in this company. We think that this is really going to be a very valuable company and we want to hold on to 100 percent of the ownership ourselves. Is there another way that we can go to the public to raise the money that we need in order to expand this company?

A. Typically then you would go to the debt market. And you would borrow money rather than selling ownership. So instead of taking on a partner in ownership, you would retain ownership, you would borrow money and promise to pay some amount of interest and principal in the future, repay the loan in the future.

Q. And that would be through the sale of --

A. That could be a private or public, if it was public, it would be some -- probably some sort of bond.

Q. Okay.. We have heard a concept referred to in the findings of fact that have already been made called a debenture. What is a debenture?

A. A debenture is simply a form of bond in the same way that a stock, and a bond is a security, a debenture is a type of bond.

In particular, a debenture is -- does not have collateral. A debenture is, its value is derived from the value of the corporation operating. So it is sometimes referred to as it's backed by the full faith and credit of the corporation.

Q. Tell us what collateral means.

A. Collateral. The easiest one is to think about someone who owns a home. And when you own a home, you buy the house, many people take out a mortgage. And the mortgage would be the debt and the house would be the collateral. Because if you don't pay the mortgage, the bank will foreclose, come and take the house and say you can't live there anymore.

Q. Do some kinds of bonds have collateral?

A. Yes, they do. There are mortgage bonds.

Q. And I gather then from what you are telling us in general that debentures are a kind of bond that is not backed up by specific collateral, you get paid back if the company makes enough money through operation to pay you back?

A. Generally speaking, yes.

Q. Before we get away from this concept of securities, what is a registered as opposed to an unregistered security?

A. I mentioned the SEC earlier, the Securities and Exchange Commission. And to be able to have a security sold in the public markets, NASDAQ, New York Stock Exchange, New York Bond Exchange, for securities to be sold there, they are required to be registered. And that means they provide certain information in a formal process with the SEC to allow them to be sold.

If they're not registered, they're not allowed to be sold in that public market.

Q. You may have already covered this in your earlier response, but I'm not certain of that.

You talked about when an investment bank underwrites an initial public offering of stock they are actually buying the stock?

A. Yes.

Q. And then reselling the stock to the public. Do investment banks also underwrite the sale of bonds by purchasing the debt initially themselves?

A. Yes. Absolutely. Bonds -- any type of security can be underwritten. In fact, even processes can be underwritten that wouldn't actually -- it wouldn't be securities, per se.

Q. Now, it would seem to me that if an investment bank is going out and buying a large chunk of stock, or taking on a large chunk of debt, that there's got to be some risk involved in that, because they own it first and they don't get their money until they resell it, right?

A. Absolutely.

Q. So what does an investment company do in order to protect itself from the possibility that, in the case of initial public offering, I bought all this stock from the company, I've given them the money for it, and then there's nobody there to buy it? How do they make sure that doesn't happen?

A. Well, in terms of, I mentioned the idea of making book, they would do a similar type of thing with a bond issue, with any issue. They would talk to people ahead of time to get an idea of, that there would be people to buy them.

Q. Okay. So obviously they've got to do some homework in advance?

A. Absolutely. There would also be the risk that something bad would happen in the time which they owned it. And so they would be wanting to do their homework, beyond who was going to buy it, they would want to do their homework with who was selling the issue, who was creating the issue.

Q. Does it occur that investment banks actually lineup the purchases for the resale before they actually make the purchase themselves?

A. There's some -- you have to be very careful. about how much lining up can be done. There's certainly, if you're going to have a smooth market, and that's in everybody's interest to have a smooth market, you have to be able to communicate.

Q. What does smooth market mean?

A. That means that there's not a shock to the market. You don't have something that happens suddenly that is a big surprise.

THE COURT: You need to look for an appropriate lunch break.

Dr. Emery. Do we know where he is? Oh, right there.

Come on up, sir, and you are still under oath.

THE WITNESS: I certainly understand the misstatement. I'm from Missouri.

THE COURT: Nebraska or whatever it is. Go ahead.

RESUMED DIRECT EXAMINATION

BY MR. SCAROLA:

Q. Dr. Emery, is there anything unusual, sir, about a corporation like either Sunbeam or Coleman seeking to or agreeing to sell itself?

A. No, there's not.

Q. If a corporation, a publicly-held corporation does get sold, what happens to the shareholders in the transaction?

A. Well, there are a variety of possibilities, but obviously they need to be compensated. They had shares that were worth something, so they get compensated. The nature of that compensation varies from case to case. It could be that it's all cash, simply a sale of shares. It could be that the shareholders in the company that's being acquired received in place of that shares in the company that is doing the acquiring. So if you have company A acquiring company B, company B's shareholders could just become shareholders in company A. And A and B go together. And you move on from there.

Not uncommon, a fairly common compensation is a combination, so you would have some cash and some shares in the company A.

Q. Whose job is it from a business perspective to see to it that the owners of the corporation, the shareholders are appropriately compensated when the corporation does get sold?

A. This goes back to what we were saying this morning that the directors are charged with the responsibility to look out for the shareholders, and the chief executive officer would then be the person who would actually operationalize that. So there would be -- they would be responsible for looking out for the welfare of the shareholders.

Q. Now from the other side of the transaction, whose job is it from a business perspective to make sure that the company that's making the purchase isn't overpaying for what it's buying?

A. Once again, it would be the comparable people in -- I think we said company A was acquiring company B, so in company A it would be a similar sort of thing that the officers, CEO and other officers being overseen by the directors are responsible to make the best decisions they can, and that would be to not pay too much for a company.

Q. How does a board of directors on either side of the transaction typically go about fulfilling that responsibility?

A. Well, there are any number of different things that might be done in terms of looking over existing past performance, financial statements. You would look at projections for future financial statements, future operating projections for the companies individually as well as what you think it would look like if they went together, what kinds of synergies is the common word for that might take place and how that would play out. So there would be a number of things they would look at. And the primary responsibility would fall to the CEO and the other officers to provide the information to the directors.

Q. Is it unusual for investment bankers on either side of that buy/sell transaction to play a role in providing advice to the board of directors so that they can do their job of protecting the shareholders?

A. No. If you think about what I said this morning, we talked about the investment banker's role to be -- to facilitate transactions. So that would be precisely the sort of thing that would help the transaction would be to get the parties together to keep the information flowing back and forth so that they would talk to each other so that the deal could go forward so that it could be successfully completed.

Q. Are you familiar with something called a fairness opinion?

A. Yes.

Q. And in the context that we're discussing right now, what is a fairness opinion?

A. Well, that would be a formal letter describing the situation and attesting that there was fairness in the deal.

Q. So where does that letter typically come from? Who sends the letter to whom?

A. Well, it could come from a lot of different places, but a lot of times the auditors, the outside accounting auditors would provide that opinion.

Q. Are there occasions also on which the investment bankers play the role of providing a fairness opinion to the board of directors to assist them in assessing whether the transaction is fair to the shareholders of either the purchasing or the selling corporation?

A. Absolutely.

Q. All right, sir. Now presumably if what the board of directors needs to look at is whether the transaction is fair, one of the principal factors that needs to be examined is what is the value of what is being bought and sold, correct?

A. Absolutely.

Q. All right. I want to talk to you for just a moment about that. What are the components that go into assessing the value of a corporation?

A. There are -- there are a few different ways to look at the value of a corporation. One way would be what could you sell the assets for. That would be a liquidation kind of idea. A more common way would be what cash flows, what money would come out of operating the company.

Q. I'm going to stop you for just a moment. Before we get past the liquidation concept, you said that one thing you might look at is what value you could get out of selling the assets, but you told us earlier that corporations not only have assets but routinely have liabilities as well, correct?

A. Correct.

Q. So where do the liabilities come in if what you're looking at is the liquidation value of the corporation?

A. Well, if you liquidated the assets, you would then take the -- part of the money from the liquidation and pay off the liabilities. So you would -- it would be very much like a home mortgage, if you sell your house and you sell the house for \$100,000 and you have a \$60,000 mortgage, then the \$60,000 is a liability. You'd pay that off, and you would net \$40,000. That would be the equity position.

Q. All right. I had interrupted you. You said that one way to look at the value of a corporation would be to assess its liquidation value.

A. Right.

Q. Take all the assets, sell them, pay off all the debts. The money you've got left over, that's the liquidation value. What are other ways to look at the value of a corporation?

A. The more common way to look at it is you're going to actually run the corporation. So you're going to acquire, company A is going to acquire company B, and company B is going to continue to operate as a corporation. They're going to create products and services, sell those products and services. And the money that you get from selling the products and services less the expenses you have in generating those products and services creates a stream of income, and that income, if you take that income, that becomes the basis for value. So if we have, for example, an income of \$100 million a year every year for perpetuity, for forever into the future. It's \$100 million per year forever in the future. We would calculate what is referred to as the present value, that's today's value of worth, would be the value of the company.

Q. What significance does it have in making that kind of value assessment to have accurate information concerning not only what the earning history has been but what the anticipated future earnings of the company may be?

A. Well, obviously making those estimates is critical. If you think there will be \$100 million a year and they turn out to be \$50 million a year, that's a very different valuation. If you -- if you think there will be \$100 million a year and they turn out to be more again, it's a different valuation. Business people work very hard at trial to get estimates, and that's one of the bases for buying and selling things is how good you are at estimating that. If you're really good at estimating that, you can make a lot of money. If you estimate it better, you know when selling something for more than what it's worth gets you extra value and you know when buying something for less than what it's worth gets you a lot of value.

So trying to make those estimates and, you know, sort of agreeing on what those estimates might be, it's essentially the linchpin for what we're talking about here, what something is worth.

How do you make those estimates? You might go out and you might make -- again, I think I said this morning about marketing research and how much sales might take place. These are the sorts of things that you would do to project the future revenues from the sales and then also what expenses you'd have to produce those sales.

Q. Are the terms "income" and "revenue" synonymous terms?

A. No, they're not. Revenue is the idea that you sell something. If a company makes a product and they sell the product for \$100, you know it costs them money to make that product, right. So if it costs them money to make that product, it might have cost them \$75. So you can say, wow, they took in \$100, that's revenue. But they're looking at it and saying, yeah, but it cost \$75 to bring in that hundred, so we really only made \$25. The \$25 is what we refer to as earnings or sometimes net income is the formal name. A lot of times people will loosely call it profit. So these are, these are sort of synonymous terms. Have to be a little careful so that they're defined carefully. General use is that they interchange -- they're interchangeable terms.

Q. We have heard in findings of fact made in advance of this trial references to something called earnings per share. What is that concept and what role does it play in the business world?

A. Well, we just mentioned the idea that there would be \$100 million in income, in net income, say. If there were 200 million shares outstanding, if the company had 200 million shares, then the earnings per share would simply be the earnings, 100 million divided by the number of shares, 200 million, so that would be 50 cents per share. So earnings per share, or sometimes called EPS, is simply that, it's just the earnings in a period divided by the number of shares.

Q. What significance is attached to the earnings per share number by the investing community?

A. Well, if you think about \$100 million in earnings, you need a way to compare that. If you take the \$100 million, the question can be asked is that a good income or a bad income. As we sit here, we can say, gee, \$100 million seems like a really good income. If General Motors made \$100 million this year, that would be a very bad income. So in order to try to measure that, have various ways of scaling it, of sort of saying, well, how much is it per share, so that becomes a very important number because that's a way we can compare Joe's Garage with General Motors, because Joe's Garage might earn, \$2.20 a share; General Motors might earn \$1.50 per share. Everybody says General Motors is much bigger. That's true. But, relatively speaking, you might say Joe's did better than GM.

Q. Right now that may very well be true.

A. It is a timing.

Q. Another question I want to ask you about assets and liabilities before we get too far -- well, we ought to finish this one line of questioning.

We were talking about different ways to value companies. And we talked about liquidation value. We talked about the evaluating the company on the basis of an income stream. Are there other ways to look at the value of corporations?

A. I mentioned the idea of liquidation. That would be taking the assets apart. You could also sell the entire firm. You could sell a company as an ongoing concern. In other words, you could sell it to somebody else who says they think they can run it better and make more money than you think you can do. So that would be a third way.

Q. Do companies have different values to different purchasers?

A. Certainly.

Q. Why and how?

A. Well, if you think about it, when you think about a stock value or a house value, you sort of see it in a context of what's it worth. And for a broad market of houses or stocks, that's fine. But when you get into the corporate finance side and you're actually going to run the company, then you start to get some very specific ideas.

So, for example, if I have at that distribution network -- What I mean by a distribution network is I have products that are sent out to my stores. So if you think about Wal-Mart, Wal-Mart has a way to get products that they purchase to the stores so you and I can buy them. If you think about that and that system is in place, so if Wal-Mart were to purchase a corporation that made certain products that could be sold in Wal-Mart stores, that company already has, in addition, a distribution network. They have a way to get things out to stores. If Wal-Mart buys that, they can take away that distribution, they can stop that distribution network, use their own distribution network and save quite a bit of money.

Now that means that to Wal-Mart the value will be -- can be very specific because it can depend on things like the distribution network, how products fit together. If Wal-Mart were selling insurance, maybe that wouldn't fit so well with the things that they sell. But if Wal-Mart were selling plastic containers like Tupperware, well, maybe that would fit with what they sell. So the fit depends a lot on what the products are and the physical assets, the actual products. So the value can depend on that.

If you compare that to, say, a company such as, I don't know, Ryder Corporation, if you compare it to a company like Ryder, say, well, why would Ryder want to buy Tupperware? They don't have a distribution network for that. They don't have a way to sell it. So for Ryder to sell Tupperware, they would be only buying it to operate on its own. They

wouldn't be buying it to integrate in, and there wouldn't be any synergies. So that would mean that there would be even substantially different opinions about what it's worth to those two entities.

Q. Can a company that is experiencing a current operating loss in a particular quarter or even a particular year in spite of the fact that it was losing money during that period of time still have some value?

A. Well, certainly. Companies go through periods where they may not be making a positive income. Companies have variations in earnings, and that doesn't mean their assets are worthless. If the projections into the future look so bleak that the company is not going to operate anymore, liquidation may look good, but that means that the stock may still have substantial value because of liquidation.

More common would be there was an upturn or a downturn in the economy. So if we talk about a car company, car companies -- actually, I think a better example is an airline company since they're in the news a lot. Airline companies always lose money? No, but they've been hit pretty hard as a group. And if you go back a number of years, some airline companies made a lot of money. So there are variations in them. In any given time, if they're not making money, that doesn't mean they're worthless.

Q. Does it really tell you anything of significance if you look in isolation at only what the profit or loss picture was of a company during a particular year without taking into consideration the assets of the corporation, the liabilities of the corporation and the long-term prospects of that corporation?

A. No, absolutely not. I mean, you can't -- you can't boil down to one number. We talked about EPS. EPS is but one measure of how well a company did.

Q. Earnings per share?

A. I'm sorry. Earnings per share.

Q. That's all right.

A. There could be -- you know, there are other ways to look at how the company is doing. The company could be looking good on one measure and not so well on another. And if you want to get a complete picture for what that company is worth or how that company is doing, you're not going to get it from a single number. As I go on to tell my students, if it were that easy, you wouldn't be able to make much money at it because everybody would do it, and there would be no money to be made.

Q. Dr. Emery, I'm going to ask you another question about looking at a single factor. And I want you to assume that in 1996 a particular company had debt of 500 plus million dollars, in fact, maybe even close to \$600 million. Does the fact that a company in a particular year has some significant amount of debt tell you anything of significance about the value of that company without knowing a lot more?

A. No. You'd need to know a lot more to have a context for what that was worth.

Q. Why? Explain that to us.

A. Well, it's kind of like the house I was talking about a minute ago. You have a house that you can sell for \$100,000 and you owe \$60,000. Somebody else might have a house that they owe \$200,000 on, but they can sell it for \$500,000. So you have to look at the assets, the left-hand side. When I said assets and liabilities and owner's equity, we call the

assets the left-hand side. You look at the assets. You have to compare it to the liabilities to find out how the company is really doing, what the equity is.

Q. Does a pattern of increasing debt, if, in fact, there were to be a pattern of increasing debt, does that mean that the company is worth less when the debt was lower than when the debt is higher?

A. No, because it would depend on the pattern of value of the assets. If the value of the assets goes up faster than the value of a debt, then, you know -- people use debt to accomplish things all the time. We use it in our -- in our personal finance lives. People use it to make investments. And the absolute number of the amount of debt is not the relevance. It's what it compares to.

Q. Before lunch we talked about how the value of stock gets set in an initial public offering, and you told us basically that that's a pretty complicated process. How does the value of stock get set in the secondary market?

A. Well, it's interesting, from two points of view. One hand, it's a lot more complex. On the other hand, it's a lot easier for some of us. It becomes more complex, but there are a lot of people trying to estimate it. And when we look over and we see a stock price that's actually in the market, so when you look and we see that a particular stock, like General Motors closed at \$56 a share, that \$56 a share for the rest of us is -- becomes an immediate measure of value, which we get from all the work that those people are doing to figure it out. So it's sort of for the investing public, it becomes wrapped up in that single stock price number, what is that stock price. Well, what are people paying for it? And because there are many people interested in that in buying and selling that stock continuously, virtually continuously, then that becomes an easy measure of value which we can see.

If you think about it from how they come up with that value, that's really just as complex and maybe more complex than the IPO in the start.

Q. Can there be a difference in the value that you get by taking the total number of outstanding shares of a corporation and multiplying it by the market price of those shares and what the total value of the corporation is? And to make this easier so that we can talk about this in more concrete terms, assume that we're dealing with ABC Corporation and that ABC Corporation is a publicly traded corporation, but for ease of working with these numbers there are 100 outstanding shares of ABC Corporation and they are trading at \$10 a share on the New York Stock Exchange. If we just take those 100 shares and value them at \$10 a share, what would the total value of all the outstanding shares be?

A. It would be \$1,000.

Q. I had you do the math instead of me.

A. I'm handicapped, calculator handicapped.

Q. Okay. Does the fact that there are 100 outstanding shares selling at \$10 a share necessarily equate to what the value of the total corporation is?

A. As a general rule, there will be a relationship between those two things. If you're trading shares where you have no control, they're the shares that we were talking about this morning where you have shares of IBM or General Motors, and I have some shares of Pfizer or some other company, Ryder, I don't run those companies, I don't have any control over the companies. Okay. The managers are running those companies. My only control comes through the directors. Okay. If I think about that, then that value of \$1,000 would be an approximation, good approximation of the value of not controlling the company.

If the company -- if you were to buy enough of the shares so that you controlled the company, those shares would generally be worth some percentage more, significantly more money if you were actually controlling the company, too, so that you might, a common thing would be that these shares would have, say, a 25-percent premium on them, and the company in total when you're controlling it would be worth instead of 1,000 might be worth \$1,250.

Q. Are there times when the market price of a company on a per share basis does not accurately reflect the true value of the company?

A. That's a very current question in my discipline. That's something that's being hotly debated is the conditions under which market share prices may not fully reflect value or accurately reflect value. It is my opinion, and I think I would be consistent with a number, a good portion of my peers around the country that in general that's much more likely to happen in overvaluation than undervaluation.

And I think you can relate it to what happened in the late '90s where many of us acknowledged that there was what you'd call a bubble. There was a lot of overvaluation, a lot of chasing stock prices. And the prices got more expensive, and the result was that we had overpriced stock. Conceptually, it's a little harder to get underpriced stock.

Q. If XYZ, Incorporated decided that it wanted to buy ABC, Incorporated because it believed that there could be substantial synergies that might arise out of the combination of the two companies, there would be economic advantages to putting the two companies together, would it be unusual in the real world for XYZ, Incorporated to pay more for all of ABC, Inc. than the product of the number of shares times the market price?

MR. HANSEN: Objection. May we approach, Your Honor?

THE COURT: Sure.

SIDE BAR CONFERENCE:

THE COURT: I think Mr. Marmer wants to hear, too. That's okay.

MR. HANSEN: Your Honor, this isn't glossing a term in Exhibit A. This is an effort to adduce new expert opinion, I think, on the subject of whether Coleman was appropriately valued at the market price when it was \$600 million in early February or some kind of estimate beyond that. He didn't hire him to do this. This isn't in his report.

THE COURT: Who's going to respond to this?

MR. SCAROLA: I will, Your Honor. The only question I'm asking -- and I'm not relating it to the specific transaction -- is there anything unusual about paying more than the per share price times the total outstanding number of shares going directly, obviously, to the reliance question involved.

MR. HANSEN: I don't follow that, Your Honor. Again, that's a fairly involved expert opinion. It's nowhere found in his report.

THE COURT: I would overrule it. He can answer.

END OF SIDE BAR

BY MR. SCAROLA:

Q. Dr. Emery, to be sure you have the question in mind, is there anything unusual about one corporation buying another corporation for purposes of integrating and operating it and paying more than the per share times number of outstanding shares total?

A. It would be virtually impossible for them to buy it for that price. If you think about it, it has to be more than that because the shareholders won't sell their shares. If the shares are selling for \$10 a share, how do you get shareholders to sell their shares? I mean, they're not going to sell them for \$9 a share. They have to pay more. So it's a virtually impossible situation that they could pay less.

And, in fact, in work that I, in fact, just published 2004, last year, in a paper I published in financial management, I -- joint work with a colleague, we looked at this. And the range of premiums, the average premium is about 25 to 30 percent. Actually, measured this way it's closer to 50 percent. But the range, you'll have them up two, 300 percent or more. So the premiums can range very large in these cases like this.

What happens is you have one company who says, gee, this is a really good deal. I think I can do something with it. Another company comes in and says, boy, I think I can do something with that. And there gets to be a bidding war. And that bidding war can run the premiums up very high.

Q. I'd like for you to list for us -- and I'm going to ask you to step down again in just a moment, and you'll get to move furniture one more time -- those factors that we have identified thus far in your testimony that have an impact on the value of a corporation.

MR. SCAROLA: May Dr. Emery step down, Your Honor?

THE COURT: Sure.

MR. SCAROLA: Thank you.

THE COURT: I'm going to ask you are you going to have him do it there, or are we going to move it back to where it was?

MR. SCAROLA: No, I'm going to have him move it right back to the spot it was in before.

BY MR. SCAROLA:

Q. If you'd just put a heading on that for us, and the heading will be factors influencing value. And let's see if we can go through the list of those things that you have already identified for us. I think you told us that one factor was assets. Is that correct?

A. Yes.

Q. Okay.

A. We talked about sales. We talked about expenses. Under sales you could have sales prices, sales -- different products. And under expenses you could have all kinds of different expenses that you might incur. So there would be a long list of things that would be involved with that. These would translate into earnings, and earnings have a tax component. The tax component is not always consistent. There is, you know, some expenses are tax deductible, some expenses aren't. There's a lot of things that go into that.

You have part of your expenses might be involved with what kind of liabilities you have, your obligations to meet those liabilities.

Q. All right. Now does the history of those factors influence value?

A. To the extent that there's information from the past, which gives you a better sense or gives you information about what to expect in the future, then that's very important.

Q. All right. So --

A. There are sometimes discontinuities that things change so much that what went on in the past is really not that relevant because the world has changed so much. I think it is -- there's a lot of talk about 9-11 being an event like that where there was so much change that what we were doing, it was sort of a discontinuity.

Q. So one of things you would want to look at is history, but you would also want to know about the surrounding circumstances of that history; is that accurate?

A. Right.

Q. Why don't you write history down for us, and we'll remember that that really applies to each of the factors that you've described above it. And do I understand that the reason why you were looking at history and prior circumstances is in order to glean from that to the extent you can information about what is likely to happen in the future?

A. Right.

Q. Okay. So why don't we put down so that we remember that understanding that what we are looking at here is future projections. All right. Thank you. And I think that you can take your seat again, and I'll move that back. And actually there's at least one other factor we talked about when we were talking about valuing the company as a whole rather than valuing individual shares of the company, and that I think you described generally as synergies. Is that accurate?

A. Yes. Synergies in cases where when you put the two together, there's a savings or a benefit. So the way people talk about that is two plus two becomes five. You add the value of one and the value of the other, but then there's some combination in that that either releases an expense or adds a profit of benefit.

Q. All right. And you contributed value also to the ability to control the entire corporation rather than just to be a single shareholder?

A. Right. There's one we call a control premium.

Q. All right. Now regarding the factors above the line, do those factors have a bearing on the individual share price as well as the value of the company as a whole?

A. Well, if you think about what we said about earnings per share, you can make the same thing about value per share. So if you see the share value, it's tied to the overall value, because there's some proportion there. That was why we had the \$10 per share times 100 is \$1,000 in total value. When we look at the value of the whole firm, then, of course, that's important to the value per share.

Q. You told us earlier, Dr. Emery, that there are specific reporting requirements for public corporations imposed by the Securities & Exchange Commission, correct?

A. Right.

Q. Do the things that public companies are required to report include information about the kinds of factors that we have identified here that can have an impact on someone's assessment of the value of individual shares?

MR. HANSEN: Objection, Your Honor. Counsel is testifying.

THE COURT: Sustained. I'll ask you to rephrase it.

MR. SCAROLA: Certainly.

BY MR. SCAROLA:

Q. What kind of information is a public company required to publicly report?

A. For example, they are required to report their balance sheet on a quarterly basis and on an annual basis.

Q. Now what kind of information as it relates to what's on the board does the balance sheet include?

A. The balance sheet is that assets, liabilities and owner's equity. That's what we think of as a snapshot of the company. It's sort of a what is the company at a particular point in time.

Another statement is the income statement. That's another piece that has to be filed, has to be put out in what are called 10-Q for a quarterly and a 10-K for an annual statement. So that's another statement that has to be put out.

The income statement is how the corporation in many ways, you think of it as how they get from one balance sheet to another. And it represents the money that they've earned. So they will have the revenues, how much they took in in money and then the different expenses that they had, and then there would be some subheadings of operating income and other parts and extraordinary items, and then there would be taxes. And then down towards the bottom it will say net income, and they'll take that net income, and they'll perhaps pay a dividend, and they'll also divide the net income by the number of shares to get the earnings per share, EPS. So those are two perhaps of the more important things. There are other statements.

Q. Are there safeguards that exist in the business world relating to public corporations that are intended to assure the accuracy of the reporting that relates to these kinds of factors that can have an influence on a company's value?

A. Yes, there are.

Q. Describe those to us, if you would, please.

A. Accountants have a number of different tasks, but one of the things that they're best known for is called auditing. And an auditor is an accountant who is outside the firm who comes into the firm and looks over the preparation of those statements I was talking about and that information that look it over and be sure that it has been done properly, prepared properly, that it's accurate and reflects the actual company as it should. So the purpose there is that what we're trying to do with those securities laws is to encourage, to allow a fair playing field, level playing field for investors.

If you think about our economy, our economy works pretty well compared to the rest of the world, and one of the reasons is because of our system of allowing that level playing field.

Q. Do public companies employ both in-house and outside accountants?

A. Yes, they do.

Q. Do in-house accountants share the same kind of responsibility for accurate reporting of the kinds of information that impacts upon the value of a company in the equities market?

A. Well, the in-house accountants are employees of the company. They're paid by the company and work there regularly. They keep the numbers for the firm. They keep the accounting statements up to date and so forth. And then the outside accountants look over that.

So, yeah, in terms of good business practices, honesty and integrity in those positions is very important.

Q. All right, sir. You told us earlier that there is nothing unusual about one company buying another. Is there anything unusual about a company using its own stock as part of the purchase price when it buys another company?

A. No. As I mentioned, that's a very common occurrence.

Q. We spoke about revenues, and I think that you gave us at least some understanding of what revenues are. How are they calculated? How do you calculate revenues?

A. Well, its simplest forms, revenues are the money that comes into the corporation during a particular time period, during this quarter of the year or this year. It turns out that because accounting is done on what's called an accrual basis, they make adjustments for, well, this is kind of like it came in or, well, certain rules and regulations will then cause a revenue to be what's called recognized, placed in that time period or not placed in that time period. And when the actual money changes hands can be different than when they write down that it actually occurred. And those -- so those rules are quite specific.

Q. All right. So there are, then, specific rules and guidelines about how a publicly traded corporation is required to calculate, recognize and report revenue?

A. Yes.

Q. Does the same apply with regard to expenses? Are there specific rules and regulations that apply to how a company is to calculate, recognize and report expenses and which period in which those expenses are supposed to be delegated?

A. Yes.

Q. Why? Why do rules exist like that about when you've got to report your income and when you've got to recognize your liabilities and your debits?

A. Well, once again, the system is designed and the purpose of the system is to try to get uniformity of measurement so that when one company reports something and another company reports something, there's a comparability, you can compare them, and it's also designed to try to get judgment out of the process. It's not completely out, but trying to minimize the amount of judgment because they don't want people to have -- introduce biases where they say, sure, we can count that when, in fact, a reasonable person wouldn't. So those guidelines are designed to protect investors.

Q. It has already been established in advance of trial in this case, Dr. Emery, that after Sunbeam announced plans to acquire Coleman, Morgan Stanley agreed to underwrite a \$750 million debenture and that Sunbeam needed the proceeds of that \$750 million debenture offering to complete the acquisition for Sunbeam. Why would Sunbeam announce plans to acquire another company?

A. When you think about the value of the stock, what I tell my students and the way I like to say it is stock prices, stock values are made on expectations. And what that means is that the value you see is based on the expectations you have about the future. To form those expectations, you need information. And if a company has information that they think is positive information that is going to add value to their company, they're going to want to get that information out to the investing public. And so they would announce that with the idea that, well, we're going to do this, and that would then be put into those expectations which would be more favorable but would also, in an ideal world, better reflect the value of the stock.

Q. Do companies also have an obligation to make announcements about bad news?

A. There are some obligations that they have. And, in fact, companies frequently make announcements that are bad news because they understand that it's going to come out, and when it comes out, it may turn out to be very much more disruptive and very much more negative than it is if they announced it ahead of time. The idea is sort of to soften the blow to tell people, well, we know it's bad, but we've been honest, we've told you that it's going to be bad so we want to tell you upfront. Whereas, if you find out without us telling you, then you may doubt our credibility and integrity.

So, yes, companies do make negative announcements.

Q. Why would a company be concerned about the investing public doubting its credibility or integrity?

A. Well, because that would go into the expectations. Public investing, public might look at it and say, well, we don't trust these people to run the company. And that could over time develop into a fight over who should run the company. And you could through the directors, the shareholders could be saying, hey, we don't think this CEO is the right person, we don't think this team is the right team. The shareholders could even -- could even go out and encourage another company to buy the company to run it better. And there's -- we refer to that as the market for corporate control. And that has an impact on value, too, because who can run it the best and extract the most economic value out of it is good for the investment and, we believe, in a capitalist system ultimately good for society. Because if things run more efficiently, then we as individual members of that society pay less for those goods and services, so things show up in the store for lower prices and the services we get we pay less. So the efficiency part is that's just one aspect of it.

Q. The specific factual finding that we are referencing is about an announcement regarding the acquisition of one corporation by another corporation and the merger of those companies together. Is that the kind of information that can have an impact on the value of a company stock, both the selling company and the purchasing company?

A. Absolutely. Those sorts of announcements are made frequently, and stock prices react in differential ways.

Q. Let's talk about that, if we could. If the investing public perceives that the purchaser is getting a very good deal in this acquisition and merger transaction, all other factors being equal, what's going to happen to the stock price?

A. Stock price could go up certainly some or very substantially depending on what the opinion is, what the collective opinion is.

Q. The same factual finding that we are talking about makes reference to Morgan Stanley agreeing to underwrite a \$750 million debenture offering for Sunbeam. You described to us what a debenture is. What is an offering of a debenture?

A. That's simply the collective set of debentures, of bonds. So each of those bonds may have a face value of \$1,000. So there would be \$750,000 of these bonds. Collectively we call that an offering or an issue.

Q. And we know from the statement that Morgan Stanley agreed to underwrite this debenture. And you told us that what that meant was that Morgan Stanley was buying the debt first and then reselling the debt.

A. Very quickly.

Q. In the open marketplace. Very quickly.

A. (Nodding head).

Q. What is the significance of a particular company being a sole underwriter?

A. If you've ever seen in the newspaper -- I don't know whether you might have seen in some of the financial newspapers there will be what is commonly referred to as a tombstone. And that will be a listing about a securities offering, like debenture offering or an IPO we talked about, an initial public offering. And what you'll see is that there are what are called lead underwriters is a common thing, and there might be one, two, three or more lead underwriters. And then there will be other investment bankers involved, and there might be 15, 20, 30, 40 or more associated investment bankers so that there can be, without too much trouble, 30, 40 or more investment bankers involved with an offering.

So to have one investment bank underwrite the whole offering is not really that common. I'd have to look up statistics to tell you how uncommon it is. When you take stocks and bonds together, it's quite uncommon.

Q. What does it communicate, if anything, to the investing public that a particular investment bank is willing to take on the sole underwriting responsibility of a \$750 million debenture offering?

A. I would interpret that as very very confident. I would interpret that as being -- communicating a confidence that would be more than usual.

Q. What does it mean in the business world when you talk about a company having a successful turn-around?

A. Well, if you think about a company that might not be doing well, and so if we -- a while ago we mentioned the airline industry since they're in the news a lot have been struggling. If you took a company, some of them have filed for bankruptcy, but if you took a company, an airline company that was not in bankruptcy yet but was struggling, it would be easy to think about that company as being a candidate for being turned around because they would be going down. Their profits are negative; they're losing money; and they need to turn that around, because, while as I mentioned earlier, you can lose money for a while, after a while it not only becomes tiresome, but you run out of money. I mean, you go out of business after a while. Your assets are dissipating.

So to turn it around would be to take a company that was falling and then turn it around and have it rising, and the rising would be certainly in revenues but even more importantly in earnings.

Q. How would a company engaged in the manufacture and marketing of consumer products go about actually accomplishing a legitimate turn-around if indeed it's possible to do so?

A. Well, certainly such things have happened, can happen. If you think about the products and services, you think about the sorts of innovations that happen, you're used to thinking of innovations in technology, so we think of computers and cell phones and the like. And that's because we see the changes, the innovations come so quickly.

But even in more standard products, more generic products, more things like appliances, there are improvements that come. The installation of computers, little computer chips into very standard products.

Think about automobiles. I mean, is an automobile dramatically different than it was 20 years ago? You step into the automobile and drive it away. It's the same. Well, no it's not the same.

There are technological improvements there. And if you can come up with improved products, products that are better, then you can improve your market share; you can be the one who's selling that product more than somebody else; you can make more money on that product. And those are all things that a company that might be doing very traditional things, they might attempt to do and in some cases be successful at.

Q. So one way you can turn a company around is by competing better on the quality of your product?

MR. HANSEN: Your Honor, I would object to the leading, Your Honor.

THE COURT: Sustained. And we need to look for a place for a break so we get them to the kitchen before it closes.

MR. SCAROLA: Would you like to do that immediately, or would you like to do that in five minutes?

THE COURT: I don't care as long as it's in the next few minutes.

MR. SCAROLA: Okay. Thank you.

BY MR. SCAROLA:

Q. We'll just finish up this area, Doctor, and before quarter of 4:00 we'll take our break.

Dr. Emery, does improving the quality of the products you are selling help a company to turn itself around?

A. I believe that's what I just said.

Q. Okay. And can you tell us, please, whether there are other ways to turn the company around besides competing better on quality?

A. One could compete better on cost. One could lower the cost. So you could make the same product, sell it for the same price but make it less expensively, and then you would make more money. You could have fewer people doing the same job. So instead of having ten employees, if you have eight employees, that would provide a savings. There are a whole host of financial considerations as well where you might pick up some economic value from making better financing transactions, having -- doing things more efficiently as it were.

Q. What about improving overhead expenses generally like reducing your work force and closing or consolidating plants or administrative offices, what kind of impact, if any, could that have on turning a company around?

MR. HANSEN: Objection; leading.

THE COURT: Sustained.

BY MR. SCAROLA:

Q. Is there any impact at all on a company's turn-around by improving the efficiency of one's operations?

MR. HANSEN: Same objection, Your Honor.

THE COURT: Sustained.

BY MR. SCAROLA:

Q. What else can improve a company's performance so that the company can be turned around besides competing better in terms of quality and competing better in terms of price?

MR. HANSEN: Same objection, Your Honor.

THE COURT: Overruled.

THE WITNESS: Well, I mentioned a minute ago having ten employees do something and instead having eight. Some of those employees could be the employees who are actually making the products or doing the service. But many of those employees may be employees doing other things in the company. They certainly could be what we call overhead, staff people helping to

support, and you can do that more efficiently.

BY MR. SCAROLA:

Q. Last question before break. How, if at all, does the geographic spread of your market impact upon the ability to turn your company around?

A. Well, as a general rule, as I'm sure you can imagine, if you have a physically bigger area, it's more difficult. I mean, you know, there's just no question if you have a concentrated market physically, you can go and check on things. You can put things together. You're less likely to have multiple warehouses, multiple production facilities. So there's any number of ways in which if you shrink your geographic coverage, why, it would -- it could help you.

MR. SCAROLA: Good place to stop, Doctor. Thank you very much.

THE COURT: We're going to ask you to meet outside the courtroom at 4:00 o'clock. We still won't talk to you. Don't talk to anybody about the case. Cafeteria closes at 4:00. If you want to bring in snacks, soda, coffee, tea lollipops, feel free.

THE WITNESS: You like lollipops.

THE COURT: No, they brought in lollipops. (The jury left the courtroom.)

THE COURT: Mr. Hansen, we want to mark the outline we were working on. We can mark this for Defendant's ID. Whatever the next number is, that's correct.

THE CLERK: That will be 997. (Defendant's Exhibit No. 997 for i.d.)

THE COURT: Was Mr. Ianno here today?

MR. HANSEN: Mr. Ianno's wife, I believe, had a medical appointment this afternoon.

THE COURT: Okay. That was what I was worried about.

How much longer do you think you'll have, Mr. Scarola?

MR. SCAROLA: I'm learning that I'm estimating very poorly. I'm likely to go through the balance of the afternoon.

THE COURT: Okay. That's fine. Thanks.

MR. HANSEN: We're going to 5:00 o'clock, then, Your Honor?

THE COURT: Well, if he finishes before. If you finish after 4:30, we'll send the jury home and do our motions. If it's before 4:30, I'll probably ask you to do a bit.

MR. HANSEN: Yes, Your Honor.

THE COURT: Okay. Thanks.

(A recess was taken from 3:49 p.m. to 4:01 p.m.)

THE COURT: Mr. Solovy, is it your birthday or somebody else's birthday?

MR. SOLOVY: My birthday.

MR. SCAROLA: 75.

THE CLERK: Today?

MR. SOLOVY: No, Sunday.

THE COURT: And you're paying to fly them all up?

MR. SOLOVY: No, my nice client is doing that. Not all. We're just taking some.

THE COURT: That's a little rude.

MR. SOLOVY: Just some, Your Honor. My son said maybe I should cancel, but I have 90 people coming.

THE COURT: Congratulations.

MR. SOLOVY: Thank you, Your Honor.

THE COURT: Are there any birthdays we need to be aware of on your team?

MR. JONES: (Indicating).

THE COURT: When?

MR. JONES: 28th.

THE COURT: Of April. If we're still here. If not, I'll make a note, Mr. Jones's birthday.

MR. SOLOVY: Mr. Schwartz is April 16th, Your Honor.

THE COURT: Any other April birthdays we need to be aware of?

THE COURT: Mr. Schwartz, we're not going to be in court.

Where's the bailiff? Do we have all the jurors?

THE BAILIFF: No. We have smokers that need to do it.

THE COURT: That's good to know. It tells me we need a little bit longer breaks.

MR. JONES: Explains the lollipops.

THE COURT: You're absolutely right about that. I guess I should have realized that one.

MR. SOLOVY: I didn't want to say it in front of the jurors, but I thought you forfeited your lollipop when you made that second misprision.

THE COURT: I definitely forfeited my lollipops.

(Jury entered the courtroom.)

THE COURT: Thanks for coming back on time. I hope you enjoyed your break. And we are in the homestretch for the week.

Okay. Go ahead and take your seats. I'm glad we have lollipops again. Wonderful. Oh, several. Okay. Good.

And we're ready to continue, Mr. Scarola. And thank you. I don't even want to know who got it for me. I don't want to get prejudiced. Okay. Thank you.

BY MR. SCAROLA:

Q. Dr. Emery, focusing on the expense side, you told us just before the break that servicing a larger geographic market can be more expensive. Let's focus on the revenue side, and tell us whether there are any advantages to expanding your market if you were trying to turn a company around.

A. Well, of course if you look at it on the revenue side, having a larger market, if you sell more and can sell more successfully and overcome the expense of a larger side, larger geographic area, then that would add market, so you could increase sales, and the question really is whether sales increased more than expenses increased, which direction is a business decision.

Q. Okay. So if I understand, then, correctly what you said, you can turn a consumer product company around by improving the quality of your product, correct?

A. Yes.

Q. You can turn a company around by producing that product more efficiently and being able to sell it at a lower cost?

A. Yes.

Q. You can turn a consumer product company around by selling the same quality product at the same price to more people?

A. That's correct.

MR. HANSEN: Objection; leading.

THE COURT: Sustained. I'll ask you to disregard the last question and answer.

BY MR. SCAROLA:

Q. Dr. Emery, among the established facts in this case are the following: "Although Morgan Stanley and Sunbeam previously had advised CPH that Sunbeam sales were running ahead of analysts' expectations for the first quarter, Morgan Stanley decided not to correct those misrepresentations. Instead, in March 1998, Morgan Stanley assisted Sunbeam in concealing the problems with Sunbeam's first quarter 1998 sales."

What I want to first focus on in that finding is the reference to analysts' expectations. What are financial analysts?

A. Financial analysts are people who -- whose job or career is focused on valuation of public companies largely. It's not restricted to that. It's broader than that. But, generally speaking, these are people who, what we call, follow companies, so they will have a set of companies that they follow, maybe six, eight, maybe ten companies that they pay close attention to. And those -- the attention they pay is largely on the basis of financial considerations; what are they worth; are they doing well; are they doing poorly; are they improving; are they declining; what do we expect their earnings per share to be for the next period; what do we expect their dividends to be for the next period; what do we expect their revenues to be for the next period. So analysts would have projections, forecasts and expectations about the future of the company at any given point in time. And that's what they do is pay attention to those companies. And then they make that information available. They make that information public. They broadcast that information, what they think about that company.

Q. Who do analysts work for?

A. Well, there's a wide variety of people they could work for. We generally think of them as working for brokerage houses. That's a particular type of analyst, but that's generally, when we say financial analysts that's one we think of first is somebody who works for a stockbroker, firm, a brokerage firm.

Q. Why do securities firms employ analysts?

A. It promotes investments, and it promotes the investment community. And when they -- when brokers help with the sale of stock, a purchase -- a trade of stock, when brokers do that, they generally make a commission so that it promotes their business.

Q. And how specifically do analysts go about performing their jobs?

A. Well, in a general sense they gather information.

Q. In what sources?

A. It depends on the analyst, but it can be from almost any source, depending on how an analyst might go after it, there are many many possibilities. Certainly at a minimum they would look at the financial statements. They would be estimating market share. They would be estimating sales, future sales, trends in sales. They would be analyzing that type of data, including, of course, balance sheets and income statements and those sorts of things.

Q. In the 1997, early 1998 time frame in particular, to what extent did analysts place confidence in the honesty and integrity of public corporations' public financial filings, the documents the SEC requires public corporations to file?

MR. HANSEN: Objection; leading; compound.

THE COURT: Overruled.

THE WITNESS: The general environment has had a significant change since that time period. This is over the last eight or so years.

BY MR. SCAROLA:

Q. Well, focus specifically on what existed in the 1997, 1998 time frame in terms of the degree of confidence that analysts placed on public financial filings, the honesty and integrity of such filings during that period of time.

A. Well, post turn of the century there have been a state of very public very large --

MR. HANSEN: Objection; nonresponsive, Your Honor.

THE COURT: Sustained. Why don't you repose the question.

BY MR. SCAROLA:

Q. Sure. Rather than talking about the changes that have occurred, if any, since 1997 and 1998, I'd like you to tell us the degree of confidence that financial analysts placed in the honesty and integrity of those public financial reports back in 1997 and 1998, early 1998.

A. They were generally well thought of. They were accepted as being generally true. There were occasionally problems. If you go back several decades, there might have been one or two notable scandals per decade, but there was a general acceptance of them as being valid and representative. And there's been an evolution of increasing doubt.

Q. All right, sir. We talked about, then, generally the fact that financial analysts conduct investigations of particular companies and publicly report on those companies. Did you in the course of your work in connection with this case review the work of financial analysts as it specifically related to the Sunbeam Corporation in the 1997, 1998 time frame?

MR. HANSEN: I'm sorry, Your Honor, but I object to Mr. Scarola testifying or characterizing testimony.

THE COURT: Overruled.

BY MR. SCAROLA:

Q. You may answer.

A. I did. I did an extensive investigation of analyst reports over starting in 1996 and through '97 and into '98, especially focusing on the last quarter of '97 and first quarter of '98.

Q. How did you go about doing that?

A. Well, largely this information, although it's not widely known how public it is, it is all publicly available information. And so you can go to public sources, SEC archives, filings. You can go to Bloomberg, Reuter's, Bridge. There are a number of different information services which have all of this material available.

Q. All right, sir. And the specific reference included in the statement that we began with when we were talking about, when we began talking about financial analysts was a reference to analysts' expectations. What is the understanding in the business world about what analysts' expectations are and the significance that they have?

A. Well, if you recall, I talked about prices being made on expectations. And those expectations are very broad. But analysts -- And analysts will certainly have those expectations broadened. But to communicate them to the public, they try to boil them down.

And so, as I mentioned a minute ago, they'll make a projection or expectation about earnings per share, dividends per share, revenues. They may make a recommendation boiled down to a, you should buy this stock; this is a good buy or you should sell this stock; this is something you should not own. Those kinds of things boil down into practical terms the overall expectations that are a little harder to gather. You know, you say, well, I think it's good. Well, how good? What does that mean?

And so they even go so far as to project stock price estimates. Those expectations, when somebody says expectation, typically you would be referring to some aspect of that, some specific forecast.

Q. All right, sir.

MR. SCAROLA: May I approach the witness, Your Honor?

THE COURT: Sure. Just make sure Mr. Hansen knows what it is you're showing him.

BY MR. SCAROLA:

Q. Dr. Emery, I'm going to hand you what has been marked for trial purposes CPH trial Exhibit Number 361, and I'll ask you, sir, whether you recognize that document.

A. I do.

Q. And what is that?

A. This is an analyst report on March 19, 1998. This report was done just after Sunbeam's announcement that they might come up short in terms of their sales for the quarter.

Q. So this is an analyst report that came out after the March 19, 1998 press release that's been referenced in the established facts in this case?

A. Immediately after, because the report starts out saying that it is after that.

Q. All right.

MR. SCAROLA: Your Honor, at this time we would move CPH trial Exhibit Number 361 into evidence.

MR. HANSEN: May we be heard, Your Honor?

THE COURT: Sure.

SIDE BAR CONFERENCE:

THE COURT: What's the legal objection?

MR. HANSEN: Hearsay. It's being offered for its truth. There's no connection to the decision making in this case. It's being offered on the issue of reliance.

THE COURT: Why don't you show that to Mr. Hansen first.

MR. SCAROLA: 361.

MR. HANSEN: The fact is this is rank hearsay, and it shouldn't come in.

MR. SCAROLA: This is the defendant's list of objections to plaintiff's Exhibits.

THE COURT: Is this the revised one?

MR. SCAROLA: That's the first one.

MR. HANSEN: We have a revised one.

THE COURT: Hold on. Let me get the revised one.

MR. SCAROLA: Here's the revised one.

MR. HANSEN: I need to see it.

MR. SCAROLA: You want to show it to Mr. Hansen first?

MR. HANSEN: Hearsay. We have a hearsay objection.

THE COURT: That's the new one.

MR. SCAROLA: That's the new one.

MR. HANSEN: It's clearly hearsay.

THE COURT: Okay. -- I'm sorry. Go ahead.

MR. SCAROLA: Our position is those objections are untimely. This was the timely filed list of objections. This document isn't being offered to prove the truth of the matter asserted but, rather, to prove the nature of the statements made at the time.

THE COURT: Then what's the relevance?

MR. SCAROLA: The relevance is that this was part of the body of information that was available to anyone, including Mr. Perelman and those persons who were advising him. And, in fact, the evidence will show that it was taken into consideration by Mr. Perelman and those that were advising him.

MR. HANSEN: Your Honor --

THE COURT: What --

MR. HANSEN: When Mr. Perelman testifies, if he's going to lay a proper foundation, that's a different story. The fact someone else had seen it is confusing and prejudicial to have the record include this kind of testimony. It's wholly immaterial.

THE COURT: Are you handing me something you need to supplement your argument or is it simply meritorious?

MR. HANSEN: This clearly shows our objections. Someone handed me a copy.

THE COURT: This is the new one?

MR. HANSEN: Yes.

THE COURT: Okay. I would -- I understand at this juncture I would overrule this objection. I think, quite honestly, the only one that's memorialized there that we need to talk about is the hearsay objection. And I think clearly something like that that could have been cured was waived.

MR. HANSEN: Is the ruling, Your Honor, that we failed to designate the objection timely?

THE COURT: Yes on this one. I'm not even getting to whether the objection is meritorious, because hearsay is the type of thing that could have been cured had they been timely notified of it. I understand we'll argue this more fully today when we're done. They could have gone to the author and figured it out.

MR. HANSEN: The author would have had to testify.

THE COURT: Right.

END OF SIDE BAR

THE COURT: It is accepted into evidence as what number, Mr. Scarola?

MR. SCAROLA: I believe 361, Your Honor. I believe I handed the court a copy.

THE COURT: I do. Do you have it?

THE CLERK: Yes.

(Plaintiff's Exhibit No. 361 in evidence.)

MR. SCAROLA: Exhibit 361. May I proceed?

THE COURT: Yes, sir.

MR. SCAROLA: Thank you. Tim, would you please put that up on the board?

BY MR. SCAROLA:

Q. Dr. Emery, first, if you would, please, just tell us whether the general formatting of this report is typical of the kinds of publications that analysts do with respect to a company.

A. Yes, there's nothing unusual about this.

Q. All right. And where is it that we find the date of this particular report?

A. You see it up in the right-hand corner.

Q. All right. And it is identified as a report with regard to Sunbeam Corporation; is that correct?

A. Yes.

Q. Okay. And just sort of take us through this report, if you would, and point out to us what is significant with regard to this report.

A. Well, you can think of this a little bit like an article in the newspaper. There's headlines and subheadlines. If you look where it says Sunbeam Corporation and right below that it says sort of the subheading, it summarizes what the opinion is. First quarter sales may fall short, in other words, that first quarter sales are going to be less than expected. They may be less than expected, but for reason we can live with long-term view unchanged.

Q. So L-T is?

A. Long-term.

Q. Common abbreviation for long-term?

THE COURT: Mr. Scarola, let me stop you there for a moment. Just for your peace of mind for your deliberations, you will have every item accepted into evidence with you. We just want you to be able to review it now.

Go ahead.

MR. SCAROLA: Thank you very much, Your Honor.

BY MR. SCAROLA:

Q. Continue on, if you would, Dr. Emery, and take us through this report. How do we know, for example, this was issued after the March 19 press release came out?

A. Well, if you go immediately to the text where it says investment conclusion, you go -- just start reading, "Prior to the opening of the market on March 19, Sunbeam announced that its first quarter sales growth might come up short of the mid team's street expectations."

Q. Stop right there. What are street expectations? We talked a little bit about analysts' expectations. What are street expectations?

A. Street refers to Wall Street. But more broadly what it really means is the investment community. It's sort of the well-informed investing public would be sort of the professionals in investing. So that would be other analysts as well as this analyst, Scott Graham.

Q. Now, again, what is the significance of information that first quarter sales might come up short of the mid team's street expectations?

A. Well, it gets back to what I said earlier about if you have news that is bad news, you may want to get that out to the public to be, to give the impression of honesty. And I think as we read now we'll see this analyst explicitly says just that. But what they're wanting to do is they're wanting to say, look, don't hold us to those expectations because it turns out we might not quite make that. So we might be a little short. Here are the reasons why. Then they try to explain why being short is not that big a deal. So it's designed to soften the blow.

Q. Okay. Now this particular report is coming from a man by the name of Scott Graham; is that correct?

A. I said that earlier.

Q. Now, did you review generally analysts' response to the information that was coming out about Sunbeam in connection with this March 19, 1998 press release?

A. I did.

Q. And were Mr. Graham's published reactions to that press release an atypical, unusual in terms of what you saw in the other analyst reports that you reviewed?

MR. HANSEN: Leading.

THE COURT: Sustained.

BY MR. SCAROLA:

Q. How did Mr. Graham's reactions relate to the other reactions you reviewed?

A. It was within the range of those reactions. It was perhaps -- Let's see how to put this. It -- if you -- the average reaction was, yes, this isn't a big deal. There was, I believe, if I remember correctly, there may have been one and half a dozen or more that said, well, it's not that big a deal. And that would be about as negative as it got. And it sort of ranked from there, I think that was one that said it that way. This might, might not be that big a deal. So it had sort of a neutral --

and I think that, in fact, the recommendation was sort of a, the bottom line recommendation was wait and see. That was the most negative.

It ranged from that up to --

MR. HANSEN: Objection. This is all hearsay. I object to this hearsay.

THE COURT: You want to argue it or not?

MR. SCAROLA: I don't.

THE COURT: Sustained.

MR. SCAROLA: Thank you, Your Honor.

BY MR. SCAROLA:

Q. Dr. Emery, did you review analyst reports starting back in 1996 with regard to Sunbeam?

A. Yes, I did.

Q. And how frequently are reports like this published by analysts concerning generally companies like Sunbeam? How often do they come out?

MR. HANSEN: Objection; leading.

THE COURT: Overruled.

THE WITNESS: It varies, but I'm -- I'd have to look back at my report to get an exact number. I don't remember, but maybe we had -- we tracked 30, 40. I don't precisely remember what the number was that we looked at. But...

BY MR. SCAROLA:

Q. 30 or 40 over what period of time?

A. Over the year and a half or year.

Q. Okay. I'm going to hand you a copy of your report.

MR. SCAROLA: May I approach the witness, Your Honor?

THE COURT: Yes.

MR. SCAROLA: Thank you.

THE COURT: I assume, Mr. Hansen, you have one in front of you.

MR. HANSEN: (Nodding head).

THE COURT: Okay. Thanks.

BY MR. SCAROLA:

Q. To the extent it's necessary for you to refresh your recollection from reviewing that report, please feel free to do so. But before we do that, just tell us what that document is, if you would.

MR. HANSEN: Your Honor, I'd request that if the witness wants to refresh his recollection it be made clear as opposed to just testifying from the report.

THE COURT: I would agree first I think he would need to testify he couldn't recall. But right now I think we're just saying what is that.

MR. SCAROLA: That's what we're saying right now. He just said he couldn't recall the precise number, which is why I handed it to him. He said he needed to look at the report.

THE COURT: I think we need to do it question by question.

MR. SCAROLA: That's fine.

BY MR. SCAROLA:

Q. Tell us what that is that you have in front of you, Dr. Emery.

A. This is a report that I wrote for CPH for Coleman (Parent) Holding Company.

Q. Does it reflect the work that you did in connection with this specific case?

A. Yes, it does.

Q. Okay. You told us a moment ago that you couldn't exactly recall how many analyst reports you reviewed. Does the review of that report refresh your recollection with regard to the number of analyst reports that you reviewed?

MR. HANSEN: Your Honor, objection to the leading and recapitulation of the testimony.

THE COURT: Overruled in this context because I think we got a little offtrack, but we're back.

THE WITNESS: Looks like it was closer to 55 or 60 rather than 40.

BY MR. SCAROLA:

Q. Over what period of time?

A. That was from November 13th, 1996 to late March '98, March 24th, '98.

Q. Is the review of analyst reports such as those that you reviewed in connection with this matter the kind of activity in which those within your profession would engage, and are these reports something that your peers would commonly rely upon in conducting evaluations of a company's performance during a particular period of time?

MR. HANSEN: Objection; compound and leading.

THE COURT: Sustained on both.

MR. SCAROLA: Both.

BY MR. SCAROLA:

Q. Tell us, please, if you would, please -- Tell us, please, Dr. Emery, what kinds of things those within your profession rely upon in making judgments about a company's economic performance during a given period of time?

A. There's sort of two levels, things that people like myself would look at. One, it would be the specifics in terms of a valuation of a company or some specific event connected, such as this. And these are things that one would pay attention to. These are important information about getting a sense of what the investment community was thinking at this time. It's a record. It's a historical record in some sense about getting a sense. Because they're not uniform. Each one doesn't say exactly the same thing. So there's sort of a point of view that one would interpret in this.

The second is in research, in financing, we routinely look at such things as in broad numbers of cases where instead of focusing on one company and one situation, you're looking across hundreds or even thousands of companies and situations. And so you would have a massive effort to undertake to look at these things.

Q. Did you in connection with the work that you did relating to this litigation form opinions and conclusions about the way in which the investing community, Wall Street, was viewing Sunbeam's performance during 1997?

A. I did.

Q. Did you as a consequence of the study that you performed and the work that you did in connection with this litigation form opinions with respect to the way in which the investing community was viewing Sunbeam's performance prior to the closing of the Sunbeam Coleman merger on March 30, 1998?

A. Yes, I did.

Q. Are the opinions and conclusions that you formed opinions and conclusions that you hold to a reasonable degree of certainty within your area of expertise?

A. Yes, they are.

Q. Let's start, if we could, please, with the year 1997. And based upon the study that you did, including your review of some more than 50 financial analyst reports relating to Sunbeam, explain to the ladies and gentlemen of the jury how Wall Street perceived what was going on at Sunbeam during 1997?

MR. HANSEN: Objection; leading.

THE COURT: Overruled.

THE WITNESS: By 1997 Sunbeam and when the then CEO, Albert Dunlap, as the spokesperson had announced a plan to turn the company around, and that was started in the late '96 period when they started announcing what --

MR. HANSEN: I object as nonresponsive. This is something different.

THE COURT: Sustained. I'll ask you to disregard the last answer. Can you rephrase the question?

MR. SCAROLA: I certainly will.

BY MR. SCAROLA:

Q. What we want to focus on rather than the underlying events at this point is Wall Street's perception of those events. How did Wall Street perceive Sunbeam in 1997?

A. As a company that had embarked on a turn-around.

Q. As 1997 progressed, how did Wall Street perceive the progress, if any, that Sunbeam was making in that turn-around process?

A. One of the things we look at is the stock price. And if you -- if we track the stock price, we go back and look at the stock price, you'll see that the stock price was climbing over the year 1997, which would be absolutely consistent with the idea that the investment community was viewing this very favorably.

Q. To what extent did your review of the analysts' reports corroborate what you interpreted from the rising stock price?

A. They were --

MR. HANSEN: Objection; leading.

THE COURT: Sustained.

BY MR. SCAROLA:

Q. To what extent, if any, did the review of the analyst reports corroborate or contradict what you viewed based upon the rising stock price?

MR. HANSEN: Same objection. Same question.

THE COURT: Sustained.

BY MR. SCAROLA:

Q. Was there any relationship at all between the analyst reports that you reviewed and the conclusions that you drew from the rising stock price?

A. They were entirely consistent.

Q. As 1997 progressed into the fourth quarter, how did Wall Street perceive Sunbeam Corporation?

A. As we got into the fourth quarter of '97, there were some questions that were raised about whether the return, whether the turn-around was quite as good as it might have been initially perceived. And there was some, I don't want to say reversal, but there was some plateauing of stock value. There was, there was a general thought of, well, okay, we've

revalued the company to incorporate this turn-around. Fine. We think it's revalued. Is this really truly going there? That was in the stock price.

The analyst reports were still quite favorable at that point. And so there was that, that level of agreement going on.

Q. We know from the findings of established fact that in February of 1998 an announcement was made concerning the merger of Sunbeam and the Coleman Company. I think it was February, perhaps early March.

A. It was February.

Q. February. Thank you. How did Wall Street view the news of that merger?

A. That was viewed favorably as witnessed in a stock price jump. In reaction to the announcement, the stock price jumped up within the next day.

Q. How did financial analysts view the news of that merger?

A. That was also viewed positively by financial analysts.

Q. What kinds of recommendations were financial analysts making with regard to the purchase of Sunbeam stock at that point in time?

MR. HANSEN: Objection.

THE COURT: Did you want to respond?

MR. SCAROLA: I'll just rephrase.

BY MR. SCAROLA:

Q. You had told us there were strong buy/sell recommendations that were being made in March of 1998 with regard to Sunbeam. Were those strong buy recommendations by Mr. Graham unique based upon your review?

MR. HANSEN: Objection, Your Honor. Same problem, them just incorporating the testimony and repeating.

THE COURT: Did you want to argue?

MR. SCAROLA: I don't.

THE COURT: Let's move on, then.

MR. SCAROLA: Thank you very much.

BY MR. SCAROLA:

Q. What do strong buy recommendations from financial analysts do in terms of influencing the price of a stock, if anything?

A. Well, there's a -- there's a positive relationship between it. It's certainly not perfect. So you see sometimes where analyst reports can be positive, but the stock does not continue to rise. But there's certainly going to be a positive relationship between those two. The analysts spend their entire working day focused on these questions. They come up with a recommendation. Some of the investment community is also spending their entire day, but most of the investment community is not spending their entire day on this question.

So they will be paying attention to what the analysts say, not necessarily accepting every piece of it. But we do look at things -- and one of the things that people in my position look at when we do research is we look at what we call consensus opinions from the analysts. So if you have all the analysts saying the same thing like buy this stock, that's a favorable consensus. You could have all of them saying sell this stock. That would be an unfavorable consensus. Sometimes you get a very mixed, and there's really not a consensus, it's kind of a mixed recommendation.

But we look at those things to -- and try to assess them. But when they're all positive, that generally, it's not too likely to see stock price movement without special new information, significant new information. It's not likely to see stock price movement that would be significantly at variance with the analysts' consensus.

Q. Did you form an opinion to a reasonable degree of certainty within your area of expertise as to whether there was a financial analyst consensus with regard to Sunbeam in that period of time leading up to March 30, 1998?

MR. HANSEN: Objection, Your Honor. That's going to call for hearsay.

THE COURT: Do you want to argue it?

MR. SCAROLA: Yes, Your Honor.

THE COURT: Why don't you guys come on up.

SIDE BAR CONFERENCE:

THE COURT: I assume the argument is just that to -- all he did is take a bunch of analyst reports and say they mostly pointed it out, and it's based on hearsay. What's the response?

MR. SCAROLA: The response is Dr. Emery told us one of the things that those within his area of expertise do is routinely examine materials to determine whether consensus exists and form opinions as to whether such a consensus exists. I think it's entirely appropriate for him to testify within his area of expertise as to whether he concluded to a reasonable degree of certainty within his area of expertise whether a consensus existed among analysts at that time.

THE COURT: I would sustain the objection. Obviously you can't give him the data he relied on and get around the hearsay rule.

END OF SIDE BAR

MR. SCAROLA: Your Honor, excuse me. I'm sorry. May I approach again?

THE COURT: If Mr. Hansen is coming up.

MR. SCAROLA: Sure.

SIDE BAR CONFERENCE:

MR. SCAROLA: I really overlooked the fact this information was not being introduced for the truth of the information but only with regard to what was being said at the time. It is the fact of the information, not the truthfulness of the information.

MR. HANSEN: I believe there's been a ruling, and, in fact, it's only relevant if truthful. If it's not truthful, it has no significance. Even if it's truthful, it can't come into evidence because Mr. Perelman didn't see it.

THE COURT: In all honesty, it's still hearsay. He doesn't have the stuff in front of him. He's saying what do these things say.

MR. SCAROLA: He's saying what his opinion was as to whether there was a consensus.

THE COURT: If you want to pull them out and say I'm not relying on hearsay; I'm just saying what they say, that's fine. He couldn't have read them all even if they're not being offered for the truth of the matter asserted and simply say this is what was said.

MR. SCAROLA: That's fine.

MR. HANSEN: Even if he did it that way, if he took a bunch of reports which are hearsay and said, okay, I've looked at them, they all say such and such, that's hearsay. These are somebody else's out-of-court statement.

MR. SCAROLA: I'll just introduce them.

MR. HANSEN: I don't believe he can.

THE COURT: Absent something that shows plaintiff relied on them, I don't know that it's relevant.

MR. HANSEN: It's also prejudicial.

MR. SCAROLA: I will represent to the court that there be testimony that the plaintiff relied upon the consensus of analyst reports as reported to him by Mr. Gittis and others within his organization.

THE COURT: Then I think Mr. Gittis and others in the organization need to specify what they looked at.

MR. SCAROLA: Okay. Thank you.

END OF SIDE BAR

BY MR. SCAROLA:

Q. Dr. Emery, to whom are analyst opinions, expectations and recommendations communicated?

A. The general public.

Q. How?

A. I think I noted earlier they're sent out in a variety of ways. Sometimes they appear in places like the Wall Street Journal, but they're certainly available through financial information services such as Bloomberg, Reuter's, Bridge. You

know, you can go to a brokerage firm and get -- I mean, if you go to a brokerage house or you have a broker, they'll make the information available to you, not a problem.

Q. Okay. You did tell us earlier that the manner in which you gathered these reports was by doing research with entities like Bloomberg, but to be clear, these reports can be obtained contemporaneously back in 1997 and 1998 by any member of the general public that wants to get them; is that correct?

A. Precisely.

MR. HANSEN: Objection; leading.

THE COURT: Sustained.

MR. SCAROLA: It was only by way of summarizing the testimony. Thank you.

THE COURT: I'm not entertaining a motion for rehearing, Mr. Scarola. Thank you.

MR. SCAROLA: Thank you.

BY MR. SCAROLA:

Q. What is an institutional investor, Dr. Emery?

A. Institutional investors are people who manage other people's money. So, for example, we may have a retirement pension plan, and there may be people who are managing that money for us. Those people are institutional investors. They are institutions that manage that money. So they're not managing their own money; they're managing somebody else's money, but they're making decisions about which stocks to buy, which bonds to buy, which ones to sell.

Q. What role, if any, do the opinions of industry analysts, financial analysts have in influencing that decision-making process by institutional investors?

MR. HANSEN: Objection.

THE COURT: Can you give me a one-word one, or do we need to talk about it?

MR. HANSEN: Beyond the scope.

THE COURT: Do you want to come up if you feel you need to argue it? That's great.

SIDE BAR CONFERENCE:

THE COURT: I assume when you said beyond the scope, you meant the report.

MR. HANSEN: Absolutely. There's nothing in any opinion about this. We're levels away from anything he came close to talking about. Now he's going to talk about how this amorphous investment analyst community was influencing some amorphous group of institutional investors which has no relevance to this case, completely prejudicial.

THE COURT: Did he opine on the effect of analyst reports on institutional investors?

MR. SCAROLA: My first response is that this is exactly one of the questions provided to opposing counsel earlier when he was given an opportunity to object to any questions to which he chose to object to.

THE COURT: That's fine. I did not find that to be an exclusive list. What else?

MR. SCAROLA: That this opinion is apparently a part of the opinions expressed in that report.

THE COURT: Sustained.

MR. SCAROLA: Thank you.

END OF SIDE BAR

MR. SCAROLA: May I proceed, Your Honor?

THE COURT: Yes, sir.

BY MR. SCAROLA:

Q. Do financial analyst reports get distributed to and reviewed by institutional investors?

MR. HANSEN: Objection, Your Honor.

THE COURT: What's the legal objection? One word. Two words.

MR. HANSEN: Same objection as before.

THE COURT: That I would overrule. You can answer that one, sir. Do you remember it?

THE WITNESS: (Nodding head).

THE COURT: Okay. Thank you.

THE WITNESS: In research that I'm currently involved with with colleagues, we have looked at that question in relating to other work we're doing, and, in fact, one can trace, through large amounts of data one can trace the impact of financial analysts we're talking about.

MR. HANSEN: Objection, Your Honor. Nonresponsive answer.

THE COURT: Sustained. I'll ask you to disregard the last question. You were answering the question before, which I had sustained the objection to. You need to listen to the question that's asked and answer only the question that's asked. Okay?

BY MR. SCAROLA:

Q. Let me refocus you, if I could, Dr. Emery?

A. You want to repeat the question?

Q. Yes, I will do that. Do institutional -- Excuse me.

Do financial analyst reports get distributed to institutional investors?

A. Yes.

Q. Thank you, sir. When we're talking about one company buying another company, what does the word "consideration" mean?

A. Essentially that's a broad word for the price paid. So what when I spoke earlier about cash and stock in a company, those would be consideration.

Q. There has been a finding that the defendant, Morgan Stanley, Incorporated, is a highly sophisticated investment banking firm that provides a wide range of financial and securities services. In the context of that statement, what is meant within the business community when an entity or a person for that matter is referred to as a highly sophisticated individual or corporation?

A. The SEC has specific rules that define the term "sophisticated." And those rules are designed --

MR. HANSEN: Objection, Your Honor, to legal testimony.

THE COURT: Sustained. I don't know, in all honesty, whether there was any attempt to put those undisputed facts in, an SEC concept of sophisticated investor.

BY MR. SCAROLA:

Q. What is the general understanding in the business community of what it means to be a sophisticated investor?

A. Knowledge.

Q. Okay. Thank you, sir. That will work.

There has been a finding that Sunbeam filed a bankruptcy petition under Chapter 11 of the Bankruptcy Code in February 2001. From a business rather than a legal perspective, what is a bankruptcy petition under Chapter 11 of the bankruptcy code?

A. It is a petition filed with the court to allow the company to not pay its bills right away, to not meet its liabilities right away but continue to operate and then through the court establish exactly what bills will be paid and how the liabilities will be -- which liabilities and to which extent they will be paid.

Q. What relationship, if any, does the filing of a bankruptcy petition have on the value of a company's stock?

A. It's a very important event. Generally we think of it as being negative, but in many cases by the time it happens it actually turns out to be positive because expectations have grown so negative that the filing of the bankruptcy petition is viewed as a positive step in the company's life.

Q. Are there circumstances where the filing of a bankruptcy petition can wipe out shareholders' value in a company?

A. Absolutely.

Q. Is Arthur Andersen a company that you are familiar with, Doctor?

A. It is.

Q. Were you familiar with Andersen back in 1997 and early 1998?

A. I was.

Q. What kind of company was Andersen back in that time frame?

A. They were one of the major accounting firms, public accounting firms.

Q. And how was Andersen viewed in the business community during that time frame?

A. They were one of the most highly respected of the accounting firms.

Q. From a business perspective, how important is it for a public company to provide honest and accurate information to its auditors?

A. I believe it's critical.

Q. Why?

A. To go back to what I said about expectations, when you want to form accurate expectations about the future or as accurate as they can be, you have to have as accurate information as is possible to have.

Q. What significance does the investing community attach to the honesty and integrity of publicly filed statements, financial statements of public corporations, specifically in the 1997/1998 time frame?

A. They were very important.

Q. Did the investing community in the 1997 and 1998 time frame have a high degree of confidence in the honesty and accuracy of publicly filed financial information?

A. In my opinion, yes.

MR. SCAROLA: Your Honor, although I'm not quite finished, I'm about to enter a new area. And I'm looking at the clock. Is it appropriate for us to break here?

THE COURT: Sure, if you're telling me you're not going to finish in the next five minutes.

MR. SCAROLA: I won't finish in five minutes, but I don't have too much more to go.

THE COURT: Okay. You can step down. Thank you, sir. And this looks like a good place to send you home for the week.

Couple things. First of all, for planning

You want to raise your right hand again. Do you swear to tell the truth, the whole truth, and nothing but the truth?

THE WITNESS: I do.

THE COURT: Thank you. Have a seat.

And is there water? What are we missing? Oh, you guys, I have you so well trained.

Great. Have a seat, sir. Thank you. Does he have water, the witness?

Oh, you have your own water.

MR. SCAROLA: The jury has been very well conditioned, Your Honor.

THE COURT: They are.

THEREUPON,

DOUGLAS EMERY

having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION (Continued)

BY MR. SCAROLA:

Q. Good morning, Dr. Emery.

A. Good morning.

Q. Dr. Emery, we are here to begin the second semester on our course in business and finance, and I am hoping that we will complete it in less than an hour, sir, as far as direct examination is concerned.

Before we get back into the point at which we left off, there are a few additional terms that I would like you to define for us that may become relevant during later stages of these proceedings.

Could you tell us first what the difference is between a holding company and an operating company?

A. The words are pretty much what they mean in terms of operating the company, the operating company actually does the day-to-day transactions and is in charge of the -- whatever the goods and services are that are being provided. Whereas, a holding company simply owns the operating company and does not involve itself, typically, in any ongoing daily conversations.

It's a little bit analogous to the board of directors versus the CEO.

Q. All right, sir.

You told us about the rights that shareholders have to elect members of the board of directors. And in the context of discussing shareholder rights to vote, what is a proxy?

A. A proxy is where someone who has the right to vote gives that voting authority to someone else.

Q. Are there different kinds of authority that can be given by way of a proxy?

A. Yes, it could be assigned to a variety of things.

Q. For example, may proxies be restricted for a particular purpose or purpose issues?

MR. HANSEN: Objection, leading.

THE COURT: Sustained.

BY MR. SCAROLA:

Q. To what extent, if any, may limitations be imposed upon proxies?

A. Like any contract, you could write it in any way you so chose. So anything that the parties agreed to about timing or issues or anything else would be feasible to have.

Q. We know from the discussion that we have had already about the established facts in this case that one of the components of the consideration paid by Sunbeam for Coleman (Parent) Holdings' 82 percent interest in Coleman was the assumption of debt.

And I'm not sure that we specifically covered that phrase in our earlier discussions.

What is assumption of debt?

A. If you recall, debt is a legal contract to owe money. To assume that would be to take it over and take it on as your liability. So the liability to pay the money would pass from one company to the other. The one who is assuming it would actually take responsibility for it, pay off the debt.

Q. The factual findings that have been made in advance of trial include a finding that after a consistent pattern of declining earnings on the part of Sunbeam during 1995 and 1996, Sunbeam's board of directors hired Mr. Al Dunlap as Sunbeam's new CEO. The established facts, then, are that, quote, claiming to be engaged in a clean-up of Sunbeam's financial problems, Dunlap recorded artificially high reserves and booked expenses that should not have been recorded until later periods.

I want to ask you some questions about some of the words that are used in that particular finding.

What are reserves?

A. Reserves are monies that are set aside in anticipation of an expense or liability that will have to be paid later in the future.

Q. Are there rules and guidelines that apply to setting up reserves in proper amounts?

A. Yes, there would be quite a number of them.

Q. And are those rules and guidelines matters that fall into the area of expertise of the people who sit in the forward-looking seats or the people who sit in the backward-looking seats?

MR. HANSEN: Objection.

BY MR. SCAROLA:

Q. That is, are they finance matters or accounting matters?

MR. HANSEN: Objection to continued leading.

THE COURT: Overruled as to that one. Go ahead.

THE WITNESS: They fall under the accounting rubric.

BY MR. SCAROLA:

Q. All right, sir. Do both inhouse and outside accountants share the job of properly applying those rules and guidelines?

A. Yes, they do.

Q. Are there -- the details regarding the rules and guidelines, since they are the backward-looking seats people's job, is that something that you consider yourself to be an expert in?

A. No, I am not an accountant.

Q. So you know that such rules and guidelines exist, but the application of those rules and guidelines is somebody else's job?

A. I do not study the specifics of those.

Q. What does it mean for reserves to be artificially high? Is that a concept with which you are familiar?

A. Yes.

Q. And what does that mean?

A. It means that the people who were setting aside the reserves may have an idea of how much they are, but they deliberately set the amount aside to be larger than what they really think it's going to be. They want to have it be larger than what it turns out to be.

Q. What is the significance to the investing community when financial reserves are intentionally distorted in that fashion, set at artificially high levels?

A. Well, it gets back to the information that we've talked about previously, the information flow. If you believe that the amount set aside is appropriate, that's -- you have some information, but if you believe it was appropriate and, in fact, it's artificially high, then that hurts your ability to understand what's going on.

Q. Now, the second part of that statement that we began with makes reference to the fact that Mr. Dunlap recorded artificially high reserves and booked expenses that should not have been recorded until later periods. Let's focus on that second half.

What does it mean to book expenses?

A. It means to actually, what we call recognize the expense in the time period. So accounting is done on an accrual basis where there are rules and regulations for recognizing things. And it doesn't always follow on the exact exchange of cash or money. And so if they recognize -- claim an expense in one period that is ahead of another period, then that distorts the statements.

Q. So there are rules and guidelines, not only that apply to establishing reserves, but that also apply to when expenses are to be properly booked?

A. Yes.

Q. Do both inhouse and outside accountants share the job of properly applying those rules and guidelines that relate to booking expenses?

A. Yes, they do.

Q. What is the significance of improperly booking expenses?

A. Well, as I said, it distorts things. It will make the earlier period -- if you anticipate an expense, it makes the earlier period have a lower net income or earned profit, and then the subsequent period have a higher net income or profit. So the effect is to shift profit from one period forward.

Q. And by anticipating an expense, you mean paying expenses that really belong in a later period in an earlier period?

A. Right.

Q. How can overstated reserves be used to increase a company's income in a later time period? How does that work?

A. The concept is very similar. If you think you're going to have an expense and you put down that it's larger than it really is, and later on you can -- as you reverse that it will make it also look like you had more profit in the later period rather than the earlier period, less in the earlier.

Q. Is the term cookie jar reserves a term that you are familiar with?

A. Yes, it is.

Q. Why are overstated reserves called cookie jar reserves?

A. This goes back to many years ago when there were people who saved money in a cookie jar. And they would put money aside in a cookie jar for things that they needed. It's a depression era, or perhaps even earlier, term.

Q. And what happens to the money once it goes into the cookie jar?

A. Then they have -- it's like a savings account. They have the ability to take it out when they think they really need it.

Q. How do bill and hold sales affect a company's future sales?

A. It's actually a similar sort of thing, except the profit direction kind of goes the other way. If you -- in a bill and hold, you are getting a customer to say they bought something when, in fact, you're not delivering it, they're not paying for it. I mean, they're sort of agreeing to buy it later. But they're agreeing now so that you can write down that it was sold.

If you write down that it was sold, then you get the revenues for that, and you get the profit for that. So you write that down ahead of time. And so that has the effect of moving revenues and profits ahead rather than delaying them. Rather than pushing them forward in time, it brings them back in time.

Q. Explain to us, if you would, please, Dr. Emery, the concept of channel stuffing; what is that?

A. The things we've been talking about when we talk about bill and hold sales, the broader term is channel stuffing. What that means is you have a distribution channel and you try to get things from your books into the channel. So they're sort of already set to go. And that accelerates revenues and profits.

Q. If the investing community doesn't know that a company's reported sales for a particular period of time are in actuality a result of improper bill and hold sales and improper channel stuffing, what significance does that lack of information have?

MR. HANSEN: Objection, Your Honor.

THE COURT: What's the legal objection?

MR. HANSEN: Leading, and also outside his report.

THE COURT: I would overrule it on the latter.

Can you rephrase it?

MR. SCAROLA: Yes, I can.

BY MR. SCAROLA:

Q. What, if any, significance does it have if the investing community is unaware of the fact that reported sales during a particular period of time are as a consequence of improper accounting procedures such as improper bill and hold sales and improper channel stuffing?

A. Once again, it's information that would be incorrect, and that would cause a misvaluation.

In particular, the issue that we get into is there may be the appearance of growth in sales when, in fact, there is no growth in sales. Growth in sales and growth in profit affects the valuation very -- in a very important way, very important ways.

So the difference between having the same profit, the same revenue every year versus growing profit, growing revenue. So if, as an outsider, I think that revenues and sales have grown, then I can make a very significant misvaluation of the company.

Q. It has been established that, quote, Dunlap further enhanced Sunbeam's income in 1997 by causing Sunbeam to record a profit of 10 million dollars from a sham sale of its warranty and spare parts business.

In the context of that statement, explain to us, please, what a sham sale is.

A. Essentially, they got one of their distributors, one of their customers who would buy products and then resell them to customers for parts and warranty work, repair work, they got that entity to pretend to buy that business from Sunbeam when, in fact, they really were just going to continue to operate in the same way that they had been operating. And they were not going to actually own that business.

Q. Dr. Emery, how could using fraudulently inflated stock to pay for another company and then merging the two companies together work to conceal a turnaround fraud?

MR. HANSEN: Objection, leading, and also outside prior opinions.

THE COURT: Overruled on the latter. Can you rephrase it?

MR. SCAROLA: On the leading grounds, Your Honor?

THE COURT: Yes, sir.

BY MR. SCAROLA:

Q. How, if at all, can using fraudulently inflated stock to purchase another company and then merging the two companies together assist in concealing a turnaround fraud?

A. When one company acquires another, especially when they are sizeable entities, there's a lot going on. And you have a lot going on in a lot of ways.

You have, as you can imagine, the physical problem of merging distribution channels, employees, and various processes.

You have the attitude problem called the culture, corporate culture.

But you also have the accounting problem of putting those things together to keep track of everything. You've got two separate books. You have to put them together.

In each of those instances when that happens, there's tremendous amount going on. And there also can be additional charges taken for what's called restructuring or, you know, the merger itself. There can be additional charges that are taken. In that process it becomes much easier to lose track of what's going on. It becomes very difficult to really track what is coming from one entity, what is coming from the other entity originally, after you've put them together.

So essentially, you're much more able to hide things. And so the fact that you might have been doing poorly, the acquiring firm might not have been doing as well as it had people believe, it would then -- could use the acquired firm to cover up, basically, that fact -- the fact that there had been fraud.

Q. Dr. Emery, I'm going to read you another sentence from the established facts.

MR. HANSEN: Can I object and approach, Your Honor?

THE COURT: Sure.

(A bench conference occurred as follows:)

MR. HANSEN: Very briefly, I'm moving for a mistrial. This witness has now given further prejudicial testimony where he embellishes on the findings, speculate as to causes and motive. None of this was disclosed in his report. It's improper embroidering on the facts the Court has determined to be applied in this trial. We can't cross-examine. We can't challenge the facts, which are not facts, as we all know. And we can't possibly get a fair trial.

This expert has not disclosed his opinions, is not competent to speculate as to a particular fraud. He's allowed to get up and bolster the Plaintiff's position, using loaded words like "cover-up," "hide," based on a report that indicated no such opinion. There is no way Morgan Stanley can get a fair trial in this courtroom, and I move for a mistrial.

THE COURT: What's the response?

MR. SCAROLA: I rely on all arguments previously made.

THE COURT: I would deny the mistrial. As I said, I think it's fair that the jurors understand the statements in Exhibit A, which I think is what he is explaining.

MR. HANSEN: Your Honor, if I could comment.

THE COURT: No, because I've ruled.

MR. HANSEN: That's not what this witness is doing. He's speculating as to motive. The most recent testimony is what is the motivation people would use -- that's not defining terms. It's speculating a level beyond defining terms; therefore, the record should reflect.

THE COURT: The record has his testimony.

(The bench conference ended.)

BY MR. SCAROLA:

Q. Dr. Emery, as I began, I'm going to read another sentence from the established facts, and that sentence uses the term restructuring charges. And I want you to tell us what restructuring charges means in the concept of these established facts.

Quote, Morgan Stanley's strategy would allow Dunlap to take massive restructuring charges purportedly related to the acquisitions and thus create more cookie jar reserves that could be tapped to bolster the future earnings of the combined companies.

What does restructuring charges mean in that context?

A. We talked about the reserves in anticipation of expenses to turn the company around. In this case it would be anticipating expenses to merge the companies, to restructure. And those -- if you took more than what you actually had, that would allow you to actually then have more cookie jar reserves.

Q. Could you give us some examples of what sort of restructuring charges would be anticipated legitimately in the merge of two companies engaged in the sales of consumer products?

A. I would go back to what I said just a minute ago. I mentioned three different types of expenses. One is physically merging things, and there would be charges -- moving charges, as simple as that. Two, there can be corporate culture issues and personnel issues. So there might be employees who are let go, and there would be severance packages and other things to help those employees find another job. And third, there would be much of the paperwork involved with merging things. All of those have legitimate costs associated with them.

Q. Among the established facts is that, quote, Morgan Stanley provided CPH with false 1996 and 1997 sales and revenue figures for Sunbeam as well as false projections that Sunbeam could not expect to achieve.

What are projections in the context of that factual statement?

A. We talked last Thursday about expectations and financial analysts and the market and so forth. In addition to that, companies actually announce and publicize what their expectations are in connection with their revenues, their earnings per share, profits, so forth. They publicize their expectations, and those are typically referred to as projections, forecasts.

Q. Is the publication of projections something that occurs as a matter of routine for public companies?

A. It's very common, yes.

Q. Why? Why do public companies put out to the public in general what their expectations are concerning their financial performance?

MR. HANSEN: Objection, leading, calls for speculation. Outside report. And may we approach?

MR. SCAROLA: I'll withdraw that question, and perhaps we can avoid another trip to the bench.

MR. HANSEN: Actually, if I might approach anyway, Your Honor.

THE COURT: Sure.

(A bench conference occurred as follows:)

MR. HANSEN: Very briefly, I neglected to mention when I was last here that Your Honor had previously issued a ruling on the motion in limine prohibiting this witness from describing motive. That testimony should be struck. I move to strike his testimony with respect to motive concealing improprieties through merger, because that was indeed testimony describing motive per Your Honor's prior ruling.

MR. SCAROLA: My only response is that Mr. Hansen mischaracterizes the testimony. Neither the question or the answer related to motive.

THE COURT: It's a motion for rehearing, which I would deny.

(The bench conference ended.)

THE COURT: You're going to pose a different question, Mr. Scarola?

MR. SCAROLA: I am.

I'm actually going to rephrase it in a way that I hope is not objectionable.

BY MR. SCAROLA:

Q. Do a company's financial projections impact on the value of the company?

A. Yes.

Q. How?

A. It's back to the flow of information that we've been talking about. The information -- a company wants to get out information. In an ideal world they want people to understand what they're doing, they're doing good things and what the value of those things are. And to do that, they want to make information available to the public, to the extent that it doesn't hurt them competitively, they would like to have the full value of what it is, you know, they're doing. So they'd like their stock price to reflect the future that they see.

Q. Do companies also sometimes project bad news?

A. Again --

MR. HANSEN: Objection, leading. May I have a standing objection to all testimony beyond the scope of the witness's report so I don't have to continuously object?

THE COURT: I think that objection was already globally lodged. I would sustain it on leading.

Do you want to rephrase it?

MR. SCAROLA: Yes.

MR. HANSEN: Does that mean I'm permitted to have a standing objection, Your Honor?

THE COURT: Yes, I think we covered that last week was my recollection. If not, that's fine.

MR. HANSEN: Thank you, Your Honor.

BY MR. SCAROLA:

Q. What statements, if any, do companies make projecting unfavorable news in the future?

A. Again, it has to do with the flow of information. One of the things that is often viewed negatively for a firm is to have a shock that is negative to the markets, one of the reasons that bad news is frequently not given while the markets are operating. You'll hear that a company announced a much lower earnings after the market closed or that they announced that they anticipate lower earnings after the market closed. What they're trying to do is to have a more even flow of information and have the investment community have a level playing field so they have the information they need to make whatever investment decisions they choose to make.

Q. Dr. Emery, I want to ask you please to explain and define some of the terms used in the following statement from the facts established in advance of trial.

Quote, Morgan Stanley presented Sunbeam's board with Morgan Stanley's opinion on the value of Coleman. Using a discounted cash flow analysis, which Morgan Stanley represented was the best gauge of stand-alone economic value and the best method of capturing the unique value of Coleman, Morgan Stanley valued CPH's Coleman stock at a range of \$31.06 to \$53.24 per Coleman share. CPH's 44,067,520 Coleman shares were worth, therefore, between 1 billion 369 million dollars and 2 billion 346 million dollars.

That's the end of the statement

Let's break that apart. What is a discounted cash flow analysis that Morgan Stanley used to come to those values of CPH's interest in Coleman?

A. One of the ways I explain this in class is, if you think about a certificate of deposit, many people have heard of a certificate of deposit, it's a way of saving. And you take an example where the bank is saying, if you will give us some money today, we'll give you a thousand dollars three years from today. The question becomes, how much money do you have to give them today?

So let's suppose you give them 780 dollars, but then three years from now they give you a thousand dollars. So the 220 dollar difference is the interest you earn. If you take that interest and break it down into a yearly interest, discounted cash flow analysis uses the same process, only it thinks about it in an opposite way. Instead of I'm investing 780 and getting a thousand, we think of it as, I expect to get a thousand in the future. That would be the earnings that Coleman expects to make, and we want to know what are those worth today.

We know from the example I just gave you that a thousand dollars three years from today might be worth 780 dollars today. So that would be a discount on the cash flow. So that's why we call it discounted cash flow analysis.

We do that to all of the future cash flows to find out what they're worth today.

Q. The statement tells us that that discounted cash flow analysis was used to come to a stand-alone economic value of CPH's ownership interest in Coleman.

What is a stand-alone economic value of a corporation?

A. Well, if you recall, we talked last time about combining companies with synergies when there might be synergies. The stand-alone value is without those synergies. It's just by itself as it now stands.

Q. Why do investment banks report to the board of directors of a client about their evaluation of a merger partner on the opposite side of the negotiating table?

MR. HANSEN: Objection, no foundation, no basis. Calls for speculation.

THE COURT: Overruled.

THE WITNESS: As we mentioned last Thursday, investment bankers' role is typically to facilitate a transaction. And so they are helping with that process. They're giving financial advice, part of that advice involves what is this company -- what do we think this company is worth? The directors would want to know that because they would want to have an idea of whether they were paying the right price, whether they were getting a good deal for the company or a bad deal for the company.

BY MR. SCAROLA:

Q. Moving on to a different area referenced in the established facts. We did already talk about the concept of a debenture offering.

But what are convertible subordinated debentures?

A. The convertible and the subordinated are modifiers. They add an aspect to the security. The convertible -- let's start with the subordinated.

Q. Let me ask you to back up even a little bit farther. Just as a reminder tell us again what a debenture is, just before we start modifying that term.

A. The debenture is a bond which is borrowed money, and it's backed by the full faith and credit of the issuing company, as opposed to a mortgage bond. So it's a certificate of borrowed money.

The subordinated means that if there are problems, those securities have a lower priority than other debentures that are not subordinated. Now, as debt they still may have a higher priority than many other securities or things in the company, but the subordinated refers to their position with respect to other debentures. They are subordinated.

Q. So it's where they stand in line when they get paid their obligation?

A. If there's a bankruptcy type of thing, if there's financial distress, it would be their priority in that case.

Q. Where do debenture holders stand in relation to stockholders or shareholders?

A. They stand ahead of stockholders.

Q. Okay. So we've taken care now of the subordinated part of the modifier.

What does it mean that these debentures were convertible?

A. The conversion or convertible term means that the security owner, the person who owns that security, has that debenture, has the right to exchange it for shares of stock. In most cases, and in this one, it would be shares of stock in the same company. So that would mean if they chose to become -- if they chose to, they could stop being bondholders and become stockholders. And to do that then, the contract has to say, how many shares do they get?

So, for example, if you had a bond that was convertible into 50 shares, then that bond could be exchanged, and in its place you would get 50 shares of stock for that exchange.

Q. Moving again, Dr. Emery. We know that, quote, Morgan Stanley agreed to serve as the sole underwriter for the convertible subordinated debenture offering and that the debentures were marketed to investors at a series of road show meetings and conference calls arranged by Morgan Stanley.

In that context, what is a road show?

A. A road show is when people from the company and the investment bank, when they go out to talk with the investing public, they will go and talk to particular potential investors, especially institutional investors who manage large funds and might want to buy the securities. It's basically a sales technique to sell the securities.

Q. What does it mean to launch a debenture offering?

A. Just like launching a ship. It's when it starts out.

Q. The factual findings include a statement that Morgan Stanley initially planned to sell 500 million dollars worth of debentures, but the offering was so successful that the size of the offering was increased to 750 million dollars on March 19, 1998, the day of the last road show.

In the investing world, what is the significance of increasing the size of an offering after the marketing of that offering has already begun, after it's been launched?

A. I believe we talked about this last Thursday. If you think about them in their efforts to sell, if they find out that a lot of people want them, they can sell many more securities, and that would be a very positive sign that people were interested in buying those securities, and so they decided to borrow more money and sell more securities.

Q. Another factual finding is this: With Morgan Stanley's knowledge and assistance, Sunbeam prepared and issued a false press release on March 19, 1998 that affirmatively misstated and concealed Sunbeam's true condition. Morgan Stanley was fully aware that the March 19, 1998 press release was false, misleading and failed to disclose material information.

What role -- that completes the factual statement.

What role does false or misleading information in a press release play in the investing community's ability to accurately assess the value of a company?

MR. HANSEN: Objection. This is all calling for speculation.

THE COURT: Overruled.

THE WITNESS: Again, the issue is information. If they have accurate information that investors can make better estimates and the risk that they take is the risk of market risk, not the risk of fraud.

BY MR. SCAROLA:

Q. Going on. Quote, the March 19, 1998 press release failed to disclose Sunbeam's actual January and February 1998 sales or the true reasons for the poor results. Instead, the press release held out the false possibility that Sunbeam still could achieve sales of 285 million to 295 million dollars and suggested that if any shortfall occurred, that shortfall would be due to the fact that certain retailers had decided to defer first quarter purchases to the second quarter.

The press release also assured that Sunbeam at least would exceed first quarter 1997 net sales of 253.4 million dollars.

Now, what I would like you to tell us in relation to that statement, Dr. Emery, is the different financial comparisons that are referenced in that statement. Could you explain to us the significance of measuring current performance against different kinds of standards?

A. Well, there are three different measures or benchmarks, comparisons that are --

Q. Let me stop you there then, if I could. If we're going to talk about three different measures, would you be so kind as to step down and use the board for us again?

THE WITNESS: One of the benchmarks -- one of the measures that they talk about there is --

THE COURT: I just want to make sure Mr. Hansen can see, you're not blocking his view.

MR. HANSEN: Thank you, Your Honor.

THE WITNESS: One of the things they looked at was, how do the companies measure in a previous parallel period, so January, February of the previous year, that's one type of comparison.

The second comparison is the financial analysts expectations. We've talked about those. And the financial analysts' expectations are another type of benchmark or comparison.

And then the third is the corporation's own expectations, which we talked about just a minute ago.

BY MR. SCAROLA:

Q. When we were speaking about projections?

A. Right, projections, expectations.

Q. All right. Now, what is the significance of measuring current performance against those three different benchmarks? What does that tell us?

A. Well, when we measure it against the past, usually what we're doing is we're looking for, what kinds of changes have taken place?

When we measure it against financial analysts' expectations, they know what the past was. They're really looking forward. What is it that we expect to happen sort of going on.

And then the corporate expectations or forecasts or projections, those are within -- from the corporation itself. And, again, the flow of information becomes very important.

Q. All right. Thank you, Doctor. You can resume your seat again.

MR. SCAROLA: And I'll move this back out of the way, Your Honor.

THE COURT: Thank you.

BY MR. SCAROLA:

Q. Dr. Emery, when we're looking at a corporation which claims to have experienced or accomplished a dramatic economic turnaround, how important is it to have accurate information to measure against those benchmarks?

A. As I noted a little earlier, it's extremely important, because if you think that revenues and profits are growing, that gives one impression of value. If you think they're pretty much staying the same, it gives a very, very different impression of value.

Q. It is an established fact that, quote, Morgan Stanley knew that a full and truthful disclosure of Sunbeam's first quarter sales would doom the debenture offering which was scheduled to close on March 25, 1998.

How are those two things connected? How does accurate information about a company's financial circumstances relate to the ability to sell out a debenture offering?

A. Well, as we noted just a little while ago, when they moved the offer from 500 to 750, that was based on a lot of interest in investing.

If the investing public found out that things were not as they thought they were, they very well may decide, we don't want to invest. We don't want to buy securities in this company. And that would have hurt the process.

Q. Another statement of established fact: As Morgan Stanley was fully aware, the written contract between CPH and Sunbeam gave CPH the express legal right to refuse to close the sale if there was a material adverse change in Sunbeam's business, results of operation, or financial condition.

Is the phrase "material adverse change" a commonly understood phrase in the business world?

A. I believe it is.

Q. What does it mean?

MR. HANSEN: Objection, calls for legal conclusion.

THE COURT: Overruled.

THE WITNESS: In the business world, if you talk about material, what you're really talking about is, does it matter? Significance. There are things that are different that don't matter. So it can't be something that doesn't matter.

Adverse, of course, means negative.

And, of course, therefore, what it means is a negative change that matters.

BY MR. SCAROLA:

Q. In the context of discussions about corporations, what is an insider?

A. An insider is someone who is connected to the corporation in some significant way, so an employee would be an insider.

Q. When an insider buys or sells stock in his or her own company, in the company in which that person is considered to be an insider, what information is available to the investing public about such purchases and sales?

A. That information goes through the regulatory process. It has to be disclosed on a regular basis. And it is collected and made available to the public, because it is relevant to what -- to the value of the company.

In our books that we've written, we discuss principles of finance. And our first principle is the idea that people will act in a self-interested way. And that would be the relevant thing here, would be to watch what people do and not what they say, another principle called signaling.

Q. What happens to the ability of industry analysts, Wall Street in general and investors, to judge the true value of a company, if anything, when a company files fraudulent financial statements and secretly engages in practices such as establishing cookie jar reserves, using bill and hold sales, recording sham sales, practices channel stuffing, and books expenses in years in which they are not actually incurred?

A. It damages or completely destroys our ability to establish any sort of accurate value for the company.

Q. What happens to the ability to judge the true value of a company when an investment banker provides the last two years of information regarding sales and revenues for that company which is materially and substantially false?

MR. HANSEN: Objection, Your Honor. Leading, no foundation. Speculation, undue repetition of matters not in dispute. I can go on.

THE COURT: Overruled.

THE WITNESS: It's the same sort of thing. It damages our ability to reach any sort of accurate value. It's part of the information process.

BY MR. SCAROLA:

Q. What happens to the ability to accurately judge the value of a company when that company's investment banker provides false economic projections that the company has no real expectation of achieving?

A. Again, as we talked, it's part of the valuation process, and that information would hurt -- inaccuracy would hurt your ability to come up with an accurate value.

Q. What happens to the ability to accurately judge the true value of a company when the company and its investment banker hide a 60 percent drop in net sales for the same period from one year to the next?

A. Same answer, it damages the ability to have an accurate sense of value.

Q. Among the established facts, Dr. Emery, is this: Morgan Stanley also knew that Sunbeam would promptly replace Morgan Stanley with another investment banking firm such as the Chase Securities team led by Mark Davis.

What would it mean for one investment banking firm to be replaced by another in the middle of a merger and acquisition and debenture sale offering?

MR. HANSEN: Objection.

May we approach?

THE COURT: Sure.

MR. SCAROLA: I'll withdraw the question completely, entirely, won't ask it at all.

THE COURT: We're still going to chat, so come on up, Mr. Scarola.

(A bench conference occurred as follows:)

MR. HANSEN: I believe there had been a ruling previously that this witness was going to explain terms, but not essentially narrate the complaint in a way that told the story that was embellishing and embroidering on the established facts. I believe this is all objectionable and beyond that order. I would move to strike the testimony, and ask for a standing objection at this point forward.

It's contrary to what the Court ordered. before. This is not a definition of terms. This is nothing more than yet the third salvo of prejudicial repetition of allegations, which is basically all we've done in the case so far, and he's arguing the issues in the case.

MR. IANNO: It was brought to my attention at the last bench conference that Mr. Scarola was shaking his head in disgust of Mr. Hansen approaching the bench. I wanted to let the Court know that.

THE COURT: I appreciate that. And if there is any nonverbal communication between any counsel and any of the jurors, it needs to stop now.

MR. IANNO: But he did it.

THE COURT: I haven't observed anything, but if there is anything, don't do it.

MR. SCAROLA: And I do not concede that any such communication occurred, because it did not.

With regard to the objection that has been raised, there is no pending question right now. So I don't know what the purpose of the objection is. I cannot agree to a standing objection in light of the nature of the objection itself. It needs to be posed with regard to specific questions so that it can be judged in its context. And as to the general statement that has been made, I rely upon prior responses.

THE COURT: Okay. As I said, I think it's fair that the jurors understand what the Exhibit A statement of facts means. I would assume we're pretty close to being done on direct. How much longer?

MR. SCAROLA: Fifteen minutes.

THE COURT: Okay.

MR. SCAROLA: Do you want to take a break now?

THE COURT: No, that's okay. We'll obviously take a break before cross.

MR. HANSEN: It's improper, embellishing, all beyond the scope of the Court's order.

MR. SCAROLA: What I will try to avoid, so we can avoid trips to the benches, Mr. Hansen needs to stand and say, same objection, and I'll say, same response. And unless Your Honor wants further argument, we can resolve it in that fashion.

MR. HANSEN: That's a design of Mr. Scarola trying to make me look bad in front of this jury. If I need to make objections, I'll stand up and --

MR. SCAROLA: Surely Your Honor will know my response will be the same, and I won't need to approach the bench.

(The bench conference ended.)

MR. SCAROLA: May we proceed, Your Honor?

THE COURT: Yes, sir.

BY MR. SCAROLA:

Q. I'm going on to the next question.

Dr. Emery, the statement of facts include the following finding: Sunbeam's outside auditors already had made it perfectly clear to Morgan Stanley that Sunbeam's first quarter 1998 sales were a disaster. One of Sunbeam's senior outside auditors, Lawrence Bornstein, has testified under oath that on March 19, 1998 he told Morgan Stanley's John Tyree that the statement in Sunbeam's March 19, 1998 press release that Sunbeam would at least exceed first quarter 1999 sales of 253.4 million dollars was not credible.

The statement goes on to say that Mr. Bornstein told Mr. Tyree, I've been to every shipping dock domestically, I've been to Hattiesburg, I've been to Neosho, I've been to Mexico City, and I don't think these guys can physically ship this much stuff.

My question to you, Dr. Emery, is this: What purpose would it serve for an auditor to go to a company's shipping docks? Why would an auditor involve himself in an activity such as that?

MR. HANSEN: Objection, 403, speculation, violation of prior court order.

THE COURT: Overruled.

THE WITNESS: That would be a way of checking on what was going on. It's as simple as auditing to verify that things are as they seem to be.

BY MR. SCAROLA:

Q. Is that an unusual kind of activity for an auditor to be involved in, actually checking on the ability of a company to fill orders?

MR. HANSEN: Same objections, plus leading.

THE COURT: I'll sustain it on the last grounds only.

BY MR. SCAROLA:

Q. To what extent, if any, is visiting a company's plant, looking at the capacity of their shipping docks to move product typical or atypical of what auditors do?

MR. HANSEN: Same objections, including leading.

THE COURT: Overruled.

You can answer it, sir.

THE WITNESS: It's not unusual at all.

BY MR. SCAROLA:

Q. The following factual finding has been made: Morgan Stanley knew no later than March 25, 1998, if not much earlier, that Sunbeam's earnings for the first quarter of 1998 were going to miss Wall Street analysts' earnings expectations, which were in the range of 28 to 31 cents per share, excluding one time charges.

Now, you've already told us about analysts' earnings expectations. What are one-time charges? What does that mean?

A. If you think about sales and expenses to produce those sales, they happen this month and next month and this year and this quarter and so forth, and they keep happening in a regular way.

And we talk about one-time charge, those are things that happen once and then may not happen again for a long time or may never happen again. So those are not recurring regularly.

Q. I have a question about the following statement: Having directly participated in misleading CPH, Morgan Stanley had a duty to disclose the true facts before the closing of the debenture offering and the Coleman acquisition. Morgan Stanley also could have required Sunbeam to postpone the closings of those transactions until the necessary disclosures were made. Morgan Stanley did neither. Instead, Morgan Stanley marched forward and closed the 750 million dollar debenture offering on March 25, 1998, which was needed to close the Coleman transaction, and assisted Sunbeam in closing the acquisition of Coleman on March 30, 1998.

My question to you is: How is it that an investment banker has the ability to postpone a transaction like a debenture offering?

A. Well, if things aren't in order, they need more information, they have the ability to say, wait a minute, we need to postpone at a minimum, we need to look at things, gather more information. They had that ability.

Q. Continuing, another quote: On April 3, 1998, just four days after the Coleman transaction closed, Sunbeam announced that sales for the first quarter of 1998 would be approximately 5 percent below the 253.4 million dollars in sales that Sunbeam reported in the first quarter of 1997. In other words, Sunbeam was expecting sales in the range of 240 million dollars. That sales shortfall was shocking news, particularly in view of assurances provided by Sunbeam both in and after its March 19, 1998 press release that 285 million to 295 million of sales was still a real possibility.

What are we talking about there when we talk about a sales shortfall?

MR. HANSEN: Objection to "what we were talking about." Objection to the form of the question. Form. "What are we talking about?"

THE COURT: Overruled.

THE WITNESS: It relates to these three benchmarks that we talked about, the past revenues that are below that, financial analysts' expectations, they're below that. Even their own statements literally days before, less than two weeks before, they're below that.

BY MR. SCAROLA:

Q. It has been found as a matter of fact that Sunbeam's news stunned the market. On April 3rd Sunbeam's stock price dropped 25 percent, from 45 and 9/16ths to 34 and 3/8ths.

What is the significance of a stock price drop of 25 percent in one day?

A. I would consider that significant negative news hit the market. It was not known. It was viewed in a substantially negative way, and it was a surprise to have that kind of a drop.

Q. Please consider the following statement: In June 1998, after a number of news articles critical of Sunbeam's practices, Sunbeam's board of directors launched an internal investigation. That investigation led quickly to the firing of Dunlap and Kersh, and, subsequently, to a restatement of Sunbeam's financial statements for 1996, 1997, and the first quarter of 1998.

Now, please explain to the jury what the significance is, if any, of a company's having to restate its audited financial statements?

A. It's a really big deal. This is not something that they wanted to have happen. And, you know, it's infrequent. Very significant.

Q. I have one last question for you, Dr. Emery. How many credit hours do we now get at the University of Miami?

A. Well, we can give audit hours.

Q. All right. Thank you very much, sir.

MR. SCAROLA: Your Honor, I have no further questions on direct exam.

THE COURT: This is probably a good place for a break. We won't talk to you. Don't talk about the case. If you want to bring in water, soda, tea, lollipops, feel free.

(Jury exits courtroom.)

THE COURT: Mr. Hansen, do you have any idea how long you think your cross is going to be?

MR. HANSEN: Certainly through lunch, Your Honor.

THE COURT: Yeah, I'm just trying to ballpark the rest of the day.

MR. HANSEN: Maybe an hour and a half.

May I renew my motion, Your Honor, briefly?

THE COURT: Sure.

MR. HANSEN: Before we take our break, I would like to renew my mistrial motion. The trial to date, which is supposedly about issues of reliance and damages, has involved, as far as I can tell, nothing more from the Plaintiff other than the endless high volume repetition of the so-called established facts, which are drilled and drilled and drilled, which are no longer allowed to be disputed, so there's no longer an issue in the case about them. There's been no effort to try and explain them. They're rather repeated and embellished and highlighted upon.

In my judgment, Morgan Stanley cannot get anything approaching fair trial on reliance and damages after this witness has been allowed to essentially do nothing more than serve as a mouthpiece for these allegations, which, again, are prejudicial, not probative, not the subject of expert testimony, and place us in the position of having to refute something we can't refute. Because Your Honor has completely restricted us from even offering any defense as to those facts. So I renew my mistrial motion. It's only become clear with time just how far from a trial on reliance and damages we've gotten.

THE COURT: Any response on behalf of Plaintiff?

MR. SCAROLA: None other than what we've repeatedly made.

THE COURT: My ruling is still the same. We don't need to reiterate my position that Morgan Stanley placed itself in the position it finds itself.

Two, I'll point out we're on the very first witness, so it's not been ad nauseam witness after witness talking about the same point to the extent it's cumulative.

Three, I said before, the jury needs to understand what the terms in Exhibit A mean, and to my understanding, that's what this witness is doing.

You can step down. Thanks, sir.

Have you revised -- because, obviously, Dr. Emery is taking longer than planned, have you come up with any revised schedule with how long you think your case in chief will take?

MR. SCAROLA: We are still targeting completion by the end of this week.

THE COURT: Close of business Thursday.

MR. SCAROLA: It could spill over into Monday, but we're still on schedule for completion by the end of Thursday.

THE COURT: Something in the back of our heads, whether we want to take a day trial break between Plaintiff's case and Defendant's case if we're going to need the time to rule on objections to depositions and other things. Just if we want to talk about it and think about it, we can talk about it later.

MR. HANSEN: Since we are here on Monday, there are other witnesses, may we know who the other witnesses --

MR. SOLOVY: I'll tell them again. I said it on Thursday. Next witness is Mr. Maher.

THE COURT: Wait, are we doing him live?

MR. SOLOVY: Live.

THE COURT: Is it Mr. Fogg's depo.

MR. SOLOVY: Mr. Fogg will be when it's convenient.

MR. SCAROLA: He's a filler.

THE COURT: That's fine.

MR. SOLOVY: Mr. Maher, Mr. Nesbitt, Mr. Perelman, Dr. Nye, Mr. Gittis.

And Mr. Perella is about a two-minute tape, Your Honor.

THE COURT: And so we have Perella and Fogg we're reading? Perella is a snippet. The other folks are all live. Dr. Nye we need, you think, about an hour ahead of time?

MR. HANSEN: Yes.

THE COURT: Is that all we're doing?

MR. SOLOVY: That's it, Your Honor.

THE COURT: That's easy. We'll be back in a few minutes.

MS. BEYNON: Your Honor, I have an opposition to the motion handed to you this morning from the Plaintiff.

MR. SCAROLA: What time does our break end, Your Honor?

THE COURT: In five minutes, 11:10.

(A recess was taken.)

THE COURT: Have a seat. Here are copies of the orders from this morning and I think a couple from last week. I'm not sure.

And are we ready to get the jurors?

MR. SCAROLA: Yes, Your Honor.

THE COURT: Okay.

(Jury enters courtroom.)

THE COURT: Thank you for coming back on time again. And we're ready to continue.

Mr. Hansen, did you have questions?

MR. HANSEN: May I proceed, Your Honor?

THE COURT: Yes, sir.

CROSS-EXAMINATION

BY MR. HANSEN:

Q. Dr. Emery, good morning. My name is Mark Hansen. And I'm one of the lawyers from Morgan Stanley here. And I have some questions for you.

Dr. Emery does the term "arm's length negotiation" have a meaning for you?

A. Yes, it does.

Q. How do you define that term?

A. I would consider an arm's length transaction one that was devoid of special considerations or some personal relationship.

Q. In what we would call a stock transaction, let's say you have two parties doing a merger transaction, assume this is a table. You've got company A over here and company B over here. They're negotiating merging company A and B. Would that be an example of an arm's length transaction?

A. I would think of it in those terms.

Q. If we could put up a graphic. You know in this case there was an arm's length negotiation between Sunbeam and the parties represented on the other side of the courtroom, correct?

A. Yes.

Q. And in the context of a merger and acquisition, there are a lot of people involved, aren't there?

A. That would -- I did not study that aspect, but, yes, I would think so.

Q. Well, did you familiarize yourself generally with the circumstances of the transaction that led to Coleman and Sunbeam combining?

A. I familiar -- I looked at a lot of different things, including stock prices and analysts' reports and information about the transaction statements, financial statements and so forth, yeah.

Q. And you knew there were buyers and sellers on opposite sides of the table, correct?

A. Certainly.

Q. Arm's length from one another, correct?

A. Yes.

Q. You knew that they had lawyers, correct?

A. Yes.

Q. And you knew, for example, that Skadden, a big New York law firm, was the lawyer for the Sunbeam side?

A. I don't actually recall that.

Q. You knew the Wachtell firm in New York was the lawyer for the MAFCO/Coleman/CPH side?

A. I did not look at the lawyers.

Q. Did you know they had lawyers?

A. I understand they had lawyers. I would expect that. That would certainly be normal.

Q. In a large transaction of this sort, it's almost unthinkable to do that transaction without sophisticated lawyers, correct?

A. Yes.

Q. And the two sides had investment bankers working for them, is that right?

A. Yes.

Q. You knew that Morgan Stanley, for example, was working for the Sunbeam side of the table?

A. Yes.

Q. And there was a banking firm called Credit Suisse First Boston and they were representing the MAFCO or CPH side of the table?

A. Yes.

Q. Is that yes?

A. Yes.

Q. And in addition, both sides had accountants, wouldn't that be typical in such a transaction?

A. Both sides, excuse me?

Q. Had accounting firms?

A. Yes.

Q. Did you know that?

A. Yes.

Q. And you knew that Arthur Andersen was the accounting firm advising the Sunbeam side?

A. Yes.

Q. And that's a Big 5 or Big 4 accounting firm at the time?

A. Certainly.

Q. And then on the other side of the table there was Ernst and Young, correct? That's also a very highly regarded accounting firm.

Now, typically, as you say, it's typical for companies to hire these kind of professionals in assisting them in a merger transaction, correct?

A. Yes.

Q. Each side will typically have its own team of advisors on the deal?

A. Typically, yes.

Q. Do you know about the experience level for example of Wachtell? Is that well known as a fancy mergers and acquisition firm in New York?

A. Their name certainly comes up in transactions, yes.

Q. Highly regarded as one of the leading merger and acquisition firms?

A. Yes.

Q. Also Credit Suisse First Boston was regarded as one of the leading financial firms in this kind of setting?

A. Certainly.

Q. Similarly, the accounting firm on the other side of the table, on the MAFCO/CPH side, Ernst and Young, that was one of the leading accounting firms in America at the time?

A. Uh-huh.

Q. True?

A. Yes.

Q. And that was also true of the professionals on the Sunbeam side of the table, they were all experienced and well regarded as well, weren't they?

A. Yes.

Q. In this transaction Morgan Stanley does not -- was not MAFCO's or CPH's investment banker, correct?

A. Morgan Stanley was not hired by CPH, that's correct.

Q. They weren't advising CPH, were they?

A. No, they were not advising them. They were providing information.

Q. They were at the other side of the table for Sunbeam. And this side of the table provided certain information you said?

A. That's correct.

Q. But MAFCO or CPH wasn't looking for advice from Morgan Stanley, they had their own investment advisor, correct?

A. In terms of advice or information?

Q. Advice.

A. I would think that they were not looking for advice.

Q. You get advice from your own advisors, right?

A. Yes.

Q. You don't get advice from advisors to the other side of the table, do you?

A. That's normally the practice, yeah.

Q. You would not get advice from the other side of the table normally, correct?

A. I mean, I can't say a blanket statement, but I think in a matter of course that would be my expectation, yeah.

Q. Your expectation would be that the people on the Coleman or the CPH side of the table would not be looking for advice from the people on the Sunbeam side of the table, correct?

A. As a matter of course, that seems right.

Q. And you know of nothing in this particular transaction that would cause it to be different from the ordinary course, do you?

A. That's correct.

Q. Now, in a merger, that's a pretty complicated transaction, isn't it?

A. Yes, it is.

Q. These are big companies, weren't they?

A. Yes.

Q. I'm sorry?

A. Yes, they were sizeable companies.

Q. A lot of issues to be resolved?

A. We talked about those, yes.

Q. The process of getting those issues resolved was a complicated process?

A. I'm sorry, say again.

Q. The process of trying to resolve all the issues that are necessary to be resolved before a merger can take place is a complicated process, isn't it?

A. You mean what I would refer to as the contracting process before the merger, the agreement to merge?

Q. Uh-huh.

A. Yes, those are very complicated contracts.

Q. And you anticipated my next question. Because it's a very complicated transaction involving a lot of details, the parties typically reduce their agreement to a writing, isn't that right?

A. That they would have a written contract?

Q. Uh-huh.

A. Yes.

Q. That's the way it happens in big mergers, right, the parties negotiate back and forth across a bargaining table and they try and hammer out a written document that reflects their understanding?

A. Yes.

Q. And so, you would agree it's a smart idea to have such a contract that lays out each side's rights and responsibilities, correct?

A. Yes.

Q. Now, you talked about investment banks sometimes providing something called fairness letters in connection with a merger; is that right?

A. Uh-huh.

Q. And that wouldn't be -- well, let me withdraw the question.

To the extent that Sunbeam's board wanted to know whether this was a good transaction to go into, who would they be looking to for an opinion on fairness?

A. Morgan Stanley.

Q. In other words, they get a fairness opinion from Morgan Stanley to their own board, correct?

A. Yes.

Q. And the MAFCO/CPH side, who would they be looking to for an opinion about whether a transaction was a fair transaction?

A. They would typically look to their -- the people that they employed.

Q. And who were those?

A. The Credit Suisse First Boston.

Q. Now, you talked about a premium that's often paid for stocks, do you remember that from your testimony last week?

A. I do. What I talked about was a control premium.

Q. And you talked about how a bidding war can take place when other companies are interested in a company?

A. I did talk about that.

Q. Now, if there's only one company interested in acquiring the other company, you can't have such a bidding war, correct?

A. You can't have a bidding war with one bidder. It would be unusual for a bidder to bid against himself.

Q. Exactly. So with one bid there's no run up or premium, correct?

A. No, I don't agree with that. One thing I need to clarify is when I spoke on Thursday I spoke about a control premium. I was not speaking about an acquisition premium.

Q. Well, are you aware that there were no other bidders for Coleman other than Sunbeam at the time of this transaction?

A. Yes, I'm aware of that.

Q. So it wasn't like there was a bidding war for Coleman at the time, was there?

A. That's correct. But that doesn't mean a premium wasn't paid.

Q. Are you aware that when presented with a Sunbeam offer, Coleman actually went out and contacted at least one other potential purchaser to see if that firm was interested?

A. No, I didn't know that.

Q. Are you aware that the company that was contacted expressed no interest in purchasing Coleman?

A. No, I didn't know that.

Q. Well, okay, back to our table for a minute. You would agree with me, wouldn't you, Dr. Emery, that one side of the table is not typically in these merger transactions relying on the other side of the table to do its work for it, correct?

A. That's a little more difficult. To do its work for it. Depends on what you mean by "do its work for it." I would agree with it, but it does rely on information, because it does rely on that information that's provided.

Q. Fair enough. So each side of the table will be providing information across the table, correct?

A. That's correct.

Q. Now, in your experience or based on your studies, Dr. Emery, isn't it true that in these kinds of merger transactions the two sides of the table won't just accept at face value the information provided across the table, but rather will check the information that's important to them before proceeding?

A. Certainly in any transaction you would want to do the best you could to verify the information.

Q. Right. There's a process that's typically followed in these kinds of transactions, correct?

A. Yeah, but it's not always possible to verify them. I mean, sometimes it's not possible to verify information.

Q. I'm not asking whether it's possible. I'm just asking is there a process typically followed in large merger transactions where the two sides attempt to verify information that's been provided by the other side?

A. Yes, there is.

Q. What's that process called?

A. Due diligence.

Q. Due diligence. Okay. Define that for a minute. What is due diligence based on your experience, Dr. Emery?

A. Due diligence is just that process where you go through and make every reasonable attempt to look at the information that's provided. And if it's -- if you can figure out that it's false, then that's what you're trying to do. And if you're not able to, then you make every reasonable effort. That's the due diligence.

Q. It's typical in these transactions, these large merger transactions that each side will make every reasonable effort to try and verify that information that's important to them, correct?

A. Certainly in any transaction, any investment you want to satisfy yourself that you've done reasonable -- you've taken every reasonable precaution against fraud.

Q. Well, let's separate out two different kinds of information. Information provided across the table that one side doesn't care about, there would be no point in checking, correct?

A. I think that would depend a lot -- I mean, it depends on what you mean doesn't care about.

Q. Well, information they're not going to use as a basis for making a decision. There would be no need to do due diligence on information you were not going to use or rely upon?

A. If what you mean is what Stan Musial's batting average was, I'd agree. But if it relates to the transaction, it's pretty hard for me to think that if it relates to the companies one wouldn't like to have more information rather than less. I can't imagine information about the other company you wouldn't want to have.

Q. So, in other words, anything provided across the table would be put through this due diligence process, according to your testimony, it all would be checked?

A. You would check everything you could check.

Q. Everything. You wouldn't separate out that which you cared about from that which you didn't care about and focus on what you cared about?

A. You certainly -- the amount of time and effort you put into things there would be -- you know, there could be a priority. I mean, in other words, how much does it matter? How material is it?

Q. So things that aren't material, no one is going to waste a lot of time on, right?

A. It depends on if they're really immaterial or not, then they're probably not going to get as much scrutiny.

Q. These people who are here as advisors on the two sides of the deal, they're not cheap, are they?

A. No.

Q. They're very expensive these top flight firms, these accountants, bankers, lawyers, aren't they?

A. Yes.

Q. So to that extent, you're going to want them to focus on things that mattered to you, right?

A. I think that's reasonable.

Q. And your view, Dr. Emery is that anything pushed across this table from this side of the table to the MAFCO/CPH side, in your view, if it's anything having to do with the nature of company, that's going to typically be put through this due diligence process, correct?

A. I would think that it would get some notice, yeah, that they would want the information. And it would be verified to the extent that it was relevant, to the extent that you could verify it.

Q. Nobody on the Sunbeam side of the table, for example, is going to rely on the MAFCO side of the table to look out for Sunbeam's interest in this transaction, correct?

A. If by that you mean what we said before about advice, that's absolutely right. On the other hand, when you have a transaction like this, there has to be some level of trust across the table. And in that kind of a case, there are many deals that are walked away from because one side doesn't trust the other. But because information is provided, one has to establish some trust. So in terms of relying upon information, yeah, I would think there would have to be.

Q. Let's take it one step at a time. You taught about something called self-interested behavior, correct?

A. Yes.

Q. The Sunbeam side has its own particular incentives in any kind of deal like this, correct?

A. Yes.

Q. And that would also be true on the MAFCO side? They would have their own desires to get something out of this transaction, correct?

A. That's true.

Q. And these guys are across the table and they negotiate to see where they can reach some common ground, that's self-interested behavior, right?

A. In our writings about self-interested behavior, we explicitly exclude the idea of lying and cheating.

Q. Well, I'm just asking, you, Dr. Emery, whether the people sitting on this side of the table are looking out for their interest and the people on the MAFCO side are functionally looking after their interest, too?

A. Certainly that is what I would expect.

Q. We're not asking about people lying to one another. I'm asking about who is doing what at the table and what their incentives are.

Let's go back to our information. You said that information pushed across the table from MAFCO over to the Sunbeam side typically is going to be scrutinized in a due diligence process, correct, to the extent it can be?

A. Both directions, yes.

Q. And that's because even -- although people may have the best of intentions, no one wants to go into a very complicated, expensive transaction without assuring itself that it's doing so on the right information?

A. Yeah.

Q. Because there's this thing called asymmetry of information, that's something you've written about?

A. I have written on that quite a bit.

Q. In terms of the relevance here, asymmetry means Sunbeam's side of the table knows a lot more about Sunbeam than the MAFCO/CPH side knows about Sunbeam?

A. That's correct.

Q. And MAFCO, on the CPH side of this transaction, they know a heck of a lot more about MAFCO and CPH than Sunbeam and its advisors, correct?

A. That's correct.

Q. This process of due diligence is an effort to rectify or remedy this asymmetry and bring the two sides into a better understanding of each side's information?

A. The entire negotiation, including due diligence, but the whole broad contractual process would be a large effort to try to overcome asymmetric information. Try to be sure that they are sharing the information so they all understand what's going on, yes.

Q. So to the extent that one side were to give the other side some financial information, the other side would then take it and attempt to verify it as much as possible to see whether that's information they wish to act upon in this transaction, correct, typically?

A. Typically.

Q. That's the usual way these deals are done, right?

A. Uh-huh.

Q. One side will say: Let's say the MAFCO/CPH side, they put across the table a set of business projections, what they think they're going to do in their business in future years, how much money they're going to make. The Sunbeam side is going to do what it can to see whether these are reasonable projections, won't they?

A. Yes.

Q. They'll do due diligence, right?

A. Yes.

Q. They'll send the lawyers out to check what lawyers can check, right?

A. Yes.

Q. They'll have their investment bankers go and try and get the underlying facts that support the numbers so they can see whether these are reasonable projections, correct?

A. To the extent that they can get it, yes.

Q. And they may even get their accountants to look at the accounting issues to see if there's issues about accounting that makes the projections reasonable?

A. Yes.

Q. That's how it typically works, right?

A. Uh-huh.

Q. You didn't study whether it worked that way in this particular transaction, did you?

A. That's correct, I did not.

Q. In terms of what's typical, what's expected, that's the process as you would expect to have it unfold?

A. That's correct.

Q. You would not expect the process would be that MAFCO, for example, would give a bunch of financial information across the table and Sunbeam would just take those papers and say, thank you very much, we're going to act on these without checking, correct?

A. That's correct.

Q. That would be extraordinary, wouldn't it?

A. That would be a surprise to me, yes.

Q. Never happened in your experience, has it?

A. Not in my experience.

Q. And that's why we do due diligence, right, because firms are going to want to remedy this disparity of information so they can act on the best information possible, correct?

A. Yes.

Q. In due diligence, isn't it true that in the typical case, Dr. Emery, as part of these merger transactions, the two sides will make an agreement that says, all right, to facilitate your getting good information about me, I'm going to give you the right to come in and inspect my books, my plants, my customers and you have to give me the right to do likewise at your company, isn't that a typical arrangement?

A. That would be a common arrangement.

Q. Since we know you have to verify this information and are not going to act just on what we tell you, we're going to remedy this asymmetry of information by having an open house, you come in and look at us and we'll look at you?

A. Understand that you can never completely remedy it, every effort would be reasonable.

Q. You'd open the door, say, come look at what you want to look at?

A. That would not be uncommon.

Q. In fact, that's the typical way it's done, there's a period of time during which both parties go to look?

A. That would be common.

Q. Is it also common, frankly, where one party expresses an unwillingness to let the other side look at something, it would not be unusual for the party not allowed to look to say, I don't want to go into this deal. If you're not willing to let me see these things, I'm walking away from the table?

A. That would also be a possible outcome.

Q. That would be something called a red flag, wouldn't it?

A. Well, there are a number of different things you could call it, but certainly a red flag would, yeah, that would be a reasonable thing to call it.

Q. I guess I just used the term, why don't we let you define that one.

Is "red flag" a term that's used in the financial community?

A. I think it's used in the same way it is in every day language, people understand red flag is a sort of a stop.

Q. Whoa, some problem here we better take a closer look?

A. Yes.

Q. So in other words, if one firm in a merger transaction said to the other firm, we won't let you look at our books, that would be a red flag saying, hmm, there might be some problem with these books, if they won't let us look at them, right?

A. That would certainly be a potential red flag.

Q. Now, you've testified about your experience as a finance professor, you know at least in general terms the kinds of information companies keep within their books and records?

A. In a general sense, yes.

Q. And so would you expect during due diligence that among the things there to be looked at would be the company's own internal financial statements, correct?

A. That would be common, yes.

Q. Are you familiar with a term called "interim financial statements"?

A. I think I understand what that would probably be.

Q. What does that mean to you?

A. That financial statements are typically done on a periodic basis, for example, every quarter. But the company along the way keeps track of things and could produce a set of financial statements that were between periods. And they would do a sort of a, an approximation, usually we would say those are unaudited typically. But they would produce them. That's what I would understand them to be.

Q. So just distinguishing here, Sunbeam, for example, on a yearly basis would have its accountant or its auditor Arthur Andersen review the books and records performance procedures, then issue an opinion as to whether the yearly statement was fair and accurate in all material respects, right?

A. Yes.

Q. And that would be an audit opinion, correct?

A. Right.

Q. That would be true on the other side for Ernst and Young on the MAFCO/CPH side?

A. Yes.

Q. So there would be an outside accountant brought in to look at the books and records, look at financial statement and satisfy itself that the books and records historically were properly recorded in accordance with something called Generally Accepted Accounting Principles?

A. That's correct.

Q. But between these periods, between these yearly periods, there's no audit, for example, of each month of results the company records internally, correct?

A. That's my -- that would be common, right, to not have audited, right.

Q. But still companies need to track what they're doing more frequently than on a yearly basis, right?

A. Yes.

Q. For example, isn't it important for a company to know in any given month how much it sold?

A. I would think so.

Q. Wouldn't it be the case that a company would typically have a monthly financial statement that said to its management, here's how much we sold, here's how much it cost us to sell that product, here's the profit that we were running for that month, recognizing this wasn't our final financial statement, subject to audit?

A. Right.

Q. That's the way big companies typically work?

A. Well, they make projections and they measure them against projections as they go and internally keep track of these things.

Q. So you would expect there would be a monthly so-called interim financial statement available for people to review if people wanted to review it?

A. Certainly a monthly would be reasonable. Some do it perhaps more frequently even.

Q. More frequently. But in other words, from your experience, you certainly expect at least a monthly financial statement to be there?

A. It wouldn't be unheard of to not have that, but that would be my expectation.

Q. That would be the usual case?

A. I would think so.

Q. Did you know whether both on the MAFCO and Sunbeam side they did both, in fact, have monthly financial statements?

A. No, we said earlier I did not examine that part of the transaction.

Q. But that's something you would expect?

A. That would be not unusual, yes.

Q. That would be the sort of thing that would be checked in the due diligence process to see how the company was actually doing in the most current month, correct?

A. Certainly I would think so.

Q. Right. There would be this historical information that would tell you about the sort of more distant past where the auditors had actually gone in and checked, that would be one thing you'd look at, right?

A. I'm sorry, say that again.

Q. You talked about these audited financial statements for a past period, right, because those go back some time and the audit opinion comes out after it's closed?

A. Right.

Q. Aren't you going to want to have the most accurate, up-to-the-date information about how the company is doing?

A. I would certainly want the most accurate information.

Q. And you'd want to see what they were recording in their own books and records in terms of sales, expenses, profits, correct?

A. To the extent feasible, yes.

Q. Well, if -- let's say if the MAFCO side had interim financial statements and these parties were contemplating a merger, you would expect the Sunbeam side to say, I want to see your most recent interim financial statements to see how you're doing?

A. Yeah, that wouldn't surprise me at all.

Q. In fact, that would be the usual way it would proceed?

A. I think that would be common.

Q. In fact, it would be extraordinary if somebody didn't want to see the most recent results, correct?

A. Yeah, but there may be other things they would want to see, too.

Q. Put aside other things. I'm saying it would be extraordinary, would it not, Dr. Emery, if one side didn't even want to see what the other side's most recent interim financial statements showed about its performance?

A. Wouldn't seem usual to me.

Q. Would it mean it was unusual?

A. It's the extra qualifier, yeah, it's a surprise, it would be a surprise, yeah.

Q. It would be odd?

A. Yeah.

Q. It would be odd, okay.

And if you looked at interim financial statements, for example, that would show you the most recent sales trends, in other words, how much they were selling most recently, whether it was going up or down from what people projected, right?

A. Typically you would try to extract out that from the statements, yes.

Q. Well, for example, you talked about in your direct testimony the importance of projections, right?

A. Yes.

Q. And that's something that the company tells some group of people, maybe the public, about what the company is expecting to do over a particular period, correct?

A. Uh-huh.

Q. Let's say we have company A here. And company A says, for our first three months of this year, 2005, we expect to sell 100 million dollars worth of product. And that's the projection. That's what you say influences how the world, the market looks at a company?

A. Yes.

Q. Let's say in our company A example we're two months -- three months constitutes a quarter, correct?

A. Say that again.

Q. A three-month period is typically referred to as a quarter in business?

A. Yes.

Q. So the first quarter of 2005 would be January, February, March?

A. If it's on a calendar year basis, that's correct.

Q. So let's say for first quarter of 2005 company A says, we're going to sell 100 million dollars worth of goods.

A. Correct.

Q. Let's say we're two months into the quarter and you're talking around the table about a merger. And somebody wants to know -- let me back up.

Company B is certainly going to want to know how company A is doing in terms of its projection, correct?

A. I would think so.

Q. Sure. So company B is going to ask company A, give me your January and February interim financials so I can see whether you're really selling enough to make this 100 million dollars projection, correct?

A. That would seem like a reasonable thing.

Q. That would be the typical thing, right?

A. I would think so.

Q. It would be odd not to ask for that, wouldn't it? It would raise a red flag, wouldn't it?

A. If you didn't ask, it would be your choice, that wouldn't be the red flag.

Q. But it would suggest that information wasn't important to you, wouldn't it?

A. No.

Q. Well, if it's the usual case that B is going to want to know about A's sales for the first quarter, if B knew that A had interim financials, it would tell it -- is it your testimony, Dr. Emery, that if B didn't even want to see that, didn't even want to see the actual information, is it your testimony that that information was still something important to B?

A. I'm sorry.

Q. I've lost the question. Bad question, I apologize.

I'm just asking you, sir, if A's first three-month quarter, if its first two months of sales are there to be seen, in other words, they're there for the asking, interim financials, and B says, I don't even want to look at that, knowing it's there to be seen. Wouldn't that suggest to you, Dr. Emery, that B didn't care about that information?

A. Not necessarily. I mean, I don't know the specifics about all of the different things in the way information was gathered. I testified just now that it would be common for them to ask for that. And if A was unwilling to provide them, we talked about that being a red flag. But I don't see how B not asking for something is a red flag. I mean, that's B's choice. B decides what information they want to gather.

And you know, you're focusing on one particular piece of information. There are many different sources of information that might provide the same thing. And I was not privy to this and I didn't study all the different things in this one, so I don't know what other things might be available.

Q. Well, I'm just doing this particular hypothetical and I'm not asking you to consider other things that might be available. One last question, then we'll move on.

Just want to make sure I understand your answer.

If B knows that A has actual operating results for January and February of 2005, and B chooses not to get that information, doesn't that suggest to you that B doesn't care about that information?

A. No, it doesn't.

Q. Dr. Emery, if one looked at the actual books and records of the company, you could judge the way the company was, in fact, recording its sales, couldn't you?

A. Not necessarily.

Q. Give you a much better --

A. These things are pretty complex. I'm careful to point out that I'm not an accountant.

Q. So you wouldn't know, right?

A. I know that there's been enough fraud in the last 10 years for me to be aware that smarter people than I am have been fooled. So I wouldn't pretend to say, well, you know, I could extract this information out by just looking at a set of books.

Q. You're not an accountants?

A. I'm not an accountant.

Q. And you're not an auditor?

A. No.

Q. But you've given testimony about some of those things in your direct exam?

A. Excuse me?

Q. You've given testimony about some of those things in your direct exam?

A. From the finance point of view, from the business point of view.

Q. From a finance point of view, to the extent that one company wanted to see how another company was, for example, recording revenues, it could take its own accounting experts and go look at the same books and records of the other company in order to see whether there was an issue there, correct?

A. To the extent that it was possible, it couldn't necessarily get everything, but it certainly could go and look, yes.

Q. So, for example, in our two sides of the table here, if you wanted to know how Sunbeam was recording its revenue and whether there were accounting issues, you could send Ernst and Young in to actually look at the accounting, an expert accounting firm to see whether there was any question they saw in terms of things like bill and hold sales or channel stuffing, correct?

A. Certainly if they agreed to that, that would be a possibility, yeah.

Q. Right. And if the Sunbeam side didn't agree to that, the MAFCO side could walk away from the deal, right?

A. Yes.

Q. And you would expect that where there were significant issues regarding accounting or how people were recording their revenues or their profits, you would expect in this kind of complicated transaction, as part of due diligence, that the experts on one side of the table would go take a look at the issues in which they were expert on the other, correct?

A. Seems reasonable, yes, typical.

Q. That would be right, that's what you would expect? Yes?

A. Yes.

Q. Now, in addition to what's actually in the books and records of the company, oftentimes it's necessary to talk to customers of the company to get a sense of how the company is doing, correct?

A. Those are possible things you would do.

Q. In other words, for example, let's say a company has a few very, very large and powerful customers. Are you with me so far?

A. Uh-huh.

Q. Let's say the company's future success really depended on how the customers viewed the company. Wouldn't you expect as part of due diligence -- let's go back to A and B -- that A would want to talk to B's biggest customers to see how the customers viewed B before proceeding with the transaction?

A. That would not be -- that would be a reasonable thing to do.

Q. That's what you would expect to happen, wouldn't you?

A. I think what we're getting into is that any given thing might be a reasonable thing to do, but sometimes there are multiple ways to gather information. And so I'm uncomfortable saying, yes, a person should be doing this when, in fact, they might be doing something else to accomplish exactly the same thing, to gather exactly the same information.

If they've satisfied themselves they gathered the information, then they may or may not choose to do it in that way. I think that's where I'm getting hung up is that they have to do a particular thing.

Q. Well --

A. That information is important information that I think would be reasonable to want to gather.

Q. Again, I'm not trying to make this any harder than it looks.

My question is just if B has some limited number of customers that are very important to B, wouldn't you expect, in the usual transaction, a merger transaction between A and B, A is going to want to learn what the customers think?

A. Yes.

Q. And that would be part of due diligence, right?

A. Right.

Q. And isn't it true that due diligence becomes even more important than perhaps it ordinarily would be if there are so-called, quote, red flags out that raise questions about a particular company?

A. The due diligence is -- I mean, there may be the potential for fraud in almost any case. So I think due diligence is an important thing to do.

Q. Well --

A. I'm not sure there's a priority there in terms of saying it's more important or that you would ignore it in some case.

Q. In other words, you think it should be a thorough and complete process even without red flags?

A. I think, as I testified in my deposition, that parties need to do the things that make them comfortable that they've done everything reasonable to satisfy themselves with the situation.

Q. And that may differ from party to party, correct?

A. People make individual decisions about it.

Q. In other words, A's needs for information in terms of B's business may be different from B's needs for information from A?

A. They're two different positions. If A were in B's case, A might gather exactly what B gathered or not. But certainly A and B are in different situations, so they can gather different information.

Q. Exactly, because A and B don't necessarily look at the world the same way, correct?

A. One company is acquiring the other. So being the acquired versus acquiring requires two different things.

Q. A and B might also think different information had different significance, correct?

A. That's possible, yes.

Q. In other words, in our example there's not a checklist that says, this is the important information and it's going to be the same on both sides, correct?

A. I agree, yes.

Q. A will have its own list of what it considers is important that it will check out, correct? B will have its list of what it considers important that it will check out, correct?

A. It will have its methods.

Q. And the information, in addition to methods, it will have the substance that it wants to check out, right? It will have the things it wants to know about?

A. Things that most concern it, yes.

Q. Those things may be different, A may be very interested in knowing B's customers. B may not have any interest in A's customers?

A. I think that's possible.

Q. In other words, the due diligence is tailored to that which the parties find important to them, correct?

A. I think any situation that is this complex has that element. You can't do everything, I guess, so you make choices about what you do.

Q. Would you agree with me, though, that the due diligence process typically in the ordinary merger type transaction is tailored to what each of the parties considers important to it?

A. It is tailored to the situation. I'm uncomfortable with the idea of thinking that there would be something somebody wouldn't care about. There's information that might involve them that they wouldn't care about, I think that's where I'm hung up.

Q. In other words, in your view every bit of information of any sort is going to be of equal significance to the two sides?

A. I didn't say equal significance, but you can say something may be more significant than something else, but that's different than saying that something, some piece of information is I don't care about it or worthless. That's a different -- a relative statement I agree with, but when you get down to saying that there's information that they simply don't care about.

Q. Let me give you an example. Let's say A in my example is seeking to acquire B, okay?

A. Okay.

Q. And B has these customers we're talking about, right?

A. Okay.

Q. And we've talked about how A would ordinarily want to know how B's customers viewed B if they were going to be ongoing customers?

A. Right.

Q. Let's say A instead is planning to close B down, not even planning to use its operations, not planning to have any sales to these particular customers and is buying B to get a tax loss, for example, is not going to operate the company.

Would the diligence be different there regarding B's customers?

A. It could be, but that's a really good example of what I was just saying.

I interpret you wanting me to say that they wouldn't care about what the customers think. And what I'm saying is, no, even in that case they would be interested in having that information. They may not work as hard to get the information because it would be a lower priority. But I can imagine a case where they got the information, found out what the customers said and actually changed their minds about what they were going to do, said, my gosh, you know, we're not going to shut it down for tax reasons, we're going to run it.

So in terms of information, I'm uncomfortable saying, well, you just don't care, wouldn't pay any attention to it.

I'm certainly comfortable saying that if your main purpose was to acquire just the assets, and we talked about this, why you might want to acquire the assets and liquidate, sell off the assets in a valuation technique. If you want to do that, then I can understand that the customer's view would be less important. But there's no way that I would say that it's irrelevant or you wouldn't care about it. It would be a question of how hard you would work maybe to gather that information.

Q. Aren't these kinds of transactions oftentimes in a fairly compressed period of time with merger transactions?

A. Well, I guess it depends what you mean by compressed. I mean, in a business sense, what you and I might think was compressed the general public wouldn't think was particularly compressed. These things go on forever it seems like.

Q. Isn't it often the case that transactions are initiated and closed within a period of weeks or months?

A. Certainly they could be closed within a period of weeks or months.

Q. To the extent that that's your time period, you have to prioritize in terms of what your doing in due diligence?

A. Absolutely.

Q. You would expect that lawyers would be involved in any due diligence process, correct?

A. Certainly.

Q. But they would have to give priority to the things that were most important?

A. That's what we said about how much they cost. You don't want to spend more than the deal is worth.

Q. And the investment bankers, they would be involved in the due diligence process, too, would they not?

A. Uh-huh.

Q. They too would be focusing on what the client considered most important?

A. I believe that's what we said. They would prioritize.

Q. Same with the accountants, they would be involved in the due diligence checking accounting issues, but, again, on a priority basis?

A. I think that's correct.

MR. HANSEN: Your Honor, this might be a good time to take our lunch.

THE COURT: Great.

It's time for lunch. We'll see you at 1:30. We still won't talk to you, don't talk about the case. It's a beautiful day outside, enjoy your lunch.

(Jury exits courtroom.)

THE COURT: Okay. Thanks.

Mr. Hansen, how much longer do you think you have, do you know?

MR. HANSEN: Probably another hour, Your Honor.

THE COURT: That's fine. Okay, we'll be back a couple minutes before 1:30 then.

MR. SOLOVY: Your Honor, can I give you our motion on deposition designations? We can either do it at 5 or tomorrow.

MR. HANSEN: We'd like to do it tomorrow, Your Honor.

THE COURT: That should be fine. The only problem tomorrow is we need to leave by about misrepresentation if it actually knew that the misrepresentation was false or if its falsity was obvious. And it may not recover if it did not actually rely on the misrepresentation.

Consequently, evidence about the investigation conducted by CPH may be relevant to your determination of whether CPH knew the statements by Sunbeam and Morgan Stanley were false or if their falsity was obvious and whether CPH actually relied on any misrepresentation.

Consequently, the evidence about any investigation which CPH did or did not conduct should be considered by you only for these issues.

Okay?

Okay. Where's Dr. Emery? Okay. Come on up, sir. And I'll remind you you're still under oath. Thank you, sir.

MR. HANSEN: May I proceed, Your Honor?

THE COURT: Yes, sir.

RESUMED CROSS-EXAMINATION

BY MR. HANSEN:

Q. Dr. Emery, good afternoon.

A. Good afternoon, Mr. Hansen.

Q. I'm going to try and speak a little more slowly this afternoon so as not to make our poor reporter have to do gymnastics with her fingers. I apologize if I was too fast this morning.

Doctor, you got a nice lunch, I hope.

A. I did.

Q. You spent it with Mr. Scarola and members of the plaintiff's team?

A. I did.

Q. But you didn't talk about the case?

A. No, we did not.

Q. Dr. Emery, you've spoken at some length in your prior testimony on direct examination about the subject of public information. Do you recall that testimony?

A. I believe so, yes.

Q. The public perception of Sunbeam back in 1997, 1998?

A. Yes.

Q. And you talked about that in two components, didn't you? You talked about what stock analysts were thinking and writing, correct?

A. Yes, I talked about that.

Q. And you also talked about what was being written in the newspapers or other publications about Sunbeam, correct?

A. I don't recall using the newspaper particularly. There were press releases, which are different, sometimes different than the newspapers. I guess we did some of that. I don't remember testifying about that.

Q. Well, didn't you say there were press reports or articles written by Mr. Dunlap and Sunbeam that you considered?

A. I don't recall. I may have, but I don't recall.

Q. And, in fact, part of your testimony about the public perception of Sunbeam, you did as part of your work review a number of articles written in the Popular Press; true?

A. I did some, yes.

Q. And the articles that you relied on in doing that work were supplied to you by the lawyers for the plaintiff in this case, correct?

A. No, that's not correct.

Q. Tell me why it isn't.

A. We did an independent investigation, and I directed research analysts to go to the public record and discover what was available at that time.

Q. And that included what was available in the Popular Press, correct?

A. Yes.

Q. In other words, you didn't want to give a misleading picture of what the public perception of Sunbeam and Mr. Dunlap were by choosing only the favorable articles, correct?

A. That's correct.

Q. That would have been misleading, wouldn't it?

A. We searched extensively to find everything we could reasonably find without regard to whether it was positive or negative on any particular point.

Q. Because you wanted to give a fair summary of what the good and the bad was out there, correct?

A. I was trying to find what I felt the consensus was and what the perhaps range of consensus or range of opinion was about Sunbeam at that time, yes.

Q. All the good, all the bad, correct, considered fairly by you?

A. All that was available, yes.

Q. Now let's start with the analysts. Stock market analysts work for brokerage houses typically, don't they?

A. Yes, typically they do.

Q. So they perform something of a research function to support the efforts of the people who sell the stocks to customers?

A. Right, the ones we're talking about are referred to as sell side analysts.

Q. And there are a lot of them, are there not?

A. Yeah, there's quite a number of sell side analysts.

Q. And they don't speak with a single voice, do they?

A. That's correct, they do not.

Q. They are independent, are they not?

A. Within as I understand that term, yes.

Q. Well, they don't go together to a convention and sit around a room like the college of cardinals in Rome and agree to a recommendation and that becomes the consensus recommendation, correct?

A. No, but you might say there's -- sometimes you can see contagion in what they're saying. Sometimes they read each other's things. You can track statistically such sort of following, some herding is what we refer to that as.

Q. Herding?

A. And that's been documented.

Q. Herding like animals, like cows?

A. Uh-huh, moving together.

Q. And, in fact, back in the '90s wasn't the head of the SEC a guy named Arthur Levin?

A. He was.

Q. Were you aware of Mr. Levin's public remarks that back in that period of our country's financial history 90 percent of all analyst reports were recommending the buying of the stocks in the report?

A. I may have heard that, yes. I don't -- I don't specifically recall, but that seems quite possible.

Q. Is that consistent with your view of how analysts were functioning back in the late '90s, they were overwhelmingly in favor of buying the stocks they were researching and reporting on?

A. During that time period, there were more buy recommendations than there were sell recommendations. But herding doesn't refer to a direction. It doesn't say all buy or all sell. It could be anything. It could be herding towards neutral.

Q. Were you also aware that Mr. Levin said that a sell recommendation in the late '90s was about as rare as a Barbara Streisand concert?

A. I don't recall that phrase. I think there were quite a few more than concerts.

Q. There are a number of different analysts, and their views may be different over time, correct?

A. Yes.

Q. And they have a responsibility not to simply just parrot what the company says but exercise their own independent judgment, correct?

A. Yes.

Q. In other words, they're not just cheerleaders for the company, they're at least in theory supposed to analyze information, reach their own recommendation?

A. Yes.

Q. And would it be fair to say that there were a number of different views of Sunbeam even within the analyst community back in the late 1990s?

A. It depends what you mean by a number of different views. We were not able -- I did not come across any sell recommendations for Sunbeam in that time, so it depends if you mean there were buy and sell. I didn't find any. It's not to say that there couldn't have been any, but all of the sources that we checked in the 50 or 60 reports that we looked at, I don't believe we ever saw one that said sell or even was worse than neutral.

Q. Well, that wouldn't be surprising at a time when 90 percent of all recommendations were buy recommendation, would it, all recommendations for all stock?

A. If 90 percent were buy recommendations, that means 10 percent would have been sell recommendations. So I guess if you're saying that if it's only 10 percent, it can't happen, I don't agree. You certainly could be in that 10 percent. 10 percent of the recommendations were sell recommendations.

Q. In the late 1990s Mr. Dunlap of Sunbeam was a very controversial al figure, wasn't he?

A. Following this, he became especially controversial.

Q. Let's say the latter part of 1997 through the first part of 1998 isn't it true that the items discussed in your report, there was a matter of controversy surrounding Mr. Dunlap as a manager of companies?

A. There was some controversy, as there is frequently, surrounding public figures.

Q. Wasn't -- didn't he generate a lot of press reports, a lot of press attention?

A. I'd have to go back and see compared to other people. He certainly was a colorful figure.

Q. Colorful in the sense he would do sort of offbeat things in the public, wouldn't he?

A. Tell you the truth, I don't recall specifics, doing things in public, funny ties. I don't recall any of that. I recall that there was -- that he seemed to have an aspect to him that, you know, people noticed. And, yes, he was more in the news than, say, some other CEOs that I could mention, but, you know... There were CEOs are in the news sometimes. I mean, you know, there are -- that does happen.

Q. Well, in 1997, in any of the materials you saw, did you see photographs of Mr. Dunlap, for example, wearing ammunition bandoliers and a Rambo style headdress?

A. No, actually I don't recall seeing that.

Q. Wasn't that, in fact, the cover picture of a book about Mr. Dunlap at that time?

A. I don't recall looking at that book.

Q. And Mr. Dunlap courted publicity, didn't he? He was somebody who went out and wanted to get publicity?

A. I have no idea what his motives were, whether he was seeking it or shunning it.

Q. Now there was an analyst -- Just sticking with analysts for a minute, are you familiar with an analyst who you commented upon or at least you incorporate in your report by the name of Andrew Shore?

A. I recall Andrew Shores being in there.

Q. Do you recall that Mr. Shore in January of 1998 claimed that Sunbeam was a, quote, very risky story?

MR. SCAROLA: Excuse me, Your Honor. I object on the basis of hearsay. Although I have no objection to the introduction of any of the analyst reports themselves, I object to quoting from a report that is not admitted into evidence, but no objection to the admission into evidence.

THE COURT: What's the response to the objection?

MR. HANSEN: Response is I'm asking the witness about information. I don't believe a speaking objection is appropriate here, Your Honor. I believe the testimony --

THE COURT: Why don't you guys come on up.

SIDE BAR CONFERENCE:

THE COURT: I mean, my concern is you've asked a series of questions that assume facts that aren't in evidence. And at some point I may need to instruct the jury that the question is not evidence. But to the extent that we're doing that again and allowing a question to be evidence, I think it is asking for hearsay to say have you heard about this hearsay statement.

MR. HANSEN: Your Honor, it's not hearsay. It's not offered for its truth. The fact is this witness purported to talk about analyst consensus and analyst views, all of which are hearsay. The only way that you can impeach that testimony is to show there were other things that he didn't consider or that he considered and rejected.

And the document from Mr. Shore, I can't put in evidence at this point, Your Honor, I'm not permitted to.

THE COURT: I think they're saying they don't object.

MR. SCAROLA: We don't.

MR. HANSEN: I can't put it in evidence now. And I don't want to do it the way Mr. Scarola wants me to do it. I want to do it a different way, which is to elicit from the witness that there were negative things said about the company. If he agrees with me, we move on. If he doesn't, I'll put the report before him, and we'll proceed that way. I don't believe that Mr. Scarola should be able to tell me I have to do it the way he wants.

THE COURT: What you want to do is ask him whether -- what he knew of certain negative reports?

MR. HANSEN: Was he aware that Mr. Shore had given such a report. My guess is he will say, yes, because this is material incorporated into his own report. I don't believe I should have to be required to take the time of going through the entire report or doing what Mr. Scarola wants. If he says he doesn't, then I'll do it another way. But that's a matter that he incorporated in his report as materials he relied on, and I believe I'm entitled to elicit there were negative things said about Sunbeam as opposed to some hallelujah chorus about Dunlap and Sunbeam.

THE COURT: I'm sorry. What's the response again?

MR. SCAROLA: I have no objection to asking are you aware of negative things that were said. I do object to quoting from documents that are not in evidence. I don't object to putting the documents in evidence. Then he can quote from them all he wants. I am not standing on the formality that we are not in his case and he, therefore, can not put in evidence. He can put the documents in evidence. He just should not be quoting from documents or purporting to quote from documents that are not in evidence.

THE COURT: I would agree at a minimum it's hearsay within hearsay. I think you're asking him does he know what this document says rather than --

MR. HANSEN: I'm not, Your Honor. This is a misrepresentation -- Mr. Shore was making this kind of misrepresentation --

THE COURT: Whether you're saying are you aware of Shore's statement, you want to put the content of the statement in front of the jury orally, and I think that's what's wrong. So, you know -- and I think I probably need to instruct the jury just globally, and I'm sure we'll do it many times on both sides of the case, that a question is not evidence.

MR. HANSEN: This is cross-examination of the other side's witness. This is not hearsay. He is talking about a public perception. Public perception is informed by statements made.

THE COURT: You're attempting to place the content of the statement in front of the jury by the question is what you're trying to do.

MR. HANSEN: I'm asking the witness if he was aware of this. He clearly is aware.

THE COURT: It's still hearsay within hearsay.

MR. HANSEN: Not offered for the truth.

THE COURT: I understand you disagree. You can ask him does he know of this statement, does he know of this statement. You can't orally by your question put the content of the statement in front of the jury because that's hearsay within hearsay. Even if you're not offering it for the truth of the matter, you're orally saying what a document says.

MR. HANSEN: I'll take it out of quotes and say were you aware that Mr. Shore purported that Sunbeam was a risky story.

THE COURT: Then still the document needs to be in evidence.

MR. HANSEN: Your Honor, I waive my directed verdict motion by offering documents into evidence. I don't care if Mr. Scarola says it's okay. I can't offer evidence at this point. That would be unfair and a trap for me.

THE COURT: I'm sure plaintiff will say that they will not deem it a waiver of any motion for directed verdict. Otherwise, you can just simply ask him by analyst and when you open your case, you can put it in.

MR. SCAROLA: I will expressly say that the offering of evidence, of this evidence will not constitute a waiver of their motion for directed verdict.

MR. HANSEN: Your Honor, I still believe, with all respect, I should be entitled to ask him if he was aware as part of his work of negative statements made by analysts.

THE COURT: I understand that to be your position.

MR. HANSEN: I can't ask him that?

THE COURT: You can ask him if he was aware of negative statements. What you're trying to do with your question is trying to place oral testimony in front of the jury. That's essentially what you're doing.

MR. HANSEN: No. If he's aware of it. He's an expert. Experts can rely on hearsay. This is hearsay an expert can consider.

THE COURT: I understand you disagree.

MR. IANNO: And if he says that, can we then say what was the statement? That's not being offered for the truth of the matter.

THE COURT: Yeah, I think that's fair.

END OF SIDE BAR.

THE COURT: Let me state the obvious. A question is not evidence. Evidence comes from the witnesses. Do you understand the difference? Okay. Great.

Go ahead, Mr. Hansen.

BY MR. HANSEN:

Q. We were talking about Mr. Shore, Dr. Emery. Were you aware of what Mr. Shore said about Sunbeam in early 1998?

A. Honestly, I probably read over 50 reports, and I don't remember every one of them. If you want to show me the report, we can go back through it.

Q. Well, do you remember that Mr. Shore had negative things about Sunbeam?

A. I remember that a good number of analyst reports in this case, and in most cases, have both positive and negative things to say about a company. It's somewhat unusual for them to be nothing negative. What was the overall recommendation? I don't recall that.

Q. In 1997, Dr. Emery, isn't it true that there were red flags and warning signs in the public perception available to the public about Dunlap and Sunbeam?

A. There were some analyst reports that said, that mentioned the term "red flags" and noted that there were some people who took a wait and see attitude. In fact, there were some report -- there were some analysts who said explicitly they would take a wait and see attitude and then subsequently raised their recommendation. For example, I think it was the Buckingham Group, William Steel, I think was the name, and he, I think, said something about a wait and see in January, and then on March 24th of 1998, January '98, March 24th of '98, I believe he upgraded his recommendation from a neutral to a buy.

At any given time, as information comes in, there is movement. And nobody in that position wants to be caught completely off guard, and so frequently reports have a variety of things. And if we look into the report and pick out a particular sentence, you know, you could find in most reports something that's, you could construe as being negative.

Q. Dr. Emery, did you or your research assistants undertake an Internet search to try to find all of the articles, good and bad, about Sunbeam in the 1997/1998 period?

A. We used sources like Lexus Nexus, Wall Street Index, sources like that. We looked at Bloomberg, Reuter's and sources like that. These are public information sources, financial information to some extent. And we searched for things that were relevant, yes.

Q. Are you familiar with the business publication Barron's?

A. Yes.

Q. That's a fairly influential business publication?

A. Among several, yes.

Q. It's relied upon in the business community?

A. As is the New York Times, Wall Street Journal, Washington Post.

Q. And Barron's is, in fact, published by the Dow Jones company which also publishes the Wall Street Journal?

A. Yes.

Q. And you've included a number of Barron's articles in your report as materials you've relied upon?

A. Okay.

Q. Were you aware that Mr. Perelman, the owner of the plaintiff in this case, had a clipping service in 1997/98 that included clippings from Barron's?

A. I was not aware that he had such a service.

Q. Isn't it true, sir, in January 1997 Barron's published an article about Dunlap and Sunbeam that covered all the things you talked about this morning in terms of the challenged practices of Sunbeam? I'll put a copy in front of Mr. Scarola and a copy in front of you.

MR. HANSEN: And per Mr. Scarola's offer, we move that into evidence as long as we preserve our rights for directed verdict.

MR. SCAROLA: No objection.

THE COURT: And what number was that?

MR. HANSEN: 199.

THE COURT: So that would be in evidence.

THE CLERK: Defendant's 199.

(Defendant's Exhibit No. 199 in evidence.)

THE COURT: Do you have an extra copy for me?

MR. HANSEN: Yes, Your Honor.

THE COURT: And you gave one to the clerk?

MR. HANSEN: Yes, Your Honor.

THE COURT: Thank you very much.

MR. HANSEN: Thank you, Your Honor.

BY MR. HANSEN:

Q. Dr. Emery, I'll give you a moment to review it. My question would be are you familiar with that article from your work?

THE COURT: While he's looking at that, all the items in evidence you'll have with you during your deliberations. I don't want to scare you that you have to memorize them now, but you should definitely look at them while they're displayed to you.

THE WITNESS: I can't say that I recall this particular article or much about it. There's a good chance that I did read it, look it over and pull out something from it in terms of ideas, but I honestly, I don't, I don't have specific memory of this article.

BY MR. HANSEN:

Q. Dr. Emery, do you believe this is one of the -articles you listed in your report as materials you relied on?

A. I don't recall off the top of my head, no. I mean, we could check the record. If it was, it was.

Q. I'll represent to you that we can't find it, but I'll give you your report if you'd like to double-check. Would you like the opportunity to double-check?

A. If it's listed as a source? It's -- I don't need to. I don't recall whether it is or not. If you'd like me to, we can check.

Q. This is a -- why don't I give you the chance.

MR. HANSEN: Your Honor, may I approach?

THE WITNESS: Yes.

BY MR. HANSEN:

Q. I'm going to hand you MS 910A, which is part of your report that contains the list of sources relied upon. Using the Bates numbers at the bottom of the page, please check to see whether this is a document that you have included in your thinking or relied upon as part of your work.

MR. SCAROLA: Your Honor, if it helps to facilitate this in any way and counsel represents that these Bates stamped numbers are not on Appendix B, which lists Bates stamped numbers, I'd be happy to stipulate to that just to save some time. If we have that affirmative representation from counsel, I'll accept that representation.

MR. HANSEN: Yes, Your Honor.

THE COURT: Okay. That's fine. So that's established, then, that it is not listed. Thank you.

BY MR. HANSEN:

Q. This was a cover story in Barron's in June of 1997, correct, Dr. Emery?

A. You say it was.

Q. Cover stories are among the most prominent story in any given publication, right?

A. Right.

Q. And this certainly would be the sort of information that you would want to consider when doing a survey of what the public perception of Sunbeam and Mr. Dunlap was in 1997, correct?

A. Not necessarily. This is the Popular Press. This has a popular element to it. It would not be possible for us to, you know, for my research assistants to have gotten everything that was out there. It would not have been possible for me to read everything and include everything, and just because it wasn't relied upon doesn't mean I didn't look at it. You know, we tried to list the things that we specifically relied on to produce that report where the report was aimed at understanding Sunbeam's fraud that they committed over that time period.

Q. Well, let me approach -- Dr. Emery, I'm going to give you a copy of MS 892. I'm sorry. MS 74, Morgan Stanley 74, and ask you do you recognize this Barron's article.

A. Again, I don't recall this specific article.

Q. I will represent to you that this does appear on the list of publications you relied on in doing your work.

A. Okay.

Q. Can we go to --

MR. HANSEN: Your Honor, we offer this pursuant to Mr. Scarola's prior stipulation.

THE COURT: Any objection?

MR. SCAROLA: None.

THE COURT: Okay. I'm sorry. What number for Morgan Stanley?

MR. HANSEN: Number 74, Your Honor.

THE COURT: So that would be in evidence as well.

MR. SCAROLA: Your Honor, just so that the record is clear, we have no objection to the introduction of any of the 1997 or 1998 analyst reports, none.

(Defendant's Exhibit No. 74 in evidence.)

THE COURT: Go ahead, Mr. Hansen. That's not material to what we're doing right now.

MR. HANSEN: 882. I have the deposition Exhibit.

THE COURT: It's number 882. I'm sorry.

MR. HANSEN: The second one was 882.

THE COURT: Okay.

BY MR. HANSEN:

Q. Dr. Emery, I'd like you to go to the second page of 882, which is a document that you said was a basis for your opinion. You see the third paragraph?

MR. SCAROLA: Your Honor, may we identify the date of this publication, please?

MR. HANSEN: I was just about to do it when Dr. Emery was finished reading.

THE WITNESS: June 6th, 1998.

MR. SCAROLA: I'm sorry. June 6?

THE WITNESS: June 6, 1998.

BY MR. HANSEN:

Q. Have you had a chance to read it?

A. Not the entire thing. I was trying to catch the date.

Q. Do you recognize this as one of the documents you relied on in giving us an opinion?

A. Specifically, no, but --

Q. Well, you'll have a chance to look at a break to check your list. On the third paragraph -- why don't you just read it aloud so we can make sure we all follow it.

A. "We can't say we are surprised by Sunbeam's current woes. In a cover story last year entitled Careful AI, we cast a skeptical eye at Dunlap's growth objectives in the low margin cutthroat small appliance industry. We also pointed out the yawning gap between Sunbeam's performance claims and reality. We took special note of Sunbeam's accounting gimmickry which appeared to have transmogrified through accounting wizardry the company's monster 1996 restructuring charge (\$337 million before taxes) into 1997's eye-popping sales and earnings rebound. But to no avail, Wall Street remained impressed by Sunbeam's earnings."

They agree that in general the consensus was positive.

THE COURT: That wasn't the question pending.

BY MR. HANSEN:

Q. Read the paragraph.

A. "Sunbeam's earnings and the stock continued to rise from a price of 37 at the time of the story."

Q. Now when you read this, Dr. Emery, you realized that here was Barron's essentially saying I told you so, we knew all along there were problems with Sunbeam, correct?

A. That's not unusual for people to say I told you so, whether they really did or not.

Q. That's what they were saying here, correct?

A. That's what they're saying here.

Q. And you saw that in your work for this case involving Barron's saying we wrote a story in June of 1997 that laid out the accounting fraud at Sunbeam, correct?

A. Yes.

Q. And you didn't even go get that cover story to put it in your report, did you, yes or no?

A. No.

Q. Let's go to the report of 1997.

A. You say go to the report, the '97 report.

Q. I'm going to ask --

A. This is after the fact stuff.

Q. The June 1997 document we have before you, which is Exhibit 199, let's go through it to see what was in June of 1997 being predicted by Barron's.

Now do you have it in front of you, Doctor?

A. I do.

Q. Let's go to the bottom of the first page. If we could highlight this last paragraph, if we could, please. Now here's Barron's saying that Mr. Dunlap is a guy who posed during a book tour decked out in a Rambo headband with bandoliers and ammo criss-crossing his chest. That was indeed Mr. Dunlap's public persona, wasn't it?

A. That's what -- yeah. I mean, I guess that's true.

Q. Let's go to the next page, if we could, please, the middle paragraph stopping with, "There are lots of shorts..." The article continues, "The best is yet to come for shareholders, Dunlap insists." He goes on about estimates. And then it says, quote, "There are lots of shorts in Sunbeam now, but I wouldn't short me. That's a gamble I'd hate to take."

What is a short?

A. Short would refer to a short sale.

Q. Under what conditions do people make short -- actually, what is a short sale?

A. A short sale is where you sell stock you don't own.

Q. And that represents a prediction by the person who sells that the stock is likely to decrease in price so that you can then buy it at a lower price and make the difference between what you sold it at and what you then bought it at as profit?

A. If -- yes.

Q. It's a prediction that the stock is going to go down, correct?

A. It's an investment. It's essentially it's a mirror image of buying the stock long. So when you buy the stock, you hold a positive position. When you sell short, you hold a negative position.

Q. Well, when you buy a stock long, you're predicting it's going to go up in value and your investment is going to increase, correct?

A. I guess I'd quibble with the word "prediction." But, you know, you're making the investment because you believe it's a good investment, yes.

Q. And when you sell a stock short, you're predicting that the stock price, or you're hoping that the stock price is going to go down because that's the only way you're going to make money, right?

A. That's correct.

Q. If the stock goes up and you've sold it without owning it, you're going to have to buy it at the higher price, and that will result in a loss, correct?

A. Yes.

Q. So when Mr. Dunlap says there are a lot of shorts in Sunbeam now, doesn't that reflect the market perception that Mr. Dunlap's stock is, his Sunbeam stock has been pumped up or overvalued?

A. No, not necessarily. Virtually any stock of -- well-traded stock will have short sales against it. I mean, we could go and check for virtually any stock. There's a continuous short sale. So there's -- almost everything has shorts against it.

Q. There are a lot of shorts in Sunbeam?

A. The argument about what is a lot... I mean, I did not undertake an analysis to go and check exactly what that is. But I would have to do a comparative analysis based on volume and other things to decide what that -- whether I agree with that conclusion.

Q. Let's go to the top of the next page, if we could, please. And if we could highlight that, this, by the way, is all in the text of a magazine article that's available to the public through Barron's and Dow Jones, correct?

A. Yes.

Q. For 1997?

A. That's what I understand.

Q. Okay. They write -- why don't you read it for us, please, top of the page, first full paragraph...

A. "Finally the huge restructuring charge Sunbeam took last year raises quality of earnings issues. For such items as litigation and bad debts, the company took large reserves that potentially could be tapped to bolster future earnings. Sunbeam also took a \$90 million inventory charge that could shore up profits and margins this year, and next as the goods are sold, a 13-percent first quarter sales jump lead to press reports of inventory stuffing to aid the top line. But Sunbeam denies any gimmickry."

Q. Inventory stuffing is the same thing as channel stuffing, isn't it?

A. Yes.

Q. That's where the manufacturer pushes product out to the customers when customers aren't ready to take it and records those sales as though they were sales as opposed to just parking them on the books?

A. Yes.

Q. And here's an article talking about that very practice?

A. Yes, that's true.

Q. They're talking about reserves in Barron's, aren't they?

A. Yes, they absolutely are.

Q. They're saying the company, this is the prior year, the company, in 1997, Barron's says Sunbeam took large reserves and as a result those reserves could shore up 1997 earnings, just what you talked about this morning, right?

A. That's exactly right, that they were saying that was a possibility.

Q. They said Sunbeam took a \$90 million inventory charge that could shore up profit and margins this year, 1997 and next year, 1998 as the goods are sold, correct?

A. Yes.

Q. That's the very practice you talked about when Mr. Scarola examined you this morning?

A. Yes, it is.

Q. And it's, in fact, what happened to Sunbeam, correct?

A. Yes. The problem with the article is --

Q. Well, I'm not asking about the problem with the article. I'm just asking if that is what, in fact, happened. Was there use of reserves in a way that deflated the performance in 1996 and inflated the performance in 1997?

A. Yes, there was apparently one statement that that was what was going to happen.

Q. Continuing on with the paragraph beginning “Finally...”, “Finally, not even the best and brightest in housewares like Newell, the Brahn division of Gillette, and Black & Decker have attained 20-percent operating margins. We'd be laughed out of Wall Street if we made near the same claims of future performance that Dunlap has made, averse a top executive of Rival, a Kansas City based appliance maker, celebrated for the crock pot.”

So Mr. Dunlap was telling the world he could do a 20-percent operating margin that nobody else in his business was able to achieve, correct?

A. That's what this particular article said about the situation. But clearly there were other people who thought differently because certainly the analyst reports that said buy would have contradicted this.

Q. I'm just asking if what he was claiming was an operating performance that was inconsistent with the operating performance other companies in the same industry were able to achieve. That's what this says, right?

A. That's one quote from one executive at one company. And that's true in that one quote.

Q. And that quote raises the red flag as to what's going on in Sunbeam, doesn't it?

A. I dare say there's no event that ever happened in history that wasn't -- you couldn't go back and find somebody who had predicted it. Whether people understood what that prediction was is impossible. People make predictions all the time.

Q. So Barron's got it right, but it just happened to be one predictor in a sea of voices; is that what you're telling me?

A. It was one of, as I said, more than 50 analyst reports didn't have anything less than a neutral recommendation.

Q. Let's go to the page starting at the top of, “Whatever the truth...” and highlight the paragraph beginning, “Yet the numbers may not tell the whole story...” It's page seven, Dr. Emery, the fourth bullet point.

MR. HANSEN: A little higher, please.

You're cutting off the top, if you could. There we go.

BY MR. HANSEN:

Q. Do you have that, Dr. Emery?

A. “Yet the numbers...” Yes.

Q. Read it for me, if you would.

A. “Yet the numbers may not tell the whole story. For one thing, some in the industry suspect that Sunbeam may have delayed some deliveries in its fourth quarter figuring the year had been trashed anyway and hoping to get off to a glowing start in '97. In any event, sales in the fourth quarter fell 5.4 percent. The company blames this on the poor condition of the old system.”

Q. Here we have Barron reporting that what Sunbeam had done in 1996 was to delay sending out products to customers because they figured '96 was a ruined year anyway. They'd rather push the deliveries into '97 even though they were '96 sales to make the disparity between the '96 loss and the '97 profit look greater, correct?

A. Yes.

Q. And that's what you told us about this morning, correct?

A. What I testified was that the consensus, the overall consensus was positive.

Q. With all due respect, I'm asking you if you told us this morning that one of the problems at Sunbeam that kept the public from knowing what went on was they played around with when things got recognized, when revenue got recognized, true?

A. Yes.

Q. And here's Barron talking about that revenue recognition in an artificial way, correct?

A. Yes.

Q. Let's go to the next paragraph, beginning, "The Wall Street Journal reported..."

A. Wall Street Journal reported, yes.

Q. I want to ask you to read that.

A. "The Wall Street Journal reported several instances of apparently sales loading or stuffing towards the end of the first quarter, including one case in which a Midwestern chain, Younkens, received a large shipment of merchandise long after the cancellation date on the order. It counted as a first quarter sales even though Younkens subsequently returned it."

Q. That's a specific allegation, is it not, of Sunbeam channel stuffing in order to recognize revenue that it shouldn't properly recognize because the customer didn't want the goods, correct?

A. It is.

Q. The next paragraph, "And the small appliance industry..."

A. "And the small appliance industry was abuzz of rumors by heavy discounting by Sunbeam to boost sales in the first quarter's waning weeks. A \$90 million inventory write-down the company took in the fourth quarter as part of it's \$337 million restructuring charge certainly gave it attitude to play let's make a deal later without impairing profits or margin."

Q. What's that telling us here is that in order to make it look like they were selling a lot of product in 1997 and make it look like they were doing really well, they would heavily discount the price of what they sold, and they would disguise the fact they were discounting by using these reserves, this \$337 million cookie jar, if you will, to cover up the heavy discount, correct?

A. Yes.

Q. That's what is plain as day in Barron's, right?

A. That's what I testified in my testimony about.

Q. Public domain information in June of 1997, correct?

A. Public perception.

Q. Was this information available in the public domain to anyone who wanted to read the Barron's article in June of 1997?

A. It was, but what I testified was that there was a perception.

Q. Doctor, I just asked you whether the information was available.

A. Just what it says here.

Q. It's available, right? Information was available, yes?

A. Yeah.

Q. Continuing on, Doctor, let's go to the next page, actually carry-over sentence, "Certain balance sheet developments in the first quarter..." then carrying over to the carry-over paragraph, "Certain balance sheet developments in the first quarter also lend..." then go to the --

A. "... credence to the possibility of inventory stuffing. During the quarter, net accounts receivable zoomed to 296.7 million from \$213.4 million at year-end. The company's explanation, some customers used Sunbeam's temporary inability to generate electronic invoices as an excuse to pay slowly."

Q. And the information conveyed here in this public article is that because Sunbeam is stuffing the inventory out to its customers when the customers don't want it, the accounts receivable or the balance of payments that are owed to Sunbeam from the customer is rising because the customers don't want to pay for products they haven't really ordered, correct?

A. That's what it says, yes.

Q. And anybody with any kind of familiarity with business would know that within seconds of reading that article right there, right?

A. Well, as I said before, this was not the only information available. So, you know, there are contradictory information. This contradicted some other information.

Q. Let's go to the next article, "The shear magnitude..."

A. "The shear magnitude of the 1996 structuring charge has engendered some skepticism. Companies can use big write-offs to burnish operating results in subsequent periods by shifting operating expenses from the periods in which they occur taking spurious inventory profits or building up large reserves that can be subsequently reversed into earnings."

Q. So what's happening here in this Barron's article is they have this \$337 million cookie jar, that's the restructuring charge, correct?

A. Yes.

Q. And they can use that to burnish their later operating results by shifting the operating expenses, say, for 1997, from the 1997 period they can take some kind of spurious inventory profits or other things, and they can take those reserves and put those into earnings, thus mask what the true performance is, right?

A. Absolutely. That's what I testified this morning. There was fraud.

Q. And here Barron's describing just what you testified to, correct?

A. Amongst many other people, yes.

Q. Let's go down to one more paragraph. And you don't have to read it. I'll read a couple. "Perhaps so, but close scrutiny of the chargeoffs yields some industry fodder for discussion. For example, buried in the charge is a \$17.7 million boost to the company's litigation reserve."

Let me stop right there. What's a litigation reserve?

A. That would be a reserve like we talked about before, an anticipated expense. So, for example, when a company faces a lawsuit, if they think they're likely to lose the lawsuit, they well may put aside a significant amount of money in anticipation of paying that loss.

Q. So you essentially reserve the money because you may have to pay it, correct?

A. Right. That's what your expected payment is.

Q. So then it goes on, it says, "...which Kersh says..." Kersh was a chief financial officer at the time?

A. Yes.

Q. "...Kersh says reflects an adverse ruling by a court in early January related to a superfund liability."

That's an environmental clean-up issue?

A. Right.

Q. "Yet the ruling wasn't considered material enough to be mentioned specifically in either Sunbeam's latest 10-K or 10-Q which were both filed months after the event."

Tell us what a 10-K is.

A. I believe I testified that a 10-K is an annual set of financial statements filed with the SEC.

Q. And what's a 10-Q?

A. That's a quarterly such statement.

Q. So what Barron's is saying here is Sunbeam has gone ahead and booked this \$17 million reserve, but, yet, they've not purported to the SEC in filings they have to make to a government agency about any problem that requires increasing litigation reserve, correct?

A. Yes.

Q. Suspicious, right?

A. Put it in the context of how many other things were being said at the same time. I agree with you, after the fact you can always find somebody who has made a prediction.

Q. We're not after the fact here. We're standing here at Barron's in June of 1997.

A. No, this is after the fact. We know that this came true, that this was true. What we didn't know at the time, if we were the investment community, and if you look at all of the other things that were said at the time, the consensus of that opinion, which they say, be that as it may, Wall Street has embraced Dunlap's rosy scenario. That's what I testified to.

Q. Doctor, I'm just asking you, sir, if sitting there in June of 1997 and reading that Sunbeam has made up this litigation reserve for a lawsuit it didn't even see fit to disclose in either of its SEC filings, was it a suspicious fact that would constitute a red flag for someone who needed to know more?

A. If your question is if I had read this article at the time, would I have shorted Sunbeam at the time I read this article and said things were in trouble, I don't know that I would.

Q. That's not my question, Doctor.

MR. HANSEN: Objection. Move to strike.

THE COURT: Sustained. I'll ask you to disregard the last answer.

BY MR. HANSEN:

Q. I'm asking you a different question, with all respect. I'm asking you if reading in June of 1997 that Sunbeam had created a \$17 million reserve for a lawsuit that it hadn't even seen fit to disclose in either of its SEC filings would have been a suspicious fact?

A. I believe the author of this article believes it was a suspicious fact, and that's why he reported it.

Q. I'm asking you, putting yourself in June of 1997 reading this article...

A. I would have to have a lot more information than just a hypothetical.

Q. On its own, though, that's a suspicious fact, you're creating a loss that you don't even disclose, right?

A. If you're looking at a 17, \$18 million charge on a billion dollars of revenue, I don't know that. Maybe. It's certainly possible. But I can't -- without a lot more information, you wouldn't be able to say, a-ha.

Q. If a company came to you today and did exactly this, said we're going to put down \$17 million for a lawsuit we haven't even seen fit to disclose, would you advise them to do that?

A. I can not answer that without more information. It simply depends.

Q. You can lie about a lawsuit? That's your testimony? You'd lie about a lawsuit you haven't disclosed? Say we need \$17 million --

A. That's not what I said.

Q. "Or take the big jump in the allowance for doubtful accounts and cash discounts to \$23.4 million in 1996 from 10.7 million in 1995 and \$3 million in 1994. The size of the '96 charge, which is largely for bad debts, is curious given that the tidal wave of retailer bankruptcy involving such companies as Jamesway, Ames and Bradleys, had crested long before '96."

Here Barron is saying they've paid for the bad accounts even though the customers were in a better position as they were in prior years?

A. That's what it says.

Q. So that raises a red flag, doesn't it?

A. Taken individually highlighted, yes, you could say, sure, that's -- but in terms of the context of a large corporation, this author believed that things were suspicious, and this was one of a lot of authors who wrote about Sunbeam in that time period.

Q. This is pretty specific, isn't it?

A. It is. And it turned out it was absolutely correct.

Q. Let's go to the next paragraph. "By taking such large reserves in 1996, Sunbeam could cut its provisions in 1997 and 1998 or perhaps eliminate the expense all together. Bolstering operating income and redundant reserves could potentially have an even more powerful effect on earnings if they are ultimately..." quote "...'reversed'..." close quote "...and added to income," correct?

A. That's exactly what I testified about.

Q. That was the very problem that ultimately created the need to go back and restate Sunbeam's financials?

A. It was.

Q. And here's Barron's predicting it in June of 1997, correct?

A. This one author, yes.

Q. Let's go on to the next paragraph, please. Actually, before I finish that, the idea of reversing, I just want to make sure we all understand that, if you have a reserve account you created in 1996, that will make earnings less in 1996, correct?

A. Yes, that's what we said.

Q. In 1997, if you basically decide you don't need that reserve anymore, it's overstated, and you shrink it or cut it down, the amount by which you cut it down becomes money that you could put in your profits for that year, correct?

A. Right. I believe what I said was it moves profit forward in time.

Q. So you can manipulate your financial position to make '96 look worse by robbing profits from 1996?

A. Yes.

Q. And '97 look better by taking the '96 profits and putting them into '97?

A. I believe that's what I testified.

Q. Now, finally, "Sunbeam took a \$92 million hit on property, plant and equipment and trademarks as part of the restructuring charge. Though some of this charge applied to assets of businesses the company is selling, the bulk applies to ongoing businesses."

Isn't it true, Dr. Emery, that what this refers to is the accounting rule that says you can't take an inventory write-off for ongoing operations; if you're going to take a write-off, it has to be for discontinued operations?

A. I'm not familiar with the rules. I know there are obsolete inventories that are possible under certain conditions, but I think the rule you're citing is generally the case.

Q. As from your business or finance understanding, you basically can't go out and write down the inventory or today's inventory on a business you're still engaged on. You can on a business you decide --

A. If you have obvious inventory, I suspect you could make a case and have that proved. I think as general rule one wouldn't do that.

Q. \$92 million hit, most of it going for ongoing business, so it shouldn't be written down. That's what they're saying. If you're concerned about the accounting issue, one could certainly get an accountant to look at this, go into Sunbeam, actually see what the operations are for these write-downs and make a determination to see if these numbers are accurate, right?

A. I suspect the author did this.

Q. You suspect this Barron's author did just that?

A. What?

Q. You suspect this Barron's author --

A. It's quite possible he or she consulted with an accountant.

Q. It's so thorough and specific that they would almost have to do that, wouldn't they?

A. It's certainly -- it's believable to me, yeah.

Q. Let's go to the next page, the second paragraph. Since my voice is getting a little dry, would you mind, Dr. Emery, doing this one?

A. Where are we now?

Q. First full paragraph on page nine.

A. "But the boost...?"

Q. Yes.

A. "But the boost to earnings from 1996 restructuring charge will fade dramatically by next year. Thus, speed is of the essence for Dunlap to act on his plan to sell Sunbeam or find a juicy acquisition. And that's still the plan as reiterated at the company's annual meeting last week, though Dunlap said Sunbeam wasn't yet in discussions with any other company."

Q. So here we have Barron's saying all this up of numbers can only last so long. The restructuring charge will be extended by 1998. In other words, you won't be able to inflate your profits after 1998 with this cookie jar, right?

A. Right.

Q. So if your plan is to use these reserves to inflate your profits for '97 and '98, boost your stock price and then make an acquisition, you better do it before 1998 is over, correct?

A. That's what he's saying.

Q. That's what this article is exactly saying, isn't it?

A. Yes, it is.

Q. And that's exactly what you were talking about this morning, isn't it?

A. That's exactly what happened.

Q. Let's go to the next full paragraph, "It's unlikely, however, that he will be able to scare up as generous a buyer for Sunbeam as he did for Scott Paper."

Let me stop there. Scott paper was Mr. Dunlap's prior, quote, turnaround situation?

A. Yes.

Q. Isn't it true that there was in the public domain around this time many questions about whether Mr. Dunlap had done the accounting gimmickry at Scott Paper?

A. I can't verify that. My memory is not -- I mean, Scott Paper was a turnaround. I mean, Scott Paper did better after he had been there. I mean, you're saying was it a fraudulent turnaround like Sunbeam? It wasn't.

Q. I'm just saying wasn't there in the public mix of information in the summer of 1997 information that included claims that Scott Paper had, in fact, not been turned around and instead had been pumped up in an artificial way?

A. And as I said a moment ago, there's almost always a range of opinions. There's somebody who says something.

Q. Continuing on with what I didn't read, though, "At a current price of more than three times sales, Sunbeam's stock is selling at two to three times the level of most of its competitor shares and Barron is suggesting that Mr. Dunlap through

these creative gimmicks or, as you say, fraud had managed to boost the share price of Sunbeam two to three times what similar company stock was selling at, correct, true?

A. Yes.

Q. Okay. Let's go to the paragraph beginning, "So..." skip down one more to, So it's more likely..." "So it's more likely, more than likely Dunlap will have to go the acquisition route, perhaps stalking a major player in the related housewares area such as Tupperware or Rubber Maid. Any such acquisition would be done in a manner that would combine the company's results before and after the merger under..." quote "...'pro forma accounting.'" "

Maybe we could stop right there. Can you tell us about pro forma accounting?

A. It would be projected. When you talk about pro forma statements, we're talking about forward looking to see if we did this, what would we look like.

Q. It goes on, "...nicely masking any shortfalls in the three-year goal of doubling sales and the like."

So what Barron's is saying there is the Dunlap plan is to have these goals he can't meet, these pumped up goals, but if he doesn't have an acquisition in time because the two companies will be combined in some form of accounting called pro forma, no one will really be able to tell how far short he's fallen, correct?

A. That's what I testified to.

Q. Very thing you said was the fraud right here in Barron's?

A. Absolutely. Yeah.

MR. HANSEN: Your Honor, would right now be a good time for a break?

THE COURT: Sure, that would be fine. We still won't talk to you. You won't talk about the case. We will see you in about ten minutes. Bring in snacks, soda, coffee or tea if you like. Thanks.

(Jury left the courtroom.)

MR. SOLOVY: Your Honor, you asked the question on the confidentiality issue.

THE COURT: Oh, yes.

MR. SOLOVY: I went back and looked at that. I hate to give you this big pile of transcript.

THE COURT: You've found some things that --

MR. SOLOVY: I short-circuited it. What happened was these documents were marked confidential. Then at the beginning of that hearing --

THE COURT: These are the --

MR. SOLOVY: Financial documents. Mr. Dimitrief tried to offer them into evidence. We objected because of the confidentiality order. Then you said, well, before we get into that let's do your motion in limine, because we had a motion

in limine to keep those documents out of evidence, period. Then after these many, I don't know, a hundred odd pages, Your Honor said I'm going to deny that motion in limine, but I'm going to give you, CPH, the opportunity to object to the introduction of these evidence at trial.

THE COURT: Okay.

MR. SOLOVY: And that's in the back, Your Honor.

THE COURT: Okay.

MR. SOLOVY: So that's why it's sort of there in limbo.

THE COURT: I think what we're saying, though, and it's sort of ringing a bell now, I need to grant Morgan Stanley's motion to remove the confidentiality designation subject to your right to object on grounds of relevancy at trial.

MR. HANSEN: Yes, Your Honor.

MR. SOLOVY: Except we don't want it published until -- Let me respectfully suggest this. If Your Honor held those documents were not confidential, was not admissible, there would be no reason to remove the confidentiality designation.

THE COURT: In all honesty, this is ringing a bell. I think the confidentiality designation comes off. It's what I said all along. You litigate in a public forum, this stuff becomes public. I understand your client disagrees.

MR. HANSEN: Two points. I want to make it abundantly clear that when I offered the exhibits in evidence that I did not waive the directed verdict, because Mr. Scarola requested that evidence to come in. I did so on that basis. I relied on his representation.

THE COURT: I understand that.

MR. HANSEN: I thought it was inappropriate, Your Honor, for Mr. Scarola to make what I considered a grandstanding series of remarks before the jury as to his willingness to have any and all Exhibits we sought to put before the jury introduced. I don't believe that's -- That was designed to suggest that we were keeping things from the jury, that he is the party of openness. If he wished to have a conference, we could have come to the bench.

Every time I have wished to make any kind of remark whatsoever he has, on the other hand, sought to shake his head, make remarks, do things that I believe are inappropriate before the jury. I request that the court admonish him for doing so.

THE COURT: Mr. Scarola, from now on I need you to quit trying to curry favor with the jurors, which would include making the jurors believe plaintiff is the only side who wants an efficient truthful presentation of the evidence in this case.

MR. SCAROLA: Thank you, Your Honor.

THE COURT: I think within the confines of evidence, I think both sides want an efficient truthful representation of what the evidence is going to be. I understand you guys disagree on what it's permissibly to include.

Are we ready for a break, then?

MR. HANSEN: Yes.

THE COURT: How long do you think your cross is going to be?

MR. HANSEN: 15 to 30 minutes.

THE COURT: Do you know how long you expect to be, Mr. Scarola, on redirect?

MR. SCAROLA: I would estimate about 20 minutes based on what I've heard so far.

THE COURT: Where do you think we're going next?

MR. SCAROLA: We have Mr. Maher ready to go.

THE COURT: Okay. Thanks. I'm just writing my notes on this.

(A recess was taken from 2:40 p.m. to 2:50 p.m.)

THE COURT: Okay. Are we ready to get the jurors?

MR. HANSEN: One thing real quick, I assume you reject our request for reconsideration of the reliance limiting instruction.

THE COURT: Yes. There's a written order. I can bring in on the break.

MR. SOLOVY: We can wait.

THE COURT: I also did an order on the confidentiality designations. I can bring them both.

MR. SOLOVY: That one we can particularly wait for Your Honor.

(Jury entered the courtroom.)

THE COURT: Go ahead and take your seats. And, Mr. Hansen, go ahead.

MR. HANSEN: May I proceed, Your Honor?

THE COURT: Yes, go ahead.

MR. HANSEN: Thank you, Your Honor.

BY MR. HANSEN:

Q. Dr. Emory, can I change topics to evaluation that we started last Thursday?

A. Yep.

Q. That is one of your particular areas of expertise in the field of finance?

A. Yes. Liabilities management is the thing I'm probably most up on, but evaluation falls in the category of things I'm able to do.

Q. One of the things that falls in the area of your expertise?

A. Um-hum.

Q. Could you help us understand better the concept of market value as you've defined in some of your previous writings?

A. Market value reflects the available information about a stock or other financial securities.

Q. Now there are a number of different ways of looking at value; is that right?

A. We talked about that, yes.

Q. Intrinsic value, book value, market value, correct?

A. I think what we talked about was liquidation value based on present value of future earnings, and then we talked about the market value of the stock.

Q. Now isn't it true, sir, that market value is the price for which something could be bought or sold in a reasonable length of time where reasonable length of time is defined in terms of the items of liquidity?

A. That is one view of market value. If we think about a stock, we think about the market value being close to what it has recently traded at.

Q. Is that --

A. It has a more historic flavor to it.

Q. If I were to get a copy of your book, though, what I just read, would that remind you that that's exactly what you put in your book as the definition part of it?

A. That would be -- yes, that would not be inconsistent.

Q. You've defined it in your own book just the way I read it a minute ago?

A. Okay.

Q. Is it true, sir, that the more liquid an asset, the shorter the time frame?

A. The more liquid the asset, the shorter the time frame we think of in terms of length of time to sell something, yes.

Q. In other words, the idea of being if you're able to sell, if there's a very efficient market and it's readily available and you can conclude a transaction in an hour, that's very liquid. Where if your asset is going to take a year or more to sell, that's highly illiquid, and, therefore, that would affect market value, correct?

A. Right.

Q. How about the concept of intrinsic value? You're familiar with that concept as well, aren't you?

A. With respect to an option?

Q. Well, is there a concept of intrinsic value where a particular asset may be more valuable to one person because of that person's unique situation?

A. I know what you're getting at, and I guess I understand that. I think we talked about the idea that I'm not sure I would use the term "intrinsic value." I think in my field when we say intrinsic value, we're typically referring to something about an option.

Q. But what would you call it, then?

A. Perceived evaluation. One person's or entity's perception of value.

Q. In other words, if we had two people, call them A and B, they might not have the same evaluation on a particular item because of the particular preferences of A or B?

A. I believe we said that Thursday.

Q. Now we talked about liquidity. Is there something known as a, quote, liquidity discount that you work with in your field?

A. Yes, there is.

Q. And when you perform an evaluation, is it often the case that you need to assess the issue of whether a discount is required to deal with the issue of liquidity?

A. Yes.

Q. Why is that?

A. The harder it is to sell something, the less liquid it is. The time and effort creates more, somewhat more risk. And so if you can't sell it conveniently, typically they'll be more effort, transaction costs associated with selling it. So, therefore, that's what we mean when we say a liquidity discount.

Q. Everything else being equal, is it true that the less liquid an asset is, the less valuable it is?

A. All else equal, ceteris paribus.

Q. Pardon me?

A. Ceteris paribus.

Q. From Harry Potter?

A. It's a Latin phrase for "all else equal." It's a academician's phrase.

Q. Is this why the valuations of assets that are subject to restrictions on their sale are often subject to something called a liquidity discount?

A. Yes, that's a -- yes, that happens.

Q. If you were asked, for example, to value a large block of unregistered securities, would it be appropriate to consider a liquidity discount for that large block of unregistered securities?

A. It's -- it could be, it would be analogous to an acquisition premium. It would be a judgment call. And typically for liquidity, you would discount for an acquisition or control. Those two types of things, those are premiums. And they add to the value. Liquidity subtracts from the value.

Q. I'm not talking at the moment about a control premium. I'm just asking you all things being equal if you have a large block of unregistered securities, would you need to consider a liquidity discount?

A. I was trying to say we had already talked about that kind of an adjustment. And liquidity, an adjustment for liquidity would be analogous to that. Yes, you would take a discount for that.

Q. What are unregistered securities? I had forgotten whether that was something covered in your prior examples.

A. I believe we did. What that means is there are securities that are not registered with the SEC and can, therefore, not be traded on public exchange or public market.

Q. They are claims on the company's ownership, but you can't go into the public marketplace and sell them as you would with registered shares?

A. Yeah. If they're stock, they would be claims on ownership. But other financial securities can be unregistered as well.

Q. In the range of your field, in the range of evaluation analysis, is there a standard sort of range of liquidity discounts that are applied in circumstances where, for example, stock is not freely tradable?

A. I believe there are.

Q. What's the range basically?

A. To tell you truth, I don't remember. I would have to check. And check, I would check with some people doing that sort of work currently. I don't -- I don't have that off the top of my head. I just don't.

Q. Wouldn't it be somewhere in the range of 13 to 45 percent?

A. I think I just said I don't know.

Q. Are there treatises you would go to to see what the range of liquidity discounts should be on certain things?

A. There are people that do this sort of work. I would check with them. Or perhaps I would check the literature and find out what a research paper said about that. I think I could do that. I mean, that's what I would do.

Q. But you don't have any idea sitting here today?

A. Unlike the control premium, I haven't written anything on that recently that it's in my mind.

Q. How about the phrase "blockage discount," is that a concept you're familiar with?

A. Sorry?

Q. Blockage or block discount.

A. Oh, discount for a block. That would be -- can I talk about the control premium in terms of --

Q. Let's just put aside things like control premiums. Just talk about a significant block of shares that you're going to try to unload in the public marketplace. What I'm asking you about is where you're going to have to sell a large number of shares, isn't it so that you need to apply a discount because the act of selling a large amount of shares may cause the price to decrease as you go?

A. It's not a linear. It's a continuum that actually reverses. It gets -- the more you sell, you get a larger block, you start to get a discount. But then it becomes large enough where it comes back up, and you can start to get a control premium. That's why I was trying to relate it to the control premium.

There's a range in which you would have a discount. There's a range in which you would have a premium.

Q. So one who was seeking to responsibly value a particular block of securities, and if it was a large block, you would need to assess the very phenomena you just described, a potential discount for some period of time and possibly an increase over time? That's an analysis that would have to be done?

A. No, not over time. If you were buying ten percent of a company, that would be a very very large block of shares -- block of stock. That could have, depending on the situation, that could have a control premium because you would have a much -- a significant say in the company. Or if there were other shareholders who were large, it might actually have a block discount.

So as you -- as you go from, you know, one percent kind of thing, you have -- it's too large for most buyers to buy, but it's too small to really offer much in control.

So the continuum I'm thinking of is the percentage of the company. After you get up to this larger 10, 15, 20 percent of the company, then you start to get into this other range. So it's not an over time thing. It's at the time how large a portion of the company of the ownership are you buying.

Q. Thank you for the clarification. You would agree with me, would you not, that somebody would have to analyze the issue of block in terms of assessing fair value for a large amount of securities?

A. I would certainly think that that would be something I would look at if I were valuing it. That would be a consideration, yes.

Q. And you couldn't, you couldn't avoid the issue. You'd have to look at it. You just can't tell how it would come out without going through the facts? That's a bad question. Let me rephrase. In order to do a fair evaluation of a block of securities on a particular date, someone who does evaluations as you do would have to ask the question what might the block discount be in these circumstances; true?

A. One would ask those questions and try to determine that aspect of the sale, yes.

Q. And it would affect value how it came out?

A. It could. It could be anywhere from negative to positive or zero.

Q. Let me just do an example for you here so we can be concrete. Let's assume you have \$500 million worth of unregistered securities. Now with those unregistered securities, how would you go about valuing that block of \$500 million securities on any given day?

A. Well, first of all, I would have to have a context. I would have to have a lot of specifics about the company. I'd have to know what type of securities they are; is this common stock; what are the voting rights on this common stock.

Q. Let's say they're unregistered, make life easier. These are unregistered securities.

A. Are they stock? Bonds?

Q. Stock. \$500 million of unregistered stock. How would you value that?

A. And the 500 million, if we already know they're 500 million, we would know the value.

Q. Let's say that's the market price, the freely tradable shares on this particular day with no restrictions.

A. These shares are traded.

Q. We're talking about unregistered shares.

A. So there's not a comparable share traded? So we wouldn't know what the market value was.

Q. Let's assume it's, however many, \$10 a share in the market times, what, 5,000 shares?

A. And the \$10 is shares that are trading on the Exchange?

Q. Right.

A. Publicly traded shares.

Q. Right.

A. And our block is not traded.

Q. Right, unregistered shares. How would you value that?

A. Well, aside from looking at what I thought compared to the market price, I would -- because if I'm buying or selling, I may be thinking that the \$10 is high or low. But I would then look at the -- a number of things. But I certainly would look at what portion of the company that was. I would look at how long they were going to be unregistered, whether they could be registered or never be registered. There are any number of contractual stipulations in a contract like this. One of the reasons that people trade stock sometimes privately is the benefits that accrue to being able to work privately and have a contract that specifically meets the needs of the people rather than being bound by the public market.

Q. You would need on this \$500 million block of unregistered securities to apply a liquidity discount, correct?

A. I would think that it was possible. That would be an aspect I would deal with. That's why I said how long is it, what are the contracts, what are the various things, and which discount, if I apply a discount, what am I applying it to. If I really am buying these shares and I think they're worth more than \$10 to begin with, then what am I discounting it from? Or if I think they're worth less, what am I discounting it from?

Q. Isn't it true, Doctor, that the Securities & Exchange Commission, the United States Government has issued a release saying the valuation of restricted securities at the market quotations for unrestricted securities of the same class or at slight discounts from such quotations is improper?

A. Tell you the truth, I'm not familiar with that legal aspect, that particular rule.

Q. Hasn't the SEC said that you couldn't lawfully value unregistered stock at the same price as registered stock or even close to it?

A. I'm sorry. I don't know that law.

Q. How about the IRS, are you aware that the IRS has revenue rulings?

MR. SCAROLA: Excuse me, Your Honor. Pardon me. It's improper to be asking this witness to state legal conclusions. I object.

THE COURT: I would overrule the objection.

But let me remind you, a question is not evidence. Do you understand what I'm telling you? Okay.

BY MR. HANSEN:

Q. Are you familiar with the IRS guidelines about valuing restricted securities?

A. I do not recall the tax laws, no, I don't.

Q. That would be something you would need to know to have an opinion on it?

A. If I were doing that, yes, I would need to know that.

Q. Are you familiar with an academic survey called the market approach to valuing businesses?

A. Are you talking about a specific paper? I'd need to have more than the title. The authors, the journal in which it appeared, the year in which it appeared. There's 70 journals in finance.

Q. You're not familiar with that one?

A. That paper out of maybe the thousand that are published every year? No.

Q. Let's add to our 500 million block the concept of a lockup. Can you tell the ladies and gentlemen of the jury what a lockup is?

A. Yes, I can.

Q. What is it?

A. A lockup is an agreement whereby shares are set aside and the holder is restricted. It's not just they're unregistered, but the holder can not sell them for some amount of time. They are locked up as it were.

Q. Not only can you not sell them into the marketplace, you can't sell them to anybody?

A. You can't sell them to anybody.

Q. Is that an additional factor that would require an additional discount if you were trying to value a \$500 million block?

A. That's what I -- that's what I said a minute ago about all the different factors one would have to bring in. They're too numerous to know without having the entire situation. Is a lockup a positive thing from the buyer's point -- yeah, from the buyer's point of view or from the shareholders' point of view who has them locked up? That depends on the rest of the contract. The contract isn't just that aspect.

Q. Well, whatever the Latin phrase was, if you've got a block of shares that are subject both to being unregistered and they are a lockup indicating they can't be sold, is that a factor in your judgment which requires a liquidity discount as we previously discussed, all other things being equal?

A. That would be part of the liquidity discount because they wouldn't be salable.

Q. You'd have to apply a liquidity discount?

A. You would have to take that into account.

Q. All other things being equal, there would be in my case a liquidity discount, correct?

A. We established that all else equal, liquidity discount; if there was a lack of liquidity, that that could cause a discount. A lockup is a form of causing illiquidity, you can't sell the stock. So --

MR. HANSEN: May I approach?

THE COURT: Sure.

BY MR. HANSEN:

Q. Why don't we deal with specific instance of liquidity discount to see what you can help us understand about it. This is Exhibit 282, a March 31, 1998 Sunbeam 10-QA. This is one of the documents you specifically relied on for your report, correct, Doctor?

A. I believe that's correct, yes.

Q. Go to page six of note two where it says acquisition.

A. I'm sorry. Page six.

THE COURT: Are you offering this into evidence?

MR. HANSEN: If subject to the same stipulation before.

MR. SCAROLA: I have no objection to the offer of this document into evidence.

THE COURT: That's fine. And I'm sorry. It's 282?

MR. HANSEN: 282, Your Honor.

THE COURT: So that would be in evidence.

MR. HANSEN: Subject to the same reservation.

THE COURT: That's my understanding.

MR. SCAROLA: I have no stipulation with regard to this. I have no objection.

THE COURT: Why don't you guys come on up, then.

SIDE BAR CONFERENCE:

THE COURT: I gather when you say subject to the same reservation, you mean that it wouldn't affect your ability to move for a directed verdict.

MR. SCAROLA: I have no stipulation with regard to this document. Have no objection.

THE COURT: You're not stipulating to preserve their right to move for directed verdict?

MR. SCAROLA: I am not stipulating to that, no.

MR. HANSEN: I think that's been submitted to the jury. He stood up previously and said we can let in anything we wanted.

THE COURT: I think it was anything referred to in his report.

MR. HANSEN: This is referred to in his report.

MR. SCAROLA: It was any analyst report. Specifically, I mentioned any analyst report. I don't believe -- I will tell you that the offering of evidence during the course of our case precludes him from moving for a directed verdict, but I'm not stipulating to those things.

MR. HANSEN: I have a solution, Your Honor.

THE COURT: Yes, sir.

MR. HANSEN: This document was on our Exhibit list, and there's no objection on the other side, so I don't believe there can be any prejudice. I will not offer it at this time, but I will show the relevant section. Since he's not objecting to it --

THE COURT: Based on the representation, as soon as we are in defendant's case you will offer it or it will be deemed automatically offered into evidence?

MR. HANSEN: Yes.

THE COURT: Any objection to that?

MR. SCAROLA: Yes. I don't think he should be showing documents to the jury that aren't admitted into evidence. He has to admit it into evidence and then he can show it to the jury.

MR. HANSEN: I can set it up as a hypothetical, but this is a waste of time. This is a document that will come into evidence. They previously lead us into doing this. There's no objection to the document.

THE COURT: Well, my recollection of the offer by Mr. Scarola was that -- was the analyst reports. I mean, I can tell you that -- well, I don't understand by putting it in evidence during their case you would waive the right to move for a directed verdict, but it's not like that's anything I've ever researched.

MR. SCAROLA: I'm going to solve this problem because I don't really believe that is the current state of the law. So if that's a concern, I will stipulate that offering this document into evidence by the defendants at this point in time does not waive their right to move for a directed verdict.

THE COURT: Okay. That's sufficient for your purpose. Great.

END OF SIDE BAR CONFERENCE.

THE COURT: We are back, and MS number 282 is in evidence.

(Defendant's Exhibit No. 282 in evidence.)

THE COURT: Go ahead, Mr. Hansen.

BY MR. HANSEN:

Q. Page 282, page six, note two, could we display that? Now this document is Sunbeam's 10-QA for the period of first quarter of 1998, correct?

A. Yes.

Q. But it was filed later on. It wasn't filed in March of 1998; it was filed sometime thereafter, correct?

A. Is this -- I have to look and see. This is the amended version?

Q. Yes.

A. So this is the one that was redone? This is the redone one?

Q. Correct. And it was filed after the plaintiff's side filed something called a 13-B.

A. I don't recall that.

Q. Can you tell --

A. That doesn't mean anything to me.

Q. What is a 13-B?

A. I don't know.

Q. Is there a filing one can make with the Securities & Exchange Commission when a particular person or entity has attained control over a corporate entity?

A. That's not a familiar -- I don't know what a 13-B is.

Q. But, at any rate, can you tell from this filing when this was filed?

A. Well, the filing on, it says it's the amended because it has amended.

Q. If you go to the second to last page, it might help.

A. I believe that was done -- the original one would have been done after March 31st after the quarter closed in the first place. And this was done, I believe it was late in the year or the next year.

Q. Look at the second to the last page, if you will, where it says --

MR. SCAROLA: If I may, it's on the cover.

THE COURT: It's both places. We just have to direct the witness's attention to either one.

THE WITNESS: I was trying to find the cover, because it seems to me it ought to be there, and I'm sorry, I'm not seeing it. Oh, November 4, 1998.

BY MR. HANSEN:

Q. Actually, if you go to the back page, there's a date when it was signed by the CFO. That's November 25th.

THE COURT: I want to make sure we're all looking at the same thing.

MR. SCAROLA: I'll stipulate it's November 25, 1998.

THE COURT: My only concern is the first page shows a filing date of November 25th as well, not some other date. I want to make sure we're all looking at the same version.

MR. SCAROLA: 11-25-98.

THE COURT: On the first and last page.

MR. HANSEN: We're all on the same page.

THE COURT: We're all on different pages, but we're looking at the same document.

BY MR. HANSEN:

Q. This was Sunbeam's effort to value the stock given to Coleman in the transaction at issue in this case, correct?

A. This was, yeah, this was a description of some of the aspects of that, yes.

Q. It says, "In exchange for 14,099,749 shares of the company's common stock and approximately \$160 million in cash as well as the assumption of one billion 16 million in debt," it says, "previously on March 30, 1998 the company," which is Sunbeam, "through a wholly-owned subsidiary acquired approximately 81 percent of the total number of then outstanding shares of common stock of Coleman from a subsidiary of MacAndrews & Forbes Holding, Inc., M&S." And then it continues on. That's the transaction, correct?

A. Right.

Q. Then it says, "The value of the common stock issued at the date of acquisition, which they put at \$524 million, was derived by using the average ending stock price as reported by the New York Stock Exchange composite tape the day before, the day of the public announcement of the acquisition. What is that, the New York Stock Exchange composite tape?"

A. Those are all the transactions that took place on this, the stock from all the different places that the New York Stock Exchange is doing business.

Q. And then it continues on, "Before on the day of the public announcement of the acquisition..." And the public announcement of the acquisition was March 2nd, 1998?

A. Date of the acquisition?

Q. Sound about right?

A. Yeah, it was approximately the first of March or end of February they announced it.

Q. So taking the New York Stock Exchange prices for Sunbeam stock?

A. That on the announcement.

Q. On the announcement date. Discounted by 15 percent due to the restrictive nature of the securities. Correct?

A. Yes, that's what it says.

Q. So is this an example of a liquidity discount being applied to the block of stock?

A. This would have all those things in it we talked about, yes.

Q. This was with the filing of the United States Securities & Exchange Commission?

A. Yes, it was.

Q. So there's a premium on making sure this is accurate?

A. Well, apparently not enough of a premium because the first time they got it wrong.

Q. And they corrected it to get it right?

A. They corrected it to get it right.

Q. This was at a period of time after Mr. Levin had gone and become CEO at Sunbeam?

A. Yes.

Q. Mr. Levin had been one of the executives of Mr. Perelman's companies before that?

A. That I don't know -- I don't know all the -- I focused on the 1996, '97 and first quarter '98 activities.

Q. And you hadn't focused on how many of the managers previously employed at Coleman Company were put into the Sunbeam company to run it?

A. No, I didn't, actually, no.

Q. We can take that down now.

Bankruptcy, Mr. Scarola asked you about bankruptcy, correct?

A. Yes, I think we talked about Chapter 11 bankruptcy, one form, one aspect of bankruptcy.

Q. And Chapter 11 is a chapter US Bankruptcy Code in which companies can go into bankruptcy and reemerge outside later as continuing companies?

A. They file for what's called protection from their creditors from the liabilities. So they suspend their liabilities, and then they reorganize themselves under the court's jurisdiction. The court dictates what they can and can't do, and negotiations of who gets what take place. And then, yes, they can, at some point it is likely and possible and likely that they will emerge from bankruptcy.

Q. And you were saying in your testimony last week how bankruptcy can actually be a good thing for shareholders as opposed to a bad thing?

A. If, in fact, it's viewed as a positive after a long series of negatives, it can actually be positive, depending on the situation, yes.

Q. And you've written in your book, have you not, that the leading cause of bankruptcy in companies in America is management incompetence, correct?

A. I'm sure you could show that to me. I don't mean -- there's a lot of words in there, and I don't recall those particular words. If you found that, I'll --

Q. Does that not refresh your recollection that that's something you have concluded in your prior work?

A. If you tell me that you found it in the book, I'll -- I don't recall writing that.

Q. Well, is it true?

A. I don't know off the top of my head. I mean, I may have known at some point. I don't recall that particular --

Q. You don't recall that particular aspect of your academic work? Isn't it true you wrote in Corporate Financial Management, at page 840, that, quote, "Managerial inexperience and incompetence are the leading causes of corporate business failure"?

A. I suspect that's the case. There are a thousand pages in the book or 900 pages in the book.

Q. On the same page don't you write, "Lack of management experience, unbalanced experience or outright management incompetence caused 94 percent of business failures"?

A. I'm sorry. I've read every word of the book, but I don't have it all memorized.

Q. Now one of the documents that you identified at page three of Appendix B of your report as a document that you relied on in forming your opinions in this case was an analyst report by a man named Nick Hineman (phonetic). Do you recall that?

A. I can't say that that name is familiar. I remember Constance Manetea (phonetic) and Elizabeth Fontanelle. I mentioned William Steel, Scott Graham.

MR. HANSEN: Can I approach?

THE COURT: Absolutely.

THE WITNESS: What's the name?

BY MR. HANSEN:

Q. Nicholas Hineman and Lawrence Filer (phonetic).

A. I can look at the report.

MR. HANSEN: May I approach?

THE COURT: Yes.

BY MR. HANSEN:

Q. I'm going to hand you what we marked as Morgan Stanley 892. I'm going to ask if you recognize that as one of the reports that you relied upon in forming your opinions.

A. I don't remember this particular one, but that doesn't mean I didn't read it.

Q. That report does, in fact, talk about bankruptcy in reference to Sunbeam, does it not? On page two, in particular, before the bottom of the page.

MR. HANSEN: While Dr. Emery is looking at that, subject to the same stipulation, we'd offer 862.

MR. SCAROLA: No objection.

THE COURT: So 892 is in evidence.

(Defendant's Exhibit No. 892 in evidence.)

BY MR. HANSEN:

Q. If you could display the second page, third full paragraph and highlight that...

You recall reading that as part of your work, Dr. Emery?

A. No, I don't, I don't recall this particular.

Q. Do you believe it's not one of the items you listed?

A. No. I'm just trying to see if I have my Exhibit list. I'm not seeing my Exhibit list. I wanted to look and see where it was in the context.

Q. It's not attached to the back of your report?

A. It wasn't on the one copy, but it... This says August 7, '98?

Q. Yes.

A. No, my report covered the '96 through March '98 period, so, no, I did not look at this report at all.

Q. You sure about that? You sure it's not listed as one of the documents you relied on in your list?

A. If you look at Exhibit 4 of my report, you'll see that the ones that we focused on stopped March 24th. I think if you read the report, the last thing I said anything about was, I think, June of '98. This is August of '98. No, I don't -- this is -- I'm sorry. I think this is after the time period I was asked to look at.

Q. Let's see if we're -- do you have page three of four of your Appendix B? Go to page three of four on your Appendix B.

A. Page three of four. Okay.

Q. Got it?

A. All right.

Q. Go about halfway down the page where it reads CPH 132. Or, I'm sorry, 139.

THE COURT: Is this item in evidence?

MR. HANSEN: Let's put that down.

THE COURT: We need to be real careful not to display items that are not in evidence.

MR. HANSEN: Pardon me.

BY MR. HANSEN:

Q. 2178.

A. This one you handed me says 2179.

Q. Turn to the second page. You're looking at the first page.

A. Oh, I see the numberings.

Q. Document front page is CPH 1392172.

A. Apparently.

Q. On your list.

A. Apparently we did look at it, but that was after the time period for which I was asking to look at.

MR. HANSEN: Your Honor --

BY MR. HANSEN:

Q. Dr. Emery, very simple question. Was this a document that you used in forming your conclusions in the case as listed in your report.

A. Apparently that was, if there was not a typo, apparently it is something we looked at.

Q. You think there's a typo there?

A. I think typos occur.

Q. This is CPH 1392172. That's the first page, right? That's in your report, isn't it?

A. I understand that.

Q. And the finishing page is 1392181. That's the finishing page of this document?

A. I've studied error, and no matter how hard you try error does occur. And I am saying we probably did, yes, apparently list this. I can't say unequivocally that there could never be a mistake.

Q. And this is a Sunbeam --

A. I know that this report happened after the period of time I was focusing on in writing the report that you saw of mine.

Q. And this is a Sunbeam analyst report of the type you talked about Thursday and again today?

A. Yes, it is. It's outside of the time period.

Q. Let's go back to the paragraph before, the third paragraph on page two.

A. Page two is not listed as having been relied on.

Q. This is a beginning Bates number; this is an end Bates number, correct, Dr. Emery? It's a starting page and ending page on your report, isn't it, Dr. Emery?

A. I'm sorry. You're right. Let me just -- no, you're right.

Q. Is it your testimony you only looked at documents by looking at the first page and the last page, is that what you're suggesting?

A. What's that?

Q. Are you suggesting to our jurors when you looked at documents, you only looked at the first page and last page and the between pages weren't looked at by you?

A. No, you look at the page that was listed. I was trying to look at that. The footnotes, when I put together the report, the footnotes refer to the specific pages. And this is a different format. I and apologize for not using the same format in both cases, but the footnotes, so that I could reference them, were put on a one page, one number for each page that we actually had something we were referring to.

Q. So are we now clear that this document, including page two, is a document that you relied on for your work?

A. Yes, we are.

Q. By the way, if it comes from CPH, does that mean it was produced to you from your client, Coleman (Parent) Holdings?

A. Yes.

Q. Now here this analyst writes, "It is vitally important that investors understand the distinct difference between the ongoing viability of Sunbeam as a company and the increasingly probable possibility that as a common shareholder today future participation in SOC..." SOC is the ticker symbol for Sunbeam?

A. SOC is ticker.

Q. "... future, given its fairly extreme overleverage and rapid deterioration, in taxable net worth are two totally distinct situations. Furthermore, we find it ironic that SOC's second largest shareholder, Ron Perelman, could end up financially better off if SOC were to enter Chapter 11 than if he had been successful selling Coleman to SOC or Sunbeam at a significantly lower noncash price as he originally attempted late last year. Were SOC or Sunbeam to enter bankruptcy today, Mr. Perelman could recognize his presently large but unrecognizable paper. Then he could potentially use this loss to offset his earnings and gains in his other profitable enterprises."

Is that an example of what you were explaining to us the other day about how it could be positive for other shareholder?

A. No, that really wasn't what I was referring to.

Q. Couple of other terms, Dr. Emery, I'd like to see if you could help us with. Could you help us with the term beneficial ownership? What is that?

A. In what context? That doesn't ring a bell off the top of my head. Have you got a context for it or something I wrote?

Q. Not something familiar with you, beneficial ownership?

A. It doesn't ring a bell.

Q. If a corporation owns a particular piece of property but all of the shares of the corporation are owned by one human being, is it said in the business community that the human being has beneficial ownership of the property, that it's actually held in legal title by the corporation?

A. I'm sorry. I don't recall that phrase, no.

Q. How about line of credit, is that something you could help us with? What is a line of credit?

A. I could help you with a line of credit. Actually, I couldn't help you with a line of credit. I'm sure your credit is good, though.

A line of credit is simply an available loan that goes up and down that if you're a company, you can go to the bank and borrow more money on a moment's notice. Actually, it's, in the last number of years it's become much more familiar because there are many individuals who also have lines of credit. In particular, especially equity lines of credit on a house. It works in a similar way. The arrangements are made ahead, and then they do what's called drawdown or draw against a line of credit.

Q. How about a debt covenant? Can you help us understand with a debt covenant is?

A. Yes, I can. A debt covenant is a particular item in the bond indenture, which is the contract under which a bond is issued. When the bond is issued, there's a complete contract. It's called the bond indenture.

And the covenants -- a covenant is one particular aspect within that. There are positive covenants and negative covenants. Positive ones require some action. Negative ones restrict against an action.

Q. So, for example, just taking the example there, if I were someone who had a large loan outstanding, might there be a covenant or a part of the term of the bank that said if I earned any additional cash, some or all of that cash would have to be paid back to the bank before I use it for something else?

A. That would certainly be a possible covenant.

Q. How about the idea of pledging stock? To what does that refer?

A. I think that would be very much in the collat -- fall in the collateral. We talked about collateral on Thursday, the idea that somebody would have an asset that if they defaulted on the loan, then the asset -- that's a mortgage kind of thing. And I think that's what that would be.

Q. So, in other words, if I had a very valuable piece of -- a car, for example, and I wanted to get a loan, I might have to tell the bank, you could keep my car as collateral for my loan?

A. Right.

Q. Would it also be true if I had shares of stock, I could go to the bank and say I have these valuable shares of stock; please hold these shares of stock; I'm pledging them to you so you make the loan?

A. Precisely.

Q. If I defaulted or didn't pay, the bank would sell my shares to satisfy the debt?

A. Yes.

Q. Or on the subject of debt, is discharging debt analytically different from getting a cash payment? I'll give you an example. Let's say I owe \$50 million to somebody. That's case one. And someone comes in and says, you know, if you'll do something for me, I will pay off your loan, you won't have that loan anymore versus somebody gives me \$50 million. Are they functionally the same?

A. Conceptually, they're exactly the same.

Q. They'd both be income to me in that hypothetical?

A. Right. Meaning that all the -- all else equal.

Q. All else equal, that Latin phrase.

A. Right.

Q. Getting the benefit of debt is as much a benefit to me as getting \$50 million cash?

A. Right.

Q. How about the issue of forward looking statements. Is that a concept you deal with in your work?

A. Yes.

Q. What are those?

A. We talked about pro forma statements where you look ahead. Forward looking statements are statements which involve some or all projections, expectations. These are things we looking toward. Frequently they also come with a disclaimer that says these are forward looking statements, and you can't rely on them. So it's kind of a, there's a tension between here they are and this is what they say, but you can't rely on them. It's an interesting sort of a tension between the two.

Q. And that's something provided for under the federal securities laws?

A. Yes.

Q. Certain different treatment for forward looking statements versus past historical statements?

A. Yes, um-hum.

Q. How about the issue of an entrepreneur? Is that something you study in your work as a business professor?

A. Certainly we talk about entrepreneurs. There's a bit of sort of a popular image to that. It's not a formal term as much as it is an entrepreneur is somebody who typically we think of them as being very creative in terms of creating new businesses, start-up companies. Those are the types of people we might label entrepreneur.

Q. Is that something you study, the decision making of entrepreneurial individuals?

A. It's certainly -- there are a lot of -- there may be some specifics that I haven't studied closely, but there's a lot of overlap because it's still a business decision. There's still a lot of financial aspects to it.

Q. You told us about proxy this morning, but I wanted to ask just a couple more questions about that, the proxy where you as a shareholder give the right to vote your shares to another person.

A. Right.

Q. Often in the corporate context the right is given by the shareholder to management, incumbent management?

A. That's typically true.

Q. Is that typically referred to as a vote of confidence by the shareholder that the shareholder believes the manager is being a good steward and is allowed to vote the shares?

A. I think. In some cases it can be positive. I view it more as a not negative. I mean, in other words, I think when people are frustrated or people have lack of confidence, they withhold, they may withhold. It's certainly not negative. Sometimes it's a little more routine. I think sometimes investors who are small shareholders check that box, and they haven't really thought about it. So for some of the investors, it's less a thinking thing than a mechanic thing. But it's certainly, it's not negative.

Q. How about for a big investor? Take a Warren Buffet or somebody who was influence --

A. I think it's much more likely he would think about it, and it would be more likely to be viewed as some positive, have a positive aspect to it.

Q. A signal of confidence to the management in the public markets?

A. Yeah, I could view it that way.

Q. So when Warren Buffet happens to be a substantial shareholder in a company and he gives his proxy to the management, that would be viewed positively by the stock market as a vote of confidence to the management?

A. I can't imagine how it would be viewed negatively. As I say, more or less positively depending on the circumstances and some of the particulars, but generally.

Q. Would it be usual for a large shareholder on the order of a Warren Buffet to give a proxy to management where that shareholder believed management had defrauded him?

A. I think that then we're getting into a lot of very specific things where I'm not as comfortable agreeing with you.

Q. Just use my hypothetical. Do you think it would be usual using your business experience or experience teaching for a large shareholder to grant the right to vote that shareholder's shares where the shareholder held the personal view that management had defrauded him?

A. I can imagine it happening. I -- Again, I think the bottom line is the specifics. You'd need specifics to say whether that was particularly odd. It doesn't seem -- I guess I could see how you would say that it doesn't -- it seems somewhat incongruent.

Q. Just trying to figure out where you come out on this. Simple hypothetical. I'm a big shareholder.

A. Hypotheticals are never simple.

Q. Let me just give you one, see what you make of it. We go back to my company A example, and say I'm a 20-percent shareholder in company A, and I learn that the CEO of company A has lied to me and cheated me and caused to put me in substantial jeopardy of losing my investment.

A. Right.

Q. CEO comes to me after I've learned all this and says I want your proxy so I can vote your shares to, A, do what I want to do at the shareholder meeting and, B, vote myself a very large pay package. You would view that as an expected ordinary thing if I were to grant that proxy?

A. I didn't say I would agree it was an expected and ordinary thing. I said I would want more information to be able to say for sure that it was as it appeared, that it was negative.

Q. Well, no, but we're not fighting the hypothetical here. That is the hypothetical. For present purposes I would like you to accept my hypothetical. No additional facts.

I know I've been defrauded, and the management is asking for my vote. In your experience, given your expertise, you're saying it would be an ordinary thing for me to give my vote to management?

A. No, I did not say it would be an ordinary thing. I said it has happened, and I would want to know more about the situation to know whether I thought that something silly or stupid had been done.

Q. An event study. You talked a little bit about how information moves stock market. You remember that testimony?

A. Yes.

Q. It's not true, is it, Dr. Emery, that you could simply say, well, there was some bad news and stock moved, so, therefore, there has to be a direct relationship between news and stock price movement, correct?

A. It is the case that there are situations where a professional judgment could be made that in somebody's judgment, yes, they -- information items are connected.

Q. But there are many many causes of what moves stock prices, correct?

A. Correct.

Q. In other words, bad news could be one cause?

A. Correct.

Q. So could the inflation in the Far East, correct?

A. Well, that's correct.

Q. So could terrible weather in Malaysia, correct?

A. That's correct.

Q. So isn't it true a professional that does evaluation work doesn't just say, well, there was a bad report on Tuesday; the stock price fell Thursday; therefore, the stock price drop is attributable to bad news? Doesn't the professional say we have to do something called an event study?

A. No, an event study involves a particular event that happens across many different companies. So you're talking about what happened in one company. When we do event studies, we collect 200, 300 different companies that had the same item like dividend announcement. And that -- those dividend announcements might have taken place over a five-year period, ten-year period. We align those in time. And then after we align those in time we talk about the day before, the day of and the day after in particular. And we do everything according to that. And then statistically we average the two or 300 items and their stock price movements. That's what we do in an event study.

I believe what you're thinking about is in a one-stock case you well might benchmark what the return should have been for the day, so there are a number of different benchmarks you could use. If I watch a stock that drops 25 percent in the day, unless that day were October 19th, 1987, I know the market didn't drop that much. And I know that statistically that was in excess. And so I feel confident in saying that the information was connected to, that is, the price drop was connected to the information.

You can benchmark it in other ways. There's what we call a capital asset pricing model. And in that model we look at benchmarking according to the risk of that individual security, and then we make an adjustment. We don't just simply take the pure change of the market. We adjust just that for what would have been expected in connection with that stock. You don't do that in an individual stock case event study. You do that in a benchmark.

Q. Is that true -- Let me give you a hypothetical here. Today is Monday. Our stock is at \$10. I announce I'm not going to earn as much money in company A as I thought we were going to earn. Stock goes to \$5 for Tuesday. Are you telling us --

A. You mean by the end of Monday or do you mean the end of Tuesday?

Q. Next day.

A. So that's two days.

Q. Closes at \$5 at the end of Tuesday. It's announced Monday. Are you telling us all that you can with confidence say that this \$5 drop in the stock price is solely the result of the announcement of the bad news?

A. No, I have to say this very carefully. I didn't say it was solely the result. What I would say is that that announcement -- and, first of all, I wouldn't look over two full days of trading. The reaction is generally quicker than that. I would be measuring from the day before until the close of that day. So the way I would say that, if I were to say that carefully, would be I believe that the information had a significant effect, not that it was the only thing that affected, but that it had a significant effect, that it was part of that drop, yes.

Q. Let me just change our hypothetical a little bit. We won't go much farther with this. Company A is company B's closest competitor. Company B has no such announcement on Monday. Company B goes from 10 down to 3 at the conclusion of Tuesday.

A. Okay. What you've now brought in is another benchmark, and that is another benchmark you could use instead of making an asset pricing model to say the S&P 500 or one of the other market indexes you could benchmark to another company in the industry that was similar enough, you would have various ways. For example, capital structure, market capitalization, total size of the firm. There would be a whole bunch of things we would do to match. But if you found a match, then that would be a benchmark. And in this case if you told me that that was the case, then you're right, I probably wouldn't conclude that the information had done that, because I'd be looking at a benchmark that would tell me that maybe there was something else, there was some other piece of information that affected both of them.

Q. So to end this sequence, one would have to know a lot more than just there's a bad piece of news in order for the stock price drop, to be able to isolate what the particular cause of the particular drop was on that given day, right?

A. To be as absolutely careful as possible, you might want to do that. In most cases we can look at something like that and say, no, it's reasonable to conclude that they're connected.

Q. Dr. Emery, is there a concept in finance known as oppression of the minority shareholders?

A. Oppression?

Q. Oppression, right.

A. Oppression. That's like a democracy.

Q. Well, if somebody has, say, 80 percent of the company and treats him or herself to more benefits from the company on a per share basis than the 20 percent shareholders, that's a bad thing, isn't it?

A. (Nodding head).

Q. Not getting into legal concepts, but that's disfavored in the world of finance; shareholders are supposed to be treated equally?

A. The minority shareholders would very quickly want to sell their stock if they didn't trust the larger shareholder.

Q. If, for example, in a merger where the shareholders are going to lose the shares they have in one company and get shares in another company, typically it will be the case, will it not, that the minority shareholders will get on a per share basis the same consideration as the majority shareholder, right?

A. Yes, some of the laws are designed to try to ensure that, just that very notion.

Q. That would be the expected thing, right?

A. No, actually there's lots of exceptions. The laws are designed to have that happen. Sometimes there is fraud.

Q. But sometimes things happen whereby either the majority or the minority get different kinds of consideration, say, for example stock and cash, but it still has to add up in a way that makes the package they get equal, right?

A. Well, there are cases of what's called green mail where individual shareholders may get bought out at a favorable price and, you know, that sort of stuff happens.

Q. Well, let's put that aside. Talk about the ordinary plain vanilla case where you're trying to do right by the minority shareholders so they get on a per share basis just what the majority gets. In stock and cash they'll have to get an equivalent package, correct?

MR. SCAROLA: Pardon me, Your Honor. Object as clearly beyond the scope of direct examination.

THE COURT: You guys want to come up?

SIDE BAR CONFERENCE:

THE COURT: Let me give them a break while we do this.

END OF SIDE BAR CONFERENCE.

THE COURT: It looks to me like you folks 13 need a break. The kitchen is only open another minutes, so if you want soda, coffee, snacks or tea, please feel free. Please don't talk about the case, and don't talk to anybody about the case. We still won't talk to you.

(Jury left the courtroom.)

THE COURT: This is Mr. Solovy's transcript back. I don't want to forget to give it back to him.

MR. SCAROLA: Your Honor, I have two concerns with regard to the line of questioning being pursued. First is that it is substantially beyond any area that was covered in direct examination. Secondly, Your Honor has imposed significant restrictions on our ability to be able to talk about the loss sustained by other investors, at least in this phase of the proceeding. And Mr. Hansen would clearly be opening the door to discussions of those matters that he has sought or that have been sought by the defendant to be kept out of evidence. So on both grounds we object to this line of questioning.

THE COURT: Okay. So as I understand it, there's an objection that it's beyond the scope of direct and also that it's not relevant at least in phase one. What's the response?

MR. HANSEN: I think we need to know what I'm going to do before they can object.

THE COURT: What's the response to the first objection beyond the scope of direct?

MR. HANSEN: This witness, Your Honor, was proffered as a witness to talk about corporate hierarchy, the interest of investors, what investors want, need, the relationship of investors to corporation, duties of corporation to investors. The only point I'm seeking to make here, Your Honor, has nothing to do with people losing money. It's this, and it's going to come up through many witnesses:

One of the ways we're going to be able to show valuation here is that Sunbeam and Mr. Perelman committed, through the Coleman Company committed on the board level that the minority shareholders, those 18-percent shareholders would get exactly what the majority shareholders got. And that was -- as Dr. Emery says that's corporate law. That's expected.

Okay. What use am I going to make of that? They got a package, but the package is somewhat different. That's where his expertise comes in. Because I can work through with him just by doing the math to come up with a per share value of Sunbeam that everybody at the time recognized was the operative per share value because in order to make the packages equivalent, that's what it had to be.

This witness is the right witness to do it, Your Honor, because he has expertise in the area. He understands the concepts. He's been offered by the plaintiff to do that. Indeed, at the opening Mr. Scarola grandiloquently said he'll be here and answer the defendant's questions, too.

This is not outside the scope. It goes to his core competence and will help the jury understand something which may be more difficult to explain through witnesses without his expertise.

THE COURT: I would sustain it as beyond the scope. Clearly at some point we need a much longer discussion about damages.

Why don't we take a break and we'll be back.

MR. SOLOVY: Thank you, Your Honor.

MR. SCAROLA: Can we have a current estimate as to how much longer?

MR. HANSEN: After that ruling, Your Honor, substantially shorter. So I may even be done. Five minutes.

THE COURT: So you'll take about 20 minutes?

MR. SCAROLA: Yes, Your Honor.

THE COURT: So we plan on getting Mr. Maher on the stand today?

MR. SCAROLA: We'd like to start him.

(A recess was taken from 3:53 p.m. to 4:01 p.m.)

THE COURT: Are we ready?

MR. SCAROLA: We are, Your Honor.

THE COURT: I thought we could talk about scheduling.

MR. IANNO: We need Mr. Hansen.

THE COURT: Okay.

I thought we could take 30 seconds and discuss scheduling before we get the jurors back. We can do the motion to compel compliance with notice to produce either right after court today or my 8:30 is off. I have an 8:00 o'clock for a half hour that I think really is a 15-minute, so I expect I'll have a half hour between 8:15 and 8:45. We could do this then. The other thing I want to tell you is I see I have a three-hour hearing on Friday morning that cancelled from 9:30 to 12:30 so I think we can plan on being here. We haven't done Dr. Nye. It strikes me that also would be an opportune time to do the objections to Morgan Stanley's deposition designations if we haven't done that already. Okay?

MR. SOLOVY: Fine, Your Honor. I would, myself being a night person, I would prefer to do our motion tonight than in the morning.

THE COURT: It looks like it's fairly straightforward.

MR. HANSEN: I don't think we've read it.

MS. BEYNON: In the production of the experts? I think we can do that today.

THE COURT: This is just a consultant.

MS. BEYNON: Correct.

THE COURT: Your expert consultant.

MR. HANSEN: If Miss Beynon is prepared to do that, that's fine. Will we suspend at 5:00 o'clock?

THE COURT: Unless we suspend beforehand.

MR. SOLOVY: Then we have this other deposition designation motion.

THE COURT: That we'll do Friday, that and Dr. Nye. I just know we have three hours on Friday, and I'd rather do that than keep the jurors hanging on one of the trial days.

MR. SOLOVY: I agree, although we can come in at 8:15. We can't move forward with the deposition designations until we get that thing out of the way.

THE COURT: Do we want to try to make an attempt at 8:15 on that?

MR. SOLOVY: I'd like to.

THE COURT: There are different categories. To the extent we have to do specific objections to designated testimony, maybe we could do that Friday morning.

MS. BEYNON: Your Honor, I've only had a chance to quickly review their motion, but it appears to me as though the witnesses they're addressing are ones on which we haven't had an opportunity to submit our objections to your counterdesignations.

MR. SOLOVY: That isn't the point of our motion.

THE COURT: I think what we're talking about is -- I mean, I read it only quickly, but it looked to me like what they're objecting to is the -- you're presenting some witnesses by deposition testimony, and there are three or four different

categories. Some of them, you know -- And I think analytically we can probably talk about the different categories tomorrow morning even if we don't get everything resolved.

MR. BEYNON: Could we know which categories you wanted us to address, Your Honor?

THE COURT: I think all the categories analytically. Then we can decide once we have the analytical framework whether that's enough for me to rule on certain categories or do we need the fuller hearing.

MS. BEYNON: We can be prepared to address that.

THE COURT: So we'll do that tomorrow morning at 8:15, and we will do the Request to Produce after we send the jury home today. Okay?

MR. SOLOVY: Thank you.

THE COURT: Are you ready for the jurors, then?

MR. SCAROLA: Ready. Do we have more cross?

MR. HANSEN: We do.

THE COURT: Okay.

MR. HANSEN: Won't be long.

(Jury entered the courtroom.)

THE COURT: Come on in and take your seats.

I'm still waiting for snacks, but that's okay. I know you'll be comfortable soon.

JUROR #7: That's next week.

THE COURT: Next week when you're really comfortable.

And, Mr. Hansen, you had a couple more questions.

BY MR. HANSEN:

Q. Very briefly. Dr. Emery, there's a couple more things I'd like you to explain, if you could. Is there something called a warrant in finance?

A. Yes.

Q. What is it?

A. A warrant is a class of security that falls under the identification of a derivative. A derivative derives its value from other financial securities. And a warrant is such a security.

Q. So it's effectively a right to buy a share of stock at a stated price, for example?

A. It's -- Another way to view it is it is a long-term option. An option is a right to buy a stock at a certain price for some period of time.

Q. So if you had a warrant to buy GM stock at \$5, say, that -- for some period of time, you would have the right or the option to exercise the warrant, buy the share of stock for \$5?

A. Correct.

Q. And the right itself, the right to buy the share, the warrant would itself trade on an exchange and have a value?

A. That's correct.

Q. Another concept I hope you can explain for us is the concept of hedging. That's the subject of some of your writing, is it not?

A. It is.

Q. What is hedging?

A. Hedging is when you take a countervailing position to the position you have. So a position is -- you may own some asset, and hedge would be that you would take another position that would cover the movement in the value of the asset you own. So, for example, insurance can be viewed as a hedge.

Q. Maybe to use an example to make it easier for me to follow, let's say, use our block of \$500 million worth of stock. Now \$500 million worth of stock but it's unregistered, and it's locked up in my example. Remember the example?

A. Yeah, yeah.

Q. But it will move, the market price may move up or down as we move forward in time, correct?

A. Correct.

Q. Would there be a way through hedging that you could protect against that?

A. There may well be.

Q. How could you do that using my example?

A. If there are market traded instruments which you can find, you could, for example, purchase a put option?

Q. A put option.

A. Yes, a put option is the right to sell. We just said the right to buy. A put option is the mirror image, the right to sell.

Q. So, in other words, in our example, you can in the marketplace buy a put, which is the right to sell your \$500 million block for \$500 million for some period of time, correct?

MR. SCAROLA: Objection; relevance; beyond the scope of direct examination, Your Honor.

THE COURT: Sustained on both.

BY MR. HANSEN:

Q. How would the put work to hedge this investment?

MR. SCAROLA: Same objection.

THE COURT: Sustained.

BY MR. HANSEN:

Q. How does the put work generally in order to hedge against the position in and stock?

MR. SCAROLA: Same objection, Your Honor.

THE COURT: Sustained.

MR. HANSEN: No further questions.

THE COURT: Do you have any questions, Mr. Scarola.

MR. SCAROLA: I do, Your Honor. Thank you very much.

REDIRECT EXAMINATION

BY MR. SCAROLA:

Q. Dr. Emery, I want to begin by asking you some additional questions about the Barron's article from May of 1997. Did you have a copy of that in front of you?

A. I believe that should still be here. I was going to say...

Q. Mr. Solovy has corrected me again. June 16, 1997.

A. Okay.

Q. Okay. Now this is the article that in cross-examination was characterized as containing, I think they were called red flags. Do you recall that?

A. Yes. That's what I believe Mr. Hansen referred to, yes.

Q. Now we know from the established facts in this case that Morgan Stanley began as the investment bank for the company referenced in this article, Sunbeam, two months before June of 1997 in April of 1997. Now accepting those facts to be true that Morgan Stanley was serving as the investment bank for Sunbeam when this Barron's article came out, is that the kind of information that an investment banker working for Sunbeam would take special note of?

MR. HANSEN: Objection; leading.

THE COURT: Sustained.

BY MR. SCAROLA:

Q. What, if any, impact -- better still, in whose face would the red flag be waving in June of 1997 if Morgan Stanley was working as the investment banker for Sunbeam at that point in time?

A. Well, certainly anybody in connection with the case would be interested in this article and want to take it into account. I think that's what we said.

Q. All right, sir. Now we also know that the very first contact between Sunbeam and CPH was in actuality the end of December 1997. You told us during your direct and cross-examination that there were some things that were typical in terms of an investigation that would be done when you are contemplating a business transaction with another corporation. Would it be typical if one company is purchasing the publicly traded shares of another corporation for the purchaser of the publicly traded shares who has no intent to operate the company whose shares he's buying but simply to be a minority shareholder, would it be typical under those circumstances for the purchaser of publicly traded shares to go back and read six-month old Barron's articles?

MR. HANSEN: Your Honor, I object to the leading and Mr. Scarola testifying.

THE COURT: Sustained. And why don't you rephrase it. Let me ask you do you mind having Mr. Scarola there, or do you want him back at this podium?

MR. SCAROLA: I can actually move. I'm happy to move.

MR. HANSEN: No, it's fine for us. Whatever is more comfortable for him.

BY MR. SCAROLA:

Q. To what extent if any, would a typical due diligence investigation on behalf of a corporation that was purchasing publicly traded shares include reading six-month old Barron's articles?

MR. HANSEN: Objection; leading and foundation.

THE COURT: Overruled.

THE WITNESS: As I said, there's a lot of information out there. There are variations of that information. This would be information that may have been discounted at the time. It was information that turned out to be correct, absolutely correct. The market apparently didn't seem to be listening to it carefully because it was as a consensus thinking elsewhere. I would take this to be information that had been largely discounted. People had seen it, observed it. And if you were an acquirer, you might have looked at it.

But even if you looked at it, I mean, it's in a mass of other things you would look at. And you're talking the balance of things, not going and finding one little piece and believing that one little piece.

BY MR. HANSEN:

Q. All right. One of the things I think you told us you looked at were the stock prices of Sunbeam.

A. Correct.

Q. Over the period of time that you examined, correct?

A. That is correct.

Q. I'm going to put up at this time --

MR. SCAROLA: And with Your Honor's permission, I want to move this a little bit closer so that this can be seen.

THE COURT: That's fine. I want to make sure the jurors can see as well. You want to put it up parallel to the -- this podium?

MR. SCAROLA: That might be fine. May I ask that Dr. Emery step down?

THE COURT: Sure.

BY MR. SCAROLA:

Q. We're really going to make you feel at home, although I don't know whether teachers continue to use these things. It's probably a laser pointer now.

A. Yeah, pretty much, that's what we're moving to.

Q. Do you recognize that document, which for the record, I've got smaller copies, Your Honor.

THE COURT: We're going to mark it for identification?

MR. SCAROLA: Yes.

THE COURT: Are they premarked or not?

MR. SCAROLA: This is CPH trial Exhibit 1296A.

THE COURT: This is for ID only. Thank you.

MR. SCAROLA: You're welcome.

(Plaintiff's Exhibit 1296A for i.d.)

BY MR. SCAROLA:

Q. Tell us, if you would, Dr. Emery, what CPH trial Exhibit 1296A is.

A. This is a graph of stock price. You see over here this tells you what the stock price, it measures the stock price, \$10, \$20 \$30, \$40, \$50. And each bar is a day, a day's price. The price you see is what's referred to as the closing price. And that's the last transaction in the day before the market closes.

For well-traded stocks, it might be a second or close before it closes. So this is right at the end of the trading day the last trade. So on July 18th, '96, the stock price end of the day was, what is that, 18.70 or something, 75. We also have the numbers.

Q. All right, sir. I want you to find on that chart for us the day the Barron's article we have just been talking about was published, June 16 of 1997.

A. June 16 of '97. Let's see. It's a little hard to read which is -- what day of the week was it? What is June 16?

Q. I can't help you with that, but perhaps some smart person in this courtroom will work that out for us.

A. June 16, is that Monday or is that --

Q. We'll find out.

A. We have to look up which day of the week. But it looks to me like it would be somewhere in here in this particular week of trading where those five closing prices start -- it's probably easier to read it off --

Q. As you assumed, we have a calendar here, and June 16 is indeed the Monday of that week. The 18th is the middle day of the week, and that's -- so these are all, these dates are all marked on the middle day of the week.

A. So Monday's price.

MR. HANSEN: I don't know if Mr. Scarola is testifying or asking a question.

BY MR. SCAROLA:

Q. I want you to assume, Doctor, that, in fact, June 16 was a Monday. And we'll establish that as a matter of evidentiary record a little later. But assume June 16 is a Monday. And I want you to assume if you're able to do this that the 18th is a Wednesday, and the 18th is the middle date that is marked down at the bottom of the chart.

A. Right.

Q. Okay. Now can you tell us, please, based on the information we have in front of us what happens to the stock price when the Barron's article is published on June 16, Monday?

A. Well, if there were any leakage of information, and sometimes there would be in such a thing, if you look back starting the Friday, from Friday to Monday, Monday's closing price is higher than Friday's closing price.

Q. And Tuesday's price?

A. Tuesday's price is still higher; Wednesday's price is higher yet; Thursday's price is even more higher; and Friday is the, actually the highest close within a, quite a period until, I think it's August, two months later when it actually reaches that higher price again.

Q. Okay. Now as has been pointed out, there may well have been other factors going on in the market that could have influenced that stock price, correct?

A. Correct.

Q. But one thing we do know is that whatever else was going on, this article was not perceived by the market to be serious enough.

I'm going to stop and withdraw that question and rephrase it because I see Mr. Hansen standing?

MR. HANSEN: Your Honor, I would object to the continued leading. I don't want to get up every time.

MR. SCAROLA: That is a leading question and I'll rephrase it.

THE COURT: Okay.

BY MR. SCAROLA:

Q. What does that observation regarding stock price before and after the publication of this Barron's article tell us about how seriously Wall Street viewed the information contained within this Barron's article?

A. I certainly don't see anything happening there. I thought the article had said, the article itself said very nicely Wall Street's not paying attention to this. Wall Street is thinking things are fine.

Q. Okay. You can resume your seat again, if you would, please, Doctor. And we'll leave that there. We may need to refer to it again unless --

MR. SCAROLA: Is that in Your Honor's way?

I can move it back.

THE COURT: I can't see Mr. Ianno, but that's okay.

Thanks.

BY MR. SCAROLA:

Q. Dr. Emery, you told us that it was not at all unusual for analysts to include both positive information and negative information in analyst reports, correct?

MR. HANSEN: Objection; continued leading. I object to having to stand up and object to this all the time.

THE COURT: I understand your concern. Sustained.

MR. SCAROLA: It is merely a predicate for the next question, Your Honor.

THE COURT: I understand that.

MR. HANSEN: Objection. Quibbling with the ruling, Your Honor.

THE COURT: Go ahead, Mr. Scarola.

BY MR. SCAROLA:

Q. I would like to take a look at Morgan Stanley 199, this June 16 Barron's article. And let's look at some of the things that were not previously read, beginning with the first paragraph of this article. And read along with me, if you would, please. Could we get that larger if we could? Even if you need to zoom in on the document so that we're not looking at the whole document. We'll begin reading while they're working on the technical aspects.

First paragraph, "Why do I keep doing corporate restructurings when I have more money than I know what to do with?" Albert "Chainsaw Al" Dunlap booms in his Delray, Florida office." Going down to the beginning of the next paragraph, "Indeed the 59-year old Westpoint graduate is riding high. Since he took over as CEO of Sunbeam last July its stock has tripled from 12 to a recent 37 boosting the small appliance maker's market capitalization by over \$2 billion."

Is that good news or bad news?

A. It certainly would be positive.

Q. Okay. Move on, if you would, please, down to the second to last full paragraph, which reads, "But Dunlap achieved icon stature on Wall Street only in 1995 by receiving..." excuse me. "...by reviving money-losing Scott Paper in less than two years and selling it to competitor Kimberly Clark for \$9 billion, three times its market value when he took over. He personally made more than \$100 million on the deal."

Would that be viewed as a positive, neutral or negative statement about Sunbeam?

A. Certainly his past success people would be thinking, well, you know, can he do it here? Yeah. He has a history of doing it.

Q. Let's turn to the next page, page two, the middle of the page, a paragraph that begins with a quote from Mr. Dunlap. It says, "The best is yet to come for shareholders, Dunlap insists. Analysts' earnings estimates run as high as \$1.55 for this year and \$2.25 for '98." Favorable, neutral or unfavorable as far as Sunbeam is concerned?

A. Again, it's as I testified before, the overall consensus was quite positive. The analysts were projecting growth and higher earnings.

Q. All right. There is, then, a statement below that at the end of that paragraph that was previously read to the jury. It says, "There are a lot of shorts in Sunbeam now, but I wouldn't short me. That's a gamble I'd hate to take."

Do you remember discussing that with opposing counsel?

A. I do.

Q. Let's go on to read the next two sentences. Excuse me. The next sentence. "Indeed, it's perhaps foolhardy to gain-say Dunlap despite his shameless self-promotion. In the past he has delivered the goods."

Bad thing for Sunbeam? Neutral thing for Sunbeam? Good thing for Sunbeam?

A. Certainly positive about him and what he's accomplished.

Q. Down to the bottom of that page, please, second to last sentence, read along with me. "Moreover, it remains to be seen whether he can meet the extraordinary growth targets he has set, an acknowledgment that Mr. Dunlap may very well be pulling off a genuine turnaround."

Neutral statement or unfavorable statement? Which is it?

A. I guess I would consider it to be fairly neutral. It's -- you know, who knows, you know. We're not betting -- we're raising questions, but he might do it.

Q. Okay. Let's go on to the next page, the third bullet point down after the review of concerns expressed by the author of this Barron's article, the following statement appears in the third bullet point, quote, "But Sunbeam denies any gimmickry." And the next bullet point, "Dunlap insists that Sunbeam will double total sales to \$2 billion by 1999, triple international sales to \$600 million and boost operating margins to 20 percent." Bad news for Sunbeam, neutral or good news?

A. To me, these are claims that are being said, wow, they're really great claims.

Q. So let's go on to the next page, if we could, page four, second full paragraph down, paragraph reads, "Be that as it may, Wall Street has embraced Dunlap's rosy scenario."

Now let's stop there for just a moment. Did your review of both the stock price charts and the analyst reports that you reviewed covering this period of time confirm, deny or fail to provide you any information as to whether that statement was true?

A. I believe that's what I testified was that the consensus was positive. This is certainly consistent with that.

Q. It goes on. It goes on. "One bull..." And let me stop there. We talked about bulls and bears. What is a Wall Street bull and what is a Wall Street bear?

A. A bull is an optimist, favorable, good times ahead. A bear is a pessimist, unfavorable, bad times ahead.

Q. So when we talk about someone being bullish on a company, what does that mean?

A. Very favorable on the company, thinking good things are going to happen.

Q. "One bull, Bear Sterns analyst, Constance Maneaty (phonetic)..." and I think that's one of people you mentioned earlier "...sees earnings of \$130.5 million or \$1.55 a share this year and \$190 million or \$2.25 in 1998, and analysts are already talking about \$3 per share in '99. Be that as it may, Wall Street has embraced Dunlap's rosy scenario."

Did your research enable you to form an opinion with regard to the accuracy of that statement?"

A. Well, that was one of quite a few that were favorable.

Q. Down to the next paragraph, second sentence, "Dunlap has an almost cult like following by virtue of his forceful personality and his stock's stellar past performances. And his structuring..." Excuse me. "And his restructurings typically generate juicy investment banking fees late in the game for recapitalizations or merger and acquisition activity."

Did your own investigation confirm the accuracy of those observations?

A. In fact, the author was exactly right on that one, too.

Q. Going down to the first sentence in the next paragraph, it reads, "In addition, Dunlap exudes credibility."

What did your investigation show you with regard to whether Mr. Dunlap's statements were being accepted by the investing community?

A. As I said, they were, they were being accepted as true.

Q. Let's go down to the last paragraph on that page and take a look at that. It reads, "For example, Sunbeam was hardly a terminal case despite Chainsaw Al's contention that, 'It would have gone under within a year if I hadn't come in.' Sunbeam had exhibited considerable earnings power under Paul Kazarian of Japonica Partners who had run it from 1990 to 1993 until a blowup with his institutional investor partners, Michael Price and Michael Steinhardt, lead to his ouster. The successful management team made some mistakes and was victimized by deteriorating fundamentals but, nonetheless, gave Sunbeam a raft of innovative new products for which the company is now taking victory laps."

Does that observation tend to contradict the belief that a genuine turnaround was possible at Sunbeam; is it neutral with respect to whether a genuine turnaround was possible at Sunbeam; or does it support the fact that a genuine turnaround was indeed possible at Sunbeam?

A. I think it reflects the same sort of thing I testified earlier about having some positives, some negatives, and all those reports tend to have that. In many ways they say they cover their bets. They overall may be positive, but they say some positive and negative things. And this is consistent with that view.

This author has said some serious questions about what's going on, but then in the next sentence seems to say, well, you know, yeah, maybe they're playing some games, but, gee, they have all these new products. So, you know, I take this as a mixed message, and that certainly is a positive statement.

Q. Let's turn to page eight, if we could. We are at a point in this Barron's article where the author has reviewed the concerns that he has regarding Sunbeam's accounting practices. And let's take a look at what Sunbeam responds to those concerns in the second full paragraph, the second full paragraph, page eight. Let's try the next paragraph which is the second full paragraph. It begins, "The indefatigable Kersh..."

"The indefatigable Kersh denies that any such motive lay behind the Sunbeam restructuring charge. Accounting regulations are strict on that score, and Al has always been vehement about our doing things the right way. We, in fact, have an internal audit team to make sure things are right and proper every quarter, he insists, pounding the table for emphasis."

Is that the kind of statement that the Wall Street investing community would view as raising concerns that the figures being publicly reported by Sunbeam are fraudulent figures?

A. No, it's a defense. It's certainly saying they're not.

Q. Let's move on with this report, if we could, Dr. Emery. And I want to try to finish up with you quickly here.

We talked about the fact that Morgan Stanley was Sunbeam's investment banker beginning back in April of 1997 when the Barron's article came out. What, if anything, does Morgan Stanley's endorsement of the Coleman/Sunbeam merger involving use of Sunbeam stock as consideration tell Wall Street in the investing community about whether Morgan Stanley was concerned about those alleged red flags?

MR. HANSEN: Objection.

THE COURT: What's the legal objection?

MR. HANSEN: No foundation; beyond the scope of opinion; leading question; compound question; irrelevant.

THE COURT: Overruled. You can answer it, sir.

BY MR. SCAROLA:

Q. Do you need the question repeated?

A. No. It's okay. Thanks. If you go back to what I said in the cross-examination, we talked about interpreting the information and what you think of that information and the point that, you know, this is something that people would look at, and you would look at carefully and I'm sure that Morgan Stanley as an investment banker involved in the transaction, involved with this company would also look at. And if people are supposed to look hard and careful at it, then I guess everybody should, not just one side.

Q. What, if anything, does Morgan Stanley's decision to be the sole underwriter of a \$750 million debenture offering with regard to the Coleman/Sunbeam merger tell Wall Street and the investing world about whether they believed that the red flags referenced in the Barron's article were matters of serious concern?

A. That article was public information and available to people. And as I testified, largely the investment community didn't believe the article. I guess the allegations in the article that we talked about, the negative allegations that actually came true eventually were not believed. And they would have been factored in when Morgan Stanley, as I mentioned I think the other day, Morgan Stanley when they decided to be the sole underwriter, that's a confident position. I mean, that's a signal to the market that, gosh, you know, they believe in it, they believe in the company.

Q. You were asked many questions on cross-examination about what would be typical with respect to due diligence. Is there a difference between what would be typical with respect to due diligence today and what would have been typical with respect to due diligence as it relates to a transaction involving publicly traded corporations, public corporations back in 1997 and early 1998?

A. If you think back to what we -- what I had said on Thursday about the environment changing and the fact that within the last several years we've had a dramatic number of fraudulent situations and scandals, and so I think that people are much more attune today to being exceptionally skeptical, exceptionally leery of people, of all of the aspects of it, but certainly accounting statements have become much more suspect in the last few years.

Q. Could you give us a working definition of due diligence?

A. The sort of background checking you would do to be comfortable that the things that someone is saying you've satisfied yourself to the extent that it's possible that those things are true, that those are -- obviously you can't ever remove all chance of fraud. But due diligence is the idea that you would do a checking to make sure that to the best of your ability, reasonable effort to make sure that things are correct, that things are accurate.

Q. You were going faster than I was able to keep up with you. But can you tell us whether I managed to accurately capture what you have told us in your testimony regarding due diligence.

A. Right. I think I used the phrase “to the best of their ability” also.

Q. Okay. Let's get that in also.

A. Reasonably, you know, it captures some of that, too.

Q. I want to talk very briefly just for a moment about the things that impact on what is reasonably necessary, what is typical of the due diligence investigation, and I want to be sure that we are talking about the kind of due diligence investigation that is not considered necessarily to be reasonable today, but I want to focus on what would have been considered to be typical and reasonable back in the 1997 first quarter 1998 time frame. Okay?

A. (Nodding head).

Q. First, would it make a difference in terms of the nature of the due diligence investigation you would conduct whether you were buying a company to operate it or simply buying a minority interest in a company that you weren't going to operate? Does that make a difference?

A. Well, as we talked about controls and control premiums, that's -- the larger stake you have, the more you're going to be concerned about being able to control things, and with that control comes responsibility. And so the level of due diligence would be greater because you would have more at stake if you were actually controlling it, operating it. So the larger your stake...

Q. To what extent, if any, does the fact that the company is a publicly traded corporation subject to federal regulation regarding its reporting requirements play in terms of what would per -- what would be typical in investigating the financial reports of that company?

A. I'm sorry. Say that again.

Q. Yes, sir. To what extent, if any, is the fact that the company you are contemplating buying shares in is a publicly traded corporation subject to federal regulation about the nature and accuracy of the reports that it must file?

A. Of course, as we said, the information has to be filed regularly. As a general rule, there's considerably more information available about a public corporation than a private corporation. And so by its very nature it can be harder. One could think of it in terms of being harder to hide things because they're public. There's available information.

Q. To what extent, if any, would the nature of the due diligence you would conduct on a company in whom you are buying a minority shareholder interest was audited by a respected accounting firm, what difference would that make?

A. Well, once again, there was more confidence in audited accounting reports at that time in history. And that would give you more confidence, and that would be part of -- you would accept that as part of your due diligence.

Q. To what extent, if any, would the source of the information that you were receiving make a difference? For example, whether the information was coming from someone who was a stranger and unknown to you as opposed to someone with whom you had been doing business for a decade and in whom you had built up a relationship of trust and confidence? Would that make any difference?

A. Well, I think that's a very normal thing in human relations where you get to know somebody, and, you know, you establish either a wariness or a sense of trust. As you establish a sense of trust, then you would be more likely to believe what they say.

Q. To what extent, if any, would it make any difference if you had contracted in written documents for specific guarantees that the information you were being provided was accurate, honest and complete?

MR. HANSEN: Objection. Misstates the evidence.

THE COURT: Overruled.

THE WITNESS: That would -- contracts and due diligence play sort of a combined role. If you've got contracts, you've got contractual clauses that protect you in certain ways.

And then the due diligence is another form. So they are -- it's just sort of one more aspect of protecting yourself in a transaction.

BY MR. SCAROLA:

Q. You were asked about due diligence typically including a review of interim financial statements. To what extent, if any, would it make a difference if in that same contract where your contracting partner guaranteed you the accuracy and honesty and completeness of its financial reports that contracting partner also was legally obliged to inform you of any material change at all that had occurred in the financial circumstances of the company? Would that make any difference in terms of what was typical to be required in terms of due diligence?

MR. HANSEN: Your Honor, this is all leading by Mr. Scarola.

THE COURT: Sustained.

BY MR. SCAROLA:

Q. Would the existence of a material adverse change clause in a contract have any impact upon what was typical in terms of due diligence?

MR. HANSEN: It's still leading. Doesn't cure it.

THE COURT: Overruled. You can answer it, sir.

THE WITNESS: The -- As I said a minute ago, they become aspects by which one controls the risk and possibility of bad things happening. And so that would certainly, a material adverse change clause would offer a level of comfort which could be viewed as part of the due diligence and serving as part of the due diligence.

MR. SCAROLA: Thank you very much, Dr. Emery. I may have no more questions if you'll just give me one second.

SIDE BAR CONFERENCE:

MR. SCAROLA: I don't want to be accused of usurping any of the court's authority. Is it the court's intention to remind the jury that if they have any questions, this is the time?

THE COURT: No, I don't do that. And we can talk about the procedure that's in the instruction at some point once we've sent the jurors home. It's my understanding we're not supposed -- to the extent possible, we're not coming back right On time. Once again, we appreciate it.

Are we missing something? Oh, we have them in the wrong order. Maybe we're just seeing if you're on your toes.

BAILIFF: That was a test, folks. Good job.

THE COURT: Okay. We're ready to continue. We're going to go back to Dr. Emery, then go back to Mr. Maher. Okay.

Dr. Emery, is he in the courtroom? Where is Dr. Emery? Is he outside?

VOICE: We're getting him right now.

THE COURT: Okay, great. Thanks.

Do you swear to tell the truth, the whole truth, and nothing but the truth?

THE WITNESS: I do.

THE COURT: Let me remind the jurors, don't draw any inference if a question is not posed to the witness, okay?

Sir, I have a list of questions I want to read to you and ask you to answer.

EXAMINATION

BY THE COURT:

Q. What activities are performed in order to report a cash flow forecast?

A. It would be a large -- there could be a fairly large number of activities that might go through. It would be common to look at -- to sort of start with what is called marketing research. And that would be to estimate what the market reaction might be to the product. We try to get a handle on estimation of sales. That probably would be broken down into various segments. And then those segments would be pulled out to an aggregate number. So you might have more sales in one area or another geographically, or from a market point of view.

Once you have what you think are sales, then you pull back and you start looking at expenses. The expenses will take on two general forms. One form is that of variable costs. Those are the -- or direct costs. Those are the costs that might go into the materials, the labor to produce the product or service. Other costs might be indirect costs or fixed costs. And these would involve things like having a building in which to sell things, having employees who do -- various support staff, but aren't directly related to selling the products.

Once you have that, that would give you what you might call free cash flow or a contribution margin, so -- to what you expect, and then subtract the fixed cost from the contribution margin. And that would give you an aggregate amount.

Now, from there, there are a variety of different directions you can go. One would be to the accounting side, in which case you would have a series of expenses, such as interest expense. From a financial analysis, largely what we would do is we would go to the cash flows, and we would go right to taxes. And the affect of interest cost would be taken into account in what we call the cost of capital.

Once we project those costs, those cash flows, after tax cash flows, once we estimate those, then we calculate present value of those cash flows. We talked about discounted cash flow analysis. And then that would be -- the present value would be what we would look at.

Q. Okay. Thank you, sir.

You focused and have obtained a financial profession, why did you not obtain a CPA qualification?

A. A CPA would be not an unheard of professional qualification for somebody in my position, but it would be quite rare.

A more common designation would be a CFA, which is a certified financial analyst. I don't hold that designation either. That designation is typically associated with people in the investments area, and I focus on the corporate area.

The credential that is uniform, essentially, for people in my position is the doctor of philosophy degree.

Q. As a financial advisor, when reviewing a profit and loss statement, what are the major elements also looked at in order to come to the conclusion that the company is either profitable or nonprofitable?

A. Essentially there are a number of different ways you can look at profitability. Some cases you would be looking at the accounting profit. So if the company is projected to be making a profit, that is, their net income is positive, there are some, especially lay people, who would look at that and say, look, they're making \$50,000 a year, that's positive. Therefore, they are making a profit. And that's one way to look at it.

In my discipline, we have a much -- I don't know what to call it, harder, more strident, stringent measurement. Our benchmark, our measure is we look at what do we think the company should be making, earning. So we might look at it and say, gee, we think this. company, based on the risk of the company and what other investments are out there, we think this company should be making \$400,000 per year.

Well, if they make less than that, we consider them to be below par. Even though they may be making \$50,000 a year, we would say, no, that company is not doing as well as we think it should be doing.

So our benchmark in my discipline includes what you would call an expected profit or a benchmark profit. So we measure from that. Whereas for tax purposes, in your experience as an employee, a day-to-day, a personal finance thing, yours would match the accounting view, which is, if it's positive, well, they're making a profit. So that would be the difference, general difference.

Q. What is the next step to validate that the dollars are true, quote, and sound, quote, in order to complete a business merger transaction?

A. That's much more difficult. In a general sense, in the case of a business merger, or almost any business transaction, the level of trust, it's almost like a personal relationship. I know it's arm's length and I know we talked about that, but if the trust is broken, if you don't trust the other side, essentially you don't engage in a transaction. I mean, people walk away from transactions all the time. I mean, there are -- well, we could do this and people get broken up.

In fact, in some cases you'll see a tension where they'll break up and then a third party will bring them back together. And that can happen a few times.

So in terms of what you do to check, you do what's reasonable to do in the circumstances. And it is situation-specific. I mean, there's not -- there's no general guidelines for how you learn to trust somebody. There are things that you do.

One of the -- one of the experiences I had years ago was, I knew a woman who was involved in a transaction. She was very unsophisticated. And in that transaction, part of the discussion she asked a very -- some very simple questions that the other people, who were more sophisticated, they never would have asked those questions. They would have taken it for granted. She asked the question -- and boy were they glad that she had asked those questions, because it turned out that there were some significant misunderstandings.

So in terms of bringing parties together, what you do, each party must do what it feels is necessary to satisfy itself. But in the end, sometimes there are things you just can't protect yourself against. You know, you can't find them out.

And so what's reasonable depends very much on the situation.

Q. In the event of a false finding from one of the parties, how typical would it be that the transaction to take place or be completed 100 percent, if at all? Would that bring the trust level down between two companies?

A. If I understand the question, I believe it certainly would affect the relationship. There's -- the remedies will vary.

Sometimes, if it's earlier enough in the process, if the ship hasn't launched, if the train hasn't left the station, if it's not been consummated, if it's not been formally put together, those are cases where people might walk away.

After it's put together, there's -- there are some incentives to try to get remedies to, to try to work things out. There are some situations where you might say, well, gosh, I -- if we were to pull away from this, it would be an embarrassment, it would be a major problem. Yes, you've done something wrong, but we're going to try and work it out.

So in that sense, again, back to a personal relationship, it might be like a problem in a marriage where you spend significant effort trying to work it out because you've already taken the steps. I mean, you're already on the train together, on the plane together. A crash would be a bad thing. So, again, it's quite situation-specific.

But the general rule about when you find out something and what you do about it would be the demarcation of you agree to go ahead with the deal, you actually consummate the deal, you're into the deal in some way. Because getting out of the deal, sometimes one party will say, I want out of the deal, things have changed significantly, I want out of the deal. And the other party will say, no, no, everything is okay. Legally you can't get out yet. It hasn't been so bad that you could get out. So there can be disagreements. Different ways to seek remedies.

Q. Are unaudited receipts reliable?

A. We think of them as being less reliable; although, you know, if you think of what's happened in the last five years, eight years, ten years, you think about the scandals that have happened, audited statements have become less reliable. So people have been fooled.

I would say they are more suspect. Unaudited statements are not necessarily unreliable. I mean, I can imagine situations where you would still accept the information, recognizing that they hadn't been audited. Again, it would go back to trust. The legal aspects, which I have no expertise in, that's not what I'm here for, but there would be a lot of those sorts of considerations that would come in.

Q. Okay.

In your opinion, is there any way First Boston could have known that Morgan Stanley didn't have accurate information if they looked a little harder?

A. As a general course, I think, again, if I go back to what's happened in the last few years, people who are a lot smarter than I am, people who are more knowledgeable, were more knowledgeable in the situation than I have been fooled.

If I go back to this situation, I did not study that aspect of it. So I can't say definitively somebody could not have found it out absolutely.

At the same time, it certainly, as I said a minute ago, there are things that can't be found out. And so the idea that you could easily find out, there's no way I would think of it as easily found out. I testified about the general consensus. We saw that there was some variation. There was a range of consensus, but the investment community, if you look at the stock price and you see it going up over this time period, I have -- I -- certainly there were a lot of people fooled about it. So there's no way that I would think that it would be an easy thing. I can't say it couldn't have been done, but I can't envision a way that, oh, sure, just do this and you would have been okay. I think it would have been difficult.

THE COURT: Want to come up a moment?

(A bench conference occurred as follows:)

THE COURT: I don't know that that implicated the instruction, because I don't think there was anything specific about this at all.

MR. HANSEN: I would move to strike the testimony as nonresponsive.

THE COURT: I wouldn't grant a motion to strike as nonresponsive, but I don't think it implicates the instruction.

MR. SCAROLA: I think it does, but if Your Honor doesn't believe --

THE COURT: That's fine. Okay.

(The bench conference ended.)

BY THE COURT:

Q. Sir, when did you, Dr. Emery, start your, his involvement with this case, start to finish, month, day, year?

A. I'm not positive about the day. I was contacted in, I think early -- it was early November. I want to say November 10th of the previous year, 2004. We talked back and forth about whether I would be willing to do the case, to do a report on this, whether I would be willing to be involved. There were a number of considerations. I had never done one of these before, and the truth is, I was really actually a little reluctant to commit to it because I had some other responsibilities and things, so I had to work out the timing to make sure that I would have the time to do the job.

I want to say probably it was a week -- maybe a week later. So maybe it was November 7th or 8th when we first talked, but it was probably about November 17th, 18th, somewhere in there, the point at which I said yes I would go ahead and be involved.

THE COURT: Thank you.

Mr. Scarola, do you have any follow-up questions?

MR. SCAROLA: Just one, Your Honor.

REDIRECT EXAMINATION

BY MR. SCAROLA:

Q. Dr. Emery, can you give the jury an estimate as to the amount of time you spent preparing to give the opinions that you have testified to today? What's the total amount of time that you spent on this project?

A. Today, to this morning?

Q. If you can give us an estimate through to today, that would be great. I'm trying to give the jury some ballpark figure as to the amount of time you've devoted to these tasks.

A. 150 to 200 hours is the range.

Q. Did you actually keep time records?

A. I did.

Q. Would you be able to give us an even more accurate figure if I were to give you the summary of those time records? Would that help you refresh your recollection?

A. I think what's probably at issue is what's happened in April and the things we've done in April.

THE COURT: Right now I just need for you to answer the question Mr. Scarola posed.

BY MR. SCAROLA:

Q. And that is, would it assist you in giving a more accurate response, would it help you refresh your recollection if I gave you a summary of the hours that you put in each month?

A. If you -- sure, I mean, that would increase the accuracy.

MR. SCAROLA: May I approach the witness, Your Honor?

THE COURT: Sure.

MR. SCAROLA: Thank you.

BY MR. SCAROLA:

Q. If you could take a look at that, does that refresh your recollection as to a --

MR. HANSEN: Impeaching his own witness.

The witness has testified, and this is an effort to impeach his own testimony.

THE COURT: Overruled.

BY MR. SCAROLA:

Q. Does that refresh your recollection as to a more accurate summary of the total number of hours that you put in?

A. This says 251.

THE COURT: The question is: Does that -- does that refresh your recollection or not? And that's a yes or no.

If it makes the light bulb go off and say, oh, I remember. If it gives you information that you didn't have before looking at the document, tell us it didn't refresh your recollection.

THE WITNESS: No, it didn't.

BY MR. SCAROLA:

Q. That's fine. So your best estimate is between 150 and 200 hours?

A. Um, that's -- that's what I would have said, but as I said --

Q. That's fine.

MR. SCAROLA: Thank you very much, Dr. Emery.

Nothing further, Your Honor.

RECROSS EXAMINATION

BY MR. HANSEN:

Q. Dr. Emery, you gave an opinion a moment ago about what CSFB could have known. You were asked a question about that. You were asked what CSFB could have done.

A. I recall the question.

Q. My question, sir, is: Wouldn't you have wanted to know whether CSFB in its own files had a copy of the Barron's article laying out the other things? In your testimony you said, laid out all the elements of the Sunbeam fraud, Morgan Stanley Exhibit 1006, CSFB production code.

And I'm going to ask you, sir, isn't that something you would want to know before giving an opinion about what CSFB would or could have known?

A. That would be part of the information. That would be part of the range of attitudes that were out there. I believe what I testified was there was a range of attitudes. And I tried to capture a consensus view in the investment community without picking out one particular article and saying after that, this is the one aspect I would look at. I looked at many things.

Q. If CSFB had right in front of it those aspects, it wouldn't have been hard to know at all if CSFB --

A. I don't know.

Q. In fact, CSFB, as you can tell from that article, had that information right in front of it?

A. I testified yesterday -- not yesterday, I testified Monday that, in fact, this information was out there, that it turned out to be correct. I do not believe that just seeing one article out after a plethora of articles that you could necessarily pick out one aspect and say, this guy has got it right, as opposed to 50, 100 or 200 other people looking at it. No, I don't agree.

Q. Let me just explore that for a minute. Let's say there are hundreds of articles out about a company and 99 of them say company is great, but there's one article that says this company is a fraud, and I'll tell you exactly why.

A. Right.

Q. Would someone doing an investigation need to focus on even that one out of 100 articles --

MR. SCAROLA: Excuse me, Your Honor, may we have a limiting instruction at this point in time, please?

THE COURT: Why don't you guys come on up?

(A bench conference occurred as follows:)

THE COURT: Any response?

MR. HANSEN: Don't believe the witness has yet given an answer that would implicate that.

MR. SCAROLA: Wouldn't need to look at the one article out of 99 in order to do a better job is the gist of the question.

THE COURT: I think we need to see what the answer is.

(The bench conference ended.)

MR. HANSEN: May I proceed?

THE COURT: Yes, sir.

BY MR. HANSEN:

Q. Do you remember my question, Doctor?

A. I believe I do.

Q. So my question is: If you've got 100 articles out there and 99 of them say, great company, love it a lot, but one of them says, look, people, this company is a fraud and here's why, they're faking this number, they're putting the numbers that should be in this year into another year, wouldn't it be necessary for somebody doing a competent, professional job to look for the problem to see whether there was a problem, as opposed to just saying, well 99 out of 100 people think it's a good company?

A. The analogy that I would give is that in 1995 there were people who said the market is going to crash. In 1996 there were the same. In 1997, '98, '99 and in 2000 there were people who said the market was going to crash. Now, in 2001

when we looked back, does anybody go back and check in 1996 that there was somebody who said it was going to crash? And the answer is, no, it's just history, so what.

But in 2000, ah, that there was somebody who said the market is going to crash this year and after the market crashed they appeared to know perfectly well what was going to happen. But that doesn't mean at the time you would have been listening to that particular person. And that's the analogy that I would give here.

If you've got 100 opinions out there. And after the fact you identify one that happened to be correct, if you go back and say, I could have known because this was the one that said. There have been so many things predicted in history that didn't come through. 9/11 is a great example of it. There were people who predicted 9/11.

Q. We're a ways away from 9/11.

Is it your testimony, sir, as an expert in finance that professionals purporting to conduct a diligence examination of a company could ignore specific information about accounting fraud within a company simply because there were other articles written about the company that said it was a good company? Is that your testimony?

A. I didn't -- I don't know what they looked at. I'm not testifying that they would ignore this. They very well could have read it, looked at it, pawed over it, and checked with other information and concluded, no, this isn't correct, the other is.

Q. But you'd have to follow up and look at it, wouldn't you?

A. I don't know that they didn't.

Q. We're not -- I know you said that. I'm just asking you, would you have to follow up these kinds of allegations and look at them?

A. You'd have to be there. This is something that is clearly situation-specific. And would I look at all the information? I would make every effort to.

Q. Sure. If you were there at the time and somebody gave you these kind of allegations that were in the Barron's article, you'd certainly check them out to see if they were true before advising your client to proceed with the transaction, wouldn't you?

A. I believe that I would do the things to satisfy myself, and that would include looking at all the information that I had available.

Q. With all respect, sir, I don't believe you answered my question.

Specifically as to the Barron's article information, if you were on the scene in 1998 in possession of those Barron's allegations about Sunbeam, would you please tell the jury whether you would have looked further into those allegations to see whether there was merit to them, or would you have ignored those allegations because there were other good things said about Sunbeam?

A. I believe that I would look at this information along with the other information to make a judgment about what I did next.

MR. HANSEN: And, Your Honor, we would offer 1006 subject to the prior stipulation and rules of court.

MR. SCAROLA: Objection, no proper predicate. Hearsay and no proper predicate.

THE COURT: Why don't you guys come on up.

MR. SCAROLA: Certainly.

(A bench conference occurred as follows:)

THE COURT: It's the same one we had. This is not in evidence.

MR. HANSEN: It's a different form, because this is CSFB's copy. This is in evidence.

THE COURT: What's the objection to just the photo?

MR. SCAROLA: The objection is that the suggestion has been made by way of questioning that this comes from CSFB's files. There is no predicate that it, in fact, came from CSFB's files. There's no predicate as to when or how it got in there. There's no predicate as to what, if anything, was done by it. All of that is done by suggestion of counsel's question.

THE COURT: We're talking about just this form.

MR. HANSEN: It's a CSFB production code at the bottom.

THE COURT: Again, I don't know that that would be sufficient. I can certainly tell the jurors it's the same article accepted into evidence. But if you're putting it into evidence just to show they have it, I do think the answer implicates the instruction.

(The bench conference ended.)

THE COURT: I'm sustaining the objection to that exhibit. But I will note for the record it is the same as Exhibit number 199 that was admitted into evidence yesterday.

And I have an instruction that I need to read you.

Let me instruct you again with respect to evidence about CPH's investigation or lack of investigation.

Under Florida law, the recipient of an intentional misrepresentation may rely on it without conducting any investigation of his own. However, evidence about the investigation or lack of investigation conducted by CPH may be relevant to your determination of whether CPH actually relied on the statements of Sunbeam and Morgan Stanley. That is, whether CPH made its decision based on these statements, CPH did not actually rely if it knew the statements to be false, if the falsity was obvious or if the information was simply disregarded.

Consequently, the evidence that you have just heard should be considered in determining -- should be considered by you only in determining the issue of reliance.

I may from time to time remind you of the limited purpose for which other evidence is admitted simply by telling you that this same limiting instruction on reliance applies to that evidence.

Okay?

MR. SCAROLA: May we approach the bench again, Your Honor?

(A bench conference occurred as follows:)

MR. SCAROLA: Your Honor, this is the document that is marked MS 1006 that's been referenced and in fact held up in front of the jury.

This is a complete list of all documents listed by the Defendant through yesterday evening, including all late-listed exhibits. Your Honor will note that this exhibit list ends at MS 1004. This document was never listed. It was-entirely improper to be making reference to it. And I would ask on that basis that the Court instruct the jury to disregard any reference to this article having been in CSFB's files.

MR. HANSEN: The response is the document itself is in evidence. This is simply a different version of it that comes from CSFB files.

THE COURT: Again, I understand what you're telling me. I can't make an evidentiary conclusion they had it at the time they did due diligence or not.

Two things, make sure neither side displays things to the jury that are not in evidence.

MR. HANSEN: I have not displayed it. I've handed it to the witness. I've handed it to counsel. I have not displayed anything.

THE COURT: That's fine.

MR. SCAROLA: I am requesting that any reference to this document having been included in CSFB's files be disregarded.

THE COURT: I would deny the request, but I will remind the jury that questions aren't evidence.

MR. HANSEN: Before we go, I would expect to ask the witness one more time, this does reflect that it comes from the CSFB file?

THE COURT: No, that would be inappropriate.

MR. SCAROLA: Thank you, Your Honor.

(The bench conference ended.)

THE COURT: Let me remind you, the content of a question is not evidence. What comes from the witness is the evidence. Everybody clear?

Mr. Hansen, any other questions?

MR. HANSEN: No further question, thank you.

THE COURT: You can step down and I think you're excused. Thank you, Dr. Emery.

THE WITNESS: I thank you for your accommodation yesterday.

(Witness excused.)

THE COURT: And we're going back to Mr. Maher, correct?

MR. MARKOWSKI: Yes, Your Honor.

THE COURT: Is he outside?

Can all the jurors see that, too?

Do you intend to use the board?

MR. MARKOWSKI: Can you folks see?

THE COURT: Everybody okay? Okay.

Sir, raise your right hand. Do you swear to ??

End of Document

© 2017 Thomson Reuters. No claim to original U.S. Government Works.

2005 WL 6399685 (Fla.Cir.Ct.) (Trial Motion, Memorandum and Affidavit)
Circuit Court of Florida.
Fifteenth Judicial Court
Palm Beach County

COLEMAN (PARENT) HOLDINGS INC., Plaintiff,

v.

MORGAN STANLEY & CO., INC., Defendant.

No. CA 03-5045 AI.
February 9, 2005.

CPH's Response to Morgan Stanley's Motion in Limine No. 19 to Exclude the Testimony of William Horton

Plaintiff Coleman (Parent) Holdings Inc. (“CPH”) respectfully submits this response opposing Morgan Stanley's Motion in Limine No. 19 to Exclude the Testimony of William Horton. Morgan Stanley seeks an Order prohibiting CPH from introducing any expert testimony by Mr. Horton concerning Morgan Stanley's “due diligence ‘duties,’ the ‘reasonableness’ of CPH's reliance on Morgan Stanley, or the materiality and accuracy of alleged statements or omissions by Morgan Stanley in the course of the Sunbeam-Coleman transaction.” Mot. at 6.

In its motion, Morgan Stanley attempts to frame Mr. Horton's opinions as *legal* conclusions and hence inadmissible. To the contrary, Mr. Horton is not offering any “legal” opinions -- rather, his opinions relate to the customs and practices of investment bankers involved in mergers and acquisitions, and the customs and practices of parties involved in such transactions when conducting due diligence. Those business issues are before the jury in this case, and they are issues that will involve evidence the jury will need assistance to understand. The opinions offered by Mr. Horton will assist the jury, and they are well within the scope of Mr. Horton's expertise, given his 22 years of experience as an investment banker working on a broad array of transactions.

Contrary to Morgan Stanley's assertions, Mr. Horton makes no effort -- overtly or covertly -- to tell this Court or the jury what the law should be. His opinions are stated in a manner designed to make clear that they are confined to what is customary and appropriate as a business matter. It follows that his opinions are both relevant and admissible.

Morgan Stanley objects to Mr. Horton offering any opinions regarding Morgan Stanley's “duties.” Mot. at 1. But that is a straw man. Morgan Stanley adds the word “duty” in its summaries of Mr. Horton's testimony where Mr. Horton does not use that word.¹ Instead, Mr. Horton offers opinions on the practices and customs of investment bankers and parties involved in transactions of the type at issue in this case.

Morgan Stanley cites the case of *Palm Beach County v. Town of Palm Beach*, 426 So. 2d 1063, 1070 (Fla. 4th DCA 1983), for the undisputed proposition that an expert may not opine on the law. Mot. at 2. But that case does not begin to support Morgan Stanley's actual argument, which is that opinions about business practices, however relevant, should be excluded if they might be mistaken for statements about the law. As the Florida Supreme Court made clear in a later decision in the same case, *Town of Palm Beach v. Palm Beach County*, 460 So. 2d 879, 882 (Fla. 1984), the distinction between permissible and impermissible expert testimony depends heavily on the particular words chosen by the expert to express his conclusion. The issue in that case was whether the plaintiffs received “real and substantial” benefits from a tax levied upon them in accordance with the Florida Constitution. *Id.* at 881. The Court held that an expert could testify within his expertise about benefits received by the plaintiffs, as long as he did not purport to apply the legal standard of “real and substantial” benefits. *Id.* Mr. Horton's opinions comply fully with this rule, as a review of his opinions makes clear.

I. There Is Nothing Improper About Mr. Horton's Opinion That It Would Be Customary for CPH to Rely on the Debenture Offering Disclosures and Due Diligence.

In his report, Mr. Horton opines that, “[a]s a matter of industry practice and custom,” CPH would expect to benefit from the due diligence performed for the contemporaneous Rule 144A offering and the related disclosures made in connection with that offering. *See* Horton Rep. at 18, *attached as Ex. 1 to Mot.* Mr. Horton takes account of all the relevant circumstances, including Sunbeam's status as a public company and its acceptance of a contractual obligation to disclose material adverse changes.²

Morgan Stanley claims that this opinion improperly seeks to establish a legal duty running from Morgan Stanley to CPH. But it does nothing of the kind -- Mr. Horton's testimony relates to industry practice and custom. The law permits the introduction of expert testimony if it “will assist the trier of fact in understanding the evidence or in determining a fact in issue.” *Fla. Stat. Ann. § 90.702 (West 2004)*. Here, Mr. Horton's testimony on this point does both. Given his expertise, Mr. Horton will be able to help the jury understand general customs and practices of investment bankers and of parties involved in major merger transactions, topics with which the jury is unlikely to be familiar. Moreover, his opinion regarding the prevailing customs and practices in the investment-banking industry and in merger transactions will assist the jury in determining whether CPH conducted proper due diligence -- a matter Morgan Stanley has put in issue in this case. *See, e.g.,* Charles W. Ehrhardt, *Florida Evidence § 90.406*, at 265-66 (2004 ed.) (“Evidence that a person's conduct conformed to a general custom has probative value in proving the conduct was reasonable”); *see also Ploetz v. Big Discount Panel Center, Inc.*, 402 So. 2d 64, 65 (Fla. 4th DCA 1981) (“[W]hat is ordinarily and usually done by men generally, engaged in the same work, has some relevancy to the inquiry as to what an ordinarily prudent person would do under the same circumstances.”) (quoting *Sea Board Air Line Ry. Co. v. Watson*, 113 So. 716, 718 (Fla. 1927)); *Restatement (Second) of Torts § 295A*, cmt. b (“Any such custom of the community in general, or of other persons under like circumstances, is always a factor to be taken into account in determining whether the actor has been negligent.”).

II. Mr. Horton Can Offer Opinions on the Industry Meaning of “Materiality,” and He Made Clear that He Is Not Opining on the Legal Meaning of that Term.

In his report, Mr. Horton offers the opinion that the information provided to Morgan Stanley in the March 19, 1998 comfort letter represented a “material adverse change in the business of Sunbeam from any business perspective, and certainly from an investment banking perspective,” and thus it would have been customary for Morgan Stanley to disclose this information. *See* Horton Rep. at 20-21. Operating from the same perspective, Mr. Horton also opines that the failure of Sunbeam and Morgan Stanley to disclose this information in the March 19 press release rendered that press release “materially misleading.” *See* Horton Rep. at 23. Morgan Stanley takes issue with those opinions, arguing that any characterization of “facts, representations, or omissions” as “material” renders the opinion a legal conclusion. *Mot.* at 4-5. Morgan Stanley is again incorrect.

The term “material adverse change,” or “material adverse effect,” is a term of art in the financial industry, and Mr. Horton is eminently qualified to give his opinion on whether certain information about Sunbeam's financial performance would be so considered. Courts have routinely held that experts may opine on whether a particular event had a “material adverse effect” on a company's finances. *See Wechsler v. Hunt Health Sys., Ltd.*, No. 94 Civ. 8294 (PKL), 2003 WL 22358807, at *6 (S.D.N.Y. Oct 16, 2003) (admitting expert testimony of a certified public accountant that a partnership's distributions to its partners “‘had a material adverse effect on the financial well-being of the company,’” as a “factual conclusion[]” that “does not usurp the function of the Court”); *Robertson Oil Co. v. Phillips Petroleum Co.*, 930 F.2d 1342, 1346 (8th Cir. 1991) (affirming district court's admission of expert testimony that pending litigation against defendant would have no “material adverse effect” on its financial position); *see also Consolidated Edison, Inc. v. Northeast Utilities*, 249 F. Supp. 2d 387, 411-13 (S.D.N.Y. 2003) (holding, in case where material adverse change clause was at issue, that

there was a material dispute of fact precluding summary judgment, on the basis of conflicting expert reports regarding whether change in company's finances amounted to a "material adverse change").

In addition, the simple fact that the phrase "material adverse change" is used in the merger agreement is no basis for excluding his testimony under Florida law. So long as it will "assist the trier of fact in understanding the evidence or in determining a fact in issue," Fla. Stat. Ann. § 90.702 (West 2004), expert testimony concerning the use of particular practices or terms of art in specialized fields is admissible to help the jury understand the connotations of contractual provisions. See *Red Carpet Corp. of Panama City Beach v. Calvert Fire Ins. Co.*, 393 So. 2d 1160, 1160-61 (Fla. 1st DCA) (holding that trial court, in suit to enforce an insurance contract, erred in excluding expert testimony on industry practice relating to such provisions, which would have "better informed" the jury "as to the meaning of the policy terms" and "equipped [it] to properly resolve the issues of fact"), review denied, 401 So. 2d 608 (Fla. 1981); *Aetna Ins. Co. v. Loxahatchee Marina, Inc.*, 236 So. 2d 12, 14 (Fla. 4th DCA 1970) ("Obscure connotations of an insurance policy can be greatly illuminated by knowledge of custom and usage in the industry as well as the expert's knowledge of terms which take on a different hue in the specialized field than in the field of general knowledge."). Like the insurance-industry experts in *Red Carpet Corp. and Aetna Insurance Co.*, Mr. Horton is highly qualified, through training and experience, to interpret this term of art, and should be permitted to do so in explaining his opinions to the jury.

Morgan Stanley's objection to Horton's opinion regarding the failure to disclose material facts also should be rejected, for the identical reason. Mr. Horton testified that he was using the term "material" in a *business* sense to connote that the facts concealed by Morgan Stanley relating to the material adverse change at Sunbeam.³ Moreover, whether particular facts are "material" from a *business* perspective is plainly a matter within the proper scope of expert testimony in investment banking, even where *legal* materiality is separately at issue. See *Calvin Klein Trademark Trust v. Wachner*, 124 F. Supp. 2d 207, 209 (S.D.N.Y. 2000) (holding that a legal determination of "materiality" presented a question that could not be "adequately resolve[d] without the benefit of an investment banker's expert assessment of which facts were 'material' from a business person's perspective").

Conclusion

For the foregoing reasons, this Court should deny Morgan Stanley's Motion in Limine No. 19.

Dated: February 9, 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

By: <<signature>>

One of Its Attorneys

Jerold S. Solovy

John Scarola

Ronald L. Marmer

SEARCY DENNEY SCAROLA BARNHART &
SHIPLEY P.A.

Jeffrey T. Shaw

JENNER & BLOCK LLP

2139 Palm Beach Lakes Blvd.

One IBM Plaza

West Palm Beach, Florida 33402-3626

Chicago, Illinois 60611-7603

(561) 686-6300

(312) 222-9350

Footnotes

- 1 Ironically, the only times that the word “duty” appear in any of Mr. Horton's three reports -- it appears only twice -- are in reference to opinions offered by Mr. Rosenbloom, *Morgan Stanley's* expert. See Ex. A, Horton Rep. (12/28/04) at 6.
- 2 Morgan Stanley contends that investment banks have no “obligation . . . to conduct due diligence in connection with the offering of securities.” Mot. at 3 n.1. That contention is disingenuous. As Mr. Horton explained at his deposition, the investment banker's “obligation” to conduct “reasonable and adequate due diligence” in connection with an offering is a matter of “usual customary practice.” Ex. B, Horton Dep. at 84-85. An investment banker who foregoes due diligence runs too great a risk of being sued -- a lesson “that is taught to investment bankers from the very beginning.” *Id.* at 85. See also Ex. C., Dep of James Lurie (counsel for Morgan Stanley) at 27 (“Q. Did Morgan Stanley have any responsibility to determine that the offering memorandum was fair and accurate? A. Under the '33 Act, they have a due diligence obligation, yes.”)
- 3 See Ex. B, Horton Dep. at 271-72 (That's material, as it . . . relates to sales. . . . Each and every one of those aspects in the comfort letter resulted in material adverse changes. Then I took it the next step, which is Morgan Stanley had all this information. They were in a unique position dealing with the information and it was never disclosed.”); *id.* at 299 (“So, am I an expert in disclosure[s] that are made and that I feel need to be made in the context of offering documents, mergers and acquisition documents, that type of thing, the answer is yes. Do I apply a legal standard to it? Do I step back and say that disclosure is covered by -- is it legally sufficient? No, I don't make that characterization. I'm dealing with it from a business point of view.”). Mr. Horton also made clear that he was drawing the same distinction between a business term of art and a legal meaning in testifying about the occurrence of a “material adverse change.” See *id.* at 249-50.

End of Document

© 2017 Thomson Reuters. No claim to original U.S. Government Works.

2003 WL 25574982 (Fla.Cir.Ct.) (Trial Motion, Memorandum and Affidavit)

Circuit Court of Florida,
Fifteenth Judicial Circuit.
Palm Beach County

COLEMAN (PARENT) HOLDINGS, INC., Plaintiff,

v.

MORGAN STANLEY & CO. INCORPORATED, Defendant.

No. CA 03-5045 AI.
February 22, 2003.

Morgan Stanley's Motion to Dismiss Plaintiff's First Amended Complaint

[Jeffrey Davidson](#), Lawrence P. bemis (FL Bar No. 618349), [Thomas A. Clare](#), [Zhonette M. Brown](#), Kirkland & Ellis LLP, 655 15th Street, N.W., Suite 1200, Washington, D.C. 20005, Telephone: (202) 879-5000, Facsimile: (202) 879-5200.

[Mark C. Hansen](#), [James M. Webster, III](#), [Rebecca A. Beynon](#), Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C., Sumner Square, 1615 M Street, N.W., Suite 400, Washington, D.C. 20036, Telephone: (202) 326-7900, Facsimile: (202) 326-7999, Counsel for Morgan Stanley & Co. Incorporated.

Carlton Fields, P.A., 222 Lakeview Ave., Suite 1400, West Palm Beach, FL 33401, Telephone: (561) 659-7070, Facsimile: (561) 659-7368, E-mail: twarner@carltonfields.com, [Thomas E. Warner](#), Florida Bar No. 176725, [Joseph Ianno, Jr.](#), Florida Bar No. 655351.

Defendant, Morgan Stanley & Co. Incorporated (“Morgan Stanley”), moves to dismiss the First Amended Complaint filed by the Plaintiff Coleman (Parent) Holdings Inc. for failure to state a cause of action as to “Aiding and Abetting”; for failure to plead fraud, aiding and abetting, and conspiracy with the particularity required by Rule 1.120(b); and failure to state a cause of action for corporate liability for fraud and punitive damages. As grounds therefore, Morgan Stanley states as follows (all cited cases are attached):

No Cause of Action for Aiding and Abetting Exists Under Florida Law

1. Aiding and Abetting, as pled by Plaintiff in the First Amended Complaint and as defined in the *Restatement (Second) of Torts II*, section 876, does not exist as a civil tort under - the common law of Florida. Since neither this court nor the District Court of Appeal has the authority to create or recognize a new cause of action in the common law, Plaintiff cannot pursue this claim. *Hoffman .v Jones*, 280 So. 2d 431 (Fla. 1973); *Conley v. Boyle Drug Co.*, 477 So. 2d 600 (Fla. 4th DCA 1985).

The only authoritative Florida case even remotely on point is *Ft. Myers Development Corporation .v J. W. McWilliams Co.*, 122 So. 264 (Fla. 1929), a case involving the liability of a corporate promoter for breaches of fiduciary duty and fraud. In *Ft. Myers*, the Florida Supreme Court extended the liability of promoters of inchoate corporations for breach of trust and secret profits “to a third person, who is averred to have *conspired* with one of two parties, between whom fiduciary relations exist, to the injury of the other.” *Id.* at 269 (emphasis added). Although the court at times referred to the third person as a conspirator *and* as an aider and abettor in the breach of trust and fraud of the promoter, it is clear that the holding of the court is based on the predicate of a conspiracy or secret agreement between the promoter and the third person to breach a fiduciary duty owed by the promoter and carry out the fraudulent scheme. *Id.* at 267-269. In the

76 years following *Ft. Myers*, the Florida Supreme Court has not adopted or recognized “aiding and abetting fraud” as a common law tort: no such tort exists in Florida in the absence of a conspiracy.

It would be reversible error to allow Plaintiff to pursue this unrecognized common law tort and present this claim to the jury. *Conley v. Boyle Drug Co.*, 477 So. 2d 600 (Fla. 4th DCA 1985).

Fraud, Including Fraud as an Element of Conspiracy and Aiding and Abetting, Must Be Pleaded With Particularity

2. While the First Amended Complaint drops Counts I and IV of the original Complaint, all of the paragraphs of Count I alleging the direct fraud of Morgan Stanley remain. Thus, there are two distinct frauds alleged in the First Amended Complaint and Plaintiff fails to specify which of the two form the basis of the underlying tort for the Aiding and Abetting claim and the Conspiracy claim;

3. As to the Conspiracy claim, Plaintiff fails to state with particularity:

A. what was the underlying fraud;

B. who at Morgan Stanley conspired with Dunlap and when;

C. what the agreement and common objective consisted of;

D. who at Morgan Stanley had actual knowledge of the underlying fraud; what that actual knowledge consisted of; and when and where that person in Morgan Stanley acquired that actual knowledge; and

E. who at Morgan Stanley provided the substantial assistance and when it was provided.

The requirements of Rule 1.120(b), pleading fraud with particularity, apply to averments charging conspiracy. *Ocala Loan Co. v. Smith*, 155 So. 2d 711 (Fla. 1st DCA 1963); *General Dynamics Corp. v. Hewitt*, 225 So. 2d 561 (Fla. 2d DCA 1969). Furthermore, because an underlying fraud is an element of conspiracy, a party alleging conspiracy must allege all of the elements of fraud. *Cf. Buckner v. Lower Florida Keys Hosp. Dist.*, 403 So. 2d 1025, 1027 (Fla. 3d DCA 1981) (holding that complaint for conspiracy to defame failed to state cause of action because it did not allege publication, an element of defamation). In order for a claim of fraud to withstand a motion to dismiss, it must allege fraud with the requisite particularity required by Fla. R. Civ. P. 1.120(b), including *who* made the false statement, the substance of the false statement, the time frame in which it was made and the context in which the statement was made. *Bankers Mutual Capital Corp. v. United States Fidelity and Guaranty Co.*, 784 So. 2d 485, 490 (Fla. 4th DCA 2001); *Robertson v. PHF Life Insurance Co.*, 702 So. 2d 555 (Fla. 1st DCA 1997) (Appellants' complaint fails to specifically identify misrepresentations or omissions of fact, the time, place or manner in which they were made, and how the representations were false or misleading.).

The particularity Morgan Stanley seeks has now become especially critical, given Plaintiff's election to proceed to trial solely on the theory of what it calls the “big” fraud. Plaintiff has made that significant election, yet turned around and filed, in essence, an amended complaint identical to the one it was previously proceeding under. All the allegations against Morgan Stanley remain the same. The old Complaint fails to allege with particularity Morgan Stanley's *connection* to the “big” fraud. In addition, as a matter of necessary pleading - and fairness - Morgan Stanley is entitled to a straightforward particularized statement of what Plaintiff contends established such a connection: what knowledge and what acts of what people, and when and how that knowledge was supposedly obtained and the acts allegedly committed. If Plaintiff intends to claim at trial knowledge or acts not yet particularized in the First Amended Complaint, Morgan Stanley is entitled to know what it is.

4. Likewise, as to the Aiding and Abetting claim, Plaintiff fails to state with particularity who at Morgan Stanley had actual knowledge of the underlying fraud; what that actual knowledge consisted of; and when and where that person in Morgan Stanley acquired that actual knowledge. Further, Plaintiff fails to state with particularity who at Morgan Stanley provided the substantial assistance and when it was provided. These elements must be pled with particularity. *See generally. Ocala Loan Co., General Dynamic Corp., Bankers Mutual Capital Corp., and Robertson .v PHF Life Ins. Co., supra.*

Corporate Liability and Punitive Damages Must be Plead with Particularity

5. Plaintiff has failed to plead a cause of action for corporate liability against Morgan Stanley because there are no allegations as to what officer or managing agent conspired with Dunlap; what the agreement and common objective consisted of what officer or managing agent at had actual knowledge of the underlying fraud; when and where officer or managing agent acquired that actual knowledge; what that actual knowledge consisted of; what officer or managing agent provided the substantial assistance and when it was provided; *Sunrise Olds-Toyota, Inc. v Monroe*, 476 So. 2d 240, 241 (Fla. 5th DCA 1985) (Any intentional conduct attributed to a corporation must be committed by an officer, agent or employee of the corporation.).

6. Plaintiff has failed to plead a cause of action for punitive damages against Morgan Stanley, as a corporate entity, because there are no allegations as to what officer, managing agent, or employee committed the alleged intentional wrongful acts. *See Schropp v. Crown Eurocars, Inc.*, 654 So. 2d 1158 (Fla. 1995); *Sunrise Olds-Toyota, Inc. v. Monroe*, 476 So. 2d 240 (Fla. 5th DCA 1985) (complaint which was vague as to what member or members of corporate employer were grossly negligent and in what capacity they acted for corporation did not make it clear that employer as opposed to some mere employee was at fault, and thus failed to state a cause of action for punitive damages).

WHEREFORE, Morgan Stanley requests that this Court enter an order granting this Motion and dismissing Plaintiff's First Amended Complaint.

Jeffrey Davidson

Lawrence P. Bemis (FL Bar No. 618349)

Thomas A. Clare

Zhonette M. Brown

KIRKLAND & ELLIS LLP

655 15th Street, N.W., Suite 1200

Washington, D.C. 20005

Telephone: (202) 879-5000

Facsimile: (202) 879-5200

Mark C. Hansen

James M. Webster, III

Rebecca A. Beynon

KELLOGG, HUBER, HANSEN

TODD, EVANS & FIGEL, P.L.L.C.

Sumner Square

1615 M Street, N.W., Suite 400

Washington, D.C. 20036

Telephone: (202) 326-7900

Facsimile: (202) 326-7999

Counsel For Morgan Stanley & Co. Incorporated

CARLTON FIELDS, P.A.

222 Lakeview Ave., Suite 1400

West Palm Beach, Fl 33401

Telephone: (561) 659-7070

Facsimile: (561) 659-7368

E-mail: twarner@carltonfields.com

<<signature>>

Thomas E. Warner

Florida Bar No. 176725

Joseph Ianno, Jr.

Florida Bar No. 655351

End of Document

© 2017 Thomson Reuters. No claim to original U.S. Government Works.

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

----- X
COLEMAN (PARENT) HOLDINGS INC., :
 :
 Plaintiff, :
 :
 v. :
 :
 MORGAN STANLEY & CO., INC., :
 :
 Defendant. :
 :
----- X

2003 CA 005045 A1

Case No. _____

JURY TRIAL DEMANDED

DOROTHY H. WILSON
CLERK OF CIRCUIT COURT
CIRCUIT CIVIL DIVISION

MAY 08 2003

COPY / ORIGINAL
RECEIVED FOR FILING

COMPLAINT

Plaintiff Coleman (Parent) Holdings Inc. ("CPH") alleges the following against
Morgan Stanley & Co., Inc. ("Morgan Stanley"):

NATURE OF THE ACTION

1. This action arises from Morgan Stanley's participation in a massive fraud centered on Florida-based Sunbeam Corporation ("Sunbeam"). As a direct result of that fraud, CPH was induced to accept 14.1 million shares of Sunbeam stock when CPH sold its 82% interest in The Coleman Company, Inc. ("Coleman") to Sunbeam on March 30, 1998. Morgan Stanley misrepresented Sunbeam's financial condition and assisted Sunbeam's CEO, Albert Dunlap, in concealing Sunbeam's true financial condition so that Sunbeam could complete the purchase of Coleman on March 30, 1998.

2. In April 1997, Morgan Stanley began serving as Sunbeam's investment banker. Morgan Stanley originally attempted to find someone to buy Sunbeam. When Morgan Stanley was unable to find a buyer, Morgan Stanley developed a strategy for Sunbeam to use its

fraudulently-inflated stock to acquire a large company that Sunbeam would own and operate. Then, trading on Morgan Stanley's relationships with CPH's senior officers, Morgan Stanley found Coleman for Sunbeam. At the time of the sale to Sunbeam, Coleman was a leading manufacturer and marketer of consumer products for the worldwide outdoor recreation market, with annual revenues in excess of \$1 billion. With Morgan Stanley's active and direct participation, CPH was persuaded to sell its interest in Coleman to Sunbeam in return for 14.1 million shares of Sunbeam stock and other consideration.

3. After Sunbeam announced plans to acquire Coleman, Morgan Stanley agreed to underwrite a \$750 million debenture offering for Sunbeam. Sunbeam needed the proceeds of that debenture offering to complete the acquisition of Coleman. As Sunbeam's investment banker and as the sole underwriter for the \$750 million debenture offering, Morgan Stanley received detailed and specific information concerning Sunbeam's financial condition and performance. Morgan Stanley received information that directly contradicted Sunbeam's and Morgan Stanley's assertions to CPH that Sunbeam had undergone a successful turnaround and that its financial performance had dramatically improved. By no later than March 18, 1998, Morgan Stanley knew that Sunbeam's January and February 1998 sales were only 50% of January and February 1997 sales, and Morgan Stanley also knew that the shortfall was caused by Sunbeam's practice of accelerating sales which otherwise would have occurred in 1998 in order to boost Sunbeam's income in 1997. Although Morgan Stanley and Sunbeam previously had advised CPH that Sunbeam's sales were running ahead of analysts' expectations for the first quarter, Morgan Stanley decided not to correct those material misrepresentations. Instead, in March 1998, Morgan Stanley assisted Sunbeam in concealing the

problems with Sunbeam's first quarter 1998 sales in order to close transactions that should have been stopped before CPH and others were swindled.

4. CPH brings this action to recover for the losses it has suffered as a result of Morgan Stanley's active participation in successfully defrauding CPH. CPH's Complaint consists of four counts: Fraudulent Misrepresentation (Count I); Aiding and Abetting (Count II); Conspiracy (Count III); and Negligent Misrepresentation (Count IV).

5. CPH seeks compensatory damages for Morgan Stanley's wrongful conduct. Using Morgan Stanley's own valuation of Coleman, CPH has lost at least \$485 million. In addition, CPH reserves the right to seek leave to amend its complaint pursuant to Fla. Stat. §768.72 to assert claims for an additional recovery of punitive damages in excess of \$1.5 billion.

JURISDICTION AND VENUE

6. This Court has jurisdiction over the subject matter of this action pursuant to Fla. Stat. § 26.012(2)(a). This Court has jurisdiction over Morgan Stanley pursuant to Fla. Stat. § 48.193.

7. Venue is proper in this district pursuant to Fla. Stat. § 47.051.

PARTIES AND OTHER KEY PARTICIPANTS

8. Plaintiff Coleman (Parent) Holdings Inc. ("CPH") directly or indirectly owned 44,067,520 shares — or approximately 82% — of Coleman prior to the transactions at issue. On March 30, 1998, Sunbeam acquired CPH's interest in Coleman. Sunbeam paid for the Coleman shares with 14.1 million shares of Sunbeam common stock and other consideration.

9. Defendant Morgan Stanley & Co., Inc. ("Morgan Stanley") is a highly sophisticated investment banking firm that provides a wide range of financial and securities services.

Among other things, Morgan Stanley provides advice on mergers and acquisitions and raises capital in the equity and debt markets. Morgan Stanley served as Sunbeam's investment banker and as the underwriter of securities issued by Sunbeam in connection with the events at issue herein.

10. Sunbeam Corporation ("Sunbeam") was a publicly-traded company headquartered in Delray Beach, Florida. Sunbeam designed and manufactured small household appliances and outdoor consumer products, which it marketed under the Sunbeam and Oster brand names. Sunbeam filed a bankruptcy petition under Chapter 11 of the Bankruptcy Code in February 2001.

11. Albert Dunlap ("Dunlap") was the Chief Executive Officer of Sunbeam from July 1996 until June 1998 when he was terminated by Sunbeam's Board of Directors. In May 2001, the United States Securities and Exchange Commission ("SEC") filed a civil injunctive suit in Miami, Florida against Dunlap based on Dunlap's fraudulent and illegal conduct at Sunbeam. In September 2002, Dunlap consented to the entry of a judgment against him in that action. The judgment, among other things, imposed a civil fine and permanently barred Dunlap from serving as an officer or director of a public company. Dunlap still resides in Boca Raton, Florida.

12. Russell Kersh ("Kersh") was the Executive Vice President of Sunbeam from July 1996 until June 1998 when he was terminated by Sunbeam's Board of Directors. In May 2001, the SEC filed a civil injunctive suit in Miami, Florida against Kersh based on Kersh's fraudulent and illegal conduct at Sunbeam. In September 2002, Kersh consented to the entry of a judgment against him in that action. The judgment, among other things, imposed a civil fine and permanently barred Kersh from serving as an officer or director of a public company. Upon information and belief, Kersh still resides in Boca Raton, Florida.

13. Arthur Andersen LLP ("Andersen") provided outside accounting services to Sunbeam through its West Palm Beach, Florida office. Andersen auditors provided information concerning Sunbeam's first quarter 1998 sales and earnings to Morgan Stanley. Upon information and belief, several of the Andersen auditors who provided information to Morgan Stanley concerning Sunbeam, including Lawrence Bornstein, still reside in Florida.

FACTUAL BACKGROUND

A. Sunbeam's Lackluster Performance (1995-1996).

14. Sunbeam designed and manufactured outdoor and household consumer products, which it marketed under the Sunbeam and Oster brand names. Sunbeam's products included small kitchen appliances, humidifiers, electric blankets, and grills. Many of the country's leading retail stores, including Wal-Mart, Target, and Home Depot, were among Sunbeam's major customers.

15. Despite Sunbeam's well-known brands and strong customer base, its financial performance was disappointing. In 1994, Sunbeam earned \$1.30 per share. In 1995, Sunbeam's earnings declined to \$0.61 per share. In 1996, Sunbeam's earnings continued to suffer. On March 22, 1996, Sunbeam issued an early warning that its first quarter earnings would be well under analysts' expectations and down from first quarter 1995. Shortly after issuing the March 22 earnings warning, Sunbeam's Chief Executive Officer and two of Sunbeam's directors announced their resignations. Less than a week later, Sunbeam announced that its first quarter 1996 earnings had plunged 42% from first quarter 1995 levels. Sunbeam also announced that its second quarter 1996 earnings would be lower than its second quarter 1995 earnings.

16. Sunbeam's disappointing earnings caused its stock price to plummet. During 1995, the price at which Sunbeam's stock traded fell 40%, from a high of \$25-1/2. In 1996, Sunbeam's stock price continued to decline until it reached a low of \$12-1/4 in July.

B. Sunbeam Hires A New Management Team (July 1996).

17. On July 18, 1996, Sunbeam's board of directors hired Albert Dunlap as Sunbeam's new Chief Executive Officer. Based upon brief terms as Chief Executive Officer of other publicly traded companies, including Scott Paper Company ("Scott Paper"), Dunlap was viewed as a "turnaround specialist" — that is, someone who could take a poorly performing company and significantly increase its value by "turning around" its financial performance. Because Dunlap touted the benefits from firing large numbers of employees and closing large numbers of plants, Dunlap became widely known as "Chainsaw Al." Dunlap lived in Boca Raton, Florida, and one of his first tasks at Sunbeam was to consolidate the company's six headquarters into one located in Delray Beach, Florida.

18. Immediately after joining Sunbeam, Dunlap hired Kersh as Sunbeam's Chief Financial Officer. Kersh had teamed with Dunlap for over 15 years, serving as a senior executive with Dunlap at other companies, including Scott Paper. Dunlap also brought in several other hand-picked executives to make up his senior management team.

19. Dunlap and his senior management team entered into employment agreements with Sunbeam. Under those agreements, Dunlap and his senior management team stood to make tens of millions of dollars if they were able to boost Sunbeam's apparent value and then sell Sunbeam to another company at a premium.

C. Dunlap Cooks The Books At Sunbeam (1996-1997).

20. In order to convince other companies that they should want to purchase Sunbeam, Dunlap needed to improve Sunbeam's reported financial performance quickly and dramatically. It was, of course, no small task to transform Sunbeam from a poorly performing company, with weak sales and declining profits, into a strong company with growing sales and soaring profits. In fact, as the world later learned, Dunlap did not achieve that change in Sunbeam's fortunes. Instead, Dunlap created the illusion of a dramatic turnaround at Sunbeam by engaging in what SEC officials subsequently described as a "case study" in financial fraud.

21. Dunlap had a three-step plan at Sunbeam. In the first step, Dunlap overstated Sunbeam's financial problems so that Sunbeam appeared to be in worse shape than it really was. After making Sunbeam look worse, Dunlap moved to step two, where he made Sunbeam look more valuable than it really was by inflating Sunbeam's sales and engaging in other earnings manipulations. In step three, Dunlap planned to sell Sunbeam to another company before it became apparent that the "improved" results were fictional. By doing so, Dunlap would make tens of millions of dollars and would be free to blame his successor for any subsequent problems.

1. Step One: Make Sunbeam Appear Worse Than It Really Was (1996).

22. Dunlap began implementing his strategy soon after his arrival at Sunbeam in 1996. Claiming to be engaged in a clean-up of Sunbeam's financial problems, Dunlap recorded artificially high reserves and booked expenses that should not have been recorded until later periods. Both of those actions made Sunbeam's financial condition appear worse than it really was, thus lowering the benchmark for measuring Sunbeam's performance in future years.

23. The overstated reserves also provided Dunlap a means by which he could inflate Sunbeam's future results during the second step of his plan. Dunlap later could "re-evaluate" and release millions of dollars from the overstated reserves to boost income in later periods. The income from released reserves contributed to the illusion of a rapid turnaround in Sunbeam's performance. Using inflated reserves to enhance income in future periods is a fraudulent practice and overstated reserves are commonly called "cookie jar" reserves.

2. Step Two: Create The False Appearance Of Dramatically Improved Performance (1997).

24. After making Sunbeam look worse than it really was in 1996, Dunlap manipulated Sunbeam's sales and expenses in 1997 to create the false appearance of quarter after quarter improvement in financial performance. For example, Dunlap caused Sunbeam to inflate its sales by engaging in phony "bill and hold" sales. Under this practice, Sunbeam recognized revenues from "sales," even though customers did not actually pay for or even take delivery of the products, which continued to sit in Sunbeam's own warehouses. Although Sunbeam recorded the "bill and hold" sales as if they were current sales, they were, in reality, simply sales stolen from future quarters. In 1997, phony "bill and hold" sales added approximately \$29 million in sales and \$4.5 million in income.

25. Throughout 1997, Sunbeam also engaged in a sales practice known as "channel stuffing" — accelerating sales that otherwise would occur in a later period, sometimes by offering steep discounts or other extraordinary customer inducements. On the grand scale employed by Sunbeam, channel stuffing inevitably leads to major sales shortfalls in later periods when

“stuffed” customers simply stop buying. Sunbeam’s senior sales officer referred to Sunbeam’s unsustainable practice of inflating performance through accelerated sales as the “doom loop.”

26. Dunlap further “enhanced” Sunbeam’s income in 1997 by causing Sunbeam to record a “profit” of \$10 million from a sham sale of its warranty and spare parts business. Dunlap also made Sunbeam appear to be more successful than it really was by reaching into the “cookie jar,” reversing inflated reserves, and recording \$35 million as income. Sunbeam’s 1997 profit margins also looked better than they really were because Dunlap already had recorded millions of dollars of 1997 expenses in 1996.

27. In October 1997, Dunlap announced that Sunbeam’s “turnaround” was complete. Compared to the third quarter of 1996, Sunbeam’s third quarter 1997 performance was remarkable. In the third quarter of 1996, Sunbeam had reported a loss of \$18.1 million. In the third quarter of 1997, however, Sunbeam reported earnings of \$34.5 million — an extraordinary turnaround from substantial losses to hefty profits. Sunbeam’s combined results for the first three quarters showed dramatic improvement as well. Sunbeam reported that its profits for the first nine months were up tenfold over the same period the year before — from \$6.5 million in 1996 to \$67.7 million in 1997. Sunbeam’s reversal of fortune caused a spectacular increase in the price of its stock. In July 1996, when Dunlap was hired, Sunbeam’s shares traded at \$12-1/4. By October 1997, Sunbeam’s shares had risen to \$49-13/16.

3. Step Three: Cash In Before The Turnaround Fraud Is Discovered (1997-1998).

28. With steps one and two successfully completed, Dunlap was more than eager to complete the final step of his scheme: to sell Sunbeam to another company and collect tens of millions of dollars for himself before the outside world could learn the truth about Sunbeam's phony "turnaround." To accomplish that third and final step, Dunlap needed an investment banking firm to serve as his skill. Morgan Stanley was pleased to play that role.

D. Morgan Stanley Vies For A Spot On Dunlap's Team (April - September 1997).

29. When Dunlap announced in early 1997 that he would begin interviewing investment bankers, Morgan Stanley immediately began pursuing the job. Although Morgan Stanley had no previous relationship with Sunbeam, one of Morgan Stanley's senior executives, William Strong, had worked closely with Dunlap on other large transactions between 1986 and 1993, when Strong was employed by Salomon Brothers.

30. Morgan Stanley knew that it was competing with other investment bankers, including Mark Davis, for Dunlap's business. Davis was the head of the mergers and acquisitions department at Chase Securities and had worked previously with Strong at Salomon Brothers. Davis had a very strong relationship with Dunlap, and Davis had served as Dunlap's investment advisor on numerous transactions, including Dunlap's sale of Scott Paper. Shortly after arriving at Sunbeam, Dunlap hired Davis to handle the sale of Sunbeam's furniture business.

31. Morgan Stanley put together a team headed by its Vice Chairman, Bruce Fiedorek, and Strong. Beginning in April 1997, Morgan Stanley's personnel traveled to Sunbeam's offices in Delray Beach, Florida to study Sunbeam and woo Dunlap. After months of

uncompensated work, in September 1997, Morgan Stanley finally persuaded Dunlap to name Morgan Stanley as Sunbeam's exclusive investment banker. Dunlap instructed Morgan Stanley to find a buyer for Sunbeam. Morgan Stanley knew that if it failed to deliver a major transaction, Morgan Stanley would not be compensated for the extensive work it had performed for Sunbeam. Morgan Stanley also knew that Davis and Chase Securities were standing by — ready and willing to reclaim their position as Dunlap's investment banker of choice.

E. Morgan Stanley Seeks A Buyer For Sunbeam (Fall 1997).

32. Throughout the fall of 1997, Morgan Stanley aggressively searched for a buyer for Sunbeam. Morgan Stanley put together extensive and detailed materials to use in marketing Sunbeam to potential buyers. Morgan Stanley pitched the transaction to more than 10 companies — including Gillette, Colgate, Sara Lee, Rubbermaid, Whirlpool, and Black & Decker — that Morgan Stanley hoped might have an interest in acquiring Sunbeam. Morgan Stanley, however, was not able to find a buyer.

33. As 1998 approached, the pressure on Dunlap increased. Dunlap was aware that Sunbeam would be unable to sustain the appearance of a successful turnaround in 1998 because Sunbeam had stolen sales from 1998 to boost 1997's numbers and the "cookie jar" reserves had been depleted. Dunlap needed a way to conceal Sunbeam's phony turnaround until a buyer could be found. Morgan Stanley provided the solution to Dunlap's problem.

F. Unable To Find A Buyer For Sunbeam, Morgan Stanley Looks For An Acquisition (December 1997).

34. Morgan Stanley knew that its failure to find a buyer for Sunbeam could prove fatal to the relationship it had worked so hard to establish with Dunlap. As the pressure on Dunlap

increased, the pressure on Morgan Stanley increased as well. Although Morgan Stanley was not able to find a buyer for Sunbeam, Morgan Stanley responded with a plan that would allow Dunlap to conceal his fraud. Morgan Stanley recommended that Sunbeam acquire other companies, using Sunbeam's stock, which was fraudulently inflated, as the "currency" that would be used to pay for the acquisitions.

35. Morgan Stanley's strategy was doubly deceptive. First, Morgan Stanley's acquisition strategy would allow Dunlap to consolidate Sunbeam's results with those of the newly-acquired companies. That would help Dunlap camouflage Sunbeam's results and make it difficult to detect any shortfall in Sunbeam's performance. Dunlap simply could label any problems that were detected as attributable to the poor performance of the acquired companies or as a temporary "blip" caused by the distraction of integrating the acquired companies with Sunbeam. Second, Morgan Stanley's strategy would allow Dunlap to take new massive restructuring charges (purportedly relating to the acquisitions) and thus create more "cookie jar" reserves that could be tapped to bolster the future earnings of the combined companies.

36. Morgan Stanley identified Coleman as one of the key potential acquisition targets. CPH owned 82% of Coleman's stock. Morgan Stanley searched the ranks of its investment bankers to locate those with the best access to CPH. Drawing on relationships between some of Morgan Stanley's investment bankers and senior CPH officers, Morgan Stanley set about trying to persuade CPH to sell its interest in Coleman to Sunbeam — and, most importantly, to accept Sunbeam stock as consideration.

37. Morgan Stanley laid the groundwork for a meeting to take place in December 1997 in Palm Beach, Florida between Dunlap and Kersh and representatives of CPH. In advance

of the Palm Beach meeting, Morgan Stanley provided materials to Sunbeam to prepare Sunbeam for the meeting. Morgan Stanley also met with Kersh and other Sunbeam personnel to prepare for the Palm Beach meeting. However, Dunlap nearly scuttled Morgan Stanley's carefully crafted plan at the outset. During the December 1997 Palm Beach meeting, when CPH rejected Dunlap's initial all-stock offer, Dunlap became so angry that he cursed and ranted at the CPH representatives and stormed out.

G. Morgan Stanley Revives The Deal And Negotiates With CPH (January-February 1998).

38. Dunlap's tantrum appeared to kill any chance that CPH would sell its interest in Coleman to Sunbeam. Morgan Stanley, however, worked to revive the discussions. Drawing again on Morgan Stanley's relationships with CPH officers, Morgan Stanley was able to restart the discussions with CPH with the promise that Dunlap would be kept away from the negotiating table. Thereafter, Morgan Stanley, through Managing Directors Strong, James Stynes, and Robert Kitts, led the discussions with CPH on Sunbeam's behalf.

39. Morgan Stanley knew that it had to persuade CPH not only to sell Coleman, but also to accept Sunbeam stock — ultimately, 14.1 million shares of Sunbeam stock — as a major part of the purchase price. During the course of negotiations, Morgan Stanley prepared and provided CPH with false financial and business information about Sunbeam designed to create the appearance that Sunbeam was prospering and that Sunbeam's stock had great value. For example, Morgan Stanley provided CPH with false 1996 and 1997 sales and revenue figures, as well as false projections that Sunbeam could not expect to achieve. Together, in face-to-face discussions, Morgan Stanley and Sunbeam assured CPH that (a) Sunbeam would meet or exceed its first quarter 1998

earnings estimates; (b) analysts' 1998 earnings estimates for Sunbeam were correct; and (c) Sunbeam's plan to earn \$2.20 per share in 1998 was easily achievable and probably low. Morgan Stanley and Sunbeam also falsely assured CPH that Sunbeam's "early buy" sales program would not hurt Sunbeam's future revenues. However, the "early buy" program was one of Sunbeam's revenue acceleration programs — and the devastating effects of Sunbeam's revenue acceleration programs already had begun to materialize at Sunbeam. Sunbeam's January and February 1998 sales were down drastically, although those results were not disclosed to CPH or the public. To the contrary, Morgan Stanley and Sunbeam together specifically advised CPH that Sunbeam's first quarter 1998 sales were "tracking fine" and running ahead of analysts' estimates.

40. Before the truth was revealed, Morgan Stanley persuaded CPH to sell its shares in Coleman to Sunbeam and to accept 14.1 million shares of Sunbeam stock as part of the consideration. Based on the price at which Sunbeam's stock was trading, the 14.1 million shares of Sunbeam stock were worth approximately \$600 million.

H. Morgan Stanley Advises Sunbeam's Board On The Acquisition (February 27, 1998).

41. On February 27, 1998, Sunbeam's Board of Directors met at Morgan Stanley's offices to consider the purchase of Coleman, as negotiated by Morgan Stanley.

42. At the February 27, 1998 meeting, Morgan Stanley made an extensive presentation to Sunbeam's Board concerning the proposed transaction. Numerous Morgan Stanley representatives, including Managing Directors Strong, Kitts, Stynes, Ruth Porat, and Vikram Pandit, attended the meeting.

43. Morgan Stanley presented Sunbeam's board with Morgan Stanley's opinion on the value of Coleman. Using a discounted cash flow analysis, which Morgan Stanley represented was the best gauge of stand-alone economic value and the best method of capturing the unique value of Coleman, Morgan Stanley valued CPH's Coleman stock at a range of \$31.06 to \$53.24 per Coleman share. CPH's 44,067,520 Coleman shares were worth, therefore, between \$1.369 billion and \$2.346 billion.

44. Following Morgan Stanley's presentation, Sunbeam's Board of Directors voted to acquire Coleman on the very favorable terms that Morgan Stanley had negotiated.

I. Morgan Stanley Develops Sunbeam's Public Announcement Of The Coleman Acquisition (February 28-March 1, 1998).

45. Morgan Stanley spent the following weekend developing Sunbeam's public relations strategy to announce the Coleman transaction. Morgan Stanley scripted the points for Dunlap to make in a conference call with analysts. Morgan Stanley also crafted a list of "key media messages" for Dunlap to use in his communications with the press. On Sunday, March 1, 1998, Morgan Stanley spoke with a reporter for the Wall Street Journal to inform him that Sunbeam would announce its acquisition of Coleman the following morning.

46. Sunbeam announced its acquisition of Coleman on Monday, March 2, 1998, prior to the opening of the financial markets. Consistent with Morgan Stanley's valuation, investors viewed Sunbeam's purchase of Coleman — and the price that Sunbeam had paid — very favorably. The day before the acquisition was announced, Sunbeam's stock closed at \$41-3/4. In the days following Sunbeam's announcement of the transaction, Sunbeam's stock rose approximately 25%, to a high of \$52.

J. Morgan Stanley Serves As The Underwriter For Sunbeam's \$750 Million Convertible Debenture Offering (March 1998).

47. Dunlap knew that Sunbeam needed to raise funds to pay the cash portion of the acquisition consideration. Dunlap also knew that Sunbeam needed cash to purchase two other smaller companies in addition to Coleman. Morgan Stanley recommended that Sunbeam raise funds through a \$500 million offering of convertible subordinated debentures. To assure the offering's success, Morgan Stanley lent its name to the offering. Indeed, Morgan Stanley agreed to serve as the sole underwriter for the offering.

48. The money raised from the sale of the debentures was used by Sunbeam to complete the acquisition of Coleman.

49. Unbeknownst to CPH or the public, Sunbeam's first quarter 1998 sales were a small fraction of the financial community's expectations for the quarter. If Dunlap could consolidate Sunbeam's sales with Coleman's sales, Dunlap knew that he could obscure Sunbeam's actual first quarter sales. As a result, Dunlap was especially anxious to complete the acquisition of Coleman before Sunbeam announced its first quarter 1998 sales. Indeed, the success of the scheme depended upon Sunbeam's ability to complete the Coleman acquisition before Sunbeam's first quarter results were announced. To satisfy Dunlap's objectives, Morgan Stanley moved up the launch date of the offering.

50. The debentures were marketed to investors at a series of "road show" meetings and conference calls arranged by Morgan Stanley. Morgan Stanley prepared and distributed a memorandum for its sales force to use in marketing the debentures to investors. Morgan Stanley also developed the script for Dunlap and Kersh to deliver during the road show. In those materials,

Morgan Stanley misrepresented Sunbeam's financial performance and emphasized Dunlap's purported "turnaround" accomplishments.

51. Morgan Stanley launched the debenture offering with a research analyst presentation to the Morgan Stanley sales force. As part of Morgan Stanley's growing relationship with Sunbeam, one of Morgan Stanley's top-rated research analysts planned to initiate equity coverage of Sunbeam. That Morgan Stanley analyst had modeled values for Sunbeam's acquisition of Coleman that were higher than even Sunbeam's management had predicted.

52. Although Morgan Stanley initially planned to sell \$500 million worth of debentures, Morgan Stanley's efforts were so successful that the size of the offering was increased to \$750 million on March 19, 1998 — the day of the last road show. The debentures were sold to investors nationwide, including investors based in Florida.

K. Morgan Stanley Is Told That Sunbeam's First Quarter Sales Are Down Dramatically (March 17 -18, 1998).

53. As Sunbeam's investment banker and the sole underwriter for the debenture offering, Morgan Stanley had a duty to investigate Sunbeam's finances and business operations. As a matter of law, that duty included an obligation to verify management's claims about Sunbeam's finances and business. Morgan Stanley, which had been working hand-in-hand with Sunbeam for almost a year and had traveled to Sunbeam's Florida offices, repeatedly asserted that it had satisfied that duty.

54. Strong, who was one of the senior Morgan Stanley investment bankers involved, has admitted in sworn testimony that he may have had more than 100 telephone conversations with Dunlap and Kersh (whose offices were in Sunbeam's Delray Beach headquarters)

and that Strong was "sure" that he would have been apprised of Sunbeam's financial performance during the first two months of 1998.

55. With the \$750 million debenture offering and the Coleman transaction set to close at the end of March 1998, Sunbeam's Florida-based outside auditors were shocked that Morgan Stanley had not asked them about Sunbeam's financial performance for first quarter 1998. Sunbeam's auditors were alarmed because Sunbeam's first quarter results were a disaster, but Dunlap, Kersh, and Morgan Stanley were telling CPH and the investing public, including investors in Florida, that Sunbeam's turnaround was a success, that Sunbeam's sales for the first quarter of 1998 were ahead of the expectations of outside financial analysts, and that Sunbeam was poised for record sales.

56. On March 17, Sunbeam's auditors forced the issue. From their Florida offices, Sunbeam's auditors sent Morgan Stanley a letter reporting that Sunbeam's net sales through January 1998 were down 60% — \$28 million in January 1998, as compared to \$73 million in January 1997. The March 17 letter explained that the decline was "primarily due to the . . . new early buy program for grills which accelerated grill sales into the fourth quarter of fiscal 1997."

57. The next day, Morgan Stanley was faxed a schedule from Sunbeam's Florida office that showed that Sunbeam's January and February 1998 net sales totaled \$72 million, an amount that was 50% lower than Sunbeam's January and February 1997 net sales of \$143.5 million.

58. Based on information that Sunbeam and Morgan Stanley had disseminated, CPH, investors, and Wall Street analysts were anticipating that Sunbeam's first quarter 1998 net sales would be in the range of \$285 million to \$295 million. Sales in that range would have been approximately 15% higher than first quarter 1997 sales. Sunbeam's January and February 1998

sales, however, totaled barely 25% of \$285 million. As Sunbeam's outside auditors advised Morgan Stanley in writing, the sales drop-off was caused by Sunbeam's sales acceleration program. The information put into Morgan Stanley's hands on March 17 and March 18 showed that Morgan Stanley's and Sunbeam's assertions to CPH and other investors were false. Contrary to what Morgan Stanley and Sunbeam had represented, Sunbeam had not undergone a successful turnaround, Sunbeam's financial performance had not dramatically improved, and Sunbeam's performance in 1998 was not better than Wall Street analysts' expectations. It was imperative, therefore, that the truth be kept from CPH until the Coleman transaction closed at the end of March 1998.

L. Morgan Stanley Assists Sunbeam In Concealing The Fraud: The False March 19, 1998 Press Release.

59. Morgan Stanley did not disclose Sunbeam's disastrous first quarter, Morgan Stanley did not insist that Sunbeam disclose its disastrous first quarter, Morgan Stanley did not correct any of the false and misleading statements it and Sunbeam had made to CPH about Sunbeam's business or performance, and Morgan Stanley did not suspend any of the critical transactions that were scheduled to close in the next two weeks. Instead, with Morgan Stanley's knowledge and assistance, Sunbeam prepared and issued a false press release on March 19, 1998 that affirmatively misstated and concealed Sunbeam's true condition.

60. The March 19, 1998 press release stated: "Sunbeam Corporation . . . said today that it is possible that its net sales for the first quarter of 1998 may be lower than the range of Wall Street analysts' estimates for \$285 million to \$295 million, but net sales are expected to exceed 1997 first quarter net sales of \$253.4 million. . . . The shortfall from analysts' estimates, if any, would be due to changes in inventory management and order patterns at certain of the Company's

major retail customers. The Company further stated that based on the strength of its new product offerings and powerful brand names, it remains highly confident about the overall sales outlook for its products for the entire year.”

61. As Morgan Stanley was fully aware, the March 19, 1998 press release was false, misleading, and failed to disclose material information. The March 19, 1998 press release failed to disclose Sunbeam’s actual January and February 1998 sales or the true reasons for the poor results. Instead, the press release held out the false possibility that Sunbeam still could achieve sales of \$285 million to \$295 million and suggested that, if any shortfall occurred, that shortfall would be due to the fact that certain retailers had decided to defer first quarter purchases to the second quarter. The press release also assured that Sunbeam at least would exceed first quarter 1997 net sales of \$253.4 million.

62. Based on information that Morgan Stanley had in its hands on March 18, 1998, it was obvious that Sunbeam would not achieve sales of \$285 million to \$295 million and that Sunbeam’s first quarter 1998 sales would be below its first quarter 1997 numbers. To simply meet 1997 first quarter sales, Sunbeam needed sales of \$123.3 million over the 12 remaining days of the quarter — an average of \$10.28 million per day. Sales of \$10.28 million per day would be 306% more than the average per day sales in March 1997, and 281% more than the average per day sales for the first 17 days of March 1998. Furthermore, Morgan Stanley knew that the shortfall from analysts’ estimates was not caused by retailers’ deciding to defer purchases from the first quarter of 1998 to the second quarter, as the press release indicated. Rather, as Sunbeam’s outside auditors had advised Morgan Stanley in writing, the collapse in first quarter sales was caused by Sunbeam’s acceleration of 1998 sales into the fourth quarter of 1997.

63. After Sunbeam's false press release was issued, Morgan Stanley stood arm-in-arm with Sunbeam while Dunlap and Kersh told CPH, analysts, and investors that the March 19, 1998 release was a purely cautionary statement because some first quarter 1998 sales might simply "spillover" into the second quarter and that Sunbeam still believed that it actually would meet analysts' estimates of \$285 million to \$295 million in first quarter 1998 sales.

64. Morgan Stanley knew that a full and truthful disclosure of Sunbeam's first quarter sales would doom the debenture offering, which was scheduled to close on March 25, 1998, and Sunbeam's purchase of Coleman, which was scheduled to close on March 30, 1998.

65. As Morgan Stanley was fully aware, the written contract between CPH and Sunbeam gave CPH the express legal right to refuse to close the sale if there was a material adverse change in Sunbeam's "business, results of operation or financial condition." Morgan Stanley knew that CPH would exercise its right and walk away from the transaction if CPH became aware of the extent and reasons for Sunbeam's disastrous first quarter results.

66. Furthermore, if the transactions did not close, Morgan Stanley would not be paid its \$10.28 million fee for the Coleman acquisition or its \$22.5 million fee for underwriting the subordinated debenture offering. Morgan Stanley also knew that Sunbeam would promptly replace Morgan Stanley with another investment banking firm – such as the Chase Securities team led by Mark Davis. Everything, therefore, depended on closing the Coleman acquisition before CPH learned the truth.

M. Sunbeam's Auditors Advise Morgan Stanley That The March 19, 1998 Release Is False.

67. Although Sunbeam's outside auditors already had made it perfectly clear to Morgan Stanley that Sunbeam's first quarter 1998 sales were a disaster, Morgan Stanley seemed intent on proceeding based upon the false March 19, 1998 press release.

68. One of Sunbeam's senior outside auditors, Lawrence Bornstein, has testified under oath that on March 19, 1998, he told Morgan Stanley's John Tyree that the statement in Sunbeam's March 19, 1998 press release — that Sunbeam would at least exceed first quarter 1997 sales of \$253.4 million — was not credible: "Just do the math . . . they've done a million dollars in sales the first 70 days of the year and now they need to do \$10 million worth of sales for the next . . . I think it was 11 days . . . I mean, something ridiculous." Bornstein also told Tyree: "I've been to every shipping dock domestically, I've been to Hattiesburg, I've been to Neosho, I've been to Mexico City, and I don't think these guys can physically ship this much stuff."

N. Morgan Stanley Marches Ahead With The Closings (March 19-March 30, 1998).

69. Morgan Stanley knew that the March 19 press release was false and misleading. Despite that knowledge and Bornstein's explicit statements, Morgan Stanley continued with its preparations to close the debenture offering on March 25, 1998 and the Coleman acquisition on March 30, 1998.

70. As part of those preparations, on March 24, 1998, Morgan Stanley's Tyree spoke by telephone with Sunbeam's Kersh, who was located in Sunbeam's Delray Beach offices, to obtain an updated report concerning Sunbeam's first quarter performance. By the time of that March 24, 1998 call, Sunbeam had fallen even further behind first quarter 1997 sales. As of

March 18, 1998, Sunbeam needed to achieve average sales of \$10.28 million per day, over 12 days, to reach first quarter 1997 sales. Sunbeam's sales between March 18 and March 24, 1998 had averaged only \$6.81 million per day — well short of the \$10.28 million per day that Sunbeam needed to achieve. Sunbeam's March 18 through March 24, 1998 sales were further proof that Sunbeam's March 19, 1998 press release was false and that Sunbeam would not achieve first quarter 1998 sales in excess of first quarter 1997 sales.

71. Morgan Stanley also knew no later than March 25, 1998, if not much earlier, that Sunbeam's earnings for the first quarter of 1998 were going to miss Wall Street analysts' earnings expectations, which were in the range of \$0.28 to \$0.31 per share (excluding one-time charges). Sunbeam's outside auditors advised Morgan Stanley on March 25 that Sunbeam had suffered a \$41.19 million loss during the first two months of 1998, including a one-time charge of \$30.2 million. Even excluding that one-time charge, Sunbeam's loss for the first two months was \$0.13 per share. To achieve first quarter 1998 operating earnings of \$0.28 per share, which were at the low end of analyst expectations, Sunbeam needed to realize a profit of \$35.5 million during March 1998 alone. A net profit of \$35.5 million in March was 500% more than Sunbeam's net profit for the entire first quarter of 1997. In fact, Sunbeam's first quarter 1998 earnings fell far short of Wall Street's expectations. Although Sunbeam's first quarter earnings were material, that information was not disclosed to CPH or the public until after the closing of the Coleman transaction on March 30, 1998.

O. Morgan Stanley Allows The Debenture Offering And The Coleman Acquisition To Close (March 25-30, 1998).

72. Having directly participated in misleading CPH and other investors, Morgan Stanley had a duty to disclose the true facts before the closing of the debenture offering and the Coleman acquisition. Morgan Stanley also could have required Sunbeam to postpone the closings of those transactions until the necessary disclosures were made. Morgan Stanley did neither. Instead, Morgan Stanley marched forward and closed the \$750 million debenture offering on March 25, 1998, which was needed to close the Coleman transaction, and assisted Sunbeam in closing the acquisition of Coleman on March 30, 1998.

73. Morgan Stanley was richly rewarded for facilitating Sunbeam's fraud. Morgan Stanley received \$22.5 million for the subordinated debenture offering and \$10.28 million for the Coleman acquisition. Morgan Stanley would have received nothing if the transactions had failed to close.

P. Sunbeam's Fraud Is Revealed, Causing The Market Value Of Sunbeam's Stock To Plummet.

74. On April 3, 1998 — just four days after the Coleman transaction closed — Sunbeam announced that sales for the first quarter of 1998 would be approximately 5% below the \$253.4 million in sales that Sunbeam reported in the first quarter of 1997. In other words, Sunbeam was expecting sales in the range of \$240 million. That sales shortfall was shocking news, particularly in view of assurances provided by Sunbeam both in and after its March 19, 1998 press release that \$285 million to \$295 million of sales was still a real possibility. The April 3, 1998 press release also disclosed that Sunbeam expected to show a loss for the quarter, although the release did not disclose the magnitude of the loss or how much of the loss was attributable to operating earnings

as opposed to one-time charges. Sunbeam's news stunned CPH and the market. On April 3rd, Sunbeam's stock price dropped 25% — from \$45-9/16 to \$34-3/8.

75. Sunbeam's actual first quarter 1998 performance was even worse than Sunbeam disclosed on April 3, 1998. The April 3, 1998 release indicated that Sunbeam's first quarter sales were in the range of \$240 million. In fact, Sunbeam's first quarter sales were \$224.5 million. Sunbeam obscured the true shortfall by extending its quarter from March 29 to March 31, 1998 — thereby adding two more days of Sunbeam sales. Sunbeam also failed to disclose that it had included two days of Coleman sales after the Coleman transaction closed on March 30. Further, Sunbeam inflated first quarter 1998 sales with \$29 million of new phony "bill and hold" sales.

76. Just as Sunbeam's first quarter 1998 sales had been a disaster, so, too, were Sunbeam's first quarter 1998 earnings. Morgan Stanley and Sunbeam had represented to CPH that Sunbeam would achieve or exceed analyst first quarter 1998 earnings estimates. At the time of that representation, the consensus among analysts was that Sunbeam would enjoy first quarter 1998 earnings of \$0.33 per share. However, on May 9, 1998, Sunbeam disclosed that it would record a first quarter loss of \$0.09 per share (excluding one-time charges) — more than \$0.40 per share lower than CPH had been told to expect.

77. Within weeks, Dunlap's fraudulent scheme began to unravel. In June 1998, after a number of news articles critical of Sunbeam's practices, Sunbeam's Board of Directors launched an internal investigation. That investigation led quickly to the firing of Dunlap and Kersh, and, subsequently, to a restatement of Sunbeam's financial statements for 1996, 1997, and the first quarter of 1998.

COUNT I

Fraudulent Misrepresentation

78. CPH repeats and realleges the allegations of paragraphs 1 through 77 above as if set forth fully herein.

79. As detailed above, Morgan Stanley participated in a scheme to mislead CPH and others and cover up the massive fraud at Sunbeam until Morgan Stanley and Sunbeam could close the purchase of Coleman. Morgan Stanley provided CPH with false information concerning Sunbeam's 1996 and 1997 financial performance, its business operations, and the value of Sunbeam's stock. Morgan Stanley also actively assisted Sunbeam in concealing Sunbeam's disastrous first quarter 1998 sales and earnings and the true reasons for Sunbeam's poor performance.

80. Morgan Stanley knew that its statements to CPH were materially false and misleading and omitted the true facts.

81. Morgan Stanley intended that CPH rely on Morgan Stanley's representations concerning Sunbeam.

82. In agreeing to accept approximately 14.1 million shares of Sunbeam stock in connection with the sale of CPH's interest in Coleman, CPH reasonably and justifiably relied upon Morgan Stanley's representations concerning Sunbeam.

83. As a result of Morgan Stanley's misconduct, CPH has suffered damages in excess of \$485 million.

COUNT II

Aiding And Abetting Fraud

84. CPH repeats and realleges the allegations of paragraphs 1 through 77 above as if set forth fully herein.

85. As detailed above, Dunlap engaged in a fraudulent scheme to inflate the price of Sunbeam's stock by improperly manipulating Sunbeam's 1996 and 1997 performance, by falsely asserting that Sunbeam had successfully "turned around," and by concealing the collapse of Sunbeam's first quarter 1998 sales and earnings and the reasons for Sunbeam's first quarter 1998 performance.

86. As detailed above, Morgan Stanley knew of Dunlap's fraudulent scheme and helped to conceal it until after Sunbeam could close the purchase of Coleman.

87. As detailed above, Morgan Stanley provided substantial assistance to Dunlap and Sunbeam, including: (a) concealing Sunbeam's first quarter 1998 sales collapse; (b) assisting with the false March 19, 1998 press release; (c) arranging road shows and meetings with prospective debenture purchasers at which Morgan Stanley, Dunlap, and others made false statements concerning Sunbeam's financial condition and business operations; (d) preparing and disseminating the preliminary and final offering memoranda for the subordinated debenture offering, both of which contained false information concerning Sunbeam's financial condition and business operations; (e) providing CPH with false financial and business information concerning Sunbeam; (f) scripting Dunlap's false public statements concerning Sunbeam's acquisition of Coleman; (g) persuading CPH to sell its interest in Coleman and to accept 14.1 million shares of Sunbeam stock and other

consideration; and (h) underwriting the \$750 million convertible debenture offering, proceeds from which were used to fund Sunbeam's purchase of Coleman.

88. As a result of Morgan Stanley's misconduct, CPH has suffered damages in excess of \$485 million.

COUNT III

Conspiracy

89. CPH repeats and realleges the allegations of paragraphs 1 through 77 above as if set forth fully herein.

90. As detailed above, Morgan Stanley conspired with Dunlap and other senior Sunbeam executives to conceal the truth about Sunbeam's financial performance and business operations.

91. As detailed above, Morgan Stanley committed overt acts in furtherance of the conspiracy, including: (a) concealing Sunbeam's first quarter 1998 sales collapse; (b) assisting with the false March 19, 1998 press release; (c) arranging road shows and meetings with prospective debenture purchasers at which Morgan Stanley, Dunlap, and others made false statements concerning Sunbeam's financial condition and business operations; (d) preparing and disseminating the preliminary and final offering memoranda for the subordinated debenture offering, both of which contained false information concerning Sunbeam's financial condition and business operations; (e) providing CPH with false financial and business information concerning Sunbeam; (f) scripting Dunlap's false public statements concerning Sunbeam's acquisition of Coleman; (g) persuading CPH to sell its interest in Coleman and to accept 14.1 million shares of Sunbeam stock and other

consideration; and (h) underwriting the \$750 million convertible debenture offering, proceeds from which were used to fund Sunbeam's purchase of Coleman.

92. As a result of Morgan Stanley's misconduct, CPH has suffered damages in excess of \$485 million.

COUNT IV

Negligent Misrepresentation

93. CPH repeats and realleges the allegations of paragraphs 1 through 77 above as if set forth fully herein.

94. As detailed above, Morgan Stanley negotiated directly with CPH concerning the transfer of CPH's 82% interest in Coleman to Sunbeam. During the course of Morgan Stanley's dealings with CPH, Morgan Stanley provided CPH with information concerning Sunbeam, which, in the exercise of reasonable care, Morgan Stanley would have known was materially false and misleading. Morgan Stanley failed to use reasonable care in providing CPH with truthful and accurate information concerning Sunbeam's 1996 and 1997 financial performance, Sunbeam's business operations, the value of Sunbeam's stock, and Sunbeam's first quarter 1998 performance.

95. As detailed above, Morgan Stanley intended for CPH to rely, and CPH justifiably relied, on the information provided by Morgan Stanley.

96. As a result of Morgan Stanley's negligence, CPH has suffered damages in excess of \$485 million.

WHEREFORE, plaintiff Coleman (Parent) Holdings Inc. demands judgment against defendant Morgan Stanley & Co., Inc. as follows:

- A. Compensatory damages to be determined at trial in an amount in excess of \$485 million;
- B. An award of costs and expenses incurred in this action, including reasonable attorneys' and experts' fees and expenses; and
- C. Any further relief as the Court may deem just and proper in light of all the circumstances of the case.
- D. CPH expressly reserves the right to seek leave to amend its complaint pursuant to Fla. Stat. § 768.72 to assert claims for punitive damages in excess of \$1.5 billion as allowed by law.

JURY DEMAND

Plaintiff demands a trial by jury on all claims.

Dated: May 8, 2003

COLEMAN (PARENT) HOLDINGS INC.

By: _____

One of Its Attorneys

John Scarola
SEARCY DENNEY SCAROLA
BARNHART & SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33409
(561) 686-6300

Jerold S. Solovy
Ronald L. Marmer
Robert T. Markowski
Deirdre E. Connell
JENNER & BLOCK, LLC
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

/mm

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

COLEMAN(PARENT) HOLDINGS, INC.

2003 CA 005045 A1

Plaintiff,

CASE NO:

vs.

MORGAN STANLEY & CO., INC.

Defendant.

SUMMONS:

THE STATE OF FLORIDA
To Each Sheriff of the State:

YOU ARE COMMANDED to serve this summons and a copy of the complaint or petition in this action on defendant:

By Serving: Morgan Stanley & Co., Inc.
Registered Agent
CT Corporation System
1299 S. Pine Island Road
Plantation, FL 33324

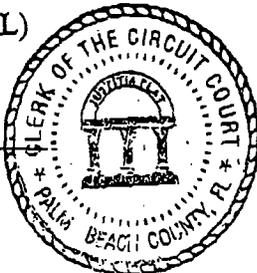
Each defendant is required to serve written defenses to the complaint or petition on Jack Scarola, Esquire, Plaintiff's attorney, whose address is Searcy Denney Scarola Barnhart & Shipley, P.A., P.O. Drawer 3626, West Palm Beach, FL 33402-3626, within 20 days after service of this summons on that defendant, exclusive of the day of service, and to file the original of the defenses with the Clerk of Court, Circuit Civil Division, either before service on plaintiff's attorney or immediately thereafter. If a defendant fails to do so, a default will be entered against that defendant for the relief demanded in the complaint or petition.

DATED on MAY 08 2003, 2003.

CLERK OF THE CIRCUIT COURT (SEAL)

BY: *[Signature]*
Deputy Clerk

JOSIE LUCCE



DOROTHY H WILKEN
Clerk Circuit Court
P.O. Box 4667
West Palm Beach, Florida
33402-4667

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

 COLEMAN (PARENT) HOLDINGS INC.,)
)
 Plaintiff,)
)
 v.)
)
 MORGAN STANLEY & CO., INC.,)
)
 Defendant.)

Case No. CA 005045 AI
 DOROTHY H. WILKEN
 CLERK OF CIRCUIT COURT
 CIRCUIT CIVIL DIVISION
 MAY 09 2003
 COPY / ORIGINAL
 RECEIVED FOR FILING

NOTICE OF TAKING VIDEOTAPED DEPOSITIONS

To: Morgan Stanley & Co., Inc.
1585 Broadway
New York, NY 10036

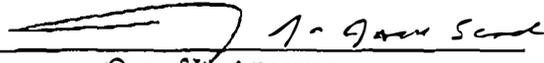
PLEASE TAKE NOTICE that Plaintiff Coleman (Parent) Holdings Inc., will take the depositions upon oral examination of the following witnesses pursuant to Florida Rule of Civil Procedure 1.310 on the dates and at the times set forth below:

John Tyree	July 10-11, 2003 at 9:00 a.m.
Robert Kitts	July 14-15, 2003 at 9:00 a.m.
Alexandre Fuchs	July 16-17, 2003 at 9:00 a.m.
Lawrence Bornstein	July 21, 2003 at 9:00 a.m.
Mark Brockelman	July 23, 2003 at 9:00 a.m.
Dennis Pastrana	July 28, 2003 at 9:00 a.m.
Richard Goudis	July 30, 2003 at 9:00 a.m.
David Fannin	August 4, 2003 at 9:00 a.m.
Albert Dunlap	August 11, 2003 at 9:00 a.m.
Deborah MacDonald	August 18, 2003 at 9:00 a.m.

The depositions will be recorded by videotape and stenographic means at the offices of Searcy Denney Scarola Barnhart & Shipley, P.C., 2139 Palm Beach Lakes Blvd., West Palm Beach, Florida. The deposition will be taken before a person authorized to administer oaths and will continue day to day until completed.

The videotape operator will be Esquire Deposition Services at 515 West Flagler Drive, Suite P-200, West Palm Beach, FL 33401.

COLEMAN (PARENT) HOLDINGS INC.

By: 
One of Its Attorneys

Jerold S. Solovy
Ronald L. Marmer
Robert T. Markowski
Deirdre E. Connell
JENNER & BLOCK, LLC
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

Jack Scarola
SEARCY DENNEY SCAROLA BARNHART
& SHIPLEY P.A.
2139 Palm Beach Lakes Blvd
West Palm Beach, Florida 33409
(561) 686-6300

IN THE CIRCUIT COURT OF THE
15TH JUDICIAL CIRCUIT IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 2003 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

FILED
03 MAY 23 PM 4:09
CIR & CO CLS PB, CD FL
CIRCUIT CIVIL 5

**MOTION FOR ENLARGEMENT OF TIME TO RESPOND TO COMPLAINT AND
ESTABLISH BRIEFING SCHEDULE**

Defendant Morgan Stanley & Co., Inc. ("Morgan Stanley & Co."), by and through its undersigned attorneys, pursuant to Rule 1.090 of the Florida Rules of Civil Procedure, respectfully moves this Court to enlarge the time for Defendant to respond to the complaint, and to have this Court establish an efficient briefing schedule for motions to dismiss.

1. On May 8, 2003, Coleman (Parent) Holdings Inc. filed the complaint in this action (the "Coleman-Parent Action").

2. On May 12, 2003, Morgan Stanley Senior Funding, Inc. ("MSSF") filed a related action against MacAndrews & Forbes Holdings Inc., and Coleman (Parent) Holdings Inc. (the "MSSF Action"). The MSSF Action was assigned to Division AG. *See Morgan Stanley Senior Funding, Inc. v. MacAndrews & Forbes Holdings Inc. and Coleman (Parent) Holdings Inc.*, Case No. 2003 CA 005165 AG.

3. The Coleman-Parent Action and the MSSF Action are companion cases pursuant to Local Rule 2.009. Both cases involve the same series of financial transactions, involve a

Coleman v. Morgan Stanley
Case No. 2003 CA 5045 AI
Motion for Enlargement of Time, etc.
Page 2

common set of operative facts, and will require the Court to consider and resolve — in the context of motions to dismiss — substantially similar legal issues. The two cases involve many of the same parties, and counsel in both cases overlap. Accordingly, the Coleman-Parent Action and the MSSF action are companion cases pursuant to Local Rule 2.009.

4. Counsel have agreed that the MSSF Action should be transferred to this division in accordance with Local Rule 2.009. Because the Coleman Parent Action was filed first, it is the lower numbered case. Accordingly, several of the parties have filed a motion to transfer the MSSF action to this Division. It is anticipated that the MSSF Action will be transferred to this Division prior to the time this Motion is heard by the Court. The parties further anticipate that the two cases will be consolidated.

5. The Defendants in both cases intend to file motions to dismiss. One of the first issues that this Court will be required to confront — in both cases — is a choice-of-law issue. Specifically, Morgan Stanley & Co. and MSSF believe that, applying the “significant relationship” test established by the Florida Supreme Court in *Bishop v. Florida Specialty Paint Co.*, 389 So.2d 999 (Fla. 1980), all substantive issues in both cases should be determined in accordance with the law of New York, which has the most “significant relationship” to the transactions and parties. It is anticipated that Plaintiff will argue that the law of Florida should govern both cases.

6. Given the importance of this threshold choice-of-law issue in both cases, and recognizing the judicial economies to be realized by proceeding in a coordinated fashion, Morgan Stanley & Co. has proposed a briefing schedule to Plaintiff. This briefing schedule will permit this Court to determine the choice-of-law question first — and then allow the parties to submit motions to dismiss that are specifically tailored, and supported by citation to relevant

Coleman v. Morgan Stanley
Case No. 2003 CA 5045 AI
Motion for Enlargement of Time, etc.
Page 3

authority, to the law of the state that the Court has determined should apply. Otherwise, the parties' motions to dismiss and supporting memoranda will have to address *both* the choice-of-law issue *and* present arguments under *both* New York and Florida law. Morgan Stanley & Co. submits that such an exercise is inefficient and unnecessary.

7. Accordingly, Morgan Stanley & Co. proposes the following briefing schedule:

a) The parties to the Coleman Parent Action and the MSSF Action will each file Memoranda addressing the Choice of Law issue on June 23, 2003. Any memoranda in opposition will be served on July 9, 2003. The Court will schedule a thirty (30) minute hearing for as soon thereafter as possible.

b) Within thirty (30) days after rendition of the Order determining the choice of law issue, the parties will file responsive motions, together with memoranda of law, or pleadings in both the Coleman Parent Action and the MSSF Action. If a motion is filed, opposing memoranda are due twenty (20) days after service of the Motion. If any party chooses to file a Motion, rather than a responsive pleading, the Court will set the Motion or Motions for hearing in accordance with the customary practice of the Court.

WHEREFORE, Defendant, Morgan Stanley & Co., Inc., respectfully requests that the Court enlarge the time for Defendant to respond to the Complaint and establish a briefing schedule as set forth herein together with such other and further relief as is just and proper.

Coleman v. Morgan Stanley
Case No. 2003 CA 5045 AI
Motion for Enlargement of Time, etc.
Page 4

CERTIFICATE OF SERVICE

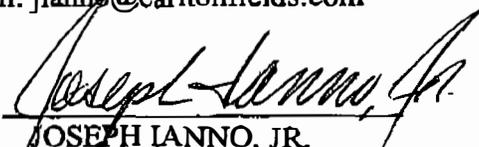
I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by facsimile and U.S. Mail to all counsel of record on the attached service list on this 23rd day of May, 2003.

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
KIRKLAND & ELLIS
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5993

**COUNSEL FOR PLAINTIFF,
MORGAN STANLEY SENIOR FUNDING**

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jjanno@carltonfields.com

BY:


JOSEPH IANNO, JR.
Florida Bar No: 655351

Coleman v. Morgan Stanley
Case No. 2003 CA 5045 AI
Motion for Enlargement of Time, etc.
Page 5

SERVICE LIST

<p>John Scarola SEARCY, DENNEY, SCAROLA, BARNHARDT & SHIPLEY, P.A. 2139 Palm Beach Lakes Boulevard West Palm Beach, Florida 33409</p>	<p>Counsel for Defendants</p>
<p>Jerold S. Solovy JENNER & BLOCK, LLC One IBM Plaza Suite 4400 Chicago, Illinois 60611</p>	<p>Counsel for Defendants</p>

IN THE CIRCUIT COURT OF THE
15TH JUDICIAL CIRCUIT IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 2003 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

DOROTHY H. WILKEN
CLERK OF CIRCUIT COURT
CIRCUIT CIVIL DIVISION

MAY 23 2003

**COPY / ORIGINAL
RECEIVED FOR FILING**

NOTICE OF HEARING

NOTICE IS HEREBY given that a hearing has been set in the above-styled case as follows:

DATE: June 2, 2003

TIME: 8:45 a.m.

PLACE: Palm Beach County Courthouse, Room 11B
205 North Dixie Highway
West Palm Beach, Florida 33401

BEFORE: Judge Elizabeth T. Maass

CONCERNING: Defendant's Motion for Enlargement of Time to Respond
to Complaint and Establish Briefing Schedule

KINDLY GOVERN YOURSELVES ACCORDINGLY.

The undersigned counsel hereby certifies that a good faith attempt to resolve the issues contained in the foregoing motions or matters will be made with opposing counsel prior to hearing on these matters on the Court's Motion Calendar.

Coleman v. Morgan Stanley
Case No: 03-CA 005045 AI
Notice of Hearing
Page 2

If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no costs to you, to the provision of certain assistance. Please contact the ADA Coordinator in the Administrative Office of the Court, Palm Beach County Courthouse, 205 North Dixie Highway, Room 5.2500, West Palm Beach, Florida 33401; telephone number (561) 355-2431 within two (2) working days of your receipt of this notice; if you are hearing or voice impaired, call 1-800-955-8771.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by

U.S. Mail to all counsel of record on the attached service list on this 23rd day of May, 2003.

Thomas D. Yannucci, P.C.,
Thomas A. Clare
Brett McGurk
KIRKLAND & ELLIS
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5993

**COUNSEL FOR DEFENDANT,
MORGAN STANLEY & CO. INC.**

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

BY: 
JOSEPH IANNO, JR.
Florida Bar No: 655351

Coleman v. Morgan Stanley
Case No: 03-CA 005045 AI
Notice of Hearing
Page 3

SERVICE LIST

<p>John Scarola SEARCY, DENNEY, SCAROLA, BARNHARDT & SHIPLEY, P.A. 2139 Palm Beach Lakes Boulevard West Palm Beach, Florida 33409</p>	<p>Counsel for Defendants</p>
<p>Jerold S. Solovy JENNER & BLOCK, LLC One IBM Plaza Suite 4400 Chicago, Illinois 60611</p>	<p>Counsel for Defendants</p>

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS, INC.,)
) Case No.: 2003 CA 005045AI
)
) Plaintiff,) Judge Elizabeth Maass
)
) v.)
)
) MORGAN STANLEY & CO., INC.,)
)
) Defendants.)
_____)

DOROTHY H. WILKEN
CLERK OF CIRCUIT COURT
CIRCUIT CIVIL DIVISION

MAY 29 2003

COPY / ORIGINAL
RECEIVED FOR FILING

**COLEMAN (PARENT) HOLDINGS, INC.'S OPPOSITION TO
MORGAN STANLEY'S REQUEST FOR A SEPARATE BRIEFING
SCHEDULE ON THE ISSUE OF CHOICE OF LAW**

Coleman (Parent) Holdings, Inc. ("CPH"), the plaintiff here and one of the defendants in Case No. 2003 CA 005165AG, submits this opposition to the motion of defendant Morgan Stanley & Co., Inc. ("Morgan Stanley") to set a separate schedule for briefing what substantive laws apply to the two lawsuits in advance of the filing of dispositive motions and other responsive pleadings.^{1/}

Argument

Morgan Stanley's request for separate, threshold briefing of disputed choice of law issues is premature, unnecessary and contrary to the goal of judicial economy.

First, briefing the choice of law issue is premature, given that no dispositive motions have been filed yet. The only way to perform a proper choice of law analysis (and the only way to determine whether it is even necessary to do so) is in the context of addressing the specific issues raised by the parties in whatever motions they might file. That analysis cannot be performed in a

^{1/} Morgan Stanley's motion misstates CPH's position in several respects, but given that most of the inaccuracies are not germane to the resolution of the instant motion, CPH will not dwell on them here. CPH, however, is compelled to correct one especially egregious error: In Paragraph 4 of its motion, Morgan Stanley represents that after the case brought by Morgan Stanley's affiliate against CPH and another party is transferred to this Court, "[t]he parties further anticipate that the two cases will be consolidated." In fact, CPH sees no reason why these two fundamentally different lawsuits with only one party in common should be consolidated, and CPH would vigorously oppose any consolidation request by Morgan Stanley.

vacuum. Morgan Stanley's proposal, which would have this Court render an advisory opinion on choice of law without even knowing what the real issues and points of contention are, puts the cart before the horse and is contrary to Florida authorities suggesting that choice of law issues cannot be addressed until they are properly framed by the pleadings. *See, e.g.,* Henry P. Trawick, Jr., *Trawick's Florida Practice and Procedure* § 6-17.5 at 101 (2003). That proposal therefore should be rejected.

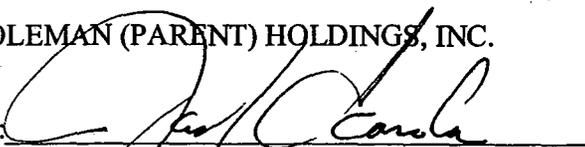
Second, separate choice of law briefing is entirely unnecessary. In the event the parties file motions that require this Court to resolve disputes concerning the governing substantive laws, the parties can address those disputes in their supporting memoranda. That is the way choice of law issues are dealt with every day. There is no reason why addressing choice of law disputes should be a bigger production in this litigation than it is in other cases.

Third, separate briefing and argument on choice of law would be contrary to the goal of judicial economy. Under Morgan Stanley's proposal (¶ 7), threshold briefing on choice of law would drag on into July, and would be followed by a 30-minute Court hearing devoted exclusively to choice of law disputes. And at that point, the Court and the parties would be far from done. The parties would then file dispositive motions, followed by still more briefing lasting into September, and by yet another Court hearing. The wisdom of proceeding in this unorthodox way — which is contrary to the usual, considerably more streamlined procedure followed in case after case — is never explained by Morgan Stanley and is far from clear. But what is clear is that Morgan Stanley's proposal of separate choice of law briefing would result in months of needless delay, the filing of excessive motions and briefs, additional unnecessary expense for the parties, and an abundance of

extra work for the Court. Morgan Stanley's proposal, which is needlessly wasteful and contrary to the goal of judicial economy, should be rejected.

Dated: May 29, 2002

COLEMAN (PARENT) HOLDINGS, INC.

By: 

One of Its Attorneys

John Scarola
SEARCY DENNEY SCAROLA
BARNHART & SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33402-3626
(561) 686-6300

Jerold S. Solovy
Ronald L. Marmer
Robert T. Markowski
Jeffrey T. Shaw
Deirdre E. Connell
JENNER & BLOCK, LLC
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

#933789

#230580/mm

IN THE CIRCUIT COURT OF THE 15TH
JUDICIAL CIRCUIT, IN AND FOR
PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

CASE NO: 2003 CA 005045 AI

vs.

MORGAN STANLEY & CO., INC.,

Defendant(s).

**ORDER ON DEFENDANT'S MOTION FOR ENLARGEMENT
OF TIME TO RESPOND TO COMPLAINT AND ESTABLISH BRIEFING SCHEDULE**

THIS CAUSE having come to be considered upon the Defendant's Motion for
Enlargement of Time to Respond to Complaint and Establish Briefing Schedule, and the Court
having reviewed the file and being fully advised in the premises, it is hereby,

ORDERED and ADJUDGED:

*Denied. However, if necessary, the Court may request supplemental
written or oral argument ~~on~~ addressed to any motion to Dismiss, if
necessary. Defendant shall serve its initial response to the Complaint, &
DONE and ORDERED at West Palm Beach, Palm Beach County, Florida, this 2*

day of June, 2003.

**together with any memorandum
of law, by June 23, 2003. Plaintiff
shall have 30 days thereafter to
serve any response, including any
memorandum, to Defendant's initial response. No **



ELIZABETH T. MAASS
CIRCUIT COURT JUDGE

Copies have been furnished to all counsel on the attached counsel list.

**hearing may be set on Defendant's initial
response until 5 days after expiration,
the time to Plaintiff to respond thereafter*

Coleman Holdings, Inc. vs Morgan Stanley & Company
Case No.:2003 CA 005045 AI
Order

COUNSEL LIST

Joseph Ianno, Jr., Esq.
Carlton Fields, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland & Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block, LLC
One IBM Plaza
Suite 4400
Chicago, IL 60611

Jack Scarola, Esq.
Searcy Denney Scarola Barnhart & Shipley. P.A.
P.O. Drawer 3626
West Palm Beach, FL 33402

2003 WL 25747989 (Fla.Cir.Ct.) (Trial Pleading)
Circuit Court of Florida.
Palm Beach County

COLEMAN (PARENT) HOLDINGS INC., Plaintiff,
v.
MORGAN STANLEY & CO., INC., Defendant.

No. 2003CA.
May 8, 2003.

Jury Trial Demanded

Complaint

[John Scarola](#), Searcy Denney Scarola, Barnhart & Shipley P.A, 2139 Palm Beach Lakes Blvd., West Palm Beach, Florida 33409, (561) 686-6300.

[Jerold S. Solovy](#), [Ronald L. Marmer](#), [Robert T. Markowski](#), [Deirdre E. Connell](#), Jenner & Block, LLC, One Ibm Plaza, Suite 4400, Chicago, Illinois 60611, (312) 222-9350.

Coleman (Parent) Holdings Inc., One of Its Attorneys.

Plaintiff Coleman (Parent) Holdings Inc. (“CPH”) alleges the following against Morgan Stanley & Co., Inc. (“Morgan Stanley”):

NATURE OF THE ACTION

1. This action arises from Morgan Stanley's participation in a massive fraud centered on Florida-based Sunbeam Corporation (“Sunbeam”). As a direct result of that fraud, CPH was induced to accept 14.1 million shares of Sunbeam stock when CPH sold its 82% interest in The Coleman Company, Inc. (“Coleman”) to Sunbeam on March 30, 1998. Morgan Stanley misrepresented Sunbeam's financial condition and assisted Sunbeam's CEO, Albert Dunlap, in concealing Sunbeam's true financial condition so that Sunbeam could complete the purchase of Coleman on March 30, 1998.

2. In April 1997, Morgan Stanley began serving as Sunbeam's investment banker. Morgan Stanley originally attempted to find someone to buy Sunbeam. When Morgan Stanley was unable to find a buyer, Morgan Stanley developed a strategy for Sunbeam to use its fraudulently-inflated stock to acquire a large company that Sunbeam would own and operate. Then, trading on Morgan Stanley's relationships with CPH's senior officers, Morgan Stanley found Coleman for Sunbeam. At the time of the sale to Sunbeam, Coleman was a leading manufacturer and marketer of consumer products for the worldwide outdoor recreation market, with annual revenues in excess of \$1 billion. With Morgan Stanley's active and direct participation, CPH was persuaded to sell its interest in Coleman to Sunbeam in return for 14.1 million shares of Sunbeam stock and other consideration.

3. After Sunbeam announced plans to acquire Coleman, Morgan Stanley agreed to underwrite a \$750 million debenture offering for Sunbeam. Sunbeam needed the proceeds of that debenture offering to complete the acquisition of Coleman. As Sunbeam's investment banker and as the sole underwriter for the \$750 million debenture offering, Morgan Stanley received detailed and specific information concerning Sunbeam's financial condition and performance. Morgan Stanley

received information that directly contradicted Sunbeam's and Morgan Stanley's assertions to CPH that Sunbeam had undergone a successful turnaround and that its financial performance had dramatically improved. By no later than March 18, 1998, Morgan Stanley knew that Sunbeam's January and February 1998 sales were only 50% of January and February 1997 sales, and Morgan Stanley also knew that the shortfall was caused by Sunbeam's practice of accelerating sales which otherwise would have occurred in 1998 in order to boost Sunbeam's income in 1997. Although Morgan Stanley and Sunbeam previously had advised CPH that Sunbeam's sales were running ahead of analysts' expectations for the first quarter, Morgan Stanley decided not to correct those material misrepresentations. Instead, in March 1998, Morgan Stanley assisted Sunbeam in concealing the problems with Sunbeam's first quarter 1998 sales in order to close transactions that should have been stopped before CPH and others were swindled.

4. CPH brings this action to recover for the losses it has suffered as a result of Morgan Stanley's active participation in successfully defrauding CPH. CPH's Complaint consists of four counts: Fraudulent Misrepresentation (Count I); Aiding and Abetting (Count II); Conspiracy (Count II); and Negligent Misrepresentation (Count IV).

5. CPH seeks compensatory damages for Morgan Stanley's wrongful conduct. Using Morgan Stanley's own valuation of Coleman, CPH has lost at least \$485 million. In addition, CPH reserves the right to seek leave to amend its complaint pursuant to [Fla. Stat. §768.72](#) to assert claims for an additional recovery of punitive damages in excess of \$1.5 billion.

JURISDICTION AND VENUE

6. This Court has jurisdiction over the subject matter of this action pursuant to [Fla. Stat. § 26.012\(2\)\(a\)](#). This Court has jurisdiction over Morgan Stanley pursuant to [Fla. Stat. § 48.193](#).

7. Venue is proper in this district pursuant to [Fla. Stat. § 47.051](#).

PARTIES AND OTHER KEY PARTICIPANTS

8. Plaintiff Coleman (Parent) Holdings Inc. ("CPH") directly or indirectly owned 44,067,520 shares - or approximately 82% - of Coleman prior to the transactions at issue. On March 30, 1998, Sunbeam acquired CPH's interest in Coleman. Sunbeam paid for the Coleman shares with 14.1 million shares of Sunbeam common stock and other consideration.

9. Defendant Morgan Stanley & Co., Inc. ("Morgan Stanley") is a highly sophisticated investment banking firm that provides a wide range of financial and securities services. Among other things, Morgan Stanley provides advice on mergers and acquisitions and raises capital in the equity and debt markets. Morgan Stanley served as Sunbeam's investment banker and as the underwriter of securities issued by Sunbeam in connection with the events at issue herein.

10. Sunbeam Corporation ("Sunbeam") was a publicly-traded company headquartered in Delray Beach, Florida. Sunbeam designed and manufactured small household appliances and outdoor consumer products, which it marketed under the Sunbeam and Oster brand names. Sunbeam filed a bankruptcy petition under Chapter 11 of the Bankruptcy Code in February 2001.

11. Albert Dunlap ("Dunlap") was the Chief Executive Officer of Sunbeam from July 1996 until June 1998 when he was terminated by Sunbeam's Board of Directors. In May 2001, the United States Securities and Exchange Commission ("SEC") filed a civil injunctive suit in Miami, Florida against Dunlap based on Dunlap's fraudulent and illegal conduct at Sunbeam. In September 2002, Dunlap consented to the entry of a judgment against him in that action. The judgment, among other things, imposed a civil fine and permanently barred Dunlap from serving as an officer or director of a public company. Dunlap still resides in Boca Raton, Florida.

12. Russell Kersh (“Kersh”) was the Executive Vice President of Sunbeam from July 1996 until June 1998 when he was terminated by Sunbeam’s Board of Directors. In May 2001, the SEC filed a civil injunctive suit in Miami, Florida against Kersh based on Kersh’s fraudulent and illegal conduct at Sunbeam. In September 2002, Kersh consented to the entry of a judgment against him in that action. The judgment, among other things, imposed a civil fine and permanently barred Kersh from serving as an officer or director of a public company. Upon information and belief, Kersh still resides in Boca Raton, Florida.

13. Arthur Andersen LLP (“Andersen”) provided outside accounting services to Sunbeam through its West Palm Beach, Florida office. Andersen auditors provided information concerning Sunbeam’s first quarter 1998 sales and earnings to Morgan Stanley. Upon information and belief, several of the Andersen auditors who provided information to Morgan Stanley concerning Sunbeam, including Lawrence Bornstein, still reside in Florida.

FACTUAL BACKGROUND

A. Sunbeam’s Lackluster Performance (1995-1996).

14. Sunbeam designed and manufactured outdoor and household consumer products, which it marketed under the Sunbeam and Oster brand names. Sunbeam’s products included small kitchen appliances, humidifiers, electric blankets, and grills. Many of the country’s leading retail stores, including Wal-Mart, Target, and Home Depot, were among Sunbeam’s major customers.

15. Despite Sunbeam’s well-known brands and strong customer base, its financial performance was disappointing. In 1994, Sunbeam earned \$1.30 per share. In 1995, Sunbeam’s earnings declined to \$0.61 per share. In 1996, Sunbeam’s earnings continued to suffer. On March 22, 1996, Sunbeam issued an early warning that its first quarter earnings would be well under analysts’ expectations and down from first quarter 1995. Shortly after issuing the March 22 earnings warning, Sunbeam’s Chief Executive Officer and two of Sunbeam’s directors announced their resignations. Less than a week later, Sunbeam announced that its first quarter 1996 earnings had plunged 42% from first quarter 1995 levels. Sunbeam also announced that its second quarter 1996 earnings would be lower than its second quarter 1995 earnings.

16. Sunbeam’s disappointing earnings caused its stock price to plummet. During 1995, the price at which Sunbeam’s stock traded fell 40%, from a high of \$25-1/2. In 1996, Sunbeam’s stock price continued to decline until it reached a low of \$12-1/4 in July.

B. Sunbeam Hires A New Management Team (July 1996).

17. On July 18, 1996, Sunbeam’s board of directors hired Albert Dunlap as Sunbeam’s new Chief Executive Officer. Based upon brief terms as Chief Executive Officer of other publicly traded companies, including Scott Paper Company (“Scott Paper”), Dunlap was viewed as a “turnaround specialist” - that is, someone who could take a poorly performing company and significantly increase its value by “turning around” its financial performance. Because Dunlap touted the benefits from firing large numbers of employees and closing large numbers of plants, Dunlap became widely known as “Chainsaw Al.” Dunlap lived in Boca Raton, Florida, and one of his first tasks at Sunbeam was to consolidate the company’s six headquarters into one located in Delray Beach, Florida.

18. Immediately after joining Sunbeam, Dunlap hired Kersh as Sunbeam’s Chief Financial Officer. Kersh had teamed with Dunlap for over 15 years, serving as a senior executive with Dunlap at other companies, including Scott Paper. Dunlap also brought in several other hand-picked executives to make up his senior management team.

19. Dunlap and his senior management team entered into employment agreements with Sunbeam. Under those agreements, Dunlap and his senior management team stood to make tens of millions of dollars if they were able to boost Sunbeam's apparent value and then sell Sunbeam to another company at a premium.

C. Dunlap Cooks The Books At Sunbeam (1996-1997).

20. In order to convince other companies that they should want to purchase Sunbeam, Dunlap needed to improve Sunbeam's reported financial performance quickly and dramatically. It was, of course, no small task to transform Sunbeam from a poorly performing company, with weak sales and declining profits, into a strong company with growing sales and soaring profits. In fact, as the world later learned, Dunlap did not achieve that change in Sunbeam's fortunes. Instead, Dunlap created the illusion of a dramatic turnaround at Sunbeam by engaging in what SEC officials subsequently described as a "case study" in financial fraud.

21. Dunlap had a three-step plan at Sunbeam. In the first step, Dunlap overstated Sunbeam's financial problems so that Sunbeam appeared to be in worse shape than it really was. After making Sunbeam look worse, Dunlap moved to step two, where he made Sunbeam look more valuable than it really was by inflating Sunbeam's sales and engaging in other earnings manipulations. In step three, Dunlap planned to sell Sunbeam to another company before it became apparent that the "improved" results were fictional. By doing so, Dunlap would make tens of millions of dollars and would be free to blame his successor for any subsequent problems.

1. Step One: Make Sunbeam Appear Worse Than It Really Was (1996).

22. Dunlap began implementing his strategy soon after his arrival at Sunbeam in 1996. Claiming to be engaged in a clean-up of Sunbeam's financial problems, Dunlap recorded artificially high reserves and booked expenses that should not have been recorded until later periods. Both of those actions made Sunbeam's financial condition appear worse than it really was, thus lowering the benchmark for measuring Sunbeam's performance in future years.

23. The overstated reserves also provided Dunlap a means by which he could inflate Sunbeam's future results during the second step of his plan. Dunlap later could "re-evaluate" and release millions of dollars from the overstated reserves to boost income in later periods. The income from released reserves contributed to the illusion of a rapid turnaround in Sunbeam's performance. Using inflated reserves to enhance income in future periods is a fraudulent practice and overstated reserves are commonly called "cookie jar" reserves.

2. Step Two: Create The False Appearance Of Dramatically Improved Performance (1997).

24. After making Sunbeam look worse than it really was in 1996, Dunlap manipulated Sunbeam's sales and expenses in 1997 to create the false appearance of quarter after quarter improvement in financial performance. For example, Dunlap caused Sunbeam to inflate its sales by engaging in phony "bill and hold" sales. Under this practice, Sunbeam recognized revenues from "sales," even though customers did not actually pay for or even take delivery of the products, which continued to sit in Sunbeam's own warehouses. Although Sunbeam recorded the "bill and hold" sales as if they were current sales, they were, in reality, simply sales stolen from future quarters. In 1997, phony "bill and hold" sales added approximately \$29 million in sales and \$4.5 million in income.

25. Throughout 1997, Sunbeam also engaged in a sales practice known as "channel stuffing" - accelerating sales that otherwise would occur in a later period, sometimes by offering steep discounts or other extraordinary customer inducements. On the grand scale employed by Sunbeam, channel stuffing inevitably leads to major sales shortfalls in later periods when "stuffed" customers simply stop buying. Sunbeam's senior sales officer referred to Sunbeam's unsustainable practice of inflating performance through accelerated sales as the "doom loop."

26. Dunlap further “enhanced” Sunbeam's income in 1997 by causing Sunbeam to record a “profit” of \$ 10 million from a sham sale of its warranty and spare parts business. Dunlap also made Sunbeam appear to be more successful than it really was by reaching into the “cookie jar,” reversing inflated reserves, and recording \$35 million as income. Sunbeam's 1997 profit margins also looked better than they really were because Dunlap already had recorded millions of dollars of 1997 expenses in 1996.

27. In October 1997, Dunlap announced that Sunbeam's “turnaround” was complete. Compared to the third quarter of 1996, Sunbeam's third quarter 1997 performance was remarkable. In the third quarter of 1996, Sunbeam had reported a loss of \$18.1 million. In the third quarter of 1997, however, Sunbeam reported earnings of \$34.5 million - an extraordinary turnaround from substantial losses to hefty profits. Sunbeam's combined results for the first three quarters showed dramatic improvement as well. Sunbeam reported that its profits for the first nine months were up tenfold over the same period the year before - from \$6.5 million in 1996 to \$67.7 million in 1997. Sunbeam's reversal of fortune caused a spectacular increase in the price of its stock. In July 1996, when Dunlap was hired, Sunbeam's shares traded at \$12-1/4. By October 1997, Sunbeam's shares had risen to \$49-13/16.

3. Step Three: Cash In Before The Turnaround Fraud Is Discovered (1997- 1998).

28. With steps one and two successfully completed, Dunlap was more than eager to complete the final step of his scheme: to sell Sunbeam to another company and collect tens of millions of dollars for himself before the outside world could learn the truth about Sunbeam's phony “turnaround.” To accomplish that third and final step, Dunlap needed an investment banking firm to serve as his shill. Morgan Stanley was pleased to play that role.

D. Morgan Stanley Vies For A Spot On Dunlap's Team (April - September 1997).

29. When Dunlap announced in early 1997 that he would begin interviewing investment bankers, Morgan Stanley immediately began pursuing the job. Although Morgan Stanley had no previous relationship with Sunbeam, one of Morgan Stanley's senior executives, William Strong, had worked closely with Dunlap on other large transactions between 1986 and 1993, when Strong was employed by Salomon Brothers.

30. Morgan Stanley knew that it was competing with other investment bankers, including Mark Davis, for Dunlap's business. Davis was the head of the mergers and acquisitions department at Chase Securities and had worked previously with Strong at Salomon Brothers. Davis had a very strong relationship with Dunlap, and Davis had served as Dunlap's investment advisor on numerous transactions, including Dunlap's sale of Scott Paper. Shortly after arriving at Sunbeam, Dunlap hired Davis to handle the sale of Sunbeam's furniture business.

31. Morgan Stanley put together a team headed by its Vice Chairman, Bruce Fiedorek, and Strong. Beginning in April 1997, Morgan Stanley's personnel traveled to Sunbeam's offices in Delray Beach, Florida to study Sunbeam and woo Dunlap. After months of uncompensated work, in September 1997, Morgan Stanley finally persuaded Dunlap to name Morgan Stanley as Sunbeam's exclusive investment banker. Dunlap instructed Morgan Stanley to find a buyer for Sunbeam. Morgan Stanley knew that if it failed to deliver a major transaction, Morgan Stanley would not be compensated for the extensive work it had performed for Sunbeam. Morgan Stanley also knew that Davis and Chase Securities were standing by - ready and willing to reclaim their position as Dunlap's investment banker of choice.

E. Morgan Stanley Seeks A Buyer For Sunbeam (Fall 1997).

32. Throughout the fall of 1997, Morgan Stanley aggressively searched for a buyer for Sunbeam. Morgan Stanley put together extensive and detailed materials to use in marketing Sunbeam to potential buyers. Morgan Stanley pitched the

transaction to more than 10 companies - including Gillette, Colgate, Sara Lee, Rubbermaid, Whirlpool, and Black & Decker - that Morgan Stanley hoped might have an interest in acquiring Sunbeam. Morgan Stanley, however, was not able to find a buyer.

33. As 1998 approached, the pressure on Dunlap increased. Dunlap was aware that Sunbeam would be unable to sustain the appearance of a successful turnaround in 1998 because Sunbeam had stolen sales from 1998 to boost 1997's numbers and the "cookie jar" reserves had been depleted. Dunlap needed a way to conceal Sunbeam's phony turnaround until a buyer could be found. Morgan Stanley provided the solution to Dunlap's problem.

F. Unable To Find A Buyer For Sunbeam, Morgan Stanley Looks For An Acquisition (December 1997).

34. Morgan Stanley knew that its failure to find a buyer for Sunbeam could prove fatal to the relationship it had worked so hard to establish with Dunlap. As the pressure on Dunlap increased, the pressure on Morgan Stanley increased as well. Although Morgan Stanley was not able to find a buyer for Sunbeam, Morgan Stanley responded with a plan that would allow Dunlap to conceal his fraud. Morgan Stanley recommended that Sunbeam acquire other companies, using Sunbeam's stock, which was fraudulently inflated, as the "currency" that would be used to pay for the acquisitions.

35. Morgan Stanley's strategy was doubly deceptive. First, Morgan Stanley's acquisition strategy would allow Dunlap to consolidate Sunbeam's results with those of the newly- acquired companies. That would help Dunlap camouflage Sunbeam's results and make it difficult to detect any shortfall in Sunbeam's performance. Dunlap simply could label any problems that were detected as attributable to the poor performance of the acquired companies or as a temporary "blip" caused by the distraction of integrating the acquired companies with Sunbeam. Second, Morgan Stanley's strategy would allow Dunlap to take new massive restructuring charges (purportedly relating to the acquisitions) and thus create more "cookie jar" reserves that could be tapped to bolster the future earnings of the combined companies.

36. Morgan Stanley identified Coleman as one of the key potential acquisition targets. CPH owned 82% of Coleman's stock. Morgan Stanley searched the ranks of its investment bankers to locate those with the best access to CPH. Drawing on relationships between some of Morgan Stanley's investment bankers and senior CPH officers, Morgan Stanley set about trying to persuade CPH to sell its interest in Coleman to Sunbeam - and, most importantly, to accept Sunbeam stock as consideration.

37. Morgan Stanley laid the groundwork for a meeting to take place in December 1997 in Palm Beach, Florida between Dunlap and Kersh and representatives of CPH. In advance of the Palm Beach meeting, Morgan Stanley provided materials to Sunbeam to prepare Sunbeam for the meeting. Morgan Stanley also met with Kersh and other Sunbeam personnel to prepare for the Palm Beach meeting. However, Dunlap nearly scuttled Morgan Stanley's carefully crafted plan at the outset. During the December 1997 Palm Beach meeting, when CPH rejected Dunlap's initial all-stock offer, Dunlap became so angry that he cursed and ranted at the CPH representatives and stormed out.

G. Morgan Stanley Revives The Deal And Negotiates With CPH (January-February 1998).

38. Dunlap's tantrum appeared to kill any chance that CPH would sell its interest in Coleman to Sunbeam. Morgan Stanley, however, worked to revive the discussions. Drawing again on Morgan Stanley's relationships with CPH officers, Morgan Stanley was able to restart the discussions with CPH with the promise that Dunlap would be kept away from the negotiating table. Thereafter, Morgan Stanley, through Managing Directors Strong, James Stynes, and Robert Kitts, led the discussions with CPH on Sunbeam's behalf.

39. Morgan Stanley knew that it had to persuade CPH not only to sell Coleman, but also to accept Sunbeam stock - ultimately, 14.1 million shares of Sunbeam stock - as a major part of the purchase price. During the course of negotiations,

Morgan Stanley prepared and provided CPH with false financial and business information about Sunbeam designed to create the appearance that Sunbeam was prospering and that Sunbeam's stock had great value. For example, Morgan Stanley provided CPH with false 1996 and 1997 sales and revenue figures, as well as false projections that Sunbeam could not expect to achieve. Together, in face-to-face discussions, Morgan Stanley and Sunbeam assured CPH that (a) Sunbeam would meet or exceed its first quarter 1998 earnings estimates; (b) analysts' 1998 earnings estimates for Sunbeam were correct; and (c) Sunbeam's plan to earn \$2.20 per share in 1998 was easily achievable and probably low. Morgan Stanley and Sunbeam also falsely assured CPH that Sunbeam's "early buy" sales program would not hurt Sunbeam's future revenues. However, the "early buy" program was one of Sunbeam's revenue acceleration programs - and the devastating effects of Sunbeam's revenue acceleration programs already had begun to materialize at Sunbeam. Sunbeam's January and February 1998 sales were down drastically, although those results were not disclosed to CPH or the public. To the contrary, Morgan Stanley and Sunbeam together specifically advised CPH that Sunbeam's first quarter 1998 sales were "tracking fine" and running ahead of analysts' estimates.

40. Before the truth was revealed, Morgan Stanley persuaded CPH to sell its shares in Coleman to Sunbeam and to accept 14.1 million shares of Sunbeam stock as part of the consideration. Based on the price at which Sunbeam's stock was trading, the 14.1 million shares of Sunbeam stock were worth approximately \$600 million.

H. Morgan Stanley Advises Sunbeam's Board On The Acquisition (February 27, 1998).

41. On February 27, 1998, Sunbeam's Board of Directors met at Morgan Stanley's offices to consider the purchase of Coleman, as negotiated by Morgan Stanley.

42. At the February 27, 1998 meeting, Morgan Stanley made an extensive presentation to Sunbeam's Board concerning the proposed transaction. Numerous Morgan Stanley representatives, including Managing Directors Strong, Kitts, Stynes, Ruth Porat, and Vikram Pandit, attended the meeting.

43. Morgan Stanley presented Sunbeam's board with Morgan Stanley's opinion on the value of Coleman. Using a discounted cash flow analysis, which Morgan Stanley represented was the best gauge of stand-alone economic value and the best method of capturing the unique value of Coleman, Morgan Stanley valued CPH's Coleman stock at a range of \$31.06 to \$53.24 per Coleman share. CPH's 44,067,520 Coleman shares were worth, therefore, between \$136 billion and \$2.46 billion.

44. Following Morgan Stanley's presentation, Sunbeam's Board of Directors voted to acquire Coleman on the very favorable terms that Morgan Stanley had negotiated.

I. Morgan Stanley Develops Sunbeam's Public Announcement Of The Coleman Acquisition (February 28-March 1, 1998).

45. Morgan Stanley spent the following weekend developing Sunbeam's public relations strategy to announce the Coleman transaction. Morgan Stanley scripted the points for Dunlap to make in a conference call with analysts. Morgan Stanley also crafted a list of "key media messages" for Dunlap to use in his communications with the press. On Sunday, March 1, 1998, Morgan Stanley spoke with a reporter for the Wall Street Journal to inform him that Sunbeam would announce its acquisition of Coleman the following morning.

46. Sunbeam announced its acquisition of Coleman on Monday, March 2, 1998, prior to the opening of the financial markets. Consistent with Morgan Stanley's valuation, investors viewed Sunbeam's purchase of Coleman - and the price that Sunbeam had paid - very favorably. The day before the acquisition was announced, Sunbeam's stock closed at \$41-3/4. In the days following Sunbeam's announcement of the transaction, Sunbeam's stock rose approximately 25%, to a high of \$52.

**J. Morgan Stanley Serves As The Underwriter For Sunbeam's
\$750 Million Convertible Debenture Offering (March 1998).**

47. Dunlap knew that Sunbeam needed to raise funds to pay the cash portion of the acquisition consideration. Dunlap also knew that Sunbeam needed cash to purchase two other smaller companies in addition to Coleman. Morgan Stanley recommended that Sunbeam raise funds through a \$500 million offering of convertible subordinated debentures. To assure the offering's success, Morgan Stanley lent its name to the offering. Indeed, Morgan Stanley agreed to serve as the sole underwriter for the offering.

48. The money raised from the sale of the debentures was used by Sunbeam to complete the acquisition of Coleman.

49. Unbeknownst to CPH or the public, Sunbeam's first quarter 1998 sales were a small fraction of the financial community's expectations for the quarter. If Dunlap could consolidate Sunbeam's sales with Coleman's sales, Dunlap knew that he could obscure Sunbeam's actual first quarter sales. As a result, Dunlap was especially anxious to complete the acquisition of Coleman before Sunbeam announced its first quarter 1998 sales. Indeed, the success of the scheme depended upon Sunbeam's ability to complete the Coleman acquisition before Sunbeam's first quarter results were announced. To satisfy Dunlap's objectives, Morgan Stanley moved up the launch date of the offering.

50. The debentures were marketed to investors at a series of "road show" meetings and conference calls arranged by Morgan Stanley. Morgan Stanley prepared and distributed a memorandum for its sales force to use in marketing the debentures to investors. Morgan Stanley also developed the script for Dunlap and Kersh to deliver during the road show. In those materials, Morgan Stanley misrepresented Sunbeam's financial performance and emphasized Dunlap's purported "turnaround" accomplishments.

51. Morgan Stanley launched the debenture offering with a research analyst presentation to the Morgan Stanley sales force. As part of Morgan Stanley's growing relationship with Sunbeam, one of Morgan Stanley's top-rated research analysts planned to initiate equity coverage of Sunbeam. That Morgan Stanley analyst had modeled values for Sunbeam's acquisition of Coleman that were higher than even Sunbeam's management had predicted.

52. Although Morgan Stanley initially planned to sell \$500 million worth of debentures, Morgan Stanley's efforts were so successful that the size of the offering was increased to \$750 million on March 19, 1998 - the day of the last road show. The debentures were sold to investors nationwide, including investors based in Florida.

K. Morgan Stanley Is Told That Sunbeam's First Quarter Sales Are Down Dramatically (March 17 -18,1998).

53. As Sunbeam's investment banker and the sole underwriter for the debenture offering, Morgan Stanley had a duty to investigate Sunbeam's finances and business operations. As a matter of law, that duty included an obligation to verify management's claims about Sunbeam's finances and business. Morgan Stanley, which had been working hand-in-hand with Sunbeam for almost a year and had traveled to Sunbeam's Florida offices, repeatedly asserted that it had satisfied that duty.

54. Strong, who was one of the senior Morgan Stanley investment bankers involved, has admitted in sworn testimony that he may have had more than 100 telephone conversations with Dunlap and Kersh (whose offices were in Sunbeam's Delray Beach headquarters) and that Strong was "sure" that he would have been apprised of Sunbeam's financial performance during the first two months of 1998.

55. With the \$750 million debenture offering and the Coleman transaction set to close at the end of March 1998, Sunbeam's Florida-based outside auditors were shocked that Morgan Stanley had not asked them about Sunbeam's financial performance for first quarter 1998. Sunbeam's auditors were alarmed because Sunbeam's first quarter results were a disaster, but Dunlap, Kersh, and Morgan Stanley were telling CPH and the investing public, including investors in Florida, that Sunbeam's turnaround was a success, that Sunbeam's sales for the first quarter of 1998 were ahead of the expectations of outside financial analysts, and that Sunbeam was poised for record sales.

56. On March 17, Sunbeam's auditors forced the issue. From their Florida offices, Sunbeam's auditors sent Morgan Stanley a letter reporting that Sunbeam's net sales through January 1998 were down 60% - \$28 million in January 1998, as compared to \$73 million in January 1997. The March 17 letter explained that the decline was "primarily due to the ... new early buy program for grills which accelerated grill sales into the fourth quarter of fiscal 1997."

57. The next day, Morgan Stanley was faxed a schedule from Sunbeam's Florida office that showed that Sunbeam's January and February 1998 net sales totaled \$72 million, an amount that was 50% lower than Sunbeam's January and February 1997 net sales of \$143.5 million.

58. Based on information that Sunbeam and Morgan Stanley had disseminated, CPH, investors, and Wall Street analysts were anticipating that Sunbeam's first quarter 1998 net sales would be in the range of \$285 million to \$295 million. Sales in that range would have been approximately 15% higher than first quarter 1997 sales. Sunbeam's January and February 1998 sales, however, totaled barely 25% of \$285 million. As Sunbeam's outside auditors advised Morgan Stanley in writing, the sales drop-off was caused by Sunbeam's sales acceleration program. The information put into Morgan Stanley's hands on March 17 and March 18 showed that Morgan Stanley's and Sunbeam's assertions to CPH and other investors were false. Contrary to what Morgan Stanley and Sunbeam had represented, Sunbeam had not undergone a successful turnaround, Sunbeam's financial performance had not dramatically improved, and Sunbeam's performance in 1998 was not better than Wall Street analysts' expectations. It was imperative, therefore, that the truth be kept from CPH until the Coleman transaction closed at the end of March 1998.

L. Morgan Stanley Assists Sunbeam In Concealing The Fraud: The False March 19, 1998 Press Release.

59. Morgan Stanley did not disclose Sunbeam's disastrous first quarter, Morgan Stanley did not insist that Sunbeam disclose its disastrous first quarter, Morgan Stanley did not correct any of the false and misleading statements it and Sunbeam had made to CPH about Sunbeam's business or performance, and Morgan Stanley did not suspend any of the critical transactions that were scheduled to close in the next two weeks. Instead, with Morgan Stanley's knowledge and assistance, Sunbeam prepared and issued a false press release on March 19, 1998 that affirmatively misstated and concealed Sunbeam's true condition.

60. The March 19, 1998 press release stated: "Sunbeam Corporation ... said today that it is possible that its net sales for the first quarter of 1998 may be lower than the range of Wall Street analysts' estimates for \$285 million to \$295 million, but net sales are expected to exceed 1997 first quarter net sales of \$253.4 million.... The shortfall from analysts' estimates, if any, would be due to changes in inventory management and order patterns at certain of the Company's major retail customers. The Company further stated that based on the strength of its new product offerings and powerful brand names, it remains highly confident about the overall sales outlook for its products for the entire year."

61. As Morgan Stanley was fully aware, the March 19, 1998 press release was false, misleading, and failed to disclose material information. The March 19, 1998 press release failed to disclose Sunbeam's actual January and February 1998 sales or the true reasons for the poor results. Instead, the press release held out the false possibility that Sunbeam still could achieve sales of \$285 million to \$295 million and suggested that, if any shortfall occurred, that shortfall would be due to the fact that certain retailers had decided to defer first quarter purchases to the second quarter. The press release also assured that Sunbeam at least would exceed first quarter 1997 net sales of \$253.4 million.

62. Based on information that Morgan Stanley had in its hands on March 18, 1998, it was obvious that Sunbeam would not achieve sales of \$285 million to \$295 million and that Sunbeam's first quarter 1998 sales would be below its first quarter 1997 numbers. To simply meet 1997 first quarter sales, Sunbeam needed sales of \$123.3 million over the 12 remaining days of the quarter - an average of \$10.28 million per day. Sales of \$10.28 million per day would be 306% more than the average per day sales in March 1997, and 281% more than the average per day sales for the first 17 days of March 1998. Furthermore, Morgan Stanley knew that the shortfall from analysts' estimates was not caused by retailers' deciding to defer purchases from the first quarter of 1998 to the second quarter, as the press release indicated. Rather, as Sunbeam's outside auditors had advised Morgan Stanley in writing, the collapse in first quarter sales was caused by Sunbeam's acceleration of 1998 sales into the fourth quarter of 1997.

63. After Sunbeam's false press release was issued, Morgan Stanley stood arm-in-arm with Sunbeam while Dunlap and Kersh told CPH, analysts, and investors that the March 19, 1998 release was a purely cautionary statement because some first quarter 1998 sales might simply "spillover" into the second quarter and that Sunbeam still believed that it actually would meet analysts' estimates of \$285 million to \$295 million in first quarter 1998 sales.

64. Morgan Stanley knew that a full and truthful disclosure of Sunbeam's first quarter sales would doom the debenture offering, which was scheduled to close on March 25, 1998, and Sunbeam's purchase of Coleman, which was scheduled to close on March 30, 1998.

65. As Morgan Stanley was fully aware, the written contract between CPH and Sunbeam gave CPH the express legal right to refuse to close the sale if there was a material adverse change in Sunbeam's "business, results of operation or financial condition." Morgan Stanley knew that CPH would exercise its right and walk away from the transaction if CPH became aware of the extent and reasons for Sunbeam's disastrous first quarter results.

66. Furthermore, if the transactions did not close, Morgan Stanley would not be paid its \$10.28 million fee for the Coleman acquisition or its \$22.5 million fee for underwriting the subordinated debenture offering. Morgan Stanley also knew that Sunbeam would promptly replace Morgan Stanley with another investment banking firm - such as the Chase Securities team led by Mark Davis. Everything, therefore, depended on closing the Coleman acquisition before CPH learned the truth.

M. Sunbeam's Auditors Advise Morgan Stanley That The March 19, 1998 Release Is False.

67. Although Sunbeam's outside auditors already had made it perfectly clear to Morgan Stanley that Sunbeam's first quarter 1998 sales were a disaster, Morgan Stanley seemed intent on proceeding based upon the false March 19, 1998 press release.

68. One of Sunbeam's senior outside auditors, Lawrence Bornstein, has testified under oath that on March 19, 1998, he told Morgan Stanley's John Tyree that the statement in Sunbeam's March 19, 1998 press release - that Sunbeam would at least exceed first quarter 1997 sales of \$253.4 million - was not credible: "Just do the math ... they've done a million dollars in sales the first 70 days of the year and now they need to do \$10 million worth of sales for the next... I think it was 11 days ... I mean, something ridiculous." Bornstein also told Tyree: "I've been to every shipping dock domestically, I've been to Hattiesburg, I've been to Neosho, I've been to Mexico City, and I don't think these guys can physically ship this much stuff."

N. Morgan Stanley Marches Ahead With The Closings (March 19-March 30, 1998).

69. Morgan Stanley knew that the March 19 press release was false and misleading. Despite that knowledge and Bornstein's explicit statements, Morgan Stanley continued with its preparations to close the debenture offering on March 25, 1998 and the Coleman acquisition on March 30, 1998.

70. As part of those preparations, on March 24, 1998, Morgan Stanley's Tyree spoke by telephone with Sunbeam's Kersh, who was located in Sunbeam's Delray Beach offices, to obtain an updated report concerning Sunbeam's first quarter performance. By the time of that March 24, 1998 call, Sunbeam had fallen even further behind first quarter 1997 sales. As of March 18, 1998, Sunbeam needed to achieve average sales of \$10.28 million per day, over 12 days, to reach first quarter 1997 sales. Sunbeam's sales between March 18 and March 24, 1998 had averaged only \$6.81 million per day - well short of the \$10.28 million per day that Sunbeam needed to achieve. Sunbeam's March 18 through March 24, 1998 sales were further proof that Sunbeam's March 19, 1998 press release was false and that Sunbeam would not achieve first quarter 1998 sales in excess of first quarter 1997 sales.

71. Morgan Stanley also knew no later than March 25, 1998, if not much earlier, that Sunbeam's earnings for the first quarter of 1998 were going to miss Wall Street analysts' earnings expectations, which were in the range of \$0.28 to \$0.31 per share (excluding one-time charges). Sunbeam's outside auditors advised Morgan Stanley on March 25 that Sunbeam had suffered a \$41.19 million loss during the first two months of 1998, including a one-time charge of \$30.2 million. Even excluding that one-time charge, Sunbeam's loss for the first two months was \$0.13 per share. To achieve first quarter 1998 operating earnings of \$0.28 per share, which were at the low end of analyst expectations, Sunbeam needed to realize a profit of \$35.5 million during March 1998 alone. A net profit of \$35.5 million in March was 500% more than Sunbeam's net profit for the entire first quarter of 1997. In fact, Sunbeam's first quarter 1998 earnings fell far short of Wall Street's expectations. Although Sunbeam's first quarter earnings were material, that information was not disclosed to CPH or the public until after the closing of the Coleman transaction on March 30, 1998.

O. Morgan Stanley Allows The Debenture Offering And The Coleman Acquisition To Close (March 25-30,1998).

72. Having directly participated in misleading CPH and other investors, Morgan Stanley had a duty to disclose the true facts before the closing of the debenture offering and the Coleman acquisition. Morgan Stanley also could have required Sunbeam to postpone the closings of those transactions until the necessary disclosures were made. Morgan Stanley did neither. Instead, Morgan Stanley marched forward and closed the \$750 million debenture offering on March 25, 1998, which was needed to close the Coleman transaction, and assisted Sunbeam in closing the acquisition of Coleman on March 30, 1998.

73. Morgan Stanley was richly rewarded for facilitating Sunbeam's fraud. Morgan Stanley received \$22.5 million for the subordinated debenture offering and \$10.28 million for the Coleman acquisition. Morgan Stanley would have received nothing if the transactions had failed to close.

P. Sunbeam's Fraud Is Revealed, Causing The Market Value Of Sunbeam's Stock To Plummet.

74. On April 3, 1998 - just four days after the Coleman transaction closed - Sunbe announced that sales for the first quarter of 1998 would be approximately 5% below the \$253.4 million in sales that Sunbeam reported in the first quarter of 1997. In other words, Sunbeam was expecting sales in the range of \$240 million. That sales shortfall was shocking news, particularly in view of assurances provided by Sunbeam both in and after its March 19, 1998 press release that \$285 million to \$295 million of sales was still a real possibility. The April 3, 1998 press release also disclosed that Sunbeam expected to show a loss for the quarter, although the release did not disclose the magnitude of the loss or how much of the loss was attributable to operating earnings as opposed to one-time charges. Sunbeam's news stunned CPH and the market. On April 3, Sunbeam's stock price dropped 25% - from \$45-9/16 to \$34-3/8.

75. Sunbeam's actual first quarter 1998 performance was even worse than Sunbeam disclosed on April 3, 1998. The April 3, 1998 release indicated that Sunbeam's first quarter sales were in the range of \$240 million. In fact, Sunbeam's first quarter sales were \$224.5 million. Sunbeam obscured the true shortfall by extending its quarter from March 29 to March 31, 1998 - thereby adding two more days of Sunbeam sales. Sunbeam also failed to disclose that it had included two days of Coleman sales after the Coleman transaction closed on March 30. Further, Sunbeam inflated first quarter 1998 sales with \$29 million of new phony "bill and hold" sales.

76. Just as Sunbeam's first quarter 1998 sales had been a disaster, so, too, were Sunbeam's first quarter 1998 earnings. Morgan Stanley and Sunbeam had represented to CPH that Sunbeam would achieve or exceed analyst first quarter 1998 earnings estimates. At the time of that representation, the consensus among analysts was that Sunbeam would enjoy first quarter 1998 earnings of \$0.33 per share. However, on May 9, 1998, Sunbeam disclosed that it would record a first quarter loss of \$0.09 per share (excluding one-time charges) - more than \$0.40 per share lower than CPH had been told to expect.

77. Within weeks, Dunlap's fraudulent scheme began to unravel. In June 1998, after a number of news articles critical of Sunbeam's practices, Sunbeam's Board of Directors launched an internal investigation. That investigation led quickly to the firing of Dunlap and Kersh, and, subsequently, to a restatement of Sunbeam's financial statements for 1996, 1997, and the first quarter of 1998.

COUNT I

Fraudulent Misrepresentation

78. CPH repeats and realleges the allegations of paragraphs 1 through 77 above as if set forth fully herein.

79. As detailed above, Morgan Stanley participated in a scheme to mislead CPH and others and cover up the massive fraud at Sunbeam until Morgan Stanley and Sunbeam could close the purchase of Coleman. Morgan Stanley provided CPH with false information concerning Sunbeam's 1996 and 1997 financial performance, its business operations, and the value of Sunbeam's stock. Morgan Stanley also actively assisted Sunbeam in concealing Sunbeam's disastrous first quarter 1998 sales and earnings and the true reasons for Sunbeam's poor performance.

80. Morgan Stanley knew that its statements to CPH were materially false and misleading and omitted the true facts.

81. Morgan Stanley intended that CPH rely on Morgan Stanley's representations concerning Sunbeam.

82. In agreeing to accept approximately 14.1 million shares of Sunbeam stock in connection with the sale of CPH's interest in Coleman, CPH reasonably and justifiably relied upon Morgan Stanley's representations concerning Sunbeam.

83. As a result of Morgan Stanley's misconduct, CPH has suffered damages in excess of \$485 million.

COUNT II

Aiding And Abetting Fraud

84. CPH repeats and realleges the allegations of paragraphs 1 through 77 above as if set forth fully herein.

85. As detailed above, Dunlap engaged in a fraudulent scheme to inflate the price of Sunbeam's stock by improperly manipulating Sunbeam's 1996 and 1997 performance, by falsely asserting that Sunbeam had successfully "turned

around,” and by concealing the collapse of Sunbeam's first quarter 1998 sales and earnings and the reasons for Sunbeam's first quarter 1998 performance.

86. As detailed above, Morgan Stanley knew of Dunlap's fraudulent scheme and helped to conceal it until after Sunbeam could close the purchase of Coleman.

87. As detailed above, Morgan Stanley provided substantial assistance to Dunlap and Sunbeam, including (a) concealing Sunbeam's first quarter 1998 sales collapse; (b) assisting with the false March 19, 1998 press release; (c) arranging road shows and meetings with prospective debenture purchasers at which Morgan Stanley, Dunlap, and others made false statements concerning Sunbeam's financial condition and business operations; (d) preparing and disseminating the preliminary and final offering memoranda for the subordinated debenture offering, both of which contained false information concerning Sunbeam's financial condition and business operations; (e) providing CPH with false financial and business information concerning Sunbeam; (f) scripting Dunlap's false public statements concerning Sunbeam's acquisition of Coleman; (g) persuading CPH to sell its interest in Coleman and to accept 14.1 million shares of Sunbeam stock and other consideration; and (h) underwriting the \$750 million convertible debenture offering, proceeds from which were used to fund Sunbeam's purchase of Coleman.

88. As a result of Morgan Stanley's misconduct, CPH has suffered damages in excess of \$485 million.

COUNT III

Conspiracy

89. CPH repeats and realleges the allegations of paragraphs 1 through 77 above as if set forth fully herein.

90. As detailed above, Morgan Stanley conspired with Dunlap and other senior Sunbeam executives to conceal the truth about Sunbeam's financial performance and business operations.

91. As detailed above, Morgan Stanley committed overt acts in furtherance of the conspiracy, including: (a) concealing Sunbeam's first quarter 1998 sales collapse; (b) assisting with the false March 19, 1998 press release; (c) arranging road shows and meetings with prospective debenture purchasers at which Morgan Stanley, Dunlap, and others made false statements concerning Sunbeam's financial condition and business operations; (d) preparing and disseminating the preliminary and final offering memoranda for the subordinated debenture offering, both of which contained false information concerning Sunbeam's financial condition and business operations; (e) providing CPH with false financial and business information concerning Sunbeam; (f) scripting Dunlap's false public statements concerning Sunbeam's acquisition of Coleman; (g) persuading CPH to sell its interest in Coleman and to accept 14.1 million shares of Sunbeam stock and other consideration; and (h) underwriting the \$750 million convertible debenture offering, proceeds from which were used to fund Sunbeam's purchase of Coleman.

92. As a result of Morgan Stanley's misconduct, CPH has suffered damages in excess of \$485 million.

COUNT IV

Negligent Misrepresentation

93. CPH repeats and realleges the allegations of paragraphs 1 through 77 above as if set forth fully herein.

94. As detailed above, Morgan Stanley negotiated directly with CPH concerning the transfer of CPH's 82% interest in Coleman to Sunbeam. During the course of Morgan Stanley's dealings with CPH, Morgan Stanley provided CPH

with information concerning Sunbeam, which, in the exercise of reasonable care, Morgan Stanley would have known was materially false and misleading. Morgan Stanley failed to use reasonable care in providing CPH with truthful and accurate information concerning Sunbeam's 1996 and 1997 financial performance, Sunbeam's business operations, the value of Sunbeam's stock, and Sunbeam's first quarter 1998 performance.

95. As detailed above, Morgan Stanley intended for CPH to rely, and CPH justifiably relied, on the information provided by Morgan Stanley.

96. As a result of Morgan Stanley's negligence, CPH has suffered damages in excess of \$485 million.

WHEREFORE, plaintiff Coleman (Parent) Holdings Inc. demands judgment against defendant Morgan Stanley & Co., Inc. as follows:

- A. Compensatory damages to be determined at trial in an amount in excess of \$485 million;
- B. An award of costs and expenses incurred in this action, including reasonable attorneys' and experts' fees and expenses; and
- C. Any further relief as the Court may deem just and proper in light of all the circumstances of the case.
- D. CPH expressly reserves the right to seek leave to amend its complaint pursuant to [Fla. Stat. § 768.72](#) to assert claims for punitive damages in excess of \$1.5 billion as allowed by law.

JURY DEMAND

Plaintiff demands a trial by jury on all claims.

Dated: May 8, 2003

CARLTON FIELDS, P.A. ATTORNEYS AT LAW

ESPERANTÉ 222 LAKEVIEW AVENUE, SUITE 1400 WEST PALM BEACH, FLORIDA 33401-6149

MAILING ADDRESS P.O. BOX 150, WEST PALM BEACH, FL 33402-0150 TEL (561) 659-7070 FAX (561) 659-7368

FAX COVER SHEET

Table with 3 columns: Date, Phone Number, Fax Number. Rows include To: Thomas Clare, From: Joyce Dillard for Joseph Ianno, Jr.

Client/Matter No.: 47877/14092

Employee No.:

Total Number of Pages Being Transmitted, Including Cover Sheet: 24

Message: Coleman v. Morgan Stanley To follow please find a file-stamped copy of the answer, without enclosures, that we filed yesterday.

Original to follow Via Regular Mail Original will Not be Sent Original will follow via Overnight Courier

The information contained in this facsimile message is attorney privileged and confidential information intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this communication is strictly prohibited.

IF THERE ARE ANY PROBLEMS OR COMPLICATIONS, PLEASE NOTIFY US IMMEDIATELY AT: (561) 659-7070

TELECOPIER OPERATOR:

WPB#565040.1

CARLTON FIELDS, P.A.

TAMPA ORLANDO TALLAHASSEE WEST PALM BEACH ST. PETERSBURG MIAMI

**IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA**

COLEMAN (PARENT) HOLDINGS, INC.,)
)
Plaintiff,)
)
v.)
)
MORGAN STANLEY & CO., INC.,)
)
Defendant.)

**COPY / ORIGINAL
RECEIVED FOR FILING**

JUN 23 2003

2003 CA 005045 AI

Judge Elizabeth T. Mass

**DOROTHY H. WILKEN
CLERK OF CIRCUIT COURT
CIRCUIT CIVIL DIVISION**

ANSWER OF MORGAN STANLEY & CO. INCORPORATED

Defendant Morgan Stanley & Co. Incorporated ("MS & Co.") responds to Plaintiff Coleman (Parent) Holdings, Inc.'s ("CPH") Complaint by denying generally that MS & Co. engaged in any fraudulent or negligent misrepresentations, any conspiracy to defraud, that MS & Co. assisted Sunbeam Corporation ("Sunbeam") or any employee, director or agent of Sunbeam in the commission of a fraudulent scheme, or that MS & Co. otherwise defrauded CPH in any manner. Specifically, MS & Co. responds to CPH's allegations as follows:

Nature of the Action

1. MS & Co. denies the allegations contained in Paragraph 1.
2. MS & Co. admits that, beginning in mid-1997, MS & Co. served as an investment banker for Sunbeam. MS & Co. admits that it attempted to identify a party interested in purchasing Sunbeam, and that those efforts were ultimately unsuccessful. MS & Co. admits that it recommended that Sunbeam's management consider acquiring other companies instead and suggested, as is common in corporate mergers and acquisitions, that Sunbeam consider, among other options, using Sunbeam stock as part of the consideration for such an acquisition. MS & Co. denies that it had any knowledge as to the accuracy of the value of Sunbeam's stock, or that

MS & Co. knew (or even suspected) that the value of Sunbeam's stock had been "fraudulently inflated." MS & Co. admits that it facilitated communications between Sunbeam and Coleman, but denies that it in any way "persuaded" CPH to sell its interest in Coleman. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of any remaining allegations contained in Paragraph 2 and consequently denies them.

3. MS & Co. admits that it agreed to serve as underwriter of a \$750 million debenture offering for Sunbeam. MS & Co. admits that, as an advisor to Sunbeam, it had access to certain financial documents, and further states that those same documents were made available to CPH during the acquisition negotiations. Further, in that regard, MS & Co. specifically disclaimed any independent evaluation of Sunbeam's financial records, and expressly stated that it relied solely on documentation and information provided by Sunbeam and Sunbeam's audited financial statements. MS & Co. admits that on March 18, 1998, it learned that Sunbeam's first quarter 1998 sales were "soft." Sunbeam insisted that its sales would meet expectations, but MS & Co. insisted that Sunbeam issue a press release to warn the market of the softening sales. Additionally, MS & Co. received two "comfort letters" from Sunbeam's auditors, Arthur Andersen. MS & Co. performed all of its obligations as an underwriter of Sunbeam securities. MS & Co. denies that it had any role in the accounting judgments described in the complaint, or any obligations to audit or independently examine Sunbeam's accounting records. MS & Co. denies that it owed any duties to CPH. MS & Co. denies that it had any independent knowledge as to the reasons behind Sunbeam's soft sales, that Sunbeam had a "practice of accelerating sales," or that it "materially misrepresent[ed]" information to CPH. Further, MS & Co. specifically denies that it in any manner assisted Sunbeam in concealing its 1998 first quarter sales numbers in order to close the transaction. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of any remaining allegations contained in Paragraph 3 and consequently denies them.

4. MS & Co. admits that CPH has brought this action against MS & Co. alleging fraudulent misrepresentation, aiding and abetting, conspiracy, and negligent misrepresentation,

but denies that there is any merit to the suit. MS & Co. specifically denies that it made any fraudulent or negligent representations to CPH, that it in any way aided or abetted a fraudulent scheme against CPH, or that it participated in a conspiracy to defraud CPH. MS & Co. denies that any losses that CPH suffered resulted from fraud or any wrongful conduct on the part of MS & Co. MS & Co. denies the remaining allegations contained in Paragraph 4.

5. MS & Co. admits that CPH purports to seek compensatory damages against MS & Co., but denies that such claim is valid, for MS & Co. denies that it was engaged in any wrongful conduct. MS & Co. denies the remaining allegations contained in Paragraph 5.

Jurisdiction and Venue

6. MS & Co. admits the allegations contained in Paragraph 6. MS & Co. further admits that it is incorporated in Delaware and has its principal place of business in New York.

7. MS & Co. denies that venue is proper in this district.

Parties and Other Key Participants

8. MS & Co. admits that CPH represented, in negotiations with Sunbeam, that it owned, directly or indirectly, approximately 82% of Coleman prior to March 30, 1998. MS & Co. admits that on March 30, 1998, Sunbeam acquired CPH's interest in Coleman by paying CPH with 14.1 million shares of Sunbeam common stock and other consideration, including a cash payment by Sunbeam to CPH in the amount of \$159,956,756.00. (See Feb. 27, 1998 Merger Agmt. § 3.1(a)(i) (Ex. 1).) MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of any remaining allegations contained in Paragraph 8 and consequently denies them.

9. MS & Co. admits that it is an investment banking firm providing financial and securities services. MS & Co. admits that, as part of its business operations, it at times provides advice on mergers and acquisitions, and raises capital in equity and debt markets, depending on the needs of its clients. MS & Co. admits that it served as Sunbeam's investment banker for

certain aspects of Sunbeam's acquisition of Coleman, and served as underwriter of certain securities issued by Sunbeam in connection with the acquisition. MS & Co. denies any remaining allegations contained in Paragraph 9.

10. MS & Co. admits that Sunbeam was a publicly-traded company which manufactures and markets household and specialty consumer products, including outdoor cooking products. MS & Co. admits that Sunbeam marketed these products under several brand names, including Sunbeam and Oster. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of any remaining allegations contained in Paragraph 10 and consequently denies them.

11. MS & Co. admits that Albert Dunlap had served as the Chief Executive Officer of Sunbeam. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 11 and consequently denies them.

12. MS & Co. admits that Russell Kersh had served as the Executive Vice President of Sunbeam. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 12 and consequently denies them.

13. MS & Co. admits that Arthur Andersen LLP served as Sunbeam's auditors and provided independent/outside accounting services to Sunbeam. MS & Co. further admits that, during the performance of its engagement, it received "comfort letters" from Arthur Andersen. MS & Co. never served as auditor for Sunbeam, and never provided Sunbeam with any accounting or accounting-related services. MS & Co. lacks sufficient knowledge or information to know the location of Lawrence Bornstein or to form a belief as to the truth of any allegations pertaining to him, and consequently denies them. MS & Co. denies any remaining allegations contained in Paragraph 13.

Factual Background

14. MS & Co. admits the allegations contained in Paragraph 14.

15. MS & Co. responds that the allegations contained in Paragraph 15 pertain to publicly available information, and refers to such information for the truth or falsity of such allegations. To the extent that further response is required, MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 15 and consequently denies them.

16. MS & Co. responds that the allegations contained in Paragraph 16 pertain to publicly available information, and refers to such information for the truth or falsity of such allegations. To the extent that further response is required, MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 16 and consequently denies them.

17. MS & Co. admits, on information and belief, that Albert Dunlap was hired as Sunbeam's Chief Executive Officer on or about July 18, 1996. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the remaining allegations contained in Paragraph 17 and consequently denies them.

18. MS & Co. admits, on information and belief, that Russell Kersh was hired as Sunbeam's Chief Financial Officer. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the remaining allegations contained in Paragraph 18 and consequently denies them.

19. MS & Co. admits, on information and belief, that Albert Dunlap and members of his senior management team entered into employment agreements with Sunbeam. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the remaining allegations contained in Paragraph 19 and consequently denies them.

20. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 20 and consequently denies them.

21. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 21 and consequently denies them.

22. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 22 and consequently denies them.

23. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 23 and consequently denies them.

24. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 24 and consequently denies them.

25. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 25 and consequently denies them.

26. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 26 and consequently denies them.

27. MS & Co. admits, on information and belief, that Sunbeam reported a loss of \$18.1 million in the third quarter of 1996, and that it had a \$34.5 million gain in the third quarter 1997. MS & Co. further admits, on information and belief, that Sunbeam reported an increase in profits from \$6.5 million in 1996 to \$67.7 million in 1997. MS & Co. responds that the allegations contained in Paragraph 27 regarding stock prices pertain to publicly available information and MS & Co. refers to such information for the truth or falsity of such allegations. To the extent that further response is required, MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 27 and consequently denies them.

28. MS & Co. admits that it was engaged by Sunbeam to explore a possible sale of Sunbeam's core business and/or the initiation of one or more acquisitions. MS & Co. denies that it ever served as Dunlap's "shill." MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of any remaining allegations contained in Paragraph 28 and consequently denies them.

29. MS & Co. admits that William Strong and other MS & Co. employees met with Sunbeam in the spring of 1997 to discuss Sunbeam's investment banking requirements. Further, MS & Co. admits that, although it was not engaged in a previous relationship with Sunbeam,

William Strong had worked with Dunlap before, during Strong's previous employment with Salomon Brothers. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of any remaining allegations contained in Paragraph 29 and consequently denies them.

30. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 30 and consequently denies them.

31. MS & Co. admits that William Strong and other MS & Co. employees met with Sunbeam in the spring of 1997 to discuss Sunbeam's investment banking requirements. MS & Co. admits that it was engaged by Sunbeam to explore a possible sale of Sunbeam's core business and/or the initiation of one or more acquisitions. MS & Co. admits that it initially sought a buyer for Sunbeam. To the extent this Paragraph alleges that MS & Co. was motivated to participate in a fraud in order to retain a single client and receive a customary fee, that allegation is foreclosed, among other reasons, by the fact that MS & Co.'s own affiliate lent hundreds of millions of dollars to Sunbeam two days after the Coleman acquisition closed. (June 1998 Credit Facilities Mem. (Ex. 2).) MS & Co. denies any remaining allegations contained in Paragraph 31.

32. MS & Co. admits that it searched for a buyer for Sunbeam. MS & Co. further admits that it assembled marketing materials based on financial documentation and audited financial statements provided to MS & Co. by Sunbeam and Arthur Andersen, for use in meetings with potential acquirers. MS & Co. admits that, despite contacting many companies, it was unable to find a buyer for Sunbeam. MS & Co. specifically denies CPH's allegation that MS & Co. knew that it would not be compensated if "it failed to deliver a major transaction," or that "Davis and Chase were standing by . . . to reclaim their position as Dunlap's investment banker of choice." MS & Co. denies any remaining allegations contained in Paragraph 32.

33. MS & Co. denies that it provided the "solution" to any "problem" alleged in Paragraph 33. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the remaining allegations contained in Paragraph 33 and consequently denies them.

34. MS & Co. admits after its unsuccessful attempts to locate a purchaser for Sunbeam, it suggested that Sunbeam acquire one or more other companies instead. MS & Co. admits that it proposed to Sunbeam, among other options, the possibility of paying for any such acquisition in part with Sunbeam's stock. MS & Co. specifically denies any knowledge to the effect that a "failure to find a buyer for Sunbeam could prove fatal to [their] relationship." MS & Co. further denies any involvement in or knowledge of fraudulently inflated Sunbeam stock or concealment of any fraud at Sunbeam. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of any remaining allegations contained in Paragraph 34 and consequently denies them.

35. MS & Co. admits that, beginning in mid-1997, MS & Co. served as an investment banker for Sunbeam. MS & Co. admits that it attempted to identify a party interested in purchasing Sunbeam, and that those efforts were ultimately unsuccessful. MS & Co. admits that it recommended that Sunbeam's management consider, among other options, acquiring other companies instead and suggested, as is common in corporate mergers and acquisitions, that Sunbeam consider using Sunbeam stock as part of the consideration for such an acquisition. MS & Co. denies that it developed "acquisition strategies" for Sunbeam or that the services or potential transactions it discussed with Sunbeam's management were deceptive or in any way designed to facilitate fraud. MS & Co. specifically denies that it in any way knew of or knowingly assisted Dunlap to "camouflage Sunbeam's results" thereby making it "difficult to detect any shortfall in Sunbeam's performance," or that it knew of or assisted Dunlap in taking "new massive restructuring charges," which thereby created increased "cookie jar reserves." MS & Co. denies any remaining allegations contained in Paragraph 35.

36. MS & Co. admits that, in its capacity as advisor to Sunbeam, it identified Coleman as a potential acquisition candidate. MS & Co. admits that it communicated with representatives of Coleman to discuss a potential acquisition, but denies that it "persuade[d] CPH to sell its interest in Coleman to Sunbeam." MS & Co. admits that CPH represented, in

negotiations with Sunbeam, that it owned, directly or indirectly, approximately 82% of Coleman prior to March 30, 1998. MS & Co. denies the remaining allegations contained in Paragraph 36.

37. MS & Co. admits that it facilitated a meeting between representatives from Sunbeam and MacAndrews & Forbes Holdings, Inc. ("MAFCO") in December 1997. MS & Co. admits that it prepared Sunbeam's representatives for that meeting. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of any remaining allegations contained in Paragraph 37 and consequently denies them.

38. MS & Co. admits that discussions between Sunbeam, MAFCO and CPH resumed in early 1998. MS & Co. further admits that its Managing Directors James Stynes and Robert Kitts worked on MS & Co.'s engagement for Sunbeam. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of any remaining allegations contained in Paragraph 38 and consequently denies them.

39. MS & Co. denies that it "persuade[d]" CPH to sell Coleman in exchange for Sunbeam stock. MS & Co. denies that it "prepared" financial information for CPH. There is, in any event, no factual allegation contained in Paragraph 39 or elsewhere that identifies such alleged information at all, let alone with particularity. MS & Co. further denies that it knowingly "provided" CPH with false financial and business information, or otherwise knowingly relayed false information to CPH which created an appearance that "Sunbeam was prospering and that Sunbeam's stock had great value." Specifically, MS & Co. denies that it knowingly provided CPH with false 1996 and 1997 sales and revenue figures or with false projections. MS & Co. denies that it "falsely assured CPH that Sunbeam's 'early buy' sales program would not hurt Sunbeam's future revenues," that "Sunbeam would meet or exceed" first quarter 1998 estimates, that 1998 earnings estimates were accurate, that a plan to earn \$2.20/share was attainable or even low, or that it "specifically advised CPH that Sunbeam's first quarter 1998 sales were 'tracking fine' and running ahead of analysts' estimates."

In any event CPH could not have relied on such alleged representations in light of (i) the Merger Agreement's representations and warranties (Merger Agmt. §§ 5.1-5.4), none of

which refer to any alleged representation contained in this Paragraph, (ii) the representations and warranties in a separate agreement that was executed by Coleman and Sunbeam (Feb. 27, 1998 Company Merger Agmt. § 5.1-5.12 (Ex. 3)), which are expressly incorporated into the Merger Agreement and none of which refer to any alleged representation contained in this Paragraph, and (iii) the Merger Agreement's broad integration clause which forecloses reliance on any alleged representation contained in this Paragraph (Merger Agmt. § 12.5). MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the remaining allegations contained in Paragraph 39 and consequently denies them.

40. MS & Co. admits that CPH agreed to sell its shares in Coleman to Sunbeam, and that CPH agreed to accept Sunbeam stock as partial payment for the sale, but denies that MS & Co. "persuaded" CPH to make the deal. CPH is a sophisticated party and was represented by its own expert advisors and attorneys. (*Id.* §§ 1.1; 4.11.) CPH and its advisors also enjoyed full access to Sunbeam's "books, records, properties, plants and personnel." (*Id.* § 6.7.) CPH also expressly disclaimed reliance on statements allegedly made during negotiations. (*Id.* § 12.5.) MS & Co. responds that the allegations contained in Paragraph 40 regarding stock value pertain to publicly available information, and refers to such information for the truth or falsity of such allegations. To the extent that further response is required, MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 40 and consequently denies them.

41. MS & Co. admits that on February 27, 1998, Sunbeam's Board of Directors met at Morgan Stanley's New York offices to discuss Sunbeam's possible purchase of Coleman. MS & Co. denies the remaining allegations contained in Paragraph 41.

42. MS & Co. admits it made a presentation during the February 27, 1998 Sunbeam Board of Directors Meeting. MS & Co. further admits that MS & Co. representatives, including William Strong, Robert Kitts, James Stynes and Ruth Porat, were present at this meeting. MS &

Co. lacks sufficient knowledge or information to form a belief as to the truth of any remaining allegations contained in Paragraph 42 and consequently denies them.

43. MS & Co. admits that at that February 27, 1998 New York meeting, it provided Sunbeam with a written "fairness opinion" regarding the fair acquisition price of Coleman. This opinion was based on financial information provided to MS & Co. by Sunbeam, Coleman, and Arthur Andersen, and on synergy analyses which MS & Co. received from CPH. The written fairness opinion explicitly stated that MS & Co. "[has] not made any independent valuation or appraisal of the assets or liabilities of [Sunbeam]." (Feb. 27, 1998 Fairness Op. at 3 (Ex. 4).) MS & Co. denies any remaining allegations contained in Paragraph 43.

44. MS & Co. admits that the Sunbeam Board of Directors approved the Coleman acquisition at the February 27, 1998 meeting in New York. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of any remaining allegations contained in Paragraph 44 and consequently denies them.

45. MS & Co. admits that it continued to provide investment banking services to Sunbeam after the Coleman acquisition was approved. MS & Co. denies any remaining allegations contained in Paragraph 45.

46. MS & Co. admits that the Coleman acquisition was announced on March 2, 1998. MS & Co. responds that the allegations contained in Paragraph 46 regarding stock prices pertain to publicly available information, and refers to such information for the truth or falsity of such allegations. To the extent that further response is required, MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 46 and consequently denies them.

47. MS & Co. admits that it agreed to serve as underwriter for Sunbeam's subordinated debentures. The "cash portion" of the consideration set forth in the Merger Agreement was also financed in part through a \$680 million loan made by Morgan Stanley Senior Funding, an affiliate of MS & Co. (See Credit Facilities Mem.) MS & Co. lacks

sufficient knowledge or information to form a belief as to the truth of any remaining allegations contained in Paragraph 47 and consequently denies them.

48. MS & Co. admits that the money raised from the sale of the debentures was used in part to finance Sunbeam's acquisition of Coleman.

49. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 49 and consequently denies them.

50. MS & Co. admits that the convertible debentures were presented to potential investors at a series of "road show" meetings and conference calls. MS & Co. admits that it reviewed and commented on the offering memorandum and other materials used to present the debentures to potential investors. MS & Co. denies that it "misrepresented Sunbeam's financial performance" or "emphasized Dunlap's purported 'turnaround' accomplishments." To the contrary, the offering memorandum expressly stated that MS & Co. assumed no responsibility for the accuracy or completeness of Sunbeam's audited financial information and warned investors not to rely on any projections of future performance. (March 19, 1998 Note Offering Mem. at 2-3, 12-17, 72 (Ex. 5).) MS & Co. denies any remaining allegations contained in Paragraph 50.

51. MS & Co. admits that it launched the debenture offering with a presentation to the Morgan Stanley sales force, but denies the remaining allegations contained in Paragraph 51.

52. MS & Co. admits that the debenture offering was increased from \$500 million to \$750 million. MS & Co. admits that the debentures were offered to investors nationwide. MS & Co. denies any remaining allegations contained in Paragraph 52.

53. MS & Co. admits that its employees traveled on one occasion to Sunbeam's Florida offices. MS & Co. denies the remaining allegations contained in Paragraph 53, except to the extent that they constitute legal conclusions to which no response is required.

54. MS & Co. admits that William Strong worked on MS & Co.'s engagement for Sunbeam. MS & Co. also admits that Strong has provided deposition testimony discussing conversations with Sunbeam officials. MS & Co. denies that Strong or any other MS & Co.

employee was accurately apprised of Sunbeam's financial condition because MS & Co. at all times relied on information provided by Sunbeam management and Arthur Andersen, including Sunbeam's audited financial statements. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of any remaining allegations contained in Paragraph 54 and consequently denies them.

55. MS & Co. denies CPH's allegation that it was "telling CPH and the investing public . . . that Sunbeam's turnaround was a success, that Sunbeam's sales for the first quarter of 1998 were ahead of expectations of outside analysts, and that Sunbeam was poised for record sales." Furthermore, any information communicated by MS & Co. was based on financial data and information provided to it by Sunbeam and Arthur Andersen — a fact that MS & Co. regularly publicized through disclaimer statements. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of any remaining allegations contained in Paragraph 55 and consequently denies them.

56. MS & Co. denies the allegations contained in Paragraph 56.

57. MS & Co. admits that it received a facsimile schedule regarding Sunbeam's finances on or about March 18, 1998. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 57 and consequently denies them.

58. MS & Co. admits that on or about March 18, 1998, it received a faxed financial schedule which reflected that Sunbeam's January and February 1998 sales were below those of January and February 1997. MS & Co. denies that it made assertions or otherwise disseminated information to CPH or others that it knew to be false. MS & Co. denies any knowledge of the fact that Sunbeam had not undergone a successful turnaround, or that Sunbeam's financial performance had not improved in the manner presented by Sunbeam's management and audited financial statements. MS & Co. admits that on March 18, 1998, it learned that Sunbeam's first quarter 1998 sales were "soft." Sunbeam insisted that its sales would meet expectations, but MS & Co. insisted that Sunbeam issue a press release to warn the market of the softening sales.

Additionally, MS & Co. received two "comfort letters" from Sunbeam's auditors, Arthur Andersen. MS & Co. performed all of its obligations as an underwriter of Sunbeam securities. MS & Co. denies that it had any role in the accounting judgments described in the complaint, or any obligations to audit or independently examine Sunbeam's accounting records. MS & Co. denies that it owed any duties to CPH. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of any remaining allegations contained in Paragraph 58 and consequently denies them.

59. MS & Co. admits that on March 18, 1998, it learned that Sunbeam's first quarter 1998 sales were "soft." Sunbeam insisted that its sales would meet expectations, but MS & Co. insisted that Sunbeam issue a press release to warn the market of the softening sales. Additionally, MS & Co. received two "comfort letters" from Sunbeam's auditors, Arthur Andersen. MS & Co. performed all of its obligations as an underwriter of Sunbeam securities. MS & Co. denies that it had any role in the accounting judgments described in the Complaint, or any obligations to audit or independently examine Sunbeam's accounting records. MS & Co. denies that it owed any duties to CPH. MS & Co. denies all remaining allegations contained in Paragraph 59.

60. MS & Co. admits that Sunbeam issued a press release on March 19, 1998 that included language selectively quoted in Paragraph 60. MS & Co. further states that the March 19, 1998 press release contained the following additional statement, omitted in the Complaint:

Cautionary Statements - Statements contained in this press release, including statements relating to the Company's expectations regarding anticipated performance in the future, are "forward looking statements," as such term is defined in the Private Securities Litigation Reform act of 1995. Actual results could differ materially from the Company's statements in this release regarding its expectations, goals or projected results, due to various factors, including those set forth in the Company's Cautionary Statements contains in its Annual Report on Form 10-K for its fiscal year ended December 31, 1997 filed with the Securities and Exchange Commission.

(March 19, 1998 Press Release (Ex. 6).)

61. MS & Co. admits that Sunbeam issued a press release on March 19, 1998 that included language selectively quoted in Paragraph 61. MS & Co. further states that the March 19, 1998 press release contained the following additional statement, omitted in the Complaint:

Cautionary Statements - Statements contained in this press release, including statements relating to the Company's expectations regarding anticipated performance in the future, are "forward looking statements," as such term is defined in the Private Securities Litigation Reform act of 1995. Actual results could differ materially from the Company's statements in this release regarding its expectations, goals or projected results, due to various factors, including those set forth in the Company's Cautionary Statements contains in its Annual Report on Form 10-K for its fiscal year ended December 31, 1997 filed with the Securities and Exchange Commission.

(*Id.*) MS & Co. denies all remaining allegations contained in Paragraph 61.

62. MS & Co. denies the allegation that it knew that the "shortfall from analysts' estimates was . . . caused by Sunbeam's acceleration of 1998 sales into the fourth quarter of 1997." MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of any remaining allegations contained in Paragraph 62 and consequently denies them.

63. MS & Co. denies the allegations contained in Paragraph 63.

64. MS & Co. specifically denies that it "knew that a full and truthful disclosure . . . would doom the debenture offering," or that it had any knowledge that the press release was untruthful or otherwise misleading. MS & Co. denies the allegations contained in Paragraph 64.

65. MS & Co. denies the allegations contained in Paragraph 65. To the extent that this Paragraph quotes the Merger Agreement, that document speaks for itself and contradicts the allegations contained in the Complaint.

66. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 66 and consequently denies them.

67. MS & Co. denies the allegations contained in Paragraph 67.

68. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 68 and consequently denies them.

69. MS & Co. admits that it continued to serve as Sunbeam's investment banker, and continued to prepare to close the debenture offering and the acquisition of Coleman, but denies any knowledge as to the alleged falsity of the March 19, 1998 press release. MS & Co. denies the remaining allegations contained in Paragraph 69.

70. MS & Co. admits that throughout its service to Sunbeam, MS & Co. employees, including Tyree, spoke via telephone with representatives of Sunbeam. MS & Co. denies any knowledge that the press release was untruthful or otherwise misleading. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the remaining allegations contained in Paragraph 70 and consequently denies them.

71. MS & Co. admits that it received "comfort letters" from Arthur Andersen. MS & Co. denies the allegation that it knew that "Sunbeam's earnings for the first quarter of 1998 were going to miss Wall Street analysts' earning expectations." MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the remaining allegations contained in Paragraph 71 and consequently denies them.

72. MS & Co. admits that it continued to prepare to close both the debenture offering and the acquisition of Coleman. MS & Co. denies any allegation of its "having directly participated in misleading CPH and other investors." MS & Co. responds that the allegation that MS & Co. "had a duty to disclose the true facts" to CPH is a legal conclusion to which no response is required. MS & Co. denies the remaining allegations contained in Paragraph 72.

73. MS & Co. admits that it received compensation for investment banking work performed by MS & Co. for Sunbeam. MS & Co. denies the allegation that it facilitated Sunbeam's fraud. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of any remaining allegations contained in Paragraph 73 and consequently denies them.

74. MS & Co. admits that on March 19, 1998, Sunbeam issued a press release which stated that "net sales for the first quarter of 1998 may be lower than the range of Wall Street analysts' estimates of \$285 million to \$295 million." MS & Co. lacks sufficient knowledge or

information to form a belief as to the truth of the remaining allegations contained in Paragraph 74 and consequently denies them.

75. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 75 and consequently denies them.

76. MS & Co. admits that it advocated issuing a press release to warn the market of the softening sales, but denies that it represented that Sunbeam's sales would exceed analysts' projections. MS & Co. denies the remaining allegations contained in Paragraph 76.

77. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 77 and consequently denies them.

Count I – Fraudulent Misrepresentation

78. MS & Co. repeats and realleges its responses to Paragraphs 1 through 77 as if set forth herein.

79. MS & Co. denies the allegations contained in Paragraph 79.

80. MS & Co. denies the allegations contained in Paragraph 80.

81. MS & Co. denies the allegations contained in Paragraph 81.

82. MS & Co. denies the allegation contained in Paragraph 82.

83. MS & Co. denies the allegation contained in Paragraph 83.

Count II – Aiding and Abetting Fraud

84. MS & Co. repeats and realleges its responses to Paragraphs 1 through 77 as if set forth herein.

85. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 85 and consequently denies them.

86. MS & Co. denies the allegation contained in Paragraph 86.

87. MS & Co. admits that, beginning in mid-1997, MS & Co. served as an investment banker and underwriter for Sunbeam. MS & Co. admits that it attempted to identify a party

interested in purchasing Sunbeam, and that those efforts were ultimately unsuccessful. MS & Co. admits that it recommended that Sunbeam's management consider acquiring other companies instead and suggested, as is common in corporate mergers and acquisitions, that Sunbeam consider using Sunbeam stock as part of the consideration for such an acquisition. MS & Co. denies that it had any knowledge as to the accuracy of the value of Sunbeam's stock, or that MS & Co. knew (or even suspected) that the value of Sunbeam's stock had been "fraudulently inflated."

MS & Co. admits that it facilitated communications between Sunbeam and Coleman, but denies that it in any way "persuaded" CPH to sell its interest in Coleman.

MS & Co. admits that on March 18, 1998, it learned that Sunbeam's first quarter 1998 sales were "soft." Sunbeam insisted that its sales would meet expectations, but MS & Co. insisted that Sunbeam issue a press release to warn the market of the softening sales. Additionally, MS & Co. received two "comfort letters" from Sunbeam's auditors, Arthur Andersen. MS & Co. performed all of its obligations as an underwriter of Sunbeam securities.

MS & Co. admits that the convertible debentures were presented to potential investors at a series of "road show" meetings and conference calls. MS & Co. admits that it reviewed and commented on the offering memorandum and other materials used to present the debentures to potential investors. MS & Co. denies the remaining allegations contained in Paragraph 87.

88. MS & Co. denies the allegations contained in Paragraph 88.

Count III – Conspiracy

89. MS & Co. repeats and realleges its responses to Paragraphs 1 through 77 as if set forth herein.

90. MS & Co. denies the allegations contained in Paragraph 90.

91. MS & Co. admits that it served as a financial advisor to Sunbeam and an underwriter of Sunbeam securities, but denies that it in any way committed "overt acts in furtherance of a conspiracy." MS & Co. denies that it performed an independent financial analysis of Sunbeam; to the contrary, MS & Co. informed CPH that it was relying solely on financial data and information provided to it by Sunbeam and Arthur Andersen. MS & Co. admits that it underwrote the \$750 million convertible debenture offering. MS & Co. denies the remaining allegations contained in Paragraph 91.

92. MS & Co. denies the allegations contained in Paragraph 92.

Count IV – Negligent Misrepresentation

93. MS & Co. repeats and realleges its responses to Paragraphs 1 through 77 as if set forth herein.

94. MS & Co. admits that it served as a financial advisor to Sunbeam and an underwriter of Sunbeam securities. MS & Co. responds that the allegations contained in Paragraph 94 constitute legal conclusions to which no response is required. Alternatively, MS & Co. denies the remaining allegations contained in Paragraph 94.

95. MS & Co. denies the allegations contained in Paragraph 95.

96. MS & Co. denies the allegations contained in Paragraph 96.

AFFIRMATIVE DEFENSES

In addition to the foregoing responses, MS & Co. asserts the following affirmative defenses to the claims stated in CPH's Complaint. MS & Co. does not assume the burden of proof on these defenses where the substantive law provides otherwise.

First Affirmative Defense

CPH's claims must be dismissed on *forum non conveniens* grounds pursuant to Florida Rule of Civil Procedure 1.061(a).

Second Affirmative Defense

CPH's alleged claims are barred, in whole or in part, for failure to state a claim upon which relief can be granted.

Third Affirmative Defense

CPH's alleged claims are barred, in whole or in part, by the doctrine of laches.

Fourth Affirmative Defense

CPH's alleged claims are barred, in whole or in part, by the doctrine of estoppel.

Fifth Affirmative Defense

CPH's alleged claims are barred, in whole or in part, by the doctrine of waiver.

Sixth Affirmative Defense

CPH's alleged claims are barred, in whole or in part, by the doctrine of unclean hands.

Seventh Affirmative Defense

CPH's alleged claims are barred, in whole or in part, by plaintiff's failure to mitigate its damages.

Eighth Affirmative Defense

CPH's alleged claims are barred because CPH has experienced no damages, and any claimed loss is speculative and/or was avoidable.

Ninth Affirmative Defense

CPH's alleged claims are barred, in whole or in part, because the claimed injuries were not proximately caused by any acts or omissions of MS & Co.

Tenth Affirmative Defense

To the extent CPH's fraud claim relies on non-disclosure, that claim is barred, in whole or in part, because MS & Co. was under no duty to disclose.

Eleventh Affirmative Defense

CPH's claims are barred, in whole or in part, because of MS & Co.'s repeated disclaimers of reliance.

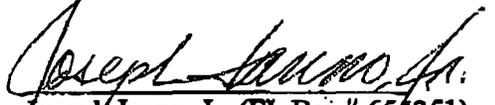
Twelfth Affirmative Defense

Any future claim by CPH for punitive damages is barred, in whole or in part, because (i) the allegedly tortious conduct is not gross, wanton, willful, or otherwise morally culpable; and (ii) the alleged conduct was not part of a pattern directed at the public generally.

WHEREFORE, MS & Co. denies that CPH is entitled to any relief whatsoever, and to the extent that CPH should recover any damage award, that award should be offset by CPH's failure to take appropriate steps to mitigate its damages. MS & Co. respectfully requests that the Court enter judgment for MS & Co. dismissing the complaint with prejudice, award MS & Co. its attorneys' fees, costs and expenses, and grant such other and further relief as may be just and proper.

Dated: June 23, 2003

Respectfully Submitted,


Joseph Ianno, Jr. (FL Bar # 656351)
CARLTON FIELDS
222 Lake View Avenue — Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368

Thomas D. Yannucci, P.C.
Thomas A. Clare
Larissa Paule-Cares
Brett H. McGurk
KIRKLAND & ELLIS
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

**ATTORNEYS FOR DEFENDANT,
MORGAN STANLEY & CO. INCORPORATED.**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Federal Express to all counsel of record listed below on this 23rd day of June, 2003.

John Scarola SEARCY, DENNEY, SCAROLA, BARNHARDT & SHIPLEY, P.A. 2139 Palm Beach Lakes Boulevard West Palm Beach, Florida 33409	Counsel for Defendants
Jerold S. Solovy JENNER & BLOCK, LLC One IBM Plaza Suite 4400 Chicago, Illinois 60611	Counsel for Defendants



JOSEPH IANNO, JR.

2003 WL 24233941 (Fla.Cir.Ct.) (Trial Pleading)
Circuit Court of Florida,
Fifteenth Judicial Circuit.
Palm Beach County

COLEMAN (PARENT) HOLDINGS, INC., Plaintiff,
v.
MORGAN STANLEY & CO., INC., Defendant.

No. 2003 CA 005045 AI.
June 23, 2003.

Answer of Morgan Stanley & Co. Incorporated

[Joseph Ianno, Jr.](#) (FL Bar # 655351), Carlton Fields, 222 Lake View Avenue -- Suite 1400, West Palm Beach, FL 33401, Telephone: (561) 659-7070, Facsimile: (561) 659-7368, [Thomas D. Yannucci, P.C.](#), [Thomas A. Clare](#), Larissa Paule-Cares, [Brett H. McGurk](#), Kirkland & Ellis, 655 15th Street, N.W., Suite 1200, Washington, D.C. 20005, Telephone: (202) 879-5000, Facsimile: (202) 879-5200, Attorneys for Defendant, Morgan Stanley & Co. Incorporated.

Judge [Elizabeth T. Maass](#).

Defendant Morgan Stanley & Co. Incorporated ("MS & Co.") responds to Plaintiff Coleman (Parent) Holdings, Inc.'s ("CPH") Complaint by denying generally that MS & Co. engaged in any fraudulent or negligent misrepresentations, any conspiracy to defraud, that MS & Co. assisted Sunbeam Corporation ("Sunbeam") or any employee, director or agent of Sunbeam in the commission of a fraudulent scheme, or that MS & Co. otherwise defrauded CPH in any manner. Specifically, MS & Co. responds to CPH's allegations as follows:

Nature of the Action

1. MS & Co. denies the allegations contained in Paragraph 1.
2. MS & Co. admits that, beginning in mid-1997, MS & Co. served as an investment banker for Sunbeam. MS & Co. admits that it attempted to identify a party interested in purchasing Sunbeam, and that those efforts were ultimately unsuccessful. MS & Co. admits that it recommended that Sunbeam's management consider acquiring other companies instead and suggested, as is common in corporate mergers and acquisitions, that Sunbeam consider, among other options, using Sunbeam stock as part of the consideration for such an acquisition. MS & Co. denies that it had any knowledge as to the accuracy of the value of Sunbeam's stock, or that MS & Co. knew (or even suspected) that the value of Sunbeam's stock had been "fraudulently inflated." MS & Co. admits that it facilitated communications between Sunbeam and Coleman, but denies that it in any way "persuaded" CPH to sell its interest in Coleman. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of any remaining allegations contained in Paragraph 2 and consequently denies them.
3. MS & Co. admits that it agreed to serve as underwriter of a \$750 million debenture offering for Sunbeam. MS & Co. admits that, as an advisor to Sunbeam, it had access to certain financial documents, and further states that those same documents were made available to CPH during the acquisition negotiations. Further, in that regard, MS & Co. specifically disclaimed any independent evaluation of Sunbeam's financial records, and expressly stated that it relied solely on documentation and information provided by Sunbeam and Sunbeam's audited financial statements. MS & Co.

admits that on March 18, 1998, it learned that Sunbeam's first quarter 1998 sales were "soft." Sunbeam insisted that its sales would meet expectations, but MS & Co. insisted that Sunbeam issue a press release to warn the market of the softening sales. Additionally, MS & Co. received two "comfort letters" from Sunbeam's auditors, Arthur Andersen. MS & Co. performed all of its obligations as an underwriter of Sunbeam securities. MS & Co. denies that it had any role in the accounting judgments described in the complaint, or any obligations to audit or independently examine Sunbeam's accounting records. MS & Co. denies that it owed any duties to CPH. MS & Co. denies that it had any independent knowledge as to the reasons behind Sunbeam's soft sales, that Sunbeam had a "practice of accelerating sales," or that it "materially misrepresent[ed]" information to CPH. Further, MS & Co. specifically denies that it in any manner assisted Sunbeam in concealing its 1998 first quarter sales numbers in order to close the transaction. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of any remaining allegations contained in Paragraph 3 and consequently denies them.

4. MS & Co. admits that CPH has brought this action against MS & Co. alleging fraudulent misrepresentation, aiding and abetting, conspiracy, and negligent misrepresentation, but denies that there is any merit to the suit. MS & Co. specifically denies that it made any fraudulent or negligent representations to CPH, that it in any way aided or abetted a fraudulent scheme against CPH, or that it participated in a conspiracy to defraud CPH. MS & Co. denies that any losses that CPH suffered resulted from fraud or any wrongful conduct on the part of MS & Co. MS & Co. denies the remaining allegations contained in Paragraph 4.

5. MS & Co. admits that CPH purports to seek compensatory damages against MS & Co., but denies that such claim is valid, for MS & Co. denies that it was engaged in any wrongful conduct. MS & Co. denies the remaining allegations contained in Paragraph 5.

Jurisdiction and Venue

6. MS & Co. admits the allegations contained in Paragraph 6. MS & Co. further admits that it is incorporated in Delaware and has its principal place of business in New York.

7. MS & Co. denies that venue is proper in this district.

Parties and Other Key Participants

8. MS & Co. admits that CPH represented, in negotiations with Sunbeam, that it owned, directly or indirectly, approximately 82% of Coleman prior to March 30, 1998. MS & Co. admits that on March 30, 1998, Sunbeam acquired CPH's interest in Coleman by paying CPH with 14.1 million shares of Sunbeam common stock and other consideration, including a cash payment by Sunbeam to CPH in the amount of \$159,956,756.00. (*See* Feb. 27, 1998 Merger Agmt. § 3.1(a)(i) (Ex. 1).) MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of any remaining allegations contained in Paragraph 8 and consequently denies them.

9. MS & Co. admits that it is an investment banking firm providing financial and securities services. MS & Co. admits that, as part of its business operations, it at times provides advice on mergers and acquisitions, and raises capital in equity and debt markets, depending on the needs of its clients. MS & Co. admits that it served as Sunbeam's investment banker for certain aspects of Sunbeam's acquisition of Coleman, and served as underwriter of certain securities issued by Sunbeam in connection with the acquisition. MS & Co. denies any remaining allegations contained in Paragraph 9.

10. MS & Co. admits that Sunbeam was a publicly-traded company which manufactures and markets household and specialty consumer products, including outdoor cooking products. MS & Co. admits that Sunbeam marketed these

products under several brand names, including Sunbeam and Oster. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of any remaining allegations contained in Paragraph 10 and consequently denies them.

11. MS & Co. admits that Albert Dunlap had served as the Chief Executive Officer of Sunbeam. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 11 and consequently denies them.

12. MS & Co. admits that Russell Kersh had served as the Executive Vice President of Sunbeam. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 12 and consequently denies them.

13. MS & Co. admits that Arthur Andersen LLP served as Sunbeam's auditors and provided independent/outside accounting services to Sunbeam. MS & Co. further admits that, during the performance of its engagement, it received "comfort letters" from Arthur Andersen. MS & Co. never served as auditor for Sunbeam, and never provided Sunbeam with any accounting or accounting-related services. MS & Co. lacks sufficient knowledge or information to know the location of Lawrence Bornstein or to form a belief as to the truth of any allegations pertaining to him, and consequently denies them. MS & Co. denies any remaining allegations contained in Paragraph 13.

Factual Background

14. MS & Co. admits the allegations contained in Paragraph 14.

15. MS & Co. responds that the allegations contained in Paragraph 15 pertain to publicly available information, and refers to such information for the truth or falsity of such allegations. To the extent that further response is required, MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 15 and consequently denies them.

16. MS & Co. responds that the allegations contained in Paragraph 16 pertain to publicly available information, and refers to such information for the truth or falsity of such allegations. To the extent that further response is required, MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 16 and consequently denies them.

17. MS & Co. admits, on information and belief, that Albert Dunlap was hired as Sunbeam's Chief Executive Officer on or about July 18, 1996. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the remaining allegations contained in Paragraph 17 and consequently denies them.

18. MS & Co. admits, on information and belief, that Russell Kersh was hired as Sunbeam's Chief Financial Officer. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the remaining allegations contained in Paragraph 18 and consequently denies them.

19. MS & Co. admits, on information and belief, that Albert Dunlap and members of his senior management team entered into employment agreements with Sunbeam. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the remaining allegations contained in Paragraph 19 and consequently denies them.

20. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 20 and consequently denies them.

21. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 21 and consequently denies them.

22. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 22 and consequently denies them.

23. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 23 and consequently denies them.

24. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 24 and consequently denies them.

25. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 25 and consequently denies them.

26. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 26 and consequently denies them.

27. MS & Co. admits, on information and belief, that Sunbeam reported a loss of \$18.1 million in the third quarter of 1996, and that it had a \$34.5 million gain in the third quarter 1997. MS & Co. further admits, on information and belief, that Sunbeam reported an increase in profits from \$6.5 million in 1996 to \$67.7 million in 1997. MS & Co. responds that the allegations contained in Paragraph 27 regarding stock prices pertain to publicly available information and MS & Co. refers to such information for the truth or falsity of such allegations. To the extent that further response is required, MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 27 and consequently denies them.

28. MS & Co. admits that it was engaged by Sunbeam to explore a possible sale of Sunbeam's core business and/or the initiation of one or more acquisitions. MS & Co. denies that it ever served as Dunlap's "shill." MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of any remaining allegations contained in Paragraph 28 and consequently denies them.

29. MS & Co. admits that William Strong and other MS & Co. employees met with Sunbeam in the spring of 1997 to discuss Sunbeam's investment banking requirements. Further, MS & Co. admits that, although it was not engaged in a previous relationship with Sunbeam, William Strong had worked with Dunlap before, during Strong's previous employment with Salomon Brothers. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of any remaining allegations contained in Paragraph 29 and consequently denies them.

30. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 30 and consequently denies them.

31. MS & Co. admits that William Strong and other MS & Co. employees met with Sunbeam in the spring of 1997 to discuss Sunbeam's investment banking requirements. MS & Co. admits that it was engaged by Sunbeam to explore a possible sale of Sunbeam's core business and/or the initiation of one or more acquisitions. MS & Co. admits that it initially sought a buyer for Sunbeam. To the extent this Paragraph alleges that MS & Co. was motivated to participate in a fraud in order to retain a single client and receive a customary fee, that allegation is foreclosed, among other reasons, by the fact that MS & Co.'s own affiliate lent hundreds of millions of dollars to Sunbeam two days after the Coleman acquisition closed. (June 1998 Credit Facilities Mem. (Ex. 2).) MS & Co. denies any remaining allegations contained in Paragraph 31.

32. MS & Co. admits that it searched for a buyer for Sunbeam. MS & Co. further admits that it assembled marketing materials based on financial documentation and audited financial statements provided to MS & Co. by Sunbeam

and Arthur Andersen, for use in meetings with potential acquirers. MS & Co. admits that, despite contacting many companies, it was unable to find a buyer for Sunbeam. MS & Co. specifically denies CPH's allegation that MS & Co. knew that it would not be compensated if "it failed to deliver a major transaction," or that "Davis and Chase were standing by ... to reclaim their position as Dunlap's investment banker of choice." MS & Co. denies any remaining allegations contained in Paragraph 32.

33. MS & Co. denies that it provided the "solution" to any "problem" alleged in Paragraph 33. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the remaining allegations contained in Paragraph 33 and consequently denies them.

34. MS & Co. admits after its unsuccessful attempts to locate a purchaser for Sunbeam, it suggested that Sunbeam acquire one or more other companies instead. MS & Co. admits that it proposed to Sunbeam, among other options, the possibility of paying for any such acquisition in part with Sunbeam's stock. MS & Co. specifically denies any knowledge to the effect that a "failure to find a buyer for Sunbeam could prove fatal to [their] relationship." MS & Co. further denies any involvement in or knowledge of fraudulently inflated Sunbeam stock or concealment of any fraud at Sunbeam. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of any remaining allegations contained in Paragraph 34 and consequently denies them.

35. MS & Co. admits that, beginning in mid-1997, MS & Co. served as an investment banker for Sunbeam. MS & Co. admits that it attempted to identify a party interested in purchasing Sunbeam, and that those efforts were ultimately unsuccessful. MS & Co. admits that it recommended that Sunbeam's management consider, among other options, acquiring other companies instead and suggested, as is common in corporate mergers and acquisitions, that Sunbeam consider using Sunbeam stock as part of the consideration for such an acquisition. MS & Co. denies that it developed "acquisition strategies" for Sunbeam or that the services or potential transactions it discussed with Sunbeam's management were deceptive or in any way designed to facilitate fraud. MS & Co. specifically denies that it in any way knew of or knowingly assisted Dunlap to "camouflage Sunbeam's results" thereby making it "difficult to detect any shortfall in Sunbeam's performance," or that it knew of or assisted Dunlap in taking "new massive restructuring charges," which thereby created increased "cookie jar reserves." MS & Co. denies any remaining allegations contained in Paragraph 35.

36. MS & Co. admits that, in its capacity as advisor to Sunbeam, it identified Coleman as a potential acquisition candidate. MS & Co. admits that it communicated with representatives of Coleman to discuss a potential acquisition, but denies that it "persuade[d] CPH to sell its interest in Coleman to Sunbeam." MS & Co. admits that CPH represented, in negotiations with Sunbeam, that it owned, directly or indirectly, approximately 82% of Coleman prior to March 30, 1998. MS & Co. denies the remaining allegations contained in Paragraph 36.

37. MS & Co. admits that it facilitated a meeting between representatives from Sunbeam and MacAndrews & Forbes Holdings, Inc. ("MAFCO") in December 1997. MS & Co. admits that it prepared Sunbeam's representatives for that meeting. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of any remaining allegations contained in Paragraph 37 and consequently denies them.

38. MS & Co. admits that discussions between Sunbeam, MAFCO and CPH resumed in early 1998. MS & Co. further admits that its Managing Directors James Stynes and Robert Kitts worked on MS & Co.'s engagement for Sunbeam. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of any remaining allegations contained in Paragraph 38 and consequently denies them.

39. MS & Co. denies that it "persuade[d]" CPH to sell Coleman in exchange for Sunbeam stock. MS & Co. denies that it "prepared" financial information for CPH. There is, in any event, no factual allegation contained in Paragraph 39 or elsewhere that identifies such alleged information at all, let alone with particularity. MS & Co. further denies

that it knowingly “provided” CPH with false financial and business information, or otherwise knowingly relayed false information to CPH which created an appearance that “Sunbeam was prospering and that Sunbeam's stock had great value.” Specifically, MS & Co. denies that it knowingly provided CPH with false 1996 and 1997 sales and revenue figures or with false projections. MS & Co. denies that it “falsely assured CPH that Sunbeam's ‘early buy’ sales program would not hurt Sunbeam's future revenues,” that “Sunbeam would meet or exceed” first quarter 1998 estimates, that 1998 earnings estimates were accurate, that a plan to earn \$2.20/share was attainable or even low, or that it “specifically advised CPH that Sunbeam's first quarter 1998 sales were ‘tracking fine’ and running ahead of analysts' estimates.”

In any event CPH could not have relied on such alleged representations in light of (i) the Merger Agreement's representations and warranties (Merger Agmt. §§ 5.1-5.4), none of which refer to any alleged representation contained in this Paragraph, (ii) the representations and warranties in a separate agreement that was executed by Coleman and Sunbeam (Feb. 27, 1998 Company Merger Agmt. § 5.1-5.12 (Ex. 3)), which are expressly incorporated into the Merger Agreement and none of which refer to any alleged representation contained in this Paragraph, and (iii) the Merger Agreement's broad integration clause which forecloses reliance on any alleged representation contained in this Paragraph (Merger Agmt. § 12.5). MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the remaining allegations contained in Paragraph 39 and consequently denies them.

40. MS & Co. admits that CPH agreed to sell its shares in Coleman to Sunbeam, and that CPH agreed to accept Sunbeam stock as partial payment for the sale, but denies that MS & Co. “persuaded” CPH to make the deal. CPH is a sophisticated party and was represented by its own expert advisors and attorneys. (*Id.* §§ 1.1; 4.11.) CPH and its advisors also enjoyed full access to Sunbeam's “books, records, properties, plants and personnel.” (*Id.* § 6.7.) CPH also expressly disclaimed reliance on statements allegedly made during negotiations. (*Id.* § 12.5.) MS & Co. responds that the allegations contained in Paragraph 40 regarding stock value pertain to publicly available information, and refers to such information for the truth or falsity of such allegations. To the extent that further response is required, MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 40 and consequently denies them.

41. MS & Co. admits that on February 27, 1998, Sunbeam's Board of Directors met at Morgan Stanley's New York offices to discuss Sunbeam's possible purchase of Coleman. MS & Co. denies the remaining allegations contained in Paragraph 41.

42. MS & Co. admits it made a presentation during the February 27, 1998 Sunbeam Board of Directors Meeting. MS & Co. further admits that MS & Co. representatives, including William Strong, Robert Kitts, James Stynes and Ruth Porat, were present at this meeting. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of any remaining allegations contained in Paragraph 42 and consequently denies them.

43. MS & Co. admits that at that February 27, 1998 New York meeting, it provided Sunbeam with a written “fairness opinion” regarding the fair acquisition price of Coleman. This opinion was based on financial information provided to MS & Co. by Sunbeam, Coleman, and Arthur Andersen, and on synergy analyses which MS & Co. received from CPH. The written fairness opinion explicitly stated that MS & Co. “[has] not made any independent valuation or appraisal of the assets or liabilities of [Sunbeam].” (Feb. 27, 1998 Fairness Op. at 3 (Ex. 4).) MS & Co. denies any remaining allegations contained in Paragraph 43.

44. MS & Co. admits that the Sunbeam Board of Directors approved the Coleman acquisition at the February 27, 1998 meeting in New York. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of any remaining allegations contained in Paragraph 44 and consequently denies them.

45. MS & Co. admits that it continued to provide investment banking services to Sunbeam after the Coleman acquisition was approved. MS & Co. denies any remaining allegations contained in Paragraph 45.

46. MS & Co. admits that the Coleman acquisition was announced on March 2, 1998. MS & Co. responds that the allegations contained in Paragraph 46 regarding stock prices pertain to publicly available information, and refers to such information for the truth or falsity of such allegations. To the extent that further response is required, MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 46 and consequently denies them.

47. MS & Co. admits that it agreed to serve as underwriter for Sunbeam's subordinated debentures. The "cash portion" of the consideration set forth in the Merger Agreement was also financed in part through a \$680 million loan made by Morgan Stanley Senior Funding, an affiliate of MS & Co. (*See Credit Facilities Mem.*) MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of any remaining allegations contained in Paragraph 47 and consequently denies them.

48. MS & Co. admits that the money raised from the sale of the debentures was used in part to finance Sunbeam's acquisition of Coleman.

49. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 49 and consequently denies them.

50. MS & Co. admits that the convertible debentures were presented to potential investors at a series of "road show" meetings and conference calls. MS & Co. admits that it reviewed and commented on the offering memorandum and other materials used to present the debentures to potential investors. MS & Co. denies that it "misrepresented Sunbeam's financial performance" or "emphasized Dunlap's purported 'turnaround' accomplishments." To the contrary, the offering memorandum expressly stated that MS & Co. assumed no responsibility for the accuracy or completeness of Sunbeam's audited financial information and warned investors not to rely on any projections of future performance. (March 19, 1998 Note Offering Mem. at 2-3, 12-17, 72 (Ex. 5).) MS & Co. denies any remaining allegations contained in Paragraph 50.

51. MS & Co. admits that it launched the debenture offering with a presentation to the Morgan Stanley sales force, but denies the remaining allegations contained in Paragraph 51.

52. MS & Co. admits that the debenture offering was increased from \$500 million to \$750 million. MS & Co. admits that the debentures were offered to investors nationwide. MS & Co. denies any remaining allegations contained in Paragraph 52.

53. MS & Co. admits that its employees traveled on one occasion to Sunbeam's Florida offices. MS & Co. denies the remaining allegations contained in Paragraph 53, except to the extent that they constitute legal conclusions to which no response is required.

54. MS & Co. admits that William Strong worked on MS & Co.'s engagement for Sunbeam. MS & Co. also admits that Strong has provided deposition testimony discussing conversations with Sunbeam officials. MS & Co. denies that Strong or any other MS & Co. employee was accurately apprised of Sunbeam's financial condition because MS & Co. at all times relied on information provided by Sunbeam management and Arthur Andersen, including Sunbeam's audited financial statements. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of any remaining allegations contained in Paragraph 54 and consequently denies them.

55. MS & Co. denies CPH's allegation that it was "telling CPH and the investing public ... that Sunbeam's turnaround was a success, that Sunbeam's sales for the first quarter of 1998 were ahead of expectations of outside analysts, and that Sunbeam was poised for record sales." Furthermore, any information communicated by MS & Co. was based on financial data and information provided to it by Sunbeam and Arthur Andersen -- a fact that MS & Co. regularly

publicized through disclaimer statements. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of any remaining allegations contained in Paragraph 55 and consequently denies them.

56. MS & Co. denies the allegations contained in Paragraph 56.

57. MS & Co. admits that it received a facsimile schedule regarding Sunbeam's finances on or about March 18, 1998. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 57 and consequently denies them.

58. MS & Co. admits that on or about March 18, 1998, it received a faxed financial schedule which reflected that Sunbeam's January and February 1998 sales were below those of January and February 1997. MS & Co. denies that it made assertions or otherwise disseminated information to CPH or others that it knew to be false. MS & Co. denies any knowledge of the fact that Sunbeam had not undergone a successful turnaround, or that Sunbeam's financial performance had not improved in the manner presented by Sunbeam's management and audited financial statements. MS & Co. admits that on March 18, 1998, it learned that Sunbeam's first quarter 1998 sales were "soft." Sunbeam insisted that its sales would meet expectations, but MS & Co. insisted that Sunbeam issue a press release to warn the market of the softening sales. Additionally, MS & Co. received two "comfort letters" from Sunbeam's auditors, Arthur Andersen. MS & Co. performed all of its obligations as an underwriter of Sunbeam securities. MS & Co. denies that it had any role in the accounting judgments described in the complaint, or any obligations to audit or independently examine Sunbeam's accounting records. MS & Co. denies that it owed any duties to CPH. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of any remaining allegations contained in Paragraph 58 and consequently denies them.

59. MS & Co. admits that on March 18, 1998, it learned that Sunbeam's first quarter 1998 sales were "soft." Sunbeam insisted that its sales would meet expectations, but MS & Co. insisted that Sunbeam issue a press release to warn the market of the softening sales. Additionally, MS & Co. received two "comfort letters" from Sunbeam's auditors, Arthur Andersen. MS & Co. performed all of its obligations as an underwriter of Sunbeam securities. MS & Co. denies that it had any role in the accounting judgments described in the Complaint, or any obligations to audit or independently examine Sunbeam's accounting records. MS & Co. denies that it owed any duties to CPH. MS & Co. denies all remaining allegations contained in Paragraph 59.

60. MS & Co. admits that Sunbeam issued a press release on March 19, 1998 that included language selectively quoted in Paragraph 60. MS & Co. further states that the March 19, 1998 press release contained the following additional statement, omitted in the Complaint:

Cautionary Statements - Statements contained in this press release, including statements relating to the Company's expectations regarding anticipated performance in the future, are "forward looking statements," as such term is defined in the Private Securities Litigation Reform act of 1995. Actual results could differ materially from the Company's statements in this release regarding its expectations, goals or projected results, due to various factors, including those set forth in the Company's Cautionary Statements contains in its Annual Report on Form 10-K for its fiscal year ended December 31, 1997 filed with the Securities and Exchange Commission.

(March 19, 1998 Press Release (Ex. 6).)

61. MS & Co. admits that Sunbeam issued a press release on March 19, 1998 that included language selectively quoted in Paragraph 61. MS & Co. further states that the March 19, 1998 press release contained the following additional statement, omitted in the Complaint:

Cautionary Statements - Statements contained in this press release, including statements relating to the Company's expectations regarding anticipated performance in the future, are "forward looking statements," as such term is defined in

the Private Securities Litigation Reform act of 1995. Actual results could differ materially from the Company's statements in this release regarding its expectations, goals or projected results, due to various factors, including those set forth in the Company's Cautionary Statements contains in its Annual Report on Form 10-K for its fiscal year ended December 31, 1997 filed with the Securities and Exchange Commission.

(*Id.*) MS & Co. denies all remaining allegations contained in Paragraph 61.

62. MS & Co. denies the allegation that it knew that the “shortfall from analysts' estimates was ... caused by Sunbeam's acceleration of 1998 sales into the fourth quarter of 1997.” MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of any remaining allegations contained in Paragraph 62 and consequently denies them.

63. MS & Co. denies the allegations contained in Paragraph 63.

64. MS & Co. specifically denies that it “knew that a full and truthful disclosure ... would doom the debenture offering,” or that it had any knowledge that the press release was untruthful or otherwise misleading. MS & Co. denies the allegations contained in Paragraph 64.

65. MS & Co. denies the allegations contained in Paragraph 65. To the extent that this Paragraph quotes the Merger Agreement, that document speaks for itself and contradicts the allegations contained in the Complaint.

66. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 66 and consequently denies them.

67. MS & Co. denies the allegations contained in Paragraph 67.

68. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 68 and consequently denies them.

69. MS & Co. admits that it continued to serve as Sunbeam's investment banker, and continued to prepare to close the debenture offering and the acquisition of Coleman, but denies any knowledge as to the alleged falsity of the March 19, 1998 press release. MS & Co. denies the remaining allegations contained in Paragraph 69.

70. MS & Co. admits that throughout its service to Sunbeam, MS & Co. employees, including Tyree, spoke via telephone with representatives of Sunbeam. MS & Co. denies any knowledge that the press release was untruthful or otherwise misleading. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the remaining allegations contained in Paragraph 70 and consequently denies them.

71. MS & Co. admits that it received “comfort letters” from Arthur Andersen. MS & Co. denies the allegation that it knew that “Sunbeam's earnings for the first quarter of 1998 were going to miss Wall Street analysts' earning expectations.” MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the remaining allegations contained in Paragraph 71 and consequently denies them.

72. MS & Co. admits that it continued to prepare to close both the debenture offering and the acquisition of Coleman. MS & Co. denies any allegation of its “having directly participated in misleading CPH and other investors.” MS & Co. responds that the allegation that MS & Co. “had a duty to disclose the true facts” to CPH is a legal conclusion to which no response is required. MS & Co. denies the remaining allegations contained in Paragraph 72.

73. MS & Co. admits that it received compensation for investment banking work performed by MS & Co. for Sunbeam. MS & Co. denies the allegation that it facilitated Sunbeam's fraud. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of any remaining allegations contained in Paragraph 73 and consequently denies them.

74. MS & Co. admits that on March 19, 1998, Sunbeam issued a press release which stated that "net sales for the first quarter of 1998 may be lower than the range of Wall Street analysts' estimates of \$285 million to \$295 million." MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the remaining allegations contained in Paragraph 74 and consequently denies them.

75. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 75 and consequently denies them.

76. MS & Co. admits that it advocated issuing a press release to warn the market of the softening sales, but denies that it represented that Sunbeam's sales would exceed analysts' projections. MS & Co. denies the remaining allegations contained in Paragraph 76.

77. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 77 and consequently denies them.

Count I -- Fraudulent Misrepresentation

78. MS & Co. repeats and realleges its responses to Paragraphs 1 through 77 as if set forth herein.

79. MS & Co. denies the allegations contained in Paragraph 79.

80. MS & Co. denies the allegations contained in Paragraph 80.

81. MS & Co. denies the allegations contained in Paragraph 81.

82. MS & Co. denies the allegations contained in Paragraph 82.

83. MS & Co. denies the allegations contained in Paragraph 83.

Count II -- Aiding and Abetting Fraud

84. MS & Co. repeats and realleges its responses to Paragraphs 1 through 77 as if set forth herein.

85. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 85 and consequently denies them.

86. MS & Co. denies the allegation contained in Paragraph 86.

87. MS & Co. admits that, beginning in mid-1997, MS & Co. served as an investment banker and underwriter for Sunbeam. MS & Co. admits that it attempted to identify a party interested in purchasing Sunbeam, and that those efforts were ultimately unsuccessful. MS & Co. admits that it recommended that Sunbeam's management consider acquiring other companies instead and suggested, as is common in corporate mergers and acquisitions, that Sunbeam consider using Sunbeam stock as part of the consideration for such an acquisition. MS & Co. denies that it had any knowledge as

to the accuracy of the value of Sunbeam's stock, or that MS & Co. knew (or even suspected) that the value of Sunbeam's stock had been "fraudulently inflated."

MS & Co. admits that it facilitated communications between Sunbeam and Coleman, but denies that it in any way "persuaded" CPH to sell its interest in Coleman.

MS & Co. admits that on March 18, 1998, it learned that Sunbeam's first quarter 1998 sales were "soft." Sunbeam insisted that its sales would meet expectations, but MS & Co. insisted that Sunbeam issue a press release to warn the market of the softening sales. Additionally, MS & Co. received two "comfort letters" from Sunbeam's auditors, Arthur Andersen. MS & Co. performed all of its obligations as an underwriter of Sunbeam securities.

MS & Co. admits that the convertible debentures were presented to potential investors at a series of "road show" meetings and conference calls. MS & Co. admits that it reviewed and commented on the offering memorandum and other materials used to present the debentures to potential investors. MS & Co. denies the remaining allegations contained in Paragraph 87.

88. MS & Co. denies the allegations contained in Paragraph 88.

Count III -- Conspiracy

89. MS & Co. repeats and realleges its responses to Paragraphs 1 through 77 as if set forth herein.

90. MS & Co. denies the allegations contained in Paragraph 90.

91. MS & Co. admits that it served as a financial advisor to Sunbeam and an underwriter of Sunbeam securities, but denies that it in any way committed "overt acts in furtherance of a conspiracy." MS & Co. denies that it performed an independent financial analysis of Sunbeam; to the contrary, MS & Co. informed CPH that it was relying solely on financial data and information provided to it by Sunbeam and Arthur Andersen. MS & Co. admits that it underwrote the \$750 million convertible debenture offering. MS & Co. denies the remaining allegations contained in Paragraph 91.

92. MS & Co. denies the allegations contained in Paragraph 92.

Count IV -- Negligent Misrepresentation

93. MS & Co. repeats and realleges its responses to Paragraphs 1 through 77 as if set forth herein.

94. MS & Co. admits that it served as a financial advisor to Sunbeam and an underwriter of Sunbeam securities. MS & Co. responds that the allegations contained in Paragraph 94 constitute legal conclusions to which no response is required. Alternatively, MS & Co. denies the remaining allegations contained in Paragraph 94.

95. MS & Co. denies the allegations contained in Paragraph 95.

96. MS & Co. denies the allegations contained in Paragraph 96.

AFFIRMATIVE DEFENSES

In addition to the foregoing responses, MS & Co. asserts the following affirmative defenses to the claims stated in CPH's Complaint. MS & Co. does not assume the burden of proof on these defenses where the substantive law provides otherwise.

First Affirmative Defense

CPH's claims must be dismissed on *forum non conveniens* grounds pursuant to [Florida Rule of Civil Procedure 1.061\(a\)](#).

Second Affirmative Defense

CPH's alleged claims are barred, in whole or in part, for failure to state a claim upon which relief can be granted.

Third Affirmative Defense

CPH's alleged claims are barred, in whole or in part, by the doctrine of laches.

Fourth Affirmative Defense

CPH's alleged claims are barred, in whole or in part, by the doctrine of estoppel.

Fifth Affirmative Defense

CPH's alleged claims are barred, in whole or in part, by the doctrine of waiver.

Sixth Affirmative Defense

CPH's alleged claims are barred, in whole or in part, by the doctrine of unclean hands.

Seventh Affirmative Defense

CPH's alleged claims are barred, in whole or in part, by plaintiff's failure to mitigate its damages.

Eighth Affirmative Defense

CPH's alleged claims are barred because CPH has experienced no damages, and any claimed loss is speculative and/or was avoidable.

Ninth Affirmative Defense

CPH's alleged claims are barred, in whole or in part, because the claimed injuries were not proximately caused by any acts or omissions of MS & Co.

Tenth Affirmative Defense

To the extent CPH's fraud claim relies on non-disclosure, that claim is barred, in whole or in part, because MS & Co. was under no duty to disclose.

Eleventh Affirmative Defense

CPH's claims are barred, in whole or in part, because of MS & Co.'s repeated disclaimers of reliance.

Twelfth Affirmative Defense

Any future claim by CPH for punitive damages is barred, in whole or in part, because (i) the allegedly tortuous conduct is not gross, wanton, willful, or otherwise morally culpable; and (ii) the alleged conduct was not part of a pattern directed at the public generally.

WHEREFORE, MS & Co. denies that CPH is entitled to any relief whatsoever, and to the extent that CPH should recover any damage award, that award should be offset by CPH's failure to take appropriate steps to mitigate its damages. MS & Co. respectfully requests that the Court enter judgment for MS & Co. dismissing the complaint with prejudice, award MS & Co. its attorneys' fees, costs and expenses, and grant such other and further relief as may be just and proper.

Dated: June 23, 2003

Appendix not available.

COPY / ORIGINAL
RECEIVED FOR FILING

JUN 25 2003

DOROTHY H. WILKEN
CLERK OF CIRCUIT COURT
CIRCUIT CIVIL DIVISION

IN THE CIRCUIT COURT
OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

CASE NO: 2003 CA 005045 AI

v.

Judge Elizabeth T. Maass

MORGAN STANLEY & CO., INC.,

Defendant.

**DEFENDANT'S MOTION TO DISMISS PURSUANT TO
FLORIDA RULE OF CIVIL PROCEDURE RULE 1.061 OR, IN THE ALTERNATIVE,
FOR JUDGMENT ON THE PLEADINGS**

Defendant, Morgan Stanley & Co. Incorporated ("MS & Co."), moves to dismiss the complaint pursuant to Florida Rule of Civil Procedure Rule 1.061 or, in the alternative, for judgment on the pleadings and says:

1. Plaintiff, Coleman (Parent) Holdings, Inc. ("CPH") has filed a four count complaint against MS & Co. alleging fraudulent misrepresentation, aiding and abetting fraud, conspiracy and negligent misrepresentation. MS & Co. filed its answer and affirmative defenses to the complaint on June 23, 2003. The complaint is based on CPH's sale of its interest in the Coleman Company to Sunbeam Corporation.

2. As more fully set forth in the memorandum of law served contemporaneously with this Motion, incorporated herein by reference and attached hereto, MS & Co. moves to dismiss this action pursuant to Fla.R.Civ.P., Rule 1.061 on the ground that New York courts are the more appropriate forum for resolution of this dispute.

3. Additionally, as more fully set forth in the memorandum of law served contemporaneously with this Motion, incorporated herein by reference and attached hereto, MS & Co. moves for judgment on the pleadings on Counts I through IV of the complaint on the grounds that these counts fail to state a cause of action pursuant to New York law.

WHEREFORE, Defendant respectfully requests that this Court dismiss this action pursuant to Fla.R.Civ.P., Rule 1.061 or in the alternative enter judgment in favor of Defendant together with such other and further relief as is just and proper.

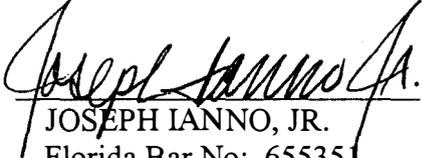
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Federal Express to all counsel of record on the attached service list on this 25th day of June, 2003.

Thomas D. Yannucci, P.C.
Thomas A. Clare
Larissa Paule-Carres
Brett McGurk
KIRKLAND & ELLIS
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5993

COUNSEL FOR DEFENDANT

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

BY: 
JOSEPH IANNO, JR.
Florida Bar No: 655351

SERVICE LIST

<p>John Scarola SEARCY, DENNEY, SCAROLA, BARNHARDT & SHIPLEY, P.A. 2139 Palm Beach Lakes Boulevard West Palm Beach, Florida 33409</p>	<p>Counsel for Plaintiff</p>
<p>Jerold S. Solovy JENNER & BLOCK, LLC One IBM Plaza Suite 4400 Chicago, Illinois 60611</p>	<p>Counsel for Plaintiff</p>

TABLE OF CONTENTS

Table of Contents i

Table of Authorities iii

INTRODUCTION 1

FACTUAL BACKGROUND..... 3

 A. Sunbeam Hires MS & Co. To Advise It Regarding A Possible Corporate Sale Or Acquisition — Not To Replace Sunbeam’s Outside Auditor Or To Review Sunbeam’s Accounting Practices. 4

 B. After A “False Start” In Florida, Sunbeam And CPH Negotiate The Written Merger Agreement In New York..... 5

 C. MS & Co. Puts Its Own Money And Reputation On The Line By Agreeing To Serve As Underwriter For Sunbeam’s \$750 Million Debenture Offering..... 7

 D. The March 19, 1998 Press Release. 8

 E. The Acquisition And Financing Transactions Close In New York. 9

 F. Accounting Irregularities Are Discovered At Sunbeam. 9

STANDARD OF REVIEW 9

ARGUMENT 10

I. THIS COURT MUST APPLY NEW YORK LAW TO PLAINTIFF’S CLAIMS..... 10

 A. Settled Choice-of-Law Principles Require Application Of New York Law. 10

 B. Where (As Here) Misrepresentation Claims Relating To The Sale Of A Business Have A Factual Nexus To New York, the Eleventh Circuit Has Already Held That Those Claims Must Be Determined By New York Law..... 13

II. THIS COURT SHOULD DISMISS THIS ENTIRE CASE PURSUANT TO FLORIDA RULE OF CIVIL PROCEDURE 1.061. 15

III. PLAINTIFF’S FRAUD CLAIM (COUNT I) MUST BE DISMISSED. 17

 A. CPH Specifically Disclaimed Reliance On The Representations Now Alleged To Be Fraudulent..... 18

 B. CPH Cannot Bring A Fraud Claim Because It Failed To Exercise Its Contractual Right To Inspect Sunbeam’s Books And Records. 21

C.	Plaintiff Cannot Allege That It Relied On Any Of The Misrepresentations Identified In The Complaint.....	23
D.	Plaintiff’s Allegations Of Scienter Make No Sense — And Fail To Meet The Basic Pleading Requirements For Fraud.	25
IV.	PLAINTIFF’S AIDING-AND-ABETTING CLAIM (COUNT II) MUST BE DISMISSED.	27
A.	The Complaint Does Not Allege That MS & Co. Had “Actual Knowledge” Of Sunbeam’s Fraud.	27
1.	If MS & Co. Is Deemed To Have Had “Actual Knowledge” Of Sunbeam’s Fraud, Then So Did CPH — By Virtue Of Its Equal Access To Sunbeam’s Books And Records.....	28
2.	Allegations Of “Constructive Knowledge” Are Not Enough.....	29
3.	Economic Motive Is <u>Not</u> “Actual Knowledge.”	29
B.	Plaintiff’s Allegations Of “Substantial Assistance” Are Legally Defective.....	30
V.	PLAINTIFF’S NEGLIGENT MISREPRESENTATION CLAIM (COUNT IV) MUST BE DISMISSED.	32
A.	Plaintiff Cannot Allege That A “Special Relationship” Existed Between CPH and MS & Co.	32
B.	Plaintiff Does Not Allege Reasonable Reliance.	34
VI.	PLAINTIFF’S CONSPIRACY CLAIM (COUNT III) MUST BE DISMISSED.....	34
	CONCLUSION.....	35

TABLE OF AUTHORITIES

Cases

<i>389 Orange St. Partners v. Arnold</i> , 179 F.3d 656 (9th Cir. 1999)	14
<i>Alexander & Alexander of N.Y., Inc. v. Fritzen</i> , 503 N.E.2d 102 (N.Y. 1986).....	34
<i>American Baptist Churches of Metro N.Y. v. Galloway</i> , 271 A.D.2d 92 (N.Y. App. Div. 2000)	34
<i>Armstrong v. McAalpin</i> , 699 F.2d 79 (2d Cir. 1983).....	27
<i>Batlemento v. Dove Fountain, Inc.</i> , 593 So. 2d 234 (Fla. 5th DCA 1991).....	19
<i>Belin v. Weissler</i> , No. 97 Civ. 8787 (RWS), 1998 WL 391114 (S.D.N.Y. July 14, 1998).....	21
<i>Bishop v. Florida Specialty Paint Co.</i> , 389 So. 2d 999 (Fla. 1980).....	10, 12
<i>Boca Raton Transp., Inc. v. Zaldivar</i> , 648 So. 2d 812 (Fla. 4th DCA 1995).....	3
<i>Butvin v. Doubleclick, Inc.</i> , No. 99 Civ. 4727, 2000 WL 827673 (S.D.N.Y. June 26, 2000).....	33
<i>Ciba-Geigy Ltd. v. Fish Peddler, Inc.</i> , 691 So. 2d 1111 (Fla. 4th DCA 1997).....	16
<i>Citibank, N.A. v. Itochu Intern. Inc.</i> , No. 01 Civ. 6007 (GBD), 2003 WL 1797847 (S.D.N.Y. April 3, 2003)	32
<i>Consolidated Edison, Inc. v. Northeast Utilities</i> , 249 F. Supp. 2d 387 (S.D.N.Y. 2003).....	20
<i>Cromer Fin. Ltd. v. Berger</i> , 137 F. Supp. 2d 452 (S.D.N.Y. 2001).....	27, 30, 31
<i>CSI Inv. Partners II, L.P. v. Cendant Corp.</i> , 2002 WL 925044 (S.D.N.Y. Feb. 28, 2002).....	33
<i>Cutler v. Aleman</i> , 701 So. 2d 390 (Fla. 3d DCA 1997)	9, 10

<i>Danann Realty Corp. v. Harris</i> , 157 N.E.2d 597 (N.Y. 1959).....	21
<i>Default Proof Credit Card Sys., Inc. v. State Street Bank & Trust Co.</i> , 753 F. Supp. 1566 (S.D. Fla. 1990)	14
<i>Diduck v. Kaszycki & Sons Contractors, Inc.</i> , 974 F.2d 270 (2d Cir. 1992).....	30
<i>Duncan v. Pencer</i> , No. 94 Civ. 0321 (LAP), 1996 WL 19043 (S.D.N.Y. Jan 18, 1996).....	26
<i>Dyncorp v. GTE Corp.</i> , 215 F. Supp. 2d 308 (S.D.N.Y. 2002).....	19, 20, 21, 34
<i>Ehrlich-Bober & Co. v. University of Houston</i> , 49 N.Y.2d 574 (N.Y. 1980)	12
<i>Emergent Capital Inv. Mgmt., LLC v. Stonepath Group, Inc.</i> , 195 F. Supp. 2d 551 (S.D.N.Y. 2002).....	19
<i>Filler v. Havnit Bank</i> , 247 F. Supp. 2d 425 (S.D.N.Y. 2003).....	27, 30, 34
<i>Friedman v. Arizona World Nurseries Ltd. P'ship</i> , 730 F. Supp. 521 (S.D.N.Y. 1990), <i>aff'd</i> , 927 F.2d 595 (2d Cir. 1991)	26
<i>Giannacopoulos v. Credit Suisse</i> , 37 F. Supp. 2d 626 (S.D.N.Y. 1999).....	22
<i>Granite Partners, L.P. v. Bear, Stearns & Co.</i> , 17 F. Supp. 2d 275 (S.D.N.Y. 1998).....	21
<i>Ground Improvement Techniques, Inc. v. Merchants Bonding Co.</i> , 707 So. 2d 1138 (Fla. 5th DCA 1998).....	15
<i>Grumman Allied Indus., Inv. v. Rohr Indus.</i> , 748 F.2d 729 (2d Cir. 1984).....	22
<i>Gulf Oil Corp. v. Gilbert</i> , 330 U.S. 501 (1947).....	16
<i>Hari & Assocs. v. RNBC, Inc.</i> , 946 F. Supp. 531 (M.D. Tenn. 1996).....	14
<i>Harris v. Kearney</i> , 786 So. 2d 1222 (Fla. 4th DCA 2001).....	3

<i>Harsco Corp. v. Segui</i> , 91 F.3d 337 (2d Cir. 1996).....	18
<i>Heard v. City of N.Y.</i> , 82 N.Y.2d 66 (N.Y. 1993)	34
<i>Hillcrest Pac. Corp. v. Yamamura</i> , 727 So. 2d 1053 (Fla. 4th DCA 1999).....	9, 19
<i>Hirsch v. Arthur Andersen & Co.</i> , 72 F.3d 1085 (2d Cir. 1995).....	31
<i>Hoch v. Rissman, Weisberg, Barrett</i> , 742 So. 2d 451 (Fla. 5th DCA 1999).....	34
<i>Hydro Investors, Inc. v. Trafalgar Power Inc.</i> , 227 F.3d 8 (2d Cir. 2000).....	32
<i>In Re Reliance Sec. Litig.</i> , 135 F. Supp. 2d 480 (D. Del. 2001).....	29
<i>Inacom Corp. v. Sears, Roebuck & Co.</i> , 254 F.3d 683 (8th Cir. 2001)	14
<i>J. Zeevi & Sons, Ltd. v. Grindlays Bank (Uganda) Ltd.</i> , 333 N.E.2d 168 (N.Y. 1975).....	12
<i>Kalnit v. Eichler</i> , 99 F. Supp. 2d 327 (S.D.N.Y. 2000), <i>aff'd</i> , 264 F.3d 131 (2d Cir. 2001).....	26
<i>Kinney System, Inc. v. Continental Ins. Co.</i> , 674 So. 2d 86 (1996).....	15
<i>Kolbeck v. LIT Am. Inc.</i> , 939 F. Supp. 240 (S.D.N.Y. 1996), <i>aff'd</i> , 152 F.3d 918 (2d Cir. 1998).....	29
<i>Lazard Freres & Co. v. Protective Life Ins. Co.</i> , 108 F.3d 1531 (2d Cir. 1997).....	19, 20
<i>Linden v. Lloyd's Planning Serv. Inc.</i> , 750 N.Y.S.2d 20 (N.Y. App. Div. 2002)	34
<i>Macurdy v. Sikov & Love, P.A.</i> , 894 F.2d 818 (6th Cir. 1990)	14

<i>Marcellus Constr. Co. v. Village of Broadalbin</i> , 755 N.Y.S.2d 474 (N.Y. App. Div. 2003)	33
<i>Marine Midland Bank, N.A. v. United Mo. Bank</i> , 223 A.D.2d 119 (N.Y. App. Div. 1996)	12
<i>Myers v. Myers</i> , 652 So. 2d 1214 (Fla. 5th DCA 1995)	28
<i>Nigerian Nat'l Petroleum Corp. v. Citibank, N.A.</i> , No. 98 Civ. 4960 (MBM), 1999 WL 558141 (S.D.N.Y. July 30, 1999)	30
<i>North Am. Knitting Mills, Inc. v. International Women's Apparel, Inc.</i> , No. 99 Civ. 4643 (LAP), 2000 WL 1290608 (S.D.N.Y. Sept. 12, 2000)	32
<i>Optopics Labs. Corp. v. Savannah Bank of Nigeria, Ltd.</i> , 816 F. Supp. 898 (S.D.N.Y. 1993)	12
<i>Primavera Familienstiftung v. Askin</i> , 173 F.R.D. 115 (S.D.N.Y. 1997)	29
<i>Prudential Ins. Co. of Am. v. Dewey, Ballantine, Bushby, Palmer & Wood</i> , 80 N.Y.2d 377 (N.Y. 1992)	33
<i>Rotterdam Ventures, Inc. v. Ernst & Young LLP</i> , 752 N.Y.S.2d 746 (N.Y. App. Div. 2002)	21
<i>Schlaifer Nance & Co. v. Estate of Andy Warhol</i> , 119 F.3d 91 (2d Cir. 1997)	22
<i>Shields v. Citytrust Bancorp., Inc.</i> , 25 F.3d 1124 (2d Cir. 1994)	25, 26, 27, 29
<i>Sky Tech. Partners, LLC v. Midwest Research Inst.</i> , 125 F. Supp. 2d 286 (S.D. Ohio 2000)	14
<i>Stolow v. Greg Manning Auctions, Inc.</i> , No. 02 Civ 2591 (SAS), 2003 WL 355447 (S.D.N.Y. Feb. 14, 2003)	27
<i>THC Holdings Corp. v. Chinn</i> , No. 95 Civ. 4422 (KMW), 1998 WL 50202 (S.D.N.Y. Feb. 6, 1998)	25
<i>Thomas v. N.A. Chase Manhattan Bank</i> , 994 F.2d 236 (5th Cir. 1993)	14
<i>Trumpet Vine Investments, N.V. v. Union Capital Partners I, Inc.</i> , 92 F.3d 1110 (11th Cir. 1996)	13, 14

<i>United Safety of Am., Inc. v. Consolidated Edison Co. of N.Y., Inc.</i> , 213 A.D.2d 283 (N.Y. App. Div. 1995)	33
<i>UST Private Equity Investors Fund, Inc. v. Salomon Smith Barney</i> , 288 A.D.2d 87 (N.Y. App. Div. 2001)	21
<i>Valassis Communications, Inc. v. Weimer</i> , 758 N.Y.S.2d 311 (N.Y. App. Div. 2003)	21
<i>Value House, Inc. v. MCI Telecomms. Corp.</i> , 917 F. Supp. 5 (D.D.C. 1996).....	14
<i>Window Headquarters, Inc. v. MAI Basic Four, Inc.</i> , No. 91 Civ. 1816 (MBM), 1994 WL 673519 (S.D.N.Y. Dec. 1, 1994).....	19

Statutes

Fla. Stat § 90.202(6) (2003).....	3
-----------------------------------	---

Rules

Florida Rule of Civil Procedure 1.061	2, 15, 16, 17
Florida Rule of Civil Procedure 1.120(b)	19
Florida Rule of Civil Procedure 1.140(c)	3

Other Authorities

Eugene F. Scoles & Peter Hay, <i>Conflict of Laws</i> § 17.52 (3d ed. 2000).....	10
<i>Restatement (Second) of the Conflicts of Law</i> § 148(1).....	10, 11, 13, 14

INTRODUCTION

This lawsuit is spurious. Filed on the eve of the running of a four-year statute of limitations, Plaintiff Coleman (Parent) Holdings Company (“CPH”) seeks to extract vast payments from Morgan Stanley & Co. Incorporated (“MS & Co.”) on the sole ground that MS & Co. formerly served as an advisor to the once-bankrupt and now-reorganized Sunbeam Corporation. The dispute revolves around negotiations that occurred in New York in mid 1997 and early 1998, during which CPH agreed to sell its interest in the Coleman Company (“Coleman”) to Sunbeam. MS & Co. served as an advisor to Sunbeam — CPH’s *counterparty* in the negotiations — for parts of the deal.

CPH now alleges — five years after the fact — that it sold its stake in Coleman (and agreed to accept Sunbeam stock as part of the purchase price) based on false representations regarding Sunbeam’s financial health. CPH purports to bring these claims against MS & Co., but *every factual allegation* in the Complaint deals exclusively with misrepresentations by Sunbeam insiders and Sunbeam’s auditor, Arthur Andersen. In fact, CPH has already asserted *precisely the same claims* against Sunbeam and Andersen, alleging — through prior filings in this very Court — that it “*directly relied*” on financial information provided by Sunbeam and Andersen (*not* MS & Co.) when it agreed to sell its stake in Coleman. CPH’s effort to recycle these claims against MS & Co. — which is twice removed from the misrepresentations alleged in the Complaint — is a transparent attempt to extend liability far beyond legal precedent. This Court should not allow CPH to ignore all bounds of principle and precedent in its quest for solvent defendants. Instead, under settled law, this Court should dismiss the Complaint.

Indeed, rather than being a *co-participant* in alleged fraud at Sunbeam, the pleadings demonstrate that MS & Co. was itself a *victim* of that fraud, as its own affiliate invested and lost hundreds of millions of dollars in the same transaction that is the subject of this lawsuit. It

would be unprecedented to permit a sophisticated plaintiff like CPH to state a claim for fraud against a financial advisor who not only represented the plaintiff's *counterparty* in a contentious arm's length transaction, but who also was substantially injured by the very fraud that is the subject of the plaintiff's Complaint.

The abusive nature of this suit is further revealed by the fact that it was filed here, in the Fifteenth Judicial District of *Florida*, rather than in *New York*, where (1) *all* named parties are headquartered, (2) *all* operative legal agreements were negotiated, drafted, and executed, (3) *all* alleged misstatements or omissions of material fact occurred, and (4) *all* action taken in reliance on those alleged misstatements and omissions occurred. Given the strong connection between this dispute and New York, this case requires — and MS & Co. now moves for — the application of New York law. For substantially the same reasons, the Complaint should be dismissed on *forum non conveniens* grounds under Florida Rule of Civil Procedure 1.061(a).

The reason CPH chose this forum is clear: it hopes to avoid the application of New York law, which bars all of its claims as a matter of law. Indeed, should the Court reach the legal merits of Plaintiff's claims, those claims should be dismissed for any of the following independent reasons:

- **First**, Plaintiff's misrepresentation claims are barred by various provisions of the written Merger Agreement, which explicitly disclaim reliance on pre-agreement negotiations and representations.
- **Second**, Plaintiff cannot plead a legally valid misrepresentation claim because it had the same access to Sunbeam's books and records as MS & Co., yet failed to take any steps to verify or investigate the representations it now claims were fraudulent.
- **Third**, Plaintiff cannot state a valid claim for fraud based on allegations that MS & Co. acted out of ordinary economic motive — such as the collection of investment banking fees — let alone on allegations that MS & Co. acted contrary to its own economic interest in participating in the alleged fraud.

- **Fourth**, Plaintiff cannot state a claim for negligent misrepresentation because it cannot allege that it enjoyed a “special relationship” with MS & Co., the financial advisor to Plaintiff’s counterparty in a contentious multi-billion dollar negotiation.
- **Fifth**, Plaintiff cannot state a valid claim for conspiracy or aiding and abetting fraud because there is no factual allegation that MS & Co. knew of the alleged fraud at Sunbeam let alone knowingly facilitated it.

At bottom, CPH should not be permitted to file a lawsuit in Florida over a transaction based entirely in New York, and thereby avoid the impact of settled New York law, which defeats CPH’s claims as a matter of law. Accordingly, in the event that the Court finds the Fifteenth Judicial Circuit a proper forum for this case, the Court should apply New York law to determine the legal sufficiency of Plaintiff’s claims and dismiss the case pursuant to Florida Rule of Civil Procedure 1.140(c).

FACTUAL BACKGROUND¹

All of the parties in this case are headquartered in New York. Plaintiff CPH is a Delaware corporation with its principal place of business in New York.² Prior to March 30,

¹ The background statement is based principally on the allegations of the Complaint, which are accepted as true only for purposes of this motion. *See, e.g., Harris v. Kearney*, 786 So. 2d 1222, 1225 (Fla. 4th DCA 2001). Reference is also made to documents directly quoted and relied upon in the Complaint, including the February 27, 1998 Merger Agreement (quoted at Compl. ¶ 65) and the March 19, 1998 Press Release (quoted at Compl. ¶ 60). The Memorandum also refers to the March 19, 1998 Note Offering Memorandum, and the February 27, 1998 Fairness Opinion, both of which are relied upon or referenced in the Complaint. (*Id.* ¶¶ 42-43, 47-52.) Copies of these documents and related materials are attached to Defendant’s Answer, which is filed simultaneously herewith (*see* Answer Exhibits 1-6), and thus may properly be considered on this motion for judgment on the pleadings. *See, e.g., Boca Raton Transp., Inc. v. Zaldivar*, 648 So. 2d 812, 813 (Fla. 4th DCA 1995). Finally, for purposes of the Court’s choice-of-law analysis, this Memorandum attaches and references the affidavits of several individuals who were present at pertinent meetings and occurrences discussed in the Complaint, all of which occurred in New York. (*See* Memorandum Exs. A-C.)

² It is telling that CPH conspicuously omits its principal place of business from its own Complaint. (Compl. ¶ 8.) In two pleadings filed by CPH in this very court, however — by the very same counsel who represent CPH here — CPH plainly stated that its “*principal offices [are] located in New York.*” *See* March 15, 2002 1st Am. Compl. ¶ 16, *Coleman (Parent) Holdings v. Arthur Andersen et al.*, No. CA 01-06062 AN (Rapp, J.) (“*Arthur Andersen* 1st Am. Compl.”) (Ex. D); June 8, 2001 Compl. ¶ 15, *Coleman (Parent) Holdings v. Arthur Andersen LLP & Phillip Harlow*, No. 01-06062AN (Ex. E). The Court may take judicial notice of these pleadings pursuant to Fla. Stat § 90.202(6) (2003), which permits judicial notice of the “[r]ecords of any court of this state.”

1998, CPH owned approximately 82% of the shares of Coleman, a manufacturer and marketer of outdoor recreation products. (Compl. ¶ 8.) On March 30, 1998, pursuant to a written Merger Agreement that was negotiated, executed, and consummated in New York, CPH sold its interest in Coleman to Sunbeam. (*Id.*) Neither Sunbeam nor Coleman is a party to this action.

Defendant MS & Co., a wholly-owned subsidiary of Morgan Stanley, is a registered broker-dealer headquartered in New York. In mid 1997 and early 1998, MS & Co. assisted Sunbeam in identifying potential acquisition candidates and served as Sunbeam's financial advisor with respect to certain aspects of Sunbeam's acquisition of Coleman and two smaller companies. (*Id.* ¶¶ 9, 32.) MS & Co. also served as underwriter for a \$750 million offering of convertible debentures, which Sunbeam used to finance the acquisitions. (*Id.* ¶¶ 9, 47, 52.) MS & Co. is incorporated in Delaware and has its principal place of business in New York. (*See* June 23, 3003 Answer of Morgan Stanley & Co. Incorporated ¶ 6.)

A. Sunbeam Hires MS & Co. To Advise It Regarding A Possible Corporate Sale Or Acquisition — Not To Replace Sunbeam's Outside Auditor Or To Review Sunbeam's Accounting Practices.

In mid 1997, Sunbeam engaged MS & Co. for advice with respect to a possible sale of Sunbeam's core business and/or the initiation of one or more acquisitions. (Compl. ¶ 31.) Throughout the fall of 1997, MS & Co. contacted at least ten potential bidders that it believed might have an interest in acquiring Sunbeam. (*Id.* ¶ 32.) In December 1997, unable to find a buyer for Sunbeam, MS & Co. recommended that Sunbeam's management consider acquiring other companies instead. (*Id.* ¶ 34.) According to the Complaint, MS & Co. suggested that Sunbeam consider using Sunbeam stock as part of the consideration offered to potential acquisition candidates. (*Id.*) Arthur Andersen served as "Sunbeam's outside auditors" (*Id.* ¶¶ 13, 67-68) and thus assumed responsibility for monitoring Sunbeam's accounting practices and verifying Sunbeam's publicly-filed financial reports, upon which Sunbeam's stock price was

based. Plaintiff has recently acknowledged in this Court that it “directly relied on Andersen’s 1996 and 1997 audit reports when it decided to close the transaction with Sunbeam.” *Arthur Andersen*, 1st Am. Compl. ¶ 93.

B. After A “False Start” In Florida, Sunbeam And CPH Negotiate The Written Merger Agreement In New York.

In December 1997, MS & Co. identified Coleman as a potential acquisition candidate. (Compl. ¶ 36.) After an initial meeting between Sunbeam and CPH in New York to discuss the possibility of such an acquisition (Stynes Decl. ¶ 4 (Ex. A).), according to the Complaint, MS & Co. “laid the groundwork” for a meeting in Palm Beach, Florida between Al Dunlap (CEO of Sunbeam), Russell Kersh (CFO of Sunbeam), and representatives of CPH (Compl. ¶ 37). The meeting was a complete disaster. According to the Complaint, Dunlap “nearly scuttled” the proposed deal when he “cursed and ranted” at the CPH representatives and “stormed out” of the meeting. (*Id.*) This aborted meeting — which MS & Co. did not attend and which does not form the basis for any claim — is the only meeting alleged in the Complaint that took place in Florida.

Sunbeam and CPH ultimately resumed negotiations in New York. (Stynes Decl. ¶ 5.) The Complaint alleges that, “[d]uring the course of negotiations,” MS & Co. “prepared and provided CPH with false financial and business information about Sunbeam.” (Compl. ¶ 39.) The Complaint alleges that these materials, together with “false projections” and misleading “earnings estimates,” were provided to CPH during “negotiations” and “face-to-face discussions” between CPH and Sunbeam. (*Id.*) All, or substantially all, such “negotiations” and “face-to-face discussions” took place in New York. (Stynes Decl. ¶ 5.)

On February 27, 1998, after several weeks of arm’s length negotiations, Sunbeam’s Board of Directors convened a special meeting in New York to consider the proposed acquisition of Coleman. (Compl. ¶ 41.) The Board of Directors met at MS & Co.’s offices in New York.

(Stynes Decl. ¶ 6.) Several representatives from MS & Co. attended the board meeting and provided Sunbeam with a written “fairness opinion” regarding the fair acquisition price of Coleman. (Compl. ¶¶ 42-43.) The Complaint does not allege that CPH was present at this board meeting, or that it relied on any representations that were made there. (*Id.*) At the conclusion of the New York meeting, Sunbeam’s Board of Directors approved the Coleman acquisition. (*Id.* ¶ 44.) Later that same day, Sunbeam and CPH formally executed the Merger Agreement in New York. (Stynes Decl. ¶ 7.)

The Merger Agreement is fundamental to this case. Although the Complaint quotes directly from the Merger Agreement and CPH purports to base its claims (at least in part) on the Merger Agreement itself (Compl. ¶ 65), CPH has failed to attach the Merger Agreement to its Complaint. Its failure to do so is not surprising because several express provisions of the Merger Agreement defeat CPH’s claims as a matter of law:

- **First**, the Merger Agreement contains a clear integration clause which expressly prohibits CPH from relying on any representations or statements made during pre-closing negotiations. (Merger Agmt. § 12.5 (Answer Ex. 1).)
- **Second**, the Merger Agreement contains detailed covenants, representations and warranties, none of which contemplate reliance on extra-contractual representations or statements. (Merger Agmt. §§ 5.1-6.10.)³
- **Third**, the Merger Agreement required Sunbeam to provide CPH and all of its “financial advisors, legal counsel, accountants, consultants and other representatives” with “full access . . . to all of [Sunbeam’s] books, records, properties, plants and personnel.” (Merger Agmt. § 6.7.) Thus, CPH and MS & Co. stood at all times on *equal footing* regarding access to information pertinent to Sunbeam’s true financial condition.

³ Article V of the Merger Agreement further incorporates every additional representation and warranty contained in the separate agreement that was executed by Coleman and Sunbeam, none of which contemplate reliance on extra-contractual representations. (See Feb. 27, 1998 Company Merger Agmt. §§ 5.1-5.12 (Answer Ex. 3).)

- **Fourth**, the Merger Agreement expressly recognized that CPH had its own sophisticated financial advisors with respect to the acquisition, and would thus be represented throughout negotiations, due diligence, and closing by Credit Suisse First Boston (“CSFB”). (*Id.* §§ 1.1; 4.11.)⁴

The Merger Agreement also set forth the commercial terms for the acquisition. In exchange for CPH’s 82% ownership interest in Coleman, Sunbeam agreed to pay \$159,956,756 in cash — and transfer 14,099,749 shares of Sunbeam’s common stock to CPH. (Merger Agmt. § 3.1(a)(i).) In addition, Sunbeam agreed to assume or repay more than \$1 billion in debt belonging to Coleman and CPH. The Merger Agreement specified that the acquisition would close in New York and that all share certificates and/or other consideration would be exchanged by the parties at the closing in New York. (*Id.* §§ 2.2, 3.1(b)(i).)

C. MS & Co. Puts Its Own Money And Reputation On The Line By Agreeing To Serve As Underwriter For Sunbeam’s \$750 Million Debenture Offering.

Sunbeam needed to raise funds to pay the substantial “cash portion” of consideration for Coleman’s \$2 billion purchase price. (Compl. ¶ 47; Merger Agmt. § 3.1(a)(i).) MS & Co. recommended that Sunbeam raise a portion of this amount through an offering of convertible debentures (“the Note Offering”). (Compl. ¶ 47; MS & Co.’s Answer ¶¶ 47, 50; March 19, 1998 Note Offering Mem. at 8, 23 (Answer Ex. 5).) MS & Co. agreed to serve as the sole underwriter for Sunbeam’s Note Offering and thus agreed to market the debentures to its most valuable institutional clients. (Compl. ¶ 47.) The notes were presented to potential investors at a series of “road show” meetings (*id.* ¶ 50) in New York (Porat Decl. ¶ 3 (Ex. B).) The Complaint alleges that MS & Co. “misrepresented Sunbeam’s financial performance” during the “road shows” and “conference calls” which took place in connection with the Note Offering. (Compl. ¶ 50.) There

⁴ CPH also was represented throughout the negotiations and due diligence process by Wachtell, Lipton, Rosen & Katz, a prominent New York law firm which specializes in counseling its clients in high-stakes mergers and acquisitions. (Stynes Decl. ¶ 3.)

is no allegation, however, that CPH ever received these alleged misrepresentations or that it relied on them when deciding to close the transaction. (*Id.*) The Note Offering ultimately raised \$750 million, which Sunbeam used to pay part of the cash consideration for the Coleman acquisition. (*Id.* ¶ 52.)

Another portion of this consideration (approximately \$680 million) was financed by Morgan Stanley Senior Funding (“MSSF”), an affiliate of MS & Co., and a wholly-owned subsidiary of Morgan Stanley. (MS & Co.’s Answer ¶ 47; Note Offering Mem. at 8, 23, 47.) Specifically, in March 1998, MSSF entered into a credit agreement with Sunbeam and agreed to lend Sunbeam approximately \$680 million to finance the acquisition. (Hart Decl. ¶ 3 (Ex. C).) Thus, through its subsidiary, Morgan Stanley invested hundreds millions of dollars in the Coleman acquisition. (MS & Co.’s Answer ¶¶ 31, 47, 66; Note Offering Mem. at 47; June 1998 Credit Facilities Mem. at 1-2; 39 (Answer Ex. 2).)⁵

D. The March 19, 1998 Press Release.

Plaintiff alleges that on March 19, 1998 — eleven days before the acquisition was scheduled to close — Sunbeam issued a “false press release” regarding Sunbeam’s first quarter financial performance. (Compl. ¶ 59.) Plaintiff alleges that the press release was prepared and issued with MS & Co.’s “knowledge and assistance,” and that the press release “affirmatively misstated and concealed Sunbeam’s true condition.” (*Id.*) The Complaint nowhere alleges that CPH relied on this press release for any reason or that CPH ever sought to verify the information contained therein.

⁵ MSSF’s loan is the subject of a companion case that is also pending in this Court. *See Morgan Stanley Senior Funding, Inc. v. Coleman (Parent) Holdings Inc. & MacAndrews & Forbes Inc.*, No. 2003 CA 00-5165AG (filed May 12, 2003). In that companion case, MSSF alleges that CPH and MAFCO fraudulently inflated the acquisition price for Coleman, causing MSSF to loan (and ultimately lose) hundreds of millions of dollars.

E. The Acquisition And Financing Transactions Close In New York.

The Note Offering closed in New York on March 19, 1998. (Porat Decl. ¶ 3.) The acquisition itself closed in New York on March 28, 1998. (Stynes Decl. ¶ 8.) CPH tendered its Coleman stock to Sunbeam in New York, as required by the Merger Agreement. (Merger Agmt. §§ 2.2, 3.1(b)(i).) Sunbeam delivered the consideration for these shares (including roughly 14.1 million shares of common stock and \$1.6 billion in cash) to CPH at the closing in New York. (*Id.* § 2.2.) The Bank Facility closed in New York on March 31, 1998. (Hart Decl. ¶ 4.) MSSF funded the Bank Facility by transferring \$680 million from its New York bank account. (*Id.*)

F. Accounting Irregularities Are Discovered At Sunbeam.

Several days after the acquisition closed, Sunbeam announced that its sales for the first quarter of 1998 were lower than sales numbers that it had reported in the first quarter of 1997. (Compl. ¶ 74.) In May 1998, Sunbeam announced that it would record a first quarter loss of \$.09 per share. (*Id.* ¶ 76.) In June 1998, Sunbeam's Board of Directors launched an internal investigation into Sunbeam's accounting practices. (*Id.* ¶ 77.) That investigation led to the June 13, 1998 firing of Al Dunlap (Sunbeam's CEO) and Russell Kersh (Sunbeam's CFO) and, ultimately, to the October 1998 restatement of Sunbeam's financial statements for 1996, 1997, and the first quarter of 1998. (*Id.*)

STANDARD OF REVIEW

On a motion for judgment on the pleadings under Florida Rule of Civil Procedure 1.140(c), the Court must accept as true all well-pleaded factual allegations of the non-moving party. *See Cutler v. Aleman*, 701 So. 2d 390, 391 (Fla. 3d DCA 1997). The Court need not, however, ignore general factual allegations that are inconsistent with specific facts "revealed by [an] exhibit attached or referred to in the complaint." *Hillcrest Pac. Corp. v. Yamamura*, 727 So. 2d 1053, 1056 (Fla. 4th DCA 1999) (internal quotation marks & citation omitted). Judgment on

the pleadings is appropriate where “on the facts as admitted for the purposes of the motion, the moving party is clearly entitled to judgment.” *Cutler*, 701 So. 2d at 391.

ARGUMENT

I. THIS COURT MUST APPLY NEW YORK LAW TO PLAINTIFF’S CLAIMS.

A. Settled Choice-of-Law Principles Require Application Of New York Law.

In *Bishop v. Florida Specialty Paint Co.*, 389 So. 2d 999 (Fla. 1980), the Florida Supreme Court adopted the principles set forth in the *Restatement (Second) of the Conflict of Laws* (“*Restatement*”) for resolving disputes over choice-of-law in controversies involving more than one jurisdiction. Applying the *Restatement* analysis to this case, it is clear that this Court must apply New York law to CPH’s claims.

All of the claims in the Complaint are based on allegations of fraud and misrepresentation. As such, the substantive law applied to these claims must be determined in accordance with Section 148 of the *Restatement*, which provides in relevant part:

When the plaintiff has suffered pecuniary harm on account of his reliance on the defendant’s false representations and *when the plaintiff’s action in reliance took place in the state where the false representations were made and received, the local law of this state determines the rights and liabilities of the parties*

Restatement § 148(1); see also Eugene F. Scoles & Peter Hay, *Conflict of Laws* § 17.52 at 798 (3d ed. 2000) (“In cases of fraud and misrepresentation, the choice of the applicable law is relatively easy. When the defendant’s fraud or misrepresentation and the defendant’s reliance occur in the same state, no problem arises.”) (citing *Restatement* § 148(1)).⁶ Application of these principles here plainly requires this Court to apply New York law to Plaintiff’s claims.

⁶ Unless otherwise indicated, all emphasis is supplied.

First, every *representation* alleged in the Complaint occurred in New York. All substantive “negotiations” and “face-to-face” discussions involving MS & Co. took place in New York. (Stynes Decl. ¶ 5.) Preparation for the “road show” meetings took place in New York, and the meetings themselves took place in New York and three other cities, none in Florida. (Porat Decl. ¶ 3.) MS & Co.’s presentation to Sunbeam’s Board of Directors took place in New York. (Stynes Decl. ¶ 6.) MS & Co.’s “fairness opinion” was presented to Sunbeam in New York. To the extent that MS & Co. reviewed the March 19, 1998 press release, it did so in New York. (Porat Decl. ¶ 4.) And there are no allegations — (nor could there be) — that MS & Co. made any representations to anyone in Florida.

Second, every *act of reliance* alleged in the Complaint occurred in New York. CPH executed and closed the Merger Agreement in New York. (Merger Agmt. § 2.2.) CPH tendered its shares of Coleman in New York. (*Id.* §§ 2.2, 3.1(b)(i).) CPH accepted shares of Sunbeam stock in New York. (*Id.*) The Note Offering closed in New York. (Porat Decl. ¶ 3.) The Bank Facility closed in New York. (Hart Decl. ¶ 4.) And there are no allegations — nor could there be — that CPH ever committed a single act of reliance to its detriment in Florida, as opposed to New York, its principal place of business.⁷

Third, every *injury* alleged in the Complaint occurred in New York. CPH tendered its shares of Coleman in New York. (Merger Agmt. § 3.1(b)(i).) CPH accepted shares of Sunbeam

⁷ Even if CPH based its claims on representations made from Florida, the *Restatement* would still compel application of New York law. The fact that CPH relied to its detriment in New York — the same state as its principal place of business — is completely determinative of the choice-of-law question, regardless of whether the representations were made from another state. See *Restatement* § 148 (comment j) (“[W]hen the plaintiff acted in reliance upon the defendant’s representations in a single state, this state will usually be the state of the applicable law . . . if (a) the defendant’s representations were received by the plaintiff in this state, or (b) this state is the state of the plaintiff’s domicile or principal place of business.”).

stock in New York. (*Id.*) Sunbeam filed for bankruptcy in New York. And there is no Florida party before this Court, let alone an injured one.⁸

Fourth, New York has a *paramount sovereign interest* in having its law applied to this controversy, which arises out of a sophisticated business transaction that was negotiated, executed and closed in New York — between two parties who are headquartered there. Indeed, it is precisely for cases like this that New York has developed a sophisticated body of law to govern fraud and misrepresentation claims that arise from New York-based financial transactions.⁹

Fifth, Florida has *no sovereign interest* in having its law applied to this controversy. There are no Florida parties before this Court; there is no Florida injury to redress; and every discussion or representation identified in the Complaint took place in New York — not Florida. Indeed, it is only by applying New York law to a case like this one that the Florida courts can ensure — as the Florida Supreme Court requires — that “rights and liabilities” are defined by the law of the state with “the most significant relationship to the occurrence and the parties.” *Bishop*, 389 So. 2d at 1001.

⁸ The Complaint makes curious reference to “Florida investors” who may have purchased some of the convertible notes (Compl. ¶ 52), but this is entirely irrelevant to the choice-of-law inquiry because (i) no such “Florida investors” are before this Court and (ii) CPH’s claims have nothing to do with investors in the convertible notes, from Florida or anywhere else.

⁹ The federal and state courts of New York have repeatedly and consistently recognized this paramount sovereign interest. *See, e.g., Marine Midland Bank, N.A. v. United Mo. Bank*, 223 A.D.2d 119, 124 (N.Y. App. Div. 1996) (“[A] known, stable, and commercially sophisticated body of law may be considered as much an attraction to conducting business in New York as its unique financial and communications resources.”) (citing *Ehrlich-Bober & Co. v. University of Houston*, 49 N.Y.2d 574, 581 (N.Y. 1980)); *Optopics Labs. Corp. v. Savannah Bank of Nigeria, Ltd.*, 816 F. Supp. 898, 904 (S.D.N.Y. 1993) (recognizing that New York has “an overriding and paramount interest” in the outcome of financial transaction litigation because New York is “a financial capital of the world [and] international clearinghouse and market place for a plethora of international transactions”) (quoting *J. Zeevi & Sons, Ltd. v. Grindlays Bank (Uganda) Ltd.*, 333 N.E.2d 168, 172 (N.Y. 1975)).

B. Where (As Here) Misrepresentation Claims Relating To The Sale Of A Business Have A Factual Nexus To New York, the Eleventh Circuit Has Already Held That Those Claims Must Be Determined By New York Law.

This case raises choice-of-law issues that are nearly identical to those presented in *Trumpet Vine Investments, N.V. v. Union Capital Partners I, Inc.*, 92 F.3d 1110 (11th Cir. 1996). That case arose out of the multi-billion dollar acquisition of Del Monte, an international corporation headquartered in Coral Gables, Florida. *See id.* at 1113-14. The plaintiff (Union Capital) claimed that the defendant (Trumpet Vine) conspired with other companies to shut it out of the acquisition. *See id.* There, as here, negotiations for the acquisition occurred chiefly in New York. *See id.* at 1116. There, as here, the plaintiff filed its claims in Florida, where the subject of the New York-based transaction (Del Monte) was headquartered and where some due diligence activities occurred. *See id.* at 1113-14. And there, as here, the plaintiff sought to assert various tort theories of fraud, misrepresentation, and conspiracy. *See id.* at 1114.

The “threshold issue” was choice-of-law. *Id.* at 1115. Union Capital argued that Florida law should govern on grounds that one of the parties to the acquisition (Del Monte) was based in Florida, and that the plaintiff (Union Capital) was itself based there. The defendant (Trumpet Vine) argued that New York law governed the claims because the transaction was negotiated and closed in New York. The District Court, applying Florida’s choice-of-law rules and Section 148 of the *Restatement*, held that New York law must be applied. A three-judge panel of the United States Court of Appeals for the Eleventh Circuit agreed — and upheld the choice-of-law ruling on appeal. *See id.* at 1118.

The same considerations that guided the courts in *Trumpet Vine* apply to this case:

- In *Trumpet Vine*, as in this case, it was *irrelevant* that Del Monte was headquartered in Florida, because “*the takeover itself was to be consummated in New York.*” *Id.*

- In *Trumpet Vine*, as in this case, it was *irrelevant* that some of the preliminary discussions took place in Florida, or even that “some acts in reliance (the due diligence) occurred in Florida.” *Id.*
- And in *Trumpet Vine*, as in this case, it was *irrelevant* that the subject of the underlying transaction was based in Florida because “New York had the most significant contacts, as *the place where the misrepresentations and the initial acts of reliance occurred.*” *Id.*

Indeed, this case presents an even *stronger* basis for applying New York law than *Trumpet Vine* because no party in this case has *any* presence in Florida. In *Trumpet Vine*, *the injured plaintiff was headquartered in Florida* and the principal injury *occurred in Florida*. No such interests are implicated here.

Trumpet Vine thus offers powerful guidance that where, as here, a business transaction is executed and closed in New York, and alleged misrepresentations, reliance, and injuries all occur in New York, the legal sufficiency of Plaintiff’s claims must be determined under the law of New York. For the Court’s convenience, a chart summarizing the parallels between CPH’s Complaint and the *Trumpet Vine* case is attached hereto as Exhibit F.¹⁰

¹⁰ Further guidance is found in the fact that reported cases applying *Restatement* principles to disputes arising from sophisticated multi-jurisdictional business transactions uniformly reach the same result as *Trumpet Vine*. See, e.g., *Inacom Corp. v. Sears, Roebuck & Co.*, 254 F.3d 683, 688 (8th Cir. 2001) (applying Nebraska law to suit arising out of the sale of a business division located in Illinois because plaintiff received, took action on, and suffered damages from fraudulent concealment in Nebraska); *389 Orange St. Partners v. Arnold*, 179 F.3d 656, 662 (9th Cir. 1999) (applying law of state where claimant signed documents containing misrepresentations and was to render payment in reliance on such misrepresentations); *Thomas v. N.A. Chase Manhattan Bank*, 994 F.2d 236, 241-42 (5th Cir. 1993) (applying law of New York because negotiations and reliance occurred in New York); *Macurdy v. Sikov & Love, P.A.*, 894 F.2d 818, 820-21 (6th Cir. 1990) (applying law of state where misrepresentations and reliance occurred); *Sky Tech. Partners, LLC v. Midwest Research Inst.*, 125 F. Supp. 2d 286, 297-98 (S.D. Ohio 2000) (applying law of state where plaintiffs had their principal place of business and acted in reliance upon alleged misrepresentations); *Hari & Assocs. v. RNBC, Inc.*, 946 F. Supp. 531, 536 (M.D. Tenn. 1996) (applying law of state where contracts and agreements were executed and misrepresentations occurred); *Value House, Inc. v. MCI Telecomms. Corp.*, 917 F. Supp. 5, 7 (D.D.C. 1996) (applying law of state where plaintiffs received negligent misrepresentations and acted in reliance thereon); *Default Proof Credit Card Sys., Inc. v. State Street Bank & Trust Co.*, 753 F. Supp. 1566, 1570-71 (S.D. Fla. 1990) (applying Massachusetts law because negotiations and actionable conduct occurred in Massachusetts notwithstanding that losses from alleged fraud occurred in Florida where the plaintiff had its principal place of business). To apply Florida law here, in short, would not only be unprecedented, it would turn the *Restatement* on its head.

II. THIS COURT SHOULD DISMISS THIS ENTIRE CASE PURSUANT TO FLORIDA RULE OF CIVIL PROCEDURE 1.061.

As the foregoing makes clear, Florida has scant connection with the underlying facts or the injury alleged in the Complaint. Under a traditional *forum non conveniens* analysis, codified by the Florida Supreme Court in Florida Rule of Civil Procedure 1.061(a), CPH's lawsuit should proceed (if at all) only in New York — where all the events alleged occurred, where the overwhelming majority of the witnesses and relevant documents are located, and where the injuries it claims to have suffered occurred. This strong preference for a New York forum is confirmed by the fact that this Court — or any other court adjudicating this controversy — will have to apply New York law to CPH's claims. *See, e.g., Kinney System, Inc. v. Continental Ins. Co.*, 674 So. 2d 86, 92 (Fla. 1996) (“[A] trial court has discretion to grant *forum non conveniens* dismissal upon finding that . . . foreign law will predominate if jurisdiction is retained.”).

Florida Rule of Civil Procedure 1.061(a) recognizes that there are certain cases that are so inconvenient to litigate in the forum selected by a plaintiff that they must be dismissed. Rule 1.061(a) allows the court to exercise its “sound discretion” — and dismiss the case — where it appears that the practical interest of the litigants and witnesses require the action to be tried in a more convenient judicial forum. Florida courts considering Rule 1.061 dismissal evaluate three key factors: (1) whether “an adequate alternate forum exists”; (2) whether “all relevant factors of private interest favor the alternate forum”; and (3) “[i]f the balance of private interests is at or near equipoise,” whether “factors of public interest tip the balance in favor of trial in the alternate forum.” *Id.* at 94; *see, e.g., Ground Improvement Techniques, Inc. v. Merchants Bonding Co.*, 707 So. 2d 1138, 1139 (Fla. 5th DCA 1998) (dismissing complaint under Rule 1.061 where pleadings and attachments showed another state was more convenient).

This case is tailor-made for a Rule 1.061 dismissal. *First*, the New York courts are clearly an “adequate alternative forum” for adjudication of a dispute which arises out of a business transaction that was negotiated, executed, and closed in New York — between two parties who are headquartered in New York. Indeed, New York courts are routinely asked to decide similar cases involving substantially identical issues. Moreover, both of the parties to this action are undoubtedly subject to personal jurisdiction in New York. And because CPH is a Delaware corporation with a New York headquarters, its choice of a Florida forum is entitled no weight in the Rule 1.061(a) inquiry. *See, e.g., Ciba-Geigy Ltd. v. Fish Peddler, Inc.*, 691 So. 2d 1111, 1118 (Fla. 4th DCA 1997) (reversing denial of motion to dismiss under Rule 1.061(a) because “no special weight should have been given to a foreign plaintiff’s choice of forum”).

Second, all relevant public and private interest factors weigh in favor of this case being pursued in New York. As set forth in detail in Part I of this Memorandum and described in the materials submitted to the Court for the choice-of-law determination:

- **The Parties, Witnesses, and Documents Are Located in New York.** All of the relevant events occurred in New York, and the overwhelming majority of witnesses, documents, and other relevant evidence are located in New York.
- **The Court Must Apply New York Law.** The Court must consider the impact of choice-of-law problems on the forum, particularly since the need to apply the law of another state points toward dismissal. The familiarity of New York courts with New York law supports dismissal here under Rule 1.061(a).
- **The Localized Nature Of The Controversy.** There is a “local interest in having localized controversies decided at home.” *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947). This case presents a case that is “local” to New York. The relevant events all occurred there, and the courts of New York have a significant interest in regulating the conduct of companies that transact business agreements there.
- **The Unfairness Of Imposing Jury Duty On Florida Residents.** There is no persuasive reason for imposing the burden of jury duty and the cost of trial on the residents of Florida where a transaction is based entirely in New York. In this case especially, the attenuated connection between CPH’s claims and

Florida make it unfair to impose the burden of jury duty on the residents of Palm Beach County.

- **The Court's Busy Docket Warrants Dismissal.** Permitting what promises to be a complex case involving the application of New York law — and discovery disputes involving New York parties, witnesses, and documents — to proceed in Florida will only further crowd an already busy docket and delay justice to Florida residents with Florida-based claims.

For all of the foregoing reasons, New York has a greater interest in this dispute than Florida and is by far the most convenient forum for the litigation of CPH's claims. Accordingly, the convenience of the parties and their witnesses, as well as the interests of justice, require the Court to dismiss the case pursuant to Federal Rule of Civil Procedure 1.061(a).¹¹

III. PLAINTIFF'S FRAUD CLAIM (COUNT I) MUST BE DISMISSED.

CPH's fraud claim fails for three separate and independent reasons. *First*, Plaintiff's claims are foreclosed by the integration clause in the Merger Agreement, which expressly disclaims reliance on pre-agreement negotiations. *Second*, settled law prohibits CPH from bringing a fraud claim based on alleged representations by MS & Co. (the financial advisor to CPH's *counterparty* in arm's length negotiations) where it failed to inspect and verify the accuracy of those alleged representations, as it had the contractual right to do. *Third*, CPH cannot base its fraud claims on allegations that MS & Co. acted against its own economic interest — *i.e.*, that it engaged in a massive fraud, allowed its affiliate to risk and lose hundreds of millions of dollars, and intentionally ripped off its own clients, all for the alleged purpose of

¹¹ In the event that this Court dismisses this action on *forum non conveniens* grounds, MSSF agrees to stipulate pursuant to Florida Rule of Civil Procedure 1.061(b) that it will voluntarily dismiss the companion case now pending in this Court and refile its complaint in New York. MSSF filed its action here only because CPH filed its case here — and only because the cases involve common facts and judicial economy demands that they be consolidated in the same forum. The most appropriate forum for these cases, however, is clearly New York, not Florida.

collecting an ordinary banking fee. Such nonsensical allegations fail, as a matter of law, to establish the “scienter” element of Plaintiff’s fraud claim.

A. CPH Specifically Disclaimed Reliance On The Representations Now Alleged To Be Fraudulent.

To state a claim for fraud, CPH must allege that it reasonably relied on fraudulent representations made by MS & Co. *See, e.g., Harsco Corp. v. Segui*, 91 F.3d 337, 342 (2d Cir. 1996). But CPH cannot establish this threshold requirement because the only representations alleged to have been made by MS & Co. — statements and materials provided during pre-closing negotiations (Compl. ¶ 39) — are expressly disclaimed in the Merger Agreement’s integration clause. Section 12.5 of the Merger Agreement provides:

Entire Agreement. This Agreement (including all Schedules and Exhibits hereto) contains *the entire agreement* among the parties hereto with respect to the subject matter hereof and *supercedes all prior agreements and understandings, oral or written, with respect to such matters*, except for the Confidentiality Agreements which will remain in full force and effect for the term provided for therein.

(Merger Agmt. § 12.5.)

This provision disclaims, in plain language, the representations alleged in Paragraph 39 of the Complaint — the *only* representations that are alleged to have been made by MS & Co. Indeed, the Merger Agreement contains or expressly incorporates dozens of representations and warranties which, pursuant to the integration clause, are the *only* representations and warranties CPH relied upon in agreeing to sell its stake in Coleman. (Merger Agmt. § 5.1-5.4; Company Merger Agmt. §§ 5.1-5.12.) These representations and warranties refer to the truth and accuracy of financial information “filed by [Sunbeam] with the SEC” (Company Merger Agmt. § 4.6);

they clearly *do not* refer to any information alleged to have been “provided” by MS & Co. (Compl. ¶ 39), which is the *only* factual basis for CPH’s fraudulent misrepresentation claim.¹²

New York law is crystal clear that a party who expressly disclaims reliance on representations in the course of a complex business transaction (as CPH has done here) cannot later sue for fraud claiming reliance on those very same representations. *See, e.g., Dyncorp v. GTE Corp.*, 215 F. Supp. 2d 308, 322-23 (S.D.N.Y. 2002) (dismissing fraud claim based on extra-contractual representations where plaintiff negotiated a merger agreement with express representations, warranties, and an integration clause); *Emergent Capital Inv. Mgmt., LLC v. Stonepath Group, Inc.*, 195 F. Supp. 2d 551, 562 (S.D.N.Y. 2002) (same).¹³

This well-established principle applies with special force where (as here) the plaintiff is a sophisticated commercial actor with substantial experience negotiating complex financial transactions. *See, e.g., Lazard Freres & Co. v. Protective Life Ins. Co.*, 108 F.3d 1531, 1543 (2d Cir. 1997) (“[A] substantial and sophisticated player . . . [is] under a further duty to protect itself from misrepresentation.”). Indeed, sophisticated entities like CPH have a legal obligation to

¹² It is significant for purposes of this Motion that, in a ninety-six paragraph Complaint, only this single paragraph (Compl. ¶ 39) alleges that MS & Co. made any representations to CPH. Every other substantive portion of the Complaint — including (i) the allegations of Sunbeam’s accounting fraud (*Id.* ¶¶ 14-27), (ii) statements made by MS & Co. to prospective purchasers of the convertible notes (*Id.* ¶¶ 47-52), and (iii) statements made by MS & Co. to the Sunbeam Board of Directors (*Id.* ¶¶ 41-44) — simply has no relevance to CPH’s claims, as there is no factual allegation that MS & Co. knew of the Sunbeam fraud or that representations by MS & Co. to the other parties were ever communicated to CPH. Given the stringent pleading standards for fraudulent misrepresentation claims, moreover, the Complaint’s conclusory and hollow allegations cannot state a claim as a matter of law. *See, e.g., Batlemento v. Dove Fountain, Inc.*, 593 So. 2d 234, 238 (Fla. 5th DCA 1991) (dismissing fraud claim where “the amended complaint does no more than identify the subject matter of the alleged false representations of fact”) (citing Fla. R. Civ. P. 1.120(b)); *see also Window Headquarters, Inc. v. MAI Basic Four, Inc.*, No. 91 Civ. 1816 (MBM), 1994 WL 673519, at *5 (S.D.N.Y. Dec. 1, 1994) (“To specify fraud with particularity, plaintiffs must allege specifically the circumstances of the fraud claimed, including the content of any alleged misrepresentation, and the date, place and identity of the persons making the misrepresentations.”).

¹³ Florida law is no different in this regard. *See, e.g., Hillcrest Pac. Corp. v. Yamamura*, 727 So. 2d 1053, 1056 (Fla. 4th DCA 1999) (“A party cannot recover in fraud for alleged oral misrepresentations that are adequately covered or expressly contradicted in a later written contract.”).

protect themselves before relying on statements or representations apart from those memorialized in a detailed agreement. *See, e.g., id.* (“[T]he failure to insert [appropriate protective language] in the agreement — by itself — renders reliance unreasonable as a matter of law.”) (citations omitted); *Consolidated Edison, Inc. v. Northeast Utilities*, 249 F. Supp. 2d 387, 402 (S.D.N.Y. 2003) (sophisticated parties cannot allege reasonable reliance on alleged statements and representations where they “could have made them a basis for a specific representation and warranty in the Merger Agreement but failed to do so”) (citations omitted); *Dyncorp*, 215 F. Supp. 2d at 322 (“Sophisticated parties to major transactions cannot avoid their disclaimers by complaining that they received less than all information, for they could have negotiated for fuller information or more complete warranties.”). Dismissal of Plaintiff’s fraud claim is warranted on this ground alone.

Indeed, CPH is part of a multi-billion dollar financial empire that routinely engages in the world’s most sophisticated and complex corporate mergers and acquisitions. In addition, CPH was represented by an army of attorneys and financial advisors who themselves are experts in precisely the sort of transaction at issue here. (*See, e.g., Merger Agmt.* §§ 1.1, 4.11 (Credit Suisse First Boston).) As a matter of law, therefore, CPH cannot plead that it reasonably relied on representations supposedly made by MS & Co. — an advisor to CPH’s *counterparty* in the negotiations — especially after having expressly **disclaimed** those representations in the Merger Agreement. To the extent CPH now alleges that it relied on such representations to support its fraudulent misrepresentation claim, its allegations are legally deficient and require this Court to dismiss Count I as a matter of law.¹⁴

¹⁴ CPH cannot claim that it is entitled to discovery on this claim, since courts routinely dismiss fraudulent misrepresentation claims that are contrary to an integration clause and not encompassed within any contractual (Continued...)

B. CPH Cannot Bring A Fraud Claim Because It Failed To Exercise Its Contractual Right To Inspect Sunbeam's Books And Records.

Quite apart from the claim-defeating integration clause, Plaintiff's fraud claim is barred for the additional reason that — despite a clear provision in the Merger Agreement that gave it unfettered access to Sunbeam's books and financial records — CPH does not allege that it ever sought to verify the financial representations it now claims were fraudulent. Indeed, “[a]s a matter of law, a sophisticated plaintiff *cannot establish* that it entered into an arm's length transaction in justifiable reliance on an alleged misrepresentation if that plaintiff *failed to make use of the means of verification that were available to it, such as reviewing the files of the other parties.*” *UST Private Equity Investors Fund, Inc. v. Salomon Smith Barney*, 288 A.D.2d 87, 88 (N.Y. App. Div. 2001) (affirming motion to dismiss fraud claims where sophisticated plaintiff failed to verify the accuracy of alleged misrepresentation during due diligence).

The reason for this rule is simple. A sophisticated party who “plainly had both access to the relevant [company] financial statements,” and the “wherewithal through [its] own financial advisors” to ascertain the financial condition of that company, is presumed as a matter of law to have had the “means to ascertain the truth of the alleged representations.” *Rotterdam Ventures, Inc. v. Ernst & Young LLP*, 752 N.Y.S.2d 746, 749 (N.Y. App. Div. 2002). Therefore, to state a

representation or warranty, especially where (as here) the plaintiff is a highly sophisticated party that could have protected itself before relying on alleged extra-contractual representations. *See, e.g., Dyncorp*, 215 F. Supp. 2d at 320 (“ruling on the legal sufficiency of a complaint based on [fraudulent] representations may properly be made on the complaint and contract alone, *without waiting for discovery*”); *Belin v. Weissler*, No. 97 Civ. 8787 (RWS), 1998 WL 391114, *5 (S.D.N.Y. July 14, 1998) (dismissing sophisticated plaintiff's misrepresentation claim that contradicts integration clause because “the asserted reliance must be found to be justifiable under all the circumstances before a complaint can be found to state a cause of action in fraud”) (quoting *Danann Realty Corp. v. Harris*, 157 N.E.2d 597, 599-600 (N.Y. 1959)); *Granite Partners, L.P. v. Bear, Stearns & Co.*, 17 F. Supp. 2d 275, 290 (S.D.N.Y. 1998) (same and noting that “whether a plaintiff has adequately pleaded justifiable reliance is a proper subject for a motion to dismiss”); *Valassis Communications, Inc. v. Weimer*, 758 N.Y.S.2d 311, 312 (N.Y. App. Div. 2003); (“*In light, however, of provisions of the parties' Purchase Agreement specifically prohibiting plaintiff's reliance on extra-contractual representations such as those upon which plaintiff's fraud claim is premised, it is plain that plaintiff's possess no viable claim for fraud*”) (citations omitted).

legally valid fraud claim, such a party “*must show* that he or she made an independent inquiry into the available information.” *Giannacopoulos v. Credit Suisse*, 37 F. Supp. 2d 626, 632 (S.D.N.Y. 1999).¹⁵

CPH clearly had “access to the relevant financial statements” and the “wherewithal, through [its] own financial advisors,” to verify the representations identified in the Complaint. The Merger Agreement required Sunbeam to provide CPH and its “financial advisors, legal counsel, accountants consultants and other representatives” with “full access . . . to all of [Sunbeam’s] books, records, properties, plants and personnel.” (Merger Agmt. § 6.7.) Moreover, CPH is undeniably a sophisticated party that was advised at all times by its own expert financial advisors, consultants, accountants and attorneys, including the international investment bank of Credit Suisse First Boston. (*Id.* §§ 1.1, 4.11.) And here, CPH was negotiating to acquire “14.1 million shares of Sunbeam stock worth approximately \$600 million.” (Compl. ¶ 40.) Therefore, unlike MS & Co., which never had and was not seeking an equity stake in Sunbeam, CPH had a profound financial incentive to inspect and verify any representation relating to the value of Sunbeam stock.

Thus, there is no question that CPH had the unfettered contractual right to access and inspect Sunbeam’s books and records. There is similarly no question that CPH had an *equal opportunity* — and *even greater incentive* — to discover accounting problems at Sunbeam before choosing to proceed with the acquisition. Despite this unlimited access, opportunity, and incentive, the Complaint nowhere alleges that CPH ever exercised its right to inspect Sunbeam’s

¹⁵ See also *Schlaifer Nance & Co. v. Estate of Andy Warhol*, 119 F.3d 91, 98 (2d Cir. 1997) (“Where sophisticated businessmen engaged in major transactions enjoy access to critical information but fail to take advantage of that access, New York courts are particularly disinclined to entertain claims of justifiable reliance.”) (quoting *Grumman Allied Indus., Inv. v. Rohr Indus.*, 748 F.2d 729, 737 (2d Cir. 1984)).

books and records or sought to independently verify the financial representations it now claims were fraudulent. Under these circumstances, CPH's fraud claim must be dismissed as a matter of law.

C. Plaintiff Cannot Allege That It Relied On Any Of The Misrepresentations Identified In The Complaint.

CPH purports to base its fraud claim — at least in part — on a March 19, 1998 Sunbeam press release warning investors that Sunbeam's net sales for the first quarter of 1998 would be lower than Wall Street analysts' estimates, but that sales in future quarters should improve. (Compl. ¶¶ 59-66.) Significantly, however, the Complaint does not allege that CPH ever *relied* on any statement in this press release.¹⁶ Indeed, any such reliance is expressly foreclosed by the plain terms of the press release, which explicitly warned readers *not to rely* on the forward-looking projections of Sunbeam's future performance:

Cautionary Statements — Statements contained in this press release, including statements relating to the Company's expectations regarding anticipated performance in the future, are 'forward looking statements,' as such term is defined in the Private Securities Litigation Reform Act of 1995. *Actual results could differ materially from the Company's statements in this release regarding its expectations, goals, or projected results, due to various factors*

(March 19, 1998 Press Release at 2 (Answer Ex. 6).) These express warnings and "Cautionary Statements" prevent CPH from relying on the press release as the basis for a fraud claim.

Similarly, the Complaint alleges that "Morgan Stanley misrepresented Sunbeam's financial performance" at a series of "road show" meetings and conference calls" which took place in the course of the Note Offering. (Compl. ¶ 50.) Significantly, however, the Complaint

¹⁶ Equally significant, despite the explicit warning of a sharp and sudden drop in sales, the Complaint never alleges (i) that CPH or any of its expert advisors *ever* inquired as to why Sunbeam sales had suddenly declined, or (ii) that CPH or any of its expert advisors *ever* demanded access to Sunbeam's books and records, as the Merger Agreement entitled them to do, to verify future sales projections. This alone is fatal to any fraud and misrepresentation claim based on representations made in the press release. See Part III.B, *supra*.

does *not* allege that anyone from CPH was present for those “road show” meetings and conference calls, or that the alleged misrepresentations were ever communicated to CPH. Equally fatal, there are no allegations in the Complaint that CPH reasonably relied upon such representations. Nor could there be, since the Note Offering Memorandum makes clear that MS & Co. *itself* relied on financial information provided by Sunbeam and Arthur Andersen (Note Offering Mem. at 2-3, 72); CPH does not allege that it was an investor in the Note Offering; and no such investor is before this Court.

The same is true regarding the February 27, 1998 Board Meeting — and the alleged misrepresentations made by MS & Co. in connection with the presentation of its opinion on the fairness of the acquisition price. (*Id.* ¶¶ 41-44.) It is clear from the face of the Complaint that any such misrepresentation was made *to the Sunbeam Board* — and not CPH. (*Id.*) There are no allegations in the Complaint — nor could there be — that CPH ever received those representations, let alone that CPH reasonably relied upon them. (*Id.*) The written opinion that is referenced in the Complaint definitively states that MS & Co. based its analysis exclusively on audit reports that had been provided by Coleman and Sunbeam “without independent verification [of their] accuracy and completeness.” (Feb. 27, 1998 Fairness Op. at 3 (Answer Ex. 4).) This opinion also states, moreover, that MS & Co.’s analysis is provided solely “for the information of the Board of Directors of [Sunbeam] and may not be used for *any other purpose* without our prior written consent.” (*Id.*) Thus, even if the Complaint alleged that CPH received or relied on information provided to the Board at this meeting, such reliance would not be reasonable as a matter of law.

D. Plaintiff's Allegations Of Scierter Make No Sense — And Fail To Meet The Basic Pleading Requirements For Fraud.

The Complaint alleges that MS & Co. knowingly participated in a massive multi-billion dollar fraud with the intent to (i) retain Sunbeam as a client and (ii) collect roughly \$30 million in investment banking and underwriting fees — an amount that is not unusual for a sophisticated \$2.2 billion transaction. (Compl. ¶¶ 31, 66, 73.) But if retention of a client and collection of normal fees is enough to plead scierter as a matter of law, then the scierter element would be rendered a dead letter in Florida — and the floodgates would be opened to a wave of frivolous fraud claims based on ordinary economic motive.

Of course, such allegations are *not* enough to state a claim for fraud. Recognizing the seriousness of fraud-based allegations, the courts have been careful to require *more* than simply an ordinary economic interest: “In looking for a sufficient allegation of motive, [courts] assume that the defendant is acting in his or her informed economic self-interest.” *Shields v. Citytrust Bancorp., Inc.*, 25 F.3d 1124, 1130 (2d Cir. 1994). Here, however, the *only* allegations of scierter are the ordinary economic motives of any financial services firm. (See Compl. ¶ 31 (“Morgan Stanley knew that if it failed to deliver a major transaction, Morgan Stanley would not be compensated for the extensive work it had performed for Sunbeam”); *Id.* ¶ 66 (alleging that “[e]verything . . . depended on closing the Coleman acquisition” because “if the transaction did not close, Morgan Stanley would not be paid its \$10.28 million fee for the Coleman acquisition or its \$22.5 million fee for underwriting the [Note Offering]”).) These allegations alone require dismissal of Plaintiff’s fraud claim because they fail to plead the requisite element of scierter. See, e.g., *THC Holdings Corp. v. Chinn*, No. 95 Civ. 4422 (KMW), 1998 WL 50202, *9 (S.D.N.Y. Feb. 6, 1998) (“A mere allegation that defendant was in a position to receive normal compensation for professional services rendered is not sufficient to support a showing of motive

in the fraud scienter analysis.”) (citing *inter alia*, *Friedman v. Arizona World Nurseries Ltd. P’ship*, 730 F. Supp. 521, 532 (S.D.N.Y. 1990) (dismissing fraud-based claim on ground that incentive of receiving fee for professional services is insufficient to allege scienter), *aff’d*, 927 F.2d 595 (2d Cir. 1991)).

Plaintiff’s allegations of scienter are not merely legally deficient, however. For even if the Court accepts all of the Complaint’s allegations as well-pleaded, it would *defy economic reason* for MS & Co. to have knowingly participated in Sunbeam’s fraud. It defies all reason to believe that MS & Co. risked its own professional reputation, knowingly ripped off its most valued clients and institutional investors, knowingly permitted its affiliate to invest and lose hundreds of millions of dollars, and exposed itself to massive liability, *all* for the supposed purpose of retaining a single client and collecting investment banking and underwriting fees for a single transaction. The economic irrationality of Plaintiff’s scienter allegations provide an additional, independent ground for dismissing its fraud claim. *See, e.g., Kalnit v. Eichler*, 99 F. Supp. 2d 327, 343 (S.D.N.Y. 2000) (“[W]here plaintiff’s view of the facts defies economic reason . . . it does not yield a reasonable inference of fraudulent intent.”) (internal quotations & citation omitted), *aff’d*, 264 F.3d 131 (2d Cir. 2001); *see also Duncan v. Pencer*, No. 94 Civ. 0321 (LAP), 1996 WL 19043, at *10 (S.D.N.Y. Jan 18, 1996) (dismissing fraud-based claim on grounds that it is “economically irrational” to assume that accounting firm “would knowingly condone a client’s fraud in order to preserve a fee that, at best, is an infinitesimal percentage of its annual revenues”) (citing *Shields*, 25 F.3d at 1130).

Indeed, Plaintiff’s far-fetched theory of scienter rings especially hollow in light of the Complaint’s allegations that MS & Co. and Sunbeam knew the fraud would be revealed shortly after “the Coleman transaction closed at the end of March 1998.” (Compl. ¶ 58; *see id.* ¶ 66.) It

simply makes no sense to believe that MS & Co. knowingly persuaded its clients to invest hundreds of millions of dollars in Sunbeam and allowed its affiliate to invest hundreds of millions of dollars in Sunbeam *two days after* the Coleman acquisition closed, all the while knowing that the fraud would be revealed shortly after the closing date. *See, e.g., Shields*, 25 F.3d at 1130 (affirming dismissal of fraud-based claim for lack of scienter and noting that “[i]t is hard to see what benefits accrue from a short term respite from an inevitable day of reckoning”).

IV. PLAINTIFF’S AIDING-AND-ABETTING CLAIM (COUNT II) MUST BE DISMISSED.

To state a claim for aiding and abetting fraud, Plaintiff must allege with the requisite particularity each of the following elements: (1) the existence of primary fraud; (2) defendant’s actual knowledge of the fraud; and (3) defendant’s substantial assistance in the commission of the fraud. *See, e.g., Cromer Fin. Ltd. v. Berger*, 137 F. Supp. 2d 452, 470 (S.D.N.Y. 2001); *Stolow v. Greg Manning Auctions, Inc.*, No. 02 Civ 2591 (SAS), 2003 WL 355447, at *10 (S.D.N.Y. Feb. 14, 2003) (citing *Armstrong v. McAalpin*, 699 F.2d 79, 91 (2d Cir. 1983)). Because the Complaint fails to allege either that MS & Co. had “actual knowledge” of Dunlap and Kersh’s alleged fraud, or that MS & Co. provided “substantial assistance” in the commission of that fraud, Count II must be dismissed as a matter of law.

A. The Complaint Does Not Allege That MS & Co. Had “Actual Knowledge” Of Sunbeam’s Fraud.

The Complaint does not contain a single non-conclusory, factual allegation that MS & Co. had actual knowledge of Dunlap and Kersh’s alleged fraud. Plaintiff’s conclusory allegations that MS & Co. “knew of Dunlap’s fraudulent scheme and helped to conceal it” (Compl. ¶ 86) is not enough to state a claim for aiding and abetting fraud. *See, e.g., Filler v. Havnit Bank*, 247 F. Supp. 2d 425, 431 (S.D.N.Y. 2003) (factual elements of aiding and abetting fraud must be alleged with particularity); *Myers v. Myers*, 652 So. 2d 1214, 1215 (Fla. 5th DCA

1995) (“Allegations contained in a pleading are insufficient if they are too general, vague or conclusory.”) (citations omitted). Here, the Complaint contains *no* factual allegations — nor could it — to support a claim that MS & Co. had “actual knowledge” of Sunbeam’s fraud.

Indeed, even if all the facts alleged in the Complaint were proven, none would show that MS & Co. had “actual knowledge” of the underlying fraudulent activities at Sunbeam. The Complaint alleges, for example, that MS & Co. recommended an acquisition strategy that included using Sunbeam stock to pay part of the purchase price (Compl. ¶ 34), and that such a strategy permitted Dunlap to conceal his fraud (*id.* ¶ 35). Notably absent from the Complaint, however, is any *factual* allegation that MS & Co. ever suspected (much less had “actual knowledge”) that Sunbeam’s stock was inflated by accounting fraud. (*Id.*) Absent such a *factual* allegation, the Complaint alleges nothing more than that MS & Co. recommended using stock to finance an acquisition — a common practice in corporate mergers and acquisitions.

1. If MS & Co. Is Deemed To Have Had “Actual Knowledge” Of Sunbeam’s Fraud, Then So Did CPH — By Virtue Of Its Equal Access To Sunbeam’s Books And Records.

To the extent CPH alleges that MS & Co. had “actual knowledge” of Sunbeam’s fraud because MS & Co. conducted due diligence on Sunbeam during the underwriting process, such allegations are fatal to CPH’s misrepresentation claims. If MS & Co. is deemed to have “actual knowledge” of fraud because of its access to Sunbeam during the due diligence process, then CPH — by virtue of the fact that it enjoyed *exactly the same access* to Sunbeam’s “books, records, properties, plants and personnel” (Merger Agmt. § 6.7) — *also* had “actual knowledge” of Sunbeam’s fraud, eliminating any claim that it relied on MS & Co. as a matter of law. Similarly, CPH cannot bootstrap MS & Co.’s role as an underwriter of Sunbeam securities into one of advisor for *CPH*, especially when CPH retained and relied upon its own army of expert advisors, attorneys, and accountants throughout the negotiation process.

2. Allegations Of “Constructive Knowledge” Are Not Enough.

The Complaint alleges that investment bankers at MS & Co. had phone conversations and meetings with Sunbeam insiders, including Dunlap and Kersh, and thus “[MS & Co.] would have been apprised of Sunbeam’s financial performance during the first two months of 1998.” (Compl. ¶ 54.) But such allegations of constructive knowledge are not enough. *See, e.g., Kolbeck v. LIT Am. Inc.*, 939 F. Supp. 240, 246 (S.D.N.Y. 1996) (“New York common law, which controls the analysis here, has not adopted a constructive knowledge standard for imposing aiding and abetting liability.”), *aff’d*, 152 F.3d 918 (2d Cir. 1998). Similarly, allegations that MS & Co. “should” or “would” have known that Sunbeam’s sales declined during the first two months of 1998 hardly supports a claim that MS & Co. had *actual knowledge* of an extensive fraud which traced to late 1996.¹⁷

3. Economic Motive Is Not “Actual Knowledge.”

Like Count I, Plaintiff’s aiding and abetting claim must be dismissed because the allegations of fraudulent intent are legally deficient. *See* Part III.C, *supra*. As with fraud generally, it is equally well-established that an allegation of “ordinary economic motives [is] insufficient to support the scienter element of an aiding and abetting claim.” *Primavera Familienstiftung v. Askin*, 173 F.R.D. 115, 127-28 (S.D.N.Y. 1997) (citing *Shields*, 25 F.3d at 1130); *Cromer Fin.*, 137 F. Supp. 2d at 495 (dismissing aiding and abetting claim against

¹⁷ Nor could there be such an allegation, since, as the Complaint itself acknowledges, MS & Co. was retained by Sunbeam only to provide financial advice to Sunbeam with respect to potential mergers and acquisitions. (Compl. ¶¶ 29-31.) MS & Co. was not retained to verify the accuracy of Sunbeam’s professionally audited financial reports, and, in fact, relied at all times on financial information provided to it by Sunbeam, Coleman, and their respective accountants. (*See* Fairness Op. at 2-3; Note Offering Mem. at 2-3, 12-17, 72); *e.g., In Re Reliance Sec. Litig.*, 135 F. Supp. 2d 480, 516 (D. Del. 2001) (dismissing claims against financial advisors where advisors “did not contract to re-audit [the company’s] financial statements and projections. Rather, [the company] asked the Financial Advisors to make a judgment based on a limited set of data”). It goes without saying, moreover, that if MS & Co. “should” or “would” have known of Sunbeam’s fraud, then so “should” or “would” have CPH known of Sunbeam’s fraud by virtue of its *equal access* to Sunbeam’s books, records, property, plants, and personnel. (Merger Agmt. § 6.7.)

financial advisor for failure to adequately plead fraudulent intent). Accordingly, allegations that MS & Co. was motivated by the collection of ordinary investment banking and underwriting fees cannot give rise to liability for aiding and abetting a massive fraud.

B. Plaintiff's Allegations Of "Substantial Assistance" Are Legally Defective.

Plaintiff does not — and indeed cannot — allege that MS & Co. provided “substantial assistance” to Sunbeam’s fraud. A defendant “provides substantial assistance *only* if it ‘affirmatively assists, helps conceal, or by virtue of failing to act when required to do enables [the fraud] to proceed.’” *Nigerian Nat’l Petroleum Corp. v. Citibank, N.A.*, No. 98 Civ. 4960 (MBM), 1999 WL 558141, at *8 (S.D.N.Y. July 30, 1999) (quoting *Diduck v. Kaszycki & Sons Contractors, Inc.*, 974 F.2d 270, 284 (2d Cir. 1992)) (alteration in *Nigerian Nat’l*). “In alleging the requisite ‘substantial assistance’ by the aider and abettor, the complaint must allege that the acts of the aider and abettor *proximately caused* the harm to the [corporation] on which the primary liability is predicated. *Allegations of a ‘but for’ causal relationship are insufficient.*” *Filler*, 247 F. Supp. 2d at 431 (internal quotation marks & citations omitted). “*Inaction* is actionable participation *only* when the defendant owes a fiduciary duty directly to the plaintiff.” *Cromer Fin.*, 137 F. Supp. 2d at 470 (internal quotation marks & citation omitted). Plaintiff’s allegations regarding MS & Co. fall well short of these requirements.

Plaintiff’s allegations of alleged “assistance” fall into three main categories, all of which fail to support a claim as a matter of law.

First, the Complaint alleges that MS & Co. “assist[ed] with the false March 19, 1998 press release.” (Compl. ¶ 87.) But CPH does not allege that it *relied* on the press release; thus, there can be no allegation that the press release “proximately caused” any harm to CPH. *See, e.g., Cromer Fin.*, 137 F. Supp. 2d at 471-72.

Second, the Complaint alleges that MS & Co. made false statements in the course of marketing the convertible notes, and that the “proceeds from [the notes] were used to fund Sunbeam’s purchase of Coleman.” (Compl. ¶ 87; *see also id.* ¶ 72 (“debenture offering . . . was needed to close the Coleman transaction”).) But these allegations — which allègè only a “but for” causal relationship between the Note Offering and the acquisition — cannot support an aiding and abetting claim. *See, e.g., Cromer Fin.*, 137 F. Supp. 2d at 470-72.¹⁸

Third, the Complaint alleges that MS & Co. provided CPH “with false financial and business information concerning Sunbeam” and thereby “persuad[ed] CPH to sell its interest in Coleman and to accept 14.1 million shares of Sunbeam stock and other consideration.” (Compl. ¶ 87.) As explained above, however, there is no allegation that MS & Co. *knew* that Sunbeam’s financial and business information was false, let alone that MS & Co. participated in the preparation of such false information. *See* Part IV.A, *supra*.¹⁹

Accordingly, because the Complaint contains no allegations that are legally sufficient to support an aiding and abetting claim, Count II must be dismissed as a matter of law.

¹⁸ Furthermore, the Complaint itself forecloses any argument that the note offering “proximately caused” CPH’s alleged harm. The Complaint concedes that the note offering provided the “*cash portion* of the acquisition consideration.” (Compl. ¶ 47.) The only injury alleged in the Complaint, however, concerns the *equity portion* of consideration, which fell in value when Sunbeam restated its 1996 and 1997 earnings and later declared bankruptcy. On the face of the Complaint, therefore, the Note Offering has no causal relation — proximate or otherwise — with the only injury that CPH seeks to redress in this case. *See, e.g., Hirsch v. Arthur Andersen & Co.*, 72 F.3d 1085, 1095 (2d Cir. 1995) (sustaining dismissal of the complaint where “attenuated allegations” supporting claim “are contradicted . . . by more specific allegations in the complaint”).

¹⁹ Furthermore, there is no connection (causal or otherwise) between information allegedly provided by the advisor to a counterparty across the table from a sophisticated corporate entity like CPH, and that entity’s decision to enter into a \$2 billion transaction, especially where the entity has retained its own team of sophisticated advisors, accountants and lawyers.

V. PLAINTIFF'S NEGLIGENT MISREPRESENTATION CLAIM (COUNT IV) MUST BE DISMISSED.

To state a claim for negligent misrepresentation, Plaintiff must allege that “(1) defendant had a duty, *as a result of a special relationship*, to give correct information; (2) the defendant made a false representation that he or she should have known was incorrect; (3) the information supplied in the representation was known by the defendant to be desired by the plaintiff for a serious purpose; (4) the plaintiff *intended to rely and act upon it*; and (5) the plaintiff *reasonably relied* on it to his or her detriment.” *Hydro Investors, Inc. v. Trafalgar Power Inc.*, 227 F.3d 8, 20 (2d Cir. 2000). CPH’s negligent misrepresentation claim fails as a matter of law because (i) the Complaint alleges no facts that give rise to a “special relationship” and (ii) none of the alleged facts support a showing of reasonable reliance.²⁰

A. Plaintiff Cannot Allege That A “Special Relationship” Existed Between CPH and MS & Co.

For the requisite “special relationship” to exist, the parties must enjoy “a closer degree of trust than an ordinary business relationship.” *Citibank, N.A. v. Itochu Intern. Inc.*, No. 01 Civ. 6007 (GBD), 2003 WL 1797847, *5 (S.D.N.Y. April 3, 2003) (internal quotations & citation omitted). “A simple arm’s length relationship is not enough.” *North Am. Knitting Mills, Inc. v. International Women’s Apparel, Inc.*, No. 99 Civ. 4643 (LAP), 2000 WL 1290608, at *5 (S.D.N.Y. Sept. 12, 2000) (dismissing negligent misrepresentation claim) (quoting *United Safety*

²⁰ There are of course other legal defects in the Complaint, including (i) that only one paragraph of the entire Complaint alleges that MS & Co. made any representations actually received by CPH; (ii) that these representations were explicitly disclaimed in the Merger Agreement; (iii) that no facts are alleged to support the conclusory allegation that MS & Co. knew or had reason to know that Sunbeam’s professionally audited financial reports were false and misleading; and (iv) that no facts are alleged to support the conclusory allegation that MS & Co. intended or believed that CPH, who retained its own expert advisors, would rely without verification on information provided by MS & Co. in the course of negotiating a multi-billion dollar corporate acquisition. Count IV fails as a matter of law for *any* of these independent reasons.

of *Am., Inc. v. Consolidated Edison Co. of N.Y., Inc.*, 213 A.D.2d 283, 286 (N.Y. App. Div. 1995)). To the contrary, “there must be a showing that there was either **actual privity of contract between the parties or a relationship so close as to approach that of privity.**” *Marcellus Constr. Co. v. Village of Broadalbin*, 755 N.Y.S.2d 474, 475 (N.Y. App. Div. 2003) (quoting *Prudential Ins. Co. of Am. v. Dewey, Ballantine, Bushby, Palmer & Wood*, 80 N.Y.2d 377, 382 (N.Y. 1992)); see also *Butvin v. Doubleclick, Inc.*, No. 99 Civ. 4727, 2000 WL 827673, at *10 (S.D.N.Y. June 26, 2000) (“a plaintiff may only recover for negligent misrepresentation **where the defendant owes him a fiduciary duty**”).

The Complaint alleges no facts to meet this required element. Nor could it, since, as alleged in the Complaint, MS & Co.’s client and CPH had a contentious business relationship, circumstances which cannot give rise to a negligent misrepresentation claim. Indeed, CPH was never MS & Co.’s client or even a shareholder of MS & Co.’s client. To the contrary, CPH always sat on **the other side of the negotiating table** from Sunbeam, MS & Co.’s client.²¹ MS & Co. was thus **twice removed** from CPH, in the context of an arms-length, across-the-table negotiation. And CPH itself was advised at all times by its own team of sophisticated experts, including its own financial advisors from Credit Suisse First Boston. (Merger Agmt. §§ 1.1, 4.11.) Accordingly, the Complaint cannot state a negligent misrepresentation claim. See, e.g., *CSI Inv. Partners II, L.P. v. Cendant Corp.*, 2002 WL 925044, *9 (S.D.N.Y. Feb. 28, 2002) (“Since APC alleges nothing more than ordinary arm’s length negotiations, its negligent misrepresentation claims fails as a matter of law.”).

²¹ Indeed, Plaintiff’s own Complaint shows how contentious the pre-acquisition negotiations were between Sunbeam and CPH. Paragraph 37 of the Complaint describes how, during an initial meeting, Sunbeam CEO Al Dunlap “cursed and ranted” at CPH representations and “stormed out” of the meeting. (Compl. ¶ 37.)

B. Plaintiff Does Not Allege Reasonable Reliance.

Like a claim for fraudulent misrepresentation, a claim of negligent misrepresentation requires a showing of reasonable reliance. *See, e.g., Dyncorp v. GTE*, 215 F. Supp. 2d 308, 328 (S.D.N.Y. 2002) (“In order to plead a claim for negligent misrepresentation, *just as for fraud*, a plaintiff must adequately plead reasonable reliance upon the alleged misrepresentations by the defendant.”) (citing *Heard v. City of N.Y.*, 82 N.Y.2d 66, 74 (N.Y. 1993)). As detailed above, there can be no such reliance in this case as a matter of law because there is no allegation that CPH ever sought to verify the accuracy of representations alleged to have been made by MS & Co, and because CPH in any event disclaimed those representations in the Merger Agreement. *See* Part III, *supra*. Accordingly, Count III must be dismissed.

VI. PLAINTIFF’S CONSPIRACY CLAIM (COUNT III) MUST BE DISMISSED.

Plaintiff’s conspiracy claim is makeweight and frivolous. Neither New York nor Florida recognize an independent tort for conspiracy. *See, e.g., American Baptist Churches of Metro N.Y. v. Galloway*, 271 A.D.2d 92, 101 (N.Y. App. Div. 2000); *Hoch v. Rissman, Weisberg, Barrett*, 742 So. 2d 451, 460 (Fla. 5th DCA 1999). Thus, because Plaintiff states no other claim as a matter of law, its conspiracy claim is foreclosed. *See, e.g., Linden v. Lloyd’s Planning Serv. Inc.*, 750 N.Y.S.2d 20, 21 (N.Y. App. Div. 2002) (“[S]ince plaintiff has no viable underlying claim for fraud or any other tort, her civil conspiracy claim was properly dismissed”) (citing *Alexander & Alexander of N.Y., Inc. v. Fritzen*, 503 N.E.2d 102, 103 (N.Y. 1986)). Even if Plaintiff could plead an actionable tort, moreover, the Complaint falls well short of pleading any facts to support a conspiracy claim.²² Accordingly, Count III must be dismissed.

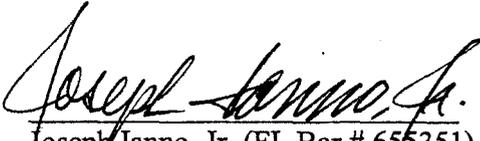
²² To state a claim for conspiracy to defraud, plaintiff must allege “(1) an agreement among two or more parties, (2) a common objective, (3) acts in furtherance of the objective and (4) knowledge [of the underlying fraud].” *Filler*, 247 F. Supp. 2d at 431 (internal quotation marks & citation omitted). The Complaint obviously fails in this regard. As demonstrated above, the
(Continued...)

CONCLUSION

For the reasons stated above, Plaintiff's Complaint should be dismissed in its entirety pursuant to Florida Rule of Civil Procedure 1.061(a). Alternatively, Defendant is entitled to judgment on the pleadings pursuant to Florida Rule of Civil Procedure 1.140(c).

Dated: June 25, 2003

Respectfully Submitted,



Joseph Ianno, Jr. (FL Bar # 655351)

CARLTON FIELDS
222 Lake View Avenue - Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett H. McGurk
KIRKLAND & ELLIS
655 15th Street, N.W. 12th Floor
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5993

Attorneys for Defendant,
Morgan Stanley & Co. Incorporated

Complaint does not adequately plead a claim of actual knowledge. Thus, there is no allegation — nor could there be an allegation — of knowing participation. Similarly, there is no allegation that MS & Co. and Sunbeam insiders acted with common objective. To the contrary, the Complaint concedes that MS & Co. had nothing to gain from the transaction other than the collection of normal investment banking fees (Compl. ¶ 66) and in fact put its own name and reputation on the line in the course of marketing the convertible notes (*Id.* ¶¶ 47-52). That is hardly enough to plead a “common objective” with Al Dunlap, whose acknowledged aim was to “collect tens of millions of dollars *for himself* before the outside world could learn the truth of Sunbeam’s phony ‘turnaround.’” (*Id.* ¶ 28.)

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CASE NO: 03 CA-005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

COPY / ORIGINAL
RECEIVED FOR FILING

JUN 25 2003

DOROTHY H. WILKEN
CLERK OF CIRCUIT COURT
CIRCUIT CIVIL DIVISION

DEFENDANT'S MOTION TO STAY DISCOVERY

Defendant Morgan Stanley & Co. Incorporated ("MS & Co."), pursuant to Florida Rule of Civil Procedure 1.280(c), moves for a protective order staying all discovery in this action until the Court has had an opportunity to rule on MS & Co.'s Motion to Dismiss Pursuant to Florida Rule of Civil Procedure 1.061 (*forum non conveniens*), and to rule on MS & Co.'s case dispositive Motion For Judgment on the Pleadings. The protective order sought in this motion is designed to protect MS & Co. — and non-party witnesses in this case — from the undue burden and unnecessary expense that would occur from allowing discovery to go forward in a case that is not even properly before this Court.

PROCEDURAL HISTORY

Plaintiff Coleman (Parent) Holdings Inc. ("CPH") filed this action on May 8, 2003, alleging that it was persuaded to sell its stake in the Coleman Company ("Coleman") to the Sunbeam Corporation ("Sunbeam") in reliance on false and misleading representations about Sunbeam's financial health. The only named defendant is MS & Co., who served as a financial advisor to Sunbeam for part of the deal and who played no role in auditing Sunbeam's financial

statements or making representations regarding Sunbeam's financial health. CPH has recently pursued identical claims in this Court against Arthur Anderson — Sunbeam's auditor — and settled those claims for an undisclosed sum.

Immediately after filing its Complaint, Plaintiff served MS & Co. with notice to take depositions of ten individuals over a two week period starting July 10, 2003. (See May 9, 2003 Notice of Taking Videotaped Deps. ("Notice of Deps.") (Ex. A).) Most of these individuals are New York residents; only one is an MS & Co. employee (and he works and lives in London); and only one is under the legal control of MS & Co. Plaintiff also served MS & Co. with a blanket request for production of documents, containing sixty-one separate paragraphs many of which themselves contain two or three separate and independent requests. (See May 9, 2003 Pl.'s 1st Request for Prod. of Docs. ("1st Request") (Ex. B).) These requests have nothing to do with Florida — to the contrary, all or substantially all of the requested documents are located in New York.¹

MS & Co. answered the Complaint on June 23, 2003. The Answer demonstrates that the Complaint fails to state any legally valid claims. The Complaint contains no factual allegation that CPH relied on any representation attributed to MS & Co. and the documents quoted in the Complaint foreclose such reliance as a matter of law. Moreover, MS & Co.'s affiliate lent and

¹ They are also redundant and abusive. See, e.g., *id.* ¶ 2 ("All documents reflecting all fees and expenses paid by Sunbeam to you, including without limitation all billing statements, invoices, time detail records, individual calendars, daily diaries (including electronic calendar programs), or other documents that describe or record the time spent, or expenses incurred (including back-up for any out-of-pocket expenses), by any Morgan Stanley personnel, or that describe or record any aspect of their activities concerning any services performed on behalf of, or concerning Sunbeam."); *id.* ¶ 29 ("All documents concerning the closing of the Subordinated Debenture Offering including without limitation all documents concerning the decision to close the Subordinated Debenture Offering."); *id.* ¶ 30 ("All documents concerning the Subordinated Debenture Offering."); *id.* ¶ 35 ("All documents concerning the Coleman Transaction."); *id.* ¶ 36 ("All documents concerning the Subordinated Debenture Offering."); *id.* ¶ 39 ("All documents concerning Coleman or CPH."); *id.* ¶ 41 ("All documents concerning the events and matters that are the subject of the Complaint filed [in] this action.").

lost hundreds of millions of dollars to Sunbeam in the course of the Coleman transaction. Thus, rather than being complicit in the fraud alleged in the Complaint, the pleadings show that MS & Co. was itself a victim of that fraud.

Simultaneously with this Motion to Stay Discovery, MS & Co. has filed its Motion to Dismiss Pursuant to Florida Rule of Civil Procedure 1.061 Or, In The Alternative, For Judgment On The Pleadings (“Motion to Dismiss”), which provides the Court with two substantial and independent grounds for disposing of Plaintiff’s Complaint in its entirety.

First, MS & Co. moves to dismiss on the ground of *forum non conveniens* pursuant to Florida Rule of Civil Procedure 1.061. Under Rule 1.061, CPH’s lawsuit should proceed in New York — where the events and injuries it complains of allegedly occurred, where both parties are headquartered, and where the overwhelming majority of the witnesses and relevant documents are located. This strong preference for a New York forum is confirmed by the fact that this Court — or any other court adjudicating this controversy — will have to apply New York law to Plaintiff’s claims.

Second, MS & Co. moves for judgment on the pleadings pursuant to Florida Rule of Civil Procedure 1.140(c). As set forth in detail in the Motion to Dismiss and Memorandum of Law filed in support thereof, Plaintiff’s Complaint suffers from numerous legal defects and should be dismissed in its entirety for failure to state a legally valid Claim.

DISCUSSION

I. This Court Has Broad Discretion To Control The Timing And Sequence Of Discovery.

Florida Rule of Civil Procedure 1.280(c) authorizes this Court to stay burdensome and ultimately wasteful discovery pending decision on dispositive motions. Rule 1.280(c) provides:

Upon motion by a party or the person from who discovery is sought, and for good cause shown, the court in which the action is

pending may make *any order* to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense that justice requires

Fla. R. Civ. P. 1.280(c). Additionally, Florida Rule of Civil Procedure 1.280(d) authorizes the Court, upon motion of one of the parties, to issue an order controlling the timing and sequence of discovery “for the convenience of parties and witnesses and in the interest of justice.”

Together, Rule 1.280(c) and Rule 1.280(d) provide the court with broad discretion to impose a stay of discovery pending the determination of dispositive motions by the issuance of a protective order. *See, e.g., Rasmussen v. South Fla. Blood Serv., Inc.*, 500 So. 2d 533, 535 (Fla. 1987) (“The discovery rules . . . confer broad discretion on the trial court to limit or prohibit discovery.”); *SCI Funeral Servs. of Fla., Inc. v. Light*, 811 So. 2d 796, 798 (Fla. 4th DCA 2002) (“[T]he scope and limitation of discovery is within the broad discretion of the trial court.”).

II. A Stay Of Discovery Is Particularly Appropriate Here Because MS & Co.’s Motion To Dismiss Raises Substantial *Forum Non Conveniens* Issues — And May Dispose of Plaintiff’s Entire Action As A Matter Of Law.

The requested stay of discovery pending resolution of MS & Co.’s Motion to Dismiss would best serve the interests of justice and judicial economy in this case because that Motion raises the serious threshold question whether — under Florida Rule of Civil Procedure 1.061 — Florida is the even appropriate forum for resolution of Plaintiff’s claims.

Indeed, nothing compels this Court to oversee the discovery of a New York plaintiff against a New York defendant regarding a transaction that was based entirely in New York. And the oversight required here would be substantial. As stated above, Plaintiff here requests discovery from non-party witnesses over whom MS & Co. has no legal control and of potentially hundreds of thousands of documents, few of which have anything to do with the merits of Plaintiff’s claims, and all (or substantially all) of which are located outside of Florida. (*See* 1st Request and Notice of Deps.) None of this discovery, of course, is relevant to the dispositive

questions now pending before this Court — *i.e.*, whether this Court is the proper forum to resolve this New York-based controversy and/or whether the Complaint states any legally valid claim — either of which may dispose of this case *in its entirety*.

Under these circumstances, a stay of the discovery sought by Plaintiff is warranted on a number of independent grounds:

First, because this action should proceed — if at all — in New York, not Florida, this Court is not the proper forum for directing discovery on the merits of Plaintiff’s claims. *See, e.g., Gleneagle Ship Mgmt. Co. v. Leondakos*, 602 So. 2d 1282, 1284 (Fla. 1992) (discovery conducted during pendency of motion to dismiss for lack of jurisdiction should not address merits of case and “should not be broad, onerous or expansive”); *Church of Scientology of Cal., Inc. v. Cazares*, 401 So. 2d 810, 810 (Fla. 2d DCA 1981) (authority of a trial court found to lack venue is limited to entry of an order dismissing or transferring the case).

Second, it would impose an unnecessary burden and expense to require the parties to engage in extensive discovery prior to this Court’s ruling on a motion that is likely to dispose of the *entire case* as a matter of law. *See, e.g., Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1367 (11th Cir. 1997) (“Facial challenges to the legal sufficiency of a claim or defense, such as a motion to dismiss based on failure to state a claim for relief, *should . . . be resolved before discovery begins.*”) (emphasis added).²

² Florida courts look to federal decisions for guidance in interpreting Florida’s Rules of Civil Procedure. *See, e.g., Gleneagle*, 602 So. 2d at 1283-84; *Smith v. Southern Baptist Hosp. of Fla., Inc.*, 564 So. 2d 1115, 1117 & n.2 (Fla. 1st DCA 1990) (federal cases are “pertinent and highly persuasive” for construing Rule 1.280(c)). These federal decisions typically stay discovery in circumstances materially indistinguishable from this case — indeed, there appears to be *no reported case* of any jurisdiction questioning a trial court’s broad discretion to limit discovery in the circumstances presented here. *See, e.g., Enplanar, Inc. v. Marsh*, 11 F.3d 1284, 1291 (5th Cir. 1994) (“[Plaintiffs] cite to *no authority*, and we have found none, *holding the district court has abused its discretion in denying merits-related discovery pending ruling on a motion for change of venue.*”) (emphasis added); *Landry v. Air Line Pilots Ass’n Int’l*, 901 F.2d 404, 435-36 (5th Cir. 1990) (affirming stay of broad discovery not related to (Continued...))

Third, non-party witnesses should not be forced to retain counsel and appear for depositions before it is determined that there is some basis for this suit to proceed in this forum, if at all. *See Chudasama*, 123 F.3d at 1368 (“Allowing a case to proceed through the pretrial process with an invalid claim. . . . does nothing but waste the resources of the litigants in the action before the court, delay resolution of disputes between other litigants, squander scarce judicial resources, and damage the integrity and the public’s perception of the . . . judicial system.”).

Fourth, the discovery sought here imposes the sort of “undue burden or expense” for which “justice requires” a temporary stay under Rule 1.280(c). Plaintiff has indiscriminately demanded every scrap of information from “Morgan Stanley” — defined broadly to include all subsidiaries, divisions, predecessors, successors, and representatives — that even tangentially relates to claims alleged in the Complaint. This information would come in the form of hardcopy files, electronic servers, computer hard drives, and electronic mail, among other sources, and could generate hundreds of thousands of documents from multiple facilities. It is hard to imagine a more burdensome or unnecessary request at this stage of the litigation.

dispositive motion); *Transunion Corp. v. PepsiCo, Inc.*, 811 F.2d 127, 130 (2d Cir. 1987) (affirming stay of discovery pending decision on motion to dismiss for *forum non conveniens*); *Spencer Trask Software & Info. Servs., L.L.C. v. RPost Int’l Ltd.*, 206 F.R.D. 367, 368 (S.D.N.Y. 2002) (“[S]tay of discovery should be granted where ***motion to dismiss ‘is potentially dispositive, and appears to be not unfounded in the law.’***”) (emphasis added) (quoting *Gandler v. Nazarov*, No. 94 Civ. 2272 (CSH), 1994 WL 702004, at *4 (S.D.N.Y. Dec. 14, 1994)); *Johnson v. New York Univ. School of Educ.*, 205 F.R.D. 433, 434 (S.D.N.Y. 2002) (granting stay where “defendant’s ***motion to dismiss is potentially dispositive and does not appear to be unfounded in the law***”) (emphasis added); *Chavous v. D.C. Fin. Responsibility & Mgmt Assistance Auth.*, 201 F.R.D. 1, 2 (D.D.C. 2001) (“It is well settled that ***discovery is generally considered inappropriate while a motion that would be thoroughly dispositive of the claims in the Complaint is pending.***”) (internal quotation & citation omitted; emphasis added); *Anti-Monopoly, Inc. v. Hasbro, Inc.*, No. 94 Civ. 2120 (LMM), 1996 WL 101277, at *3 (S.D.N.Y. March 7, 1996) (granting stay on the ground that discovery “***will be totally unnecessary if [Defendant’s] motion for judgment on the pleadings . . . is granted***”) (emphasis added).

Finally, Plaintiff will not be prejudiced if discovery is postponed. The question whether the Plaintiff states any legally valid claims is a pure question of law — no factual development can assist the Court in making that determination. Nor do any of Plaintiff's discovery requests pertain to whether this Court is a proper forum for this suit. At bottom, Plaintiff has filed suit in a foreign jurisdiction with no connection to the underlying claim and now seeks to have discovery directed by a foreign court against a foreign defendant and non-party witnesses. The interests of justice, judicial economy, fundamental fairness and common sense require that such discovery be stayed prior to a ruling on whether this case even belongs in Florida and/or whether this case presents any legally valid claims.

CONCLUSION

Staying discovery pending resolution of MS & Co.'s Motion to Dismiss best serves the interest of justice and judicial economy. MS & Co.'s Motion to Dismiss will allow the Court to dispose of Plaintiff's entire action with no additional expenditure of resources by the parties. Compared to the burden of discovery, especially for non-party and non-resident witnesses, Plaintiff will suffer no cognizable injury from allowing the Court to determine whether the Florida courts are a proper forum for this case before discovery commences. Allowing discovery to go forward, however — before the forum issue has been determined and the legal sufficiency of Plaintiff's Complaint has been established — would be wasteful, burdensome, and prejudicial.

For these reasons, Defendant MS & Co. respectfully requests that this Court enter an order staying all discovery pending the Court's rulings on MS & Co.'s Motion to Dismiss.

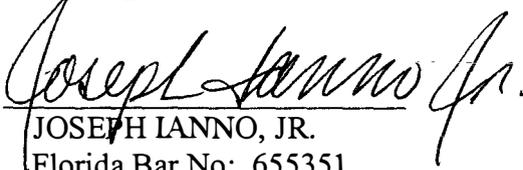
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Federal Express to all counsel of record on the attached service list on this 25th day of June, 2003.

Thomas D. Yannucci, P.C.
Thomas A. Clare
Larissa Paule-Carres
Brett McGurk
KIRKLAND & ELLIS
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5993

COUNSEL FOR DEFENDANT

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

BY: 
JOSEPH IANNO, JR.
Florida Bar No: 655351

SERVICE LIST

<p>John Scarola SEARCY, DENNEY, SCAROLA, BARNHARDT & SHIPLEY, P.A. 2139 Palm Beach Lakes Boulevard West Palm Beach, Florida 33409</p>	<p>Counsel for Plaintiff</p>
<p>Jerold S. Solovy JENNER & BLOCK, LLC One IBM Plaza Suite 4400 Chicago, Illinois 60611</p>	<p>Counsel for Plaintiff</p>

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

 COLEMAN (PARENT) HOLDINGS INC.,)
)
 Plaintiff,)
)
 v.)
)
 MORGAN STANLEY & CO., INC.,)
)
 Defendant.)

Case No. CA 005045 AI
 DOROTHY H. WILKEN
 CLERK OF CIRCUIT COURT
 CIRCUIT CIVIL DIVISION
 MAY 09 2003
 COPY / ORIGINAL
 RECEIVED FOR FILING

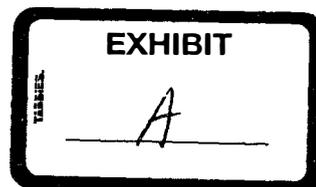
NOTICE OF TAKING VIDEOTAPED DEPOSITIONS

To: Morgan Stanley & Co., Inc.
1585 Broadway
New York, NY 10036

PLEASE TAKE NOTICE that Plaintiff Coleman (Parent) Holdings Inc., will take the depositions upon oral examination of the following witnesses pursuant to Florida Rule of Civil Procedure 1.310 on the dates and at the times set forth below:

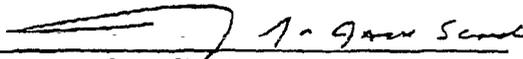
John Tyree	July 10-11, 2003 at 9:00 a.m.
Robert Kitts	July 14-15, 2003 at 9:00 a.m.
Alexandre Fuchs	July 16-17, 2003 at 9:00 a.m.
Lawrence Bornstein	July 21, 2003 at 9:00 a.m.
Mark Brockelman	July 23, 2003 at 9:00 a.m.
Dennis Pastrana	July 28, 2003 at 9:00 a.m.
Richard Goudis	July 30, 2003 at 9:00 a.m.
David Fannin	August 4, 2003 at 9:00 a.m.
Albert Dunlap	August 11, 2003 at 9:00 a.m.
Deborah MacDonald	August 18, 2003 at 9:00 a.m.

The depositions will be recorded by videotape and stenographic means at the offices of Searcy Denney Scarola Barnhart & Shipley, P.C., 2139 Palm Beach Lakes Blvd., West Palm Beach, Florida. The deposition will be taken before a person authorized to administer oaths and will continue day to day until completed.



The videotape operator will be Esquire Deposition Services at 515 West Flagler Drive, Suite P-200, West Palm Beach, FL 33401.

COLEMAN (PARENT) HOLDINGS INC.

By: 
One of Its Attorneys

Jerold S. Solovy
Ronald L. Marmor
Robert T. Markowski
Deirdre E. Connell
JENNER & BLOCK, LLC
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

Jack Scarola
SEARCY DENNEY SCAROLA BARNHART
& SHIPLEY P.A.
2139 Palm Beach Lakes Blvd
West Palm Beach, Florida 33409
(561) 686-6300

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,
v.
MORGAN STANLEY & CO., INC.,
Defendant.

Case No. CA 005045 AI

DOROTHY H. WILKEN
CLERK OF CIRCUIT COURT
CIRCUIT CIVIL DIVISION

MAY 09 2003

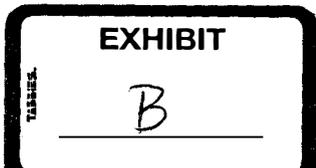
COPY / ORIGINAL
RECEIVED FOR FILING

PLAINTIFF'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS

Plaintiff Coleman (Parent) Holdings, Inc. ("CPH" or "Plaintiff"), by its attorneys Searcy Denney Scarola Barnhart & Shipley P.A. and Jenner & Block, LLC, hereby serves its First Request for Production of Documents upon Defendant Morgan Stanley & Co., Inc. ("Morgan Stanley" or "Defendant"), and requests responses and the production of documents at the office of Searcy Denney Scarola Barnhart & Shipley P.A., 2139 Palm Beach Lakes Blvd., West Palm Beach, Florida, within the time provided by Florida Rule of Civil Procedure 1.350(b).

DEFINITIONS

1. "Arbitrations" means Albert J. Dunlap and Sunbeam Corporation, No. 32 160 00088 99 (AAA); and Russell A. Kersh and Sunbeam Corporation, No. 32 160 00091 99 (AAA).
2. "Coleman" means the Coleman Company, Inc. or any of its present and former officers, directors, employees, representatives, agents, and all other persons acting or purporting to act on its behalf.



3. "CPH" means Coleman (Parent) Holdings Inc., Coleman Worldwide Corporation, CLN Holdings, Co. Inc., or any of their present and former officers, directors, employees, representatives, agents, and all other persons acting or purporting to act on their behalf.

4. "Coleman Transaction" means the transaction contemplated by the February 27, 1998 Agreements.

5. "Communication" means the transmittal of information by letter, memorandum, facsimile, orally, or otherwise.

6. "Concerning" means reflecting, relating to, referring to, describing, evidencing, or constituting.

7. "Documents" means documents whether fixed in tangible medium or electronically stored. The word "documents" shall include, by way of example and not by way of limitation, all of the following: papers, correspondence, trade letters, envelopes, memoranda, telegrams, cables, notes, messages, reports, studies, press releases, comparisons, books, accounts, checks, audio and video recordings and transcriptions thereof, pleadings, testimony, articles, bulletins, pamphlets, brochures, magazines, questionnaires, surveys, charts, newspapers, calendars, desk calendars, pocket calendars, lists, logs, publications, notices, diagrams, instructions, diaries, minutes for meetings, corporate minutes, orders, resolutions, agendas, memorials or notes of oral communications, whether by telephone or face-to-face, contracts, agreements, drafts of or proposed contracts or agreements, memoranda of understanding, letters of intent, computer tapes, computer drives or memories, computer diskettes or disks, e-mail, CD-ROMs, or any other tangible thing on which any handwriting, typing, printing, photostatic, electronic, or other form of communication or information is recorded or reproduced, together with all notations on any of the foregoing, all

originals, file copies, or other unique copies of the foregoing, and all versions or drafts thereof, whether used or not.

8. "February 27, 1998 Agreements" means (a) the Agreement and Plan of Merger dated as of February 27, 1998 among Sunbeam Corp., Laser Acquisition Corp., CLN Holdings, Inc. and Coleman (Parent) Holdings Inc. and (b) the Agreement and Plan of Merger dated as of February 27, 1998 among Sunbeam Corp., Camper Acquisition Corp., and The Coleman Company, Inc.

9. "Financial Statements" means, without limitation, balance sheets, statements of income, earnings, retained earnings, sources and applications of funds, cash flow projections, notes to each such statements, or any other notes which pertain to the past or present financial condition of Sunbeam, whether any of the foregoing is audited or unaudited, whether final, interim or pro forma, complete or partial, consolidated, yearly, monthly, or otherwise.

10. "Litigations" means In Re Sunbeam Securities Litigation, 98-8258-Civ.-Middlebrooks (S.D. Fla.); Camden Asset Management L.P., et al. v. Sunbeam Corporation, et al., 98-8773-Civ.-Middlebrooks and 98-8275-Civ.-Middlebrooks (S.D. Fla.); Krim v. Dunlap, et al., No. CL983168AD (15th Jud. Cir., Fla.); Stanleton v. Sunbeam Corp., et al., No. 98-1676-Civ.-King (S.D. Fla.); Sunbeam Corp. v. PricewaterhouseCoopers LLP, No. CL005444AN (15th Jud. Cir., Fla.); In re Sunbeam Corp., Inc., No. 01-40291 (AJG) (Bankr. S.D.N.Y.) and any adversary proceedings therein; SEC v. Dunlap, et al., No. 01-8437-Civ.-Middlebrooks (S.D. Fla.); Oaktree Capital Management LLC v. Arthur Andersen LLP, No. BC257177 (L.A. Cty., CA); and Coleman (Parent) Holdings Inc. v. Arthur Andersen LLP, et al., No. CA 01-06062AN (15th Jud. Cir., Fla).

11. "Morgan Stanley" means Morgan Stanley & Co., Inc. or any of its subsidiaries, divisions, predecessors, successors, present and former employees, representatives, agents, attorneys, accountants, advisors, or all other persons acting or purporting to act on its behalf.

12. "SEC Administrative Proceedings" means In the Matter of Sunbeam Corp., SEC Administrative Proceeding File No. 3-10481, and In the Matter of David C. Fannin, SEC Administrative Proceeding File No. 3-10482.
13. "SEC" means the Securities and Exchange Commission.
14. "Subordinated Debentures" means Sunbeam's Zero Coupon Convertible Senior Subordinated Debentures Due 2018.
15. "Subordinated Debenture Offering" means the offering of Sunbeam's Subordinated Debentures.
16. "Sunbeam" means Sunbeam Corporation, or any of its subsidiaries, divisions, affiliates, predecessors, successors, present and former employees, representatives, agents, and all other persons acting or purporting to act on its behalf.
17. "You" or "Your" means Morgan Stanley & Co., Inc. and/or any of its subsidiaries, divisions, predecessors, successors, present or former employees, representatives, agents, attorneys, accountants, advisors, or anyone acting or purporting to act on its behalf.

INSTRUCTIONS

1. Documents shall be produced as they are kept in the usual course of business, or organized and labeled to correspond to the categories in this Request. Documents attached to each other should not be separated. Documents consisting of items previously produced in the Litigations, Arbitrations, and/or SEC Administrative Proceedings with Bates numbering shall be produced in Bates number order.
2. All documents shall be produced in the file folder, envelope or other container in which the documents are kept or maintained by you. If, for any reason, the container cannot be produced, produce copies of all labels or other identifying marks.

3. The relevant period, unless otherwise indicated, shall be from **January 1, 1997 through the date of trial of this matter**, and shall include all documents and information which relate in whole or in part to such period, or to events or circumstances during such period, even though dated, prepared, generated or received prior or subsequent to that period. Please supplement or correct your responses to these requests if, at any time, you become aware that your responses are incomplete or incorrect in any respect.

4. If you claim the attorney-client privilege, or any other privilege or work-product protection for all or any portion of a document, you shall provide a privilege log that describes the withheld material sufficiently to allow CPH to test the privilege or protection asserted.

5. The following rules of construction apply:

- a) The connectives "and" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery requests all responses that might otherwise be outside of their scope;
- b) The term "including" shall be construed to mean "without limitation";
and
- c) The use of the singular form of any word includes the plural and vice versa.

DOCUMENTS REQUESTED

1. All documents concerning your efforts to have Sunbeam retain or maintain your investment banking and/or securities underwriting services.
2. All documents reflecting all fees and expenses paid by Sunbeam to you, including without limitation all billing statements, invoices, time detail records, individual calendars,

daily diaries (including electronic calendar programs), or other documents that describe or record the time spent, or expenses incurred (including back-up for any out-of-pocket expenses), by any Morgan Stanley personnel, or that describe or record any aspect of their activities concerning any services performed on behalf of, or concerning, Sunbeam.

3. All documents concerning any investigation, analysis, or due diligence of Sunbeam conducted by you or on your behalf in 1997 or 1998.

4. All documents concerning any investigation, analysis, or due diligence of Coleman or CPH conducted by you or on your behalf in 1997 or 1998.

5. All documents concerning your attempts in 1997 or 1998 to locate someone to purchase or otherwise acquire Sunbeam, whether through merger, purchase, transfer of assets or securities, or otherwise.

6. All documents concerning your attempts in 1997 or 1998 to locate companies for Sunbeam to purchase or otherwise acquire, whether through merger, purchase, transfer of assets or securities, or otherwise.

7. All documents concerning the negotiation and signing of the February 27, 1998 Agreements.

8. All documents concerning the closing of the Coleman Transaction, including without limitation all documents concerning the decision to close the Coleman Transaction.

9. All documents concerning the meetings of Sunbeam's Board of Directors in 1997 and 1998.

10. All documents concerning any discussion, promise, agreement, or plan to have research analysts, whether or not at Morgan Stanley, provide coverage for Sunbeam or any of its debt or equity securities.

11. All documents used, analyzed, consulted, or prepared by any Morgan Stanley research analyst, including without limitation Andrew Conway, James Dormer, Jake Foley, and Karen Eltrich, concerning Sunbeam.
12. All documents concerning communications between or among you, Sunbeam, and Wall Street analysts concerning Sunbeam or the Coleman Transaction.
13. All documents concerning any valuation of Sunbeam or Sunbeam securities.
14. All documents concerning the stock market's valuation of Sunbeam securities, including without limitation documents describing or analyzing the increase or decline in the market price of Sunbeam stock in the period from and including July 1, 1996 through and including December 31, 1998.
15. All documents concerning any valuation of Coleman or Coleman securities.
16. All documents concerning synergies that might be achieved from a business combination of Sunbeam and Coleman.
17. All documents concerning Sunbeam's financial statements and/or restated financial statements.
18. All documents concerning the increase in the size of the Subordinated Debenture Offering from \$500 million to \$750 million.
19. All documents concerning any draft or executed "comfort letters" requested by you or provided to you in connection with the Subordinated Debenture Offering.
20. All documents concerning the sale of, or your attempts to sell, Subordinated Debentures, including without limitation documents concerning road shows, communications with potential investors, or communications with or among Morgan Stanley's sales personnel.
21. All documents concerning the pricing of the Subordinated Debentures.

22. All documents concerning the conversion features of the Subordinated Debentures.
23. All documents concerning the "book of demand" for the Subordinated Debentures.
24. All documents concerning the events that took place on March 19, 1998 at Global Financial Press, including without limitation documents concerning Lawrence Bornstein and/or John Tyree.
25. All documents concerning your communications with Sunbeam on March 18, 1998.
26. All documents concerning the "bring-down" due diligence for the Subordinated Debenture Offering.
27. All documents concerning your communications with Sunbeam on March 24, 1998.
28. All documents concerning Sunbeam's first quarter 1998 sales and/or earnings.
29. All documents concerning the closing of the Subordinated Debenture Offering including without limitation all documents concerning the decision to close the Subordinated Debenture Offering.
30. All documents concerning the Subordinated Debenture Offering.
31. All documents concerning any work or services you performed for or on behalf of Sunbeam in 1997 or 1998, regardless of whether you were compensated for that work.
32. All documents concerning press releases issued by Sunbeam on October 23, 1997, March 19, 1998, April 3, 1998, May 9, 1998, June 15, 1998, June 25, 1998, June 30, 1998, October 20, 1998, and November 12, 1998.

33. All documents concerning the statements contained in the press releases issued by Sunbeam on October 23, 1997, March 19, 1998, April 3, 1998, May 9, 1998, June 15, 1998, June 25, 1998, June 30, 1998, October 20, 1998, and November 12, 1998.

34. All documents concerning communications relating to Sunbeam, Coleman, or CPH, including without limitation internal communications within Morgan Stanley or communications between or among Morgan Stanley and Sunbeam; Skadden, Arps, Slate, Meagher & Flom LLP; Coopers & Lybrand LLP; Llama Company; Arthur Andersen LLP; Sard Verbinnen & Co., Inc.; Hill & Knowlton, Inc.; The Coleman Company, Inc.; Credit Suisse First Boston; Coleman (Parent) Holdings Inc.; MacAndrews & Forbes Holdings, Inc.; Wachtell Lipton, Rosen & Katz; Davis Polk & Wardwell; or any other person or company, and/or any of their respective employees, agents, or representatives.

35. All documents concerning the Coleman Transaction.

36. All documents concerning the Subordinated Debenture Offering.

37. All documents concerning Albert Dunlap and/or Russell Kersh.

38. All documents concerning the Scott Paper Company.

39. All documents concerning Coleman or CPH.

40. All documents concerning MacAndrews & Forbes Holdings, Inc. with respect to Sunbeam, Coleman, or CPH.

41. All documents concerning the events and matters that are the subject of the Complaint filed in this action.

42. Organizational charts, memoranda, or similar documents that describe the business organizational structure and the administrative, management, and reporting structure of Morgan Stanley from and including January 1, 1997 through and including December 31, 1998.

43. All documents concerning Morgan Stanley's policies, procedures, manuals, guidelines, reference materials, or checklists that were in effect from and including January 1, 1997 through and including December 31, 1998 for the performance of due diligence, including without limitation due diligence performed in connection with underwriting the sale of equity or debt securities.

44. All documents concerning employment contracts, performance evaluations, and/or personnel files (including without limitation any documents that describe or discuss the training, experience, competence, and accomplishments) of all Morgan Stanley personnel who performed services for or on behalf of Sunbeam in 1997 or 1998.

45. All documents concerning Morgan Stanley's performance evaluation criteria or guidelines in effect from and including January 1, 1997 through and including December 31, 1998.

46. All documents concerning Morgan Stanley's compensation criteria or guidelines in effect from and including January 1, 1997 through and including December 31, 1998.

47. All marketing or other promotional material prepared or used by, or on behalf of, Morgan Stanley concerning investment banking or securities underwriting services that were created or used at any time from and including January 1, 1997 through and including December 31, 1998.

48. All of your document retention or document destruction policies or procedures or similar procedures for the back-up or deletion of electronic or hard copy documents of any kind for any time during 1997 through the present, including without limitation any amendments to any such policies or procedures, schedules or related documents, and any memoranda or other instructions communicated to your employees concerning the obligation and procedures to be

utilized to preserve all relevant documents, including without limitation evidence concerning the Litigations, the Arbitrations, and the SEC Administrative Proceedings.

49. All documents you have provided or produced to any party (whether voluntarily or in response to a document request, subpoena duces tecum, or other process served on you) in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings (including without limitation any reports, communications, filings, testimony, legal memoranda, statements, or other documents submitted to the Securities & Exchange Commission or any other party).

50. All documents you have provided to the SEC, the Attorney General of New York, or any other governmental or regulatory body concerning Sunbeam.

51. All documents you have received from the SEC, the Attorney General of New York, or any other governmental or regulatory body concerning Sunbeam.

52. All discovery requests or subpoenas served on you in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

53. All responses and/or objections that you provided or produced in response to a discovery request or subpoena served on you in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

54. All communications concerning any discovery request or subpoena served on you in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

55. All motions, memoranda, briefs, rulings, orders, or transcripts of proceedings concerning any discovery request, subpoena, or other process in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

56. All privilege logs you prepared in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings with respect to documents that you withheld from production in response to any document requests, subpoenas duces tecum, or other process.

57. All transcripts of and exhibits to any depositions, recorded statements, or affidavits in connection with any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

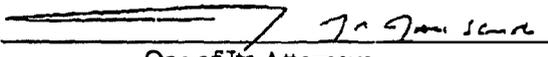
58. All documents obtained by you or produced to you by other parties, third parties, or non-parties (whether voluntarily or in response to any document requests, subpoenas duces tecum, or other process served by you or any other party) concerning Sunbeam.

59. All document requests, subpoenas duces tecum, interrogatories, requests for admission, responses, or objections that you served on, or received from, any party, third party or non-party in In re Sunbeam Corp., Inc., No. 01-40291 (AIG) (Bankr. S.D.N.Y.) and any adversary proceedings therein.

60. All transcripts of any hearings held in connection with the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

61. All affidavits, declarations, or other testimonial statements filed or submitted in connection with any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

COLEMAN (PARENT) HOLDINGS INC.

By: 
One of Its Attorneys

Jerold S. Solovy
Ronald L. Marnner
Robert T. Markowski
Deirdre E. Connell
JENNER & BLOCK, LLC
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

Jack Scarola
SEARCY DENNEY SCAROLA BARNHART
& SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33402-3626
(561) 686-6300

#230580/mm

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 2003 CA 005165 AI

MORGAN STANLEY SENIOR FUNDING,
INC.,

Plaintiffs,

vs.

MACANDREWS & FORBES HOLDINGS
INC, and COLEMAN (PARENT)
HOLDINGS INC.,

Defendant.

SUBPOENA DUCES TECUM WITHOUT DEPOSITION

THE STATE OF FLORIDA

TO: Custodian of Records
Bank of America National Trust and Savings Association
625 N. Flagler Drive
West Palm Beach, FL 33401

YOU ARE COMMANDED to appear at Searcy Denney Scarola Barnhart & Shipley,
P.A., 2139 Palm Beach Lakes Boulevard, West Palm Beach, FL, 33409 on or before 30 days
from the date of this subpoena:

SEE ATTACHMENT A
and to have with you at that time and place the following:

Duces Tecum: SEE ATTACHMENT A

MSSFI V. MACANDREWS, ETAL.
2003 CA 005045 AI
SDT Without Deposition

These items will be inspected and may be copied at that time. You will not be required to surrender the original items. You may comply with this subpoena by providing legible copies of the items to be produced to the attorney whose name appears on this subpoena on or before the scheduled date of production. You may condition the preparation of the copies upon the payment in advance of the reasonable cost of preparation. You may mail or deliver the copies to the attorney whose name appears on this subpoena and thereby eliminate your appearance at the time and place specified above. You have the right to object to the production pursuant to this subpoena at any time before production by giving written notice to the attorney whose name appears on this subpoena. **THIS WILL NOT BE A DEPOSITION. NO TESTIMONY WILL BE TAKEN.**

If you fail to:

- 1) Appear as specified; or
- 2) Furnish the records instead of appearing as provided above; or
- 3) Object to this subpoena,

MSSF I V. MACANDREWS, ETAL.
2003 CA 005045 AI
SDT Without Deposition

You may be in contempt of court. You are subpoenaed to appear by the following attorney, and unless excused from this subpoena by this attorney or the court, you shall respond to this subpoena as directed.

DATED this 8th day of July, 2003.



JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 478-0754
Attorneys for Defendants

MSSFI V. MACANDREWS, ETAL.
2003 CA 005045 AI
SDT Without Deposition

**CERTIFICATION OF RESPONSE TO
SUBPOENA DUCES TECUM WITHOUT DEPOSITION**

STATE OF FLORIDA
COUNTY OF _____

The undersigned, as custodian of records for Bank of America National Trust and Savings Association, certifies that the attached documents consisting of _____ pages represents a true copy of all items within my possession, custody or control which are described in the Subpoena Duces Tecum Without Deposition served on me in the above styled action and each page is numbered by me for identification. Production is complete and has been numbered by the custodian of records.

It is further certified that originals of the items produced are maintained under the direction, custody and control of the undersigned.

The foregoing Certification was acknowledged before me, an officer duly authorized in the State and County aforesaid to take acknowledgments, this _____ day of _____, 20____, who:

[] is personally known to me; or

[] has produced _____ as identification; and who:

MSSF I V. MACANDREWS, ETAL.
2003 CA 005045 AI
SDT Without Deposition

did or

did not, take an oath,

and who executed the foregoing certification, and who acknowledged the foregoing certification to be freely and voluntarily executed for the purposes therein recited.

Notary Public, State of Florida at Large

My Commission Expires:

MSSFI V. MACANDREWS, ETAL.
2003 CA 005045 AI
SDT Without Deposition

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block, LLC
One IBM Plaza
Suite 4400
Chicago, IL 60611

ATTACHMENT A

**SUBPOENA TO CUSTODIAN OF RECORDS OF
BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION**

You are hereby requested to produce the following documents pursuant to the definitions and instructions contained herein:

DOCUMENTS REQUESTED

1. All documents concerning synergies that might be achieved from a business combination of Sunbeam, Coleman, Signature Brands, and First Alert, or any combination thereof.
2. All documents concerning the potential or actual integration of Coleman, First Alert, and/or Signature Brands with Sunbeam, including, but not limited to, studies, reports, analyses, evaluations, projections, estimates, comments, or other work, performed by Coopers & Lybrand, Morgan Stanley, MSSF, Bank of America, or First Union.
3. All documents concerning any evaluation or assessment of the Bank Facilities, either prior to or after March 31, 1998, by you or any of the Lenders, including, but not limited to, any credit review or portfolio review, credit review sheets, call reports, contact reports, credit approval forms, portfolio forms, credit risk reviews, and covenant compliance reports.
4. All communications by and among the Lenders concerning the Credit Agreement, the Bank Facilities, Sunbeam, Coleman, or the Coleman Transaction.
5. All documents concerning the Lenders' plans or efforts to syndicate or sell off any portion of the Lenders' Commitments, as reflected in Schedule 2.01 of the Credit Agreement, including, but not limited to, information packages provided to potential lenders, lists or designations of potential lenders, communications with potential lenders, expressions of

interest and/or commitment made by any potential lender, and/or presentations or handouts used at lender group meetings.

6. All documents concerning Sunbeam's intention to draw down any portion of the Credit Agreement, specifically including, but not limited to, any and all written Borrowing Requests.

7. All documents concerning whether or not you or any of the Lenders considered exercising their right to terminate service under the Credit Agreement following any material adverse change in the financial status of Sunbeam.

8. All documents concerning any offer to buy Reorganized Sunbeam, or the sale, or possible sale of Reorganized Sunbeam or any subsidiary or material group of assets thereof.

9. All documents concerning your efforts to have Sunbeam retain or maintain your lending services both prior to and after the closing of the Bank Facilities.

10. All documents reflecting all fees and expenses paid by Sunbeam to you including, but not limited to, any Documentation Agent (as defined in the Credit Agreement) fee and any other fee related to the Credit Agreement.

11. All documents concerning the Bank Facilities, including, but not limited to, the sources and uses of the Bank Facilities, the decision to close the Bank Facilities, and the closing of the Bank Facilities.

12. All documents concerning any investigation, analysis, or due diligence of Sunbeam conducted by you or on your behalf or by Morgan Stanley in 1997 or 1998.

13. All documents concerning any investigation, analysis, or due diligence of Coleman or CPH conducted by you or on your behalf or by Morgan Stanley in 1997 or 1998.

14. All documents concerning the negotiation and signing of the February 27, 1998 Agreements.
15. All documents concerning the closing of the Coleman Transaction, including, without limitation, all documents concerning the decision to close the Coleman Transaction.
16. All documents concerning the meetings of Sunbeam's Board of Directors.
17. All documents concerning any valuation of Sunbeam or Sunbeam securities.
18. All documents concerning the stock market's valuation of Sunbeam securities, including, without limitation, documents describing or analyzing the increase or decline in the market price of Sunbeam stock in any portion of the period from and including July 1, 1996 through and including December 31, 1998.
19. All documents concerning your role as Documentation Agent for the Credit Agreement or Bank Facilities.
20. All documents concerning your April 28, 1998 meeting with Sunbeam, First Union, MSSF and/or Morgan Stanley, including, but not limited to, all notes taken of or during the meeting and documents memorializing, describing, or referring to the meeting.
21. All documents concerning any amendment to the Credit Agreement, including, but not limited to, the April 1998, June 1998, and July 1998 amendments. Your response should include, but is not limited to, all documents concerning the reasons for the amendments.
22. All documents concerning your meetings with Sunbeam, First Union, MSSF and/or Morgan Stanley at which the topics of Sunbeam or the Bank Facilities were

discussed including, but not limited to, all notes taken of or during the meeting and documents concerning the meeting. Your response should include documents from the period after the Bank Facilities closed on March 31, 1998.

23. All documents concerning the lien placed by you and/or MSSF and First Union on Coleman stock owned by Sunbeam, including, but not limited to, documents concerning the reason or decision to seek the lien.

24. All documents concerning the collateral for the Bank Facilities, including, but not limited to, all documents evaluating or assessing the value of that collateral.

25. All documents concerning the settlement agreement between CPH and Sunbeam dated August 12, 1998.

26. All documents concerning any write-off or loss reserve you have taken against the Bank Facilities.

27. All documents concerning your rating of the Bank Facilities and any change made to that rating.

28. All documents concerning any distribution you received as part of Sunbeam's bankruptcy reorganization plan, including, but not limited to, the value of the Sunbeam stock you received, and all documents evaluating or assessing the value of that distribution.

29. All documents concerning Sunbeam's decision to file for bankruptcy.

30. All documents concerning Sunbeam's plan of reorganization.

31. All documents concerning any settlement or compromise reached with the Official Committee of Unsecured Creditors of Sunbeam Corporation.

32. All documents concerning any valuation of Coleman or Coleman securities.
33. All documents concerning Sunbeam's or Coleman's financial statements and/or Sunbeam's restated financial statements.
34. All documents concerning the increase in the size of the Subordinated Debenture Offering from \$500 million to \$750 million.
35. All documents concerning the decrease in the amount of the Bank Facilities from \$2.0 billion to \$1.7 billion.
36. All documents concerning any draft or executed "comfort letters" prepared in connection with the Subordinated Debenture Offering.
37. All documents concerning the sale of Subordinated Debentures, including, without limitation, documents concerning road shows, communications with potential investors, or communications with or among Morgan Stanley's sales personnel.
38. All documents concerning the Subordinated Debenture Offering, including, but not limited to the pricing, conversion features, and/or "book of demand" for the Subordinated Debentures.
39. All documents concerning the events that took place on March 19, 1998 at Global Financial Press, including, without limitation, documents concerning Lawrence Bornstein and/or John Tyree.
40. All documents concerning the "bring-down" due diligence for the Subordinated Debenture Offering.
41. All documents concerning Sunbeam's first quarter 1998 sales and/or earnings.

42. All documents concerning the closing of the Subordinated Debenture Offering including, without limitation, all documents concerning the decision to close the Subordinated Debenture Offering.

43. All documents concerning any press releases or any statement contained in any press release by Sunbeam bearing the following dates or issued on or about October 23, 1997, March 19, 1998, April 3, 1998, May 9, 1998, June 15, 1998, June 25, 1998, June 30, 1998, October 20, 1998, or November 12, 1998.

44. All documents concerning communications relating to Sunbeam, Coleman, or CPH, concerning the subject of the Coleman Transaction or the Bank Facility, including, without limitation, internal communications within Bank of America or communications between or among Bank of America and Sunbeam; Skadden, Arps, Slate, Meagher & Flom LLP; Coopers & Lybrand; Llama Company; Arthur Andersen LLP; Sard Verbinnen & Co., Inc.; Hill & Knowlton, Inc.; Coleman; Credit Suisse First Boston; CPH; Mafco.; Wachtell Lipton, Rosen & Katz; Davis Polk & Wardwell; or any other person or company, and/or any of their respective employees, agents, or representatives.

45. All documents concerning any inquiry from, or any communication between or among you and any Sunbeam investor, potential investor, securities or financial analyst, or rating agency relating to Sunbeam.

46. All documents concerning any meeting between and among you, Sunbeam, Arthur Andersen, Coopers & Lybrand, Morgan Stanley, MSSF, First Union, Coleman, First Alert, or Signature Brands related to the 1998 acquisitions, the integration of the acquisitions, including, but not limited to, documents prepared for, disseminated at, utilized during, or prepared after such meetings.

47. All documents concerning the Coleman Transaction.

48. All documents concerning Albert Dunlap and/or Russell Kersh.

49. Organizational charts, memoranda, or similar documents that describe the business organizational structure and the administrative, management, and reporting structure of Bank of America from and including January 1, 1997 through and including December 31, 1998.

50. All documents concerning Bank of America's policies, procedures, manuals, guidelines, reference materials, or checklists that were in effect during any period from and including January 1, 1997 through and including December 31, 1998 for the performance of due diligence, including, without limitation, due diligence performed in connection with underwriting credit facilities.

51. All of your document retention or document destruction policies or procedures or similar procedures for the preservation, storage, destruction, back-up or deletion of documents of any kind, including electronic or hard copy versions of documents, for any time during 1996 through the present, including, without limitation, any amendment to any such policies or procedures, schedules or related documents, any and all records concerning adherence to and failure to adhere to or abide by any such policies or procedures, and any memoranda or other instructions concerning the obligation and procedures to be utilized to preserve all relevant documents, including without limitation evidence concerning the Litigations, the Arbitrations, and the SEC Administrative Proceedings.

52. All documents or other information you have provided or produced to any party (whether voluntarily or in response to document requests, subpoena duces tecum, interrogatories, requests for admission, or other requests for information and/or documents) in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings (including,

without limitation, any reports, communications, filings, testimony, legal memoranda, statements, or other documents submitted to the Securities & Exchange Commission or any other party). Your response should include:

- a. All discovery requests, subpoenas duces tecum, interrogatories, or requests for admissions served on you in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings;
- b. All responses and/or objections that you provided or produced in response to any discovery request, subpoena duces tecum, interrogatories, or requests for admission served on you in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings; and
- c. All privilege logs you prepared in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings with respect to documents that you withheld from production in response to any document requests, subpoenas duces tecum, or other request for information and/or documents.

53. All communications concerning any discovery request, subpoena duces tecum, interrogatories, or requests for admission served on you in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

54. All documents you have provided to or received from the SEC, the Attorney General of New York, or any other governmental or regulatory body concerning Sunbeam or the Coleman Transaction.

55. All motions, memoranda, briefs, rulings, orders, or transcripts of any proceeding concerning any discovery request, subpoena, or other request for information and/or documents in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

56. All transcripts of and exhibits to any depositions, recorded statements, affidavits or hearings held in connection with any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

57. All documents obtained by you or produced to you by other parties, third parties, or non-parties (whether voluntarily or in response to any document requests, subpoenas duces tecum, or other process served by you or any other party) concerning Sunbeam or the Coleman Transaction.

58. All affidavits, declarations, or other testimonial statements filed or submitted in connection with any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

DEFINITIONS

1. "Arbitrations" means Albert J. Dunlap and Sunbeam Corporation, No. 32 160 00088 99 (AAA); and Russell A. Kersh and Sunbeam Corporation, No. 32 160 00091 99 (AAA).

2. "Bank Facility" means the Credit Agreement, including amendments, and all funds extended by MSSF, First Union, and/or Bank of America to Sunbeam pursuant to the Credit Agreement, including, but not limited to, Tranche A, Tranche B, and the Revolving Credit Facility.

3. "Bank of America" means Bank of America National Trust and Savings Association and any of its subsidiaries, divisions, affiliates, predecessors, successors, joint

ventures, present and former officers, directors, employees, representatives, and agents, and all other persons acting or purporting to act on its behalf.

4. "Borrowing Request" means any request by Sunbeam for a Borrowing in accordance with Section 2.03 of the Credit Agreement.

5. "Coleman" means The Coleman Company, Inc. and any of its predecessors, successors, subsidiaries, and present and former officers, directors, and employees.

6. "CPH" means Coleman (Parent) Holdings Inc., Coleman Worldwide Corporation, CLN Holdings Inc., and any of their predecessors, successors, subsidiaries, and present and former officers, directors, and employees.

7. "Coleman Transaction" means the transaction contemplated by the February 27, 1998 Agreements.

8. "Communication" means the transmittal of information (in the form of facts, ideas, inquiries or otherwise) by letter, memorandum, facsimile, orally, electronically or otherwise.

9. "Concerning" means concerning, reflecting, relating to, referring to, describing, evidencing, or constituting.

10. "Coopers & Lybrand" means the former Coopers & Lybrand LLP (now known as PricewaterhouseCoopers LLP), and any of its predecessors, successors, affiliates, subsidiaries, and present and former partners, employees, representatives, and agents.

11. "Credit Agreement" means that agreement entered into by Sunbeam Corporation, as borrower, with MSSF, First Union, and Bank of America, as Lenders, dated March 30, 1998 and all amendments thereto.

12. "Documents" shall be given the broad meaning provided in Rule 1.350 of the Florida Rules of Civil Procedure and refers to any form or means, whether physical, visual, or electronic, in or by which words, numbers, or ideas are recorded or preserved, whether fixed in tangible medium or electronically stored, including any and all drafts of any final document. The word "documents" shall include, by way of example and not by way of limitation, all of the following: papers, correspondence, trade letters, envelopes, memoranda, telegrams, cables, notes, messages, reports, studies, press releases, comparisons, books, accounts, checks, audio and video recordings and transcriptions thereof, pleadings, testimony, articles, bulletins, pamphlets, brochures, magazines, questionnaires, surveys, charts, newspapers, calendars, desk calendars, pocket calendars, lists, logs, publications, notices, diagrams, instructions, diaries, minutes for meetings, corporate minutes, orders, resolutions, agendas, memorials or notes of oral communications, whether by telephone or face-to-face, contracts, agreements, drafts of or proposed contracts or agreements, memoranda of understanding, letters of intent, computer tapes, computer drives or memories, computer diskettes or disks, e-mail, CD-ROMs, or any other tangible thing on which any handwriting, typing, printing, photostatic, electronic, or other form of communication or information is recorded or reproduced, together with all notations on any of the foregoing, all originals, file copies, or other unique copies of the foregoing, and all versions or drafts thereof, whether used or not.

13. "February 27, 1998 Agreements" means (a) the Agreement and Plan of Merger dated as of February 27, 1998 among Sunbeam Corp., Laser Acquisition Corp., CLN Holdings Inc. and Coleman (Parent) Holdings Inc. and (b) the Agreement and Plan of Merger dated as of February 27, 1998 among Sunbeam Corp., Camper Acquisition Corp., and The Coleman Company, Inc.

14. “Financial Statements” means, without limitation, balance sheets, statements of income, earnings, retained earnings, sources and applications of funds, cash flow projections, notes to each such statements, or any other notes which pertain to the past or present financial condition of Sunbeam, whether any of the foregoing is audited or unaudited, whether final, interim or pro forma, complete or partial, consolidated, yearly, monthly, or otherwise.

15. “First Alert” means First Alert, Inc., and any of its predecessors, successors, affiliates, subsidiaries, and present and former officers, directors, employees, representatives, and agents.

16. “First Union” means First Union National Bank (now known as Wachovia Bank, National Association) and any of its predecessors, successors, affiliates, subsidiaries, and present and former officers, directors, employees, representatives, and agents.

17. “Lenders” means the entities listed on Schedule 2.01 of the Credit Agreement under the heading “Lenders” and any other Person that shall have become a party to the Credit Agreement as a Lender pursuant to an assignment and acceptance.

18. “Litigations” means In Re Sunbeam Securities Litigation, 98-8258-Civ.-Middlebrooks (S.D. Fla.); Camden Asset Management, L.P., et al. v. Sunbeam Corporation, et al., 98-8773-Civ.-Middlebrooks and 98-8275-Civ.-Middlebrooks (S.D. Fla.); Krim v. Dunlap, et al., No. CL983168AD (15th Jud. Cir., Fla.); Stapleton v. Sunbeam Corp., et al., No. 98-1676-Civ.-King (S.D. Fla.); Sunbeam Corp. v. PricewaterhouseCoopers LLP, No. CL005444AN (15th Jud. Cir., Fla.); In re Sunbeam Corp., No. 01-40291 (AJG) (Bankr. S.D.N.Y.) and every adversary proceeding therein; SEC v. Dunlap, et al., No. 01-8437-Civ.-Middlebrooks (S.D. Fla.); Oaktree Capital Management LLC v. Arthur Andersen LLP, No. BC257177 (L.A. Cty., CA); and

Coleman (Parent) Holdings Inc. v. Arthur Andersen LLP, et al., No. CA 01-06062AN (15th Jud. Cir., Fla).

19. “Mafco” means MacAndrews & Forbes Holdings Inc. and any of its predecessors, successors, subsidiaries, and present and former officers, directors, and employees.

20. “Morgan Stanley” means Morgan Stanley & Co., Inc. and any of its predecessors, successors, affiliates, subsidiaries, and present and former officers, directors, partners, employees, representatives, and agents.

21. “MSSF” means Morgan Stanley Senior Funding, Inc. and any of its predecessors, successors, affiliates, subsidiaries, and present and former officers, directors, partners, employees, representatives, and agents.

22. “Person” means any natural person, corporation, limited liability company, trust, joint venture, association, company, partnership, governmental authority, or other entity.

23. “Reorganized Sunbeam” means Sunbeam Corporation on and after the effective date of Sunbeam’s chapter 11 plan of reorganization as filed with the United States Bankruptcy Court in the Southern District of New York.

24. “SEC Administrative Proceedings” means In the Matter of Sunbeam Corp., SEC Administrative Proceeding File No. 3-10481, and In the Matter of David C. Fannin, SEC Administrative Proceeding File No. 3-10482.

25. “SEC” means the Securities and Exchange Commission.

26. “Signature Brands” means Signature Brands USA, Inc. and any of its predecessors, successors, affiliates, subsidiaries, and present and former officers, directors, employees, representatives, and agents.

27. "Subordinated Debentures" means Sunbeam's Zero Coupon Convertible Senior Subordinated Debentures Due 2018.

28. "Subordinated Debenture Offering" means the offering of Sunbeam's Subordinated Debentures.

29. "Sunbeam" means Sunbeam Corporation and any of its predecessors, successors, affiliates, subsidiaries, and present and former officers, directors, employees, representatives, and agents.

30. "You" or "Your" means Bank of America and any of its subsidiaries, divisions, predecessors, successors, present or former employees, representatives, agents, attorneys, accountants, advisors, or anyone acting or purporting to act on its behalf.

INSTRUCTIONS

1. Documents shall be produced as they are kept in the usual course of business, or organized and labeled to correspond to the categories in this Request. Documents attached to each other should not be separated. Documents consisting of items previously produced in the Litigations, Arbitrations, and/or SEC Administrative Proceedings with Bates numbering shall be produced in Bates number order.

2. All documents shall be produced in the file folder, envelope or other container in which the documents are kept or maintained by you. If, for any reason, the container cannot be produced, produce copies of all labels or other identifying marks.

3. The relevant period, unless otherwise indicated, shall be from **January 1, 1996 through the date of trial of this matter**, and shall include all documents and information which relate in whole or in part to such period, or to events or circumstances during such period,

even though dated, prepared, generated or received prior or subsequent to that period. Please supplement or correct your responses to these requests if, at any time, you become aware that your responses are incomplete or incorrect in any respect.

4. If you claim the attorney-client privilege, or any other privilege or work-product protection for all or any portion of a document, you shall provide a privilege log that describes the withheld material sufficiently to allow CPH and Mafco to test the privilege or protection asserted.

5. The following rules of construction apply:

a. The connectives "and" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery requests all responses that might otherwise be outside of their scope;

b. The term "including" shall be construed to mean "without limitation"; and

c. The use of the singular form of any word includes the plural and vice versa.

MACANDREWS & FORBES HOLDINGS INC.
and COLEMAN (PARENT) HOLDINGS INC.

By: 
One of Their Attorneys

Jerold S. Solovy
Ronald L. Marmer
Robert T. Markowski
Deirdre E. Connell
JENNER & BLOCK, LLC
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

Jack Scarola
SEARCY DENNEY SCAROLA BARNHART
& SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33402-3626
(561) 686-6300

Dated: ~~June~~ ^{July} 1, 2003

#230580/mm

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 2003 CA 005165 AI

MORGAN STANLEY SENIOR FUNDING,
INC.,

Plaintiffs,

vs.

MACANDREWS & FORBES HOLDINGS
INC, and COLEMAN (PARENT)
HOLDINGS INC.,

Defendant.

SUBPOENA DUCES TECUM WITHOUT DEPOSITION

THE STATE OF FLORIDA

TO: Custodian of Records
Wachovia Bank, NA
777 S. Flagler Drive
West Palm Beach, FL 33401

YOU ARE COMMANDED to appear at Searcy Denney Scarola Barnhart & Shipley,
P.A., 2139 Palm Beach Lakes Boulevard, West Palm Beach, FL, 33409 on or before 30 days
from the date of this subpoena:

SEE ATTACHMENT A
and to have with you at that time and place the following:

Duces Tecum: SEE ATTACHMENT A

MSSFI V. MACANDREWS, ETAL.
2003 CA 005045 AJ
SDT Without Deposition

These items will be inspected and may be copied at that time. You will not be required to surrender the original items. You may comply with this subpoena by providing legible copies of the items to be produced to the attorney whose name appears on this subpoena on or before the scheduled date of production. You may condition the preparation of the copies upon the payment in advance of the reasonable cost of preparation. You may mail or deliver the copies to the attorney whose name appears on this subpoena and thereby eliminate your appearance at the time and place specified above. You have the right to object to the production pursuant to this subpoena at any time before production by giving written notice to the attorney whose name appears on this subpoena. **THIS WILL NOT BE A DEPOSITION. NO TESTIMONY WILL BE TAKEN.**

If you fail to:

- 1) Appear as specified; or
- 2) Furnish the records instead of appearing as provided above; or
- 3) Object to this subpoena,

MSSFI V. MACANDREWS, ETAL.
2003 CA 005045 AI
SDT Without Deposition

You may be in contempt of court. You are subpoenaed to appear by the following attorney, and unless excused from this subpoena by this attorney or the court, you shall respond to this subpoena as directed.

DATED this 8th day of July, 2003.



JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 478-0754
Attorneys for Defendants

MSSFI V. MACANDREWS, ETAL.
2003 CA 005045 AI
SDT Without Deposition

**CERTIFICATION OF RESPONSE TO
SUBPOENA DUCES TECUM WITHOUT DEPOSITION**

STATE OF FLORIDA
COUNTY OF _____

The undersigned, as custodian of records for Wachovia Bank, NA, certifies that the attached documents consisting of _____ pages represents a true copy of all items within my possession, custody or control which are described in the Subpoena Duces Tecum Without Deposition served on me in the above styled action and each page is numbered by me for identification. Production is complete and has been numbered by the custodian of records.

It is further certified that originals of the items produced are maintained under the direction, custody and control of the undersigned.

The foregoing Certification was acknowledged before me, an officer duly authorized in the State and County aforesaid to take acknowledgments, this _____ day of _____, 20____, who:

- is personally known to me; or
- has produced _____ as identification; and who:
- did or

MSSFI V. MACANDREWS, ETAL.
2003 CA 005045 AI
SDT Without Deposition

[] did not, take an oath,
and who executed the foregoing certification, and who acknowledged the foregoing certification
to be freely and voluntarily executed for the purposes therein recited.

Notary Public, State of Florida at Large

My Commission Expires:

MSSFI V. MACANDREWS, ETAL.
2003 CA 005045 AI
SDT Without Deposition

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block, LLC
One IBM Plaza
Suite 4400
Chicago, IL 60611

ATTACHMENT A

**SUBPOENA TO CUSTODIAN OF RECORDS OF
FIRST UNION NATIONAL BANK
(NOW KNOWN AS WACHOVIA BANK NATIONAL ASSOCIATION)**

You are hereby requested to produce the following documents pursuant to the definitions and instructions contained herein:

DOCUMENTS REQUESTED

1. All documents concerning synergies that might be achieved from a business combination of Sunbeam, Coleman, Signature Brands, and First Alert, or any combination thereof.
2. All documents concerning the potential or actual integration of Coleman, First Alert, and/or Signature Brands with Sunbeam, including, but not limited to, studies, reports, analyses, evaluations, projections, estimates, comments, or other work, performed by Coopers & Lybrand, Morgan Stanley, MSSF, Bank of America, or First Union.
3. All documents concerning any evaluation or assessment of the Bank Facilities, either prior to or after March 31, 1998, by you or any of the Lenders, including, but not limited to, any credit review or portfolio review, credit review sheets, call reports, contact reports, credit approval forms, portfolio forms, credit risk reviews, and covenant compliance reports.
4. All communications by and among the Lenders concerning the Credit Agreement, the Bank Facilities, Sunbeam, Coleman, or the Coleman Transaction.
5. All documents concerning the Lenders' plans or efforts to syndicate or sell off any portion of the Lenders' Commitments, as reflected in Schedule 2.01 of the Credit Agreement, including, but not limited to, information packages provided to potential lenders, lists or designations of potential lenders, communications with potential lenders, expressions of

interest and/or commitment made by any potential lender, and/or presentations or handouts used at lender group meetings.

6. All documents concerning Sunbeam's intention to draw down any portion of the Credit Agreement, specifically including, but not limited to, any and all written Borrowing Requests.

7. All documents concerning whether or not you or any of the Lenders considered exercising their right to terminate service under the Credit Agreement following any material adverse change in the financial status of Sunbeam.

8. All documents concerning any offer to buy Reorganized Sunbeam, or the sale, or possible sale of Reorganized Sunbeam or any subsidiary or material group of assets thereof.

9. All documents concerning your efforts to have Sunbeam retain or maintain your lending services both prior to and after the closing of the Bank Facilities.

10. All documents reflecting all fees and expenses paid by Sunbeam to you, including, but not limited to, any Administrative Agent (as defined in the Credit Agreement) fee and any other fee related to the Credit Agreement.

11. All documents concerning the Bank Facilities, including, but not limited to, the sources and uses of the Bank Facilities, the decision to close the Bank Facilities, and the closing of the Bank Facilities.

12. All documents concerning any investigation, analysis, or due diligence of Sunbeam conducted by you or on your behalf or by Morgan Stanley in 1997 or 1998.

13. All documents concerning any investigation, analysis, or due diligence of Coleman or CPH conducted by you or on your behalf or by Morgan Stanley in 1997 or 1998.

14. All documents concerning the negotiation and signing of the February 27, 1998 Agreements.
15. All documents concerning the closing of the Coleman Transaction, including, without limitation, all documents concerning the decision to close the Coleman Transaction.
16. All documents concerning the meetings of Sunbeam's Board of Directors.
17. All documents concerning any valuation of Sunbeam or Sunbeam securities.
18. All documents concerning the stock market's valuation of Sunbeam securities, including, without limitation, documents describing or analyzing the increase or decline in the market price of Sunbeam stock in any portion of the period from and including July 1, 1996 through and including December 31, 1998.
19. All documents concerning your role as Administrative Agent for the Credit Agreement or Bank Facilities.
20. All documents concerning your April 28, 1998 meeting with Sunbeam, Bank of America, and MSSF and/or Morgan Stanley, including, but not limited to, all notes taken of or during the meeting and documents memorializing, describing, or referring to the meeting.
21. All documents concerning any amendment to the Credit Agreement, including, but not limited to, the April 1998, June 1998, and July 1998 amendments. Your response should include, but is not limited to, all documents concerning the reasons for the amendments.
22. All documents concerning your meetings with Sunbeam, Bank of America, MSSF and/or Morgan Stanley at which the topics of Sunbeam or the Bank Facilities

were discussed including, but not limited to, all notes taken of or during the meeting and documents concerning the meeting. Your response should include documents from the period after the Bank Facilities closed on March 31, 1998.

23. All documents concerning the lien placed by you and/or Bank of America and MSSF on Coleman stock owned by Sunbeam, including, but not limited to, documents concerning the reason or decision to seek the lien.

24. All documents concerning the collateral for the Bank Facilities, including, but not limited to, all documents evaluating or assessing the value of that collateral.

25. All documents concerning the settlement agreement between CPH and Sunbeam dated August 12, 1998.

26. All documents concerning any write-off or loss reserve you have taken against the Bank Facilities.

27. All documents concerning your rating of the Bank Facilities and any change made to that rating.

28. All documents concerning any distribution you received as part of Sunbeam's bankruptcy reorganization plan, including, but not limited to, the value of the Sunbeam stock you received, and all documents evaluating or assessing the value of that distribution.

29. All documents concerning Sunbeam's decision to file for bankruptcy.

30. All documents concerning Sunbeam's plan of reorganization.

31. All documents concerning any settlement or compromise reached with the Official Committee of Unsecured Creditors of Sunbeam Corporation.

32. All documents concerning any valuation of Coleman or Coleman securities.
33. All documents concerning Sunbeam's or Coleman's financial statements and/or Sunbeam's restated financial statements.
34. All documents concerning the increase in the size of the Subordinated Debenture Offering from \$500 million to \$750 million.
35. All documents concerning the decrease in the amount of the Bank Facilities from \$2.0 billion to \$1.7 billion.
36. All documents concerning any draft or executed "comfort letters" prepared in connection with the Subordinated Debenture Offering.
37. All documents concerning the sale of Subordinated Debentures, including, without limitation, documents concerning road shows, communications with potential investors, or communications with or among Morgan Stanley's sales personnel.
38. All documents concerning the Subordinated Debenture offering, including, but not limited to, the pricing, conversion features, and/or "book of demand" for the Subordinated Debentures.
39. All documents concerning the events that took place on March 19, 1998 at Global Financial Press, including, without limitation, documents concerning Lawrence Bornstein and/or John Tyree.
40. All documents concerning the "bring-down" due diligence for the Subordinated Debenture Offering.
41. All documents concerning Sunbeam's first quarter 1998 sales and/or earnings.

42. All documents concerning the closing of the Subordinated Debenture Offering including, without limitation, all documents concerning the decision to close the Subordinated Debenture Offering.

43. All documents concerning any press releases or any statement contained in any press release by Sunbeam bearing the following dates or issued on or about October 23, 1997, March 19, 1998, April 3, 1998, May 9, 1998, June 15, 1998, June 25, 1998, June 30, 1998, October 20, 1998, or November 12, 1998.

44. All documents concerning communications relating to Sunbeam, Coleman, or CPH, concerning the subject of the Coleman Transaction or the Bank Facility, including, without limitation, internal communications within First Union or communications between or among First Union and Sunbeam; Skadden, Arps, Slate, Meagher & Flom LLP; Coopers & Lybrand; Llama Company; Arthur Andersen LLP; Sard Verbinnen & Co., Inc.; Hill & Knowlton, Inc.; Coleman, Credit Suisse First Boston; CPH.; Mafco; Wachtell Lipton, Rosen & Katz; Davis Polk & Wardwell; or any other person or company, and/or any of their respective employees, agents, or representatives.

45. All documents concerning any inquiry from, or any communication between or among you and any Sunbeam investor, potential investor, securities or financial analyst, or rating agency relating to Sunbeam.

46. All documents concerning any meeting between and among you, Sunbeam, Arthur Andersen, Coopers & Lybrand, Morgan Stanley, MSSF, Coleman, First Alert, or Signature Brands related to the 1998 acquisitions, the integration of the acquisitions, including, but not limited to, documents prepared for, disseminated at, utilized during, or prepared after such meetings.

47. All documents concerning the Coleman Transaction.

48. All documents concerning Albert Dunlap and/or Russell Kersh.

49. Organizational charts, memoranda, or similar documents that describe the business organizational structure and the administrative, management, and reporting structure of First Union from and including January 1, 1997 through and including December 31, 1998.

50. All documents concerning First Union's policies, procedures, manuals, guidelines, reference materials, or checklists that were in effect during any period from and including January 1, 1997 through and including December 31, 1998 for the performance of due diligence, including, without limitation, due diligence performed in connection with underwriting credit facilities.

51. All of your document retention or document destruction policies or procedures or similar procedures for the preservation, storage, destruction, back-up or deletion of documents of any kind, including electronic or hard copy versions of documents, for any time during 1996 through the present, including, without limitation, any amendment to any such policies or procedures, schedules or related documents, any and all records concerning adherence to and failure to adhere to or abide by any such policies or procedures, and any memoranda or other instructions concerning the obligation and procedures to be utilized to preserve all relevant documents, including without limitation evidence concerning the Litigations, the Arbitrations, and the SEC Administrative Proceedings.

52. All documents or other information you have provided or produced to any party (whether voluntarily or in response to a document request, subpoena duces tecum, interrogatories, requests for admission, or other requests for information and/or documents) in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings (including,

without limitation, any reports, communications, filings, testimony, legal memoranda, statements, or other documents submitted to the Securities & Exchange Commission or any other party). Your response should include:

- a. All discovery requests, subpoenas duces tecum, interrogatories, or requests for admissions served on you in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings;
- b. All responses and/or objections that you provided or produced in response to any discovery request, subpoena duces tecum, interrogatories, or requests for admission served on you in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings; and
- c. All privilege logs you prepared in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings with respect to documents that you withheld from production in response to any document requests, subpoenas duces tecum, or other request for information and/or documents.

53. All communications concerning any discovery request, subpoena duces tecum, interrogatories, or requests for admission served on you in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

54. All documents you have provided to or received from the SEC, the Attorney General of New York, or any other governmental or regulatory body concerning Sunbeam or the Coleman Transaction.

55. All motions, memoranda, briefs, rulings, orders, or transcripts of any proceeding concerning any discovery request, subpoena, or other request for information and/or documents in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

56. All transcripts of and exhibits to any depositions, recorded statements, affidavits or hearings held in connection with any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

57. All documents obtained by you or produced to you by other parties, third parties, or non-parties (whether voluntarily or in response to any document requests, subpoenas duces tecum, or other process served by you or any other party) concerning Sunbeam or the Coleman Transaction.

58. All affidavits, declarations, or other testimonial statements filed or submitted in connection with any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

DEFINITIONS

1. "Arbitrations" means Albert J. Dunlap and Sunbeam Corporation, No. 32 160 00088 99 (AAA); and Russell A. Kersh and Sunbeam Corporation, No. 32 160 00091 99 (AAA).

2. "Bank Facility" means the Credit Agreement, including amendments, and all funds extended by MSSF, First Union, and/or Bank of America to Sunbeam pursuant to the Credit Agreement, including, but not limited to, Tranche A, Tranche B, and the Revolving Credit Facility.

3. “Bank of America” means Bank of America National Trust and Savings Association and any of its present and former officers, directors, employees, representatives, and agents.

4. “Borrowing Request” means any request by Sunbeam for a Borrowing in accordance with Section 2.03 of the Credit Agreement.

5. “Coleman” means The Coleman Company, Inc. and any of its predecessors, successors, subsidiaries, and present and former officers, directors, and employees.

6. “CPH” means Coleman (Parent) Holdings Inc., Coleman Worldwide Corporation, CLN Holdings, Inc., and any of their predecessors, successors, subsidiaries, and present and former officers, directors, and employees.

7. “Coleman Transaction” means the transaction contemplated by the February 27, 1998 Agreements.

8. “Communication” means the transmittal of information (in the form of facts, ideas, inquiries or otherwise) by letter, memorandum, facsimile, orally, electronically, or otherwise.

9. “Concerning” means concerning, reflecting, relating to, referring to, describing, evidencing, or constituting.

10. “Coopers & Lybrand” means the former Coopers & Lybrand LLP (now known as PricewaterhouseCoopers LLP), and any of its predecessors, successors, affiliates, subsidiaries, and present and former partners, employees, representatives, and agents.

11. "Credit Agreement" means that agreement entered into by Sunbeam Corporation, as borrower, with MSSF, First Union, and Bank of America as Lenders, dated March 30, 1998 and all amendments thereto.

12. "Documents" shall be given the broad meaning provided in Rule 1.350 of the Florida Rules of Civil Procedure and refers to any form or means, whether physical, visual, or electronic, in or by which words, numbers, or ideas are recorded or preserved, whether fixed in tangible medium or electronically stored, including any and all drafts of any final document. The word "documents" shall include, by way of example and not by way of limitation, all of the following: papers, correspondence, trade letters, envelopes, memoranda, telegrams, cables, notes, messages, reports, studies, press releases, comparisons, books, accounts, checks, audio and video recordings and transcriptions thereof, pleadings, testimony, articles, bulletins, pamphlets, brochures, magazines, questionnaires, surveys, charts, newspapers, calendars, desk calendars, pocket calendars, lists, logs, publications, notices, diagrams, instructions, diaries, minutes for meetings, corporate minutes, orders, resolutions, agendas, memorials or notes of oral communications, whether by telephone or face-to-face, contracts, agreements, drafts of or proposed contracts or agreements, memoranda of understanding, letters of intent, computer tapes, computer drives or memories, computer diskettes or disks, e-mail, CD-ROMs, or any other tangible thing on which any handwriting, typing, printing, photostatic, electronic, or other form of communication or information is recorded or reproduced, together with all notations on any of the foregoing, all originals, file copies, or other unique copies of the foregoing, and all versions or drafts thereof, whether used or not.

13. "February 27, 1998 Agreements" means (a) the Agreement and Plan of Merger dated as of February 27, 1998 among Sunbeam Corp., Laser Acquisition Corp., CLN

Holdings, Inc. and Coleman (Parent) Holdings Inc. and (b) the Agreement and Plan of Merger dated as of February 27, 1998 among Sunbeam Corp., Camper Acquisition Corp., and The Coleman Company, Inc.

14. "Financial Statements" means, without limitation, balance sheets, statements of income, earnings, retained earnings, sources and applications of funds, cash flow projections, notes to each such statements, or any other notes which pertain to the past or present financial condition of Sunbeam, whether any of the foregoing is audited or unaudited, whether final, interim or pro forma, complete or partial, consolidated, yearly, monthly, or otherwise.

15. "First Alert" means First Alert, Inc., and any of its predecessors, successors, affiliates, subsidiaries, and present and former officers, directors, employees, representatives, and agents.

16. "First Union" means First Union National Bank (now known as Wachovia Bank, National Association) and any of its subsidiaries, divisions, affiliates, predecessors, successors, joint ventures, present and former officers, directors, employees, representatives, agents, and all other persons acting or purporting to act on its behalf.

17. "Lenders" means the entities listed on Schedule 2.01 of the Credit Agreement under the heading "Lenders" and any other Person that shall have become a party to the Credit Agreement as a Lender pursuant to an assignment and acceptance.

18. "Litigations" means In Re Sunbeam Securities Litigation, 98-8258-Civ.-Middlebrooks (S.D. Fla.); Camden Asset Management, L.P., et al. v. Sunbeam Corporation, et al., 98-8773-Civ.-Middlebrooks and 98-8275-Civ.-Middlebrooks (S.D. Fla.); Krim v. Dunlap, et al., No. CL983168AD (15th Jud. Cir., Fla.); Stapleton v. Sunbeam Corp., et al., No. 98-1676-

Civ.-King (S.D. Fla.); Sunbeam Corp. v. PricewaterhouseCoopers LLP, No. CL005444AN (15th Jud. Cir., Fla.); In re Sunbeam Corp., No. 01-40291 (AJG) (Bankr. S.D.N.Y.) and every adversary proceeding therein; SEC v. Dunlap, et al., No. 01-8437-Civ.-Middlebrooks (S.D. Fla.); Oaktree Capital Management LLC v. Arthur Andersen LLP, No. BC257177 (L.A. Cty., CA); and Coleman (Parent) Holdings Inc. v. Arthur Andersen LLP, et al., No. CA 01-06062AN (15th Jud. Cir., Fla).

19. “Mafco” means MacAndrews & Forbes Holdings Inc. and any of its predecessors, successors, subsidiaries, and present and former officers, directors, and employees.

20. “Morgan Stanley” means Morgan Stanley & Co., Inc. and any of its predecessors, successors, affiliates, subsidiaries, and present and former officers, directors, partners, employees, representatives, and agents.

21. “MSSF” means Morgan Stanley Senior Funding, Inc. and any of its predecessors, successors, affiliates, subsidiaries, and present and former officers, directors, partners, employees, representatives, and agents.

22. “Person” means any natural person, corporation, limited liability company, trust, joint venture, association, company, partnership, governmental authority, or other entity.

23. “Reorganized Sunbeam” means Sunbeam Corporation on and after the effective date of Sunbeam’s chapter 11 plan of reorganization as filed with the United States Bankruptcy Court in the Southern District of New York.

24. “SEC Administrative Proceedings” means In the Matter of Sunbeam Corp., SEC Administrative Proceeding File No. 3-10481, and In the Matter of David C. Fannin, SEC Administrative Proceeding File No. 3-10482.

25. "SEC" means the Securities and Exchange Commission.
26. "Signature Brands" means Signature Brands USA, Inc., and any of its predecessors, successors, affiliates, subsidiaries, and present and former officers, directors, employees, representatives, and agents.
27. "Subordinated Debentures" means Sunbeam's Zero Coupon Convertible Senior Subordinated Debentures Due 2018.
28. "Subordinated Debenture Offering" means the offering of Sunbeam's Subordinated Debentures.
29. "Sunbeam" means Sunbeam Corporation, and any of its predecessors, successors, affiliates, subsidiaries, and present and former officers, directors, employees, representatives, and agents.
30. "You" or "Your" means First Union and any of its subsidiaries, divisions, predecessors, successors, present or former employees, representatives, agents, attorneys, accountants, advisors, or anyone acting or purporting to act on its behalf.

INSTRUCTIONS

1. Documents shall be produced as they are kept in the usual course of business, or organized and labeled to correspond to the categories in this Request. Documents attached to each other should not be separated. Documents consisting of items previously produced in the Litigations, Arbitrations, and/or SEC Administrative Proceedings with Bates numbering shall be produced in Bates number order.

2. All documents shall be produced in the file folder, envelope or other container in which the documents are kept or maintained by you. If, for any reason, the container cannot be produced, produce copies of all labels or other identifying marks.

3. The relevant period, unless otherwise indicated, shall be from **January 1, 1996 through the date of trial of this matter**, and shall include all documents and information which relate in whole or in part to such period, or to events or circumstances during such period, even though dated, prepared, generated or received prior or subsequent to that period. Please supplement or correct your responses to these requests if, at any time, you become aware that your responses are incomplete or incorrect in any respect.

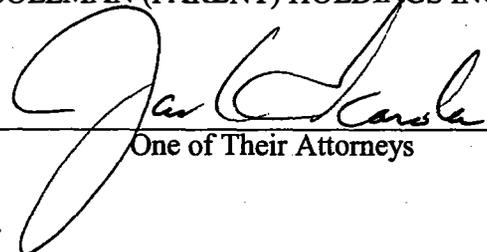
4. If you claim the attorney-client privilege, or any other privilege or work-product protection for all or any portion of a document, you shall provide a privilege log that describes the withheld material sufficiently to allow CPH and Mafco to test the privilege or protection asserted.

5. The following rules of construction apply:

- a) The connectives "and" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery requests all responses that might otherwise be outside of their scope;
- b) The term "including" shall be construed to mean "without limitation"; and
- c) The use of the singular form of any word includes the plural and vice versa.

MACANDREWS & FORBES HOLDINGS INC.
and COLEMAN (PARENT) HOLDINGS INC.

By: _____



One of Their Attorneys

Jerold S. Solovy
Ronald L. Marmer
Robert T. Markowski
Deirdre E. Connell
JENNER & BLOCK, LLC
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

Jack Scarola
SEARCY DENNEY SCAROLA BARNHART
& SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33402-3626
(561) 686-6300

Dated: ~~June~~ ^{July} 1, 2003

#230580/mm

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN
AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

CASE NO: 2003 CA 005045 AI

Plaintiffs,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.

_____ /

ORDER ON DEFENDANT'S MOTION TO STAY DISCOVERY

THIS CAUSE having come to be considered upon the Defendant, Morgan Stanley & Co., Inc.'s Motion to Stay Discovery, and the Court having reviewed the file and being fully advised in the premises, it is hereby,

ORDERED and ADJUDGED:

The motion is Denied

DONE AND ORDERED at West Palm Beach, County, Florida, this _____ day of _____, 2003.

SIGNED AND DATED

JUL 30 2003

JUDGE

ELIZABETH MAASS
CIRCUIT COURT JUDGE

Copies have been furnished to all counsel on the attached counsel list.

Coleman Holdings, Inc. vs Morgan Stanley & Company
Case No.: 2003 CA 005045 AI
Order on Deft's M/T/Stay Discovery

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jack Scarola, Esq.
Searcy Denney Scarola Barnhart & Shipley
P.O. Drawer 3626
West Palm Beach, FL 33402

Jerold S. Solovy, Esq.
Jenner & Block, LLC
One IBM Plaza
Suite 4400
Chicago, IL 60611

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CASE NO: 03 CA-005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

**DEFENDANT'S OBJECTION TO SUBPOENAS
DIRECTED TO BANK OF AMERICA NATIONAL TRUST
AND SAVINGS ASSOCIATION AND WACHOVIA BANK, NA**

Defendant, MORGAN STANLEY & CO., INC. by and through its undersigned attorneys, pursuant to Fla.R.Civ.P., Rule 1.351 objects to the subpoenas directed to Bank of America National Trust and Savings Association and Wachovia Bank, NA dated July 1, 2003.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by facsimile and U.S. Mail to all counsel of record on the attached service list on this 11th day of July, 2003.

Thomas D. Yannucci, P.C.
Thomas A. Clare
Larissa Paule-Carres
Brett H. McGurk
KIRKLAND & ELLIS
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

COUNSEL FOR DEFENDANT

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

BY:


JOSEPH IANNO, JR.

Florida Bar No: 655351

SERVICE LIST

<p>John Scarola SEARCY, DENNEY, SCAROLA, BARNHARDT & SHIPLEY, P.A. 2139 Palm Beach Lakes Boulevard West Palm Beach, Florida 33409</p>	<p>Counsel for Plaintiff</p>
<p>Jerold S. Solovy JENNER & BLOCK, LLC One IBM Plaza Suite 4400 Chicago, Illinois 60611</p>	<p>Counsel for Plaintiff</p>

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

CASE NO: 2003 CA 005045 AI

v.

Judge Elizabeth T. Maass

MORGAN STANLEY & CO., INC.,

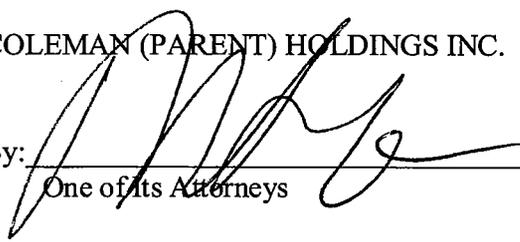
Defendant.

**PLAINTIFF'S REPLY TO ANSWER AND AFFIRMATIVE
DEFENSES OF MORGAN STANLEY & CO., INC.**

Plaintiff Coleman (Parent) Holdings Inc., by its attorneys, hereby replies to the Affirmative Defenses interposed by defendant Morgan Stanley & Co., Inc., and by way of reply, denies each and every allegation set forth and demands strict proof thereof.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the attorneys on the attached service list by the methods indicated this 14th day of July, 2002.

COLEMAN (PARENT) HOLDINGS INC.

By: 

One of its Attorneys

John Scarola
SEARCY DENNEY SCAROLA
BARNHART & SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33402-3626
(561) 686-6300

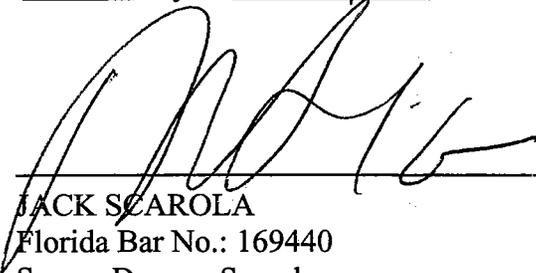
Jerold S. Solovy
Ronald L. Marmer
Robert T. Markowski
Michael T. Brody
Jeffrey T. Shaw
Deirdre E. Connell
JENNER & BLOCK, LLC
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

#952103

16div-003552

Coleman Holdings, Inc. vs Morgan Stanley & Company
Case No.: 2003 CA 005045 AI
Pltf's Reply to Aff. Def.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by
U.S. Mail to all Counsel on the attached list, this 14th day of July, 2003.



JACK SCAROLA

Florida Bar No.: 169440

Searcy Denney Scarola

Barnhart & Shipley, P.A.

2139 Palm Beach Lakes Boulevard

West Palm Beach, FL 33409

Phone: (561) 686-6300

Fax: (561) 478-0754

Attorney for Plaintiffs

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block, LLC
One IBM Plaza
Suite 4400
Chicago, IL 60611

LAW OFFICES
JENNER & BLOCK, LLC

ONE IBM PLAZA
CHICAGO, ILLINOIS 60611

(312) 222-9350
(312) 527-0484 FAX

DEIRDRE E. CONNELL
312-923-2661 Direct Dial
312-840-7661 Direct Facsimile

TELECOMMUNICATION TRANSMITTAL

DATE: July 17, 2003

TO: **Thomas A. Clare, Esq.** **VOICE:** (202) 879-5993
KIRKLAND & ELLIS
655 Fifteenth Street, N.W., Suite 1200 **FAX:** (202) 879-5200
Washington, D.C. 20005-5793

FROM: Deirdre E. Connell **SECY. EXT.:** 6486

EMP. NO.: 035666 **CLIENT NO.:** 41198-10003

IMPORTANT: THIS MESSAGE IS INTENDED ONLY FOR THE USE OF THE INDIVIDUAL OR ENTITY TO WHICH IT IS ADDRESSED, AND MAY CONTAIN INFORMATION THAT IS ATTORNEY WORK PRODUCT, PRIVILEGED, CONFIDENTIAL AND EXEMPT FROM DISCLOSURE UNDER APPLICABLE LAW. IF THE READER OF THIS MESSAGE IS NOT THE INTENDED RECIPIENT, OR THE EMPLOYEE OR AGENT RESPONSIBLE FOR DELIVERING THE MESSAGE TO THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION, DISTRIBUTION OR COPYING OF THIS COMMUNICATION IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE NOTIFY US IMMEDIATELY BY TELEPHONE, AND RETURN THE ORIGINAL MESSAGE TO US AT THE ABOVE ADDRESS VIA POSTAL SERVICE. THANK YOU.

MESSAGE: **Please see attached.**

Total number of pages including this cover sheet: _____

DATE SENT: 7/17/03 TIME SENT: _____ SENT BY: S. EDDINGTON

IF YOU DO NOT RECEIVE ALL PAGES, PLEASE CALL (312) 222-9350, EXT: 6486

OR (312) 923-2661; AFTER 6:00 P.M. & WEEKENDS (312) 222-9350, EXT. 6120, 6121

**IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA**

COLEMAN (PARENT) HOLDINGS INC.,)

Plaintiff,)

v.)

MORGAN STANLEY & CO., INC.,)

Defendant.)

Case No. 2003 CA 005045 AI

Judge Elizabeth I. Maass

NOTICE OF DEPOSITION

To: Thomas A. Clare, Esq.
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Joseph Ianno, Jr., Esq.
CARLTON FIELDS
222 Lake View Avenue, Suite 1400
West Palm Beach, FL 33401

PLEASE TAKE NOTICE that Plaintiff Coleman (Parent) Holdings, Inc. ("CPH") requests the deposition upon oral examination of Defendant Morgan Stanley & Co., Inc. pursuant to Florida Rule of Civil Procedure 1.310 on the date and at the time set forth below:

Morgan Stanley & Co., Inc.

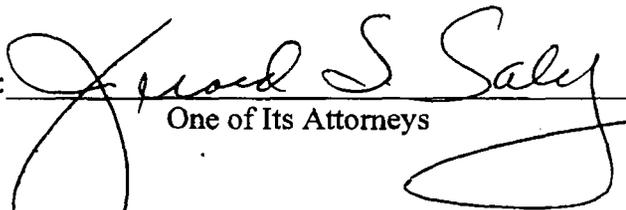
August 5, 2003 at 9:30 a.m.

The deposition will be recorded by stenographic means at the offices of Searcy Denney Scarola Barnhart & Shipley, P.C., 2139 Palm Beach Lakes Blvd., West Palm Beach, Florida. The deposition will be taken before a person authorized to administer oaths and will continue day to day until completed.

The deposition is being taken with respect to the topics described on the attached Exhibit A. Please designate one or more officers, directors, managing agents, or other persons to testify on your behalf and state the matters on which each person designated will testify.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by facsimile and mail to all counsel on the attached Service List, this 17th day of July, 2003.

COLEMAN (PARENT) HOLDINGS INC.

By: 
One of Its Attorneys

Jerold S. Solovy
Ronald L. Marnner
Robert T. Markowski
Deirdre E. Connell
JENNER & BLOCK, LLC
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

Jack Scarola
SEARCY DENNEY SCAROLA BARNHART &
SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409
(561) 686-6300

SERVICE LIST

Thomas A. Clare, Esq.
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Joseph Ianno, Jr., Esq.
CARLTON FIELDS
222 Lake View Avenue, Suite 1400
West Palm Beach, FL 33401

EXHIBIT A

CORPORATE DEPOSITION TOPICS

1. The corporate organizational structure of Morgan Stanley & Co., Inc. and its parents, subsidiaries, and affiliates.
2. The policies and procedures for maintaining and preserving electronic or hard copy documents and/or files of Morgan Stanley & Co., Inc.
3. The location and/or procedure for the collection of documents responsive to CPH's previously served Requests for Production of Documents.

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CASE NO: 03 CA-005045 AI

COLEMAN (PARENT) HOLDING INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

DOROTHY H. WILKEN
CLERK OF CIRCUIT COURT
CIRCUIT CIVIL DIVISION

JUL 28 2003

COPY / ORIGINAL
RECEIVED FOR FILING

VERIFIED MOTION TO ADMIT
THOMAS A. CLARE, PRO HAC VICE

Defendant Morgan Stanley & Co., Inc., pursuant Fla. R. Jud. Adm. 2.061, requests this Court to admit attorney Thomas A. Clare, *pro hac vice*, and in support of this Motion, states the following:

1. Defendant requests that this Court permit Thomas A. Clare, an attorney with the law firm of Kirkland & Ellis whose address is 655 15th Street, N.W. – 12th Floor, Washington, D.C. 20005, to appear *pro hac vice* and participate fully in this action as additional counsel on behalf of Defendant.

2. Mr. Clare has been admitted to practice before all courts in the Commonwealth of Virginia since October 11, 1995, and all courts in the District of Columbia since February 1, 1999. Mr. Clare also has been admitted to practice before the United States Court of Appeals for the Fourth Circuit and the United States District Courts for the Eastern District of Virginia and the District of Maryland. Mr. Clare is a member of the State Bar of Virginia and the Bar of

District of Columbia and is in good standing with respect to such memberships. Mr. Clare has not been disciplined in any jurisdiction.

3. Mr. Clare has read all the applicable provisions of The Rules of Judicial Administration and the Rules Regulating The Florida Bar.

4. This verified motion complies with the Rules of Judicial Administration.

5. The undersigned will remain associated with this matter at all stages as required by local rules.

6. Mr. Clare has previously filed a motion on May 29, 2001 for permission to appear in Florida state courts in *Siemens Information v. Qtera Corp.*, CL-99-12321 (15th Jud. Cir., Palm Beach County, Fla.). That case was terminated in October, 2001. The representation of Defendant in this matter commenced on May 8, 2003.

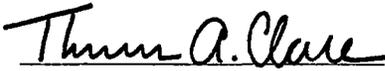
7. Mr. Clare will be associated with Joseph Ianno, Jr. for purposes of this representation. Mr. Ianno is a member in good standing of the Florida Bar.

8. A proposed order granting this Motion is attached hereto.

9. Counsel for Plaintiff has been consulted regarding this motion and has no objection.

WHEREFORE, Defendant respectfully requests that this Court enter an order admitting Thomas A. Clare, *pro hac vice* for the purpose of representing Defendant as counsel in connection with this action pending before this Court together with such other and further relief as the Court deems just and proper.

The undersigned verifies that he has knowledge of the facts stated herein, and that the statements in the foregoing motion are true and correct.



Thomas A. Clare

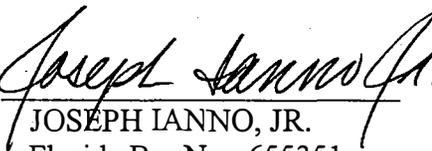
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to all counsel of record on the attached service list on this 28th day of July, 2003.

Thomas D. Yannucci, P.C.
Thomas A. Clare
Larissa Paule-Carres
Brett H. McGurk
KIRKLAND & ELLIS LLP
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

**COUNSEL FOR DEFENDANT,
MORGAN STANLEY & CO., INC.**

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

BY: 

JOSEPH IANNO, JR.
Florida Bar No: 655351

SERVICE LIST

<p>John Scarola, Esq. SEARCY, DENNEY, SCAROLA, BARNHARDT & SHIPLEY, P.A. 2139 Palm Beach Lakes Boulevard West Palm Beach, Florida 33409 Telephone: (561) 686-6300 Facsimile (561) 478-0754</p>	<p>Counsel for Plaintiff</p>
<p>Jerold S. Solovy, Esq. JENNER & BLOCK, LLC One IBM Plaza, Suite 4400 Chicago, Illinois 60611 Telephone: (312) 222-9350 Facsimile: (312) 840-7671</p>	<p>Counsel for Plaintiff</p>

IN THE CIRCUIT COURT OF THE
15TH JUDICIAL CIRCUIT IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 2003 CA 005045 AI

COLEMAN (PARENT) HOLDING INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

**ORDER GRANTING VERIFIED MOTION
TO ADMIT THOMAS A. CLARE PRO HAC VICE**

THIS CAUSE having come before the Court upon Defendant's Verified Motion to Admit Thomas A. Clare Pro Hac Vice, and the Court having been advised of the agreement of counsel and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that:

Defendant, Morgan Stanley & Co., Inc.'s Verified Motion to Admit Thomas A. Clare Pro Hac Vice is GRANTED.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this ____ day of July, 2003.

ELIZABETH T. MAASS
Circuit Court Judge

Copies furnished to:

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett H. McGurk
Larissa Paule-Carres
KIRKLAND & ELLIS
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005

John Scarola
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33409

Jerold S. Solovy
JENNER & BLOCK, LLC
One IBM Plaza
Suite 4400
Chicago, Illinois 60611

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CASE NO: 03 CA-005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

DOROTHY H. WILKEN
CLERK OF CIRCUIT COURT
CIRCUIT CIVIL DIVISION

JUL 28 2003

COPY / ORIGINAL
RECEIVED FOR FILING

VERIFIED MOTION TO ADMIT
BRETT H. MCGURK PRO HAC VICE

Defendant Morgan Stanley & Co., Inc. pursuant Fla. R. Jud. Adm. 2.061, requests this Court to admit attorney Brett H. McGurk, *pro hac vice*, and in support of this Motion, states the following:

1. Defendant requests that this Court permit Brett H. McGurk, an attorney with the law firm of Kirkland & Ellis LLP whose address is 655 15th Street, N.W. – 12th Floor, Washington, D.C. 20005, to appear *pro hac vice* and participate fully in this action as additional counsel on behalf of Defendant.

2. Mr. McGurk has been admitted to practice before all courts in the State of New York since December 11, 2000. Mr. McGurk also has been admitted to practice before the District of Columbia Court of Appeals. Mr. McGurk is a member of the State Bar of New York and is in good standing with respect to such membership. Mr. McGurk has not been disciplined in any jurisdiction.

3. Mr. McGurk has read all the applicable provisions of The Rules of Judicial Administration and the Rules Regulating The Florida Bar.

4. This verified motion complies with the Rules of Judicial Administration.

5. The undersigned will remain associated with this matter at all stages as required by local rules.

6. Mr. McGurk has not filed a motion for permission to appear in Florida state courts in the preceding five years. The representation of Defendant in this matter commenced on May 8, 2003.

7. Mr. McGurk will be associated with Joseph Ianno, Jr. for purposes of this representation. Mr. Ianno is a member in good standing of the Florida Bar.

8. A proposed order granting this Motion is attached hereto.

9. Counsel for Plaintiff has been consulted regarding this motion and has no objection.

WHEREFORE, Defendant respectfully requests that this Court enter an order admitting Brett H. McGurk, *pro hac vice* for the purpose of representing Defendant as counsel in connection with this action pending before this Court together with such other and further relief as the Court deems just and proper.

The undersigned verifies that he has knowledge of the facts stated herein, and that the statements in the foregoing motion are true and correct.


Brett H. McGurk

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to all counsel of record on the attached service list on this 28th day of July, 2003.

Thomas D. Yannucci, P.C.
Thomas A. Clare
Larissa Paule-Carres
Brett H. McGurk
KIRKLAND & ELLIS LLP
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

**COUNSEL FOR DEFENDANT,
MORGAN STANLEY & CO., INC.**

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

BY:


JOSEPH IANNO, JR.
Florida Bar No: 655351

SERVICE LIST

<p>John Scarola, Esq. SEARCY, DENNEY, SCAROLA, BARNHARDT & SHIPLEY, P.A. 2139 Palm Beach Lakes Boulevard West Palm Beach, Florida 33409 Telephone: (561) 686-6300 Facsimile (561) 478-0754</p>	<p>Counsel for Plaintiff</p>
<p>Jerold S. Solovy, Esq. JENNER & BLOCK, LLC One IBM Plaza, Suite 4400 Chicago, Illinois 60611 Telephone: (312) 222-9350 Facsimile: (312) 840-7671</p>	<p>Counsel for Plaintiff</p>

IN THE CIRCUIT COURT OF THE
15TH JUDICIAL CIRCUIT IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 2003 CA 005045 AI

COLEMAN (PARENT) HOLDING INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

**ORDER GRANTING VERIFIED MOTION
TO ADMIT BRETT H. MCGURK PRO HAC VICE**

THIS CAUSE having come before the Court upon Defendant's Verified Motion to Admit Brett H. McGurk Pro Hac Vice, and the Court having been advised of the agreement of counsel and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that:

Defendant, Morgan Stanley & Co., Inc.'s Verified Motion to Admit Brett H. McGurk Pro Hac Vice is GRANTED.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this ____ day of July, 2003.

ELIZABETH T. MAASS
Circuit Court Judge

Copies furnished to:

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett H. McGurk
Larissa Paule-Carres
KIRKLAND & ELLIS
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005

John Scarola
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33409

Jerold S. Solovy
JENNER & BLOCK, LLC
One IBM Plaza
Suite 4400
Chicago, Illinois 60611

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CASE NO: 03 CA-005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

DOROTHY H. WILKEN
CLERK OF CIRCUIT COURT
CIRCUIT COURT DIVISION

JUL 28 2003

COPY / ORIGINAL
RECEIVED FOR FILING

VERIFIED MOTION TO ADMIT
LARISSA PAULE-CARRES PRO HAC VICE

Defendant Morgan Stanley & Co., Inc., pursuant Fla. R. Jud. Adm. 2.061, requests this Court to admit attorney Larissa Paule-Carres, *pro hac vice*, and in support of this Motion, states the following:

1. Defendant requests that this Court permit Larissa Paule-Carres, an attorney with the law firm of Kirkland & Ellis LLP whose address is 655 15th Street, N.W. – 12th Floor, Washington, D.C. 20005, to appear *pro hac vice* and participate fully in this action as additional counsel on behalf of Defendant.

2. Ms. Paule-Carres has been admitted to practice before all courts in the Commonwealth of Virginia since November 1, 1999, and in all courts in the District of Columbia since June, 2000. Ms. Paule-Carres is a member of the State Bar of Virginia and the Bar of the District of Columbia and is in good standing with respect to such membership. Ms. Paule-Carres has not been disciplined in any jurisdiction.

3. Ms. Paule-Carres has read all the applicable provisions of The Rules of Judicial Administration and the Rules Regulating The Florida Bar.

4. This verified motion complies with the Rules of Judicial Administration.

5. The undersigned will remain associated with this matter at all stages as required by local rules.

6. Ms. Paule-Carres has not filed a motion for permission to appear in Florida state courts in the preceding five years. The representation of Defendant in this matter commenced on May 8, 2003.

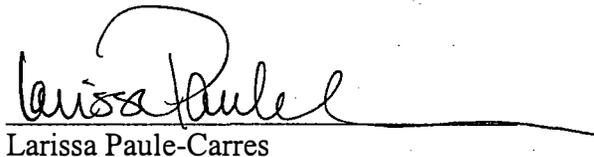
7. Ms. Paule-Carres will be associated with Joseph Ianno, Jr. for purposes of this representation. Mr. Ianno is a member in good standing of the Florida Bar.

8. A proposed order granting this Motion is attached hereto.

9. Counsel for Plaintiff has been consulted regarding this motion and has no objection.

WHEREFORE, Defendant respectfully requests that this Court enter an order admitting Larissa Paule-Carres, *pro hac vice* for the purpose of representing Defendant as counsel in connection with this action pending before this Court together with such other and further relief as the Court deems just and proper.

The undersigned verifies that she has knowledge of the facts stated herein, and that the statements in the foregoing motion are true and correct.


Larissa Paule-Carres

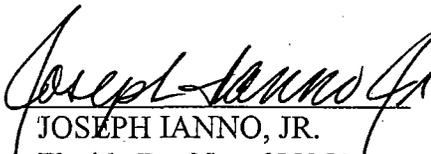
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to all counsel of record on the attached service list on this 28th day of July, 2003.

Thomas D. Yannucci, P.C.
Thomas A. Clare
Larissa Paule-Carres
Brett H. McGurk
KIRKLAND & ELLIS LLP
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

**COUNSEL FOR DEFENDANT,
MORGAN STANLEY & CO., INC.**

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

BY: 
JOSEPH IANNO, JR.
Florida Bar No: 655351

SERVICE LIST

<p>John Scarola, Esq. SEARCY, DENNEY, SCAROLA, BARNHARDT & SHIPLEY, P.A. 2139 Palm Beach Lakes Boulevard West Palm Beach, Florida 33409 Telephone: (561) 686-6300 Facsimile (561) 478-0754</p>	<p>Counsel for Plaintiff</p>
<p>Jerold S. Solovy, Esq. JENNER & BLOCK, LLC One IBM Plaza, Suite 4400 Chicago, Illinois 60611 Telephone: (312) 222-9350 Facsimile: (312) 840-7671</p>	<p>Counsel for Plaintiff</p>

IN THE CIRCUIT COURT OF THE
15TH JUDICIAL CIRCUIT IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 2003 CA 005045 AI

COLEMAN (PARENT) HOLDING INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

**ORDER GRANTING VERIFIED MOTION
TO ADMIT LARISSA PAULE-CARRES PRO HAC VICE**

THIS CAUSE having come before the Court upon Defendant's Verified Motion to Admit Larissa Paule-Carres Pro Hac Vice, and the Court having been advised of the agreement of counsel and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that:

Defendant, Morgan Stanley & Co., Inc.'s Verified Motion to Admit Larissa Paule-Carres Pro Hac Vice is GRANTED.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this ____ day of July, 2003.

ELIZABETH T. MAASS
Circuit Court Judge

Copies furnished to:

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett H. McGurk
Larissa Paule-Carres
KIRKLAND & ELLIS
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005

John Scarola
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33409

Jerold S. Solovy
JENNER & BLOCK, LLC
One IBM Plaza
Suite 4400
Chicago, Illinois 60611

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CASE NO: 03 CA-005045 AI

COLEMAN (PARENT) HOLDING INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

DOROTHY H. WILKEN
CLERK OF CIRCUIT COURT
CIRCUIT CIVIL DIVISION

JUL 28 2003

COPY / ORIGINAL
RECEIVED FOR FILING

VERIFIED MOTION TO ADMIT
THOMAS D. YANNUCCI, PRO HAC VICE

Defendant Morgan Stanley & Co., Inc., pursuant Fla. R. Jud. Adm. 2.061, requests this Court to admit attorney Thomas D. Yannucci, *pro hac vice*, and in support of this Motion, states the following:

1. Defendant requests that this Court permit Thomas D. Yannucci, an attorney with the law firm of Kirkland & Ellis whose address is 655 15th Street, N.W. – 12th Floor, Washington, D.C. 20005, to appear *pro hac vice* and participate fully in this action as additional counsel on behalf of Defendant.

2. Mr. Yannucci has been admitted to practice before all courts in the District of Columbia since December 18, 1981. Mr. Yannucci also has been admitted to practice before the United States Supreme Court; the United States Courts of Appeals for the District of Columbia Circuit, First Circuit, Second Circuit, Third Circuit, Fourth Circuit, Fifth Circuit, Sixth Circuit, Seventh Circuit, Eighth Circuit, Tenth Circuit and Eleventh Circuit; and the United States

District Courts for the District of Columbia, the Eastern District of Missouri, the Central District of Illinois, and the Eastern District of Wisconsin. Mr. Yannucci is a member of the Bar of District of Columbia and is in good standing with respect to such memberships. Mr. Yannucci has not been disciplined in any jurisdiction.

3. Mr. Yannucci has read all the applicable provisions of The Rules of Judicial Administration and the Rules Regulating The Florida Bar.

4. This verified motion complies with the Rules of Judicial Administration.

5. The undersigned will remain associated with this matter at all stages as required by local rules.

6. Mr. Yannucci has previously filed a motion on January 24, 2000 for permission to appear in Florida state courts in *Siemens Information v. Qtera Corp.*, CL 99-12321 (15th Jud. Cir., Palm Beach County, FL). That case was terminated in October, 2001. The representation of Defendant in this matter commenced on May 8, 2003.

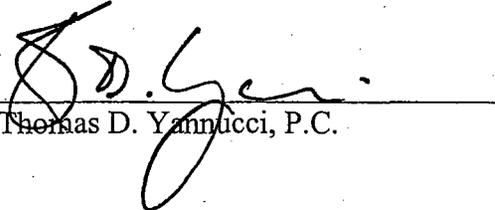
7. Mr. Yannucci will be associated with Joseph Ianno, Jr. for purposes of this representation. Mr. Ianno is a member in good standing of the Florida Bar.

8. A proposed order granting this Motion is attached hereto.

9. Counsel for Plaintiff has been consulted regarding this motion and has no objection.

WHEREFORE, Defendant respectfully requests that this Court enter an order admitting Thomas D. Yannucci, *pro hac vice* for the purpose of representing Defendant as counsel in connection with this action pending before this Court together with such other and further relief as the Court deems just and proper.

The undersigned verifies that he has knowledge of the facts stated herein, and that the statements in the foregoing motion are true and correct.


Thomas D. Yannucci, P.C.

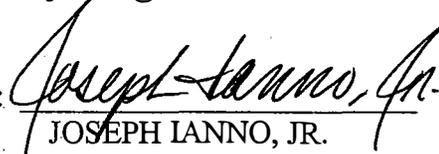
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to all counsel of record on the attached service list on this 28th day of July, 2003.

Thomas D. Yannucci, P.C.
Thomas A. Clare
Larissa Paule-Carres
Brett H. McGurk
KIRKLAND & ELLIS LLP
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

**COUNSEL FOR DEFENDANT,
MORGAN STANLEY & CO., INC.**

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

BY: 
JOSEPH IANNO, JR.
Florida Bar No: 655351

SERVICE LIST

<p>John Scarola, Esq. SEARCY, DENNEY, SCAROLA, BARNHARDT & SHIPLEY, P.A. 2139 Palm Beach Lakes Boulevard West Palm Beach, Florida 33409 Telephone: (561) 686-6300 Facsimile (561) 478-0754</p>	<p>Counsel for Plaintiff</p>
<p>Jerold S. Solovy, Esq. JENNER & BLOCK, LLC One IBM Plaza, Suite 4400 Chicago, Illinois 60611 Telephone: (312) 222-9350 Facsimile: (312) 840-7671</p>	<p>Counsel for Plaintiff</p>

IN THE CIRCUIT COURT OF THE
15TH JUDICIAL CIRCUIT IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 2003 CA 005045 AI

COLEMAN (PARENT) HOLDING INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

**ORDER GRANTING VERIFIED MOTION
TO ADMIT THOMAS D. YANNUCCI PRO HAC VICE**

THIS CAUSE having come before the Court upon Defendant's Verified Motion to Admit Thomas D. Yannucci Pro Hac Vice, and the Court having been advised of the agreement of counsel and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that:

Defendant, Morgan Stanley & Co., Inc.'s Verified Motion to Admit Thomas D. Yannucci Pro Hac Vice is GRANTED.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this ____
day of July, 2003.

ELIZABETH T. MAASS
Circuit Court Judge

Copies furnished to:

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett H. McGurk
Larissa Paule-Carres
KIRKLAND & ELLIS
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005

John Scarola
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33409

Jerold S. Solovy
JENNER & BLOCK, LLC
One IBM Plaza
Suite 4400
Chicago, Illinois 60611

Plaintiff has previously retained the foreign attorneys and the above-named law firm to provide legal representation in connection with this matter.

3. Jerold S. Solovy is a member in good standing of the following bars: U.S. Supreme Court; U.S. Court of Appeals for the following circuits: Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth and Federal; U.S. District Court for the Northern District of Illinois; U.S. District Court for the Southern District of Illinois; U.S. District Court for the District of Columbia; U.S. District Court for the Eastern District Court of Michigan; U.S. District Court for the Western District of Texas; and the Illinois Supreme Court. Mr. Solovy was admitted *pro hac vice* in the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County in the case of *Coleman (Parent) Holdings, Inc. v. Arthur Andersen LLP*, CA 01-06062AN. Mr. Solovy has never been disciplined, suspended, or disbarred by any court.

4. Ronald L. Marmer is a member in good standing of the following bars: U.S. Supreme Court; U.S. Court of Appeals for the Second, Sixth and Seventh Circuits; U.S. District Court for the Northern District of Illinois; the U.S. District Court for the Eastern District of Michigan; and the Illinois Supreme Court. Mr. Marmer was admitted *pro hac vice* in the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County in the case of *Coleman (Parent) Holdings, Inc. v. Arthur Andersen LLP*, CA 01-06062AN. Mr. Marmer has never been disciplined, suspended, or disbarred by any court.

5. Robert T. Markowski is a member in good standing of the following bars: U.S. Court of Appeals for the Seventh and Ninth Circuits; U.S. District Court for the Northern District of Illinois; U.S. District Court for the Central District of Illinois; U.S. District Court for the Eastern District of Michigan; and the Illinois Supreme Court. Mr. Markowski was admitted *pro hac vice* in

the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County in the case of *Coleman (Parent) Holdings, Inc. v. Arthur Andersen LLP*, CA 01-06062AN. Mr. Markowski has never been disciplined, suspended, or disbarred by any court.

6. Michael T. Brody is a member in good standing of the following bars: U.S. Court of Appeals for the Seventh and D.C. Circuits; U.S. District Court for the Northern District of Illinois; and the Illinois Supreme Court. Mr. Brody has not filed an application in any Florida state court to appear as counsel under Florida Rule of Judicial Administration 2.061 in the last five years. Mr. Brody has never been disciplined, suspended, or disbarred by any court.

7. Jeffrey T. Shaw is a member in good standing of the following bars: U.S. Supreme Court; U.S. Court of Appeals for the following circuits: Seventh, Tenth, D.C., and Federal; U.S. District Court for the Northern District of Illinois; and the Illinois Supreme Court. Mr. Shaw has not filed an application in any Florida state court to appear as counsel under Florida Rule of Judicial Administration 2.061 in the last five years. Mr. Shaw has never been disciplined, suspended, or disbarred by any court.

8. Deirdre E. Connell is a member in good standing of the following bars: U.S. Court of Appeals for the Seventh Circuit; U.S. District Court for the Northern District of Illinois, and the Illinois Supreme Court. Ms. Connell has not filed an application in any Florida state court to appear as counsel under Florida Rule of Judicial Administration 2.061 in the last five years. Ms. Connell has never been disciplined, suspended, or disbarred by any court.

9. Elizabeth A. Coleman is a member in good standing of the following bars: U.S. Court of Appeals for the Seventh Circuit; U.S. District Court for the Northern District of Illinois, U.S. District Court for the Western District of Michigan; and the Illinois Supreme Court. Ms. Coleman has not filed an application in any Florida state court to appear as counsel under Florida Rule of

Judicial Administration 2.061 in the last five years. Ms. Coleman has never been disciplined, suspended, or disbarred by any court.

10. Denise K. Bowler is a member in good standing of the following bars: U.S. District Court for the Northern District of Illinois and the Illinois Supreme Court. Ms. Bowler has not filed an application in any Florida state court to appear as counsel under Florida Rule of Judicial Administration 2.061 in the last five years. Ms. Bowler has never been disciplined, suspended, or disbarred by any court.

11. John W. Joyce is a member in good standing of the following bars: U.S. District Court for the Northern District of Illinois, U.S. Court of Appeals for the Seventh Circuit, the Illinois Supreme Court, and the Louisiana Supreme Court. Mr. Joyce has not filed an application in any Florida state court to appear as counsel under Florida Rule of Judicial Administration 2.061 in the last five years. Mr. Joyce has never been disciplined, suspended, or disbarred by any court.

12. Christopher M. O'Connor is a member in good standing of the following bars: U.S. District Court for the Northern District of Illinois and the Illinois Supreme Court. Mr. O'Connor has not filed an application in any Florida state court to appear as counsel under Florida Rule of Judicial Administration 2.061 in the last five years. Mr. O'Connor has never been disciplined, suspended, or disbarred by any court.

13. Stephen P. Baker is a member in good standing of the following bars: U.S. District Court for the Northern District of Illinois and the Illinois Supreme Court. Mr. Baker has not filed an application in any Florida state court to appear as counsel under Florida Rule of Judicial Administration 2.061 in the last five years. Mr. Baker has never been disciplined, suspended, or disbarred by any court.

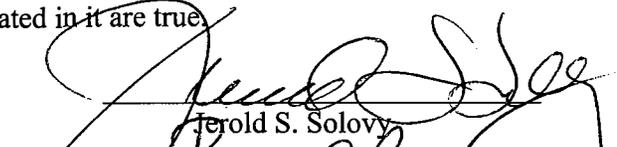
14. Daniel E. Shaw is a member in good standing of the following bars: U.S. District Court for the Northern District of Illinois and the Illinois Supreme Court. Mr. Shaw has not filed an application in any Florida state court to appear as counsel under Florida Rule of Judicial Administration 2.061 in the last five years. Mr. Shaw has never been disciplined, suspended, or disbarred by any court.

15. The attorneys seeking admission have read all applicable provisions of the Florida Rules of Judicial Administration and the Rules Regulating the Florida Bar, and this motion complies with those rules.

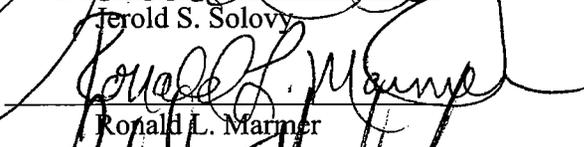
16. Jack Scarola has been a member of the Florida Bar since 1973, Florida Bar No. 169440, and consents to act as co-counsel with the foreign attorneys in this action.

WHEREFORE, Plaintiff moves this Court for an Order permitting Jerold S. Solovy, Ronald L. Marmer, Robert T. Markowski, Michael T. Brody, Jeffrey T. Shaw, Deirdre E. Connell, Elizabeth A. Coleman, Denise K. Bowler, John W. Joyce, Christopher M. O'Connor, Stephen P. Baker, and Daniel E. Shaw to appear on behalf of Plaintiff's counsel in this action.

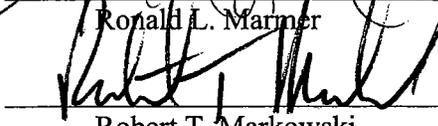
Under penalty of perjury, I declare that I have read the foregoing motion and with respect to my credentials the facts stated in it are true.



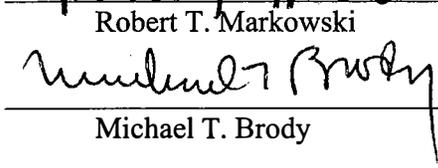
Jerold S. Solovy



Ronald L. Marmer



Robert T. Markowski



Michael T. Brody



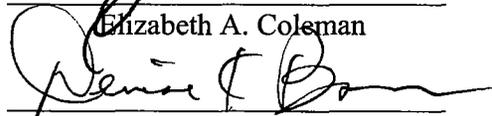
Jeffrey T. Shaw



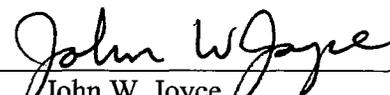
Deirdre E. Connell



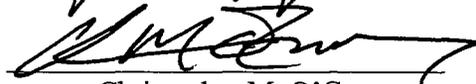
Elizabeth A. Coleman



Denise K. Bowler



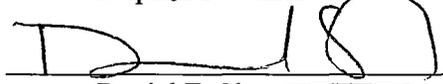
John W. Joyce



Christopher M. O'Connor



Stephen P. Baker



Daniel E. Shaw

Respectfully submitted,

By: 

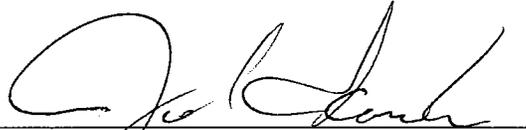
John Scarola
Fla. Bar No. 169440
Counsel for Plaintiff

CERTIFICATE OF SERVICE

_____The undersigned, an attorney, hereby certifies that a copy of the foregoing has been furnished by U.S. Mail and facsimile to the following counsel for Defendant on this 29th day of July, 2003.

Joseph Ianno, Jr.
CARLTON FIELDS
222 Lake View Avenue, Suite 1400
West Palm Beach, FL 33401
Tel.: (561) 659-7070
Fax: (561) 659-7368

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett H. McGurk
KIRKLAND & ELLIS
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Tel.: (202) 879-5000
Fax: (202) 879-5200



John Scarola
SEARCY DENNEY SCAROLA BARNHART
& SHIPLEY, P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33409
Tel.: (561) 686-6300

Counsel for Plaintiff

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 2003 CA 005045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,

Defendant(s).

NOTICE OF DEPOSITION

TO: Counsel on the attached list

PLEASE TAKE NOTICE that Plaintiff Coleman (Parent) Holdings, Inc., hereby notices the deposition upon oral examination of the Custodian of Records, Bank of America National Trust and Savings Association pursuant to Florida Rule of Civil Procedure 1.410 on the date and at the time set forth below:

Custodian of Records
Bank of America National Trust
and Savings Association

August 15, 2003 at 9:30 a.m.

The witness will be requested to bring to the deposition documents specified on Attachment A.

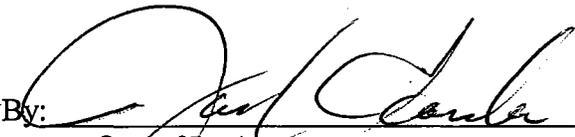
The deposition will be recorded by stenographic means at the offices of Searcy Denney Scarola Barnhart & Shipley, P.C., 2139 Palm Beach Lakes Blvd., West Palm Beach, Florida.

The deposition will be taken before a person authorized to administer oaths and will continue until completed.

MSSFI V. MACANDREWS, ET AL.
2003 CA 005045 AI

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by
telex and by overnight mail to all counsel on the attached Service List, this 29th day of
July, 2003.

COLEMAN (PARENT) HOLDINGS, INC.

By: 
One of Its Attorneys

Jerold S. Solovy
Ronald L. Marmer
Robert T. Markowski
Deirdre E. Connell
JENNER & BLOCK, LLC
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

Jack Scarola
SEARCY DENNEY SCAROLA
BARNHART & SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409
(561) 686-6300

MSSFI V. MACANDREWS, ET AL.
2003 CA 005045 AI

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block, LLC
One IBM Plaza
Suite 4400
Chicago, IL 60611

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 2003 CA 005045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,

Defendant(s).

SUBPOENA DUCES TECUM

THE STATE OF FLORIDA

TO: Custodian of Records
Bank of America National Trust and
Savings Association
625 N. Flagler Drive
West Palm Beach, FL 33401

YOU ARE COMMANDED to appear for deposition at Searcy Denney Scarola Barnhart
& Shipley, P.A., 2139 Palm Beach Lakes Boulevard, West Palm Beach, FL, 33409 on the 15th
day of August, 2003 at 9:30 a.m. and to have with you at that time and place the documents
specified on Attachment A.

If you fail to:

- 1) Appear as specified; or
- 2) Furnish the records instead of appearing as provided above; or

MSSFI V. MACANDREWS, ET AL.
2003 CA 005045 AI

3) Object to this subpoena,

You may be in contempt of court. You are subpoenaed to appear by the following attorney, and unless excused from this subpoena by this attorney or the court, you shall respond to this subpoena as directed.

DATED this 29th day of July, 2003.



JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 478-0754
Attorneys for Plaintiff

CERTIFICATION OF RESPONSE TO
SUBPOENA DUCES TECUM

STATE OF FLORIDA
COUNTY OF _____

The undersigned, as custodian of records for Bank of America National Trust and Savings Association, certifies that the attached documents consisting of ____ pages represents a true copy of all items within my possession, custody or control which are described in the Subpoena Duces Tecum served on me in the above styled action and each page is numbered by me for identification. Production is complete and has been numbered by the custodian of records.

It is further certified that originals of the items produced are maintained under the direction, custody and control of the undersigned.

The foregoing Certification was acknowledged before me, an officer duly authorized in the State and County aforesaid to take acknowledgments, this _____ day of _____, 20____, who:

- is personally known to me; or
- has produced _____ as identification; and who:
- did or
- did not, take an oath,

MSSF I V. MACANDREWS, ET AL.
2003 CA 005045 AI

and who executed the foregoing certification, and who acknowledged the foregoing certification
to be freely and voluntarily executed for the purposes therein recited.

Notary Public, State of Florida at Large

My Commission Expires:

ATTACHMENT A

**SUBPOENA TO CUSTODIAN OF RECORDS OF
BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION**

You are hereby requested to produce the following documents pursuant to the definitions and instructions contained herein:

DOCUMENTS REQUESTED

1. All documents concerning synergies that might be achieved from a business combination of Sunbeam, Coleman, Signature Brands, and First Alert, or any combination thereof.
2. All documents concerning the potential or actual integration of Coleman, First Alert, and/or Signature Brands with Sunbeam, including, but not limited to, studies, reports, analyses, evaluations, projections, estimates, comments, or other work, performed by Coopers & Lybrand, Morgan Stanley, MSSF, Bank of America, or First Union.
3. All documents concerning any evaluation or assessment of the Bank Facilities, either prior to or after March 31, 1998, by you or any of the Lenders, including, but not limited to, any credit review or portfolio review, credit review sheets, call reports, contact reports, credit approval forms, portfolio forms, credit risk reviews, and covenant compliance reports.
4. All communications by and among the Lenders concerning the Credit Agreement, the Bank Facilities, Sunbeam, Coleman, or the Coleman Transaction.
5. All documents concerning the Lenders' plans or efforts to syndicate or sell off any portion of the Lenders' Commitments, as reflected in Schedule 2.01 of the Credit Agreement, including, but not limited to, information packages provided to potential lenders, lists or designations of potential lenders, communications with potential lenders, expressions of

interest and/or commitment made by any potential lender, and/or presentations or handouts used at lender group meetings.

6. All documents concerning Sunbeam's intention to draw down any portion of the Credit Agreement, specifically including, but not limited to, any and all written Borrowing Requests.

7. All documents concerning whether or not you or any of the Lenders considered exercising their right to terminate service under the Credit Agreement following any material adverse change in the financial status of Sunbeam.

8. All documents concerning any offer to buy Reorganized Sunbeam, or the sale, or possible sale of Reorganized Sunbeam or any subsidiary or material group of assets thereof.

9. All documents concerning your efforts to have Sunbeam retain or maintain your lending services both prior to and after the closing of the Bank Facilities.

10. All documents reflecting all fees and expenses paid by Sunbeam to you including, but not limited to, any Documentation Agent (as defined in the Credit Agreement) fee and any other fee related to the Credit Agreement.

11. All documents concerning the Bank Facilities, including, but not limited to, the sources and uses of the Bank Facilities, the decision to close the Bank Facilities, and the closing of the Bank Facilities.

12. All documents concerning any investigation, analysis, or due diligence of Sunbeam conducted by you or on your behalf or by Morgan Stanley in 1997 or 1998.

13. All documents concerning any investigation, analysis, or due diligence of Coleman or CPH conducted by you or on your behalf or by Morgan Stanley in 1997 or 1998.

14. All documents concerning the negotiation and signing of the February 27, 1998 Agreements.

15. All documents concerning the closing of the Coleman Transaction, including, without limitation, all documents concerning the decision to close the Coleman Transaction.

16. All documents concerning the meetings of Sunbeam's Board of Directors.

17. All documents concerning any valuation of Sunbeam or Sunbeam securities.

18. All documents concerning the stock market's valuation of Sunbeam securities, including, without limitation, documents describing or analyzing the increase or decline in the market price of Sunbeam stock in any portion of the period from and including July 1, 1996 through and including December 31, 1998.

19. All documents concerning your role as Documentation Agent for the Credit Agreement or Bank Facilities.

20. All documents concerning your April 28, 1998 meeting with Sunbeam, First Union, MSSF and/or Morgan Stanley, including, but not limited to, all notes taken of or during the meeting and documents memorializing, describing, or referring to the meeting.

21. All documents concerning any amendment to the Credit Agreement, including, but not limited to, the April 1998, June 1998, and July 1998 amendments. Your response should include, but is not limited to, all documents concerning the reasons for the amendments.

22. All documents concerning your meetings with Sunbeam, First Union, MSSF and/or Morgan Stanley at which the topics of Sunbeam or the Bank Facilities were

discussed including, but not limited to, all notes taken of or during the meeting and documents concerning the meeting. Your response should include documents from the period after the Bank Facilities closed on March 31, 1998.

23. All documents concerning the lien placed by you and/or MSSF and First Union on Coleman stock owned by Sunbeam, including, but not limited to, documents concerning the reason or decision to seek the lien.

24. All documents concerning the collateral for the Bank Facilities, including, but not limited to, all documents evaluating or assessing the value of that collateral.

25. All documents concerning the settlement agreement between CPH and Sunbeam dated August 12, 1998.

26. All documents concerning any write-off or loss reserve you have taken against the Bank Facilities.

27. All documents concerning your rating of the Bank Facilities and any change made to that rating.

28. All documents concerning any distribution you received as part of Sunbeam's bankruptcy reorganization plan, including, but not limited to, the value of the Sunbeam stock you received, and all documents evaluating or assessing the value of that distribution.

29. All documents concerning Sunbeam's decision to file for bankruptcy.

30. All documents concerning Sunbeam's plan of reorganization.

31. All documents concerning any settlement or compromise reached with the Official Committee of Unsecured Creditors of Sunbeam Corporation.

32. All documents concerning any valuation of Coleman or Coleman securities.
33. All documents concerning Sunbeam's or Coleman's financial statements and/or Sunbeam's restated financial statements.
34. All documents concerning the increase in the size of the Subordinated Debenture Offering from \$500 million to \$750 million.
35. All documents concerning the decrease in the amount of the Bank Facilities from \$2.0 billion to \$1.7 billion.
36. All documents concerning any draft or executed "comfort letters" prepared in connection with the Subordinated Debenture Offering.
37. All documents concerning the sale of Subordinated Debentures, including, without limitation, documents concerning road shows, communications with potential investors, or communications with or among Morgan Stanley's sales personnel.
38. All documents concerning the Subordinated Debenture Offering, including, but not limited to the pricing, conversion features, and/or "book of demand" for the Subordinated Debentures.
39. All documents concerning the events that took place on March 19, 1998 at Global Financial Press, including, without limitation, documents concerning Lawrence Bornstein and/or John Tyree.
40. All documents concerning the "bring-down" due diligence for the Subordinated Debenture Offering.
41. All documents concerning Sunbeam's first quarter 1998 sales and/or earnings.

42. All documents concerning the closing of the Subordinated Debenture Offering including, without limitation, all documents concerning the decision to close the Subordinated Debenture Offering.

43. All documents concerning any press releases or any statement contained in any press release by Sunbeam bearing the following dates or issued on or about October 23, 1997, March 19, 1998, April 3, 1998, May 9, 1998, June 15, 1998, June 25, 1998, June 30, 1998, October 20, 1998, or November 12, 1998.

44. All documents concerning communications relating to Sunbeam, Coleman, or CPH, concerning the subject of the Coleman Transaction or the Bank Facility, including, without limitation, internal communications within Bank of America or communications between or among Bank of America and Sunbeam; Skadden, Arps, Slate, Meagher & Flom LLP; Coopers & Lybrand; Llama Company; Arthur Andersen LLP; Sard Verbinnen & Co., Inc.; Hill & Knowlton, Inc.; Coleman; Credit Suisse First Boston; CPH; Mafco.; Wachtell Lipton, Rosen & Katz; Davis Polk & Wardwell; or any other person or company, and/or any of their respective employees, agents, or representatives.

45. All documents concerning any inquiry from, or any communication between or among you and any Sunbeam investor, potential investor, securities or financial analyst, or rating agency relating to Sunbeam.

46. All documents concerning any meeting between and among you, Sunbeam, Arthur Andersen, Coopers & Lybrand, Morgan Stanley, MSSF, First Union, Coleman, First Alert, or Signature Brands related to the 1998 acquisitions, the integration of the acquisitions, including, but not limited to, documents prepared for, disseminated at, utilized during, or prepared after such meetings.

47. All documents concerning the Coleman Transaction.

48. All documents concerning Albert Dunlap and/or Russell Kersh.

49. Organizational charts, memoranda, or similar documents that describe the business organizational structure and the administrative, management, and reporting structure of Bank of America from and including January 1, 1997 through and including December 31, 1998.

50. All documents concerning Bank of America's policies, procedures, manuals, guidelines, reference materials, or checklists that were in effect during any period from and including January 1, 1997 through and including December 31, 1998 for the performance of due diligence, including, without limitation, due diligence performed in connection with underwriting credit facilities.

51. All of your document retention or document destruction policies or procedures or similar procedures for the preservation, storage, destruction, back-up or deletion of documents of any kind, including electronic or hard copy versions of documents, for any time during 1996 through the present, including, without limitation, any amendment to any such policies or procedures, schedules or related documents, any and all records concerning adherence to and failure to adhere to or abide by any such policies or procedures, and any memoranda or other instructions concerning the obligation and procedures to be utilized to preserve all relevant documents, including without limitation evidence concerning the Litigations, the Arbitrations, and the SEC Administrative Proceedings.

52. All documents or other information you have provided or produced to any party (whether voluntarily or in response to document requests, subpoena duces tecum, interrogatories, requests for admission, or other requests for information and/or documents) in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings (including,

without limitation, any reports, communications, filings, testimony, legal memoranda, statements, or other documents submitted to the Securities & Exchange Commission or any other party). Your response should include:

- a. All discovery requests, subpoenas duces tecum, interrogatories, or requests for admissions served on you in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings;
- b. All responses and/or objections that you provided or produced in response to any discovery request, subpoena duces tecum, interrogatories, or requests for admission served on you in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings; and
- c. All privilege logs you prepared in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings with respect to documents that you withheld from production in response to any document requests, subpoenas duces tecum, or other request for information and/or documents.

53. All communications concerning any discovery request, subpoena duces tecum, interrogatories, or requests for admission served on you in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

54. All documents you have provided to or received from the SEC, the Attorney General of New York, or any other governmental or regulatory body concerning Sunbeam or the Coleman Transaction.

55. All motions, memoranda, briefs, rulings, orders, or transcripts of any proceeding concerning any discovery request, subpoena, or other request for information and/or documents in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

56. All transcripts of and exhibits to any depositions, recorded statements, affidavits or hearings held in connection with any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

57. All documents obtained by you or produced to you by other parties, third parties, or non-parties (whether voluntarily or in response to any document requests, subpoenas duces tecum, or other process served by you or any other party) concerning Sunbeam or the Coleman Transaction.

58. All affidavits, declarations, or other testimonial statements filed or submitted in connection with any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

DEFINITIONS

1. "Arbitrations" means Albert J. Dunlap and Sunbeam Corporation, No. 32 160 00088 99 (AAA); and Russell A. Kersh and Sunbeam Corporation, No. 32 160 00091 99 (AAA).

2. "Bank Facility" means the Credit Agreement, including amendments, and all funds extended by MSSF, First Union, and/or Bank of America to Sunbeam pursuant to the Credit Agreement, including, but not limited to, Tranche A, Tranche B, and the Revolving Credit Facility.

3. "Bank of America" means Bank of America National Trust and Savings Association and any of its subsidiaries, divisions, affiliates, predecessors, successors, joint

ventures, present and former officers, directors, employees, representatives, and agents, and all other persons acting or purporting to act on its behalf.

4. “Borrowing Request” means any request by Sunbeam for a Borrowing in accordance with Section 2.03 of the Credit Agreement.

5. “Coleman” means The Coleman Company, Inc. and any of its predecessors, successors, subsidiaries, and present and former officers, directors, and employees.

6. “CPH” means Coleman (Parent) Holdings Inc., Coleman Worldwide Corporation, CLN Holdings Inc., and any of their predecessors, successors, subsidiaries, and present and former officers, directors, and employees.

7. “Coleman Transaction” means the transaction contemplated by the February 27, 1998 Agreements.

8. “Communication” means the transmittal of information (in the form of facts, ideas, inquiries or otherwise) by letter, memorandum, facsimile, orally, electronically or otherwise.

9. “Concerning” means concerning, reflecting, relating to, referring to, describing, evidencing, or constituting.

10. “Coopers & Lybrand” means the former Coopers & Lybrand LLP (now known as PricewaterhouseCoopers LLP), and any of its predecessors, successors, affiliates, subsidiaries, and present and former partners, employees, representatives, and agents.

11. “Credit Agreement” means that agreement entered into by Sunbeam Corporation, as borrower, with MSSF, First Union, and Bank of America, as Lenders, dated March 30, 1998 and all amendments thereto.

12. "Documents" shall be given the broad meaning provided in Rule 1.350 of the Florida Rules of Civil Procedure and refers to any form or means, whether physical, visual, or electronic, in or by which words, numbers, or ideas are recorded or preserved, whether fixed in tangible medium or electronically stored, including any and all drafts of any final document. The word "documents" shall include, by way of example and not by way of limitation, all of the following: papers, correspondence, trade letters, envelopes, memoranda, telegrams, cables, notes, messages, reports, studies, press releases, comparisons, books, accounts, checks, audio and video recordings and transcriptions thereof, pleadings, testimony, articles, bulletins, pamphlets, brochures, magazines, questionnaires, surveys, charts, newspapers, calendars, desk calendars, pocket calendars, lists, logs, publications, notices, diagrams, instructions, diaries, minutes for meetings, corporate minutes, orders, resolutions, agendas, memorials or notes of oral communications, whether by telephone or face-to-face, contracts, agreements, drafts of or proposed contracts or agreements, memoranda of understanding, letters of intent, computer tapes, computer drives or memories, computer diskettes or disks, e-mail, CD-ROMs, or any other tangible thing on which any handwriting, typing, printing, photostatic, electronic, or other form of communication or information is recorded or reproduced, together with all notations on any of the foregoing, all originals, file copies, or other unique copies of the foregoing, and all versions or drafts thereof, whether used or not.

13. "February 27, 1998 Agreements" means (a) the Agreement and Plan of Merger dated as of February 27, 1998 among Sunbeam Corp., Laser Acquisition Corp., CLN Holdings Inc. and Coleman (Parent) Holdings Inc. and (b) the Agreement and Plan of Merger dated as of February 27, 1998 among Sunbeam Corp., Camper Acquisition Corp., and The Coleman Company, Inc.

14. “Financial Statements” means, without limitation, balance sheets, statements of income, earnings, retained earnings, sources and applications of funds, cash flow projections, notes to each such statements, or any other notes which pertain to the past or present financial condition of Sunbeam, whether any of the foregoing is audited or unaudited, whether final, interim or pro forma, complete or partial, consolidated, yearly, monthly, or otherwise.

15. “First Alert” means First Alert, Inc., and any of its predecessors, successors, affiliates, subsidiaries, and present and former officers, directors, employees, representatives, and agents.

16. “First Union” means First Union National Bank (now known as Wachovia Bank, National Association) and any of its predecessors, successors, affiliates, subsidiaries, and present and former officers, directors, employees, representatives, and agents.

17. “Lenders” means the entities listed on Schedule 2.01 of the Credit Agreement under the heading “Lenders” and any other Person that shall have become a party to the Credit Agreement as a Lender pursuant to an assignment and acceptance.

18. “Litigations” means In Re Sunbeam Securities Litigation, 98-8258-Civ.-Middlebrooks (S.D. Fla.); Camden Asset Management, L.P., et al. v. Sunbeam Corporation, et al., 98-8773-Civ.-Middlebrooks and 98-8275-Civ.-Middlebrooks (S.D. Fla.); Krim v. Dunlap, et al., No. CL983168AD (15th Jud. Cir., Fla.); Stapleton v. Sunbeam Corp., et al., No. 98-1676-Civ.-King (S.D. Fla.); Sunbeam Corp. v. PricewaterhouseCoopers LLP, No. CL005444AN (15th Jud. Cir., Fla.); In re Sunbeam Corp., No. 01-40291 (AJG) (Bankr. S.D.N.Y.) and every adversary proceeding therein; SEC v. Dunlap, et al., No. 01-8437-Civ.-Middlebrooks (S.D. Fla.); Oaktree Capital Management LLC v. Arthur Andersen LLP, No. BC257177 (L.A. Cty., CA); and

Coleman (Parent) Holdings Inc. v. Arthur Andersen LLP, et al., No. CA 01-06062AN (15th Jud. Cir., Fla).

19. “Mafco” means MacAndrews & Forbes Holdings Inc. and any of its predecessors, successors, subsidiaries, and present and former officers, directors, and employees.

20. “Morgan Stanley” means Morgan Stanley & Co., Inc. and any of its predecessors, successors, affiliates, subsidiaries, and present and former officers, directors, partners, employees, representatives, and agents.

21. “MSSF” means Morgan Stanley Senior Funding, Inc. and any of its predecessors, successors, affiliates, subsidiaries, and present and former officers, directors, partners, employees, representatives, and agents.

22. “Person” means any natural person, corporation, limited liability company, trust, joint venture, association, company, partnership, governmental authority, or other entity.

23. “Reorganized Sunbeam” means Sunbeam Corporation on and after the effective date of Sunbeam’s chapter 11 plan of reorganization as filed with the United States Bankruptcy Court in the Southern District of New York.

24. “SEC Administrative Proceedings” means In the Matter of Sunbeam Corp., SEC Administrative Proceeding File No. 3-10481, and In the Matter of David C. Fannin, SEC Administrative Proceeding File No. 3-10482.

25. “SEC” means the Securities and Exchange Commission.

26. “Signature Brands” means Signature Brands USA, Inc. and any of its predecessors, successors, affiliates, subsidiaries, and present and former officers, directors, employees, representatives, and agents.

27. “Subordinated Debentures” means Sunbeam’s Zero Coupon Convertible Senior Subordinated Debentures Due 2018.

28. “Subordinated Debenture Offering” means the offering of Sunbeam’s Subordinated Debentures.

29. “Sunbeam” means Sunbeam Corporation and any of its predecessors, successors, affiliates, subsidiaries, and present and former officers, directors, employees, representatives, and agents.

30. “You” or “Your” means Bank of America and any of its subsidiaries, divisions, predecessors, successors, present or former employees, representatives, agents, attorneys, accountants, advisors, or anyone acting or purporting to act on its behalf.

INSTRUCTIONS

1. Documents shall be produced as they are kept in the usual course of business, or organized and labeled to correspond to the categories in this Request. Documents attached to each other should not be separated. Documents consisting of items previously produced in the Litigations, Arbitrations, and/or SEC Administrative Proceedings with Bates numbering shall be produced in Bates number order.

2. All documents shall be produced in the file folder, envelope or other container in which the documents are kept or maintained by you. If, for any reason, the container cannot be produced, produce copies of all labels or other identifying marks.

3. The relevant period, unless otherwise indicated, shall be from **January 1, 1996 through the date of trial of this matter**, and shall include all documents and information which relate in whole or in part to such period, or to events or circumstances during such period,

even though dated, prepared, generated or received prior or subsequent to that period. Please supplement or correct your responses to these requests if, at any time, you become aware that your responses are incomplete or incorrect in any respect.

4. If you claim the attorney-client privilege, or any other privilege or work-product protection for all or any portion of a document, you shall provide a privilege log that describes the withheld material sufficiently to allow CPH and Mafco to test the privilege or protection asserted.

5. The following rules of construction apply:

a. The connectives “and” and “or” shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery requests all responses that might otherwise be outside of their scope;

b. The term “including” shall be construed to mean “without limitation”; and

c. The use of the singular form of any word includes the plural and vice versa.

MACANDREWS & FORBES HOLDINGS INC.
and COLEMAN (PARENT) HOLDINGS INC.

By: _____
One of Their Attorneys

Jerold S. Solovy
Ronald L. Marnmer
Robert T. Markowski
Deirdre E. Connell
JENNER & BLOCK, LLC
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

Jack Scarola
SEARCY DENNEY SCAROLA BARNHART
& SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33402-3626
(561) 686-6300

Dated: July __, 2003

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 2003 CA 005045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,

Defendant(s).

NOTICE OF DEPOSITION

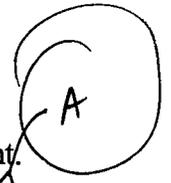
TO: Counsel on the attached list

PLEASE TAKE NOTICE that Plaintiff Coleman (Parent) Holdings, Inc., hereby notices the deposition upon oral examination of the Custodian of Records, Bank of America National Trust and Savings Association pursuant to Florida Rule of Civil Procedure 1.410 on the date and at the time set forth below:

Custodian of Records
Bank of America National Trust
and Savings Association

August 15, 2003 at 9:30 a.m.

The witness will be requested to bring to the deposition documents specified on Attachment.



The deposition will be recorded by stenographic means at the offices of Searcy Denney Scarola Barnhart & Shipley, P.C., 2139 Palm Beach Lakes Blvd., West Palm Beach, Florida. The deposition will be taken before a person authorized to administer oaths and will continue until completed.

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 2003 CA 005045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,

Defendant(s).

NOTICE OF DEPOSITION

TO: Counsel on the attached list

PLEASE TAKE NOTICE that Plaintiff Coleman (Parent) Holdings, Inc., hereby notices the deposition upon oral examination of the Custodian of Records, Wachovia Bank, NA pursuant to Florida Rule of Civil Procedure 1.410 on the date and at the time set forth below:

Custodian of Records
Wachovia Bank, NA

August 15, 2003 at 1:30 p.m.

The witness will be requested to bring to the deposition documents specified on Attachment A.

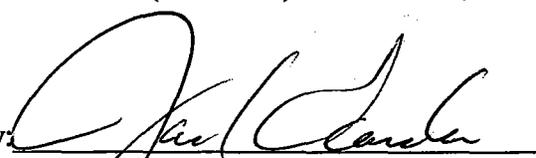
The deposition will be recorded by stenographic means at the offices of Searcy Denney Scarola Barnhart & Shipley, P.C., 2139 Palm Beach Lakes Blvd., West Palm Beach, Florida.

The deposition will be taken before a person authorized to administer oaths and will continue until completed.

MSSFI V. MACANDREWS, ET AL.
2003 CA 005045 AI

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by
telefax and by overnight mail to all counsel on the attached Service List, this 29th day of
July, 2003.

COLEMAN (PARENT) HOLDINGS, INC.

By: 

One of Its Attorneys

Jerold S. Solovy
Ronald L. Marmer
Robert T. Markowski
Deirdre E. Connell
JENNER & BLOCK, LLC
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

Jack Scarola
SEARCY DENNEY SCAROLA
BARNHART & SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409
(561) 686-6300

MSSFI V. MACANDREWS, ET AL.
2003 CA 005045 AI

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block, LLC
One IBM Plaza
Suite 4400
Chicago, IL 60611

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 2003 CA 005045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff(s).

vs.

MORGAN STANLEY & CO., INC.,

Defendant(s).

SUBPOENA DUCES TECUM

THE STATE OF FLORIDA

TO: Custodian of Records
Wachovia Bank, NA
777 S. Flagler Drive
West Palm Beach, FL 33401

YOU ARE COMMANDED to appear for deposition at Searcy Denney Scarola Barnhart & Shipley, P.A., 2139 Palm Beach Lakes Boulevard, West Palm Beach, FL, 33409 on the 15th day of August, 2003 at 1:30 p.m. and to have with you at that time and place the documents specified on Attachment A.

If you fail to:

- 1) Appear as specified; or
- 2) Furnish the records instead of appearing as provided above; or

MSSFV V. MACANDREWS, ET AL.
2003 CA 005045 AI

3) Object to this subpoena,

You may be in contempt of court. You are subpoenaed to appear by the following attorney, and unless excused from this subpoena by this attorney or the court, you shall respond to this subpoena as directed.

DATED this 29th day of July, 2003.



JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 478-0754
Attorneys for Plaintiff

CERTIFICATION OF RESPONSE TO
SUBPOENA DUCES TECUM

STATE OF FLORIDA
COUNTY OF _____

The undersigned, as custodian of records for Wachovia Bank, NA, certifies that the attached documents consisting of ____ pages represents a true copy of all items within my possession, custody or control which are described in the Subpoena Duces Tecum served on me in the above styled action and each page is numbered by me for identification. Production is complete and has been numbered by the custodian of records.

It is further certified that originals of the items produced are maintained under the direction, custody and control of the undersigned.

The foregoing Certification was acknowledged before me, an officer duly authorized in the State and County aforesaid to take acknowledgments, this _____ day of _____, 20____, who:

- is personally known to me; or
- has produced _____ as identification; and who:
- did or
- did not, take an oath,

MSSF I V. MACANDREWS, ET AL.
2003 CA 005045 AI

and who executed the foregoing certification, and who acknowledged the foregoing certification
to be freely and voluntarily executed for the purposes therein recited.

Notary Public, State of Florida at Large

My Commission Expires:

956885

ATTACHMENT A

**SUBPOENA TO CUSTODIAN OF RECORDS OF
FIRST UNION NATIONAL BANK
(NOW KNOWN AS WACHOVIA BANK NATIONAL ASSOCIATION)**

You are hereby requested to produce the following documents pursuant to the definitions and instructions contained herein:

DOCUMENTS REQUESTED

1. All documents concerning synergies that might be achieved from a business combination of Sunbeam, Coleman, Signature Brands, and First Alert, or any combination thereof.
2. All documents concerning the potential or actual integration of Coleman, First Alert, and/or Signature Brands with Sunbeam, including, but not limited to, studies, reports, analyses, evaluations, projections, estimates, comments, or other work, performed by Coopers & Lybrand, Morgan Stanley, MSSF, Bank of America, or First Union.
3. All documents concerning any evaluation or assessment of the Bank Facilities, either prior to or after March 31, 1998, by you or any of the Lenders, including, but not limited to, any credit review or portfolio review, credit review sheets, call reports, contact reports, credit approval forms, portfolio forms, credit risk reviews, and covenant compliance reports.
4. All communications by and among the Lenders concerning the Credit Agreement, the Bank Facilities, Sunbeam, Coleman, or the Coleman Transaction.
5. All documents concerning the Lenders' plans or efforts to syndicate or sell off any portion of the Lenders' Commitments, as reflected in Schedule 2.01 of the Credit Agreement, including, but not limited to, information packages provided to potential lenders, lists or designations of potential lenders, communications with potential lenders, expressions of

interest and/or commitment made by any potential lender, and/or presentations or handouts used at lender group meetings.

6. All documents concerning Sunbeam's intention to draw down any portion of the Credit Agreement, specifically including, but not limited to, any and all written Borrowing Requests.

7. All documents concerning whether or not you or any of the Lenders considered exercising their right to terminate service under the Credit Agreement following any material adverse change in the financial status of Sunbeam.

8. All documents concerning any offer to buy Reorganized Sunbeam, or the sale, or possible sale of Reorganized Sunbeam or any subsidiary or material group of assets thereof.

9. All documents concerning your efforts to have Sunbeam retain or maintain your lending services both prior to and after the closing of the Bank Facilities.

10. All documents reflecting all fees and expenses paid by Sunbeam to you, including, but not limited to, any Administrative Agent (as defined in the Credit Agreement) fee and any other fee related to the Credit Agreement.

11. All documents concerning the Bank Facilities, including, but not limited to, the sources and uses of the Bank Facilities, the decision to close the Bank Facilities, and the closing of the Bank Facilities.

12. All documents concerning any investigation, analysis, or due diligence of Sunbeam conducted by you or on your behalf or by Morgan Stanley in 1997 or 1998.

13. All documents concerning any investigation, analysis, or due diligence of Coleman or CPH conducted by you or on your behalf or by Morgan Stanley in 1997 or 1998.

14. All documents concerning the negotiation and signing of the February 27, 1998 Agreements.
15. All documents concerning the closing of the Coleman Transaction, including, without limitation, all documents concerning the decision to close the Coleman Transaction.
16. All documents concerning the meetings of Sunbeam's Board of Directors.
17. All documents concerning any valuation of Sunbeam or Sunbeam securities.
18. All documents concerning the stock market's valuation of Sunbeam securities, including, without limitation, documents describing or analyzing the increase or decline in the market price of Sunbeam stock in any portion of the period from and including July 1, 1996 through and including December 31, 1998.
19. All documents concerning your role as Administrative Agent for the Credit Agreement or Bank Facilities.
20. All documents concerning your April 28, 1998 meeting with Sunbeam, Bank of America, and MSSF and/or Morgan Stanley, including, but not limited to, all notes taken of or during the meeting and documents memorializing, describing, or referring to the meeting.
21. All documents concerning any amendment to the Credit Agreement, including, but not limited to, the April 1998, June 1998, and July 1998 amendments. Your response should include, but is not limited to, all documents concerning the reasons for the amendments.
22. All documents concerning your meetings with Sunbeam, Bank of America, MSSF and/or Morgan Stanley at which the topics of Sunbeam or the Bank Facilities

were discussed including, but not limited to, all notes taken of or during the meeting and documents concerning the meeting. Your response should include documents from the period after the Bank Facilities closed on March 31, 1998.

23. All documents concerning the lien placed by you and/or Bank of America and MSSF on Coleman stock owned by Sunbeam, including, but not limited to, documents concerning the reason or decision to seek the lien.

24. All documents concerning the collateral for the Bank Facilities, including, but not limited to, all documents evaluating or assessing the value of that collateral.

25. All documents concerning the settlement agreement between CPH and Sunbeam dated August 12, 1998.

26. All documents concerning any write-off or loss reserve you have taken against the Bank Facilities.

27. All documents concerning your rating of the Bank Facilities and any change made to that rating.

28. All documents concerning any distribution you received as part of Sunbeam's bankruptcy reorganization plan, including, but not limited to, the value of the Sunbeam stock you received, and all documents evaluating or assessing the value of that distribution.

29. All documents concerning Sunbeam's decision to file for bankruptcy.

30. All documents concerning Sunbeam's plan of reorganization.

31. All documents concerning any settlement or compromise reached with the Official Committee of Unsecured Creditors of Sunbeam Corporation.

32. All documents concerning any valuation of Coleman or Coleman securities.
33. All documents concerning Sunbeam's or Coleman's financial statements and/or Sunbeam's restated financial statements.
34. All documents concerning the increase in the size of the Subordinated Debenture Offering from \$500 million to \$750 million.
35. All documents concerning the decrease in the amount of the Bank Facilities from \$2.0 billion to \$1.7 billion.
36. All documents concerning any draft or executed "comfort letters" prepared in connection with the Subordinated Debenture Offering.
37. All documents concerning the sale of Subordinated Debentures, including, without limitation, documents concerning road shows, communications with potential investors, or communications with or among Morgan Stanley's sales personnel.
38. All documents concerning the Subordinated Debenture offering, including, but not limited to, the pricing, conversion features, and/or "book of demand" for the Subordinated Debentures.
39. All documents concerning the events that took place on March 19, 1998 at Global Financial Press, including, without limitation, documents concerning Lawrence Bornstein and/or John Tyree.
40. All documents concerning the "bring-down" due diligence for the Subordinated Debenture Offering.
41. All documents concerning Sunbeam's first quarter 1998 sales and/or earnings.

42. All documents concerning the closing of the Subordinated Debenture Offering including, without limitation, all documents concerning the decision to close the Subordinated Debenture Offering.

43. All documents concerning any press releases or any statement contained in any press release by Sunbeam bearing the following dates or issued on or about October 23, 1997, March 19, 1998, April 3, 1998, May 9, 1998, June 15, 1998, June 25, 1998, June 30, 1998, October 20, 1998, or November 12, 1998.

44. All documents concerning communications relating to Sunbeam, Coleman, or CPH, concerning the subject of the Coleman Transaction or the Bank Facility, including, without limitation, internal communications within First Union or communications between or among First Union and Sunbeam; Skadden, Arps, Slate, Meagher & Flom LLP; Coopers & Lybrand; Llama Company; Arthur Andersen LLP; Sard Verbinnen & Co., Inc.; Hill & Knowlton, Inc.; Coleman, Credit Suisse First Boston; CPH.; Mafco; Wachtell Lipton, Rosen & Katz; Davis Polk & Wardwell; or any other person or company, and/or any of their respective employees, agents, or representatives.

45. All documents concerning any inquiry from, or any communication between or among you and any Sunbeam investor, potential investor, securities or financial analyst, or rating agency relating to Sunbeam.

46. All documents concerning any meeting between and among you, Sunbeam, Arthur Andersen, Coopers & Lybrand, Morgan Stanley, MSSF, Coleman, First Alert, or Signature Brands related to the 1998 acquisitions, the integration of the acquisitions, including, but not limited to, documents prepared for, disseminated at, utilized during, or prepared after such meetings.

47. All documents concerning the Coleman Transaction.

48. All documents concerning Albert Dunlap and/or Russell Kersh.

49. Organizational charts, memoranda, or similar documents that describe the business organizational structure and the administrative, management, and reporting structure of First Union from and including January 1, 1997 through and including December 31, 1998.

50. All documents concerning First Union's policies, procedures, manuals, guidelines, reference materials, or checklists that were in effect during any period from and including January 1, 1997 through and including December 31, 1998 for the performance of due diligence, including, without limitation, due diligence performed in connection with underwriting credit facilities.

51. All of your document retention or document destruction policies or procedures or similar procedures for the preservation, storage, destruction, back-up or deletion of documents of any kind, including electronic or hard copy versions of documents, for any time during 1996 through the present, including, without limitation, any amendment to any such policies or procedures, schedules or related documents, any and all records concerning adherence to and failure to adhere to or abide by any such policies or procedures, and any memoranda or other instructions concerning the obligation and procedures to be utilized to preserve all relevant documents, including without limitation evidence concerning the Litigations, the Arbitrations, and the SEC Administrative Proceedings.

52. All documents or other information you have provided or produced to any party (whether voluntarily or in response to a document request, subpoena duces tecum, interrogatories, requests for admission, or other requests for information and/or documents) in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings (including,

without limitation, any reports, communications, filings, testimony, legal memoranda, statements, or other documents submitted to the Securities & Exchange Commission or any other party). Your response should include:

- a. All discovery requests, subpoenas duces tecum, interrogatories, or requests for admissions served on you in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings;
- b. All responses and/or objections that you provided or produced in response to any discovery request, subpoena duces tecum, interrogatories, or requests for admission served on you in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings; and
- c. All privilege logs you prepared in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings with respect to documents that you withheld from production in response to any document requests, subpoenas duces tecum, or other request for information and/or documents.

53. All communications concerning any discovery request, subpoena duces tecum, interrogatories, or requests for admission served on you in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

54. All documents you have provided to or received from the SEC, the Attorney General of New York, or any other governmental or regulatory body concerning Sunbeam or the Coleman Transaction.

55. All motions, memoranda, briefs, rulings, orders, or transcripts of any proceeding concerning any discovery request, subpoena, or other request for information and/or documents in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

56. All transcripts of and exhibits to any depositions, recorded statements, affidavits or hearings held in connection with any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

57. All documents obtained by you or produced to you by other parties, third parties, or non-parties (whether voluntarily or in response to any document requests, subpoenas duces tecum, or other process served by you or any other party) concerning Sunbeam or the Coleman Transaction.

58. All affidavits, declarations, or other testimonial statements filed or submitted in connection with any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

DEFINITIONS

1. "Arbitrations" means Albert J. Dunlap and Sunbeam Corporation, No. 32 160 00088 99 (AAA); and Russell A. Kersh and Sunbeam Corporation, No. 32 160 00091 99 (AAA).

2. "Bank Facility" means the Credit Agreement, including amendments, and all funds extended by MSSF, First Union, and/or Bank of America to Sunbeam pursuant to the Credit Agreement, including, but not limited to, Tranche A, Tranche B, and the Revolving Credit Facility.

3. "Bank of America" means Bank of America National Trust and Savings Association and any of its present and former officers, directors, employees, representatives, and agents.

4. "Borrowing Request" means any request by Sunbeam for a Borrowing in accordance with Section 2.03 of the Credit Agreement.

5. "Coleman" means The Coleman Company, Inc. and any of its predecessors, successors, subsidiaries, and present and former officers, directors, and employees.

6. "CPH" means Coleman (Parent) Holdings Inc., Coleman Worldwide Corporation, CLN Holdings, Inc., and any of their predecessors, successors, subsidiaries, and present and former officers, directors, and employees.

7. "Coleman Transaction" means the transaction contemplated by the February 27, 1998 Agreements.

8. "Communication" means the transmittal of information (in the form of facts, ideas, inquiries or otherwise) by letter, memorandum, facsimile, orally, electronically, or otherwise.

9. "Concerning" means concerning, reflecting, relating to, referring to, describing, evidencing, or constituting.

10. "Coopers & Lybrand" means the former Coopers & Lybrand LLP (now known as PricewaterhouseCoopers LLP), and any of its predecessors, successors, affiliates, subsidiaries, and present and former partners, employees, representatives, and agents.

11. "Credit Agreement" means that agreement entered into by Sunbeam Corporation, as borrower, with MSSF, First Union, and Bank of America as Lenders, dated March 30, 1998 and all amendments thereto.

12. "Documents" shall be given the broad meaning provided in Rule 1.350 of the Florida Rules of Civil Procedure and refers to any form or means, whether physical, visual, or electronic, in or by which words, numbers, or ideas are recorded or preserved, whether fixed in tangible medium or electronically stored, including any and all drafts of any final document. The word "documents" shall include, by way of example and not by way of limitation, all of the following: papers, correspondence, trade letters, envelopes, memoranda, telegrams, cables, notes, messages, reports, studies, press releases, comparisons, books, accounts, checks, audio and video recordings and transcriptions thereof, pleadings, testimony, articles, bulletins, pamphlets, brochures, magazines, questionnaires, surveys, charts, newspapers, calendars, desk calendars, pocket calendars, lists, logs, publications, notices, diagrams, instructions, diaries, minutes for meetings, corporate minutes, orders, resolutions, agendas, memorials or notes of oral communications, whether by telephone or face-to-face, contracts, agreements, drafts of or proposed contracts or agreements, memoranda of understanding, letters of intent, computer tapes, computer drives or memories, computer diskettes or disks, e-mail, CD-ROMs, or any other tangible thing on which any handwriting, typing, printing, photostatic, electronic, or other form of communication or information is recorded or reproduced, together with all notations on any of the foregoing, all originals, file copies, or other unique copies of the foregoing, and all versions or drafts thereof, whether used or not.

13. "February 27, 1998 Agreements" means (a) the Agreement and Plan of Merger dated as of February 27, 1998 among Sunbeam Corp., Laser Acquisition Corp., CLN

Holdings, Inc. and Coleman (Parent) Holdings Inc. and (b) the Agreement and Plan of Merger dated as of February 27, 1998 among Sunbeam Corp., Camper Acquisition Corp., and The Coleman Company, Inc.

14. "Financial Statements" means, without limitation, balance sheets, statements of income, earnings, retained earnings, sources and applications of funds, cash flow projections, notes to each such statements, or any other notes which pertain to the past or present financial condition of Sunbeam, whether any of the foregoing is audited or unaudited, whether final, interim or pro forma, complete or partial, consolidated, yearly, monthly, or otherwise.

15. "First Alert" means First Alert, Inc., and any of its predecessors, successors, affiliates, subsidiaries, and present and former officers, directors, employees, representatives, and agents.

16. "First Union" means First Union National Bank (now known as Wachovia Bank, National Association) and any of its subsidiaries, divisions, affiliates, predecessors, successors, joint ventures, present and former officers, directors, employees, representatives, agents, and all other persons acting or purporting to act on its behalf.

17. "Lenders" means the entities listed on Schedule 2.01 of the Credit Agreement under the heading "Lenders" and any other Person that shall have become a party to the Credit Agreement as a Lender pursuant to an assignment and acceptance.

18. "Litigations" means In Re Sunbeam Securities Litigation, 98-8258-Civ.-Middlebrooks (S.D. Fla.); Camden Asset Management, L.P., et al. v. Sunbeam Corporation, et al., 98-8773-Civ.-Middlebrooks and 98-8275-Civ.-Middlebrooks (S.D. Fla.); Krim v. Dunlap, et al., No. CL983168AD (15th Jud. Cir., Fla.); Stapleton v. Sunbeam Corp., et al., No. 98-1676-

Civ.-King (S.D. Fla.); Sunbeam Corp. v. PricewaterhouseCoopers LLP, No. CL005444AN (15th Jud. Cir., Fla.); In re Sunbeam Corp., No. 01-40291 (AJG) (Bankr. S.D.N.Y.) and every adversary proceeding therein; SEC v. Dunlap, et al., No. 01-8437-Civ.-Middlebrooks (S.D. Fla.); Oaktree Capital Management LLC v. Arthur Andersen LLP, No. BC257177 (L.A. Cty., CA); and Coleman (Parent) Holdings Inc. v. Arthur Andersen LLP, et al., No. CA 01-06062AN (15th Jud. Cir., Fla).

19. “Mafco” means MacAndrews & Forbes Holdings Inc. and any of its predecessors, successors, subsidiaries, and present and former officers, directors, and employees.

20. “Morgan Stanley” means Morgan Stanley & Co., Inc. and any of its predecessors, successors, affiliates, subsidiaries, and present and former officers, directors, partners, employees, representatives, and agents.

21. “MSSF” means Morgan Stanley Senior Funding, Inc. and any of its predecessors, successors, affiliates, subsidiaries, and present and former officers, directors, partners, employees, representatives, and agents.

22. “Person” means any natural person, corporation, limited liability company, trust, joint venture, association, company, partnership, governmental authority, or other entity.

23. “Reorganized Sunbeam” means Sunbeam Corporation on and after the effective date of Sunbeam’s chapter 11 plan of reorganization as filed with the United States Bankruptcy Court in the Southern District of New York.

24. “SEC Administrative Proceedings” means In the Matter of Sunbeam Corp., SEC Administrative Proceeding File No. 3-10481, and In the Matter of David C. Fannin, SEC Administrative Proceeding File No. 3-10482.

25. "SEC" means the Securities and Exchange Commission.
26. "Signature Brands" means Signature Brands USA, Inc., and any of its predecessors, successors, affiliates, subsidiaries, and present and former officers, directors, employees, representatives, and agents.
27. "Subordinated Debentures" means Sunbeam's Zero Coupon Convertible Senior Subordinated Debentures Due 2018.
28. "Subordinated Debenture Offering" means the offering of Sunbeam's Subordinated Debentures.
29. "Sunbeam" means Sunbeam Corporation, and any of its predecessors, successors, affiliates, subsidiaries, and present and former officers, directors, employees, representatives, and agents.
30. "You" or "Your" means First Union and any of its subsidiaries, divisions, predecessors, successors, present or former employees, representatives, agents, attorneys, accountants, advisors, or anyone acting or purporting to act on its behalf.

INSTRUCTIONS

1. Documents shall be produced as they are kept in the usual course of business, or organized and labeled to correspond to the categories in this Request. Documents attached to each other should not be separated. Documents consisting of items previously produced in the Litigations, Arbitrations, and/or SEC Administrative Proceedings with Bates numbering shall be produced in Bates number order.

2. All documents shall be produced in the file folder, envelope or other container in which the documents are kept or maintained by you. If, for any reason, the container cannot be produced, produce copies of all labels or other identifying marks.

3. The relevant period, unless otherwise indicated, shall be from **January 1, 1996 through the date of trial of this matter**, and shall include all documents and information which relate in whole or in part to such period, or to events or circumstances during such period, even though dated, prepared, generated or received prior or subsequent to that period. Please supplement or correct your responses to these requests if, at any time, you become aware that your responses are incomplete or incorrect in any respect.

4. If you claim the attorney-client privilege, or any other privilege or work-product protection for all or any portion of a document, you shall provide a privilege log that describes the withheld material sufficiently to allow CPH and Mafco to test the privilege or protection asserted.

5. The following rules of construction apply:

- a) The connectives “and” and “or” shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery requests all responses that might otherwise be outside of their scope;
- b) The term “including” shall be construed to mean “without limitation”; and
- c) The use of the singular form of any word includes the plural and vice versa.

MACANDREWS & FORBES HOLDINGS INC.
and COLEMAN (PARENT) HOLDINGS INC.

By: _____
One of Their Attorneys

Jerold S. Solovy
Ronald L. Marmer
Robert T. Markowski
Deirdre E. Connell
JENNER & BLOCK, LLC
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

Jack Scarola
SEARCY DENNEY SCAROLA BARNHART
& SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33402-3626
(561) 686-6300

Dated: July __, 2003

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 2003 CA 005045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,

Defendant(s).

NOTICE OF DEPOSITION

TO: Counsel on the attached list

PLEASE TAKE NOTICE that Plaintiff Coleman (Parent) Holdings, Inc., hereby notices the deposition upon oral examination of the Custodian of Records, Wachovia Bank, NA pursuant to Florida Rule of Civil Procedure 1.410 on the date and at the time set forth below:

Custodian of Records
Wachovia Bank, NA

August 15, 2003 at 1:30 p.m.

The witness will be requested to bring to the deposition documents specified on Attachment.

The deposition will be recorded by stenographic means at the offices of Searcy Denney Scarola Barnhart & Shipley, P.C., 2139 Palm Beach Lakes Blvd., West Palm Beach, Florida. The deposition will be taken before a person authorized to administer oaths and will continue until completed.

A

#230580/mm

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

MORGAN STANLEY SENIOR FUNDING,
INC.,

CASE NO.: 2003 CA 005165 AI

Plaintiffs,

vs.

MACANDREWS & FORBES HOLDINGS
INC. and COLEMAN (PARENT)
HOLDINGS INC.

Defendants,

NOTICE OF HEARING

YOU ARE HEREBY NOTIFIED that the undersigned has called up for hearing the following:

DATE: August 11, 2003

TIME: 8:45 a.m.

JUDGE: Hon. Elizabeth T. Maass

PLACE: Palm Beach County Courthouse, Room #11.1208, 205 North Dixie Highway,
West Palm Beach, FL 33401

SPECIFIC MATTERS TO BE HEARD:

Defendant, MacAndrews & Forbes Holdings Inc.'s and
Coleman (Parent) Holdings Inc.'s Motion to Permit Foreign
Attorneys for Appear

Moving counsel certifies that he or she contacted opposing counsel and attempted to resolve the discovery dispute without hearing.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to all Counsel on the attached list, this 26th day of July, 2003.

Coleman Holdings, Inc. vs Morgan Stanley & Company
Case No.: 2003 CA 005045 AI
Notice of Hearing

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block, LLC
One IBM Plaza
Suite 4400
Chicago, IL 60611

**IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA**

COLEMAN (PARENT) HOLDINGS INC.,)	
)	
Plaintiff,	)	Case No.: 2003 CA 005045 AI
v.)	
)	
MORGAN STANLEY & CO., INC.,	)	Judge Elizabeth I. Maass
)	
Defendant.)	
)	

STIPULATED CONFIDENTIALITY ORDER

The parties hereto hereby stipulate and agree to the following Confidentiality Order:

1. Scope of Order. This Order shall apply to all non-public and Confidential (as hereinafter defined) materials produced in this litigation and all testimony given in any deposition by any party to the litigation or by any person or entity that is not a party hereto (a “non-party”), to all non-public and Confidential information disclosed by any party hereto during the course of the captioned litigation and to all non-public information disclosed to any party hereto by any non-party in response to the service of a subpoena or notice of deposition on a non-party in connection with the captioned litigation (“Litigation Materials”).

2. This Order shall not apply to any document, testimony or other information that (a) is already in a receiving party’s possession at the time it is produced, (b) becomes generally available to the public other than as a result of disclosure in violation of this Order or in breach of any other legal obligation, or (c) becomes available to a party other than through voluntary or required production from a person or party who obtained the document, testimony or other information without any confidentiality restriction.

3. Litigation Materials and the information derived therefrom shall be used solely for the purpose of preparing for and conducting this litigation, and shall not be disclosed or used for any other purpose.

4. Any party or non-party may designate as "Confidential" any Litigation Materials or portions thereof which the party or non-party believes, in good faith, constitute, contain, reveal or reflect proprietary or confidential trade secrets or technical, business, financial or personnel information of a current nature. If a party or non-party produces Litigation Materials that have been produced in another litigation or to any government entity and such Litigation Materials have been designated confidential or were accompanied by a request that confidential treatment be accorded them, such Litigation Materials shall be deemed to have been designated "Confidential" for purposes of this Stipulation and Order.

5. Any documents or other tangible Litigation Materials may be designated as "Confidential" by marking every such page "Confidential" or by informing the other party in writing that such material is Confidential. Such markings will be made in a manner which does not obliterate or obscure the content of the document or other tangible Litigation Material. If Litigation Material is inspected at the choice of location of the party or non-party producing or disclosing Litigation Materials (a "producing party"), all such Litigation Material shall be presumed at such inspection to have been designated as Confidential by the producing party until such time as the producing party provides copies to the party that requested the Litigation Material. Production of Confidential Material for inspection and copying shall not constitute a waiver of confidentiality.

6. Depositions or other testimony may be designated "Confidential" by any one of the following means:

(a) stating orally on the record, with reasonable precision as to the affected testimony, on the day the testimony is given that this information is “Confidential”; or

(b) sending written notice designating, by page and line, the portions of the transcript of the deposition or other testimony to be treated as “Confidential” within 10 days after receipt of the transcripts.

7. The entire transcript of any deposition shall be treated as Confidential Material until thirty days after the conclusion of the deposition. Each page of deposition transcript designated as Confidential Material shall be stamped, as set forth in paragraph 5 above, by the court reporter or counsel.

8. In the event it becomes necessary at a deposition or hearing to show any Confidential Material to a witness, any testimony related to the Confidential Material shall be deemed to be Confidential Material, and the pages and lines of the transcript that set forth such testimony shall be stamped as set forth in paragraph 5 of this Stipulation.

9. Litigation Materials designated “Confidential” and any copies thereof, and the information contained therein, shall not be given, shown, made available or communicated in any way to anyone except:

(a) The Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida (the “Court”) (including Clerks and other Court personnel). Litigation Materials designated “Confidential” and any copies thereof, and the information contained therein, that are filed with the Court or any pleadings, motions or other papers filed with the Court, shall be filed under seal in a separate sealed envelope conspicuously marked “Filed Under Seal – Subject to Confidentiality Order,” or with such other markings as required by Court rules, and shall be kept under seal until further order of the

Court. Where possible, only those portions of filings with the Court that disclose matters designated "Confidential" shall be filed under seal;

(b) counsel to the parties, including co-counsel of record for the parties actually assisting in the prosecution or defense of this litigation, and the legal associates and clerical or other support staff who are employed by such counsel or attorneys and are working under the express direction of such counsel or attorneys;

(c) parties and current officers and employees of parties to the extent reasonably deemed necessary by counsel disclosing such information for the purpose of assisting in the prosecution or defense of this litigation;

(d) outside photocopying, graphic production services, litigation support services, or investigators employed by the parties or their counsel to assist in this litigation and computer personnel performing duties in relation to a computerized litigation system;

(e) any person who is a witness or deponent, and his or her counsel, during the course of a deposition of testimony in this litigation;

(f) any person who is a potential fact witness in the litigation, provided, however, that a person identified solely in this subparagraph shall not be permitted to retain copies of such Litigation Material;

(g) court reporters, stenographers, or videographers who record deposition or other testimony in the litigation;

(h) experts or consultants retained in connection with the litigation;

(i) any person who is indicated on the face of a document to have been an author, addressee or copy recipient thereof, provided, however, that a person identified

solely in this subparagraph shall not be permitted to retain copies of such Litigation Material; and

(j) any other person, upon written consent from the party or person who designated such Litigation Materials “Confidential.”

10. Before any person included in paragraph 9(f) or (h) is given access to Litigation Materials designated “Confidential,” and before any person included in subparagraph 9(e) is permitted to retain any copy of Litigation Materials designated Confidential, such person shall be provided with a copy of this Order and shall acknowledge in a written statement, in the form provided as Exhibit A hereto, that he or she read the Order and agrees to be bound by the terms thereof. Such executed forms shall be retained in the files of counsel for the party who gave access to Litigation Materials to the person who was provided such access. Such executed forms shall not be subject to disclosure under the Florida Rules of Civil Procedure unless a showing of good cause is made and the Court so orders.

11. The inadvertent production of privileged or arguably privileged materials shall not be determined to be either: (a) a general waiver of the attorney-client privilege, the work product doctrine or any other privilege; or (b) a specific waiver of any such privilege with respect to documents being produced or the testimony given. Notice of any claim of privilege as to any document claimed to have been produced inadvertently shall be given within a reasonable period of time after discovery of the inadvertent production, and, on request by the producing party, all inadvertently produced materials as to which a claim of privilege is properly asserted and any copies thereof shall be returned promptly.

12. Nothing in this Order shall prevent any producing party from disclosing or using its own “Confidential” Litigation Materials as it deems appropriate, and any such disclosure shall not be deemed a waiver of any party’s right or obligations under this Order with

respect to any other information. If a party or non-party that designates information “Confidential” discloses or uses such “Confidential” Litigation Materials in a manner inconsistent with the claim that such information is confidential, any party may move the Court for an order removing such “Confidential” designation pursuant to paragraph 15 herein. Nothing in this Stipulation and Order shall impose any restrictions on the use or disclosure by any party of documents, materials, testimony or other information produced as Litigation Material obtained by such party independently of discovery in this litigation.

13. The parties do not waive any right to object to any discovery request, or to the admission of evidence on any ground, or seek any further protective order, or to seek relief from the Court from any provision of this Order by application on notice on any grounds.

14. If any party objects to the designation of any Litigation Materials as “Confidential,” the party shall first state the objection by letter to the party that made such designations. The parties agree to confer in good faith by telephone or in person to attempt to resolve any dispute respecting the terms or operation of this Order. If the parties are unable to resolve such dispute within 5 days of such conference, any party may then move the Court to do so. Until the Court rules on such dispute, the Litigation Materials in question shall continue to be treated as “Confidential,” as designated.

15. Upon motion, the Court may order the removal of the “Confidential” designation from any information so designated. In connection with any motion concerning the propriety of a “Confidential” designation, the party making the designation shall bear the burden of proof.

16. Within 60 days of the conclusion of this litigation as to all parties, all Litigation Materials designated “Confidential” and all copies or notes thereof shall be returned to counsel for the producing party who initially produced the Litigation Materials, or destroyed,

except that counsel may retain their work product and copies of court filings, transcripts, and exhibits, provided said retained documents will continue to be treated as provided in this Order, as modified by rulings of the Court. If a party chooses to destroy documents after the litigation has concluded, that party shall certify such destruction in writing to the producing party upon written request for such certification by the producing party.

17. The failure of any party to challenge the designation by another production party of Litigation Material as “Confidential” during the discovery period shall not be a waiver of that party’s right to object to the designation of such material at trial.

18. This Stipulation applies to all non-parties that are served with subpoenas in connection with this litigation or who otherwise produce documents or are noticed for deposition in connection with this litigation, and all such non-parties are entitled to the protection afforded hereby upon signing a copy of this agreement and agreeing to be bound by its terms.

19. Any party may move to modify the provisions of this Order at any time or the parties may agree by written stipulation, subject to further order of the Court, to modify the provisions of the Order. Should any non-party seek access to the Confidential Material, by request, subpoena or otherwise, the party or recipient of the Confidential Material from whom such access is sought, as applicable, shall promptly notify the producing party who produced such Confidential Materials of such requested access and shall not provide such materials unless required by law or with the consent of the producing party.

20. This Order shall not apply to any Litigation Materials offered or otherwise used by any party at trial or at any hearing held in open court. Prior to the use of any Litigation Materials that have been designated Confidential at trial or any hearing to be held in open court, counsel who desires to so offer or use such Confidential Material shall take reasonable steps to afford opposing counsel and counsel for the producing party who produced such Confidential

Material a reasonable opportunity to object to the disclosure in open court of such Confidential Material, and nothing herein shall be construed a wavier of such right to object.

21. Written notice provided pursuant to this Order shall be made to counsel of record by facsimile.

22. The provisions of this Order shall survive the final termination of the case for any retained Confidential Litigation Material thereof.

COLEMAN (PARENT) HOLDINGS, INC.

MORGAN STANLEY & CO., INC.

By 
John Scarola
SEARCY, DENNEY, SCAROLA,
BARNHART & SHIPLEY P.A.
2139 Palm Beach Lake Boulevard
West Palm Beach, FL 33409

By 
Joseph Ianno, Jr.
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Jerold S. Solovy
Ronald L. Marmer
Robert T. Markowski
Deirdre E. Connell
JENNER & BLOCK, LLC
One IBM Plaza, Suite 4400
Chicago, IL 60611

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
KIRKLAND & ELLIS
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005

SO ORDERED;

This ____ day of _____, 2003

SIGNED AND DATED
JUL 31 2003
JUDGE ELIZABETH T. MAASS

CIRCUIT JUDGE

COPIES PROVIDED TO COUNSEL OF RECORD ON THE ATTACHED LIST

COUNSEL LIST

**Counsel for Plaintiff
COLEMAN (PARENT) HOLDINGS INC.**

SEARCY DENNEY SCAROLA
BARNHART & SHIPLEY P.A.
John Scarola, Esq.
2139 Palm Beach Lake Blvd.
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 684-5816

JENNER & BLOCK, LLC
Jerold S. Solovy, Esq.
Ronald L. Mariner, Esq.
Robert T. Markowski, Esq.
Deirdre E. Connell, Esq.
One IBM Plaza, Suite 4400
Chicago, IL 60611
Phone: (312) 222-9350
Fax: (312) 527-0484

**Counsel for Defendant
MORGAN STANLEY & CO., INC.**

CARLTON FIELDS, P.A.
Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Phone: (561) 659-7070
Fax: (561) 659-7368

KIRKLAND & ELLIS
Thomas D. Yannucci, P.C.
Thomas A. Clare, Esq.
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Phone: (202) 879-5000
Fax: (202) 879-5200

work, all copies of any materials I receive which have been designated as "Confidential," and that I will carefully maintain such materials in a container, drawer, room or other safe place in a manner consistent with the Order. I acknowledge that the return or destruction of "Confidential" material shall not relieve me from any other continuing obligations imposed upon me by the Order.

6. I stipulate to the jurisdiction of this Court.

Date: _____

(Signature)

Document No. 945236

IN THE CIRCUIT COURT OF THE
15TH JUDICIAL CIRCUIT IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 2003 CA 005045 AI

COLEMAN (PARENT) HOLDING INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

**ORDER GRANTING VERIFIED MOTION
TO ADMIT THOMAS A. CLARE PRO HAC VICE**

THIS CAUSE having come before the Court upon Defendant's Verified Motion to Admit Thomas A. Clare Pro Hac Vice, and the Court having been advised of the agreement of counsel and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that:

Defendant, Morgan Stanley & Co., Inc.'s Verified Motion to Admit Thomas A. Clare Pro Hac Vice is GRANTED.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this _____ day of July, 2003.

SIGNED AND DATED

AUG 01 2003

ELIZABETH T. MAASS
Circuit Court Judge

Copies furnished to:

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett H. McGurk
Larissa Paule-Carres
KIRKLAND & ELLIS
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005

John Scarola
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33409

Jerold S. Solovy
JENNER & BLOCK, LLC
One IBM Plaza
Suite 4400
Chicago, Illinois 60611

IN THE CIRCUIT COURT OF THE
15TH JUDICIAL CIRCUIT IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 2003 CA 005045 AI

COLEMAN (PARENT) HOLDING INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

**ORDER GRANTING VERIFIED MOTION
TO ADMIT BRETT H. MCGURK PRO HAC VICE**

THIS CAUSE having come before the Court upon Defendant's Verified Motion to Admit Brett H. McGurk Pro Hac Vice, and the Court having been advised of the agreement of counsel and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that:

Defendant, Morgan Stanley & Co., Inc.'s Verified Motion to Admit Brett H. McGurk Pro Hac Vice is GRANTED.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this _____ day of July, 2003.

SIGNED AND DATED

AUG 01 2003

JUDGE ELIZABETH T. MAASS

ELIZABETH T. MAASS
Circuit Court Judge

Copies furnished to:

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett H. McGurk
Larissa Paule-Carres
KIRKLAND & ELLIS
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005

John Scarola
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33409

Jerold S. Solovy
JENNER & BLOCK, LLC
One IBM Plaza
Suite 4400
Chicago, Illinois 60611

IN THE CIRCUIT COURT OF THE
15TH JUDICIAL CIRCUIT IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 2003 CA 005045 AI

COLEMAN (PARENT) HOLDING INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

**ORDER GRANTING VERIFIED MOTION
TO ADMIT LARISSA PAULE-CARRES PRO HAC VICE**

THIS CAUSE having come before the Court upon Defendant's Verified Motion to Admit Larissa Paule-Carres Pro Hac Vice, and the Court having been advised of the agreement of counsel and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that:

Defendant, Morgan Stanley & Co., Inc.'s Verified Motion to Admit Larissa Paule-Carres Pro Hac Vice is GRANTED.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida, this _____ day of July, 2003.

SIGNED AND DATED

AUG 01 2003

ELIZABETH T. MAASS
JUDGE ELIZABETH T. MAASS
Circuit Court Judge

Copies furnished to:

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett H. McGurk
Larissa Paule-Carres
KIRKLAND & ELLIS
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005

John Scarola
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33409

Jerold S. Solovy
JENNER & BLOCK, LLC
One IBM Plaza
Suite 4400
Chicago, Illinois 60611

IN THE CIRCUIT COURT OF THE
15TH JUDICIAL CIRCUIT IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 2003 CA 005045 AI

COLEMAN (PARENT) HOLDING INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

ORDER GRANTING VERIFIED MOTION
TO ADMIT THOMAS D. YANNUCCI PRO HAC VICE

THIS CAUSE having come before the Court upon Defendant's Verified Motion to Admit Thomas D. Yannucci Pro Hac Vice, and the Court having been advised of the agreement of counsel and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that:

Defendant, Morgan Stanley & Co., Inc.'s Verified Motion to Admit Thomas D. Yannucci Pro Hac Vice is GRANTED.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this _____ day of July, 2003.

SIGNED AND DATED
AUG 01 2003
JUDGE ELIZABETH T. MAASS
ELIZABETH T. MAASS
Circuit Court Judge

Copies furnished to:

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett H. McGurk
Larissa Paule-Carres
KIRKLAND & ELLIS
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005

John Scarola
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33409

Jerold S. Solovy
JENNER & BLOCK, LLC
One IBM Plaza
Suite 4400
Chicago, Illinois 60611

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CASE NO: 03 CA-005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

REQUEST FOR COPIES

Defendant, MORGAN STANLEY & CO., INC., by and through its undersigned counsel, hereby requests copies of all documents received from Bank of America National Trust Association or Wachovia Bank, N.A. pursuant to the subpoenas dated July 29, 2003. Reasonable copying costs will be reimbursed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by facsimile and U.S. Mail to all counsel of record on the attached service list on this 7th day of August, 2003.

Thomas D. Yannucci, P.C.
Thomas A. Clare
Larissa Paule-Carres
Brett H. McGurk
KIRKLAND & ELLIS
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

COUNSEL FOR DEFENDANT

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

BY: 

JOSEPH IANNO, JR.
Florida Bar No: 655351

SERVICE LIST

<p>John Scarola SEARCY, DENNEY, SCAROLA, BARNHARDT & SHIPLEY, P.A. 2139 Palm Beach Lakes Boulevard West Palm Beach, Florida 33409</p>	<p>Counsel for Plaintiff</p>
<p>Jerold S. Solovy JENNER & BLOCK, LLC One IBM Plaza Suite 4400 Chicago, Illinois 60611</p>	<p>Counsel for Plaintiff</p>

CARLTON FIELDS

ATTORNEYS AT LAW

MIAMI
ORLANDO
ST. PETERSBURG
TALLAHASSEE
TAMPA

WEST PALM BEACH

Esperanté
222 Lakeview Avenue, Suite 1400
West Palm Beach, Florida 33401-6149
P.O. Box 150
West Palm Beach, Florida 33402-0150

561.659.7070
561.659.7368 fax
www.carltonfields.com

E-MAIL: jjanno@carltonfields.com

August 18, 2003

The Honorable Elizabeth Maass
Palm Beach County Courthouse
205 North Dixie Highway
West Palm Beach, Florida 33401

VIA HAND DELIVERY

Re: *Coleman (Parent) Holdings Co. v. Morgan Stanley & Co.*
and
Morgan Stanley Senior Funding, Inc. v. MacAndrews & Forbes Holdings, Inc.

Dear Judge Maass:

Enclosed is a courtesy copy of Morgan Stanley's Motions to Admit Pro Hac Vice of attorneys Ryan P. Phair, Zhonette Brown and Kathyryn R. DeBord in the above-referenced respective matters. Jack Scarola, counsel for opposing party, does not object to the entry of these motions. Additionally, enclosed please find proposed Orders. If Your Honor finds the proposed Orders acceptable, please execute same and provide counsel of record with executed copies. For Your Honor's convenience please find self-addressed stamped envelopes.

Sincerely,



Joseph Ianno, Jr.

/jed

cc: Jack Scarola
Jerold Solovy
Thomas Clare

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CASE NO: 03 CA-005165 AG

MORGAN STANLEY SENIOR FUNDING, INC.,

Plaintiff,

v.

MACANDREWS & FORBES HOLDINGS, INC.
AND COLEMAN (PARENT) HOLDINGS INC.,

Defendant.

VERIFIED MOTION TO ADMIT
KATHRYN R. DEBORD, PRO HAC VICE

Plaintiff Morgan Stanley Senior Funding, Inc., pursuant Fla. R. Jud. Adm. 2.061, requests this Court to admit attorney Kathryn R. DeBord, *pro hac vice*, and in support of this Motion, states the following:

1. Plaintiff requests that this Court permit Kathryn R. DeBord, an attorney with the law firm of Kirkland & Ellis LLP whose address is 655 15th Street, N.W. – 12th Floor, Washington, D.C. 20005, to appear *pro hac vice* and participate fully in this action as additional counsel on behalf of Plaintiff.

2. Ms. DeBord has been admitted to practice before all courts in the State of Maryland since December 17, 2002. Ms. DeBord is a member of the State Bar of Maryland and is in good standing with respect to such membership. Ms. DeBord has not been disciplined in any jurisdiction.

3. Ms. DeBord has read all the applicable provisions of The Rules of Judicial Administration and the Rules Regulating The Florida Bar.

4. This verified motion complies with the Rules of Judicial Administration.

5. The undersigned will remain associated with this matter at all stages as required by local rules.

6. Ms. DeBord has not filed a motion for permission to appear in Florida state courts in the preceding five years. The representation of Plaintiff in this matter commenced on May 12, 2003.

7. Ms. DeBord will be associated with Joseph Ianno, Jr. for purposes of this representation. Mr. Ianno is a member in good standing of the Florida Bar.

8. A proposed order granting this Motion is attached hereto.

9. Counsel for Defendant has been consulted regarding this motion and has no objection.

WHEREFORE, Plaintiff respectfully requests that this Court enter an order admitting Kathryn R. DeBord, *pro hac vice* for the purpose of representing Plaintiff as counsel in connection with this action pending before this Court together with such other and further relief as the Court deems just and proper.

The undersigned verifies that he has knowledge of the facts stated herein, and that the statements in the foregoing motion are true and correct.


Kathryn R. DeBord

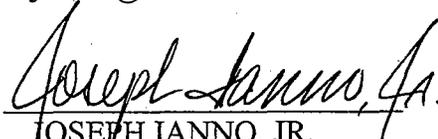
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to all counsel of record on the attached service list on this 18th day of August, 2003.

Thomas D. Yannucci, P.C.
Thomas A. Clare
Larissa Paule-Carres
Kathryn R. DeBord
KIRKLAND & ELLIS LLP
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

**COUNSEL FOR PLAINTIFF,
MORGAN STANLEY SENIOR FUNDING**

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

BY: 
JOSEPH IANNO, JR.
Florida Bar No: 655351

SERVICE LIST

<p>John Scarola, Esq. SEARCY, DENNEY, SCAROLA, BARNHARDT & SHIPLEY, P.A. 2139 Palm Beach Lakes Boulevard West Palm Beach, Florida 33409 Telephone: (561) 686-6300 Facsimile (561) 478-0754</p>	<p>Counsel for Defendants</p>
<p>Jerold S. Solovy, Esq. JENNER & BLOCK, LLC One IBM Plaza, Suite 4400 Chicago, Illinois 60611 Telephone: (312) 222-9350 Facsimile: (312) 840-7671</p>	<p>Counsel for Defendants</p>

IN THE CIRCUIT COURT OF THE
15TH JUDICIAL CIRCUIT IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 2003 CA 005165 AI

MORGAN STANLEY SENIOR FUNDING,
INC.,

Plaintiff,

v.

MACANDREWS & FORBES HOLDINGS,
INC., and COLEMAN (PARENT)
HOLDINGS, INC.

Defendants.

**ORDER GRANTING VERIFIED MOTION
TO ADMIT KATHRYN R. DEBORD PRO HAC VICE**

THIS CAUSE having come before the Court upon Plaintiff's Verified Motion to Admit Kathryn R. DeBord Pro Hac Vice, and the Court having been advised of the agreement of counsel and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that:

Plaintiff, Morgan Stanley Senior Funding, Inc.'s Verified Motion to Admit Kathryn R. DeBord Pro Hac Vice is GRANTED.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this ____
day of August, 2003.

ELIZABETH T. MAASS
Circuit Court Judge

Copies furnished to:

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett H. McGurk
Larissa Paule-Carres
Ryan P. Phair
Zhonette Brown
Kathryn R. DeBord
KIRKLAND & ELLIS LLP
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005

John Scarola
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33409

Jerold S. Solovy
JENNER & BLOCK, LLC
One IBM Plaza
Suite 4400
Chicago, Illinois 60611

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CASE NO: 03 CA-005165 AG

MORGAN STANLEY SENIOR FUNDING, INC.,

Plaintiff,

v.

MACANDREWS & FORBES HOLDINGS, INC.
AND COLEMAN (PARENT) HOLDINGS INC.,

Defendant.

VERIFIED MOTION TO ADMIT
ZHONETTE BROWN, PRO HAC VICE

Plaintiff Morgan Stanley Senior Funding, Inc., pursuant Fla. R. Jud. Adm. 2.061, requests this Court to admit attorney Zhonette Brown, *pro hac vice*, and in support of this Motion, states the following:

1. Plaintiff requests that this Court permit Zhonette Brown, an attorney with the law firm of Kirkland & Ellis LLP whose address is 655 15th Street, N.W. – 12th Floor, Washington, D.C. 20005, to appear *pro hac vice* and participate fully in this action as additional counsel on behalf of Plaintiff.

2. Ms. Brown been admitted to practice before all courts in the State of Maryland since December 15, 1998, and all courts in the District of Columbia since August 2, 1999. Ms. Brown also has been admitted to practice before the United States Court of Appeals for the Fourth Circuit and the U.S. District Court of the District of Columbia. Ms. Brown is a member

of the State Bar of Maryland and the Bar of the District of Columbia and is in good standing with respect to such memberships. Ms. Brown has not been disciplined in any jurisdiction.

3. Ms. Brown has read all the applicable provisions of The Rules of Judicial Administration and the Rules Regulating The Florida Bar.

4. This verified motion complies with the Rules of Judicial Administration.

5. The undersigned will remain associated with this matter at all stages as required by local rules.

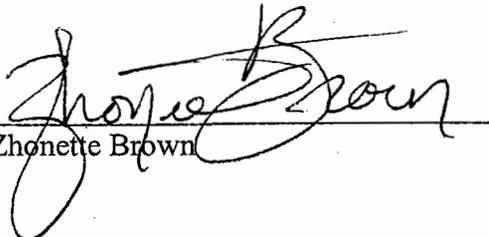
6. Ms. Brown will be associated with Joseph Ianno, Jr. for purposes of this representation. Mr. Ianno is a member in good standing of the Florida Bar.

7. A proposed order granting this Motion is attached hereto.

8. Counsel for Defendant has been consulted regarding this motion and has no objection.

WHEREFORE, Plaintiff respectfully requests that this Court enter an order admitting Zhonette Brown, *pro hac vice* for the purpose of representing Plaintiff as counsel in connection with this action pending before this Court together with such other and further relief as the Court deems just and proper.

The undersigned verifies that she has knowledge of the facts stated herein, and that the statements in the foregoing motion are true and correct.


Zhonette Brown

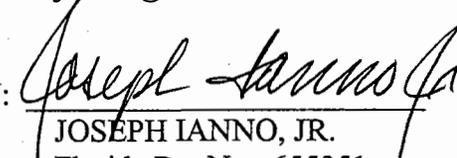
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to all counsel of record on the attached service list on this 18th day of August, 2003.

Thomas D. Yannucci, P.C.
Thomas A. Clare
Larissa Paule-Carres
Brett H. McGurk
KIRKLAND & ELLIS LLP
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

**COUNSEL FOR PLAINTIFF,
MORGAN STANLEY SENIOR FUNDING**

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

BY: 
JOSEPH IANNO, JR.
Florida Bar No: 655351

SERVICE LIST

<p>John Scarola, Esq. SEARCY, DENNEY, SCAROLA, BARNHARDT & SHIPLEY, P.A. 2139 Palm Beach Lakes Boulevard West Palm Beach, Florida 33409 Telephone: (561) 686-6300 Facsimile (561) 478-0754</p>	<p>Counsel for Defendants</p>
<p>Jerold S. Solovy, Esq. JENNER & BLOCK, LLC One IBM Plaza, Suite 4400 Chicago, Illinois 60611 Telephone: (312) 222-9350 Facsimile: (312) 840-7671</p>	<p>Counsel for Defendants</p>

IN THE CIRCUIT COURT OF THE
15TH JUDICIAL CIRCUIT IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 2003 CA 005165 AI

MORGAN STANLEY SENIOR FUNDING,
INC.,

Plaintiff,

v.

MACANDREWS & FORBES HOLDINGS,
INC., and COLEMAN (PARENT)
HOLDINGS, INC.

Defendants.

**ORDER GRANTING VERIFIED MOTION
TO ADMIT ZHONETTE BROWN PRO HAC VICE**

THIS CAUSE having come before the Court upon Plaintiff's Verified Motion to Admit Zhonette Brown Pro Hac Vice, and the Court having been advised of the agreement of counsel and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that:

Plaintiff, Morgan Stanley Senior Funding, Inc.'s Verified Motion to Admit Zhonette Brown Pro Hac Vice is GRANTED.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this ____ day of August, 2003.

ELIZABETH T. MAASS
Circuit Court Judge

Copies furnished to:

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett H. McGurk
Larissa Paule-Carres
Ryan P. Phair
Zhonette Brown
Kathryn R. DeBord
KIRKLAND & ELLIS LLP
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005

John Scarola
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33409

Jerold S. Solovy
JENNER & BLOCK, LLC
One IBM Plaza
Suite 4400
Chicago, Illinois 60611

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CASE NO: 03 CA-005165 AG

MORGAN STANLEY SENIOR FUNDING, INC.,

Plaintiff,

v.

MACANDREWS & FORBES HOLDINGS, INC.
AND COLEMAN (PARENT) HOLDINGS INC.,

Defendant.

VERIFIED MOTION TO ADMIT
RYAN P. PHAIR, PRO HAC VICE

Plaintiff Morgan Stanley Senior Funding, Inc., pursuant Fla. R. Jud. Adm. 2.061, requests this Court to admit attorney Ryan P. Phair, *pro hac vice*, and in support of this Motion, states the following:

1. Plaintiff requests that this Court permit Ryan P. Phair, an attorney with the law firm of Kirkland & Ellis LLP whose address is 655 15th Street, N.W. – 12th Floor, Washington, D.C. 20005, to appear *pro hac vice* and participate fully in this action as additional counsel on behalf of Plaintiff.

2. Mr. Phair been admitted to practice before all courts in the Commonwealth of Maryland since December 12, 2001, and all courts in the District of Columbia since September 13, 2002. Mr. Phair also has been admitted to practice before the United States Court of Appeals for the Fourth Circuit. Mr. Phair is a member of the State Bar of Maryland and the

Bar of the District of Columbia and is in good standing with respect to such memberships. Mr. Phair has not been disciplined in any jurisdiction.

3. Mr. Phair has read all the applicable provisions of The Rules of Judicial Administration and the Rules Regulating The Florida Bar.

4. This verified motion complies with the Rules of Judicial Administration.

5. The undersigned will remain associated with this matter at all stages as required by local rules.

6. Mr. Phair will be associated with Joseph Ianno, Jr. for purposes of this representation. Mr. Ianno is a member in good standing of the Florida Bar.

7. A proposed order granting this Motion is attached hereto.

8. Counsel for Defendant has been consulted regarding this motion and has no objection.

WHEREFORE, Plaintiff respectfully requests that this Court enter an order admitting Ryan A. Phair, *pro hac vice* for the purpose of representing Plaintiff as counsel in connection with this action pending before this Court together with such other and further relief as the Court deems just and proper.

The undersigned verifies that he has knowledge of the facts stated herein, and that the statements in the foregoing motion are true and correct.


Ryan P. Phair

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to all counsel of record on the attached service list on this 18th day of ~~July~~ ^{August}, 2003.

Thomas D. Yannucci, P.C.
Thomas A. Clare
Larissa Paule-Carres
Brett H. McGurk
KIRKLAND & ELLIS LLP
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

**COUNSEL FOR PLAINTIFF,
MORGAN STANLEY SENIOR FUNDING**

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

BY: 
JOSEPH IANNO, JR.
Florida Bar No: 655351

SERVICE LIST

<p>John Scarola, Esq. SEARCY, DENNEY, SCAROLA, BARNHARDT & SHIPLEY, P.A. 2139 Palm Beach Lakes Boulevard West Palm Beach, Florida 33409 Telephone: (561) 686-6300 Facsimile (561) 478-0754</p>	<p>Counsel for Defendants</p>
<p>Jerold S. Solovy, Esq. JENNER & BLOCK, LLC One IBM Plaza, Suite 4400 Chicago, Illinois 60611 Telephone: (312) 222-9350 Facsimile: (312) 840-7671</p>	<p>Counsel for Defendants</p>

IN THE CIRCUIT COURT OF THE
15TH JUDICIAL CIRCUIT IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 2003 CA 005165 AI

MORGAN STANLEY SENIOR FUNDING,
INC.,

Plaintiff,

v.

MACANDREWS & FORBES HOLDINGS,
INC., and COLEMAN (PARENT)
HOLDINGS, INC.

Defendants.

**ORDER GRANTING VERIFIED MOTION
TO ADMIT RYAN P. PHAIR PRO HAC VICE**

THIS CAUSE having come before the Court upon Plaintiff's Verified Motion to Admit Ryan P. Phair Pro Hac Vice, and the Court having been advised of the agreement of counsel and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that:

Plaintiff, Morgan Stanley Senior Funding, Inc.'s Verified Motion to Admit Ryan P. Phair Pro Hac Vice is GRANTED.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this ____ day of August, 2003.

ELIZABETH T. MAASS
Circuit Court Judge

Copies furnished to:

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett H. McGurk
Larissa Paule-Carres
Ryan P. Phair
Zhonette Brown
Kathryn R. DeBord
KIRKLAND & ELLIS LLP
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005

John Scarola
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33409

Jerold S. Solovy
JENNER & BLOCK, LLC
One IBM Plaza
Suite 4400
Chicago, Illinois 60611

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CASE NO: 03 CA-005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

VERIFIED MOTION TO ADMIT
KATHRYN R. DEBORD PRO HAC VICE

Defendant Morgan Stanley & Co., Inc. pursuant Fla. R. Jud. Adm. 2.061, requests this Court to admit attorney Kathryn R. DeBord, *pro hac vice*, and in support of this Motion, states the following:

1. Defendant requests that this Court permit Kathryn R. DeBord, an attorney with the law firm of Kirkland & Ellis LLP whose address is 655 15th Street, N.W. – 12th Floor, Washington, D.C. 20005, to appear *pro hac vice* and participate fully in this action as additional counsel on behalf of Defendant.

2. Ms. DeBord has been admitted to practice before all courts in the State of Maryland since December 17, 2002. Ms. DeBord is a member of the State Bar of Maryland and is in good standing with respect to such membership. Ms. DeBord has not been disciplined in any jurisdiction.

3. Ms. DeBord has read all the applicable provisions of The Rules of Judicial Administration and the Rules Regulating The Florida Bar.

4. This verified motion complies with the Rules of Judicial Administration.

5. The undersigned will remain associated with this matter at all stages as required by local rules.

6. Ms. DeBord has not filed a motion for permission to appear in Florida state courts in the preceding five years. The representation of Defendant in this matter commenced on May 8, 2003.

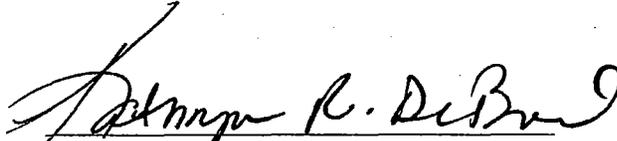
7. Ms. DeBord will be associated with Joseph Ianno, Jr. for purposes of this representation. Mr. Ianno is a member in good standing of the Florida Bar.

8. A proposed order granting this Motion is attached hereto.

9. Counsel for Plaintiff has been consulted regarding this motion and has no objection.

WHEREFORE, Defendant respectfully requests that this Court enter an order admitting Kathryn R. DeBord, *pro hac vice* for the purpose of representing Defendant as counsel in connection with this action pending before this Court together with such other and further relief as the Court deems just and proper.

The undersigned verifies that he has knowledge of the facts stated herein, and that the statements in the foregoing motion are true and correct.


Kathryn R. DeBord

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to all counsel of record on the attached service list on this 18th day of August, 2003.

Thomas D. Yannucci, P.C.
Thomas A. Clare
Larissa Paule-Carres
Brett H. McGurk
Kathryn R. DeBord
KIRKLAND & ELLIS LLP
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

**COUNSEL FOR DEFENDANT,
MORGAN STANLEY & CO., INC.**

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

BY: 
JOSEPH IANNO, JR.
Florida Bar No: 655351

SERVICE LIST

<p>John Scarola, Esq. SEARCY, DENNEY, SCAROLA, BARNHARDT & SHIPLEY, P.A. 2139 Palm Beach Lakes Boulevard West Palm Beach, Florida 33409 Telephone: (561) 686-6300 Facsimile (561) 478-0754</p>	<p>Counsel for Plaintiff</p>
<p>Jerold S. Solovy, Esq. JENNER & BLOCK, LLC One IBM Plaza, Suite 4400 Chicago, Illinois 60611 Telephone: (312) 222-9350 Facsimile: (312) 840-7671</p>	<p>Counsel for Plaintiff</p>

IN THE CIRCUIT COURT OF THE
15TH JUDICIAL CIRCUIT IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 2003 CA 005045 AI

COLEMAN (PARENT) HOLDING INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

**ORDER GRANTING VERIFIED MOTION
TO ADMIT KATHRYN R. DEBORD PRO HAC VICE**

THIS CAUSE having come before the Court upon Defendant's Verified Motion to Admit Kathryn R. DeBord Pro Hac Vice, and the Court having been advised of the agreement of counsel and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that:

Defendant, Morgan Stanley & Co., Inc.'s Verified Motion to Admit Kathryn R. DeBord Pro Hac Vice is GRANTED.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this ____ day of August, 2003.

ELIZABETH T. MAASS
Circuit Court Judge

Copies furnished to:

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett H. McGurk
Larissa Paule-Carres
Zhonette Brown
Ryan P. Phai
Kathryn R. DeBord
KIRKLAND & ELLIS LLP
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005

John Scarola
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33409

Jerold S. Solovy
JENNER & BLOCK, LLC
One IBM Plaza
Suite 4400
Chicago, Illinois 60611

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CASE NO: 03 CA-005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

VERIFIED MOTION TO ADMIT
RYAN P. PHAIR, PRO HAC VICE

Defendant Morgan Stanley & Co., Inc., pursuant Fla. R. Jud. Adm. 2.061, requests this Court to admit attorney Ryan P. Phair, *pro hac vice*, and in support of this Motion, states the following:

1. Defendant requests that this Court permit Ryan P. Phair, an attorney with the law firm of Kirkland & Ellis LLP whose address is 655 15th Street, N.W. – 12th Floor, Washington, D.C. 20005, to appear pro hac vice and participate fully in this action as additional counsel on behalf of Defendant.

2. Mr. Phair has been admitted to practice before all courts in the Commonwealth of Maryland since December 12, 2001, and all courts in the District of Columbia since September 13, 2002. Mr. Phair also has been admitted to practice before the United States Court of Appeals for the Fourth Circuit. Mr. Phair is a member of the State Bar of Maryland and the

Bar of the District of Columbia and is in good standing with respect to such memberships. Mr. Phair has not been disciplined in any jurisdiction.

3. Mr. Phair has read all the applicable provisions of The Rules of Judicial Administration and the Rules Regulating The Florida Bar.

4. This verified motion complies with the Rules of Judicial Administration.

5. The undersigned will remain associated with this matter at all stages as required by local rules.

6. Mr. Phair will be associated with Joseph Ianno, Jr. for purposes of this representation. Mr. Ianno is a member in good standing of the Florida Bar.

7. A proposed order granting this Motion is attached hereto.

8. Counsel for Plaintiff has been consulted regarding this motion and has no objection.

WHEREFORE, Defendant respectfully requests that this Court enter an order admitting Ryan P. Phair, *pro hac vice* for the purpose of representing Defendant as counsel in connection with this action pending before this Court together with such other and further relief as the Court deems just and proper.

The undersigned verifies that he has knowledge of the facts stated herein, and that the statements in the foregoing motion are true and correct.



Ryan P. Phair

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to all counsel of record on the attached service list on this 18th day of August, 2003.

Thomas D. Yannucci, P.C.
Thomas A. Clare
Larissa Paule-Carres
Brett H. McGurk
KIRKLAND & ELLIS LLP
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

**COUNSEL FOR DEFENDANT,
MORGAN STANLEY & CO., INC.**

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

BY: 
JOSEPH IANNO, JR.
Florida Bar No: 655351

SERVICE LIST

<p>John Scarola, Esq. SEARCY, DENNEY, SCAROLA, BARNHARDT & SHIPLEY, P.A. 2139 Palm Beach Lakes Boulevard West Palm Beach, Florida 33409 Telephone: (561) 686-6300 Facsimile (561) 478-0754</p>	<p>Counsel for Plaintiff</p>
<p>Jerold S. Solovy, Esq. JENNER & BLOCK, LLC One IBM Plaza, Suite 4400 Chicago, Illinois 60611 Telephone: (312) 222-9350 Facsimile: (312) 840-7671</p>	<p>Counsel for Plaintiff</p>

IN THE CIRCUIT COURT OF THE
15TH JUDICIAL CIRCUIT IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 2003 CA 005045 AI

COLEMAN (PARENT) HOLDING INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

**ORDER GRANTING VERIFIED MOTION
TO ADMIT RYAN P. PHAIR PRO HAC VICE**

THIS CAUSE having come before the Court upon Defendant's Verified Motion to Admit Ryan P. Phair Pro Hac Vice, and the Court having been advised of the agreement of counsel and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that:

Defendant, Morgan Stanley & Co., Inc.'s Verified Motion to Admit Ryan P. Phair Pro Hac Vice is GRANTED.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this ____
day of August, 2003.

ELIZABETH T. MAASS
Circuit Court Judge

Copies furnished to:

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett H. McGurk
Larissa Paule-Carres
Zhonette Brown
Ryan P. Phair
KIRKLAND & ELLIS LLP
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005

John Scarola
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33409

Jerold S. Solovy
JENNER & BLOCK, LLC
One IBM Plaza
Suite 4400
Chicago, Illinois 60611

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CASE NO: 03 CA-005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

VERIFIED MOTION TO ADMIT
ZHONETTE BROWN, PRO HAC VICE

Defendant Morgan Stanley & Co., Inc., pursuant Fla. R. Jud. Adm. 2.061, requests this Court to admit attorney Zhonette Brown, *pro hac vice*, and in support of this Motion, states the following:

1. Defendant requests that this Court permit Zhonette Brown, an attorney with the law firm of Kirkland & Ellis LLP whose address is 655 15th Street, N.W. – 12th Floor, Washington, D.C. 20005, to appear *pro hac vice* and participate fully in this action as additional counsel on behalf of Defendant.

2. Ms. Brown has been admitted to practice before all courts in the State of Maryland since December 15, 1998, and all courts in the District of Columbia since August 2, 1999. Ms. Brown also has been admitted to practice before the United States Court of Appeals for the Fourth Circuit and the United States District Court for the District of Columbia. Ms. Brown is a member of the State Bar of Maryland and the Bar of the District of Columbia and is

in good standing with respect to such memberships. Ms. Brown has not been disciplined in any jurisdiction.

3. Ms. Brown has read all the applicable provisions of The Rules of Judicial Administration and the Rules Regulating The Florida Bar.

4. This verified motion complies with the Rules of Judicial Administration.

5. The undersigned will remain associated with this matter at all stages as required by local rules.

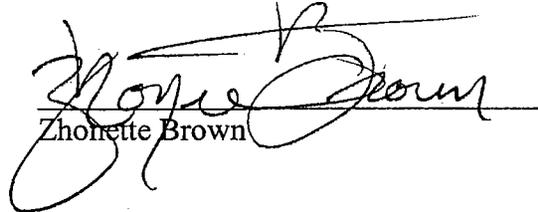
6. Ms. Brown will be associated with Joseph Ianno, Jr. for purposes of this representation. Mr. Ianno is a member in good standing of the Florida Bar.

7. A proposed order granting this Motion is attached hereto.

8. Counsel for Plaintiff has been consulted regarding this motion and has no objection.

WHEREFORE, Defendant respectfully requests that this Court enter an order admitting Zhonette Brown, *pro hac vice* for the purpose of representing Defendant as counsel in connection with this action pending before this Court together with such other and further relief as the Court deems just and proper.

The undersigned verifies that she has knowledge of the facts stated herein, and that the statements in the foregoing motion are true and correct.


Zhonette Brown

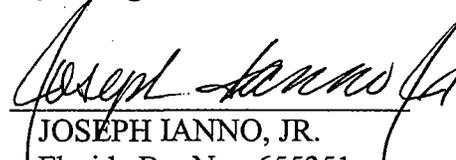
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to all counsel of record on the attached service list on this 18th day of August, 2003.

Thomas D. Yannucci, P.C.
Thomas A. Clare
Larissa Paule-Carres
Brett H. McGurk
KIRKLAND & ELLIS LLP
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

**COUNSEL FOR DEFENDANT,
MORGAN STANLEY & CO., INC.**

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

BY: 
JOSEPH IANNO, JR.
Florida Bar No: 655351

SERVICE LIST

<p>John Scarola, Esq. SEARCY, DENNEY, SCAROLA, BARNHARDT & SHIPLEY, P.A. 2139 Palm Beach Lakes Boulevard West Palm Beach, Florida 33409 Telephone: (561) 686-6300 Facsimile (561) 478-0754</p>	<p>Counsel for Plaintiff</p>
<p>Jerold S. Solovy, Esq. JENNER & BLOCK, LLC One IBM Plaza, Suite 4400 Chicago, Illinois 60611 Telephone: (312) 222-9350 Facsimile: (312) 840-7671</p>	<p>Counsel for Plaintiff</p>

IN THE CIRCUIT COURT OF THE
15TH JUDICIAL CIRCUIT IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 2003 CA 005045 AI

COLEMAN (PARENT) HOLDING INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

**ORDER GRANTING VERIFIED MOTION
TO ADMIT ZHONETTE BROWN PRO HAC VICE**

THIS CAUSE having come before the Court upon Defendant's Verified Motion to Admit Zhonette Brown Pro Hac Vice, and the Court having been advised of the agreement of counsel and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that:

Defendant, Morgan Stanley & Co., Inc.'s Verified Motion to Admit Zhonette Brown Pro Hac Vice is GRANTED.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this ____ day of August, 2003.

ELIZABETH T. MAASS
Circuit Court Judge

Copies furnished to:

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett H. McGurk
Larissa Paule-Carres
Zhonette Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005

John Scarola
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33409

Jerold S. Solovy
JENNER & BLOCK, LLC
One IBM Plaza
Suite 4400
Chicago, Illinois 60611

IN THE CIRCUIT COURT OF THE
15TH JUDICIAL CIRCUIT IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 2003 CA 005045 AI

COLEMAN (PARENT) HOLDING INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

**ORDER GRANTING VERIFIED MOTION
TO ADMIT KATHRYN R. DEBORD PRO HAC VICE**

THIS CAUSE having come before the Court upon Defendant's Verified Motion to Admit Kathryn R. DeBord Pro Hac Vice, and the Court having been advised of the agreement of counsel and being otherwise fully advised in the premises, it is hereby

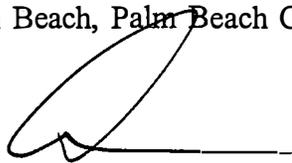
ORDERED AND ADJUDGED that:

Defendant, Morgan Stanley & Co., Inc.'s Verified Motion to Admit Kathryn R. DeBord Pro Hac Vice is GRANTED. *MS. DeBord may practice before the*

Court in this act.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 19

day of August, 2003.



ELIZABETH T. MAASS
Circuit Court Judge

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

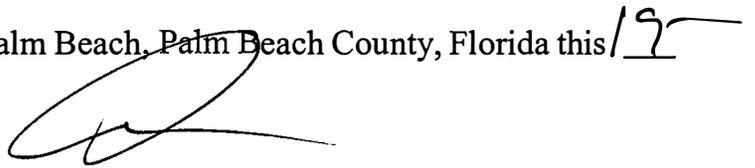
MORGAN STANLEY & CO., INC.,
Defendant(s).

**ORDER ON DEFENDANT'S VERIFIED MOTION TO ADMIT
ZHONETTE BROWN, PRO HAC VICE**

THIS CAUSE came before the Court, in Chambers, on Defendant's Verified Motion to Admit Zhonette Brown, Pro Hac Vice. Based on a review of the Motion, it is

ORDERED AND ADJUDGED that Defendant's Verified Motion to Admit Zhonette Brown, Pro Hac Vice is Denied, without prejudice to counsel's filing a renewed Motion to Admit Zhonette Brown, Pro Hac Vice, containing the information required by Rule 2.061 (b), Fla. R. Jud. Admin.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 19th
day of August, 2003.



ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:

Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci
655 15th Street, NW, Suite 1200
Washington DC 20005

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, Il 60611

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

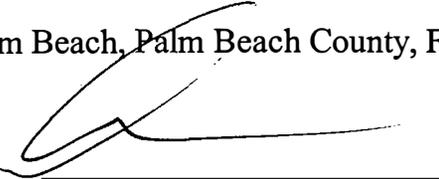
MORGAN STANLEY & CO., INC.,
Defendant(s).

**ORDER ON DEFENDANT'S VERIFIED MOTION TO ADMIT RYAN P. PHAIR,
PRO HAC VICE**

THIS CAUSE came before the Court, in Chambers, on Defendant's Verified Motion to Admit Ryan P. Phair, Pro Hac Vice. Based on a review of the Motion, it is

ORDERED AND ADJUDGED that Defendant's Verified Motion to Admit Ryan P. Phair, Pro Hac Vice is Denied, without prejudice to counsel's filing a renewed Motion to Admit Ryan P. Phair, Pro Hac Vice, containing the information required by Rule 2.061 (b), Fla. R. Jud. Admin.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 19
day of August, 2003.


ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:

Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci
655 15th Street, NW, Suite 1200
Washington DC 20005

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, Il 60611

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO: 2003 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

MOTION FOR EXTENSION OF TIME

COMES NOW, non-party, WACHOVIA BANK, N.A. ("Wachovia"), and hereby moves for an enlargement of time to serve its response to the Notice of Deposition/Subpoena Duces Tecum directed to Custodian of Records of Wachovia on July 29, 2003 (the "Subpoena") served by Plaintiff. As grounds therefore, Wachovia states as follows:

1. On or about August 4, 2003 Wachovia was served with the Notice of Deposition for August 15, 2003 at 1:30 P.M. together with the Subpoena with Attachment A, which categorized the documents requested, a copy of which is attached hereto and marked as Composite Exhibit "A".

2. Attachment A to the Subpoena requests 58 categories of documents for the period January 1, 1996 through the date of trial in this matter (see instructions paragraph 3 on page 15). It further requests documents from two arbitrations, nine other lawsuits and two separate SEC Administrative Proceedings (see Definitions, paragraphs 1, 2, and 18 found on pages 9, 12 and 13, respectfully of Attachment A).

3. On its face, the Subpoena is patently overbroad, vague, ambiguous and requests commercially sensitive and/or confidential documents.

4. Moreover, the bulk of the documents requested concern a depositor or borrower other than Plaintiff herein. Pursuant to Section 655.059, Florida Statutes, the access to books and records of a financial institution are confidential and are only available for inspection and examination as proscribed in Rule 655.059(2)(b).

5. Further, there may be confidentiality provisions in Wachovia's agreements with its borrower, referenced in the Subpoena, (the "Borrower") that preclude Wachovia from disclosing the information requested to third parties without the Borrower's consent and/or prior court order.

6. Wachovia is unaware of any "agreement" by the Borrower or court order requiring the release of the information requested in the Subpoena.

7. However, in an effort to evaluate the relevancy of the request, Wachovia has ordered copies of the Complaints entitled "*Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc.*, Case No: 2003 CA 05045 AI and *Morgan Stanley Senior Funding, Inc. v. MacAndrews & Forbes Holdings, Inc. and Coleman (Parent) Holdings, Inc.*, Case No: 2003 CA 005165 AI.

8. Wachovia is also in the process of ascertaining the location and availability of the documents requested in the voluminous Subpoena to the extent the documents are identifiable.

9. Within (30) thirty days, Wachovia should be in a better position to ascertain what, if any, documents should be produced and are available for production,

should Plaintiff overcome the confidentiality requirements of 655.059, and any confidentiality agreements Wachovia has with the Borrower.

10. Wachovia has provided written notification to counsel for Plaintiff of its position.

11. Wachovia is not intentionally delaying the production of the documents requested, but is in need of additional time in light of the breadth of the Subpoena and the issues raised herein.

WHEREFORE, for good cause shown, non-party, Wachovia, prays this court to enter its order granting it thirty (30) additional days to and including September 21, 2003 to serve a response to Plaintiff's Deposition Notice/Subpoena Duces Tecum directed to the Custodian of Records of Wachovia and for any other relief the court may deem just and proper under the premises.

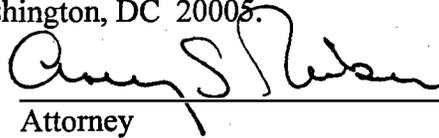
RUDEN, McCLOSKEY, SMITH,
SCHUSTER & RUSSELL, P.A.
Attorneys for non-party, Wachovia Bank, N.A.
222 Lakeview Avenue, Suite 800
West Palm Beach, Florida 33401
Telephone: 561/838-4500
Facsimile: 561/832-3036

BY: 
AMY S. RUBIN
FLORIDA BAR NO: 476048

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document was furnished by US Mail this 22nd day of August, 2003 to: Jack Scarola, Searcy Denney Scarola Barnhard & Shipley, P.A., 2139 Palm Beach Lakes Blvd, West Palm Beach, FL

33409; Jerold S. Solovy, Ronald I. Marner, Robert T. Makowski, Deirdre E. Connell,
Jenner & Bock, LLC, One IBM Plaza, Suite 4400, Chicago, IL 60611, Joseph Ianno, Jr.,
Esquire, Carlton, Fields, et al, 222 Lakeview Avenue, Suite 1400, West Palm Beach, FL
33401; and to Thomas D. Yannucci, P.C., Thomas A. Clare, Brett McGurk, Kirkland and
Ellis, 655 15th Street, NW, Suite 1200, Washington, DC 20005.



Attorney

AUG 7 2003

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 2003 CA 005045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,

Defendant(s).

NOTICE OF DEPOSITION

TO: Counsel on the attached list

1150 8/4/03
[Signature]

PLEASE TAKE NOTICE that Plaintiff Coleman (Parent) Holdings, Inc., hereby notices the deposition upon oral examination of the Custodian of Records, Wachovia Bank, NA pursuant to Florida Rule of Civil Procedure 1.410 on the date and at the time set forth below:

Custodian of Records August 15, 2003 at 1:30 p.m.
Wachovia Bank, NA

The witness will be requested to bring to the deposition documents specified on Attachment A.

The deposition will be recorded by stenographic means at the offices of Searcy Denney Scarola Barnhart & Shipley, P.C., 2139 Palm Beach Lakes Blvd., West Palm Beach, Florida.

The deposition will be taken before a person authorized to administer oaths and will continue until completed.

MSSFI V. MACANDREWS, ET AL.
2003 CA 005045 AL

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by
telex and by overnight mail to all counsel on the attached Service List, this 29th day of
July, 2003.

COLEMAN (PARENT) HOLDINGS, INC.

By 
One of its Attorneys

Jerold S. Solovy
Ronald L. Manner
Robert T. Markowski
Deirdre E. Connell
JENNER & BLOCK, LLC
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

Jack Scarola
SEARCY DENNEY SCAROLA
BARNHART & SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409
(561) 686-6300

MSSFI V. MACANDREWS, ET AL
2003 CA 005045 AI

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block, LLC
One IBM Plaza
Suite 4400
Chicago, IL 60611

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 2003 CA 005045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,

Defendant(s).

SUBPOENA DUCES TECUM

THE STATE OF FLORIDA

TO: Custodian of Records
Wachovia Bank, NA
777 S. Flagler Drive
West Palm Beach, FL 33401

YOU ARE COMMANDED to appear for deposition at Searcy Denney Scarola Barnhart & Shipley, P.A., 2139 Palm Beach Lakes Boulevard, West Palm Beach, FL, 33409 on the 15th day of August, 2003 at 1:30 p.m. and to have with you at that time and place the documents specified on Attachment A.

If you fail to:

- 1) Appear as specified; or
- 2) Furnish the records instead of appearing as provided above; or

ATTACHMENT A**SUBPOENA TO CUSTODIAN OF RECORDS OF
FIRST UNION NATIONAL BANK
(NOW KNOWN AS WACHOVIA BANK NATIONAL ASSOCIATION)**

You are hereby requested to produce the following documents pursuant to the definitions and instructions contained herein:

DOCUMENTS REQUESTED

1. All documents concerning synergies that might be achieved from a business combination of Sunbeam, Coleman, Signature Brands, and First Alert, or any combination thereof.
2. All documents concerning the potential or actual integration of Coleman, First Alert, and/or Signature Brands with Sunbeam, including, but not limited to, studies, reports, analyses, evaluations, projections, estimates, comments, or other work, performed by Coopers & Lybrand, Morgan Stanley, MSSF, Bank of America, or First Union.
3. All documents concerning any evaluation or assessment of the Bank Facilities, either prior to or after March 31, 1998, by you or any of the Lenders, including, but not limited to, any credit review or portfolio review, credit review sheets, call reports, contact reports, credit approval forms, portfolio forms, credit risk reviews, and covenant compliance reports.
4. All communications by and among the Lenders concerning the Credit Agreement, the Bank Facilities, Sunbeam, Coleman, or the Coleman Transaction.
5. All documents concerning the Lenders' plans or efforts to syndicate or sell off any portion of the Lenders' Commitments, as reflected in Schedule 2.01 of the Credit Agreement, including, but not limited to, information packages provided to potential lenders, lists or designations of potential lenders, communications with potential lenders, expressions of

interest and/or commitment made by any potential lender, and/or presentations or handouts used at lender group meetings.

6. All documents concerning Sunbeam's intention to draw down any portion of the Credit Agreement, specifically including, but not limited to, any and all written Borrowing Requests.

7. All documents concerning whether or not you or any of the Lenders considered exercising their right to terminate service under the Credit Agreement following any material adverse change in the financial status of Sunbeam.

8. All documents concerning any offer to buy Reorganized Sunbeam, or the sale, or possible sale of Reorganized Sunbeam or any subsidiary or material group of assets thereof.

9. All documents concerning your efforts to have Sunbeam retain or maintain your lending services both prior to and after the closing of the Bank Facilities.

10. All documents reflecting all fees and expenses paid by Sunbeam to you, including, but not limited to, any Administrative Agent (as defined in the Credit Agreement) fee and any other fee related to the Credit Agreement.

11. All documents concerning the Bank Facilities, including, but not limited to, the sources and uses of the Bank Facilities, the decision to close the Bank Facilities, and the closing of the Bank Facilities.

12. All documents concerning any investigation, analysis, or due diligence of Sunbeam conducted by you or on your behalf or by Morgan Stanley in 1997 or 1998.

13. All documents concerning any investigation, analysis, or due diligence of Coleman or CPH conducted by you or on your behalf or by Morgan Stanley in 1997 or 1998.

14. All documents concerning the negotiation and signing of the February 27, 1998 Agreements.
15. All documents concerning the closing of the Coleman Transaction, including, without limitation, all documents concerning the decision to close the Coleman Transaction.
16. All documents concerning the meetings of Sunbeam's Board of Directors.
17. All documents concerning any valuation of Sunbeam or Sunbeam securities.
18. All documents concerning the stock market's valuation of Sunbeam securities, including, without limitation, documents describing or analyzing the increase or decline in the market price of Sunbeam stock in any portion of the period from and including July 1, 1996 through and including December 31, 1998.
19. All documents concerning your role as Administrative Agent for the Credit Agreement or Bank Facilities.
20. All documents concerning your April 28, 1998 meeting with Sunbeam, Bank of America, and MSSF and/or Morgan Stanley, including, but not limited to, all notes taken of or during the meeting and documents memorializing, describing, or referring to the meeting.
21. All documents concerning any amendment to the Credit Agreement, including, but not limited to, the April 1998, June 1998, and July 1998 amendments. Your response should include, but is not limited to, all documents concerning the reasons for the amendments.
22. All documents concerning your meetings with Sunbeam, Bank of America, MSSF and/or Morgan Stanley at which the topics of Sunbeam or the Bank Facilities

were discussed including, but not limited to, all notes taken of or during the meeting and documents concerning the meeting. Your response should include documents from the period after the Bank Facilities closed on March 31, 1998.

23. All documents concerning the lien placed by you and/or Bank of America and MSSF on Coleman stock owned by Sunbeam, including, but not limited to, documents concerning the reason or decision to seek the lien.

24. All documents concerning the collateral for the Bank Facilities, including, but not limited to, all documents evaluating or assessing the value of that collateral.

25. All documents concerning the settlement agreement between CPH and Sunbeam dated August 12, 1998.

26. All documents concerning any write-off or loss reserve you have taken against the Bank Facilities.

27. All documents concerning your rating of the Bank Facilities and any change made to that rating.

28. All documents concerning any distribution you received as part of Sunbeam's bankruptcy reorganization plan, including, but not limited to, the value of the Sunbeam stock you received, and all documents evaluating or assessing the value of that distribution.

29. All documents concerning Sunbeam's decision to file for bankruptcy.

30. All documents concerning Sunbeam's plan of reorganization.

31. All documents concerning any settlement or compromise reached with the Official Committee of Unsecured Creditors of Sunbeam Corporation.

32. All documents concerning any valuation of Coleman or Coleman securities.
33. All documents concerning Sunbeam's or Coleman's financial statements and/or Sunbeam's restated financial statements.
34. All documents concerning the increase in the size of the Subordinated Debenture Offering from \$500 million to \$750 million.
35. All documents concerning the decrease in the amount of the Bank Facilities from \$2.0 billion to \$1.7 billion.
36. All documents concerning any draft or executed "comfort letters" prepared in connection with the Subordinated Debenture Offering.
37. All documents concerning the sale of Subordinated Debentures, including, without limitation, documents concerning road shows, communications with potential investors, or communications with or among Morgan Stanley's sales personnel.
38. All documents concerning the Subordinated Debenture offering, including, but not limited to, the pricing, conversion features, and/or "book of demand" for the Subordinated Debentures.
39. All documents concerning the events that took place on March 19, 1998 at Global Financial Press, including, without limitation, documents concerning Lawrence Bornstein and/or John Tyree.
40. All documents concerning the "bring-down" due diligence for the Subordinated Debenture Offering.
41. All documents concerning Sunbeam's first quarter 1998 sales and/or earnings.

42. All documents concerning the closing of the Subordinated Debenture Offering including, without limitation, all documents concerning the decision to close the Subordinated Debenture Offering.

43. All documents concerning any press releases or any statement contained in any press release by Sunbeam bearing the following dates or issued on or about October 23, 1997, March 19, 1998, April 3, 1998, May 9, 1998, June 15, 1998, June 25, 1998, June 30, 1998, October 20, 1998, or November 12, 1998.

44. All documents concerning communications relating to Sunbeam, Coleman, or CPH, concerning the subject of the Coleman Transaction or the Bank Facility, including, without limitation, internal communications within First Union or communications between or among First Union and Sunbeam; Sladden, Arps, Slate, Meagher & Flom LLP; Coopers & Lybrand; Llama Company; Arthur Andersen LLP; Sard Verbinnen & Co., Inc.; Hill & Knowlton, Inc.; Coleman, Credit Suisse First Boston; CPH; Mafco; Wachtell Lipton, Rosen & Katz; Davis Polk & Wardwell; or any other person or company, and/or any of their respective employees, agents, or representatives.

45. All documents concerning any inquiry from, or any communication between or among you and any Sunbeam investor, potential investor, securities or financial analyst, or rating agency relating to Sunbeam.

46. All documents concerning any meeting between and among you, Sunbeam, Arthur Andersen, Coopers & Lybrand, Morgan Stanley, MSSF, Coleman, First Alert, or Signature Brands related to the 1998 acquisitions, the integration of the acquisitions, including, but not limited to, documents prepared for, disseminated at, utilized during, or prepared after such meetings.

47. All documents concerning the Coleman Transaction.
48. All documents concerning Albert Dunlap and/or Russell Kersh.
49. Organizational charts, memoranda, or similar documents that describe the business organizational structure and the administrative, management, and reporting structure of First Union from and including January 1, 1997 through and including December 31, 1998.
50. All documents concerning First Union's policies, procedures, manuals, guidelines, reference materials, or checklists that were in effect during any period from and including January 1, 1997 through and including December 31, 1998 for the performance of due diligence, including, without limitation, due diligence performed in connection with underwriting credit facilities.
51. All of your document retention or document destruction policies or procedures or similar procedures for the preservation, storage, destruction, back-up or deletion of documents of any kind, including electronic or hard copy versions of documents, for any time during 1996 through the present, including, without limitation, any amendment to any such policies or procedures, schedules or related documents, any and all records concerning adherence to and failure to adhere to or abide by any such policies or procedures, and any memoranda or other instructions concerning the obligation and procedures to be utilized to preserve all relevant documents, including without limitation evidence concerning the Litigations, the Arbitrations, and the SEC Administrative Proceedings.
52. All documents or other information you have provided or produced to any party (whether voluntarily or in response to a document request, subpoena duces tecum, interrogatories, requests for admission, or other requests for information and/or documents) in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings (including,

55. All motions, memoranda, briefs, rulings, orders, or transcripts of any proceeding concerning any discovery request, subpoena, or other request for information and/or documents in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

56. All transcripts of and exhibits to any depositions, recorded statements, affidavits or hearings held in connection with any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

57. All documents obtained by you or produced to you by other parties, third parties, or non-parties (whether voluntarily or in response to any document requests, subpoenas duces tecum, or other process served by you or any other party) concerning Sunbeam or the Coleman Transaction.

58. All affidavits, declarations, or other testimonial statements filed or submitted in connection with any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

DEFINITIONS

1. "Arbitrations" means Albert J. Dunlap and Sunbeam Corporation, No. 32 160 00088 99 (AAA); and Russell A. Kersh and Sunbeam Corporation, No. 32 160 00091 99 (AAA).

2. "Bank Facility" means the Credit Agreement, including amendments, and all funds extended by MSSF, First Union, and/or Bank of America to Sunbeam pursuant to the Credit Agreement, including, but not limited to, Tranche A, Tranche B, and the Revolving Credit Facility.

3. "Bank of America" means Bank of America National Trust and Savings Association and any of its present and former officers, directors, employees, representatives, and agents.
4. "Borrowing Request" means any request by Sunbeam for a Borrowing in accordance with Section 2.03 of the Credit Agreement.
5. "Coleman" means The Coleman Company, Inc. and any of its predecessors, successors, subsidiaries, and present and former officers, directors, and employees.
6. "CPH" means Coleman (Parent) Holdings Inc., Coleman Worldwide Corporation, CLN Holdings, Inc., and any of their predecessors, successors, subsidiaries, and present and former officers, directors, and employees.
7. "Coleman Transaction" means the transaction contemplated by the February 27, 1998 Agreements.
8. "Communication" means the transmittal of information (in the form of facts, ideas, inquiries or otherwise) by letter, memorandum, facsimile, orally, electronically, or otherwise.
9. "Concerning" means concerning, reflecting, relating to, referring to, describing, evidencing, or constituting.
10. "Coopers & Lybrand" means the former Coopers & Lybrand LLP (now known as PricewaterhouseCoopers LLP), and any of its predecessors, successors, affiliates, subsidiaries, and present and former partners, employees, representatives, and agents.

11. "Credit Agreement" means that agreement entered into by Sunbeam Corporation, as borrower, with MSSF, First Union, and Bank of America as Lenders, dated March 30, 1998 and all amendments thereto.

12. "Documents" shall be given the broad meaning provided in Rule 1.350 of the Florida Rules of Civil Procedure and refers to any form or means, whether physical, visual, or electronic, in or by which words, numbers, or ideas are recorded or preserved, whether fixed in tangible medium or electronically stored, including any and all drafts of any final document. The word "documents" shall include, by way of example and not by way of limitation, all of the following: papers, correspondence, trade letters, envelopes, memoranda, telegrams, cables, notes, messages, reports, studies, press releases, comparisons, books, accounts, checks, audio and video recordings and transcriptions thereof, pleadings, testimony, articles, bulletins, pamphlets, brochures, magazines, questionnaires, surveys, charts, newspapers, calendars, desk calendars, pocket calendars, lists, logs, publications, notices, diagrams, instructions, diaries, minutes for meetings, corporate minutes, orders, resolutions, agendas, memorials or notes of oral communications, whether by telephone or face-to-face, contracts, agreements, drafts of or proposed contracts or agreements, memoranda of understanding, letters of intent, computer tapes, computer drives or memories, computer diskettes or disks, e-mail, CD-ROMs, or any other tangible thing on which any handwriting, typing, printing, photostatic, electronic, or other form of communication or information is recorded or reproduced, together with all notations on any of the foregoing, all originals, file copies, or other unique copies of the foregoing, and all versions or drafts thereof, whether used or not.

13. "February 27, 1998 Agreements" means (a) the Agreement and Plan of Merger dated as of February 27, 1998 among Sunbeam Corp., Laser Acquisition Corp., CLN

Civ.-King (S.D. Fla.); Sunbeam Corp. v. PricewaterhouseCoopers LLP, No. CL005444AN (15th Jud. Cir., Fla.); In re Sunbeam Corp., No. 01-40291 (AJG) (Bankr. S.D.N.Y.) and every adversary proceeding therein; SEC v. Dunlap, et al., No. 01-8437-Civ.-Middlebrooks (S.D. Fla.); Oaktree Capital Management LLC v. Arthur Andersen LLP, No. BC257177 (L.A. Cty., CA); and Coleman (Parent) Holdings Inc. v. Arthur Andersen LLP, et al., No. CA 01-06062AN (15th Jud. Cir., Fla).

19. "Mafoo" means MacAndrews & Forbes Holdings Inc. and any of its predecessors, successors, subsidiaries, and present and former officers, directors, and employees.

20. "Morgan Stanley" means Morgan Stanley & Co., Inc. and any of its predecessors, successors, affiliates, subsidiaries, and present and former officers, directors, partners, employees, representatives, and agents.

21. "MSSF" means Morgan Stanley Senior Funding, Inc. and any of its predecessors, successors, affiliates, subsidiaries, and present and former officers, directors, partners, employees, representatives, and agents.

22. "Person" means any natural person, corporation, limited liability company, trust, joint venture, association, company, partnership, governmental authority, or other entity.

23. "Reorganized Sunbeam" means Sunbeam Corporation on and after the effective date of Sunbeam's chapter 11 plan of reorganization as filed with the United States Bankruptcy Court in the Southern District of New York.

24. "SEC Administrative Proceedings" means In the Matter of Sunbeam Corp., SEC Administrative Proceeding File No. 3-10481, and In the Matter of David C. Fannin, SEC Administrative Proceeding File No. 3-10482.

25. "SEC" means the Securities and Exchange Commission.
26. "Signature Brands" means Signature Brands USA, Inc., and any of its predecessors, successors, affiliates, subsidiaries, and present and former officers, directors, employees, representatives, and agents.
27. "Subordinated Debentures" means Sunbeam's Zero Coupon Convertible Senior Subordinated Debentures Due 2018.
28. "Subordinated Debenture Offering" means the offering of Sunbeam's Subordinated Debentures.
29. "Sunbeam" means Sunbeam Corporation, and any of its predecessors, successors, affiliates, subsidiaries, and present and former officers, directors, employees, representatives, and agents.
30. "You" or "Your" means First Union and any of its subsidiaries, divisions, predecessors, successors, present or former employees, representatives, agents, attorneys, accountants, advisors, or anyone acting or purporting to act on its behalf.

INSTRUCTIONS

1. Documents shall be produced as they are kept in the usual course of business, or organized and labeled to correspond to the categories in this Request. Documents attached to each other should not be separated. Documents consisting of items previously produced in the Litigations, Arbitrations, and/or SEC Administrative Proceedings with Bates numbering shall be produced in Bates number order.

2. All documents shall be produced in the file folder, envelope or other container in which the documents are kept or maintained by you. If, for any reason, the container cannot be produced, produce copies of all labels or other identifying marks.

3. The relevant period, unless otherwise indicated, shall be from January 1, 1996 through the date of trial of this matter, and shall include all documents and information which relate in whole or in part to such period, or to events or circumstances during such period, even though dated, prepared, generated or received prior or subsequent to that period. Please supplement or correct your responses to these requests if, at any time, you become aware that your responses are incomplete or incorrect in any respect.

4. If you claim the attorney-client privilege, or any other privilege or work-product protection for all or any portion of a document, you shall provide a privilege log that describes the withheld material sufficiently to allow CPH and Maico to test the privilege or protection asserted.

5. The following rules of construction apply:

- a) The connectives "and" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery requests all responses that might otherwise be outside of their scope;
- b) The term "including" shall be construed to mean "without limitation"; and
- c) The use of the singular form of any word includes the plural and vice versa.

**MACANDREWS & FORBES HOLDINGS INC.
and COLEMAN (PARENT) HOLDINGS INC.**

By: _____

One of Their Attorneys

**Jerold S. Solovy
Ronald L. Marmer
Robert T. Markowski
Deirdre E. Connell
JENNER & BLOCK, LLC
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350**

**Jack Scarola
SEARCY DENNEY SCAROLA BARNHART
& SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33402-3626
(561) 686-6300**

Dated: July __, 2003

SEARCY
DENNEY
SCAROLA
BARNHART
& SHIPLEY P.A.

*Attorneys
at Law*

☒ WEST PALM BEACH OFFICE:

2139 PALM BEACH LAKES BLVD.
WEST PALM BEACH, FLORIDA 33409

P.O. DRAWER 3626
WEST PALM BEACH, FLORIDA 33402

(561) 686-6300
1-800-780-8607
FAX: (561) 478-0754

☐ TALLAHASSEE OFFICE:

P.O. DRAWER 1230
TALLAHASSEE, FLORIDA 32302

(850) 224-7600
1-888-549-7011
FAX: (850) 224-7602

ATTORNEYS AT LAW:

ROSALYN SIA BAKER
F. GREGORY BARNHART*
LANCE BLOCK*
EARL L. DENNEY, JR.*
SEAN C. DOMNICK*
JAMES W. GUSTAFSON, JR.
DAVID K. KELLEY, JR.*
WILLIAM B. KING
DARRYL L. LEWIS*
WILLIAM A. NORTON*
DAVID J. SALES*
JOHN SCAROLA*
CHRISTIAN D. SEARCY*
HARRY A. SHEVIN
JOHN A. SHIPLEY III*
CHRISTOPHER K. SPEED*
KAREN E. TERRY
C. CALVIN WARRINER III*
DAVID J. WHITE*

*SHAREHOLDERS

PARALEGALS:

VIVIAN AYAN-TEJEDA
LAURIE J. BRIGGS
DEANE L. CADY
DANIEL J. CALLOWAY
EMILIO DIAMANTIS
DAVID W. GILMORE
TED E. KULESA
JAMES PETER LOVE
CHRISTOPHER J. PILATO
ROBERT W. PITCHER
WILLIAM H. SEABOLD
KATHLEEN SIMON
STEVE M. SMITH
WALTER A. STEIN
BRIAN P. SULLIVAN
KEVIN J. WALSH
GEORGIA K. WETHERINGTON
JUDSON WHITEHORN

Via Hand Delivery

September 2, 2003

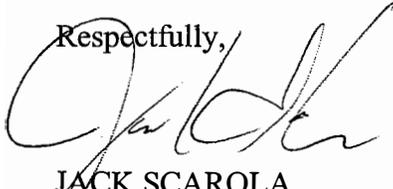
Hon. Elizabeth T. Maass
Palm Beach County Courthouse
Room #11.1208
205 North Dixie Highway
West Palm Beach, FL 33401

Re: Coleman Holdings, Inc. vs Morgan Stanley & Company
Matter No.: 029986-230580

Dear Judge Maass:

Enclosed please find an original and four copies of a proposed Agreed Order Regarding Enlargement of Time to Prepare Privilege Log in the above-styled matter. If same meets with your approval, I would ask that your Honor sign same returning conformed copies to all counsel in the envelopes provided.

Respectfully,



JACK SCAROLA
JS/mm
Enc.

cc: Joseph Ianno, Esq. (Via Fax)
Jenner & Block, LLC (Via Fax)
Thomas A. Clare, Esq. (Via Fax)



16div-003727

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,))	
Plaintiffs,))	
vs. )	)	2003 CA 005045 AI
MORGAN STANLEY & CO., INC., )	)	Judge Elizabeth T. Maass
Defendant.))	
_____))	

AGREED ORDER REGARDING ENLARGEMENT
OF TIME TO PREPARE PRIVILEGE LOG

THIS CAUSE, having come before the Court on the agreement of the parties, and the Court having reviewed the pleadings on file and otherwise being fully advised in the premises, it is hereby

ORDERED AND ADJUDGED as follows:

1. This Order shall apply to all current and future document discovery requests served by the parties in this action.
2. Upon review of the document requests served by the parties in this action, certain documents may be within the scope of the request that are protected by the attorney-client or work product privileges.
3. If any documents are withheld from production on the basis of privilege, the Court orders that each party provide a privilege log listing those documents pursuant to Florida Rule of Civil Procedure 1.280(b)(5). The parties have indicated that they expect to produce documents on a "rolling" basis. Accordingly, the privilege log also shall be provided on a rolling basis within thirty (30) days after each portion of the party's production of documents

from which the documents have been withheld on the basis of privilege. For any production of documents made prior to the date of this Order, the producing party shall provide the privilege log within thirty (30) days after the entry of this Order.

4. To the extent privilege logs were created in connection with other proceedings, the parties may use those privilege logs in this action, supplementing those logs as necessary to identify each individual document withheld on the basis of privilege.

5. The privilege log shall include, without limitation, any otherwise responsive documents that were created by the parties' lawyers in connection with the underlying transactions.

6. The parties are not required to provide a privilege log listing otherwise responsive documents where those documents involve privileged communications between the parties and their lawyers in connection with litigation arising from the transactions at issue in this case. For purposes of this paragraph, such litigation shall include, without limitation, this action and antecedent litigation involving the same transactions.

DONE AND ORDERED at Palm Beach County, Florida, this ____ day of _____, 2003.

ELIZABETH T. MAASS
CIRCUIT COURT JUDGE

Coleman v. Morgan Stanley
2003 CA 005045 AI
Agreed Order Regarding Enlargement of Time
To Prepare Privilage Log

Copies furnished to:

Joseph Ianno, Jr., Esquire
Carlton Fields, P.A.
222 Lakeview Avenue, Suite 1400
West Palm Beach, FL 33401
561-659-7070 - Phone
561-659-7368 - Fax

John Scarola, Esquire
Searcy Denney Scarola Barnhart & Shipley P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409
561-686-6300 - Phone
561-478-0754 - Fax

Jerold S. Solovy
Ronald L. Marmer
Robert T. Markowski
Michael T. Brody
Jeffrey T. Shaw
Deirdre E. Connell
JENNER & BLOCK, LLC
One IBM Plaza
Chicago, Illinois 60611
312-222-9350 - Phone
312-527-0484 - Fax

Thomas D. Yannucci, P.C
Thomas A. Clare
Brett H. McGurk
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
202-879-5000 - Phone
202-879-5200 - Fax

2003 WL 25853457 (Fla.Cir.Ct.) (Trial Deposition and Discovery)
Circuit Court of Florida.
Fifteenth Judicial Circuit
Palm Beach County

COLEMAN (PARENT) HOLDINGS INC., Plaintiff,

v.

MORGAN STANLEY & CO., INC., Defendant.

No. 2003 CA 005045 AI.

September 2, 2003.

Coleman (Parent) Holdings Inc's First Set of Interrogatories to Defendant Morgan Stanley & Co.,Inc.

Coleman (Parent) Holdings Inc., [John Scarola](#), Searcy Denney Scarola Barnhart &, Shipley P.A., 2139 Palm Beach Lakes Blvd., West Palm Beach, FL 33409, (561) 686-6300.

[Jerold S. Solovy](#), [Ronald L. Marmer](#), [Robert T. Markowski](#), [Michael T. Brody](#), [Deirdre E. Connell](#), Jenner & Block, LLC, One IBM Plaza, Suite 4400, Chicago, Illinois 60611, (312) 222-9350.

Judge [Elizabeth T. Maass](#).

Pursuant to [Florida Rules of Civil Procedure 1.280](#) and [1.340](#), Plaintiff Coleman (Parent) Holdings, Inc., by its attorneys, hereby requests that Defendant Morgan Stanley & Co., Inc. answer the following Interrogatories within thirty (30) days from the date of service.

DEFINITIONS

The following definitions apply to each Interrogatory:

1. "Identify," when used with respect to natural persons, means to state the full name of such person, and his or her last known address and telephone number, and if employed, the occupation and the job title or position of the person, and the name, address, and telephone number of the employer.
2. "Identify," when used with respect to a person other than a natural person, means to state the type of person (corporation, partnership, government agency, etc.), full name and address of its principal place of business concerned with each matter inquired of in these interrogatories.
3. "Coleman Transaction" means the transaction by which Sunbeam acquired CPH's interest in The Coleman Company, Inc.
4. "Morgan Stanley" means Morgan Stanley & Co., Inc. and any of its present and former employees representatives agents attorneys accountants and advisors.
5. "MSSF" means Morgan Stanley Senior Funding, Inc. and any of its present and former employees, representatives, agents, attorneys, accountants, and advisors.

6. "Subordinated Debenture Offering" means the offering of Sunbeam's Zero Coupon Convertible Senior Subordinated Debentures Due 2018.

7. "Sunbeam" means Sunbeam Corporation.

INSTRUCTIONS

8. The connectives "and" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of each Interrogatory all responses that might otherwise be construed to be outside the scope.

9. The use of the singular form of any word includes the plural and vice versa.

INTERROGATORIES

INTERROGATORY NO. 1: Identify each individual who conducted due diligence of Sunbeam or is knowledgeable about the due diligence conducted of Sunbeam by or on behalf of Morgan Stanley or MSSF. For each individual, identify his or her role and/or the basis and substance of his or her knowledge.

INTERROGATORY NO. 2: Identify each individual who conducted due diligence of Coleman or is knowledgeable about the due diligence conducted of Coleman by or on behalf of Morgan Stanley or MSSF. For each individual, identify his or her role and/or the basis and substance of his or her knowledge.

INTERROGATORY NO. 3: Identify each discussion, telephone conference, meeting, document, or other communication any Morgan Stanley employee or other representative (including attorneys) had or received prior to March 30, 1998 concerning Sunbeam's first quarter 1998 sales and/or profits and, for each such communication, identify the individuals participating in the communication, the date of the communication, and state the substance of the communication.

INTERROGATORY NO. 4: Identify each Morgan Stanley employee or representative (including attorneys) who received, reviewed, discussed, and/or commented upon Sunbeam's March 19, 1998 Press Release (or any drafts thereof) prior to its issuance by Sunbeam on March 19, 1998.

INTERROGATORY NO. 5: Identify each Morgan Stanley employee or representative (including attorneys) who communicated with John Tyree on or after March 19, 1998 concerning, in anyway, Sunbeam's first quarter 1998 sales and/or Sunbeam's March 19, 1998 Press Release.

INTERROGATORY NO. 6: State with particularity all actions Morgan Stanley took to "perform[] all of [Morgan Stanley's] obligations as an underwriter of Sunbeam securities" as alleged in Morgan Stanley's answer to paragraphs 58, 59, and 87 of the complaint in CD CD this action.

INTERROGATORY NO. 7: Itemize the fees, expenses, payments, and any other cash or non-cash compensation Morgan Stanley received from Sunbeam for any project, including but not limited to Sunbeam's acquisition of The Coleman Company, Inc.; Sunbeam's acquisition of Signature Brands USA; Sunbeam's acquisition of First Alert, Inc.; the Subordinated Debenture Offering; the tender offer for Signature Brands USA; the tender offer for First Alert, Inc.; and any other project for Sunbeam for which Morgan Stanley received compensation of any kind from Sunbeam.

INTERROGATORY NO. 8: Identify all claims that have been threatened, communicated, or otherwise asserted against Morgan Stanley involving allegations that Morgan Stanley failed to conduct due diligence properly in a public or private offering or in any transaction where a portion of the consideration for the transaction consisted of stock.

INTERROGATORY NO. 9: Identify each instance on which Morgan Stanley employees or representatives (including attorneys) traveled to Florida in connection with Morgan Stanley's work for Sunbeam and, for each such instance, identify the Morgan Stanley employees or representatives who traveled to Florida and the purpose, date, and duration of the trip.

INTERROGATORY NO. 10: Identify each instance in which Morgan Stanley employees or representatives (including attorneys) communicated by telephone, in writing, by e-mail, telecopy, or overnight courier with individuals in Florida in connection with Morgan Stanley's work for Sunbeam and, for each such instance, identify the Morgan Stanley employees or representatives who participated in the communication and the substance and date of the communication.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by facsimile and mail to all counsel on the attached Service List, this 28th day of August, 2003.

End of Document

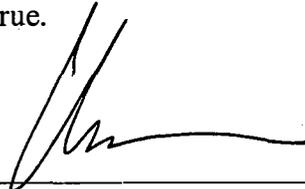
© 2017 Thomson Reuters. No claim to original U.S. Government Works.

U.S. District Court for the Eastern District of Michigan; and the Illinois Supreme Court. Mr. Johnson has not filed an application in any Florida state court to appear as counsel under Florida Rule of Judicial Administration 2.061 in the last five years. Mr. Johnson has never been disciplined, suspended, or disbarred by any court.

4. Jack Scarola has been a member of the Florida Bar since 1973, Florida Bar No. 169440, and consents to act as co-counsel with the foreign attorney in this action.

WHEREFORE, Plaintiff moves this Court for an Order permitting Clark C. Johnson to appear on behalf of Plaintiff's counsel in this action.

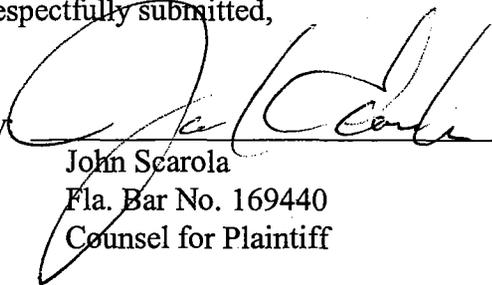
Under penalty of perjury, I declare that I have read the foregoing motion and with respect to my credentials the facts stated in it are true.



Clark C. Johnson

Respectfully submitted,

By



John Scarola
Fla. Bar No. 169440
Counsel for Plaintiff

CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that a copy of the foregoing has been furnished by U.S. Mail and facsimile to the following counsel for Defendant on this 8th day of September, 2003.

Joseph Ianno, Jr.
CARLTON FIELDS
222 Lake View Avenue, Suite 1400
West Palm Beach, FL 33401
Tel.: (561) 659-7070
Fax: (561) 659-7368

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett H. McGurk
KIRKLAND & ELLIS
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Tel.: (202) 879-5000
Fax: (202) 879-5200



John Scarola
SEARCY DENNEY SCAROLA BARNHART
& SHIPLEY, P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33409
Tel.: (561) 686-6300

Counsel for Plaintiff

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CASE NO: 03 CA-005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

DOROTHY H. WILKEN
CLERK OF CIRCUIT COURT
CIRCUIT CIVIL DIVISION

SEP 15 2003

COPY / ORIGINAL
RECEIVED FOR FILING

**DEFENDANT'S MOTION TO SET HEARING
ON DEFENDANT'S MOTION TO DISMISS**

Defendant, Morgan Stanley & Co., Inc. ("Morgan Stanley"), requests this Court set a hearing on its Motion to Dismiss as a result of the parties' inability to agree upon a mutually convenient date within a reasonable time frame.

1. On June 25, 2003, Morgan Stanley filed its Motion to Dismiss Pursuant to Fla.R.Civ.P., Rule 1.061 or, in the alternative, for Judgment on the Pleadings. The grounds for the Motion to Dismiss include forum non conveniens and failure to properly state a cause of action.

2. The parties had originally agreed to a hearing on this Motion for October, 2003. After this date was agreed to by counsel, Morgan Stanley's counsel was informed that this date was no longer convenient for certain Plaintiff's counsel. Thus, the hearing was not scheduled and the parties attempted to obtain other dates.

3. Despite numerous attempts to reschedule the hearing, the parties have been unable to agree upon mutually convenient dates that are within a reasonable time. This Court provided counsel with several hearing dates in October and November. The undersigned originally attempted to schedule this hearing during one of the Court's available October dates. However, Plaintiff's counsel, despite having at least 12 members of the Jenner & Block firm admitted pro hac vice as well as very competent local counsel, have indicated that they are not available for any hearing dates in October but were available for the November 14th date provided by the Court.

4. Because Plaintiff's counsel were not available during any of the October dates, the undersigned reluctantly agreed to the November 14, 2003 date. Although Plaintiff's counsel originally indicated that they were available on this date, the undersigned was recently informed that this date is no longer convenient for Plaintiff's counsel.

5. Because the Motion requests dismissal of this action based on forum non conveniens grounds, Morgan Stanley is being subjected to unnecessary burden and expense until the Motion is heard and determined by this Court.

WHEREFORE, Defendant, Morgan Stanley, respectfully requests that this Court enter an order Specially Setting the Motion to Dismiss for hearing together with such other and further relief as is just and proper.

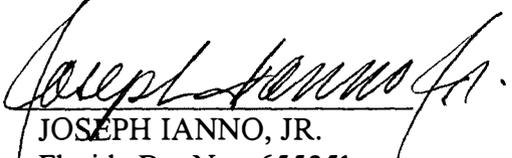
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by facsimile and U.S. Mail to all counsel of record on the attached service list on this 12th day of September, 2003.

Thomas D. Yannucci, P.C.
Thomas A. Clare
Larissa Paule-Carres
Brett H. McGurk
KIRKLAND & ELLIS
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

COUNSEL FOR DEFENDANT

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

BY: 
JOSEPH IANNO, JR.
Florida Bar No: 655351

SERVICE LIST

John Scarola SEARCY, DENNEY, SCAROLA, BARNHARDT & SHIPLEY, P.A. 2139 Palm Beach Lakes Boulevard West Palm Beach, Florida 33409	Counsel for Plaintiff
Jerold S. Solovy Michael Brody JENNER & BLOCK, LLC One IBM Plaza Suite 4400 Chicago, Illinois 60611	Counsel for Plaintiff

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CASE NO: 03 CA-005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

DOROTHY H. WILKEN
CLERK OF CIRCUIT COURT
CIRCUIT CIVIL DIVISION

SEP 15 2003

COPY / ORIGINAL
RECEIVED FOR FILING

NOTICE OF HEARING

NOTICE IS HEREBY given that a hearing has been set in the above-styled case as follows:

DATE: September 29, 2003

TIME: 8:45 A.M.

PLACE: Palm Beach County Courthouse
205 N. Dixie Highway
Room 11B
West Palm Beach, Florida 33401

BEFORE: Judge Elizabeth Maass

CONCERNING: Defendant's Motion to Set hearing on Defendant's Motion
to Dismiss.

KINDLY GOVERN YOURSELVES ACCORDINGLY.

**The undersigned counsel hereby certifies that a good faith attempt to resolve
the issues contained in the foregoing motions or matters will be made with**

**opposing counsel prior to hearing on these matters on the Court's Motion
Calendar.**

If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no costs to you, to the provision of certain assistance. Please contact the ADA Coordinator in the Administrative Office of the Court, Palm Beach County Courthouse, 205 North Dixie Highway, Room 5.2500, West Palm Beach, Florida 33401; telephone number (561) 355-2431 within two (2) working days of your receipt of this notice; if you are hearing or voice impaired, call 1-800-955-8771.

CERTIFICATE OF SERVICE

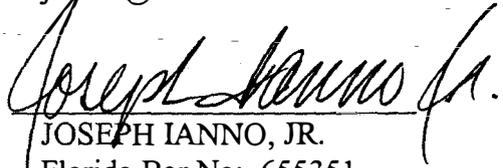
I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by facsimile and U.S. Mail to all counsel of record on the attached service list on this 15th day of September, 2003.

Thomas D. Yannucci, P.C.
Thomas A. Clare
Larissa Paule-Carres
Brett H. McGurk
KIRKLAND & ELLIS
655 15th Street, N.W. -- Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

COUNSEL FOR DEFENDANT

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

BY:


JOSEPH IANNO, JR.
Florida Bar No: 655351

SERVICE LIST

Jack Scarola SEARCY, DENNY, SCAROLA, BARNHARDT & SHIPLEY, P.A. 2139 Palm Beach Lakes Blvd. West Palm Beach, FL 33409	Counsel for Plaintiff
Jerold S. Solovy Michael Brody JENNER & BLOCK, LLC One IBM Plaza Suite 400 Chicago, IL 60611	Counsel for Plaintiff

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

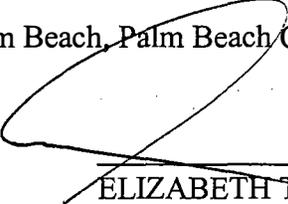
MORGAN STANLEY & CO., INC.,
Defendant(s).

ORDER AND DIRECTIONS TO THE CLERK

THIS CAUSE came before the Court, in Chambers, on its own Motion. Based on the foregoing, it is

ORDERED AND ADJUDGED that the Clerk is directed to docket and file attorney Jack Scarola's letter dated September 10, 2003.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this
16 day of September, 2003.



ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci
655 15th Street, NW, Suite 1200
Washington DC 20005

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, Il 60611

Michael I. Allen
Shapiro Mitchell Forman Allen & Miller LLP
380 Madison Avenue
New York, NY 10017

or any person able to administer oaths pursuant to the laws of New York duly authorized by him.

Done and Ordered in Palm Beach County, Florida this _____ day of _____, 2003.

SIGNED AND DATED

SEP 16 2003

JUDGE ELIZABETH T. MAASS
Circuit Court Judge Elizabeth T. Maass

Coleman v. Morgan Stanley
2003 CA 005045 AI
Order on Appointment of Commission

Copies furnished to:

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lakeview Avenue
Suite 1400
West Palm Beach, Florida 33401
(561) 659-7070
(561) 659-7368 (fax)

John Scarola, Esq.
SEARCY DENNEY SCAROLA BARNHART
& SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33409
(561) 686-6300
(561) 478-0754 (fax)

Jerold S. Solovy, Esq.
JENNER & BLOCK, LLC
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350
(312) 527-0484 (fax)

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett H. McGurk
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 879-5000
(202) 879-5200 (fax)



THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
OF FLORIDA

CHAMBERS OF
ELIZABETH T. MAASS
CIRCUIT JUDGE

COUNTY COURTHOUSE
WEST PALM BEACH, FLORIDA 33401
561/355-6050

September 17, 2003

Jack Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

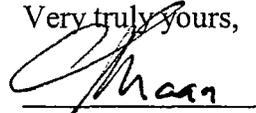
RE: Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co., Inc.
Case No.: CA 03-5045 AI

Dear Mr. Scarola:

I am in receipt of your letter dated September 22, 2003 and the proposed Agreed Order Permitting Foreign Attorneys to Appear for the action referenced above.

The copy of Plaintiff Coleman (Parent) Holdings Inc.'s Motion to Permit Foreign Attorney to Appear included seeks admission of Clark C. Johnson only. The Motion fails to address the items required by Rule 2.061 (b) (4) and (5), Fla. R. Jud. Admin. Further, the proposed Agreed Order admits Jerold S. Solovy, Ronald L. Marnner, Robert T. Markowski, Michael T. Brody, Jeffrey T. Shaw, Deirdre E. Connell, Elizabeth A. Coleman, Denise K. Bowler, John W. Joyce, Christopher M. O'Connor, Stephen P. Baker, and Daniel E. Shaw as co-counsel. I have not, then, signed the proposed Agreed Order, which, together with the copy of the Motion, is returned with this letter.

Very truly yours,


Elizabeth T Maass
Circuit Court Judge

copies to:

Joseph Ianno, Jr., Esq., 222 Lakeview Ave., Suite 1400, West Palm Beach, FL 33401
Thomas D. Yannucci, P.C., 655 15th Street, N.W., Suite 1200, Washington, DC 20005
Jerold S. Solovy, Esq., One IBM Plaza, Suite 4400, Chicago, IL 60611

16div-003747

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CASE NO: 03 CA-005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

COPY / ORIGINAL
RECEIVED FOR FILING

SEP 18 2003

DOROTHY H. WILKEN
CLERK OF CIRCUIT COURT
CIRCUIT CIVIL DIVISION

VERIFIED MOTION TO ADMIT
ZHONETTE BROWN, PRO HAC VICE

Defendant Morgan Stanley & Co., Inc., pursuant Fla. R. Jud. Adm. 2.061, requests this Court to admit attorney Zhonette Brown, *pro hac vice*, and in support of this Motion, states the following:

1. Defendant requests that this Court permit Zhonette Brown, an attorney with the law firm of Kirkland & Ellis LLP whose address is 655 15th Street, N.W. – 12th Floor, Washington, D.C. 20005, to appear *pro hac vice* and participate fully in this action as additional counsel on behalf of Defendant.

2. Ms. Brown has been admitted to practice before all courts in the State of Maryland since December 15, 1998, and all courts in the District of Columbia since August 2, 1999. Ms. Brown also has been admitted to practice before the United States Court of Appeals for the Fourth Circuit and the United States District Court for the District of Columbia. Ms. Brown is a member of the State Bar of Maryland and the Bar of the District of Columbia and is

in good standing with respect to such memberships. Ms. Brown has not been disciplined in any jurisdiction.

3. Ms. Brown has read all the applicable provisions of The Rules of Judicial Administration and the Rules Regulating The Florida Bar.

4. This verified motion complies with the Rules of Judicial Administration.

5. The undersigned will remain associated with this matter at all stages as required by local rules.

6. Ms. Brown has not filed a motion for permission to appear in Florida state courts in the preceding five years. The representation of Defendant in this matter commenced on May 8, 2003.

7. Ms. Brown will be associated with Joseph Ianno, Jr. for purposes of this representation. Mr. Ianno is a member in good standing of the Florida Bar.

8. A proposed order granting this Motion is attached hereto.

9. Counsel for Plaintiff has been consulted regarding this motion and has no objection.

WHEREFORE, Defendant respectfully requests that this Court enter an order admitting Zhonette Brown, *pro hac vice* for the purpose of representing Defendant as counsel in connection with this action pending before this Court together with such other and further relief as the Court deems just and proper.

The undersigned verifies that she has knowledge of the facts stated herein, and that the statements in the foregoing motion are true and correct.


Zhonette Brown

CERTIFICATE OF SERVICE

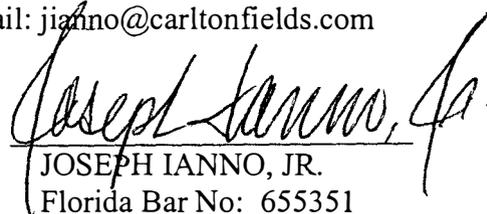
I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to all counsel of record on the attached service list on this 18th day of September, 2003.

Thomas D. Yannucci, P.C.
Thomas A. Clare
Larissa Paule-Carres
Brett H. McGurk
KIRKLAND & ELLIS LLP
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

**COUNSEL FOR DEFENDANT,
MORGAN STANLEY & CO., INC.**

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

BY:


JOSEPH IANNO, JR.
Florida Bar No: 655351

SERVICE LIST

<p>John Scarola, Esq. SEARCY, DENNEY, SCAROLA, BARNHARDT & SHIPLEY, P.A. 2139 Palm Beach Lakes Boulevard West Palm Beach, Florida 33409 Telephone: (561) 686-6300 Facsimile (561) 478-0754</p>	<p>Counsel for Plaintiff</p>
<p>Jerold S. Solovy, Esq. JENNER & BLOCK, LLC One IBM Plaza, Suite 4400 Chicago, Illinois 60611 Telephone: (312) 222-9350 Facsimile: (312) 840-7671</p>	<p>Counsel for Plaintiff</p>

IN THE CIRCUIT COURT OF THE
15TH JUDICIAL CIRCUIT IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 2003 CA 005045 AI

COLEMAN (PARENT) HOLDING INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

_____/

**ORDER GRANTING VERIFIED MOTION
TO ADMIT ZHONETTE BROWN PRO HAC VICE**

THIS CAUSE having come before the Court upon Defendant's Verified Motion to Admit Zhonette Brown Pro Hac Vice, and the Court having been advised of the agreement of counsel and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that:

Defendant, Morgan Stanley & Co., Inc.'s Verified Motion to Admit Zhonette Brown Pro Hac Vice is GRANTED.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this ____ day of September, 2003.

ELIZABETH T. MAASS
Circuit Court Judge

Copies furnished to:

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett H. McGurk
Larissa Paule-Carres
Zhonette Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005

John Scarola
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33409

Jerold S. Solovy
JENNER & BLOCK, LLC
One IBM Plaza
Suite 4400
Chicago, Illinois 60611

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CASE NO: 03 CA-005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

COPY / ORIGINAL
RECEIVED FOR FILING

SEP 18 2003

DOROTHY H. WILKEN
CLERK OF CIRCUIT COURT
CIRCUIT CIVIL DIVISION

VERIFIED MOTION TO ADMIT
RYAN P. PHAIR, PRO HAC VICE

Defendant Morgan Stanley & Co., Inc., pursuant Fla. R. Jud. Adm. 2.061, requests this Court to admit attorney Ryan P. Phair, *pro hac vice*, and in support of this Motion, states the following:

1. Defendant requests that this Court permit Ryan P. Phair, an attorney with the law firm of Kirkland & Ellis LLP whose address is 655 15th Street, N.W. – 12th Floor, Washington, D.C. 20005, to appear *pro hac vice* and participate fully in this action as additional counsel on behalf of Defendant.

2. Mr. Phair has been admitted to practice before all courts in the Commonwealth of Maryland since December 12, 2001, and all courts in the District of Columbia since September 13, 2002. Mr. Phair also has been admitted to practice before the United States Court of Appeals for the Fourth Circuit. Mr. Phair is a member of the State Bar of Maryland and the

Bar of the District of Columbia and is in good standing with respect to such memberships. Mr. Phair has not been disciplined in any jurisdiction.

3. Mr. Phair has read all the applicable provisions of The Rules of Judicial Administration and the Rules Regulating The Florida Bar.

4. This verified motion complies with the Rules of Judicial Administration.

5. The undersigned will remain associated with this matter at all stages as required by local rules.

6. Mr. Phair has not filed a motion for permission to appear in Florida state courts in the preceding five years. The representation of Defendant in this matter commenced on May 8, 2003.

7. Mr. Phair will be associated with Joseph Ianno, Jr. for purposes of this representation. Mr. Ianno is a member in good standing of the Florida Bar.

8. A proposed order granting this Motion is attached hereto.

9. Counsel for Plaintiff has been consulted regarding this motion and has no objection.

WHEREFORE, Defendant respectfully requests that this Court enter an order admitting Ryan P. Phair, *pro hac vice* for the purpose of representing Defendant as counsel in connection with this action pending before this Court together with such other and further relief as the Court deems just and proper.

The undersigned verifies that he has knowledge of the facts stated herein, and that the statements in the foregoing motion are true and correct.


Ryan P. Phair

CERTIFICATE OF SERVICE

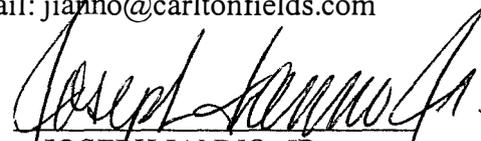
I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to all counsel of record on the attached service list on this 18th day of September, 2003.

Thomas D. Yannucci, P.C.
Thomas A. Clare
Larissa Paule-Carres
Brett H. McGurk
KIRKLAND & ELLIS LLP
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

**COUNSEL FOR DEFENDANT,
MORGAN STANLEY & CO., INC.**

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

BY:


JOSEPH IANNO, JR.
Florida Bar No: 655351

SERVICE LIST

<p>John Scarola, Esq. SEARCY, DENNEY, SCAROLA, BARNHARDT & SHIPLEY, P.A. 2139 Palm Beach Lakes Boulevard West Palm Beach, Florida 33409 Telephone: (561) 686-6300 Facsimile (561) 478-0754</p>	<p>Counsel for Plaintiff</p>
<p>Jerold S. Solovy, Esq. JENNER & BLOCK, LLC One IBM Plaza, Suite 4400 Chicago, Illinois 60611 Telephone: (312) 222-9350 Facsimile: (312) 840-7671</p>	<p>Counsel for Plaintiff</p>

IN THE CIRCUIT COURT OF THE
15TH JUDICIAL CIRCUIT IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 2003 CA 005045 AI

COLEMAN (PARENT) HOLDING INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

_____/

**ORDER GRANTING VERIFIED MOTION
TO ADMIT RYAN P. PHAIR PRO HAC VICE**

THIS CAUSE having come before the Court upon Defendant's Verified Motion to Admit Ryan P. Phair Pro Hac Vice, and the Court having been advised of the agreement of counsel and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that:

Defendant, Morgan Stanley & Co., Inc.'s Verified Motion to Admit Ryan P. Phair Pro Hac Vice is GRANTED.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this ____ day of September, 2003.

ELIZABETH T. MAASS
Circuit Court Judge

Copies furnished to:

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett H. McGurk
Larissa Paule-Carres
Zhonette Brown
Ryan P. Phair
KIRKLAND & ELLIS LLP
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005

John Scarola
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33409

Jerold S. Solovy
JENNER & BLOCK, LLC
One IBM Plaza
Suite 4400
Chicago, Illinois 60611

#230580/mm

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

CASE NO: 2003 CA 005045 AI

Plaintiffs,

vs.

MORGAN STANLEY & CO., INC.

Defendant.

DOROTHY H. WILKEN
CLERK OF CIRCUIT COURT
CIRCUIT CIVIL DIVISION

SEP 19 2003

COPY / ORIGINAL
RECEIVED FOR FILINGMOTION TO COMPEL PRODUCTION

Plaintiff, COLEMAN (PARENT) HOLDINGS INC., by and through their undersigned counsel, moves this Honorable Court for the issuance of an Order compelling the production of documents in response to the attached subpoena (Exhibit A) and in support thereof the Plaintiff would show:

1. the subpoenas are reasonably calculated to lead to the discovery of admissible evidence.
2. the deponents have indicated through counsel that they construe F.S. §655.059(2)(b) as precluding their production of the requested documents in the absence of a court order (see correspondence attached as Exhibit B).
3. this motion and notice of hearing have been served on counsel for the deponent and counsel for Sunbeam.

Coleman Holdings, Inc. vs Morgan Stanley & Company
Motion To Compel Production
Case No.: 2003 CA 005045 AI

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by *FAX AND*
U.S. Mail to all counsel on the attached list on this 19th day of Sept, 2003.



JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 478-0754
Attorneys for Plaintiff

Coleman Holdings, Inc. vs Morgan Stanley & Company
Motion To Compel Production
Case No.: 2003 CA 005045 AI

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block, LLC
One IBM Plaza
Suite 4400
Chicago, IL 60611

Mark F. Bideau, Esq.
Lorie M. Gleim, Esq.
Greenberg Traurig, P.A.
777 South Flagler Drive, Suite 300 East
West Palm Beach, FL 33401
Attys for Sunbeam

David M. Wells, Esq.
McGuire Woods, LLP
Bank of America Tower
50 North Laura Street, Suite 3300
Jacksonville, FL 32202-3661
Attys for Bank of America

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 2003 CA 005045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,

Defendant(s).

SUBPOENA DUCES TECUM

THE STATE OF FLORIDA

TO: Custodian of Records
Bank of America National Trust and
Savings Association
625 N. Flagler Drive
West Palm Beach, FL 33401

YOU ARE COMMANDED to appear for deposition at Searcy Denney Scarola Barnhart
& Shipley, P.A., 2139 Palm Beach Lakes Boulevard, West Palm Beach, FL, 33409 on the 15th
day of August, 2003 at 9:30 a.m. and to have with you at that time and place the documents
specified on Attachment A.

If you fail to:

- 1) Appear as specified; or
- 2) Furnish the records instead of appearing as provided above; or

EXHIBIT A

MSSFI V. MACANDREWS, ET AL.
2003 CA 005045 AJ

3) Object to this subpoena,

You may be in contempt of court. You are subpoenaed to appear by the following attorney, and unless excused from this subpoena by this attorney or the court, you shall respond to this subpoena as directed.

DATED this 29th day of July, 2003.



JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 478-0754
Attorneys for Plaintiff

MSSFI V. MACANDREWS, ET AL.
2003 CA 005045 AI

**CERTIFICATION OF RESPONSE TO
SUBPOENA DUCES TECUM**

STATE OF FLORIDA
COUNTY OF _____

The undersigned, as custodian of records for Bank of America National Trust and Savings Association, certifies that the attached documents consisting of ____ pages represents a true copy of all items within my possession, custody or control which are described in the Subpoena Duces Tecum served on me in the above styled action and each page is numbered by me for identification. Production is complete and has been numbered by the custodian of records.

It is further certified that originals of the items produced are maintained under the direction, custody and control of the undersigned.

The foregoing Certification was acknowledged before me, an officer duly authorized in the State and County aforesaid to take acknowledgments, this _____ day of _____, 20____, who:

- is personally known to me; or
- has produced _____ as identification; and who:
- did or
- did not, take an oath,

**MSSFI V. MACANDREWS, ET AL.
2003 CA 005045 AI**

**and who executed the foregoing certification, and who acknowledged the foregoing certification
to be freely and voluntarily executed for the purposes therein recited.**

Notary Public, State of Florida at Large

My Commission Expires:

ATTACHMENT A**SUBPOENA TO CUSTODIAN OF RECORDS OF
BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION**

You are hereby requested to produce the following documents pursuant to the definitions and instructions contained herein:

DOCUMENTS REQUESTED

1. All documents concerning synergies that might be achieved from a business combination of Sunbeam, Coleman, Signature Brands, and First Alert, or any combination thereof.
2. All documents concerning the potential or actual integration of Coleman, First Alert, and/or Signature Brands with Sunbeam, including, but not limited to, studies, reports, analyses, evaluations, projections, estimates, comments, or other work, performed by Coopers & Lybrand, Morgan Stanley, MSSF, Bank of America, or First Union.
3. All documents concerning any evaluation or assessment of the Bank Facilities, either prior to or after March 31, 1998, by you or any of the Lenders, including, but not limited to, any credit review or portfolio review, credit review sheets, call reports, contact reports, credit approval forms, portfolio forms, credit risk reviews, and covenant compliance reports.
4. All communications by and among the Lenders concerning the Credit Agreement, the Bank Facilities, Sunbeam, Coleman, or the Coleman Transaction.
5. All documents concerning the Lenders' plans or efforts to syndicate or sell off any portion of the Lenders' Commitments, as reflected in Schedule 2.01 of the Credit Agreement, including, but not limited to, information packages provided to potential lenders, lists or designations of potential lenders, communications with potential lenders, expressions of interest, and any other documents or information relating to the syndication or sale of any portion of the Lenders' Commitments.

interest and/or commitment made by any potential lender, and/or presentations or handouts used at lender group meetings.

6. All documents concerning Sunbeam's intention to draw down any portion of the Credit Agreement, specifically including, but not limited to, any and all written Borrowing Requests.

7. All documents concerning whether or not you or any of the Lenders considered exercising their right to terminate service under the Credit Agreement following any material adverse change in the financial status of Sunbeam.

8. All documents concerning any offer to buy Reorganized Sunbeam, or the sale, or possible sale of Reorganized Sunbeam or any subsidiary or material group of assets thereof.

9. All documents concerning your efforts to have Sunbeam retain or maintain your lending services both prior to and after the closing of the Bank Facilities.

10. All documents reflecting all fees and expenses paid by Sunbeam to you including, but not limited to, any Documentation Agent (as defined in the Credit Agreement) fee and any other fee related to the Credit Agreement.

11. All documents concerning the Bank Facilities, including, but not limited to, the sources and uses of the Bank Facilities, the decision to close the Bank Facilities, and the closing of the Bank Facilities.

12. All documents concerning any investigation, analysis, or due diligence of Sunbeam conducted by you or on your behalf or by Morgan Stanley in 1997 or 1998.

13. All documents concerning any investigation, analysis, or due diligence of Coleman or CPH conducted by you or on your behalf or by Morgan Stanley in 1997 or 1998.

14. All documents concerning the negotiation and signing of the February 27, 1998 Agreements.
15. All documents concerning the closing of the Coleman Transaction, including, without limitation, all documents concerning the decision to close the Coleman Transaction.
16. All documents concerning the meetings of Sunbeam's Board of Directors.
17. All documents concerning any valuation of Sunbeam or Sunbeam securities.
18. All documents concerning the stock market's valuation of Sunbeam securities, including, without limitation, documents describing or analyzing the increase or decline in the market price of Sunbeam stock in any portion of the period from and including July 1, 1996 through and including December 31, 1998.
19. All documents concerning your role as Documentation Agent for the Credit Agreement or Bank Facilities.
20. All documents concerning your April 28, 1998 meeting with Sunbeam, First Union, MSSF and/or Morgan Stanley, including, but not limited to, all notes taken of or during the meeting and documents memorializing, describing, or referring to the meeting.
21. All documents concerning any amendment to the Credit Agreement, including, but not limited to, the April 1998, June 1998, and July 1998 amendments. Your response should include, but is not limited to, all documents concerning the reasons for the amendments.
22. All documents concerning your meetings with Sunbeam, First Union, MSSF and/or Morgan Stanley at which the topics of Sunbeam or the Bank Facilities were

discussed including, but not limited to, all notes taken of or during the meeting and documents concerning the meeting. Your response should include documents from the period after the Bank Facilities closed on March 31, 1998.

23. All documents concerning the lien placed by you and/or MSSF and First Union on Coleman stock owned by Sunbeam, including, but not limited to, documents concerning the reason or decision to seek the lien.

24. All documents concerning the collateral for the Bank Facilities, including, but not limited to, all documents evaluating or assessing the value of that collateral.

25. All documents concerning the settlement agreement between CPH and Sunbeam dated August 12, 1998.

26. All documents concerning any write-off or loss reserve you have taken against the Bank Facilities.

27. All documents concerning your rating of the Bank Facilities and any change made to that rating.

28. All documents concerning any distribution you received as part of Sunbeam's bankruptcy reorganization plan, including, but not limited to, the value of the Sunbeam stock you received, and all documents evaluating or assessing the value of that distribution.

29. All documents concerning Sunbeam's decision to file for bankruptcy.

30. All documents concerning Sunbeam's plan of reorganization.

31. All documents concerning any settlement or compromise reached with the Official Committee of Unsecured Creditors of Sunbeam Corporation.

32. All documents concerning any valuation of Coleman or Coleman securities.
33. All documents concerning Sunbeam's or Coleman's financial statements and/or Sunbeam's restated financial statements.
34. All documents concerning the increase in the size of the Subordinated Debenture Offering from \$500 million to \$750 million.
35. All documents concerning the decrease in the amount of the Bank Facilities from \$2.0 billion to \$1.7 billion.
36. All documents concerning any draft or executed "comfort letters" prepared in connection with the Subordinated Debenture Offering.
37. All documents concerning the sale of Subordinated Debentures, including, without limitation, documents concerning road shows, communications with potential investors, or communications with or among Morgan Stanley's sales personnel.
38. All documents concerning the Subordinated Debenture Offering, including, but not limited to the pricing, conversion features, and/or "book of demand" for the Subordinated Debentures.
39. All documents concerning the events that took place on March 19, 1998 at Global Financial Press, including, without limitation, documents concerning Lawrence Bornstein and/or John Tyree.
40. All documents concerning the "bring-down" due diligence for the Subordinated Debenture Offering.
41. All documents concerning Sunbeam's first quarter 1998 sales and/or earnings.

42. All documents concerning the closing of the Subordinated Debenture Offering including, without limitation, all documents concerning the decision to close the Subordinated Debenture Offering.

43. All documents concerning any press releases or any statement contained in any press release by Sunbeam bearing the following dates or issued on or about October 23, 1997, March 19, 1998, April 3, 1998, May 9, 1998, June 15, 1998, June 25, 1998, June 30, 1998, October 20, 1998, or November 12, 1998.

44. All documents concerning communications relating to Sunbeam, Coleman, or CPH, concerning the subject of the Coleman Transaction or the Bank Facility, including, without limitation, internal communications within Bank of America or communications between or among Bank of America and Sunbeam; Skadden, Arps, Slate, Meagher & Flom LLP; Coopers & Lybrand; Llama Company; Arthur Andersen LLP; Sard Verbinen & Co., Inc.; Hill & Knowlton, Inc.; Coleman; Credit Suisse First Boston; CPH; Mafco.; Wachtell Lipton, Rosen & Katz; Davis Polk & Wardwell; or any other person or company, and/or any of their respective employees, agents, or representatives.

45. All documents concerning any inquiry from, or any communication between or among you and any Sunbeam investor, potential investor, securities or financial analyst, or rating agency relating to Sunbeam.

46. All documents concerning any meeting between and among you, Sunbeam, Arthur Andersen, Coopers & Lybrand, Morgan Stanley, MSSF, First Union, Coleman, First Alert, or Signature Brands related to the 1998 acquisitions, the integration of the acquisitions, including, but not limited to, documents prepared for, disseminated at, utilized during, or prepared after such meetings.

47. All documents concerning the Coleman Transaction.
48. All documents concerning Albert Dunlap and/or Russell Kersh.
49. Organizational charts, memoranda, or similar documents that describe the business organizational structure and the administrative, management, and reporting structure of Bank of America from and including January 1, 1997 through and including December 31, 1998.
50. All documents concerning Bank of America's policies, procedures, manuals, guidelines, reference materials, or checklists that were in effect during any period from and including January 1, 1997 through and including December 31, 1998 for the performance of due diligence, including, without limitation, due diligence performed in connection with underwriting credit facilities.
51. All of your document retention or document destruction policies or procedures or similar procedures for the preservation, storage, destruction, back-up or deletion of documents of any kind, including electronic or hard copy versions of documents, for any time during 1996 through the present, including, without limitation, any amendment to any such policies or procedures, schedules or related documents, any and all records concerning adherence to and failure to adhere to or abide by any such policies or procedures, and any memoranda or other instructions concerning the obligation and procedures to be utilized to preserve all relevant documents, including without limitation evidence concerning the Litigations, the Arbitrations, and the SEC Administrative Proceedings.
52. All documents or other information you have provided or produced to any party (whether voluntarily or in response to document requests, subpoena duces tecum, interrogatories, requests for admission, or other requests for information and/or documents) in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings (including,

without limitation, any reports, communications, filings, testimony, legal memoranda, statements, or other documents submitted to the Securities & Exchange Commission or any other party). Your response should include:

- a. All discovery requests, subpoenas duces tecum, interrogatories, or requests for admissions served on you in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings;
- b. All responses and/or objections that you provided or produced in response to any discovery request, subpoena duces tecum, interrogatories, or requests for admission served on you in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings; and
- c. All privilege logs you prepared in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings with respect to documents that you withheld from production in response to any document requests, subpoenas duces tecum, or other request for information and/or documents.

53. All communications concerning any discovery request, subpoena duces tecum, interrogatories, or requests for admission served on you in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

54. All documents you have provided to or received from the SEC, the Attorney General of New York, or any other governmental or regulatory body concerning Sunbeam or the Coleman Transaction.

55. All motions, memoranda, briefs, rulings, orders, or transcripts of any proceeding concerning any discovery request, subpoena, or other request for information and/or documents in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

56. All transcripts of and exhibits to any depositions, recorded statements, affidavits or hearings held in connection with any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

57. All documents obtained by you or produced to you by other parties, third parties, or non-parties (whether voluntarily or in response to any document requests, subpoenas duces tecum, or other process served by you or any other party) concerning Sunbeam or the Coleman Transaction.

58. All affidavits, declarations, or other testimonial statements filed or submitted in connection with any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

DEFINITIONS

1. "Arbitrations" means Albert J. Dunlap and Sunbeam Corporation, No. 32 160 00088 99 (AAA); and Russell A. Kersh and Sunbeam Corporation, No. 32 160 00091 99 (AAA).

2. "Bank Facility" means the Credit Agreement, including amendments, and all funds extended by MSSF, First Union, and/or Bank of America to Sunbeam pursuant to the Credit Agreement, including, but not limited to, Tranche A, Tranche B, and the Revolving Credit Facility.

3. "Bank of America" means Bank of America National Trust and Savings Association and any of its subsidiaries, divisions, affiliates, predecessors, successors, joint

ventures, present and former officers, directors, employees, representatives, and agents, and all other persons acting or purporting to act on its behalf.

4. "Borrowing Request" means any request by Sunbeam for a Borrowing in accordance with Section 2.03 of the Credit Agreement.

5. "Coleman" means The Coleman Company, Inc. and any of its predecessors, successors, subsidiaries, and present and former officers, directors, and employees.

6. "CPH" means Coleman (Parent) Holdings Inc., Coleman Worldwide Corporation, CLN Holdings Inc., and any of their predecessors, successors, subsidiaries, and present and former officers, directors, and employees.

7. "Coleman Transaction" means the transaction contemplated by the February 27, 1998 Agreements.

8. "Communication" means the transmittal of information (in the form of facts, ideas, inquiries or otherwise) by letter, memorandum, facsimile, orally, electronically or otherwise.

9. "Concerning" means concerning, reflecting, relating to, referring to, describing, evidencing, or constituting.

10. "Coopers & Lybrand" means the former Coopers & Lybrand LLP (now known as PricewaterhouseCoopers LLP), and any of its predecessors, successors, affiliates, subsidiaries, and present and former partners, employees, representatives, and agents.

11. "Credit Agreement" means that agreement entered into by Sunbeam Corporation, as borrower, with MSSF, First Union, and Bank of America, as Lenders, dated March 30, 1998 and all amendments thereto.

12. "Documents" shall be given the broad meaning provided in Rule 1.350 of the Florida Rules of Civil Procedure and refers to any form or means, whether physical, visual, or electronic, in or by which words, numbers, or ideas are recorded or preserved, whether fixed in tangible medium or electronically stored, including any and all drafts of any final document. The word "documents" shall include, by way of example and not by way of limitation, all of the following: papers, correspondence, trade letters, envelopes, memoranda, telegrams, cables, notes, messages, reports, studies, press releases, comparisons, books, accounts, checks, audio and video recordings and transcriptions thereof, pleadings, testimony, articles, bulletins, pamphlets, brochures, magazines, questionnaires, surveys, charts, newspapers, calendars, desk calendars, pocket calendars, lists, logs, publications, notices, diagrams, instructions, diaries, minutes for meetings, corporate minutes, orders, resolutions, agendas, memorials or notes of oral communications, whether by telephone or face-to-face, contracts, agreements, drafts of or proposed contracts or agreements, memoranda of understanding, letters of intent, computer tapes, computer drives or memories, computer diskettes or disks, e-mail, CD-ROMs, or any other tangible thing on which any handwriting, typing, printing, photostatic, electronic, or other form of communication or information is recorded or reproduced, together with all notations on any of the foregoing, all originals, file copies, or other unique copies of the foregoing, and all versions or drafts thereof, whether used or not.

13. "February 27, 1998 Agreements" means (a) the Agreement and Plan of Merger dated as of February 27, 1998 among Sunbeam Corp., Laser Acquisition Corp., CLN Holdings Inc. and Coleman (Parent) Holdings Inc. and (b) the Agreement and Plan of Merger dated as of February 27, 1998 among Sunbeam Corp., Camper Acquisition Corp., and The Coleman Company, Inc.

14. "Financial Statements" means, without limitation, balance sheets, statements of income, earnings, retained earnings, sources and applications of funds, cash flow projections, notes to each such statements, or any other notes which pertain to the past or present financial condition of Sunbeam, whether any of the foregoing is audited or unaudited, whether final, interim or pro forma, complete or partial, consolidated, yearly, monthly, or otherwise.
15. "First Alert" means First Alert, Inc., and any of its predecessors, successors, affiliates, subsidiaries, and present and former officers, directors, employees, representatives, and agents.
16. "First Union" means First Union National Bank (now known as Wachovia Bank, National Association) and any of its predecessors, successors, affiliates, subsidiaries, and present and former officers, directors, employees, representatives, and agents.
17. "Lenders" means the entities listed on Schedule 2.01 of the Credit Agreement under the heading "Lenders" and any other Person that shall have become a party to the Credit Agreement as a Lender pursuant to an assignment and acceptance.
18. "Litigations" means In Re Sunbeam Securities Litigation, 98-8258-Civ.-Middlebrooks (S.D. Fla.); Camden Asset Management, L.P., et al. v. Sunbeam Corporation, et al., 98-8773-Civ.-Middlebrooks and 98-8275-Civ.-Middlebrooks (S.D. Fla.); Krim v. Dunlap, et al., No. CL983168AD (15th Jud. Cir., Fla.); Stapleton v. Sunbeam Corp., et al., No. 98-1676-Civ.-King (S.D. Fla.); Sunbeam Corp. v. PricewaterhouseCoopers LLP, No. CL005444AN (15th Jud. Cir., Fla.); In re Sunbeam Corp., No. 01-40291 (AJG) (Bankr. S.D.N.Y.) and every adversary proceeding therein; SEC v. Dunlap, et al., No. 01-8437-Civ.-Middlebrooks (S.D. Fla.); Oaktree Capital Management LLC v. Arthur Andersen LLP, No. BC257177 (L.A. Cty., CA); and

Coleman (Parent) Holdings Inc. v. Arthur Andersen LLP, et al., No. CA 01-06062AN (15th Jud. Cir., Fla).

19. "Mafco" means MacAndrews & Forbes Holdings Inc. and any of its predecessors, successors, subsidiaries, and present and former officers, directors, and employees.

20. "Morgan Stanley" means Morgan Stanley & Co., Inc. and any of its predecessors, successors, affiliates, subsidiaries, and present and former officers, directors, partners, employees, representatives, and agents.

21. "MSSF" means Morgan Stanley Senior Funding, Inc. and any of its predecessors, successors, affiliates, subsidiaries, and present and former officers, directors, partners, employees, representatives, and agents.

22. "Person" means any natural person, corporation, limited liability company, trust, joint venture, association, company, partnership, governmental authority, or other entity.

23. "Reorganized Sunbeam" means Sunbeam Corporation on and after the effective date of Sunbeam's chapter 11 plan of reorganization as filed with the United States Bankruptcy Court in the Southern District of New York.

24. "SEC Administrative Proceedings" means In the Matter of Sunbeam Corp., SEC Administrative Proceeding File No. 3-10481, and In the Matter of David C. Fannin, SEC Administrative Proceeding File No. 3-10482.

25. "SEC" means the Securities and Exchange Commission.

26. "Signature Brands" means Signature Brands USA, Inc. and any of its predecessors, successors, affiliates, subsidiaries, and present and former officers, directors, employees, representatives, and agents.

27. **“Subordinated Debentures” means Sunbeam’s Zero Coupon Convertible Senior Subordinated Debentures Due 2018.**

28. **“Subordinated Debenture Offering” means the offering of Sunbeam’s Subordinated Debentures.**

29. **“Sunbeam” means Sunbeam Corporation and any of its predecessors, successors, affiliates, subsidiaries, and present and former officers, directors, employees, representatives, and agents.**

30. **“You” or “Your” means Bank of America and any of its subsidiaries, divisions, predecessors, successors, present or former employees, representatives, agents, attorneys, accountants, advisors, or anyone acting or purporting to act on its behalf.**

INSTRUCTIONS

1. **Documents shall be produced as they are kept in the usual course of business, or organized and labeled to correspond to the categories in this Request. Documents attached to each other should not be separated. Documents consisting of items previously produced in the Litigations, Arbitrations, and/or SEC Administrative Proceedings with Bates numbering shall be produced in Bates number order.**

2. **All documents shall be produced in the file folder, envelope or other container in which the documents are kept or maintained by you. If, for any reason, the container cannot be produced, produce copies of all labels or other identifying marks.**

3. **The relevant period, unless otherwise indicated, shall be from January 1, 1996 through the date of trial of this matter, and shall include all documents and information which relate in whole or in part to such period, or to events or circumstances during such period,**

even though dated, prepared, generated or received prior or subsequent to that period. Please supplement or correct your responses to these requests if, at any time, you become aware that your responses are incomplete or incorrect in any respect.

4. If you claim the attorney-client privilege, or any other privilege or work-product protection for all or any portion of a document, you shall provide a privilege log that describes the withheld material sufficiently to allow CPH and Mafco to test the privilege or protection asserted.

5. The following rules of construction apply:

a. The connectives "and" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery requests all responses that might otherwise be outside of their scope;

b. The term "including" shall be construed to mean "without limitation"; and

c. The use of the singular form of any word includes the plural and vice versa.

MACANDREWS & FORBES HOLDINGS INC.
and COLEMAN (PARENT) HOLDINGS INC.

By: _____
One of Their Attorneys

Jerold S. Solovy
Ronald L. Marmer
Robert T. Markowski
Deirdre E. Connell
JENNER & BLOCK, LLC
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

Jack Scarola
SEARCY DENNEY SCAROLA BARNHART
& SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33402-3626
(561) 686-6300

Dated: July __, 2003

SEP-15-03 MON 10:39 AM

FAX NO.

P. 02

McGuireWoods LLP
 Bank of America Tower
 50 North Laura Street
 Suite 3300
 Sonville, FL 32202-3661
 Phone: 904.798.3200
 Fax: 904.798.3207
 www.mcguirewoods.com

David M. Wells
 Direct: 904.798.2693

McGUIREWOODS

dwells@mcguirewoods.com
 Direct Fax: 904.798.3207

September 12, 2003

Via Facsimile and U.S. Mail

Jack Scarola, Esq.
 Searcy Denney Scarola
 Barnhart & Shipley, P.A.
 2139 Palm Beach Lakes Blvd.
 West Palm Beach, FL 33402-3626

Re: Subpoenas issued by Coleman (Parent) Holdings, Inc. to Bank of America National Trust and Savings Association n/k/a Bank of America, N.A.
Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc., 2003 CA 005045
Morgan Stanley Senior Funding, Inc. v. MacAndrews & Forbes Holdings, Inc. and Coleman (Parent) Holdings, Inc., 2003 CA 005165

Dear Mr. Scarola:

Thank you for your letter of September 10, 2003 and the enclosed confidentiality order.

As I mentioned in my previous letter, unless the advance consent of Sunbeam is procured, or a court order issues specifically overriding the statute, Section 655.059(2)(b), Florida Statutes restricts Bank of America from disclosing the borrower account and loan information the subpoenas request, on pain of liability for a third degree felony as provided by § 655.059(2)(c). A review of the confidentiality order indicates that it does not address this statutory restriction on disclosure. To protect itself, Bank of America must wait for the written consent of Sunbeam, n/k/a American Household, Inc., or an order from the Court that specifically addresses § 655.059(2)(b) before it can produce the bulk of the responsive documents it has agreed to produce to Coleman (Parent) Holdings, Inc. If you are aware of any legal authority to the contrary, or an opinion construing the statute differently, please advise me of the same.

Very truly yours,



David M. Wells

DMW/mm

cc: Michael Cavendish
 222131

SEP 15 2003 003782

EXHIBIT B

IN THE CIRCUIT COURT OF THE
15TH JUDICIAL CIRCUIT IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 2003 CA 005045 AI

COLEMAN (PARENT) HOLDING INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

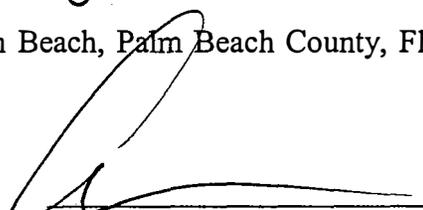
**ORDER GRANTING VERIFIED MOTION
TO ADMIT ZHONETTE BROWN PRO HAC VICE**

THIS CAUSE having come before the Court upon Defendant's Verified Motion to Admit Zhonette Brown Pro Hac Vice, and the Court having been advised of the agreement of counsel and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that:

Defendant, Morgan Stanley & Co., Inc.'s Verified Motion to Admit Zhonette Brown Pro Hac Vice is GRANTED. *Ms. Braun may appear as counsel for Defendant in this action.*

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 19 day of September, 2003.


ELIZABETH T. MAASS
Circuit Court Judge

Copies furnished to:

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett H. McGurk
Larissa Paule-Carres
Zhonette Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005

John Scarola
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33409

Jerold S. Solovy
JENNER & BLOCK, LLC
One IBM Plaza
Suite 4400
Chicago, Illinois 60611

IN THE CIRCUIT COURT OF THE
15TH JUDICIAL CIRCUIT IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 2003 CA 005045 AI

COLEMAN (PARENT) HOLDING INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

**ORDER GRANTING VERIFIED MOTION
TO ADMIT RYAN P. PHAIR PRO HAC VICE**

THIS CAUSE having come before the Court upon Defendant's Verified Motion to Admit Ryan P. Phair Pro Hac Vice, and the Court having been advised of the agreement of counsel and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that:

Defendant, Morgan Stanley & Co., Inc.'s Verified Motion to Admit Ryan P. Phair Pro Hac Vice is GRANTED. *Mr. Phair may appear as counsel for defendant in this action.*

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 19 day of September, 2003.



ELIZABETH T. MAASS
Circuit Court Judge

Copies furnished to:

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett H. McGurk
Larissa Paule-Carres
Zhonette Brown
Ryan P. Phair
KIRKLAND & ELLIS LLP
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005

John Scarola
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33409

Jerold S. Solovy
JENNER & BLOCK, LLC
One IBM Plaza
Suite 4400
Chicago, Illinois 60611

SEARCY
DENNEY
SCAROLA
BARNHART
& SHIPLEY, P.A.

*Attorneys
at Law*

WEST PALM BEACH OFFICE:

2139 PALM BEACH LAKES BLVD.
WEST PALM BEACH, FLORIDA 33409

P.O. DRAWER 3626
WEST PALM BEACH, FLORIDA 33402

(561) 688-6300
1-800-780-8807
FAX: (561) 478-0754

TALLAHASSEE OFFICE:

P.O. DRAWER 1230
TALLAHASSEE, FLORIDA 32302

(850) 224-7600
1-888-549-7011
FAX: (850) 224-7602

ATTORNEYS AT LAW:

ROSALYN SIA BAKER
F. GREGORY BARNHART*
LANCE BLOCK*
EARL L. DENNEY, JR.*
SEAN C. DOMINICK*
JAMES W. GUSTAFSON, JR.
DAVID K. KELLEY, JR.*
WILLIAM B. KING
DARRYL L. LEWIS*
WILLIAM A. NORTON*
DAVID J. SALES*
JOHN SCAROLA*
CHRISTIAN O. SEARCY*
HARRY A. SHEVIN
JOHN A. SHIPLEY III*
CHRISTOPHER K. SPEED*
KAREN E. TERRY
C. CALVIN WARRINER III*
DAVID J. WHITE*

*SHAREHOLDERS

PARALEGALS:

VIVIAN AYAN-TEJEDA
LAURIE J. BRIGGS
DEANE L. CADY
DANIEL J. CALLOWAY
EMILIO DIAMANTIS
DAVID W. GILMORE
TED E. KULESA
JAMES PETER LOVE
CHRISTOPHER J. PILATO
ROBERT W. FITCHER
WILLIAM H. SEABOLD
KATHLEEN SIMON
STEVE M. SMITH
WALTER A. STEIN
BRIAN P. SULLIVAN
KEVIN J. WALSH
GEORGIA K. WETHERINGTON
JUDSON WHITEHORN

Via Hand Delivery
September 22, 2003

Hon. Elizabeth T. Maass
Palm Beach County Courthouse
Room #11.1208
205 North Dixie Highway
West Palm Beach, FL 33401

Re: Coleman Holdings, Inc. vs Morgan Stanley & Company
Case No. 2003 CA 005045 AI
Morgan Stanley v. MacAndrews & Forbes
Case No. 2003 CA 005165 AI
Matter No.: 029986-230580

Dear Judge Maass:

Enclosed please find an original and four copies of two proposed Agreed Orders Permitting Foreign Attorneys to Appear in the above-styled matters, together with courtesy copies of the motions.

If same meet with your approval, we ask that your Honor sign same, returning conformed copies to all counsel in the envelopes provided.

Respectfully,
Dictated But Not Signed By
Jack Scarola To Expedite Delivery
JACK SCAROLA
JS/mm
Enc.

cc: Joseph Ianno, Esq. (Via Fax)
Thomas A. Clare, Esq. (Via Fax)
Jenner & Block, LLC (Via Fax)



16div-003787

#230580/mm

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

CASE NO.: 2003 CA 005045 AI

Plaintiffs,

vs.

MORGAN STANLEY & CO., INC.,

Defendant,

NOTICE OF HEARING

YOU ARE HEREBY NOTIFIED that the undersigned has called up for hearing the

following:

DATE: Monday, September 29, 2003

TIME: 8:45 a.m.

JUDGE: Hon. Elizabeth T. Maass

PLACE: Palm Beach County Courthouse, Room #11.1208, 205 North Dixie Highway,
West Palm Beach, FL 33401

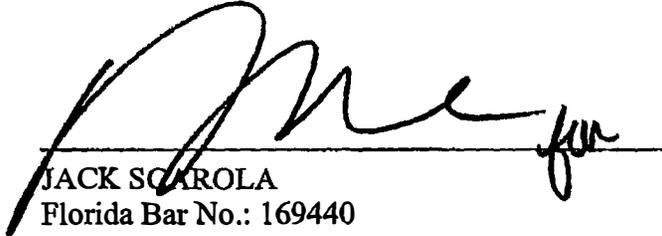
SPECIFIC MATTERS TO BE HEARD:

Motion to Compel Production

Moving counsel certifies that he or she contacted opposing counsel and attempted to resolve the discovery dispute without hearing.

Coleman Holdings, Inc. vs Morgan Stanley & Company
Case No.: 2003 CA 005045 AI
Notice of Hearing

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by *FAX AND*
U.S. Mail to all Counsel on the attached list, this *13th* day of *Sept*, 2003.



JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 478-0754
Attorney for Plaintiff

Coleman Holdings, Inc. vs Morgan Stanley & Company
Case No.: 2003 CA 005045 AI
Notice of Hearing

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block, LLC
One IBM Plaza
Suite 4400
Chicago, IL 60611

Mark F. Bideau, Esq.
Lorie M. Gleim, Esq.
Greenberg Traurig, P.A.
777 South Flagler Drive, Suite 300 East
West Palm Beach, FL 33401
Attys for Sunbeam

David M. Wells, Esq.
McGuire Woods, LLP
Bank of America Tower
50 North Laura Street, Suite 3300
Jacksonville, FL 32202-3661
Attys for Bank of America

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CASE NO: 2003 CA-005045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.

SUBPOENA DUCES TECUM WITH DEPOSITION

THE STATE OF FLORIDA

TO: Custodian of Records
PricewaterhouseCoopers LLP
222 Lakeview Avenue, Suite 360
West Palm Beach, FL 33401-6136

YOU ARE COMMANDED to appear at Searcy Denney Scarola Barnhart & Shipley, P.A., 2139 Palm Beach Lakes Boulevard, West Palm Beach, FL, 33409 on October 17, 2003 for deposition upon oral examination, and to have with you at that time and place the following:

Duces Tecum: SEE ATTACHMENT A

These items will be inspected and may be copied at that time. You will not be required to surrender the original items. You may comply with the request for documents in this subpoena by providing legible copies of the items to be produced to the attorney whose name appears on this subpoena on or before the scheduled date of production. You may condition the preparation of the copies upon the payment in advance of the reasonable cost of preparation. You have the right to object to the production pursuant to this subpoena at any time before production by giving written notice to the attorney whose name appears on this subpoena. The deposition will

Coleman (Parent) Holdings Inc. vs. Morgan Stanley & Co., Inc.
Case No.: 2003 CA 005045 AI

be recorded by stenographic means at the offices of Searcy Denney Scarola Barnhart & Shipley.

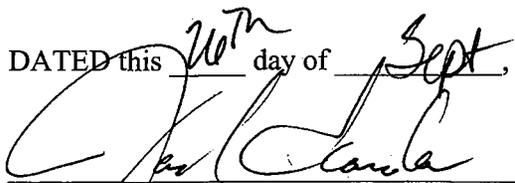
The deposition will be taken before a person authorized to administer oaths and will continue day to day until completed.

If you fail to:

- 1) Appear as specified; or
- 2) Furnish the records; or
- 3) Object to this subpoena,

you may be in contempt of court. You are subpoenaed to appear by the following attorney, and unless excused from this subpoena by this attorney or the court, you shall respond to this subpoena as directed.

DATED this 20th day of Sept, 2003



JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 478-0754
Attorney for Plaintiff

CERTIFICATION OF RESPONSE TO
SUBPOENA DUCES TECUM FOR DEPOSITION AND DOCUMENTS

STATE OF FLORIDA
COUNTY OF _____

The undersigned, as custodian of records for PricewaterhouseCoopers LLP, certifies that the attached documents consisting of ____ pages represents a true copy of all items within my possession, custody or control which are described in the Subpoena Duces Tecum For Deposition and Documents served on me in the above-styled action and each page is numbered by me for identification. Production is complete and has been numbered by the custodian of records.

It is further certified that originals of the items produced are maintained under the direction, custody and control of the undersigned.

The foregoing Certification was acknowledged before me, an officer duly authorized in the State and County aforesaid to take acknowledgments, this _____ day of _____, 2003, who:

- is personally known to me; or
- has produced _____ as identification; and who:
- did or
- did not, take an oath,

Coleman (Parent) Holdings Inc. vs. Morgan Stanley & Co., Inc.
Case No.: 2003 CA 005045 AI

and who executed the foregoing certification, and who acknowledged the foregoing certification
to be freely and voluntarily executed for the purposes therein recited.

Notary Public, State of Florida at Large

My Commission Expires:

ATTACHMENT A

**SUBPOENA TO NON-PARTY
PRICEWATERHOUSECOOPERS LLP**

You are hereby requested to produce the following documents pursuant to the definitions and instructions contained herein.

DOCUMENTS REQUESTED

1. All documents concerning any analysis of potential or actual synergies that might be achieved from a business combination of Sunbeam, and any or all of Coleman, Signature Brands or First Alert.
2. All documents concerning due diligence or evaluations performed concerning Sunbeam, Coleman, First Alert, and/or Signature Brands.
3. All documents concerning the Coleman Transaction.
4. All documents concerning meetings with or communications to, from, or relating to Sunbeam or Morgan Stanley, MSSF, Bank of America, First Union, Coleman, First Alert, and/or Signature Brands to the extent that those meetings or communications also concern Sunbeam.
5. All documents concerning potential business combinations involving Sunbeam, including but not limited to, potential acquisitions by Sunbeam, potential acquisitions of Sunbeam, or potential mergers between Sunbeam and another company or entity.
6. All documents concerning any inquiry from, or any communication between or among you and any Sunbeam investor, potential investor, securities or financial analyst, or rating agency relating to Sunbeam.

7. All documents concerning any Sunbeam financial plan, budget, target, goal, forecast, or projection for sales, earnings, synergies, or operating margins, including, but not limited to, (i) the bases for such financial plans, budgets, targets, goals, forecasts, or projections, and (ii) variances from such plans, budgets, targets, goals, forecasts, or projections.

8. All documents concerning the issuance of any opinion, report, or assurance relating to Sunbeam's acquisitions of Coleman, Signature Brands, and/or First Alert and the integration of those acquisitions.

9. All documents concerning the Subordinated Debentures.

10. All documents concerning the Offering Memorandum.

11. All documents concerning the Bank Facilities.

12. All documents concerning the Credit Agreement.

13. All documents concerning Sunbeam's actual and/or expected sales, revenues, or earnings for all or any portion of 1996, 1997, and/or 1998.

14. All documents concerning the March 19, 1998 press release issued by Sunbeam.

15. All documents concerning any valuation of Coleman or Sunbeam.

16. All documents concerning the integration of Sunbeam and Coleman, First Alert, and/or Signature Brands operations following the acquisition by Sunbeam of Coleman, First Alert, and Signature Brands.

17. All documents concerning the report on the 1998 integration and restructuring of First Alert, Coleman and Standard Brands presented to Sunbeam's Board of Directors on May 6, 1998, including, but not limited to, all drafts, preliminary reports, interim

reports, source documents, interview notes, outlines, planning reports and comments by any other entity.

18. All documents concerning the hiring or retention of Coopers & Lybrand by Sunbeam.

19. All letters of engagement, representation letters, management or attorney inquiry letters and responses thereto relating to any work you performed for Sunbeam.

20. All billing statements, invoices, time detail records, individual calendars, daily diaries (including electronic calendar programs), or other documents that describe or record the work performed, meetings attended, the time spent, or expenses incurred (including back-up for any out-of-pocket expenses), by any Coopers & Lybrand personnel, or that describe or record any aspect of their activities concerning any services performed on behalf of, or concerning, Sunbeam.

21. For the period from January 1, 1996 to the date of this response, all documents sufficient to reflect (a) the fees, expenses or compensation you received from Sunbeam; and (b) negotiations between you and Sunbeam relating to monies Sunbeam would pay for your audit, accounting, consulting, or other work for Sunbeam.

22. Documents sufficient to reflect the identity of persons at Coopers & Lybrand who performed any work for Sunbeam, including, but not limited to, time budgets and analyses, billing runs, expense reports, and memoranda.

23. All files, working papers, desk and pocket calendars, diaries, documents, reading and chronological files, and notebooks maintained by or reports generated by any of your personnel concerning any activities they performed in connection with work performed for

Sunbeam, including, but not limited to, those of Donald Burnett, Albert Lapierre, Andrew Molenaar, Jack Bonini, Dan Dooley, Harvey Kelly, Frank Pringle, Steven Skalak, Cassandra Reynolds, Jong Lee, Dick Oishi, John Wong, Todd Evans, Chris Rhee, Erik Mauch, Tom Nicholas, and Keith Polak.

24. All documents, including, but not limited to, original Workpapers concerning any work performed for Sunbeam, including Acquisition Consulting or Integration Consulting.

25. Documents constituting an index of your Workpapers concerning any work performed for Sunbeam, including, but not limited to, all Acquisition Consulting and Integration Consulting.

26. All documents relating to the work plan or methodology employed by Coopers & Lybrand in its Acquisition Consulting and Integration Consulting, including, but not limited to, the goals and the basis for any recommendations.

27. All documents relating to interviews conducted by Coopers & Lybrand as part of its work for Sunbeam, including but not limited to its Acquisition Consulting and Integration Consulting.

28. All of your document retention or document destruction policies or procedures or similar procedures for the preservation, storage, destruction, back-up or deletion of documents of any kind, including of electronic or hard copy versions of documents, for any time during 1996 through the present, including, without limitation, any amendment to any such policies or procedures, schedules or related documents, any and all records concerning adherence to and failure to adhere to or abide by any such policies or procedures, and any memoranda or

other instructions concerning the obligation and procedures to be utilized to preserve all relevant documents, including without limitation evidence concerning the Litigations.

29. All documents concerning any of the Litigations, including but not limited to all: (a) pleadings, motions, memoranda, briefs, affidavits, declarations, or other court filings; (b) orders and/or rulings; (c) hearing transcripts; (c) written discovery, including but not limited to document requests, subpoenas, requests for admission, interrogatories, and responses thereto; (d) documents produced by any parties or non-parties; (e) privilege logs; (f) deposition transcripts or exhibits; (g) expert reports or other expert discovery; and (h) documents concerning communications or correspondence concerning the Litigations. The relevant time period for this request is April 1998 through the date of service of this subpoena.

30. All documents you have provided to or received from the SEC, the Justice Department, the U.S. Attorney for the Southern District of New York, the Attorney General of New York, any other federal, state governmental or regulatory body, or any other self-regulatory body concerning Sunbeam, Morgan Stanley, MSSF, or the Coleman Transaction. The relevant time period for this request is February 1998 through the date of service of this subpoena.

DEFINITIONS

1. “Acquisition Consulting” means any studies, reports, analyses, evaluations, projections, estimates, or other work, in which you were involved concerning all potential and actual acquisition candidates or targets for Sunbeam beginning in 1997 and continuing through Spring 1998.

2. “Bank Facilities” means the Credit Agreement, including amendments, and all funds extended by MSSF, First Union, and/or Bank of America to Sunbeam pursuant to

the Credit Agreement, including, but not limited to, Tranche A, Tranche B, and the Revolving Credit Facility.

3. “Bank of America” means Bank of America National Trust and Savings Association and any of its predecessors, successors, affiliates, subsidiaries, and present and former officers, directors, employees, representatives, and agents.

4. “Coleman” means The Coleman Company, Inc. and any of its predecessors, successors, subsidiaries, and present and former officers, directors, and employees.

5. “Coopers & Lybrand” means the former Coopers & Lybrand LLP (now known as PricewaterhouseCoopers LLP), and any of its subsidiaries, divisions, predecessors, successors, present and former partners, employees, representatives, agents, attorneys, accountants, advisors, or anyone acting or purporting to act on its behalf.

6. “CPH” means Coleman (Parent) Holdings Inc. and any of its present and former officers, directors, and employees.

7. “Communication” means the transmittal of information (in the form of facts, ideas, inquiries or otherwise) by letter, memorandum, facsimile, orally, electronically, or otherwise.

8. “Concerning” means concerning, reflecting, relating to, referring to, describing, evidencing, or constituting.

9. “Credit Agreement” means that agreement entered into by Sunbeam Corporation, as borrower, with MSSF, First Union and Bank of America as Lenders, dated March 30, 1998 and all amendments thereto.

10. "Documents" shall be given the broad meaning provided in Rule 1.350 of the Florida Rules of Civil Procedure and refers to any form or means, whether physical, visual, or electronic, in or by which words, numbers, or ideas are recorded or preserved, whether fixed in tangible medium or electronically stored, including any and all drafts of any final document. The word "documents" shall include, by way of example and not by way of limitation, all of the following: papers, correspondence, trade letters, envelopes, memoranda, telegrams, cables, notes, messages, reports, studies, press releases, comparisons, books, accounts, checks, audio and video recordings and transcriptions thereof, pleadings, testimony, articles, bulletins, pamphlets, brochures, magazines, questionnaires, surveys, charts, newspapers, calendars, desk calendars, pocket calendars, lists, logs, publications, notices, diagrams, instructions, diaries, minutes for meetings, corporate minutes, orders, resolutions, agendas, memorials or notes of oral communications, whether by telephone or face-to-face, contracts, agreements, drafts of or proposed contracts or agreements, memoranda of understanding, letters of intent, computer tapes, computer drives or memories, computer diskettes or disks, e-mail, CD-ROMs, or any other tangible thing on which any handwriting, typing, printing, photostatic, electronic, or other form of communication or information is recorded or reproduced, together with all notations on any of the foregoing, all originals, file copies, or other unique copies of the foregoing, and all versions or drafts thereof, whether used or not.

11. "First Alert" means First Alert, Inc., and any of its predecessors, successors, affiliates, subsidiaries, and present and former officers, directors, employees, representatives, and agents.

12. “First Union” means First Union National Bank (now known as Wachovia Bank, National Association) and any of its predecessors, successors, affiliates, subsidiaries, and present and former officers, directors, employees, representatives, and agents.

13. “Integration Consulting” means any studies, reports, analyses, evaluations, projections, estimates, or other work, in which you were involved, concerning the potential or actual integration of Coleman, First Alert, and/or Signature Brands with Sunbeam.

14. “Lenders” means the entities listed on Schedule 2.01 of the Credit Agreement under the heading “Lenders” and any other Person that shall have become a party to the Credit Agreement as a Lender pursuant to an assignment and acceptance.

15. “Litigations” means In Re Sunbeam Securities Litigation, 98-8258-Civ.-Middlebrooks (S.D. Fla.); Camden Asset Management, L.P., et al. v. Sunbeam Corporation, et al., 98-8773-Civ.-Middlebrooks and 98-8275-Civ.-Middlebrooks (S.D. Fla.); Krim v. Dunlap, et al., No. CL983168AD (15th Jud. Cir., Fla.); Stapleton v. Sunbeam Corp., et al., No. 98-1676-Civ.-King (S.D. Fla.); Sunbeam Corp. v. PricewaterhouseCoopers LLP, No. CL005444AN (15th Jud. Cir., Fla.); In re Sunbeam Corp., No. 01-40291 (AJG) (Bankr. S.D.N.Y.), and every adversary proceeding therein; SEC v. Dunlap, et al., No. 01-8437-Civ.-Middlebrooks (S.D. Fla.); Oaktree Capital Management LLC v. Arthur Andersen LLP, No. BC257177 (L.A. Cty., CA); and Coleman (Parent) Holdings Inc. v. Arthur Andersen LLP, et al., No. CA 01-06062AN (15th Jud. Cir., Fla.); Albert J. Dunlap and Sunbeam Corporation, No. 32 160 00088 99 (AAA); and Russell A. Kersh and Sunbeam Corporation, No. 32 160 00091 99 (AAA); In the Matter of Sunbeam Corp., SEC Administrative Proceeding File No. 3-10481; and In the Matter of David C. Fannin, SEC Administrative Proceeding File No. 3-10482.

16. “Morgan Stanley” means Morgan Stanley & Co., Inc. and any of its predecessors, successors, affiliates, subsidiaries, and present and former officers, directors, partners, employees, representatives, and agents.

17. “MSSF” means Morgan Stanley Senior Funding, Inc. and any of its predecessors, successors, affiliates, subsidiaries, and present and former officers, directors, partners, employees, representatives, and agents.

18. “Offering Memorandum” means the offering memorandum for Sunbeam’s zero coupon convertible senior subordinated debentures due 2018.

19. “Person” means any natural person, corporation, limited liability company, trust, joint venture, association, company, partnership, governmental authority, or other entity.

20. “SEC” means the Securities and Exchange Commission.

21. “Signature Brands” means Signature Brands USA, Inc. and any of its predecessors, successors, affiliates, subsidiaries, and present and former officers, directors, employees, representatives, and agents.

22. “Subordinated Debentures” means Sunbeam’s Zero Coupon Convertible Senior Subordinated Debentures Due 2018.

23. “Subordinated Debenture Offering” means the offering of Sunbeam’s Subordinated Debentures.

24. “Sunbeam” means Sunbeam Corporation and any of its predecessors, successors, affiliates, subsidiaries, and present and former officers, directors, employees, representatives, and agents.

25. "Workpapers" means all records which concern the work performed, information obtained or the pertinent conclusions reached in the engagement by any auditor, accountant, practitioner, consultant or any other person working on your behalf or on behalf of Arthur Andersen including those documents defined by Generally Accepted Auditing and Attestation standards as workpapers.

26. "You" or "Your" means Coopers & Lybrand (now known as PricewaterhouseCoopers LLP) and any of its subsidiaries, divisions, predecessors, successors, present and former employees, representatives, agents, attorneys, accountants, advisors, or anyone acting or purporting to act on its behalf.

INSTRUCTIONS

1. Documents shall be produced as they are kept in the usual course of business, or organized and labeled to correspond to the categories in this Request. Documents attached to each other should not be separated. Documents consisting of items previously produced in the Litigations with Bates numbering shall be produced in Bates number order.

2. All documents shall be produced in the file folder, envelope or other container in which the documents are kept or maintained by you. If, for any reason, the container cannot be produced, produce copies of all labels or other identifying marks.

3. The relevant period, unless otherwise indicated, shall be from **January 1, 1996 through the date of trial of this matter**, and shall include all documents and information which relate in whole or in part to such period, or to events or circumstances during such period, even though dated, prepared, generated or received prior or subsequent to that period. Please

supplement or correct your responses to these requests if, at any time, you become aware that your responses are incomplete or incorrect in any respect.

4. If you claim the attorney-client privilege, or any other privilege or work-product protection for all or any portion of a document, you shall provide a privilege log that describes the withheld material sufficiently to allow CPH to test the privilege or protection asserted.

5. The following rules of construction apply:

- a. The connectives “and” and “or” shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery requests all responses that might otherwise be outside of their scope;
- b. The term “including” shall be construed to mean “without limitation”; and
- c. The use of the singular form of any word includes the plural and vice versa.

09/26/2003 15:53 FAX

#230580/mm

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

CASE NO.: 2003 CA 005045 AI

Plaintiffs,

vs.

MORGAN STANLEY & CO., INC.,

Defendant,

RE-NOTICE OF HEARING
(Cancels hearing previously set for 9/29/03)

YOU ARE HEREBY NOTIFIED that the undersigned has called up for hearing the following:

DATE: October 2, 2003

TIME: 8:45 a.m.

JUDGE: Hon. Elizabeth T. Maass

PLACE: Palm Beach County Courthouse, Room #11.1208, 205 North Dixie Highway,
West Palm Beach, FL 33401

SPECIFIC MATTERS TO BE HEARD:

Motion to Compel Production

Moving counsel certifies that he or she contacted opposing counsel and attempted to resolve the discovery dispute without hearing.

Coleman Holdings, Inc. vs Morgan Stanley & Company
Case No.: 2003 CA 005045 AI
Re-Notice of Hearing

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by
Fax and U.S. Mail to all Counsel on the attached list, this 26th day of Sept., 2003.



JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 478-0754
Attorney for Plaintiff

Coleman Holdings, Inc. vs Morgan Stanley & Company
Case No.: 2003 CA 005045 AI
Re-Notice of Hearing

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block, LLC
One IBM Plaza
Suite 4400
Chicago, IL 60611

Mark F. Bideau, Esq.
Lorie M. Gleim, Esq.
Greenberg Traurig, P.A.
777 South Flagler Drive, Suite 300 East
West Palm Beach, FL 33401
Attys for Sunbeam

David M. Wells, Esq.
McGuire Woods, LLP
Bank of America Tower
50 North Laura Street, Suite 3300
Jacksonville, FL 32202-3661
Attys for Bank of America

**IN THE CIRCUIT COURT FOR THE
FIFTEENTH JUDICIAL CIRCUIT, IN
AND FOR PALM BEACH COUNTY,
FLORIDA**

**COLEMAN (PARENT) HOLDINGS,
INC.**

Plaintiff,

v.

MORGAN STANLEY & CO., INC.

CASE NO.: 2003 CA 005045 AI

Defendant.

**AMENDED MOTION OF NON-PARTY TO APPEAR
THROUGH USE OF COMMUNICATION EQUIPMENT**

Non-Party, Bank of America, N.A., pursuant to Rule 2.071(c) of the Florida Judicial Administration Rules, hereby requests this Court that it be permitted to participate through communication equipment in the motion calendar hearing which has been scheduled by plaintiff for 8:45 a.m. Thursday, October 2, 2003 and as grounds therefor would show:

1. Bank of America, N.A. is a non-party in this action. Bank of America, N.A. has been served with certain subpoenas to produce documents.
2. Because the subpoenas seek disclosure of banking records protected by Fla. Stat. § 655.059(2)(b), Bank of America, N.A. has advised plaintiff that the documents Bank of America, N.A. has agreed to produce can only be produced upon the entry of an appropriate order pursuant to § 655.059(2)(b).

3. The undersigned counsel for Bank of America, N.A. cannot be present in West Palm Beach on Thursday, October 2, but does not wish to impede the ability of the parties to proceed forward with discovery. Accordingly, Bank of America, N.A. is prepared to proceed with the hearing and appear by telephone. Pursuant to Rule 2.071(c) of the Florida Judicial Administrative Rules, appearance by telephone is appropriate, absent a showing of good cause to deny the request, where the hearing is set for not longer than 15 minutes. The pending motion is set for the Court's motion calendar which is intended to deal with motions of less than 15 minutes.

WHEREFORE, Bank of America, N.A. requests that it be permitted to appear for the above-referenced hearing by telephone or that the hearing be rescheduled to a mutually convenient date.

McGuireWoods LLP

By: 

David M. Wells

Florida Bar No. 0309291

Michael Cavendish

Florida Bar No.: 0143774

50 N. Laura St., Suite 3300

Jacksonville, Florida 32202

(904) 798-2693

(904) 798-3207 (FAX)

Attorneys for non-party Bank of America, N.A.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was transmitted by Federal Express on September 29, 2003 to:

Jack Scarola, Esquire
Searcy Denney Scarola Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33402-3626

Jerold S. Solovy, Esquire
Jenner & Block, LLC
One IBM Plaza
Suite 4400
Chicago, IL 60611

Joseph Ianno, Esquire
Carlton Fields
222 Lake View Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannuci, Esquire
Kirkland and Ellis
655 15th Street, N.W.
Suite 1200
Washington, D.C. 20005

Mark F. Bideau, Esquire
Lorie K. Gleim
Greenberg Traurig, P.A.
777 South Flagler Drive
Suite 300 East
West Palm Beach, FL 33401



Attorney

CARLTON FIELDS, P.A.

ATTORNEYS AT LAW

Esperanté
222 Lakeview Avenue, Suite 1400
West Palm Beach, Florida 33401-6149

MAILING ADDRESS
P.O. Box 150, West Palm Beach, FL 33402-0150
Tel 561.659.7070 Fax 561.659.7368

FAX COVER SHEET

Date:	September 29, 2003	Phone Number	Fax Number
To:	Jack Scarola, Esq.	(561) 689-6300	(561) 684-5816
	Jerry Solovy, Esq.	(312) 923-2711	(312) 840-7671
	Thomas Clare, Esq.		(202) 879-2000-5200
From:	Joseph Ianno, Jr.	561.659.7070	561.659.7368

Client/Matter No.: 47877/14092

Employee No.: 048

Total Number of Pages Being Transmitted, Including Cover Sheet:

Message:

Original to follow Via Regular Mail

Original will Not be Sent

Original will follow via Overnight Courier

 The information contained in this facsimile message is attorney privileged and confidential information intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone (if long distance, please call collect) and return the original message to us at the above address via the U.S. Postal Service. Thank you.

If there are any problems or complications, please notify us immediately at:

561.659.7070

Telecopier operator: _____

WPB#567902.2

CARLTON FIELDS, P.A.

Miami Orlando St. Petersburg Tallahassee Tampa West Palm Beach

MIAMI
ORLANDO
ST. PETERSBURG
TALLAHASSEE
TAMPA

WEST PALM BEACH

CARLTON FIELDS

ATTORNEYS AT LAW

Esperanza
222 Lakeview Avenue, Suite 1400
West Palm Beach, Florida 33401-6149
P.O. Box 150
West Palm Beach, Florida 33402-0150

561.659.7070
561.659.7368 fax

www.carltonfields.com
E-MAIL: jianno@carltonfields.com

September 29, 2003

The Honorable Elizabeth Maass
Palm Beach County Courthouse
205 North Dixie Highway
West Palm Beach, Florida 33401

VIA HAND DELIVERY

Re: *Coleman (Parent) Holdings Co. v. Morgan Stanley & Co.*
Case No. 2003 CA 5045 AI

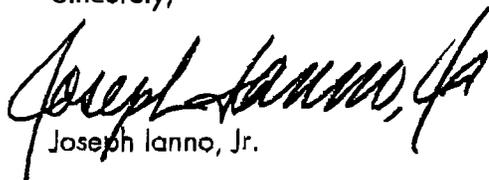
Dear Judge Maass:

At 4:33 p.m. this afternoon, we received Mr. Scarola's letter via facsimile unilaterally electing December 5, 2003 for the hearing on Defendant's Motion to Dismiss in the above matter. No attempt was made to coordinate this date and time with the undersigned. It was the undersigned's understanding that the Court's ruling at Uniform Motion Calendar was that if the parties were unable to agree on either of the alternative dates that the Court provided, the hearing would be set by default on October 31, 2003 at 4:00 p.m.

At this time, the Defendant does not agree to delay the hearing on our Motion to Dismiss until December 5th; therefore, we respectfully request that Your Honor require the parties to appear on October 31, 2003 at 4:00 p.m. as the Court ruled at the hearing this morning.

Thank you for your assistance in this matter.

Sincerely,


Joseph Ianno, Jr.

/jed

cc: Jack Scarola
Jerold Solovy
Thomas Clare

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

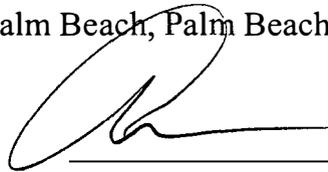
MORGAN STANLEY & CO., INC.,
Defendant(s).

ORDER DENYING REHEARING

THIS CAUSE came before the Court, in Chambers, on Defendant's counsel's letter dated September 29, 2003, which the Court elects to treat as including a Motion for Rehearing. Based on the foregoing, it is

ORDERED AND ADJUDGED that Defendant's Motion for Rehearing is Denied. Hearing on Defendant's Motion to Dismiss remains set December 5, 2003, at 8:00 a.m.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 30th day of September, 2003.



ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci
655 15th Street, NW, Suite 1200
Washington DC 20005

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, Il 60611

Mark F. Bideau, Esq.
777 S. Flagler Dr., Suite 300E
West Palm Beach, FL 33401

David M. Wells, Esq.
50 N. Laura Street, Suite 3300
Jacksonville, FL 32202

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

ORDER SPECIALLY SETTING HEARING

THIS CAUSE having come before the Court, it is hereby

ORDERED AND ADJUDGED that hearing on Defendant's Motion to Dismiss is specially set before the Honorable Elizabeth T. Maass on December 5, 2003, at 8:00 a.m., in Courtroom 11B, 205 N. Dixie Hwy, WPB, FL 33401. This is a specially set hearing which shall be limited to 1 hour. It is further

ORDERED AND ADJUDGED that the attorneys/parties must submit to the Court one (1) week before the hearing:

1. copies of all relevant pleadings;
2. a copy of any memorandum of law; and
3. copies of all case law authority.

This hearing shall not be canceled unless the issues of this motion have been settled, and an order entered, or the motion withdrawn.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 29th day of September, 2003.



ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:

Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci
655 15th Street, NW, Suite 1200
Washington DC 20005

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, Il 60611

Mark F. Bideau, Esq.
777 S. Flagler Dr., Suite 300E
West Palm Beach, FL 33401

David M. Wells, Esq.
50 N. Laura Street, Suite 3300
Jacksonville, FL 32202

If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please contact the ADA Coordinator in the Administrative Office of the Court, Palm Beach County Courthouse, 205 North Dixie Highway, Room 5.2500, West Palm Beach, Florida 33401; telephone number (561) 355-4380 within two (2) working days of your receipt of this [describe notice]; if you are hearing or voice impaired, call 1-800-955-8771.

SPANISH

Si Ud. es una persona incapacitada que necesita de un servicio especial para participar en este proceso, Ud. tiene derecho a que le provean cierta ayuda sin costo alguno. Por favor pongase en contacto con el Coordinador de la Oficina Administrativa de la Corte ADA, situada en el 205 North Dixie Highway, Oficina 5.2500, West Palm Beach, Florida, 33401, teléfono (561) 355-4380, dentro de los dos (2) próximos días hábiles después de recibir esta [describa la notificación]; si tiene incapacidad de oír ó hablar llame al 1-800-955-8771.

CREOLE

Si ou sé yon moun ki Infirm, ki bézwen ninpôt akomodasyon pou ka patisipé nan pwosè sa-a, ou gen dwa, san'l pa kouté'w anyin, pou yo ba'w kèk sèvis. Tanpri kontaké koòdinatè ADA ya nan Biro Administratif Tribinal nan cité Palm Beach la, ki nan 205 North Dixie Highway, Cham 5.2500, West Palm Beach, Florida 33401, niméro telefonn-nan sé (561) 355-4380, rélé dé (2) jou dé lè ou résévwa [notis sa-a]; si ou bèbè ou byen soud rélé 1-800-955-8771.

FRENCH

Si vous êtes infirme, et en besoin de n'importe accommodation pour pouvoir participer á ces procédures, vous pouvez gratuitement recevoir, certains services. S'il-vous-plait contactez le coordinateur du Bureau Administratif du Tribunal de Palm Beach, située à 205 North Dixie Highway, Chambre 5.2500, West Palm Beach, Florida 33401, numéro de téléphone (561) 355-4380 durant deux (2) jours suivant la réception de [cette note]; si vous êtes muets ou sourds, appelez 1-800-955-8771.

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

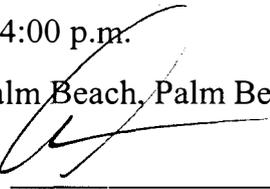
**ORDER ON DEFENDANT'S MOTION TO SET HEARING ON DEFENDANT'S
MOTION TO DISMISS**

THIS CAUSE came before the Court September 29, 2003 on Defendant's Motion to Set Hearing on Defendant's Motion to Dismiss, with both counsel present. Based on the proceedings before the Court, it is hereby

ORDERED AND ADJUDGED that Defendant's Motion to Set Hearing on Defendant's Motion to Dismiss is Granted. In open Court the undersigned offered three possible dates to counsel for hearing on Defendant's Motion to Dismiss: (1) October 31, 2003, at 4:00 p.m., 1 hour reserved; (2) November 20, 2003, at 4:00 p.m., 1 hour reserved; and (3) December 5, 2003, at 8:00 a.m., 1 hour reserved. Based on the foregoing, it is

ORDERED AND ADJUDGED that unless Plaintiff's counsel contacts the undersigned's office by 4:00 p.m. September 29, 2003 to select November 20, 2003, at 4:00 p.m. or December 5, 2003, at 8:00 a.m., the Court shall schedule the hearing on Defendant's Motion to Dismiss on October 31, 2003, at 4:00 p.m.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 29
day of September, 2003.



ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:

Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci
655 15th Street, NW, Suite 1200
Washington DC 20005

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, Il 60611

Mark F. Bideau, Esq.
777 S. Flagler Dr., Suite 300E
West Palm Beach, FL 33401

David M. Wells, Esq.
50 N. Laura Street, Suite 3300
Jacksonville, FL 32202

00001

1 IN THE FIFTEENTH JUDICIAL CIRCUIT COURT IN
2 AND FOR PALM BEACH COUNTY, FLORIDA
3 CIVIL DIVISION
4

Case No. 03 CA 005045 AI

5 COLEMAN (PARENT) HOLDINGS, INC.,
6

Plaintiff,
7

vs.
8

MORGAN STANLEY & CO., INC.,,
9

Defendant.
10 _____/

11
12 HEARING BEFORE THE
13 HONORABLE ELIZABETH MAASS
14
15
16
17
18
19

Monday, September 29, 2003
20 Palm Beach County Courthouse
Courtroom 11-B
21 205 N. Dixie Highway
West Palm Beach, Florida 33401
22 9:29 a.m. - 9:38 a.m.
23
24
25

00002

1 APPEARANCES:
2

3 SEARCY, DENNEY, SCAROLA,
BARNHART & SHIPLEY
4 2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33401
5 BY: JACK SCAROLA, ESQUIRE
Attorneys for the Plaintiff
6
7

CARLTON, FIELDS
8 Suite 1400
222 Lakeview Avenue
9 West Palm Beach, Florida 33401
BY: JOSEPH IANNO, JR., ESQUIRE

16div-003820

10 Attorneys for the Defendants

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

00003

1 The Hearing before the HON. ELIZABETH MAASS
2 was taken before me, PATTY McCOY, Shorthand
3 Reporter, Notary Public, State of Florida at
4 Large, at the Palm Beach County Courthouse, 205
5 North Dixie Highway, Courtroom 11-B, West Palm
6 Beach, Florida, beginning at the hour of 9:29
7 a.m., on Monday, September 29, 2003, pursuant to
8 the Notice filed herein, in the above-entitled
9 cause pending before the above-named Court.

10 P R O C E E D I N G S

11
12 THE COURT: Good morning. Do we have
13 a copy of the motion we're on today?

14 MR. IANNO: Yes. This is the case of
15 Coleman vs. Morgan Stanley. Joe Ianno, I'm
16 here on behalf of Morgan Stanley.

17 THE COURT: Thank you.

18 MR. IANNO: We've tried to work this
19 out, Your Honor. This is basically a
20 request of the Court to try to get a hearing
21 scheduled on our motion to dismiss.

22 The Court may recall back in July we
23 were here on a motion to stay discovery
24 based on our motion to dismiss which alleges
25 format and convenience grounds as well as

00004

1 some other grounds.

2 Pending a hearing on that motion --
3 when we were here in July the parties had
4 agreed to an October hearing date on that
5 motion, and subsequent to that hearing, that
6 date fell apart.

7 We've been trying to get it worked in
8 again into the Court's calendar based on
9 dates your assistant has provided to us. We
10 had agreed on a November 14th date.

11 Well, first of all, Plaintiff's

16div-003821

12 counsel said November 14th wasn't an
13 available date. We had tried to get it in
14 September. That didn't work. We called him
15 back and we said, okay, we'll do November
16 14th.

17 THE COURT: How long is this going to
18 take?

19 MR. IANNO: Half hour to an hour.

20 THE COURT: Is it set now?

21 MR. IANNO: No.

22 THE COURT: So we just want to get the
23 book and try to find something?

24 MR. SCAROLA: Yes. We do have a date
25 where everyone is available. The problem is

00005

1 that the Defendants are anxious to resolve
2 the motion prior to that mutually agreeable
3 date cleared on Your Honor's calendar.

4 THE COURT: That's fine.

5 MR. IANNO: That date is December
6 12th, Your Honor.

7 THE COURT: Let's look at the book and
8 even see what's a possibility. The only
9 thing, it references a bunch of pro hac vice
10 attorneys. I don't think I signed that off
11 yet.

12 MR. SCAROLA: There are probably,
13 there are probably 20 who have already been
14 admitted. There may be others who are still
15 outstanding.

16 THE COURT: I've got a couple, because
17 there's a related case, there's another
18 Morgan Stanely?

19 MR. IANNO: Yes, there's two before
20 Your Honor.

21 THE COURT: I got a letter, Mr.
22 Scarola, from your office enclosing a motion
23 signed by one and a proposed order for about
24 a dozen people. So I wrote a letter and
25 sent it back saying -- you hadn't signed a

00006

1 letter, I think somebody had signed it in
2 your absence, so it will show up, and just
3 so you know you need to follow up on it.

4 Okay, you said tentatively we have a
5 December 12th, is that the date?

6 MR. IANNO: Well, December 12th, your
7 assistant gave us a three hour time span
8 from 8 to 11.

9 THE COURT: That's not even all
10 available now still. That's what happened.

11 MR. IANNO: Yeah.

12 THE COURT: But you're telling me it's
13 not in the book for now, correct?

16div-003822

14 MR. IANNO: It is not in the book,
15 Your Honor.
16 THE COURT: Okay, so let's figure out
17 what we can do.
18 I can do it at 4:00 on October 31st.
19 MR. IANNO: That's fine, Your Honor.
20 THE COURT: Do you know if you're
21 available then?
22 MR. SCAROLA: Your Honor, the problem
23 is not really either Mr. Ianno's
24 availability or my availability. The
25 problem is that we are both local counsel

00007

1 for out of state law firms who will be the
2 ones that will be primarily --
3 THE COURT: Can we call them now?
4 MR. SCAROLA: My out of state counsel
5 is Chicago and so it's only 8:00 there.
6 MR. IANNO: My national counsel, Your
7 Honor, said whatever date the Court orders
8 somebody will be here, and if not I'll argue
9 it.
10 THE COURT: I'll tell you what, hold
11 on.
12 MR. SCAROLA: If you could give us
13 three alternatives --
14 THE COURT: What I'm going to do is
15 say give you two or three dates and say if
16 you don't call my office by 4:00 today and
17 pick this date, then by default it's the
18 October 31st date.
19 MR. SCAROLA: That's fine. Thank you.
20 THE COURT: Okay? Number one is
21 10-31-03, 4:00 p.m., one hour.
22 MR. SCAROLA: I've got to caution the
23 Court that I think Mr. Ianno is being a
24 little optimistic in light of the number of
25 lawyers involved that we could finish this

00008

1 in one hour.
2 THE COURT: Oh, but that's a Friday
3 afternoon, everyone loves to stay late on
4 Friday. If we go over, that's life.
5 MR. IANNO: It doesn't get dark for
6 trick or treating until six or seven, Your
7 Honor. That's the only thing my calendar
8 would be conflicted on.
9 THE COURT: Option Number 2, 11-20-03,
10 4:00 p.m.
11 THE COURT: Option Number 3 is 8:00
12 a.m., 12-5-03.
13 MR. SCAROLA: Thank you, Your Honor.
14 THE COURT: So if we don't hear from
15 you by 4:00 today, we're going to plug it in

16div-003823

16 for that October 31st date.
17 MR. IANNO: Thank you very much.
18 I appreciate it.
19 THE COURT: Okay, bye-bye.
20
21 (Thereupon, at 9:38 a.m. the hearing
22 was concluded.)
23
24
25

00009

1 C E R T I F I C A T E

2

THE STATE OF FLORIDA)

3

COUNTY OF PALM BEACH)

4

5 I, Patty McCoy, Shorthand Reporter, certify
6 that I was authorized to and did stenographically
7 report the foregoing proceedings and that the
8 transcript is a true record.

9

10 Dated this 30th day of September, 2000.

11

12

13

14

15

16

Patty McCoy, Shorthand Reporter

17

18

19

20

21

22

23

24

25

00001

1 IN THE FIFTEENTH JUDICIAL CIRCUIT COURT IN
2 AND FOR PALM BEACH COUNTY, FLORIDA
3 CIVIL DIVISION
4

Case No. 03 CA 005045 AI

5 COLEMAN (PARENT) HOLDINGS, INC.,
6

Plaintiff,
7

vs.
8

MORGAN STANLEY & CO., INC.,,
9

Defendant.
10 _____/

11
12 HEARING BEFORE THE
13 HONORABLE ELIZABETH MAASS
14
15
16
17
18
19

Monday, September 29, 2003
20 Palm Beach County Courthouse
Courtroom 11-B
21 205 N. Dixie Highway
West Palm Beach, Florida 33401
22 9:29 a.m. - 9:38 a.m.
23
24
25

00002

1 APPEARANCES:
2

3 SEARCY, DENNEY, SCAROLA,
BARNHART & SHIPLEY
4 2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33401
5 BY: JACK SCAROLA, ESQUIRE
Attorneys for the Plaintiff
6
7

CARLTON, FIELDS
8 Suite 1400
222 Lakeview Avenue
9 West Palm Beach, Florida 33401
BY: JOSEPH IANNO, JR., ESQUIRE

16div-003825

10 Attorneys for the Defendants
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

00003

1 The Hearing before the HON. ELIZABETH MAASS
2 was taken before me, PATTY McCOY, Shorthand
3 Reporter, Notary Public, State of Florida at
4 Large, at the Palm Beach County Courthouse, 205
5 North Dixie Highway, Courtroom 11-B, West Palm
6 Beach, Florida, beginning at the hour of 9:29
7 a.m., on Monday, September 29, 2003, pursuant to
8 the Notice filed herein, in the above-entitled
9 cause pending before the above-named Court.

10 P R O C E E D I N G S
11

12 THE COURT: Good morning. Do we have
13 a copy of the motion we're on today?

14 MR. IANNO: Yes. This is the case of
15 Coleman vs. Morgan Stanley. Joe Ianno, I'm
16 here on behalf of Morgan Stanley.

17 THE COURT: Thank you.

18 MR. IANNO: We've tried to work this
19 out, Your Honor. This is basically a
20 request of the Court to try to get a hearing
21 scheduled on our motion to dismiss.

22 The Court may recall back in July we
23 were here on a motion to stay discovery
24 based on our motion to dismiss which alleges
25 format and convenience grounds as well as

00004

1 some other grounds.

2 Pending a hearing on that motion --
3 when we were here in July the parties had
4 agreed to an October hearing date on that
5 motion, and subsequent to that hearing, that
6 date fell apart.

7 We've been trying to get it worked in
8 again into the Court's calendar based on
9 dates your assistant has provided to us. We
10 had agreed on a November 14th date.

11 Well, first of all, Plaintiff's

12 counsel said November 14th wasn't an
13 available date. We had tried to get it in
14 September. That didn't work. We called him
15 back and we said, okay, we'll do November
16 14th.

17 THE COURT: How long is this going to
18 take?

19 MR. IANNO: Half hour to an hour.

20 THE COURT: Is it set now?

21 MR. IANNO: No.

22 THE COURT: So we just want to get the
23 book and try to find something?

24 MR. SCAROLA: Yes. We do have a date
25 where everyone is available. The problem is

00005

1 that the Defendants are anxious to resolve
2 the motion prior to that mutually agreeable
3 date cleared on Your Honor's calendar.

4 THE COURT: That's fine.

5 MR. IANNO: That date is December
6 12th, Your Honor.

7 THE COURT: Let's look at the book and
8 even see what's a possibility. The only
9 thing, it references a bunch of pro hac vice
10 attorneys. I don't think I signed that off
11 yet.

12 MR. SCAROLA: There are probably,
13 there are probably 20 who have already been
14 admitted. There may be others who are still
15 outstanding.

16 THE COURT: I've got a couple, because
17 there's a related case, there's another
18 Morgan Stanely?

19 MR. IANNO: Yes, there's two before
20 Your Honor.

21 THE COURT: I got a letter, Mr.
22 Scarola, from your office enclosing a motion
23 signed by one and a proposed order for about
24 a dozen people. So I wrote a letter and
25 sent it back saying -- you hadn't signed a

00006

1 letter, I think somebody had signed it in
2 your absence, so it will show up, and just
3 so you know you need to follow up on it.

4 Okay, you said tentatively we have a
5 December 12th, is that the date?

6 MR. IANNO: Well, December 12th, your
7 assistant gave us a three hour time span
8 from 8 to 11.

9 THE COURT: That's not even all
10 available now still. That's what happened.

11 MR. IANNO: Yeah.

12 THE COURT: But you're telling me it's
13 not in the book for now, correct?

14 MR. IANNO: It is not in the book,
15 Your Honor.
16 THE COURT: Okay, so let's figure out
17 what we can do.
18 I can do it at 4:00 on October 31st.
19 MR. IANNO: That's fine, Your Honor.
20 THE COURT: Do you know if you're
21 available then?
22 MR. SCAROLA: Your Honor, the problem
23 is not really either Mr. Ianno's
24 availability or my availability. The
25 problem is that we are both local counsel

00007

1 for out of state law firms who will be the
2 ones that will be primarily --
3 THE COURT: Can we call them now?
4 MR. SCAROLA: My out of state counsel
5 is Chicago and so it's only 8:00 there.
6 MR. IANNO: My national counsel, Your
7 Honor, said whatever date the Court orders
8 somebody will be here, and if not I'll argue
9 it.
10 THE COURT: I'll tell you what, hold
11 on.
12 MR. SCAROLA: If you could give us
13 three alternatives --
14 THE COURT: What I'm going to do is
15 say give you two or three dates and say if
16 you don't call my office by 4:00 today and
17 pick this date, then by default it's the
18 October 31st date.
19 MR. SCAROLA: That's fine. Thank you.
20 THE COURT: Okay? Number one is
21 10-31-03, 4:00 p.m., one hour.
22 MR. SCAROLA: I've got to caution the
23 Court that I think Mr. Ianno is being a
24 little optimistic in light of the number of
25 lawyers involved that we could finish this

00008

1 in one hour.
2 THE COURT: Oh, but that's a Friday
3 afternoon, everyone loves to stay late on
4 Friday. If we go over, that's life.
5 MR. IANNO: It doesn't get dark for
6 trick or treating until six or seven, Your
7 Honor. That's the only thing my calendar
8 would be conflicted on.
9 THE COURT: Option Number 2, 11-20-03,
10 4:00 p.m.
11 THE COURT: Option Number 3 is 8:00
12 a.m., 12-5-03.
13 MR. SCAROLA: Thank you, Your Honor.
14 THE COURT: So if we don't hear from
15 you by 4:00 today, we're going to plug it in

16 for that October 31st date.
17 MR. IANNO: Thank you very much.
18 I appreciate it.
19 THE COURT: Okay, bye-bye.
20
21 (Thereupon, at 9:38 a.m. the hearing
22 was concluded.)
23
24
25

00009

1 C E R T I F I C A T E

2

THE STATE OF FLORIDA)

3

COUNTY OF PALM BEACH)

4

5 I, Patty McCoy, Shorthand Reporter, certify
6 that I was authorized to and did stenographically
7 report the foregoing proceedings and that the
8 transcript is a true record.

9

10 Dated this 30th day of September, 2000.

11

12

13

14

15

16

Patty McCoy, Shorthand Reporter

17

18

19

20

21

22

23

24

25

**IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA**

<hr/>	
COLEMAN (PARENT) HOLDINGS INC.,)
)
Plaintiff,)
)
v.)
)
MORGAN STANLEY & CO., INC.,)
)
Defendant.)
)
<hr/>	

Case No. 2003 CA 005045 AI
Judge Elizabeth I. Maass

**PLAINTIFF COLEMAN (PARENT) HOLDINGS INC.'S
MOTION TO PERMIT FOREIGN ATTORNEY TO APPEAR**

Plaintiff Coleman (Parent) Holdings Inc., joined by its Florida counsel, Jack Scarola, move this Court pursuant to Rule 2.061(b) of the Florida Rules of Judicial Administration, for an Order permitting Clark C. Johnson to appear *pro hac vice* in this action on behalf of Plaintiff. In support of the motion, Plaintiff states:

1. Plaintiff has retained attorney Jack Scarola and the firm of Searcy Denney Scarola Barnhart & Shipley, P.A., 2139 Palm Beach Lakes Boulevard, West Palm Beach, Florida, as Florida counsel to assist in this matter.

2. Plaintiff and its Florida counsel seek the assistance of Clark C. Johnson of Jenner & Block, LLC, One IBM Plaza, Chicago, Illinois, in this matter. Plaintiff has previously retained the above-named law firm to provide legal representation in connection with this matter in 2001.

3. Clark C. Johnson is a member in good standing of the following bars: U.S. Court of Appeals for the Seventh Circuit; U.S. Court of Appeals for the Eleventh Circuit; U.S. District Court for the Northern District of Illinois (trial bar); U.S. District Court for the Central District of Illinois;

U.S. District Court for the Eastern District of Michigan; and the Illinois Supreme Court. Outside of this case and its companion case, No. 2003 CA 005165 AG, Mr. Johnson has not filed an application in any Florida state court to appear as counsel under Florida Rule of Judicial Administration 2.061 in the last five years. Mr. Johnson has never been disciplined, suspended, or disbarred by any court.

4. Mr. Johnson has read all applicable provisions of the Florida Rules of Judicial Administration and the Rules Regulating the Florida Bar, and this motion complies with those rules.

5. Jack Scarola has been a member of the Florida Bar since 1973, Florida Bar No. 169440, and consents to act as co-counsel with the foreign attorney in this action.

WHEREFORE, Plaintiff moves this Court for an Order permitting Clark C. Johnson to appear on behalf of Plaintiff's counsel in this action.

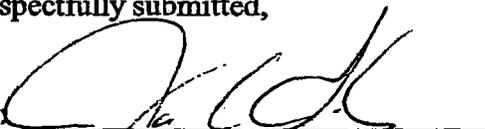
Under penalty of perjury, I declare that I have read the foregoing motion and with respect to my credentials the facts stated in it are true.



Clark C. Johnson

Respectfully submitted,

By



John Scarola
Fla. Bar No. 169440
Counsel for Plaintiff

CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that a copy of the foregoing has been furnished by U.S. Mail and facsimile to the following counsel for Defendant on this 2nd day of October, 2003.

Joseph Ianno, Jr.
CARLTON FIELDS
222 Lake View Avenue, Suite 1400
West Palm Beach, FL 33401
Tel.: (561) 659-7070
Fax: (561) 659-7368

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett H. McGurk
KIRKLAND & ELLIS
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Tel.: (202) 879-5000
Fax: (202) 879-5200



John Scarola
SEARCY DENNEY SCAROLA BARNHART
& SHIPLEY, P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33409
Tel.: (561) 686-6300

Counsel for Plaintiff

CARLTON FIELDS, P.A.

ATTORNEYS AT LAW

Esperanté
222 Lakeview Avenue, Suite 1400
West Palm Beach, Florida 33401-6149

MAILING ADDRESS
P.O. Box 150, West Palm Beach, FL 33402-0150
Tel 561.659.7070 Fax 561.659.7368

FAX COVER SHEET

Date:	October 7, 2003	Phone Number	Fax Number
To:	Jack Scarola, Esq.	(561) 689-6300	(561) 684-5816
	Jerald Solovy, Esq.	(312) 923-2711	(312) 840-7671
	Thomas Clare, Esq.		(202) 879-5200
From:	Joseph Ianno, Jr.	561.659.7070	561.659.7368

Client/Matter No.: 47877/14092

Employee No.: 048

Total Number of Pages Being Transmitted, Including Cover Sheet: 2

Message: Defendant's Motion for Protective Order, Sanctions and Imposition of Cost Bond and Notice of Hearing.

Original to follow Via Regular Mail Original will Not be Sent Original will follow via Overnight Courier

The information contained in this facsimile message is attorney privileged and confidential information intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone (if long distance, please call collect) and return the original message to us at the above address via the U.S. Postal Service. Thank you.

If there are any problems or complications, please notify us immediately at:
561.659.7070

Telecopier operator: _____

WPB#567902.2

CARLTON FIELDS, P.A.

Miami Orlando St. Petersburg Tallahassee Tampa West Palm Beach

MIAMI
ORLANDO
ST. PETERSBURG
TALLAHASSEE
TAMPA

CARLTON FIELDS

ATTORNEYS AT LAW

WEST PALM BEACH

Esperanté
222 Lakewood Avenue, Suite 1400
West Palm Beach, Florida 33401-6149
P.O. Box 130
West Palm Beach, Florida 33402-0150

561.659.7070
561.659.7368 fax

www.carltonfields.com
E-MAIL: jjanna@carltonfields.com

October 7, 2003

The Honorable Elizabeth Maass
Palm Beach County Courthouse
205 North Dixie Highway
West Palm Beach, Florida 33401

VIA HAND DELIVERY

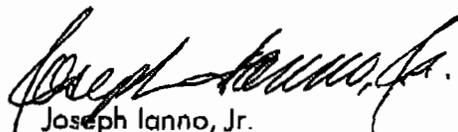
Re: *Coleman (Parent) Holdings Co. v. Morgan Stanley & Co.*
Case No. 2003 CA 5045 AI

Dear Judge Maass:

Enclosed please find a courtesy copy of Defendant's Motion for Protective Order, for Sanctions and for Imposition of a Cost Bond in the above matter. Also enclosed is a Notice of Hearing for Uniform Motion Calendar on October 16, 2003.

Thank you for your assistance in this matter.

Sincerely,


Joseph Ianno, Jr.

/jed

cc: Jack Scarola
Jerold Solovy
Thomas Clare

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CASE NO: 03 CA-005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

NOTICE OF HEARING

NOTICE IS HEREBY given that a hearing has been set in the above-styled case as follows:

DATE: October 16, 2003

TIME: 8:45 A.M.

PLACE: Palm Beach County Courthouse
205 N. Dixie Highway
Room 11B
West Palm Beach, Florida 33401

BEFORE: Judge Elizabeth Maass

CONCERNING: Defendant's Motion for Protective Order, Sanctions and
Imposition of a Cost Bond.

KINDLY GOVERN YOURSELVES ACCORDINGLY.

The undersigned counsel hereby certifies that a good faith attempt to resolve
the issues contained in the foregoing motions or matters was made with

opposing counsel prior to hearing on these matters on the Court's Motion Calendar.

If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no costs to you, to the provision of certain assistance. Please contact the ADA Coordinator in the Administrative Office of the Court, Palm Beach County Courthouse, 205 North Dixie Highway, Room 5.2500, West Palm Beach, Florida 33401; telephone number (561) 355-2431 within two (2) working days of your receipt of this notice; if you are hearing or voice impaired, call 1-800-955-8771.

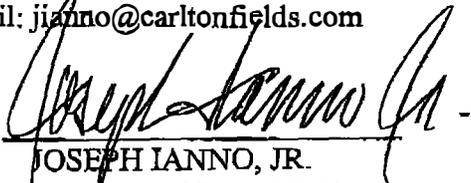
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by facsimile and U.S. Mail to all counsel of record on the attached service list on this 17th day of October, 2003.

Thomas D. Yannucci, P.C.
Thomas A. Clare
Larissa Paule-Carres
Brett H. McGurk
KIRKLAND & ELLIS
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

COUNSEL FOR DEFENDANT

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

BY: 
JOSEPH IANNO, JR.
Florida Bar No: 655351

SERVICE LIST

Jack Scarola SEARCY, DENNY, SCAROLA, BARNHARDT & SHIPLEY, P.A. 2139 Palm Beach Lakes Blvd. West Palm Beach, FL 33409	Counsel for Plaintiff
Jerold S. Solovy Michael Brody JENNER & BLOCK, LLC One IBM Plaza Suite 400 Chicago, IL 60611	Counsel for Plaintiff

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CASE NO: 03 CA-005045 AJ

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

**DEFENDANT'S MOTION FOR PROTECTIVE ORDER, SANCTIONS AND
IMPOSITION OF A COST BOND**

Defendant Morgan Stanley & Co. Incorporated ("Morgan Stanley") requests that this Court enter a Protective Order concerning depositions unilaterally scheduled by the Plaintiff in 5 different cities in 4 states during a 17-day period in late October and early November. Plaintiff previously represented to this Court (and to Defendant) that its attorneys were unavailable to participate in a hearing on Defendant's Motion to Dismiss on at least two of the days they now seek to take depositions. In support of its motion, Defendant states as follows:

1. Attached hereto as Exhibit I is Plaintiff's Notice of Taking Videotaped Depositions received on October 2, 2003 at 5:08 p.m. In order to appreciate the Plaintiff's bad faith in scheduling these depositions, a chronology of events is necessary:

- a) On June 25, 2003, Morgan Stanley filed its Motion To Dismiss Pursuant to Florida Rule of Civil Procedure 1.061 or, in the alternative, for Judgment on the

Pleadings. The grounds for the Motion to Dismiss include *forum non conveniens* and failure to properly state a cause of action.

- b) The parties had originally agreed to hold a hearing on Morgan Stanley's Motion to Dismiss on October 10, 2003. After this date was agreed to by counsel, Morgan Stanley's counsel was informed that this date was no longer convenient for certain of Plaintiff's counsel. Indeed, Counsel for Morgan Stanley was advised by Attorney Deirdre Connell that the law firm of Jenner & Block was not available for any of the potential hearing dates during the month of October for a hearing on Defendant's Motion to Dismiss. Ms. Connell is also the attorney who signed the deposition notice at issue in this motion.
- c) On September 29, 2003, the parties attended a hearing before this Court on Defendant's Motion to Set Hearing. At the hearing, the Court indicated that October 31, 2003 was an available hearing date for the Motion to Dismiss. Mr. Scarola indicated that before he could agree to the October 31, 2003 date, he would need to check with his co-counsel at Jenner & Block. The Court provided Mr. Scarola with alternative options if the Jenner & Block attorneys were not available on that date.
- d) Not surprisingly, Plaintiff chose the last possible date offered by the Court for a hearing on the Motion to Dismiss. The hearing was then scheduled by the Court for December 5, 2003.
- e) On October 2, 2003, at the request of the undersigned, the Court rescheduled the hearing to December 12, 2003 and increased the time allotted for the hearing from 60 minutes to 90 minutes.

f) Less than 12 hours after that hearing, Plaintiff served the Notice of Taking Videotaped Depositions that is the subject of this Motion. The Deposition Notice purports to schedule 10 depositions for 10 consecutive business days in October and to schedule depositions during the first 4 business days in November. The notice includes a date upon which Defendant's counsel had previously indicated to Plaintiff that Defendant's counsel could not be available. This notice also includes two dates, October 24 and October 31, where Plaintiff's counsel expressly indicated that they were unavailable for a hearing on Defendant's Motion to Dismiss.

2. In order to avoid the undue burden and expense of depositions during the pendency of Defendant's Motion to Dismiss, Defendant had previously requested that this Court stay discovery until the Court had had an opportunity to rule on the Motion to Dismiss. That motion was denied, in part because — at the time the Motion to Stay — counsel had agreed to a prompt hearing on the Motion to Dismiss in early October. As the chronology above indicates, the hearing on the Motion to Dismiss now will not occur until December 2003, nearly five months after it was filed.

3. Since the Court denied Morgan Stanley's Motion to Stay, the parties have engaged in substantial written discovery. The parties have propounded the following written discovery requests in this case:

- Plaintiff's First Request for Production of Documents (61 Requests);
- Plaintiff CPH's Second Request for Production of Documents (15 Requests);
- Morgan Stanley & Co. Incorporated's First Request for Production of Documents to Plaintiff (41 Requests);
- Morgan Stanley & Co. Incorporated's First Set of Interrogatories to Plaintiff Coleman (Parent) Holdings, Inc. (5 Interrogatories);

- Morgan Stanley & Co. Incorporated's First Set of Request for Admission (273 Requests);
- Coleman (Parent) Holding Inc's First Set of Interrogatories to Defendant Morgan Stanley & Co., Inc. (10 Interrogatories, plus subparts);
- Morgan Stanley & Co. Incorporated's Second Set of Interrogatories and Second Request for Production of Documents to Plaintiff Coleman (Parent) Holdings, Inc. (7 Interrogatories, 1 Request); and
- Coleman (Parent) Holding Inc.'s First Set of Requests For Admission (314 Requests).

4. In addition, the parties have engaged in substantial written discovery in the related case that is also pending in this Court, *Morgan Stanley Senior Funding v. MacAndrews & Forbes*, Case Number 2003CA005165:

- Defendant CPH's First Request for Production of Documents (86 Requests);
- Morgan Stanley Senior Funding's First Request for Production of Documents to Plaintiff (44 Requests);
- Defendant Coleman (Parent) Holding Inc's First Set of Interrogatories to Plaintiff Morgan Stanley Senior Funding, Inc. (8 Interrogatories, plus subparts);
- Defendant Coleman (Parent) Holding Inc's Second Set of Interrogatories to Plaintiff Morgan Stanley Senior Funding, Inc. (4 Interrogatories, plus subparts);
- Morgan Stanley Senior Funding's First Set of Interrogatories and Second Request for Production of Documents to Defendants MacAndrews & Forbes Holdings, Inc. and Coleman (Parent) Holdings, Inc. (3 Interrogatories, 1 Request); and
- Coleman (Parent) Holding Inc.'s First Set of Requests for Admission (314 Requests).

5. In response to the requests identified in the preceding paragraphs, the parties have exchanged hundreds of boxes of documents and provided dozens of pages of responses to interrogatories and requests for admissions. The parties also have exchanged privilege logs in accordance with the Court's September 4, 2003 Agreed Order.

6. Moreover, the parties have served discovery requests on third parties such as Andersen Worldwide, Bank of America, Wachovia, Davis Polk & Wardwell, and Wachtell, Lipton Rosen & Katz. Two depositions of these third parties' custodians of records have been scheduled. Indeed, Plaintiff scheduled one such deposition on October 24, the second deposition that Plaintiff has scheduled on a date when it previously represented it was unavailable for a hearing on the Motion to Dismiss. There is a significant amount of additional third party discovery yet to be served. Thus, there remains a significant volume of documents to be produced by third parties and reviewed by the parties.

7. The parties also have engaged in deposition discovery. Specifically, each party has conducted depositions of the other party's corporate representative on issues relating to document retention, location, collection and production. Additionally, Morgan Stanley has already made John Tyree, a fact witness who currently resides in the United Kingdom, available to CPH for deposition on September 15, 2003. Mr. Tyree was in the United States to attend to a personal family matter, and, at an inconvenience to himself and his family, made himself available in New York for a full day's deposition.

8. Morgan Stanley's Motion to Dismiss raises substantial *forum non conveniens* issues — and may dispose of Plaintiff's entire action as a matter of law. Plaintiff has effectively delayed the hearing on the Motion to Dismiss because of its counsel's alleged unavailability. It is now clear, however, that although Plaintiff's counsel are allegedly unavailable to attend a hearing before this Court, those same attorneys are apparently available to schedule 120 hours of depositions during that same time period (assuming 8 hour depositions).

9. The potential cost to the Defendant of proceeding with these depositions is enormous. A conservative estimate of the attorneys' fees and costs that would be incurred to prepare for and attend the depositions as currently scheduled is approximately \$150,000.00.

10. Defendant submits that the service of the Deposition Notice on October 2, 2003, only a few hours after the hearing before this Court, evidences Plaintiff's clear intent to delay the hearing while at the same time subject the Defendant to harassment, annoyance, undue burden and expenses in responding to further deposition discovery.

11. Morgan Stanley does not seek to stay all discovery during the pendency of its Motion to Dismiss (a request the Court has already denied). Morgan Stanley does not oppose proceeding with document discovery. However, Plaintiff's conduct in delaying the hearing on Defendant's Motion to Dismiss, while at the same time scheduling depositions during the same time period, justifies the requested Protective Order prohibiting further depositions. Plaintiff should not be permitted to proceed with burdensome and expensive deposition discovery while at the same time avoiding a hearing on Morgan Stanley's Motion to Dismiss.

WHEREFORE, in order to avoid the undue burden and expense of additional depositions, and as a sanction for Plaintiff's bad faith in scheduling these depositions, Defendant Morgan Stanley respectfully requests that this Court:

(A) enter a Protective Order prohibiting further depositions, other than depositions of custodians of records, until the Court has ruled on Defendant's Motion to Dismiss; or

(B) alternatively, prohibiting the taking of the depositions listed on Plaintiff's October 2, 2003 deposition notice and requiring Plaintiff to coordinate mutually convenient dates and times with counsel for Defendant; and

- (C) reserving jurisdiction for the imposition of sanctions; and
- (D) such other and further relief as the Court deems just and proper.

Dated: October 7, 2003

Respectfully Submitted,



Joseph Manno, Jr. (FL Bar # 655351)

CARLTON FIELDS
222 Lake View Avenue - Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368

Thomas D. Yannucci, P.C
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W., 12th Floor
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

Attorneys for Defendant,
Morgan Stanley & Co. Incorporated

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by facsimile and U.S. Mail to all counsel of record on the attached service list on this 7th day of October, 2003.

Thomas D. Yannucci, P.C.
Thomas A. Clare
Larissa Paule-Carres
Brett H. McGurk
KIRKLAND & ELLIS LLP
655 15th Street, N.W., 12th Floor
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

COUNSEL FOR DEFENDANT

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

BY: 
JOSEPH IANNO, JR.
Florida Bar No: 655351

SERVICE LIST

<p>John Scarola SEARCY, DENNEY, SCAROLA, BARNHARDT & SHIPLEY, P.A. 2139 Palm Beach Lakes Boulevard West Palm Beach, Florida 33409</p>	<p>Counsel for Plaintiff</p>
<p>Jerold S. Solovy Michael Brody JENNER & BLOCK, LLC One IBM Plaza Suite 4400 Chicago, Illinois 60611</p>	<p>Counsel for Plaintiff</p>

EXHIBIT I

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 2003 CA 005045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

NOTICE OF TAKING VIDEOTAPED DEPOSITIONS

To: Thomas A. Clare, Esq.
KIRKLAND & ELLIS, LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lake View Avenue
Suite 1400
West Palm Beach, FL 33401

PLEASE TAKE NOTICE that Plaintiff Coleman (Parent) Holdings Inc. will take the depositions upon oral examination of the following witnesses pursuant to Florida Rule of Civil Procedure 1.310 on the dates, times, and locations set forth below:

DEPONENT	DATE AND TIME	LOCATION
Andrew Savarie	October 20, 2003 at 9:30 a.m.	JENNER & BLOCK, LLC One IBM Plaza Chicago, Illinois 60611
Vance Kistler	October 21, 2003 at 9:30 a.m.	SEARCY DENNEY SCAROLA BARNHART & SHIPLEY, P.C. 2139 Palm Beach Lakes Blvd. West Palm Beach, Florida 33409
Donald Denkhaus	October 22, 2003 at 9:30 a.m.	SEARCY DENNEY SCAROLA BARNHART & SHIPLEY, P.C. 2139 Palm Beach Lakes Blvd. West Palm Beach, Florida 33409

Kevin Krayner	October 23, 2003 at 9:30 a.m.	ESQUIRE DEPOSITION SERVICES 600 S. Andrews Avenue, 2nd Floor Ft. Lauderdale, Florida 33301
Tyrone Chang	October 24, 2003 at 9:30 a.m.	SHAPIRO MITCHELL FORMAN ALLEN & MILLER LLP 380 Madison Avenue New York, New York 10017
Scott Yales	October 27, 2003 at 9:30 a.m.	SEARCY DENNEY SCAROLA BARNHART & SHIPLEY, P.C. 2139 Palm Beach Lakes Blvd. West Palm Beach, Florida 33409
William Strong	October 28, 2003 at 9:30 a.m.	JENNER & BLOCK, LLC One IBM Plaza Chicago, Illinois 60611
Urban Kantola	October 29, 2003 at 9:30 a.m.	ESQUIRE DEPOSITION SERVICES 600 S. Andrews Avenue, 2nd Floor Ft. Lauderdale, Florida 33301
William Pruitt	October 30, 2003 at 9:30 a.m.	SEARCY DENNEY SCAROLA BARNHART & SHIPLEY, P.C. 2139 Palm Beach Lakes Blvd. West Palm Beach, Florida 33409
Lee Griffith	October 31, 2003 at 9:30 a.m.	SEARCY DENNEY SCAROLA BARNHART & SHIPLEY, P.C. 2139 Palm Beach Lakes Blvd. West Palm Beach, Florida 33409
Deborah MacDonald	November 3, 2003 at 9:30 a.m.	SEARCY DENNEY SCAROLA BARNHART & SHIPLEY, P.C. 2139 Palm Beach Lakes Blvd. West Palm Beach, Florida 33409
R. Bram Smith	November 5, 2003 at 9:30 a.m.	SHAPIRO MITCHELL FORMAN ALLEN & MILLER LLP 380 Madison Avenue New York, New York 10017
Deidra Den Danto	November 6, 2003 at 9:30 a.m.	STRONGWATER & ASSOCIATES, LLC 1360 Peachtree Street, N.E. Suite 930 Atlanta, Georgia 30309

Coleman Holdings Inc. v. Morgan Stanley & Company
Case No.: 2003 CA 005045 AJ
Plaintiff's Subpoena for Deposition
October 2, 2003

The depositions will be recorded by videotape and stenographic means. The deposition will be taken before a person authorized to administer oaths and will continue day to day until completed.

The videotape operator will be Esquire Deposition Services at the following locations: (1) 515 West Flagler Drive, Suite P-200, West Palm Beach, FL 33401 for the depositions proceeding in Florida; (2) 155 N. Wacker Drive, Chicago, IL 60606 for the depositions proceeding in Illinois; (3) 216 E. 45th Street, New York, NY 10017 for the depositions proceeding in New York; and (4) 1100 Spring Street NW, #102, Atlanta, Georgia 30309-2823 for the deposition proceeding in Atlanta.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by facsimile and mail to all counsel on the attached Service List, this 2nd day of October, 2003.

Dated: October 2, 2003

COLEMAN (PARENT) HOLDINGS INC.

By: 
One of Its Attorneys

Jerold S. Solovy
Michael T. Brody
Deirdre E. Connell
JENNER & BLOCK, LLC
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

Jack Scarola
SEARCY DENNEY SCAROLA BARNHART
& SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33409
(561) 686-6300

Coleman Holdings Inc. v. Morgan Stanley & Company
Case No.: 2003 CA 005045 AI
Plaintiff's Subpoena for Deposition
October 2, 2003

SERVICE LIST

Thomas A. Clare, Esq.
KIRKLAND & ELLIS, LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lake View Avenue
Suite 1400
West Palm Beach, FL 33401

#230580/mm

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

CASE NO.: 2003 CA 005045 AI

Plaintiffs,

vs.

MORGAN STANLEY & CO., INC.,

Defendant,

RE-NOTICE OF HEARING
(Cancels hearing for 10/9/03)

YOU ARE HEREBY NOTIFIED that the undersigned has called up for hearing the following:

DATE: October 16, 2003

TIME: 8:45 a.m.

JUDGE: Hon. Elizabeth T. Maass

PLACE: Palm Beach County Courthouse, Room #11.1208, 205 North Dixie Highway,
West Palm Beach, FL 33401

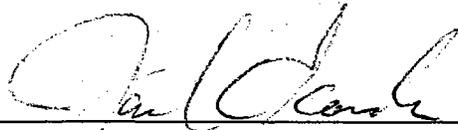
SPECIFIC MATTERS TO BE HEARD:

Coleman (Parent) Holdings Inc.'s Motion to Compel
Production of Deposition Witness (Filed Under Seal)

Moving counsel certifies that he or she contacted opposing counsel and attempted to resolve the discovery dispute without hearing.

Coleman Holdings, Inc. vs Morgan Stanley & Company
Case No.: 2003 CA 005045 AI
Notice of Hearing

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by
Fax and US Mail to all Counsel on the attached list, this 8th day of October, 2003.



JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 478-0754
Attorney for Plaintiffs

Coleman Holdings, Inc. vs Morgan Stanley & Company
Case No.: 2003 CA 005045 AI
Notice of Hearing

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block, LLC
One IBM Plaza
Suite 4400
Chicago, IL 60611

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CASE NO: 03 CA-005045 AI

COLEMAN (PARENT) HOLDING INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

RECEIVED FOR FILING
JULY 31 2003
COURT
CLERK

NOTICE OF FILING

Defendant, MORGAN STANLEY & CO. INC., by and through its undersigned attorneys, hereby gives notice that it has filed its Confidential Opposition to Coleman (Parent) Holdings, Inc.'s Motion to Compel Production of Deposition Witness, under seal with the Clerk of the Court pursuant to the Order of this Court dated July 31, 2003.

CERTIFICATE OF SERVICE

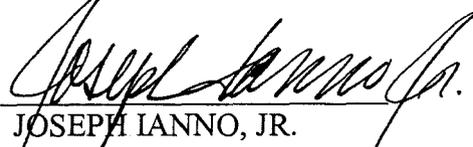
I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by e-mail and facsimile to all counsel of record on the attached service list on this 14th day of October, 2003.

Thomas D. Yannucci, P.C.
Thomas A. Clare
Larissa Paule-Carres
Brett H. McGurk
KIRKLAND & ELLIS, LLP
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

**COUNSEL FOR DEFENDANT,
MORGAN STANLEY & CO., INC.**

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

BY:


JOSEPH IANNO, JR.
Florida Bar No: 655351

SERVICE LIST

<p>John Scarola, Esq. SEARCY, DENNEY, SCAROLA, BARNHARDT & SHIPLEY, P.A. 2139 Palm Beach Lakes Boulevard West Palm Beach, Florida 33409 Telephone: (561) 686-6300 Facsimile (561) 478-0754</p>	<p>Counsel for Plaintiff</p>
<p>Jerold S. Solovy, Esq. JENNER & BLOCK, LLC One IBM Plaza, Suite 4400 Chicago, Illinois 60611 Telephone: (312) 222-9350 Facsimile: (312) 840-7671</p>	<p>Counsel for Plaintiff</p>

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CASE NO: 03 CA-005045 AI

COLEMAN (PARENT) HOLDING INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

15th
COURT
SESSION

2003

RECEIVED ORIGINAL
FOR FILING

CONFIDENTIAL – FILED UNDER SEAL

Defendant, MORGAN STANLEY & CO. INC., Confidential Opposition to Coleman
(Parent) Holdings, Inc.'s Motion to Compel Production of Deposition Witness.

**THIS ENVELOPE CONTAINS MATERIAL SUBJECT TO A
CONFIDENTIALITY ORDER ENTERED IN THIS ACTION. IT IS NOT
TO BE OPENED NOR THE CONTENTS THEREOF DISPLAYED,
REVEALED, OR MADE PUBLIC, EXCEPT BY WRITTEN ORDER OF
THE COURT**

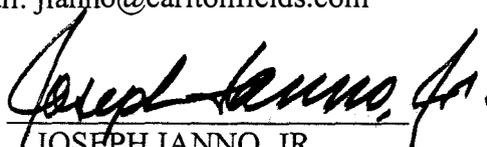
CONFIDENTIAL – FILED UNDER SEAL

Thomas D. Yannucci, P.C.
Thomas A. Clare
Larissa Paule-Carres
Brett H. McGurk
KIRKLAND & ELLIS
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

COUNSEL FOR DEFENDANT

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

BY:


JOSEPH IANNO, JR.

Florida Bar No: 655351

CARLTON FIELDS, P.A.

ATTORNEYS AT LAW

ESPERANTÉ
222 LAKEVIEW AVENUE, SUITE 1400
WEST PALM BEACH, FLORIDA 33401-6149

MAILING ADDRESS
P.O. BOX 150, WEST PALM BEACH, FL 33402-0150
TEL (561) 659-7070 FAX (561) 659-7368

FAX COVER SHEET

Date:	October 17, 2003	Phone Number	Fax Number
To:	Thomas Clare	(202) 879-5000	(202) 879-5200
From:	Joyce Dillard, CLA	(561) 659-7070	(561) 659-7368

Client/Matter No.: 47877/14092

Employee No.:

Total Number of Pages Being Transmitted, Including Cover Sheet: 5

Message: *Coleman v. Morgan Stanley*

To follow please find a copy of Jack Scarola's letter to Judge Maass enclosing the proposed Order on Appointment of Commissions. I noticed that you were not cc'd on this.

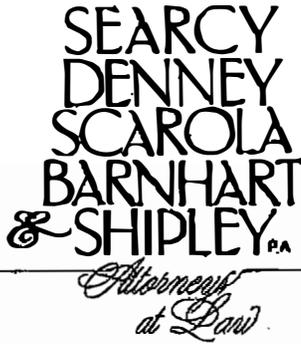
Original to follow Via Regular Mail Original will Not be Sent Original will follow via Overnight Courier

 The information contained in this facsimile message is attorney privileged and confidential information intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone (if long distance, please call collect) and return the original message to us at the above address via the U.S. Postal Service. Thank you.

IF THERE ARE ANY PROBLEMS OR COMPLICATIONS, PLEASE NOTIFY US IMMEDIATELY AT:
(561) 659-7070

TELECOPIER OPERATOR: _____

10/17/2003 14:14 FAX



WEST PALM BEACH OFFICE:

2139 PALM BEACH LAKES BLVD,
WEST PALM BEACH, FLORIDA 33409

P.O. DRAWER 3628
WEST PALM BEACH, FLORIDA 33402

(561) 855-5300
1-800-760-8807
FAX: (561) 478-0754

TALLAHASSEE OFFICE:

P.O. DRAWER 1290
TALLAHASSEE, FLORIDA 32302

(850) 224-7800
1-800-549-7011
FAX: (850) 224-7802

HAND DELIVERED

October 17, 2003

ATTORNEYS AT LAW:

ROBALYN SA BAKER
 F. GREGORY BARNHART
 LANCE BLOCK
 EARL L. DENNEY, JR.
 SEAN C. DOMINICK
 JAMES W. GUSTAFSON, JR.
 DAVID K. KELLEY, JR.
 WILLIAM D. KING
 DARBYL L. LEWIS
 WILLIAM A. NORTON
 DAVID J. SALES
 JOHN SCAROLA
 CHRISTIAN D. SEARCY
 HARRY A. SHEVIN
 JOHN A. SHIPLEY III
 CHRISTOPHER K. SPEED
 KAREN E. TERRY
 C. CALVIN WARRINER III
 DAVID J. WHITE

***SHAREHOLDERS**

PARALEGALS:

VIVIAN AYAN-TEJEDA
 LAURIE J. BRIGGS
 DEANE L. CADY
 DANIEL J. GALLOWAY
 EMILIO DIAMANTIS
 DAVID W. GILMORE
 TED E. KULEBA
 JAMES PETER LOVE
 CHRISTOPHER J. PILATO
 ROBERT W. FITCHER
 WILLIAM H. SEABOLD
 KATHLEEN SIMON
 STEVE M. SMITH
 WALTER A. STEIN
 BRIAN P. SULLIVAN
 KEVIN J. WALSH
 GEORGIA K. WETHERINGTON
 JUDSON WHITHORN

Hon. Elizabeth T. Maass
 Palm Beach County Courthouse
 Room #11.1208
 205 North Dixie Highway
 West Palm Beach, FL 33401

Re: Coleman Holdings, Inc. vs Morgan Stanley & Company
 Case No. 2003 CA 005045 AI
 Matter No.: 029986-230580

Dear Judge Maass:

Enclosed please find a courtesy copy of Plaintiff's Motion to Appoint Commissions to which defense counsel, Joe Ianno, Esq., has no objection. Also enclosed are an original and four copies of a proposed Order on Appointment of Commissions. If same meets with your Honor's approval, we ask that your Honor sign same, returning conformed copies to all counsel in the envelopes provided.

Respectfully,
 Dictated But Not Signed By
 Jack Scarola To Expedite Delivery

JACK SCAROLA
 JS/mm
 Enc.

cc: Joe Ianno, Esq. (Via Fax)
 Jenner & Block (Via Fax)



10/17/2003 14:18 FAX

**IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA**

COLEMAN (PARENT) HOLDINGS, INC.,)	
)	
Plaintiff,	)	Case No.: 2003 CA 005045 AI
)	
v.	)	Judge Elizabeth T. Maass
)	
MORGAN STANLEY & CO., INC.,)	
)	
Defendant.)	
)	

ORDER ON APPOINTMENT OF COMMISSIONS

This cause came before the Court on Plaintiff's Motion to Appoint Commissions so that it can subpoena for depositions and documents witnesses in other jurisdictions. After reviewing the pleadings, and otherwise being advised in the premises it is ORDERED AND ADJUDGED that commissions are appointed so that plaintiff may subpoena depositions and documents from the following witnesses:

- Custodian of Records
LLAMA COMPANY
16 West Colt Square Drive
Fayetteville, Arkansas 72703-2813
- Custodian of Records
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
Four Times Square
New York, New York 10036
- DEIDRA DENDANTO
335 Glendale Avenue, N.E.
Atlanta, Georgia 30307

10/17/2003 14:16 FAX

The following commissions are appointed for the purposes of obtaining depositions and documents from the above listed witnesses, and other witnesses whose discovery is sought in the commissions' jurisdictions:

Kathy Bates
AFFORDABLE INVESTIGATIONS
44 Hidden Valley Drive
Conway, Arkansas 72034

or any other person duly authorized by her and able to administer oaths pursuant to the laws of Arkansas.

Jay Strongwater
STRONGWATER & ASSOCIATES, LLC
1360 Peachtree Street, N.E.
Suite 930
Atlanta, Georgia 30309

or any other person duly authorized by him and able to administer oaths pursuant to the laws of Georgia.

Michael I. Allen
SHAPIRO MITCHELL FORMAN ALLEN & MILLER LLP
380 Madison Avenue
New York, New York 10017

or any person duly authorized by him and able to administer oaths pursuant to the laws of New York.

Done and Ordered in Palm Beach County, Florida this ____ day of _____, 2003.

Circuit Court Judge Elizabeth T. Maass

Coleman v. Morgan Stanley
2003 CA 005045 AI
Order on Appointment of Commissions

Copies furnished to:

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lakeview Avenue
Suite 1400
West Palm Beach, Florida 33401
(561) 659-7070
(561) 659-7368 (fax)

John Scarola, Esq.
SEARCY DENNEY SCAROLA BARNHART
& SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33409
(561) 686-6300
(561) 478-0754 (fax)

Jerold S. Solovy, Esq.
JENNER & BLOCK, LLC
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350
(312) 527-0484 (fax)

Thomas D. Yannauci, P.C.
Thomas A. Clare
Brett H. McGurk
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 879-5000
(202) 879-5200 (fax)

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

CASE NO: 2003 CA 005045 AI

v.

Judge Elizabeth T. Maass

MORGAN STANLEY & CO., INC.,

Defendant.

**COLEMAN (PARENT) HOLDINGS INC.'S
MOTION TO COMPEL PRODUCTION OF
DOCUMENTS RELATING TO SCOTT PAPER**

Pursuant to Fla. R. Civ. P. 1.380(a)(1), Plaintiff Coleman (Parent) Holdings Inc. ("CPH") respectfully requests that the Court direct Defendant Morgan Stanley & Co., Inc. ("Morgan Stanley") to produce documents relating to Scott Paper Company (Request No. 38). In support of this motion, CPH states as follows:

1. Request No. 38 seeks "[a]ll documents concerning the Scott Paper Company" from January 1, 1997 to the present. (See Exh. A.) Scott Paper is the company where Albert Dunlap was CEO prior to his tenure at Sunbeam Corporation ("Sunbeam"). As alleged in CPH's complaint, based in large part on his work at Scott Paper, Mr. Dunlap "was viewed as a 'turnaround specialist' — that is, someone who could take a poorly performing company and significantly increase its value by 'turning around' its financial performance." (See Exh. B ¶ 17.) As the complaint also alleges, during the course of Morgan Stanley's work for Sunbeam in 1998, Morgan Stanley created promotional materials that touted Mr. Dunlap and his prior "'turnaround' accomplishments." See *id.* ¶ 50. In fact, however, Mr. Dunlap's supposed "turnaround" of Scott Paper was a sham and he used many of the same fraudulent techniques — albeit more egregiously — at Sunbeam. In requesting Morgan Stanley's Scott Paper documents, we are seeking relevant facts concerning the allegations in the complaint, including information about whether Morgan Stanley doubted Mr. Dunlap's "turnaround" of Scott Paper at the time Morgan Stanley was trumpeting his credentials in the Sunbeam promotional materials.

2. Prior to working with Mr. Dunlap at Sunbeam, Morgan Stanley had experience with and knowledge of Scott Paper's business. It is a matter of public record that during the 1990s — including the April 1994-December 1996 time period in which Mr. Dunlap was Scott Paper's CEO — Morgan Stanley analysts were following Scott Paper's business closely. It also is a matter of public record that in early 1998, Morgan Stanley was hired to assist the parent company of Scott Paper (Kimberly-Clark) in finding a buyer for some of Scott Paper's business holdings. In short, Morgan Stanley must have documents concerning Mr. Dunlap's tenure at Scott Paper, and those documents would be relevant to test Morgan Stanley's claim that it knew nothing of Mr. Dunlap's improper business methods and was as much the "victim" of his fraud at Sunbeam as anyone else.

3. Despite the obvious relevance of Morgan Stanley's Scott Paper documents, Morgan Stanley has objected on a number of boilerplate grounds to producing them, and has "agreed" to produce documents only "to the extent that the documents relate to the Coleman Transaction or Sunbeam, and are also responsive to one of the other requests" of CPH. (See Exh. C ¶ 38.) When given the opportunity to explain exactly what this objection means during the parties' meet-and-confers, Morgan Stanley demurred. By limiting its production to documents that are "responsive to one of the other requests," however, it is clear that Morgan Stanley is saying in effect that it is not producing any documents that are responsive only to Request No. 38.

4. Morgan Stanley has no legitimate basis for withholding any of the documents responsive to Request No. 38. Morgan Stanley has offered nothing but boilerplate objections such as that the document requests involved are "overbroad" or "unduly burdensome" or "not reasonably calculated to lead to the discovery of admissible evidence." As the Appellate Court has held, however, unsubstantiated objections like those are "patently without merit" and "constitute discovery abuse" (*First Healthcare Corp. v. Hamilton*, 740 So. 2d 1189, 1193 n.1 (Fla. 4th DCA 1999), review dismissed, 743 So. 2d 12 (Fla. 1999)):

Each of these objections, stated baldly and without particulars, is patently without merit as the court found following the hearing on plaintiff's motion to compel. Such "stonewalling tactics," designed to delay making a timely response to valid discovery requests, constitute discovery abuse and should not be condoned.

5. Counsel for CPH contacted counsel for Morgan Stanley in an attempt to resolve this discovery dispute without a hearing but was unable to do so.

WHEREFORE, Plaintiff CPH respectfully requests that this Court direct Morgan Stanley to produce within 10 days of the Court's order the documents responsive to Request No. 38 of CPH's first set of document requests.

Dated: October 17, 2003

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

By: 
One of Its Attorneys

Jerold S. Solovy
JENNER & BLOCK, LLC
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

John Scarola
SEARCY DENNEY SCAROLA
BARNHART & SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33402-3626
(561) 686-6300

#983747

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,)
)
 Plaintiff,)
)
 v.)
)
MORGAN STANLEY & CO., INC.,)
)
 Defendant.)

Case No. CA 005045 AI

DOROTHY H. WILKEN
CLERK OF CIRCUIT COURT
CIRCUIT CIVIL DIVISION

MAY 09 2003

COPY / ORIGINAL
RECEIVED FOR FILING

PLAINTIFF'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS

Plaintiff Coleman (Parent) Holdings, Inc. ("CPH" or "Plaintiff"), by its attorneys Searcy Denney Scarola Barham & Shipley P.A. and Jenner & Block, LLC, hereby serves its First Request for Production of Documents upon Defendant Morgan Stanley & Co., Inc. ("Morgan Stanley" or "Defendant"), and requests responses and the production of documents at the office of Searcy Denney Scarola Barham & Shipley P.A., 2139 Palm Beach Lakes Blvd., West Palm Beach, Florida, within the time provided by Florida Rule of Civil Procedure 1.350(b).

DEFINITIONS

1. "Arbitrations" means Albert J. Dunlap and Sunbeam Corporation, No. 32 160 00088 99 (AAA); and Russell A. Kersh and Sunbeam Corporation, No. 32 160 00091 99 (AAA).
2. "Coleman" means the Coleman Company, Inc. or any of its present and former officers, directors, employees, representatives, agents, and all other persons acting or purporting to act on its behalf.



33. All documents concerning the statements contained in the press releases issued by Sunbeam on October 23, 1997, March 19, 1998, April 3, 1998, May 9, 1998, June 15, 1998, June 25, 1998, June 30, 1998, October 20, 1998, and November 12, 1998.

34. All documents concerning communications relating to Sunbeam, Coleman, or CPH, including without limitation internal communications within Morgan Stanley or communications between or among Morgan Stanley and Sunbeam; Skadden, Arps, Slate, Meagher & Flom LLP; Coopers & Lybrand LLP; Liama Company; Arthur Andersen LLP; Sard Verbinnen & Co., Inc.; Hill & Knowlton, Inc.; The Coleman Company, Inc.; Credit Suisse First Boston; Coleman (Parent) Holdings Inc.; MacAndrews & Forbes Holdings, Inc.; Wachtell Lipton, Rosen & Katz; Davis Polk & Wardwell; or any other person or company, and/or any of their respective employees, agents, or representatives.

35. All documents concerning the Coleman Transaction.

36. All documents concerning the Subordinated Debenture Offering.

37. All documents concerning Albert Dunlap and/or Russell Kersh.

38. All documents concerning the Scott Paper Company.

39. All documents concerning Coleman or CPH.

40. All documents concerning MacAndrews & Forbes Holdings, Inc. with respect to Sunbeam, Coleman, or CPH.

41. All documents concerning the events and matters that are the subject of the Complaint filed in this action.

42. Organizational charts, memoranda, or similar documents that describe the business organizational structure and the administrative, management, and reporting structure of Morgan Stanley from and including January 1, 1997 through and including December 31, 1998.

56. All privilege logs you prepared in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings with respect to documents that you withheld from production in response to any document requests, subpoenas duces tecum, or other process.

57. All transcripts of and exhibits to any depositions, recorded statements, or affidavits in connection with any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

58. All documents obtained by you or produced to you by other parties, third parties, or non-parties (whether voluntarily or in response to any document requests, subpoenas duces tecum, or other process served by you or any other party) concerning Sunbeam.

59. All document requests, subpoenas duces tecum, interrogatories, requests for admission, responses, or objections that you served on, or received from, any party, third party or non-party in In re Sunbeam Corp., Inc., No. 01-40291 (A/G) (Bankr. S.D.N.Y.) and any adversary proceedings therein.

60. All transcripts of any hearings held in connection with the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

61. All affidavits, declarations, or other testimonial statements filed or submitted in connection with any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

COLEMAN (PARENT) HOLDINGS INC.

By: 
One of Its Attorneys

Jerold S. Solovy
Ronald L. Marmer
Robert T. Markowski
Deirdre E. Connell
JENNER & BLOCK, LLC
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

Jack Scarola
SEARCY DENNEY SCAROLA BARNHART
& SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33402-3626
(561) 686-6300

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

-----X
COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.
-----X

2003 CA 005045 A1

Case No. _____

JURY TRIAL DEMANDED

DOROTHY H. WILKE
CLERK OF CIRCUIT COURT
CIRCUIT CIVIL DIVISION

MAY 08 2003

COPY / ORIGINAL
RECEIVED FOR FILING

COMPLAINT

Plaintiff Coleman (Parent) Holdings Inc. ("CPH") alleges the following against
Morgan Stanley & Co., Inc. ("Morgan Stanley"):

NATURE OF THE ACTION

1. This action arises from Morgan Stanley's participation in a massive fraud centered on Florida-based Sunbeam Corporation ("Sunbeam"). As a direct result of that fraud, CPH was induced to accept 14.1 million shares of Sunbeam stock when CPH sold its 82% interest in The Coleman Company, Inc. ("Coleman") to Sunbeam on March 30, 1998. Morgan Stanley misrepresented Sunbeam's financial condition and assisted Sunbeam's CEO, Albert Dunlap, in concealing Sunbeam's true financial condition so that Sunbeam could complete the purchase of Coleman on March 30, 1998.

2. In April 1997, Morgan Stanley began serving as Sunbeam's investment banker. Morgan Stanley originally attempted to find someone to buy Sunbeam. When Morgan Stanley was unable to find a buyer, Morgan Stanley developed a strategy for Sunbeam to use its

EXHIBIT
B

16. Sunbeam's disappointing earnings caused its stock price to plummet. During 1995, the price at which Sunbeam's stock traded fell 40%, from a high of \$25-1/2. In 1996, Sunbeam's stock price continued to decline until it reached a low of \$12-1/4 in July.

B. Sunbeam Hires A New Management Team (July 1996).

17. On July 18, 1996, Sunbeam's board of directors hired Albert Dunlap as Sunbeam's new Chief Executive Officer. Based upon brief terms as Chief Executive Officer of other publicly traded companies, including Scott Paper Company ("Scott Paper"), Dunlap was viewed as a "turnaround specialist" — that is, someone who could take a poorly performing company and significantly increase its value by "turning around" its financial performance. Because Dunlap touted the benefits from firing large numbers of employees and closing large numbers of plants, Dunlap became widely known as "Chainsaw Al." Dunlap lived in Boca Raton, Florida, and one of his first tasks at Sunbeam was to consolidate the company's six headquarters into one located in Delray Beach, Florida.

18. Immediately after joining Sunbeam, Dunlap hired Kersh as Sunbeam's Chief Financial Officer. Kersh had teamed with Dunlap for over 15 years, serving as a senior executive with Dunlap at other companies, including Scott Paper. Dunlap also brought in several other hand-picked executives to make up his senior management team.

19. Dunlap and his senior management team entered into employment agreements with Sunbeam. Under those agreements, Dunlap and his senior management team stood to make tens of millions of dollars if they were able to boost Sunbeam's apparent value and then sell Sunbeam to another company at a premium.

J. Morgan Stanley Serves As The Underwriter For Sunbeam's \$750 Million Convertible Debenture Offering (March 1998).

47. Dunlap knew that Sunbeam needed to raise funds to pay the cash portion of the acquisition consideration. Dunlap also knew that Sunbeam needed cash to purchase two other smaller companies in addition to Coleman. Morgan Stanley recommended that Sunbeam raise funds through a \$500 million offering of convertible subordinated debentures. To assure the offering's success, Morgan Stanley lent its name to the offering. Indeed, Morgan Stanley agreed to serve as the sole underwriter for the offering.

48. The money raised from the sale of the debentures was used by Sunbeam to complete the acquisition of Coleman.

49. Unbeknownst to CPH or the public, Sunbeam's first quarter 1998 sales were a small fraction of the financial community's expectations for the quarter. If Dunlap could consolidate Sunbeam's sales with Coleman's sales, Dunlap knew that he could obscure Sunbeam's actual first quarter sales. As a result, Dunlap was especially anxious to complete the acquisition of Coleman before Sunbeam announced its first quarter 1998 sales. Indeed, the success of the scheme depended upon Sunbeam's ability to complete the Coleman acquisition before Sunbeam's first quarter results were announced. To satisfy Dunlap's objectives, Morgan Stanley moved up the launch date of the offering.

50. The debentures were marketed to investors at a series of "road show" meetings and conference calls arranged by Morgan Stanley. Morgan Stanley prepared and distributed a memorandum for its sales force to use in marketing the debentures to investors. Morgan Stanley also developed the script for Dunlap and Kersh to deliver during the road show. In those materials,

Morgan Stanley misrepresented Sunbeam's financial performance and emphasized Dunlap's purported "turnaround" accomplishments.

51. Morgan Stanley launched the debenture offering with a research analyst presentation to the Morgan Stanley sales force. As part of Morgan Stanley's growing relationship with Sunbeam, one of Morgan Stanley's top-rated research analysts planned to initiate equity coverage of Sunbeam. That Morgan Stanley analyst had modeled values for Sunbeam's acquisition of Coleman that were higher than even Sunbeam's management had predicted.

52. Although Morgan Stanley initially planned to sell \$500 million worth of debentures, Morgan Stanley's efforts were so successful that the size of the offering was increased to \$750 million on March 19, 1998 — the day of the last road show. The debentures were sold to investors nationwide, including investors based in Florida.

K. Morgan Stanley Is Told That Sunbeam's First Quarter Sales Are Down Dramatically (March 17 -18, 1998).

53. As Sunbeam's investment banker and the sole underwriter for the debenture offering, Morgan Stanley had a duty to investigate Sunbeam's finances and business operations. As a matter of law, that duty included an obligation to verify management's claims about Sunbeam's finances and business. Morgan Stanley, which had been working hand-in-hand with Sunbeam for almost a year and had traveled to Sunbeam's Florida offices, repeatedly asserted that it had satisfied that duty.

54. Strong, who was one of the senior Morgan Stanley investment bankers involved, has admitted in sworn testimony that he may have had more than 100 telephone conversations with Dunlap and Kersh (whose offices were in Sunbeam's Delray Beach headquarters)

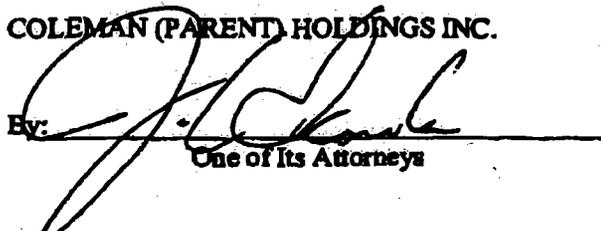
- A. Compensatory damages to be determined at trial in an amount in excess of \$485 million;
- B. An award of costs and expenses incurred in this action, including reasonable attorneys' and experts' fees and expenses; and
- C. Any further relief as the Court may deem just and proper in light of all the circumstances of the case.
- D. CPH expressly reserves the right to seek leave to amend its complaint pursuant to Fla. Stat. § 768.72 to assert claims for punitive damages in excess of \$1.5 billion as allowed by law.

JURY DEMAND

Plaintiff demands a trial by jury on all claims.

Dated: May 8, 2003

COLEMAN (PARENT) HOLDINGS INC.

By: 

One of Its Attorneys

John Scarola
SEARCY DENNEY SCAROLA
BARNHART & SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33409
(561) 686-6300

Jerold S. Solovy
Ronald L. Marmor
Robert T. Markowski
Deirdre E. Connell
JENNER & BLOCK, LLC
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CASE NO: 03 CA-005045 AI

COLEMAN (PARENT) HOLDINGS, INC.;

Plaintiff,

v.

MORGAN STANLEY & CO., INC.;

Defendant.

**MORGAN STANLEY & CO. INCORPORATED'S SECOND SUPPLEMENTAL
OBJECTIONS TO COLEMAN (PARENT) HOLDINGS, INC. FIRST REQUEST FOR
PRODUCTION OF DOCUMENTS**

Pursuant to Rules 1.280 and 1.350 of the Florida Rules of Civil Procedure, defendant, Morgan Stanley & Co. Incorporated ("MS & Co.") hereby interposes the following second supplemental objections to plaintiff Coleman (Parent) Holdings, Inc.'s ("CPH") First Request for Production of Documents ("Request for Production").

GENERAL OBJECTIONS

The following general objections apply to all specifications of CPH's Request for Production. Each General Objection is hereby incorporated in the response to each specific request as if fully set forth therein:

1. MS & Co. objects to the entire Request for Production as over broad and unduly burdensome. CPH has requested the production of impermissibly broad categories of documents that, if read literally and in combination with the equally overbroad Definitions, would require MS & Co. to collect, review and produce potentially hundreds of thousands of pages of



DOCUMENT REQUEST NO. 38

All documents concerning the Scott Paper Company.

MS & Co.'s Objections:

MS & Co. objects to this request as vague, ambiguous, overly broad, and unduly unduly burdensome. Further, MS & Co. objects to this request in that it is wholly irrelevant to the instant litigation and is not reasonably calculated to lead to the discovery of admissible evidence. The Scott Paper Company is not party to this action. MS & Co. will produce documents, located after a good faith search for documents in its possession, custody, or control, responsive to this request, to the extent that the documents relate to the Coleman Transaction or Sunbeam, and are also responsive to one of the other requests.

DOCUMENT REQUEST NO. 39

All documents concerning Coleman or CPH.

MS & Co.'s Objections:

MS & Co. objects to this request to the extent it seeks documents which MS & Co. has previously produced in response to subpoenas in related legal proceedings, and which MS & Co. has previously agreed to make available to CPH. In addition, MS & Co. objects to this request because it is duplicative of other document requests, including, but not limited to Request Nos. 4, 8, 12, 15, 16, 34, 35, 40, 49 and 50. Requiring MS & Co. to produce all documents "concerning Coleman or CPH," with no further specification or identification of requested documents would impose an unreasonable and undue burden on MS & Co. It is unreasonable to so broadly tailor a request so as to encompass absolutely every document pertaining to Coleman or CPH. Subject to and without waiving its general and specific objections, MS & Co. will produce non-privileged documents, located after a good-faith search

Dated: August 12, 2003

Respectfully Submitted,

Joseph Ianno, Jr. (FL Bar # 655351)
CARLTON FIELDS
222 Lake View Avenue - Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368

Thomas A. Clare

Thomas D. Yannucci, P.C.

Thomas A. Clare

Larissa Paule-Carres

Kathryn DeBord

KIRKLAND & ELLIS

655 15th Street, N.W. 12th Floor

Washington, D.C. 20005

Telephone: (202) 879-5000

Facsimile: (202) 879-5200

Attorneys for Defendant

Morgan Stanley & Co. Incorporated

#230580/mm

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

CASE NO.: 2003 CA 005045 AI

Plaintiffs,

vs.

MORGAN STANLEY & CO., INC.,

Defendant,

NOTICE OF HEARING

YOU ARE HEREBY NOTIFIED that the undersigned has called up for hearing the following:

DATE: October 23, 2003

TIME: 8:45 a.m.

JUDGE: Hon. Elizabeth T. Maass

PLACE: Palm Beach County Courthouse, Room #11.1208, 205 North Dixie Highway,
West Palm Beach, FL 33401

SPECIFIC MATTERS TO BE HEARD:

COLEMAN (PARENT) HOLDINGS INC.'S MOTION TO COMPEL
PRODUCTION OF DOCUMENTS RELATING TO SCOTT PAPER

Moving counsel certifies that he or she contacted opposing counsel and attempted to resolve the discovery dispute without hearing.

Coleman Holdings, Inc. vs Morgan Stanley & Company
Case No.: 2003 CA 005045 AI
Notice of Hearing

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by
Fax and U.S. Mail to all Counsel on the attached list, this 17th day of October, 2003.



JACK SCAROLA
Florida Bar No.: 169440
Sercy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 478-0754
Attorney for Plaintiffs

Coleman Holdings, Inc. vs Morgan Stanley & Company
Case No.: 2003 CA 005045 AI
Notice of Hearing

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block, LLC
One IBM Plaza
Suite 4400
Chicago, IL 60611

**IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA**

COLEMAN (PARENT) HOLDINGS, INC.,)

Plaintiff,)

v.)

MORGAN STANLEY & CO., INC.,)

Defendant.)

Case No.: 2003 CA 005045 AI

Judge Elizabeth T. Maass

ORDER ON APPOINTMENT OF COMMISSIONS

This cause came before the Court on Plaintiff's Motion to Appoint Commissions so that it can subpoena for depositions and documents witnesses in other jurisdictions. After reviewing the pleadings, and otherwise being advised in the premises it is ORDERED AND ADJUDGED that commissions are appointed so that plaintiff may subpoena depositions and documents from the following witnesses:

- Custodian of Records
LLAMA COMPANY
16 West Colt Square Drive
Fayetteville, Arkansas 72703-2813
- Custodian of Records
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
Four Times Square
New York, New York 10036
- DEIDRA DENDANTO
335 Glendale Avenue, N.E.
Atlanta, Georgia 30307

The following commissions are appointed for the purposes of obtaining depositions and documents from the above listed witnesses, and other witnesses whose discovery is sought in the commissions' jurisdictions:

Kathy Bates
AFFORDABLE INVESTIGATIONS
44 Hidden Valley Drive
Conway, Arkansas 72034

or any other person duly authorized by her and able to administer oaths pursuant to the laws of Arkansas.

Jay Strongwater
STRONGWATER & ASSOCIATES, LLC
1360 Peachtree Street, N.E.
Suite 930
Atlanta, Georgia 30309

or any other person duly authorized by him and able to administer oaths pursuant to the laws of Georgia.

Michael I. Allen
SHAPIRO MITCHELL FORMAN ALLEN & MILLER LLP
380 Madison Avenue
New York, New York 10017

or any person duly authorized by him and able to administer oaths pursuant to the laws of New York.

This Order does not authorize the issuance of subpoenas to the list witnesses, but simply appoints the commissions for

Done and Ordered in Palm Beach County, Florida this 20th day of OCT., 2003.

** purposes, administration of oaths and the taking of deposition testimony.*



Circuit Court Judge Elizabeth T. Maass

Coleman v. Morgan Stanley
2003 CA 005045 AI
Order on Appointment of Commissions

Copies furnished to:

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lakeview Avenue
Suite 1400
West Palm Beach, Florida 33401
(561) 659-7070
(561) 659-7368 (fax)

John Scarola, Esq.
SEARCY DENNEY SCAROLA BARNHART
& SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33409
(561) 686-6300
(561) 478-0754 (fax)

Jerold S. Solovy, Esq.
JENNER & BLOCK, LLC
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350
(312) 527-0484 (fax)

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett H. McGurk
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 879-5000
(202) 879-5200 (fax)

CARLTON FIELDS

ATTORNEYS AT LAW

MIAMI
ORLANDO
ST. PETERSBURG
TALLAHASSEE
TAMPA

WEST PALM BEACH

Esperanté
222 Lakeview Avenue, Suite 1400
West Palm Beach, Florida 33401-6149
P.O. Box 150
West Palm Beach, Florida 33402-0150

561.659.7070
561.659.7368 fax
www.carltonfields.com

E-MAIL: jjanno@carltonfields.com

October 21, 2003

The Honorable Elizabeth Maass
Palm Beach County Courthouse
205 North Dixie Highway
West Palm Beach, Florida 33401

VIA HAND DELIVERY

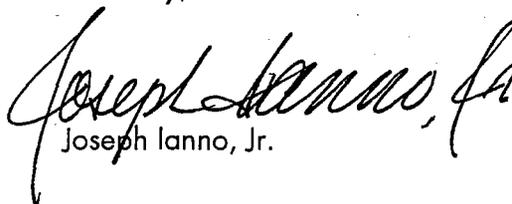
Re: *Coleman (Parent) Holdings Co. v. Morgan Stanley & Co.*
Case No. 2003 CA 5045 AI

Dear Judge Maass:

Enclosed please find a courtesy copy of Defendant's Motion for Issuance of Commissions and proposed Agreed Order Appointing Commissioners and Commissions. Attorney Jack Scarola has no objection to the entry of the proposed agreed order. If the proposed Agreed Order Appointing Commissioners and Commissions meets with your approval, kindly execute same and provide confirmed copies to counsel of record.

Thank you for your assistance in this matter.

Sincerely,


Joseph Ianno, Jr.

/jed

Enclosures

cc: Jack Scarola (w/encl.)
Jerold Solovy (w/encl.)
Thomas Clare (w/encl.)

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CASE NO: 03 CA-005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

**MORGAN STANLEY & CO. INCORPORATED'S
MOTION FOR ISSUANCE OF COMMISSIONS**

Morgan Stanley & Co. Incorporated ("MS & Co.") files its Motion for
Issuance of Commissions and states:

1. MS & Co. needs to depose and obtain documents concerning this case from the
following witnesses residing in New York:

Records Custodian
Credit Suisse First Boston
Eleven Madison Avenue
New York, New York 10010

Records Custodian
Wachtell Lipton Rosen & Katz
51 West 52nd Street
New York, New York 10019

The commissions that MS & Co. seeks to have appointed are:

Esquire Deposition Services
216 E. 45th Street, 8th FL
New York, New York 10017-3304

Spherion Deposition Services

545 5th Avenue
New York , New York 10017

or any person duly authorized by it and able to administer oaths pursuant to the laws of New York.

2. MS & Co. requests that this Court issue commissions appointing commissioners in New York to take the testimony of the above witness under oath and on oral examination in accordance with Fla. R. Civ. P. 1.300 and 1.310 and Florida Statutes § 92.251.

3. Attached as Exhibit "A" is the proposed commission to commissioners in New York authorizing them to take the deposition of the witnesses identified above.

WHEREFORE, MS & Co. respectfully requests that this Court issue the commissions in form attached as Exhibit "A."

CERTIFICATE OF SERVICE

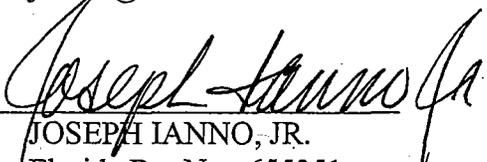
I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by e-mail and facsimile to all counsel of record on the attached service list on this 21st day of October, 2003.

Thomas D. Yannucci, P.C.
Thomas A. Clare
Larissa Paule-Carres
Brett H. McGurk
KIRKLAND & ELLIS, LLP
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

**COUNSEL FOR DEFENDANT,
MORGAN STANLEY & CO., INC.**

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

BY:


JOSEPH IANNO, JR.
Florida Bar No: 655351

SERVICE LIST

<p>John Scarola SEARCY, DENNEY, SCAROLA, BARNHARDT & SHIPLEY, P.A. 2139 Palm Beach Lakes Boulevard West Palm Beach, Florida 33409</p>	<p>Counsel for Plaintiff</p>
<p>Jerold S. Solovy JENNER & BLOCK, LLC One IBM Plaza Suite 4400 Chicago, Illinois 60611</p>	<p>Counsel for Plaintiff</p>

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CASE NO: 03 CA-005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

AGREED ORDER APPOINTING COMMISSIONERS AND COMMISSIONS

THIS CAUSE, having come before the Circuit Court in and for Palm Beach County, State of Florida, on the agreement of the parties, and

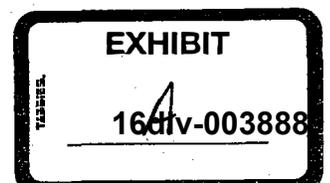
WHEREAS, it appears to the Court that:

1. Defendant Morgan Stanley & Co. Incorporated ("MS & Co.") desires to take the deposition of and obtain documents from the following witnesses who reside in New York with knowledge of facts relevant to this case:

Records Custodian
Credit Suisse First Boston
Eleven Madison Avenue
New York, NY 10010

Records Custodian
Wachtell, Lipton, Rosen & Katz
51 West 52nd Street
New York, NY 10019

2. You are hereby appointed as commissioners to take the testimony (and obtain the requested documentation) of the above witnesses and other witnesses whose discovery is sought



in the commissions' jurisdiction under oath and on oral examination in accordance with the applicable Florida Statutes and Rules of Civil Procedure:

Esquire Deposition Services
216 E. 45th Street, 8th FL
New York, New York 10017-3304

Spherion Deposition Services
545 5th Avenue
New York, New York 10017

or any person able to administer oaths pursuant to the laws of New York duly authorized by him.

DONE AND ORDERED in Chambers, West Palm Beach, Palm Beach County, Florida
this ____ day of October, 2003.

Elizabeth T. Maass
Circuit Court Judge

Copies furnished to:

Joseph Ianno, Jr., Esq., CARLTON FIELDS, P.A., 222 Lakeview Ave., Suite 1400, West Palm Beach, FL 33401

John Scarola, Esq., SEARCY, DENNEY, SCAROLA, BARNHARDT & SHIPLEY, P.A., 2139 Palm Beach Lakes Blvd., West Palm Beach, FL 33409

Thomas A. Clare, Esq., KIRKLAND & ELLIS LLP, 655 15th Street, N.W. – Suite 1200, Washington, D.C. 20005

Jerold S. Solovy, Esq., JENNER & BLOCK, LLC, One IBM Plaza, Suite 4400, Chicago, Illinois 60611

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CASE NO: 03 CA-005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

AGREED ORDER APPOINTING COMMISSIONERS AND COMMISSIONS

THIS CAUSE, having come before the Circuit Court in and for Palm Beach County, State of Florida, on the agreement of the parties, and

WHEREAS, it appears to the Court that:

1. Defendant Morgan Stanley & Co. Incorporated ("MS & Co.") desires to take the deposition of and obtain documents from the following witnesses who reside in New York with knowledge of facts relevant to this case:

Records Custodian
Credit Suisse First Boston
Eleven Madison Avenue
New York, NY 10010

Records Custodian
Wachtell, Lipton, Rosen & Katz
51 West 52nd Street
New York, NY 10019

2. You are hereby appointed as commissioners to take the testimony (and obtain the requested documentation) of the above witnesses and other witnesses whose discovery is sought

in the commissions' jurisdiction under oath and on oral examination in accordance with the applicable Florida Statutes and Rules of Civil Procedure:

Esquire Deposition Services
216 E. 45th Street, 8th FL
New York, New York 10017-3304

Spherion Deposition Services
545 5th Avenue
New York, New York 10017

or any person able to administer oaths pursuant to the laws of New York duly authorized by him.

DONE AND ORDERED in Chambers, West Palm Beach, Palm Beach County, Florida
this ____ day of October, 2003.

Elizabeth T. Maass
Circuit Court Judge

Copies furnished to:

Joseph Ianno, Jr., Esq., CARLTON FIELDS, P.A., 222 Lakeview Ave., Suite 1400, West Palm Beach, FL 33401

John Scarola, Esq., SEARCY, DENNEY, SCAROLA, BARNHARDT & SHIPLEY, P.A., 2139 Palm Beach Lakes Blvd., West Palm Beach, FL 33409

Thomas A. Clare, Esq., KIRKLAND & ELLIS LLP, 655 15th Street, N.W. – Suite 1200, Washington, D.C. 20005

Jerold S. Solovy, Esq., JENNER & BLOCK, LLC, One IBM Plaza, Suite 4400, Chicago, Illinois 60611

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CASE NO: 03 CA-005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

09 OCT 22 PM 4:27
15th JUDICIAL CIRCUIT
PALM BEACH COUNTY
CIVIL

AGREED ORDER APPOINTING COMMISSIONERS AND COMMISSIONS

THIS CAUSE, having come before the Circuit Court in and for Palm Beach County, State of Florida, on the agreement of the parties, and

WHEREAS, it appears to the Court that:

1. Defendant Morgan Stanley & Co. Incorporated ("MS & Co.") desires to take the deposition of and obtain documents from the following witnesses who reside in New York with knowledge of facts relevant to this case:

Records Custodian
Credit Suisse First Boston
Eleven Madison Avenue
New York, NY 10010

Records Custodian
Wachtell, Lipton, Rosen & Katz
51 West 52nd Street
New York, NY 10019

2. You are hereby appointed as commissioners to take the testimony (and obtain the requested documentation) of the above witnesses and other witnesses whose discovery is sought

121

in the commissions' jurisdiction under oath and on oral examination in accordance with the applicable Florida Statutes and Rules of Civil Procedure:

Esquire Deposition Services
216 E. 45th Street, 8th FL
New York, New York 10017-3304

Spherion Deposition Services
545 5th Avenue
New York, New York 10017

or any person able to administer oaths pursuant to the laws of New York duly authorized by him.

DONE AND ORDERED in Chambers, West Palm Beach, Palm Beach County, Florida

this 20 day of October, 2003.



Elizabeth T. Maass
Circuit Court Judge

Copies furnished to:

Joseph Ianno, Jr., Esq., CARLTON FIELDS, P.A., 222 Lakeview Ave., Suite 1400, West Palm Beach, FL 33401

John Scarola, Esq., SEARCY, DENNEY, SCAROLA, BARNHARDT & SHIPLEY, P.A., 2139 Palm Beach Lakes Blvd., West Palm Beach, FL 33409

Thomas A. Clare, Esq., KIRKLAND & ELLIS LLP, 655 15th Street, N.W. – Suite 1200, Washington, D.C. 20005

Jerold S. Solovy, Esq., JENNER & BLOCK, LLC, One IBM Plaza, Suite 4400, Chicago, Illinois 60611



PALM BEACH COUNTY, STATE OF FLORIDA
I hereby certify that the foregoing is a true copy of the record in my office.

This 27 Day of Oct 2003

DOROTHY H. WILKEN
Clerk Circuit Court

BY [Signature] D.C.

#230580/mm

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

CASE NO.: 2003 CA 005045 AI

Plaintiffs,

vs.

MORGAN STANLEY & CO., INC.,

Defendant,

_____ /

RE-NOTICE OF HEARING

(Cancels hearing previously set for 10/23/03)

YOU ARE HEREBY NOTIFIED that the undersigned has called up for hearing the following:

DATE: October 27, 2003

TIME: 8:45 a.m.

JUDGE: Hon. Elizabeth T. Maass

PLACE: Palm Beach County Courthouse, Room #11.1208, 205 North Dixie Highway,
West Palm Beach, FL 33401

SPECIFIC MATTERS TO BE HEARD:

COLEMAN (PARENT) HOLDINGS INC.'S MOTION TO COMPEL
PRODUCTION OF DOCUMENTS RELATING TO SCOTT PAPER

Moving counsel certifies that he or she contacted opposing counsel and attempted to resolve the discovery dispute without hearing.

Coleman Holdings, Inc. vs Morgan Stanley & Company
Case No.: 2003 CA 005045 AI
Notice of Hearing

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by
Fax and U.S. Mail to all Counsel on the attached list, this 22 day of Oct., 2003.



JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 478-0754
Attorney for Plaintiffs

Coleman Holdings, Inc. vs Morgan Stanley & Company
Case No.: 2003 CA 005045 AI
Notice of Hearing

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block, LLC
One IBM Plaza
Suite 4400
Chicago, IL 60611

#230580/mm

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

CASE NO.: 2003 CA 005045 AI

Plaintiffs,

vs.

MORGAN STANLEY & CO., INC.,

Defendant,

_____ /

RE-NOTICE OF HEARING

(Cancels hearing previously set for 10/23/03)

YOU ARE HEREBY NOTIFIED that the undersigned has called up for hearing the following:

DATE: October 27, 2003

TIME: 8:45 a.m.

JUDGE: Hon. Elizabeth T. Maass

PLACE: Palm Beach County Courthouse, Room #11.1208, 205 North Dixie Highway,
West Palm Beach, FL 33401

SPECIFIC MATTERS TO BE HEARD:

**COLEMAN (PARENT) HOLDINGS INC.'S MOTION TO COMPEL
PRODUCTION OF DOCUMENTS RELATING TO SCOTT PAPER**

Moving counsel certifies that he or she contacted opposing counsel and attempted to resolve the discovery dispute without hearing.

Coleman Holdings, Inc. vs Morgan Stanley & Company
Case No.: 2003 CA 005045 AI
Notice of Hearing

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by
Fax and U.S. Mail to all Counsel on the attached list, this 22 day of Oct., 2003.



JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 478-0754
Attorney for Plaintiffs

Coleman Holdings, Inc. vs Morgan Stanley & Company
Case No.: 2003 CA 005045 AI
Notice of Hearing

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block, LLC
One IBM Plaza
Suite 4400
Chicago, IL 60611

FAX TRANSMITTAL

J E N N E R & B L O C K

Jenner&Block, LLC
One IBM Plaza
Chicago, IL 60611-7603
Tel 312 222-9350
www.jenner.com

Chicago
Dallas
Washington, DC

Date: September 23, 2003

To: Thomas A. Clare
Kirkland & Ellis, LLP

Fax: 202-879-5200
Voice: 202-879-5000

Joseph Ianno, Jr.
Carlton Fields P.A.

Fax: 561-659-7368
Voice: 561-659-7070

From: Elizabeth Abbene Coleman
312 923-2659

Employee Number: 013459

Client Number: 41198-10003

Important: This message is intended only for the use of the individual or entity to which it is addressed, and may contain information that is attorney work product, privileged, confidential and exempt from disclosure under applicable law. If the reader of this message is not the intended recipient, or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone, and return the original message to us at the above address via postal service. Thank you.

Message:

Please see attached.

Total number of pages including this cover sheet: 5

If you do not receive all pages, please call: 312 222-9350

Secretary: Jacqueline Oreamuno

Time Sent: 5:54

Sent By: *J. M. ...*

Extension: 6289

JENNER & BLOCK

October 27, 2003

Jenner & Block, LLC
One IBM Plaza
Chicago, IL 60611-7603
Tel 312 222-9350
www.jenner.com

Chicago
Dallas
Washington, DC

By Telecopy

Thomas A. Clare, Esq.
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W., Suite 1200
Washington, D.C. 20005

Michael T. Brody
Tel 312 923-2711
Fax 312 840-7711
mbrody@jenner.com

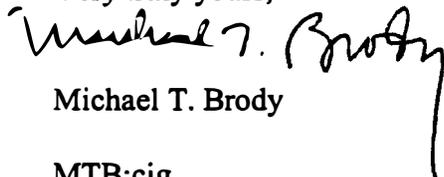
Re: Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co.

Dear Tom:

On October 2, 2003, we noticed a series of depositions, including four present or former Morgan Stanley employees. In response to the notice of deposition, you advised us that all requests for depositions of current and former Morgan Stanley employees should go through you. (T. Clare to M. Brody letter, October 10, 2003.) We requested that you provide us with dates for the depositions of the Morgan Stanley witnesses. (M. Brody to T. Clare letter, October 13, 2003.) Weeks have come and gone, but you have still not scheduled a single deposition of a Morgan Stanley witness. Moreover, our most recent letter on the subject, which called for a response on or before October 24, 2003, has gone unanswered. (M. Brody to T. Clare letter, October 21, 2003.) Despite your promise to reschedule these depositions, we are no closer to scheduling the depositions of Morgan Stanley witnesses than we were on October 2, 2003.

We have attempted to reach reasonable accommodations with you as to the dates for the depositions of Morgan Stanley witnesses. You have been unwilling to schedule any depositions. I enclose an amended notice for the depositions of Messrs. Savarie, Chang, and Strong. Mr. Smith was noticed originally for November 5, 2003. Having received no alternative dates from you, we intend to go forward with Mr. Smith's deposition on that date. If you are unable to go forward on the date originally noticed for Mr. Smith or the remaining dates identified in the attached notice, we insist that you provide reasonable alternative dates by November 3, 2003 so that all of these depositions may be completed in the month of November. Otherwise, you will need to seek relief from the Court.

Very truly yours,



Michael T. Brody

MTB:cjg

cc: Joseph Ianno, Esq. (by facsimile)
John Scarola, Esq. (by facsimile)
Jerold S. Solovy, Esq.

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 2003 CA 005045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

_____ /

AMENDED NOTICE OF TAKING VIDEOTAPED DEPOSITIONS

To: Thomas A. Clare, Esq.
KIRKLAND & ELLIS, LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lake View Avenue
Suite 1400
West Palm Beach, FL 33401

PLEASE TAKE NOTICE that Plaintiff Coleman (Parent) Holdings Inc. will take the depositions upon oral examination of the following witnesses pursuant to Florida Rule of Civil Procedure 1.310 on the dates, times, and locations set forth below:

DEPONENT	DATE AND TIME	LOCATION
Andrew Savarie	November 13, 2003 at 9:30 a.m.	JENNER & BLOCK, LLC One IBM Plaza Chicago, Illinois 60611
Tyrone Chang	November 17, 2003 at 9:30 a.m.	SHAPIRO MITCHELL FORMAN ALLEN & MILLER LLP 380 Madison Avenue New York, New York 10017
William Strong	November 20, 2003 at 9:30 a.m.	JENNER & BLOCK, LLC One IBM Plaza Chicago, Illinois 60611

The depositions will be recorded by videotape and stenographic means. The deposition will be taken before a person authorized to administer oaths and will continue day to day until completed.

The videotape operator will be Esquire Deposition Services at the following locations: (1) 155 N. Wacker Drive, Chicago, IL 60606 for the depositions proceeding in Illinois; and (2) 216 E. 45th Street, New York, NY 10017 for the depositions proceeding in New York.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by facsimile and mail to all counsel on the attached Service List, this 27th day of October, 2003.

Dated: October 27, 2003

COLEMAN (PARENT) HOLDINGS INC.

By: Michael T. Brody
One of Its Attorneys

Jerold S. Solovy
Michael T. Brody
Deirdre E. Connell
JENNER & BLOCK, LLC
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

Jack Scarola
SEARCY DENNEY SCAROLA BARNHART
& SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33409
(561) 686-6300

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Company, Inc.
Case No.: 2003 CA 005045 AI
Amended Notice of Taking Videotaped Depositions
October 27, 2003

SERVICE LIST

Thomas A. Clare, Esq.
KIRKLAND & ELLIS, LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lake View Avenue
Suite 1400
West Palm Beach, FL 33401

#230580/mm

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN
AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

CASE NO: 2003 CA 005045 AI

Plaintiffs,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.

**ORDER ON COLEMAN (PARENT) HOLDINGS INC.'S MOTION TO COMPEL
PRODUCTION OF DOCUMENTS RELATING TO SCOTT PAPER**

THIS CAUSE having come to be considered upon the Coleman (Parent) Holdings Inc.'s Motion to Compel Production of Documents Relating to Scott Paper, and the Court having reviewed the file and being fully advised in the premises, it is hereby,

ORDERED and ADJUDGED:

Granted, in part. Paragraph 35 of Plaintiff's First Report in

Production of Documents is limited to documents dealing with an analysis of the Scott Paper Company's financial position or condition produced between Jan. 1, 1997 and Jan. 1, 2000. Defendant will produce for

DONE AND ORDERED at West Palm Beach, County, Florida, this 22 day of

Dec., 2003.

** inspection and copying all
lets with its core, custody, or
control responsive to ¶ 35 so
limited with 30 days.*



ELIZABETH T. MAASS
CIRCUIT COURT JUDGE

Copies have been furnished to all counsel on the attached counsel list.

Coleman Holdings, Inc. vs Morgan Stanley & Company
Case No.:2003 CA 005045 AI
Order

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite1400⁺
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block, LLC
One IBM Plaza
Suite 4400
Chicago, IL 60611

Jack Scarola, Esq.
Searcy Denney Scarola Barnhart & Shipley
P.O. Box 3626
West Palm Beach, FL 33402-3626

SEARCY
DENNEY
SCAROLA
BARNHART
& SHIPLEY P.A.

*Attorneys
at Law*

WEST PALM BEACH OFFICE:

2139 PALM BEACH LAKES BLVD.
WEST PALM BEACH, FLORIDA 33409

P.O. DRAWER 3826
WEST PALM BEACH, FLORIDA 33402

(561) 686-6300
1-800-780-8607
FAX: (561) 478-0754

TALLAHASSEE OFFICE:

P.O. DRAWER 1230
TALLAHASSEE, FLORIDA 32302

(850) 224-7600
1-888-549-7011
FAX: (850) 224-7602

October 29, 2003

ATTORNEYS AT LAW:

ROSALYN SIA BAKER
F. GREGORY BARNHART*
LANCE BLOCK*
EARL L. DENNEY, JR.*
SEAN C. DOMNICK*
JAMES W. GUSTAFSON, JR.
DAVID K. KELLEY, JR.*
WILLIAM B. KING
DARRYL L. LEWIS*
WILLIAM A. NORTON*
DAVID J. SALES*
JOHN SCAROLA*
CHRISTIAN D. SEARCY*
HARRY A. SHEVIN
JOHN A. SHIPLEY III*
CHRISTOPHER K. SPEED*
KAREN E. TERRY
C. CALVIN WARRINER III*
DAVID J. WHITE*

*SHAREHOLDERS

PARALEGALS:

VIVIAN AYAN-TEJEDA
LAURIE J. BRIGGS
DEANE L. CADY
DANIEL J. CALLOWAY
EMILIO DIAMANTIS
DAVID W. GILMORE
TED E. KULESA
JAMES PETER LOVE
CHRISTOPHER J. PILATO
ROBERT W. PITCHER
WILLIAM H. SEABOLD
KATHLEEN SIMON
STEVE M. SMITH
WALTER A. STEIN
BRIAN P. SULLIVAN
KEVIN J. WALSH
GEORGIA K. WETHERINGTON
JUDSON WHITEHORN

Hon. Elizabeth T. Maass
Palm Beach County Courthouse
Room #11.1208
205 North Dixie Highway
West Palm Beach, FL 33401

Re: Coleman (Parent) Holdings Inc. vs Morgan Stanley & Company
Case No. 2003 CA 005045 AI
Morgan Stanley Senior Funding, Inc. v. MacAndrews & Forbes, etal.
Case No. 2003 CA 005165 AI
Matter No.: 029986-230580

Dear Judge Maass:

Enclosed please find an original and four copies of two proposed Agreed Orders Permitting Foreign Attorneys to Appear in the above-styled matters, together with courtesy copies of the motions. We have obtained the verbal agreement from defense counsel, Joe Ianno, Esq. to the submission of these Agreed Orders.

If same meet with your approval, we ask that your Honor sign same, returning conformed copies to all counsel in the envelopes provided.

Respectfully,

Jack Scarola
JACK SCAROLA
JS/mm
Enc.

cc: Joseph Ianno, Esq. (Via Fax)
Thomas A. Clare, Esq. (Via Fax)
Jenner & Block, LLC (Via Fax)



#230580/mm

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN
AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

CASE NO: 2003 CA 005045 AI

Plaintiffs,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.

_____ /

AGREED ORDER PERMITTING FOREIGN ATTORNEYS TO APPEAR

THIS CAUSE having come to be considered upon the Plaintiff, Coleman (Parent) Holdings Inc.'s Motion to Permit Foreign Attorneys to Appear, and the Court having reviewed the file and being fully advised in the premises, it is hereby,

ORDERED and ADJUDGED that Clark C. Johnson of Jenner & Block, LLC is admitted Pro Hac Vice in the above-styled matter on behalf of the Plaintiff.

DONE AND ORDERED at West Palm Beach, County, Florida, this _____ day of _____, 2003.

ELIZABETH T. MAASS
CIRCUIT COURT JUDGE

Copies have been furnished to all counsel on the attached counsel list.

Coleman v. Morgan Stanley
Case No.: 2003 CA 005045 AI
Order Permitting Foreign Attys to Appear

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block, LLC
One IBM Plaza
Suite 4400
Chicago, IL 60611

Jack Scarola, Esq.
Searcy Denney Scarola Barnhart & Shipley
P.O. Drawer 3626
West Palm Beach, FL 33402

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CASE NO: 03 CA-005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that a hearing has been set in the above-styled case as follows:

DATE: November 6, 2003

TIME: 8:45 a.m.

PLACE: Palm Beach County Courthouse, Courtroom 11B
205 North Dixie Highway
West Palm Beach, Florida 33401

BEFORE: Judge Elizabeth T. Maass

CONCERNING: Defendant's Motion to Compel Plaintiff to Produce
Settlement Agreement with Arthur Andersen

KINDLY GOVERN YOURSELVES ACCORDINGLY.

The undersigned counsel hereby certifies that a good faith attempt to resolve the issues contained in the foregoing motions or matters will be made with opposing counsel prior to hearing on these matters on the Court's Motion Calendar.

If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no costs to you, to the provision of certain assistance. Please contact the ADA Coordinator in the Administrative Office of the Court, Palm Beach County Courthouse, 205 North Dixie Highway, Room 5.2500, West Palm Beach, Florida 33401; telephone number (561) 355-2431 within two (2) working days of your receipt of this notice; if you are hearing or voice impaired, call 1-800-955-8771.

CERTIFICATE OF SERVICE

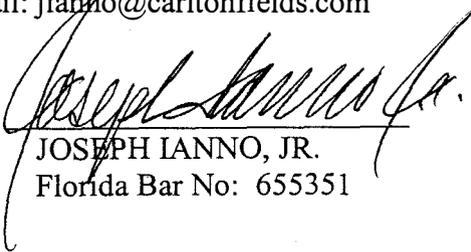
I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail, e-mail and facsimile to all counsel of record on the attached service list on this 29th day of October, 2003.

Thomas D. Yannucci, P.C.
Thomas A. Clare
Larissa Paule-Carres
Brett H. McGurk
KIRKLAND & ELLIS
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

COUNSEL FOR DEFENDANT

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

BY:


JOSEPH IANNO, JR.
Florida Bar No: 655351

SERVICE LIST

Jack Scarola
SEARCY, DENNY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Counsel for Plaintiff

Jerold S. Solovy
Michael Brody
JENNER & BLOCK, LLC
One IBM Plaza
Suite 400
Chicago, IL 60611

Counsel for Plaintiff

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO: 03 CA-005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

NOTICE OF FILING PLEADING UNDER SEAL

Defendant, Morgan Stanley & Co. Inc., by and through its undersigned counsel, hereby gives notice that Morgan Stanley & Co. Inc.'s Opposition to Coleman (Parent) Holdings, Inc.'s Motion to Compel concerning E-Mails was filed under seal this 4th day of November, 2003.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by e-mail and Federal Express to all counsel of record on the attached service list on this 4th day of November, 2003.

Thomas D. Yannucci, P.C.
Thomas A. Clare
Zhonette M. Brown
Ryan P. Phair
Kathryn R. DeBord
KIRKLAND & ELLIS LLP
655 15th Street, N.W., 12th Floor
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

**COUNSEL FOR DEFENDANT,
MORGAN STANLEY & CO., INC.**

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

BY:


JOSEPH IANNO, JR.
Florida Bar No: 655351

SERVICE LIST

<p>John Scarola SEARCY, DENNEY, SCAROLA, BARNHARDT & SHIPLEY, P.A. 2139 Palm Beach Lakes Boulevard West Palm Beach, Florida 33409</p>	<p>Counsel for Plaintiff</p>
<p>Jerold S. Solovy JENNER & BLOCK, LLC One IBM Plaza Suite 4400 Chicago, Illinois 60611</p>	<p>Counsel for Plaintiff</p>

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

<hr/>)	
COLEMAN (PARENT) HOLDINGS, INC.,))	
))	
Plaintiff,	)	)	Case No.: 2003 CA 005045 AI
))	
v.	)	)	Judge Elizabeth T. Maass
))	
MORGAN STANLEY & CO., INC.,))	
))	
Defendant.))	
<hr/>)	

ORDER ON APPOINTMENT OF COMMISSIONS

This cause came before the Court on Plaintiff's Motion to Appoint Commissions so that it can subpoena for depositions and documents witnesses in other jurisdictions. After reviewing the pleadings, and otherwise being advised in the premises it is ORDERED AND ADJUDGED that commissions are appointed so that plaintiff may subpoena depositions and documents from the following witnesses:

- Andrew B. Savarie
1136 Ash St.
Winnetka, IL 60093-2104
- R. Bram Smith
Bear, Stearns & Co. Inc.
245 Park Avenue
New York, NY 10167
- Alexandre J. Fuchs
2 Fifth Avenue, #11K
New York, NY 10011

- Robert W. Kitts
Thomas Weisel Partners
Lever House
390 Park Avenue, 17th Floor
New York, NY 10022
- T. Chang
10990 Rochester Ave., Apt. 307
Los Angeles, CA 90024-6281

The following commissions are appointed for the purposes of obtaining depositions and documents from the above listed witnesses, and other witnesses whose discovery is sought in the commissions' jurisdictions:

Jerold S. Solovy
Jenner & Block, LLC
One IBM Plaza, Suite 4400
Chicago, IL 60611
(312) 222-9350

or any person duly authorized by him and able to administer oaths pursuant to the laws of Illinois.

Michael I. Allen
SHAPIRO MITCHELL FORMAN ALLEN & MILLER LLP
380 Madison Avenue
New York, New York 10017

or any person duly authorized by him and able to administer oaths pursuant to the laws of New York.

Marc M. Seltzer
Susman Godfrey L.L.P.
1880 Century Park East
Suite 950
Los Angeles, California 90067
(310) 789-3102

or any person duly authorized by him and able to administer oaths pursuant to the laws of California

Done and Ordered in Palm Beach County, Florida this ___ day of _____, 2003.

Circuit Court Judge Elizabeth T. Maass

Coleman v. Morgan Stanley
2003 CA 005045 AI
Order on Appointment of Commissions

Copies furnished to:

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lakeview Avenue
Suite 1400
West Palm Beach, Florida 33401
(561) 659-7070
(561) 659-7368 (fax)

John Scarola, Esq.
SEARCY DENNEY SCAROLA BARNHART
& SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33409
(561) 686-6300
(561) 478-0754 (fax)

Jerold S. Solovy, Esq.
JENNER & BLOCK, LLC
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350
(312) 527-0484 (fax)

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett H. McGurk
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 879-5000
(202) 879-5200 (fax)

999134

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

_____)	
COLEMAN (PARENT) HOLDINGS, INC.,)	
)	
Plaintiff,	)	Case No.: 2003 CA 005045 AI
)	
v.	)	Judge Elizabeth T. Maass
)	
MORGAN STANLEY & CO., INC.,)	
)	
Defendant.)	
_____)	

PLAINTIFF'S MOTION TO APPOINT COMMISSIONS

Plaintiff Coleman (Parent) Holdings, Inc. ("CPH"), pursuant to Florida Statutes § 92.251, files this Motion to Appoint Commissions so that it can subpoena for depositions and documents witnesses in other jurisdictions. CPH states as follows:

CPH requests that this Court appoint commissions so that it may subpoena the following witnesses:

- Andrew B. Savarie
1136 Ash St.
Winnetka, IL 60093-2104
- R. Bram Smith
Bear, Stearns & Co. Inc.
245 Park Avenue
New York, NY 10167
- Alexandre J. Fuchs
2 Fifth Avenue, #11K
New York, NY 10011
- Robert W. Kitts
Thomas Weisel Partners
Lever House
390 Park Avenue, 17th Floor
New York, NY 10022

- T. Chang
10990 Rochester Ave., Apt. 307
Los Angeles, CA 90024-6281

CPH seeks to have the following commissions appointed for this purpose of obtaining documents and depositions from the above-listed witnesses:

Jerold S. Solovy
Jenner & Block, LLC
One IBM Plaza, Suite 4400
Chicago, IL 60611
(312) 222-9350

or any person duly authorized by him and able to administer oaths pursuant to the laws of Illinois.

Michael I. Allen
SHAPIRO MITCHELL FORMAN ALLEN & MILLER LLP
380 Madison Avenue
New York, New York 10017

or any person duly authorized by him and able to administer oaths pursuant to the laws of New York.

Marc M. Seltzer
Susman Godfrey L.L.P.
1880 Century Park East
Suite 950
Los Angeles, California 90067
(310) 789-3102

or any person duly authorized by him and able to administer oaths pursuant to the laws of California.

WHEREFORE, CPH respectfully requests the entry of an order appointing the above as commissions in the listed jurisdictions for purposes of this case.

COLEMAN (PARENT) HOLDINGS, INC.

Dated: November 5, 2003

By: 
One of Its Attorneys

Jerold S. Solovy
JENNER & BLOCK, LLC
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

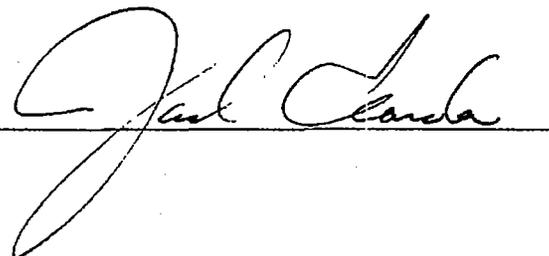
Jack Scarola
SEARCY DENNEY SCAROLA BARNHART
& SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33402-362
(561) 686-6300

CERTIFICATE OF SERVICE

I, JACK SCAROLA, hereby certify that a true and correct copy of the foregoing PLAINTIFF'S MOTION TO APPOINT COMMISSIONS has been served upon the parties listed below via Facsimile and U.S. Mail on this 5th day of November, 2003.

Thomas A. Clare, Esq.
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lake View Avenue
Suite 1400
West Palm Beach, FL 33401



SERVICE LIST

Thomas A. Clare, Esq.
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lake View Avenue, Suite 1400
West Palm Beach, FL 33401

999133

SEARCY
DENNEY
SCAROLA
BARNHART
& SHIPLEY P.A.

*Attorneys
at Law*

WEST PALM BEACH OFFICE:

2139 PALM BEACH LAKES BLVD.
WEST PALM BEACH, FLORIDA 33409

P.O. DRAWER 3826
WEST PALM BEACH, FLORIDA 33402

(561) 866-8300
1-800-780-8807
FAX: (561) 478-0754

TALLAHASSEE OFFICE:

P.O. DRAWER 1230
TALLAHASSEE, FLORIDA 32302

(850) 224-7600
1-888-548-7011
FAX: (850) 224-7602

Via Hand Delivery
November 5, 2003

ATTORNEYS AT LAW:

ROSALYN SIA BAKER
F. GREGORY BARNHART*
LANCE BLOCK*
EARL L. DENNEY, JR.*
SEAN C. DOMNICK*
JAMES W. GUSTAFSON, JR.
DAVID K. KELLEY, JR.*
WILLIAM B. KING
DARRYL L. LEWIS*
WILLIAM A. NORTON*
DAVID J. SALES*
JOHN SCAROLA*
CHRISTIAN D. SEARCY*
HARRY A. SHEVIN
JOHN A. SHIPLEY III*
CHRISTOPHER K. SPEED*
KAREN E. TERRY
C. CALVIN WARRINER III*
DAVID J. WHITE*

*SHAREHOLDERS

PARALEGALS:

VIVIAN AYAN-TEJEDA
LAURIE J. BRIGGS
DEANE L. CADY
DANIEL J. CALLOWAY
EMILIO DIAMANTIS
DAVID W. GILMORE
TED E. KULESA
JAMES PETER LOVE
CHRISTOPHER J. PILATO
ROBERT W. PITCHER
WILLIAM H. SEABOLD
KATHLEEN SIMON
STEVE M. SMITH
WALTER A. STEIN
BRIAN P. SULLIVAN
KEVIN J. WALSH
GEORGIA K. WETHERINGTON
JUDSON WHITEHORN

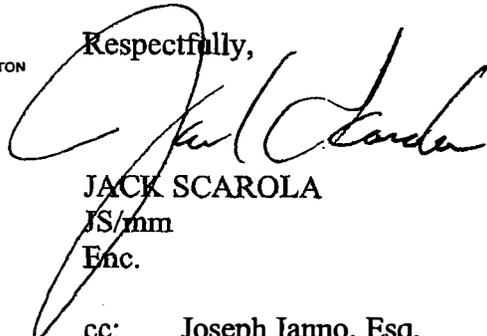
Hon. Elizabeth T. Maass
Palm Beach County Courthouse
Room #11.1208
205 North Dixie Highway
West Palm Beach, FL 33401

Re: Coleman (Parent) Holdings Inc. vs Morgan Stanley & Company
Matter No.: 029986-230580

Dear Judge Maass:

Enclosed please find a courtesy copy of Coleman (Parent) Holdings, Inc.'s Response in Opposition to Defendant's Motion to Compel Production of Settlement Agreement with Arthur Andersen. Said motion is currently scheduled to be heard on your Honor's uniform motion calendar tomorrow, November 6, 2003.

Respectfully,



JACK SCAROLA
JS/mm
Enc.

cc: Joseph Ianno, Esq.
Thomas A. Clare, Esq.
Jerold S. Solovy, Esq.
Hank Jackson, Esq.
Ben V. Preziosi, Esq.



WWW.SEARCYLAW.COM

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

CASE NO: 2003 CA 005045 AI

v.

Judge Elizabeth T. Maass

MORGAN STANLEY & CO., INC.,

Defendant.

COPY

**COLEMAN (PARENT) HOLDINGS INC.'S
RESPONSE IN OPPOSITION TO DEFENDANT'S
MOTION TO COMPEL PRODUCTION OF SETTLEMENT
AGREEMENT WITH ARTHUR ANDERSEN**

Morgan Stanley's motion to compel production of CPH's settlement agreement with Arthur Andersen fails to establish any persuasive reason why this Court should refuse to honor the contractual undertaking between CPH and Andersen to keep the settlement terms confidential. As is shown below, pursuant to the strong public policies of encouraging settlements and enforcing private contracts, courts routinely uphold the confidentiality of settlement agreements in the face of generalized requests for disclosure like the one at issue here. This Court should do the same.^{1/}

I. Morgan Stanley Has Not Shown Any Need For Discovery Of The Settlement Agreement At This Time.

Morgan Stanley offers two reasons why it supposedly needs to discover the CPH-Andersen settlement agreement: (1) the settlement agreement might be relevant to Morgan Stanley's "potential liability exposure" or to a set-off of damages to which Morgan Stanley could be entitled in the event

^{1/} At the threshold, CPH is compelled to point out that Morgan Stanley's recitation of the facts and law in its motion is inaccurate in material respects. First, Morgan Stanley asserts that CPH's claims against Morgan Stanley are based on factual allegations that deal "exclusively with misrepresentations by Sunbeam insiders and Sunbeam's auditor, Arthur Andersen" (MS Mot. 2). That is not correct. CPH's complaint specifically alleges that Morgan Stanley made direct and materially false representations to CPH (e.g., Compl. ¶¶ 38-40). Second, Morgan Stanley also contends that "[s]ettled choice-of-law principles require the Court to apply New York law to plaintiff's claims" (MS Mot. 4 n.1). That too is not correct. As CPH will show in its response to Morgan Stanley's motion to dismiss, Florida law applies. In those and other material respects, Morgan Stanley's recitation of the applicable facts and law is simply wrong.

that there is a damages verdict against it; and (2) the settlement agreement supposedly is needed to explore the biases, interests, and credibility of Andersen witnesses — some of whom are scheduled to be deposed in the near future (MS Mot. 4-5). Neither of those contentions supports Morgan Stanley's request to discover the settlement agreement at this early stage of the litigation.

Set-off. Morgan Stanley suggests that it is entitled to discover the settlement agreement "to evaluate its potential liability exposure" (MS Mot. 4). That assertion is much too vague and lacking in specificity to overcome the contractual right to confidentiality that is at stake in this case. *See, e.g., Florida Patient's Compensation Fund v. Reyka*, 434 So. 2d 363, 364 (Fla. 4th DCA 1983) ("to use the Florida Rules of Civil Procedure to obtain information for settlement or related purposes was not, in our view, the intent of Florida Rule of Civil Procedure 1.280(b)(1)"); *All AT&T Corp. Fiber Optic PLTFs v. All AT&T Fiber Optic Defendants*, 2002 WL 1364157, *2 (S.D. Ind. 2002) (denying motion to compel settlement agreement from prior litigation: "[t]he fact that thorough knowledge of AT&T's finances might help plaintiffs formulate a strategy for settlement negotiations does not render the terms of the agreement discoverable"); *Centellion Data Systems, Inc. v. Ameritech Corp.*, 193 F.R.D. 550, 552 (S.D. Ind. 1999) (refusing to compel production of settlement agreement: "information is not relevant or discoverable under Rule 26(b) because it might assist a party's evaluation of whether to settle or try a case or help a party prepare negotiating strategies").

To the extent the settlement agreement might be relevant to a set-off, that certainly does not justify Morgan Stanley's request to discover all of the terms of the CPH-Andersen settlement agreement. At most, all that Morgan Stanley needs to discover is the settlement amount. And even with respect to the settlement amount, there certainly is no need for Morgan Stanley to discover the amount now, given that the issue of set-off will not arise until there is a damages verdict against Morgan Stanley. Only then would Morgan Stanley have an arguable need to discover the settlement amount. Morgan Stanley's request for production of the entire CPH-Andersen settlement agreement at this time therefore seeks far too much, and far too soon. *See Rowe Entertainment, Inc. v. William Morris Agency, Ltd.*, 2001 WL 699051, *1 (S.D.N.Y. 2001) (denying motion to compel production of settlement agreement and rejecting argument that agreement was relevant to reduction of

damages: “While that fact will make the agreement discoverable after trial, it does not make it relevant now”); *ABF Capital Mgmt. v. Askin Capital*, 2000 WL 191698, *3 (S.D.N.Y. 2000) (citation omitted) (denying motion to compel production of settlement agreement and rejecting offset argument as premature: “Even [after final judgment has been rendered], the settlement would not be evidence relevant to any issue in this case other than the ministerial apportionment of damages. . . . Hence, the amount of the settlement is not relevant to any issue in this case at this time”).

Bias. To the extent Morgan Stanley argues that it needs to examine the CPH-Andersen settlement agreement to evaluate the biases of the Andersen witnesses who are going to be deposed (MS Mot. 4-5), there is no basis for that argument. That no such need exists is demonstrated by the conduct of Morgan Stanley’s counsel during the first deposition of an Andersen witness (Vance Kistler), which took place on October 29. During the deposition, although Morgan Stanley’s counsel questioned Mr. Kistler at length, not once did counsel ask Mr. Kistler about the settlement agreement. Nor did counsel state or suggest in any way that his questioning was being hampered because he did not have access to the CPH-Andersen settlement agreement. Counsel’s silence in that regard is impossible to square with Morgan Stanley’s present assertion that it needs the settlement agreement to explore the biases of Andersen witnesses.

In any event, the settlement agreement would be of no use to Morgan Stanley in its effort to explore witness bias, because it contains no “cooperation” or any other provision whereby Andersen undertakes to assist CPH in any way that might have an impact on this litigation. CPH can, if the Court desires, tender the settlement agreement for an in-camera inspection to verify that fact.

Morgan Stanley ends by arguing that, at a minimum, it should be allowed during the depositions of Andersen and CPH witnesses to explore “whether any promises have been made’ by Arthur Andersen in the settlement agreement that could affect the present action” (MS Mot. 5). CPH has no objection to that inquiry — although, again, it is telling that Morgan Stanley did not even attempt to ask those kinds of questions during the first Andersen deposition. CPH has no objection, although the likely response from most if not all of the witnesses will be, “What settlement

agreement are you talking about?” or “I don’t know what the settlement agreement provides.”

II. The Settling Parties’ Contractual Right To Confidentiality Is Entitled To Respect.

Although Morgan Stanley’s motion proceeds as if confidential settlement agreements are available for the asking, the reality is that unless a specific showing of need is made, courts honor the contractual rights of the parties to settlement agreements along with the confidentiality provisions that those agreements contain. “[T]he strong public policy favoring settlement of disputed claims dictates that confidentiality agreements regarding such settlements not be lightly abrogated.” *Flynn v. Portland General Electric Corp.*, 1989 WL 112802, *2 (D. Ore. 1989); *see also Centellion Data Systems*, 193 F.R.D. at 553 (finding that stated need for disclosure was “not strong enough to overcome the confidentiality of the AT&T-Centellion settlement agreement”: “we believe, on balance, that settlements are and will be encouraged, in the run of cases, more by maintaining the confidentiality of agreements than by disclosure”); *Hasbrouck v. BankAmerica Housing Services*, 187 F.R.D. 453, 461-62 (N.D.N.Y. 1999) (Magistrate Judge’s ruling) (issuing a protective order to bar discovery of settlement agreement in part because of the “substantial public interest in maintaining confidentiality of settlements”), *aff’d*, 190 F.R.D. 42, 44 (N.D.N.Y. 1999); *Kalinauskas v. Wong*, 151 F.R.D. 363, 365 (D. Nev. 1993) (“Confidential settlements benefit society and the parties involved by resolving disputes relatively quickly” and “[t]he secrecy of the settlement agreement and the contractual rights of the parties thereunder deserve court protection”).

As the foregoing cases establish, contrary to the impression left by Morgan Stanley’s motion, much more is at stake here than Morgan Stanley’s general curiosity about the settlement terms of the CPH-Andersen agreement: the contractual confidentiality rights of the parties to the CPH-Andersen settlement agreement also are entitled to respect and consideration. If Morgan Stanley is to overcome those rights, Morgan Stanley should be required to make a particularized showing of need for the discovery it is seeking, and not simply rely on generalized arguments. As shown above, however, Morgan Stanley has not come close to providing a persuasive reason why it is entitled to discover any aspect of the CPH-Andersen settlement agreement at this stage of the litigation.

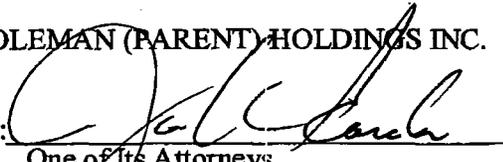
* * *

Morgan Stanley's request for disclosure of the settlement agreement constitutes an improper intrusion into confidential matters that Morgan Stanley has not begun to justify. Consequently, Plaintiff CPH respectfully requests that Morgan Stanley's motion to compel production of the CPH-Andersen settlement agreement be denied.

Dated: November 5, 2003

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

By: 
One of Its Attorneys

Jerold S. Solovy
JENNER & BLOCK, LLC
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

John Scarola
SEARCY DENNEY SCAROLA
BARNHART & SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33402-3626
(561) 686-6300

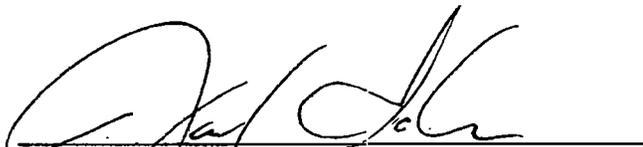
#996774

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by

Fax and Federal Express to all counsel on the attached list on this 5th day of

Nov. , 20 03.



JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 478-0754
Attorneys for Plaintiff

Coleman (Parent) Holdings Inc. vs Morgan Stanley & Company
Case No.: 2003 CA 005045 AI

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block, LLC
One IBM Plaza
Suite 4400
Chicago, IL 60611

Hank Jackson, Esq.
Holland & Knight
P.O. Box 3208
West Palm Beach, FL 33402-3208

Ben V. Preziosi, Esquire
Curtis, Mallet-Prevost, Colt & Mosle LLP
101 Park Avenue
New York, NY 10178

1 IN THE FIFTEENTH JUDICIAL CIRCUIT COURT
IN AND FOR PALM BEACH COUNTY, FLORIDA
2 CASE NUMBER: 2003 CA 005045 AI

3 COLEMAN (PARENT) HOLDINGS, INC.,

4 Plaintiffs,

5 vs.

6 MORGAN STANLEY & CO., INC.

7 Defendant.

8 _____/

9 PROCEEDINGS BEFORE THE HONORABLE ELIZABETH T. MAASS

10

11 APPEARANCES:

12 SEARCY, DENNEY, SCAROLA,
BARNHART & SHIPLEY, P.A.

13 2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33409

14 Phone: (561) 686-6300

ATTORNEYS FOR THE PLAINTIFF

15 BY: JACK SCAROLA, ESQUIRE

16 KIRKLAND AND ELLIS
655 15 Street, N.W., Suite 1200

17 Washington, D.C. 2005

Phone: (202) 879-5000

18 ATTORNEYS FOR THE DEFENDANT

BY: THOMAS A. CLARE

19

CARLTON FIELDS, et al.
20 222 Lakeview Avenue, Suite 1400

West Palm Beach, Florida 33401

21 PHONE: (561) 659-7070

ATTORNEYS FOR THE DEFENDANT

22 BY: JOSEPH IANNO, JR., ESQUIRE

23 - - -

24 Thursday, November 6, 2003
Palm Beach County Courthouse
25 West Palm Beach, Florida

1 TRANSCRIPT OF THE PROCEEDINGS, TAKEN BEFORE
2 THE HONORABLE ELIZABETH MAASS IN COURTROOM 11B, PALM
3 BEACH COUNTY COURTHOUSE, WEST PALM BEACH, FLORIDA, ON
4 THURSDAY, NOVEMBER 6, 2003, BEGINNING AT 8:55 A.M.

5 - - -

6 THE COURT: Do we really think we're going to
7 do this this morning?

8 MR. SCAROLA: We are going to surprise Your
9 Honor.

10 THE COURT: Okay. How are we doing that?

11 MR. SCAROLA: We're going to surprise you by
12 telling you first that with regard to the motion
13 to compel production of emails, we have come to an
14 agreement.

15 THE COURT: Okay.

16 MR. SCAROLA: And we will describe the terms
17 of that agreement for the record.

18 For the record, my name is Jack Scarola. I'm
19 hear on behalf of the Plaintiff Coleman (Parent)
20 Holdings. There are two motions. First is motion
21 to compel directed to the production of emails.

22 The agreement that we have reached is that
23 the Defendant Morgan Stanley will produce a

24 witness who is knowledgeable with respect to the
25 retention and retrieval -- the retention policies

PINNACLE REPORTING, INC.
(561) 820-9066

3

1 and retrieval capabilities with regard to emails.
2 They will also produce all documents that were
3 submitted to federal regulators with regard to
4 Morgan Stanley's email retention policies and
5 retrieval capabilities.

6 THE COURT: I don't think I have that motion.
7 The only one I have deals with the objections to
8 production of the settlement agreement. Are you
9 submitting a proposed agreed order on this?

10 MR. SCAROLA: We will submit a proposed
11 agreed order.

12 THE COURT: You're just telling me stuff and
13 hopefully I'll remember it when I see the order.

14 MR. SCAROLA: Yes.

15 We have agreed reciprocally that we will
16 provide a corporate representative who will
17 address the same issues on behalf of Coleman
18 (Parent) Holdings, Incorporated.

19 THE COURT: Okay.

20 MR. SCAROLA: With regard to the second
21 motion, that's the Defense's motion, so I'll allow
22 them to go first.

16div-003933

23 THE COURT: That's the one. Do we really
24 think we're going to get this done at an 8:45?
25 MR. CLARE: Judge, this is on Morgan

PINNACLE REPORTING, INC.
(561) 820-9066

4

1 Stanley's motion to compel the production of a
2 single document, the settlement agreement between
3 Coleman (Parent) and Arthur Andersen. And just
4 briefly, I think it's fairly straightforward in
5 terms of the history of this, that prior to
6 initiating the lawsuit against Morgan Stanley,
7 Coleman (Parent) brought a virtually identical
8 lawsuit against Arthur Andersen, same allegations,
9 same claim of damages, and now have settled.

10 THE COURT: Let me ask you this. This is the
11 notebook you gave me for this; right?

12 MR. CLARE: That includes the cases that
13 we've cited.

14 THE COURT: I can't do this on an 8:45.
15 Please understand, 8:45's are things -- I can read
16 everything. I can walk in and not know anything.
17 I can read everything I've got to read, absorb
18 everything I've got to, and I can do it in ten
19 minutes. I can't even read your motion in ten
20 minutes.

16div-003934

21 MR. CLARE: I have one case, City of
22 Homestead case, that --
23 THE COURT: I'm happy to get the book and
24 specially set. I'm happy to do it on an expedited
25 basis. I cannot do this on an 8:45. If you

PINNACLE REPORTING, INC.
(561) 820-9066

5

1 bothered to put together a notebook like this, I
2 know I need more time with it, okay?

3 Do you want me to get the book? Do you have
4 access to your schedules?

5 MR. CLARE: Sure.

6 MR. SCAROLA: I don't, but can make a phone
7 call to my office.

8 THE COURT: Okay. That's great.

9 MR. SCAROLA: Would you like me to get my
10 office on the line, Your Honor?

11 THE COURT: Sure.

12 MR. CLARE: Just in the interest of
13 completeness and while we're waiting for the
14 schedule, Mr. Scarola described in broad outlines
15 what the agreed upon order would be on this other
16 motion. There is one caveat I explained to
17 Mr. Scarola in the hallway, and we will work it
18 out between the parties before we submit an agreed
19 upon order to Your Honor. I am not aware as I sit

16div-003935

20 here right now what limitations there are right
21 now without disclosing to Mr. Scarola's client
22 information we provided to federal regulators. We
23 agreed to provide whatever it is we can provide.

24 THE COURT: Are you saying we might have a
25 legal dispute later about what you're permitted to

PINNACLE REPORTING, INC.
(561) 820-9066

6

1 disclose?

2 MR. CLARE: About what we're permitted to
3 disclose, and I just don't know all the details
4 without consulting with my client. We have an
5 agreement in principle that whatever we can
6 provide on this, we'll provide. I know there are
7 materials we can provide, I just don't know the
8 scope of it. And I don't want to represent to the
9 court that we're waiving or even have the ability
10 to waive protections that I'm not aware of right
11 now.

12 MR. SCAROLA: The only caveat to that is that
13 there's a commitment that they will provide good
14 faith cooperation in obtaining whatever
15 information is necessary in order to make full
16 disclosure.

17 THE COURT: Okay.

18 MR. CLARE: That's correct.

19 THE COURT: We can try the 14th, which is a
20 week from tomorrow at 4:30. Do you know if you're
21 available, sir?

22 MR. CLARE: There was a deposition that was
23 scheduled that day.

24 THE COURT: In this case?

25 MR. CLARE: In this case in New York.

PINNACLE REPORTING, INC.
(561) 820-9066

7

1 THE COURT: Who?

2 MR. CLARE: Mr. John Tirey (ph) is coming
3 from that the United Kingdom for a deposition that
4 day.

5 THE COURT: You have depositions in this
6 case, so that's probably not a good day. Let's
7 find a better time.

8 We could try 4:30 on Tuesday, November 25.
9 That's the Tuesday of Thanksgiving week, just so
10 you-all are clear.

11 MR. CLARE: That's fine with me, Your Honor.

12 MR. IANNO: That's not a problem.

13 MR. SCAROLA: That works, Your Honor.

14 THE COURT: Is that okay? We will do it
15 then. And I'll hold the stuff you gave me. If
16 you want me to look at anything else, send it to

16div-003937

17 me a few days ahead of time so I have it.

18 MR. CLARE: Thank you.

19 MR. SCAROLA: Thank you, Your Honor.

20 THE COURT: Thank you.

21 (Whereupon, at 9:03 a.m., the proceedings concluded.)

22

23

24

25

PINNACLE REPORTING, INC.
(561) 820-9066

8

1 CERTIFICATE

2 - - -

3

4 STATE OF FLORIDA

5 COUNTY OF PALM BEACH

6

7 I, PAMELA GRIMALDI, Registered Professional

8 Reporter, do hereby certify that I was authorized to

9 and did stenographically report the foregoing

10 proceedings and that the transcript is a true and

11 correct transcription of my stenotype notes of the

12 proceedings.

13

14 Dated this 18th day of November, 2003.

16div-003938

15

16

17

18

PAMELA GRIMALDI

19

Registered Professional Reporter

20

21

22

23

The foregoing certification of this transcript does not
24 apply to any reproduction of the same by any means
unless under the direct control and/or direction of the
25 certifying reporter.

PINNACLE REPORTING, INC.

(561) 820-9066

16div-003939

1 IN THE FIFTEENTH JUDICIAL CIRCUIT COURT
IN AND FOR PALM BEACH COUNTY, FLORIDA
2 CASE NUMBER: 2003 CA 005045 AI

3 COLEMAN (PARENT) HOLDINGS, INC.,

4 Plaintiffs,

5 vs.

6 MORGAN STANLEY & CO., INC.

7 Defendant.

8 _____/

9 PROCEEDINGS BEFORE THE HONORABLE ELIZABETH T. MAASS
10

11 APPEARANCES:

12 SEARCY, DENNEY, SCAROLA,
BARNHART & SHIPLEY, P.A.
13 2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33409
14 Phone: (561) 686-6300
ATTORNEYS FOR THE PLAINTIFF
15 BY: JACK SCAROLA, ESQUIRE

16 KIRKLAND AND ELLIS
655 15 Street, N.W., Suite 1200
17 Washington, D.C. 2005
Phone: (202) 879-5000
18 ATTORNEYS FOR THE DEFENDANT
BY: THOMAS A. CLARE

19
CARLTON FIELDS, et al.
20 222 Lakeview Avenue, Suite 1400
West Palm Beach, Florida 33401
21 PHONE: (561) 659-7070
ATTORNEYS FOR THE DEFENDANT
22 BY: JOSEPH IANNO, JR., ESQUIRE

23 - - -

24 Thursday, November 6, 2003
Palm Beach County Courthouse
25 West Palm Beach, Florida

1 TRANSCRIPT OF THE PROCEEDINGS, TAKEN BEFORE
2 THE HONORABLE ELIZABETH MAASS IN COURTROOM 11B, PALM
3 BEACH COUNTY COURTHOUSE, WEST PALM BEACH, FLORIDA, ON
4 THURSDAY, NOVEMBER 6, 2003, BEGINNING AT 8:55 A.M.

5 - - -

6 THE COURT: Do we really think we're going to
7 do this this morning?

8 MR. SCAROLA: We are going to surprise Your
9 Honor.

10 THE COURT: Okay. How are we doing that?

11 MR. SCAROLA: We're going to surprise you by
12 telling you first that with regard to the motion
13 to compel production of emails, we have come to an
14 agreement.

15 THE COURT: Okay.

16 MR. SCAROLA: And we will describe the terms
17 of that agreement for the record.

18 For the record, my name is Jack Scarola. I'm
19 hear on behalf of the Plaintiff Coleman (Parent)
20 Holdings. There are two motions. First is motion
21 to compel directed to the production of emails.

22 The agreement that we have reached is that
23 the Defendant Morgan Stanley will produce a

24 witness who is knowledgeable with respect to the
25 retention and retrieval -- the retention policies

PINNACLE REPORTING, INC.
(561) 820-9066

3

1 and retrieval capabilities with regard to emails.
2 They will also produce all documents that were
3 submitted to federal regulators with regard to
4 Morgan Stanley's email retention policies and
5 retrieval capabilities.

6 THE COURT: I don't think I have that motion.
7 The only one I have deals with the objections to
8 production of the settlement agreement. Are you
9 submitting a proposed agreed order on this?

10 MR. SCAROLA: We will submit a proposed
11 agreed order.

12 THE COURT: You're just telling me stuff and
13 hopefully I'll remember it when I see the order.

14 MR. SCAROLA: Yes.

15 We have agreed reciprocally that we will
16 provide a corporate representative who will
17 address the same issues on behalf of Coleman
18 (Parent) Holdings, Incorporated.

19 THE COURT: Okay.

20 MR. SCAROLA: With regard to the second
21 motion, that's the Defense's motion, so I'll allow
22 them to go first.

23 THE COURT: That's the one. Do we really
24 think we're going to get this done at an 8:45?
25 MR. CLARE: Judge, this is on Morgan

PINNACLE REPORTING, INC.
(561) 820-9066

4

1 Stanley's motion to compel the production of a
2 single document, the settlement agreement between
3 Coleman (Parent) and Arthur Andersen. And just
4 briefly, I think it's fairly straightforward in
5 terms of the history of this, that prior to
6 initiating the lawsuit against Morgan Stanley,
7 Coleman (Parent) brought a virtually identical
8 lawsuit against Arthur Andersen, same allegations,
9 same claim of damages, and now have settled.

10 THE COURT: Let me ask you this. This is the
11 notebook you gave me for this; right?

12 MR. CLARE: That includes the cases that
13 we've cited.

14 THE COURT: I can't do this on an 8:45.
15 Please understand, 8:45's are things -- I can read
16 everything. I can walk in and not know anything.
17 I can read everything I've got to read, absorb
18 everything I've got to, and I can do it in ten
19 minutes. I can't even read your motion in ten
20 minutes.

21 MR. CLARE: I have one case, City of
22 Homestead case, that --
23 THE COURT: I'm happy to get the book and
24 specially set. I'm happy to do it on an expedited
25 basis. I cannot do this on an 8:45. If you

PINNACLE REPORTING, INC.
(561) 820-9066

5

1 bothered to put together a notebook like this, I
2 know I need more time with it, okay?

3 Do you want me to get the book? Do you have
4 access to your schedules?

5 MR. CLARE: Sure.

6 MR. SCAROLA: I don't, but can make a phone
7 call to my office.

8 THE COURT: Okay. That's great.

9 MR. SCAROLA: Would you like me to get my
10 office on the line, Your Honor?

11 THE COURT: Sure.

12 MR. CLARE: Just in the interest of
13 completeness and while we're waiting for the
14 schedule, Mr. Scarola described in broad outlines
15 what the agreed upon order would be on this other
16 motion. There is one caveat I explained to
17 Mr. Scarola in the hallway, and we will work it
18 out between the parties before we submit an agreed
19 upon order to Your Honor. I am not aware as I sit

20 here right now what limitations there are right
21 now without disclosing to Mr. Scarola's client
22 information we provided to federal regulators. We
23 agreed to provide whatever it is we can provide.

24 THE COURT: Are you saying we might have a
25 legal dispute later about what you're permitted to

PINNACLE REPORTING, INC.
(561) 820-9066

6

1 disclose?

2 MR. CLARE: About what we're permitted to
3 disclose, and I just don't know all the details
4 without consulting with my client. We have an
5 agreement in principle that whatever we can
6 provide on this, we'll provide. I know there are
7 materials we can provide, I just don't know the
8 scope of it. And I don't want to represent to the
9 court that we're waiving or even have the ability
10 to waive protections that I'm not aware of right
11 now.

12 MR. SCAROLA: The only caveat to that is that
13 there's a commitment that they will provide good
14 faith cooperation in obtaining whatever
15 information is necessary in order to make full
16 disclosure.

17 THE COURT: Okay.

18 MR. CLARE: That's correct.

19 THE COURT: We can try the 14th, which is a
20 week from tomorrow at 4:30. Do you know if you're
21 available, sir?

22 MR. CLARE: There was a deposition that was
23 scheduled that day.

24 THE COURT: In this case?

25 MR. CLARE: In this case in New York.

PINNACLE REPORTING, INC.
(561) 820-9066

7

1 THE COURT: Who?

2 MR. CLARE: Mr. John Tirey (ph) is coming
3 from that the United Kingdom for a deposition that
4 day.

5 THE COURT: You have depositions in this
6 case, so that's probably not a good day. Let's
7 find a better time.

8 We could try 4:30 on Tuesday, November 25.
9 That's the Tuesday of Thanksgiving week, just so
10 you-all are clear.

11 MR. CLARE: That's fine with me, Your Honor.

12 MR. IANNO: That's not a problem.

13 MR. SCAROLA: That works, Your Honor.

14 THE COURT: Is that okay? We will do it
15 then. And I'll hold the stuff you gave me. If
16 you want me to look at anything else, send it to

17 me a few days ahead of time so I have it.

18 MR. CLARE: Thank you.

19 MR. SCAROLA: Thank you, Your Honor.

20 THE COURT: Thank you.

21 (Whereupon, at 9:03 a.m., the proceedings concluded.)

22

23

24

25

PINNACLE REPORTING, INC.
(561) 820-9066

8

1 CERTIFICATE

2 - - -

3

4 STATE OF FLORIDA

5 COUNTY OF PALM BEACH

6

7 I, PAMELA GRIMALDI, Registered Professional

8 Reporter, do hereby certify that I was authorized to

9 and did stenographically report the foregoing

10 proceedings and that the transcript is a true and

11 correct transcription of my stenotype notes of the

12 proceedings.

13

14 Dated this 18th day of November, 2003.

15

16

17

PAMELA GRIMALDI

19

Registered Professional Reporter

20

21

22

23

The foregoing certification of this transcript does not
24 apply to any reproduction of the same by any means
unless under the direct control and/or direction of the
25 certifying reporter.

PINNACLE REPORTING, INC.

(561) 820-9066

LAW OFFICES

JENNER & BLOCK, LLC

ONE IBM PLAZA
CHICAGO, ILLINOIS 60611

(312) 222-9350
(312) 527-0484 FAX

DEIRDRE E. CONNELL
312-923-2661 Direct Dial
312-840-7661 Direct Facsimile

TELECOMMUNICATION TRANSMITTAL

DATE: November 11, 2003

TO: Thomas A. Clare, Esq.
KIRKLAND & ELLIS, LLP

VOICE: (202) 879-5993
FAX: (202) 879-5200

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.

VOICE: (561) 659-7070
FAX: (561) 659-7368

FROM: Deirdre E. Connell

SECY. EXT.: 6486

EMP. NO.: 035666

CLIENT NO.: 41198-10003

IMPORTANT: THIS MESSAGE IS INTENDED ONLY FOR THE USE OF THE INDIVIDUAL OR ENTITY TO WHICH IT IS ADDRESSED, AND MAY CONTAIN INFORMATION THAT IS ATTORNEY WORK PRODUCT, PRIVILEGED, CONFIDENTIAL AND EXEMPT FROM DISCLOSURE UNDER APPLICABLE LAW. IF THE READER OF THIS MESSAGE IS NOT THE INTENDED RECIPIENT, OR THE EMPLOYEE OR AGENT RESPONSIBLE FOR DELIVERING THE MESSAGE TO THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION, DISTRIBUTION OR COPYING OF THIS COMMUNICATION IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE NOTIFY US IMMEDIATELY BY TELEPHONE, AND RETURN THE ORIGINAL MESSAGE TO US AT THE ABOVE ADDRESS VIA POSTAL SERVICE. THANK YOU.

MESSAGE: **Please see attached.**

Total number of pages including this cover sheet: 11

DATE SENT: 11/11/03 TIME SENT: 4:00 pm SENT BY: S. EDDINGTON

IF YOU DO NOT RECEIVE ALL PAGES, PLEASE CALL (312) 222-9350, EXT: 6486

**IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA**

_____)	
COLEMAN (PARENT) HOLDINGS, INC.,)	
)	
Plaintiff,	)	Case No.: 2003-CA 005045 AI
)	
v.	)	Judge Elizabeth T. Maass
)	
MORGAN STANLEY & CO., INC.,)	
)	
Defendant.)	
_____)	

NOTICE OF DEPOSITION

PLEASE TAKE NOTICE that the testimony of the Custodian of Records of the Llama Company, L.P., will be taken by deposition pursuant to the authority contained in Rule 30 of the Arkansas Rules of Civil Procedure and Rule 1.410 of the Florida Rules of Civil Procedure, for all purposes allowed under the provisions of the Arkansas Rules of Civil Procedure and Florida Rules of Civil Procedure, before a duly qualified Court Reporting service at the office of Wright, Lindsey & Jennings LLP, 200 West Capitol Avenue, Suite 2300, Little Rock, Arkansas 72201, commencing at 10:00 a.m., on December 4, 2003, until the examination is concluded. You are hereby invited to attend and examine.

PLEASE TAKE FURTHER NOTICE that the Custodian of Records of Llama Company, L.P., is requested to produce at his/her deposition, pursuant to Rule 34 of the Arkansas Rules of Civil Procedure and Rule 1.410 of the Florida Rules of Civil Procedure all

documents and materials in his/her possession or under his/her control that are responsive to the requests listed on Attachment A.

Dated: November 11, 2003

By: 
One of Coleman (Parent) Holdings' Attorneys

Jerold S. Solovy
JENNER & BLOCK, LLC
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

Jack Scarola
SEARCY DENNEY SCAROLA BARNHART
& SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33402-362
(561) 686-6300

ATTACHMENT A
TO SUBPOENA TO NON-PARTY LLAMA COMPANY

You are hereby requested to produce the following documents pursuant to the definitions and instructions set forth below.

DOCUMENTS REQUESTED

1. All documents concerning Sunbeam's or Morgan Stanley's engagement of Llama, or Sunbeam's engagement of Morgan Stanley, including but not limited to engagement letters, bills, invoices, billing or payment records, and back-up for statements of professional services rendered by You and/or expenses incurred in connection with Your work for Sunbeam, Morgan Stanley, or MSSF.
2. All calendars, diaries, timekeeping sheets or records maintained by You or any of Your personnel concerning any activities or services performed for Sunbeam, Morgan Stanley, or MSSF.
3. All documents concerning attempts by Morgan Stanley or You to locate (a) someone to purchase or otherwise acquire Sunbeam, in whole or in part, whether through merger, purchase, transfer of assets or securities, or otherwise or (b) companies for Sunbeam to purchase or otherwise acquire, whether through merger, purchase, transfer of assets or securities, or otherwise.
4. All documents concerning the Coleman Transaction, the Credit Agreement, the Bank Facilities, or the Subordinated Debenture Offering.
5. All documents concerning communications between or among any of You, Morgan Stanley, MSSF, Skadden, Arps, Slate, Meagher & Flom, LLP, Arthur Andersen, or Davis Polk & Wardwell concerning Sunbeam.
6. All documents concerning any of the Litigations, including but not limited to all: (a) pleadings, motions, memoranda, briefs, affidavits, declarations, or other court filings; (b) orders and/or rulings; (c) hearing transcripts; (c) written discovery, including but not limited to

document requests, subpoenas, requests for admission, interrogatories, and responses thereto; (d) documents produced by any parties or non-parties; (e) privilege logs; (f) deposition transcripts or exhibits; (g) expert reports or other expert discovery; and (h) documents concerning communications or correspondence concerning the Litigations. The relevant time period for this request is April 1998 through the date of service of this subpoena.

7. All documents You provided to or received from the SEC, the Justice Department, the U.S. Attorney for the Southern District of New York, the Attorney General of New York, any other federal or state governmental or regulatory body, or any other self-regulatory body concerning Sunbeam, Morgan Stanley, MSSF, the Coleman Transaction, the Subordinated Debenture Offering, and/or the Bank Facilities. The relevant time period for this request is February 1998 through the date of service of this subpoena.

DEFINITIONS

1. "Arthur Andersen" means Arthur Andersen LLP.
2. "CPH" means Coleman (Parent) Holdings Inc., Coleman Worldwide Corporation, CLN Holdings Inc., their predecessors, successors, subsidiaries, and their present and former officers, directors, and employees.
3. "Coleman Transaction" means the transaction by which Sunbeam acquired CPH's interest in The Coleman Company.
4. "Communication" means the transmittal of information (in the form of facts, ideas, inquiries or otherwise) by letter, memorandum, facsimile, orally, electronically or otherwise.
5. "Concerning" means concerning, reflecting, relating to, referring to, describing, evidencing, or constituting.

6. "Credit Agreement" means that agreement entered into by Sunbeam Corporation, as borrower, with Morgan Stanley Senior Funding, Inc., Bank of America National Trust and Savings Association, and First Union National Bank (now known as Wachovia Bank, National Association), as lenders, dated March 30, 1998 and amended periodically thereafter by agreement of the parties.

7. "Documents" shall be given the broad meaning provided in Rule 34 of the Arkansas Rules of Civil Procedure and refers to any form or means, whether physical, visual, or electronic, in or by which words, numbers, or ideas are recorded or preserved, whether fixed in tangible medium or electronically stored, including any and all drafts of any final document. The word "documents" shall include, by way of example and not by way of limitation, all of the following: papers, correspondence, trade letters, envelopes, memoranda, telegrams, cables, notes, messages, reports, studies, press releases, comparisons, books, accounts, checks, audio and video recordings and transcriptions thereof, pleadings, testimony, articles, bulletins, pamphlets, brochures, magazines, questionnaires, surveys, charts, newspapers, calendars, desk calendars, pocket calendars, lists, logs, publications, notices, diagrams, instructions, diaries, minutes for meetings, corporate minutes, orders, resolutions, agendas, memorials or notes of oral communications, whether by telephone or face-to-face, contracts, agreements, drafts of or proposed contracts or agreements, memoranda of understanding, letters of intent, computer tapes, computer drives or memories, computer diskettes or disks, e-mail, CD-ROMs, or any other tangible thing on which any handwriting, typing, printing, photostatic, electronic, or other form of communication or information is recorded or reproduced, together with all notations on any of the foregoing, all originals, file copies, or other unique copies of the foregoing, and all versions or drafts thereof, whether used or not.

8. “Llama” means Llama Company and any of its predecessors, successors, affiliates, subsidiaries, divisions, and its present and former partners, employees, representatives and agents, and all other persons acting or purporting to act on its behalf.

9. “Litigations” means In Re Sunbeam Securities Litigation, 98-8258-Civ.-Middlebrooks (S.D. Fla.); Camden Asset Management, L.P., et al. v. Sunbeam Corporation, et al., 98-8773-Civ.-Middlebrooks and 98-8275-Civ.-Middlebrooks (S.D. Fla.); Krim v. Dunlap, et al., No. CL983168AD (15th Jud. Cir., Fla.); Stapleton v. Sunbeam Corp., et al., No. 98-1676-Civ.-King (S.D. Fla.); Sunbeam Corp. v. PricewaterhouseCoopers LLP, No. CL005444AN (15th Jud. Cir., Fla.); In re Sunbeam Corp., No. 01-40291 (AJG) (Bankr. S.D.N.Y.), and every adversary proceeding therein; SEC v. Dunlap, et al., No. 01-8437-Civ.-Middlebrooks (S.D. Fla.); Oaktree Capital Management LLC v. Arthur Andersen LLP, No. BC257177 (L.A. Cty., CA); and Coleman (Parent) Holdings Inc. v. Arthur Andersen LLP, et al., No. CA 01-06062AN (15th Jud. Cir., Fla); Albert J. Dunlap and Sunbeam Corporation, No. 32 160 00088 99 (AAA); and Russell A. Kersh and Sunbeam Corporation, No. 32 160 00091 99 (AAA); In the Matter of Sunbeam Corp., SEC Administrative Proceeding File No. 3-10481; In the Matter of David C. Fannin, SEC Administrative Proceeding File No. 3-10482 and any other matter in which You represented Morgan Stanley or MSSF in connection with Sunbeam, the Coleman Transaction, the Credit Agreement, the Bank Facilities, or the Subordinated Debenture Offering.

10. “Morgan Stanley” means Morgan Stanley & Co., Inc. and any of its predecessors, successors, affiliates, subsidiaries, and present and former officers, directors, partners, employees, representatives, and agents.

11. "MSSF" means Morgan Stanley Senior Funding, Inc. and any of its predecessors, successors, affiliates, subsidiaries, and present and former officers, directors, partners, employees, representatives, and agents.

12. "Person" means any natural person, corporation, limited liability company, trust, joint venture, association, company, partnership, governmental authority, or other entity.

13. "SEC" means the Securities and Exchange Commission.

14. "Subordinated Debenture Offering" means the offering of Sunbeam's Zero Coupon Convertible Senior Subordinated Debentures Due 2018.

15. "Sunbeam" means Sunbeam Corporation and any of its predecessors, successors, affiliates, subsidiaries, and present and former officers, directors, employees, representatives, and agents.

16. "You" or "Your" means Llama Company and any of its predecessors, successors, subsidiaries, divisions, and its present and former partners, employees, representatives, and agents, and all other persons acting or purporting to act on its behalf.

INSTRUCTIONS

1. Documents shall be produced as they are kept in the usual course of business, or organized and labeled to correspond to the categories in this Request. Documents attached to each other should not be separated. Documents consisting of items previously produced in the Bankruptcy Proceeding and/or Other Litigations with Bates numbering shall be produced in Bates number order.

2. All documents shall be produced in the file folder, envelope or other container in which the documents are kept or maintained by You. If, for any reason, the container cannot be produced, produce copies of all labels or other identifying marks.

3. The relevant period, unless otherwise indicated, shall be from **January 1, 1997 through the date of service of this subpoena**, and shall include all documents and information which relate in whole or in part to such period, or to events or circumstances during such period, even though dated, prepared, generated or received prior or subsequent to that period. Please supplement or correct Your responses to these requests if, at any time, You become aware that Your responses are incomplete or incorrect in any respect.

4. If You claim the attorney-client privilege, or any other privilege or work-product protection for all or any portion of a document, You shall provide a privilege log that describes the withheld material sufficiently to allow CPH to test the privilege or protection asserted.

5. The following rules of construction apply:

- a. The connectives “and” and “or” shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery requests all responses that might otherwise be outside of their scope;
- b. The term “including” shall be construed to mean “without limitation”; and
- c. The use of the singular form of any word includes the plural and vice versa.

Document Number: 977628

CERTIFICATE OF SERVICE

I, Deirdre E. Connell, hereby certify that a true and correct copy of the foregoing **PLAINTIFF'S MOTION TO APPOINT COMMISSIONS** has been served upon the parties listed below via Facsimile and U.S. Mail on this 11th day of November, 2003.

Thomas A. Clare, Esq.
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lake View Avenue
Suite 1400
West Palm Beach, FL 33401



Deirdre E. Connell

SERVICE LIST

**Thomas A. Clare, Esq.
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005**

**Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lake View Avenue, Suite 1400
West Palm Beach, FL 33401**

SEARCY
DENNEY
SCAROLA
BARNHART
& SHIPLEY P.A.

*Attorneys
at Law*

WEST PALM BEACH OFFICE:

2139 PALM BEACH LAKES BLVD.
WEST PALM BEACH, FLORIDA 33409

P.O. DRAWER 3626
WEST PALM BEACH, FLORIDA 33402

(561) 686-6300
1-800-780-8607
FAX: (561) 478-0754

TALLAHASSEE OFFICE:

P.O. DRAWER 1230
TALLAHASSEE, FLORIDA 32302

(850) 224-7600
1-888-549-7011
FAX: (850) 224-7602

Via Hand Delivery

November 14, 2003

ATTORNEYS AT LAW:

ROSALYN SIA BAKER
F. GREGORY BARNHART*
LANCE BLOCK*
EARL L. DENNEY, JR.*
SEAN C. DOMNICK*
JAMES W. GUSTAFSON, JR.
DAVID K. KELLEY, JR.*
WILLIAM B. KING
DARRYL L. LEWIS*
WILLIAM A. NORTON*
DAVID J. SALES*
JOHN SCAROLA*
CHRISTIAN D. SEARCY*
HARRY A. SHEVIN
JOHN A. SHIPLEY III*
CHRISTOPHER K. SPEED*
KAREN E. TERRY
C. CALVIN WARRINER III*
DAVID J. WHITE*

*SHAREHOLDERS

PARALEGALS:

VIVIAN AYAN-TEJEDA
LAURIE J. BRIGGS
DEANE L. CADY
DANIEL J. CALLOWAY
EMILIO DIAMANTIS
DAVID W. GILMORE
TED E. KULESA
JAMES PETER LOVE
CHRISTOPHER J. PILATO
ROBERT W. PITCHER
WILLIAM H. SEABOLD
KATHLEEN SIMON
STEVE M. SMITH
WALTER A. STEIN
BRIAN P. SULLIVAN
KEVIN J. WALSH
GEORGIA K. WETHERINGTON
JUDSON WHITEHORN

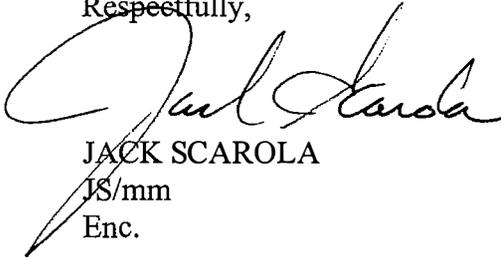
Hon. Elizabeth T. Maass
Palm Beach County Courthouse
Room #11.1208
205 North Dixie Highway
West Palm Beach, FL 33401

Re: Coleman (Parent) Holdings Inc. vs Morgan Stanley & Company
Case No. 2003 CA 005045AI
Matter No.: 029986-230580

Dear Judge Maass:

Enclosed please find a courtesy copy of Plaintiff's Response in Opposition to Morgan Stanley's Motion to Dismiss. Said motion is currently scheduled to be heard by your Honor on December 12, 2003 at 8:30 a.m.

Respectfully,


JACK SCAROLA
JS/mm
Enc.

cc: Joseph Ianno, Esq. (Via Fax & Fedex)
Thomas A. Clare, Esq. (Via Fax & Fedex)
Jerold s. Solovy, Esq. (Via Fax & Fedex)



16div-003960

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

CASE NO: 2003 CA 005045 AI

v.

Judge Elizabeth T. Maass

MORGAN STANLEY & CO., INC.,

Defendant.

**PLAINTIFF'S RESPONSE IN OPPOSITION TO
DEFENDANT'S MOTION TO DISMISS UNDER RULE 1.061
OR, IN THE ALTERNATIVE, FOR JUDGMENT ON THE PLEADINGS**

Jerold S. Solovy
JENNER & BLOCK, LLC
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

John Scarola
SEARCY DENNEY SCAROLA
BARNHART & SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33402-3626
(561) 686-6300

Attorneys for Plaintiff
Coleman (Parent) Holdings Inc.

16div-003961

TABLE OF CONTENTS

	Page
Table of Authorities	v
Statement of Facts	2
A. Sunbeam's Business And Lackluster Performance (1995-1996)	3
B. Sunbeam Hires A New Management Team (July 1996)	3
C. Dunlap Cooks The Books At Sunbeam (1996-1997)	4
1. Step One: Make Sunbeam Appear Worse Than It Really Was (1996)	5
2. Step Two: Create The False Appearance Of Dramatically Improved Performance (1997)	5
3. Step Three: Cash In Before The Turnaround Fraud Is Discovered (1997-1998)	6
D. Morgan Stanley Vies For A Spot On Dunlap's Team (April-September 1997)	7
E. Morgan Stanley Seeks A Buyer For Sunbeam (Fall 1997)	7
F. Unable To Find A Buyer For Sunbeam, Morgan Stanley Looks For An Acquisition (December 1997)	8
G. Morgan Stanley Revives The Deal And Negotiates With CPH (January-February 1998)	9
H. Morgan Stanley Advises Sunbeam's Board On The Acquisition (February 27, 1998)	10
I. Morgan Stanley Develops Sunbeam's Public Announcement Of The Coleman Acquisition (February 28-March 1, 1998)	11
J. Morgan Stanley Serves As The Underwriter For Sunbeam's \$750 Million Convertible Debenture Offering (March 1998)	11
K. Morgan Stanley Receives Written Notice That Sunbeam's First Quarter Sales Are Down Dramatically (March 17-18, 1998)	12
L. Morgan Stanley Assists Sunbeam In Concealing The Fraud: The False March 19, 1998 Press Release	14

M.	Sunbeam’s Auditors Advise Morgan Stanley That The March 19, 1998 Release Is False	16
N.	Morgan Stanley, By No Later Than March 19, Knew That It Would Be Facing Legal Action For Its Role In The Debenture Offering	16
O.	Morgan Stanley Marches Ahead With The Closings (March 19-March 30, 1998)	17
P.	Morgan Stanley Allows The Debenture Offering And The Coleman Acquisition To Close (March 25-30, 1998)	18
Q.	Sunbeam’s Fraudulent Scheme Begins To Unravel, Causing The Market Value Of Sunbeam’s Stock To Plummet	18
R.	The Defrauders Are Brought To Justice	19
	Argument	20
I.	Morgan Stanley Has Shown No Reason Why This Court Should Exercise Its Discretion To Dismiss This Case On <i>Forum Non Conveniens</i> Grounds	20
A.	The Private Interest Favors CPH’s Venue Choice	20
	This lawsuit, as Morgan Stanley has admitted, centers on Florida events	20
	Many important non-party witnesses live in Florida	21
	The numerous Florida contacts favor Florida	23
B.	The Public Interest Also Favors This Case Staying In Florida	30
C.	Morgan Stanley’s Arguments Are Unavailing	30
II.	Florida Law, Not New York Law, Applies In Determining Whether CPH’s Claims Are Actionable For Purposes Of Morgan Stanley’s Motion For Judgment On The Pleadings	31
A.	Florida Has The Most Significant Relationship To This Dispute	31
1.	The complaint allegations, which must be accepted as true at this stage, establish that Florida has the most significant relationship to this dispute	33
2.	Florida has a strong interest in the application of its law	36

- B. Morgan Stanley’s Contention That New York Rather Than Florida Law Applies Is Without Merit 36

- III. If This Court Concludes That Florida Law Applies, The Court Should Deny Morgan Stanley’s Motion For Judgment On The Pleadings Without Further Inquiry 38

- IV. Morgan Stanley’s Motion For Judgment On The Pleadings Is Meritless No Matter What Law Applies 38
 - A. CPH’s Fraud Count (Count I) States A Claim 39
 - 1. CPH did not “disclaim” reliance on Morgan Stanley’s misrepresentations by agreeing to the integration clause in the Merger Agreement 40
 - 2. CPH’s fraud claim should proceed notwithstanding its supposed “failure” to inspect Sunbeam’s books and records 43
 - 3. CPH has alleged that it relied on the misrepresentations identified in the complaint and has done so sufficiently 46
 - 4. CPH’s allegations of scienter also are more than sufficient 48
 - B. CPH’s Aiding-And-Abetting Count (Count II) States A Claim 51
 - 1. CPH’s “knowledge” allegations are sufficient 51
 - Morgan Stanley’s knowledge need not be pleaded with particularity ... 51
 - Morgan Stanley’s “equal access to books” argument is baseless 52
 - Morgan Stanley’s constructive fraud argument is a nonissue 53
 - Economic motive also is not an issue 53
 - 2. CPH’s “substantial assistance” allegations are sufficient 53
 - C. CPH’s Negligent Misrepresentation Count (Count IV) States A Claim 55
 - 1. Morgan Stanley’s “special” or “near privity” relationship argument is baseless 55
 - 2. Morgan Stanley’s reliance argument also is baseless 56

D. CPH's Conspiracy Count (Count III), Which is Based On Its Underlying Fraud Count, States A Claim 56

Conclusion 58

TABLE OF AUTHORITIES

	Page
<i>Acquadro v. Bergeron</i> , 851 So. 2d 665 (Fla. 2003)	29
<i>Aerovias Nacionales de Colombia, S.A. v. Tellez</i> , 596 So. 2d 1193 (Fla. 3d DCA 1992)	44, 51
<i>AES Corp. v. Dow Chemical Co.</i> , 325 F.3d 174 (3d Cir. 2003)	43
<i>Aetna Casualty & Surety Co. v. Huntington National Bank</i> , 587 So. 2d 483 (Fla. 4th DCA 1991), <i>decision approved pursuant to</i> <i>Fla. Const. art. V, § 3(b)(4)</i> , 609 So. 2d 1315 (Fla. 1992)	38
<i>BDO Seidman, LLP v. British Car Auctions, Inc.</i> , 802 So. 2d 366 (Fla. 4th DCA 2001)	44
<i>Banks v. Public Storage Mgmt., Inc.</i> , 585 So. 2d 476 (Fla. 3d DCA 1991)	43
<i>Besett v. Basnett</i> , 389 So. 2d 995 (Fla. 1980)	43
<i>Bishop v. Florida Specialty Paint Co.</i> , 389 So. 2d 999 (Fla. 1980)	31
<i>Caretta Trucking, Inc. v. Cheoy Lee Shipyards, Ltd.</i> , 647 So. 2d 1028 (Fla. 4th DCA 1994)	41
<i>Cohan v. Sicular</i> , 625 N.Y.S.2d 278 (N.Y. App. Div. 1995)	41
<i>Cohen v. Kravit Estate Buyers, Inc.</i> , 843 So. 2d 989 (Fla. 4th DCA 2003)	40, 49
<i>Country World, Inc. v. Imperial Frozen Foods Co.</i> , 589 N.Y.S.2d 81 (N.Y. App. Div. 1992)	40, 45
<i>Covert v. South Florida Stadium Corp.</i> , 762 So. 2d 938 (Fla. 3d DCA 2000)	39
<i>Credit Alliance Corp. v. Arthur Andersen & Co.</i> , 493 N.Y.S.2d 435 (N.Y. 1985)	55
<i>Dimon Inc. v. Folium, Inc.</i> , 48 F. Supp. 2d 359 (S.D.N.Y. 1999)	41, 46
<i>Diodato v. Eastchester Development Corp.</i> , 489 N.Y.S.2d 293 (N.Y. App. Div. 1985)	42
<i>Doehla v. Wathne Ltd., Inc.</i> , No. 98 Civ. 6087 CSH, 1999 WL 566311 (S.D.N.Y. Aug. 3, 1999)	40, 44, 45
<i>Domres v. Perrigan</i> , 760 So. 2d 1028 (Fla. 5th DCA 2000)	37, 39
<i>Execu-Tech Business Systems, Inc. v. New Oji Paper Co.</i> , 752 So. 2d 582 (Fla. 2000)	29
<i>Fidelity Funding of California, Inc. v. Reinhold</i> , 79 F. Supp. 2d 110 (E.D.N.Y. 1997)	46

<i>Filler v. Hanvit Bank</i> , 247 F. Supp. 2d 425 (S.D.N.Y. 2003), vacated, No. 01 CIV 9510 (MGC), 01 CIV 8251 (MGC), 2003 WL 21729978 (S.D.N.Y. July 25, 2003)	52
<i>Forbes v. Gimbel</i> , 539 So. 2d 18 (Fla. 1st DCA 1989)	37
<i>Gabriel Capital, L.P. v. NatWest Finance, Inc.</i> , 94 F. Supp. 2d 491 (S.D.N.Y. 2000)	57
<i>Gilchrist Timber Co. v. ITT Rayonier, Inc.</i> , 696 So. 2d 334 (Fla. 1997)	43, 44
<i>Hoch v. Rissman, Weisberg, Barrett</i> , 742 So. 2d 451 (Fla. 5th DCA 1999)	56, 57
<i>Houbigant, Inc. v. Deloitte & Touche LLP</i> , 753 N.Y.S.2d 493 (N.Y. App. Div. 2003)	52
<i>Kinney Systems, Inc. v. Continental Insurance Co.</i> , 674 So. 2d 86 (Fla. 1996)	20
<i>L. Luria & Son, Inc. v. Honeywell, Inc.</i> , 460 So. 2d 521 (Fla. 4th DCA 1984)	43
<i>Lazard Freres & Co. v. Protective Life Ins. Co.</i> , 108 F.3d 1531 (2d Cir. 1997)	46
<i>Manufacturers Hanover Trust Co. v. Yanakas</i> , 7 F.3d 310 (2d Cir. 1993)	42
<i>M/I Schottenstein Homes, Inc. v. Azam</i> , 813 So. 2d 91 (Fla. 2002)	45
<i>Mejia v. Jurich</i> , 781 So. 2d 1175 (Fla. 3d DCA 2001)	42
<i>MeterLogic, Inc. v. Copier Solutions, Inc.</i> , 126 F. Supp. 2d 1346 (S.D. Fla. 2000)	42
<i>Nomura, Sec. Int'l, Inc. v. E*Trade Sec., Inc.</i> , 280 F. Supp. 2d 184 (S.D.N.Y. 2003)	46
<i>Oxford Health Plans (N.Y.), Inc. v. Bettercare Health Care PainMgmt. & Rehab PC</i> , 762 N.Y.S.2d 344 (N.Y. App. Div. 2003)	52
<i>Pafco General Insurance Co. v. Wah-Wai Furniture Co.</i> , 701 So. 2d 902 (Fla. 3d DCA 1997)	30
<i>Pearce v. Knepper</i> , 53 N.Y.S.2d 845 (N.Y. Sup. Ct. 1945)	43
<i>Pinzl v. LaPointe</i> , 426 So. 2d 65 (Fla. 5th DCA 1983)	40, 45
<i>Primavera Familienstiftung v. Askin</i> , 130 F. Supp. 2d 450 (S.D.N.Y. 2001), amended in part on other grounds, 137 F. Supp. 2d 438 (S.D.N.Y. 2001)	46
<i>Ray v. Elks Lodge No. 1870</i> , 649 So. 2d 292 (Fla. 4th DCA 1995)	37
<i>Rudolph v. Turecek</i> , 658 N.Y.S.2d 769 (N.Y. App. Div. 1997)	40
<i>Safety National Casualty Corp. v. Florida Municipal Insurance Trust</i> , 818 So. 2d 612 (Fla. 5th DCA 2002)	23, 37

<i>Scarborough Associates v. Financial Federal Savings & Loan Association of Dade County</i> , 647 So. 2d 1001 (Fla. 3d DCA 1994)	3, 37
<i>Sheen v. Jenkins</i> , 629 So. 2d 1033 (Fla. 4th DCA 1993)	43
<i>Skubal v. Cooley</i> , 639 So. 2d 1126 (Fla. 4th DCA 1994)	37
<i>State v. First Investors Corp.</i> , 592 N.Y.S.2d 561 (N.Y. Sup. Ct. 1992)	40
<i>Strauss v. Sillin</i> , 393 So. 2d 1205 (Fla. 2d DCA 1981)	44, 51
<i>Swersky v. Dreyer & Traub</i> , 643 N.Y.S.2d 33 (N.Y. App. Div. 1996)	45
<i>Taylor Woodrow Homes Florida, Inc. v. 46-A Corp.</i> , No. 5D01-15814, 2003 WL 158888 (Fla. 5th DCA Jan. 24, 2003)	41
<i>Tew v. Chase Manhattan Bank, N.A.</i> , 728 F. Supp. 1551 (S.D. Fla. 1990)	33, 36
<i>Thor Bear, Inc. v. Crocker Mizner Park, Inc.</i> , 648 So. 2d 168 (Fla. 4th DCA 1994)	40, 45
<i>Tinker v. De Maria Porsche Audi, Inc.</i> , 459 So. 2d 487 (Fla. 3d DCA 1984)	42
<i>In re Unicapital Corp. Securities Litigation</i> , 149 F. Supp. 2d 1353 (S.D. Fla. 2001)	48
<i>Wendt v. Horowitz</i> , 822 So. 2d 1252 (Fla. 2002)	29
<i>Zuckerman-Vernon Corp. v. Rosen</i> , 361 So. 2d 804 (Fla. 4th DCA 1978)	42

STATUTES AND RULES

Fla. Stat. § 47.051 (2003)	21
Fla. Stat. § 90.202(6) (2003)	21
Fed. R. Civ. P. 9(b)	52
Fla. R. Civ. P. 1.061	20
Fla. R. Civ. P. 1.120	51, 52

MISCELLANEOUS

Fla. Jur. 2d, <i>Courts and Judges</i> § 71 (1998)	30
N.Y. Jur. 2d, <i>Fraud and Deceit</i> § 227 (2001)	42
<i>Restatement (Second) of Conflicts of Laws</i> § 6	31, 32, 36
<i>Restatement (Second) of Conflict of Laws</i> § 127	44, 51
<i>Restatement (Second) of Conflict of Laws</i> § 148	31, 32, 33

Introduction

Defendant Morgan Stanley & Co., Inc. (“Morgan Stanley”) attempts to portray this lawsuit as a “spurious” action that “revolves around negotiations that occurred in New York.” See MS Mem. 1. In fact, the well-pleaded complaint allegations of plaintiff Coleman (Parent) Holdings Inc. (“CPH”) establish that this action arises from Morgan Stanley’s active participation in the massive fraud surrounding Florida-based Sunbeam Corporation. That fraud, which had Florida as its epicenter, has resulted in the litigation of no less than 24 lawsuits in the federal and state courts of Florida.¹⁷

Morgan Stanley’s deep involvement in the Sunbeam fraud shows beyond meaningful dispute that this lawsuit should proceed here so that a Florida jury can require Morgan Stanley to answer in damages for its participation in the fraud — as have the many other participants sued here in Florida. That result is especially appropriate in light of the fact that Morgan Stanley’s own sister company, Morgan Stanley Senior Funding, Inc. (“MSSF”), chose to file its own Sunbeam-related lawsuit in this Court. See *Morgan Stanley Senior Funding, Inc. v. MacAndrews & Forbes Holdings, Inc., et*

¹⁷ See *Shallal v. Elson, et al.*, No. 98-8739 (S.D. Fla.); *Camden Asset Management, L.P. v. Sunbeam Corporation, et al.*, No. 98-8773 (S.D. Fla.); *Hamilton Partners v. Sunbeam Corporation, et al.*, No. 99-8275 (S.D. Fla.); *Coleman (Parent) Holdings Inc. v. Arthur Andersen LLP, et al.*, No. CA 01-6062 (Fla. Cir. Ct., Palm Beach County); *Morgan Stanley Senior Funding, Inc. v. MacAndrews & Forbes Holdings, Inc., et al.*, No. 2003 CA 005165 (Fla. Cir. Ct., Palm Beach County); *Krim v. Dunlap, et al.*, No. CL 98-3168 (Fla. Cir. Ct., Palm Beach County); *Bird v. Sunbeam Corporation, et al.*, No. 98-8258 (S.D. Fla.) (consolidated into *In re Sunbeam Securities Litigation*, No. 98-8258 (S.D. Fla.)); *Frankel v. Sunbeam Corporation, et al.*, No. 98-8310 (S.D. Fla.) (same); *Lionelli v. Sunbeam Corporation, et al.*, No. 98-8323 (S.D. Fla.) (same); *Goldberg v. Dunlap, et al.*, No. 98-8260 (S.D. Fla.) (same); *Lembeck v. Dunlap, et al.*, No. 98-8307 (S.D. Fla.) (same); *Mintz v. Sunbeam Corporation, et al.*, No. 98-8281 (S.D. Fla.) (same); *Klewin v. Sunbeam Corporation, et al.*, No. 98-8313 (S.D. Fla.) (same); *Applestein v. Sunbeam Corporation, et al.*, No. 98-8316 (S.D. Fla.) (same); *Singleton v. Sunbeam Corporation, et al.*, No. 98-8347 (S.D. Fla.) (same); *Lindeman v. Sunbeam Corporation, et al.*, No. 98-8289 (S.D. Fla.) (same); *Stapleton v. Sunbeam Corporation, et al.*, No. 98-1676 (S.D. Fla.) (same); *Cunningham v. Sunbeam Corporation, et al.*, No. 98-6723 (S.D. Fla.) (same); *Klein v. Sunbeam Corporation, et al.*, No. 98-8418 (S.D. Fla.) (same); *Havsy v. Sunbeam Corporation, et al.*, No. 98-8475 (S.D. Fla.) (same); *Cutler v. Sunbeam Corporation, et al.*, No. 98-8321 (S.D. Fla.) (same); *Gottlieb v. Sunbeam Corporation, et al.*, No. 98-8401 (S.D. Fla.) (same); *Kavlak v. Dunlap, et al.*, No. 98-8400 (S.D. Fla.) (same); *U.S. National Bank of Galveston v. Sunbeam Corporation, et al.*, No. 99-8283 (S.D. Fla.) (same).

al., No. 2003 CA 005165 (Fla. Cir. Ct., Palm Beach County). MSSF, which is represented by the same counsel as Morgan Stanley, alleges in its complaint that venue is proper here because its claims arise out of activities that occurred in Florida. Given MSSF's venue choice, and Morgan Stanley's concession in its supporting brief that this case and the MSSF lawsuit "involve common facts" (MS Mem. 17 n.11), Morgan Stanley's argument that Florida is an inappropriate forum for the resolution of CPH's claims is not credible.

In Morgan Stanley's alternative motion for judgment on the pleadings, which Morgan Stanley filed two days after answering CPH's complaint, Morgan Stanley contends that this case should be dismissed because CPH was a so-called "sophisticated" player in the Sunbeam transaction and had the wherewithal to go out and investigate for itself whether Morgan Stanley and its client Sunbeam were lying. The assumption underlying Morgan Stanley's argument is that the law does not protect sophisticated business people who fall victim to the perpetrators of a massive financial fraud. And the unstated, but inevitable, corollary to Morgan Stanley's assumption is that firms such as Morgan Stanley may lie with impunity — because the parties with whom they deal always can be characterized as sophisticated parties who, according to Morgan Stanley, should bear the sole responsibility for discovering the fraud.

Morgan Stanley's theory is as untenable as it is contrary to law. Although Morgan Stanley has strived mightily in its brief to disclaim any responsibility for the Sunbeam fraud, the reality is that the law protects all victims of fraud — even "sophisticated" victims — and requires defrauders such as Morgan Stanley to pay for the consequences of their wrongdoing. CPH's complaint in this case alleges, in great detail, Morgan Stanley's direct involvement in the Sunbeam fraud. Those detailed allegations raise many issues concerning Morgan Stanley's misrepresentations and intent to deceive CPH, as well as CPH's reasonable reliance, that are for the jury to resolve as a matter of fact — and cannot therefore be disposed of as a matter of law on a motion for judgment on the pleadings.

Statement of Facts

This action arises from the deep involvement of Morgan Stanley in the massive fraud

perpetrated by Florida-based Sunbeam Corporation (“Sunbeam”). As a result of that fraud, which was accomplished with Morgan Stanley’s active participation, CPH was induced to accept 14.1 million shares of Sunbeam stock when CPH sold its 82% investment in The Coleman Company, Inc. (“Coleman”) to Sunbeam on March 30, 1998. *See* Complaint ¶¶ 1-2. A detailed exposition of the Sunbeam fraud, and Morgan Stanley’s direct participation in it, is set forth next. The facts are taken from the allegations of the complaint and must therefore be accepted as true for purposes of Morgan Stanley’s motion. *See Scarborough Assocs. v. Fin. Fed. Sav. & Loan Ass’n of Dade County*, 647 So. 2d 1001, 1002 (Fla. 3d DCA 1994).

A. Sunbeam’s Business And Lackluster Performance (1995-1996).

Sunbeam designed and manufactured outdoor and household consumer products, which it marketed under the Sunbeam and Oster brand names. Many of the country’s leading retail stores, including Wal-Mart, Target, and Home Depot, were among Sunbeam’s major customers. *See* Complaint ¶ 14.

Despite Sunbeam’s well-known brands and strong customer base, its financial performance was disappointing. In 1994, Sunbeam earned \$1.30 per share. In 1995, Sunbeam’s earnings declined to \$0.61 per share. In 1996, Sunbeam’s earnings continued to suffer. On March 22, 1996, Sunbeam issued an early warning that its first quarter earnings would be well under analysts’ expectations and down from first quarter 1995. Shortly after issuing the March 22 earnings warning, Sunbeam’s Chief Executive Officer and two of Sunbeam’s directors announced their resignations. Less than a week later, Sunbeam announced that its first quarter 1996 earnings had plunged 42% from first quarter 1995 levels. Sunbeam also announced that its second quarter 1996 earnings would be lower than its second quarter 1995 earnings. *See* Complaint ¶ 15.

The stock market reacted predictably. During 1995, the price at which Sunbeam’s stock traded fell 40%, from a high of \$25-1/2. In 1996, Sunbeam’s stock price continued to decline until it reached a low of \$12-1/4 in July. *See* Complaint ¶ 16.

B. Sunbeam Hires A New Management Team (July 1996).

On July 18, 1996, Sunbeam’s board of directors hired Albert Dunlap as Sunbeam’s new

Chief Executive Officer. Dunlap, based on his performance at other struggling companies, was heralded as a “turnaround specialist” — someone who could take a poorly performing company and significantly increase its value by “turning around” its financial performance. Because Dunlap touted the benefits from firing large numbers of employees and closing large numbers of plants, Dunlap became widely known as “Chainsaw Al.” Dunlap lived in Boca Raton, Florida, and one of his first tasks at Sunbeam was to consolidate the company’s six headquarters into one located in Delray Beach, Florida. *See* Complaint ¶ 17.

Immediately after joining Sunbeam, Dunlap hired Russell Kersh as Sunbeam’s Chief Financial Officer. Kersh had teamed with Dunlap for over 15 years, serving as a senior executive with Dunlap at other companies, including Scott Paper. Dunlap also brought in several other hand-picked executives to make up his senior management team. *See* Complaint ¶ 18.

Dunlap and his team entered into employment agreements with Sunbeam. Under those agreements, Dunlap and his team stood to make tens of millions of dollars if they were able to boost Sunbeam’s apparent value and then sell Sunbeam to another company at a premium. *See* Complaint ¶ 19.

C. Dunlap Cooks The Books At Sunbeam (1996-1997).

To validate his reputation and convince other companies that they should want to purchase Sunbeam, which was Dunlap’s objective from the outset, Dunlap needed to improve Sunbeam’s reported financial performance quickly and dramatically. It was, of course, no small task to transform Sunbeam from a poorly performing company, with weak sales and declining profits, into a strong company with rapidly growing sales and soaring profits. In fact, as the world later learned, Dunlap did not achieve that change in Sunbeam’s fortunes. Instead, Dunlap created the illusion of a dramatic turnaround at Sunbeam by engaging in what a senior SEC official subsequently described as a “case study” in financial fraud. *See* Complaint ¶ 20.

Dunlap had a three-step plan at Sunbeam. In the first step, Dunlap overstated Sunbeam’s financial problems so that Sunbeam appeared to be in worse shape than it really was. After artificially deflating Sunbeam’s financial results, Dunlap moved to step two, where he made

Sunbeam look more valuable than it really was by inflating Sunbeam's sales and engaging in other earnings manipulations. In step three, Dunlap planned to cash in by selling Sunbeam before it became known that the "improved" results were fictional. By doing so, Dunlap would make tens of millions of dollars and would be free to blame his successor for any subsequent decline in Sunbeam's fortunes. *See* Complaint ¶ 21.

1. Step One: Make Sunbeam Appear Worse Than It Really Was (1996).

Dunlap began implementing his strategy soon after his arrival at Sunbeam in 1996. Claiming to be engaged in a clean-up of Sunbeam's financial problems, Dunlap recorded artificially high reserves and booked expenses that should not have been recorded until later periods. Both of those actions made Sunbeam's reported performance appear worse than it really was, thus lowering the benchmark for measuring Sunbeam's financial results in future years. *See* Complaint ¶ 22.

The overstated reserves also provided Dunlap a means by which he could inflate Sunbeam's future results during the second step of his plan. Dunlap later could "re-evaluate" and release millions of dollars from the overstated reserves to boost income in later periods. The income from released reserves contributed to the illusion of a rapid turnaround in Sunbeam's performance. Using inflated reserves to enhance income in future periods is a fraudulent practice. Overstated reserves are commonly called "cookie jar" reserves. *See* Complaint ¶ 23.

2. Step Two: Create The False Appearance Of Dramatically Improved Performance (1997).

After making Sunbeam look worse than it really was in 1996, Dunlap manipulated Sunbeam's sales and expenses in 1997 to create the false appearance of quarter after quarter improvement in financial performance. For example, Dunlap caused Sunbeam to inflate its sales revenues by engaging in phony "bill and hold" sales. Under this practice, Sunbeam recognized revenues from "sales," even though customers did not actually pay for or even take delivery of the products, which continued to sit in Sunbeam's own warehouses. Although Sunbeam recorded the "bill and hold" sales as if they were current sales, they were, in reality, simply sales stolen from future quarters. In 1997, phony "bill and hold" sales added approximately \$29 million in sales and

\$4.5 million in profit. *See* Complaint ¶ 24.

Throughout 1997, Sunbeam also engaged in a sales practice known as “channel stuffing” — accelerating sales that otherwise would occur in a later period, sometimes by offering steep discounts or other extraordinary customer inducements. On the grand scale employed by Sunbeam, channel stuffing inevitably leads to major sales shortfalls in later periods when “stuffed” customers simply stop buying while they burn off their inflated inventories. Sunbeam’s senior sales officer referred to Sunbeam’s unsustainable practice of inflating performance through accelerated sales as the “doom loop.” *See* Complaint ¶ 25.

Dunlap further “enhanced” Sunbeam’s income in 1997 by causing Sunbeam to record a “profit” of \$10 million from a sham sale of its warranty and spare parts business. Dunlap also made Sunbeam appear to be more successful than it really was by reaching into the “cookie jar,” reversing inflated reserves, and recording \$35 million as income. Sunbeam’s 1997 profit margins also looked better than they really were because Dunlap already had recorded millions of dollars of 1997 expenses in 1996. *See* Complaint ¶ 26.

In October 1997, Dunlap declared that Sunbeam’s “turnaround” was complete. Compared to the third quarter of 1996, Sunbeam’s third quarter 1997 performance was remarkable. In the third quarter of 1996, Sunbeam had reported a loss of \$18.1 million. In the third quarter of 1997, however, Sunbeam reported earnings of \$34.5 million — an extraordinary turnaround from substantial losses to hefty profits. Sunbeam’s combined results for the first three quarters showed dramatic improvement as well. Sunbeam reported that its profits for the first nine months were up tenfold over the same period the year before — from \$6.5 million in 1996 to \$67.7 million in 1997. Sunbeam’s reversal of fortune caused a spectacular increase in the price of its stock. In July 1996, when Dunlap was hired, Sunbeam’s shares traded at \$12-1/4. By October 1997, Sunbeam’s shares had risen to \$49-13/16. *See* Complaint ¶ 27.

3. Step Three: Cash In Before The Turnaround Fraud Is Discovered (1997-1998).

With steps one and two successfully completed, Dunlap was more than eager to complete the final step of his scheme: to sell Sunbeam to another company and collect tens of millions of dollars

for himself before the outside world could learn the truth about Sunbeam's phony "turnaround." To accomplish that third and final step, Dunlap needed an investment banking firm to serve as his shill. In exchange for its lucrative fees, Morgan Stanley was more than pleased to play that role. *See* Complaint ¶ 28.

D. Morgan Stanley Vies For A Spot On Dunlap's Team (April-September 1997).

When Dunlap announced in early 1997 that he would begin interviewing investment bankers, Morgan Stanley immediately began pursuing the job. Although Morgan Stanley had no previous relationship with Sunbeam, one of Morgan Stanley's senior executives, William Strong, had worked closely with Dunlap on other large transactions when Strong worked for Salomon Brothers. *See* Complaint ¶ 29.

Morgan Stanley knew that it was competing with other investment bankers, including Chase Securities, for Dunlap's business. Mark Davis, the head of the mergers and acquisitions department at Chase Securities, had worked previously with Strong at Salomon Brothers. Davis had a very close relationship with Dunlap and had served as Dunlap's investment advisor on numerous transactions, including Dunlap's sale of Scott Paper. Shortly after arriving at Sunbeam, Dunlap hired Davis to handle the sale of one of Sunbeam's businesses. *See* Complaint ¶ 30.

Eager to obtain this engagement, Morgan Stanley put together a team headed by its Vice Chairman, Bruce Fiedorek, and Strong. Beginning in April 1997, Morgan Stanley's personnel traveled to Sunbeam's offices in Delray Beach, Florida to study Sunbeam and woo Dunlap. After months of uncompensated work, in September 1997, Morgan Stanley finally persuaded Dunlap to name Morgan Stanley as Sunbeam's exclusive investment banker. Dunlap's directive to Morgan Stanley was to find a buyer for Sunbeam. Morgan Stanley knew that if it failed to deliver a major transaction, Morgan Stanley would not be compensated for the extensive work it had performed for Sunbeam. Morgan Stanley also knew that Davis and Chase Securities were standing by — ready and willing to reclaim their position as Dunlap's investment banker of choice. *See* Complaint ¶ 31.

E. Morgan Stanley Seeks A Buyer For Sunbeam (Fall 1997).

Under Dunlap's constant pressure, Morgan Stanley aggressively searched for a buyer for

Sunbeam. Morgan Stanley put together extensive and detailed materials to use in marketing Sunbeam to potential buyers. Morgan Stanley pitched the transaction to numerous companies — including Gillette, Colgate, Sara Lee, Rubbermaid, Whirlpool, and Black & Decker — hoping that those companies might have an interest in acquiring Sunbeam. Morgan Stanley, however, was not able to find a buyer. *See* Complaint ¶ 32.

As 1998 approached, the pressure on Dunlap increased. Dunlap was aware that Sunbeam would be unable to sustain the appearance of a successful turnaround in 1998 because Sunbeam had stolen massive amounts of sales from 1998 to inflate artificially 1997's numbers and the "cookie jar" reserves had been depleted. Dunlap needed a way to cash in on Sunbeam's high stock price and to conceal Sunbeam's phony turnaround until a buyer could be found. Eager to help, and to earn its massive fees, Morgan Stanley provided the solution. *See* Complaint ¶ 33.

F. Unable To Find A Buyer For Sunbeam, Morgan Stanley Looks For An Acquisition (December 1997).

Morgan Stanley knew that its failure to find a buyer for Sunbeam could prove fatal to the relationship it had worked so hard to establish with Dunlap. As the pressure on Dunlap increased, the pressure on Morgan Stanley to produce results increased as well. Morgan Stanley responded with a plan that would allow Dunlap to conceal his fraud. Morgan Stanley advised that Sunbeam should acquire other companies, using Sunbeam's stock, which was fraudulently inflated, as the "currency" that would be used to pay for the acquisitions. *See* Complaint ¶ 34.

Morgan Stanley's strategy was doubly deceptive. First, it would allow Dunlap to consolidate Sunbeam's results with those of the newly acquired companies. That would help Dunlap camouflage Sunbeam's results and make it difficult to detect any shortfall in Sunbeam's performance. Dunlap simply could label any problem that surfaced as attributable to the poor performance of the acquired companies or as a temporary "blip" caused by the distraction of integrating the acquired companies with Sunbeam. Second, Morgan Stanley's strategy would allow Dunlap to take new massive restructuring charges (purportedly relating to the acquisitions) and thus create more "cookie jar" reserves available to bolster the future earnings of the combined companies. *See* Complaint ¶ 35.

Morgan Stanley identified Coleman as a key acquisition target. CPH owned 82% of Coleman's stock. Morgan Stanley searched the ranks of its investment bankers to locate those with the best access to CPH. Drawing on relationships between some of Morgan Stanley's investment bankers and senior CPH officers, Morgan Stanley set about the task of persuading CPH to sell its interest in Coleman to Sunbeam — and, most importantly, to accept Sunbeam stock as consideration. *See* Complaint ¶ 36.

Morgan Stanley laid the groundwork for a meeting to take place in December 1997 in Palm Beach, Florida among Dunlap, Kersh, and representatives of CPH. In advance of the Palm Beach meeting, Morgan Stanley provided materials to Sunbeam to prepare Sunbeam for the meeting. Morgan Stanley also met with Kersh and other Sunbeam personnel to prepare for the Palm Beach meeting. However, Dunlap nearly scuttled Morgan Stanley's carefully crafted plan at the outset. During the December 1997 Palm Beach meeting, when CPH rejected Dunlap's initial all-stock offer, Dunlap became so angry that he cursed and ranted at the CPH representatives and stormed out. *See* Complaint ¶ 37.

G. Morgan Stanley Revives The Deal And Negotiates With CPH (January-February 1998).

Dunlap's tantrum appeared to kill Morgan Stanley's plan to have CPH take Sunbeam stock in exchange for its interest in Coleman. Morgan Stanley, however, worked to revive the discussions. Drawing again on Morgan Stanley's relationships with CPH officers, Morgan Stanley was able to restart the discussions with CPH, promising that Dunlap would be kept away from the negotiating table. Thereafter, Morgan Stanley, through Managing Directors Strong, James Stynes, and Robert Kitts, led the discussions on Sunbeam's behalf. *See* Complaint ¶ 38.

Morgan Stanley knew that it had to persuade CPH not only to sell Coleman, but also to accept Sunbeam stock — ultimately, 14.1 million shares of Sunbeam stock — as a major part of the purchase price. During the course of negotiations, Morgan Stanley prepared and provided CPH with false financial and business information about Sunbeam designed to create the appearance that Sunbeam was prospering and that Sunbeam's stock had great value. For example, Morgan Stanley provided CPH with false 1996 and 1997 sales and revenue figures, as well as false projections that

Sunbeam could not expect to achieve.

In face-to-face discussions, Morgan Stanley and Sunbeam together assured CPH that (a) Sunbeam would meet or exceed its first quarter 1998 earnings estimates; (b) analysts' 1998 earnings estimates for Sunbeam were correct; and (c) Sunbeam's plan to earn \$2.20 per share in 1998 was easily achievable and probably low. Morgan Stanley and Sunbeam also falsely assured CPH that Sunbeam's "early buy" sales program would not hurt Sunbeam's future revenues. However, the "early buy" program was one of Sunbeam's revenue acceleration programs — and the devastating effects of Sunbeam's revenue acceleration programs already had begun to materialize at Sunbeam. Sunbeam's January and February 1998 sales were down drastically, although those results were not disclosed to CPH or the public. To the contrary, Morgan Stanley and Sunbeam together falsely advised CPH that Sunbeam's first quarter 1998 sales were "tracking fine" and running ahead of analysts' estimates. *See* Complaint ¶ 39.

Before the truth came out, Morgan Stanley persuaded CPH to sell its shares in Coleman to Sunbeam and to accept 14.1 million shares of Sunbeam stock as part of the consideration. Based on the price at which Sunbeam's stock was trading, the 14.1 million shares of Sunbeam stock had a market value of \$600 million or more. *See* Complaint ¶ 40.

H. Morgan Stanley Advises Sunbeam's Board On The Acquisition (February 27, 1998).

On February 27, 1998, Sunbeam's Board of Directors met at Morgan Stanley's offices to consider the purchase of Coleman, as negotiated by Morgan Stanley. At the meeting, Morgan Stanley made an extensive presentation to Sunbeam's Board concerning the proposed transaction. Numerous Morgan Stanley representatives, including Managing Directors Strong, Kitts, Stynes, Ruth Porat, and Vikram Pandit, attended the meeting. *See* Complaint ¶¶ 41-42. Morgan Stanley presented Sunbeam's board with Morgan Stanley's opinion on the value of Coleman. Using a discounted cash flow analysis, which Morgan Stanley represented was the best gauge of stand-alone economic value and the best method of capturing the unique value of Coleman, Morgan Stanley valued CPH's Coleman stock at a range of \$31.06 to \$53.24 per share. Morgan Stanley's own analysis therefore shows that CPH's 44,067,520 Coleman shares were worth between \$1.369 billion and \$2.346

billion. *See* Complaint ¶ 43.

Following Morgan Stanley's presentation, Sunbeam's Board of Directors voted to acquire Coleman on the very favorable terms that Morgan Stanley had negotiated. *See* Complaint ¶ 44.

I. Morgan Stanley Develops Sunbeam's Public Announcement Of The Coleman Acquisition (February 28-March 1, 1998).

Morgan Stanley spent the following weekend developing Sunbeam's public relations strategy to announce the Coleman transaction. Morgan Stanley scripted the points for Dunlap to make in a conference call with analysts. Morgan Stanley also crafted a list of "key media messages" for Dunlap to use in his communications with the press. On Sunday, March 1, 1998, Morgan Stanley spoke with a reporter for the Wall Street Journal to inform him that Sunbeam would announce its acquisition of Coleman the following morning. *See* Complaint ¶ 45.

Sunbeam announced its acquisition of Coleman on Monday, March 2, 1998, prior to the opening of the financial markets. Consistent with Morgan Stanley's valuation, investors viewed Sunbeam's acquisition — and the price that Sunbeam had paid for Coleman — very favorably. The day before the acquisition was announced, Sunbeam's stock closed at \$41-3/4. In the days following Sunbeam's announcement of the transaction, Sunbeam's stock rose approximately 25%, to a high of \$52. *See* Complaint ¶ 46.

J. Morgan Stanley Serves As The Underwriter For Sunbeam's \$750 Million Convertible Debenture Offering (March 1998).

Dunlap knew that Sunbeam needed to raise funds to pay the cash portion of the acquisition consideration. Dunlap also knew that Sunbeam needed cash to purchase two other smaller companies in addition to Coleman. Morgan Stanley recommended that Sunbeam raise funds through a \$500 million offering of convertible subordinated debentures. To assure the offering's success, and in exchange for substantial fees, Morgan Stanley lent its name to the offering. Indeed, Morgan Stanley agreed to serve as the sole underwriter for the offering. The money raised from the sale of the debentures was used by Sunbeam to complete the acquisition of Coleman. *See* Complaint ¶¶ 47-48.

Unbeknownst to CPH or the public, as a direct consequence of Sunbeam's manipulation of

its 1997 financial results, Sunbeam's first quarter 1998 sales were a small fraction of the financial community's expectations for the quarter. If Dunlap could consolidate Sunbeam's sales with Coleman's sales, Dunlap knew that he could obscure the implications of Sunbeam's collapsed first quarter sales. As a result, Dunlap was especially anxious to complete the acquisition of Coleman before Sunbeam announced its first quarter results. Indeed, the success of the scheme depended upon Sunbeam's ability to complete the Coleman acquisition before Sunbeam's first quarter results were announced. To satisfy Dunlap's objectives, Morgan Stanley moved up the launch date of the debenture offering. *See* Complaint ¶ 49.

Morgan Stanley arranged a series of "road show" meetings and conference calls to market the debentures to investors. Morgan Stanley prepared and distributed a memorandum for its sales force to use in marketing the debentures to investors. Morgan Stanley also developed the script for Dunlap and Kersh to deliver during the road show. In those materials, Morgan Stanley misrepresented Sunbeam's financial performance and emphasized Dunlap's purported "turnaround" accomplishments. *See* Complaint ¶ 50.

Morgan Stanley launched the debenture offering with a research analyst presentation to the Morgan Stanley sales force. As part of Morgan Stanley's growing relationship with Sunbeam, one of Morgan Stanley's top-rated research analysts planned to initiate equity coverage of Sunbeam. That Morgan Stanley analyst had modeled values for Sunbeam's acquisition of Coleman that were higher than even Sunbeam's management had predicted. *See* Complaint ¶ 51.

Although Sunbeam initially planned to sell \$500 million worth of debentures, Morgan Stanley's marketing efforts were so successful that the size of the offering was increased to \$750 million on March 19, 1998 — the day of the last road show. Morgan Stanley sold the debentures to investors nationwide, including investors based in Florida. *See* Complaint ¶ 52.

K. Morgan Stanley Receives Written Notice That Sunbeam's First Quarter Sales Are Down Dramatically (March 17-18, 1998).

As Sunbeam's investment banker and the sole underwriter for the debenture offering, Morgan Stanley had a duty to investigate Sunbeam's finances and business operations. That duty included

an obligation to verify management's claims about Sunbeam's finances and business. Morgan Stanley, which had been working hand-in-hand with Sunbeam for almost a year and had traveled to Sunbeam's Florida offices, repeatedly asserted that it had satisfied that duty. *See* Complaint ¶ 53.

Strong, who was one of the senior Morgan Stanley investment bankers involved, has admitted in sworn testimony that he may have had 100 or more telephone conversations with Dunlap and Kersh (whose offices were in Sunbeam's Delray Beach headquarters) and that Strong was "sure" that he would have been apprised of Sunbeam's financial performance during the first two months of 1998. *See* Complaint ¶ 54.

With the \$750 million debenture offering and the Coleman transaction set to close at the end of March 1998, Sunbeam's Florida-based outside auditors were shocked that Morgan Stanley had not asked them about Sunbeam's financial performance for first quarter 1998. Sunbeam's auditors were alarmed because Sunbeam's first quarter results were a disaster, but Dunlap, Kersh, and Morgan Stanley were telling CPH and the investing public, including investors in Florida, that Sunbeam's turnaround was a success, that Sunbeam's sales for the first quarter of 1998 were ahead of the expectations of outside financial analysts, and that Sunbeam was poised for record sales. *See* Complaint ¶ 55.

On March 17, Sunbeam's auditors forced the issue. From their Florida offices, Sunbeam's auditors sent Morgan Stanley a letter reporting that Sunbeam's net sales through January 1998 were down a stunning 60% — \$28 million in January 1998, as compared to \$73 million in January 1997. The March 17 letter explained that the decline was "primarily due to the . . . new early buy program for grills which accelerated grill sales into the fourth quarter of fiscal 1997." The next day, Morgan Stanley was faxed a schedule from Sunbeam's Florida office that showed that Sunbeam's January and February 1998 net sales totaled \$72 million — 50% lower than Sunbeam's January and February 1997 net sales of \$143.5 million. *See* Complaint ¶¶ 56-57.

Based on information that Sunbeam and Morgan Stanley had disseminated, CPH, investors, and Wall Street analysts were anticipating that Sunbeam's first quarter 1998 net sales would be in the range of \$285 million to \$295 million. Sales in that range would have been approximately 15%

higher than first quarter 1997 sales. Sunbeam's January and February 1998 sales, however, totaled \$72 million, barely 25% of \$285 million. As Sunbeam's outside auditors advised Morgan Stanley in writing, the sales drop-off was driven by Sunbeam's sales acceleration program, a fraudulent program that manipulated the fourth quarter 1997 financial results. The information put into Morgan Stanley's hands on March 17 and March 18 placed Morgan Stanley on written notice that Morgan Stanley's and Sunbeam's assertions to CPH and other investors were false. Contrary to what Morgan Stanley and Sunbeam had represented, Sunbeam had not undergone a successful turnaround, Sunbeam's financial performance had not dramatically improved, and Sunbeam's performance in 1998 was not going to be better than Wall Street analysts' expectations. It was imperative to Morgan Stanley, therefore, that the truth be kept from CPH until the Coleman transaction closed at the end of March 1998. *See* Complaint ¶ 58.

L. Morgan Stanley Assists Sunbeam In Concealing The Fraud: The False March 19, 1998 Press Release.

Morgan Stanley did not disclose Sunbeam's disastrous first quarter, Morgan Stanley did not insist that Sunbeam disclose its disastrous first quarter, Morgan Stanley did not correct any of the false and misleading statements it and Sunbeam had made to CPH about Sunbeam's business or performance, and Morgan Stanley did not suspend any of the critical transactions that were scheduled to close in the next two weeks. Instead, with Morgan Stanley's knowledge and assistance, Sunbeam prepared and issued a false press release on March 19, 1998 that affirmatively misstated and concealed Sunbeam's true condition. *See* Complaint ¶ 59. The press release stated (Complaint ¶ 60):

Sunbeam Corporation . . . said today that it is possible that its net sales for the first quarter of 1998 may be lower than the range of Wall Street analysts' estimates of \$285 million to \$295 million, but net sales are expected to exceed 1997 first quarter net sales of \$253.4 million. . . . The shortfall from analysts' estimates, if any, would be due to changes in inventory management and order patterns at certain of the Company's major retail customers. The Company further stated that based on the strength of its new product offerings and powerful brand names, it remains highly confident about the overall sales outlook for its products for the entire year.

As Morgan Stanley was fully aware, the March 19, 1998 press release was false, misleading, and failed to disclose material information. The press release failed to disclose Sunbeam's disastrous

January and February 1998 sales results or the true reasons for the first quarter collapse. Instead, the press release held out the false possibility that Sunbeam still could achieve sales of \$285 million to \$295 million and suggested that, if any shortfall occurred, that shortfall would be due to the fact that certain retailers had decided to defer first quarter purchases to the second quarter. The press release also assured that Sunbeam at least would exceed first quarter 1997 net sales of \$253.4 million. *See* Complaint ¶ 61.

Based on information that Morgan Stanley had in its hands on March 18, 1998, it was obvious that Sunbeam would not achieve sales of \$285 million to \$295 million and that Sunbeam's first quarter 1998 sales would be below its first quarter 1997 numbers. Simply to meet 1997 first quarter sales, much less than the much higher figures investors expected, Sunbeam needed sales of \$123.3 million over the 12 remaining days of the quarter — an average of \$10.28 million per day. Sales of \$10.28 million per day would be 306% more than the average per day sales in March 1997, and 281% more than the average per day sales for the first 17 days of March 1998.

Furthermore, Morgan Stanley knew that the shortfall from analysts' estimates was not caused by retailers' deciding to defer purchases from the first quarter of 1998 to the second quarter, as the press release implied. Rather, as Sunbeam's outside auditors had advised Morgan Stanley in writing, the collapse in first quarter sales was driven by Sunbeam's acceleration of 1998 sales into the fourth quarter of 1997. *See* Complaint ¶ 62.

After Sunbeam's false press release was issued, Morgan Stanley stood arm-in-arm with Sunbeam while Dunlap and Kersh told CPH, analysts, and investors that the March 19, 1998 release was immaterial and was a purely cautionary statement made because of the possibility that some first quarter 1998 sales might simply "spillover" into the second quarter and that Sunbeam still believed that it actually would meet analysts' estimates of \$285 million to \$295 million in first quarter 1998 sales. *See* Complaint ¶ 63.

Morgan Stanley knew that a full and truthful disclosure of Sunbeam's first quarter sales collapse would doom Sunbeam's purchase of Coleman, which was scheduled to close on March 30, 1998. As Morgan Stanley was fully aware, the written contract between CPH and Sunbeam gave

CPH the express legal right to refuse to close the sale if there was a material adverse change in Sunbeam's "business, results of operation or financial condition." Morgan Stanley knew that CPH, which was about to receive 14.1 million shares of Sunbeam stock, would exercise its right to walk away from the transaction if CPH became aware of the extent and reasons for Sunbeam's disastrous first quarter results. *See* Complaint ¶¶ 64-65.

Furthermore, if the transactions did not close, Morgan Stanley would not be paid its \$10.28 million fee for the Coleman acquisition or its \$22.5 million fee for underwriting the subordinated debenture offering. Morgan Stanley also knew that Sunbeam might replace Morgan Stanley with another investment banking firm — such as the Chase Securities team led by Mark Davis. Everything, therefore, depended on closing the Coleman acquisition before CPH learned the truth. *See* Complaint ¶ 66.

M. Sunbeam's Auditors Advise Morgan Stanley That The March 19, 1998 Release Is False.

Although Sunbeam's outside auditors already had made it perfectly clear to Morgan Stanley that Sunbeam's first quarter 1998 sales were a disaster, Morgan Stanley was intent on proceeding based upon the false March 19, 1998 press release. *See* Complaint ¶ 67.

One of Sunbeam's senior outside auditors, Lawrence Bornstein, has testified under oath that on March 19, 1998, he told Morgan Stanley's John Tyree that the statement in Sunbeam's March 19, 1998 press release — that Sunbeam would at least exceed first quarter 1997 sales of \$253.4 million — was not credible: "Just do the math . . . they've done a million dollars in sales the first 70 days of the year and now they need to do \$10 million worth of sales for the next . . . I think it was 11 days . . . I mean, something ridiculous." Bornstein also told Tyree: "I've been to every [Sunbeam] shipping dock domestically, I've been to Hattiesburg, I've been to Neosho, I've been to Mexico City, and I don't think these guys can physically ship this much stuff." *See* Complaint ¶ 68.

N. Morgan Stanley, By No Later Than March 19, Knew That It Would Be Facing Legal Action For Its Role In The Debenture Offering.

During his confrontation of Tyree, Bornstein warned that "there's going to be a lot of lawsuits" if Sunbeam did not achieve the numbers in the March 19, 1998 press release — and

internal Morgan Stanley documents bear out Morgan Stanley's understanding of that fact. Although discovery still is ongoing, CPH has learned recently that by the time the press release came out on March 19, Morgan Stanley knew that it would be facing legal action. CPH obtained that information from the privilege log that Morgan Stanley has served, which lists a document dated March 19, 1998 relating to the offering of subordinated debentures as "work product" — that is, that it was prepared in anticipation of litigation.

O. Morgan Stanley Marches Ahead With The Closings (March 19-March 30, 1998).

Morgan Stanley knew that the March 19 press release was false and misleading, and as Morgan Stanley's privilege log confirms, Morgan Stanley knew it would be facing lawsuits as a result of its participation in the Sunbeam fraud. Despite that knowledge and Bornstein's explicit statements, Morgan Stanley continued with its drive to close the debenture offering on March 25, 1998 and the Coleman acquisition on March 30, 1998 — before the first quarter results became public.

As part of those preparations, on March 24, 1998, Morgan Stanley's Tyree spoke by telephone with Sunbeam's Kersh, who was located in Sunbeam's Delray Beach offices, to obtain an updated report concerning Sunbeam's first quarter performance. By the time of that March 24, 1998 call, Sunbeam had fallen even further behind first quarter 1997 sales. As of March 18, 1998, Sunbeam needed to achieve average sales of \$10.28 million per day, over 12 days, to reach first quarter 1997 sales. Sunbeam's sales between March 18 and March 24, 1998 had averaged only \$6.81 million per day — well short of the \$10.28 million per day that Sunbeam needed to achieve. Sunbeam's March 18 through March 24, 1998 sales were further proof that Sunbeam's March 19, 1998 press release was false and that Sunbeam would not achieve first quarter 1998 sales in excess of first quarter 1997 sales. *See Complaint ¶¶ 69-70.*

Morgan Stanley also knew no later than March 25, 1998, if not much earlier, that Sunbeam's earnings for the first quarter of 1998 were going to miss Wall Street analysts' earnings expectations, which were in the range of \$0.28 to \$0.31 per share (excluding one-time charges). Sunbeam's outside auditors advised Morgan Stanley on March 25 that Sunbeam had suffered a \$41.19 million

loss during the first two months of 1998, including a one-time charge of \$30.2 million. Even excluding that one-time charge, Sunbeam's loss for the first two months was \$0.13 per share. To achieve first quarter 1998 operating earnings of \$0.28 per share, which were at the low end of analyst expectations, Sunbeam needed to realize a profit of \$35.5 million during March 1998 alone. A net profit of \$35.5 million in March would be 500% more than Sunbeam's net profit for the entire first quarter of 1997. In fact, Sunbeam's first quarter 1998 earnings fell far short of Wall Street's expectations. Although the collapse of Sunbeam's first quarter earnings was another material fact, that information was not disclosed to CPH or the public until after the closing of the Coleman transaction on March 30, 1998. *See* Complaint ¶ 71.

P. Morgan Stanley Allows The Debenture Offering And The Coleman Acquisition To Close (March 25-30, 1998).

Having directly participated in misleading CPH and other investors, Morgan Stanley had a duty to disclose the true facts before the closing of the debenture offering and the Coleman acquisition. Morgan Stanley also could have required Sunbeam to postpone the closings of those transactions until the necessary disclosures were made. Morgan Stanley did neither. Instead, Morgan Stanley marched forward and closed the \$750 million debenture offering on March 25, 1998, which was needed to consummate the Coleman transaction, and assisted Sunbeam in closing the acquisition of Coleman on March 30, 1998. *See* Complaint ¶ 72.

Morgan Stanley was richly rewarded for directly facilitating Sunbeam's fraud. Among other things, Morgan Stanley received \$22.5 million for the subordinated debenture offering and \$10.28 million for the Coleman acquisition. Morgan Stanley would have received nothing if the transactions had failed to close. *See* Complaint ¶ 73.

Q. Sunbeam's Fraudulent Scheme Begins To Unravel, Causing The Market Value Of Sunbeam's Stock To Plummet.

On April 3, 1998 — just four days after the Coleman transaction closed — Sunbeam announced that sales for the first quarter of 1998 would be approximately 5% below the \$253.4 million in sales that Sunbeam reported in the first quarter of 1997. In other words, Sunbeam was expecting sales in the range of \$240 million. That sales shortfall was shocking news, particularly

in view of assurances provided by Sunbeam both in and after its March 19, 1998 press release that \$285 million to \$295 million of sales was still a real possibility. The April 3, 1998 press release also disclosed for the first time that Sunbeam would fall far short of Wall Street's earnings estimates and, in fact, now expected to show a loss for the quarter. Sunbeam's news stunned CPH and the market. On April 3, Sunbeam's stock price dropped 25% — from \$45-9/16 to \$34-3/8. *See* Complaint ¶ 74.

Sunbeam's actual first quarter 1998 performance was even worse than Sunbeam disclosed on April 3, 1998. The April 3 press release indicated that Sunbeam's first quarter sales were in the range of \$240 million. In fact, Sunbeam's first quarter sales were \$224.5 million. Sunbeam obscured the true shortfall by extending its quarter from March 29 to March 31, 1998 — thereby adding two more days of Sunbeam sales. Sunbeam also failed to disclose that it had included two days of Coleman sales due to the closing of the Coleman transaction on March 30. And even the \$224.5 million sales figure was inflated by \$29 million of new phony "bill and hold" sales. *See* Complaint ¶ 75.

Just as Sunbeam's first quarter 1998 sales had been a disaster, so, too, were Sunbeam's first quarter 1998 earnings. Morgan Stanley and Sunbeam had represented to CPH that Sunbeam would achieve or exceed analyst first quarter 1998 earnings estimates. At the time of that representation, the consensus among analysts was that Sunbeam would enjoy first quarter 1998 earnings of \$0.33 per share. However, on May 9, 1998, Sunbeam disclosed that it would record a first quarter loss of \$0.09 per share (excluding one-time charges) — more than \$0.40 per share lower than CPH had been told to expect. *See* Complaint ¶ 76.

Within weeks, Dunlap's fraudulent scheme began to unravel. In June 1998, after a number of news articles critical of Sunbeam's practices, Sunbeam's Board of Directors launched an internal investigation. That investigation led quickly to the firing of Dunlap and Kersh, and, subsequently, to a restatement of Sunbeam's financial statements for 1996, 1997, and the first quarter of 1998. *See* Complaint ¶ 77.

R. The Defrauders Are Brought To Justice.

As observed above, the Sunbeam fraud has resulted in dozens of lawsuits in this State, and

many of the responsible actors have been required to answer for their involvement in the wrongdoing as a result. In this case, CPH seeks to hold Morgan Stanley accountable for its involvement in the same fraud.

Argument

I. **Morgan Stanley Has Shown No Reason Why This Court Should Exercise Its Discretion To Dismiss This Case On *Forum Non Conveniens* Grounds.**

Morgan Stanley has shown no reason why this Court should decline to exercise its jurisdiction and instead dismiss this case on *forum non conveniens* grounds. A court that has been asked to dismiss a complaint on *forum non conveniens* grounds must conduct the following four-part inquiry (*Kinney Sys., Inc. v. Cont'l Ins. Co.*, 674 So. 2d 86, 90 (Fla. 1996) (citation omitted, emphasis in original)):

“(1) As a prerequisite, the court must establish whether an adequate alternative forum exists which possesses jurisdiction over the whole case. (2) Next, the trial judge must consider all relevant factors of *private* interest, weighing in the balance a strong presumption against disturbing plaintiffs’ initial forum choice. (3) If the trial judge finds this balance of private interest in equipoise or near equipoise, he must then determine whether or not factors of *public* interest tip the balance in favor of a trial in [another] forum. (4) If he decides that the balance favors such a . . . forum, the trial judge must finally ensure that plaintiffs can reinstate their suit in the alternative forum without undue inconvenience or prejudice.”

Accord Fla. R. Civ. P. 1.061. Here, the first factor is not an issue because a New York court would possess jurisdiction over the whole case, and the fourth factor also is not an issue because a party seeking a *forum non conveniens* dismissal is automatically deemed to stipulate that the filing date of the action in the new forum will be treated as the same as the filing date of the Florida action, thereby avoiding questions relating to the statute of limitations. *See* Fla. R. Civ. P. 1.061(c). The other two factors, however, clearly preclude dismissal of this case on *forum non conveniens* grounds.

A. **The Private Interest Favors CPH’s Venue Choice.**

This lawsuit, as Morgan Stanley has admitted, centers on Florida events. The relevant factors of private interest, far from overcoming the presumption against disturbing CPH’s choice of Florida as the forum for this lawsuit, affirmatively favor CPH’s venue selection. Although Morgan Stanley now pretends otherwise, this case centers on events that occurred in Florida. Indeed, Morgan

Stanley and its sister company, MSSF, contended as much in pleadings filed earlier in this litigation. *See Fla. Stat. § 90.202(6) (2003) (court documents are subject to judicial notice).* MSSF, which is represented by the same counsel as Morgan Stanley, filed its complaint against CPH and another defendant here in this State and Country. In that complaint, MSSF admitted that venue is proper in this State and County pursuant to Fla. Stat. § 47.051 and that personal jurisdiction over CPH and the other defendant is present “because the cause of action arises out of Defendants’ activities in the State.” *See MSSF Complaint, ¶¶ 13-14 (emphasis added).* That is a telling admission because Morgan Stanley asserted in the brief that it filed in support of the instant motion that this case and the MSSF lawsuit “involve common facts” (MS Mem. 17 n.11), and also asserted in an earlier motion that this case and the MSSF lawsuit “involve the same series of financial transactions, involve a common set of operative facts, and will require the Court to consider and resolve . . . substantially similar legal issues.” *See MS 5/23/03 / Motion ¶ 3.* Those binding admissions confirm the appropriateness of CPH’s choice of forum.

Many important non-party witnesses live in Florida. The private interest also weighs heavily in favor of this case staying in Florida because many important non-party witnesses reside in Florida. Those witnesses, whose roles in this case for the most part are detailed in the allegations of the complaint just summarized, include former Sunbeam directors, executives, and employees; former Arthur Andersen partners and employees; and former First Union National Bank employees.

A partial list of non-party witnesses who have Florida residences include the following:

- Albert Dunlap, the former Chairman and CEO of Sunbeam who hired Morgan Stanley to assist Sunbeam with the sale of the company or the acquisition of other companies. Dunlap maintains a residence in Boca Raton, Florida.
- David Fannin, the former Vice President, Secretary, and General Counsel of Sunbeam who was intimately involved with Morgan Stanley’s work over the course of the entire transaction. Fannin maintains a residence in Fort Lauderdale, Florida.
- Donald Denkhaus, a former Arthur Andersen audit supervisor who worked on the 1998 Restatement investigation. Denkhaus maintains a residence in Miami, Florida.
- Richard Goudis, the former Vice President of Investor Relations and Corporate Planning at Sunbeam who worked with Morgan Stanley in developing the roadshow strategy that falsely represented Sunbeam’s financial condition. Goudis maintains a residence in Boca Raton, Florida.

- Lee Griffith, the former Vice President of Sales at Sunbeam who has knowledge of Sunbeam's "bill and hold" and "channel stuffing" practices. Griffith maintains a residence in Boca Raton, Florida.
- Russell Kersh, the former Vice Chairman and Chief Financial Officer at Sunbeam who teamed with Dunlap for over 15 years and played a key role in the Sunbeam "turnaround" fraud. Kersh maintains a residence in Boca Raton, Florida.
- Howard Kristol, a former outside director of Sunbeam when Albert Dunlap served as Chairman and CEO. Kristol maintains a residence in Boca Raton, Florida.
- Deborah MacDonald, the former Director of Corporate Planning and Director of Worldwide Strategy and Planning at Sunbeam who was responsible for forecasting Sunbeam's financial performance and providing financial information to Morgan Stanley. MacDonald maintains a residence in Boca Raton, Florida.
- Lawrence Bornstein, the former senior audit manager at Arthur Andersen who was involved in the due diligence for the subordinated debenture offering and confronted Morgan Stanley about the false statements in Sunbeam's March 19, 1998 press release. Bornstein maintains a residence in Lake Worth, Florida.
- Mark Brockelman, the former senior audit manager at Arthur Andersen who was involved in the due diligence for the subordinated debenture offering and was present when Lawrence Bornstein confronted Morgan Stanley about the false statements in Sunbeam's March 19, 1998 press release. Brockelman maintains a residence in Lake Worth, Florida.
- Philip Harlow, the former Sunbeam engagement partner at Arthur Andersen who worked with Lawrence Bornstein on the subordinate debenture offering and comfort letters. Harlow maintains a residence in Fort Lauderdale, Florida.
- Vance Kistler, a former financial auditor at Arthur Andersen who worked on the 1997 audit of Sunbeam. Kistler maintains a residence in Boca Raton, Florida.
- Dennis Pastrana, the former senior audit partner and senior accountant at Arthur Andersen who worked with Lawrence Bornstein on the subordinated debenture offering and physically monitored Sunbeam's practices on shipping docks on the eve of the close of the first quarter of 1998. Pastrana maintains a residence in Miami, Florida.
- William Pruitt, the former senior audit partner at Arthur Andersen and concurring partner on the subordinated debenture offering and comfort letters. Pruitt maintains a residence in Miami, Florida.
- M. Walker Duvall, the former Senior Vice President of Corporate Banking at First Union National Bank, a financial institution that was part of a group of lenders that provided financing to Sunbeam in conjunction with the acquisitions. Duvall maintains a residence in Boca Raton, Florida.
- William Rutter, a former Senior Vice President at First Union National Bank and former outside director of Sunbeam. Rutter maintains a residence in Lighthouse Point, Florida.

See Exh. A (Declaration of Christopher M. O'Connor attesting to the sources of the foregoing addresses); see also *Safety Nat'l Cas. Corp. v. Florida Mun. Ins. Trust*, 818 So. 2d 612, 613 (Fla. 5th DCA 2002) (recognizing use of declarations in connection with *forum non conveniens* motions). The only way to ensure that those important non-party witnesses will be available to testify in person at trial is to have the case pending here.

There are, as Morgan Stanley undoubtedly will emphasize in its reply, some potential trial witnesses who live and work in New York. But virtually without exception, those witnesses are employed by the parties or are lawyers or agents for the parties. Those witnesses, who are under the control of the parties, will appear to testify no matter where the trial occurs. So what matters for purposes of Morgan Stanley's motion are the Dunlaps, the Kersh, the Bornsteins, and the Fannins of the world — key witnesses who cannot be compelled to appear at trial outside their home state. It is beyond serious dispute that the vast majority of those witnesses reside in Florida and can be compelled to testify at trial only if the trial takes place here.

The numerous Florida contacts favor Florida. The appropriateness of a Florida court to hear this lawsuit is underscored by the significant number of Florida contacts to this dispute. Those contacts, which Morgan Stanley simply ignores, are evidenced by documents produced in this litigation and by sworn testimony in related litigation. Those contacts include the following:

- On or about April 22, 1997, Morgan Stanley personnel traveled to Delray Beach, Florida to meet with Albert Dunlap and Russell Kersh at Sunbeam's headquarters to discuss the retention of Morgan Stanley as financial advisor to Sunbeam.
- On or about July 18, 1997, Morgan Stanley personnel participated in a conference call with Russell Kersh, who was in Florida, concerning synergies that could result from various potential business combinations.
- On or about July 21, 1997, Morgan Stanley personnel participated in a conference call with Sunbeam personnel, who were located in Florida, concerning possible business combination synergies.
- On or about July 24, 1997, Morgan Stanley personnel met in Florida with Albert Dunlap and Russell Kersh to discuss strategic alternatives for Sunbeam.
- On or about August 8, 1997, Morgan Stanley personnel met with Sunbeam personnel in Florida to discuss potential acquisition candidates.

- On or about September 5, 1997, Morgan Stanley sent an engagement letter to Sunbeam's Florida offices leading to Morgan Stanley's sale, merger, and acquisition work for Sunbeam.
- On or about September 11, 1997, Morgan Stanley personnel sent discussion materials to Sunbeam's Florida offices regarding an overview of the proposed selling process.
- On or about September 18, 1997, Morgan Stanley personnel sent to Sunbeam's Florida offices a draft of an informational memorandum for Sunbeam's review.
- On or about September 19, 1997, William Strong of Morgan Stanley sent Albert Dunlap in Florida a letter seeking an amendment to the September 5, 1997 engagement letter between Sunbeam and Morgan Stanley.
- On or about September 22, 1997, Morgan Stanley personnel met with Sunbeam personnel in Florida in connection with Morgan Stanley's work for Sunbeam.
- On or about September 23 and 24, 1997, Morgan Stanley personnel conducted due diligence of Sunbeam at Sunbeam's offices in Florida.
- On or about October 9, 1997, Morgan Stanley personnel sent briefing materials to Russell Kersh and David Fannin in Florida.
- On October 23, 1997, Sunbeam issued a press release from its headquarters in Florida announcing the retention of Morgan Stanley to serve as Sunbeam's financial advisor in exploring strategic alternatives.
- On or about October 29, 1997, Morgan Stanley personnel conducted due diligence of Sunbeam at Sunbeam's offices in Florida.
- On or about December 11, 1997, James Stynes of Morgan Stanley sent to Sunbeam's Florida offices preliminary discussion materials regarding a potential transaction involving Coleman.
- On or about December 16, 1997, Morgan Stanley personnel sent a fax to Sunbeam's Florida offices containing documents concerning a potential transaction involving Coleman and Sunbeam.
- On or about December 18, 1997, Albert Dunlap, Michael Price, Ronald Perelman, and Howard Gittis met in Florida to discuss a potential transaction involving Sunbeam and Coleman.
- On or about December 24, 1997, Morgan Stanley personnel sent a memorandum to Sunbeam's offices in Florida attaching documents concerning durable consumer product companies.
- On or about January 5, 1998, Morgan Stanley personnel met with Sunbeam personnel in Florida in connection with Morgan Stanley's work for Sunbeam.
- On or about January 15, 1998, Morgan Stanley personnel participated in a conference call with Russell Kersh, who was in Florida, concerning updates on project status and organizational issues.

- On or about January 20, 1998, Morgan Stanley personnel conducted a conference call with Sunbeam personnel, who were in Florida, concerning potential buyers and acquisition targets.
- On or about January 26, 1998, Morgan Stanley personnel faxed materials to Russell Kersh in Florida involving a potential transaction between Sunbeam and Coleman.
- On or about February 2, 1998, Morgan Stanley personnel faxed a document concerning income projections for Coleman and Sunbeam to Sunbeam's Florida offices.
- On or about February 2, 1998, Morgan Stanley personnel participated in a conference call with Sunbeam personnel, who were in Florida, in connection with Morgan Stanley's work for Sunbeam, including work relating to the Coleman transaction.
- On or about February 3, 1998, Sunbeam personnel met with an Arthur Andersen representative at Sunbeam's Florida offices in connection with the Coleman transaction.
- On or about February 5, 1998, Morgan Stanley personnel participated in a conference call with Sunbeam personnel, who were in Florida, in connection with Morgan Stanley's work for Sunbeam, including work relating to the Coleman transaction.
- On or about February 20, 1998, Morgan Stanley personnel faxed to Sunbeam's Florida offices proposed summary transaction terms and information on the public relations firm Sard Verbinnen & Co.
- Sunbeam's March 2, 1998 press release announcing the Coleman transaction, which Morgan Stanley was instrumental in putting together, was issued out of Sunbeam's Florida offices.
- On or about March 4 and 5, 1998, Morgan Stanley personnel conducted due diligence at Sunbeam's Florida offices.
- On or about March 5, 1998, John Tyree of Morgan Stanley attended a drafting session in Florida in connection with the subordinated debenture offering.
- On March 5, 1998, Morgan Stanley personnel met at Sunbeam's offices in Delray Beach, Florida in connection with Morgan Stanley's work for Sunbeam on the Coleman transaction.
- On or about March 5, 1998, Morgan Stanley personnel issued to Sunbeam in Florida a "highly confident" letter concerning the financing of the Coleman transaction.
- On or about March 11, 1998, Morgan Stanley personnel sent a letter to Arthur Andersen in Florida requesting a "comfort letter" for the subordinated debenture offering.
- On or about March 11, 1998, Morgan Stanley personnel faxed to Deborah MacDonald in Florida pro forma financial information concerning Sunbeam's acquisitions.

- On or about March 12, 1998, Morgan Stanley personnel conducted an accounting due diligence conference call regarding Sunbeam's financial circumstances with Arthur Andersen personnel, who were in Florida.
- On or about March 18, 1998, Sunbeam personnel in Florida faxed to Morgan Stanley information showing that Sunbeam's first quarter 1998 sales were less than half of Sunbeam's January and February 1997 sales.
- On March 18, 1998, Morgan Stanley personnel participated in one or more conference calls with Sunbeam personnel, who were in Florida, concerning Sunbeam's first quarter 1998 sales and the issuance of a press release.
- Sunbeam's March 19, 1998 press release was issued from Sunbeam's offices in Florida.
- On or about March 19, 1998, Arthur Andersen's Fort Lauderdale office issued a "comfort letter" to Morgan Stanley.
- Lock Up Letters concerning restrictions on Sunbeam stock signed by Charles Elson, Howard Kristol, Faith Whittlesey, William Rutter, and Donald Uzzi were faxed from Sunbeam's offices in Florida.
- On or about March 23, 1998, John Tyree of Morgan Stanley faxed a memorandum concerning bring-down due diligence to Sunbeam in Florida.
- On or about March 24, 1998, John Tyree of Morgan Stanley spoke by telephone with Russell Kersh, who was in Sunbeam's Florida offices, concerning due diligence.
- On or about March 25, 1998, Arthur Andersen's Fort Lauderdale office issued a "comfort letter" to Morgan Stanley.
- On or about March 31, 1998, Morgan Stanley sent to Sunbeam's Florida offices a \$9.6 million invoice for services performed for Sunbeam.
- William Strong of Morgan Stanley testified that it is possible that he had between 50 and 100 telephone conversations with Albert Dunlap and Russell Kersh between December 1997 and April 1998 in connection with Morgan Stanley's work for Sunbeam.
- Morgan Stanley's counsel in connection with the subordinated debenture offering, Davis Polk & Wardwell, faxed, mailed, or caused to be delivered by other means correspondence, documents, and other communications to Sunbeam's offices in Florida.

See Exh. A (Declaration of Christopher M. O'Connor attesting to the sources of the foregoing contacts).

Morgan Stanley, in its responses to interrogatories, has confirmed the extensive contacts that its personnel had with Florida. See MS Resp. to Int. No. 9. When Morgan Stanley was asked which of its personnel communicated in writing or by e-mail, telecopy, or overnight courier with

individuals in Florida concerning the Sunbeam matter, Morgan Stanley stated in its interrogatory responses that it would be “unduly burdensome” to provide that information. *See* MS Resp. to Int. No. 10. The reason it supposedly is “unduly burdensome” for Morgan Stanley to respond is plain: Morgan Stanley personnel had countless contacts with individuals in Florida regarding the Sunbeam matter.

Morgan Stanley, in its responses to requests for admission, further confirmed that there were significant and numerous Florida contacts with this case. Although Morgan Stanley’s admissions in that regard are too numerous to list here, the following is a sampling of instances in which Morgan Stanley admitted Florida’s connection to the key events giving rise to this case, to the individuals involved in those events, and to the many lawsuits arising from the Sunbeam fraud:

- admitting that Morgan Stanley has an office in Florida and that Morgan Stanley DW has multiple branch offices in Florida (Resp. No. 1).
- admitting that at the time of the Coleman transaction Morgan Stanley had an office in Florida and that Morgan Stanley DW had several branch offices in Florida (Resp. No. 2).
- admitting that at the time of the Coleman transaction Sunbeam’s principal place of business was located in Delray Beach, Florida (Resp. No. 59).
- admitting that Sunbeam personnel and representatives involved with the Coleman transaction had offices in Florida (Resp. No. 60).
- admitting that at the time of the Coleman transaction Albert Dunlap, the former CEO of Sunbeam, worked at Sunbeam’s headquarters in Florida (Resp. No. 61).
- admitting that at the time of the Coleman transaction Philip Harlow worked for Arthur Andersen in Florida (Resp. No. 105).
- admitting that at the time of the Coleman transaction Lawrence Bornstein worked for Arthur Andersen in Florida (Resp. No. 108).
- admitting that Morgan Stanley conducted business in Florida with Sunbeam in connection with the Coleman transaction (Resp. No. 129).
- admitting that MSSF conducted business with Sunbeam in Florida in connection with the Coleman transaction (Resp. No. 130).
- admitting that Morgan Stanley conducted due diligence in Florida in connection with the Coleman transaction (Resp. No. 131).
- admitting that MSSF conducted due diligence in Florida in connection with the Coleman transaction (Resp. No. 132).

- admitting that Morgan Stanley conducted due diligence in Florida in connection with the Subordinated Debenture Offering (Resp. No. 143).
- admitting that MSSF conducted due diligence in Florida in connection with the Subordinated Debenture Offering (Resp. No. 144).
- admitting that Morgan Stanley conducted due diligence in Florida in connection with the Bank Facility (Resp. No. 155).
- admitting that MSSF conducted due diligence in Florida in connection with the Bank Facility (Resp. No. 156).
- admitting that Morgan Stanley personnel met with Sunbeam on two occasions between July and August 1997 in Sunbeam's Florida offices (Resp. No. 172).
- admitting that on or about September 22, 1997 Morgan Stanley personnel or representatives met with Sunbeam personnel or representatives in Florida in connection with Morgan Stanley's work for Sunbeam (Resp. No. 179).
- admitting that on or about September 23 and 24, 1997 Morgan Stanley personnel or representatives conducted due diligence at Sunbeam's offices in Florida (Resp. No. 180).
- admitting that on or about October 29, 1997 Morgan Stanley personnel or representatives conducted due diligence at Sunbeam's offices in Florida (Resp. No. 185).
- admitting that on or about January 5, 1998 Morgan Stanley personnel or representatives met with Sunbeam personnel or representatives in Florida in connection with Morgan Stanley's work for Sunbeam (Resp. No. 191).
- admitting that on or about March 4, 1998 Morgan Stanley personnel or representatives conducted due diligence at Sunbeam's Florida offices (Resp. No. 209).
- admitting that on or about March 4, 1998 MSSF personnel or representatives conducted due diligence at Sunbeam's Florida offices (Resp. No. 210).
- admitting that on or about March 5, 1998 Morgan Stanley personnel or representatives conducted due diligence at Sunbeam's Florida offices (Resp. No. 211).
- admitting that on or about March 5, 1998 MSSF personnel or representatives conducted due diligence at Sunbeam's Florida offices (Resp. No. 212).
- admitting that on or about March 5, 1998 John Tyree of Morgan Stanley attended a drafting session in Florida in connection with the Subordinated Debenture Offering (Resp. No. 214).

- admitting that on March 5, 1998 John Tyree, Andrew Savarie, Bram Smith, Ishaan Seth, Thomas Burchill, and Michael Hart, all of Morgan Stanley, met at Sunbeam's offices in Delray Beach, Florida in connection with Morgan Stanley's work for Sunbeam (Resp. No. 220).
- admitting that several lawsuits were transferred to or coordinated with the federal case entitled *In re Sunbeam Securities Litigation* in Florida (Resp. No. 254).
- admitting that CPH sued Arthur Andersen and Philip Harlow in state court in Florida in the case entitled *Coleman (Parent) Holdings Inc. v. Arthur Andersen LLP and Philip Harlow* (Resp. No. 280).

The foregoing admissions are just the tip of the iceberg. All told, although Morgan Stanley struggled mightily in its responses to avoid conceding any Florida nexus, Morgan Stanley admitted Florida's connection to the key events and parties involved in this case in response to 113 separate requests for admission. *See id.*; *see also* Resp. Nos. 10, 44, 45, 47, 49, 57, 58, 62, 63, 64, 65, 66, 67, 68, 69, 70, 94, 102, 103, 104, 111, 114, 117, 127, 133, 134, 137, 138, 139, 140, 141, 142, 145, 146, 149, 150, 151, 152, 153, 154, 157, 158, 178, 184, 207, 213, 215, 216, 217, 218, 219, 226, 229, 233, 236, 237, 238, 239, 240, 243, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279.

Insofar as Morgan Stanley asserts that it conducted a number of its activities from New York, that assertion is beside the point because as an active co-conspirator in the fraudulent activities occurring in this State (as alleged in Count III of the complaint), Morgan Stanley most certainly could expect to be haled into Florida to answer for its conduct. *See Execu-Tech Bus. Sys., Inc. v. New Oji Paper Co.*, 752 So. 2d 582, 585 (Fla. 2000) (personal jurisdiction exists over co-conspirator, even if co-conspirator's conduct was all out-of-state, if that conduct was in aid of a tortious act occurring in this State); *see also Acquadro v. Bergeron*, 851 So. 2d 665, 670 (Fla. 2003) (“telephonic, electronic, or written communications into Florida may form the basis for personal jurisdiction . . . if the alleged cause of action arises from the communications”) (quoting *Wendt v. Horowitz*, 822 So. 2d 1252, 1260 (Fla. 2002)). So the private interest, far from tipping the balance in favor of another forum, strongly favors this case staying here in Florida — where MSSF, Morgan Stanley's sister company, itself has filed suit.

B. The Public Interest Also Favors This Case Staying In Florida.

This Court need address the public interest only if the competing private interests are in equipoise. As shown above, that is not the case: the private interests plainly favor keeping this lawsuit in Florida, along with the lawsuit that MSSF filed here. Nonetheless, were the Court to evaluate the public interest, it is clear that the public interest also favors keeping this litigation in Florida. As set forth above, at least two-dozen cases arising from the Sunbeam fraud have been litigated in this State. The fact that many Sunbeam cases have been adjudicated in this State and County demonstrates that the public interest weighs in favor of this litigation staying here in Florida. *See Pafco Gen. Ins. Co. v. Wah-Wai Furniture Co.*, 701 So. 2d 902, 904 (Fla. 3d DCA 1997) (rejecting *forum non conveniens* argument, observing that “[l]itigation of related claims in the same tribunal is favored in order to avoid duplicative litigation, attendant unnecessary expense, loss of time to courts, witnesses and litigants, and inconsistent results”) (citations omitted).

C. Morgan Stanley’s Arguments Are Unavailing.

The additional points cited by Morgan Stanley are neither among the factors recognized by Florida law nor otherwise sufficient to warrant a *forum non conveniens* dismissal. *See* MS Mem. 16-17. With respect to Morgan Stanley’s choice of law point, Morgan Stanley’s motion should be denied without further inquiry if this Court decides that Florida law applies (the choice of law question is addressed in Section II below), because Morgan Stanley stakes virtually its entire *forum non conveniens* argument on the assumption that New York law applies. But even if New York law were to apply to the claims in this case, which it does not, that would not be sufficient to warrant a *forum non conveniens* dismissal given all of the private and public interests favoring this case remaining here, and given that Florida courts regularly apply the laws of other states without relinquishing their virtually unflagging obligation to exercise jurisdiction over lawsuits filed here. *See* 12A Fla. Jur. 2d, *Courts and Judges* § 71 (1998) (“a court cannot improperly refuse to exercise jurisdiction once it has been shown to exist”).

With respect to Morgan Stanley’s argument about the supposed “unfairness” of imposing jury duty on Florida residents and this Court’s “busy docket,” Morgan Stanley’s argument is meritless.

The Sunbeam fraud is a Florida-based fraud, which has been adjudicated in Florida courts time and again, so Florida residents have a strong interest in the resolution of the matters involved here. And although this Court's docket undoubtedly is very busy, Morgan Stanley has not shown that New York courts are any less busy, or that it is ever permissible for a court to decline jurisdiction on the ground of overwork.

In sum, Morgan Stanley has not begun to make the strong showing that it must to demonstrate the propriety of a *forum non conveniens* dismissal. Consequently, Morgan Stanley's motion to dismiss on that ground should be denied.

II. Florida Law, Not New York Law, Applies In Determining Whether CPH's Claims Are Actionable For Purposes Of Morgan Stanley's Motion For Judgment On The Pleadings.

Morgan Stanley's brief begins with a consideration of which substantive law this Court should apply in adjudicating Morgan Stanley's motion for judgment on the pleadings, which Morgan Stanley filed two days after it answered CPH's complaint. The parties dispute the answer to that question, with Morgan Stanley arguing that New York law governs, and CPH arguing that Florida law applies. CPH, as is demonstrated below, is correct.

A. Florida Has The Most Significant Relationship To This Dispute.

Florida law, contrary to Morgan Stanley's contention, applies to this Florida-initiated fraud centering on a large Florida corporation. That conclusion is confirmed by applying the choice of law rule adopted by the courts of this State, the "most significant relationship" test of the *Restatement (Second) of Conflict of Laws*. See *Bishop v. Florida Specialty Paint Co.*, 389 So. 2d 999, 1001 (Fla. 1980); see also *Restatement (Second) of Conflict of Laws* § 6 (1971). Morgan Stanley acknowledges Florida's adoption of the *Restatement*, but then proceeds (MS Mem. 10) to make an argument under *Restatement* § 148(1), which is the wrong section. That section is confined to situations where all of the plaintiff's actions in reliance on the purported representations took place in the same state where the false representations were made and received. As CPH's complaint and Morgan Stanley's own arguments establish, Morgan Stanley's fraudulent actions and CPH's reliance took place in at least two states: primarily in Florida, but also in New York. See, e.g., Complaint ¶¶ 36-44; MS

Mem. 10-12. As a result, the governing choice of law test is *Restatement* § 148(2), which provides:

(2) When the plaintiff's action in reliance [on the defendant's false representations] took place in whole or in part in a state other than that where the false representations were made, the forum will consider such of the following contacts . . . as may be present . . .

- (a) the place, or places, where the plaintiff acted in reliance upon the defendant's representations,
- (b) the place where the plaintiff received the representations,
- (c) the place where the defendant made the representations,
- (d) the domicile, residence, nationality, place of incorporation and place of business of the parties,
- (e) the place where a tangible thing which is the subject of the transaction between the parties was situated at the time, and
- (f) the place where the plaintiff is to render performance under a contract which he has been induced to enter by the false representations of the defendant.

The first Comment to *Restatement* § 148(2) further elaborates that the choice of law inquiry under § 148(2) should be undertaken in light of the "most significant relationship" principles of *Restatement* § 6. See *Restatement (Second) of Conflict of Laws* § 148, cmt. e (1971); see also *id.* § 6 (providing that factors relevant to choice of law include "(a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of the states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied").

Indeed, although Morgan Stanley attempts to portray the choice of applicable law as essentially preordained under *Restatement* § 148(1), the truth is that the search for the state with the most significant relationship must be conducted under § 148(1) (emphasis added):

When the plaintiff has suffered pecuniary harm on account of his reliance on the defendant's false representations and when the plaintiff's action in reliance took place in the state where the false representations were made and received, the local law of this state determines the rights and liabilities of the parties unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.

The underscored language, which Morgan Stanley surprisingly omits from its quotation of

Restatement § 148(1), confirms that the choice of law inquiry under § 148(1), like the inquiry under § 148(2), requires an evaluation of which state has the most significant relationship to the claim.

When determining which state has the most significant relationship to a misrepresentation claim, courts consider the location of the place where the fraud was “initiated and perpetuated.” *Tew v. Chase Manhattan Bank, N.A.*, 728 F. Supp. 1551, 1563-64 (S.D. Fla. 1990). In *Tew*, for example, the court rejected a New York bank’s contention that New York law governed and instead applied Florida law because the fraud “was centered” at the Fort Lauderdale office of the corporation where “the former officers and directors initiated and perpetrated the fraud.” *Id.* at 1563. The court observed that, “[g]ranted the injury [at issue] encompassed victims around the nation, including New York.” *Id.* at 1564. But that did not alter the fact that “the locus of the harm was in Florida.” *Id.* Given Florida’s “interest in punishing fraudulent actions committed by corporate entities and principals doing business here” — and given that “Chase Manhattan was contacted from Florida via written correspondence and telephone calls” and that Chase also sent two of its employees to Florida on one occasion — the court rejected Chase’s argument and held that “Florida has the most significant relationship to the fraudulent activities at issue.” *Id.* at 1564-65.

Here, despite Morgan Stanley’s attempts to invoke the wrong section of the *Restatement* and then to quote selectively from it, as is demonstrated below, Florida has the most significant relationship to the fraudulent scheme giving rise to CPH’s claims against Morgan Stanley.

1. The complaint allegations, which must be accepted as true at this stage, establish that Florida has the most significant relationship to this dispute.

The allegations of CPH’s complaint reveal numerous Florida contacts such as the following:

First, the financial information that was obscured, manipulated, and altered by Morgan Stanley originated in Florida. *See* Complaint ¶¶ 49, 54, 57, 67-71. The truth regarding Sunbeam’s poor financial performance — which Morgan Stanley worked so effectively to hide from CPH and the public — was communicated in telephone calls and facsimile messages sent from Florida. *See* Complaint ¶¶ 54, 57, 67-71.

Second, Florida was the source of one of the biggest misrepresentations giving rise to CPH's claims — the false March 19, 1998 press release that was revised and approved by Morgan Stanley. *See* Complaint ¶¶ 59-62. The false press release prevented CPH from exercising its right to avoid closing its transaction by concealing Florida-based Sunbeam's horrendous first quarter collapse. *See* Complaint ¶¶ 59-62.

Third, Florida was the locus of the complicated campaign of deceit orchestrated by Morgan Stanley and Florida-based Sunbeam. The claims at issue are centered around a massive fraud perpetrated by a Florida corporation, arising from misrepresentations regarding the performance of a Florida corporation. *See* Complaint ¶¶ 1, 31, 37, 54.

In addition, the complaint catalogues numerous other Florida contacts, including the following:

- “Morgan Stanley put together a team headed by its Vice Chairman, Bruce Fiedorek, and [William] Strong. Beginning in April 1997, Morgan Stanley's personnel traveled to Sunbeam's offices in Delray Beach, Florida to study Sunbeam and woo Dunlap. After months of uncompensated work, in September 1997, Morgan Stanley finally persuaded Dunlap to name Morgan Stanley as Sunbeam's exclusive investment banker. Dunlap instructed Morgan Stanley to find a buyer for Sunbeam.” *See* Complaint ¶ 31.
- “Morgan Stanley laid the groundwork for a meeting to take place in December 1997 in Palm Beach, Florida between Dunlap and Kersh and representatives of CPH. In advance of the Palm Beach meeting, Morgan Stanley provided materials to Sunbeam to prepare Sunbeam for the meeting. Morgan Stanley also met with Kersh and other Sunbeam personnel to prepare for the Palm Beach meeting.” *See* Complaint ¶ 37.
- “On March 17, Sunbeam's auditors forced the issue. From their Florida offices, Sunbeam's auditors sent Morgan Stanley a letter reporting that Sunbeam's net sales through January 1998 were down 60% — \$28 million in January 1998, as compared to \$73 million in January 1997. The March 17 letter explained that the decline was ‘primarily due to the . . . new early buy program for grills which accelerated grill sales into the fourth quarter of fiscal 1997.’” *See* Complaint ¶ 56.
- “The next day, Morgan Stanley was faxed a schedule from Sunbeam's Florida office that showed that Sunbeam's January and February 1998 net sales totaled \$72 million, an amount that was 50% lower than Sunbeam's January and February 1997 net sales of \$143.5 million.” *See* Complaint ¶ 57.
- “[W]ith Morgan Stanley's knowledge and assistance, Sunbeam prepared and issued a false press release on March 19, 1998 [from Delray Beach, Florida] that affirmatively misstated and concealed Sunbeam's true condition.” *See* Complaint ¶ 59.

- “Sunbeam . . . was a publicly-traded company headquartered in Delray Beach, Florida.” *See* Complaint ¶ 10.
- “Dunlap still resides in Boca Raton, Florida.” *See* Complaint ¶ 11.
- “Upon information and belief, Kersh still resides in Boca Raton, Florida.” *See* Complaint ¶ 12.
- “Arthur Andersen LLP (‘Andersen’) provided outside accounting services to Sunbeam through its West Palm Beach, Florida office. Andersen auditors provided information concerning Sunbeam’s first quarter 1998 sales and earnings to Morgan Stanley. Upon information and belief, several of the Andersen auditors who provided information to Morgan Stanley concerning Sunbeam, including Lawrence Bornstein, still reside in Florida.” *See* Complaint ¶ 13.
- “Dunlap lived in Boca Raton, Florida, and one of his first tasks at Sunbeam was to consolidate the company’s six headquarters into one located in Delray Beach, Florida.” *See* Complaint ¶ 17.
- “Although Morgan Stanley initially planned to sell \$500 million worth of debentures, Morgan Stanley’s efforts were so successful that the size of the offering was increased to \$750 million on March 19, 1998 — the day of the last road show. The debentures were sold to investors nationwide, including investors based in Florida.” *See* Complaint ¶ 52.
- “Morgan Stanley . . . had been working hand-in-hand with Sunbeam for almost a year and had traveled to Sunbeam’s Florida offices” *See* Complaint ¶ 53.
- “Strong, who was one of the senior Morgan Stanley investment bankers involved, has admitted in sworn testimony that he may have had more than 100 telephone conversations with Dunlap and Kersh (whose offices were in Sunbeam’s Delray Beach headquarters) and that Strong was ‘sure’ that he would have been apprised of Sunbeam’s financial performance during the first two months of 1998.” *See* Complaint ¶ 54.
- “With the \$750 million debenture offering and the Coleman transaction set to close at the end of March 1998, Sunbeam’s Florida-based outside auditors were shocked that Morgan Stanley had not asked them about Sunbeam’s financial performance for first quarter 1998. Sunbeam’s auditors were alarmed because Sunbeam’s first quarter results were a disaster, but Dunlap, Kersh, and Morgan Stanley were telling CPH and the investing public, including investors in Florida, that Sunbeam’s turnaround was a success” *See* Complaint ¶ 55.
- “[O]n March 24, 1998, Morgan Stanley’s Tyree spoke by telephone with Sunbeam’s Kersh, who was located in Sunbeam’s Delray Beach offices, to obtain an updated report concerning Sunbeam’s first quarter performance.” *See* Complaint ¶ 70.

In sum, the complaint amply demonstrates that Florida has the most significant relationship to CPH’s claims.

2. Florida has a strong interest in the application of its law.

An independent reason why Florida law should govern CPH's claims is that Florida has a strong interest in the application of its law to this dispute. *See Tew*, 728 F. Supp. at 1564 (applying Florida law in part because Florida has an "interest in punishing fraudulent actions committed by corporate entities and principals doing business here"); *Restatement (Second) of Conflict of Laws* § 6 (1971) (additional choice of law factors to consider include "the relevant policies of the forum"). Many of the misrepresentations that caused CPH to deal with Florida-based Sunbeam occurred in Florida, and the misrepresentations were designed to obscure the truth about a Florida-based corporation's financial condition, so this Court has a strong interest in regulating the substantive claims in this Florida-centered fraud in accordance with Florida law. Indeed, given that at least 24 cases arising from the Sunbeam fraud have been adjudicated in this State, it is hard to imagine that a State could have a greater interest in bringing the actors in the Sunbeam fraud to justice in accordance with Florida law.

B. Morgan Stanley's Contention That New York Rather Than Florida Law Applies Is Without Merit.

In arguing that New York law applies to CPH's claims, not once does Morgan Stanley address any of the numerous Florida contacts just discussed, which establish Florida's most significant relationship to this dispute. Instead of addressing the complaint allegations — with one exception that does not remotely support its argument that New York law applies — Morgan Stanley bases its choice of law argument exclusively on a handful of declarations that supposedly catalogue the New York contacts with this dispute. *See MS Mem.* 10-12. The one exception is Morgan Stanley's glancing allusion to the Merger Agreement among Sunbeam, CPH, and others. *See MS Mem.* 11. Morgan Stanley, however, fails to disclose that the Merger Agreement expressly provides that it is governed by the law of Delaware. *See MS Answer*, Exh. 1, § 12.8. The Merger Agreement does not support the application of New York law.

As for the remainder of Morgan Stanley's argument, it is based entirely on declarations that are not part of the pleadings, and is therefore improper. Although declarations can be considered in

connection with a *forum non conveniens* motion, see *Safety Nat'l*, 818 So. 2d at 613, Morgan Stanley's use of declarations to argue the choice of law point in its motion for judgment on the pleadings violates two cardinal rules governing such motions:

First, in adjudicating Morgan Stanley's motion, this Court "must accept as true all well-pleaded allegations" of the complaint. See *Scarborough Assocs.*, 647 So. 2d at 1002. Morgan Stanley, however, has disregarded that rule.

Second, a motion for judgment on the pleadings "must be decided on the pleadings without reference to facts which may be properly considered under other procedural vehicles and without the aid of outside matters." See *Ray v. Elks Lodge No. 1870*, 649 So. 2d 292, 293 (Fla. 4th DCA 1995); see also *Forbes v. Gimbel*, 539 So. 2d 18, 19 (Fla. 1st DCA 1989) ("[O]nly the pleadings may be considered in ruling on a motion for judgment on the pleadings"); *Skubal v. Cooley*, 639 So. 2d 1126, 1126 (Fla. 4th DCA 1994) (a motion for judgment on the pleadings "must be decided on the pleadings, without reference to facts which may be properly considered under other procedural vehicles"); *Domres v. Perrigan*, 760 So. 2d 1028, 1029 (Fla. 5th DCA 2000) ("Matters extraneous to the pleadings are not considered" in adjudicating a motion for judgment on the pleadings). Morgan Stanley, in violation of that rule, bases its choice of law argument on declarations that are not part of the pleadings. These declarations must be disregarded by this Court in deciding the motion.

Because Morgan Stanley has chosen not to address the numerous Florida contacts alleged in the complaint, and instead has opted to rely on declarations that cannot be considered in connection with a motion for judgment on the pleadings, this Court need not address the choice of law issue any further. Florida substantive law governs the sufficiency of CPH's claims in this case.

In any event, the same conclusion would be required even if the declarations were fair game in undertaking the choice of law inquiry. As shown in Section I above, based on the complaint allegations — as supplemented by the declaration that CPH submitted in connection with Morgan Stanley's *forum non conveniens* motion, by Morgan Stanley's interrogatory responses, and by its response to requests to admit — it is clear that the Florida contacts are considerably more significant

than the New York contacts. Thus, because Florida has the most significant relationship to this dispute, Florida law governs.

III. If This Court Concludes That Florida Law Applies, The Court Should Deny Morgan Stanley's Motion For Judgment On The Pleadings Without Further Inquiry.

In the event this Court concludes that Florida substantive law applies to CPH's claims, this Court should deny Morgan Stanley's motion for judgment on the pleadings without reading another word beyond this section, because Morgan Stanley has staked its entire motion on its faulty assumption that New York law applies. With the exception of three vague references to Florida cases that lend no support to Morgan Stanley's arguments — two in footnotes on page 19 and the other following a New York law citation on page 34 — Morgan Stanley's 18-page explanation of why it supposedly is entitled to judgment on the pleadings is supported exclusively by citations to cases applying New York law. Morgan Stanley has not endeavored to show that Florida law is the same or similar, nor could Morgan Stanley credibly make that argument now, given that it has insisted that this Court undertake a detailed choice of law analysis, an analysis that would need to be undertaken only if the law that the movant wants to have applied is materially different from the law of the forum. *See Aetna Cas. & Sur. Co. v. Huntington Nat'l Bank*, 587 So. 2d 483, 486 (Fla. 4thDCA 1991) (where there was no real conflict between Florida law and the law of Ohio, Appellate Court concluded that Florida law properly was applied), *decision approved pursuant to Fla. Const. art. V, § 3(b)(4)*, 609 So. 2d 1315 (Fla. 1992). Morgan Stanley obviously has urged this Court to reject Florida law and to apply New York law instead because Morgan Stanley knows that it has absolutely no chance of succeeding if Florida law applies.

Morgan Stanley's neglect of Florida law in its motion for judgment on the pleadings is fatal. As the movant with the burden of persuasion, it is incumbent upon Morgan Stanley to demonstrate to this Court's satisfaction why it is entitled to judgment in its favor, with appropriate citations to the applicable law. Because Morgan Stanley's opening brief has provided no meaningful citation to Florida law, if this Court finds that Florida law applies to CPH's claims, this Court should deny that motion without further inquiry.

IV. Morgan Stanley's Motion For Judgment On The Pleadings Is Meritless No Matter What Law Applies.

Even if this Court considers the substance of Morgan Stanley's arguments, its motion for judgment on the pleadings should be denied because regardless of whether Florida or New York law applies, it is clear that CPH has stated actionable claims against Morgan Stanley. A party requesting judgment on the pleadings has a "heavy burden." *Covert v. South Florida Stadium Corp.*, 762 So. 2d 938, 939 (Fla. 3d DCA 2000). As the Appellate Court explained in *Scarborough Associates*, 647 So. 2d at 1002 (citation omitted):

In ruling on a motion for judgment on the pleadings material allegations of the moving party which have been denied are taken as false. Conclusions of law also are not deemed admitted for purposes of the motion. The court must accept as true all well-pleaded allegations of the non-moving party. Judgment on the pleadings can be granted only if, on the facts as admitted for purposes of the motion, the moving party is clearly entitled to judgment.

See also Domres, 760 So. 2d at 1029 ("A defensive motion for judgment on the pleadings is submitted to the same legal test as a motion to dismiss. . . . [M]atters extraneous to the pleadings are not considered.").

Here, taking all of the allegations in CPH's complaint to be true and all of the contentions in Morgan Stanley's answer and affirmative defenses to be false, Morgan Stanley's motion should be denied because the pleadings plainly set forth actionable claims for relief. That conclusion is confirmed not only under Florida law, which governs here, but also under the New York case authorities that Morgan Stanley erroneously relies on as controlling.

A. CPH's Fraud Count (Count I) States A Claim.

Although Morgan Stanley introduces its fraud section by stating that CPH's claim fails for "three separate and independent reasons" (MS Mem. 17), the argument that follows actually identifies four: (1) CPH cannot establish reliance because reliance supposedly is "expressly disclaimed in the Merger Agreement's integration clause" (MS Mem. 18-20); (2) CPH cannot establish its justifiable reliance on the misrepresentations for the additional reason that CPH supposedly "failed to make use of the means of verification that were available to it" as to Sunbeam's books (MS Mem. 21-23); (3) CPH "cannot allege" that it relied on any of the

misrepresentations identified in the complaint (MS Mem. 23-24); and (4) CPH's allegations of intent or scienter are "legally deficient" as well as contrary to "economic reason" (MS Mem. 25-27).

As a preliminary matter, it bears observing that Morgan Stanley has elected to make a set of arguments that are especially ill-suited for resolution on the pleadings, because they all involve either the reasonableness of CPH's reliance or the adequacy of CPH's allegations concerning Morgan Stanley's intent. However, the law is clear that reliance and intent are questions of fact for the jury and not for the Court to resolve. *See, e.g., Pinzl v. LaPointe*, 426 So. 2d 65, 66 (Fla. 5th DCA 1983) (reversing dismissal: "Reliance on misrepresentations and a duty to inquire are usually determinations for the trier of fact"); *Thor Bear, Inc. v. Crocker Mizner Park, Inc.*, 648 So. 2d 168, 173 (Fla. 4th DCA 1994) ("a determination of reliance is typically left to the trier of fact"); *Cohen v. Kravit Estate Buyers, Inc.*, 843 So. 2d 989, 991 (Fla. 4th DCA 2003) ("In fraud cases, [even] summary judgment is rarely proper as the issue so frequently turns on the axis of the circumstances surrounding the complete transaction, including circumstantial evidence of intent and knowledge"); *Doehla v. Wathne Ltd., Inc.*, No. 98 Civ. 6087 CSH, 1999 WL 566311, at *10-11 (S.D.N.Y. Aug. 3, 1999) (refusing to dismiss fraud claim under New York law because question whether reliance is justifiable "is intensely fact-specific and generally considered inappropriate for determination on a motion to dismiss"); *Country World, Inc. v. Imperial Frozen Foods Co.*, 589 N.Y.S. 2d 81, 82 (N.Y. App. Div. 1992) (same); *Rudolph v. Turecek*, 658 N.Y.S.2d 769, 771 (N.Y. App. Div. 1997) ("whether a party could have ascertained the facts with reasonable diligence is a factual question for resolution by the jury"); *State v. First Investors Corp.*, 592 N.Y.S.2d 561, 568 (N.Y. Sup. Ct. 1992) ("fraudulent intent is a question of fact, not of law, and . . . '[a]ctual intent to defraud, or fraud in fact, like any other fact, may be shown by circumstantial evidence'") (citation omitted). In this case, as is demonstrated below, there is no basis for departing from that general rule.

1. CPH did not "disclaim" reliance on Morgan Stanley's misrepresentations by agreeing to the integration clause in the Merger Agreement.

Morgan Stanley first contends that CPH supposedly disclaimed reliance on any misrepresentation by Morgan Stanley in the following provision of a Merger Agreement, an

agreement with respect to which Morgan Stanley is not even a party (MS Answer, Exh. A, § 12.5):

Entire Agreement. This Agreement (including all Schedules and Exhibits) contains the entire agreement among the parties hereto with respect to the subject matter hereof and supersedes all prior agreements and understandings, oral or written, with respect to such matters, except for the Confidentiality Agreements which will remain in full force and effect for the term provided for therein.

At the outset, it bears mentioning that, by making this argument, Morgan Stanley and its lawyers are revealing that they are not at all concerned with either the consistency or the integrity of their legal arguments. That is because the present argument is directly at odds with the complaint filed by Morgan Stanley sister company MSSF, by the very same lawyers, in which MSSF bases its entire case on alleged representations that are external to the Merger Agreement. MSSF's complaint, which CPH has answered, is based entirely on alleged representations concerning the so-called "synergies" that would result from a merger of Coleman and two other companies with Sunbeam — even though those supposed representations fall completely outside the Merger Agreement. Morgan Stanley never attempts to square its present argument with MSSF's complaint, of course, because they are directly inconsistent. In any event, Morgan Stanley's contention that CPH disclaimed reliance on Morgan Stanley's fraudulent statements through the integration clause in the Merger Agreement is baseless for several reasons.

First, a threshold problem with Morgan Stanley's reliance on the integration clause in the Merger Agreement is that Morgan Stanley is not a party to the agreement. The parties are Sunbeam, CPH, Laser Acquisition Corp., and CLN Holdings Inc. See MS Answer, Exh. A, p. 1. That is fatal because a person or entity that is not a party to a contract cannot invoke the clauses that it contains in order to escape liability for fraud. See *Taylor Woodrow Homes Florida, Inc v. 4/46-A Corp.*, No. 5D01-15814, 2003 WL 158888, at *7 (Fla. 5th DCA Jan. 24, 2003) ("A person who is not a party to a contract may not sue for breach" unless he or she is a third-party beneficiary); *Caretta Trucking, Inc. v. Cheoy Lee Shipyards, Ltd.*, 647 So. 2d 1028, 1030-31 (Fla. 4th DCA 1994) (same); *Cohan v. Sicular*, 625 N.Y.S.2d 278, 280 (N.Y. App. Div. 1995) (in refusing to dismiss fraud claim against brokers, court rejected brokers' invocation of integration clause in contract "since they were not parties to the real estate contract"); *Diodato v. Eastchester Dev. Corp.*, 489 N.Y.S.2d 293, 294 (N.Y.

App. Div. 1985) (“the purported disclaimer would not inure to the benefit of defendant . . . as he was not a party to the contract.”).

Second, Morgan Stanley’s reliance argument does not withstand scrutiny because, on its face, the integration clause at issue merely says that there is no other agreement between the parties other than what they have put down in writing in their contract. The law is settled, in both Florida and New York, that such clauses do not immunize even the parties to the contract (which, again, Morgan Stanley was not) from claims of fraud or fraud in the inducement. *See, e.g., MeterLogic, Inc. v. Copier Solutions, Inc.*, 126 F. Supp. 2d 1346, 1362-63 (S.D. Fla. 2000) (“Florida law is clear that if a party alleges that a contract was procured by fraud or misrepresentation as to a material fact, an integration clause will not make the contract incontestable, and the oral representations may be introduced into evidence to establish fraud”); *Tinker v. De Maria Porsche Audi, Inc.*, 459 So. 2d 487, 490-92 (Fla. 3d DCA 1984) (reversing trial court’s ruling that a sales contract that disclaimed oral representations made with respect to the condition or fitness of the product property constituted a bar to an action for fraud or misrepresentation even when the misrepresentation was made for the purpose of inducing the sale: “a written disclaimer . . . is ineffective to negate a seller’s liability for fraud in the inducement”); *Mejia v. Jurich*, 781 So. 2d 1175, 1178 (Fla. 3d DCA 2001) (reversing dismissal order: “The existence of a merger or integration clause, which purports to make oral agreements not incorporated into the written contract unenforceable, does not affect oral representations which are alleged to have fraudulently induced a person to enter into the agreement”); *Mfrs. Hanover Trust Co. v. Yanakas*, 7 F.3d 310, 315 (2d Cir. 1993) (under New York law, “a general merger clause is ineffective, however, to preclude parol evidence that a party was induced to enter into the contract by means of fraud”); 60A N.Y. Jur. 2d, *Fraud and Deceit* § 227 (2001) (“It is well established that a general or ‘boiler plate’ merger clause in a written contract is ineffective to preclude judicial inquiry into specific allegations of fraud.”).

Third, Morgan Stanley’s attempt to find refuge in the integration clause is unavailing in any event, because parties cannot enter into contracts that would relieve a party of the consequences of its fraud. *See Zuckerman-Vernon Corp. v. Rosen*, 361 So. 2d 804, 806 (Fla. 4th DCA 1978) (“a party

cannot contract against liability for his own fraud in order to exempt him from liability for an intentional tort”); *L. Luria & Son, Inc. v. Honeywell, Inc.*, 460 So. 2d 521, 523 (Fla. 4th DCA 1984) (“Fraud is an intentional tort and thus not subject to the cathartic effect of the exculpatory clauses found in contracts”); *Banks v. Pub. Storage Mgmt., Inc.*, 585 So. 2d 476, 476 (Fla. 3d DCA 1991) (same); *Pearce v. Knepper*, 53 N.Y.S. 2d 845, 846 (N.Y. Sup. Ct. 1945) (“no contract could ever be entered into which would relieve a party thereto from the consequences of his fraud or bad faith.”); *see also AES Corp. v. Dow Chem. Co.*, 325 F.3d 174, 179 (3d Cir. 2003) (under federal law, a nonreliance clause can never bar a Rule 10b-5 claim as a matter of law).

Fourth, Morgan Stanley cannot escape responsibility for its fraud for one additional reason: the integration clause predates many of the misrepresentations for which Morgan Stanley is responsible. Specifically, the Merger Agreement is dated February 27, 1998, but CPH’s complaint alleges that Morgan Stanley’s fraudulent conduct continued through the end of March. *See* Complaint ¶¶ 45-72. Thus, regardless of the applicability of the integration clause here, it cannot possibly be read as a license to commit fraud in the future.

2. CPH’s fraud claim should proceed notwithstanding its supposed “failure” to inspect Sunbeam’s books and records.

Morgan Stanley next contends that CPH could not justifiably have relied on the misrepresentations because it supposedly failed to determine for itself whether it was being lied to by Morgan Stanley and others. *See* MS Mem. 21-23. Morgan Stanley’s contention is wrong for several reasons.

First, insofar as Morgan Stanley contends that CPH was required to allege that it took affirmative steps to find out whether Morgan Stanley was lying, Morgan Stanley grossly overstates CPH’s pleading obligations. Florida law recognizes no such requirement. *See, e.g., Sheen v. Jenkins*, 629 So. 2d 1033, 1035 (Fla. 4th DCA 1993) (“a recipient may rely on the truth of a representation, even though its falsity could have been ascertained had he made an investigation, unless he knows the representation to be false or its falsity is obvious to him”) (quoting *Besett v. Basnett*, 389 So. 2d 995, 998 (Fla. 1980)); *see also Gilchrist Timber Co. v. ITT Rayonier, Inc.*, 696

So. 2d 334, 336-37 (Fla. 1997). That is dispositive, even if this Court determines that New York substantive law applies to CPH's claims, because Florida procedural law still applies to the question of what CPH need and need not plead in its complaint. *See Aerovias Nacionales de Colombia, S.A. v. Tellez*, 596 So. 2d 1193, 1195 (Fla. 3d DCA 1992) ("the law of the forum, *i.e.*, Florida law, governs on procedural matters"); *Strauss v. Sillin*, 393 So. 2d 1205, 1206 (Fla. 2d DCA 1981) ("In conflict of law situations, matters of procedure are generally resolved by the law of the state in which the action has been instituted"); *Restatement (Second) of Conflict of Laws* § 127 (1971) ("The local law of the forum governs rules of pleading and the conduct of proceedings in court"); *see also BDO Seidman, LLP v. British Car Auctions, Inc.*, 802 So. 2d 366, 369 (Fla. 4th DCA 2001) (Gross, J., concurring) ("A court usually applies its own local law rules prescribing how litigation shall be conducted even when it applies the local law rules of another state to resolve other issues in the case.").

Although the point is academic, it bears mentioning that New York law does not require a defrauded plaintiff to plead the affirmative steps it took to confirm the accuracy of the statements made to it. In *Doehla v. Wathne Ltd.*, for example, the court refused to dismiss a fraud claim under New York law despite defendant's contention that plaintiff "was an experienced businessman" and that his "complaint [did] not contain any indication that he undertook to make an independent investigation of the [fraudulent] financial condition representations." *See* 1999 WL 566311, at *11. The court observed that "[t]he difficulty with defendants' position is that no authority to which I am directed requires a pleading to contain affirmative allegations detailing the investigative efforts of a claimant in the circumstances underlying this case." *Id.* at *12. Thus, the court concluded (*id.* at *13):

I do not believe the authorities require plaintiff to mount a preemptive strike against a potential challenge to the reasonableness of his reliance by detailing the efforts he undertook to uncover the truth, when no facts alleged suggest that his pleaded reliance on the statements, pertaining to confidential information within their possession alone . . . was unreasonable. Accordingly, . . . dismissal based on lack of reasonable reliance at this stage would be inappropriate.

The same conclusion is required here.

Second, the reasonableness of a party's reliance is a question for the trier of fact that generally is considered unsuited for disposition on a threshold motion such as this. *See, e.g., Pinzl*, 426 So. 2d at 66 (Florida law); *Thor Bear*, 648 So. 2d at 173 (Florida law); *Doehla*, 1999 WL 566311, at *10-11 (New York law); *Country World*, 589 N.Y.S.2d at 82 (New York law). That is true, notwithstanding Morgan Stanley's contention that CPH is supposedly "sophisticated," because even New York law (which Morgan Stanley obviously favors) has recognized that a plaintiff's level of "sophistication" and its access to information themselves are fact-bound issues. *See Swersky v. Dreyer & Traub*, 643 N.Y.S.2d 33, 37 (N.Y. App. Div. 1996) (reversing trial court's determination that reliance was unjustified because of plaintiff's "sophistication" and access to information: "[t]his issue should not have been resolved as a matter of law").

Third, Morgan Stanley's assertions about what Sunbeam's books would have revealed to CPH themselves raise factual questions that cannot be resolved in a motion such as the one at bar. As the Florida Supreme Court ruled recently, whether the facts supposedly were available to the victim involves a case-by-case factual inquiry, which "should not be resolved through a motion to dismiss and the use of a bright-line rule of preclusion" (*M/I Schottenstein Homes, Inc. v. Azam*, 813 So. 2d 91, 94-95 (Fla. 2002)):

[W]e hold that the question of whether a cause of action for fraudulent misrepresentation exists where the putatively misrepresented information is contained in the public record is one of fact that should not be resolved through a motion to dismiss and the use of a bright-line rule of preclusion. In pursuing this case-by-case consideration of the facts, courts should be mindful of the type of information that the purchaser asserts was fraudulently misrepresented. . . . Thus, this factual examination is indeed a consideration of the totality of the circumstances surrounding the type of information, the nature of the communication between the parties, and the relative positions of the parties.

The Florida Supreme Court's holding — that the question of whether a public record disclosed the truth could not be resolved through a motion to dismiss — applies with even greater force here given that Morgan Stanley argues CPH should have searched for information contained in Sunbeam's private records.

Fourth, Morgan Stanley's argument ignores that in this case, the truth was peculiarly within the knowledge of Morgan Stanley and the other defrauders. That is significant because "when the

information is peculiarly within the possession of the defendants, then plaintiff may rely without prosecuting an investigation even where plaintiff could have determined the truth with relatively modest investigation.” *Fid. Funding of California, Inc. v. Reinhold*, 79 F. Supp. 2d 110, 121 (E.D.N.Y. 1997) (holding defendants liable for fraud under New York law and rejecting defendants’ justifiable reliance argument); *see also Nomura, Sec. Int’l, Inc. v. E*Trade Sec., Inc.*, 280 F. Supp. 2d 184, 206 (S.D.N.Y. 2003) (rejecting defendant’s argument that plaintiff “should have alleged that it had attempted to access” withheld information: “Where, as here, the defendant is alleged to have withheld facts about its own transactions, the plaintiff’s lack of ready access to that information is presumed”); *Doehla*, 1999 WL 566311, at *13 (“a plaintiff’s failure to investigate will not preclude a finding of reasonable reliance where the facts allegedly misrepresented ‘are peculiarly within the defendant’s knowledge [and plaintiff] had no independent means of ascertaining the truth’”) (citation omitted); *Dimon Inc. v. Folium, Inc.*, 48 F. Supp. 2d 359, 368 (S.D.N.Y. 1999) (“The New York cases recognize that the peculiar knowledge exception applies not only where the facts allegedly misrepresented literally were within the exclusive knowledge of the defendant, but also where the truth theoretically might have been discovered, though only with extraordinary effort or great difficulty”); *Primavera Familienstiftung v. Askin*, 130 F. Supp. 2d 450, 495 (S.D.N.Y. 2001), *amended in part on other grounds*, 137 F. Supp. 2d 438 (S.D.N.Y. 2001) (“even sophisticated investors may justifiably rely on facts that are ‘peculiarly within the other party’s knowledge’”) (citing *Lazard Freres & Co. v. Protective Life Ins. Co.*, 108 F.3d 1531, 1542 (2d Cir. 1997)).

3. CPH has alleged that it relied on the misrepresentations identified in the complaint and has done so sufficiently.

Morgan Stanley next contends that CPH’s complaint should be dismissed because CPH has not alleged that it justifiably relied on the March 19, 1998 press release or the other misrepresentations by Morgan Stanley and others. *See* MS Mem. 23-24. In fact, however, CPH’s complaint does so.

First, contrary to Morgan Stanley’s contention, CPH’s complaint is replete with allegations that CPH relied on the representations set out in the complaint. The fraud count incorporates all of

the prior allegations — including the misrepresentations made during the course of the Sunbeam fraud. *See* Complaint ¶ 78 (“CPH repeats and realleges the allegations of paragraphs 1 through 77 above as if set forth fully herein”). Then, after incorporating all of those misrepresentations, the fraud count expressly alleges that CPH relied on them. *See* Complaint ¶ 82 (“In agreeing to accept approximately 14.1 million shares of Sunbeam stock in connection with the sale of CPH’s interest in Coleman, CPH reasonably and justifiably relied upon Morgan Stanley’s representations concerning Sunbeam”). Thus, Morgan Stanley’s argument rests on a proposition that is demonstrably untrue.

Second, contrary to Morgan Stanley’s suggestion, the complaint also alleges that CPH relied on representations made directly by Morgan Stanley. For example, in paragraph 39, CPH’s complaint alleges:

Morgan Stanley knew that it had to persuade CPH not only to sell Coleman, but also to accept Sunbeam stock — ultimately, 14.1 million shares of Sunbeam stock — as a major part of the purchase price. . . . Together, in face-to-face discussions, Morgan Stanley and Sunbeam assured CPH that (a) Sunbeam would meet or exceed its first quarter 1998 earnings estimates; (b) analysts’ 1998 earnings estimates for Sunbeam were correct; and (c) Sunbeam’s plan to earn \$2.20 per share in 1998 was easily achievable and probably low. Morgan Stanley and Sunbeam also falsely assured CPH that Sunbeam’s “early buy” sales program would not hurt Sunbeam’s future revenues. However, the “early buy” program was one of Sunbeam’s revenue acceleration programs — and the devastating effects of Sunbeam’s revenue program already had begun to materialize at Sunbeam. Sunbeam’s January and February 1998 sales were down drastically, although those results were not disclosed to CPH or to the public. To the contrary, Morgan Stanley and Sunbeam together specifically advised CPH that Sunbeam’s first quarter 1998 sales were “tracking fine” and running ahead of analysts’ estimates.

CPH’s complaint further alleges that “[b]efore the truth was revealed, Morgan Stanley persuaded CPH to sell its shares in Coleman to Sunbeam and to accept 14.1 million shares of Sunbeam stock as part of the consideration.” *See* Complaint ¶ 40.

Third, that leaves Morgan Stanley with its contention that the March 19, 1998 press release contained a provision entitled “Cautionary Statements” — applicable to “‘forward looking statements,’ as such term is defined in the Private Securities Litigation Reform Act of 1995” — which supposedly “warned readers not to rely on the forward-looking projections of Sunbeam’s future performance.” *See* MS Mem. 23. By relying on that general warning, Morgan Stanley

apparently would have this Court believe that at least under federal law, such a warning is sufficient to immunize a party from liability for any false forward looking statements. Federal law, however, is directly to the contrary. See *In re Unicapital Corp. Sec. Litig.*, 149 F. Supp. 2d 1353, 1375 (S.D. Fla. 2001) (forward looking statements in press releases not shielded from liability under the safe-harbor provision of the Private Securities Litigation Reform Act because “the warnings contained in Unicapital’s press release contained little more than generic, boilerplate language”). Of course, CPH’s claims are not based on federal law (a point that further undermines Morgan Stanley’s reliance on the boilerplate warning language in the press release), but the language relied on by Morgan Stanley would have no effect on CPH’s claims even if they were.

In addition, CPH’s claims are not based on forward-looking statements. Instead, CPH’s claims are based on Morgan Stanley’s failure in connection with the press release to disclose then-existing facts, including the following facts set forth in the complaint (Complaint ¶¶ 61-62):

- As Morgan Stanley was fully aware, the March 19, 1998 press release was false, misleading, and failed to disclose material information. The March 19, 1998 press release failed to disclose Sunbeam’s actual January and February 1998 sales or the true reasons for the poor results.
- Morgan Stanley knew that the shortfall from analysts’ estimates was not caused by retailers’ deciding to defer purchases from the first quarter of 1998 to the second quarter, as the press release indicated. Rather, as Sunbeam’s outside auditors had advised Morgan Stanley in writing, the collapse in first quarter sales was caused by Sunbeam’s acceleration of 1998 sales into the fourth quarter of 1997.

Thus, the boilerplate language relied on by Morgan Stanley does not defeat CPH’s reliance on the representations alleged in the complaint, and Morgan Stanley does not cite a single case suggesting otherwise.

4. CPH’s allegations of scienter also are more than sufficient.

Morgan Stanley’s last attack on CPH’s fraud claim is that it insufficiently alleges intent or scienter because (a) the complaint supposedly alleges only that Morgan Stanley had the “ordinary economic interest” of receiving compensation for the work it was doing and (b) the idea that Morgan Stanley was attempting to engage in fraud defies “economic reason” because it would have “risked its own professional reputation, knowingly ripped off its most valued clients and institutional

investors, knowingly permitted its affiliate to invest and lose hundreds of millions of dollars, and exposed itself to massive liability.” *See* MS Mem. 25-27. Those contentions are insufficient to support judgment as a matter of law.

First, once again, Morgan Stanley ignores that questions of intent are for the trier of fact and not to be resolved on a motion to dismiss. *See, e.g., Cohen*, 843 So. 2d at 991; *First Investors*, 592 N.Y.S.2d at 568. That established principle alone warrants rejection of Morgan Stanley’s argument.

Second, with respect to Morgan Stanley’s contention that all that it had to gain from its fraud was compensation for the services it was rendering, Morgan Stanley ignores the allegations of the complaint. The complaint, in addition to alleging that Morgan Stanley stood to reap tens of millions of dollars in fees from the fraudulent transactions, also alleges that Morgan Stanley wanted to work for Sunbeam into the future and was deeply concerned that it would be replaced if it did not participate in the fraud. *See* Complaint ¶ 31 (“Morgan Stanley also knew that Davis and Chase Securities were standing by — ready and willing to reclaim their position as Dunlap’s investment banker of choice”); *id.* ¶ 66 (“Morgan Stanley also knew that Sunbeam would promptly replace Morgan Stanley with another investment banking firm — such as the Chase Securities firm led by Mark Davis”). Those allegations, which Morgan Stanley ignores, render irrelevant the two cases cited by Morgan Stanley addressing the “mere” allegation that the defendant was in a position to receive normal compensation. *See* MS Mem. 25-26.

Third, as for Morgan Stanley’s assertion that CPH’s fraud claim defies economic reason, CPH certainly agrees that defrauding one’s customers is not a proper business strategy. But time and again businesses — including Morgan Stanley — do indeed cheat their own customers and others. The courts hold them accountable for their wrongdoing when they do.

As for Morgan Stanley’s contention that CPH’s theory makes no sense because Morgan Stanley’s sister company (MSSF) loaned and lost millions of dollars, the short answer is that it is an unfortunate matter of public record that banks do indeed lend money to companies that the banks know are misrepresenting their true financial conditions. Just recently, two of the nation’s largest banks — J.P. Morgan Chase and Citigroup — were the subject of criminal and regulatory charges

due to their knowing participation in Enron's fraud on its shareholders. Despite the fact that both banks made massive loans to Enron, and ended up as two of the biggest creditors in the Enron bankruptcy, the SEC and the U.S. Attorney in Manhattan both accused the banks of assisting Enron in misrepresenting its true financial condition for years — and the banks ended up paying \$300 million in fines and penalties to resolve the matter. *See* Kurt Eichenwald and Riva D. Atlas, *2 Banks Settle Accusations They Aided in Enron Fraud*, N.Y. Times, July 29, 2003, at A1 (available at www.lexis.com); Floyd Norris, *A Warning Shot to Banks on Role in Others' Fraud*, N.Y. Times, July 29, 2003, at C1 (available at www.lexis.com). Thus, although it might not be wise or right for banks to lend money to corporations to assist in a fraud on shareholders, the reality is that banks do so readily and knowingly in order to earn massive fees.

Morgan Stanley's "makes no sense" argument also ignores that: (a) Morgan Stanley expected that MSSF would syndicate most or all of the loan promptly after completing the transaction, and in fact, MSSF did so; (b) MSSF enjoyed an economic cushion against the risk resulting from Sunbeam's fraud because Sunbeam issued \$750 million of debentures (increased from the \$500 million offering originally planned) that were subordinated to MSSF's loan; and (c) as a secured lender, MSSF had far less risk than the parties (such as CPH) that received Sunbeam's common stock. MSSF was playing with fire and ultimately got burned when the fraud was exposed faster than the defrauders anticipated, but it certainly does not follow from that fact that CPH's claims should be dismissed on the ground that they are nonsensical. The fact that MSSF lost money does not mean that CPH's fraud theory does not make sense; it only means that MSSF miscalculated the risk to the senior secured debt, which MSSF thought was insulated by billions of dollars in equity and an additional \$750 million in subordinated debt.

In sum, notwithstanding Morgan Stanley's invitation to this Court to resolve the inherently fact-bound issues of reliance and intent as a matter of law, the applicable law and the relevant facts alleged in the complaint preclude that result.

B. CPH's Aiding-And-Abetting Count (Count II) States A Claim.

Morgan Stanley next contends that CPH's claim for aiding and abetting fraud must be dismissed because the complaint does not sufficiently allege "actual knowledge" of Sunbeam's fraud or "substantial assistance" in that fraud. *See* MS Mem. 27-31. In fact, however, the complaint adequately alleges both.

1. CPH's "knowledge" allegations are sufficient.

Morgan Stanley's knowledge need not be pleaded with particularity. The complaint alleges that Morgan Stanley "knew of Dunlap's fraudulent scheme and helped to conceal it" (*see* Complaint ¶ 86), which should be the end of the matter. Nonetheless, Morgan Stanley insists that this is not enough because Morgan Stanley's knowledge must be pleaded with particularity. *See* MS Mem. 27-28. That contention is baseless for multiple reasons.

First, Morgan Stanley's contention ignores that the law applicable to the procedural issue of the sufficiency of CPH's pleading is Florida law, and that is true even if another state's substantive law were to apply to CPH's claims. *See Aerovias Nacionales*, 596 So. 2d at 1195 ("the law of the forum, *i.e.*, Florida law, governs on procedural matters"); *Strauss*, 393 So. 2d at 1206 ("In conflict of law situations, matters of procedure are generally resolved by the law of the state in which the action has been instituted"); *Restatement (Second) of Conflict of Laws* § 127 (1971) ("The local law of the forum governs rules of pleading and the conduct of proceedings in court").

Under Florida Rule of Civil Procedure 1.120, matters such as intent and knowledge may be "averred generally," even in cases involving fraud. So even though Morgan Stanley includes a rare citation to Florida law in this particular argument, for the bland proposition that allegations in a pleading are insufficient if they are too general or vague, Morgan Stanley ignores the dispositive Florida procedural rule. Because Morgan Stanley's knowledge can be "averred generally," CPH's allegation is sufficient.

Second, although the point is academic, the same rule has been adopted under federal law — even though Morgan Stanley's citation to and primary reliance on a federal district court case appears to be designed to misguide this Court into assuming otherwise. The case cited by Morgan

Stanley, *Filler v. Hanvit Bank*, 247 F. Supp. 2d 425 (S.D.N.Y. 2003) — a decision that has since been vacated (*see* No. 01 CIV 9510 (MGC), 01 CIV 8251 (MGC), 2003 WL 21729978 (S.D.N.Y. July 25, 2003)) and therefore is no longer of any force or effect — does not even address a plaintiff's supposed failure to allege adequately a defendant's knowledge of fraud. Had the court addressed that question, it would have applied Federal Rule of Civil Procedure 9(b), which like Rule 1.120 provides that allegations of fraud must be pleaded with particularity but that “[m]alice, intent, knowledge, and other condition of mind of a person may be averred generally.”

Third, even assuming for the sake of argument that New York law applies, the result would be the same because New York authorities do not require that knowledge be pleaded with particularity. *See Houbigant, Inc. v. Deloitte & Touche LLP*, 753 N.Y.S.2d 493, 498 (N.Y. App. Div. 2003). Instead, recognizing that knowledge of fraud is “the element most likely to be within the sole knowledge of the defendant and least amenable to direct proof,” New York law requires only “that the complaint contain[] some rational basis for inferring that the alleged misrepresentation was knowingly made.” *Id.*; *see also Oxford Health Plans (N.Y.), Inc. v. Bettercare Health Care Pain Mgmt. & Rehab PC*, 762 N.Y.S.2d 344, 346 (N.Y. App. Div. 2003) (citing *Houbigant* with approval). “Indeed,” as the Appellate Court in *Houbigant* observed, “to require anything beyond that would be particularly undesirable at this time, when it has been widely acknowledged that our society is experiencing a proliferation of frauds perpetrated by officers of large corporations, for their own personal gain, unchecked by the ‘impartial’ auditors they hired.” *Houbigant*, 753 N.Y.S.2d at 498. Thus, even if New York law were to apply, CPH's complaint clearly satisfies that liberal pleading standard that *Houbigant* embraces as appropriate in cases like this.

In sum, Morgan Stanley's assertion that CPH's allegation of knowledge is insufficient is based on a studied ignorance of the applicable law, which establishes that CPH is permitted to aver Morgan Stanley's fraud generally.

Morgan Stanley's “equal access to books” argument is baseless. Morgan Stanley next argues that even if Morgan Stanley had actual knowledge of the fraud, CPH had actual knowledge too, “by virtue of the fact that it enjoyed exactly the same access to Sunbeam's books [and] records”

as Morgan Stanley had. *See* MS Mem. 28. That argument is without merit because it is simply a rehash of the argument that CPH's fraud claim should be dismissed because CPH supposedly had access to Sunbeam books and records that would have disclosed Morgan Stanley's fraudulent conduct. As CPH demonstrated in Section IV.A.2 above, that argument is legally insufficient for the following reasons: (1) Morgan Stanley's argument rests on erroneous and grossly overstated assumptions about CPH's pleading obligations; (2) the reasonableness of CPH's reliance on Morgan Stanley is a question of fact for the jury; (3) Morgan Stanley's argument is based on assertions about what Sunbeam's books would have revealed, yet another issue of fact; and (4) the truth was peculiarly within the knowledge of Morgan Stanley and the other defrauders. *See* pages 43-46.

Morgan Stanley's constructive fraud argument is a nonissue. Notwithstanding Morgan Stanley's assertion about constructive knowledge (MS Mem. 29), that issue is moot because as shown above, the complaint alleges Morgan Stanley's actual knowledge of the fraud. *See* Complaint ¶ 86.

Economic motive also is not an issue. Morgan Stanley's contention that economic motive does not translate into actual knowledge or intent simply repeats its flawed argument. As shown in Section IV.A.4 above, the complaint alleges more than mere "ordinary" economic motives on the part of Morgan Stanley — including that Morgan Stanley, in addition to standing to reap tens of millions of dollars in fees, wanted to work for Sunbeam into the future and was concerned that it would be replaced if it did not participate in the fraud. *See* Complaint ¶¶ 31, 66; *see also* page 49.

2. CPH's "substantial assistance" allegations are sufficient.

Morgan Stanley begins this argument with the extravagant contention that CPH "does not — and indeed cannot — allege that [Morgan Stanley] provided 'substantial assistance' to Sunbeam's fraud." *See* MS Mem. 30. And yet, in the next two pages of its argument, Morgan Stanley identifies several such allegations in the complaint. Those allegations, by themselves, disprove the premise of Morgan Stanley's argument.

Nor is Morgan Stanley's attempt to downplay the significance of those allegations any more

successful: Morgan Stanley's argument in that regard amounts to a reprise of failed arguments. With respect to the press release, Morgan Stanley states that "CPH does not allege that it relied on the press release" (MS Mem. 30), but CPH already has shown in Section IV.A.3 above that Morgan Stanley's assertion is wrong. CPH has alleged that it relied on the press release and the other misrepresentations that were made. With respect to Morgan Stanley's attack on CPH's complaint allegations relating to Morgan Stanley's assistance with the debenture offering (Complaint ¶¶ 72, 87), Morgan Stanley's attack is baseless because the complaint alleges that Morgan Stanley "closed the debenture offering" and that the closing "was needed to close the Coleman transaction." See Complaint ¶ 72. Clearly, Morgan Stanley's work on the debenture offering is further proof of Morgan Stanley's substantial assistance in the Sunbeam fraud. With respect to Morgan Stanley's provision to CPH of false financial and business information concerning Sunbeam, Morgan Stanley contends that "there is no allegation that [Morgan Stanley] knew that Sunbeam's financial and business information was false" (MS Mem. 31), but the error in that assertion is established by paragraph 86 of the complaint. That paragraph states that Morgan Stanley "knew of Dunlap's fraudulent scheme and helped to conceal it." See Complaint ¶ 86.

Equally fatal to its argument, Morgan Stanley has ignored other allegations demonstrating Morgan Stanley's substantial assistance in the Sunbeam fraud. In fact, the allegations cited by Morgan Stanley constitute just a small fraction of the germane allegations: the complaint devotes literally dozens of paragraphs to Morgan Stanley's work in assisting the Sunbeam fraud. See Complaint ¶ 38 ("Morgan Stanley, through Managing Directors Strong, James Stynes, and Robert Kitts, led the [Coleman acquisition] discussions with CPH on Sunbeam's behalf"); Complaint ¶ 39 ("During the course of negotiations, Morgan Stanley prepared and provided CPH with false financial and business information about Sunbeam," including "false 1996 and 1997 sales and revenue figures"); *id.* ("Together, in face to face discussions, Morgan Stanley and Sunbeam" made numerous assurances about Sunbeam's performance and business practices to CPH); *see also* Complaint ¶¶ 29-37, 40-73. Those allegations, which must be accepted as true, further debunk Morgan Stanley's contention that the complaint's allegations of substantial assistance are insufficient.

C. CPH's Negligent Misrepresentation Count (Count IV) States A Claim.

Morgan Stanley next contends that CPH's negligent misrepresentation claim should be dismissed on two grounds: (1) the complaint does not sufficiently allege that there was a "special" or "near privity" relationship between Morgan Stanley and CPH (MS Mem. 32-33); and (2) the complaint does not sufficiently allege reasonable reliance (MS Mem. 34). Neither argument has merit.

1. Morgan Stanley's "special" or "near privity" relationship argument is baseless.

Morgan Stanley's "special" or "near privity" relationship argument is without merit for two reasons.

First, there is no such requirement under Florida law, and Morgan Stanley does not contend otherwise. Thus, if this Court concludes that Florida rather than New York applies to CPH's claims, that argument should be rejected without further inquiry.

Second, even under New York law, the complaint's allegations are sufficient because they show a near privity relationship between the parties. The highest court of the State of New York has set forth the following three-prong test for determining when a "near privity" relationship is present: (1) the defendant must have been aware that its representation would be used for a particular purpose; (2) the defendant must have intended that a known party or parties would rely thereon in furtherance of that purpose; and (3) there must have been some conduct on the part of the defendant linking it to that party or parties that evinces the defendant's understanding of that party or parties' reliance. *See Credit Alliance Corp. v. Arthur Andersen & Co.*, 493 N.Y.S.2d 435, 443 (N.Y. 1985).

The complaint clearly satisfies all three of those elements:

- The complaint establishes that Morgan Stanley knew that its representations would be used for a particular purpose. The complaint alleges that Morgan Stanley made representations to CPH during face-to-face discussions for the purpose of persuading CPH to sell Coleman and accept Sunbeam stock as a major part of the purchase price. *See* Complaint ¶¶ 39, 94. Moreover, the complaint alleges that it was "Morgan Stanley [that] persuaded CPH to sell its shares in Coleman to Sunbeam and to accept 14.1 million shares of Sunbeam stock as part of the consideration." *See* Complaint ¶ 41.
- The complaint establishes that Morgan Stanley intended that CPH rely on Morgan

Stanley's representations because, again, they were made in face-to-face discussions that were designed to induce CPH to take action. *See* Complaint ¶¶ 39, 94. Consequently, as the complaint alleges expressly, "Morgan Stanley intended for CPH to rely . . . on the information provided by Morgan Stanley." *See* Complaint ¶ 95.

- The complaint establishes that Morgan Stanley understood that CPH was relying upon the false information. The complaint alleges that Morgan Stanley provided inaccurate information — including information "concerning Sunbeam's 1996 and 1997 financial performance, Sunbeam's business operations, the value of Sunbeam's stock, and Sunbeam's first-quarter 1998 performance" — during the course of direct negotiations with CPH that led to the transfer of CPH's 82% interest in Coleman to Sunbeam. *See* Complaint ¶ 94.

2. Morgan Stanley's reliance argument also is baseless.

Morgan Stanley's last attack on CPH's negligent misrepresentation claim is a reprise of an argument that it made in connection with the fraud claim — that CPH cannot have relied justifiably on Morgan Stanley's representations as a matter of law. As shown above in Section IV.A.2, that argument is baseless because: (1) it rests on erroneous and exaggerated assumptions about CPH's pleading obligations; (2) the reasonableness of CPH's reliance on Morgan Stanley is a jury question; (3) Morgan Stanley's argument is based on assertions about what Sunbeam's books would have shown that raise still more issues of fact for the jury; and (4) the truth was peculiarly within the knowledge of Morgan Stanley and the other defrauders. *See* pages 43-46.

D. CPH's Conspiracy Count (Count III), Which is Based On Its Underlying Fraud Count, States A Claim.

Morgan Stanley begins its attack on this claim by contending that "[n]either New York nor Florida recognize an independent tort for conspiracy" (MS Mem. 34), which misses the point. Although Morgan Stanley has addressed CPH's claims out of order so as to make it appear that CPH has alleged a disembodied conspiracy count, the fact is that the complaint pleads a count for conspiracy to commit fraud — which is why it follows the fraud (Count I) and aiding and abetting (Count II) counts. *See* Complaint ¶¶ 89-92. It is perfectly appropriate to plead a conspiracy count based on an underlying fraud claim, as Morgan Stanley concedes. *See* MS Mem. 34 n.22 (setting forth the elements for "a claim for conspiracy due to fraud" under New York law); *see also Hoch v. Rissman, Weisberg, Barrett*, 742 So. 2d 451, 460 (Fla. 5th DCA 1999) (confirming that conspiracy claim is derived from the underlying claim that forms its basis).

That leaves Morgan Stanley's contention — which is embedded in the very last of its numerous footnotes — that CPH has not pleaded an actionable, underlying tort or the elements of a derivative conspiracy claim. *See* MS Mem. 34 n.22. That argument is without merit. The elements of a civil conspiracy are (1) an agreement between two or more parties to achieve an illegal objective; and (2) an overt act in furtherance of that illegal objective. *See Hoch*, 742 So. 2d at 460; *Nicholson v. Kellin*, 481 So. 2d 931, 935 (Fla. 5th DCA 1985); *Gabriel Capital, L.P. v. NatWest Fin., Inc.*, 94 F. Supp. 2d 491, 511 (S.D.N.Y. 2000) (New York law). The complaint, the allegations of which must be accepted as true, alleges both elements.

Specifically, after detailing the extensive factual bases for the fraud, the complaint in paragraph 90 alleges based on the detailed factual allegations that precede it that “Morgan Stanley conspired with Dunlap and other senior Sunbeam executives to conceal the truth about Sunbeam’s financial performance and business operations.” The complaint then alleges, in paragraph 91, a number of specific “overt acts in furtherance of the conspiracy” committed by Morgan Stanley:

- “concealing Sunbeam’s first quarter 1998 sales collapse;”
- “assisting with the false March 19, 1998 press release;”
- “arranging road shows with prospective debenture purchasers at which Morgan Stanley, Dunlap and others made false statements concerning Sunbeam’s financial condition and business operations;”
- “preparing and disseminating the preliminary and final offering memoranda for the subordinated debenture offering, both of which contained false information concerning Sunbeam’s financial condition and business operations;”
- “providing CPH with false financial and business information concerning Sunbeam;”
- “scripting Dunlap’s false public statements concerning Sunbeam’s acquisition of Coleman;”
- “persuading CPH to sell its interest in Coleman and to accept 14.1 million shares of Sunbeam stock and other consideration;” and
- “underwriting the \$750 convertible debenture offering, proceeds from which were used to fund Sunbeam’s purchase of Coleman.”

Those allegations are more than sufficient to state a claim and to withstand Morgan Stanley’s meritless motion for judgment on the pleadings.

Conclusion

Morgan Stanley's *forum non conveniens* motion is without merit. This action arises out of a Florida-based fraud that has led to the prosecution of no less than 24 lawsuits in Florida. Indeed, Morgan Stanley's own sister company chose to file its complaint here. That complaint, according to Morgan Stanley, arises from the same nucleus of operative facts as this case, and that complaint affirmatively asserts that the pertinent events occurred in Florida. As the complaints in both cases confirm, the factual ties to Florida abound. Moreover, many critical, non-party witnesses live in Florida and can be compelled to testify at trial only in Florida. Given Florida's close connection to this dispute, the lawsuit should remain here.

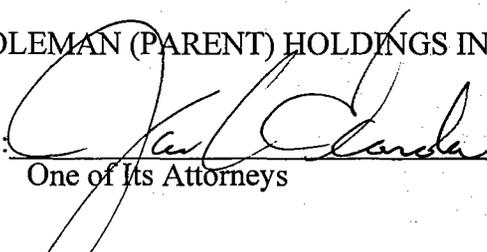
Morgan Stanley's motion for judgment on the pleadings likewise is without merit. CPH's complaint is far from bare bones: it alleges, in great detail, Morgan Stanley's deep and direct involvement in the massive fraud surrounding Sunbeam's demise. The complaint also alleges, in similar detail, the direct misrepresentations that Morgan Stanley made to CPH in furtherance of that fraud. Ignoring the allegations in the complaint, Morgan Stanley argues that it is incredible to believe that it would deceive its own clients or risk its reputation. At best, that is closing argument to the jury. Even more strained is Morgan Stanley's contention that because CPH was a "sophisticated" business player, Morgan Stanley could defraud CPH with impunity. The law, of course, protects all victims of deliberate fraud — even "sophisticated" ones — and requires wrongdoers like Morgan Stanley to answer in damages for the injuries that they cause. Under any conceivably applicable source of governing law, the detailed allegations in the complaint raise factual questions concerning Morgan Stanley's intent to deceive, CPH's reasonable reliance on

Morgan Stanley's false statements, Morgan Stanley's knowledge concerning the fraud, and Morgan Stanley's active participation in the fraud. Those factual questions are for the jury to decide.

Dated: November 14, 2003

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

By: 
One of Its Attorneys

Jerold S. Solovy
JENNER & BLOCK, LLC
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

John Scarola
SEARCY DENNEY SCAROLA
BARNHART & SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33402-3626
(561) 686-6300

#1000788

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by
Fax and Federal Express to all counsel on the attached list on this 14th day of
Nov., 2003.



JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 478-0754
Attorneys for Plaintiff

Coleman (Parent) Holdings Inc. vs Morgan Stanley & Company
Case No.: 2003 CA 005045 AI

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block, LLC
One IBM Plaza
Suite 4400
Chicago, IL 60611

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

CASE NO: 2003 CA 005045 AI

v.

Judge Elizabeth T. Maass

MORGAN STANLEY & CO., INC.,

Defendant.

DECLARATION OF CHRISTOPHER M. O'CONNOR

1. I am an associate attorney at the law firm of Jenner & Block, LLC in Chicago, Illinois, and have been admitted *pro hac vice* in the above-captioned case. Jenner & Block, LLC and the West Palm Beach, Florida law firm of Searcy Denney Scarola Barnhart & Shipley P.A. represent Plaintiff Coleman (Parent) Holdings Inc. ("CPH") in this action.

2. I have searched public records databases and reviewed documents produced in this case to determine whether certain non-party witnesses in this case maintain a residence in the State of Florida. The information contained in those sources indicates that the non-party witnesses listed in Section I.A of CPH's response brief maintain a residence in the State of Florida.

3. I have reviewed documents produced in this case to identify Morgan Stanley's contacts with the State of Florida that relate to the dispute in this case. The documents that are listed in Section I.A of CPH's response brief constitute a partial list of documents that evidence Morgan Stanley's contacts with the State of Florida.

4. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Dated: November 14, 2003



Christopher M. O'Connor

**IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA**

COLEMAN (PARENT) HOLDINGS, INC.,)	
)	
Plaintiff,	)	Case No.: 2003 CA 005045 AI
)	
v.	)	Judge Elizabeth T. Maass
)	
MORGAN STANLEY & CO., INC.,)	
)	
Defendant.)	
)	

ORDER ON APPOINTMENT OF COMMISSIONS

This cause came before the Court on Plaintiff's Motion to Appoint Commissions so that it can subpoena for depositions and documents witnesses in other jurisdictions. After reviewing the pleadings, and otherwise being advised in the premises it is ORDERED AND ADJUDGED that commissions are appointed so that plaintiff may subpoena depositions and documents from the following witnesses:

- Andrew B. Savarie
1136 Ash St.
Winnetka, IL 60093-2104

- R. Bram Smith
Bear, Stearns & Co. Inc.
245 Park Avenue
New York, NY 10167

- Alexandre J. Fuchs
2 Fifth Avenue, #11K
New York, NY 10011

- Robert W. Kitts
Thomas Weisel Partners
Lever House
390 Park Avenue, 17th Floor
New York, NY 10022
- T. Chang
10990 Rochester Ave., Apt. 307
Los Angeles, CA 90024-6281

The following commissions are appointed for the purposes of obtaining depositions and documents from the above listed witnesses, and other witnesses whose discovery is sought in the commissions' jurisdictions:

Jerold S. Solovy
Jenner & Block, LLC
One IBM Plaza, Suite 4400
Chicago, Il 60611
(312) 222-9350

or any person duly authorized by him and able to administer oaths pursuant to the laws of Illinois.

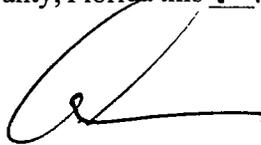
Michael I. Allen
SHAPIRO MITCHELL FORMAN ALLEN & MILLER LLP
380 Madison Avenue
New York, New York 10017

or any person duly authorized by him and able to administer oaths pursuant to the laws of New York.

Marc M. Seltzer
Susman Godfrey L.L.P.
1880 Century Park East
Suite 950
Los Angeles, California 90067
(310) 789-3102

or any person duly authorized by him and able to administer oaths pursuant to the laws of California.*

Done and Ordered in Palm Beach County, Florida this 14th day of Nov., 2003.



Circuit Court Judge Elizabeth T. Maass

Coleman v. Morgan Stanley
2003 CA 005045 AI
Order on Appointment of Commissions

Copies furnished to:

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lakeview Avenue
Suite 1400
West Palm Beach, Florida 33401
(561) 659-7070
(561) 659-7368 (fax)

John Scarola, Esq.
SEARCY DENNEY SCAROLA BARNHART
& SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33409
(561) 686-6300
(561) 478-0754 (fax)

* This order does not purport to grant the power of the commissions appointed to subpoena witnesses or documents, but simply the power to administer oaths and transcribe deposition testimony. r

Jerold S. Solovy, Esq.
JENNER & BLOCK, LLC
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350
(312) 527-0484 (fax)

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett H. McGurk
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 879-5000
(202) 879-5200 (fax)

999134

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

ORDER SPECIALLY SETTING HEARING

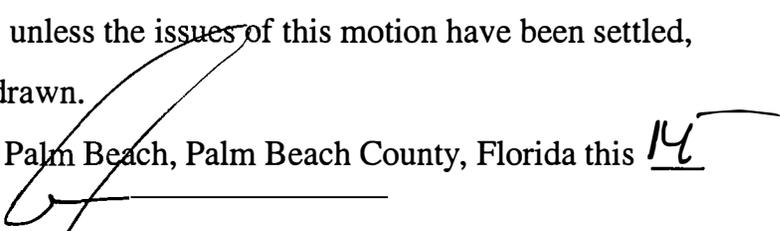
THIS CAUSE having come before the Court, it is hereby
ORDERED AND ADJUDGED that hearing on Defendant's Motion to Compel
Production of Settlement Agreement with Arthur Andersen is specially set before the
Honorable Elizabeth T. Maass on November 25, 2003, at 4:30 p.m., in Courtroom 11B, 205
N. Dixie Hwy, WPB, FL 33401. This is a specially set hearing which shall be limited to 30
minutes. It is further

ORDERED AND ADJUDGED that the attorneys/parties must submit to the Court
three (3) days before the hearing:

1. copies of all relevant pleadings;
2. a copy of any memorandum of law; and
3. copies of all case law authority.

This hearing shall not be canceled unless the issues of this motion have been settled,
and an order entered, or the motion withdrawn.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 14
day of November, 2003.



ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci
655 15th Street, NW, Suite 1200
Washington DC 20005

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, Il 60611

Mark F. Bideau, Esq.
777 S. Flagler Dr., Suite 300E
West Palm Beach, FL 33401

David M. Wells, Esq.
50 N. Laura Street, Suite 3300
Jacksonville, FL 32202

If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please contact the ADA Coordinator in the Administrative Office of the Court, Palm Beach County Courthouse, 205 North Dixie Highway, Room 5.2500, West Palm Beach, Florida 33401; telephone number (561) 355-4380 within two (2) working days of your receipt of this [describe notice]; if you are hearing or voice impaired, call 1-800-955-8771.

SPANISH

Si Ud. es una persona incapacitada que necesita de un servicio especial para participar en este proceso, Ud. tiene derecho a que le provean cierta ayuda sin costo alguno. Por favor pongase en contacto con el Coordinador de la Oficina Administrativa de la Corte ADA, situada en el 205 North Dixie Highway, Oficina 5.2500, West Palm Beach, Florida, 33401, teléfono (561) 355-4380, dentro de los dos (2) próximos días hábiles después de recibir esta [describa la notificación]; si tiene incapacidad de oír ó hablar llame al 1-800-955-8771.

CREOLE

Si ou sé yon moun ki Infirm, ki bézwen ninpôt akomodasyon pou ka patisipé nan pwosè sa-a, ou gen dwa, san'l pa kouté'w anyin, pou yo ba'w kèk sèvis. Tanpri kontaké koòdinatè ADA ya nan Biro Administratif Tribinal nan cité Palm Beach la, ki nan 205 North Dixie Highway, Cham 5.2500, West Palm Beach, Florida 33401, niméro telefonn-nan sé (561) 355-4380, rélé dé (2) jou dé lè ou résévwa [notis sa-a]; si ou bèbè ou byen soud rélé 1-800-955-8771.

FRENCH

Si vous êtes infirme, et en besoin de n'importe accommodation pour pouvoir participer á ces procédures, vous pouvez gratuitement recevoir, certains services. S'il-vous-plait contactez le coordinateur du Bureau Administratif du Tribunal de Palm Beach, située à 205 North Dixie Highway, Chambre 5.2500, West Palm Beach, Florida 33401, numéro de téléphone (561) 355-4380 durant deux (2) jours suivant la réception de [cette note]; si vous êtes muets ou sourds, appelez 1-800-955-8771.

SEARCY
DENNEY
SCAROLA
BARNHART
& SHIPLEY P.A.

*Attorneys
at Law*

WEST PALM BEACH OFFICE:

2139 PALM BEACH LAKES BLVD.
WEST PALM BEACH, FLORIDA 33409

P.O. DRAWER 3626
WEST PALM BEACH, FLORIDA 33402

(561) 866-5300
1-800-760-8607
FAX: (561) 478-0754

TALLAHASSEE OFFICE:

P.O. DRAWER 1230
TALLAHASSEE, FLORIDA 32302

(850) 224-7800
1-888-549-7011
FAX: (850) 224-7602

Via Hand Delivery
November 19, 2003

ATTORNEYS AT LAW:

ROSALYN SIA BAKER
F. GREGORY BARNHART*
LANCE BLOCK*
EARL L. DENNEY, JR.*
SEAN C. DOMNICK*
JAMES W. GUSTAFSON, JR.*
DAVID K. KELLEY, JR.*
WILLIAM B. KING
DARRYL L. LEWIS*
WILLIAM A. NORTON*
DAVID J. SALES*
JOHN SCAROLA
CHRISTIAN D. SEARCY*
HARRY A. SHEVIN
JOHN A. SHIPLEY III*
CHRISTOPHER K. SPEED*
KAREN E. TERRY
C. CALVIN WARRINER III*
DAVID J. WHITE*

*SHAREHOLDERS

Hon. Elizabeth T. Maass
Palm Beach County Courthouse
Room #11.1208
205 North Dixie Highway
West Palm Beach, FL 33401

Re: Coleman (Parent) Holdings Inc. vs Morgan Stanley & Company
Case No. 2003 CA 005045 AI
Matter No.: 029986-230580

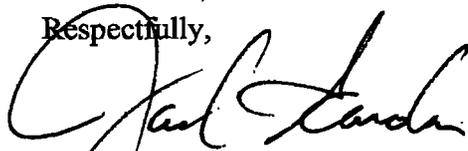
PARALEGALS:

VIVIAN AYAN-TEJEDA
LAURIE J. BRIGGS
DEANE L. CADY
DANIEL J. CALLOWAY
EMILIO DIAMANTIS
DAVID W. GILMORE
TED E. KULESA
JAMES PETER LOVE
CHRISTOPHER J. PILATO
ROBERT W. PITCHER
WILLIAM H. SEABOLD
KATHLEEN SIMON
STEVE M. SMITH
WALTER A. STEIN
BRIAN P. SULLIVAN
KEVIN J. WALSH
GEORGIA K. WETHERINGTON
JUDSON WHITEHORN

Dear Judge Maass:

A proposed order was submitted to the Court by mail concerning a motion to compel directed at the production of information concerning emails. The Defendants have subsequently objected by letter of November 18 to the entry of that Order and the accompanying motion has been filed and noticed for hearing in response to that objection.

Respectfully,



JACK SCAROLA
JS/mm
Enc.

cc: Joseph Ianno, Esq. (Via Fax)
Thomas A. Clare, Esq. (Via Fax)
Jenner & Block, LLC (Via Fax)



#230580/mm

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

CASE NO.: 2003 CA 005045 AI

Plaintiffs,

vs.

MORGAN STANLEY & CO., INC.,

Defendant,

_____ /

NOTICE OF HEARING

YOU ARE HEREBY NOTIFIED that the undersigned has called up for hearing the following:

DATE: November 25, 2003

TIME: 8:45 a.m.

JUDGE: Hon. Elizabeth T. Maass

PLACE: Palm Beach County Courthouse, Room #11.1208, 205 North Dixie Highway,
West Palm Beach, FL 33401

SPECIFIC MATTERS TO BE HEARD:

Plaintiff's Motion for Entry of Order Upon Stipulation of the Parties

Moving counsel certifies that he or she contacted opposing counsel and attempted to resolve the discovery dispute without hearing.

Coleman (Parent) Holdings Inc. vs Morgan Stanley & Company
Case No.: 2003 CA 005045 AI
Notice of Hearing

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by
Fax and U.S. Mail to all Counsel on the attached list, this 19th day of Nov., 2003.



JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 478-0754
Attorney for Plaintiffs

Coleman (Parent) Holdings Inc. vs Morgan Stanley & Company
Case No.: 2003 CA 005045 AI
Notice of Hearing

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block, LLC
One IBM Plaza
Suite 4400
Chicago, IL 60611

#230580/mm

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

CASE NO: 2003 CA 005045 AI

Plaintiffs,

vs.

MORGAN STANLEY & CO., INC.

Defendant.

MOTION FOR ENTRY OF ORDER
UPON STIPULATION OF THE PARTIES

Plaintiff, Coleman (Parent) Holdings Inc., moves this Honorable Court to enter the proposed Order previously submitted to the Court on Plaintiff's Motion to Compel concerning Emails and in support thereof would show:

1. Plaintiff moved to compel discovery concerning emails (Motion to Compel was filed under seal);
2. At a duly noticed Uniform Motion Calendar hearing on November 6, 2003 (transcript attached), the parties placed a stipulation on the record resolving the referenced motion;
3. Plaintiff drafted a proposed Order accurately reflecting the stipulation of the parties and submitted it to opposing counsel for review and approval (correspondence and proposed Order attached);

**Coleman Holdings, Inc. vs Morgan Stanley & Company
Motion For Entry Of Order Upon Stipulation Of The Parties
Case No.: 2003 CA 005045 AI**

COUNSEL LIST

**Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite1400
West Palm Beach, FL 33401**

**Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005**

**Jerold S. Solovy, Esq.
Jenner & Block, LLC
One IBM Plaza
Suite 4400
Chicago, IL 60611**

1 IN THE FIFTEENTH JUDICIAL CIRCUIT COURT
 2 IN AND FOR PALM BEACH COUNTY, FLORIDA
 3 CASE NUMBER: 2003 CA 005045 AI

4 COLEMAN (PARENT) HOLDINGS, INC.,
 5 Plaintiffs,
 6 vs.
 7 MORGAN STANLEY & CO., INC.
 8 Defendant.

9 PROCEEDINGS BEFORE THE HONORABLE ELIZABETH T. MAASS

10 APPEARANCES:

11 SEARCY, DENNEY, SCAROLA,
 12 BARNHART & SHIPLEY, P.A.
 13 2139 Palm Beach Lakes Boulevard
 14 West Palm Beach, Florida 33409
 15 Phone: (561) 686-6300
 16 ATTORNEYS FOR THE PLAINTIFF
 17 BY: JACK SCAROLA, ESQUIRE

18 KIRKLAND AND ELLIS
 19 655 15 Street, N.W., Suite 1200
 20 Washington, D.C. 20005
 21 Phone: (202) 879-5000
 22 ATTORNEYS FOR THE DEFENDANT
 23 BY: THOMAS A. CLARE

24 CARLTON FIELDS, et al.
 25 222 Lakeview Avenue, Suite 1400
 West Palm Beach, Florida 33401
 PHONE: (561) 659-7070
 ATTORNEYS FOR THE DEFENDANT
 BY: JOSEPH IANNO, JR., ESQUIRE

Thursday, November 6, 2003
 Palm Beach County Courthouse
 West Palm Beach, Florida

PINNACLE REPORTING, INC.
 (561) 820-9066

1 and retrieval capabilities with regard to emails.
 2 They will also produce all documents that were
 3 submitted to federal regulators with regard to
 4 Morgan Stanley's email retention policies and
 5 retrieval capabilities.

6 THE COURT: I don't think I have that motion.
 7 The only one I have deals with the objections to
 8 production of the settlement agreement. Are you
 9 submitting a proposed agreed order on this?

10 MR. SCAROLA: We will submit a proposed
 11 agreed order.

12 THE COURT: You're just telling me stuff and
 13 hopefully I'll remember it when I see the order.

14 MR. SCAROLA: Yes.

15 We have agreed reciprocally that we will
 16 provide a corporate representative who will
 17 address the same issues on behalf of Coleman
 18 (Parent) Holdings, Incorporated.

19 THE COURT: Okay.

20 MR. SCAROLA: With regard to the second
 21 motion, that's the Defense's motion, so I'll allow
 22 them to go first.

23 THE COURT: That's the one. Do we really
 24 think we're going to get this done at an 8:45?

25 MR. CLARE: Judge, this is on Morgan

PINNACLE REPORTING, INC.
 (561) 820-9066

1 TRANSCRIPT OF THE PROCEEDINGS, TAKEN BEFORE
 2 THE HONORABLE ELIZABETH MAASS IN COURTROOM 11B, PALM
 3 BEACH COUNTY COURTHOUSE, WEST PALM BEACH, FLORIDA, ON
 4 THURSDAY, NOVEMBER 6, 2003, BEGINNING AT 8:55 A.M.

5

6 THE COURT: Do we really think we're going to
 7 do this this morning?

8 MR. SCAROLA: We are going to surprise Your
 9 Honor.

10 THE COURT: Okay. How are we doing that?

11 MR. SCAROLA: We're going to surprise you by
 12 telling you first that with regard to the motion
 13 to compel production of emails, we have come to an
 14 agreement.

15 THE COURT: Okay.

16 MR. SCAROLA: And we will describe the terms
 17 of that agreement for the record.

18 For the record, my name is Jack Scarola. I'm
 19 hear on behalf of the Plaintiff Coleman (Parent)
 20 Holdings. There are two motions. First is motion
 21 to compel directed to the production of emails.
 22 The agreement that we have reached is that
 23 the Defendant Morgan Stanley will produce a
 24 witness who is knowledgeable with respect to the
 25 retention and retrieval -- the retention policies

PINNACLE REPORTING, INC.
 (561) 820-9066

1 Stanley's motion to compel the production of a
 2 single document, the settlement agreement between
 3 Coleman (Parent) and Arthur Andersen. And just
 4 briefly, I think it's fairly straightforward in
 5 terms of the history of this, that prior to
 6 initiating the lawsuit against Morgan Stanley,
 7 Coleman (Parent) brought a virtually identical
 8 lawsuit against Arthur Andersen, same allegations,
 9 same claim of damages, and now have settled.

10 THE COURT: Let me ask you this. This is the
 11 notebook you gave me for this, right?

12 MR. CLARE: That includes the cases that
 13 we've cited.

14 THE COURT: I can't do this on an 8:45.
 15 Please understand, 8:45's are things -- I can read
 16 everything. I can walk in and not know anything.
 17 I can read everything I've got to read, absorb
 18 everything I've got to, and I can do it in ten
 19 minutes. I can't even read your motion in ten
 20 minutes.

21 MR. CLARE: I have one case, City of
 22 Homestead case, that --

23 THE COURT: I'm happy to get the book and
 24 specially set. I'm happy to do it on an expedited
 25 basis. I cannot do this on an 8:45. If you

PINNACLE REPORTING, INC.
 (561) 820-9066

1 bothered to put together a notebook like this, I
 2 know I need more time with it, okay?
 3 Do you want me to get the book? Do you have
 4 access to your schedules?
 5 MR. CLARE: Sure.
 6 MR. SCAROLA: I don't, but can make a phone
 7 call to my office.
 8 THE COURT: Okay. That's great.
 9 MR. SCAROLA: Would you like me to get my
 10 office on the line, Your Honor?
 11 THE COURT: Sure.
 12 MR. CLARE: Just in the interest of
 13 completeness and while we're waiting for the
 14 schedule, Mr. Scarola described in broad outlines
 15 what the agreed upon order would be on this other
 16 motion. There is one caveat I explained to
 17 Mr. Scarola in the hallway, and we will work it
 18 out between the parties before we submit an agreed
 19 upon order to Your Honor. I am not aware as I sit
 20 here right now what limitations there are right
 21 now without disclosing to Mr. Scarola's client
 22 information we provided to federal regulators. We
 23 agreed to provide whatever it is we can provide.
 24 THE COURT: Are you saying we might have a
 25 legal dispute later about what you're permitted to

PINNACLE REPORTING, INC.
(561) 820-9066

1 THE COURT: Who?
 2 MR. CLARE: Mr. John Tirey (ph) is coming
 3 from that the United Kingdom for a deposition that
 4 day.
 5 THE COURT: You have depositions in this
 6 case, so that's probably not a good day. Let's
 7 find a better time.
 8 We could try 4:30 on Tuesday, November 25.
 9 That's the Tuesday of Thanksgiving week, just so
 10 you-all are clear.
 11 MR. CLARE: That's fine with me, Your Honor.
 12 MR. IANNO: That's not a problem.
 13 MR. SCAROLA: That works, Your Honor.
 14 THE COURT: Is that okay? We will do it
 15 then. And I'll hold the stuff you gave me. If
 16 you want me to look at anything else, send it to
 17 me a few days ahead of time so I have it.
 18 MR. CLARE: Thank you.
 19 MR. SCAROLA: Thank you, Your Honor.
 20 THE COURT: Thank you.
 21 (Whereupon, at 9:03 a.m., the proceedings concluded.)
 22
 23
 24
 25

PINNACLE REPORTING, INC.
(561) 820-9066

1 disclose?
 2 MR. CLARE: About what we're permitted to
 3 disclose, and I just don't know all the details
 4 without consulting with my client. We have an
 5 agreement in principle that whatever we can
 6 provide on this, we'll provide. I know there are
 7 materials we can provide, I just don't know the
 8 scope of it. And I don't want to represent to the
 9 court that we're waiving or even have the ability
 10 to waive protections that I'm not aware of right
 11 now.
 12 MR. SCAROLA: The only caveat to that is that
 13 there's a commitment that they will provide good
 14 faith cooperation in obtaining whatever
 15 information is necessary in order to make full
 16 disclosure.
 17 THE COURT: Okay.
 18 MR. CLARE: That's correct.
 19 THE COURT: We can try the 14th, which is a
 20 week from tomorrow at 4:30. Do you know if you're
 21 available, sir?
 22 MR. CLARE: There was a deposition that was
 23 scheduled that day.
 24 THE COURT: In this case?
 25 MR. CLARE: In this case in New York.

PINNACLE REPORTING, INC.
(561) 820-9066

1 C E R T I F I C A T E
 2
 3
 4 STATE OF FLORIDA
 5 COUNTY OF PALM BEACH
 6
 7 I, PAMELA GRIMALDI, Registered Professional
 8 Reporter, do hereby certify that I was authorized to
 9 and did stenographically report the foregoing
 10 proceedings and that the transcript is a true and
 11 correct transcription of my stenotype notes of the
 12 proceedings.
 13
 14 Dated this 18th day of November, 2003.
 15
 16
 17
 18 PAMELA GRIMALDI
 19 Registered Professional Reporter
 20
 21
 22
 23 The foregoing certification of this transcript does not
 24 apply to any reproduction of the same by any means
 25 unless under the direct control and/or direction of the
 certifying reporter.

PINNACLE REPORTING, INC.
(561) 820-9066

-	ask 4/10	Defendant 1/7 1/18 1/21 2/23
-- 4/15 4/22	at 2/4 3/24 6/20 7/16 7/21	Defense's 3/21
0	ATTORNEYS 1/14 1/18 1/21	DENNEY 1/12
005045 1/2	authorized 8/8	deposition 6/22 7/3
03 7/21	available 6/21	depositions 7/5
1	Avenue 1/20	describe 2/16
11B 2/2	aware 5/19 6/10	described 5/14
1200 1/16	B	details 6/3
1400 1/20	BARNHART 1/12	did 8/9
14th 6/19	basis 4/25	direct 8/24
15 1/16	be 5/15	directed 2/21
18th 8/14	before 1/9 2/1 5/18	direction 8/24
2	BEGINNING 2/4	disclose 6/1 6/3
2003 1/2 1/24 2/4 8/14	behalf 2/19 3/17	disclosing 5/21
2005 1/17	better 7/7	disclosure 6/16
202 1/17	between 4/2 5/18	dispute 5/25
2139 1/13	book 4/23 5/3	document 4/2
222 1/20	bothered 5/1	documents 3/2
3	Boulevard 1/13	does 8/23
30 6/20 7/8	briefly 4/4	doing 2/10
33401 1/20	broad 5/14	don't 3/6 5/6 6/3 6/7 6/8
33409 1/13	brought 4/7	done 3/24
4	but 5/6	E
45 3/24 4/14 4/25	C	ELIZABETH 1/9 2/2
45's are 4/15	CA 1/2	ELLIS 1/16
5	call 5/7	else 7/16
55 2/4	can't 4/14 4/19	email 3/4
561 1/14 1/21	cannot 4/25	emails 2/13 2/21 3/1
6	capabilities 3/1 3/5	ESQUIRE 1/15 1/22
655 1/16	CARLTON 1/19	et 1/19
659-7070 1/21	case 1/2 4/21 4/22 6/24 6/25	even 4/19 6/9
686-6300 1/14	7/6	everything 4/16 4/17 4/18
8	cases 4/12	expedited 4/24
879-5000 1/17	caveat 5/16 6/12	explained 5/16
A	certification 8/23	F
a.m 2/4 7/21	certify 8/8	fairly 4/4
ability 6/9	certifying 8/25	faith 6/14
about 5/25 6/2	CIRCUIT 1/1	federal 3/3 5/22
absorb 4/17	cited 4/13	few 7/17
access 5/4	City 4/21	FIELDS 1/19
address 3/17	claim 4/9	FIFTEENTH 1/1
against 4/6 4/8	CLARE 1/18	find 7/7
agreed 3/9 3/11 3/15 5/15	clear 7/10	fine 7/11
5/18 5/23	client 5/21 6/4	first 2/12 2/20 3/22
agreement 2/14 2/17 2/22 3/8	CO 1/6	FLORIDA 1/1 1/13 1/20 1/25
4/2 6/5	COLEMAN 1/3 2/19 3/17 4/3	2/3 8/4
ahead 7/17	4/7	foregoing 8/9 8/23
AI 1/2	come 2/13	full 6/15
al 1/19	coming 7/2	G
all 3/2 6/3	commitment 6/13	gave 4/11 7/15
allegations 4/8	compel 2/13 2/21 4/1	get 3/24 4/23 5/3 5/9
allow 3/21	completeness 5/13	go 3/22
also 3/2	concluded 7/21	going 2/6 2/8 2/11 3/24
am 5/19	consulting 6/4	good 6/13 7/6
Andersen 4/3 4/8	control 8/24	got 4/17 4/18
any 8/24 8/24	cooperation 6/14	great 5/8
anything 4/16 7/16	corporate 3/16	GRIMALDI 8/7 8/18
APPEARANCES 1/11	correct 6/18 8/11	H
apply 8/24	could 7/8	hallway 5/17
are 2/8 2/10 2/20 3/8 5/20	COUNTY 1/1 1/24 2/3 8/5	happy 4/23 4/24
5/24 6/6 7/10	court 1/1 6/9	hear 2/19
Arthur 4/3 4/8	Courthouse 1/24 2/3	here 5/20
as 5/19	COURTROOM 2/2	hereby 8/8
	D	history 4/5
	D.C 1/17	hold 7/15
	damages 4/9	HOLDINGS 1/3 2/20 3/18
	Dated 8/14	Homestead 4/22
	day 6/23 7/4 7/6 8/14	Honor 2/9 5/10 5/19 7/11
	days 7/17	7/13 7/19
	deals 3/7	

H	need 5/2 New 6/25 not 4/16 5/19 6/10 7/6 7/12 8/23 notebook 4/11 5/1 notes 8/11 November 1/24 2/4 8/14 November 25 7/8 now 4/9 5/20 5/21 6/11 NUMBER 1/2	retrieval -- 2/25 right 4/11 5/20 5/20 6/10
HONORABLE 1/9 2/2 hopefully 3/13 How 2/10		S
I		same 3/17 4/8 4/9 8/24 saying 5/24 SCAROLA 1/12 1/15 2/18 schedule 5/14 scheduled 6/23 schedules 5/4 scope 6/8 SEARCY 1/12 second 3/20 see 3/13 send 7/16 set 4/24 settled 4/9 settlement 3/8 4/2 SHIPLEY 1/12 single 4/2 sir 6/21 sit 5/19 so 3/21 7/6 7/9 7/17 specially 4/24 STANLEY 1/6 2/23 4/6 Stanley's 3/4 4/1 STATE 8/4 stenographically 8/9 stenotype 8/11 straightforward 4/4 Street 1/16 stuff 3/12 7/15 submit 3/10 5/18 submitted 3/3 submitting 3/9 Suite 1/16 1/20 Sure 5/5 5/11 surprise 2/8 2/11
I'll 3/13 3/21 7/15 I'm 2/18 4/23 4/24 6/10 I've 4/17 4/18 IANNO 1/22 identical 4/7 if 4/25 6/20 7/15 INC 1/3 1/6 includes 4/12 Incorporated 3/18 information 5/22 6/15 initiating 4/6 interest 5/12 issues 3/17 it's 4/4	O	T
J	objections 3/7 obtaining 6/14 office 5/7 5/10 okay 2/10 2/15 3/19 5/2 5/8 6/17 7/14 one 3/7 3/23 4/21 5/16 only 3/7 6/12 or 6/9 8/24 order 3/9 3/11 3/13 5/15 5/19 6/15 other 5/15 out 5/18 outlines 5/14	TAKEN 2/1 telling 2/12 3/12 ten 4/18 4/19 terms 2/16 4/5 Thank 7/18 7/19 7/20 Thanksgiving 7/9 that's 3/21 3/23 5/8 6/18 7/6 7/9 7/11 7/12 them 3/22 then 7/15 there 2/20 5/16 5/20 6/6 6/22 there's 6/13 they 3/2 6/13 things 4/15 think 2/6 3/6 3/24 4/4 THOMAS 1/18 Thursday 1/24 2/4 time 5/2 7/7 7/17 Tirey 7/2 together 5/1 tomorrow 6/20 transcript 2/1 8/10 8/23 transcription 8/11 true 8/10 try 6/19 7/8 Tuesday 7/8 7/9 two 2/20
JACK 1/15 2/18 JOSEPH 1/22 JR 1/22 Judge 3/25 JUDICIAL 1/1 just 3/12 4/3 5/12 6/3 6/7 7/9	P	U
K	P.A. 1/12 PAMELA 8/7 8/18 PARENT 1/3 2/19 3/18 4/3 4/7 parties 5/18 permitted 5/25 6/2 ph 7/2 phone 1/14 1/17 1/21 5/6 PLAINTIFF 1/14 2/19 Plaintiffs 1/4 Please 4/15 policies 2/25 3/4 principle 6/5 prior 4/5 probably 7/6 problem 7/12 proceedings 1/9 2/1 7/21 8/10 8/12 produce 2/23 3/2 production 2/13 2/21 3/8 4/1 Professional 8/7 8/19 proposed 3/9 3/10 protections 6/10 provide 3/16 5/23 5/23 6/6 6/6 6/7 6/13 provided 5/22 put 5/1	under 8/24 understand 4/15 United 7/3
Kingdom 7/3 KIRKLAND 1/16 know 4/16 5/2 6/3 6/6 6/7 6/20 knowledgeable 2/24		
L	R	
Lakes 1/13 Lakeview 1/20 later 5/25 lawsuit 4/6 4/8 legal 5/25 Let 4/10 Let's 7/6 like 5/1 5/9 limitations 5/20 line 5/10 look 7/16	reached 2/22 read 4/15 4/17 4/17 really 2/6 3/23 reciprocally 3/15 record 2/17 2/18 reed 4/19 regard 2/12 3/1 3/3 3/20 Registered 8/7 8/19 regulators 3/3 5/22 remember 3/13 report 8/9 reporter 8/8 8/19 8/25 represent 6/8 representative 3/16 reproduction 8/24 respect 2/24 retention 2/25 2/25 3/4 retrieval 3/1 3/5	
M		
MAASS 1/9 2/2 make 5/6 6/15 materials 6/7 means 8/24 might 5/24 minutes 4/19 4/20 more 5/2 MORGAN 1/6 2/23 3/4 3/25 4/6 morning 2/7 motion 2/12 2/20 3/6 3/21 3/21 4/1 4/19 5/16 motions 2/20 Mr. John 7/2 Mr. Scarola 5/14 5/17 Mr. Scarola's 5/21 my 2/18 5/7 5/9 6/4 8/11		
N		
N.W. 1/16 name 2/18 necessary 6/15		

U		
unless 8/24 upon 5/15 5/19		
V		
virtually 4/7		
W		
waiting 5/13 waive 6/10 waiving 6/9 walk 4/16 want 5/3 6/8 7/16 was 6/22 6/22 8/8 Washington 1/17 we'll 6/6 we're 2/6 2/11 3/24 5/13 6/2 6/9 we've 4/13 week 6/20 7/9 were 3/2 West 1/13 1/20 1/25 2/3 what 5/15 5/20 5/25 6/2 whatever 5/23 6/5 6/14 when 3/13 Whereupon 7/21 which 6/19 while 5/13 who 2/24 3/16 7/1 without 5/21 6/4 witness 2/24 work 5/17 works 7/13 would 5/9 5/15		
Y		
Yes 3/14 York 6/25 you're 3/12 5/25 6/20 you-all 7/10 your 2/8 4/19 5/4 5/10 5/19 7/11 7/13 7/19		

MARY MCCANN

From: tclare@kirkland.com
Sent: Wednesday, November 12, 2003 11:47 AM
To: MARY MCCANN
Cc: Ianno, Joseph; MARY MCCANN; dconnell@jenner.com
Subject: RE: Coleman v. Morgan Stanley

Have forwarded to client for review.

MEM@SearcyLaw.com on 11/12/2003 11:51:09 AM

To: "Ianno, Joseph" <JIanno@CarltonFields.com>
cc: Thomas Clare/Washington DC/Kirkland-Ellis@K&E,
"MARY MCCANN" <MEM@SearcyLaw.com>,
dconnell@jenner.com

Subject: RE: Coleman v. Morgan Stanley

Awaiting your response. Status, please. Thank you.

Mary McCann, Secretary to Jack Scarola

-----Original Message-----

From: Ianno, Joseph [mailto:JIanno@CarltonFields.com]
Sent: Tuesday, November 11, 2003 9:41 AM
To: MARY MCCANN
Subject: RE: Coleman v. Morgan Stanley

I had to forward to T. Clare since it was his agreement. Please copy him with any e-mails on this case.

Thanks

Joe

Joseph Ianno, Jr., Esquire
Carlton Fields, P.A.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401
(561) 659-7070
(561) 659-7368 facsimile
jianno@carltonfields.com
www.carltonfields.com

The information contained in this communication is confidential, may be attorney-client privileged, may constitute attorney work product, and is intended only for the use of the addressee. It is the property of

Carlton Fields. Unauthorized use, disclosure or copying of this communication or any part thereof is strictly prohibited and may be unlawful. For a copy of Carlton Fields' Privacy Policy, please visit our website at <http://www.carltonfields.com/privacy.htm>.

-----Original Message-----

From: MARY MCCANN [mailto:MEM@SearcyLaw.com]
Sent: Tuesday, November 11, 2003 9:40 AM
To: Ianno, Joseph
Cc: MARY MCCANN; dconnell@jenner.com
Subject: Coleman v. Morgan Stanley

Please see attached proposed Agreed Order on Coleman (Parent) Holdings Inc.'s Motion to Compel Concerning E-Mails for your review and approval prior to submission to the Court.

Please get back to me at your earliest possible opportunity. Thank you.

JS/mm
<<doc_103_8DBF.DOC>>

Privileged and Confidential

The information contained in this e-mail message is intended for the use of the individual or entity to which it is addressed and may contain information that is proprietary, privileged, confidential, and exempt from disclosure under applicable laws. If the reader of this message is not the intended recipient, or the employee or agent responsible for delivery to the intended recipient, you are hereby notified that any use, printing, reproduction, disclosure or dissemination of this communication may be subject to legal restriction or sanction.

#230580/mm

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN
AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

CASE NO: 2003 CA 005045 AI

Plaintiffs,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.

**ORDER ON COLEMAN (PARENT) HOLDINGS INC.'S
MOTION TO COMPEL CONCERNING E-MAILS**

THIS CAUSE is before the Court upon Coleman (Parent) Holdings Inc.'s Motion to Compel Concerning E-mails, and the subsequent stipulation of the parties, upon consideration of which, it is hereby,

ORDERED and ADJUDGED:

1. The Defendant shall within 10 days of the date of this order produce all materials submitted to regulators in connection with any investigation of Morgan Stanley's e-mail retention policies;
2. To the extent any restrictions may limit the ability of the Defendant to comply with the provisions of Paragraph 2 of his Order, the Defendant shall cooperate in good faith to secure the removal of those restrictions.
3. Within 15 days following the production called for in Paragraph 1, each party shall produce a corporate representative to be deposed at a mutually agreeable time and place to testify pursuant to the provisions of Rule 1.310, F.R. Civ. P. concerning that party's e-mail retention policies, practices and procedures at all times material to the

Coleman Holdings, Inc. vs Morgan Stanley & Company
Case No.:2003 CA 005045 AI
Order

claims asserted herein and also concerning the ability, procedure, time, labor and
expense involved in retrieving e-mails generated during the relevant time period;

DONE AND ORDERED at West Palm Beach, Palm Beach County, Florida, this _____
day of _____, 2003.

ELIZABETH T. MAASS
CIRCUIT COURT JUDGE

Copies have been furnished to all counsel on the attached counsel list.

Coleman Holdings, Inc. vs Morgan Stanley & Company
Case No.:2003 CA 005045 AI
Order

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block, LLC
One IBM Plaza
Suite 4400
Chicago, IL 60611

Jack Scarola, Esq.
Searcy Denney Scarola Barnhart & Shipley
P.O. Drawer 3626
West Palm Beach, FL 33402

CARLTON FIELDS

ATTORNEYS AT LAW

MIAMI
ORLANDO
ST. PETERSBURG
TALLAHASSEE
TAMPA

WEST PALM BEACH

Esperanté
222 Lakeview Avenue, Suite 1400
West Palm Beach, Florida 33401-6149
P.O. Box 150
West Palm Beach, Florida 33402-0150

561.659.7070
561.659.7368 fax

www.carltonfields.com

E-MAIL: jjanno@carltonfields.com

November 20, 2003

The Honorable Elizabeth Maass
Palm Beach County Courthouse
205 North Dixie Highway
West Palm Beach, Florida 33401

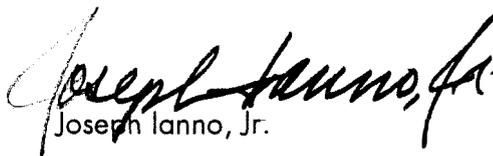
VIA HAND DELIVERY

Re: *Coleman (Parent) Holdings Co. v. Morgan Stanley & Co.*
Case No. 2003 CA 5045 AI

Dear Judge Maass:

In addition to our supporting pleadings and case authority submitted under separate cover of November 4, 2003, enclosed please find a courtesy copy of Defendant's Reply in Support of Its Motion to Compel Plaintiff to Produce Settlement Agreement with Arthur Andersen which has been filed under seal. Also enclosed are additional case authority referenced within Defendant's Reply. Defendant's Motion to Compel is specially set before Your Honor on November 25, 2003 at 4:30 p.m.

Respectfully,


Joseph Ianno, Jr.

/jed

Enclosures

cc: Jack Scarola (w/encl.)
Jerold Solovy (w/encl.)
Thomas Clare (w/encl.)

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO: 03 CA-005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

NOTICE OF FILING PLEADING UNDER SEAL

Defendant, Morgan Stanley & Co. Inc., by and through its undersigned counsel, hereby gives notice that Morgan Stanley & Co. Inc.'s Reply in Support of Its Motion to Compel Plaintiff to Produce Settlement Agreement with Arthur Andersen was filed under seal this 20th day of November, 2003.

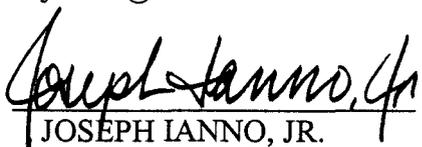
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by e-mail and Federal Express to all counsel of record on the attached service list on this 20th day of November, 2003.

Thomas D. Yannucci, P.C.
Thomas A. Clare
Zhonette M. Brown
Ryan P. Phair
Kathryn R. DeBord
KIRKLAND & ELLIS LLP
655 15th Street, N.W., 12th Floor
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

**COUNSEL FOR DEFENDANT,
MORGAN STANLEY & CO., INC.**

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

BY: 
JOSEPH IANNO, JR.
Florida Bar No: 655351

SERVICE LIST

<p>John Scarola SEARCY, DENNEY, SCAROLA, BARNHARDT & SHIPLEY, P.A. 2139 Palm Beach Lakes Boulevard West Palm Beach, Florida 33409</p>	<p>Counsel for Plaintiff</p>
<p>Jerold S. Solovy JENNER & BLOCK, LLC One IBM Plaza Suite 4400 Chicago, Illinois 60611</p>	<p>Counsel for Plaintiff</p>

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

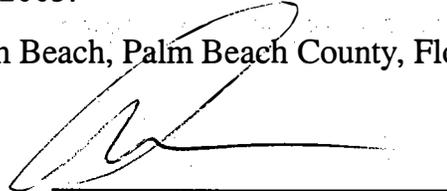
MORGAN STANLEY & CO., INC.,
Defendant(s).

ORDER AND DIRECTIONS TO THE CLERK

THIS CAUSE came before the Court, in Chambers, on its own Motion. Based on the foregoing, it is

ORDERED AND ADJUDGED that the Clerk is directed to docket and file attorney Joseph Ianno, Jr.'s letter dated November 18, 2003.

JW DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this
 day of November, 2003.



ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:

Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci
655 15th Street, NW, Suite 1200
Washington DC 20005

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, Il 60611

Mark F. Bideau, Esq.
777 S. Flagler Dr., Suite 300E
West Palm Beach, FL 33401

David M. Wells, Esq.
50 N. Laura Street, Suite 3300
Jacksonville, FL 32202

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

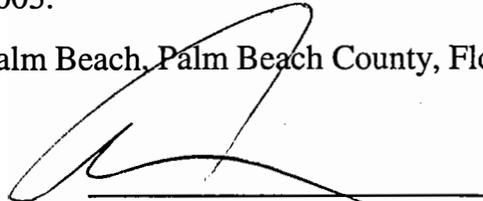
MORGAN STANLEY & CO., INC.,
Defendant(s).

ORDER AND DIRECTIONS TO THE CLERK

THIS CAUSE came before the Court, in Chambers, on its own Motion. Based on the foregoing, it is

ORDERED AND ADJUDGED that the Clerk is directed to docket and file attorney Jack Scarola's letter dated November 18, 2003.

20 ~~DONE~~ AND ORDERED in West Palm Beach, Palm Beach County, Florida this
 day of November, 2003.



ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:

Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci
655 15th Street, NW, Suite 1200
Washington DC 20005

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, Il 60611

Mark F. Bideau, Esq.
777 S. Flagler Dr., Suite 300E
West Palm Beach, FL 33401

David M. Wells, Esq.
50 N. Laura Street, Suite 3300
Jacksonville, FL 32202

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

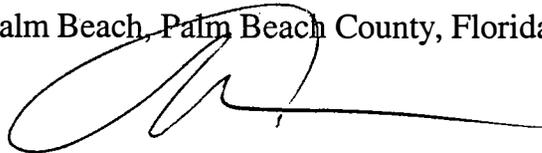
MORGAN STANLEY & CO., INC.,
Defendant(s).

ORDER AND DIRECTIONS TO THE CLERK

THIS CAUSE came before the Court, in Chambers, on its own Motion. Based on the foregoing, it is

ORDERED AND ADJUDGED that the Clerk is directed to docket and file attorney Jack Scarola's letter and its enclosures dated November 19, 2003.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 20 day of November, 2003.



ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci
655 15th Street, NW, Suite 1200
Washington DC 20005

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, Il 60611

Mark F. Bideau, Esq.
777 S. Flagler Dr., Suite 300E
West Palm Beach, FL 33401

David M. Wells, Esq.
50 N. Laura Street, Suite 3300
Jacksonville, FL 32202

LAW OFFICES
J E N N E R & B L O C K , L L C

ONE IBM PLAZA
CHICAGO, ILLINOIS 60611

(312) 222-9350
(312) 527-0484 FAX

DEIRDRE E. CONNELL
312-923-2661 Direct Dial
312-840-7661 Direct Facsimile

TELECOMMUNICATION TRANSMITTAL

DATE: November 21, 2003

TO: **Thomas A. Clare, Esq.**
KIRKLAND & ELLIS, LLP

VOICE: (202) 879-5993
FAX: (202) 879-5200

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.

VOICE: (561) 659-7070
FAX: (561) 659-7368

FROM: Deirdre E. Connell

SECY. EXT.: 6486

EMP. NO.: 035666

CLIENT NO.: 41198-10003

IMPORTANT: THIS MESSAGE IS INTENDED ONLY FOR THE USE OF THE INDIVIDUAL OR ENTITY TO WHICH IT IS ADDRESSED, AND MAY CONTAIN INFORMATION THAT IS ATTORNEY WORK PRODUCT, PRIVILEGED, CONFIDENTIAL AND EXEMPT FROM DISCLOSURE UNDER APPLICABLE LAW. IF THE READER OF THIS MESSAGE IS NOT THE INTENDED RECIPIENT, OR THE EMPLOYEE OR AGENT RESPONSIBLE FOR DELIVERING THE MESSAGE TO THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION, DISTRIBUTION OR COPYING OF THIS COMMUNICATION IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE NOTIFY US IMMEDIATELY BY TELEPHONE, AND RETURN THE ORIGINAL MESSAGE TO US AT THE ABOVE ADDRESS VIA POSTAL SERVICE. THANK YOU.

MESSAGE: **Please see attached.**

Total number of pages including this cover sheet: 25

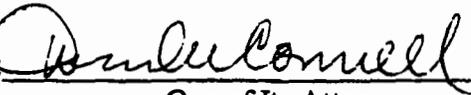
DATE SENT: 11/21/03 TIME SENT: 4:10 pm SENT BY: S. EDDINGTON

IF YOU DO NOT RECEIVE ALL PAGES, PLEASE CALL (312) 222-9350, EXT: 6486

The witnesses will be requested to bring to the depositions the documents specified in Exhibit A to the Subpoena for each witness. The depositions will be recorded by stenographic and audio-visual means and will be taken before a person authorized to administer oaths and will continue day to day until completed. The videographer will be Esquire Deposition Services, New York, NY.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by facsimile and mail to all counsel on the attached Service List, this 21st day of November, 2003.

COLEMAN (PARENT) HOLDINGS INC.

By: 
One of Its Attorneys

Jerold S. Solovy
Deirdre E. Connell
JENNER & BLOCK, LLC
One IBM Plaza
Suite 4400
Chicago, Illinois 60611
(312) 222-9350

Jack Scarola
SEARCY DENNEY SCAROLA BARNHART
& SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33409
(561) 686-6300

SERVICE LIST

**Thomas A. Clare, Esq.
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005**

**Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lake View Avenue
Suite 1400
West Palm Beach, FL 33401**

Document Number : 1005986

**EXHIBIT A
TO SUBPOENA TO NON-PARTY
ROBERT W. KITTS**

You are hereby requested to produce the following documents pursuant to the definitions and instructions set forth below.

DOCUMENTS REQUESTED

1. All documents concerning the identity of any Morgan Stanley personnel who performed any work for Sunbeam concerning the Coleman Transaction, the Subordinated Debenture Offering, the Bank Facility, or the Credit Agreement.
2. All documents concerning Sunbeam's engagement of Morgan Stanley, including but not limited to engagement letters, bills, invoices, billing or payment records, and back-up for statements of professional services rendered and/or expenses incurred in connection with Morgan Stanley's work for Sunbeam.
3. All calendars, diaries, timekeeping sheets or records maintained by You concerning any activities or services performed for Sunbeam, Morgan Stanley, or MSSF.
4. All documents concerning any investigation, analysis or due diligence concerning Sunbeam or Coleman provided to or conducted by or on behalf of Morgan Stanley or MSSF.
5. All documents concerning attempts by Morgan Stanley to locate (a) someone to purchase or otherwise acquire Sunbeam, in whole or in part, whether through merger, purchase, transfer of assets or securities, or otherwise or (b) companies for Sunbeam to purchase or otherwise acquire, whether through merger, purchase, transfer of assets or securities, or otherwise.
6. All documents concerning the Coleman Transaction, the Credit Agreement, the Bank Facilities, or the Subordinated Debenture Offering.

7. All documents concerning the "bring-down" due diligence for the Subordinated Debenture Offering.
8. All documents concerning Sunbeam's March 19, 1998 press release, including but not limited to whether to issue the press release, whether to include all or any portion of the March 19, 1998 press release in the Offering Memorandum, or concerning the contents or drafting of the press release.
9. All documents concerning Sunbeam's actual or expected sales, revenues, or earnings for all or any portion of 1996, 1997, or 1998.
10. All documents concerning the drafting and issuance of the Offering Memorandum.
11. All documents concerning the March 19, 1998 drafting session and/or meeting that took place at Global Financial Press concerning the Offering Memorandum.
12. All documents concerning any conversations or communications of any kind involving John Tyree or Lawrence Bornstein concerning Sunbeam.
13. All documents relating to synergies that might be achieved from a business combination of Sunbeam, and any or all of Coleman, Signature Brands USA, and First Alert, Inc.
14. All documents concerning the sale of the Subordinated Debentures, including but not limited to documents concerning roadshows; communications with potential investors, CPH, Coleman, Mafoo, or analysts; or communications with or among Morgan Stanley's personnel.
15. All documents reflecting or concerning any communications between or among any of Morgan Stanley, MSSF, Davis Polk, Sunbeam, Arthur Andersen LLP, and/or Skadden concerning Sunbeam, the Coleman Transaction, the Subordinated Debenture Offering, the Bank Facility, or the Credit Agreement.

16. All documents concerning any “comfort letters” prepared in connection with the Subordinated Debenture Offering or the Credit Agreement including but not limited to Arthur Andersen’s letters dated March 19, 1998 and March 25, 1998 and any drafts of those letters.

17. All documents concerning any valuation of Coleman or Sunbeam securities (a) prepared or performed by Morgan Stanley or MSSF or (b) provided to Morgan Stanley or MSSF.

18. All documents You or Morgan Stanley provided to or received from the SEC, the Justice Department, the U.S. Attorney for the Southern District of New York, the Attorney General of New York, any other federal or state governmental or regulatory body, or any other self-regulatory body concerning Sunbeam, Morgan Stanley, MSSF, the Coleman Transaction, the Subordinated Debenture Offering, and/or the Bank Facilities. The relevant time period for this request is February 1998 through the date of service of this subpoena.

19. All documents you provided to any party in connection with any of the Litigations.

DEFINITIONS

1. “Arthur Andersen” means Arthur Andersen LLP and its present and former partners and employees.

2. “CPH” means Coleman (Parent) Holdings Inc., and its present and former officers, directors, and employees.

3. “Coleman Transaction” means the transaction by which Sunbeam acquired CPH’s interest in The Coleman Company.

4. “Communication” means the transmittal of information (in the form of facts, ideas, inquiries or otherwise) by letter, memorandum, facsimile, orally, electronically or otherwise.

5. **“Concerning”** means concerning, reflecting, relating to, referring to, describing, evidencing, or constituting.

6. **“Credit Agreement”** means that agreement entered into by Sunbeam Corporation, as borrower, with Morgan Stanley Senior Funding, Inc., Bank of America National Trust and Savings Association, and First Union National Bank (now known as Wachovia Bank, National Association), as lenders, dated March 30, 1998 and amended periodically thereafter by agreement of the parties.

7. **“Documents”** shall be given the broad meaning provided in CPLR Rule 3120 and refers to any form or means, whether physical, visual, or electronic, in or by which words, numbers, or ideas are recorded or preserved, whether fixed in tangible medium or electronically stored, including any and all drafts of any final document. The word “documents” shall include, by way of example and not by way of limitation, all of the following: papers, correspondence, trade letters, envelopes, memoranda, telegrams, cables, notes, messages, reports, studies, press releases, comparisons, books, accounts, checks, audio and video recordings and transcriptions thereof, pleadings, testimony, articles, bulletins, pamphlets, brochures, magazines, questionnaires, surveys, charts, newspapers, calendars, desk calendars, pocket calendars, lists, logs, publications, notices, diagrams, instructions, diaries, minutes for meetings, corporate minutes, orders, resolutions, agendas, memorials or notes of oral communications, whether by telephone or face-to-face, contracts, agreements, drafts of or proposed contracts or agreements, memoranda of understanding, letters of intent, computer tapes, computer drives or memories, computer diskettes or disks, e-mail, CD-ROMs, or any other tangible thing on which any handwriting, typing, printing, photostatic, electronic, or other form of communication or information is recorded or reproduced, together with

all notations on any of the foregoing, all originals, file copies, or other unique copies of the foregoing, and all versions or drafts thereof, whether used or not.

8. "Litigations" means In Re Sunbeam Securities Litigation, 98-8258-Civ.-Middlebrooks (S.D. Fla.); Camden Asset Management, L.P., et al. v. Sunbeam Corporation, et al., 98-8773-Civ.-Middlebrooks and 98-8275-Civ.-Middlebrooks (S.D. Fla.); Krim v. Dunlap, et al., No. CL983168AD (15th Jud. Cir., Fla.); Stapleton v. Sunbeam Corp., et al., No. 98-1676-Civ.-King (S.D. Fla.); Sunbeam Corp. v. PricewaterhouseCoopers LLP, No. CL005444AN (15th Jud. Cir., Fla.); In re Sunbeam Corp., No. 01-40291 (AJG) (Bankr. S.D.N.Y.), and every adversary proceeding therein; SEC v. Dunlap, et al., No. 01-8437-Civ.-Middlebrooks (S.D. Fla.); Oaktree Capital Management LLC v. Arthur Andersen LLP, No. BC257177 (L.A. Cty., CA); and Coleman (Parent) Holdings Inc. v. Arthur Andersen LLP, et al., No. CA 01-06062AN (15th Jud. Cir., Fla); Albert J. Dunlap and Sunbeam Corporation, No. 32 160 00088 99 (AAA); and Russell A. Kersh and Sunbeam Corporation, No. 32 160 00091 99 (AAA); In the Matter of Sunbeam Corp., SEC Administrative Proceeding File No. 3-10481; In the Matter of David C. Fannin, SEC Administrative Proceeding File No. 3-10482, and any other matter involving the Coleman Transaction, the Credit Agreement, the Bank Facilities, or the Subordinated Debenture Offering.

9. "Morgan Stanley" means Morgan Stanley & Co., Inc. and any of its direct or indirect parents, affiliates, subsidiaries, and present and former officers, directors, partners, employees, representatives, and agents.

10. "MSSF" means Morgan Stanley Senior Funding, Inc. and any of its direct or indirect parents, affiliates, subsidiaries, and present and former officers, directors, partners, employees, representatives, and agents.

11. **“Person” means any natural person, corporation, limited liability company, trust, joint venture, association, company, partnership, governmental authority, or other entity.**
12. **“SEC” means the Securities and Exchange Commission.**
13. **“Skadden” means Skadden, Arps, Slate, Meagher & Flom LLP and any of its present and former partners, employees, representatives and agents.**
14. **“Subordinated Debenture Offering” means the offering of Sunbeam’s Zero Coupon Convertible Senior Subordinated Debentures Due 2018.**
15. **“Sunbeam” means Sunbeam Corporation and any of its present and former officers, directors, employees, representatives, and agents.**
16. **“You” or “Your” means Robert W. Kitts and any of Robert W. Kitts’s present and former representatives and agents.**

INSTRUCTIONS

1. **Documents shall be produced as they are kept in the usual course of business, or organized and labeled to correspond to the categories in this Request. Documents attached to each other should not be separated.**
2. **All documents shall be produced in the file folder, envelope or other container in which the documents are kept or maintained by you. If, for any reason, the container cannot be produced, produce copies of all labels or other identifying marks.**
3. **The relevant period, unless otherwise indicated, shall be April 1, 1997 through the date of service of this subpoena, and shall include all documents and information which relate in whole or in part to such period, or to events or circumstances during such period, even though dated, prepared, generated or received prior or subsequent to that period. Please supplement or**

correct your responses to these requests if, at any time, you become aware that your responses are incomplete or incorrect in any respect.

4. If you claim the attorney-client privilege, or any other privilege or work-product protection for all or any portion of a document, you shall provide a privilege log that describes the withheld material sufficiently to allow CPH to test the privilege or protection asserted.

5. The following rules of construction apply:

- a. The connectives “and” and “or” shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery requests all responses that might otherwise be outside of their scope;
- b. The term “including” shall be construed to mean “without limitation”; and
- c. The use of the singular form of any word includes the plural and vice versa.

Doc. # 1005974

**EXHIBIT A
TO SUBPOENA TO NON-PARTY
ALEXANDRE J. FUCHS**

You are hereby requested to produce the following documents pursuant to the definitions and instructions set forth below.

DOCUMENTS REQUESTED

1. All documents concerning the identity of any Morgan Stanley personnel who performed any work for Sunbeam concerning the Coleman Transaction, the Subordinated Debenture Offering, the Bank Facility, or the Credit Agreement.
2. All documents concerning Sunbeam's engagement of Morgan Stanley, including but not limited to engagement letters, bills, invoices, billing or payment records, and back-up for statements of professional services rendered and/or expenses incurred in connection with Morgan Stanley's work for Sunbeam.
3. All calendars, diaries, timekeeping sheets or records maintained by You concerning any activities or services performed for Sunbeam, Morgan Stanley, or MSSF.
4. All documents concerning any investigation, analysis or due diligence concerning Sunbeam or Coleman provided to or conducted by or on behalf of Morgan Stanley or MSSF.
5. All documents concerning attempts by Morgan Stanley to locate (a) someone to purchase or otherwise acquire Sunbeam, in whole or in part, whether through merger, purchase, transfer of assets or securities, or otherwise or (b) companies for Sunbeam to purchase or otherwise acquire, whether through merger, purchase, transfer of assets or securities, or otherwise.
6. All documents concerning the Coleman Transaction, the Credit Agreement, the Bank Facilities, or the Subordinated Debenture Offering.

7. All documents concerning the "bring-down" due diligence for the Subordinated Debenture Offering.
8. All documents concerning Sunbeam's March 19, 1998 press release, including but not limited to whether to issue the press release, whether to include all or any portion of the March 19, 1998 press release in the Offering Memorandum, or concerning the contents or drafting of the press release.
9. All documents concerning Sunbeam's actual or expected sales, revenues, or earnings for all or any portion of 1996, 1997, or 1998.
10. All documents concerning the drafting and issuance of the Offering Memorandum.
11. All documents concerning the March 19, 1998 drafting session and/or meeting that took place at Global Financial Press concerning the Offering Memorandum.
12. All documents concerning any conversations or communications of any kind involving John Tyree or Lawrence Bornstein concerning Sunbeam.
13. All documents relating to synergies that might be achieved from a business combination of Sunbeam, and any or all of Coleman, Signature Brands USA, and First Alert, Inc.
14. All documents concerning the sale of the Subordinated Debentures, including but not limited to documents concerning roadshows; communications with potential investors, CPH, Coleman, Mafco, or analysts; or communications with or among Morgan Stanley's personnel.
15. All documents reflecting or concerning any communications between or among any of Morgan Stanley, MSSF, Davis Polk, Sunbeam, Arthur Andersen LLP, and/or Skadden concerning Sunbeam, the Coleman Transaction, the Subordinated Debenture Offering, the Bank Facility, or the Credit Agreement.

16. All documents concerning any "comfort letters" prepared in connection with the Subordinated Debenture Offering or the Credit Agreement including but not limited to Arthur Andersen's letters dated March 19, 1998 and March 25, 1998 and any drafts of those letters.

17. All documents concerning any valuation of Coleman or Sunbeam securities (a) prepared or performed by Morgan Stanley or MSSF or (b) provided to Morgan Stanley or MSSF.

18. All documents You or Morgan Stanley provided to or received from the SEC, the Justice Department, the U.S. Attorney for the Southern District of New York, the Attorney General of New York, any other federal or state governmental or regulatory body, or any other self-regulatory body concerning Sunbeam, Morgan Stanley, MSSF, the Coleman Transaction, the Subordinated Debenture Offering, and/or the Bank Facilities. The relevant time period for this request is February 1998 through the date of service of this subpoena.

19. All documents you provided to any party in connection with any of the Litigations.

DEFINITIONS

1. "Arthur Andersen" means Arthur Andersen LLP and its present and former partners and employees.

2. "CPH" means Coleman (Parent) Holdings Inc., and its present and former officers, directors, and employees.

3. "Coleman Transaction" means the transaction by which Sunbeam acquired CPH's interest in The Coleman Company.

4. "Communication" means the transmittal of information (in the form of facts, ideas, inquiries or otherwise) by letter, memorandum, facsimile, orally, electronically or otherwise.

5. "Concerning" means concerning, reflecting, relating to, referring to, describing, evidencing, or constituting.

6. "Credit Agreement" means that agreement entered into by Sunbeam Corporation, as borrower, with Morgan Stanley Senior Funding, Inc., Bank of America National Trust and Savings Association, and First Union National Bank (now known as Wachovia Bank, National Association), as lenders, dated March 30, 1998 and amended periodically thereafter by agreement of the parties.

7. "Documents" shall be given the broad meaning provided in CPLR Rule 3120 and refers to any form or means, whether physical, visual, or electronic, in or by which words, numbers, or ideas are recorded or preserved, whether fixed in tangible medium or electronically stored, including any and all drafts of any final document. The word "documents" shall include, by way of example and not by way of limitation, all of the following: papers, correspondence, trade letters, envelopes, memoranda, telegrams, cables, notes, messages, reports, studies, press releases, comparisons, books, accounts, checks, audio and video recordings and transcriptions thereof, pleadings, testimony, articles, bulletins, pamphlets, brochures, magazines, questionnaires, surveys, charts, newspapers, calendars, desk calendars, pocket calendars, lists, logs, publications, notices, diagrams, instructions, diaries, minutes for meetings, corporate minutes, orders, resolutions, agendas, memorials or notes of oral communications, whether by telephone or face-to-face, contracts, agreements, drafts of or proposed contracts or agreements, memoranda of understanding, letters of intent, computer tapes, computer drives or memories, computer diskettes or disks, e-mail, CD-ROMs, or any other tangible thing on which any handwriting, typing, printing, photostatic, electronic, or other form of communication or information is recorded or reproduced, together with

all notations on any of the foregoing, all originals, file copies, or other unique copies of the foregoing, and all versions or drafts thereof, whether used or not.

8. "Litigations" means In Re Sunbeam Securities Litigation, 98-8258-Civ.-Middlebrooks (S.D. Fla.); Camden Asset Management, L.P., et al. v. Sunbeam Corporation, et al., 98-8773-Civ.-Middlebrooks and 98-8275-Civ.-Middlebrooks (S.D. Fla.); Krim v. Dunlap, et al., No. CL983168AD (15th Jud. Cir., Fla.); Stapleton v. Sunbeam Corp., et al., No. 98-1676-Civ.-King (S.D. Fla.); Sunbeam Corp. v. PricewaterhouseCoopers LLP, No. CL005444AN (15th Jud. Cir., Fla.); In re Sunbeam Corp., No. 01-40291 (AJG) (Bankr. S.D.N.Y.), and every adversary proceeding therein; SEC v. Dunlap, et al., No. 01-8437-Civ.-Middlebrooks (S.D. Fla.); Oaktree Capital Management LLC v. Arthur Andersen LLP, No. BC257177 (L.A. Cty., CA); and Coleman (Parent) Holdings Inc. v. Arthur Andersen LLP, et al., No. CA 01-06062AN (15th Jud. Cir., Fla.); Albert J. Dunlap and Sunbeam Corporation, No. 32 160 00088 99 (AAA); and Russell A. Kersh and Sunbeam Corporation, No. 32 160 00091 99 (AAA); In the Matter of Sunbeam Corp., SEC Administrative Proceeding File No. 3-10481; In the Matter of David C. Fannin, SEC Administrative Proceeding File No. 3-10482, and any other matter involving the Coleman Transaction, the Credit Agreement, the Bank Facilities, or the Subordinated Debenture Offering.

9. "Morgan Stanley" means Morgan Stanley & Co., Inc. and any of its direct or indirect parents, affiliates, subsidiaries, and present and former officers, directors, partners, employees, representatives, and agents.

10. "MSSF" means Morgan Stanley Senior Funding, Inc. and any of its direct or indirect parents, affiliates, subsidiaries, and present and former officers, directors, partners, employees, representatives, and agents.

11. "Person" means any natural person, corporation, limited liability company, trust, joint venture, association, company, partnership, governmental authority, or other entity.
12. "SEC" means the Securities and Exchange Commission.
13. "Skadden" means Skadden, Arps, Slate, Meagher & Flom LLP and any of its present and former partners, employees, representatives and agents.
14. "Subordinated Debenture Offering" means the offering of Sunbeam's Zero Coupon Convertible Senior Subordinated Debentures Due 2018.
15. "Sunbeam" means Sunbeam Corporation and any of its present and former officers, directors, employees, representatives, and agents.
16. "You" or "Your" means Alexandre J. Fuchs and any of Alexandre J. Fuchs's present and former representatives and agents.

INSTRUCTIONS

1. Documents shall be produced as they are kept in the usual course of business, or organized and labeled to correspond to the categories in this Request. Documents attached to each other should not be separated.
2. All documents shall be produced in the file folder, envelope or other container in which the documents are kept or maintained by you. If, for any reason, the container cannot be produced, produce copies of all labels or other identifying marks.
3. The relevant period, unless otherwise indicated, shall be April 1, 1997 through the date of service of this subpoena, and shall include all documents and information which relate in whole or in part to such period, or to events or circumstances during such period, even though dated, prepared, generated or received prior or subsequent to that period. Please supplement or

correct your responses to these requests if, at any time, you become aware that your responses are incomplete or incorrect in any respect.

4. If you claim the attorney-client privilege, or any other privilege or work-product protection for all or any portion of a document, you shall provide a privilege log that describes the withheld material sufficiently to allow CPH to test the privilege or protection asserted.

5. The following rules of construction apply:

- a. The connectives “and” and “or” shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery requests all responses that might otherwise be outside of their scope;
- b. The term “including” shall be construed to mean “without limitation”; and
- c. The use of the singular form of any word includes the plural and vice versa.

Doc. # 1005971

**EXHIBIT A
TO SUBPOENA TO NON-PARTY
R. BRAM SMITH**

You are hereby requested to produce the following documents pursuant to the definitions and instructions set forth below.

DOCUMENTS REQUESTED

1. All documents concerning the identity of any Morgan Stanley personnel who performed any work for Sunbeam concerning the Coleman Transaction, the Subordinated Debenture Offering, the Bank Facility, or the Credit Agreement.
2. All documents concerning Sunbeam's engagement of Morgan Stanley, including but not limited to engagement letters, bills, invoices, billing or payment records, and back-up for statements of professional services rendered and/or expenses incurred in connection with Morgan Stanley's work for Sunbeam.
3. All calendars, diaries, timekeeping sheets or records maintained by You concerning any activities or services performed for Sunbeam, Morgan Stanley, or MSSF.
4. All documents concerning any investigation, analysis or due diligence concerning Sunbeam or Coleman provided to or conducted by or on behalf of Morgan Stanley or MSSF.
5. All documents concerning attempts by Morgan Stanley to locate (a) someone to purchase or otherwise acquire Sunbeam, in whole or in part, whether through merger, purchase, transfer of assets or securities, or otherwise or (b) companies for Sunbeam to purchase or otherwise acquire, whether through merger, purchase, transfer of assets or securities, or otherwise.
6. All documents concerning the Coleman Transaction, the Credit Agreement, the Bank Facilities, or the Subordinated Debenture Offering.

7. All documents concerning the "bring-down" due diligence for the Subordinated Debenture Offering.

8. All documents concerning Sunbeam's March 19, 1998 press release, including but not limited to whether to issue the press release, whether to include all or any portion of the March 19, 1998 press release in the Offering Memorandum, or concerning the contents or drafting of the press release.

9. All documents concerning Sunbeam's actual or expected sales, revenues, or earnings for all or any portion of 1996, 1997, or 1998.

10. All documents concerning the drafting and issuance of the Offering Memorandum.

11. All documents concerning the March 19, 1998 drafting session and/or meeting that took place at Global Financial Press concerning the Offering Memorandum.

12. All documents concerning any conversations or communications of any kind involving John Tyree or Lawrence Bornstein concerning Sunbeam.

13. All documents relating to synergies that might be achieved from a business combination of Sunbeam, and any or all of Coleman, Signature Brands USA, and First Alert, Inc.

14. All documents concerning the sale of the Subordinated Debentures, including but not limited to documents concerning roadshows; communications with potential investors, CPH, Coleman, Mafoo, or analysts; or communications with or among Morgan Stanley's personnel.

15. All documents reflecting or concerning any communications between or among any of Morgan Stanley, MSSF, Davis Polk, Sunbeam, Arthur Andersen LLP, and/or Skadden concerning Sunbeam, the Coleman Transaction, the Subordinated Debenture Offering, the Bank Facility, or the Credit Agreement.

16. All documents concerning any "comfort letters" prepared in connection with the Subordinated Debenture Offering or the Credit Agreement including but not limited to Arthur Andersen's letters dated March 19, 1998 and March 25, 1998 and any drafts of those letters.

17. All documents concerning any valuation of Coleman or Sunbeam securities (a) prepared or performed by Morgan Stanley or MSSF or (b) provided to Morgan Stanley or MSSF.

18. All documents You or Morgan Stanley provided to or received from the SEC, the Justice Department, the U.S. Attorney for the Southern District of New York, the Attorney General of New York, any other federal or state governmental or regulatory body, or any other self-regulatory body concerning Sunbeam, Morgan Stanley, MSSF, the Coleman Transaction, the Subordinated Debenture Offering, and/or the Bank Facilities. The relevant time period for this request is February 1998 through the date of service of this subpoena.

19. All documents you provided to any party in connection with any of the Litigations.

DEFINITIONS

1. "Arthur Andersen" means Arthur Andersen LLP and its present and former partners and employees.

2. "CPH" means Coleman (Parent) Holdings Inc., and its present and former officers, directors, and employees.

3. "Coleman Transaction" means the transaction by which Sunbeam acquired CPH's interest in The Coleman Company.

4. "Communication" means the transmittal of information (in the form of facts, ideas, inquiries or otherwise) by letter, memorandum, facsimile, orally, electronically or otherwise.

5. "Concerning" means concerning, reflecting, relating to, referring to, describing, evidencing, or constituting.

6. "Credit Agreement" means that agreement entered into by Sunbeam Corporation, as borrower, with Morgan Stanley Senior Funding, Inc., Bank of America National Trust and Savings Association, and First Union National Bank (now known as Wachovia Bank, National Association), as lenders, dated March 30, 1998 and amended periodically thereafter by agreement of the parties.

7. "Documents" shall be given the broad meaning provided in CPLR Rule 3120 and refers to any form or means, whether physical, visual, or electronic, in or by which words, numbers, or ideas are recorded or preserved, whether fixed in tangible medium or electronically stored, including any and all drafts of any final document. The word "documents" shall include, by way of example and not by way of limitation, all of the following: papers, correspondence, trade letters, envelopes, memoranda, telegrams, cables, notes, messages, reports, studies, press releases, comparisons, books, accounts, checks, audio and video recordings and transcriptions thereof, pleadings, testimony, articles, bulletins, pamphlets, brochures, magazines, questionnaires, surveys, charts, newspapers, calendars, desk calendars, pocket calendars, lists, logs, publications, notices, diagrams, instructions, diaries, minutes for meetings, corporate minutes, orders, resolutions, agendas, memorials or notes of oral communications, whether by telephone or face-to-face, contracts, agreements, drafts of or proposed contracts or agreements, memoranda of understanding, letters of intent, computer tapes, computer drives or memories, computer diskettes or disks, e-mail, CD-ROMs, or any other tangible thing on which any handwriting, typing, printing, photostatic, electronic, or other form of communication or information is recorded or reproduced, together with

all notations on any of the foregoing, all originals, file copies, or other unique copies of the foregoing, and all versions or drafts thereof, whether used or not.

8. "Litigations" means In Re Sunbeam Securities Litigation, 98-8258-Civ.-Middlebrooks (S.D. Fla.); Camden Asset Management, L.P., et al. v. Sunbeam Corporation, et al., 98-8773-Civ.-Middlebrooks and 98-8275-Civ.-Middlebrooks (S.D. Fla.); Krim v. Dunlap, et al., No. CL983168AD (15th Jud. Cir., Fla.); Stapleton v. Sunbeam Corp., et al., No. 98-1676-Civ.-King (S.D. Fla.); Sunbeam Corp. v. PricewaterhouseCoopers LLP, No. CL005444AN (15th Jud. Cir., Fla.); In re Sunbeam Corp., No. 01-40291 (AJG) (Bankr. S.D.N.Y.), and every adversary proceeding therein; SEC v. Dunlap, et al., No. 01-8437-Civ.-Middlebrooks (S.D. Fla.); Oaktree Capital Management LLC v. Arthur Andersen LLP, No. BC257177 (L.A. Cty., CA); and Coleman (Parent) Holdings Inc. v. Arthur Andersen LLP, et al., No. CA 01-06062AN (15th Jud. Cir., Fla); Albert J. Dunlap and Sunbeam Corporation, No. 32 160 00088 99 (AAA); and Russell A. Kersh and Sunbeam Corporation, No. 32 160 00091 99 (AAA); In the Matter of Sunbeam Corp., SEC Administrative Proceeding File No. 3-10481; In the Matter of David C. Fannin, SEC Administrative Proceeding File No. 3-10482, and any other matter involving the Coleman Transaction, the Credit Agreement, the Bank Facilities, or the Subordinated Debenture Offering.

9. "Morgan Stanley" means Morgan Stanley & Co., Inc. and any of its direct or indirect parents, affiliates, subsidiaries, and present and former officers, directors, partners, employees, representatives, and agents.

10. "MSSF" means Morgan Stanley Senior Funding, Inc. and any of its direct or indirect parents, affiliates, subsidiaries, and present and former officers, directors, partners, employees, representatives, and agents.

11. "Person" means any natural person, corporation, limited liability company, trust, joint venture, association, company, partnership, governmental authority, or other entity.
12. "SEC" means the Securities and Exchange Commission.
13. "Skadden" means Skadden, Arps, Slate, Meagher & Flom LLP and any of its present and former partners, employees, representatives and agents.
14. "Subordinated Debenture Offering" means the offering of Sunbeam's Zero Coupon Convertible Senior Subordinated Debentures Due 2018.
15. "Sunbeam" means Sunbeam Corporation and any of its present and former officers, directors, employees, representatives, and agents.
16. "You" or "Your" means R. Bram Smith and any of R. Bram Smith's present and former representatives and agents.

INSTRUCTIONS

1. Documents shall be produced as they are kept in the usual course of business, or organized and labeled to correspond to the categories in this Request. Documents attached to each other should not be separated.
2. All documents shall be produced in the file folder, envelope or other container in which the documents are kept or maintained by you. If, for any reason, the container cannot be produced, produce copies of all labels or other identifying marks.
3. The relevant period, unless otherwise indicated, shall be April 1, 1997 through the date of service of this subpoena, and shall include all documents and information which relate in whole or in part to such period, or to events or circumstances during such period, even though dated, prepared, generated or received prior or subsequent to that period. Please supplement or

correct your responses to these requests if, at any time, you become aware that your responses are incomplete or incorrect in any respect.

4. If you claim the attorney-client privilege, or any other privilege or work-product protection for all or any portion of a document, you shall provide a privilege log that describes the withheld material sufficiently to allow CPH to test the privilege or protection asserted.

5. The following rules of construction apply:

- a. The connectives “and” and “or” shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery requests all responses that might otherwise be outside of their scope;
- b. The term “including” shall be construed to mean “without limitation”; and
- c. The use of the singular form of any word includes the plural and vice versa.

Doc. # 1005969

CARLTON FIELDS

ATTORNEYS AT LAW

MIAMI
ORLANDO
ST. PETERSBURG
TALLAHASSEE
TAMPA

WEST PALM BEACH

Esperanté
222 Lakeview Avenue, Suite 1400
West Palm Beach, Florida 33401-6149
P.O. Box 150
West Palm Beach, Florida 33402-0150

561.659.7070
561.659.7368 fax

www.carltonfields.com

E-MAIL: jianno@carltonfields.com

November 21, 2003

The Honorable Elizabeth Maass
Palm Beach County Courthouse
205 North Dixie Highway
West Palm Beach, Florida 33401

VIA HAND DELIVERY

Re: *Coleman (Parent) Holdings Co. v. Morgan Stanley & Co.*
Case No. 2003 CA 5045 AI

Dear Judge Maass:

Enclosed please find a courtesy copy of Defendant's Response to Plaintiff's Motion for Entry of Order upon Stipulation of the Parties. Plaintiff's motion is scheduled to be heard before Your Honor on November 25, 2003 at 8:45 a.m.

Respectfully,


Joseph Ianno, Jr.

/jed

Enclosures

cc: Jack Scarola (w/encl.)
Jerold Solovy (w/encl.)
Thomas Clare (w/encl.)

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CASE NO: 03 CA-005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

**MORGAN STANLEY & CO. INCORPORATED'S RESPONSE TO PLAINTIFF'S
MOTION FOR ENTRY OF ORDER UPON STIPULATION OF THE PARTIES**

Defendant Morgan Stanley & Co. Incorporated ("MS & Co."), by and through its undersigned attorneys, files its response to Plaintiff's Motion for Entry of Order Upon Stipulation of the Parties and states:

1. On November 6, 2003, Plaintiff had scheduled its Motion to Compel Concerning E-mails before this Court.
2. Prior to the hearing, counsel reached a tentative agreement to resolve the Motion without the Court's assistance. Counsel for the parties outlined the contours of their tentative agreement for the Court.¹

¹ A copy of the transcript from the November 6, 2003 hearing is attached hereto at Exhibit 1.

3. The parties described the “broad outlines” (Tr. 5) of their tentative agreement as follows:

- A. Counsel would “work it out between the parties” (Tr. 5) and submit an agreed order to the Court subsequent to the hearing. (Tr. 3, line 10).
- B. The parties would provide a corporate representative that would provide testimony concerning each party’s retention policies and retrieval capabilities concerning e-mails. (Tr. 2-3)
- C. Morgan Stanley would -- subject to the caveats expressly raised by Morgan Stanley’s counsel during the hearing -- provide all documents submitted to federal regulators concerning Morgan Stanley’s e-mail retention policies and retrieval capabilities. (Tr. 3, 5)
- D. Any agreement on this issue would be subject to counsel’s consultation with Morgan Stanley concerning what documents Morgan Stanley could provide. (Tr. 6, lines 6-11)
- E. Without consulting with Morgan Stanley, counsel was not waiving any protections of which counsel was unaware. (Tr. 6, lines 2-11).
- F. In the event that disclosure of certain documents was not permitted, Morgan Stanley would provide “good faith cooperation” in “obtaining whatever information is necessary” (Tr. 6, lines 12-16)

4. Subsequent to November 6, and as expressly contemplated during the hearing, counsel for Morgan Stanley consulted with their client. As a result of that consultation, counsel learned that the documents described at the November 6, 2003 hearing are the subject of a pending discovery motion in In re Initial Public Offering Securities Litigation, Case No. 21 MC

92 (SAS) in the United States District Court for the Southern District of New York. The Motion seeks to prevent the disclosure of the documents.

5. As it committed to do during the November 6 hearing, counsel for Morgan Stanley promptly notified counsel for Plaintiff -- Jenner & Block -- of this potential impediment to production. Moreover, Morgan Stanley offered to produce the documents promptly to Plaintiff if and when permitted by the Federal Court's ruling on the pending discovery motion. This offer has been continued to the present but has not been accepted by the Plaintiff.

6. Indeed, the Court *expressly recognized* the possibility that there may be a dispute between the parties regarding the scope of documents that Morgan Stanley would be able to produce pursuant to the tentative agreement. In response to remarks by Morgan Stanley's counsel, the Court inquired as follows:

12 MR. CLARE: Just in the interest of
13 completeness and while we're waiting for the
14 schedule, Mr. Scarola described in broad outlines
15 what the agreed upon order would be on this other
16 motion. There is one caveat I explained to
17 Mr. Scarola in the hallway, and we will work it
18 out between the parties before we submit an agreed
19 upon order to Your Honor. I am not aware as I sit
20 here right now what limitations there are right
21 now without disclosing to Mr. Scarola's client
22 information we provided to federal regulators. We
23 agreed to provide whatever it is we can provide.

24 THE COURT: Are you saying we might have a
25 legal dispute later about what you're permitted to
1 disclose?

2 MR. CLARE: About what we're permitted to
3 disclose, and I just don't know all the details
4 without consulting with my client. We have an
5 agreement in principle that whatever we can
6 provide on this, we'll provide. I know there are
7 materials we can provide, I just don't know the
8 scope of it. And I don't want to represent to the

9 court that we're waiving or even have the ability
10 to waive protections that I'm not aware of right
11 now.

Tr. 5, line 12 through 6, line 11 (emphasis added).

7. Notwithstanding the fact that an agreement was not reached, counsel for Plaintiff submitted a unilateral order to the Court and has now filed a Motion for Entry of Order Upon Stipulation of the Parties..

8. Morgan Stanley respectfully submits that Plaintiff's Proposed Order does not properly reflect the agreement between the parties as reflected by the Transcript. Thus, Morgan Stanley has prepared an alternative order based on the transcript. A copy of the proposed order is attached hereto at Exhibit 2.

WHEREFORE, Morgan Stanley respectfully requests that the Court enter the proposed order attached hereto together with such other and further relief as the Court deems just and proper.

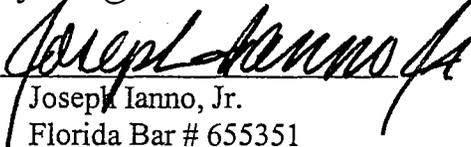
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Federal Express and e-mail to all counsel of record on the attached service list on this 21st day of November, 2003.

Thomas D. Yannucci, P.C.
Thomas A. Clare
Zhonette M. Brown
Ryan P. Phair
Kathryn R. DeBord
KIRKLAND & ELLIS LLP
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
email: jianno@carltonfields.com

BY:


Joseph Ianno, Jr.
Florida Bar # 655351

Counsel for Defendant
Morgan Stanley & Co. Incorporated

SERVICE LIST

<p>John Scarola SEARCY, DENNEY, SCAROLA, BARNHARDT & SHIPLEY, P.A. 2139 Palm Beach Lakes Boulevard West Palm Beach, Florida 33409</p>	<p>Counsel for Plaintiff</p>
<p>Jerold S. Solovy JENNER & BLOCK, LLC One IBM Plaza Suite 4400 Chicago, Illinois 60611</p>	<p>Counsel for Plaintiff</p>

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE FIFTEENTH JUDICIAL CIRCUIT COURT
IN AND FOR PALM BEACH COUNTY, FLORIDA
CASE NUMBER: 2003 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiffs,
vs.
MORGAN STANLEY & CO., INC.
Defendant.

COPY

PROCEEDINGS BEFORE THE HONORABLE ELIZABETH T. MAASS

APPEARANCES:

SEARCY, DENNEY, SCAROLA,
BARNHART & SHIPLEY, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33409
Phone: (561) 686-6300
ATTORNEYS FOR THE PLAINTIFF
BY: JACK SCAROLA, ESQUIRE

KIRKLAND AND ELLIS
655 15 Street, N.W., Suite 1200
Washington, D.C. 2005
Phone: (202) 879-5000
ATTORNEYS FOR THE DEFENDANT
BY: THOMAS A. CLARE

CARLTON FIELDS, et al.
222 Lakeview Avenue, Suite 1400
West Palm Beach, Florida 33401
PHONE: (561) 659-7070
ATTORNEYS FOR THE DEFENDANT
BY: JOSEPH IANNO, JR., ESQUIRE

Thursday, November 6, 2003
Palm Beach County Courthouse
West Palm Beach, Florida

EXHIBIT
16d/v-004093

1 TRANSCRIPT OF THE PROCEEDINGS, TAKEN BEFORE
2 THE HONORABLE ELIZABETH MAASS IN COURTROOM 11B, PALM
3 BEACH COUNTY COURTHOUSE, WEST PALM BEACH, FLORIDA, ON
4 THURSDAY, NOVEMBER 6, 2003, BEGINNING AT 8:55 A.M.

5 - - -
6 THE COURT: Do we really think we're going to
7 do this this morning?

8 MR. SCAROLA: We are going to surprise Your
9 Honor.

10 THE COURT: Okay. How are we doing that?

11 MR. SCAROLA: We're going to surprise you by
12 telling you first that with regard to the motion
13 to compel production of emails, we have come to an
14 agreement.

15 THE COURT: Okay.

16 MR. SCAROLA: And we will describe the terms
17 of that agreement for the record.

18 For the record, my name is Jack Scarola. I'm
19 hear on behalf of the Plaintiff Coleman (Parent)
20 Holdings. There are two motions. First is motion
21 to compel directed to the production of emails.

22 The agreement that we have reached is that
23 the Defendant Morgan Stanley will produce a
24 witness who is knowledgeable with respect to the
25 retention and retrieval -- the retention policies

1 and retrieval capabilities with regard to emails.
2 They will also produce all documents that were
3 submitted to federal regulators with regard to
4 Morgan Stanley's email retention policies and
5 retrieval capabilities.

6 THE COURT: I don't think I have that motion.
7 The only one I have deals with the objections to
8 production of the settlement agreement. Are you
9 submitting a proposed agreed order on this?

10 MR. SCAROLA: We will submit a proposed
11 agreed order.

12 THE COURT: You're just telling me stuff and
13 hopefully I'll remember it when I see the order.

14 MR. SCAROLA: Yes.

15 We have agreed reciprocally that we will
16 provide a corporate representative who will
17 address the same issues on behalf of Coleman
18 (Parent) Holdings, Incorporated.

19 THE COURT: Okay.

20 MR. SCAROLA: With regard to the second
21 motion, that's the Defense's motion, so I'll allow
22 them to go first.

23 THE COURT: That's the one. Do we really
24 think we're going to get this done at an 8:45?

25 MR. CLARE: Judge, this is on Morgan

1 Stanley's motion to compel the production of a
2 single document, the settlement agreement between
3 Coleman (Parent) and Arthur Andersen. And just
4 briefly, I think it's fairly straightforward in
5 terms of the history of this, that prior to
6 initiating the lawsuit against Morgan Stanley,
7 Coleman (Parent) brought a virtually identical
8 lawsuit against Arthur Andersen, same allegations,
9 same claim of damages, and now have settled.

10 THE COURT: Let me ask you this. This is the
11 notebook you gave me for this; right?

12 MR. CLARE: That includes the cases that
13 we've cited.

14 THE COURT: I can't do this on an 8:45.
15 Please understand, 8:45's are things -- I can read
16 everything. I can walk in and not know anything.
17 I can read everything I've got to read, absorb
18 everything I've got to, and I can do it in ten
19 minutes. I can't even read your motion in ten
20 minutes.

21 MR. CLARE: I have one case, City of
22 Homestead case, that --

23 THE COURT: I'm happy to get the book and
24 specially set. I'm happy to do it on an expedited
25 basis. I cannot do this on an 8:45. If you

1 bothered to put together a notebook like this, I
2 know I need more time with it, okay?

3 Do you want me to get the book? Do you have
4 access to your schedules?

5 MR. CLARE: Sure.

6 MR. SCAROLA: I don't, but can make a phone
7 call to my office.

8 THE COURT: Okay. That's great.

9 MR. SCAROLA: Would you like me to get my
10 office on the line, Your Honor?

11 THE COURT: Sure.

12 MR. CLARE: Just in the interest of
13 completeness and while we're waiting for the
14 schedule, Mr. Scarola described in broad outlines
15 what the agreed upon order would be on this other
16 motion. There is one caveat I explained to
17 Mr. Scarola in the hallway, and we will work it
18 out between the parties before we submit an agreed
19 upon order to Your Honor. I am not aware as I sit
20 here right now what limitations there are right
21 now without disclosing to Mr. Scarola's client
22 information we provided to federal regulators. We
23 agreed to provide whatever it is we can provide.

24 THE COURT: Are you saying we might have a
25 legal dispute later about what you're permitted to

1 disclose?

2 MR. CLARE: About what we're permitted to
3 disclose, and I just don't know all the details
4 without consulting with my client. We have an
5 agreement in principle that whatever we can
6 provide on this, we'll provide. I know there are
7 materials we can provide, I just don't know the
8 scope of it. And I don't want to represent to the
9 court that we're waiving or even have the ability
10 to waive protections that I'm not aware of right
11 now.

12 MR. SCAROLA: The only caveat to that is that
13 there's a commitment that they will provide good
14 faith cooperation in obtaining whatever
15 information is necessary in order to make full
16 disclosure.

17 THE COURT: Okay.

18 MR. CLARE: That's correct.

19 THE COURT: We can try the 14th, which is a
20 week from tomorrow at 4:30. Do you know if you're
21 available, sir?

22 MR. CLARE: There was a deposition that was
23 scheduled that day.

24 THE COURT: In this case?

25 MR. CLARE: In this case in New York.

1 THE COURT: Who?

2 MR. CLARE: Mr. John Tirey (ph) is coming
3 from that the United Kingdom for a deposition that
4 day.

5 THE COURT: You have depositions in this
6 case, so that's probably not a good day. Let's
7 find a better time.

8 We could try 4:30 on Tuesday, November 25.
9 That's the Tuesday of Thanksgiving week, just so
10 you-all are clear.

11 MR. CLARE: That's fine with me, Your Honor.

12 MR. IANNO: That's not a problem.

13 MR. SCAROLA: That works, Your Honor.

14 THE COURT: Is that okay? We will do it
15 then. And I'll hold the stuff you gave me. If
16 you want me to look at anything else, send it to
17 me a few days ahead of time so I have it.

18 MR. CLARE: Thank you.

19 MR. SCAROLA: Thank you, Your Honor.

20 THE COURT: Thank you.

21 (Whereupon, at 9:03 a.m., the proceedings concluded.)

22

23

24

25

C E R T I F I C A T E

STATE OF FLORIDA

COUNTY OF PALM BEACH

I, PAMELA GRIMALDI, Registered Professional Reporter, do hereby certify that I was authorized to and did stenographically report the foregoing proceedings and that the transcript is a true and correct transcription of my stenotype notes of the proceedings.

Dated this 18th day of November, 2003.



PAMELA GRIMALDI

Registered Professional Reporter

The foregoing certification of this transcript does not apply to any reproduction of the same by any means unless under the direct control and/or direction of the certifying reporter.

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN
AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

CASE NO: 2003 CA 005045 AI

Plaintiffs,

vs.

MORGAN STANLEY & CO., INC.,

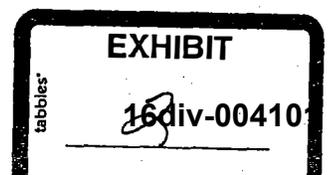
Defendant.

**ORDER ON COLEMAN (PARENT) HOLDINGS INC.'S
MOTION TO COMPEL CONCERNING E-MAILS**

THIS CAUSE is before the Court upon Coleman (Parent) Holdings Inc.'s Motion to Compel Concerning E-mails, and the subsequent stipulation of the parties, upon consideration of which, it is hereby,

ORDERED and ADJUDGED:

1. The Defendant shall, within ten (10) days of the date of this order, produce all materials submitted to regulators regarding Morgan Stanley's e-mail retention policies and retrieval capabilities. To the extent that the discoverability of any of the materials described in this Paragraph is subject to a pending discovery motion in In re Initial Public Offering Securities Litigation, Case No. 21 MC 92 (SAS) in the United States District Court for the Southern District of New York, those materials shall not be produced until five (5) days after the entry of an order resolving the discovery motion in that case, and then only to the extent required or permitted by such order.



2. To the extent the Defendant is unable to comply with the provisions of Paragraph 1 of this Order, the Defendant shall provide good faith cooperation in obtaining whatever information is necessary in order to make full disclosure..
3. Within 15 days following the final production called for in Paragraph 1, each party shall produce a corporate representative to be deposed at a mutually agreeable time and place to testify pursuant to the provisions of Rule 1.310, Fla.R. Civ. P. concerning that party's e-mail retention policies, practices and procedures at all times material to the claims asserted herein and also concerning the ability, procedure, time, labor and expense involved in retrieving e-mails generated during the relevant time period;

DONE AND ORDERED at West Palm Beach, Palm Beach County, Florida, this _____
day of _____, 2003.

ELIZABETH T. MAASS
CIRCUIT COURT JUDGE

Copies have been furnished to all counsel on the attached counsel list.

Coleman Holdings, Inc. vs Morgan Stanley & Company
Case No.:2003 CA 005045 AI
Order

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block, LLC
One IBM Plaza
Suite 4400
Chicago, IL 60611

Jack Scarola, Esq.
Searcy Denney Scarola Barnhart & Shipley
P.O. Drawer 3626
West Palm Beach, FL 33402

00001

1 IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA
2 CASE NO. 2003-CA-005045 AI
3
4 COLEMAN (PARENT) HOLDINGS, INC.,
5 Plaintiff,
6 vs.
7 MORGAN STANLEY & COMPANY, INC.
8 Defendant.

9

10

11

12

13

14 TRANSCRIPT OF THE PROCEEDINGS BEFORE
THE HONORABLE ELIZABETH MAASS

15

16

17

18

West Palm Beach, Florida
November 25, 2003
4:37 p.m. - 5:18 p.m.

19

20

21

22

23

24

25

00002

1 APPEARANCES:

2

SEARCY, DENNEY, SCAROLA, BARNHART & SHIPLEY, P.A.
3 2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33401
4 Counsel for the Plaintiff
BY: JACK SCAROLA, ESQUIRE

5

6

7

CARLTON, FIELDS, WARD, EMMANUEL,
8 SMITH & CUTLER, P.A.
Esperante
9 222 Lakeview Avenue, Suite 1400
West Palm Beach, Florida 33401-6149
10 Counsel for the Defendant
BY: JOSEPH IANNO, JR., ESQUIRE

11

12

13

KIRKLAND AND ELLIS

16div-004104

14 655 15th Street N.W., Suite 1200
Washington, D.C. 20005
15 Counsel for the Defendant
BY: THOMAS A. CLARE, ESQUIRE

16
17
18

HOLLAND & KNIGHT, LLP
19 625 North Flagler Drive, Suite 700
West Palm Beach, Florida 33401
20 Counsel for Arthur Andersen
BY: HANK JACKSON, ESQUIRE

21
22
23
24
25

00003

1 BE IT REMEMBERED that the foregoing
2 proceedings were had before the HONORABLE ELIZABETH
3 MAASS, in the Palm Beach County Courthouse, West Palm
4 Beach, Florida, on November 25, 2003, starting at
5 4:37 p.m., with appearances as hereinabove noted,
6 to wit:

7 - - - -

8 THE COURT: This is Coleman and Morgan
9 Stanley. It's defendant's motion, I think, to
10 compel production of a settlement agreement.

11 MR. IANNO: That's correct.

12 MR. CLARE: That's correct.

13 THE COURT: You-all can have a seat.

14 The first motion I have though, and I
15 apologize, I didn't have time to go through the
16 files to try to find this, I see that defendant
17 has filed certain things under seal or has
18 tendered certain things under seal, and I hope
19 that none of them have been filed yet. Was there
20 an order entered that permitted that procedure?

21 MR. IANNO: Yes, Your Honor. Joe Ianno.
22 I believe that the confidentiality order that was
23 entered in this case provided for that.

24 THE COURT: You're going to have to tell me,
25 because I thought --

00004

1 MR. IANNO: I didn't bring the
2 confidentiality order with me.

3 THE COURT: Because, obviously, under the
4 Rules of Judicial Administration, things can't get
5 filed under seal --

6 MR. IANNO: Without notice to media.

7 THE COURT: And all that. And I thought when
8 I looked at the proposed order in this case,
9 either I struck through that stuff or I mailed it
10 back to you guys and said I can't sign this. And

16div-004105

11 if I haven't done that yet, that's why we need to
12 find that order.

13 I haven't looked at any of the stuff that was
14 given to me under seal. I need to just give it
15 back to you. It's not my policy to look at things
16 that can't be part of the court record absent a
17 clear order that permits me to do so.

18 It could be somehow I signed it and I forgot.

19 MR. IANNO: I don't believe that the motion
20 at issue though, Your Honor, was filed under seal.

21 THE COURT: No, just some of the stuff. I'll
22 give you guys -- Whoever gave me this stuff, I'm
23 just going to give it back.

24 MR. SCAROLA: I think what was filed under
25 seal was your reply memorandum.

00005

1 MR. IANNO: It could be.

2 THE COURT: I have a couple things under
3 seal. I got this (indicating).

4 MR. IANNO: If I may, Your Honor.

5 THE COURT: And then you gave me a copy of
6 it, which I don't want. And then I got this
7 (indicating). I don't know if that's all of it or
8 not.

9 MR. IANNO: Okay. This was not filed under
10 seal, Your Honor (indicating).

11 THE COURT: I thought it's telling me it's a
12 copy of what was filed under seal for me. No?

13 MR. IANNO: That must have been a mistake,
14 Your Honor, because that was not filed under seal.

15 THE COURT: You're comfortable it wasn't?
16 Do you want to show it to Mr. Scarola?

17 MR. IANNO: I think it may have been filed.
18 It is a response.

19 I think that was just a mistake, Your Honor,
20 on this one. That was our reply to Mr. Scarola's
21 opposition.

22 THE COURT: Okay. And have you seen this
23 (indicating)?

24 MR. SCAROLA: I have, yes, Your Honor.

25 THE COURT: Okay. Thanks.

00006

1 MR. IANNO: These are other motions, Your
2 Honor, that are not at issue today.

3 THE COURT: So when it says confidential
4 under seal, it was a misnomer?

5 MR. IANNO: Yes. It was a mistake. That one
6 was not intended to be filed under seal.

7 THE COURT: Do we know if it was filed?

8 MR. IANNO: It may have been.

9 THE COURT: What if it wasn't? Do you want
10 me to do directions to the clerk saying --

11 MR. IANNO: You can file that.

12 THE COURT: The whole thing says

16div-004106

13 confidential.

14 MR. IANNO: That can be filed. That does not
15 need to be under seal.

16 THE COURT: Okay. Thank you.

17 What did you want to say in support of your
18 motion?

19 MR. CLARE: Good morning, Your Honor.
20 Tom Clare from Kirkland and Ellis in Washington on
21 behalf of the defendant, Morgan Stanley. This is
22 our motion to compel the production of the
23 settlement agreement.

24 THE COURT: Right.

25 MR. CLARE: I think to understand the context

00007

1 of the motion, it's helpful to go back in time and
2 understand the events that led up to this lawsuit
3 and the litigations that came before this
4 settlement agreement is the subject of the motion.

5 In March of 1998, Mr. Scarola's client sold
6 its interest in the Coleman Company to Sunbeam.
7 My client, Morgan Stanley, was the financial
8 advisor to Sunbeam for part of that deal. Arthur
9 Andersen was the auditor to Sunbeam at the time.

10 After the acquisition was closed, there were
11 accounting problems discovered at Sunbeam,
12 management was fired, the auditors were changed
13 and litigation ensued.

14 Morgan Stanley was never sued by anybody
15 until Coleman Parent Holdings Company sued us
16 earlier this year, but all the other litigation
17 ensued, including claims that were brought or
18 threatened to be brought by the plaintiff in this
19 case against Sunbeam, and then a second suit
20 against Arthur Andersen. Both of those cases were
21 settled.

22 The settlement agreement between Coleman
23 Parent Holdings and Sunbeam was public, a matter
24 of public record, publicly filed with the SEC
25 filings. The settlement agreement between Coleman

00008

1 and Arthur Andersen was not.

2 Andersen has been identified as an important
3 critical witness in this case. There are partners
4 and former partners of Arthur Andersen who are
5 identified in the Complaint as providing a factual
6 basis for the fraud and negligent
7 misrepresentation counts that are brought against
8 us, and there's an issue of setoff. Very clearly
9 in the case, they were seeking to recover the same
10 damages from us as they've already recovered from
11 Arthur Andersen stating the same allegations of
12 reliance and the same damages allegations.

13 So we're entitled to know, under the City of
14 Homestead case in the Third District Court of

16div-004107

15 Appeals that came down, the position that was
16 recently re-affirmed by the Nester case that came
17 down a month ago in the Court of Appeals in
18 support of that. It's relevant.

19 As well, Your Honor, potentially to the forum
20 non conveniens and choice of law motion that we're
21 going to be back arguing before Your Honor on
22 December 12th, to the extent that --

23 THE COURT: How would it be relevant to
24 choice of law?

25 MR. CLARE: To the extent that Coleman
00009

1 Parent, which is headquartered in New York, and
2 its parent company, which is headquartered in
3 New York, agreed to settle this litigation and
4 enforce the settlement agreement in the courts of
5 New York or agreed to be bound by the choice of
6 law provision that specifies New York law should
7 apply, that's relevant to whether New York is an
8 inconvenient forum for them to litigate this case.

9 THE COURT: So it's not a choice of law, it's
10 just an inconvenient forum argument?

11 MR. CLARE: Well, there's both.

12 THE COURT: How is it choice of law, so I
13 understand?

14 MR. CLARE: On December 12th, we'll be
15 back --

16 THE COURT: Right.

17 MR. CLARE: -- to argue our motion to
18 dismiss, and it's our view that the substantive
19 law of the State of New York applies to their
20 claims.

21 THE COURT: Right, but how is -- I'm sorry.
22 I thought I understood you to say that potentially
23 the settlement agreement between Coleman and
24 Arthur Andersen will have some bearing on the
25 choice of law to be applied in this case.

00010

1 MR. CLARE: I may have misspoken.

2 THE COURT: Maybe I misunderstood it.

3 MR. CLARE: We're not a party to that
4 agreement, so obviously, it doesn't bear directly
5 on it, but I do think it is relevant to their
6 expectation that events giving rise to this
7 controversy arising out of the Sunbeam transaction
8 will be governed at least in part by New York law.

9 So that's an additional reason why we think
10 it's relevant. But the primary reasons are the
11 setoff, the damages claims, we're going to need
12 our experts to prepare damages reports at some
13 point to submit our expert testimony on damages
14 and also to evaluate our position, our potential
15 liability exposure. Without knowing what the
16 setoff is, it's impossible for my client to --

16div-004108

17 THE COURT: So are you saying the only part
18 of the agreement you need access to is the dollar
19 amount?

20 MR. CLARE: No, actually, that's not correct.
21 Under the City of Homestead case, the Court said
22 the amount and the terms need to be disclosed.

23 I can't conjure up all of the reasons why it
24 might be relevant. Those are the reasons that
25 I've identified here. There may be a denial of

00011

1 liability by Arthur Andersen. There may be an
2 admission of liability by Arthur Andersen. There
3 may be a release of claims coming back the other
4 direction against Coleman Parent. I just don't
5 have any idea without seeing the agreement to
6 understand the relevance of it. And that's why
7 the procedures that Mr. Scarola has suggested,
8 which is to delay and defer production of this
9 settlement agreement until later in the case, is
10 not appropriate, nor is an in camera inspection to
11 review, because having access to the discovery,
12 wanting to take the depositions of Arthur Andersen
13 people, there's no way that we can tell from an in
14 camera review or by delaying months and months
15 until trial whether we'll be able to effectively
16 cross examine witnesses during depositions and the
17 like.

18 It would be a different case if they had not
19 identified Arthur Andersen as critical to the
20 establishment of their case.

21 THE COURT: Okay. Let me see what
22 plaintiff's position is. Thank you.

23 MR. SCAROLA: Good afternoon, Your Honor.
24 Jack Scarola on behalf of Coleman Parent Holdings
25 Company.

00012

1 If I may, let me present both the defense and
2 the Court with copies of some highlighted cases
3 that I would like to discuss, Your Honor, in the
4 course of our presentation.

5 THE COURT: Okay. Thank you.

6 MR. SCAROLA: Let me begin, Your Honor, by
7 acknowledging that as the defendants themselves
8 have stated, Rule 1.280(b)(1) permits discovery of
9 all relevant evidence; that is, evidence relevant
10 to the subject matter of the case, but that
11 evidence must also be either admissible or
12 reasonably calculated to lead to the discovery of
13 admissible evidence. And we must concede that the
14 principal case relied upon by the defense, the
15 City of Homestead, would require Your Honor to
16 compel disclosure of the amount of this
17 settlement.

18 There is language in the City of Homestead

16div-004109

19 case that has been accurately quoted in the
20 defendant's brief, and it is that the settlement
21 terms and amount must be disclosed.

22 But if Your Honor takes a look at that
23 opinion, and we're going to go through it together
24 if you'll indulge me for just a moment, you'll
25 find that the reference to terms is pure dicta.

00013

1 This is a case involving the wrongful death
2 of a seven-year-old, and there were two defendants
3 named in the lawsuit; an entity called
4 Meda-Therapy Institute and the City of Homestead.
5 The case, while pending, was settled with
6 Meda-Therapy Institute and proceeded against the
7 city. There was a confidential settlement
8 agreement -- excuse me. There was a settlement
9 agreement that was entered into, and the city,
10 according to the opinion, and this appears under
11 headnote 1, the last sentence in the paragraph,
12 quote, the city filed a motion to compel
13 disclosure of the settlement amount. The Court
14 denied the motion.

15 The opinion then goes on to say, the motion
16 to compel should have been granted, the settlement
17 terms and amount must be disclosed.

18 There was never even, according to the
19 opinion, a request for the terms, there was a
20 request for the amount. And the rationale in the
21 opinion was that the amount may be relevant to
22 setoff and the remaining defendant was entitled to
23 know what that amount was for that reason.

24 So the only issue before the Court was
25 whether the amount should be disclosed. There is

00014

1 no reference to any confidentiality provisions in
2 the settlement agreement, so the case is
3 distinguishable from the standpoint that there was
4 no contractual obligation imposed upon any party,
5 at least based upon the opinion, to keep the terms
6 of the settlement confidential.

7 And the Court also observed that a factor
8 that was taken into consideration in this case was
9 that the defendant seeking this discovery was a
10 public entity, and the Court found that to be a
11 relevant factor. In the last sentence of the
12 opinion, the Court says, the case for disclosure
13 is especially strong, whereas here the plaintiffs
14 are suing a public entity.

15 The precedent upon which this case is based,
16 the one cited authority is the case of Smith vs.
17 TIB Bank of The Keys, another Third DCA opinion.
18 And in that case, a plaintiff was seeking
19 certiorari review of an order compelling answers
20 during the course of a deposition. The plaintiff

16div-004110

21 had been involved in a prior unrelated lawsuit
22 arising out of the plaintiff's employment with an
23 entirely separate entity, and the plaintiff
24 settled that unrelated claim and entered into a
25 settlement agreement that did have contractual

00015

1 requirements that the terms of the settlement
2 remain confidential.

3 When the questions were asked during
4 deposition, the plaintiff declined to answer those
5 on the basis that answering the questions would
6 place the plaintiff in violation of the
7 confidentiality provisions in the earlier order.

8 The trial court entered an order which
9 recognized the obligation for the plaintiff to
10 decline to answer questions that were within the
11 scope of the confidentiality provision of the
12 order, and the trial court fashioned an order that
13 was expressly designed to give maximum effect to
14 the rights of privacy that arose out of the
15 confidentiality provision and at the same time
16 provide the defendant seeking the discovery with
17 relevant and material information.

18 So the Court basically said you must answer
19 these questions, you are within your rights to
20 decline to answer questions that fall within the
21 scope of the confidentiality provision.

22 And if you take a look at the opinion, you
23 will see that the Court has weighed the right of
24 privacy and the expectation of privacy arising out
25 of the confidentiality provisions in the

00016

1 settlement agreement and balanced those against
2 the rights for discovery, which we think is what
3 appropriately must be done.

4 We have also provided the Court with a Fourth
5 DCA case that recognizes a general principal that
6 materials sought to be discovered must properly be
7 related to the issues involved in the litigation.
8 That's a case that has been cited in our brief and
9 recognizes the fact that Rule 1.280(b)(1) is not
10 to be used simply for gathering information
11 regarding settlement possibilities.

12 And we have given the Court two federal cases
13 that interpret the identical provisions in the
14 federal rules and weigh the privacy rights against
15 the rights to disclosure and approve a procedure
16 whereby the Court has conducted an in camera
17 inspection to make a determination as to whether
18 any provisions in the settlement agreement must be
19 disclosed because they have the possibility of
20 providing grounds for impeachment of the settling
21 party.

22 We think that that's the appropriate

16div-004111

23 procedure for the Court to follow under these
24 circumstances.

25 There have been a number of arguments that
00017

1 have been made as to potential reasons for the
2 disclosure of information contained within the
3 settlement agreement. Those are contained within
4 the reply memo that Your Honor has not yet had an
5 opportunity to see, but if you turn to page 6,
6 there are individual bullet points that catalog
7 the bases --

8 THE COURT: I'm sorry, this is contained
9 where?

10 MR. SCAROLA: In the reply memo that was
11 filed by defendants. I'll just give Your Honor my
12 copy.

13 There are various bullet points at the top
14 that talk about things that reasonably might
15 appear within a settlement agreement and might
16 provide a basis for some argument that portions of
17 the settlement agreement are relevant or material.

18 We are prepared to provide the settlement
19 agreement to Your Honor for in camera inspection.
20 I have it with me today. It's relatively brief,
21 and you can look at it quickly. You're going to
22 find, to corroborate the representations we have
23 already made to the Court, there are no
24 cooperation provisions in the agreement, there are
25 no provisions that require Arthur Andersen to

00018

1 produce witnesses in a particular forum.

2 THE COURT: How many pages is it?

3 MR. SCAROLA: It's about four or five.

4 THE COURT: Any objection to my looking at it
5 now?

6 MR. CLARE: No, Your Honor.

7 THE COURT: Okay.

8 It's more than four or five.

9 MR. IANNO: Even with my eyes, Your Honor, it
10 looks single spaced.

11 THE COURT: I saw that.

12 MR. SCAROLA: It is single spaced.

13 I tried to tab the paragraphs that I thought
14 might be of particular concern to the Court, and
15 some of it you'll be able to see just by the
16 nature of the subject matter dealt with in the
17 paragraph.

18 THE COURT: Can you give me just one second
19 to look at it?

20 MR. SCAROLA: Sure.

21 THE COURT: Because I want to get a sense of
22 what we're talking about.

23 MR. SCAROLA: Absolutely.

24 Your Honor, may I interrupt for just one

16div-004112

25 moment?

00019

1 THE COURT: Sure.

2 MR. SCAROLA: I would appreciate if Your
3 Honor would order me to produce that for in camera
4 inspection.

5 THE COURT: Oh, yes, I just did. I'm sorry.

6 MR. SCAROLA: Thank you. I thought that's
7 what you were doing.

8 THE COURT: That's what I was doing.

9 MR. SCAROLA: Thank you.

10 THE COURT: Okay.

11 MR. SCAROLA: To conclude, Your Honor, in
12 addition to those items that are listed in the
13 reply memo, there has, for the first time, been a
14 suggestion that if there were a choice of forum
15 provision contained within that agreement, that it
16 might have some relevance to the issues with
17 respect to forum non conveniens, and I think
18 Your Honor will see from a review of the document
19 that there is no stipulation with regard to an
20 appropriate forum for litigation concerning that
21 agreement.

22 So I think that upon review of the document,
23 there is only one provision in the document that
24 has any relevance or materiality with respect to
25 this litigation, and that is the issue of the

00020

1 amount of the settlement which relates solely to
2 the issue of setoff, and upon court order, we are
3 prepared to make a confidential disclosure of the
4 amount of that settlement under the terms of the
5 confidentiality agreement previously entered. We
6 would designate that as confidential information
7 in order to restrict its proper use to this case
8 and make the disclosure with regard to that
9 amount.

10 THE COURT: Any objection to my making a
11 photocopy of it?

12 MR. SCAROLA: No, not at all.

13 THE COURT: Thanks.

14 Was the settlement consummated?

15 MR. SCAROLA: Yes.

16 THE COURT: Under its terms?

17 MR. SCAROLA: Yes.

18 THE COURT: Okay.

19 Do you accept that representation?

20 MR. CLARE: That it was consummated under its
21 terms?

22 THE COURT: Yeah.

23 MR. CLARE: I don't have any reason to
24 believe or not believe that that's incorrect.

25 I would say that this is a non-privileged

00021

16div-004113

1 contract that's no different than any other
2 contract, that I'd like the opportunity to examine
3 the document to understand and pressure test the
4 assertions that Mr. Scarola has made about the
5 document, the nuances associated with it that I
6 would like to explore.

7 And, you know, the Florida courts --

8 MR. SCAROLA: I'm sorry, before there's a
9 rebuttal --

10 THE COURT: I'm sorry, you weren't done.

11 MR. SCAROLA: There's just one last point
12 that I want to make.

13 THE COURT: Sure.

14 MR. SCAROLA: And that is that Florida does
15 have a constitutionally-recognized right to
16 privacy. This is private economic information.
17 There must be a balancing test between that right
18 to privacy and the defendant's rights in this
19 lawsuit, and that right to privacy needs to be
20 taken into careful consideration before any other
21 terms of this agreement were to be disclosed. And
22 I suggest that upon reading the agreement, it is
23 abundantly clear that none of the stated purposes
24 for which this discovery is sought would be served
25 by the disclosure of any other provision in that

00022

1 document at all.

2 THE COURT: Okay.

3 MR. SCAROLA: Thank you.

4 THE COURT: What did you want to respond,
5 sir?

6 MR. CLARE: Just on that last point, Your
7 Honor, there's --

8 MR. SCAROLA: I'm sorry. Just one last
9 thing.

10 Mr. Jackson has been rehearsing all day long
11 to be able to say with credibility I agree with
12 everything Mr. Scarola just said, so could we just
13 give him the opportunity to do that on behalf of
14 Arthur Andersen?

15 MR. JACKSON: Your Honor, Hank Jackson on
16 behalf of Arthur Andersen.

17 THE COURT: Okay. I'm glad to know that
18 you're here. I didn't realize you were here for
19 Arthur Andersen.

20 MR. JACKSON: I'm from Holland & Knight.
21 We represented Arthur Andersen in the previous
22 lawsuit and were part of the settlement
23 negotiations and the settlement.

24 I'd just like to reiterate that the
25 confidentiality provision was a material term of

00023

1 that agreement, and we believe that to the extent
2 permissible by law, that it should be enforced,

16div-004114

3 and it should only be breached or allowed to come
4 out in the open to the extent that it is clearly
5 established that it is relevant. And we believe
6 that the proper procedure is for the Court to look
7 at it in camera and to make that judgment, and
8 we'd ask that you do that.

9 THE COURT: What did you want to respond,
10 sir?

11 MR. CLARE: On Mr. Scarola's final point,
12 with the Court's permission, I'll hand to counsel
13 and to Your Honor just some citations to Florida
14 cases that are all cited in our brief that make
15 the point that a contractual confidentiality
16 provision cannot be used to subvert discovery.

17 There's a protective order in this case. We
18 will agree to be bound by the full extent of the
19 confidentiality order in terms of disclosing it.
20 We will go one step further and agree to make it
21 attorney's eyes only with the proviso that I be
22 able to show it to a limited number of in-house
23 attorneys at Morgan Stanley for the purposes of
24 evaluating it for the purposes that I've
25 identified for Your Honor.

00024

1 So with the confidentiality order, the
2 balancing test that Mr. Scarola has already
3 identified has already been done. Those privacy
4 considerations that Arthur Andersen is worried
5 about about disclosure, nothing's going to be in
6 the open. This is all going to be treated as the
7 highest degree of confidentiality under the
8 protective order that Your Honor has already
9 signed, and we agree and are willing to accept
10 those restrictions on our use of it.

11 THE COURT: Okay. Let me take another
12 advisement, okay?

13 Thank you very much.

14 MR. SCAROLA: Your Honor, there is one
15 additional brief matter, if we could impose upon
16 the Court. We had actually set it for an 8:45
17 hearing this morning, and because of Your Honor's
18 crowded calendar, we hoped that we might just
19 bring it to you this afternoon.

20 THE COURT: Sure. What is that?

21 You can take this back, sir. Thanks.

22 MR. SCAROLA: Your Honor, it relates to the
23 exchange of correspondence with which we barraged
24 you concerning the entry of an order --

25 THE COURT: Oh, yeah. Okay.

00025

1 MR. SCAROLA: -- arising out of a stipulated
2 agreement between the parties.

3 If I could hand Your Honor the transcript of
4 the earlier hearing.

16div-004115

5 THE COURT: Okay. Is it your position there
6 was a stipulation?

7 MR. SCAROLA: It is absolutely my position
8 that there was an on-the-record stipulation, yes,
9 Your Honor.

10 THE COURT: Okay.

11 MR. SCAROLA: This is the motion for entry of
12 an order upon stipulation of the parties, and I'll
13 pull Your Honor's attention to those specific and
14 brief provisions that indicate that there was
15 indeed a stipulation.

16 If we begin at page 2, I am addressing the
17 Court at line 13, "We have come to an agreement,
18 specifically with regard to the motion to compel
19 production of e-mails."

20 Going down to line 18, "For the record, my
21 name is Jack Scarola. I'm here on behalf of the
22 plaintiff, Coleman Parent Holdings. There are two
23 motions. The first is a motion to compel directed
24 to the production of e-mails. The agreement that
25 we have reached is that the defendant, Morgan

00026

1 Stanley, will produce a witness who is
2 knowledgeable with respect to the retention and
3 retrieval -- the retention policies and retrieval
4 capabilities with regard to e-mails. They will
5 also produce all documents that were submitted to
6 federal regulators with regard to Morgan Stanley's
7 e-mail retention policies and retrieval
8 capabilities."

9 Morgan Stanley was sued by government
10 regulators and paid in excess of a million dollars
11 for violating document retention policies, and we
12 wanted to get the documents that the federal
13 government obtained in connection with that
14 proceeding. So there's an agreement that they're
15 going to produce a witness.

16 The next part of the agreement appears at
17 page 5.

18 THE COURT: Okay.

19 MR. SCAROLA: Mr. Clare is speaking.

20 Mr. Clare addresses the Court at line 14. He
21 says, beginning at line 12, "Just in the interest
22 of completeness and while we're waiting for the
23 schedule," because there was another motion we
24 were discussing, "Mr. Scarola described in broad
25 outlines what the agreed-upon order would be on

00027

1 this other motion. There is one caveat I
2 explained to Mr. Scarola in the hallway, and we
3 will work it out between the parties before we
4 submit an agreed-upon order to Your Honor. I am
5 not aware as I sit here right now what limitations
6 there are right now without disclosing to

7 Mr. Scarola's client information we provided to
8 federal regulators."

9 And I think that "without" is supposed to be
10 "about" disclosing, "there are right now about
11 disclosing."

12 THE COURT: You're saying if there were
13 regulations in place that would prohibit them from
14 disclosing them.

15 MR. SCAROLA: That's right.

16 THE COURT: Okay.

17 MR. SCAROLA: What Mr. Clare is saying is
18 there may be some restrictions and I don't know
19 what they are and I need --

20 THE COURT: We may not be able to do some of
21 this stuff.

22 MR. SCAROLA: That's correct. So he is
23 saying that.

24 He says, "We agreed to provide whatever it is
25 we can provide."

00028

1 Okay? So he's saying, whatever documents
2 we're allowed to provide, we'll give to you.

3 He then goes on to say at line 6 on page 6,
4 "I know there are materials we can provide, I just
5 don't know the scope of it."

6 I then speak, and I say, "The only caveat to
7 that is that there's a commitment that they will
8 provide good faith cooperation in obtaining
9 whatever information is necessary in order to make
10 full disclosure."

11 And Mr. Clare says, "That's correct."

12 THE COURT: Okay.

13 MR. SCAROLA: Now, that was the agreement.
14 We're going to both provide witnesses that are
15 going to talk about e-mail retention procedures
16 and capabilities, and the second part is, they're
17 going to give us everything that they gave to the
18 federal government except to the extent that they
19 are prohibited from doing so. And if there are
20 prohibitions, they are going to provide good faith
21 cooperation in an effort to try to give us full
22 disclosure.

23 That's the order that I submitted to the
24 Court, and there has been an effort now to recede
25 from that agreement and to change it.

00029

1 THE COURT: Do you have a copy of your
2 proposed order?

3 MR. SCAROLA: Yes, Your Honor, I do.
4 I provided the Court separately the original --

5 THE COURT: It's attached? Oh, this is it.
6 Okay.

7 MR. SCAROLA: Did I give it to Your Honor?

8 THE COURT: I assume so. Yeah. It's

16div-004117

9 attached to the transcript.
10 MR. SCAROLA: That's the one, yes.
11 THE COURT: Okay. That's fine. Let me just
12 look at it.
13 MR. SCAROLA: Sure.
14 THE COURT: Okay. And what's the objection?
15 MR. IANNO: Judge, Joe Ianno. This dispute
16 centers around one thing.
17 THE COURT: What's that?
18 MR. IANNO: The submission that Mr. Scarola
19 wants that was provided to the federal regulators
20 is right now the subject of a motion pending in
21 the Federal Court in the Southern District to
22 prevent its disclosure. By providing it to
23 Mr. Scarola, we would be violating or mooted that
24 motion that was filed by a co-defendant in that
25 case.

00030

1 What we've told Mr. Scarola --
2 THE COURT: I'm sorry, tell me a little bit
3 more about what you're saying.
4 MR. IANNO: Okay. There is a motion right
5 now that is pending, an action in the Federal
6 District that we've cited in our response. It's
7 entitled --
8 THE COURT: I don't have your response. If
9 you have it, that would be great.
10 MR. IANNO: I do. Here's a copy of our
11 response, Your Honor.
12 THE COURT: Thank you. Okay.
13 MR. IANNO: And we've attached a proposed
14 alternate order to our response. And the case in
15 the federal court is styled In Re: Initial Public
16 Offering Securities Litigation, it's pending in
17 the Southern District of New York in Federal
18 Court. That motion is directed -- it's filed by a
19 co-defendant of Morgan Stanley's in that case --
20 to prevent the disclosure of what is called the
21 Wells Submission, which is the document that
22 Mr. Scarola is attempting to get.
23 THE COURT: I'm sorry, who is trying to
24 prevent the disclosure of this?
25 MR. IANNO: A co-defendant. There is another

00031

1 underwriting defendant.
2 THE COURT: A private party?
3 MR. IANNO: Another private party. They're
4 saying that this document is prohibited from
5 disclosure because it's settlement discussions.
6 It's the negotiations leading up to the settlement
7 with the SEC, and they're saying that settlement
8 discussions, not the final agreement, but the
9 settlement discussions leading up to the SEC
10 settlement are prohibited from being disclosed in

16div-004118

11 discovery.

12 That motion, to my understanding, has been
13 fully briefed and is awaiting ruling by Judge
14 Scheindlin in New York.

15 THE COURT: These are documents that your
16 client provided?

17 MR. IANNO: To the SEC, I believe that's
18 correct, yes, Your Honor.

19 THE COURT: Okay.

20 MR. IANNO: And this underwriting defendant,
21 co-defendant, is saying these documents are not
22 discoverable in the federal court. We're
23 waiting --

24 THE COURT: Were they documents drafted for
25 the SEC or just documents provided to the SEC?

00032

1 MR. IANNO: They were drafted for the SEC in
2 connection with the settlement discussions of the
3 SEC action that Mr. Scarola referenced in his
4 argument.

5 THE COURT: These are e-mails?

6 MR. IANNO: No. It's a document describing
7 Morgan Stanley's e-mail retrieval and retention.

8 THE COURT: Oh, I see.

9 MR. IANNO: It's discussing how e-mails are
10 stored, how they're backed up, how they're
11 retrieved, things of that nature. It's about a
12 40 or 50-page document is my understanding of that
13 document. And it's submitted in connection with
14 the SEC claims against Morgan Stanley and other
15 defendants, as I understand that.

16 What Mr. Clare said when we were here on
17 November 6th, and it's reflected in the
18 transcript, is he did not know, and he's here to
19 speak to that, but what was our ability to waive
20 at the time. And what Mr. Scarola didn't read
21 from the transcript is when Mr. Clare was here on
22 page 6 --

23 THE COURT: Let me get to that. Okay. What
24 line?

25 MR. IANNO: It's line 8. And it's where

00033

1 Mr. Scarola stopped. "And I don't want to
2 represent to the Court that we're waiving or even
3 have the ability to waive protections that I'm not
4 aware of right now."

5 Specifically, this case came up after we went
6 back and consulted with the client. If you look
7 just above that on line 4, Mr. Clare says he
8 doesn't know all the details without consulting
9 the client.

10 What we had agreed to do on November 6th is
11 go back and draft a proposed agreed order. That's
12 reflected back on page 2, I believe, where the

16div-004119

13 Court asks you, you expect me to remember this
14 when you submit a proposed agreed order. That's
15 what we were talking about.

16 What we've told Mr. Scarola repeatedly and
17 what we've said in our proposed order, once the
18 judge rules in New York, if we're permitted to
19 disclose it, we'll give it to you within five
20 days. That's the only dispute.

21 If the judge rules that it's not
22 discoverable, we can't produce it in this case
23 without violating that court order. And what
24 Mr. Scarola wants us to do, he says, well, I want
25 you to go in and waive that protection and waive

00034

1 the judge's ruling, because if the judge has ruled
2 today --

3 THE COURT: He's saying you already did.
4 Is that right?

5 MR. SCAROLA: Absolutely.

6 MR. IANNO: But Mr. Clare when he was here
7 specifically told the Court, and we knew, and the
8 Court recognized indeed that there may be other
9 problems with the disclosure of this document.

10 THE COURT: Well, let me ask you this.

11 The way I read that transcript, you-all were
12 agreeing that unless some federal regulation
13 prohibits the disclosure, you'll make it, and if
14 it does, you'll apply, you know, to permit a
15 disclosure.

16 MR. IANNO: And we've waived confidentiality.
17 We have done the good faith cooperation and waived
18 the confidentiality. The only thing we can't
19 waive is this federal court proceeding at this
20 time.

21 THE COURT: Why not?

22 MR. IANNO: Because there's a --

23 THE COURT: Because you don't want to, or
24 because there's something else going on?

25 MR. IANNO: It's another defendant that

00035

1 brought the motion, Judge. We would be mooting
2 the co-defendant's motion at that point in time.
3 All the details, I'm not a party, I'm not a member
4 of the Bar in New York, I don't know all the
5 details going on in the New York case and why or
6 why not this document is being prohibited from
7 disclosure.

8 But, for instance, if this court rules that
9 we should disclose the Wells Submission to Scarola
10 and at the same time the federal court has ruled
11 that it can't be disclosed --

12 THE COURT: Can't be disclosed to whom?

13 MR. IANNO: To anyone.

14 As I understand the motion in New York, it's

16div-004120

15 to prohibit disclosure of this document in
16 discovery.

17 THE COURT: Well, but that's different than
18 saying it can't be disclosed to a non-party.

19 MR. IANNO: Well, I think it's saying you
20 can't disclose this document to anyone.

21 MR. CLARE: Your Honor --

22 MR. IANNO: And maybe Mr. Clare --

23 MR. CLARE: I only have a little bit better
24 of an understanding of this, because I'm also not
25 a party to this New York action.

00036

1 The submission -- The basic gist of the
2 motion is to interpret the Wells Process in
3 dealing with the SEC. The SEC issues a notice
4 that says this group of people, underwriters, are
5 potentially liable for such and such, and in order
6 to settle those claims, we invite all of the
7 potential targets of this investigation to come
8 and make submissions.

9 THE COURT: Right. And this is the
10 submission that you-all made?

11 MR. CLARE: This is one of the submissions
12 that we and --

13 THE COURT: And at the time you made the
14 submission, for instance, would it have prohibited
15 your publishing it in the paper?

16 MR. CLARE: It was requested to be treated
17 under the Wells Submission Process as confidential
18 by the SEC and was not disclosed to anybody else.
19 So yes, Your Honor, absolutely.

20 THE COURT: What would have prohibited your
21 disclosing it to a third party at the time you
22 made it?

23 MR. CLARE: What would have prohibited us
24 from disclosing it to a third party? In order for
25 us to get the benefit of the confidentiality that

00037

1 we had requested in the Wells Process, which is an
2 enforcement action, that we had to maintain its
3 confidentiality.

4 THE COURT: As against whom; the world?

5 MR. CLARE: As against the world, sure.

6 And if we had produced it to the New York
7 Times or provided it to third parties, then we
8 were waiving this protection, this Wells
9 Regulatory Process that we had in place.

10 And so we're willing to waive that. Morgan
11 Stanley has said, for the good of this agreement,
12 we are more than happy to waive that request. The
13 only thing -- There's this judicial proceeding
14 that is determining what is this Wells Process
15 about. It is exactly the federal regulatory
16 enforcement process that's being interpreted by

16div-004121

17 Judge Scheindlin in New York, what is the Wells
18 Process.

19 When you get to a certain stage in the Wells
20 Process and the parties are contemplating a
21 settlement, do materials that are exchanged
22 between the SEC and the potential targets of an
23 investigation, do they take on the conduct of
24 settlement negotiations such that they're not
25 discoverable by third parties? That is the issue

00038

1 that's being --

2 THE COURT: What do you mean they're not
3 discoverable by third parties? If I enter into a
4 settlement agreement, while there may be limits or
5 there may be privileges attached as to what gets
6 said in the settlement, nothing prohibits me in
7 general from going and telling everybody else what
8 happened.

9 MR. CLARE: And the Wells Process, in order
10 to maintain that confidentiality, which is a
11 confidentiality in the Wells Process that
12 implicates enforcement considerations that it
13 might get us crosswise with the SEC if we were to
14 disclose during settlement discussions with the
15 SEC, if we were to go out and say here's what
16 we're talking about the SEC, here's the
17 enforcement proceedings that's underway, here's
18 what they're looking at, that would get my client
19 potentially crosswise with the SEC.

20 So there's a lot of issues at stake with the
21 integrity of the Wells Process.

22 THE COURT: But the SEC is not saying you
23 can't disclose this?

24 MR. CLARE: The SEC is not a party to the
25 pending action in New York.

00039

1 THE COURT: So there's no agency saying you
2 can't disclose this; you just don't want to do it
3 because --

4 MR. CLARE: Because at the time we entered
5 into this broad -- again, broad outlines of this
6 agreement, and I expressly said to Your Honor that
7 I don't want to be representing to the Court that
8 I'm waiving any protection, and there's no
9 discussion here about regulations or
10 confidentiality restriction, there's no discussion
11 of that. I said, I'm not waiving anything that I
12 don't know what exists.

13 I went back and I consulted with the client,
14 checked with the outside counsel that was handling
15 this and he said this is the subject of a pending
16 discovery motion.

17 THE COURT: What's the response?

18 MR. SCAROLA: Your Honor, Mr. Clare says he's

16div-004122

19 not the attorney involved in the New York
20 proceeding, but it's my understanding that it's
21 Mr. Clare's law firm that represents the same
22 parties in the New York proceeding.

23 I also understand that the entity that is
24 filing this motion attempting to obtain an order
25 that would restrict disclosure is an entity that

00040

1 is somehow related to Morgan Stanley. It's a
2 Morgan Stanley subsidiary or affiliate.

3 Now, they can't come before Your Honor and
4 say we're going to provide you with good faith
5 cooperation to get all these documents while at
6 the same time through a subsidiary they're trying
7 to get a New York court to enter an order that
8 would prohibit us from getting the documents.

9 And the bottom line is, this proposed order
10 asks them to do nothing that would violate any
11 existing obligation of confidentiality, but if
12 there is no existing obligation of
13 confidentiality, they're required to turn over
14 everything that they have the authority to turn
15 over. If the authority exists today to turn it
16 over, we should get it. If it doesn't exist
17 today, we can't get it, but they're required to
18 provide good faith cooperation in helping us to
19 get it.

20 THE COURT: Okay.

21 MR. SCAROLA: That's all that we're asking.
22 That's what they agreed to.

23 THE COURT: Let me take another advisement.
24 It's his motion, he goes first and last.

25 MR. IANNO: I have an alternative order,

00041

1 Your Honor, on that motion.

2 THE COURT: Thank you very much.

3 MR. SCAROLA: Thank you, Your Honor. I
4 appreciate your extra time this afternoon. Happy
5 Thanksgiving.

6 MR. IANNO: And hopefully, this is your last
7 hearing before the holiday.

8 THE COURT: It is now.

9 Thanks. Thanks. Bye-bye.

10 MR. IANNO: Thank you, Judge.

11 (Proceedings concluded at 5:18 p.m.)
12
13
14
15
16
17
18
19
20

00001

1 IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA
2 CASE NO. 2003-CA-005045 AI
3
4 COLEMAN (PARENT) HOLDINGS, INC.,
5 Plaintiff,
6 vs.
7 MORGAN STANLEY & COMPANY, INC.
8 Defendant.

9

10

11

12

13

14 TRANSCRIPT OF THE PROCEEDINGS BEFORE
THE HONORABLE ELIZABETH MAASS

15

16

17

18

West Palm Beach, Florida
November 25, 2003
4:37 p.m. - 5:18 p.m.

19

20

21

22

23

24

25

00002

1 APPEARANCES:

2

SEARCY, DENNEY, SCAROLA, BARNHART & SHIPLEY, P.A.
3 2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33401
4 Counsel for the Plaintiff
BY: JACK SCAROLA, ESQUIRE

5

6

7

CARLTON, FIELDS, WARD, EMMANUEL,
8 SMITH & CUTLER, P.A.
Esperante
9 222 Lakeview Avenue, Suite 1400
West Palm Beach, Florida 33401-6149
10 Counsel for the Defendant
BY: JOSEPH IANNO, JR., ESQUIRE

11

12

13

KIRKLAND AND ELLIS

16div-004125

14 655 15th Street N.W., Suite 1200
Washington, D.C. 20005
15 Counsel for the Defendant
BY: THOMAS A. CLARE, ESQUIRE

16
17
18

HOLLAND & KNIGHT, LLP
19 625 North Flagler Drive, Suite 700
West Palm Beach, Florida 33401
20 Counsel for Arthur Andersen
BY: HANK JACKSON, ESQUIRE

21
22
23
24
25

00003

1 BE IT REMEMBERED that the foregoing
2 proceedings were had before the HONORABLE ELIZABETH
3 MAASS, in the Palm Beach County Courthouse, West Palm
4 Beach, Florida, on November 25, 2003, starting at
5 4:37 p.m., with appearances as hereinabove noted,
6 to wit:

7 - - - -

8 THE COURT: This is Coleman and Morgan
9 Stanley. It's defendant's motion, I think, to
10 compel production of a settlement agreement.

11 MR. IANNO: That's correct.

12 MR. CLARE: That's correct.

13 THE COURT: You-all can have a seat.

14 The first motion I have though, and I
15 apologize, I didn't have time to go through the
16 files to try to find this, I see that defendant
17 has filed certain things under seal or has
18 tendered certain things under seal, and I hope
19 that none of them have been filed yet. Was there
20 an order entered that permitted that procedure?

21 MR. IANNO: Yes, Your Honor. Joe Ianno.
22 I believe that the confidentiality order that was
23 entered in this case provided for that.

24 THE COURT: You're going to have to tell me,
25 because I thought --

00004

1 MR. IANNO: I didn't bring the
2 confidentiality order with me.

3 THE COURT: Because, obviously, under the
4 Rules of Judicial Administration, things can't get
5 filed under seal --

6 MR. IANNO: Without notice to media.

7 THE COURT: And all that. And I thought when
8 I looked at the proposed order in this case,
9 either I struck through that stuff or I mailed it
10 back to you guys and said I can't sign this. And

11 if I haven't done that yet, that's why we need to
12 find that order.

13 I haven't looked at any of the stuff that was
14 given to me under seal. I need to just give it
15 back to you. It's not my policy to look at things
16 that can't be part of the court record absent a
17 clear order that permits me to do so.

18 It could be somehow I signed it and I forgot.

19 MR. IANNO: I don't believe that the motion
20 at issue though, Your Honor, was filed under seal.

21 THE COURT: No, just some of the stuff. I'll
22 give you guys -- Whoever gave me this stuff, I'm
23 just going to give it back.

24 MR. SCAROLA: I think what was filed under
25 seal was your reply memorandum.

00005

1 MR. IANNO: It could be.

2 THE COURT: I have a couple things under
3 seal. I got this (indicating).

4 MR. IANNO: If I may, Your Honor.

5 THE COURT: And then you gave me a copy of
6 it, which I don't want. And then I got this
7 (indicating). I don't know if that's all of it or
8 not.

9 MR. IANNO: Okay. This was not filed under
10 seal, Your Honor (indicating).

11 THE COURT: I thought it's telling me it's a
12 copy of what was filed under seal for me. No?

13 MR. IANNO: That must have been a mistake,
14 Your Honor, because that was not filed under seal.

15 THE COURT: You're comfortable it wasn't?
16 Do you want to show it to Mr. Scarola?

17 MR. IANNO: I think it may have been filed.
18 It is a response.

19 I think that was just a mistake, Your Honor,
20 on this one. That was our reply to Mr. Scarola's
21 opposition.

22 THE COURT: Okay. And have you seen this
23 (indicating)?

24 MR. SCAROLA: I have, yes, Your Honor.

25 THE COURT: Okay. Thanks.

00006

1 MR. IANNO: These are other motions, Your
2 Honor, that are not at issue today.

3 THE COURT: So when it says confidential
4 under seal, it was a misnomer?

5 MR. IANNO: Yes. It was a mistake. That one
6 was not intended to be filed under seal.

7 THE COURT: Do we know if it was filed?

8 MR. IANNO: It may have been.

9 THE COURT: What if it wasn't? Do you want
10 me to do directions to the clerk saying --

11 MR. IANNO: You can file that.

12 THE COURT: The whole thing says

13 confidential.

14 MR. IANNO: That can be filed. That does not
15 need to be under seal.

16 THE COURT: Okay. Thank you.

17 What did you want to say in support of your
18 motion?

19 MR. CLARE: Good morning, Your Honor.
20 Tom Clare from Kirkland and Ellis in Washington on
21 behalf of the defendant, Morgan Stanley. This is
22 our motion to compel the production of the
23 settlement agreement.

24 THE COURT: Right.

25 MR. CLARE: I think to understand the context

00007

1 of the motion, it's helpful to go back in time and
2 understand the events that led up to this lawsuit
3 and the litigations that came before this
4 settlement agreement is the subject of the motion.

5 In March of 1998, Mr. Scarola's client sold
6 its interest in the Coleman Company to Sunbeam.
7 My client, Morgan Stanley, was the financial
8 advisor to Sunbeam for part of that deal. Arthur
9 Andersen was the auditor to Sunbeam at the time.

10 After the acquisition was closed, there were
11 accounting problems discovered at Sunbeam,
12 management was fired, the auditors were changed
13 and litigation ensued.

14 Morgan Stanley was never sued by anybody
15 until Coleman Parent Holdings Company sued us
16 earlier this year, but all the other litigation
17 ensued, including claims that were brought or
18 threatened to be brought by the plaintiff in this
19 case against Sunbeam, and then a second suit
20 against Arthur Andersen. Both of those cases were
21 settled.

22 The settlement agreement between Coleman
23 Parent Holdings and Sunbeam was public, a matter
24 of public record, publicly filed with the SEC
25 filings. The settlement agreement between Coleman

00008

1 and Arthur Andersen was not.

2 Andersen has been identified as an important
3 critical witness in this case. There are partners
4 and former partners of Arthur Andersen who are
5 identified in the Complaint as providing a factual
6 basis for the fraud and negligent
7 misrepresentation counts that are brought against
8 us, and there's an issue of setoff. Very clearly
9 in the case, they were seeking to recover the same
10 damages from us as they've already recovered from
11 Arthur Andersen stating the same allegations of
12 reliance and the same damages allegations.

13 So we're entitled to know, under the City of
14 Homestead case in the Third District Court of

15 Appeals that came down, the position that was
16 recently re-affirmed by the Nester case that came
17 down a month ago in the Court of Appeals in
18 support of that. It's relevant.

19 As well, Your Honor, potentially to the forum
20 non conveniens and choice of law motion that we're
21 going to be back arguing before Your Honor on
22 December 12th, to the extent that --

23 THE COURT: How would it be relevant to
24 choice of law?

25 MR. CLARE: To the extent that Coleman
00009

1 Parent, which is headquartered in New York, and
2 its parent company, which is headquartered in
3 New York, agreed to settle this litigation and
4 enforce the settlement agreement in the courts of
5 New York or agreed to be bound by the choice of
6 law provision that specifies New York law should
7 apply, that's relevant to whether New York is an
8 inconvenient forum for them to litigate this case.

9 THE COURT: So it's not a choice of law, it's
10 just an inconvenient forum argument?

11 MR. CLARE: Well, there's both.

12 THE COURT: How is it choice of law, so I
13 understand?

14 MR. CLARE: On December 12th, we'll be
15 back --

16 THE COURT: Right.

17 MR. CLARE: -- to argue our motion to
18 dismiss, and it's our view that the substantive
19 law of the State of New York applies to their
20 claims.

21 THE COURT: Right, but how is -- I'm sorry.
22 I thought I understood you to say that potentially
23 the settlement agreement between Coleman and
24 Arthur Andersen will have some bearing on the
25 choice of law to be applied in this case.

00010

1 MR. CLARE: I may have misspoken.

2 THE COURT: Maybe I misunderstood it.

3 MR. CLARE: We're not a party to that
4 agreement, so obviously, it doesn't bear directly
5 on it, but I do think it is relevant to their
6 expectation that events giving rise to this
7 controversy arising out of the Sunbeam transaction
8 will be governed at least in part by New York law.

9 So that's an additional reason why we think
10 it's relevant. But the primary reasons are the
11 setoff, the damages claims, we're going to need
12 our experts to prepare damages reports at some
13 point to submit our expert testimony on damages
14 and also to evaluate our position, our potential
15 liability exposure. Without knowing what the
16 setoff is, it's impossible for my client to --

17 THE COURT: So are you saying the only part
18 of the agreement you need access to is the dollar
19 amount?

20 MR. CLARE: No, actually, that's not correct.
21 Under the City of Homestead case, the Court said
22 the amount and the terms need to be disclosed.

23 I can't conjure up all of the reasons why it
24 might be relevant. Those are the reasons that
25 I've identified here. There may be a denial of

00011

1 liability by Arthur Andersen. There may be an
2 admission of liability by Arthur Andersen. There
3 may be a release of claims coming back the other
4 direction against Coleman Parent. I just don't
5 have any idea without seeing the agreement to
6 understand the relevance of it. And that's why
7 the procedures that Mr. Scarola has suggested,
8 which is to delay and defer production of this
9 settlement agreement until later in the case, is
10 not appropriate, nor is an in camera inspection to
11 review, because having access to the discovery,
12 wanting to take the depositions of Arthur Andersen
13 people, there's no way that we can tell from an in
14 camera review or by delaying months and months
15 until trial whether we'll be able to effectively
16 cross examine witnesses during depositions and the
17 like.

18 It would be a different case if they had not
19 identified Arthur Andersen as critical to the
20 establishment of their case.

21 THE COURT: Okay. Let me see what
22 plaintiff's position is. Thank you.

23 MR. SCAROLA: Good afternoon, Your Honor.
24 Jack Scarola on behalf of Coleman Parent Holdings
25 Company.

00012

1 If I may, let me present both the defense and
2 the Court with copies of some highlighted cases
3 that I would like to discuss, Your Honor, in the
4 course of our presentation.

5 THE COURT: Okay. Thank you.

6 MR. SCAROLA: Let me begin, Your Honor, by
7 acknowledging that as the defendants themselves
8 have stated, Rule 1.280(b)(1) permits discovery of
9 all relevant evidence; that is, evidence relevant
10 to the subject matter of the case, but that
11 evidence must also be either admissible or
12 reasonably calculated to lead to the discovery of
13 admissible evidence. And we must concede that the
14 principal case relied upon by the defense, the
15 City of Homestead, would require Your Honor to
16 compel disclosure of the amount of this
17 settlement.

18 There is language in the City of Homestead

19 case that has been accurately quoted in the
20 defendant's brief, and it is that the settlement
21 terms and amount must be disclosed.

22 But if Your Honor takes a look at that
23 opinion, and we're going to go through it together
24 if you'll indulge me for just a moment, you'll
25 find that the reference to terms is pure dicta.

00013

1 This is a case involving the wrongful death
2 of a seven-year-old, and there were two defendants
3 named in the lawsuit; an entity called
4 Meda-Therapy Institute and the City of Homestead.
5 The case, while pending, was settled with
6 Meda-Therapy Institute and proceeded against the
7 city. There was a confidential settlement
8 agreement -- excuse me. There was a settlement
9 agreement that was entered into, and the city,
10 according to the opinion, and this appears under
11 headnote 1, the last sentence in the paragraph,
12 quote, the city filed a motion to compel
13 disclosure of the settlement amount. The Court
14 denied the motion.

15 The opinion then goes on to say, the motion
16 to compel should have been granted, the settlement
17 terms and amount must be disclosed.

18 There was never even, according to the
19 opinion, a request for the terms, there was a
20 request for the amount. And the rationale in the
21 opinion was that the amount may be relevant to
22 setoff and the remaining defendant was entitled to
23 know what that amount was for that reason.

24 So the only issue before the Court was
25 whether the amount should be disclosed. There is

00014

1 no reference to any confidentiality provisions in
2 the settlement agreement, so the case is
3 distinguishable from the standpoint that there was
4 no contractual obligation imposed upon any party,
5 at least based upon the opinion, to keep the terms
6 of the settlement confidential.

7 And the Court also observed that a factor
8 that was taken into consideration in this case was
9 that the defendant seeking this discovery was a
10 public entity, and the Court found that to be a
11 relevant factor. In the last sentence of the
12 opinion, the Court says, the case for disclosure
13 is especially strong, whereas here the plaintiffs
14 are suing a public entity.

15 The precedent upon which this case is based,
16 the one cited authority is the case of Smith vs.
17 TIB Bank of The Keys, another Third DCA opinion.
18 And in that case, a plaintiff was seeking
19 certiorari review of an order compelling answers
20 during the course of a deposition. The plaintiff

21 had been involved in a prior unrelated lawsuit
22 arising out of the plaintiff's employment with an
23 entirely separate entity, and the plaintiff
24 settled that unrelated claim and entered into a
25 settlement agreement that did have contractual

00015

1 requirements that the terms of the settlement
2 remain confidential.

3 When the questions were asked during
4 deposition, the plaintiff declined to answer those
5 on the basis that answering the questions would
6 place the plaintiff in violation of the
7 confidentiality provisions in the earlier order.

8 The trial court entered an order which
9 recognized the obligation for the plaintiff to
10 decline to answer questions that were within the
11 scope of the confidentiality provision of the
12 order, and the trial court fashioned an order that
13 was expressly designed to give maximum effect to
14 the rights of privacy that arose out of the
15 confidentiality provision and at the same time
16 provide the defendant seeking the discovery with
17 relevant and material information.

18 So the Court basically said you must answer
19 these questions, you are within your rights to
20 decline to answer questions that fall within the
21 scope of the confidentiality provision.

22 And if you take a look at the opinion, you
23 will see that the Court has weighed the right of
24 privacy and the expectation of privacy arising out
25 of the confidentiality provisions in the

00016

1 settlement agreement and balanced those against
2 the rights for discovery, which we think is what
3 appropriately must be done.

4 We have also provided the Court with a Fourth
5 DCA case that recognizes a general principal that
6 materials sought to be discovered must properly be
7 related to the issues involved in the litigation.
8 That's a case that has been cited in our brief and
9 recognizes the fact that Rule 1.280(b)(1) is not
10 to be used simply for gathering information
11 regarding settlement possibilities.

12 And we have given the Court two federal cases
13 that interpret the identical provisions in the
14 federal rules and weigh the privacy rights against
15 the rights to disclosure and approve a procedure
16 whereby the Court has conducted an in camera
17 inspection to make a determination as to whether
18 any provisions in the settlement agreement must be
19 disclosed because they have the possibility of
20 providing grounds for impeachment of the settling
21 party.

22 We think that that's the appropriate

23 procedure for the Court to follow under these
24 circumstances.

25 There have been a number of arguments that

00017

1 have been made as to potential reasons for the
2 disclosure of information contained within the
3 settlement agreement. Those are contained within
4 the reply memo that Your Honor has not yet had an
5 opportunity to see, but if you turn to page 6,
6 there are individual bullet points that catalog
7 the bases --

8 THE COURT: I'm sorry, this is contained
9 where?

10 MR. SCAROLA: In the reply memo that was
11 filed by defendants. I'll just give Your Honor my
12 copy.

13 There are various bullet points at the top
14 that talk about things that reasonably might
15 appear within a settlement agreement and might
16 provide a basis for some argument that portions of
17 the settlement agreement are relevant or material.

18 We are prepared to provide the settlement
19 agreement to Your Honor for in camera inspection.
20 I have it with me today. It's relatively brief,
21 and you can look at it quickly. You're going to
22 find, to corroborate the representations we have
23 already made to the Court, there are no
24 cooperation provisions in the agreement, there are
25 no provisions that require Arthur Andersen to

00018

1 produce witnesses in a particular forum.

2 THE COURT: How many pages is it?

3 MR. SCAROLA: It's about four or five.

4 THE COURT: Any objection to my looking at it
5 now?

6 MR. CLARE: No, Your Honor.

7 THE COURT: Okay.

8 It's more than four or five.

9 MR. IANNO: Even with my eyes, Your Honor, it
10 looks single spaced.

11 THE COURT: I saw that.

12 MR. SCAROLA: It is single spaced.

13 I tried to tab the paragraphs that I thought
14 might be of particular concern to the Court, and
15 some of it you'll be able to see just by the
16 nature of the subject matter dealt with in the
17 paragraph.

18 THE COURT: Can you give me just one second
19 to look at it?

20 MR. SCAROLA: Sure.

21 THE COURT: Because I want to get a sense of
22 what we're talking about.

23 MR. SCAROLA: Absolutely.

24 Your Honor, may I interrupt for just one

25 moment?

00019

1 THE COURT: Sure.

2 MR. SCAROLA: I would appreciate if Your
3 Honor would order me to produce that for in camera
4 inspection.

5 THE COURT: Oh, yes, I just did. I'm sorry.

6 MR. SCAROLA: Thank you. I thought that's
7 what you were doing.

8 THE COURT: That's what I was doing.

9 MR. SCAROLA: Thank you.

10 THE COURT: Okay.

11 MR. SCAROLA: To conclude, Your Honor, in
12 addition to those items that are listed in the
13 reply memo, there has, for the first time, been a
14 suggestion that if there were a choice of forum
15 provision contained within that agreement, that it
16 might have some relevance to the issues with
17 respect to forum non conveniens, and I think
18 Your Honor will see from a review of the document
19 that there is no stipulation with regard to an
20 appropriate forum for litigation concerning that
21 agreement.

22 So I think that upon review of the document,
23 there is only one provision in the document that
24 has any relevance or materiality with respect to
25 this litigation, and that is the issue of the

00020

1 amount of the settlement which relates solely to
2 the issue of setoff, and upon court order, we are
3 prepared to make a confidential disclosure of the
4 amount of that settlement under the terms of the
5 confidentiality agreement previously entered. We
6 would designate that as confidential information
7 in order to restrict its proper use to this case
8 and make the disclosure with regard to that
9 amount.

10 THE COURT: Any objection to my making a
11 photocopy of it?

12 MR. SCAROLA: No, not at all.

13 THE COURT: Thanks.

14 Was the settlement consummated?

15 MR. SCAROLA: Yes.

16 THE COURT: Under its terms?

17 MR. SCAROLA: Yes.

18 THE COURT: Okay.

19 Do you accept that representation?

20 MR. CLARE: That it was consummated under its
21 terms?

22 THE COURT: Yeah.

23 MR. CLARE: I don't have any reason to
24 believe or not believe that that's incorrect.

25 I would say that this is a non-privileged

00021

1 contract that's no different than any other
2 contract, that I'd like the opportunity to examine
3 the document to understand and pressure test the
4 assertions that Mr. Scarola has made about the
5 document, the nuances associated with it that I
6 would like to explore.

7 And, you know, the Florida courts --

8 MR. SCAROLA: I'm sorry, before there's a
9 rebuttal --

10 THE COURT: I'm sorry, you weren't done.

11 MR. SCAROLA: There's just one last point
12 that I want to make.

13 THE COURT: Sure.

14 MR. SCAROLA: And that is that Florida does
15 have a constitutionally-recognized right to
16 privacy. This is private economic information.
17 There must be a balancing test between that right
18 to privacy and the defendant's rights in this
19 lawsuit, and that right to privacy needs to be
20 taken into careful consideration before any other
21 terms of this agreement were to be disclosed. And
22 I suggest that upon reading the agreement, it is
23 abundantly clear that none of the stated purposes
24 for which this discovery is sought would be served
25 by the disclosure of any other provision in that

00022

1 document at all.

2 THE COURT: Okay.

3 MR. SCAROLA: Thank you.

4 THE COURT: What did you want to respond,
5 sir?

6 MR. CLARE: Just on that last point, Your
7 Honor, there's --

8 MR. SCAROLA: I'm sorry. Just one last
9 thing.

10 Mr. Jackson has been rehearsing all day long
11 to be able to say with credibility I agree with
12 everything Mr. Scarola just said, so could we just
13 give him the opportunity to do that on behalf of
14 Arthur Andersen?

15 MR. JACKSON: Your Honor, Hank Jackson on
16 behalf of Arthur Andersen.

17 THE COURT: Okay. I'm glad to know that
18 you're here. I didn't realize you were here for
19 Arthur Andersen.

20 MR. JACKSON: I'm from Holland & Knight.
21 We represented Arthur Andersen in the previous
22 lawsuit and were part of the settlement
23 negotiations and the settlement.

24 I'd just like to reiterate that the
25 confidentiality provision was a material term of

00023

1 that agreement, and we believe that to the extent
2 permissible by law, that it should be enforced,

3 and it should only be breached or allowed to come
4 out in the open to the extent that it is clearly
5 established that it is relevant. And we believe
6 that the proper procedure is for the Court to look
7 at it in camera and to make that judgment, and
8 we'd ask that you do that.

9 THE COURT: What did you want to respond,
10 sir?

11 MR. CLARE: On Mr. Scarola's final point,
12 with the Court's permission, I'll hand to counsel
13 and to Your Honor just some citations to Florida
14 cases that are all cited in our brief that make
15 the point that a contractual confidentiality
16 provision cannot be used to subvert discovery.

17 There's a protective order in this case. We
18 will agree to be bound by the full extent of the
19 confidentiality order in terms of disclosing it.
20 We will go one step further and agree to make it
21 attorney's eyes only with the proviso that I be
22 able to show it to a limited number of in-house
23 attorneys at Morgan Stanley for the purposes of
24 evaluating it for the purposes that I've
25 identified for Your Honor.

00024

1 So with the confidentiality order, the
2 balancing test that Mr. Scarola has already
3 identified has already been done. Those privacy
4 considerations that Arthur Andersen is worried
5 about about disclosure, nothing's going to be in
6 the open. This is all going to be treated as the
7 highest degree of confidentiality under the
8 protective order that Your Honor has already
9 signed, and we agree and are willing to accept
10 those restrictions on our use of it.

11 THE COURT: Okay. Let me take another
12 advisement, okay?

13 Thank you very much.

14 MR. SCAROLA: Your Honor, there is one
15 additional brief matter, if we could impose upon
16 the Court. We had actually set it for an 8:45
17 hearing this morning, and because of Your Honor's
18 crowded calendar, we hoped that we might just
19 bring it to you this afternoon.

20 THE COURT: Sure. What is that?

21 You can take this back, sir. Thanks.

22 MR. SCAROLA: Your Honor, it relates to the
23 exchange of correspondence with which we barraged
24 you concerning the entry of an order --

25 THE COURT: Oh, yeah. Okay.

00025

1 MR. SCAROLA: -- arising out of a stipulated
2 agreement between the parties.

3 If I could hand Your Honor the transcript of
4 the earlier hearing.

5 THE COURT: Okay. Is it your position there
6 was a stipulation?

7 MR. SCAROLA: It is absolutely my position
8 that there was an on-the-record stipulation, yes,
9 Your Honor.

10 THE COURT: Okay.

11 MR. SCAROLA: This is the motion for entry of
12 an order upon stipulation of the parties, and I'll
13 pull Your Honor's attention to those specific and
14 brief provisions that indicate that there was
15 indeed a stipulation.

16 If we begin at page 2, I am addressing the
17 Court at line 13, "We have come to an agreement,
18 specifically with regard to the motion to compel
19 production of e-mails."

20 Going down to line 18, "For the record, my
21 name is Jack Scarola. I'm here on behalf of the
22 plaintiff, Coleman Parent Holdings. There are two
23 motions. The first is a motion to compel directed
24 to the production of e-mails. The agreement that
25 we have reached is that the defendant, Morgan

00026

1 Stanley, will produce a witness who is
2 knowledgeable with respect to the retention and
3 retrieval -- the retention policies and retrieval
4 capabilities with regard to e-mails. They will
5 also produce all documents that were submitted to
6 federal regulators with regard to Morgan Stanley's
7 e-mail retention policies and retrieval
8 capabilities."

9 Morgan Stanley was sued by government
10 regulators and paid in excess of a million dollars
11 for violating document retention policies, and we
12 wanted to get the documents that the federal
13 government obtained in connection with that
14 proceeding. So there's an agreement that they're
15 going to produce a witness.

16 The next part of the agreement appears at
17 page 5.

18 THE COURT: Okay.

19 MR. SCAROLA: Mr. Clare is speaking.

20 Mr. Clare addresses the Court at line 14. He
21 says, beginning at line 12, "Just in the interest
22 of completeness and while we're waiting for the
23 schedule," because there was another motion we
24 were discussing, "Mr. Scarola described in broad
25 outlines what the agreed-upon order would be on

00027

1 this other motion. There is one caveat I
2 explained to Mr. Scarola in the hallway, and we
3 will work it out between the parties before we
4 submit an agreed-upon order to Your Honor. I am
5 not aware as I sit here right now what limitations
6 there are right now without disclosing to

7 Mr. Scarola's client information we provided to
8 federal regulators."

9 And I think that "without" is supposed to be
10 "about" disclosing, "there are right now about
11 disclosing."

12 THE COURT: You're saying if there were
13 regulations in place that would prohibit them from
14 disclosing them.

15 MR. SCAROLA: That's right.

16 THE COURT: Okay.

17 MR. SCAROLA: What Mr. Clare is saying is
18 there may be some restrictions and I don't know
19 what they are and I need --

20 THE COURT: We may not be able to do some of
21 this stuff.

22 MR. SCAROLA: That's correct. So he is
23 saying that.

24 He says, "We agreed to provide whatever it is
25 we can provide."

00028

1 Okay? So he's saying, whatever documents
2 we're allowed to provide, we'll give to you.

3 He then goes on to say at line 6 on page 6,
4 "I know there are materials we can provide, I just
5 don't know the scope of it."

6 I then speak, and I say, "The only caveat to
7 that is that there's a commitment that they will
8 provide good faith cooperation in obtaining
9 whatever information is necessary in order to make
10 full disclosure."

11 And Mr. Clare says, "That's correct."

12 THE COURT: Okay.

13 MR. SCAROLA: Now, that was the agreement.
14 We're going to both provide witnesses that are
15 going to talk about e-mail retention procedures
16 and capabilities, and the second part is, they're
17 going to give us everything that they gave to the
18 federal government except to the extent that they
19 are prohibited from doing so. And if there are
20 prohibitions, they are going to provide good faith
21 cooperation in an effort to try to give us full
22 disclosure.

23 That's the order that I submitted to the
24 Court, and there has been an effort now to recede
25 from that agreement and to change it.

00029

1 THE COURT: Do you have a copy of your
2 proposed order?

3 MR. SCAROLA: Yes, Your Honor, I do.
4 I provided the Court separately the original --

5 THE COURT: It's attached? Oh, this is it.
6 Okay.

7 MR. SCAROLA: Did I give it to Your Honor?

8 THE COURT: I assume so. Yeah. It's

9 attached to the transcript.
10 MR. SCAROLA: That's the one, yes.
11 THE COURT: Okay. That's fine. Let me just
12 look at it.
13 MR. SCAROLA: Sure.
14 THE COURT: Okay. And what's the objection?
15 MR. IANNO: Judge, Joe Ianno. This dispute
16 centers around one thing.
17 THE COURT: What's that?
18 MR. IANNO: The submission that Mr. Scarola
19 wants that was provided to the federal regulators
20 is right now the subject of a motion pending in
21 the Federal Court in the Southern District to
22 prevent its disclosure. By providing it to
23 Mr. Scarola, we would be violating or mooted that
24 motion that was filed by a co-defendant in that
25 case.

00030

1 What we've told Mr. Scarola --
2 THE COURT: I'm sorry, tell me a little bit
3 more about what you're saying.
4 MR. IANNO: Okay. There is a motion right
5 now that is pending, an action in the Federal
6 District that we've cited in our response. It's
7 entitled --
8 THE COURT: I don't have your response. If
9 you have it, that would be great.
10 MR. IANNO: I do. Here's a copy of our
11 response, Your Honor.
12 THE COURT: Thank you. Okay.
13 MR. IANNO: And we've attached a proposed
14 alternate order to our response. And the case in
15 the federal court is styled In Re: Initial Public
16 Offering Securities Litigation, it's pending in
17 the Southern District of New York in Federal
18 Court. That motion is directed -- it's filed by a
19 co-defendant of Morgan Stanley's in that case --
20 to prevent the disclosure of what is called the
21 Wells Submission, which is the document that
22 Mr. Scarola is attempting to get.
23 THE COURT: I'm sorry, who is trying to
24 prevent the disclosure of this?
25 MR. IANNO: A co-defendant. There is another

00031

1 underwriting defendant.
2 THE COURT: A private party?
3 MR. IANNO: Another private party. They're
4 saying that this document is prohibited from
5 disclosure because it's settlement discussions.
6 It's the negotiations leading up to the settlement
7 with the SEC, and they're saying that settlement
8 discussions, not the final agreement, but the
9 settlement discussions leading up to the SEC
10 settlement are prohibited from being disclosed in

11 discovery.

12 That motion, to my understanding, has been
13 fully briefed and is awaiting ruling by Judge
14 Scheindlin in New York.

15 THE COURT: These are documents that your
16 client provided?

17 MR. IANNO: To the SEC, I believe that's
18 correct, yes, Your Honor.

19 THE COURT: Okay.

20 MR. IANNO: And this underwriting defendant,
21 co-defendant, is saying these documents are not
22 discoverable in the federal court. We're
23 waiting --

24 THE COURT: Were they documents drafted for
25 the SEC or just documents provided to the SEC?

00032

1 MR. IANNO: They were drafted for the SEC in
2 connection with the settlement discussions of the
3 SEC action that Mr. Scarola referenced in his
4 argument.

5 THE COURT: These are e-mails?

6 MR. IANNO: No. It's a document describing
7 Morgan Stanley's e-mail retrieval and retention.

8 THE COURT: Oh, I see.

9 MR. IANNO: It's discussing how e-mails are
10 stored, how they're backed up, how they're
11 retrieved, things of that nature. It's about a
12 40 or 50-page document is my understanding of that
13 document. And it's submitted in connection with
14 the SEC claims against Morgan Stanley and other
15 defendants, as I understand that.

16 What Mr. Clare said when we were here on
17 November 6th, and it's reflected in the
18 transcript, is he did not know, and he's here to
19 speak to that, but what was our ability to waive
20 at the time. And what Mr. Scarola didn't read
21 from the transcript is when Mr. Clare was here on
22 page 6 --

23 THE COURT: Let me get to that. Okay. What
24 line?

25 MR. IANNO: It's line 8. And it's where

00033

1 Mr. Scarola stopped. "And I don't want to
2 represent to the Court that we're waiving or even
3 have the ability to waive protections that I'm not
4 aware of right now."

5 Specifically, this case came up after we went
6 back and consulted with the client. If you look
7 just above that on line 4, Mr. Clare says he
8 doesn't know all the details without consulting
9 the client.

10 What we had agreed to do on November 6th is
11 go back and draft a proposed agreed order. That's
12 reflected back on page 2, I believe, where the

13 Court asks you, you expect me to remember this
14 when you submit a proposed agreed order. That's
15 what we were talking about.

16 What we've told Mr. Scarola repeatedly and
17 what we've said in our proposed order, once the
18 judge rules in New York, if we're permitted to
19 disclose it, we'll give it to you within five
20 days. That's the only dispute.

21 If the judge rules that it's not
22 discoverable, we can't produce it in this case
23 without violating that court order. And what
24 Mr. Scarola wants us to do, he says, well, I want
25 you to go in and waive that protection and waive

00034

1 the judge's ruling, because if the judge has ruled
2 today --

3 THE COURT: He's saying you already did.
4 Is that right?

5 MR. SCAROLA: Absolutely.

6 MR. IANNO: But Mr. Clare when he was here
7 specifically told the Court, and we knew, and the
8 Court recognized indeed that there may be other
9 problems with the disclosure of this document.

10 THE COURT: Well, let me ask you this.

11 The way I read that transcript, you-all were
12 agreeing that unless some federal regulation
13 prohibits the disclosure, you'll make it, and if
14 it does, you'll apply, you know, to permit a
15 disclosure.

16 MR. IANNO: And we've waived confidentiality.
17 We have done the good faith cooperation and waived
18 the confidentiality. The only thing we can't
19 waive is this federal court proceeding at this
20 time.

21 THE COURT: Why not?

22 MR. IANNO: Because there's a --

23 THE COURT: Because you don't want to, or
24 because there's something else going on?

25 MR. IANNO: It's another defendant that

00035

1 brought the motion, Judge. We would be mooting
2 the co-defendant's motion at that point in time.
3 All the details, I'm not a party, I'm not a member
4 of the Bar in New York, I don't know all the
5 details going on in the New York case and why or
6 why not this document is being prohibited from
7 disclosure.

8 But, for instance, if this court rules that
9 we should disclose the Wells Submission to Scarola
10 and at the same time the federal court has ruled
11 that it can't be disclosed --

12 THE COURT: Can't be disclosed to whom?

13 MR. IANNO: To anyone.

14 As I understand the motion in New York, it's

15 to prohibit disclosure of this document in
16 discovery.

17 THE COURT: Well, but that's different than
18 saying it can't be disclosed to a non-party.

19 MR. IANNO: Well, I think it's saying you
20 can't disclose this document to anyone.

21 MR. CLARE: Your Honor --

22 MR. IANNO: And maybe Mr. Clare --

23 MR. CLARE: I only have a little bit better
24 of an understanding of this, because I'm also not
25 a party to this New York action.

00036

1 The submission -- The basic gist of the
2 motion is to interpret the Wells Process in
3 dealing with the SEC. The SEC issues a notice
4 that says this group of people, underwriters, are
5 potentially liable for such and such, and in order
6 to settle those claims, we invite all of the
7 potential targets of this investigation to come
8 and make submissions.

9 THE COURT: Right. And this is the
10 submission that you-all made?

11 MR. CLARE: This is one of the submissions
12 that we and --

13 THE COURT: And at the time you made the
14 submission, for instance, would it have prohibited
15 your publishing it in the paper?

16 MR. CLARE: It was requested to be treated
17 under the Wells Submission Process as confidential
18 by the SEC and was not disclosed to anybody else.
19 So yes, Your Honor, absolutely.

20 THE COURT: What would have prohibited your
21 disclosing it to a third party at the time you
22 made it?

23 MR. CLARE: What would have prohibited us
24 from disclosing it to a third party? In order for
25 us to get the benefit of the confidentiality that

00037

1 we had requested in the Wells Process, which is an
2 enforcement action, that we had to maintain its
3 confidentiality.

4 THE COURT: As against whom; the world?

5 MR. CLARE: As against the world, sure.

6 And if we had produced it to the New York
7 Times or provided it to third parties, then we
8 were waiving this protection, this Wells
9 Regulatory Process that we had in place.

10 And so we're willing to waive that. Morgan
11 Stanley has said, for the good of this agreement,
12 we are more than happy to waive that request. The
13 only thing -- There's this judicial proceeding
14 that is determining what is this Wells Process
15 about. It is exactly the federal regulatory
16 enforcement process that's being interpreted by

17 Judge Scheindlin in New York, what is the Wells
18 Process.

19 When you get to a certain stage in the Wells
20 Process and the parties are contemplating a
21 settlement, do materials that are exchanged
22 between the SEC and the potential targets of an
23 investigation, do they take on the conduct of
24 settlement negotiations such that they're not
25 discoverable by third parties? That is the issue

00038

1 that's being --

2 THE COURT: What do you mean they're not
3 discoverable by third parties? If I enter into a
4 settlement agreement, while there may be limits or
5 there may be privileges attached as to what gets
6 said in the settlement, nothing prohibits me in
7 general from going and telling everybody else what
8 happened.

9 MR. CLARE: And the Wells Process, in order
10 to maintain that confidentiality, which is a
11 confidentiality in the Wells Process that
12 implicates enforcement considerations that it
13 might get us crosswise with the SEC if we were to
14 disclose during settlement discussions with the
15 SEC, if we were to go out and say here's what
16 we're talking about the SEC, here's the
17 enforcement proceedings that's underway, here's
18 what they're looking at, that would get my client
19 potentially crosswise with the SEC.

20 So there's a lot of issues at stake with the
21 integrity of the Wells Process.

22 THE COURT: But the SEC is not saying you
23 can't disclose this?

24 MR. CLARE: The SEC is not a party to the
25 pending action in New York.

00039

1 THE COURT: So there's no agency saying you
2 can't disclose this; you just don't want to do it
3 because --

4 MR. CLARE: Because at the time we entered
5 into this broad -- again, broad outlines of this
6 agreement, and I expressly said to Your Honor that
7 I don't want to be representing to the Court that
8 I'm waiving any protection, and there's no
9 discussion here about regulations or
10 confidentiality restriction, there's no discussion
11 of that. I said, I'm not waiving anything that I
12 don't know what exists.

13 I went back and I consulted with the client,
14 checked with the outside counsel that was handling
15 this and he said this is the subject of a pending
16 discovery motion.

17 THE COURT: What's the response?

18 MR. SCAROLA: Your Honor, Mr. Clare says he's

19 not the attorney involved in the New York
20 proceeding, but it's my understanding that it's
21 Mr. Clare's law firm that represents the same
22 parties in the New York proceeding.

23 I also understand that the entity that is
24 filing this motion attempting to obtain an order
25 that would restrict disclosure is an entity that

00040

1 is somehow related to Morgan Stanley. It's a
2 Morgan Stanley subsidiary or affiliate.

3 Now, they can't come before Your Honor and
4 say we're going to provide you with good faith
5 cooperation to get all these documents while at
6 the same time through a subsidiary they're trying
7 to get a New York court to enter an order that
8 would prohibit us from getting the documents.

9 And the bottom line is, this proposed order
10 asks them to do nothing that would violate any
11 existing obligation of confidentiality, but if
12 there is no existing obligation of
13 confidentiality, they're required to turn over
14 everything that they have the authority to turn
15 over. If the authority exists today to turn it
16 over, we should get it. If it doesn't exist
17 today, we can't get it, but they're required to
18 provide good faith cooperation in helping us to
19 get it.

20 THE COURT: Okay.

21 MR. SCAROLA: That's all that we're asking.
22 That's what they agreed to.

23 THE COURT: Let me take another advisement.
24 It's his motion, he goes first and last.

25 MR. IANNO: I have an alternative order,

00041

1 Your Honor, on that motion.

2 THE COURT: Thank you very much.

3 MR. SCAROLA: Thank you, Your Honor. I
4 appreciate your extra time this afternoon. Happy
5 Thanksgiving.

6 MR. IANNO: And hopefully, this is your last
7 hearing before the holiday.

8 THE COURT: It is now.

9 Thanks. Thanks. Bye-bye.

10 MR. IANNO: Thank you, Judge.

11 (Proceedings concluded at 5:18 p.m.)
12
13
14
15
16
17
18
19
20

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CASE NO: 03 CA-005165 AG

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INCORPORATED,

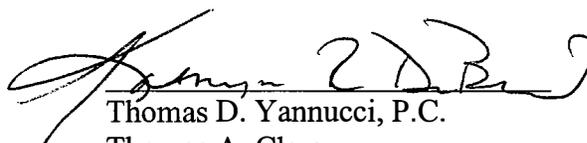
Defendant.

_____ /

**DEFENDANT'S NOTICE OF SERVING CONFIDENTIAL ANSWERS TO PLAINTIFFS
SECOND SET OF INTERROGATORIES**

Defendant Morgan Stanley & Co., Incorporated, by and through their undersigned
counsel, hereby give notice that Defendant served confidential answers to Plaintiff's Second Set
of Interrogatories, on this 1st day of December, 2003.

Dated: December 1, 2003



Thomas D. Yannucci, P.C.

Thomas A. Clare

Zhonette Brown

Larissa Paule-Carres

Brett H. McGurk

Kathryn DeBord

KIRKLAND & ELLIS LLP

655 15th Street, N.W. – Suite 1200

Washington, D.C. 20005

Telephone: (202) 879-5000

Facsimile: (202) 879-5200

Joseph Ianno, Jr. (FL Bar # 655351)

CARLTON FIELDS, P.A.

222 Lakeview Ave., Suite 1400

West Palm Beach, FL 33401

Telephone: (561) 659-7070

Facsimile: (561) 659-7368

Counsel for Defendant

Morgan Stanley & Co. Incorporated

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by facsimile and e-mail to all counsel of record on the attached service list on this 1st day of December, 2003.

Thomas D. Yannucci, P.C.
Thomas A. Clare
Zhonette Brown
Larissa Paule-Carres
Brett H. McGurk
Kathryn DeBord
KIRKLAND & ELLIS LLP
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

Joseph Ianno, Jr. (FL Bar # 655351)
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

BY: 
Kathryn R. DeBord

Counsel for Defendant
Morgan Stanley & Co. Incorporated

SERVICE LIST

<p>John Scarola SEARCY, DENNEY, SCAROLA, BARNHARDT & SHIPLEY, P.A. 2139 Palm Beach Lakes Boulevard West Palm Beach, Florida 33409</p>	<p>Counsel for Plaintiff</p>
<p>Jerold S. Solovy JENNER & BLOCK, LLC One IBM Plaza Suite 4400 Chicago, Illinois 60611</p>	<p>Counsel for Plaintiff</p>

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

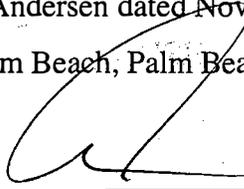
MORGAN STANLEY & CO., INC.,
Defendant(s).

ORDER AND DIRECTIONS TO THE CLERK

THIS CAUSE came before the Court, in Chambers, on its own Motion. Based on the foregoing, it is

ORDERED AND ADJUDGED that the Clerk is directed to docket and file the copy of Defendant Morgan Stanley & Co., Inc.'s Reply in Support of Its Motion to Compel Plaintiff to Produce Settlement Agreement with Arthur Andersen dated November 20, 2003.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this
1 day of December, 2003.



ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:

Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci
655 15th Street, NW, Suite 1200
Washington DC 20005

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, IL 60611

Mark F. Bideau, Esq.
777 S. Flagler Dr., Suite 300E
West Palm Beach, FL 33401

David M. Wells, Esq.
50 N. Laura Street, Suite 3300
Jacksonville, FL 32202

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

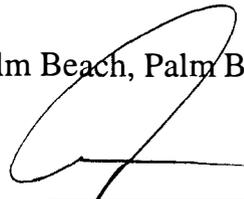
MORGAN STANLEY & CO., INC.,
Defendant(s).

**ORDER ON PLAINTIFF'S MOTION FOR ENTRY OF ORDER UPON
STIPULATION OF THE PARTIES**

THIS CAUSE came before the Court November 25, 2003 on Plaintiff's Motion for Entry of Order upon Stipulation of the Parties, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that Plaintiff's Motion for Entry of Order upon Stipulation of the Parties is Denied, without prejudice to any party's right to reset hearing on Plaintiff's Motion to Compel (e-mails).

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 1
day of December, 2003.



ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:

Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci
655 15th Street, NW, Suite 1200
Washington DC 20005

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, Il 60611

Mark F. Bideau, Esq.
777 S. Flagler Dr., Suite 300E
West Palm Beach, FL 33401

David M. Wells, Esq.
50 N. Laura Street, Suite 3300
Jacksonville, FL 32202

#230580/mm

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

CASE NO.: 2003 CA 005045 AI

Plaintiffs,

vs.

MORGAN STANLEY & CO., INC.,

Defendant,

_____ /

RE-NOTICE OF HEARING

YOU ARE HEREBY NOTIFIED that the undersigned has called up for hearing the following:

DATE: December 8, 2003

TIME: 8:45 a.m.

JUDGE: Hon. Elizabeth T. Maass

PLACE: Palm Beach County Courthouse, Room #11.1208, 205 North Dixie Highway,
West Palm Beach, FL 33401

SPECIFIC MATTERS TO BE HEARD:

COLEMAN (PARENT) HOLDINGS INC.'S MOTION TO COMPEL CONCERNING E-MAILS (**FILED UNDER SEAL**)

Moving counsel certifies that he or she contacted opposing counsel and attempted to resolve the discovery dispute without hearing.

Coleman Holdings, Inc. vs Morgan Stanley & Company
Case No.: 2003 CA 005045 AI
Re-Notice of Hearing

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by
Fax and U.S. Mail to all Counsel on the attached list, this 2ND day of Dec., 2003.



JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 478-0754
Attorney for Plaintiff

Coleman Holdings, Inc. vs Morgan Stanley & Company
Case No.: 2003 CA 005045 AJ
Re-Notice of Hearing

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block, LLC
One IBM Plaza
Suite 4400
Chicago, IL 60611

#230580/mm

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

CASE NO: 2003 CA 005045 AI

Plaintiffs,

vs.

MORGAN STANLEY & CO., INC.

Defendant.

**COLEMAN (PARENT) HOLDINGS INC.'S AMENDED MOTION TO COMPEL
CONCERNING EMAILS**

In accordance with this Court's Order of December 1, 2003 denying enforcement of the stipulation of the parties concerning production of emails, but specifically permitting Plaintiff to renew its Motion to Compel, and pursuant to Fla. R. Civ. P. 1.380(a)(1), Plaintiff Coleman (Parent) Holdings Inc. ("CPH") respectfully requests that the Court direct Defendant Morgan Stanley & Co., Inc. ("Morgan Stanley"): (1) to produce all materials submitted to regulators, received from regulators, or reflecting communications with regulators, in connection with any investigation of Morgan Stanley's e-mail retention policy; (2) to cooperate in good faith with CPH to obtain all such materials, to the extent that there are any restrictions imposed by regulators that might limit the right of Morgan Stanley to make full disclosure; and (3) to provide, within 15 days of the foregoing production, a corporate representative to testify pursuant to Fla. R. Civ. P. 1.310 concerning Morgan Stanley's e-mail retention policies, practices, and procedures, and concerning Morgan Stanley's ability (including the procedures, time, labor, and expense involved) to retrieve e-mails. In support of this motion, CPH states as follows:

1. This motion has been necessitated by Morgan Stanley's failure to produce e-mail messages responsive to CPH's document requests. In the more than 80,000 pages of documents

Coleman (Parent) Holdings Inc. v. Morgan Stanley
Case No 2003 CA 005045 AI

produced by Morgan Stanley, so far, CPH has been able to locate only a small handful of e-mails.

2. It is a matter of public record that Morgan Stanley, as a regulated entity, was fined heavily by federal regulators for failing to retain e-mails in the form and for the amount of time required by federal law. Until January 2001, pursuant to Morgan Stanley's internal policy of scrubbing its files, Morgan Stanley retained back up for e-mail messages for only one year, even though Morgan Stanley had a legal obligation to maintain e-mails in a readily accessible manner for a period of three years. As a result of Morgan Stanley's e-mail scrubbing policy, Morgan Stanley was the target of an investigation by the SEC, NASD, and the New York Stock Exchange. In late 2002, Morgan Stanley paid a \$1.65 million fine and began retaining e-mails on optical discs for three years. See Exh. A, 12/5/02 SEC Order, Findings, and Penalties.

3. Despite Morgan Stanley's internal policy of purging its files of e-mails in the period prior to January 2001 — a policy that was contrary to federal law — Morgan Stanley started saving documents relevant to the litigation involving the Sunbeam fraud beginning in February 1999. But as for e-mails, Morgan Stanley so far has produced precious few — even though Morgan Stanley admittedly may still have e-mails preserved on magnetic tape, hard drives, or other forms of back up. Morgan Stanley, however, has not searched any of those back-up sources.^{1/}

^{1/} The facts in this paragraph were confirmed by a Morgan Stanley Rule 1.310 representative at a deposition that, for some reason, Morgan Stanley designated as subject to the confidentiality provisions of the protective order entered in this case. CPH attached the relevant transcript excerpts to its original e-mail motion, and if the Court so desires, CPH can provide those excerpts again.

Coleman (Parent) Holdings Inc. v. Morgan Stanley
Case No. 2003 CA 005045 AI

4. Morgan Stanley opposed production of e-mails complaining of the supposedly enormous effort that would be involved. CPH, however, should not be required to accept Morgan Stanley's assertions at face value.

WHEREFORE, Plaintiff CPH respectfully requests that this Court direct Morgan Stanley: (1) to produce all materials submitted to regulators, received from regulators, or reflecting communications with regulators, in connection with any investigation of Morgan Stanley's e-mail retention policy; (2) to cooperate in good faith with CPH to obtain all such materials, to the extent that there are any restrictions imposed by regulators that might limit the right of Morgan Stanley to make full disclosure; and (3) to provide, within 15 days of the foregoing production, a corporate representative to testify pursuant to Fla. R. Civ. P. 1.310 concerning Morgan Stanley's e-mail retention policies, practices, and procedures, and concerning Morgan Stanley's ability (including the procedures, time, labor, and expense involved) to retrieve e-mails.

Dated: December 3, 2003

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

By



One of Its Attorneys

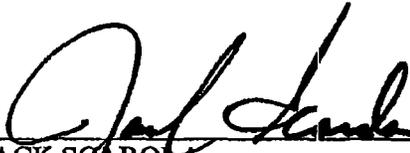
Jerold S. Solovy
JENNER & BLOCK LLP
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

John Scarola
SEARCY DENNEY SCAROLA
BARNHART & SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33402-3626
(561) 686-6300

#986927

Coleman (Parent) Holdings Inc. vs Morgan Stanley & Company
Case No.: 2003 CA 005045 AI

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by
Fax and U.S. Mail to all counsel on the attached list on this 3rd day of December,
2003.



JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 478-0754
Attorneys for Plaintiffs

Coleman (Parent) Holdings Inc. vs Morgan Stanley & Company
Case No.: 2003 CA 005045 AI

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block, LLC
One IBM Plaza
Suite 4400
Chicago, IL 60611

#230580/mm

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

CASE NO.: 2003 CA 005045 AI

Plaintiffs,

vs.

MORGAN STANLEY & CO., INC.,

Defendant,

RE-NOTICE OF HEARING
(Cancels hearing previously set for 12/8/03)
(UMC suspended week of 12/8/03)

YOU ARE HEREBY NOTIFIED that the undersigned has called up for hearing the following:

- DATE:** December 16, 2003
- TIME:** 8:45 a.m.
- JUDGE:** Hon. Elizabeth T. Maass
- PLACE:** Palm Beach County Courthouse, Room #11.1208, 205 North Dixie Highway, West Palm Beach, FL 33401

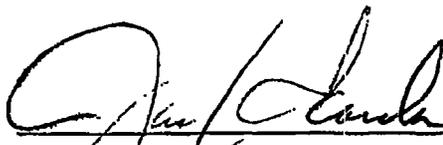
SPECIFIC MATTERS TO BE HEARD:

COLEMAN (PARENT) HOLDINGS INC.'S AMENDED MOTION TO COMPEL CONCERNING E-MAILS (FILED UNDER SEAL)

Moving counsel certifies that he or she contacted opposing counsel and attempted to resolve the discovery dispute without hearing.

Coleman Holdings, Inc. vs Morgan Stanley & Company
Case No.: 2003 CA 005045 AI
Re-Notice of Hearing

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by
Fax and U.S. Mail to all Counsel on the attached list, this 4th day of December 2003.



JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 478-0754
Attorney for Plaintiff

Coleman Holdings, Inc. vs Morgan Stanley & Company
Case No.: 2003 CA 005045 AI
Re-Notice of Hearing

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block, LLC
One IBM Plaza
Suite 4400
Chicago, IL 60611

FAX TRANSMITTAL

J E N N E R & B L O C K

Jenner&Block LLP
One IBM Plaza
Chicago, IL 60611-7603
Tel 312 222-9350
www.jenner.com

Chicago
Dallas
Washington, DC

Date: December 10, 2003

To: Thomas A. Clare, Esq.
Kirkland & Ellis
Fax: (202) 879-5200
Voice: (202) 879-5993

cc: Joseph Ianno, Jr.
Carlton Fields, P.A.
Fax: (561) 659-7368
Voice: (561) 659-7070

John Scarola, Esq.
Searcy Denney Scarola
Barnhart & Shipley, P.A.
Fax: (561) 684-5816 (before 5:00 pm)
Voice: (561) 686-6350, Ext. 140

From: Michael T. Brody
312 923-2711
Client Number: 41198-10003

Important: This message is intended only for the use of the individual or entity to which it is addressed, and may contain information that is attorney work product, privileged, confidential and exempt from disclosure under applicable law. If the reader of this message is not the intended recipient, or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone, and return the original message to us at the above address via postal service. Thank you.

Message:

Total number of pages including this cover sheet: 5

Time Sent: 12:20 p.

If you do not receive all pages, please call: 312 222-9350

Sent By:

Secretary: Caryn Jo Geisler

Extension: 6490

JENNER & BLOCK

December 10, 2003

By Telecopy

Thomas A. Clare, Esq.
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Jenner & Block LLP
One IBM Plaza
Chicago, IL 60611-7603
Tel 312 222-9350
www.jenner.com

Chicago
Dallas
Washington, DC

Michael T. Brody
Tel 312 923-2711
Fax 312 840-7711
mbrody@jenner.com

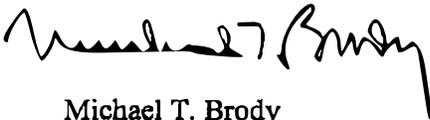
Re: *Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co.*

Dear Tom:

I write in response to your letter of December 9, 2003 concerning the depositions we noticed of former Morgan Stanley employees. We accept the dates you have proposed and confirm that the depositions will commence on the following days and at the locations identified in the attached notice of deposition:

R. Bram Smith	January 13, 2004	New York
Robert Kitts	January 20, 2004	New York
Andrew Savarie	January 22, 2004	Chicago
Alexandre Fuchs	January 27, 2004	New York

Very truly yours,



Michael T. Brody

MTB:cjg
Enclosure

cc: Joseph Ianno, Esq. (by telecopy)
John Scarola, Esq. (by telecopy)
Jerold S. Solovy, Esq.

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Company, Inc.
Case No.: 2003 CA 005045 AI
Amended Notice of Taking Videotaped Depositions
December 10, 2003

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 2003 CA 005045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

AMENDED NOTICE OF TAKING VIDEOTAPED DEPOSITIONS

To: Thomas A. Clare, Esq.
KIRKLAND & ELLIS, LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lake View Avenue
Suite 1400
West Palm Beach, FL 33401

PLEASE TAKE NOTICE that Plaintiff Coleman (Parent) Holdings, Inc. ("CPH") requests the depositions upon oral examination of the following non-party witnesses pursuant to the commissions issued by the Circuit Court of the Fifteenth Judicial District of Florida and the subpoenas issued in aid of those commissions by the Supreme Court of the State of New York and the Circuit Court of Cook County, Illinois on the dates, times, and at the locations set forth below:

DEPONENT	DATE AND TIME	LOCATION
R. Bram Smith	January 13, 2004 at 9:30 a.m.	Esquire Deposition Services 216 E. 45 th St., 8 th Floor New York, NY 10017
Robert W. Kitts	January 20, 2004 at 9:30 a.m.	Esquire Deposition Services 216 E. 45 th St., 8 th Floor New York, NY 10017

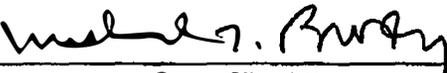
Andrew Savarie	January 22, 2004 at 9:30 a.m.	JENNER & BLOCK LLP One IBM Plaza, Suite 4000 Chicago, IL 60611
Alexandre J. Fuchs	January 27, 2004 at 9:30 a.m.	Esquire Deposition Services 216 E. 45 th St., 8 th Floor New York, NY 10017

The witnesses are requested to bring to the depositions the documents specified in Exhibit A to the Subpoena for each witness. The depositions will be recorded by stenographic and audio-visual means and will be taken before a person authorized to administer oaths and will continue day to day until completed. The videographer for the New York depositions will be Esquire Deposition Services, New York, NY and the videographer for the Chicago deposition will be Esquire Deposition Services headquartered at 155 N. Wacker Drive, Chicago, IL 60606.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by facsimile and mail to all counsel on the attached Service List, this 10th day of December, 2003.

Dated: December 10, 2003

COLEMAN (PARENT) HOLDINGS INC.

By: 
One of Its Attorneys

Jerold S. Solovy
Michael T. Brody
Deirdre E. Connell
JENNER & BLOCK LLP
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

Jack Scarola
SEARCY DENNEY SCAROLA BARNHART
& SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33409
(561) 686-6300

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Company, Inc.
Case No.: 2003 CA 005045 AI
Amended Notice of Taking Videotaped Depositions
December 10, 2003

SERVICE LIST

Thomas A. Clare, Esq.
KIRKLAND & ELLIS, LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lake View Avenue
Suite 1400
West Palm Beach, FL 33401

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

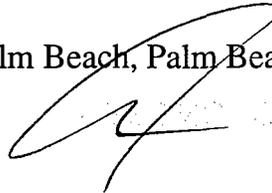
MORGAN STANLEY & CO., INC.,
Defendant(s).

ORDER AND DIRECTIONS TO THE CLERK

THIS CAUSE came before the Court, in Chambers, on its own Motion. Based on the foregoing, it is

ORDERED AND ADJUDGED that the Clerk is directed to docket and file all legal memoranda filed in this case.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 11 day of December, 2003.



ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci
655 15th Street, NW, Suite 1200
Washington DC 20005

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, IL 60611

Mark F. Bideau, Esq.
777 S. Flagler Dr., Suite 300E
West Palm Beach, FL 33401

David M. Wells, Esq.
50 N. Laura Street, Suite 3300
Jacksonville, FL 32202

FAX TRANSMITTAL

J E N N E R & B L O C K

Jenner&Block LLP
One IBM Plaza
Chicago, IL 60611-7603
Tel 312 222-9350
www.jenner.com

Chicago
Dallas
Washington, DC

Date: December 12, 2003

To: Thomas A. Clare, Esq.
Kirkland & Ellis

Fax: (202) 879-5200
Voice: (202) 879-5993

cc: Joseph Ianno, Jr.
Carlton Fields, P.A.

Fax: (561) 659-7368
Voice: (561) 659-7070

John Scarola, Esq.
Searcy Denney Scarola
Barrhart & Shipley, P.A.

Fax: (561) 684-5816 (before 5:00 pm)
Voice: (561) 686-6350, Ext. 140

From: Michael T. Brody
312 923-2711

Client Number: 41198-10003

Important: This message is intended only for the use of the individual or entity to which it is addressed, and may contain information that is attorney work product, privileged, confidential and exempt from disclosure under applicable law. If the reader of this message is not the intended recipient, or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone, and return the original message to us at the above address via postal service. Thank you.

Message:

Total number of pages including this cover sheet: **5**
If you do not receive all pages, please call: 312 222-9350
Secretary: Caryn Jo Geisler

Time Sent:
Sent By:
Extension: 6490

JENNER & BLOCK

December 12, 2003

By Telecopy

Thomas A. Clare, Esq.
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Jenner & Block LLP
One IBM Plaza
Chicago, IL 60611-7603
Tel 312 222-9350
www.jenner.com

Chicago
Dallas
Washington, DC

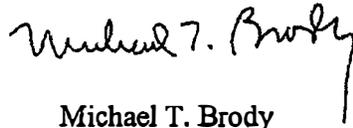
Michael T. Brody
Tel 312 923-2711
Fax 312 840-7711
mbrody@jenner.com

**Re: *Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co.
Morgan Stanley Senior Funding, Inc. v. MacAndrews & Forbes Holdings Inc., et al.***

Dear Tom:

I enclose an amended notice of deposition for the deposition of Tyrone Chang. Mr. Chang has been served with a subpoena for the date reflected in the notice.

Very truly yours,



Michael T. Brody

MTB:cjg

cc: Joseph Ianno, Esq. (by telecopy)
John Scarola, Esq. (by telecopy)
Jerold S. Solovy, Esq.

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Company, Inc.
Case No.: 2003 CA 005045 AI
Amended Notice of Taking Videotaped Deposition
December 12, 2003

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 2003 CA 005045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

_____ /

AMENDED NOTICE OF TAKING VIDEOTAPED DEPOSITION

To: Thomas A. Clare, Esq.
KIRKLAND & ELLIS, LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lake View Avenue
Suite 1400
West Palm Beach, FL 33401

PLEASE TAKE NOTICE that Plaintiff Coleman (Parent) Holdings Inc. will take the deposition upon oral examination of the following witness pursuant to Florida Rule of Civil Procedure 1.310 on the date, time, and at the location set forth below:

DEPONENT	DATE AND TIME	LOCATION
Tyrone Chang	January 5, 2003 at 9:30 a.m.	Susman & Godfrey L.L.P. 1901 Avenue of the Stars Suite 950 Los Angeles, CA 90067

The deposition will be recorded by videotape and stenographic means. The deposition will be taken before a person authorized to administer oaths and will continue day to day until completed.

The videotape operator will be Esquire Deposition Services headquartered at 6222 Wilshire Blvd., Second Floor, Los Angeles, California 90028.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by facsimile and mail to all counsel on the attached Service List, this 12th day of December, 2003.

Dated: December 12, 2003

COLEMAN (PARENT) HOLDINGS INC.

By: Michael T. Brody
One of Its Attorneys

Jerold S. Solovy
Michael T. Brody
Deirdre E. Connell
JENNER & BLOCK LLP
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

Jack Scarola
SEARCY DENNEY SCAROLA BARNHART
& SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33409
(561) 686-6300

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Company, Inc.
Case No.: 2003 CA 005045 AI
Amended Notice of Taking Videotaped Deposition
December 12, 2003

SERVICE LIST

Thomas A. Clare, Esq.
KIRKLAND & ELLIS, LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lake View Avenue
Suite 1400
West Palm Beach, FL 33401

#230580/mm

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

CASE NO: 2003 CA 005045 AI

Plaintiffs,

vs.

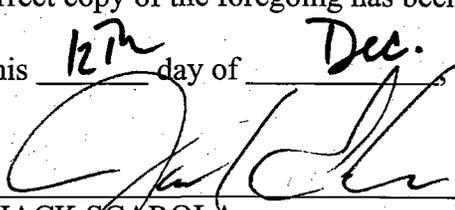
MORGAN STANLEY & CO., INC.

Defendant.

NOTICE OF UNAVAILABILITY

The undersigned counsel for Plaintiff states that the law offices of Searcy Denney Scarola Barnhart & Shipley, P.A. will be closed from December 22, 2003 through and including December 26, 2003, and respectfully requests that no hearings, depositions, trials or any other matter involving the above-styled cause be scheduled during this time.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to all counsel on the attached list on this 12th day of Dec. 2003.



JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 478-0754
Attorneys for Plaintiffs

Coleman Holdings, Inc. vs Morgan Stanley & Company
Notice Of Unavailability
Case No.: 2003 CA 005045 AI

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block, LLC
One IBM Plaza
Suite 4400
Chicago, IL 60611

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

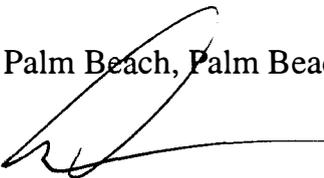
MORGAN STANLEY & CO., INC.,
Defendant(s).

**ORDER ON DEFENDANT'S MOTION TO DISMISS PURSUANT TO FLORIDA
RULE OF CIVIL PROCEDURE 1.061 OR, IN THE ALTERNATIVE, FOR
JUDGMENT ON THE PLEADINGS**

THIS CAUSE came before the Court December 12, 2003 on Defendant's Motion to Dismiss Pursuant to Florida Rule of Civil Procedure 1.061 or, in the Alternative, for Judgment on the Pleadings, with both parties well represented by counsel. For purposes of the portion of the Motion seeking dismissal of the action on forum non-conveniens grounds only, the undersigned has assumed, but not decided, that New York substantive law controls. Based on the foregoing and the proceedings before the Court, it is

ORDERED AND ADJUDGED that Defendant's Motion to Dismiss Pursuant to Florida Rule of Civil Procedure 1.061 or, in the Alternative, for Judgment on the Pleadings is Denied.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 15
day of December, 2003.



ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci
655 15th Street, NW, Suite 1200
Washington DC 20005

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, Il 60611

Mark F. Bideau, Esq.
777 S. Flagler Dr., Suite 300E
West Palm Beach, FL 33401

David M. Wells, Esq.
50 N. Laura Street, Suite 3300
Jacksonville, FL 32202

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

ORDER AND NOTICE OF HEARING

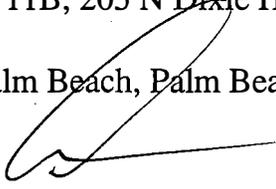
This cause having come before the Court, it is

ORDERED AND ADJUDGED that hearing on Coleman (Parent) Holdings Inc.'s
Motion to Compel Concerning E-Mails is hereby set for

December 17, 2003, at 10:00 a.m.

at the West Palm Beach Courthouse, Room 11B, 205 N Dixie Hwy, WPB, FL.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 16
day of December, 2003.



ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci
655 15th Street, NW, Suite 1200
Washington DC 20005

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, IL 60611

Mark F. Bideau, Esq.
777 S. Flagler Dr., Suite 300E
West Palm Beach, FL 33401

David M. Wells, Esq.
50 N. Laura Street, Suite 3300
Jacksonville, FL 32202

If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please contact the ADA Coordinator in the Administrative Office of the Court, Palm Beach County Courthouse, 205 North Dixie Highway, Room 5.2500, West Palm Beach, Florida 33401; telephone number (561) 355-4380 within two (2) working days of your receipt of this [describe notice]; if you are hearing or voice impaired, call 1-800-955-8771.

SPANISH

Si Ud. es una persona incapacitada que necesita de un servicio especial para participar en este proceso, Ud. tiene derecho a que le provean cierta ayuda sin costo alguno. Por favor pongase en contacto con el Coordinador de la Oficina Administrativa de la Corte ADA, situada en el 205 North Dixie Highway, Oficina 5.2500, West Palm Beach, Florida, 33401, teléfono (561) 355-4380, dentro de los dos (2) próximos días hábiles después de recibir esta [describa la notificación]; si tiene incapacidad de oír ó hablar llame al 1-800-955-8771.

CREOLE

Si ou sé yon moun ki Infim, ki bézwen ninpôt akomodasyon pou ka patisipé nan pwosè sa-a, ou gen dwa, san'l pa kouté'w anyin, pou yo ba'w kèk sèvis. Tanpri kontakté koòdinatè ADA ya nan Biro Administratif Tribinal nan cité Palm Beach la, ki nan 205 North Dixie Highway, Cham 5.2500, West Palm Beach, Florida 33401, niméro telefonn-nan sé (561) 355-4380, rélé dé (2) jou dé lè ou résévwa [notis sa-a]; si ou bèbè ou byen soud rélé 1-800-955-8771.

FRENCH

Si vous êtes infirme, et en besoin de n'importe quelle accommodation pour pouvoir participer à ces procédures, vous pouvez gratuitement recevoir, certains services. S'il-vous-plait contactez le coordinateur du Bureau Administratif du Tribunal de Palm Beach, située à 205 North Dixie Highway, Chambre 5.2500, West Palm Beach, Florida 33401, numéro de téléphone (561) 355-4380 durant deux (2) jours suivant la réception de [cette note]; si vous êtes muets ou sourds, appelez 1-800-955-8771.

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

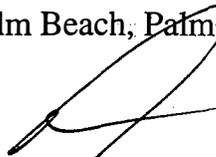
MORGAN STANLEY & CO., INC.,
Defendant(s).

ORDER AND DIRECTIONS TO THE CLERK

THIS CAUSE came before the Court, in Chambers, on its own Motion. Based on the foregoing, it is

ORDERED AND ADJUDGED that the Clerk is directed to docket and file the copy of John Plotnick's September 9, 2003 deposition transcript.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this
17 day of December, 2003.



ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci
655 15th Street, NW, Suite 1200
Washington DC 20005

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, IL 60611

Mark F. Bideau, Esq.
777 S. Flagler Dr., Suite 300E
West Palm Beach, FL 33401

David M. Wells, Esq.
50 N. Laura Street, Suite 3300
Jacksonville, FL 32202

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

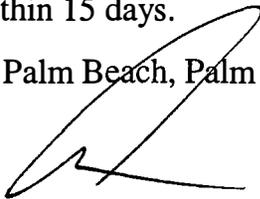
MORGAN STANLEY & CO., INC.,
Defendant(s).

ORDER ON PLAINTIFF'S ORE TENUS MOTION TO SHORTEN TIME

THIS CAUSE came before the Court December 17, 2003 on Plaintiff's ore tenus Motion to Shorten Time, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that Plaintiff's ore tenus Motion to Shorten Time is Granted. If Plaintiff serves a Request for Production seeking documents provided to or received from the SEC in connection with Administrative Proceeding 3-10957, Defendant shall serve its response to the Request within 15 days.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this  day of December, 2003.



ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci
655 15th Street, NW, Suite 1200
Washington DC 20005

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, Il 60611

Mark F. Bideau, Esq.
777 S. Flagler Dr., Suite 300E
West Palm Beach, FL 33401

David M. Wells, Esq.
50 N. Laura Street, Suite 3300
Jacksonville, FL 32202

0001

1 IN THE FIFTEENTH JUDICIAL CIRCUIT COURT
2 IN AND FOR PALM BEACH COUNTY, FLORIDA
3 CIVIL DIVISION
4 CASE NUMBER: 2003-CA 005045 AJ

5 COLEMAN (PARENT) HOLDINGS,INC.,

6 Plaintiffs,

7 vs.

8 MORGAN STANLEY & CO., INC.,

9 Defendant.
10 _____/

11 PROCEEDINGS BEFORE THE HONORABLE ELIZABETH T. MAASS

12

13

14 APPEARANCES:

15

On behalf of the Plaintiff:

16 SEARCY, DENNEY, SCAROLA,
17 BARNHART & SHIPLEY, P.A.
2139 Palm Beach Lakes Blvd.

18

West Palm Beach, Florida 33409

19

BY: JACK SCAROLA, ESQUIRE

20

On behalf of the Defendant:

21

CARLTON FIELDS

22

222 Lakeview Avenue, Suite 1400

23

West Palm Beach, Florida 33401-6149

24

BY: JOSEPH IANNO, JR., ESQUIRE

25

24 Wednesday, December 17, 2003

PALM BEACH COUNTY COURTHOUSE

25 WEST PALM BEACH, FLORIDA

PINNACLE REPORTING, INC.

(561) 820-9066

0002

1 P R O C E E D I N G S

2

3

THE COURT: Good morning. Have a seat. I
4 apologize for keeping you waiting.

5

This is Coleman & Morgan and it's

6

Plaintiffs' motion to compel concerning the

7

E-mails.

8

MR. SCAROLA: It is, in fact, Plaintiff's

9

amended motion to compel concerning E-mails.

10 THE COURT: I thought it was Plaintiff's
11 motion to compel.

12 MR. IANNO: And I had the same confusion,
13 Your Honor, yesterday. And Mr. Scarola and I
14 exchanged E-mails, I don't know if we spoke on
15 the phone, but we definitely exchanged
16 E-mails. I believe that it was the original
17 motion.

18 THE COURT: Yeah, I looked at my notice of
19 hearing.

20 MR. IANNO: I have the transcript, Your
21 Honor. Apparently -- and Mr. Scarola can
22 correct me -- it's the underlying motion, but
23 the relief that's being sought is an order
24 compelling us to produce the documents that
25 were submitted to the SCC and to produce a
PINNACLE REPORTING, INC.
(561) 820-9066

0003

1 corporate representative. It's not the actual
2 production of the E-mails or testimony
3 regarding the burden, expense of going through
4 and restoring the E-mails from the magnetic
5 tapes. I believe that's what we're going to
6 argue this morning.

7 MR. SCAROLA: If I could just have a
8 moment to walk the Court through this, I think
9 it will become apparent what it is we're doing
10 here.

11 THE COURT: Sure.

12 MR. SCAROLA: This is Plaintiffs' first
13 request for production.

14 THE COURT: Okay.

15 MR. SCAROLA: I would call the Court's
16 attention initially to the definition of terms,
17 paragraph 7; documents means E-mails or any
18 other electronic form of communication.

19 THE COURT: Okay.

20 MR. SCAROLA: If Your Honor will then turn
21 to Request No. 48, and you can read it faster
22 than I can read it to you.

23 THE COURT: I'll see what it says.
24 Okay.

25 MR. SCAROLA: Forty-nine, 50 and 51.
PINNACLE REPORTING, INC.
(561) 820-9066

0004

1 THE COURT: Okay.

2 MR. SCAROLA: All right. I think there is
3 little doubt, having read through the
4 definition in those sections, that we are
5 looking for all relevant E-mails concerning
6 these issues. And Your Honor will recall the
7 presentations that were made to you last week

8 concerning the underlying allegations in this
9 complaint, that clearly a very significant
10 issue in this claim for fraud against Morgan
11 Stanley is what Morgan Stanley knew and when
12 Morgan Stanley knew it. We have a burden to
13 prove that there were knowingly false
14 misrepresentations that were made and that
15 Morgan Stanley was participating in aiding and
16 abetting conspiring with Sunbeam in its knowing
17 false misrepresentations.

18 So obviously a significant source of
19 information concerning what Morgan Stanley knew
20 would be Morgan Stanley's internal
21 communications regarding all issues relating to
22 Sunbeam. And we filed a request to produce
23 which clearly encompasses that sort of document
24 reading electronic information.

25 What we received in response was a
PINNACLE REPORTING, INC.
(561) 820-9066

0005

1 substantial production that contained very,
2 very few E-mail communications. And we also
3 learned that Morgan Stanley had been sanctioned
4 by the SCC for failing to comply with Federal
5 regulations regarding the preservation,
6 specifically, of E-mail communications.

7 We noticed the deposition under Rule 1.310
8 of a corporate representative -- and if Your
9 Honor will take a look at paragraphs 2 and 3 of
10 the description of the information that we were
11 seeking -- we sought specifically, in paragraph
12 2, policies and procedures for maintaining and
13 preserving electronic or hard copy documents
14 and/or files of Morgan Stanley & Co.,
15 Incorporated and the location and/or procedure
16 for the collection of documents responsive to
17 Coleman (parents) previously served request for
18 production of documents. So we wanted to get
19 behind the production to make a determination
20 as to what efforts were made to attempt to find
21 E-mails and what potential existed for the
22 recovery of E-mails.

23 We took the deposition of the corporate
24 representative. And if Your Honor will take a
25 look at Exhibit B to the amended motion to
PINNACLE REPORTING, INC.
(561) 820-9066

0006

1 compel -- do you have that handy?

2 THE COURT: I know I looked at it
3 yesterday. Whether I have it handy now, I
4 don't know.

5 MR. IANNO: Let me provide the Court with

16div-004189

6 a copy of that.

7 THE COURT: This is the transcript or a
8 portion of the transcript of the deposition?

9 MR. SCAROLA: Yes, Your Honor, we provided
10 you with portions of the copy of the transcript
11 of the deposition. I don't have the exhibit
12 here. I apologize for that.

13 THE COURT: I know I read it. 126 or 127
14 something.

15 MR. SCAROLA: Let me give you my copy.

16 Following the corporate representative's
17 deposition, we communicated in writing with
18 Morgan Stanley and specifically identified
19 deficiencies in the corporate representative's
20 ability to respond within those areas
21 designated in the notice of deposition and made
22 specific transcript references to where the
23 corporate representative acknowledged his
24 inability to provide information that was
25 clearly relevant and material. We then filed

PINNACLE REPORTING, INC.

(561) 820-9066

0007

1 our initial motion to compel.

2 THE COURT: That I do have. Actually,
3 that's what I had looked at, I guess, that had
4 copies of the transcripts attached.

5 MR. SCAROLA: Well, then, Your Honor is
6 aware that what we were seeking in that motion
7 were three things.

8 First, that Morgan Stanley be compelled to
9 undertake a full investigation of the
10 information in its possession, including
11 magnetic tapes and hard drives for E-mail
12 messages responsive to Coleman (parent)
13 Holdings document request.

14 Now, once we request the documents, the
15 law imposes an obligation on them to conduct a
16 reasonable, thorough investigation within the
17 corporation to make the determination as to
18 what exists. We're simply asking the Court, at
19 that point, to compel them to do that which is
20 inherent in the obligation to respond to the
21 request to produce.

22 The second request was to produce within
23 10 days any E-mails that are located, which
24 obviously they would be obliged to do under the
25 terms of the previously served request to

PINNACLE REPORTING, INC.

(561) 820-9066

0008

1 produce.

2 THE COURT: Your initial response to the
3 request to produce, did it say that there were

16div-004190

4 items within their possession, custody or
5 control that weren't produced because the cost
6 inherent in it?

7 MR. SCAROLA: That came in the very
8 substantial response they filed to the motion
9 to produce.

10 Now, at no time in this response did they
11 ever raise an issue that Coleman (parent) was
12 seeking to compel something that had not been
13 requested. Their response asserted four
14 objections. They said what we were asking in
15 our motion to compel -- and I didn't finish
16 with the third thing.

17 The third thing was to comply with their
18 obligation to produce a corporate
19 representative that had knowledge with regard
20 to these matters. What they said was that the
21 tasks we were asking be performed were overly
22 burdensome, that it was harassing, that it was
23 unlikely to lead to the discovery of admissible
24 evidence because -- well, they'll have to
25 explain that to you because I really don't

PINNACLE REPORTING, INC.
(561) 820-9066

0009

1 understand what their argument is in support of
2 that contention. But the fourth and final
3 argument they made was that Morgan Stanley was
4 somehow not entitled to this discovery because
5 Morgan Stanley had unclean hands because Morgan
6 Stanley, Sr. funded hadn't preserved all of its
7 E-mails, so it was not right for
8 Morgan Stanley -- excuse me -- that MAFCO, our
9 parent corporation, had not preserved all of
10 its E-mails.

11 Well, I hope that we don't need to deal
12 with that issue, but I want to respond to it
13 very quickly. And that is, there is a
14 difference between the obligations imposed
15 and --

16 THE COURT: Let me stop you there. To me,
17 that's -- and can you respond -- it's sort of a
18 red herring issue, because it's apples and
19 oranges. If they had some sort of destruction
20 of evidence, we can address that separately
21 when it's properly framed by the pleadings and
22 talk about the appropriate sanctions. But I
23 know what the appropriate sanction is, if I
24 don't look at the motion currently in front of
25 me and make a sanction going to that motion.

PINNACLE REPORTING, INC.
(561) 820-9066

0010

1 MR. IANNO: I didn't want to interrupt Mr.

16div-004191

2 Scarola, but I don't know if we're arguing the
3 amended motion now or if we're back to the
4 original motion.

5 If we're back to the original, I have some
6 problems with arguing that to the Court today.

7 MR. SCAROLA: We're not back to the
8 original motion. Your Honor needs to
9 understand this background to understand the
10 relief that we're currently requesting.

11 THE COURT: Do you have a copy of the
12 amended motion? I thought we were doing the
13 original motion. That's the one I have a copy
14 of. Do you have an extra copy?

15 MR. IANNO: I do.

16 THE COURT: Thank you. Let me -- I'm
17 trying to figure where we're going. And I
18 apologize for interrupting your argument.

19 But realistically, are you seeking
20 anything today other than having a competent
21 corporate representative testify as to both
22 their retention policy and what efforts they
23 have made to locate this stuff and copies of
24 the documents they gave to the SCC?

25 MR. SCAROLA: No. That's all we are
PINNACLE REPORTING, INC.
(561) 820-9066

0011

1 asking for.

2 THE COURT: That's all you want?

3 MR. SCAROLA: That's all we want.

4 THE COURT: So what you're saying is sort
5 of twofold. One is, produce the corporate rep
6 like we originally asked who can answer all
7 these questions and then we can figure out if
8 your answers are taken in good faith.

9 MR. SCAROLA: That's precisely right.
10 They raised a burdensome objection and we're
11 entitled to explore that. We're not obliged to
12 accept on its face their assertion without any
13 particulars whatsoever, if it's going to take a
14 lot of time and cost us a lot of money and it's
15 not going to lead to anything productive. We
16 want sworn testimony that allows us to assess
17 those contentions. If they are right, we may
18 abandon our efforts to get E-mails. If they
19 are wrong, we have placed ourselves in a
20 position to come back before Your Honor on the
21 original motion to get them to do that which we
22 originally requested that they do.

23 THE COURT: What did you want to say in
24 support of the contention that they should
25 produce the documents produced to the SCC?

PINNACLE REPORTING, INC.
(561) 820-9066

16div-004192

0012

1 That's the other prong of what we're looking
2 for today.

3 MR. SCAROLA: Yes, that's correct.

4 The other prong of what we're looking at
5 is production of the documents that were sent
6 to the SCC.

7 THE COURT: First of all, can we agree you
8 guys should produce somebody who's competent to
9 testify to these matters?

10 MR. IANNO: Under a proper 1.310 notice,
11 yes. That's where we have our disagreement, is
12 the testimony that Mr. Scarola is asking for is
13 not contained with the original deposition
14 notice.

15 What we said is, let's both mutually
16 produce our corporate representatives on an
17 agreed upon list of topics for the expense, the
18 procedures for restoring back-up tapes.

19 THE COURT: I'm looking at the notice of
20 taking deposition that was served August 22nd.

21 In items 2 and 3, is it your position you
22 produced somebody competent to testify to those
23 matters?

24 MR. IANNO: Mr. Plotnick was produced on
25 September 9th.

PINNACLE REPORTING, INC.
(561) 820-9066

0013

1 THE COURT: Right.

2 MR. IANNO: And he had rendered 160 pages
3 of deposition testimony on those three topics.

4 Now, if the Court -- if Mr. Scarola says
5 he didn't testify on the topics that were in
6 this deposition notice that you're looking at,
7 I think you have to look at all 160 pages to
8 see that he did testify on the policies and
9 procedures of document retention at Morgan
10 Stanley.

11 THE COURT: I thought he said he didn't
12 know anything about pre 2000.

13 MR. IANNO: You could, Your Honor, read
14 the 160 pages. But I think that the solution
15 here on this is to have an agreed upon list of
16 topics that Mr. Scarola's client and our client
17 want mutual corporate representatives to
18 testify to here. The point here is not the
19 retention policy, it's what it would take to
20 restore back-up tapes.

21 THE COURT: It's sort of a little bit of
22 both I would imagine.

23 Let me ask you this: I think the proposal
24 on the table, as I understand it, sort of mixes
25 these two things again and says, if you produce

16div-004193

PINNACLE REPORTING, INC.
(561) 820-9066

0014

1 somebody to testify about your policy, we'll
2 produce somebody to testify about our
3 policies.

4 Are you willing to accept that offer or
5 not?

6 MR. SCAROLA: We have always been willing
7 to produce a corporate representative to
8 testify about our policies. That was part of
9 the stipulation that we entered on the record
10 before the Court. We are still prepared to do
11 that, although there is no motion to require us
12 to do it. We're willing to do that. That's
13 discovery that they're entitled to.

14 The contention that we have failed to
15 identify specifically what it is we need is
16 just false. If you look at the letter of
17 September 18, we could not have been more
18 specific about the deficiencies in Mr.
19 Plotnick's deposition. We identify precisely
20 the information that we need and we identify
21 the page and line references where Mr. Plotnick
22 was unable to provide that information. I
23 don't know what more we could do than that.
24 That is our specific list of everything that we
25 need from this defendant.

PINNACLE REPORTING, INC.
(561) 820-9066

0015

1 THE COURT: So I'm clear, are you saying
2 you will accept their stipulation and we need
3 to sit down right now and make a list of things
4 this person is going to testify to --

5 MR. IANNO: Apparently so.

6 THE COURT: -- or are we going back to the
7 motion?

8 MR. IANNO: I have the SCC filings. There
9 is a separate and totally distinct argument on
10 that.

11 THE COURT: I understand that. We're not
12 doing that now. We'll do it today. We're not
13 doing it at this moment.

14 I took your copy of the September 18
15 letter, right?

16 MR. SCAROLA: Yes, Your Honor. That is
17 attached as an exhibit to the amended --

18 MR. IANNO: It's attached as Exhibit C to
19 the original motion.

20 MR. SCAROLA: The original motion. So you
21 do have a copy of it.

22 THE COURT: I do have it someplace.

23 MR. SCAROLA: There are numerous letters

16div-004194

24 going back and forth between the parties. I
25 don't have all the letters that were sent by
PINNACLE REPORTING, INC.
(561) 820-9066

0016

1 Morgan Stanley.

2 THE COURT: No, I don't think that we're
3 going to be able to use it as a prompt for what
4 it is we want the person to be competent to
5 testify to, right?

6 MR. SCAROLA: That's our list.

7 THE COURT: Okay. He will be right back
8 then.

9 So, if we were going to make a global
10 stipulation, it will be, I assume, somebody
11 competent to testify as to the policies and
12 procedures for maintaining, preserving
13 electronic or photocopied documents and/or
14 files of the party, right, that would be Number
15 2?

16 MR. SCAROLA: That's correct.

17 THE COURT: Number 3 would be the location
18 and/or procedure, the collection of documents
19 -- here's your copy back.

20 MR. SCAROLA: Thank you very much.

21 THE COURT: You dictate to me the list,
22 what you want this person -- you think this
23 person should be competent to testify about.

24 MR. SCAROLA: I think we could very easily
25 simply state that the defendants shall produce
PINNACLE REPORTING, INC.
(561) 820-9066

0017

1 a corporate representative --

2 THE COURT: Well, each party.

3 MR. SCAROLA: -- each party shall produce
4 a corporate representative who can address all
5 matters identified in the letter of September
6 18, 2003, attached hereto.

7 THE COURT: But that's sort of one-sided.

8 MR. SCAROLA: I'm agreeing to make it
9 reciprocal.

10 THE COURT: So addressing the types of
11 issues addressed?

12 MR. IANNO: That's why we wanted a new
13 notice that said, we want a corporate
14 representative to testify about A, B, C, D, so
15 we wouldn't have this disagreement, because we
16 believe we already complied with what's in the
17 September 18th letter. We can get Mr. Clare on
18 the phone and he can address it. I haven't had
19 the time to prepare and go through line by line
20 Mr. Plotnick's deposition testimony to address
21 this specific issue. But the parties, three

16div-004195

22 months ago, exchanged correspondence. They
23 responded to these, and we said we have
24 prepared, is my understanding, and he was
25 adequately prepared.

PINNACLE REPORTING, INC.
(561) 820-9066

0018

1 My understanding is, the purpose of
2 today's hearing was simply to tell -- bring a
3 corporate representative to say this is what it
4 would take to restore the E-mails to support
5 our objection, not to whether or not we
6 retained them, not whether or not the retention
7 policies were, because that's what I thought
8 Mr. Scarola was getting at.

9 We believe Mr. Plotnick already testified
10 to the three areas here. But if they want to
11 have a reciprocal witness that says it would
12 cost millions of dollars and months and months
13 of work to restore the magnetic tapes that are
14 available on back up --

15 MR. SCAROLA: Your Honor, this is -- I'm
16 sorry.

17 MR. IANNO: -- we would produce somebody
18 like that the first two weeks of January.

19 MR. SCAROLA: This is the language
20 included in the amended motion to compel: To
21 provide within 15 days of the production that
22 we are requesting a corporate representative to
23 testify, pursuant to Florida Rules of Civil
24 Procedure 1.310, concerning Morgan Stanley's
25 E-mail retention policies, practices and

PINNACLE REPORTING, INC.
(561) 820-9066

0019

1 procedures and concerning Morgan Stanley's
2 ability, including the procedures, time, labor
3 and expense involved to retrieve E-mails.

4 THE COURT: Now, can you live with that?

5 MR. IANNO: The second phrase of it, yes,
6 Your Honor, because we believe on the first
7 phrase of it, the policies and procedures, Mr.
8 Plotnick testified to that.

9 THE COURT: I can go back and look at it.
10 Maybe I'm thinking of something else. I
11 thought he was vague about what it was about
12 from '99 to 2000.

13 MR. IANNO: Well, there is a reason for
14 that. I believe it was explained and it can be
15 explained further if necessary. But the
16 deposition lasted 160 pages and the Court was
17 only provided with excerpts of it. And I think
18 if the Court -- if the Court will indulge me
19 for a minute, Mr. Scarola said he didn't

16div-004196

20 understand our relevance objection. And the
21 Court may or may not recall Mr. Scarola's
22 motion to compel on Scott Paper documents, that
23 the Court ruled on anything pre, I believe,
24 2000 should be produced, but anything post 2000
25 should not be produced.

PINNACLE REPORTING, INC.
(561) 820-9066

0020

1 THE COURT: Right.

2 MR. IANNO: The problem is, there is no
3 E-mails that predate 2000. That was the basis
4 for the relevance objection. And I believe
5 somebody will testify to that on the second
6 phrase of Mr. Scarola's wherefor clause
7 concerning the ability, including the
8 procedures, time and labor expenses involved to
9 retrieve E-mails. And that will explain that.
10 I think that's what he needs to do.

11 But the point that we've always made and
12 the point I made yesterday at the Uniform
13 Motion Calendar is, there is no deposition
14 notice that asked for that second phrase.
15 We're trying to agree that we will produce a
16 corporate representative on that second phrase
17 of the wherefor clause. But to say motion to
18 compel --

19 THE COURT: Let me stop you. Give me an
20 example from the September 18th letter, for
21 instance, that you think requests information
22 that either Mr. Plotnick did provide, but was
23 not included in the ambient of the taking of
24 the deposition.

25 MR. IANNO: I would love to, but I have to
PINNACLE REPORTING, INC.
(561) 820-9066

0021

1 be honest with the Court, in the 24 hours, I
2 have not had a chance to go through Mr.
3 Plotnick's deposition. As this Court knows, I
4 wasn't in the office yesterday afternoon. We
5 haven't had sufficient time to prepare a
6 response to that. But there are letters that I
7 could have sent over to the Court that respond
8 specifically to Mr. Scarola's September 18th
9 letter. That's a problem with having the
10 hearing today. I did my best to get everything
11 together on this and I just couldn't get
12 everything together in the 24 hours to put in a
13 package to the Court to show how we responded
14 to Mr. -- I guess it's Jenner & Block's
15 September 18th letter.

16 MR. SCAROLA: It really is unfair to
17 represent that they have had 24 hours to

16div-004197

18 respond to these issues. Your Honor is well
19 aware that these matters have been before the
20 Court now for a long time and there is no
21 reason to delay resolution of these issues
22 beyond today. They've had this letter
23 identifying deficiencies since September 18.
24 And the second part of the letter --

25 THE COURT: Let me ask you this --
PINNACLE REPORTING, INC.
(561) 820-9066

0022

1 MR. SCAROLA: Yes.

2 THE COURT: -- are you -- if we pick up
3 the language from the wherefor clause of your
4 motion, asking for somebody competent to
5 testify concerning the E-mail retention
6 policies and practices and the procedures to
7 retrieve the E-mails and the costs, if they
8 produce somebody other than Plotnick, are you
9 happy? Because obviously --

10 MR. SCAROLA: I don't care who the person
11 is. It's the information that we want.

12 THE COURT: I don't know that there was an
13 obligation for him to go do some independent
14 investigation before he was deposed.

15 MR. SCAROLA: Respectfully, Your Honor,
16 that's exactly what the law says. When we
17 issue 30 -- a Rule 1.310 notice of deposition
18 of a corporate representative, they are
19 obliged -- the corporate representative is
20 obliged to educate himself with respect to the
21 knowledge that the corporation has. We didn't
22 notice the deposition to Mr. Plotnick.

23 THE COURT: I understand that.

24 MR. SCAROLA: And, I'm sorry, I don't have
25 that case law at hand.

PINNACLE REPORTING, INC.
(561) 820-9066

0023

1 THE COURT: I thought they had to produce
2 the person most knowledgeable on that topic.

3 MR. SCAROLA: I hope Mr. Ianno will agree
4 to this without having to get into a legal
5 argument. The case law is very clear, that
6 there is an obligation imposed upon the
7 corporation to educate itself with respect to
8 what knowledge exists within the corporation,
9 so they are producing an individual who is
10 capable of speaking on behalf of the
11 corporation with regard to these topics to
12 disclose the full corporate knowledge on those
13 topics. And if it takes 10 people to respond,
14 they're obliged to produce as many people as
15 necessary to address those topics on the

16div-004198

16 corporation's behalf. That's the whole purpose
17 of that rule. And it is very clear from case
18 law with respect to that rule, that there is an
19 obligation to conduct a good faith
20 investigation in advance in order to be able to
21 respond on behalf of the corporation.

22 THE COURT: Okay. Do you agree with that
23 statement?

24 MR. IANNO: Briefly, Your Honor. This
25 wasn't my motion to argue. This was Mr.

PINNACLE REPORTING, INC.
(561) 820-9066

0024

1 Clair's motion. I'm not fully aware of all of
2 the facts. I'm not prepared -- I'm not
3 prepared. Mr. Clare was home with a 104 fever
4 yesterday.

5 With respect to the 301(b)6 notice, my
6 interpretation and understanding of the rule is
7 very consistent with Mr. Scarola's. It's not
8 the person most knowledgable. It's the
9 corporation has an obligation to produce a
10 representative to testify on these areas and
11 the noticing party takes it at their risk if
12 their areas are not specific and they're vague,
13 like they are in this case. It's subject to
14 interpretation, policies and procedures.

15 We produced a corporate representative
16 that testified as to what Morgan Stanley's
17 policies and procedures were with respect to
18 retention. He was educated.

19 THE COURT: That's where we were then.
20 What you're now telling me is that we're not
21 going to reach an agreement on this point.

22 MR. SCAROLA: I'm prepared to stipulate --

23 THE COURT: You want a stipulation that
24 they both have to produce somebody knowledgable
25 about their E-mail retention policy and

PINNACLE REPORTING, INC.
(561) 820-9066

0025

1 somebody knowledgable about the cost retrieving
2 the E-mails? You're not willing to do the
3 former?

4 MR. IANNO: We're willing to produce
5 someone to support our cost and burdensome
6 objection on the first two weeks of January,
7 Your Honor.

8 THE COURT: You're not willing to do the
9 former?

10 MR. IANNO: We believe --

11 THE COURT: That's not my question. We're
12 not going to get this done in the time we
13 have. We're back to arguing the motion.

16div-004199

14 What did you want to say in support?
15 MR. SCAROLA: Are we doing it in two parts
16 still?
17 THE COURT: I think we're still on two
18 parts. I think I have your argument on part
19 one. Let them respond and we'll come back to
20 the SCC argument.
21 MR. SCAROLA: I'm happy to do that.
22 THE COURT: What did you want to say?
23 MR. IANNO: I'm not sure I can add
24 anything else.
25 THE COURT: Do you have a copy of
PINNACLE REPORTING, INC.
(561) 820-9066

0026

1 Plotnick's deposition for me?
2 MR. IANNO: I do. This is the entire
3 deposition, together with exhibits.
4 THE COURT: Thank you.
5 So it's your position that all --
6 MR. IANNO: That what is sought -- it's my
7 understanding what was sought here and what the
8 discussion has been since the Uniform Motion
9 Calendar about three weeks ago has been,
10 produce someone to testify as to the costs and
11 the expense and the time and the burden that
12 will be involved in going through the thousands
13 of magnetic back-up tapes that Morgan Stanley
14 has for a certain time period that exists, and
15 we are willing to produce that person.
16 We believe we have produced the corporate
17 representative that was appropriately
18 identified in the corporate representative
19 deposition topics 1 through 3 of the 310(b)6
20 deposition notice.
21 As I explained to the Court, I did my best
22 to get fully up to speed on this issue.
23 Unfortunately, I did not have the time to go
24 through Mr. Plotnick's entire deposition last
25 night. I downloaded it to go through that. I
PINNACLE REPORTING, INC.
(561) 820-9066

0027

1 could send over to the Court this afternoon our
2 response letters that go through in detail what
3 Mr. Plotnick testified to, but it was my
4 understanding what we were going to argue today
5 was simply whether or not we would produce the
6 corporate representative on the E-mail burden.
7 And the other thing, Your Honor, is, Mr.
8 Scarola's client waited three months, the
9 September 18 letter, before they brought this
10 to the Court's attention and we had to wait
11 months for our motion to dismiss hearing. If

16div-004200

12 we could have some additional time, I'm sure
13 Mr. Clare will be fully prepared to address
14 each and every one of the questions the Court
15 has requested of Mr. Plotnick's deposition that
16 I'm not able to do.

17 THE COURT: Okay. Let's do the SCC
18 documents.

19 MR. SCAROLA: Thank you.

20 I have called the Court's attention to the
21 broad scope of our request to produce, the
22 specific paragraphs in that prior request that
23 impose a burden to produce all communications
24 regarding E-mails, as well as all E-mails,
25 specifically communications with the SCC are
PINNACLE REPORTING, INC.

(561) 820-9066

0028

1 referenced. And the only objection that we
2 have had to the production of the SCC documents
3 has been that an order may be entered in
4 response to somebody's motion in a New York
5 court that might preclude the disclosure of
6 these documents at sometime in the future.

7 Our efforts to determine who filed the
8 motion, what the motion is seeking to do, have
9 been ignored. They don't chose to tell us.

10 And the potential for some court sometime in
11 the future to restrict the Defendant's ability
12 to make disclosure sometime in the future ought
13 not in any way to impact upon this Court's
14 ordering production of that which has been
15 requested in the past.

16 So as we stand right now, there is no
17 assertion of any inability to produce documents
18 that have been requested. And, again, all we
19 are seeking is predicate information to
20 determine the validity of the objections that
21 have been raised.

22 THE COURT: Do you have a copy of what
23 their response was on this issue?

24 MR. SCAROLA: The only response on this
25 issue has been the response that was filed to
PINNACLE REPORTING, INC.

(561) 820-9066

0029

1 our original motion to compel, which alleges
2 that this is burdensome, harassing and not
3 likely to lead to the discovery of admissible
4 evidence.

5 THE COURT: So how do you --

6 MR. SCAROLA: The argument about the New
7 York --

8 THE COURT: Right.

9 MR. SCAROLA: -- the New York court,

16div-004201

10 that's argument that was made before Your Honor
11 in open court. That's never been reduced to
12 writing. No, that's simply the verbal
13 representations made to Your Honor in response
14 to -- in the context of our motion to enforce
15 the in-court stipulation. You remember --

16 THE COURT: Right.

17 MR. SCAROLA: -- that's a piece I left out
18 in the middle. But in the middle of all of
19 this, we thought we had an agreement. We
20 obviously, in the Court's opinion, didn't have
21 an agreement.

22 But during the course of those arguments,
23 they told Your Honor, we don't want you to
24 order us to do this yet because a New York
25 court may sometime enter a response to some

PINNACLE REPORTING, INC.

(561) 820-9066

0030

1 motion, which they couldn't tell us anything
2 about and refuse to tell us anything about.

3 THE COURT: So I'm clear, what we're
4 talking about doesn't have anything to do with
5 E-mail retention policies or anything else?

6 MR. SCAROLA: No. It specifically relates
7 to E-mail retention policies.

8 THE COURT: The action before the SCC on
9 that point, we're not talking about trying to
10 discover E-mails, we're trying to get hard
11 copies, presumably, of documents provided to
12 the SCC?

13 MR. SCAROLA: Regarding E-mail retention
14 policies and E-mail destruction, so that we can
15 find out what is in fact available and how
16 readily available it is or is not, at least
17 according to what they told the SCC, correct.

18 THE COURT: And where in any response --
19 how did Morgan Stanley place the Plaintiff on
20 notice that these documents were retained and
21 not produced?

22 MR. IANNO: Well, that's the heart of this
23 matter, Your Honor. It's not that they were
24 not produced, it's that they were not
25 responsive. They were only offered to the

PINNACLE REPORTING, INC.

(561) 820-9066

0031

1 Plaintiff as a possible resolution to the
2 motion to compel.

3 I can walk the Court through why this
4 document is not responsive.

5 THE COURT: You're telling me it's not
6 included in the Plaintiffs' first request for
7 production?

16div-004202

8 MR. SCAROLA: Absolutely not.
9 THE COURT: Tell me why not.
10 MR. SCAROLA: This is a document that was
11 produced by attorneys.
12 THE COURT: Is it a single document?
13 MR. IANNO: Yes, produced in response to
14 the SCC by attorneys. It is not a Morgan
15 Stanley policy. It is not a Morgan Stanley
16 procedure. It is more akin to a pleading that
17 was produced -- and this is the key point, Your
18 Honor, that Mr. Scarola omitted from his
19 argument -- that it is produced in a separate
20 IPO allocation proceeding. It has absolutely
21 nothing to do with Sunbeam. It has absolutely
22 nothing to do with the facts of this case. And
23 if the Court looks at Definition No. 12 in the
24 first request for production, they went through
25 great pains to define terms. SCC
PINNACLE REPORTING, INC.
(561) 820-9066

0032

1 administrative proceeding means, in the matter
2 of Sunbeam Corp, and it lists the proceeding
3 number, and in the matter of David C. Fannin,
4 F-A-N-N-I-N, and it lists an administrative
5 proceeding. This document was not submitted in
6 connection with either of those proceedings.
7 It was not submitted in connection with
8 arbitration concerning Mr. Dunlop or in
9 connection with any of the litigations, which
10 are all defined terms in this request for
11 production.

12 If the Court goes through Request No. 48
13 through 51, which are the only ones Mr. Scarola
14 identified, all of the documents requested
15 there are limited to those three definitions.
16 This document --

17 THE COURT: Tell me again what proceeding
18 it was produced, the SCC in connection with?

19 MR. IANNO: It's called an IPO allocation
20 proceeding, which involved numerous securities
21 firms, investment bankers, Your Honor. It had
22 nothing to do with Sunbeam.

23 And the reason -- the only reason that Mr.
24 Scarola knows about it, is because it was
25 widely reported. And in an effort to resolve
PINNACLE REPORTING, INC.
(561) 820-9066

0033

1 the motion to compel originally, the one that
2 we had the failed stipulation on, we offered to
3 produce it if we could. That's the only reason
4 the New York court comes into play.
5 The procedure that's being utilized today

16div-004203

6 on the motion to compel is improper, because
7 this document was never requested. If the
8 Plaintiff wants these documents, they can file
9 a request for production. We will respond to
10 it in due course. We can argue about whether
11 or not it's admissible.

12 THE COURT: So they just need to do, what
13 you're telling me, a request using this
14 administrative proceeding number?

15 MR. IANNO: Not this --

16 THE COURT: Well, the 3-10597. That's the
17 one where they did the order dealing with
18 retention?

19 MR. IANNO: I don't have the number in
20 front of me.

21 MR. SCAROLA: It is attached as an
22 exhibit.

23 THE COURT: Right.

24 So you're saying they amend their --

25 MR. IANNO: Well, they need to do a
PINNACLE REPORTING, INC.
(561) 820-9066

0034

1 request before they do a motion to compel.

2 THE COURT: No, I understand.

3 What's the response to that argument, that
4 this is in a separate proceeding and it's just
5 within the ambit of this request?

6 MR. SCAROLA: Well, it isn't within the
7 ambit of the defined SCC proceeding.

8 The requests include paragraph 50, all
9 documents you have provided to the SCC, the
10 Attorney General of New York, or any other
11 governmental or regulatory body concerning
12 Sunbeam.

13 THE COURT: They say this doesn't concern
14 Sunbeam.

15 MR. SCAROLA: It does concern Sunbeam,
16 from the perspective it concerns all of their
17 E-mail communications, Sunbeam and others.

18 THE COURT: That's a nice argument.
19 Assume I'm not going to accept that one.

20 MR. SCAROLA: If you're not going to
21 accept that argument and the sole objection
22 that they are making is that this has not been
23 specifically requested, I go back to my office,
24 I file that request.

25 What I don't want to happen is, what we
PINNACLE REPORTING, INC.
(561) 820-9066

0035

1 get are objections that bring us right back to
2 this same point all over again. If what
3 they're saying is they are willing to produce

16div-004204

4 it as specifically requested, that's fine.
5 We'll specifically request it. But we ought
6 not -- we ought not to play the game for the
7 first time in this hearing, raising the
8 objection that this was not specifically
9 requested because that objection has never
10 previously been raised, to raise that objection
11 now, to have us make this specific request and
12 then to file some sort of new objections to the
13 production after we spent as much time as we
14 have trying to reach this point.

15 THE COURT: I understand your concern. I
16 also understand, if it wasn't originally
17 requested, they didn't have an obligation to
18 file objection to something that wasn't
19 requested.

20 My hope is that you go back and request
21 it. You will have either it will be produced
22 or have something that frames the legal issues
23 presumably along the lines we discussed. At
24 least I will need less education next time to
25 get to the point that we're at now.

PINNACLE REPORTING, INC.
(561) 820-9066

0036

1 MR. SCAROLA: Will the Court entertain an
2 Ore Tenus motion to require a response to that
3 request to produce within 10 days?

4 MR. IANNO: Ten days is over the
5 Holidays. I will do a shortened time.
6 Probably right after the first of the year.

7 THE COURT: Can you do?

8 MR. IANNO: January 5th.

9 THE COURT: It's a Monday.

10 MR. SCAROLA: I think it's a Friday.

11 THE COURT: I think January 5th is a
12 Monday.

13 MR. SCAROLA: It's difficult for me to
14 imagine, with this issue having been discussed
15 as much as it's been discussed, if there is an
16 objection to be raised. I'm not talking about
17 producing the documents within that period of
18 time. But if there is an objection to be
19 raised, let's get it on the table, get it on
20 the table now. Ten days should be more than
21 adequate time. I would think that 48 hours is
22 enough time. So I would request, I persist in
23 my request that a 10-day time limit be set.

24 MR. IANNO: Can we have the Socii (ph)
25 Rule in affect, Your Honor? Whenever we need

PINNACLE REPORTING, INC.
(561) 820-9066

0037

1 something quickly, we can't get it; whenever

16div-004205

2 the Plaintiff wants something quickly, they get
3 it.

4 I'd love to, but this is December 17;
5 Christmas is in a week, the New Year holiday.
6 Mr. Scarola's office is closed for a week. I
7 mean, I'm willing to do it in a shorter time,
8 maybe even earlier than that. I hate to be
9 burdened. If the Court wants, the 2nd is a
10 Friday.

11 THE COURT: I'll tell you what, I'll do it
12 15 days. I'm not sure the request --

13 MR. SCAROLA: Fifteen days from the filing
14 of the request?

15 THE COURT: Fifteen days from service of
16 the request, including five days in the mail.

17 MR. SCAROLA: It will be faxed today.

18 MR. IANNO: Just on side, the parties have
19 an agreement that all service is either by fax,
20 E-mail and Federal Express. We're trying to
21 get everybody -- because of the lawyers
22 involved, we're trying to serve everybody by
23 E-mails or fax and everything goes by Federal
24 Express.

25 THE COURT: I appreciate that. What I'm
PINNACLE REPORTING, INC.
(561) 820-9066

0038

1 looking for real quick, I need to get an order
2 on this. Obviously I lost it. Was the number
3 for the proceedings we are talking about.
4 Obviously we were only talking about shortening
5 the time to respond to the request to produce.
6 My documents deal with that proceeding.

7 MR. IANNO: I believe it's addressed as
8 Exhibit B, Your Honor. I think this is -- I
9 want to say that it's this one.

10 MR. SCAROLA: Administrative proceeding
11 File No. 3-10597.

12 THE COURT: Seeking documents provided to
13 the SCC.

14 MR. SCAROLA: And received from the SCC in
15 connection with that matter.

16 THE COURT: Okay. I'll take the first one
17 under advisement and you will get an order.

18 MR. IANNO: Thank you, Your Honor.

19 MR. SCAROLA: Thank you. And we are
20 closed next week. Merry Christmas, Your
21 Honor.

22 MR. IANNO: Your Honor, just, if that's
23 the wrong proceeding number, I'd be happy to
24 advise the Court. I'll just call your JA. I
25 assume it's the right one. I want to make

PINNACLE REPORTING, INC.
(561) 820-9066

16div-004206

0039

1 sure. I'll check and make sure. I don't want
2 the Plaintiff to request the wrong documents
3 either.

4 THE COURT: Advise us in writing. Let Mr.
5 Scarola know.

6 MR. IANNO: I will.

7 THE COURT: I assume, Mr. Scarola, if we
8 get something from Mr. Ianno saying that's the
9 wrong number, we can put in the right number?

10 MR. SCAROLA: Yeah. I don't know how it
11 could be the wrong number when that's the
12 proceeding in which they were fined over a
13 million dollars.

14 If Mr. Ianno informs you of a different
15 number, I assume he will be doing so in good
16 faith, Your Honor can substitute that different
17 number. If it turns out there is a problem,
18 we'll be back to see you.

19 THE COURT: He's done it at his own peril,
20 so I have no doubt he would not intentionally
21 advise the Court.

22 MR. IANNO: If you don't hear from me,
23 that is the number.

24 THE COURT: I appreciate that.
25 (At 10:45 a.m. the hearing was adjourned.)

PINNACLE REPORTING, INC.
(561) 820-9066

0040

1 C E R T I F I C A T E

2 - - -

3

4 STATE OF FLORIDA
5 COUNTY OF PALM BEACH

6

7 I, PATRICIA A. LANOSA, Registered
8 Professional Reporter, do hereby certify that I was
9 authorized to and did stenographically report the
10 foregoing proceedings and that the transcript is a
11 true and correct transcription of my stenotype notes
12 of the proceedings.

13

14 Dated this 17th day of December, 2003.

15

16

17

PATRICIA A. LANOSA
Registered Professional Reporter

18

19

20

21

22

23

24

25

The foregoing certification of this transcript does
not apply to any reproduction of the same by any
means unless under the direct control and/or
direction of the certifying reporter.

16div-004207

PINNACLE REPORTING, INC.
(561) 820-9066

0001

1 IN THE FIFTEENTH JUDICIAL CIRCUIT COURT
2 IN AND FOR PALM BEACH COUNTY, FLORIDA
3 CIVIL DIVISION
4 CASE NUMBER: 2003-CA 005045 AJ

5 COLEMAN (PARENT) HOLDINGS, INC.,

6 Plaintiffs,

7 vs.

8 MORGAN STANLEY & CO., INC.,

9 Defendant.
10 _____/

11 PROCEEDINGS BEFORE THE HONORABLE ELIZABETH T. MAASS

12

13

14 APPEARANCES:

15

On behalf of the Plaintiff:

16 SEARCY, DENNEY, SCAROLA,
17 BARNHART & SHIPLEY, P.A.
2139 Palm Beach Lakes Blvd.

18

West Palm Beach, Florida 33409

19

BY: JACK SCAROLA, ESQUIRE

20

On behalf of the Defendant:

21

CARLTON FIELDS

22

222 Lakeview Avenue, Suite 1400

23

West Palm Beach, Florida 33401-6149

24

BY: JOSEPH IANNO, JR., ESQUIRE

25

26 Wednesday, December 17, 2003

27 PALM BEACH COUNTY COURTHOUSE

28 WEST PALM BEACH, FLORIDA

29 PINNACLE REPORTING, INC.

(561) 820-9066

0002

1 P R O C E E D I N G S

2

3

THE COURT: Good morning. Have a seat. I
4 apologize for keeping you waiting.

5

5 This is Coleman & Morgan and it's
6 Plaintiffs' motion to compel concerning the
7 E-mails.

8

8 MR. SCAROLA: It is, in fact, Plaintiff's
9 amended motion to compel concerning E-mails.

9

10 THE COURT: I thought it was Plaintiff's
11 motion to compel.

12 MR. IANNO: And I had the same confusion,
13 Your Honor, yesterday. And Mr. Scarola and I
14 exchanged E-mails, I don't know if we spoke on
15 the phone, but we definitely exchanged
16 E-mails. I believe that it was the original
17 motion.

18 THE COURT: Yeah, I looked at my notice of
19 hearing.

20 MR. IANNO: I have the transcript, Your
21 Honor. Apparently -- and Mr. Scarola can
22 correct me -- it's the underlying motion, but
23 the relief that's being sought is an order
24 compelling us to produce the documents that
25 were submitted to the SCC and to produce a
PINNACLE REPORTING, INC.
(561) 820-9066

0003

1 corporate representative. It's not the actual
2 production of the E-mails or testimony
3 regarding the burden, expense of going through
4 and restoring the E-mails from the magnetic
5 tapes. I believe that's what we're going to
6 argue this morning.

7 MR. SCAROLA: If I could just have a
8 moment to walk the Court through this, I think
9 it will become apparent what it is we're doing
10 here.

11 THE COURT: Sure.

12 MR. SCAROLA: This is Plaintiffs' first
13 request for production.

14 THE COURT: Okay.

15 MR. SCAROLA: I would call the Court's
16 attention initially to the definition of terms,
17 paragraph 7; documents means E-mails or any
18 other electronic form of communication.

19 THE COURT: Okay.

20 MR. SCAROLA: If Your Honor will then turn
21 to Request No. 48, and you can read it faster
22 than I can read it to you.

23 THE COURT: I'll see what it says.
24 Okay.

25 MR. SCAROLA: Forty-nine, 50 and 51.
PINNACLE REPORTING, INC.
(561) 820-9066

0004

1 THE COURT: Okay.

2 MR. SCAROLA: All right. I think there is
3 little doubt, having read through the
4 definition in those sections, that we are
5 looking for all relevant E-mails concerning
6 these issues. And Your Honor will recall the
7 presentations that were made to you last week

8 concerning the underlying allegations in this
9 complaint, that clearly a very significant
10 issue in this claim for fraud against Morgan
11 Stanley is what Morgan Stanley knew and when
12 Morgan Stanley knew it. We have a burden to
13 prove that there were knowingly false
14 misrepresentations that were made and that
15 Morgan Stanley was participating in aiding and
16 abetting conspiring with Sunbeam in its knowing
17 false misrepresentations.

18 So obviously a significant source of
19 information concerning what Morgan Stanley knew
20 would be Morgan Stanley's internal
21 communications regarding all issues relating to
22 Sunbeam. And we filed a request to produce
23 which clearly encompasses that sort of document
24 reading electronic information.

25 What we received in response was a
PINNACLE REPORTING, INC.
(561) 820-9066

0005

1 substantial production that contained very,
2 very few E-mail communications. And we also
3 learned that Morgan Stanley had been sanctioned
4 by the SCC for failing to comply with Federal
5 regulations regarding the preservation,
6 specifically, of E-mail communications.

7 We noticed the deposition under Rule 1.310
8 of a corporate representative -- and if Your
9 Honor will take a look at paragraphs 2 and 3 of
10 the description of the information that we were
11 seeking -- we sought specifically, in paragraph
12 2, policies and procedures for maintaining and
13 preserving electronic or hard copy documents
14 and/or files of Morgan Stanley & Co.,
15 Incorporated and the location and/or procedure
16 for the collection of documents responsive to
17 Coleman (parents) previously served request for
18 production of documents. So we wanted to get
19 behind the production to make a determination
20 as to what efforts were made to attempt to find
21 E-mails and what potential existed for the
22 recovery of E-mails.

23 We took the deposition of the corporate
24 representative. And if Your Honor will take a
25 look at Exhibit B to the amended motion to
PINNACLE REPORTING, INC.
(561) 820-9066

0006

1 compel -- do you have that handy?

2 THE COURT: I know I looked at it
3 yesterday. Whether I have it handy now, I
4 don't know.

5 MR. IANNO: Let me provide the Court with

6 a copy of that.

7 THE COURT: This is the transcript or a
8 portion of the transcript of the deposition?

9 MR. SCAROLA: Yes, Your Honor, we provided
10 you with portions of the copy of the transcript
11 of the deposition. I don't have the exhibit
12 here. I apologize for that.

13 THE COURT: I know I read it. 126 or 127
14 something.

15 MR. SCAROLA: Let me give you my copy.

16 Following the corporate representative's
17 deposition, we communicated in writing with
18 Morgan Stanley and specifically identified
19 deficiencies in the corporate representative's
20 ability to respond within those areas
21 designated in the notice of deposition and made
22 specific transcript references to where the
23 corporate representative acknowledged his
24 inability to provide information that was
25 clearly relevant and material. We then filed

PINNACLE REPORTING, INC.

(561) 820-9066

0007

1 our initial motion to compel.

2 THE COURT: That I do have. Actually,
3 that's what I had looked at, I guess, that had
4 copies of the transcripts attached.

5 MR. SCAROLA: Well, then, Your Honor is
6 aware that what we were seeking in that motion
7 were three things.

8 First, that Morgan Stanley be compelled to
9 undertake a full investigation of the
10 information in its possession, including
11 magnetic tapes and hard drives for E-mail
12 messages responsive to Coleman (parent)
13 Holdings document request.

14 Now, once we request the documents, the
15 law imposes an obligation on them to conduct a
16 reasonable, thorough investigation within the
17 corporation to make the determination as to
18 what exists. We're simply asking the Court, at
19 that point, to compel them to do that which is
20 inherent in the obligation to respond to the
21 request to produce.

22 The second request was to produce within
23 10 days any E-mails that are located, which
24 obviously they would be obliged to do under the
25 terms of the previously served request to

PINNACLE REPORTING, INC.

(561) 820-9066

0008

1 produce.

2 THE COURT: Your initial response to the
3 request to produce, did it say that there were

4 items within their possession, custody or
5 control that weren't produced because the cost
6 inherent in it?

7 MR. SCAROLA: That came in the very
8 substantial response they filed to the motion
9 to produce.

10 Now, at no time in this response did they
11 ever raise an issue that Coleman (parent) was
12 seeking to compel something that had not been
13 requested. Their response asserted four
14 objections. They said what we were asking in
15 our motion to compel -- and I didn't finish
16 with the third thing.

17 The third thing was to comply with their
18 obligation to produce a corporate
19 representative that had knowledge with regard
20 to these matters. What they said was that the
21 tasks we were asking be performed were overly
22 burdensome, that it was harassing, that it was
23 unlikely to lead to the discovery of admissible
24 evidence because -- well, they'll have to
25 explain that to you because I really don't

PINNACLE REPORTING, INC.
(561) 820-9066

0009

1 understand what their argument is in support of
2 that contention. But the fourth and final
3 argument they made was that Morgan Stanley was
4 somehow not entitled to this discovery because
5 Morgan Stanley had unclean hands because Morgan
6 Stanley, Sr. funded hadn't preserved all of its
7 E-mails, so it was not right for
8 Morgan Stanley -- excuse me -- that MAFCO, our
9 parent corporation, had not preserved all of
10 its E-mails.

11 Well, I hope that we don't need to deal
12 with that issue, but I want to respond to it
13 very quickly. And that is, there is a
14 difference between the obligations imposed
15 and --

16 THE COURT: Let me stop you there. To me,
17 that's -- and can you respond -- it's sort of a
18 red herring issue, because it's apples and
19 oranges. If they had some sort of destruction
20 of evidence, we can address that separately
21 when it's properly framed by the pleadings and
22 talk about the appropriate sanctions. But I
23 know what the appropriate sanction is, if I
24 don't look at the motion currently in front of
25 me and make a sanction going to that motion.

PINNACLE REPORTING, INC.
(561) 820-9066

0010

1 MR. IANNO: I didn't want to interrupt Mr.

2 Scarola, but I don't know if we're arguing the
3 amended motion now or if we're back to the
4 original motion.

5 If we're back to the original, I have some
6 problems with arguing that to the Court today.

7 MR. SCAROLA: We're not back to the
8 original motion. Your Honor needs to
9 understand this background to understand the
10 relief that we're currently requesting.

11 THE COURT: Do you have a copy of the
12 amended motion? I thought we were doing the
13 original motion. That's the one I have a copy
14 of. Do you have an extra copy?

15 MR. IANNO: I do.

16 THE COURT: Thank you. Let me -- I'm
17 trying to figure where we're going. And I
18 apologize for interrupting your argument.

19 But realistically, are you seeking
20 anything today other than having a competent
21 corporate representative testify as to both
22 their retention policy and what efforts they
23 have made to locate this stuff and copies of
24 the documents they gave to the SCC?

25 MR. SCAROLA: No. That's all we are
PINNACLE REPORTING, INC.
(561) 820-9066

0011

1 asking for.

2 THE COURT: That's all you want?

3 MR. SCAROLA: That's all we want.

4 THE COURT: So what you're saying is sort
5 of twofold. One is, produce the corporate rep
6 like we originally asked who can answer all
7 these questions and then we can figure out if
8 your answers are taken in good faith.

9 MR. SCAROLA: That's precisely right.
10 They raised a burdensome objection and we're
11 entitled to explore that. We're not obliged to
12 accept on its face their assertion without any
13 particulars whatsoever, if it's going to take a
14 lot of time and cost us a lot of money and it's
15 not going to lead to anything productive. We
16 want sworn testimony that allows us to assess
17 those contentions. If they are right, we may
18 abandon our efforts to get E-mails. If they
19 are wrong, we have placed ourselves in a
20 position to come back before Your Honor on the
21 original motion to get them to do that which we
22 originally requested that they do.

23 THE COURT: What did you want to say in
24 support of the contention that they should
25 produce the documents produced to the SCC?

PINNACLE REPORTING, INC.
(561) 820-9066

0012

1 That's the other prong of what we're looking
2 for today.

3 MR. SCAROLA: Yes, that's correct.

4 The other prong of what we're looking at
5 is production of the documents that were sent
6 to the SCC.

7 THE COURT: First of all, can we agree you
8 guys should produce somebody who's competent to
9 testify to these matters?

10 MR. IANNO: Under a proper 1.310 notice,
11 yes. That's where we have our disagreement, is
12 the testimony that Mr. Scarola is asking for is
13 not contained with the original deposition
14 notice.

15 What we said is, let's both mutually
16 produce our corporate representatives on an
17 agreed upon list of topics for the expense, the
18 procedures for restoring back-up tapes.

19 THE COURT: I'm looking at the notice of
20 taking deposition that was served August 22nd.

21 In items 2 and 3, is it your position you
22 produced somebody competent to testify to those
23 matters?

24 MR. IANNO: Mr. Plotnick was produced on
25 September 9th.

PINNACLE REPORTING, INC.
(561) 820-9066

0013

1 THE COURT: Right.

2 MR. IANNO: And he had rendered 160 pages
3 of deposition testimony on those three topics.

4 Now, if the Court -- if Mr. Scarola says
5 he didn't testify on the topics that were in
6 this deposition notice that you're looking at,
7 I think you have to look at all 160 pages to
8 see that he did testify on the policies and
9 procedures of document retention at Morgan
10 Stanley.

11 THE COURT: I thought he said he didn't
12 know anything about pre 2000.

13 MR. IANNO: You could, Your Honor, read
14 the 160 pages. But I think that the solution
15 here on this is to have an agreed upon list of
16 topics that Mr. Scarola's client and our client
17 want mutual corporate representatives to
18 testify to here. The point here is not the
19 retention policy, it's what it would take to
20 restore back-up tapes.

21 THE COURT: It's sort of a little bit of
22 both I would imagine.

23 Let me ask you this: I think the proposal
24 on the table, as I understand it, sort of mixes
25 these two things again and says, if you produce

16div-004215

PINNACLE REPORTING, INC.
(561) 820-9066

0014

1 somebody to testify about your policy, we'll
2 produce somebody to testify about our
3 policies.

4 Are you willing to accept that offer or
5 not?

6 MR. SCAROLA: We have always been willing
7 to produce a corporate representative to
8 testify about our policies. That was part of
9 the stipulation that we entered on the record
10 before the Court. We are still prepared to do
11 that, although there is no motion to require us
12 to do it. We're willing to do that. That's
13 discovery that they're entitled to.

14 The contention that we have failed to
15 identify specifically what it is we need is
16 just false. If you look at the letter of
17 September 18, we could not have been more
18 specific about the deficiencies in Mr.
19 Plotnick's deposition. We identify precisely
20 the information that we need and we identify
21 the page and line references where Mr. Plotnick
22 was unable to provide that information. I
23 don't know what more we could do than that.
24 That is our specific list of everything that we
25 need from this defendant.

PINNACLE REPORTING, INC.
(561) 820-9066

0015

1 THE COURT: So I'm clear, are you saying
2 you will accept their stipulation and we need
3 to sit down right now and make a list of things
4 this person is going to testify to --

5 MR. IANNO: Apparently so.

6 THE COURT: -- or are we going back to the
7 motion?

8 MR. IANNO: I have the SCC filings. There
9 is a separate and totally distinct argument on
10 that.

11 THE COURT: I understand that. We're not
12 doing that now. We'll do it today. We're not
13 doing it at this moment.

14 I took your copy of the September 18
15 letter, right?

16 MR. SCAROLA: Yes, Your Honor. That is
17 attached as an exhibit to the amended --

18 MR. IANNO: It's attached as Exhibit C to
19 the original motion.

20 MR. SCAROLA: The original motion. So you
21 do have a copy of it.

22 THE COURT: I do have it someplace.

23 MR. SCAROLA: There are numerous letters

24 going back and forth between the parties. I
25 don't have all the letters that were sent by
PINNACLE REPORTING, INC.
(561) 820-9066

0016

1 Morgan Stanley.

2 THE COURT: No, I don't think that we're
3 going to be able to use it as a prompt for what
4 it is we want the person to be competent to
5 testify to, right?

6 MR. SCAROLA: That's our list.

7 THE COURT: Okay. He will be right back
8 then.

9 So, if we were going to make a global
10 stipulation, it will be, I assume, somebody
11 competent to testify as to the policies and
12 procedures for maintaining, preserving
13 electronic or photocopied documents and/or
14 files of the party, right, that would be Number
15 2?

16 MR. SCAROLA: That's correct.

17 THE COURT: Number 3 would be the location
18 and/or procedure, the collection of documents
19 -- here's your copy back.

20 MR. SCAROLA: Thank you very much.

21 THE COURT: You dictate to me the list,
22 what you want this person -- you think this
23 person should be competent to testify about.

24 MR. SCAROLA: I think we could very easily
25 simply state that the defendants shall produce
PINNACLE REPORTING, INC.
(561) 820-9066

0017

1 a corporate representative --

2 THE COURT: Well, each party.

3 MR. SCAROLA: -- each party shall produce
4 a corporate representative who can address all
5 matters identified in the letter of September
6 18, 2003, attached hereto.

7 THE COURT: But that's sort of one-sided.

8 MR. SCAROLA: I'm agreeing to make it
9 reciprocal.

10 THE COURT: So addressing the types of
11 issues addressed?

12 MR. IANNO: That's why we wanted a new
13 notice that said, we want a corporate
14 representative to testify about A, B, C, D, so
15 we wouldn't have this disagreement, because we
16 believe we already complied with what's in the
17 September 18th letter. We can get Mr. Clare on
18 the phone and he can address it. I haven't had
19 the time to prepare and go through line by line
20 Mr. Plotnick's deposition testimony to address
21 this specific issue. But the parties, three

22 months ago, exchanged correspondence. They
23 responded to these, and we said we have
24 prepared, is my understanding, and he was
25 adequately prepared.

PINNACLE REPORTING, INC.
(561) 820-9066

0018

1 My understanding is, the purpose of
2 today's hearing was simply to tell -- bring a
3 corporate representative to say this is what it
4 would take to restore the E-mails to support
5 our objection, not to whether or not we
6 retained them, not whether or not the retention
7 policies were, because that's what I thought
8 Mr. Scarola was getting at.

9 We believe Mr. Plotnick already testified
10 to the three areas here. But if they want to
11 have a reciprocal witness that says it would
12 cost millions of dollars and months and months
13 of work to restore the magnetic tapes that are
14 available on back up --

15 MR. SCAROLA: Your Honor, this is -- I'm
16 sorry.

17 MR. IANNO: -- we would produce somebody
18 like that the first two weeks of January.

19 MR. SCAROLA: This is the language
20 included in the amended motion to compel: To
21 provide within 15 days of the production that
22 we are requesting a corporate representative to
23 testify, pursuant to Florida Rules of Civil
24 Procedure 1.310, concerning Morgan Stanley's
25 E-mail retention policies, practices and

PINNACLE REPORTING, INC.
(561) 820-9066

0019

1 procedures and concerning Morgan Stanley's
2 ability, including the procedures, time, labor
3 and expense involved to retrieve E-mails.

4 THE COURT: Now, can you live with that?

5 MR. IANNO: The second phrase of it, yes,
6 Your Honor, because we believe on the first
7 phrase of it, the policies and procedures, Mr.
8 Plotnick testified to that.

9 THE COURT: I can go back and look at it.
10 Maybe I'm thinking of something else. I
11 thought he was vague about what it was about
12 from '99 to 2000.

13 MR. IANNO: Well, there is a reason for
14 that. I believe it was explained and it can be
15 explained further if necessary. But the
16 deposition lasted 160 pages and the Court was
17 only provided with excerpts of it. And I think
18 if the Court -- if the Court will indulge me
19 for a minute, Mr. Scarola said he didn't

20 understand our relevance objection. And the
21 Court may or may not recall Mr. Scarola's
22 motion to compel on Scott Paper documents, that
23 the Court ruled on anything pre, I believe,
24 2000 should be produced, but anything post 2000
25 should not be produced.

PINNACLE REPORTING, INC.
(561) 820-9066

0020

1 THE COURT: Right.

2 MR. IANNO: The problem is, there is no
3 E-mails that predate 2000. That was the basis
4 for the relevance objection. And I believe
5 somebody will testify to that on the second
6 phrase of Mr. Scarola's wherefor clause
7 concerning the ability, including the
8 procedures, time and labor expenses involved to
9 retrieve E-mails. And that will explain that.
10 I think that's what he needs to do.

11 But the point that we've always made and
12 the point I made yesterday at the Uniform
13 Motion Calendar is, there is no deposition
14 notice that asked for that second phrase.
15 We're trying to agree that we will produce a
16 corporate representative on that second phrase
17 of the wherefor clause. But to say motion to
18 compel --

19 THE COURT: Let me stop you. Give me an
20 example from the September 18th letter, for
21 instance, that you think requests information
22 that either Mr. Plotnick did provide, but was
23 not included in the ambient of the taking of
24 the deposition.

25 MR. IANNO: I would love to, but I have to
PINNACLE REPORTING, INC.
(561) 820-9066

0021

1 be honest with the Court, in the 24 hours, I
2 have not had a chance to go through Mr.
3 Plotnick's deposition. As this Court knows, I
4 wasn't in the office yesterday afternoon. We
5 haven't had sufficient time to prepare a
6 response to that. But there are letters that I
7 could have sent over to the Court that respond
8 specifically to Mr. Scarola's September 18th
9 letter. That's a problem with having the
10 hearing today. I did my best to get everything
11 together on this and I just couldn't get
12 everything together in the 24 hours to put in a
13 package to the Court to show how we responded
14 to Mr. -- I guess it's Jenner & Block's
15 September 18th letter.

16 MR. SCAROLA: It really is unfair to
17 represent that they have had 24 hours to

18 respond to these issues. Your Honor is well
19 aware that these matters have been before the
20 Court now for a long time and there is no
21 reason to delay resolution of these issues
22 beyond today. They've had this letter
23 identifying deficiencies since September 18.
24 And the second part of the letter --

25 THE COURT: Let me ask you this --
PINNACLE REPORTING, INC.
(561) 820-9066

0022

1 MR. SCAROLA: Yes.

2 THE COURT: -- are you -- if we pick up
3 the language from the wherefor clause of your
4 motion, asking for somebody competent to
5 testify concerning the E-mail retention
6 policies and practices and the procedures to
7 retrieve the E-mails and the costs, if they
8 produce somebody other than Plotnick, are you
9 happy? Because obviously --

10 MR. SCAROLA: I don't care who the person
11 is. It's the information that we want.

12 THE COURT: I don't know that there was an
13 obligation for him to go do some independent
14 investigation before he was deposed.

15 MR. SCAROLA: Respectfully, Your Honor,
16 that's exactly what the law says. When we
17 issue 30 -- a Rule 1.310 notice of deposition
18 of a corporate representative, they are
19 obliged -- the corporate representative is
20 obliged to educate himself with respect to the
21 knowledge that the corporation has. We didn't
22 notice the deposition to Mr. Plotnick.

23 THE COURT: I understand that.

24 MR. SCAROLA: And, I'm sorry, I don't have
25 that case law at hand.

PINNACLE REPORTING, INC.
(561) 820-9066

0023

1 THE COURT: I thought they had to produce
2 the person most knowledgeable on that topic.

3 MR. SCAROLA: I hope Mr. Ianno will agree
4 to this without having to get into a legal
5 argument. The case law is very clear, that
6 there is an obligation imposed upon the
7 corporation to educate itself with respect to
8 what knowledge exists within the corporation,
9 so they are producing an individual who is
10 capable of speaking on behalf of the
11 corporation with regard to these topics to
12 disclose the full corporate knowledge on those
13 topics. And if it takes 10 people to respond,
14 they're obliged to produce as many people as
15 necessary to address those topics on the

16 corporation's behalf. That's the whole purpose
17 of that rule. And it is very clear from case
18 law with respect to that rule, that there is an
19 obligation to conduct a good faith
20 investigation in advance in order to be able to
21 respond on behalf of the corporation.

22 THE COURT: Okay. Do you agree with that
23 statement?

24 MR. IANNO: Briefly, Your Honor. This
25 wasn't my motion to argue. This was Mr.

PINNACLE REPORTING, INC.
(561) 820-9066

0024

1 Clair's motion. I'm not fully aware of all of
2 the facts. I'm not prepared -- I'm not
3 prepared. Mr. Clare was home with a 104 fever
4 yesterday.

5 With respect to the 301(b)6 notice, my
6 interpretation and understanding of the rule is
7 very consistent with Mr. Scarola's. It's not
8 the person most knowledgable. It's the
9 corporation has an obligation to produce a
10 representative to testify on these areas and
11 the noticing party takes it at their risk if
12 their areas are not specific and they're vague,
13 like they are in this case. It's subject to
14 interpretation, policies and procedures.

15 We produced a corporate representative
16 that testified as to what Morgan Stanley's
17 policies and procedures were with respect to
18 retention. He was educated.

19 THE COURT: That's where we were then.
20 What you're now telling me is that we're not
21 going to reach an agreement on this point.

22 MR. SCAROLA: I'm prepared to stipulate --

23 THE COURT: You want a stipulation that
24 they both have to produce somebody knowledgable
25 about their E-mail retention policy and

PINNACLE REPORTING, INC.
(561) 820-9066

0025

1 somebody knowledgable about the cost retrieving
2 the E-mails? You're not willing to do the
3 former?

4 MR. IANNO: We're willing to produce
5 someone to support our cost and burdensome
6 objection on the first two weeks of January,
7 Your Honor.

8 THE COURT: You're not willing to do the
9 former?

10 MR. IANNO: We believe --

11 THE COURT: That's not my question. We're
12 not going to get this done in the time we
13 have. We're back to arguing the motion.

14 What did you want to say in support?
15 MR. SCAROLA: Are we doing it in two parts
16 still?
17 THE COURT: I think we're still on two
18 parts. I think I have your argument on part
19 one. Let them respond and we'll come back to
20 the SCC argument.
21 MR. SCAROLA: I'm happy to do that.
22 THE COURT: What did you want to say?
23 MR. IANNO: I'm not sure I can add
24 anything else.
25 THE COURT: Do you have a copy of
PINNACLE REPORTING, INC.
(561) 820-9066

0026

1 Plotnick's deposition for me?
2 MR. IANNO: I do. This is the entire
3 deposition, together with exhibits.
4 THE COURT: Thank you.
5 So it's your position that all --
6 MR. IANNO: That what is sought -- it's my
7 understanding what was sought here and what the
8 discussion has been since the Uniform Motion
9 Calendar about three weeks ago has been,
10 produce someone to testify as to the costs and
11 the expense and the time and the burden that
12 will be involved in going through the thousands
13 of magnetic back-up tapes that Morgan Stanley
14 has for a certain time period that exists, and
15 we are willing to produce that person.
16 We believe we have produced the corporate
17 representative that was appropriately
18 identified in the corporate representative
19 deposition topics 1 through 3 of the 310(b)6
20 deposition notice.
21 As I explained to the Court, I did my best
22 to get fully up to speed on this issue.
23 Unfortunately, I did not have the time to go
24 through Mr. Plotnick's entire deposition last
25 night. I downloaded it to go through that. I
PINNACLE REPORTING, INC.
(561) 820-9066

0027

1 could send over to the Court this afternoon our
2 response letters that go through in detail what
3 Mr. Plotnick testified to, but it was my
4 understanding what we were going to argue today
5 was simply whether or not we would produce the
6 corporate representative on the E-mail burden.
7 And the other thing, Your Honor, is, Mr.
8 Scarola's client waited three months, the
9 September 18 letter, before they brought this
10 to the Court's attention and we had to wait
11 months for our motion to dismiss hearing. If

12 we could have some additional time, I'm sure
13 Mr. Clare will be fully prepared to address
14 each and every one of the questions the Court
15 has requested of Mr. Plotnick's deposition that
16 I'm not able to do.

17 THE COURT: Okay. Let's do the SCC
18 documents.

19 MR. SCAROLA: Thank you.

20 I have called the Court's attention to the
21 broad scope of our request to produce, the
22 specific paragraphs in that prior request that
23 impose a burden to produce all communications
24 regarding E-mails, as well as all E-mails,
25 specifically communications with the SCC are
PINNACLE REPORTING, INC.

(561) 820-9066

0028

1 referenced. And the only objection that we
2 have had to the production of the SCC documents
3 has been that an order may be entered in
4 response to somebody's motion in a New York
5 court that might preclude the disclosure of
6 these documents at sometime in the future.

7 Our efforts to determine who filed the
8 motion, what the motion is seeking to do, have
9 been ignored. They don't chose to tell us.

10 And the potential for some court sometime in
11 the future to restrict the Defendant's ability
12 to make disclosure sometime in the future ought
13 not in any way to impact upon this Court's
14 ordering production of that which has been
15 requested in the past.

16 So as we stand right now, there is no
17 assertion of any inability to produce documents
18 that have been requested. And, again, all we
19 are seeking is predicate information to
20 determine the validity of the objections that
21 have been raised.

22 THE COURT: Do you have a copy of what
23 their response was on this issue?

24 MR. SCAROLA: The only response on this
25 issue has been the response that was filed to
PINNACLE REPORTING, INC.

(561) 820-9066

0029

1 our original motion to compel, which alleges
2 that this is burdensome, harassing and not
3 likely to lead to the discovery of admissible
4 evidence.

5 THE COURT: So how do you --

6 MR. SCAROLA: The argument about the New
7 York --

8 THE COURT: Right.

9 MR. SCAROLA: -- the New York court,

10 that's argument that was made before Your Honor
11 in open court. That's never been reduced to
12 writing. No, that's simply the verbal
13 representations made to Your Honor in response
14 to -- in the context of our motion to enforce
15 the in-court stipulation. You remember --

16 THE COURT: Right.

17 MR. SCAROLA: -- that's a piece I left out
18 in the middle. But in the middle of all of
19 this, we thought we had an agreement. We
20 obviously, in the Court's opinion, didn't have
21 an agreement.

22 But during the course of those arguments,
23 they told Your Honor, we don't want you to
24 order us to do this yet because a New York
25 court may sometime enter a response to some

PINNACLE REPORTING, INC.

(561) 820-9066

0030

1 motion, which they couldn't tell us anything
2 about and refuse to tell us anything about.

3 THE COURT: So I'm clear, what we're
4 talking about doesn't have anything to do with
5 E-mail retention policies or anything else?

6 MR. SCAROLA: No. It specifically relates
7 to E-mail retention policies.

8 THE COURT: The action before the SCC on
9 that point, we're not talking about trying to
10 discover E-mails, we're trying to get hard
11 copies, presumably, of documents provided to
12 the SCC?

13 MR. SCAROLA: Regarding E-mail retention
14 policies and E-mail destruction, so that we can
15 find out what is in fact available and how
16 readily available it is or is not, at least
17 according to what they told the SCC, correct.

18 THE COURT: And where in any response --
19 how did Morgan Stanley place the Plaintiff on
20 notice that these documents were retained and
21 not produced?

22 MR. IANNO: Well, that's the heart of this
23 matter, Your Honor. It's not that they were
24 not produced, it's that they were not
25 responsive. They were only offered to the

PINNACLE REPORTING, INC.

(561) 820-9066

0031

1 Plaintiff as a possible resolution to the
2 motion to compel.

3 I can walk the Court through why this
4 document is not responsive.

5 THE COURT: You're telling me it's not
6 included in the Plaintiffs' first request for
7 production?

8 MR. SCAROLA: Absolutely not.
9 THE COURT: Tell me why not.
10 MR. SCAROLA: This is a document that was
11 produced by attorneys.
12 THE COURT: Is it a single document?
13 MR. IANNO: Yes, produced in response to
14 the SCC by attorneys. It is not a Morgan
15 Stanley policy. It is not a Morgan Stanley
16 procedure. It is more akin to a pleading that
17 was produced -- and this is the key point, Your
18 Honor, that Mr. Scarola omitted from his
19 argument -- that it is produced in a separate
20 IPO allocation proceeding. It has absolutely
21 nothing to do with Sunbeam. It has absolutely
22 nothing to do with the facts of this case. And
23 if the Court looks at Definition No. 12 in the
24 first request for production, they went through
25 great pains to define terms. SCC
PINNACLE REPORTING, INC.
(561) 820-9066

0032

1 administrative proceeding means, in the matter
2 of Sunbeam Corp, and it lists the proceeding
3 number, and in the matter of David C. Fannin,
4 F-A-N-N-I-N, and it lists an administrative
5 proceeding. This document was not submitted in
6 connection with either of those proceedings.
7 It was not submitted in connection with
8 arbitration concerning Mr. Dunlop or in
9 connection with any of the litigations, which
10 are all defined terms in this request for
11 production.
12 If the Court goes through Request No. 48
13 through 51, which are the only ones Mr. Scarola
14 identified, all of the documents requested
15 there are limited to those three definitions.
16 This document --
17 THE COURT: Tell me again what proceeding
18 it was produced, the SCC in connection with?
19 MR. IANNO: It's called an IPO allocation
20 proceeding, which involved numerous securities
21 firms, investment bankers, Your Honor. It had
22 nothing to do with Sunbeam.
23 And the reason -- the only reason that Mr.
24 Scarola knows about it, is because it was
25 widely reported. And in an effort to resolve
PINNACLE REPORTING, INC.
(561) 820-9066

0033

1 the motion to compel originally, the one that
2 we had the failed stipulation on, we offered to
3 produce it if we could. That's the only reason
4 the New York court comes into play.
5 The procedure that's being utilized today

6 on the motion to compel is improper, because
7 this document was never requested. If the
8 Plaintiff wants these documents, they can file
9 a request for production. We will respond to
10 it in due course. We can argue about whether
11 or not it's admissible.

12 THE COURT: So they just need to do, what
13 you're telling me, a request using this
14 administrative proceeding number?

15 MR. IANNO: Not this --

16 THE COURT: Well, the 3-10597. That's the
17 one where they did the order dealing with
18 retention?

19 MR. IANNO: I don't have the number in
20 front of me.

21 MR. SCAROLA: It is attached as an
22 exhibit.

23 THE COURT: Right.

24 So you're saying they amend their --

25 MR. IANNO: Well, they need to do a
PINNACLE REPORTING, INC.
(561) 820-9066

0034

1 request before they do a motion to compel.

2 THE COURT: No, I understand.

3 What's the response to that argument, that
4 this is in a separate proceeding and it's just
5 within the ambit of this request?

6 MR. SCAROLA: Well, it isn't within the
7 ambit of the defined SCC proceeding.

8 The requests include paragraph 50, all
9 documents you have provided to the SCC, the
10 Attorney General of New York, or any other
11 governmental or regulatory body concerning
12 Sunbeam.

13 THE COURT: They say this doesn't concern
14 Sunbeam.

15 MR. SCAROLA: It does concern Sunbeam,
16 from the perspective it concerns all of their
17 E-mail communications, Sunbeam and others.

18 THE COURT: That's a nice argument.
19 Assume I'm not going to accept that one.

20 MR. SCAROLA: If you're not going to
21 accept that argument and the sole objection
22 that they are making is that this has not been
23 specifically requested, I go back to my office,
24 I file that request.

25 What I don't want to happen is, what we
PINNACLE REPORTING, INC.
(561) 820-9066

0035

1 get are objections that bring us right back to
2 this same point all over again. If what
3 they're saying is they are willing to produce

4 it as specifically requested, that's fine.
5 We'll specifically request it. But we ought
6 not -- we ought not to play the game for the
7 first time in this hearing, raising the
8 objection that this was not specifically
9 requested because that objection has never
10 previously been raised, to raise that objection
11 now, to have us make this specific request and
12 then to file some sort of new objections to the
13 production after we spent as much time as we
14 have trying to reach this point.

15 THE COURT: I understand your concern. I
16 also understand, if it wasn't originally
17 requested, they didn't have an obligation to
18 file objection to something that wasn't
19 requested.

20 My hope is that you go back and request
21 it. You will have either it will be produced
22 or have something that frames the legal issues
23 presumably along the lines we discussed. At
24 least I will need less education next time to
25 get to the point that we're at now.

PINNACLE REPORTING, INC.
(561) 820-9066

0036

1 MR. SCAROLA: Will the Court entertain an
2 Ore Tenus motion to require a response to that
3 request to produce within 10 days?

4 MR. IANNO: Ten days is over the
5 Holidays. I will do a shortened time.
6 Probably right after the first of the year.

7 THE COURT: Can you do?

8 MR. IANNO: January 5th.

9 THE COURT: It's a Monday.

10 MR. SCAROLA: I think it's a Friday.

11 THE COURT: I think January 5th is a
12 Monday.

13 MR. SCAROLA: It's difficult for me to
14 imagine, with this issue having been discussed
15 as much as it's been discussed, if there is an
16 objection to be raised. I'm not talking about
17 producing the documents within that period of
18 time. But if there is an objection to be
19 raised, let's get it on the table, get it on
20 the table now. Ten days should be more than
21 adequate time. I would think that 48 hours is
22 enough time. So I would request, I persist in
23 my request that a 10-day time limit be set.

24 MR. IANNO: Can we have the Socii (ph)
25 Rule in affect, Your Honor? Whenever we need

PINNACLE REPORTING, INC.
(561) 820-9066

0037

1 something quickly, we can't get it; whenever

2 the Plaintiff wants something quickly, they get
3 it.

4 I'd love to, but this is December 17;
5 Christmas is in a week, the New Year holiday.
6 Mr. Scarola's office is closed for a week. I
7 mean, I'm willing to do it in a shorter time,
8 maybe even earlier than that. I hate to be
9 burdened. If the Court wants, the 2nd is a
10 Friday.

11 THE COURT: I'll tell you what, I'll do it
12 15 days. I'm not sure the request --

13 MR. SCAROLA: Fifteen days from the filing
14 of the request?

15 THE COURT: Fifteen days from service of
16 the request, including five days in the mail.

17 MR. SCAROLA: It will be faxed today.

18 MR. IANNO: Just on side, the parties have
19 an agreement that all service is either by fax,
20 E-mail and Federal Express. We're trying to
21 get everybody -- because of the lawyers
22 involved, we're trying to serve everybody by
23 E-mails or fax and everything goes by Federal
24 Express.

25 THE COURT: I appreciate that. What I'm
PINNACLE REPORTING, INC.
(561) 820-9066

0038

1 looking for real quick, I need to get an order
2 on this. Obviously I lost it. Was the number
3 for the proceedings we are talking about.
4 Obviously we were only talking about shortening
5 the time to respond to the request to produce.
6 My documents deal with that proceeding.

7 MR. IANNO: I believe it's addressed as
8 Exhibit B, Your Honor. I think this is -- I
9 want to say that it's this one.

10 MR. SCAROLA: Administrative proceeding
11 File No. 3-10597.

12 THE COURT: Seeking documents provided to
13 the SCC.

14 MR. SCAROLA: And received from the SCC in
15 connection with that matter.

16 THE COURT: Okay. I'll take the first one
17 under advisement and you will get an order.

18 MR. IANNO: Thank you, Your Honor.

19 MR. SCAROLA: Thank you. And we are
20 closed next week. Merry Christmas, Your
21 Honor.

22 MR. IANNO: Your Honor, just, if that's
23 the wrong proceeding number, I'd be happy to
24 advise the Court. I'll just call your JA. I
25 assume it's the right one. I want to make

PINNACLE REPORTING, INC.
(561) 820-9066

0039

1 sure. I'll check and make sure. I don't want
2 the Plaintiff to request the wrong documents
3 either.

4 THE COURT: Advise us in writing. Let Mr.
5 Scarola know.

6 MR. IANNO: I will.

7 THE COURT: I assume, Mr. Scarola, if we
8 get something from Mr. Ianno saying that's the
9 wrong number, we can put in the right number?

10 MR. SCAROLA: Yeah. I don't know how it
11 could be the wrong number when that's the
12 proceeding in which they were fined over a
13 million dollars.

14 If Mr. Ianno informs you of a different
15 number, I assume he will be doing so in good
16 faith, Your Honor can substitute that different
17 number. If it turns out there is a problem,
18 we'll be back to see you.

19 THE COURT: He's done it at his own peril,
20 so I have no doubt he would not intentionally
21 advise the Court.

22 MR. IANNO: If you don't hear from me,
23 that is the number.

24 THE COURT: I appreciate that.
25 (At 10:45 a.m. the hearing was adjourned.)

PINNACLE REPORTING, INC.
(561) 820-9066

0040

1 C E R T I F I C A T E

2 - - -

3

4 STATE OF FLORIDA
5 COUNTY OF PALM BEACH

6

7 I, PATRICIA A. LANOSA, Registered
8 Professional Reporter, do hereby certify that I was
9 authorized to and did stenographically report the
10 foregoing proceedings and that the transcript is a
11 true and correct transcription of my stenotype notes
12 of the proceedings.

13

14 Dated this 17th day of December, 2003.

15

16

17

PATRICIA A. LANOSA
Registered Professional Reporter

18

19

20

21 The foregoing certification of this transcript does
22 not apply to any reproduction of the same by any
23 means unless under the direct control and/or
24 direction of the certifying reporter.

25

PINNACLE REPORTING, INC.
(561) 820-9066

in the Order, Findings, and Penalties entered by the SEC against Morgan Stanley on December 5, 2002 attached hereto as Exhibit A.

Dated: December 17, 2003

COLEMAN (PARENT) HOLDINGS INC.

By: *Michael T. Scarola*
One of Its Attorneys

Jerold S. Solovy
JENNER & BLOCK LLP
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

Jack Scarola
SEARCY DENNEY SCAROLA BARNHART
& SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33402-3626
(561) 686-6300

10/29/2003 15:53 FAX

@013/021

Deutsche Bank Securities, Inc., et al.: Admin. Proc. Rel. No. 34-46937 / December 3, 2002 Page 1 of 5



Home | Previous Page

J.S. Securities and Exchange Commission

**UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION**

**SECURITIES EXCHANGE ACT OF 1934
RELEASE NO. 46937 / DECEMBER 3, 2002**

**ADMINISTRATIVE PROCEEDING
FILE NO. 3-10957**

In The Matter Of

**DEUTSCHE BANK SECURITIES, INC.,
GOLDMAN, SACHS & CO.,
MORGAN STANLEY & CO. INCORPORATED,
SALOMON SMITH BARNEY INC., and
U.S. BANCORP PIPER JAFFRAY INC.,**

Respondents.

**ORDER INSTITUTING
PROCEEDINGS PURSUANT
TO SECTION 15(b)(4) AND
SECTION 21C OF THE
SECURITIES EXCHANGE ACT
OF 1934, MAKING
FINDINGS AND IMPOSING
CEASE-AND-DELIST
ORDERS, PENALTIES, AND
OTHER RELIEF**

I.
The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings pursuant to Section 15(b)(4) and Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), be and hereby are instituted against Deutsche Bank Securities, Inc., Goldman, Sachs & Co., Morgan Stanley & Co. Incorporated, Salomon Smith Barney Inc., and U.S. Bancorp Piper Jaffray Inc. (collectively, "Respondents").

II.

In anticipation of the institution of these proceedings, the Respondents have each submitted Offers of Settlement ("Offers") to the Commission, which the Commission has determined to accept. Solely for the purpose of these proceedings, and any other proceedings brought by or on behalf of the Commission or to which the Commission is a party, the Respondents, without admitting or denying the findings herein, except as to the Commission's jurisdiction over them and over the subject matter of these proceedings, consent to the entry of this Order Instituting Proceedings Pursuant to Section 15(b)(4) and Section 21C of the Securities Exchange Act of 1934, Making Findings and Imposing Cease-and-Delist Orders, Penalties, And Other Relief ("Order").

<http://www.sec.gov/litigation/admin/34-46937.htm>



10/29/2003 15:54 FAX

0014/021

Deutsche Bank Securities, Inc., et al.: Admin. Proc. Rel. No. 34-46937 / December 3, 2002 Page 2 of 3

Accordingly, it is ordered that proceedings pursuant to Exchange Act Section 15(b)(4) and Section 21C be, and hereby are, instituted.

III.

On the basis of this Order and the Respondents' Offers, the Commission finds that:

A. RESPONDENTS

Deutsche Bank Securities, Inc. is a Delaware corporation with its principal place of business in New York, New York. Deutsche Bank is a broker-dealer registered with the Commission pursuant to Section 15(b) of the Exchange Act and is a member of NASD and the New York Stock Exchange. Deutsche Bank engages in a nationwide securities business.

Goldman, Sachs & Co. is a New York limited partnership with its principal place of business in New York, New York. Goldman Sachs is a broker-dealer registered with the Commission pursuant to Section 15(b) of the Exchange Act, and is a member of NASD and the New York Stock Exchange. Goldman Sachs engages in a nationwide securities business.

Morgan Stanley & Co. Incorporated is a Delaware corporation with its principal place of business in New York, New York. Morgan Stanley is a broker-dealer registered with the Commission pursuant to Section 15(b) of the Exchange Act, and is a member of NASD and the New York Stock Exchange. Morgan Stanley engages in a nationwide securities business.

Salomon Smith Barney Inc. is a New York corporation with its principal place of business in New York, New York. Salomon Smith Barney is a broker-dealer registered with the Commission pursuant to Section 15(b) of the Exchange Act, and is a member of NASD and the New York Stock Exchange. Salomon Smith Barney engages in a nationwide securities business.

U.S. Bancorp Piper Jaffray Inc. is a Delaware corporation with its principal place of business in Minneapolis, Minnesota. U.S. Bancorp Piper Jaffray is a broker-dealer registered with the Commission pursuant to Section 15(b) of the Exchange Act, and is a member of NASD and the New York Stock Exchange. U.S. Bancorp Piper Jaffray engages in a nationwide securities business.

B. SUMMARY

This action concerns Respondents' violations of the record-keeping requirements of Section 17(a) of the Exchange Act and Rule 17a-4 thereunder during the period from 1999 to at least 2001 (the "relevant period"). During all or part of the relevant period, each Respondent failed to preserve for three years, and/or to preserve in an accessible place for two years, electronic mail communications (including inter-office memoranda and communications) received and sent by its agents and employees that related to its business as a member of an exchange, broker or dealer. Each Respondent lacked adequate systems or procedures for the preservation of electronic mail communications.

<http://www.sec.gov/litigation/admin/34-46937.htm>

10/28/2003 13:54 FAX

015/021

Deutsche Bank Securities, Inc., et al.: Admin. Proc. Rel. No. 34-46937 / December 3, 2002 Page 3 of 5

C. FACTS

The facts specific to these proceedings are set forth below:

1. The employees of each Respondent used electronic mail communications in part to conduct the Respondent's business as a broker, dealer and member of an exchange.
2. Respondents failed to preserve copies of electronic mail communications for three years, and/or maintain electronic mail communications for the first two years in an accessible place. Respondents did not have adequate systems or procedures in place during all or part of the relevant period to retain and/or make accessible electronic mail communications. Each Respondent's failure to preserve electronic mail communications and/or to maintain them in an accessible place was discovered during investigations being conducted jointly and separately by the Commission, the New York Stock Exchange, and NASD. The deficiencies in Respondent's systems and procedures for the preservation of electronic mail communications predated these investigations.
3. Some Respondents backed up electronic mail communications on tape or other media that Respondents represent was part of a process designed as a disaster recovery or business continuity measure, or for another business purpose. While some Respondents relied on these backups to preserve electronic mail communications during the relevant period, Respondents had inadequate systems or procedures to ensure the retention of such back-ups for three years and/or to maintain such data in a readily accessible manner for two years. These Respondents discarded, or recycled and overwrote their back-up tapes and other media, often a year or less after back-up occurred. In those instances in which Respondents did retain electronic mail communications, these electronic mail communications were often stored in an unorganized fashion on backup tapes, other media, or on the hard drives of computers used by individual employees of Respondents. Before the filing of these proceedings, one or more Respondents took steps to develop new database systems for the retention of electronic mail communications.
4. While some Respondents relied upon employees to preserve copies of their electronic mail communications on the hard drives of their individual personal computers or elsewhere, and many e-mails were preserved, there were inadequate systems or procedures to ensure that employees did so for the requisite record-keeping period. In some instances, hard drives of computers were erased when individuals left the employment of the Respondent.

D. LEGAL DISCUSSION

Section 17(a)(1) of the Exchange Act provides that each member of a national securities exchange, broker, or dealer "shall make and keep for prescribed periods such records, furnish copies thereof, and make and disseminate such reports as the Commission, by rule, prescribes as necessary or appropriate in the public interest, for the protection of

<http://www.sec.gov/litigation/admin/34-46937.htm>

10/29/2003 13:55 FAX

018/021

Deutsche Bank Securities, Inc., et al: Adm'n. Proc. Rel. No. 34-46937 / December 3, 2002 Page 4 of 5

investors, or otherwise in furtherance of the purposes of this title."

The Commission has emphasized the importance of the records required by the rules as "the basic source documents" of a broker-dealer. *Statement Regarding the Maintenance of Current Books and Records by Brokers and Dealers*, 4 SEC Doctet 195 (April 6, 1974). The record keeping rules are "a keystone of the surveillance of broker and dealers by [Commission] staff and by the securities industry's self-regulatory bodies." *Edward J. Mawod & Co.*, 46 S.E.C. 865, 873 n.39 (1977) (citation omitted), *aff'd sub nom. Mawod & Co. v. SEC*, 591 F.2d 588 (10th Cir. 1979).

Pursuant to its authority under Section 17(a)(1) of the Exchange Act, the Commission promulgated Rule 17a-4. Rule 17a-4(b)(4) in turn requires each Respondent to "preserve for a period of not less than 3 years, the first two years in an accessible place... [o]riginals of all communications received and copies of all communications sent by such member, broker or dealer (including inter-office memoranda and communications) relating to his business as such." Rule 17a-4 is not by its terms limited to physical documents. The Commission has stated that "internal electronic mail communications relating to a broker-dealer's 'business as such' fall within the purview of Rule 17a-4 and that, for the purposes of Rule 17a-4, 'the content of the electronic communication is determinative' as to whether that communication is required to be retained and accessible. *Reporting Requirements for Brokers or Dealers under the Securities Exchange Act of 1934*, Rel. No. 34-38245 (Feb. 5, 1997).

Based on the foregoing and Respondents' Offers of Settlement, the Commission finds that with respect to electronic mail communications during the relevant period, each Respondent willfully violated Section 17(a) of the Exchange Act and Rule 17a-4 promulgated thereunder by failing to preserve electronic mail communications for three years, and/or by failing to preserve electronic mail communications for the first two years in an accessible place.¹

IV.

Each Respondent has undertaken to review its procedures regarding the preservation of electronic mail communications for compliance with the federal securities laws and regulations, and the rules of NASD and New York Stock Exchange. Within 90 days of the issuance of this Order, unless otherwise extended by the staff of the Commission for good cause shown, each Respondent undertakes and agrees to inform the Commission in writing that it has completed its review and that it has established systems and procedures reasonably designed to achieve compliance with those laws, regulations, and rules concerning the preservation of electronic mail communications.

V.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions specified in Respondents' Offers.

ACCORDINGLY, IT IS HEREBY ORDERED:

<http://www.sec.gov/litigation/admin/34-46937.htm>

10/29/2003 15:55 FAX

017/021

Deutsche Bank Securities, Inc., et al.: Admin. Proc. Rel. No. 34-46937 / December 3, 2002 Page 3 of 5

- A. Respondents, and each of them, pursuant to Section 21C of the Exchange Act, cease and desist from committing or causing any violations and any future violations of Section 17(a) of the Exchange Act and Rule 17a-4 promulgated thereunder.
- B. Respondents, and each of them, are censured pursuant to Section 15(b)(4) of the Exchange Act.
- C. Each Respondent shall, within ten days of the entry of this Order, pay the amount of \$1,650,000, for a total of \$9,250,000 by all named Respondents. Each Respondent shall make payment as follows: (i) pursuant to Section 15(b)(4) and Section 21B of the Exchange Act, Respondent shall pay a civil monetary penalty of \$350,000 to the United States Treasury; (ii) pursuant to Respondent's agreement with NASD in related proceedings, Respondent shall pay a fine in the amount of \$550,000 to NASD; and (iii) pursuant to Respondent's agreement with the New York Stock Exchange in related proceedings, Respondent shall pay a fine in the amount of \$550,000 to the New York Stock Exchange. Such payment to the U.S. Treasury shall be: (A) made by United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and (D) submitted under cover letter that identifies the payer as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Antonia Chlon, Associate Director, Division of Enforcement, Securities and Exchange Commission, 450 5th Street N.W., Washington, D.C. 20549-0801.
- D. Each Respondent shall comply with the undertaking contained in Section IV., above.

By the Commission.

Jonathan G. Katz
Secretary

¹ "Willfully" as used in this Order means intentionally committing the act which constitutes the violation. See *Wansover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000); *Tager v. SEC*, 344 F.2d 5, 8 (2d Cir. 1965). There is no requirement that the actor also be aware that he is violating one of the Rules or Acts.

<http://www.sec.gov/litigation/admin/34-46937.htm>

Home | Previous Page

Modified: 12/03/2002

<http://www.sec.gov/litigation/admin/34-46937.htm>

CERTIFICATE OF SERVICE

I, Suzanne J. Prysak, hereby certify that a true and correct copy of the foregoing **PLAINTIFF CPHS' THIRD REQUEST FOR PRODUCTION OF DOCUMENTS** has been served upon the parties listed below via Facsimile on this 17th day of December, 2003.

Thomas A. Clare, Esq.
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Joseph Ianno, Jr., Esq.
CARLTON FIELDS
222 Lake View Avenue, Suite 1400
West Palm Beach, FL 33401


Suzanne J. Prysak

FAX TRANSMITTAL

JENNER & BLOCK

Jenner&Block LLP
One IBM Plaza
Chicago, IL 60611-7609
Tel 312 222-9350
www.jenner.com

Chicago
Dallas
Washington, DC

Date: December 18, 2003

To: Thomas A. Clare, Esq.
KIRKLAND & ELLIS

Fax: 202 879 5200

Voice: 202 879 5993

From: Clark C. Johnson
312 923-2739

Employee Number:

Client Number: 41198 10003

Important: This message is intended only for the use of the individual or entity to which it is addressed, and may contain information that is attorney work product, privileged, confidential and exempt from disclosure under applicable law. If the reader of this message is not the intended recipient, or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone, and return the original message to us at the above address via postal service. Thank you.

Message: Please see attached.

Total number of pages including this cover sheet:

Time Sent:

If you do not receive all pages, please call: 312 222-9350

Sent By:

Secretary:

Extension:

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Company, Inc.
Case No.: 2003 CA 005045 AI
Amended Notice of Taking Videotaped Depositions
December 18, 2003

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 2003 CA 005045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

AMENDED NOTICE OF TAKING VIDEOTAPED DEPOSITIONS

To: Thomas A. Clare, Esq.
KIRKLAND & ELLIS, LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lake View Avenue
Suite 1400
West Palm Beach, FL 33401

PLEASE TAKE NOTICE that Plaintiff Coleman (Parent) Holdings, Inc. ("CPH") requests the depositions upon oral examination of the following non-party witnesses pursuant to the subpoenas and commission issued by the Circuit Court of the Fifteenth Judicial District of Florida and the subpoena issued in aid of that commission by the Superior Court of Los Angeles County, California on the dates, times, and at the locations set forth below:

DEPONENT	DATE AND TIME	LOCATION
Tyrone Chang	January 8, 2004 at 9:00 a.m.	SUSMAN GODFREY L.L.P. Suite 950 1901 Avenue of the Stars Los Angeles, CA 90067-6029

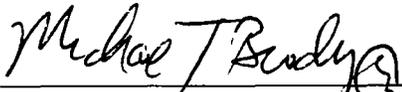
Dennis Pastrana	January 12, 2004 at 9:00 a.m.	ESQUIRE DEPOSITION SERVICES Courthouse Tower 44 West Flagler Street, 14th Floor Miami, Florida 33130
William Pruitt	January 13, 2004 at 9:00 a.m.	ESQUIRE DEPOSITION SERVICES Courthouse Tower 44 West Flagler Street, 14th Floor Miami, Florida 33130
Mark Brockelman	January 14, 2004 at 9:00 a.m.	SEARCY DENNEY SCAROLA BARNHART & SHIPLEY, P.A. 2139 Palm Beach Lakes Blvd. West Palm Beach, Florida 33409
Lawrence Bornstein	January 15, 2004 at 9:00 a.m.	SEARCY DENNEY SCAROLA BARNHART & SHIPLEY, P.A. 2139 Palm Beach Lakes Blvd. West Palm Beach, Florida 33409

The witnesses are requested to bring to the depositions the documents specified in Exhibit A to the Subpoena for each witness. The depositions will be recorded by stenographic and audio-visual means and will be taken before a person authorized to administer oaths and will continue day to day until completed. The videographer for the Florida depositions will be Esquire Deposition Services, Miami, Florida and the videographer for the Los Angeles deposition will be Esquire Deposition Services, Los Angeles, California.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by facsimile and mail to all counsel on the attached Service List, this 18th day of December, 2003.

Dated: December 18, 2003

COLEMAN (PARENT) HOLDINGS INC.

By: 
One of Its Attorneys

Jerold S. Solovy
Michael T. Brody
Deirdre E. Connell
JENNER & BLOCK LLP
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

Jack Scarola
SEARCY DENNEY SCAROLA BARNHART
& SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33409
(561) 686-6300

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Company, Inc.
Case No.: 2003 CA 005045 AI
Amended Notice of Taking Videotaped Depositions
December 18, 2003

SERVICE LIST

Thomas A. Clare, Esq.
KIRKLAND & ELLIS, LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lake View Avenue
Suite 1400
West Palm Beach, FL 33401

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

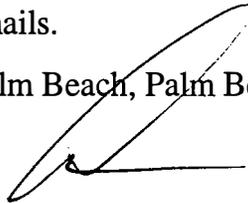
MORGAN STANLEY & CO., INC.,
Defendant(s).

**ORDER ON COLEMAN (PARENT) HOLDINGS INC.'S AMENDED MOTION TO
COMPEL CONCERNING EMAILS**

THIS CAUSE came before the Court December 17, 2003 on Coleman (Parent) Holdings Inc.'s Amended Motion to Compel Concerning Emails, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that the Motion is Granted, in part. Within 30 days, Morgan Stanley shall produce a corporate representative to testify pursuant to Florida Rule of Civil Procedure 1.310 concerning Morgan Stanley's e-mail retention policies, practices, and procedures, and concerning Morgan Stanley's ability (including the procedures, time, labor, and expense involved) to retrieve e-mails.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 18 day of December, 2003.



ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci
655 15th Street, NW, Suite 1200
Washington DC 20005

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, Il 60611

Mark F. Bideau, Esq.
777 S. Flagler Dr., Suite 300E
West Palm Beach, FL 33401

David M. Wells, Esq.
50 N. Laura Street, Suite 3300
Jacksonville, FL 32202

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

CASE NO: 2003 CA 005045 AI

v.

Judge Elizabeth T. Maass

MORGAN STANLEY & CO., INC.,

Defendant.

**PLAINTIFF'S MOTION FOR A PROTECTIVE ORDER TO
BAR CERTAIN NON-PARTY DISCOVERY**

Pursuant to Fla. R. Civ. P. 1.280(c), Plaintiff Coleman (Parent) Holdings Inc. ("CPH") hereby requests a protective order barring Defendant Morgan Stanley & Co., Inc. ("Morgan Stanley") from obtaining certain discovery that it has sought from non-parties by way of subpoena. In support of this motion, CPH states as follows:

1. This motion has been necessitated by Morgan Stanley's recent service in the State of New York of subpoenas on two non-parties that provided services in connection with transactions involving CPH and its parent, MacAndrews & Forbes Holdings Inc. ("MAFCO"), in the past — the law firm of Wachtell, Lipton, Rosen & Katz ("Wachtell Lipton") and the investment banking firm of Credit Suisse First Boston ("Credit Suisse"). Specifically, the subpoenas seek a wide array of documents from Wachtell Lipton and Credit Suisse that pertain to services that these firms may have provided in connection with a number of non-Sunbeam/Coleman transactions involving CPH and MAFCO, even though these documents have nothing to do with the transaction by which Sunbeam acquired CPH's 82% stock interest in Coleman and cannot possibly lead to the discovery of admissible evidence. The objectionable document requests in the subpoenas are as follows:

A. Wachtell Lipton Subpoena ¶ 10, Credit Suisse Subpoena ¶ 7.

2. These document requests call for "[a]ll documents reflecting, referring, or relating to due diligence performed by [Wachtell Lipton or Credit Suisse] in connection with the sale of any company in which CPH or MAFCO received stock as part of the consideration for sale, including,

but not limited to the transactions listed in Attachment B.” *See* Exh. A, Wachtell Lipton Subpoena ¶ 10; Exh. B, Credit Suisse Subpoena ¶ 7 (emphasis added). Attachment B to the subpoenas lists a number of transactions, including transactions involving Revlon and Panavision, that have nothing to do with the Sunbeam transaction. Because Morgan Stanley’s document requests are overbroad, and cannot possibly lead to the discovery of admissible evidence concerning the only transaction at issue in this case, they should be barred.

B. Wachtell, Lipton Request No. 33, Credit Suisse Request No. 30.

3. These document requests call for “[d]ocuments sufficient to identify any work or services you performed for or on behalf of CPH or MAFCO in 1997 or 1998, regardless of whether you were compensated for that work.” *See* Exh. A, Wachtell Lipton Subpoena ¶ 33; Exh. B, Credit Suisse Subpoena ¶ 30. These requests also seek documents that have nothing to do with Sunbeam or any issue relevant to this case, and as a result, the requests are overbroad and cannot possibly lead to the discovery of admissible evidence.

C. Credit Suisse Requests Nos. 18, 35.

4. CPH does not object to the portion of Request No. 18 that seeks “documents concerning your efforts to have CPH or MAFCO retain or maintain your services in connection with the Coleman Transaction,” but CPH objects to the additional portion demanding the production of documents “in connection with any other proposed engagement involving the performance of due diligence,” because that request for documents concerning other engagements is not likely to lead to the discovery of admissible evidence. *See* Exh. B, Credit Suisse Subpoena ¶ 18. Similarly, Request No. 35 is not limited to the Sunbeam transaction at issue in this case. Instead, the request calls for “[a]ll documents concerning employment contracts, performance evaluations, and/or personnel files of all [Credit Suisse] personnel who performed services for or on behalf of CPH or MAFCO in 1997 or 1998, to the extent that those documents also relate to due diligence performed on engagements for CPH or MAFCO.” *See id.* ¶ 35. To the extent this request calls for documents relating to services or transactions unrelated to the Sunbeam transaction, the request is overbroad and cannot possibly lead to the discovery of admissible evidence. There is no issue in this case

concerning whether Credit Suisse should have praised or punished its personnel for their performance on any transaction, whether or not Sunbeam-related.

5. All of the non-objectionable portions of the foregoing document requests are duplicative of other requests to these non-parties that are not at issue in this motion. *See, e.g.*, Exh. A, Wachtell Lipton Subpoena ¶ 2 (requesting “[a]ll documents referring to the Coleman Transaction”); Exh. B, Credit Suisse Subpoena ¶ 2 (same). Thus, this Court need not try to cut back these requests in any way to save non-objectionable portions.

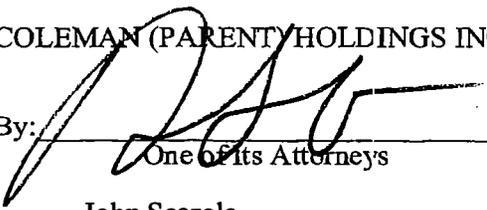
6. Counsel for CPH wrote counsel for Morgan Stanley on December 17, 2003, inviting Morgan Stanley to reconsider the foregoing discovery requests and to confer in an attempt to resolve this dispute. CPH’s efforts were not successful.

WHEREFORE, CPH requests a protective order barring Morgan Stanley from obtaining any documents responsive to Requests Nos. 10 and 33 of the Wachtell Lipton subpoena, and to Requests Nos. 7, 18, 30, and 35 of the Credit Suisse subpoena.

Dated: December 19, 2003

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

By: 

One of its Attorneys

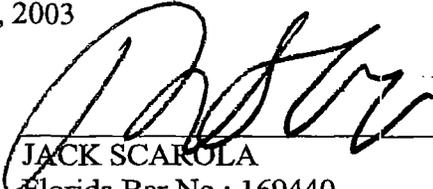
Jerold S. Solovy
JENNER & BLOCK LLP
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

John Scarola
SEARCY DENNEY SCAROLA
BARNHART & SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33402-3626
(561) 686-6300

#1017237

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Fax and Federal Express to all counsel on the attached list and by Federal Express to Theodore Gewertz, Wachtell, Lipton, Rosen and Katz, 51 West 52nd Street, New York, NY 10019; and Nancy Swift, VP and Counsel, Credit Suisse First Boston, One Madison Avenue, New York, NY 10010 on this 19th day of Dec-, 2003



JACK SCAROLA

Florida Bar No.: 169440

Searcy Denney Scarola

Barnhart & Shipley, P.A.

2139 Palm Beach Lakes Boulevard

West Palm Beach, FL 33409

Phone: (561) 686-6300

Fax: (561) 478-0754

Attorneys for Plaintiff

Coleman (Parent) Holdings Inc. vs Morgan Stanley & Company
Case No.: 2003 CA 005045 AI

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block, LLC
One IBM Plaza
Suite 4400
Chicago, IL 60611

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

Index No. 121095/03

In the matter of the application of MORGAN
STANLEY & CO. INCORPORATED,

Petitioner,

for an order to take the deposition of

Custodian of Records of Credit Suisse First
Boston and Custodian of Records of Wachtell,
Lipton, Rosen, and Katz

**JUDICIAL SUBPOENA
DUCES TECUM**

In an action entitled

COLEMAN (PARENT) HOLDINGS, INC. V.
MORGAN STANLEY & CO., INC. pending
In the Circuit Court of the 15th Judicial Circuit
of the State of Florida.

The People of the State of New York

To: Records Custodian
Wachtell, Lipton, Rosen, and Katz
51 West 52nd Street
New York, NY 10019

GREETINGS:

WE COMMAND YOU, That all business and excuses being laid aside, you and each of you
to appear and attend before a public notary at the offices of Kirkland & Ellis, LLP, Citigroup Center, 153 East
53rd Street, New York, NY 10022 on January 2, 2004 at 10:00 AM, and at any recessed or adjourned date to give
testimony in this action on the part of the Petitioner, Morgan Stanley & Co. Incorporated, and that you bring
with you, and produce at the same time and place certain, see Attachment A and Attachment B,

now in your custody, and all other deeds, evidences and writings, which you have in your custody or power,
concerning the premises.

Failure to comply with this subpoena is punishable as a contempt of Court and shall make you liable to the
person on whose behalf this subpoena was issued for a penalty not to exceed fifty dollars and all damages sustained
by reason of your failure to comply.

Dated: 12/12/03


(The name signed must be printed beneath)
Jeanne M. Heffernan, Esq.

Attorney(s) for Petitioner

Office and Post Office Address:
Kirkland & Ellis, LLP
153 East 53rd Street
New York, NY 10022
(212) 446-4800

A copy of this subpoena must
accompany all papers or other items
delivered to the court.

Unless the subpoena duces tecum directs the production of original documents for inspection and copying at the place where such items are
usually maintained, it shall be sufficient to deliver complete and accurate copies of the items to be produced. The reasonable production expenses
of a non-party witness shall be defrayed by the party seeking discovery, CPLR § 3122 (d).

EXHIBIT
tabler
A



At the Ex Parte Motion Term of the
Supreme Court of the State of New York,
held in and for the County of New York, at
the County Courthouse, on the 10th day of

MARTIN SCHOENFELD
December 10, 2003

Present Hon.

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

**In the matter of the application of MORGAN
STANLEY & CO. INCORPORATED,**

INDEX NO. 121095/2003

Petitioner,

**ORDER TO TAKE DEPOSITION OF
WITNESSES FOR USE WITHOUT THE
STATE PURSUANT TO CPLR § 3102(e)**

for an order to Take the Deposition of

Custodian of Records of Credit Suisse First
Boston and Custodian of Records of Wachtell,
Lipton, Rosen, and Katz

In an action entitled

**COLEMAN (PARENT) HOLDINGS, INC. V.
MORGAN STANLEY & CO., INC.** pending
in the Circuit Court of the 15th Judicial Circuit
of the State of Florida.

An application having been made on behalf of defendant Morgan Stanley & Co. Inc. for
the taking of the deposition and/or the production of documents of Respondents pursuant to a
Commission issued in connection with an action pending in the Circuit Court of the 15th Judicial
Circuit of the State of Florida.

NOW, on reading and filing the Affirmation of Eric Leon, Esq., affirmed to on December
9, 2003, the Commission to take depositions of Respondents and the accompanying document
requests. It is,

ORDERED that oral depositions of Respondents be conducted by video and stenographic means at the offices of Kirkland & Ellis, LLP, 153 East 53rd Street, New York, New York, 10022-4611 on January 2, 2004 at 10:00 a.m. before a notary public or other person authorized to administer oaths in order to give testimony and/or produce documents; and it is further

~~ORDERED that the documents requested be produced at the offices of Kirkland & Ellis, LLP, 153 East 53rd Street, New York, New York, 10022-4611 on January 2, 2004 at 10:00 a.m.; and it is further~~

ORDERED that personal service of a copy of this Order along with the subpoena upon Respondents and service by mail ^{or fax} on all attorneys of record ^{in the Florida action} on or before December 12, 2003 shall be sufficient.

ENTER:



ATTACHMENT A**INSTRUCTIONS**

The connectives "and" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery request all responses that might otherwise be construed to be outside of its scope.

2. The use of the singular form of any word includes the plural and vice versa.

3. Documents requested and to be produced include all Documents in the possession, custody or control of the plaintiff including, but not limited to, any agents, employees, contractors, attorneys, and consultants or experts working for or in favor of the plaintiff or its attorneys.

4. If, in responding to this Subpoena, you encounter any ambiguities when construing a request or definition, the response shall set forth the matter deemed ambiguous and the construction used in responding.

5. Whenever in this Subpoena you are asked to identify or produce a document which is deemed by you to be properly withheld from production for inspection or copying under claim of privilege (including, but not limited to, the work product doctrine), provide a privilege log that includes: the type of document, the general subject matter of the document, the date of the document, and such other information as is sufficient to identify the document, including, where appropriate, the author, addressee, custodian, and any other recipient of the document, and where not apparent, the relationship of the author, the addressee, custodian, and any other recipient to each other, in a manner that, without revealing the information claimed

to be protected, will enable this party to assess the applicability of the privilege protection claimed by you. The privilege log shall be provided within the time set forth in the agreed-upon order.

6. If production of any requested document(s) is objected to on the grounds that production is unduly burdensome, describe the burden or expense of the proposed discovery.

7. When a document contains both privileged and non-privileged material, the non-privileged material must be disclosed to the fullest extent possible without disclosing the privileged material. If a privilege is asserted with regard to part of the material contained in a document, the party claiming the privilege must clearly indicate the portions as to which the privilege is claimed. When a document has been redacted or altered in any fashion, identify as to each document the reason for the redaction or alteration. Any redaction must be clearly visible on the redacted document.

8. If a responsive document exists but is no longer in your possession, custody, or control, state: its date, author(s), recipient(s), subject matter, what disposition was made of the document, and the person or entity, if any, now in possession, custody, or control of the document. If a responsive document has been destroyed, identify the date of destruction, the person who destroyed the document and the person who directed that the document be destroyed and state the reason for its destruction.

9. Produce all of the documents responsive to the numbered requests below either as they are kept in the usual course of business or by custodian.

10. If any of these documents cannot be produced in full, you are requested to produce them to the fullest extent possible, specifying clearly the reasons for your inability to produce the remainder and stating any information, knowledge, or belief you have concerning the unproduced portion.

11. If the requested documents are maintained in a file, the file folder is included in the request for production of those documents.

12. The terms "any," "all" and "each" shall be construed to mean "any," "all," or "each.

13. The term "including" shall be construed to mean "including but not limited to."

14. The present tense shall be construed to include the past and future tenses.

15. The specificity of any request herein shall not be construed to limit the generality or reach of any other request herein.

16. Unless otherwise specified, this Request calls for the production of documents created, delivered, distributed, sent, received, accessed, or modified up to the date of your response to this Request.

DEFINITIONS

"Advisors" means financial advisors, legal advisors, accountants, consultants and any other third-party advising or assisting in any way with the Coleman Transaction.

2. The "Bankruptcy Proceeding" means *In re Sunbeam Corp.*, No. 01-40291 (AJG) (Bankr. S.D.N.Y.), and every adversary proceeding therein.

3. "Communication" means any exchange or transmittal of information by any means of transmission, including, without limitation, face-to-face conversation, mail, overnight delivery, Internet, telephone, electronic mail, or facsimile.

4. The term "concerning" means relating to, referring to, describing, evidencing, or constituting.

5. "Coleman" means Coleman Company, Inc

6. The "Coleman Transaction" means Sunbeam's acquisition of Coleman Company, Inc. from CPH and all related communications, agreements, and transactions, including the February 27, 1998 Agreements and the March 30, 1998 closing.

7. "CPH" means Coleman (Parent) Holdings Inc. and any of its officers, directors, former or present employees, representatives and agents.

8. Wachtell, Lipton, Rosen & Katz ("Wachtell") means Wachtell and any of its officers, directors, former or present employees, representatives and agents.

9. "Document" means any recording in any tangible form of any information, whether handwritten, typed, printed, stored on computer disks, tapes, or databases, or otherwise reproduced. "Document" or "documents" also includes electronic documents whether stored on servers or hard drives, e-mail, backup tapes, voicemail and video and audio

recordings. A draft or non-identical copy is a separate document within the meaning of this term.

10. The "February 27, 1998 Agreements" means (a) the Agreement and Plan of Merger dated February 27, 1998 between Sunbeam Corp., Laser Acquisition Corp., CLN Holdings, Inc. and Coleman (Parent) Holdings Inc. and (b) the Agreement and Plan of Merger dated February 27, 1998 between Sunbeam Corp., Camper Acquisition Corp., and The Coleman Company, Inc., and all schedules, exhibits, and documents related to those Agreements.

11 "Financial Information" means information concerning the past or present financial condition of Sunbeam or Sunbeam securities.

12. "Financial Statements" means documents reflecting Financial Information, including without limitation quarterly reports, yearly reports, balance sheets, statements of income, earnings, cash flow projections, and sources and applications of funds.

13. The term "identify" (with respect to documents) means to give, to the extent known, the (i) type of document; (ii) general subject matter; (iii) date of the document; and (iv) author(s), addressee(s) and recipient(s).

14. "Litigations" means *In re Sunbeam Securities Litigation*, 98-8258-Civ.-Middlebrooks (S.D. Fla); *Camden Asset Management LP. v. Sunbeam Corporation*, 98-8773-Civ.-Middlebrooks and 98-8275-Civ.-Middlebrooks (S.D. Fla); *Krim v. Dunlap*, No. CL 983168AD (15th Jud. Cir., Fla.); *Stapleton v. Sunbeam Corp.*, No. 98-1676-Civ.-King (S.D. Fla); *Sunbeam Corp. v. PricewaterhouseCoopers LLP*, No. CL 005444AN (15th Jud. Cir., Fla.); *In re Sunbeam Corp., Inc.*, No. 01-40291 (AJG) (Bankr. S.D.N.Y.) and any adversary proceedings

therein; *SEC v. Dunlop*, No. 01-8437-Civ.-Middlebrooks (S.D. Fla.); *Oaktree Capital Management LLC v. Arthur Andersen LLP*, No. BC257177 (L.A. Cty., CA); and *Coleman (Parent) Holdings Inc. v. Arthur Andersen LLP*, No. CA 01-06062AN (15th Jud. Cir., Fla.) and any other action arising out of the Sunbeam Acquisition of Coleman.

15. "MAFCO" means MacAndrews & Forbes, Inc. and any of its officers, directors, parents, subsidiaries, former or present employees, representatives, and agents.

16. "MS & Co." means Morgan Stanley & Co. Inc. and any of its officers, directors, former or present employees, representatives and agents.

17. "MSSF" means Morgan Stanley Senior Funding, Inc. and any of its officers, directors, former or present employees, representatives and agents.

18. The term "person" is defined as any natural person or any business, legal or governmental entity or association.

19. The term "relating to" means concerning, evidencing, referring to, or constituting.

20. The "Relevant Period," unless otherwise indicated, shall be from January 1, 1997 through the date of this subpoena.

21. "SEC Administrative Proceedings" means *In the Matter of Sunbeam Corp.*, SEC Administrative Proceeding File No. 3-10481, and *In the Matter of David C. Fannin*, SEC Administrative Proceeding File No. 3-10482

22. "Sunbeam" means Sunbeam Corporation or any of its subsidiaries, divisions, predecessors, successors, present and former employees, representatives, and agents.

23. "Synergies" means post-acquisition gains through increased revenue and/or decreased cost.

24. The terms "you" or "your" means "Wachtel" as defined in Definition 8.

DOCUMENTS TO BE PRODUCED

All documents concerning the negotiation, signing, and implementation of the February 27, 1998 Agreements.

2. All documents referring or relating to the Coleman Transaction.
3. All documents reflecting, referring, or relating to communications between Wachtel and any MAFCO representatives or Advisors regarding the Coleman Transaction.
4. Documents sufficient to identify all personnel or persons acting on your behalf who performed work for MAFCO concerning Sunbeam or the Coleman Transaction.
5. All timekeeping sheets or records maintained by you or any of your personnel or attorneys concerning activities or services performed for MAFCO concerning the Coleman Transaction.
6. All bills and invoices rendered by you and/or expenses incurred on behalf of MAFCO in connection with the Coleman Transaction

7. All documents concerning any claims or potential claims that MAFCO brought or investigated bringing against Sunbeam, Arthur Andersen, MS & Co., or Coopers & Lybrand arising out of the Coleman Transaction.

8. All documents referring or relating to Arthur Andersen's 1996 and 1997 audit of Sunbeam, including without limitation any review, investigation, analysis, or due diligence conducted by Wachtell in connection with the audit.

9. All documents referring or relating to any review, investigation, analysis, or due diligence of Sunbeam conducted by Wachtell or CPH, including without limitation all documents reflecting Financial Information obtained by Wachtell or CPH.

10. All documents reflecting, referring, or relating to due diligence performed by Wachtell in connection with the sale of any company in which CPH or MAFCO received stock as part of the consideration for sale, including but not limited to the transactions listed in Attachment B.

11. All documents referring or relating to Sunbeam's public announcement of the Coleman Transaction.

12. All documents concerning or identifying any communications that took place between or among Wachtell, CPH or MAFCO, and Arthur Andersen concerning Sunbeam or the Coleman Transaction.

13. All documents reflecting, referring, or relating to any communications that took place between Wachtell, CPH or MAFCO, and Sunbeam concerning the Coleman Transaction.

14. All documents reflecting, referring, or relating to any communications that took place between or among Wachtell, CPH or MAFCO, and MS & Co. or Morgan Stanley Senior Funding related to Sunbeam or the Coleman Transaction.

15. All documents concerning the potential or actual integration of Coleman, First Alert, and/or Signature Brands with Sunbeam, including, but not limited to, studies, reports, analyses, evaluations, projections, estimates, comments, or other work performed relating to actual or potential synergies to be realized from such integration.

16. All of your document retention policies for the Relevant Period.

17. All documents referring or relating to Wachtell's policies, procedures, manuals, guidelines, reference materials, or checklists for performing due diligence that were in effect during the Relevant Period.

18. All calendars and other day planners, whether paper or electronic, reflecting meetings, events, telephone conferences or other communications regarding the Coleman Transaction.

19. All documents you have provided to or received from any party in the Bankruptcy Proceedings or in any of the Litigations, Arbitrations, or SEC Administrative Proceedings, including documents responding to discovery requests, interrogatories, privilege logs, reports, communications, filings, testimony, legal memoranda, statements, affidavits, declarations and other documents.

20. All documents you have provided to or received from the SEC or any other state or federal governmental or regulatory body concerning Sunbeam or Coleman.

21 All documents concerning your efforts to have CPH or MAFCO retain or maintain your services in connection with the Coleman Transaction.

22 All documents concerning your retention or engagement by MAFCO for services related to the Coleman Transaction.

23 All documents concerning any legal or fairness opinions issued by you in connection with the Coleman Transaction.

24 All documents you obtained or generated in connection with your engagement by CPH or MAFCO related to Coleman or Sunbeam's acquisition of Coleman.

25 All documents reflecting all fees and expenses paid by CPH or MAFCO to you in connection with the Coleman Transaction.

26 All documents concerning the closing of the Coleman Transaction, including without limitation all documents concerning the decision to close the Coleman Transaction.

27 All documents used, analyzed, consulted, or prepared by any Wachtell employee or agent concerning Sunbeam.

28 All documents concerning communications between or among you, Sunbeam, Arthur Andersen, MS & Co., CPH or MAFCO, and Wall Street analysts concerning Sunbeam or the Coleman Transaction.

29 All documents concerning the valuation of Sunbeam securities, including without limitation analyst reports from and including July 1, 1996 through December 31, 1998.

30. All documents concerning any valuation of Coleman or Coleman securities.
31. All documents concerning Sunbeam's financial statements and/or restated financial statements.
32. All documents concerning Sunbeam's first quarter 1998 sales and/or earnings.
33. Documents sufficient to identify any work or services you performed for or on behalf of CPH or MAFCO in 1997 or 1998, regardless of whether you were compensated for that work.
34. All documents concerning the statements contained in the press releases issued by Sunbeam on October 23, 1997, March 19, 1998, April 3, 1998, May 9, 1998, June 15, 1998, June 25, 1998, June 30, 1998, October 20, 1998, and November 12, 1998.
35. All documents concerning communications relating to Sunbeam, Coleman, or CPH, including without limitation internal communications within Wachtell or communications between or among Wachtell, MS & Co., MSSF and Sunbeam; Skadden, Arps, Slate, Meagher & Flom LLP; Coopers & Lybrand LLP; Llama Company; Arthur Andersen LLP; Sard Verbinnen & Co., Inc.; Hill & Knowlton, Inc.; The Coleman Company, Inc.; Coleman (Parent) Holdings Inc.; MacAndrews & Forbes Holdings, Inc.; Wachtell Lipton, Rosen & Katz; Davis Polk & Wardwell; or any other person or company, and/or any of their respective employees, agents, or representatives.
36. All documents concerning Albert Dunlap and/or Russell Kersh.

37. All documents concerning MARCO with respect to Sunbeam, Coleman or CPH.

38. All documents concerning Scott Paper's financial condition that were created between January 1, 1997 and January 1, 2000.

39. All transcripts of and exhibits to any depositions, recorded statements, or affidavits in connection with any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

40. All affidavits, declarations, or other testimonial statements filed or submitted in connection with any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

41. All documents concerning or related to the August 12, 1998 Settlement Agreement between CPH and Sunbeam.

ATTACHMENT B

MAFCO's 2003 purchase of Series C Preferred Stock from Revlon, Inc. ("Revlon") and purchase of shares of Class A Common Stock from Revlon.

- **Revlon Holdings Inc.'s 1993 purchase of Series A Preferred Stock from Revlon.**
Coleman's 1995 purchase of the shares in Sierra Corporation of Forth Smith, Inc. owned by a group of private investors.
Revlon Holdings Inc.'s 2001 receipt of common and preferred shares of Revlon in exchange for certain assets held by Revlon Holdings Inc.
- **C&F (Parent) Holdings Inc.'s ("C&F Parent") 1995 receipt of shares in MAFCO Consolidated Group Inc.**
- **MAFCO's 2001 receipt of preferred shares in MFW in exchange for certain Senior Subordinated Discount Notes that it owned.**
- **MAFCO's 2002 purchase of preferred shares in Panavision from Panavision.**
MAFCO's 2003 purchase of preferred shares in Panavision from Panavision.
- **MAFCO's 2003 purchase of units in SpectaGuard Acquisition LLC and all of the shares of SpectaGuard Holding Corporation, a unitholder in SpectaGuard Acquisition LLC.**

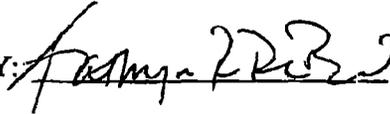
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by facsimile and email to all counsel of record on the attached service list on this 12th day of December, 2003.

Thomas D. Yannucci, P.C.
Thomas A. Clare
Zhonette M. Brown
Ryan P. Phair
Kathryn R. DeBord
KIRKLAND & ELLIS LLP
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

Counsel for Defendant
Morgan Stanley & Co. Incorporated

Joseph Ianno, Jr. (FL Bar # 655351)
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
email: jianno@carltonfields.com

BY: 

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

Index No. 12:1095/03

**In the matter of the application of MORGAN
STANLEY & CO. INCORPORATED,**

Petitioner,

for an order to take the deposition of

**Custodian of Records of Credit Suisse First
Boston and Custodian of Records of Wachtel,
Lipton, Rosen, and Katz**

In an action entitled

**COLEMAN (PARENT) HOLDINGS, INC. V.
MORGAN STANLEY & CO., INC. pending
In the Circuit Court of the 15th Judicial Circuit
of the State of Florida.**

**JUDICIAL SUBPOENA
DUCES TECUM**

The People of the State of New York

To: **Records Custodian
Credit Suisse First Boston
Eleven Madison Avenue
New York, NY 10010**

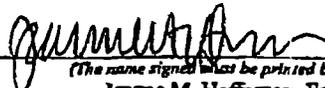
GREETINGS:

**WE COMMAND YOU, That all business and excuses being laid aside, you and each of you
to appear and attend before a public notary at the offices of Kirkland & Ellis, LLP, Citigroup Center, 153 East
53rd Street, New York, NY 10022 on January 2, 2004 at 10:00 AM, and at any recessed or adjourned date to
give testimony in this action on the part of the Petitioner, Morgan Stanley & Co., Incorporated and that you
bring with you, and produce at the same time and place certain, see Attachment A and Attachment B,**

**now in your custody, and all other deeds, evidences and writings, which you have in your custody or power,
concerning the premises.**

**Failure to comply with this subpoena is punishable as a contempt of Court and shall make you liable to the
person on whose behalf this subpoena is issued for a penalty not to exceed fifty dollars and all damages sustained
by reason of your failure to comply.**

Dated: 12/12/03


(The name signed must be printed beneath)
Jeanne M. Heffernan, Esq.

**A copy of this subpoena must
accompany all papers or other items
delivered to the court.**

Attorney(s) for Petitioner

Office and Post Office Address:
Kirkland & Ellis, LLP
153 East 53rd Street
New York, NY 10022
(212) 446-4800

**Unless the subpoena duces tecum directs the production of original documents for inspection and copying at the place where such items are
usually maintained, it shall be sufficient to deliver complete and accurate copies of the items to be produced. The reasonable production expenses
of a non-party witness shall be defrayed by the party seeking discovery, CPLR § 3122 (d).**

EXHIBIT
B



At the Ex Parte Motion Term of the
Supreme Court of the State of New York,
held in and for the County of New York, at
the County Courthouse, on the 10th day of

MARTIN SCHOENFELD
December 10, 2003

Present Hon. _____

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

In the matter of the application of MORGAN
STANLEY & CO. INCORPORATED,

INDEX NO. 121095/2003

Petitioner,

ORDER TO TAKE DEPOSITION OF
WITNESSES FOR USE WITHOUT THE
STATE PURSUANT TO CPLR § 3102(e)

for an order to Take the Deposition of

Custodian of Records of Credit Suisse First
Boston and Custodian of Records of Wachtell,
Lipton, Rosen, and Katz

In an action entitled

COLEMAN (PARENT) HOLDINGS, INC. V.
MORGAN STANLEY & CO., INC. pending
in the Circuit Court of the 15th Judicial Circuit
of the State of Florida.

An application having been made on behalf of defendant Morgan Stanley & Co. Inc. for
the taking of the deposition and/or the production of documents of Respondents pursuant to a
Commission issued in connection with an action pending in the Circuit Court of the 15th Judicial
Circuit of the State of Florida.

NOW, on reading and filing the Affirmation of Eric Leon, Esq., affirmed to on December
9, 2003, the Commission to take depositions of Respondents and the accompanying document
requests. It is,

~~ORDERED that oral depositions of Respondents be conducted by video and stenographic means at the offices of Kirkland & Ellis, LLP, 153 East 53rd Street, New York, New York, 10022-4611 on January 2, 2004 at 10:00 a.m. before a notary public or other person authorized to administer oaths in order to give testimony and/or produce documents; and it is further~~

~~ORDERED that the documents requested be produced at the offices of Kirkland & Ellis, LLP, 153 East 53rd Street, New York, New York, 10022-4611 on January 2, 2004 at 10:00 a.m.; and it is further~~

ORDERED that personal service of a copy of this Order along with the subpoena upon Respondents and service by mail ^{or fax} on all attorneys ^{in the Florida action} of record ⁱⁿ on or before December 12, 2003 shall be sufficient.

ENTER:



ATTACHMENT A**INSTRUCTIONS**

1 The connectives "and" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery request all responses that might otherwise be construed to be outside of its scope.

2 The use of the singular form of any word includes the plural and vice versa.

3 Documents requested and to be produced include all Documents in the possession, custody or control of the plaintiff including, but not limited to, any agents, employees, contractors, attorneys, and consultants or experts working for or in favor of the plaintiff or its attorneys.

4 If, in responding to this Subpoena, you encounter any ambiguities when construing a request or definition, the response shall set forth the matter deemed ambiguous and the construction used in responding.

5 Whenever in this Subpoena you are asked to identify or produce a document which is deemed by you to be properly withheld from production for inspection or copying under claim of privilege (including, but not limited to, the work product doctrine), provide a privilege log that includes: the type of document, the general subject matter of the document, the date of the document, and such other information as is sufficient to identify the document, including, where appropriate, the author, addressee, custodian, and any other recipient of the document, and where not apparent, the relationship of the author, the addressee, custodian, and any other recipient to each other, in a manner that, without revealing the

information claimed to be protected, will enable this party to assess the applicability of the privilege protection claimed by you. The privilege log shall be provided within the time set forth in the agreed-upon order.

6. If production of any requested document(s) is objected to on the grounds that production is unduly burdensome, describe the burden or expense of the proposed discovery.

7. When a document contains both privileged and non-privileged material, the non-privileged material must be disclosed to the fullest extent possible without disclosing the privileged material. If a privilege is asserted with regard to part of the material contained in a document, the party claiming the privilege must clearly indicate the portions as to which the privilege is claimed. When a document has been redacted or altered in any fashion, identify as to each document the reason for the redaction or alteration. Any redaction must be clearly visible on the redacted document.

8. If a responsive document exists but is no longer in your possession, custody, or control, state: its date, author(s), recipient(s), subject matter, what disposition was made of the document, and the person or entity, if any, now in possession, custody, or control of the document. If a responsive document has been destroyed, identify the date of destruction, the person who destroyed the document and the person who directed that the document be destroyed and state the reason for its destruction.

9. Produce all of the documents responsive to the numbered requests below either as they are kept in the usual course of business or by custodian.

10. If any of these documents cannot be produced in full, you are requested to produce them to the fullest extent possible, specifying clearly the reasons for your inability to produce the remainder and stating any information, knowledge, or belief you have concerning the unproduced portion.

11. If the requested documents are maintained in a file, the file folder is included in the request for production of those documents.

12. The terms "any," "all" and "each" shall be construed to mean "any," "all," or "each."

13. The term "including" shall be construed to mean "including but not limited to."

14. The present tense shall be construed to include the past and future tenses.

15. The specificity of any request herein shall not be construed to limit the generality or reach of any other request herein.

16. Unless otherwise specified, this Request calls for the production of documents created, delivered, distributed, sent, received, accessed, or modified up to the date of your response to this Request.

DEFINITIONS

1. "Advisors" means financial advisors, legal advisors, accountants, consultants and any other third-party advising or assisting in any way with the Coleman Transaction.

2. "Communication" means any exchange or transmittal of information by any means of transmission, including, without limitation, face-to-face conversation, mail, overnight delivery, Internet, telephone, electronic mail, or facsimile.

3. The term "concerning" means relating to, referring to, describing, evidencing, or constituting.

4. "Coleman" means Coleman Company, Inc.

5. The "Coleman Transaction" means Sunbeam's acquisition of Coleman Company, Inc. from CPH and all related communications, agreements, and transactions, including the February 27, 1998 Agreements and the March 30, 1998 closing.

6. "CPH" means Coleruan (Parent) Holdings Inc. and any of its officers, directors, former or present employees, representatives and agents.

7. Credit Suisse First Boston means Credit Suisse First Boston and any of its officers, directors, former or present employees, representatives and agents.

8. "Document" means any recording in any tangible form of any information, whether handwritten, typed, printed, stored on computer disks, tapes, or databases, or otherwise reproduced. "Document" or "documents" also includes electronic documents whether stored on servers or hard drives, e-mail, backup tapes, voicemail and video and audio recordings. A draft or non-identical copy is a separate document within the meaning of this term.

9. The "February 27, 1998 Agreements" means (a) the Agreement and Plan of Merger dated February 27, 1998 between Sunbeam Corp., Laser Acquisition Corp., CLN Holdings, Inc. and Coleman (Parent) Holdings Inc. and (b) the Agreement and Plan of Merger dated February 27, 1998 between Sunbeam Corp., Camper Acquisition Corp., and The Coleman Company, Inc., and all schedules, exhibits, and documents related to those Agreements.

10. "Financial Information" means information concerning the past or present financial condition of Sunbeam or Sunbeam securities.

11. "Financial Statements" means documents reflecting Financial Information, including without limitation quarterly reports, yearly reports, balance sheets, statements of income, earnings, cash flow projections, and sources and applications of funds.

12. The term "identify" (with respect to documents) means to give, to the extent known, the (i) type of document; (ii) general subject matter; (iii) date of the document; and (iv) author(s), addressee(s) and recipient(s).

13. "Litigations" means *In re Sunbeam Securities Litigation*, 98-8258-Civ.-Middlebrooks (S.D. Fla); *Camden Asset Management L.P. v. Sunbeam Corporation*, 98-8773-Civ.-Middlebrooks and 98-8275-Civ.-Middlebrooks (S.D. Fla); *Krim v. Dunlap*, No. CL 983168AD (15th Jud. Cir., Fla.); *Stapleton v. Sunbeam Corp.*, No. 98-1676-Civ.-King (S.D. Fla); *Sunbeam Corp. v. PricewaterhouseCoopers LLP*, No. CL 005444AN (15th Jud. Cir., Fla.); *In re Sunbeam Corp., Inc.*, No. 01-40291 (AJG) (Bankr. S.D.N.Y.) and any adversary proceedings therein; *SEC v. Dunlap*, No. 01-8437-Civ.-Middlebrooks (S.D. Fla.); *Oaktree Capital Management LLC v. Arthur Andersen LLP*, No. BC257177 (L.A. Cty., CA); and

Coleman (Parent) Holdings Inc. v. Arthur Andersen LLP, No. CA 01-06062AN (15th Jud. Cir. Fla.) and any other action arising out of the Sunbeam Acquisition of Coleman.

14. "MAFCO" means MacAndrews & Forbes, Inc. and any of its officers, directors, parents, subsidiaries, former or present employees, representatives, and agents.

15. "MS & Co." means Morgan Stanley & Co. Inc. and any of its officers, directors, former or present employees, representatives and agents.

16. "MSSF" means Morgan Stanley Senior Funding, Inc. and any of its officers, directors, former or present employees, representatives and agents.

17. The term "person" is defined as any natural person or any business, legal or governmental entity or association.

18. The term "relating to" means concerning, evidencing, referring to, or constituting.

19. The "Relevant Period," unless otherwise indicated, shall be from January , 1997 through the date of this subpoena.

20. "SEC Administrative Proceedings" means *In the Matter of Sunbeam Corp.*, SEC Administrative Proceeding File No. 3-10481, and *In the Matter of David C. Fannin*, SEC Administrative Proceeding File No. 3-10482.

21 "Sunbeam" means Sunbeam Corporation or any of its subsidiaries, divisions, predecessors, successors, present and former employees, representatives, and agents.

"Synergies" means post-acquisition gains through increased revenue and/or decreased cost.

The terms "you" or "your" means "CSFB" as defined in Definition 7.

DOCUMENTS TO BE PRODUCED

- 1 All documents concerning the negotiation, signing, and implementation of the February 27, 1998 Agreements.
- 2 All documents referring or relating to the Coleman Transaction.
- 3 All documents reflecting, referring, or relating to communications between CSFB and any MAFCO representatives or Advisors regarding the Coleman Transaction.
- 4 All documents referring or relating to Arthur Andersen's 1996 and 1997 audit of Sunbeam, including without limitation any review, investigation, analysis, and due diligence conducted by CSFB in connection with the audit.
- 5 All documents referring or relating to the restatement of Sunbeam's financial statements for 1996, 1997 or 1998.
- 6 All documents referring or relating to any review, investigation, analysis, or due diligence of Sunbeam conducted by CSFB or CPH, including without limitation all documents reflecting Financial Information obtained by CSFB or CPH.
- 7 All documents reflecting, referring, or relating to due diligence performed by CSFB in connection with the sale of any company in which CPH or MAFCO received stock

as part of the consideration for sale, including but not limited to the transactions listed in Attachment B.

8. All documents referring or relating to Sunbeam's public announcement of the Coleman Transaction.

9. All documents concerning or identifying any communications that took place between or among CSFB, CPH or MAFCO, and Arthur Andersen concerning Sunbeam or the Coleman Transaction.

10. All documents reflecting, referring, or relating to any communications that took place between CSFB, CPH or MAFCO, and Sunbeam related to the Coleman Transaction.

11. All documents reflecting, referring, or relating to any communications that took place between or among CSFB, CPH or MAFCO, and MS & Co. or MISSF related to Sunbeam or the Coleman Transaction.

12. All documents concerning the potential or actual integration of Coleman, First Alert, and/or Signature Brands with Sunbeam, including, but not limited to, studies, reports, analyses, evaluations, projections, estimates, comments, or other work performed relating to actual or potential synergies to be realized from such an integration.

13. All of your document retention policies for the Relevant Period.

14. All documents referring or relating to CSFB's policies, procedures, manuals, guidelines, reference materials, or checklists for performing due diligence that were in effect during the Relevant Period.

15. All calendars and other day planners, whether paper or electronic, reflecting meetings, events, telephone conferences or other communications regarding the Coleman Transaction.

16. All documents you have provided to or received from any party in any of the Litigations, Arbitrations, or SEC Administrative Proceedings, including documents responding to discovery requests, interrogatories, privilege logs, reports, communications, filings, testimony, legal memoranda, statements, affidavits, declarations and other documents.

17. All documents you have provided to or received from the SEC or any other state or federal governmental or regulatory body concerning Sunbeam or Coleman.

18. All documents concerning your efforts to have CPH or MAFCO retain or maintain your services in connection with the Coleman Transaction, or in connection with any other proposed engagement involving the performance of due diligence.

19. All documents concerning your retention or engagement by CPH for services related to the Coleman Transaction.

20. All documents concerning any legal or fairness opinion issued by you in connection with the Coleman Transaction.

21. All documents you obtained or generated in connection with your engagement by CPH or MAFCO related to Coleman or Sunbeam's acquisition of Coleman.

22. All documents reflecting all fees and expenses paid by CPH or MAFCO to you in connection with the Coleman Transaction.

23. All documents concerning the closing of the Coleman Transaction, including without limitation all documents concerning the decision to close the Coleman Transaction.

24. All documents used, analyzed, consulted, or prepared by any CSFB employee or agent concerning Sunbeam.

25. All documents concerning communications between or among you, Sunbeam, Arthur Andersen, MS & Co., CPH or MAFCO, and Wall Street analysts concerning Sunbeam or the Coleman Transaction.

26. All documents concerning the valuation of Sunbeam securities, including without limitation analyst reports from and including July 1, 1996 through December 31, 1998.

27. All documents concerning any valuation of Coleman or Coleman securities.

28. All documents concerning Sunbeam's financial statements and/or restated financial statements.

29. All documents concerning Sunbeam's first quarter 1998 sales and/or earnings.

30. Documents sufficient to identify any work or services you performed for or on behalf of CPH or MAFCO in 1997 or 1998, regardless of whether you were compensated for that work.

31. All documents concerning the statements contained in the press releases issued by Sunbeam on October 23, 1997; March 19, 1998; April 3, 1998; May 9, 1998; June 15, 1998; June 25, 1998; June 30, 1998; October 20, 1998, and November 12, 1998.

32. All documents concerning communications relating to Sunbeam, Coleman, or CPH, including without limitation internal communications within CSFB or communications between or among CSFB, MS & Co., MSSF and Sunbeam; Skadden, Arps, Slate, Meagher & Flom LLP; Coopers & Lybrand LLP; Llana Company; Arthur Andersen LLP; Sard, Verbinnen & Co., Inc.; Hill & Knowlton, Inc.; The Coleman Company, Inc.; Coleman (Parent) Holdings Inc.; MacAndrews & Forbes Holdings, Inc.; Wachtell Lipton, Rosen & Katz; Davis Polk & Wardwell; or any other person or company, and/or any of their respective employees, agents, or representatives.

33. All documents concerning Albert Dunlap and/or Russell Kersh.

34. All documents concerning MAFCO with respect to Sunbeam, Coleman or CPH.

35. All documents concerning employment contracts, performance evaluations, and/or personnel files of all CSFB personnel who performed services for or on behalf of CPH or MAFCO in 1997 or 1998, to the extent that those documents also relate to due diligence work performed on engagements for CPH or MAFCO.

36. All documents concerning Scott Paper's financial condition that were created between January 1, 1997 and January 1, 2000.

37. All transcripts of and exhibits to any depositions, recorded statements, or affidavits in connection with any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

38. All affidavits, declarations, or other testimonial statements filed or submitted in connection with any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

39. All documents concerning or related to the August 12, 1998 Settlement Agreement between CPH and Sunbeam.

ATTACHMENT B

- **MAFCO's 2003 purchase of Series C Preferred Stock from Revlon, Inc. ("Revlon") and purchase of shares of Class A Common Stock from Revlon.**
Revlon Holdings Inc.'s 1993 purchase of Series A Preferred Stock from Revlon.
- **Coleman's 1995 purchase of the shares in Sierra Corporation of Forth Smith, Inc. owned by a group of private investors.**
Revlon Holdings Inc.'s 2001 receipt of common and preferred shares of Revlon in exchange for certain assets held by Revlon Holdings Inc.
- **C&F (Parent) Holdings Inc.'s ("C&F Parent") 1995 receipt of shares in MAFCO Consolidated Group Inc.**
- **MAFCO's 2001 receipt of preferred shares in MFW in exchange for certain Senior Subordinated Discount Notes that it owned.**
- **MAFCO's 2002 purchase of preferred shares in Panavision from Panavision.**
MAFCO's 2003 purchase of preferred shares in Panavision from Panavision.
- **MAFCO's 2003 purchase of units in SpectaGuard Acquisition LLC and all of the shares of SpectaGuard Holding Corporation, a unitholder in SpectaGuard Acquisition LLC.**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by facsimile and email to all counsel of record on the attached service list on this 12th day of December, 2003.

Thomas D. Yannucci, P.C.
Thomas A. Clare
Zhonette M. Brown
Ryan P. Phair
Kathryn R. DeBord
KIRKLAND & ELLIS LLP
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

Joseph Ianno, Jr. (FL Bar # 655351)
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
email: jianno@carltonfields.com

BY: 

Counsel for Defendant
Morgan Stanley & Co. Incorporated

#230580/mm

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 2003 CA 005045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiffs,

vs.

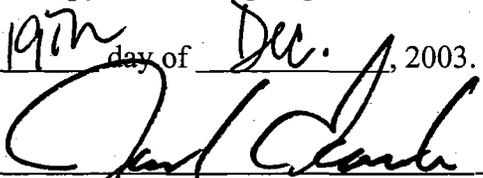
MORGAN STANLEY & CO., INC.,

Defendant.

NOTICE FOR JURY TRIAL

Plaintiffs, COLEMAN (PARENT) HOLDINGS INC., pursuant to Rule 1.440 of the Florida Rules of Civil Procedure, show to the Court that the action is at issue and ready to be set for trial on the original action or a subsequent proceeding. It is expected that this case will take 15 days (3 weeks) to try.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to all Counsel on the attached list, this 19th day of Dec., 2003.



JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 478-0754
Attorneys for Plaintiffs

Coleman (Parent) Holdings Inc. vs Morgan Stanley & Company
Case No.: 2003 CA 005045 AI
Plaintiffs' Notice of Jury Trial

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block, LLC
One IBM Plaza
Suite 4400
Chicago, IL 60611

#230580/mm

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

CASE NO.: 2003 CA 005045 AI

Plaintiffs,

vs.

MORGAN STANLEY & CO., INC.,

Defendant,

NOTICE OF HEARING

YOU ARE HEREBY NOTIFIED that the undersigned has called up for hearing the following:

DATE: December 30, 2003

TIME: 8:45 a.m.

JUDGE: Hon. Elizabeth T. Maass

PLACE: Palm Beach County Courthouse, Room #11.1208, 205 North Dixie Highway,
West Palm Beach, FL 33401

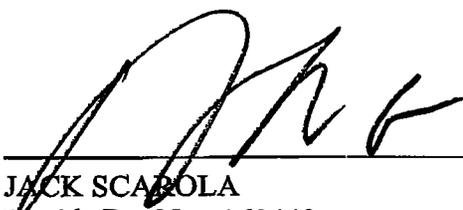
SPECIFIC MATTERS TO BE HEARD:

Plaintiff's Motion for a Protective Order to Bar Certain Non-Party Discovery

Moving counsel certifies that he or she contacted opposing counsel and attempted to resolve the discovery dispute without hearing.

Coleman Holdings, Inc. vs Morgan Stanley & Company
Case No.: 2003 CA 005045 AI
Notice of Hearing

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Fax and U.S. Mail to all Counsel on the attached list, and by Federal Express to Theodore Gewertz, Wachtell, Lipton, Rosen and Katz, 51 West 52nd Street, New York, NY 10019; and Nancy Swift, VP and Counsel, Credit Suisse First Boston, One Madison Avenue, New York, NY 10010 on this 19th day of Dec., 2003.



JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 478-0754
Attorney for Plaintiffs

Coleman Holdings, Inc. vs Morgan Stanley & Company
Case No.: 2003 CA 005045 AI
Notice of Hearing

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block, LLC
One IBM Plaza
Suite 4400
Chicago, IL 60611

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CASE NO: 03 CA-005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.

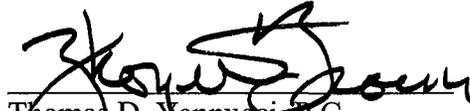
NOTICE OF VIDEOTAPED DEPOSITION

PLEASE TAKE NOTICE that Defendant Morgan Stanley & Company Incorporated will take the videotaped deposition of Donald G. Drapkin, pursuant to Florida Rules of Civil Procedure 1.280 and 1.310. The oral examination will take place beginning on January 7, 2004, at 9:30 a.m. and continue from day to day until completed at the offices of Kirkland & Ellis, LLP, 153 East 53rd Street, New York, New York, 10022.

The deposition will be taken before a person authorized to administer oaths and recorded by stenographic and videographic means. The video operator will be Esquire Deposition Services of 216 E. 45th Street in New York, New York. The witness is instructed to bring all

books, papers, and other things in his or her possession or under his control relevant to this lawsuit (and not previously produced in discovery) to the examination.

Dated: December 19, 2003



Thomas D. Yannucci, P.C.

Thomas A. Clare

Zhonette M. Brown

Larissa Paule-Carres

Ryan P. Phair

Kathryn DeBord

KIRKLAND & ELLIS LLP

655 15th Street, N.W. – Suite 1200

Washington, D.C. 20005

Telephone: (202) 879-5000

Facsimile: (202) 879-5200

Joseph Ianno, Jr. (FL Bar # 655351)

CARLTON FIELDS, P.A.

222 Lakeview Ave., Suite 1400

West Palm Beach, FL 33401

Telephone: (561) 659-7070

Facsimile: (561) 659-7368

Counsel for Defendant

Morgan Stanley & Co. Incorporated

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by facsimile and e-mail to all counsel of record on the attached service list on this 19th day of December, 2003.

Thomas D. Yannucci, P.C.
Thomas A. Clare
Zhonette M. Brown
Larissa Paule-Carres
Ryan P. Phair
Kathryn DeBord
KIRKLAND & ELLIS LLP
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

Joseph Ianno, Jr. (FL Bar # 655351)
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

BY: 

Counsel for Defendant
Morgan Stanley & Co. Incorporated

SERVICE LIST

<p>John Scarola SEARCY, DENNEY, SCAROLA, BARNHARDT & SHIPLEY, P.A. 2139 Palm Beach Lakes Boulevard West Palm Beach, Florida 33409</p>	<p>Counsel for Plaintiff</p>
<p>Jerold S. Solovy JENNER & BLOCK, LLC One IBM Plaza Suite 4400 Chicago, Illinois 60611</p>	<p>Counsel for Plaintiff</p>

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CASE NO: 03 CA-005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.

**MORGAN STANLEY & CO. INCORPORATED'S
MOTION TO COMPEL DISCOVERY**

Pursuant to Florida Rule of Civil Procedure 1.380(a), Morgan Stanley & Co. Incorporated ("Morgan Stanley") respectfully moves this Court for an order compelling Coleman (Parent) Holdings Inc. ("CPH") to respond to discovery pertaining to the identities, experience and competence of in-house CPH and MAFCO employees to conduct due diligence in acquisition transactions of the type at issue here, and in particular to respond to Morgan Stanley's Third Set of Interrogatories, Interrogatory No. 2.

As grounds for this motion, Morgan Stanley states:

1. CPH has refused to respond to the following interrogatory designed to identify the CPH and MacAndrews & Forbes ("MAFCO") employees responsible for conducting due diligence in acquisition transactions in 1997 through 1998:

Identify all persons at CPH or MAFCO whose job responsibilities included, in 1997 and 1998, due diligence or financial review of proposed mergers and acquisitions, including a description of each person's educational employment history, a description of any accounting or financial certifications or licenses held by such

persons, and a description of any financial or business training they have had.

(Oct. 13, 2003 MS 3d Set of Interrogs. to Plf. CPH, Irrog. 2. (Ex. 1).)

2. CPH objected to this request “insofar as it seeks information related to MAFCO, a non-party to this lawsuit;” because it is “vague, ambiguous and overbroad insofar as it fails to define the term ‘due diligence;’” and because it is “not limited to individuals who performed due diligence concerning the [Coleman] transaction.” (Nov. 12, 2003 CPH Resp. & Objs. to Def. MS 3d Set of Interrogs, Resp. 2 (Ex. 2).) These objections are wholly without merit.

3. As an initial matter, CPH cannot shield MAFCO and its employees from discovery. CPH is an empty-shell holding company that, according to CPH’s Rule 1.310 deposition witness (himself a MAFCO employee), has no employees of its own. All negotiations and decisions were handled by MAFCO employees. Indeed, CPH’s lawsuit against Morgan Stanley is premised on an acquisition transaction in which MAFCO, CPH’s parent company, played a larger role in the transaction than CPH itself. If Morgan Stanley is unable to get discovery from MAFCO (whose employees negotiated the acquisition and exercised complete control over the actions of CPH with regard to the decision to sell its interest in Coleman), Morgan Stanley will not have access to important discoverable information about the claims alleged against it. CPH, as the plaintiff, cannot employ the resources of MAFCO to bring this litigation to bear, but then hide behind corporate formalities to deprive Morgan Stanley of plainly discoverable information that is clearly relevant to the case.

4. There is no dispute that MAFCO employees have pertinent discoverable information. CPH’s own interrogatory response lists fourteen (14) MAFCO employees as having discoverable information relating to CPH’s Complaint – but not a single CPH employee. (See Sept. 2, 2003 CPH Resp. to MS 1st Set Interrogs., Resp. 1, served Sept. 2, 2003 and filed

under seal) In addition, CPH identified at least six (6) instances in which MAFCO representatives personally met with Morgan Stanley representatives to discuss or negotiate the Coleman Transaction, *see* Oct. 13, 2003 CPH Resp. to MS 2d Set of Interrogs. & 2nd Req. for Prod. of Docs., Resp. 1, served Oct. 13, 2003 and filed under seal, and at least eleven (11) instances in which MAFCO representatives discussed the transaction with Morgan Stanley, *see id.* at Resp. 3. None of these discovery responses refer to any action by a CPH employee. In light of MAFCO's important role in the acquisition transaction and CPH's own admission that MAFCO personnel have discoverable information, CPH's refusal to respond to MAFCO-related discovery on the grounds that MAFCO and its employees are non-parties in this instance is groundless. Further, given the close relationship between CPH and MAFCO, there can be no question that information that is available to MAFCO is also available to CPH. Pursuant to Rule 1.340, CPH is obligated to "furnish the information available to that party."

5. CPH's objection to responding to this Interrogatory because it fails to define the term "due diligence" is nonsensical. Given that CPH's claims against Morgan Stanley are premised on (legally and factually defective) allegations that Morgan Stanley did not conduct proper due diligence of Sunbeam, and the fact that CPH has used the term "due diligence" repeatedly in its *own* discovery requests and responses, CPH cannot seriously now contend that it does not know what "activities might be encompassed" by that term.¹ CPH cannot be permitted to base its Complaint in part upon allegations of faulty "due diligence" and at the same

¹ *See, e.g., id.* at Resps. 4-5 (responding (1) that on February 23, 1998, "Messrs. Nesbitt, Page, [et. al.]...met with Messrs. Stynes, Fuchs, [et. al.]...*to conduct due diligence*; (2) that on February 23-24 1998 "Messrs. Fannin, Goudis, [et. al.]...met with Messrs. Levin, Page [et. al] *to conduct due diligence*; and (3) that "on January 29, 1998, Sunbeam and Morgan Stanley representatives met with Coleman, Mafco, and Credit Suisse First Boston representatives in New York to discuss the Transaction *and preliminary due diligence.*") (emphasis added); *see also* May 9, 2003 Plf.'s 1st Req. for Prod. of Docs., Reqs. 3, 4, 26, 43 (requesting documents related to "due diligence" without providing a definition of that term) (Ex. 3).)

time shield itself from “due diligence”-related discovery on the grounds that the term is “vague and ambiguous.”

6. Nor can CPH limit discovery to the identities of the MAFCO employees who conducted due diligence for the Coleman acquisition. Given the nature of CPH’s claims and allegations – i.e. that CPH relied on a financial advisor to its counterparty in arm’s length negotiation in deciding to proceed with the acquisition – Morgan Stanley is entitled to discover the identities and qualifications of the sophisticated in-house advisors that were available to CPH to perform the same functions for which it supposedly relied upon Morgan Stanley. Such discovery will enable Morgan Stanley to determine, for example, whether CPH and MAFCO made any attempts to verify the representations that CPH alleges supports its claim against Morgan Stanley, and will in turn show that CPH and MAFCO had absolutely no basis for relying upon representations made by their counterparty’s underwriter.

7. Limiting discovery to the individuals involved in the Coleman acquisition, moreover, would acutely impair Morgan Stanley from defending CPH’s allegations. CPH and MAFCO are highly sophisticated parties who (according to their own prior interrogatory responses) have entered into a spate of acquisition transactions – precisely like the Coleman Transaction – in which they received stock as part of the consideration. Morgan Stanley is entitled to explore whether CPH and MAFCO performed the same types and degree of due diligence and financial analysis for the Coleman transaction as it did for these other sales, and whether CPH and MAFCO availed themselves of the same in-house resources and expertise in deciding whether to proceed with those transactions.

Conclusion

For the foregoing reasons, Morgan Stanley respectfully requests an order compelling CPH to respond to Morgan Stanley’s Third Set of Interrogatories, Interrogatory No. 2.

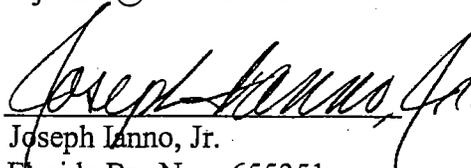
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Federal Express and e-mail to all counsel of record on the attached service list on this 29th day of December, 2003.

Thomas D. Yannucci, P.C.
Thomas A. Clare
KIRKLAND & ELLIS LLP
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

BY:



Joseph Ianno, Jr.
Florida Bar No: 655351

Counsel for Defendant
Morgan Stanley & Co. Incorporated

SERVICE LIST

<p>John Scarola SEARCY, DENNEY, SCAROLA, BARNHARDT & SHIPLEY, P.A. 2139 Palm Beach Lakes Boulevard West Palm Beach, Florida 33409</p>	<p>Counsel for Plaintiff</p>
<p>Michael Brody JENNER & BLOCK, LLC One IBM Plaza Suite 4400 Chicago, Illinois 60611</p>	<p>Counsel for Plaintiff</p>

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CASE NO: 03 CA-005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

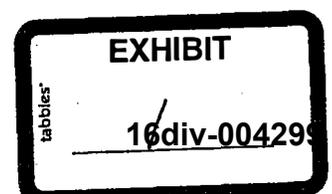
Defendant.

**MORGAN STANLEY & CO. INCORPORATED'S THIRD SET OF
INTERROGATORIES TO PLAINTIFF COLEMAN (PARENT) HOLDINGS, INC.**

Pursuant to the Florida Rules of Civil Procedure 1.280 and 1.340, Defendant Morgan Stanley & Co. Incorporated ("MS & Co.") hereby requests that Plaintiff Coleman (Parent) Holdings, Inc. ("CPH") answer the following interrogatories and otherwise specify objections, if any, in accordance with the definitions and instructions contained herein.

INSTRUCTIONS

1. The connectives "and" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery request all responses that might otherwise be construed to be outside of its scope.
2. The use of the singular form of any word includes the plural and vice versa.
3. Each interrogatory should be answered separately and fully, unless it is objected to, in which event the reasons for the objections should be stated with specificity. The answers are to be signed by plaintiffs and the objections, if any, are to be signed by the attorney(s).



making them. Where a complete answer to a particular interrogatory is not possible, the interrogatory should be answered to the extent possible and a statement should be made indicating why only a partial answer is given, the efforts made by you to obtain the information and the source from which all responsive information may be obtained, to the best of your knowledge or belief.

4. If it is claimed that information responsive to any interrogatory is privileged, work product, or otherwise protected from disclosure, state the nature and basis for any such claim of privilege, work product, or other ground for nondisclosure and identify: (a) the subject matter of any such information; (b) if the information is embodied in a document, the author of the document and each person to whom the original or a copy of the document was sent; (c) if the information was communicated orally, the person making the communication and all persons present at or participating in the communication; (d) the date of the document or oral communication; and (e) the general subject matter of the document or oral communication, within the time set forth in the agreed-upon order. Any part of an answer to which you do not claim privilege or work product should be given in full.

5. The term "identify" (with respect to documents) means to give, to the extent known, the (i) type of document; (ii) general subject matter; (iii) date of the document; and (iv) author(s), addressee(s) and recipient(s).

6. The term "identify" (with respect to persons) means to give, to the extent known, the person's full name, present or last known address, and when referring to a natural person, additionally, the present or last known place of employment. Once a person has been identified in accordance with this subparagraph, only the name of that person need be listed in response to subsequent discovery requesting the identification of that person.

7. When used in reference to a person other than a natural person, "identify" means: (a) to state its name; (b) to describe its nature (e.g., corporation, partnership, etc.); (c) to state the location of its principal place of business; and (d) to identify the person or persons employed by such entity whose actions on behalf of the entity are responsive to the interrogatory.

8. When used with respect to the identification of facts, acts, events, occurrences, meetings, telephone conferences or communications, "identify" means to describe with specificity the fact, act, event, occurrence, meeting, telephone conference, or communication in question, including, but not limited to: (a) identifying all participants in the fact, act, event, occurrence, meeting, telephone conference or communication; (b) stating the date(s) on which the fact, act, event, occurrence, meeting, telephone conference or communication took place; (c) stating the location(s) at which the fact, act, event, occurrence, meeting, telephone conference or communication took place; and (d) providing a description of the substance of the fact, act, event, occurrence, meeting, telephone conference or communication.

9. The terms "any," "all" and "each" shall be construed to mean "any," "all," or "each."

10. The term "including" shall be construed to mean "including but not limited to."

11. The present tense shall be construed to include the past and future tenses.

12. Unless otherwise indicated, these interrogatories request information for the period beginning January 1, 1996.

DEFINITIONS

1. "CPH" means Coleman (Parent) Holdings Inc. and any of its officers, directors, former or present employees, representatives and agents.

2. "MAFCO" means MacAndrews & Forbes Holdings, Inc. and any of its officers, directors, former or present employees, representatives and agents.

3. "MS & Co." means Morgan Stanley & Co. Inc. and any of its officers, directors, former or present employees, representatives and agents.

4. The term "person" is defined as any natural person or any business, legal or governmental entity or association.

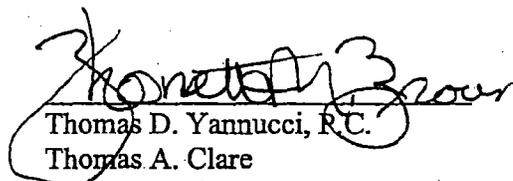
5. The terms "you" or "your" means "CPH" as defined in Definition 16.

INTERROGATORIES

1. State with particularity the 1997 and 1998 net worth, income, revenue and global holdings (including non-MAFCO holdings) of MAFCO, CPH, Ronald Perelman, Howard Gittis, and any other MAFCO or CPH employee who participated in the due diligence or financial review of Sunbeam's acquisition of the Coleman Company.

2. Identify all persons at CPH or MAFCO whose job responsibilities included, in 1997 or 1998, due diligence or financial review of proposed mergers and acquisitions, including a description of each person's educational and employment history, a description of any accounting or financial certifications or licenses held by such persons, and a description of any financial or business training they have had.

Dated: October 13, 2003



Thomas D. Yannucci, R.C.

Thomas A. Clare

Zhonette M. Brown

KIRKLAND & ELLIS LLP

655 15th Street, N.W. – Suite 1200

Washington, D.C. 20005

Telephone: (202) 879-5000

Facsimile: (202) 879-5200

Joseph Ianno, Jr. (FL Bar # 655351)

CARLTON FIELDS, P.A.

222 Lakeview Ave., Suite 1400

West Palm Beach, FL 33401

Telephone: (561) 659-7070

Facsimile: (561) 659-7368

**Counsel for Defendant
Morgan Stanley & Co. Incorporated**

CERTIFICATE OF SERVICE

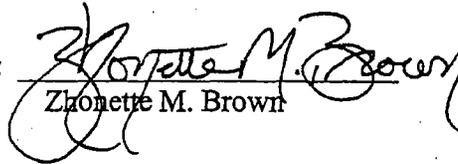
I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by facsimile and e-mail to all counsel of record on the attached service list on this 13th day of October, 2003.

Thomas D. Yannucci, P.C.
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

Counsel for Defendant
Morgan Stanley & Co. Incorporated

Joseph Ianno, Jr. (FL Bar # 655351)
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

BY:


Zhonette M. Brown

SERVICE LIST

<p>John Scarola SEARCY, DENNEY, SCAROLA, BARNHARDT & SHIPLEY, P.A. 2139 Palm Beach Lakes Boulevard West Palm Beach, Florida 33409</p>	<p>Counsel for Plaintiff</p>
<p>Jerold S. Solovy JENNER & BLOCK, LLC One IBM Plaza Suite 4400 Chicago, Illinois 60611</p>	<p>Counsel for Plaintiff</p>

**IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA**

COLEMAN (PARENT) HOLDINGS INC.,)	
)	
Plaintiff,	)	Case No. 03 CA 005045 AI
)	
v.	)	Judge Elizabeth T. Maass
)	
MORGAN STANLEY & CO., INC.,)	
)	
Defendant.)	
)	

**COLEMAN (PARENT) HOLDINGS INC.'S RESPONSES AND
OBJECTIONS TO DEFENDANT MORGAN STANLEY & CO., INC.'S
THIRD SET OF INTERROGATORIES**

Plaintiff Coleman (Parent) Holdings Inc. ("CPH"), by its attorneys, and pursuant to Florida Rules of Civil Procedure 1.280, 1.340 and 1.350, hereby responds and objects to Morgan Stanley & Co. Incorporated's ("Morgan Stanley") Third Set of Interrogatories ("Interrogatories") dated October 13, 2003 as follows:

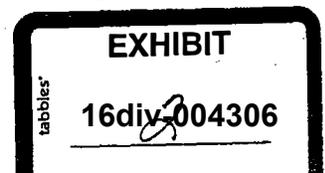
INITIAL OBJECTIONS

1. CPH incorporates by reference the Initial Objections set forth in its written response to Morgan Stanley's first set of interrogatories.

INTERROGATORY RESPONSES AND FURTHER OBJECTIONS

INTERROGATORY NO. 1: State with particularity the 1997 and 1998 net worth, income, revenue and global holdings (including non-MAFCO holdings) of MAFCO, CPH, Ronald Perelman, Howard Gittis, and any other MAFCO or CPH employee who participated in the due diligence or financial review of Sunbeam's acquisition of the Coleman Company.

RESPONSE: CPH notes that Interrogatory No. 1 constitutes multiple separate interrogatories. CPH objects to Interrogatory No. 1 as overbroad and not relevant to the litigation nor reasonably calculated to lead to the discovery of admissible evidence. CPH further objects to Interrogatory No. 1 because it seeks personal information about entities and individuals not party to



this lawsuit, including Mafco, Ronald Perelman, Howard Gittis, and other individuals employed by Mafco or CPH.

INTERROGATORY NO. 2: Identify all persons at CPH or MAFCO whose job responsibilities included, in 1997 or 1998, due diligence or financial review of proposed mergers and acquisitions, including a description of each person's educational and employment history, a description of any accounting or financial certifications or licenses held by such persons, and a description of any financial or business training they have had.

RESPONSE: CPH notes that Interrogatory No. 2 constitutes multiple separate interrogatories. CPH objects to Interrogatory No. 2 insofar as it seeks information related to Mafco, a non-party to this lawsuit. CPH further objects to Interrogatory No. 2 as overbroad and as seeking information not relevant to the litigation nor reasonably calculated to lead to the discovery of admissible evidence because Interrogatory No. 2 is not limited to individuals who performed due diligence concerning the transaction by which Sunbeam acquired CPH's interest in The Coleman Company, Inc. CPH further objects to Interrogatory No. 2 on the ground that it is vague, ambiguous, and overbroad insofar as it fails to define the term "due diligence" or otherwise identify with sufficient particularity the activities that might be encompassed by that term.

As to objections:

By: 
One of Their Attorneys

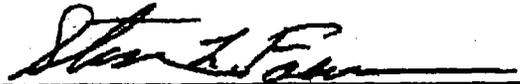
Dated: November 12, 2003

John Scarola
SEARCY DENNEY SCAROLA BARNHART
& SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33402-3626
(561) 686-6300

Jerold S. Solovy
Michael T. Brody
Deirdre E. Connell
JENNER & BLOCK, LLC
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

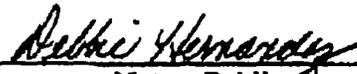
ATTORNEYS FOR COLEMAN (PARENT) HOLDINGS INC.

I, Steven L. Fasman, being duly sworn, depose and say that I am authorized on behalf of Coleman (Parent) Holdings Inc. and, on its behalf, I have read the foregoing **COLEMAN (PARENT) HOLDINGS INC.'S RESPONSES AND OBJECTIONS TO MORGAN STANLEY & CO., INC.'S THIRD SET OF INTERROGATORIES**, and to the best of my knowledge and belief the responses contained therein are true and correct.



STEVEN L. FASMAN

Subscribed and sworn to before me
this 12th day of November, 2003.



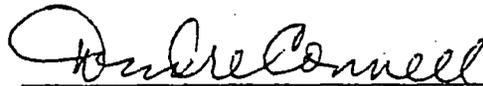
Notary Public
DEBBIE HERNANDEZ
Notary Public, State of New York
No. 01H25021258
Qualified in Queens County
Certificate Filed in New York County
Commission Expires December 13, 2005

CERTIFICATE OF SERVICE

I, Deirdre E. Connell, hereby certify that a true and correct copy of the foregoing **COLEMAN (PARENT) HOLDINGS INC.'S RESPONSES AND OBJECTIONS TO DEFENDANT MORGAN STANLEY & CO., INC.'S THIRD SET OF INTERROGATORIES** has been served upon the parties listed below via facsimile and U.S. mail on this 12th day of November 2003.

Thomas A. Clare, Esq.
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lake View Avenue, Suite 1400
West Palm Beach, FL 33401



Deirdre E. Connell

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

Case No. CA 005045 AI

DOROTHY H. WILKEN
CLERK OF CIRCUIT COURT
CIRCUIT CIVIL DIVISION

MAY 09 2003

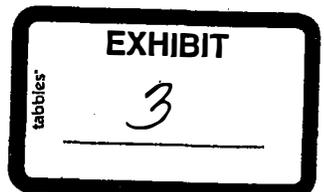
COPY / ORIGINAL
RECEIVED FOR FILING

PLAINTIFF'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS

Plaintiff Coleman (Parent) Holdings, Inc. ("CPH" or "Plaintiff"), by its attorneys Searcy Denney Scarola Barnhart & Shipley P.A. and Jenner & Block, LLC, hereby serves its First Request for Production of Documents upon Defendant Morgan Stanley & Co., Inc. ("Morgan Stanley" or "Defendant"), and requests responses and the production of documents at the office of Searcy Denney Scarola Barnhart & Shipley P.A., 2139 Palm Beach Lakes Blvd., West Palm Beach, Florida, within the time provided by Florida Rule of Civil Procedure 1.350(b).

DEFINITIONS

1. "Arbitrations" means Albert J. Dunlap and Sunbeam Corporation, No. 32 160 00088 99 (AAA); and Russell A. Kersh and Sunbeam Corporation, No. 32 160 00091 99 (AAA).
2. "Coleman" means the Coleman Company, Inc. or any of its present and former officers, directors, employees, representatives, agents, and all other persons acting or purporting to act on its behalf.



3. "CPH" means Coleman (Parent) Holdings Inc., Coleman Worldwide Corporation, CLN Holdings, Co. Inc., or any of their present and former officers, directors, employees, representatives, agents, and all other persons acting or purporting to act on their behalf.

4. "Coleman Transaction" means the transaction contemplated by the February 27, 1998 Agreements.

5. "Communication" means the transmittal of information by letter, memorandum, facsimile, orally, or otherwise.

6. "Concerning" means reflecting, relating to, referring to, describing, evidencing, or constituting.

7. "Documents" means documents whether fixed in tangible medium or electronically stored. The word "documents" shall include, by way of example and not by way of limitation, all of the following: papers, correspondence, trade letters, envelopes, memoranda, telegrams, cables, notes, messages, reports, studies, press releases, comparisons, books, accounts, checks, audio and video recordings and transcriptions thereof, pleadings, testimony, articles, bulletins, pamphlets, brochures, magazines, questionnaires, surveys, charts, newspapers, calendars, desk calendars, pocket calendars, lists, logs, publications, notices, diagrams, instructions, diaries, minutes for meetings, corporate minutes, orders, resolutions, agendas, memorials or notes of oral communications, whether by telephone or face-to-face, contracts, agreements, drafts of or proposed contracts or agreements, memoranda of understanding, letters of intent, computer tapes, computer drives or memories, computer diskettes or disks, e-mail, CD-ROMs, or any other tangible thing on which any handwriting, typing, printing, photostatic, electronic, or other form of communication or information is recorded or reproduced, together with all notations on any of the foregoing, all

originals, file copies, or other unique copies of the foregoing, and all versions or drafts thereof, whether used or not.

8. "February 27, 1998 Agreements" means (a) the Agreement and Plan of Merger dated as of February 27, 1998 among Sunbeam Corp., Laser Acquisition Corp., CLN Holdings, Inc. and Coleman (Parent) Holdings Inc. and (b) the Agreement and Plan of Merger dated as of February 27, 1998 among Sunbeam Corp., Camper Acquisition Corp., and The Coleman Company, Inc.

9. "Financial Statements" means, without limitation, balance sheets, statements of income, earnings, retained earnings, sources and applications of funds, cash flow projections, notes to each such statements, or any other notes which pertain to the past or present financial condition of Sunbeam, whether any of the foregoing is audited or unaudited, whether final, interim or pro forma, complete or partial, consolidated, yearly, monthly, or otherwise.

10. "Litigations" means In Re Sunbeam Securities Litigation, 98-8258-Civ.-Middlebrooks (S.D. Fla.); Camden Asset Management L.P., et al. v. Sunbeam Corporation, et al., 98-8773-Civ.-Middlebrooks and 98-8275-Civ.-Middlebrooks (S.D. Fla.); Krim v. Dunlap, et al., No. CL983168AD (15th Jud. Cir., Fla.); Stapleton v. Sunbeam Corp., et al., No. 98-1676-Civ.-King (S.D. Fla.); Sunbeam Corp. v. PricewaterhouseCoopers LLP, No. CL005444AN (15th Jud. Cir., Fla.); In re Sunbeam Corp., Inc., No. 01-40291 (AJG) (Bankr. S.D.N.Y.) and any adversary proceedings therein; SEC v. Dunlap, et al., No. 01-8437-Civ.-Middlebrooks (S.D. Fla.); Oaktree Capital Management LLC v. Arthur Andersen LLP, No. BC257177 (L.A. Cty., CA); and Coleman (Parent) Holdings Inc. v. Arthur Andersen LLP, et al., No. CA 01-06062AN (15th Jud. Cir., Fla).

11. "Morgan Stanley" means Morgan Stanley & Co., Inc. or any of its subsidiaries, divisions, predecessors, successors, present and former employees, representatives, agents, attorneys, accountants, advisors, or all other persons acting or purporting to act on its behalf.

12. "SEC Administrative Proceedings" means In the Matter of Sunbeam Corp., SEC Administrative Proceeding File No. 3-10481, and In the Matter of David C. Fannin, SEC Administrative Proceeding File No. 3-10482.

13. "SEC" means the Securities and Exchange Commission.

14. "Subordinated Debentures" means Sunbeam's Zero Coupon Convertible Senior Subordinated Debentures Due 2018.

15. "Subordinated Debenture Offering" means the offering of Sunbeam's Subordinated Debentures.

16. "Sunbeam" means Sunbeam Corporation, or any of its subsidiaries, divisions, affiliates, predecessors, successors, present and former employees, representatives, agents, and all other persons acting or purporting to act on its behalf.

17. "You" or "Your" means Morgan Stanley & Co., Inc. and/or any of its subsidiaries, divisions, predecessors, successors, present or former employees, representatives, agents, attorneys, accountants, advisors, or anyone acting or purporting to act on its behalf.

INSTRUCTIONS

1. Documents shall be produced as they are kept in the usual course of business, or organized and labeled to correspond to the categories in this Request. Documents attached to each other should not be separated. Documents consisting of items previously produced in the Litigations, Arbitrations, and/or SEC Administrative Proceedings with Bates numbering shall be produced in Bates number order.

2. All documents shall be produced in the file folder, envelope or other container in which the documents are kept or maintained by you. If, for any reason, the container cannot be produced, produce copies of all labels or other identifying marks.

3. The relevant period, unless otherwise indicated, shall be from **January 1, 1997 through the date of trial of this matter**, and shall include all documents and information which relate in whole or in part to such period, or to events or circumstances during such period, even though dated, prepared, generated or received prior or subsequent to that period. Please supplement or correct your responses to these requests if, at any time, you become aware that your responses are incomplete or incorrect in any respect.

4. If you claim the attorney-client privilege, or any other privilege or work-product protection for all or any portion of a document, you shall provide a privilege log that describes the withheld material sufficiently to allow CPH to test the privilege or protection asserted.

5. The following rules of construction apply:

- a) The connectives "and" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery requests all responses that might otherwise be outside of their scope;
- b) The term "including" shall be construed to mean "without limitation";
and
- c) The use of the singular form of any word includes the plural and vice versa.

DOCUMENTS REQUESTED

1. All documents concerning your efforts to have Sunbeam retain or maintain your investment banking and/or securities underwriting services.

2. All documents reflecting all fees and expenses paid by Sunbeam to you, including without limitation all billing statements, invoices, time detail records, individual calendars,

daily diaries (including electronic calendar programs), or other documents that describe or record the time spent, or expenses incurred (including back-up for any out-of-pocket expenses), by any Morgan Stanley personnel, or that describe or record any aspect of their activities concerning any services performed on behalf of, or concerning, Sunbeam.

3. All documents concerning any investigation, analysis, or due diligence of Sunbeam conducted by you or on your behalf in 1997 or 1998.

4. All documents concerning any investigation, analysis, or due diligence of Coleman or CPH conducted by you or on your behalf in 1997 or 1998.

5. All documents concerning your attempts in 1997 or 1998 to locate someone to purchase or otherwise acquire Sunbeam, whether through merger, purchase, transfer of assets or securities, or otherwise.

6. All documents concerning your attempts in 1997 or 1998 to locate companies for Sunbeam to purchase or otherwise acquire, whether through merger, purchase, transfer of assets or securities, or otherwise.

7. All documents concerning the negotiation and signing of the February 27, 1998 Agreements.

8. All documents concerning the closing of the Coleman Transaction, including without limitation all documents concerning the decision to close the Coleman Transaction.

9. All documents concerning the meetings of Sunbeam's Board of Directors in 1997 and 1998.

10. All documents concerning any discussion, promise, agreement, or plan to have research analysts, whether or not at Morgan Stanley, provide coverage for Sunbeam or any of its debt or equity securities.

11. All documents used, analyzed, consulted, or prepared by any Morgan Stanley research analyst, including without limitation Andrew Conway, James Dormer, Jake Foley, and Karen Eltrich, concerning Sunbeam.
12. All documents concerning communications between or among you, Sunbeam, and Wall Street analysts concerning Sunbeam or the Coleman Transaction.
13. All documents concerning any valuation of Sunbeam or Sunbeam securities.
14. All documents concerning the stock market's valuation of Sunbeam securities, including without limitation documents describing or analyzing the increase or decline in the market price of Sunbeam stock in the period from and including July 1, 1996 through and including December 31, 1998.
15. All documents concerning any valuation of Coleman or Coleman securities.
16. All documents concerning synergies that might be achieved from a business combination of Sunbeam and Coleman.
17. All documents concerning Sunbeam's financial statements and/or restated financial statements.
18. All documents concerning the increase in the size of the Subordinated Debenture Offering from \$500 million to \$750 million.
19. All documents concerning any draft or executed "comfort letters" requested by you or provided to you in connection with the Subordinated Debenture Offering.
20. All documents concerning the sale of, or your attempts to sell, Subordinated Debentures, including without limitation documents concerning road shows, communications with potential investors, or communications with or among Morgan Stanley's sales personnel.
21. All documents concerning the pricing of the Subordinated Debentures.

22. All documents concerning the conversion features of the Subordinated Debentures.
23. All documents concerning the "book of demand" for the Subordinated Debentures.
24. All documents concerning the events that took place on March 19, 1998 at Global Financial Press, including without limitation documents concerning Lawrence Bornstein and/or John Tyree.
25. All documents concerning your communications with Sunbeam on March 18, 1998.
26. All documents concerning the "bring-down" due diligence for the Subordinated Debenture Offering.
27. All documents concerning your communications with Sunbeam on March 24, 1998.
28. All documents concerning Sunbeam's first quarter 1998 sales and/or earnings.
29. All documents concerning the closing of the Subordinated Debenture Offering including without limitation all documents concerning the decision to close the Subordinated Debenture Offering.
30. All documents concerning the Subordinated Debenture Offering.
31. All documents concerning any work or services you performed for or on behalf of Sunbeam in 1997 or 1998, regardless of whether you were compensated for that work.
32. All documents concerning press releases issued by Sunbeam on October 23, 1997, March 19, 1998, April 3, 1998, May 9, 1998, June 15, 1998, June 25, 1998, June 30, 1998, October 20, 1998, and November 12, 1998.

33. All documents concerning the statements contained in the press releases issued by Sunbeam on October 23, 1997, March 19, 1998, April 3, 1998, May 9, 1998, June 15, 1998, June 25, 1998, June 30, 1998, October 20, 1998, and November 12, 1998.

34. All documents concerning communications relating to Sunbeam, Coleman, or CPH, including without limitation internal communications within Morgan Stanley or communications between or among Morgan Stanley and Sunbeam; Skadden, Arps, Slate, Meagher & Flom LLP; Coopers & Lybrand LLP; Llama Company; Arthur Andersen LLP; Sard Verbinnen & Co., Inc.; Hill & Knowlton, Inc.; The Coleman Company, Inc.; Credit Suisse First Boston; Coleman (Parent) Holdings Inc.; MacAndrews & Forbes Holdings, Inc.; Wachtell Lipton, Rosen & Katz; Davis Polk & Wardwell; or any other person or company, and/or any of their respective employees, agents, or representatives.

35. All documents concerning the Coleman Transaction.

36. All documents concerning the Subordinated Debenture Offering.

37. All documents concerning Albert Dunlap and/or Russell Kersh.

38. All documents concerning the Scott Paper Company.

39. All documents concerning Coleman or CPH.

40. All documents concerning MacAndrews & Forbes Holdings, Inc. with respect to Sunbeam, Coleman, or CPH.

41. All documents concerning the events and matters that are the subject of the Complaint filed in this action.

42. Organizational charts, memoranda, or similar documents that describe the business organizational structure and the administrative, management, and reporting structure of Morgan Stanley from and including January 1, 1997 through and including December 31, 1998.

43. All documents concerning Morgan Stanley's policies, procedures, manuals, guidelines, reference materials, or checklists that were in effect from and including January 1, 1997 through and including December 31, 1998 for the performance of due diligence, including without limitation due diligence performed in connection with underwriting the sale of equity or debt securities.

44. All documents concerning employment contracts, performance evaluations, and/or personnel files (including without limitation any documents that describe or discuss the training, experience, competence, and accomplishments) of all Morgan Stanley personnel who performed services for or on behalf of Sunbeam in 1997 or 1998.

45. All documents concerning Morgan Stanley's performance evaluation criteria or guidelines in effect from and including January 1, 1997 through and including December 31, 1998.

46. All documents concerning Morgan Stanley's compensation criteria or guidelines in effect from and including January 1, 1997 through and including December 31, 1998.

47. All marketing or other promotional material prepared or used by, or on behalf of, Morgan Stanley concerning investment banking or securities underwriting services that were created or used at any time from and including January 1, 1997 through and including December 31, 1998.

48. All of your document retention or document destruction policies or procedures or similar procedures for the back-up or deletion of electronic or hard copy documents of any kind for any time during 1997 through the present, including without limitation any amendments to any such policies or procedures, schedules or related documents, and any memoranda or other instructions communicated to your employees concerning the obligation and procedures to be

utilized to preserve all relevant documents, including without limitation evidence concerning the Litigations, the Arbitrations, and the SEC Administrative Proceedings.

49. All documents you have provided or produced to any party (whether voluntarily or in response to a document request, subpoena duces tecum, or other process served on you) in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings (including without limitation any reports, communications, filings, testimony, legal memoranda, statements, or other documents submitted to the Securities & Exchange Commission or any other party).

50. All documents you have provided to the SEC, the Attorney General of New York, or any other governmental or regulatory body concerning Sunbeam.

51. All documents you have received from the SEC, the Attorney General of New York, or any other governmental or regulatory body concerning Sunbeam.

52. All discovery requests or subpoenas served on you in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

53. All responses and/or objections that you provided or produced in response to a discovery request or subpoena served on you in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

54. All communications concerning any discovery request or subpoena served on you in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

55. All motions, memoranda, briefs, rulings, orders, or transcripts of proceedings concerning any discovery request, subpoena, or other process in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

56. All privilege logs you prepared in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings with respect to documents that you withheld from production in response to any document requests, subpoenas duces tecum, or other process.

57. All transcripts of and exhibits to any depositions, recorded statements, or affidavits in connection with any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

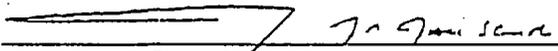
58. All documents obtained by you or produced to you by other parties, third parties, or non-parties (whether voluntarily or in response to any document requests, subpoenas duces tecum, or other process served by you or any other party) concerning Sunbeam.

59. All document requests, subpoenas duces tecum, interrogatories, requests for admission, responses, or objections that you served on, or received from, any party, third party or non-party in In re Sunbeam Corp., Inc., No. 01-40291 (AJG) (Bankr. S.D.N.Y.) and any adversary proceedings therein.

60. All transcripts of any hearings held in connection with the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

61. All affidavits, declarations, or other testimonial statements filed or submitted in connection with any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

COLEMAN (PARENT) HOLDINGS INC.

By: 
One of Its Attorneys

Jerold S. Solovy
Ronald L. Marmer
Robert T. Markowski
Deirdre E. Connell
JENNER & BLOCK, LLC
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

Jack Scarola
SEARCY DENNEY SCAROLA BARNHART
& SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33402-3626
(561) 686-6300

CARLTON FIELDS

ATTORNEYS AT LAW

MIAMI
ORLANDO
ST. PETERSBURG
TALLAHASSEE
TAMPA

WEST PALM BEACH

Esperanté
222 Lakeview Avenue, Suite 1400
West Palm Beach, Florida 33401-6149
P.O. Box 150
West Palm Beach, Florida 33402-0150

561.659.7070
561.659.7368 fax

www.carltonfields.com

E-MAIL: jjanno@carltonfields.com

December 29, 2003

The Honorable Elizabeth Maass
Palm Beach County Courthouse
205 North Dixie Highway
West Palm Beach, Florida 33401

VIA HAND DELIVERY

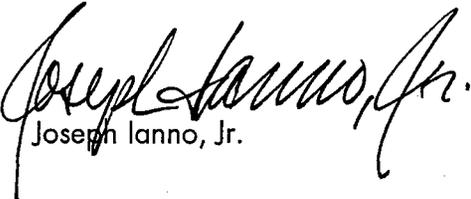
Re: *Coleman (Parent) Holdings Co. v. Morgan Stanley & Co.*
Case No. 2003 CA 5045 AI
Morgan Stanley Senior Funding v. MacAndrews & Forbes Holdings
Case No: 2003 CA 5165 AI

Dear Judge Maass:

Enclosed please find a courtesy copy of Morgan Stanley's Motion to Admit Michael C. Occhuzzo Pro Hac Vice in each of the above-referenced matters. Attorney Jack Scarola has no objection to these motions. If the proposed Orders Granting Pro Hac Vice meet with your approval, kindly execute same and provide confirmed copies to counsel of record.

Thank you for your assistance in this matter.

Respectfully,



Joseph Ianno, Jr.

/jed

Enclosures

cc: Jack Scarola (w/encl.)
Jerold Solovy (w/encl.)
Thomas Clare (w/encl.)

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CASE NO: 03 CA-005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

**VERIFIED MOTION TO ADMIT
MICHAEL C. OCCHUIZZO, PRO HAC VICE**

Defendant Morgan Stanley & Co., Inc., pursuant Fla. R. Jud. Adm. 2.061, requests this Court to admit attorney Michael C. Occhuizzo, *pro hac vice*, and in support of this Motion, states the following:

1. Defendant requests that this Court permit Michael C. Occhuizzo, an attorney with the law firm of Kirkland & Ellis LLP whose address is 655 15th Street, N.W. – 12th Floor, Washington, D.C. 20005, to appear *pro hac vice* and participate fully in this action as additional counsel on behalf of Defendant.

2. Mr. Occhuizzo has been admitted to practice before all courts in the Commonwealth of Pennsylvania since November 7, 2002, and all courts in the District of Columbia since December 8, 2003. Mr. Occhuizzo also has been admitted to practice before the United States Court of Appeals for the Third Circuit and the United States District Court for the District of Western Pennsylvania. Mr. Occhuizzo is a member of the State Bar of Pennsylvania

and the Bar of the District of Columbia and is in good standing with respect to such memberships. Mr. Occhuzzo has not been disciplined in any jurisdiction.

3. Mr. Occhuzzo has read all the applicable provisions of The Rules of Judicial Administration and the Rules Regulating The Florida Bar.

4. This verified motion complies with the Rules of Judicial Administration.

5. The undersigned will remain associated with this matter at all stages as required by local rules.

6. Mr. Occhuzzo has not filed a motion for permission to appear in Florida state courts in the preceding five years. The representation of Defendant in this matter commenced on May 8, 2003.

7. Mr. Occhuzzo will be associated with Joseph Ianno, Jr. for purposes of this representation. Mr. Ianno is a member in good standing of the Florida Bar.

8. A proposed order granting this Motion is attached hereto.

9. Counsel for Plaintiff has been consulted regarding this motion and has no objection.

WHEREFORE, Defendant respectfully requests that this Court enter an order admitting Michael C. Occhuzzo, *pro hac vice* for the purpose of representing Defendant as counsel in connection with this action pending before this Court together with such other and further relief as the Court deems just and proper.

The undersigned verifies that he has knowledge of the facts stated herein, and that the statements in the foregoing motion are true and correct.



Michael C. Occhuizzo

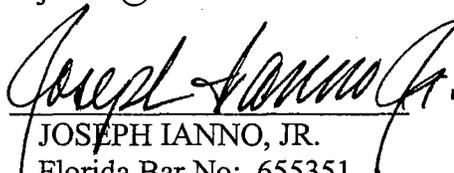
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to all counsel of record on the attached service list on this 29th day of December, 2003.

Thomas D. Yannucci, P.C.
Thomas A. Clare
Larissa Paule-Carres
Brett H. McGurk
KIRKLAND & ELLIS LLP
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

**COUNSEL FOR DEFENDANT,
MORGAN STANLEY & Co., INC.**

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

BY: 

JOSEPH IANNO, JR.
Florida Bar No: 655351

SERVICE LIST

<p>John Scarola, Esq. SEARCY, DENNEY, SCAROLA, BARNHARDT & SHIPLEY, P.A. 2139 Palm Beach Lakes Boulevard West Palm Beach, Florida 33409 Telephone: (561) 686-6300 Facsimile (561) 478-0754</p>	<p>Counsel for Plaintiff</p>
<p>Jerold S. Solovy, Esq. JENNER & BLOCK, LLC One IBM Plaza, Suite 4400 Chicago, Illinois 60611 Telephone: (312) 222-9350 Facsimile: (312) 840-7671</p>	<p>Counsel for Plaintiff</p>

IN THE CIRCUIT COURT OF THE
15TH JUDICIAL CIRCUIT IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 2003 CA 005045 AI

COLEMAN (PARENT) HOLDING INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

**ORDER GRANTING VERIFIED MOTION
TO ADMIT MICHAEL C. OCCHUIZZO, PRO HAC VICE**

THIS CAUSE having come before the Court upon Defendant's Verified Motion to Admit Michael C. Occhuizzo, Pro Hac Vice, and the Court having been advised of the agreement of counsel and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that:

Defendant, Morgan Stanley & Co., Inc.'s Verified Motion to Admit Michael C. Occhuizzo, Pro Hac Vice is GRANTED.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this ____
day of December, 2003.

ELIZABETH T. MAASS
Circuit Court Judge

Copies furnished to:

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Larissa Paule-Carres
Zhonette Brown
Brett H. McGurk
Kathryn R. DeBord
Michael C. Occhuizzo
KIRKLAND & ELLIS LLP
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005

Jack Scarola
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33409

Jerold S. Solovy
JENNER & BLOCK, LLC
One IBM Plaza
Suite 4400
Chicago, Illinois 60611

#230580/mm

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

CASE NO.: 2003 CA 005045 AI

Plaintiffs,

vs.

MORGAN STANLEY & CO., INC.,

Defendant,

_____ /

RE-NOTICE OF HEARING

YOU ARE HEREBY NOTIFIED that the undersigned has called up for hearing the following:

DATE: January 7, 2004

TIME: 8:45 a.m.

JUDGE: Hon. Elizabeth T. Maass

PLACE: Palm Beach County Courthouse, Room #11.1208, 205 North Dixie Highway,
West Palm Beach, FL 33401

SPECIFIC MATTERS TO BE HEARD:

Plaintiff's Motion for a Protective Order to Bar Certain Non-Party Discovery

Moving counsel certifies that he or she contacted opposing counsel and attempted to resolve the discovery dispute without hearing.

Coleman Holdings, Inc. vs Morgan Stanley & Company
Case No.: 2003 CA 005045 AI
Notice of Hearing

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Fax and U.S. Mail to all Counsel on the attached list, and by ~~Federal Express~~ ^{MAIL} to Theodore Gewertz, Wachtell, Lipton, Rosen and Katz, 51 West 52nd Street, New York, NY 10019; and Nancy Swift, VP and Counsel, Credit Suisse First Boston, One Madison Avenue, New York, NY 10010 on this 30th day of Dec., 2003.



JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 478-0754
Attorney for Plaintiffs

Coleman Holdings, Inc. vs Morgan Stanley & Company
Case No.: 2003 CA 005045 AJ
Notice of Hearing

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block, LLC
One IBM Plaza
Suite 4400
Chicago, IL 60611

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CASE NO: 03 CA-005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that a hearing has been set in the above-styled case as

follows:

DATE: January 8, 2004

TIME: 8:45 a.m.

PLACE: Palm Beach County Courthouse, Courtroom 11B
205 North Dixie Highway
West Palm Beach, Florida 33401

BEFORE: Judge Elizabeth T. Maass

CONCERNING: Defendant, Morgan Stanley & Co. Incorporated's Motion
to Compel Discovery

KINDLY GOVERN YOURSELVES ACCORDINGLY.

The undersigned counsel hereby certifies that a good faith attempt to resolve the issues contained in the foregoing motions or matters will be made with opposing counsel prior to hearing on these matters on the Court's Motion Calendar.

If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no costs to you, to the provision of certain assistance. Please contact the ADA Coordinator in the Administrative Office of the Court, Palm Beach County Courthouse, 205 North Dixie Highway, Room 5.2500, West Palm Beach, Florida 33401; telephone number (561) 355-2431 within two (2) working days of your receipt of this notice; if you are hearing or voice impaired, call 1-800-955-8771.

CERTIFICATE OF SERVICE

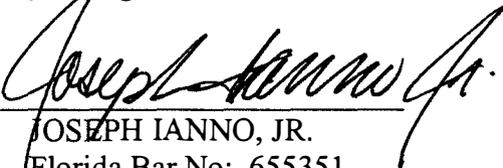
I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Federal Express and e-mail to all counsel of record on the attached service list on this 31st day of December, 2003.

Thomas D. Yannucci, P.C.
Thomas A. Clare
Zhonette M. Brown
Larissa Paule-Carres
Brett H. McGurk
KIRKLAND & ELLIS
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

COUNSEL FOR DEFENDANT

CARLTON FIELDS, P.A.
222 Lakeview Ave.
Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

BY:


JOSEPH IANNO, JR.
Florida Bar No: 655351

SERVICE LIST

Jack Scarola
SEARCY, DENNY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy
Michael Brody
JENNER & BLOCK, LLC
One IBM Plaza
Suite 400
Chicago, IL 60611

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CASE NO: 03 CA-005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that a hearing has been set in the above-styled case as follows:

DATE: January 12, 2004

TIME: 8:45 a.m.

PLACE: Palm Beach County Courthouse, Courtroom 11B
205 North Dixie Highway
West Palm Beach, Florida 33401

BEFORE: Judge Elizabeth T. Maass

CONCERNING: Defendant, Morgan Stanley & Co. Incorporated's Motion
to Compel Discovery (re: Defendant's Third Set of
Interrogatories, Interrogatory No. 1)

KINDLY GOVERN YOURSELVES ACCORDINGLY.

The undersigned counsel hereby certifies that a good faith attempt to resolve the issues contained in the foregoing motions or matters will be made with opposing counsel prior to hearing on these matters on the Court's Motion Calendar.

If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no costs to you, to the provision of certain assistance. Please contact the ADA Coordinator in the Administrative Office of the Court, Palm Beach County Courthouse, 205 North Dixie Highway, Room 5.2500, West Palm Beach, Florida 33401; telephone number (561) 355-2431 within two (2) working days of your receipt of this notice; if you are hearing or voice impaired, call 1-800-955-8771.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Federal Express and e-mail to all counsel of record on the attached service list on this 5th day of January, 2004.

Thomas D. Yannucci, P.C.
Thomas A. Clare
Zhonette M. Brown
Larissa Paule-Carres
Brett H. McGurk
KIRKLAND & ELLIS
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

COUNSEL FOR DEFENDANT

CARLTON FIELDS, P.A.
222 Lakeview Ave.
Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

BY: 
JOSEPH IANNO, JR.
Florida Bar No: 655351

SERVICE LIST

Jack Scarola
SEARCY, DENNY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy
Michael Brody
JENNER & BLOCK, LLC
One IBM Plaza
Suite 400
Chicago, IL 60611

IN THE CIRCUIT COURT OF THE
15TH JUDICIAL CIRCUIT IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 2003 CA 005045 AI

COLEMAN (PARENT) HOLDING INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

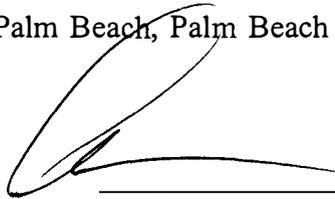
ORDER GRANTING VERIFIED MOTION
TO ADMIT MICHAEL C. OCCHUIZZO, PRO HAC VICE

THIS CAUSE having come before the Court upon Defendant's Verified Motion to Admit Michael C. Occhuizzo, Pro Hac Vice, and the Court having been advised of the agreement of counsel and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that:

Defendant, Morgan Stanley & Co., Inc.'s Verified Motion to Admit Michael C. Occhuizzo, Pro Hac Vice is GRANTED, and counsel is admitted for purpose of this case.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 6 day of December, 2003



ELIZABETH T. MAASS
Circuit Court Judge

Copies furnished to:

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Larissa Paule-Carres
Zhonette Brown
Brett H. McGurk
Kathryn R. DeBord
Michael C. Occhuzzo
KIRKLAND & ELLIS LLP
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005

Jack Scarola
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33409

Jerold S. Solovy
JENNER & BLOCK, LLC
One IBM Plaza
Suite 4400
Chicago, Illinois 60611

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

**ORDER SETTING JURY TRIAL AND
DIRECTING PRETRIAL AND MEDIATION PROCEDURES**

I. SCHEDULING

This action is set for jury trial on the calendar beginning March 22, 2004 through April 23, 2004 at 9:45 o'clock a.m. **YOU MUST APPEAR AT 9:00 O'CLOCK A.M. ON Friday, March 12, 2004, IN COURTROOM 11B, Palm Beach County Courthouse, 205 N. Dixie Hwy, West Palm Beach, FLORIDA FOR THE JURY CALENDAR CALL.** (15 days reserved).

The trial will be scheduled sometime during the calendar beginning March 22, 2004 through April 23, 2004, at a date and time to be provided at the calendar call, subject to the court's ordering a later case setting.

II. UNIFORM PRETRIAL PROCEDURE

A. On the last business day no later than 60 days prior to calendar call, the parties shall exchange lists of all trial exhibits, names and addresses of all trial witnesses, and names and addresses of all expert witnesses.

B. On the last business day no later than 50 days prior to calendar call, the parties shall exchange lists of names and addresses of all rebuttal witnesses.

C. In addition to the names and addresses of each expert retained to formulate an expert opinion with regard to this cause, both on the initial listing and on rebuttal, the parties shall provide:

1. the subject matter about which the expert is expected to testify;
2. the substance of the facts and opinions to which the expert is expected to testified;
3. a summary of the grounds for each opinion;
4. a copy of any written reports issued by the expert regarding this case; and
5. a copy of the expert's curriculum vitae.

D. On the last business day no later than thirty (30) days prior to calendar call the parties shall confer and:

1. discuss settlement;
2. simplify the issues and stipulate, in writing, to as many facts and issues as possible;
3. prepare a Pre-trial Stipulation in accordance with paragraph E; and
4. list all objections to trial exhibits.

E. **PRETRIAL STIPULATIONS MUST BE FILED.** It shall be the duty of counsel for the Plaintiff to see that the Pre-trial Stipulation is drawn, executed by counsel for all parties, and filed with the Clerk no later than twenty (20) days prior to calendar call. **UNILATERAL PRETRIAL STATEMENTS ARE DISALLOWED, UNLESS APPROVED BY THE COURT, AFTER NOTICE AND HEARING SHOWING GOOD CAUSE.** Counsel for all parties are charged with good faith cooperation in this regard. The Pre-trial Stipulation shall contain in separately numbered paragraphs:

1. a list of all pending motions requiring action by the Court and the dates those motions are set for hearing;
2. stipulated facts which require no proof at trial which may be read to the trier of fact;
3. a statement of all issues of fact for determination at trial;
4. each party's numbered list of trial exhibits with specific objections, if any, to schedules attached to the Stipulation;
5. each party's numbered list of trial witnesses with addresses (including all known rebuttal witnesses); the list of witnesses shall be on separate schedules attached to the Stipulation;
6. a statement of estimated trial time;
7. names of attorneys to try case; and
8. number of peremptory challenges per party.

F. **FILING OF PRE-TRIAL STIPULATION.** Failure to file the Pre-trial Stipulation or a Court Approved Unilateral Stipulation as above provided may result in the case's being stricken from the Court's calendar at its sounding or other sanctions.

G. **ADDITIONAL, EXHIBITS, WITNESSES OR OBJECTIONS.** At trial, the parties shall be strictly limited to exhibits and witnesses disclosed and objections reserved on the schedules attached to the Pre-trial Stipulation prepared in accordance with Paragraphs D and E, absent agreement specifically state in the Pre-trial Stipulation or order of the Court upon good cause shown. Failure to reserve objections constitutes a waiver. A party desiring to use an exhibit or witness discovered after counsel have conferred pursuant to paragraph D shall immediately furnish the Court and other counsel with a description of the exhibit or with the witness' name and address and the expected subject matter of the witness' testimony, together with the reason for the late discovery of the exhibit

or witness. Use of the exhibit or witness may be allowed by the Court for good cause shown or to prevent manifest injustice.

H. DISCOVERY. Unless otherwise agreed in the Pre-trial Stipulation, all discovery must be completed no later than ten (10) days before the date set for calendar call, absent agreement for later discovery specifically stated in the Pre-trial Stipulation or for other good cause shown.

I. PRE-TRIAL CONFERENCE. No pre-trial conference pursuant to Fla. R. Civ. P. 1.200 is set by the Court on its own motion. If a pre-trial conference is set upon motion of a party, counsel shall meet and prepare a stipulation pursuant to Paragraphs D and E and file the stipulation no later than five (5) days before the conference. Failure to request a pre-trial conference in a timely fashion constitutes a waiver of the notice of requirement of Rule 1.200. Motions for Summary Judgment will not be heard at any pre-trial conference.

J. UNIQUE QUESTIONS OF LAW. On the date of trial, counsel for the parties are directed to submit to the Court appropriate memoranda with citations to legal authority in support of any unique legal questions which may reasonably be anticipated to arise during the trial.

K. MODIFICATION TO UNIFORM PRE-TRIAL PROCEDURE. Upon written stipulation of the parties filed with the Court, the Pre-trial Procedure, except for items II D-F, inclusive, may be modified in accordance with the parties' stipulation, except to the extent that the stipulation may interfere with the Court's scheduling of the this matter for trial or hinder the orderly progress of the trial.

L. PREMARKING EXHIBITS. Prior to trial, each party shall meet with and assist the clerk in marking for identification all exhibits, as directed by the clerk.

M. DEPOSITION DESIGNATIONS. No later than 45 days prior to calendar call, each party shall serve his, her, or its designation of depositions, or portions of depositions, each intends to offer as testimony in his, her, or its case in chief. No later than 35 days prior to calendar call, each opposing party shall serve his, her, or its counter (or "fairness") designations to portions of depositions designated, together with objections to the depositions, or portions thereof, originally designated. No later than 25 days prior to calendar call, each party shall serve his, her, or its objections to counter designations served by an opposing party. It shall be the obligation of the objecting party's counsel to secure sufficient hearing time for the Court to hear and rule on the objections prior calendar call.

III. MEDIATION

A. All parties are required to participate in mediation.

1. The appearance of counsel who will try the case and representatives of each party with full authority to enter into a complete compromise and settlement is mandatory. If insurance is involved, an adjuster with authority up to the policy limits or the most recent demand, whichever is

lower, shall attend.

2. At least one week before the conference, all parties shall file with the mediator a brief, written summary of the case containing a list of issues as to each party. If an attorney or party filing the summary wishes its content to remain confidential, he/she must advise the mediator in writing when the report is filed.

3. All discussions, representations, and statements made at the mediation conference shall be privileged consistent with Florida Statutes sections 44.102 and 90.408.

4. The mediator has no power to compel or enforce a settlement agreement. If a settlement is reached, it shall be the responsibility of the attorneys or parties to reduce the agreement to writing and to comply with Florida Rule of Civil Procedure 1.730(b), unless waived.

B. The Plaintiff's attorney shall be responsible for scheduling mediation. The parties should agree on a mediator. If they are unable to agree, any party may apply to the Court for appointment of a mediator in conformity with Rule 1.720 (f), Fla. R. Civ. P. The lead attorney or party shall file and serve on all parties and the mediator a Notice of Mediation giving the time, place, and date of the mediation and the mediator's name. The mediator shall be paid \$175.00 per hour, unless otherwise agreed by the parties.

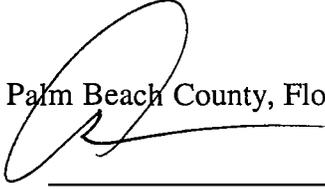
C. Completion of mediation is a prerequisite to trial. If mediation is not conducted, or if a party fails to participate in mediation, the case may be stricken from the trial calendar, pleadings may be stricken, and other sanctions may be imposed.

D. Any party opposing mediation may proceed under Florida Rule of Civil Procedure 1.700(b).

IV. NONCOMPLIANCE

NONCOMPLIANCE WITH ANY PORTION OF THIS ORDER MAY RESULT IN THE STRIKING OF THE CASE, WITNESSES, OR EXHIBITS, OR IMPOSITION OF SUCH OTHER SANCTIONS AS ARE JUST.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida, this 6 day of January, 2004.



ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci
655 15th Street, NW, Suite 1200
Washington DC 20005

Page 5

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, Il 60611

Mark F. Bideau, Esq.
777 S. Flagler Dr., Suite 300E
West Palm Beach, FL 33401

David M. Wells, Esq.
50 N. Laura Street, Suite 3300
Jacksonville, FL 32202

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

**ORDER SETTING JURY TRIAL AND
DIRECTING PRETRIAL AND MEDIATION PROCEDURES**

I. SCHEDULING

This action is set for jury trial on the calendar beginning March 22, 2004 through April 23, 2004 at 9:45 o'clock a.m. **YOU MUST APPEAR AT 9:00 O'CLOCK A.M. ON Friday, March 12, 2004, IN COURTROOM 11B, Palm Beach County Courthouse, 205 N. Dixie Hwy, West Palm Beach, FLORIDA FOR THE JURY CALENDAR CALL.** (15 days reserved).

The trial will be scheduled sometime during the calendar beginning March 22, 2004 through April 23, 2004, at a date and time to be provided at the calendar call, subject to the court's ordering a later case setting.

II. UNIFORM PRETRIAL PROCEDURE

A. On the last business day no later than 60 days prior to calendar call, the parties shall exchange lists of all trial exhibits, names and addresses of all trial witnesses, and names and addresses of all expert witnesses.

B. On the last business day no later than 50 days prior to calendar call, the parties shall exchange lists of names and addresses of all rebuttal witnesses.

C. In addition to the names and addresses of each expert retained to formulate an expert opinion with regard to this cause, both on the initial listing and on rebuttal, the parties shall provide:

1. the subject matter about which the expert is expected to testify;
2. the substance of the facts and opinions to which the expert is expected to testified;
3. a summary of the grounds for each opinion;
4. a copy of any written reports issued by the expert regarding this case; and
5. a copy of the expert's curriculum vitae.

D. On the last business day no later than thirty (30) days prior to calendar call the parties shall confer and:

1. discuss settlement;
2. simplify the issues and stipulate, in writing, to as many facts and issues as possible;
3. prepare a Pre-trial Stipulation in accordance with paragraph E; and
4. list all objections to trial exhibits.

E. **PRETRIAL STIPULATIONS MUST BE FILED.** It shall be the duty of counsel for the Plaintiff to see that the Pre-trial Stipulation is drawn, executed by counsel for all parties, and filed with the Clerk no later than twenty (20) days prior to calendar call. **UNILATERAL PRETRIAL STATEMENTS ARE DISALLOWED, UNLESS APPROVED BY THE COURT, AFTER NOTICE AND HEARING SHOWING GOOD CAUSE.** Counsel for all parties are charged with good faith cooperation in this regard. The Pre-trial Stipulation shall contain in separately numbered paragraphs:

1. a list of all pending motions requiring action by the Court and the dates those motions are set for hearing;
2. stipulated facts which require no proof at trial which may be read to the trier of fact;
3. a statement of all issues of fact for determination at trial;
4. each party's numbered list of trial exhibits with specific objections, if any, to schedules attached to the Stipulation;
5. each party's numbered list of trial witnesses with addresses (including all known rebuttal witnesses); the list of witnesses shall be on separate schedules attached to the Stipulation;
6. a statement of estimated trial time;
7. names of attorneys to try case; and
8. number of peremptory challenges per party.

F. **FILING OF PRE-TRIAL STIPULATION.** Failure to file the Pre-trial Stipulation or a Court Approved Unilateral Stipulation as above provided may result in the case's being stricken from the Court's calendar at its sounding or other sanctions.

G. **ADDITIONAL, EXHIBITS, WITNESSES OR OBJECTIONS.** At trial, the parties shall be strictly limited to exhibits and witnesses disclosed and objections reserved on the schedules attached to the Pre-trial Stipulation prepared in accordance with Paragraphs D and E, absent agreement specifically state in the Pre-trial Stipulation or order of the Court upon good cause shown. Failure to reserve objections constitutes a waiver. A party desiring to use an exhibit or witness discovered after counsel have conferred pursuant to paragraph D shall immediately furnish the Court and other counsel with a description of the exhibit or with the witness' name and address and the expected subject matter of the witness' testimony, together with the reason for the late discovery of the exhibit

or witness. Use of the exhibit or witness may be allowed by the Court for good cause shown or to prevent manifest injustice.

H. **DISCOVERY.** Unless otherwise agreed in the Pre-trial Stipulation, all discovery must be completed no later than ten (10) days before the date set for calendar call, absent agreement for later discovery specifically stated in the Pre-trial Stipulation or for other good cause shown.

I. **PRE-TRIAL CONFERENCE.** No pre-trial conference pursuant to Fla. R. Civ. P. 1.200 is set by the Court on its own motion. If a pre-trial conference is set upon motion of a party, counsel shall meet and prepare a stipulation pursuant to Paragraphs D and E and file the stipulation no later than five (5) days before the conference. Failure to request a pre-trial conference in a timely fashion constitutes a waiver of the notice of requirement of Rule 1.200. Motions for Summary Judgment will not be heard at any pre-trial conference.

J. **UNIQUE QUESTIONS OF LAW.** On the date of trial, counsel for the parties are directed to submit to the Court appropriate memoranda with citations to legal authority in support of any unique legal questions which may reasonably be anticipated to arise during the trial.

K. **MODIFICATION TO UNIFORM PRE-TRIAL PROCEDURE.** Upon written stipulation of the parties filed with the Court, the Pre-trial Procedure, except for items II D-F, inclusive, may be modified in accordance with the parties' stipulation, except to the extent that the stipulation may interfere with the Court's scheduling of the this matter for trial or hinder the orderly progress of the trial.

L. **PREMARKING EXHIBITS.** Prior to trial, each party shall meet with and assist the clerk in marking for identification all exhibits, as directed by the clerk.

M. **DEPOSITION DESIGNATIONS.** No later than 45 days prior to calendar call, each party shall serve his, her, or its designation of depositions, or portions of depositions, each intends to offer as testimony in his, her, or its case in chief. No later than 35 days prior to calendar call, each opposing party shall serve his, her, or its counter (or "fairness") designations to portions of depositions designated, together with objections to the depositions, or portions thereof, originally designated. No later than 25 days prior to calendar call, each party shall serve his, her, or its objections to counter designations served by an opposing party. It shall be the obligation of the objecting party's counsel to secure sufficient hearing time for the Court to hear and rule on the objections prior calendar call.

III. MEDIATION

A. All parties are required to participate in mediation.

1. The appearance of counsel who will try the case and representatives of each party with full authority to enter into a complete compromise and settlement is mandatory. If insurance is involved, an adjuster with authority up to the policy limits or the most recent demand, whichever is

lower, shall attend.

2. At least one week before the conference, all parties shall file with the mediator a brief, written summary of the case containing a list of issues as to each party. If an attorney or party filing the summary wishes its content to remain confidential, he/she must advise the mediator in writing when the report is filed.

3. All discussions, representations, and statements made at the mediation conference shall be privileged consistent with Florida Statutes sections 44.102 and 90.408.

4. The mediator has no power to compel or enforce a settlement agreement. If a settlement is reached, it shall be the responsibility of the attorneys or parties to reduce the agreement to writing and to comply with Florida Rule of Civil Procedure 1.730(b), unless waived.

B. The Plaintiff's attorney shall be responsible for scheduling mediation. The parties should agree on a mediator. If they are unable to agree, any party may apply to the Court for appointment of a mediator in conformity with Rule 1.720 (f), Fla. R. Civ. P. The lead attorney or party shall file and serve on all parties and the mediator a Notice of Mediation giving the time, place, and date of the mediation and the mediator's name. The mediator shall be paid \$175.00 per hour, unless otherwise agreed by the parties.

C. Completion of mediation is a prerequisite to trial. If mediation is not conducted, or if a party fails to participate in mediation, the case may be stricken from the trial calendar, pleadings may be stricken, and other sanctions may be imposed.

D. Any party opposing mediation may proceed under Florida Rule of Civil Procedure 1.700(b).

IV. NONCOMPLIANCE

NONCOMPLIANCE WITH ANY PORTION OF THIS ORDER MAY RESULT IN THE STRIKING OF THE CASE, WITNESSES, OR EXHIBITS, OR IMPOSITION OF SUCH OTHER SANCTIONS AS ARE JUST.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida, this 5 day of January, 2004.



ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci
655 15th Street, NW, Suite 1200
Washington DC 20005

Page 5

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, Il 60611

Mark F. Bideau, Esq.
777 S. Flagler Dr., Suite 300E
West Palm Beach, FL 33401

David M. Wells, Esq.
50 N. Laura Street, Suite 3300
Jacksonville, FL 32202

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN
AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

CASE NO: 03- CA-005045 AJ

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.

**AGREED ORDER ON MORGAN STANLEY & CO.
INCORPORATED'S MOTION TO COMPEL DISCOVERY**

THIS CAUSE having come before this Court upon Morgan Stanley & Co. Incorporated's Motion to Compel Discovery on this 8th day of January, 2004, and the Court being advised of the agreement of the parties, it is hereby,

ORDERED and ADJUDGED that:

Plaintiff shall completely respond to Interrogatory No. 2 to Morgan Stanley's Third Set of Interrogatories on or before January 22, 2004.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida, this 8th day of January, 2004.

ELIZABETH T. MAASS
CIRCUIT COURT JUDGE

Copies have been furnished to all counsel on the attached counsel list.

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block, LLC
One IBM Plaza
Suite 4400
Chicago, IL 60611

Jack Scarola, Esq.
Searcy Denney Scarola Barnhart & Shipley
P.O. Drawer 3626
West Palm Beach, FL 33402

FAX TRANSMITTAL

J E N N E R & B L O C K

Jenner&Block LLP
One IBM Plaza
Chicago, IL 60611-7603
Tel 312 222-9350
www.jenner.com

Chicago
Dallas
Washington, DC

Date: January 8, 2004

To: Thomas A. Clare, Esq.
KIRKLAND & ELLIS

Fax: 202 879 5200

Voice: 202 879 5993

From: Suzanne J. Prysak

Employee Number:

Client Number: 41198 10003

Important: This message is intended only for the use of the individual or entity to which it is addressed, and may contain information that is attorney work product, privileged, confidential and exempt from disclosure under applicable law. If the reader of this message is not the intended recipient, or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone, and return the original message to us at the above address via postal service. Thank you.

Message: Please see attached.

Total number of pages including this cover sheet:

Time Sent:

If you do not receive all pages, please call: 312 222-9350

Sent By:

Secretary:

Extension:

JENNER & BLOCK

January 8, 2004

By Telecopy

Jenner & Block LLP
One IBM Plaza
Chicago, IL 60611-7603
Tel 312 222-9350
www.jenner.com

Chicago
Dallas
Washington, DC

Thomas A. Clare, Esq.
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

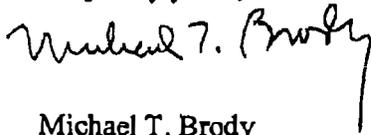
Michael T. Brody
Tel 312 923-2711
Fax 312 840-7711
mbrody@jenner.com

**Re: *Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co.
Morgan Stanley Senior Funding, Inc. v. MacAndrews & Forbes Holdings Inc., et al.***

Dear Tom:

I write in response to your January 5, 2004 letter in which you propose dates for Bram Smith's deposition. We accept your proposed date of February 24, 2004 for that deposition. In connection with that, I enclose an Amended Notice of Deposition reflecting that date.

Very truly yours,



Michael T. Brody

MTB:cjg
Enclosure

cc: Joseph Ianno, Esq. (by telecopy)
John Scarola, Esq. (by telecopy)
Jerold S. Solovy, Esq.

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Company, Inc.
 Case No.: 2003 CA 005045 AI
 Amended Notice of Taking Videotaped Deposition
 January 8, 2004

IN THE CIRCUIT COURT OF THE
 FIFTEENTH JUDICIAL CIRCUIT, IN AND
 FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 2003 CA 005045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

AMENDED NOTICE OF TAKING VIDEOTAPED DEPOSITION

To: Thomas A. Clare, Esq.
 KIRKLAND & ELLIS, LLP
 655 Fifteenth Street, N.W.
 Suite 1200
 Washington, D.C. 20005

Joseph Ianno, Jr., Esq.
 CARLTON FIELDS, P.A.
 222 Lake View Avenue
 Suite 1400
 West Palm Beach, FL 33401

PLEASE TAKE NOTICE that Plaintiff Coleman (Parent) Holdings, Inc. ("CPH") requests the deposition upon oral examination of the following non-party witness pursuant to the subpoena issued by the Circuit Court of the Fifteenth Judicial District of Florida on the date, time, and at the location set forth below:

DEPONENT	DATE AND TIME	LOCATION
R. Bram Smith	February 24, 2004 at 9:30 a.m.	Esquire Deposition Services 216 E. 45 th St., 8 th Floor New York, NY 10017

The witness is requested to bring to the deposition the documents specified in Exhibit A to the Subpoena. The deposition will be recorded by stenographic and audio-visual means and will be taken before a person authorized to administer oaths and will continue day to day until completed. The videographer will be Esquire Deposition Services, New York, New York.

taken before a person authorized to administer oaths and will continue day to day until completed. The videographer will be Esquire Deposition Services, New York, New York.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by facsimile and mail to all counsel on the attached Service List, this 8th day of January, 2004.

Dated: January 8, 2004

COLEMAN (PARENT) HOLDINGS INC.

By: Michael T. Brody
One of Its Attorneys

Jerold S. Solovy
Michael T. Brody
Deirdre E. Connell
JENNER & BLOCK LLP
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

Jack Scarola
SEARCY DENNEY SCAROLA BARNHART
& SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33409
(561) 686-6300

SERVICE LIST

Thomas A. Clare, Esq.
KIRKLAND & ELLIS, LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lake View Avenue, Suite 1400
West Palm Beach, FL 33401

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

ORDER AND NOTICE OF HEARING

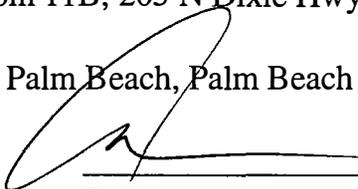
This cause having come before the Court, it is

ORDERED AND ADJUDGED that hearing on Plaintiff's Motion for a Protective
Order to Bar Certain Non-Party Discovery is hereby set for

January 8, 2004, at 12:30 p.m.

at the West Palm Beach Courthouse, Room 11B, 205 N Dixie Hwy, WPB, FL.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 8
day of January, 2004.



ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:

Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci
655 15th Street, NW, Suite 1200
Washington DC 20005

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, Il 60611

Mark F. Bideau, Esq.
777 S. Flagler Dr., Suite 300E
West Palm Beach, FL 33401

David M. Wells, Esq.
50 N. Laura Street, Suite 3300
Jacksonville, FL 32202

If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please contact the ADA Coordinator in the Administrative Office of the Court, Palm Beach County Courthouse, 205 North Dixie Highway, Room 5.2500, West Palm Beach, Florida 33401; telephone number (561) 355-4380 within two (2) working days of your receipt of this [describe notice]; if you are hearing or voice impaired, call 1-800-955-8771.

SPANISH

Si Ud. es una persona incapacitada que necesita de un servicio especial para participar en este proceso, Ud. tiene derecho a que le provean cierta ayuda sin costo alguno. Por favor pongase en contacto con el Coordinador de la Oficina Administrativa de la Corte ADA, situada en el 205 North Dixie Highway, Oficina 5.2500, West Palm Beach, Florida, 33401, teléfono (561) 355-4380, dentro de los dos (2) próximos días hábiles después de recibir esta [describa la notificación]; si tiene incapacidad de oír ó hablar llame al 1-800-955-8771.

CREOLE

Si ou sé yon moun ki Infirm, ki bészwen ninpôt akomodasyon pou ka patisipé nan pwosè sa-a, ou gen dwa, san'l pa kouté'w anyin, pou yo ba'w kèk sèvis. Tanpri kontaké koòdinatè ADA ya nan Biro Administratif Tribinal nan cité Palm Beach la, ki nan 205 North Dixie Highway, Cham 5.2500, West Palm Beach, Florida 33401, niméro telefonn-nan sé (561) 355-4380, rélé dé (2) jou dé lè ou résévwa [notis sa-a]; si ou bèbè ou byen soud rélé 1-800-955-8771.

FRENCH

Si vous êtes infirme, et en besoin de n'importe quelle accommodation pour pouvoir participer à ces procédures, vous pouvez gratuitement recevoir, certains services. S'il-vous-plait contactez le coordinateur du Bureau Administratif du Tribunal de Palm Beach, située à 205 North Dixie Highway, Chambre 5.2500, West Palm Beach, Florida 33401, numéro de téléphone (561) 355-4380 durant deux (2) jours suivant la réception de [cette note]; si vous êtes muets ou sourds, appelez 1-800-955-8771.

00001

1 IN THE FIFTEENTH JUDICIAL CIRCUIT COURT IN
2 AND FOR PALM BEACH COUNTY, FLORIDA
3 CIVIL DIVISION
4 CASE NO. 03 CA-005045 AI

5
6
7 COLEMAN (PARENT) HOLDINGS, INC.,
8 Plaintiff,

9
vs

10 MORGAN STANLEY & CO., INC.,
11
12 Defendant.

13
14
15
16 HEARING BEFORE THE
17 HONORABLE ELIZABETH T. MAASS

18
19
20
21
22 Thursday, January 8, 2004
23 Palm Beach County Courthouse
West Palm Beach, Florida
12:30 p.m. - 1:00 p.m.

24
25

00002

1 APPEARANCES:

2
3 Searcy, Denney, Scarola, Barnhart & Shipley, P.A.
4 2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33409
5 BY: JACK SCAROLA, ESQUIRE
6 Attorneys for the Plaintiff

7
8 Kirkland & Ellis, LLP
9 655 15th Street, N.W., Suite 1200
10 Washington, D.C. 20005
BY: ZHONETTE M. BROWN, ESQUIRE
11 - and -
12 Carlton Fields, P.A.
Esperante' Building
222 Lakeview Avenue, Suite 1400
West Palm Beach, Florida 33401-6149
BY: MICHAEL K. WINSTON, ESQUIRE
Attorneys for the Defendant

16div-004358

13
14
15
16
17
18
19
20
21
22
23
24
25

00003

1 P R O C E E D I N G S

2 The hearing before the Hon. Elizabeth T. Maass was
3 taken before me, Susan Fannon, Certified Shorthand Reporter,
4 Notary Public, State of Florida at Large, at the Palm Beach
5 County Courthouse, 250 South Dixie Highway, West Palm Beach,
6 Florida, beginning at the hour of 12:30 p.m. on Thursday,
7 January 8, 2004 pursuant to the Notice filed herein, in the
8 above-entitled cause pending before the above-named Court.

9 - - - -

10 MR. SCAROLA: We thank you for accommodating
11 us, your Honor.

12 MS. BROWN: Yes, thank you.

13 THE COURT: That's okay. Coleman (Parent)
14 and Morgan. This is Plaintiff's motion for protective order
15 as to certain non-party discovery. What did you want to say
16 in support of it?

17 MR. SCAROLA: Thank you, your Honor. Your
18 Honor, I have provided some outlines that were helpful in my
19 own analysis of these issues, and I hope they will be of
20 some assistance to the Court as well.

21 THE COURT: Okay.

22 MR. SCAROLA: I am handing them to you in the
23 order in which it is likely that I will reference them.

24 THE COURT: Thank you.

25 MR. SCAROLA: It's probably helpful to begin

00004

1 by just reminding your Honor that this is a case involving a
2 purchase and sale concerning Sunbeam Corporation. Sunbeam
3 Corporation, it is basically acknowledged by both sides,
4 engaged in fraudulent accounting practices which had an
5 enormous impact on its stock price.

6 Those fraudulent accounting practices became
7 publicly disclosed subsequent to the transaction engaged in
8 in which Coleman (Parent) Holding Company, a major holder of
9 Sunbeam stock, excuse me, in which Coleman (Parent) Holding
10 Company transferred an interest that it had in the Coleman
11 Company in exchange for, among other consideration, a
12 significant amount of Sunbeam stock.

13 Morgan Stanley was involved in that transaction
14 as a financial advisor and provided information to Coleman

16div-004359

15 (Parent) Holding which we allege we relied upon. And
16 there are basically two claims. There are fraudulent
17 misrepresentation claims and there are negligent
18 misrepresentation claims.

19 With regard to the fraudulent misrepresentation
20 claims, obviously we are alleging that there was actual
21 knowledge on the part of Morgan Stanley with respect to the
22 fraudulent practices of Sunbeam, which actual knowledge was
23 concealed from Coleman (Parent) Holding Company.

24 The negligent misrepresentation claim is that --
25 really one of two things, either Morgan Stanley knew of the
00005

1 fraudulent practices and negligently failed to disclose what
2 they knew or negligently failed to have learned of the
3 fraudulent practices.

4 And I think it is important to understand those
5 issues so that we can understand whether there is any
6 possible relevance to the discovery that is presently being
7 sought. And basically the discovery that is presently being
8 sought is discovery of both a law firm and an investment
9 banking firm that provided services to Coleman (Parent)
10 Holding and MAFCO its parent company in connection with the
11 Sunbeam transaction, but also have provided services to
12 Coleman (Parent) Holding and/or MAFCO in connection with
13 completely unrelated purchases and sales in which a transfer
14 of stock also was involved in one respect or another.

15 Now, clearly with regard to the fraudulent
16 misrepresentation claim, I suggest that there is no possible
17 theory of relevance concerning the discovery that is being
18 sought from those third parties. What we are told by Morgan
19 Stanley is that they want to fully explore -- and this is a
20 quote from their responsive memorandum, and it is contained
21 under the section MS contentions -- they are entitled to
22 fully explore the competence and sophistication of Coleman
23 (Parent) Holdings own paid legal and financial advisers.

24 Now, the competence and sophistication of some
25 third party with regard to the fraudulent misrepresentation
00006

1 claim could not possibly have any bearing. If any argument
2 is to be made with regard to the relevance and materiality
3 of this information, it would seem to me that it needs to be
4 made with respect to the negligent misrepresentation claims.
5 And those are the claims that I've sort of briefly outlined
6 the issues on in this first page.

7 The issue on the claim that we have made is was
8 Morgan Stanley negligent in misrepresenting Sunbeam's
9 financial condition to Coleman (Parent) Holding; and we
10 prove our case in that regard by establishing that they knew
11 about Sunbeam's fraudulent accounting and negligently failed
12 to disclose it or they negligently failed to discover the
13 fraud.

14 What these third parties knew or were capable of
15 knowing couldn't have any bearing on that issue. So it
16 seems that the only potential bearing has to be on the

17 defense side of this case, the comparative negligence claim
18 that has been made against us.

19 THE COURT: Let me ask you this. And I
20 apologize, I didn't have that long to look at what the
21 parties filed, but it strikes me that one of the things
22 Morgan Stanley is saying is that this is potentially
23 relevant to whether your client relied on the misstatements
24 whether they were fraudulently or negligently made; and, if
25 so, whether the reliance was reasonable. And one way you

00007

1 could determine that is if in similar deals they did
2 tremendous due diligence and in this deal they only did a
3 little due diligence, it may be more likely that in this
4 deal they relied on the representations. Whereas if they
5 always did tremendous due diligence, maybe it is less
6 likely.

7 MR. SCAROLA: Okay, and I think that I
8 understood that that is what they were getting at also;
9 however, this is what they also say in their memo.

10 Page 2, "It is evident that Coleman (Parent)
11 Holding and its advisors conducted little or no due
12 diligence on their own," and that's the little or no due
13 diligence on their own is their emphasis, "prior to closing
14 the acquisition transaction with Sunbeam."

15 In fact, the defense contention is that our
16 negligence was not in the manner in which we conducted our
17 own due diligence but in choosing to rely upon an advisor to
18 our opposite party in the transaction.

19 There is no issue in this case about whether
20 Wachtell Lipton, if Wachtell Lipton was given the chore in
21 connection with this transaction of conducting a thorough
22 due diligence investigation, would have discovered the
23 fraud. It certainly isn't going to be our position that if
24 a thorough due diligence investigation was conducted by
25 Wachtell Lipton, they wouldn't have found it because we're

00008

1 arguing that a thorough due diligence investigation not only
2 would have but in fact did disclose these fraudulent
3 transactions.

4 We certainly wouldn't be contending that a
5 thorough due diligence investigation by Wachtell Lipton
6 could not have discovered this fraud. In the same respect
7 we would not be arguing that a thorough due diligence
8 investigation by Credit Suisse would have failed to disclose
9 the fraudulent transaction.

10 THE COURT: Is that the same as stipulating
11 that neither Wachtell Lipton or Credit Suisse did sufficient
12 due diligence?

13 MR. SCAROLA: It is stipulating that neither
14 Wachtell Lipton nor Credit Suisse did the kind of due
15 diligence that would have disclosed these fraudulent
16 transactions because they didn't disclose the fraudulent
17 transactions. And they are not alleging that they did.
18 That's simply not a contention. We acknowledge that

16div-004361

19 these companies had the capacity, had they been given
20 the assignment, to uncover these fraudulent
21 transactions.

22 THE COURT: Do you agree your client did not
23 give them that assignment?

24 MR. SCAROLA: Yes, yes, we agree that they
25 were not given the assignment to conduct the kind of due
00009

1 diligence investigation that would have uncovered these
2 fraudulent transactions. We in fact did rely and
3 acknowledge that we relied, and it is inherent in our case
4 to contend that we relied not upon Credit Suisse or upon
5 Wachtell Lipton, but rather our allegation is we relied upon
6 Morgan Stanley.

7 So if we're coming before the Court saying we
8 relied upon Morgan Stanley, what possible relevance could
9 there be to establishing the degree of expertise of any
10 third party?

11 Whether the due diligence investigation conducted
12 by Morgan Stanley did or did not meet the generally accepted
13 standard of care for the conduct of due diligence under
14 these particular circumstances cannot be proven by proving
15 what Wachtell Lipton did in some other case or what anyone,
16 any one individual did in any particular case.

17 THE COURT: But couldn't there be some
18 potential relevancy then to what your client directed them
19 to do in other cases? I mean, if in other similar
20 transactions your client gave them directions to do full due
21 diligence, the kind that would have turned up this kind of
22 massive fraud; and in this one case did not give them such
23 directions, it strikes me that is a ripe avenue of
24 cross-examination.

25 MR. SCAROLA: But that is not a contested
00010

1 issue. That's my point.

2 THE COURT: But you're agreeing your client
3 was negligent in the type of direction it gave its own
4 advisor?

5 MR. SCAROLA: No, no, the issue becomes was
6 it negligent for my client to rely upon Morgan Stanley and
7 not to have retained an independent due diligence
8 third-party investigator in light of all the surrounding
9 circumstances of this particular case. And that issue has
10 no light shed upon it by what happened in unrelated
11 transactions. And to emphasize that, I put together -- and
12 this is really right off the top of my head --

13 THE COURT: Okay.

14 MR. SCAROLA: -- a list of possible factors
15 influencing a stock purchaser's due diligence. And before
16 they could begin to demonstrate that there is any possible
17 probative value in looking to see what these companies did
18 in other transactions, they would need to demonstrate that
19 these were the same circumstances.

20 It's no different than if we were talking about

21 an automobile accident case. You can't prove that the
22 driver was negligent in this case by bringing in five other
23 people to say I saw other cars driving at the same rate of
24 speed. I saw other cars who also didn't come to a full stop
25 at that intersection. The fact that a majority of people

00011

1 speed on I-95 through the construction zones that exist on
2 that roadway today does not prove that a reasonably prudent
3 person would speed through those construction zones. And
4 the fact that any one person was speeding doesn't prove that
5 this driver was not negligent in speeding through the
6 construction zone on this particular occasion at this
7 particular time.

8 But to begin to even suggest that it's probative,
9 you need to prove that all of the circumstances were the
10 same. You need to prove that it's publicly traded and not
11 privately held, the value of the stock relative to the total
12 transaction, the nature of the company, warranties that are
13 made in connection with the transaction, the security that
14 is offered for those warranties, the competence, reputation
15 and integrity of people and entities on the other side of
16 the transaction. Is it reasonable for me to rely upon what
17 you say?

18 Well, whether it is reasonable for me to rely
19 upon what you say about the value of this stock depends upon
20 what kind of reputation you have with respect to honesty and
21 truthfulness. What I know about your expertise in judging
22 the value of the stock, your competence with regard to these
23 particular matters. And then I need to take a look at the
24 quality and quantity of the information available from
25 competent and trustworthy third parties independent of this

00012

1 source.

2 The kind of investigation I need to do depends at
3 least upon those kinds of factors. And our contention in
4 this case is it was reasonable for us to have relied upon
5 Morgan Stanley.

6 They may bring in expert witnesses who say that
7 reliance was unreasonable under these circumstances and they
8 should have hired Wachtell Lipton and given them a broader
9 mission than what they were given in this case.

10 They can fully discover, and we have offered them
11 all of the discovery with regard to what Wachtell Lipton did
12 with respect to this transaction, what was done by Credit
13 Suisse with regard to this transaction, and at the very
14 least before they should be able to come in and begin to
15 request information concerning what was done in other
16 transactions, first they should examine what was done in
17 this transaction and the assignment that was given to them,
18 which they have not yet done. And, secondly, they need to
19 establish some parallel between other transactions they want
20 to look at and this transaction. If there is no parallel in
21 the transactions, if the only thing they had in common was
22 they both involved some transfer of stock and that is all

16div-004363

23 they are able to show, it could not possibly have any
24 probative value whatsoever in terms of establishing any of
25 the contested issues in this lawsuit.

00013

1 THE COURT: Let me ask you this. You're
2 characterizing sort of a comparative negligence as to
3 whether your client was negligent relying on the
4 representations from Morgan Stanley; but I sort of thought
5 some of the negligence or comparative negligence alleged
6 would have been that your client was negligent in not
7 performing its own due diligence.

8 MR. SCAROLA: I think that's really part and
9 parcel.

10 THE COURT: I don't think that's the same
11 thing. If you sort of have your traffic analogy, I may be
12 negligent if I'm in the intersection and I don't have the
13 right of way and somebody says come on (indicating) and I
14 don't check it, I just go and get an accident whereas I may
15 be negligent by relying on that, but I also may be negligent
16 by not looking myself and seeing if there was other traffic.

17 MR. SCAROLA: I agree.

18 THE COURT: And I think what they are
19 accusing you of is not having looked at the other traffic.

20 MR. SCAROLA: Then they are entitled to
21 absolutely, fully and completely explore what we did in this
22 transaction.

23 THE COURT: How would it not be relevant that
24 every other time you bothered to turn your head and look?

25 MR. SCAROLA: The same way it would be

00014

1 irrelevant in the auto negligence case to which we are
2 analogizing this to bring witnesses to come in and say that
3 I always stopped at that stop sign before.

4 THE COURT: You're talking about you, not
5 third parties.

6 MR. SCAROLA: Yes, me, me. I always stopped
7 at that stop sign before. Whether I always stopped at that
8 stop sign before or I never stopped at that stop sign before
9 does not determine whether I was negligent in failing to
10 stop on that occasion.

11 It may be that in every other transaction I have
12 conducted -- I meaning Coleman (Parent) Holding -- in every
13 other transaction I've conducted I chose, not that I needed
14 to, not that the generally accepted standard of care
15 required me to, but I chose to retain Wachtell Lipton and
16 Credit Suisse both to conduct the most thorough due
17 diligence investigation in the world, to conduct them
18 independently of one another, to make sure that their
19 results corroborated and maybe even to hire a third party as
20 well.

21 But the fact that I triple checked Transaction A
22 does not mean that in order to meet the generally accepted
23 standard of care I was required to triple check other
24 transactions.

16div-004364

25 It just doesn't have any probative value, first

00015

1 of all, because you haven't established that these other
2 transactions in fact presented the same set of
3 circumstances. But even if they did, my choice to use
4 extraordinary care in other circumstances does not mean that
5 I was negligent in failing to use extraordinary care in this
6 circumstance.

7 THE COURT: Let me ask you this, and I
8 apologize my thinking is not very mature on this issue.
9 Assume at trial we would require expert testimony as to what
10 is the level of due diligence that's required in this type
11 of transaction.

12 MR. SCAROLA: I don't believe that that is a
13 matter of common knowledge to a jury. I think it clearly
14 will require expert testimony. Somebody is going to have to
15 come in and say the generally accepted standard of care for
16 due diligence under these circumstances is this.

17 THE COURT: And presumably somebody other
18 than your client?

19 MR. SCAROLA: Presumably somebody other than
20 my client, sure.

21 THE COURT: And I assume what you're telling
22 me is that somebody other than your client, which your
23 client has chosen to do on past occasions, isn't going to
24 effect what is the standard of appropriate care?

25 MR. SCAROLA: No, ma'am. The generally
00016

1 accepted standard of care is not a matter of majority rule.
2 It is not a matter of consensus. It is what a reasonably
3 prudent business person would do under the same or similar
4 circumstances.

5 THE COURT: Let me ask you this. Are you
6 willing to agree now that no sort of affiliate or employee
7 of your client will offer testimony at trial as to standard
8 of care?

9 MR. SCAROLA: Yes --

10 THE COURT: Okay.

11 MR. SCAROLA: -- I am because I really don't
12 believe that we would have a credible expert witness if that
13 expert witness were an affiliate of my client. We're going
14 to choose someone of independence to offer that testimony.
15 We're not going to choose somebody in-house to offer that
16 standard of care testimony.

17 THE COURT: Okay. What's the response?

18 MS. BROWN: Your Honor, first, to start, I
19 want to thank you again for accommodating my schedule.

20 THE COURT: Sure. I'm sorry you missed the
21 first flight back.

22 MS. BROWN: I do want to start with a little
23 bit of context myself. It is interesting the
24 characterization that the Plaintiff has presented of what
25 this case is about because the standard or the principal

00017

16div-004365

1 that they wish to apply here is that the only transaction
2 that is relevant is their transfer of 82 percent of their
3 interest in Coleman to Sunbeam; but I will tell you -- and
4 as you know from the motions coming before -- that is not a
5 standard they've applied to their own discovery.

6 You can go back and look at the document requests
7 they served in May on our counsel, Davis Polk, and they were
8 before your Honor on a motion to compel documents related to
9 Scott Paper and Kimberly Clark, if you'll recall. So this
10 principal is a new found principal that they're asserting
11 for your Honor that they have not held themselves to.

12 In addition, your Honor, they claim, as
13 Mr. Scarola noted, to rely upon Morgan Stanley. The issue
14 in this case is not simply whether they were negligent. It
15 is whether they in fact did rely on Morgan Stanley. We are
16 entitled, your Honor, to find and assert proof that would
17 show in fact they did not rely --

18 THE COURT: Give me an example of the kind of
19 things you think this discovery would develop that would
20 give you evidence on that point.

21 MS. BROWN: Your Honor, I think, as you have
22 noted, there's a difference between what they relied upon
23 and how they relied upon these particular parties, CSFB and
24 Wachtell, we're not going into other parties, how they have
25 relied upon these parties in these types of actions.

00018

1 And I think we have been very, very careful to
2 narrow it. We're only asking generally about due diligence.
3 We're only asking about matters related to CSFB, to Coleman
4 (Parent) and to MAFCO, and we're only asking about
5 transactions in which they took back stock.

6 MAFCO and CPH are very sophisticated parties,
7 your Honor. They engage in a multitude of types of
8 transactions. They are doing deals daily.

9 We are limiting ourselves to a very narrow scope.
10 And after things went awry in 1998, there was press
11 expressing surprise at the perfunctory due diligence that
12 CPH performed. We're entitled to discovery that would not
13 only show that indeed it was perfunctory by a general
14 standard but by their own standard and that may reveal why,
15 what motivation --

16 THE COURT: Why do you think you could put
17 evidence before the jury that was perfunctory by their own
18 standard if they are not offering expert testimony as to the
19 standard of care?

20 MS. BROWN: I see this, your Honor -- and I
21 think you alluded to this earlier -- as similar to what one
22 might do with an expert.

23 While their own witnesses may not seek to have
24 themselves recognized as experts, MAFCO and CPH, mostly
25 MAFCO, holds itself out to be supreme deal masters, if you

00019

1 will. One way, the most effective way sometimes to
2 cross-examine someone who is akin to an expert is not to ask

16div-004366

3 them what they did, but to establish what it is that could
4 have been done.

5 For instance, if this were an expert deposition
6 or testimony, you would obtain information about that
7 expert's prior testimony, about other testing or whatever
8 that they did in similar situations and inquire of them why
9 they didn't do that in this particular case.

10 THE COURT: But if they are not being offered
11 as an expert as to the standard of care, that wouldn't be
12 relevant, would it?

13 MS. BROWN: I believe, your Honor, that it
14 would be relevant to show again it's not only the standard
15 of care it's the motivation. Was there a reason, whether it
16 was strategic or otherwise, that they did not perform the
17 type of due diligence that they performed in other cases.

18 We believe that their motivation will be shown in
19 part by what they did. In other words, your Honor, we
20 believe there may have been reasons why the due diligence
21 they performed in this case is not as extensive, the
22 assignments were not as extensive as they were in other
23 cases. We want to show that. And then we want to show the
24 reasons or potential reasons why.

25 THE COURT: Okay.

00020

1 MS. BROWN: Also, your Honor, I believe that
2 the competence of their advisors is relevant, again, to
3 establish whether or not they relied upon Morgan Stanley.
4 Is that a credible assertion? In order to establish whether
5 that's a credible assertion, we can establish their own
6 sophistication, the sophistication of these particular
7 advisors they historically relied upon and how they have
8 used these advisors as tools to perform due diligence; and,
9 again, we have been very careful to craft our request so
10 that they are limited to CPH and MAFCO, limited to other
11 similar structural deals where they took stock back and
12 limited to due diligence.

13 The other thing that I would note about these
14 requests, your Honor, which I alluded to before is the fact
15 that it's ironic that they are before you seeking to bar
16 this sort of discovery when Morgan Stanley is seeking to
17 disprove their assertions and also to prove our defenses
18 when they, themselves, have sought this discovery from us
19 and from our advisors.

20 For instance, with regard to the due diligence
21 that they performed, that CSFB and Wachtell performed on
22 other transactions, CPH asked for and we produced documents,
23 Morgan Stanley produced documents related to general due
24 diligence, not limited to this transaction, as CPH now seeks
25 to limit discovery. In each one of the requests that they

00021

1 seek to bar, your Honor, there is a similar request CPH has
2 asserted and has received documents or other discovery
3 related to that request that is not limited to the deal at
4 issue.

16div-004367

5 THE COURT: Well, except it is a little bit
6 different. I mean, your client is in a different position
7 than the Plaintiff is, and you're alleging to have done
8 things. You're alleged to be sort of the expert here. So I
9 can imagine there would be certain discovery that would be
10 properly promulgated on your client that may not be on the
11 Plaintiff.

12 MS. BROWN: I am not sure that we're alleged
13 to be anymore of an expert than CSFB. We were on the
14 opposite side of the table of MAFCO. We were financial
15 advisor to Sunbeam. CSFB was on the opposite side of the
16 table of Sunbeam and they were a financial advisor to CPH
17 and MAFCO. They are similarly situated. We're no more
18 experts, to use that term, than they are.

19 And I can go through again each one of the
20 requests. Mr. Scarola didn't go through the particular
21 requests. But for example, where we think due diligence
22 related to other stock deals, we would like to establish the
23 universe of possible, reasonable due diligence, establish
24 how CPH and MAFCO used their advisors for due diligence more
25 than they did here. And then in other cases they have

00022

1 availed themselves of the rights and abilities to inspect
2 the records and inspect documents of the other side under a
3 confidentiality agreement.

4 I would note as well, your Honor, that the
5 transactions that we are asking CPH and CSFB and Wachtell
6 about are transactions that came from discovery requests
7 that we promulgated to CPH and MAFCO. We asked them,
8 identify similarly structured deals. And when they answered
9 that discovery request, they didn't assert the relevance
10 argument that they have newly asserted here.

11 So I don't think that it's prudent or fair at
12 this point to establish a new principal for discovery that
13 they have not held themselves to, to allow them to conduct a
14 wealth of discovery relating to deals other than the deal at
15 issue here, for whatever purposes, and then to seek to limit
16 us to the transfer of the 82 percent interest from Coleman
17 to Sunbeam.

18 THE COURT: Okay. Any other argument?

19 MS. BROWN: No, your Honor. If you're
20 interested, I do have the reciprocal discovery request, I
21 can point out to you --

22 THE COURT: That sort of doesn't go to
23 whether this discovery request is appropriate, which is
24 really all I am looking at today. Okay. Thank you.

25 Did you want to respond?

00023

1 MR. SCAROLA: Briefly, your Honor. Thank
2 you. Your Honor, the Evidence Code does specifically
3 recognize circumstances where evidence of routine practice
4 is admissible. It is section 90.406. And what it says is,
5 "Evidence of the routine practice of an organization,
6 whether corroborated or not and regardless of the presence

16div-004368

7 eye witnesses, is admissible to prove that the conduct of
8 the organization on a particular occasion was in conformity
9 with the routine practice."

10 So it specifically tells us when a business
11 should be subjected to discovery with regard to what its
12 routine practices are.

13 And counsel is right, we have requested
14 information from Morgan Stanley with regard to its routine
15 practices. We have asked them to produce any manual,
16 memorandum or other document describing its routine
17 requirements for due diligence because it is our burden to
18 establish what this business did in this transaction.

19 And one of the ways in which we prove what Morgan
20 Stanley did in this transaction is to prove what its routine
21 practices were. We have not sought discovery, and Morgan
22 Stanley has declined to provide discovery with regard to any
23 other particular transaction.

24 We want their policies, practices and procedures
25 at this point in time but we have not sought -- at least as
00024

1 of now -- to go beyond what their documents say their
2 policies, practices and procedure are.

3 MS. BROWN: Your Honor --

4 THE COURT: Hold on.

5 MR. SCAROLA: They, rather than attempting to
6 prove through evidence of the routine practice of an
7 organization that what we did was in conformity with the
8 routine practice, they are telling you that their contention
9 is that what we did was not in conformity with our routine
10 practice. And we acknowledge that it was not in conformity
11 with what we did in particular other circumstances because
12 this was a different transaction.

13 So the justification for the discovery simply
14 doesn't exist under the Evidence Code. Thank you, your
15 Honor.

16 THE COURT: Let me take it under
17 advisement. I need to spend a little time with the
18 requests themselves.

19 MS. BROWN: May I respond briefly?

20 THE COURT: No, because he goes first and
21 last. It's his motion. I know it is frustrating.

22 MR. SCAROLA: Thank you very much, your
23 Honor.

24 MS. BROWN: Thank you.

25 THE COURT: Thank you. Bye, bye. Have a
00025

1 good trip back.

2 (Thereupon, at 1 p.m. the proceedings
3 concluded.)

4 - - - -

5
6
7
8

9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

00026

1 C E R T I F I C A T E

2
3
4
5
6
7
8
9
10
11

5 STATE OF FLORIDA)
6
7 COUNTY OF PALM BEACH)

12 I, Susan Fannon, Certified Shorthand Reporter,
13 certify that I was authorized to and did stenographically
14 report the foregoing proceedings and that the transcript is
15 a true record to the best of my skill, knowledge and
16 ability.

17
18

19 Dated this day of , 2004.

20
21
22
23
24
25

 Susan Fannon, CSR

00001

1 IN THE FIFTEENTH JUDICIAL CIRCUIT COURT IN
2 AND FOR PALM BEACH COUNTY, FLORIDA
3 CIVIL DIVISION
4 CASE NO. 03 CA-005045 AI
5

6
7 COLEMAN (PARENT) HOLDINGS, INC.,
8 Plaintiff,
9

vs

10 MORGAN STANLEY & CO., INC.,
11
12 Defendant.

13
14
15
16 HEARING BEFORE THE
17 HONORABLE ELIZABETH T. MAASS
18

19
20
21
22 Thursday, January 8, 2004
23 Palm Beach County Courthouse
West Palm Beach, Florida
12:30 p.m. - 1:00 p.m.

24
25

00002

1 APPEARANCES:

2
3 Searcy, Denney, Scarola, Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33409
4 BY: JACK SCAROLA, ESQUIRE
Attorneys for the Plaintiff

5
6 Kirkland & Ellis, LLP
655 15th Street, N.W., Suite 1200
7 Washington, D.C. 20005
BY: ZHONETTE M. BROWN, ESQUIRE
8 - and -
9 Carlton Fields, P.A.
Esperante' Building
222 Lakeview Avenue, Suite 1400
10 West Palm Beach, Florida 33401-6149
BY: MICHAEL K. WINSTON, ESQUIRE
11 Attorneys for the Defendant

12 - - - -

16div-004371

13
14
15
16
17
18
19
20
21
22
23
24
25

00003

1 P R O C E E D I N G S

2 The hearing before the Hon. Elizabeth T. Maass was
3 taken before me, Susan Fannon, Certified Shorthand Reporter,
4 Notary Public, State of Florida at Large, at the Palm Beach
5 County Courthouse, 250 South Dixie Highway, West Palm Beach,
6 Florida, beginning at the hour of 12:30 p.m. on Thursday,
7 January 8, 2004 pursuant to the Notice filed herein, in the
8 above-entitled cause pending before the above-named Court.

9 - - - -

10 MR. SCAROLA: We thank you for accommodating
11 us, your Honor.

12 MS. BROWN: Yes, thank you.

13 THE COURT: That's okay. Coleman (Parent)
14 and Morgan. This is Plaintiff's motion for protective order
15 as to certain non-party discovery. What did you want to say
16 in support of it?

17 MR. SCAROLA: Thank you, your Honor. Your
18 Honor, I have provided some outlines that were helpful in my
19 own analysis of these issues, and I hope they will be of
20 some assistance to the Court as well.

21 THE COURT: Okay.

22 MR. SCAROLA: I am handing them to you in the
23 order in which it is likely that I will reference them.

24 THE COURT: Thank you.

25 MR. SCAROLA: It's probably helpful to begin

00004

1 by just reminding your Honor that this is a case involving a
2 purchase and sale concerning Sunbeam Corporation. Sunbeam
3 Corporation, it is basically acknowledged by both sides,
4 engaged in fraudulent accounting practices which had an
5 enormous impact on its stock price.

6 Those fraudulent accounting practices became
7 publicly disclosed subsequent to the transaction engaged in
8 in which Coleman (Parent) Holding Company, a major holder of
9 Sunbeam stock, excuse me, in which Coleman (Parent) Holding
10 Company transferred an interest that it had in the Coleman
11 Company in exchange for, among other consideration, a
12 significant amount of Sunbeam stock.

13 Morgan Stanley was involved in that transaction
14 as a financial advisor and provided information to Coleman

15 (Parent) Holding which we allege we relied upon. And
16 there are basically two claims. There are fraudulent
17 misrepresentation claims and there are negligent
18 misrepresentation claims.

19 With regard to the fraudulent misrepresentation
20 claims, obviously we are alleging that there was actual
21 knowledge on the part of Morgan Stanley with respect to the
22 fraudulent practices of Sunbeam, which actual knowledge was
23 concealed from Coleman (Parent) Holding Company.

24 The negligent misrepresentation claim is that --
25 really one of two things, either Morgan Stanley knew of the
00005

1 fraudulent practices and negligently failed to disclose what
2 they knew or negligently failed to have learned of the
3 fraudulent practices.

4 And I think it is important to understand those
5 issues so that we can understand whether there is any
6 possible relevance to the discovery that is presently being
7 sought. And basically the discovery that is presently being
8 sought is discovery of both a law firm and an investment
9 banking firm that provided services to Coleman (Parent)
10 Holding and MAFCO its parent company in connection with the
11 Sunbeam transaction, but also have provided services to
12 Coleman (Parent) Holding and/or MAFCO in connection with
13 completely unrelated purchases and sales in which a transfer
14 of stock also was involved in one respect or another.

15 Now, clearly with regard to the fraudulent
16 misrepresentation claim, I suggest that there is no possible
17 theory of relevance concerning the discovery that is being
18 sought from those third parties. What we are told by Morgan
19 Stanley is that they want to fully explore -- and this is a
20 quote from their responsive memorandum, and it is contained
21 under the section MS contentions -- they are entitled to
22 fully explore the competence and sophistication of Coleman
23 (Parent) Holdings own paid legal and financial advisers.

24 Now, the competence and sophistication of some
25 third party with regard to the fraudulent misrepresentation
00006

1 claim could not possibly have any bearing. If any argument
2 is to be made with regard to the relevance and materiality
3 of this information, it would seem to me that it needs to be
4 made with respect to the negligent misrepresentation claims.
5 And those are the claims that I've sort of briefly outlined
6 the issues on in this first page.

7 The issue on the claim that we have made is was
8 Morgan Stanley negligent in misrepresenting Sunbeam's
9 financial condition to Coleman (Parent) Holding; and we
10 prove our case in that regard by establishing that they knew
11 about Sunbeam's fraudulent accounting and negligently failed
12 to disclose it or they negligently failed to discover the
13 fraud.

14 What these third parties knew or were capable of
15 knowing couldn't have any bearing on that issue. So it
16 seems that the only potential bearing has to be on the

17 defense side of this case, the comparative negligence claim
18 that has been made against us.

19 THE COURT: Let me ask you this. And I
20 apologize, I didn't have that long to look at what the
21 parties filed, but it strikes me that one of the things
22 Morgan Stanley is saying is that this is potentially
23 relevant to whether your client relied on the misstatements
24 whether they were fraudulently or negligently made; and, if
25 so, whether the reliance was reasonable. And one way you

00007

1 could determine that is if in similar deals they did
2 tremendous due diligence and in this deal they only did a
3 little due diligence, it may be more likely that in this
4 deal they relied on the representations. Whereas if they
5 always did tremendous due diligence, maybe it is less
6 likely.

7 MR. SCAROLA: Okay, and I think that I
8 understood that that is what they were getting at also;
9 however, this is what they also say in their memo.

10 Page 2, "It is evident that Coleman (Parent)
11 Holding and its advisors conducted little or no due
12 diligence on their own," and that's the little or no due
13 diligence on their own is their emphasis, "prior to closing
14 the acquisition transaction with Sunbeam."

15 In fact, the defense contention is that our
16 negligence was not in the manner in which we conducted our
17 own due diligence but in choosing to rely upon an advisor to
18 our opposite party in the transaction.

19 There is no issue in this case about whether
20 Wachtell Lipton, if Wachtell Lipton was given the chore in
21 connection with this transaction of conducting a thorough
22 due diligence investigation, would have discovered the
23 fraud. It certainly isn't going to be our position that if
24 a thorough due diligence investigation was conducted by
25 Wachtell Lipton, they wouldn't have found it because we're

00008

1 arguing that a thorough due diligence investigation not only
2 would have but in fact did disclose these fraudulent
3 transactions.

4 We certainly wouldn't be contending that a
5 thorough due diligence investigation by Wachtell Lipton
6 could not have discovered this fraud. In the same respect
7 we would not be arguing that a thorough due diligence
8 investigation by Credit Suisse would have failed to disclose
9 the fraudulent transaction.

10 THE COURT: Is that the same as stipulating
11 that neither Wachtell Lipton or Credit Suisse did sufficient
12 due diligence?

13 MR. SCAROLA: It is stipulating that neither
14 Wachtell Lipton nor Credit Suisse did the kind of due
15 diligence that would have disclosed these fraudulent
16 transactions because they didn't disclose the fraudulent
17 transactions. And they are not alleging that they did.
18 That's simply not a contention. We acknowledge that

19 these companies had the capacity, had they been given
20 the assignment, to uncover these fraudulent
21 transactions.

22 THE COURT: Do you agree your client did not
23 give them that assignment?

24 MR. SCAROLA: Yes, yes, we agree that they
25 were not given the assignment to conduct the kind of due
00009

1 diligence investigation that would have uncovered these
2 fraudulent transactions. We in fact did rely and
3 acknowledge that we relied, and it is inherent in our case
4 to contend that we relied not upon Credit Suisse or upon
5 Wachtell Lipton, but rather our allegation is we relied upon
6 Morgan Stanley.

7 So if we're coming before the Court saying we
8 relied upon Morgan Stanley, what possible relevance could
9 there be to establishing the degree of expertise of any
10 third party?

11 Whether the due diligence investigation conducted
12 by Morgan Stanley did or did not meet the generally accepted
13 standard of care for the conduct of due diligence under
14 these particular circumstances cannot be proven by proving
15 what Wachtell Lipton did in some other case or what anyone,
16 any one individual did in any particular case.

17 THE COURT: But couldn't there be some
18 potential relevancy then to what your client directed them
19 to do in other cases? I mean, if in other similar
20 transactions your client gave them directions to do full due
21 diligence, the kind that would have turned up this kind of
22 massive fraud; and in this one case did not give them such
23 directions, it strikes me that is a ripe avenue of
24 cross-examination.

25 MR. SCAROLA: But that is not a contested
00010

1 issue. That's my point.

2 THE COURT: But you're agreeing your client
3 was negligent in the type of direction it gave its own
4 advisor?

5 MR. SCAROLA: No, no, the issue becomes was
6 it negligent for my client to rely upon Morgan Stanley and
7 not to have retained an independent due diligence
8 third-party investigator in light of all the surrounding
9 circumstances of this particular case. And that issue has
10 no light shed upon it by what happened in unrelated
11 transactions. And to emphasize that, I put together -- and
12 this is really right off the top of my head --

13 THE COURT: Okay.

14 MR. SCAROLA: -- a list of possible factors
15 influencing a stock purchaser's due diligence. And before
16 they could begin to demonstrate that there is any possible
17 probative value in looking to see what these companies did
18 in other transactions, they would need to demonstrate that
19 these were the same circumstances.

20 It's no different than if we were talking about

21 an automobile accident case. You can't prove that the
22 driver was negligent in this case by bringing in five other
23 people to say I saw other cars driving at the same rate of
24 speed. I saw other cars who also didn't come to a full stop
25 at that intersection. The fact that a majority of people

00011

1 speed on I-95 through the construction zones that exist on
2 that roadway today does not prove that a reasonably prudent
3 person would speed through those construction zones. And
4 the fact that any one person was speeding doesn't prove that
5 this driver was not negligent in speeding through the
6 construction zone on this particular occasion at this
7 particular time.

8 But to begin to even suggest that it's probative,
9 you need to prove that all of the circumstances were the
10 same. You need to prove that it's publicly traded and not
11 privately held, the value of the stock relative to the total
12 transaction, the nature of the company, warranties that are
13 made in connection with the transaction, the security that
14 is offered for those warranties, the competence, reputation
15 and integrity of people and entities on the other side of
16 the transaction. Is it reasonable for me to rely upon what
17 you say?

18 Well, whether it is reasonable for me to rely
19 upon what you say about the value of this stock depends upon
20 what kind of reputation you have with respect to honesty and
21 truthfulness. What I know about your expertise in judging
22 the value of the stock, your competence with regard to these
23 particular matters. And then I need to take a look at the
24 quality and quantity of the information available from
25 competent and trustworthy third parties independent of this

00012

1 source.

2 The kind of investigation I need to do depends at
3 least upon those kinds of factors. And our contention in
4 this case is it was reasonable for us to have relied upon
5 Morgan Stanley.

6 They may bring in expert witnesses who say that
7 reliance was unreasonable under these circumstances and they
8 should have hired Wachtell Lipton and given them a broader
9 mission than what they were given in this case.

10 They can fully discover, and we have offered them
11 all of the discovery with regard to what Wachtell Lipton did
12 with respect to this transaction, what was done by Credit
13 Suisse with regard to this transaction, and at the very
14 least before they should be able to come in and begin to
15 request information concerning what was done in other
16 transactions, first they should examine what was done in
17 this transaction and the assignment that was given to them,
18 which they have not yet done. And, secondly, they need to
19 establish some parallel between other transactions they want
20 to look at and this transaction. If there is no parallel in
21 the transactions, if the only thing they had in common was
22 they both involved some transfer of stock and that is all

23 they are able to show, it could not possibly have any
24 probative value whatsoever in terms of establishing any of
25 the contested issues in this lawsuit.

00013

1 THE COURT: Let me ask you this. You're
2 characterizing sort of a comparative negligence as to
3 whether your client was negligent relying on the
4 representations from Morgan Stanley; but I sort of thought
5 some of the negligence or comparative negligence alleged
6 would have been that your client was negligent in not
7 performing its own due diligence.

8 MR. SCAROLA: I think that's really part and
9 parcel.

10 THE COURT: I don't think that's the same
11 thing. If you sort of have your traffic analogy, I may be
12 negligent if I'm in the intersection and I don't have the
13 right of way and somebody says come on (indicating) and I
14 don't check it, I just go and get an accident whereas I may
15 be negligent by relying on that, but I also may be negligent
16 by not looking myself and seeing if there was other traffic.

17 MR. SCAROLA: I agree.

18 THE COURT: And I think what they are
19 accusing you of is not having looked at the other traffic.

20 MR. SCAROLA: Then they are entitled to
21 absolutely, fully and completely explore what we did in this
22 transaction.

23 THE COURT: How would it not be relevant that
24 every other time you bothered to turn your head and look?

25 MR. SCAROLA: The same way it would be

00014

1 irrelevant in the auto negligence case to which we are
2 analogizing this to bring witnesses to come in and say that
3 I always stopped at that stop sign before.

4 THE COURT: You're talking about you, not
5 third parties.

6 MR. SCAROLA: Yes, me, me. I always stopped
7 at that stop sign before. Whether I always stopped at that
8 stop sign before or I never stopped at that stop sign before
9 does not determine whether I was negligent in failing to
10 stop on that occasion.

11 It may be that in every other transaction I have
12 conducted -- I meaning Coleman (Parent) Holding -- in every
13 other transaction I've conducted I chose, not that I needed
14 to, not that the generally accepted standard of care
15 required me to, but I chose to retain Wachtell Lipton and
16 Credit Suisse both to conduct the most thorough due
17 diligence investigation in the world, to conduct them
18 independently of one another, to make sure that their
19 results corroborated and maybe even to hire a third party as
20 well.

21 But the fact that I triple checked Transaction A
22 does not mean that in order to meet the generally accepted
23 standard of care I was required to triple check other
24 transactions.

25 It just doesn't have any probative value, first

00015

1 of all, because you haven't established that these other
2 transactions in fact presented the same set of
3 circumstances. But even if they did, my choice to use
4 extraordinary care in other circumstances does not mean that
5 I was negligent in failing to use extraordinary care in this
6 circumstance.

7 THE COURT: Let me ask you this, and I
8 apologize my thinking is not very mature on this issue.
9 Assume at trial we would require expert testimony as to what
10 is the level of due diligence that's required in this type
11 of transaction.

12 MR. SCAROLA: I don't believe that that is a
13 matter of common knowledge to a jury. I think it clearly
14 will require expert testimony. Somebody is going to have to
15 come in and say the generally accepted standard of care for
16 due diligence under these circumstances is this.

17 THE COURT: And presumably somebody other
18 than your client?

19 MR. SCAROLA: Presumably somebody other than
20 my client, sure.

21 THE COURT: And I assume what you're telling
22 me is that somebody other than your client, which your
23 client has chosen to do on past occasions, isn't going to
24 effect what is the standard of appropriate care?

25 MR. SCAROLA: No, ma'am. The generally

00016

1 accepted standard of care is not a matter of majority rule.
2 It is not a matter of consensus. It is what a reasonably
3 prudent business person would do under the same or similar
4 circumstances.

5 THE COURT: Let me ask you this. Are you
6 willing to agree now that no sort of affiliate or employee
7 of your client will offer testimony at trial as to standard
8 of care?

9 MR. SCAROLA: Yes --

10 THE COURT: Okay.

11 MR. SCAROLA: -- I am because I really don't
12 believe that we would have a credible expert witness if that
13 expert witness were an affiliate of my client. We're going
14 to choose someone of independence to offer that testimony.
15 We're not going to choose somebody in-house to offer that
16 standard of care testimony.

17 THE COURT: Okay. What's the response?

18 MS. BROWN: Your Honor, first, to start, I
19 want to thank you again for accommodating my schedule.

20 THE COURT: Sure. I'm sorry you missed the
21 first flight back.

22 MS. BROWN: I do want to start with a little
23 bit of context myself. It is interesting the
24 characterization that the Plaintiff has presented of what
25 this case is about because the standard or the principal

00017

1 that they wish to apply here is that the only transaction
2 that is relevant is their transfer of 82 percent of their
3 interest in Coleman to Sunbeam; but I will tell you -- and
4 as you know from the motions coming before -- that is not a
5 standard they've applied to their own discovery.

6 You can go back and look at the document requests
7 they served in May on our counsel, Davis Polk, and they were
8 before your Honor on a motion to compel documents related to
9 Scott Paper and Kimberly Clark, if you'll recall. So this
10 principal is a new found principal that they're asserting
11 for your Honor that they have not held themselves to.

12 In addition, your Honor, they claim, as
13 Mr. Scarola noted, to rely upon Morgan Stanley. The issue
14 in this case is not simply whether they were negligent. It
15 is whether they in fact did rely on Morgan Stanley. We are
16 entitled, your Honor, to find and assert proof that would
17 show in fact they did not rely --

18 THE COURT: Give me an example of the kind of
19 things you think this discovery would develop that would
20 give you evidence on that point.

21 MS. BROWN: Your Honor, I think, as you have
22 noted, there's a difference between what they relied upon
23 and how they relied upon these particular parties, CSFB and
24 Wachtell, we're not going into other parties, how they have
25 relied upon these parties in these types of actions.

00018

1 And I think we have been very, very careful to
2 narrow it. We're only asking generally about due diligence.
3 We're only asking about matters related to CSFB, to Coleman
4 (Parent) and to MAFCO, and we're only asking about
5 transactions in which they took back stock.

6 MAFCO and CPH are very sophisticated parties,
7 your Honor. They engage in a multitude of types of
8 transactions. They are doing deals daily.

9 We are limiting ourselves to a very narrow scope.
10 And after things went awry in 1998, there was press
11 expressing surprise at the perfunctory due diligence that
12 CPH performed. We're entitled to discovery that would not
13 only show that indeed it was perfunctory by a general
14 standard but by their own standard and that may reveal why,
15 what motivation --

16 THE COURT: Why do you think you could put
17 evidence before the jury that was perfunctory by their own
18 standard if they are not offering expert testimony as to the
19 standard of care?

20 MS. BROWN: I see this, your Honor -- and I
21 think you alluded to this earlier -- as similar to what one
22 might do with an expert.

23 While their own witnesses may not seek to have
24 themselves recognized as experts, MAFCO and CPH, mostly
25 MAFCO, holds itself out to be supreme deal masters, if you

00019

1 will. One way, the most effective way sometimes to
2 cross-examine someone who is akin to an expert is not to ask

3 them what they did, but to establish what it is that could
4 have been done.

5 For instance, if this were an expert deposition
6 or testimony, you would obtain information about that
7 expert's prior testimony, about other testing or whatever
8 that they did in similar situations and inquire of them why
9 they didn't do that in this particular case.

10 THE COURT: But if they are not being offered
11 as an expert as to the standard of care, that wouldn't be
12 relevant, would it?

13 MS. BROWN: I believe, your Honor, that it
14 would be relevant to show again it's not only the standard
15 of care it's the motivation. Was there a reason, whether it
16 was strategic or otherwise, that they did not perform the
17 type of due diligence that they performed in other cases.

18 We believe that their motivation will be shown in
19 part by what they did. In other words, your Honor, we
20 believe there may have been reasons why the due diligence
21 they performed in this case is not as extensive, the
22 assignments were not as extensive as they were in other
23 cases. We want to show that. And then we want to show the
24 reasons or potential reasons why.

25 THE COURT: Okay.

00020

1 MS. BROWN: Also, your Honor, I believe that
2 the competence of their advisors is relevant, again, to
3 establish whether or not they relied upon Morgan Stanley.
4 Is that a credible assertion? In order to establish whether
5 that's a credible assertion, we can establish their own
6 sophistication, the sophistication of these particular
7 advisors they historically relied upon and how they have
8 used these advisors as tools to perform due diligence; and,
9 again, we have been very careful to craft our request so
10 that they are limited to CPH and MAFCO, limited to other
11 similar structural deals where they took stock back and
12 limited to due diligence.

13 The other thing that I would note about these
14 requests, your Honor, which I alluded to before is the fact
15 that it's ironic that they are before you seeking to bar
16 this sort of discovery when Morgan Stanley is seeking to
17 disprove their assertions and also to prove our defenses
18 when they, themselves, have sought this discovery from us
19 and from our advisors.

20 For instance, with regard to the due diligence
21 that they performed, that CSFB and Wachtell performed on
22 other transactions, CPH asked for and we produced documents,
23 Morgan Stanley produced documents related to general due
24 diligence, not limited to this transaction, as CPH now seeks
25 to limit discovery. In each one of the requests that they

00021

1 seek to bar, your Honor, there is a similar request CPH has
2 asserted and has received documents or other discovery
3 related to that request that is not limited to the deal at
4 issue.

5 THE COURT: Well, except it is a little bit
6 different. I mean, your client is in a different position
7 than the Plaintiff is, and you're alleging to have done
8 things. You're alleged to be sort of the expert here. So I
9 can imagine there would be certain discovery that would be
10 properly promulgated on your client that may not be on the
11 Plaintiff.

12 MS. BROWN: I am not sure that we're alleged
13 to be anymore of an expert than CSFB. We were on the
14 opposite side of the table of MAFCO. We were financial
15 advisor to Sunbeam. CSFB was on the opposite side of the
16 table of Sunbeam and they were a financial advisor to CPH
17 and MAFCO. They are similarly situated. We're no more
18 experts, to use that term, than they are.

19 And I can go through again each one of the
20 requests. Mr. Scarola didn't go through the particular
21 requests. But for example, where we think due diligence
22 related to other stock deals, we would like to establish the
23 universe of possible, reasonable due diligence, establish
24 how CPH and MAFCO used their advisors for due diligence more
25 than they did here. And then in other cases they have

00022

1 availed themselves of the rights and abilities to inspect
2 the records and inspect documents of the other side under a
3 confidentiality agreement.

4 I would note as well, your Honor, that the
5 transactions that we are asking CPH and CSFB and Wachtell
6 about are transactions that came from discovery requests
7 that we promulgated to CPH and MAFCO. We asked them,
8 identify similarly structured deals. And when they answered
9 that discovery request, they didn't assert the relevance
10 argument that they have newly asserted here.

11 So I don't think that it's prudent or fair at
12 this point to establish a new principal for discovery that
13 they have not held themselves to, to allow them to conduct a
14 wealth of discovery relating to deals other than the deal at
15 issue here, for whatever purposes, and then to seek to limit
16 us to the transfer of the 82 percent interest from Coleman
17 to Sunbeam.

18 THE COURT: Okay. Any other argument?

19 MS. BROWN: No, your Honor. If you're
20 interested, I do have the reciprocal discovery request, I
21 can point out to you --

22 THE COURT: That sort of doesn't go to
23 whether this discovery request is appropriate, which is
24 really all I am looking at today. Okay. Thank you.

25 Did you want to respond?

00023

1 MR. SCAROLA: Briefly, your Honor. Thank
2 you. Your Honor, the Evidence Code does specifically
3 recognize circumstances where evidence of routine practice
4 is admissible. It is section 90.406. And what it says is,
5 "Evidence of the routine practice of an organization,
6 whether corroborated or not and regardless of the presence

7 eye witnesses, is admissible to prove that the conduct of
8 the organization on a particular occasion was in conformity
9 with the routine practice."

10 So it specifically tells us when a business
11 should be subjected to discovery with regard to what its
12 routine practices are.

13 And counsel is right, we have requested
14 information from Morgan Stanley with regard to its routine
15 practices. We have asked them to produce any manual,
16 memorandum or other document describing its routine
17 requirements for due diligence because it is our burden to
18 establish what this business did in this transaction.

19 And one of the ways in which we prove what Morgan
20 Stanley did in this transaction is to prove what its routine
21 practices were. We have not sought discovery, and Morgan
22 Stanley has declined to provide discovery with regard to any
23 other particular transaction.

24 We want their policies, practices and procedures
25 at this point in time but we have not sought -- at least as
00024

1 of now -- to go beyond what their documents say their
2 policies, practices and procedure are.

3 MS. BROWN: Your Honor --

4 THE COURT: Hold on.

5 MR. SCAROLA: They, rather than attempting to
6 prove through evidence of the routine practice of an
7 organization that what we did was in conformity with the
8 routine practice, they are telling you that their contention
9 is that what we did was not in conformity with our routine
10 practice. And we acknowledge that it was not in conformity
11 with what we did in particular other circumstances because
12 this was a different transaction.

13 So the justification for the discovery simply
14 doesn't exist under the Evidence Code. Thank you, your
15 Honor.

16 THE COURT: Let me take it under
17 advisement. I need to spend a little time with the
18 requests themselves.

19 MS. BROWN: May I respond briefly?

20 THE COURT: No, because he goes first and
21 last. It's his motion. I know it is frustrating.

22 MR. SCAROLA: Thank you very much, your
23 Honor.

24 MS. BROWN: Thank you.

25 THE COURT: Thank you. Bye, bye. Have a
00025

1 good trip back.

2 (Thereupon, at 1 p.m. the proceedings
3 concluded.)

4 - - - -

5
6
7
8

9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
00026

1 CERTIFICATE

2
3
4
5
6
7
8
9
10
11

STATE OF FLORIDA)
COUNTY OF PALM BEACH)

12
13
14
15
16

I, Susan Fannon, Certified Shorthand Reporter,
certify that I was authorized to and did stenographically
report the foregoing proceedings and that the transcript is
a true record to the best of my skill, knowledge and
ability.

17
18
19

Dated this day of , 2004.

20
21
22
23
24
25

Susan Fannon, CSR

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

CASE NO: 2003 CA 005045 AI

v.

Judge Elizabeth T. Maass

MORGAN STANLEY & CO., INC.,

Defendant.

**COLEMAN (PARENT) HOLDINGS INC.'S RESPONSE TO
MORGAN STANLEY & CO., INC.'S MOTION TO COMPEL DISCOVERY**

Morgan Stanley has moved to compel CPH to provide information concerning the “1997-1998 net worth, income, revenue and global holdings (including non-MAFCO holdings) of MAFCO, CPH, Ronald Perelman, Howard Gittis, and any other MAFCO or CPH employee who participated in the due diligence or financial review of Sunbeam’s acquisition of the Coleman Company,” purportedly on the ground that this financial information is relevant to CPH’s “sophistication” in business affairs. As shown below, CPH does not dispute that it is sophisticated. Morgan Stanley, therefore, has no need for the private financial information it seeks.

The law is clear that, due to the private nature of the kind of financial information that Morgan Stanley is requesting, such information is not discoverable on demand. *See, e.g., Berkeley v. Eisen*, 699 So. 2d 789, 790 (Fla. 4th DCA 1997) (“the law in the state of Florida recognizes an individual’s legitimate expectation of privacy in financial institution records”) (citation omitted); *Mogul v. Mogul*, 730 So. 2d 1287, 1290 (Fla. 5th DCA 1999) (“financial information of private persons is entitled to protection by this State’s constitutional right of privacy, if there is no relevant or compelling reason to compel disclosure”). An exception exists where the financial information requested has direct relevance to an issue or claim — such as where finances are germane to the calculation of compensatory or punitive damages. *See, e.g., Florida Gaming Corp. of Delaware v. American Jai-Alai, Inc.*, 673 So. 2d 523, 524 (Fla. 4th DCA 1996), *review denied*, 682 So. 2d 1099 (Fla. 1996); *Key West Convalescent Center, Inc. v. Doherty*, 619 So. 2d 367, 368-69 (Fla. 3d

DCA 1993).

Morgan Stanley, as its motion reveals, can make no such claim of relevance. As a result, Morgan Stanley bases its discovery demand on a theory that no Florida decision of which we are aware has recognized: to show CPH's "sophistication" in business affairs. CPH's business sophistication, however, is not in dispute. CPH, as its complaint and the discovery record demonstrate, acknowledges that it is experienced in complex business transactions. The transaction that lies at the heart of this lawsuit — whereby CPH conveyed its 82% interest in The Coleman Company to Sunbeam in exchange for Sunbeam stock and other consideration — is itself an example of a major financial transaction. In addition, as our discovery answers show, CPH, MAFCO, and their affiliates have been involved in other significant transactions. *See, e.g.*, CPH's Response to Interrogatory No. 5 in Morgan Stanley's First Set of Interrogatories (listing 40 transactions by MAFCO, by companies controlled by MAFCO, and by affiliates of CPH and MAFCO); *cf. Gruman v. Bankers Trust Co.*, 379 So. 2d 658, 659 (Fla. 3d DCA 1980) (Appellate Court quashing order requiring disclosure of information about a party's bank accounts where party already had stipulated to the only issue to which his finances were relevant).

Moreover, even if discovery of financial information concerning CPH or MAFCO were proper, discovery of the personal finances of executives and employees is not. The interrogatory at issue demands, as to anyone at MAFCO and CPH who had any involvement with the Sunbeam/Coleman transaction, detailed information concerning how much money those individuals have and what they own. That information has nothing to do with whether CPH is sophisticated in business matters. Thus, especially as Morgan Stanley's discovery demand relates to individual MAFCO and CPH officers and employees, that demand should be rejected. *See Frank Medina Trading Co. v. Blanco*, 553 So. 2d 285, 285 (Fla. 3d DCA 1989) (although corporate tax returns were discoverable, because they were relevant to issues in dispute, the personal tax returns of corporate officers were not discoverable).

* * *

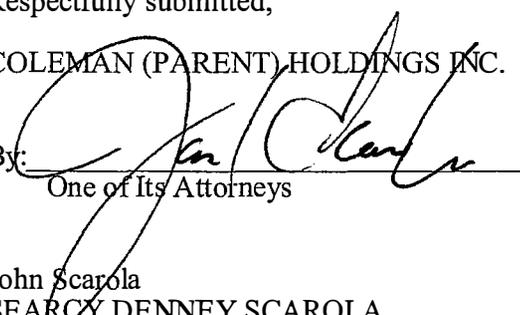
In sum, although Morgan Stanley contends that it needs to discover the finances of CPH,

MAFCO, and their officers and employees to prove CPH's business sophistication, the information Morgan Stanley seeks is unnecessary to show CPH's sophistication and impermissibly seeks disclosure of private financial information. CPH's sophistication is not in dispute.

Dated: January 9, 2004

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

By: 
One of Its Attorneys

Jerold S. Solovy
JENNER & BLOCK LLP
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

John Scarola
SEARCY DENNEY SCAROLA
BARNHART & SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33402-3626
(561) 686-6300

#1023120

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by
Fax and Federal Express to all counsel on the attached list on this 9th day of
JAN, 2004.



JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 478-0754
Attorneys for Plaintiff

Coleman (Parent) Holdings Inc. vs Morgan Stanley & Company
Case No.: 2003 CA 005045 AI

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block, LLC
One IBM Plaza
Suite 4400
Chicago, IL 60611

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS, INC.,

CASE NO: 03 CA-005045 AI

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

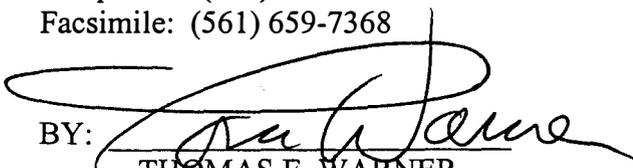
Defendant.

NOTICE OF APPEAL OF NON-FINAL ORDER

Pursuant to Fla.R.App.P. 9.130(a)(3)(A) (Non-Final Orders, "concern venue"), notice is given that Morgan Stanley & Co., Inc., Defendant/Appellant, appeals to the Fourth District Court of Appeals, State of Florida, the order of this Court rendered on December 15, 2003. The nature of the order is a non-final order denying Defendant's Motion to Dismiss Pursuant to Florida Rule of Civil Procedure 1.061 (Choice of Forum – Forum Non-Conveniens) or, in the alternative, for Judgment on the Pleadings.

KIRKLAND & ELLIS
Thomas D. Yannucci, P.C.
Thomas A. Clare
Zhonette M. Brown
Brett H. McGurk
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

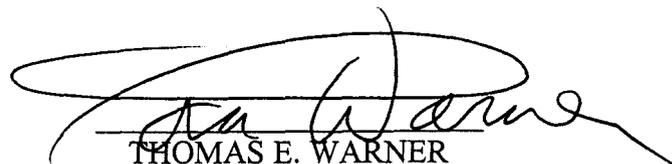
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368

BY: 
THOMAS E. WARNER
Florida Bar No: 176725
JOSEPH IANNO, JR.
Florida Bar No: 655351

COUNSEL FOR DEFENDANT/APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Federal Express and e-mail to all counsel of record listed below on this 9th day of January, 2004.


THOMAS E. WARNER

Jack Scarola
**SEARCY, DENNY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy
Michael Brody
JENNER & BLOCK, LLC
One IBM Plaza
Suite 400
Chicago, IL 60611

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

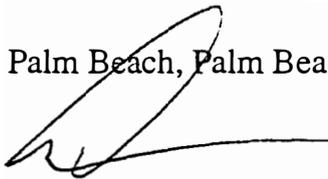
MORGAN STANLEY & CO., INC.,
Defendant(s).

**ORDER ON DEFENDANT'S MOTION TO DISMISS PURSUANT TO FLORIDA
RULE OF CIVIL PROCEDURE 1.061 OR, IN THE ALTERNATIVE, FOR
JUDGMENT ON THE PLEADINGS**

THIS CAUSE came before the Court December 12, 2003 on Defendant's Motion to Dismiss Pursuant to Florida Rule of Civil Procedure 1.061 or, in the Alternative, for Judgment on the Pleadings, with both parties well represented by counsel. For purposes of the portion of the Motion seeking dismissal of the action on forum non-conveniens grounds only, the undersigned has assumed, but not decided, that New York substantive law controls. Based on the foregoing and the proceedings before the Court, it is

ORDERED AND ADJUDGED that Defendant's Motion to Dismiss Pursuant to Florida Rule of Civil Procedure 1.061 or, in the Alternative, for Judgment on the Pleadings is Denied.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 15th day of December, 2003.



ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

RECEIVED
JAN 13 2004
JUDGE

12/15
16div-004391
Judge

Thomas D. Yannucci
655 15th Street, NW, Suite 1200
Washington DC 20005

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, IL 60611

Mark F. Bideau, Esq.
777 S. Flagler Dr., Suite 300E
West Palm Beach, FL 33401

David M. Wells, Esq.
50 N. Laura Street, Suite 3300
Jacksonville, FL 32202

FAX TRANSMITTAL

J E N N E R & B L O C K

Jenner&Block LLP
One IBM Plaza
Chicago, IL 60611-7603
Tel 312 222-9350
www.jenner.com

Chicago
Dallas
Washington, DC

Date: January 14, 2004

To: Thomas A. Clare, Esq.
Kirkland & Ellis

cc: Joseph Ianno, Jr.
Carlton Fields, P.A.

John Scarola, Esq.
Searcy Denney Scarola
Barnhart & Shipley, P.A.

From: Michael T. Brody
312 923-2711

Fax: (202) 879-5200
Voice: (202) 879-5993

Fax: (561) 659-7368
Voice: (561) 659-7070

Fax: (561) 684-5816 (before 5:00 pm)
Voice: (561) 686-6350, Ext. 140

Client Number: 41198-10003

Important: This message is intended only for the use of the individual or entity to which it is addressed, and may contain information that is attorney work product, privileged, confidential and exempt from disclosure under applicable law. If the reader of this message is not the intended recipient, or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone, and return the original message to us at the above address via postal service. Thank you.

Message:

Total number of pages including this cover sheet: 4
If you do not receive all pages, please call: 312 222-9350
Secretary: Caryn Jo Geisler

Time Sent:
Sent By:
Extension: 6490

JENNER & BLOCK

January 14, 2004

By Telecopy

Thomas A. Clare, Esq.
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Jenner & Block LLP
One IBM Plaza
Chicago, IL 60611-7603
Tel 312 222-9350
www.jenner.com

Chicago
Dallas
Washington, DC

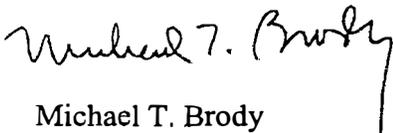
Michael T. Brody
Tel 312 923-2711
Fax 312 840-7711
mbrody@jenner.com

**Re: *Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co.
Morgan Stanley Senior Funding, Inc. v. MacAndrews & Forbes Holdings Inc., et al.***

Dear Tom:

We accept February 12, 2004 to commence the deposition of Mr. Kitts. An amended notice is enclosed.

Very truly yours,



Michael T. Brody

MTB:cjg

Enclosure

cc: Joseph Ianno, Esq. (by telecopy)
John Scarola, Esq. (by telecopy)
Jerold S. Solovy, Esq.

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Company, Inc.
 Case No.: 2003 CA 005045 AI
 Amended Notice of Taking Videotaped Deposition
 January 14, 2004

IN THE CIRCUIT COURT OF THE
 FIFTEENTH JUDICIAL CIRCUIT, IN AND
 FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 2003 CA 005045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

_____ /

AMENDED NOTICE OF TAKING VIDEOTAPED DEPOSITION

To: Thomas A. Clare, Esq.
 KIRKLAND & ELLIS, LLP
 655 Fifteenth Street, N.W.
 Suite 1200
 Washington, D.C. 20005

Joseph Ianno, Jr., Esq.
 CARLTON FIELDS, P.A.
 222 Lake View Avenue
 Suite 1400
 West Palm Beach, FL 33401

PLEASE TAKE NOTICE that Plaintiff Coleman (Parent) Holdings, Inc. ("CPH") requests the deposition upon oral examination of the following non-party witness pursuant to the commission issued by the Circuit Court of the Fifteenth Judicial District of Florida and the subpoena issued in aid of that commission by the Supreme Court of the State of New York on the date, time, and location set forth below:

DEPONENT	DATE AND TIME	LOCATION
Robert W. Kitts	February 12, 2004 at 9:30 a.m.	Esquire Deposition Services 216 E. 45 th St., 8 th Floor New York, NY 10017

The witness is requested to bring to the deposition the documents specified in Exhibit A to the Subpoena. The deposition will be recorded by stenographic and audio-visual means and will be taken before a person authorized to administer oaths and will continue day to day until completed. The videographer will be Esquire Deposition Services, New York, New York.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by facsimile and mail to all counsel on the attached Service List, this 14th day of January, 2004.

Dated: January 14, 2004

COLEMAN (PARENT) HOLDINGS INC.

By: 
One of Its Attorneys

Jerold S. Solovy
Michael T. Brody
Deirdre E. Connell
JENNER & BLOCK LLP
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

Jack Scarola
SEARCY DENNEY SCAROLA BARNHART
& SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33409
(561) 686-6300

SERVICE LIST

Thomas A. Clare, Esq.
KIRKLAND & ELLIS, LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lake View Avenue, Suite 1400
West Palm Beach, FL 33401

KIRKLAND & ELLIS LLP

Fax Transmittal

655 Fifteenth Street, N.W.
Washington, D.C. 20005
Phone: 202 879-5000
Fax: 202 879-5200

Please notify us immediately if any pages are not received.

THE INFORMATION CONTAINED IN THIS COMMUNICATION IS CONFIDENTIAL, MAY BE ATTORNEY-CLIENT PRIVILEGED, MAY CONSTITUTE INSIDE INFORMATION, AND IS INTENDED ONLY FOR THE USE OF THE ADDRESSEE. UNAUTHORIZED USE, DISCLOSURE OR COPYING IS STRICTLY PROHIBITED AND MAY BE UNLAWFUL.

**IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR,
PLEASE NOTIFY US IMMEDIATELY AT:
202 879-5000.**

To:	Company:	Fax #:	Direct #:
Michael T. Brody	Jenner & Block, LLC	(312) 840-7711	(312) 923-2711
Jerold Solovy	Jenner & Block, LLC	(312) 840-7671	(312) 923-2671
Joseph Ianno	Carlton Fields, P.A.	561-659-7368	561-659-7070
John Scarola	Searcy, Denney, Scarola, Barnhart & Shipley	561-684-5816	561-686-6300

From:	Date:	Pages w/cover:	Fax #:	Direct #:
Larissa L. Paule-Carres	January 14, 2004	5	202 879-5200	202 879-5951

Message:

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CASE NO: 03 CA-005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

AMENDED NOTICE OF VIDEOTAPED DEPOSITION

PLEASE TAKE NOTICE that Defendant Morgan Stanley & Company Incorporated (“MS & Co.”) will take the deposition of Coleman (Parent) Holdings, Inc. (“CPH”) through a CPH representative or representatives with knowledge on the topics listed below, pursuant to Florida Rules of Civil Procedure 1.280 and 1.310. The oral examination will take place on January 21, 2004, from 1:00 p.m. until conclusion, at the offices of Kirkland & Ellis, LLP, 153 East 53rd Street, New York, New York 10022.

CPH shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf on the following matters:

1. CPH’s e-mail retention policies, practices, and procedures from 1997 to the present, including but not limited to the e-mail programs used, the frequency of e-mail backups, the media used for the storage of current and backed-up or archived e-mail, and the use and identity of any vendors.
2. CPH’s ability to retrieve or restore e-mail, including but not limited to the procedures, time, labor, and expense involved.

The deposition will be taken before a person authorized to administer oaths and recorded by stenographic and videographic means. The video operator will be Esquire Deposition Services of 216 E. 45th Street, New York, New York. The witness is instructed to bring all books, papers, and other things in his or her possession or under its control relevant to this lawsuit (and not previously produced in discovery) to the examination.

Dated: January 14, 2004



Thomas D. Yannucci, P.C.

Thomas A. Clare

Zhonette M. Brown

Larissa Paule-Carres

Kathryn DeBord

Ryan Phair

KIRKLAND & ELLIS LLP

655 15th Street, N.W. – Suite 1200

Washington, D.C. 20005

Telephone: (202) 879-5000

Facsimile: (202) 879-5200

Joseph Ianno, Jr. (FL Bar # 655351)

CARLTON FIELDS, P.A.

222 Lakeview Ave., Suite 1400

West Palm Beach, FL 33401

Telephone: (561) 659-7070

Facsimile: (561) 659-7368

Counsel for Defendant

Morgan Stanley & Co. Incorporated

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by facsimile and e-mail to all counsel of record on the attached service list on this 14th day of January, 2004.

Thomas D. Yannucci, P.C.
Thomas A. Clare
Zhonette M. Brown
Larissa Paule-Carres
Kathryn DeBord
Ryan Phair
KIRKLAND & ELLIS LLP
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

Joseph Ianno, Jr. (FL Bar # 655351)
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

BY: 
Larissa Paule-Carres

Counsel for Defendant
Morgan Stanley & Co. Incorporated

SERVICE LIST

<p>John Scarola SEARCY, DENNEY, SCAROLA, BARNHARDT & SHIPLEY, P.A. 2139 Palm Beach Lakes Boulevard West Palm Beach, Florida 33409</p>	<p>Counsel for Plaintiff</p>
<p>Jerold S. Solovy JENNER & BLOCK, LLC One IBM Plaza Suite 4400 Chicago, Illinois 60611</p>	<p>Counsel for Plaintiff</p>

KIRKLAND & ELLIS LLP

AND AFFILIATED PARTNERSHIPS

655 Fifteenth Street, N.W.
Washington, D.C. 20005

202 879-5000

www.kirkland.com

Thomas A. Clare
To Call Writer Directly:
202 879-5993
tclare@kirkland.com

Facsimile:
202 879-5200
Dir. Fax: 202 879-5200

January 14, 2004

Michael T. Brody Esq.
Jenner & Block, LLC
One IBM Plaza
Chicago, IL 60611-7603

Dear Mike:

Attached is an amended deposition notice reflecting our agreement to begin Mr. Drapkin's January 30, 2004 deposition at 9:30 a.m. rather than 9:00 a.m.

Sincerely,



Thomas A. Clare

TAC/aka

cc: Joseph Ianno, Jr., Esq. (by facsimile)
John Scarola, Esq. (by facsimile)

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CASE NO: 03 CA-005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO. INCORPORATED,

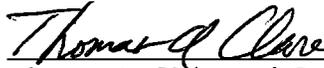
Defendant.

AMENDED NOTICE OF VIDEOTAPED DEPOSITION

PLEASE TAKE NOTICE that Defendant Morgan Stanley & Company Incorporated will take the videotaped deposition Donald G. Drapkin, pursuant to Florida Rules of Civil Procedure 1.280 and 1.310. The oral examination will take place beginning on January 30, 2004, at 9:30 a.m. and continue from day to day until completed at the offices of Kirkland & Ellis, LLP, 153 East 53rd Street, New York, New York, 10022.

The deposition will be taken before a person authorized to administer oaths and recorded by stenographic and videographic means. The video operator will be Esquire Deposition Services of 216 E. 45th Street in New York, New York. The witness is instructed to bring all books, papers, and other things in his or her possession or under its control relevant to this lawsuit (and not previously produced in discovery) to the examination.

Dated: January 11, 2004



Thomas D. Yannucci, P.C.

Thomas A. Clare

Zhonette M. Brown

Larissa Paule-Carres

Ryan P. Phair

Kathryn DeBord

KIRKLAND & ELLIS LLP

655 15th Street, N.W. – Suite 1200

Washington, D.C. 20005

Telephone: (202) 879-5000

Facsimile: (202) 879-5200

Joseph Ianno, Jr. (FL Bar # 655351)

CARLTON FIELDS, P.A.

222 Lakeview Ave., Suite 1400

West Palm Beach, FL 33401

Telephone: (561) 659-7070

Facsimile: (561) 659-7368

Counsel for Defendant

Morgan Stanley & Co. Incorporated

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by facsimile and e-mail to all counsel of record on the attached service list on this 10th day of January, 2004.

Thomas D. Yannucci, P.C.
Thomas A. Clare
Zhonette M. Brown
Larissa Paule-Carres
Ryan P. Phair
Kathryn DeBord
KIRKLAND & ELLIS LLP
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

Joseph Ianno, Jr. (FL Bar # 655351)
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

BY: *Thomas A. Clare*

Counsel for Defendant
Morgan Stanley & Co. Incorporated

SERVICE LIST

<p>John Scarola SEARCY, DENNEY, SCAROLA, BARNHARDT & SHIPLEY, P.A. 2139 Palm Beach Lakes Boulevard West Palm Beach, Florida 33409</p>	<p>Counsel for Plaintiff</p>
<p>Jerold S. Solovy JENNER & BLOCK, LLC One IBM Plaza Suite 4400 Chicago, Illinois 60611</p>	<p>Counsel for Plaintiff</p>

#230580/mm

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

CASE NO.: 2003 CA 005045 AI

Plaintiffs,

vs.

MORGAN STANLEY & CO., INC.,

Defendant,

NOTICE OF HEARING

YOU ARE HEREBY NOTIFIED that the undersigned has called up for hearing the

following:

DATE: February 20, 2004

TIME: 3:30 p.m.

JUDGE: Hon. Elizabeth T. Maass

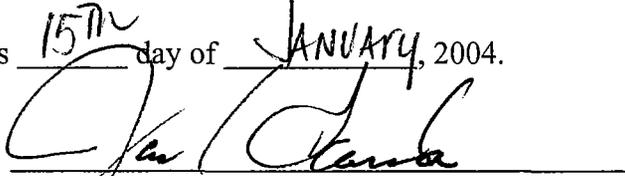
PLACE: Palm Beach County Courthouse, Room #11.1208, 205 North Dixie Highway,
West Palm Beach, FL 33401

SPECIFIC MATTERS TO BE HEARD:

Plaintiff's Motion for Special Trial Setting

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by

U.S. Mail to all Counsel on the attached list, this 15th day of JANUARY, 2004.



JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 478-0754
Attorney for Plaintiffs

Coleman (Parent) Holdings Inc. vs Morgan Stanley & Co., Inc.
Case No.: 2003 CA 005045 AI
Notice of Hearing

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block LLP
One IBM Plaza
Suite 4400
Chicago, IL 60611

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CASE NO: 03 CA-005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

**MORGAN STANLEY & CO. INCORPORATED'S
MOTION FOR ISSUANCE OF COMMISSIONS**

Morgan Stanley & Co. Incorporated ("MS & Co.") files its Motion for Issuance of Commissions and states:

1. MS & Co. needs to depose and obtain documents concerning this case from the following witnesses residing in California, Connecticut, Kansas, Minnesota, New York, Texas, and the District of Columbia:

Karen Kay Clark
1674 Amarelle Street
Newbury Park, CA 91320

Frank N. Gifford
126 Taconic Road
Greenwich, CT 06831-3139

Robert K. Duffy
16 Saint Nicholas Road
Darien, CT 06820-2823

Joseph P. Page
921 Sheridan Street, Apt. 119
Wichita, KS 67213-1363

William H. Spoor
622 West Ferndale Road
Wayzata, MN 55391

Adam Emmerich
Wachtell, Lipton, Rosen & Katz
51 West 52nd Street
New York, NY 10019

Steven Cohen
Wachtell, Lipton, Rosen & Katz
51 West 52nd Street
New York, NY 10019

Steven K. Geller
301 East 79th Street, Apt. 4H
New York, NY 10021-0932

Donald Uzzi
4209 Beverly Drive
Dallas, TX 75202

Ann Dibble Jordan
2940 Benton Place NW
Washington, DC 20008

The commissioners that MS & Co. seeks to have appointed is:

Esquire Santa Ana
2100 North Broadway, Second Floor
Santa Ana, CA 97206

Del Vecchio Reporting
117 Randi Drive
Madison, CT 06443

Harper Court Reporting
P.O. Box 3008
Wichita, KS 67201

Kirby Kennedy & Associates
5200 Wilson Road #219
Minneapolis, MN 55424

Esquire Deposition Services
216 E. 45th Street, 8th FL
New York, New York 10017-3304

Esquire Deposition Services
703 McKinney Avenue #320
Dallas, Texas 75202

Esquire Deposition Services
1020 19th Street NW, #621
Washington, DC 20036

or any person duly authorized by it and able to administer oaths pursuant to the laws of California, Connecticut, Kansas, Minnesota, New York, Texas, and the District of Columbia.

2. MS & Co. requests that this Court issue a commission appointing commissioners in California, Connecticut, Kansas, Minnesota, New York, Texas, and the District of Columbia to take the videotaped testimony of the above witness under oath and on oral examination in accordance with Fla.R Civ.P. 1.300 and 1.310 and Florida Statutes § 92.251.

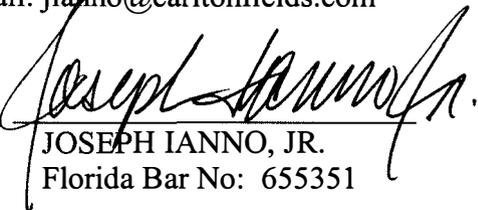
3. Attached as Exhibit "A" is the proposed commission to the commissioners in California, Connecticut, Kansas, Minnesota, New York, Texas, and the District of Columbia authorizing them to take the depositions of the witnesses identified above.

WHEREFORE, MS & Co. respectfully requests that this Court issue the commission in the form attached as Exhibit "A."

Thomas D. Yannucci, P.C.
Thomas A. Clare
Zhonette M. Brown
Larissa Paule-Carres
KIRKLAND & ELLIS
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

COUNSEL FOR DEFENDANT

CARLTON FIELDS, P.A.
222 Lakeview Ave.
Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

BY: 
JOSEPH IANNO, JR.
Florida Bar No: 655351

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail and e-mail to all counsel of record on the following service list on this 15th day of January, 2004.


JOSEPH IANNO, JR.

SERVICE LIST

John Scarola SEARCY, DENNEY, SCAROLA, BARNHARDT & SHIPLEY, P.A. 2139 Palm Beach Lakes Boulevard West Palm Beach, Florida 33409	Counsel for Plaintiff
Jerold S. Solovy JENNER & BLOCK, LLC One IBM Plaza Suite 4400 Chicago, Illinois 60611	Counsel for Plaintiff

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CASE NO: 03 CA-005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

AGREED ORDER APPOINTING COMMISSIONERS AND COMMISSIONS

THIS CAUSE, having come before the Circuit Court in and for Palm Beach County, State of Florida, on the agreement of the parties, and

WHEREAS, it appears to the Court that:

1. Defendant Morgan Stanley & Co. Incorporated (“MS & Co.”) desires to take the videotaped depositions of and obtain documents from the following witnesses who reside in California, Connecticut, Kansas, Minnesota, New York, Texas, and the District of Columbia and who have knowledge of facts relevant to this case:

Karen Kay Clark
1674 Amarelle Street
Newbury Park, CA 91320

Frank N. Gifford
126 Taconic Road
Greenwich, CT 06831-3139

Robert J. Duffy
16 Saint Nicholas Road
Darien, CT 06820-2823

Joseph P. Page
921 Sheridan Street, Apt. 119
Wichita, KS 67213-1363

William H. Spoor
622 West Ferndale Road
Wayzata, MN 55391

Adam Emmerich
Wachtell, Lipton, Rosen & Katz
51 West 52nd Street
New York, NY 10019

Steven Cohen
Wachtell, Lipton, Rosen & Katz
51 West 52nd Street
New York, NY 10019

Steven K. Geller
301 East 79th Street, Apt. 4H
New York, NY 10021-0932

Donald Uzzi
4209 Beverly Dr.
Dallas, TX 75205-3020

Ann Dibble Jordan
2940 Benton Place NW
Washington, DC 20008

2. You are hereby appointed as commissioners to take the videotaped testimony (and obtain the requested documentation) of the above witnesses and other witnesses whose discovery is sought in the commissions' jurisdiction under oath and on oral examination in accordance with the applicable Florida Statutes and Rules of Civil Procedure:

Esquire Santa Ana
2100 North Broadway, Second Floor
Santa Ana, CA 97206

Del Vecchio Reporting
117 Randi Drive
Madison, CT 06443

Harper Court Reporting
P.O. Box 3008
Wichita, KS 67201

Kirby Kennedy & Associates
5200 Wilson Road #219
Minneapolis, MN 55424

Esquire Deposition Services
216 E. 45th Street, 8th FL
New York, New York 10017-3304

Esquire Deposition Services
703 McKinney Avenue #320
Dallas, Texas 75202

Esquire Deposition Services
1020 19th Street NW, #621
Washington, DC 20036

or any person able to administer oaths pursuant to the laws of California, Connecticut, Kansas, Minnesota, New York, Texas, and the District of Columbia and duly authorized by him.

3. This order does not purport to grant the power of the commissioners appointed to subpoena witnesses or documents, but simply the power to administer oaths and transcribe deposition testimony.

DONE AND ORDERED in Chambers, West Palm Beach, Palm Beach County, Florida
this ____ day of January, 2004.

ELIZABETH T. MAASS
Circuit Court Judge

Coleman (Parent) Holdings v. Morgan Stanley & Co. Inc.
2003 CA 005045AI
Agreed Order on Appointment of Commission

Copies furnished to:

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368

John Scarola, Esq.
SEARCY, DENNEY, SCAROLA, BARNHARDT
& SHIPLEY, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33409
Telephone: (561) 686-3000
Facsimile: (561) 478-0754

Thomas D. Yannucci, P.C.
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

Jerold S. Solovy
JENNER & BLOCK, LLC
One IBM Plaza
Suite 4400
Chicago, Illinois 60611
Telephone: (312) 222-9350
Facsimile: (312) 527-0484

FAX TRANSMITTAL

J E N N E R & B L O C K

Jenner&Block LLP
One IBM Plaza
Chicago, IL 60611-7603
Tel 312 222-9350
www.jenner.com

Chicago
Dallas
Washington, DC

Date: January 19, 2004

To: Thomas A. Clare, Esq.
KIRKLAND & ELLIS

Fax: 202 879 5200

Voice: 202 879 5993

From: Clark C. Johnson
312 923-2739

Employee Number:

Client Number: 41198 10003

Important: This message is intended only for the use of the individual or entity to which it is addressed, and may contain information that is attorney work product, privileged, confidential and exempt from disclosure under applicable law. If the reader of this message is not the intended recipient, or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone, and return the original message to us at the above address via postal service. Thank you.

Message: Please see attached.

Total number of pages including this cover sheet:

Time Sent:

If you do not receive all pages, please call: 312 222-9350

Sent By:

Secretary:

Extension:

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by facsimile and mail to all counsel on the attached Service List, this 19th day of January, 2004.

COLEMAN (PARENT) HOLDINGS INC.

By: Mike Brody
One of Its Attorneys

Jerold S. Solovy
Ronald L. Marmer
Robert T. Markowski
Michael T. Brody
JENNER & BLOCK, LLC
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

Jack Scarola
SEARCY DENNEY SCAROLA BARNHART &
SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409
(561) 686-6300

SERVICE LIST

Thomas A. Clare, Esq.
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Joseph Ianno, Jr., Esq.
CARLTON FIELDS
222 Lake View Avenue, Suite 1400
West Palm Beach, FL 33401

EXHIBIT A**CORPORATE DEPOSITION TOPICS**

1. Morgan Stanley's current and former policies, practices, and procedures for the retention of electronic documents, including e-mail, including but not limited to:
 - a. the policies, practices, and procedures Morgan Stanley applied with respect to electronic documents and e-mail relating to documents responsive to the requests in this case, and in prior Sunbeam-related litigation;
 - b. the policies, practices, and procedures Morgan Stanley has implemented in order to comply with the SEC's December 3, 2002 Order;
 - c. the policies, practices, and procedures Morgan Stanley had in place prior to the SEC's December 3, 2002 Order;
2. Morgan Stanley's current and former means of enforcing or assuring compliance with its then-existing policies, practices, and procedures for the retention of electronic documents, including e-mail.
3. Morgan Stanley's current and former ability to restore and/or retrieve e-mails, and the means employed to do so, including but not limited to:
 - a. whether the media housing Morgan Stanley's electronic documents and e-mail is active/online data, near-line data, offline data, back-up tape, or erased or fragmented material, the means available to access any or each of those media, and the reliability of these media; and
 - b. the procedures, time labor, and expense involved to restore and/or retrieve e-mails.

FAX TRANSMITTAL

J E N N E R & B L O C K

Jenner&Block LLP
One IBM Plaza
Chicago, IL 60611-7603
Tel 312 222-9350
www.jenner.com

Chicago
Dallas
Washington, DC

Date: January 20, 2004

To: Thomas A. Clare, Esq.
Kirkland & Ellis

Fax: (202) 879-5200
Voice: (202) 879-5993

cc: Joseph Ianno, Jr.
Carlton Fields, P.A.

Fax: (561) 659-7368
Voice: (561) 659-7070

From: Michael T. Brody
312 923-2711

Client Number: 41198-10003

Important: This message is intended only for the use of the individual or entity to which it is addressed, and may contain information that is attorney work product, privileged, confidential and exempt from disclosure under applicable law. If the reader of this message is not the intended recipient, or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone, and return the original message to us at the above address via postal service. Thank you.

Message:

Total number of pages including this cover sheet: 4

Time Sent:

If you do not receive all pages, please call: 312 222-9350

Sent By:

Secretary: Caryn Jo Geisler

Extension: 6490

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by facsimile and mail to all counsel on the attached Service List, this 20th day of January, 2004.

COLEMAN (PARENT) HOLDINGS INC.

By: Michael T. Brody
One of Its Attorneys

Jerold S. Solovy
Ronald L. Marmer
Robert T. Markowski
Michael T. Brody
JENNER & BLOCK, LLC
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

Jack Scarola
SEARCY DENNEY SCAROLA BARNHART &
SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409
(561) 686-6300

SERVICE LIST

Thomas A. Clare, Esq.
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Joseph Ianno, Jr., Esq.
CARLTON FIELDS
222 Lake View Avenue, Suite 1400
West Palm Beach, FL 33401

EXHIBIT A**CORPORATE DEPOSITION TOPICS**

1. Morgan Stanley's current and former policies, practices, and procedures for the retention of electronic documents, including e-mail, including but not limited to:
 - a. the policies, practices, and procedures Morgan Stanley applied with respect to electronic documents and e-mail relating to documents responsive to the requests in this case, and in prior Sunbeam-related litigation;
 - b. the policies, practices, and procedures Morgan Stanley has implemented in order to comply with the SEC's December 3, 2002 Order;
 - c. the policies, practices, and procedures Morgan Stanley had in place prior to the SEC's December 3, 2002 Order;
2. Morgan Stanley's current and former means of enforcing or assuring compliance with its then-existing policies, practices, and procedures for the retention of electronic documents, including e-mail.
3. Morgan Stanley's current and former ability to restore and/or retrieve e-mails, and the means employed to do so, including but not limited to:
 - a. whether the media housing Morgan Stanley's electronic documents and e-mail is active/online data, near-line data, offline data, back-up tape, or erased or fragmented material, the means available to access any or each of those media, and the reliability of these media; and
 - b. the procedures, time labor, and expense involved to restore and/or retrieve e-mails.

FAX TRANSMITTAL

J E N N E R & B L O C K

Jenner&Block LLP
One IBM Plaza
Chicago, IL 60611-7603
Tel 312 222-9350
www.jenner.com

Chicago
Dallas
Washington, DC

Date: January 20, 2004

To: Thomas A. Clare, Esq.
Kirkland & Ellis

cc: Joseph Ianno, Jr.
Carlton Fields, P.A.

From: Michael T. Brody
312 923-2711

Fax: (202) 879-5200
Voice: (202) 879-5993

Fax: (561) 659-7368
Voice: (561) 659-7070

Client Number: 41198-10003

Important: This message is intended only for the use of the individual or entity to which it is addressed, and may contain information that is attorney work product, privileged, confidential and exempt from disclosure under applicable law. If the reader of this message is not the intended recipient, or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone, and return the original message to us at the above address via postal service. Thank you.

Message:

Total number of pages including this cover sheet: 3

If you do not receive all pages, please call: 312 222-9350

Secretary: Caryn Jo Geisler

Time Sent:

Sent By:

Extension: 6490

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by facsimile and mail to all counsel on the attached Service List, this 20th day of January, 2004.

Dated: January 20, 2004

COLEMAN (PARENT) HOLDINGS INC.

By: Michael T. Brody
One of Its Attorneys

Jerold S. Solovy
Michael T. Brody
Deirdre E. Connell
JENNER & BLOCK LLP
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

Jack Scarola
SEARCY DENNEY SCAROLA BARNHART
& SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33409
(561) 686-6300

SERVICE LIST

Thomas A. Clare, Esq.
KIRKLAND & ELLIS, LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lake View Avenue, Suite 1400
West Palm Beach, FL 33401

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CASE NO: 03 CA-005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

AGREED ORDER APPOINTING COMMISSIONERS AND COMMISSIONS

THIS CAUSE, having come before the Circuit Court in and for Palm Beach County, State of Florida, on the agreement of the parties, and

WHEREAS, it appears to the Court that:

1. Defendant Morgan Stanley & Co. Incorporated ("MS & Co.") desires to take the videotaped depositions of and obtain documents from the following witnesses who reside in California, Connecticut, Kansas, Minnesota, New York, Texas, and the District of Columbia and who have knowledge of facts relevant to this case:

Karen Kay Clark
1674 Amarelle Street
Newbury Park, CA 91320

Frank N. Gifford
126 Taconic Road
Greenwich, CT 06831-3139

Robert J. Duffy
16 Saint Nicholas Road
Darien, CT 06820-2823

Joseph P. Page
921 Sheridan Street, Apt. 119
Wichita, KS 67213-1363

William H. Spoor
622 West Ferndale Road
Wayzata, MN 55391

Adam Emmerich
Wachtell, Lipton, Rosen & Katz
51 West 52nd Street
New York, NY 10019

Steven Cohen
Wachtell, Lipton, Rosen & Katz
51 West 52nd Street
New York, NY 10019

Steven K. Geller
301 East 79th Street, Apt. 4H
New York, NY 10021-0932

Donald Uzzi
4209 Beverly Dr.
Dallas, TX 75205-3020

Ann Dibble Jordan
2940 Benton Place NW
Washington, DC 20008

2. You are hereby appointed as commissioners to take the videotaped testimony (and obtain the requested documentation) of the above witnesses and other witnesses whose discovery is sought in the commissions' jurisdiction under oath and on oral examination in accordance with the applicable Florida Statutes and Rules of Civil Procedure:

Esquire Santa Ana
2100 North Broadway, Second Floor
Santa Ana, CA 97206

Del Vecchio Reporting
117 Randi Drive
Madison, CT 06443

Harper Court Reporting
P.O. Box 3008
Wichita, KS 67201

Kirby Kennedy & Associates
5200 Wilson Road #219
Minneapolis, MN 55424

Esquire Deposition Services
216 E. 45th Street, 8th FL
New York, New York 10017-3304

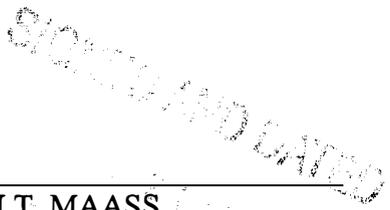
Esquire Deposition Services
703 McKinney Avenue #320
Dallas, Texas 75202

Esquire Deposition Services
1020 19th Street NW, #621
Washington, DC 20036

or any person able to administer oaths pursuant to the laws of California, Connecticut, Kansas, Minnesota, New York, Texas, and the District of Columbia and duly authorized by him.

3. This order does not purport to grant the power of the commissioners appointed to subpoena witnesses or documents, but simply the power to administer oaths and transcribe deposition testimony.

DONE AND ORDERED in Chambers, West Palm Beach, Palm Beach County, Florida
this ____ day of January, 2004.



ELIZABETH T. MAASS
Circuit Court Judge

Coleman (Parent) Holdings v. Morgan Stanley & Co. Inc.
2003 CA 005045AI
Agreed Order on Appointment of Commission

Copies furnished to:

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368

John Scarola, Esq.
SEARCY, DENNEY, SCAROLA, BARNHARDT
& SHIPLEY, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33409
Telephone: (561) 686-3000
Facsimile: (561) 478-0754

Thomas D. Yannucci, P.C.
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

Jerold S. Solovy
JENNER & BLOCK, LLC
One IBM Plaza
Suite 4400
Chicago, Illinois 60611
Telephone: (312) 222-9350
Facsimile: (312) 527-0484

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CASE NO: 03 CA-005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

**MORGAN STANLEY & CO. INCORPORATED'S MOTION TO
CLARIFY AND ENFORCE STIPULATIONS MADE BY
COLEMAN (PARENT) HOLDING AT THE JANUARY 8, 2004 HEARING**

Defendant Morgan Stanley & Co., Incorporated ("Morgan Stanley"), by and through its undersigned attorneys, respectfully submits this Motion to Clarify and Enforce Stipulations made by Plaintiff Coleman (Parent) Holdings, Inc. ("CPH") during the January 8, 2004 hearing and states in support:

1. On December 19, 2003, CPH filed a Motion for Protective Order seeking to prevent Morgan Stanley from obtaining, among other things, evidence concerning the due diligence work performed by CPH's financial and legal advisors on transactions other than Sunbeam's acquisition of Coleman. In support of its Motion, during the January 8, 2004 hearing, CPH argued and stipulated to certain facts concerning the competence and capability of its advisors:

- CSFB and Wachtell “had the capacity, had they been given the assignment, to uncover these fraudulent transactions” at Sunbeam (Jan. 8, 2004 Hr. Tr. at 8 (Ex. 1));
- “any reasonably prudent due diligence” by CSFB or Wachtell “would have detected the fraud” at Sunbeam (“Negligent Misrepresentation” exhibit provided by CPH counsel at hearing (Ex. 2));
- “neither Wachtell Lipton nor Credit Suisse did the kind of due diligence that would have disclosed these fraudulent transactions” (Hr. Tr. at 8); and
- CSFB and Wachtell were not asked by CPH, Coleman or MAFCO (or any affiliate) “to conduct the kind of [reasonably prudent] due diligence investigation that would have uncovered these fraudulent transactions” at Sunbeam (Hr. Tr. at 8 -9).

2. Based in part on these arguments and stipulations, the Court issued an Order on January 9, 2004 narrowing the scope of documents that CSFB and Wachtell will be required to produce. Morgan Stanley contends that, having stipulated to these facts and thereby prevailed in large part on its motion to limit discovery, CPH should be held to its in-Court stipulations. While the Court’s January 9, 2004 Order memorializes one stipulation made by CPH at the hearing, the cited stipulation reflects only one of the reasons Morgan Stanley sought the requested discovery from Wachtell and CSFB. CPH knows this as well, which is why it tendered all of the above stipulations during the January 8, 2004 hearing. These representations are fundamental to the Court’s Order limiting discovery, and should be deemed to be admitted for all purposes going forward in this litigation, including the instructions to be presented to the jury. Moreover, the additional stipulations noted above may serve to narrow the scope of discovery and prevent future discovery disputes.

WHEREFORE, Defendant, Morgan Stanley & Co., Inc. requests this Court to enter an Order clarifying and enforcing all of the above-referenced stipulations made by CPH at the January 8, 2004 hearing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to counsel of record on the attached service list by U.S. Mail, facsimile and e-mail on this 21st day of January, 2004.

Thomas D. Yannucci, P.C.
Thomas A. Clare
Zhonette M. Brown
Larissa Paule-Carres
KIRKLAND & ELLIS
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

COUNSEL FOR DEFENDANT

CARLTON FIELDS, P.A.
222 Lakeview Ave.
Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
E-mail: jianno@carltonfields.com

BY: 
JOSEPH IANNO, JR.
Florida Bar No: 655351

SERVICE LIST

<p>John Scarola SEARCY, DENNEY, SCAROLA, BARNHARDT & SHIPLEY, P.A. 2139 Palm Beach Lakes Boulevard West Palm Beach, Florida 33409</p>	<p>Counsel for Plaintiff</p>
<p>Jerold S. Solovy JENNER & BLOCK, LLC One IBM Plaza Suite 4400 Chicago, Illinois 60611</p>	<p>Counsel for Plaintiff</p>

COPY

1 IN THE FIFTEENTH JUDICIAL CIRCUIT COURT IN

2 AND FOR PALM BEACH COUNTY, FLORIDA

3 CIVIL DIVISION

4 CASE NO. 03 CA-005045 AI

5
6
7 COLEMAN (PARENT) HOLDINGS, INC.,

8 Plaintiff,

9 vs

10 MORGAN STANLEY & CO., INC.,

11 Defendant.
12

13
14
15 HEARING BEFORE THE
16 HONORABLE ELIZABETH T. MAASS
17

18
19
20
21
22 Thursday, January 8, 2004
23 Palm Beach County Courthouse
24 West Palm Beach, Florida
25 12:30 p.m. - 1:00 p.m.

1 APPEARANCES:

2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Searcy, Denney, Scarola, Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33409
BY: JACK SCAROLA, ESQUIRE
Attorneys for the Plaintiff

Kirkland & Ellis, LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
BY: ZHONETTE M. BROWN, ESQUIRE
- and -
Carlton Fields, P.A.
Esperante' Building
222 Lakeview Avenue, Suite 1400
West Palm Beach, Florida 33401-6149
BY: MICHAEL K. WINSTON, ESQUIRE
Attorneys for the Defendant

- - - -

P R O C E E D I N G S

1
2 The hearing before the Hon. Elizabeth T. Maass was
3 taken before me, Susan Fannon, Certified Shorthand Reporter,
4 Notary Public, State of Florida at Large, at the Palm Beach
5 County Courthouse, 250 South Dixie Highway, West Palm Beach,
6 Florida, beginning at the hour of 12:30 p.m. on Thursday,
7 January 8, 2004 pursuant to the Notice filed herein, in the
8 above-entitled cause pending before the above-named Court.

9 - - - -

10 MR. SCAROLA: We thank you for accommodating
11 us, your Honor.

12 MS. BROWN: Yes, thank you.

13 THE COURT: That's okay. Coleman (Parent)
14 and Morgan. This is Plaintiff's motion for protective order
15 as to certain non-party discovery. What did you want to say
16 in support of it?

17 MR. SCAROLA: Thank you, your Honor. Your
18 Honor, I have provided some outlines that were helpful in my
19 own analysis of these issues, and I hope they will be of
20 some assistance to the Court as well.

21 THE COURT: Okay.

22 MR. SCAROLA: I am handing them to you in the
23 order in which it is likely that I will reference them.

24 THE COURT: Thank you.

25 MR. SCAROLA: It's probably helpful to begin

1 by just reminding your Honor that this is a case involving a
2 purchase and sale concerning Sunbeam Corporation. Sunbeam
3 Corporation, it is basically acknowledged by both sides,
4 engaged in fraudulent accounting practices which had an
5 enormous impact on its stock price.

6 Those fraudulent accounting practices became
7 publicly disclosed subsequent to the transaction engaged in
8 in which Coleman (Parent) Holding Company, a major holder of
9 Sunbeam stock, excuse me, in which Coleman (Parent) Holding
10 Company transferred an interest that it had in the Coleman
11 Company in exchange for, among other consideration, a
12 significant amount of Sunbeam stock.

13 Morgan Stanley was involved in that transaction
14 as a financial advisor and provided information to Coleman
15 (Parent) Holding which we allege we relied upon. And
16 there are basically two claims. There are fraudulent
17 misrepresentation claims and there are negligent
18 misrepresentation claims.

19 With regard to the fraudulent misrepresentation
20 claims, obviously we are alleging that there was actual
21 knowledge on the part of Morgan Stanley with respect to the
22 fraudulent practices of Sunbeam, which actual knowledge was
23 concealed from Coleman (Parent) Holding Company.

24 The negligent misrepresentation claim is that --
25 really one of two things, either Morgan Stanley knew of the

1 fraudulent practices and negligently failed to disclose what
2 they knew or negligently failed to have learned of the
3 fraudulent practices.

4 And I think it is important to understand those
5 issues so that we can understand whether there is any
6 possible relevance to the discovery that is presently being
7 sought. And basically the discovery that is presently being
8 sought is discovery of both a law firm and an investment
9 banking firm that provided services to Coleman (Parent)
10 Holding and MAFCO its parent company in connection with the
11 Sunbeam transaction, but also have provided services to
12 Coleman (Parent) Holding and/or MAFCO in connection with
13 completely unrelated purchases and sales in which a transfer
14 of stock also was involved in one respect or another.

15 Now, clearly with regard to the fraudulent
16 misrepresentation claim, I suggest that there is no possible
17 theory of relevance concerning the discovery that is being
18 sought from those third parties. What we are told by Morgan
19 Stanley is that they want to fully explore -- and this is a
20 quote from their responsive memorandum, and it is contained
21 under the section MS contentions -- they are entitled to
22 fully explore the competence and sophistication of Coleman
23 (Parent) Holdings own paid legal and financial advisers.

24 Now, the competence and sophistication of some
25 third party with regard to the fraudulent misrepresentation

1 claim could not possibly have any bearing. If any argument
2 is to be made with regard to the relevance and materiality
3 of this information, it would seem to me that it needs to be
4 made with respect to the negligent misrepresentation claims.
5 And those are the claims that I've sort of briefly outlined
6 the issues on in this first page.

7 The issue on the claim that we have made is was
8 Morgan Stanley negligent in misrepresenting Sunbeam's
9 financial condition to Coleman (Parent) Holding; and we
10 prove our case in that regard by establishing that they knew
11 about Sunbeam's fraudulent accounting and negligently failed
12 to disclose it or they negligently failed to discover the
13 fraud.

14 What these third parties knew or were capable of
15 knowing couldn't have any bearing on that issue. So it
16 seems that the only potential bearing has to be on the
17 defense side of this case, the comparative negligence claim
18 that has been made against us.

19 THE COURT: Let me ask you this. And I
20 apologize, I didn't have that long to look at what the
21 parties filed, but it strikes me that one of the things
22 Morgan Stanley is saying is that this is potentially
23 relevant to whether your client relied on the misstatements
24 whether they were fraudulently or negligently made; and, if
25 so, whether the reliance was reasonable. And one way you

1 could determine that is if in similar deals they did
2 tremendous due diligence and in this deal they only did a
3 little due diligence, it may be more likely that in this
4 deal they relied on the representations. Whereas if they
5 always did tremendous due diligence, maybe it is less
6 likely.

7 MR. SCAROLA: Okay, and I think that I
8 understood that that is what they were getting at also;
9 however, this is what they also say in their memo.

10 Page 2, "It is evident that Coleman (Parent)
11 Holding and its advisors conducted little or no due
12 diligence on their own," and that's the little or no due
13 diligence on their own is their emphasis, "prior to closing
14 the acquisition transaction with Sunbeam."

15 In fact, the defense contention is that our
16 negligence was not in the manner in which we conducted our
17 own due diligence but in choosing to rely upon an advisor to
18 our opposite party in the transaction.

19 There is no issue in this case about whether
20 Wachtell Lipton, if Wachtell Lipton was given the chore in
21 connection with this transaction of conducting a thorough
22 due diligence investigation, would have discovered the
23 fraud. It certainly isn't going to be our position that if
24 a thorough due diligence investigation was conducted by
25 Wachtell Lipton, they wouldn't have found it because we're

1 arguing that a thorough due diligence investigation not only
2 would have but in fact did disclose these fraudulent
3 transactions.

4 We certainly wouldn't be contending that a
5 thorough due diligence investigation by Wachtell Lipton
6 could not have discovered this fraud. In the same respect
7 we would not be arguing that a thorough due diligence
8 investigation by Credit Suisse would have failed to disclose
9 the fraudulent transaction.

10 THE COURT: Is that the same as stipulating
11 that neither Wachtell Lipton or Credit Suisse did sufficient
12 due diligence?

13 MR. SCAROLA: It is stipulating that neither
14 Wachtell Lipton nor Credit Suisse did the kind of due
15 diligence that would have disclosed these fraudulent
16 transactions because they didn't disclose the fraudulent
17 transactions. And they are not alleging that they did.
18 That's simply not a contention. We acknowledge that
19 these companies had the capacity, had they been given
20 the assignment, to uncover these fraudulent
21 transactions.

22 THE COURT: Do you agree your client did not
23 give them that assignment?

24 MR. SCAROLA: Yes, yes, we agree that they
25 were not given the assignment to conduct the kind of due

1 diligence investigation that would have uncovered these
2 fraudulent transactions. We in fact did rely and
3 acknowledge that we relied, and it is inherent in our case
4 to contend that we relied not upon Credit Suisse or upon
5 Wachtell Lipton, but rather our allegation is we relied upon
6 Morgan Stanley.

7 So if we're coming before the Court saying we
8 relied upon Morgan Stanley, what possible relevance could
9 there be to establishing the degree of expertise of any
10 third party?

11 Whether the due diligence investigation conducted
12 by Morgan Stanley did or did not meet the generally accepted
13 standard of care for the conduct of due diligence under
14 these particular circumstances cannot be proven by proving
15 what Wachtell Lipton did in some other case or what anyone,
16 any one individual did in any particular case.

17 THE COURT: But couldn't there be some
18 potential relevancy then to what your client directed them
19 to do in other cases? I mean, if in other similar
20 transactions your client gave them directions to do full due
21 diligence, the kind that would have turned up this kind of
22 massive fraud; and in this one case did not give them such
23 directions, it strikes me that is a ripe avenue of
24 cross-examination.

25 MR. SCAROLA: But that is not a contested

1 issue. That's my point.

2 THE COURT: But you're agreeing your client
3 was negligent in the type of direction it gave its own
4 advisor?

5 MR. SCAROLA: No, no, the issue becomes was
6 it negligent for my client to rely upon Morgan Stanley and
7 not to have retained an independent due diligence
8 third-party investigator in light of all the surrounding
9 circumstances of this particular case. And that issue has
10 no light shed upon it by what happened in unrelated
11 transactions. And to emphasize that, I put together -- and
12 this is really right off the top of my head --

13 THE COURT: Okay.

14 MR. SCAROLA: -- a list of possible factors
15 influencing a stock purchaser's due diligence. And before
16 they could begin to demonstrate that there is any possible
17 probative value in looking to see what these companies did
18 in other transactions, they would need to demonstrate that
19 these were the same circumstances.

20 It's no different than if we were talking about
21 an automobile accident case. You can't prove that the
22 driver was negligent in this case by bringing in five other
23 people to say I saw other cars driving at the same rate of
24 speed. I saw other cars who also didn't come to a full stop
25 at that intersection. The fact that a majority of people

1 speed on I-95 through the construction zones that exist on
2 that roadway today does not prove that a reasonably prudent
3 person would speed through those construction zones. And
4 the fact that any one person was speeding doesn't prove that
5 this driver was not negligent in speeding through the
6 construction zone on this particular occasion at this
7 particular time.

8 But to begin to even suggest that it's probative,
9 you need to prove that all of the circumstances were the
10 same. You need to prove that it's publicly traded and not
11 privately held, the value of the stock relative to the total
12 transaction, the nature of the company, warranties that are
13 made in connection with the transaction, the security that
14 is offered for those warranties, the competence, reputation
15 and integrity of people and entities on the other side of
16 the transaction. Is it reasonable for me to rely upon what
17 you say?

18 Well, whether it is reasonable for me to rely
19 upon what you say about the value of this stock depends upon
20 what kind of reputation you have with respect to honesty and
21 truthfulness. What I know about your expertise in judging
22 the value of the stock, your competence with regard to these
23 particular matters. And then I need to take a look at the
24 quality and quantity of the information available from
25 competent and trustworthy third parties independent of this

1 source.

2 The kind of investigation I need to do depends at
3 least upon those kinds of factors. And our contention in
4 this case is it was reasonable for us to have relied upon
5 Morgan Stanley.

6 They may bring in expert witnesses who say that
7 reliance was unreasonable under these circumstances and they
8 should have hired Wachtell Lipton and given them a broader
9 mission than what they were given in this case.

10 They can fully discover, and we have offered them
11 all of the discovery with regard to what Wachtell Lipton did
12 with respect to this transaction, what was done by Credit
13 Suisse with regard to this transaction, and at the very
14 least before they should be able to come in and begin to
15 request information concerning what was done in other
16 transactions, first they should examine what was done in
17 this transaction and the assignment that was given to them,
18 which they have not yet done. And, secondly, they need to
19 establish some parallel between other transactions they want
20 to look at and this transaction. If there is no parallel in
21 the transactions, if the only thing they had in common was
22 they both involved some transfer of stock and that is all
23 they are able to show, it could not possibly have any
24 probative value whatsoever in terms of establishing any of
25 the contested issues in this lawsuit.

1 THE COURT: Let me ask you this. You're
2 characterizing sort of a comparative negligence as to
3 whether your client was negligent relying on the
4 representations from Morgan Stanley; but I sort of thought
5 some of the negligence or comparative negligence alleged
6 would have been that your client was negligent in not
7 performing its own due diligence.

8 MR. SCAROLA: I think that's really part and
9 parcel.

10 THE COURT: I don't think that's the same
11 thing. If you sort of have your traffic analogy, I may be
12 negligent if I'm in the intersection and I don't have the
13 right of way and somebody says come on (indicating) and I
14 don't check it, I just go and get an accident whereas I may
15 be negligent by relying on that, but I also may be negligent
16 by not looking myself and seeing if there was other traffic.

17 MR. SCAROLA: I agree.

18 THE COURT: And I think what they are
19 accusing you of is not having looked at the other traffic.

20 MR. SCAROLA: Then they are entitled to
21 absolutely, fully and completely explore what we did in this
22 transaction.

23 THE COURT: How would it not be relevant that
24 every other time you bothered to turn your head and look?

25 MR. SCAROLA: The same way it would be

1 irrelevant in the auto negligence case to which we are
2 analogizing this to bring witnesses to come in and say that
3 I always stopped at that stop sign before.

4 THE COURT: You're talking about you, not
5 third parties.

6 MR. SCAROLA: Yes, me, me. I always stopped
7 at that stop sign before. Whether I always stopped at that
8 stop sign before or I never stopped at that stop sign before
9 does not determine whether I was negligent in failing to
10 stop on that occasion.

11 It may be that in every other transaction I have
12 conducted -- I meaning Coleman (Parent) Holding -- in every
13 other transaction I've conducted I chose, not that I needed
14 to, not that the generally accepted standard of care
15 required me to, but I chose to retain Wachtell Lipton and
16 Credit Suisse both to conduct the most thorough due
17 diligence investigation in the world, to conduct them
18 independently of one another, to make sure that their
19 results corroborated and maybe even to hire a third party as
20 well.

21 But the fact that I triple checked Transaction A
22 does not mean that in order to meet the generally accepted
23 standard of care I was required to triple check other
24 transactions.

25 It just doesn't have any probative value, first

1 of all, because you haven't established that these other
2 transactions in fact presented the same set of
3 circumstances. But even if they did, my choice to use
4 extraordinary care in other circumstances does not mean that
5 I was negligent in failing to use extraordinary care in this
6 circumstance.

7 THE COURT: Let me ask you this, and I
8 apologize my thinking is not very mature on this issue.
9 Assume at trial we would require expert testimony as to what
10 is the level of due diligence that's required in this type
11 of transaction.

12 MR. SCAROLA: I don't believe that that is a
13 matter of common knowledge to a jury. I think it clearly
14 will require expert testimony. Somebody is going to have to
15 come in and say the generally accepted standard of care for
16 due diligence under these circumstances is this.

17 THE COURT: And presumably somebody other
18 than your client?

19 MR. SCAROLA: Presumably somebody other than
20 my client, sure.

21 THE COURT: And I assume what you're telling
22 me is that somebody other than your client, which your
23 client has chosen to do on past occasions, isn't going to
24 effect what is the standard of appropriate care?

25 MR. SCAROLA: No, ma'am. The generally

1 accepted standard of care is not a matter of majority rule.
2 It is not a matter of consensus. It is what a reasonably
3 prudent business person would do under the same or similar
4 circumstances.

5 THE COURT: Let me ask you this. Are you
6 willing to agree now that no sort of affiliate or employee
7 of your client will offer testimony at trial as to standard
8 of care?

9 MR. SCAROLA: Yes --

10 THE COURT: Okay.

11 MR. SCAROLA: -- I am because I really don't
12 believe that we would have a credible expert witness if that
13 expert witness were an affiliate of my client. We're going
14 to choose someone of independence to offer that testimony.
15 We're not going to choose somebody in-house to offer that
16 standard of care testimony.

17 THE COURT: Okay. What's the response?

18 MS. BROWN: Your Honor, first, to start, I
19 want to thank you again for accommodating my schedule.

20 THE COURT: Sure. I'm sorry you missed the
21 first flight back.

22 MS. BROWN: I do want to start with a little
23 bit of context myself. It is interesting the
24 characterization that the Plaintiff has presented of what
25 this case is about because the standard or the principal

1 that they wish to apply here is that the only transaction
2 that is relevant is their transfer of 82 percent of their
3 interest in Coleman to Sunbeam; but I will tell you -- and
4 as you know from the motions coming before -- that is not a
5 standard they've applied to their own discovery.

6 You can go back and look at the document requests
7 they served in May on our counsel, Davis Polk, and they were
8 before your Honor on a motion to compel documents related to
9 Scott Paper and Kimberly Clark, if you'll recall. So this
10 principal is a new found principal that they're asserting
11 for your Honor that they have not held themselves to.

12 In addition, your Honor, they claim, as
13 Mr. Scarola noted, to rely upon Morgan Stanley. The issue
14 in this case is not simply whether they were negligent. It
15 is whether they in fact did rely on Morgan Stanley. We are
16 entitled, your Honor, to find and assert proof that would
17 show in fact they did not rely --

18 THE COURT: Give me an example of the kind of
19 things you think this discovery would develop that would
20 give you evidence on that point.

21 MS. BROWN: Your Honor, I think, as you have
22 noted, there's a difference between what they relied upon
23 and how they relied upon these particular parties, CSFB and
24 Wachtell, we're not going into other parties, how they have
25 relied upon these parties in these types of actions.

1 And I think we have been very, very careful to
2 narrow it. We're only asking generally about due diligence.
3 We're only asking about matters related to CSFB, to Coleman
4 (Parent) and to MAFCO, and we're only asking about
5 transactions in which they took back stock.

6 MAFCO and CPH are very sophisticated parties,
7 your Honor. They engage in a multitude of types of
8 transactions. They are doing deals daily.

9 We are limiting ourselves to a very narrow scope.
10 And after things went awry in 1998, there was press
11 expressing surprise at the perfunctory due diligence that
12 CPH performed. We're entitled to discovery that would not
13 only show that indeed it was perfunctory by a general
14 standard but by their own standard and that may reveal why,
15 what motivation --

16 THE COURT: Why do you think you could put
17 evidence before the jury that was perfunctory by their own
18 standard if they are not offering expert testimony as to the
19 standard of care?

20 MS. BROWN: I see this, your Honor -- and I
21 think you alluded to this earlier -- as similar to what one
22 might do with an expert.

23 While their own witnesses may not seek to have
24 themselves recognized as experts, MAFCO and CPH, mostly
25 MAFCO, holds itself out to be supreme deal masters, if you

1 will. One way, the most effective way sometimes to
2 cross-examine someone who is akin to an expert is not to ask
3 them what they did, but to establish what it is that could
4 have been done.

5 For instance, if this were an expert deposition
6 or testimony, you would obtain information about that
7 expert's prior testimony, about other testing or whatever
8 that they did in similar situations and inquire of them why
9 they didn't do that in this particular case.

10 THE COURT: But if they are not being offered
11 as an expert as to the standard of care, that wouldn't be
12 relevant, would it?

13 MS. BROWN: I believe, your Honor, that it
14 would be relevant to show again it's not only the standard
15 of care it's the motivation. Was there a reason, whether it
16 was strategic or otherwise, that they did not perform the
17 type of due diligence that they performed in other cases.

18 We believe that their motivation will be shown in
19 part by what they did. In other words, your Honor, we
20 believe there may have been reasons why the due diligence
21 they performed in this case is not as extensive, the
22 assignments were not as extensive as they were in other
23 cases. We want to show that. And then we want to show the
24 reasons or potential reasons why.

25 THE COURT: Okay.

1 MS. BROWN: Also, your Honor, I believe that
2 the competence of their advisors is relevant, again, to
3 establish whether or not they relied upon Morgan Stanley.
4 Is that a credible assertion? In order to establish whether
5 that's a credible assertion, we can establish their own
6 sophistication, the sophistication of these particular
7 advisors they historically relied upon and how they have
8 used these advisors as tools to perform due diligence; and,
9 again, we have been very careful to craft our request so
10 that they are limited to CPH and MAFCO, limited to other
11 similar structural deals where they took stock back and
12 limited to due diligence.

13 The other thing that I would note about these
14 requests, your Honor, which I alluded to before is the fact
15 that it's ironic that they are before you seeking to bar
16 this sort of discovery when Morgan Stanley is seeking to
17 disprove their assertions and also to prove our defenses
18 when they, themselves, have sought this discovery from us
19 and from our advisors.

20 For instance, with regard to the due diligence
21 that they performed, that CSFB and Wachtell performed on
22 other transactions, CPH asked for and we produced documents,
23 Morgan Stanley produced documents related to general due
24 diligence, not limited to this transaction, as CPH now seeks
25 to limit discovery. In each one of the requests that they

1 seek to bar, your Honor, there is a similar request CPH has
2 asserted and has received documents or other discovery
3 related to that request that is not limited to the deal at
4 issue.

5 THE COURT: Well, except it is a little bit
6 different. I mean, your client is in a different position
7 than the Plaintiff is, and you're alleging to have done
8 things. You're alleged to be sort of the expert here. So I
9 can imagine there would be certain discovery that would be
10 properly promulgated on your client that may not be on the
11 Plaintiff.

12 MS. BROWN: I am not sure that we're alleged
13 to be anymore of an expert than CSFB. We were on the
14 opposite side of the table of MAFCO. We were financial
15 advisor to Sunbeam. CSFB was on the opposite side of the
16 table of Sunbeam and they were a financial advisor to CPH
17 and MAFCO. They are similarly situated. We're no more
18 experts, to use that term, than they are.

19 And I can go through again each one of the
20 requests. Mr. Scarola didn't go through the particular
21 requests. But for example, where we think due diligence
22 related to other stock deals, we would like to establish the
23 universe of possible, reasonable due diligence, establish
24 how CPH and MAFCO used their advisors for due diligence more
25 than they did here. And then in other cases they have

1 availed themselves of the rights and abilities to inspect
2 the records and inspect documents of the other side under a
3 confidentiality agreement.

4 I would note as well, your Honor, that the
5 transactions that we are asking CPH and CSFB and Wachtell
6 about are transactions that came from discovery requests
7 that we promulgated to CPH and MAFCO. We asked them,
8 identify similarly structured deals. And when they answered
9 that discovery request, they didn't assert the relevance
10 argument that they have newly asserted here.

11 So I don't think that it's prudent or fair at
12 this point to establish a new principal for discovery that
13 they have not held themselves to, to allow them to conduct a
14 wealth of discovery relating to deals other than the deal at
15 issue here, for whatever purposes, and then to seek to limit
16 us to the transfer of the 82 percent interest from Coleman
17 to Sunbeam.

18 THE COURT: Okay. Any other argument?

19 MS. BROWN: No, your Honor. If you're
20 interested, I do have the reciprocal discovery request, I
21 can point out to you --

22 THE COURT: That sort of doesn't go to
23 whether this discovery request is appropriate, which is
24 really all I am looking at today. Okay. Thank you.

25 Did you want to respond?

1 MR. SCAROLA: Briefly, your Honor. Thank
2 you. Your Honor, the Evidence Code does specifically
3 recognize circumstances where evidence of routine practice
4 is admissible. It is section 90.406. And what it says is,
5 "Evidence of the routine practice of an organization,
6 whether corroborated or not and regardless of the presence
7 eye witnesses, is admissible to prove that the conduct of
8 the organization on a particular occasion was in conformity
9 with the routine practice."

10 So it specifically tells us when a business
11 should be subjected to discovery with regard to what its
12 routine practices are.

13 And counsel is right, we have requested
14 information from Morgan Stanley with regard to its routine
15 practices. We have asked them to produce any manual,
16 memorandum or other document describing its routine
17 requirements for due diligence because it is our burden to
18 establish what this business did in this transaction.

19 And one of the ways in which we prove what Morgan
20 Stanley did in this transaction is to prove what its routine
21 practices were. We have not sought discovery, and Morgan
22 Stanley has declined to provide discovery with regard to any
23 other particular transaction.

24 We want their policies, practices and procedures
25 at this point in time but we have not sought -- at least as

1 of now -- to go beyond what their documents say their
2 policies, practices and procedure are.

3 MS. BROWN: Your Honor --

4 THE COURT: Hold on.

5 MR. SCAROLA: They, rather than attempting to
6 prove through evidence of the routine practice of an
7 organization that what we did was in conformity with the
8 routine practice, they are telling you that their contention
9 is that what we did was not in conformity with our routine
10 practice. And we acknowledge that it was not in conformity
11 with what we did in particular other circumstances because
12 this was a different transaction.

13 So the justification for the discovery simply
14 doesn't exist under the Evidence Code. Thank you, your
15 Honor.

16 THE COURT: Let me take it under
17 advisement. I need to spend a little time with the
18 requests themselves.

19 MS. BROWN: May I respond briefly?

20 THE COURT: No, because he goes first and
21 last. It's his motion. I know it is frustrating.

22 MR. SCAROLA: Thank you very much, your
23 Honor.

24 MS. BROWN: Thank you.

25 THE COURT: Thank you. Bye, bye. Have a

1 good trip back.

2 (Thereupon, at 1 p.m. the proceedings
3 concluded.)

4

- - - -

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

C E R T I F I C A T E

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

STATE OF FLORIDA)

COUNTY OF PALM BEACH)

I, Susan Fannon, Certified Shorthand Reporter,
certify that I was authorized to and did stenographically
report the foregoing proceedings and that the transcript is
a true record to the best of my skill, knowledge and
ability.

Dated this 12th day of January, 2004.



Susan Fannon, CSR

NEGLIGENT MISREPRESENTATION

Issue: Was MS negligent in misrepresenting Sunbeam's financial condition to CPH

CPH proves its case only by establishing:

1. MS actually knew about Sunbeam's fraudulent accounting and negligently failed to disclose what it new

OR

2. MS negligently failed to discover the fraud

COMPARATIVE NEGLIGENCE

Issue: Was CPH negligent

1. In choosing to rely on MS without conducting its own due diligence

OR

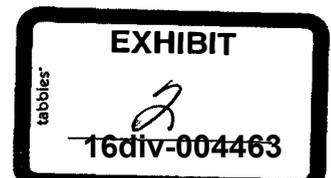
2. In conducting an inadequate due diligence investigation

MS' CONTENTION

- "Entitled to fully explore the competence and sophistication of CPH's own paid legal and financial advisors"

Issue is not what CPH and its advisors had the capacity to do BUT WHAT THEY IN FACT DID.

MS Memo Page 2: "It is evident that CPH and its advisors conducted little or no due diligence of their own prior to closing the acquisition transaction with Sunbeam" (Defendant's emphasis)



CONFIRMS DEFENDANTS ARE NOT QUESTIONING OUR CAPACITY TO CONDUCT DUE DILIGENCE BUT RATHER OUR CHOICE TO RELY ON THEIR REPRESENTATIONS BASED ON THEIR DUE DILIGENCE.

It would be logically absurd for Plaintiff to argue that Wachtel Lipton or Credit Suisse were incapable of discovering fraud but MS could.

Our position must be that any reasonably prudent due diligence investigation would have detected the fraud and we reasonably relied upon MS to have conducted such an investigation.

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CASE NO: 03 CA-005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that a hearing has been set in the above-styled case as follows:

DATE: February 5, 2004

TIME: 8:45 a.m.

PLACE: Palm Beach County Courthouse, Courtroom 11A
205 North Dixie Highway
West Palm Beach, Florida 33401

BEFORE: Judge Elizabeth T. Maass

CONCERNING: Defendant, Morgan Stanley & Co. Incorporated's Motion
to Clarify and Enforce Stipulations made by Plaintiff at the
January 8, 2004 Hearing

KINDLY GOVERN YOURSELVES ACCORDINGLY.

The undersigned counsel hereby certifies that a good faith attempt to resolve the issues contained in the foregoing motions or matters will be made with opposing counsel prior to hearing on these matters on the Court's Motion Calendar.

If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no costs to you, to the provision of certain assistance. Please contact the ADA Coordinator in the Administrative Office of the Court, Palm Beach County Courthouse, 205 North Dixie Highway, Room 5.2500, West Palm Beach, Florida 33401; telephone number (561) 355-2431 within two (2) working days of your receipt of this notice; if you are hearing or voice impaired, call 1-800-955-8771.

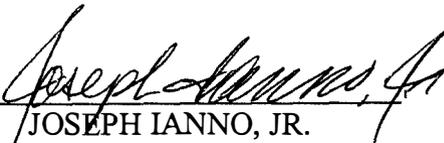
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by U.S. Mail, facsimile and e-mail on this 2ND day of January, 2004.

Thomas D. Yannucci, P.C.
Thomas A. Clare
Zhonette M. Brown
Larissa Paule-Carres
KIRKLAND & ELLIS LLP
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

COUNSEL FOR DEFENDANT

CARLTON FIELDS, P.A.
222 Lakeview Ave.
Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
E-mail: jianno@carltonfields.com

BY: 
JOSEPH IANNO, JR.
Florida Bar No: 655351

SERVICE LIST

Jack Scarola
**SEARCY, DENNY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy
Michael Brody
JENNER & BLOCK, LLC
One IBM Plaza
Suite 400
Chicago, IL 60611

#230580/mm

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN
AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

CASE NO: 2003 CA 005045 AI

Plaintiffs,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.

**ORDER ON DEFENDANT, MORGAN STANLEY & CO., INC.'S MOTION TO
CLARIFY AND ENFORCE STIPULATIONS MADE BY PLAINTIFF AT THE
JANUARY 8, 2004 HEARING**

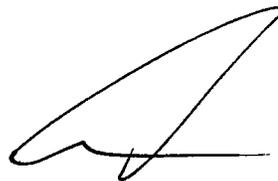
THIS CAUSE having come to be considered upon the Defendant, Morgan Stanley & Co., Inc.'s Motion to Clarify and Enforce Stipulations made by Plaintiff at the January 8, 2004 hearing, and the court having reviewed the file and being fully advised in the premises, it is hereby,

ORDERED and ADJUDGED:

The Motion is Denied.

DONE AND ORDERED at West Palm Beach, Palm Beach County, Florida, this 5

day of Sept, 2004.



ELIZABETH T. MAASS
CIRCUIT COURT JUDGE

Copies have been furnished to all counsel on the attached counsel list.

Coleman Holdings, Inc. vs Morgan Stanley & Company
Case No.:2003 CA 005045 AI
Order

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block LLP
One IBM Plaza
Suite 4400
Chicago, IL 60611

Jack Scarola, Esq.
Searcy Denney Scarola Barnhart & Shipley
P.O. Box 3626
West Palm Beach, FL 33402

SEARCY
DENNEY
SCAROLA
BARNHART
& SHIPLEY PA
*Attorneys
at Law*

WEST PALM BEACH OFFICE:

2139 PALM BEACH LAKES BLVD.
WEST PALM BEACH, FLORIDA 33409

P.O. DRAWER 3826
WEST PALM BEACH, FLORIDA 33402

(561) 686-6300
1-800-790-8807
FAX: (561) 478-0751

TALLAHASSEE OFFICE:

THE TOWLE HOUSE
517 NORTH CALHOUN STREET
TALLAHASSEE, FL 32301-1271

P.O. DRAWER 1238
TALLAHASSEE, FLORIDA 32302

(850) 224-7600
1-888-548-7611
FAX: (850) 224-7602

VIA FACSIMILE 561-659-7368

February 11, 2004

ATTORNEYS AT LAW:

ROSALYN SIA BAKER-BARNES
F. GREGORY BARNHART
LANCE BLOCK
EARL L. DENNEY, JR.
SEAN C. DOMANICK
JAMES W. GUSTAFSON, JR.
DAVID K. KELLEY, JR.
WILLIAM B. KING
DARRYL L. LEWIS
WILLIAM A. NORTON
DAVID J. SALES
JOHN SCAROLA
CHRISTIAN D. SEARCY
HARRY A. SHEVIN
JOHN A. SHIPLEY III
CHRISTOPHER K. SPEED
KAREN E. TERRY
C. CALVIN WARRINER III
DAVID J. WHITE

SHAREHOLDERS

PARALEGALS:

VIVIAN AVAN-TEJEDA
LAURIE J. BRIGGS
DEANE L. CADY
DANIEL J. CALLOWAY
EMILIO DIAMANTIS
DAVID W. GILMORE
TED E. KULESA
JAMES PETER LOVE
CHRISTOPHER J. PILATO
ROBERT W. PITCHER
WILLIAM H. SEAROLD
KATHLEEN SIMON
STEVE M. SMITH
WALTER A. STEIN
BRIAN P. SULLIVAN
KEVIN J. WALSH
GEORGIA K. WETHERINGTON
JUDSON WHITEHORN

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue, Suite 1400
West Palm Beach, FL 33401

Re: Coleman(Parent)Holdings Inc. v. Morgan Stanley & Co., Inc.
Matter No.: 029986-230580

Dear Joe:

Enclosed is a copy of Plaintiffs' Motion to Compel Production of Documents Relating to Employee Performance. Also enclosed is our Notice of Hearing on the motion for February 19, 2004. If there is a possibility of resolving any of the issues raised in the motion without the necessity of court intervention, please call me. Since my schedule often makes it difficult to reach me by phone during regular business hours, I invite you, if necessary, to call me at home in the evening at 561-575-2427.

Sincerely,

Jack Scarola
JACK SCAROLA
JS/mm
Enc.

cc: Jeff Shaw, Esq.
Jenner & Block LLP



#230580/mm

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

CASE NO.: 2003 CA 005045 AI

Plaintiffs,

vs.

MORGAN STANLEY & CO., INC.,

Defendant,

NOTICE OF HEARING

YOU ARE HEREBY NOTIFIED that the undersigned has called up for hearing the

following:

DATE: February 19, 2004

TIME: 8:45 a.m.

JUDGE: Hon. Elizabeth T. Maass

PLACE: Palm Beach County Courthouse, Room #11.1208, 205 North Dixie Highway,
West Palm Beach, FL 33401

SPECIFIC MATTERS TO BE HEARD:

Coleman (Parent) Holdings Inc.'s Motion to Compel
Production of Documents Relating to Employee Performance

Moving counsel certifies that he or she contacted opposing counsel and attempted to
resolve the discovery dispute without hearing.

Colemar Holdings, Inc. vs Morgan Stanley & Company
Case No.: 2003 CA 005045 AI
Notice of Hearing

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by
FAY AND FEDAY
1 U.S. Mail to all Counsel on the attached list, this 17th day of Feb., 2004.



JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 478-0754
Attorney for Plaintiffs

Coleman Holdings, Inc. vs Morgan Stanley & Company
Case No. 2003 CA 005045 AJ
Notice of Hearing

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block LLP
One IEM Plaza
Suite 4400
Chicago, IL 60611

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

CASE NO: 2003 CA 005045 AI

v.

Judge Elizabeth T. Maass

MORGAN STANLEY & CO., INC.,

Defendant.

**COLEMAN (PARENT) HOLDINGS INC.'S
MOTION TO COMPEL PRODUCTION OF DOCUMENTS
RELATING TO EMPLOYEE PERFORMANCE**

Pursuant to Fla. R. Civ. P. 1.380(a)(1), Plaintiff Coleman (Parent) Holdings Inc. ("CPH") respectfully requests that the Court direct Defendant Morgan Stanley & Co., Inc. ("Morgan Stanley") to produce the following documents requested in CPH's first request for production.

1. The three document requests at issue in this motion relate to a narrow category of Sunbeam-related personnel files (Exh. A):

Request No. 44: All documents concerning employment contracts, performance evaluations, and/or personnel files (including without limitation any documents that describe or discuss the training, experience, competence, and accomplishments) of all Morgan Stanley personnel who performed services for or on behalf of Sunbeam in 1997 or 1998.

Request No. 45: All documents concerning Morgan Stanley's performance evaluation criteria or guidelines in effect from and including January 1, 1997 through and including December 31, 1998.

Request No. 46: All documents concerning Morgan Stanley's compensation criteria or guidelines in effect from and including January 1, 1997 through and including December 31, 1998.

2. In its written response, Morgan Stanley objected to each of those document requests on the ground that they supposedly seek documents that are neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. In addition, with respect to Request No. 44, Morgan Stanley further objected that it "would unnecessarily infringe on the privacy interests of those employees" who worked on Sunbeam matters. See Exh. A ¶¶ 44-46.

3. Morgan Stanley has no basis for withholding any of the documents that are responsive to Request Nos. 44, 45, and 46. Morgan Stanley, for the most part, has offered nothing but boilerplate objections such as that the document requests involved are “not reasonably calculated to lead to the discovery of admissible evidence.” As the Appellate Court has held, however, unsubstantiated objections like those are “patently without merit” and “constitute discovery abuse” (*First Healthcare Corp. v. Hamilton*, 740 So. 2d 1189, 1193 n.1 (Fla. 4th DCA 1999), *review dismissed*, 743 So. 2d 12 (Fla. 1999)):

Each of these objections, stated baldly and without particulars, is patently without merit as the court found following the hearing on plaintiff's motion to compel. Such “stonewalling tactics,” designed to delay making a timely response to valid discovery requests, constitute discovery abuse and should not be condoned.

4. The only arguable exception to Morgan Stanley's boilerplate objections is its assertion that providing documents responsive to Request No. 44 might implicate some unspecified privacy concerns. The Florida Supreme Court, however, concluded that non-public employers like Morgan Stanley lack standing to assert the privacy rights of their employees and can object only on the ground of relevance — a ground that has no merit here. *See Alterra Healthcare Corp. v. Estate of Sielly*, 827 So. 2d 936, 944-45 (Fla. 2002).

5. Even if it were appropriate to weigh privacy concerns in determining whether to allow discovery (*see id.*), those concerns are at best negligible given that this Court has entered a Protective Order in this case that can be used to ensure confidentiality. Moreover, as CPH advised Morgan Stanley (Exhs. B, C), CPH is willing at this point (without prejudice to its right to request further information later if circumstances warrant) to limit Request No. 44 to the following documents:

- A. **Documents that mention Sunbeam by name.** Documents in the personnel files of the individuals who worked on the Sunbeam matter that actually mention “Sunbeam” plainly are both relevant and easily identified and produced.
- B. **Documents relating to fee generation.** Documents that address the extent to which an employee who worked on the Sunbeam matter was successful in generating fees for Morgan Stanley (from any client during the relevant time period), or unsuccessful in doing so, are discoverable because they would shed light on the financial incentives surrounding Morgan Stanley's determination to do work for Sunbeam and assist in the fraud.

C. **Documents concerning criticisms or reprimands.** Documents reflecting that the employees who worked on Sunbeam were criticized or reprimanded for their performance — and documents reflecting criticisms or reprimands of the same employees in connection with similar types of work for other clients, whether mentioning Sunbeam or not — would be relevant to CPH's claims in this case. Among other things, CPH has asserted a negligence claim, and the kinds of documents sought here are tailored to lead to discoverable information relevant to that claim.

6. Morgan Stanley has rejected this compromise concerning Request No. 44. Morgan Stanley has offered instead to produce documents covered by categories A and B, but as to category C, Morgan Stanley would produce only those criticism or reprimand related documents that refer "to the employee's performance of due diligence activities." *See* Exh. D.

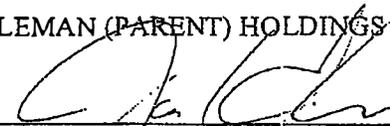
7. Morgan Stanley's limitations on Request No. 44 are unacceptable because they would prevent CPH from obtaining relevant information concerning the Morgan Stanley employees whose conduct is at the heart of this case. As Morgan Stanley would have it, Morgan Stanley could withhold documents reflecting concerns about the competence or honesty of the employees who worked on the Sunbeam matter unless those documents happen to deal with the subject of due diligence. That is insufficient. CPH is entitled to all documents in which employees who worked on the Sunbeam matter were reprimanded or criticized for their work — regardless of whether or not that work related to due diligence activities. In addition, CPH is entitled to all the documents called for by Request Nos. 45 and 46, which Morgan Stanley's counterproposal ignores entirely.

WHEREFORE, Plaintiff CPH respectfully requests that this Court direct Morgan Stanley to produce within 10 days of the Court's order the documents responsive to Request Nos. 44 (that is, the documents that mention Sunbeam by name, relate to fee generation, or concern criticisms or reprimands), 45, and 46 of CPH's first set of document requests.

Dated: February 11, 2004

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

By: 
One of Its Attorneys:

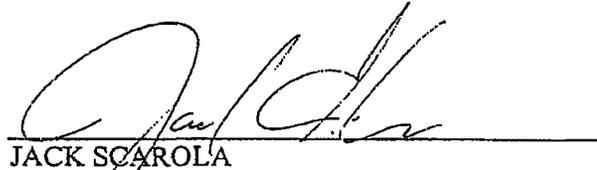
Jerold S. Solovy
JENNER & BLOCK LLP
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

John Scarola
SEARCY DENNEY SCAROLA
BARNHART & SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33402-3626
(561) 686-6300

9837:1

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by
Fax and Federal Express to all counsel on the attached list on this 11th day of
February, 2004.



JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 478-0754
Attorneys for Plaintiff

Coleman (Parent) Holdings Inc. vs Morgan Stanley & Company
Case No.: 2003 CA 005045 AI

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block, LLC
One IEM Plaza
Suite 4400
Chicago, IL 60611

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CASE NO: 03 CA-005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

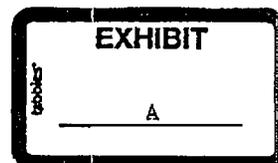
**MORGAN STANLEY & CO. INCORPORATED'S SECOND SUPPLEMENTAL
OBJECTIONS TO COLEMAN (PARENT) HOLDINGS, INC. FIRST REQUEST FOR
PRODUCTION OF DOCUMENTS**

Pursuant to Rules 1.280 and 1.350 of the Florida Rules of Civil Procedure, defendant, Morgan Stanley & Co. Incorporated ("MS & Co.") hereby interposes the following second supplemental objections to plaintiff Coleman (Parent) Holdings, Inc.'s ("CPH") First Request for Production of Documents ("Request for Production").

GENERAL OBJECTIONS

The following general objections apply to all specifications of CPH's Request for Production. Each General Objection is hereby incorporated in the response to each specific request as if fully set forth therein:

1. MS & Co. objects to the entire Request for Production as over broad and unduly burdensome. CPH has requested the production of impermissibly broad categories of documents that, if read literally and in combination with the equally overbroad Definitions, would require MS & Co. to collect, review and produce potentially hundreds of thousands of pages of



MS & Co.'s Objections:

MS & Co. objects to this request to the extent that it is vague, ambiguous, over broad and unduly burdensome. To the extent that it seeks documents concerning due diligence other than that due diligence performed in the course of MS & Co.'s engagement for Sunbeam, the request is requesting documents which are irrelevant to this litigation and not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving its general and specific objections, MS & Co. will produce non-privileged documents, located after a good-faith search of documents in its possession, custody, or control, relating to the due diligence performed by MS & Co. in the course of its engagement with Sunbeam Corporation or relating to the Coleman Transaction, and any general due diligence materials responsive to this request. MS & Co. will not produce documents that relate to other transactions not relevant to this lawsuit.

DOCUMENT REQUEST NO. 44

All documents concerning employment contracts, performance evaluations, and/or personnel files (including without limitation any documents that describe or discuss the training, experience, competence, and accomplishments) of all Morgan Stanley personnel who performed services for or on behalf of Sunbeam in 1997 or 1998.

MS & Co.'s Objections:

MS & Co. objects to this request to the extent that it seeks documents which are protected by the attorney-client, attorney work product, other common law or statutory privileges, or which are otherwise immune from discovery. MS & Co. expressly reserves the right to assert any and all common law or statutory privileges to which MS & Co. and its attorneys are entitled under applicable law.

This request seeks to compel production of personnel files and performance evaluations of individual MS & Co. employees that are neither relevant to CPH's claims nor

reasonably calculated to lead to the discovery of admissible evidence and, in addition, would unnecessarily infringe on the privacy interests of those employees.

MS & Co. will not produce documents responsive to this request.

DOCUMENT REQUEST NO. 45

All documents concerning Morgan Stanley's performance evaluation criteria or guidelines in effect from and including January 1, 1997 through and including December 31, 1998.

MS & Co.'s Objections:

MS & Co. objects to this request to the extent that it seeks documents which are protected by the attorney-client, attorney work product, other common law or statutory privileges, or which are otherwise immune from discovery. MS & Co. expressly reserves the right to assert any and all common law or statutory privileges to which MS & Co. and its attorneys are entitled under applicable law.

MS & Co. objects to this request in that it seeks the production of documents which are irrelevant to this litigation and not reasonably calculated to lead to the discovery of admissible evidence. MS & Co. will not produce documents responsive to this request.

DOCUMENT REQUEST NO. 46

All documents concerning Morgan Stanley's compensation criteria or guidelines in effect from and including January 1, 1997 through and including December 31, 1998.

MS & Co.'s Objections:

MS & Co. objects to this request to the extent that it seeks documents which are protected by the attorney-client, attorney work product, other common law or statutory privileges, or which are otherwise immune from discovery. MS & Co. expressly reserves the right to assert any and all common law or statutory privileges to which MS & Co. and its attorneys are entitled under applicable law.

MS & Co. objects to this request in that it seeks the production of documents which are irrelevant to this litigation and not reasonably calculated to lead to the discovery of admissible evidence. MS & Co. will not produce documents responsive to this request.

DOCUMENT REQUEST NO. 47

All marketing or other promotional material prepared or used by, or on behalf of, Morgan Stanley concerning investment banking or securities underwriting services that were created or used at any time from and including January 1, 1997 through and including December 31, 1998.

MS & Co.'s Objections:

MS & Co. objects to this request for "all marketing or promotional material...concerning investment banking or securities underwriting services" as overbroad, unduly burdensome and inadequately tailored. Requiring MS & Co. to produce all documents sought in this request would necessitate the production of all of MS & Co.'s promotional materials, in their entirety, which would result in the production of documents irrelevant to this litigation and not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving its general and specific objections, MS & Co. will produce any general marketing or promotional materials responsive to this request, and any marketing or promotional material provided or presented to Sunbeam, CPH, or MAFCO, responsive to this request, located after a good-faith search of documents in its possession, custody, or control.

DOCUMENT REQUEST NO. 48

All of your document retention or document destruction policies or procedures or similar procedures for the back-up or deletion of electronic or hard copy documents of any kind for any time during 1997 through the present, including without limitation any amendments to any such policies or procedures, schedules or related documents, and any memoranda or other instructions communicated to your employees concerning the obligation and procedures to be utilized to preserve all relevant documents, including without limitation evidence concerning the Litigations, the Arbitrations, and the SEC Administrative Proceedings.

Dated: August 12, 2003

Respectfully Submitted,

Joseph Ianno, Jr. (FL Bar # 655351)
CARLTON FIELDS
222 Lake View Avenue - Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368

Thomas A. Clare

Thomas D. Yannucci, P.C.

Thomas A. Clare

Larissa Paule-Carres

Kathryn DeBord

KIRKLAND & ELLIS

655 15th Street, N.W. 12th Floor

Washington, D.C. 20005

Telephone: (202) 879-5000

Facsimile: (202) 879-5200

Attorneys for Defendant
Morgan Stanley & Co. Incorporated

JENNER & BLOCK

August 28, 2003

Jenner & Block, LLC
One IBM Plaza
Chicago, IL 60611-7603
Tel 312 447-9350
www.jenner.com
Chicago
Dallas
Washington, DC

By Telecopy

Thomas A. Clare, Esq.
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Michael T. Brody
Tel 312 923-2711
Fax 312 840-7711
mbrody@jenner.com

Re: *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co.*
Morgan Stanley Senior Funding v. MacAndrews & Forbes Holdings Inc., et al.

Dear Tom:

I write in an attempt to reach agreement on one outstanding discovery issue. In discovery requests to Morgan Stanley ("MS & Co.") and Morgan Stanley Senior Funding ("MSSF"), CPH sought personnel and compensation documents relating to the individuals who worked on the Sunbeam transactions. MS & Co. and MSSF objected to these requests.

In an attempt to avoid bringing this matter to the Court, and without prejudice to later renewing our requests for the full scope of documents encompassed by our requests, we propose to limit Request 44 served upon MS & Co. and Request 69 served upon MSSF to those documents that are responsive to these requests and mention Sunbeam by name, relate to fee generation (or the lack of it), or contain or concern criticisms or reprimands for work done by the relevant employees. We continue to seek all documents responsive to Requests 45 and 46 upon MS & Co. and Requests 71 and 72 upon MSSF, which are more general in nature.

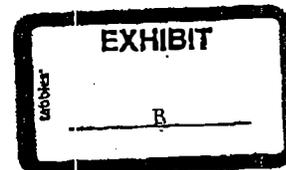
Please reconsider your objections. If you do not do so by September 3, 2003, we will bring this to the attention of the Court.

Very truly yours,

Michael T. Brody

MTB:cjg

cc: Joseph Ianno, Esq. (by facsimile)
John Scarola, Esq. (by facsimile)
Jerold S. Solovy, Esq.



JENNER & BLOCK

September 18, 2003

Jenner & Block, LLC
One IBM Plaza
Chicago, IL 60611-7609
Tel 312 222-9350
www.jenner.com
Chicago
Dallas
Washington, DC

By Telecopy

Thomas A. Clare, Esq.
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Michael T. Brody
Tel 312 923-1711
Fax 312 840-7711
mbrody@jenner.com

Re: *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co.*
Morgan Stanley Senior Funding v. MacAndrews & Forbes Holdings Inc., et al.

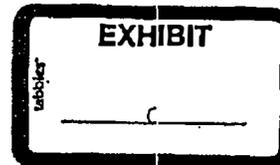
Dear Tom:

I reviewed the blank personnel evaluation forms that Larissa Paule-Carres forwarded to me. Based on my review of those documents, I renew our request that Morgan Stanley and MSSF produce the documents I described in my offer to compromise dated August 28, 2003.

The evaluative categories contained in the personnel evaluation forms are sufficiently general that relevant comments or ratings can appear in nearly any category. Because of the generality of the categories, and the manner in which they overlap, we are not able to limit our inquiry to particular categories. I renew our request that Morgan Stanley and MSSF produce the evaluation forms, consistent with the requests contained in my letter of August 28, 2003. If Morgan Stanley or MSSF personnel who worked on Sunbeam matters are evaluated in a different manner – that is, if particular employees are not evaluated using the forms you provided – we also request that you produce those evaluation materials.

You have raised concerns about the personal privacy of the Morgan Stanley and MSSF employees. We have a protective order in place, which should address those concerns.

Finally, the forms you provided refer to other Morgan Stanley and/or MSSF documents that are plainly responsive to the request discussed in my letter of August 28. For example, the forms you provided refer to performance criteria contained in the "PE Guide" for the relevant year. The form states that such information can also be obtained on the "OOD PE home page on MS



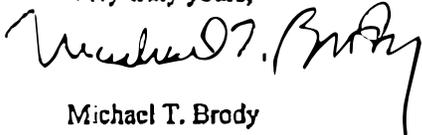
Thomas A. Clare, Esq.
September 18, 2003
Page 2

JENNER & BLOCK

Today." The forms refer to a Performance Criteria Matrix that can be found in the PE Guide. The forms also refer to self evaluations completed by the employee. All of these documents, and any other performance criteria or evaluations pertaining to the employees in question, contain information responsive to our requests. Consistent with my letter of August 28, we request that you produce these documents.

Please produce these documents before September 29, 2003, or we will present this issue to the Court.

Very truly yours,



Michael T. Brody

MTB:cjg

cc Joseph Ianno, Esq. (by facsimile)
John Scarola, Esq. (by facsimile)
Larissa Paule-Carres, Esq. (by facsimile)
Jerold S. Solovy, Esq.

KIRKLAND & ELLIS LLP

AND AFFILIATED PARTNERSHIPS

655 Fifteenth Street, N.W.
Washington, D.C. 20005

202 879-5000

www.kirkland.com

Thomas A. Claro
To Call Writer Directly:
(202) 879-3393
tclaro@kirkland.com

Facsimile:
202 879-5200

September 25, 2003

By Facsimile

Michael Brody, Esq.
Jenner & Block, LLC
One IBM Plaza
Chicago, IL 60611-7603

Re: *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc.*
MSSF v. MacAndrews & Forbes Holdings Inc. et al.

Dear Mike:

I write in response to your September 18 letter regarding employee personnel files. Because of Hurricane Isabel and the closure of our D.C. office, I did not receive your letter until the office reopened on September 22.

CPH's document requests on these issues (even as narrowed in your August 28, 2003 letter) are overbroad and seek sensitive personal information that is neither relevant to the subject matter of the litigation nor reasonably likely to lead to the discovery of relevant information. Even with the protective order in place, the blunderbuss approach suggested by your letter would result in the disclosure of broad categories of irrelevant personal information -- and an unwarranted invasion of the privacy of the employees involved.

With regard to employee personnel files, we are willing to produce, with respect to employees directly involved in Sunbeam related engagements, redacted copies of the personnel files that will allow you to see: (1) all references (positive or negative) to work performed by the employee on Sunbeam-related engagements; (2) all references (positive or negative) to the employee's performance in fee generation; and (3) all references (positive or negative) to the employee's performance of due diligence activities. If this compromise approach is acceptable, we will begin to prepare the documents for production.

Chicago

London

Los Angeles

New York

San Francisco



KIRKLAND & ELLIS LLP

Michael Brody, Esq.
September 25, 2003
Page 2

With regard to the other documents referred to you in your letter (i.e. the "PII Guide"), we will examine those documents to determine if those documents are responsive to CPH's document requests and not otherwise subject to objection.

Sincerely,

Thomas A. Clare

Thomas A. Clare

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

CASE NO: 2003 CA 005045 AI

v.

Judge Elizabeth T. Maass

MORGAN STANLEY & CO., INC.,

Defendant.

**COLEMAN (PARENT) HOLDINGS INC.'S
STATEMENT OF UNRESOLVED LEGAL ISSUES**

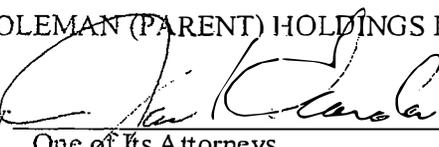
In connection with the case management conference scheduled for February 20, 2004, Plaintiff Coleman (Parent) Holdings Inc. ("CPH") hereby submits this statement of unresolved legal issues:

1. CPH intends to file a motion to seek leave to amend its complaint pursuant to Fla. Stat. § 768.72 to assert a claim for punitive damages in excess of \$1.5 billion dollars as allowed by law.
2. CPH intends to file a motion for appropriate relief in light of Morgan Stanley's failure to preserve relevant discovery in the form of e-mails created prior to January 1, 2001.

Date: February 17, 2004

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

By 

One of Its Attorneys

Jerold S. Solovy
JENNER & BLOCK LLP
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

John Scarola
SEARCY DENNEY SCAROLA
BARNHART & SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33402-3626
(561) 686-6300

#1036988

16div-004490

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by
Fax and Federal Express to all counsel on the attached list on this 17th day of
February, 2004.



JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 478-0754
Attorneys for Plaintiff

Coleman (Parent) Holdings Inc. vs Morgan Stanley & Company
Case No.: 2003 CA 005045 AI

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block LLP
One IBM Plaza
Suite 4400
Chicago, IL 60611

MIAMI
ORLANDO
ST. PETERSBURG
TALLAHASSEE
TAMPA

CARLTON FIELDS

ATTORNEYS AT LAW

WEST PALM BEACH

Esperanté
222 Lakeview Avenue, Suite 1400
West Palm Beach, Florida 33401-6149
P.O. Box 150
West Palm Beach, Florida 33402-0150

561.659.7070
561.659.7368 fax
www.carltonfields.com

E-MAIL: jianno@carltonfields.com

February 17, 2004

The Honorable Elizabeth Maass
Palm Beach County Courthouse
205 North Dixie Highway
West Palm Beach, Florida 33401

VIA HAND DELIVERY

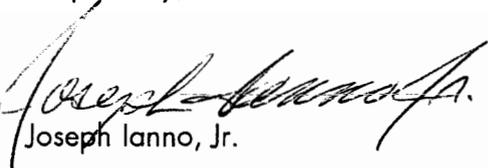
Re: *Coleman (Parent) Holdings Co. v. Morgan Stanley & Co.*
Case No: 03 CA 5045 AI

Dear Judge Maass:

This Court has scheduled a Case Management Conference on Friday, February 20, 2004 at 3:30 p.m. in the above-referenced matter. In addition to the Joint Submission of the Parties for February 20, 2004 Case Management Conference, provided under separate correspondence, Defendant, Morgan Coleman, submits the enclosed Statement of Unresolved Legal Issues.

Thank you.

Respectfully,



Joseph Ianno, Jr.

Enclosure

cc: Jack Scarola (via facsimile w/encl.)
Jerold Solovy (via facsimile w/encl.)
Thomas Clare (via facsimile w/encl.)

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CASE NO: 03 CA-005045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

MORGAN STANLEY'S STATEMENT OF UNRESOLVED LEGAL ISSUES

Pursuant to the Court's Order of January 13, 2004, Defendant Morgan Stanley & Co. Incorporated ("Morgan Stanley") hereby submits the following statement of unresolved legal issues. For additional information about the status of the litigation, Morgan Stanley refers the Court to the Joint Submission of the Parties For February 20, 2004 Case Management Conference (the "Joint Submission"), which is being filed simultaneously herewith.

I. Statement Of Unresolved Legal Issues

A. Choice-Of-Law

Before a trial can be held in this matter, the Court must determine an important unresolved issue — the substantive law to be applied to Plaintiff's claims. During the December 12, 2003 hearing on Morgan Stanley's Motion For Judgment On The Pleadings, the Court declined to rule on the question of which state's substantive law (New York or Florida) will apply to Plaintiff's claims. Instead, the Court stated that it would address this fact-intensive

choice-of-law issue in connection with a separately-filed motion — and invited the parties to make detailed factual submissions addressing this issue.

Given the importance of this threshold choice-of-law determination to the parties' summary judgment motions and many other pretrial procedures, Morgan Stanley has proposed a briefing and argument schedule that will allow the Court an opportunity to consider and determine the choice-of-law issue in accordance with the procedures suggested by the Court during the December 12, 2003 hearing. Morgan Stanley's proposed schedule is attached to the Joint Submission as Exhibit 2.

B. Whether CPH Has Stated A Legally Cognizable Claim

On June 25, 2003, Morgan Stanley filed its Motion to Dismiss Pursuant to Florida Rule of Civil Procedure 1.061 Or, In The Alternative, For Judgment On the Pleadings. The Court held a hearing on both of these motions on December 12, 2003. With regard to Morgan Stanley's Motion For Judgment On The Pleadings, the Court declined to reach the question of whether CPH has stated a legally cognizable claim against Morgan Stanley, reasoning that the Court could not look beyond the pleadings to resolve the parties' dispute regarding which state's substantive law (Florida or New York) should be applied

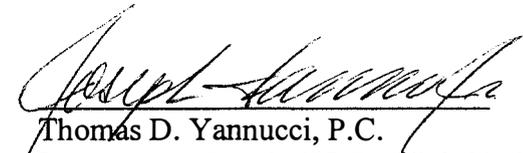
Once the Court has determined which state's substantive law will apply, the legal sufficiency of CPH's claims will once again be ripe for determination by the Court, either in the context of a renewed motion for judgment on the pleadings or a motion for summary judgment. Issues for determination by the Court may include, among other issues (1) whether CPH's misrepresentation claims are barred by various provisions of the written Merger Agreement, which explicitly disclaims reliance on pre-agreement negotiations and representations; (2) whether CPH can plead a valid misrepresentation claim since it had the same access to Sunbeam's books and records, yet failed to take any steps to verify or investigate the

representations it now claims were fraudulent; (3) whether CPH has adequately alleged and established a legally cognizable theory of intent to defraud; (4) whether CPH has adequately alleged and established that CPH enjoyed the requisite "relationship" with Morgan Stanley sufficient to support a claim for negligent misrepresentation; and (5) whether CPH has alleged and established that Morgan Stanley knew of the alleged fraud at Sunbeam and knowingly facilitated it sufficient to state a claim for conspiracy or aiding and abetting fraud.

II. Unresolved Motions And Other Requests For Action

There are no unresolved motions or other outstanding requests for action filed by Morgan Stanley at the time of this submission.

Dated: February 17, 2004



Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar # 618349)
Thomas A. Clare
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
(202) 879-5000

Joseph Ianno, Jr. (FL Bar # 655351)
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
(561) 659-7070

Counsel for Defendant
Morgan Stanley & Co. Incorporated

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Company, Inc.
Case No.: 2003 CA 005045 AI
Notice of Taking Videotaped Depositions
February 18, 2004

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 2003 CA 005045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

NOTICE OF TAKING VIDEOTAPED DEPOSITIONS

To: Thomas A. Clare, Esq.
KIRKLAND & ELLIS, LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lake View Avenue
Suite 1400
West Palm Beach, FL 33401

PLEASE TAKE NOTICE that Plaintiff Coleman (Parent) Holdings Inc. will take the depositions upon oral examination of the following witnesses pursuant to Florida Rule of Civil Procedure 1.310 on the dates, times, and locations set forth below:

DEPONENT	DATE AND TIME	LOCATION
Shani Boone	March 3, 2004 at 9:30 a.m.	Esquire Deposition Services 216 E. 45 th St., 8 th Floor New York, NY 10017
Lili Rafii	March 4, 2004 at 9:30 a.m.	Esquire Deposition Services 216 E. 45 th St., 8 th Floor New York, NY 10017
James Stynes	March 11, 2004 at 9:30 a.m.	Esquire Deposition Services 216 E. 45 th St., 8 th Floor New York, NY 10017

Ruth Porat	March 12, 2004 at 9:30 a.m.	Esquire Deposition Services 216 E. 45 th St., 8 th Floor New York, NY 10017
Michael Hart	March 18, 2004 at 9:30 a.m.	Esquire Deposition Services 216 E. 45 th St., 8 th Floor New York, NY 10017
Andrew Conway	March 19, 2004 at 9:30 a.m.	Esquire Deposition Services 216 E. 45 th St., 8 th Floor New York, NY 10017
Gene Yoo	March 25, 2004 at 9:30 a.m.	Esquire Deposition Services 175 Federal Street Suite 508 Boston, MA 02110
Joshua Webber	March 26, 2004 at 9:30 a.m.	Esquire Deposition Services 175 Federal Street Suite 508 Boston, MA 02110

The depositions will be recorded by videotape and stenographic means. The depositions will be taken before a person authorized to administer oaths and will continue day to day until completed.

The videotape operators will be Esquire Deposition Services located in New York, New York and Esquire Deposition Services located in Boston, Massachusetts.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by facsimile and mail to all counsel on the attached Service List, this 18th day of February, 2004.

Dated: February 18, 2004

COLEMAN (PARENT) HOLDINGS INC.

By: Michael T. Brody
One of Its Attorneys

Jerold S. Solovy
Michael T. Brody
Clark C. Johnson
JENNER & BLOCK LLP
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

Jack Scarola
SEARCY DENNEY SCAROLA BARNHART
& SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33409
(561) 686-6300

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Company, Inc.
Case No.: 2003 CA 005045 AI
Notice of Taking Videotaped Depositions
February 18, 2004

SERVICE LIST

Thomas A. Clare, Esq.
KIRKLAND & ELLIS, LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lake View Avenue
Suite 1400
West Palm Beach, FL 33401

FAX TRANSMITTAL

JENNER & BLOCK

Jenner & Block LLP
One IBM Plaza
Chicago, IL 60611
Tel 312 222-9350
www.jenner.com

Chicago
Dallas
Washington, DC

Date: February 18, 2004

To: Thomas A. Clare, Esq.

Fax: (202) 879-5200
Voice: (202) 879-5993

Joseph Ianno, Jr.

Fax: (561) 659-7368
Voice: (561) 659-7070

John Scarola, Esq.

Fax: (561) 684-5816 (before 5 PM)
Voice: (561) 686-6350, Ext. 140

From: Michael T. Brody
312 923-2711

Employee Number:

Client Number: 41198-10003

Important: This message is intended only for the use of the individual or entity to which it is addressed, and may contain information that is attorney work product, privileged, confidential, and exempt from disclosure under applicable law. If the reader of this message is not the intended recipient, or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution, or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone, and return the original message to us at the above address via postal service. Thank you.

Message:

Total number of pages including this cover sheet: **5**

Time Sent:

If you do not receive all pages, please call: 312 222-9350

Sent By:

Secretary: Caryn Jo Geisler

Extension: 6490

JENNER & BLOCK

February 18, 2004

Jenner & Block LLP
One IBM Plaza
Chicago, IL 60611
Tel 312-222-9350
www.jenner.com

Chicago
Dallas
Washington, DC

By Telecopy

Thomas A. Clare, Esq..
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

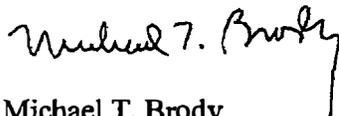
Michael T. Brody
Tel 312 923-2711
Fax 312 840-7711
mbrody@jenner.com

Re: *Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co.*
Morgan Stanley Senior Funding, Inc. v. MacAndrews & Forbes Holdings Inc., et al.

Dear Tom:

I attach a deposition notice for eight current and former Morgan Stanley employees. Please let us know whether you will represent the former Morgan Stanley employees. By informing us now of your intention to represent these individuals, you will eliminate the delay we have experienced with prior depositions resulting from the need to procure commissions and serve subpoenas. Thank you in advance for your cooperation.

Very truly yours,



Michael T. Brody

MTB:cjg

cc: Joseph Ianno, Esq. (by telecopy)
John Scarola, Esq. (by telecopy)
Jerold S. Solovy, Esq.

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CASE NO: 03 CA-005045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

**MOTION TO COMPEL THE PRODUCTION OF DOCUMENTS
PURSUANT TO THE PARTIES' WRITTEN AGREEMENT**

Defendant Morgan Stanley & Company Incorporated ("Morgan Stanley"), by and through its undersigned attorneys, respectfully submits this Motion To Compel The Production Of Documents Pursuant To The Parties' Written Agreement, and states in support:

1. Both Parties Have Responsive Documents That Exist In Electronic Form. It is undisputed that both Morgan Stanley and Coleman (Parent) Holdings Inc. ("CPH") possess certain documents that exist in electronic form, including word processing files, spreadsheets and electronic presentation material. (Jan. 29, 2004 Letter from M. Brody to L. Paule-Carres (Ex. A).) Similarly, there is no dispute that such documents are responsive to both parties' requests for production. This motion addresses the *form* in which such electronic documents are to be produced: electronic (as CPH previously requested and the parties previously agreed) or hard-copy paper form.

2. CPH Insisted That Morgan Stanley Produce Electronic Documents In Electronic Form. The issue of how electronic documents would be produced first arose last summer, shortly after Morgan Stanley made its initial production of documents to CPH. Morgan Stanley produced its documents in hard-copy form, including hard-copy printouts of electronic documents that resided on Morgan Stanley computers and electronic servers. During meet-and-confer sessions and again in written correspondence, CPH *insisted* that Morgan Stanley produce electronic documents in electronic form. Specifically, CPH wrote “[W]e would like an *electronic copy of the documents that were printed from your clients’ computers.*” (Aug. 1, 2003 Letter from D. Connell to T. Clare at 3 (Ex. B).)¹ After receiving assurances that this agreement would be reciprocal, Morgan Stanley complied with CPH’s request and produced the electronic documents from its prior production in electronic form.

3. CPH and Morgan Stanley Enter Into A Written Agreement Regarding The Production of Electronic Documents. Morgan Stanley and CPH negotiated and executed a letter agreement addressing the production protocols and cost sharing mechanisms to be implemented. With regard to electronic documents, this agreement states that “[t]he parties *have produced and will produce to each other various [electronic] documents that exist in electronic form.*” (Aug. 19, 2003 Letter from M. Brody to Z. Brown at 2 (Ex. C).)² There can be no mistake that this letter agreement provided for the exchange of electronic documents in an electronic medium, as

¹ Unless otherwise indicated, all emphasis herein is supplied.

² This agreement further contemplates the use of such electronic form productions by stipulating that prior to use of the electronic-form documents, the parties will “assign production numbers to the electronic document consisting of the number assigned to the electronic medium followed by the file name of the document as found in the electronic medium.” (*Id.*)

opposed to a hard-copy, i.e., paper, form. CPH's attorneys drafted this written agreement, which was countersigned by counsel for Morgan Stanley.

4. Morgan Stanley Has Complied With The Parties' Written Agreement. Morgan Stanley has complied with the parties' agreement by producing electronic documents "in electronic form." Despite additional burden, time, and expense, Morgan Stanley, obtained and produced "in electronic form" documents that had already been produced in hard copy as part of its initial production; on August 8, 2003, Morgan Stanley produced to CPH three CDs of electronic documents which corresponded to its initial hard-copy production of documents. In subsequent productions as well, Morgan Stanley has produced electronic documents in electronic form. Specifically, on October 1, November 10, and November 25, 2003, Morgan Stanley produced one, two and one CD of electronic documents "in electronic form" respectively. In total, Morgan Stanley has produced seven CDs of electronic files, representing 825 files and 185.57 MB of electronic data.

5. CPH Has Failed And Refused To Comply With The Parties' Agreement. CPH has not produced a single electronic document from its own files, or the files of its parent company, MacAndrews & Forbes Holdings. (Oct. 6, 2003 Letter from M. Brody to Z. Brown at 2 (Ex. D).)³ While CPH has produced some documents electronically, a closer inspection of the

³ Given the parties' letter agreement, coupled with the testimony Andrew Fasman, Morgan Stanley understood CPH's October 6, 2003 letter to mean that they did not have any electronic documents -- not that they were not producing them electronically. In relevant part, Mr. Fasman testified that electronic documents were not collected or searched for, nor were employees given instructions to search for electronic documents, at any point prior to 2001. In response to questioning about post-2001, when CPH did search for electronic documents, Mr. Fasman could not recall whether any documents in fact remained:

Q. Were any electronic documents produced in that litigation, in CPH's suit against Arthur Andersen?

A. I believe electronic media were produced. I don't know whether they were simply copies of other
(Continued...)

Bates numbers on these documents and the correspondence from prior Sunbeam-related litigation reveals that those documents *did not originate from CPH's own files*, but rather were documents that were produced to CPH in "electronic form" by various third parties.

6. CPH Has Exploited Morgan Stanley's Production Of Electronic Documents In Electronic Form. CPH's refusal to comply with the parties' agreement has led to disparities in the information available to the parties, and has led to inequities and prejudicial harm to Morgan Stanley during the course of discovery. It is fundamentally unfair, from both a financial and access-to-information standpoint, to allow one party to shirk its contractual obligation by producing documents solely in paper format, while the other party compliantly provides electronic documents in electronic form.

Further, the complying party – in this case, Morgan Stanley – as a result of its electronic production, has ultimately provided CPH with information and data that would not be available absent the electronic production. This phenomenon was highlighted most recently during the January 8, 2004 deposition of Tyrone Chang, in which Mr. Chang was repeatedly questioned regarding the "metadata" contained in some of the electronic files that were produced to CPH, and subsequently used as CPH Exhibits 81A, 83, 84A, 91, 93, 94 and 99.⁴ As many of those

electronic media or images of hard copy documents, or it may have been that electronic documents were only produced by printing them out and providing the hard copies. Whatever there was was produced.

Q. But you don't know whether in fact there was any remaining electronic documents in 2001?

A. I only know that whatever there was was produced.

(Sept. 15, 2003 Fasman Dep. at 99 (Ex. E); *see also id.* at 107-110)

⁴ It is curious to note that in utilizing the electronic versions of Morgan Stanley's production, CPH failed to adhere to the protocol established by the August 19 letter agreement with regard to the labeling of electronic documents prior to their use. Pursuant to that agreement, Morgan Stanley and CPH were to follow the convention of
(Continued...)

documents were in fact produced initially in paper form, such material and information would not have been available to CPH absent Morgan Stanley's production of electronic documents in the agreed upon electronic form.⁵

7. CPH's Excuses For Refusing To Produce Documents "In Electronic Form" Are Unavailing. CPH has tried to hide behind weak claims to support its position – most notably, that the August 19, 2003 letter agreement “does not require CPH to produce every document in two separate media.” (Feb. 6, 2004 Letter from M. Brody to L. Paule-Carres (Ex. F).) But CPH cannot avoid complying with the agreement using their failure comply with the agreement (by producing in hard copy) as an excuse. Nor is Morgan Stanley suggesting that CPH is obligated to “produce every document in two separate media.” CPH is, however, obligated to produce electronic documents in the agreed-upon medium: *in electronic form*. Nowhere in that letter agreement (which was drafted by CPH) is there any limiting factor – either by subject matter, or timing of production – which would provide for electronic documents to be produced in any other format.

“assign[ing] production numbers to the electronic document consisting of the number assigned to the electronic medium followed by the file name of the document as found in the electronic medium.” (Aug. 19, 2003 Letter at 2.) In contravention of this standard, CPH merely labeled Morgan Stanley's electronic documents “C:\ConcordanceTemp” – not the “C:\[bates number on CD]” as agreed upon.

⁵ For example, CPH Exhibits 81A, 83, 84A and 91 were produced initially in paper form, and were only produced electronically after CPH insisted as much. The metadata information would not have been available for CPH's use and analysis had Morgan Stanley not made such electronic documents available in electronic form.

CONCLUSION

CPH must not be rewarded for its discovery gamesmanship. Morgan Stanley requests the Court to enter an order directing CPH to produce "in electronic form" all electronic documents responsive to Morgan Stanley's document requests, including those previously produced in hard-copy form.

Respectfully submitted,

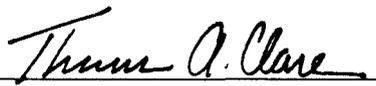
BY: Thomas A. Clare
Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar No. 618349)
Thomas A. Clare
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

Joseph Ianno, Jr. (FL Bar No. 655351)
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368

**Counsel for Morgan Stanley & Co.
Incorporated**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by facsimile and e-mail to all counsel of record on the attached service list on this 19th day of February, 2004.


Thomas A. Clare

SERVICE LIST

<p>John Scarola SEARCY, DENNEY, SCAROLA, BARNHARDT & SHIPLEY, P.A. 2139 Palm Beach Lakes Boulevard West Palm Beach, Florida 33409</p>	<p>Counsel for Coleman (Parent) Holding Inc.</p>
<p>Jerold S. Solovy JENNER & BLOCK, LLC One IBM Plaza Suite 4400 Chicago, Illinois 60611</p>	<p>Counsel for Coleman (Parent) Holding Inc.</p>

Exhibit A

JENNER & BLOCK

January 29, 2004

Jenner & Block LLP
One IBM Plaza
Chicago, IL 60611-7603
Tel 312 222-9350
www.jenner.com

Chicago
Dallas
Washington, DC

BY FEDERAL EXPRESS

Larissa Paule-Carres
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005

Michael T. Brody
Tel 312 923-2711
Fax 312 840-7711
mbrody@jenner.com

Re: *Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co.*

Dear Larissa:

I write in response to your January 23, 2004 letter concerning CPH's January 16 document production.

First, we have reviewed the original Bates labeled documents and found no instance where we produced additional documents on January 20 that had not been produced on January 16. Specifically, the range you provided, CPH 2005804-2005815, was produced on January 16 bearing Bates labels CPH 2005523-2005534. With respect to CPH 2005769 and CPH 2005792, I enclose additional copies of those documents in response to your concern that the documents were not photocopied in their entirety.

Second, with respect to your concern about missing pages, your assertion that the documents were produced without any stapling, clipping or other form of separation of documents is incorrect. While some documents, including CPH 2005763-2005765, may have been produced as they were maintained in the files (without staples or paper clips), many of the produced documents were in fact stapled or paper clipped. Furthermore, several of the documents appear to be single pages of multi-page documents that were maintained in the files separate from the complete document. After conducting a reasonable search for responsive documents, we believe that all responsive pages have been produced.

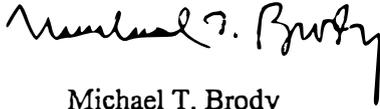
Finally, I did not represent that Mafco had no extant electronic documents. As you know from Mr. Fasman's deposition, certain documents remain in electronic form. The documents we produced on January 16 are hard copy versions of electronic documents. Producing documents to you in hard copy form fulfills our obligations under the rules. You provide no reason why we are obligated to produce the documents in two media. Given that we have fulfilled our obligation by producing the documents, we are not obligated to expend additional time and

Larissa Paule-Carres
January 29, 2004
Page 2

JENNER & BLOCK

resources in an effort to search for and produce individual electronic files that already were provided to you in hard copy form.

Sincerely,



Michael T. Brody

/enclosure

cc: Jerold S. Solovy, Esq.
John Scarola, Esq. (via fax)
Joseph Ianno, Esq. (via fax)

16div-004512

Exhibit B

JENNER & BLOCK

Jenner & Block, LLC
One IBM Plaza
Chicago, IL 60611-7503
Tel 312 527-9350
www.jenner.com

Chicago
Dallas
Washington, DC

August 1, 2003

DEIRDRE E. CONNELL
TEL 312 923-2661
FAX 312 840-7881
DCONNELL@JENNER.COM

VIA FACSIMILE

Thomas A. Clare, Esq.
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005-5793

Re: ***Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co., Inc.
MSSF v. MacAndrews & Forbes Holdings Inc. et al.***

Dear Tom:

I write to follow up on the conversation you, Jerry Solovy, and I had yesterday afternoon on several discovery topics.

1. **Deposition Scheduling.** We agreed upon the following: (a) fact depositions will begin on September 15, 2003 with John Tyree; (b) Morgan Stanley will produce Mr. Tyree for his deposition in Florida without the need for letters rogatory; (c) you will propose dates for early September for the Rule 1.310 deposition we noticed on July 17, 2003; (d) we will withdraw the Rule 1.310 deposition we noticed on the topics relating to Morgan Stanley's control over Mr. Tyree; and (e) we will propose dates for early September for the Rule 1.310 deposition MSSF noticed. With respect to MSSF's deposition notice, you agreed that we need not produce documents at the time of the deposition. In addition, you indicated that you would consult with Mr. Ianno, but that it was likely that you would withdraw Topic No. 3 of MSSF's notice. In addition, we agreed to cooperate in scheduling the depositions of our clients and third party witnesses.

2. **CPH Document Production.** We advised you that CPH would begin its document production on August 14, 2003, which is the same date on which CPH's written responses to your document requests are due. As we explained, we will make CPH's documents available for your inspection at our offices in Chicago. We will afford Morgan Stanley and MSSF the opportunity to designate the documents they wish to have copied. Alternatively, if Morgan Stanley and MSSF wish to designate all documents for copying, please advise us of the name of the copy service you engage.

JENNER & BLOCK

Thomas A. Clare, Esq.
August 1, 2003
Page 2

We advised you that the requests served by Morgan Stanley and MSSF seek the production of a substantial quantity of documents, many of which we believe are not pertinent to the claims asserted in the pending cases. As we explained, although we still are in the process of compiling those documents, we estimate that the production will be in excess of 350 boxes. We discussed that the bulk of the document production will consist of documents and other materials that we received from Andersen or the SEC in connection with the *CPH v. Andersen* litigation. Thus, as we explained, the date on which we will be able to produce those documents is dependent on the date that our motion on the *Andersen* confidentiality order is resolved by the Court. That motion has been set for hearing on August 12.

3. Morgan Stanley's 7/25/03 "Supplemental" Written Responses to CPH's Document Requests. You confirmed that we are at issue with respect to Request Nos. 43 (due diligence materials), 44 (personnel files), 45 (performance criteria), and 46 (compensation criteria). With respect to Request No. 38, which seeks the production of documents relating to Scott Paper, you will confirm that Morgan Stanley is producing those documents in response to other requests. In addition, we asked you to clarify the limitations Morgan Stanley placed on its responses to Request Nos. 13, 15, 25, 27, 39, 40, 42, and 48. You agreed to advise us whether Morgan Stanley was withholding any documents responsive to those requests on the basis of those limitations.

We also discussed Morgan Stanley's objection to the definition of "Morgan Stanley" and "You." In its objection, Morgan Stanley narrows the definition in a way that appears to exclude Morgan Stanley's subsidiaries, divisions, attorneys, accountants, and advisors. You agreed to advise us whether that was intentional and whether Morgan Stanley is withholding any responsive documents on that basis. With respect to electronic documents, you advised us that Morgan Stanley has or will search the email, hard drives, and network files of "custodians," but that Morgan Stanley will not review any electronic back-up or archives to search for responsive documents. You further explained that "custodians" are those Morgan Stanley employees who had access to responsive documents. We asked you to share with us your list of "custodians" and you agreed to do so at "an appropriate time." You also suggested that this issue would be an appropriate area of inquiry at the Rule 1.310 deposition noticed by CPH.

4. MSSF's Written Responses to CPH's Document Requests. We asked when we could expect to receive MSSF's response to the issues we discussed during our July 23, 2003 meet and confer teleconference. You indicated that you would send MSSF's response "promptly."

5. Morgan Stanley's and MSSF's July 25, 2003 Document Production. We discussed the fact that Morgan Stanley and MSSF have combined their document productions in such a way that it is not possible for us to determine whether any particular document came

JENNER & BLOCK

Thomas A. Clare, Esq.
August 1, 2003
Page 3

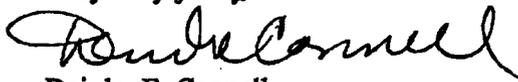
from the files of Morgan Stanley, MSSF, or both. We understand that Morgan Stanley will attempt to provide source information for the documents in its production. If, however, Morgan Stanley and MSSF is unable to provide us with that source information, this will constitute an acknowledgment by your clients that the documents came from the files of both companies.

In addition, we raised with you certain concerns that we have identified thus far with the document production made on July 25. First, many of the documents in Boxes 13 and 14 bear a date code of July 23, 2003, which apparently is the date on which the documents were printed out. Obviously, those documents were created on dates prior to July 22, 2003. We asked you to provide information concerning the dates on which the documents were created. You will determine what information is available in that regard. As you may already know, many applications programs embed in their files a date of creation and/or date of last modification field that can be accessed from the "open" command of those programs. In addition, we would like an electronic copy of the documents that were printed from your clients' computers. Second, a number of documents in Box 13 are illegible and incomprehensible, perhaps due to formatting issues. We will provide you with a list of bates numbers of those documents so that you will be able to determine whether better copies of the documents are available. Third, it appears that Morgan Stanley has redacted a number of documents. You assured us that the basis of those redactions will be reflected in Morgan Stanley's privilege log. Fourth, we understand that Jack Scarola and Joe Ianno are working toward an agreement concerning privilege logs that will provide us with a concrete timetable for the exchange of privilege logs. We will advise you when we discover additional issues as we continue our review of your July 25 document production.

6. Coordination of Hearing and Deposition Dates. We agreed that, for purposes of scheduling hearings or depositions, Jack Scarola's office would coordinate dates with us and Joe Ianno's office would coordinate dates with you. Thus, it will be sufficient if our side contacts either of the firms on your side to schedule matters and vice versa.

We will respond separately to your July 29, 2003 letter.

Very truly yours,



Deirdre E. Connell

DEC/sac

cc: Joseph Ianno, Jr. Esq.
John Scarola, Esq.
Jerold S. Solovy, Esq

Exhibit C

JENNER & BLOCK

August 19, 2003

By Facsimile

Zhonette Brown, Esq.
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Jenner & Block, LLC
One IBM Plaza
Chicago, IL 60611-7603
Tel 312 527-9850
www.jenner.com

Chicago
Dallas
Washington, DC

Michael T. Brody
Tel 312 923-2711
Fax 312 840-7711
mbrody@jenner.com

Re: *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co.*

Dear Zhonette:

As we discussed, we propose that Morgan Stanley & Company and CPH share certain costs involved in the production of documents in *Coleman (Parent) Holdings, Inc., v. Morgan Stanley & Co., Inc.*, No. CA 03-005045 AI (Fla. 15th Jud. Cir.), and *Morgan Stanley Senior Funding, Inc. v. MacAndrews & Forbes Holdings, Inc. and Coleman (Parent) Holdings Inc.*, No. 03 CA-005165 AG (Fla. 15th Jud. Cir.). We propose the following:

1. ***Documents produced by Jenner & Block, LLC in paper form only.***

Compulit, under a joint contract with (1) Morgan Stanley & Co.; and (2) Jenner & Block, LLC ("J&B") or Coleman (Parent) Holdings Inc. will pick up the documents J&B has produced in paper form, assign a production number and confidential designation, and image the documents. Compulit will produce two identical sets of copies of the images and will provide one set of images to Kirkland & Ellis LLP ("K&E") in Washington, D.C., and a second set of images to J&B in Chicago, Illinois simultaneously. Compulit will reassemble the original documents in the manner in which they were produced and will return the documents to J&B in the same files and boxes in which they were produced. The parties will enter into a separate contract with Compulit, which contract will more fully describe the services Compulit will perform. Compulit will perform its services on a schedule that is acceptable to the parties. Compulit will issue separate bills to J&B and Morgan Stanley. With the exception of delivery and pickup charges, the costs of Compulit's services will be split equally.

2. ***Documents that have been imaged.***

J&B production. J&B has produced documents to K&E that have already been imaged. K&E wishes to obtain copies of those images, which J&B agrees to provide. For those documents that K&E obtains in image form, Morgan Stanley will pay J&B \$0.08 per page. The payment will be made within 15 days of delivery of the images. Morgan Stanley may set-off against this cost any amount due Morgan Stanley as a result of

Zhonette Brown, Esq.
August 19, 2003
Page 2

JENNER & BLOCK

providing imaged documents to J&B or CPH. In addition, Morgan Stanley will pay the costs associated with duplicating any media containing document images.

K&E production. K&E has produced documents to J&B in paper form that have been imaged. J&B wishes to obtain copies of those images, which K&E agrees to provide. For those documents that J&B obtains in image form, J&B or CPH will pay K&E \$0.08 per page. The payment will be made within 15 days of delivery of the images. J&B or CPH may set-off this cost against the amount due J&B as a result of providing imaged documents to K&E. In addition, J&B or CPH will pay the costs associated with duplicating any media containing document images.

Each party will simultaneously provide to the other party disks containing the images described in this section. The parties agree that if the disks or other media are duplicated by one of the law firms, the cost charged for that law firm's duplication of the disks or other media will not exceed the cost of performing that service as charged by a vendor selected by the receiving party.

3. *Electronic documents.*

The parties have produced and will produce to each other various documents that exist in electronic form. Before using any of these electronic documents in this litigation, other than for purposes that are purely internal to the parties, the parties agree that they will assign production numbers to the electronic document consisting of the number assigned to the electronic medium followed by the file name of the document as found on the electronic medium.

Please indicate your agreement to this proposal by signing and returning this document to me.

Sincerely,



Michael T. Brody

Agreed to:

By

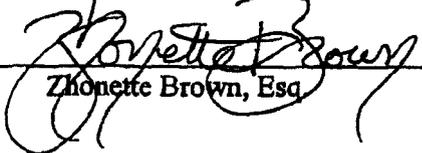

Zhonette Brown, Esq.

Exhibit D

JENNER & BLOCK

October 6, 2003

Jenner & Block, LLC
One IBM Plaza
Chicago, IL 60611-7603
Tel 312 222-9350
www.jenner.com

Chicago
Dallas
Washington, DC

By Telecopy

Zhonette M. Brown, Esq.
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Michael T. Brody
Tel 312 923-2711
Fax 312 840-7711
mbrody@jenner.com

**Re: *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co.
Morgan Stanley Senior Funding v. MacAndrews & Forbes Holdings Inc., et al.***

Dear Zhonette:

I write in response to your letter of October 1, 2003.

Your statement that "persons responsible for the document collection on behalf of CPH and Mafco did not contact that Mafco employees who were most significantly involved" with the transaction is reckless. As you know from the deposition of Steven Fasman, Mafco and CPH thoroughly searched their files well before the filing of this litigation and collected all documents that relate to the transaction at issue. As you know from Mr. Fasman's description of that search, CPH and Mafco contacted those employees who are most significantly involved with the transaction, including individuals who were no longer employed by CPH or Mafco at the time of the document production. These current and former employees were asked to identify others who might have responsive documents. Responsive documents were collected and produced in prior litigation. Those documents have now been produced to you. Having already collected responsive documents from those current and former employees who worked on the transaction, CPH and Mafco did not return to those employees to request them to produce the documents they had already produced. Instead, CPH and Mafco identified those few instances in which Morgan Stanley's document requests might call for the production of additional documents not previously collected. CPH and Mafco identified those documents and produced them to you. Thus, it is not correct to state that those individuals most significantly involved with the transaction have not been asked to produce their documents.

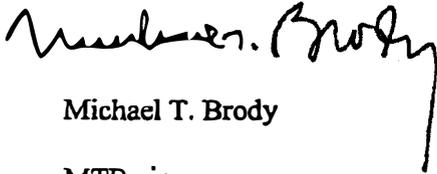
Next, you state that our response to Morgan Stanley's requests for admission "implies that the key personnel having knowledge relating to the requests were not contacted or questioned." We reject your assertion that our inquiry was insufficient to meet our discovery obligations. CPH made a good faith investigation and answered these lengthy requests appropriately. Furthermore, with respect to your specific complaint that "CPH's response to Request 230, 232, 234, and 235 seem to indicate that the involved personnel were not consulted," we note that those particular requests do not identify specific people, but rather refer only to entities.

Zhonette M. Brown, Esq.
October 6, 2003
Page 2

JENNER & BLOCK

Finally, you state that there have been some errors in the production of electronic documents although you fail to identify either the documents or the errors. As we advised you during the document production, neither CPH nor Mafo produced documents in electronic form. The electronic documents that we produced, as we advised you, were electronic documents we obtained from other individuals. Furthermore, we advised you that we were unable to open a number of those electronic documents. I suspect that your experience has been similar.

Very truly yours,



Michael T. Brody

MTB:cjg

cc: Joseph Ianno, Esq. (by facsimile)
John Scarola, Esq. (by facsimile)
Jerold S. Solovy, Esq.

Exhibit E

1 IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
 2 IN AND FOR PALM BEACH COUNTY, FLORIDA

3 - - - - - x

4 MORGAN STANLEY SENIOR FUNDING, :
 5 INC., :

ORIGINAL

6 Plaintiff, :

7 vs. : Case No:

8 MACANDREWS & FORBES : 03 CA-005165 AG

9 HOLDINGS, INC., and COLEMAN :

10 (PARENT) HOLDINGS, INC., :

11 Defendants. :

12 - - - - - x

13 Video Deposition of STEVEN L. FASMAN, held
 14 at the offices of KIRKLAND & ELLIS, 655 15th Street,
 15 N.W., Washington, D.C. 20005, commencing at 10:00
 16 a.m., Monday, September 15, 2003, before Robert M.
 17 Jakupciak, RPR and Notary Public.

18
 19
 20
 21
 22

1 that the subpoena contained were provided.

2 Q. Do you know which among those three you
3 listed was actually provided as guidance?

4 A. It depends on the individual.

5 Q. In Mr. Golden's collection of documents for
6 the securities litigation did he collect from anyone
7 any electronic documents?

8 A. No.

9 Q. Did Mr. Golden collect from anyone any
10 e-mail in soft copy or hard copy?

11 A. I believe, yes.

12 Q. From whom did he collect e-mail?

13 A. I don't know.

14 Q. Why do you believe that he collected
15 e-mail?

16 A. Because I believe e-mails were produced and
17 hard copies of e-mails were produced in connection
18 with that litigation.

19 Q. Were the assistants and secretaries of the
20 individuals that you referred to who Mr. Golden
21 contacted also contacted and instructed to review
22 files?

1 A. To the extent that they were ever taken
2 from the original providers? I don't know.

3 Q. Did CPH or MAFCO retain any sort of record
4 or index of the documents that it provided to
5 Wachtell?

6 A. I think there were some notes kept, yes.

7 Q. Kept by whom?

8 A. Well, I'm thinking of Mr. Golden, but it
9 certainly wouldn't surprise me if in some instances at
10 least the individuals who provided documents would
11 have made some notes of what was given away.

12 Q. Were the people who Mr. Golden contacted in
13 that instance instructed to provide electronic
14 documents?

15 A. No.

16 Q. Were they instructed to search for
17 electronic documents?

18 A. No.

19 Q. Between 1997 and when Mr. Golden searched
20 for documents for the securities litigation, had MAFCO
21 or CPH changed servers?

22 A. I don't know.

1 Q. Would the outside vending company to which
2 you referred have been responsible for any change in
3 servers at MAFCO?

4 A. They would have changed them if there was a
5 change.

6 Q. Did Mr. Golden undertake any search of the
7 servers in response to the document production or
8 collection in 1999 or 2000 for the securities
9 litigation?

10 A. No.

11 Q. Do you know why not?

12 A. Wachtell, Lipton, on behalf of the company,
13 objected to producing anything electronic. That
14 objection was neither challenged nor overruled.

15 Q. At any point between 1997 and today has
16 there been any effort by MAFCO to collect and retain
17 electronic documents related to the Sunbeam
18 acquisition of Coleman?

19 A. Yes.-

20 Q. When was that?

21 A. The first time?

22 Q. Yes.

1 A. 2001.

2 Q. Related to the CPH suit against Arthur
3 Andersen?

4 A. Yes.

5 Q. When MAFCO and CPH undertook to locate any
6 electronic documents related to the Sunbeam
7 acquisition of Coleman, were there any electronic
8 documents remaining?

9 A. I don't know.

10 Q. Who would know that?

11 A. I don't know if anybody would know at this
12 point.

13 Q. Who conducted the search for electronic
14 documents in 2001?

15 A. Various people.

16 Q. Who are all the people that you recall
17 conducting a search for electronic documents in 2001?

18 A. Everybody that was asked for documents was
19 asked for their electronic documents as well as their
20 hard copy documents.

21 Q. Were any electronic documents produced in
22 that litigation, in CPH's suit against Arthur

1 Andersen?

2 A. I believe electronic media were produced.
3 I don't know whether they were simply copies of other
4 electronic media or images of hard copy documents, or
5 it may have been that electronic documents were only
6 produced by printing them out and providing the hard
7 copies. Whatever there was was produced.

8 Q. But you don't know whether in fact there
9 was any remaining electronic documents in 2001?

10 A. I only know that whatever there was was
11 produced.

12 Q. What was the next instance in which CPH or
13 MAFCO collected documents for litigation related to
14 the Sunbeam acquisition of Coleman?

15 A. In connection with this matter.

16 Q. Well, I'm referring to next after the 1999
17 or 2001 one in which they collected it for the
18 securities litigation.

19 A. Yes. I was answering your question. I
20 wasn't clarifying it.

21 Q. Was there no separate collection effort for
22 the lawsuit against Arthur Andersen?

Exhibit F

JENNER & BLOCK

February 6, 2004

By Telecopy

Larissa L. Paule-Carres, Esq.
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Jenner & Block LLP
One IBM Plaza
Chicago, IL 60611-7603
Tel 312 222-9350
www.jenner.com

Chicago
Dallas
Washington, DC

Michael T. Brody
Tel 312 923-2711
Fax 312 840-7711
mbrody@jenner.com

Re: *Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co.*

Dear Larissa:

I write in response to your February 4, 2004 letter regarding our most recent document production in which you demand a response by today.

You claim that the parties have agreed to produce documents in both electronic and hard copy form, but we are not aware of any such agreement. The three items you reference as evidence of that supposed agreement are inapposite:

- First, the August 1, 2003 letter concerned a situation in which Morgan Stanley produced documents that were incomprehensible in hard copy form. We then asked you to produce those documents in electronic form, and you agreed to do so. That was not an agreement to produce every document in both hard copy and electronic form for the duration of the case;
- Second, the August 19, 2003 letter agreement you reference simply related to logistical procedures for producing documents in hard copy form and in electronic form. Again, that agreement does not require CPH to produce every document in two separate media; and
- Third, you cite an August 28, 2003 letter relating to Morgan Stanley's refusal to pay imaging costs. That letter has nothing to do with a supposed agreement to produce multiple copies of the same documents in varying forms.

Larissa L. Paule-Carres, Esq.
February 6, 2004
Page 2

You have not responded to my letter of January 23, 2004. Please explain why you believe it is necessary or appropriate for CPH to incur the burden and expense of producing the identical documents twice.

Very truly yours,



Michael T. Brody

cc: Joseph Ianno, Esq. (by telecopy)
John Scarola, Esq. (by telecopy)
Jerold S. Solovy, Esq.

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CASE NO: 03 CA-005045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that a hearing has been set in the above-styled case as follows:

DATE: February 26, 2004

TIME: 8:45 a.m.

PLACE: Palm Beach County Courthouse, Courtroom 11A
205 North Dixie Highway
West Palm Beach, Florida 33401

BEFORE: Judge Elizabeth T. Maass

CONCERNING: Defendant, Morgan Stanley & Co. Incorporated's Motion
to Compel the Production of Documents Pursuant to the
Parties' Written Agreement

KINDLY GOVERN YOURSELVES ACCORDINGLY.

The undersigned counsel hereby certifies that a good faith attempt to resolve the issues contained in the foregoing motions or matters will be made with opposing counsel prior to hearing on these matters on the Court's Motion Calendar.

If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no costs to you, to the provision of certain assistance. Please contact the ADA Coordinator in the Administrative Office of the Court, Palm Beach County Courthouse, 205 North Dixie Highway, Room 5.2500, West Palm Beach, Florida 33401; telephone number (561) 355-2431 within two (2) working days of your receipt of this notice; if you are hearing or voice impaired, call 1-800-955-8771.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and e-mail on this 19th day of February, 2004.

BY: Thomas A. Clare
Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar No. 618349)
Thomas A. Clare
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

Joseph Ianno, Jr. (FL Bar No. 655351)
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368

**Counsel for Morgan Stanley & Co.
Incorporated**

SERVICE LIST

Jack Scarola
**SEARCY, DENNY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy
Michael Brody
JENNER & BLOCK, LLC
One IBM Plaza
Suite 400
Chicago, IL 60611

1 IN THE CIRCUIT COURT OF THE
2 FIFTEENTH JUDICIAL CIRCUIT
3 IN AND FOR PALM BEACH COUNTY, FLORIDA

4 CASE NO.: 2003 CA 005045 AI

5

6

7 COLEMAN (PARENT) HOLDINGS, INC.,

8 Plaintiff,

9 vs.

10 MORGAN STANLEY & CO., INC.,

11 Defendant.

12

13

14

15

16 TRANSCRIPT OF PROCEEDINGS HAD BEFORE THE
17 HONORABLE ELIZABETH MAASS
18 ON FEBRUARY 19, 2004

19

20

21

22

23

24

25

1 APPEARANCES:

2 ON BEHALF OF THE PLAINTIFF:

3 SEARCY, DENNEY, SCAROLA,
4 BARNHART & SHIPLEY, P.A.
5 2139 PALM BEACH LAKES BOULEVARD
6 WEST PALM BEACH, FL 33409
7 By: JACK SCAROLA, ESQ.

8
9 ON BEHALF OF THE DEFENDANT:

10
11 CARLTON, FIELDS, ET AL
12 222 LAKEVIEW AVENUE
13 SUITE 1400
14 WEST PALM BEACH, FL 33401
15 BY: JOSEPH IANNO, JR. ESQ.

16
17 KIRKLAND AND ELLIS
18 655 15TH STREET, N.W.
19 SUITE 1200
20 WASHINGTON, D.C. 20005
21 BY: THOMAS A. CLARE, ESQ.

22

23

24

25

26

27

28

29

30

31

32

33

34

1 BE IT REMEMBERED that the following
2 proceedings were had before the HONORABLE ELIZABETH
3 MAASS, Judge in the above-named Court, at 205 North
4 Dixie Highway, in the City of West Palm Beach,
5 County of Palm Beach, State of Florida, on 19th, the
6 day of February, 2004, beginning at the hour of 8:30
7 o'clock, a.m. to wit:

8 - - - - -

9 MR. SCAROLA: Does Your Honor have a
10 motion?

11 THE COURT: I have a copy.

12 MR. IANNO: Your Honor, Joe Ianno and Tom
13 Clare on behalf of Morgan Stanley. You should
14 have our opposition which we delivered over to
15 the Court I think Tuesday morning.

16 THE COURT: Yes.

17 MR. SCAROLA: This is the blank order,
18 Your Honor.

19 THE COURT: Thank you very much.

20 MR. SCAROLA: Would Your Honor like to
21 take a moment?

22 THE COURT: Give me a second to look at
23 it.

24 Are you just trying to figure out if they

25 think their employees did a bad job on the

PINNACLE REPORTING, INC.

561-820-9066

4

1 Sunbeam deal or a good job?

2 MR. SCAROLA: No, Your Honor. That

3 clearly is one objective of the discovery.

4 That is, to make a determination as to whether

5 there were internal evaluations which amount to

6 an acknowledgement of some negligence on the

7 part of the employees by the corporation

8 itself, by Morgan Stanley itself, acknowledging

9 that its own employees did not do a good job.

10 But that's only a piece of it.

11 THE COURT: What's the other piece?

12 MR. SCAROLA: There is a negligent

13 misrepresentation claim. And that evidence

14 would be obviously relevant to the negligent

15 misrepresentation claim.

16 We have also reserved the right to assert

17 a punitive damage claim and under the Mercury

18 Motors standard, if we are able to demonstrate

19 some negligence on the part of the corporate

20 defendant, we establish vicarious liability for

21 the intentional wrongdoing of Morgan Stanley

22 employees. Some negligence on the part of the

23 corporate defendant would include the negligent

24 hiring or negligent retention of employees

16div-004539

25 involved in misconduct. So we're also seeking,

PINNACLE REPORTING, INC.
561-820-9066

5

1 as the statute allows us to, in advance of the
2 actual assertion of the punitive damage claim
3 discovery relating to the punitive damage claim
4 and that aspect of punitive damages. We want
5 to know what Morgan Stanley's assessment of its
6 own employees was.

7 For example, it may turn out that there is
8 a pattern of negligence evident from the
9 evaluations that Morgan Stanley has done of its
10 own employees. They know that this employee
11 over the course of time has not done what that
12 employee should be doing with respect to due
13 diligence responsibilities assigned to that
14 employee. Clearly, that would be relevant and
15 material on both the negligence claims and the
16 punitive damage claim.

17 Now, there has been substantial agreement
18 with regard to some of these matters and I
19 should let the Court know what that agreement
20 is. With regard to number 46, there is an
21 agreement that there will be production of the
22 compensation criteria and guidelines that are
23 requested in number 46. That agreement came in

24 response to our motion, although this request
25 was filed back in May of last year and

PINNACLE REPORTING, INC.
561-820-9066

6

1 substantial negotiations have gone on. We do
2 have that agreement. I have agreed this
3 morning that they can have 20 days in which to
4 produce that information. And so 46 is taken
5 care of.

6 Number 45 is also taken care of. They
7 have agreed that -- actually, what they have
8 said is that they have already produced some
9 documents that are responsive to that request.

10 All we want with regard to 45 is a
11 representation either that all documents have
12 been produced or the production of such
13 additional documents as may exist. So that's
14 narrowed the scope of the request with regard
15 to number 45.

16 THE COURT: Let me ask you this: Looking
17 at their response, there are three categories
18 that they have offered to produce, or three
19 subcategories of documents they have offered to
20 produce from the personnel files. Give me an
21 example of what you are looking for that would
22 not be included in those three subcategories.

23 MR. SCAROLA: I believe, Your Honor, that

16div-004541

24 the only issue currently with regard to number

25 44 is the scope, the temporal scope of the

PINNACLE REPORTING, INC.

561-820-9066

7

1 production.

2 THE COURT: So we're agreeing to limiting

3 it to the categories they have said --

4 MR. SCAROLA: Documents that mention

5 Sunbeam by name, documents relating to fee

6 generation. And the third category, if we're

7 communicating accurately, is criticisms or

8 reprimands of employees who worked on the

9 Sunbeam matter.

10 THE COURT: I thought it was any due

11 diligence.

12 MR. CLARE: It's actually a little bit

13 different than I think Mr. Scarola is stating.

14 That's where we have the area of dispute.

15 We're more than happy to produce references,

16 positive or negative, to employees' performance

17 of due diligence functions and that I believe

18 should take care of --

19 THE COURT: Global, not just Sunbeam, but

20 any due diligence.

21 MR. CLARE: Not just Sunbeam, any other

22 deal which is, quite frankly, broader than I

23 think we need to go, but we're willing to do
24 that to accommodate what Mr. Scarola wants to
25 accomplish here. What we don't want is a

PINNACLE REPORTING, INC.
561-820-9066

8

1 frolic and detour through these confidential
2 personnel employee files.

3 THE COURT: Let me ask you that. With
4 that representation, is that sufficient for
5 your client's purposes?

6 MR. SCAROLA: I'm not sure what Mr. Clare
7 means by no frolic and detour into personnel
8 files.

9 THE COURT: Setting that aside, and I
10 don't even want to go there, is it sufficient
11 if they produce all documents that either
12 relate to work performed on any Sunbeam-related
13 items relating to performance and fee
14 generation and relating to all performance in
15 due diligence activities for any clients?

16 MR. SCAROLA: No, Your Honor. We are not
17 prepared to agree to limit it only to due
18 diligence.

19 THE COURT: Give me an example of the kind
20 of things you think would be omitted by that
21 that you would be entitled to see.

22 MR. SCAROLA: Yes. Criticisms or

16div-004543

23 reprimands for not heeding the warnings of
24 accountants. If accountants are communicating
25 to Morgan Stanley even outside the area of due

PINNACLE REPORTING, INC.
561-820-9066

9

1 diligence and some employee disregards the
2 accountant's warning inappropriately and Morgan
3 Stanley acknowledges that this employee is not
4 heeding the accountant's warnings, that clearly
5 would have a bearing upon the kinds of things
6 that we believe occurred here. Criticisms or
7 reprimands for not being thorough in
8 questioning representations made by third
9 parties.

10 THE COURT: That wouldn't be part of due
11 diligence.

12 MR. SCAROLA: Well, not necessarily. It
13 does not have to occur in the context of the
14 due diligence investigation. It could occur in
15 the context of an audit. It could occur in the
16 context of a lot of different things. It
17 wouldn't necessarily have to be due diligence.
18 So by limiting the scope only to due diligence
19 responsibilities, we think that we may be
20 missing clearly relevant and material
21 information.

22 THE COURT: What's the response to the
23 contention that it should be somewhat broader
24 than due diligence?

25 MR. CLARE: I'm really not sure what other

PINNACLE REPORTING, INC.
561-820-9066

10

1 activities would fall into either of those two
2 categories that Morgan Stanley performed.
3 Morgan Stanley is not an auditor, it's not an
4 accounting firm. And the only scenarios that
5 I'm aware of that Morgan Stanley would be
6 interacting with accountants are in the context
7 of either a merger and acquisition due
8 diligence, which would be covered by the
9 umbrella of due diligence, or in the context of
10 the underwriting the securities offering, which
11 again would be under the context of due
12 diligence. So as to both of those two
13 categories, I don't see a broadening of what it
14 is that we're willing to do.

15 What we're trying to avoid by having a
16 global production of, quote, criticisms are
17 having to produce unrelated, completely
18 unrelated statements of weaknesses or areas of
19 development for employees. Because
20 effectively, that will bring open the entire
21 personnel file of these employees. For

16div-004545

22 example, things like organizational skills
23 might be considered to be a criticism or
24 weakness or public speaking might be identified
25 to be a weakness. These are things that are

PINNACLE REPORTING, INC.
561-820-9066

11

1 totally unrelated to the issues in this case.
2 And by narrowing it to due diligence, which is
3 really the negligence claim that is asserted
4 against Morgan Stanley, and that performance,
5 we think that would cover all the things that
6 Mr. Scarola is talking about.

7 MR. SCAROLA: What if we have an employee
8 that is simply caught lying and stealing and
9 outside the context of the due diligence
10 investigation, if there's an indication of
11 moral turpitude on the part of this individual,
12 it would seem to me that's relevant and
13 material. What counsel is saying is all we do
14 is due diligence. Then clearly, any function
15 performed by that employee relates to due
16 diligence because that's his job. I'm not sure
17 what it is they're trying to exclude. If their
18 representation is the only thing we do at
19 Morgan Stanley is due diligence --

20 MR. CLARE: That's not what I'm saying.

21 But Mr. Scarola's question about the
22 truthfulness and veracity and moral turpitude
23 and the like is another category that we have
24 offered to produce. All references, positive
25 or negative, to an employee's truthfulness or

PINNACLE REPORTING, INC.
561-820-9066

12

1 veracity.

2 THE COURT: Where is that? Because I'm
3 looking at your memo, I didn't see that.

4 MR. CLARE: In response to the
5 opposition -- let me cite you to the page
6 there, Your Honor. It is page --

7 MR. SCAROLA: I'm just trying to figure
8 out what it is they don't want to give us. I'm
9 really not concerned if some employee has been
10 criticized because they got in late one morning
11 or left early. But it is difficult for me to
12 be able to frame a request to produce that
13 eliminates categories of criticism that would
14 be irrelevant without encompassing in that
15 definition relevant criticisms. I don't know
16 what harm exists in giving us the broader
17 category of information. If we find out
18 somebody was late for work, what difference
19 does it make?

20 THE COURT: That's suggesting that we

16div-004547

21 should just ignore objections based on
22 relevancy.

23 MR. SCAROLA: I'm not suggesting that.
24 And if there is a way in which we could define
25 exceptions so that they don't have the

PINNACLE REPORTING, INC.
561-820-9066

13

1 reasonable possibility of excluding relevant
2 and material information, I'm prepared to do
3 that.

4 THE COURT: It would strike me what we
5 need to do is limit it to sort of the three
6 categories that are listed at the bottom of
7 page two and top of page three of Morgan
8 Stanley, Incorporated's opposition to Coleman's
9 motion to compel together with -- and I know
10 you told me it's in there someplace, I'm sure
11 it is -- information that goes to the
12 truthfulness and veracity of its employees.

13 MR. CLARE: It's on page five over to six.

14 THE COURT: So the references are positive
15 or negative. I would define it as employees'
16 gathering or synthesizing of information from
17 third parties, including clients, just so it --
18 to the extent there may be something broader
19 than due diligence. If we're talking about a

20 shortcoming of an employee or particular talent
21 for gathering stuff or doing something with it,
22 I think that should be disclosed.

23 MR. SCAROLA: Truthfulness, veracity,
24 moral turpitude and competence.

25 MR. CLARE: Now we're getting very general

PINNACLE REPORTING, INC.
561-820-9066

14

1 and broad. Your Honor's formulation of the
2 information gathering and synthesizing
3 activities is something that is acceptable.

4 THE COURT: Did you have a proposed order
5 or are we writing it?

6 MR. SCAROLA: All I have is a blank, Your
7 Honor.

8 MR. CLARE: I have a proposed order that
9 memorializes, I believe. If I can hand it up,
10 maybe use it as a starting point.

11 THE COURT: Sure.

12 MR. SCAROLA: The one other issue that we
13 had, Your Honor, was the temporal scope of the
14 records to be produced.

15 THE COURT: What was the issue with that?

16 MR. SCAROLA: What I have suggested is
17 that we are willing to start with a ten-year
18 time frame without prejudice to extend
19 backwards if there is an indication of some

20 pattern of wrongdoing during that ten-year time
21 frame.

22 THE COURT: Well, I assume we're talking
23 about a ten-year time frame -- we've already
24 limited it only to employees who worked on
25 Sunbeam.

PINNACLE REPORTING, INC.
561-820-9066

15

1 MR. SCAROLA: That's correct.

2 THE COURT: The ten years starts or ends
3 where?

4 MR. SCAROLA: The ten years ends with the
5 completion of any activities relating to the
6 Sunbeam transaction.

7 MR. CLARE: Mr. Scarola has made my point
8 of an example of frolic and detour. These
9 transactions took place in 1997 and 1998.
10 We've offered to produce the 1997 and 1998
11 evaluations and are willing to go back a
12 reasonable amount in these same categories in
13 order to determine if -- whether there's
14 anything there that would give rise to an
15 inference of a pattern or anything else that
16 would warrant further follow-up discovery. I
17 think ten years is way too broad given the
18 issues.

19 Last month we were here, Your Honor,
20 seeking information about Coleman Parent's own
21 negligence in conducting their own due
22 diligence on this deal and we were told by
23 Mr. Scarola that other deals what were done at
24 prior occasions, and there was this complicated
25 analogy to a traffic situation and a stop sign

PINNACLE REPORTING, INC.
561-820-9066

16

1 that have no bearing, no probative value and no
2 relevancy here. So to the extent we're now
3 going back ten years and talking about
4 ten years' worth of prior deals and prior
5 information gathering, I think we're now
6 completely far afield from the issues that are
7 involved here.

8 MR. SCAROLA: I'm not talking about ten
9 years of prior deals. I'm talking about ten
10 years of criticisms to determine whether there
11 is a pattern of --

12 THE COURT: It would strike me five years
13 before the deal in question is reasonable,
14 which would put us back in '92; is that right?

15 MR. SCAROLA: That's correct.

16 MR. CLARE: Yes. We're talking about over
17 50 employees, Your Honor.

18 THE COURT: Yes.

16div-004551

19 MR. CLARE: The other important point that
20 I would like to make here with regard to the
21 scope of what it is that we're producing, there
22 are these documents that are the
23 memorialization of criticisms and reprimands
24 that are the culmination of the review process.
25 It is the document that is signed off by the

PINNACLE REPORTING, INC.
561-820-9066

17

1 employees and the review committee and provided
2 to them. It's called the evaluation and
3 development summary. It is the
4 memorialization. I have a blank copy if you
5 would like to see what it looks like. It is
6 those documents that we would be producing for
7 each of these employees for each of these
8 years.

9 THE COURT: There's no back-up documents
10 that's in the personnel file?

11 MR. CLARE: Well, Morgan Stanley has a
12 360-degree review process in which personnel --

13 THE COURT: I'll tell you what, I got
14 other folks waiting on for 8:45's. Sit in the
15 box and come up with an order that memorializes
16 what we have already done. Going to start from
17 any document created from '92 forward, not just

18 from a summary document you guys produce once
19 review is completed, but the underlying
20 documentation, as well. And then what we need
21 to discuss is whether we want to set up an hour
22 hearing every month from now on so you guys
23 aren't always coming in on 8:45's and taking
24 more than your ten minutes.

25 MR. SCAROLA: We have a case management

PINNACLE REPORTING, INC.
561-820-9066

18

1 conference before Your Honor tomorrow.

2 THE COURT: Can we discuss that then?

3 Because we need to carve out time where we're
4 going to come and talk about this case and not
5 subject everybody else in the courthouse. Sit
6 and talk about this and we will come back.

7 MR. SCAROLA: Would you like us to get out
8 of your earshot?

9 THE COURT: I don't care where you do it.
10 Come back and visit me before you leave. Okay.

11 Do you want this back, Mr. Scarola? It's
12 the form order you gave me.

13 MR. SCAROLA: I'll conserve my envelopes.

14 (Off the record.)

15 MR. CLARE: Your Honor, I think we have
16 made some progress with one fairly significant
17 exception.

16div-004553

18 THE COURT: Okay.

19 MR. CLARE: That relates to how we are
20 going to treat the categories of information
21 that fall outside of the categories that we
22 have identified that we are going to produce.

23 Our position and our view is that to the
24 extent a document contains information within
25 the category, we will produce it and we will

PINNACLE REPORTING, INC.
561-820-9066

19

1 redact the rest of the information that falls
2 outside of those enumerated categories.
3 Mr. Scarola takes a different view that the
4 documents must be produced in its entirety with
5 the pertinent and non-pertinent information.
6 We believe that completely vitiates the
7 limitation. If we are going to carve out these
8 categories that are very, very broad and
9 produce them, then the impertinent material
10 that happens to be on the same page or the same
11 document gets produced, then that completely
12 vitiates the relevancy limitations that we put
13 on the documents.

14 THE COURT: What's the response?

15 MR. SCAROLA: The purpose of redaction is
16 to protect privileged information, not to leave

17 in the discretion of the opposing party a
18 determination with regard to what's relevant
19 and not relevant in a document that is
20 admittedly relevant. If the document contains
21 relevant information, we ought to get the
22 entire document unless there's something that's
23 privileged included within that document. And
24 privileged material appropriately should be
25 redacted. I think it's inappropriate if the

PINNACLE REPORTING, INC.
561-820-9066

20

1 document itself contains relevant information
2 to have Morgan Stanley going through and
3 deleting portions of the relevant document.

4 MR. CLARE: Then, number one, again I go
5 back to my point that it completely vitiates
6 the whole concept of identifying relevant
7 categories because if it's an end run around
8 those categories --

9 THE COURT: Give me an example of the kind
10 of document where you think there would be
11 redaction.

12 MR. CLARE: If there is a document that
13 says, for example, and this is purely
14 hypothetical, if there is a document that
15 mentions performance on a Sunbeam engagement
16 and there's three sentences that talk about the

16div-004555

17 employee's performance on Sunbeam and the
18 three additional pages talk about the fact that
19 he's late for meetings or the fact he dresses
20 sloppy.

21 THE COURT: Wouldn't that be unlikely that
22 that would be in a single document?

23 MR. CLARE: No, Your Honor. Actually,
24 that's exactly the point, is that this
25 information is contained in a single document.

PINNACLE REPORTING, INC.
561-820-9066

21

1 The way that the evaluation forms are
2 filled out, it is a number of categories upon
3 which employees are evaluated, including things
4 like fee generation is one section and then
5 there are other sections that have nothing to
6 do with the categories that we have identified.

7 THE COURT: How often are these summaries
8 done?

9 MR. CLARE: Once a year.

10 THE COURT: So it would only be in the
11 annual summaries we're talking about?

12 MR. CLARE: That's correct. And if we're
13 talking about the annual summaries, then I have
14 less of a problem. But we're not. And we want
15 to produce the annual summaries, at least as a

16 starting point, so we can determine if there's
17 anything there. But Mr. Scarola says that he
18 doesn't want the summaries, he wants all the
19 back-up documents.

20 THE COURT: Right. That's what I said.
21 They get the back-up documents.

22 MR. CLARE: Now we're talking about --

23 THE COURT: Would you agree to redaction
24 of the annual summaries only?

25 MR. CLARE: Actually, that's opposite of

PINNACLE REPORTING, INC.
561-820-9066

22

1 the concern that we have. The annual summaries
2 are the least voluminous part. It's the
3 back-up documentation. Each person that fills
4 out a review for a person fills out a review in
5 these broad categories.

6 If it would help to illustrate the point,
7 I can show you a blank copy of what these
8 summaries look like so you can see it might
9 contain both relevant as we've identified --

10 THE COURT: That's why it strikes me the
11 annual summaries would be redacted, but I don't
12 see the point redacting the back-up
13 information. It's much more likely to deal
14 with just a single issue.

15 MR. CLARE: Actually, that's not correct.

16div-004557

16 The back-up documentation, the back-up forms
17 are exactly the same. The same categories of
18 information that are on the summary are on the
19 evaluation forms. I can also show you one of
20 those forms.

21 THE COURT: They don't have the general
22 notes from supervisors? If somebody has a
23 concern about an employee, they don't sometimes
24 simply put -- for instance, it would strike me
25 if they're criticizing for somebody doing

PINNACLE REPORTING, INC.
561-820-9066

23

1 insufficient due diligence, there might have
2 been an exchange of memos between the employee
3 and supervisor before then talking about the
4 deficiencies. And it would strike me that
5 those e-mails might eventually find its way
6 into the employee file.

7 MR. CLARE: Sure. And they would get
8 that, they would get that exchange of e-mails.

9 THE COURT: What you're suggesting is that
10 you want to redact from those items, not from
11 the summaries. It strikes me the summaries
12 would be much more likely to have things that
13 should be included.

14 MR. CLARE: We're not talking about

15 redacting entire documents. To the extent that
16 that same e-mail that you referenced and that
17 same exchange of memos talks about due
18 diligence in paragraph one and sloppy dressing
19 in paragraph two, paragraph one gets produced,
20 paragraph two is redacted. It protects the
21 legitimate interest that we have carved out
22 with these relevancy objections.

23 All I'm talking about is excising
24 individual references that fall outside of the
25 references that we have agreed to produce.

PINNACLE REPORTING, INC.
561-820-9066

24

1 THE COURT: It would strike me that if the
2 document has relevant information and there's
3 other information in there that you think is
4 not relevant but also not privileged, you need
5 to produce the document. Otherwise, I think,
6 in all honestly, I think we're investing too
7 much discretion in Morgan Stanley simply to sit
8 and take out parts of the document that may be
9 necessary to understand the evident information
10 in context. I understand you disagree.

11 Do you want to make that change on this
12 order?

13 MR. SCAROLA: Yes.

14 THE COURT: Then we still get to see each

16div-004559

15 other tomorrow, and try to carve out a little

16 time.

17 MR. SCAROLA: We are. Thank you.

18 MR. CLARE: Judge, in connection with the

19 status conference tomorrow, we submitted joint

20 submissions I think on Tuesday, as well. I

21 want to make sure the Court has those.

22 THE COURT: I haven't seen those, but I

23 would imagine we have it.

24 MR. CLARE: If there's any problem, let my

25 office know. We can send over another copy.

PINNACLE REPORTING, INC.
561-820-9066

25

1 THE COURT: Okay. Thank you very much.

2 (Thereupon, the foregoing

3 proceedings were concluded at

4 9:05 o'clock, a.m.)

5

6

7

8

9

10

11

12

13

14
15
16
17
18
19
20
21
22
23
24
25

PINNACLE REPORTING, INC.
561-820-9066

26

1 C E R T I F I C A T E

2 STATE OF FLORIDA

3 COUNTY OF PALM BEACH

4

5 I, GINA GRANT, Notary Public, State of Florida

6 at Large, do hereby certify that I was authorized to

7 and did stenographically report the foregoing

8 proceedings.

9 Dated this 23rd day of February, 2004

10

11

12

GINA GRANT, Notary Public

13

16div-004561

14

15

16

17

18

19

20

21

22

23

24

25

PINNACLE REPORTING, INC.
561-820-9066

16div-004562

1 IN THE CIRCUIT COURT OF THE
2 FIFTEENTH JUDICIAL CIRCUIT
3 IN AND FOR PALM BEACH COUNTY, FLORIDA

4 CASE NO.: 2003 CA 005045 AI

5

6

7 COLEMAN (PARENT) HOLDINGS, INC.,

8 Plaintiff,

9 vs.

10 MORGAN STANLEY & CO., INC.,

11 Defendant.

12

13

14

15

16 TRANSCRIPT OF PROCEEDINGS HAD BEFORE THE
17 HONORABLE ELIZABETH MAASS
18 ON FEBRUARY 19, 2004

19

20

21

22

23

24

25

1 APPEARANCES:

2 ON BEHALF OF THE PLAINTIFF:

3 SEARCY, DENNEY, SCAROLA,
4 BARNHART & SHIPLEY, P.A.
5 2139 PALM BEACH LAKES BOULEVARD
6 WEST PALM BEACH, FL 33409
7 By: JACK SCAROLA, ESQ.

8
9 ON BEHALF OF THE DEFENDANT:

10
11 CARLTON, FIELDS, ET AL
12 222 LAKEVIEW AVENUE
13 SUITE 1400
14 WEST PALM BEACH, FL 33401
15 BY: JOSEPH IANNO, JR. ESQ.

16
17 KIRKLAND AND ELLIS
18 655 15TH STREET, N.W.
19 SUITE 1200
20 WASHINGTON, D.C. 20005
21 BY: THOMAS A. CLARE, ESQ.

22

23

24

25

1 BE IT REMEMBERED that the following
2 proceedings were had before the HONORABLE ELIZABETH
3 MAASS, Judge in the above-named Court, at 205 North
4 Dixie Highway, in the City of West Palm Beach,
5 County of Palm Beach, State of Florida, on 19th, the
6 day of February, 2004, beginning at the hour of 8:30
7 o'clock, a.m. to wit:

8 - - - - -

9 MR. SCAROLA: Does Your Honor have a
10 motion?

11 THE COURT: I have a copy.

12 MR. IANNO: Your Honor, Joe Ianno and Tom
13 Clare on behalf of Morgan Stanley. You should
14 have our opposition which we delivered over to
15 the Court I think Tuesday morning.

16 THE COURT: Yes.

17 MR. SCAROLA: This is the blank order,
18 Your Honor.

19 THE COURT: Thank you very much.

20 MR. SCAROLA: Would Your Honor like to
21 take a moment?

22 THE COURT: Give me a second to look at
23 it.

24 Are you just trying to figure out if they

25 think their employees did a bad job on the

PINNACLE REPORTING, INC.

561-820-9066

4

1 Sunbeam deal or a good job?

2 MR. SCAROLA: No, Your Honor. That

3 clearly is one objective of the discovery.

4 That is, to make a determination as to whether

5 there were internal evaluations which amount to

6 an acknowledgement of some negligence on the

7 part of the employees by the corporation

8 itself, by Morgan Stanley itself, acknowledging

9 that its own employees did not do a good job.

10 But that's only a piece of it.

11 THE COURT: What's the other piece?

12 MR. SCAROLA: There is a negligent

13 misrepresentation claim. And that evidence

14 would be obviously relevant to the negligent

15 misrepresentation claim.

16 We have also reserved the right to assert

17 a punitive damage claim and under the Mercury

18 Motors standard, if we are able to demonstrate

19 some negligence on the part of the corporate

20 defendant, we establish vicarious liability for

21 the intentional wrongdoing of Morgan Stanley

22 employees. Some negligence on the part of the

23 corporate defendant would include the negligent

24 hiring or negligent retention of employees

25 involved in misconduct. So we're also seeking,

PINNACLE REPORTING, INC.
561-820-9066

5

1 as the statute allows us to, in advance of the
2 actual assertion of the punitive damage claim
3 discovery relating to the punitive damage claim
4 and that aspect of punitive damages. We want
5 to know what Morgan Stanley's assessment of its
6 own employees was.

7 For example, it may turn out that there is
8 a pattern of negligence evident from the
9 evaluations that Morgan Stanley has done of its
10 own employees. They know that this employee
11 over the course of time has not done what that
12 employee should be doing with respect to due
13 diligence responsibilities assigned to that
14 employee. Clearly, that would be relevant and
15 material on both the negligence claims and the
16 punitive damage claim.

17 Now, there has been substantial agreement
18 with regard to some of these matters and I
19 should let the Court know what that agreement
20 is. With regard to number 46, there is an
21 agreement that there will be production of the
22 compensation criteria and guidelines that are
23 requested in number 46. That agreement came in

24 response to our motion, although this request
25 was filed back in May of last year and

PINNACLE REPORTING, INC.
561-820-9066

6

1 substantial negotiations have gone on. We do
2 have that agreement. I have agreed this
3 morning that they can have 20 days in which to
4 produce that information. And so 46 is taken
5 care of.

6 Number 45 is also taken care of. They
7 have agreed that -- actually, what they have
8 said is that they have already produced some
9 documents that are responsive to that request.

10 All we want with regard to 45 is a
11 representation either that all documents have
12 been produced or the production of such
13 additional documents as may exist. So that's
14 narrowed the scope of the request with regard
15 to number 45.

16 THE COURT: Let me ask you this: Looking
17 at their response, there are three categories
18 that they have offered to produce, or three
19 subcategories of documents they have offered to
20 produce from the personnel files. Give me an
21 example of what you are looking for that would
22 not be included in those three subcategories.

23 MR. SCAROLA: I believe, Your Honor, that

24 the only issue currently with regard to number

25 44 is the scope, the temporal scope of the

PINNACLE REPORTING, INC.

561-820-9066

7

1 production.

2 THE COURT: So we're agreeing to limiting

3 it to the categories they have said --

4 MR. SCAROLA: Documents that mention

5 Sunbeam by name, documents relating to fee

6 generation. And the third category, if we're

7 communicating accurately, is criticisms or

8 reprimands of employees who worked on the

9 Sunbeam matter.

10 THE COURT: I thought it was any due

11 diligence.

12 MR. CLARE: It's actually a little bit

13 different than I think Mr. Scarola is stating.

14 That's where we have the area of dispute.

15 We're more than happy to produce references,

16 positive or negative, to employees' performance

17 of due diligence functions and that I believe

18 should take care of --

19 THE COURT: Global, not just Sunbeam, but

20 any due diligence.

21 MR. CLARE: Not just Sunbeam, any other

22 deal which is, quite frankly, broader than I

23 think we need to go, but we're willing to do
24 that to accommodate what Mr. Scarola wants to
25 accomplish here. What we don't want is a

PINNACLE REPORTING, INC.
561-820-9066

8

1 frolic and detour through these confidential
2 personnel employee files.

3 THE COURT: Let me ask you that. With
4 that representation, is that sufficient for
5 your client's purposes?

6 MR. SCAROLA: I'm not sure what Mr. Clare
7 means by no frolic and detour into personnel
8 files.

9 THE COURT: Setting that aside, and I
10 don't even want to go there, is it sufficient
11 if they produce all documents that either
12 relate to work performed on any Sunbeam-related
13 items relating to performance and fee
14 generation and relating to all performance in
15 due diligence activities for any clients?

16 MR. SCAROLA: No, Your Honor. We are not
17 prepared to agree to limit it only to due
18 diligence.

19 THE COURT: Give me an example of the kind
20 of things you think would be omitted by that
21 that you would be entitled to see.

22 MR. SCAROLA: Yes. Criticisms or

23 reprimands for not heeding the warnings of
24 accountants. If accountants are communicating
25 to Morgan Stanley even outside the area of due

PINNACLE REPORTING, INC.
561-820-9066

9

1 diligence and some employee disregards the
2 accountant's warning inappropriately and Morgan
3 Stanley acknowledges that this employee is not
4 heeding the accountant's warnings, that clearly
5 would have a bearing upon the kinds of things
6 that we believe occurred here. Criticisms or
7 reprimands for not being thorough in
8 questioning representations made by third
9 parties.

10 THE COURT: That wouldn't be part of due
11 diligence.

12 MR. SCAROLA: Well, not necessarily. It
13 does not have to occur in the context of the
14 due diligence investigation. It could occur in
15 the context of an audit. It could occur in the
16 context of a lot of different things. It
17 wouldn't necessarily have to be due diligence.
18 So by limiting the scope only to due diligence
19 responsibilities, we think that we may be
20 missing clearly relevant and material
21 information.

22 THE COURT: What's the response to the
23 contention that it should be somewhat broader
24 than due diligence?

25 MR. CLARE: I'm really not sure what other

PINNACLE REPORTING, INC.
561-820-9066

10

1 activities would fall into either of those two
2 categories that Morgan Stanley performed.
3 Morgan Stanley is not an auditor, it's not an
4 accounting firm. And the only scenarios that
5 I'm aware of that Morgan Stanley would be
6 interacting with accountants are in the context
7 of either a merger and acquisition due
8 diligence, which would be covered by the
9 umbrella of due diligence, or in the context of
10 the underwriting the securities offering, which
11 again would be under the context of due
12 diligence. So as to both of those two
13 categories, I don't see a broadening of what it
14 is that we're willing to do.

15 What we're trying to avoid by having a
16 global production of, quote, criticisms are
17 having to produce unrelated, completely
18 unrelated statements of weaknesses or areas of
19 development for employees. Because
20 effectively, that will bring open the entire
21 personnel file of these employees. For

22 example, things like organizational skills
23 might be considered to be a criticism or
24 weakness or public speaking might be identified
25 to be a weakness. These are things that are

PINNACLE REPORTING, INC.
561-820-9066

11

1 totally unrelated to the issues in this case.
2 And by narrowing it to due diligence, which is
3 really the negligence claim that is asserted
4 against Morgan Stanley, and that performance,
5 we think that would cover all the things that
6 Mr. Scarola is talking about.

7 MR. SCAROLA: What if we have an employee
8 that is simply caught lying and stealing and
9 outside the context of the due diligence
10 investigation, if there's an indication of
11 moral turpitude on the part of this individual,
12 it would seem to me that's relevant and
13 material. What counsel is saying is all we do
14 is due diligence. Then clearly, any function
15 performed by that employee relates to due
16 diligence because that's his job. I'm not sure
17 what it is they're trying to exclude. If their
18 representation is the only thing we do at
19 Morgan Stanley is due diligence --

20 MR. CLARE: That's not what I'm saying.

21 But Mr. Scarola's question about the
22 truthfulness and veracity and moral turpitude
23 and the like is another category that we have
24 offered to produce. All references, positive
25 or negative, to an employee's truthfulness or

PINNACLE REPORTING, INC.
561-820-9066

12

1 veracity.

2 THE COURT: Where is that? Because I'm
3 looking at your memo, I didn't see that.

4 MR. CLARE: In response to the
5 opposition -- let me cite you to the page
6 there, Your Honor. It is page --

7 MR. SCAROLA: I'm just trying to figure
8 out what it is they don't want to give us. I'm
9 really not concerned if some employee has been
10 criticized because they got in late one morning
11 or left early. But it is difficult for me to
12 be able to frame a request to produce that
13 eliminates categories of criticism that would
14 be irrelevant without encompassing in that
15 definition relevant criticisms. I don't know
16 what harm exists in giving us the broader
17 category of information. If we find out
18 somebody was late for work, what difference
19 does it make?

20 THE COURT: That's suggesting that we

21 should just ignore objections based on
22 relevancy.

23 MR. SCAROLA: I'm not suggesting that.

24 And if there is a way in which we could define
25 exceptions so that they don't have the

PINNACLE REPORTING, INC.
561-820-9066

13

1 reasonable possibility of excluding relevant
2 and material information, I'm prepared to do
3 that.

4 THE COURT: It would strike me what we
5 need to do is limit it to sort of the three
6 categories that are listed at the bottom of
7 page two and top of page three of Morgan
8 Stanley, Incorporated's opposition to Coleman's
9 motion to compel together with -- and I know
10 you told me it's in there someplace, I'm sure
11 it is -- information that goes to the
12 truthfulness and veracity of its employees.

13 MR. CLARE: It's on page five over to six.

14 THE COURT: So the references are positive
15 or negative. I would define it as employees'
16 gathering or synthesizing of information from
17 third parties, including clients, just so it --
18 to the extent there may be something broader
19 than due diligence. If we're talking about a

20 shortcoming of an employee or particular talent
21 for gathering stuff or doing something with it,
22 I think that should be disclosed.

23 MR. SCAROLA: Truthfulness, veracity,
24 moral turpitude and competence.

25 MR. CLARE: Now we're getting very general

PINNACLE REPORTING, INC.
561-820-9066

14

1 and broad. Your Honor's formulation of the
2 information gathering and synthesizing
3 activities is something that is acceptable.

4 THE COURT: Did you have a proposed order
5 or are we writing it?

6 MR. SCAROLA: All I have is a blank, Your
7 Honor.

8 MR. CLARE: I have a proposed order that
9 memorializes, I believe. If I can hand it up,
10 maybe use it as a starting point.

11 THE COURT: Sure.

12 MR. SCAROLA: The one other issue that we
13 had, Your Honor, was the temporal scope of the
14 records to be produced.

15 THE COURT: What was the issue with that?

16 MR. SCAROLA: What I have suggested is
17 that we are willing to start with a ten-year
18 time frame without prejudice to extend
19 backwards if there is an indication of some

20 pattern of wrongdoing during that ten-year time
21 frame.

22 THE COURT: Well, I assume we're talking
23 about a ten-year time frame -- we've already
24 limited it only to employees who worked on
25 Sunbeam.

PINNACLE REPORTING, INC.
561-820-9066

15

1 MR. SCAROLA: That's correct.

2 THE COURT: The ten years starts or ends
3 where?

4 MR. SCAROLA: The ten years ends with the
5 completion of any activities relating to the
6 Sunbeam transaction.

7 MR. CLARE: Mr. Scarola has made my point
8 of an example of frolic and detour. These
9 transactions took place in 1997 and 1998.
10 We've offered to produce the 1997 and 1998
11 evaluations and are willing to go back a
12 reasonable amount in these same categories in
13 order to determine if -- whether there's
14 anything there that would give rise to an
15 inference of a pattern or anything else that
16 would warrant further follow-up discovery. I
17 think ten years is way too broad given the
18 issues.

19 Last month we were here, Your Honor,
20 seeking information about Coleman Parent's own
21 negligence in conducting their own due
22 diligence on this deal and we were told by
23 Mr. Scarola that other deals what were done at
24 prior occasions, and there was this complicated
25 analogy to a traffic situation and a stop sign

PINNACLE REPORTING, INC.
561-820-9066

16

1 that have no bearing, no probative value and no
2 relevancy here. So to the extent we're now
3 going back ten years and talking about
4 ten years' worth of prior deals and prior
5 information gathering, I think we're now
6 completely far afield from the issues that are
7 involved here.

8 MR. SCAROLA: I'm not talking about ten
9 years of prior deals. I'm talking about ten
10 years of criticisms to determine whether there
11 is a pattern of --

12 THE COURT: It would strike me five years
13 before the deal in question is reasonable,
14 which would put us back in '92; is that right?

15 MR. SCAROLA: That's correct.

16 MR. CLARE: Yes. We're talking about over
17 50 employees, Your Honor.

18 THE COURT: Yes.

19 MR. CLARE: The other important point that
20 I would like to make here with regard to the
21 scope of what it is that we're producing, there
22 are these documents that are the
23 memorialization of criticisms and reprimands
24 that are the culmination of the review process.
25 It is the document that is signed off by the

PINNACLE REPORTING, INC.
561-820-9066

17

1 employees and the review committee and provided
2 to them. It's called the evaluation and
3 development summary. It is the
4 memorialization. I have a blank copy if you
5 would like to see what it looks like. It is
6 those documents that we would be producing for
7 each of these employees for each of these
8 years.

9 THE COURT: There's no back-up documents
10 that's in the personnel file?

11 MR. CLARE: Well, Morgan Stanley has a
12 360-degree review process in which personnel --

13 THE COURT: I'll tell you what, I got
14 other folks waiting on for 8:45's. Sit in the
15 box and come up with an order that memorializes
16 what we have already done. Going to start from
17 any document created from '92 forward, not just

18 from a summary document you guys produce once
19 review is completed, but the underlying
20 documentation, as well. And then what we need
21 to discuss is whether we want to set up an hour
22 hearing every month from now on so you guys
23 aren't always coming in on 8:45's and taking
24 more than your ten minutes.

25 MR. SCAROLA: We have a case management

PINNACLE REPORTING, INC.
561-820-9066

18

1 conference before Your Honor tomorrow.

2 THE COURT: Can we discuss that then?

3 Because we need to carve out time where we're
4 going to come and talk about this case and not
5 subject everybody else in the courthouse. Sit
6 and talk about this and we will come back.

7 MR. SCAROLA: Would you like us to get out
8 of your earshot?

9 THE COURT: I don't care where you do it.
10 Come back and visit me before you leave. Okay.

11 Do you want this back, Mr. Scarola? It's
12 the form order you gave me.

13 MR. SCAROLA: I'll conserve my envelopes.

14 (Off the record.)

15 MR. CLARE: Your Honor, I think we have
16 made some progress with one fairly significant
17 exception.

18 THE COURT: Okay.

19 MR. CLARE: That relates to how we are
20 going to treat the categories of information
21 that fall outside of the categories that we
22 have identified that we are going to produce.

23 Our position and our view is that to the
24 extent a document contains information within
25 the category, we will produce it and we will

PINNACLE REPORTING, INC.
561-820-9066

19

1 redact the rest of the information that falls
2 outside of those enumerated categories.
3 Mr. Scarola takes a different view that the
4 documents must be produced in its entirety with
5 the pertinent and non-pertinent information.
6 We believe that completely vitiates the
7 limitation. If we are going to carve out these
8 categories that are very, very broad and
9 produce them, then the impertinent material
10 that happens to be on the same page or the same
11 document gets produced, then that completely
12 vitiates the relevancy limitations that we put
13 on the documents.

14 THE COURT: What's the response?

15 MR. SCAROLA: The purpose of redaction is
16 to protect privileged information, not to leave

17 in the discretion of the opposing party a
18 determination with regard to what's relevant
19 and not relevant in a document that is
20 admittedly relevant. If the document contains
21 relevant information, we ought to get the
22 entire document unless there's something that's
23 privileged included within that document. And
24 privileged material appropriately should be
25 redacted. I think it's inappropriate if the

PINNACLE REPORTING, INC.
561-820-9066

20

1 document itself contains relevant information
2 to have Morgan Stanley going through and
3 deleting portions of the relevant document.

4 MR. CLARE: Then, number one, again I go
5 back to my point that it completely vitiates
6 the whole concept of identifying relevant
7 categories because if it's an end run around
8 those categories --

9 THE COURT: Give me an example of the kind
10 of document where you think there would be
11 redaction.

12 MR. CLARE: If there is a document that
13 says, for example, and this is purely
14 hypothetical, if there is a document that
15 mentions performance on a Sunbeam engagement
16 and there's three sentences that talk about the

17 employee's performance on Sunbeam and the
18 three additional pages talk about the fact that
19 he's late for meetings or the fact he dresses
20 sloppy.

21 THE COURT: Wouldn't that be unlikely that
22 that would be in a single document?

23 MR. CLARE: No, Your Honor. Actually,
24 that's exactly the point, is that this
25 information is contained in a single document.

PINNACLE REPORTING, INC.
561-820-9066

21

1 The way that the evaluation forms are
2 filled out, it is a number of categories upon
3 which employees are evaluated, including things
4 like fee generation is one section and then
5 there are other sections that have nothing to
6 do with the categories that we have identified.

7 THE COURT: How often are these summaries
8 done?

9 MR. CLARE: Once a year.

10 THE COURT: So it would only be in the
11 annual summaries we're talking about?

12 MR. CLARE: That's correct. And if we're
13 talking about the annual summaries, then I have
14 less of a problem. But we're not. And we want
15 to produce the annual summaries, at least as a

16 starting point, so we can determine if there's
17 anything there. But Mr. Scarola says that he
18 doesn't want the summaries, he wants all the
19 back-up documents.

20 THE COURT: Right. That's what I said.
21 They get the back-up documents.

22 MR. CLARE: Now we're talking about --

23 THE COURT: Would you agree to redaction
24 of the annual summaries only?

25 MR. CLARE: Actually, that's opposite of

PINNACLE REPORTING, INC.
561-820-9066

22

1 the concern that we have. The annual summaries
2 are the least voluminous part. It's the
3 back-up documentation. Each person that fills
4 out a review for a person fills out a review in
5 these broad categories.

6 If it would help to illustrate the point,
7 I can show you a blank copy of what these
8 summaries look like so you can see it might
9 contain both relevant as we've identified --

10 THE COURT: That's why it strikes me the
11 annual summaries would be redacted, but I don't
12 see the point redacting the back-up
13 information. It's much more likely to deal
14 with just a single issue.

15 MR. CLARE: Actually, that's not correct.

16 The back-up documentation, the back-up forms
17 are exactly the same. The same categories of
18 information that are on the summary are on the
19 evaluation forms. I can also show you one of
20 those forms.

21 THE COURT: They don't have the general
22 notes from supervisors? If somebody has a
23 concern about an employee, they don't sometimes
24 simply put -- for instance, it would strike me
25 if they're criticizing for somebody doing

PINNACLE REPORTING, INC.
561-820-9066

23

1 insufficient due diligence, there might have
2 been an exchange of memos between the employee
3 and supervisor before then talking about the
4 deficiencies. And it would strike me that
5 those e-mails might eventually find its way
6 into the employee file.

7 MR. CLARE: Sure. And they would get
8 that, they would get that exchange of e-mails.

9 THE COURT: What you're suggesting is that
10 you want to redact from those items, not from
11 the summaries. It strikes me the summaries
12 would be much more likely to have things that
13 should be included.

14 MR. CLARE: We're not talking about

15 redacting entire documents. To the extent that
16 that same e-mail that you referenced and that
17 same exchange of memos talks about due
18 diligence in paragraph one and sloppy dressing
19 in paragraph two, paragraph one gets produced,
20 paragraph two is redacted. It protects the
21 legitimate interest that we have carved out
22 with these relevancy objections.

23 All I'm talking about is excising
24 individual references that fall outside of the
25 references that we have agreed to produce.

PINNACLE REPORTING, INC.
561-820-9066

24

1 THE COURT: It would strike me that if the
2 document has relevant information and there's
3 other information in there that you think is
4 not relevant but also not privileged, you need
5 to produce the document. Otherwise, I think,
6 in all honestly, I think we're investing too
7 much discretion in Morgan Stanley simply to sit
8 and take out parts of the document that may be
9 necessary to understand the evident information
10 in context. I understand you disagree.

11 Do you want to make that change on this
12 order?

13 MR. SCAROLA: Yes.

14 THE COURT: Then we still get to see each

15 other tomorrow, and try to carve out a little

16 time.

17 MR. SCAROLA: We are. Thank you.

18 MR. CLARE: Judge, in connection with the

19 status conference tomorrow, we submitted joint

20 submissions I think on Tuesday, as well. I

21 want to make sure the Court has those.

22 THE COURT: I haven't seen those, but I

23 would imagine we have it.

24 MR. CLARE: If there's any problem, let my

25 office know. We can send over another copy.

PINNACLE REPORTING, INC.
561-820-9066

25

1 THE COURT: Okay. Thank you very much.

2 (Thereupon, the foregoing

3 proceedings were concluded at

4 9:05 o'clock, a.m.)

5

6

7

8

9

10

11

12

13

14
15
16
17
18
19
20
21
22
23
24
25

PINNACLE REPORTING, INC.
561-820-9066

26

1 C E R T I F I C A T E

2 STATE OF FLORIDA

3 COUNTY OF PALM BEACH

4

5 I, GINA GRANT, Notary Public, State of Florida

6 at Large, do hereby certify that I was authorized to

7 and did stenographically report the foregoing

8 proceedings.

9 Dated this 23rd day of February, 2004

10

11

12

GINA GRANT, Notary Public

13

14

15

16

17

18

19

20

21

22

23

24

25

PINNACLE REPORTING, INC.
561-820-9066

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

CASE NO. CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

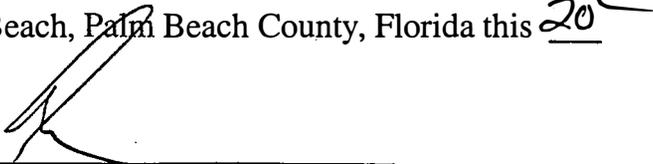
MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

**ORDER ON JOINT MOTION TO CONSOLIDATE AND DIRECTIONS TO THE
CLERK**

THIS CAUSE came before the Court February 20, 2004 on the parties' Joint Motion to Consolidate, with all counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that the parties' Joint Motion to Consolidate is Granted. These actions are consolidated for discovery and trial. Henceforth, all pleadings and papers shall use the dual caption noted above. The Clerk is directed to place all further filings in the Court file in case number 2003 CA 5045 AI. The Clerk shall place the original of this Order in the Court file in case number 2003 CA 5045 AI and a certified copy in the Court file in case number 2003 CA 5165 AI.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 20
day of February, 2004.


ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:

Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci
655 15th Street, NW, Suite 1200
Washington DC 20005

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Soiovy, Esq.
One IBM Plaza, Suite 4400
Chicago, Il 60611

Mark F. Bideau, Esq.
777 S. Flagler Dr., Suite 300E
West Palm Beach, FL 33401

David M. Wells, Esq.
50 N. Laura Street, Suite 3300
Jacksonville, FL 32202

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR
PALM BEACH COUNTY, FLORIDA
CASE NO. 2003 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiffs,

-vs-

MORGAN STANLEY & CO., INC.,

Defendant.

_____ /

Transcript of Proceedings beginning at
3:30 p.m., and concluding at 4:29 p.m., on Friday,
February 20, 2004, taken at the Palm Beach County
Courthouse, West Palm Beach, Florida, before the
Honorable Elizabeth T. Maass, Circuit Court Judge.
Reported by Shirley D. King, Professional Court
Reporter.

PINNACLE REPORTING, INC.
(561) 820-9066

2

1 A P P E A R A N C E S

2

3

SEARCY DENNEY SCAROLA
BARNHART & SHIPLEY, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33409
Phone: (561) 686-6300
BY: JACK SCAROLA, ESQUIRE

7

8

JENNER & BLOCK LLP
One IBM Plaza
Chicago, Illinois 60611
Phone: (312) 222-9350
BY: JEROLD S. SOLOVY, ESQUIRE
RONALD L. MARMER, ESQUIRE

11

12

KIRKLAND & ELLIS LLP
777 South Figueroa Street
Los Angeles, California 90017
Phone: (213) 630-8413
BY: LAWRENCE P. BEMIS, ESQUIRE
THOMAS A. CLARE, ESQUIRE

15

16

CARLTON FIELDS
Esperante
222 Lakeview Avenue, Suite 1400
West Palm Beach, Florida 33401
Phone: (561) 659-7070
BY: JOSEPH IANNO, JR., ESQUIRE

19

20

Also present: Steve Fasman

21

22

23

16div-004593

24

25

PINNACLE REPORTING, INC.
(561) 820-9066

3

1 PROCEEDINGS

2 - - -

3 THE COURT: Good afternoon. Have a seat.

4 This is Coleman and Morgan Stanley. Where do we
5 want to start?

6 MR. SCAROLA: Your Honor, Jack Scarola on
7 behalf of Coleman Parent. With me is Mr. Jerry
8 Solovy, Mr. Ron Marmer, and this is Steve Fasman,
9 our corporate representative.

10 And I think that we are probably in
11 agreement that the first issue to be dealt with,
12 which can be dealt with rather easily, is a
13 determination as to the consolidation of the two
14 related pending cases. And I think that both
15 parties are in agreement that it is appropriate,
16 both for purposes of discovery and trial, to
17 consolidate these related matters.

18 THE COURT: Is that accurate?

19 MR. BEMIS: Good afternoon, Your Honor.
20 Lawrence Bemis with Kirkland & Ellis on behalf of
21 Morgan Stanley and Morgan Stanley Senior

16div-004594

22 Funding.

23 The answer is, yes, I think we all agree to
24 that.

25 THE COURT: I'm just trying to think,

PINNACLE REPORTING, INC.
(561) 820-9066

4

1 mechanically, how do we want to do that?

2 MR. BEMIS: Your Honor, there is no separate
3 order on that. We did submit a proposed order
4 which was based on what we understood was a
5 sample pretrial compliance order for case
6 management conference Your Honor had entered, but
7 the consolidation issue, for reasons which escape
8 me, was not put in there, so we will need a
9 separate order ordering consolidation.

10 THE COURT: Right. But I'm just trying to
11 figure out mechanically what we want the clerk to
12 do with the files and how we would like to
13 proceed with the pleadings.

14 MR. BEMIS: I think the way it's done is we
15 put both case captions on each and file them
16 accordingly.

17 MR. SCAROLA: Either that or Your Honor's
18 order can simply direct us to file all pleadings
19 under the lower case number and we'll just style

16div-004595

20 everything under the lower case number. I think
21 what otherwise happens is that the clerk requires
22 us to file duplicates.

23 THE COURT: We don't want to do that. I
24 want to have one place where we look for
25 everything.

PINNACLE REPORTING, INC.
(561) 820-9066

5

1 MR. BEMIS: What I would like, Your Honor,
2 is not to have the single number on the cases,
3 but that both numbers appear, for reasons I'm
4 going to explain. There may be additional
5 counsel in this case who will be only in one of
6 the cases and not the other.

7 THE COURT: So are we agreeing we're
8 consolidating for all purposes?

9 MR. SCAROLA: Yes, Your Honor, both
10 discovery and trial.

11 MR. BEMIS: Yes, Your Honor.

12 THE COURT: For discovery and trial. Okay.
13 So we will use a joint caption, but with the
14 lower number listed first, and you'll direct the
15 clerk to place everything from now on in the
16 lower-numbered case?

17 MR. SCAROLA: I think that works.

16div-004596

18 MR. BEMIS: That's fine, Your Honor.

19 THE COURT: Okay. Is there a written motion
20 to consolidate? If so, who filed it?

21 MR. BEMIS: It is not, Your Honor. But it
22 would normally be something that under Rule 1.200
23 we would take up at this time.

24 THE COURT: No, no. I'm just trying to
25 think. I'm writing my notes so I can do the

PINNACLE REPORTING, INC.
(561) 820-9066

6

1 order and whether I had to say it was a joint or
2 was it written or oral --

3 MR. SCAROLA: Pursuant to oral stipulation
4 of the parties.

5 THE COURT: So we agree it is a joint ore
6 tenus motion to consolidate?

7 MR. BEMIS: Actually, it's in our joint
8 written statement to the Court, as you ordered,
9 that we agreed to it, so it's actually pursuant
10 to a written statement.

11 THE COURT: Okay. What next?

12 MR. SCAROLA: Your Honor, I think that the
13 next matter appropriately addressed is the issue
14 of the trial date. I think that once Your Honor
15 has made a determination as to when this case

16div-004597

16 will be tried, then the parties are going to be
17 able to come to an agreement with regard to
18 establishing other related deadlines based upon
19 that trial date.

20 And Your Honor may recall from a review of
21 our submissions, that not surprisingly on this
22 side of the courtroom we have requested an August
23 trial date and on that side of the courtroom they
24 have suggested a February 2005 trial date.

25 I will tell Your Honor, that from the

PINNACLE REPORTING, INC.
(561) 820-9066

7

1 Plaintiff's perspective, we are prepared to split
2 the difference with the defense and choose a date
3 between the August and February date, taking into
4 account these considerations; the Jewish Holidays
5 are in September and it would be difficult for us
6 to select a date that was either during or very
7 close to the September Jewish Holidays, and,
8 obviously I think that all parties would be
9 concerned in terms of our ability to select a
10 jury if we start bumping up against Thanksgiving,
11 Christmas and the New Year. What that means,
12 since we anticipate 15 trial days, three weeks of
13 trial, is that a date approximately the middle of

16div-004598

14 October would be far enough away from the
15 September holidays and also far enough away from
16 Thanksgiving that we would be able to comfortably
17 complete the trial in that period. So our
18 suggestion, in light of the requests that have
19 been made on both sides, if it fits in with Your
20 Honor's calendar, we are suggesting that a date
21 be selected in the beginning, approximately mid
22 October.

23 THE COURT: I guess a more fundamental
24 preliminary question, are we at issue yet?

25 MR. BEMIS: We are in --

PINNACLE REPORTING, INC.
(561) 820-9066

8

1 MR. SCAROLA: We are currently at issue.

2 THE COURT: Although you still plan to file
3 a motion to amend punitive damages?

4 MR. SCAROLA: That is correct, we are
5 anticipating filing a motion to amend to add
6 punitive damages.

7 I will tell Your Honor that it is our
8 position that that motion does not, because it
9 only goes to the relief sought, place the case in
10 a position where this matter is not at issue and
11 could not be set for trial.

16div-004599

12 THE COURT: Your suggestion is this be set
13 for trial in mid October?

14 MR. SCAROLA: That's correct.

15 THE COURT: That strikes me, quit honestly,
16 as pretty ambitious for a case this size.

17 MR. SCAROLA: Well, Your Honor, we have been
18 proceeding very quickly with regard to the
19 discovery in this matter. As Your Honor is well
20 aware, this is not the first litigation that
21 arises out of these related circumstances, so
22 discovery has been expedited by virtue of the
23 fact that we have been able to exchange documents
24 previously compiled in relation to other
25 litigation and rely upon prior deposition

PINNACLE REPORTING, INC.
(561) 820-9066

9

1 testimony taken in connection with other
2 litigation. And while this certainly is a
3 matter of substantial magnitude, we feel very
4 comfortable about our ability to be ready for
5 trial in early August and certainly anticipate no
6 problem whatsoever in being ready to go to trial
7 in October. So I don't think it is as ambitious
8 as might appear at first blush.

9 MR. BEMIS: Your Honor, may I use the

16div-004600

10 podium?

11 THE COURT: However you're more comfortable
12 is fine.

13 MR. BEMIS: I'm used to a podium.

14 Your Honor, as you're aware, there are two
15 calendars. And I won't go in the intermediate
16 base because I do agree with Mr. Scarola, that
17 once we have a trial date, we can work
18 backwards. And whatever date you select, we'll
19 deal with that offline and not take the Court's
20 time.

21 I didn't know until just now that they're in
22 agreement that it's a three-week trial. So it's
23 a jury trial.

24 THE COURT: Well, the only thing I will
25 point out is we're not in trial on Fridays. So

PINNACLE REPORTING, INC.
(561) 820-9066

10

1 if we're talking about 15 trial days, it's really
2 a four-week trial.

3 MR. BEMIS: So it's a four-week trial, Your
4 Honor.

5 Based on the original schedule, we proposed
6 a date approximately 12 months forward. And I
7 thought that was a very aggressive schedule, for

16div-004601

8 reasons I'm going to tell you, and I question
9 whether we can meet it. And the reason is,
10 overall, while they say this has been done
11 before, it is true that they have done it before,
12 as I'm going to explain, but Morgan Stanley and
13 Morgan Stanley Senior Funding haven't been a
14 party to any of the other litigation and we
15 haven't gone through all of this before, so they
16 had a huge head start in terms of their
17 preparation for the case.

18 Even an October schedule, Your Honor, I
19 think is extraordinarily unrealistic for a number
20 of reasons. First of all, it is a huge case and
21 it's not old. I mean, these cases were filed in
22 May of 2003. It was on the very eve of the
23 running of the statute of limitations, which had
24 already been extended by --

25 THE COURT: That's not relevant to what

PINNACLE REPORTING, INC.
(561) 820-9066

11

1 we're looking at, but go ahead, sir.

2 MR. BEMIS: But the point of it is that
3 there are no equities in this case that require
4 us to go on a crazy track of double tracking
5 depositions and creating all kinds of logistical

16div-004602

6 difficulties when a pace of one year to get this
7 case finished is not unreasonable, given its
8 size. We have \$2 billion of damages asserted on
9 one side; \$680 million on our side. You have
10 five sets of parties to this case: You have the
11 parties to the acquisition, we have the
12 accountants, we have the law firm, investment
13 bankers, financial advisors. There are three
14 sets of either litigation or proposed litigation
15 that were massive that preceded this. There was
16 the Coleman claims against Sunbeam, which did not
17 result in litigation, but there was a lot of
18 paperwork generated there. Coleman sued Arthur
19 Anderson. There was a big settlement there.
20 You're familiar with that because we had an issue
21 over the production of the settlement agreement.
22 There was a shareholder suit for Sunbeam. SEC
23 investigation. We received in August 400 boxes
24 of documents in the case. There have been 210
25 witnesses who have given testimony in these cases

PINNACLE REPORTING, INC.
(561) 820-9066

12

1 over 400 plus days. And we have had eight
2 months at this point to try to work ourself
3 through that.

16div-004603

4 Now the parties have been moving quickly.
5 I've been on the case only three or four weeks.
6 And I was brought in because it has been moving
7 quickly and because I've also -- I practiced in
8 Florida for 18 years. This case -- in nine
9 months we have accomplished an extraordinary
10 amount of written discovery. I could go through
11 it, but I think you're aware of it. We have many
12 document requests, hundreds of requests for
13 admissions, interrogatories. And that's on both
14 cases. We've been doing both cases
15 simultaneously. We've had 18 depositions taken
16 already. There are 28 deposition notices or
17 commissions pending today. Twenty-eight. Now
18 in terms of motion practice, you're well familiar
19 with that. And on top of what we've
20 accomplished, we have the pending appeal on the
21 venue issue. Now Your Honor's ruled on that
22 issue on December 15th. The first appellant
23 brief, Your Honor, is due February 25th. And if
24 we assume the 40/40 -- or excuse me -- 20/20 plus
25 extensions, if any are requested, we still have

PINNACLE REPORTING, INC.
(561) 820-9066

2 requesting. I frankly -- my experience in the
3 Fourth DCA is that we probably won't have a
4 decision by either August or October. Now I
5 could be wrong on that. But the last case I had,
6 which the decision came down in October of last
7 year, it took 18 months from oral argument to get
8 an opinion and it's now on rehearing. So I
9 think we're kidding ourselves that we're going to
10 get that issue resolved. Now why is that
11 important? Two reasons. One is, you can't enter
12 a final judgement in the case, even if you triad
13 (ph) the verdict, for either party. You'd have
14 to stay entry of the judgement. If the court of
15 appeals were to disagree with Your Honor -- and
16 respectfully that is a possibility --

17 THE COURT: Sure.

18 MR. BEMIS: -- the entire trial is a nullity,
19 under the Supreme Court's decision in Leroy
20 versus Great Western United at 443 U.S. 173. It
21 was a case under the Williams Act. I don't
22 believe there's any Florida case directly on
23 point, but I know that's Federal law and I
24 believe that would be the law in Florida.

25 Also, Your Honor, there's going to be an

1 additional party requested to be added. Morgan
2 Stanley Senior Funding intends to add Arthur
3 Anderson as a defendant to the case in the Morgan
4 Stanley Senior Funding case. The claims there
5 will be essentially duplicative, in the sense
6 that they will mirror the claims that Coleman
7 filed against Arthur Anderson and resulted in the
8 settlement agreement that you reviewed. We have
9 proposed a date of April 16th to get that
10 resolved.

11 One of the reasons why we need additional
12 time is that Kirkland & Ellis cannot represent
13 Morgan Stanley Senior Funding in that action.
14 We have a conflict. And so Morgan Stanley Senior
15 Funding is reviewing counsel now and they're
16 going to have to handle that matter. The
17 significance of this I think Your Honor would be
18 aware of, having reviewed the settlement
19 agreement, which is subject to a protective order
20 so I don't want to go into the terms of it
21 because it would, I think, violate the terms of
22 it, unless we did an in camera in chambers, but I
23 think Your Honor would know the reason we would
24 bring them in now that we have the settlement
25 agreement, which we didn't get, by the way, until

1 December, so it's a fairly recent development in
2 the case.

3 Another reason, Your Honor, about what is
4 going to happen in terms of scheduling, is just
5 the sheer number of depositions in this case. I
6 did say there have been 18 taken to date. There
7 are now requested, and that means notices are out
8 or commissions have been requested, so we're
9 manipulating dates and witness availability --
10 and, by the way, these have been set without
11 witnesses being asked whether they're available,
12 28 of them in 10 states. We intend to request a
13 total of 42 more depositions and they're located
14 all over the United States. In summary, we've
15 got 28 pending, most of which are by the
16 Plaintiffs. There are some that we have
17 commissions for and we're going to request a
18 total of 42. That's 70 depositions. It's not
19 possible to take 70 depositions in the time that
20 was originally proposed, August 2nd, for trial.
21 That would be one deposition a day, because
22 there's only 70 days left until their proposed
23 discovery cutoff. It's not going to happen. And
24 even extending the discovery cutoff on fact

25 discovery, it is a maniacal schedule that is not

PINNACLE REPORTING, INC.
(561) 820-9066

16

1 conducive to justice in the case. It just isn't
2 necessary when there are no equities to
3 advancement.

4 There are issues you're going to have to
5 resolve, whether it be by summary judgement,
6 which is likely on somebody's part on some of the
7 claims, and we are going to respectfully renew
8 our request that the choice of law issue be
9 resolved prior --

10 THE COURT: Let me ask you all this: I
11 mean, in all honesty, I think October is two
12 ambitious of a date realistically. What I would
13 like to do is, I'm looking -- can I have a 2005
14 calendar?

15 I believe a good day to start it would be
16 January 27th. That would be the first day of the
17 new docket for me. In my experience, that's a
18 good time to get jurors. Their vacations are
19 done; they're not in that spring vacation mode
20 yet. I just want to double-check that that is a
21 Monday. January 27th is a Monday. I don't
22 know if it's a holiday.

16div-004608

23 MR. BEMIS: It's President's Day.
24 THE COURT: Well, no, I think it might be
25 Martin Luther King's Birthday. It's a holiday.

PINNACLE REPORTING, INC.
(561) 820-9066

17

1 MR. BEMIS: It's one of those days.
2 President's Day is February.
3 THE COURT: That may be Martin Luther King
4 Day. If it is, we'll be starting on a Tuesday.
5 But assuming we take that as a trial date to
6 start, let's work backwards from there.
7 MR. BEMIS: My suggestion on that would be
8 to adopt Mr. Scarola's offer, and that is, that
9 we meet on that and not ask you to take the time
10 today to beat out 30 days, because there are a
11 lot of days --
12 MR. SCAROLA: I agree, Your Honor. That's
13 not likely to create a problem between us.
14 We'll be able to come to an agreement with regard
15 to the dates that fall working backwards from
16 that trial date.
17 THE COURT: That's fine. The only other two
18 things I would like to do then, if we're going to
19 sort of take that as a trial date, is take, I
20 would imagine, at least a day -- you all are

16div-004609

21 going to have to tell me if it needs to be longer
22 than that -- maybe a week or two weeks before the
23 trial date to do all the motions in limine and to
24 do any objections to deposition testimony, and,
25 we need to talk about the procedure for

PINNACLE REPORTING, INC.
(561) 820-9066

18

1 designating both deposition testimony and
2 objections to it. But the only thing that
3 upsets me, particularly if there's a long trial
4 like that, is if we inconvenience the jurors and
5 ask them to wait and waste their time to do
6 things that we, frankly, didn't do ahead of
7 time.

8 MR. BEMIS: I think the proposed schedule
9 that we had put before Your Honor does deal with
10 all those issues. And we'll make sure that it
11 conforms to your suggestion.

12 THE COURT: What I would want to do now,
13 quite honestly, is pick out the time at a minimum
14 for subsequent case management conference
15 hearings and that hearing time we know we're
16 going to need a week or two before the trial gets
17 started. You all then can back into whatever
18 scheduling you want as long as it's before me in

16div-004610

19 a timely manner. But I want the hearing time
20 carved out so we know we have it.
21 MR. SCAROLA: Your Honor, I anticipate that
22 as a consequence of the nature of the litigation
23 and the geographic diversity of the witnesses
24 involved, there will be substantial testimony
25 presented by way of videotape. That will require

PINNACLE REPORTING, INC.
(561) 820-9066

19

1 considerable judicial labor, in terms of page and
2 line designations, and rulings on objections far
3 enough in advance of trial to be able to complete
4 the editing process.

5 THE COURT: Right.

6 MR. SCAROLA: So even the idea that that
7 might be done in a day I think is probably --

8 THE COURT: How long do you think we need?

9 MR. SCAROLA: I'm strictly -- I'm
10 guesstimating based on prior experience in
11 dealing with that kind of situation before. And
12 I would think that we're probably looking at
13 three or four days.

14 THE COURT: That's fine. I'm just
15 looking.

16 MR. SCAROLA: I might suggest that that

16div-004611

17 might be an appropriate task for a special
18 master. That's not something I've discussed with
19 my client or cocounsel yet, but it may be.

20 THE COURT: I don't mind doing that. My
21 only concern would be that requires you to
22 designate the depositions far enough ahead of
23 time so the master can listen to it, issue a
24 report, give time for objections, and then give
25 me time to do whatever I need to do after the

PINNACLE REPORTING, INC.
(561) 820-9066

20

1 objections.

2 MR. SCAROLA: I understand. And, again, I
3 haven't thought about the logistics of that, but
4 it's a suggestion that I think both sides needs
5 to consider. That may help to expedite things
6 ultimately.

7 THE COURT: The only thing I'm wondering,
8 and you all can tell me, my personal experience
9 is that nothing much happens right before or
10 after Christmas. And I'm looking, December 24th
11 is a Friday, whether we want to try to set aside
12 that Monday, Tuesday, Wednesday, Thursday, so now
13 we know we have that time. It's sitting there
14 and if we can use it. . .

16div-004612

15 MR. SCAROLA: That works for us, Your Honor.

16 THE COURT: We can do all the motions in
17 limine and any other objections I'm going to have
18 to rule on we have it ready then.

19 MR. BEMIS: Your Honor, if you do that, I'm
20 going to be stuck here for Christmas.

21 THE COURT: You can't get out the 23rd?
22 You're going the wrong way. Where are you
23 going?

24 MR. BEMIS: I'm going back to the west
25 coast. You said the 24th --

PINNACLE REPORTING, INC.
(561) 820-9066

21

1 MR. SCAROLA: That'll be the 20th, the 21st
2 and the 22nd.

3 THE COURT: Just those three days.

4 MR. BEMIS: Monday, Tuesday and Wednesday is
5 fine.

6 THE COURT: Monday, Tuesday, Wednesday.
7 That would take us only to the 22nd, those three
8 days.

9 MR. SOLOVY: I can think of worse places to
10 be stuck than Palm Beach, Your Honor.

11 THE COURT: Most people are coming down
12 here.

16div-004613

13 MR. BEMIS: Thank you, Your Honor.

14 THE COURT: Okay.

15 MR. SOLOVY: That's a great time to get this
16 stuff done.

17 THE COURT: That way we have it done going
18 into the New Year, motions in limine and
19 objections to -- in your proposed timetable, you
20 give time frames for you all to do designations
21 of deposition testimony, objections and --

22 MR. BEMIS: Yes. And then we'd have to
23 present that as a package. We need to work out
24 the logistics of that. Mr. Scarola and I have
25 been through it, I'm sure, and can figure out a

PINNACLE REPORTING, INC.
(561) 820-9066

22

1 way to do it. It isn't easy and it won't be
2 easy for you no matter how we do it.

3 THE COURT: That's fine.

4 I know Defendant had a concern about at some
5 point reaching a determination on what
6 substantive law applies. Are we thinking we
7 would do this by summary judgement or by what
8 mechanism?

9 MR. BEMIS: My suggestion to that, and it's
10 in our schedule, that we brief that issue

16div-004614

11 separately.

12 THE COURT: Tell me procedurally how we're
13 doing it.

14 MR. BEMIS: It's called a motion. We file
15 an undifferentiated motion for choice of law
16 based on the claims. There are four claims in
17 the case. And those four claims state the
18 substantive law -- will determine the substantive
19 law that apply.

20 THE COURT: I hate to do this -- and it's
21 just the way I think. I apologize -- what kind
22 of motion is this? Is it declaratory
23 judgement? Is it summary? What are we calling
24 it?

25 MR. BEMIS: It's just a motion, Your Honor.

PINNACLE REPORTING, INC.
(561) 820-9066

23

1 Just under Florida Rules you can have an
2 undifferentiated motion for anything that
3 requires an order in the case. And Your Honor
4 has to decide the issue at some point. We can't
5 do jury instructions.

6 THE COURT: I agree we need to decide it.
7 Is this something that would require evidence be
8 considered?

16div-004615

9 MR. BEMIS: You can take evidence on it.
10 In fact, we cited some cases in the motion to
11 dismiss. I didn't argue that, but I read the
12 briefs. And it is possible, and not only is it
13 possible, but it should be done that way for your
14 benefit, as well as the parties. Because when we
15 get to the point of summary judgement, the jury
16 instructions, we need to know this issue. And
17 we've put a date in our order to brief the issue.

18 THE COURT: Does Plaintiff agree that this
19 should be done by a motion?

20 MR. SCAROLA: No, Your Honor. As a matter
21 of fact, you may recall that this same suggestion
22 has been made repeatedly by the Defense in
23 earlier hearings and Your Honor's reaction was
24 exactly the same as the reaction you're now
25 having.

PINNACLE REPORTING, INC.
(561) 820-9066

24

1 The choice of law issue needs to be
2 determined in a factual context. And you
3 expressly stated that it seems to you that the
4 correct procedural presentation of that issue was
5 by way of motion for summary judgement.

6 THE COURT: Let me ask you this: Do we

16div-004616

7 agree that this is a decision that needs to be --
8 we certainly don't want to be making it in the
9 middle of trial.

10 MR. SCAROLA: We absolutely agree that it
11 needs to be made in advance of trial. And I
12 agree with the suggestion that Your Honor has
13 made repeatedly in the past, the way to address
14 it is by way of summary judgement.

15 THE COURT: Well, why can't I do this: What
16 if there's disputed issues of fact on a summary
17 judgement so we can't reach it on summary
18 judgement. Then what happens?

19 MR. SCAROLA: Well, in the presentation of
20 the summary judgment motion we still need to make
21 a determination, based upon the facts presented
22 to the court, as to the standard that is going to
23 be applied. So the facts can be presented to the
24 court in the context of a summary judgement
25 motion and you'll then be able to determine which

PINNACLE REPORTING, INC.
(561) 820-9066

25

1 law applies. Even if you ultimately determine,
2 that because there are disputed issues of fact,
3 under the law that applies, no summary judgement
4 can be granted. But I really think that Your

16div-004617

5 Honor needs to have a factual context in which to
6 make that determination. It cannot be done in
7 the abstract.

8 MR. BEMIS: Your Honor, the issue of the
9 substantive law that is applicable to the case
10 does not turn on contested issues of who said
11 what to whom. They turn on the gravity of the
12 claims in the sense of the restatement. Those
13 issues can be resolved, you may take evidence on
14 those issues, and you're not going to decide any
15 liability or damages.

16 THE COURT: I understand that.

17 MR. BEMIS: And that should be determined
18 before we go into the process of briefing summary
19 judgment, because it will complicate the matter
20 immeasurably for us to try to prepare for this
21 case for trial with 80 some depositions if we
22 don't know what the controlling law is.

23 When Your Honor first considered this -- and
24 I've read the transcript. I understand you had
25 some difficulties with it. I think the reason

PINNACLE REPORTING, INC.
(561) 820-9066

1 for it was -- and I'm not putting my words into
2 your head, but as I read it, it was the

3 combination of the venue issue and trying to deal
4 with what you do with that and the facts related
5 to that and how that would interplay with the
6 summary judgement, as well as a feeling that
7 perhaps you need to have the summary judgement of
8 who said what to whom framed when you were
9 deciding choice of law. And I think
10 fundamentally that's not right. And this one
11 I've heard -- and you'll tell me if you disagree
12 -- I think the process should be, look at the
13 gravity of the claims. Those gravity issues are
14 not dispositive of summary judgement. And we can
15 decide. Who said what to whom will be on summary
16 judgement. What law applies to who said what to
17 whom and when they did it, those are summary
18 judgement issues. The rest is a substantive
19 legal issue that you need to decide as a
20 precursor for deciding summary judgement, if
21 those motions are filed. And that should be
22 decided as promptly as possible, given your
23 schedule.

24 THE COURT: Tell you what, neither one of
25 you is going to convince me today that one

PINNACLE REPORTING, INC.
(561) 820-9066

1 approach is correct or incorrect. But I'm just
2 telling you, I still have the same concerns I've
3 had all along, which is something to suggest we
4 do an evidentiary hearing on this kind of point.

5 MR. BEMIS: I don't think it's an
6 evidentiary hearing. I think gravity of claims
7 is like personal jurisdiction, for the most
8 part. You know, those are not dispositive to the
9 case. It's, where did it happen.

10 THE COURT: That's still evidentiary.

11 MR. BEMIS: This is a case about who said
12 what to whom. We need to know what law applies
13 to those representations.

14 THE COURT: Nobody's suggesting it's not an
15 important issue. All we're suggesting is, how do
16 we want to do this.

17 MR. BEMIS: My suggestion is, Your Honor,
18 let's brief the issue. We're the ones doing the
19 work, other than you reading the brief. If you
20 conclude, I can't decide it, I think it's
21 improper without an evidentiary hearing or I'm
22 not going to have an evidentiary hearing, so be
23 it. Then we'll proceed to the next step. But we
24 ought to be given an opportunity to put the issue
25 --

1 THE COURT: So what you are suggesting --

2 MR. SCAROLA: Is an advisory opinion from
3 the Court.

4 MR. BEMIS: No.

5 THE COURT: Well, I'm still trying to figure
6 out how we want to do this. I understand the
7 point you're making, but I also -- let me ask you
8 this: Are you all in agreement on the timetable
9 when this needs to be determined?

10 MR. SCAROLA: It is our belief that it only
11 needs to be determined in the context of whatever
12 summary judgment motions are filed. If the
13 choice of law issue is not dispositive of a
14 claim, then how could it affect the presentation
15 of evidence at trial?

16 THE COURT: No. I understand that you all
17 don't want to be briefing the substantive motion
18 for summary judgement and have to brief it under
19 both law because I haven't made a decision on
20 which one's going to apply.

21 MR. SCAROLA: On the contrary, I believe
22 that's exactly what we should be doing. I think
23 that we should be briefing the summary judgment
24 motions in the context of conflicting laws
25 because the decision doesn't need to be made,

1 except as the laws in fact conflict with regard
2 to a particular set of facts. If there's no
3 difference in the law under Set of Facts A and
4 Set of Facts B, then Your Honor doesn't need to
5 determine which law applies.

6 THE COURT: Yes. But on the other hand,
7 then I'm going through the mental exercise of
8 looking at two different state's laws and
9 deciding whether they're the same or not; and
10 then if they're different, having to go the step
11 to decide -- and I'm doing that on every point of
12 law I'm having to consider, while making the
13 fundamental decision of are we going to apply New
14 York or Florida substantive law. Then we're only
15 looking at one law from then on.

16 MR. SCAROLA: Except that the authorities
17 suggest that this needs to be an issue-by-issue
18 determination.

19 MR. BEMIS: It is an issue-by-issue by
20 claim. There are four claims in the case.
21 Whether they're our claims or their claims or our
22 claims against Arthur Anderson, there are four
23 claims. They're all "who said what to who"

24 claims. You need to decide the gravity of the
25 law that applies to those claims before we get

PINNACLE REPORTING, INC.
(561) 820-9066

30

1 into trying to briefing whether the "who said
2 what to who" gives rise to a liability.

3 THE COURT: I understand what you're saying
4 and I will tend to agree, although I'm still hung
5 up on procedurally how we're going to get to
6 where we need to go.

7 MR. BEMIS: Just brief it and make a
8 decision whether we're right or wrong and one way
9 or the other we live with it and we go on with
10 the case.

11 MR. SCAROLA: Respectfully, Your Honor, if
12 we're briefing something, don't we have to brief
13 it in the context of some kind of motion? And if
14 it's not a summary judgment motion, what is it?

15 MR. BEMIS: There is no rule in Florida that
16 motions have to be summary judgement or anything
17 else. Any request for an order is a motion.

18 THE COURT: I would agree that there are
19 certain requests to the court that simply aren't
20 appropriate. And if I could only have labels on
21 the motions that are appropriate, we know they're

16div-004623

22 appropriate, and there's procedures in place for
23 considering them.

24 MR. BEMIS: Well, that's true, because they
25 have a certain set we review all of the time.

PINNACLE REPORTING, INC.
(561) 820-9066

31

1 But every case has peculiar issues and we don't
2 have choice of law in most cases so we have to
3 have an order telling us. How do you do that?
4 You do it by motion. And any request in Florida
5 for an order by the court is done by motion.
6 Some we have labels for and we have specific
7 standards for. The case law on choice of law,
8 there's a law for that, isn't in the rules, it's
9 in the cases. And there are cases talking about
10 what you consider to determine choice of law,
11 which, again, is not a question of who said what
12 to who, but where's the gravity of the law and
13 how we apply it.

14 THE COURT: Here's what I think we need to
15 do: I think we need to set a deadline for you
16 all to file whatever motions you're going to be
17 filing seeking for determination on choice of
18 law. And if we decide it should be done on
19 summary judgement, you're doing your summary

16div-004624

20 judgement. If somehow I can do a hearing that's
21 not a summary judgment, you file an appropriate
22 motion. If you think it's evidentiary, you put
23 that in a motion.

24 MR. BEMIS: We have a date for that in our
25 proposed order. It's June 21st. But we're going

PINNACLE REPORTING, INC.
(561) 820-9066

32

1 to have to move it in light of your change of the
2 date. But we do have a date for that, which
3 would allow us to get the issue teed up.

4 THE COURT: I think what we need to do now
5 then is to set aside the hearing time for hearing
6 these motions so we know where we're going.

7 MR. BEMIS: We had set the week of June 21st
8 for the hearing. We had a little bit earlier
9 date for this, but we can --

10 MR. SCAROLA: The order anticipates, Your
11 Honor, that there will be a deadline for filing
12 motions and then a period of time shortly
13 following that when those motions --

14 THE COURT: What I'm suggesting, though, is
15 this is a motion that needs to be sped up. This
16 will not be sort of a generic motion for summary
17 judgement.

16div-004625

18 MR. BEMIS: No. What we had contemplated in
19 our order -- and again, we may have to advance
20 this in light of the trial date -- but we had
21 suggested May 28th as the briefing date,
22 responses on June 18th, and a hearing on the week
23 of June 21st. We're perfectly willing to live
24 with that schedule, or we can advance it if we
25 have to. We're far enough in advance of the

PINNACLE REPORTING, INC.
(561) 820-9066

33

1 trial preparation and summary judgement to get
2 that done.

3 So the week of June 21st was our hearing.
4 We were going to suggest that week. We didn't
5 know what your calendar held.

6 THE COURT: Frankly, I'm busy on that day.

7 MR. SCAROLA: We were hoping it was August.

8 THE COURT: And it's sort of hard because
9 right now we don't know how long it would take.

10 MR. BEMIS: I would suggest that we're
11 talking probably an hour, an hour hearing, 30
12 minutes. I mean, if the United States Supreme
13 Court can -- Bush versus Gore was argued 20
14 minutes per side.

15 THE COURT: Sure. But I assume that we're

16div-004626

16 assuming then that we're not taking any

17 evidence.

18 MR. BEMIS: If we do, we'd have to come
19 back. We're far enough in advance we can tell
20 you, Your Honor, the next time we meet with you
21 we're suggesting, I think, at your suggestion, a
22 monthly conference. This is an issue we could
23 address --

24 THE COURT: If you're suggesting we not
25 carve out the time now, that's fine.

PINNACLE REPORTING, INC.
(561) 820-9066

34

1 MR. BEMIS: Give us a date during the week
2 of June 21st. We'll live with that and work
3 against it.

4 THE COURT: The week of June 21st we
5 actually have a judges conference. I'm looking
6 at Monday, June 28th, nine-thirty.

7 MR. BEMIS: That's fine. I'm not that busy
8 yet.

9 MR. SCAROLA: Obviously, Your Honor, we need
10 to see what the motion is in order to make a
11 determination as to whether it is an appropriate
12 way in which to present these issues to the
13 Court. And we can't judge that until we see the

16div-004627

14 motion.

15 MR. BEMIS: We do have a provision for reply
16 in responses to the motion.

17 THE COURT: That is all motions seeking a
18 determination of choice of law.

19 MR. BEMIS: And we'll have those on file by
20 -- I think the 18th would be a completion date,
21 which would give Your Honor 10 days in advance.
22 You'd have all the materials, which I would hope
23 would be adequate for consideration.

24 THE COURT: Okay.

25 MR. SCAROLA: Your Honor, just so that I'm

PINNACLE REPORTING, INC.
(561) 820-9066

35

1 sure I understand what you have just said. If
2 it is the Plaintiff's position that choice of law
3 issues need to be resolved in the context of
4 summary judgment motions --

5 THE COURT: What I'm saying is, no, that
6 we're not going to be doing -- to the extent --
7 if at some point you're going to be seeking a
8 determination from me prior to trial of the
9 appropriate substantive law to apply, those
10 motions are going to be heard that day.

11 MR. SCAROLA: Well, our position is that

16div-004628

12 Florida Law applies.

13 THE COURT: Then you wouldn't be seeking any
14 other determination other than Florida Law.

15 MR. SCAROLA: But what I'm trying to
16 determine is, if it is our position that Florida
17 Law applies and consequently we are not filing a
18 choice of law motion, but rather only planning on
19 presenting our summary judgment motions pursuant
20 to Florida Law, is there any --

21 THE COURT: Assuming you won't be arguing in
22 those same motions that Florida Law is the law
23 that gets applied.

24 MR. SCAROLA: Well, clearly whenever we file
25 a summary judgement motion we're arguing that

PINNACLE REPORTING, INC.
(561) 820-9066

36

1 Florida Law applies.

2 MR. BEMIS: Your Honor --

3 THE COURT: You're arguing Florida Law
4 applies, but there is not -- please understand,
5 that what I don't want is motions for summary
6 judgement filed by the Plaintiff in October which
7 both argue Florida Law and argue that Florida Law
8 is the applicable law. The point of this is to
9 determine, for the purposes of this case, the

16div-004629

10 substantive law that will apply. And after this,
11 we won't be arguing which substantive law applies
12 for various claims because we will already, my
13 hope is, have determined that.

14 MR. SCAROLA: And so that the Court
15 understands what our position is, it is our
16 position that the choice of law determination
17 cannot be made in the abstract, but only in the
18 context of specific issues presented in either a
19 summary judgment motion or some other motion that
20 is fact specific.

21 THE COURT: But we already have your claims,
22 correct?

23 MR. SCAROLA: You do have our claims,
24 absolutely. Yes, they're stated in our
25 complaint.

PINNACLE REPORTING, INC.
(561) 820-9066

37

1 THE COURT: Right. And so presumably
2 they're going to be determined by substantive law
3 of New York or Florida.

4 MR. SCAROLA: We presume they're going to be
5 determined by Florida Law.

6 MR. BEMIS: And we presume New York, and
7 that's what we're going to thrash out. Who said

16div-004630

8 what to who will be determined in summary
9 judgement, but the gravity of law will be
10 determined by you as a matter of law, which is
11 your responsibility --

12 THE COURT: But please understand, so you
13 know what I'm trying to say, if we get into
14 October and you file something seeking summary
15 judgment on Florida Law, you can argue Florida
16 Law to me, but you won't be able to argue the
17 applicability of the Florida Law.

18 MR. SCAROLA: Because you will have already
19 made that determination --

20 THE COURT: Because that's the point -- on
21 this point, I agree with Defendant. This is a
22 threshold issue we need to reach, both for the
23 economy of your client and for the economy of the
24 court. It's simply not an efficient way to run a
25 case, not to know which substantive law applies.

PINNACLE REPORTING, INC.
(561) 820-9066

38

1 MR. SCAROLA: I think I understand what the
2 Court's intention is. I'm just having a little
3 bit of difficulty understanding, as a practical
4 matter, how that motion is going to be -- the
5 procedural manner in which that motion is going

16div-004631

6 to be presented to the Court, other than by way
7 of summary judgment.

8 THE COURT: Obviously I share that concern
9 and I'm sure we're going to get educated.

10 MR. BEMIS: Thank you, Your Honor.

11 MR. SCAROLA: Okay.

12 MR. BEMIS: Are there any other critical
13 dates of the pretrial schedule that Your Honor
14 would like to address?

15 THE COURT: Hold on. I just want to finish
16 my notes.

17 And we agree this is a 15-day trial?

18 MR. BEMIS: Fifteen trial days, Your Honor,
19 yes.

20 THE COURT: Is that including jury
21 selection?

22 MR. BEMIS: Yes. I mean, that's our best
23 guess. I mean, at this point it's tough to tell,
24 but that's our best guess. And apparently Mr.
25 Scarola agrees that 15 days appears to be what

PINNACLE REPORTING, INC.
(561) 820-9066

39

1 we're going to need.

2 MR. SCAROLA: I believe so, Your Honor.

3 Your Honor, I'm sorry to go back one more

16div-004632

4 time, but I do want to be certain that I

5 understand.

6 If it is our position that Florida Law does
7 apply in this case, is it necessary for us to be
8 filing something affirmatively?

9 THE COURT: Only if -- please understand --
10 I can't think of how to say it more clearly. Let
11 me think if I can -- that you would be precluded
12 then from arguing later on in your motions for
13 summary judgement the applicability of Florida
14 Law; this would simply be an assumption that it
15 did apply. But if there were disputed issues
16 about whether it did, we wouldn't be arguing it
17 then.

18 MR. SCAROLA: I only need to understand
19 where the burden lies. If nobody does anything
20 between now and the time of filing of motions for
21 summary judgement, I would assume that the law
22 that would have to be applied, based upon what
23 Your Honor just said, is the Law of Florida.

24 THE COURT: No. I would not have a law to
25 apply. And if you go back, that meant that you

PINNACLE REPORTING, INC.
(561) 820-9066

2 management conference.

3 MR. BEMIS: Your Honor, we're going to file
4 a motion that it's New York Law.

5 THE COURT: Right, and that becomes moot,
6 because you're going to force the issue.

7 MR. SCAROLA: If there's a clear
8 understanding that they're forcing the issue,
9 then that's fine. I know that they're going to
10 file a motion to which we're going to respond.

11 But it seems to me, that in the absence of
12 their assuming the burden of demonstrating that
13 New York Law applies, the law that ordinarily
14 applies to Florida cases is Florida Law. So I
15 just need to make sure that we're counting on
16 them filing a motion. And if they don't file a
17 motion --

18 MR. BEMIS: We will. And it will say that
19 New York Law applies and they will respond that
20 Florida Law applies and Your Honor will make a
21 judicial ruling and we'll follow up.

22 MR. SCAROLA: That's fine. The record is
23 clear as to how that's going to happen then.

24 THE COURT: All right. It strikes me, we
25 need to stop abusing 8:45's and carve up some

1 reasonable hearing time.

2 MR. BEMIS: We have, Your Honor, what I call
3 a modest proposal to reduce frequent flyer miles
4 from our standpoint, and that is, that we take
5 you up on your suggestion of setting aside an
6 hour or if you believe more -- I don't know the
7 appropriate frequency, whether it should be once
8 a month or whether every three weeks, depends on
9 your calendar and what's pending, and then have
10 everything scheduled at one time. I would
11 suggest a seven-and-two rule, where seven days in
12 advance all motions are filed, two days before
13 that responses are filed and Mr. Scarola and I
14 can take alternating responsibility for providing
15 Your Honor with the materials several days in
16 advance. Then we just go through them seriatim.

17 THE COURT: It strikes me that every three
18 weeks may be about right. I'm afraid every month
19 may not be often enough.

20 MR. BEMIS: Three weeks is fine with us.

21 MR. SCAROLA: May I have just one moment?

22 THE COURT: Sure.

23 MR. SCAROLA: Is it Your Honor's intent that
24 there will be no uniform motion calendars during
25 --

1 THE COURT: Well, that's something we can
2 talk about. We've had a number of hearings on
3 the uniform motion calendar that probably
4 shouldn't have been set there. In all honesty,
5 you guys are sophisticated enough attorneys, I
6 would be shocked if you had a motion that clearly
7 was probably not a UMC. It strikes me, you guys
8 will work it out. On the other hand, if there is
9 one, I certainly don't mind hearing it.

10 MR. SCAROLA: I only asked that question
11 because it'll make a difference in terms of what
12 we think appropriate frequency to be.

13 THE COURT: Sure. We're talking about
14 frequency and length of the hearing, whether we
15 think it should be an hour, an hour and a half or
16 two hours, and that depends on how frequently
17 we're going to do it.

18 MR. BEMIS: Your Honor, my proposal is three
19 weeks, two hours. We'll know in advance. I love
20 your suggestion, so that's fine with us.

21 THE COURT: Why don't we just cross out all
22 our time for this case.

23 MR. BEMIS: Actually, Your Honor, your
24 suggestion yesterday is really, in my experience

25 here, it is really the most expeditious way, and

PINNACLE REPORTING, INC.
(561) 820-9066

43

1 the state courts, big cases, just carve it out --

2 THE COURT: I agree with that. Two hours
3 every three weeks is fairly aggressive, but if
4 that's what it needs. I don't want to put all
5 the things in place to have a specially set trial
6 and discover that we didn't have to, a sufficient
7 hearing would have been fine.

8 MR. SCAROLA: Our past experience, our track
9 record thus far is, that we would not consume two
10 hours of Your Honor's time every three weeks. I
11 would also anticipate, however, that as discovery
12 heats up in this case, that we might consume that
13 much time. My suggestion would be that we might
14 want to start out at an hour and then increase
15 the time as we get farther on down the road,
16 because we'll probably need additional time
17 later.

18 MR. BEMIS: That's fine with me, Your Honor.

19 MR. SCAROLA: And we can let you know at one
20 of those one-hour hearings the point in time in
21 which we anticipate we're going to now need two
22 hours.

16div-004637

23 THE COURT: Frankly, by that time it's too
24 late to give you the two hours. I'm going to set
25 the time up right now.

PINNACLE REPORTING, INC.
(561) 820-9066

44

1 MR. SCAROLA: Well then that's great. Then
2 we'll take the two hours now.

3 THE COURT: So first of all, we want mid
4 March. Is that what we're talking about first?

5 MR. SCAROLA: That's fine.

6 THE COURT: I can give you an hour at
7 three-thirty on March 19th. I don't have
8 anything in the morning. Do you want that one?

9 MR. BEMIS: Three-thirty is fine with us.

10 MR. SCAROLA: That's fine.

11 THE COURT: 3/19/04, three-thirty, one
12 hour.

13 The next one is going to be early April. I
14 can do four o'clock on April 16th.

15 MR. BEMIS: April 16th, 4 p.m.

16 THE COURT: Then we got May.

17 We could do it May 7th. Would you prefer
18 morning or afternoon, if given a choice?

19 MR. BEMIS: Frankly, we'd prefer the
20 mornings, so we can come in the night before.

16div-004638

21 THE COURT: I could do eight o'clock on May

22 7th?

23 MR. BEMIS: Fine.

24 THE COURT: All right. And after that we'll

25 start the two-hour ones. So we're looking the

PINNACLE REPORTING, INC.
(561) 820-9066

45

1 beginning of June. That's May 28th. We prefer

2 8 a.m. again?

3 MR. BEMIS: That's fine, Your Honor. What

4 day of the week is May 28th?

5 THE COURT: These are all Fridays, because

6 those are all the special set.

7 MR. BEMIS: May 28th, is that the Friday

8 before Memorial Day?

9 THE COURT: It is the Friday before Memorial

10 Day.

11 MR. BEMIS: Either come up or go back from

12 the 28th, because Memorial Day is very difficult

13 to get in and out.

14 THE COURT: June 4th, 8 a.m., still two

15 hours.

16 MR. BEMIS: Fine.

17 THE COURT: You probably don't want July

18 2nd?

16div-004639

19 MR. BEMIS: July 2nd is okay. That will be

20 okay with us.

21 THE COURT: You sure?

22 MR. BEMIS: Yes.

23 THE COURT: That's a little more than --

24 that's four weeks instead of three.

25 MR. BEMIS: I think by summer we're going to

PINNACLE REPORTING, INC.
(561) 820-9066

46

1 be so deep in depositions that --

2 THE COURT: 8 a.m., two hours.

3 Late July. July 23rd?

4 MR. BEMIS: Fine.

5 THE COURT: That would be 9 a.m.

6 We're in mid August.

7 MR. IANNO: Your Honor, July 23rd was 9

8 a.m.?

9 THE COURT: Yes.

10 Do you want August 13th or August 20th?

11 MR. SCAROLA: 13th, please.

12 MR. BEMIS: 13th is fine.

13 THE COURT: August 13th, '04, 8 a.m.

14 Early September. September 3rd. That would

15 be one-thirty for two hours.

16 MR. BEMIS: Where is that in relation to

16div-004640

17 Labor Day?

18 THE COURT: You want to avoid that?

19 MR. BEMIS: It's so hard to travel on those
20 holidays.

21 THE COURT: I know. I generally go away for
22 a long weekend right after that.

23 MR. SCAROLA: Last week in August.

24 THE COURT: We already have August 13th.

25 MR. BEMIS: If we could just move it to

PINNACLE REPORTING, INC.
(561) 820-9066

47

1 another week in September if you have it, because
2 that's a vacation period for a lot of people and
3 a holiday weekend.

4 THE COURT: But then we're up to September
5 --

6 MR. SCAROLA: 10th.

7 THE COURT: No. That's the weekend I
8 usually go away. September 17th or go back in
9 late August.

10 MR. BEMIS: The 17th is fine with us.

11 THE COURT: Isn't the 16th Rosh Hashanah.

12 MR. SOLOVY: Yes it is, and the 17th. So
13 why don't we go the end of August, Your Honor.

14 THE COURT: That's fine. We can go back to

16div-004641

15 August 27th.

16 MR. BEMIS: That's fine.

17 THE COURT: And that we can do 8 a.m.

18 again.

19 And then we're in late September.

20 September 25 -- oh, Yom Kipper.

21 MR. SOLOVY: And that's a Saturday anyway,

22 Your Honor.

23 THE COURT: Oh, that's right. Could you do

24 the 24th? You can't do it first thing in the

25 morning?

PINNACLE REPORTING, INC.
(561) 820-9066

48

1 MR. SOLOVY: No, that will be too hard for
2 me. The only way, if we could intrude upon your
3 Thursday the 23rd, that would work. Anything
4 earlier that week.

5 THE COURT: I could do it the afternoon of
6 the 23rd. I couldn't do it the morning.

7 MR. BEMIS: That's fine.

8 MR. SOLOVY: That would work.

9 THE COURT: 3 p.m.

10 October 15th.

11 MR. BEMIS: That's fine.

12 THE COURT: 8 a.m.

16div-004642

13 November 5th, 8 a.m.

14 And then I think our last one would be early

15 December. December 3rd.

16 MR. BEMIS: That's fine.

17 MR. SOLOVY: Fine.

18 THE COURT: 8 a.m. Okay. We'll get all

19 those done.

20 MR. SCAROLA: Thank you.

21 Your Honor, we do have by agreement one

22 discovery dispute set on the uniform motion

23 calendar for next Thursday I believe, which we

24 would want to be able to --

25 THE COURT: We'll do it then.

PINNACLE REPORTING, INC.
(561) 820-9066

49

1 MR. BEMIS: I think there are actually two

2 set, one on each side.

3 Our suggestion is, let's move them over to

4 the first conference.

5 MR. SCAROLA: We do not want to delay ours.

6 THE COURT: Let me see next week's

7 calendar.

8 Tell you what, I think I could do it

9 nine-thirty on Thursday. Do you want to do that,

10 and then I could give you more time?

16div-004643

11 MR. SCAROLA: I am in trial in front of
12 Judge Miller and we generally begin at
13 nine-thirty.

14 MR. BEMIS: Could I have one second, Your
15 Honor?

16 THE COURT: Sure.

17 I don't mind if you come and we try to do
18 them. I really haven't looked at them so I don't
19 know what they are.

20 MR. BEMIS: First of all, I can't come next
21 week, but I can come on the 19th on this one.
22 It's my anniversary and I'm going to be on
23 vacation.

24 THE COURT: March 19th?

25 MR. BEMIS: I can't be here, but I'm going

PINNACLE REPORTING, INC.
(561) 820-9066

50

1 to have somebody here. We'll have it covered by
2 one of the firms. That's an impossible -- it's
3 my 35th wedding anniversary.

4 THE COURT: I understand. That's fine.

5 MR. BEMIS: With regard to Mr. Scarola's
6 motion, I have been looking at this -- I haven't
7 had as much time in the case unfortunately -- I
8 am going to make a concerted effort to see if I

16div-004644

9 can resolve that motion.

10 THE COURT: The one that's set next
11 Thursday?

12 MR. BEMIS: The one he wants to hear on the
13 19th.

14 THE COURT: When you said the 19th, you
15 confused me.

16 MR. BEMIS: I misspoke. The 26th.

17 I thought I could clearly have it resolved
18 by then. I'm almost certain I cannot resolve it
19 by next Thursday with the client to deal with
20 what he wants and to see what we can do. That
21 is why I would like to see it moved. I represent
22 to the Court we already started the process of
23 trying to get through the issues clearly with the
24 client to see if we can get it resolved in a
25 fashion that's acceptable or better than what we

PINNACLE REPORTING, INC.
(561) 820-9066

51

1 are currently doing with them so you don't have
2 to intervene.

3 THE COURT: So are you telling me you don't
4 think you can resolve it with the client by next
5 Thursday --

6 MR. BEMIS: Yes, I cannot.

16div-004645

7 THE COURT: -- but we recognize Mr. Scarola
8 doesn't want to wait until March 19th to have it
9 heard.

10 MR. BEMIS: Even if you give us just a
11 couple more -- rather than one week, give us two
12 weeks, even if it has to be on the uniform
13 calendar.

14 THE COURT: I could do it Wednesday, March
15 3rd at eight-thirty.

16 MR. BEMIS: That would be much better for
17 us. We might resolve it by then.

18 MR. SCAROLA: That's fine, Your Honor.
19 We're willing to make that concession. This is
20 an outstanding discovery --

21 THE COURT: Was this noticed for next
22 Thursday?

23 MR. SCAROLA: Actually, it was noticed for
24 earlier. They requested that we push it back.
25 We've pushed it back. And we will agree to push

PINNACLE REPORTING, INC.
(561) 820-9066

52

1 it back again, but this is a discovery matter
2 that has been pending for a long time.

3 THE COURT: So it's already noticed for
4 Thursday?

16div-004646

5 MR. SCAROLA: Yes.

6 THE COURT: Resetting the hearing -- and
7 Thursday is, what, the 26th -- 2/26/04 at eight
8 forty-five to 3/3/04 at eight-thirty.

9 MR. SCAROLA: Is Your Honor planning on
10 sending out a notice with respect to that
11 hearing?

12 THE COURT: Yes. We'll just include it in
13 this.

14 MR. CLARE: Your Honor, clarification:
15 There are two motions that are pending. There is
16 one filed by the Plaintiff and one filed by the
17 Defendant.

18 THE COURT: That's why I wanted to make sure
19 there was a notice of hearing, so my order
20 wouldn't be referencing something else.

21 MR. SCAROLA: That works. Thank you, Your
22 Honor.

23 Your Honor, one additional matter that I
24 think we need to address in light of the comments
25 about an amendment of the pleadings to add a

PINNACLE REPORTING, INC.
(561) 820-9066

53

1 party. Obviously, if that were to occur, then
2 this matter would not be at issue at that time.

16div-004647

3 And certainly if such an amendment is going to
4 take place or if there's going to be an attempt
5 made to amend, because we fully anticipate
6 resisting such an amendment, that's something
7 that should be done within the very immediate
8 future.

9 THE COURT: Well, I would hope when you guys
10 talk about time frames, you come up with a time
11 frame for filing any motion to amend.

12 MR. BEMIS: We did. April 16th is the day
13 we suggested.

14 Our problem is, we're conflicted out and we
15 need to find counsel and get them -- this is a
16 massive case to get them into quickly and there's
17 limits as to what I can do as counsel for Morgan
18 Stanley with a conflict. They're going to have
19 to get in -- but they will only be joining on the
20 Morgan Stanley Senior Funding side and they will
21 be asserting one claim. There are going to be
22 multiple claims, but they will only be against
23 Arthur Anderson. They will in large measure, I
24 believe, mirror Coleman's claims against Arthur
25 Anderson, claiming that, hey, just like Coleman

PINNACLE REPORTING, INC.
(561) 820-9066

1 claims they got defrauded or they were
2 misrepresented too, Morgan Stanley Senior Funding
3 was misrepresented too when it lent \$680 million
4 in this transaction and lost it.

5 MR. SOLOVY: Judge, the reason for the push
6 is -- we also think there's a lot of skulduggery
7 involved in this motion. And being a little old
8 and inept, when he didn't want to keep one
9 number, that sort of baffled me for a moment,
10 until I heard the terms of Arthur Anderson being
11 brought in. It isn't that Kirkland & Ellis, this
12 little small, thousand-person firm is undermanned
13 and this came as a lightning bolt to them. So
14 we think that this is improper adding of a party
15 too late, for many reasons, and we're not wanting
16 them to tarry anymore.

17 THE COURT: All I can say is, we're arguing
18 about something that's not in front of me now.
19 And I can tell you I have a habit of tuning it
20 out because it's things I don't need to know.
21 If the motion's made, we'll consider it on the
22 merits then. And I'm sure you guys are going to
23 argue we're too far down the road to allow him
24 in.

25 MR. SOLOVY: I just wanted to give this

1 Court a note ahead of time, Your Honor, so by my
2 silence you didn't think I was thinking this was
3 a happy development.

4 MR. SCAROLA: I would only mention, in the
5 context of what is relevant to the issues before
6 Your Honor, that there is a distinction between a
7 motion to amend to add a new party and the motion
8 to amend with regard to the punitive damage
9 claim, which we likely would not be prepared to
10 make by an April date.

11 MR. BEMIS: We don't have any objection to
12 that. We have the same issue. We'll work that
13 out.

14 THE COURT: Let's assume, and I'm acutely
15 aware when attorneys attempt to give me
16 information that I don't need until the issue's
17 in front of me, and I have to assume they're
18 doing it for other things that may not be
19 appropriate.

20 MR. BEMIS: Understood.

21 THE COURT: Thank you very much.

22 MR. SCAROLA: Thank you very much, Your
23 Honor.

24 (At 4:29 p.m., the deposition was
25 concluded.)

1 CERTIFICATE

2 - - -

3 STATE OF FLORIDA

4 COUNTY OF PALM BEACH

5

6 I, SHIRLEY D. KING, Professional Court
7 Reporter, do hereby certify that I was authorized to
8 and did stenographically report the foregoing
9 proceedings and that the transcript is a true and
10 correct transcription of my stenotype notes of the
11 proceedings.

12

13 Dated this 1st day of March, 2004.

14

15

16 _____
SHIRLEY D. KING

17 Professional Court Reporter

18

19

20 The foregoing certification of this transcript does
21 not apply to any reproduction of the same by any means
22 unless under the direct control and/or direction of
23 the certifying reporter.

24

25

PINNACLE REPORTING, INC.
(561) 820-9066

16div-004652

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR
PALM BEACH COUNTY, FLORIDA
CASE NO. 2003 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiffs,
-vs-

MORGAN STANLEY & CO., INC.,
Defendant.

Transcript of Proceedings beginning at
3:30 p.m., and concluding at 4:29 p.m., on Friday,
February 20, 2004, taken at the Palm Beach County
Courthouse, West Palm Beach, Florida, before the
Honorable Elizabeth T. Maass, Circuit Court Judge.
Reported by Shirley D. King, Professional Court
Reporter.

PINNACLE REPORTING, INC.
(561) 820-9066

2

1 A P P E A R A N C E S

2

3

SEARCY DENNEY SCAROLA
BARNHART & SHIPLEY, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33409
Phone: (561) 686-6300
BY: JACK SCAROLA, ESQUIRE

7

8

JENNER & BLOCK LLP
One IBM Plaza
Chicago, Illinois 60611
Phone: (312) 222-9350
BY: JEROLD S. SOLOVY, ESQUIRE
RONALD L. MARMER, ESQUIRE

11

12

KIRKLAND & ELLIS LLP
777 South Figueroa Street
Los Angeles, California 90017
Phone: (213) 630-8413
BY: LAWRENCE P. BEMIS, ESQUIRE
THOMAS A. CLARE, ESQUIRE

15

16

CARLTON FIELDS
Esperante
222 Lakeview Avenue, Suite 1400
West Palm Beach, Florida 33401
Phone: (561) 659-7070
BY: JOSEPH IANNO, JR., ESQUIRE

19

20

Also present: Steve Fasman

21

22

23

24

25

PINNACLE REPORTING, INC.
(561) 820-9066

3

1 PROCEEDINGS

2 - - -

3 THE COURT: Good afternoon. Have a seat.

4 This is Coleman and Morgan Stanley. Where do we
5 want to start?

6 MR. SCAROLA: Your Honor, Jack Scarola on
7 behalf of Coleman Parent. With me is Mr. Jerry
8 Solovy, Mr. Ron Marmer, and this is Steve Fasman,
9 our corporate representative.

10 And I think that we are probably in
11 agreement that the first issue to be dealt with,
12 which can be dealt with rather easily, is a
13 determination as to the consolidation of the two
14 related pending cases. And I think that both
15 parties are in agreement that it is appropriate,
16 both for purposes of discovery and trial, to
17 consolidate these related matters.

18 THE COURT: Is that accurate?

19 MR. BEMIS: Good afternoon, Your Honor.
20 Lawrence Bemis with Kirkland & Ellis on behalf of
21 Morgan Stanley and Morgan Stanley Senior

16div-004655

22 Funding.

23 The answer is, yes, I think we all agree to
24 that.

25 THE COURT: I'm just trying to think,

PINNACLE REPORTING, INC.
(561) 820-9066

4

1 mechanically, how do we want to do that?

2 MR. BEMIS: Your Honor, there is no separate
3 order on that. We did submit a proposed order
4 which was based on what we understood was a
5 sample pretrial compliance order for case
6 management conference Your Honor had entered, but
7 the consolidation issue, for reasons which escape
8 me, was not put in there, so we will need a
9 separate order ordering consolidation.

10 THE COURT: Right. But I'm just trying to
11 figure out mechanically what we want the clerk to
12 do with the files and how we would like to
13 proceed with the pleadings.

14 MR. BEMIS: I think the way it's done is we
15 put both case captions on each and file them
16 accordingly.

17 MR. SCAROLA: Either that or Your Honor's
18 order can simply direct us to file all pleadings
19 under the lower case number and we'll just style

20 everything under the lower case number. I think
21 what otherwise happens is that the clerk requires
22 us to file duplicates.

23 THE COURT: We don't want to do that. I
24 want to have one place where we look for
25 everything.

PINNACLE REPORTING, INC.
(561) 820-9066

5

1 MR. BEMIS: What I would like, Your Honor,
2 is not to have the single number on the cases,
3 but that both numbers appear, for reasons I'm
4 going to explain. There may be additional
5 counsel in this case who will be only in one of
6 the cases and not the other.

7 THE COURT: So are we agreeing we're
8 consolidating for all purposes?

9 MR. SCAROLA: Yes, Your Honor, both
10 discovery and trial.

11 MR. BEMIS: Yes, Your Honor.

12 THE COURT: For discovery and trial. Okay.
13 So we will use a joint caption, but with the
14 lower number listed first, and you'll direct the
15 clerk to place everything from now on in the
16 lower-numbered case?

17 MR. SCAROLA: I think that works.

18 MR. BEMIS: That's fine, Your Honor.

19 THE COURT: Okay. Is there a written motion
20 to consolidate? If so, who filed it?

21 MR. BEMIS: It is not, Your Honor. But it
22 would normally be something that under Rule 1.200
23 we would take up at this time.

24 THE COURT: No, no. I'm just trying to
25 think. I'm writing my notes so I can do the

PINNACLE REPORTING, INC.
(561) 820-9066

6

1 order and whether I had to say it was a joint or
2 was it written or oral --

3 MR. SCAROLA: Pursuant to oral stipulation
4 of the parties.

5 THE COURT: So we agree it is a joint ore
6 tenus motion to consolidate?

7 MR. BEMIS: Actually, it's in our joint
8 written statement to the Court, as you ordered,
9 that we agreed to it, so it's actually pursuant
10 to a written statement.

11 THE COURT: Okay. What next?

12 MR. SCAROLA: Your Honor, I think that the
13 next matter appropriately addressed is the issue
14 of the trial date. I think that once Your Honor
15 has made a determination as to when this case

16 will be tried, then the parties are going to be
17 able to come to an agreement with regard to
18 establishing other related deadlines based upon
19 that trial date.

20 And Your Honor may recall from a review of
21 our submissions, that not surprisingly on this
22 side of the courtroom we have requested an August
23 trial date and on that side of the courtroom they
24 have suggested a February 2005 trial date.

25 I will tell Your Honor, that from the

PINNACLE REPORTING, INC.
(561) 820-9066

7

1 Plaintiff's perspective, we are prepared to split
2 the difference with the defense and choose a date
3 between the August and February date, taking into
4 account these considerations; the Jewish Holidays
5 are in September and it would be difficult for us
6 to select a date that was either during or very
7 close to the September Jewish Holidays, and,
8 obviously I think that all parties would be
9 concerned in terms of our ability to select a
10 jury if we start bumping up against Thanksgiving,
11 Christmas and the New Year. What that means,
12 since we anticipate 15 trial days, three weeks of
13 trial, is that a date approximately the middle of

14 October would be far enough away from the
15 September holidays and also far enough away from
16 Thanksgiving that we would be able to comfortably
17 complete the trial in that period. So our
18 suggestion, in light of the requests that have
19 been made on both sides, if it fits in with Your
20 Honor's calendar, we are suggesting that a date
21 be selected in the beginning, approximately mid
22 October.

23 THE COURT: I guess a more fundamental
24 preliminary question, are we at issue yet?

25 MR. BEMIS: We are in --

PINNACLE REPORTING, INC.
(561) 820-9066

8

1 MR. SCAROLA: We are currently at issue.

2 THE COURT: Although you still plan to file
3 a motion to amend punitive damages?

4 MR. SCAROLA: That is correct, we are
5 anticipating filing a motion to amend to add
6 punitive damages.

7 I will tell Your Honor that it is our
8 position that that motion does not, because it
9 only goes to the relief sought, place the case in
10 a position where this matter is not at issue and
11 could not be set for trial.

12 THE COURT: Your suggestion is this be set
13 for trial in mid October?

14 MR. SCAROLA: That's correct.

15 THE COURT: That strikes me, quit honestly,
16 as pretty ambitious for a case this size.

17 MR. SCAROLA: Well, Your Honor, we have been
18 proceeding very quickly with regard to the
19 discovery in this matter. As Your Honor is well
20 aware, this is not the first litigation that
21 arises out of these related circumstances, so
22 discovery has been expedited by virtue of the
23 fact that we have been able to exchange documents
24 previously compiled in relation to other
25 litigation and rely upon prior deposition

PINNACLE REPORTING, INC.
(561) 820-9066

9

1 testimony taken in connection with other
2 litigation. And while this certainly is a
3 matter of substantial magnitude, we feel very
4 comfortable about our ability to be ready for
5 trial in early August and certainly anticipate no
6 problem whatsoever in being ready to go to trial
7 in October. So I don't think it is as ambitious
8 as might appear at first blush.

9 MR. BEMIS: Your Honor, may I use the

10 podium?

11 THE COURT: However you're more comfortable
12 is fine.

13 MR. BEMIS: I'm used to a podium.

14 Your Honor, as you're aware, there are two
15 calendars. And I won't go in the intermediate
16 base because I do agree with Mr. Scarola, that
17 once we have a trial date, we can work
18 backwards. And whatever date you select, we'll
19 deal with that offline and not take the Court's
20 time.

21 I didn't know until just now that they're in
22 agreement that it's a three-week trial. So it's
23 a jury trial.

24 THE COURT: Well, the only thing I will
25 point out is we're not in trial on Fridays. So

PINNACLE REPORTING, INC.
(561) 820-9066

10

1 if we're talking about 15 trial days, it's really
2 a four-week trial.

3 MR. BEMIS: So it's a four-week trial, Your
4 Honor.

5 Based on the original schedule, we proposed
6 a date approximately 12 months forward. And I
7 thought that was a very aggressive schedule, for

8 reasons I'm going to tell you, and I question
9 whether we can meet it. And the reason is,
10 overall, while they say this has been done
11 before, it is true that they have done it before,
12 as I'm going to explain, but Morgan Stanley and
13 Morgan Stanley Senior Funding haven't been a
14 party to any of the other litigation and we
15 haven't gone through all of this before, so they
16 had a huge head start in terms of their
17 preparation for the case.

18 Even an October schedule, Your Honor, I
19 think is extraordinarily unrealistic for a number
20 of reasons. First of all, it is a huge case and
21 it's not old. I mean, these cases were filed in
22 May of 2003. It was on the very eve of the
23 running of the statute of limitations, which had
24 already been extended by --

25 THE COURT: That's not relevant to what

PINNACLE REPORTING, INC.
(561) 820-9066

11

1 we're looking at, but go ahead, sir.

2 MR. BEMIS: But the point of it is that
3 there are no equities in this case that require
4 us to go on a crazy track of double tracking
5 depositions and creating all kinds of logistical

6 difficulties when a pace of one year to get this
7 case finished is not unreasonable, given its
8 size. We have \$2 billion of damages asserted on
9 one side; \$680 million on our side. You have
10 five sets of parties to this case: You have the
11 parties to the acquisition, we have the
12 accountants, we have the law firm, investment
13 bankers, financial advisors. There are three
14 sets of either litigation or proposed litigation
15 that were massive that preceded this. There was
16 the Coleman claims against Sunbeam, which did not
17 result in litigation, but there was a lot of
18 paperwork generated there. Coleman sued Arthur
19 Anderson. There was a big settlement there.
20 You're familiar with that because we had an issue
21 over the production of the settlement agreement.
22 There was a shareholder suit for Sunbeam. SEC
23 investigation. We received in August 400 boxes
24 of documents in the case. There have been 210
25 witnesses who have given testimony in these cases

PINNACLE REPORTING, INC.
(561) 820-9066

12

1 over 400 plus days. And we have had eight
2 months at this point to try to work ourself
3 through that.

16div-004664

4 Now the parties have been moving quickly.
5 I've been on the case only three or four weeks.
6 And I was brought in because it has been moving
7 quickly and because I've also -- I practiced in
8 Florida for 18 years. This case -- in nine
9 months we have accomplished an extraordinary
10 amount of written discovery. I could go through
11 it, but I think you're aware of it. We have many
12 document requests, hundreds of requests for
13 admissions, interrogatories. And that's on both
14 cases. We've been doing both cases
15 simultaneously. We've had 18 depositions taken
16 already. There are 28 deposition notices or
17 commissions pending today. Twenty-eight. Now
18 in terms of motion practice, you're well familiar
19 with that. And on top of what we've
20 accomplished, we have the pending appeal on the
21 venue issue. Now Your Honor's ruled on that
22 issue on December 15th. The first appellant
23 brief, Your Honor, is due February 25th. And if
24 we assume the 40/40 -- or excuse me -- 20/20 plus
25 extensions, if any are requested, we still have

PINNACLE REPORTING, INC.
(561) 820-9066

2 requesting. I frankly -- my experience in the
3 Fourth DCA is that we probably won't have a
4 decision by either August or October. Now I
5 could be wrong on that. But the last case I had,
6 which the decision came down in October of last
7 year, it took 18 months from oral argument to get
8 an opinion and it's now on rehearing. So I
9 think we're kidding ourselves that we're going to
10 get that issue resolved. Now why is that
11 important? Two reasons. One is, you can't enter
12 a final judgement in the case, even if you triad
13 (ph) the verdict, for either party. You'd have
14 to stay entry of the judgement. If the court of
15 appeals were to disagree with Your Honor -- and
16 respectfully that is a possibility --

17 THE COURT: Sure.

18 MR. BEMIS: -- the entire trial is a nullity,
19 under the Supreme Court's decision in Leroy
20 versus Great Western United at 443 U.S. 173. It
21 was a case under the Williams Act. I don't
22 believe there's any Florida case directly on
23 point, but I know that's Federal law and I
24 believe that would be the law in Florida.

25 Also, Your Honor, there's going to be an

1 additional party requested to be added. Morgan
2 Stanley Senior Funding intends to add Arthur
3 Anderson as a defendant to the case in the Morgan
4 Stanley Senior Funding case. The claims there
5 will be essentially duplicative, in the sense
6 that they will mirror the claims that Coleman
7 filed against Arthur Anderson and resulted in the
8 settlement agreement that you reviewed. We have
9 proposed a date of April 16th to get that
10 resolved.

11 One of the reasons why we need additional
12 time is that Kirkland & Ellis cannot represent
13 Morgan Stanley Senior Funding in that action.
14 We have a conflict. And so Morgan Stanley Senior
15 Funding is reviewing counsel now and they're
16 going to have to handle that matter. The
17 significance of this I think Your Honor would be
18 aware of, having reviewed the settlement
19 agreement, which is subject to a protective order
20 so I don't want to go into the terms of it
21 because it would, I think, violate the terms of
22 it, unless we did an in camera in chambers, but I
23 think Your Honor would know the reason we would
24 bring them in now that we have the settlement
25 agreement, which we didn't get, by the way, until

1 December, so it's a fairly recent development in
2 the case.

3 Another reason, Your Honor, about what is
4 going to happen in terms of scheduling, is just
5 the sheer number of depositions in this case. I
6 did say there have been 18 taken to date. There
7 are now requested, and that means notices are out
8 or commissions have been requested, so we're
9 manipulating dates and witness availability --
10 and, by the way, these have been set without
11 witnesses being asked whether they're available,
12 28 of them in 10 states. We intend to request a
13 total of 42 more depositions and they're located
14 all over the United States. In summary, we've
15 got 28 pending, most of which are by the
16 Plaintiffs. There are some that we have
17 commissions for and we're going to request a
18 total of 42. That's 70 depositions. It's not
19 possible to take 70 depositions in the time that
20 was originally proposed, August 2nd, for trial.
21 That would be one deposition a day, because
22 there's only 70 days left until their proposed
23 discovery cutoff. It's not going to happen. And
24 even extending the discovery cutoff on fact

25 discovery, it is a maniacal schedule that is not

PINNACLE REPORTING, INC.
(561) 820-9066

16

1 conducive to justice in the case. It just isn't
2 necessary when there are no equities to
3 advancement.

4 There are issues you're going to have to
5 resolve, whether it be by summary judgement,
6 which is likely on somebody's part on some of the
7 claims, and we are going to respectfully renew
8 our request that the choice of law issue be
9 resolved prior --

10 THE COURT: Let me ask you all this: I
11 mean, in all honesty, I think October is two
12 ambitious of a date realistically. What I would
13 like to do is, I'm looking -- can I have a 2005
14 calendar?

15 I believe a good day to start it would be
16 January 27th. That would be the first day of the
17 new docket for me. In my experience, that's a
18 good time to get jurors. Their vacations are
19 done; they're not in that spring vacation mode
20 yet. I just want to double-check that that is a
21 Monday. January 27th is a Monday. I don't
22 know if it's a holiday.

16div-004669

23 MR. BEMIS: It's President's Day.

24 THE COURT: Well, no, I think it might be

25 Martin Luther King's Birthday. It's a holiday.

PINNACLE REPORTING, INC.
(561) 820-9066

17

1 MR. BEMIS: It's one of those days.

2 President's Day is February.

3 THE COURT: That may be Martin Luther King

4 Day. If it is, we'll be starting on a Tuesday.

5 But assuming we take that as a trial date to

6 start, let's work backwards from there.

7 MR. BEMIS: My suggestion on that would be

8 to adopt Mr. Scarola's offer, and that is, that

9 we meet on that and not ask you to take the time

10 today to beat out 30 days, because there are a

11 lot of days --

12 MR. SCAROLA: I agree, Your Honor. That's

13 not likely to create a problem between us.

14 We'll be able to come to an agreement with regard

15 to the dates that fall working backwards from

16 that trial date.

17 THE COURT: That's fine. The only other two

18 things I would like to do then, if we're going to

19 sort of take that as a trial date, is take, I

20 would imagine, at least a day -- you all are

21 going to have to tell me if it needs to be longer
22 than that -- maybe a week or two weeks before the
23 trial date to do all the motions in limine and to
24 do any objections to deposition testimony, and,
25 we need to talk about the procedure for

PINNACLE REPORTING, INC.
(561) 820-9066

18

1 designating both deposition testimony and
2 objections to it. But the only thing that
3 upsets me, particularly if there's a long trial
4 like that, is if we inconvenience the jurors and
5 ask them to wait and waste their time to do
6 things that we, frankly, didn't do ahead of
7 time.

8 MR. BEMIS: I think the proposed schedule
9 that we had put before Your Honor does deal with
10 all those issues. And we'll make sure that it
11 conforms to your suggestion.

12 THE COURT: What I would want to do now,
13 quite honestly, is pick out the time at a minimum
14 for subsequent case management conference
15 hearings and that hearing time we know we're
16 going to need a week or two before the trial gets
17 started. You all then can back into whatever
18 scheduling you want as long as it's before me in

19 a timely manner. But I want the hearing time
20 carved out so we know we have it.
21 MR. SCAROLA: Your Honor, I anticipate that
22 as a consequence of the nature of the litigation
23 and the geographic diversity of the witnesses
24 involved, there will be substantial testimony
25 presented by way of videotape. That will require

PINNACLE REPORTING, INC.
(561) 820-9066

19

1 considerable judicial labor, in terms of page and
2 line designations, and rulings on objections far
3 enough in advance of trial to be able to complete
4 the editing process.

5 THE COURT: Right.

6 MR. SCAROLA: So even the idea that that
7 might be done in a day I think is probably --

8 THE COURT: How long do you think we need?

9 MR. SCAROLA: I'm strictly -- I'm
10 guesstimating based on prior experience in
11 dealing with that kind of situation before. And
12 I would think that we're probably looking at
13 three or four days.

14 THE COURT: That's fine. I'm just
15 looking.

16 MR. SCAROLA: I might suggest that that

17 might be an appropriate task for a special
18 master. That's not something I've discussed with
19 my client or cocounsel yet, but it may be.

20 THE COURT: I don't mind doing that. My
21 only concern would be that requires you to
22 designate the depositions far enough ahead of
23 time so the master can listen to it, issue a
24 report, give time for objections, and then give
25 me time to do whatever I need to do after the

PINNACLE REPORTING, INC.
(561) 820-9066

20

1 objections.

2 MR. SCAROLA: I understand. And, again, I
3 haven't thought about the logistics of that, but
4 it's a suggestion that I think both sides needs
5 to consider. That may help to expedite things
6 ultimately.

7 THE COURT: The only thing I'm wondering,
8 and you all can tell me, my personal experience
9 is that nothing much happens right before or
10 after Christmas. And I'm looking, December 24th
11 is a Friday, whether we want to try to set aside
12 that Monday, Tuesday, Wednesday, Thursday, so now
13 we know we have that time. It's sitting there
14 and if we can use it. . .

15 MR. SCAROLA: That works for us, Your Honor.

16 THE COURT: We can do all the motions in
17 limine and any other objections I'm going to have
18 to rule on we have it ready then.

19 MR. BEMIS: Your Honor, if you do that, I'm
20 going to be stuck here for Christmas.

21 THE COURT: You can't get out the 23rd?
22 You're going the wrong way. Where are you
23 going?

24 MR. BEMIS: I'm going back to the west
25 coast. You said the 24th --

PINNACLE REPORTING, INC.
(561) 820-9066

21

1 MR. SCAROLA: That'll be the 20th, the 21st
2 and the 22nd.

3 THE COURT: Just those three days.

4 MR. BEMIS: Monday, Tuesday and Wednesday is
5 fine.

6 THE COURT: Monday, Tuesday, Wednesday.
7 That would take us only to the 22nd, those three
8 days.

9 MR. SOLOVY: I can think of worse places to
10 be stuck than Palm Beach, Your Honor.

11 THE COURT: Most people are coming down
12 here.

13 MR. BEMIS: Thank you, Your Honor.

14 THE COURT: Okay.

15 MR. SOLOVY: That's a great time to get this
16 stuff done.

17 THE COURT: That way we have it done going
18 into the New Year, motions in limine and
19 objections to -- in your proposed timetable, you
20 give time frames for you all to do designations
21 of deposition testimony, objections and --

22 MR. BEMIS: Yes. And then we'd have to
23 present that as a package. We need to work out
24 the logistics of that. Mr. Scarola and I have
25 been through it, I'm sure, and can figure out a

PINNACLE REPORTING, INC.
(561) 820-9066

22

1 way to do it. It isn't easy and it won't be
2 easy for you no matter how we do it.

3 THE COURT: That's fine.

4 I know Defendant had a concern about at some
5 point reaching a determination on what
6 substantive law applies. Are we thinking we
7 would do this by summary judgement or by what
8 mechanism?

9 MR. BEMIS: My suggestion to that, and it's
10 in our schedule, that we brief that issue

11 separately.

12 THE COURT: Tell me procedurally how we're
13 doing it.

14 MR. BEMIS: It's called a motion. We file
15 an undifferentiated motion for choice of law
16 based on the claims. There are four claims in
17 the case. And those four claims state the
18 substantive law -- will determine the substantive
19 law that apply.

20 THE COURT: I hate to do this -- and it's
21 just the way I think. I apologize -- what kind
22 of motion is this? Is it declaratory
23 judgement? Is it summary? What are we calling
24 it?

25 MR. BEMIS: It's just a motion, Your Honor.

PINNACLE REPORTING, INC.
(561) 820-9066

23

1 Just under Florida Rules you can have an
2 undifferentiated motion for anything that
3 requires an order in the case. And Your Honor
4 has to decide the issue at some point. We can't
5 do jury instructions.

6 THE COURT: I agree we need to decide it.
7 Is this something that would require evidence be
8 considered?

9 MR. BEMIS: You can take evidence on it.
10 In fact, we cited some cases in the motion to
11 dismiss. I didn't argue that, but I read the
12 briefs. And it is possible, and not only is it
13 possible, but it should be done that way for your
14 benefit, as well as the parties. Because when we
15 get to the point of summary judgement, the jury
16 instructions, we need to know this issue. And
17 we've put a date in our order to brief the issue.

18 THE COURT: Does Plaintiff agree that this
19 should be done by a motion?

20 MR. SCAROLA: No, Your Honor. As a matter
21 of fact, you may recall that this same suggestion
22 has been made repeatedly by the Defense in
23 earlier hearings and Your Honor's reaction was
24 exactly the same as the reaction you're now
25 having.

PINNACLE REPORTING, INC.
(561) 820-9066

24

1 The choice of law issue needs to be
2 determined in a factual context. And you
3 expressly stated that it seems to you that the
4 correct procedural presentation of that issue was
5 by way of motion for summary judgement.

6 THE COURT: Let me ask you this: Do we

7 agree that this is a decision that needs to be --
8 we certainly don't want to be making it in the
9 middle of trial.

10 MR. SCAROLA: We absolutely agree that it
11 needs to be made in advance of trial. And I
12 agree with the suggestion that Your Honor has
13 made repeatedly in the past, the way to address
14 it is by way of summary judgement.

15 THE COURT: Well, why can't I do this: What
16 if there's disputed issues of fact on a summary
17 judgement so we can't reach it on summary
18 judgement. Then what happens?

19 MR. SCAROLA: Well, in the presentation of
20 the summary judgment motion we still need to make
21 a determination, based upon the facts presented
22 to the court, as to the standard that is going to
23 be applied. So the facts can be presented to the
24 court in the context of a summary judgement
25 motion and you'll then be able to determine which

PINNACLE REPORTING, INC.
(561) 820-9066

25

1 law applies. Even if you ultimately determine,
2 that because there are disputed issues of fact,
3 under the law that applies, no summary judgement
4 can be granted. But I really think that Your

16div-004678

5 Honor needs to have a factual context in which to
6 make that determination. It cannot be done in
7 the abstract.

8 MR. BEMIS: Your Honor, the issue of the
9 substantive law that is applicable to the case
10 does not turn on contested issues of who said
11 what to whom. They turn on the gravity of the
12 claims in the sense of the restatement. Those
13 issues can be resolved, you may take evidence on
14 those issues, and you're not going to decide any
15 liability or damages.

16 THE COURT: I understand that.

17 MR. BEMIS: And that should be determined
18 before we go into the process of briefing summary
19 judgment, because it will complicate the matter
20 immeasurably for us to try to prepare for this
21 case for trial with 80 some depositions if we
22 don't know what the controlling law is.

23 When Your Honor first considered this -- and
24 I've read the transcript. I understand you had
25 some difficulties with it. I think the reason

PINNACLE REPORTING, INC.
(561) 820-9066

1 for it was -- and I'm not putting my words into
2 your head, but as I read it, it was the

3 combination of the venue issue and trying to deal
4 with what you do with that and the facts related
5 to that and how that would interplay with the
6 summary judgement, as well as a feeling that
7 perhaps you need to have the summary judgement of
8 who said what to whom framed when you were
9 deciding choice of law. And I think
10 fundamentally that's not right. And this one
11 I've heard -- and you'll tell me if you disagree
12 -- I think the process should be, look at the
13 gravity of the claims. Those gravity issues are
14 not dispositive of summary judgement. And we can
15 decide. Who said what to whom will be on summary
16 judgement. What law applies to who said what to
17 whom and when they did it, those are summary
18 judgement issues. The rest is a substantive
19 legal issue that you need to decide as a
20 precursor for deciding summary judgement, if
21 those motions are filed. And that should be
22 decided as promptly as possible, given your
23 schedule.

24 THE COURT: Tell you what, neither one of
25 you is going to convince me today that one

PINNACLE REPORTING, INC.
(561) 820-9066

1 approach is correct or incorrect. But I'm just
2 telling you, I still have the same concerns I've
3 had all along, which is something to suggest we
4 do an evidentiary hearing on this kind of point.

5 MR. BEMIS: I don't think it's an
6 evidentiary hearing. I think gravity of claims
7 is like personal jurisdiction, for the most
8 part. You know, those are not dispositive to the
9 case. It's, where did it happen.

10 THE COURT: That's still evidentiary.

11 MR. BEMIS: This is a case about who said
12 what to whom. We need to know what law applies
13 to those representations.

14 THE COURT: Nobody's suggesting it's not an
15 important issue. All we're suggesting is, how do
16 we want to do this.

17 MR. BEMIS: My suggestion is, Your Honor,
18 let's brief the issue. We're the ones doing the
19 work, other than you reading the brief. If you
20 conclude, I can't decide it, I think it's
21 improper without an evidentiary hearing or I'm
22 not going to have an evidentiary hearing, so be
23 it. Then we'll proceed to the next step. But we
24 ought to be given an opportunity to put the issue
25 --

1 THE COURT: So what you are suggesting --

2 MR. SCAROLA: Is an advisory opinion from
3 the Court.

4 MR. BEMIS: No.

5 THE COURT: Well, I'm still trying to figure
6 out how we want to do this. I understand the
7 point you're making, but I also -- let me ask you
8 this: Are you all in agreement on the timetable
9 when this needs to be determined?

10 MR. SCAROLA: It is our belief that it only
11 needs to be determined in the context of whatever
12 summary judgment motions are filed. If the
13 choice of law issue is not dispositive of a
14 claim, then how could it affect the presentation
15 of evidence at trial?

16 THE COURT: No. I understand that you all
17 don't want to be briefing the substantive motion
18 for summary judgement and have to brief it under
19 both law because I haven't made a decision on
20 which one's going to apply.

21 MR. SCAROLA: On the contrary, I believe
22 that's exactly what we should be doing. I think
23 that we should be briefing the summary judgment
24 motions in the context of conflicting laws
25 because the decision doesn't need to be made,

1 except as the laws in fact conflict with regard
2 to a particular set of facts. If there's no
3 difference in the law under Set of Facts A and
4 Set of Facts B, then Your Honor doesn't need to
5 determine which law applies.

6 THE COURT: Yes. But on the other hand,
7 then I'm going through the mental exercise of
8 looking at two different state's laws and
9 deciding whether they're the same or not; and
10 then if they're different, having to go the step
11 to decide -- and I'm doing that on every point of
12 law I'm having to consider, while making the
13 fundamental decision of are we going to apply New
14 York or Florida substantive law. Then we're only
15 looking at one law from then on.

16 MR. SCAROLA: Except that the authorities
17 suggest that this needs to be an issue-by-issue
18 determination.

19 MR. BEMIS: It is an issue-by-issue by
20 claim. There are four claims in the case.
21 Whether they're our claims or their claims or our
22 claims against Arthur Anderson, there are four
23 claims. They're all "who said what to who"

24 claims. You need to decide the gravity of the
25 law that applies to those claims before we get

PINNACLE REPORTING, INC.
(561) 820-9066

30

1 into trying to briefing whether the "who said
2 what to who" gives rise to a liability.

3 THE COURT: I understand what you're saying
4 and I will tend to agree, although I'm still hung
5 up on procedurally how we're going to get to
6 where we need to go.

7 MR. BEMIS: Just brief it and make a
8 decision whether we're right or wrong and one way
9 or the other we live with it and we go on with
10 the case.

11 MR. SCAROLA: Respectfully, Your Honor, if
12 we're briefing something, don't we have to brief
13 it in the context of some kind of motion? And if
14 it's not a summary judgment motion, what is it?

15 MR. BEMIS: There is no rule in Florida that
16 motions have to be summary judgement or anything
17 else. Any request for an order is a motion.

18 THE COURT: I would agree that there are
19 certain requests to the court that simply aren't
20 appropriate. And if I could only have labels on
21 the motions that are appropriate, we know they're

22 appropriate, and there's procedures in place for
23 considering them.

24 MR. BEMIS: Well, that's true, because they
25 have a certain set we review all of the time.

PINNACLE REPORTING, INC.
(561) 820-9066

31

1 But every case has peculiar issues and we don't
2 have choice of law in most cases so we have to
3 have an order telling us. How do you do that?
4 You do it by motion. And any request in Florida
5 for an order by the court is done by motion.
6 Some we have labels for and we have specific
7 standards for. The case law on choice of law,
8 there's a law for that, isn't in the rules, it's
9 in the cases. And there are cases talking about
10 what you consider to determine choice of law,
11 which, again, is not a question of who said what
12 to who, but where's the gravity of the law and
13 how we apply it.

14 THE COURT: Here's what I think we need to
15 do: I think we need to set a deadline for you
16 all to file whatever motions you're going to be
17 filing seeking for determination on choice of
18 law. And if we decide it should be done on
19 summary judgement, you're doing your summary

20 judgement. If somehow I can do a hearing that's
21 not a summary judgment, you file an appropriate
22 motion. If you think it's evidentiary, you put
23 that in a motion.

24 MR. BEMIS: We have a date for that in our
25 proposed order. It's June 21st. But we're going

PINNACLE REPORTING, INC.
(561) 820-9066

32

1 to have to move it in light of your change of the
2 date. But we do have a date for that, which
3 would allow us to get the issue teed up.

4 THE COURT: I think what we need to do now
5 then is to set aside the hearing time for hearing
6 these motions so we know where we're going.

7 MR. BEMIS: We had set the week of June 21st
8 for the hearing. We had a little bit earlier
9 date for this, but we can --

10 MR. SCAROLA: The order anticipates, Your
11 Honor, that there will be a deadline for filing
12 motions and then a period of time shortly
13 following that when those motions --

14 THE COURT: What I'm suggesting, though, is
15 this is a motion that needs to be sped up. This
16 will not be sort of a generic motion for summary
17 judgement.

18 MR. BEMIS: No. What we had contemplated in
19 our order -- and again, we may have to advance
20 this in light of the trial date -- but we had
21 suggested May 28th as the briefing date,
22 responses on June 18th, and a hearing on the week
23 of June 21st. We're perfectly willing to live
24 with that schedule, or we can advance it if we
25 have to. We're far enough in advance of the

PINNACLE REPORTING, INC.
(561) 820-9066

33

1 trial preparation and summary judgement to get
2 that done.

3 So the week of June 21st was our hearing.
4 We were going to suggest that week. We didn't
5 know what your calendar held.

6 THE COURT: Frankly, I'm busy on that day.

7 MR. SCAROLA: We were hoping it was August.

8 THE COURT: And it's sort of hard because
9 right now we don't know how long it would take.

10 MR. BEMIS: I would suggest that we're
11 talking probably an hour, an hour hearing, 30
12 minutes. I mean, if the United States Supreme
13 Court can -- Bush versus Gore was argued 20
14 minutes per side.

15 THE COURT: Sure. But I assume that we're

16 assuming then that we're not taking any

17 evidence.

18 MR. BEMIS: If we do, we'd have to come
19 back. We're far enough in advance we can tell
20 you, Your Honor, the next time we meet with you
21 we're suggesting, I think, at your suggestion, a
22 monthly conference. This is an issue we could
23 address --

24 THE COURT: If you're suggesting we not
25 carve out the time now, that's fine.

PINNACLE REPORTING, INC.
(561) 820-9066

34

1 MR. BEMIS: Give us a date during the week
2 of June 21st. We'll live with that and work
3 against it.

4 THE COURT: The week of June 21st we
5 actually have a judges conference. I'm looking
6 at Monday, June 28th, nine-thirty.

7 MR. BEMIS: That's fine. I'm not that busy
8 yet.

9 MR. SCAROLA: Obviously, Your Honor, we need
10 to see what the motion is in order to make a
11 determination as to whether it is an appropriate
12 way in which to present these issues to the
13 Court. And we can't judge that until we see the

14 motion.

15 MR. BEMIS: We do have a provision for reply
16 in responses to the motion.

17 THE COURT: That is all motions seeking a
18 determination of choice of law.

19 MR. BEMIS: And we'll have those on file by
20 -- I think the 18th would be a completion date,
21 which would give Your Honor 10 days in advance.
22 You'd have all the materials, which I would hope
23 would be adequate for consideration.

24 THE COURT: Okay.

25 MR. SCAROLA: Your Honor, just so that I'm

PINNACLE REPORTING, INC.
(561) 820-9066

35

1 sure I understand what you have just said. If
2 it is the Plaintiff's position that choice of law
3 issues need to be resolved in the context of
4 summary judgment motions --

5 THE COURT: What I'm saying is, no, that
6 we're not going to be doing -- to the extent --
7 if at some point you're going to be seeking a
8 determination from me prior to trial of the
9 appropriate substantive law to apply, those
10 motions are going to be heard that day.

11 MR. SCAROLA: Well, our position is that

12 Florida Law applies.

13 THE COURT: Then you wouldn't be seeking any
14 other determination other than Florida Law.

15 MR. SCAROLA: But what I'm trying to
16 determine is, if it is our position that Florida
17 Law applies and consequently we are not filing a
18 choice of law motion, but rather only planning on
19 presenting our summary judgment motions pursuant
20 to Florida Law, is there any --

21 THE COURT: Assuming you won't be arguing in
22 those same motions that Florida Law is the law
23 that gets applied.

24 MR. SCAROLA: Well, clearly whenever we file
25 a summary judgement motion we're arguing that

PINNACLE REPORTING, INC.
(561) 820-9066

36

1 Florida Law applies.

2 MR. BEMIS: Your Honor --

3 THE COURT: You're arguing Florida Law
4 applies, but there is not -- please understand,
5 that what I don't want is motions for summary
6 judgement filed by the Plaintiff in October which
7 both argue Florida Law and argue that Florida Law
8 is the applicable law. The point of this is to
9 determine, for the purposes of this case, the

10 substantive law that will apply. And after this,
11 we won't be arguing which substantive law applies
12 for various claims because we will already, my
13 hope is, have determined that.

14 MR. SCAROLA: And so that the Court
15 understands what our position is, it is our
16 position that the choice of law determination
17 cannot be made in the abstract, but only in the
18 context of specific issues presented in either a
19 summary judgment motion or some other motion that
20 is fact specific.

21 THE COURT: But we already have your claims,
22 correct?

23 MR. SCAROLA: You do have our claims,
24 absolutely. Yes, they're stated in our
25 complaint.

PINNACLE REPORTING, INC.
(561) 820-9066

37

1 THE COURT: Right. And so presumably
2 they're going to be determined by substantive law
3 of New York or Florida.

4 MR. SCAROLA: We presume they're going to be
5 determined by Florida Law.

6 MR. BEMIS: And we presume New York, and
7 that's what we're going to thrash out. Who said

8 what to who will be determined in summary
9 judgement, but the gravity of law will be
10 determined by you as a matter of law, which is
11 your responsibility --

12 THE COURT: But please understand, so you
13 know what I'm trying to say, if we get into
14 October and you file something seeking summary
15 judgment on Florida Law, you can argue Florida
16 Law to me, but you won't be able to argue the
17 applicability of the Florida Law.

18 MR. SCAROLA: Because you will have already
19 made that determination --

20 THE COURT: Because that's the point -- on
21 this point, I agree with Defendant. This is a
22 threshold issue we need to reach, both for the
23 economy of your client and for the economy of the
24 court. It's simply not an efficient way to run a
25 case, not to know which substantive law applies.

PINNACLE REPORTING, INC.
(561) 820-9066

38

1 MR. SCAROLA: I think I understand what the
2 Court's intention is. I'm just having a little
3 bit of difficulty understanding, as a practical
4 matter, how that motion is going to be -- the
5 procedural manner in which that motion is going

16div-004692

6 to be presented to the Court, other than by way
7 of summary judgment.

8 THE COURT: Obviously I share that concern
9 and I'm sure we're going to get educated.

10 MR. BEMIS: Thank you, Your Honor.

11 MR. SCAROLA: Okay.

12 MR. BEMIS: Are there any other critical
13 dates of the pretrial schedule that Your Honor
14 would like to address?

15 THE COURT: Hold on. I just want to finish
16 my notes.

17 And we agree this is a 15-day trial?

18 MR. BEMIS: Fifteen trial days, Your Honor,
19 yes.

20 THE COURT: Is that including jury
21 selection?

22 MR. BEMIS: Yes. I mean, that's our best
23 guess. I mean, at this point it's tough to tell,
24 but that's our best guess. And apparently Mr.
25 Scarola agrees that 15 days appears to be what

PINNACLE REPORTING, INC.
(561) 820-9066

1 we're going to need.

2 MR. SCAROLA: I believe so, Your Honor.

3 Your Honor, I'm sorry to go back one more

4 time, but I do want to be certain that I

5 understand.

6 If it is our position that Florida Law does
7 apply in this case, is it necessary for us to be
8 filing something affirmatively?

9 THE COURT: Only if -- please understand --
10 I can't think of how to say it more clearly. Let
11 me think if I can -- that you would be precluded
12 then from arguing later on in your motions for
13 summary judgement the applicability of Florida
14 Law; this would simply be an assumption that it
15 did apply. But if there were disputed issues
16 about whether it did, we wouldn't be arguing it
17 then.

18 MR. SCAROLA: I only need to understand
19 where the burden lies. If nobody does anything
20 between now and the time of filing of motions for
21 summary judgement, I would assume that the law
22 that would have to be applied, based upon what
23 Your Honor just said, is the Law of Florida.

24 THE COURT: No. I would not have a law to
25 apply. And if you go back, that meant that you

PINNACLE REPORTING, INC.
(561) 820-9066

2 management conference.

3 MR. BEMIS: Your Honor, we're going to file
4 a motion that it's New York Law.

5 THE COURT: Right, and that becomes moot,
6 because you're going to force the issue.

7 MR. SCAROLA: If there's a clear
8 understanding that they're forcing the issue,
9 then that's fine. I know that they're going to
10 file a motion to which we're going to respond.

11 But it seems to me, that in the absence of
12 their assuming the burden of demonstrating that
13 New York Law applies, the law that ordinarily
14 applies to Florida cases is Florida Law. So I
15 just need to make sure that we're counting on
16 them filing a motion. And if they don't file a
17 motion --

18 MR. BEMIS: We will. And it will say that
19 New York Law applies and they will respond that
20 Florida Law applies and Your Honor will make a
21 judicial ruling and we'll follow up.

22 MR. SCAROLA: That's fine. The record is
23 clear as to how that's going to happen then.

24 THE COURT: All right. It strikes me, we
25 need to stop abusing 8:45's and carve up some

1 reasonable hearing time.

2 MR. BEMIS: We have, Your Honor, what I call
3 a modest proposal to reduce frequent flyer miles
4 from our standpoint, and that is, that we take
5 you up on your suggestion of setting aside an
6 hour or if you believe more -- I don't know the
7 appropriate frequency, whether it should be once
8 a month or whether every three weeks, depends on
9 your calendar and what's pending, and then have
10 everything scheduled at one time. I would
11 suggest a seven-and-two rule, where seven days in
12 advance all motions are filed, two days before
13 that responses are filed and Mr. Scarola and I
14 can take alternating responsibility for providing
15 Your Honor with the materials several days in
16 advance. Then we just go through them seriatim.

17 THE COURT: It strikes me that every three
18 weeks may be about right. I'm afraid every month
19 may not be often enough.

20 MR. BEMIS: Three weeks is fine with us.

21 MR. SCAROLA: May I have just one moment?

22 THE COURT: Sure.

23 MR. SCAROLA: Is it Your Honor's intent that
24 there will be no uniform motion calendars during
25 --

1 THE COURT: Well, that's something we can
2 talk about. We've had a number of hearings on
3 the uniform motion calendar that probably
4 shouldn't have been set there. In all honesty,
5 you guys are sophisticated enough attorneys, I
6 would be shocked if you had a motion that clearly
7 was probably not a UMC. It strikes me, you guys
8 will work it out. On the other hand, if there is
9 one, I certainly don't mind hearing it.

10 MR. SCAROLA: I only asked that question
11 because it'll make a difference in terms of what
12 we think appropriate frequency to be.

13 THE COURT: Sure. We're talking about
14 frequency and length of the hearing, whether we
15 think it should be an hour, an hour and a half or
16 two hours, and that depends on how frequently
17 we're going to do it.

18 MR. BEMIS: Your Honor, my proposal is three
19 weeks, two hours. We'll know in advance. I love
20 your suggestion, so that's fine with us.

21 THE COURT: Why don't we just cross out all
22 our time for this case.

23 MR. BEMIS: Actually, Your Honor, your
24 suggestion yesterday is really, in my experience

25 here, it is really the most expeditious way, and

PINNACLE REPORTING, INC.
(561) 820-9066

43

1 the state courts, big cases, just carve it out --

2 THE COURT: I agree with that. Two hours
3 every three weeks is fairly aggressive, but if
4 that's what it needs. I don't want to put all
5 the things in place to have a specially set trial
6 and discover that we didn't have to, a sufficient
7 hearing would have been fine.

8 MR. SCAROLA: Our past experience, our track
9 record thus far is, that we would not consume two
10 hours of Your Honor's time every three weeks. I
11 would also anticipate, however, that as discovery
12 heats up in this case, that we might consume that
13 much time. My suggestion would be that we might
14 want to start out at an hour and then increase
15 the time as we get farther on down the road,
16 because we'll probably need additional time
17 later.

18 MR. BEMIS: That's fine with me, Your Honor.

19 MR. SCAROLA: And we can let you know at one
20 of those one-hour hearings the point in time in
21 which we anticipate we're going to now need two
22 hours.

23 THE COURT: Frankly, by that time it's too
24 late to give you the two hours. I'm going to set
25 the time up right now.

PINNACLE REPORTING, INC.
(561) 820-9066

44

1 MR. SCAROLA: Well then that's great. Then
2 we'll take the two hours now.

3 THE COURT: So first of all, we want mid
4 March. Is that what we're talking about first?

5 MR. SCAROLA: That's fine.

6 THE COURT: I can give you an hour at
7 three-thirty on March 19th. I don't have
8 anything in the morning. Do you want that one?

9 MR. BEMIS: Three-thirty is fine with us.

10 MR. SCAROLA: That's fine.

11 THE COURT: 3/19/04, three-thirty, one
12 hour.

13 The next one is going to be early April. I
14 can do four o'clock on April 16th.

15 MR. BEMIS: April 16th, 4 p.m.

16 THE COURT: Then we got May.

17 We could do it May 7th. Would you prefer
18 morning or afternoon, if given a choice?

19 MR. BEMIS: Frankly, we'd prefer the
20 mornings, so we can come in the night before.

21 THE COURT: I could do eight o'clock on May

22 7th?

23 MR. BEMIS: Fine.

24 THE COURT: All right. And after that we'll

25 start the two-hour ones. So we're looking the

PINNACLE REPORTING, INC.
(561) 820-9066

45

1 beginning of June. That's May 28th. We prefer

2 8 a.m. again?

3 MR. BEMIS: That's fine, Your Honor. What

4 day of the week is May 28th?

5 THE COURT: These are all Fridays, because

6 those are all the special set.

7 MR. BEMIS: May 28th, is that the Friday

8 before Memorial Day?

9 THE COURT: It is the Friday before Memorial

10 Day.

11 MR. BEMIS: Either come up or go back from

12 the 28th, because Memorial Day is very difficult

13 to get in and out.

14 THE COURT: June 4th, 8 a.m., still two

15 hours.

16 MR. BEMIS: Fine.

17 THE COURT: You probably don't want July

18 2nd?

19 MR. BEMIS: July 2nd is okay. That will be

20 okay with us.

21 THE COURT: You sure?

22 MR. BEMIS: Yes.

23 THE COURT: That's a little more than --

24 that's four weeks instead of three.

25 MR. BEMIS: I think by summer we're going to

PINNACLE REPORTING, INC.
(561) 820-9066

46

1 be so deep in depositions that --

2 THE COURT: 8 a.m., two hours.

3 Late July. July 23rd?

4 MR. BEMIS: Fine.

5 THE COURT: That would be 9 a.m.

6 We're in mid August.

7 MR. IANNO: Your Honor, July 23rd was 9

8 a.m.?

9 THE COURT: Yes.

10 Do you want August 13th or August 20th?

11 MR. SCAROLA: 13th, please.

12 MR. BEMIS: 13th is fine.

13 THE COURT: August 13th, '04, 8 a.m.

14 Early September. September 3rd. That would

15 be one-thirty for two hours.

16 MR. BEMIS: Where is that in relation to

17 Labor Day?

18 THE COURT: You want to avoid that?

19 MR. BEMIS: It's so hard to travel on those
20 holidays.

21 THE COURT: I know. I generally go away for
22 a long weekend right after that.

23 MR. SCAROLA: Last week in August.

24 THE COURT: We already have August 13th.

25 MR. BEMIS: If we could just move it to

PINNACLE REPORTING, INC.
(561) 820-9066

47

1 another week in September if you have it, because
2 that's a vacation period for a lot of people and
3 a holiday weekend.

4 THE COURT: But then we're up to September
5 --

6 MR. SCAROLA: 10th.

7 THE COURT: No. That's the weekend I
8 usually go away. September 17th or go back in
9 late August.

10 MR. BEMIS: The 17th is fine with us.

11 THE COURT: Isn't the 16th Rosh Hashanah.

12 MR. SOLOVY: Yes it is, and the 17th. So
13 why don't we go the end of August, Your Honor.

14 THE COURT: That's fine. We can go back to

15 August 27th.

16 MR. BEMIS: That's fine.

17 THE COURT: And that we can do 8 a.m.

18 again.

19 And then we're in late September.

20 September 25 -- oh, Yom Kipper.

21 MR. SOLOVY: And that's a Saturday anyway,

22 Your Honor.

23 THE COURT: Oh, that's right. Could you do

24 the 24th? You can't do it first thing in the

25 morning?

PINNACLE REPORTING, INC.
(561) 820-9066

48

1 MR. SOLOVY: No, that will be too hard for
2 me. The only way, if we could intrude upon your
3 Thursday the 23rd, that would work. Anything
4 earlier that week.

5 THE COURT: I could do it the afternoon of
6 the 23rd. I couldn't do it the morning.

7 MR. BEMIS: That's fine.

8 MR. SOLOVY: That would work.

9 THE COURT: 3 p.m.

10 October 15th.

11 MR. BEMIS: That's fine.

12 THE COURT: 8 a.m.

13 November 5th, 8 a.m.

14 And then I think our last one would be early

15 December. December 3rd.

16 MR. BEMIS: That's fine.

17 MR. SOLOVY: Fine.

18 THE COURT: 8 a.m. Okay. We'll get all
19 those done.

20 MR. SCAROLA: Thank you.

21 Your Honor, we do have by agreement one
22 discovery dispute set on the uniform motion
23 calendar for next Thursday I believe, which we
24 would want to be able to --

25 THE COURT: We'll do it then.

PINNACLE REPORTING, INC.
(561) 820-9066

49

1 MR. BEMIS: I think there are actually two
2 set, one on each side.

3 Our suggestion is, let's move them over to
4 the first conference.

5 MR. SCAROLA: We do not want to delay ours.

6 THE COURT: Let me see next week's
7 calendar.

8 Tell you what, I think I could do it
9 nine-thirty on Thursday. Do you want to do that,
10 and then I could give you more time?

11 MR. SCAROLA: I am in trial in front of
12 Judge Miller and we generally begin at
13 nine-thirty.

14 MR. BEMIS: Could I have one second, Your
15 Honor?

16 THE COURT: Sure.

17 I don't mind if you come and we try to do
18 them. I really haven't looked at them so I don't
19 know what they are.

20 MR. BEMIS: First of all, I can't come next
21 week, but I can come on the 19th on this one.
22 It's my anniversary and I'm going to be on
23 vacation.

24 THE COURT: March 19th?

25 MR. BEMIS: I can't be here, but I'm going

PINNACLE REPORTING, INC.
(561) 820-9066

50

1 to have somebody here. We'll have it covered by
2 one of the firms. That's an impossible -- it's
3 my 35th wedding anniversary.

4 THE COURT: I understand. That's fine.

5 MR. BEMIS: With regard to Mr. Scarola's
6 motion, I have been looking at this -- I haven't
7 had as much time in the case unfortunately -- I
8 am going to make a concerted effort to see if I

9 can resolve that motion.

10 THE COURT: The one that's set next
11 Thursday?

12 MR. BEMIS: The one he wants to hear on the
13 19th.

14 THE COURT: When you said the 19th, you
15 confused me.

16 MR. BEMIS: I misspoke. The 26th.

17 I thought I could clearly have it resolved
18 by then. I'm almost certain I cannot resolve it
19 by next Thursday with the client to deal with
20 what he wants and to see what we can do. That
21 is why I would like to see it moved. I represent
22 to the Court we already started the process of
23 trying to get through the issues clearly with the
24 client to see if we can get it resolved in a
25 fashion that's acceptable or better than what we

PINNACLE REPORTING, INC.
(561) 820-9066

51

1 are currently doing with them so you don't have
2 to intervene.

3 THE COURT: So are you telling me you don't
4 think you can resolve it with the client by next
5 Thursday --

6 MR. BEMIS: Yes, I cannot.

16div-004706

7 THE COURT: -- but we recognize Mr. Scarola
8 doesn't want to wait until March 19th to have it
9 heard.

10 MR. BEMIS: Even if you give us just a
11 couple more -- rather than one week, give us two
12 weeks, even if it has to be on the uniform
13 calendar.

14 THE COURT: I could do it Wednesday, March
15 3rd at eight-thirty.

16 MR. BEMIS: That would be much better for
17 us. We might resolve it by then.

18 MR. SCAROLA: That's fine, Your Honor.
19 We're willing to make that concession. This is
20 an outstanding discovery --

21 THE COURT: Was this noticed for next
22 Thursday?

23 MR. SCAROLA: Actually, it was noticed for
24 earlier. They requested that we push it back.
25 We've pushed it back. And we will agree to push

PINNACLE REPORTING, INC.
(561) 820-9066

52

1 it back again, but this is a discovery matter
2 that has been pending for a long time.

3 THE COURT: So it's already noticed for
4 Thursday?

16div-004707

5 MR. SCAROLA: Yes.

6 THE COURT: Resetting the hearing -- and
7 Thursday is, what, the 26th -- 2/26/04 at eight
8 forty-five to 3/3/04 at eight-thirty.

9 MR. SCAROLA: Is Your Honor planning on
10 sending out a notice with respect to that
11 hearing?

12 THE COURT: Yes. We'll just include it in
13 this.

14 MR. CLARE: Your Honor, clarification:
15 There are two motions that are pending. There is
16 one filed by the Plaintiff and one filed by the
17 Defendant.

18 THE COURT: That's why I wanted to make sure
19 there was a notice of hearing, so my order
20 wouldn't be referencing something else.

21 MR. SCAROLA: That works. Thank you, Your
22 Honor.

23 Your Honor, one additional matter that I
24 think we need to address in light of the comments
25 about an amendment of the pleadings to add a

PINNACLE REPORTING, INC.
(561) 820-9066

1 party. Obviously, if that were to occur, then
2 this matter would not be at issue at that time.

3 And certainly if such an amendment is going to
4 take place or if there's going to be an attempt
5 made to amend, because we fully anticipate
6 resisting such an amendment, that's something
7 that should be done within the very immediate
8 future.

9 THE COURT: Well, I would hope when you guys
10 talk about time frames, you come up with a time
11 frame for filing any motion to amend.

12 MR. BEMIS: We did. April 16th is the day
13 we suggested.

14 Our problem is, we're conflicted out and we
15 need to find counsel and get them -- this is a
16 massive case to get them into quickly and there's
17 limits as to what I can do as counsel for Morgan
18 Stanley with a conflict. They're going to have
19 to get in -- but they will only be joining on the
20 Morgan Stanley Senior Funding side and they will
21 be asserting one claim. There are going to be
22 multiple claims, but they will only be against
23 Arthur Anderson. They will in large measure, I
24 believe, mirror Coleman's claims against Arthur
25 Anderson, claiming that, hey, just like Coleman

PINNACLE REPORTING, INC.
(561) 820-9066

1 claims they got defrauded or they were
2 misrepresented too, Morgan Stanley Senior Funding
3 was misrepresented too when it lent \$680 million
4 in this transaction and lost it.

5 MR. SOLOVY: Judge, the reason for the push
6 is -- we also think there's a lot of skulduggery
7 involved in this motion. And being a little old
8 and inept, when he didn't want to keep one
9 number, that sort of baffled me for a moment,
10 until I heard the terms of Arthur Anderson being
11 brought in. It isn't that Kirkland & Ellis, this
12 little small, thousand-person firm is undermanned
13 and this came as a lightning bolt to them. So
14 we think that this is improper adding of a party
15 too late, for many reasons, and we're not wanting
16 them to tarry anymore.

17 THE COURT: All I can say is, we're arguing
18 about something that's not in front of me now.
19 And I can tell you I have a habit of tuning it
20 out because it's things I don't need to know.
21 If the motion's made, we'll consider it on the
22 merits then. And I'm sure you guys are going to
23 argue we're too far down the road to allow him
24 in.

25 MR. SOLOVY: I just wanted to give this

1 Court a note ahead of time, Your Honor, so by my
2 silence you didn't think I was thinking this was
3 a happy development.

4 MR. SCAROLA: I would only mention, in the
5 context of what is relevant to the issues before
6 Your Honor, that there is a distinction between a
7 motion to amend to add a new party and the motion
8 to amend with regard to the punitive damage
9 claim, which we likely would not be prepared to
10 make by an April date.

11 MR. BEMIS: We don't have any objection to
12 that. We have the same issue. We'll work that
13 out.

14 THE COURT: Let's assume, and I'm acutely
15 aware when attorneys attempt to give me
16 information that I don't need until the issue's
17 in front of me, and I have to assume they're
18 doing it for other things that may not be
19 appropriate.

20 MR. BEMIS: Understood.

21 THE COURT: Thank you very much.

22 MR. SCAROLA: Thank you very much, Your
23 Honor.

24 (At 4:29 p.m., the deposition was
25 concluded.)

1 CERTIFICATE

2 - - -

3 STATE OF FLORIDA

4 COUNTY OF PALM BEACH

5

6 I, SHIRLEY D. KING, Professional Court

7 Reporter, do hereby certify that I was authorized to

8 and did stenographically report the foregoing

9 proceedings and that the transcript is a true and

10 correct transcription of my stenotype notes of the

11 proceedings.

12

13 Dated this 1st day of March, 2004.

14

15

16 SHIRLEY D. KING

17 Professional Court Reporter

18

19

20 The foregoing certification of this transcript does

21 not apply to any reproduction of the same by any means

22 unless under the direct control and/or direction of

23 the certifying reporter.

24

25

PINNACLE REPORTING, INC.
(561) 820-9066

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

_____ /

CASE NO. CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

_____ /

**ORDER FOLLOWING CASE MANAGEMENT CONFERENCE
AND NOTICE OF HEARINGS**

This case came before the Court February 20, 2004 for a case management conference, with all parties well represented by counsel. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that this action is specially set for jury trial

January 17, 2005, at 9:30 a.m., 15 days reserved

1.17.05 gpl

at the West Palm Beach Courthouse, Room 11A, 205 N Dixie Hwy, WPB, FL. It is further

ORDERED AND ADJUDGED that hearing on Motions is Limine and objections to deposition designations is hereby set for

December 20, 2004 through December 22, 2004, at 9:30 a.m.

*12.20-22.04
gpl*

at the West Palm Beach Courthouse, Room 11A, 205 N Dixie Hwy, WPB, FL. Counsel shall provide the Court with a copy of each deposition to be read to the jury, with objected to testimony highlighted. It is further

ORDERED AND ADJUDGED that the attorneys/parties must submit to the Court one (1) week before the hearing:

1. copies of all Motions in Limine and relevant pleadings;
2. a copy of any memorandum of law; and
3. copies of all case law authority.

This hearing shall not be canceled unless the issues of the Motions in Limine have been settled, and orders entered, or the motions withdrawn. It is further

ORDERED AND ADJUDGED further case management conferences and, time permitting, hearing on all outstanding motions shall be held

March 19, 2004, at 3:30 p.m., 1 hour reserved
April 16, 2004, at 4:00 p.m., 1 hour reserved
May 7, 2004, at 8:00 a.m., 1 hour reserved
June 4, 2004, at 8:00 a.m., 2 hours reserved
July 2, 2004, at 8:00 a.m., 2 hours reserved
July 23, 2004, at 9:00 a.m., 2 hours reserved
August 13, 2004, at 8:00 a.m., 2 hours reserved
August 27, 2004, at 8:00 a.m., 2 hours reserved
September 23, 2004, at 3:00 p.m., 2 hours reserved

October 15, 2004, at 8:00 a.m., 2 hours reserved

November 5, 2004, at 8:00 a.m., 2 hours reserved

December 3, 2004, at 8:00 a.m., 2 hours reserved

in Courtroom 11A, 205 N. Dixie Hwy, WPB, FL 33401. It is further

ORDERED AND ADJUDGED that the attorneys/parties must submit to the Court one (1) week before each hearing:

1. an agreed upon update of the case's background and procedural history, which shall specifically address whether the deadlines established by any pre-trial order are being met;
2. copies of all relevant pleadings;
3. a copy of any memorandum of law; and
4. copies of all case law authority.

gml

These hearings shall not be canceled absent Court order. It is further

ORDERED AND ADJUDGED that hearing set February 26, 2004 is canceled and is reset to March 3, 2004, at 8:30 a.m., in Courtroom 11A, 205 N. Dixie Hwy, WPB, FL

3.3.04 gml

33401. This is a specially set hearing which shall be limited to 15 minutes. It is further

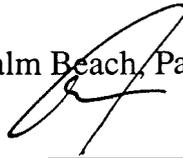
ORDERED AND ADJUDGED that the attorneys/parties must submit to the Court two (2) days before the hearing:

gml

1. copies of all relevant pleadings;
2. a copy of any memorandum of law; and
3. copies of all case law authority.

This hearing shall not be canceled unless the issues of this motion have been settled,
and an order entered, or the motion withdrawn.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 24
day of February, 2004.



ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:

Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci
655 15th Street, NW, Suite 1200
Washington DC 20005

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, Il 60611

Mark F. Bideau, Esq.
777 S. Flagler Dr., Suite 300E
West Palm Beach, FL 33401

David M. Wells, Esq.
50 N. Laura Street, Suite 3300
Jacksonville, FL 32202

If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please contact the ADA Coordinator in the Administrative Office of the Court, Palm Beach County Courthouse, 205 North Dixie Highway, Room 5.2500, West Palm Beach, Florida 33401; telephone number (561) 355-4380 within two (2) working days of your receipt of this [describe notice]; if you are hearing or voice impaired, call 1-800-955-8771.

SPANISH

Si Ud. es una persona incapacitada que necesita de un servicio especial para participar en este proceso, Ud. tiene derecho a que le provean cierta ayuda sin costo alguno. Por favor pongase en contacto con el Coordinador de la Oficina Administrativa de la Corte ADA, situada en el 205 North Dixie Highway, Oficina 5.2500, West Palm Beach, Florida, 33401, teléfono (561) 355-4380, dentro de los dos (2) próximos días hábiles después de recibir esta [describa la notificación]; si tiene incapacidad de oír ó hablar llame al 1-800-955-8771.

CREOLE

Si ou sé yon moun ki Infirm, ki bézwen ninpôt akomodasyon pou ka patisipé nan pwosè sa-a, ou gen dwa, san'l pa kouté'w anyin, pou yo ba'w kèk sèvis. Tanpri kontakté koòdinatè ADA ya nan Biro Administratif Tribinal nan cité Palm Beach la, ki nan 205 North Dixie Highway, Cham 5.2500, West Palm Beach, Florida 33401, niméro telefonn-nan sé (561) 355-4380, rélé dé (2) jou dé lè ou résévwa [notis sa-a]; si ou bèbè ou byen soud rélé 1-800-955-8771.

FRENCH

Si vous êtes infirme, et en besoin de n'importe accommodation pour pouvoir participer á ces procédures, vous pouvez gratuitement recevoir, certains services. S'il-vous-plait contactez le coordinateur du Bureau Administratif du Tribunal de Palm Beach, située à 205 North Dixie Highway, Chambre 5.2500, West Palm Beach, Florida 33401, numéro de téléphone (561) 355-4380 durant deux (2) jours suivant la réception de [cette note]; si vous êtes muets ou sourds, appelez 1-800-955-8771.

#230580/mm

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

Case No. CA 03-5045 AI

vs.

MORGAN STANLEY & CO., INC.,

Defendant,

_____ /

MORGAN STANLEY SENIOR FUNDING, INC.,

Plaintiff,

Case No. CA 03-5165 AI

vs.

MACANDREWS & FORBES HOLDINGS, INC.,

Defendant,

_____ /

MOTION FOR ENTRY OF ORDER

Plaintiff moves for entry of an Order on Plaintiff's previously filed and heard Motion to Compel in Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co., Inc., Case No. CA 005045 AI. In support of this Motion, Plaintiff would show that the parties have been unable to agree on the language to be incorporated in a proposed Order.

Coleman Holdings Inc. vs Morgan Stanley & Co., Inc.
MSSFR v. MAFCO
Case No.: 2003 CA 005045 AI

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by
Fax and Federal Express to all counsel on the attached list on this 27th day of
Feb., 2004.



JACK SCAROLA
Florida Bar No.: 169440
Searoy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 478-0754
Attorneys for Coleman and MacAndrews

Coleman Holdings Inc. vs Morgan Stanley & Co., Inc.
MSSFR v. MAFCO
Case No.: 2003 CA 005045 AI

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block LLP
One IBM Plaza
Suite 4400
Chicago, IL 60611

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN
AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

Case No. CA 03-5045 AI

MORGAN STANLEY & CO., INC.,

Defendant,

MORGAN STANLEY SENIOR FUNDING,
INC.,

Plaintiff,

Case No. CA 03-5165 AI

vs.

MACANDREWS & FORBES HOLDINGS,
INC.,

Defendant

NOTICE OF HEARING

YOU ARE HEREBY NOTIFIED that the undersigned has called up for hearing the following:

DATE: March 3, 2004

TIME: 8:30 a.m.

JUDGE: Hon. Elizabeth T. Maass

PLACE: Palm Beach County Courthouse, Room #11.1208, 205 North Dixie Highway,
West Palm Beach, FL 33401

SPECIFIC MATTERS TO BE HEARD:

Plaintiff's Motion for Entry of Order

Coleman (Parent) Holdings Inc. vs Morgan Stanley & Co., Inc.
Case No : 2003 CA 005045 AI
Notice of Hearing

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block LLP
One IBM Plaza
Suite 4400
Chicago, IL 60611

Colemar (Parent) Holdings Inc. vs Morgan Stanley & Co., Inc.
Case No : 2003 CA 005045 AI
Notice of Hearing

Moving counsel certifies that he or she contacted opposing counsel and attempted to resolve the discovery dispute without hearing.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to all Counsel on the attached list, this 27th day of Feb, 2004.



JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 478-0754
Attorney for Plaintiffs

#23058J/mm

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

MORGAN STANLEY SENIOR FUNDING,
INC.,

CASE NO.: 2003 CA 005165 AI

Plaintiffs,

vs.

MACANDREWS & FORBES HOLDINGS,
INC. and COLEMAN (PARENT)
HOLDINGS INC.,

Defendants,

RE-NOTICE OF HEARING

YOU ARE HEREBY NOTIFIED that the undersigned has called up for hearing the following:

DATE: March 19, 2004

TIME: 3:30 p.m.

JUDGE: Hon. Elizabeth T. Maass

PLACE: Palm Beach County Courthouse, Room #11.1208, 205 North Dixie Highway,
West Palm Beach, FL 33401

SPECIFIC MATTERS TO BE HEARD:

DEFENDANTS' MOTION TO COMPEL PRODUCTION OF DOCUMENTS RESPONSIVE
TO DEFENDANTS' FIRST REQUEST FOR PRODUCTION

Moving counsel certifies that he or she contacted opposing counsel and attempted to resolve the discovery dispute without hearing.

MSSF I V MAFCO
Case No.: 2003 CA 005165 AI
Re-Notice of Hearing

HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by
Fax and Federal Express to all Counsel on the attached list, this 3rd day of March,
2004.



JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 478-0754
Attorney for Defendants

MSSFJ V. MAFCO
Case No.: 2003 CA 005165 AI
Re-Notice of Hearing

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block LLP
One IBM Plaza
Suite 4400
Chicago, IL 60611

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CASE NO: 03 CA-005045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

**ORDER GRANTING IN PART AND DENYING IN PART
PLAINTIFF'S MOTION TO COMPEL PRODUCTION OF
DOCUMENTS RELATING TO EMPLOYEE PERFORMANCE**

THIS CAUSE came before the Court February 19, 2004 on Plaintiff's Motion to Compel Production of Documents Relating To Employee Performance, and the Court having reviewed the pleadings on file, heard argument of counsel and otherwise being fully advised in the premises, it is hereby

ORDERED AND ADJUDGED as follows:

1. The Motion is Granted In Part, and Denied, In Part.
2. Defendant shall produce, within thirty (30) days of this Order, copies of documents responsive to Plaintiff's May 9, 2003 Request to Produce number 44 for the Morgan Stanley employees who worked on the 1997-98 Sunbeam-related engagements. Specifically, Morgan Stanley shall produce, for those employees and for the time period from 1992 through and including 1998:

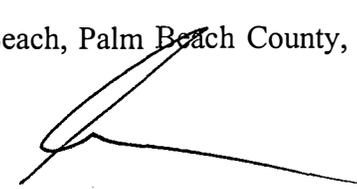
- (a) All references (positive or negative) to work performed by the employee on Sunbeam-related engagements and/or to the general quality of work performed in 1997 and/or 1998.
- (b) All references (positive or negative) to the employee's performance in fee generation.
- (c) All references (positive or negative) to the employee's performance of due diligence activities, *regardless of whether designated specifically as such.*
- (d) All references (positive or negative) to the employee's truthfulness, veracity, or moral turpitude.

Privileged information only may be redacted.

3. Defendant shall produce, within thirty (30) days of this Order, additional documents (if any) responsive to Plaintiff's May 9, 2003 Request to Produce numbers 45 and 46.

4. This ruling is without prejudice to Plaintiff's ability to request additional employee performance-related discovery based upon the content of the production requested pursuant to this Order.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 3 day of March, 2004.



ELIZABETH T. MAASS
Circuit Court Judge

Copies furnished:

Joseph Ianno, Jr. Esq.
CARLTON FIELDS, P.A.
222 Lakeview Avenue – Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, Esq.
KIRKLAND & ELLIS LLP
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005

John Scarola, Esq.
SEARCY DENNEY SCAROLA BARNHART & SHIPLEY, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33409

Jerold S. Solovy, Esq.
JENNER & BLOCK LLP
One IBM Plaza – Suite 4400
Chicago, IL 60611

00001

1 IN THE FIFTEENTH JUDICIAL CIRCUIT COURT IN
2 AND FOR PALM BEACH COUNTY, FLORIDA
3 CIVIL DIVISION
4

Case No. 03 CA-005045 AI

5
6 COLEMAN (PARENT) HOLDINGS INC.,
7

Plaintiff,

8
9 vs.

10 MORGAN STANLEY & CO., INC.,
11
12 Defendant.
13

14 HEARING BEFORE THE
15 HONORABLE ELIZABETH T. MAASS
16
17
18
19
20

21 Wednesday, March 3, 2004
22 Palm Beach County Courthouse
23 Courtroom 11A
24 205 N. Dixie Highway
25 West Palm Beach, Florida 33401
8:32 a.m. - 8:45 a.m.

00002

1 APPEARANCES:
2

3 SEARCY, DENNEY, SCAROLA,
4 BARNHART & SHIPLEY
5 2139 Palm Beach Lakes Boulevard
6 West Palm Beach, Florida 33409
7 (561) 686-6300
8 BY: JACK SCAROLA, ESQUIRE
9 Attorneys for the Plaintiff
10

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51
52
53
54
55
56
57
58
59
60
61
62
63
64
65
66
67
68
69
70
71
72
73
74
75
76
77
78
79
80
81
82
83
84
85
86
87
88
89
90
91
92
93
94
95
96
97
98
99
100
101
102
103
104
105
106
107
108
109
110
111
112
113
114
115
116
117
118
119
120
121
122
123
124
125
126
127
128
129
130
131
132
133
134
135
136
137
138
139
140
141
142
143
144
145
146
147
148
149
150
151
152
153
154
155
156
157
158
159
160
161
162
163
164
165
166
167
168
169
170
171
172
173
174
175
176
177
178
179
180
181
182
183
184
185
186
187
188
189
190
191
192
193
194
195
196
197
198
199
200
201
202
203
204
205
206
207
208
209
210
211
212
213
214
215
216
217
218
219
220
221
222
223
224
225
226
227
228
229
230
231
232
233
234
235
236
237
238
239
240
241
242
243
244
245
246
247
248
249
250
251
252
253
254
255
256
257
258
259
260
261
262
263
264
265
266
267
268
269
270
271
272
273
274
275
276
277
278
279
280
281
282
283
284
285
286
287
288
289
290
291
292
293
294
295
296
297
298
299
300
301
302
303
304
305
306
307
308
309
310
311
312
313
314
315
316
317
318
319
320
321
322
323
324
325
326
327
328
329
330
331
332
333
334
335
336
337
338
339
340
341
342
343
344
345
346
347
348
349
350
351
352
353
354
355
356
357
358
359
360
361
362
363
364
365
366
367
368
369
370
371
372
373
374
375
376
377
378
379
380
381
382
383
384
385
386
387
388
389
390
391
392
393
394
395
396
397
398
399
400
401
402
403
404
405
406
407
408
409
410
411
412
413
414
415
416
417
418
419
420
421
422
423
424
425
426
427
428
429
430
431
432
433
434
435
436
437
438
439
440
441
442
443
444
445
446
447
448
449
450
451
452
453
454
455
456
457
458
459
460
461
462
463
464
465
466
467
468
469
470
471
472
473
474
475
476
477
478
479
480
481
482
483
484
485
486
487
488
489
490
491
492
493
494
495
496
497
498
499
500
501
502
503
504
505
506
507
508
509
510
511
512
513
514
515
516
517
518
519
520
521
522
523
524
525
526
527
528
529
530
531
532
533
534
535
536
537
538
539
540
541
542
543
544
545
546
547
548
549
550
551
552
553
554
555
556
557
558
559
560
561
562
563
564
565
566
567
568
569
570
571
572
573
574
575
576
577
578
579
580
581
582
583
584
585
586
587
588
589
590
591
592
593
594
595
596
597
598
599
600
601
602
603
604
605
606
607
608
609
610
611
612
613
614
615
616
617
618
619
620
621
622
623
624
625
626
627
628
629
630
631
632
633
634
635
636
637
638
639
640
641
642
643
644
645
646
647
648
649
650
651
652
653
654
655
656
657
658
659
660
661
662
663
664
665
666
667
668
669
670
671
672
673
674
675
676
677
678
679
680
681
682
683
684
685
686
687
688
689
690
691
692
693
694
695
696
697
698
699
700
701
702
703
704
705
706
707
708
709
710
711
712
713
714
715
716
717
718
719
720
721
722
723
724
725
726
727
728
729
730
731
732
733
734
735
736
737
738
739
740
741
742
743
744
745
746
747
748
749
750
751
752
753
754
755
756
757
758
759
760
761
762
763
764
765
766
767
768
769
770
771
772
773
774
775
776
777
778
779
780
781
782
783
784
785
786
787
788
789
790
791
792
793
794
795
796
797
798
799
800
801
802
803
804
805
806
807
808
809
810
811
812
813
814
815
816
817
818
819
820
821
822
823
824
825
826
827
828
829
830
831
832
833
834
835
836
837
838
839
840
841
842
843
844
845
846
847
848
849
850
851
852
853
854
855
856
857
858
859
860
861
862
863
864
865
866
867
868
869
870
871
872
873
874
875
876
877
878
879
880
881
882
883
884
885
886
887
888
889
890
891
892
893
894
895
896
897
898
899
900
901
902
903
904
905
906
907
908
909
910
911
912
913
914
915
916
917
918
919
920
921
922
923
924
925
926
927
928
929
930
931
932
933
934
935
936
937
938
939
940
941
942
943
944
945
946
947
948
949
950
951
952
953
954
955
956
957
958
959
960
961
962
963
964
965
966
967
968
969
970
971
972
973
974
975
976
977
978
979
980
981
982
983
984
985
986
987
988
989
990
991
992
993
994
995
996
997
998
999
1000

16div-004731

BY: JOSEPH IANNO, JR., ESQUIRE

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

00003

1 The Hearing before the HON. ELIZABETH T.
2 MAASS was taken before me, PATTY McCOY, Shorthand
3 Reporter, Notary Public, State of Florida at
4 Large, at the Palm Beach County Courthouse, 205
5 North Dixie Highway, Courtroom 11A, West Palm
6 Beach, Florida, beginning at the hour of 8:32
7 a.m., on Wednesday, March 3, 2004, pursuant to
8 the Notice filed herein, in the above-entitled
9 cause pending before the above-named Court.

10 P R O C E E D I N G S

11 THE COURT: Good morning. Have a
12 seat.

13 MR. IANNO: Good morning, Your Honor.

14 MR. SCAROLA: Good morning, Your
15 Honor.

16 THE COURT: And this is Coleman and
17 Morgan Stanley. It's defendant's motion to
18 compel. What did you want to say in support
19 of it?

20 MR. IANNO: Actually, Your Honor, we
21 had called your office yesterday. The
22 parties are continuing to negotiate the
23 motions to compel and it asked that we move
24 them over to the next scheduled case
25 management conference.

00004

1 THE COURT: Right.

2 MR. IANNO: So we're only here today,
3 I believe, in agreement on a motion for an
4 entry of an order from last week's 8:45.

5 THE COURT: Oh, I apologize. What
6 order and what did we neglect to do?

7 MR. IANNO: This is on the performance
8 of evaluation --

9 MR. SCAROLA: Your Honor didn't
10 neglect to do anything. It's our neglect,
11 not yours.

16div-004732

12 THE COURT: Well, I doubt that but go
13 ahead.

14 MR. IANNO: This is the disagreement
15 we have, it's Mr. Scarola's motion for entry
16 of an order related to the February 19th
17 8:45. It's his motion.

18 THE COURT: Yeah, okay. Shoot. I
19 know what day it was. I mean how could you
20 not be doing the motion to compel?

21 MR. SCAROLA: Your Honor, this is the
22 order that was initially drafted with
23 respect to the hearing that was held before
24 Your Honor I guess a week and a half ago
25 now.

00005

1 THE COURT: Thank you, sir.

2 MR. SCAROLA: The only point in
3 contention is with regard to sub-paragraph
4 "C" in that order.

5 THE COURT: I just want to back up a
6 minute. I did not generate an order on
7 this?

8 MR. SCAROLA: No, Your Honor. You
9 left it to us to draft and we thought we had
10 an agreement, and we have what I think is a
11 minor disagreement in terms of how this
12 needs to be worded.

13 THE COURT: Okay.

14 MR. SCAROLA: You may recall that
15 there was a dispute with regard to the scope
16 of the production of documents relating to
17 the critique of Morgan Stanley employees.

18 Your Honor announced a ruling from the
19 bench in that regard and I believe that the
20 order that you have before Your Honor, we
21 share the belief that that order accurately
22 reflects what the Court's intent was with
23 only a single dispute relating to sub
24 paragraph "C" requiring the production of
25 documents which reflect performance positive

00006

1 or negative of due diligence activities.

2 THE COURT: Excuse me one second.
3 I apologize.

4 Pete, could you just give this to
5 Nancy and make sure we didn't do an order on
6 it?

7 I apologize. I mean it's just
8 sticking in my head so much. I just want to
9 make sure we didn't do an order that

10 THE BAILIFF: You don't know if we did
11 an order?

12 THE COURT: That is a proposed order.
13 I need to know whether we did our own from

16div-004733

14 the hearing that day.

15 I apologize.

16 MR. IANNO: I have the transcript,
17 Your Honor, and you left it to us to go
18 right out and that's what we, I thought we
19 had done in the back of the courtroom.

20 THE COURT: Okay, I'm sure you're
21 right. I just want to clear up that so I
22 don't -- go ahead. Continue your argument.
23 We're talking about "C."

24 MR. SCAROLA: Yes, we're talking about
25 "C." "C" would require the production of

00007

1 positive or negative comments with regard to
2 the performance of due diligence activities.

3 The concern that I have is that Morgan
4 Stanley may decline to produce comments
5 relating to the performance of due diligence
6 activities unless the comment is
7 specifically designated as relating to due
8 diligence activities. That is the criteria
9 that they may apply in complying with that
10 proposed order as drafted is if it doesn't
11 say due diligence, it doesn't get produced.

12 THE COURT: So you're saying if it was
13 done -- okay.

14 MR. SCAROLA: What I would like the
15 order to say, and this is the only point of
16 disagreement, is that the language should
17 include, "which is related or may reasonably
18 be related to the performance of due
19 diligence responsibilities regardless of
20 whether specifically designated as such."

21 So if the comment is a general comment
22 that may encompass due diligence activities,
23 which are obviously the focus of our
24 concerns, although not specifically
25 designated due diligence, it ought to be

00008

1 produced.

2 THE COURT: But are you suggesting if
3 there's comment that just says, you know,
4 John Doe does a good job and one of this job
5 duties is due diligence, you want that
6 produced?

7 MR. SCAROLA: Yes. Or if it says John
8 Doe during this period of time did a bad
9 job, you know, it's just a general criticism
10 saying he neglected his duties and one of
11 his duties was due diligence, then that is a
12 comment that may reflect upon his
13 performance of due diligence and ought to be
14 provided to us even though it doesn't
15 specifically say due diligence.

16div-004734

16 THE COURT: What's your client's
17 position?

18 MR. IANNO: Well, first of all, Your
19 Honor, we're renegotiating the Court's
20 ruling and that's my first problem with
21 this. If I may, I can give the Court a copy
22 of the transcript in our opposition that was
23 filed.

24 THE COURT: Sure. And is there a
25 written motion we're here on today, just so
00009

1 I'm clear?

2 MR. IANNO: Motion for entry of order.

3 THE COURT: Okay, but there is a
4 motion called that?

5 MR. SCAROLA: Yes, Your Honor. This
6 is a copy of the motion, Your Honor. I
7 don't know that it's going to be of any help
8 to you but that's what it says.

9 THE COURT: Thank You.

10 MR. IANNO: When we went over this,
11 Your Honor, and as the Court will see this
12 very position that Mr. Scarola is raising
13 just opens everything up and all the
14 limitations the Court placed on this
15 discovery are now out the window because if
16 this employee has very bad telephone
17 manners, all of a sudden maybe that's
18 related to due diligence activities. He's
19 talking to somebody of due diligence, he's
20 rude to them. That could be reasonably
21 related.

22 The way we had worded this, and the
23 Court said on page 13 paragraph 4, what we
24 need to do is limit this to the three
25 categories that were listed in our
00010

1 opposition on page 2, I believe, of the
2 opposition.

3 The order that we went back and wrote
4 up in the courtroom was exactly
5 word-for-word those three categories with
6 the addition of what Mr. Scarola wanted were
7 any criticisms of moral turpitude,
8 dishonesty and the like, which became the
9 fourth subcategory.

10 The next day Mr. Scarola comes, when
11 we have the case management conference on
12 February 20th, and adds language to the
13 first category that says, "and any
14 references to the employee's performance."

15 And that can encompass virtually
16 everything an employee does; they're a bad
17 dresser, whatever. And that's the argument

18 we made at the hearing in the transcript, if
19 it's related to their due diligence
20 activity, that's covered by "C."

21 But what Mr. Scarola wants if this
22 employee has just said, You're just not
23 doing a very good job because you're not
24 here timely, it opens up the whole
25 employee's personnel file, and we're talking

00011

1 50, 60 employees here.

2 And that's why the Court had entered
3 an order, as it said on Page 13, is these
4 three categories plus the addition of this
5 extra category, and that's what the order
6 accurately reflects.

7 We shouldn't be able to go back and
8 renegotiate additional things. And the
9 order as drafted, it says, without prejudice
10 for Mr. Scarola to come back.

11 MR. SCAROLA: Your Honor?

12 THE COURT: What's the response?

13 MR. SCAROLA: If the criticism says
14 that he has bad telephone manners or he
15 dresses sloppily, that is not related nor
16 reasonably related to the performance of his
17 due diligence responsibilities.

18 I just want to make it clear that even
19 if this is a general comment without
20 limitation saying you're doing a bad job
21 answering the telephone, if it's a general
22 comment you're doing a bad job, even though
23 it doesn't specifically say "in the
24 performance of your due diligence
25 activities," that may reasonably be

00012

1 interpreted as encompassing due diligence
2 activities and we ought to be able to get
3 that.

4 So the language I'm proposing simply
5 says that. It says, "which is related or
6 reasonably may be related to the performance
7 of due diligence responsibilities regardless
8 of whether specifically designated as such."

9 If it is specifically designated, and
10 it's not due diligence, you don't need to
11 give it to me; but if reasonably it could be
12 interpreted as relating to due diligence, we
13 ought to get it.

14 THE COURT: I'm sorry, what was the
15 second argue -- regarding -- oh, regardless
16 of designation?

17 MR. SCAROLA: Yes, regardless of
18 whether it's specifically designated as
19 such. You'll excuse my --

16div-004736

20 THE COURT: That's okay.
21 MR. SCAROLA: So it is, "which is
22 related or reasonably may be related to the
23 performance of due diligence
24 responsibilities regardless of whether
25 specifically designated as such."

00013

1 THE COURT: I mean the part I would, I
2 mean the first part quite frankly I think is
3 implicit in there. The second part I am
4 willing to add the language "regardless of
5 whether it's specifically designated as due
6 diligence performance." I mean that.

7 MR. IANNO: Right.

8 THE COURT: They're not using magic
9 words. You guys still know you have to
10 produce it.

11 MR. IANNO: Exactly, Your Honor. I
12 thought the way it was worded with "due
13 diligence activities" sufficiently
14 encompassed Mr. Scarola's concerns.

15 THE COURT: I think you're probably
16 right. I don't know whether this is adding
17 anything but just so there's no
18 misunderstanding, it doesn't matter if they
19 call it due diligence, if it is due
20 diligence, it gets produced.

21 And it's the 3rd of March.

22 Either side have envelopes?

23 MR. SCAROLA: I think they're attached
24 to the package that I gave Your Honor.

25 THE COURT: I probably lost them.

00014

1 Hold on.

2 MR. IANNO: If not I have a set.

3 THE COURT: I don't want to

4 MR. IANNO: I have a set, Your Honor.

5 THE COURT: Well, you don't need --
6 oh, we do have one. Okay. Thank you very
7 much.

8 MR. SCAROLA: Thank you, Your Honor.

9 MR. IANNO: Thank you, Your Honor.

10 THE COURT: Bye-bye.

11

12 (Thereupon, at 8:45 a.m. the hearing
13 was concluded.)

14

15

16

17

18

19

20

21

16div-004737

22
23
24
25
00015
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T E

THE STATE OF FLORIDA)
COUNTY OF PALM BEACH)

I, Patty McCoy, Shorthand Reporter, certify
that I was authorized to and did stenographically
report the foregoing proceedings and that the
transcript is a true record.

Dated this 3rd day of March, 2004.

Patty McCoy, Shorthand Reporter

00001

1 IN THE FIFTEENTH JUDICIAL CIRCUIT COURT IN
2 AND FOR PALM BEACH COUNTY, FLORIDA
3 CIVIL DIVISION
4

Case No. 03 CA-005045 AI

5
6 COLEMAN (PARENT) HOLDINGS INC.,
7

Plaintiff,

8
9 vs.

10 MORGAN STANLEY & CO., INC.,
11
12 Defendant.
13

14 HEARING BEFORE THE
15 HONORABLE ELIZABETH T. MAASS
16
17
18
19
20

21 Wednesday, March 3, 2004
22 Palm Beach County Courthouse
23 Courtroom 11A
24 205 N. Dixie Highway
25 West Palm Beach, Florida 33401
8:32 a.m. - 8:45 a.m.

00002

1 APPEARANCES:
2

3 SEARCY, DENNEY, SCAROLA,
4 BARNHART & SHIPLEY
5 2139 Palm Beach Lakes Boulevard
6 West Palm Beach, Florida 33409
7 (561) 686-6300
8 BY: JACK SCAROLA, ESQUIRE
9 Attorneys for the Plaintiff
10

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51
52
53
54
55
56
57
58
59
60
61
62
63
64
65
66
67
68
69
70
71
72
73
74
75
76
77
78
79
80
81
82
83
84
85
86
87
88
89
90
91
92
93
94
95
96
97
98
99
100
101
102
103
104
105
106
107
108
109
110
111
112
113
114
115
116
117
118
119
120
121
122
123
124
125
126
127
128
129
130
131
132
133
134
135
136
137
138
139
140
141
142
143
144
145
146
147
148
149
150
151
152
153
154
155
156
157
158
159
160
161
162
163
164
165
166
167
168
169
170
171
172
173
174
175
176
177
178
179
180
181
182
183
184
185
186
187
188
189
190
191
192
193
194
195
196
197
198
199
200
201
202
203
204
205
206
207
208
209
210
211
212
213
214
215
216
217
218
219
220
221
222
223
224
225
226
227
228
229
230
231
232
233
234
235
236
237
238
239
240
241
242
243
244
245
246
247
248
249
250
251
252
253
254
255
256
257
258
259
260
261
262
263
264
265
266
267
268
269
270
271
272
273
274
275
276
277
278
279
280
281
282
283
284
285
286
287
288
289
290
291
292
293
294
295
296
297
298
299
300
301
302
303
304
305
306
307
308
309
310
311
312
313
314
315
316
317
318
319
320
321
322
323
324
325
326
327
328
329
330
331
332
333
334
335
336
337
338
339
340
341
342
343
344
345
346
347
348
349
350
351
352
353
354
355
356
357
358
359
360
361
362
363
364
365
366
367
368
369
370
371
372
373
374
375
376
377
378
379
380
381
382
383
384
385
386
387
388
389
390
391
392
393
394
395
396
397
398
399
400
401
402
403
404
405
406
407
408
409
410
411
412
413
414
415
416
417
418
419
420
421
422
423
424
425
426
427
428
429
430
431
432
433
434
435
436
437
438
439
440
441
442
443
444
445
446
447
448
449
450
451
452
453
454
455
456
457
458
459
460
461
462
463
464
465
466
467
468
469
470
471
472
473
474
475
476
477
478
479
480
481
482
483
484
485
486
487
488
489
490
491
492
493
494
495
496
497
498
499
500
501
502
503
504
505
506
507
508
509
510
511
512
513
514
515
516
517
518
519
520
521
522
523
524
525
526
527
528
529
530
531
532
533
534
535
536
537
538
539
540
541
542
543
544
545
546
547
548
549
550
551
552
553
554
555
556
557
558
559
560
561
562
563
564
565
566
567
568
569
570
571
572
573
574
575
576
577
578
579
580
581
582
583
584
585
586
587
588
589
590
591
592
593
594
595
596
597
598
599
600
601
602
603
604
605
606
607
608
609
610
611
612
613
614
615
616
617
618
619
620
621
622
623
624
625
626
627
628
629
630
631
632
633
634
635
636
637
638
639
640
641
642
643
644
645
646
647
648
649
650
651
652
653
654
655
656
657
658
659
660
661
662
663
664
665
666
667
668
669
670
671
672
673
674
675
676
677
678
679
680
681
682
683
684
685
686
687
688
689
690
691
692
693
694
695
696
697
698
699
700
701
702
703
704
705
706
707
708
709
710
711
712
713
714
715
716
717
718
719
720
721
722
723
724
725
726
727
728
729
730
731
732
733
734
735
736
737
738
739
740
741
742
743
744
745
746
747
748
749
750
751
752
753
754
755
756
757
758
759
760
761
762
763
764
765
766
767
768
769
770
771
772
773
774
775
776
777
778
779
780
781
782
783
784
785
786
787
788
789
790
791
792
793
794
795
796
797
798
799
800
801
802
803
804
805
806
807
808
809
810
811
812
813
814
815
816
817
818
819
820
821
822
823
824
825
826
827
828
829
830
831
832
833
834
835
836
837
838
839
840
841
842
843
844
845
846
847
848
849
850
851
852
853
854
855
856
857
858
859
860
861
862
863
864
865
866
867
868
869
870
871
872
873
874
875
876
877
878
879
880
881
882
883
884
885
886
887
888
889
890
891
892
893
894
895
896
897
898
899
900
901
902
903
904
905
906
907
908
909
910
911
912
913
914
915
916
917
918
919
920
921
922
923
924
925
926
927
928
929
930
931
932
933
934
935
936
937
938
939
940
941
942
943
944
945
946
947
948
949
950
951
952
953
954
955
956
957
958
959
960
961
962
963
964
965
966
967
968
969
970
971
972
973
974
975
976
977
978
979
980
981
982
983
984
985
986
987
988
989
990
991
992
993
994
995
996
997
998
999
1000

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

00003

1 The Hearing before the HON. ELIZABETH T.
2 MAASS was taken before me, PATTY McCOY, Shorthand
3 Reporter, Notary Public, State of Florida at
4 Large, at the Palm Beach County Courthouse, 205
5 North Dixie Highway, Courtroom 11A, West Palm
6 Beach, Florida, beginning at the hour of 8:32
7 a.m., on Wednesday, March 3, 2004, pursuant to
8 the Notice filed herein, in the above-entitled
9 cause pending before the above-named Court.

10 P R O C E E D I N G S

11 THE COURT: Good morning. Have a
12 seat.

13 MR. IANNO: Good morning, Your Honor.

14 MR. SCAROLA: Good morning, Your
15 Honor.

16 THE COURT: And this is Coleman and
17 Morgan Stanley. It's defendant's motion to
18 compel. What did you want to say in support
19 of it?

20 MR. IANNO: Actually, Your Honor, we
21 had called your office yesterday. The
22 parties are continuing to negotiate the
23 motions to compel and it asked that we move
24 them over to the next scheduled case
25 management conference.

00004

1 THE COURT: Right.

2 MR. IANNO: So we're only here today,
3 I believe, in agreement on a motion for an
4 entry of an order from last week's 8:45.

5 THE COURT: Oh, I apologize. What
6 order and what did we neglect to do?

7 MR. IANNO: This is on the performance
8 of evaluation --

9 MR. SCAROLA: Your Honor didn't
10 neglect to do anything. It's our neglect,
11 not yours.

12 THE COURT: Well, I doubt that but go
13 ahead.

14 MR. IANNO: This is the disagreement
15 we have, it's Mr. Scarola's motion for entry
16 of an order related to the February 19th
17 8:45. It's his motion.

18 THE COURT: Yeah, okay. Shoot. I
19 know what day it was. I mean how could you
20 not be doing the motion to compel?

21 MR. SCAROLA: Your Honor, this is the
22 order that was initially drafted with
23 respect to the hearing that was held before
24 Your Honor I guess a week and a half ago
25 now.

00005

1 THE COURT: Thank you, sir.

2 MR. SCAROLA: The only point in
3 contention is with regard to sub-paragraph
4 "C" in that order.

5 THE COURT: I just want to back up a
6 minute. I did not generate an order on
7 this?

8 MR. SCAROLA: No, Your Honor. You
9 left it to us to draft and we thought we had
10 an agreement, and we have what I think is a
11 minor disagreement in terms of how this
12 needs to be worded.

13 THE COURT: Okay.

14 MR. SCAROLA: You may recall that
15 there was a dispute with regard to the scope
16 of the production of documents relating to
17 the critique of Morgan Stanley employees.

18 Your Honor announced a ruling from the
19 bench in that regard and I believe that the
20 order that you have before Your Honor, we
21 share the belief that that order accurately
22 reflects what the Court's intent was with
23 only a single dispute relating to sub
24 paragraph "C" requiring the production of
25 documents which reflect performance positive

00006

1 or negative of due diligence activities.

2 THE COURT: Excuse me one second.
3 I apologize.

4 Pete, could you just give this to
5 Nancy and make sure we didn't do an order on
6 it?

7 I apologize. I mean it's just
8 sticking in my head so much. I just want to
9 make sure we didn't do an order that

10 THE BAILIFF: You don't know if we did
11 an order?

12 THE COURT: That is a proposed order.
13 I need to know whether we did our own from

14 the hearing that day.

15 I apologize.

16 MR. IANNO: I have the transcript,
17 Your Honor, and you left it to us to go
18 right out and that's what we, I thought we
19 had done in the back of the courtroom.

20 THE COURT: Okay, I'm sure you're
21 right. I just want to clear up that so I
22 don't -- go ahead. Continue your argument.
23 We're talking about "C."

24 MR. SCAROLA: Yes, we're talking about
25 "C." "C" would require the production of

00007

1 positive or negative comments with regard to
2 the performance of due diligence activities.

3 The concern that I have is that Morgan
4 Stanley may decline to produce comments
5 relating to the performance of due diligence
6 activities unless the comment is
7 specifically designated as relating to due
8 diligence activities. That is the criteria
9 that they may apply in complying with that
10 proposed order as drafted is if it doesn't
11 say due diligence, it doesn't get produced.

12 THE COURT: So you're saying if it was
13 done -- okay.

14 MR. SCAROLA: What I would like the
15 order to say, and this is the only point of
16 disagreement, is that the language should
17 include, "which is related or may reasonably
18 be related to the performance of due
19 diligence responsibilities regardless of
20 whether specifically designated as such."

21 So if the comment is a general comment
22 that may encompass due diligence activities,
23 which are obviously the focus of our
24 concerns, although not specifically
25 designated due diligence, it ought to be

00008

1 produced.

2 THE COURT: But are you suggesting if
3 there's comment that just says, you know,
4 John Doe does a good job and one of this job
5 duties is due diligence, you want that
6 produced?

7 MR. SCAROLA: Yes. Or if it says John
8 Doe during this period of time did a bad
9 job, you know, it's just a general criticism
10 saying he neglected his duties and one of
11 his duties was due diligence, then that is a
12 comment that may reflect upon his
13 performance of due diligence and ought to be
14 provided to us even though it doesn't
15 specifically say due diligence.

16 THE COURT: What's your client's
17 position?

18 MR. IANNO: Well, first of all, Your
19 Honor, we're renegotiating the Court's
20 ruling and that's my first problem with
21 this. If I may, I can give the Court a copy
22 of the transcript in our opposition that was
23 filed.

24 THE COURT: Sure. And is there a
25 written motion we're here on today, just so
00009

1 I'm clear?

2 MR. IANNO: Motion for entry of order.

3 THE COURT: Okay, but there is a
4 motion called that?

5 MR. SCAROLA: Yes, Your Honor. This
6 is a copy of the motion, Your Honor. I
7 don't know that it's going to be of any help
8 to you but that's what it says.

9 THE COURT: Thank You.

10 MR. IANNO: When we went over this,
11 Your Honor, and as the Court will see this
12 very position that Mr. Scarola is raising
13 just opens everything up and all the
14 limitations the Court placed on this
15 discovery are now out the window because if
16 this employee has very bad telephone
17 manners, all of a sudden maybe that's
18 related to due diligence activities. He's
19 talking to somebody of due diligence, he's
20 rude to them. That could be reasonably
21 related.

22 The way we had worded this, and the
23 Court said on page 13 paragraph 4, what we
24 need to do is limit this to the three
25 categories that were listed in our
00010

1 opposition on page 2, I believe, of the
2 opposition.

3 The order that we went back and wrote
4 up in the courtroom was exactly
5 word-for-word those three categories with
6 the addition of what Mr. Scarola wanted were
7 any criticisms of moral turpitude,
8 dishonesty and the like, which became the
9 fourth subcategory.

10 The next day Mr. Scarola comes, when
11 we have the case management conference on
12 February 20th, and adds language to the
13 first category that says, "and any
14 references to the employee's performance."

15 And that can encompass virtually
16 everything an employee does; they're a bad
17 dresser, whatever. And that's the argument

18 we made at the hearing in the transcript, if
19 it's related to their due diligence
20 activity, that's covered by "C."

21 But what Mr. Scarola wants if this
22 employee has just said, You're just not
23 doing a very good job because you're not
24 here timely, it opens up the whole
25 employee's personnel file, and we're talking

00011

1 50, 60 employees here.

2 And that's why the Court had entered
3 an order, as it said on Page 13, is these
4 three categories plus the addition of this
5 extra category, and that's what the order
6 accurately reflects.

7 We shouldn't be able to go back and
8 renegotiate additional things. And the
9 order as drafted, it says, without prejudice
10 for Mr. Scarola to come back.

11 MR. SCAROLA: Your Honor?

12 THE COURT: What's the response?

13 MR. SCAROLA: If the criticism says
14 that he has bad telephone manners or he
15 dresses sloppily, that is not related nor
16 reasonably related to the performance of his
17 due diligence responsibilities.

18 I just want to make it clear that even
19 if this is a general comment without
20 limitation saying you're doing a bad job
21 answering the telephone, if it's a general
22 comment you're doing a bad job, even though
23 it doesn't specifically say "in the
24 performance of your due diligence
25 activities," that may reasonably be

00012

1 interpreted as encompassing due diligence
2 activities and we ought to be able to get
3 that.

4 So the language I'm proposing simply
5 says that. It says, "which is related or
6 reasonably may be related to the performance
7 of due diligence responsibilities regardless
8 of whether specifically designated as such."

9 If it is specifically designated, and
10 it's not due diligence, you don't need to
11 give it to me; but if reasonably it could be
12 interpreted as relating to due diligence, we
13 ought to get it.

14 THE COURT: I'm sorry, what was the
15 second argue -- regarding -- oh, regardless
16 of designation?

17 MR. SCAROLA: Yes, regardless of
18 whether it's specifically designated as
19 such. You'll excuse my --

20 THE COURT: That's okay.

21 MR. SCAROLA: So it is, "which is
22 related or reasonably may be related to the
23 performance of due diligence
24 responsibilities regardless of whether
25 specifically designated as such."

00013

1 THE COURT: I mean the part I would, I
2 mean the first part quite frankly I think is
3 implicit in there. The second part I am
4 willing to add the language "regardless of
5 whether it's specifically designated as due
6 diligence performance." I mean that.

7 MR. IANNO: Right.

8 THE COURT: They're not using magic
9 words. You guys still know you have to
10 produce it.

11 MR. IANNO: Exactly, Your Honor. I
12 thought the way it was worded with "due
13 diligence activities" sufficiently
14 encompassed Mr. Scarola's concerns.

15 THE COURT: I think you're probably
16 right. I don't know whether this is adding
17 anything but just so there's no
18 misunderstanding, it doesn't matter if they
19 call it due diligence, if it is due
20 diligence, it gets produced.

21 And it's the 3rd of March.

22 Either side have envelopes?

23 MR. SCAROLA: I think they're attached
24 to the package that I gave Your Honor.

25 THE COURT: I probably lost them.

00014

1 Hold on.

2 MR. IANNO: If not I have a set.

3 THE COURT: I don't want to

4 MR. IANNO: I have a set, Your Honor.

5 THE COURT: Well, you don't need --
6 oh, we do have one. Okay. Thank you very
7 much.

8 MR. SCAROLA: Thank you, Your Honor.

9 MR. IANNO: Thank you, Your Honor.

10 THE COURT: Bye-bye.

11

12 (Thereupon, at 8:45 a.m. the hearing
13 was concluded.)

14

15

16

17

18

19

20

21

22
23
24
25
00015
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T E

THE STATE OF FLORIDA)

COUNTY OF PALM BEACH)

I, Patty McCoy, Shorthand Reporter, certify
that I was authorized to and did stenographically
report the foregoing proceedings and that the
transcript is a true record.

Dated this 3rd day of March, 2004.

Patty McCoy, Shorthand Reporter

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 2003 CA 005045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,

Defendant(s).

_____ /

NOTICE OF DEPOSITION

TO: Counsel on the attached list

PLEASE TAKE NOTICE that Plaintiff Coleman (Parent) Holdings, Inc., hereby notices the deposition upon oral examination of the Custodian of Records, Bloomberg, Inc. pursuant to Florida Rule of Civil Procedure 1.410 on the date and at the time set forth below:

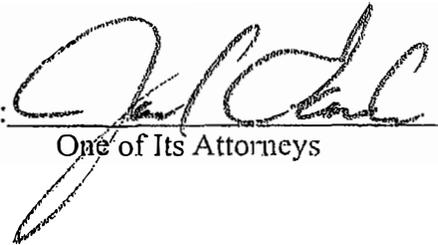
Custodian of Records March 29, 2004 at 9:30 a.m.
Bloomberg, Inc.

The witness will be requested to bring to the deposition documents specified on Attachment A.

The deposition will be recorded by stenographic means at the offices of Searcy Denney Scarola Barnhart & Shipley, P.C., 2139 Palm Beach Lakes Blvd., West Palm Beach, Florida. The deposition will be taken before a person authorized to administer oaths and will continue until completed.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by telefax and by overnight mail to all counsel on the attached Service List, this 4th day of March, 2004.

COLEMAN (PARENT) HOLDINGS, INC.

By: 
One of Its Attorneys

Jerold S. Solovy
Ronald L. Marmer
Robert T. Markowski
Clark C. Johnson
JENNER & BLOCK, LLC
One IEM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

Jack Scarola
SEARCY DENNEY SCAROLA
BARNHART & SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409
(561) 686-6300

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block, LLC
One IBM Plaza
Suite 4400
Chicago, IL 60611

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 2003 CA 005045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,

Defendant(s).

SUBPOENA DUCES TECUM

THE STATE OF FLORIDA

TO: Custodian of Records
Bloomberg, Inc.
THE PRENTICE-HALL CORPORATION SYSTEM INC.
1201 HAYS STREET SUITE 105
TALLAHASSEE FL 32301

YOU ARE COMMANDED to appear for deposition at Searcy Denney Scarola
Barnhart & Shipley, P.A., 2139 Palm Beach Lakes Boulevard, West Palm Beach, FL, 33409 on
the 29th day of March, 2004 at 9:30 a.m. and to have with you at that time and place the
documents specified on Attachment A.

If you fail to:

- 1) Appear as specified; or
- 2) Furnish the records instead of appearing as provided above; or
- 3) Object to this subpoena,

You may be in contempt of court. You are subpoenaed to appear by the following attorney, and unless excused from this subpoena by this attorney or the court, you shall respond to this subpoena as directed.

DATED this 4th day of March, 2004.



JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 478-0754
Attorneys for Plaintiff

**CERTIFICATION OF RESPONSE TO
SUBPOENA DUCES TECUM**

STATE OF FLORIDA
COUNTY OF _____

The undersigned, as custodian of records for Bloomberg, Inc., certifies that the attached documents consisting of ____ pages represents a true copy of all items with in my possession, custody or control which are described in the Subpoena Duces Tecum served on me in the above styled action and each page is numbered by me for identification. Production is complete and has been numbered by the custodian of records.

It is further certified that originals of the items produced are maintained under the direction, custody and control of the undersigned.

The foregoing Certification was acknowledged before me, an officer duly authorized in the State and County aforesaid to take acknowledgments, this _____ day of _____, 20____, who:

- is personally known to me; or
- has produced _____ as identification; and who:
- did or
- did not, take an oath,

and who executed the foregoing certification, and who acknowledged the foregoing certification to be freely and voluntarily executed for the purposes therein recited.

Notary Public, State of Florida at Large

My Commission Expires:

**ATTACHMENT A
TO SUBPOENA TO NON-PARTY
BLOOMBERG, INC.**

You are hereby requested to produce the following documents pursuant to the definitions and instructions set forth below.

DOCUMENTS REQUESTED

1. All documents concerning emails or electronic messages of the following Morgan Stanley or MSSF employees:

- Leslie E. Bradford
- Steven L. Brown
- Shani Boone
- Thomas Burchill
- Tyrone Chang
- Andrew Conway
- Benjamin D. Derito
- Karen Eltrich
- Alex Fuchs
- Jake Foley
- Joel P. Feldmann
- Richard B. Felix
- Johannes Groeller
- Michael Hart
- Robert Kitts
- William Kourakos

- Tarek F. Abdel-Meguid
- Stephen R. Munger
- Stephan F. Newhouse
- Ralph L. Pellecchio
- Ruth Porat
- Lily Raffi
- Michael L. Rankowitz
- William J. Sanders
- Andrew B. Savarie
- Ishaan Seth
- Marium A. Short
- Dwight D. Sipprelle
- Bram Smith
- William Strong
- James Stynes
- John Tyree
- Joshua A. Webber
- Chris Whelan
- William H. Wright
- Gene K. Yoo

DEFINITIONS

1. "Concerning" means concerning, reflecting, relating to, referring to, describing, evidencing, or constituting.

2. "Documents" shall be given the broad meaning provided in Rule 1.350 of the Florida Rules of Civil Procedure and refers to any form or means, whether physical, visual, or electronic, in or by which words, numbers, or ideas are recorded or preserved, whether fixed in tangible medium or electronically stored, including any and all drafts of any final document. The word "documents" shall include, by way of example and not by way of limitation, all of the following: papers, correspondence, trade letters, envelopes, memoranda, telegrams, cables, notes, messages, reports, studies, press releases, comparisons, books, accounts, checks, audio and video recordings and transcriptions thereof, pleadings, testimony, articles, bulletins, pamphlets, brochures, magazines, questionnaires, surveys, charts, newspapers, calendars, desk calendars, pocket calendars, lists, logs, publications, notices, diagrams, instructions, diaries, minutes for meetings, corporate minutes, orders, resolutions, agendas, memorials or notes of oral communications, whether by telephone or face-to-face, contracts, agreements, drafts of or proposed contracts or agreements, memoranda of understanding, letters of intent, computer tapes, computer drives or memories, computer diskettes or disks, e-mail, CD-ROMs, or any other tangible thing on which any handwriting, typing, printing, photostatic, electronic, or other form of communication or information is recorded or reproduced, together with all notations on any of the foregoing, all originals, file copies, or other unique copies of the foregoing, and all versions or drafts thereof, whether used or not.

3. "Morgan Stanley" means Morgan Stanley & Co., Inc. and any of its predecessors, successors, affiliates, subsidiaries, and present and former officers, directors, partners, employees, representatives, and agents.

4. "MSSF" means Morgan Stanley Senior Funding, Inc. and any of its predecessors, successors, affiliates, subsidiaries, and present and former officers, directors, partners, employees, representatives, and agents.

INSTRUCTIONS

1. Documents shall be produced as they are kept in the usual course of business, or organized and labeled to correspond to the categories in this Request. Documents attached to each other should not be separated. Documents consisting of items previously produced in the Litigations with Bates numbering shall be produced in Bates number order. Documents stored in an electronic format should be produced in a readable electronic format accessible by a standard database program such as concordance.

2. All documents shall be produced in the file folder, envelope or other container in which the documents are kept or maintained by you. If, for any reason, the container cannot be produced, produce copies of all labels or other identifying marks.

3. The relevant period, unless otherwise indicated, shall be from **January 1, 1997 through the date of this subpoena**, and shall include all documents and information which relate in whole or in part to such period, or to events or circumstances during such period, even though dated, prepared, generated or received prior or subsequent to that period. Please supplement or correct your responses to these requests if, at any time, you become aware that your responses are incomplete or incorrect in any respect.

4. If you claim the attorney-client privilege, or any other privilege or work-product protection for all or any portion of a document, you shall provide a privilege log that describes the withheld material sufficiently to allow CPH to test the privilege or protection asserted.

5. The following rules of construction apply:

- A. The connectives "and" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery requests all responses that might otherwise be outside of their scope;
- B. The term "including" shall be construed to mean "without limitation"; and
- C. The use of the singular form of any word includes the plural and vice versa.

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 2003 CA 005045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,

Defendant(s).

_____ /

NOTICE OF DEPOSITION

TO: Counsel on the attached list

PLEASE TAKE NOTICE that Plaintiff Coleman (Parent) Holdings, Inc., hereby notices the deposition upon oral examination of the Custodian of Records, Hill & Knowlton, Inc. pursuant to Florida Rule of Civil Procedure 1.410 on the date and at the time set forth below:

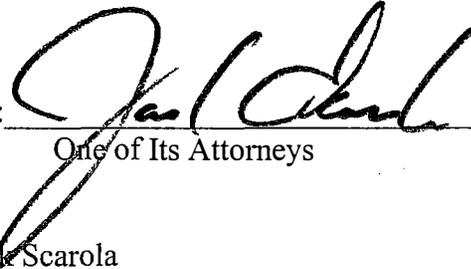
Custodian of Records March 30, 2004 at 9:30 a.m.
Hill & Knowlton, Inc.

The witness will be requested to bring to the deposition documents specified on Attachment A.

The deposition will be recorded by stenographic means at the offices of Searcy Denney Scarola Barnhart & Shipley, P.C., 2139 Palm Beach Lakes Blvd., West Palm Beach, Florida. The deposition will be taken before a person authorized to administer oaths and will continue until completed.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by telefax and by overnight mail to all counsel on the attached Service List, this 17th day of March, 2004.

COLEMAN (PARENT) HOLDINGS, INC.

By: 
One of Its Attorneys

Jerold S. Solovy
Ronald L. Marmer
Robert T. Markowski
Clark C. Johnson
JENNER & BLOCK, LLC
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

Jack Scarola
SEARCY DENNEY SCAROLA
BARNHART & SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409
(561) 686-6300

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block, LLC
One IBM Plaza
Suite 4400
Chicago, IL 60611

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH, COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

CASE NO. CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

**COLEMAN (PARENT) HOLDINGS INC.'S MOTION FOR PERMISSION
TO HAVE THIRD PARTY RETRIEVE MORGAN STANLEY E-MAIL
AND OTHER RESPONSIVE DOCUMENTS**

Plaintiff Coleman (Parent) Holdings Inc. ("CPH") respectfully requests that this Court direct Defendant Morgan Stanley and Company, Inc. ("Morgan Stanley") to provide Kroll Ontrack, Inc. ("Kroll"), a third party computer specialist, access to its computer backup tapes (or other storage media) so that Kroll can retrieve e-mail and other responsive documents at Morgan Stanley's expense. In support of this motion, CPH states as follows:

1. As this Court is aware, Morgan Stanley has disclosed that it failed to retain the e-mail that its personnel generated prior to January 1, 2000 — despite having a legal obligation to do so. Based on the depositions taken to date, however, CPH has learned that it is possible that many of these e-mails and other responsive documents could be retrieved from Morgan Stanley's computer backup files. Morgan Stanley, however, has refused to attempt to retrieve those documents on the ground that the retrieval process would be burdensome.

2. To accommodate CPH's need for discovery, as well as Morgan Stanley's concerns over burden, CPH has proposed that a third party conduct the search for e-mail and other responsive documents in Morgan Stanley's backup files. CPH has proposed that the search be conducted by Kroll, an independent firm with the expertise to conduct such a search. Specifically, CPH has proposed the following procedure: (a) Kroll first would agree in writing to be bound by the terms of the protective order entered in this case; (b) Kroll then would conduct a search of Morgan Stanley's backup files for e-mail and other responsive documents at Morgan Stanley's expense; (c) the e-mails retrieved by Kroll would be delivered to Morgan Stanley for review; (d) Morgan Stanley then would review the retrieved e-mails for privilege and responsiveness to CPH's prior document requests; (e) Morgan Stanley would produce all responsive and nonprivileged documents to CPH; and (f) Morgan Stanley would provide a supplemental log of the retrieved documents withheld on privilege grounds.

3. CPH's proposal addresses Morgan Stanley's concerns over burden while it accommodates CPH's need to discover e-mails and other documents that are responsive to CPH's document requests. The proposal also is fair and equitable because CPH has agreed to make it reciprocal. As shown in CPH's response to Morgan Stanley's motion to compel production of electronic documents in electronic form, CPH has proposed the same procedure for the materials sought by that motion: Kroll would be allowed access to CPH's files and would search them at CPH's expense for electronic documents in electronic form.

4. Despite the fairness of CPH's proposal and the obvious benefits of involving a third party -- having a reputable third party conduct the search would prevent the disputes that inevitably would erupt about thoroughness, timeliness, and costs if the parties were to conduct their own searches and bill the other side -- Morgan Stanley has rejected CPH's proposal for third-party participation. Instead, Morgan Stanley has responded that it would conduct limited searches for email from the files of five individuals -- conditioned upon CPH agreeing to a number of undertakings -- and would search in additional files only if CPH pays for the process. That is not sufficient. The initial search proposed by Morgan Stanley is far from adequate, given the involvement of dozens of Morgan Stanley employees in the underlying events. Moreover, having

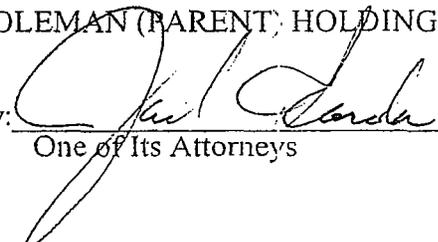
Morgan Stanley instead of a third party conduct the searches would lead to inevitable disputes that could be avoided easily if an independent computer professional were involved. Because CPH's reciprocal proposal constitutes a reasonable accommodation of CPH's need for discovery, and Morgan Stanley's concerns over undue burden, the proposal should be adopted by the Court.

For the foregoing reasons, CPH respectfully requests that this Court direct Morgan Stanley to provide Kroll Ontrack, Inc. access to Morgan Stanley's computer backup files in accordance with the terms discussed above, for the purpose of searching for e-mail and other documents generated prior to January 1, 2000 that are responsive to CPH's prior document requests.

Dated: March 12, 2004

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

By: 

One of Its Attorneys

Jerold S. Solovy
Ronald L. Marmer
Jeffrey T. Shaw
JENNER & BLOCK LLP
One IBM Plaza
Chicago, IL 60611
(312) 222-9350

Jack Scarola
SEARCY, DENNEY, SCAROLA,
BARNHART & SHIPLEY, P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33401
(561) 686-6300

#1054311

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by
Fax and Federal Express to all counsel on the attached list on this 12TH day of
March, 2004.



JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 478-0754
Attorneys for Coleman(Parent)Holdings Inc.
and MacAndrews & Forbes Holdings, Inc.

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block LLP
One IBM Plaza
Suite 4400
Chicago, IL 60611

#230580/mm

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

CASE NO: 2003 CA 005045 AI

Plaintiffs,

vs.

MORGAN STANLEY & CO., INC.

Defendant.

MORGAN STANLEY SENIOR FUNDING,
INC.,

Plaintiff,

CASE NO. CA 03-5165 AI

vs.

MACANDREWS & FORBES HOLDINGS,
INC.,

Defendant,

NOTICE OF FILING PLEADING UNDER SEAL

Plaintiff, COLEMAN (PARENT) HOLDINGS INC., hereby gives Notice of the filing of
Coleman (Parent) Holdings Inc.'s Motion for a Rule to Show Cause, filed under Seal on this
date.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by
Fax and Federal Express to all counsel on the attached list on this 12TH day of MARCH,
2004.



JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 478-0754
Attorneys for Coleman and MacAndrews

Coleman (Parent) Holdings Inc. vs Morgan Stanley & Company
Notice Of Filing Pleading Under Seal
Case No.: 2003 CA 005045 AI

COUNSEL LIST

Joseph Lanno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block, LLC
One IBM Plaza
Suite 400
Chicago, IL 60611

#230530/mm

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

CASE NO.: 2003 CA 05045 AI

Plaintiffs,

vs.

MORGAN STANLEY & CO., INC.,

Defendant,

_____ /

MORGAN STANLEY SENIOR FUNDING,
INC.,

Plaintiff,

CASE NO. CA 03-565 AI

vs.

MACANDREWS & FORBES HOLDINGS,
INC.,

Defendant,

_____ /

NOTICE OF HEARING

YOU ARE HEREBY NOTIFIED that the undersigned has called up for hearing the following:

DATE: March 19, 2004

TIME: 3:30 p.m.

JUDGE: Hon. Elizabeth T. Maass

PLACE: Palm Beach County Courthouse, Room #11.1208, 205 North Dixie Highway,
West Palm Beach, FL 33401

SPECIFIC MATTERS TO BE HEARD:

- (1) COLEMAN (PARENT) HOLDINGS INC.'S MOTION FOR A RULE TO SHOW CAUSE (filed under seal)
- (2) COLEMAN (PARENT) HOLDINGS INC.'S MOTION FOR PERMISSION TO HAVE THIRD PARTY RETRIEVE MORGAN STANLEY E-MAIL AND OTHER RESPONSIVE DOCUMENTS

Coleman Holdings, Inc. vs Morgan Stanley & Company
Case No.: 2003 CA 005045 AJ
Notice of Hearing

Moving counsel certifies that he or she contacted opposing counsel and attempted to resolve the discovery dispute without hearing.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Fax and Federal Express to all Counsel on the attached list, this 12th day of MARCH, 2004.



JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 478-0754
Attorney for Coleman (Parent) Holdings Inc.
and MacAndrews & Forbes Holdings, Inc.

Coleman Holdings, Inc. vs Morgan Stanley & Company
Case No.: 2003 CA 005045 AI
Notice of Hearing

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block LLP
One IBM Plaza
Suite 4400
Chicago, IL 60611

CARLTON FIELDS, P.A.

ATTORNEYS AT LAW

ESPERANTÉ
222 LAKEVIEW AVENUE, SUITE 1400
WEST PALM BEACH, FLORIDA 33401-6149

MAILING ADDRESS
P.O. BOX 150, WEST PALM BEACH, FL 33402-0150
TEL (561) 659-7070 FAX (561) 659-7368

FAX COVER SHEET

Date:	March 12, 2004	Phone Number	Fax Number
To:	Jack Scarola	(561) 686-6300	(561) 684-5816
	Jerold Solovy	(312) 222-9350	(312) 527-0484
	Thomas Clare	(202) 879-5993	(202) 879-5200
From:	Joyce Dillard, CLA, for Joseph Ianno, Jr.	(561) 659-7070	(561) 659-7368

Client/Matter No.: 47877/14092

Employee No.:

Total Number of Pages Being Transmitted, Including Cover Sheet: 8

Message:

To follow please find a copy of Joseph Ianno's letter of March 12, 2004 to Judge Maass with enclosures.

Original to follow Via Regular Mail Original will Not be Sent Original will follow via Overnight Courier

 The information contained in this facsimile message is attorney privileged and confidential information intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone (if long distance, please call collect) and return the original message to us at the above address via the U.S. Postal Service. Thank you.

IF THERE ARE ANY PROBLEMS OR COMPLICATIONS, PLEASE NOTIFY US IMMEDIATELY AT:
(561) 659-7070

TELECOPIER OPERATOR: _____

WPB#566762.1

CARLTON FIELDS, P. A.

TAMPA ORLANDO TALLAHASSEE WEST PALM BEACH ST. PETERSBURG MIAMI

MIAMI
ORLANDO
ST. PETERSBURG
TALLAHASSEE
TAMPA

WEST PALM BEACH

CARLTON FIELDS

ATTORNEYS AT LAW

Esperanté
222 Lakeview Avenue, Suite 1400
West Palm Beach, Florida 33401-6149
P.O. Box 150
West Palm Beach, Florida 33402-0150

561.659.7070
561.659.7368 fax
www.carltonfields.com

E-MAIL: jlanno@carltonfields.com

March 12, 2004

The Honorable Elizabeth Maass
Palm Beach County Courthouse
205 North Dixie Highway
West Palm Beach, Florida 33401

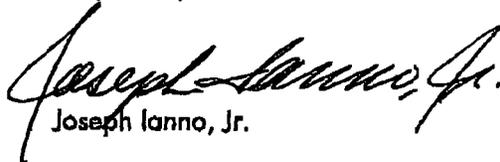
VIA HAND-DELIVERY

Re: *Coleman (Parent) Holdings Co. v. Morgan Stanley & Co.,*
Case No: CA 03-5045 AI and
Morgan Stanley Senior Funding, Inc.,
Case No: CA 03-5165 AI

Dear Judge Maass:

Enclosed please find the parties' proposed Modified Order Granting in Part and Denying in Part Plaintiff's Motion to Compel Production of Documents Relating to Employee Performance. The order Your Honor entered on March 3, 2004 was erroneously provided by Plaintiff in open court. Attorney Jack Scarola has reviewed the proposed order and has no objection to its form. For Your Honor's convenience, we have also enclosed a copy of the March 3, 2004 order. If the proposed order meets with Your Honor's approval, kindly execute same and provide conformed copies to counsel of record. For the convenience of Your Honor's judicial assistant, enclosed please find additional copies and self-addressed stamped envelopes.

Respectfully,



Joseph Ianno, Jr.

Enclosure

cc: Jack Scarola (via facsimile w/encl.)
Jerold Solovy (via facsimile w/encl.)
Thomas Clare (via facsimile w/encl.)

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CASE NO: 03 CA-005045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

**ORDER GRANTING IN PART AND DENYING IN PART
PLAINTIFF'S MOTION TO COMPEL PRODUCTION OF
DOCUMENTS RELATING TO EMPLOYEE PERFORMANCE**

THIS CAUSE came before the Court February 19, 2004 on Plaintiff's Motion to Compel Production of Documents Relating To Employee Performance, and the Court having reviewed the pleadings on file, heard argument of counsel and otherwise being fully advised in the premises, it is hereby

ORDERED AND ADJUDGED as follows:

1. The Motion is Granted In Part, and Denied, In Part.
2. Defendant shall produce, within thirty (30) days of this Order, copies of documents responsive to Plaintiff's May 9, 2003 Request to Produce number 44 for the Morgan Stanley employees who worked on the 1997-98 Sunbeam-related engagements. Specifically, Morgan Stanley shall produce, for those employees and for the time period from 1992 through and including 1998:

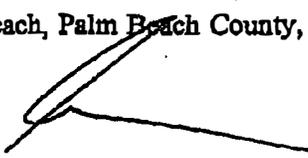
- (a) All references (positive or negative) to work performed by the employee on Sunbeam-related engagements and/or to the general quality of work performed in 1997 and/or 1998.
- (b) All references (positive or negative) to the employee's performance in fee generation.
- (c) All references (positive or negative) to the employee's performance of due diligence activities, *regardless of whether designated specifically as such.*
- (d) All references (positive or negative) to the employee's truthfulness, veracity, or moral turpitude.

Privileged information only may be redacted.

3. Defendant shall produce, within thirty (30) days of this Order, additional documents (if any) responsive to Plaintiff's May 9, 2003 Request to Produce numbers 45 and 46.

4. This ruling is without prejudice to Plaintiff's ability to request additional employee performance-related disc very based upon the content of the production requested pursuant to this Order.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 3 day of March, 2004.



ELIZABETH T. MAASS
Circuit Court Judge

Copies furnished:

Joseph Ianno, Jr. Esq.
CARLTON FIELDS, P.A.
222 Lakeview Avenue - Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, Esq.
KIRKLAND & ELLIS LLP
655 15th Street, N.W. - Suite 1200
Washington, D.C. 20005

John Scarola, Esq.
SEARCY DENNEY SCAROLA BARNHART & SHIPLEY, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33409

Jerold S. Solovy, Esq.
JENNER & BLOCK LLP
One IBM Plaza -- Suite 4400
Chicago, IL 60611

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

v.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO., INC.,

Defendant.

MORGAN STANLEY SENIOR FUNDING, INC.,

Plaintiff,

v.

CASE NO: CA 03-5165 AI

MACANDREWS & FORBES HOLDINGS, INC.,

Defendant.

**MODIFIED ORDER GRANTING IN PART AND DENYING IN PART
PLAINTIFF COLEMAN (PARENT) HOLDINGS INC.'S MOTION TO COMPEL
PRODUCTION OF DOCUMENTS RELATING TO EMPLOYEE PERFORMANCE**

THIS CAUSE having come before the Court on its Order entered March 3, 2004 on Plaintiff Coleman (Parent) Holdings Inc.'s Motion to Compel Production of Documents Relating To Employee Performance, and the Court having reviewed the pleadings on file, being advised of the parties agreement to the modification, and otherwise being fully advised in the premises, it is hereby

ORDERED AND ADJUDGED as follows:

1. The Motion is Granted In Part, and Denied, In Part.

2. Defendant shall produce, on or before April 2, 2004, copies of document responsive to Plaintiff's May 9, 2003 Request to Produce number 44 for the Morgan Stanley employees who worked on the 1997-98 Sunbeam-related engagements. Specifically, Morgan Stanley shall produce, for those employees and for the time period from 1992 through and including 1998:

- (a) All references (positive or negative) to work performed by the employee on Sunbeam-related engagements.
- (b) All references (positive or negative) to the employee's performance in fee generation.
- (c) All references (positive or negative) to the employee's performance of due diligence activities, regardless of whether designated specifically as such.
- (d) All references (positive or negative) to the employee's truthfulness, veracity, or moral turpitude.

Privileged information only may be redacted.

3. Defendant shall produce, on or before April 2, 2004, additional documents (if any) responsive to Plaintiff's May 9, 2003 Request to Produce numbers 45 and 46.

4. This ruling is without prejudice to Plaintiff's ability to request additional employee performance-related discovery based upon the content of the production requested pursuant to this Order.

5. This order supersedes the Order Granting In Part and Denying In Part Plaintiff's Motion to Compel Production of Documents Relating to Employee Performance entered by this Court on March 3, 2004.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this ____ day of March 2004.

ELIZABETH T. MAASS
Circuit Court Judge

Copies furnished:

Joseph Ianno, Jr. Esq.
CARLTON FIELDS, P.A.
222 Lakeview Avenue – Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, Esq.
KIRKLAND & ELLIS LLP
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005

John Scarola, Esq.
SEARCY DENNEY SCAROLA BARNHART & SHIPLEY, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33409

Jerold S. Solovy, Esq.
JENNER & BLOCK LLP
One IBM Plaza – Suite 4400
Chicago, IL 60611

SEARCY
DENNEY
SCAROLA
BARNHART
& SHIPLEY P.A.

*Attorneys
at Law*

WEST PALM BEACH OFFICE:

2139 PALM BEACH LAKES BLVD.
WEST PALM BEACH, FLORIDA 33409
P.O. DRAWER 3626
WEST PALM BEACH, FLORIDA 33402

(561) 686-6300
1-800-780-6607
FAX: (561) 478-0754

TALLAHASSEE OFFICE:

THE TOWLE HOUSE
507 NORTH CALHOUN STREET
TALLAHASSEE, FL 32301-1231
P.O. DRAWER 1230
TALLAHASSEE, FLORIDA 32302

(850) 224-7600
1-888-549-7011
FAX (850) 224-7602

March 12, 2004

Hon. Elizabeth T. Maass
Palm Beach County Courthouse
Room #11.1208
205 North Dixie Highway
West Palm Beach, FL 33401

Re: Coleman (Parent) Holdings Inc. vs Morgan Stanley & Company, Inc,
MSSFI v. MacAndrews & Forbes Holdings, Inc.
Case No. CA 03-5045 A1
Matter No.: 029986-230580

Dear Judge Maass:

Enclosed you will find a courtesy copy of Coleman (Parent) Holdings, Inc.'s Motion for a Rule to Show Cause, together with supporting Appendix. This motion is scheduled to be heard on March 19, 2004 at 3:30 p.m. Please note that the original motion has been filed under seal pursuant to the Court's Confidentiality Order. We would request, therefore, that this courtesy copy of the sealed motion be returned to counsel upon completion of the hearing on March 19th.

Also enclosed are courtesy copies of the following pleadings which are also for hearing at the case management conference on March 19th:

Joint Submission of the Parties for March 19, 2004
Case Management Conference

Coleman (Parent) Holdings Inc.'s Motion for Permission to Have
Third Party Retrieve Morgan Stanley E-Mail and Other Responsive Documents

Defendants' Motion to Compel Production of Documents
Responsive to Defendants' First Request for Production

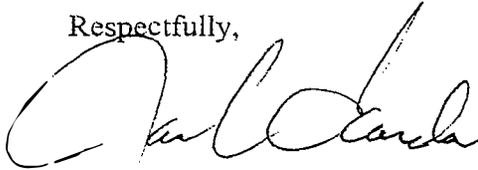


WWW.SEARCYLAW.COM

Honorable Elizabeth T. Maass
March 12, 2004
Page 2

Thank you for your attention to this matter.

Respectfully,



JACK SCAROLA

JS/mm

Enc.

cc: Joseph Ianno, Jr., Esq.
Thomas A. Clare, Esq.
Jerold S. Solovy, Esq.



CARLTON FIELDS

ATTORNEYS AT LAW

MIAMI
ORLANDO
ST. PETERSBURG
TALLAHASSEE
TAMPA

WEST PALM BEACH

Esperanté
222 Lakeview Avenue, Suite 1400
West Palm Beach, Florida 33401-6149
P.O. Box 150
West Palm Beach, Florida 33402-0150

561.659.7070
561.659.7368 fax
www.carltonfields.com

E-MAIL: jianno@carltonfields.com

March 12, 2004

The Honorable Elizabeth Maass
Palm Beach County Courthouse
205 North Dixie Highway
West Palm Beach, Florida 33401

VIA HAND DELIVERY

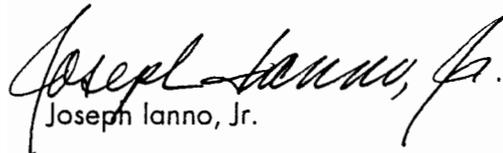
Re: *Coleman (Parent) Holdings Co. v. Morgan Stanley & Co.*
Case No: CA 03-5045 AI
Morgan Stanley Senior Funding, Inc. v. MacAndrews & Forbes Holdings, Inc.
Case No: CA 03-5165 AI

Dear Judge Maass:

This Court has scheduled a Case Management Conference on Friday, March 19, 2004 at 3:30 p.m. in the above-referenced consolidated matters. For Your Honor's convenience enclosed please find a copy of Morgan Stanley's pending motions and supporting documentation.

Thank you.

Respectfully,



Joseph Ianno, Jr.

/jed

Enclosures

cc: Jack Scarola (via facsimile and e-mail w/out encl.)
Jerold Solovy (via facsimile and e-mail w/out encl.)
Thomas Clare (via facsimile and e-mail w/out encl.)

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

v.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO., INC.,

Defendant.

_____/

MORGAN STANLEY SENIOR FUNDING, INC.,

Plaintiff,

v.

CASE NO: CA 03-5165 AI

MACANDREWS & FORBES HOLDINGS, INC.,

Defendant.

_____/

NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that a hearing has been set in the above-styled case as follows:

DATE:	March 19, 2004
TIME:	3:30 p.m.
PLACE:	Palm Beach County Courthouse, Courtroom 11A 205 North Dixie Highway West Palm Beach, Florida 33401
BEFORE:	Judge Elizabeth T. Maass
CONCERNING:	Defendant, Morgan Stanley & Co. Incorporated's Motion to Compel Coleman (Parent) Holdings Inc.'s Response to Fourth Set of Interrogatories

and

Defendant, Morgan Stanley & Co. Incorporated's Motion
to Compel the Production of Documents Pursuant to the
Parties' Written Agreement

KINDLY GOVERN YOURSELVES ACCORDINGLY.

The undersigned counsel hereby certifies that a good faith attempt to resolve the issues contained in the foregoing motions or matters will be made with opposing counsel prior to hearing on these matters on the Court's Motion Calendar.

If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no costs to you, to the provision of certain assistance. Please contact the ADA Coordinator in the Administrative Office of the Court, Palm Beach County Courthouse, 205 North Dixie Highway, Room 5.2500, West Palm Beach, Florida 33401; telephone number (561) 355-2431 within two (2) working days of your receipt of this notice; if you are hearing or voice impaired, call 1-800-955-8771.

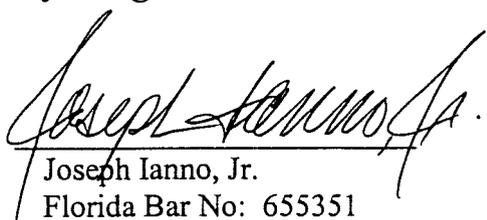
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and e-mail on this 12th day of March, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar No. 618349)
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

**Counsel for Defendant
Morgan Stanley & Co. Incorporated**

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

BY: 
Joseph Ianno, Jr.
Florida Bar No: 655351

SERVICE LIST

Jack Scarola
**SEARCY, DENNY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy
Michael Brody
JENNER & BLOCK, LLC
One IBM Plaza, Suite 400
Chicago, IL 60611

IN THE FIFTEENTH JUDICIAL
CIRCUIT IN AND FOR PALM BEACH
COUNTY, FLORIDA

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

CASE NO: CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

**MOTION TO COMPEL CPH'S RESPONSE TO MORGAN STANLEY & CO.'S
FOURTH SET OF INTERROGATORIES**

Defendant Morgan Stanley & Company Incorporated ("Morgan Stanley"), by and through its undersigned attorneys, respectfully submits this Motion to Compel Plaintiff Coleman (Parent) Holdings ("CPH") provided an adequate response to Morgan Stanley's Fourth Set of Interrogatories. In support of its Motion, Morgan Stanley states as follows:

1. CPH has identified, in its response to a prior interrogatory, approximately thirty-five alleged "misrepresentations" that it intends to rely upon at trial. (See Sept. 2, 2003 CPH's Resp. to Morgan Stanley's First Set of Interrogs., Interrog. 3.) In its Fourth Set of Interrogatories, Morgan Stanley requested that, for each of the alleged misrepresentations it intends to rely on at trial, CPH state:

- the date and time CPH contends Morgan Stanley knew or learned that the alleged representation was false or misleading;

- the events, documents, or circumstances under which CPH contends Morgan Stanley obtained that knowledge; and
- the identity of the persons CPH contends provided or obtained that that knowledge.

(See Feb. 20, 2004 CPH's Resp. & Objs. to Morgan Stanley's 4th Set of Interrogs.)

2. CPH's response to the interrogatory is wholly inadequate. Out of the thirty-five "misrepresentations" CPH intends to rely on at trial, CPH has provided only partial information for only two. For the remaining thirty-three representations it previously identified, CPH either did not respond at all — or simply provided non-responsive conclusions and legal theories regurgitated from its Complaint. (*See Id.*)

3. Morgan Stanley is entitled to full discovery into how CPH intends to prove the "knowledge" element of its fraud claim. Morgan Stanley is entitled to know — for each of the misrepresentations that CPH intends to rely upon at trial — exactly *when* CPH contends that Morgan Stanley knew the misrepresentation to be false, and exactly *how* CPH contends that Morgan Stanley obtained that knowledge. In order to state a fraud claim against Morgan Stanley, CPH must allege and prove "(1) a false statement concerning a specific material fact; (2) *the maker's knowledge that the representation is false*; (3) an intention that the representation induces another's reliance; and (4) consequent injury by the other party acting in reliance on the representation." *Cohen v. Kravit Estate Buyers, Inc.*, 843 So. 2d 989, 991 (Fla. 4th DCA 2003) (emphasis added; internal quotations & citation omitted); *see also* Fla. Std. Jury Instr. (Civ.) 8(a). CPH will bear the burden of proof on all of these elements at trial, and Morgan Stanley is entitled to discover what evidence CPH intends to present on each of these points.

4. CPH has informed Morgan Stanley of its belief that it is premature to require CPH to provide this information at this stage of the proceeding because the requested information relates to matter peculiarly within Morgan Stanley's knowledge and discovery is still underway.

In light of these objections, Morgan Stanley has asked CPH to commit to updating its response periodically during the court of discovery – but CPH has refused.

5. For these reasons, Morgan Stanley requests the Court to enter an order directing CPH to provide a complete response to Interrogatory No. 1 (Fourth Request) for each of the misrepresentations it intends to rely on at trial, and to update its response every thirty (30) days through the end of fact discovery. Alternatively, Morgan Stanley requests the Court enter an order precluding CPH from relying on any of the alleged misrepresentations as to which its response is deficient.

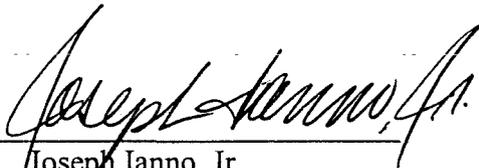
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and e-mail on this 12th day of March, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar No. 618349)
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

Counsel for Defendant
Morgan Stanley & Co. Incorporated

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
E-mail: jianno@carltonfields.com

BY: 
Joseph Ianno, Jr.
Florida Bar No: 655351

SERVICE LIST

Jack Scarola
**SEARCY, DENNY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy
Michael Brody
JENNER & BLOCK, LLC
One IBM Plaza, Suite 400
Chicago, IL 60611

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

_____ /

CASE NO. CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

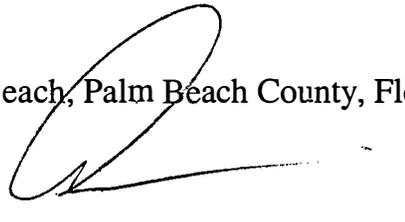
_____ /

ORDER AND DIRECTIONS TO THE CLERK

THIS CAUSE came before the Court, in Chambers, on its own Motion. Based on the foregoing, it is

ORDERED AND ADJUDGED that the Clerk is directed to docket and file attorney Joseph Ianno's letter dated March 12, 2004.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 15th day of March, 2004.



ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci
655 15th Street, NW, Suite 1200
Washington DC 20005

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, Il 60611

Mark F. Bideau, Esq.
777 S. Flagler Dr., Suite 300E
West Palm Beach, FL 33401

David M. Wells, Esq.
50 N. Laura Street, Suite 3300
Jacksonville, FL 32202

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

v.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO., INC.,

Defendant.

MORGAN STANLEY SENIOR FUNDING, INC.,

Plaintiff,

v.

CASE NO: CA 03-5165 AI

MACANDREWS & FORBES HOLDINGS, INC.,

Defendant.

**MODIFIED ORDER GRANTING IN PART AND DENYING IN PART
PLAINTIFF COLEMAN (PARENT) HOLDINGS INC.'S, MOTION TO COMPEL
PRODUCTION OF DOCUMENTS RELATING TO EMPLOYEE PERFORMANCE**

THIS CAUSE having come before the Court on its Order entered March 3, 2004 on Plaintiff Coleman (Parent) Holdings Inc.'s Motion to Compel Production of Documents Relating To Employee Performance, and the Court having reviewed the pleadings on file, being advised of the parties agreement to the modification, and otherwise being fully advised in the premises, it is hereby

ORDERED AND ADJUDGED as follows:

1. The Motion is Granted In Part, and Denied, In Part.

2. Defendant shall produce, on or before April 2, 2004, copies of documents responsive to Plaintiff's May 9, 2003 Request to Produce number 44 for the Morgan Stanley employees who worked on the 1997-98 Sunbeam-related engagements. Specifically, Morgan Stanley shall produce, for those employees and for the time period from 1992 through and including 1998:

- (a) All references (positive or negative) to work performed by the employee on Sunbeam-related engagements.
- (b) All references (positive or negative) to the employee's performance in fee generation.
- (c) All references (positive or negative) to the employee's performance of due diligence activities, regardless of whether designated specifically as such.
- (d) All references (positive or negative) to the employee's truthfulness, veracity, or moral turpitude.

Privileged information only may be redacted.

3. Defendant shall produce, on or before April 2, 2004, additional documents (if any) responsive to Plaintiff's May 9, 2003 Request to Produce numbers 45 and 46.

4. This ruling is without prejudice to Plaintiff's ability to request additional employee performance-related discovery based upon the content of the production requested pursuant to this Order.

5. This order supersedes the Order Granting In Part and Denying In Part Plaintiff's Motion to Compel Production of Documents Relating to Employee Performance entered by this Court on March 3, 2004.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this ____ day of March 2004.

ELIZABETH T. MAASS
Circuit Court Judge

SIGNED
MAY 15 2004
JUDGE ELIZABETH T. MAASS

Copies furnished:

Joseph Ianno, Jr. Esq.
CARLTON FIELDS, P.A.
222 Lakeview Avenue – Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, Esq.
KIRKLAND & ELLIS LLP
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005

John Scarola, Esq.
SEARCY DENNEY SCAROLA BARNHART & SHIPLEY, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33409

Jerold S. Solovy, Esq.
JENNER & BLOCK LLP
One IBM Plaza – Suite 4400
Chicago, IL 60611

SEARCY
DENNEY
SCAROLA
BARNHART
& SHIPLEY P.A.

*Altit neus
at Law*

WEST PALM BEACH OFFICE:

2139 PALM BEACH LAKES BLVD.
WEST PALM BEACH, FLORIDA 33409

P.O. DRAWER 3828
WEST PALM BEACH, FLORIDA 33402

(561) 686-6300
1-800-780-8607
FAX: (561) 478-0754

TALLAHASSEE OFFICE:

THE TOWLE HOUSE
517 NORTH CALHOUN STREET
TALLAHASSEE, FL 32301-1231

P.O. DRAWER 1230
TALLAHASSEE, FLORIDA 32302

(850) 224-7600
1-888-549-7011
FAX: (850) 224-7602

March 16, 2004

Hon. Elizabeth T. Maass
Palm Beach County Courthouse
Room #11.1208
205 North Dixie Highway
West Palm Beach, FL 33401

ATTORNEYS AT LAW:

ROSALYN SIA BAKER-BARNES
F. GREGORY BARNHART*
LANCE BLOCK*
EARL L. DENNEY, JR.*
SEAN C. DOMNICK*
JAMES W. GUSTAFSON, JR.
DAVID K. KELLEY, JR.*
WILLIAM B. KING
DARRYL L. LEVINS*
WILLIAM A. NORTON*
DAVID J. SALES*
JOHN SCAROLA*
CHRISTIAN D. SEARCY*
HARRY A. SHEVIN
JOHN A. SHIPLEY III*
CHRISTOPHER K. SPEED*
KAREN E. TERRY
C. CALVIN WARRINER III*
DAVID J. WHITE*

*SHAREHOLDERS

PARALEGALS:

VIVIAN AVAN-TEJEDA
LAURIE J. BRIGGS
DEANE L. CADY
DANIEL J. CALLOWAY
EMILIO DIAMANTIS
DAVID W. GILMORE
TED E. KULESA
JAMES PETER LOVE
CHRISTOPHER J. PILATO
ROBERT W. FITCHER
WILLIAM H. SEASOLD
KATHLEEN SIMON
STEVE M. SMITH
WALTER A. STEIN
BRIAN P. SULLIVAN
KEVIN J. WALSH
GEORGIA K. WETHERINGTON
JUDSON WHITEHORN

Re: Coleman (Parent) Holdings Inc. vs Morgan Stanley & Company
Matter No.: 029986-230580

Dear Judge Maass:

Enclosed please find copies of the following cases which Plaintiff, Coleman, cites in support of its Motion for a Rule to Show Cause which was filed in this matter on March 12, 2004 and which is currently set for hearing on March 19, 2004 at 3:30 p.m.

- Acosta v. Creative, 756 So.2d 193*
- Levy v. Levy, 861 So.2d 1211*
- Wells v. State of Florida, 654 So.2d 145*
- State of Florida v. Jones Chemicals, 1993 WL 388645 (M.D. Fla.)*
- Paranzino v. Barnett Bank, 690 So.2d 725*
- Cem-A-Care of Florida, Inc. v. Automated Planning Systems, Inc., 442 So. 2d 1048*
- Sanducco Corp. v. University Village, 484 So. 2d 640*

Respectfully,

Dictated But Not Signed By
Jack Scarola To Expedite Delivery

JACK SCAROLA
JS/mm
Enc.

cc: Joseph Ianno, Esq. (Via Fax w/o encl.)
Thomas Clare, Esq. (Via Fax w/o encl.)
Jenner & Block LLP (Via Fax w/encl.)



IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH, COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

CASE NO. CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

**COLEMAN (PARENT) HOLDINGS INC.'S
RESPONSE TO MORGAN STANLEY'S MOTION TO COMPEL
PURSUANT TO ALLEGED WRITTEN AGREEMENT**

Morgan Stanley asks the Court to require CPH to search backup tapes from an old computer system for the purpose of locating electronic versions of documents that CPH already has produced to Morgan Stanley in paper form. Morgan Stanley contends that the electronic versions of those documents must be produced so that Morgan Stanley can inspect them for metadata. If it were simply a matter of performing a routine search to locate those documents in electronic form, CPH would have no objection to providing them to Morgan Stanley, even though Morgan Stanley already has all of the documents in paper form. But, as explained below, CPH would have to go to considerable burden and expense to do so. Nonetheless, CPH has offered to comply with Morgan Stanley's request, if that agreement is reciprocal. That is, CPH wants Morgan Stanley to confirm that it will conduct searches of its files for e-mail and other responsive documents that Morgan Stanley has claimed would be too burdensome.

Specifically, CPH has proposed that both CPH and Morgan Stanley retain a third-party computer specialist — Kroll Ontrack, Inc. (“Kroll”) — to search their respective backup tapes to locate the requested documents. Morgan Stanley has refused. Incredibly, Morgan Stanley insists that CPH should be required to go to the time and expense to search its backup tapes for electronic versions of documents that Morgan Stanley already has in paper form, but Morgan Stanley will not itself undertake the burden of searching its own backup tapes to locate e-mails and other responsive documents that have not been produced to CPH at all — not in paper or electronic form.

As shown below, CPH's proposal is fair to everyone and assures that the parties receive the information they believe necessary.

1. **Contrary To Morgan Stanley's Assertions, CPH Should Not Be Required To Search Its Backup Tapes For Electronic Versions Of Documents Morgan Stanley Already Has In Paper Form.**
 - A. **To comply with Morgan Stanley's request, CPH would have to undertake a burdensome search of its backup tapes.**

The burden involved. This discovery dispute arose after Morgan Stanley, having received about 320 pages of documents printed from backup tapes for CPH's computer system, demanded that CPH go back and reproduce those documents in electronic form. Although the number of documents seems rather modest, the task of finding the electronic versions for those documents would be burdensome and expensive. *See* Affidavit of Steven L. Fasman (Exhibit A hereto).

To understand the burden involved, it is important to understand the effort that CPH engaged in when it produced the documents in the first place. The documents were produced from backup tapes from an old computer system. It is difficult to conduct any meaningful document search of the backup tapes, because the system accepts only one-phrase searches and there is no ability to narrow them with additional or modifying terms. Thus, if the term “Coleman” is entered, the search will yield every document containing the word Coleman — including documents reflecting that someone's last name is “Coleman.” To locate the 320 pages of responsive documents from the backup tapes, Mr. Fasman instructed that certain word searches be performed and that the documents

containing "hits" be hard-copied for his personal review. Because the search could not be refined, it produced massively overbroad responses.

To find the 320 pages of documents in electronic form would involve an even more arduous process. The only way to find each document is to select the most uncommon word in the document, search for that word, and review at a monitor attached to the server all of the documents containing that word. For example, if we are trying to find the electronic version of a letter, we would have to review each electronic document containing the word specified in the search. That process must be repeated for each document — one by one.

Morgan Stanley has rejected our attempts at compromise. In an effort to accommodate Morgan Stanley's discovery requests, and avoid the full extent of the burden just described, CPH has offered to search for electronic documents in electronic form if Morgan Stanley would identify the specific documents to be searched. In recent correspondence concerning this dispute, Morgan Stanley identified certain discrete categories of documents, including documents with unique codes, and CPH has undertaken to search for them in their electronic form. CPH has advised Morgan Stanley that it will endeavor to produce the electronic versions of those documents, to the extent they exist, as soon as the search is complete. But many of the documents at issue in this motion have no such unique codes or terms, and in order to find those documents, the search process just described is very time consuming. As to those documents, CPH has renewed its invitation that Morgan Stanley identify any further documents that it wants searched. Morgan Stanley, however, has rejected all of CPH's efforts to compromise this dispute.

B. CPH did not agree to produce electronic documents in electronic form.

Because of the burden just described, not surprisingly, CPH did not agree to produce all electronic documents in electronic form. Morgan Stanley bases its contention that CPH did so on an August 19, 2003 letter from CPH's counsel, but as that letter confirms, CPH made no blanket promise to produce electronic documents in electronic form. The section of the letter cited by Morgan Stanley states as follows (MS Mot. Exh. C, p. 2, bold face added):

3. *Electronic documents.*

The parties have produced and will produce to each other various documents that exist in electronic form. Before using any of these electronic documents in this litigation, other than for purposes that are purely internal to the parties, the parties agree that they will assign production numbers to the electronic document consisting of the number assigned to the electronic medium followed by the file name of the documents as found on the electronic medium.

According to Morgan Stanley, the bold-faced topic sentence memorializes CPH's agreement to produce electronic documents in electronic form, but that reading is indeed a stretch. The sentence is merely a statement of fact — electronic documents have been produced in electronic form and more will be in the future. The sentence is not a blanket promise concerning the production of electronic documents.

C. Morgan Stanley never acted as if there were such an agreement and has not produced all electronic documents in electronic form.

From the time the August 19, 2003 letter was sent until very recently, Morgan Stanley never behaved as if there were an agreement to produce electronic documents only in electronic form. Notably, Morgan Stanley has failed to produce all of its electronic documents in electronic form. From the face of some of the documents Morgan Stanley has produced, we know that they have an electronic source but nonetheless have been produced only in paper form. Examples include time records produced on February 18, 2004, more time records produced on September 5, 2003, and a document entitled "Client Revenue Detail by Job" that was attached to Morgan Stanley's October 6, 2003 response to CPH's first set of interrogatories. CPH has not challenged such productions because there was no agreement to produce electronic documents only in electronic form. Morgan Stanley cites (at 2) one instance in which CPH requested that Morgan Stanley produce electronic documents in electronic form. CPH made that request — on August 1, 2003, a month before the so-called agreement on which Morgan Stanley's motion is based — with respect to two boxes of documents. CPH made that request not out of some knee-jerk desire to have electronic documents in electronic form, but because many of the paper documents were illegible or had formatting problems. *See MS Mot. Exh. B, p. 3.*

Significantly, Morgan Stanley makes no such complaint here. The paper documents that CPH has produced are legible. Instead, Morgan Stanley insists on obtaining both paper and electronic versions in the hope of finding metadata. CPH is willing to undertake that burden, but only if Morgan Stanley agrees to search its backup tapes for documents that CPH has requested.

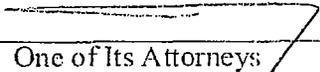
2. CPH's Compromise Proposal Should Be Adopted Because It Constitutes A Reasonable Accommodation Of Morgan Stanley's Discovery Needs And CPH's Legitimate Concerns About Undue Burden.

CPH, as observed above, has sought to resolve this discovery dispute by proposing that a third party computer specialist review CPH's backup tapes, at CPH's expense, and attempt to retrieve the electronic documents in electronic form that Morgan Stanley is demanding. Specifically, CPH has proposed that this task be undertaken by Kroll, an independent and highly reputable company that serves law firms and other companies nationwide. CPH's proposal is contingent upon a similar arrangement being adopted in connection with CPH's attempt to retrieve Morgan Stanley's pre-January 2000 e-mail and other responsive documents: Kroll should be allowed to attempt to retrieve those documents at Morgan Stanley's expense. This compromise accommodates both parties' discovery needs and concerns over burden. The concept of having a reputable third party conduct the search is desirable, because it would prevent the disputes that otherwise would arise concerning the thoroughness of the search, the timely completion of the search, and the cost associated with it, if the parties were left to search their own files. Despite the reasonableness of CPH's reciprocal proposal, however, Morgan Stanley has rejected it. That objection is unreasonable. If this Court is inclined to require CPH to reopen its files to look for electronic documents in electronic form, that process should be undertaken pursuant to the reciprocal proposal just described, with both parties' files to be searched by Kroll.

Date d: March 17, 2004

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

By:  /s/ _____
One of Its Attorneys

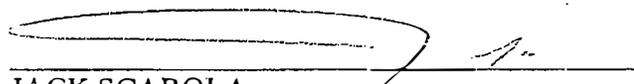
Jerald S. Solovy
Ronald L. Marmer
Jeffrey T. Shaw
JENNER & BLOCK LLP
One IBM Plaza
Chicago, IL 60611
(312) 222-9350

Jack Scarola
SEARCY, DENNEY, SCAROLA,
BARNHART & SHIPLEY, P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33401
(561) 686-6300

#1043370

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by
Fax and Federal Express to all counsel on the attached list on this 17th day of
March, 2004.



JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 478-0754
Attorneys for Coleman(Parent)Holdings Inc.
and MacAndrews & Forbes Holdings, Inc.

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block LLP
One IBM Plaza
Suite 4400
Chicago, IL 60611

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH, COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

CASE NO. CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

AFFIDAVIT OF STEVEN L. FASMAN

Steven L. Fasman, having been duly sworn under oath, hereby deposes and states as follows:

1. I am Senior Vice President-Law of MacAndrews & Forbes Holdings, Inc. and have primary responsibility for responding to Morgan Stanley's discovery requests in the above captioned litigation. I have personal knowledge of the facts stated herein.

2. My understanding is that this discovery dispute arose after Morgan Stanley, having received about 320 pages of documents printed from backup tapes for CPH's computer system, demanded that CPH go back and reproduce those documents in electronic form. Below is a description of the effort involved in producing those documents, and in addition, the burden involved in finding the electronic versions for the documents.

3. The documents were produced from backup tapes from an old computer system. It is extremely difficult to conduct any meaningful document search of the backup tapes, because the system accepts only one-phrase searches and there is no ability to narrow them with additional or modifying terms. Thus, if the term "Coleman" is entered, the search will yield every document

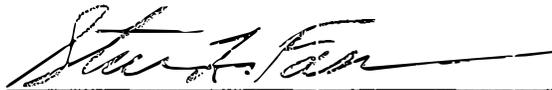
EXHIBIT
tabbles®
16div-004803

containing the word Coleman — including documents reflecting that someone’s last name is “Coleman.”

4. To locate the 320 pages of responsive documents from the backup tapes, I instructed that certain word searches be performed and that the documents containing “hits” be hard-copied for my personal review. Because the search could not be refined, it produced massively overbroad responses. In order to insure that all responsive documents were culled out of this massive collection of documents, I personally reviewed every printed page. This effort took dozens of hours spread over several weeks as my duties permitted.

5. To find the 320 pages of documents in electronic form would involve an even more arduous process. The only way to find each document is to select the most uncommon word in the document, search for that word, and review at a monitor attached to the server all of the documents containing that word. For example, if we are trying to find the electronic version of a letter, we would have to review each electronic document containing the word specified in the search. That process must be repeated for each document — one by one.

FURTHER AFFIANT SAYETH NOT.


STEVEN L. FASMAN

SUBSCRIBED AND SWORN TO
before me this 16th day of March, 2004.


Notary Public

DEBBIE HERNANDEZ
Notary Public, State of New York
No. 01HE5021255
Qualified in Queens County
Certificate Filed in New York County
Commission Expires December 13, 2005

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

DOROTHY H. WILKEN
CLERK OF CIRCUIT COURT
CIRCUIT CIVIL DIVISION

MAR 17 2004

COPY / ORIGINAL
RECEIVED FOR FILING

CASE NO: CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

**VERIFIED MOTION TO ADMIT
REBECCA A. BEYNON, PRO HAC VICE**

Morgan Stanley & Co., Incorporated (MS & Co.) and Morgan Stanley Senior Funding (MSSF), pursuant to Fla. R. Jud. Adm. 2.061, request this Court to admit attorney Rebecca A. Beynon, *pro hac vice*, and in support of this Motion, state the following:

1. MS & Co. and MSSF request that this Court permit Rebecca A. Beynon, an attorney with the law firm of Kellogg, Huber, Hansen, Todd & Evans, PLLC, whose address is 1615 M Street, NW, Washington, D.C. 20036, to appear *pro hac vice* and participate fully in this action as additional counsel on behalf of MS & Co. and MSSF.

2. Ms. Beynon is a member in good standing of the Bar of the District of Columbia, where she was admitted in 1995, and the Bar of the State of Texas, where she was admitted in November 1994. Ms. Beynon has not been disciplined in any jurisdiction.

3. Ms. Beynon has read all the applicable provisions of The Rules of Judicial Administration and the Rules Regulating The Florida Bar.

4. This verified motion complies with the Rules of Judicial Administration.

5. The undersigned will remain associated with this matter at all stages as required by local rules.

6. Ms. Beynon has not, in the past five years, sought *pro hac vice* admission in any other matter before this or any other Florida state court.

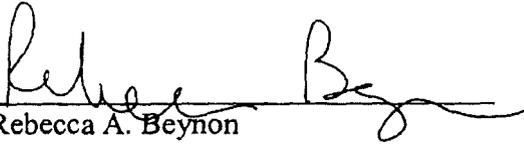
7. Ms. Beynon will be associated with Joseph Ianno, Jr. for purposes of this representation. Mr. Ianno is a member in good standing of the Florida Bar.

8. A proposed order granting this Motion is attached hereto.

9. Counsel for Coleman (Parent) Holdings, Inc. and MacAndrews & Forbes, Inc. have been consulted regarding this motion and object to this motion.

WHEREFORE, MS & Co. and MSSF respectfully request that this Court enter an order admitting Rebecca A. Beynon, *pro hac vice* for the purpose of representing MS & Co. and MSSF as counsel in connection with this action pending before this Court together with such other and further relief as the Court deems just and proper.

The undersigned verifies that he has knowledge of the facts stated herein, and that the statements in the foregoing motion are true and correct.


Rebecca A. Beynon

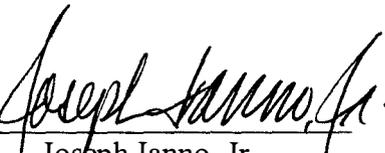
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this 17th day of March, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar No. 618349)
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

Michael K. Kellogg
Mark C. Hansen
James M. Webster
Rebecca A. Beynon
**KELLOGG, HUBER, HANSEN,
TODD & EVANS, PLLC**
Sumner Square
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
Telephone: (202) 326-7900
Facsimile: (202) 326-7999

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
E-mail: jianno@carltonfields.com

BY: 
Joseph Ianno, Jr.
Florida Bar No: 655351

**Counsel for Morgan Stanley & Co. Incorporated
and Morgan Stanley Senior Funding**

SERVICE LIST

Jack Scarola
**SEARCY, DENNY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy
Michael Brody
JENNER & BLOCK, LLC
One IBM Plaza, Suite 400
Chicago, IL 60611

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

v.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO., INC.,

Defendant.

MORGAN STANLEY SENIOR FUNDING, INC.,

Plaintiff,

v.

CASE NO: CA 03-5165 AI

MACANDREWS & FORBES HOLDINGS, INC.,

Defendant.

**ORDER GRANTING VERIFIED MOTION
TO ADMIT REBECCA A. BEYNON, PRO HAC VICE**

THIS CAUSE having come before the Court upon Morgan Stanley & Company, Inc.'s and Morgan Stanley Senior Funding, Inc.'s Verified Motion to Admit Rebecca A. Beynon, Pro Hac Vice, and the Court having heard argument of counsel and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that:

Morgan Stanley & Co., Inc.'s and Morgan Stanley Senior Funding, Inc.'s Verified Motion to Admit Rebecca A. Beynon is GRANTED. Counsel is admitted for purposes of

this case.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this

____ day of March, 2004.

ELIZABETH T. MAASS
Circuit Court Judge

Copies furnished to:

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
KIRKLAND & ELLIS LLP
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005

James M. Webster, III
Rebecca Beynon
Mark C. Hansen
**KELLOGG, HUBER, HANSEN,
TODD & EVANS, P.L.L.C.**
Summer Square, Suite 400
1615 M. Street, N.W.
Washington, D.C. 20036-3206

Jack Scarola
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409

Jerold S. Solovy
JENNER & BLOCK, LLC
One IBM Plaza
Suite 4400
Chicago, IL 60611

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

DOROTHY H. WILKEN
CLERK OF CIRCUIT COURT
CIRCUIT CIVIL DIVISION

MAR 17 2004

CASE NO: CA 03-5165 AI

COPY / ORIGINAL
RECEIVED FOR FILING

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

**VERIFIED MOTION TO ADMIT
MARK C. HANSEN, PRO HAC VICE**

Morgan Stanley & Co., Incorporated MS & Co.) and Morgan Stanley Senior Funding (MSSF), pursuant to Fla. R. Jud. Adm. 2.061, request this Court to admit attorney Mark C. Hansen, *pro hac vice*, and in support of this Motion, state the following:

1. MS & Co. and MSSF request that this Court permit Mark C. Hansen, an attorney with the law firm of Kellogg, Huber, Hansen, Todd & Evans, PLLC, whose address is 1615 M Street, N.W., Suite 400, Washington, D.C. 20036, to appear *pro hac vice* and participate fully in this action as additional counsel on behalf of MS & Co. and MSSF.

2. Mr. Hansen is a member in good standing of the Bar of the District of Columbia, where he was admitted in December 1990, the Bar of the State of Massachusetts, where he was admitted in December 1983, and the Bar of the State of Maryland, where he was admitted in April 1995. He is also admitted to practice before the U.S. District Courts for the District of

Columbia, Massachusetts, Maryland, Illinois, the U.S. Courts of Appeals for the District of Columbia, First, Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Eleventh, and Federal Circuits, and the Maryland Court of Appeals. Mr. Hansen has not been disciplined in any jurisdiction.

3. Mr. Hansen has read all the applicable provisions of The Rules of Judicial Administration and the Rules Regulating The Florida Bar.

4. This verified motion complies with the Rules of Judicial Administration.

5. The undersigned will remain associated with this matter at all stages as required by local rules.

6. Mr. Hansen has not, in the past five years, sought *pro hac vice* admission in any other matter before this or any other Florida state court.

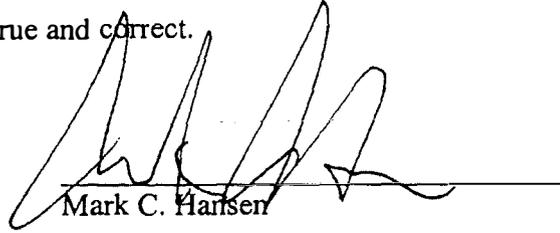
7. Mr. Hansen will be associated with Joseph Ianno, Jr. for purposes of this representation. Mr. Ianno is a member in good standing of the Florida Bar.

8. A proposed order granting this Motion is attached hereto.

9. Counsel for Coleman (Parent) Holdings, Inc. and MacAndrews & Forbes, Inc. have been consulted regarding this motion and object to this motion.

WHEREFORE, MS & Co. and MSSF respectfully request that this Court enter an order admitting Mark C. Hansen, *pro hac vice* for the purpose of representing MS & Co. and MSSF as counsel in connection with this action pending before this Court together with such other and further relief as the Court deems just and proper.

The undersigned verifies that he has knowledge of the facts stated herein, and that the statements in the foregoing motion are true and correct.



Mark C. Hansen

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this 17th day of March, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar No. 618349)
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

Michael K. Kellogg
Mark C. Hansen
James M. Webster
Rebecca A. Beynon
**KELLOGG, HUBER, HANSEN,
TODD & EVANS, PLLC**
Sumner Square
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
Telephone: (202) 326-7900
Facsimile: (202) 326-7999

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
E-mail: jianno@carltonfields.com

BY: Joseph Ianno, Jr.
Joseph Ianno, Jr.
Florida Bar No: 655351

**Counsel for Morgan Stanley & Co. Incorporated
and Morgan Stanley Senior Funding**

SERVICE LIST

Jack Scarola
**SEARCY, DENNY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy
Michael Brody
JENNER & BLOCK, LLC
One IBM Plaza, Suite 400
Chicago, IL 60611

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

v.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO., INC.,

Defendant.

MORGAN STANLEY SENIOR FUNDING, INC.,

Plaintiff,

v.

CASE NO: CA 03-5165 AI

MACANDREWS & FORBES HOLDINGS, INC.,

Defendant.

**ORDER GRANTING VERIFIED MOTION
TO ADMIT MARK C. HANSEN, PRO HAC VICE**

THIS CAUSE having come before the Court upon Morgan Stanley & Company, Inc.'s and Morgan Stanley Senior Funding, Inc.'s Verified Motion to Admit Mark C. Hansen, Pro Hac Vice, and the Court having heard argument of counsel and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that:

Morgan Stanley & Co., Inc.'s and Morgan Stanley Senior Funding, Inc.'s Verified Motion to Admit Mark C. Hansen is GRANTED. Counsel is admitted for purposes of

this case.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this

____ day of March, 2004.

ELIZABETH T. MAASS
Circuit Court Judge

Copies furnished to:

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
KIRKLAND & ELLIS LLP
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005

James M. Webster, III
Rebecca Beynon
Mark C. Hansen
**KELLOGG, HUBER, HANSEN,
TODD & EVANS, P.L.L.C.**
Sumner Square, Suite 400
1615 M. Street, N.W.
Washington, D.C. 20036-3206

Jack Scarola
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33409

Jerold S. Solovy
JENNER & BLOCK, LLC
One IBM Plaza
Suite 4400
Chicago, Illinois 60611

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

CASE NO: CA 03-5045 AI

DOROTHY H. WILKEN
CLERK OF CIRCUIT COURT
CIRCUIT CIVIL DIVISION

MAR 17 2004

COPY / ORIGINAL
RECEIVED FOR FILING

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

CASE NO: CA 03-5165 AI

**VERIFIED MOTION TO ADMIT
JAMES M. WEBSTER III, PRO HAC VICE**

Morgan Stanley & Co., Incorporated (MS & Co.) and Morgan Stanley Senior Funding (MSSF), pursuant to Fla. R. Jud. Adm. 2.061, request this Court to admit attorney James M. Webster III, *pro hac vice*, and in support of this Motion, state the following:

1. MS & Co. and MSSF request that this Court permit James M. Webster III an attorney with the law firm of Webster, Huber, Hansen, Todd & Evans, PLLC, whose address is 1615 M Street, N.W., Suite 400, Washington, D.C. 20036, to appear *pro hac vice* and participate fully in this action as additional counsel on behalf of MS & Co. and MSSF.

2. Mr. Webster is a member in good standing of the Bar of the District of Columbia, where he was admitted on April 1, 1996, and the Bar of the State of Maryland, where he was admitted on December 15, 1994. He is also admitted to practice in the U.S. District Courts for

the District of Columbia and Maryland, and the U.S. Courts of Appeals for the District of Columbia and Fourth Circuits. Mr. Webster has not been disciplined in any jurisdiction.

3. Mr. Webster has read all the applicable provisions of The Rules of Judicial Administration and the Rules Regulating The Florida Bar.

4. This verified motion complies with the Rules of Judicial Administration.

5. The undersigned will remain associated with this matter at all stages as required by local rules.

6. Mr. Webster has not, in the past five years, sought *pro hac vice* admission in any other matter before this or any other Florida state court.

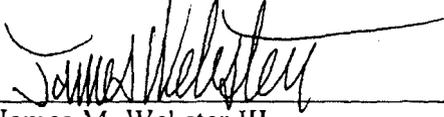
7. Mr. Webster will be associated with Joseph Ianno, Jr. for purposes of this representation. Mr. Ianno is a member in good standing of the Florida Bar.

8. A proposed order granting this Motion is attached hereto.

9. Counsel for Coleman (Parent) Holdings, Inc. and MacAndrews & Forbes, Inc. have been consulted regarding this motion and object to this motion.

WHEREFORE, MS & Co. and MSSF respectfully request that this Court enter an order admitting James M. Webster III, *pro hac vice* for the purpose of representing MS & Co. and MSSF as counsel in connection with this action pending before this Court together with such other and further relief as the Court deems just and proper.

The undersigned verifies that he has knowledge of the facts stated herein, and that the statements in the foregoing motion are true and correct.

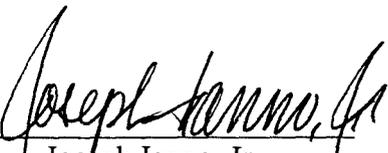

James M. Webster III

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this 17th day of March, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar No. 618349)
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
E-mail: jianno@carltonfields.com

BY: 
Joseph Ianno, Jr.
Florida Bar No: 655351

Michael K. Kellogg
Mark C. Hansen
James M. Webster
Rebecca A. Beynon
**KELLOGG, HUBER, HANSEN,
TODD & EVANS, PLLC**
Sumner Square
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
Telephone: (202) 326-7900
Facsimile: (202) 326-7999

**Counsel for Morgan Stanley & Co. Incorporated
and Morgan Stanley Senior Funding**

SERVICE LIST

Jack Scarola
**SEARCY, DENNY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy
Michael Brody
JENNER & BLOCK, LLC
One IBM Plaza, Suite 400
Chicago, IL 60611

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

v.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO., INC.,

Defendant.

MORGAN STANLEY SENIOR FUNDING, INC.,

Plaintiff,

v.

CASE NO: CA 03-5165 AI

MACANDREWS & FORBES HOLDINGS, INC.,

Defendant.

**ORDER GRANTING VERIFIED MOTION
TO ADMIT JAMES M. WEBSTER, III, PRO HAC VICE**

THIS CAUSE having come before the Court upon Morgan Stanley & Company, Inc.'s and Morgan Stanley Senior Funding, Inc.'s Verified Motion to Admit James M. Webster, III, Pro Hac Vice, and the Court having heard argument of counsel and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that:

Morgan Stanley & Co., Inc.'s and Morgan Stanley Senior Funding, Inc.'s Verified Motion to Admit James M. Webster, III is GRANTED. Counsel is admitted for the

purpose of this case.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this

____ day of March, 2004.

ELIZABETH T. MAASS
Circuit Court Judge

Copies furnished to:

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
KIRKLAND & ELLIS LLP
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005

James M. Webster, III
Rebecca Beynon
Mark C. Hansen
**KELLOGG, HUBER, HANSEN,
TODD & EVANS, P.L.L.C.**
Sumner Square, Suite 400
1615 M. Street, N.W.
Washington, D.C. 20036-3206

Jack Scarola
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33409

Jerold S. Solovy
JENNER & BLOCK, LLC
One IBM Plaza
Suite 4400
Chicago, Illinois 60611

CARLTON FIELDS, P.A.

ATTORNEYS AT LAW

ESPERANTE
222 LAKEVIEW AVENUE, SUITE 1400
WEST PALM BEACH, FLORIDA 33401-6149

MAILING ADDRESS
P.O. BOX 150, WEST PALM BEACH, FL 33402-0150
TEL (561) 659-7070 FAX (561) 659-7368

FAX COVER SHEET

Date:	March 17, 2004	Phone Number	Fax Number
To:	Jack Scarola	(561) 686-6300	(561) 684-5816
	Jerold Solovy	(312) 222-9350	(312) 527-0484
	Thomas Clare	(202) 879-5993	(202) 879-5200
	Michael K Kellogg	(202) 326-7900	(202) 326-7999
From:	Joyce Dillard, CLA, for Joseph Ianno, Jr.	(561) 659-7070	(561) 659-7368

Client/Matter No.: 47877/14092

Employee No.:

Total Number of Pages Being Transmitted, Including Cover Sheet: 25

Message:

To follow please find a copy of Morgan Stanley's motions to admit attorneys James M. Webster, III, Mark C. Hansen, and Rebecca A. Bcynon pro hac vice, and notice of hearing for March 19, 2004.

Original to follow Via Regular Mail Original will Not be Sent Original will follow via Overnight Courier

 The information contained in this facsimile message is attorney privileged and confidential information intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone (if long distance, please call collect) and return the original message to us at the above address via the U.S. Postal Service. Thank you.

IF THERE ARE ANY PROBLEMS OR COMPLICATIONS, PLEASE NOTIFY US IMMEDIATELY AT:
(561) 659-7070

TELECOPIER OPERATOR: _____

WPB#566762.1

CARLTON FIELDS, P.A.

TAMPA ORLANDO TALLAHASSEE WEST PALM BEACH ST. PETERSBURG MIAMI

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

v.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO., INC.,

Defendant.

_____ /
MORGAN STANLEY SENIOR FUNDING, INC.,

Plaintiff,

v.

CASE NO: CA 03-5165 AI

MACANDREWS & FORBES HOLDINGS, INC.,

Defendant.

NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that a hearing has been set in the above-styled case as follows:

DATE:	March 19, 2004
TIME:	3:30 p.m.
PLACE:	Palm Beach County Courthouse, Courtroom 11A 205 North Dixie Highway West Palm Beach, Florida 33401
BEFORE:	Judge Elizabeth T. Maass
CONCERNING:	Morgan Stanley & Co. Incorporated's and Morgan Stanley Senior Funding, Inc.'s Verified Motion to Admit James M. Webster, III, Pro Hac Vice;

Coleman v. Morgan Stanley
Case No: 03-CA-005045 AI
Notice of Hearing
Page 2

Morgan Stanley & Co. Incorporated's and Morgan Stanley Senior Funding, Inc.'s Verified Motion to Admit Mark C. Hansen Pro Hac Vice;

and

Morgan Stanley & Co. Incorporated's and Morgan Stanley Senior Funding, Inc.'s Verified Motion to Admit Rebecca A. Beynon Pro Hac Vice

KINDLY GOVERN YOURSELVES ACCORDINGLY.

The undersigned counsel hereby certifies that a good faith attempt to resolve the issues contained in the foregoing motions or matters will be made with opposing counsel prior to hearing on these matters on the Court's Motion Calendar.

If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no costs to you, to the provision of certain assistance. Please contact the ADA Coordinator in the Administrative Office of the Court, Palm Beach County Courthouse, 205 North Dixie Highway, Room 5.2500, West Palm Beach, Florida 33401; telephone number (561) 355-2431 within two (2) working days of your receipt of this notice; if you are hearing or voice impaired, call 1-800-955-8771.

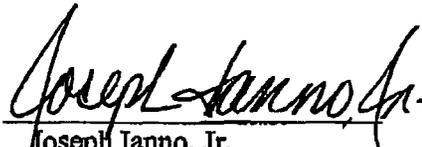
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this 17th day of March, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar No. 618349)
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

Counsel for Defendant
Morgan Stanley & Co. Incorporated

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

BY: 
Joseph Ianno, Jr.
Florida Bar No: 655351

Coleman v. Morgan Stanley
Case No: 03-CA-005045 AJ
Notice of Hearing
Page 3

SERVICE LIST

Jack Scarola
**SEARCY, DENNY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy
Michael Brody
JENNER & BLOCK, LLC
One IBM Plaza, Suite 400
Chicago, IL 60611

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

CASE NO: CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

**VERIFIED MOTION TO ADMIT
REBECCA A. BEYNON, PRO HAC VICE**

Morgan Stanley & Co., Incorporated (MS & Co.) and Morgan Stanley Senior Funding (MSSF), pursuant to Fla. R. Jud. Adm. 2.061, request this Court to admit attorney Rebecca A. Beynon, *pro hac vice*, and in support of this Motion, state the following:

1. MS & Co. and MSSF request that this Court permit Rebecca A. Beynon, an attorney with the law firm of Kellogg, Huber, Hansen, Todd & Evans, PLLC, whose address is 1615 M Street, NW, Washington, D.C. 20036, to appear *pro hac vice* and participate fully in this action as additional counsel on behalf of MS & Co. and MSSF.

2. Ms. Beynon is a member in good standing of the Bar of the District of Columbia, where she was admitted in 1995, and the Bar of the State of Texas, where she was admitted in November 1994. Ms. Beynon has not been disciplined in any jurisdiction.

3. Ms. Beynon has read all the applicable provisions of The Rules of Judicial Administration and the Rules Regulating The Florida Bar.

4. This verified motion complies with the Rules of Judicial Administration.

5. The undersigned will remain associated with this matter at all stages as required by local rules.

6. Ms. Beynon has not, in the past five years, sought *pro hac vice* admission in any other matter before this or any other Florida state court.

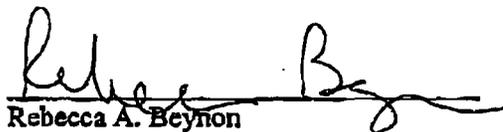
7. Ms. Beynon will be associated with Joseph Ianno, Jr. for purposes of this representation. Mr. Ianno is a member in good standing of the Florida Bar.

8. A proposed order granting this Motion is attached hereto.

9. Counsel for Coleman (Parent) Holdings, Inc. and MacAndrews & Forbes, Inc. have been consulted regarding this motion and object to this motion.

WHEREFORE, MS & Co. and MSSF respectfully request that this Court enter an order admitting Rebecca A. Beynon, *pro hac vice* for the purpose of representing MS & Co. and MSSF as counsel in connection with this action pending before this Court together with such other and further relief as the Court deems just and proper.

The undersigned verifies that he has knowledge of the facts stated herein, and that the statements in the foregoing motion are true and correct.


Rebecca A. Beynon

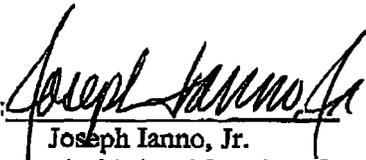
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this 17th day of March, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar No. 618349)
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
E-mail: jianno@carltonfields.com.

Michael K. Kellogg
Mark C. Hansen
James M. Webster
Rebecca A. Beynon
**KELLOGG, HUBER, HANSEN,
TODD & EVANS, PLLC**
Sumner Square
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
Telephone: (202) 326-7900
Facsimile: (202) 326-7999

BY: 
Joseph Ianno, Jr.
Florida Bar No: 655351

**Counsel for Morgan Stanley & Co. Incorporated
and Morgan Stanley Senior Funding**

SERVICE LIST

Jack Scarola
**SEARCY, DENNY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy
Michael Brody
JENNER & BLOCK, LLC
One IBM Plaza, Suite 400
Chicago, IL 60611

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

v.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO., INC.,

Defendant.

MORGAN STANLEY SENIOR FUNDING, INC.,

Plaintiff,

v.

CASE NO: CA 03-5165 AI

MACANDREWS & FORBES HOLDINGS, INC.,

Defendant.

**ORDER GRANTING VERIFIED MOTION
TO ADMIT REBECCA A. BEYNON, PRO HAC VICE**

THIS CAUSE having come before the Court upon Morgan Stanley & Company, Inc.'s and Morgan Stanley Senior Funding, Inc.'s Verified Motion to Admit Rebecca A. Beynon, Pro Hac Vice, and the Court having heard argument of counsel and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that:

Morgan Stanley & Co., Inc.'s and Morgan Stanley Senior Funding, Inc.'s Verified Motion to Admit Rebecca A. Beynon is GRANTED. Counsel is admitted for purposes of

Coleman v. Morgan Stanley, Case No: CA 03-5045 A1
Morgan Stanley v. MacAndrews & Forbes, Case No: CA 03-5165 A1
Order Granting Motion to Admit James M. Webster, III, Pro Hac Vice
Page 2

this case.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this
____ day of March, 2004.

ELIZABETH T. MAASS
Circuit Court Judge

Copies furnished to:

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
KIRKLAND & ELLIS LLP
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005

James M. Webster, III
Rebecca Beynon
Mark C. Hansen
**KELLOGG, HUBER, HANSEN,
TODD & EVANS, P.L.L.C.**
Summer Square, Suite 400
1615 M. Street, N.W.
Washington, D.C. 20036-3206

Jack Scarola
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409

Jerold S. Solovy
JENNER & BLOCK, LLC
One IBM Plaza
Suite 4400
Chicago, IL 60611

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

CASE NO: CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

**VERIFIED MOTION TO ADMIT
JAMES M. WEBSTER III, PRO HAC VICE**

Morgan Stanley & Co., Incorporated (MS & Co.) and Morgan Stanley Senior Funding (MSSF), pursuant to Fla. R. Jud. Adm. 2.061, request this Court to admit attorney James M. Webster III, *pro hac vice*, and in support of this Motion, state the following:

1. MS & Co. and MSSF request that this Court permit James M. Webster III an attorney with the law firm of Webster, Huber, Hansen, Todd & Evans, PLLC, whose address is 1615 M Street, N.W., Suite 400, Washington, D.C. 20036, to appear *pro hac vice* and participate fully in this action as additional counsel on behalf of MS & Co. and MSSF.

2. Mr. Webster is a member in good standing of the Bar of the District of Columbia, where he was admitted on April 1, 1996, and the Bar of the State of Maryland, where he was admitted on December 15, 1994. He is also admitted to practice in the U.S. District Courts for

the District of Columbia and Maryland, and the U.S. Courts of Appeals for the District of Columbia and Fourth Circuits. Mr. Webster has not been disciplined in any jurisdiction.

3. Mr. Webster has read all the applicable provisions of The Rules of Judicial Administration and the Rules Regulating The Florida Bar.

4. This verified motion complies with the Rules of Judicial Administration.

5. The undersigned will remain associated with this matter at all stages as required by local rules.

6. Mr. Webster has not, in the past five years, sought *pro hac vice* admission in any other matter before this or any other Florida state court.

7. Mr. Webster will be associated with Joseph Ianno, Jr. for purposes of this representation. Mr. Ianno is a member in good standing of the Florida Bar.

8. A proposed order granting this Motion is attached hereto.

9. Counsel for Coleman (Parent) Holdings, Inc. and MacAndrews & Forbes, Inc. have been consulted regarding this motion and object to this motion.

WHEREFORE, MS & Co. and MSSF respectfully request that this Court enter an order admitting James M. Webster III, *pro hac vice* for the purpose of representing MS & Co. and MSSF as counsel in connection with this action pending before this Court together with such other and further relief as the Court deems just and proper.

The undersigned verifies that he has knowledge of the facts stated herein, and that the statements in the foregoing motion are true and correct.



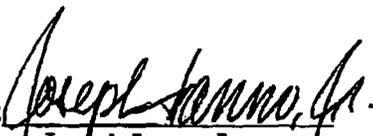
James M. Webster III

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this 17th day of March, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bernis (FL Bar No. 618349)
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
E-mail: jianno@carltonfields.com

BY: 
Joseph Ianno, Jr.
Florida Bar No: 655351

Michael K. Kellogg
Mark C. Hansen
James M. Webster
Rebecca A. Beynon
**KELLOGG, HUBER, HANSEN,
TODD & EVANS, PLLC**
Sumner Square
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
Telephone: (202) 326-7900
Facsimile: (202) 326-7999

**Counsel for Morgan Stanley & Co. Incorporated
and Morgan Stanley Senior Funding**

SERVICE LIST

Jack Scarola
**SEARCY, DENNY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy
Michael Brody
JENNER & BLOCK, LLC
One IBM Plaza, Suite 400
Chicago, IL 60611

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

v.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO., INC.,

Defendant.

MORGAN STANLEY SENIOR FUNDING, INC.,

Plaintiff,

v.

CASE NO: CA 03-5165 AI

MACANDREWS & FORBES HOLDINGS, INC.,

Defendant.

**ORDER GRANTING VERIFIED MOTION
TO ADMIT JAMES M. WEBSTER, III, PRO HAC VICE**

THIS CAUSE having come before the Court upon Morgan Stanley & Company, Inc.'s and Morgan Stanley Senior Funding, Inc.'s Verified Motion to Admit James M. Webster, III, Pro Hac Vice, and the Court having heard argument of counsel and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that:

Morgan Stanley & Co., Inc.'s and Morgan Stanley Senior Funding, Inc.'s Verified Motion to Admit James M. Webster, III is GRANTED. Counsel is admitted for the

Coleman v. Morgan Stanley, Case No: CA 03-5045 A;
Morgan Stanley v. MacAndrews & Forbes, Case No: CA 03-5165 A;
Order Granting Motion to Admit James M. Webster, III, Pro Hac Vice
Page 2

purpose of this case.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this

___ day of March, 2004.

ELIZABETH T. MAASS
Circuit Court Judge

Copies furnished to:

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
KIRKLAND & ELLIS LLP
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005

James M. Webster, III
Rebecca Beynon
Mark C. Hansen
**KELLOGG, HUBER, HANSEN,
TODD & EVANS, P.L.L.C.**
Sumner Square, Suite 400
1615 M. Street, N.W.
Washington, D.C. 20036-3206

Jack Scarola
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33409

Jerold S. Solovy
JENNER & BLOCK, LLC
One IBM Plaza
Suite 4400
Chicago, Illinois 60611

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

CASE NO: CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

**VERIFIED MOTION TO ADMIT
MARK C. HANSEN, PRO HAC VICE**

Morgan Stanley & Co., Incorporated MS & Co.) and Morgan Stanley Senior Funding (MSSF), pursuant to Fla. R. Jud. Adm. 2.061, request this Court to admit attorney Mark C. Hansen, *pro hac vice*, and in support of this Motion, state the following:

1. MS & Co. and MSSF request that this Court permit Mark C. Hansen, an attorney with the law firm of Kellogg, Huber, Hansen, Todd & Evans, PLLC, whose address is 1615 M Street, N.W., Suite 400, Washington, D.C. 20036, to appear *pro hac vice* and participate fully in this action as additional counsel on behalf of MS & Co. and MSSF.

2. Mr. Hansen is a member in good standing of the Bar of the District of Columbia, where he was admitted in December 1990, the Bar of the State of Massachusetts, where he was admitted in December 1983, and the Bar of the State of Maryland, where he was admitted in April 1995. He is also admitted to practice before the U.S. District Courts for the District of

Columbia, Massachusetts, Maryland, Illinois, the U.S. Courts of Appeals for the District of Columbia, First, Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Eleventh, and Federal Circuits, and the Maryland Court of Appeals. Mr. Hansen has not been disciplined in any jurisdiction.

3. Mr. Hansen has read all the applicable provisions of The Rules of Judicial Administration and the Rules Regulating The Florida Bar.

4. This verified motion complies with the Rules of Judicial Administration.

5. The undersigned will remain associated with this matter at all stages as required by local rules.

6. Mr. Hansen has not, in the past five years, sought *pro hac vice* admission in any other matter before this or any other Florida state court.

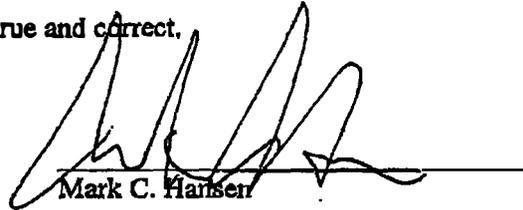
7. Mr. Hansen will be associated with Joseph Ianno, Jr. for purposes of this representation. Mr. Ianno is a member in good standing of the Florida Bar.

8. A proposed order granting this Motion is attached hereto.

9. Counsel for Coleman (Parent) Holdings, Inc. and MacAndrews & Forbes, Inc. have been consulted regarding this motion and object to this motion.

WHEREFORE, MS & Co. and MSSF respectfully request that this Court enter an order admitting Mark C. Hansen, *pro hac vice* for the purpose of representing MS & Co. and MSSF as counsel in connection with this action pending before this Court together with such other and further relief as the Court deems just and proper.

The undersigned verifies that he has knowledge of the facts stated herein, and that the statements in the foregoing motion are true and correct.



Mark C. Hansen

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this 17th day of March, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar No. 618349)
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

Michael K. Kellogg
Mark C. Hansen
James M. Webster
Rebecca A. Beynon
**KELLOGG, HUBER, HANSEN,
TODD & EVANS, PLLC**
Sumner Square
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
Telephone: (202) 326-7900
Facsimile: (202) 326-7999

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
E-mail: jianno@carltonfields.com

BY: Joseph Ianno, Jr.
Joseph Ianno, Jr.
Florida Bar No: 655351

**Counsel for Morgan Stanley & Co. Incorporated
and Morgan Stanley Senior Funding**

SERVICE LIST

Jack Scarola
**SEARCY, DENNY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy
Michael Brody
JENNER & BLOCK, LLC
One IBM Plaza, Suite 400
Chicago, IL 60611

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

v.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO., INC.,

Defendant.

MORGAN STANLEY SENIOR FUNDING, INC.,

Plaintiff,

v.

CASE NO: CA 03-5165 AI

MACANDREWS & FORBES HOLDINGS, INC.,

Defendant.

**ORDER GRANTING VERIFIED MOTION
TO ADMIT MARK C. HANSEN, PRO HAC VICE**

THIS CAUSE having come before the Court upon Morgan Stanley & Company, Inc.'s and Morgan Stanley Senior Funding, Inc.'s Verified Motion to Admit Mark C. Hansen, Pro Hac Vice, and the Court having heard argument of counsel and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that:

Morgan Stanley & Co., Inc.'s and Morgan Stanley Senior Funding, Inc.'s Verified Motion to Admit Mark C. Hansen is GRANTED. Counsel is admitted for purposes of

Coleman v. Morgan Stanley, Case No: CA 03-5045 AI
Morgan Stanley v. MacAndrews & Forbes, Case No: CA 03-5165 AI
Order Granting Motion to Admit James M. Webster, III, Pro Hac Vice
Page 2

this case.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this
____ day of March, 2004.

ELIZABETH T. MAASS
Circuit Court Judge

Copies furnished to:

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
KIRKLAND & ELLIS LLP
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005

James M. Webster, III
Rebecca Beynon
Mark C. Hansen
**KELLOGG, HUBER, HANSEN,
TODD & EVANS, P.L.L.C.**
Sumner Square, Suite 400
1615 M. Street, N.W.
Washington, D.C. 20036-3206

Jack Scarola
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33409

Jerold S. Solovy
JENNER & BLOCK, LLC
One IBM Plaza
Suite 4400
Chicago, Illinois 60611

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

v.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO., INC.,

Defendant.

MORGAN STANLEY SENIOR FUNDING, INC.,

Plaintiff,

v.

CASE NO: CA 03-5165 AI

MACANDREWS & FORBES HOLDINGS, INC.,

Defendant.

NOTICE OF FILING ORIGINAL DECLARATIONS

Morgan Stanley & Co. Incorporated and Morgan Stanley Senior Funding, Inc., by and through their undersigned counsel, hereby give notice that it has filed the original declarations of James F. Doyle, Esq., Thomas A. Clare, Esq., and Rebecca A. Beynon, Esq.

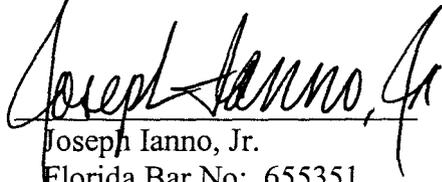
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the service list below by facsimile and e-mail on this 18th day of March, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar No. 618349)
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

**Counsel for Morgan Stanley & Co.
Incorporated and Morgan Stanley
Senior Funding**

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
E-mail: jianno@carltonfields.com

BY: 
Joseph Ianno, Jr.
Florida Bar No: 655351

SERVICE LIST

Jack Scarola
**SEARCY, DENNY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy
Michael Brody
JENNER & BLOCK, LLC
One IBM Plaza, Suite 400
Chicago, IL 60611

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

CASE NO: CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

DECLARATION OF JAMES F. DOYLE, ESQ.

I, James F. Doyle, Esq., declare:

1. I submit this declaration in support of Morgan Stanley's Opposition to CPH's Motion For A Rule To Show Cause. All facts set forth in this declaration are based upon my personal knowledge. If called as a witness, I could and would competently testify to all facts stated in this declaration.

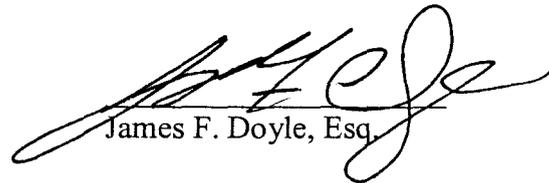
2. I am a Vice President & Counsel in Morgan Stanley's Law Division. I have day-to-day responsibility for the above-captioned actions.

3. Neither I nor anyone else from Morgan Stanley to my knowledge provided the Settlement Agreement between CPH and Arthur Andersen (or any other "Confidential" materials or information) to Wachovia Bank N.A., either before or after Morgan Stanley and Wachovia filed their lawsuits against Arthur Andersen. Neither I nor anyone else from Morgan

Stanley to my knowledge discussed the Settlement Agreement (or any other “Confidential” materials or information) with Wachovia, either before or after Morgan Stanley and Wachovia filed their lawsuits against Arthur Andersen.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 17th day of March, 2004, in New York, New York.


James F. Doyle, Esq.

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

CASE NO: CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

DECLARATION OF THOMAS A. CLARE, ESQ.

I, Thomas A. Clare, Esq., declare:

1. I submit this declaration in support of Morgan Stanley's Opposition to Coleman (Parent) Holding, Inc.'s ("CPH") Motion For A Rule To Show Cause. All facts set forth in this declaration are based upon my personal knowledge. If called as a witness, I could and would competently testify to all facts stated in this declaration.

2. I am a partner in the law firm of Kirkland & Ellis LLP. Kirkland & Ellis LLP is counsel to Morgan Stanley in the above-captioned matters. I have been an attorney at Kirkland & Ellis LLP since 1996.

3. On March 10, March 11, and March 12, 2004, I conducted a series of telephone conferences with attorneys at Jenner & Block, counsel for CPH, to discuss pretrial scheduling and discovery matters. In the course of those telephone conferences, I spoke with

three different attorneys representing CPH. CPH's attorneys never informed me that CPH intended to file a Motion for a Rule To Show Cause on March 12, nor did they make any effort to discuss or resolve any of the issues raised in that Motion.

4. On March 12, 2004, during one of those telephone conferences, I specifically asked one of CPH's attorneys whether there were any motions that CPH intended to file for consideration at the March 19, 2004 case management conference other than the discovery motions we had already discussed. CPH's attorney stated that, while "other motions" were under consideration," he "did not want to talk about them." CPH filed its Motion for a Rule To Show Cause within hours of that conversation.

5. I took affirmative steps to ensure that no one had access to "Confidential" information or materials who is not authorized under the Confidentiality Order to do so. I did not provide anyone from Kellogg Huber, Hansen, Todd & Evans P.L.L.C. ("KHHTE") access to any "Confidential" information or materials until after KHHTE had been retained as counsel to Morgan Stanley. In addition, out of an abundance of caution, I requested the KHHTE attorneys to sign the Court-approved "Declaration Of Acknowledgment And Agreement To Be Bound By Protective Order," which is part of the Confidentiality Order in the above-referenced actions.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 17th day of March, 2004, at Washington, D.C.


Thomas A. Clare, Esq.

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

CASE NO: CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

DECLARATION OF REBECCA A. BEYNON, ESQ.

I, Rebecca A. Beynon, Esq. declare:

1. I submit this declaration in support of Morgan Stanley's Opposition to CPH's Motion For A Rule To Show Cause. All facts set forth in this declaration are based upon my personal knowledge. If called as a witness, I could and would competently testify to all facts stated in this declaration.

2. I am an associate at the law firm of Kellogg, Huber, Hansen, Todd & Evans P.L.L.C. ("KHTE"). I have been an associate at KHTE since July 2003. Prior to July 2003, I was a Special Assistant to the President in the White House Office of Faith-Based and Community Initiatives from 2002 to 2003.

3. KHTE was retained in late February 2004 to represent Morgan Stanley & Co. Incorporated and Morgan Stanley Senior Funding, Inc. (collectively, "Morgan Stanley")

in those aspects of the above-captioned case that involve Arthur Andersen and in the prosecution of Morgan Stanley's claims against Arthur Andersen.

4. I affirm that KHTE did not have access to Confidential information under the July 31, 2003 Stipulated Confidentiality Agreement or the December 4, 2003 Order until after Morgan Stanley retained KHTE as co-counsel in the above-captioned litigation and as counsel in Morgan Stanley's action against Arthur Andersen.

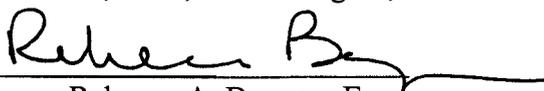
5. I further attest that Morgan Stanley required KHTE attorneys to sign a "Declaration Of Acknowledgment And Agreement To Be Bound By Protective Order," a part of the Court's Confidentiality Order.

6. In accordance with our obligations under the July 31, 2003 Stipulated Confidentiality Order, neither I nor any other lawyer at KHTE have ever provided any Confidential Material to Wachovia.

7. In a March 2, 2004 letter I wrote to Wachovia's counsel on behalf of Morgan Stanley, I expressly declined to provide Wachovia "any information" regarding "the likelihood of recovery against Arthur Andersen, and in particular whether Arthur Andersen has available insurance coverage or other means with which to satisfy a judgment."

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 17th day of March, 2004, at Washington, D.C.


Rebecca A. Beynon, Esq.

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

v.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO., INC.,

Defendant.

DOROTHY H. WILKEN
CLERK OF CIRCUIT COURT
OFFICE OF ADMINISTRATION

MAR 18 2004

COPIES ORIGINAL
RECEIVED FOR FILING

MORGAN STANLEY SENIOR FUNDING, INC.,

Plaintiff,

v.

CASE NO: CA 03-5165 AI

MACANDREWS & FORBES HOLDINGS, INC.,

Defendant.

NOTICE OF FILING PLEADING UNDER SEAL

Morgan Stanley & Co. Incorporated and Morgan Stanley Senior Funding, Inc., by and through their undersigned counsel, hereby give notice that Morgan Stanley's Opposition to Coleman (Parent) Holdings, Inc.'s Motion for Rule to Show Cause, without exhibits, was filed under seal this 18th day of March, 2004.

CERTIFICATE OF SERVICE

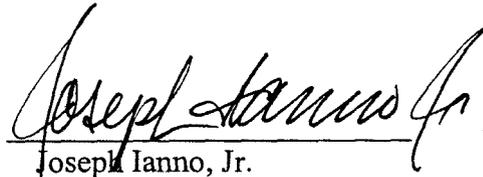
I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the service list below by facsimile and Federal Express on this 18th day of March, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar No. 618349)
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

**Counsel for Morgan Stanley & Co.
Incorporated and Morgan Stanley
Senior Funding**

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
E-mail: jianno@carltonfields.com

BY:



Joseph Ianno, Jr.
Florida Bar No: 655351

SERVICE LIST

Jack Scarola
**SEARCY, DENNY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy
Michael Brody
JENNER & BLOCK, LLC
One IBM Plaza, Suite 400
Chicago, IL 60611

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH, COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,

Defendant(s).

CASE NO. CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,

Plaintiff(s),

vs.

MACANDREWS & FORBES HOLDINGS, INC.,

Defendant(s).

AGREED ORDER CONCERNING PRETRIAL SCHEDULE

The Court, having previously specially set this action for jury trial, and the parties having agreed to the following pretrial schedule, it is:

ORDERED AND ADJUDGED that the proceedings relating to choice-of-law will take place on the following schedule:

Morgan Stanley's Initial Choice-of-Law Brief	April 30, 2004
CPH's Choice-of-Law Opposition	June 4, 2004
Morgan Stanley's Choice-of-Law Reply	June 18, 2004
Hearing on Choice-of-Law	June 28, 2004 (9:30 a.m.)

ORDERED AND ADJUDGED that the proceedings relating to summary judgment will take place on the following schedule:

Summary Judgment Briefs	September 20, 2004
-------------------------	--------------------

Summary Judgment Oppositions	October 25, 2004
Summary Judgment Replies	November 8, 2004
Summary Judgment Hearing	November 19, 2004

ORDERED AND ADJUDGED that the proceedings relating to mediation will take place on the following schedule:

Mediator Selected	November 19, 2004
Mediation	December 6, 2004

ORDERED AND ADJUDGED that the proceedings relating to expert discovery will take place on the following schedule:

Plaintiffs' Expert Disclosures	September 10, 2004
Defendants' Expert Disclosures	September 24, 2004
Rebuttal Expert Disclosures	October 8, 2004
Depositions of Experts	October 18-29, 2004

The parties agree, and the Court orders, that expert witness disclosures shall include: (a) the name and business address of the witness; (b) the subject matter about which the expert will testify; (c) the substance of the facts and opinions to which the expert will testify; (d) a summary of the grounds for each opinion; (e) a copy of any written reports issued by the expert regarding this case; (f) a copy of the expert's curriculum vitae; (g) a list of all cases in which the expert has testified during the past five years; (h) a list of all produced documents relied on by the expert; and (i) copies of all non-produced documents relied on by the expert. Expert witnesses will not be permitted to testify as to opinions, or the bases therefore, unless the opinions or bases were disclosed with particularity in accordance with this Order.

ORDERED AND ADJUDGED that the parties may move to amend the pleadings in this case on or before August 6, 2004, or on a later date in accordance with Florida law.

ORDERED AND ADJUDGED that the remaining pretrial proceedings will take place on the following schedule:

Completion of Fact Discovery	September 3, 2004
Deposition Designations Exchanged	November 19, 2004
Deposition Counter-Designations and Initial Objections Exchanged	December 3, 2004
Motions in Limine	December 3, 2004
Witness Lists and Trial Exhibits Exchanged	December 3, 2004
Objections to Counter-Designations Exchanged	December 8, 2004
Meet-and-Confer re Deposition Designations	December 10, 2004
Motion in Limine Oppositions	December 13, 2004
Joint Pretrial Stipulation (in the form directed by the Court's Uniform Pretrial Procedure)	December 13, 2004
Deposition Designations, Counter Designations, and Objections to Designations and Counter Designations provided to the Court	December 13, 2004
Pretrial Conference	December 20-22, 2004
Jury Instructions and Verdict Forms Exchanged	January 14, 2005
Final Pretrial Conference	January 14, 2005
Jury Trial Begins (15 trial days)	January 18, 2005

The Court will receive objections to instructions and verdict forms, and the parties' counter-instructions on a date to be determined during trial.

DONE AND ORDERED in West Palm Beach County, Florida this ___ day of March,
2004.

ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:

Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, Esq.
655 15th Street, NW, Suite 1200
Washington DC 20005

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, IL 60611

#1051485

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH, COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

_____/ CASE NO. CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

_____/

**AGREED ORDER ON DEFENDANT MACANDREWS & FORBES HOLDINGS, INC.'S
AND COLEMAN (PARENT) HOLDINGS INC.'S MOTION TO COMPEL
PRODUCTION OF DOCUMENTS RESPONSIVE TO
DEFENDANTS' FIRST REQUEST FOR PRODUCTION**

THIS CAUSE having come to be considered upon Defendants' motion to compel production of documents responsive to Defendants' first request for production, the parties having reached agreement, it is hereby

ORDERED and ADJUDGED:

1. Concerning Requests Nos. 24, 35, 36, and 37 of Defendants' first request for production, to the extent such documents exist, Plaintiff Morgan Stanley Senior Funding, Inc. will produce all responsive non-privileged documents within 30 days.

2. Concerning Requests Nos. 31, 32, 33, 42, 47, 49, 50, 61, 63, 65, and 66 of Defendants' first request for production, the date restriction previously imposed by MSSF will be removed and to the extent such documents exist, MSSF will produce all responsive non-privileged documents within 30 days.

3. Concerning Request No. 40 of Defendants' first request for production, MSSF will produce: (a) the settlement agreement encompassed within the plan of reorganization; (b) any side deals or other agreements with the creditors' committee; and (c) any documents concerning the value of any settlement, any side deals, or proposed settlements, created prior to the consummation of the settlements, within 30 days. Morgan Stanley has represented that the documents concerning the value of any settlement or side deal created after the consummation of such settlement or side deal have already been produced, or will be produced, in response to other document requests.

DONE AND ORDERED at West Palm Beach County, Florida, this ____ day of March, 2004.

SIGNED AND DATED

MAR 19 2004

ELIZABETH T. MAASS
Circuit Court Judge

copies furnished to:

Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, Esq.
655 15th Street, NW, Suite 1200
Washington DC 20005

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, IL 60611

Coleman (Parent) Holdings Inc. vs Morgan Stanley & Company, Inc.
Case No.:2003 CA 005045 AI
Order

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block LLP
One IBM Plaza
Suite 4400
Chicago, IL 60611

Jack Scarola, Esq.
Searcy Denney Scarola Barnhart & Shipley
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

CASE NO. CA 03-5045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant,

MORGAN STANLEY SENIOR FUNDING, INC.

Plaintiff,

vs.

MACANDREWS & FORBES HOLDINGS, INC.,

CASE NO. 03-5165 AI

Defendant,

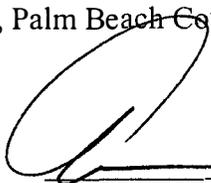
ORDER ON MORGAN STANLEY'S MOTION TO COMPEL
PURSUANT TO ALLEGED WRITTEN AGREEMENT

THIS CAUSE having come to be considered upon Morgan Stanley's Motion to Compel Pursuant to Alleged Written Agreement, and the court having reviewed the file and being fully advised in the premises, it is hereby,

ORDERED and ADJUDGED:

the is Denied

DONE AND ORDERED at West Palm Beach, Palm Beach County, Florida, this 19th
day of March, 2004.



ELIZABETH T. MAASS
CIRCUIT COURT JUDGE

Copies have been furnished to all counsel on the attached counsel list.

Coleman (Parent) Holdings Inc. vs Morgan Stanley & Company, Inc.
Case No.:2003 CA 005045 AI
Order

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block LLP
One IBM Plaza
Suite 4400
Chicago, IL 60611

Jack Scarola, Esq.
Searcy Denney Scarola Barnhart & Shipley
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

_____ /

CASE NO. CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

_____ /

ORDER AND NOTICE OF HEARING

This case came before the Court for a case management conference and hearing on Coleman (Parent) Holdings, Inc.'s Motion for Rule to Show Cause March 19, 2004, with all parties well represented by counsel. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that within 10 days Defendants Morgan Stanley & Co., Incorporated and Morgan Stanley Senior Funding, Inc., shall produce for inspection and copying by Plaintiff all Exhibit As, Declaration of Acknowledgment and Agreement to be Bound by Protective Order, to the Stipulated Confidentiality Order entered July 31, 2003 secured in connection with the dissemination of the settlement agreement between Plaintiff and Arthur Andersen, LLP. It is further

ORDERED AND ADJUDGED that hearing on Plaintiff's Motion for Rule to Show Cause and Morgan Stanley & Co., Incorporated and Morgan Stanley Senior Funding, Inc.'s Verified Motion to Admit Rebecca A. Beynon, Pro Hac Vice; Verified Motion to Admit James M. Webster III, Pro Hac Vice; and Verified Motion to Admit Mark C. Hansen, Pro Hac Vice shall be held

April 30, 2004, at 9:00 a.m. - 10:30 a.m. and 3:00 p.m. - 5:00 p.m.

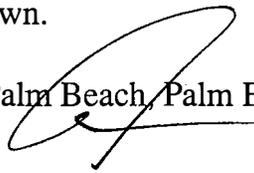
at the West Palm Beach Courthouse, Room 11A, 205 N Dixie Hwy, WPB, FL. It is further

ORDERED AND ADJUDGED that the attorneys/parties must submit to the Court one (1) week before the hearing:

1. copies of all relevant pleadings;
2. a copy of any memorandum of law; and
3. copies of all case law authority.

This hearing shall not be canceled unless the issues of the motions have been settled, and orders entered, or the motions withdrawn.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 20 day of March, 2004.



ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci
655 15th Street, NW, Suite 1200
Washington DC 20005

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, Il 60611

If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please contact the ADA Coordinator in the Administrative Office of the Court, Palm Beach County Courthouse, 205 North Dixie Highway, Room 5.2500, West Palm Beach, Florida 33401; telephone number (561) 355-4380 within two (2) working days of your receipt of this [describe notice]; if you are hearing or voice impaired, call 1-800-955-8771.

SPANISH

Si Ud. es una persona incapacitada que necesita de un servicio especial para participar en este proceso, Ud. tiene derecho a que le provean cierta ayuda sin costo alguno. Por favor pongase en contacto con el Coordinador de la Oficina Administrativa de la Corte ADA, situada en el 205 North Dixie Highway, Oficina 5.2500, West Palm Beach, Florida, 33401, teléfono (561) 355-4380, dentro de los dos (2) próximos días hábiles después de recibir esta [describa la notificación]; si tiene incapacidad de oír ó hablar llame al 1-800-955-8771.

CREOLE

Si ou sé yon moun ki Infim, ki bézwen ninpôt akomodasyon pou ka patisipé nan pwosè sa-a, ou gen dwa, san'l pa kouté'w anyin, pou yo ba'w kèk sèvis. Tanpri kontaké koòdinatè ADA ya nan Biro Administratif Tribinal nan cité Palm Beach la, ki nan 205 North Dixie Highway, Cham 5.2500, West Palm Beach, Florida 33401, niméro telefonn-nan sé (561) 355-4380, rélé dé (2) jou dé lè ou résévwa [notis sa-a]; si ou bèbè ou byen soud rélé 1-800-955-8771.

FRENCH

Si vous êtes infirme, et en besoin de n'importe quelle accommodation pour pouvoir participer à ces procédures, vous pouvez gratuitement recevoir, certains services. S'il-vous-plait contactez le coordinateur du Bureau Administratif du Tribunal de Palm Beach, située à 205 North Dixie Highway, Chambre 5.2500, West Palm Beach, Florida 33401, numéro de téléphone (561) 355-4380 durant deux (2) jours suivant la réception de [cette note]; si vous êtes muets ou sourds, appelez 1-800-955-8771.

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

CASE NO. CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

**ORDER ON MORGAN STANLEY'S MOTION TO COMPEL RESPONSE TO
FOURTH SET OF INTERROGATORIES**

THIS CAUSE came before the Court March 19, 2004 on Morgan Stanley's Motion to Compel Response to Fourth Set of Interrogatories, with all counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that the Motion is Granted, in part. Within 30 days, Plaintiff shall serve its amended Answer to Morgan Stanley's Fourth Set of Interrogatories, specifically stating, if known, the date and time Plaintiff contends Defendant knew the alleged misrepresentations found in (i) the "Discussion Materials" and Strategic Plan furnished February 23, 1998; (ii) those listed as bullet points in Plaintiff's Response to Interrogatory 3 of Defendant's First Set of Interrogatories; (iii) the March 19, 1998 press release; and (iv) documents SB232346; MS 0007797-0007970; SB 0018203-0018288; MS 009999; CP 038199-038206; CP 016766; CP 039154-039157; CP 016747-016750; CP

004888; CP 009659-009660; and CP 046317-046319, were false and/or misleading.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 20
day of March, 2004.



ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:

Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci
655 15th Street, NW, Suite 1200
Washington DC 20005

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, Il 60611

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT IN
AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.

_____ /

MORGAN STANLEY'S MOTION TO DISCHARGE JURY PANELS

Pursuant to Fla. R. Civ. P. 1.431, Morgan Stanley & Co. Incorporated ("Morgan Stanley") respectfully requests that the Court enter an order discharging the two panels of prospective jurors who have participated in voir dire examination on March 11, 16, 17, and 22, 2005. On March 23, 2005, this case changed fundamentally as a result of the withdrawal by Kirkland & Ellis LLP ("K&E") from its representation of Morgan Stanley and the Court's ruling partially granting Plaintiff's renewed motion for default judgment against Morgan Stanley.

The assembled panels of prospective jurors have been examined for hours regarding a case that is now fundamentally different, and their examination was conducted by lead trial counsel whose representation of Morgan Stanley has now terminated under disquieting circumstances. Even a sugar-coated explanation of the events that have transpired is certain to bias these prospective jurors against Morgan Stanley — thereby depriving Morgan Stanley of its constitutional right to trial by a fair and impartial jury. This bias is not curable. Accordingly, the

Court should discharge these panels and permit the parties to begin voir dire examination afresh with new panels.

ARGUMENT

1. “The primary purpose of voir dire is to determine whether the juror is qualified and will be fair and impartial, free from all bias, prejudice or interest in the cause being tried.” *Ritter v. Jimenez*, 343 So. 2d 659, 661 (3d DCA 1977) (quoting *Barker v. Randolph*, 239 So. 2d 110 (Fla. 1st DCA 1970)).

2. Although the “decision whether to dismiss any or all jurors lies in the sound discretion of the trial judge,” *Bauta v. State*, 698 So. 2d 860, 861 (Fla. 3d DCA 1997), courts have recognized that “the impartiality of the finders of fact is an absolute prerequisite to our system of justice.” *Mitchell v. State*, 862 So. 2d 908, 911 (Fla. 4th DCA 2003) (quoting *Williams v. State*, 638 So. 2d 976, 978 (Fla. 4th DCA 1994)); *see also Carratelli v. State*, 832 So. 2d 850, 854 (Fla. 4th DCA 2003). As the Florida Supreme Court has repeatedly held, “[t]he test for determining juror competency is whether the juror can lay aside any bias or prejudice and render a verdict solely on the evidence presented and the instructions on the law given by the court.” *Busby v. State*, No. SC02-1364, 2004 WL 2471387, at *4 (Fla. Nov. 4, 2004) (granting new trial to defendant prejudiced by trial court’s improper denial of for-cause challenge against juror); *see also Weinstein Design Group, Inc. v. Fielder*, 884 So. 2d 990, 994 (Fla. 2004) (same); *Singer v. State*, 109 So. 2d 7, 24 (Fla. 1959) (same).

3. Applying this rule, “[c]lose cases [involving challenges to the impartiality of potential jurors] should be resolved in favor of excusing the juror rather than leaving a doubt as to his or her impartiality.” *Weinstein Design Group, Inc. v. Fielder*, 884 So. 2d 990, 994 (Fla. 2004) (quoting *Bryant v. State*, 765 So. 2d 68, 71 (Fla. 4th DCA 2000)); *see also Carratelli*, 832 So. 2d at 854.

4. In the many hours that panel members have spent in voir dire examination, they have received detailed descriptions and explanations regarding the case. The information that these panels have thus far received from the parties' lawyers and the Court is now, for the most part, wholly invalid. Obviously, these prospective jurors cannot be kept in the dark about what has occurred. But it will be impossible to explain to these prospective jurors the highly unusual events that have occurred in a way that does not grossly prejudice Morgan Stanley.

5. As an initial matter, Morgan Stanley's voir dire examination has so far been conducted *solely* by lead trial counsel from K&E. Morgan Stanley's credibility with the prospective jurors turned *wholly* on their perception of and trust in that lawyer. Now, however, that attorney has withdrawn from the representation of Morgan Stanley and will no longer play any role before the jury in this matter. This lawyer's disappearance from the case will cause prospective jurors to speculate as to why he suddenly vanished from his representation of Morgan Stanley. Moreover, when they are instructed at trial, the jurors will be forced to conclude that, during voir dire, Morgan Stanley *deliberately misled* them by permitting this lawyer to appear before them. Their trust in Morgan Stanley will be fatally and irreparably undermined, to a degree far different than any new juror would feel if he or she learned merely that previous counsel had been terminated.

6. In addition, potential jurors have been instructed that Morgan Stanley's liability to Coleman (Parent) Holdings, Inc. ("CPH") is something that, if selected as jurors, they will be called upon to decide. For example, Prospective Juror No. 65 (a member of the first panel) pointedly asked: "[H]as this case been proven, and have people been proven at fault and we're deciding compensation?" 3/16/05 Vol. 39 Hrg. Tr. at 4098:18-20. In response, the panel was

informed that jurors *would* be deciding liability issues: “No one’s guilt has been proven with regard to anything yet. You haven’t heard the first piece of evidence.” *Id.* at 4099:15-17.

7. Along these same lines, on March 17, 2005, plaintiff’s counsel informed the second panel that “before we ever start talking about damages,” it would be necessary to prove “Morgan Stanley did something wrong.” 3/17/05 Vol. 40 Hrg. Tr. at 4314:20-22. Prospective Juror No. 92 noted that “first you’d have to decide if there was anything wrong first before you would do the amount, right?” *Id.* at 4315:1-3. Plaintiff’s counsel assured her that, if the party with burden of proof “proved nothing,” then the jury’s “verdict would be, Morgan Stanley, you didn’t do anything wrong because it hasn’t been proven.” *Id.* at 4315:15-17. “No liability, zero verdict.” *Id.* at 4315:21-22.

8. Now, as a result of the Court’s default ruling, these same jurors will be told that — completely to the contrary of what they were told previously — liability will now *not* be an issue for them to consider. Such an instruction cannot be accomplished without irreparable prejudice to Morgan Stanley. The jurors will undoubtedly speculate, to Morgan Stanley’s great detriment, as to why this unusual decision was reached and why they previously received different instructions on the issue. Jurors will infer that at least some of this conduct occurred during voir dire examination, leading to the inevitable conclusion that Morgan Stanley deliberately deceived them during voir dire examination.

9. These circumstances alone would warrant the discharge of the jury panel. However, they are compounded by the many objectionable statements that have been made during the voir dire process. Plaintiff’s counsel has improperly suggested criminal or administrative proceedings were brought, leading to the Court reading a curative instruction. *See, e.g.*, 3/16/05 Vol. 38 Hrg. Tr. at 4036:23-4037:6 (“So whether there have been criminal

proceedings, the nature of the criminal proceedings, who was subject to criminal proceedings, whether some administrative agency took action with regard to these issues, that's not a concern of the jury. You will be instructed at the conclusion of the case that you must focus your concern solely on the civil issues." Plaintiff's attorneys have made inappropriate comments regarding their religious affiliation that the Court found were designed to curry favor with the jurors. *See, e.g.,* 3/17/05 Vol. 41 Hrg. Tr. at 4376:2-13 ("You know, in my own studies I've learned about the Old Testament God as being a God — a stern God of vengeance, and the New Testament God of God being forgiveness, of love. The primary message of the Old Testament being, follow the rules, keep the Ten Commandments. And the primary message of the New Testament being one of love and forgiveness. But there is a rule-following aspect to the New Testament as well, because Christ comes into the temple and throws out the money. He gets angered. He's had enough."). They have improperly remarked upon the wealth of Morgan Stanley's counsel. *See, e.g.,* 3/17/05 Vol. 41 Hrg. Tr. at 4355:6-11 ("It was because I saw Mr. Ianno driving his fancy car, and I have a grudge against him because he's the lawyer on the other side of this case and so I have intentionally run into him with his automobile, purposely used my car as a weapon.").

10. The panels of prospective jurors will be irreversibly tainted by these events. As Morgan Stanley is prepared to show through expert testimony, any explanation these panel members are given regarding the highly unusual events that have occurred will be inadequate to cure the prejudice to Morgan Stanley. In these circumstances, selecting jurors from these tainted panels would be violative of Morgan Stanley's constitutional due process right to have this matter heard by a fair and impartial jury.

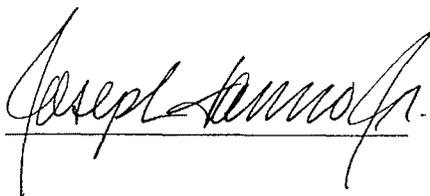
WHEREFORE Morgan Stanley respectfully requests that this Court enter an Order discharging the two panels of prospective jurors that participated in voir dire examinations conducted on March 11, 16, 17, and 22, 2005.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 23rd day of March 2005.

Mark C. Hansen
James M. Webster, III
Rebecca A. Beynon
**KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL, P.L.L.C.**
Sumner Square
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
Telephone: (202) 326-7900
Facsimile: (202) 326-7999

Joseph Ianno, Jr. (FL Bar No. 655351)
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368

BY: 

Counsel for Morgan Stanley & Co. Incorporated

SERVICE LIST

Jack Scarola
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy
Michael Brody
JENNER & BLOCK, LLC
c/o Mafco Holdings, Inc.
777 S. Flager Drive
Suite 1200 – West Tower
West Palm Beach, FL 22401-6136

Law Offices

D. CULVER SMITH III, P.A.

Suite 401, Northbridge Centre
515 North Flagler Drive
~~P.O. Box 3003 (ZIP 33402-3003)~~
West Palm Beach, Florida 33401

Tel. 561-833-3772
Fax 561-833-4585
www.dcsmithlaw.com

Appellate Practice
Special Counsel/Litigation Support
Lawyer Ethics and Discipline

D. Culver "Skip" Smith III
dcs@dcsmithlaw.com

March 23, 2004

BY HAND

The Honorable Elizabeth T. Maass
Circuit Judge, Fifteenth Judicial Circuit of Florida
Room 11.1208, Palm Beach County Courthouse
205 North Dixie Highway
West Palm Beach, FL 33401

Re: *Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co., Inc.*,
Case No. 02003CA005045XXOCAI
Morgan Stanley Senior Funding, Inc. v. MacAndrews & Forbes Holdings, Inc., et al.,
Case No. 502003CA005165XXOCAI
Notification of companion case

Dear Judge Maass:

In accordance with local administrative order 2.009-5/99, I wish to notify Your Honor of the following recently-filed companion case to the two above-referenced cases that are pending in your division:

Morgan Stanley & Co. Incorporated, et al. v. Arthur Andersen LLP et al.,
Case No. 502004CA002257XXXXMB (Division AA)

I have filed a motion on behalf of the plaintiffs to transfer this recently-filed action to your division. The motion is set for hearing before Judge Miller on Tuesday, March 30, 2004, at 8:45 a.m.

16div-004883

Very respectfully yours,

A handwritten signature in black ink, appearing to read "Karen M. Miller", followed by a square box containing a stylized mark.

1037-001.ltr.maass.01

cc: The Honorable Karen M. Miller (by hand)
Mr. Michael Moscato (by facsimile)
Ms. Rebecca A. Beynon (by e-mail/pdf)

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

_____ /

CASE NO. CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

_____ /

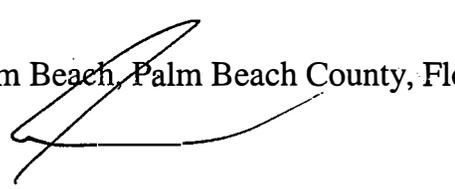
ORDER AND DIRECTIONS TO THE CLERK

THIS CAUSE came before the Court, in Chambers, on its own Motion. Based on the foregoing, it is

ORDERED AND ADJUDGED that the Clerk is directed to docket and file attorney Skip Smith's letter dated March 23, 2004.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this

24 day of March, 2004.



ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci
655 15th Street, NW, Suite 1200
Washington DC 20005

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, Il 60611

Skip Smith, Esq.
515 N. Flagler Dr., Suite 401
West Palm Beach, FL 33401

FAX TRANSMITTAL

JENNER & BLOCK

Jenner & Block LLP
One IBM Plaza
Chicago, IL 60611
Tel 312 222-9350
www.jenner.com

Chicago
Dallas
Washington, DC

Date: March 26, 2004

To: Thomas A. Clare, Esq.

Fax: (202) 879-5200

Voice: (202) 879-5993

Joseph Ianno, Jr.

Fax: (561) 659-7368

Voice: (561) 659-7070

John Scarola, Esq.

Fax: (561) 684-5816 (before 5 PM)

Voice: (561) 686-6350, Ext. 140

From: Michael T. Brody
312 923-2711

Employee Number:

Client Number: 41198-10003

Important: This message is intended only for the use of the individual or entity to which it is addressed, and may contain information that is attorney work product, privileged, confidential, and exempt from disclosure under applicable law. If the reader of this message is not the intended recipient, or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution, or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone, and return the original message to us at the above address via postal service. Thank you.

Message:

Total number of pages including this cover sheet: 4

Time Sent:

If you do not receive all pages, please call: 312 222-9350

Sent By:

Secretary: Caryn Jo Geisler

Extension: 6490

JENNER & BLOCK

March 26, 2004

Jenner & Block LLP
One IBM Plaza
Chicago, IL 60611
Tel 312-222-9350
www.jenner.com

Chicago
Dallas
Washington, DC

By Telecopy

Thomas A. Clare, Esq.
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Michael T. Brody
Tel 312 923-2711
Fax 312 840-7711
mbrody@jenner.com

Re: *Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co.*
Morgan Stanley Senior Funding, Inc. v. MacAndrews & Forbes Holdings Inc., et al.

Dear Tom:

I enclose a revised Notice of Deposition for Lili Rafii.

Very truly yours,



Michael T. Brody

MTB:cjg

cc: Joseph Ianno, Esq. (by telecopy)
John Scarola, Esq. (by telecopy)
Jerold S. Solovy, Esq.

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Company, Inc.
Case No.: 2003 CA 005045 AI
Notice of Taking Videotaped Deposition
March 26, 2004

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 2003 CA 005045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

NOTICE OF TAKING VIDEOTAPED DEPOSITION

To: Thomas A. Clare, Esq.
KIRKLAND & ELLIS, LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lake View Avenue
Suite 1400
West Palm Beach, FL 33401

PLEASE TAKE NOTICE that Plaintiff Coleman (Parent) Holdings Inc. will take the deposition upon oral examination of the following witness pursuant to Florida Rule of Civil Procedure 1.310 on the dates, times, and locations set forth below:

Table with 3 columns: DEPONENT, DATE AND TIME, LOCATION. Row 1: Lili Rafi, April 2, 2004 at 9:30 a.m., Esquire Deposition Services 216 E. 45th St., 8th Floor New York, NY 10017

The deposition will be recorded by videotape and stenographic means. The deposition will be taken before a person authorized to administer oaths and will continue day to day until completed.

The videotape operator will be Esquire Deposition Services located in New York, New York.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by facsimile and mail to all counsel on the attached Service List this 26th day of March, 2004.

Dated: March 26, 2004

COLEMAN (PARENT) HOLDINGS INC.

By: Michael T. Brody
One of Its Attorneys

Jerold S. Solovy
Michael T. Brody
Clark C. Johnson
JENNER & BLOCK LLP
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

Jack Scarola
SEARCY DENNEY SCAROLA BARNHART
& SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33409
(561) 686-6300

SERVICE LIST

Thomas A. Clare, Esq.
KIRKLAND & ELLIS, LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lake View Avenue
Suite 1400
West Palm Beach, FL 33401

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH, COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

CASE NO. CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
COLEMAN (PARENT) HOLDINGS INC.,
Defendant(s).

**MACANDREWS & FORBES HOLDINGS INC.'S AND
COLEMAN (PARENT) HOLDINGS INC.'S VERIFIED
MOTION TO PERMIT FOREIGN ATTORNEY TO APPEAR**

MacAndrews & Forbes Holdings, Inc. ("MAFCO") and Coleman (Parent) Holdings Inc. ("CPH"), joined by their Florida counsel, Jack Scarola, move this Court pursuant to Rule 2.061(b) of the Florida Rules of Judicial Administration, for an Order permitting Suzanne J. Prysak to appear *pro hac vice* in this action on their behalf. In support of the motion, MAFCO and CPH state:

1. MAFCO and CPH have retained attorney Jack Scarola and the firm of Searcy Denney Scarola Barnhart & Shipley, P.A., 2139 Palm Beach Lakes Boulevard, West Palm Beach, Florida, as Florida counsel to assist in this matter.

2. MAFCO and CPH and their Florida counsel seek the assistance of Suzanne J. Prysak of Jenner & Block, LLC, One IBM Plaza, Chicago, Illinois, in this matter. MAFCO and CPH have previously retained the above-named law firm to provide legal representation in connection with this matter in 2001.

3. Suzanne J. Prysak is a member in good standing of the following bars: U.S. Court of Appeals for the Seventh Circuit; U.S. District Court for the Northern District of Illinois; U.S. District Court for the Southern District of Illinois; and the Illinois Supreme Court. Outside of this case, Ms. Prysak has not filed an application in any Florida state court to appear as counsel under Florida Rule of Judicial Administration 2.061 in the last five years. Ms. Prysak has never been disciplined, suspended, or disbarred by any court.

4. Ms. Prysak has read all applicable provisions of the Florida Rules of Judicial Administration and the Rules Regulating the Florida Bar, and this motion complies with those rules.

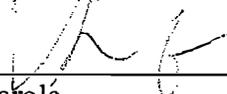
5. Jack Scarola has been a member of the Florida Bar since 1973, Florida Bar No. 169440, and consents to act as co-counsel with the foreign attorney in this action.

WHEREFORE, MAFCO and CPH move this Court for an Order permitting Suzanne J. Prysak to appear on their behalf in this action.

Under penalty of perjury, I declare that I have read the foregoing motion and with respect to my credentials the facts stated in it are true.



Suzanne J. Prysak
Respectfully submitted,

By: _____


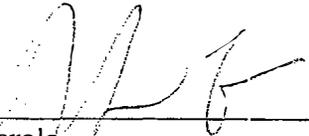
John Scarola
Fla. Bar No. 169440

CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that a copy of the foregoing has been furnished by U.S. Mail and facsimile to the following counsel for Plaintiff on this 29th day of March, 2004.

Joseph Ianno, Jr.
CARLTON FIELDS
222 Lake View Avenue, Suite 1400
West Palm Beach, FL 33401
Tel.: (561) 659-7070
Fax: (561) 659-7368

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett H. McGurk
KIRKLAND & ELLIS
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Tel.: (202) 879-5000
Fax: (202) 879-5200



John Scarola
SEARCY DENNEY SCAROLA BARNHART
& SHIPLEY, P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33409
Tel.: (561) 686-6300

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH, COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

_____/ CASE NO. CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
COLEMAN (PARENT) HOLDINGS INC.,
Defendant(s).

_____ /

**ORDER GRANTING VERIFIED MOTION TO
PERMIT FOREIGN ATTORNEY TO APPEAR**

THIS CAUSE having come before the Court upon MacAndrews & Forbes Holdings, Inc. ("MAFCO") and Coleman (Parent) Holdings Inc.'s ("CPH") Verified Motion to Permit Foreign Attorney Suzanne J. Prysak to Appear *pro hac vice*, and the Court having been advised of the agreement of Florida counsel and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that:

MAFCO and CPH's Verified Motion to Permit Foreign Attorney Suzanne J. Prysak to Appear *pro hac vice* is GRANTED.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this ___ day of March, 2004.

ELIZABETH T. MAASS
Circuit Court Judge

Copies furnished to:

Thomas A. Clare, Esq.
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lake View Avenue
Suite 1400
West Palm Beach, FL 33401

John Scarola, Esq.
SEARCY DENNEY SCAROLA BARNHART
& SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33409
(561) 686-6300
(561) 478-0754 (fax)

Jerold S. Solovy, Esq.
JENNER & BLOCK, LLC
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350
(312) 527-0484 (fax)

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

CASE NO: CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that a hearing has been set in the above-styled case as follows:

DATE: April 16, 2004
TIME: 4:00 p.m.
PLACE: Palm Beach County Courthouse, Courtroom 11A
205 North Dixie Highway
West Palm Beach, Florida 33401
BEFORE: Judge Elizabeth T. Maass
CONCERNING: Motion For Protective Order Regarding The Use Of
Confidential Personnel Evaluations

and

Motion To Compel Production of Documents Responsive
To Morgan Stanley's Fourth Request For Production

KINDLY GOVERN YOURSELVES ACCORDINGLY.

16div-004896

The undersigned counsel hereby certifies that a good faith attempt to resolve the issues contained in the foregoing motions or matters will be made with opposing counsel prior to hearing on these matters on the Court's Motion Calendar.

If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no costs to you, to the provision of certain assistance. Please contact the ADA Coordinator in the Administrative Office of the Court, Palm Beach County Courthouse, 205 North Dixie Highway, Room 5.2500, West Palm Beach, Florida 33401; telephone number (561) 355-2431 within two (2) working days of your receipt of this notice; if you are hearing or voice impaired, call 1-800-955-8771.

CERTIFICATE OF SERVICE

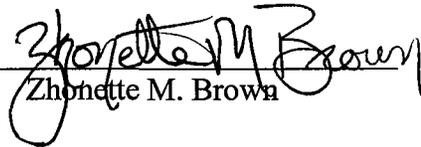
I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this 9th day of April, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar No. 618349)
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

**Counsel for Morgan Stanley & Co.
Incorporated and Morgan Stanley
Senior Funding, Inc.**

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
E-mail: jianno@carltonfields.com

BY:


Zhonette M. Brown

SERVICE LIST

Jack Scarola
**SEARCY, DENNY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy
Michael Brody
JENNER & BLOCK, LLC
One IBM Plaza, Suite 400
Chicago, IL 60611

#230580/mm

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA.

COLEMAN (PARENT) HOLDINGS INC.,

CASE NO: 2003 CA 005045 AI

Plaintiffs,

vs.

MORGAN STANLEY & CO., INC.

Defendant.

MORGAN STANLEY SENIOR FUNDING,
INC.,

Plaintiff,

CASE NO. CA 03-5165 AI

vs.

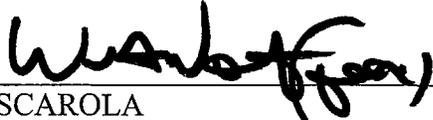
MACANDREWS & FORBES HOLDINGS,
INC.,

Defendant,

NOTICE OF FILING PLEADING UNDER SEAL

COLEMAN (PARENT) HOLDINGS INC. hereby gives Notice of the filing of Coleman (Parent) Holdings Inc.'s Motion to Compel Answers to Interrogatories, filed under Seal on this date.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Fax and Federal Express to all counsel on the attached list on this 12th day of April, 2004.



JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 478-0754
Attorneys for Coleman and MacAndrews

Coleman (Parent) Holdings Inc. vs Morgan Stanley & Company
Notice Of Filing Pleading Under Seal
Case No.: 2003 CA 005045 AI

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block, LLC
One IBM Plaza
Suite 4400
Chicago, IL 60611

#230580/mm

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

CASE NO: 2003 CA 005045 AI

Plaintiffs,

vs.

MORGAN STANLEY & CO., INC.

Defendant.

MORGAN STANLEY SENIOR FUNDING,
INC.,

Plaintiff,

CASE NO. CA 03-5165 AI

vs.

MACANDREWS & FORBES HOLDINGS,
INC.,

Defendant,

NOTICE OF FILING PLEADING UNDER SEAL

COLEMAN (PARENT) HOLDINGS INC. hereby gives Notice of the filing of Coleman (Parent) Holdings Inc.'s Motion to Compel Answers to Deposition Questions and For Other Relief, filed under Seal on this date.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Fax and Federal Express to all counsel on the attached list on this 12th day of April, 2004.



JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 478-0754
Attorneys for Coleman and MacAndrews

Coleman (Parent) Holdings Inc. vs Morgan Stanley & Company
Notice Of Filing Pleading Under Seal
Case No.: 2003 CA 005045 AI

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block, LLC
One IBM Plaza
Suite 4400
Chicago, IL 60611

#230580/mm

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

CASE NO: 2003 CA 005045 AI

Plaintiffs,

vs.

MORGAN STANLEY & CO., INC.

Defendant.

MORGAN STANLEY SENIOR FUNDING,
INC.,

Plaintiff,

CASE NO. CA 03-5165 AI

vs.

MACANDREWS & FORBES HOLDINGS,
INC.,

Defendant,

NOTICE OF FILING PLEADING UNDER SEAL

COLEMAN (PARENT) HOLDINGS INC. hereby gives Notice of the filing of Coleman (Parent) Holdings Inc.'s Motion to Compel Supplementation of Privilege Log and Other Relief, filed under Seal on this date.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Fax and Federal Express to all counsel on the attached list on this 12th day of April, 2004.



JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 478-0754
Attorneys for Coleman and MacAndrews

Coleman (Parent) Holdings Inc. vs Morgan Stanley & Company
Notice Of Filing Pleading Under Seal
Case No.: 2003 CA 005045 AI

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block, LLC
One IBM Plaza
Suite 4400
Chicago, IL 60611

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

CASE NO: CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

**MOTION TO COMPEL PRODUCTION OF DOCUMENTS RESPONSIVE TO
MORGAN STANLEY'S FOURTH REQUEST FOR PRODUCTION**

Defendant Morgan Stanley & Co. Incorporated ("Morgan Stanley") moves this Court to enter an order compelling Plaintiff Coleman (Parent) Holdings ("CPH") to produce documents responsive Request No. 1 of Morgan Stanley's Fourth Request for Production. In support of its Motion, Morgan Stanley states as follows:

1. Request No. 1 of Morgan Stanley's Fourth Request for Production seeks the following categories of documents:

All documents concerning any debt issued by Coleman or any parent or affiliate company where such debt was secured by the assets or stock of Coleman and/or any direct or indirect parent of Coleman, including but not limited to documents concerning the satisfaction, projected satisfaction, income required to satisfy or accounting treatment of such debt.

(Jan. 23, 2004 MS 4th Req. for Prod. of Docs to Plf., Req. 1 (Ex. A.))

2. CPH objected to Request No. 1 and has significantly limited the scope and timeframe of Morgan Stanley's request. Specifically, CPH stated that it would only produce "documents, if any, relating to any debt issued by CPH or Mafco and pending during the period 1997-98 that was secured by stock in The Coleman Company, Inc., Coleman Worldwide Corporation or CLN Holdings Inc." (March 1, 2004 CPH's Resp. to MS 4th Req. for Prod. of Docs, Resp. 1 (Ex. B).) By limiting Morgan Stanley's request in this manner, CPH has unilaterally and improperly excluded scores of documents relevant to this lawsuit, including documents relating to:

- (a) debt obligations incurred by The Coleman Company itself – the *very subject* of the acquisition transaction that is at issue in this litigation;
- (b) debt obligations incurred by many other Coleman-related "holding companies" such as New Coleman Holdings, which MacAndrews & Forbes Holdings Inc. ("MAFCO") established to structure its indirect ownership in Coleman;
- (c) debt obligations incurred by other MAFCO affiliates but *secured* by shares of Coleman or the Coleman-related "holding companies"; and
- (d) debt that may not have been "pending" in 1997 – but which is nevertheless relevant to understanding CPH's then-existing debt structure because the debt had been refinanced, restructured, or delayed in a manner that would impact later financial periods.

3. The limitations imposed by CPH are improper – and will unreasonably frustrate Morgan Stanley's efforts to obtain full and fair discovery of issues relevant to this lawsuit. When Sunbeam agreed to acquire CPH's interest in Coleman, it agreed to pay approximately \$1.6 billion in cash, to provide CPH with approximately 14 million shares of Sunbeam stock, and to *assume more than one billion dollars in operating and holding company debt*. A complete understanding of the debt obligations that were issued or secured by Coleman and all of its related "holding companies" is critical to developing a complete and accurate financial picture of Coleman, understanding the facts that motivated CPH and MAFCO to sell the Coleman

Company in the manner and at the time that they did, and understanding the substantial benefits that MAFCO and CPH derived from the acquisition transaction.

4. MAFCO, CPH, and Coleman have an extremely complex and intertwined financial structure. Discovery in this case has shown that CPH, MAFCO, and Coleman “routinely” used shares of Coleman and Coleman-related “holding companies” to secure obligations incurred by MAFCO and its affiliates, including “affiliates” unrelated to Coleman. Indeed, a draft disclosure statement prepared by MAFCO’s legal advisors for submission to the Securities Exchange Commission describes CPH’s ownership of Coleman stock as follows:

Substantially all of the shares owned are pledged to secure obligations of Coleman Worldwide Corporation and CLN Holdings Inc., and shares of intermediate holding companies are or from time to time may be pledged to secure obligations of MacAndrews & Forbes Holdings, Inc. or its affiliates.

(MS Dep. Ex. 73 at 19 n.1 (Ex. C).) As written, CPH’s objections and limitations to discovery would prevent Morgan Stanley from discovering information about *both* of the categories of obligations described in this draft disclosure statement.

5. CPH’s attempt to limit its response to debt that was “pending” in 1997 and 1998 is similarly improper. Limiting the timeframe to 1997 and 1998 will prevent Morgan Stanley from analyzing the impact of 1994 - 1996 acquisitions and transactions on its financial position in 1997 and 1998. Coleman was undergoing a significant restructuring when it was purchased by Sunbeam. Between 1994 and 1996, Coleman bought six companies. Morgan Stanley seeks to understand the impact that the debt associated with these and other transactions may have had on CPH’s motivation for selling Coleman at the time that it did, and for the particular mix of cash, stock, and assumption of debt the parties ultimately agreed to in the February 27, 1998 merger agreements.

6. For these reasons, Morgan Stanley requests the Court to enter an order directing CPH to produce documents responsive to Request No. 1 of Morgan Stanley's Fourth Request for Production in its entirety.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this 9th day of April, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar No. 618349)
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

**Counsel for Defendant
Morgan Stanley & Co. Incorporated**

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
E-mail: jianno@carltonfields.com

BY:


Zhonette M. Brown

SERVICE LIST

Jack Scarola
**SEARCY, DENNY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy
Michael Brody
JENNER & BLOCK, LLC
One IBM Plaza, Suite 400
Chicago, IL 60611

Exhibit A

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CASE NO: 03 CA-005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

**MORGAN STANLEY & CO. INCORPORATED'S FOURTH REQUEST
FOR PRODUCTION OF DOCUMENTS TO PLAINTIFF**

Pursuant to Rules 1.280 and 1.350 of the Florida Rules of Civil Procedure, Morgan Stanley & Co. Incorporated ("MS & Co.") requests that plaintiff produce the documents and things referred to in the following specific requests. The specific requests are preceded by Instructions and Definitions which shall govern the specific requests. Documents and things responsive to these requests should be produced to counsel for Morgan Stanley & Co. Incorporated at the law firm of Carlton Fields, P.A., 222 Lakeview Avenue, Suite 1200, West Palm Beach, FL 33401, within the time required by Florida Rule of Civil Procedure 1.350(b) or as otherwise agreed to by the parties or specified by the Court.

INSTRUCTIONS

1. The connectives "and" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery request all responses that might otherwise be construed to be outside of its scope.

2. The use of the singular form of any word includes the plural and vice versa.

3. Documents requested and to be produced include all Documents in the possession, custody or control of the plaintiff including, but not limited to, any agents, employees, contractors, attorneys, and consultants or experts working for or in favor of the plaintiff or its attorneys.

4. If, in responding to this Request for Production, you encounter any ambiguities when construing a request or definition, the response shall set forth the matter deemed ambiguous and the construction used in responding.

5. Whenever in this Request you are asked to identify or produce a document which is deemed by you to be properly withheld from production for inspection or copying under claim of privilege (including, but not limited to, the work product doctrine), provide a privilege log that includes: the type of document, the general subject matter of the document, the date of the document, and such other information as is sufficient to identify the document, including, where appropriate, the author, addressee, custodian, and any other recipient of the document, and where not apparent, the relationship of the author, the addressee, custodian, and any other recipient to each other, in a manner that, without revealing the information claimed to be protected, will enable this party to assess the applicability of the privilege protection claimed by you. The privilege log shall be provided within the time set forth in the agreed-upon order.

6. If production of any requested document(s) is objected to on the grounds that production is unduly burdensome, describe the burden or expense of the proposed discovery.

7. When a document contains both privileged and non-privileged material, the non-privileged material must be disclosed to the fullest extent possible without disclosing the

privileged material. If a privilege is asserted with regard to part of the material contained in a document, the party claiming the privilege must clearly indicate the portions as to which the privilege is claimed. When a document has been redacted or altered in any fashion, identify as to each document the reason for the redaction or alteration. Any redaction must be clearly visible on the redacted document.

8. If a responsive document exists but is no longer in your possession, custody, or control, state: its date, author(s), recipient(s), subject matter, what disposition was made of the document, and the person or entity, if any, now in possession, custody, or control of the document. If a responsive document has been destroyed, identify the date of destruction, the person who destroyed the document and the person who directed that the document be destroyed and state the reason for its destruction.

9. Produce all of the documents responsive to the numbered requests below either as they are kept in the usual course of business or by custodian.

10. If any of these documents cannot be produced in full, you are requested to produce them to the fullest extent possible, specifying clearly the reasons for your inability to produce the remainder and stating any information, knowledge, or belief you have concerning the unproduced portion.

11. If the requested documents are maintained in a file, the file folder is included in the request for production of those documents.

12. The terms “any,” “all” and “each” shall be construed to mean “any,” “all,” or “each”.

13. The term “including” shall be construed to mean “including but not limited to.”

14. The present tense shall be construed to include the past and future tenses.

15. The specificity of any request herein shall not be construed to limit the generality or reach of any other request herein.

16. Unless otherwise specified, this Request calls for the production of documents created, delivered, distributed, sent, received, accessed, or modified up to the date of your response to this Request.

DEFINITIONS

1. The term “concerning” means relating to, referring to, describing, evidencing, or constituting.

2. “Coleman” means Coleman Company, Inc.

3. The “Coleman Transaction” means Sunbeam’s acquisition of Coleman Company, Inc. from CPH and all related communications, agreements, and transactions, including the February 27, 1998 Agreements and the March 30, 1998 closing.

4. “CPH” means Coleman (Parent) Holdings Inc. and any of its officers, directors, former or present employees, representatives and agents.

5. “CSFB” means Credit Suisse First Boston LLC and any of its officers, directors, former or present employees, representatives and agents.

6. “Document” means any recording in any tangible form of any information, whether handwritten, typed, printed, stored on computer disks, tapes, or databases, or otherwise reproduced. “Document” or “documents” also includes electronic documents whether stored on servers or hard drives, e-mail, backup tapes, voicemail and video and audio recordings. A draft or non-identical copy is a separate document within the meaning of this term.

7. "MAFCO" means MacAndrews & Forbes Holdings, Inc. and any of its officers, directors, former or present employees, representatives and agents.

8. "MS & Co." means Morgan Stanley & Co. Incorporated and any of its officers, directors, former or present employees, representatives and agents.

9. The term "person" is defined as any natural person or any business, legal or governmental entity or association.

10. The terms "plaintiff" and "defendant" as well as a party's full or abbreviated name or pronoun referring to a party mean the party and, where applicable, its officers, directors, employees, partners, corporate parent, subsidiaries or affiliates. This definition is not intended to impose a discovery obligation on any person who is not a party to the litigation.

11. The term "relating to" means concerning, evidencing, referring to, or constituting.

12. "Sunbeam" means Sunbeam Corporation or any of its subsidiaries, divisions, predecessors, successors, present and former employees, representatives, and agents.

DOCUMENTS TO BE PRODUCED

1. All documents concerning any debt issued by Coleman or any parent or affiliate company where such debt was secured by the assets or stock of Coleman and/or any direct or indirect parent of Coleman, including but not limited to documents concerning the satisfaction, projected satisfaction, income required to satisfy or accounting treatment of such debt.

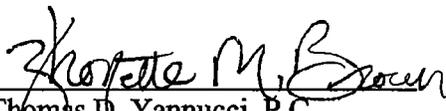
2. All resumes and documents concerning biographical information, including but not limited to educational and professional background and experience, of the

individuals identified under the MAFCO and Coleman headings in CPH's Response to MS & Co.'s First Set of Interrogatories, Interrogatory No. 1.

3. All documents concerning any threatened or filed lawsuit against or by MAFCO, CPH or affiliate related or referring to Sunbeam's acquisition of Coleman.

4. All documents concerning payments of any kind made by MAFCO, CPH or any affiliate to CSFB in 1996, 1997, and 1998.

Dated: January 23, 2004


Thomas D. Yannucci, P.C.
Thomas A. Clare
Zhonette M. Brown
Larissa Paule-Carres
Kathryn R. DeBord
Ryan P. Phair
Michael C. Occhuizzo
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

Joseph Ianno, Jr. (FL Bar # 655351)
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368

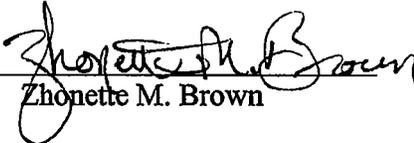
Counsel for Defendant
Morgan Stanley & Co. Incorporated

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by facsimile and e-mail to all counsel of record on the attached service list on this 23rd day of January, 2004.

Thomas D. Yannucci, P.C.
Thomas A. Clare
Zhonette M. Brown
Larissa Paule-Carres
Kathryn R. DeBord
Ryan P. Phair
Michael C. Occhuizzo
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

Joseph Ianno, Jr. (FL Bar # 655351)
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

BY: 
Zhonette M. Brown

Counsel for Defendant
Morgan Stanley & Co. Incorporated

SERVICE LIST

<p>John Scarola SEARCY, DENNEY, SCAROLA, BARNHARDT & SHIPLEY, P.A. 2139 Palm Beach Lakes Boulevard West Palm Beach, Florida 33409</p>	<p>Counsel for Plaintiff</p>
<p>Jerold S. Solovy JENNER & BLOCK, LLC One IBM Plaza Suite 4400 Chicago, Illinois 60611</p>	<p>Counsel for Plaintiff</p>

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

CASE NO: CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that a hearing has been set in the above-styled case as follows:

DATE: April 16, 2004
TIME: 4:00 p.m.
PLACE: Palm Beach County Courthouse, Courtroom 11A
205 North Dixie Highway
West Palm Beach, Florida 33401
BEFORE: Judge Elizabeth T. Maass
CONCERNING: Motion For Protective Order Regarding The Use Of
Confidential Personnel Evaluations

and

Motion To Compel Production of Documents Responsive
To Morgan Stanley's Fourth Request For Production

KINDLY GOVERN YOURSELVES ACCORDINGLY.

16div-004919

The undersigned counsel hereby certifies that a good faith attempt to resolve the issues contained in the foregoing motions or matters will be made with opposing counsel prior to hearing on these matters on the Court's Motion Calendar.

If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no costs to you, to the provision of certain assistance. Please contact the ADA Coordinator in the Administrative Office of the Court, Palm Beach County Courthouse, 205 North Dixie Highway, Room 5.2500, West Palm Beach, Florida 33401; telephone number (561) 355-2431 within two (2) working days of your receipt of this notice; if you are hearing or voice impaired, call 1-800-955-8771.

CERTIFICATE OF SERVICE

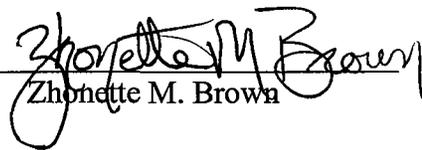
I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this 9th day of April, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar No. 618349)
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

**Counsel for Morgan Stanley & Co.
Incorporated and Morgan Stanley
Senior Funding, Inc.**

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
E-mail: jianno@carltonfields.com

BY:


Zhonette M. Brown

SERVICE LIST

Jack Scarola
**SEARCY, DENNY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy
Michael Brody
JENNER & BLOCK, LLC
One IBM Plaza, Suite 400
Chicago, IL 60611

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH, COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

_____/ CASE NO. CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

_____/

**COLEMAN (PARENT) HOLDINGS INC.'S
RESPONSE TO MOTION TO COMPEL PRODUCTION
OF DOCUMENTS RESPONSIVE TO MORGAN STANLEY'S
FOURTH REQUEST FOR PRODUCTION**

MS&Co. improperly has refused to withdraw this motion to compel even though CPH already has provided most of the documents in question and has agreed to provide any remaining documents that have not been produced within 21 days. The purported production deficiencies are set forth in Paragraphs 2(a)-(d) and Paragraph 5 of MS&Co.'s motion. On April 12, 2004, the next business day after receiving MS&Co.'s motion, CPH advised MS&Co. that the documents set forth in Paragraphs 2(b)-(d) already have been produced or do not exist. As for the documents identified in Paragraphs 2(a) and Paragraph 5, although CPH does not believe that they would lead to the discovery of admissible evidence, CPH agreed to provide any such documents that it has within 21 days if MS&Co. would withdraw its motion. *See* Exh. A. Thus,

CPH already has produced all of the documents called for in the motion of MS&Co., or has agreed to do so in short order.

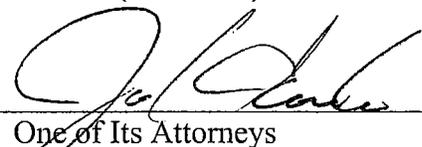
Inexplicably, however, MS&Co. has refused to withdraw its motion. On April 13, 2004, MS&Co. responded to CPH's April 12 letter, stating that the purported deficiencies identified in the motion were not intended to be "exhaustive" and that MS&Co. also wanted additional unspecified documents. *See* Exh. B. MS&Co.'s position is improper and overreaching: CPH has agreed to cure the purported document production deficiencies identified in MS&Co.'s motion to compel. As for any other documents that MS&Co. might want, no such documents are addressed in the motion before this Court.

For the foregoing reasons, because CPH already has agreed to cure any existing document production deficiencies that are identified in Paragraphs 2(a)-(d) and Paragraph 5 of MS&Co.'s motion to compel, the motion should be denied.

Dated: April 14, 2004

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

By: 
One of Its Attorneys

Jerold S. Solovy
Ronald L. Marmer
Jeffrey T. Shaw
JENNER & BLOCK LLP
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

John Scarola
SEARCY DENNEY SCAROLA
BARNHART & SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33402-3626
(561) 686-6300

#1069619

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by
Fax and Federal Express to all counsel on the attached list on this 14th day of
April, 2004.



JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 478-0754
Attorneys for Coleman(Parent)Holdings Inc.
and MacAndrews & Forbes Holdings, Inc.

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block LLP
One IBM Plaza
Suite 4400
Chicago, IL 60611

JENNER & BLOCK

April 12, 2004

Jenner & Block LLP
One IBM Plaza
Chicago, IL 60611
Tel 312-222-9350
www.jenner.com

Chicago
Dallas
Washington, DC

BY TELECOPY

Thomas A. Clare, Esq.
Kirkland & Ellis LLP
655 Fifteenth Street, N.W., Suite 1200
Washington, D.C. 20005

Michael T. Brody
Tel 312 923-2711
Fax 312 840-7711
mbrody@jenner.com

Re: *Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co.*
Morgan Stanley Senior Funding, Inc. v. MacAndrews & Forbes Holdings Inc., et al.

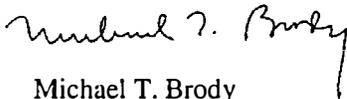
Dear Tom:

This letter relates to your motion to compel production of documents responsive to Morgan Stanley's fourth request for production. At the threshold, we are puzzled by the purported deficiencies in our production you identified in your motion, given that our most recent letter to you on the subject of these requests invited you to explain your position concerning this discovery, and you did not respond.

In any event, as we understand it, the supposed deficiencies identified in your motion are set forth in Paragraphs 2(a)-(d) and in Paragraph 5. Concerning the documents identified in Paragraphs 2(a)-(d), documents responsive to subparagraphs (b) through (d) already have been produced or do not exist. As for subparagraph (a), we objected to producing documents concerning borrowings by Coleman secured by the assets of Coleman. While we still do not understand how documents about Coleman's asset-based borrowing could be relevant to this case, we are willing to produce the documents, if any exist. To the extent we have any responsive documents that have not been produced yet, subject to your agreement to withdraw your motion, we will produce those documents within 21 days. Concerning the documents identified in Paragraph 5, subject to your agreement to withdraw your motion, we likewise will produce any documents that have not yet been produced within 21 days.

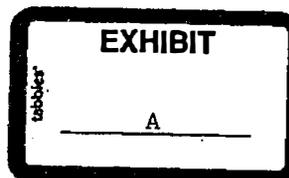
Please confirm whether our proposal is acceptable to you by 12:00 p.m. on Tuesday, April 13. If it is, please prepare an agreed order for our review.

Very truly yours,



Michael T. Brody

cc: Joseph Ianno, Esq. (by telecopy)
John Scarola, Esq. (by telecopy)
Jerold S. Solovy, Esq.



16div-004926

KIRKLAND & ELLIS LLP

Fax Transmittal

655 Fifteenth Street, N.W.
Washington, D.C. 20005
Phone: 202 879-5000
Fax: 202 879-5200

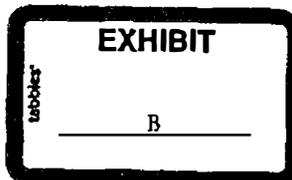
Please notify us immediately if any pages are not received.

THE INFORMATION CONTAINED IN THIS COMMUNICATION IS CONFIDENTIAL, MAY BE ATTORNEY-CLIENT PRIVILEGED, MAY CONSTITUTE INSIDE INFORMATION, AND IS INTENDED ONLY FOR THE USE OF THE ADDRESSEE. UNAUTHORIZED USE, DISCLOSURE OR COPYING IS STRICTLY PROHIBITED AND MAY BE UNLAWFUL.

IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR,
PLEASE NOTIFY US IMMEDIATELY AT:
202 879-5000.

To:	Company:	Fax #:	Direct #:	
Michael Brody	Jenner & Block, LLC	(312) 840-7711	(312) 923-2711	
Jerold Solovy	Jenner & Block, LLC	(312) 840-7671	(312) 923-2671	
Joseph Ianno	Carlton Fields, P.A.	(561) 659-7368	(561) 659-7070	
John Scarola	Searcy Denney Scarola Barnhart & Shipley	(561) 684-5816	(561) 686-6300	
From:	Date:	Pages w/cover:	Fax #:	Direct #:
Kathryn R. DeBord	April 13, 2004		(202) 879-5200	(202) 879-5078

Message:



KIRKLAND & ELLIS LLP

AND AFFILIATED PARTNERSHIPS

655 Fifteenth Street, N.W.
Washington, D.C. 20005

202 879-5000

www.kirkland.com

Thomas A. Clare
To Call Writer Directly:
(202) 879-5993
tclare@kirkland.comFacsimile:
202 879-5200
Dir. Fax: (202) 879-5200

April 13, 2004

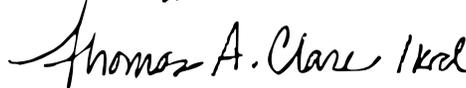
By FacsimileMichael Brody, Esq.
Jenner & Block, LLC
One IBM Plaza
Chicago, IL 60611-7603Re: *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc.*
MSSF v. MacAndrews & Forbes Holdings Inc. et al.

Dear Mike:

I write in response to your April 12, 2004 letter regarding Morgan Stanley's motion to compel production of documents responsive to its Fourth Request for Production, Request No. 1. We appreciate CPH's reconsideration of its position with regard to that request. Please note, however, that the enumerated paragraphs in Morgan Stanley's motion that you cite to in your letter were not meant to be exhaustive, and Morgan Stanley does not agree to your proposal to the extent that it excludes categories of otherwise responsive documents. In addition, as indicated in its motion, Morgan Stanley seeks all documents responsive to Request No. 1 from 1994 through 1998.

Unless I hear from you today I will assume that we are in agreement and will proceed with preparing an order for your review.

Sincerely,



Thomas A. Clare

cc: Joseph Ianno, Jr., Esq. (by facsimile)
John Scarola, Esq. (by facsimile)

Chicago

London

Los Angeles

New York

San Francisco

16div-004928

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH, COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

_____/ CASE NO. CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

_____/

**COLEMAN (PARENT) HOLDINGS INC.'S
RESPONSE TO MOTION FOR PROTECTIVE ORDER
REGARDING THE USE OF PERSONNEL EVALUATIONS**

MS&Co. and MSSF have moved for a protective order seeking to limit severely CPH's ability to question present and former Morgan Stanley employees about admittedly relevant evaluation materials that pertain to those employees. According to the motion of MS&Co. and MSSF, CPH should be precluded from showing so-called "raw" evaluation comments to the employees to whom the comments pertain, or to anyone other than the individual who made the comments, because that limitation supposedly is necessary to preserve "employees' working relationships with one another" and "the confidentiality and proper functioning of Morgan Stanley's 360-degree evaluation process" and to prevent the "embarrass[ment] and harass[ment] [of] Morgan Stanley's employees" (Mot. ¶¶ 6-7). The motion of MS&Co. and MSSF — which amounts to an inappropriate motion to reconsider this Court's ruling on CPH's motion to compel production of personnel records — is without merit for several reasons.

First, the motion is improper because it seeks to impose significant and unfounded limitations on CPH's ability to examine the very witnesses who are the subjects of the evaluations in question. MS&Co. and MSSF previously asked this Court to limit the production of evaluation materials only to summary documents, but this Court refused, recognizing that the underlying evaluations and comments also were relevant. Clearly, the most logical individuals to ask about those comments are both those who made the comments and the individuals who are the subjects of those comments. The effort of MS&Co. and MSSF to cut off fully half of the inquiry constitutes an improper attempt to greatly reduce the probative value of the materials that this Court ordered MS&Co. and MSSF to produce.

Second, the concerns voiced by MS&Co. and MSSF in support of the discovery limitations that they seek are too vague and too general to overcome CPH's legitimate interest in questioning appropriate witnesses about the evaluation materials. MS&Co. and MSSF have not identified a single criticism or evaluation in their recent document production to substantiate their assertion that the integrity of their evaluation process depends upon the discovery limitations that they request. MS&Co. and MSSF therefore have failed to establish the "good cause" that is necessary for this Court to impose those limitations. *See* Fla. R. Civ. P. ¶ 1.280(c).

In this regard, far from supporting the limitations on discovery sought by MS&Co. and MSSF, the solitary case authority cited in their motion illustrates just how far short they have fallen of the showing that is necessary for the issuance of a protective order. In that case, *South Florida Blood Service, Inc. v. Rasmussen*, 467 So. 2d 798 (Fla. 3d DCA 1985), the issue was whether a blood bank should be compelled to provide the names and addresses of 51 volunteer blood donors to an individual who allegedly contracted the AIDS virus from blood transfusions. In a 2-1 decision, after carefully considering the privacy interests at stake, the Court majority concluded that "[t]he complete denial of discovery is necessary to ensure the protection of both

the donors' privacy interests and society's interest in a strong and healthy volunteer blood donation program." *Id.* at 804. Here, in contrast to the blood bank in *South Florida Blood Service*, MS&Co. and MSSF have not begun to demonstrate that important privacy or societal interests require the relief they seek. Instead, MS&Co. and MSSF are requesting severe limitations on CPH's right to take discovery, based solely on their inchoate apprehension about the toll that discovery supposedly would take on their internal evaluation system and on employee relations. Such vague and unsubstantiated assertions are a far cry from the compelling circumstances that prompted the limitation on discovery in *South Florida Blood Service*.

Third, the concerns advanced by MS&Co. and MSSF about the purported integrity of their evaluation process, and the effect on working relationships that disclosures of evaluation materials might have, ignore that virtually all of the evaluation materials pertain to former employees. MS&Co. and MSSF have produced evaluation materials for 24 individuals, and of those individuals, only six are known to be employed by MS&Co. and MSSF at the present time (15 individuals are known to be former employees, one individual is deceased, and the employment status of the remaining two individuals has not been disclosed by MS&Co. and MSSF).

Even as to the six individuals who remain employed by MS&Co. and MSSF, the evaluations in question all date from 1997 and 1998 — more than six years ago. Moreover, there has been no showing as to how many, if any, of the critical evaluators of those six individuals remain employed by MS&Co. and MSSF. Consequently, the concerns cited by MS&Co. and MSSF are grossly exaggerated, if they exist at all.

For the foregoing reasons, the motion of MS&Co. and MSSF for a protective order regarding the use of confidential personnel evaluations should be denied.

Dated: April 14, 2004

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

By:  _____

One of Its Attorneys

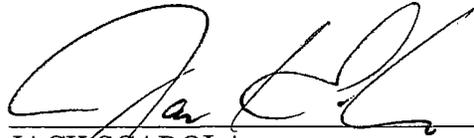
Jerold S. Solovy
Ronald L. Marmer
Jeffrey T. Shaw
JENNER & BLOCK LLP
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

John Scarola
SEARCY DENNEY SCAROLA
BARNHART & SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33402-3626
(561) 686-6300

#1068933

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by
Fax and Federal Express to all counsel on the attached list on this 14th day of
April, 2004.



JACK SCAROLA

Florida Bar No.: 169440

Searcy Denney Scarola

Barnhart & Shipley, P.A.

2139 Palm Beach Lakes Boulevard

West Palm Beach, FL 33409

Phone: (561) 686-6300

Fax: (561) 478-0754

Attorneys for Coleman(Parent)Holdings Inc.

and MacAndrews & Forbes Holdings, Inc.

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGürk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block LLP
One IBM Plaza
Suite 4400
Chicago, IL 60611

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

DOROTHY H. WILKEN
CLERK OF COURT
CASE NO: CA-03-5045 AI
APR 1 2004

RECEIVED FOR FILING

MORGAN STANLEY SENIOR FUNDING, INC.,

Plaintiff,

v.

CASE NO: CA 03-5165 AI

MACANDREWS & FORBES HOLDINGS, INC.,

Defendant.

NOTICE OF FILING ORIGINAL DECLARATION

Morgan Stanley & Co. Incorporated and Morgan Stanley Senior Funding, Inc. ("Morgan Stanley"), by and through their undersigned counsel, hereby give notice that it has filed the original Declaration of R. Bram Smith in support of Morgan Stanley's Opposition to CPH's Motion to Compel Answers to Deposition Questions.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the service list below by facsimile and Federal Express on this 14th day of April, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar No. 618349)
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

Michael K. Kellogg
Mark C. Hansen
James M. Webster
Rebecca A. Beynon
**KELLOGG, HUBER, HANSEN,
TODD & EVANS P.L.L.C.**
Sumner Square
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
Telephone: (202) 326-7900
Facsimile: (202) 326-7999
(*Pro Hac Vice* Pending)

**Counsel for Morgan Stanley & Co.
Incorporated and Morgan Stanley
Senior Funding**

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
E-mail: jianno@carltonfields.com

BY: 
Joseph Ianno, Jr.
Florida Bar No: 655351

SERVICE LIST

Jack Scarola
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy
Michael Brody
JENNER & BLOCK, LLC
One IBM Plaza, Suite 400
Chicago, IL 60611

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

CASE NO: CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

DECLARATION OF R. BRAM SMITH

I, R. Bram Smith, declare:

1. I submit this declaration in support of Morgan Stanley's Opposition to CPH's Motion To Compel Answers To Deposition Questions And For Other Relief. All facts set forth in this declaration are based upon my personal knowledge. If called as a witness, I could and would competently testify to all facts stated in this declaration.

2. I am currently employed as a Senior Managing Director at Bear Stearns & Co., Inc. Before joining Bear Stearns, I was a Managing Director in the Loan Products Group at Morgan Stanley.

3. In March 1998, I was President of Morgan Stanley Senior Funding ("MSSF") — and a member of the Morgan Stanley team that negotiated and entered into a credit agreement with Sunbeam. Pursuant to the credit agreement, Sunbeam borrowed \$680 million

from MSSF, with the borrowings used by Sunbeam to fund certain costs relating to the acquisitions.

4. On February 24, 2004, I provided a deposition in the above-referenced matters at the request of Coleman (Parent) Holdings (“CPH”). The deposition took one full day to complete. The deposition itself — and the half-day of preparation with counsel that preceded the deposition — took me away from my duties at Bear Stearns, my current employer. Accordingly, as the deposition wore on, I became increasingly frustrated with the length of the deposition, the amount of time spent on matters unrelated to my principal responsibilities involving the origination of the Sunbeam credit agreement, and the repetitive nature of much of the questioning.

5. At one point during the deposition, I was asked — repeatedly and in several different variations — to express an opinion whether a certain press release issued by Sunbeam on March 19, 1998 “adequately disclosed” certain information regarding Sunbeam’s first quarter 1998 performance. I grew exasperated with this line of questioning, since I had previously testified (at some length) that I had not been involved in the discussions that lead to Sunbeam’s issuance of the March 19, 1998 press release, had not been involved in the due diligence conducted by Morgan Stanley regarding Sunbeam’s first quarter 1998 performance, and had not played any role in the preparation of the March 19, 1998 press release.

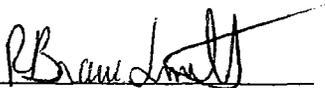
6. As a result of this repeated questioning, I lost my composure and concentration. I requested a break — but the questioner refused to allow one. I needed to take a break to compose myself before answering again, and so excused myself from the deposition. Tom Clare, counsel for Morgan Stanley and the attorney representing me during the deposition, followed me out into the hallway outside the deposition room.

7. During the short break, I did not discuss the substance of my testimony with Mr. Clare — and we did not discuss how I should respond to the pending question. Mr. Clare only instructed me to regain my composure, to return to the deposition room when I was ready, and to answer the pending question to the best of my ability. I followed Mr. Clare's instructions and returned to the deposition room several minutes later. When the deposition resumed, I truthfully stated —as I had previously stated on several occasions — that I do not have an opinion regarding the adequacy of Sunbeam's press release. As noted above, I was not directly involved in the events leading to the issuance of the Sunbeam press release.

8. I understand that counsel for CPH has argued that my leaving the deposition is somehow "evidence" that Morgan Stanley engaged in wrongdoing in connection the work that it performed for Sunbeam in 1997 and 1998. That suggestion is false — and a mischaracterization of the events that occurred during my deposition. The fact that I left the deposition had nothing to do with my view of the merits of CPH's contentions or the substance of any of the questions that were asked — but rather with the manner in which the deposition was being conducted.

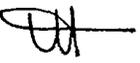
I declare under penalty of perjury that the foregoing is true and correct.

Executed this 12th day of April 2004, in New York, New York.


s. R. Bram Smith

state of ny
county of ny

sworn to me before this 12th day of April 2004


LAURA L. TORRADU
Notary Public, State of New York
No. 31-5027975
Qualified in New York County
Commission Expires May 23rd 2006

Westchester County, certificate filed in NY County

16div-004940

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

MORGAN STANLEY SENIOR FUNDING, INC.,

Plaintiff,

v.

MACANDREWS & FORBES HOLDINGS, INC.,

Defendant.

FILED
APR 14 2004
CLERK OF COURT
PALM BEACH COUNTY
FLORIDA
ORIGINAL
FILED

CASE NO: CA 03-5045 AI

CASE NO: CA 03-5165 AI

NOTICE OF FILING EXHIBIT UNDER SEAL

Morgan Stanley & Co. Incorporated and Morgan Stanley Senior Funding, Inc., by and through their undersigned counsel, hereby give notice that Morgan Stanley's Exhibit "A" to their Opposition to CPH's Motion to Compel Answers to Interrogatories has been filed under seal this 14th day of April, 2004.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the service list below by facsimile and Federal Express on this 14th day of April, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar No. 618349)
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

Michael K. Kellogg
Mark C. Hansen
James M. Webster
Rebecca A. Beynon
**KELLOGG, HUBER, HANSEN,
TODD & EVANS P.L.L.C.**
Sumner Square
1615 M. Street, N.W., Suite 400
Washington, D.C. 20036
Telephone: (202) 326-7900
Facsimile: (202) 326-7999
(*Pro Hac Vice* Pending)

**Counsel for Morgan Stanley & Co.
Incorporated and Morgan Stanley
Senior Funding**

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
E-mail: jianno@carltonfields.com

BY: Joseph Ianno, Jr.
Joseph Ianno, Jr.
Florida Bar No: 655351

SERVICE LIST

Jack Scarola
**SEARCY, DENNY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy
Michael Brody
JENNER & BLOCK, LLC
One IBM Plaza, Suite 400
Chicago, IL 60611

IN THE FIFTEENTH JUDICIAL
CIRCUIT IN AND FOR PALM BEACH
COUNTY, FLORIDA

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,
Defendant.

DOROTHY H. WILKEN
CLERK OF CIRCUIT COURT
CIRCUIT COURT COMMISSION

APR 11 2004

COPY / ORIGINAL
RECEIVED FOR FILING

CASE NO: CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff,

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant.

**MORGAN STANLEY'S OPPOSITION TO COLEMAN (PARENT) HOLDING INC.'S
MOTION TO COMPEL ANSWERS TO INTERROGATORIES**

Morgan Stanley & Co. Incorporated's and Morgan Stanley Senior Funding, Inc.'s ("Morgan Stanley") responses to CPH's interrogatories fully complied with Florida Rules. CPH's motion to compel should be denied because: (1) Morgan Stanley already answered the requests in conformance with its discovery obligations; (2) CPH's motion is nothing more than an impermissible attempt to force Morgan Stanley to update its discovery responses – a burden that the Florida rules do not require and CPH itself has consistently rejected; and (3) CPH's motion improperly seeks to have the Court reform CPH's vague discovery requests.

1. Morgan Stanley's Responses Are Complete And Fully Satisfied Morgan Stanley's Obligations Under The Florida Rules.

Consistent with the Florida Rules of Civil Procedure, Morgan Stanley responded to CPH's interrogatories in good faith and to the best of its ability. Before providing the responses

to the interrogatories, Morgan Stanley conducted an inquiry of the facts known to it. That inquiry was hampered, however, by the fact that more than five years have elapsed since the events at issue transpired, by the fact that a significant number of people involved in the underlying transaction are no longer with Morgan Stanley,¹ and by the fact that the discovery process for this case was in its initial stages.² Additionally, Morgan Stanley was hampered by the broad and vague nature of the interrogatories requesting, for instance, the names of persons “knowledgeable about” *or* “involved in” certain activities such as due diligence.

Nonetheless, Morgan Stanley was able to identify a number of current and former Morgan Stanley employees it believed were, to some extent, “knowledgeable about” or “involved in” the subject matter of the interrogatories. The good faith effort made by Morgan Stanley is evidenced by the fact that, in response to each request for a list of employees associated with a particular topic, Morgan Stanley identified no more than 17 employees for each question, the employees identified in each response are not identical, and Morgan Stanley did not respond by simply providing a players list or similar documents.

Morgan Stanley directly responded to the requests propounded by CPH. CPH’s objections to Morgan Stanley’s use of the phrases “believe” and “may have” in structuring its interrogatory responses are without merit. Indeed, CPH itself has responded to similar interrogatory requests in related litigation in Florida state court by identifying persons who “may have” knowledge on particular topics and thus cannot be heard to complain here. *See* Oct. 15, 2001 Plf’s Resps. & Objs. to Arthur Andersen LLP’s & Phillip E. Harlow’s 1st Set of Interrog.

¹ The fact that many of these employees have left Morgan Stanley demonstrates that contrary to CPH’s unsupported assertion, the information sought in CPH’s interrogatories is not “readily available” to Morgan Stanley.

to Plf., Resps. 2 and 3, *Coleman (Parent) Holdings, Inc. v. Arthur Andersen LLP*, No. CA-01-06062AN (Fla. 15th Jud. Dist.) (Ex. A). Morgan Stanley conducted a good faith investigation of the facts and could not offer a more definitive list in response to each question. Short of omniscience, it is impossible to determine what third parties (former employees) are “knowledgeable” about any particular topic. Indeed, CPH itself has not offered and cannot ask for more. (*See, e.g.*, Sept. 12, 2003 Letter from M. Brody to K. DeBord at 1 (stating that CPH “ha[s] made every effort” to comply with the Florida Rules and that CPH will not comply with “additional demands” that seek to “impose additional burdens or requirements that exceed or are inconsistent with the Florida Rules.”) (Ex. B).)

2. CPH’s Motion Is An Attempt To Circumvent Florida Rules.

CPH’s motion is a deliberate attempt to circumvent the Florida Rules of Civil Procedure. The General Provision Governing Discovery specifically states that, “A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information thereafter acquired.” Fla. R. Civ. P. 1.280(e). The Florida Rules require only that parties respond to interrogatory requests to the best of their knowledge at the time the responses are served. *See Anthony v. Schmitt*, 557 So. 2d 656, 660 (Fla. 2d DCA 1990) (Noting that “[u]nlike the Federal Rules of Civil Procedure, the Florida Rules of Civil Procedure never require a party to update answers to interrogatories . . .”).

Morgan Stanley’s interrogatory responses satisfied its obligation to respond to the best of its knowledge. And because CPH itself has responded to discovery in a manner that it now complains is improper, CPH’s motion should be seen for what it is: a request that Morgan

² Indeed, when Morgan Stanley served its interrogatory responses, the parties had completed only one half of one deposition addressing the events underlying the instant lawsuits.

Stanley supplement its interrogatory responses six months after they were served. On October 16, 2003, ten days after Morgan Stanley served its interrogatory answers, CPH took issue with the phrasing of the interrogatory responses that are the subject of the instant motion. The parties exchanged a series of letters in which Morgan Stanley pointed out that CPH had used the same phrasing in its own discovery responses in a related case. Ultimately, on November 13, 2003, in the spirit of compromise, Morgan Stanley provided CPH with additional information in an effort to resolve a potential dispute. On November 20, 2003, CPH “acknowledge[d] the additional information [Morgan Stanley] provided” and never again, until the filing of the instant motion, complained of the phraseology used in Morgan Stanley’s interrogatory responses. (Nov. 20, 2003 Letter from M. Brody to K. DeBord at 1 (Ex. C).) CPH’s acknowledgement and failure to raise the issue again demonstrates that while CPH was satisfied with Morgan Stanley’s responses in November 2003, CPH seeks to have Morgan Stanley update its interrogatory responses at the end of April, 2004, after five months of additional discovery has been completed.

CPH’s improper intent can also be seen in the relief that CPH requests. CPH premises its motion on what it claims are “improper[] qualifi[cations]” on which particular employees were involved in or knowledgeable about certain topics. (Apr. 9, 2004 CPH’s Mot. to Compel Answers to Interrogs. at 2.) Specifically CPH takes exception to the use of the terms “believes” and “may have” been. (*Id.* at 3.) In its primary request for relief, however, CPH seeks to have Morgan Stanley start from scratch and respond again to the complete interrogatories. CPH should not be permitted to manufacture a discovery dispute by identifying a picayune qualm with Morgan Stanley’s response, a response identical to that provided by CPH on another occasion, and thereby circumvent the purpose and intent of Florida Rule 1.280(e).

CPH's motion is part of an ongoing discovery dispute in which CPH has unilaterally sought discovery updates from Morgan Stanley while refusing to update its own requests. As one example, Morgan Stanley sought the following interrogatory response from CPH:

Identify all persons involved in developing, preparing, reviewing, or verifying the information reflected on the Schedule of Synergies and state, with respect to each, the[] nature of their involvement.

(July 22, 2003 Morgan Stanley's 1st Set of Interrogs. to Plf. CPH, Interrog. 4 (Ex. D).)

CPH responded by listing only the individuals involved in *preparing* the document, and provided no additional information. When Morgan Stanley requested that CPH amend its response to identify the persons involved in developing, reviewing, or verifying the information reflected on the Schedule of Synergies and to state the nature of their involvement, as requested, CPH countered that it "provided all responsive information it had in its possession as of September 2, 2003," and refused to provide Morgan Stanley any additional information. (See Oct. 8, 2003 Letter from D. Connell to DeBord (Ex. E).)

In an attempt to resolve the type of dispute that is now before this Court, Morgan Stanley suggested to CPH *in October* that the parties arrange "a mutually agreed-upon method for updating discovery responses once new, responsive information becomes available." (See Oct. 23, 2003 Letter from K. DeBord to M. Brody at 3 (Ex. F).) CPH rejected Morgan Stanley's offer. (See Nov. 20, 2003 Letter from M. Brody to K. DeBord (Ex. G).)

CPH cannot have it both ways: it cannot unilaterally impose upon Morgan Stanley an obligation to update its discovery responses in contravention of the Florida Rules while, at the same time, use the Rules to shield itself from a reciprocal obligation.

3. CPH's Motion Seeks To Have The Court Rewrite Its Interrogatories.

Not only is CPH seeking to circumvent the Florida Rules, CPH also is attempting to use this motion to re-write its interrogatory requests. CPH is seeking the Court's assistance now

because its interrogatory requests were poorly worded and CPH has already served interrogatories in excess of the limit established by the Florida Rules. CPH's own motion demonstrates the inadequacies with the interrogatories as propounded by CPH. For example, CPH states in its argument that it wants to know who was "*involved* in key events." (Mot. at 4 (emphasis added).) Yet when it makes its request for relief, CPH claims to want to know who has or may have "*knowledge* of the subject matter of the Interrogatory." (*Id.* at 5 (emphasis added).) CPH's original interrogatory asked for both who was involved and who has knowledge. Neither through its requests nor through its definitions did CPH seek to have Morgan Stanley distinguish between those with "knowledge" and those "involved" or classify its answer in terms of Morgan Stanley's degree of certainty as it now seeks. Morgan Stanley answered the requests as they were propounded and CPH cannot use a motion to compel to reform its requests.

For the foregoing reasons, Morgan Stanley requests that the Court deny CPH's Motion to Compel Interrogatory Responses in its entirety.

CERTIFICATE OF SERVICE

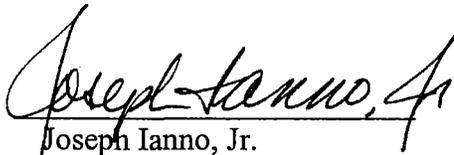
I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this 14th day of April, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar No. 618349)
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

Michael K. Kellogg
Mark C. Hansen
James M. Webster
Rebecca A. Beynon
**KELLOGG, HUBER, HANSEN,
TODD & EVANS P.L.L.C.**
Sumner Square
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
Telephone: (202) 326-7900
Facsimile: (202) 326-7999
(*Pro Hac Vice* Pending)

**Counsel for Defendant
Morgan Stanley & Co. Incorporated**

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
E-mail: jianno@carltonfields.com

BY: 
Joseph Ianno, Jr.
Florida Bar No: 655351

SERVICE LIST

Jack Scarola
**SEARCY, DENNY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy
Michael Brody
JENNER & BLOCK, LLC
One IBM Plaza, Suite 400
Chicago, IL 60611

Exhibit A
(Filed Under Seal)

Exhibit B

JENNER & BLOCK

September 12, 2003

By Facsimile

Kathryn R. DeBord, Esq.
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005

Jenner & Block, LLC
One IBM Plaza
Chicago, IL 60611-7603
Tel 312 222-9350
www.jenner.com

Chicago
Dallas
Washington, DC

Michael T. Brody
Tel 312 923-2711
Fax 312 840-7711
mbrody@jenner.com

**Re: *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co.
Morgan Stanley Senior Funding v. MacAndrews & Forbes Holdings Inc., et al.***

Dear Kathryn:

I write in response to your letter of August 27, 2003 concerning CPH's objections and responses to Morgan Stanley's first requests for production of documents and CPH's and Mafco's objections and responses to MSSF's first requests for production of documents.

Objections and Responses to Morgan Stanley's Requests For Production

Initial Objection 1. CPH and Mafco produced to Morgan Stanley and MSSF over a million pages of documents within 30 days of receiving your documents requests. We have made every effort to provide complete and accurate responses in accordance with the Florida Rules of Civil Procedure. To the extent Morgan Stanley seeks to impose additional burdens or requirements that exceed or are inconsistent with the Florida Rules, we advised you that CPH and Mafco will not comply with your additional demands. Morgan Stanley has lodged many of the same objections to our document requests, including its General Objections Nos. 3, 5, 8, and 10.

You have inquired whether we intend to withhold documents based upon our objections to your instructions and definitions. To the extent your requests call for the production of documents protected by the attorney-client privilege or work product doctrine, we intend to withhold documents that otherwise would be responsive, as we state in our Initial Objection 2. We will comply with the stipulation entered by the court regarding the production of privilege logs. We stand on our objection that Instructions 3, 4, 5, 6, 7, 8, 9, 10, 11, and 16, and Definitions 9 and 15 (Morgan Stanley) and 11 and 17 (MSSF) go beyond the requirements of applicable law. We will address these in turn.

Instructions No. 3 and 8: CPH and Mafco will produce all documents in their possession, custody, or control as required by the Florida Rules. We have produced documents originally in the possession of CPH's prior counsel. We note that Morgan Stanley is willing to produce documents in the possession of certain of its counsel, but not others. You have been unwilling to explain your inconsistent position with respect to documents in the possession of third parties.

Kathryn R. DeBord, Esq.
September 12, 2003
Page 2

JENNER & BLOCK

See Brody to Clare letter, August 20, 2003. CPH and Mafco will not withhold documents on the basis of these objections.

Instruction No. 4: In response to specific document requests, we have identified ambiguities in your requests and have provided the construction we used in our responses to those ambiguous requests. Unless noted in response to a specific request, CPH and Mafco will not withhold documents on the basis of this initial objection.

Instruction No. 5: We will produce a privilege log in accordance with the Florida Rules and in the manner stipulated to by the parties, as entered by the Court on September 4, 2003.

Instruction 6: We object to the production of documents where production would be unduly burdensome. We have not interposed this objection in response to any of your specific requests and therefore will not withhold any documents on the basis of this objection.

Instruction 7: We will produce documents in redacted form when necessary to prevent the production of privileged communications, work product, or non-responsive information in accordance with the Florida Rules. CPH and Mafco will not otherwise withhold documents on the basis of this objection.

Instructions 9 and 10: CPH and Mafco have not withheld documents on the basis of these objections.

Instruction 11: This instruction seeks the production of documents protected from disclosure by the attorney-client privilege or work product doctrine. CPH and Mafco will not produce file folders that were created by Jenner & Block, and which therefore constitute work product.

Instruction 16: This instruction is exceptionally broad, and seeks documents over a longer time frame than is encompassed by Morgan Stanley's or MSSF's responses. We invite you to propose a reasonable time frame for your requests.

Morgan Stanley Definition 9 / MSSF Definition 11: CPH and Mafco stand on their objection to the definition of "documents" to the extent the definition is inconsistent with their obligations under the Florida Rules of Civil Procedure. CPH and Mafco will not withhold any documents based on these objections.

Morgan Stanley Definition 15 / MSSF Definition 17: We objected to your definition of "identify," and your August 27 letter does not offer any explanation of the term. We note, however, that this term, although defined, is not used in your document requests.

Initial Objection 3. We remain unwilling to accept Morgan Stanley's definition of "Coleman Transaction." You have defined that term to mean "Sunbeam's acquisition of Coleman Company, Inc. from CPH," which did not occur, and further to include other "related agreements and transactions," which we do not understand. In our objection, we explained that we would

Kathryn R. DeBord, Esq.
September 12, 2003
Page 3

JENNER & BLOCK

produce documents concerning the transaction that actually took place. What more are you interested in receiving?

Morgan Stanley Request No. 1. We objected to the use of the term "implementation." We explained that we would construe that term to mean the closing of the transaction. We further explained that if you meant the term to mean the actual integration of the companies, those documents were encompassed by your Request 26, which seeks "all documents concerning potential or actual integration of Coleman, First Alert, and/or Signature Brands with Sunbeam . . ." Your attempt to clarify your Request by defining "implementation" to mean "to put into effect" is unhelpful and does not allow us to further respond to this Request. Based on our construction of Requests 1 and 26, we believe we have fully responded to your requests.

Morgan Stanley Request No. 8. CPH stands on its objection and response to this Request. CPH will not withhold documents based on this objection.

Morgan Stanley Request No. 9. We are investigating our production regarding this request, and we will respond under separate cover.

Morgan Stanley Request No. 15. This Request sought information concerning due diligence, which we agreed to provide. It continues to state: "including without limitation" documents reflecting all "Financial Information" CPH ever obtained about Sunbeam. As we understand your definition, the request for "Financial Information" is broader than the request for due diligence information, in which it is supposedly encompassed. We have not withheld any documents responsive to what we understand this request to seek – due diligence. The further request, for all Financial Information, is overbroad.

Morgan Stanley Request No. 16. In this request, you sought various due diligence materials. We agreed to provide exactly what you have agreed to provide: documents relating to due diligence for this transaction, and general due diligence materials. We are not providing (nor are you) due diligence materials from other transactions. Why are you entitled to receive documents you are not willing to produce to us? Do you intend to modify your prior response to our Request No. 43?

Morgan Stanley Request No. 28. In response to this request, we offered to produce more documents than you requested. Morgan Stanley's definition of "your" was limited to "CPH." CPH does not have an organizational chart or a chart of reporting relationships, and therefore there are no documents responsive to this Request. Nonetheless, we responded by voluntarily producing documents sufficient to show the relationship of CPH with its corporate parent at the time of the February 27, 1998 Agreements. We specifically refer Morgan Stanley to the 10-Ks filed by the Coleman Co., Inc. in 1997 and 1998, which we produced, which explain the relationship between CPH and its parent and subsidiaries at all relevant times. We have also provided a written response describing corporate structure. CPH stands on its objections and response to this Request.

Kathryn R. DeBord, Esq.
September 12, 2003
Page 4

JENNER & BLOCK

Morgan Stanley Request No. 31. CPH produced redacted calendars responsive to this Request that include relevant entries. You apparently want calendar entries that have nothing to do with Coleman or Sunbeam. We invite you to explain what other information from these calendars you believe you are entitled to receive, and why.

Morgan Stanley Request Nos. 32-35. In response to these requests, we outlined precisely what we were producing. We are not producing documents that reflect attorney-client communications or work product from other litigation arising from the Sunbeam transaction. We invite you to explain what other documents you believe you are entitled to receive that we are not providing in our responses.

Morgan Stanley Request No. 40. As we explained in our response, CPH would be in violation of the terms of the settlement agreement between CPH and Arthur Andersen if CPH disclosed any of the terms of the settlement agreement. We therefore are unable to agree to your request to produce a portion of the agreement. We invite you to explain why you believe you are entitled to any portion of the settlement agreement and the legitimate purpose that would be served by disclosure of the terms of the settlement agreement.

Objections and Responses to MSSF's First Request for Production

Certain of the issues you raise relating to the MSSF requests are duplicative of the same issues you raise with regard to the Morgan Stanley requests. I will not repeat the discussion below of items I have already addressed.

Initial Objection No. 6. We objected to MSSF's definition of "MAFCO," because it is incorrect. CPH and Mafco will construe the definition to refer to MacAndrews & Forbes Holdings Inc. and any of its officers, directors, former or present employees, representatives, and agents. We are not withholding any documents based upon this definition, as corrected.

MSSF Request No. 6. Our response to Request No. 6 contained a typographical error. The response should read: "Defendants object to the multiple false premises contained in the request. Subject to and without waiving these objections and the foregoing Initial Objections, including without limitation defendants' objection to the term 'Schedule of Synergies,' CPH and Mafco will produce documents referring or relating to the December 1997 meeting."

MSSF Request No. 9. See our discussion of Morgan Stanley Request No. 15 above.

MSSF Request No. 15. We stand by our objection to this request. There was never any "decision" to make any such "representation," and therefore there are no documents responsive to this Request.

MSSF Request No. 22. We are investigating our production regarding this request, and we will respond under separate cover.

Kathryn R. DeBord, Esq.
September 12, 2003
Page 5

JENNER & BLOCK

MSSF Request No. 30. We have fully responded to this request. We have produced documents, as you request, sufficient to show the corporate relationships between the relevant entities at the relevant time. CPH and MacAndrews & Forbes Holdings Inc. do not have any organization charts of internal reporting relationships. Please advise me if you believe you are entitled to additional documents.

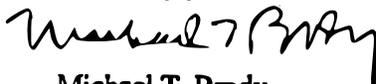
MSSF Request Nos. 37-42. In response to these requests, we outlined precisely what we were producing. We are not producing documents that reflect attorney-client communications or work product from other litigation arising from the Sunbeam transaction. We invite you to explain what other documents you believe you are entitled to receive that we are not providing in our responses.

* * *

Finally, you complain that we have not produced enough documents from CPH or Mafco. CPH and Mafco produced an extraordinary number of documents and other discovery materials to Morgan Stanley and MSSF. As we have advised you on several occasions, a majority of the documents in our production are documents we received from third parties arising from Sunbeam's fraudulent practices and related litigation. We have produced documents from our clients' files relating to the relevant topics. In stark contrast, Morgan Stanley and MSSF, two global financial and investment institutions, have produced a small number of documents and Morgan Stanley has been afforded almost four months to respond to our requests.

Please contact me if you would like to discuss any of these issues.

Very truly yours,



Michael T. Brody

cc: Joseph Ianno, Esq. (by facsimile)
John Scarola, Esq. (by facsimile)
Jerold S. Solovy, Esq.

Doc. No. 972199

Exhibit C

JENNER & BLOCK

November 20, 2003

By Telecopy

Kathryn R. DeBord, Esq.
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Jenner & Block, LLC
One IBM Plaza
Chicago, IL 60611-7603
Tel 312 222-9350
www.jenner.com

Chicago
Dallas
Washington, DC

Michael T. Brody
Tel 312 923-2711
Fax 312 840-7711
mbrody@jenner.com

**Re: *Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co.*
*Morgan Stanley Senior Funding, Inc. v. MacAndrews & Forbes Holdings Inc., et al.***

Dear Kathryn:

I received your November 13 letter concerning your clients' interrogatory answers, and I acknowledge the additional information you provided. Nevertheless, as detailed below, many of your answers, although in some instances lengthy, do not answer the specific questions we posed.

MSSF Damages. In its complaint, MSSF alleged that it suffered damages. It must have had a basis for that allegation. Nevertheless, you have not provided any information concerning the nature, much less the amount, of those damages. You cite a decision in a federal employment class action to support your refusal to provide an answer. That decision is not the norm—indeed, under the current federal rules, a computation of damages, and information bearing on the nature and extent of injuries suffered is required as an initial disclosure. *See* Fed. R. Civ. P. 26(a)(1)(C). Courts overwhelmingly reject objections of prematurity and order plaintiffs to provide information concerning damages. *See, e.g., Doe v. Mercy Health Corp.*, 1993 WL 377064 (E.D. Pa.) (compelling interrogatory answers and stating that at outset of case “plaintiff must be in a position to know what damages he has suffered, as well as what method of calculation he plans to use”); *Geer v. Cox*, 2003 WL 21254731 (D. Kan.) (rejecting prematurity objection and stating that “it is no answer for a plaintiff to assert that he will need discovery or to consult with an expert to determine his losses”). Again, putting aside whether you will be able to provide a more detailed answer at a later date, we demand that you provide an answer as to the information in your possession now.

Morgan Stanley Corporate Affiliates. You have limited your responses to the named Morgan Stanley parties and refuse to provide information from other Morgan Stanley entities. Your clients are in a position to know which Morgan Stanley entities may have responsive information and are under a duty to provide that information. We are not required to guess which of Morgan Stanley's corporate affiliates were involved in Sunbeam-related transactions, nor should we be put to the burden of serving subpoenas on other Morgan Stanley entities. In any event, we know that entities in addition to Morgan Stanley and MSSF were involved in the Sunbeam transaction. For instance, entities doing business under the trade name “Morgan Stanley Dean Witter” obviously had substantial involvement. We assume that the trade name would encompass activities of numerous

Kathryn R. DeBord, Esq.
November 20, 2003
Page 2

entities, including Morgan Stanley Dean Witter International, Inc., Morgan Stanley DW, Inc., Morgan Stanley Dean Witter Wealth Management, Inc., Morgan Stanley Dean Witter Asset Capital Inc., and various of the "MSDW" companies. Please provide us information from those entities, and any entities doing business under that trade name, as well as from entities Morgan Stanley and MSSF have reason to believe possess responsive information.

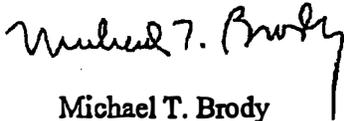
Communications Concerning Sunbeam EPS/Sales. You ask how Morgan Stanley's Answer to Interrogatory No. 3 is deficient, noting that the answer is comprised of eight paragraphs. The interrogatory asks about, *inter alia*, communications involving Morgan Stanley relating to Sunbeam's EPS. The answer identifies several conversations relating to Sunbeam's sales, but none relating to EPS. Is this an oversight or are we to assume that Morgan Stanley had no communications with anyone relating to Sunbeam's EPS? In addition, the answer does not indicate (a) which "member of Sunbeam's management" told Ruth Porat that sales were "soft"; (b) which "Sunbeam officials" insisted that sales expectations would be met; (c) other than Mr. Tyree, who was present at Global Financial Press; or (d) who participated in "bring-down" due diligence.

The "Truth" Concerning Synergies. My November 6 letter noted that MSSF had not explained how the alleged representations made to it were false. Your letter refers to Interrogatory No. 2 to MSSF, when in fact Interrogatory No. 3 (and not, No. 4, as I initially indicated) addresses this issue. Putting aside confusion over interrogatory numbering, MSSF has not stated what is false about the representations MSSF supposedly received. MSSF must have had some inkling as to what it believes is the truth in order for it to file its claims. Please provide that information now.

As to each of these areas, please let me know by November 25 if you intend to provide additional information, or whether the Court's assistance will be necessary.

Finally, as to your proposal to agree to supplementation of interrogatory answers, we intend to follow the requirements of the Florida rules in this regard.

Very truly yours,



Michael T. Brody

MTB:cjg

cc: Joseph Iarno, Esq. (by telecopy)
John Scarola, Esq. (by telecopy)
Jerold S. Solovy, Esq.

1004277

Exhibit D

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CASE NO: 03 CA-005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

**MORGAN STANLEY & CO. INCORPORATED'S FIRST SET OF
INTERROGATORIES TO PLAINTIFF COLEMAN (PARENT) HOLDINGS, INC.**

Pursuant to the Florida Rules of Civil Procedure 1.280 and 1.340, Defendant Morgan Stanley & Co. Incorporated ("MS & Co.") hereby requests that Plaintiff Coleman (Parent) Holdings, Inc. ("CPH") answer the following interrogatories and otherwise specify objections, if any, in accordance with the definitions and instructions contained herein.

INSTRUCTIONS

1. The connectives "and" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery request all responses that might otherwise be construed to be outside of its scope.
2. The use of the singular form of any word includes the plural and vice versa.
3. Each interrogatory should be answered separately and fully, unless it is objected to, in which event the reasons for the objections should be stated with specificity. The answers are to be signed by plaintiffs and the objections, if any, are to be signed by the attorney(s)

making them. Where a complete answer to a particular interrogatory is not possible, the interrogatory should be answered to the extent possible and a statement should be made indicating why only a partial answer is given, the efforts made by you to obtain the information and the source from which all responsive information may be obtained, to the best of your knowledge or belief.

4. If it is claimed that information responsive to any interrogatory is privileged, work product, or otherwise protected from disclosure, state the nature and basis for any such claim of privilege, work product, or other ground for nondisclosure and identify: (a) the subject matter of any such information; (b) if the information is embodied in a document, the author of the document and each person to whom the original or a copy of the document was sent; (c) if the information was communicated orally, the person making the communication and all persons present at or participating in the communication; (d) the date of the document or oral communication; and (e) the general subject matter of the document or oral communication, within the time set forth in the agreed-upon order. Any part of an answer to which you do not claim privilege or work product should be given in full.

5. The term "identify" (with respect to documents) means to give, to the extent known, the (i) type of document; (ii) general subject matter; (iii) date of the document; and (iv) author(s), addressee(s) and recipient(s).

6. The term "identify" (with respect to persons) means to give, to the extent known, the person's full name, present or last known address, and when referring to a natural person, additionally, the present or last known place of employment. Once a person has been identified in accordance with this subparagraph, only the name of that person need be listed in response to subsequent discovery requesting the identification of that person.

7. When used in reference to a person other than a natural person, "identify" means: (a) to state its name; (b) to describe its nature (e.g., corporation, partnership, etc.); (c) to state the location of its principal place of business; and (d) to identify the person or persons employed by such entity whose actions on behalf of the entity are responsive to the interrogatory.

8. When used with respect to the identification of facts, acts, events, occurrences, meetings, telephone conferences or communications, "identify" means to describe with specificity the fact, act, event, occurrence, meeting, telephone conference, or communication in question, including, but not limited to: (a) identifying all participants in the fact, act, event, occurrence, meeting, telephone conference or communication; (b) stating the date(s) on which the fact, act, event, occurrence, meeting, telephone conference or communication took place; (c) stating the location(s) at which the fact, act, event, occurrence, meeting, telephone conference or communication took place; and (d) providing a description of the substance of the fact, act, event, occurrence, meeting, telephone conference or communication.

9. The terms "any," "all" and "each" shall be construed to mean "any," "all," or "each."

10. The term "including" shall be construed to mean "including but not limited to."

11. The present tense shall be construed to include the past and future tenses.

12. Unless otherwise indicated, these interrogatories request information for the period beginning January 1, 1997.

DEFINITIONS

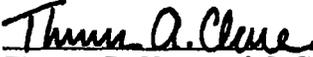
13. "Advisors" means financial advisors, legal advisors, accountants, consultants and any other third-party advising or assisting CPH and/or MAFCO in any way in connection with the Coleman Transaction, including but not limited to individuals at Credit Suisse First Boston and Wachtell, Lipton, Rosen & Katz.

14. "Coleman" means Coleman Company, Inc.
15. The "Coleman Transaction" means Sunbeam's acquisition of Coleman Company, Inc. from CPH.
16. "CPH" means Coleman (Parent) Holdings Inc. and any of its officers, directors, former or present employees, representatives and agents.
17. "MAFCO" means MacAndrews & Forbes Holdings, Inc. and any of its officers, directors, former or present employees, representatives and agents.
18. "MS & Co." means Morgan Stanley & Co. Inc. and any of its officers, directors, former or present employees, representatives and agents.
19. The term "person" is defined as any natural person or any business, legal or governmental entity or association.
20. "Schedule of Synergies" means the written schedule attached as Exhibit A to Plaintiff's Complaint in the action styled as *Morgan Stanley Senior Funding, Inc. v. MacAndrews & Forbes Holdings, Inc., and Coleman (Parent) Holdings Inc.*, Case No. CA 005165 AG (15th Jud. Cir. Fla.).
21. "Synergies" means post-acquisition gains through increased revenue and/or decreased cost.
22. The terms "you" or "your" means "CPH" as defined in Definition 16.
23. "Complaint" means the complaint filed by Coleman (Parent) Holdings Inc. in this action styled as *Coleman (Parent) Holdings Inc., v. Morgan Stanley & Co., Inc.*, No. CA 005045 A1 (15th Jud. Cir. Fla.).

INTERROGATORIES

1. Identify all individuals who may have discoverable information relating to the allegations in your Complaint and state, with respect to each, the subjects of the information the possess.
2. Identify all Advisors and state, with respect to each, the nature of the services they performed in connection with the Coleman Transaction.
3. Identify with particularity all misrepresentations by MS & Co. that CPH intends to rely upon at trial and state, with respect to each such statement, the date and time the representation was made; the document, setting or circumstances in which the representation was made; the person(s) who made the representation; the exact wording of the misrepresentation; and all reasons why CPH believes the misrepresentation was false when it was made.
4. Identify all persons involved in developing, preparing, reviewing, or verifying the information reflected on the Schedule of Synergies and state, with respect to each, their nature of their involvement.
5. Identify all transactions since 1993 in which CPH or MAFCO, or any company owned, controlled, or affiliated with CPH or MAFCO, has received stock as any portion of the consideration for the transaction.

Dated: July 22, 2003


Thomas D. Yannucci, P.C.
Thomas A. Clare
Larissa Paule-Carres
Brett H. McGurk
Kathryn DeBord
KIRKLAND & ELLIS LLP
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

Joseph Ianno, Jr. (FL Bar # 655351)
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368

Counsel for Defendant
Morgan Stanley & Co. Incorporated

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by facsimile and e-mail to all counsel of record on the attached service list on this 22nd day of July, 2003.

Thomas D. Yannucci, P.C.
Thomas A. Clare
Larissa Paule-Carres
Brett H. McGurk
Kathryn DeBord
KIRKLAND & ELLIS LLP
655 15th Street, N.W. -- Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

Counsel for Defendant
Morgan Stanley & Co. Incorporated

Joseph Ianno, Jr. (FL Bar # 655351)
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

BY: Thomas A. Clare
Thomas A. Clare

SERVICE LIST

<p>John Scarola SEARCY, DENNEY, SCAROLA, BARNHARDT & SHIPLEY, P.A. 2139 Palm Beach Lakes Boulevard West Palm Beach, Florida 33409</p>	<p>Counsel for Plaintiff</p>
<p>Jerold S. Solovy JENNER & BLOCK, LLC One IBM Plaza Suite 4400 Chicago, Illinois 60611</p>	<p>Counsel for Plaintiff</p>

Exhibit E

JENNER & BLOCK

Jenner & Block, LLC
One Bank Plaza
Chicago, IL 60611-7603
Tel 312 222-9950
www.jenner.com

Chicago
Dallas
Washington, DC

October 8, 2003

VIA FACSIMILE

Kathryn R. DeBord, Esq.
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005-5793

DEIRDRE E. CONNELL
TEL 312 923-2861
FAX 312 840-7061
DCONNELL@JENNER.COM

Re: *Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co., Inc.*

Dear Kathryn:

I write in response to your October 8, 2003 letter concerning CPH's September 2, 2003 response to Morgan Stanley's first set of interrogatories. With respect to Interrogatory No. 4, CPH provided all responsive information it had in its possession as of September 2, 2003.

The remainder of your letter appears to be an effort to rebut certain of CPH's objections that Interrogatory No. 3 was premature given Morgan Stanley's discovery non-performance as of September 2, 2003, the date on which the interrogatory responses were served. For example, you complain that the interrogatory response notes that Morgan Stanley had not yet produced a single witness for deposition. As of September 2, that was true. Moreover, although Mr. Tyree's deposition began on September 15, 2003, Morgan Stanley has refused to provide additional dates for the continuation of Mr. Tyree's deposition and has forced us to seek the Court's assistance in completing that deposition. Morgan Stanley also has filed a motion designed to stay or prevent any further substantive depositions from occurring. You also complain that the interrogatory response observes that Morgan Stanley's document production was not complete as of September 2. That observation was clearly correct; indeed, Morgan Stanley produced nearly one-half of its documents after September 2, 2003 and produced documents as recently as October 1, 2003. In short, CPH fails to see how its September 2 interrogatory answers misrepresented anything about Morgan Stanley's discovery compliance.

Very truly yours,



Deirdre E. Connell

DEC/sac

Document Number: 987933

Exhibit F

KIRKLAND & ELLIS LLP

AND AFFILIATED PARTNERSHIPS

655 Fifteenth Street, N.W.
Washington, D.C. 20005

Kathryn R. DeBord
To Call Writer Directly:
(202) 879-5078
kdebord@kirkland.com

202 879-5000
www.kirkland.com

Facsimile:
202 879-5200
Dir. Fax: (202) 879-5200

October 23, 2003

By Facsimile

Michael Brody, Esq.
Jenner & Block, LLC
One IBM Plaza
Chicago, IL 60611-7603

Re: *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc.*
MSSF v. MacAndrews & Forbes Holdings Inc. et al.

Dear Mike:

I write in response to your October 16, 2003 letter regarding MS & Co. and MSSF's Interrogatory Responses.

With respect to your request that MS & Co. and MSSF's answers include all information "regardless of the Morgan Stanley entity involved," we stand on our objection that your request is unduly burdensome. MS & Co. and MSSF were the only Morgan Stanley entities involved in the transactions that form the basis for the actions, and are the only entities with information reasonably likely to lead to the discovery of admissible evidence. MS & Co. and MSSF have over 150 sister companies in the United States and around the world. These companies are not parties to this lawsuit and have nothing to do with this action.

The majority of your remaining concerns serve to highlight CPH and MAFCO's massive effort to create discovery disputes where there ought not be any throughout the course of discovery in this case, and, even more importantly, CPH and MAFCO's systematic failure to live up to very same demands it purports to place on MS & Co. and MSSF. The following are but a few examples:

First, an overwhelming portion of your letter complains about interrogatory responses in which MS & Co. or MSSF's answer uses the phrase "may have." Your objection to our use of this phrase is frivolous, particularly because CPH and MAFCO used the exact same phrase in its responses to MS & Co. in this action and in its responses to Arthur Andersen in the *Andersen* action. See, e.g., October 15, 2001 Coleman (Parent) Holdings, Inc. Resp. and Obj. to Arthur Andersen LLP's, et. al. 1st Set of Interrogatories to Plf. At Reqs. 2 and 3 (stating that Plaintiff believes the following people "may have" knowledge of the facts alleged in the Complaint and

KIRKLAND & ELLIS LLP

Michael Brody, Esq.
October 23, 2003
Page 2

"may have" knowledge pertaining to the due diligence conducted by or on behalf of Sunbeam Corporation of the Coleman Company, Inc.).

Second, your letter complains about MS & Co.'s objection on relevance and overbreadth grounds to Interrogatory No. 8, which requests "all claims that have been threatened, communicated, or otherwise asserted against Morgan Stanley involving allegations that Morgan Stanley failed to conduct due diligence properly in a public or private offering." Despite MS & Co.'s objections, it provided CPH with a list of all claims brought by non-purchasers against MS & Co. alleging faulty due diligence. MS & Co.'s reasonable limitation on your request stands in sharp contrast with MAFCO and CPH's flat refusal to respond to a comparable interrogatory served by MSSF. MSSF Interrogatory No. 1 asked you to identify "all claims that have been threatened, communicated, or otherwise asserted against MAFCO involving fraud, theft...or any violation of the securities laws and regulations, including allegations of 'channel stuffing'..." You objected to this request as overbroad to the extent that it "requires MAFCO and CPH to identify claims that have been "alleged, threatened, communicated or otherwise asserted" against MAFCO (even though this is the exact same language employed by your own request, see above), and you further stated that accusations of accounting improprieties and channel stuffing relates to MAFCO and CPH's "routine business disputes" and are irrelevant to this action. You ultimately limited your response to the "transaction at issue in this case," and responded that "no claims have been alleged, threatened, communicated or otherwise asserted against MAFCO involving fraud, theft, bribery, and/or any violation of the securities laws and regulations...in connection with the Transaction at issue in this suit" (had you forgotten about the action against MAFCO brought by MSSF?). Your utter deficiency in answering this and other interrogatories have been addressed under separate cover, but for now your response serves to highlight the absurdity of your "outrage" over MS & Co. and MSSF's responses to your interrogatory requests.

Third, you objected that MSSF failed to provide, in response to Interrogatory No. 4, a description of the role of each person who was involved in developing and reviewing the synergy figures. MSSF did not provide that information because that information was not available to it at the time, but that is beside the point. MS & Co.'s own Interrogatory Request No. 1 (first request) asked CPH to identify individuals with discoverable information relating to the allegations made in your Complaint *and, with respect to each* the subjects of the information they possess. CPH provided a list of individuals but failed to provide "the subjects of the information they possess" as requested. Likewise, MS & Co.'s Interrogatory No. 4 asked CPH for all persons involved in developing, preparing, reviewing, or verifying the information reflected on the Schedule of Synergies *and, with respect to each*, the nature of their involvement. Once again CPH provided the names of three people that CPH "believes" were involved in *preparing* the synergies, but failed to provide those individuals involved in "developing, reviewing, or verifying" the synergies and failed to provide "the nature of their involvement." When asked for an explanation, Deirdre Connell glibly responded that "CPH provided all

KIRKLAND & ELLIS LLP

Michael Brody, Esq.
October 23, 2003
Page 3

responsive information it had in its possession as of September 2, 2003" with no further explanation and no offer to provide additional information when it became available. (See Connell letter to DeBord dated October 8, 2003). Quite simply, if CPH and MAFCO are asserting that MS & Co. and MSSF did not meet its discovery obligations in answering this response, CPH and MAFCO likewise failed to meet their own obligations.

As a fourth and final example, your letter objects to MSSF's answer to Interrogatory No. 2, which asks MSSF to identify with particularity all misrepresentations MSSF intends to rely upon at trial. MSSF responded by stating those facts, known by MSSF as of October 6, 2003, that form the basis of MSSF's allegations that MAFCO and CPH committed fraud. MSSF's response is qualitatively no different from CPH's own response to MS & Co.'s Interrogatory No. 3 (first request), which asks for the same information. To the extent that you seek more information, we note that discovery is in very early stages, and we are entitled to develop the facts that we will use against you at trial through the discovery process.

* * * * *

CPH and MAFCO's efforts to employ double standards aside, MS & Co. and MSSF responded to CPH and MAFCO's interrogatory requests in good faith, and provided the information known by MS & Co. and MSSF at the time the responses were served. MS & Co. and MSSF have honored their discovery obligations. As you have pointed out, this case is still at an early stage, and MS & Co. and MSSF's investigation is ongoing. Moreover, I note that a number of the questions in your October 16, 2003 letter are better suited to other forms of discovery and/or appear designed to circumvent the limitation upon the number of interrogatories that a party may propound.

One option for all parties is a mutually agreed-upon method for updating discovery responses once new, responsive information becomes available. Please let me know if CPH and MAFCO are amenable to such an arrangement.

Sincerely,



Kathryn R. DeBord

cc: Joseph Ianno, Jr., Esq. (by facsimile)
Deirdre Connell, Esq. (by facsimile)
Jerold S. Solovy, Esq. (by facsimile)
John Scarola, Esq. (by facsimile)

Exhibit G

JENNER & BLOCK

November 20, 2003

By Telecopy

Kathryn R. DeBord, Esq.
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Jenner & Block, LLC
One IBM Plaza
Chicago, IL 60611-7603
Tel 312 222-9350
www.jenner.com

Chicago
Dallas
Washington, DC

Michael T. Brody
Tel 312 923-2711
Fax 312 840-7711
mbrody@jenner.com

Re: *Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co.*
Morgan Stanley Senior Funding, Inc. v. MacAndrews & Forbes Holdings Inc., et al.

Dear Kathryn:

I received your November 13 letter concerning your clients' interrogatory answers, and I acknowledge the additional information you provided. Nevertheless, as detailed below, many of your answers, although in some instances lengthy, do not answer the specific questions we posed.

MSSF Damages. In its complaint, MSSF alleged that it suffered damages. It must have had a basis for that allegation. Nevertheless, you have not provided any information concerning the nature, much less the amount, of those damages. You cite a decision in a federal employment class action to support your refusal to provide an answer. That decision is not the norm—indeed, under the current federal rules, a computation of damages, and information bearing on the nature and extent of injuries suffered is required as an initial disclosure. *See* Fed. R. Civ. P. 26(a)(1)(C). Courts overwhelmingly reject objections of prematurity and order plaintiffs to provide information concerning damages. *See, e.g., Doe v. Mercy Health Corp.*, 1993 WL 377064 (E.D. Pa.) (compelling interrogatory answers and stating that at outset of case “plaintiff must be in a position to know what damages he has suffered, as well as what method of calculation he plans to use”); *Geer v. Cox*, 2003 WL 21254731 (D. Kan.) (rejecting prematurity objection and stating that “it is no answer for a plaintiff to assert that he will need discovery or to consult with an expert to determine his losses”). Again, putting aside whether you will be able to provide a more detailed answer at a later date, we demand that you provide an answer as to the information in your possession now.

Morgan Stanley Corporate Affiliates. You have limited your responses to the named Morgan Stanley parties and refuse to provide information from other Morgan Stanley entities. Your clients are in a position to know which Morgan Stanley entities may have responsive information and are under a duty to provide that information. We are not required to guess which of Morgan Stanley's corporate affiliates were involved in Sunbeam-related transactions, nor should we be put to the burden of serving subpoenas on other Morgan Stanley entities. In any event, we know that entities in addition to Morgan Stanley and MSSF were involved in the Sunbeam transaction. For instance, entities doing business under the trade name “Morgan Stanley Dean Witter” obviously had substantial involvement. We assume that the trade name would encompass activities of numerous

Kathryn R. DeBord, Esq.
November 20, 2003
Page 2

entities, including Morgan Stanley Dean Witter International, Inc., Morgan Stanley DW, Inc., Morgan Stanley Dean Witter Wealth Management, Inc., Morgan Stanley Dean Witter Asset Capital Inc., and various of the "MSDW" companies. Please provide us information from those entities, and any entities doing business under that trade name, as well as from entities Morgan Stanley and MSSF have reason to believe possess responsive information.

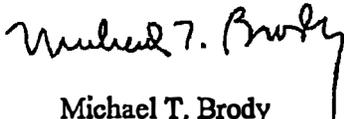
Communications Concerning Sunbeam EPS/Sales. You ask how Morgan Stanley's Answer to Interrogatory No. 3 is deficient, noting that the answer is comprised of eight paragraphs. The interrogatory asks about, *inter alia*, communications involving Morgan Stanley relating to Sunbeam's EPS. The answer identifies several conversations relating to Sunbeam's sales, but none relating to EPS. Is this an oversight or are we to assume that Morgan Stanley had no communications with anyone relating to Sunbeam's EPS? In addition, the answer does not indicate (a) which "member of Sunbeam's management" told Ruth Porat that sales were "soft"; (b) which "Sunbeam officials" insisted that sales expectations would be met; (c) other than Mr. Tyree, who was present at Global Financial Press; or (d) who participated in "bring-down" due diligence.

The "Truth" Concerning Synergies. My November 6 letter noted that MSSF had not explained how the alleged representations made to it were false. Your letter refers to Interrogatory No. 2 to MSSF, when in fact Interrogatory No. 3 (and not, No. 4, as I initially indicated) addresses this issue. Putting aside confusion over interrogatory numbering, MSSF has not stated what is false about the representations MSSF supposedly received. MSSF must have had some inkling as to what it believes is the truth in order for it to file its claims. Please provide that information now.

As to each of these areas, please let me know by November 25 if you intend to provide additional information, or whether the Court's assistance will be necessary.

Finally, as to your proposal to agree to supplementation of interrogatory answers, we intend to follow the requirements of the Florida rules in this regard.

Very truly yours,



Michael T. Brody

MTB:cjg

cc: Joseph Ianno, Esq. (by telecopy)
John Scarola, Esq. (by telecopy)
Jerold S. Solovy, Esq.

1004277

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,
Defendant.

CASE NO: CA 03-5045 AI

DOROTHY H. WILKEN
CLERK OF CIRCUIT COURT
CIVIL DIVISION

APR 14 2004

COPY ORIGINAL
RECEIVED FOR FILING

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff,

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant.

CASE NO: CA 03-5165 AI

**MORGAN STANLEY'S OPPOSITION TO COLEMAN (PARENT)
HOLDINGS INC.'S MOTION TO COMPEL CONSENT TO
THIRD PARTY PRODUCTION OF RESPONSIVE E-MAILS**

The Court should not compel Morgan Stanley & Co. Incorporated and Morgan Stanley Senior Funding, Inc. ("Morgan Stanley") to consent to an improper and overbroad subpoena issued by Coleman (Parent) Holdings, Inc. ("CPH") to a third party, Bloomberg Inc. ("Bloomberg"). The subpoena requests:

All documents concerning emails or electronic messages of [36]
Morgan Stanley or MSSF employees.

(Mar. 4, 2004 Subpoena Duces Tecum, Req. 1 (Ex. A.)) CPH's remarkable request for the production of *every single e-mail* message sent or received by thirty-six Morgan Stanley employees *over a seven-year period* and *regardless of subject matter* is overbroad, unduly burdensome, and contravenes the Florida Rules governing discovery. Morgan Stanley's refusal to consent to the production was completely justified.

1. CPH's Subpoena Fails To Comply With The Florida Rules.

Bloomberg's subpoena, on its face, would require Bloomberg to produce potentially hundreds of thousands of totally irrelevant e-mail messages, which are completely unrelated to the issues in this litigation and contain confidential information about Morgan Stanley's other clients and unrelated financial transactions. Morgan Stanley should not be required to consent to the production of totally irrelevant documents – or to undertake the enormous burden of conforming CPH's subpoena to the Florida Rules. Florida Rule of Civil Procedure 1.280(b)(1) limits the scope of discovery to “any matter, not privileged, *that is relevant to the subject matter* of the pending action” Fla. R. Civ. P. 1.280(b)(1) (emphasis added). CPH's subpoena to Bloomberg *does not contain any subject matter limitation*, and is therefore impermissibly overbroad.

CPH's subpoena requests all Bloomberg e-mail messages, regardless of subject matter, sent or received by those Morgan Stanley employees who were identified in interrogatories as having worked on the Sunbeam Transaction. The suggestion in CPH's Motion – that this “employee” limitation may also double as a subject matter limitation¹ – is false. The fact that an employee worked on the Sunbeam Transaction does not mean that *every single e-mail* sent or received by that employee *over a seven-year period* is related to Sunbeam, nor does it serve to justify the production of e-mails wholly unrelated in subject matter to Sunbeam. *See, e.g., Theofel v. Farey-Jones*, 359 F.3d 1066, 1071-72 (9th Cir. 2004) (noting that defendant's third-

¹CPH's motion glosses over the unlimited scope of the subpoena by only referring to e-mails related to the Sunbeam Transaction. (See Mot. to Compel Morgan Stanley's Consent to 3d Party Prod. of Resp. E-mails at 1 (“Bloomberg has in its possession e-mails sent or received by various Morgan Stanley employees who worked on the Sunbeam transaction and who used Bloomberg e-mail accounts.”); *id.* at 3 (“E-mails...that refer to issues in this case, or which summarize or describe events concerning Sunbeam...are plainly responsive”).)

party subpoena seeking “[a]ll copies of e-mails sent or received by anyone’ at [plaintiff company], with no limitation as to time or scope” was, “on its face, . . .massively overbroad.”).

CPH’s failure to comply with the Florida Rules is fatal – and fully justifies Morgan Stanley’s refusal to consent to production pursuant to the subpoena, in accordance with its rights under the federal Electronic Communications Privacy Act. *See Calderbank v. Cazares*, 435 So. 2d 377, 379 (Fla. 5th DCA 1983) (“A reasonably ‘calculated’ causal connection between the information sought and the possible evidence relevant to the issues in the pending action must ‘appear’ from the nature of both or it must be demonstrated by the person seeking the discovery.”).

Despite the facially overbroad subpoena, Morgan Stanley has offered to allow the production of “those Bloomberg documents that are responsive to CPH’s outstanding document requests to Morgan Stanley,” subject only to the parties’ outstanding objections and the prior rulings of the Court. (Apr. 7, 2004 Letter from T. Clare to M. Brody at 2 (Ex. B).) That limitation is not only *necessary* to conform CPH’s overbroad request to the Florida Rules – but also provides the information CPH purports to seek. *See* Fla. R. Civ. P. 1.280(b)(1); May 9, 2003 Plf’s 1st Req. for Prod. of Docs., Reqs. 30, 35, 36 (covering such broad categories as “[a]ll documents concerning the Coleman Transaction” and “[a]ll documents concerning the Subordinated Debenture Offering”) (Ex. C).) Without such subject matter limitations, CPH’s subpoena is simply a fishing expedition, a tactic for harassment, or both.

2. Morgan Stanley Has Consented To The Production Of Bloomberg E-mails From A Relevant Time Period.

The financial transactions at issue in this litigation took place in 1998 – yet CPH’s subpoena to Bloomberg seeks all e-mails (regardless of subject matter) from January 1, 1997

through the present. CPH's failure to limit its subpoena to a relevant time period is fatal to its subpoena to Bloomberg – and fully justifies Morgan Stanley's refusal to consent.

Morgan Stanley has proposed to limit the relevant period in the Bloomberg subpoena to January 1, 1997 through January 1, 2000. The theoretical possibility finding relevant and responsive e-mails from after January 2000 is minuscule, and does not justify the enormous burden and cost of reviewing and producing e-mails from this time period, which (even at its earliest point) is more than a year-and-a-half after the financial transactions closed.

CPH's explanation for its overly expansive time period – that Morgan Stanley employees may have sent or received e-mails that “summarize or describe events concerning Sunbeam” that took place *over a year-and-a-half earlier* – is too remote to justify the associated burden. See *Calderbank*, 435 So. 2d at 379 (“The mere fact that an inquiry that appears to be irrelevant ‘might’ lead to evidence that is relevant and admissible to the issues in the pending suit is not sufficient [to permit discovery].”)

CPH's only other argument for obtaining post-2000 e-mails from Bloomberg – an agreement by Morgan Stanley to produce other categories of documents from after 2000 – is misguided. In the previous instance, the documents CPH requested were limited in subject matter, relatively few in number, and would be found in a handful of readily identifiable sources within Morgan Stanley. This stands in sharp contrast to CPH's current request, which lacks any specificity of subject matter, potentially involves hundreds of thousands of e-mails, and would impose an enormous burden on Bloomberg and Morgan Stanley to implement.

Finally, CPH seeks to compel Morgan Stanley's consent for Bloomberg to produce e-mails and electronic messages regarding Morgan Stanley employees *who CPH acknowledges did not have an e-mail account with Bloomberg at any time*. (See Apr. 2, 2004 Letter from M.

Brody to T. Clare (“Based on my consultation with counsel for Bloomberg, it appears that Bloomberg does not have emails or other responsive information pertaining to these individuals.”) (Ex. D.) This blind insistence on production, which CPH essentially admits will be futile, creates the unnecessary potential for inadvertent disclosure of sensitive information that is unrelated and unresponsive to CPH’s subpoena, and merely increases the burden on Bloomberg and Morgan Stanley.

CONCLUSION

For these reasons, CPH’s Motion to Compel Morgan Stanley’s Consent to Third Party Production of Responsive E-Mails should be denied.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by facsimile and Federal Express to all counsel of record on the attached service list on this 14th day of April, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar # 618349)
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

Michael K. Kellogg
Mark C. Hansen
James M. Webster
Rebecca A. Beynon
**KELLOGG, HUBER, HANSEN,
TODD & EVANS P.L.L.C.**
Sumner Square
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
Telephone: (202) 326-7900
Facsimile: (202) 326-7999
(*Pro Hac Vice* Pending)

**Counsel for Morgan Stanley & Co.
Incorporated & Morgan Stanley Senior
Funding Inc.**

Joseph Ianno, Jr. (FL Bar # 655351)
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

BY: 

SERVICE LIST

Counsel for Coleman(Parent) Holdings & MacAndrews & Forbes Holdings, Inc.

John Scarola

**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33409

Jerold S. Solovy

JENNER & BLOCK, LLC
One IBM Plaza, Suite 4400
Chicago, Illinois 60611

Exhibit A

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 2003 CA 005045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,

Defendant(s).

SUBPOENA DUCES TECUM

THE STATE OF FLORIDA

TO: Custodian of Records
Bloomberg, Inc.
THE PRENTICE-HALL CORPORATION SYSTEM INC.
1201 HAYS STREET SUITE 105
TALLAHASSEE FL 32301

YOU ARE COMMANDED to appear for deposition at Searcy Denney Scarola
Barnhart & Shipley, P.A., 2139 Palm Beach Lakes Boulevard, West Palm Beach, FL, 33409 on
the 29th day of March, 2004 at 9:30 a.m. and to have with you at that time and place the
documents specified on Attachment A.

If you fail to:

- 1) Appear as specified; or
- 2) Furnish the records instead of appearing as provided above; or
- 3) Object to this subpoena,

You may be in contempt of court. You are subpoenaed to appear by the following attorney, and unless excused from this subpoena by this attorney or the court, you shall respond to this subpoena as directed.

DATED this 4th day of March, 2004.



JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 478-0754
Attorneys for Plaintiff

**CERTIFICATION OF RESPONSE TO
SUBPOENA DUCES TECUM**

STATE OF FLORIDA
COUNTY OF _____

The undersigned, as custodian of records for Bloomberg, Inc., certifies that the attached documents consisting of ____ pages represents a true copy of all items with in my possession, custody or control which are described in the Subpoena Duces Tecum served on me in the above styled action and each page is numbered by me for identification. Production is complete and has been numbered by the custodian of records.

It is further certified that originals of the items produced are maintained under the direction, custody and control of the undersigned.

The foregoing Certification was acknowledged before me, an officer duly authorized in the State and County aforesaid to take acknowledgments, this _____ day of _____, 20____, who:

- is personally known to me; or
- has produced _____ as identification; and who:
- did or
- did not, take an oath,

and who executed the foregoing certification, and who acknowledged the foregoing certification to be freely and voluntarily executed for the purposes therein recited.

Notary Public, State of Florida at Large

My Commission Expires:

**ATTACHMENT A
TO SUBPOENA TO NON-PARTY
BLOOMBERG, INC.**

You are hereby requested to produce the following documents pursuant to the definitions and instructions set forth below.

DOCUMENTS REQUESTED

1. All documents concerning emails or electronic messages of the following Morgan Stanley or MSSF employees:

- Leslie E. Bradford
- Steven L. Brown
- Shani Boone
- Thomas Burchill
- Tyrone Chang
- Andrew Conway
- Benjamin D. Derito
- Karen Eltrich
- Alex Fuchs
- Jake Foley
- Joel P. Feldmann
- Richard B. Felix
- Johannes Groeller
- Michael Hart
- Robert Kitts
- William Kourakos

- Tarek F. Abdel-Meguid
- Stephen R. Munger
- Stephan F. Newhouse
- Ralph L. Pellecchio
- Ruth Porat
- Lily Rafii
- Michael L. Rankowitz
- William J. Sanders
- Andrew B. Savarie
- Ishaan Seth
- Marium A. Short
- Dwight D. Sipprelle
- Bram Smith
- William Strong
- James Stynes
- John Tyree
- Joshua A. Webber
- Chris Whelan
- William H. Wright
- Gene K. Yoo

DEFINITIONS

1. "Concerning" means concerning, reflecting, relating to, referring to, describing, evidencing, or constituting.

2. "Documents" shall be given the broad meaning provided in Rule 1.350 of the Florida Rules of Civil Procedure and refers to any form or means, whether physical, visual, or electronic, in or by which words, numbers, or ideas are recorded or preserved, whether fixed in tangible medium or electronically stored, including any and all drafts of any final document. The word "documents" shall include, by way of example and not by way of limitation, all of the following: papers, correspondence, trade letters, envelopes, memoranda, telegrams, cables, notes, messages, reports, studies, press releases, comparisons, books, accounts, checks, audio and video recordings and transcriptions thereof, pleadings, testimony, articles, bulletins, pamphlets, brochures, magazines, questionnaires, surveys, charts, newspapers, calendars, desk calendars, pocket calendars, lists, logs, publications, notices, diagrams, instructions, diaries, minutes for meetings, corporate minutes, orders, resolutions, agendas, memorials or notes of oral communications, whether by telephone or face-to-face, contracts, agreements, drafts of or proposed contracts or agreements, memoranda of understanding, letters of intent, computer tapes, computer drives or memories, computer diskettes or disks, e-mail, CD-ROMs, or any other tangible thing on which any handwriting, typing, printing, photostatic, electronic, or other form of communication or information is recorded or reproduced, together with all notations on any of the foregoing, all originals, file copies, or other unique copies of the foregoing, and all versions or drafts thereof, whether used or not.

3. "Morgan Stanley" means Morgan Stanley & Co., Inc. and any of its predecessors, successors, affiliates, subsidiaries, and present and former officers, directors, partners, employees, representatives, and agents.

4. "MSSF" means Morgan Stanley Senior Funding, Inc. and any of its predecessors, successors, affiliates, subsidiaries, and present and former officers, directors, partners, employees, representatives, and agents.

INSTRUCTIONS

1. Documents shall be produced as they are kept in the usual course of business, or organized and labeled to correspond to the categories in this Request. Documents attached to each other should not be separated. Documents consisting of items previously produced in the Litigations with Bates numbering shall be produced in Bates number order. Documents stored in an electronic format should be produced in a readable electronic format accessible by a standard database program such as concordance.

2. All documents shall be produced in the file folder, envelope or other container in which the documents are kept or maintained by you. If, for any reason, the container cannot be produced, produce copies of all labels or other identifying marks.

3. The relevant period, unless otherwise indicated, shall be from January 1, 1997 through the date of this subpoena, and shall include all documents and information which relate in whole or in part to such period, or to events or circumstances during such period, even though dated, prepared, generated or received prior or subsequent to that period. Please supplement or correct your responses to these requests if, at any time, you become aware that your responses are incomplete or incorrect in any respect.

4. If you claim the attorney-client privilege, or any other privilege or work-product protection for all or any portion of a document, you shall provide a privilege log that describes the withheld material sufficiently to allow CPH to test the privilege or protection asserted.

5. The following rules of construction apply:

- A. The connectives "and" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery requests all responses that might otherwise be outside of their scope;
- B. The term "including" shall be construed to mean "without limitation"; and
- C. The use of the singular form of any word includes the plural and vice versa.

Exhibit B

KIRKLAND & ELLIS LLP

AND AFFILIATED PARTNERSHIPS

655 Fifteenth Street, N.W.
Washington, D.C. 20005

202 879-5000

www.kirkland.com

Thomas A. Clare
To Call Writer Directly:
(202) 879-5993
tclare@kirkland.com

Facsimile:
202 879-5200

April 7, 2004

BY FACSIMILE

Michael Brody, Esq.
Jenner & Block, LLC
One IBM Plaza
Chicago, IL 60611-7603

Re: *Coleman (Parent) Holdings v. Morgan Stanley & Co.*
Morgan Stanley Senior Funding v. MacAndrews & Forbes et al.

Dear Mike:

I write in response to your April 2, 2004 letter regarding CPH's subpoena to Bloomberg. I will address each of the issues raised in your letter in turn:

First, we both agree that Bloomberg does not have any e-mails or other responsive information pertaining to the 17 individuals who did not have Bloomberg e-mail accounts during the time period defined by the subpoena. Morgan Stanley's consent (or refusal to consent) is therefore irrelevant.

Second, with regard to e-mails after January 1, 2000, we have explained repeatedly why it is wasteful and burdensome to require Morgan Stanley to undertake a costly review of e-mails from a time period that does not even *begin* until more than a year-and-a-half after the financial transactions at issue in these cases. I refer you to my March 11, 2004 letter for a detailed explanation of our position in this regard. The instances identified in your letter where Morgan Stanley has agreed to produce certain categories of documents after January 1, 2004 present a different situation. The documents in those categories are expected to be relatively few in number -- and can be obtained from a small number of sources within Morgan Stanley. Those limited categories of documents stand in sharp contrast to CPH's extremely broad subpoena to Bloomberg, which -- on its face -- asks for every e-mail (without limitation and regardless of subject matter) from more than thirty-five individuals over a seven year period. There simply is no reason to believe that CPH's "all-or-nothing" approach to the production of e-mails from after January 1, 2000 is reasonably likely to yield relevant and responsive e-mails -- or that the theoretical possibility of finding relevant and responsive e-mails from several years after the fact would justify the enormous burden and cost of reviewing and producing e-mails from this time period.

KIRKLAND & ELLIS LLP

Michael Brody, Esq.
April 7, 2004
Page 2

Third, you asked about the criteria that we intend to apply during our responsiveness review. As noted above, CPH's subpoena to Bloomberg does not contain any subject-matter limitation. CPH is not entitled to e-mails that have nothing to do with the transactions and issues in this case. Accordingly, we intend to produce to CPH only those Bloomberg documents that are responsive to CPH's outstanding document requests to Morgan Stanley -- subject to Morgan Stanley's outstanding objections to those requests and the Court's prior rulings on discovery issues.

Fourth, the omission of Joshua Webber from my letter was inadvertent. Mr. Webber should have been included in the list of individuals who did not have a Bloomberg account at any time during the time period defined by the subpoena.

Sincerely,



Thomas A. Clare

cc: Joseph Ianno, Esq. (by facsimile)
John Scarola, Esq. (by facsimile)
Jerold S. Solovy, Esq. (by facsimile)
Thomas H. Golden, Esq. (by facsimile)

Exhibit C

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

 COLEMAN (PARENT) HOLDINGS INC.,)
)
 Plaintiff,)
)
 v.)
)
 MORGAN STANLEY & CO., INC.,)
)
 Defendant.)

Case No. CA 005045 AI

DOROTHY H. WILKEN
CLERK OF CIRCUIT COURT
CIRCUIT CIVIL DIVISION

MAY 09 2003

COPY / ORIGINAL
RECEIVED FOR FILING

PLAINTIFF'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS

Plaintiff Coleman (Parent) Holdings, Inc. ("CPH" or "Plaintiff"), by its attorneys Searcy Denney Scarola Barnhart & Shipley P.A. and Jenner & Block, LLC, hereby serves its First Request for Production of Documents upon Defendant Morgan Stanley & Co., Inc. ("Morgan Stanley" or "Defendant"), and requests responses and the production of documents at the office of Searcy Denney Scarola Barnhart & Shipley P.A., 2139 Palm Beach Lakes Blvd., West Palm Beach, Florida, within the time provided by Florida Rule of Civil Procedure 1.350(b).

DEFINITIONS

1. "Arbitrations" means Albert J. Dunlap and Sunbeam Corporation, No. 32 160 00088 99 (AAA); and Russell A. Kersh and Sunbeam Corporation, No. 32 160 00091 99 (AAA).
2. "Coleman" means the Coleman Company, Inc. or any of its present and former officers, directors, employees, representatives, agents, and all other persons acting or purporting to act on its behalf.

3. "CPH" means Coleman (Parent) Holdings Inc., Coleman Worldwide Corporation, CLN Holdings, Co. Inc., or any of their present and former officers, directors, employees, representatives, agents, and all other persons acting or purporting to act on their behalf.

4. "Coleman Transaction" means the transaction contemplated by the February 27, 1998 Agreements.

5. "Communication" means the transmittal of information by letter, memorandum, facsimile, orally, or otherwise.

6. "Concerning" means reflecting, relating to, referring to, describing, evidencing, or constituting.

7. "Documents" means documents whether fixed in tangible medium or electronically stored. The word "documents" shall include, by way of example and not by way of limitation, all of the following: papers, correspondence, trade letters, envelopes, memoranda, telegrams, cables, notes, messages, reports, studies, press releases, comparisons, books, accounts, checks, audio and video recordings and transcriptions thereof, pleadings, testimony, articles, bulletins, pamphlets, brochures, magazines, questionnaires, surveys, charts, newspapers, calendars, desk calendars, pocket calendars, lists, logs, publications, notices, diagrams, instructions, diaries, minutes for meetings, corporate minutes, orders, resolutions, agendas, memorials or notes of oral communications, whether by telephone or face-to-face, contracts, agreements, drafts of or proposed contracts or agreements, memoranda of understanding, letters of intent, computer tapes, computer drives or memories, computer diskettes or disks, e-mail, CD-ROMs, or any other tangible thing on which any handwriting, typing, printing, photostatic, electronic, or other form of communication or information is recorded or reproduced, together with all notations on any of the foregoing, all

originals, file copies, or other unique copies of the foregoing, and all versions or drafts thereof, whether used or not.

8. "February 27, 1998 Agreements" means (a) the Agreement and Plan of Merger dated as of February 27, 1998 among Sunbeam Corp., Laser Acquisition Corp., CLN Holdings, Inc. and Coleman (Parent) Holdings Inc. and (b) the Agreement and Plan of Merger dated as of February 27, 1998 among Sunbeam Corp., Camper Acquisition Corp., and The Coleman Company, Inc.

9. "Financial Statements" means, without limitation, balance sheets, statements of income, earnings, retained earnings, sources and applications of funds, cash flow projections, notes to each such statements, or any other notes which pertain to the past or present financial condition of Sunbeam, whether any of the foregoing is audited or unaudited, whether final, interim or pro forma, complete or partial, consolidated, yearly, monthly, or otherwise.

10. "Litigations" means In Re Sunbeam Securities Litigation, 98-8258-Civ.-Middlebrooks (S.D. Fla.); Camden Asset Management L.P., et al. v. Sunbeam Corporation, et al., 98-8773-Civ.-Middlebrooks and 98-8275-Civ.-Middlebrooks (S.D. Fla.); Krim v. Dunlap, et al., No. CL983168AD (15th Jud. Cir., Fla.); Stapleton v. Sunbeam Corp., et al., No. 98-1676-Civ.-King (S.D. Fla.); Sunbeam Corp. v. PricewaterhouseCoopers LLP, No. CL005444AN (15th Jud. Cir., Fla.); In re Sunbeam Corp., Inc., No. 01-40291 (AJG) (Bankr. S.D.N.Y.) and any adversary proceedings therein; SEC v. Dunlap, et al., No. 01-8437-Civ.-Middlebrooks (S.D. Fla.); Oaktree Capital Management LLC v. Arthur Andersen LLP, No. BC257177 (L.A. Cty., CA); and Coleman (Parent) Holdings Inc. v. Arthur Andersen LLP, et al., No. CA 01-06062AN (15th Jud. Cir., Fla).

11. "Morgan Stanley" means Morgan Stanley & Co., Inc. or any of its subsidiaries, divisions, predecessors, successors, present and former employees, representatives, agents, attorneys, accountants, advisors, or all other persons acting or purporting to act on its behalf.

12. "SEC Administrative Proceedings" means In the Matter of Sunbeam Corp., SEC Administrative Proceeding File No. 3-10481, and In the Matter of David C. Fannin, SEC Administrative Proceeding File No. 3-10482.

13. "SEC" means the Securities and Exchange Commission.

14. "Subordinated Debentures" means Sunbeam's Zero Coupon Convertible Senior Subordinated Debentures Due 2018.

15. "Subordinated Debenture Offering" means the offering of Sunbeam's Subordinated Debentures.

16. "Sunbeam" means Sunbeam Corporation, or any of its subsidiaries, divisions, affiliates, predecessors, successors, present and former employees, representatives, agents, and all other persons acting or purporting to act on its behalf.

17. "You" or "Your" means Morgan Stanley & Co., Inc. and/or any of its subsidiaries, divisions, predecessors, successors, present or former employees, representatives, agents, attorneys, accountants, advisors, or anyone acting or purporting to act on its behalf.

INSTRUCTIONS

1. Documents shall be produced as they are kept in the usual course of business, or organized and labeled to correspond to the categories in this Request. Documents attached to each other should not be separated. Documents consisting of items previously produced in the Litigations, Arbitrations, and/or SEC Administrative Proceedings with Bates numbering shall be produced in Bates number order.

2. All documents shall be produced in the file folder, envelope or other container in which the documents are kept or maintained by you. If, for any reason, the container cannot be produced, produce copies of all labels or other identifying marks.

3. The relevant period, unless otherwise indicated, shall be from January 1, 1997 through the date of trial of this matter, and shall include all documents and information which relate in whole or in part to such period, or to events or circumstances during such period, even though dated, prepared, generated or received prior or subsequent to that period. Please supplement or correct your responses to these requests if, at any time, you become aware that your responses are incomplete or incorrect in any respect.

4. If you claim the attorney-client privilege, or any other privilege or work-product protection for all or any portion of a document, you shall provide a privilege log that describes the withheld material sufficiently to allow CPH to test the privilege or protection asserted.

5. The following rules of construction apply:

- a) The connectives "and" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery requests all responses that might otherwise be outside of their scope;
- b) The term "including" shall be construed to mean "without limitation"; and
- c) The use of the singular form of any word includes the plural and vice versa.

DOCUMENTS REQUESTED

1. All documents concerning your efforts to have Sunbeam retain or maintain your investment banking and/or securities underwriting services.

2. All documents reflecting all fees and expenses paid by Sunbeam to you, including without limitation all billing statements, invoices, time detail records, individual calendars,

daily diaries (including electronic calendar programs), or other documents that describe or record the time spent, or expenses incurred (including back-up for any out-of-pocket expenses), by any Morgan Stanley personnel, or that describe or record any aspect of their activities concerning any services performed on behalf of, or concerning, Sunbeam.

3. All documents concerning any investigation, analysis, or due diligence of Sunbeam conducted by you or on your behalf in 1997 or 1998.

4. All documents concerning any investigation, analysis, or due diligence of Coleman or CPH conducted by you or on your behalf in 1997 or 1998.

5. All documents concerning your attempts in 1997 or 1998 to locate someone to purchase or otherwise acquire Sunbeam, whether through merger, purchase, transfer of assets or securities, or otherwise.

6. All documents concerning your attempts in 1997 or 1998 to locate companies for Sunbeam to purchase or otherwise acquire, whether through merger, purchase, transfer of assets or securities, or otherwise.

7. All documents concerning the negotiation and signing of the February 27, 1998 Agreements.

8. All documents concerning the closing of the Coleman Transaction, including without limitation all documents concerning the decision to close the Coleman Transaction.

9. All documents concerning the meetings of Sunbeam's Board of Directors in 1997 and 1998.

10. All documents concerning any discussion, promise, agreement, or plan to have research analysts, whether or not at Morgan Stanley, provide coverage for Sunbeam or any of its debt or equity securities.

11. All documents used, analyzed, consulted, or prepared by any Morgan Stanley research analyst, including without limitation Andrew Conway, James Dormer, Jake Foley, and Karen Eltrich, concerning Sunbeam.
12. All documents concerning communications between or among you, Sunbeam, and Wall Street analysts concerning Sunbeam or the Coleman Transaction.
13. All documents concerning any valuation of Sunbeam or Sunbeam securities.
14. All documents concerning the stock market's valuation of Sunbeam securities, including without limitation documents describing or analyzing the increase or decline in the market price of Sunbeam stock in the period from and including July 1, 1996 through and including December 31, 1998.
15. All documents concerning any valuation of Coleman or Coleman securities.
16. All documents concerning synergies that might be achieved from a business combination of Sunbeam and Coleman.
17. All documents concerning Sunbeam's financial statements and/or restated financial statements.
18. All documents concerning the increase in the size of the Subordinated Debenture Offering from \$500 million to \$750 million.
19. All documents concerning any draft or executed "comfort letters" requested by you or provided to you in connection with the Subordinated Debenture Offering.
20. All documents concerning the sale of, or your attempts to sell, Subordinated Debentures, including without limitation documents concerning road shows, communications with potential investors, or communications with or among Morgan Stanley's sales personnel.
21. All documents concerning the pricing of the Subordinated Debentures.

22. All documents concerning the conversion features of the Subordinated Debentures.
23. All documents concerning the "book of demand" for the Subordinated Debentures.
24. All documents concerning the events that took place on March 19, 1998 at Global Financial Press, including without limitation documents concerning Lawrence Bornstein and/or John Tyree.
25. All documents concerning your communications with Sunbeam on March 18, 1998.
26. All documents concerning the "bring-down" due diligence for the Subordinated Debenture Offering.
27. All documents concerning your communications with Sunbeam on March 24, 1998.
28. All documents concerning Sunbeam's first quarter 1998 sales and/or earnings.
29. All documents concerning the closing of the Subordinated Debenture Offering including without limitation all documents concerning the decision to close the Subordinated Debenture Offering.
30. All documents concerning the Subordinated Debenture Offering.
31. All documents concerning any work or services you performed for or on behalf of Sunbeam in 1997 or 1998, regardless of whether you were compensated for that work.
32. All documents concerning press releases issued by Sunbeam on October 23, 1997, March 19, 1998, April 3, 1998, May 9, 1998, June 15, 1998, June 25, 1998, June 30, 1998, October 20, 1998, and November 12, 1998.

33. All documents concerning the statements contained in the press releases issued by Sunbeam on October 23, 1997, March 19, 1998, April 3, 1998, May 9, 1998, June 15, 1998, June 25, 1998, June 30, 1998, October 20, 1998, and November 12, 1998.

34. All documents concerning communications relating to Sunbeam, Coleman, or CPH, including without limitation internal communications within Morgan Stanley or communications between or among Morgan Stanley and Sunbeam; Skadden, Arps, Slate, Meagher & Flom LLP; Coopers & Lybrand LLP; Llama Company; Arthur Andersen LLP; Sard Verbinnen & Co., Inc.; Hill & Knowlton, Inc.; The Coleman Company, Inc.; Credit Suisse First Boston; Coleman (Parent) Holdings Inc.; MacAndrews & Forbes Holdings, Inc.; Wachtell Lipton, Rosen & Katz; Davis Polk & Wardwell; or any other person or company, and/or any of their respective employees, agents, or representatives.

35. All documents concerning the Coleman Transaction.

36. All documents concerning the Subordinated Debenture Offering.

37. All documents concerning Albert Dunlap and/or Russell Kersh.

38. All documents concerning the Scott Paper Company.

39. All documents concerning Coleman or CPH.

40. All documents concerning MacAndrews & Forbes Holdings, Inc. with respect to Sunbeam, Coleman, or CPH.

41. All documents concerning the events and matters that are the subject of the Complaint filed in this action.

42. Organizational charts, memoranda, or similar documents that describe the business organizational structure and the administrative, management, and reporting structure of Morgan Stanley from and including January 1, 1997 through and including December 31, 1998.

43. All documents concerning Morgan Stanley's policies, procedures, manuals, guidelines, reference materials, or checklists that were in effect from and including January 1, 1997 through and including December 31, 1998 for the performance of due diligence, including without limitation due diligence performed in connection with underwriting the sale of equity or debt securities.

44. All documents concerning employment contracts, performance evaluations, and/or personnel files (including without limitation any documents that describe or discuss the training, experience, competence, and accomplishments) of all Morgan Stanley personnel who performed services for or on behalf of Sunbeam in 1997 or 1998.

45. All documents concerning Morgan Stanley's performance evaluation criteria or guidelines in effect from and including January 1, 1997 through and including December 31, 1998.

46. All documents concerning Morgan Stanley's compensation criteria or guidelines in effect from and including January 1, 1997 through and including December 31, 1998.

47. All marketing or other promotional material prepared or used by, or on behalf of, Morgan Stanley concerning investment banking or securities underwriting services that were created or used at any time from and including January 1, 1997 through and including December 31, 1998.

48. All of your document retention or document destruction policies or procedures or similar procedures for the back-up or deletion of electronic or hard copy documents of any kind for any time during 1997 through the present, including without limitation any amendments to any such policies or procedures, schedules or related documents, and any memoranda or other instructions communicated to your employees concerning the obligation and procedures to be

utilized to preserve all relevant documents, including without limitation evidence concerning the Litigations, the Arbitrations, and the SEC Administrative Proceedings.

49. All documents you have provided or produced to any party (whether voluntarily or in response to a document request, subpoena duces tecum, or other process served on you) in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings (including without limitation any reports, communications, filings, testimony, legal memoranda, statements, or other documents submitted to the Securities & Exchange Commission or any other party).

50. All documents you have provided to the SEC, the Attorney General of New York, or any other governmental or regulatory body concerning Sunbeam.

51. All documents you have received from the SEC, the Attorney General of New York, or any other governmental or regulatory body concerning Sunbeam.

52. All discovery requests or subpoenas served on you in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

53. All responses and/or objections that you provided or produced in response to a discovery request or subpoena served on you in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

54. All communications concerning any discovery request or subpoena served on you in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

55. All motions, memoranda, briefs, rulings, orders, or transcripts of proceedings concerning any discovery request, subpoena, or other process in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

56. All privilege logs you prepared in any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings with respect to documents that you withheld from production in response to any document requests, subpoenas duces tecum, or other process.

57. All transcripts of and exhibits to any depositions, recorded statements, or affidavits in connection with any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

58. All documents obtained by you or produced to you by other parties, third parties, or non-parties (whether voluntarily or in response to any document requests, subpoenas duces tecum, or other process served by you or any other party) concerning Sunbeam.

59. All document requests, subpoenas duces tecum, interrogatories, requests for admission, responses, or objections that you served on, or received from, any party, third party or non-party in In re Sunbeam Corp., Inc., No. 01-40291 (AJG) (Bankr. S.D.N.Y.) and any adversary proceedings therein.

60. All transcripts of any hearings held in connection with the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

61. All affidavits, declarations, or other testimonial statements filed or submitted in connection with any of the Litigations, the Arbitrations, or the SEC Administrative Proceedings.

COLEMAN (PARENT) HOLDINGS INC.

By: Jack Scarola
One of Its Attorneys

Jerold S. Solovy
Ronald L. Marmer
Robert T. Markowski
Deirdre E. Connell
JENNER & BLOCK, LLC
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

Jack Scarola
SEARCY DENNEY SCAROLA BARNHART
& SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33402-3626
(561) 686-6300

Exhibit D

JENNER & BLOCK

April 2, 2004

Jenner & Block LLP
One IBM Plaza
Chicago, IL 60611
Tel 312-229-9350
www.jenner.com

Chicago
Dallas
Washington, DC

By Telecopy

Thomas A. Clare, Esq.
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Michael T. Brody
Tel 312 923-2711
Fax 312 840-7711
mbrody@jenner.com

Re: *Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co.*
Morgan Stanley Senior Funding, Inc. v. MacAndrews & Forbes Holdings Inc., et al.

Dear Tom:

I write concerning your letter of April 1, 2004, in which you attempt to redefine the scope of the subpoena we served upon Bloomberg for the production of emails.

You have attempted to limit discovery in two ways. First, you have refused to consent to the production of any emails or information regarding 17 individuals whom you state did not have Bloomberg email accounts at any time during the relevant time period defined in the subpoena. (As you know, the relevant time period in the subpoena is from January 1, 1997 to the date of the subpoena.) Based on my consultation with counsel for Bloomberg, it appears that Bloomberg does not have emails or other responsive information pertaining to these individuals. Thus, to avoid an issue where there is none, I request that you consent to the production sought in the subpoena, and Bloomberg will produce no responsive documents as to those 17 individuals. If, notwithstanding the fact that these individuals did not themselves have Bloomberg email accounts, Bloomberg has responsive documents, your refusal to consent is unjustified.

Second, you have unilaterally imposed a date restriction and have refused to consent to the production of any emails after January 1, 2000. Your restriction has no basis, as the subpoena defines as relevant the entire time period between January 1, 1997 and the date of the subpoena. Nor is your restriction appropriate on the facts of this case. Information contained in emails after January 1, 2000 may be critically relevant. For example, emails sent in 2000 that describe Morgan Stanley's earlier work on the Sunbeam transaction would be responsive and should be produced. Your limitation also is inconsistent with Morgan Stanley's own document production in this case. Morgan Stanley has produced documents generated in or after 2000. In response to our recent motion to compel, you agreed to produce documents created after the Sunbeam bankruptcy in 2001. Thus, your refusal to consent to the production of emails after January 1, 2000 is wholly unjustified.

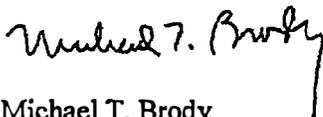
Thomas A. Clare, Esq.
April 2, 2004
Page 2

By copy of this letter, I am requesting Bloomberg to produce to you all documents responsive to our subpoena. This production would include emails from or concerning individuals who themselves did not have Bloomberg email accounts, emails from or concerning individuals who did not have Bloomberg accounts until after January 1, 2000, and emails created or sent after January 1, 2000 for those individuals who had Bloomberg accounts prior to January 1, 2000, as well as the limited quantity of documents referenced in your letter. I acknowledge that Bloomberg has expressed the concern that it may not produce these documents to CPH without consent. I have requested Bloomberg to produce the documents to you. In the event that you persist in your position and refuse to produce documents to us other than as set forth in your letter of April 1, 2004, we can raise the matter before Judge Maass.

Finally, your letter presents two other issues. In discussing the limited universe of documents that you agree Bloomberg may provide, you state that Morgan Stanley's attorneys will review the documents for responsiveness and privilege. What standards does Morgan Stanley intend to apply? Certainly, all of the documents Bloomberg will provide to you are responsive to our subpoena. Also, your letter omits any mention of Joshua Webber, who is listed in the subpoena. Was this omission intentional?

Please respond to this letter on or before April 5, 2004, or the parties will be at an impasse as to this issue.

Very truly yours,



Michael T. Brody

MTB:cjg

cc: Thomas H. Golden, Esq.
Joseph Ianno, Esq. (by telecopy)
John Scarola, Esq. (by telecopy)
Jerold S. Solovy, Esq.

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

_____ /

MORGAN STANLEY SENIOR FUNDING, INC.,

Plaintiff,

v.

MACANDREWS & FORBES HOLDINGS, INC.,

Defendant.

_____ /

DOROTHY H. YOUNG
CLERK OF CIRCUIT COURT
CIRCUIT CIVIL DIVISION
APR 14 2004
COPY FILED
CASE NO. CA 03-5045 AI
RECEIVED FOR FILING

CASE NO: CA 03-5165 AI

NOTICE OF FILING PLEADING UNDER SEAL

Morgan Stanley & Co. Incorporated and Morgan Stanley Senior Funding, Inc., by and through their undersigned counsel, hereby give notice that Morgan Stanley's Opposition to CPH's Motion to Compel Answers to Deposition Questions and For Other Relief has been filed under seal this 14th day of April, 2004.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the service list below by facsimile and Federal Express on this 14th day of April, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar No. 618349)
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

Michael K. Kellogg
Mark C. Hansen
James M. Webster
Rebecca A. Beynon
**KELLOGG, HUBER, HANSEN,
TODD & EVANS P.L.L.C.**
Sumner Square
1615 M. Street, N.W., Suite 400
Washington, D.C. 20036
Telephone: (202) 326-7900
Facsimile: (202) 326-7999
(*Pro Hac Vice* Pending)

**Counsel for Morgan Stanley & Co.
Incorporated and Morgan Stanley
Senior Funding**

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
E-mail: jianno@carltonfields.com

BY: Joseph Ianno, Jr.
Joseph Ianno, Jr.
Florida Bar No: 655351

SERVICE LIST

Jack Scarola
**SEARCY, DENNY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy
Michael Brody
JENNER & BLOCK, LLC
One IBM Plaza, Suite 400
Chicago, IL 60611

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,
Defendant.

DOROTHY H. WILKEN
CLERK OF DISTRICT COURT
CIVIL DIVISION

APR 14 2004

ORIGINAL
RECEIVED FOR FILING

CASE NO: CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff,

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant.

**MORGAN STANLEY'S RESPONSE AND OPPOSITION TO COLEMAN
(PARENT) HOLDINGS INC.'S MOTION TO COMPEL SUPPLEMENTATION
OF PRIVILEGE LOG AND OTHER RELIEF**

Coleman (Parent) Holdings Inc.'s ("CPH") motion to compel the supplementation of Morgan Stanley & Co. Incorporated's and Morgan Stanley Senior Funding, Inc.'s ("Morgan Stanley") privilege log is without merit. As CPH is well aware, the vast majority of the privilege log entries relate to two types of documents: (1) documents created by consultants hired by Morgan Stanley counsel to assist counsel and Morgan Stanley with the preparation for and the conduct of litigation; and (2) documents from the files of Morgan Stanley in-house counsel in their capacity as legal counsel – some with handwritten notes of counsel – that bear no indication that they were circulated beyond Morgan Stanley. These documents are clearly shielded from production by the work product doctrine and/or the attorney-client privilege. CPH's motion should be denied.

1. Documents Produced By Outside Consultants At The Direction Of Counsel And In Anticipation Of Litigation Are Privileged.

CPH argues that select log entries – specifically, entries concerning documents created by consulting firms hired by Morgan Stanley’s attorneys in the bankruptcy proceedings – are not “sufficient to test the propriety of the claims of privilege” merely because recipients are not listed on Morgan Stanley’s privilege log. (Apr. 9, 2004 CPH’s Mot. to Compel Supp. of Priv. Log & Other Relief at 2.) In furtherance of their assertion, CPH relies on the Florida case *TIG Insurance Corp. of America v. Johnson*, which states that:

The following information shall be provided in the objection, unless divulgence of such information would cause disclosure of the allegedly privileged information: (A) For documents: (1) the type of document; (2) general subject matter of the document; (3) the date of the document; (4) such other information as is sufficient to identify the document for a subpoena duces tecum, including, *where appropriate*, the author of the document, the addressee of the document, and, where not apparent, the relationship of the author and addressee to each other.

799 So. 2d 339, 341 (Fla. 4th DCA 2001) (internal quotations & citation omitted; emphasis added). However, CPH is erroneous in its assertions on two fronts. First of all, in relying on the *TIG* opinion, CPH fails to acknowledge two key words employed by the Court: “where appropriate.” Certainly, if a document does not identify the recipient, then it is “not appropriate” to list one.

The lack of an identifiable attorney as the author or recipient on the face of the privileged document does not exempt it from the privileges accorded attorney-client or work product materials. The “relevant inquiry” is “whether these materials were prepared for litigation, not whether they were produced by or sent to an attorney.” *Johnson Matthey, Inc. v. Research*

Corp., No. 01 CIV 8115, 2002 WL 31235717, at *3 (S.D.N.Y. Oct. 3, 2002.)¹ “The fact that the privilege log does not list an attorney as an author or recipient of any of these documents does not mean that work product [or attorney client] protection is unavailable.” *Id.*; *see U.S. Info. Sys., Inc. v. International Bhd. of Elec. Workers Local Union 3*, No. 00CIV4763RMBJCF, 2002 WL 31093619, at *1 (S.D.N.Y. Sept. 17, 2002) (denying relief as to the form of the privilege log, because although “some documents are not identified by date, and for others, the author is identified simply as [the corporation],” the log “generally conforms to [local rule 26.2(a)]’s requirements,” and the company “has represented that for such documents the date or the identity of the specific individual who authored the document could not be ascertained”).

Secondly, CPH has failed to acknowledge that there are many other entries on Morgan Stanley’s privilege log which were authored by either Houlihan Lokey Howard & Zurkin or Policano & Manzo, the two consulting firms hired by Morgan Stanley. Each document being contested by CPH is either a sub- or super-set of these other documents which also have been withheld on privilege grounds, but which, because of their completeness, identify their recipients, and thus are uncontested. It is clear that the log entries at issue were not sent to different recipients outside of Morgan Stanley, but merely separated from their respective documents or cover sheets.

Morgan Stanley’s privilege log conforms to the Florida Rules. Absent evidence that the documents targeted by CPH were disseminated beyond Morgan Stanley, they should be afforded their rightful work product privilege protection.

¹ Given that both CPH and the *TIG* Court relied on and cited to New York caselaw as persuasive authority to assist in the development of Florida’s body of law pertaining to privilege logs, Morgan Stanley turns there as well.

2. Internal Documents From the Files Of Morgan Stanley's In-House Counsel Are Privileged.

The vast majority of the remaining log entries challenged by CPH are from the files of Morgan Stanley's in-house counsel; files that were maintained in their capacity as counsel and used to assist with the preparation and conduct of litigation. The four other entries that do not fit this description clearly indicate that they are documents exchanged between Morgan Stanley counsel and Morgan Stanley. As an initial matter, CPH has asserted that absent the specific identification of the name of a member of Morgan Stanley's in-house or retained legal counsel, a document cannot be afforded privileged status. This is patently absurd, and as such, courts refuse to adopt such positions. In *Rockwell Automation, Inc. v. GGS Liquidation, Inc.*, the court maintained that privilege log entries which lack specific identification of the author or addressee are not per se denied the aegis of the attorney client or work product privileges. *Rockwell Automation, Inc. v. GGS Liquidation, Inc.*, No. 00 Civ.8763, 2003 WL 22227968, at *3 (S.D.N.Y. Sept. 25, 2003.) (“[I]t may not be clear which specific [corporate] lawyers and/or employees were involved, but a lawyer obviously was involved, and the communication with the client reflected in the documents is privileged.”) (internal quotations & citation omitted). To the contrary, the Rockwell Court found that the plaintiff had in fact “adequately identified the authors and addressees.” *Id.* All of the entries, while not specifically naming an attorney, per se, attribute authorship to MS Counsel, Legal Department, or Outside Counsel, an identification sufficient according to the Rockwell decision.

Entries numbered 274, 284, 285, 299 represent Legal Department Holders Inquiry Reports. While the privileged nature of such documents is not immediately obvious, Morgan Stanley has on multiple occasions described it to CPH: “The ‘holder’s inquiry report’ is a report which is generated by the Legal Department (specifically the Law Compliance Department),

containing proprietary account information and material, and sought and arranged in such a manner as to constitute both attorney-client information and work product, and therefore protected from production.” (Oct. 22, 2003 Letter from L. Paule-Carrel to M. Brody at 4 (Ex. A).) The data contained in such reports “is sought and arranged by attorneys in such a manner as to constitute both attorney-client information and work product, and therefore protected from production. The specific searches and compilations manifested in these reports represent attorney thought and work product.” (Jan. 16, 2004 Letter from L. Paule-Carres to M. Brody at 3 (Ex. B) (emphasis in original).) Furthermore, “[t]he data contained in these reports is sought by Morgan Stanley attorneys with regard to the company’s ongoing cases. Morgan Stanley counsel use this data not for business purposes, but specifically for the purpose of aiding the company and its outside counsel in litigation preparation.” (Mar. 1, 2004 Letter from L. Paule-Carres to M. Brody at 3 (Ex. C).) Clearly they fall under the protection of the attorney client and work product privileges.

Another example can be gleaned from entries numbered 303, 305, and 307 whose descriptions reveal the source of the privilege claim. Each of these documents are subsets or duplicates, some with handwritten attorney notes, of entry 273, and reflect a document drafted and arranged by counsel. A review of entry number 303 – “‘Sunbeam Overview’ with Monroe Sonnenborn’s handwritten notes” – clarifies that the privileged nature of this document is Morgan Stanley’s attorney, Mr. Sonnenborn’s, handwritten notes. Again, this was pointed out to CPH on more than one occasion. (See Oct. 22, 2003 Letter at 4 (identifying M. Sonnenborn as a Morgan Stanley attorney) (Ex. A); Jan. 16, 2004 Letter at 3 (highlighting M. Sonnenborn’s involvement in the document relating to entry number 303) (Ex. B).) And the description or

entry number 305 reads “Legal Memo entitled ‘Possible Bid for [illegible] Corp.’ – again, clearly a document protected by the attorney client and work product privileges.

Absent revealing the actual documents, which is not a viable option, there seem to be no explanations or discussions which satisfy CPH. Thus, for the foregoing reasons, Morgan Stanley requests that the Court deny CPH’s Motion to Compel Supplementation Of Privilege Log And Other Relief in its entirety. At a minimum, Morgan Stanley should be permitted – once Wachtell Lipton make these documents available – to review and make supplementation if necessary. Alternatively, Morgan Stanley requests that it be permitted to provide an in camera submission with the documents available to Morgan Stanley and a more detailed explanation of the relationships of the concerned parties before the Court rules.

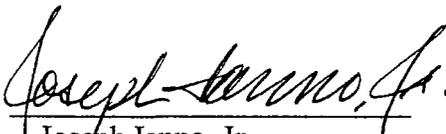
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this 14th day of April, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar No. 618349)
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N. W., Suite 1200
Washington, D. C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

Joseph Ianno, Jr. (Florida Bar No: 655351)
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
E-mail: jianno@carltonfields.com

Michael K. Kellogg
Mark C. Hansen
James M. Webster
Rebecca A. Beynon
**KELLOGG, HUBER, HANSEN,
TODD & EVANS P.L.L.C.**
Sumner Square
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
Telephone: (202) 326-7900
Facsimile: (202) 326-7999
(*Pro Hac Vice* Pending)

BY: 
Joseph Ianno, Jr.

**Counsel for Morgan Stanley & Co.
Incorporated and Morgan Stanley
Senior Funding, Inc.**

SERVICE LIST

Jack Scarola
**SEARCY, DENNY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy
Michael Brody
JENNER & BLOCK, LLC
One IBM Plaza, Suite 400
Chicago, IL 60611

Exhibit A

KIRKLAND & ELLIS LLP

AND AFFILIATED PARTNERSHIPS

655 Fifteenth Street, N.W.
Washington, D.C. 20005

202 879-5000

www.kirkland.com

Larissa Paule-Carres
To Call Writer Directly:
(202) 879-5951
lpaule-carres@kirkland.com

Facsimile:
202 879-5200

Dir. Fax: (202) 879-5200

October 22, 2003

By Facsimile

Michael Brody
Jenner & Block, LLC
One IBM Plaza
Chicago, IL 60611-7603

Re: *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co.*

Dear Mike:

I write in response to your October 16, 2003 letter.

As an initial matter, we dispute the statements in your letter characterizing the privilege logs submitted by Morgan Stanley as inadequate. Morgan Stanley has complied with all of its obligations under the Florida Rules of Civil Procedure, as well as under the agreed-upon order entered by the Court regarding privilege logs. In fact, Morgan Stanley actually surpassed the requirements of the agreed-upon order by providing privilege logs for all production installments predating the log, including those production installments that were made fewer than thirty days earlier.

As for the specific issues raised in your letter:

1. Your blanket assertion that Morgan Stanley's three privilege logs fail to "constitute the universe of documents withheld to date by Morgan Stanley" is as incorrect as it is non-specific. As noted above, Morgan Stanley has provided a privilege log for all documents produced to date. Your accusations are particularly misplaced given the multiple deficiencies of CPH's own privilege log. In a quick search of CPH's hard copy paper production, it is evident that at least 55 documents had been removed from the production on claims of privilege, yet not included on the privilege log you provided. A listing of these omissions is attached to this letter in Attachment A. Morgan Stanley awaits clarification from CPH as to the listing of documents omitted from its privilege log.
2. Your comment regarding the log notation that the Morgan Stanley/Sunbeam Privilege Log "exclud[ed] as non-responsive any Legal Department files concerning the various Sunbeam litigations and the Chapter 11 proceeding"

Chicago

London

Los Angeles

New York

San Francisco

16div-005026

KIRKLAND & ELLIS LLP

Michael Brody
October 22, 2003
Page 2

ignores the context of the notation. That note was added to a log that was produced in a prior legal proceeding, as expressly permitted by the agreed-upon order. In responding to the current set of document requests served by CPH, Morgan Stanley reviewed all relevant documents from its Legal Department and did not exclude from its production or log such documents.

3. CPH suggests that certain privilege log entries appear to be lumped multiple documents. Entry number 243 has been reviewed and broken out into individual redactions (all stemming from one document). These changes are reflected in the revised Morgan Stanley privilege log provided in Attachment B. Regarding CPH's inquiry into log entry number 307, that is an entry from a prior log created for a prior case in response to prior document requests. *See* September 4th Agreed Order Regarding Enlargement Of Time To Prepare Privilege Log. To the extent documents were previously withheld on the basis of privilege, those documents are in the possession of third parties whom CPH have already subpoenaed. Accordingly, Morgan Stanley is unable to make any changes to this former log.
4. CPH suggests that Morgan Stanley and MSSF have failed to "provide sufficient information concerning attachments to the documents listed in its logs." Our review of the Florida Rules of Civil Procedure and the September 4th Agreed Order Regarding Enlargement Of Time To Prepare Privilege Log reveals no requirements regarding the inclusion or treatment of attachments in privilege logs.
5. CPH notes that Morgan Stanley neglected to provide Bates numbers to the documents which had been redacted, thereby "mak[ing] it impossible to match redactions to their corresponding privilege log entry." Again, this criticism seems strange given the fact that in its privilege log, CPH provided improper Bates numbers to the redacted documents, i.e., it used a prior Bates numbering system different from that which was implemented in this current production (recall that the parties, in producing prior productions, were to re-number such prior productions without obscuring prior Bates numbers). Nevertheless, Morgan Stanley is attaching a revised privilege log with the identification of Bates numbers of the documents which were redacted. *See*, Attachment B.
6. CPH claims that Morgan Stanley's description reading "[r]edacted documents, reflecting internal client matter information," for entries numbered 71, 73-74, 76, 79, 83-85, 90-105, 108-118, 121-130, 132, and 134-137 are insufficient. Each document cited contains irrelevant and non-substantive client matter and billing information, which was redacted on privilege and relevance grounds.

KIRKLAND & ELLIS LLP

Michael Brody
October 22, 2003
Page 3

7. CPH claims that various descriptions lack the requisite specificity via the use of terms such as "in-house counsel," "outside counsel," "MS counsel," "Legal Department," "expert," or "client." CPH's log contains many similar entries. Nevertheless, where additional information was available, those instances have been modified, as reflected in the attached revised version of the Morgan Stanley privilege log. *See*, Attachment B

Other entries identified by CPH reflect documents and draft documents which came from Morgan Stanley's Legal Department files in general. As such, it is clear that they were either a) created by a member of the Legal Department, and thus covered by the attorney-client and attorney work product privileges, or b) provided to the Legal Department for review and comment and seeking legal advice, thereby affording such documents the protective privileges.

Documents created by experts at the request of counsel, and in anticipation of litigation are further protected as work product, and therefore, will not be divulged. *See infra*, item number 13 for further discussion regarding experts.

Finally, CPH has listed a series of entries which stem from prior privilege logs. These logs were provided to CPH pursuant to the September 4th Agreed Order Regarding Enlargement Of Time To Prepare Privilege Log, which stated that "[t]o the extent privilege logs were created in connection with other proceedings, the parties may use those privilege logs in this action." To the extent documents were previously withheld on the basis of privilege, those documents are in the possession of third parties whom CPH have already subpoenaed. Moreover, it is clear from a review of the custodian, author, addressee, and description fields that those entries that CPH has noted are in fact privileged -- either having been drafted by an attorney, sent to an attorney for review and comment, or reflect discussions between and advice of attorneys. No further description is necessary for those entries.

Included with this letter as Attachment C is a chart delineating Morgan Stanley's responses to each specific entry that CPH questioned in this section.

8. CPH requests further information as to the persons affiliated with "Bank Group SSD Credit." In fact, Bank Group, SSD and Credit are three separate internal Morgan Stanley divisions. Each is comprised of certain Morgan Stanley personnel, for instance, Bram Smith, Michael Hart, and Simon Rankin, among others, are/were affiliated with the Bank Group (Investment Banking Division); Mitch Petrick and Ted Doster, among others, are/were affiliated with the SSD,

KIRKLAND & ELLIS LLP

Michael Brody
October 22, 2003
Page 4

“Special Situations” Debt (note that it is possible that that was a typo meant to be SSG, meaning “Special Situations Group,”) at Morgan Stanley Senior Funding; and Richard Felix, Leslie Bradford, and Morgan Edwards, among others, are/were affiliated with the Credit Group.

9. CPH requests titles and affiliations for certain persons. They are as follows: Kenneth S. Zimman, Member, Simpson, Thatcher & Bartlett, LLP; James C. Buresh, Member, Simpson, Thatcher & Bartlett, LLP; Michael S. Zuckert, former attorney in Morgan Stanley’s Law Department; Matt Edmonds, former Executive Director of Banking for Morgan Stanley; Christine Edwards, former Morgan Stanley General Counsel; Helen Meates, Morgan Stanley Executive Director in Investment Banking; Denis Villon, Morgan Stanley Senior Manager for Finance & Business Unit Controller; Robert F. Wise, Jr., Partner, Davis, Polk & Wardwell; Allen Dean, Partner, Davis, Polk & Wardwell; Jeffrey Small, Partner, Davis, Polk & Wardwell; and Monroe Sonnenborn, former head of Morgan Stanley’s Litigation Department.
10. CPH seeks clarification of Privilege Log entries 145, 177, and 215. As to entry number 145, this document came from an archived file for which we are still trying to obtain more specific information so as to respond to your request. Upon review of entry number 177, it appears as if the description is in fact erroneous, and should read “[f]axed memorandum from outside counsel to client and experts regarding proposed term sheet materials and information and forwarding such marked up materials.” Finally, regarding entry number 215, it appears as if the description section contains a typographical error, and should read “[m]emo from client to outside counsel providing information and seeking legal advice regarding credit agreement.” Such changes are reflected in Morgan Stanley’s revised privilege log at Attachment B.
11. CPH requests clarification regarding the identification of the “holder’s inquiry report,” described in entry 284. The “holder’s inquiry report” is a report which is generated by the Legal Department (specifically the Law Compliance Department), containing proprietary account information and material, and sought and arranged in such a manner as to constitute both attorney-client information and work product, and therefore protected from production.
12. CPH seeks clarification as to the basis of Morgan Stanley’s assertion of the work product privilege with regard to certain communications with Sunbeam Corp. As to entry number 201, this was as draft letter created at the request of counsel, in preparation for litigation, which was to be sent to Sunbeam in its final form. Clearly the draft was not communicated with Sunbeam, and as such, remains

KIRKLAND & ELLIS LLP

Michael Brody
October 22, 2003
Page 5

covered by the work product privilege. The recipient section of entry 201 has been modified to reflect this. Regarding entry number 221, the memo reflecting the author and recipients listed do not correspond to actual description of the document. The memorandum and its attachment are clearly not privileged, and Morgan Stanley is therefore removing it from its Privilege Log. This document will be a part of Morgan Stanley's next production. However, the document to which it was inadvertently attached, and which corresponds to the description, is in fact privileged, and will remain as revised entry number 221. Regarding CPH's inquiry into log entry number 283, that is an entry from a prior log created for a prior case in response to prior document requests. To the extent documents were previously withheld on the basis of privilege, those documents are in the possession of third parties whom CPH have already subpoenaed. Accordingly, Morgan Stanley is unable to make any changes to this former log.

13. CPH seeks information regarding the nature of Houlihan Lokey Howard & Zurkin Financial Advisors, Inc.'s and Policano & Manzo's representation of Morgan Stanley. Specifically, CPH seeks the dates on which such representation began, the entities which retained the companies, the purpose of the retention and the litigation (of any) for which they were retained. Houlihan Lokey and Policano & Manzo were hired by Simpson Thatcher & Bartlett in order to assist it in the representation of First Union Bank, Morgan Stanley Senior Funding, Inc. and Bank of America National Trust and Savings Association (the "Senior Lenders") in association with and in anticipation of the Sunbeam Bankruptcy proceeding. As such they are protected by the attorney work product privilege. Requests for any further information or documentation sought by CPH should be directed to Simpson, Thatcher & Bartlett.

As you note in your October 16, 2003 letter, Morgan Stanley has produced three privilege logs -- one from the recent document production made in association with the current cases, and two relating to prior productions made in prior litigations. These other privilege logs were produced in accordance with the September 4th Agreed Order Regarding Enlargement Of Time To Prepare Privilege Log, which stated that "[t]o the extent privilege logs were created in connection with other proceedings, the parties may use those privilege logs in this action, supplementing those logs as necessary to identify each individual document withheld on the basis of privilege." Contrarily, CPH filed only one privilege log. Please confirm that CPH in fact reviewed all of its documents, hard copy and electronic, whether produced in past litigations or only in the instant one, and included them on this single privilege log (essentially re-creating prior privilege logs specifically for this case). In the event that such prior privilege logs were not incorporated into the current log received on October 6, 2003, please remit such privilege logs immediately.

KIRKLAND & ELLIS LLP

Michael Brody
October 22, 2003
Page 6

Sincerely,

A handwritten signature in black ink, appearing to read "Larissa Paule-Carres". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Larissa Paule-Carres

cc: Joseph Ianno, Jr., Esq. (by facsimile)
Jack Scarola, Esq. (by facsimile)

Attachments

Exhibit B

KIRKLAND & ELLIS LLP

AND AFFILIATED PARTNERSHIPS

655 Fifteenth Street, N.W.
Washington, D.C. 20005

Larissa Paule-Carres
To Call Writer Directly:
(202) 879-5951
lpaule-carres@kirkland.com

202 879-5000
www.kirkland.com

Facsimile:
202 879-5200
Dir. Fax: (202) 879-5200

January 16, 2004

By Facsimile

Michael Brody
Jenner & Block, LLC
One IBM Plaza
Chicago, IL 60611-7603

Re: *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co.*

Dear Mike:

I am writing in response to the issues and questions pertaining to Morgan Stanley's privilege logs raised by your November 25, 2003 letter.

First, in paragraph number 3, you request clarification as to the origin of certain entries on Morgan Stanley's revised privilege log -- specifically numbers 243.1-243.15. These entries replace that which was previously numbered 243.

In response to CPH's request for additional identifying information regarding the listed persons, Morgan Stanley provides the following information: Florence Davis is a former attorney in the Law Division at Morgan Stanley, Ivan Freeman is an employee of Morgan Stanley's Institutional Securities Equity Division, John Crompton is an employee of Morgan Stanley's Institutional Securities Equity Division, Richard Rosenthal is an attorney in the Morgan Stanley Law Department; Dennis Jonelit is a former employee of Morgan Stanley's Institutional Securities Equity Division, Peter Vogelsang is an attorney in the Morgan Stanley Law Department; Rose-Anne Richter is an employee of Morgan Stanley's Law Division, Paul Loomis is an employee of Morgan Stanley's Law Division, Deborah DeCotis is an employee of Morgan Stanley's Strategy & Administration Division, Patrick de Saint-Aignon is an employee of Morgan Stanley's Finance Division, David Farrand (note that this was misspelled on the privilege log entry 243.09 as "Ferrand") is a former Managing Director in Morgan Stanley's Fixed Income Division, Mario Francescotti is an employee of Morgan Stanley's Institutional Securities Management Division, Clinton Gartin is an employee of Morgan Stanley's Investment Banking Division, Craig Goldberg is an employee of Morgan Stanley's Global Capital Markets - Joint Venture Division, Kenneth Janney is a former employee of Morgan Stanley's Fixed Income Division, William Kneisel is a former employee of Morgan Stanley's Global Capital Markets - Joint Venture Division; Robert Matschullat is a former employee of Morgan Stanley's Investment Banking Division; W. Carter McClelland is a former employee of Morgan Stanley's

Chicago

London

Los Angeles

New York

San Francisco

16div-005033

Michael Brody
January 16, 2004
Page 2

Law Division; Mark Seigel is a former employee of Morgan Stanley's Global Capital Markets-Joint Venture Division; Robert Scott is an employee of Morgan Stanley's Institutional Securities Management Division; Kenneth Wolfe is a former employee of Morgan Stanley's Global Capital Markets-Joint Venture Division; Richard Castellano is an employee of Morgan Stanley's Institutional Securities-Equity Division; Michael Janson is a former employee of Morgan Stanley's Global Capital Markets-Joint Venture Division; Candice Koederitz is an employee of Morgan Stanley's Investment Banking Division; Kimball Mayer is a former employee of Morgan Stanley's Global Capital Markets-Joint Venture Division.

You also seek further review and consideration of Morgan Stanley's privilege assertion with regard to entry number 243.13. Upon review, further discussion of this documents is unwarranted, as it is dated May 4, 1990, which pre-dates the time frame contained in CPH's document requests. Morgan Stanley will remove this document from its privilege log, but will not be producing it, given its non-responsiveness.

Second, in paragraph 5 of your letter, you seek additional information regarding certain entries on Morgan Stanley's privilege log. You state that entries 138 and 141 are inadequate in that, among other things, they do not identify a recipient. Based on the information in the slide, it is impossible to ascertain by whom this slide was received, if anyone at all. It is not inconceivable that the slide was never distributed, but was merely used for a presentation. It appears as if this is a presentation slide taken out of context -- removed from the remainder of the presentation or report, and as such it is difficult to respond to your questions. However, what is clear is that it contains information specifically referencing the legal advice and comments (relating to the Sunbeam transaction) of Peter Levin, an attorney at Davis, Polk & Wardwell representing Morgan Stanley. As such, this document is privileged and will not be produced.

You assert that entries 139, 140, 142 and 143 are inadequate in that they do not identify a recipient. In each instance, Morgan Stanley has identified that the document was created by attorneys at Morgan Stanley -- Soo-Mi Lee and Michael Zuckert -- and provided to the client. In this instance, the "client" is Morgan Stanley. The documents in question do not indicate a specific person to whom they were provided (perhaps it was to the Morgan Stanley Sunbeam file), but each document does reflect that it is a "Privileged And Confidential Communication Of Counsel." Similarly, none of these documents suggest that they were provided to anyone outside of Morgan Stanley. As such, these documents are privileged and will not be produced.

Third, in paragraph number 6, citing to paragraph 7 of Morgan Stanley's October 23rd letter, you dispute Morgan Stanley's position that documents originating from Morgan Stanley's Legal Department are privileged. In its revised privilege log provided to CPH on October 23rd, Morgan Stanley provided additional specific information for entries 138-143, 160-162, 167, 196, 198, 199, 208, 212 and 243.

Michael Brody
January 16, 2004
Page 3

Regarding CPH's further inquiry into various of Morgan Stanley's entries between numbers 266 and 307, we reiterate that those entries are contained in prior Morgan Stanley privilege logs and that the documents underlying those entries are not in Morgan Stanley's possession or otherwise available for review. That being said, an inspection of the entries enumerated by CPH reveals certain information which should remove any doubt as to Morgan Stanley's assertion of privilege:

Numbers 278, 303 and 305 specifically identify the following attorneys' involvement respectively: Michael Zuckert's, Monroe Sonnenborn's, and Bruce Fiodorek's. Numbers 266, 274, 281, 282, 284, 285, 294, 296-300, 304 and 307 came from the Legal Department or MS Counsel. It continues to be Morgan Stanley's position that documents created generally by the companies legal department, or located in its files were either created or sent to it for the purpose of the provision of legal advice, and as such are privileged. Further, many of these aforementioned entries (274, 285, 294, 299 and 307) which were located in an attorney's files, have handwritten notes on them which in and of themselves would be privileged, given the presumption that the handwritten notes are those of the custodian. And finally, several of the aforementioned entries (284, 285, 294 and 299) are referring to "Holder's Inquiry Reports" which, as discussed in the October 23rd letter and again below, are covered by the attorney client and work product privileges.

Fourth, in paragraph number 7 you seek the job affiliations of Joel Hoffman and David Chapnick. Mr. Hoffman is retired from and Mr. Chapnick is of counsel at Simpson, Thacher & Bartlett, LLP.

Fifth, in paragraph number 8, you seek further information regarding entry number 145. It appears as if that particular entry was incorrect. While it was supposed to represent a binder which was created by Morgan Stanley in house and outside attorneys, the entry as written did not reflect that. This has been corrected in the revised privilege log, which is included as Attachment A.

Sixth, in paragraph number 9, you again seek information regarding the Holder's Inquiry Report. While you question the privileged nature of reports containing "proprietary account information and material," claiming that to be merely confidential and covered by the Protective Order, you fail to acknowledge the fact that the data is *sought and arranged by attorneys in such a manner as to constitute both attorney-client information and work product*, and therefore protected from production. The specific searches and compilations manifested in these reports represent attorney thought and work product. These documents will not be produced, as they clearly fall within the parameters of attorney client and work product privileges.

Seventh, in paragraph number 10 you enumerate various issues pertaining to the Bates numbering of Morgan Stanley's redactions. I address your concerns seriatim in the chart

Michael Brody
January 16, 2004
Page 4

included as Attachment B. Additionally, Morgan Stanley has modified its Revised Privilege Log to reflect these changes. Regarding your inquiry into entry number 220, in paragraph 10(c), entry number 220 is one document, which happens to contain multiple redactions. Each redaction is explained by the same privilege description, i.e., that it is a letter from an expert to the client regarding invoices made in preparation for litigation. Given the fact that all of the redactions pertain to the same subject matter, and the fact that they all stemmed from the same single document, it is our position that such redactions were appropriately represented on Morgan Stanley's privilege log.

Eighth, in paragraph number 11, you seek additional information regarding various privilege log entries. Each is addressed below:

- Entries numbered 157, 170-182, 184-189 state in their privilege descriptions that they pertain to an "analysis of Sunbeam." In fact only entries numbered 157, 179-182, 184-189 (i.e., not 170-178) contain such language. Through inspection of those listed entries, it is clear that they represent documents created at the request of counsel, which pertain to Sunbeam's financials, liquidity and various litigations and settlements, and as such are privileged. Further explanation is unnecessary.
- Entries numbered 146, 148-50, 153, 191, 193-94, 201-02, 209-12, 214, 221-22 state in their privilege descriptions that they pertain to a settlement. These documents were all created by or at the request of counsel with regard to the loans issued by the bank group, which included Morgan Stanley Senior Funding, and the courses of action that MSSF had available to it having learned of Sunbeam's accounting issues and financial condition.
- Entry number 81 refers to the redacted faxed memoranda from Morgan Stanley's outside counsel to its in house attorney. The entry mentions a "tolling agreement" which refers to Morgan Stanley's tolling of potential claims which could be asserted in prior litigations relating to the Sunbeam/Coleman transaction.
- Entries numbers 219 and 224 refer to "recently executed documents," such as the Credit Agreements, which related to the Sunbeam/Coleman transaction.
- Entry number 226 is self-explanatory in that it is a redacted letter "from outside counsel to client [Morgan Stanley] providing legal advice regarding credit agreement," as related to the Sunbeam/Coleman transaction.
- The document captured by entry number 169 was written at the request of counsel to the Bank Group -- the entities, including Morgan Stanley Senior Funding, which were

Michael Brody
January 16, 2004
Page 5

responsible for loaning moneys to Sunbeam with regard to the Sunbeam/Coleman transaction.

Sincerely,

A handwritten signature in black ink, appearing to read "Larissa Paule-Carres", with a long horizontal flourish extending to the right.

Larissa Paule-Carres

cc: Jerold Solovy, Esq.
John Scarola, Esq.
Joseph Ianno, Esq.

Exhibit C

KIRKLAND & ELLIS LLP

AND AFFILIATED PARTNERSHIPS

655 Fifteenth Street, N.W.
Washington, D.C. 20005

202 879-5000

www.kirkland.com

Larissa Paule-Carres
To Call Writer Directly:
(202) 879-5951
lpaule-carres@kirkland.com

Facsimile:
202 879-5200

Dir. Fax: (202) 879-5200

March 1, 2004

By Facsimile

Michael Brody
Jenner & Block, LLC
One IBM Plaza
Chicago, IL 60611-7603

Re: *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co.*

Dear Mike:

I am writing in response to the issues and questions pertaining to Morgan Stanley's privilege logs raised by your February 6, 2004 letter.

First, in response to your request for information regarding the recipients of the redacted documents logged in entries 243.05, 243.10, 243.11 and 243.12 -- these documents were intended to be included in the discussion of entry number 243.13 contained in Morgan Stanley's January 16, 2004 letter to you. Review of these documents also reveals that further discussion or analysis is unwarranted, as they are dated July 1993, March 18, 1993, April 1990, and February 1992 respectively. Each of these documents pre-dates the time frame contained in CPH's document requests, therefore Morgan Stanley will remove the documents from its privilege log, but will not be producing them, given their non-responsiveness.

Furthermore, your February 6th letter misconstrued a comment made in my October 22nd letter -- in writing that all of the entries "stemmed from one document," I meant that 243-243.15 were all initially lumped into entry number 243. The various documents reflected in those log entries were not comprised in one single document (thus our willingness to break them out in the privilege log), and therefore, the removal from the log of those which documents which are date-non-responsive is appropriate. Additionally, as to your inquiry into entry 243, as distinguished from 243.01-243.15: entry number 243 remains on the log as it did in Morgan Stanley's initial privilege log, and entries 243.1-243.15 comprise the universe of documents that were originally contained in entry number 243. Those documents were in fact all one entry initially, but have been subsequently parsed out. For ease of understanding, Morgan Stanley will remove entry number 243 from its log.

Second, you accuse Morgan Stanley of failure "to provide basis for an assertion of privilege" for a series of entries which state in the privilege description "redacted documents,

Chicago

London

Los Angeles

New York

San Francisco

16div-005039

Michael Brody
March 1, 2004
Page 2

reflecting internal client matter information." I have repeatedly assured you that these documents contain "non-substantive client matter and billing information" -- there is nothing tricky or subversive here -- the redacted material is simply attorney billing matter numbers which are exempt from production as work product data. However, during the February 19th hearing, Mr. Scarola commented on the inappropriateness of documents redacted as non-responsive. Morgan Stanley immediately sent a letter regarding seeking an unredacted production of CPH's documents which were previously redacted as "irrelevant" or "nonresponsive," yet have not received CPH's response to date. Provided that you are willing to "unredact" those documents, Morgan Stanley will agree to produce unredacted versions of the documents logged as entries numbered 71, 73-74, 76, 79, 83-85, 90-105, 108-118, 121-130, 132, and 134-137.

Third, Morgan Stanley will re-review its privilege log and reassess any attachments that may have been logged with its parent document. A revised log reflecting the results of this analysis of any attachments will follow shortly under separate cover.

Fourth, you again seek information regarding the documents covered by Morgan Stanley's two prior privilege logs. And again, I respond that Kirkland & Ellis does not have any of the documents underlying those privilege logs. Other law firms have been involved in the representation of Morgan Stanley since the inception of the related litigations, and it is those firms which created the logs and possess the relevant documents. I never suggested the possibility that such documents have been destroyed. I simply do not have the documents to review or produce (were a production necessary). I suggested several months ago that you seek further information from other firms which represented Morgan Stanley; I renew that suggestion now.

Fifth, you assert that documents logged as entries 138-143 should be produced simply because they do not reveal the identity of recipients, and because the legend of "privileged & confidential" is simply insufficient to sustain the attorney-client and/or attorney work product privilege. We disagree. As I mentioned in prior communications, it is clear that the documents contain information and legal advice stemming from Morgan Stanley counsel. There is no indication that such information was disseminated beyond the client/company, and therefore such materials are privileged, and will not be produced.

Sixth, in response to your inquiry regarding documents authored by Houlihan Lokey Howard & Zurkin, or Policano & Manzo, Morgan Stanley again states that these were consultants hired by Morgan Stanley's counsel, Simpson Thatcher & Bartlett, for the purpose of aiding counsel with issues relevant to anticipated litigation. As such, these documents are in fact protected by the work product privilege. While most of the documents do not specifically identify their recipients, it is clear that both consultants were operating pursuant to instructions from Morgan Stanley's counsel, and that both consultants were providing their work product to Morgan Stanley's counsel.

Michael Brody
March 1, 2004
Page 3

Seventh, as I explained above, Kirkland and Ellis LLP does not have access to the documents underlying the privilege logs which contain the entries recorded as numbers 266, 274, 281-82, 284-85, 296-300, 304, and 307, and are therefore unable to provide any additional insight into these documents. Again, I suggested that you seek further information from the other firms which represented Morgan Stanley. However, Morgan Stanley once again asserts that documents numbered 266, 274, 281, 282, 284, 285, 294, 296-300, 304 and 307 came from the Legal Department or MS Counsel, and therefore were either created or sent to it for the purpose of the provision of legal advice, and as such are privileged. Additionally, as mentioned in our January 16th letter, many of these aforementioned entries (274, 285, 294, 299 and 307) which were located in an attorney's files contain handwritten notes on them which in and of themselves would be privileged, or reference "Holder's Inquiry Reports" which, as discussed below, are covered by the attorney client and work product privileges (see entries 284, 285, 294 and 299).

Eighth, in response to your inquiry as to the authors and recipients of the binder of draft offering memoranda and bank documents, Morgan Stanley has decided to produce to CPH a redacted version of the binder. The newly redacted documents will appear on the forthcoming privilege log as entries 145.01, *et seq.*

Ninth, you again seek information regarding the Holder's Inquiry Report. The data contained in these reports is sought by Morgan Stanley attorneys with regard to the company's ongoing cases. Morgan Stanley counsel use this data not for business purposes, but specifically for the purpose of aiding the company and its outside counsel in litigation preparation. As stated in prior communications, the information is sought and arranged by attorneys in such a manner as to constitute both attorney-client information and work product, and therefore protected from production. These documents will not be produced.

Tenth, Morgan Stanley will modify its log to reflect a more specific subject matter of the identified documents logged as entries 219 and 224.

Eleventh, you assert that Morgan Stanley has waived its right to assert the "common interest" privilege with regard to all documents shared among the bank group. As an initial matter, there is no "common interest privilege." There is, however, an attorney-work-product privilege, which was legitimately asserted by Morgan Stanley with regard to the subject documents. A review of past correspondence reveals that upon CPH's inquiry into the assertion of that privilege, Morgan Stanley explained that it had withheld such documents on the basis that they were created by or at the request of the counsel to the entity known as the Bank Group -- an entity comprised of First Union, Bank of America, and Morgan Stanley Senior Funding. The "common interest" principle does not in and of itself serve to protect the documents from production -- it merely allows for the various parties with the common interest to each make the attorney-work-product assertion. This is exactly what Morgan Stanley has done. I believed that

Michael Brody
March 1, 2004
Page 4

this was made clear in response to your prior inquiries; however, Morgan Stanley will modify its log by adding the "common interest principle" to relevant entries in order to delineate those attorney-work-product claims that are subject to the principle.

As I mentioned above, Morgan Stanley will endeavor to re-review any documents which may be deemed attachments in an effort to either log the document separately, or enhance the current privilege description to reflect information regarding the attachment. This document will be provided to CPH under separate cover.

Sincerely,

A handwritten signature in black ink, appearing to read "Larissa Paule-Carres", with a long horizontal flourish extending to the right.

Larissa Paule-Carres

cc: Jerold Solovy, Esq.
John Scarola, Esq.
Joseph Ianno, Esq.

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH, COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

_____/ CASE NO. CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

_____/

**AGREED ORDER ON COLEMAN (PARENT) HOLDINGS INC.'S MOTION TO
COMPEL CONSENT TO THIRD-PARTY PRODUCTION OF RESPONSIVE E-MAILS**

THIS CAUSE having come to be considered upon Coleman (Parent) Holdings, Inc.'s ("CPH") motion to compel consent to third-party production of responsive e-mails, the parties having reached agreement, it is hereby

ORDERED and ADJUDGED:

1. Morgan Stanley & Co., Inc. and Morgan Stanley Senior Funding, Inc. (collectively, "Morgan Stanley") will obtain from Bloomberg, Inc., all e-mail, including any e-mail that can be restored from backup, of each of the Morgan Stanley employees or former employees identified in Response Nos. 1, 2, 3, and 5 of MS & Co.'s Responses to CPH's First Set of Interrogatories and Response Nos. 1, 4, 5, and 6 of MSSF's Responses to Defendants' First Set of Interrogatories. Herein, that set of e-mails shall be called "Bloomberg e-mail." Morgan Stanley will advise counsel for CPH of the volume of Bloomberg e-mail provided by Bloomberg.

2. Morgan Stanley attorneys shall review for responsiveness and privilege all Bloomberg e-mail that (a) is dated from February 15, 1998 through April 15, 1998, and/or (b) without regard to date, contains any of the following terms:

AA
Andersen
Anderson
Bornstein
Camper
Coleman
Colman
Comfort Letter
Dunlap
Early Buy
Fannin
Goudis
Grill
Harlow
Kersh
Laser
MacAndrews
MAFCO
Maher
Nesbitt
Pearlman
Perelman
Perlman
Press Release
Scott
SOC
Sunbeam
Synergies
Uzzi

The term search shall be neither case-sensitive nor whole word sensitive.

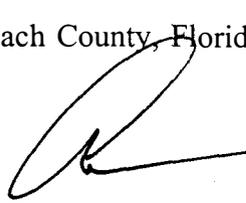
3. ~~Non-privileged~~ Bloomberg e-mails responsive to any CPH or MAFCO document request will be produced by ~~May 14, 2004~~. **REQUESTED IMMEDIATELY AND NON-PRIVILEGED E-MAILS WILL BE WITHIN 25 DAYS OF MORGAN STANLEY'S RECEIPT OF THOSE E-MAILS.**

4. Any materials withheld on privilege grounds shall be listed on a privilege log in accordance with this Court's previous orders.

5. An authorized Morgan Stanley representative will certify compliance with Paragraphs 1 through 4 of this Order.

6. Each side shall bear its own costs.

DONE AND ORDERED at West Palm Beach County, Florida, this 16 day of April, 2004.



ELIZABETH T. MAASS
Circuit Court Judge

copies furnished to:

Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, Esq.
655 15th Street, NW, Suite 1200
Washington DC 20005

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, IL 60611

1071024 v1

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH, COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

_____/ CASE NO. CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

**AGREED ORDER ON COLEMAN (PARENT) HOLDINGS INC.'S MOTION TO
COMPEL CONCERNING E-MAILS AND OTHER ELECTRONIC DOCUMENTS**

THIS CAUSE having come to be considered upon Coleman (Parent) Holdings, Inc.'s ("CPH") motion to compel concerning e-mails and other electronic documents, the parties having reached agreement, it is hereby

ORDERED and ADJUDGED:

1. Morgan Stanley & Co., Inc. and Morgan Stanley Senior Funding, Inc. (collectively, "Morgan Stanley") will search the oldest full backup that exists for e-mail of each of the Morgan Stanley employees or former employees identified in Response Nos. 1, 2, 3, and 5 of MS & Co.'s Responses to CPH's First Set of Interrogatories and Response Nos. 1, 4, 5, and 6 of MSSF's Responses to Defendants' First Set of Interrogatories.

2. Morgan Stanley shall provide to its attorneys for responsiveness and privilege review all e-mail that (a) is dated from February 15, 1998 through April 15, 1998, and/or (b), without regard to date, contains any of the following terms:

AA
Andersen
Anderson
Bornstein
Camper
Coleman
Colman
Comfort Letter
Dunlap
Early Buy
Fannin
Goudis
Grill
Harlow
Kersh
Laser
MacAndrews
MAFCO
Maher
Nesbitt
Pearlman
Perelman
Perlman
Press Release
Scott
SOC
Sunbeam
Synergies
Uzzi

The term search shall be neither case-sensitive nor whole word sensitive.

3. Non-privileged e-mails responsive to any CPH or MAFCO document request will be produced by May 14, 2004.

4. Any materials withheld on privilege grounds shall be listed on a privilege log in accordance with this Court's previous orders.

5. An authorized Morgan Stanley representative will certify compliance with Paragraphs 1 through 4 of this Order, and will identify the date of the backup utilized for each employee or former employee for whom email is being produced.

6. This Order is without prejudice to CPH's right to seek restoration and production of certain electronic documents and also is without prejudice to Morgan Stanley's right to seek restoration and production of e-mail.

7. Each side shall bear its own costs.

DONE AND ORDERED at West Palm Beach County, Florida, this ____ day of April, 2004.

SIGNED AND DATED
APR 16 2004
ELIZABETH T. MAASS
Circuit Court Judge
JUDGE ELIZABETH T. MAASS

copies furnished to:

Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, Esq.
655 15th Street, NW, Suite 1200
Washington DC 20005

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, IL 60611

1070345 v2

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

CASE NO. CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

ORDER AND NOTICE OF HEARING

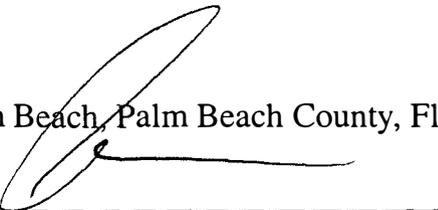
This cause having come before the Court, it is

ORDERED AND ADJUDGED that hearing on Defendant's Motion for Protective
Order Regarding the Use of Confidential Personnel Evaluations is hereby set for

April 22, 2004, at 8:45 a.m.

at the West Palm Beach Courthouse, Room 11A, 205 N Dixie Hwy, WPB, FL. Any
counsel may appear by speaker telephone upon prior arrangement with the Court's Judicial
Assistant, Nancy Ross, at (561) 355-6050.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 19
day of April, 2004.



ELIZABETH T. MAASS
Circuit Court Judge

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

_____ /

CASE NO. CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

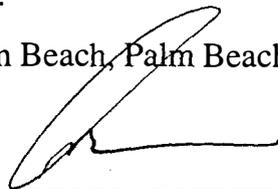
_____ /

**ORDER ON COLEMAN (PARENT) HOLDINGS INC.'S MOTION TO COMPEL
ANSWERS TO INTERROGATORIES**

THIS CAUSE came before the Court April 16, 2004 on Coleman (Parent) Holdings Inc.'s Motion to Compel Answers to Interrogatories, with all counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that Coleman (Parent) Holdings Inc.'s Motion to Compel Answers to Interrogatories is Denied.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 19 day of April, 2004.



ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:

Joseph Ianno, Jr., Esq.

222 Lakeview Ave., Suite 1400

West Palm Beach, FL 33401

Thomas D. Yannucci

655 15th Street, NW, Suite 1200

Washington DC 20005

John Scarola, Esq.

2139 Palm Beach Lakes Blvd.

West Palm Beach, FL 33409

Jerold S. Solovy, Esq.

One IBM Plaza, Suite 4400

Chicago, Il 60611

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

CASE NO. CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

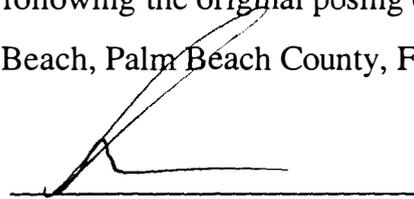
MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

**ORDER ON COLEMAN (PARENT) HOLDINGS INC.'S MOTION TO COMPEL
ANSWERS TO DEPOSITION QUESTIONS AND FOR OTHER RELIEF**

THIS CAUSE came before the Court April 16, 2004 on Coleman (Parent) Holdings Inc.'s Motion to Compel Answers to Deposition Questions and for Other Relief, with all counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that the Motion is Granted, in part. The deposition of Mr. Smith shall be reconvened. Plaintiff's questioning shall be limited to that question posed at page 183, line 16 of his February 24, 2004 deposition and any related or follow up questions. Further, Mr. Smith may be asked about any non-privileged portions of his conversation with his lawyer which took place following the original posing of the question.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 19
day of April, 2004.


ELIZABETH T. MAASS
Circuit Court Judge

16div-005052

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

CASE NO. CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

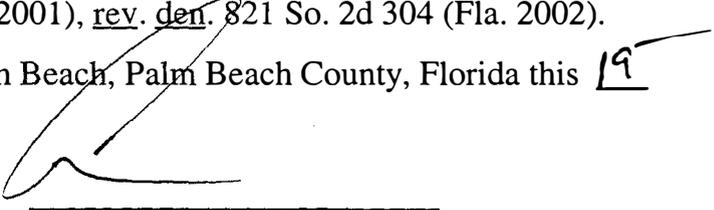
MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

**ORDER ON COLEMAN (PARENT) HOLDINGS INC.'S MOTION TO COMPEL
SUPPLEMENTATION OF PRIVILEGE LOG AND OTHER RELIEF**

THIS CAUSE came before the Court April 16, 2004 on Coleman (Parent) Holdings Inc.'s Motion to Compel Supplementation of Privilege Log and Other Relief, with all counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that the Motion is Granted, in part. Morgan Stanley & Co., Inc., and Morgan Stanley Senior Funding, Inc., shall, within 20 days, serve their supplemental privilege log for the entries included in the Motion, which shall include using good faith efforts to provide all information required by TIG Ins. Corp. of America v. Johnson, 799 So. 2d 339, 341 (Fla. 4th DCA 2001), rev. den. 821 So. 2d 304 (Fla. 2002).

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 19 day of April, 2004.


ELIZABETH T. MAASS
Circuit Court Judge

16div-005053

copies furnished:

Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci
655 15th Street, NW, Suite 1200
Washington DC 20005

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, Il 60611

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

CASE NO. CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

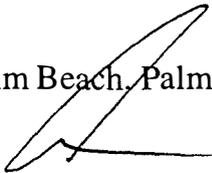
MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

**ORDER ON DEFENDANT MORGAN STANLEY & CO. INC.'S MOTION TO
COMPEL PRODUCTION OF DOCUMENTS RESPONSIVE TO MORGAN
STANLEY'S FOURTH REQUEST FOR PRODUCTION**

THIS CAUSE came before the Court April 16, 2004 on Defendant Morgan Stanley & Co. Inc.'s Motion to Compel Production of Documents Responsive to Morgan Stanley's Fourth Request for Production, with all counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that the Motion is Granted, in part. Within 19 days Plaintiff shall produce for inspection and copying all items specifically referred to in the Motion, without prejudice to Defendant's right to call up the remainder of Plaintiff's objections for hearing.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 19th day of April, 2004.



ELIZABETH T. MAASS
Circuit Court Judge

16div-005055

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

CASE NO. CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

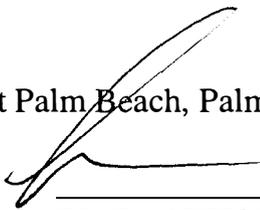
MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

ORDER SPECIALLY RE-SETTING HEARING

THIS CAUSE having come before the Court, it is hereby

ORDERED AND ADJUDGED that the case management conference and, time permitting, hearing on all outstanding motions set June 4, 2004 is canceled and is specially re-set before the Honorable Elizabeth T. Maass on June 11, 2004, at 1:30 p.m., in Courtroom 11A, 205 N. Dixie Hwy. WPB. FL 33401. This is a specially set hearing which shall be limited to 2 hours.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 19
day of April, 2004.



ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

00001

1 IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

2 CASE NO. 2003-CA-005045 AI

3
4 COLEMAN (PARENT) HOLDINGS, INC.,
5 Plaintiff,

6 vs.
7 MORGAN STANLEY & COMPANY, INC.
8 Defendant.

9
10
11
12
13

14
15 TRANSCRIPT OF THE PROCEEDINGS BEFORE
16 THE HONORABLE ELIZABETH MAASS

17
18
19

20 Palm Beach County Courthouse
Courtroom 11A
West Palm Beach, Florida
21 April 22, 2004
8:51 a.m. - 9:01 a.m.
22 Reported by: Lisa D. Danforth
23
24
25

00002

1 APPEARANCES:

2
3 SEARCY, DENNEY, SCAROLA, BARNHART & SHIPLEY, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33401
4 Counsel for the Plaintiff
BY: JACK SCAROLA, ESQUIRE

5
6
7
8 CARLTON, FIELDS, WARD, EMMANUEL,
SMITH & CUTLER, P.A.
Esperante
9 222 Lakeview Avenue, Suite 1400
West Palm Beach, Florida 33401-6149
10 Counsel for the Defendant
BY: MICHAEL K. WINSTON, ESQUIRE

11
12

16div-005057

13 KIRKLAND AND ELLIS
655 15th Street N.W., Suite 1200
14 Washington, D.C. 20005
Counsel for the Defendant
15 BY: THOMAS A. CLARE, ESQUIRE
(Via Telephone)

16
17
18
19
20
21
22
23
24
25

00003

1 BE IT REMEMBERED that the foregoing
2 proceedings were had before the HONORABLE ELIZABETH
3 MAASS, in the Palm Beach County Courthouse, Courtroom
4 11A, West Palm Beach, Florida, on April 22, 2004,
5 starting at 8:51 a.m., with appearances as hereinabove
6 noted, to wit:

7 - - - -

8 THE COURT: Hi. This is Judge Maass. Who do
9 I have on the phone?

10 MR. CLARE: Good morning, Your Honor. It's
11 Tom Clare from the law firm of Kirkland and Ellis
12 in Washington, D.C. on behalf of Morgan Stanley.

13 THE COURT: Okay, Mr. Clare, I have you on
14 speakerphone in the courtroom in Coleman vs.
15 Morgan Stanley. This is defendant's motion for
16 protective order regarding confidential personnel
17 evaluations.

18 MR. CLARE: That's correct.

19 THE COURT: You-all might want to pull those
20 podiums forward just a little bit more.

21 Did you-all work out anything or not?

22 MR. CLARE: Your Honor, we haven't made much
23 progress. On Monday morning I wrote a letter to
24 counsel for Coleman (Parent) and said that we were
25 interested in exploring the proposal that

00004

1 Mr. Scarola had made last Friday during the case
2 management conference but wanted some additional
3 information about how it would work in the real
4 world, the nuts and bolts of it, and did not get a
5 response until last night when I heard back that
6 they would not be submitting a proposed order at
7 this morning's hearing.

8 So I'm afraid that I still don't know what
9 their position is and whether they're still
10 planning to live with the proposal that they
11 proposed last Friday afternoon.

16div-005058

12 THE COURT: Is there a proposal on the table
13 or not?

14 MR. SCAROLA: There isn't, Your Honor, and I
15 would like to explain why.

16 Let me first of all --

17 THE COURT: Well, we don't have to know why.

18 MR. SCAROLA: Okay.

19 THE COURT: The question is, do we think
20 there will be a proposal, or do we need to argue
21 again the merits of the motion?

22 MR. SCAROLA: We need to address the merits
23 of the motion.

24 THE COURT: All right. What did you want to
25 say in support of the motion?

00005

1 MR. CLARE: Well, Your Honor, we went through
2 last Friday my concerns and our client's
3 substantial concern about the damage to the
4 evaluation process that would be incurred if
5 employees were shown documents in their
6 depositions that they had never seen before in the
7 course of their evaluations. We talked about the
8 360 degree review process that Morgan Stanley uses
9 and how the anonymity and confidentiality of the
10 people doing the evaluations is critical to
11 maintaining the integrity of the process and also
12 to prevent undue embarrassment and harassment and
13 invasion of privacy of these witnesses.

14 We do not believe there is any legitimate
15 discovery purpose that can be obtained by showing
16 these documents to these witnesses --

17 THE COURT: Let me ask --

18 MR. CLARE: -- when in fact they have never
19 seen the documents before, they did not write
20 them, they have not even heard these comments
21 before, but at a minimum, there can be no
22 discovery purpose in disclosing the identities of
23 the anonymous reviewers who provided that
24 information.

25 We have never stated and do not contend that

00006

1 they cannot question these witnesses about the
2 information that is contained in these raw
3 evaluation materials and we are not asking the
4 Court to limit in any way the scope of questioning
5 at the depositions. Our concern is really the
6 vehicle with which they choose to do it and the
7 harm that would accrue if they show these
8 documents to witnesses where they would not have
9 seen the documents before.

10 THE COURT: Let me ask you this. Is the
11 concern really just showing the physical document
12 to the deponent?

13 MR. CLARE: Yes, it is.

16div-005059

14 THE COURT: Okay.

15 MR. CLARE: In a form that is not redacted to
16 redact the identity of the reviewer. And on these
17 forms, there are dozens and dozens and dozens of
18 entries that have absolutely nothing to do with
19 Sunbeam, and so at a minimum, the non-Sunbeam
20 entries ought to be redacted, and even for the
21 Sunbeam entries, the identities of the authors
22 ought to be redacted to prevent this harm.
23 There's been no identification of a legitimate
24 discovery purpose that could be served from not
25 doing that, at a minimum.

00007

1 THE COURT: What's the response?

2 MR. SCAROLA: Your Honor, let me present the
3 Court with a hypothetical which I think will
4 illustrate the concerns that we have.

5 Let's assume that an individual employee who
6 worked on the Sunbeam transaction is expressly
7 criticized either by someone beneath him, a
8 lateral employee, or someone above him for having
9 done a bad job in the due diligence that Morgan
10 Stanley was obliged to do in connection with this
11 transaction or having done a bad job in
12 communicating appropriate information or gathering
13 appropriate information regarding this
14 transaction. Clearly, that kind of information
15 within the internal documents of Morgan Stanley,
16 who is accused of having intentionally or
17 negligently failed to appropriately gather and
18 communicate information to us in this transaction,
19 would be highly probative.

20 I understand the concerns that Morgan Stanley
21 has about preserving the integrity of their
22 internal evaluative process. It's a legitimate
23 business concern, but it is not a legitimate
24 business concern that is recognized by a legal
25 privilege, nor is it a legitimate business concern

00008

1 that overrides the concern that we have.

2 THE COURT: But this is what I'm trying to
3 figure out. Why would you have to show the
4 deponent the document as opposed to simply asking
5 the deponent isn't it true that your supervisor
6 criticized you for the quality of your work on
7 this job?

8 MR. SCAROLA: Well, clearly, clearly, there
9 is a value in front of the jury in being able to
10 substantiate the fact that the question that we
11 are asking has a factual basis and that indeed the
12 criticism was made. And when I initially made the
13 proposal before Your Honor, I was focussing in
14 terms of the discovery process and not
15 anticipating what's going to happen at trial.

16div-005060

16 Clearly, at trial, it is going to be both
17 appropriate and necessary to disclose the
18 documents themselves to demonstrate that those
19 criticisms were indeed made.

20 And so that Your Honor knows that we're not
21 talking about this in a vacuum and hypothetically,
22 I want to hand you a copy of an example.

23 THE COURT: Right. I remember seeing them,
24 but I still am trying to -- First of all, are
25 these discovery depositions? We're not talking

00009

1 about trial testimony, correct?

2 MR. SCAROLA: Well, Your Honor, we are
3 talking about trial testimony, because we are
4 talking about videotape depositions being taken
5 for purposes of presentation at trial of witnesses
6 who are out of state and whose attendance cannot
7 be compelled.

8 THE COURT: Let me ask you this.

9 Even if we were in trial, if they have never
10 seen this item before, why would we be showing it
11 to the witness?

12 MR. CLARE: And --

13 THE COURT: I don't understand how we get
14 there.

15 MR. CLARE: I don't mean to interrupt --

16 THE COURT: Yes, you do.

17 MR. CLARE: -- but the purpose for which
18 Mr. Scarola has identified wanting to use the
19 documents at trial, these documents, and the point
20 that he's trying to make that they exist and that
21 these points were written can be proven
22 independently.

23 THE COURT: Sure. I understand that. That's
24 why I'm wondering how -- At trial, if the
25 witnesses testify that they've never seen these

00010

1 documents, why would we be showing them at trial
2 to the witnesses?

3 MR. SCAROLA: Well, my point is not that
4 they're going to be shown to the witness at trial.
5 My point is that if the concern on the part of
6 Morgan Stanley which justifies a restriction on
7 the use of the documents is that we don't want
8 these criticisms to be made public because it's
9 going to impair our evaluative process if the
10 criticisms are made public, they eventually are
11 going to be made public in any circumstance.

12 THE COURT: Sure. But isn't it much less
13 likely that the individual employee who was
14 criticized is going to marry up what the criticism
15 was or who it came from if it comes out in trial
16 1,500 miles from where the employee is than if
17 they're sitting in a deposition and you're giving

16div-005061

18 them a copy of the evaluation?
19 MR. SCAROLA: It's my understanding that
20 Morgan Stanley's concern is not with regard to
21 this individual, but rather to preserve the
22 integrity of the system that they have of
23 360 degree evaluation, because in fact, most of
24 these individuals, more than half of them, are no
25 longer employed by Morgan Stanley.

00011

1 THE COURT: I have to cut you off, because
2 we're about out of time.

3 What's the response, and what is your
4 concern; is it for the individual employees or
5 simply the integrity of the process as a whole?

6 MR. CLARE: It is absolutely for the concern
7 of the individuals, that they will be confronted
8 with comments that they have never seen before in
9 a litigation environment by their coworkers, their
10 colleagues, their superiors, even their former
11 coworkers. So we're concerned about both.

12 And I just want to respond briefly to one
13 point Mr. Scarola made.

14 Our concern is not that this information
15 never be made public in a trial setting. We have
16 suggested that they can show these same documents
17 to the authors of the comments in order to
18 substantiate them, to explore in as much detail as
19 they want what they meant when they wrote these
20 comments. That is more than adequate in order to
21 prove and to use it in a legitimate way without --
22 with the proper foundation as opposed to showing
23 them to a witness who never would have seen it
24 before where the only purpose would be to
25 intimidate and harass a witness into agreeing with

00012

1 or commenting on a document that they had not seen
2 or heard before.

3 THE COURT: Okay. We need to stop here.
4 It's his motion, he goes first and last. I'll
5 take it under advisement.

6 MR. SCAROLA: Thank you very much, Your
7 Honor.

8 THE COURT: Thank you, sir.

9 MR. CLARE: Thank you, Your Honor. I
10 appreciate you allowing me to appear by telephone.

11 MR. SCAROLA: Your Honor, I have just a blank
12 order.

13 THE COURT: That's okay, but I will take
14 envelops.

15 Thank you, sir. Bye-bye.

16 MR. CLARE: Bye-bye.

17 (Proceedings concluded at 9:01 a.m.)
18
19

16div-005062

20
21
22
23
24
25

00013

1 C E R T I F I C A T E

2
3 THE STATE OF FLORIDA)
)

4 COUNTY OF PALM BEACH)
5

6 I, Lisa D. Danforth, Registered Professional
7 Reporter, Certified Real-Time Reporter, do hereby
8 certify that I was authorized to and did report the
9 foregoing proceedings at the time and place herein
10 stated, and that the foregoing is a true and correct
11 transcription of my stenotype notes taken during said
12 proceedings.

13
14 IN WITNESS WHEREOF, I have hereunto set my hand
15 this 23rd day of March, 2004.

16
17
18
19

LISA D. DANFORTH, RPR, CRR

20
21
22
23
24
25

00001

1 IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

2 CASE NO. 2003-CA-005045 AI

3
4 COLEMAN (PARENT) HOLDINGS, INC.,

5 Plaintiff,

6 vs.

7 MORGAN STANLEY & COMPANY, INC.

8 Defendant.

9

10

11

12

13

14

TRANSCRIPT OF THE PROCEEDINGS BEFORE
THE HONORABLE ELIZABETH MAASS

15

16

17

18

19

Palm Beach County Courthouse

20

Courtroom 11A

West Palm Beach, Florida

21

April 22, 2004

8:51 a.m. - 9:01 a.m.

22

Reported by: Lisa D. Danforth

23

24

25

00002

1 APPEARANCES:

2

SEARCY, DENNEY, SCAROLA, BARNHART & SHIPLEY, P.A.

3

2139 Palm Beach Lakes Boulevard

West Palm Beach, Florida 33401

4

Counsel for the Plaintiff

BY: JACK SCAROLA, ESQUIRE

5

6

7

CARLTON, FIELDS, WARD, EMMANUEL,

8

SMITH & CUTLER, P.A.

Esperante

9

222 Lakeview Avenue, Suite 1400

West Palm Beach, Florida 33401-6149

10

Counsel for the Defendant

BY: MICHAEL K. WINSTON, ESQUIRE

11

12

16div-005064

13 KIRKLAND AND ELLIS
655 15th Street N.W., Suite 1200
14 Washington, D.C. 20005
Counsel for the Defendant
15 BY: THOMAS A. CLARE, ESQUIRE
(Via Telephone)

16
17
18
19
20
21
22
23
24
25

00003

1 BE IT REMEMBERED that the foregoing
2 proceedings were had before the HONORABLE ELIZABETH
3 MAASS, in the Palm Beach County Courthouse, Courtroom
4 11A, West Palm Beach, Florida, on April 22, 2004,
5 starting at 8:51 a.m., with appearances as hereinabove
6 noted, to wit:

7 - - - -

8 THE COURT: Hi. This is Judge Maass. Who do
9 I have on the phone?

10 MR. CLARE: Good morning, Your Honor. It's
11 Tom Clare from the law firm of Kirkland and Ellis
12 in Washington, D.C. on behalf of Morgan Stanley.

13 THE COURT: Okay, Mr. Clare, I have you on
14 speakerphone in the courtroom in Coleman vs.
15 Morgan Stanley. This is defendant's motion for
16 protective order regarding confidential personnel
17 evaluations.

18 MR. CLARE: That's correct.

19 THE COURT: You-all might want to pull those
20 podiums forward just a little bit more.

21 Did you-all work out anything or not?

22 MR. CLARE: Your Honor, we haven't made much
23 progress. On Monday morning I wrote a letter to
24 counsel for Coleman (Parent) and said that we were
25 interested in exploring the proposal that

00004

1 Mr. Scarola had made last Friday during the case
2 management conference but wanted some additional
3 information about how it would work in the real
4 world, the nuts and bolts of it, and did not get a
5 response until last night when I heard back that
6 they would not be submitting a proposed order at
7 this morning's hearing.

8 So I'm afraid that I still don't know what
9 their position is and whether they're still
10 planning to live with the proposal that they
11 proposed last Friday afternoon.

12 THE COURT: Is there a proposal on the table
13 or not?

14 MR. SCAROLA: There isn't, Your Honor, and I
15 would like to explain why.

16 Let me first of all --

17 THE COURT: Well, we don't have to know why.

18 MR. SCAROLA: Okay.

19 THE COURT: The question is, do we think
20 there will be a proposal, or do we need to argue
21 again the merits of the motion?

22 MR. SCAROLA: We need to address the merits
23 of the motion.

24 THE COURT: All right. What did you want to
25 say in support of the motion?

00005

1 MR. CLARE: Well, Your Honor, we went through
2 last Friday my concerns and our client's
3 substantial concern about the damage to the
4 evaluation process that would be incurred if
5 employees were shown documents in their
6 depositions that they had never seen before in the
7 course of their evaluations. We talked about the
8 360 degree review process that Morgan Stanley uses
9 and how the anonymity and confidentiality of the
10 people doing the evaluations is critical to
11 maintaining the integrity of the process and also
12 to prevent undue embarrassment and harassment and
13 invasion of privacy of these witnesses.

14 We do not believe there is any legitimate
15 discovery purpose that can be obtained by showing
16 these documents to these witnesses --

17 THE COURT: Let me ask --

18 MR. CLARE: -- when in fact they have never
19 seen the documents before, they did not write
20 them, they have not even heard these comments
21 before, but at a minimum, there can be no
22 discovery purpose in disclosing the identities of
23 the anonymous reviewers who provided that
24 information.

25 We have never stated and do not contend that

00006

1 they cannot question these witnesses about the
2 information that is contained in these raw
3 evaluation materials and we are not asking the
4 Court to limit in any way the scope of questioning
5 at the depositions. Our concern is really the
6 vehicle with which they choose to do it and the
7 harm that would accrue if they show these
8 documents to witnesses where they would not have
9 seen the documents before.

10 THE COURT: Let me ask you this. Is the
11 concern really just showing the physical document
12 to the deponent?

13 MR. CLARE: Yes, it is.

14 THE COURT: Okay.

15 MR. CLARE: In a form that is not redacted to
16 redact the identity of the reviewer. And on these
17 forms, there are dozens and dozens and dozens of
18 entries that have absolutely nothing to do with
19 Sunbeam, and so at a minimum, the non-Sunbeam
20 entries ought to be redacted, and even for the
21 Sunbeam entries, the identities of the authors
22 ought to be redacted to prevent this harm.
23 There's been no identification of a legitimate
24 discovery purpose that could be served from not
25 doing that, at a minimum.

00007

1 THE COURT: What's the response?

2 MR. SCAROLA: Your Honor, let me present the
3 Court with a hypothetical which I think will
4 illustrate the concerns that we have.

5 Let's assume that an individual employee who
6 worked on the Sunbeam transaction is expressly
7 criticized either by someone beneath him, a
8 lateral employee, or someone above him for having
9 done a bad job in the due diligence that Morgan
10 Stanley was obliged to do in connection with this
11 transaction or having done a bad job in
12 communicating appropriate information or gathering
13 appropriate information regarding this
14 transaction. Clearly, that kind of information
15 within the internal documents of Morgan Stanley,
16 who is accused of having intentionally or
17 negligently failed to appropriately gather and
18 communicate information to us in this transaction,
19 would be highly probative.

20 I understand the concerns that Morgan Stanley
21 has about preserving the integrity of their
22 internal evaluative process. It's a legitimate
23 business concern, but it is not a legitimate
24 business concern that is recognized by a legal
25 privilege, nor is it a legitimate business concern

00008

1 that overrides the concern that we have.

2 THE COURT: But this is what I'm trying to
3 figure out. Why would you have to show the
4 deponent the document as opposed to simply asking
5 the deponent isn't it true that your supervisor
6 criticized you for the quality of your work on
7 this job?

8 MR. SCAROLA: Well, clearly, clearly, there
9 is a value in front of the jury in being able to
10 substantiate the fact that the question that we
11 are asking has a factual basis and that indeed the
12 criticism was made. And when I initially made the
13 proposal before Your Honor, I was focussing in
14 terms of the discovery process and not
15 anticipating what's going to happen at trial.

16 Clearly, at trial, it is going to be both
17 appropriate and necessary to disclose the
18 documents themselves to demonstrate that those
19 criticisms were indeed made.

20 And so that Your Honor knows that we're not
21 talking about this in a vacuum and hypothetically,
22 I want to hand you a copy of an example.

23 THE COURT: Right. I remember seeing them,
24 but I still am trying to -- First of all, are
25 these discovery depositions? We're not talking

00009

1 about trial testimony, correct?

2 MR. SCAROLA: Well, Your Honor, we are
3 talking about trial testimony, because we are
4 talking about videotape depositions being taken
5 for purposes of presentation at trial of witnesses
6 who are out of state and whose attendance cannot
7 be compelled.

8 THE COURT: Let me ask you this.

9 Even if we were in trial, if they have never
10 seen this item before, why would we be showing it
11 to the witness?

12 MR. CLARE: And --

13 THE COURT: I don't understand how we get
14 there.

15 MR. CLARE: I don't mean to interrupt --

16 THE COURT: Yes, you do.

17 MR. CLARE: -- but the purpose for which
18 Mr. Scarola has identified wanting to use the
19 documents at trial, these documents, and the point
20 that he's trying to make that they exist and that
21 these points were written can be proven
22 independently.

23 THE COURT: Sure. I understand that. That's
24 why I'm wondering how -- At trial, if the
25 witnesses testify that they've never seen these

00010

1 documents, why would we be showing them at trial
2 to the witnesses?

3 MR. SCAROLA: Well, my point is not that
4 they're going to be shown to the witness at trial.
5 My point is that if the concern on the part of
6 Morgan Stanley which justifies a restriction on
7 the use of the documents is that we don't want
8 these criticisms to be made public because it's
9 going to impair our evaluative process if the
10 criticisms are made public, they eventually are
11 going to be made public in any circumstance.

12 THE COURT: Sure. But isn't it much less
13 likely that the individual employee who was
14 criticized is going to marry up what the criticism
15 was or who it came from if it comes out in trial
16 1,500 miles from where the employee is than if
17 they're sitting in a deposition and you're giving

18 them a copy of the evaluation?
19 MR. SCAROLA: It's my understanding that
20 Morgan Stanley's concern is not with regard to
21 this individual, but rather to preserve the
22 integrity of the system that they have of
23 360 degree evaluation, because in fact, most of
24 these individuals, more than half of them, are no
25 longer employed by Morgan Stanley.

00011

1 THE COURT: I have to cut you off, because
2 we're about out of time.

3 What's the response, and what is your
4 concern; is it for the individual employees or
5 simply the integrity of the process as a whole?

6 MR. CLARE: It is absolutely for the concern
7 of the individuals, that they will be confronted
8 with comments that they have never seen before in
9 a litigation environment by their coworkers, their
10 colleagues, their superiors, even their former
11 coworkers. So we're concerned about both.

12 And I just want to respond briefly to one
13 point Mr. Scarola made.

14 Our concern is not that this information
15 never be made public in a trial setting. We have
16 suggested that they can show these same documents
17 to the authors of the comments in order to
18 substantiate them, to explore in as much detail as
19 they want what they meant when they wrote these
20 comments. That is more than adequate in order to
21 prove and to use it in a legitimate way without --
22 with the proper foundation as opposed to showing
23 them to a witness who never would have seen it
24 before where the only purpose would be to
25 intimidate and harass a witness into agreeing with

00012

1 or commenting on a document that they had not seen
2 or heard before.

3 THE COURT: Okay. We need to stop here.
4 It's his motion, he goes first and last. I'll
5 take it under advisement.

6 MR. SCAROLA: Thank you very much, Your
7 Honor.

8 THE COURT: Thank you, sir.

9 MR. CLARE: Thank you, Your Honor. I
10 appreciate you allowing me to appear by telephone.

11 MR. SCAROLA: Your Honor, I have just a blank
12 order.

13 THE COURT: That's okay, but I will take
14 envelops.

15 Thank you, sir. Bye-bye.

16 MR. CLARE: Bye-bye.

17 (Proceedings concluded at 9:01 a.m.)
18
19

20
21
22
23
24
25
00013
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATE

THE STATE OF FLORIDA)
)
COUNTY OF PALM BEACH)

I, Lisa D. Danforth, Registered Professional Reporter, Certified Real-Time Reporter, do hereby certify that I was authorized to and did report the foregoing proceedings at the time and place herein stated, and that the foregoing is a true and correct transcription of my stenotype notes taken during said proceedings.

IN WITNESS WHEREOF, I have hereunto set my hand this 23rd day of March, 2004.

LISA D. DANFORTH, RPR, CRR

#230580/smk

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

CASE NO.: CA 03-5045 AI

Plaintiffs,

vs.
MORGAN STANLEY & CO., INC.,

Defendant,

MORGAN STANLEY SENIOR FUNDING,
INC.,

CASE NO. CA 03-5165 AI

Plaintiff,

vs.
MACANDREWS & FORBES HOLDINGS,
INC.,

Defendant,

NOTICE OF HEARING
(Special Setting)

YOU ARE HEREBY NOTIFIED that the undersigned has called up for hearing the following:

DATE: April 30, 2004

TIME: 9:00 a.m..

JUDGE: Hon. Elizabeth T. Maass

PLACE: Palm Beach County Courthouse, Room #11.1208, 205 North Dixie Highway,
West Palm Beach, FL 33401

SPECIFIC MATTERS TO BE HEARD:

- (1) COLEMAN (PARENT) HOLDINGS INC.'S MOTION FOR REMOVAL OF CONFIDENTIALITY DESIGNATIONS (filed under seal)

Coleman (Parent) Holdings, Inc. vs Morgan Stanley & Company
Case No : 2003 CA 005045 AI
Notice of Hearing

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by
Fax and Federal Express to all Counsel on the attached list, this 23rd day of April,
2004.



JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 684-5816
Attorney for Coleman (Parent) Holdings Inc.
and MacAndrews & Forbes Holdings, Inc.

Coleman (Parent) Holdings, Inc. vs Morgan Stanley & Company
Case No.: 2003 CA 005045 AJ
Notice of Hearing

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 400
West Palm Beach, FL 33401

Thomas D. Yarnucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block LLP
One IBM Plaza
Suite 400
Chicago, IL 60611

#2305: 0/smk

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

CASE NO: 2003 CA 005045 AI

Plaintiffs,

vs.
MORC AN STANLEY & CO., INC.

Defendant.

MORC AN STANLEY SENIOR FUNDING,
INC.,

Plaintiff,

CASE NO. CA 03-5165 AI

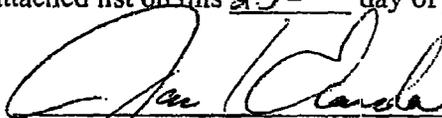
vs.
MACANDREWS & FORBES HOLDINGS,
INC.,

Defendant,

NOTICE OF FILING PLEADING UNDER SEAL

Plaintiff, COLEMAN (PARENT) HOLDINGS INC., hereby gives Notice of the filing of
Coleman (Parent) Holdings Inc.'s Motion for Removal of Confidentiality Designations, filed
under Seal on this date.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by
Fax and Federal Express to all counsel on the attached list on this 23rd day of April,
2004.



JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 684-5815
Attorneys for Coleman (Parent) Holdings, Inc.
and MacAndrews & Forbes Holdings, Inc.

Coleman (Parent) Holdings Inc. vs Morgan Stanley & Company
Notice Of Filing Pleading Under Seal
Case No.: 2003 CA 005045 AI

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block, LLC
One IBM Plaza
Suite 4100
Chicago, IL 60611

#230580/smk

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

CASE NO: 2003 CA 005045 AI

Plaintiffs,

vs.

MORGAN STANLEY & CO., INC.

Defendant.

MORGAN STANLEY SENIOR FUNDING,
INC.,

Plaintiff,

CASE NO. CA 03-5165 AI

vs.

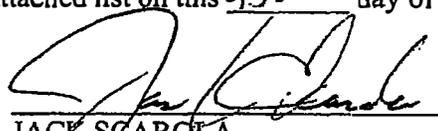
MACANDREWS & FORBES HOLDINGS,
INC.,

Defendant,

NOTICE OF FILING PLEADING UNDER SEAL

Plaintiff, COLEMAN (PARENT) HOLDINGS INC., hereby gives Notice of the filing of
Coleman (Parent) Holdings Inc.'s Reply in Support of Its Motion for a Rule to Show Cause, filed
under Seal on this date.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by
Fax and Federal Express to all counsel on the attached list on this 23rd day of April,
2004.



JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 684-5815
Attorneys for Coleman (Parent) Holdings, Inc.
and MacAndrews & Forbes Holdings, Inc.

Coleman (Parent) Holdings Inc. vs Morgan Stanley & Company
Notice Of Filing Pleading Under Seal
Case No.: 2003 CA 005045 AI

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block, LLC
One IBM Plaza
Suite 4400
Chicago, IL 60611

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO., INC.,

Defendant.

_____/

MORGAN STANLEY SENIOR FUNDING, INC.,

Plaintiff,

vs.

MACANDREWS & FORBES HOLDINGS, INC., CASE NO: CA 03-5165 AI

Defendant.

_____/

NOTICE OF VIDEOTAPED DEPOSITION

PLEASE TAKE NOTICE that Defendant Morgan Stanley & Company Incorporated will take the videotaped deposition of Joseph Page, pursuant to Florida Rules of Civil Procedure 1.280 and 1.310. The oral examination will take place beginning on April 27, 2004, at ~~9:00 a.m.~~ **1:00p.m.** and continue from day to day until completed at the offices of Orbach, Huff & Suarez, 1901 Avenue of the Stars, Suite 575 Los Angeles, CA 90067. The deposition will be taken before a person authorized to administer oaths and recorded by stenographic and videographic means. The video operator will be Esquire Deposition Services of 6222 Wilshire Blvd Los Angeles, California 90048. The witness is instructed to bring all books, papers, and other things in his or

her possession or under its control relevant to this lawsuit (and not previously produced in discovery) to the examination.

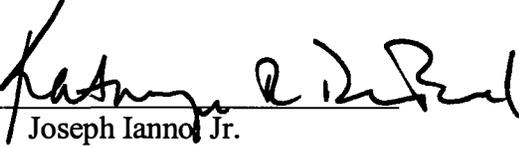
Dated: April 23, 2004

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar No. 618349)
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

Michael K. Kellogg
Mark C. Hansen
James M. Webster
Rebecca A. Beynon
**KELLOGG, HUBER, HANSEN,
TODD & EVANS P.L.L.C.**
Sumner Square
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
Telephone: (202) 326-7900
Facsimile: (202) 326-7999
(*Pro Hac Vice* Pending)

**Counsel for Morgan Stanley & Co.
Incorporated and Morgan Stanley Senior
Funding**

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
E-mail: jianno@carltonfields.com

BY: 
Joseph Ianno Jr.
Florida Bar No. 655351

CERTIFICATE OF SERVICE

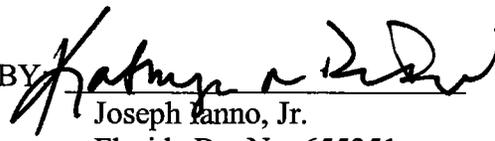
I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this 23rd day of April, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar No. 618349)
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

Michael K. Kellogg
Mark C. Hansen
James M. Webster
Rebecca A. Beynon
**KELLOGG, HUBER, HANSEN,
TODD & EVANS P.L.L.C.**
Sumner Square
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
Telephone: (202) 326-7900
Facsimile: (202) 326-7999
(*Pro Hac Vice* Pending)

**Counsel for Morgan Stanley & Co.
Incorporated and Morgan Stanley
Senior Funding**

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
E-mail: jianno@carltonfields.com

BY 
Joseph Janno, Jr.
Florida Bar No. 655351

SERVICE LIST

Jack Scarola
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy
Michael Brody
JENNER & BLOCK, LLC
One IBM Plaza, Suite 400
Chicago, IL 60611

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

MORGAN STANLEY SENIOR FUNDING, INC., CASE NO. CA-03-5165 AI
Plaintiff(s),

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

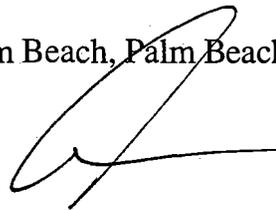
**ORDER ON DEFENDANT, MORGAN STANLEY & CO. INC.'S MOTION FOR
PROTECTIVE ORDER REGARDING THE USE OF CONFIDENTIAL
PERSONNEL EVALUATIONS**

THIS CAUSE came before the Court on April 22, 2004 on Defendant Morgan Stanley & Co. Inc.'s Motion for Protective Order Regarding the Use of Confidential Personnel Evaluations, with all counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that the motion is granted, in part, and denied, in part. Plaintiff shall not present the confidential personnel evaluations to a deponent unless the deponent first testifies that he or she has previously been made privy to the confidential personnel evaluation and its underlying data, unless the deponent was the author, nor shall

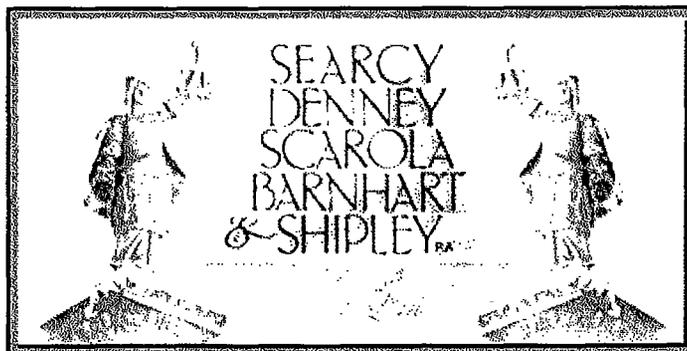
counsel, in the form of a question, imply information comes from the raw data of an employee's confidential personnel evaluation.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 28
day of April, 2004.



ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
JOSEPH IANNO, JR., ESQ., 222 Lakeview Avenue, Suite 1400, West Palm Beach, FL 33401
THOMAS D. YANNUCCI, ESQ., 655 15th Street, NW, Suite 1200, Washington DC 20005
JOHN SCAROLA, ESQ., 2139 Palm Beach Lakes Boulevard, West Palm Beach, FL 33409
JEROLD S. SOLOVY, ESQ., One IBM Plaza, Suite 4400, Chicago, IL 60611

**FACSIMILE COVER SHEET**

TO: Thomas Yannucci
Kirkland and Ellis

FAX NUMBER: (202) 879-5200

TELEPHONE NUMBER: (202) 879-5000

FROM: JACK SCAROLA, ESQUIRE

FAX NUMBER: (561) 684-5816

DATE: April 23, 2004

NUMBER OF PAGES: 67
(including cover sheet)

REMARKS: Coleman (Parent) Holdings v. Morgan Stanley –
Attached please find the Supplemental Appendix to Coleman
(Parent) Holdings Inc.'s Reply in Support of Its Motion for a Rule
to Show Cause

Hard Copy to Follow No Hard Copy to Follow

The information contained in this facsimile message is attorney privileged and confidential information intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this communication is strictly prohibited and will be considered as a tortious interference in our confidential business relationships. If you have received this communication in error, please immediately notify us by telephone and return the original message to us at the above address via the U.S. Postal Service. Thank you.

RE: 029986-230580
Searcy Denney Scarola Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard, West Palm Beach, FL 33409
Phone: (561) 686-6300 Toll free: (800) 780-8607

16div-005084

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH, COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff(s).

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

CASE NO. CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s).

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

**SUPPLEMENTAL APPENDIX TO COLEMAN (PARENT) HOLDINGS INC.'S
REPLY IN SUPPORT OF ITS MOTION FOR A RULE TO SHOW CAUSE**

Jerold S. Solovy
Ronald L. Marmer
Jeffrey T. Shaw
JENNER & BLOCK LLP
One BM Plaza
Chicago, IL 60611
(312) 222-9350

Jack Scarola
SEARCY, DENNEY, SCAROLA,
BARNHART & SHIPLEY, P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33401
(561) 686-6300

Attorneys for Appellee Coleman (Parent) Holdings Inc.

TABLE OF CONTENTS

	Tab
Transcript of Proceedings, March 19, 2004.....	1
Letter from D. Connell to T. Clare, June 17, 2003	2
Protective Order Entered in <i>CPH v. Andersen</i> , October 16, 2001	3
Letter from T. Clare to M. Brody, July 15, 2003	4
Letter from M. Brody to T. Clare, July 17, 2003	5
Letter from M. Brody to T. Clare, July 22, 2003	6
Letter from K. DeBord to M. Brody, July 24, 2003	7
Order Denying Motion to Transfer in New Morgan Stanley Litigation, April 5, 2004	8
CPH's Interrogatories to MS&Co. and MSSF, March 19, 2004	9
CPH's Interrogatories to MSSF, March 19, 2004.....	10

4hrg0319.txt

0001

1 IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
 2 IN AND FOR PALM BEACH COUNTY, FLORIDA
 3 CASE NO. 2003-CA-005045 AI
 4 COLEMAN (PARENT) HOLDINGS, INC.,
 5 Plaintiff,
 6 vs.
 7 MORGAN STANLEY & COMPANY, INC.
 8 Defendant.

9
10
11
12
13

- - -

14

TRANSCRIPT OF THE PROCEEDINGS BEFORE
 THE HONORABLE ELIZABETH MAASS

- - -

15
16
17
18
19

Palm Beach County Courthouse
 West Palm Beach, Florida
 March 19, 2004
 3:27 p.m. - 4:33 p.m.
 Reported by: Lisa D. Danforth

20
21
22
23
24
25

0002

1 APPEARANCES:

2

SEARCY, DENNEY, SCAROLA, BARNHART & SHIPLEY, P.A.
 2139 Palm Beach Lakes Boulevard
 West Palm Beach, Florida 33401
 Counsel for the Plaintiff
 BY: JACK SCAROLA, ESQUIRE

5
6

7

JENNER & BLOCK
 One IBM Plaza
 Chicago, IL 60611-7603
 Co-Counsel for the Plaintiff
 BY: JEROLD S. SOLOVY, ESQUIRE
 JEFFREY SHAW, ESQUIRE
 RONALD L. MARMER, ESQUIRE

10
11

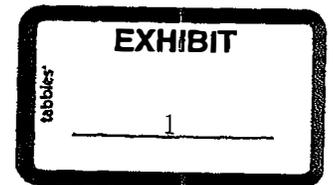
12

CARLTON, FIELDS, WARD, EMMANUEL,
 SMITH & CUTLER, P.A.
 Esperante
 222 Lakeview Avenue, Suite 1400
 West Palm Beach, Florida 33401-6149
 Counsel for the Defendant
 BY: JOSEPH IANNO, JR., ESQUIRE

15
16

17

KIRKLAND AND ELLIS
 655 15th Street N.W., Suite 1200
 Washington, D.C. 20005



4hrg0319.txt

18 Counsel for the Defendant
19 BY: THOMAS A. CLARE, ESQUIRE
20 KEVIN DRISCOLL, ESQUIRE

21 KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
22 Sumner Square
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
23 Co-Counsel for the Defendant
BY: MARK C. HANSEN, ESQUIRE
24 REBECCA A. BEYNON, ESQUIRE
25

0003

1 BE IT REMEMBERED that the foregoing
2 proceedings were had before the HONORABLE ELIZABETH
3 MASS, in the Palm Beach County Courthouse, west Palm
4 Beach, Florida, on March 19, 2004, starting at
5 3:27 p.m., with appearances as hereinabove noted,
6 to wit:

7
8 THE COURT: Good afternoon. Have a seat.
9 This is Coleman and Morgan Stanley. It's a case
10 management conference and hearing on outstanding
11 motions.

12 I was given a proposed agreed order
13 concerning the pretrial schedule. Is that agreed
14 to by everybody?

15 MR. IANNO: Yes, Your Honor.

16 THE COURT: Any objection to my simply
17 signing it then?

18 MR. SCAROLA: I don't believe so, Your Honor.

19 THE COURT: Anybody have --

20 MR. SCAROLA: I do have --

21 THE COURT: -- envelops? Thank you.

22 MR. SCAROLA: I have envelops, extra copies.

23 THE COURT: Great.

24 MR. SCAROLA: And to start off on the right
25 foot, this is another agreed order on one of the

0004

1 matters that was pending before Your Honor.

2 THE COURT: Okay. Where do we want to go
3 next?

4 MR. IANNO: Judge, Joe Ianno here on behalf
5 of Morgan Stanley. We have a number of motions.

6 THE COURT: I hope not too many, because I
7 haven't looked at a number, but go ahead.

8 MR. IANNO: Well, I think the easiest way to
9 do this now, as far as I'm concerned, and I don't
10 know Mr. Scarola's position on this, but we have
11 some outstanding pro hac motions that the
12 plaintiffs object to.

13 THE COURT: Right.

14 MR. IANNO: I thought those would be
15 relatively quick, we could get those out of the
16 way. We have some discovery issues that need to
17 be addressed so we can get to the merits of this
18 case, and then we have another motion that was
19 filed by the plaintiffs that we sent our
20 opposition on yesterday that was filed by the
21 plaintiffs last Friday.

22 THE COURT: That's the motion for order to
23 show cause?

24 MR. IANNO: That's correct.

4hrg0319.txt

25 MR. SCAROLA: That's correct.
0005

1 THE COURT: I would agree that's probably the
2 most time-intensive of the ones we have today.
3 Do we want to do the other ones first and then
4 come back to that?

5 MR. SCAROLA: Your Honor, the only objection
6 that I have to the order suggested by Mr. Ianno is
7 that we believe there is a relationship between
8 the motions for admission pro hac vice and the
9 issues that are raised in the contempt petition.
10 It may be easier for Your Honor to defer that.

11 THE COURT: So you would prefer to have those
12 heard together?

13 MR. SCAROLA: Yes.

14 THE COURT: Any objection to that, to doing
15 the discovery issue first?

16 MR. IANNO: No, Your Honor.

17 THE COURT: Okay. Which one do we want to do
18 first on the discovery issues then?

19 MR. SCAROLA: I would suggest, Your Honor,
20 that we address the issue with regard to e-mails.

21 THE COURT: That's fine.

22 MR. SCAROLA: Let me just summarize for the
23 Court briefly what I believe the points of
24 contention are and how we suggest that those
25 points of contention be resolved.

0006
1 THE COURT: And so I'm clear, which specific
2 motion or motions are we now arguing?

3 MR. SCAROLA: To refer to them by correct
4 title, it is Coleman (Parent) Holdings' motion to
5 permit Kroll access to files.

6 THE COURT: I have something called Coleman
7 (Parent) Holdings' motion for permission to have
8 third party retrieve --

9 MR. SCAROLA: Yes, that's the one.

10 THE COURT: That's the one? Okay.

11 MR. SCAROLA: Thank you, yes. In my index
12 it's referred to differently. I apologize for
13 that.

14 THE COURT: That's fine.

15 MR. SCAROLA: And then Morgan Stanley's
16 motion to compel electronic documents in
17 electronic form.

18 MR. CLARE: I'm not sure that these two
19 issues necessarily are joined together. That's
20 the way that --

21 THE COURT: Okay. What's the name of your
22 motion?

23 MR. CLARE: Our motion is Morgan Stanley's
24 motion to compel production of electronic
25 documents pursuant to the parties' agreement.

0007
1 THE COURT: I know I've seen that one.
2 I don't have it in front of me, so let me find it
3 again.

4 MR. IANNO: Your Honor, according to the
5 cross reference I have, it's tab Roman numeral VI
6 I think 3 in your notebook that we provided to the
7 Court.

8 THE COURT: I have more than one notebook.

9 MR. IANNO: The one that was provided on

4hrq0319.txt

10 Friday, which I think is labeled just --
11 MR. SCAROLA: Do you have this one
12 (indicating)?
13 THE COURT: I do.
14 MR. SCAROLA: Okay. If I have that one, what
15 we are looking at is tab --
16 THE COURT: well, the one I have that looks
17 like that is your appendix to the motion for order
18 to show cause.
19 MR. SCAROLA: Then you don't have this one.
20 THE COURT: Then I don't have that one.
21 MR. SCAROLA: No.
22 THE COURT: But I know I've seen the motion
23 you're talking about.
24 MR. IANNO: If I may, Your Honor.
25 THE COURT: Sure.

0008

1 MR. IANNO: It's going to be in the other
2 notebook that we provided; the first one, correct.
3 And according to that, it's --
4 THE COURT: I don't have Roman numerals.
5 MR. CLARE: Maybe it's just tab 3.
6 MR. SCAROLA: I can provide the Court with
7 extra copies right here, Your Honor.
8 This is the motion for permission
9 (indicating). This is a blank order with regard
10 to that motion that I might as well give you at
11 the same time (indicating).
12 THE COURT: Okay. This one I have, so let
13 me -- Hold on. Yes, this one I have, so let me
14 give it back.
15 MR. SCAROLA: Okay. This is the motion to
16 compel production pursuant to written agreement;
17 this is the response to that motion; and this is
18 the blank order with regard to that motion
19 (indicating).
20 THE COURT: All right. I'll leave blank
21 orders up here.
22 Great. Thank you.
23 MR. SCAROLA: You're welcome.
24 THE COURT: And as I understand it, we first
25 want to argue -- If you don't mind, what I'd like

0009

1 to do first is the motion to compel pursuant to
2 the parties' written agreement.
3 MR. SCAROLA: That's fine; although, we'll be
4 responding really in a manner that will cover both
5 issues, but --
6 THE COURT: That's fine.
7 And I guess the real question I had when I
8 had that letter, I'll be honest with you, I didn't
9 read it as an agreement. I mean, I didn't read it
10 as an agreement that electronic documents would be
11 produced in electronic form. I just read it as
12 sort of a statement that we expect in this
13 litigation some will.
14 MR. CLARE: That some will.
15 THE COURT: Yeah.
16 MR. CLARE: The context of the discussion and
17 the way that that letter agreement came about was
18 last summer, Morgan Stanley made its initial
19 production of documents. In that initial
20 production of documents, there were a number of

4hrq0319.txt

21 non-e-mail electronic documents, things like word
22 processing files and spreadsheets and PowerPoint
23 presentations that had been printed out and
24 produced to Coleman (Parent).

25 THE COURT: Okay.

0010

1 MR. CLARE: And that generated a discovery
2 dispute, a series of correspondence where Coleman
3 (Parent) insisted that we go back and produce
4 electronic versions of the same documents that we
5 had produced, to which we said that's fine, but
6 let us generate a protocol for electronic
7 documents in this case. It was part of a broader
8 agreement designed to minimize costs and share the
9 costs. That was the genesis of this agreement.

10 And pursuant to that agreement, Morgan
11 Stanley has, for the past six months, each time it
12 has provided a document production, provided hard
13 copy documents and electronic documents that
14 existed in electronic form.

15 And so we were dismayed to learn earlier this
16 year, a month or so ago, that there were
17 electronic documents that had been produced to us
18 in hard copy form that had not been produced to us
19 electronically.

20 So it is not only the parties' written
21 agreement that we are moving pursuant, but it has
22 been the course of dealing in discovery in this
23 case that electronic documents will be produced in
24 addition to hard copy form.

25 THE COURT: Okay. Let's assume that my

0011

1 interpretation of the Rules of Judicial
2 Administration, if there's a stipulation between
3 counsel about the procedures to be used in a case,
4 if it's not made in open court, it has to be in
5 writing and signed by the party to be charged. So
6 let's assume I would not adopt an argument that
7 course of dealing would establish something that
8 the Rules of Civil Procedure don't. What's the
9 response though to the argument that this letter
10 was a written stipulation?

11 MR. SCAROLA: That Your Honor's initial
12 impression is absolutely accurate.

13 Let me state for the record first, Jack
14 Scarola on behalf of Coleman (Parent) Holding.
15 With me is Mr. Solovy, Mr. Marmer and Mr. Shaw.
16 I will be at least initially speaking on behalf of
17 Coleman (Parent).

18 Your Honor I think is absolutely correct that
19 the letter does not constitute a written agreement
20 to produce documents in both written form and
21 electronic form. We produced these documents in
22 written form, and as we have described in our
23 response to the Court, the task of attempting to
24 locate the electronic forms of these documents for
25 purposes of allowing the defense to search for the

0012

1 metadata that may be included in those electronic
2 documents, because of the manner in which the
3 electronic documents are stored, is
4 extraordinarily burdensome. We don't have a way
5 by which to easily locate them unless there is a

4hrq0319.txt

6 specifically identifiable number or a very unique
7 term included within the document. Our ability to
8 search the electronic data is limited and would
9 require us to perform a very burdensome task.

10 THE COURT: Let me stop you. And you-all are
11 going to help me, but I don't want to confuse two
12 legal issues. The first legal issue I'm looking
13 at is, was there a stipulation between the parties
14 on this point. So maybe the second legal issue
15 we're looking at is, is there a request from
16 defendants outstanding that absent even this
17 agreement would have compelled this production.

18 MR. SCAROLA: I think the answer to that is
19 no.

20 THE COURT: And I think what you're arguing
21 is the second.

22 MR. SCAROLA: I think the answer to that is
23 no, Your Honor. The defendants are traveling on
24 the contention that there is an agreement that
25 requires us to produce the electronic documents in

0013
1 the absence of a specific request for the
2 production of the documents in electronic form.

3 THE COURT: So then am I correct whether or
4 not it was burdensome to comply with it is simply
5 not an issue for me?

6 MR. SCAROLA: I am mixing the two arguments.

7 THE COURT: I don't know if you are. I just
8 want to make sure --

9 MR. SCAROLA: I am.

10 THE COURT: -- that I understand what your
11 contention is.

12 MR. SCAROLA: I acknowledge that I am.

13 The issue before the Court, the narrow issue
14 before the Court is whether the letter that Your
15 Honor has seen constitutes an agreement to produce
16 documents in both written and electronic form.
17 Your Honor's read that document. We believe you
18 are correct in interpreting it as you have. There
19 is simply no such agreement. And if that's the
20 issue that we're looking at, the narrow issue
21 we're looking at, that's my entire argument with
22 regard to that issue.

23 THE COURT: Okay. What's the response?

24 MR. CLARE: Well, if this were simply a
25 letter that was exchanged in the course of a

0014
1 discovery dispute, I might agree with Mr. Scarola,
2 but this was a document that was drafted by
3 Coleman (Parent)'s lawyers on their letterhead and
4 then counter-signed by my firm after extensive
5 negotiations over the terms. The signature that
6 appears on the second page, Ms. Zhonette Brown, is
7 an associate at our firm who entered into this
8 agreement on behalf of Morgan Stanley after this
9 protracted dispute about how this was going to be
10 done. And the whole purpose of this was to avoid
11 the double standard that is now being hoisted upon
12 us of demanding documents that had already been
13 produced in hard copy form in electronic form.

14 So we believe we had done what was necessary
15 to accept the representation of our opposing
16 counsel in a counter-signed legal document

4hrg0319.txt

17 which -- or counter-signed letter, excuse me, that
18 would memorialize how the parties would proceed in
19 discovery going forward. It also covers things
20 like the division of costs for discovery, and it
21 was of sufficient importance in moment that the
22 two firms counter-signed the document.

23 So in addition to the agreement, if I've not
24 persuaded Your Honor that this should be elevated
25 to something beyond a mere discovery letter,

0015

1 shouldn't the same standard apply in terms of what
2 requests were made of Morgan Stanley to produce
3 these same documents? It was no less burdensome
4 for us to comply with the letter we received from
5 Jenner & Block in September that said not good
6 enough, produce these in electronic form.

7 The concept of metadata which Mr. Scarola
8 referred to is one which his client has taken full
9 advantage of with regard to our production. At
10 the depositions of several witnesses in this case,
11 they have confronted the witness with documents,
12 exhibits, that have the metadata, and from that,
13 they've been able to ask questions about who was
14 the author, how much time was spent on various
15 tasks, and all we're asking for is the benefit of
16 the bargain that we thought we had in the
17 counter-signed document, and moreover, on top of
18 that, this is the benefit of the bargain that we
19 gave them by subsequently producing electronic
20 documents in electronic form.

21 MR. SCAROLA: I --

22 THE COURT: I think --

23 MR. SCAROLA: I'm sorry.

24 THE COURT: It's his motion; he goes first
25 and last.

0016

1 MR. SCAROLA: Sure.

2 THE COURT: First of all, I think the latter
3 argument is really what I said I simply can't
4 accept, which is absent a written agreement that
5 complies with the rule of judicial administration,
6 I don't do the inquiry on whether there was some
7 agreement between the attorneys or not, I think
8 precisely for this reason, that the Court
9 shouldn't be put in a position of taking oral
10 testimony from attorneys and deciding what it was
11 they agreed to.

12 With that said, I'll be honest with you, even
13 in context, I don't read the August 19, 2003
14 letter as establishing this -- as a stipulation
15 between attorneys, at least not as defendant is
16 now reading it.

17 MR. CLARE: Would Your Honor be amenable to a
18 motion not to be filed today, but to a subsequent
19 motion if we were to be able to point to an
20 outstanding request where the request itself
21 propounded upon the plaintiff --

22 THE COURT: I don't rule in a vacuum, and I
23 certainly don't entertain oral motions for
24 rehearing, so you'd have to file whatever you
25 think is appropriate.

0017

1

MR. CLARE: Okay. We will do that.

4hrg0319.txt

2 THE COURT: I can tell you that I rarely get
3 mad at what attorneys file. I may dismiss it, but
4 I don't get mad.

5 One thing, and I apologize -- actually, two
6 things would be very helpful to me on these case
7 management conferences and are really stupid; one
8 is if you-all could get together and put together
9 for me a notebook of all the pleadings. The files
10 are voluminous. We don't have people who put nice
11 little tabs on things like you guys have, and if I
12 need to go through and see exactly what legal
13 issues are framed, it's very difficult. If I had
14 simply a pleading notebook, it would be very, very
15 helpful to me.

16 The other thing that would be helpful, if you
17 all could bring little name cards and put them up
18 by each of you, that way, after we've done this a
19 couple times, I'll know each of you.

20 MR. SCAROLA: Scarola.

21 THE COURT: And even the name of your client
22 would be really nice. Okay? And then I'll know
23 and I'm not going to be under a misapprehension of
24 who each of you is or who your client is.

25 MR. SCAROLA: Certainly, Your Honor.

0018

1 THE COURT: I appreciate that. Thank you
2 very much.

3 MR. SCAROLA: The next is Coleman (Parent)
4 Holdings' motion for permission to have third
5 party retrieve Morgan Stanley e-mail --

6 THE COURT: Yes.

7 MR. SCAROLA: -- and other responsive
8 documents, which I had spilled over to begin
9 discussing with Your Honor.

10 THE COURT: Okay. Go ahead.

11 MR. SCAROLA: And let me tell Your Honor what
12 the current proposal is that is on the table with
13 regard to these issues, because obviously, there
14 are going to be requests for electronic production
15 and there are going to be arguments about the
16 extent to which it is burdensome and how carefully
17 parties did or did not review the electronic data
18 available to them in order to make the production
19 requested.

20 what we have proposed is that a third party,
21 and we have identified one that we are familiar
22 with and in whom we have confidence, although we
23 are not wed to that particular third-party
24 forensic firm, computer forensic firm, we're open
25 to suggestions if there's somebody else, and

0019

1 there's been some suggestion and discussion today
2 that there may be somebody else in whom the
3 defendants have greater confidence or who has
4 greater familiarity with the defendant's computer
5 systems, and as long as we're satisfied that
6 they're an independent third party, we really
7 don't care who it is.

8 Our suggestion is this. We both want and
9 need electronic discovery. We think that a third
10 party ought to be designated to conduct the review
11 of the electronic records of both firms.

12 One of the issues of contention was who is

4hrg0319.txt

13 going to bear the expense of having that third
14 party come in to conduct the review, and to the
15 extent that there is a disparity between the costs
16 involved in conducting the electronic review of
17 plaintiffs as compared to conducting the
18 electronic review of defendants, the issue was
19 will we bear our own burden initially or will we
20 bear the burden of opposing parties initially.

21 What we suggest to the Court to resolve those
22 concerns is that the third party perform the tasks
23 for both parties, both plaintiff and defendants, a
24 total bill will be presented for all of the work
25 performed, the bill gets divided in the middle,

0020

1 the cost of electronic discovery is divided
2 without regard to how much was spent reviewing our
3 records and how much was spent reviewing their
4 records, and quite frankly, we have every reason
5 to believe it's going to be far less costly to
6 examine ours than to examine theirs.

7 THE COURT: Okay. Let me stop you, because I
8 want to again make sure I understand where we are
9 procedurally.

10 what you're talking about is sort of a global
11 suggestion to deal with retrieval of electronic
12 documents in this case.

13 MR. SCAROLA: That's correct.

14 THE COURT: Okay.

15 MR. SCAROLA: And there are outstanding
16 requests.

17 THE COURT: That was what I was going to back
18 into.

19 MR. SCAROLA: Yes.

20 THE COURT: Because to generate --

21 MR. SCAROLA: To place this in procedural
22 context --

23 THE COURT: I'm not aware of a procedure that
24 would allow me to force you guys into some sort of
25 an accommodation like this, so really, I have two

0021

1 questions, I guess one for each of you, and don't
2 answer them quite yet.

3 First is, are defendants even amenable to
4 something like this or not? I mean, are you
5 amenable to a proposal and we're simply fighting
6 over its terms, or are you guys simply not
7 amenable to a proposal?

8 And then, Mr. Scarola, what I need to know
9 from you is sort of have I jumped -- am I really
10 looking at some sort of motion to compel them to
11 respond to a production request for e-mails
12 generated prior to 1997, or is there some specific
13 discovery request I'm now looking at they have
14 objected to, and you're saying, look, Judge, this
15 information is available, and we're willing to
16 bear the cost or at least a portion of it to
17 retrieve it?

18 MR. SCAROLA: I think the latter is correct,
19 Your Honor.

20 THE COURT: Okay.

21 MR. SCAROLA: There have been requests for
22 the production of e-mails, and we'll focus
23 specifically on them, because that's the primary

4hrg0319.txt

24 concern.
25 THE COURT: Okay.
0022

1 MR. SCAROLA: Electronic records of e-mails
2 that have been exchanged.
3 THE COURT: Do we agree that there has been
4 such a request outstanding?
5 MR. CLARE: There has been a request
6 outstanding.
7 THE COURT: And have you-all objected?
8 MR. CLARE: From the very beginning.
9 THE COURT: And what's the basis of the
10 objection?
11 MR. CLARE: We objected to the breadth of the
12 request that they're making. And to answer Your
13 Honor's question directly -- and the burden that
14 is associated with it -- that given the particular
15 e-mail back-up tapes that are in existence five,
16 six years after the fact of these transactions,
17 that the scope of the e-mail request that they are
18 seeking is improperly and unduly burdensome given
19 the enormous costs that would be required, given
20 the fact that the time period for which we have
21 back-up tapes postdates the events by several
22 years.
23 And so what Your Honor will remember --
24 To put the e-mail dispute in broader procedural
25 context, we've been arguing about this since
0023

1 October. Mr. Scarola filed a motion to compel the
2 production of e-mails, all of the e-mail backups,
3 and we came in with an opposition that gave
4 substantial figures about the cost and the burden
5 to do this. There was an amended motion that was
6 filed where Coleman requested discovery on the
7 burden and the cost, and we had a round of
8 depositions on this point. So now this is the
9 third motion, and what I believe --
10 MR. SCAROLA: I don't mean to interrupt, but
11 I do mean to interrupt.
12 THE COURT: I was going to say, I think you
13 do, Mr. Scarola.
14 MR. SCAROLA: I do mean to interrupt, and the
15 reason I mean to interrupt is because this is my
16 motion, and I don't mind, obviously, Mr. Clare
17 responding to the Court's question, but he's gone
18 considerably beyond that and is now arguing his
19 position --
20 MR. CLARE: well, I'm --
21 MR. SCAROLA: -- and I'd like the Court to
22 understand what ours is before we get the other
23 side's argument.
24 THE COURT: Let me ask you this. Has there
25 ever been a disposition of a motion to compel
0024

1 where we have made a determination whether either
2 the scope of the request is overbroad or
3 compliance is unduly burdensome?
4 MR. CLARE: No, Your Honor.
5 THE COURT: Then I guess my question to you,
6 Mr. Scarola, is, are we jumping ahead; do we first
7 need to dispose of that motion absent some sort of
8 agreement to them that, yeah, they're amenable to

4hr0319.txt

9 this type of procedure?

10 MR. SCAROLA: I don't believe so, Your Honor,
11 for this reason. The procedural context is, we
12 filed the motion, they filed their objection, we
13 have made a proposal to meet that objection, and
14 what we're --

15 THE COURT: I don't think I can make a --
16 I mean, essentially what you're trying to do is
17 force them to mediate the issues raised by the
18 motion, and I don't --

19 MR. SCAROLA: No. No. We've attempted --
20 We've attempted to resolve those issues between
21 ourselves. We've been unsuccessful in doing that,
22 and this is by way of a motion to compel
23 compliance and a suggestion as to how compliance
24 ought to be compelled.

25 THE COURT: Okay.

0025

1 MR. SCAROLA: That's really where we are.

2 THE COURT: I can tell you, I can't do it in
3 this context. I think what -- I'm not aware of
4 any procedure that would allow me to short-circuit
5 ruling on defendant's objections and require the
6 parties to engage in this sort of shared
7 enterprise.

8 I mean, at a bare minimum, this would have to
9 be piggybacked onto any hearing calling up the
10 objections, so this would be --

11 Oh, you gave me an order.

12 MR. SCAROLA: Yes, Your Honor, I did.

13 And I would --

14 THE COURT: Let me finish writing, and then
15 we'll talk.

16 MR. SCAROLA: Yes, surely.

17 THE COURT: Okay. All this says is it's
18 denied without prejudice for plaintiff's right to
19 argue the propriety of the proposal in support of
20 its motion to compel.

21 MR. SCAROLA: And the only thing I wanted to
22 point out to Your Honor is that regardless of how
23 this motion may be styled, it is clear from the
24 motion itself that what we are addressing is the
25 burdensome objection.

0026

1 THE COURT: I understand that, but again, I'm
2 not prepared for that today.

3 MR. SCAROLA: That's fine.

4 THE COURT: It's not like I've taken out your
5 discovery request, I looked at their objections,
6 I've reviewed the depositions you guys took on
7 this point, and we can now argue it intelligently.

8 MR. SCAROLA: We'll present it to Your Honor
9 in --

10 THE COURT: And please understand when I say
11 without prejudice to their right to argue the
12 propriety of the proposal, I'm not saying I think
13 the proposal is proper; I'm just saying it's
14 something I would really have to go back and think
15 about, and I can't even put it into context until
16 we do the other motion.

17 MR. CLARE: I understand your order to be
18 saying that is step two of what will be a two-step
19 process.

4hr0319.txt

20 THE COURT: Right.
21 MR. SCAROLA: Although, I would hope that we
22 can schedule both at the same time; that is --
23 THE COURT: We can try if my little brain
24 will think that fast, Mr. Scarola.
25 MR. SCAROLA: Okay. Thank you.

0027

1 THE COURT: What else do we have besides the
2 motion for order to show cause?
3 MR. SCAROLA: The only other motion, Your
4 Honor, I believe, is the motion for admission
5 pro hac vice.
6 MR. CLARE: That's actually not correct.
7 MR. SCAROLA: Oh, okay.
8 THE COURT: What else do we have?
9 MR. CLARE: Now it's my turn to interrupt
10 Mr. Scarola, and I do apologize, but --
11 MR. SCAROLA: You're right. I'm sorry, I've
12 forgotten, there is another discovery motion.
13 MR. CLARE: There is the Morgan Stanley's
14 motion to compel responses to the fourth set of
15 interrogatories.
16 THE COURT: Now, I know I've seen that, too.
17 MR. IANNO: That was the one that was
18 actually behind tab 3, Your Honor.
19 THE COURT: Right. I was going to say, I
20 know I've seen it.
21 MR. SCAROLA: Do you have that, or does the
22 Court need it?
23 THE COURT: I do have it.
24 MR. SCAROLA: Okay.
25 THE COURT: Yes, I did read it, okay.

0028

1 what did you want to say in support of it?
2 MR. CLARE: To back up for a moment and give
3 the Court the procedural context of our motion,
4 this is a motion to compel responses to our fourth
5 set of interrogatories, but in the summer and fall
6 of last year, we propounded our first set of
7 interrogatories where we asked the defendant to
8 identify all of the misrepresentations that they
9 intend to rely on at trial, and they complied and
10 identified, by our count, 35-some
11 misrepresentations.
12 We then propounded our fourth set of
13 interrogatories where we asked them to tell us
14 when for each of those misrepresentations they
15 allege or believe that Morgan Stanley knew the
16 representation was false or misleading. And they
17 did give us a long answer, a six-page answer, but
18 there's no substance to it in terms of answering
19 the specific questions that we asked.
20 THE COURT: Okay.
21 MR. CLARE: What we have asked for is for
22 them to tell us for each of those 35
23 representations by what date do they contend or do
24 they believe the evidence supports Morgan Stanley
25 knew or should have known the misrepresentations

0029

1 to be false.
2 At a minimum, even if they are unable or
3 unwilling to provide us with dates, we are
4 entitled to know for each of those

4hrq0319.txt

5 misrepresentations whether they contend we knew
6 that to be false when made or after it was made we
7 learned facts to suggest that we had a duty to go
8 back and re-inform them or correct prior
9 representations that we had made. And we believe
10 that's significant given the business context and
11 the merger and acquisition transactions that
12 really form the basis of this agreement.

13 And if you'll indulge me for just a minute,
14 I'll give you an example of what I'm talking
15 about.

16 THE COURT: Okay.

17 MR. CLARE: The allegations in the Complaint,
18 in the fraud count, allege that Morgan Stanley
19 made certain misrepresentations that induced
20 Coleman (Parent) Holding to enter into this
21 agreement. The merger and acquisition agreement
22 was signed on February 27th, 1998, and there was a
23 period of about one month between the merger
24 agreement and the date of the close.

25 THE COURT: Right.

0030
1 MR. CLARE: Many of the events that are in
2 the interrogatory response that we received and
3 that are cited in the Complaint take place in that
4 intervening month, and so my question and the
5 question that the interrogatory was designed to
6 illicit an answer to was whether Morgan Stanley
7 obtained the knowledge of the fraud, supposedly,
8 before the time the misrepresentations were made
9 that supposedly induced them or after, because if
10 it's after the date of the definitive agreement,
11 the merger and acquisition agreement, there's an
12 entirely different legal construct that we need to
13 know in order to defend against those claims.

14 THE COURT: Let me ask you, and I don't know
15 if you guys can agree on this, in the February '98
16 contract, was there an out for either party prior
17 to closing?

18 MR. MARMER: Yes, Your Honor. Ron Marmer.
19 There is. There's a material adverse change
20 clause.

21 THE COURT: Thank you.

22 MR. CLARE: And in addition to the material
23 adverse change clause, which they have invoked as
24 part of the obligation that triggered some
25 obligation on the part of Morgan Stanley to come

0031
1 forward with information they supposedly learned
2 during this time period, but there is also a
3 complex framework of representations between the
4 parties, between Sunbeam and Coleman (Parent), and
5 disclosure obligations. The parties' relationship
6 at that point changes from -- and I say "the
7 parties," I mean Sunbeam and Coleman's
8 relationship becomes contractual in nature.

9 Sunbeam's lawyers at Skadden, Arps in
10 New York are administering this contract on behalf
11 of their client, and the obligations that Sunbeam
12 and its advisors had versus, in that environment,
13 the contractual environment, are different and may
14 be different than they would be in the
15 pre-contractual environment that they're alleging.

4hrG0319.txt

16 So the question here -- And I've read
17 Mr. Scarola's response, and I really think it
18 really makes the issue too complicated. All we're
19 trying to find out is, for each of these
20 representations, are they saying we did it with
21 malice in our hearts because we knew them to be
22 false, or are they saying we made them believing
23 them to be true and subsequently learned
24 information that imposed a duty on us to go back
25 and inform them.

0032

1 As I read the Complaint in this case and as
2 I read the answers to the interrogatory, I believe
3 it is a mix of both, and I, in order to defend
4 against it, need to know which --

5 THE COURT: So I understand, is what you're
6 really -- I was looking at how the interrogatory
7 was framed, but is what you're looking for today
8 an answer to whether each of the representations
9 was known to be true at the time it was made or
10 subsequently discovered to be true -- or untrue?
11 I'm sorry.

12 MR. CLARE: Correct. That is the information
13 we are seeking.

14 THE COURT: Okay.

15 Now, Mr. Scarola, I know I've read your
16 answer, and I've lost it. Do you have another
17 copy?

18 MR. SCAROLA: I'm sure I do, Your Honor. If
19 I may have just a moment.

20 MR. CLARE: I have it.

21 THE COURT: Thank you.

22 Okay. What did you want to say?

23 And first of all, you know, sort of limiting
24 or narrowing the scope of the motion to just
25 asking for whether it's your client's contention

0033

1 that these were known to be untrue when made or
2 subsequently discovered to be untrue, what's wrong
3 with requiring your client to the extent it has
4 that information to disclose it?

5 MR. SCAROLA: There is nothing wrong with
6 requiring us to answer that question had that been
7 the question that was asked, but that's not the
8 question that was asked.

9 THE COURT: Well, they ask you to identify
10 with particularity the date and time you contend
11 Morgan Stanley knew the alleged representation to
12 be false or misleading.

13 MR. SCAROLA: Yes, Your Honor, which is,
14 respectfully, a different question than whether
15 they knew at the time the representation was made.
16 I believe that the answer that has been given is
17 an answer that very thoroughly responds to the
18 question that has been asked and provides all of
19 the information that was available to us as of the
20 time of the filing of that answer.

21 THE COURT: Let me -- I apologize for
22 interrupting.

23 MR. SCAROLA: No, that's all right.

24 THE COURT: What's the response to the simple
25 contention that, yeah, the interrogatory asks when

0034

4hrg0319.txt

1 did you find that to be false, but it doesn't ask
2 when did you say that the representation made.

3 MR. CLARE: Because we already know from the
4 answer to our first interrogatory when the answer
5 was made. We have no complaint --

6 THE COURT: When the misrepresentation was
7 made?

8 MR. CLARE: Correct.

9 THE COURT: Do you have that in an
10 interrogatory to show me?

11 MR. CLARE: I'm sure we do.

12 THE COURT: Just show it to Mr. Scarola
13 first.

14 And did it give you dates when the alleged
15 misrepresentations were made?

16 MR. CLARE: Yes, Your Honor, for many of the
17 misrepresentations.

18 For example, they describe meetings that
19 occurred on certain dates, negotiation meetings
20 that were provided and documents that were
21 provided at negotiation sessions on particular
22 dates that they contend contain
23 misrepresentations.

24 THE COURT: Okay. Let me just look at the --

25 MR. CLARE: Any objection?

0035

1 MR. SCAROLA: Oh, no, no.

2 THE COURT: Do you have both the question and
3 the answer?

4 MR. CLARE: Yes, Your Honor.

5 THE COURT: Let me just look at both of those
6 briefly.

7 Thanks.

8 MR. CLARE: This is the interrogatory
9 question at the bottom of the page, and the answer
10 begins on the subsequent page.

11 THE COURT: Oh, thanks.

12 Okay. Thanks. I get the flavor of it, which
13 is what I was looking for. Thanks.

14 Okay. What's the response then? Let's
15 assume then that I think this interrogatory asks
16 for the date when you found out it was false and
17 they want to say is that different than the date
18 you already said it was made.

19 MR. SCAROLA: I think it does ask for the
20 date when we found out that --

21 THE COURT: No, when they found out it was
22 false.

23 MR. SCAROLA: When they found out it was
24 false.

25 THE COURT: Right.

0036

1 MR. SCAROLA: Which, respectfully, is a
2 different question than do you contend that when
3 we made the representation we knew it was false.

4 THE COURT: Sure, but the information -- I
5 agree it's a different question, but given their
6 interrogatory 1, what they're saying is, compare
7 the two answers and they get the answer to that
8 question.

9 MR. SCAROLA: I really don't believe they do,
10 for this reason, Your Honor. If you ask me what
11 the date was when they found out X was false, my

4hr0319.txt

12 response may very well be I don't know when you
13 found out, I don't know the date. If you ask me
14 do you contend that at the time I made this
15 representation I knew it was false, I may very
16 well be able to answer that even though I can't
17 give them the date when they found out it was
18 false.

19 THE COURT: So let me ask you this. Where in
20 the answer to this interrogatory would I look to
21 see when you allege they found these items to be
22 false?

23 MR. SCAROLA: I think that the context of the
24 answer itself clearly indicates all of the
25 information that we have about the communications

0037

1 that were made to them and when they were made
2 that were contrary to the representations that
3 were made to us. It is throughout the text of
4 this detailed six-page narrative.

5 THE COURT: All right. This is your filing
6 under seal. This has your answer attached,
7 correct?

8 MR. SCAROLA: It does have the answer
9 attached. It's Exhibit A, Your Honor.

10 If I might, I don't mean to interrupt you --

11 THE COURT: No, go ahead.

12 MR. SCAROLA: If you'll just look at page 3,
13 this is one obvious place, page 3, first full
14 paragraph, second sentence, "Morgan Stanley's
15 investigation in the summer of 1997 revealed that
16 Al Dunlop's supposed turn-around of Sunbeam was
17 strikingly similar to Dunlop's restructuring of
18 Scott Paper in 1995 which Morgan Stanley knew was
19 a volume-driven plan to prop up the company for
20 sale."

21 If you continue reading on from there, we
22 talk about all of the surrounding circumstances
23 that placed Morgan Stanley on notice that the
24 information that it was providing was false
25 information, and we have recited those facts known

0038

1 to us, including the dates with respect to those
2 facts, that lead us to the conclusion that Morgan
3 Stanley at the time it made these representations,
4 particular representations that are detailed, was
5 aware of the fact that the representations that
6 they were making were false.

7 THE COURT: Do I have interrogatory number 3
8 in the answer?

9 MR. CLARE: I'm sorry?

10 THE COURT: The interrogatory 3, do I have
11 that, the one that's referenced in interrogatory
12 number 4?

13 MR. DRISCOLL: It's the third interrogatory,
14 the first set, Your Honor.

15 THE COURT: I'm sorry?

16 MR. DRISCOLL: It's the third interrogatory,
17 first set.

18 MR. CLARE: It's the one that I think Your
19 Honor was just looking at that I just handed up.

20 THE COURT: Oh, I thought that was the first.

21 MR. CLARE: It is, but it's the third
22 interrogatory of the first set.

4hrg0319.txt

23 THE COURT: Okay. What's the response?
24 MR. CLARE: The response is, I know what
25 Mr. Scarola's contentions are about the argument,
0039
1 and the reason why I styled my interrogatories in
2 exactly this fashion was to avoid hearing his
3 opening statement in their interrogatory response
4 about the inferences that can be drawn from
5 various historical facts.
6 My question in the interrogatories were much
7 simpler. I asked them in the manner I did
8 precisely to avoid having to discern, which I've
9 been unable to do, for which of the
10 misrepresentations do they claim we knew in
11 advance were false and which ones do they claim we
12 found out after were false. I cannot devine that
13 information from these two interrogatories.
14 MR. SCAROLA: And we'd be happy to answer
15 that interrogatory, but it's not this
16 interrogatory.
17 THE COURT: Do you have a proposed order on
18 this one?
19 MR. SCAROLA: I think I do, Your Honor. I
20 may have handed you a blank order on this one
21 already, and if I didn't, I'm sure I have one.
22 THE COURT: If you did, I lost it.
23 MR. SCAROLA: Yes, I do have a blank order,
24 Your Honor.
25 Your Honor, there is a second aspect to this
0040
1 motion that has not been addressed, and I don't
2 know whether counsel's abandoning that aspect or
3 not, but we haven't heard any argument about it.
4 THE COURT: Hold on.
5 Okay. I'm going to type this up. And I
6 understand we may --
7 Is the other issue you wanted to talk about a
8 duty to update the answer or something else?
9 MR. SCAROLA: Yes, Your Honor, that's the
10 issue.
11 THE COURT: I think we would agree it wasn't
12 argued, but I don't know if there is a duty to
13 update it currently, but what I am going to do is
14 do an order that goes through the prior answer of
15 the interrogatory and pulls out what I think to be
16 the answer that sort of addresses the question
17 asked, which is what was false and misleading, and
18 says as to these representations, tell us when you
19 believe -- when Morgan Stanley found these to be
20 false. Okay?
21 MR. CLARE: I've learned at my very first
22 hearing in front of Your Honor that after you set
23 pen to paper, not to go beyond that.
24 THE COURT: You can ask her to type that,
25 because it's not going to make any sense until she
0041
1 types it. It takes up too much room.
2 All I've done is going through the answer to
3 the prior interrogatory and pull out what I think
4 to be sort of the core representations that they
5 contend were erroneous, which is I guess the
6 strategic plan; I'd have to look at what I wrote,
7 all the things going through the answer that they

4hr0319.txt

8 say contain incorrect information, and say as to
9 these things, tell us when you believe these items
10 to be false. Can you do that within 30 days?

11 MR. SCAROLA: Yes, Your Honor.

12 THE COURT: Where do we go next?

13 MR. SCAROLA: I think the --

14 THE COURT: Oh, and why don't you take -- Did
15 I tear up -- I might have torn up some of the
16 things you gave me. I apologize. Here it is
17 back, the parts I have left. There was a list of
18 documents at the end with CP numbers and other
19 numbers and it would have taken me too long to
20 write it up by hand.

21 MR. CLARE: Okay. Certainly.

22 THE COURT: Okay.

23 MR. SCAROLA: Your Honor, the next matter to
24 be addressed before the Court is Coleman (Parent)
25 Holding Incorporated's motion for a rule to show

0042

1 cause.

2 THE COURT: Okay. And we wanted to do that
3 in connection with the motion for pro hac vice?

4 MR. CLARE: I assume so, Your Honor.

5 MR. SCAROLA: We would request that, yes.

6 MR. CLARE: And if I could just explain why
7 it would be important --

8 THE COURT: Sure.

9 MR. CLARE: -- to address those two issues
10 together, without preempting Mr. Scarola's
11 opportunity to argue.

12 As we discussed during the last case
13 management conference on February 20th, Kirkland
14 and Ellis has a conflict with Andersen, and we
15 advised the Court that we would be adding
16 additional counsel as co-counsel in this case to
17 represent Morgan Stanley with those aspects of the
18 case going forward. And with me in the courtroom
19 today is Mr. Mark Hansen from the law firm of
20 Kellogg, Huber & Hansen.

21 MR. HANSEN: Good afternoon, Your Honor.

22 THE COURT: Good afternoon.

23 MR. CLARE: And in order to respond to some
24 of the allegations that have been made and some of
25 the arguments that have been made on the Andersen

0043

1 side of the case, I have asked Mr. Hansen to join
2 us today and will require his assistance in
3 responding.

4 THE COURT: As an attorney or just as --

5 MR. CLARE: As an attorney.

6 THE COURT: -- or as a witness?

7 MR. CLARE: He is co-counsel in this case.

8 MR. IANNO: Mr. Hansen, Ms. Beynon and
9 Mr. Webster are making their appearances, Your
10 Honor, as counsel --

11 THE COURT: Who do you represent?

12 MR. IANNO: Morgan Stanley, the defendant in
13 this case.

14 THE COURT: And why do we need him as opposed
15 to there being a witness, just so I understand?

16 MR. IANNO: Well, they are going to actively
17 participate in this case, Your Honor, in the
18 Morgan Stanley/Coleman case, but as I understand,

4hrq0319.txt

19 their role is going to be limited to the Arthur
20 Andersen issues.

21 As the Court may be aware from reading the
22 papers, there are these two other lawsuits that
23 have been filed that involve Arthur Andersen --

24 THE COURT: Do they represent --

25 MR. IANNO: Morgan Stanley in one of these

0044

1 other cases.

2 THE COURT: They do?

3 MR. IANNO: Yes.

4 MR. CLARE: Yes.

5 MR. SCAROLA: I have a serious problem with
6 their presence in the courtroom except to the
7 extent that they may be called to testify as
8 witnesses unless and until such time as they are
9 admitted pro hac --

10 THE COURT: Let me stop you guys.

11 MR. SCAROLA: Yes.

12 THE COURT: We have 20 minutes left. Are we
13 going to have time? I don't see that this is a
14 20-minute issue, to be honest with you.

15 MR. SCAROLA: Well, if I might just describe
16 the scope of what it is we are requesting today,
17 perhaps Your Honor will have a different
18 perspective on that, because I agree that these
19 issues cannot be resolved finally today.

20 what we are requesting is a recognition that
21 the matters raised in our motion present serious
22 concerns about a violation of a court order that
23 need to be investigated, and the means by which
24 they would be investigated would be the issuance
25 of a rule to show cause, the setting --

0045

1 THE COURT: Let's assume I'm not even sure I
2 can do that and allow them to adequately respond
3 in 20 minutes.

4 MR. SCAROLA: Then --

5 THE COURT: I can tell you, I take all these
6 things seriously. It's apparent to me from both
7 your filings that this is something you all take
8 seriously, too, and I think even issuing a rule to
9 show cause is something I would want full argument
10 on.

11 MR. SCAROLA: Then let me narrow it even
12 further for the Court.

13 THE COURT: Okay.

14 MR. SCAROLA: We are requesting an
15 opportunity to take discovery with regard to the
16 matter that we have presented by way of our
17 motion. Our discovery request is a very limited
18 request for discovery.

19 THE COURT: And your position is it's
20 broad --

21 MR. CLARE: It is.

22 THE COURT: -- and invades attorney/client
23 privilege?

24 MR. CLARE: Well, Mr. Scarola is effectively
25 giving himself the remedy he seeks in the motion

0046

1 to show cause, because as Your Honor will see, the
2 discovery that he is requesting, which was just
3 handed to us moments before we walked in the

4hrg0319.txt

4 courtroom, is an invasion of Morgan Stanley's
5 attorney/client and work product privileges and is
6 entirely predicated on the finding of a violation.

7 And I agree with Your Honor, this is a
8 serious issue, the allegations are serious, they
9 are also false, but Morgan Stanley needs an
10 opportunity to respond.

11 THE COURT: Okay.

12 MR. CLARE: And the discovery that
13 Mr. Scarola is seeking is exactly the relief
14 sought in his motion for a rule to show cause.

15 So we would object to any discovery until
16 Your Honor has had an opportunity to hear from
17 Morgan Stanley on our belief that the motion
18 should be denied in its entirety and that no
19 discovery is appropriate.

20 MR. SCAROLA: May I be heard with regard to
21 this request, Your Honor?

22 THE COURT: Sure.

23 MR. SCAROLA: Thank you very much.

24 THE COURT: well, request for what; for the
25 limited discovery?

0047

1 MR. SCAROLA: Yes.

2 THE COURT: I can tell you, Mr. Scarola,
3 that's not something I'm prepared to take argument
4 on in what is now 15 minutes; I'm just not.

5 MR. SCAROLA: Okay.

6 THE COURT: It's something I take seriously.
7 Even in 15 minutes, I couldn't allow you to fully
8 present your arguments for me to make an
9 intelligent decision on what, if anything, should
10 be done.

11 With that said, in all honesty, I think two
12 things; I would agree the motion for admission
13 pro hac vice I don't want to hear today either,
14 because it strikes me that they are intertwined
15 with the issues raised by the motion for order to
16 show cause. And as I understand sort of
17 plaintiff's concern is that defendant may be
18 trying to sort of bootstrap or eliminate a legal
19 issue by making them counsel of record in this
20 case.

21 MR. SOLOVY: Exactly.

22 THE COURT: And I understand that's the
23 concern, and quite honestly, that's something that
24 I would have to think a whole lot more about and
25 understand the context before I were to permit it.

0048

1 MR. SCAROLA: May I just -- I know that Your
2 Honor has indicated that you don't --

3 THE COURT: Where's pen and paper? I've got
4 to start writing, Mr. Scarola, so you'll be quiet.

5 MR. CLARE: This is the Tom Clare rule.

6 MR. SCAROLA: Your Honor has indicated that
7 you're not inclined to grant us this discovery,
8 but I don't know if you've had a chance to take a
9 look at what we are requesting here. What it
10 amounts to is nothing more than what we would be
11 entitled to under the terms of a privilege log.
12 This is no invasion of the attorney/client
13 privilege in any respect or the work product
14 privilege, because it simply seeks to find out

4hrq0319.txt

15 whether confidential information has been
16 communicated.
17 THE COURT: well, let me ask you this.
18 Are you happy with -- And I'm trying to think
19 where I could quickly put my hands on a copy of
20 the confidentiality order.
21 MR. SCAROLA: Right here, Your Honor.
22 THE COURT: I assume there was an attachment
23 to it of something that had to be signed before
24 its contents --
25 MR. CLARE: And that is part and parcel of
0049
1 our argument, Your Honor. These attorneys signed
2 it --
3 THE COURT: well, I understand that argument.
4 I don't think that answers the question.
5 MR. IANNO: No, there --
6 THE COURT: That's sort of saying you could
7 go hire an attorney to collect a credit card debt
8 in Minnesota and give them this and it would be
9 okay, and that's, you know, obviously not the
10 case. So I don't think that answers the question.
11 MR. IANNO: The direct answer is declaration
12 A, Your Honor, that requires any persons to be
13 bound by the confidentiality order.
14 THE COURT: So is all you're asking for is
15 all of the Exhibit A's that were signed by people
16 who received a copy of the settlement agreement?
17 MR. SCAROLA: well, certainly that would be a
18 helpful starting point, but that is not the end of
19 the inquiry.
20 THE COURT: I agree it's not, but just
21 understanding my reluctance to do anything today,
22 is that sufficient to get us started?
23 MR. SCAROLA: We would like whatever Your
24 Honor is willing to give us today --
25 THE COURT: Is there anything more I --
0050
1 MR. SCAROLA: -- because I will have achieved
2 at least a little bit more.
3 THE COURT: At a minimum, I would be
4 requiring you to produce the Exhibit A's that have
5 been signed for people who have received the
6 settlement agreement.
7 MR. CLARE: We have already supplied to Court
8 and to counsel many of them, and so we have no
9 objection to producing all of them.
10 THE COURT: Okay.
11 MR. CLARE: But we disagree with the further
12 assertion by Mr. Scarola that anything beyond
13 that, anything in the interrogatories that he's
14 handed Your Honor, are appropriate. We object --
15 THE COURT: These are originals you gave me,
16 correct?
17 MR. SCAROLA: Those are originals, yes, Your
18 Honor.
19 THE COURT: So I need to put them in the
20 court file?
21 MR. SCAROLA: Yes.
22 THE COURT: Okay.
23 MR. SCAROLA: I have extra copies if Your
24 Honor would like extra copies.
25 MR. IANNO: Are those interrogatories?

4hrg0319.txt

0051

1 MR. SCAROLA: Those are the same
2 interrogatories that I --
3 MR. IANNO: Interrogatories typically don't
4 get filed.
5 MR. SCAROLA: That's right, they typically
6 don't. Thank you.
7 THE COURT: Oh, so you want them back?
8 Well, if you have the notice --
9 MR. SCAROLA: I've hand-delivered them, Your
10 Honor. That's all right.
11 THE COURT: So I'll give them back then.
12 MR. IANNO: Your Honor, I don't know. This
13 is the Florida lawyer here talking, because I'm
14 fully aware of TIG, a case I don't agree with, but
15 just looking at Mr. Scarola's interrogatory very
16 quickly, number 4, detail the purported factual
17 basis for Morgan Stanley's inclusion as a
18 plaintiff. I mean, obviously, that's going to
19 invade the attorney/client privilege.
20 THE COURT: I'm not looking at those.
21 MR. IANNO: Okay.
22 THE COURT: Let's assume all I'm doing today
23 is acknowledging we need a hearing on the motion
24 that probably needs to be specially set so we're
25 not looking at other stuff while we do it, and

0052

1 that in the meantime, defendant will produce all
2 of the --
3 MR. SCAROLA: Exhibit A's.
4 MR. CLARE: Exhibit A's.
5 THE COURT: -- Exhibit A's to the stipulated
6 confidentiality order executed when a copy of the
7 settlement agreement was disseminated.
8 MR. IANNO: And really, my concern was, if I
9 don't respond to this because the motion doesn't
10 get heard for 30 days, under TIG, I don't want
11 there to be the waiver. That's my concern.
12 THE COURT: I see.
13 MR. IANNO: If we're fighting about this and
14 we fight about it for 45 days --
15 MR. SCAROLA: Just file your motion for
16 protective order.
17 THE COURT: Yeah, I think that's all you need
18 to do.
19 MR. IANNO: Okay. That's my concern. Are
20 these now considered filed and they require a
21 response, or are we going to decide whether or not
22 Mr. Scarola is even allowed to serve these?
23 That's what I can't --
24 THE COURT: I think in all honesty, he can
25 serve anything he wants in the ambit of this

0053

1 litigation, and you need to file a motion.
2 MR. SCAROLA: We do consider those to have
3 been served as of today.
4 MR. IANNO: Okay. That's what I need to
5 know.
6 MR. CLARE: we'll file our motion.
7 THE COURT: When is our next case management
8 conference, and when do we go to two hours?
9 MR. IANNO: It's a one-hour, Your Honor.
10 THE COURT: It's still one hour?

4hrg0319.txt

11 MR. CLARE: It's one hour, and I believe it's
12 April 16th, but I will confirm that.

13 MR. SOLOVY: It is April 16th, 4:00, Your
14 Honor.

15 Your Honor, Mr. Solovy. I agree with your
16 statement, we don't want to get this mixed up with
17 that.

18 THE COURT: No, I agree. I'm just looking at
19 if there's any other time that day.

20 MR. SOLOVY: Well, we view this as more
21 pressing, Your Honor, if you have time.

22 THE COURT: I do, too. In all honesty, to
23 the extent I think I would prefer more time, I
24 don't know that we do.

25 MR. SOLOVY: Your Honor, I have to tell you,

0054

1 it's very cold in Chicago, so the quicker you get
2 us down, the happier I am.

3 THE COURT: I understand. I also have other
4 cases.

5 MR. SOLOVY: I also have a wife in Naples,
6 you see, so this works very well for me, Your
7 Honor, it keeps a happy marriage going.

8 And, Your Honor, you know, we view this very
9 seriously, so, you know...

10 THE COURT: I'm not suggesting I don't, too,
11 but I'm also suggesting that there I don't think
12 is going to be any damage that can't be remedied
13 if we wait a little time to hear it. So let me
14 look at what we got.

15 I just want to get the clerk's docket sheet.

16 The best I can do when I know I can do it is
17 April 30th, and I can tell you what time I have
18 that day. Again it's a Friday, and I have from
19 nine to 10:30 free, and I also have from three to
20 five.

21 MR. SOLOVY: Let me ask you this, Your Honor.
22 We do have the 4:00 on the 16th.

23 THE COURT: We do.

24 MR. SOLOVY: So I'd rather use that time for
25 this motion than --

0055

1 THE COURT: My concern is whether an hour is
2 going to be sufficient. I'll be honest with
3 you --

4 MR. SOLOVY: I agree.

5 THE COURT: You guys are versed in the
6 issues, I'm not, and, you know, it's just going to
7 take you longer to explain it to me, that's all.

8 MR. CLARE: I share that concern, and I also
9 am concerned that we keep those previously
10 scheduled case management conferences --

11 THE COURT: No, I agree.

12 MR. CLARE: -- to keep this case on track.

13 THE COURT: I understand that this is an
14 important issue to both sides.

15 MR. SOLOVY: At what time, Your Honor?

16 MR. SCAROLA: It's either an hour in the
17 morning or two hours in the afternoon?

18 THE COURT: I can give you both, I don't
19 care. I mean, I've got nine to 10:30 in the
20 morning, and I also have three to five in the
21 afternoon. I'm happy to give you both; if you

4hr0319.txt

22 finish early, great; if you don't, then we have
23 the extra time to come back.
24 MR. SOLOVY: I agree. That's fine, Your
25 Honor.

0056

1 THE COURT: Okay. I have read the stuff
2 you've given me on this, and it is something I
3 would have to think about. Something that would
4 be helpful to me I think is if you don't each take
5 extreme positions in arguing it. I mean, I
6 understand that you got to zealously advocate on
7 behalf of your client, but when we get into the
8 issues, it would be helpful to me if you don't
9 each argue only the extremes, but also argue the
10 middle ground, because that's going to present
11 sort of the panoply of things to me that I
12 probably need to consider.

13 MR. SCAROLA: That tends to be the rule by
14 which we live on this side of the courtroom, but
15 we'll make an extra effort to try to apply it in
16 this circumstance diligently.

17 THE COURT: I'm not suggesting, please
18 understand, to either side that I know what I
19 would do; I simply don't, but I'm just saying, to
20 me, it's not an issue that I've been confronted
21 with before and I sort of need to think through
22 the various --

23 MR. SCAROLA: May I make this request, Your
24 Honor?

25 In light of the fact that we have served the

0057

1 interrogatories today and we have a hearing
2 scheduled for April 16, if in fact there are going
3 to be objections rather than answers, as it
4 appears apparent there will be, may we request
5 that the time be shortened in which to file those
6 objections so that the merits of those objections
7 can be addressed on the 16th and we might perhaps
8 have answers in time for the hearing on the 30th?

9 THE COURT: Quite honestly, what I would
10 suspect is until we've done something on the 30th,
11 none of this is going to be relevant.

12 MR. IANNO: Well, that was my concern.

13 MR. SCAROLA: Well, it's difficult for me to
14 comprehend how we're going to take three hours
15 then if all we are going to do --

16 THE COURT: We probably won't, in all
17 honesty, we probably won't, but I think -- And I
18 understand your client's position, but you're
19 accelerating this at a speed I'm not comfortable
20 with.

21 MR. SCAROLA: Well, today is the 19th. Today
22 is the 19th. All we're asking for is a brief
23 acceleration on the filing of objections to
24 interrogatories in this case.

25 THE COURT: Sure, but I can tell you what the

0058

1 objections are going to be. I mean, I can guess,
2 is that this isn't relevant to the issues framed
3 by the pleadings, and you're not going to be able
4 to respond to that until you know if I'm going to
5 issue the order to show cause.

6 MR. IANNO: Which is why I brought up the

4hrg0319.txt

7

waiver issue with TIG --

8

THE COURT: No, I understand that.

9

MR. IANNO: -- because what you're going to see is the motion for protective order to stay this until that's decided.

10

11

12

THE COURT: Right. And that's sort of when I talk about being prepared to argue the middle ground, that's the kind of thing I'm talking about; it's just like if you'd give some thought to, okay -- because it could be -- well, I don't even want to speculate, because I don't know what I'm going to do on the 30th. All I know is, right now, I would not accelerate the time to file objections to the interrogatories, because I don't think it would get us anywhere. Okay?

13

14

15

16

17

18

19

20

21

22

MR. SCAROLA: I do understand that.

23

THE COURT: I understand you don't agree, Mr. Scarola.

24

25

0059

MR. SCAROLA: No, I don't disagree. I don't

disagree at all. I just want to be sure that I have an accurate understanding of what it is the Court wants to do. And as I perceive it, there really is a three-step process involved here. The first step is a construction of the Court's order and confidentiality agreement --

1

2

3

4

5

6

7

THE COURT: Sure.

8

MR. SCAROLA: -- to make a determination as to what is allowed and what is prohibited.

9

10

THE COURT: Because as I read what you guys wrote, you acknowledge you gave the settlement agreement to counsel in a subsequent litigation.

11

12

13

MR. CLARE: As we were permitted to do.

14

THE COURT: Well, yeah, I don't think that there's an argument about that.

15

16

MR. CLARE: And also, the qualification of it being subsequent litigation. It is this litigation, it is filed in this courthouse, and a motion to transfer that case to Your Honor is pending.

17

18

19

20

MR. IANNO: They're all facts that will be explained to the Court.

21

22

THE COURT: And I read that in your response, and I understand that. Again, that's the kind of thing I got to think about a bit more.

23

24

25

0060

MR. SCAROLA: And my point is, if step one is simply a construction of the contract, step two would then be discovery to determine whether and to what extent the contract was violated, if it is construed in such a way that what is acknowledged to have occurred is in fact in violation of the contract. If what Your Honor says is I'll assume that what the plaintiff is contending happened --

1

2

3

4

5

6

7

8

THE COURT: Sure.

9

MR. SCAROLA: -- but it doesn't violate the order --

10

11

THE COURT: But assuming what you're saying is correct, again, we can't get to step two, which is what's the discovery, until we've first done step one --

12

13

14

15

MR. SCAROLA: Yes, Your Honor.

16

THE COURT: -- which makes the

17

4hrg0319.txt

18 interrogatories --
19 MR. SCAROLA: But the only point I'm making
20 there is that step one should not take us a very
21 long time. If all we're doing is construing the
22 contract, we've got the Court's order and the
23 confidentiality agreement, and all we're going to
24 do is address what does this mean --

25 THE COURT: Sure.

0061

1 MR. SCAROLA: -- that's something that we
2 ought to be able to handle --
3 THE COURT: I would agree we should be able
4 to handle that.
5 On the other hand, I understand you're saying
6 that --
7 MR. CLARE: The issues need to be addressed
8 together.

9 THE COURT: Well, or that -- You know, it's
10 like a whole argument this litigation -- somehow
11 this subsequently-filed litigation against Arthur
12 Andersen is the same litigation as this.

13 MR. SOLOVY: Well, if we're going to get into
14 this, Your Honor, we drafted this protective order
15 with language saying that you could use this in
16 subsequent litigation. Mr. Clare, on behalf of
17 Morgan Stanley, said, oh, no, no, no, took that
18 out and specifically limited it.

19 THE COURT: Then what you're telling me is
20 you're going to want evidence at the hearing.

21 MR. IANNO: And that's going to take at least
22 an hour, if not more.

23 THE COURT: If it's a stipulated order, it's
24 also a contract between the parties.

25 MR. SCAROLA: Yes, indeed.

0062

1 MR. CLARE: And not to delve into the merits,
2 which I thought we were not going to do, but
3 Mr. Hansen is counsel in this case, he is
4 co-counsel in this case.

5 MR. SOLOVY: He's not counsel yet, Your
6 Honor, because you haven't let him in.

7 THE COURT: As I said --

8 MR. CLARE: But that goes to the construction
9 issue.

10 THE COURT: As I said, I'm not comfortable
11 doing the motions for admission pro hac vice
12 divorced from the motion for the order to show
13 cause. Okay?

14 MR. SCAROLA: All right. Thank you. I think
15 we understand what the scope of the initial
16 hearing will be, Your Honor.

17 THE COURT: I've got to notice those motions
18 for hearing with the motion for order to show
19 cause. It's the 3, correct?

20 MR. IANNO: Correct, Your Honor.

21 THE COURT: Okay. So I can notice those
22 together with the order to show cause, together
23 with the order acknowledging defendant's
24 stipulation to produce Exhibit A's, right?

25 MR. CLARE: We have made that acknowledgment.

0063

1 THE COURT: And when are those going to be
2 produced by?

4hrg0319.txt

3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
0064
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
0065

MR. SCAROLA: Ten days?

MR. CLARE: Ten days.

THE COURT: Ten days. Okay. I will do that order and get you copies.

MR. SCAROLA: Thank you very much, Your Honor.

THE COURT: Thank you very much.

MR. SOLOVY: Thank you for your time, Your Honor.

MR. IANNO: Thank you.

THE COURT: Hey let me ask you, I apologize, I still have defendant's motion to compel production of documents. Is that still pending?

MR. CLARE: I believe that's the agreed-upon order.

MR. SCAROLA: That's the agreed one.

THE COURT: Is that the one I have the agreed order on?

MR. SCAROLA: Yes, Your Honor.

MR. IANNO: Your Honor, housekeeping matter. This doesn't really have to be on the record. Most of the time I know the Court doesn't ask for proposed orders; I noticed today you asked for

one.

THE COURT: Sometimes I do.

MR. IANNO: I just want to know whether --

THE COURT: My general practice is to do my own, unless they're going to be really short and I can fill in the blank.

MR. IANNO: Right, which is why I didn't bring any today.

THE COURT: I know.

(Proceedings concluded at 4:33 p.m.)

C E R T I F I C A T E

THE STATE OF FLORIDA)
)
COUNTY OF PALM BEACH)

I, Lisa D. Danforth, Registered Professional Reporter, Certified Real-Time Reporter, do hereby certify that I was authorized to and did report the foregoing proceedings at the time and place herein stated, and that the foregoing is a true and correct transcription of my stenotype notes taken during said proceedings.

4hr0319.txt

13
14
15
16
17
18
19

20
21
22
23
24
25

IN WITNESS WHEREOF, I have hereunto set my hand
this 26th day of March, 2004.

LISA D. DANFORTH, RPR, CRR

JENNER & BLOCK

Jenner & Block, LLC Chicago
 One 1814 Plaza Dallas
 Chicago, IL 60611-7603 Washington, DC
 Tel 312 222-9350
 www.jenner.com

DEIRDRE E. CONNELL
 TEL 312 923-2661
 FAX 312 840-7661
 DCONNELL@JENNER.COM

June 17, 2003

VIA FACSIMILE

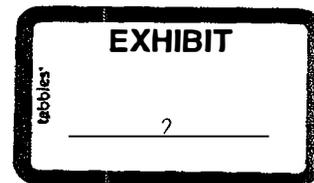
Thomas A. Clare, Esq.
 CIRKLAND & ELLIS
 555 Fifteenth Street, N.W.
 Suite 1200
 Washington, D.C. 20005-5793

Dear Tom:

Jerry and I left a voicemail message for you earlier today as we would like to hear from you on the discovery issues we raised last Wednesday; namely Morgan Stanley's response to our document request (due on 6/26) and our notice of deposition, which notices the depositions of three Morgan Stanley personnel beginning on July 10.

With respect to our document request, we want to discuss a timetable for the production of documents. As for the deposition notice, you indicated last Wednesday that Mr. Kitts is no longer employed by Morgan Stanley, Mr. Tyree is a current employee, and you are undertaking to confirm the status of Mr. Fuchs' employment. Please confirm Mr. Tyree's availability and please inform us promptly whether Mr. Fuchs is currently employed by Morgan Stanley. If Mr. Fuchs is a current Morgan Stanley employee, please confirm his availability for the dates noticed for his deposition. If the deposition dates for current Morgan Stanley employees are not convenient, we are willing to make accommodations, but we want Morgan Stanley promptly to propose new dates that will allow us to take the depositions within a reasonably short period of time.

In addition to those issues, we would like to address the issue of a protective order. We assume that Morgan Stanley will want one, and we propose that the parties use the same protective order that was used in the Andersen case and *In re Sunbeam* (the Sunbeam shareholder case). We believe that doing so will make the use of materials from those cases less complicated. To move things along, we will send you our proposal shortly.



JENNER & BLOCK

Thomas A. Clare, Esq.
June 17, 2003
Page 2

Beginning tomorrow morning, I will be out of the office on vacation. In my absence, please contact my partner, Michael Brody (mbrody@jenner.com and 312-923-2711).

As you know from your prior conversations with Jerry and me, we are eager to move this litigation forward.

Best regards,



Deirdre E. Connell

DEC/sae

Document Number: 942350

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

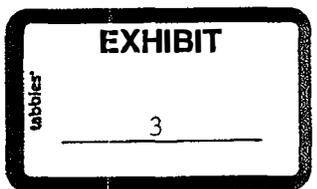
CCLEMAN (PARENT) HOLDINGS, INC.,	)	Case No.: CA 01-06062AN
)	
Plaintiff,	)	Judge Stephen A. Rapp
)	
v.)	
)	
ARTHUR ANDERSEN LLP and	)	JURY TRIAL DEMANDED
PHILLIP E. HARLOW,)	
)	
Defendants.)	
)	

STIPULATED CONFIDENTIALITY ORDER

The parties hereto hereby stipulate and agree to the following Confidentiality Order:

1. Scope of Order. This Order shall apply to all non-public and Confidential (as hereinafter defined) materials produced in this litigation and all testimony given in any deposition by any party to the litigation or by any person or entity that is not a party hereto (a "non-party"), to all non-public and Confidential information disclosed by any party hereto during the course of the captioned litigation and to all non-public information disclosed to any party hereto by any non-party in response to the service of a subpoena or notice of deposition on a non-party in connection with the captioned litigation ("Litigation Materials").

2. This Order shall not apply to any document, testimony or other information that (a) is already in a receiving party's possession at the time it is produced, (b) becomes generally available to the public other than as a result of disclosure in violation of this Order or in breach of any other legal obligation, or (c) becomes available to a party other than through voluntary or required production from a person or party who obtained the document, testimony or other information without any confidentiality restriction.



3. Litigation Materials and the information derived therefrom shall be used solely for the purpose of preparing for and conducting this litigation or any other litigation arising therefrom, and shall not be disclosed or used for any other purpose.

4. Any party or non-party may designate as "Confidential" any Litigation Materials or portions thereof which the party or non-party believes, in good faith, constitute, contain, reveal or reflect proprietary or confidential trade secrets or technical, business, financial or personnel information of a current nature. If a party or non-party produces Litigation Materials that have been produced in another litigation or to any government entity and such Litigation Materials have been designated confidential or were accompanied by a request that confidential treatment be accorded them, such Litigation Materials shall be deemed to have been designated "Confidential" for purposes of this Stipulation and Order.

5. Any documents or other tangible Litigation Materials may be designated as "Confidential" by marking every such page "Confidential" or by informing the other party in writing that such material is Confidential. Such markings will be made in a manner which does not obliterate or obscure the content of the document or other tangible Litigation Material. If Litigation Material is inspected at the choice of location of the party or non-party producing or disclosing Litigation Materials (a "producing party"), all such Litigation Material shall be presumed at such inspection to have been designated as Confidential by the producing party until such time as the producing party provides copies to the party that requested the Litigation Material. Production of Confidential Material for inspection and copying shall not constitute a waiver of confidentiality.

6. Depositions or other testimony may be designated "Confidential" by any one of the following means:

(a) stating orally on the record, with reasonable precision as to the affected testimony, on the day the testimony is given that this information is "Confidential"; or

(b) sending written notice designating, by page and line, the portions of the transcript of the deposition or other testimony to be treated as "Confidential" within 10 days after receipt of the transcripts.

7. The entire transcript of any deposition shall be treated as Confidential Material until thirty days after the conclusion of the deposition. Each page of deposition transcript designated as Confidential Material shall be stamped, as set forth in paragraph 5 above, by the court reporter or counsel.

8. In the event it becomes necessary at a deposition or hearing to show any Confidential Material to a witness, any testimony related to the Confidential Material shall be deemed to be Confidential Material, and the pages and lines of the transcript that set forth such testimony shall be stamped as set forth in paragraph 5 of this Stipulation.

9. Litigation Materials designated "Confidential" and any copies thereof, and the information contained therein, shall not be given, shown, made available or communicated in any way to anyone except:

(a) The Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida (the "Court") (including Clerks and other Court personnel). Litigation Materials designated "Confidential" and any copies thereof, and the information contained therein, that are filed with the Court or any pleadings, motions or other papers filed with the Court, shall be filed under seal in a separate sealed envelope conspicuously marked "Filed Under Seal – Subject to Confidentiality Order," or with such other markings as required by Court rules, and shall be kept under seal until further order of the

Court. Where possible, only those portions of filings with the Court that disclose matters designated "Confidential" shall be filed under seal;

(b) counsel to the parties, including co-counsel of record for the parties actually assisting in the prosecution or defense of this litigation, and the legal associates and clerical or other support staff who are employed by such counsel or attorneys and are working under the express direction of such counsel or attorneys;

(c) parties and current officers and employees of parties to the extent reasonably deemed necessary by counsel disclosing such information for the purpose of assisting in the prosecution or defense of this litigation;

(d) outside photocopying, graphic production services, litigation support services, or investigators employed by the parties or their counsel to assist in this litigation and computer personnel performing duties in relation to a computerized litigation system;

(e) any person who is a witness or deponent, and his or her counsel, during the course of a deposition of testimony in this litigation;

(f) any person who is a potential fact witness in the litigation, provided, however, that a person identified solely in this subparagraph shall not be permitted to retain copies of such Litigation Material;

(g) court reporters, stenographers, or videographers who record deposition or other testimony in the litigation;

(h) experts or consultants retained in connection with the litigation;

(i) any person who is indicated on the face of a document to have been an author, addressee or copy recipient thereof, provided, however, that a person identified

solely in this subparagraph shall not be permitted to retain copies of such Litigation Material; and

(j) any other person, upon written consent from the party or person who designated such Litigation Materials "Confidential."

10. Before any person included in paragraph 9(f) or (h) is given access to Litigation Materials designated "Confidential," and before any person included in subparagraph 9(e) is permitted to retain any copy of Litigation Materials designated Confidential, such person shall be provided with a copy of this Order and shall acknowledge in a written statement, in the form provided as Exhibit A hereto, that he or she read the Order and agrees to be bound by the terms thereof. Such executed forms shall be retained in the files of counsel for the party who gave access to Litigation Materials to the person who was provided such access. Such executed forms shall not be subject to disclosure under the Florida Rules of Civil Procedure unless a showing of good cause is made and the Court so orders.

11. The inadvertent production of privileged or arguably privileged materials shall not be determined to be either: (a) a general waiver of the attorney-client privilege, the work product doctrine or any other privilege; or (b) a specific waiver of any such privilege with respect to documents being produced or the testimony given. Notice of any claim of privilege as to any document claimed to have been produced inadvertently shall be given within a reasonable period of time after discovery of the inadvertent production, and, on request by the producing party, all inadvertently produced materials as to which a claim of privilege is properly asserted and any copies thereof shall be returned promptly.

12. Nothing in this Order shall prevent any producing party from disclosing or using its own "Confidential" Litigation Materials as it deems appropriate, and any such

disclosure shall not be deemed a waiver of any party's right or obligations under this Order with respect to any other information. If a party or non-party that designates information "Confidential" discloses or uses such "Confidential" Litigation Materials in a manner inconsistent with the claim that such information is confidential, any party may move the Court for an order removing such "Confidential" designation pursuant to paragraph 15 herein. Nothing in this Stipulation and Order shall impose any restrictions on the use or disclosure by any party of documents, materials, testimony or other information produced as Litigation Material obtained by such party independently of discovery in this litigation.

13. The parties do not waive any right to object to any discovery request, or to the admission of evidence on any ground, or seek any further protective order, or to seek relief from the Court from any provision of this Order by application on notice on any grounds.

14. If any party objects to the designation of any Litigation Materials as "Confidential," the party shall first state the objection by letter to the party that made such designations. The parties agree to confer in good faith by telephone or in person to attempt to resolve any dispute respecting the terms or operation of this Order. If the parties are unable to resolve such dispute within 5 days of such conference, any party may then move the Court to do so. Until the Court rules on such dispute, the Litigation Materials in question shall continue to be treated as "Confidential," as designated.

15. Upon motion, the Court may order the removal of the "Confidential" designation from any information so designated. In connection with any motion concerning the propriety of a "Confidential" designation, the party making the designation shall bear the burden of proof.

16. Within 60 days of the conclusion of this litigation as to all parties, all Litigation Materials designated "Confidential" and all copies or notes thereof shall be returned to counsel for the producing party who initially produced the Litigation Materials, or destroyed, except that counsel may retain their work product and copies of court filings, transcripts, and exhibits, provided said retained documents will continue to be treated as provided in this Order, as modified by rulings of the Court. If a party chooses to destroy documents after the litigation has concluded, that party shall certify such destruction in writing to the producing party upon written request for such certification by the producing party.

17. The failure of any party to challenge the designation by another production party of Litigation Material as "Confidential" during the discovery period shall not be a waiver of that party's right to object to the designation of such material at trial.

18. This Stipulation applies to all non-parties that are served with subpoenas in connection with this litigation or who otherwise produce documents or are noticed for deposition in connection with this litigation, and all such non-parties are entitled to the protection afforded hereby upon signing a copy of this agreement and agreeing to be bound by its terms.

19. Any party may move to modify the provisions of this Order at any time or the parties may agree by written stipulation, subject to further order of the Court, to modify the provisions of the Order. Should any non-party seek access to the Confidential Material, by request, subpoena or otherwise, the party or recipient of the Confidential Material from whom such access is sought, as applicable, shall promptly notify the producing party who produced such Confidential Materials of such requested access and shall not provide such materials unless required by law or with the consent of the producing party.

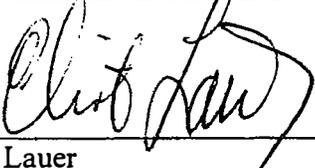
20. This Order shall not apply to any Litigation Materials offered or otherwise used by any party at trial or at any hearing held in open court. Prior to the use of any Litigation Materials that have been designated Confidential at trial or any hearing to be held in open court, counsel who desires to so offer or use such Confidential Material shall take reasonable steps to afford opposing counsel and counsel for the producing party who produced such Confidential Material a reasonable opportunity to object to the disclosure in open court of such Confidential Material, and nothing herein shall be construed a waiver of such right to object.

21. Written notice provided pursuant to this Order shall be made to counsel of record by facsimile.

22. The provisions of this Order shall survive the final termination of the case for any retained Confidential Litigation Material thereof.

**ARTHUR ANDERSEN LLP
and PHILLIP E. HARLOW**

**COLEMAN (PARENT) HOLDINGS,
INC.**

By 
Eliot Lauer
Curtis, Mallet-Prevost, Colt &
& Mosle LLP
101 Park Avenue
New York, NY 10178

By 
Jack Scarola
Searcy, Denney, Scarola, Barnhart
& Shipley P.A.
2139 Palm Beach Lake Boulevard
West Palm Beach, FL 33409

SO ORDERED;

This _____ day of _____, 2001

SIGNED AND DATED

OCT 16 2001

Stephen A. Rapp
CIRCUIT JUDGE Circuit Judge

COPIES PROVIDED TO ALL THOSE ON THE ATTACHED COUNSEL LIST

COUNSEL LIST**Attorneys for Defendants**
Arthur Andersen LLP
and Phillip E. Harlow

CURTIS, MALLET-PREVOST, COLT
& MOSLE LLP

Elicot Lauer
Berard Preziosi
101 Park Avenue
New York, NY 10178
(212) 696-6000

BARTLIT BECK HERMAN PALENCHAR &
SCOTT

Mark L. Levine, Esq.
Mark Ouweleen, Esq.
Courthouse Place
54 West Hubbard Street
Chicago, IL 60610
(312) 494-4454

HOLLAND & KNIGHT LLP

Hank Jackson, Esq.
625 North Flagler Drive
Suite 700
West Palm Beach, FL 33401
(561) 833-2000

Counsel for Plaintiff
Colman (Parent) Holdings, Inc.

SEARCY DENNEY SCAROLA
BARNHART & SHIPLEY P.A.
Jack Scarola, Esq.
2139 Palm Beach Lake Blvd.
West Palm Beach, FL 33409
(561) 686-6300

JENNER & BLOCK LLC

Jerold S. Solovy, Esq.
Joel J. Africk, Esq.
Matthew M. Neumeier, Esq.
Avigian J. Stern, Esq.
One IBM Plaza, Suite 4400
Chicago, IL 60611
(312) 222-9350

work, all copies of any materials I receive which have been designated as "Confidential," and that I will carefully maintain such materials in a container, drawer, room or other safe place in a manner consistent with the Order. I acknowledge that the return or destruction of "Confidential" material shall not relieve me from any other continuing obligations imposed upon me by the Order.

6. I stipulate to the jurisdiction of this Court.

Date: _____

(Signature)

KIRKLAND & ELLIS LLP

AND AFFILIATED PARTNERSHIPS

655 Fifteenth Street, N.W.
Washington, D.C. 20005

Thomas A. Clare
To Call Writer Directly:
202-879-5993
tclare@kirkland.com

202 878-5000
www.kirkland.com

Facsimile:
202 879-5200
Dir. Fax: 202 879-5200

July 15, 2003

BY FACSIMILE

Michael Brody, Esq.
Jeanner & Block, LLC
One IBM Plaza Suite 4400
Chicago, Illinois 60611

Dear Mike:

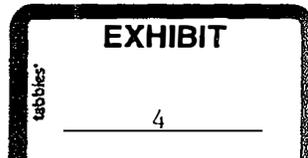
Please find the enclosed requests for production of documents from Morgan Stanley & Co Incorporated and Morgan Stanley Senior Funding. Regarding the issues we discussed yesterday:

• **Protective Order From Andersen Litigation:** The only outstanding issue is our request to remove the "or any other litigation arising therefrom" language in Paragraph 2. We remain unconvinced that the administrative convenience of having precisely the same protective order outweighs the uncertainties created by this unnecessary and open-ended provision. Please let me know how you intend to proceed. Once we have resolved this issue, we will prepare a letter to memorialize the agreements reached during our July 14, 2003 call regarding the interpretation and administration of the protective order.

• **Depositions Of Current And Former MS & Co. Employees:**

- (a) We understand that you intend to prepare the necessary papers to obtain the deposition of John Tyree. We will accept service on his behalf.
- (b) We are not authorized to provide you with "last known" contact information for Alex Fuchs or Robert Kitts absent a properly framed discovery request.

• **MS & Co.'s Objections To CPH's Requests For Production:** We are in the process of reviewing the issues you raised during yesterday's call regarding MS & Co.'s objections to CPH's Requests for Production. MS & Co. intends -- at the time it makes its initial production -- to provide CPH with updated objections/responses to the RFPs reflecting its final decisions on those issues.



Chicago

London

Los Angeles

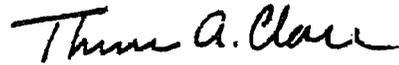
New York

San Francisco

KIRKLAND & ELLIS LLP

Jul 15, 2003
Page 2

Sincerely,

A handwritten signature in black ink that reads "Thomas A. Clare". The signature is written in a cursive, flowing style.

Thomas A. Clare

cc: John Scarola, Esq.

JENNER & BLOCK

July 17, 2003

Jenner & Block, LLC
 One IBM Plaza
 Chicago, IL 60611-7603
 Tel 312 222-9350
 www.jenner.com

Chicago
 Dallas
 Washington, DC

By Telecopy

Thomas A. Clare, Esq.
 Kirkland & Ellis
 655 Fifteenth Street, N.W.
 Suite 1200
 Washington, D.C. 20005

Michael T. Brody
 Tel 312 923-2711
 Fax 312 840-7711
 mbrody@jenner.com

Re: Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co.

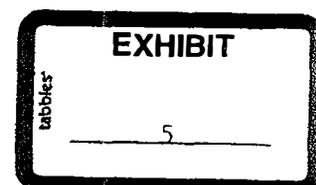
Dear Tom:

I write concerning the various topics Deirdre Connell and I discussed Monday in our meet and confer telephone conference concerning the discovery requests Coleman (Parent) Holdings, Inc. ("CPH") propounded upon Morgan Stanley & Co. ("Morgan Stanley"). As you know, it is our view that Morgan Stanley has failed to respond appropriately to CPH's document requests and CPH's deposition notices. The Court has denied Morgan Stanley's motion to stay discovery, and it is apparent that Morgan Stanley is now engaging in "self help" to delay discovery that is clearly necessary and appropriate. This letter summarizes our discussions on specific items.

1. Deposition Dates. We have noticed depositions and expect to proceed with deposition discovery. While we are willing to accommodate reasonable scheduling requests, Morgan Stanley continues to refuse to offer dates for the depositions CPH noticed. You indicated in our conference that Morgan Stanley is willing to begin depositions in early September, but only if CPH produces documents by mid-August in response to document requests that Morgan Stanley served on July 15.

We do not agree to postpone depositions. We served our notice of deposition upon Morgan Stanley on May 12. Morgan Stanley now seeks unilaterally to condition its compliance with deposition discovery upon CPH's response to recently served document requests. It is unreasonable to delay deposition discovery for another two months.

Nor do we believe that Morgan Stanley's compliance with the long-pending deposition notice may be conditioned upon an agreement of CPH to produce documents by mid-August. Morgan Stanley only this week served its discovery requests. Morgan Stanley requests that CPH meet a schedule that Morgan Stanley has not even come close to meeting. CPH served document requests on May 12, and Morgan Stanley proposes to begin its production on July 25, approximately 75 days later. Morgan Stanley wants CPH to respond to the newly-served requests and produce documents by mid-August, or within 30 days. We will do our best to produce documents, and we will advise you of a schedule for production after we review Morgan



16div-005130

Thomas A. Clare, Esq.
July 17, 2003
Page 2

JENNER & BLOCK

Stanley's requests. But Morgan Stanley's tactical decision to delay seeking document discovery is no reason to postpone the depositions we noticed on May 12.

2. **Availability of Deponents.** As to the particular deponents, Morgan Stanley has refused to produce Mr. Tyree. During our conference call, you advised that Mr. Tyree is a current employee of a Morgan Stanley entity known as Morgan Stanley International, Ltd. Counsel for Morgan Stanley apparently had contacted Mr. Tyree about this case. It is transparent that your client can produce Mr. Tyree when and where you choose.

For no reason other than to obtain further delay, Morgan Stanley has insisted that CPH obtain letters rogatory to compel the deposition of Mr. Tyree in London. Once we jump over those hurdles, you indicated Mr. Tyree is willing to come to the United States for his deposition. We do not believe it is reasonable for Morgan Stanley to insist on letters rogatory.

3. **Morgan Stanley's Objections to CPH's Document Requests.** Under the discovery rules, Morgan Stanley is obligated to respond to CPH's document requests in good faith. Morgan Stanley failed to do so. Instead, Morgan Stanley raised a multitude of spurious objections. Morgan Stanley did not agree to produce anything in its written responses. To be clear, we do not believe it is permissible to file the kind of response you have filed. We also do not believe it is permissible to schedule a meet and confer, but then decline to provide meaningful responses to our questions.

Our objective in our meet and confer was to narrow the scope of any disagreements so that we need not burden the Court unnecessarily. To start, we asked you to explain various objections and to identify those instances in which Morgan Stanley would produce documents despite initial objections. You refused to explain Morgan Stanley's objections and have failed to articulate in the written responses what documents Morgan Stanley is producing and what it refuses to produce based on its objections. In your subsequent letter of July 15, you indicated that Morgan Stanley intends to serve a modified response along with the future document production, at which time Morgan Stanley may provide some of the answers we sought in our discovery conference.

Obviously, Morgan Stanley's principal strategy at play is to delay discovery. Morgan Stanley was obligated to provide good faith responses on June 25, not sometime after Morgan Stanley begins producing documents in July. Morgan Stanley served 46 pages of objections to our discovery responses and has refused to resolve those objections.

Morgan Stanley's particular objections are groundless. Several examples demonstrate Morgan Stanley's refusal to provide plainly relevant information. For example:

- Although the central issue in CPH's suit is the fraudulent statements made to CPH by Morgan Stanley bearing on Sunbeam's value, Morgan Stanley objected to a request that sought the production of documents relating to the value of Sunbeam securities (Request 13), claiming that such information was not relevant;

Thomas A. Clare, Esq.
 July 17, 2003
 Page 3

JENNER & BLOCK

- Morgan Stanley asserted that the request calling for the production of documents relating to particular events that took place on March 19, 1998 (Request 24) was "vague, ambiguous, and overbroad," despite the fact that the complaint in this case details the events at issue (¶¶ 59-66);
- Morgan Stanley likewise asserted that Request 25 was "vague, ambiguous, and overbroad," despite the fact that it was a narrow request that sought Morgan Stanley's communications with Sunbeam on a single day – March 18, 1998;
- Morgan Stanley refused to produce documents relating to its procedures for due diligence (Request 43), limiting its response to those due diligence procedures that relate to the Sunbeam transaction only. Ignoring its own objections, and again demonstrating Morgan Stanley's bad faith, Morgan Stanley now has served discovery requests on CPH seeking documents relating to CPH's procedures for due diligence (Morgan Stanley Request 29). Morgan Stanley's Request 29 confirms the reasonableness of CPH's Request 43;
- Morgan Stanley refused to produce any documents relating to the personnel who performed services on behalf of Sunbeam, including the criteria used to evaluate or compensate those personnel (Requests 43-46). Those documents are directly relevant to CPH's fraud claims in Count I;

Morgan Stanley refused to produce documents relating to cases, arbitrations, and other proceedings on the ground that CPH can obtain such documents elsewhere (Requests 55, 57, 60-61). That is not a proper objection. If Morgan Stanley has the documents, it must produce them. It is not proper to tell us to ask someone else. Moreover, again ignoring its own objections, Morgan Stanley has requested from CPH (Morgan Stanley Requests 32-38) the same information that Morgan Stanley refuses to provide.

In our discovery conference, you refused to explain what Morgan Stanley would produce, and what Morgan Stanley would withhold. You refused to identify whether Morgan Stanley intended to withhold documents responsive to any particular document request based on Morgan Stanley's objections. You refused to provide explanations for Morgan Stanley's objections, and you refused to withdraw any of Morgan Stanley's objections, other than the objection (which the Court already has overruled) that discovery in this case should await the resolution of Morgan Stanley's pending motion. In response to several of our requests, Morgan Stanley's written response states that "MS & Co. stands ready to negotiate a limitation to this request." In our discovery conference, we asked you to make good on Morgan Stanley's promise. You refused to do so. Without explanation, Morgan Stanley now has served on CPH document requests including many of the same requests it has refused to honor.

We also discussed Morgan Stanley's general objections. We asked you if Morgan Stanley intended to withhold any documents pursuant to its thirteen general objections, its nine objections to definitions, and its three objections to instructions. Inexplicably, Morgan Stanley declines to state whether it intends to withhold documents on the basis of any of those objections. Morgan Stanley also was unwilling to explain any of its general objections or to

Thomas A. Clare, Esq.
July 17, 2003
Page 4

J E N N E R & B L O C K

modify them. We note that Morgan Stanley has adopted in its discovery requests several of the definitions that it objected to in our discovery requests.

4. **Andersen Protective Order.** CPH has proposed using in this case the protective order that Judge Rapp entered in the *Andersen* litigation. The *Andersen* protective order is the same protective order that Judge Middlebrooks entered in *In re Sunbeam Sec. Litig.*, 98-8258-CIV-Middlebrooks (S.D. Fla.). We think it makes sense to use the same protective order here.

The one area in which Morgan Stanley raised an objection to the protective order is Paragraph 3, which permits the use of documents produced pursuant to the protective order in this case, or in other litigation arising therefrom." That same provision exists in both the *Andersen* litigation protective order and the *In re Sunbeam Sec. Litig.* protective order. Nonetheless, we are willing to delete that phrase from the protective order to be used in this case. With that modification, we will present the *Andersen* order for entry by agreement in this case next week.

You raised a number of issues concerning the language of the protective order, which we resolved. We agreed that neither party would argue that the language "of a current nature" in paragraph 4 of the Protective Order would preclude confidential treatment of documents relating to the 1998 transactions. The parties further agreed that the time to designate deposition transcripts as confidential would be the later of 10 days after receipt of the transcript or 30 days after the completion of the deposition, resolving the potential ambiguity you claim exists between Paragraphs 6(b) and 7. We agreed that Paragraph 9(e) permits providing confidential material to a witness or deponent, and his or her counsel, in the course of the deposition, and Paragraph 9(f) permits exhibiting that information to a deponent in preparation for his deposition. We agreed that Paragraph 11, which requires the return of inadvertently produced privileged documents upon the receipt of a "proper assertion" of privilege, means that in the event a party requests the return of an inadvertently produced document, the document would be returned promptly after the assertion of privilege, and the parties would thereafter resolve, if necessary, whether the document in fact was privileged. We have no objection to Morgan Stanley's request that if the parties discover after production that a document was inadvertently not designated confidential, they may add such a designation. Finally, we agreed to discuss in the future, if necessary, a protocol for adding confidential designations to unconventional documents, such as computer disks.

5. **Timing and Sequence of Discovery.** You suggested for the first time in our call that the parties produce documents once, for both cases. That is, the parties would produce their documents in both the CPH case and the Morgan Stanley Senior Funding case at the same time, without distinction between the two cases. That procedure is not consistent with the document requests we served and would compromise the jury's ability to determine which documents came from Morgan Stanley and which documents came from Morgan Stanley Senior Funding.

Morgan Stanley, as defined in the document requests, is required to produce documents within its possession, custody, or control in a manner that permits their identification as documents produced by Morgan Stanley. Morgan Stanley Senior Funding, as defined in the document requests, likewise is required to produce documents within its possession, custody, or control in a manner that permits their identification as documents produced by Morgan Stanley Senior

Thomas A. Clare, Esq.
July 17, 2003
Page 5

JENNER & BLOCK

Funding. If Morgan Stanley has a document in its files, and Morgan Stanley Senior Funding has the same document in its files, each company should produce a copy of the document. That permits us (and ultimately the jury) to know what documents Morgan Stanley had and what documents Morgan Stanley Senior Funding had. We do not agree to blur that distinction. Alternatively, if, contrary to the terms of the document requests, you produce Morgan Stanley's and Morgan Stanley Senior Funding's documents in a single production, it will reflect that all produced documents are within the possession, custody, or control of both Morgan Stanley and Morgan Stanley Senior Funding.

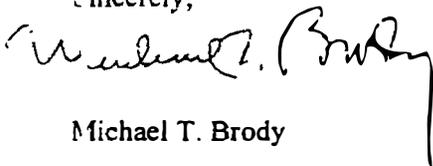
You offered for the first time in our call to produce Morgan Stanley's documents in hard copy, or in a computer readable form, on the condition that CPH will do the same. You were unable to give us an estimate of the expected volume of Morgan Stanley's production. Please advise us of Morgan Stanley's expected production so that we may respond to your request.

We discussed the third-party subpoenas that CPH has served, and that Morgan Stanley will serve. We each agreed to share documents obtained from third parties pursuant to subpoena. That is, we will make available to you all documents we obtain from third parties pursuant to subpoena, and you will do the same.

6. **Time for Discovery.** Beginning with the conversation Ron Marmor and I had with you on June 17, 2003, we have been asking Morgan Stanley to set forth its expected period for the completion of discovery. As in our prior conversations, you refused to do so. We renew our request that Morgan Stanley set forth its estimate of the expected discovery period in this case.

In conclusion, and as we stated in our discovery conference, we have satisfied our obligations to meet and confer. We also would like to direct your attention to the provisions of F.S. § 57.105.

Sincerely,



Michael T. Brody

MTB/cjg

cc: Joseph Ianno, Jr., Esq. (by telecopy)
John Scarola, Esq. (by telecopy)
Jerold S. Solovy, Esq.

JENNER & BLOCK

Jenner & Block, LLC
 One IBM Plaza
 Chicago, IL 60611-7603
 Tel 312 222-9350
 www.jenner.com

Chicago
 Dallas
 Washington, DC

July 22, 2003

MICHAEL T. BRODY
 TEL 312 923-2711
 FAX 312 640-7711
 MBRODY@JENNER.COM

VIA FACSIMILE

Thomas A. Clare, Esq.
 KIRKLAND & ELLIS
 635 Fifteenth Street, N.W.
 Suite 1200
 Washington, D.C. 20005-5793

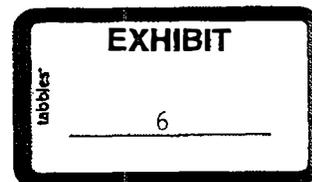
Re: *MSSF v. MacAndrews & Forbes Holdings Inc. et al.*

Dear Tom:

This letter responds to your letter dated July 19, 2003 that was sent by facsimile on July 21, 2003. For ease of reference, the paragraph numbers in this letter conform to the paragraph numbers in my July 17 letter. Although we understand that Morgan Stanley & Co. ("Morgan Stanley") preferred not to have discovery proceed, Judge Maass has denied Morgan Stanley's motion to stay discovery. Accordingly, we expect Morgan Stanley to comply with its discovery obligations within the time frames provided by the applicable Florida rules.

1 and 2. Deposition Dates/Availability of Deponents. On May 9, 2003, we filed a Notice of Deposition setting Mr. Tyree's deposition for July 10 and 11. You have advised that Mr. Tyree is available to be deposed on September 8. We will agree to defer his deposition for approximately two months, commencing on September 8, provided that is a firm date, that Morgan Stanley produces Mr. Tyree in the Continental United States, and that Morgan Stanley does not require us either to seek letters rogatory or other form of international process. We hope to complete Mr. Tyree's deposition within two days.

We do not agree that you can condition producing Mr. Tyree upon other events, including our production of documents pursuant to a document request that Morgan Stanley, for tactical reasons, elected not to file until July 15, 2003. We also do not agree that we should be required to obtain letters rogatory. If we are able to reach agreement re Mr. Tyree's deposition, we will withdraw our Notices of Deposition pursuant to Florida Rule of Civil Procedure 1.310 concerning Morgan Stanley's relationship with Morgan Stanley & Co. International Ltd. and Mr. Tyree.



JENNER & BLOCK

Thomas A. Clare, Esq.
July 22, 2003
Page 2

We will advise you when we have confirmed dates for the third parties identified in our Notice of Deposition. If there are particular dates that are inconvenient for you, please let us know now, so that we can attempt to avoid those dates.

3. Morgan Stanley's Objections to CPH's Document Requests. We are entitled to know whether Morgan Stanley is producing documents responsive to each document request or withholding documents based upon its various objections. You have declined to provide that information. Although you assert that Morgan Stanley timely filed its response to CPH's first document request, that "response" was no response at all. We do not believe Judge Maass will have any trouble seeing that filing for what it is.

Morgan Stanley advises that it will file "revised responses" on July 25, 2003 -- more than one month after Morgan Stanley was obligated to file a good-faith response to CPH's first document request. We understand that Morgan Stanley's "revised responses" will set forth Morgan Stanley's definitive positions re CPH's first document request. We reserve all of our rights, and we encourage Morgan Stanley to address clearly and specifically the deficiencies we have identified. To the extent that the parties continue to disagree, we will seek guidance from the Court.

4. Andersen Protective Order. We have submitted the revised language as an agreed order.

5. Timing and Sequence of Discovery. Morgan Stanley decries as "inefficient and wasteful" our desire to have documents produced in a manner that clearly reveals which party had those documents in its files. We disagree. It is inefficient and wasteful to have attorneys and witnesses trying to reconstruct whether a document came from Morgan Stanley or from Morgan Stanley Senior Funding. If Morgan Stanley does not produce the documents in the manner requested, but instead blurs the distinction, we shall treat that production as confirmation that all of the documents are within the possession, custody, or control of both Morgan Stanley and Morgan Stanley Senior Funding, estopping both Morgan Stanley and Morgan Stanley Senior Funding from contending otherwise.

With regard to the logistics, we would like to review the documents before designating them for copying. If it is more convenient, we can conduct that review at your office in Washington, D.C. As your letter suggests, those arrangements will be reciprocal. You may review the documents CPH produces at our office, and arrange for a copy service to duplicate the documents you designate. Because both of our firms have offices in Chicago and Washington, D.C., that should facilitate our respective efforts.

JENNER & BLOCK

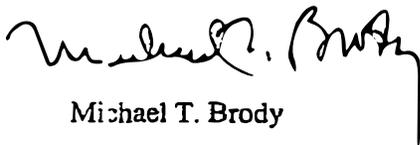
Thomas A. Clare, Esq.
July 22, 2003
Page 3

6. Time for Discovery. We do not agree with your recitation of events, and we are disappointed that Morgan Stanley continues to decline our request to discuss the time frame for completing fact discovery.

Your letter also refers to Mr. Scarola's request to extend the time for the filing of our response brief. As Mr. Scarola has advised, despite our desire to have a prompt hearing on Morgan Stanley's motion to dismiss or for judgment on the pleadings, it appears that the hearing dates that worked for us did not work for you. We understand that the likely available date for a hearing that works for our schedule, your schedule, and the Court's schedule is in October. Our response brief, therefore, will not delay the hearing.

We do not believe that the appointment of a special master is appropriate. To the extent that the parties are unable to agree upon our discovery obligations, Judge Maass will be able to provide us with guidance on any such issues.

Very truly yours,



Michael T. Brody

MTB/sae

cc: Joseph Ianno, Jr. Esq.
John Scarola, Esq.
Jerold S. Solovy, Esq.

Document Number: 955349

07/24/03 17:08 FAX 16931007099991312861 KIRKLAND & ELLIS LLP

002/003

KIRKLAND & ELLIS LLP

AND AFFILIATED FIRM PARTNERSHIPS

855 Fifteenth Street, N.W.
Washington, D.C. 20005

202 879-5000

www.kirkland.com

Kathryn R. DeBord
To Call Writer Directly:
(202) 879-5078
kdebord@kirkland.comFacsimile:
202 879-5200

Dir. Fax: (202) 879-5200

July 24, 2003

By FacsimileMichael Brody, Esq.
Jenner & Block, LLC
One IBM Plaza
Chicago, IL 60611-7603Re: *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co. Inc. and
Morgan Stanley Senior Funding, Inc. v. MacAndrews & Forbes Holdings,
Inc., and Coleman (Parent) Holdings Inc.*

Dear Mike:

This letter confirms our discussion regarding the proposed protective order on July 14, 2003 and the agreements we reached with regard to that order. As you confirmed in your July 17, 2003 and July 22, 2003 correspondence, the parties have agreed to use same protective order entered in the *Andersen* litigation -- but to delete the phrase "or any other litigation arising therefrom" in paragraph 3. We also agreed to the following constructions:

1. Paragraph 4. We agreed that the events of 1997 and 1998 relating to the Coleman Transaction and the related financing transactions are deemed "of a current nature" for the purposes of the protective order, to ensure that confidential treatment of those materials cannot be precluded.
2. Paragraphs 6(b) and 7. We agreed that the time to designate the confidentiality of deposition transcripts is 10 days after receipt of the transcript or 30 days after the completion of the deposition, whichever is later.
3. Paragraphs 9(e) and (f). We agreed that documents designated as confidential can be shown to deponents in preparation for their deposition and during the deposition, as long as the witnesses are not permitted to retain copies of the documents.
4. Paragraph 11. We agreed that -- upon a claim of the inadvertent production of privileged documents -- the documents subject to that claim will be promptly returned to the producing party. Any dispute or disagreement regarding the assertion of a privilege will be resolved, if at all, after the document has been returned.

EXHIBIT

tabbies

7

16dIV-005138

KIRKLAND & ELLIS LLP

Michael Brody, Esq.
July 24, 2003
Page 2

In addition to these clarifications of specific paragraphs, we also agreed that the parties may subsequently add a confidentiality designation to a produced document whose confidentiality designation was inadvertently left off. Finally, we agreed to resolve, on a case-by-case basis, a protocol for adding confidentiality designations to electronic media and other things.

Sincerely,



Kathryn R. DeBord

cc: Joseph Ianno, Jr., Esq. (by facsimile)
John Scarola, Esq. (by facsimile)

IN THE CIRCUIT COURT OF THE Fifteenth
JUDICIAL CIRCUIT, IN AND FOR Palm Beach
COUNTY, FLORIDA

Morgan Stanley & Co.
Incorporated, et al.,
Plaintiffs

Case No.:

v.
Arthur Anderson LLP, et al
Defendants

ORDER
Denying Motion to Transfer

THIS CAUSE having come on to be heard on this 30 day of March, 2004, on Defendant's Plaintiff's

Motion to Transfer Action

and the Court having considered the record, having heard counsel, and being otherwise advised in the Premises,

it is hereby,

ORDERED AND ADJUDGED that said Motion be, and the same is hereby

Denied

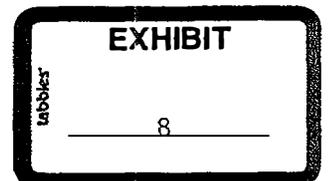
DONE AND ORDERED in Chambers, at West Palm Beach, Palm Beach County, Florida
this 5 day of April, 2004



Circuit Judge

Copies furnished:

To recorder call Grant at 500/846-2982



16div-005140

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

Case No. CA 03-5045 AI

vs.

MORGAN STANLEY & CO., INC.,

Defendant,

MORGAN STANLEY SENIOR FUNDING, INC.,

Plaintiff,

Case No. CA 03-5165 AI

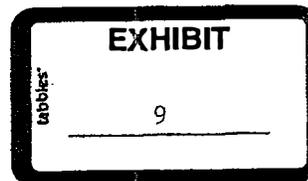
vs.

MACANDREWS & FORBES HOLDINGS, INC.,

Defendant,

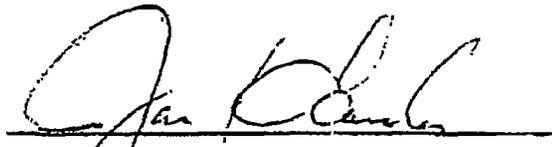
**NOTICE OF PROPOUNDING INTERROGATORIES
TO MORGAN STANLEY & CO., INC.**

COLEMAN (PARENT) HOLDINGS INC., hereby gives notice that pursuant to Rule
340(e), Florida Rules of Civil Procedure, that Interrogatories numbered 1 through 4 have been
directed to DEFENDANT, MORGAN STANLEY & CO, INC., this 19th day of March 2004.



Coleman Holdings, Inc. vs Morgan Stanley & Company
Case No.: 2003 CA 005045 AI

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by
Fax and Federal Express to all Counsel on the attached list on this 19 day of MARCH,
2004.



Jack Scarola
Florida Bar No.: 169440
Scarola Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 478-0754
Attorney for Coleman (Parent) Holdings Inc.
and MacAndrews & Forbes Holdings, Inc.

Coleman Holdings, Inc. vs Morgan Stanley & Company
Case No.: 2003 CA 005045 A1

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block LLP
One IBM Plaza
Suite 4400
Chicago, IL 60611

INTERROGATORIES TO MORGAN STANLEY & CO., INC.

1. Did any provision in the Settlement Agreement play any part in the filing of the New Morgan Stanley Litigation?

2. Identify all individuals, other than Kirkland & Ellis and Carlton Fields attorneys, who have received a copy of all or any portion of any information designated as "confidential" including but not limited to the Settlement Agreement or any information derived from it, whether in whole or in part, in words or in substance, directly or indirectly.

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co.
Case No.: 2003 CA 005045 AI

3. Provide a detailed account setting forth when each individual identified in response to the preceding interrogatory received the confidential information, from whom they received it, how they received it, why it was provided to them, and any use they made of it.

4. Detail the purported factual basis for Morgan Stanley & Co.'s inclusion as a plaintiff in the New Morgan Stanley Litigation, including specifically the nature and amount of any damages alleged to have been sustained by Morgan Stanley & Co.

Coleman Holdings, Inc. vs Morgan Stanley & Company
Case No.: 2003 CA 005045 AI

STATE OF _____)
COUNTY OF _____)

~~The foregoing instrument was sworn to and subscribed before me this _____ day of _____, 20____, by _____, who is personally known to me (_____) or who has provided proper identification _____.~~

(SEAL)

(Notary signature)

(Notary name - print)
NOTARY PUBLIC, State of Florida

Serial number, if any)

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

Case No. CA 03-5045 AI

vs.

MORGAN STANLEY & CO., INC.,

Defendant,

MORGAN STANLEY SENIOR FUNDING, INC.,

Plaintiff,

Case No. CA 03-5165 AI

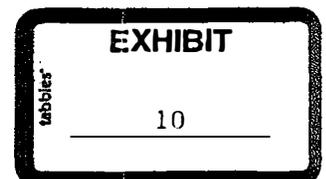
vs.

MACANDREWS & FORBES HOLDINGS, INC.,

Defendant,

**NOTICE OF PROPOUNDING INTERROGATORIES
TO MORGAN STANLEY SENIOR FUNDING, INC.**

MACANDREWS & FORBES HOLDINGS INC., hereby gives notice that pursuant to Rule 1.340(e), Florida Rules of Civil Procedure, that Interrogatories numbered 1 through 4 have been directed to DEFENDANT, MORGAN STANLEY SENIOR FUNDING, INC., this 19th day of March, 2004.



MSSF1 v. MacAndrews
Case No.: 2003 CA 005165 AI

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by
Fax and Federal Express to all Counsel on the attached list on this 19 day of March,
2004.



Jack Scarola
~~Florida Bar No.: 169440~~
Searcy Denney Scarola
Barhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 478-0754
Attorney for Coleman (Parent) Holdings Inc.
and MacAndrews & Forbes Holdings, Inc.

MSSFI v. MacAndrews
Case No.: 2003 CA 005165 AJ

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

~~Thomas D. Yannucci, P.C.~~
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block LLP
One IBM Plaza
Suite 4400
Chicago, IL 60611

INTERROGATORIES TO MORGAN STANLEY SENIOR FUNDING, INC.

1. Did any provision in the Settlement Agreement play any part in the filing of the New Morgan Stanley Litigation?

2. Identify all individuals, other than Kirkland & Ellis and Carlton Fields attorneys, who have received a copy of all or any portion of any information designated as "confidential" including but not limited to the Settlement Agreement or any information derived from it, whether in whole or in part, in words or in substance, directly or indirectly.

MSSFI v. MacAndrews
Case No.: 2003 CA 005165 AI

3. Provide a detailed account setting forth when each individual identified in response to the preceding interrogatory received the confidential information, from whom they received it, how they received it, why it was provided to them, and any use they made of it.

4. Detail the purported factual basis for Morgan Stanley & Co.'s inclusion as a plaintiff in the New Morgan Stanley Litigation, including specifically the nature and amount of any damages alleged to have been sustained by Morgan Stanley & Co.

MSSF1 v. MacAndrews
Case No.: 2003 CA 005165 A1

STATE OF _____)
COUNTY OF _____)

~~The foregoing instrument was sworn to and subscribed before me this _____ day of _____, 20____, by _____, who is personally known to me (_____) or who has provided proper identification _____.~~

(SEAL)

(Notary signature)

(Notary name - print)
NOTARY PUBLIC, State of Florida

(Serial number, if any)

 *** MULTI TX/RX REPORT ***

TX/RX NO 1869
 PGS. 5
 TX/RX INCOMPLETE -----
 TRANSACTION OK
 (1) 23812#72663#622#13128407711#
 (2) 23812#72663#622#13128407671#
 (3) 23812#72663#622#15616597368#
 (4) 23812#72663#622#15616845816#

 ERROR INFORMATION

KIRKLAND & ELLIS LLP

Fax Transmittal

655 Fifteenth Street, N.W.
 Washington, D.C. 20005
 Phone: 202 879-5000
 Fax: 202 879-5200

Please notify us immediately if any pages are not received.

THE INFORMATION CONTAINED IN THIS COMMUNICATION IS CONFIDENTIAL, MAY BE ATTORNEY-CLIENT PRIVILEGED, MAY CONSTITUTE INSIDE INFORMATION, AND IS INTENDED ONLY FOR THE USE OF THE ADDRESSEE. UNAUTHORIZED USE, DISCLOSURE OR COPYING IS STRICTLY PROHIBITED AND MAY BE UNLAWFUL.

IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR,
 PLEASE NOTIFY US IMMEDIATELY AT:
 202 879-5000.

<i>To:</i>	<i>Company:</i>	<i>Fax #:</i>	<i>Direct #:</i>	
Michael Brody	Jenner & Block, LLC	(312) 840-7711	(312) 923-2711	
Jerold Solovy	Jenner & Block, LLC	(312) 840-7671	(312) 923-2671	
Joseph Ianno	Carlton Fields, P.A.	(561) 659-7368	(561) 659-7070	
John Scarola	Searcy Denney Scarola Barnhart & Shipley	(561) 684-5816	(561) 686-6300	
<i>From:</i>	<i>Date:</i>	<i>Pages w/cover:</i>	<i>Fax #:</i>	<i>Direct #:</i>
Kathryn R. DeBord	April 26, 2004		(202) 879-5200	(202) 879-5078

Message:

KIRKLAND & ELLIS LLP

Fax Transmittal

655 Fifteenth Street, N.W.
Washington, D.C. 20005
Phone: 202 879-5000
Fax: 202 879-5200

Please notify us immediately if any pages are not received.

THE INFORMATION CONTAINED IN THIS COMMUNICATION IS CONFIDENTIAL, MAY BE ATTORNEY-CLIENT PRIVILEGED, MAY CONSTITUTE INSIDE INFORMATION, AND IS INTENDED ONLY FOR THE USE OF THE ADDRESSEE. UNAUTHORIZED USE, DISCLOSURE OR COPYING IS STRICTLY PROHIBITED AND MAY BE UNLAWFUL.

**IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR,
PLEASE NOTIFY US IMMEDIATELY AT:
202 879-5000.**

To:	Company:	Fax #:	Direct #:
Michael Brody	Jenner & Block, LLC	(312) 840-7711	(312) 923-2711
Jerold Solovy	Jenner & Block, LLC	(312) 840-7671	(312) 923-2671
Joseph Ianno	Carlton Fields, P.A.	(561) 659-7368	(561) 659-7070
John Scarola	Searcy Denney Scarola Barnhart & Shipley	(561) 684-5816	(561) 686-6300

From:	Date:	Pages w/cover:	Fax #:	Direct #:
Kathryn R. DeBord	April 26, 2004		(202) 879-5200	(202) 879-5078

Message:

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO., INC.,

Defendant.

MORGAN STANLEY SENIOR FUNDING, INC.,

Plaintiff,

vs.

MACANDREWS & FORBES HOLDINGS, INC., CASE NO: CA 03-5165 AI

Defendant.

AMENDED NOTICE OF VIDEOTAPED DEPOSITION

PLEASE TAKE NOTICE that Defendant Morgan Stanley & Company Incorporated will take the videotaped deposition of Joseph Page, pursuant to Florida Rules of Civil Procedure 1.280 and 1.310. The oral examination will take place beginning on April 27, 2004, at 1:00 p.m. and continue from day to day until completed at the offices of Orbach, Huff & Suarez, 1901 Avenue of the Stars, Suite 575 Los Angeles, CA 90067. The deposition will be taken before a person authorized to administer oaths and recorded by stenographic and videographic means. The video operator will be Esquire Deposition Services of 6222 Wilshire Blvd Los Angeles, California 90048. The witness is instructed to bring all books, papers, and other things in his or

her possession or under its control relevant to this lawsuit (and not previously produced in discovery) to the examination.

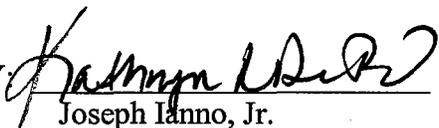
Dated: April 26, 2004

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar No. 618349)
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

Michael K. Kellogg
Mark C. Hansen
James M. Webster
Rebecca A. Beynon
**KELLOGG, HUBER, HANSEN,
TODD & EVANS P.L.L.C.**
Sumner Square
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
Telephone: (202) 326-7900
Facsimile: (202) 326-7999
(*Pro Hac Vice* Pending)

**Counsel for Morgan Stanley & Co.
Incorporated and Morgan Stanley Senior
Funding**

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
E-mail: jianno@carltonfields.com

BY: 
Joseph Ianno, Jr.
Florida Bar No. 655351

CERTIFICATE OF SERVICE

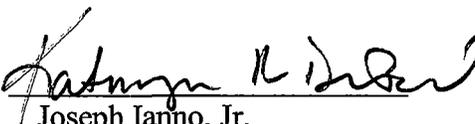
I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this 26th day of April, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar No. 618349)
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

Michael K. Kellogg
Mark C. Hansen
James M. Webster
Rebecca A. Beynon
**KELLOGG, HUBER, HANSEN,
TODD & EVANS P.L.L.C.**
Sumner Square
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
Telephone: (202) 326-7900
Facsimile: (202) 326-7999
(*Pro Hac Vice* Pending)

**Counsel for Morgan Stanley & Co.
Incorporated and Morgan Stanley
Senior Funding**

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
E-mail: jianno@carltonfields.com

BY: 
Joseph Ianno, Jr.
Florida Bar No. 655351

SERVICE LIST

Jack Scarola
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy
Michael Brody
JENNER & BLOCK, LLC
One IBM Plaza, Suite 400
Chicago, IL 60611

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,

Defendant(s).

CASE NO. CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,

Plaintiff(s),

vs.

MACANDREWS & FORBES HOLDINGS, INC.,

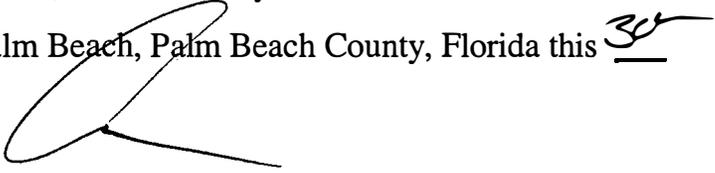
Defendant(s).

**AGREED ORDER ON COLEMAN (PARENT) HOLDINGS INC.'S MOTION FOR
REMOVAL OF CONFIDENTIALITY DESIGNATIONS**

THIS CAUSE came before the Court April 30, 2004 on Coleman (Parent) Holdings Inc.'s Motion for Removal of Confidentiality Designations, with all counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that the Motion is Granted. The Confidential designation on the executed copies of Exhibit A to the Stipulated Confidentiality Order that Morgan Stanley produced to CPH on March 31, 2004 is hereby removed.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 30 day of April, 2004.



ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:

Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci
655 15th Street, NW, Suite 1200
Washington DC 20005

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, Il 60611

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

CASE NO. CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

ORDER CANCELING HEARING

THIS CAUSE came before the Court April 30, 2004, with all counsel present.

Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that hearing set May 7, 2004 is canceled.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 30
day of April, 2004.

ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:

Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci
655 15th Street, NW, Suite 1200
Washington DC 20005

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, Il 60611

FAX TRANSMITTAL

J E N N E R & B L O C K

Jenner & Block LLP
One IBM Plaza
Chicago, IL 60611-7603
Tel 312 222-9350
www.jenner.com

Chicago
Dallas
Washington, DC

Date: May 11, 2004
To: Thomas A. Clare, Esq.
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005

Fax: 202 879-5200
Voice: 202 879-5993

Joseph Ianno, Jr., Esq.
Carlton Fields, P.A.
222 Lake View Avenue
West Palm Beach, FL 33401

Fax: 561 659-7368
Voice: 561 659-7070

From: Michael T. Brody
312 840-2711

Client Number: 41198-10003

Important: This message is intended only for the use of the individual or entity to which it is addressed, and may contain information that is attorney work product, privileged, confidential and exempt from disclosure under applicable law. If the reader of this message is not the intended recipient, or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone, and return the original message to us at the above address via postal service. Thank you.

Message: Please see attached.

Total number of pages including this cover sheet *24*
If you do not receive all pages, please call: 312 222-9350
Secretary: Sue Durkin

Time Sent:
Sent By: *Sue Durkin*
Extension: 6387

JENNER & BLOCK

May 11, 2004

Jenner & Block LLP
One IBM Plaza
Chicago, IL 60611
Tel 312-222-9350
www.jenner.com

Chicago
Dallas
Washington, DC

By Telecopy

Thomas A. Clare, Esq.
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

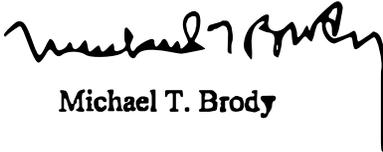
Michael T. Brody
Tel 312 923-2711
Fax 312 840-7711
mbrody@jenner.com

Re: Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co.
Morgan Stanley Senior Funding, Inc. v. MacAndrews & Forbes Holdings Inc., et al.

Dear Tom:

I write in response to your letter of May 3, 2004, offering June 4, 2004 as a deposition date for Andrew Conway. We accept your offer and attach an Amended Notice of Deposition recording that date.

Very truly yours,



Michael T. Brody

MTB:cjg

cc: Joseph Ianno, Esq. (by telecopy)
John Scarola, Esq. (by telecopy)
Jerold S. Solovy, Esq.

**IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA**

)	
COLEMAN (PARENT) HOLDINGS INC.,)	
)	
Plaintiff,)	
	)	Case No. 2003 CA 005045 AI
v.)	
	)	Judge Elizabeth T. Maass
MORGAN STANLEY & CO., INC.,)	
)	
Defendant.)	
)	

AMENDED NOTICE OF DEPOSITION

To: Thomas A. Clare, Esq. KIRKLAND & ELLIS LLP 655 Fifteenth Street, N.W. Suite 1200 Washington, D.C. 20005	Joseph Ianno, Jr., Esq. CARLTON FIELDS, P.A. 222 Lake View Avenue, Suite 1400 West Palm Beach, FL 33401
---	--

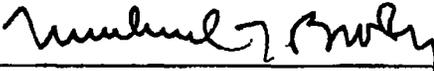
PLEASE TAKE NOTICE that Plaintiff Coleman (Parent) Holdings, Inc. ("CPH") requests the deposition upon oral examination of the following non-party witness pursuant to the commission issued by the Circuit Court of the Fifteenth Judicial District of Florida and the subpoena issued in aid of that commission by the Supreme Court of the State of New York on the date, time, and location set forth below:

DEPONENT	DATE AND TIME	LOCATION
Andrew Conway 225 Boulder Ridge Road Scarsdale, NY 10583	June 4, 2004 at 10:00 a.m.	Esquire Deposition Services 216 E. 45th Street, 8th FL New York, New York 10017

The witness will be requested to bring to the deposition the documents specified in Exhibit A to the Subpoena. The deposition will be recorded by stenographic and audio-visual means and will be taken before a person authorized to administer oaths and will continue day to day until completed. The videographer will be Esquire Deposition Services, New York, NY.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by facsimile and mail to all counsel on the attached Service List, this 11th day of May, 2004.

COLEMAN (PARENT) HOLDINGS INC.

By: 

One of Its Attorneys

Jerold S. Solovy
Michael T. Brody
JENNER & BLOCK, LLC
One IBM Plaza
Suite 4400
Chicago, Illinois 60611
(312) 222-9350

Jack Scarola
SEARCY DENNEY SCAROLA BARNHART
& SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33409
(561) 686-6300

SERVICE LIST

Thomas A. Clare, Esq.
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lake View Avenue
Suite 1400
West Palm Beach, FL 33401

Document Number : 1073127

**EXHIBIT A
TO SUBPOENA TO NON-PARTY
ANDREW CONWAY**

You are hereby requested to produce the following documents pursuant to the definitions and instructions set forth below.

DOCUMENTS REQUESTED

1. All documents concerning the identity of any Morgan Stanley personnel who performed any work for Sunbeam concerning the Coleman Transaction, the Subordinated Debenture Offering, the Bank Facility, or the Credit Agreement.
2. All documents concerning Sunbeam's engagement of Morgan Stanley, including but not limited to engagement letters, bills, invoices, billing or payment records, and back-up for statements of professional services rendered and/or expenses incurred in connection with Morgan Stanley's work for Sunbeam.
3. All calendars, diaries, timekeeping sheets or records maintained by You concerning any activities or services performed for Sunbeam, Morgan Stanley, or MSSF.
4. All documents concerning any investigation, analysis or due diligence concerning Sunbeam or Coleman provided to or conducted by or on behalf of Morgan Stanley or MSSF.
5. All documents concerning attempts by Morgan Stanley to locate (a) someone to purchase or otherwise acquire Sunbeam, in whole or in part, whether through merger, purchase, transfer of assets or securities, or otherwise or (b) companies for Sunbeam to purchase or otherwise acquire, whether through merger, purchase, transfer of assets or securities, or otherwise.
6. All documents concerning the Coleman Transaction, the Credit Agreement, the Bank Facilities, or the Subordinated Debenture Offering.

7. All documents concerning the "bring-down" due diligence for the Subordinated Debenture Offering.
8. All documents concerning Sunbeam's March 19, 1998 press release, including but not limited to whether to issue the press release, whether to include all or any portion of the March 19, 1998 press release in the Offering Memorandum, or concerning the contents or drafting of the press release.
9. All documents concerning Sunbeam's actual or expected sales, revenues, or earnings for all or any portion of 1996, 1997, or 1998.
10. All documents concerning the drafting and issuance of the Offering Memorandum.
11. All documents concerning the March 19, 1998 drafting session and/or meeting that took place at Global Financial Press concerning the Offering Memorandum.
12. All documents concerning any conversations or communications of any kind involving John Tyree or Lawrence Bornstein concerning Sunbeam.
13. All documents relating to synergies that might be achieved from a business combination of Sunbeam, and any or all of Coleman, Signature Brands USA, and First Alert, Inc.
14. All documents concerning the sale of the Subordinated Debentures, including but not limited to documents concerning roadshows; communications with potential investors, CPH, Coleman, Mafco, or analysts; or communications with or among Morgan Stanley's personnel.
15. All documents reflecting or concerning any communications between or among any of Morgan Stanley, MSSF, Davis Polk, Sunbeam, Arthur Andersen LLP, and/or Skadden concerning Sunbeam, the Coleman Transaction, the Subordinated Debenture Offering, the Bank Facility, or the Credit Agreement.

16. All documents concerning any "comfort letters" prepared in connection with the Subordinated Debenture Offering or the Credit Agreement including but not limited to Arthur Andersen's letters dated March 19, 1998 and March 25, 1998 and any drafts of those letters.

17. All documents concerning any valuation of Coleman or Sunbeam securities (a) prepared or performed by Morgan Stanley or MSSF or (b) provided to Morgan Stanley or MSSF.

18. All documents You or Morgan Stanley provided to or received from the SEC, the Justice Department, the U.S. Attorney for the Southern District of New York, the Attorney General of New York, any other federal or state governmental or regulatory body, or any other self-regulatory body concerning Sunbeam, Morgan Stanley, MSSF, the Coleman Transaction, the Subordinated Debenture Offering, and/or the Bank Facilities. The relevant time period for this request is February 1998 through the date of service of this subpoena.

19. All documents you provided to any party in connection with any of the Litigations.

DEFINITIONS

1. "Arthur Andersen" means Arthur Andersen LLP and its present and former partners and employees.

2. "CPH" means Coleman (Parent) Holdings Inc., and its present and former officers, directors, and employees.

3. "Coleman Transaction" means the transaction by which Sunbeam acquired CPH's interest in The Coleman Company.

4. "Communication" means the transmittal of information (in the form of facts, ideas, inquiries or otherwise) by letter, memorandum, facsimile, orally, electronically or otherwise.

5. "Concerning" means concerning, reflecting, relating to, referring to, describing, evidencing, or constituting.

6. "Credit Agreement" means that agreement entered into by Sunbeam Corporation, as borrower, with Morgan Stanley Senior Funding, Inc., Bank of America National Trust and Savings Association, and First Union National Bank (now known as Wachovia Bank, National Association), as lenders, dated March 30, 1998 and amended periodically thereafter by agreement of the parties.

7. "Documents" shall be given the broad meaning provided in CPLR Rule 3120 and refers to any form or means, whether physical, visual, or electronic, in or by which words, numbers, or ideas are recorded or preserved, whether fixed in tangible medium or electronically stored, including any and all drafts of any final document. The word "documents" shall include, by way of example and not by way of limitation, all of the following: papers, correspondence, trade letters, envelopes, memoranda, telegrams, cables, notes, messages, reports, studies, press releases, comparisons, books, accounts, checks, audio and video recordings and transcriptions thereof, pleadings, testimony, articles, bulletins, pamphlets, brochures, magazines, questionnaires, surveys, charts, newspapers, calendars, desk calendars, pocket calendars, lists, logs, publications, notices, diagrams, instructions, diaries, minutes for meetings, corporate minutes, orders, resolutions, agendas, memorials or notes of oral communications, whether by telephone or face-to-face, contracts, agreements, drafts of or proposed contracts or agreements, memoranda of understanding, letters of intent, computer tapes, computer drives or memories, computer diskettes or disks, e-mail, CD-ROMs, or any other tangible thing on which any handwriting, typing, printing, photostatic, electronic, or other form of communication or information is recorded or reproduced, together with

all notations on any of the foregoing, all originals, file copies, or other unique copies of the foregoing, and all versions or drafts thereof, whether used or not.

8. "Litigations" means In Re Sunbeam Securities Litigation, 98-8258-Civ.-Middlebrooks (S.D. Fla.); Camden Asset Management, L.P., et al. v. Sunbeam Corporation, et al., 98-8773-Civ.-Middlebrooks and 98-8275-Civ.-Middlebrooks (S.D. Fla.); Krim v. Dunlap, et al., No. CL983168AD (15th Jud. Cir., Fla.); Stapleton v. Sunbeam Corp., et al., No. 98-1676-Civ.-King (S.D. Fla.); Sunbeam Corp. v. PricewaterhouseCoopers LLP, No. CL005444AN (15th Jud. Cir., Fla.); In re Sunbeam Corp., No. 01-40291 (AJG) (Bankr. S.D.N.Y.), and every adversary proceeding therein; SEC v. Dunlap, et al., No. 01-8437-Civ.-Middlebrooks (S.D. Fla.); Oaktree Capital Management LLC v. Arthur Andersen LLP, No. BC257177 (L.A. Cty., CA); and Coleman (Parent) Holdings Inc. v. Arthur Andersen LLP, et al., No. CA 01-06062AN (15th Jud. Cir., Fla); Albert J. Dunlap and Sunbeam Corporation, No. 32 160 00088 99 (AAA); and Russell A. Kersh and Sunbeam Corporation, No. 32 160 00091 99 (AAA); In the Matter of Sunbeam Corp., SEC Administrative Proceeding File No. 3-10481; In the Matter of David C. Fannin, SEC Administrative Proceeding File No. 3-10482, and any other matter involving the Coleman Transaction, the Credit Agreement, the Bank Facilities, or the Subordinated Debenture Offering.

9. "Morgan Stanley" means Morgan Stanley & Co., Inc. and any of its direct or indirect parents, affiliates, subsidiaries, and present and former officers, directors, partners, employees, representatives, and agents.

10. "MSSF" means Morgan Stanley Senior Funding, Inc. and any of its direct or indirect parents, affiliates, subsidiaries, and present and former officers, directors, partners, employees, representatives, and agents.

11. "Person" means any natural person, corporation, limited liability company, trust, joint venture, association, company, partnership, governmental authority, or other entity.
12. "SEC" means the Securities and Exchange Commission.
13. "Skadden" means Skadden, Arps, Slate, Meagher & Flom LLP and any of its present and former partners, employees, representatives and agents.
14. "Subordinated Debenture Offering" means the offering of Sunbeam's Zero Coupon Convertible Senior Subordinated Debentures Due 2018.
15. "Sunbeam" means Sunbeam Corporation and any of its present and former officers, directors, employees, representatives, and agents.
16. "You" or "Your" means Andrew Conway and any of Andrew Conway's present and former representatives and agents.

INSTRUCTIONS

1. Documents shall be produced as they are kept in the usual course of business, or organized and labeled to correspond to the categories in this Request. Documents attached to each other should not be separated.
2. All documents shall be produced in the file folder, envelope or other container in which the documents are kept or maintained by you. If, for any reason, the container cannot be produced, produce copies of all labels or other identifying marks.
3. The relevant period, unless otherwise indicated, shall be April 1, 1997 through the date of service of this subpoena, and shall include all documents and information which relate in whole or in part to such period, or to events or circumstances during such period, even though dated, prepared, generated or received prior or subsequent to that period. Please supplement or

correct your responses to these requests if, at any time, you become aware that your responses are incomplete or incorrect in any respect.

4. If you claim the attorney-client privilege, or any other privilege or work-product protection for all or any portion of a document, you shall provide a privilege log that describes the withheld material sufficiently to allow CPH to test the privilege or protection asserted.

5. The following rules of construction apply:

- a. The connectives “and” and “or” shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery requests all responses that might otherwise be outside of their scope;
- b. The term “including” shall be construed to mean “without limitation”; and
- c. The use of the singular form of any word includes the plural and vice versa.

Doc. # 1062687

**IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA**

COLEMAN (PARENT) HOLDINGS INC.,)	
)	
Plaintiff,)	
	)	Case No. 2003 CA 005045 AI
v.)	
	)	Judge Elizabeth T. Maass
MORGAN STANLEY & CO., INC.,)	
)	
Defendant.)	
)	

NOTICE OF DEPOSITION

To: Thomas A. Clare, Esq. KIRKLAND & ELLIS LLP 655 Fifteenth Street, N.W. Suite 1200 Washington, D.C. 20005	Joseph Ianno, Jr., Esq. CARLTON FIELDS, P.A. 222 Lake View Avenue, Suite 1400 West Palm Beach, FL 33401
--	--

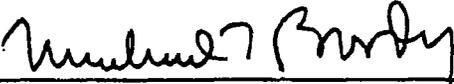
PLEASE TAKE NOTICE that Plaintiff Coleman (Parent) Holdings, Inc. ("CPH") requests the deposition upon oral examination of the following non-party witness pursuant to the commission issued by the Circuit Court of the Fifteenth Judicial District of Florida and the subpoena issued in aid of that commission by the Supreme Court of the State of New York on the date, time, and location set forth below:

DEPONENT	DATE AND TIME	LOCATION
James Stynes 941 Park Ave. Apt. 9C New York, New York 10028	June 18, 2004 at 10:00 a.m.	Esquire Deposition Services 216 E. 45th Street, 8th FL New York, New York 10017

The witness will be requested to bring to the deposition the documents specified in Exhibit A to the Subpoena. The deposition will be recorded by stenographic and audio-visual means and will be taken before a person authorized to administer oaths and will continue day to day until completed. The videographer will be Esquire Deposition Services, New York, NY.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by facsimile and mail to all counsel on the attached Service List, this 11th day of May, 2004.

COLEMAN (PARENT) HOLDINGS INC.

By: 
One of Its Attorneys

Jerold S. Solovy
Michael T. Brody
JENNER & BLOCK, LLC
One IBM Plaza
Suite 4400
Chicago, Illinois 60611
(312) 222-9350

Jack Scarola
SEARCY DENNEY SCAROLA BARNHART
& SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33409
(561) 686-6300

SERVICE LIST

**Thomas A. Clare, Esq.
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005**

**Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lake View Avenue
Suite 1400
West Palm Beach, FL 33401**

Document Number : 1080290

**EXHIBIT A
TO SUBPOENA TO NON-PARTY
JAMES STYNES**

You are hereby requested to produce the following documents pursuant to the definitions and instructions set forth below.

DOCUMENTS REQUESTED

1. All documents concerning the identity of any Morgan Stanley personnel who performed any work for Sunbeam concerning the Coleman Transaction, the Subordinated Debenture Offering, the Bank Facility, or the Credit Agreement.
2. All documents concerning Sunbeam's engagement of Morgan Stanley, including but not limited to engagement letters, bills, invoices, billing or payment records, and back-up for statements of professional services rendered and/or expenses incurred in connection with Morgan Stanley's work for Sunbeam.
3. All calendars, diaries, timekeeping sheets or records maintained by You concerning any activities or services performed for Sunbeam, Morgan Stanley, or MSSF.
4. All documents concerning any investigation, analysis or due diligence concerning Sunbeam or Coleman provided to or conducted by or on behalf of Morgan Stanley or MSSF.
5. All documents concerning attempts by Morgan Stanley to locate (a) someone to purchase or otherwise acquire Sunbeam, in whole or in part, whether through merger, purchase, transfer of assets or securities, or otherwise or (b) companies for Sunbeam to purchase or otherwise acquire, whether through merger, purchase, transfer of assets or securities, or otherwise.
6. All documents concerning the Coleman Transaction, the Credit Agreement, the Bank Facilities, or the Subordinated Debenture Offering.

7. All documents concerning the "bring-down" due diligence for the Subordinated Debenture Offering.
8. All documents concerning Sunbeam's March 19, 1998 press release, including but not limited to whether to issue the press release, whether to include all or any portion of the March 19, 1998 press release in the Offering Memorandum, or concerning the contents or drafting of the press release.
9. All documents concerning Sunbeam's actual or expected sales, revenues, or earnings for all or any portion of 1996, 1997, or 1998.
10. All documents concerning the drafting and issuance of the Offering Memorandum.
11. All documents concerning the March 19, 1998 drafting session and/or meeting that took place at Global Financial Press concerning the Offering Memorandum.
12. All documents concerning any conversations or communications of any kind involving John Tyree or Lawrence Bornstein concerning Sunbeam.
13. All documents relating to synergies that might be achieved from a business combination of Sunbeam, and any or all of Coleman, Signature Brands USA, and First Alert, Inc.
14. All documents concerning the sale of the Subordinated Debentures, including but not limited to documents concerning roadshows; communications with potential investors, CPH, Coleman, Mafco, or analysts; or communications with or among Morgan Stanley's personnel.
15. All documents reflecting or concerning any communications between or among any of Morgan Stanley, MSSF, Davis Polk, Sunbeam, Arthur Andersen LLP, and/or Skadden concerning Sunbeam, the Coleman Transaction, the Subordinated Debenture Offering, the Bank Facility, or the Credit Agreement.

16. All documents concerning any "comfort letters" prepared in connection with the Subordinated Debenture Offering or the Credit Agreement including but not limited to Arthur Andersen's letters dated March 19, 1998 and March 25, 1998 and any drafts of those letters.

17. All documents concerning any valuation of Coleman or Sunbeam securities (a) prepared or performed by Morgan Stanley or MSSF or (b) provided to Morgan Stanley or MSSF.

18. All documents You or Morgan Stanley provided to or received from the SEC, the Justice Department, the U.S. Attorney for the Southern District of New York, the Attorney General of New York, any other federal or state governmental or regulatory body, or any other self-regulatory body concerning Sunbeam, Morgan Stanley, MSSF, the Coleman Transaction, the Subordinated Debenture Offering, and/or the Bank Facilities. The relevant time period for this request is February 1998 through the date of service of this subpoena.

19. All documents you provided to any party in connection with any of the Litigations.

DEFINITIONS

1. "Arthur Andersen" means Arthur Andersen LLP and its present and former partners and employees.

2. "CPH" means Coleman (Parent) Holdings Inc., and its present and former officers, directors, and employees.

3. "Coleman Transaction" means the transaction by which Sunbeam acquired CPH's interest in The Coleman Company.

4. "Communication" means the transmittal of information (in the form of facts, ideas, inquiries or otherwise) by letter, memorandum, facsimile, orally, electronically or otherwise.

5. "Concerning" means concerning, reflecting, relating to, referring to, describing, evidencing, or constituting.

6. "Credit Agreement" means that agreement entered into by Sunbeam Corporation, as borrower, with Morgan Stanley Senior Funding, Inc., Bank of America National Trust and Savings Association, and First Union National Bank (now known as Wachovia Bank, National Association), as lenders, dated March 30, 1998 and amended periodically thereafter by agreement of the parties.

7. "Documents" shall be given the broad meaning provided in CPLR Rule 3120 and refers to any form or means, whether physical, visual, or electronic, in or by which words, numbers, or ideas are recorded or preserved, whether fixed in tangible medium or electronically stored, including any and all drafts of any final document. The word "documents" shall include, by way of example and not by way of limitation, all of the following: papers, correspondence, trade letters, envelopes, memoranda, telegrams, cables, notes, messages, reports, studies, press releases, comparisons, books, accounts, checks, audio and video recordings and transcriptions thereof, pleadings, testimony, articles, bulletins, pamphlets, brochures, magazines, questionnaires, surveys, charts, newspapers, calendars, desk calendars, pocket calendars, lists, logs, publications, notices, diagrams, instructions, diaries, minutes for meetings, corporate minutes, orders, resolutions, agendas, memorials or notes of oral communications, whether by telephone or face-to-face, contracts, agreements, drafts of or proposed contracts or agreements, memoranda of understanding, letters of intent, computer tapes, computer drives or memories, computer diskettes or disks, e-mail, CD-ROMs, or any other tangible thing on which any handwriting, typing, printing, photostatic, electronic, or other form of communication or information is recorded or reproduced, together with

all notations on any of the foregoing, all originals, file copies, or other unique copies of the foregoing, and all versions or drafts thereof, whether used or not.

8. "Litigations" means In Re Sunbeam Securities Litigation, 98-8258-Civ.-Middlebrooks (S.D. Fla.); Camden Asset Management, L.P., et al. v. Sunbeam Corporation, et al., 98-8773-Civ.-Middlebrooks and 98-8275-Civ.-Middlebrooks (S.D. Fla.); Krim v. Dunlap, et al., No. CL983168AD (15th Jud. Cir., Fla.); Stapleton v. Sunbeam Corp., et al., No. 98-1676-Civ.-King (S.D. Fla.); Sunbeam Corp. v. PricewaterhouseCoopers LLP, No. CL005444AN (15th Jud. Cir., Fla.); In re Sunbeam Corp., No. 01-40291 (AJG) (Bankr. S.D.N.Y.), and every adversary proceeding therein; SEC v. Dunlap, et al., No. 01-8437-Civ.-Middlebrooks (S.D. Fla.); Oaktree Capital Management LLC v. Arthur Andersen LLP, No. BC257177 (L.A. Cty., CA); and Coleman (Parent) Holdings Inc. v. Arthur Andersen LLP, et al., No. CA 01-06062AN (15th Jud. Cir., Fla.); Albert J. Dunlap and Sunbeam Corporation, No. 32 160 00088 99 (AAA); and Russell A. Kersh and Sunbeam Corporation, No. 32 160 00091 99 (AAA); In the Matter of Sunbeam Corp., SEC Administrative Proceeding File No. 3-10481; In the Matter of David C. Fannin, SEC Administrative Proceeding File No. 3-10482, and any other matter involving the Coleman Transaction, the Credit Agreement, the Bank Facilities, or the Subordinated Debenture Offering.

9. "Morgan Stanley" means Morgan Stanley & Co., Inc. and any of its direct or indirect parents, affiliates, subsidiaries, and present and former officers, directors, partners, employees, representatives, and agents.

10. "MSSF" means Morgan Stanley Senior Funding, Inc. and any of its direct or indirect parents, affiliates, subsidiaries, and present and former officers, directors, partners, employees, representatives, and agents.

11. "Person" means any natural person, corporation, limited liability company, trust, joint venture, association, company, partnership, governmental authority, or other entity.
12. "SEC" means the Securities and Exchange Commission.
13. "Skadden" means Skadden, Arps, Slate, Meagher & Flom LLP and any of its present and former partners, employees, representatives and agents.
14. "Subordinated Debenture Offering" means the offering of Sunbeam's Zero Coupon Convertible Senior Subordinated Debentures Due 2018.
15. "Sunbeam" means Sunbeam Corporation and any of its present and former officers, directors, employees, representatives, and agents.
16. "You" or "Your" means James Stynes and any of James Stynes's present and former representatives and agents.

INSTRUCTIONS

1. Documents shall be produced as they are kept in the usual course of business, or organized and labeled to correspond to the categories in this Request. Documents attached to each other should not be separated.
2. All documents shall be produced in the file folder, envelope or other container in which the documents are kept or maintained by you. If, for any reason, the container cannot be produced, produce copies of all labels or other identifying marks.
3. The relevant period, unless otherwise indicated, shall be April 1, 1997 through the date of service of this subpoena, and shall include all documents and information which relate in whole or in part to such period, or to events or circumstances during such period, even though dated, prepared, generated or received prior or subsequent to that period. Please supplement or

correct your responses to these requests if, at any time, you become aware that your responses are incomplete or incorrect in any respect.

4. If you claim the attorney-client privilege, or any other privilege or work-product protection for all or any portion of a document, you shall provide a privilege log that describes the withheld material sufficiently to allow CPH to test the privilege or protection asserted.

5. The following rules of construction apply:

- a. The connectives "and" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery requests all responses that might otherwise be outside of their scope;
- b. The term "including" shall be construed to mean "without limitation"; and
- c. The use of the singular form of any word includes the plural and vice versa.

Doc. # 1080303

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Company, Inc.
Case No.: 2003 CA 005045 AI
Notice of Taking Videotaped Depositions
May 11, 2004

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 2003 CA 005045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

NOTICE OF TAKING VIDEOTAPED DEPOSITIONS

To: Thomas A. Clare, Esq.
KIRKLAND & ELLIS, LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lake View Avenue
Suite 1400
West Palm Beach, FL 33401

PLEASE TAKE NOTICE that Plaintiff Coleman (Parent) Holdings Inc. will take the deposition upon oral examination of the following witnesses pursuant to Florida Rule of Civil Procedure 1.310 on the dates, times, and locations set forth below:

DEPONENT	DATE AND TIME
Heather Stack	May 25, 2004 at 9:30 a.m.
Alan Dean	June 3, 2004 at 9:30 a.m.
James Lurie	June 17, 2004 at 9:30 a.m.

All of the depositions will be conducted at Esquire Deposition Services, 216 E. 45th St., 8th Floor, New York, NY 10017. The depositions will be recorded by videotape and stenographic means. The depositions will be taken before a person authorized to administer oaths and will continue day to day until completed.

The videotape operator will be Esquire Deposition Services located in New York, New York.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by facsimile and mail to all counsel on the attached Service List this 11th day of May 2004.

Dated: May 11, 2004

COLEMAN (PARENT) HOLDINGS INC.

By: Michael T. Brody
One of Its Attorneys

Jerold S. Solovy
Michael T. Brody
Clark C. Johnson
JENNER & BLOCK LLP
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

Jack Scarola
SEARCY DENNEY SCAROLA BARNHART
& SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33409
(561) 686-6300

SERVICE LIST

Thomas A. Clare, Esq.
KIRKLAND & ELLIS, LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lake View Avenue
Suite 1400
West Palm Beach, FL 33401

FAX TRANSMITTAL

J E N N E R & B L O C K

Jenner&Block LLP
One IBM Plaza
Chicago, IL 60611-7603
Tel 312 222-9350
www.jenner.com

Chicago
Dallas
Washington, DC

Date: May 13, 2004

To: Thomas A. Clare, Esq.
KIRKLAND & ELLIS

Fax: 202 879 5200

Voice: 202 879 5993

From: Clark C. Johnson
312 923-2739

Employee Number:

Client Number: 41198 10003

Important: This message is intended only for the use of the individual or entity to which it is addressed, and may contain information that is attorney work product, privileged, confidential and exempt from disclosure under applicable law. If the reader of this message is not the intended recipient, or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone, and return the original message to us at the above address via postal service. Thank you.

Message: Please see attached.

Total number of pages including this cover sheet:

Time Sent:

If you do not receive all pages, please call: 312 222-9350

Sent By:

Secretary:

Extension:

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Company, Inc.
Case No.: 2003 CA 005045 AI
Notice of Taking Videotaped Deposition
May 13, 2004

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH, COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

CASE NO. CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

AMENDED NOTICE OF TAKING VIDEOTAPED DEPOSITIONS

To: Thomas A. Clare, Esq.
KIRKLAND & ELLIS, LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lake View Avenue
Suite 1400
West Palm Beach, FL 33401

PLEASE TAKE NOTICE that Plaintiff Coleman (Parent) Holdings Inc. will take the deposition upon oral examination of the following witnesses pursuant to Florida Rule of Civil Procedure 1.310 on the dates, times, and locations set forth below:

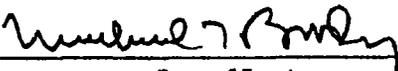
DEPONENT	DATE AND TIME	LOCATION
Joshua Webber	May 18, 2004 at 9:30 a.m.	Esquire Deposition Services 175 Federal Street Suite 508 Boston, Massachusetts 02110
Michael Hart	May 19-20, 2004 at 9:30 a.m.	Esquire Deposition Services 216 E. 45 th St., 8 th Floor New York, NY 10017
Gene Yoo	June 16, 2004 at 9:30 a.m.	Esquire Deposition Services 99 Summer Street, Suite 804 Boston, Massachusetts 02110

The depositions will be recorded by stenographic and audio-visual means and will be taken before a person authorized to administer oaths and will continue day to day until completed. The videographer will be Esquire Deposition Services in New York and Boston.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by facsimile and mail to all counsel on the attached Service List, this 13th day of May, 2004.

Dated: May 13, 2004

COLEMAN (PARENT) HOLDINGS INC.

By: 
One of Its Attorneys

Jerold S. Solovy
Michael T. Brody
Clark C. Johnson
JENNER & BLOCK LLP
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

Jack Scarola
SEARCY DENNEY SCAROLA BARNHART
& SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33409
(561) 686-6300

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Company, Inc.
Case No.: 2003 CA 005045 AI
Notice of Taking Videotaped Deposition
May 13, 2004

SERVICE LIST

Thomas A. Clare, Esq.
KIRKLAND & ELLIS, LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lake View Avenue, Suite 1400
West Palm Beach, FL 33401

FAX TRANSMITTAL

J E N N E R & B L O C K

Jenner&Block LLP
One IBM Plaza
Chicago, IL 60611-7608
Tel 312 222-9350
www.jenner.com

Chicago
Dallas
Washington, DC

Date: May 14, 2004

To: Thomas A. Clare, Esq.
KIRKLAND & ELLIS

Fax: 202 879 5200

Voice: 202 879 5993

From: Clark C. Johnson
312 923-2739

Employee Number:

Client Number: 41198 10003

Important: This message is intended only for the use of the individual or entity to which it is addressed, and may contain information that is attorney work product, privileged, confidential and exempt from disclosure under applicable law. If the reader of this message is not the intended recipient, or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone, and return the original message to us at the above address via postal service. Thank you.

Message: Please see attached.

Total number of pages including this cover sheet:

Time Sent:

If you do not receive all pages, please call: 312 222-9350

Sent By:

Secretary:

Extension:

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Company, Inc.
Case No.: 2003 CA 005045 AI
Amended Notice of Taking Videotaped Depositions
May 14, 2004

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 2003 CA 005045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

AMENDED NOTICE OF TAKING VIDEOTAPED DEPOSITIONS

To: Thomas A. Clare, Esq.
KIRKLAND & ELLIS, LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lake View Avenue
Suite 1400
West Palm Beach, FL 33401

PLEASE TAKE NOTICE that Plaintiff Coleman (Parent) Holdings Inc. will take the deposition upon oral examination of the following witnesses pursuant to Florida Rule of Civil Procedure 1.310 on the dates, times, and locations set forth below:

DEPONENT	DATE AND TIME
Heather Stack	May 25, 2004 at 9:30 a.m.
Alan Dean	June 3, 2004 at 9:30 a.m.
James Lurie	June 18, 2004 at 9:30 a.m.

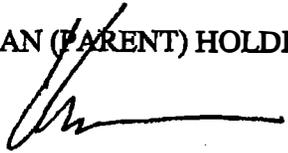
All of the depositions will be conducted at Esquire Deposition Services, 216 E. 45th St., 8th Floor, New York, NY 10017. The depositions will be recorded by videotape and stenographic means. The depositions will be taken before a person authorized to administer oaths and will continue day to day until completed.

The videotape operator will be Esquire Deposition Services located in New York, New York.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by facsimile and mail to all counsel on the attached Service List this 14th day of May 2004.

Dated: May 14, 2004

COLEMAN (PARENT) HOLDINGS INC.

By: 
One of Its Attorneys

Jerold S. Solovy
Michael T. Brody
Clark C. Johnson
JENNER & BLOCK LLP
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

Jack Scarola
SEARCY DENNEY SCAROLA BARNHART
& SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33409
(561) 686-6300

SERVICE LIST

Thomas A. Clare, Esq.
KIRKLAND & ELLIS, LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lake View Avenue
Suite 1400
West Palm Beach, FL 33401

#2305:0/smk

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

CASE NO.: CA 03-5045 AI

Plaintiffs,

vs.

MORGAN STANLEY & CO., INC.,

Defendant,

_____ /

MORGAN STANLEY SENIOR FUNDING,
INC.,

CASE NO. CA 03-5165 AI

Plaintiff,

vs.

MACANDREWS & FORBES HOLDINGS,
INC.,

Defendant,

_____ /

NOTICE OF SPECIAL SET HEARING

(30 minutes)

YOU ARE HEREBY NOTIFIED that the undersigned has called up for hearing the following:

DATE: May 24, 2004

TIME: 8:00 a.m..

JUDGE: Hon. Elizabeth T. Maass

PLACE: Palm Beach County Courthouse, Room #11.1208, 205 North Dixie Highway,
West Palm Beach, FL 33401

SPECIFIC MATTERS TO BE HEARD:

- (1) COLEMAN (PARENT) HOLDINGS INC.'S MOTION TO ALLOW ARTHUR ANDERSEN LLP ACCESS TO CONFIDENTIAL INFORMATION (filed under seal)

Coleman (Parent) Holdings, Inc. vs Morgan Stanley & Company
Case No.: 2003 CA 005045 AI
Notice of Hearing

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by
Fax and Federal Express to all Counsel on the attached list, this 14th day of May,
2004.



JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 684-5816
Attorney for Coleman (Parent) Holdings Inc.
and MacAndrews & Forbes Holdings, Inc.

Colemar (Parent) Holdings, Inc. vs Morgan Stanley & Company
Case No : 2003 CA 005045 AI
Notice of Hearing

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block LLP
One IEM Plaza
Suite 4400
Chicago, IL 60611

WEST PALM BEACH OFFICE :

2139 PALM BEACH LAKES BLVD
WEST PALM BEACH, FLORIDA 33409

P.O. DRAWER 3626
WEST PALM BEACH, FLORIDA 33402

(561) 686-6300
1-800-780-8607
FAX: (561) 478-0754

SEARCY DENNEY SCAROLA BARNHART & SHIPLEY PA

*Attorneys
at Law*

TALLAHASSEE OFFICE:

THE TOWLE HOUSE
517 NORTH CALHOUN STREET
TALLAHASSEE, FL 32301-1231

P.O. DRAWER 1230
TALLAHASSEE, FLORIDA 32302

(850) 224-7600
1-888-549-7011
FAX: (850) 224-7602

Via Fax
May 14, 2004

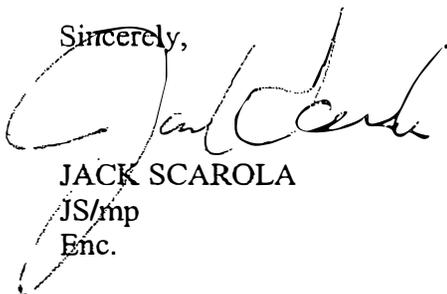
Joseph Ianno, Jr., Esq.
Carlton Fields, et al.
222 Lakeview Avenue, Suite 1400
West Palm Beach, FL 33401

Re: Coleman Holdings, Inc. vs Morgan Stanley & Company
Matter No.: 029986-230580

Dear Joe:

Your position regarding Suzanne Prysak's pro hac vice admission simply does not make sense. However, we have set the motion for hearing so that your objection may be considered by the Court.

Sincerely,



JACK SCAROLA
JS/mp
Enc.

cc: Thomas Clare, Esq.
Jenner & Block LLP



WWW.SEARCYLAW.COM

ATTORNEYS AT LAW:
ROSALYN SIA BAKER
F. GREGORY BARNHART
LANCE BLOCK
SARL L. DENNEY, JR.
SEAN C. DONNICK
JAMES W. GUSTAFSON, JR.
DAVID K. KELLEY, JR.
WILLIAM E. KING
DARRYL L. LEWIS
WILLIAM A. NORTON
DAVID J. SALES
JOHN SCAROLA
CHRISTIAN D. SEARCY
HARRY A. SHEVIN
JOHN A. SHIPLEY III
CHRISTOPHER K. SPEED
KAREN E. TERRY
C. CALVIN WARRINER III
DAVID J. WHITE
*SHAREHOLDERS

PARALEGALS
WIVIAN AYAN-TEJEDA
LAURIE J. BRIGGS
DEANEL CADY
DANIEL J. CALLOWAY
EMILIO DIAMANTIS
RANDY M. DUFRESNE
DAVID W. GILMORE
TED E. KULESA
JAMES PETER LOVE
CHRISTOPHER J. PILATO
ROBERT W. PITCHER
KATHLEEN SIMON
STEVE M. SMITH
WALTER A. STEIN
BRIAN P. SULLIVAN
KEVIN J. WALSH
JUDSON WHITEHORN

#2305 30/smk

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

CASE NO.: CA 03-5045 AI

Plaintiffs,

vs.

MORGAN STANLEY & CO., INC.,

Defendant,

_____ /

MORGAN STANLEY SENIOR FUNDING,
INC.,

CASE NO. CA 03-5165 AI

Plaintiff,

vs.

MACANDREWS & FORBES HOLDINGS,
INC.,

Defendant,

_____ /

NOTICE OF HEARING

YOU ARE HEREBY NOTIFIED that the undersigned has called up for hearing the following:

DATE: May 19, 2004

TIME 8:45 a.m..

JUDGE: Hon. Elizabeth T. Maass

PLACE: Palm Beach County Courthouse, Room #11.1208, 205 North Dixie Highway,
West Palm Beach, FL 33401

SPECIFIC MATTERS TO BE HEARD:

MACANDREWS & FORBES HOLDINGS INC.'S AND COLEMAN (PARENT) HOLDINGS INC.'S VERIFIED MOTION TO PERMIT FOREIGN ATTORNEY TO APPEAR.

Coleman (Parent) Holdings, Inc. vs Morgan Stanley & Company
Case No.: 2003 CA 005045 AI
Notice of Hearing

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by
Fax and Federal Express to all Counsel on the attached list, this 14th day of May,
2004.



JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 684-5816
Attorney for Coleman (Parent) Holdings Inc.
and MacAndrews & Forbes Holdings, Inc.

Coleman (Parent) Holdings, Inc. vs Morgan Stanley & Company
Case No.: 2003 CA 005045 AI
Notice of Hearing

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 14th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block LLP
One IBM Plaza
Suite 400
Chicago, IL 60611

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

CASE NO. CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

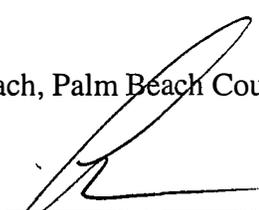
ORDER

THIS CAUSE came before the Court, in Chambers, on Coleman (Parent) Holdings Inc.'s Motion to Allow Arthur Andersen LLP Access to Confidential Transcript; attorney Jack Scarola's letter dated May 12, 2004; and attorney Joseph Ianno's letter dated May 14, 2004. Based on the foregoing, it is

ORDERED AND ADJUDGED that counsel are charged with the duty of good faith cooperation in setting hearing on the Motion, 30 minutes reserved. It is further

ORDERED AND ADJUDGED that at least three business days prior to any hearing Plaintiff shall provide opposing counsel and the undersigned a copy of the transcript from the April 30, 2004 hearing, with the portions Plaintiff seeks to have exempted from the confidentiality order highlighted.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 17 day of May, 2004.



ELIZABETH T. MAASS
Circuit Court Judge

16div-005201

copies furnished:

Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci
655 15th Street, NW, Suite 1200
Washington DC 20005

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, Il 60611

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

CASE NO. CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

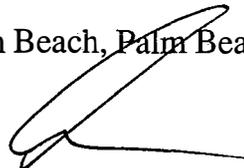
MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

ORDER AND DIRECTIONS TO THE CLERK

THIS CAUSE came before the Court, in Chambers, on its own Motion. Based on the foregoing, it is

ORDERED AND ADJUDGED that the Clerk is directed to docket and file attorney Jack Scarola's letter dated May 12, 2004.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 17 day of May, 2004.



ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci
655 15th Street, NW, Suite 1200
Washington DC 20005

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, Il 60611

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

CASE NO. CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

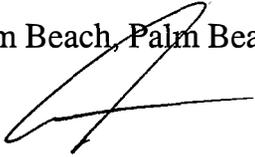
MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

ORDER AND DIRECTIONS TO THE CLERK

THIS CAUSE came before the Court, in Chambers, on its own Motion. Based on the foregoing, it is

ORDERED AND ADJUDGED that the Clerk is directed to docket and file attorney Joseph Ianno's letter dated May 14, 2004.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 17 day of May, 2004.


ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci
655 15th Street, NW, Suite 1200
Washington DC 20005

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, Il 60611

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

CASE NO. CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

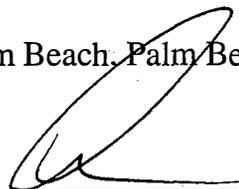
MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

ORDER AND DIRECTIONS TO THE CLERK

THIS CAUSE came before the Court, in Chambers, on its own Motion. Based on the foregoing, it is

ORDERED AND ADJUDGED that the Clerk is directed to docket and file attorney Jerold Solovy's letter dated May 14, 2004.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 17 day of May, 2004.



ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci
655 15th Street, NW, Suite 1200
Washington DC 20005

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, Il 60611

 *** TX REPORT ***

TRANSMISSION OK

TX/RX NO 2142
 CONNECTION TEL 663#622#15616845816#
 SUBADDRESS
 CONNECTION ID
 ST. TIME 05/20 08:56
 USAGE T 01'03
 PGS. SENT 5
 RESULT OK

KIRKLAND & ELLIS LLP

Fax Transmittal

655 Fifteenth Street, N.W.
 Washington, D.C. 20005
 Phone: 202 879-5000
 Fax: 202 879-5200

Please notify us immediately if any pages are not received.

THE INFORMATION CONTAINED IN THIS COMMUNICATION IS CONFIDENTIAL, MAY BE ATTORNEY-CLIENT PRIVILEGED, MAY CONSTITUTE INSIDE INFORMATION, AND IS INTENDED ONLY FOR THE USE OF THE ADDRESSEE. UNAUTHORIZED USE, DISCLOSURE OR COPYING IS STRICTLY PROHIBITED AND MAY BE UNLAWFUL.

IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR,
 PLEASE NOTIFY US IMMEDIATELY AT:
 202 879-5000.

To:	Company:	Fax #:	Direct #:
Michael T. Brody	Jenner & Block	312-840-7711	312-923-2711
Joseph Ianno, Jr., Esq.	Carlton Fields, PA	561-659-7368	888-659-9191
John Scarola, Esq.	Searcy Denney Scarola Barnhart & Shipley, P.A.	561-684-5816	561-686-6300

From:	Date:	Pages w/cover:	Fax #:	Direct #:
Zhonette M. Brown	May 19, 2004	5	202-879-5200	202-879-5108

Message:

Per your letter of May 17, 2004, we will take the deposition of Mr. Schwartz on May 26, 2004 in New York. Please find a Notice of Deposition attached.

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,

Defendant(s).

CASE NO: CA 03-5165 AI

**MORGAN STANLEY SENIOR FUNDING,
INC.,**

Plaintiff(s),

vs.

**MACANDREWS & FORBES HOLDINGS,
INC.,**

Defendant(s).

NOTICE OF VIDEOTAPED DEPOSITION

PLEASE TAKE NOTICE that Morgan Stanley & Company Incorporated and Morgan Stanley Senior Funding, Inc. will take the videotaped deposition of Barry Schwartz, pursuant to Florida Rules of Civil Procedure 1.280 and 1.310. The oral examination will take place beginning on May 26, 2004, at 10:00 a.m. and continue from day to day until completed at the offices of Kirkland & Ellis, LLP, 153 East 53rd Street, New York, New York, 10022. The deposition will be taken before a person authorized to administer oaths and recorded by stenographic and videographic means. The video operator will be Esquire Deposition Services of 216 E. 45th Street in New York, New York. The witness is instructed to bring all books, papers, and other things in his possession or under his control relevant to this lawsuit (and not previously produced in discovery) to the examination.

Dated: May 19, 2004

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar # 618349)
Thomas A. Clare
Zhonette M. Brown
Michael C. Occhuizzo
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

Michael K. Kellogg
Mark C. Hansen
James M. Webster
Rebecca A. Beynon
**KELLOGG, HUBER, HANSEN,
TODD & EVANS P.L.L.C.**
Sumner Square
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
Telephone: (202) 326-7900
Facsimile: (202) 326-7999
(*Pro Hac Vice* Pending)

**Counsel for Morgan Stanley & Co.
Incorporated & Morgan Stanley Senior
Funding**

Joseph Ianno, Jr. (FL Bar # 655351)
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

BY: 

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile on this 19th day of May, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar # 618349)
Thomas A. Clare
Zhonette M. Brown
Michael C. Occhuizzo
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

Michael K. Kellogg
Mark C. Hansen
James M. Webster
Rebecca A. Beynon
**KELLOGG, HUBER, HANSEN,
TODD & EVANS P.L.L.C.**
Sumner Square
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
Telephone: (202) 326-7900
Facsimile: (202) 326-7999
(*Pro Hac Vice* Pending)

**Counsel for Morgan Stanley & Co.
Incorporated & Morgan Stanley Senior
Funding**

Joseph Ianno, Jr. (FL Bar # 655351)
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

BY: 

SERVICE LIST

Counsel for Coleman(Parent) Holdings & MacAndrews & Forbes

John Scarola
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33409

Jerold S. Solovy
JENNER & BLOCK, LLC
One IBM Plaza, Suite 4400
Chicago, Illinois 60611

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH, COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

CASE NO. CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
COLEMAN (PARENT) HOLDINGS INC.,
Defendant(s).

**ORDER GRANTING VERIFIED MOTION TO
PERMIT FOREIGN ATTORNEY TO APPEAR**

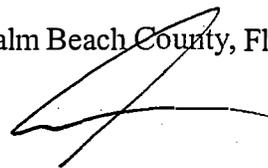
THIS CAUSE having come before the Court upon MacAndrews & Forbes Holdings, Inc. ("MAFCO") and Coleman (Parent) Holdings Inc.'s ("CPH") Verified Motion to Permit Foreign Attorney Suzanne J. Prysak to Appear *pro hac vice*, and the Court having been advised of the agreement of Florida counsel and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that:

MAFCO and CPH's Verified Motion to Permit Foreign Attorney Suzanne J. Prysak to Appear *pro hac vice* is GRANTED, and Ms. Prysak admitted to practice -
in case.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 19 day of

May
March, 2004.



ELIZABETH T. MAASS
Circuit Court Judge

16div-005214

Copies furnished to:

Thomas A. Clare, Esq.
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lake View Avenue
Suite 1400
West Palm Beach, FL 33401

John Scarola, Esq.
SEARCY DENNEY SCAROLA BARNHART
& SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33409
(561) 686-6300
(561) 478-0754 (fax)

Jerold S. Solovy, Esq.
JENNER & BLOCK, LLC
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350
(312) 527-0484 (fax)

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

_____/

CASE NO. CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

_____/

ORDER SPECIALLY RE-SETTING HEARING

THIS CAUSE having come before the Court, it is hereby

ORDERED AND ADJUDGED that hearing on Coleman (Parent) Holdings Inc.'s Motion to Allow Arthur Andersen LLP Access to Confidential Information set May 24, 2004 is canceled and is specially re-set before the Honorable Elizabeth T. Maass on May 28, 2004, at 11:30 a.m., in Courtroom 11A, 205 N. Dixie Hwy, WPB, FL 33401. This is a specially set hearing which shall be limited to 30 minutes. It is further

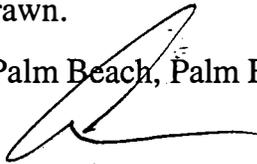
ORDERED AND ADJUDGED that the attorneys/parties must submit to the Court three (3) days before the hearing:

1. copies of all relevant pleadings;
2. a copy of any memorandum of law; and
3. copies of all case law authority.

This hearing shall not be canceled unless the issues of this motion have been settled,

and an order entered, or the motion withdrawn.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 19
day of May, 2004.



ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:

Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci
655 15th Street, NW, Suite 1200
Washington DC 20005

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, Il 60611

If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please contact the ADA Coordinator in the Administrative Office of the Court, Palm Beach County Courthouse, 205 North Dixie Highway, Room 5.2500, West Palm Beach, Florida 33401; telephone number (561) 355-4380 within two (2) working days of your receipt of this [describe notice]; if you are hearing or voice impaired, call 1-800-955-8771.

SPANISH

Si Ud. es una persona incapacitada que necesita de un servicio especial para participar en este proceso, Ud. tiene derecho a que le provean cierta ayuda sin costo alguno. Por favor pongase en contacto con el Coordinador de la Oficina Administrativa de la Corte ADA, situada en el 205 North Dixie Highway, Oficina 5.2500, West Palm Beach, Florida, 33401, teléfono (561) 355-4380, dentro de los dos (2) próximos días hábiles después de recibir esta [describa la notificación]; si tiene incapacidad de oír ó hablar llame al 1-800-955-8771.

CREOLE

Si ou sé yon moun ki Infim, ki bézwen ninpôt akomodasyon pou ka patisipé nan pwosè sa-a, ou gen dwa, san'l pa kouté'w anyin, pou yo ba'w kèk sèvis. Tanpri kontaké koòdinatè ADA ya nan Biro Administratif Tribinal nan cité Palm Beach la, ki nan 205 North Dixie Highway, Cham 5.2500, West Palm Beach, Florida 33401, niméro téléfonn-nan sé (561) 355-4380, rélé dé (2) jou dé lè ou résévwa [notis sa-a]; si ou bèbè ou byen soud rélé 1-800-955-8771.

FRENCH

Si vous êtes infirme, et en besoin de n'importe quelle accommodation pour pouvoir participer à ces procédures, vous pouvez gratuitement recevoir, certains services. S'il-vous-plait contactez le coordinateur du Bureau Administratif du Tribunal de Palm Beach, située à 205 North Dixie Highway, Chambre 5.2500, West Palm Beach, Florida 33401, numéro de téléphone (561) 355-4380 durant deux (2) jours suivant la réception de [cette note]; si vous êtes muets ou sourds, appelez 1-800-955-8771.

#230530/smk

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

CASE NO.: CA 03-5045 AI

Plaintiffs,

vs.

MORGAN STANLEY & CO., INC.,

Defendant,

MORGAN STANLEY SENIOR FUNDING,
INC.,

Plaintiff,

CASE NO. CA 03-5165 AI

vs.

MACANDREWS & FORBES HOLDINGS,
INC.,

Defendant,

NOTICE OF HEARING

YOU ARE HEREBY NOTIFIED that the undersigned has called up for hearing the following:

DATE: May 24, 2004

TIME: 8:45 a.m..

JUDGE: Hon. Elizabeth T. Maass

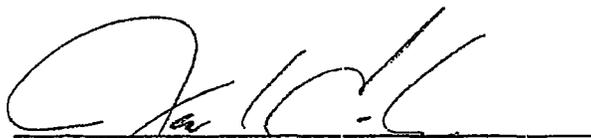
PLACE: Palm Beach County Courthouse, Room #11.1208, 205 North Dixie Highway,
West Palm Beach, FL 33401

SPECIFIC MATTERS TO BE HEARD:

**Coleman (Parent) Holdings Inc. and MacAndrews & Forbes Holdings Inc.'s Motion
for Entry of an Order to Correct Filing Error**

Coleman (Parent) Holdings, Inc. vs Morgan Stanley & Company
Case No : 2003 CA 005045 AI
Notice o 'Hearing

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by
Fax and Federal Express to all Counsel on the attached list, this 21 day of May,
2004.



JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 684-5816
Attorney for Coleman (Parent) Holdings Inc.
and MacAndrews & Forbes Holdings, Inc.

Coleman (Parent) Holdings, Inc. vs Morgan Stanley & Company
Case No.: 2003 CA 005045 AI
Notice of Hearing

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block LLP
One IEM Plaza
Suite 400
Chicago, IL 60611

#230583/mp

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

CASE NO: 2003 CA 005045 AI

Plaintiff,

vs.

MORCAN STANLEY & CO., INC.,

Defendant,

MORCAN STANLEY SENIOR FUNDING,
INC.,

Plaintiff,

CASE NO. CA 03-5165 AI

vs.

MACANDREWS & FORBES HOLDINGS,
INC.,

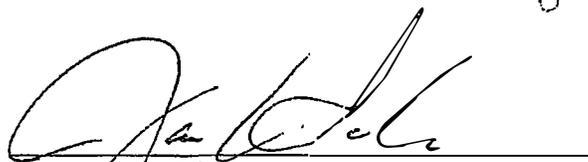
Defendant,

**MOTION FOR ENTRY OF AN
ORDER TO CORRECT FILING ERROR**

COLEMAN (PARENT) HOLDINGS INC. moves this Honorable Court to enter an Order
correcting the inadvertent error which occurred in the recent filing of Coleman (Parent)'s Notice
of Compliance With Order of May 17, 2004, when the attached transcript was not filed under
seal.

Coleman (Parent) Holdings Inc. vs Morgan Stanley & Co., Inc.
Stipulated Motion For Entry Of An Order To Correct Filing Error
Case No.: 2003 CA 005045 AI

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by
Fax and Federal Express to all counsel on the attached list on this 21 day of May,
2004.



JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 478-0754
Attorneys for Coleman and Mafco

Coleman (Parent) Holdings Inc. vs Morgan Stanley & Co., Inc.
Stipulated Motion For Entry Of An Order To Correct Filing Error
Case No.: 2003 CA 005045 AI

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Ferold S. Solovy, Esq.
Jenner & Block LLP
One IBM Plaza
Suite 1400
Chicago, IL 60611

#230580/mp

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN
AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

CASE NO: 2003 CA 005045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.

MORGAN STANLEY SENIOR FUNDING,
INC.,

Plaintiff,

vs.

CASE NO. CA 03-5165 AI

MACANDREWS & FORBES HOLDINGS,
INC.,

Defendant,

ORDER DIRECTING THE SEALING OF PRIOR FILING

Upon consideration of the Motion of Coleman (Parent) Holdings Inc. for Entry of an Order to Correct Filing Error, the Clerk of Court is hereby directed to seal Coleman (Parent) Holdings, Inc.'s Notice of Compliance With Order of May 17, 2004 bearing Certificate of Service date May 20, 2004.

DONE AND ORDERED at West Palm Beach, Palm Beach County, Florida, this _____
day of _____, 2004.

SIGNED AND DATED

MAY 24 2004

JUDGE ELIZABETH T. MAASS
ELIZABETH T. MAASS
CIRCUIT COURT JUDGE

Copies have been furnished to all counsel on the attached counsel list.

Coleman Holdings, Inc. vs Morgan Stanley & Company
Case No.:2003 CA 005045 AI
Order

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block LLP
One IBM Plaza
Suite 4400
Chicago, IL 60611

Jack Scarola, Esq.
Searcy Denney Scarola Barnhart & Shipley
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO., INC.,

Defendant.

MORGAN STANLEY SENIOR FUNDING, INC.,

Plaintiff,

v.

CASE NO: CA 03-5165 AI

MACANDREWS & FORBES HOLDINGS, INC.,

Defendant.

NOTICE OF FILING PLEADING UNDER SEAL

Morgan Stanley & Co. Incorporated and Morgan Stanley Senior Funding, Inc. ("Morgan Stanley"), by and through their undersigned counsel, hereby give notice that the Morgan Stanley's Response and Opposition to Coleman (Parent) Holdings, Inc.'s Motion to Allow Arthur Andersen Access to Confidential Transcript has been filed under seal this 26th day of May, 2004.

Coleman v. Morgan Stanley, Case No: CA 03-5045 AI
Morgan Stanley v. MacAndrews, Case No: CA 03-5045
Notice of Filing Under Seal
Page 2

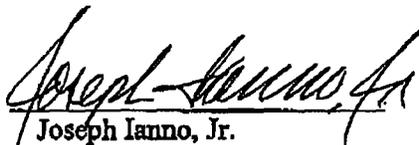
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the service list below by facsimile and Federal Express on this ^{26th} day of May, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar No. 618349)
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
E-mail: jianno@carltonfields.com

Michael K. Kellogg
Mark C. Hansen
James M. Webster
Rebecca A. Beynon
**KELLOGG, HUBER, HANSEN,
TODD & EVANS P.L.L.C.**
Sumner Square
1615 M. Street, N.W., Suite 400
Washington, D.C. 20036
Telephone: (202) 326-7900
Facsimile: (202) 326-7999
(*Pro Hac Vice* Pending)

BY: 
Joseph Ianno, Jr.
Florida Bar No: 655351

**Counsel for Morgan Stanley & Co.
Incorporated and Morgan Stanley
Senior Funding**

FAX TRANSMITTAL

JENNER & BLOCK

Jenner & Block LLP
One IBM Plaza
Chicago, IL 60611-7603
Tel 312 222-9350
www.jenner.com

Chicago
Dallas
Washington, DC

Date: May 27, 2004

To: Thomas A. Clare, Esq.
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005

Fax: 202 879-5200
Voice: 202 879-5993

Joseph Ianno, Jr., Esq.
Carlton Fields, P.A.
222 Lake View Avenue
West Palm Beach, FL 33401

Fax: 561 659-7368
Voice: 561 659-7070

From: Stephen P. Baker
312 840-7211

Client Number: 41198-10003

Important: This message is intended only for the use of the individual or entity to which it is addressed, and may contain information that is attorney work product, privileged, confidential and exempt from disclosure under applicable law. If the reader of this message is not the intended recipient, or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone, and return the original message to us at the above address via postal service. Thank you.

Message: Please see attached.

Total number of pages including this cover sheet: 11

If you do not receive all pages, please call: 312 222-9350

Secretary: Sue Durkin

Time Sent:

Sent By: *Sue Durkin*

Extension: 6387

16div-005228

**IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA**

COLEMAN (PARENT) HOLDINGS INC.,)	
)	
Plaintiff,)	
	)	Case No. 2003 CA 005045 AI
v.)	
	)	Judge Elizabeth T. Maass
MORGAN STANLEY & CO., INC.,)	
)	
Defendant.)	
)	

AMENDED NOTICE OF DEPOSITION

To: Thomas A. Clare, Esq. KIRKLAND & ELLIS LLP 655 Fifteenth Street, N.W. Suite 1200 Washington, D.C. 20005	Joseph Ianno, Jr., Esq. CARLTON FIELDS, P.A. 222 Lake View Avenue, Suite 1400 West Palm Beach, FL 33401
---	--

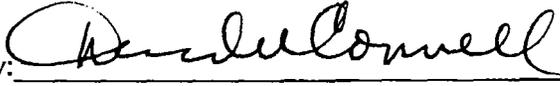
PLEASE TAKE NOTICE that Plaintiff Coleman (Parent) Holdings Inc. (“CPH”) requests the deposition upon oral examination of the following non-party witness pursuant to the commission issued by the Circuit Court of the Fifteenth Judicial District of Florida and the subpoena issued in aid of that commission by the Supreme Court of the State of New York on the date, time, and location set forth below:

DEPONENT	DATE AND TIME	LOCATION
James Stynes 941 Park Ave. Apt. 9C New York, New York 10028	July 1, 2004 at 10:00 a.m.	Esquire Deposition Services 216 E. 45th Street, 8th FL New York, New York 10017

The witness will be requested to bring to the deposition the documents specified in Exhibit A to the Subpoena. The deposition will be recorded by stenographic and audio-visual means and will be taken before a person authorized to administer oaths and will continue day to day until completed. The videographer will be Esquire Deposition Services, New York, NY.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by facsimile and mail to all counsel on the attached Service List, this 27th day of May, 2004.

COLEMAN (PARENT) HOLDINGS INC.

By: 
One of Its Attorneys

Jerold S. Solovy
Deirdre E. Connell
JENNER & BLOCK, LLC
One IBM Plaza
Suite 4400
Chicago, Illinois 60611
(312) 222-9350

Jack Scarola
SEARCY DENNEY SCAROLA BARNHART
& SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33409
(561) 686-6300

SERVICE LIST

Thomas A. Clare, Esq.
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lake View Avenue
Suite 1400
West Palm Beach, FL 33401

Document Number : 1080290

**EXHIBIT A
TO SUBPOENA TO NON-PARTY
JAMES STYNES**

You are hereby requested to produce the following documents pursuant to the definitions and instructions set forth below.

DOCUMENTS REQUESTED

1. All documents concerning the identity of any Morgan Stanley personnel who performed any work for Sunbeam concerning the Coleman Transaction, the Subordinated Debenture Offering, the Bank Facility, or the Credit Agreement.
2. All documents concerning Sunbeam's engagement of Morgan Stanley, including but not limited to engagement letters, bills, invoices, billing or payment records, and back-up for statements of professional services rendered and/or expenses incurred in connection with Morgan Stanley's work for Sunbeam.
3. All calendars, diaries, timekeeping sheets or records maintained by You concerning any activities or services performed for Sunbeam, Morgan Stanley, or MSSF.
4. All documents concerning any investigation, analysis or due diligence concerning Sunbeam or Coleman provided to or conducted by or on behalf of Morgan Stanley or MSSF.
5. All documents concerning attempts by Morgan Stanley to locate (a) someone to purchase or otherwise acquire Sunbeam, in whole or in part, whether through merger, purchase, transfer of assets or securities, or otherwise or (b) companies for Sunbeam to purchase or otherwise acquire, whether through merger, purchase, transfer of assets or securities, or otherwise.
6. All documents concerning the Coleman Transaction, the Credit Agreement, the Bank Facilities, or the Subordinated Debenture Offering.

7. All documents concerning the “bring-down” due diligence for the Subordinated Debenture Offering.
8. All documents concerning Sunbeam’s March 19, 1998 press release, including but not limited to whether to issue the press release, whether to include all or any portion of the March 19, 1998 press release in the Offering Memorandum, or concerning the contents or drafting of the press release.
9. All documents concerning Sunbeam’s actual or expected sales, revenues, or earnings for all or any portion of 1996, 1997, or 1998.
10. All documents concerning the drafting and issuance of the Offering Memorandum.
11. All documents concerning the March 19, 1998 drafting session and/or meeting that took place at Global Financial Press concerning the Offering Memorandum.
12. All documents concerning any conversations or communications of any kind involving John Tyree or Lawrence Bornstein concerning Sunbeam.
13. All documents relating to synergies that might be achieved from a business combination of Sunbeam, and any or all of Coleman, Signature Brands USA, and First Alert, Inc.
14. All documents concerning the sale of the Subordinated Debentures, including but not limited to documents concerning roadshows; communications with potential investors, CPH, Coleman, Mafco, or analysts; or communications with or among Morgan Stanley’s personnel.
15. All documents reflecting or concerning any communications between or among any of Morgan Stanley, MSSF, Davis Polk, Sunbeam, Arthur Andersen LLP, and/or Skadden concerning Sunbeam, the Coleman Transaction, the Subordinated Debenture Offering, the Bank Facility, or the Credit Agreement.

16. All documents concerning any "comfort letters" prepared in connection with the Subordinated Debenture Offering or the Credit Agreement including but not limited to Arthur Andersen's letters dated March 19, 1998 and March 25, 1998 and any drafts of those letters.

17. All documents concerning any valuation of Coleman or Sunbeam securities (a) prepared or performed by Morgan Stanley or MSSF or (b) provided to Morgan Stanley or MSSF.

18. All documents You or Morgan Stanley provided to or received from the SEC, the Justice Department, the U.S. Attorney for the Southern District of New York, the Attorney General of New York, any other federal or state governmental or regulatory body, or any other self-regulatory body concerning Sunbeam, Morgan Stanley, MSSF, the Coleman Transaction, the Subordinated Debenture Offering, and/or the Bank Facilities. The relevant time period for this request is February 1998 through the date of service of this subpoena.

19. All documents you provided to any party in connection with any of the Litigations.

DEFINITIONS

1. "Arthur Andersen" means Arthur Andersen LLP and its present and former partners and employees.

2. "CPH" means Coleman (Parent) Holdings Inc., and its present and former officers, directors, and employees.

3. "Coleman Transaction" means the transaction by which Sunbeam acquired CPH's interest in The Coleman Company.

4. "Communication" means the transmittal of information (in the form of facts, ideas, inquiries or otherwise) by letter, memorandum, facsimile, orally, electronically or otherwise.

5. "Concerning" means concerning, reflecting, relating to, referring to, describing, evidencing, or constituting.

6. "Credit Agreement" means that agreement entered into by Sunbeam Corporation, as borrower, with Morgan Stanley Senior Funding, Inc., Bank of America National Trust and Savings Association, and First Union National Bank (now known as Wachovia Bank, National Association), as lenders, dated March 30, 1998 and amended periodically thereafter by agreement of the parties.

7. "Documents" shall be given the broad meaning provided in CPLR Rule 3120 and refers to any form or means, whether physical, visual, or electronic, in or by which words, numbers, or ideas are recorded or preserved, whether fixed in tangible medium or electronically stored, including any and all drafts of any final document. The word "documents" shall include, by way of example and not by way of limitation, all of the following: papers, correspondence, trade letters, envelopes, memoranda, telegrams, cables, notes, messages, reports, studies, press releases, comparisons, books, accounts, checks, audio and video recordings and transcriptions thereof, pleadings, testimony, articles, bulletins, pamphlets, brochures, magazines, questionnaires, surveys, charts, newspapers, calendars, desk calendars, pocket calendars, lists, logs, publications, notices, diagrams, instructions, diaries, minutes for meetings, corporate minutes, orders, resolutions, agendas, memorials or notes of oral communications, whether by telephone or face-to-face, contracts, agreements, drafts of or proposed contracts or agreements, memoranda of understanding, letters of intent, computer tapes, computer drives or memories, computer diskettes or disks, e-mail, CD-ROMs, or any other tangible thing on which any handwriting, typing, printing, photostatic, electronic, or other form of communication or information is recorded or reproduced, together with

all notations on any of the foregoing, all originals, file copies, or other unique copies of the foregoing, and all versions or drafts thereof, whether used or not.

8. "Litigations" means In Re Sunbeam Securities Litigation, 98-8258-Civ.-Middlebrooks (S.D. Fla.); Camden Asset Management, L.P., et al. v. Sunbeam Corporation, et al., 98-8773-Civ.-Middlebrooks and 98-8275-Civ.-Middlebrooks (S.D. Fla.); Krim v. Dunlap, et al., No. CL983168AD (15th Jud. Cir., Fla.); Stapleton v. Sunbeam Corp., et al., No. 98-1676-Civ.-King (S.D. Fla.); Sunbeam Corp. v. PricewaterhouseCoopers LLP, No. CL005444AN (15th Jud. Cir., Fla.); In re Sunbeam Corp., No. 01-40291 (AJG) (Bankr. S.D.N.Y.), and every adversary proceeding therein; SEC v. Dunlap, et al., No. 01-8437-Civ.-Middlebrooks (S.D. Fla.); Oaktree Capital Management LLC v. Arthur Andersen LLP, No. BC257177 (L.A. Cty., CA); and Coleman (Parent) Holdings Inc. v. Arthur Andersen LLP, et al., No. CA 01-06062AN (15th Jud. Cir., Fla.); Albert J. Dunlap and Sunbeam Corporation, No. 32 160 00088 99 (AAA); and Russell A. Kersh and Sunbeam Corporation, No. 32 160 00091 99 (AAA); In the Matter of Sunbeam Corp., SEC Administrative Proceeding File No. 3-10481; In the Matter of David C. Fannin, SEC Administrative Proceeding File No. 3-10482, and any other matter involving the Coleman Transaction, the Credit Agreement, the Bank Facilities, or the Subordinated Debenture Offering.

9. "Morgan Stanley" means Morgan Stanley & Co., Inc. and any of its direct or indirect parents, affiliates, subsidiaries, and present and former officers, directors, partners, employees, representatives, and agents.

10. "MSSF" means Morgan Stanley Senior Funding, Inc. and any of its direct or indirect parents, affiliates, subsidiaries, and present and former officers, directors, partners, employees, representatives, and agents.

11. "Person" means any natural person, corporation, limited liability company, trust, joint venture, association, company, partnership, governmental authority, or other entity.
12. "SEC" means the Securities and Exchange Commission.
13. "Skadden" means Skadden, Arps, Slate, Meagher & Flom LLP and any of its present and former partners, employees, representatives and agents.
14. "Subordinated Debenture Offering" means the offering of Sunbeam's Zero Coupon Convertible Senior Subordinated Debentures Due 2018.
15. "Sunbeam" means Sunbeam Corporation and any of its present and former officers, directors, employees, representatives, and agents.
16. "You" or "Your" means James Stynes and any of James Stynes's present and former representatives and agents.

INSTRUCTIONS

1. Documents shall be produced as they are kept in the usual course of business, or organized and labeled to correspond to the categories in this Request. Documents attached to each other should not be separated.
2. All documents shall be produced in the file folder, envelope or other container in which the documents are kept or maintained by you. If, for any reason, the container cannot be produced, produce copies of all labels or other identifying marks.
3. The relevant period, unless otherwise indicated, shall be April 1, 1997 through the date of service of this subpoena, and shall include all documents and information which relate in whole or in part to such period, or to events or circumstances during such period, even though dated, prepared, generated or received prior or subsequent to that period. Please supplement or

correct your responses to these requests if, at any time, you become aware that your responses are incomplete or incorrect in any respect.

4. If you claim the attorney-client privilege, or any other privilege or work-product protection for all or any portion of a document, you shall provide a privilege log that describes the withheld material sufficiently to allow CPH to test the privilege or protection asserted.

5. The following rules of construction apply:

- a. The connectives “and” and “or” shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery requests all responses that might otherwise be outside of their scope;
- b. The term “including” shall be construed to mean “without limitation”; and
- c. The use of the singular form of any word includes the plural and vice versa.

Doc. # 1080303

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

_____/ CASE NO. CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

_____/

ORDER AND RE-NOTICE OF HEARING

This case came before the Court May 28, 2004 on Coleman (Parent) Holding Inc.'s Motion to Allow Arthur Andersen LLP Access to Confidential Information, with all counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that hearing on Coleman (Parent) Holding Inc.'s Motion to Allow Arthur Andersen LLP Access to Confidential Information is hereby re-set for

June 7, 2004, at 1:30 p.m.

at the West Palm Beach Courthouse, Room 11A, 205 N Dixie Hwy, WPB, FL. Defendant shall provide the undersigned and opposing counsel with a copy of the transcript from the

April 30, 2004 hearing with all portions Defendant claims to be confidential highlighted by
12 noon June 3, 2004.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 28
day of May, 2004.



ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:

Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci
655 15th Street, NW, Suite 1200
Washington DC 20005

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, Il 60611

If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please contact the ADA Coordinator in the Administrative Office of the Court, Palm Beach County Courthouse, 205 North Dixie Highway, Room 5.2500, West Palm Beach, Florida 33401; telephone number (561) 355-4380 within two (2) working days of your receipt of this [describe notice]; if you are hearing or voice impaired, call 1-800-955-8771.

SPANISH

Si Ud. es una persona incapacitada que necesita de un servicio especial para participar en este proceso, Ud. tiene derecho a que le provean cierta ayuda sin costo alguno. Por favor pongase en contacto con el Coordinador de la Oficina Administrativa de la Corte ADA, situada en el 205 North Dixie Highway, Oficina 5.2500, West Palm Beach, Florida, 33401, teléfono (561) 355-4380, dentro de los dos (2) próximos días hábiles después de recibir esta [describa la notificación]; si tiene incapacidad de oír ó hablar llame al 1-800-955-8771.

CREOLE

Si ou sé yon moun ki Infirm, ki bézwen ninpôt akomodasyon pou ka patisipé nan pwosè sa-a, ou gen dwa, san'l pa kouté'w anyin, pou yo ba'w kèk sèvis. Tanpri kontakté koòdinatè ADA ya nan Biro Administratif Tribinal nan cité Palm Beach la, ki nan 205 North Dixie Highway, Cham 5.2500, West Palm Beach, Florida 33401, niméro telefonn-nan sé (561) 355-4380, rélé dé (2) jou dé lè ou résévwa [notis sa-a]; si ou bèbè ou byen soud rélé 1-800-955-8771.

FRENCH

Si vous êtes infirme, et en besoin de n'importe quelle accommodation pour pouvoir participer à ces procédures, vous pouvez gratuitement recevoir, certains services. S'il-vous-plait contactez le coordinateur du Bureau Administratif du Tribunal de Palm Beach, située à 205 North Dixie Highway, Chambre 5.2500, West Palm Beach, Florida 33401, numéro de téléphone (561) 355-4380 durant deux (2) jours suivant la réception de [cette note]; si vous êtes muets ou sourds, appelez 1-800-955-8771.

1 IN THE FIFTEENTH JUDICIAL CIRCUIT COURT
IN AND FOR PALM BEACH COUNTY, FLORIDA

2

3

4

5 CASE NO. CA 03-5045 AI

6 COLEMAN (PARENT) HOLDINGS, INC.,

7 Plaintiff(s),

8 vs.

9 MORGAN STANLEY & CO., INC.,

10 Defendant(s).

_____ /

11

CASE NO. CA 03-5165 AI

12

MORGAN STANLEY SENIOR FUNDING, INC.,

13

Plaintiff(s),

14

vs.

15

MACANDREWS & FORBES HOLDINGS, INC.,

16

Defendant(s).

_____ /

18

19

20 TRANSCRIPT OF THE PROCEEDINGS
BEFORE THE HONORABLE ELIZABETH T. MAASS,
21 ON FRIDAY, MAY 28, 2004.

22

23

24

25

1 APPEARANCES:

2 FOR THE PLAINTIFF(S):

SEARCY DENNEY SCAROLA

3 BARNHART & SHIPLEY

2139 Palm Beach Lakes Blvd.

4 West Palm Beach, Florida 33409

BY: JACK SCAROLA, ESQUIRE

5 - AND -

JENNER & BLOCK

6

7 BY: RONALD MARMER, ESQUIRE

Appearing via telephone

8

FOR THE DEFENDANT(S):

9 CARLTON FIELDS

222 Lakeview Ave.

10 Suite 1400

West Palm Beach, Florida

11 BY: JOSEPH IANNO, JR., ESQUIRE

- AND -

12 KIRKLAND & ELLIS, LLP

777 South Figueroa Street

13 Los Angeles, California 90017

BY: LAWRENCE P. BEMIS, ESQUIRE

14

15

16

17

18

19

20

21

22

23

24

PINNACLE REPORTING, INC.
(561) 820-9066

3

1 TRANSCRIPT OF THE PROCEEDINGS, TAKEN BEFORE THE
2 HONORABLE ELIZABETH T. MAASS IN COURTROOM 11A, PALM
3 BEACH COUNTY COURTHOUSE, WEST PALM BEACH, FLORIDA,
4 ON FRIDAY, MAY, 28, 2004, BEGINNING AT 11:28 A.M.

5 - - -

6 THE COURT: Good morning. Have a seat.

7 MR. SCAROLA: Good morning, Your Honor.

8 THE COURT: We are back on Coleman and
9 Morgan Stanley, and this is Plaintiff's motion.

10 What did you want to say in support of it?

11 MR. SCAROLA: I would request, Your Honor,
12 if I may, that we tie in some folks from
13 Chicago who would like to be able to listen in
14 and perhaps participate.

15 THE COURT: Sure. Who are they?

16 MR. SCAROLA: I know that Mr. Shaw is
17 likely to be on the other end of the line.
18 These are the Jenner and Block attorneys, Your
19 Honor, and this is the toll free number and the
20 participant number for the conference.

21 THE COURT: Okay. They represent Coleman
22 as well?

23 MR. SCAROLA: They are co-counsel with me,
24 yes, Your Honor.

25 THE COURT: Do you want to just place a

PINNACLE REPORTING, INC.
(561) 820-9066

4

1 phone call?

2 MR. IANNO: Your Honor, while we're doing
3 that, I guess pursuant to the stipulated
4 confidentiality order in this case, we are
5 designating this transcript as confidential.
6 It's not necessary to close the proceedings
7 since there is no one else in the courtroom
8 other than counsel.

9 THE COURT: Is what you're suggesting --
10 this is actually something I probably need to
11 go back and look at the transcript from the
12 last hearing -- is that any transcript of this
13 hearing will be deemed confidential for
14 purposes of that order?

15 MR. IANNO: Correct.

16 THE COURT: Just the transcript?

17 MR. SCAROLA: I believe they have the
18 unilateral right to make that designation and I
19 recognize their unilateral right to make that
20 designation. I will offer the same stipulation
21 that I entered into at the commencement of the

16div-005245

22 last hearing; and that is, that nothing that is
23 said during the course of this hearing will be
24 deemed to constitute either a violation of the
25 confidentiality order or a waiver of the

PINNACLE REPORTING, INC.
(561) 820-9066

5

1 confidentiality order.

2 THE COURT: Okay. So is that -- would you
3 accept that stipulation?

4 MR. IANNO: Well, I understand that, Your
5 Honor, but --

6 MR. SCAROLA: Could we hold on just one
7 second?

8 THE BAILIFF: Ron Marmer I have on the
9 phone.

10 MR. SCAROLA: That's fine.

11 (Thereupon, Ronald Marmer appeared via telephone
12 and the following proceedings were had.)

13 THE COURT: Hi, this is Judge Maass. Who
14 do I have on the phone?

15 MR. MARMER: Good morning, Your Honor.
16 This is Ron Marmer from Jenner and Block in
17 Chicago.

18 THE COURT: Hi. I have you on the speaker
19 phone in the courtroom in Coleman Parent versus

16div-005246

20 Morgan Stanley. We're going to put you up. It
21 sometimes can be difficult to hear, so if you
22 have a problem let us know.

23 And you all might want to pull the podiums
24 forward maybe just so he can hear you a little
25 bit better.

PINNACLE REPORTING, INC.
(561) 820-9066

6

1

2 MR. SCAROLA: Thank you very much, Your
3 Honor.

4 THE COURT: Let's go back to where we
5 were, first dealing with, as I understand it,
6 Mr. Ianno has designated any transcript from
7 this proceeding as confidential pursuant to the
8 prior stipulated confidentiality order. And,
9 Mr. Scarola, you were offering the same
10 stipulation that counsel reached at the prior
11 hearing, which is that nothing said in this
12 hearing will be deemed to either waive or be in
13 violation of the prior confidentiality order?

14 MR. SCAROLA: That is correct, Your Honor.

15 THE COURT: And would your client accept
16 that stipulation?

17 MR. IANNO: We accept that stipulation,
18 Your Honor. But I want to go also one step

16div-005247

19 further with what the Court said on the
20 transcript to make sure we clarify that even
21 though the transcript is confidential, that the
22 parties -- and I think Mr. Scarola acknowledges
23 this at the end of the last hearing -- can't go
24 out and say what was said in the transcript.
25 Even though the written word is confidential,

PINNACLE REPORTING, INC.
(561) 820-9066

7

1 you can't orally go out and disclose what the
2 transcript says to third parties.

3 And Mr. Scarola, I don't know if he agrees
4 with that or not, but that's our position.

5 Just because a transcript is confidential, you
6 shouldn't be able to disclose to third parties
7 under the confidentiality order what you can't
8 say.

9 MR. SCAROLA: I am not willing, as I stand
10 here, to enter into a verbal modification of
11 the confidentiality order which was reached
12 after considerable negotiation among counsel
13 and carefully drafted to define its proper
14 scope.

15 I will tell you that subjectively, I don't
16 think that someone can evade the

17 confidentiality order by verbally communicating
18 something that is designated as confidential.

19 THE COURT: Does either side have a copy
20 of the stipulated confidentiality order?

21 MR. SCAROLA: Yes, Your Honor.

22 THE COURT: That would be helpful.

23 MR. SCAROLA: Do you have multiple copies?

24 I have one.

25 MR. IANNO: I have just one.

PINNACLE REPORTING, INC.
(561) 820-9066

8

1 THE COURT: We'll make a photocopy of
2 that.

3 MR. IANNO: We have another copy, Your
4 Honor, but I don't know if you have the
5 reference binder that we sent over in this
6 case.

7 THE COURT: I do. Is it in there?

8 MR. IANNO: It should be.

9 THE COURT: I should have guessed that it
10 would be in there.

11 MR. SCAROLA: I'm sure we've provided
12 copies to Your Honor on a couple of occasions.

13 THE COURT: I have seen multiple copies, I
14 just --

15 MR. IANNO: In the reference binder it

16div-005249

16 should be under one of those tabs. It's the
17 third one, tab three. It's in both cases. The
18 same one in both cases.

19 THE COURT: Okay, let me look.

20 Okay. Back to where we were. You were
21 saying you would not accept a stipulation that
22 said -- that any oral statement of what
23 transpired at this hearing will be deemed
24 confidential as well or could not be made?

25 MR. SCAROLA: What I am saying, Your

PINNACLE REPORTING, INC.
(561) 820-9066

9

1 Honor, is that the stipulated confidentiality
2 order says what it says. And to the extent
3 that it would apply to any of the matters that
4 are disclosed during the course of this
5 hearing, to the extent that disclosures during
6 this hearing would constitute what the
7 confidentiality order describes and defines as
8 litigation materials, once they unilaterally
9 designate the transcript as confidential, I
10 can't disclose that information, as I
11 understand the confidentiality order.

12 And my subjective belief as I stand here
13 right now is, not only could I not hand someone

16div-005250

14 the transcript while that designation remains
15 in place, I think that a reasonable reading of
16 the confidentiality order would preclude me
17 from accomplishing indirectly that which I am
18 prohibited from accomplishing directly. I not
19 only can't hand them the transcript unless and
20 until the confidentiality provisions or the
21 confidentiality designation is removed, I can't
22 tell them confidential information, either.

23 That's my subjective belief. If that's
24 what the confidentiality order says, that's
25 what we're going to do.

PINNACLE REPORTING, INC.
(561) 820-9066

10

1 THE COURT: I think that's probably fine
2 for today's purposes.

3 I will be honest with you, at some point
4 we all need to go back and give some, I think,
5 more thought to what we are designating as
6 confidential. For instance, it should not be
7 confidential whether or not I greeted you guys
8 when you came in the courtroom. You know, at
9 some point we're likely to get ourselves into
10 trouble if we keep sort of over-designating
11 information.

12 MR. IANNO: Agreed.

16div-005251

13 THE COURT: Okay. Are we prepared to go
14 forward today then?

15 MR. SCAROLA: We are, Your Honor, yes.

16 THE COURT: Okay. What did you want to
17 say in support of the motion?

18 MR. SCAROLA: Your Honor, we are here
19 before the Court seeking permission to make a
20 limited disclosure of information that has been
21 designated under the terms of the
22 confidentiality order as litigation materials
23 subject to the orders provision; specifically,
24 the transcript of the last hearing held before
25 Your Honor.

PINNACLE REPORTING, INC.
(561) 820-9066

11

1 In support of that motion, I would point
2 out first that the contention on the part of
3 Morgan Stanley that we somehow stipulated to
4 preserve everything said during the course of
5 the last hearing as confidential is simply not
6 supported by the transcript of the hearing.

7 I stipulated to the following, and Your
8 Honor has a copy of the transcript. It's pages
9 five and six of the transcript. And the heart
10 of the stipulation appears at page seven.

16div-005252

11 The Court at line 3 says: "I assume what
12 you're saying is that you want sort of
13 everything we say to be deemed confidential
14 under the terms of the stipulated
15 confidentiality order?"

16 Mr. Bemis responds: "Either that, and a
17 statement that no one is going to allege later
18 that statements made in response to arguments
19 made with respect to documents filed under seal
20 are going to violate the confidentiality
21 order."

22 My response: "Your Honor, we will agree
23 that participation in this hearing will not
24 constitute a waiver of any confidentiality
25 argument. I think that's what Mr. Bemis is

PINNACLE REPORTING, INC.
(561) 820-9066

12

1 asking for and we don't have a problem with
2 that."

3 The Court says: "Or a violation?"

4 And I agree: "Or a violation of the
5 confidentiality order."

6 THE COURT: That's what I highlighted,
7 which was my first question. Are you simply
8 trying to seek a declaration that nothing
9 prohibits your telling a third party what

16div-005253

10 transpired at this hearing? Because the only
11 thing that was stipulated to was that whatever
12 was said at the hearing wouldn't be a waiver of
13 the confidentiality provision or a violation of
14 the confidentiality order.

15 MR. SCAROLA: Yes, Your Honor. Where that
16 brings us is to this point: They have said we
17 can't show it to anyone because we stipulated
18 that it was going to be confidential and the
19 burden, therefore, rests on us that it's going
20 to be confidential.

21 THE COURT: And you're saying, no, we
22 didn't?

23 MR. SCAROLA: I'm saying, no, there is no
24 such stipulation. What we acknowledged was,
25 they have the right to unilaterally designate

PINNACLE REPORTING, INC.
(561) 820-9066

13

1 that hearing, the transcript of that hearing,
2 or they've claimed a right to unilaterally
3 designate the transcript of that hearing as
4 confidential.

5 Then, under the terms of the
6 confidentiality order we challenge that
7 stipulation, the burden shifts to them to

16div-005254

8 demonstrate that this in fact is confidential
9 information.

10 THE COURT: So let me ask you this: The
11 argument you are raising now was an argument
12 that occurred to me when I was reviewing the
13 transcript yesterday. Was this one that was
14 made to them before today?

15 MR. SCAROLA: Was what one made before
16 today?

17 THE COURT: You filed a motion. Did the
18 motion raise the issue that it's our position
19 that the transcript itself wasn't designated
20 confidential and we want to be able to disclose
21 it? Because I didn't think it did.

22 MR. SCAROLA: Please understand, I'm not
23 contending they haven't designated the
24 transcript as confidential; they have. They
25 told us that they wanted it to be confidential

PINNACLE REPORTING, INC.
(561) 820-9066

14

1 at the hearing.

2 THE COURT: Let me find your motion then,
3 because I need to see exactly what issue the
4 motion raised.

5 MR. IANNO: It's in the notebook at tab
6 one for this hearing. I'm sorry, Your Honor.

16div-005255

7 THE COURT: I'm sure it is, I just have to
8 find the notebook for this hearing.

9 MR. SCAROLA: I can provide the Court with
10 a copy right here, Your Honor.

11 THE COURT: I have it. That's okay, I do
12 have it. Thanks.

13 Where in the transcript do we think that
14 Morgan Stanley designated the entire transcript
15 as confidential? Do we think that happened at
16 that hearing?

17 MR. SCAROLA: I don't think there is any
18 dispute between us that that's --

19 THE COURT: Do we think that happened at
20 the hearing is my question.

21 MR. IANNO: We think Mr. Scarola and
22 Morgan Stanley agreed to it, Your Honor, and
23 it's on page 140 -- 140-something.

24 THE COURT: 140 what?

25 MR. IANNO: It's on page 140, line 11.

PINNACLE REPORTING, INC.
(561) 820-9066

15

1 It's Mr. Scarola speaking, Your Honor.

2 THE COURT: Let me read it, okay?

3 MR. IANNO: And, Your Honor, if you go to
4 page 142, line 3.

16div-005256

5 THE COURT: Okay. I would agree at page
6 44 is where Defendant designates it as
7 confidential.

8 MR. SCAROLA: 144, Your Honor.

9 THE COURT: 144.

10 And I'm talking to Mr. Bemis at line 17:

11 "Right. And you're saying that, as I
12 understand it, you're agreeing to or you are
13 designating the entire thing as confidential,
14 correct?"

15 Mr. Bemis: "Yes."

16 And then I turn to you, Mr. Scarola, and
17 basically said: "And you're going to want to
18 file a motion."

19 MR. SCAROLA: Yes, and that's why we're
20 here.

21 THE COURT: So you're saying the burden is
22 on them to show what's confidential about this?

23 MR. SCAROLA: Exactly. They are
24 obliged -- once we have challenged the
25 confidentiality designation, as we now have by

PINNACLE REPORTING, INC.
(561) 820-9066

16

1 way of this motion, the burden shifts to them
2 to demonstrate that it is properly retained as
3 confidential under the terms of the

16div-005257

4 confidentiality order.

5 And I want to call the Court's attention
6 to just a couple of quick things before we turn
7 it over to them to meet their burden.

8 First, this order pertains to litigation
9 materials. Litigation materials are defined in
10 paragraph number one of the stipulated order.
11 And it says, "Litigation materials are all non-
12 public and confidential information disclosed
13 by any party hereto during the course of the
14 captioned litigation." That, I suggest, is the
15 relevant portion of the litigation materials
16 designation.

17 There is an exception. Paragraph two
18 says, "This order shall not apply to any
19 information that, A, is already in a receiving
20 parties' possession."

21 Now the only thing that could arguably be
22 suggested is confidential is the contents of
23 the settlement agreement; in particular, the
24 reference in this transcript to the amount of
25 the settlement. We certainly knew about that.

PINNACLE REPORTING, INC.
(561) 820-9066

1 We were the ones who disclosed it to them. It

2 is information that was already in our
3 possession. So they have no right to designate
4 as confidential in this proceeding information
5 that we already had, point number one.

6 MR. IANNO: Your Honor, can I object to
7 this? None of this is raised in Mr. Scarola's
8 motion. None of this argument is raised at all
9 in the motion. The motion is very bare bones
10 and fails to meet the minimal requirements.

11 I feel that now we're being ambushed by
12 Mr. Scarola's argument that this is litigation
13 materials, all this argument. So I object to
14 that argument, him going outside of his motion.

15 MR. SCAROLA: I don't see how that
16 possibly could be suggested as --

17 THE COURT: I understand your point. But
18 what else did you want to say?

19 MR. SCAROLA: Paragraph 9I. That
20 paragraph provides that even materials that
21 have properly been designated as confidential
22 may be shown to the author of the materials,
23 although the author is not supposed to retain a
24 copy.

25 What we are asking is that we disclose

PINNACLE REPORTING, INC.
(561) 820-9066

1 information to Arthur Anderson that Arthur
2 Anderson already has because it was the author
3 of the materials, it signed the settlement
4 agreement.

5 THE COURT: Is it accurate to say that
6 what you're seeking permission to do is just to
7 tell them what defense counsel said in the
8 hearing about the terms of the settlement?

9 MR. SCAROLA: We want to show them the
10 entire transcript so that they understand the
11 context in which that information was
12 disclosed. Remember, this was not a closed
13 hearing.

14 THE COURT: I understand that.

15 Do we, first of all, agree that at the end
16 of the last hearing Defendant designated the
17 entire transcript as confidential under the
18 terms of the order?

19 MR. IANNO: After Mr. Scarola did, we
20 agreed with him.

21 THE COURT: Well, Mr. Scarola said ten
22 days and you guys said, no, we're designating
23 the whole thing, basically.

24 MR. IANNO: He wanted it designated as
25 confidential for at least ten days. We said

1 we're designating the whole thing.

2 THE COURT: Right. And he said, fine,
3 I'll file a motion to get the stuff I want
4 released released.

5 MR. IANNO: Correct.

6 THE COURT: Is it still you're client's
7 position that the entire thing is properly
8 designated as confidential?

9 MR. IANNO: Well, Your Honor, I don't
10 think that's our position.

11 What the Court required Mr. Scarola to do
12 when we came here a week ago Wednesday is, tell
13 me those portions you want to disclose to
14 Arthur Anderson.

15 THE COURT: And he said the whole thing.

16 MR. IANNO: The whole thing.

17 And it's our position that under the
18 Court's previous orders relating to the Arthur
19 Anderson settlement agreement, the Court
20 specifically ordered the parties to hold that
21 settlement agreement as confidential, that
22 those parts of the settlement agreement and
23 those parts of the transcript where the
24 settlement agreement was discussed needs to
25 remain confidential.

1 But it's not -- I think the point here,
2 Your Honor, is what you were catching. Mr.
3 Scarola doesn't -- the provisions he read of
4 the stipulated confidentiality order don't
5 apply. He doesn't want to disclose the
6 settlement agreement to Arthur Anderson.
7 Clearly, they have that document. He wants to
8 disclose counsel's argument.

9 THE COURT: Well, why is that
10 confidential?

11 MR. IANNO: Because the Court said the
12 terms of the settlement agreement need to
13 remain confidential. Our argument here was
14 confidential, it shouldn't be disclosed. They
15 don't need to know. There has been no purpose
16 given --

17 THE COURT: I don't know that that's the
18 standard. I mean, you know, I need -- and I'm
19 sure you can explain it to me later -- a better
20 understanding of the dynamic of why they want
21 to disclose this to Arthur Anderson -- and
22 please, I don't mean this in a derogatory
23 fashion -- other than to be tattletales. So I
24 need to have a sense of what's truly going on

25 here.

PINNACLE REPORTING, INC.
(561) 820-9066

21

1 That said, I don't know that that's really
2 going to effect the legal ruling of is this
3 properly deemed confidential or not. We don't
4 go around designating things confidential
5 unless there really is some purpose. And by
6 that, I mean some legal purpose of designating
7 this confidential.

8 MR. IANNO: Your Honor, we don't know what
9 their purpose is because their motion doesn't
10 tell us. We can assume, and that's what we put
11 in our response, that there is no legitimate
12 purpose.

13 THE COURT: Why does that matter if it
14 shouldn't be -- I mean, please understand, I
15 feel strongly that we don't keep secrets when
16 you choose to litigate in a public forum. And
17 absent a trade secret, a privilege, or some
18 overriding public policy consideration that
19 would suggest things should not be public, they
20 should be public.

21 And I would agree sometimes that means
22 embarrassing things are disclosed, derogatory

16div-005263

23 things are disclosed, things that maybe civil
24 people would prefer not be disclosed get
25 disclosed. But it doesn't change the legal

PINNACLE REPORTING, INC.
(561) 820-9066

22

1 analysis. If it's not properly kept
2 confidential for an overriding public purpose,
3 it's simply not kept confidential.

4 So what I need -- I would agree with Mr.
5 Scarola that Defendant is the one who
6 designated the entire transcript as
7 confidential. So what I will need you to do is
8 to defend -- if you're telling me you need to
9 go back and review it and decide which parts
10 you really think are confidential, you need to
11 isolate those. And then I need you to be able
12 to defend why they are confidential. And we
13 can come back after lunch after you've had a
14 chance to do that exercise.

15 MR. IANNO: Well, Your Honor, I thought
16 Mr. Scarola was going to do that; he did not.
17 I wasn't prepared to do that today. We are
18 prepared to argue that Mr. Scarola has not met
19 any burden or stated any legitimate purpose for
20 disclosing that.

21 THE COURT: I'm just saying, I don't

16div-005264

22 think that -- that may be an interesting fact,
23 but I don't know that it's legally relevant.
24 So I am happy to come back at 1:30 and
25 hopefully you've marked up the transcript by

PINNACLE REPORTING, INC.
(561) 820-9066

23

1 then and we can at least isolate the parts that
2 you are claiming are legitimately confidential.

3 MR. IANNO: Mr. Bemis, I know, has a
4 flight to catch, Your Honor, because of the
5 holiday weekend.

6 THE COURT: I am going on vacation for a
7 week. I am happy to take you guys the first
8 day I come back from my vacation, which will be
9 June -- whatever it is.

10 MR. SCAROLA: Respectfully, Your Honor, I
11 know that they would love to have a further
12 delay --

13 THE COURT: I understand that they
14 originally sought to push this off further.
15 But in all honesty, without an understanding of
16 the dynamic of why it's so critical this
17 information be disclosed, it's hard for me --
18 in all honesty, Mr. Scarola, the argument you
19 are making now, while it occurred to me when I

20 read the transcript, I was not aware from the
21 motion that that's what we were going to be
22 arguing. In all honesty, I wasn't aware of
23 that because I would have told them designate
24 the parts you're really trying to keep
25 confidential if I thought that's the direction

PINNACLE REPORTING, INC.
(561) 820-9066

24

1 we were going.

2 MR. SCAROLA: Clearly, the motion places
3 them on --

4 THE COURT: I understand what you're
5 telling me. All I'm saying is, I didn't
6 understand that, either. I understood it was
7 an issue from reading the transcript. I didn't
8 understand that it was an issue you were
9 pushing.

10 So I am happy to do this at 1:30 today, I
11 am happy to do it the Monday I get back from
12 vacation, even though I am not otherwise in
13 court. You guys tell me what you prefer.

14 MR. SCAROLA: The very first opportunity
15 that Your Honor has. And we would strongly
16 urge that this matter get resolved today.

17 And I will explain to the Court, although
18 I agree with you that it is legally irrelevant,

16div-005266

19 I will explain to the Court in the context of
20 the stipulation that we have arrived at why we
21 want to do what we want to do. The first
22 reason is, because we have a right to do it.
23 The second reason is, because Arthur Anderson
24 asked us for the information. And they are
25 aware of it because they have gotten a copy of

PINNACLE REPORTING, INC.
(561) 820-9066

25

1 the letter. By letter, Arthur Anderson has
2 requested to have the transcript of this last
3 proceeding.

4 And I will explain to Your Honor, as Your
5 Honor is already aware, there are provisions in
6 the settlement agreement that impose financial
7 obligations on my client as a consequence of
8 litigation that has been brought against Arthur
9 Anderson. That places us in a position where
10 we have a unity of interest with Arthur
11 Anderson. We need to be able to cooperate with
12 them and they are obliged to cooperate with us
13 as well. We want to provide the information
14 with regard to what went on in open court
15 because we believe it has implications with
16 regard to our own responsibilities under the

17 terms of the relationship created between
18 Arthur Anderson and Coleman as a consequence of
19 that settlement agreement.

20 We're not simply tattletaling. And I
21 understand that that was not said in a
22 pejorative fashion, but there is a legitimate
23 legal reason why we want to share this
24 information, and we want to share it
25 expeditiously.

PINNACLE REPORTING, INC.
(561) 820-9066

26

1 As I explained to Your Honor at the last
2 hearing, the attorney's fees exceeded \$48,000
3 as of the time of that last hearing. I have no
4 idea where they are now.

5 THE COURT: When is Mr. Bemis' flight
6 back?

7 MR. BEMIS: I have a 2:30 flight. It's
8 the last flight out of here and I fly out of
9 West Palm.

10 MR. SCAROLA: Respectfully, Mr. Ianno is
11 the one who is doing the argument, he is here.
12 They can spend whatever time they need to to
13 try to come up with some confidential portion
14 of this transcript. I'm sure they are very
15 familiar with it.

16div-005268

16 The only claim that is made in any of the
17 eight pages that they have filed is that the
18 confidential portion is the amount of the
19 settlement, which obviously Arthur Anderson
20 already knows.

21 MR. IANNO: Why do they need to know
22 what's said at the hearing, Your Honor? I
23 still don't understand.

24 THE COURT: Well, setting that aside,
25 because as I understand it -- I don't know the

PINNACLE REPORTING, INC.
(561) 820-9066

27

1 dynamics of the case as well as you guys do.
2 I'm sure some day I will, but I don't right
3 now. But setting that aside, in all honesty,
4 what was said at that hearing that could not be
5 made known to Arthur Anderson that really could
6 be deemed confidential as to Arthur Anderson?

7 MR. IANNO: Well, it's a question of what
8 is the use of confidential material.

9 THE COURT: No. The question is, is it
10 confidential. That's the first hurdle. If
11 it's not confidential, frankly, we're not
12 addressing today whether it's used properly or
13 not.

14 MR. IANNO: I think it is confidential
15 because the Court ordered it to be confidential
16 when you ordered the settlement agreement to be
17 produced back in December.

18 THE COURT: Sure. But confidential
19 information is not -- I mean, it specifically
20 excludes information already in the receiving
21 parties' possession at the time it's produced.

22 MR. IANNO: That's not what Mr. Scarola
23 wants to disclose.

24 THE COURT: He wants to disclose the fact
25 that counsel disclosed it.

PINNACLE REPORTING, INC.
(561) 820-9066

28

1 MR. IANNO: That it was said in open
2 court.

3 THE COURT: That's not confidential. What
4 gets said in open court is not -- any member of
5 the public could have walked in and listened to
6 that. How can you possibly claim that it's
7 confidential to tell Arthur Anderson it was
8 said?

9 MR. IANNO: Because we agreed. That's the
10 problem, Your Honor. We believe we had a
11 stipulation that that was going to be
12 confidential.

16div-005270

13 THE COURT: In all honesty, the agreement
14 that was reached at the commencement of the
15 hearing was that anything that was said in the
16 hearing would not be deemed a waiver or a
17 violation.

18 MR. BEMIS: It would be confidential under
19 the terms of the hearing, Your Honor.

20 THE COURT: No, that's not the way, quite
21 honestly, I read the stipulation between
22 counsel. And I specifically asked you guys if
23 you wanted me to enter an order and you said it
24 wasn't necessary. It was only at the end of
25 the hearing that there was a designation of the

PINNACLE REPORTING, INC.
(561) 820-9066

29

1 entire transcript as confidential.

2 MR. IANNO: I understand, Your Honor. But
3 what Mr. Scarola said was, it wouldn't be a
4 violation of the court order, and now they
5 attempt to use that in some way to violate the
6 Court order. What they're trying to do is get
7 from the back door what they can't get from the
8 front door.

9 THE COURT: In all honesty, I don't see it
10 that way. I understand your consternation. I

16div-005271

11 understand your concern about the reason that
12 they are pursuing this. But I have a real hard
13 time understanding how the fact that counsel
14 said the amount of the settlement is
15 confidential.

16 MR. IANNO: Or that Mr. Scarola disclosed
17 the terms of the indemnity.

18 THE COURT: When the terms of the
19 agreement itself are not confidential as
20 against Arthur Anderson, I have a hard time
21 thinking the fact that somebody disclosed them
22 as confidential. I just don't see it.

23 And again, I'm happy to come back at 1:30
24 if you think there is additional argument you
25 can present.

PINNACLE REPORTING, INC.
(561) 820-9066

30

1 MR. BEMIS: What I would like to do is
2 take you up on your offer to revisit this on
3 the 7th because I need to confer with my client
4 as well. And if we're going to do a
5 designation, I just cannot do it between now
6 and the time we have and do it intelligently.

7 This argument that's being made today was
8 not raised. I read their papers, I wrote the
9 brief that was filed with Mr. Ianno, and this

16div-005272

10 is a totally different argument than what was
11 presented in their papers.

12 THE COURT: We will come back that Monday.

13 I understand your consternation, but we are
14 happy to do it. Happy happy. That's fine.

15 MR. SCAROLA: Three of us are happy, one
16 of us is very disappointed.

17 THE COURT: I understand.

18 And by Wednesday I need from Defendant the
19 portions highlighted that you still are
20 contending are confidential. Obviously, vast
21 portions of that transcript are not properly
22 deemed confidential.

23 MR. BEMIS: Your Honor, I appreciate that
24 position. I will tell you, however, that is
25 not the position that the parties have been

PINNACLE REPORTING, INC.
(561) 820-9066

31

1 taking in the litigation. For example, every
2 deposition transcript in this case, from your
3 name to your address, is designated as
4 confidential by Coleman in this case.

5 THE COURT: We will see you all, or
6 whoever wants to come back, on June 7th at
7 1:30.

16div-005273

8 MR. BEMIS: June 7th, 1:30. Thank you,
9 Your Honor.
10 MR. SCAROLA: Thank you, Your Honor.
11 THE COURT: Thank you, sir. Bye-bye.
12 MR. MARMER: Thank you very much, Your
13 Honor.
14 MR. IANNO: Your Honor, I understood from
15 Deputy Spall that there probably won't be
16 anyone in your office next week?
17 THE COURT: No, just Tuesday and
18 Wednesday. Two days.
19 MR. IANNO: Okay. We will have it hand
20 delivered.
21 THE COURT: I really won't be able to
22 review it until Monday morning, but it takes a
23 couple of days for us to get it.
24 (Thereupon, at 12:00 p.m., the proceedings
25 were concluded.)

PINNACLE REPORTING, INC.
(561) 820-9066

32

1 C E R T I F I C A T E

2 - - -

3

4 STATE OF FLORIDA

5 COUNTY OF PALM BEACH

6

16div-005274

7 I, Norma Scherer, do hereby certify that I
8 was authorized to and did stenographically report
9 the foregoing proceedings and that the transcript is
10 a true and correct transcription of my stenotype
11 notes of the proceedings.

12

13 Dated this 29th day of May, 2004.

14

15

16

17

18

19

20

21

22

23

24

25

PINNACLE REPORTING, INC.
(561) 820-9066

16div-005275

1 IN THE FIFTEENTH JUDICIAL CIRCUIT COURT
2 IN AND FOR PALM BEACH COUNTY, FLORIDA

3
4
5 CASE NO. CA 03-5045 AI

6 COLEMAN (PARENT) HOLDINGS, INC.,

7 Plaintiff(s),

8 vs.

9 MORGAN STANLEY & CO., INC.,

10 Defendant(s).
_____ /

11 CASE NO. CA 03-5165 AI

12 MORGAN STANLEY SENIOR FUNDING, INC.,

13 Plaintiff(s),

14 vs.

15 MACANDREWS & FORBES HOLDINGS, INC.,

16 Defendant(s).
_____ /

17
18
19
20 TRANSCRIPT OF THE PROCEEDINGS
21 BEFORE THE HONORABLE ELIZABETH T. MAASS,
22 ON FRIDAY, MAY 28, 2004.
23
24
25

1 APPEARANCES:

2 FOR THE PLAINTIFF(S):

SEARCY DENNEY SCAROLA

3 BARNHART & SHIPLEY

2139 Palm Beach Lakes Blvd.

4 West Palm Beach, Florida 33409

BY: JACK SCAROLA, ESQUIRE

5 - AND -

JENNER & BLOCK

6

7 BY: RONALD MARMER, ESQUIRE

Appearing via telephone

8

FOR THE DEFENDANT(S):

9 CARLTON FIELDS

222 Lakeview Ave.

10 Suite 1400

West Palm Beach, Florida

11 BY: JOSEPH IANNO, JR., ESQUIRE

- AND -

12 KIRKLAND & ELLIS, LLP

777 South Figueroa Street

13 Los Angeles, California 90017

BY: LAWRENCE P. BEMIS, ESQUIRE

14

15

16

17

18

19

20

21

22

23

24

PINNACLE REPORTING, INC.
(561) 820-9066

3

1 TRANSCRIPT OF THE PROCEEDINGS, TAKEN BEFORE THE
2 HONORABLE ELIZABETH T. MAASS IN COURTROOM 11A, PALM
3 BEACH COUNTY COURTHOUSE, WEST PALM BEACH, FLORIDA,
4 ON FRIDAY, MAY, 28, 2004, BEGINNING AT 11:28 A.M.

5 - - -

6 THE COURT: Good morning. Have a seat.

7 MR. SCAROLA: Good morning, Your Honor.

8 THE COURT: We are back on Coleman and
9 Morgan Stanley, and this is Plaintiff's motion.

10 What did you want to say in support of it?

11 MR. SCAROLA: I would request, Your Honor,
12 if I may, that we tie in some folks from
13 Chicago who would like to be able to listen in
14 and perhaps participate.

15 THE COURT: Sure. Who are they?

16 MR. SCAROLA: I know that Mr. Shaw is
17 likely to be on the other end of the line.
18 These are the Jenner and Block attorneys, Your
19 Honor, and this is the toll free number and the
20 participant number for the conference.

21 THE COURT: Okay. They represent Coleman
22 as well?

23 MR. SCAROLA: They are co-counsel with me,
24 yes, Your Honor.

25 THE COURT: Do you want to just place a

PINNACLE REPORTING, INC.
(561) 820-9066

4

1 phone call?

2 MR. IANNO: Your Honor, while we're doing
3 that, I guess pursuant to the stipulated
4 confidentiality order in this case, we are
5 designating this transcript as confidential.
6 It's not necessary to close the proceedings
7 since there is no one else in the courtroom
8 other than counsel.

9 THE COURT: Is what you're suggesting --
10 this is actually something I probably need to
11 go back and look at the transcript from the
12 last hearing -- is that any transcript of this
13 hearing will be deemed confidential for
14 purposes of that order?

15 MR. IANNO: Correct.

16 THE COURT: Just the transcript?

17 MR. SCAROLA: I believe they have the
18 unilateral right to make that designation and I
19 recognize their unilateral right to make that
20 designation. I will offer the same stipulation
21 that I entered into at the commencement of the

22 last hearing; and that is, that nothing that is
23 said during the course of this hearing will be
24 deemed to constitute either a violation of the
25 confidentiality order or a waiver of the

PINNACLE REPORTING, INC.
(561) 820-9066

5

1 confidentiality order.

2 THE COURT: Okay. So is that -- would you
3 accept that stipulation?

4 MR. IANNO: Well, I understand that, Your
5 Honor, but --

6 MR. SCAROLA: Could we hold on just one
7 second?

8 THE BAILIFF: Ron Marmer I have on the
9 phone.

10 MR. SCAROLA: That's fine.

11 (Thereupon, Ronald Marmer appeared via telephone
12 and the following proceedings were had.)

13 THE COURT: Hi, this is Judge Maass. Who
14 do I have on the phone?

15 MR. MARMER: Good morning, Your Honor.
16 This is Ron Marmer from Jenner and Block in
17 Chicago.

18 THE COURT: Hi. I have you on the speaker
19 phone in the courtroom in Coleman Parent versus

20 Morgan Stanley. We're going to put you up. It
21 sometimes can be difficult to hear, so if you
22 have a problem let us know.

23 And you all might want to pull the podiums
24 forward maybe just so he can hear you a little
25 bit better.

PINNACLE REPORTING, INC.
(561) 820-9066

6

1

2 MR. SCAROLA: Thank you very much, Your
3 Honor.

4 THE COURT: Let's go back to where we
5 were, first dealing with, as I understand it,
6 Mr. Ianno has designated any transcript from
7 this proceeding as confidential pursuant to the
8 prior stipulated confidentiality order. And,
9 Mr. Scarola, you were offering the same
10 stipulation that counsel reached at the prior
11 hearing, which is that nothing said in this
12 hearing will be deemed to either waive or be in
13 violation of the prior confidentiality order?

14 MR. SCAROLA: That is correct, Your Honor.

15 THE COURT: And would your client accept
16 that stipulation?

17 MR. IANNO: We accept that stipulation,
18 Your Honor. But I want to go also one step

19 further with what the Court said on the
20 transcript to make sure we clarify that even
21 though the transcript is confidential, that the
22 parties -- and I think Mr. Scarola acknowledges
23 this at the end of the last hearing -- can't go
24 out and say what was said in the transcript.
25 Even though the written word is confidential,

PINNACLE REPORTING, INC.
(561) 820-9066

7

1 you can't orally go out and disclose what the
2 transcript says to third parties.

3 And Mr. Scarola, I don't know if he agrees
4 with that or not, but that's our position.

5 Just because a transcript is confidential, you
6 shouldn't be able to disclose to third parties
7 under the confidentiality order what you can't
8 say.

9 MR. SCAROLA: I am not willing, as I stand
10 here, to enter into a verbal modification of
11 the confidentiality order which was reached
12 after considerable negotiation among counsel
13 and carefully drafted to define its proper
14 scope.

15 I will tell you that subjectively, I don't
16 think that someone can evade the

17 confidentiality order by verbally communicating
18 something that is designated as confidential.

19 THE COURT: Does either side have a copy
20 of the stipulated confidentiality order?

21 MR. SCAROLA: Yes, Your Honor.

22 THE COURT: That would be helpful.

23 MR. SCAROLA: Do you have multiple copies?

24 I have one.

25 MR. IANNO: I have just one.

PINNACLE REPORTING, INC.
(561) 820-9066

8

1 THE COURT: We'll make a photocopy of
2 that.

3 MR. IANNO: We have another copy, Your
4 Honor, but I don't know if you have the
5 reference binder that we sent over in this
6 case.

7 THE COURT: I do. Is it in there?

8 MR. IANNO: It should be.

9 THE COURT: I should have guessed that it
10 would be in there.

11 MR. SCAROLA: I'm sure we've provided
12 copies to Your Honor on a couple of occasions.

13 THE COURT: I have seen multiple copies, I
14 just --

15 MR. IANNO: In the reference binder it

16 should be under one of those tabs. It's the
17 third one, tab three. It's in both cases. The
18 same one in both cases.

19 THE COURT: Okay, let me look.

20 Okay. Back to where we were. You were
21 saying you would not accept a stipulation that
22 said -- that any oral statement of what
23 transpired at this hearing will be deemed
24 confidential as well or could not be made?

25 MR. SCAROLA: What I am saying, Your

PINNACLE REPORTING, INC.
(561) 820-9066

9

1 Honor, is that the stipulated confidentiality
2 order says what it says. And to the extent
3 that it would apply to any of the matters that
4 are disclosed during the course of this
5 hearing, to the extent that disclosures during
6 this hearing would constitute what the
7 confidentiality order describes and defines as
8 litigation materials, once they unilaterally
9 designate the transcript as confidential, I
10 can't disclose that information, as I
11 understand the confidentiality order.

12 And my subjective belief as I stand here
13 right now is, not only could I not hand someone

14 the transcript while that designation remains
15 in place, I think that a reasonable reading of
16 the confidentiality order would preclude me
17 from accomplishing indirectly that which I am
18 prohibited from accomplishing directly. I not
19 only can't hand them the transcript unless and
20 until the confidentiality provisions or the
21 confidentiality designation is removed, I can't
22 tell them confidential information, either.

23 That's my subjective belief. If that's
24 what the confidentiality order says, that's
25 what we're going to do.

PINNACLE REPORTING, INC.
(561) 820-9066

10

1 THE COURT: I think that's probably fine
2 for today's purposes.

3 I will be honest with you, at some point
4 we all need to go back and give some, I think,
5 more thought to what we are designating as
6 confidential. For instance, it should not be
7 confidential whether or not I greeted you guys
8 when you came in the courtroom. You know, at
9 some point we're likely to get ourselves into
10 trouble if we keep sort of over-designating
11 information.

12 MR. IANNO: Agreed.

13 THE COURT: Okay. Are we prepared to go
14 forward today then?

15 MR. SCAROLA: We are, Your Honor, yes.

16 THE COURT: Okay. What did you want to
17 say in support of the motion?

18 MR. SCAROLA: Your Honor, we are here
19 before the Court seeking permission to make a
20 limited disclosure of information that has been
21 designated under the terms of the
22 confidentiality order as litigation materials
23 subject to the orders provision; specifically,
24 the transcript of the last hearing held before
25 Your Honor.

PINNACLE REPORTING, INC.
(561) 820-9066

11

1 In support of that motion, I would point
2 out first that the contention on the part of
3 Morgan Stanley that we somehow stipulated to
4 preserve everything said during the course of
5 the last hearing as confidential is simply not
6 supported by the transcript of the hearing.

7 I stipulated to the following, and Your
8 Honor has a copy of the transcript. It's pages
9 five and six of the transcript. And the heart
10 of the stipulation appears at page seven.

11 The Court at line 3 says: "I assume what
12 you're saying is that you want sort of
13 everything we say to be deemed confidential
14 under the terms of the stipulated
15 confidentiality order?"

16 Mr. Bemis responds: "Either that, and a
17 statement that no one is going to allege later
18 that statements made in response to arguments
19 made with respect to documents filed under seal
20 are going to violate the confidentiality
21 order."

22 My response: "Your Honor, we will agree
23 that participation in this hearing will not
24 constitute a waiver of any confidentiality
25 argument. I think that's what Mr. Bemis is

PINNACLE REPORTING, INC.
(561) 820-9066

12

1 asking for and we don't have a problem with
2 that."

3 The Court says: "Or a violation?"

4 And I agree: "Or a violation of the
5 confidentiality order."

6 THE COURT: That's what I highlighted,
7 which was my first question. Are you simply
8 trying to seek a declaration that nothing
9 prohibits your telling a third party what

10 transpired at this hearing? Because the only
11 thing that was stipulated to was that whatever
12 was said at the hearing wouldn't be a waiver of
13 the confidentiality provision or a violation of
14 the confidentiality order.

15 MR. SCAROLA: Yes, Your Honor. Where that
16 brings us is to this point: They have said we
17 can't show it to anyone because we stipulated
18 that it was going to be confidential and the
19 burden, therefore, rests on us that it's going
20 to be confidential.

21 THE COURT: And you're saying, no, we
22 didn't?

23 MR. SCAROLA: I'm saying, no, there is no
24 such stipulation. What we acknowledged was,
25 they have the right to unilaterally designate

PINNACLE REPORTING, INC.
(561) 820-9066

13

1 that hearing, the transcript of that hearing,
2 or they've claimed a right to unilaterally
3 designate the transcript of that hearing as
4 confidential.

5 Then, under the terms of the
6 confidentiality order we challenge that
7 stipulation, the burden shifts to them to

8 demonstrate that this in fact is confidential
9 information.

10 THE COURT: So let me ask you this: The
11 argument you are raising now was an argument
12 that occurred to me when I was reviewing the
13 transcript yesterday. Was this one that was
14 made to them before today?

15 MR. SCAROLA: Was what one made before
16 today?

17 THE COURT: You filed a motion. Did the
18 motion raise the issue that it's our position
19 that the transcript itself wasn't designated
20 confidential and we want to be able to disclose
21 it? Because I didn't think it did.

22 MR. SCAROLA: Please understand, I'm not
23 contending they haven't designated the
24 transcript as confidential; they have. They
25 told us that they wanted it to be confidential

PINNACLE REPORTING, INC.
(561) 820-9066

14

1 at the hearing.

2 THE COURT: Let me find your motion then,
3 because I need to see exactly what issue the
4 motion raised.

5 MR. IANNO: It's in the notebook at tab
6 one for this hearing. I'm sorry, Your Honor.

7 THE COURT: I'm sure it is, I just have to
8 find the notebook for this hearing.

9 MR. SCAROLA: I can provide the Court with
10 a copy right here, Your Honor.

11 THE COURT: I have it. That's okay, I do
12 have it. Thanks.

13 Where in the transcript do we think that
14 Morgan Stanley designated the entire transcript
15 as confidential? Do we think that happened at
16 that hearing?

17 MR. SCAROLA: I don't think there is any
18 dispute between us that that's --

19 THE COURT: Do we think that happened at
20 the hearing is my question.

21 MR. IANNO: We think Mr. Scarola and
22 Morgan Stanley agreed to it, Your Honor, and
23 it's on page 140 -- 140-something.

24 THE COURT: 140 what?

25 MR. IANNO: It's on page 140, line 11.

PINNACLE REPORTING, INC.
(561) 820-9066

15

1 It's Mr. Scarola speaking, Your Honor.

2 THE COURT: Let me read it, okay?

3 MR. IANNO: And, Your Honor, if you go to
4 page 142, line 3.

5 THE COURT: Okay. I would agree at page
6 44 is where Defendant designates it as
7 confidential.

8 MR. SCAROLA: 144, Your Honor.

9 THE COURT: 144.

10 And I'm talking to Mr. Bemis at line 17:

11 "Right. And you're saying that, as I
12 understand it, you're agreeing to or you are
13 designating the entire thing as confidential,
14 correct?"

15 Mr. Bemis: "Yes."

16 And then I turn to you, Mr. Scarola, and
17 basically said: "And you're going to want to
18 file a motion."

19 MR. SCAROLA: Yes, and that's why we're
20 here.

21 THE COURT: So you're saying the burden is
22 on them to show what's confidential about this?

23 MR. SCAROLA: Exactly. They are
24 obliged -- once we have challenged the
25 confidentiality designation, as we now have by

PINNACLE REPORTING, INC.
(561) 820-9066

16

1 way of this motion, the burden shifts to them
2 to demonstrate that it is properly retained as
3 confidential under the terms of the

16div-005291

4 confidentiality order.

5 And I want to call the Court's attention
6 to just a couple of quick things before we turn
7 it over to them to meet their burden.

8 First, this order pertains to litigation
9 materials. Litigation materials are defined in
10 paragraph number one of the stipulated order.
11 And it says, "Litigation materials are all non-
12 public and confidential information disclosed
13 by any party hereto during the course of the
14 captioned litigation." That, I suggest, is the
15 relevant portion of the litigation materials
16 designation.

17 There is an exception. Paragraph two
18 says, "This order shall not apply to any
19 information that, A, is already in a receiving
20 parties' possession."

21 Now the only thing that could arguably be
22 suggested is confidential is the contents of
23 the settlement agreement; in particular, the
24 reference in this transcript to the amount of
25 the settlement. We certainly knew about that.

PINNACLE REPORTING, INC.
(561) 820-9066

1 We were the ones who disclosed it to them. It

2 is information that was already in our
3 possession. So they have no right to designate
4 as confidential in this proceeding information
5 that we already had, point number one.

6 MR. IANNO: Your Honor, can I object to
7 this? None of this is raised in Mr. Scarola's
8 motion. None of this argument is raised at all
9 in the motion. The motion is very bare bones
10 and fails to meet the minimal requirements.

11 I feel that now we're being ambushed by
12 Mr. Scarola's argument that this is litigation
13 materials, all this argument. So I object to
14 that argument, him going outside of his motion.

15 MR. SCAROLA: I don't see how that
16 possibly could be suggested as --

17 THE COURT: I understand your point. But
18 what else did you want to say?

19 MR. SCAROLA: Paragraph 9I. That
20 paragraph provides that even materials that
21 have properly been designated as confidential
22 may be shown to the author of the materials,
23 although the author is not supposed to retain a
24 copy.

25 What we are asking is that we disclose

1 information to Arthur Anderson that Arthur
2 Anderson already has because it was the author
3 of the materials, it signed the settlement
4 agreement.

5 THE COURT: Is it accurate to say that
6 what you're seeking permission to do is just to
7 tell them what defense counsel said in the
8 hearing about the terms of the settlement?

9 MR. SCAROLA: We want to show them the
10 entire transcript so that they understand the
11 context in which that information was
12 disclosed. Remember, this was not a closed
13 hearing.

14 THE COURT: I understand that.

15 Do we, first of all, agree that at the end
16 of the last hearing Defendant designated the
17 entire transcript as confidential under the
18 terms of the order?

19 MR. IANNO: After Mr. Scarola did, we
20 agreed with him.

21 THE COURT: Well, Mr. Scarola said ten
22 days and you guys said, no, we're designating
23 the whole thing, basically.

24 MR. IANNO: He wanted it designated as
25 confidential for at least ten days. We said

1 we're designating the whole thing.

2 THE COURT: Right. And he said, fine,
3 I'll file a motion to get the stuff I want
4 released released.

5 MR. IANNO: Correct.

6 THE COURT: Is it still you're client's
7 position that the entire thing is properly
8 designated as confidential?

9 MR. IANNO: Well, Your Honor, I don't
10 think that's our position.

11 What the Court required Mr. Scarola to do
12 when we came here a week ago Wednesday is, tell
13 me those portions you want to disclose to
14 Arthur Anderson.

15 THE COURT: And he said the whole thing.

16 MR. IANNO: The whole thing.

17 And it's our position that under the
18 Court's previous orders relating to the Arthur
19 Anderson settlement agreement, the Court
20 specifically ordered the parties to hold that
21 settlement agreement as confidential, that
22 those parts of the settlement agreement and
23 those parts of the transcript where the
24 settlement agreement was discussed needs to
25 remain confidential.

1 But it's not -- I think the point here,
2 Your Honor, is what you were catching. Mr.
3 Scarola doesn't -- the provisions he read of
4 the stipulated confidentiality order don't
5 apply. He doesn't want to disclose the
6 settlement agreement to Arthur Anderson.
7 Clearly, they have that document. He wants to
8 disclose counsel's argument.

9 THE COURT: Well, why is that
10 confidential?

11 MR. IANNO: Because the Court said the
12 terms of the settlement agreement need to
13 remain confidential. Our argument here was
14 confidential, it shouldn't be disclosed. They
15 don't need to know. There has been no purpose
16 given --

17 THE COURT: I don't know that that's the
18 standard. I mean, you know, I need -- and I'm
19 sure you can explain it to me later -- a better
20 understanding of the dynamic of why they want
21 to disclose this to Arthur Anderson -- and
22 please, I don't mean this in a derogatory
23 fashion -- other than to be tattletales. So I
24 need to have a sense of what's truly going on

25 here.

PINNACLE REPORTING, INC.
(561) 820-9066

21

1 That said, I don't know that that's really
2 going to effect the legal ruling of is this
3 properly deemed confidential or not. We don't
4 go around designating things confidential
5 unless there really is some purpose. And by
6 that, I mean some legal purpose of designating
7 this confidential.

8 MR. IANNO: Your Honor, we don't know what
9 their purpose is because their motion doesn't
10 tell us. We can assume, and that's what we put
11 in our response, that there is no legitimate
12 purpose.

13 THE COURT: Why does that matter if it
14 shouldn't be -- I mean, please understand, I
15 feel strongly that we don't keep secrets when
16 you choose to litigate in a public forum. And
17 absent a trade secret, a privilege, or some
18 overriding public policy consideration that
19 would suggest things should not be public, they
20 should be public.

21 And I would agree sometimes that means
22 embarrassing things are disclosed, derogatory

23 things are disclosed, things that maybe civil
24 people would prefer not be disclosed get
25 disclosed. But it doesn't change the legal

PINNACLE REPORTING, INC.
(561) 820-9066

22

1 analysis. If it's not properly kept
2 confidential for an overriding public purpose,
3 it's simply not kept confidential.

4 So what I need -- I would agree with Mr.
5 Scarola that Defendant is the one who
6 designated the entire transcript as
7 confidential. So what I will need you to do is
8 to defend -- if you're telling me you need to
9 go back and review it and decide which parts
10 you really think are confidential, you need to
11 isolate those. And then I need you to be able
12 to defend why they are confidential. And we
13 can come back after lunch after you've had a
14 chance to do that exercise.

15 MR. IANNO: Well, Your Honor, I thought
16 Mr. Scarola was going to do that; he did not.
17 I wasn't prepared to do that today. We are
18 prepared to argue that Mr. Scarola has not met
19 any burden or stated any legitimate purpose for
20 disclosing that.

21 THE COURT: I'm just saying, I don't

22 think that -- that may be an interesting fact,
23 but I don't know that it's legally relevant.
24 So I am happy to come back at 1:30 and
25 hopefully you've marked up the transcript by

PINNACLE REPORTING, INC.
(561) 820-9066

23

1 then and we can at least isolate the parts that
2 you are claiming are legitimately confidential.

3 MR. IANNO: Mr. Bemis, I know, has a
4 flight to catch, Your Honor, because of the
5 holiday weekend.

6 THE COURT: I am going on vacation for a
7 week. I am happy to take you guys the first
8 day I come back from my vacation, which will be
9 June -- whatever it is.

10 MR. SCAROLA: Respectfully, Your Honor, I
11 know that they would love to have a further
12 delay --

13 THE COURT: I understand that they
14 originally sought to push this off further.
15 But in all honesty, without an understanding of
16 the dynamic of why it's so critical this
17 information be disclosed, it's hard for me --
18 in all honesty, Mr. Scarola, the argument you
19 are making now, while it occurred to me when I

20 read the transcript, I was not aware from the
21 motion that that's what we were going to be
22 arguing. In all honesty, I wasn't aware of
23 that because I would have told them designate
24 the parts you're really trying to keep
25 confidential if I thought that's the direction

PINNACLE REPORTING, INC.
(561) 820-9066

24

1 we were going.

2 MR. SCAROLA: Clearly, the motion places
3 them on --

4 THE COURT: I understand what you're
5 telling me. All I'm saying is, I didn't
6 understand that, either. I understood it was
7 an issue from reading the transcript. I didn't
8 understand that it was an issue you were
9 pushing.

10 So I am happy to do this at 1:30 today, I
11 am happy to do it the Monday I get back from
12 vacation, even though I am not otherwise in
13 court. You guys tell me what you prefer.

14 MR. SCAROLA: The very first opportunity
15 that Your Honor has. And we would strongly
16 urge that this matter get resolved today.

17 And I will explain to the Court, although
18 I agree with you that it is legally irrelevant,

19 I will explain to the Court in the context of
20 the stipulation that we have arrived at why we
21 want to do what we want to do. The first
22 reason is, because we have a right to do it.
23 The second reason is, because Arthur Anderson
24 asked us for the information. And they are
25 aware of it because they have gotten a copy of

PINNACLE REPORTING, INC.
(561) 820-9066

25

1 the letter. By letter, Arthur Anderson has
2 requested to have the transcript of this last
3 proceeding.

4 And I will explain to Your Honor, as Your
5 Honor is already aware, there are provisions in
6 the settlement agreement that impose financial
7 obligations on my client as a consequence of
8 litigation that has been brought against Arthur
9 Anderson. That places us in a position where
10 we have a unity of interest with Arthur
11 Anderson. We need to be able to cooperate with
12 them and they are obliged to cooperate with us
13 as well. We want to provide the information
14 with regard to what went on in open court
15 because we believe it has implications with
16 regard to our own responsibilities under the

17 terms of the relationship created between
18 Arthur Anderson and Coleman as a consequence of
19 that settlement agreement.

20 We're not simply tattletaling. And I
21 understand that that was not said in a
22 pejorative fashion, but there is a legitimate
23 legal reason why we want to share this
24 information, and we want to share it
25 expeditiously.

PINNACLE REPORTING, INC.
(561) 820-9066

26

1 As I explained to Your Honor at the last
2 hearing, the attorney's fees exceeded \$48,000
3 as of the time of that last hearing. I have no
4 idea where they are now.

5 THE COURT: When is Mr. Bemis' flight
6 back?

7 MR. BEMIS: I have a 2:30 flight. It's
8 the last flight out of here and I fly out of
9 West Palm.

10 MR. SCAROLA: Respectfully, Mr. Ianno is
11 the one who is doing the argument, he is here.
12 They can spend whatever time they need to to
13 try to come up with some confidential portion
14 of this transcript. I'm sure they are very
15 familiar with it.

16 The only claim that is made in any of the
17 eight pages that they have filed is that the
18 confidential portion is the amount of the
19 settlement, which obviously Arthur Anderson
20 already knows.

21 MR. IANNO: Why do they need to know
22 what's said at the hearing, Your Honor? I
23 still don't understand.

24 THE COURT: Well, setting that aside,
25 because as I understand it -- I don't know the

PINNACLE REPORTING, INC.
(561) 820-9066

27

1 dynamics of the case as well as you guys do.
2 I'm sure some day I will, but I don't right
3 now. But setting that aside, in all honesty,
4 what was said at that hearing that could not be
5 made known to Arthur Anderson that really could
6 be deemed confidential as to Arthur Anderson?

7 MR. IANNO: Well, it's a question of what
8 is the use of confidential material.

9 THE COURT: No. The question is, is it
10 confidential. That's the first hurdle. If
11 it's not confidential, frankly, we're not
12 addressing today whether it's used properly or
13 not.

14 MR. IANNO: I think it is confidential
15 because the Court ordered it to be confidential
16 when you ordered the settlement agreement to be
17 produced back in December.

18 THE COURT: Sure. But confidential
19 information is not -- I mean, it specifically
20 excludes information already in the receiving
21 parties' possession at the time it's produced.

22 MR. IANNO: That's not what Mr. Scarola
23 wants to disclose.

24 THE COURT: He wants to disclose the fact
25 that counsel disclosed it.

PINNACLE REPORTING, INC.
(561) 820-9066

28

1 MR. IANNO: That it was said in open
2 court.

3 THE COURT: That's not confidential. What
4 gets said in open court is not -- any member of
5 the public could have walked in and listened to
6 that. How can you possibly claim that it's
7 confidential to tell Arthur Anderson it was
8 said?

9 MR. IANNO: Because we agreed. That's the
10 problem, Your Honor. We believe we had a
11 stipulation that that was going to be
12 confidential.

13 THE COURT: In all honesty, the agreement
14 that was reached at the commencement of the
15 hearing was that anything that was said in the
16 hearing would not be deemed a waiver or a
17 violation.

18 MR. BEMIS: It would be confidential under
19 the terms of the hearing, Your Honor.

20 THE COURT: No, that's not the way, quite
21 honestly, I read the stipulation between
22 counsel. And I specifically asked you guys if
23 you wanted me to enter an order and you said it
24 wasn't necessary. It was only at the end of
25 the hearing that there was a designation of the

PINNACLE REPORTING, INC.
(561) 820-9066

29

1 entire transcript as confidential.

2 MR. IANNO: I understand, Your Honor. But
3 what Mr. Scarola said was, it wouldn't be a
4 violation of the court order, and now they
5 attempt to use that in some way to violate the
6 Court order. What they're trying to do is get
7 from the back door what they can't get from the
8 front door.

9 THE COURT: In all honesty, I don't see it
10 that way. I understand your consternation. I

11 understand your concern about the reason that
12 they are pursuing this. But I have a real hard
13 time understanding how the fact that counsel
14 said the amount of the settlement is
15 confidential.

16 MR. IANNO: Or that Mr. Scarola disclosed
17 the terms of the indemnity.

18 THE COURT: When the terms of the
19 agreement itself are not confidential as
20 against Arthur Anderson, I have a hard time
21 thinking the fact that somebody disclosed them
22 as confidential. I just don't see it.

23 And again, I'm happy to come back at 1:30
24 if you think there is additional argument you
25 can present.

PINNACLE REPORTING, INC.
(561) 820-9066

30

1 MR. BEMIS: What I would like to do is
2 take you up on your offer to revisit this on
3 the 7th because I need to confer with my client
4 as well. And if we're going to do a
5 designation, I just cannot do it between now
6 and the time we have and do it intelligently.

7 This argument that's being made today was
8 not raised. I read their papers, I wrote the
9 brief that was filed with Mr. Ianno, and this

10 is a totally different argument than what was
11 presented in their papers.

12 THE COURT: We will come back that Monday.

13 I understand your consternation, but we are
14 happy to do it. Happy happy. That's fine.

15 MR. SCAROLA: Three of us are happy, one
16 of us is very disappointed.

17 THE COURT: I understand.

18 And by Wednesday I need from Defendant the
19 portions highlighted that you still are
20 contending are confidential. Obviously, vast
21 portions of that transcript are not properly
22 deemed confidential.

23 MR. BEMIS: Your Honor, I appreciate that
24 position. I will tell you, however, that is
25 not the position that the parties have been

PINNACLE REPORTING, INC.
(561) 820-9066

31

1 taking in the litigation. For example, every
2 deposition transcript in this case, from your
3 name to your address, is designated as
4 confidential by Coleman in this case.

5 THE COURT: We will see you all, or
6 whoever wants to come back, on June 7th at
7 1:30.

8 MR. BEMIS: June 7th, 1:30. Thank you,
9 Your Honor.
10 MR. SCAROLA: Thank you, Your Honor.
11 THE COURT: Thank you, sir. Bye-bye.
12 MR. MARMER: Thank you very much, Your
13 Honor.
14 MR. IANNO: Your Honor, I understood from
15 Deputy Spall that there probably won't be
16 anyone in your office next week?
17 THE COURT: No, just Tuesday and
18 Wednesday. Two days.
19 MR. IANNO: Okay. We will have it hand
20 delivered.
21 THE COURT: I really won't be able to
22 review it until Monday morning, but it takes a
23 couple of days for us to get it.
24 (Thereupon, at 12:00 p.m., the proceedings
25 were concluded.)

PINNACLE REPORTING, INC.
(561) 820-9066

32

1 CERTIFICATE

2 - - -

3

4 STATE OF FLORIDA

5 COUNTY OF PALM BEACH

6

7 I, Norma Scherer, do hereby certify that I
8 was authorized to and did stenographically report
9 the foregoing proceedings and that the transcript is
10 a true and correct transcription of my stenotype
11 notes of the proceedings.

12

13 Dated this 29th day of May, 2004.

14

15

16

17

18

19

20

21

22

23

24

25

PINNACLE REPORTING, INC.
(561) 820-9066

#2305 30/mp

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

CASE NO.: CA 03-5045 AI

Plaintiffs,

vs.

MORGAN STANLEY & CO., INC.,

Defendant,

_____ /

MORGAN STANLEY SENIOR FUNDING,
INC.,

CASE NO. CA 03-5165 AI

Plaintiff,

vs.

MACANDREWS & FORBES HOLDINGS,
INC.,

Defendant,

_____ /

NOTICE OF HEARING

YOU ARE HEREBY NOTIFIED that the undersigned has called up for hearing the following:

DATE: June 11, 2004

TIME: 1:30 p.m.

JUDGE: Hon. Elizabeth T. Maass

PLACE: Palm Beach County Courthouse, Room #11.1208, 205 North Dixie Highway,
West Palm Beach, FL 33401

SPECIFIC MATTERS TO BE HEARD:

**Morgan Stanley and MSSF's Motion for Protective Order filed April 16, 2004
(FILED UNDER SEAL)**

Coleman (Parent) Holdings, Inc. vs Morgan Stanley & Company
Case No.: 2003 CA 005045 AI
Notice of Hearing

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by
Fax and Federal Express to all Counsel on the attached list, this 4th day of JUNE,
2004.



JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 684-5816
Attorney for Coleman (Parent) Holdings Inc.
and MacAndrews & Forbes Holdings, Inc.

Coleman (Parent) Holdings, Inc. vs Morgan Stanley & Company
Case No.: 2003 CA 005045 A1
Notice of Hearing

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block LLP
One IEM Plaza
Suite 400
Chicago, IL 60611

1 IN THE FIFTEENTH JUDICIAL CIRCUIT COURT
IN AND FOR PALM BEACH COUNTY, FLORIDA
2 CIVIL DIVISION

3 COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff,
4 CASE NO. CA 03-5045 AI

vs.
5 MORGAN STANLEY & CO., INC.,
Defendant.

6 _____/
MORGAN STANLEY SENIOR FUNDING, INC.,
7 Plaintiff,

vs. CASE NO. CA 03-5165
8 MACANDREWS & FORBES HOLDINGS, INC.,
Defendant.

9 _____/

10 PROCEEDINGS BEFORE THE HONORABLE ELIZABETH T. MAASS

11 APPEARANCES:

On behalf of the Plaintiff:

12 SEARCY, DENNEY, SCAROLA, BARNHART &
SHIPLEY P.A.

13 2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33409

14 BY: JACK SCAROLA, ESQUIRE
-AND-

15 JENNER & BLOCK
BY: RONALD MARMER, ESQUIRE
16 (Appearing telephonically)

17 On behalf of the Defendant:

CARLTON FIELDS
18 222 Lakeview Avenue, Suite 1400
West Palm Beach, Florida 33401

19 BY: JOSEPH IANNO, JR., ESQUIRE
- AND -

20 KIRKLAND & ELLIS, LLP
777 South Figueroa Street
21 Los Angeles, California 90017
BY: LAWRENCE P. BEMIS, ESQUIRE
22 (Appearing telephonically)

- - -

23 Monday, June 7, 2004
24 PALM BEACH COUNTY COURTHOUSE
WEST PALM BEACH, FLORIDA

PINNACLE REPORTING, INC.
(561) 820-9066

2

1 PROCEEDINGS

2 - - -

3 THE COURT: Good afternoon. We're back on
4 Coleman and Morgan Stanley, which is the motion
5 to remove the confidential designation from the
6 transcript?

7 MR. SCAROLA: Yes, Your Honor. We're
8 waiting for some telephone participants.

9 (Discussion held off the record.)

10 MR. IANNO: Mr. Bemis is going to be on
11 the phone because he's traveling to New York
12 for a deposition in this case. He apologizes
13 he couldn't be here in person again.

14 (Discussion held off the record.)

15 THE COURT: Is he the only one doing it by
16 phone?

17 MR. IANNO: And Mr. Marmer.

18 MR. SCAROLA: Someone from Jenner &
19 Block.

20 THE COURT: Hi, this is Judge Maass. Who
21 do I have on the phone?

22 MR. BEMIS: Good afternoon. This is
23 Lawrence Bemis, Kirkland & Ellis.

24 THE COURT: Hello, Mr. Bemis.

25 MR. MARMER: This is Ron Marmer.

PINNACLE REPORTING, INC.
(561) 820-9066

3

1 THE COURT: Good afternoon. I have you
2 each on the speakerphone in the Courtroom in
3 Coleman and Morgan Stanley. This is Coleman's
4 motion to allow Arthur Anderson access to

16div-005315

5 confidential information.

6 What did you want to say in support of it,

7 Mr. Scarola?

8 MR. SCAROLA: Your Honor. You will recall
9 that we actually began a hearing on this motion
10 previously before Your Honor, and it appears
11 that Morgan Stanley recognizes that it could
12 not meet the burdens imposed upon it as a
13 consequence of Your Honor's prior specific
14 findings, has chosen to ignore those prior
15 specific findings, and attempt to reargue again
16 that it is as a consequence of a stipulation on
17 the part of the Coleman's part that we are
18 where we are.

19 THE COURT: Let's assume I'm not inclined
20 to rehear argument on that.

21 MR. SCAROLA: I'm happy to make that
22 assumption, in which case the burden obviously
23 shifts back to Morgan Stanley. Your Honor gave
24 Morgan Stanley an opportunity to meet that
25 burden. They have submitted a written memo

PINNACLE REPORTING, INC.
(561) 820-9066

1 that completely fails to address why any of
2 these materials should remain confidential.
3 They do designate certain portions but present
4 no argument whatsoever to support a position
5 that, particularly as to Arthur Anderson, these
6 matters ought not to be communicated. So, I
7 think it shifts to them at this point.

8 THE COURT: Tell me why anything said in
9 that transcript is confidential?

10 MR. IANNO: Your Honor, remember the
11 transcript itself is based on the settlement
12 agreement which the parties -- the court
13 actually ordered it be designated as
14 confidential. So that our position is Coleman
15 cannot use their confidentiality designation as
16 both a sword and a shield.

17 And if you'll allow me to digress just a
18 moment and address Mr. Scarola's comments,
19 because at the outset I want to say, the reason
20 we incorporated our previous arguments in our
21 responses, we didn't want to be constituted a

22 waiver. We understand the court's ruling, we
23 don't intend to reargue those positions. We
24 want to be understood and recognize we're not
25 waiving those either. We've included them in

PINNACLE REPORTING, INC.
(561) 820-9066

5

1 our supplemental response.
2 The point of the matter is, Coleman and
3 Arthur Anderson now allege to have an immunity
4 of interest, are saying, we can use your
5 violation of the confidentiality order as a
6 sword and did exactly that. In the other case
7 that's pending in front of Judge Miller, they
8 have now moved to dismiss based on the same
9 grounds they have filed their rule to show
10 cause, really the contempt motion in this case
11 seeking to disqualify counsel. So, we're going

16div-005318

12 to use this confidential settlement agreement
13 as a sword, say it's a release of the
14 preexisting claims Morgan Stanley has and at
15 the same time we're going to prevent you from
16 defending yourselves in this case.

17 So, it's either -- the settlement
18 agreement is either confidential or it's not.
19 Frankly, there's nothing confidential in that
20 settlement agreement whatsoever.

21 THE COURT: Please understand at this
22 juncture we're not going back and challenging
23 whether the settlement agreement should be
24 deemed confidential or not.

25 What I'm asking you to do is defend your

PINNACLE REPORTING, INC.
(561) 820-9066

2 that transcript is confidential.

3 MR. IANNO: I have to stand on the
4 argument we made before that we believe we're
5 entitled to rely on the stipulation. I don't
6 intent to reargue it. The only thing new that
7 we can add to that is that Coleman is using
8 that transcript in the settlement agreement as
9 both a sword and shield under the
10 confidentiality order. We don't believe that
11 they can selectively disclose portions of it
12 and use that against Morgan Stanley, while at
13 the same time saying Morgan Stanley, you can't
14 use it. You can't have your cake and eat it
15 too on the Coleman side. Either everything is
16 open to the public scrutiny or it's not. And
17 that's our position on this.

18 I don't know if Mr. Bemis has anything to
19 add to that. I believe with all the arguments
20 made at the previous hearing and today and in
21 our supplemental response, either they have to
22 say it's confidential and no one gets to see
23 it, or it's not confidential and it's open to
24 the public in general.

25 Your Honor, what's happening here, we have

PINNACLE REPORTING, INC.
(561) 820-9066

16div-005320

1 a confidential document that we're discussing
2 in open court. So, they're saying, you can't
3 discuss the document but anything you say in
4 court can be disclosed to Arthur Anderson. We
5 have to either -- either it's confidential or
6 it's not. Right now we feel like we're
7 handcuffed with the designations Coleman is
8 making in this case on the confidentiality.

9 THE COURT: Mr. Bemis, did you have
10 anything you wanted to add?

11 MR. BEMIS: Nothing that would not be
12 repetitive.

13 THE COURT: Okay. I appreciate that.

14 Mr. Scarola, did you want to respond?

15 MR. SCAROLA: Your Honor, clearly Morgan
16 Stanley is attempting to confuse two separate
17 issues.

18 The one issue before the court has to do

19 with our request for a limited exception to
20 confidentiality with regard to the hearing. We
21 are not before the court today to address
22 issues concerning the contractual
23 confidentiality that exists in the settlement
24 agreement. If Morgan Stanley chooses to
25 challenge that in some way at sometime in the

PINNACLE REPORTING, INC.
(561) 820-9066

8

1 future, that simply is a separate issue.
2 That's not the matter before the court right
3 now. We are here only to determine whether the
4 hearing transcript must remain confidential
5 with regard to Arthur Anderson.

6 The burden is upon Morgan Stanley to
7 establish the need for that confidentiality,
8 some legal privilege that exists that would

16div-005322

9 preclude the disclosure of the contents of that
10 hearing and they have utterly and completely
11 failed to meet that burden.

12 THE COURT: Let me ask you this. Can a
13 designation of confidentiality be removed for a
14 publication one entity only?

15 MR. SCAROLA: That's all we're requesting.

16 THE COURT: So, you're saying it's a
17 stipulated order and is sort of an acceptable
18 interpretation, something of quasi
19 confidential?

20 MR. SCAROLA: What we're saying is, that
21 they have designated the entire transcript as
22 confidential. We haven't chosen to challenge
23 their entire designation. We have asked for a
24 limited exception. The limited exception that
25 we have chosen to request is disclosure to

PINNACLE REPORTING, INC.
(561) 820-9066

1 Arthur Anderson who already has --

2 THE COURT: But I guess what I'm trying to
3 figure out is, is it implicit in that some of
4 the information you now want to disclose may be
5 confidential as to a third party but is not
6 confidential as to Arthur Anderson under the
7 order or some of this is just not confidential
8 at all and we're simply not choosing to be
9 discriminating enough to figure out which two
10 categories any particular portion of the
11 transcript falls into?

12 MR. SCAROLA: I think that both of those
13 responses pertain. I think that clearly with
14 regard to Arthur Anderson there is no basis
15 whatsoever to keep what was said in open court
16 confidential. I don't know that at this point
17 we need to address the issue beyond that and
18 we're not asking the court to address the issue
19 beyond that. There may be circumstances where
20 disclosure to one third party is appropriate
21 and disclose to some other third party may not
22 be. And, certainly, I would think that it is
23 within the contemplation of the stipulated
24 confidentiality order that there is an ability
25 to modify that order by way of application to

1 the Court. The burden of establishing any
2 confidentiality protection rests upon the party
3 making the unilateral designation. The party
4 making the unilateral designation here was
5 Morgan Stanley. They have failed to meet that
6 burden. They have the ability, because we're
7 talking only about the transcript itself, they
8 have the ability to remove the confidentiality
9 designation in its entirety if they choose to
10 do that. They could simply withdraw it. We
11 might seek then to impose a confidentiality
12 obligation ourselves. But right now that's not
13 within our control. We're dealing with their
14 unilateral designation of everything and we
15 have asked the court for a limited exception to

16 that designation.

17 And, that's really the limited issue that

18 Your Honor is dealing with at this point.

19 THE COURT: What's the response?

20 MR. IANNO: Either it's confidential or

21 it's not. If it's not confidential, as Mr.

22 Scarola argues, then it was discussed in open

23 court, it's open to the public in general.

24 Mr. Scarola always has the opportunity

25 right now if he wants to designate the

PINNACLE REPORTING, INC.
(561) 820-9066

11

1 transcript as confidential, he doesn't need us

2 to withdraw our confidential designation for

3 the plaintiff to designate it as confidential.

4 As Your Honor said, there's no limited

5 exception to the confidentiality order, we're

16div-005326

6 not agreeing to that. Either the transcript
7 remains confidential for the reasons we stated
8 or it isn't confidential.

9 THE COURT: I'll be honest with you, the
10 way I read that order, I don't want to -- we
11 parsed a lot already. I think, arguably, the
12 only part of that transcript that is
13 confidential, any part that discloses the terms
14 of the settlement agreement. And I don't think
15 we remove the designation for publication to a
16 single third party only. Either it's removed
17 or remains in place. If you guys have the time
18 and want to go through the transcript and tell
19 me where those specific discussions are,
20 certain settlement terms. My recollection is
21 there was maybe only one or two places.

22 MR. SCAROLA: Well, I don't know that
23 there would be a need to do that.

24 THE COURT: That's the part that would
25 remain confidential. The portion of the

PINNACLE REPORTING, INC.
(561) 820-9066

1 transcript, for instance, if there was
2 reference to the total amounts of settlement, I
3 think there was at least once or twice, I think
4 that remains confidential.

5 Now, please understand that under the
6 terms of the confidentiality order, I don't
7 think anything we -- obviously Arthur Anderson
8 already knows that.

9 MR. SCAROLA: Clearly.

10 THE COURT: Right.

11 MR. SCAROLA: But I'm trying to understand
12 what the court's inclination is at this point.

13 THE COURT: If we're going to remove the
14 confidentiality designation from any portion,
15 it gets removed for the world. It doesn't get
16 removed solely for Arthur Anderson.

17 MR. SCAROLA: That part I understand.

18 THE COURT: But with that said, my
19 recollection is there are some specific
20 references to specific terms of the settlement
21 agreement that would still remain confidential.

22 MR. SCAROLA: On what basis?

23 THE COURT: Frankly on the basis that you
24 guys -- we still have the confidentiality
25 provision of the settlement agreement itself.

PINNACLE REPORTING, INC.
(561) 820-9066

13

1 MR. BEMIS: Your Honor, this is Mr.
2 Bemis. There are four locations. I couldn't
3 do a page and line without a break. There are
4 four locations in the transcript where Mr.
5 Scarola began with two references. I make a
6 reference and there's a reference at the end of
7 the transcript.

8 THE COURT: I need to read the specific
9 verbiage to see what I think what portions of
10 that remains confidential.

11 MR. SCAROLA: Let me --

12 MR. BEMIS: Each of those passages is

16div-005329

13 cited in our initial memorandum. I have to go
14 back and double check.

15 THE COURT: I would need to go back, too.
16 Hold on. Mr. Scarola is asking for a
17 clarification.

18 MR. SCAROLA: Yes. There has been a
19 designation of the entire transcript as
20 confidential.

21 THE COURT: Correct.

22 MR. SCAROLA: We have challenged that
23 designation.

24 THE COURT: Correct.

25 MR. SCAROLA: The burden shifts to Morgan

PINNACLE REPORTING, INC.
(561) 820-9066

1 Stanley to demonstrate why any portion of that
2 transcript should remain confidential. Our

3 position is that they have failed to meet that
4 burden.

5 THE COURT: And, again, I need to go
6 back. My recollection when we, -- distinct
7 recollection is when we had the hearing on
8 whether the settlement agreement should be
9 disclosed, that there was a stipulation it
10 would be deemed confidential. Indeed, I know
11 my order included that. But my recollection is
12 that was stipulated to and indeed, I think you
13 know, there has been argument back and forth
14 whether the stipulation was more broad than
15 what I included in the order. But clearly at a
16 minimum, it's my recollection there was a
17 stipulation that the settlement agreement
18 itself is confidential. If that's the state of
19 the record, I don't think you can say, yes, the
20 settlement agreement is confidential.

21 But, if someone makes reference to one of
22 the terms in court having first gotten sort of
23 the stipulation that nothing we say here will
24 be deemed a violation or a waiver of the
25 confidentiality order, that now you can publish

PINNACLE REPORTING, INC.
(561) 820-9066

16div-005331

1 what was said to the world.

2 MR. SCAROLA: We're not requesting that we
3 publish this to the world.

4 THE COURT: Right. Please understand I'm
5 not parsing it to say what we're publishing to
6 Arthur Anderson. Now, if I go back, I think
7 the stipulated confidentiality order says, it's
8 not a violation or simply not confidential with
9 any third party with knowledge of what's said.

10 MR. SCAROLA: Part of the problem is that
11 the confidentiality order itself defines what
12 litigation materials are.

13 THE COURT: Right.

14 MR. SCAROLA: And litigation materials do
15 not include any information that is already in
16 a receiving party's possession.

17 THE COURT: Right.

18 MR. SCAROLA: So, they cannot keep us from
19 sharing information that is already in our

20 possession.

21 THE COURT: Right.

22 MR. SCAROLA: And the confidentiality

23 order is already in our possession.

24 THE COURT: Yeah.

25 MR. SCAROLA: We have that confidentiality

PINNACLE REPORTING, INC.
(561) 820-9066

16

1 order. We are entitled under the court's
2 order, not addressing what restrictions may be
3 imposed upon us by the confidentiality -- by
4 the settlement agreement itself, because the
5 settlement agreement has its own
6 confidentiality provisions --

7 THE COURT: Right.

8 MR. SCAROLA: -- which we must deal with
9 independent of the court's order. Looking only

16div-005333

10 at the court's order, the court's order tells
11 us that it is litigation materials that cannot
12 be disseminated and litigation materials do not
13 include anything already in a receiving party's
14 possession.

15 THE COURT: Correct.

16 MR. SCAROLA: So, as it stands right now,
17 the only thing that keeps us from sharing with
18 Arthur Anderson the contents of the settlement
19 agreement to which Arthur Anderson itself is a
20 party, is the designation of the transcript --

21 THE COURT: No.

22 MR. SCAROLA: -- as confidential.

23 THE COURT: That's not accurate.

24 MR. SCAROLA: I don't know where I lost
25 you.

PINNACLE REPORTING, INC.
(561) 820-9066

1 THE COURT: Because, what prevents --
2 first of all, I have to go back and look -- all
3 we're talking about today is whether the
4 transcript itself should be confidential.

5 Please understand there is a big
6 distinction between a settlement agreement that
7 says litigation is settled for X amount of
8 dollars and then a transcript where an attorney
9 says, and I am representing to the Court this
10 litigation was settled for X amount of
11 dollars. Those are two separate things.

12 What we're talking about is the latter,
13 not the former. We're not talking about the
14 use of the settlement agreement at all.

15 MR. SCAROLA: We're talking about the
16 transcript, correct.

17 THE COURT: We're talking about the use of
18 the transcript. All I'm saying, to the extent
19 there is a stipulation between the parties that
20 the settlement agreement is confidential,
21 references in the transcript to specific terms
22 of the settlement agreement likewise is
23 confidential.

24 MR. SCAROLA: Pursuant to stipulation.

25 THE COURT: Yeah. That's a logical --

1 MR. SCAROLA: So, the burden then shifts
2 to us if we want out of the stipulation; is
3 that what you're saying?

4 THE COURT: I would assume but that's not
5 something in front of me, I don't think,
6 today. And in all honesty, Mr. Scarola, when
7 we get the transcript, and go through the parts
8 we're referring to, I think we're talking about
9 a handful of words.

10 MR. IANNO: I think with the certain
11 amount of lines on either side to put it in
12 context.

13 MR. SCAROLA: That's what I understand
14 their burden was today, to come before the
15 court and to demonstrate a legal basis for
16 specific sections to remain confidential.

17 THE COURT: And what I'm saying is the
18 only basis I see for any portion of that
19 transcript to be deemed confidential is based
20 on the stipulation that counsel previously
21 reached the settlement agreement itself is
22 confidential.

23 MR. SCAROLA: What page and lines are we
24 not permitted to share with Arthur Anderson?

25 THE COURT: That's what I want to go

PINNACLE REPORTING, INC.
(561) 820-9066

19

1 through right now. I think we're talking about
2 a handful of places. We need a few minutes to
3 go through and figure that out.

4 MR. BEMIS: Your Honor, if we could take a
5 short break, I could talk to Mr. Ianno, I think
6 I can give him the pages and lines.

16div-005337

7 THE COURT: Do you want to do that? You
8 guys can stay and talk, I'll come back.

9 MR. BEMIS: I know I can do it relatively
10 quickly. I don't want to hold the court up
11 while I'm perusing through my papers.

12 MR. IANNO: Ron, I'll call you separately
13 on my cell phone.

14 THE COURT: You can stay here and I'll go.

15 MR. IANNO: For Friday's hearing here's
16 our notebook. And I believe --

17 THE COURT: I'm glad to see it's much
18 shorter.

19 MR. IANNO: And I know, Your Honor, there
20 is a request by Mr. Bemis if we could start the
21 hearing in the morning. We're presently
22 scheduled for 1:30. Maybe while we're taking
23 this break if there is a possibility --

24 THE COURT: As far as I know, nothing
25 cancelled. Let me check, I just don't know.

PINNACLE REPORTING, INC.
(561) 820-9066

1 (Recess taken.)

2 THE COURT: I'm back now.

3 MR. MARMER: I'm sorry.

4 THE COURT: That's okay, I just walked
5 in. While I'm thinking of it, I checked
6 Friday's schedule. So far I don't have any
7 openings in the morning. If something opens,
8 if you guys are both amenable, we'll call your
9 offices.

10 What, if anything, can be located?

11 MR. SCAROLA: Do you have the transcript
12 in front of you?

13 THE COURT: I do.

14 MR. SCAROLA: We begin at page 16 lines 6
15 through 13. They have been designated as
16 confidential by Morgan Stanley. We are not at
17 this time challenging that confidentiality
18 designation. So, we are in agreement.

19 THE COURT: That's 6 through 13.

20 MR. SCAROLA: Six through 13 at page 16.

21 MR. IANNO: The only thing that concerns
22 me with that is Mr. Scarola's qualification at
23 this time.

24 THE COURT: Meaning that it wasn't part of
25 your agreement?

PINNACLE REPORTING, INC.
(561) 820-9066

21

1 MR. SCAROLA: That's the first time I've
2 heard that. It's either confidential, stays
3 confidential, unless Mr. Bemis feels
4 differently. We don't want to be back here
5 next week to remove the confidentiality
6 designation. It's either a stipulation today
7 that it's confidential or the court needs to
8 rule that it's confidential, I believe.

9 MR. SCAROLA: We're not stipulating that
10 it's confidential. They have challenged, they
11 have designated these lines as confidential.
12 We are not challenging that confidentiality
13 designation. To the extent your motion seeks

16div-005340

14 to have this undesignated confidential, you're
15 abandoning that portion of your motion?

16 MR. SCAROLA: That's correct.

17 THE COURT: Okay.

18 MR. SCAROLA: That's correct. But more
19 accurately stated, that's right. They have
20 designated as confidential but we are not
21 challenging that.

22 THE COURT: Okay. So, we're not
23 stipulating it's confidential, it's just a
24 motion to abandon?

25 MR. SCAROLA: That's correct.

PINNACLE REPORTING, INC.
(561) 820-9066

22

1 THE COURT: What's next?

2 MR. SCAROLA: Page 33 lines 21 through 34
3 line 3.

16div-005341

4 THE COURT: Who is the speaker?

5 MR. IANNO: I believe this is Mr. Scarola
6 still, Your Honor.

7 THE COURT: Okay.

8 MR. SCAROLA: We are not challenging --

9 THE COURT: Again, the motion is
10 abandoned?

11 MR. SCAROLA: We are abandoning our motion
12 to challenge that confidentiality designation.

13 THE COURT: Okay.

14 MR. IANNO: And Your Honor --

15 MR. SCAROLA: Going to page 46 line 5.

16 THE COURT: Okay.

17 MR. SCAROLA: We are challenging the
18 confidentiality designation from lines 5
19 through line 16 ending with the word of --
20 resulted in a settlement of.

21 We are withdrawing any challenge to the
22 balance of line 16, line 17 and line 18.

23 THE COURT: Okay.

24 MR. SCAROLA: So, the court is faced with
25 ruling on the appropriateness of the

PINNACLE REPORTING, INC.
(561) 820-9066

16div-005342

1 designation of 46 line 5 through 16 resulted in
2 a settlement of.

3 THE COURT: Right. And, I'm sorry.

4 MR. IANNO: Your Honor, I just want to say
5 equivalent to what Mr. Scarola said, in context
6 we had designated page 46 line 5 through page
7 47 line 19 as the confidential portion.

8 Mr. Scarola is abandoning the motion as it
9 pertains to where the settlement amount is
10 discussed on line 16 page 46.

11 THE COURT: Really he's abandoning
12 through --

13 MR. IANNO: Forty six line 18. Where you
14 see the numbers.

15 MR. SCAROLA: I will also be challenging
16 the designation from 46:19 through 47:9.

17 THE COURT: Oh, you are?

18 MR. SCAROLA: Yes. So, the only portion
19 we are abandoning is from 16 after "of" through
20 18, the end of the sentence.

21 THE COURT: Okay. And this is Mr. Bemis
22 speaking?

23 MR. SCAROLA: That's correct.

24 THE COURT: Okay. Okay. Why would that
25 be confidential, 46:5 through 46:16?

PINNACLE REPORTING, INC.
(561) 820-9066

24

1 MR. IANNO: Your Honor, I think that if
2 you look at it, what they're talking about here
3 is the consummation of the settlement
4 agreement. Although it doesn't discuss the
5 specific amount of the settlement agreement, I
6 think that the fact that the settlement
7 agreement amounts being paid is probably
8 confidential to Anderson. And I just don't
9 think you can divorce that from the settlement
10 amount or the terms. I think you need to keep

16div-005344

11 everything in context so you're not
12 inadvertently disclosing something. The fact
13 they paid a certain amount may be just as
14 confidential as the amount.

15 THE COURT: What's the response?

16 MR. SCAROLA: First of all, the entire
17 first paragraph discusses earlier court
18 proceedings that are not confidential, as far
19 as I know. It's just discussion about what
20 happened in an earlier court proceeding.

21 The fact that there has been a settlement
22 of those claims is a matter of public record.
23 Those cases were filed, they were resolved and
24 dismissed.

25 THE COURT: Okay.

PINNACLE REPORTING, INC.
(561) 820-9066

1 MR. SCAROLA: And the only thing that I
2 suggest could arguably be confidential would be
3 the amount of the settlement.

4 THE COURT: Okay. The part that I believe
5 is still confidential begins at line 15 after
6 the first word. So, after agreement, the rest
7 of 15 and then all of 16, 17 and 18.

8 MR. IANNO: Okay.

9 MR. SCAROLA: We are then also challenging
10 lines 19 through line 9 on page 47.

11 THE COURT: Right. I'm reading that.
12 Somehow this is confidential.

13 MR. IANNO: I can see some portion of that
14 as being non-confidential where they talk about
15 the mere image of the claims made in the
16 complaint.

17 What I don't know, as we sit here today,
18 whether or not those exact numbers that are
19 mentioned in there are part of the settlement
20 agreements, whether they're mentioned in the
21 complaint in that.

22 So, as we sit here today, I think that
23 what we're saying here, our position on this
24 is, in order to keep the confidentiality
25 intact, you need to include all of that

1 language. I don't see any reason that it needs
2 to be disclosed. If it is a public record, it
3 is a public record, as far as the claims. I
4 agree with that. I don't know if the terms in
5 the amounts claim were somehow mentioned in the
6 settlement agreement, it's some type of recital
7 clause, things of that nature. I think that to
8 the extent anything in here is public record,
9 really, we don't need to disclose that. At
10 this point, I can't tell you what exactly the
11 complaint says as far as claim damages.

12 THE COURT: Does Mr. Bemis know?

13 MR. BEMIS: Your Honor, I can address that
14 issue, if you wish?

15 THE COURT: Sure.

16 MR. BEMIS: Your Honor, those figures are
17 not in the settlement agreement.

18 THE COURT: I appreciate your candor.

19 I don't think any of that is

20 confidential. Where to next?

21 MR. SCAROLA: Page 143, Your Honor.

22 THE COURT: I want to make my notes.

23 46:19. I'm sorry, what page next?

24 MR. SCAROLA: Page 143, lines 8 through 15

25 have been designated. We challenge the

PINNACLE REPORTING, INC.
(561) 820-9066

27

1 designation of lines 8 through 12 ending with

2 the words a million times.

3 MR. BEMIS: Your Honor, we'll agree to

4 that.

5 THE COURT: Okay. So, that's not

6 confidential either. Anything else, then?

7 MR. SCAROLA: We are withdrawing our

16div-005348

8 challenge to the designation as confidential of
9 the sentence that begins, "the settlement", at
10 line 12, through the word "amount" on line 15.

11 That would remain confidential.

12 THE COURT: Okay. Anything else?

13 MR. SCAROLA: That's it.

14 THE COURT: So, the only part that -- the
15 only part I ruled on is the --

16 MR. IANNO: I think, if I may, to say that
17 the plaintiff has abandoned their motion as
18 relates to page 16 line 6 through 13, 33:21
19 through 34:3, and then that portion that the
20 plaintiff abandoned on page 46 and then the
21 court ruled on the remainder.

22 THE COURT: I want to make sure I get the
23 part they abandoned.

24 MR. IANNO: Which is --

25 THE COURT: The balance of 16 through 18.

PINNACLE REPORTING, INC.
(561) 820-9066

1 MR. IANNO: Right.

2 THE COURT: And then also -- no --

3 MR. IANNO: What's the numbers? Where you
4 see the numbers on line 16 through line 18 that
5 was abandoned.

6 THE COURT: Right.

7 MR. IANNO: And the court, perhaps the
8 easiest way to do this is, the defendant
9 designated 46:5 through 47 line 9. Other than
10 that portion, the court overrules a designation
11 to the balance. I think we can say they
12 abandon their motion on 143:12, the sentence
13 begins on 143:12 through 15.

14 THE COURT: 143:12 or --

15 MR. IANNO: That's where it started and
16 that's where we started our designation but we
17 withdraw that portion.

18 THE COURT: It was abandoned at 143:12
19 through 15?

20 MR. IANNO: Right. The sentence that
21 begins on line 12.

22 THE COURT: Is that it?

23 MR. IANNO: Mr. Bemis, is that accurate?

24 MR. BEMIS: Yes, it is. Your Honor, not

25 to beat a dead horse to life, this stipulation

PINNACLE REPORTING, INC.
(561) 820-9066

29

1 is pursuant to the Court, obviously to the
2 court's prior direction in the case.

3 THE COURT: I understand that.

4 MR. BEMIS: All right, Your Honor.

5 THE COURT: I will do this order and I'll
6 see you Friday.

7 MR. MARMER: This is Ron Marmer. May I
8 add one thought? I want to be clear, if the
9 court recites only what we've abandoned in our
10 motion, you need another piece, I think, and
11 that is that Morgan Stanley are no longer
12 persisting in their confidentiality
13 designation. Otherwise the whole thing will
14 end up being confidential except for the parts

16div-005351

15 where -- we start with the proposition they
16 have to identify the whole thing as
17 confidential. We bring a motion to undo it,
18 abandon selective portions of our motion, that
19 means everything else we were persisting in
20 should be --

21 THE COURT: Should be opened.

22 MR. MARMER: Yes. I don't want anybody
23 pregnant reading the orders would end up --

24 THE COURT: I understand.

25 MR. IANNO: I think that's what Mr. Bemis

PINNACLE REPORTING, INC.
(561) 820-9066

30

1 was getting at, is not abandonment of our
2 position, rather on the court's ruling, this is
3 where we ended up.

4 THE COURT: All right. I will do the

16div-005352

5 order and again you'll get copies and I'll see
6 you on Friday.

7 (At 2:25 the hearing was adjourned.)

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

PINNACLE REPORTING, INC.
(561) 820-9066

16div-005353

1 CERTIFICATE

2 - - -

3

4 STATE OF FLORIDA

5 COUNTY OF PALM BEACH

6

7 I, PATRICIA A. LANOSA, Registered
8 Professional Reporter, do hereby certify that I was
9 authorized to and did stenographically report the
10 foregoing proceedings and that the transcript is a
11 true and correct transcription of my stenotype notes
12 of the proceedings.

13

14 Dated this 7th day of June, 2004.

15

16 _____

17 PATRICIA A. LANOSA

18 Registered Professional Reporter

19

20

21 The foregoing certification of this transcript does

22 not apply to any reproduction of the same by any

23 means unless under the direct control and/or

24 direction of the certifying reporter.

25

PINNACLE REPORTING, INC.
(561) 820-9066

16div-005355

1 IN THE FIFTEENTH JUDICIAL CIRCUIT COURT
2 IN AND FOR PALM BEACH COUNTY, FLORIDA
3 CIVIL DIVISION

3 COLEMAN (PARENT) HOLDINGS, INC.,
4 Plaintiff,
5 CASE NO. CA 03-5045 AI

6 vs.
7 MORGAN STANLEY & CO., INC.,
8 Defendant.

9 _____/
10 MORGAN STANLEY SENIOR FUNDING, INC.,
11 Plaintiff,

12 vs. CASE NO. CA 03-5165
13 MACANDREWS & FORBES HOLDINGS, INC.,
14 Defendant.

15 _____/

16 PROCEEDINGS BEFORE THE HONORABLE ELIZABETH T. MAASS

17 APPEARANCES:

18 On behalf of the Plaintiff:

19 SEARCY, DENNEY, SCAROLA, BARNHART &
20 SHIPLEY P.A.

21 2139 Palm Beach Lakes Blvd.
22 West Palm Beach, Florida 33409

23 BY: JACK SCAROLA, ESQUIRE
24 -AND-

25 JENNER & BLOCK
26 BY: RONALD MARMER, ESQUIRE
27 (Appearing telephonically)

28 On behalf of the Defendant:

29 CARLTON FIELDS
30 222 Lakeview Avenue, Suite 1400
31 West Palm Beach, Florida 33401

32 BY: JOSEPH IANNO, JR., ESQUIRE
33 - AND -

34 KIRKLAND & ELLIS, LLP
35 777 South Figueroa Street
36 Los Angeles, California 90017
37 BY: LAWRENCE P. BEMIS, ESQUIRE
38 (Appearing telephonically)

39 - - -

40 Monday, June 7, 2004
41 PALM BEACH COUNTY COURTHOUSE
42 WEST PALM BEACH, FLORIDA

PINNACLE REPORTING, INC.
(561) 820-9066

2

1 PROCEEDINGS

2 - - -

3 THE COURT: Good afternoon. We're back on
4 Coleman and Morgan Stanley, which is the motion
5 to remove the confidential designation from the
6 transcript?

7 MR. SCAROLA: Yes, Your Honor. We're
8 waiting for some telephone participants.

9 (Discussion held off the record.)

10 MR. IANNO: Mr. Bemis is going to be on
11 the phone because he's traveling to New York
12 for a deposition in this case. He apologizes
13 he couldn't be here in person again.

14 (Discussion held off the record.)

15 THE COURT: Is he the only one doing it by
16 phone?

17 MR. IANNO: And Mr. Marmer.

18 MR. SCAROLA: Someone from Jenner &
19 Block.

20 THE COURT: Hi, this is Judge Maass. Who
21 do I have on the phone?

22 MR. BEMIS: Good afternoon. This is
23 Lawrence Bemis, Kirkland & Ellis.

24 THE COURT: Hello, Mr. Bemis.

25 MR. MARMER: This is Ron Marmer.

PINNACLE REPORTING, INC.
(561) 820-9066

3

1 THE COURT: Good afternoon. I have you
2 each on the speakerphone in the Courtroom in
3 Coleman and Morgan Stanley. This is Coleman's
4 motion to allow Arthur Anderson access to

16div-005358

5 confidential information.

6 What did you want to say in support of it,

7 Mr. Scarola?

8 MR. SCAROLA: Your Honor. You will recall
9 that we actually began a hearing on this motion
10 previously before Your Honor, and it appears
11 that Morgan Stanley recognizes that it could
12 not meet the burdens imposed upon it as a
13 consequence of Your Honor's prior specific
14 findings, has chosen to ignore those prior
15 specific findings, and attempt to reargue again
16 that it is as a consequence of a stipulation on
17 the part of the Coleman's part that we are
18 where we are.

19 THE COURT: Let's assume I'm not inclined
20 to rehear argument on that.

21 MR. SCAROLA: I'm happy to make that
22 assumption, in which case the burden obviously
23 shifts back to Morgan Stanley. Your Honor gave
24 Morgan Stanley an opportunity to meet that
25 burden. They have submitted a written memo

PINNACLE REPORTING, INC.
(561) 820-9066

1 that completely fails to address why any of
2 these materials should remain confidential.
3 They do designate certain portions but present
4 no argument whatsoever to support a position
5 that, particularly as to Arthur Anderson, these
6 matters ought not to be communicated. So, I
7 think it shifts to them at this point.

8 THE COURT: Tell me why anything said in
9 that transcript is confidential?

10 MR. IANNO: Your Honor, remember the
11 transcript itself is based on the settlement
12 agreement which the parties -- the court
13 actually ordered it be designated as
14 confidential. So that our position is Coleman
15 cannot use their confidentiality designation as
16 both a sword and a shield.

17 And if you'll allow me to digress just a
18 moment and address Mr. Scarola's comments,
19 because at the outset I want to say, the reason
20 we incorporated our previous arguments in our
21 responses, we didn't want to be constituted a

22 waiver. We understand the court's ruling, we
23 don't intend to reargue those positions. We
24 want to be understood and recognize we're not
25 waiving those either. We've included them in

PINNACLE REPORTING, INC.
(561) 820-9066

5

1 our supplemental response.
2 The point of the matter is, Coleman and
3 Arthur Anderson now allege to have an immunity
4 of interest, are saying, we can use your
5 violation of the confidentiality order as a
6 sword and did exactly that. In the other case
7 that's pending in front of Judge Miller, they
8 have now moved to dismiss based on the same
9 grounds they have filed their rule to show
10 cause, really the contempt motion in this case
11 seeking to disqualify counsel. So, we're going

16div-005361

12 to use this confidential settlement agreement
13 as a sword, say it's a release of the
14 preexisting claims Morgan Stanley has and at
15 the same time we're going to prevent you from
16 defending yourselves in this case.

17 So, it's either -- the settlement
18 agreement is either confidential or it's not.
19 Frankly, there's nothing confidential in that
20 settlement agreement whatsoever.

21 THE COURT: Please understand at this
22 juncture we're not going back and challenging
23 whether the settlement agreement should be
24 deemed confidential or not.

25 What I'm asking you to do is defend your

PINNACLE REPORTING, INC.
(561) 820-9066

2 that transcript is confidential.

3 MR. IANNO: I have to stand on the
4 argument we made before that we believe we're
5 entitled to rely on the stipulation. I don't
6 intent to reargue it. The only thing new that
7 we can add to that is that Coleman is using
8 that transcript in the settlement agreement as
9 both a sword and shield under the
10 confidentiality order. We don't believe that
11 they can selectively disclose portions of it
12 and use that against Morgan Stanley, while at
13 the same time saying Morgan Stanley, you can't
14 use it. You can't have your cake and eat it
15 too on the Coleman side. Either everything is
16 open to the public scrutiny or it's not. And
17 that's our position on this.

18 I don't know if Mr. Bemis has anything to
19 add to that. I believe with all the arguments
20 made at the previous hearing and today and in
21 our supplemental response, either they have to
22 say it's confidential and no one gets to see
23 it, or it's not confidential and it's open to
24 the public in general.

25 Your Honor, what's happening here, we have

1 a confidential document that we're discussing
2 in open court. So, they're saying, you can't
3 discuss the document but anything you say in
4 court can be disclosed to Arthur Anderson. We
5 have to either -- either it's confidential or
6 it's not. Right now we feel like we're
7 handcuffed with the designations Coleman is
8 making in this case on the confidentiality.

9 THE COURT: Mr. Bemis, did you have
10 anything you wanted to add?

11 MR. BEMIS: Nothing that would not be
12 repetitive.

13 THE COURT: Okay. I appreciate that.

14 Mr. Scarola, did you want to respond?

15 MR. SCAROLA: Your Honor, clearly Morgan
16 Stanley is attempting to confuse two separate
17 issues.

18 The one issue before the court has to do

19 with our request for a limited exception to
20 confidentiality with regard to the hearing. We
21 are not before the court today to address
22 issues concerning the contractual
23 confidentiality that exists in the settlement
24 agreement. If Morgan Stanley chooses to
25 challenge that in some way at sometime in the

PINNACLE REPORTING, INC.
(561) 820-9066

8

1 future, that simply is a separate issue.
2 That's not the matter before the court right
3 now. We are here only to determine whether the
4 hearing transcript must remain confidential
5 with regard to Arthur Anderson.

6 The burden is upon Morgan Stanley to
7 establish the need for that confidentiality,
8 some legal privilege that exists that would

9 preclude the disclosure of the contents of that
10 hearing and they have utterly and completely
11 failed to meet that burden.

12 THE COURT: Let me ask you this. Can a
13 designation of confidentiality be removed for a
14 publication one entity only?

15 MR. SCAROLA: That's all we're requesting.

16 THE COURT: So, you're saying it's a
17 stipulated order and is sort of an acceptable
18 interpretation, something of quasi
19 confidential?

20 MR. SCAROLA: What we're saying is, that
21 they have designated the entire transcript as
22 confidential. We haven't chosen to challenge
23 their entire designation. We have asked for a
24 limited exception. The limited exception that
25 we have chosen to request is disclosure to

PINNACLE REPORTING, INC.
(561) 820-9066

1 Arthur Anderson who already has --

2 THE COURT: But I guess what I'm trying to
3 figure out is, is it implicit in that some of
4 the information you now want to disclose may be
5 confidential as to a third party but is not
6 confidential as to Arthur Anderson under the
7 order or some of this is just not confidential
8 at all and we're simply not choosing to be
9 discriminating enough to figure out which two
10 categories any particular portion of the
11 transcript falls into?

12 MR. SCAROLA: I think that both of those
13 responses pertain. I think that clearly with
14 regard to Arthur Anderson there is no basis
15 whatsoever to keep what was said in open court
16 confidential. I don't know that at this point
17 we need to address the issue beyond that and
18 we're not asking the court to address the issue
19 beyond that. There may be circumstances where
20 disclosure to one third party is appropriate
21 and disclose to some other third party may not
22 be. And, certainly, I would think that it is
23 within the contemplation of the stipulated
24 confidentiality order that there is an ability
25 to modify that order by way of application to

1 the Court. The burden of establishing any
2 confidentiality protection rests upon the party
3 making the unilateral designation. The party
4 making the unilateral designation here was
5 Morgan Stanley. They have failed to meet that
6 burden. They have the ability, because we're
7 talking only about the transcript itself, they
8 have the ability to remove the confidentiality
9 designation in its entirety if they choose to
10 do that. They could simply withdraw it. We
11 might seek then to impose a confidentiality
12 obligation ourselves. But right now that's not
13 within our control. We're dealing with their
14 unilateral designation of everything and we
15 have asked the court for a limited exception to

16 that designation.

17 And, that's really the limited issue that

18 Your Honor is dealing with at this point.

19 THE COURT: What's the response?

20 MR. IANNO: Either it's confidential or

21 it's not. If it's not confidential, as Mr.

22 Scarola argues, then it was discussed in open

23 court, it's open to the public in general.

24 Mr. Scarola always has the opportunity

25 right now if he wants to designate the

PINNACLE REPORTING, INC.
(561) 820-9066

11

1 transcript as confidential, he doesn't need us

2 to withdraw our confidential designation for

3 the plaintiff to designate it as confidential.

4 As Your Honor said, there's no limited

5 exception to the confidentiality order, we're

6 not agreeing to that. Either the transcript
7 remains confidential for the reasons we stated
8 or it isn't confidential.

9 THE COURT: I'll be honest with you, the
10 way I read that order, I don't want to -- we
11 parsed a lot already. I think, arguably, the
12 only part of that transcript that is
13 confidential, any part that discloses the terms
14 of the settlement agreement. And I don't think
15 we remove the designation for publication to a
16 single third party only. Either it's removed
17 or remains in place. If you guys have the time
18 and want to go through the transcript and tell
19 me where those specific discussions are,
20 certain settlement terms. My recollection is
21 there was maybe only one or two places.

22 MR. SCAROLA: Well, I don't know that
23 there would be a need to do that.

24 THE COURT: That's the part that would
25 remain confidential. The portion of the

PINNACLE REPORTING, INC.
(561) 820-9066

1 transcript, for instance, if there was
2 reference to the total amounts of settlement, I
3 think there was at least once or twice, I think
4 that remains confidential.

5 Now, please understand that under the
6 terms of the confidentiality order, I don't
7 think anything we -- obviously Arthur Anderson
8 already knows that.

9 MR. SCAROLA: Clearly.

10 THE COURT: Right.

11 MR. SCAROLA: But I'm trying to understand
12 what the court's inclination is at this point.

13 THE COURT: If we're going to remove the
14 confidentiality designation from any portion,
15 it gets removed for the world. It doesn't get
16 removed solely for Arthur Anderson.

17 MR. SCAROLA: That part I understand.

18 THE COURT: But with that said, my
19 recollection is there are some specific
20 references to specific terms of the settlement
21 agreement that would still remain confidential.

22 MR. SCAROLA: On what basis?

23 THE COURT: Frankly on the basis that you
24 guys -- we still have the confidentiality
25 provision of the settlement agreement itself.

PINNACLE REPORTING, INC.
(561) 820-9066

13

1 MR. BEMIS: Your Honor, this is Mr.
2 Bemis. There are four locations. I couldn't
3 do a page and line without a break. There are
4 four locations in the transcript where Mr.
5 Scarola began with two references. I make a
6 reference and there's a reference at the end of
7 the transcript.

8 THE COURT: I need to read the specific
9 verbiage to see what I think what portions of
10 that remains confidential.

11 MR. SCAROLA: Let me --

12 MR. BEMIS: Each of those passages is

13 cited in our initial memorandum. I have to go
14 back and double check.

15 THE COURT: I would need to go back, too.
16 Hold on. Mr. Scarola is asking for a
17 clarification.

18 MR. SCAROLA: Yes. There has been a
19 designation of the entire transcript as
20 confidential.

21 THE COURT: Correct.

22 MR. SCAROLA: We have challenged that
23 designation.

24 THE COURT: Correct.

25 MR. SCAROLA: The burden shifts to Morgan

PINNACLE REPORTING, INC.
(561) 820-9066

1 Stanley to demonstrate why any portion of that
2 transcript should remain confidential. Our

3 position is that they have failed to meet that
4 burden.

5 THE COURT: And, again, I need to go
6 back. My recollection when we, -- distinct
7 recollection is when we had the hearing on
8 whether the settlement agreement should be
9 disclosed, that there was a stipulation it
10 would be deemed confidential. Indeed, I know
11 my order included that. But my recollection is
12 that was stipulated to and indeed, I think you
13 know, there has been argument back and forth
14 whether the stipulation was more broad than
15 what I included in the order. But clearly at a
16 minimum, it's my recollection there was a
17 stipulation that the settlement agreement
18 itself is confidential. If that's the state of
19 the record, I don't think you can say, yes, the
20 settlement agreement is confidential.

21 But, if someone makes reference to one of
22 the terms in court having first gotten sort of
23 the stipulation that nothing we say here will
24 be deemed a violation or a waiver of the
25 confidentiality order, that now you can publish

PINNACLE REPORTING, INC.
(561) 820-9066

1 what was said to the world.

2 MR. SCAROLA: We're not requesting that we
3 publish this to the world.

4 THE COURT: Right. Please understand I'm
5 not parsing it to say what we're publishing to
6 Arthur Anderson. Now, if I go back, I think
7 the stipulated confidentiality order says, it's
8 not a violation or simply not confidential with
9 any third party with knowledge of what's said.

10 MR. SCAROLA: Part of the problem is that
11 the confidentiality order itself defines what
12 litigation materials are.

13 THE COURT: Right.

14 MR. SCAROLA: And litigation materials do
15 not include any information that is already in
16 a receiving party's possession.

17 THE COURT: Right.

18 MR. SCAROLA: So, they cannot keep us from
19 sharing information that is already in our

20 possession.

21 THE COURT: Right.

22 MR. SCAROLA: And the confidentiality

23 order is already in our possession.

24 THE COURT: Yeah.

25 MR. SCAROLA: We have that confidentiality

PINNACLE REPORTING, INC.
(561) 820-9066

16

1 order. We are entitled under the court's
2 order, not addressing what restrictions may be
3 imposed upon us by the confidentiality -- by
4 the settlement agreement itself, because the
5 settlement agreement has its own
6 confidentiality provisions --

7 THE COURT: Right.

8 MR. SCAROLA: -- which we must deal with
9 independent of the court's order. Looking only

10 at the court's order, the court's order tells
11 us that it is litigation materials that cannot
12 be disseminated and litigation materials do not
13 include anything already in a receiving party's
14 possession.

15 THE COURT: Correct.

16 MR. SCAROLA: So, as it stands right now,
17 the only thing that keeps us from sharing with
18 Arthur Anderson the contents of the settlement
19 agreement to which Arthur Anderson itself is a
20 party, is the designation of the transcript --

21 THE COURT: No.

22 MR. SCAROLA: -- as confidential.

23 THE COURT: That's not accurate.

24 MR. SCAROLA: I don't know where I lost
25 you.

PINNACLE REPORTING, INC.
(561) 820-9066

1 THE COURT: Because, what prevents --
2 first of all, I have to go back and look -- all
3 we're talking about today is whether the
4 transcript itself should be confidential.

5 Please understand there is a big
6 distinction between a settlement agreement that
7 says litigation is settled for X amount of
8 dollars and then a transcript where an attorney
9 says, and I am representing to the Court this
10 litigation was settled for X amount of
11 dollars. Those are two separate things.

12 What we're talking about is the latter,
13 not the former. We're not talking about the
14 use of the settlement agreement at all.

15 MR. SCAROLA: We're talking about the
16 transcript, correct.

17 THE COURT: We're talking about the use of
18 the transcript. All I'm saying, to the extent
19 there is a stipulation between the parties that
20 the settlement agreement is confidential,
21 references in the transcript to specific terms
22 of the settlement agreement likewise is
23 confidential.

24 MR. SCAROLA: Pursuant to stipulation.

25 THE COURT: Yeah. That's a logical --

1 MR. SCAROLA: So, the burden then shifts
2 to us if we want out of the stipulation; is
3 that what you're saying?

4 THE COURT: I would assume but that's not
5 something in front of me, I don't think,
6 today. And in all honesty, Mr. Scarola, when
7 we get the transcript, and go through the parts
8 we're referring to, I think we're talking about
9 a handful of words.

10 MR. IANNO: I think with the certain
11 amount of lines on either side to put it in
12 context.

13 MR. SCAROLA: That's what I understand
14 their burden was today, to come before the
15 court and to demonstrate a legal basis for
16 specific sections to remain confidential.

17 THE COURT: And what I'm saying is the
18 only basis I see for any portion of that
19 transcript to be deemed confidential is based
20 on the stipulation that counsel previously
21 reached the settlement agreement itself is
22 confidential.

23 MR. SCAROLA: What page and lines are we
24 not permitted to share with Arthur Anderson?

25 THE COURT: That's what I want to go

PINNACLE REPORTING, INC.
(561) 820-9066

19

1 through right now. I think we're talking about
2 a handful of places. We need a few minutes to
3 go through and figure that out.

4 MR. BEMIS: Your Honor, if we could take a
5 short break, I could talk to Mr. Ianno, I think
6 I can give him the pages and lines.

7 THE COURT: Do you want to do that? You
8 guys can stay and talk, I'll come back.

9 MR. BEMIS: I know I can do it relatively
10 quickly. I don't want to hold the court up
11 while I'm perusing through my papers.

12 MR. IANNO: Ron, I'll call you separately
13 on my cell phone.

14 THE COURT: You can stay here and I'll go.

15 MR. IANNO: For Friday's hearing here's
16 our notebook. And I believe --

17 THE COURT: I'm glad to see it's much
18 shorter.

19 MR. IANNO: And I know, Your Honor, there
20 is a request by Mr. Bemis if we could start the
21 hearing in the morning. We're presently
22 scheduled for 1:30. Maybe while we're taking
23 this break if there is a possibility --

24 THE COURT: As far as I know, nothing
25 cancelled. Let me check, I just don't know.

PINNACLE REPORTING, INC.
(561) 820-9066

1 (Recess taken.)

2 THE COURT: I'm back now.

3 MR. MARMER: I'm sorry.

4 THE COURT: That's okay, I just walked
5 in. While I'm thinking of it, I checked
6 Friday's schedule. So far I don't have any
7 openings in the morning. If something opens,
8 if you guys are both amenable, we'll call your
9 offices.

10 What, if anything, can be located?

11 MR. SCAROLA: Do you have the transcript
12 in front of you?

13 THE COURT: I do.

14 MR. SCAROLA: We begin at page 16 lines 6
15 through 13. They have been designated as
16 confidential by Morgan Stanley. We are not at
17 this time challenging that confidentiality
18 designation. So, we are in agreement.

19 THE COURT: That's 6 through 13.

20 MR. SCAROLA: Six through 13 at page 16.

21 MR. IANNO: The only thing that concerns
22 me with that is Mr. Scarola's qualification at
23 this time.

24 THE COURT: Meaning that it wasn't part of
25 your agreement?

PINNACLE REPORTING, INC.
(561) 820-9066

21

1 MR. SCAROLA: That's the first time I've
2 heard that. It's either confidential, stays
3 confidential, unless Mr. Bemis feels
4 differently. We don't want to be back here
5 next week to remove the confidentiality
6 designation. It's either a stipulation today
7 that it's confidential or the court needs to
8 rule that it's confidential, I believe.

9 MR. SCAROLA: We're not stipulating that
10 it's confidential. They have challenged, they
11 have designated these lines as confidential.
12 We are not challenging that confidentiality
13 designation. To the extent your motion seeks

14 to have this undesignated confidential, you're
15 abandoning that portion of your motion?

16 MR. SCAROLA: That's correct.

17 THE COURT: Okay.

18 MR. SCAROLA: That's correct. But more
19 accurately stated, that's right. They have
20 designated as confidential but we are not
21 challenging that.

22 THE COURT: Okay. So, we're not
23 stipulating it's confidential, it's just a
24 motion to abandon?

25 MR. SCAROLA: That's correct.

PINNACLE REPORTING, INC.
(561) 820-9066

22

1 THE COURT: What's next?

2 MR. SCAROLA: Page 33 lines 21 through 34
3 line 3.

16div-005384

4 THE COURT: Who is the speaker?

5 MR. IANNO: I believe this is Mr. Scarola

6 still, Your Honor.

7 THE COURT: Okay.

8 MR. SCAROLA: We are not challenging --

9 THE COURT: Again, the motion is
10 abandoned?

11 MR. SCAROLA: We are abandoning our motion
12 to challenge that confidentiality designation.

13 THE COURT: Okay.

14 MR. IANNO: And Your Honor --

15 MR. SCAROLA: Going to page 46 line 5.

16 THE COURT: Okay.

17 MR. SCAROLA: We are challenging the
18 confidentiality designation from lines 5
19 through line 16 ending with the word of --
20 resulted in a settlement of.

21 We are withdrawing any challenge to the
22 balance of line 16, line 17 and line 18.

23 THE COURT: Okay.

24 MR. SCAROLA: So, the court is faced with
25 ruling on the appropriateness of the

PINNACLE REPORTING, INC.
(561) 820-9066

1 designation of 46 line 5 through 16 resulted in
2 a settlement of.

3 THE COURT: Right. And, I'm sorry.

4 MR. IANNO: Your Honor, I just want to say
5 equivalent to what Mr. Scarola said, in context
6 we had designated page 46 line 5 through page
7 47 line 19 as the confidential portion.

8 Mr. Scarola is abandoning the motion as it
9 pertains to where the settlement amount is
10 discussed on line 16 page 46.

11 THE COURT: Really he's abandoning
12 through --

13 MR. IANNO: Forty six line 18. Where you
14 see the numbers.

15 MR. SCAROLA: I will also be challenging
16 the designation from 46:19 through 47:9.

17 THE COURT: Oh, you are?

18 MR. SCAROLA: Yes. So, the only portion
19 we are abandoning is from 16 after "of" through
20 18, the end of the sentence.

21 THE COURT: Okay. And this is Mr. Bemis
22 speaking?

23 MR. SCAROLA: That's correct.

24 THE COURT: Okay. Okay. Why would that
25 be confidential, 46:5 through 46:16?

PINNACLE REPORTING, INC.
(561) 820-9066

24

1 MR. IANNO: Your Honor, I think that if
2 you look at it, what they're talking about here
3 is the consummation of the settlement
4 agreement. Although it doesn't discuss the
5 specific amount of the settlement agreement, I
6 think that the fact that the settlement
7 agreement amounts being paid is probably
8 confidential to Anderson. And I just don't
9 think you can divorce that from the settlement
10 amount or the terms. I think you need to keep

11 everything in context so you're not
12 inadvertently disclosing something. The fact
13 they paid a certain amount may be just as
14 confidential as the amount.

15 THE COURT: What's the response?

16 MR. SCAROLA: First of all, the entire
17 first paragraph discusses earlier court
18 proceedings that are not confidential, as far
19 as I know. It's just discussion about what
20 happened in an earlier court proceeding.

21 The fact that there has been a settlement
22 of those claims is a matter of public record.
23 Those cases were filed, they were resolved and
24 dismissed.

25 THE COURT: Okay.

PINNACLE REPORTING, INC.
(561) 820-9066

1 MR. SCAROLA: And the only thing that I
2 suggest could arguably be confidential would be
3 the amount of the settlement.

4 THE COURT: Okay. The part that I believe
5 is still confidential begins at line 15 after
6 the first word. So, after agreement, the rest
7 of 15 and then all of 16, 17 and 18.

8 MR. IANNO: Okay.

9 MR. SCAROLA: We are then also challenging
10 lines 19 through line 9 on page 47.

11 THE COURT: Right. I'm reading that.
12 Somehow this is confidential.

13 MR. IANNO: I can see some portion of that
14 as being non-confidential where they talk about
15 the mere image of the claims made in the
16 complaint.

17 What I don't know, as we sit here today,
18 whether or not those exact numbers that are
19 mentioned in there are part of the settlement
20 agreements, whether they're mentioned in the
21 complaint in that.

22 So, as we sit here today, I think that
23 what we're saying here, our position on this
24 is, in order to keep the confidentiality
25 intact, you need to include all of that

1 language. I don't see any reason that it needs
2 to be disclosed. If it is a public record, it
3 is a public record, as far as the claims. I
4 agree with that. I don't know if the terms in
5 the amounts claim were somehow mentioned in the
6 settlement agreement, it's some type of recital
7 clause, things of that nature. I think that to
8 the extent anything in here is public record,
9 really, we don't need to disclose that. At
10 this point, I can't tell you what exactly the
11 complaint says as far as claim damages.

12 THE COURT: Does Mr. Bemis know?

13 MR. BEMIS: Your Honor, I can address that
14 issue, if you wish?

15 THE COURT: Sure.

16 MR. BEMIS: Your Honor, those figures are
17 not in the settlement agreement.

18 THE COURT: I appreciate your candor.

19 I don't think any of that is

20 confidential. Where to next?

21 MR. SCAROLA: Page 143, Your Honor.

22 THE COURT: I want to make my notes.

23 46:19. I'm sorry, what page next?

24 MR. SCAROLA: Page 143, lines 8 through 15

25 have been designated. We challenge the

PINNACLE REPORTING, INC.
(561) 820-9066

27

1 designation of lines 8 through 12 ending with

2 the words a million times.

3 MR. BEMIS: Your Honor, we'll agree to

4 that.

5 THE COURT: Okay. So, that's not

6 confidential either. Anything else, then?

7 MR. SCAROLA: We are withdrawing our

8 challenge to the designation as confidential of
9 the sentence that begins, "the settlement", at
10 line 12, through the word "amount" on line 15.

11 That would remain confidential.

12 THE COURT: Okay. Anything else?

13 MR. SCAROLA: That's it.

14 THE COURT: So, the only part that -- the
15 only part I ruled on is the --

16 MR. IANNO: I think, if I may, to say that
17 the plaintiff has abandoned their motion as
18 relates to page 16 line 6 through 13, 33:21
19 through 34:3, and then that portion that the
20 plaintiff abandoned on page 46 and then the
21 court ruled on the remainder.

22 THE COURT: I want to make sure I get the
23 part they abandoned.

24 MR. IANNO: Which is --

25 THE COURT: The balance of 16 through 18.

PINNACLE REPORTING, INC.
(561) 820-9066

1 MR. IANNO: Right.

2 THE COURT: And then also -- no --

3 MR. IANNO: What's the numbers? Where you
4 see the numbers on line 16 through line 18 that
5 was abandoned.

6 THE COURT: Right.

7 MR. IANNO: And the court, perhaps the
8 easiest way to do this is, the defendant
9 designated 46:5 through 47 line 9. Other than
10 that portion, the court overrules a designation
11 to the balance. I think we can say they
12 abandon their motion on 143:12, the sentence
13 begins on 143:12 through 15.

14 THE COURT: 143:12 or --

15 MR. IANNO: That's where it started and
16 that's where we started our designation but we
17 withdraw that portion.

18 THE COURT: It was abandoned at 143:12
19 through 15?

20 MR. IANNO: Right. The sentence that
21 begins on line 12.

22 THE COURT: Is that it?

23 MR. IANNO: Mr. Bemis, is that accurate?

24 MR. BEMIS: Yes, it is. Your Honor, not

25 to beat a dead horse to life, this stipulation

PINNACLE REPORTING, INC.
(561) 820-9066

29

1 is pursuant to the Court, obviously to the
2 court's prior direction in the case.

3 THE COURT: I understand that.

4 MR. BEMIS: All right, Your Honor.

5 THE COURT: I will do this order and I'll
6 see you Friday.

7 MR. MARMER: This is Ron Marmer. May I
8 add one thought? I want to be clear, if the
9 court recites only what we've abandoned in our
10 motion, you need another piece, I think, and
11 that is that Morgan Stanley are no longer
12 persisting in their confidentiality
13 designation. Otherwise the whole thing will
14 end up being confidential except for the parts

16div-005394

15 where -- we start with the proposition they
16 have to identify the whole thing as
17 confidential. We bring a motion to undo it,
18 abandon selective portions of our motion, that
19 means everything else we were persisting in
20 should be --

21 THE COURT: Should be opened.

22 MR. MARMER: Yes. I don't want anybody
23 pregnant reading the orders would end up --

24 THE COURT: I understand.

25 MR. IANNO: I think that's what Mr. Bemis

PINNACLE REPORTING, INC.
(561) 820-9066

30

1 was getting at, is not abandonment of our
2 position, rather on the court's ruling, this is
3 where we ended up.

4 THE COURT: All right. I will do the

5 order and again you'll get copies and I'll see
6 you on Friday.

7 (At 2:25 the hearing was adjourned.)

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

PINNACLE REPORTING, INC.
(561) 820-9066

1 CERTIFICATE

2 ---

3

4 STATE OF FLORIDA

5 COUNTY OF PALM BEACH

6

7 I, PATRICIA A. LANOSA, Registered
8 Professional Reporter, do hereby certify that I was
9 authorized to and did stenographically report the
10 foregoing proceedings and that the transcript is a
11 true and correct transcription of my stenotype notes
12 of the proceedings.

13

14 Dated this 7th day of June, 2004.

15

16 _____

17 PATRICIA A. LANOSA

18 Registered Professional Reporter

19

20

21 The foregoing certification of this transcript does

22 not apply to any reproduction of the same by any

23 means unless under the direct control and/or

24 direction of the certifying reporter.

25

PINNACLE REPORTING, INC.
(561) 820-9066

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

_____ /

CASE NO. CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

_____ /

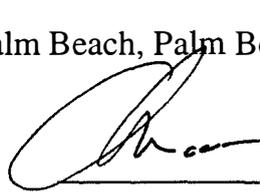
**ORDER ON COLEMAN (PARENT) HOLDINGS INC.'S MOTION TO ALLOW
ARTHUR ANDERSEN LLP ACCESS TO CONFIDENTIAL TRANSCRIPT**

THIS CAUSE came before the Court June 7, 2004 on Coleman (Parent) Holdings Inc.'s Motion to Allow Arthur Andersen LLP Access to Confidential Transcript, with all parties well represented by counsel. In open Court Plaintiff abandoned that part of its Motion seeking to have the Confidential designation removed from the portions of the transcript of the April 30, 2004 hearing in this case ("Transcript") found at page 16, lines 6-13; page 33, line 21 through 34, line 3; page 46, beginning after "of" on line 16 through line 18; and page 143, beginning after "times" on line 12 through line 15. Based on the foregoing and the proceedings before the Court, it is

ORDERED AND ADJUDGED that Plaintiff's Motion to Allow Arthur Andersen LLP Access to Confidential Transcript is Granted, in part. The Confidential designation is hereby removed from the Transcript excluding (i) those portions recited above for which

Plaintiff abandoned its Motion and (ii) page 46, beginning at line 15 after "agreement" through "of" in line 16.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 8
day of June, 2004.



ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:

Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci
655 15th Street, NW, Suite 1200
Washington DC 20005

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, IL 60611

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

CASE NO: CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

**MORGAN STANLEY & CO. INCORPORATED'S FURTHER
INTERROGATORY CONCERNING COLEMAN (PARENT)
HOLDINGS, INC.'S MOTION FOR CONTEMPT**

Pursuant to the Florida Rules of Civil Procedure 1.280 and 1.340, Morgan Stanley & Co. Incorporated ("MS & Co.") and Morgan Stanley Senior Funding, Inc. ("MSSF) hereby request that Coleman (Parent) Holdings, Inc. ("CPH") and MacAndrews & Forbes Holdings, Inc. ("MAFCO") answer the following interrogatory and otherwise specify objections, if any, in accordance with the definitions and instructions contained herein.

INSTRUCTIONS

1. The connectives "and" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery request all responses that might otherwise be construed to be outside of its scope.
2. The use of the singular form of any word includes the plural and vice versa.

3. Each interrogatory should be answered separately and fully, unless it is objected to, in which event the reasons for the objections should be stated with specificity. The answers are to be signed by plaintiffs and the objections, if any, are to be signed by the attorney(s) making them. Where a complete answer to a particular interrogatory is not possible, the interrogatory should be answered to the extent possible and a statement should be made indicating why only a partial answer is given, the efforts made by you to obtain the information and the source from which all responsive information may be obtained, to the best of your knowledge or belief.

4. If it is claimed that information responsive to any interrogatory is privileged, work product, or otherwise protected from disclosure, state the nature and basis for any such claim of privilege, work product, or other ground for nondisclosure and identify: (a) the subject matter of any such information; (b) if the information is embodied in a document, the author of the document and each person to whom the original or a copy of the document was sent; (c) if the information was communicated orally, the person making the communication and all persons present at or participating in the communication; (d) the date of the document or oral communication; and (e) the general subject matter of the document or oral communication, within the time set forth in the agreed-upon order. Any part of an answer to which you do not claim privilege or work product should be given in full.

5. The term “identify” (with respect to documents) means to give, to the extent known, the (i) type of document; (ii) general subject matter; (iii) date of the document; and (iv) author(s), addressee(s) and recipient(s).

6. The term “identify” (with respect to persons) means to give, to the extent known, the person’s full name, present or last known address, and when referring to a natural person,

additionally, the present or last known place of employment. Once a person has been identified in accordance with this subparagraph, only the name of that person need be listed in response to subsequent discovery requesting the identification of that person.

7. When used in reference to a person other than a natural person, "identify" means: (a) to state its name; (b) to describe its nature (e.g., corporation, partnership, etc.); (c) to state the location of its principal place of business; and (d) to identify the person or persons employed by such entity whose actions on behalf of the entity are responsive to the interrogatory.

8. When used with respect to the identification of facts, acts, events, occurrences, meetings, telephone conferences or communications, "identify" means to describe with specificity the fact, act, event, occurrence, meeting, telephone conference, or communication in question, including, but not limited to: (a) identifying all participants in the fact, act, event, occurrence, meeting, telephone conference or communication; (b) stating the date(s) on which the fact, act, event, occurrence, meeting, telephone conference or communication took place; (c) stating the location(s) at which the fact, act, event, occurrence, meeting, telephone conference or communication took place; and (d) providing a description of the substance of the fact, act, event, occurrence, meeting, telephone conference or communication.

9. The terms "any," "all" and "each" shall be construed to mean "any," "all," or "each."

10. The term "including" shall be construed to mean "including but not limited to."

11. The present tense shall be construed to include the past and future tenses.

12. Unless otherwise indicated, these interrogatories request information for the period beginning January 1, 1996 to the date of your answer or objection to these interrogatories.

DEFINITIONS

1. “Arthur Andersen” shall mean Arthur Andersen LLP and any of its current or former partners, officers, directors, employees, representatives and agents.
2. “Concerning” shall mean relating to, referring to, describing, evidencing, or constituting.
3. “Communication” shall mean any exchange or transmittal of information by any means of transmission, including, without limitation, face-to-face conversation, mail, overnight delivery, Internet, telephone, electronic mail, or facsimile.
4. “Confidentiality Order” shall mean the Stipulated Confidentiality Order entered by the Court in the above-captioned matter on July 31, 2003.
5. “CPH” shall mean Coleman (Parent) Holdings Inc. and any of its current or former officers, directors, employees, representatives and agents.
6. “Curtis Mallet” shall mean the law firm of Curtis, Mallet-Prevost, Colt & Mosle, LLP and any of its current or former partners, associates, former or present employees, representatives and agents.
7. “Document” shall mean any recording in any tangible form of any information, whether handwritten, typed, printed, stored on computer disks, tapes, or databases, or otherwise reproduced. “Document” or “documents” also includes electronic documents whether stored on servers or hard drives, e-mail, backup tapes, voicemail and video and audio recordings. A draft or non-identical copy is a separate document within the meaning of this term.
8. “Jenner & Block” shall mean the law firm of Jenner & Block LLC and any of its partners, associates, former or present employees, representatives and agents.

9. “KHHTE” shall mean the law firm of Kellogg, Huber, Hansen, Todd & Evans P.L.L.C., and any of its current or former partners, associates, employees, representatives and agents.

10. “MAFCO” shall mean MacAndrews & Forbes Holdings, Inc. and any of its current or former officers, directors, employees, representatives and agents.

11. The terms “plaintiff” and “defendant” as well as a party’s full or abbreviated name or pronoun referring to a party shall mean the party and, where applicable, its officers, directors, employees, partners, corporate parent, subsidiaries or affiliates. This definition is not intended to impose a discovery obligation on any person who is not a party to the litigation.

12. “Relating to” shall mean concerning, evidencing, referring to, or constituting.

13. “Searcy Denny” shall mean the law firm of Searcy, Denny, Scarola, Barnhardt & Shipley, P.A., and any of its current or former partners, associates, employees, representatives and agents.

INTERROGATORIES

1. Identify any communications between or among CPH, MAFCO, Arthur Andersen, Jenner & Block, Searcy Denny, and Curtis Mallet regarding Arthur Andersen LLP’s June 3, 2004 Motion for Violations of Confidentiality Order, filed in Morgan Stanley & Co. Incorporated, et al. v. Arthur Andersen LLP, et al., Civil Action No. 2004 CA 002257 (Miller, J.).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by facsimile and Federal Express to all counsel of record on the attached service list on this 10th day of June, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar # 618349)
Thomas A. Clare
Zhonette M. Brown
Michael C. Occhuizzo
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

Joseph Ianno, Jr. (FL Bar # 655351)
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

BY: 

**Counsel for Morgan Stanley & Co.
Incorporated & Morgan Stanley Senior
Funding**

SERVICE LIST

Counsel for Coleman(Parent) Holdings & MacAndrews & Forbes

John Scarola

**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33409

Jerold S. Solovy

JENNER & BLOCK, LLC
One IBM Plaza, Suite 4400
Chicago, Illinois 60611

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH, COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

CASE NO. CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

**AGREED ORDER CANCELLING
JUNE 11, 2004 CASE MANAGEMENT CONFERENCE**

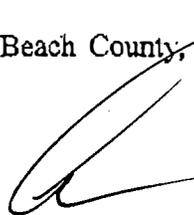
THIS CAUSE having come before the Court on the parties' Joint Motion to Cancel June 11, 2004 Case Management Conference, and the parties have reached agreement, it is hereby:

ORDERED and ADJUDGED:

1. The Joint Motion to Cancel June 11, 2003 Case Management Conference is GRANTED.

2. The June 11, 2004 Case Management Conference is cancelled.

DONE AND ORDERED at West Palm Beach County, Florida, this 11 day of June 2004.



ELIZABETH T. MAASS
Circuit Court Judge

copies furnished to:

Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, Esq.
655 15th Street, NW, Suite 1200
Washington DC 20005

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, IL 60611

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff,

CASE NO: CA 03-5045 AI

vs.

MORGAN STANLEY & CO., INC.,
Defendant.

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff,

CASE NO: CA 03-5165 AI

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant.

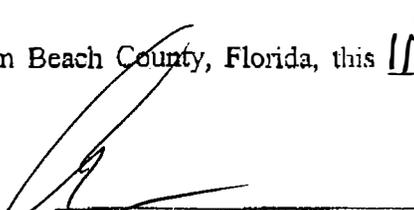
**AGREED ORDER REGARDING MORGAN STANLEY'S
MOTION FOR PROTECTIVE ORDER**

THIS CAUSE having come before the Court on Morgan Stanley's Motion For Protective Order and the parties having reached agreement, it is hereby

ORDERED and ADJUDGED:

1. Morgan Stanley shall serve its responses to Coleman (Parent) Holding Inc.'s Interrogatories to Morgan Stanley & Co. and MacAndrews & Forbes Holding Inc.'s Interrogatories to Morgan Stanley Senior Funding, Inc. (both served on March 19, 2004) on or before June 16, 2004.

DONE AND ORDERED at West Palm Beach County, Florida, this 11 day of June 2004.



ELIZABETH T. MAASS
Circuit Court Judge

Copies furnished to:

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368

John Scarola, Esq.
SEARCY, DENNEY, SCAROLA, BARNHARDT & SHIPLEY, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33409
Telephone: (561) 686-3000
Facsimile: (561) 478-0754

Thomas D. Yannucci, P.C.
KIRKLAND & ELLIS LLP
655 15th Street, N.W. - Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

Jerold S. Solovy
JENNER & BLOCK, LLC
One IBM Plaza -- Suite 4400
Chicago, Illinois 60611
Telephone: (312) 222-9350
Facsimile: (312) 527-0484

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH, COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

CASE NO. CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

**AGREED ORDER REGARDING MORGAN STANLEY'S MOTION TO REMOVE
CONFIDENTIALITY DESIGNATION FROM INTERROGATORIES**

THIS CAUSE having come before the Court on Morgan Stanley's Motion to Remove Confidential Designation From Interrogatories, and the parties have reached agreement, it is hereby:

ORDERED and ADJUDGED:

1. The confidential designation placed on Interrogatory No. 7 of Coleman (Parent) Holdings Inc.'s Further Interrogatories Concerning its Motion for Contempt served on May 28, 2004 shall remain in full force and effect. With regard to Interrogatory No. 7, this Order is without prejudice to Morgan Stanley's right to request the removal of the confidential

designation at a later time. Coleman (Parent) Holdings Inc. agrees to remove the confidential designation from all other portions of the Interrogatories it served on May 28, 2004.

DONE AND ORDERED at West Palm Beach County, Florida, this 11th day of June 2004.



ELIZABETH T. MAASS

Circuit Court Judge

copies furnished to:

Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, Esq.
655 15th Street, NW, Suite 1200
Washington DC 20005

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, IL 60611

CARLTON FIELDS, P.A.

ATTORNEYS AT LAW

ESPERANTÉ
222 LAKEVIEW AVENUE, SUITE 1400
WEST PALM BEACH, FLORIDA 33401-6149

MAILING ADDRESS
P.O. BOX 150, WEST PALM BEACH, FL 33402-0150
TEL (561) 659-7070 FAX (561) 659-7368

FAX COVER SHEET

Date:	June 11, 2004	Phone Number	Fax Number
To:	Jack Scarola	(561) 686-6300	(561) 684-5816
	Jerold Solovy/Michael Brody	(312) 222-9350	(312) 840-7711
	Thomas Clare	(202) 879-5993	(202) 879-5200
From:	Joyce Dillard, CLA	(561) 659-7070	(561) 659-7368

Client/Matter No.: 47877/14092

Employee No.:

Total Number of Pages Being Transmitted, Including Cover Sheet: 3

Message:

Coleman v. Morgan Stanley & Co., Inc.

Morgan Stanley Senior Funding, Inc. v. Macandrews & Forbes Holdings, Inc.

To follow please find a copy of Morgan Stanley's Notice of Serving Further Interrogatory Concerning CPH's Motion for Contempt.

Original to follow Via Regular Mail Original will Not be Sent Original will follow via Overnight Courier

 The information contained in this facsimile message is attorney privileged and confidential information intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone (if long distance, please call collect) and return the original message to us at the above address via the U.S. Postal Service. Thank you.

IF THERE ARE ANY PROBLEMS OR COMPLICATIONS, PLEASE NOTIFY US IMMEDIATELY AT:
(561) 659-7070

TELECOPIER OPERATOR: _____

WPB#566762.5

CARLTON FIELDS, P.A.

TAMPA ORLANDO TALLAHASSEE WEST PALM BEACH ST. PETERSBURG MIAMI

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT IN
AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO., INC.,

Defendant.

MORGAN STANLEY SENIOR FUNDING, INC.,

Plaintiff,

vs.

MACANDREWS & FORBES HOLDINGS, INC., CASE NO: CA 03-5165 AI

Defendant.

**MORGAN STANLEY & CO. INCORPORATED'S NOTICE OF
SERVING FURTHER INTERROGATORY CONCERNING
COLEMAN (PARENT) HOLDINGS, INC.'S MOTION FOR CONTEMPT**

Morgan Stanley & Co. Incorporated, by and through its undersigned counsel, hereby gives notice that it has served its Further Interrogatory Concerning Coleman (Parent) Holdings, Inc.'s Motion for Contempt upon Coleman (Parent) Holdings, Inc. by facsimile and Federal Express on June 10, 2004 by serving John Scarola, Esquire and Jerold S. Solovy, Esquire.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the below service list by facsimile and Federal Express on this 11th day of June, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar No. 618349)
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

**Counsel for Morgan Stanley & Co.
Incorporated and Morgan Stanley
Senior Funding**

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
E-mail: jianno@carltonfields.com

BY: 
Joseph Ianno, Jr.
Florida Bar No. 655351

SERVICE LIST

Jack Scarola
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy
Michael Brody
JENNER & BLOCK, LLC
One IBM Plaza, Suite 400
Chicago, IL 60611

#230580/mp

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN
AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

CASE NO: 2003 CA 005045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.

MORGAN STANLEY SENIOR FUNDING,
INC.,

Plaintiff,

vs.

MACANDREWS & FORBES HOLDINGS,
INC.,

CASE NO. CA 03-5165 AI

Defendant,

NOTICE OF UNAVAILABILITY

COMES NOW the undersigned attorney and hereby gives notice that he will be
unavailable as follows:

July 12, 2004 through and including July 16, 2004

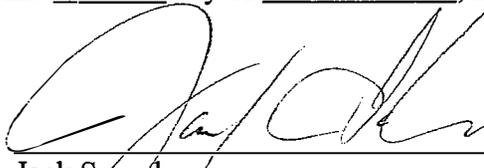
August 5, 2004 through and including August 6, 2004

September 3, 2004

Please avoid scheduling any proceedings regarding this cause during this time period, if
possible.

Coleman Holdings, Inc. vs Morgan Stanley & Company
Case No.: 2003 CA 005045 AI
Notice of Unavailability

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by
U.S. Mail to all counsel on the attached list on this 14th day of JUNE, 2004.



Jack Scarola
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 478-0754
Attorneys for Plaintiffs

Coleman Holdings, Inc. vs Morgan Stanley & Company
Case No.: 2003 CA 005045 AI
Notice of Unavailability

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block LLP
One IBM Plaza
Suite 4400
Chicago, IL 60611

CARLTON FIELDS, P.A.

ATTORNEYS AT LAW

ESPERANTÉ

222 LAKEVIEW AVENUE, SUITE 1400
WEST PALM BEACH, FLORIDA 33401-6149

MAILING ADDRESS

P.O. BOX 150, WEST PALM BEACH, FL 33402-0150
TEL (561) 659-7070 FAX (561) 659-7368

FAX COVER SHEET

Date:	June 16, 2004	Phone Number	Fax Number
To:	Jack Scarola	(561) 686-6300	(561) 684-5816
	Jerold Solovy/Michael Brody	(312) 222-9350	(312) 840-7711
	Thomas Clare	(202) 879-5993	(202) 879-5200
	Rebecca Beynon/Mark Hansen	(202) 326-7900	(202) 326-7999
From:	Joycc Dillard, CLA	(561) 659-7070	(561) 659-7368

Client/Matter No.: 47877/14092

Employee No.:

Total Number of Pages Being Transmitted, Including Cover Sheet: 19

Message:
Coleman v. Morgan Stanley & Co., Inc.
Morgan Stanley Senior Funding, Inc. v. Macandrews & Forbes Holdings, Inc.

To follow please find a copy of Joe Ianno's letter of today's date to Mike Brody with enclosure..

Original to follow Via Regular Mail Original will Not be Sent Original will follow via Overnight Courier

 The information contained in this facsimile message is attorney privileged and confidential information intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone (if long distance, please call collect) and return the original message to us at the above address via the U.S. Postal Service. Thank you.

IF THERE ARE ANY PROBLEMS OR COMPLICATIONS, PLEASE NOTIFY US IMMEDIATELY AT:
(561) 659-7070

TELECOPIER OPERATOR: _____

WPB#566762.3

CARLTON FIELDS, P.A.

TAMPA ORLANDO TALLAHASSEE WEST PALM BEACH ST. PETERSBURG MIAMI

CARLTON FIELDS

ATTORNEYS AT LAW

MIAMI
ORLANDO
ST. PETERSBURG
TALLAHASSEE
TAMPA

WEST PALM BEACH

Esperantó
222 Lakeview Avenue, Suite 1400
West Palm Beach, Florida 33401-6149
P.O. Box 150
West Palm Beach, Florida 33402-0150561.659.7070
561.659.7368 fax
www.carltonfields.com

June 16, 2004

Mike Brody, Esq.
Jenner & Block
One IBM Plaza
Chicago, IL 60611-7603

VIA FACSIMILE

Re: *Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co.*
Morgan Stanley Senior Funding, Inc. v. MacAndrews & Forbes Holdings, Inc.

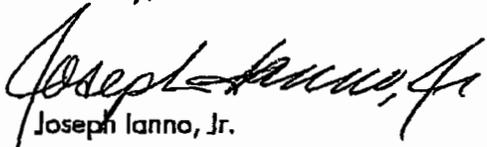
Dear Mike:

I am enclosing Morgan Stanley's responses to CPH's Interrogatories dated March 19, 2004.

As you will see from the enclosed response, Morgan Stanley has objected in part to Interrogatory No. 3 – based on the attorney-client privilege and the attorney work product doctrine – to providing a document-by-document identification of documents received by Kellogg, Huber, Hansen, Todd & Evans in the course of their representation of Morgan Stanley. We do not intend for that objection to curtail or delay discovery, however, and are prepared – upon reaching an appropriate stipulation that the provision this information will not constitute (or argued by CPH to be) a waiver of any privilege or work product protection – to provide you with the requested information. Indeed, we are prepared, within 48 hours of executing a non-waiver stipulation meeting the requirements of Florida Rule of Judicial Administration 2.060(g), to substitute our amended response.

Please let me know your position on this issue after you have had an opportunity to review the responses.

Sincerely,


Joseph Ianno, Jr.

Enclosure

cc: Tom Clare (via facsimile)
Mark Hansen (via facsimile)
Jack Scarola (via facsimile)

WPB#581064.1

16div-005421

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff,

CASE NO: CA 03-5045 AI

vs.

MORGAN STANLEY & CO., INC.,
Defendant.

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff,

CASE NO: CA 03-5165 AI

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant.

**MORGAN STANLEY'S ANSWERS AND OBJECTIONS
TO COLEMAN (PARENT) HOLDING INC.'S INTERROGATORIES**

Defendant Morgan Stanley & Co. Incorporated ("MS & Co.") and Plaintiff Morgan Stanley Senior Funding, Inc. ("MSSF") (collectively "Morgan Stanley"), by its attorneys, and pursuant to Florida Rules of Civil Procedure 1.280 and 1.340, provides the following answers and objections to Coleman (Parent) Holdings Inc.'s ("CPH") Interrogatories dated March 19, 2004.

GENERAL OBJECTIONS

1. Morgan Stanley objects to the Interrogatories to the extent that they seek information protected from disclosure by the attorney-client privilege, the attorney-work-product doctrine, the common interest doctrine, or any other applicable constitutional, statutory or common law privilege, doctrine, immunity or rule.

2. Morgan Stanley's answers and objections are based on a good faith investigation. Morgan Stanley reserves the right to amend and/or modify its answers and objections.

3. Morgan Stanley incorporates each of these General Objections into each of the Answers and Specific Objections set forth below, as though each General Objection is fully set forth therein.

ANSWERS AND SPECIFIC OBJECTIONS

INTERROGATORY NO. 1: Did any provision in the Settlement Agreement play any part in the filing of the New Morgan Stanley Litigation?

RESPONSE: Morgan Stanley objects to this Interrogatory on the grounds that it is vague and ambiguous. Specifically, the terms "any provision," "any part," "Settlement Agreement," and "New Morgan Stanley Litigation" are undefined and overbroad. For purposes of this Interrogatory, Morgan Stanley will construe the term "Settlement Agreement" to mean the document attached as Exhibit 1 to the Court's December 4, 2003 Order on Defendant's Motion to Compel Settlement Agreement, and the term "New Morgan Stanley Litigation" to mean the civil action styled as Morgan Stanley & Co., Inc. et al. v. Arthur Andersen LLP et al. (No. CL 04-2257 AA) (Miller, J.). By construing "New Morgan Stanley Litigation" in this manner, Morgan Stanley does not agree or concede that Civil Action No. CL 04-2257 AA, which arises out of the same transactions and occurrences as these consolidated actions, is a new or separate "litigation" as that term is used in the Protective Order.

Morgan Stanley objects to this Interrogatory on the ground that it seeks information covered by the attorney-client and attorney-work-product privileges. Specifically, the information sought by this Interrogatory — whether or not the Settlement Agreement played any role in the filing of the New Morgan Stanley Litigation — expressly seeks the mental

impressions and strategy of Morgan Stanley and its counsel, attorneys from the law firm of Kellogg, Huber, Hansen, Todd, and Evans P.L.L.C. ("KHHTB"). That information is squarely protected by the attorney work-product doctrine and, to the extent that it would reveal communications between Morgan Stanley and its counsel, protected by the attorney-client privilege. Accordingly, it is not discoverable.

Subject to and without waiving its general and specific objections, and without waiving any applicable privilege, Morgan Stanley provides the following background information regarding the claims asserted in the New Morgan Stanley Litigation.

The legal claims in the New Morgan Stanley Litigation were based on the total mix of information available to Morgan Stanley and KHHTB at the time it was filed. The Complaint in the New Morgan Stanley Litigation does not in any way quote, reference, attach, or describe the Settlement Agreement, or any other "Confidential" information subject to the Protective Order.

The allegations and legal claims made in Morgan Stanley's Complaint against Arthur Andersen arise entirely from conduct that occurred in 1996, 1997, and 1998, and are based exclusively on the fraud and other actionable misconduct committed by the Arthur Andersen defendants (collectively "Arthur Andersen") in connection with the preparation and certification of Sunbeam's audited financial statements.

Specifically, as alleged in the Complaint, MSSF — in direct reliance on certified financial statements audited by Arthur Andersen — provided a \$680 million loan to Sunbeam. MS & Co. — in direct reliance on those same certified financial statements — agreed to underwrite a \$750 million offering of convertible debentures issued by Sunbeam. As alleged in the Complaint (and as described below in response to Interrogatory No. 4), the plaintiffs in the New Morgan Stanley Litigation suffered hundreds of millions of dollars in damages as a result of

the fraud and other misconduct of the Arthur Andersen defendants. Morgan Stanley has pre-existing legal claims to recover those damages — and is entitled to recover those damages from the defendants in the New Morgan Stanley Litigation.

Each of plaintiffs in the New Morgan Stanley Litigation had a cause of action against the defendants in that action that predates the Settlement Agreement — and its subsequent production to Morgan Stanley in the above-captioned consolidated actions — by several years. Those pre-existing causes of action (each consisting of multiple claims) stem from the same 1998 financial transactions and historical events that are the subject of the above-captioned consolidated actions and have existed — independent of the Settlement Agreement between Arthur Andersen and CPH — ever since.

Starting in April 2001, Morgan Stanley's pre-existing claims against Arthur Andersen were subject to various tolling agreements between the defendants in that action and Sunbeam's lenders and underwriters. The tolling agreement expressly recognized that Sunbeam's lenders and underwriters, including Morgan Stanley Dean Witter & Co., Morgan Stanley Senior Funding, Inc., Bank of American, NA, and First Union National Bank, "and all of their respective successors, predecessors, affiliates, and assigns," had pre-existing claims against Arthur Andersen. The first such tolling agreement, which expressly recognizes Morgan Stanley's pre-existing claims against Arthur Andersen, was dated April 2001 — more than 18 months before the Settlement Agreement *even existed*, and more than 32 months before the Settlement Agreement was first produced to Morgan Stanley.

INTERROGATORY NO. 2: Identify all individuals, other than Kirkland & Ellis and Carlton Fields attorneys, who have received a copy of all or any portion of any information designated as "Confidential" including but not limited to the Settlement Agreement or any

information derived from it, whether in whole or in part, in words or in substance, directly or indirectly.

RESPONSE: Morgan Stanley objects to this Interrogatory on the grounds that it is vague and ambiguous. Specifically, the term "Settlement Agreement" is undefined and overbroad. For purposes of this Interrogatory, Morgan Stanley will construe the term "Settlement Agreement" to mean the document attached as Exhibit 1 to the Court's December 4, 2003 Order on Defendant's Motion to Compel Settlement Agreement.

Morgan Stanley objects to this Interrogatory on the ground that it is overbroad and improperly seeks information covered by the attorney-client and attorney-work-product privileges. Specifically, Morgan Stanley objects to providing information regarding the identities of the current Morgan Stanley employees who have had access to "Confidential" information in the course of assisting counsel in the defense and prosecution of these consolidated actions, and whose access to "Confidential" information is expressly permitted by the Protective Order. (See Protective Order ¶ 9(b)) Similarly, Morgan Stanley objects to providing information regarding the identities of the experts and/or consultants that it has retained to assist counsel in the defense and prosecution of these consolidated actions, and whose access to "Confidential" information is expressly permitted by the Protective Order. (See Protective Order ¶ 9(h)) Morgan Stanley also objects to providing information regarding the identities of persons who have had access to "Confidential" documents originating from Morgan Stanley's own files. (See Protective Order ¶ 12)

Subject to and without waiving its general and specific objections, the individuals identified in the response to Interrogatory Three have received information designated as "Confidential" as described therein.

INTERROGATORY NO. 3: Provide a detailed account setting forth when each individual identified in response to the preceding interrogatory received the confidential information, from whom they received it, how they received it, why it was provided to them, and any use they made of it.

RESPONSE: Morgan Stanley objects to this Interrogatory on the grounds that it is vague and ambiguous. Specifically, the term "Settlement Agreement" is undefined and overbroad. For purposes of this Interrogatories, Morgan Stanley will construe the term "Settlement Agreement" to mean the document attached as Exhibit 1 to the Court's December 4, 2003 Order on Defendant's Motion to Compel Settlement Agreement.

Morgan Stanley objects to this Interrogatory on the ground that it seeks information covered by the attorney-client and attorney-work-product privileges. Specifically, the information sought by this Interrogatory — "why" certain information was provided and how it may have been "used" — expressly seeks the mental impressions and strategy of Morgan Stanley and its counsel. That information is squarely protected by the attorney work-product doctrine and, to the extent that it would reveal communications between Morgan Stanley and its counsel, protected by the attorney-client privilege. Accordingly, it is not discoverable.

Morgan Stanley further objects to this Interrogatory on the ground that it is overbroad and improperly seeks information covered by the attorney-client and attorney-work-product privileges. Specifically, Morgan Stanley objects to providing information regarding the identities of the current Morgan Stanley employees who have had access to "Confidential" information in the course of assisting counsel in the defense and prosecution of these consolidated actions, and whose access to "Confidential" information is expressly permitted by the Protective Order. (See Protective Order ¶ 9(b)) Similarly, Morgan Stanley objects to

providing information regarding the identities of the experts and/or consultants that it has retained to assist counsel in the defense and prosecution of these consolidated actions, and whose access to "Confidential" information is expressly permitted by the Protective Order. (See Protective Order ¶ 9(h)) Morgan Stanley also objects to providing information regarding the identities of persons who have had access to "Confidential" documents originating from Morgan Stanley's own files. (See Protective Order ¶ 12)

Subject to and without waiving its general and specific objections, Morgan Stanley believes that the following people received or had access to documents and information designated as "Confidential."

Recipient	Date	With	Who Provided	How Received	Reason Provided	Use Made
Bills, Cariann	12/4/2003	Esquire Deposition Services	Markowski, Robert O'Connor, Chris	Provided to court reporter as deposition exhibit(s).	To facilitate transcription of deposition proceedings.	To transcribe record of deposition proceedings.
Boone, Shani	4/22/2004	MS	Johnson, Clark O'Connor, Chris	Provided to witness as deposition exhibit(s).	To aid in the conduct of the deposition.	To respond to deposition questions.
Bornstein, Lawrence	1/15/2004	AA	Markowski, Robert O'Connor, Chris Clare, Thomas DeBord, Kathryn	Provided to witness as deposition exhibit(s).	To aid in the conduct of the deposition.	To respond to deposition questions.
Boskind, Wendy	5/12/2004 5/25/2004	Esquire Deposition Services	Brown, Zhonette Bemis, Lawrence Brody, Michael	Provided to court reporter as deposition exhibit(s).	To facilitate transcription of deposition proceedings.	To transcribe record of deposition proceedings.
Bridge, Rachel	1/14/2004 1/15/2004	Esquire Deposition Services	Brody, Michael O'Connor, Chris Clare, Thomas DeBord, Kathryn Markowski, Robert	Provided to court reporter as deposition exhibit(s).	To facilitate transcription of deposition proceedings.	To transcribe record of deposition proceedings.
Brockelman, Mark	1/14/2004	AA	Brody, Michael O'Connor, Chris Clare, Thomas DeBord, Kathryn	Provided to witness as deposition exhibit(s).	To aid in the conduct of the deposition.	To respond to deposition questions.
Buhlman, Marc	12/4/2003 1/22/2004	Esquire Deposition Services	Markowski, Robert O'Connor, Chris Brody, Michael Prysak, Suzanne	Provided to videographer as deposition exhibit(s).	To facilitate recording of deposition proceedings.	To create video record of deposition proceedings.

Recipient	Date	With	Who Provided	How Received	Reason Provided	Use Made
Chang, Tyrone	1/8/2004	MS	Brody, Michael	Provided to witness as deposition exhibit(s).	To aid in the conduct of the deposition.	To respond to deposition questions.
Cohen, Steven	6/3/2004	Esquire Deposition Services	Johnson, Clark	Provided to court reporter as deposition exhibit(s).	To facilitate transcription of deposition proceedings.	To transcribe record of deposition proceedings.
Conway, Andrew	6/4/2004	MS	Johnson, Clark Baker, Stephen	Provided to witness as deposition exhibit(s).	To aid in the conduct of the deposition.	To respond to deposition questions.
Dean, Alan	6/3/2004	Davis	Johnson, Clark	Provided to witness as deposition exhibit(s).	To aid in the conduct of the deposition.	To respond to deposition questions.
Denkhaus, Donald	11/6/2003	AA	Johnson, Clark Bowler, Denise Brown, Zhonette	Provided to witness as deposition exhibit(s).	To aid in the conduct of the deposition.	To respond to deposition questions.
Disla, Victor	4/6/2004 6/3/2004	Esquire Deposition Services	Clare, Thomas Michael Johnson, Clark	Provided to videographer as deposition exhibit(s).	To facilitate recording of deposition proceedings.	To create video record of deposition proceedings.
Fasman, Steve	9/15/2003 1/21/2004	CPH, MAFCO	Brown, Zhonette Paule-Carres, Larissa	Provided to witness as deposition exhibit(s).	To aid in the conduct of the deposition.	To respond to deposition questions.
Felten, Pamela	4/27/2004	Esquire Deposition Services	Clare, Thomas	Provided to court reporter as deposition exhibit(s).	To facilitate transcription of deposition proceedings.	To transcribe record of deposition proceedings.
Fuchs, Alexandre	2/13/2004	MS	Johnson, Clark Bowler, Denise	Provided to witness as deposition exhibit(s).	To aid in the conduct of the deposition.	To respond to deposition questions.
Ginstling, Norman	4/6/2004	MAFCO	Clare, Thomas Occhuzzo, Michael	Provided to witness as deposition exhibit(s).	To aid in the conduct of the deposition.	To respond to deposition questions.
Granderson, Mark	4/2/2004 5/25/2004 6/8/2004	Esquire Deposition Services	Johnson, Clark Prysak, Suzanne Brody, Michael Bemis, Lawrence DeBord, Kathryn	Provided to videographer as deposition exhibit(s).	To facilitate recording of deposition proceedings.	To create video record of deposition proceedings.
Grant, Angela	4/2/2004	Esquire Deposition Services	Johnson, Clark Prysak, Suzanne	Provided to court reporter as deposition exhibit(s).	To facilitate transcription of deposition proceedings.	To transcribe record of deposition proceedings.
Greenberg, Linda	6/8/2004	Esquire Deposition Services	Bemis, Lawrence DeBord, Kathryn	Provided to court reporter as deposition exhibit(s).	To facilitate transcription of deposition proceedings.	To transcribe record of deposition proceedings.

Recipient	Date	With	Who Provided	How Received	Reason Provided	Use Made
Hart, Michael	5/19/2004	MS	Markowski, Robert O'Connor, Chris	Provided to witness as deposition exhibit(s).	To aid in the conduct of the deposition.	To respond to deposition questions.
Henry, David	2/12/2004 2/13/2004	Esquire Deposition Services	Johnson, Clark Bowler, Denise	Provided to court reporter as deposition exhibit(s).	To facilitate transcription of deposition proceedings.	To transcribe record of deposition proceedings.
Henry, John	9/15/2003	Esquire Deposition Services	Markowski, Robert O'Connor, Chris	Provided to court reporter as deposition exhibit(s).	To facilitate transcription of deposition proceedings.	To transcribe record of deposition proceedings.
Jakupciak, Robert	9/15/2003	Henderson Court Reporting	Brown, Zhonette	Provided to court reporter as deposition exhibit(s).	To facilitate transcription of deposition proceedings.	To transcribe record of deposition proceedings.
Janson, Paul	9/9/2003	Esquire Deposition Services	Johnson, Clark	Provided to videographer as deposition exhibit(s).	To facilitate recording of deposition proceedings.	To create video record of deposition proceedings.
Kingsley, Andrea	1/21/2004	Esquire Deposition Services	Paule-Carres, Larissa	Provided to court reporter as deposition exhibit(s).	To facilitate transcription of deposition proceedings.	To transcribe record of deposition proceedings.
Kistler, Vance	10/29/2003	AA	Johnson, Clark Clare, Thomas	Provided to witness as deposition exhibit(s).	To aid in the conduct of the deposition.	To respond to deposition questions.
Kitts, Robert	2/12/2004	MS	Johnson, Clark Bowler, Denise	Provided to witness as deposition exhibit(s).	To aid in the conduct of the deposition.	To respond to deposition questions.
Langer, Laurie	4/22/2004	Esquire Deposition Services	Johnson, Clark O'Connor, Chris	Provided to court reporter as deposition exhibit(s).	To facilitate transcription of deposition proceedings.	To transcribe record of deposition proceedings.
Lerman, Mitch	4/27/2004	Esquire Deposition Services	Clare, Thomas	Provided to videographer as deposition exhibit(s).	To facilitate recording of deposition proceedings.	To create video record of deposition proceedings.
Martinez, Ruben	11/14/2003 2/24/2004 5/12/2004 5/19/2004	Esquire Deposition Services	Markowski, Robert O'Connor, Chris Brown, Zhonette Bemis, Lawrence	Provided to videographer as deposition exhibit(s).	To facilitate recording of deposition proceedings.	To create video record of deposition proceedings.
Marut, Corinne	1/22/2004	Esquire Deposition Services	Brody, Michael Prysak, Suzanne	Provided to court reporter as deposition exhibit(s).	To facilitate transcription of deposition proceedings.	To transcribe record of deposition proceedings.
Mazzella, Pamela	2/24/2004	Esquire Deposition Services	Markowski, Robert O'Connor, Chris	Provided to court reporter as deposition exhibit(s).	To facilitate transcription of deposition proceedings.	To transcribe record of deposition proceedings.

Recipient	Date	With	Who Provided	How Received	Reason Provided	Use Made
McKay, Sherilynn	11/6/2003	Esquire Deposition Services	Johnson, Clark Bowler, Denise Brown, Zhonett	Provided to court reporter as deposition exhibit(s).	To facilitate transcription of deposition proceedings.	To transcribe record of deposition proceedings.
Miller, Matthew	1/8/2004	Esquire Deposition Services	Brody, Michael	Provided to videographer as deposition exhibit(s).	To facilitate recording of deposition proceedings.	To create video record of deposition proceedings.
Mitchell, Shapiro	9/9/2003	Esquire Deposition Services	Johnson, Clark	Provided to court reporter as deposition exhibit(s).	To facilitate transcription of deposition proceedings.	To transcribe record of deposition proceedings.
Montalvo, Alejandro	1/12/2004 1/13/2004	Esquire Deposition Services	Johnson, Clark Baker, Stephen Brown, Zhonette	Provided to videographer as deposition exhibit(s).	To facilitate recording of deposition proceedings.	To create video record of deposition proceedings.
Monthei, Fred	5/18/2004	Esquire Deposition Services	Brody, Michael	Provided to videographer as deposition exhibit(s).	To facilitate recording of deposition proceedings.	To create video record of deposition proceedings.
Monty, Fred	4/22/2004	Esquire Deposition Services	Johnson, Clark O'Connor, Chris	Provided to videographer as deposition exhibit(s).	To facilitate recording of deposition proceedings.	To create video record of deposition proceedings.
Nichols, Thomas	4/6/2004	Esquire Deposition Services	Clare, Thomas Occhuzzo, Michael	Provided to court reporter as deposition exhibit(s).	To facilitate transcription of deposition proceedings.	To transcribe record of deposition proceedings.
Olsen, Lee	11/24/2003	Esquire Deposition Services	Brody, Michael Brown, Zhonette	Provided to videographer as deposition exhibit(s).	To facilitate recording of deposition proceedings.	To create video record of deposition proceedings.
Page, Joe	4/27/2004	MAFCO	Clare, Thomas	Provided to witness as deposition exhibit(s).	To aid in the conduct of the deposition.	To respond to deposition questions.
Pastrana, Dennis	1/12/2004	AA	Johnson, Clark Baker, Stephen Brown, Zhonette	Provided to witness as deposition exhibit(s).	To aid in the conduct of the deposition.	To respond to deposition questions.
Peacock, Mary	5/18/2004	Esquire Deposition Services	Brody, Michael	Provided to court reporter as deposition exhibit(s).	To facilitate transcription of deposition proceedings.	To transcribe record of deposition proceedings.
Plotnick, John	9/9/2003	MS, MSSF	Johnson, Clark	Provided to witness as deposition exhibit(s).	To aid in the conduct of the deposition.	To respond to deposition questions.
Pruitt, William	1/13/2004	AA	Johnson, Clark Baker, Stephen Brown, Zhonette	Provided to witness as deposition exhibit(s).	To aid in the conduct of the deposition.	To respond to deposition questions.

Recipient	Date	With	Who Provided	How Received	Reason Provided	Use Made
Rafi, Lilly	4/2/2004	MS	Johnson, Clark Fryszak, Suzanne	Provided to witness as deposition exhibit(s).	To aid in the conduct of the deposition.	To respond to deposition questions.
Randerson, Mark	2/12/2004 2/13/2004	Esquire Deposition Services	Johnson, Clark Bowler, Denise	Provided to videographer as deposition exhibit(s).	To facilitate recording of deposition proceedings.	To create video record of deposition proceedings.
Reid, Ana	1/12/2004 1/13/2004	Esquire Deposition Services	Johnson, Clark Baker, Stephen Brown, Zhonette	Provided to court reporter as deposition exhibit(s).	To facilitate transcription of deposition proceedings.	To transcribe record of deposition proceedings.
Rivera, Marcello	9/15/2003 1/21/2004	Esquire Deposition Services	Markowski, Robert O'Connor, Chris Paule-Carres, Larissa	Provided to videographer as deposition exhibit(s).	To facilitate recording of deposition proceedings.	To create video record of deposition proceedings.
Rosen, Eitan	1/14/2004 1/15/2004	Esquire Deposition Services	Brody, Michael O'Connor, Chris Clare, Thomas DeBord, Kathryn Markowski, Robert	Provided to videographer as deposition exhibit(s).	To facilitate recording of deposition proceedings.	To create video record of deposition proceedings.
Sanborn, Rick	9/15/2003	Henderson Court Reporting	Brown, Zhonette	Provided to videographer as deposition exhibit(s).	To facilitate recording of deposition proceedings.	To create video record of deposition proceedings.
Saunders, Robert	2/10/2004	MS	Johnson, Clark	Provided to witness as deposition exhibit(s).	To aid in the conduct of the deposition.	To respond to deposition questions.
Savarie, Andrew	1/22/2004	MS	Brody, Michael Fryszak, Suzanne	Provided to witness as deposition exhibit(s).	To aid in the conduct of the deposition.	To respond to deposition questions.
Shapiro, Paul	6/8/2004	MAFCO	Bemis, Lawrence DeBord, Kathryn	Provided to witness as deposition exhibit(s).	To aid in the conduct of the deposition.	To respond to deposition questions.
Shaw, Robert	2/10/2004	Esquire Deposition Services	Johnson, Clark	Provided to court reporter as deposition exhibit(s).	To facilitate transcription of deposition proceedings.	To transcribe record of deposition proceedings.
Slovin, Joe	5/12/2004	MAFCO	Brown, Zhonette Bemis, Lawrence	Provided to witness as deposition exhibit(s).	To aid in the conduct of the deposition.	To respond to deposition questions.
Smith, Bram	2/24/2004	MS	Markowski, Robert O'Connor, Chris	Provided to witness as deposition exhibit(s).	To aid in the conduct of the deposition.	To respond to deposition questions.
Stack, Heather	5/25/2004	Davis	Brody, Michael	Provided to witness as deposition exhibit(s).	To aid in the conduct of the deposition.	To respond to deposition questions.

Recipient	Date	With	Who Provided	How Received	Reason Provided	Use Made
Stitt, Pamela	1/8/2004	Esquire Deposition Services	Brody, Michael	Provided to court reporter as deposition exhibit(s).	To facilitate transcription of deposition proceedings.	To transcribe record of deposition proceedings.
Stoltz-Lauric, Shauna	6/4/2004	Esquire Deposition Services	Johnson, Clark Baker, Stephen	Provided to court reporter as deposition exhibit(s).	To facilitate transcription of deposition proceedings.	To transcribe record of deposition proceedings.
Strong, William	12/4/2003	MS	Markowski, Robert O'Connor, Chris	Provided to witness as deposition exhibit(s).	To aid in the conduct of the deposition.	To respond to deposition questions.
Sullivan, Pamela	11/24/2003	Esquire Deposition Services	Brody, Michael Brown, Zhonette	Provided to court reporter as deposition exhibit(s).	To facilitate transcription of deposition proceedings.	To transcribe record of deposition proceedings.
Szabo, Kathy	10/29/2003	Esquire Deposition Services	Johnson, Clark Clare, Thomas	Provided to court reporter as deposition exhibit(s).	To facilitate transcription of deposition proceedings.	To transcribe record of deposition proceedings.
Takahashi, Tami	5/19/2004	Esquire Deposition Services	Markowski, Robert O'Connor, Chris	Provided to court reporter as deposition exhibit(s).	To facilitate transcription of deposition proceedings.	To transcribe record of deposition proceedings.
Tyree, John	9/15/2003 11/14/2003	MS	Markowski, Robert O'Connor, Chris	Provided to witness as deposition exhibit(s).	To aid in the conduct of the deposition.	To respond to deposition questions.
Watson, Jane	11/14/2003	Esquire Deposition Services	Markowski, Robert O'Connor, Chris	Provided to court reporter as deposition exhibit(s).	To facilitate transcription of deposition proceedings.	To transcribe record of deposition proceedings.
Webber, Josh	5/18/2004	MS	Brody, Michael	Provided to witness as deposition exhibit(s).	To aid in the conduct of the deposition.	To respond to deposition questions.
Yales, Scott	11/24/2003	Sunbeam	Brody, Michael Brown, Zhonette	Provided to witness as deposition exhibit(s).	To aid in the conduct of the deposition.	To respond to deposition questions.
Zarnetske, Kristen	6/4/2004	Esquire Deposition Services	Johnson, Clark Baker, Stephen	Provided to videographer as deposition exhibit(s).	To facilitate recording of deposition proceedings.	To create video record of deposition proceedings.

Morgan Stanley further states that, as expressly permitted by the Protective Order, some of the deposition witnesses identified above were shown documents during the preparation of their depositions, and that some of the documents shown to the deposition witnesses during the deposition preparation sessions may have included "Confidential" information. None of the

witnesses were permitted to retain copies of any of the documents shown to them during deposition preparation. No deposition witnesses were shown the Settlement Agreement, either during a deposition or during a deposition preparation session.

Answering further, Morgan Stanley states that, between February 26, 2004 and March 3, 2004, Kirkland & Ellis LLP provided KHTE, its co-counsel in the above-captioned consolidated actions, with a limited number of documents bearing a "Confidential" designation. Morgan Stanley is prepared — upon execution of an appropriate non-waiver stipulation meeting the requirements of Florida Rule of Judicial Administration 2.060(g) — to supplement its response to identify the documents received by KHTE.

Morgan Stanley had retained KHTE on February 23, 2004, as co-counsel with Kirkland & Ellis in the consolidated civil actions of Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc., (No. CA 03-5045 AD) (Maass, J.) and Morgan Stanley Senior Funding Inc. v. MacAndrews & Forbes Holdings, Inc. et al., (No. CA 03-5165 AD) (Maass, J.). Thereafter, as counsel to Morgan Stanley, KHTE filed the civil action styled Morgan Stanley & Co., Inc. et al. v. Arthur Andersen LLP et al. (No. CL 04-2257 AA) (Miller, J.). The four KHTE attorneys who represent Morgan Stanley in these matters (Mark C. Hansen, Michael K. Kellogg, James M. Webster, and Rebecca A. Beynon) all executed the confidentiality undertaking attached as Exhibit A to the Protective Order.

INTERROGATORY NO. 4: Detail the purported factual basis for Morgan Stanley & Co.'s inclusion as a plaintiff in the New Morgan Stanley Litigation, including specifically the nature and amount of any damages alleged to have been sustained by Morgan Stanley & Co.

RESPONSE: Morgan Stanley objects to this Interrogatory on the grounds that it is vague, ambiguous, overbroad, and irrelevant to the issues in the above-captioned consolidated actions. Subject to and without waiving any objections it might have in the New Morgan Stanley Litigation, MS & Co. will provide specific information regarding the amounts and types of damages it has suffered in connection with expert disclosures and discovery requests that are properly served in Morgan Stanley & Co., Inc. et al. v. Arthur Andersen LLP et al. (No. CL 04-2257 AA). MS & Co.'s expert disclosures and discovery responses will occur on dates agreed to by the parties or established by Judge Miller in that action.

Subject to and without waiving its general and specific objections, Morgan Stanley states, for purposes of this Interrogatory only, that MS & Co. suffered substantial monetary damages in connection with Sunbeam's offering of \$750 million Zero-Coupon Convertible Debentures. Subsequent to the offering, for which MS & Co. served as underwriter, MS & Co. held debentures to facilitate secondary market trading. As a result of the conduct described in the Complaint filed in Morgan Stanley & Co., Inc. et al. v. Arthur Andersen LLP et al. (No. CL 04-2257 AA), MS & Co. suffered damages when those debentures held by MS & Co. lost value.

In addition to the direct damages described generally in the preceding paragraph, MS & Co. reserves the right to seek damages for injuries to its reputation, goodwill, and business, in amounts to be determined at trial in Morgan Stanley & Co., Inc. et al. v. Arthur Andersen LLP et al. (No. CL 04-2257 AA). Further, MS & Co. has reserved the right to seek leave to amend its complaint pursuant to Fla. Stat. § 768.72 to assert claims for punitive damages in excess of \$1.2 billion as allowed by law.

As to objections:



Joseph Ianno, Jr. (Florida Bar No. 655351)

CARLTON FIELDS, P.A.

222 Lakeview Ave., Suite 1400

West Palm Beach, FL 33401

Telephone: (561) 659-7070

Facsimile: (561) 659-7368

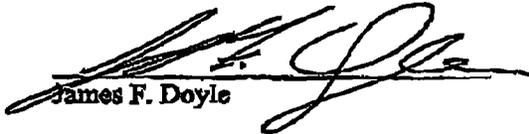
E-mail: jianno@carltonfields.com

Attorneys for:

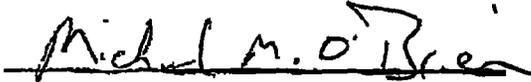
Morgan Stanley & Co. Incorporated

Morgan Stanley Senior Funding, Inc.

I, James F. Doyle, being duly sworn, depose and say that I have read the foregoing *Morgan Stanley's Answers And Objections To Coleman (Parent) Holding Inc.'s Interrogatories* and, to the best of my knowledge and belief, the response is true and correct.


James F. Doyle

Subscribed and sworn to before me
this 16th day of June 2004.



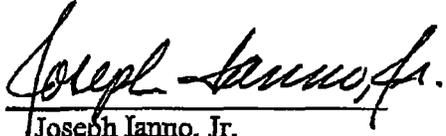
MICHAEL M. O'BRIEN
Notary Public, State of New York
No. 31-6003142
Qualified in New York County
Commission Expires Oct 19, 20 06



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this 16th day of June, 2004.

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
E-mail: jianno@carltonfields.com

BY: 
Joseph Ianno, Jr.
Florida Bar No. 655351

SERVICE LIST

Jack Scarola
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy
Michael Brody
JENNER & BLOCK, LLC
One IBM Plaza, Suite 400
Chicago, IL 60611

CARLTON FIELDS, P.A. ATTORNEYS AT LAW

ESPERANTÉ 222 LAKEVIEW AVENUE, SUITE 1400 WEST PALM BEACH, FLORIDA 33401-6149

MAILING ADDRESS P.O. BOX 150, WEST PALM BEACH, FL 33402-0150 TEL (561) 659-7070 FAX (561) 659-7368

FAX COVER SHEET

Table with 3 columns: Date, Phone Number, Fax Number. Rows include recipient details (Jack Scarola, Jerold Solovy/Michael Brody, Thomas Clare) and sender (Joyce Dillard, CLA).

Client/Matter No.: 47877/14092

Employee No.:

Total Number of Pages Being Transmitted, Including Cover Sheet: 3

Message: Coleman v. Morgan Stanley & Co., Inc. Morgan Stanley Senior Funding, Inc. v. Macandrews & Forbes Holdings, Inc. To follow please find a copy of Morgan Stanley's Notice of Serving Answers to CPH's March 19, 2004 Interrogatories.

Original to follow Via Regular Mail Original will Not be Sent Original will follow via Overnight Courier

The information contained in this facsimile message is attorney privileged and confidential information intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this communication is strictly prohibited.

IF THERE ARE ANY PROBLEMS OR COMPLICATIONS, PLEASE NOTIFY US IMMEDIATELY AT: (561) 659-7070

TELECOPIER OPERATOR:

WPB#566762.5

CARLTON FIELDS, P.A.

TAMPA ORLANDO TALLAHASSEE WEST PALM BEACH ST. PETERSBURG MIAMI

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT IN
AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO., INC.,

Defendant.

MORGAN STANLEY SENIOR FUNDING, INC.,

Plaintiff,

vs.

MACANDREWS & FORBES HOLDINGS, INC., CASE NO: CA 03-5165 AI

Defendant.

**MORGAN STANLEY & CO. INCORPORATED'S
NOTICE OF SERVING ANSWERS TO
COLEMAN (PARENT) HOLDINGS INC.'S INTERROGATORIES**

Morgan Stanley & Co. Incorporated, by and through its undersigned counsel, hereby gives notice that it has served its Answers and Objections to Coleman (Parent) Holdings Inc.'s March 19, 2004 Interrogatories on June 16, 2004.

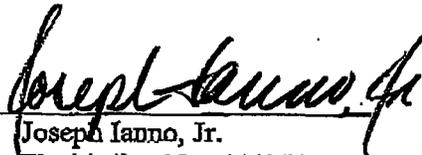
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the below service list by facsimile and Federal Express on this 17th day of June, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bernis (FL Bar No. 618349)
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

**Counsel for Morgan Stanley & Co.
Incorporated and Morgan Stanley
Senior Funding**

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
E-mail: jianno@carltonfields.com

BY: 
Joseph Ianno, Jr.
Florida Bar No. 655351

SERVICE LIST

Jack Scarola
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy
Michael Brody
JENNER & BLOCK, LLC
One IBM Plaza, Suite 400
Chicago, IL 60611

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,

Defendant(s).

CASE NO: CA 03-5165 AI

**MORGAN STANLEY SENIOR FUNDING,
INC.,**

Plaintiff(s),

vs.

**MACANDREWS & FORBES HOLDINGS,
INC.,**

Defendant(s).

AMENDED NOTICE OF VIDEOTAPED DEPOSITION

PLEASE TAKE NOTICE that Defendant Morgan Stanley & Company Incorporated and Plaintiff Morgan Stanley Senior Funding will take the videotaped deposition of Frank Gifford, pursuant to Florida Rules of Civil Procedure 1.280 and 1.310. The oral examination will take place beginning on July 22, 2004, at 10:00 a.m. and continue from day to day until completed at the offices of Kirkland & Ellis, LLP, 153 East 53rd Street, New York, New York, 10022. The deposition will be taken before a person authorized to administer oaths and recorded by stenographic and videographic means. The video operator will be Esquire Deposition Services of 216 E. 45th Street in New York, New York. The witness is instructed to bring all books, papers, and other things in his possession or under his control relevant to this lawsuit (and not previously produced in discovery) to the examination.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this 16th day of June, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar # 618349)
Thomas A. Clare
Zhonette M. Brown
Michael C. Occhuzzo
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

Joseph Ianno, Jr. (FL Bar # 655351)
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

BY: 

**Counsel for Morgan Stanley & Co.
Incorporated & Morgan Stanley Senior
Funding**

SERVICE LIST

Counsel for Coleman(Parent) Holdings & MacAndrews & Forbes

John Scarola

SEARCY, DENNEY, SCAROLA,

BARNHARDT & SHIPLEY, P.A.

2139 Palm Beach Lakes Boulevard

West Palm Beach, Florida 33409

Jerold S. Solovy

JENNER & BLOCK, LLC

One IBM Plaza, Suite 4400

Chicago, Illinois 60611

CARLTON FIELDS, P.A.

ATTORNEYS AT LAW

ESPERANTÉ
222 LAKEVIEW AVENUE, SUITE 1400
WEST PALM BEACH, FLORIDA 33401-6149

MAILING ADDRESS
P.O. BOX 150, WEST PALM BEACH, FL 33402-0150
TEL (561) 659-7070 FAX (561) 659-7368

FAX COVER SHEET

Date:	June 18, 2004	Phone Number	Fax Number
To:	Jack Scarola	(561) 686-6300	(561) 684-5816
	Jerold Solovy/Michael Brody	(312) 222-9350	(312) 840-7711
	Thomas Clare	(202) 879-5993	(202) 879-5200
	Rebecca Beynon/Mark Hansen	(202) 326-7900	(202) 326-7999
From:	Joyce Dillard, CLA	(561) 659-7070	(561) 659-7368

Client/Matter No.: 47877/14092

Employee No.:

Total Number of Pages Being Transmitted, Including Cover Sheet: 4

Message:
Coleman v. Morgan Stanley & Co., Inc.
Morgan Stanley Senior Funding, Inc. v. Macandrews & Forbes Holdings, Inc.

To follow please find a copy of Defendants' Notice of Filing Original Discovery Objections and Requests.

Original to follow Via Regular Mail Original will Not be Sent Original will follow via Overnight Courier

 The information contained in this facsimile message is attorney privileged and confidential information intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone (if long distance, please call collect) and return the original message to us at the above address via the U.S. Postal Service. Thank you.

IF THERE ARE ANY PROBLEMS OR COMPLICATIONS, PLEASE NOTIFY US IMMEDIATELY AT:
(561) 659-7070

TELECOPIER OPERATOR: _____

WPB#566762.3

CARLTON FIELDS, P.A.

TAMPA ORLANDO TALLAHASSEE WEST PALM BEACH ST. PETERSBURG MIAMI

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

v.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO., INC.,

Defendant.

MORGAN STANLEY SENIOR FUNDING, INC.,

Plaintiff,

v.

CASE NO: CA 03-5165 AI

MACANDREWS & FORBES HOLDINGS, INC.,

Defendant.

NOTICE OF FILING ORIGINAL DISCOVERY OBJECTIONS AND REQUESTS

Morgan Stanley & Co. Incorporated and Morgan Stanley Senior Funding, Inc. ("Morgan Stanley"), by and through their undersigned counsel, hereby give notice that it has filed the following original discovery objections and requests:

- 1. Morgan Stanley & Co. Incorporated's Response and Objections to Coleman (Parent) Holdings, Inc.'s Third Request for Production of Documents Served on January 2, 2004
- 2. Morgan Stanley & Co. Incorporated's Fourth Request for Production of Documents to Plaintiff Served on January 23, 2004
- 3. Morgan Stanley & Co. Incorporated's Second Set of Requests for Admission Served February 16, 2004

Coleman v. Morgan Stanley, Case No: CA 03-5045 AI
Morgan Stanley v. MacAndrews, Case No: CA 03-5045
Notice of Filing Original Discovery Objections and Requests

- 4. Morgan Stanley & Co. Incorporated's Sixth Request for Production of Documents to Plaintiff Served March 10, 2004
- 5. Morgan Stanley & Co. Incorporated's Request for Production of Documents Concerning Coleman (Parent) Holdings, Inc.'s Motion for Contempt Served May 28, 2004

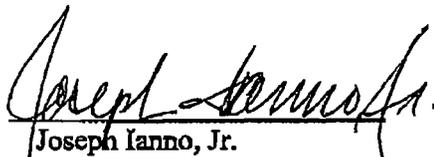
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the service list below by facsimile and Federal Express on this 18th day of June, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bernis (FL Bar No. 618349)
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
E-mail: jianno@carltonfields.com

Michael K. Kellogg
Mark C. Hansen
James M. Webster
Rebecca A. Beynon
**KELLOGG, HUBER, HANSEN,
TODD & EVANS P.L.L.C.**
Sumner Square
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
Telephone: (202) 326-7900
Facsimile: (202) 326-7999
(*Pro Hac Vice* Pending)

BY: 
Joseph Ianno, Jr.
Florida Bar No: 655351

*Counsel for Morgan Stanley & Co.
Incorporated and Morgan Stanley Senior
Funding*

Coleman v. Morgan Stanley, Case No: CA 03-5045 AI
Morgan Stanley v. MacAndrews, Case No: CA 03-5045
Notice of Filing Original Discovery Objections and Requests

SERVICE LIST

Jack Scarola
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy
Michael Brody
JENNER & BLOCK, LLC
One IBM Plaza, Suite 400
Chicago, IL 60611

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CASE NO: 03 CA-005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO. INC.,

Defendant.

**MORGAN STANLEY & CO. INCORPORATED'S RESPONSE AND
OBJECTIONS TO COLEMAN (PARENT) HOLDINGS, INC.'S
THIRD REQUEST FOR PRODUCTION OF DOCUMENTS**

Pursuant to Rules 1.280 and 1.350 of the Florida Rules of Civil Procedure, defendant Morgan Stanley & Co. Incorporated ("MS & Co.") hereby interposes the following objections and responses to plaintiff Coleman (Parent) Holdings, Inc.'s ("CPH") Third Request for Production of Documents ("Request for Production").

GENERAL OBJECTIONS

MS & Co. incorporates by reference its General Objections to Plaintiff's First and Second Requests for Production of Documents. MS & Co. also objects to Plaintiff's Third Request for Production as irrelevant to the issues in this litigation and not reasonably likely to lead to the discovery of admissible evidence.

SPECIFIC RESPONSE AND OBJECTIONS**DOCUMENT REQUEST NO. 1**

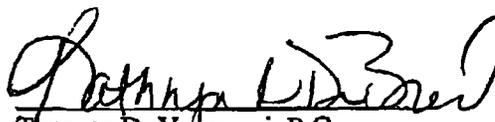
All materials and documents submitted to the United States Securities and Exchange Commission ("SEC"), received from the SEC, or reflecting communications with the SEC in connection with any investigation, inquiry, or examination concerning or relating to Morgan Stanley's policies and/or procedures with regard to the retention, storage, deletion, and/or back-up of electronic mail (emails), including but not limited to all documents and communications resulting in the Order, Findings, and Penalties entered by the SEC against Morgan Stanley on December 5, 2002 attached hereto as Exhibit A.

MS & Co.'s Response and Objections:

MS & Co. incorporates by reference its General Objections as if fully set forth herein. MS & Co. further states that on December 24, 2003, the United States District Court for the Southern District of New York (Sheindlin, J.) issued an opinion and order in the *In re Initial Public Offering Securities Litigation* addressing certain issues (previously described by counsel for MS & Co. during discovery hearings in this case) regarding the production of certain submissions to the SEC in discovery in civil litigation. Subject to and without waiving its General Objections, MS & Co. will produce the requested submission within five (5) business days of this Response.

Dated: January 2, 2004

Respectfully Submitted,



Thomas D. Yarrucci, P.C.

Thomas A. Clare

Zhonette M. Brown

Ryan P. Phair

Kathryn R. DeBord

KIRKLAND & ELLIS LLP

655 15th Street, N.W. 12th Floor

Washington, D.C. 20005

Telephone: (202) 879-5000

Facsimile: (202) 879-5200

*Attorneys for Defendant
Morgan Stanley & Co. Incorporated*

CERTIFICATE OF SERVICE

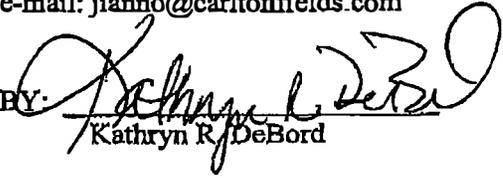
I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by e-mail and facsimile to all counsel of record on the attached service list on this 2nd day of January, 2004.

Thomas D. Yannucci, P.C.
Thomas A. Clare
Zhonette M. Brown
Ryan P. Phair
Kathryn R. DeBord
KIRKLAND & ELLIS LLP
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

Counsel for Defendant
Morgan Stanley & Co. Incorporated

Joseph Ianno, Jr. (FL Bar # 655351)
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

BY:


Kathryn R. DeBord

SERVICE LIST

John Scarola SEARCY, DENNEY, SCAROLA, BARNHARDT & SHIPLEY, P.A. 2139 Palm Beach Lakes Boulevard West Palm Beach, Florida 33409	Counsel for Plaintiff
Michael Brody JENNER & BLOCK, LLC One IBM Plaza Suite 4400 Chicago, Illinois 60611	Counsel for Plaintiff

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CASE NO: 03 CA-005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

**MORGAN STANLEY & CO. INCORPORATED'S FOURTH REQUEST
FOR PRODUCTION OF DOCUMENTS TO PLAINTIFF**

Pursuant to Rules 1.280 and 1.350 of the Florida Rules of Civil Procedure, Morgan Stanley & Co. Incorporated ("MS & Co.") requests that plaintiff produce the documents and things referred to in the following specific requests. The specific requests are preceded by Instructions and Definitions which shall govern the specific requests. Documents and things responsive to these requests should be produced to counsel for Morgan Stanley & Co. Incorporated at the law firm of Carlton Fields, P.A., 222 Lakeview Avenue, Suite 1200, West Palm Beach, FL 33401, within the time required by Florida Rule of Civil Procedure 1.350(b) or as otherwise agreed to by the parties or specified by the Court.

INSTRUCTIONS

1. The connectives "and" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery request all responses that might otherwise be construed to be outside of its scope.

2. The use of the singular form of any word includes the plural and vice versa.

3. Documents requested and to be produced include all Documents in the possession, custody or control of the plaintiff including, but not limited to, any agents, employees, contractors, attorneys, and consultants or experts working for or in favor of the plaintiff or its attorneys.

4. If, in responding to this Request for Production, you encounter any ambiguities when construing a request or definition, the response shall set forth the matter deemed ambiguous and the construction used in responding.

5. Whenever in this Request you are asked to identify or produce a document which is deemed by you to be properly withheld from production for inspection or copying under claim of privilege (including, but not limited to, the work product doctrine), provide a privilege log that includes: the type of document, the general subject matter of the document, the date of the document, and such other information as is sufficient to identify the document, including, where appropriate, the author, addressee, custodian, and any other recipient of the document, and where not apparent, the relationship of the author, the addressee, custodian, and any other recipient to each other, in a manner that, without revealing the information claimed to be protected, will enable this party to assess the applicability of the privilege protection claimed by you. The privilege log shall be provided within the time set forth in the agreed-upon order.

6. If production of any requested document(s) is objected to on the grounds that production is unduly burdensome, describe the burden or expense of the proposed discovery.

7. When a document contains both privileged and non-privileged material, the non-privileged material must be disclosed to the fullest extent possible without disclosing the

privileged material. If a privilege is asserted with regard to part of the material contained in a document, the party claiming the privilege must clearly indicate the portions as to which the privilege is claimed. When a document has been redacted or altered in any fashion, identify as to each document the reason for the redaction or alteration. Any redaction must be clearly visible on the redacted document.

8. If a responsive document exists but is no longer in your possession, custody, or control, state: its date, author(s), recipient(s), subject matter, what disposition was made of the document, and the person or entity, if any, now in possession, custody, or control of the document. If a responsive document has been destroyed, identify the date of destruction, the person who destroyed the document and the person who directed that the document be destroyed and state the reason for its destruction.

9. Produce all of the documents responsive to the numbered requests below either as they are kept in the usual course of business or by custodian.

10. If any of these documents cannot be produced in full, you are requested to produce them to the fullest extent possible, specifying clearly the reasons for your inability to produce the remainder and stating any information, knowledge, or belief you have concerning the unproduced portion.

11. If the requested documents are maintained in a file, the file folder is included in the request for production of those documents.

12. The terms "any," "all" and "each" shall be construed to mean "any," "all," or "each".

13. The term "including" shall be construed to mean "including but not limited to."

14. The present tense shall be construed to include the past and future tenses.
15. The specificity of any request herein shall not be construed to limit the generality or reach of any other request herein.
16. Unless otherwise specified, this Request calls for the production of documents created, delivered, distributed, sent, received, accessed, or modified up to the date of your response to this Request.

DEFINITIONS

1. The term "concerning" means relating to, referring to, describing, evidencing, or constituting.
2. "Coleman" means Coleman Company, Inc.
3. The "Coleman Transaction" means Sunbeam's acquisition of Coleman Company, Inc. from CPH and all related communications, agreements, and transactions, including the February 27, 1998 Agreements and the March 30, 1998 closing.
4. "CPH" means Coleman (Parent) Holdings Inc. and any of its officers, directors, former or present employees, representatives and agents.
5. "CSFB" means Credit Suisse First Boston LLC and any of its officers, directors, former or present employees, representatives and agents.
6. "Document" means any recording in any tangible form of any information, whether handwritten, typed, printed, stored on computer disks, tapes, or databases, or otherwise reproduced. "Document" or "documents" also includes electronic documents whether stored on servers or hard drives, e-mail, backup tapes, voicemail and video and audio recordings. A draft or non-identical copy is a separate document within the meaning of this term.

7. "MAFCO" means MacAndrews & Forbes Holdings, Inc. and any of its officers, directors, former or present employees, representatives and agents.

8. "MS & Co." means Morgan Stanley & Co. Incorporated and any of its officers, directors, former or present employees, representatives and agents.

9. The term "person" is defined as any natural person or any business, legal or governmental entity or association.

10. The terms "plaintiff" and "defendant" as well as a party's full or abbreviated name or pronoun referring to a party mean the party and, where applicable, its officers, directors, employees, partners, corporate parent, subsidiaries or affiliates. This definition is not intended to impose a discovery obligation on any person who is not a party to the litigation.

11. The term "relating to" means concerning, evidencing, referring to, or constituting.

12. "Sunbeam" means Sunbeam Corporation or any of its subsidiaries, divisions, predecessors, successors, present and former employees, representatives, and agents.

DOCUMENTS TO BE PRODUCED

1. All documents concerning any debt issued by Coleman or any parent or affiliate company where such debt was secured by the assets or stock of Coleman and/or any direct or indirect parent of Coleman, including but not limited to documents concerning the satisfaction, projected satisfaction, income required to satisfy or accounting treatment of such debt.

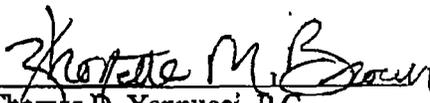
2. All resumes and documents concerning biographical information, including but not limited to educational and professional background and experience, of the

individuals identified under the MAFCO and Coleman headings in CPH's Response to MS & Co.'s First Set of Interrogatories, Interrogatory No. 1.

3. All documents concerning any threatened or filed lawsuit against or by MAFCO, CPH or affiliate related or referring to Sunbeam's acquisition of Coleman.

4. All documents concerning payments of any kind made by MAFCO, CPH or any affiliate to CSFB in 1996, 1997, and 1998.

Dated: January 23, 2004


 Thomas D. Yannucci, P.C.
 Thomas A. Clare
 Zhonette M. Brown
 Larissa Paule-Carres
 Kathryn R. DeBord
 Ryan P. Phair
 Michael C. Occhuizzo
KIRKLAND & ELLIS LLP
 655 15th Street, N.W., Suite 1200
 Washington, D.C. 20005
 Telephone: (202) 879-5000
 Facsimile: (202) 879-5200

Joseph Ianno, Jr. (FL Bar # 655351)
CARLTON FIELDS, P.A.
 222 Lakeview Ave., Suite 1400
 West Palm Beach, FL 33401
 Telephone: (561) 659-7070
 Facsimile: (561) 659-7368

Counsel for Defendant
Morgan Stanley & Co. Incorporated

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by facsimile and e-mail to all counsel of record on the attached service list on this 23rd day of January, 2004.

Thomas D. Yannucci, P.C.
Thomas A. Clare
Zhonette M. Brown
Larissa Paule-Carres
Kathryn R. DeBord
Ryan P. Phair
Michael C. Occhuzzo
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

Joseph Ianno, Jr. (FL Bar # 655351)
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

BY: 
Zhonette M. Brown

**Counsel for Defendant
Morgan Stanley & Co. Incorporated**

SERVICE LIST

<p>John Scarola SEARCY, DENNEY, SCAROLA, BARNHARDT & SHIPLEY, P.A. 2139 Palm Beach Lakes Boulevard West Palm Beach, Florida 33409</p>	<p>Counsel for Plaintiff</p>
<p>Jerold S. Solovy JENNER & BLOCK, LLC One IBM Plaza Suite 4400 Chicago, Illinois 60611</p>	<p>Counsel for Plaintiff</p>

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CASE NO: 03 CA-005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

**MORGAN STANLEY & CO. INCORPORATED'S SECOND SET
OF REQUESTS FOR ADMISSION**

Pursuant to Florida Rule of Civil Procedure 1.370, Defendant Morgan Stanley & Co. Incorporated ("Morgan Stanley") submits this second set of requests for admission to Plaintiff Coleman (Parent) Holdings, Inc. ("CPH"). The specific requests are preceded by Instructions and Definitions which shall govern the specific requests. Morgan Stanley requests that Plaintiff answer, under oath, the following requests for admission in accordance with the Florida Rules of Civil Procedure, or within such shorter period as may be agreed by counsel, and submit them in writing to counsel for Morgan Stanley at the offices of Kirkland & Ellis LLP, 655 Fifteenth Street, NW, Suite 1200, Washington, DC 20005.

INSTRUCTIONS

1. The connectives "and" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery request all responses that might otherwise be construed to be outside of its scope.

2. The use of the singular form of any word includes the plural and vice versa.

3. If you cannot admit or deny a request for admission after making a reasonable inquiry and the information known or readily attainable by CPH is insufficient to enable CPH to admit or deny fully, so state and admit or deny to the extent possible, specifying your inability to answer the remainder; stating whatever information or knowledge you have concerning the unanswered portion; and detailing what you did in attempting to secure the information.

4. The terms "any," "all," and "each" shall be construed to mean "any," "all," or "each".

5. The term "including" shall be construed to mean "including but not limited to."

6. The present tense shall be construed to include the past and future tenses.

DEFINITIONS

1. "Advisors" means financial advisors, legal advisors, accountants, consultants, and any other third-party advising or assisting CPH, Coleman, or MAFCO (or any affiliate thereof) in any way with the Coleman Transaction.

2. "Coleman" means Coleman Company, Inc.

3. The "Coleman Transaction" means Sunbeam's acquisition of Coleman Company, Inc. from CPH and all related communications, agreements, and transactions, including the February 27, 1998 Agreements and the March 30, 1998 closing.

4. "CPH" means Coleman (Parent) Holdings Inc. and any of its officers, directors, former or present employees, representatives, and Advisors.

5. "February 27, 1998 Agreements" means (a) the Agreement and Plan of Merger dated February 27, 1998 between Sunbeam Corp., Laser Acquisition Corp., CLN Holdings, Inc., and Coleman (Parent) Holdings Inc.; (b) the Agreement and Plan of Merger dated February 27, 1998 between Sunbeam Corp., Camper Acquisition Corp., and The Coleman Company, Inc.; and (c) all schedules, exhibits, and documents related to those Agreements.

6. "MAFCO" means MacAndrews & Forbes Holdings, Inc. and any of its officers, directors, former or present employees, representatives and agents, and Advisors.

7. The term "person" is defined as any natural person or any business, legal or governmental entity or association.

8. "Sunbeam" means Sunbeam Corporation or any of its subsidiaries, divisions, predecessors, successors, present and former employees, representatives, and agents.

9. The term "Accounting Irregularities" refers to the accounting practices engaged in by Sunbeam during 1996, 1997, and the first quarter of 1998 that led to the restatement of Sunbeam's financial statements in October of 1998.

REQUESTS FOR ADMISSION

1. CPH retained Credit Suisse First Boston as its exclusive financial advisor for the Coleman Transaction.

2. Coleman retained Credit Suisse First Boston as its exclusive financial advisor for the Coleman Transaction.

3. MAFCO retained Credit Suisse First Boston as its exclusive financial advisor for the Coleman Transaction.

4. Credit Suisse First Boston had the ability in 1997 and 1998 to conduct a due-diligence investigation sufficient to detect Accounting Irregularities at Sunbeam.

5. Credit Suisse First Boston had the ability in 1997 and 1998 to conduct a due-diligence investigation sufficient to detect the falsity of the misrepresentations alleged in the Complaint.

6. CPH retained Wachtell, Lipton, Rosen & Katz as its legal advisor for the Coleman Transaction.

7. Coleman retained Wachtell, Lipton, Rosen & Katz as its legal advisor for the Coleman Transaction.

8. MAFCO retained Wachtell, Lipton, Rosen & Katz as its legal advisor in the Coleman Transaction.

9. Wachtell, Lipton, Rosen & Katz had the ability in 1997 and 1998 to conduct a due-diligence investigation sufficient to detect Accounting Irregularities at Sunbeam.

10. Wachtell, Lipton, Rosen & Katz had the ability in 1997 and 1998 to conduct a due-diligence investigation sufficient to detect the falsity of the misrepresentations alleged in the Complaint.

11. Any reasonable due-diligence investigation by Credit Suisse First Boston in the first quarter of 1998 would have been sufficient to detect Accounting Irregularities at Sunbeam.

12. Any reasonable due-diligence investigation by Credit Suisse First Boston in the first quarter of 1998 would have been sufficient to detect the falsity of the misrepresentations alleged in the Complaint.

13. Any reasonable due-diligence investigation by Wachtell, Lipton, Rosen & Katz in the first quarter of 1998 would have been sufficient to detect Accounting Irregularities at Sunbeam.

14. Any reasonable due-diligence investigation by Wachtell, Lipton, Rosen & Katz in the first quarter of 1998 would have been sufficient to detect the falsity of the misrepresentations alleged in the Complaint.

15. CPH did not ask Credit Suisse First Boston to perform a due-diligence investigation into Sunbeam in the first quarter of 1998.

16. CPH did not ask Wachtell, Lipton, Rosen & Katz to perform a due-diligence investigation into Sunbeam in the first quarter of 1998.

17. Coleman did not ask Credit Suisse First Boston to perform a due-diligence investigation into Sunbeam in the first quarter of 1998.

18. Coleman did not ask Wachtell, Lipton, Rosen & Katz to perform a due-diligence investigation into Sunbeam in the first quarter of 1998.

19. MAFCO did not ask Credit Suisse First Boston to perform a due-diligence investigation into Sunbeam in the first quarter of 1998.

20. MAFCO did not ask Wachtell, Lipton, Rosen & Katz to perform a due-diligence investigation into Sunbeam in the first quarter of 1998.

21. Credit Suisse First Boston did not conduct a due-diligence investigation into Sunbeam in the first quarter of 1998.

22. Wachtell, Lipton, Rosen & Katz did not conduct a due-diligence investigation into Sunbeam in the first quarter of 1998.

23. Neither CPH nor its attorneys are in possession of the letter alleged to have been faxed to Morgan Stanley from Arthur Andersen on March 17, 1998, as described in paragraph 56 in CPH's Complaint.

Dated: February 16, 2004



Thomas D. Yannucci, P.C.

Lawrence P. Bemis

Thomas A. Clare

KIRKLAND & ELLIS LLP

655 15th Street, N.W. – Suite 1200

Washington, D.C. 20005

Telephone: (202) 879-5000

Facsimile: (202) 879-5200

Joseph Ianno, Jr. (FL Bar # 655351)

CARLTON FIELDS, P.A.

222 Lakeview Ave., Suite 1400

West Palm Beach, FL 33401

Telephone: (561) 659-7070

Facsimile: (561) 659-7368

Counsel for Defendant

Morgan Stanley & Co. Incorporated

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by facsimile and e-mail to all counsel of record on the attached service list on this 16th day of February, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis
Thomas A. Clare
KIRKLAND & ELLIS LLP
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

**Counsel for Defendant
Morgan Stanley & Co. Incorporated**

Joseph Ianno, Jr. (FL Bar # 655351)
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

BY:



SERVICE LIST

<p>John Scarola SEARCY, DENNEY, SCAROLA, BARNHARDT & SHIPLEY, P.A. 2139 Palm Beach Lakes Boulevard West Palm Beach, Florida 33409</p>	<p>Counsel for Plaintiff</p>
<p>Michael Brody JENNER & BLOCK, LLC One IBM Plaza Suite 4400 Chicago, Illinois 60611</p>	<p>Counsel for Plaintiff</p>

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

CASE NO: CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

**MORGAN STANLEY & CO. INCORPORATED'S SIXTH REQUEST
FOR PRODUCTION OF DOCUMENTS TO PLAINTIFF**

Pursuant to Rules 1.280 and 1.350 of the Florida Rules of Civil Procedure, Morgan Stanley & Co. Incorporated ("MS & Co.") requests that plaintiff produce the documents and things referred to in the following specific requests. The specific requests are preceded by Instructions and Definitions which shall govern the specific requests. Documents and things responsive to these requests should be produced to counsel for Morgan Stanley & Co. Incorporated at the law firm of Carlton Fields, P.A., 222 Lakeview Avenue, Suite 1200, West Palm Beach, FL 33401, within the time required by Florida Rule of Civil Procedure 1.350(b) or as otherwise agreed to by the parties or specified by the Court.

INSTRUCTIONS

1. The connectives "and" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery request all responses that might otherwise be construed to be outside of its scope.

2. The use of the singular form of any word includes the plural and vice versa.

3. Documents requested and to be produced include all Documents in the possession, custody or control of the plaintiff including, but not limited to, any agents, employees, contractors, attorneys, and consultants or experts working for or in favor of the plaintiff or its attorneys.

4. If, in responding to this Request for Production, you encounter any ambiguities when construing a request or definition, the response shall set forth the matter deemed ambiguous and the construction used in responding.

5. Whenever in this Request you are asked to identify or produce a document which is deemed by you to be properly withheld from production for inspection or copying under claim of privilege (including, but not limited to, the work product doctrine), provide a privilege log that includes: the type of document, the general subject matter of the document, the date of the document, and such other information as is sufficient to identify the document, including, where appropriate, the author, addressee, custodian, and any other recipient of the document, and where not apparent, the relationship of the author, the addressee, custodian, and any other recipient to each other, in a manner that, without revealing the information claimed to be protected, will enable this party to assess the applicability of the privilege protection claimed by you. The privilege log shall be provided within the time set forth in the agreed-upon order.

6. If production of any requested document(s) is objected to on the grounds that production is unduly burdensome, describe the burden or expense of the proposed discovery.

7. When a document contains both privileged and non-privileged material, the non-privileged material must be disclosed to the fullest extent possible without disclosing the privileged material. If a privilege is asserted with regard to part of the material contained in a document, the party claiming the privilege must clearly indicate the portions as to which the privilege is claimed. When a document has been redacted or altered in any fashion, identify as to each document the reason for the redaction or alteration. Any redaction must be clearly visible on the redacted document.

8. If a responsive document exists but is no longer in your possession, custody, or control, state: its date, author(s), recipient(s), subject matter, what disposition was made of the document, and the person or entity, if any, now in possession, custody, or control of the document. If a responsive document has been destroyed, identify the date of destruction, the person who destroyed the document and the person who directed that the document be destroyed and state the reason for its destruction.

9. Produce all of the documents responsive to the numbered requests below either as they are kept in the usual course of business or by custodian.

10. If any of these documents cannot be produced in full, you are requested to produce them to the fullest extent possible, specifying clearly the reasons for your inability to produce the remainder and stating any information, knowledge, or belief you have concerning the unproduced portion.

11. If the requested documents are maintained in a file, the file folder is included in the request for production of those documents.

12. The terms "any," "all" and "each" shall be construed to mean "any," "all," or "each".
13. The term "including" shall be construed to mean "including but not limited to."
14. The present tense shall be construed to include the past and future tenses.
15. The specificity of any request herein shall not be construed to limit the generality or reach of any other request herein.
16. Unless otherwise specified, this Request calls for the production of documents created, delivered, distributed, sent, received, accessed, or modified up to the date of your response to this Request.

DEFINITIONS

1. "Aames Financial Corporation" means Aames Financial Corporation and any of its officers, directors, former or present employees, representatives and agents.
2. "Albert Dunlap" means Albert Dunlap and any of Albert Dunlap's present and former representatives and agents.
3. "Bushnell" means Bushnell and any of its officers, directors, former or present employees, representatives and agents.
4. The term "concerning" means relating to, referring to, describing, evidencing, or constituting.
5. "Coleman" means Coleman Company, Inc.
6. The "Coleman Transaction" means Sunbeam's acquisition of Coleman Company, Inc. from CPH and all related communications, agreements, and transactions, including the February 27, 1998 Agreements and the March 30, 1998 closing.

7. "CPH" means Coleman (Parent) Holdings Inc. and any of its officers, directors, former or present employees, representatives and agents.

8. "Day International" means Day International, Inc. and any of its officers, directors, former or present employees, representatives and agents.

9. "Document" means any recording in any tangible form of any information, whether handwritten, typed, printed, stored on computer disks, tapes, or databases, or otherwise reproduced. "Document" or "documents" also includes electronic documents whether stored on servers or hard drives, e-mail, backup tapes, voicemail and video and audio recordings. A draft or non-identical copy is a separate document within the meaning of this term.

10. "Golden State Bancorp" means Golden State Bancorp and any of its officers, directors, former or present employees, representatives and agents.

11. "Gucci" means Gucci Group N.V. and any of its officers, directors, former or present employees, representatives and agents.

12. "Kimberly-Clark" means Kimberly-Clark Corporation and any of its officers, directors, former or present employees, representatives and agents.

13. "MAFCO" means MacAndrews & Forbes Holdings, Inc. and any of its officers, directors, former or present employees, representatives and agents.

14. "MS & Co." means Morgan Stanley & Co. Incorporated and any of its officers, directors, former or present employees, representatives and agents.

15. "Panavision" means Panavision, Inc. and any of its officers, directors, former or present employees, representatives and agents.

16. The term "person" is defined as any natural person or any business, legal or governmental entity or association.

17. The terms "plaintiff" and "defendant" as well as a party's full or abbreviated name or pronoun referring to a party mean the party and, where applicable, its officers, directors, employees, partners, corporate parent, subsidiaries or affiliates. This definition is not intended to impose a discovery obligation on any person who is not a party to the litigation.

18. The term "relating to" means concerning, evidencing, referring to, or constituting.

19. "Revlon Escrow Corporation" means Revlon Escrow Corporation or any of its subsidiaries, divisions, predecessors, successors, present and former employees, representatives, and agents.

20. "Scott Paper" means Scott Paper Company or any of its subsidiaries, divisions, predecessors, successors, present and former employees, representatives, and agents.

21. "Staten Island" means the entity or person referred to on CPH2000642.

22. "Sunbeam" means Sunbeam Corporation or any of its subsidiaries, divisions, predecessors, successors, present and former employees, representatives, and agents.

23. "Timber REITs" mean Timber Real Estate Investment Trusts.

DOCUMENTS TO BE PRODUCED

1. All documents that evidence the recognition of revenue or loss by CPH, MAFCO or any subsidiary or affiliate company, and the tax treatment or consequences thereof from the sale of Coleman common stock to Sunbeam, including any recognition of revenue concerning the settlement with Sunbeam.

- 2. All documents concerning Scott Paper, including internal or third party analysis of its financial performance and acquisition by Kimberly-Clark.
- 3. All documents concerning Albert Dunlap, including documents referring to his professional employment history.
- 4. All documents concerning the issuance of private placement notes by Revlon Escrow Corporation in February 1998.
- 5. All documents concerning any transaction contemplated or consummated between October 1, 1997 and March 30, 1998 by or among CPH, MAFCO, or any subsidiary or affiliate regarding Aames Financial Corporation, Bushnell, Day International, Golden State Bancorp, Gucci, Panavision, Timber REITs, or any other transaction contemplated or consummated between October 1, 1997 and March 30, 1998 where the value of consideration offered or received was expected to, or did, exceed \$5 million.

Dated: March 10, 2004

Thomas D. Yannucci, P.C.
 Lawrence P. Bemis (FL Bar # 618349)
 Thomas A. Clare
 Zhonette M. Brown
 Michael C. Occhuzzo
KIRKLAND & ELLIS LLP
 655 15th Street, N.W., Suite 1200
 Washington, D.C. 20005
 Telephone: (202) 879-5000
 Facsimile: (202) 879-5200



 Joseph Ianno, Jr. (FL Bar # 655351)
CARLTON FIELDS, P.A.
 222 Lakeview Ave., Suite 1400
 West Palm Beach, FL 33401
 Telephone: (561) 659-7070
 Facsimile: (561) 659-7368

**Counsel for Morgan Stanley & Co.
 Incorporated & Morgan Stanley Senior
 Funding**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by facsimile and e-mail to all counsel of record on the attached service list on this 10th day of March, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar # 618349)
Thomas A. Clare
Zhonette M. Brown
Michael C. Occhuzzo
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

Joseph Ianno, Jr. (FL Bar # 655351)
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

BY: 

**Counsel for Morgan Stanley & Co.
Incorporated & Morgan Stanley Senior
Funding**

SERVICE LIST

Counsel for Coleman(Parent) Holdings & MacAndrews & Forbes

John Scarola
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33409

Jerold S. Solovy
JENNER & BLOCK, LLC
One IBM Plaza, Suite 4400
Chicago, Illinois 60611

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

CASE NO: CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

**MORGAN STANLEY & CO. INCORPORATED'S REQUEST FOR
PRODUCTION OF DOCUMENTS CONCERNING COLEMAN
(PARENT) HOLDINGS, INC.'S MOTION FOR CONTEMPT**

Pursuant to Rules 1.280 and 1.350 of the Florida Rules of Civil Procedure, Morgan Stanley & Co. Incorporated ("MS & Co.") and Morgan Stanley Senior Funding, Inc. ("MSSF) request that Coleman (Parent) Holdings, Inc. ("CPH") and MacAndrews & Forbes Holdings, Inc. ("MAFCO") produce the documents and things referred to in the following specific requests. The specific requests are preceded by Instructions and Definitions which shall govern the specific requests. Documents and things responsive to these requests should be produced at the law firm of Carlton Fields, P.A., 222 Lakeview Avenue, Suite 1200, West Palm Beach, FL 33401, within the time required by Florida Rule of Civil Procedure 1.350(b) or as otherwise agreed to by the parties or specified by the Court.

INSTRUCTIONS

1. The connectives "and" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery request all responses that might otherwise be construed to be outside of its scope.

2. The use of the singular form of any word includes the plural and vice versa.

3. Documents requested and to be produced include all Documents in the possession, custody or control of the plaintiff including, but not limited to, any agents, employees, contractors, attorneys, and consultants or experts working for or in favor of the plaintiff or its attorneys.

4. If, in responding to this Request for Production, you encounter any ambiguities when construing a request or definition, the response shall set forth the matter deemed ambiguous and the construction used in responding.

5. Whenever in this Request you are asked to identify or produce a document which is deemed by you to be properly withheld from production for inspection or copying under claim of privilege (including, but not limited to, the work product doctrine), provide a privilege log that includes: the type of document, the general subject matter of the document, the date of the document, and such other information as is sufficient to identify the document, including, where appropriate, the author, addressee, custodian, and any other recipient of the document, and where not apparent, the relationship of the author, the addressee, custodian, and any other recipient to each other, in a manner that, without revealing the information claimed to be protected, will enable this party to assess the applicability of the privilege protection claimed by you. The privilege log shall be provided within the time set forth in the agreed-upon order.

6. If production of any requested document(s) is objected to on the grounds that production is unduly burdensome, describe the burden or expense of the proposed discovery.

7. When a document contains both privileged and non-privileged material, the non-privileged material must be disclosed to the fullest extent possible without disclosing the privileged material. If a privilege is asserted with regard to part of the material contained in a document, the party claiming the privilege must clearly indicate the portions as to which the privilege is claimed. When a document has been redacted or altered in any fashion, identify as to each document the reason for the redaction or alteration. Any redaction must be clearly visible on the redacted document.

8. If a responsive document exists but is no longer in your possession, custody, or control, state: its date, author(s), recipient(s), subject matter, what disposition was made of the document, and the person or entity, if any, now in possession, custody, or control of the document. If a responsive document has been destroyed, identify the date of destruction, the person who destroyed the document and the person who directed that the document be destroyed and state the reason for its destruction.

9. Produce all of the documents responsive to the numbered requests below either as they are kept in the usual course of business or by custodian.

10. If any of these documents cannot be produced in full, you are requested to produce them to the fullest extent possible, specifying clearly the reasons for your inability to produce the remainder and stating any information, knowledge, or belief you have concerning the unproduced portion.

11. If the requested documents are maintained in a file, the file folder is included in the request for production of those documents.

12. The terms "any," "all" and "each" shall be construed to mean "any," "all," or "each".
13. The term "including" shall be construed to mean "including but not limited to."
14. The present tense shall be construed to include the past and future tenses.
15. The specificity of any request herein shall not be construed to limit the generality or reach of any other request herein.
16. Unless otherwise specified, these requests call for the production of documents created, delivered, distributed, sent, received, accessed, or modified for the period beginning January 1, 1996 to the date of your response to these requests.

DEFINITIONS

1. "Arthur Andersen" shall mean Arthur Andersen LLP and any of its current or former partners, officers, directors, employees, representatives and agents.
2. "Concerning" shall mean relating to, referring to, describing, evidencing, or constituting.
3. "Communication" shall mean any exchange or transmittal of information by any means of transmission, including, without limitation, face-to-face conversation, mail, overnight delivery, Internet, telephone, electronic mail, or facsimile.
4. "Confidentiality Order" shall mean the Stipulated Confidentiality Order entered by the Court in the above-captioned matter on July 31, 2003.
5. "CPH" shall mean Coleman (Parent) Holdings Inc. and any of its current or former officers, directors, employees, representatives and agents.

6. "Curtis Mallet" shall mean the law firm of Curtis, Mallet-Prevost, Colt & Mosle, LLP and any of its current or former partners, associates, former or present employees, representatives and agents.

7. "Document" shall mean any recording in any tangible form of any information, whether handwritten, typed, printed, stored on computer disks, tapes, or databases, or otherwise reproduced. "Document" or "documents" also includes electronic documents whether stored on servers or hard drives, e-mail, backup tapes, voicemail and video and audio recordings. A draft or non-identical copy is a separate document within the meaning of this term.

8. "Indemnification Agreement" shall mean any agreement described or encompassed by Fla. R. Civ. P. 1.280.

9. "Jenner & Block" shall mean the law firm of Jenner & Block LLC and any of its partners, associates, former or present employees, representatives and agents.

10. "KHTE" shall mean the law firm of Kellogg, Huber, Hansen, Todd & Evans P.L.L.C., and any of its current or former partners, associates, employees, representatives and agents.

11. "Kirkland & Ellis" shall mean the law firm of Kirkland & Ellis LLP and any of its current or former partners, associates, employees, representatives and agents.

12. "MAFCO" shall mean MacAndrews & Forbes Holdings, Inc. and any of its current or former officers, directors, employees, representatives and agents.

13. "Morgan Stanley" shall mean MS & Co., MSSF, and Morgan Stanley, collectively, and any of their current or former officers, directors, employees, representatives and agents.

14. "Motion for Contempt" shall mean the Motion for a Rule to Show Cause originally filed by CPH on March 12, 2004 and subsequently deemed by the Court to be a motion for contempt.

15. "MS & Co." shall mean Morgan Stanley & Co. Incorporated and any of its current or former officers, directors, employees, representatives and agents.

16. "MSSF" shall mean Morgan Stanley Senior Funding, Inc. and any of its current or former officers, directors, employees, representatives and agents.

17. "Person" shall mean any natural person or any business, legal or governmental entity or association.

18. The terms "plaintiff" and "defendant" as well as a party's full or abbreviated name or pronoun referring to a party shall mean the party and, where applicable, its officers, directors, employees, partners, corporate parent, subsidiaries or affiliates. This definition is not intended to impose a discovery obligation on any person who is not a party to the litigation.

19. "Relating to" shall mean concerning, evidencing, referring to, or constituting.

20. "Searcy Denny" shall mean the law firm of Searcy, Denny, Scarola, Barnhardt & Shipley, P.A., and any of its current or former partners, associates, employees, representatives and agents.

21. "Settlement Agreement" shall mean the October 19, 2002 settlement agreement between CPH and Arthur Andersen, attached as Exhibit 1 to the Court's December 4, 2003 Order.

22. "Wachovia Bank" shall mean Wachovia Bank, N.A. and any of its current or former officers, directors, employees, representatives and agents.

23. The terms "you" or "your" shall mean "CPH" and "MAFCO" as defined in this section.

24. "Your counsel" shall mean the law firms of Jenner & Block, LLC and Searcy, Denny, Scarola, Barnhardt & Shipley, P.A., and any of their current or former partners, associates, employees, representatives and agents.

DOCUMENTS TO BE PRODUCED

1. All documents that you contend support the allegations in the Motion for Contempt.

2. All documents that you contend support the allegation that Morgan Stanley or its attorneys violated the Confidentiality Order.

3. All documents that you contend support the allegation that Morgan Stanley or its attorneys disclosed the Settlement Agreement to attorneys from KHTE in violation of the Confidentiality Order.

4. All documents that you contend support the allegation that Morgan Stanley or its attorneys disclosed the Settlement Agreement to Wachovia Bank.

5. All documents that you contend support the allegation that Morgan Stanley or its attorneys used information derived from the Settlement Agreement in violation of the Confidentiality Order.

6. All documents reflecting or concerning any communications since May 8, 2003 between or among any of CPH, MAFCO, Arthur Andersen, Jenner & Block, Searcy Denny, and Curtis Mallet regarding the Settlement Agreement.

7. All documents reflecting or concerning any communications between or among CPH, MAFCO, Arthur Andersen, Jenner & Block, Searcy Denny, and Curtis Mallet regarding the investigation and decision to file the Motion for Contempt.

8. All documents reflecting or concerning any communications between or among CPH, MAFCO, Arthur Andersen, Jenner & Block, Searcy Denny, and Curtis Mallet regarding CPH's May 5, 2004 Motion to Allow Arthur Andersen LLP Access to Confidential Information.

9. All documents reflecting or concerning any communications between or among CPH, MAFCO, Arthur Andersen, Jenner & Block, Searcy Denny, and Curtis Mallet regarding Curtis Mallet's letters to Kirkland & Ellis, dated April 22, 2004, April 26, 2004, and May 20, 2004.

10. All documents in your possession on March 12, 2004, or in the possession of your counsel on March 12, 2004, referring or relating to any tolling agreement between Morgan Stanley and Arthur Andersen.

11. All documents concerning any investigation undertaken by you or your counsel prior to the filing of the Motion for Contempt that attempted to discover facts concerning the allegations made in that motion.

12. All documents concerning any Indemnification Agreements between or among CPH, MAFCO, Arthur Andersen, Jenner & Block, Searcy Denny, and Curtis Mallet that relate in any way to claims arising out of the transactions and occurrences that are the subject matter of the above-captioned consolidated actions or Morgan Stanley & Co. Incorporated, et al. v. Arthur Andersen LLP, et al., Civil Action No. 2004 CA 002257 (Miller, J.).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by facsimile and Federal Express to all counsel of record on the attached service list on this 28th day of May, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar # 618349)
Thomas A. Clare
Zhonette M. Brown
Michael C. Occhuizzo
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

Joseph Ianno, Jr. (FL Bar # 655351)
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

BY: Thomas A. Clare

**Counsel for Morgan Stanley & Co.
Incorporated & Morgan Stanley Senior
Funding**

SERVICE LIST

Counsel for Coleman(Parent) Holdings & MacAndrews & Forbes

John Scarola
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33409

Jerold S. Solovy
JENNER & BLOCK, LLC
One IBM Plaza, Suite 4400
Chicago, Illinois 60611

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,

Defendant(s).

CASE NO: CA 03-5165 AI

**MORGAN STANLEY SENIOR FUNDING,
INC.,**

Plaintiff(s),

vs.

**MACANDREWS & FORBES HOLDINGS,
INC.,**

Defendant(s).

AMENDED NOTICE OF VIDEOTAPED DEPOSITION

PLEASE TAKE NOTICE that Morgan Stanley & Company Incorporated and Morgan Stanley Senior Funding, Inc. will take the videotaped deposition of Barry Schwartz, pursuant to Florida Rules of Civil Procedure 1.280 and 1.310. The oral examination will take place beginning on June 25, 2004, at 9:30 a.m. and continue from day to day until completed at the offices of Kirkland & Ellis, LLP, 153 East 53rd Street, New York, New York, 10022. The deposition will be taken before a person authorized to administer oaths and recorded by stenographic and videographic means. The video operator will be Esquire Deposition Services of 216 E. 45th Street in New York, New York. The witness is instructed to bring all books, papers, and other things in his possession or under his control relevant to this lawsuit (and not previously produced in discovery) to the examination.

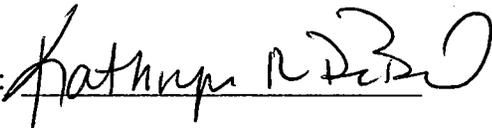
Dated: June 21, 2004

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar # 618349)
Thomas A. Clare
Zhonette M. Brown
Michael C. Occhuizzo
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

Michael K. Kellogg
Mark C. Hansen
James M. Webster
Rebecca A. Beynon
**KELLOGG, HUBER, HANSEN,
TODD & EVANS P.L.L.C.**
Sumner Square
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
Telephone: (202) 326-7900
Facsimile: (202) 326-7999
(*Pro Hac Vice* Pending)

**Counsel for Morgan Stanley & Co.
Incorporated & Morgan Stanley Senior
Funding**

Joseph Ianno, Jr. (FL Bar # 655351)
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

BY: 

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and federal express on this 21st day of June, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar # 618349)
Thomas A. Clare
Zhonette M. Brown
Michael C. Occhuizzo
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

Joseph Ianno, Jr. (FL Bar # 655351)
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

BY: 

Michael K. Kellogg
Mark C. Hansen
James M. Webster
Rebecca A. Beynon
**KELLOGG, HUBER, HANSEN,
TODD & EVANS P.L.L.C.**
Sumner Square
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
Telephone: (202) 326-7900
Facsimile: (202) 326-7999
(*Pro Hac Vice* Pending)

**Counsel for Morgan Stanley & Co.
Incorporated & Morgan Stanley Senior
Funding**

SERVICE LIST

Counsel for Coleman(Parent) Holdings & MacAndrews & Forbes

John Scarola

**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**

2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33409

Jerold S. Solovy

JENNER & BLOCK, LLC

One IBM Plaza, Suite 4400
Chicago, Illinois 60611

KIRKLAND & ELLIS LLP

AND AFFILIATED PARTNERSHIPS

655 Fifteenth Street, N.W.
Washington, D.C. 20005

Thomas A. Clare
To Call Writer Directly:
(202) 879-5993
tclare@kirkland.com

202 879-5000
www.kirkland.com

Facsimile:
202 879-5200
Dir. Fax: (202) 879-5200

June 23, 2004

By Facsimile

Michael Brody, Esq.
Jenner & Block, LLC
One IBM Plaza
Chicago, IL 60611-7603

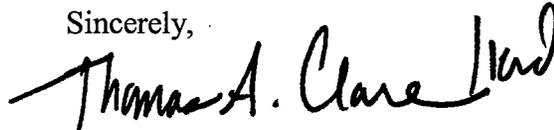
**Re: *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc.*
*MSSF v. MacAndrews & Forbes Holdings Inc. et al.***

Dear Mike:

I write in response to your June 21, 2004 letters regarding Morgan Stanley's May 14, 2004 e-mail production and the forthcoming production of Bloomberg e-mails. With regard to the May 14, 2004 production, a privilege log is enclosed, along with the certification of compliance described by the April 16, 2004 Agreed Order.

Regarding the third-party e-mails, Morgan Stanley received the e-mails from Bloomberg on June 14, 2004. Pursuant to the Court's Order, all non-privileged responsive e-mails will be produced on Friday, July 9, 2004.

Sincerely,



Thomas A. Clare

cc: Joseph Ianno, Jr., Esq. (by facsimile)
John Scarola, Esq. (by facsimile)
Mark Hansen, Esq. (by facsimile)

Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co. Incorporated
Morgan Stanley Senior Funding v. MacAndrews & Forbes Holdings Inc., et al.

June 23, 2004 Privilege Log

Priv No.	Date	Author(s)	Recipient(s)	Priv	Privilege Description	Redact Bates
436	6/22/1998	McFadden, Meanmarie (MS)	Corpcommww (MS); Smith, Bram (MS); Strong, William (MS); Zuckert, Michael (MS)	AC	E-mail to corporate communications reflecting legal advice provided by in-house counsel.	
437	6/22/1998	McFadden, Meanmarie (MS)	Corpcommww (MS); Smith, Bram (MS); Strong, William (MS); Zuckert, Michael (MS)	AC	E-mail to corporate communications reflecting legal advice provided by in-house counsel.	

CERTIFICATION OF COMPLIANCE

I, Arthur Riel, hereby certify that Morgan Stanley & Co. and Morgan Stanley Senior Funding, Inc. complied with Paragraphs 1 and 2 of the April 16 Agreed Order on Coleman (Parent) Holdings Inc.'s Motion to Compel Concerning E-mails and Other Electronic Documents. The date of the backup utilized for each employee or former employee for whom e-mail was produced was January, 2000. The responsiveness and privilege review described in Paragraph 2 of the April 16, 2004 Agreed Order was conducted by counsel from Kirkland & Ellis LLP. It is my understanding that counsel from Kirkland & Ellis LLP produced all nonprivileged responsive documents on May 14, 2004 in compliance with the Court's order, and that a privilege log was subsequently provided.

Dated this 23 day of June, 2004.

By:



Arthur Riel

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.

_____ /

MORGAN STANLEY SENIOR FUNDING, CASE NO. CA 03-5165 AI INC.,

Plaintiff,

vs.

MACANDREWS & FORBES HOLDINGS
INC., et al.,

Defendant.

_____ /

**JOINT SUBMISSION OF THE PARTIES FOR
JULY 2, 2004 CASE MANAGEMENT CONFERENCE**

Pursuant to the Court's Order of February 24, 2004, the parties in the above-referenced action hereby submit the following Joint Submission in advance of the July 2, 2004 Case Management Conference.

I. Agreed-Upon Statement Of Background And Procedural History

The following is the parties' agreed-upon summary of the two companion cases now pending before this Court, which have been consolidated for trial.

**A. Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co. Incorporated.
(Case No. 03 CA-005045 AI)**

Background. This case arises out of an acquisition transaction that was negotiated and consummated in late 1997 and early 1998, in which Coleman (Parent) Holdings Inc. ("CPH")

sold its 82% interest in The Coleman Company, Inc. ("Coleman") to Sunbeam Corporation ("Sunbeam"). Morgan Stanley & Co., Inc. ("Morgan Stanley") served as financial advisor to Sunbeam for parts of the acquisition transaction and served as the lead underwriter for a \$750,000,000 debenture offering that Sunbeam used to finance the acquisition.

CPH's Complaint alleges claims arising from this transaction for fraudulent misrepresentation, negligent misrepresentation, aiding and abetting fraud, and conspiracy. CPH's Complaint has sought damages of at least \$485 million and has reserved the right to seek punitive damages. Morgan Stanley denies the material allegations in CPH's Complaint and also denies CPH's entitlement to damages.

Procedural History. CPH filed its Complaint on May 8, 2003 (the "CPH Action"). Morgan Stanley filed its Answer on June 23, 2003 and, on June 25, 2003 filed its Motion to Dismiss Pursuant To Florida Rule of Civil Procedure 1.061 Or, In the Alternative, For Judgment On The Pleadings. The Court held a hearing on these motions on December 12, 2003. On December 15, 2003, the Court issued an Order denying both motions. On January 9, 2004, Morgan Stanley timely filed a Notice of Appeal regarding the denial of its motion to dismiss. See Florida Rule of Appellate Procedure 9.130(a)(3)(A) (providing for interlocutory appellate review of non-final orders "concerning venue"). On February 20, 2004, the Court consolidated CPH's action against Morgan Stanley with Morgan Stanley Senior Funding's action against CPH and MacAndrews & Forbes Holdings Inc.

B. Morgan Stanley Senior Funding, Inc. v. MacAndrews & Forbes Holdings Inc., et al. (Case No. 03 CA-005165 AI)

Background. This action arises out of the same series of financial transactions as the CPH Action. In 1998, Morgan Stanley Senior Funding, Inc. ("MSSF") and other lenders entered into a credit agreement with Sunbeam under which MSSF agreed to provide senior secured

financing to Sunbeam in connection with Sunbeam's acquisition of Coleman and two smaller companies.

MSSF's Complaint alleges that, in the course of Sunbeam's acquisition of Coleman, Defendants MacAndrews & Forbes Holdings Inc. ("MAFCO") and CPH provided false information to MSSF about the "synergies" that Sunbeam would achieve from the combination of Sunbeam and Coleman. MSSF alleges that Defendant's inflated synergy projections caused Sunbeam to pay a higher price to acquire Coleman and consequently caused Sunbeam's lenders (including MSSF) to make larger loans to finance the acquisition. MSSF's Complaint alleges that it suffered hundreds of millions of dollars in damages when Sunbeam declared bankruptcy in February 2001 and defaulted on acquisition-related loans. MSSF has alleged claims for fraud and negligent misrepresentation, and has reserved the right to seek punitive damages. CPH denies the material allegations in MSSF's Complaint and also denies MSSF's entitlement to damages.

Procedural History. MSSF filed its Complaint against MAFCO and CPH on May 12, 2003 (the "MSSF Action"). The MSSF Action was initially assigned to Division AG. Because the MSSF Action and the CPH Action involve the same series of financial transactions and arise from a common set of operative facts, the parties agreed that the two cases are companion cases under Local Rule 2.009 and requested a transfer to Division AI, where the first-filed, lower numbered CPH Action was assigned. The motion to transfer was granted on June 9, 2003. Defendants CPH and MAFCO filed their Answer on June 25, 2003. On February 20, 2004, the Court consolidated MSSF's action against CPH and MAFCO with CPH's action against Morgan Stanley.

II. Report On Discovery In The Two Cases

A. Morgan Stanley's And MSSF's Position On Discovery

1. Merits Discovery

CPH, MAFCO, Morgan Stanley, and MSSF are actively pursuing written and deposition discovery in these consolidated actions. The parties have exchanged hundreds of thousands of pages of documents, have served and answered multiple sets of interrogatories and requests for admission, and have deposed more than two dozen party and non-party witnesses. Discovery in both cases is ongoing.

At the February 20, 2004 Case Management Conference, counsel for Morgan Stanley informed the Court that — according to counsel's best estimates — approximately seventy (70) additional depositions would need to be completed before the close of fact discovery. Thereafter, on or about March 11, the parties agreed to take alternate weeks for taking and defending depositions.

Since the February 20 Case Management Conference, seventeen (17) additional depositions have been completed. Seven (7) more depositions have been scheduled and are confirmed for the weeks and months ahead. Morgan Stanley has seven (7) outstanding requests for deposition dates of CPH and MAFCO witnesses — and has attempted to secure deposition dates for several additional non-party witnesses.

In their Position on Discovery (below), CPH and MAFCO correctly point out that Morgan Stanley did not begin taking depositions in these cases until several months after CPH. This is hardly surprising since — unlike CPH and MAFCO — Morgan Stanley has not been a party to any of the prior Sunbeam-related cases. Given their five-year “head start” in collecting and reviewing relevant documents, interviewing witnesses, taking depositions, and litigating Sunbeam-related issues, it should come as no surprise that CPH was prepared to begin taking

depositions earlier than Morgan Stanley.¹ Moreover, Morgan Stanley's Motion to Dismiss and Motion for Judgment on the Pleadings was not decided until the middle December 2003. If granted, this motion either would have eliminated the need for costly and expensive depositions or, at a minimum, would have substantially altered the manner in which deposition discovery is conducted in these cases, since the overwhelming majority of party and non-party witnesses in these cases live and work in New York.

The parties have experienced considerable difficulty scheduling depositions in light of scheduling conflicts for counsel on both sides and the location of the witnesses, almost all of whom are located outside of Florida. CPH and MAFCO have offered witnesses for depositions outside of Florida on dates previously established by the Court for Case Management Conferences and have, on several occasions, confirmed (and then canceled or postponed) depositions previously set to go forward.

For example, CPH and MAFCO twice postponed the deposition of Barry Schwartz (now completed), postponed the deposition of Bruce Slovin (now completed), and postponed the deposition of James Robinson, for various reasons ranging from "unavoidable conflicts" to "medical emergencies." Another CPH / MAFCO witness, Lawrence Jones, was only available on a day that had been previously scheduled by the Court for a Case Management Conference, and is now expected to be unavailable for an unspecified amount of time due to upcoming surgery. Similar scheduling considerations have required Morgan Stanley to postpone the depositions of other deposition witnesses, many of whom no longer work for Morgan Stanley and are no longer under its control.

¹ Morgan Stanley did not obtain access to the overwhelming majority of documents in this case until September 2003, when CPH began to produce hundreds of thousands of documents to Morgan Stanley, including more than four hundred (400+) deposition transcripts from prior Sunbeam-related matters.

Even when depositions have been successfully scheduled, the parties have experienced difficulties beyond their control that have prevented the deposition from going forward. When Mr. Schwartz's deposition was finally scheduled and confirmed for June 18, for example, the deposition needed to be postponed (for a third time) because Morgan Stanley's attorneys were unable to make it to New York for the deposition due to inclement weather and cancelled flights.

Morgan Stanley is of course willing to accommodate the legitimate scheduling considerations of witnesses and their counsel — but these schedule conflicts and difficulties have prevented the parties from proceeding with depositions at the pace contemplated during the February 20 Case Management Conference.

Finally, the parties have had to divert resources away from deposition discovery to address collateral issues unrelated to the merits of these consolidated actions. These issues are discussed in the next section.

2. Non-Merits Discovery

On March 12, CPH filed its Motion For A Rule To Show Cause, which was later converted by the Court into a motion for contempt. On May 14, 2004, the Court converted CPH's Motion for a Rule To Show Cause into a motion to contempt. On March 19, CPH served its first set of interrogatories relating to that motion. Pursuant to an agreement between the parties Morgan Stanley responded to those Interrogatories on June 16, 2004. Morgan Stanley and CPH are in the process of finalizing an agreed-upon order memorializing a stipulation that will facilitate Morgan Stanley supplementing its responses.

On May 28, CPH served its second set of interrogatories relating to its motion for contempt —together with a set document requests relating to that motion. On that same date, Morgan Stanley served its own interrogatories and requests for documents on CPH relating to CPH's motion for contempt. The parties' responses and objections to this "second wave" of non-merits discovery are due June 28, 2004.

CPH's contempt motion, together with CPH's related Motion to Allow Arthur Andersen Access to Confidential Transcript (filed May 5, 2004) and other motions relating to the confidentiality of documents and pleadings, have required extensive additional briefing, necessitated attendance of counsel at multiple specially-set hearings in Florida, and the preparation of non-merits discovery requests and responses. CPH's objections also have prevented attorneys from Kellogg, Huber, Hansen, Todd, and Evans P.L.L.C. ("KHHTE") from participating as co-counsel and assisting with discovery. These satellite issues have prevented the parties from conducting depositions at the pace originally contemplated during the February 20, 2004 Case Management Conference.

It is apparent that CPH and MAFCO, acting in concert with Arthur Andersen, are using the non-merits discovery served in these cases to manipulate the proceedings in these consolidated actions and Civil Action No. 04-22577 AA, now pending before Judge Miller. In pleadings filed with Judge Miller, Arthur Andersen has moved for sanctions against Morgan Stanley, sought to disqualify Morgan Stanley's attorneys in that action, and moved to stay all discovery in that action. Simultaneously, CPH (who has professed a "unity of interest" with Arthur Andersen) has sought, through the non-merits discovery served in these consolidated actions, to discover detailed information regarding Morgan Stanley's damages claims in the Civil Action No. 04-22577 AA. CPH seeks this information despite the fact that Arthur Andersen is not a party in these consolidated actions; Kirkland & Ellis LLP does not represent Morgan Stanley in Civil Action No. 04-22577 AA; and CPH has objected to Morgan Stanley's chosen counsel (KHHTE) from appearing in these consolidated actions.

The satellite issues and gamesmanship described in this section have prevented the parties from conducting depositions at the pace originally contemplated during the February 20, 2004 Case Management Conference.

B. CPH'S And MAFCO's Position On Discovery

CPH and MAFCO stipulate only to the first paragraph of Section II.A above. CPH and MAFCO object to the remaining statements concerning discovery as incomplete, misleading, and self-serving on the part of Morgan Stanley and MSSF, because it is quite clear that this case is on track to be tried as scheduled in January 2005. CPH and MAFCO expressed these objections to Morgan Stanley and MSSF, and requested that a neutral statement of the discovery status be substituted, but Morgan Stanley and MSSF refused that request. Consequently, CPH and MAFCO provide the account of discovery that follows.

1. Deposition Discovery

As of June 25, 2004, 33 depositions have been taken. Of those depositions, 26 have been taken by CPH and MAFCO, and 7 have been taken by Morgan Stanley and MSSF:

WITNESS	AFFILIATION AT RELEVANT TIME	DATE	TAKEN BY
Boone, Shani	Morgan Stanley	04/22/2004	CPH/MAFCO
Chan, Tyrone	Morgan Stanley	01/08/2004	CPH/MAFCO
Conway, Andrew	Morgan Stanley	06/04/2004	CPH/MAFCO
Fuchs, Alexandre	Morgan Stanley	02/13/2004	CPH/MAFCO
Hart, Michael	MSSF	05/19/2004	CPH/MAFCO
Kitts, Robert	Morgan Stanley	02/12/2004	CPH/MAFCO
MS/MSSF (by John Plotnick)	Morgan Stanley	09/09/2003	CPH/MAFCO
MS E-mail Rep.(Robert Saunders)	Morgan Stanley	02/10/2004	CPH/MAFCO
Rafii, Lily	Morgan Stanley	04/02/2004	CPH/MAFCO
Savarie, Andrew	Morgan Stanley	01/22/2004	CPH/MAFCO
Smith, R. Bram	MSSF	02/24/2004	CPH/MAFCO
Stron, William	Morgan Stanley	12/04/2003	CPH/MAFCO
Tyree, John	Morgan Stanley	09/15/2003	CPH/MAFCO
Tyree, John	Morgan Stanley	11/14/2003	CPH/MAFCO
Webster, Joshua	Morgan Stanley	05/18/2004	CPH/MAFCO
Yoo, Gene	Morgan Stanley	06/16/2004	CPH/MAFCO
THIRD PARTIES			
Bornstein, Lawrence	Arthur Andersen	01/15/2004	CPH/MAFCO
Brockelman, Mark	Arthur Andersen	01/14/2004	CPH/MAFCO

Denkh us, Donald	Arthur Andersen	11/06/2003	CPH/MAFCO
Kistler Vance	Arthur Andersen	10/29/2003	CPH/MAFCO
Pastrai a, Dennis	Arthur Andersen	01/12/2004	CPH/MAFCO
Pruitt, William	Arthur Andersen	01/13/2004	CPH/MAFCO
Dean, Alan	Davis Polk & Wardwell	06/03/2004	CPH/MAFCO
Lurie, James	Davis Polk & Wardwell	06/18/2004	CPH/MAFCO
Stack, Heather	Davis Polk & Wardwell	05/25/2004	CPH/MAFCO
Yales, Scott	Sunbeam	11/24/2003	CPH/MAFCO
Drapk n, Donald	MAFCO	06/24/2004	Morgan Stanley
Ginstl ng, Norman	MAFCO	04/06/2004	Morgan Stanley
MAFC O (by Steven Fasman)	MAFCO	09/15/2003 01/21/2004	Morgan Stanley
Page, oseph	MAFCO	04/27/2004	Morgan Stanley
Schwartz, Barry	MAFCO	06/25/2004	Morgan Stanley
Shapiro, Paul	MAFCO	06/08/2004	Morgan Stanley
Slovir, Bruce	MAFCO	05/12/2004	Morgan Stanley

In addition, both sides have requested deposition dates for certain individuals, and expressed interest in deposing still other individuals. Although Morgan Stanley and MSSF make it sound as if scheduling issues have been caused only by CPH, in fact, Morgan Stanley and MSSF frequently have delayed providing dates for depositions and have changed previously set dates. In any event, Morgan Stanley's and MSSF's finger-pointing is irrelevant, because there is no motion pending before this Court concerning deposition scheduling -- indeed, to date, no such motion ever has been filed.²

² As for the charge of Morgan Stanley and MSSF that they "did not obtain access to the overwhelming majority of documents in this case until September 2003," and that CPH only "began to" produce documents then, those statements are wrong. In timely response to the document requests of Morgan Stanley and MSSF, CPH made the vast majority of its documents available for review on August 15, 2003 and the review began then. By September 8, 2003, as a letter written by counsel for Morgan Stanley and MSSF confirms, CPH's document production was "substantially completed." That was before any deposition had occurred.

Concerning the statement of counsel for Morgan Stanley and MSSF at the February 20, 2004 hearing that at least 70 depositions would need to be completed before the fact discovery cut-off, CPH and MAFCO believe that counsel's estimate is exaggerated. In any event, given that approximately 10 attorneys presently are appearing for Morgan Stanley and MSSF in this case, Morgan Stanley and MSSF certainly have the resources to complete all necessary depositions before the September 3, 2004 discovery cut-off.

2. Discovery concerning CPH's motion for contempt

The interrogatories served thus far are as follows:

PARTY SERVING	SERVICE DATE	DATE DUE	RESPONSE RECEIVED
CPH to Morgan Stanley	March 19	April 19	June 16
MAFCO to MSSF	March 19	April 19	June 16
CPH to Morgan Stanley	May 28	June 28	Not Due
Morgan Stanley to CPH	May 28	June 28	Not Due
Morgan Stanley to CPH	June 10	July 12	Not Due

The document requests served thus far are as follows:

PARTY SERVING	SERVICE DATE	DATE DUE	RESPONSE RECEIVED
CPH to Morgan Stanley	May 28	June 28	Not Due
MS to CPH	May 28	June 28	Not Due
MS to CPH	June 10	July 12	Not Due

CPH intends to serve its responses to the discovery requests that are due on June 28 on that day.

The reason for the delay in CPH's receipt of answers to its first interrogatories on the contempt issue (the interrogatories were served on March 19 but responses were not received until June 16) is because CPH encountered considerable resistance from Morgan Stanley and MSSF. That resistance began on April 16, when Morgan Stanley and MSSF filed a motion for protective order, and the resistance continued even after this Court's May 14 Order allowing CPH's motion for contempt to proceed. Only after CPH scheduled Morgan Stanley's and

MSSF's motion for protective order for hearing did Morgan Stanley and MSSF agree to answer the interrogatories.

III. Pretrial Schedule

On February 24, 2004, the Court entered an order setting this matter for trial in January 2005, and on March 23, 2004, this Court entered an Agreed Order setting the pretrial schedule in this matter and scheduling trial to begin on January 18, 2005.

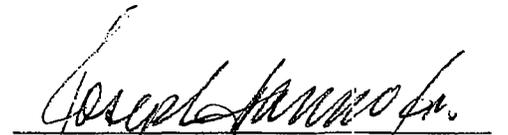
Dated: June 25, 2004



John Scarola (FL Bar No. 169440)
**SEARCY, DENNEY, SCAROLA,
 ARNHARDT & SHIPLEY, P.A.**
 2139 Palm Beach Lakes Blvd
 West Palm Beach, FL 33402-3626
 (561) 636-6300

Jerold D. Solovy
 Ronald L. Marmer
 Jeffrey T. Shaw
JENNIFER & BLOCK LLP
 One IBM Plaza, Suite 4400
 Chicago, Illinois 60611
 (312) 222-9350

**Counsel for Coleman (Parent) Holdings Inc.
 and MacAndrews & Forbes Holdings Inc.**



Joseph Ianno, Jr. (FL Bar No. 655351)
CARLTON FIELDS, P.A.
 222 Lakeview Ave., Suite 1400
 West Palm Beach, FL 33401
 (561) 659-7070

Thomas D. Yannucci, P.C.
 Lawrence P. Bemis (FL Bar No. 618349)
 Thomas A. Clare
KIRKLAND & ELLIS LLP
 655 15th Street, N.W., Suite 1200
 Washington, D.C. 20005
 (202) 879-5000

**Counsel for Morgan Stanley & Co., Inc. and
 Morgan Stanley Senior Funding, Inc.**

#1118654

CARLTON FIELDS, P.A.

ATTORNEYS AT LAW

ESPERANTÉ
222 LAKEVIEW AVENUE, SUITE 1400
WEST PALM BEACH, FLORIDA 33401-6149

MAILING ADDRESS
P.O. BOX 150, WEST PALM BEACH, FL 33402-0150
TEL (561) 659-7070 FAX (561) 659-7368

FAX COVER SHEET

Date:	June 28, 2004	Phone Number	Fax Number
To:	Jack Scarola, Esq.	(561) 686-6300	(561) 684-5816
	Jerold Solovy, Esq./Mike Brody, Esq.	(312) 222-9350	(312) 840-7711
	Thomas Clare, Esq.	(202) 879-5993	(202) 879-5200
From:	Joyce Dillard, CLA	(561) 659-7070	(561) 659-7368

Client/Matter No.: 47877/14092

Employee No.: 048

Total Number of Pages Being Transmitted, Including Cover Sheet: 12

Message:

Coleman v. Morgan Stanley & Co., Inc.

Morgan Stanley Senior Funding, Inc. v. Macandrews & Forbes Holdings, Inc.

To follow please find a copy of Morgan Stanley's Notice of Filing Original Discovery Request.

Original to follow Via Regular Mail Original will Not be Sent Original will follow via Overnight Courier

 The information contained in this facsimile message is attorney privileged and confidential information intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone (if long distance, please call collect) and return the original message to us at the above address via the U.S. Postal Service. Thank you.

IF THERE ARE ANY PROBLEMS OR COMPLICATIONS, PLEASE NOTIFY US IMMEDIATELY AT:
(561) 659-7070

TELECOPIER OPERATOR: _____

WPB#566762.7

CARLTON FIELDS, P.A.

TAMPA ORLANDO TALLAHASSEE WEST PALM BEACH ST. PETERSBURG MIAMI

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

v.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO., INC.,

Defendant.

MORGAN STANLEY SENIOR FUNDING, INC.,

Plaintiff,

v.

CASE NO: CA 03-5165 AI

MACANDREWS & FORBES HOLDINGS, INC.,

Defendant.

NOTICE OF FILING ORIGINAL DISCOVERY REQUEST

Morgan Stanley & Co. Incorporated and Morgan Stanley Senior Funding, Inc. ("Morgan Stanley"), by and through their undersigned counsel, hereby give notice that it has filed its original Seventh Request for Production of Documents.

Coleman v. Morgan Stanley, Case No: CA 03-5045 AI
Morgan Stanley v. MacAndrews, Case No: CA 03-5045
Notice of Filing Original Discovery Objections and Requests

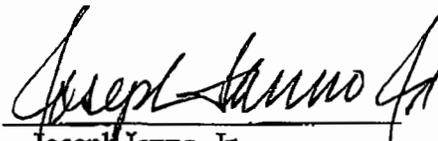
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the service list below by facsimile and Federal Express on this 28th day of June, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar No. 618349)
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

*Counsel for Morgan Stanley & Co.
Incorporated and Morgan Stanley Senior
Funding*

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
E-mail: jianno@carltonfields.com

BY: 
Joseph Ianno, Jr.
Florida Bar No: 655351

SERVICE LIST

Jack Scarola
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy
Michael Brody
JENNER & BLOCK, LLC
One IBM Plaza, Suite 400
Chicago, IL 60611

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

CASE NO: CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

**MORGAN STANLEY & CO. INCORPORATED'S SEVENTH REQUEST
FOR PRODUCTION OF DOCUMENTS**

Pursuant to Rules 1.280 and 1.350 of the Florida Rules of Civil Procedure, Morgan Stanley & Co. Incorporated ("MS & Co.") requests that plaintiff produce the documents and things referred to in the following specific requests. The specific requests are preceded by Instructions and Definitions which shall govern the specific requests. Documents and things responsive to these requests should be produced to counsel for Morgan Stanley & Co. Incorporated at the law firm of Carlton Fields, P.A., 222 Lakeview Avenue, Suite 1200, West Palm Beach, FL 33401, within the time required by Florida Rule of Civil Procedure 1.350(b) or as otherwise agreed to by the parties or specified by the Court.

INSTRUCTIONS

1. The connectives "and" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery request all responses that might otherwise be construed to be outside of its scope.

2. The use of the singular form of any word includes the plural and vice versa.

3. Documents requested and to be produced include all Documents in the possession, custody or control of the plaintiff including, but not limited to, any agents, employees, contractors, attorneys, and consultants or experts working for or in favor of the plaintiff or its attorneys.

4. If, in responding to this Request for Production, you encounter any ambiguities when construing a request or definition, the response shall set forth the matter deemed ambiguous and the construction used in responding.

5. Whenever in this Request you are asked to identify or produce a document which is deemed by you to be properly withheld from production for inspection or copying under claim of privilege (including, but not limited to, the work product doctrine), provide a privilege log that includes: the type of document, the general subject matter of the document, the date of the document, and such other information as is sufficient to identify the document, including, where appropriate, the author, addressee, custodian, and any other recipient of the document, and where not apparent, the relationship of the author, the addressee, custodian, and any other recipient to each other, in a manner that, without revealing the information claimed to be protected, will enable this party to assess the applicability of the privilege protection claimed by you. The privilege log shall be provided within the time set forth in the agreed-upon order.

6. If production of any requested document(s) is objected to on the grounds that production is unduly burdensome, describe the burden or expense of the proposed discovery.

7. When a document contains both privileged and non-privileged material, the non-privileged material must be disclosed to the fullest extent possible without disclosing the privileged material. If a privilege is asserted with regard to part of the material contained in a document, the party claiming the privilege must clearly indicate the portions as to which the privilege is claimed. When a document has been redacted or altered in any fashion, identify as to each document the reason for the redaction or alteration. Any redaction must be clearly visible on the redacted document.

8. If a responsive document exists but is no longer in your possession, custody, or control, state: its date, author(s), recipient(s), subject matter, what disposition was made of the document, and the person or entity, if any, now in possession, custody, or control of the document. If a responsive document has been destroyed, identify the date of destruction, the person who destroyed the document and the person who directed that the document be destroyed and state the reason for its destruction.

9. Produce all of the documents responsive to the numbered requests below either as they are kept in the usual course of business or by custodian.

10. If any of these documents cannot be produced in full, you are requested to produce them to the fullest extent possible, specifying clearly the reasons for your inability to produce the remainder and stating any information, knowledge, or belief you have concerning the unproduced portion.

11. If the requested documents are maintained in a file, the file folder is included in the request for production of those documents.

12. The terms "any," "all" and "each" shall be construed to mean "any," "all," or "each".
13. The term "including" shall be construed to mean "including but not limited to."
14. The present tense shall be construed to include the past and future tenses.
15. The specificity of any request herein shall not be construed to limit the generality or reach of any other request herein.
16. Unless otherwise specified, this Request calls for the production of documents created, delivered, distributed, sent, received, accessed, or modified up to the date of your response to this Request.

DEFINITIONS

1. The term "concerning" means relating to, referring to, describing, evidencing, or constituting.
2. "Coleman" means Coleman Company, Inc.
3. The "Coleman Transaction" means Sunbeam's acquisition of Coleman Company, Inc. from CPH and all related communications, agreements, and transactions, including the February 27, 1998 Agreements and the March 30, 1998 closing.
4. "Confidentiality Agreements" shall have the meaning set forth in Article VI, Section 6.7 of the Agreement and Plan of Merger among Sunbeam Corporation, Laser Acquisition Corp., CLN Holdings Inc. and CPH Dated as of February 27, 1998 and any amendments thereto.
5. "CPH" means Coleman (Parent) Holdings Inc. and any of its officers, directors, former or present employees, representatives and agents.

6. "Document" means any recording in any tangible form of any information, whether handwritten, typed, printed, stored on computer disks, tapes, or databases, or otherwise reproduced. "Document" or "documents" also includes electronic documents whether stored on servers or hard drives, e-mail, backup tapes, voicemail and video and audio recordings. A draft or non-identical copy is a separate document within the meaning of this term.

7. "Holdings Disclosure Schedule" shall have the meaning ascribed to it in Article I, Section 1.1 of the Agreement and Plan of Merger among Sunbeam Corporation, Laser Acquisition Corp., CLN Holdings Inc. and CPH Dated as of February 27, 1998 and any amendments thereto.

8. "MAFCO" means MacAndrews & Forbes Holdings, Inc. and any of its officers, directors, former or present employees, representatives and agents.

9. "MAFCO Tax Sharing Agreement" means the Tax Equivalent Payment Agreement (Tax Agreement IV) entered into as of March 4, 1992 between Coleman Finance Holdings and its parent company, which is referenced in the Tax Sharing Termination Agreement dated May 27, 1993 (Exhibit 10.40).

10. "MS & Co." means Morgan Stanley & Co. Incorporated and any of its officers, directors, former or present employees, representatives and agents.

11. The term "person" is defined as any natural person or any business, legal or governmental entity or association.

12. The terms "plaintiff" and "defendant" as well as a party's full or abbreviated name or pronoun referring to a party mean the party and, where applicable, its officers, directors, employees, partners, corporate parent, subsidiaries or affiliates. This

definition is not intended to impose a discovery obligation on any person who is not a party to the litigation.

13. The term "relating to" means concerning, evidencing, referring to, or constituting.

14. "Sunbeam" means Sunbeam Corporation or any of its subsidiaries, divisions, predecessors, successors, present and former employees, representatives, and agents.

DOCUMENTS TO BE PRODUCED

1. All documents concerning any sale, transfer, pledge assignment or other disposition of Sunbeam stock by CPH, MAFCO or any of their affiliates, as described in Article VII, Section 7.1 of the Agreement and Plan of Merger among Sunbeam Corporation, Laser Acquisition Corp., CLN Holdings Inc. and CPH dated as of February 27, 1998 and any amendments thereto.

2. All documents concerning the MAFCO Tax Sharing Agreement.

3. All documents listed on the Holdings Disclosure Schedule, and all documents relating to the agreements, contracts, arrangements, payables, obligations and understandings reflected on the Holdings Disclosure Schedule.

4. All drafts and executed copies of the Confidentiality Agreements.

Dated: April 12, 2004

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar # 618349)
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000


Joseph Ianno, Jr. (FL Bar # 655351)
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368

Facsimile: (202) 879-5200

**Counsel for Morgan Stanley & Co.
Incorporated & Morgan Stanley Senior
Funding**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by facsimile and e-mail to all counsel of record on the attached service list on this 12th day of April, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar # 618349)
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

Joseph Ianno, Jr. (FL Bar # 655351)
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

BY: 

**Counsel for Morgan Stanley & Co.
Incorporated & Morgan Stanley Senior
Funding**

SERVICE LIST

Counsel for Coleman(Parent) Holdings, Inc. & MacAndrews & Forbes Holdings, Inc.

John Scarola

**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33409

Jerold S. Solovy

JENNER & BLOCK, LLC
One IBM Plaza, Suite 4400
Chicago, Illinois 60611

IN THE CIRCUIT COURT OF
FIFTEENTH JUDICIAL CIRCUIT IN
AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO., INC.,

Defendant.

MORGAN STANLEY SENIOR FUNDING, INC.,

Plaintiff,

vs.

MACANDREWS & FORBES HOLDINGS, INC., CASE NO: CA 03-5165 AI

Defendant.

**STIPULATION REGARDING INTERROGATORIES AND ORDER APPROVING
STIPULATION**

Morgan Stanley & Co. Incorporated and Morgan Stanley Senior Funding, Inc. (collectively "Morgan Stanley"), by and through their undersigned attorneys, and Coleman (Parent) Holdings Inc. and MacAndrews & Forbes Holdings, Inc. (collectively "CPH"), by and through their undersigned attorneys, stipulate as follows:

1. On March 19, 2004, CPH served Interrogatories upon Morgan Stanley ("Interrogatories"). Pursuant to the Agreement of the parties, Morgan Stanley responded to those Interrogatories on June 16, 2004.

2. At the time it served its responses, Morgan Stanley advised CPH that it would provide additional information to CPH if CPH agreed that the provision of the additional

information would not constitute a waiver of any privilege or protection. CPH has agreed to that request, and this Stipulation reflects the parties' agreement.

3. Consequently, the parties stipulate as follows:

- a. Morgan Stanley will provide supplemental responses to CPH's Interrogatories on the close of business on the day after execution of this Stipulation and the entry of the attached Order by the Court.
- b. Morgan Stanley's supplemental response to CPH's Interrogatories will not constitute — and will not be construed as — a waiver of any privilege or protection available to Morgan Stanley, including but not limited to the attorney-client privilege or work product doctrine. CPH will not argue or assert, in this or any other proceeding, that Morgan Stanley has waived any applicable privilege protection by responding to the Interrogatories.

[remainder of page intentionally left blank]

c. However, this stipulation is without prejudice for CPH to argue waiver based upon facts separate and distinct from the responses served by Morgan Stanley to the interrogatories.

Dated: JUNE 25, 2004

**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33402-3626
Telephone: 561) 686-6300

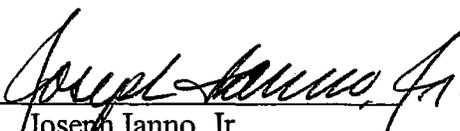
BY: 
John Scarola
Florida Bar No. 169440

Jerold S. Solovy
JENNER & BLOCK LLP
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

*Counsel for Coleman (Parent) Holdings
Inc. and MacAndrews & Forbes Holdings
Inc.*

Dated: June 25, 2004

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
E-mail: jianno@carltonfields.com

BY: 
Joseph Ianno, Jr.
Florida Bar No. 655351

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar No. 618349)
Thomas A. Clare
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

Mark C. Hansen
Michael K. Kellogg
James M. Webster
Rebecca A. Beynon
**KELLOGG, HUBER, HANSEN,
TODD & EVANS P.L.L.C.**
Sumner Square
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
Telephone: (202) 326-7900
Facsimile: (202) 326-7999
(Pro Hac Vice Pending)

*Counsel for Morgan Stanley & Co. Incorporated
and Morgan Stanley Senior Funding*

ORDER APPROVING STIPULATION

THIS CAUSE, having come before the Court upon the foregoing stipulation, and after having reviewed the agreement of the parties, the Court approves the stipulation

DONE AND ORDERED in chambers in West Palm Beach, Florida this _____ day of June, 2004.

SIGNED AND DATED
JUN 28 2004

Elizabeth Maass
Circuit Judge
JUDGE ELIZABETH T. MAASS

Copies furnished to:

Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, Esq.
655 15th Street, NW, Suite 1200
Washington DC 20005

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, IL 60611

#230580/mp

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

CASE NO.: CA 03-5045 AI

Plaintiffs,

vs.

MORC AN STANLEY & CO., INC.,

Defendant,

MORC AN STANLEY SENIOR FUNDING,
INC.,

CASE NO. CA 03-5165 AI

Plaintiff,

vs.

MAC ANDREWS & FORBES HOLDINGS,
INC.,

Defendant,

NOTICE OF HEARING

YOU ARE HEREBY NOTIFIED that the undersigned has called up for hearing the following:

DATE: July 2, 2004

TIME: 8:00 a.m.

JUDGE: Hon. Elizabeth T. Maass

PLACE: Palm Beach County Courthouse, Room #11.1208, 205 North Dixie Highway,
West Palm Beach, FL 33401

SPECIFIC MATTERS TO BE HEARD:

MOTION FOR LEAVE TO PROPOUND ADDITIONAL INTERROGATORIES

Coleman (Parent) Holdings, Inc. vs Morgan Stanley & Company
Case No : 2003 CA 005045 AI
Notice of Hearing

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by
Fax and Federal Express to all Counsel on the attached list, this 29th day of June,
2004.

JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 684-5816
Attorney for Coleman (Parent) Holdings Inc.
and MacAndrews & Forbes Holdings, Inc.

Colemar (Parent) Holdings, Inc. vs Morgan Stanley & Company
Case No : 2003 CA 005045 A1
Notice of Hearing

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 La Gravier Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block LLP
One IEM Plaza
Suite 4400
Chicago, IL 60611

#23058)/mm

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

Case No. CA 03-5045 AI

vs.
MORGAN STANLEY & CO., INC.,

Defendant,

MORGAN STANLEY SENIOR FUNDING, INC.,

Plaintiff,

Case No. CA 03-5165 AI

vs.
MACANDREWS & FORBES HOLDINGS, INC.,

Defendant,

**MOTION FOR LEAVE TO PROPOUND
ADDITIONAL INTERROGATORIES**

Plaintiff, Coleman (Parent) Holdings Inc., by and through their undersigned counsel, hereby seeks leave of Court to propound additional interrogatories seeking updated information in response to interrogatories previously propounded to the Defendant.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Fax and Federal Express to all counsel on the attached list on this 29 day of JUNE, 2004.


JACK SCAROLA
Florida Bar No. 169440
Searcy Denney Scarola Barnhart
& Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Telephone: 561-686-6300
Facsimile: 561-684-5816
Attorneys for CPH and MAFCO

Coleman Holdings Inc. vs Morgan Stanley & Co., Inc.
MSSFF v. MAFCO
Case No.: 2003 CA 005045 AI

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block LLP
One IEM Plaza
Suite 4400
Chicago, IL 60611

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

/
CASE NO. CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

NOTICE OF DEPOSITION

To: Thomas A. Clare, Esq.
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lake View Avenue, Suite 1400
West Palm Beach, FL 33401

PLEASE TAKE NOTICE that Plaintiff Coleman (Parent) Holdings, Inc. ("CPH") will take the deposition upon oral examination of the following witness pursuant to Florida Rule of Civil Procedure 1.310 on the date, time, and location set forth below:

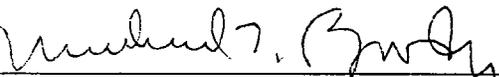
DEPONENT	DATE AND TIME	LOCATION
Chris Whelan	July 14, 2004 at 9:30 a.m.	Esquire Deposition Services 216 E. 45th Street, 8th FL New York, New York 10017

The deposition will be recorded by stenographic and audio-visual means and will be taken before a person authorized to administer oaths and will continue day to day until completed. The videographer will be Esquire Deposition Services, New York, NY.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by facsimile and mail to all counsel on the attached Service List, this 29th day of June, 2004.

Dated: June 29, 2004

COLEMAN (PARENT) HOLDINGS INC.

By: 

One of Its Attorneys

Jerold S. Solovy
Michael T. Brody
JENNER & BLOCK, LLC
One IBM Plaza
Suite 4400
Chicago, Illinois 60611
(312) 222-9350

Jack Scarola
SEARCY DENNEY SCAROLA BARNHART
& SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33409
(561) 686-6300

SERVICE LIST

Thomas A. Clare, Esq.
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lake View Avenue
Suite 1400
West Palm Beach, FL 33401

Document Number : 1121327

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

CASE NO. CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

NOTICE OF DEPOSITION

To: Thomas A. Clare, Esq.
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lake View Avenue, Suite 1400
West Palm Beach, FL 33401

PLEASE TAKE NOTICE that Plaintiff Coleman (Parent) Holdings, Inc. ("CPH") will take the deposition upon oral examination of the following witness pursuant to Florida Rule of Civil Procedure 1.310 on the date, time, and location set forth below:

DEPONENT	DATE AND TIME	LOCATION
William Wright	July 1, 2004 at 9:30 a.m.	Esquire Deposition Services 216 E. 45th Street, 8th FL New York, New York 10017

The deposition will be recorded by stenographic and audio-visual means and will be taken before a person authorized to administer oaths and will continue day to day until completed. The videographer will be Esquire Deposition Services, New York, NY.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by facsimile and mail to all counsel on the attached Service List, this 29th day of June, 2004.

Dated: June 29, 2004

COLEMAN (PARENT) HOLDINGS INC.

By: 

One of Its Attorneys

Jerold S. Solovy
Michael T. Brody
JENNER & BLOCK, LLC
One IBM Plaza
Suite 4400
Chicago, Illinois 60611
(312) 222-9350

Jack Scarola
SEARCY DENNEY SCAROLA BARNHART
& SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33409
(561) 686-6300

SERVICE LIST

Thomas A. Clare, Esq.
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lake View Avenue
Suite 1400
West Palm Beach, FL 33401

Document Number : 1121336

#230480/smk

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

CASE NO: 2003 CA 005045 AI

Plaintiffs,

vs.

MORGAN STANLEY & CO., INC.

Defendant.

MORGAN STANLEY SENIOR FUNDING,
INC.,

Plaintiff,

CASE NO. CA 03-5165 AI

vs.

MACANDREWS & FORBES HOLDINGS,
INC.,

Defendant,

NOTICE OF FILING PLEADING UNDER SEAL

Plaintiff, COLEMAN (PARENT) HOLDINGS INC., hereby gives Notice of the filing of
Coleman (Parent) Holdings Inc.'s Answers to Morgan Stanley & Co. Incorporated's
Interrogatories Concerning Coleman (Parent) Holdings Inc.'s Motion for Contempt, filed under
Seal on this date.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by
Fax and Federal Express to all counsel on the attached list on this 23rd day of June,
2004.

JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 684-5815
Attorneys for Coleman (Parent) Holdings, Inc.
and MacAndrews & Forbes Holdings, Inc.

Coleman (Parent) Holdings Inc. vs Morgan Stanley & Company
Notice Of Filing Pleading Under Seal
Case No.: 2003 CA 005045 A1

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block, LLC
One IEM Plaza
Suite 4400
Chicago, IL 60611

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

CASE NO. CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

**COLEMAN (PARENT) HOLDINGS INC.'S RESPONSES TO
MORGAN STANLEY & CO. INCORPORATED'S REQUEST FOR
PRODUCTION OF DOCUMENTS CONCERNING COLEMAN
(PARENT) HOLDINGS INC.'S MOTION FOR CONTEMPT**

Coleman (Parent) Holdings, Inc. ("CPH"), by and through its attorneys, and pursuant to Rules 1.280 and 1.350 of the Florida Rules of Civil Procedure, responds to Morgan Stanley & Co. Incorporated's ("MS & Co.'s") Request for Production of Documents concerning CPH's Motion for Contempt as follows:

INITIAL OBJECTIONS

CPH objects to MS&Co.'s requests for production, including all Definitions and Instructions, to the extent that they purport to impose upon CPH any requirements that exceed or are inconsistent with the requirements of the Florida Rules of Civil Procedure or any other applicable rule or court order. For example, CPH will not comply with Instruction Nos. 3, 4, 5, 6, 7, 8, 9, 10, 11, and 16 or Definition No. 7 to the extent that they purport to impose on CPH

obligations that are not required by Florida rules and case law. CPH will comply with the applicable rules and law.

2. CPH objects to MS&Co.'s requests for production to the extent that they seek the production of any documents or information protected from discovery by reason of the attorney-client privilege, the work-product doctrine, the common interest doctrine, or any other applicable privilege, doctrine, immunity, or rule. CPH reserves the right to assert any and all privileges to which CPH is entitled under the law. CPH will provide a log of documents withheld from production on the basis of the attorney-client privilege, the work product doctrine, or any other applicable privilege, doctrine, immunity, or rule.

3. CPH objects to the extent that any request for production seeks documents that are in the public domain and accessible to all parties. In responding to the requests for production, CPH will produce publicly available documents to the extent that copies exist in CPH's files of otherwise non-public information responsive to these requests.

4. By stating that CPH will produce documents responsive to a particular document request, CPH does not represent that any such documents exist. Rather, CPH is responding that to the extent such documents are located, they will be produced.

5. By stating that CPH will produce responsive documents, CPH does not concede the relevance of any of the produced documents to the subject matter of this litigation or to the admissibility of those documents at trial.

5. CPH's objections and responses are based on a good-faith search for documents within CPH's possession, custody, and control. CPH expressly reserves the right to amend and/or modify its objections and responses.

7. CPH responds to MS&Co.'s document requests without waiving the Initial Objections. CPH incorporates, as though fully set forth therein, these Initial Objections into each of the Responses and Further Objections set forth below.

RESPONSES AND FURTHER OBJECTIONS TO REQUESTS FOR PRODUCTION

Request No. 1. All documents that you contend support the allegations in the Motion for Contempt.

RESPONSE: CPH objects to this request as duplicative, harassing, and unnecessary because CPH already has provided MS & Co. with all of those documents in connection with the proceedings on CPH's motion for contempt. Subject to and without waiving this objection or the foregoing Initial Objections, CPH will produce all non-privileged documents within its possession, custody, or control responsive to Request No. 1.

Request No. 2. All documents that you contend support the allegation that Morgan Stanley or its attorneys violated the Confidentiality Order.

RESPONSE: CPH objects to this request as duplicative, harassing, and unnecessary because CPH already has provided MS & Co. with all of those documents in connection with the proceedings on CPH's motion for contempt. Subject to and without waiving this objection or the foregoing Initial Objections, CPH will produce all non-privileged documents within its possession, custody, or control responsive to Request No. 2.

Request No. 3. All documents that you contend support the allegation that Morgan Stanley or its attorneys disclosed the Settlement Agreement to attorneys from KHTE in violation of the Confidentiality Order.

RESPONSE: CPH objects to this request because MS&Co. has conceded in open court that the settlement agreement was provided to KHTE attorneys. CPH further objects to this request as duplicative, harassing, and unnecessary because CPH already has provided MS & Co. with all of those documents in connection with the proceedings on CPH's motion for contempt. Subject to

and without waiving these objections or the foregoing Initial Objections, CPH will produce all non-privileged documents within its possession, custody, or control responsive to Request No. 3.

Request No. 4. All documents that you contend support the allegation that Morgan Stanley or its attorneys disclosed the Settlement Agreement to Wachovia Bank.

RESPONSE: CPH objects to this request because CPH has not made the allegation "that Morgan Stanley or its attorneys disclosed the Settlement Agreement to Wachovia Bank." CPH also objects to this request as duplicative, harassing, and unnecessary because CPH already has provided MS & Co. with all of those documents in connection with the proceedings on CPH's motion for contempt. Subject to and without waiving this objection or the foregoing Initial Objections, CPH will produce all non-privileged documents within its possession, custody, or control responsive to Request No. 4.

Request No. 5. All documents that you contend support the allegation that Morgan Stanley or its attorneys used information derived from the Settlement Agreement in violation of the Confidentiality Order.

RESPONSE: CPH objects to this request as duplicative, harassing, and unnecessary because CPH already has provided MS & Co. with all of those documents in connection with the proceedings on CPH's motion for contempt. Subject to and without waiving this objection or the foregoing Initial Objections, CPH will produce all non-privileged documents within its possession, custody, or control responsive to Request No. 5.

Request No. 6. All documents reflecting or concerning any communications since May 8, 2001 between or among any of CPH, MAFCO, Arthur Andersen, Jenner & Block, Searcy Denny, and Curtis Mallet regarding the Settlement Agreement.

RESPONSE: CPH objects to this request because it seeks documents that are not reasonably calculated to lead to discovery of admissible evidence. CPH also objects to this request because it seeks documents that are protected by the attorney-client privilege, the work-product doctrine, and the common interest doctrine. CPH will not produce any documents in response to Request No. 6.

Request No. 7. All documents reflecting or concerning any communication between or among CPH, MAFCO, Arthur Andersen, Jenner & Block, Searcy Denny, and Curtis Mallet regarding the investigation and decision to file the Motion for Contempt.

RESPONSE: CPH objects to this request because it seeks documents that are not reasonably calculated to lead to discovery of admissible evidence. CPH also objects to this request because it seeks documents that are protected by the attorney-client privilege, the work-product doctrine, and the common interest doctrine. CPH will not produce any documents in response to Request No. 7.

Request No. 8. All documents reflecting or concerning any communications between or among CPH, MAFCO, Arthur Andersen, Jenner & Block, Searcy Denny, and Curtis Mallet regarding CPH's May 5, 2004 Motion to Allow Arthur Andersen LLP Access to Confidential Information.

RESPONSE: CPH objects to this request because it seeks documents that are not reasonably calculated to lead to discovery of admissible evidence. CPH also objects to this request because it seeks documents that are protected by the attorney-client privilege, the work-product doctrine, and the common interest doctrine. CPH will not produce any documents in response to Request No. 8.

Request No. 9. All documents reflecting or concerning any communications between or among CPH, MAFCO, Arthur Andersen, Jenner & Block, Searcy Denny, and Curtis Mallet regarding Curtis Mallet's letters to Kirkland & Ellis, dated April 22, 2004, April 26, 2004, and May 20, 2004.

RESPONSE: CPH objects to this request because it seeks documents that are not reasonably calculated to lead to discovery of admissible evidence. CPH also objects to this request because it seeks documents that are protected by the attorney-client privilege, the work-product doctrine, and the common interest doctrine. CPH will not produce any documents in response to Request No. 9.

Request No. 10. All documents in your possession on March 12, 2004, or in the possession of your counsel on March 12, 2004, referring or relating to any tolling agreement between Morgan Stanley and Arthur Andersen.

RESPONSE: CPH objects to this request because it seeks documents that are not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving this objection or the foregoing Initial Objections, CPH will produce all non-privileged documents within its possession, custody, or control responsive to Request No. 10.

Request No. 11. All documents concerning any investigation undertaken by you or your counsel prior to the filing of the Motion for Contempt that attempted to discover facts concerning the allegations made in that motion.

RESPONSE: CPH objects to this request as not reasonably calculated to lead to the discovery of admissible evidence. CPH also objects to this interrogatory as seeking the disclosure of communications that are protected by the attorney-client privilege, the work product doctrine, and the common interest doctrine. CPH will not produce any documents in response to Request No. 11

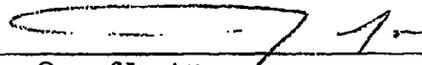
Request No. 12. All documents concerning any Indemnification Agreements between or among CPH, MAFCO, Arthur Andersen, Jenner & Block, Searcy Denny, and Curtis Mallet that relate in any way to claims arising out of the transactions and occurrences that are the subject matter of the above-captioned consolidated actions or Morgan Stanley & Co. Incorporated, et al. v. Arthur Andersen LLP, et al., Civil Action No. 2004 CA 002257 (Miller, J.)

RESPONSE: CPH objects to this request as overbroad, not reasonably calculated to lead to the discovery of admissible evidence, and as otherwise seeking information that is not discoverable insofar as the interrogatory seeks documents "concerning" indemnification agreements. Although Rule 1.280(b)(2) of the Florida Rules of Civil Procedure provides that "[a] party may obtain discovery of the existence and contents of any agreement under which any person may be liable to satisfy part or all of a judgment that may be entered in the action or to indemnify or to reimburse a party for payments made to satisfy the judgment," that Rule does not authorize discovery of all documents "concerning" indemnification agreements, and CPH therefore will not produce such documents. CPH further objects to Request No. 12 because it is not confined to indemnity agreements entered into with respect to this litigation. Instead, Request No. 12 also

seeks documents concerning indemnity agreements entered into with respect to separate litigation, which is not discovery within the contemplation of Rule 1.280(b)(2). Subject to and without waiving these objections or the foregoing Initial Objections, CPH will produce the only document containing an indemnification agreement in its possession, custody, or control responsive to Request No. 12.

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

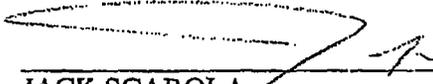
By: 
One of Its Attorneys

Jerold S. Solovy
Ronald L. Marner
Jeffrey T. Shaw
JENNIFER & BLOCK LLP
One IEM Plaza
Chicago, Illinois 60611
(312) 222-9350

John Scarola
SEARCY DENNEY SCAROLA
BARNHART & SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33402-3626
(561) 686-6300

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by
Fax and Federal Express to all counsel on the attached list on this 29th day of
June, 2004.



JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 684-5816
Attorneys for Coleman(Parent)Holdings Inc.
and MacAndrews & Forbes Holdings, Inc.

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 400
West Palm Beach, FL 33401

Thomas D. Yamucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenne & Block LLP
One IBM Plaza
Suite 400
Chicago, IL 60611

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff,

CASE NO: CA 03-5045 AI

vs.

MORGAN STANLEY & CO., INC.,
Defendant.

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff,

CASE NO: CA 03-5165 AI

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant.

**MORGAN STANLEY'S OBJECTIONS TO
COLEMAN (PARENT) HOLDINGS INC.'S REQUEST FOR PRODUCTION OF
DOCUMENTS CONCERNING ITS MOTION FOR CONTEMPT**

Pursuant to Rules 1.280 and 1.350 of the Florida Rules of Civil Procedure, Defendant Morgan Stanley & Co. Incorporated ("MS & Co.") and Plaintiff Morgan Stanley Senior Funding, Inc. ("MSSF") (collectively "Morgan Stanley") provide the following responses and objections to Coleman (Parent) Holdings Inc.'s ("CPH") Request for Production of Documents Concerning Its Motion for Contempt dated May 28, 2004 ("Request for Production"):

GENERAL OBJECTIONS

The following General Objections apply to the entire Request for Production and apply to each and every Document Request as if fully set forth with respect to each Request:

1. Morgan Stanley objects to the entire Request for Production to the extent that it seeks materials protected from disclosure by the attorney-client privilege, the attorney-work-product doctrine, the common-interest doctrine, or any other applicable constitutional, statutory, or common-law privilege, doctrine, immunity, or rule. Morgan Stanley will exchange with CPH a categorization of documents not produced based on a claim of privilege or discovery immunity within 30 days after Morgan Stanley's production of the documents from which the documents have been withheld on grounds of privilege or discovery immunity, pursuant to the Agreed Order Regarding Enlargement of Time To Prepare Privilege Log entered in the above-captioned consolidated actions on September 4, 2003.

2. Morgan Stanley objects to the entire Request for Production because it seeks materials that are neither relevant nor likely to lead to the discovery of evidence related to the subject matter of the pending action as framed by the pleadings in the above-captioned consolidated actions.

3. Morgan Stanley objects to the entire Request for Production to the extent that it seeks to impose obligations, including a continuing duty of supplementation, different from, or in addition to, those provided in the Florida Rules of Civil Procedure, discovery guidelines of this Court, and applicable case law.

4. Morgan Stanley objects to the entire Request for Production to the extent that it is intended to harass or annoy Morgan Stanley or its employees, to create additional and unnecessary expense for Morgan Stanley, or to serve any other improper purpose. In particular,

many of the Document Requests improperly seek — by their express terms — *only* documents protected from disclosure by the attorney-client privilege, the work-product doctrine, the common-interest doctrine, or other applicable privileges and immunities. Such Document Requests are patently improper and appear to have been included for the sole purpose of harassing and annoying Morgan Stanley, and for the improper purpose of requiring Morgan Stanley to incur the burden and expense of preparing a privilege log.

5. Morgan Stanley objects to the entire Request for Production to the extent that it seeks the production of documents in the possession of third parties and not within Morgan Stanley's possession, custody, or control, including those documents in the sole possession of the law firms of Kirkland & Ellis LLP ("Kirkland & Ellis") and "Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C. ("KHHTE").

6. Morgan Stanley objects to the entire Request for Production to the extent that it seeks the production of documents that are publicly available or otherwise equally accessible to both parties, including deposition transcripts and court records.

7. It should not be inferred from the form or substance of any objection or response contained herein that documents responsive to any particular Request exist.

8. Morgan Stanley's responses to CPH's Document Requests shall not be construed in any way as an admission that any definition provided by CPH is either factually correct or legally binding upon Morgan Stanley, or as a waiver of any of Morgan Stanley's Objections, including, but not limited to, objections regarding discoverability and admissibility of documents.

9. Morgan Stanley's objections are based on its good-faith investigations and discovery to date. Morgan Stanley expressly reserves the right to modify and supplement these objections.

OBJECTIONS TO DEFINITIONS AND INSTRUCTIONS

DEFINITIONS AND INSTRUCTIONS NO. 1: The terms "documents" and "concerning" have the meaning ascribed to them in Plaintiff's [CPH's] First Request for Production of Documents.

OBJECTIONS: Morgan Stanley incorporates by reference its objections to these definitions, as set forth in Morgan Stanley's Objections to CPH's First Request for Production of Documents.

DEFINITIONS AND INSTRUCTIONS NO. 5: CPH incorporates the instructions set forth in Plaintiff's [CPH's] First Request for Production of Documents.

OBJECTIONS: Morgan Stanley incorporates by reference its objections to these instructions, as set forth in Morgan Stanley's Objections to CPH's First Request for Production of Documents.

SPECIFIC OBJECTIONS AND RESPONSES

DOCUMENT REQUEST NO. 1: All documents relating to (a) whether and when Kellogg, Huber, Hansen, Todd & Evans P.L.L.C. ("Kellogg Huber") began representing MS & Co. and/or MSSF in the above-captioned consolidated litigation; (b) whether, when, and what information contained in the Settlement Agreement was disclosed to Kellogg Huber; and/or (c) the scope of responsibilities assumed by Kellogg Huber with respect to the above-captioned consolidated litigation.

OBJECTIONS: In addition to the general objections stated above, Morgan Stanley objects to this Request to the extent that it seeks materials protected from disclosure by the attorney-client privilege and the attorney-work-product doctrine.

Subject to and without waiving its specific or general objections, Morgan Stanley will produce non-privileged documents, located after a good-faith search of documents in its possession, custody, or control, that are responsive to this Request.

DOCUMENT REQUEST NO. 2: All documents concerning why firms other than Kirkland & Ellis LLP and Carlton Fields were being retained in the above-captioned consolidated litigation.

OBJECTIONS: In addition to the general objections stated above, Morgan Stanley objects to this Request on the ground that it seeks information that is neither relevant nor likely to lead to the discovery of evidence related to a matter at issue among the parties. Morgan Stanley further objects to this Request to the extent that it seeks information covered by the attorney-client privilege and the attorney-work-product doctrine. Morgan Stanley will not produce documents pursuant to this Request.

DOCUMENT REQUEST NO. 3: All documents concerning why firms other than Kirkland & Ellis LLP and Carlton Fields were being retained to file suit against Arthur Andersen.

OBJECTIONS: In addition to the general objections stated above, Morgan Stanley objects to this Request on the ground that it seeks information that is neither relevant nor likely to lead to the discovery of evidence related to a matter at issue among the parties. Morgan Stanley further objects to this Request to the extent that it seeks information covered by the attorney-client privilege and the attorney-work-product doctrine. Morgan Stanley will not produce documents pursuant to this Request.

DOCUMENT REQUEST NO. 4: All documents relating to why Morgan Stanley Entities waited until March 1, 2004 to sue Arthur Andersen.

OBJECTIONS: In addition to the general objections stated above, Morgan Stanley objects to this Request on the ground that it seeks information that is neither relevant nor likely to lead to the discovery of evidence related to a matter at issue among the parties. Morgan Stanley further objects to this Request to the extent that it seeks information covered by the attorney-client privilege and the attorney-work-product doctrine. Subject to and without waiving its specific or general objections, Morgan Stanley will produce non-privileged documents, located after a good-faith search of documents in its possession, custody, or control, that are responsive to this Request.

DOCUMENT REQUEST NO. 5: All documents relating to whether the contents of the Settlement Agreement, and/or any other material designated "Confidential," were disclosed to third parties.

OBJECTIONS: In addition to the general objections stated above, Morgan Stanley objects to this Request on the grounds that the term "third parties" is vague and ambiguous. For purposes of this Request, Morgan Stanley shall construe "third parties" to mean persons not authorized to receive "Confidential" information under Paragraphs 9 and 10 of the Protective Order. Morgan Stanley denies that the contents of the Settlement Agreement and/or any other material designated as "Confidential" were disclosed to third parties.

Morgan Stanley further objects to this Request to the extent that it seeks information covered by the attorney-client and common-interest privileges and the attorney-work-product doctrine. Subject to and without waiving its specific or general objections, Morgan Stanley will

produce non-privileged documents, located after a good-faith search of documents in its possession, custody, or control, that are responsive to this Request.

DOCUMENT REQUEST NO. 6: All documents referring to any portion of the Settlement Agreement.

OBJECTIONS: In addition to the general objections stated above, Morgan Stanley objects to this Request as overbroad, unduly burdensome, and not likely to lead to the discovery of evidence related to a matter at issue among the parties. Specifically, Morgan Stanley objects to this Request to the extent that it purports to require the production of *all* documents referring to the Settlement Agreement, including those that relate only to the above-captioned consolidated actions (*e.g.*, Morgan Stanley's potential set-off of damages) and therefore are not relevant to CPH's Motion for Contempt.

Morgan Stanley further objects to this Request to the extent that it seeks information covered by the attorney-client privilege and the attorney-work-product doctrine.

Subject to and without waiving its specific or general objections, Morgan Stanley will produce non-privileged documents, located after a good-faith search of documents in its possession, custody, or control, that are responsive to this Request.

DOCUMENT REQUEST NO. 7: All documents relating to Morgan Stanley Entities' use of the Settlement Agreement.

OBJECTIONS: In addition to the general objections stated above, Morgan Stanley objects to this Request on the grounds that the phrase "use of the Settlement Agreement" is vague and ambiguous. For purposes of this Request, Morgan Stanley shall construe "use of the Settlement Agreement" to mean the disclosure of any of the terms of the Settlement Agreement to a third party not authorized to receive "Confidential" information under Paragraphs 9 and 10

of the Protective Order, or the disclosure of any "Confidential" information subject to the Protective Order, including disclosure in a court record.

Morgan Stanley further objects to this Request as overbroad, unduly burdensome, and not likely to lead to the discovery of evidence related to a matter at issue among the parties. Specifically, Morgan Stanley objects to this Request to the extent that it purports to require the production of *all* documents referring to the Settlement Agreement, including those that relate only to the above-captioned consolidated actions (e.g., Morgan Stanley's potential set-off of damages) and therefore are not relevant to CPH's Motion for Contempt. Morgan Stanley also objects to this Request to the extent that it seeks information covered by the attorney-client privilege and the attorney-work-product doctrine.

Subject to and without waiving its specific or general objections, and without waiving any applicable privilege, Morgan Stanley states that it has, in good faith, conducted a search of documents in its possession, custody, or control, and it has located no documents that are responsive to this Request.

DOCUMENT REQUEST NO. 8: All documents relating to Morgan Stanley Entities' purpose in using the Settlement Agreement.

OBJECTIONS: In addition to the general objections stated above, Morgan Stanley objects to this Request on the grounds that the phrase "purpose in using the Settlement Agreement" is vague and ambiguous. For purposes of this Request, Morgan Stanley adopts its construction of the phrase "use of the Settlement Agreement" described in its response to Document Request No. 7, *supra*.

Morgan Stanley further objects to this Request as overbroad, unduly burdensome, and not likely to lead to the discovery of evidence related to a matter at issue among the parties.

Specifically, Morgan Stanley objects to this Request to the extent that it purports to require the production of *all* documents referring to the Settlement Agreement, including those that relate only to the above-captioned consolidated actions (e.g., Morgan Stanley's potential set-off of damages) and therefore are not relevant to CPH's Motion for Contempt. Morgan Stanley also objects to this Request to the extent that it seeks information covered by the attorney-client privilege and the attorney-work-product doctrine.

Subject to and without waiving its specific or general objections, and without waiving any applicable privilege, Morgan Stanley states that it has, in good faith, conducted a search of documents in its possession, custody, or control, and it has located no documents that are responsive to this Request.

DOCUMENT REQUEST NO. 9: All drafts of complaints by any Morgan Stanley Entities against Arthur Andersen, including all versions reflecting any handwritten comments or marginalia, and all documents reflecting when and/or by whom each draft and version was prepared.

OBJECTIONS: In addition to the general objections stated above, Morgan Stanley objects to this Request to the extent that it seeks information covered by the attorney-client and common-interest privilege and the attorney-work-product doctrine. Accordingly, it is not discoverable.

Subject to and without waiving its specific or general objections, Morgan Stanley states that it has, in good faith, conducted a search of documents in its possession, custody, or control, and it has to date located no non-privileged documents that are responsive to this Request.

DOCUMENT REQUEST NO. 10: All documents relating to any damages that MS & Co. seeks to recover in its claim against Arthur Andersen.

OBJECTIONS: In addition to the general objections stated above, Morgan Stanley objects to this Request on the ground that it seeks information that is neither relevant nor likely to lead to the discovery of evidence related to a matter at issue among the parties. Morgan Stanley further objects to this Request to the extent that it seeks information covered by the attorney-client privilege and the attorney-work-product doctrine.

Morgan Stanley further objects to this Request that this discovery request is not permissible, pursuant to Florida Rule of Civil Procedure 1.280(b).

Subject to and without waiving any objections it might have in Morgan Stanley & Co., Inc. et al. v. Arthur Andersen LLP et al. (No. CL 04-2257 AA), and without waiving its specific or general objections above, MS & Co. will provide specific information regarding the amounts and types of damages it has suffered in connection with expert disclosures and discovery requests that are properly served in Morgan Stanley & Co., Inc. et al. v. Arthur Andersen LLP et al. (No. CL 04-2257 AA). MS & Co.'s expert disclosures and discovery responses will occur on dates agreed to by the parties or established by Judge Miller in that action.

DOCUMENT REQUEST NO. 11: All documents referring to any advantages Morgan Stanley Entities hope(d) to obtain in the above-captioned consolidated litigation by suing Arthur Andersen.

OBJECTIONS: In addition to the general objections stated above, Morgan Stanley objects to this Request on the grounds that the term "any advantages" is vague and ambiguous. Morgan Stanley also objects to this Request to the extent that it seeks information covered by the attorney-client privilege and the attorney-work-product doctrine.

Subject to and without waiving its specific or general objections, Morgan Stanley states that it has, in good faith, conducted a search of documents in its possession, custody, or control, and it has to date located no non-privileged documents that are responsive to this Request.

DOCUMENT REQUEST NO. 12: All documents relating to, or that were a source of information used in preparing, any answers to the interrogatories served on March 19, 2004 and/or on May 28, 2004.

OBJECTIONS: In addition to the general objections stated above, Morgan Stanley objects to this Request to the extent that it seeks information covered by the attorney-client privilege and the attorney-work-product doctrine.

Subject to and without waiving its specific or general objections, Morgan Stanley will produce non-privileged documents, located after a good-faith search of documents in its possession, custody, or control, that are responsive to this Request.

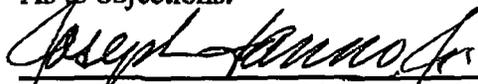
DOCUMENT REQUEST NO. 13: All documents, including all time sheets and billing records, reflecting time expended and/or the nature of services rendered by Kellogg Huber in either the above-captioned consolidated litigation and/or *Morgan Stanley & Co., Inc., et al. v.*

Arthur Andersen LLP, et al., No. 50-2004-CA-2257-xxxx-NB, from the inception of such services to and including March 1, 2004.

OBJECTIONS: In addition to the general objections stated above, Morgan Stanley objects to this Request to the extent that it seeks information covered by the attorney-client privilege and the attorney-work-product doctrine. Accordingly, it is not discoverable.

Morgan Stanley further objects to this Request on the ground that it seeks information that is neither relevant nor likely to lead to the discovery of evidence related to a matter at issue among the parties. Morgan Stanley will not produce documents pursuant to this Request.

As to objections:



Joseph Ianno, Jr. (Florida Bar No. 655351)

CARLTON FIELDS, P.A.

222 Lakeview Ave., Suite 1400

West Palm Beach, FL 33401

Telephone: (561) 659-7070

Facsimile: (561) 659-7368

E-mail: jianno@carltonfields.com

Attorneys for

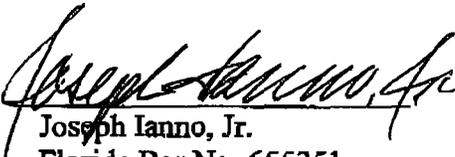
Morgan Stanley & Co. Incorporated
Morgan Stanley Senior Funding, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this 30th day of June, 2004.

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
E-mail: jianno@carltonfields.com

BY:



Joseph Ianno, Jr.
Florida Bar No. 655351

SERVICE LIST

Jack Scarola
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy
Michael Brody
JENNER & BLOCK, LLC
One IBM Plaza, Suite 400
Chicago, IL 60611

CARLTON FIELDS, P.A.

ATTORNEYS AT LAW

ESPERANTÉ
222 LAKEVIEW AVENUE, SUITE 1400
WEST PALM BEACH, FLORIDA 33401-6149

MAILING ADDRESS
P.O. BOX 150, WEST PALM BEACH, FL 33402-0150
TEL (561) 659-7070 FAX (561) 659-7368

FAX COVER SHEET

Date:	June 30, 2004	Phone Number	Fax Number
To:	Jack Scarola, Esq.	(561) 686-6300	(561) 684-5816
	Jerrold Solovy, Esq./Miles Brody, Esq.	(312) 222-9350	(312) 840-7711
	Thomas Clare, Esq.	(202) 879-5993	(202) 879-5200
From:	Joyce Dillard, CLA	(561) 659-7070	(561) 659-7368

Client/Matter No.: 47877/14092

Employee No.: 048

Total Number of Pages Being Transmitted, Including Cover Sheet: 4

Message:
Coleman v. Morgan Stanley & Co., Inc.
Morgan Stanley Senior Funding, Inc. v. Macandrews & Forbes Holdings, Inc.

To follow please find a copy of Morgan Stanley's Opposition to Plaintiff's Motion for Leave to Propound Additional Interrogatories.

Original to follow Via Regular Mail Original will Not be Sent Original will follow via Overnight Courier

 The information contained in this facsimile message is attorney privileged and confidential information intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone (if long distance, please call collect) and return the original message to us at the above address via the U.S. Postal Service. Thank you.

IF THERE ARE ANY PROBLEMS OR COMPLICATIONS, PLEASE NOTIFY US IMMEDIATELY AT:
(561) 659-7070

TELECOPIER OPERATOR: _____

WPB#566762.7

CARLTON FIELDS, P. A.

TAMPA ORLANDO TALLAHASSEE WEST PALM BEACH ST. PETERSBURG MIAMI

IN THE CIRCUIT COURT OF
FIFTEENTH JUDICIAL CIRCUIT IN
AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO., INC.,

Defendant.

MORGAN STANLEY SENIOR FUNDING, INC.,

Plaintiff,

vs.

MACANDREWS & FORBES HOLDINGS, INC., CASE NO: CA 03-5165 AI

Defendant.

**MORGAN STANLEY'S OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO
PROPOUND ADDITIONAL INTERROGATORIES**

Morgan Stanley & Co. Incorporated and Morgan Stanley Senior Funding, Inc. (collectively "Morgan Stanley"), by and through their undersigned attorneys, opposes Coleman (Parent) Holdings Inc. ("CPH") Motion for Leave to Propound Additional Interrogatories, and states as follows:

1. On June 29, 2004, CPH served its Motion for Leave. On the same day, CPH noticed the Motion for Leave to be heard at the Case Management Conference ("CMC") on July 2, 2004.

Coleman v. Morgan Stanley
Case No. CA 03-5045-AI
Page 2

2. Pursuant to this Court's Order setting the CMC dated February 24, 2004, all motions to be heard must be filed at least one-week before the hearing. Consequently, any motion to be heard on July 2, 2004 should have been filed and served on or before June 25, 2004. Since CPH did not file its Motion for Leave until June 29, 2004, just 2 days before the CMC, the Motion for Leave should not be heard. Additionally, given the late filing of the Motion, counsel have not had an opportunity to discuss whether an agreement could be reached.

3. Moreover, the Motion for Leave on its face is insufficient. The Motion fails to set forth good cause for permitting CPH to propound additional Interrogatories.

WHEREFORE, Morgan Stanley respectfully requests that the Court decline to hear CPH's Motion until a later date, or, in the alternative, deny the Motion as insufficient together with such other and further relief as the Court deems just and proper.

CERTIFICATE OF SERVICE

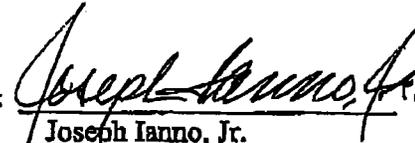
I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this 30th day of June, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar No. 618349)
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

**Counsel for Morgan Stanley & Co.
Incorporated and Morgan Stanley
Senior Funding**

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
E-mail: jianno@carltonfields.com

BY:


Joseph Ianno, Jr.
Florida Bar No: 655351

Coleman v. Morgan Stanley
Case No. CA 03-5045-AI
Page 3

SERVICE LIST

Jack Scarola
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy
Michael Brody
JENNER & BLOCK, LLC
One IBM Plaza, Suite 400
Chicago, IL 60611
Insert certificate of service

#230580/smk

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN
AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

CASE NO: 2003 CA 005045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.

MORGAN STANLEY SENIOR FUNDING,
INC.,

Plaintiff,

vs.

MACANDREWS & FORBES HOLDINGS,
INC.,

CASE NO. CA 03-5165 AI

Defendant,

NOTICE OF UNAVAILABILITY

COMES NOW the undersigned attorney and hereby gives notice that he will be
unavailable as follows:

July 12, 2004 through and including July 16, 2004

August 5, 2004 through and including August 6, 2004

August 15, 2004 through August 26, 2004

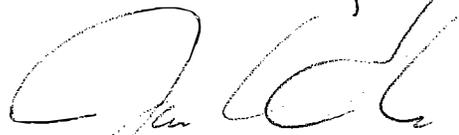
September 3, 2004

September 15, 2004 through September 30, 2004

Please avoid scheduling any proceedings regarding this cause during this time period, if
possible.

Coleman Holdings, Inc. vs Morgan Stanley & Company
Case No.: 2003 CA 005045 AI
Notice of Unavailability

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by
U.S. Mail to all counsel on the attached list on this 1st day of July, 2004.



Jack Scarola
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 684-5816
Attorneys for Plaintiffs

Coleman Holdings, Inc. vs Morgan Stanley & Company
Case No.: 2003 CA 005045 AI
Notice of Unavailability

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block LLP
One IBM Plaza
Suite 4400
Chicago, IL 60611

KIRKLAND & ELLIS LLP

AND AFFILIATED PARTNERSHIPS

655 Fifteenth Street, N.W.
Washington, D.C. 20005

Zhonette M. Brown
To Call Writer Directly:
202-879-5108
zbrown@kirkland.com

202 879-5000
www.kirkland.com

Facsimile:
202 879-5200
Dir. Fax: 202-879-5200

July 1, 2004

VIA FACSIMILE

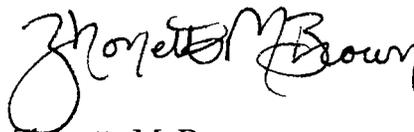
Michael Brody, Esq.
Jenner & Block, LLC
One IBM Plaza
Chicago, IL 60611

Re: *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co. Incorporated*
Morgan Stanley Senior Funding, Inc. v. MacAndrews & Forbes
Holdings, Inc., et al

Dear Mike:

Enclosed please find an amended notice of deposition for Mr. Duffy. As we discussed, his deposition will occur on July 8, 2004. Although CSFB offered Mr. Geller on June 7, 2004 and Morgan Stanley was prepared to proceed, CPH stated that it could not attend the deposition on that date. We will therefore work with CSFB to find another date for Mr. Geller's deposition.

Sincerely,



Zhonette M. Brown

Enclosure

cc: Joseph Ianno, Jr., Esq. (by facsimile)
John Scarola, Esq. (by facsimile)
Steven R. Paradise, Esq. (by facsimile)

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff,

vs.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO., INC.,
Defendant.

_____/

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff,

vs.

CASE NO: CA 03-5165 AI

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant.

_____/

AMENDED NOTICE OF VIDEOTAPED DEPOSITION

PLEASE TAKE NOTICE that Morgan Stanley & Company Incorporated and Morgan Stanley Senior Funding, Inc. will take the videotaped deposition of Robert J. Duffy, pursuant to Florida Rules of Civil Procedure 1.280 and 1.310. The oral examination will take place beginning on July 8, 2004, at 9:30 a.m. and continue from day to day until completed at the offices of Kirkland & Ellis, LLP, 153 East 53rd Street, New York, New York, 10022. The deposition will be taken before a person authorized to administer oaths and recorded by stenographic and videographic means. The video operator will be Esquire Deposition Services of 216 E. 45th Street in New York, New York. The witness is instructed to bring all books, papers, and other things in his possession or under his control relevant to this lawsuit (and not previously produced in discovery) to the examination.

CERTIFICATE OF SERVICE

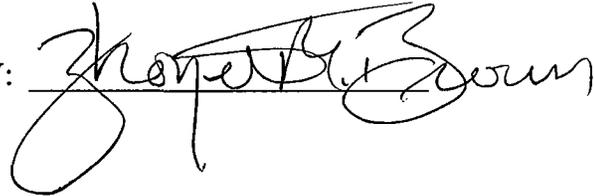
I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this 1st day of July, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar No. 618349)
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

Joseph Ianno, Jr. (FL Bar No. 655351)
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
E-mail: jianno@carltonfields.com

*Counsel for Morgan Stanley & Co.
Incorporated and Morgan Stanley Senior
Funding*

BY: _____



SERVICE LIST

Jack Scarola
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy
Michael Brody
JENNER & BLOCK, LLC
One IBM Plaza, Suite 400
Chicago, IL 60611

IN THE CIRCUIT COURT OF
FIFTEENTH JUDICIAL CIRCUIT IN
AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO., INC.,

Defendant.

MORGAN STANLEY SENIOR FUNDING, INC.,

Plaintiff,

vs.

MACANDREWS & FORBES HOLDINGS, INC., CASE NO: CA 03-5165 AI

Defendant.

**MORGAN STANLEY'S OBJECTION TO PLAINTIFF'S SUBPOENA DUCES TECUM
WITHOUT DEPOSITION AND MOTION TO QUASH**

Morgan Stanley & Co. Incorporated and Morgan Stanley Senior Funding, Inc. (collectively "Morgan Stanley"), by and through their undersigned attorneys, objects to Plaintiffs' Subpoena Duces Tecum Without Deposition, and states as follows:

1. On June 29, 2004, Plaintiff served a Subpoena Duces Tecum Without Deposition directed to the Records Custodian of Wachovia Bank. The only method for obtaining documents from a non-party without a deposition is provided in Fla. R. Civ. P., Rule 1.351. This Rule provides in part:

A party desiring production under this rule shall serve notice on every other party of intent to serve a subpoena under this rule at least 10 days before the subpoena

is issued if service is by delivery and 15 days before the subpoena is issued if served by mail.

2. Plaintiff failed to comply with Rule 1.351 because no notice of intent was provided to other parties in this action. Therefore, the Subpoena is invalid and should be quashed.

3. To the extent the Subpoena has not been served and Plaintiff requests that the Court consider the June 29, 2004 subpoena as a Notice of Intent, Morgan Stanley objects to the issuance of the proposed subpoena.

WHEREFORE, Morgan Stanley respectfully requests that the Court quash the subpoena directed to Wachovia Bank, N.A. dated June 29, 2004 and award such other and further relief as the Court deems just and proper.

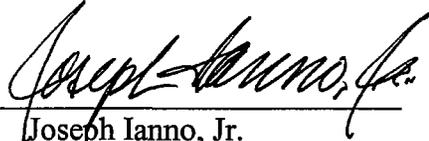
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this 18th day of July, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar No. 618349)
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

**Counsel for Morgan Stanley & Co.
Incorporated and Morgan Stanley
Senior Funding**

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
E-mail: jianno@carltonfields.com

BY: 
Joseph Ianno, Jr.
Florida Bar No: 655351

SERVICE LIST

Jack Scarola

SEARCY, DENNEY, SCAROLA,

BARNHARDT & SHIPLEY, P.A.

2139 Palm Beach Lakes Blvd.

West Palm Beach, FL 33409

Jerold S. Solovy

Michael Brody

JENNER & BLOCK, LLC

One IBM Plaza, Suite 400

Chicago, IL 60611

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

_____ /

CASE NO. CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

_____ /

**STIPULATION REGARDING INTERROGATORIES AND ORDER APPROVING
STIPULATION**

Morgan Stanley & Co. Incorporated and Morgan Stanley Senior Funding, Inc.

(collectively "Morgan Stanley"), by and through their undersigned attorneys, and Coleman (Parent) Holdings Inc. and MacAndrews & Forbes Holdings, Inc. (collectively "CPH"), by and through their undersigned attorneys, stipulate as follows:

1. On June 30, 2004, Morgan Stanley produced to CPH certain documents responsive to CPH's Request for Production of Documents Concerning Its Motion for Contempt ("Document Request").

2. Morgan Stanley has advised CPH that it is willing to produce the retention letter sent by Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C. ("Retention Letter") in response to the Document Request if the parties agree that the production of that Retention Letter will not be deemed to be a waiver of privilege.

3. Consequently, the parties stipulate that:

- a. Morgan Stanley's production of the Retention Letter will not constitute — and will not be construed as — a waiver of any privilege or protection available to Morgan Stanley, including but not limited to the attorney-client privilege or work product doctrine. CPH will not argue or assert, in this or any other proceeding, that Morgan Stanley has waived any applicable privilege protection by producing the Retention Letter.
- b. This stipulation is without prejudice to CPH's right to argue waiver based upon facts separate and distinct from the production of the Retention Letter in response to the Document Request.

Dated: _____

BY: _____

John Scarola
Florida Bar No. 169440
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33402-3626
Telephone: (561) 686-6300

Jerold S. Solovy
JENNER & BLOCK LLP
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

*Counsel for Coleman (Parent) Holdings Inc.
and MacAndrews & Forbes Holdings*

Dated: _____

BY: _____

Joseph Ianno, Jr.
Florida Bar No. 655351
CARLTON FIELDS, P.A.
222 Lakeview Ave. Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
E-mail: jianno@carltonfields.com

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar No. 618349)
Thomas A. Clare
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

*Counsel for Morgan Stanley & Co. Incorporated
and Morgan Stanley Senior Funding*

ORDER APPROVING STIPULATION

THIS CAUSE, having come before the Court upon the foregoing stipulation, and after having reviewed the agreement of the parties, the Court approves the stipulation.

DONE AND ORDERED in chambers in West Palm Beach, Florida this _____ day of July, 2004.

SIGNED AND DATED
JUL 02 2004
JUDGE ELIZABETH T. MAASS

Elizabeth Maass
Circuit Judge

Copies furnished to:

Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, Esq.
655 15th Street, NW, Suite 1200
Washington, DC 20005

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, IL 60611

CARLTON FIELDS, P.A.

ATTORNEYS AT LAW

Esperanté
222 Lakeview Avenue, Suite 1400
West Palm Beach, Florida 33401-6149

MAILING ADDRESS
P.O. Box 150, West Palm Beach, FL 33402-0150
Tel 561.659.7070 Fax 561.659.7368

FAX COVER SHEET

Date:	July 9, 2004	Phone Number	Fax Number
To:	Jack Scarola, Esq.	(561) 689-6300	(561) 684-5816
	Jerold Solovy, Esq.	(312) 923-2711	(312) 840-7671
	Michael Brody		(312) 840-7711
	Thomas Clare, Esq.		(202) 879-5200
From:	Joyce Dillard, CLA to Joseph Ianno, Jr.	561.659.7070	561.659.7368

Client/Matter No.: 47877/14092

Employee No.:

Total Number of Pages Being Transmitted, Including Cover Sheet: 10

Message: To follow please find a copy of Mr. Ianno's letter of today's date to Judge Maass with its enclosed Motion to Reschedule and Notice of Hearing. Also please find a copy of a Notice of Unavailability of Larry Bemis.

Original to follow Via Regular Mail Original will Not be Sent Original will follow via Overnight Courier

 The information contained in this facsimile message is attorney privileged and confidential information intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone (if long distance, please call collect) and return the original message to us at the above address via the U.S. Postal Service. Thank you.

If there are any problems or complications, please notify us immediately at:
561.659.7070

Telecopier operator: _____

WPB#567902.5

CARLTON FIELDS, P.A.

Miami Orlando St. Petersburg Tallahassee Tampa West Palm Beach

MIAMI
ORLANDO
ST. PETERSBURG
TALLAHASSEE
TAMPA

CARLTON FIELDS

ATTORNEYS AT LAW

WEST PALM BEACH

Esperonié
222 Lakaview Avenue, Suite 1400
West Palm Beach, Florida 33401-6149
P.O. Box 150
West Palm Beach, Florida 33402-0150

561.659.7070
561.659.7368 fax
www.carltonfields.com

E-MAIL: Jlanno@carltonfields.com

July 9, 2004

The Honorable Elizabeth Maass
Palm Beach County Courthouse
205 North Dixie Highway, Room 11.1208
West Palm Beach, Florida 33401

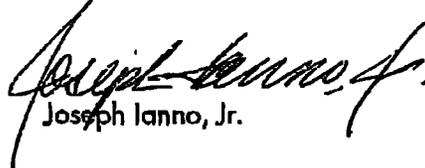
VIA HAND-DELIVERY

Re: *Coleman (Parent) Holdings Co. v. Morgan Stanley & Co.*, Case No: CA 03-5045 AI
Morgan Stanley v. MacAndrews & Forbes Holdings, Inc., Case No: CA 03-5165 AI

Dear Judge Maass:

Enclosed please find a courtesy copy of Morgan Stanley's Motion to Reschedule Case Management Conference and to Amend Hearing Procedures. Counsel for Coleman does not object to this motion being heard on Wednesday, July 14, 2004 at Uniform Motion Calendar; therefore, Morgan Stanley has noticed this motion for July 14, 2004 at 8:45 a.m. A copy of the Notice of Hearing is also enclosed for Your Honor's convenience.

Respectfully,



Joseph Ianno, Jr.

/jed

Enclosures

cc: Jack Scarola (by facsimile w/encl.)
Jerold Solovy (by facsimile w/encl.)

IN THE CIRCUIT COURT OF
FIFTEENTH JUDICIAL CIRCUIT IN
AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO., INC.,

Defendant.

MORGAN STANLEY SENIOR FUNDING, INC.,

Plaintiff,

vs.

MACANDREWS & FORBES HOLDINGS, INC., CASE NO: CA 03-5165 AI

Defendant.

NOTICE OF UNAVAILABILITY

Morgan Stanley & Co. Incorporated and Morgan Stanley Senior Funding, Inc., by and through their undersigned attorneys, hereby give notice that lead-counsel, Lawrence P. Bemis, will be unavailable from July 15, 2004 through July 25, 2004, and request that no court appearances, trials, hearings or depositions in the above-styled cause be scheduled within the aforementioned time period.

Coleman v. Morgan Stanley

Case No. CA 03-5045-AI

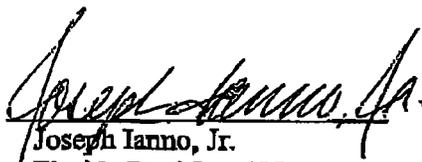
Page 2

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this 9th day of July, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar No. 618349)
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
E-mail: jianno@carltonfields.com

BY: 
Joseph Ianno, Jr.
Florida Bar No: 655351

**Counsel for Morgan Stanley & Co.
Incorporated and Morgan Stanley
Senior Funding**

SERVICE LIST

Jack Scarola
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy
Michael Brody
JENNER & BLOCK, LLC
One IBM Plaza, Suite 400
Chicago, IL 60611

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

v.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO., INC.,

Defendant.

MORGAN STANLEY SENIOR FUNDING, INC.,

Plaintiff,

v.

CASE NO: CA 03-5165 AI

MACANDREWS & FORBES HOLDINGS, INC.,

Defendant.

NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that a hearing has been set in the above-styled case as follows:

DATE:	July 14, 2004
TIME:	8:45 a.m.
PLACE:	Palm Beach County Courthouse, Courtroom 11A 205 North Dixie Highway West Palm Beach, Florida 33401
BEFORE:	Judge Elizabeth T. Maass
CONCERNING:	Morgan Stanley's Motion to Reschedule Case Management Conference and to Amend Hearing Procedures

Coleman v. Morgan Stanley
Case No: 03-CA-005045 AI
Notice of Hearing
Page 2

KINDLY GOVERN YOURSELVES ACCORDINGLY.

The undersigned counsel hereby certifies that a good faith attempt to resolve the issues contained in the foregoing motions or matters will be made with opposing counsel prior to hearing on these matters on the Court's Motion Calendar.

If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no costs to you, to the provision of certain assistance. Please contact the ADA Coordinator in the Administrative Office of the Court, Palm Beach County Courthouse, 205 North Dixie Highway, Room 5.2500, West Palm Beach, Florida 33401; telephone number (561) 355-2431 within two (2) working days of your receipt of this notice; if you are hearing or voice impaired, call 1-800-955-8771.

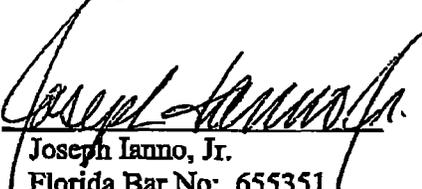
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this  day of July, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar No. 618349)
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

Counsel for Defendant
Morgan Stanley & Co. Incorporated

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

BY: 

Joseph Ianno, Jr.
Florida Bar No: 655351

Coleman v. Morgan Stanley
Case No: 03-CA-005045 AI
Notice of Hearing
Page 3

SERVICE LIST

Jack Scarola
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy
Michael Brody
JENNER & BLOCK, LLC
One IBM Plaza, Suite 400
Chicago, IL 60611

IN THE CIRCUIT COURT OF
FIFTEENTH JUDICIAL CIRCUIT IN
AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO., INC.,

Defendant.

MORGAN STANLEY SENIOR FUNDING, INC.,

Plaintiff,

vs.

MACANDREWS & FORBES HOLDINGS, INC., CASE NO: CA 03-5165 AI

Defendant.

**MORGAN STANLEY'S MOTION TO RESCHEDULE CASE MANAGEMENT
CONFERENCE AND TO AMEND HEARING PROCEDURES**

Morgan Stanley & Co. Incorporated and Morgan Stanley Senior Funding, Inc. (collectively "Morgan Stanley"), by and through their undersigned attorneys, file this Motion to Reschedule the Case Management Conference on July 23, 2004 and to amend the hearing procedures in this matter, and state as follows:

1. By Order dated February 24, 2004, this Court scheduled numerous Case Management Conferences ("CMC"). The next CMC is scheduled for July 23, 2004 at 9:00 a.m. with two hours reserved.

Coleman v. Morgan Stanley

Case No. CA 03-5045-AI

Page 2

2. Mr. Bemis, one of Morgan Stanley's lead attorneys, is scheduled to be out of the country from July 15, 2004 through July 25, 2004 and is unavailable to attend this hearing either in person or by telephone. Therefore, Morgan Stanley requests the Court to reschedule this hearing to another date.

3. Currently, there are no motions filed that are scheduled to be heard at the July 23rd CMC; therefore, there is no prejudice if this hearing is continued.

4. Additionally, Morgan Stanley, requests that this Court amend the hearing procedures set forth in the Court's February 24, 2004 Order.

5. Currently, any motion scheduled to be heard must be filed one week prior to the hearing. This procedure is not feasible since Plaintiff is filing substantive motions late on the Friday before the CMC. This practice deprives Morgan Stanley of a meaningful opportunity to review and research the motions and, at the same time, prepare and file a response by the following Wednesday. Moreover, this procedure does not allow the Court sufficient time to review any response memorandum prior to the hearing.

6. Morgan Stanley requests that the Court amend the hearing procedures to provide that all Motions must be filed a minimum of two weeks prior to the hearing and that any response memoranda are filed one week prior to the hearing.

7. Counsel for Morgan Stanley was advised that counsel for Plaintiff objects to a continuance of the hearing scheduled for July 23, 2004.

WHEREFORE, Morgan Stanley respectfully requests that the Court reschedule the Case Management Conference and amend the hearing procedures as set forth above and award such other and further relief as the Court deems just and proper.

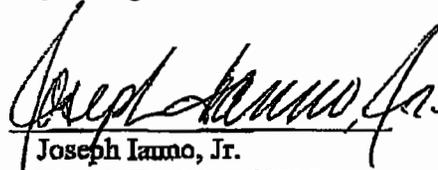
Coleman v. Morgan Stanley
Case No. CA 03-5045-AI
Page 3

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this  day of July, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar No. 618349)
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
E-mail: jianno@carltonfields.com

BY: 
Joseph Ianno, Jr.
Florida Bar No: 655351

**Counsel for Morgan Stanley & Co.
Incorporated and Morgan Stanley
Senior Funding**

SERVICE LIST

Jack Scarola
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy
Michael Brody
JENNER & BLOCK, LLC
One IBM Plaza, Suite 400
Chicago, IL 60611

IN THE CIRCUIT COURT OF
FIFTEENTH JUDICIAL CIRCUIT IN
AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO., INC.,

Defendant.

_____/

MORGAN STANLEY SENIOR FUNDING, INC.,

Plaintiff,

vs.

MACANDREWS & FORBES HOLDINGS, INC., CASE NO: CA 03-5165 AI

Defendant.

_____ /

NOTICE OF UNAVAILABILITY

Morgan Stanley & Co. Incorporated and Morgan Stanley Senior Funding, Inc., by and through their undersigned attorneys, hereby give notice that lead-counsel, Lawrence P. Bemis, will be unavailable from July 15, 2004 through July 25, 2004, and request that no court appearances, trials, hearings or depositions in the above-styled cause be scheduled within the aforementioned time period.

CERTIFICATE OF SERVICE

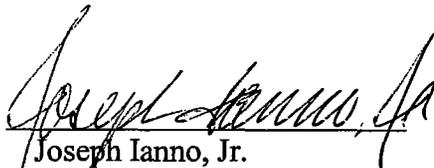
I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this 9th day of July, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar No. 618349)
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

**Counsel for Morgan Stanley & Co.
Incorporated and Morgan Stanley
Senior Funding**

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
E-mail: jianno@carltonfields.com

BY:


Joseph Ianno, Jr.
Florida Bar No: 655351

SERVICE LIST

Jack Scarola
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy
Michael Brody
JENNER & BLOCK, LLC
One IBM Plaza, Suite 400
Chicago, IL 60611

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

_____/

CASE NO. CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

_____/

**ORDER ON COLEMAN (PARENT) HOLDINGS INC.'S MOTION TO COMPEL
RESPONSES TO INTERROGATORIES**

THIS CAUSE came before the Court July 2, 2004 on Coleman (Parent) Holdings Inc.'s Motion to Compel Responses to Interrogatories, with all parties well represented by counsel. In open Court counsel for Defendant Morgan Stanley & Co., Inc. ("MS & Co."), represented that Defendant's Supplemental Answers included a complete answer to interrogatory 2, excluding those individuals or entities identified in subparagraphs 9(c) and 9(h) of the Stipulated Confidentiality Order, and that no individuals or entities identified in subparagraph 9(h) have received copies of the Settlement Agreement.

This case arises out of an acquisition transaction that was negotiated and consummated in late 1997 and early 1998, in which Coleman (Parent) Holdings, Inc. ("CPH"), sold its 82% interest in the Coleman Company, Inc. ("Coleman"), to Sunbeam Corporation ("Sunbeam"). Morgan Stanley & Co., Inc. ("MS & Co."), served as financial

advisor to Sunbeam for parts of the acquisition transaction and served as the lead underwriter for a \$750,000,000 debenture offering that Sunbeam used to finance the acquisition.

In 1998, Morgan Stanley Senior Funding, Inc. ("MSSF"), and other lenders entered into a credit agreement with Sunbeam under which MSSF agreed to provide senior secured financing to Sunbeam in connection with Sunbeam's acquisition of Coleman and two smaller companies.

CPH sued Arthur Andersen, Sunbeam's auditors and advisors, in 2001, alleging that Arthur Andersen made misrepresentations concerning Sunbeam's financial condition which CPH relied on in selling Coleman to Sunbeam in return for Sunbeam stock. That action settled in October, 2002 under a written Settlement Agreement ("Settlement Agreement").

In 2003, CPH sued Morgan Stanley here alleging claims arising from this transaction for fraudulent misrepresentation, negligent misrepresentation, aiding and abetting fraud, and conspiracy, and seeks damages of at least \$485 million. Later in 2003, MSSF filed suit alleging that, in the course of Sunbeam's acquisition of Coleman, Defendants MacAndrews & Forbes Holdings, Inc. ("MAFCO"), and CPH provided false information to MSSF about the "synergies" that Sunbeam would achieve from the combination of Sunbeam and Coleman. MSSF alleges that MAFCO and CPH's inflated synergy projections caused Sunbeam to pay a higher price to acquire Coleman and consequently caused Sunbeam's lenders, including MSSF, to make larger loans to finance the acquisition. These suits have been consolidated.

Defendants sought production of the CPH/Arthur Andersen Settlement Agreement in this case. By Order filed December 18, 2003, the Court ordered its production, subject to the terms of the Stipulated Confidentiality Order ("Confidentiality Order"), which limited its dissemination and use.

By its Motion for Order to Show Cause, since renominated as a Motion for Contempt

by the Court, Plaintiff alleges that Defendants violated the December 18, 2003 Order and the Confidentiality Order by disseminating the Settlement Agreement more broadly than permitted and by using it for an improper purpose: Plaintiff claims that the Settlement Agreement's indemnification provision motivated MS & Co. to be included as a co-plaintiff in Defendants' suit against Arthur Anderson.

Plaintiff points to circumstantial evidence to support its motion: MS & Co. had to be included in the suit to trigger the indemnification provision under the Settlement Agreement; MS & Co. sued Arthur Andersen shortly after the Settlement Agreement was produced; and the basis for MS & Co.'s claim, as opposed to MSSF's claim, is not apparent.

At both the April 30 and July 2, 2004 hearings, counsel for MS & Co. attempted to persuade the Court that Plaintiff's conclusions were inaccurate. Specifically, counsel for MS & Co. repeatedly disclosed privileged information to the Court, including the reasons for and timing of his client's retention of Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C; the scope of Kellogg, Huber's duties; and the reasons why the filing of the suit against Arthur Andersen was delayed. Repeatedly, when given the opportunity to withdraw the representations, he refused. Plaintiff claims this waived any privilege on the items disclosed and related matters. MS & Co. claims it did not.

MS & Co. had the choice of standing on its attorney-client and work product privileges, and refusing to divulge privileged information about the need for alternate counsel and the timing of the Arthur Andersen suit and its perceived merits, or waiving the privilege and permitting a full vetting of the subject. It may not do what it has attempted to do here, though, and selectively reveal only such privileged information as it believes helps its position. The conclusion is inescapable that Defendant MS & Co. has waived any privilege with respect to the reasons for and timing of the retention the Kellogg, Huber law firm; the scope of its representation; and the timing of the Arthur Andersen suit. See Fla. Stat. §90.507; Hamilton v. Hamilton Steel Corporation, 409 So. 2d 1111, 1114 (Fla. 4th

DCA 1982).¹

The Court finds, though, that MS & Co. has not waived any work product or attorney-client privilege as to the role, if any, the Settlement Agreement may have played in the filing of the subsequent litigation. Instead, the Court accepts MS & Co.'s position that its counsel's statement that ". . . there simply is no temporal or factual or legal connection between the Arthur Andersen complaint and the settlement agreement . . . Morgan Stanley didn't use the settlement agreement in . . . the Andersen complaint" [April 30, 2004 Tr. page 58, line 12] was intended to mean only that the Andersen complaint was not "brought" on the settlement agreement, as contemplated by Rule 1.130 (a), Fla. R. Civ. P., not that it was not motivated by the existence of the Settlement Agreement.

MS & Co. appears to argue, though, that if that privilege has not been waived, then its answer to Interrogatory 1 would necessarily require disclosure of privileged information. That conclusion does not necessarily follow. First, a simple yes or no does not require disclosure of either the existence or content of attorney-client communications or work product. Second, MS & Co. may have independently evaluated the impact of the Settlement Agreement and made a decision, without advice from or communication about its implications with counsel. Consequently, even an elaborated answer may not contain privileged information.

Finally, the Court agrees with Defendant that Plaintiff's Motion for Contempt cannot

¹"to us it would appear that even if a privilege would have existed, it was waived in this instance. It is black letter law that once the privilege is waived, and the horse is out of the barn, it cannot be reinvoked. In the instant case, single counsel showed up at a hearing and publicly announced on behalf of all his clients all of the details of the settlement. Later some of his clients and he himself now claim certain details of that same settlement to be 'confidential.' We cannot agree, for the settlement supposedly in its entirety, had already been publicly announced to third parties, including the judge, at the settlement hearing. An explanation of any inconsistencies now appearing must be forthcoming outside of any claim of privilege."

Hamilton at 1114.

be used to justify delving into Defendant's use of confidential documents other than the Settlement Agreement.

Based on the foregoing and on the proceedings before the Court, it is

ORDERED AND ADJUDGED that MS & Co., Inc., is bound by its counsel's representation that its Supplemental Answers included a complete answer to Interrogatory 2, excluding those individuals or entities identified in subparagraphs 9 (c) and 9 (h) of the Stipulated Confidentiality Order, and that no individuals or entities identified in subparagraph 9 (h) of the Confidentiality Order have received copies of the Settlement Agreement. It is further

ORDERED AND ADJUDGED that the Motion is Granted, in part. Interrogatory 2 is amended by interlineation to delete "any information designated as 'confidential' including but not limited to". Defendant shall serve on Plaintiff its complete answers to interrogatories 2, as so amended, and 4 and those portions of interrogatory 3 for which there is no privilege claim, within 20 days. It is further

ORDERED AND ADJUDGED that within 20 days, MS & Co. shall submit directly to the Court, in a sealed envelope marked "DO NOT OPEN PER JULY 12, 2004 COURT ORDER": (i) its complete answer to Interrogatory 1 and the portions of the answers to interrogatory 3 omitted based on privilege, with all privileged information highlighted; (ii) affidavit(s) detailing the specific factual basis to support each privilege claim; (iii) any legal argument to support the privilege claims; and (iv) a copy of the Interrogatories and this Order. The Court shall reseal the items tendered and place them in the Court file following ruling on MS & Co.'s objections. The resealed item may not be unsealed or removed from the court file absent subsequent order of this or an appellate court. Those portions of (ii) and (iii) over which MS & Co. claims no privilege and the portions of the answers not claimed to be privileged shall be served on Plaintiff. Plaintiff shall serve any response to MS & Co.'s legal argument within 10 days of its service.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 6th
day of July, 2004.



ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci
655 15th Street, NW, Suite 1200
Washington DC 20005

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, IL 60611

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.
MORGAN STANLEY & CO., INC.,
Defendant(s).

CASE NO: CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),
vs.
MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

NOTICE OF VIDEOTAPED DEPOSITION

PLEASE TAKE NOTICE that Defendant Morgan Stanley & Company Incorporated and Plaintiff Morgan Stanley Senior Funding will take the videotaped deposition of William H. Spoor, pursuant to Florida Rules of Civil Procedure 1.280 and 1.310. The oral examination will take place beginning on July 20, 2004, at 9:30 a.m. and continue from day to day until completed at Greene Espel, P.L.L.P., 200 South Sixth Street, Suite 1200, Minneapolis, MN 55402. The deposition will be taken before a person authorized to administer oaths and recorded by stenographic and videographic means. The video operator will be Esquire Deposition Services of 701 Fourth Avenue South, Suite 500, Minneapolis, MN 55415. The witness is instructed to bring all books, papers, and other things in his possession or under his control relevant to this lawsuit (and not previously produced in discovery) to the examination.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this 13th day of July, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar # 618349)
Thomas A. Clare
Zhonette M. Brown
Michael C. Occhuizzo
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

Joseph Ianno, Jr. (FL Bar # 655351)
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

BY: 

**Counsel for Morgan Stanley & Co.
Incorporated & Morgan Stanley Senior
Funding**

SERVICE LIST

Counsel for Coleman(Parent) Holdings & MacAndrews & Forbes

John Scarola

**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**

2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33409

Jerold S. Solovy

JENNER & BLOCK, LLC

One IBM Plaza, Suite 4400
Chicago, Illinois 60611

#230580/mp

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 2003 CA 005045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiffs,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.

MORGAN STANLEY SENIOR FUNDING,
INC.,

Plaintiff,

vs.

MACANDREWS & FORBES HOLDINGS,
INC.,

Defendant,

CASE NO. 2003 CA 03-5165 AI

NOTICE OF TAKING DEPOSITION

***Duces Tecum**

PLEASE TAKE NOTICE that the undersigned attorneys will take deposition(s) of:

<u>NAME AND ADDRESS</u>	<u>DATE AND TIME</u>	<u>LOCATION</u>
Records Custodian Wachovia Bank, N.A. 777 S. Flagler Drive West Palm Beach, FL 33401	July 30, 2004 9:00 a.m.	2139 Palm Beach Lakes Boulevard, West Palm Beach, Florida

***DUCES TECUM: TO HAVE AND BRING WITH YOU AT THE TIME OF THE DEPOSITION THE FOLLOWING:**

SEE ATTACHMENT "A"

AND any and all materials which you have reviewed in preparation for your testimony.

upon oral examination before Pinnacle Reporting, Inc., a Notary Public; or any other officer authorized by law to take depositions in the State of Florida. The oral examination is being taken

Coleman Holdings, Inc. vs Morgan Stanley & Company
Case No.: 2003 CA 005045 AI
Plaintiff's Notice Taking Deposition Duces Tecum

for the purpose of discovery, for uses at trial, or for such other purposes as are permitted under the applicable Statutes or Rules.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Fax and Federal Express to all Counsel on the attached list, this 12th day of July, 2004.



JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 478-0754
Attorneys for CPH and MAFCO

cc: Pinnacle Reporting, Inc.
**MICRO COPY AND SUMMATION BRIEFCASE FILE (SBF) DISC
REQUESTED – AMICUS IF SBF NOT AVAILABLE**

AMERICANS WITH DISABILITIES ACT

In accordance with the Americans With Disabilities Act, persons in need of a special accommodation to participate in this proceeding should contact the Human Resources Manager, Searcy Denney Scarola Barnhart & Shipley, P.A., no later than seven days prior to the proceeding. Please telephone (561) 686-6300.

Coleman Holdings, Inc. vs Morgan Stanley & Company
Case No.: 2003 CA 005045 AI
Plaintiff's Notice Taking Deposition Duces Tecum

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner and Block LLP
One IBM Plaza, Suite 4400
Chicago, IL 60611

ATTACHMENT A

**SUBPOENA TO CUSTODIAN OF RECORDS OF
FIRST UNION NATIONAL BANK
(NOW KNOWN AS WACHOVIA BANK NATIONAL ASSOCIATION)**

You are hereby requested to produce the following documents pursuant to the following definitions and instructions.

DOCUMENTS REQUESTED

1. All documents referring to any portion of the Settlement Agreement.
2. All documents received from Morgan Stanley Entities; Kirkland & Ellis, LLP; Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C. (“Kellogg Huber”); or Carlton Fields, P.A. that relate in any way to Arthur Andersen.
3. All documents reflecting or referring to any information received from Morgan Stanley Entities; Kirkland & Ellis, LLP; Kellogg Huber; or Carlton Fields, P.A. that relates in any way to Arthur Andersen.
4. All documents reflecting or referring to any communications with Morgan Stanley Entities; Kirkland & Ellis, LLP; Kellogg Huber; or Carlton Fields, P.A. that relate in any way to Arthur Andersen.
5. All documents relating to (a) whether and when Kellogg Huber began representing Morgan Stanley Entities in the consolidated litigation captioned *Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co., Inc., //Morgan Stanley Senior Funding, Inc. v. MacAndrews & Forbes Holdings Inc.*, Case Nos. CA 03-5045 AI/CA 03-5165-AI, pending in the Fifteenth Judicial Circuit, Palm Beach County, Florida (“the Consolidated Coleman Litigation”); (b) whether, when, and what information contained in the Settlement Agreement was disclosed to Kellogg Huber; and/or (c) the scope of responsibilities assumed by Kellogg Huber with respect to the Consolidated Coleman Litigation.

6. All documents concerning why firms other than Kirkland & Ellis LLP and Carlton Fields, P.A. were being retained to file suit against Arthur Andersen.
7. All documents relating to why Morgan Stanley Entities waited until March 1, 2004 to sue Arthur Andersen.
8. All documents relating to why Wachovia Bank, N.A. waited until March 1, 2004 to sue Arthur Andersen.
9. All documents relating to whether the contents of the Settlement Agreement, and/or any other material designated “Confidential” in the Consolidated Coleman Litigation were disclosed to any third parties, including Wachovia Bank, N.A.
10. All documents relating to any reason why the contents of the Settlement Agreement, and/or any other material designated “Confidential” in the Consolidated Coleman Litigation were disclosed to any third parties, including Wachovia Bank, N.A.
11. All drafts of complaints by any Morgan Stanley Entities against Arthur Andersen, including all versions reflecting any handwritten comments or marginalia, and all documents reflecting when and/or by whom each draft and version was prepared.
12. All documents concerning the value of American Household, Inc., or any portion of American Household, Inc.
13. All financial statements of American Household, Inc.

DEFINITIONS

1. “Arthur Andersen” means Arthur Andersen LLP; Andersen Worldwide, Société Coopérative; Arthur Andersen & Co. (Canada); Ruiz, Urquiza Y Cia, S.C.; Piernavieja, Porta, Cachafeiro & Avocados [Asociados]; Arthur Andersen (U.K.); Phillip Harlow; Lawrence Bornstein; William Pruitt; and/or Donald Denkhaus.

2. "Communication" means the transmittal of information (in the form of facts, ideas, inquiries or otherwise) by letter, memorandum, facsimile, orally, electronically, or otherwise.
3. "Concerning" means concerning, reflecting, relating to, referring to, describing, evidencing, or constituting.
4. "Documents" shall be given the broad meaning provided in Rule 1.350 of the Florida Rules of Civil Procedure and refers to any form or means, whether physical, visual, or electronic, in or by which words, numbers, or ideas are recorded or preserved, whether fixed in tangible medium or electronically stored, including any and all drafts of any final document. The word "documents" shall include, by way of example and not by way of limitation, all of the following: papers, correspondence, trade letters, envelopes, memoranda, telegrams, cables, notes, messages, reports, studies, press releases, comparisons, books, accounts, checks, audio and video recordings and transcriptions thereof, pleadings, testimony, articles, bulletins, pamphlets, brochures, magazines, questionnaires, surveys, charts, newspapers, calendars, desk calendars, pocket calendars, lists, logs, publications, notices, diagrams, instructions, diaries, minutes for meetings, corporate minutes, orders, resolutions, agendas, memorials or notes of oral communications, whether by telephone or face-to-face, contracts, agreements, drafts of or proposed contracts or agreements, memoranda of understanding, letters of intent, computer tapes, computer drives or memories, computer diskettes or disks, e-mail, CD-ROMs, or any other tangible thing on which any handwriting, typing, printing, photostatic, electronic, or other form of communication or information is recorded or reproduced, together with all notations on any of the foregoing, all originals, file copies, or other unique copies of the foregoing, and all versions or drafts thereof, whether used or not.

5. "Financial Statements" means, without limitation, balance sheets, statements of income, earnings, retained earnings, sources and applications of funds, cash flow projections, notes to each such statements, or any other notes which pertain to the past or present financial condition of Sunbeam, whether any of the foregoing is audited or unaudited, whether final, interim or pro forma, complete or partial, consolidated, yearly, monthly, or otherwise.
6. "Morgan Stanley Entities" means Morgan Stanley & Co., Inc.; Morgan Stanley Senior Funding Inc.; Morgan Stanley; Morgan Stanley Dean Witter & Co.; and/or any entity owned in whole or in part, directly or indirectly, by Morgan Stanley.
7. "Settlement Agreement" means the settlement agreement between, inter alia, Coleman (Parent) Holdings Inc. and Arthur Andersen LLP, compelled to be produced and designated as Confidential by Judge Elizabeth T. Maass on December 4, 2003.

INSTRUCTIONS

1. Documents shall be produced as they are kept in the usual course of business, or organized and labeled to correspond to the categories in this Request. Documents attached to each other should not be separated. Documents consisting of items previously produced in the Litigations, Arbitrations, and/or SEC Administrative Proceedings with Bates numbering shall be produced in Bates number order.
2. All documents shall be produced in the file folder, envelope or other container in which the documents are kept or maintained by you. If, for any reason, the container cannot be produced, produce copies of all labels or other identifying marks.
3. The relevant period, unless otherwise indicated, shall be from **January 1, 2001 through the date of trial of this matter**, and shall include all documents and information which relate in whole or in part to such period, or to events or circumstances during such period, even

though dated, prepared, generated or received prior or subsequent to that period. Please supplement or correct your responses to these requests if, at any time, you become aware that your responses are incomplete or incorrect in any respect.

4. If you claim the attorney-client privilege, or any other privilege or work-product protection for all or any portion of a document, you shall provide a privilege log that describes the withheld material sufficiently to allow CPH and Mafco to test the privilege or protection asserted.
5. The following rules of construction apply:
 - a) The connectives “and” and “or” shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery requests all responses that might otherwise be outside of their scope;
 - b) The term “including” shall be construed to mean “without limitation”; and
 - c) The use of the singular form of any word includes the plural and vice versa.

#230580/mp

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN
AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiffs,

CASE NO: 2003 CA 005045 AI

vs.
MORGAN STANLEY & CO., INC.,

Defendant.

MORGAN STANLEY SENIOR FUNDING,
INC.,

Plaintiff,

vs.

CASE NO.: 2003 CA 03-5165 AI

MACANDREWS & FORBES HOLDINGS,
INC.,

Defendant,

SUBPOENA DUCES TECUM FOR DEPOSITION

THE STATE OF FLORIDA

**TO: Records Custodian
Wachovia Bank, N.A.
777 S. Flagler Drive
West Palm Beach, FL 33401**

YOU ARE COMMANDED to appear before a person authorized by law to take depositions at **2139 Palm Beach Lakes Boulevard, West Palm Beach, Florida on July 30, 2004, at 9:00 A.M.**, for the taking of your deposition in this action. You are to have with you at the above place and time the following:

DUCES TECUM: SEE ATTACHMENT "A"

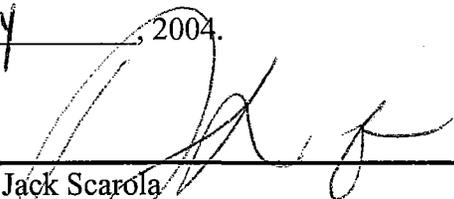
If you fail to appear, you may be in contempt of Court.

16div-005604

Coleman Holdings, Inc. vs Morgan Stanley & Company
Case No.: 2003 CA 005045 AI
SDT for Depo

You are subpoenaed to appear by the following attorney and unless excused from this subpoena by this attorney or the Court, you shall respond to this subpoena as directed.

DATED this 12th day of July, 2004.



Jack Scarola
On Behalf of the Court

JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 478-0754
Attorneys for CPH and MAFCO

ATTACHMENT A

**SUBPOENA TO CUSTODIAN OF RECORDS OF
FIRST UNION NATIONAL BANK
(NOW KNOWN AS WACHOVIA BANK NATIONAL ASSOCIATION)**

You are hereby requested to produce the following documents pursuant to the following definitions and instructions.

DOCUMENTS REQUESTED

1. All documents referring to any portion of the Settlement Agreement.
2. All documents received from Morgan Stanley Entities; Kirkland & Ellis, LLP; Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C. (“Kellogg Huber”); or Carlton Fields, P.A. that relate in any way to Arthur Andersen.
3. All documents reflecting or referring to any information received from Morgan Stanley Entities; Kirkland & Ellis, LLP; Kellogg Huber; or Carlton Fields, P.A. that relates in any way to Arthur Andersen.
4. All documents reflecting or referring to any communications with Morgan Stanley Entities; Kirkland & Ellis, LLP; Kellogg Huber; or Carlton Fields, P.A. that relate in any way to Arthur Andersen.
5. All documents relating to (a) whether and when Kellogg Huber began representing Morgan Stanley Entities in the consolidated litigation captioned *Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co., Inc., //Morgan Stanley Senior Funding, Inc. v. MacAndrews & Forbes Holdings Inc.*, Case Nos. CA 03-5045 AI/CA 03-5165-AI, pending in the Fifteenth Judicial Circuit, Palm Beach County, Florida (“the Consolidated Coleman Litigation”); (b) whether, when, and what information contained in the Settlement Agreement was disclosed to Kellogg Huber; and/or (c) the scope of responsibilities assumed by Kellogg Huber with respect to the Consolidated Coleman Litigation.

6. All documents concerning why firms other than Kirkland & Ellis LLP and Carlton Fields, P.A. were being retained to file suit against Arthur Andersen.
7. All documents relating to why Morgan Stanley Entities waited until March 1, 2004 to sue Arthur Andersen.
8. All documents relating to why Wachovia Bank, N.A. waited until March 1, 2004 to sue Arthur Andersen.
9. All documents relating to whether the contents of the Settlement Agreement, and/or any other material designated "Confidential" in the Consolidated Coleman Litigation were disclosed to any third parties, including Wachovia Bank, N.A.
10. All documents relating to any reason why the contents of the Settlement Agreement, and/or any other material designated "Confidential" in the Consolidated Coleman Litigation were disclosed to any third parties, including Wachovia Bank, N.A.
11. All drafts of complaints by any Morgan Stanley Entities against Arthur Andersen, including all versions reflecting any handwritten comments or marginalia, and all documents reflecting when and/or by whom each draft and version was prepared.
12. All documents concerning the value of American Household, Inc., or any portion of American Household, Inc.
13. All financial statements of American Household, Inc.

DEFINITIONS

1. "Arthur Andersen" means Arthur Andersen LLP; Andersen Worldwide, Société Coopérative; Arthur Andersen & Co. (Canada); Ruiz, Urquiza Y Cia, S.C.; Piernavieja, Porta, Cachafeiro & Avocados [Asociados]; Arthur Andersen (U.K.); Phillip Harlow; Lawrence Bornstein; William Pruitt; and/or Donald Denkhaus.

2. "Communication" means the transmittal of information (in the form of facts, ideas, inquiries or otherwise) by letter, memorandum, facsimile, orally, electronically, or otherwise.
3. "Concerning" means concerning, reflecting, relating to, referring to, describing, evidencing, or constituting.
4. "Documents" shall be given the broad meaning provided in Rule 1.350 of the Florida Rules of Civil Procedure and refers to any form or means, whether physical, visual, or electronic, in or by which words, numbers, or ideas are recorded or preserved, whether fixed in tangible medium or electronically stored, including any and all drafts of any final document. The word "documents" shall include, by way of example and not by way of limitation, all of the following: papers, correspondence, trade letters, envelopes, memoranda, telegrams, cables, notes, messages, reports, studies, press releases, comparisons, books, accounts, checks, audio and video recordings and transcriptions thereof, pleadings, testimony, articles, bulletins, pamphlets, brochures, magazines, questionnaires, surveys, charts, newspapers, calendars, desk calendars, pocket calendars, lists, logs, publications, notices, diagrams, instructions, diaries, minutes for meetings, corporate minutes, orders, resolutions, agendas, memorials or notes of oral communications, whether by telephone or face-to-face, contracts, agreements, drafts of or proposed contracts or agreements, memoranda of understanding, letters of intent, computer tapes, computer drives or memories, computer diskettes or disks, e-mail, CD-ROMs, or any other tangible thing on which any handwriting, typing, printing, photostatic, electronic, or other form of communication or information is recorded or reproduced, together with all notations on any of the foregoing, all originals, file copies, or other unique copies of the foregoing, and all versions or drafts thereof, whether used or not.

5. "Financial Statements" means, without limitation, balance sheets, statements of income, earnings, retained earnings, sources and applications of funds, cash flow projections, notes to each such statements, or any other notes which pertain to the past or present financial condition of Sunbeam, whether any of the foregoing is audited or unaudited, whether final, interim or pro forma, complete or partial, consolidated, yearly, monthly, or otherwise.
6. "Morgan Stanley Entities" means Morgan Stanley & Co., Inc.; Morgan Stanley Senior Funding Inc.; Morgan Stanley; Morgan Stanley Dean Witter & Co.; and/or any entity owned in whole or in part, directly or indirectly, by Morgan Stanley.
7. "Settlement Agreement" means the settlement agreement between, inter alia, Coleman (Parent) Holdings Inc. and Arthur Andersen LLP, compelled to be produced and designated as Confidential by Judge Elizabeth T. Maass on December 4, 2003.

INSTRUCTIONS

1. Documents shall be produced as they are kept in the usual course of business, or organized and labeled to correspond to the categories in this Request. Documents attached to each other should not be separated. Documents consisting of items previously produced in the Litigations, Arbitrations, and/or SEC Administrative Proceedings with Bates numbering shall be produced in Bates number order.
2. All documents shall be produced in the file folder, envelope or other container in which the documents are kept or maintained by you. If, for any reason, the container cannot be produced, produce copies of all labels or other identifying marks.
3. The relevant period, unless otherwise indicated, shall be from **January 1, 2001 through the date of trial of this matter**, and shall include all documents and information which relate in whole or in part to such period, or to events or circumstances during such period, even

though dated, prepared, generated or received prior or subsequent to that period. Please supplement or correct your responses to these requests if, at any time, you become aware that your responses are incomplete or incorrect in any respect.

4. If you claim the attorney-client privilege, or any other privilege or work-product protection for all or any portion of a document, you shall provide a privilege log that describes the withheld material sufficiently to allow CPH and Mafco to test the privilege or protection asserted.
5. The following rules of construction apply:
 - a) The connectives “and” and “or” shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery requests all responses that might otherwise be outside of their scope;
 - b) The term “including” shall be construed to mean “without limitation”; and
 - c) The use of the singular form of any word includes the plural and vice versa.

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

_____/

CASE NO. CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

_____/

**ORDER ON MORGAN STANLEY'S MOTION TO RESCHEDULE CASE
MANAGEMENT CONFERENCE AND TO AMEND HEARING PROCEDURES
AND DEFENDANTS' ORE TENUS MOTION TO CONTINUE HEARING ON
PLAINTIFF'S MOTIONS TO COMPEL RESPONSES TO DISCOVERERY
(CONTEMPT)**

THIS CAUSE came before the Court July 14, 2004 on Morgan Stanley's Motion to Reschedule Case Management Conference and to Amend Hearing Procedures and Defendants' ore tenus Motion to Continue Hearing on Plaintiff's Motions to Compel Responses to Discovery (Contempt), with Plaintiff's counsel present and Defendants' counsel participating by speaker telephone. Based on the proceedings before the Court, it is

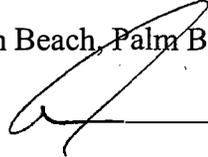
ORDERED AND ADJUDGED that Morgan Stanley's Motion to Reschedule Case Management Conference is Denied. It is further

ORDERED AND ADJUDGED that the Court defers ruling on Defendants' ore tenus Motion to Continue Hearing on Plaintiff's Motions to Compel Responses to Discovery

(Contempt). It is further

ORDERED AND ADJUDGED that Morgan Stanley's Motion to Amend Hearing Procedures is Granted. Henceforth, all motions to be heard at case management conferences shall be served no later than 14 days prior to the scheduled case management conference (10 days prior to the August 27, 2004 case management conference). Any responses thereto shall be served no later than 7 days prior to the case management conference.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 14 day of July, 2004.



ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:

Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci
655 15th Street, NW, Suite 1200
Washington DC 20005

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, Il 60611

00001

1 IN THE CIRCUIT COURT OF THE 15TH
2 JUDICIAL CIRCUIT IN AND FOR
3 PALM BEACH COUNTY, FLORIDA

4 COLEMAN (PARENT) HOLDINGS, INC.,

5 Plaintiff,

6 vs. CASE NO. 03-5045 AI

7 MORGAN STANLEY & COMPANY, INC.,

8 Defendant.

9 -----X
10 MORGAN STANLEY SENIOR FUNDING, INC.,
11 Plaintiff,

12 CASE NO. CA 03-5165 AI

13 v.
14 MACANDREWS & FORBES HOLDINGS, INC.

15 -----/

16 The above-styled cause came on for hearing
17 before the HONORABLE ELIZABETH T. MAASS at the
18 Palm Beach County Courthouse, West Palm Beach,
19 Florida, July 14, 2004 commencing at 8:45
20 o'clock a.m.

21
22
23
24
25
00002

1 APPEARANCES:
2 SEARCY, DENNEY, SCAROLA,
3 BARNHARDT & SHIPLEY, P.A.
4 By: ROSALYN SIA BAKER, JR., ESQUIRE
5 2139 Palm Beach Lakes Blvd.
6 West Palm Beach, Florida 33409
7 Appearing on behalf of the Plaintiff.

8 CARLTON, FIELDS, P.A.
9 By: JOSEPH IANNO, JR., ESQUIRE
222 Lakeview Avenue
Suite 1400
West Palm Beach, Florida 33401-6149
Appearing on behalf of the Defendant,
MORGAN STANLEY.

JENNER & BLOCK, LLC.

10 By: RONALD MARMER, ESQUIRE
One IBM Plaza, Suite 400
11 Chicago, IL 606611
Appearing on behalf of MACANDREWS & FORBES
12 telephonically.
13
14
15
16
17
18
19
20
21
22
23
24
25

00003

1 (Whereupon, the following proceedings were had:).

2 THE COURT: This is Judge Maass. Who do I
3 have on the phone?

4 MR. MARMER: Morning, this is Ron Marmer.

5 THE COURT: I have you on the speaker
6 phone in the courtroom in Coleman and Morgan
7 Stanley. Why don't you come forward so she can
8 hear. We wanted to reschedule the case
9 management conference that is September the
10 23rd.

11 MR. IANNO: Yes, Your Honor. Joe Ianno
12 here on behalf of Morgan Stanley, the senior
13 funding plaintiff in the other case. As you may
14 recall back in February we scheduled numerous
15 case management conferences. The next one
16 scheduled is July 23rd, a week from this Friday.
17 At the time we scheduled them no one had
18 coordinated a schedule. Mr. Bemis who is the
19 lead counsel and has been arguing all the
20 hearings in the last two months for Morgan
21 Stanley is out of the country starting tomorrow
22 for ten days. He won't be available. We have
23 asked to reschedule it a week, if possible,
24 whatever, the court has on its schedule. As it
25 sits right now there is not a single motion that

00004

1 has been filed or noticed for hearing at the
2 case management conference. So there is no
3 prejudice to any party. Now, I talked to Mr.
4 Scarola about this. He said the attorneys for
5 Jenner and Block were objecting to this. What
6 we suspect and the reason for the second part of
7 our motion is on Friday we are going to get a
8 slue of motions that were supposes to be

16div-005614

9 scheduled for the following Friday. That is
10 what has been happening throughout this case.
11 That results in the court getting these multiple
12 binders for the case.

13 THE COURT: Ask the bailiff to step in.

14 MR. IANNO: And that results in the court
15 getting as you have seen in the last couple of
16 case management conferences the first binder,
17 the second binder, then a complete binder. What
18 we are asking the court to do is amend their
19 hearing procedures in this case to provide that
20 the motions to be heard be filed two weeks prior
21 to the case management conference and then any
22 responsive memoranda be filed one week prior to
23 the case management conference and that the
24 party responsible for filing either the
25 responsive memoranda, we can work this out

00005

1 amongst ourselves because what is happening
2 now --

3 THE COURT: I understand what you are
4 saying. Response.

5 MS. BAKER: I'm saying -- Ms. Baker. I'm
6 here for Jack Scarola. Ron Marmer can better
7 address these issues.

8 THE COURT: What did you want to say?

9 MS. BAKER: Here is the one.

10 THE COURT: Is that him? We lost him.
11 Call it. I need the book. Thanks.

12 MR. MARMER: We were not connected. After
13 I said good morning, Your Honor, and my name
14 there was a beeping sound and we heard nothing
15 further.

16 THE COURT: What Mr. Ianno was suggesting
17 is there was nothing set at the case management
18 conference right now that he believes perhaps
19 plaintiffs are objecting only because they
20 intend to file a big binder on Friday with
21 substantive motions and they will have
22 insufficient time to respond. He was suggesting
23 two things, won, the case management conference
24 being reset and two that the case management
25 orders be amended to require motions be served

00006

1 two weeks before the case management hearing,
2 responses within one week and they then
3 coordinate my getting a single binder that
4 includes both the motions and the response.
5 What is your argument both in opposition I guess
6 to resetting the case management case conference
7 and amending the case management award?

8 MR. MARMER: Yes, Your Honor, there is.
9 Thank you. We do oppose both of those requests.
10 First with regard to the July 23 case management

16div-005615

11 conference, we do intent to file motions. The
12 state in Morgan Stanley papers says there is
13 nothing set yet which is not surprising because
14 the motions are not due until this Friday. We
15 do fully expect to be filing several motions for
16 the hearing on July 23, that have been the
17 subject of some correspondence between the
18 parties. So I don't think they will come to any
19 surprise to Morgan Stanley. With regards to the
20 the discovery time, case management conference,
21 itself, we understand that Mr. Bemis has a
22 scheduling conflict and we would normally try to
23 accommodate him on that. Unfortunately, with
24 the discovery cut-off coming up of September 3,
25 we really believe we need to stick to our

00007

1 existing hearing. We have really three case
2 management conferences, including July 23
3 between now and the close of discovery, July 23,
4 August 13 and August 27. And when those were
5 set back in February, on February 20th of the
6 court's hearing then, the whole point of that
7 was the parties foresaw that as we got towards
8 the close of discovery, we likely would need
9 more of the court's time. We therefore set more
10 frequent conferences and the court allowed us
11 two hours for those including --

12 THE COURT: Let me ask you this.

13 MR. MARMER: I think that is right. That
14 is entirely important that we keep it and there
15 is no easy way to move these dates. Both
16 Fridays are both terrible for us.

17 THE COURT: Let me --

18 MR. MARMER: We appreciate Mr. Bemis has a
19 scheduling issue and we would normally be
20 sympathetic to that and are sympathetic to that.
21 The fact of the matter is everybody has been
22 planning around those days, February 20th. We
23 all locked them into our schedule. With regard
24 to moving it, we very much oppose that and do
25 expect to present several motions.

00008

1 THE COURT: What are the motions you
2 expect to present?

3 MR. MARMER: Which motions?

4 THE COURT: Tell me right now what the
5 motions are.

6 MR. MARMER: I'm sorry, sometimes the
7 first couple words get cut off. The answer is
8 we had one motion which is going to address
9 essentially a deficiency in the verification of
10 the interrogatories that Morgan Stanley Funding
11 has filed, the partial has verified, one in
12 particular of their sets of the interrogatories

16div-005616

13 he had his deposition taken at which point he
14 basically says "Beats me, I don't know anything
15 about this." That is fast on the heels of a
16 series of other depositions where we have not
17 been able to get to the bottom, the gist of it
18 has to do with the nature of the claims in the
19 Morgan Stanley Funding case against us. So one
20 of our motions attacks that. We have another
21 motion which we will deal with lifting certain
22 confidentiality designations from certain of the
23 pleadings, making a second motion on that as
24 well as relating -- I think it would be the
25 second one, in general it will be

00009

1 nonconfidential motion. We are going to ask
2 Your Honor to designate four words in the recent
3 order that Your Honor entered and is
4 confidential and redact them and then we have at
5 least a fourth motion which is going to deal
6 with our second wave of content discovery. Your
7 Honor has ruled on the first four
8 interrogatories. We subsequently had filed
9 additional discovery requests and there is
10 considerable disputes between the parties
11 concerning those. There are several other
12 matters where we are awaiting responses.
13 Hopefully we will get them today from Morgan
14 Stanley on some other outstanding discovery
15 requests, depending on what those responses are,
16 there may or may not be some other issues up.
17 But those are just the issues that we presently
18 have in the works and expect to be filing on
19 Friday.

20 THE COURT: Which one of these did you
21 know or not know about?

22 MR. IANNO: The one that I knew about was
23 the motion that was directed to the contempt
24 interrogatories and based --

25 THE COURT: That is the last one you

00010

1 referred to?

2 MR. IANNO: That is the one we expected
3 was coming. We were going to say with that, we
4 think that is premature until the court finishes
5 the rules on the first set. The order was just
6 received by us yesterday and I assume Mr. Marmer
7 received that same order. So we think the court
8 ought to finish with that set. We think that is
9 premature. With regard to the verification and
10 lifting of confidentiality designation, I'm
11 personally not aware of what those issues relate
12 to. I know I have seen some letters requesting
13 that. I think we can work those out in all
14 likelihood. They can all wait a week. There is

16div-005617

15 no real pressing thing that goes to the merits
16 of this case.

17 THE COURT: I understand what you are
18 telling me. The problem is I don't have time
19 the next week. I leave for vacation after work
20 on the 30th and I don't have any time on the
21 30th. I'm gone the following Friday and then we
22 are in August.

23 MR. IANNO: August 13th. There is nothing
24 here that deals with the merits of the case that
25 can't wait till August 13, if we expand the time
00011

1 on August 13th to two hours if the court had the
2 time available.

3 THE COURT: We don't.

4 MR. IANNO: In two hours we ought to be
5 able to address this. It goes to the heart of
6 the matter, Judge. If we have these motions on
7 a regular case --

8 THE COURT: I understand that. I would
9 agree that is something we need to change. I
10 can tell you I'm not inclined to reset the case
11 management conference. That is set next Friday.
12 In all honesty you are perfectly competent to
13 argue any of these things. I have no doubt that
14 your client is not going to be injured if you do
15 them and not Mr. Bemis.

16 That said I would agree that we can't have
17 a flood of substantive motions served one week
18 before we are expected to argue them. Today is
19 Wednesday. It would strike me for the case
20 management conference that is set next Friday we
21 need motions served by I think close of business
22 Thursday at least shorten it. You guys make up
23 your mind if you are serving them or not and we
24 can't been doing substantive motions the last
25 day for service. It is not fair. And then from
00012

1 now on I would agree the motions need to be
2 served two weeks before the case management
3 conference with a week to respond.

4 MR. MARMER: This is Ron Marmer. I could
5 just respond to that, expressly, I don't want to
6 argue it, not address the court's point at all.
7 The one thing that we need to contemplate in
8 that two weeks point is that because the case
9 management conferences are actually scheduled
10 now two weeks apart, what is going to happen is
11 that on July 23 when we are at the case
12 management conference we will that day then have
13 to file any motions that will be heard on August
14 13, and on the August 13th case management
15 conference we will that day have to file any
16 motions for August 27. I'm wondering if whether

17 we couldn't adapt this just a bit to make it
18 maybe instead of one week ahead, maybe ten days
19 ahead or something --

20 THE COURT: What are --

21 MR. MARMER: -- so there is a little
22 window of opportunity and we are not at the case
23 management conference and trying to finalize
24 motions on the same day.

25 THE COURT: We have August 13th and when
00013

1 is the next one after that?

2 MR. MARMER: August 27th.

3 THE COURT: Then when after that?

4 MR. MARMER: Then we have the close of
5 discovery, out of the normal. There are some
6 other things. Those are the two.

7 THE COURT: Just the two.

8 MR. MARMER: Before, July 23, August 13.

9 THE COURT: Any objection for those two
10 requiring them ten days ahead of time?

11 MR. MARMER: The close of discovery there
12 is more stuff coming.

13 MR. IANNO: For the August 13th, Judge,
14 that would be like July 30th.

15 THE COURT: That is okay. We are really
16 only -- really only talking August 27.

17 MR. IANNO: We do that one ten days.
18 Judge, can I make a request, an ore tenus
19 request, is that the one motion that is really
20 problematic because Mr. Bemis isn't here is the
21 one dealing with interrogatories because really
22 he has to argue that for the client's behalf.
23 He is the one that has been involved in that.
24 It is the same motion we have heard. It is just
25 dealing with the different set of

00014

1 interrogatories. Those issues are really the
2 same and I'm sure the client would not want me
3 arguing those. As competent as the court may
4 think, that really is Mr. Bemis' area. The
5 other ones perhaps other attorneys can argue but
6 the most compelling interrogatories on the
7 contempt motion, we ask that the court postponed
8 it until August 13. If the court gave us 20
9 days.

10 THE COURT: I know. What is the response
11 to the request that that one motion not be heard
12 next Friday?

13 MR. MARMER: Our feeling is this has been
14 really a subject of extensive delay. We did get
15 Your Honor's ruling and we sent a letter off
16 promptly yesterday after getting the order to
17 the attorneys for Morgan Stanley and said we
18 think that Your Honor's ruling actually takes

16div-005619

19 into account virtually all of the disputes that
20 exist as to the new set. So our feeling was
21 they ought to be able to tell us now. We
22 understand you used to have all these
23 objections. The judge ruled on whole chunks of
24 this dispute, in her word. In light of the
25 judge's ruling, why don't you get back to us and
00015

1 let us know in which instances you are going
2 to -- you may want to preserve your position but
3 in which instances are you going to agree with
4 us that given the rulings that had already had
5 come down, here is where we are at and let's
6 procedure the same way. If there is some area
7 that is not addressed by the Judge's rulings
8 let's get those tendered up so we can get any
9 new feature that you believe is presented from
10 the court for ruling so we aren't waiting and
11 waiting and waiting. This is a matter that has
12 been extended for months and months.

13 THE COURT: Where is Mr. Bemis going to be
14 on vacation?

15 MR. IANNO: He is out of the country. He
16 is on a vacation.

17 THE COURT: Where out of the country?

18 MR. IANNO: Somewhere up in the North
19 Atlantic, I think and that is why he is not even
20 available by telephone.

21 THE COURT: Do this by telephone.

22 MR. IANNO: He is going to be out of
23 touch.

24 THE COURT: When is he leaving and coming
25 back.

00016

1 MR. IANNO: Leaving tomorrow. The 25th.
2 Gone from the 14th, I guess, 15th through the
3 25th.

4 MR. MARMER: Your Honor, while we are
5 sympathetic to people wanting to take vacations
6 let us say we scheduled our vacations and our
7 client commitments based on what Your Honor
8 ruled on February 20th when everything was
9 there, including Mr. Bemis where he
10 affirmatively accepted the dates that were
11 discussed. So our view is this is not any kind
12 of unfair surprise or effort on our part to
13 manipulate the schedule or set something for a
14 special hearing on a date that no one could
15 anticipate. Everybody knew since February 20th
16 to lock these dates in and plan around it, which
17 we have done.

18 THE COURT: In all honesty on this, I
19 don't want to say we won't hear that motion. I
20 understand what you are telling me. We have not

16div-005620

21 even seen it. For all I know it is going to be
22 straightforward or it is not going to be
23 straightforward so I am not going to rule on
24 that part now. I understand what it is you are
25 telling me. Is it plaintiff is going to file a

00017

1 motion to compel answers to interrogatories or
2 are there objections to interrogatories we are
3 calling up?

4 MR. MARMER: We are filing motions to
5 compel and there is also on the contempt part
6 there is also a discovery request that is
7 directed to documents as well as
8 interrogatories.

9 THE COURT: Okay. Let me do an order and
10 you each get a copy. I am going to defer ruling
11 on your ore tenus motion to continue those
12 hearings dealing with the contempt. I want to
13 see what they are. Okay. Okay. Thank you very
14 much. Bye. Thanks, sir.

15 MR. IANNO: Thank you, Judge.

16 (Whereupon, the taking of the hearing
17 was concluded at or about 9:00 o'clock a.m.)

18 -----

19

20

21

22

23

24

25

00018

1 CERTIFICATE

2

3 STATE OF FLORIDA)

4) SS:

5 COUNTY OF PALM BEACH)

6

7 I, SHARON L. SUGDEN, Shorthand Reporter,
8 certify that I was authorized to and did
9 stenographically record the foregoing hearing;
10 and that the transcript is a true record of the
11 proceedings.

12 I FURTHER CERTIFY that I am not a
13 relative, employee, attorney, or counsel of any
14 of the parties, nor am I a relative or employee
15 of any of the parties' attorneys or counsel
16 connected with the action, nor am I financially
17 interested in the action.

18 Dated this 14th day of July, 2004.

19

20

21

SHARON L. SUGDEN,

16div-005621

22
23
24
25

Shorthand Reporter

00001

1 IN THE CIRCUIT COURT OF THE 15TH
2 JUDICIAL CIRCUIT IN AND FOR
3 PALM BEACH COUNTY, FLORIDA

4 COLEMAN (PARENT) HOLDINGS, INC.,

5 Plaintiff,

6 vs. CASE NO. 03-5045 AI

7 MORGAN STANLEY & COMPANY, INC.,

8 Defendant.

9 -----X
10 MORGAN STANLEY SENIOR FUNDING, INC.,
11 Plaintiff,

12 CASE NO. CA 03-5165 AI

13 v.
14 MACANDREWS & FORBES HOLDINGS, INC.

15 -----/

16 The above-styled cause came on for hearing
17 before the HONORABLE ELIZABETH T. MAASS at the
18 Palm Beach County Courthouse, West Palm Beach,
19 Florida, July 14, 2004 commencing at 8:45
20 o'clock a.m.

21
22
23
24
25
00002

1 APPEARANCES:
2 SEARCY, DENNEY, SCAROLA,
3 BARNHARDT & SHIPLEY, P.A.
4 By: ROSALYN SIA BAKER, JR., ESQUIRE
5 2139 Palm Beach Lakes Blvd.
6 West Palm Beach, Florida 33409
7 Appearing on behalf of the Plaintiff.

8 CARLTON, FIELDS, P.A.
9 By: JOSEPH IANNO, JR., ESQUIRE
222 Lakeview Avenue
Suite 1400
West Palm Beach, Florida 33401-6149
Appearing on behalf of the Defendant,
MORGAN STANLEY.

JENNER & BLOCK, LLC.

10 By: RONALD MARMER, ESQUIRE
One IBM Plaza, Suite 400
11 Chicago, IL 606611
Appearing on behalf of MACANDREWS & FORBES
12 telephonically.
13
14
15
16
17
18
19
20
21
22
23
24
25

00003

1 (Whereupon, the following proceedings were had:).

2 THE COURT: This is Judge Maass. Who do I
3 have on the phone?

4 MR. MARMER: Morning, this is Ron Marmer.

5 THE COURT: I have you on the speaker
6 phone in the courtroom in Coleman and Morgan
7 Stanley. Why don't you come forward so she can
8 hear. We wanted to reschedule the case
9 management conference that is September the
10 23rd.

11 MR. IANNO: Yes, Your Honor. Joe Ianno
12 here on behalf of Morgan Stanley, the senior
13 funding plaintiff in the other case. As you may
14 recall back in February we scheduled numerous
15 case management conferences. The next one
16 scheduled is July 23rd, a week from this Friday.
17 At the time we scheduled them no one had
18 coordinated a schedule. Mr. Bemis who is the
19 lead counsel and has been arguing all the
20 hearings in the last two months for Morgan
21 Stanley is out of the country starting tomorrow
22 for ten days. He won't be available. We have
23 asked to reschedule it a week, if possible,
24 whatever, the court has on its schedule. As it
25 sits right now there is not a single motion that

00004

1 has been filed or noticed for hearing at the
2 case management conference. So there is no
3 prejudice to any party. Now, I talked to Mr.
4 Scarola about this. He said the attorneys for
5 Jenner and Block were objecting to this. What
6 we suspect and the reason for the second part of
7 our motion is on Friday we are going to get a
8 slue of motions that were supposes to be

9 scheduled for the following Friday. That is
10 what has been happening throughout this case.
11 That results in the court getting these multiple
12 binders for the case.

13 THE COURT: Ask the bailiff to step in.

14 MR. IANNO: And that results in the court
15 getting as you have seen in the last couple of
16 case management conferences the first binder,
17 the second binder, then a complete binder. What
18 we are asking the court to do is amend their
19 hearing procedures in this case to provide that
20 the motions to be heard be filed two weeks prior
21 to the case management conference and then any
22 responsive memoranda be filed one week prior to
23 the case management conference and that the
24 party responsible for filing either the
25 responsive memoranda, we can work this out

00005

1 amongst ourselves because what is happening
2 now --

3 THE COURT: I understand what you are
4 saying. Response.

5 MS. BAKER: I'm saying -- Ms. Baker. I'm
6 here for Jack Scarola. Ron Marmer can better
7 address these issues.

8 THE COURT: What did you want to say?

9 MS. BAKER: Here is the one.

10 THE COURT: Is that him? We lost him.
11 Call it. I need the book. Thanks.

12 MR. MARMER: We were not connected. After
13 I said good morning, Your Honor, and my name
14 there was a beeping sound and we heard nothing
15 further.

16 THE COURT: What Mr. Ianno was suggesting
17 is there was nothing set at the case management
18 conference right now that he believes perhaps
19 plaintiffs are objecting only because they
20 intend to file a big binder on Friday with
21 substantive motions and they will have
22 insufficient time to respond. He was suggesting
23 two things, won, the case management conference
24 being reset and two that the case management
25 orders be amended to require motions be served

00006

1 two weeks before the case management hearing,
2 responses within one week and they then
3 coordinate my getting a single binder that
4 includes both the motions and the response.
5 What is your argument both in opposition I guess
6 to resetting the case management case conference
7 and amending the case management award?

8 MR. MARMER: Yes, Your Honor, there is.
9 Thank you. We do oppose both of those requests.
10 First with regard to the July 23 case management

11 conference, we do intent to file motions. The
12 state in Morgan Stanley papers says there is
13 nothing set yet which is not surprising because
14 the motions are not due until this Friday. We
15 do fully expect to be filing several motions for
16 the hearing on July 23, that have been the
17 subject of some correspondence between the
18 parties. So I don't think they will come to any
19 surprise to Morgan Stanley. With regards to the
20 the discovery time, case management conference,
21 itself, we understand that Mr. Bemis has a
22 scheduling conflict and we would normally try to
23 accommodate him on that. Unfortunately, with
24 the discovery cut-off coming up of September 3,
25 we really believe we need to stick to our

00007

1 existing hearing. We have really three case
2 management conferences, including July 23
3 between now and the close of discovery, July 23,
4 August 13 and August 27. And when those were
5 set back in February, on February 20th of the
6 court's hearing then, the whole point of that
7 was the parties foresaw that as we got towards
8 the close of discovery, we likely would need
9 more of the court's time. We therefore set more
10 frequent conferences and the court allowed us
11 two hours for those including --

12 THE COURT: Let me ask you this.

13 MR. MARMER: I think that is right. That
14 is entirely important that we keep it and there
15 is no easy way to move these dates. Both
16 Fridays are both terrible for us.

17 THE COURT: Let me --

18 MR. MARMER: We appreciate Mr. Bemis has a
19 scheduling issue and we would normally be
20 sympathetic to that and are sympathetic to that.
21 The fact of the matter is everybody has been
22 planning around those days, February 20th. We
23 all locked them into our schedule. With regard
24 to moving it, we very much oppose that and do
25 expect to present several motions.

00008

1 THE COURT: What are the motions you
2 expect to present?

3 MR. MARMER: Which motions?

4 THE COURT: Tell me right now what the
5 motions are.

6 MR. MARMER: I'm sorry, sometimes the
7 first couple words get cut off. The answer is
8 we had one motion which is going to address
9 essentially a deficiency in the verification of
10 the interrogatories that Morgan Stanley Funding
11 has filed, the partial has verified, one in
12 particular of their sets of the interrogatories

13 he had his deposition taken at which point he
14 basically says "Beats me, I don't know anything
15 about this." That is fast on the heels of a
16 series of other depositions where we have not
17 been able to get to the bottom, the gist of it
18 has to do with the nature of the claims in the
19 Morgan Stanley Funding case against us. So one
20 of our motions attacks that. We have another
21 motion which we will deal with lifting certain
22 confidentiality designations from certain of the
23 pleadings, making a second motion on that as
24 well as relating -- I think it would be the
25 second one, in general it will be

00009

1 nonconfidential motion. We are going to ask
2 Your Honor to designate four words in the recent
3 order that Your Honor entered and is
4 confidential and redact them and then we have at
5 least a fourth motion which is going to deal
6 with our second wave of content discovery. Your
7 Honor has ruled on the first four
8 interrogatories. We subsequently had filed
9 additional discovery requests and there is
10 considerable disputes between the parties
11 concerning those. There are several other
12 matters where we are awaiting responses.
13 Hopefully we will get them today from Morgan
14 Stanley on some other outstanding discovery
15 requests, depending on what those responses are,
16 there may or may not be some other issues up.
17 But those are just the issues that we presently
18 have in the works and expect to be filing on
19 Friday.

20 THE COURT: Which one of these did you
21 know or not know about?

22 MR. IANNO: The one that I knew about was
23 the motion that was directed to the contempt
24 interrogatories and based --

25 THE COURT: That is the last one you

00010

1 referred to?

2 MR. IANNO: That is the one we expected
3 was coming. We were going to say with that, we
4 think that is premature until the court finishes
5 the rules on the first set. The order was just
6 received by us yesterday and I assume Mr. Marmer
7 received that same order. So we think the court
8 ought to finish with that set. We think that is
9 premature. With regard to the verification and
10 lifting of confidentiality designation, I'm
11 personally not aware of what those issues relate
12 to. I know I have seen some letters requesting
13 that. I think we can work those out in all
14 likelihood. They can all wait a week. There is

15 no real pressing thing that goes to the merits
16 of this case.

17 THE COURT: I understand what you are
18 telling me. The problem is I don't have time
19 the next week. I leave for vacation after work
20 on the 30th and I don't have any time on the
21 30th. I'm gone the following Friday and then we
22 are in August.

23 MR. IANNO: August 13th. There is nothing
24 here that deals with the merits of the case that
25 can't wait till August 13, if we expand the time
00011

1 on August 13th to two hours if the court had the
2 time available.

3 THE COURT: We don't.

4 MR. IANNO: In two hours we ought to be
5 able to address this. It goes to the heart of
6 the matter, Judge. If we have these motions on
7 a regular case --

8 THE COURT: I understand that. I would
9 agree that is something we need to change. I
10 can tell you I'm not inclined to reset the case
11 management conference. That is set next Friday.
12 In all honesty you are perfectly competent to
13 argue any of these things. I have no doubt that
14 your client is not going to be injured if you do
15 them and not Mr. Bemis.

16 That said I would agree that we can't have
17 a flood of substantive motions served one week
18 before we are expected to argue them. Today is
19 Wednesday. It would strike me for the case
20 management conference that is set next Friday we
21 need motions served by I think close of business
22 Thursday at least shorten it. You guys make up
23 your mind if you are serving them or not and we
24 can't been doing substantive motions the last
25 day for service. It is not fair. And then from
00012

1 now on I would agree the motions need to be
2 served two weeks before the case management
3 conference with a week to respond.

4 MR. MARMER: This is Ron Marmer. I could
5 just respond to that, expressly, I don't want to
6 argue it, not address the court's point at all.
7 The one thing that we need to contemplate in
8 that two weeks point is that because the case
9 management conferences are actually scheduled
10 now two weeks apart, what is going to happen is
11 that on July 23 when we are at the case
12 management conference we will that day then have
13 to file any motions that will be heard on August
14 13, and on the August 13th case management
15 conference we will that day have to file any
16 motions for August 27. I'm wondering if whether

17 we couldn't adapt this just a bit to make it
18 maybe instead of one week ahead, maybe ten days
19 ahead or something --

20 THE COURT: What are --

21 MR. MARMER: -- so there is a little
22 window of opportunity and we are not at the case
23 management conference and trying to finalize
24 motions on the same day.

25 THE COURT: We have August 13th and when
00013

1 is the next one after that?

2 MR. MARMER: August 27th.

3 THE COURT: Then when after that?

4 MR. MARMER: Then we have the close of
5 discovery, out of the normal. There are some
6 other things. Those are the two.

7 THE COURT: Just the two.

8 MR. MARMER: Before, July 23, August 13.

9 THE COURT: Any objection for those two
10 requiring them ten days ahead of time?

11 MR. MARMER: The close of discovery there
12 is more stuff coming.

13 MR. IANNO: For the August 13th, Judge,
14 that would be like July 30th.

15 THE COURT: That is okay. We are really
16 only -- really only talking August 27.

17 MR. IANNO: We do that one ten days.
18 Judge, can I make a request, an ore tenus
19 request, is that the one motion that is really
20 problematic because Mr. Bemis isn't here is the
21 one dealing with interrogatories because really
22 he has to argue that for the client's behalf.
23 He is the one that has been involved in that.
24 It is the same motion we have heard. It is just
25 dealing with the different set of

00014

1 interrogatories. Those issues are really the
2 same and I'm sure the client would not want me
3 arguing those. As competent as the court may
4 think, that really is Mr. Bemis' area. The
5 other ones perhaps other attorneys can argue but
6 the most compelling interrogatories on the
7 contempt motion, we ask that the court postponed
8 it until August 13. If the court gave us 20
9 days.

10 THE COURT: I know. What is the response
11 to the request that that one motion not be heard
12 next Friday?

13 MR. MARMER: Our feeling is this has been
14 really a subject of extensive delay. We did get
15 Your Honor's ruling and we sent a letter off
16 promptly yesterday after getting the order to
17 the attorneys for Morgan Stanley and said we
18 think that Your Honor's ruling actually takes

19 into account virtually all of the disputes that
20 exist as to the new set. So our feeling was
21 they ought to be able to tell us now. We
22 understand you used to have all these
23 objections. The judge ruled on whole chunks of
24 this dispute, in her word. In light of the
25 judge's ruling, why don't you get back to us and
00015

1 let us know in which instances you are going
2 to -- you may want to preserve your position but
3 in which instances are you going to agree with
4 us that given the rulings that had already had
5 come down, here is where we are at and let's
6 procedure the same way. If there is some area
7 that is not addressed by the Judge's rulings
8 let's get those tendered up so we can get any
9 new feature that you believe is presented from
10 the court for ruling so we aren't waiting and
11 waiting and waiting. This is a matter that has
12 been extended for months and months.

13 THE COURT: Where is Mr. Bemis going to be
14 on vacation?

15 MR. IANNO: He is out of the country. He
16 is on a vacation.

17 THE COURT: Where out of the country?

18 MR. IANNO: Somewhere up in the North
19 Atlantic, I think and that is why he is not even
20 available by telephone.

21 THE COURT: Do this by telephone.

22 MR. IANNO: He is going to be out of
23 touch.

24 THE COURT: When is he leaving and coming
25 back.

00016

1 MR. IANNO: Leaving tomorrow. The 25th.
2 Gone from the 14th, I guess, 15th through the
3 25th.

4 MR. MARMER: Your Honor, while we are
5 sympathetic to people wanting to take vacations
6 let us say we scheduled our vacations and our
7 client commitments based on what Your Honor
8 ruled on February 20th when everything was
9 there, including Mr. Bemis where he
10 affirmatively accepted the dates that were
11 discussed. So our view is this is not any kind
12 of unfair surprise or effort on our part to
13 manipulate the schedule or set something for a
14 special hearing on a date that no one could
15 anticipate. Everybody knew since February 20th
16 to lock these dates in and plan around it, which
17 we have done.

18 THE COURT: In all honesty on this, I
19 don't want to say we won't hear that motion. I
20 understand what you are telling me. We have not

21 even seen it. For all I know it is going to be
22 straightforward or it is not going to be
23 straightforward so I am not going to rule on
24 that part now. I understand what it is you are
25 telling me. Is it plaintiff is going to file a

00017

1 motion to compel answers to interrogatories or
2 are there objections to interrogatories we are
3 calling up?

4 MR. MARMER: We are filing motions to
5 compel and there is also on the contempt part
6 there is also a discovery request that is
7 directed to documents as well as
8 interrogatories.

9 THE COURT: Okay. Let me do an order and
10 you each get a copy. I am going to defer ruling
11 on your ore tenus motion to continue those
12 hearings dealing with the contempt. I want to
13 see what they are. Okay. Okay. Thank you very
14 much. Bye. Thanks, sir.

15 MR. IANNO: Thank you, Judge.

16 (Whereupon, the taking of the hearing
17 was concluded at or about 9:00 o'clock a.m.)

18 -----

19

20

21

22

23

24

25

00018

1 CERTIFICATE

2

3 STATE OF FLORIDA)

4) SS:

5 COUNTY OF PALM BEACH)

6

7 I, SHARON L. SUGDEN, Shorthand Reporter,
8 certify that I was authorized to and did
9 stenographically record the foregoing hearing;
10 and that the transcript is a true record of the
11 proceedings.

12 I FURTHER CERTIFY that I am not a
13 relative, employee, attorney, or counsel of any
14 of the parties, nor am I a relative or employee
15 of any of the parties' attorneys or counsel
16 connected with the action, nor am I financially
17 interested in the action.

18 Dated this 14th day of July, 2004.

19

20

21

SHARON L. SUGDEN,

16div-005631

22
23
24
25

Shorthand Reporter

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.

MORGAN STANLEY SENIOR FUNDING,

CASE NO. CA 03-5165 AI INC.,

Plaintiff,

vs.

MACANDREWS & FORBES HOLDINGS
INC., et al.,

Defendant.

**JOINT SUBMISSION OF THE PARTIES FOR
JULY 23, 2004 CASE MANAGEMENT CONFERENCE**

Pursuant to the Court's Order of February 24, 2004, the parties in the above-referenced action hereby submit the following Joint Submission in advance of the July 23, 2004 Case Management Conference.

I. Agreed-Upon Statement Of Background And Procedural History

The following is the parties' agreed-upon summary of the two companion cases now pending before this Court, which have been consolidated for trial.

**A. Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co. Incorporated.
(Case No. 03 CA-005045 AI)**

Background. This case arises out of an acquisition transaction that was negotiated and consummated in late 1997 and early 1998, in which Coleman (Parent) Holdings Inc. ("CPH")

sold its 82% interest in The Coleman Company, Inc. ("Coleman") to Sunbeam Corporation ("Sunbeam"). Morgan Stanley & Co., Inc. ("Morgan Stanley") served as financial advisor to Sunbeam for parts of the acquisition transaction and served as the lead underwriter for a \$750,000,000 debenture offering that Sunbeam used to finance the acquisition.

CPH's Complaint alleges claims arising from this transaction for fraudulent misrepresentation, negligent misrepresentation, aiding and abetting fraud, and conspiracy. CPH's Complaint has sought damages of at least \$485 million and has reserved the right to seek punitive damages. Morgan Stanley denies the material allegations in CPH's Complaint and also denies CPH's entitlement to damages.

Procedural History. CPH filed its Complaint on May 8, 2003 (the "CPH Action"). Morgan Stanley filed its Answer on June 23, 2003 and, on June 25, 2003 filed its Motion to Dismiss Pursuant To Florida Rule of Civil Procedure 1.061 Or, In the Alternative, For Judgment On The Pleadings. The Court held a hearing on these motions on December 12, 2003. On December 15, 2003, the Court issued an Order denying both motions. On January 9, 2004, Morgan Stanley timely filed a Notice of Appeal regarding the denial of its motion to dismiss. See Florida Rule of Appellate Procedure 9.130(a)(3)(A) (providing for interlocutory appellate review of non-final orders "concerning venue"). On February 20, 2004, the Court consolidated CPH's action against Morgan Stanley with Morgan Stanley Senior Funding's action against CPH and MacAndrews & Forbes Holdings Inc.

B. Morgan Stanley Senior Funding, Inc. v. MacAndrews & Forbes Holdings Inc., et al. (Case No. 03 CA-005165 AD)

Background. This action arises out of the same series of financial transactions as the CPH Action. In 1998, Morgan Stanley Senior Funding, Inc. ("MSSF") and other lenders entered into a credit agreement with Sunbeam under which MSSF agreed to provide senior secured

financing to Sunbeam in connection with Sunbeam's acquisition of Coleman and two smaller companies.

MSSF's Complaint alleges that, in the course of Sunbeam's acquisition of Coleman, Defendants MacAndrews & Forbes Holdings Inc. ("MAFCO") and CPH provided false information to MSSF about the "synergies" that Sunbeam would achieve from the combination of Sunbeam and Coleman. MSSF alleges that Defendant's inflated synergy projections caused Sunbeam to pay a higher price to acquire Coleman and consequently caused Sunbeam's lenders (including MSSF) to make larger loans to finance the acquisition. MSSF's Complaint alleges that it suffered hundreds of millions of dollars in damages when Sunbeam declared bankruptcy in February 2001 and defaulted on acquisition-related loans. MSSF has alleged claims for fraud and negligent misrepresentation, and has reserved the right to seek punitive damages. CPH denies the material allegations in MSSF's Complaint and also denies MSSF's entitlement to damages.

Procedural History. MSSF filed its Complaint against MAFCO and CPH on May 12, 2003 (the "MSSF Action"). The MSSF Action was initially assigned to Division AG. Because the MSSF Action and the CPH Action involve the same series of financial transactions and arise from a common set of operative facts, the parties agreed that the two cases are companion cases under Local Rule 2.009 and requested a transfer to Division AI, where the first-filed, lower numbered CPH Action was assigned. The motion to transfer was granted on June 9, 2003. Defendants CPH and MAFCO filed their Answer on June 25, 2003. On February 20, 2004, the Court consolidated MSSF's action against CPH and MAFCO with CPH's action against Morgan Stanley.

II. Report On Discovery In The Two Cases

A. Morgan Stanley's And MSSF's Position On Discovery

1. Merits Discovery

CPH, MAFCO, Morgan Stanley, and MSSF are actively pursuing written and deposition discovery in these consolidated actions. The parties have exchanged hundreds of thousands of pages of documents, have served and answered multiple sets of interrogatories and requests for admission, and have deposed more than two dozen party and non-party witnesses. Discovery in both cases is ongoing.

At the February 20, 2004 Case Management Conference, counsel for Morgan Stanley informed the Court that — according to counsel's best estimates — approximately seventy (70) additional depositions would need to be completed before the close of fact discovery. Thereafter, on or about March 11, the parties agreed to take alternate weeks for taking and defending depositions.

Since the February 20 Case Management Conference, twenty-two (22) additional depositions have been completed. Five (5) more depositions have been scheduled and are confirmed for the weeks ahead. Morgan Stanley has seven (7) outstanding requests for deposition dates of CPH and MAFCO witnesses — and has attempted to secure deposition dates for several additional non-party witnesses.

In their Position on Discovery (below), CPH and MAFCO correctly point out that Morgan Stanley did not begin taking depositions in these cases until several months after CPH. This is hardly surprising since — unlike CPH and MAFCO — Morgan Stanley has not been a party to any of the prior Sunbeam-related cases. Given their five-year "head start" in collecting and reviewing relevant documents, interviewing witnesses, taking depositions, and litigating Sunbeam-related issues, it should come as no surprise that CPH was prepared to begin taking

depositions earlier than Morgan Stanley.¹ Moreover, Morgan Stanley's Motion to Dismiss and Motion for Judgment on the Pleadings was not decided until the middle December 2003. If granted, this motion either would have eliminated the need for costly and expensive depositions or, at a minimum, would have substantially altered the manner in which deposition discovery is conducted in these cases, since the overwhelming majority of party and non-party witnesses in these cases live and work in New York.

The parties have experienced considerable difficulty scheduling depositions in light of scheduling conflicts for counsel on both sides and the location of the witnesses, almost all of whom are located outside of Florida. CPH and MAFCO have offered witnesses for depositions outside of Florida on dates previously established by the Court for Case Management Conferences and have, on several occasions, confirmed (and then canceled or postponed) depositions previously set to go forward.

For example, CPH and MAFCO twice postponed the deposition of Barry Schwartz (now completed), postponed the deposition of Bruce Slovin (now completed), and postponed the deposition of James Robinson, for various reasons ranging from "unavoidable conflicts" to "medical emergencies." Another CPH / MAFCO witness, Lawrence Jones, was only available on a day that had been previously scheduled by the Court for a Case Management Conference, and is now expected to be unavailable for an unspecified amount of time due to upcoming surgery. Similar scheduling considerations have required Morgan Stanley to postpone the depositions of other deposition witnesses, many of whom no longer work for Morgan Stanley and are no longer under its control.

¹ Morgan Stanley did not obtain access to the overwhelming majority of documents in this case until September 2003, when CPH began to produce hundreds of thousands of documents to Morgan Stanley, including more than four hundred (400+) deposition transcripts from prior Sunbeam-related matters.

Even when depositions have been successfully scheduled, the parties have experienced difficulties beyond their control that have prevented the deposition from going forward. When Mr. Schwartz's deposition was finally scheduled and confirmed for June 18, for example, the deposition needed to be postponed (for a third time) because Morgan Stanley's attorneys were unable to make it to New York for the deposition due to inclement weather and cancelled flights.

Morgan Stanley is of course willing to accommodate the legitimate scheduling considerations of witnesses and their counsel — but these schedule conflicts and difficulties have prevented the parties from proceeding with depositions at the pace contemplated during the February 20 Case Management Conference.

Finally, the parties have had to divert resources away from deposition discovery to address collateral issues unrelated to the merits of these consolidated actions. These issues are discussed in the next section.

2. Non-Merits Discovery

On March 12, CPH filed its Motion For A Rule To Show Cause. On May 14, 2004, the Court converted CPH's Motion for a Rule To Show Cause into a Motion for Contempt. On March 19, CPH served its first set of interrogatories relating to that motion. Morgan Stanley responded to those Interrogatories on June 16, 2004 and provided supplemental responses to CPH on June 29, 2004. On July 12, 2004, the Court entered an Order directing Morgan Stanley to supplement its responses to those Interrogatories within twenty days, including certain responses to be filed directly with the Court under seal.

On May 28, CPH served its second set of interrogatories relating to its motion for contempt — together with a set of document requests relating to that motion. On that same date, Morgan Stanley served its own interrogatories and requests for documents on CPH relating to CPH's motion for contempt. The parties served responses and objections to this "second wave" of non-merits discovery on June 28, 2004.

CPH's contempt motion, together with CPH's related Motion to Allow Arthur Andersen Access to Confidential Transcript (filed May 5, 2004) and other motions relating to the confidentiality of documents and pleadings, have required extensive additional briefing, necessitated attendance of counsel at multiple specially-set hearings in Florida, and the preparation of non-merits discovery requests and responses. CPH's objections also have prevented attorneys from Kellogg, Huber, Hansen, Todd, and Evans P.L.L.C. ("KHYTE") from participating as co-counsel and assisting with discovery. These satellite issues have prevented the parties from conducting depositions at the pace originally contemplated during the February 20, 2004 Case Management Conference.

It is apparent that CPH and MAFCO, acting in concert with Arthur Andersen, are using the non-merits discovery served in these cases to manipulate the proceedings in these consolidated actions and Civil Action No. 04-22577 AA, now pending before Judge Miller. In pleadings filed with Judge Miller, Arthur Andersen has moved for sanctions against Morgan Stanley, sought to disqualify Morgan Stanley's attorneys in that action, and moved to stay all discovery in that action. Simultaneously, CPH (who has professed a "unity of interest" with Arthur Andersen) has sought, through the non-merits discovery served in these consolidated actions, to discover detailed information regarding Morgan Stanley's damages claims in the Civil Action No. 04-22577 AA. CPH seeks this information despite the fact that Arthur Andersen is not a party in these consolidated actions; Kirkland & Ellis LLP does not represent Morgan Stanley in Civil Action No. 04-22577 AA; and CPH has objected to Morgan Stanley's chosen counsel (KHYTE) from appearing in these consolidated actions.

The satellite issues and gamesmanship described in this section have prevented the parties from conducting depositions at the pace originally contemplated during the February 20, 2004 Case Management Conference.

B. CPH'S And MAFCO's Position On Discovery

CPH and MAFCO stipulate only to the first paragraph of Section II.A above. CPH and MAFCO object to the remaining statements concerning discovery as incomplete, misleading, and self-serving on the part of Morgan Stanley and MSSF, because it is quite clear that this case is on track to be tried as scheduled in January 2005. CPH and MAFCO expressed these objections to Morgan Stanley and MSSF, and requested that a neutral statement of the discovery status be substituted, but Morgan Stanley and MSSF refused that request. Consequently, CPH and MAFCO provide the account of discovery that follows.

1. Deposition Discovery

As of July 15, 2004, 38 depositions have been taken. Of those depositions, 29 have been taken by CPH and MAFCO, and 9 have been taken by Morgan Stanley and MSSF:

WITNESS	AFFILIATION	DATE	TAKEN BY
Boone, Shani	Morgan Stanley	04/22/2004	CPH/MAFCO
Chang, Tyrone	Morgan Stanley	01/08/2004	CPH/MAFCO
Conway, Andrew	Morgan Stanley	06/04/2004	CPH/MAFCO
Fuchs, Alexandre	Morgan Stanley	02/13/2004	CPH/MAFCO
Hart, Michael	MSSF	05/19/2004	CPH/MAFCO
Kitts, Robert	Morgan Stanley	02/12/2004	CPH/MAFCO
MS/MSSF (by John Plotnick)	Morgan Stanley	09/09/2003	CPH/MAFCO
MS E-mail Rep.(Robert Saunders)	Morgan Stanley	02/10/2004	CPH/MAFCO
Raffi, Lily	Morgan Stanley	04/02/2004	CPH/MAFCO
Savarie, Andrew	Morgan Stanley	01/22/2004	CPH/MAFCO
Smith, R. Bram	MSSF	02/24/2004	CPH/MAFCO
Strong, William	Morgan Stanley	12/04/2003	CPH/MAFCO
Stynes, James	Morgan Stanley	07/13/2004	CPH/MAFCO
Tyree, John	Morgan Stanley	09/15/2003	CPH/MAFCO
Tyree, John	Morgan Stanley	11/14/2003	CPH/MAFCO
Webber, Joshua	Morgan Stanley	05/18/2004	CPH/MAFCO
Whelan, Christopher	Morgan Stanley	07/14/2004	CPH/MAFCO
Wright, William	Morgan Stanley	07/01/2004	CPH/MAFCO
Yoo, Gene	Morgan Stanley	06/16/2004	CPH/MAFCO
THIRD PARTIES			
Bornstein, Lawrence	Arthur Andersen	01/15/2004	CPH/MAFCO

Brockelman, Mark	Arthur Andersen	01/14/2004	CPH/MAFCO
Denkhaus, Donald	Arthur Andersen	11/06/2003	CPH/MAFCO
Kistler, Vance	Arthur Andersen	10/29/2003	CPH/MAFCO
Pastrana, Dennis	Arthur Andersen	01/12/2004	CPH/MAFCO
Fruitt, William	Arthur Andersen	01/13/2004	CPH/MAFCO
Dean, Alan	Davis Polk & Wardwell	06/03/2004	CPH/MAFCO
Lurie, James	Davis Polk & Wardwell	06/18/2004	CPH/MAFCO
Stack, Heather	Davis Polk & Wardwell	05/25/2004	CPH/MAFCO
Yales, Scott	Sunbeam	11/24/2003	CPH/MAFCO
Drapkin, Donald	MAFCO	06/24/2004	MS
Ginstling, Norman	MAFCO	04/06/2004	MS
MAFCO (by Steven Fasman)	MAFCO	09/15/2003 01/21/2004	MS
Page, Joseph	MAFCO	04/27/2004	MS
Salig, Joram	MAFCO	07/08/2004	MS
Schwartz, Barry	MAFCO	06/25/2004	MS
Shapiro, Paul	MAFCO	06/08/2004	MS
Slotkin, Todd	MAFCO	07/07/2004	MS
Slovin, Bruce	MAFCO	05/12/2004	MS

In addition, both sides have requested deposition dates for certain individuals, and expressed interest in deposing still other individuals. Although Morgan Stanley and MSSF make it sound as if scheduling issues have been caused only by CPH, in fact, Morgan Stanley and MSSF frequently have delayed providing dates for depositions and have changed previously set dates. In any event, Morgan Stanley's and MSSF's finger-pointing is irrelevant, because there is no motion pending before this Court concerning deposition scheduling — indeed, to date, no such motion ever has been filed.²

² As for the charge of Morgan Stanley and MSSF that they “did not obtain access to the overwhelming majority of documents in this case until September 2003,” and that CPH only “began to” produce documents then, those statements are wrong. In timely response to the document requests of Morgan Stanley and MSSF, CPH made the vast majority of its documents available for review on August 15, 2003 and the review began then. By September 8, 2003, as a

Concerning the statement of counsel for Morgan Stanley and MSSF at the February 20, 2004 hearing that at least 70 depositions would need to be completed before the fact discovery cut-off, CPH and MAFCO believe that counsel's estimate is exaggerated. In any event, given that approximately 10 attorneys presently are appearing for Morgan Stanley and MSSF in this case, Morgan Stanley and MSSF certainly have the resources to complete all necessary depositions before the September 3, 2004 discovery cut-off.

2. Discovery concerning CPH's motion for contempt

The parties have served interrogatories and document requests on each other in connection with CPH's motion for contempt. Because Morgan Stanley's and MSSF's responses to the discovery requests that CPH and MAFCO served on March 19 were insufficient, however, CPH and MAFCO filed a motion to compel. On July 12, this Court entered an order granting that motion in part, and directing Morgan Stanley and MSSF to provide further information within 20 days.

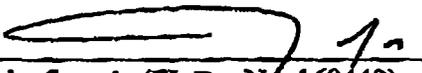
CPH and MAFCO also served further interrogatories and document requests in connection with CPH's motion for contempt on May 28, and Morgan Stanley and MSSF have several responses to those discovery requests. Because CPH and MAFCO believe that the responses are deficient in many respects, however, CPH and MAFCO have filed a motion to compel to be heard at the July 23 Case Management Conference.

letter written by counsel for Morgan Stanley and MSSF confirms, CPH's document production was "substantially completed." That was before any deposition had occurred.

III. Pretrial Schedule

On February 24, 2004, the Court entered an order setting this matter for trial in January 2005, and on March 23, 2004, this Court entered an Agreed Order setting the pretrial schedule in this matter and scheduling trial to begin on January 18, 2005.

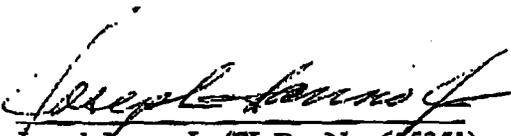
Dated: July 15, 2004



John Scarola (FL Bar No. 169440)
**SEARCY, DENNEY, SCAROLA,
 ARNHARDT & SHIPLEY, P.A.**
 2139 Palm Beach Lakes Blvd
 West Palm Beach, FL 33402-3626
 (561) 686-6300

Jerold S. Solovy
 Ronald L. Marmer
 Jeffrey T. Shaw
JENNER & BLOCK LLP
 One IBM Plaza, Suite 4400
 Chicago, Illinois 60611
 (312) 222-9350

**Counsel for Coleman (Parent) Holdings Inc.
 and MacAndrews & Forbes Holdings Inc.**



Joseph Ianno, Jr. (FL Bar No. 655351)
CARLTON FIELDS, P.A.
 222 Lakeview Ave., Suite 1400
 West Palm Beach, FL 33401
 (561) 659-7070

Thomas D. Yannucci, P.C.
 Lawrence P. Bemis (FL Bar No. 618349)
 Thomas A. Clare
KIRKLAND & ELLIS LLP
 655 15th Street, N.W., Suite 1200
 Washington, D.C. 20005
 (202) 879-5000

**Counsel for Morgan Stanley & Co., Inc. and
 Morgan Stanley Senior Funding, Inc.**

#1127347

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO., INC.,

Defendant.

DOROTHY H. WILKEN
CLERK OF CIRCUIT COURT
CIRCUIT CIVIL DIVISION

JUL 15 2004

COPY / ORIGINAL
RECEIVED FOR FILING

_____ /
MORGAN STANLEY SENIOR FUNDING, INC.,

Plaintiff,

vs.

CASE NO: CA 03-5165 AI

MACANDREWS & FORBES HOLDINGS, INC.,

Defendant.

**MORGAN STANLEY'S MOTION TO SET A HEARING ON THE
CONTEMPT MOTION AND EXTEND MERITS DISCOVERY**

Defendant Morgan Stanley & Co. Incorporated and Plaintiff Morgan Stanley Senior Funding, Inc. (collectively "Morgan Stanley"), by its attorneys, respectfully moves this Court, pursuant to Fla. R. Civ. P. 1.280 & 1.460, Fla. R. Jud. Admin. 2.085(d), and the Court's inherent authority to manage its docket, to amend the Pretrial Schedule in these consolidated actions to (1) extend merits discovery and other pretrial deadlines; and (2) establish a schedule for the prompt resolution of Coleman (Parent) Holdings, Inc.'s ("CPH") (renominated) Motion for Contempt. In support of its motion, Morgan Stanley states as follows:

STATEMENT OF FACTS

A. Procedural History

1. These complex consolidated actions arise out of a 1998 acquisition transaction in which CPH sold its 82% interest in The Coleman Company, Inc. to Sunbeam Corporation. Morgan Stanley & Co. Incorporated ("MS & Co.") served as financial advisor to Sunbeam for

parts of the acquisition transaction and served as lead underwriter for a \$750,000,000 debenture offering that Sunbeam used to finance the acquisition. Morgan Stanley Senior Funding, Inc. (“MSSF”) and other lenders provided senior secured financing to Sunbeam in connection with Sunbeam’s acquisition of Coleman and two smaller companies.

2. CPH filed the initial action in this litigation (Civil Action No. CA 03-5045 AI) on May 8, 2003. CPH’s Complaint alleges claims against MS & Co. for fraudulent misrepresentation, negligent misrepresentation, aiding and abetting fraud, and conspiracy. CPH seeks damages in excess of \$485 million, and has reserved the right to seek leave to amend its Complaint pursuant to Fla. Stat. § 768.72 to seek punitive damages in excess of \$1.5 billion.

3. MSSF filed the second action in this litigation (Civil Action No. CA 03-5165 AI) on May 12, 2003. MSSF’s Complaint, which is in the nature of a counterclaim, alleges claims against CPH and its parent company MacAndrews & Forbes Holdings Inc. (“MAFCO”) for fraudulent misrepresentation and negligent misrepresentation. MSSF seeks compensatory damages in an amount to be determined at trial and has reserved the right to seek leave to amend its Complaint pursuant to Fla. Stat. § 768.72 to seek punitive damages.

4. On June 25, 2003, MS & Co. filed its Motion to Dismiss Pursuant to Florida Rule of Civil Procedure Rule 1.061 Or in the Alternative for Judgment on the Pleadings. These initial motions, if granted, would have disposed entirely of Civil Action No. CA 03-5045 AI — and would have lead to the re-filing of Civil Action No. CA 03-5165 AI in New York. Morgan Stanley sought to have these threshold motions heard promptly but, due to the repeated unavailability of CPH’s Chicago counsel, was unable to obtain a hearing on its Motion to Dismiss until December 12, 2003. The Court entered an Order denying the motions on December 15, 2003. That Order is on appeal and fully briefed.

5. While the Motion to Dismiss was pending, the parties engaged in substantial written and deposition discovery. The parties exchanged hundreds of thousands of pages of documents, served and answered hundreds of requests for admission, and dozens of interrogatories. Indeed, even before the first Case Management Conference (February 20, 2004), the parties completed eighteen (18) depositions and appeared before the Court on seven (7) separate occasions to resolve discovery motions.

6. On February 20, 2004, and after ruling on the Motion to Dismiss, the Court held the first Case Management Conference on the two actions. At that time, the Court consolidated the two cases. Additionally, counsel for CPH agreed that these consolidated actions address “matter[s] of substantial magnitude,” and would require a four-week jury trial. (Feb. 20, 2004 Hrg. at 9-10.)

7. At the February 20, 2004 Case Management Conference, counsel for Morgan Stanley advised the Court that approximately seventy (70) fact depositions remained to be completed, and that Morgan Stanley intended to retain additional counsel.¹ Morgan Stanley retained additional counsel — attorneys from the law firm of Kellogg, Huber, Hansen, Todd & Evans P.L.L.C. (“KHHTE”) — three days later on February 23, 2004.

8. At the February 20, 2004 Case Management Conference, the parties and the Court discussed a proposed trial date. Counsel for Morgan Stanley recommended that, because of the substantial discovery and other pretrial tasks left to be completed, the Court should set a trial

¹ The vast majority of witnesses in this action are outside the jurisdiction of the Court and thus their depositions are necessary for both discovery and the preservation of their testimony.

date *no earlier* than February 25, 2005.² Counsel for CPH and MAFCO proposed trial dates beginning in August 2004. The Court set the trial for January 18, 2005. The parties then agreed to negotiate the pretrial schedule working backwards from the January 18 trial date.

9. After the February 20 Case Management Conference, and continuing through early March, counsel for the parties negotiated the pretrial schedule. On March 11, 2004, counsel for the parties conducted a conference call to resolve, among other things, the proposed pretrial schedule and how depositions would be scheduled on a going-forward basis. During the call, the parties agreed on a schedule predicated on the Court's January 18 trial date — and further agreed to alternate weeks for taking and defending depositions. (Mar. 11, 2004 Letter from T. Clare to M. Brody (Ex. 1).)

10. At no point during the March 11, 2004 telephone conference (or during any other discussion among the parties regarding the proposed pretrial schedule) did counsel for CPH tell Morgan Stanley's attorneys that CPH intended to file (the next day) a Motion for a Rule to Show Cause and seek additional discovery related to that motion. Accordingly, the pretrial schedule discussed by the parties (and later presented to the Court) contained no allowance or provision for these non-merits discovery and proceedings.

11. The parties submitted the proposed pretrial schedule to the Court on March 12, 2004. That same day, CPH filed its Motion for a Rule to Show Cause.

² Counsel for Morgan Stanley noted that, given the "sheer number of deposition in this case," even a February, 2005 trial date would be a "very aggressive schedule." (Feb. 20, 2004 Hrg. 10.)

12. On March 19, 2004, the Court entered an Order establishing the following pretrial deadlines:

Date	Event	Status
4/30/2004	MS Initial Choice-of-Law Brief	Completed
6/4/2004	CPH's Choice-of-Law Opposition	Completed
6/18/2004	MS Choice-of-Law Reply	Completed
6/28/2004	Hearing on Choice-of-Law	Completed
8/6/2004	Amendment of Pleadings	Pending
9/3/2004	Completion of Fact Discovery	Pending
9/10/2004	Plaintiffs' Expert Disclosures	Pending
9/20/2004	Summary Judgment Briefs	Pending
9/24/2004	Defendants' Expert Disclosures	Pending
10/8/2004	Rebuttal Expert Disclosures	Pending
10/18/2004	Depositions of Experts (2 weeks)	Pending
10/25/2004	Summary Judgment Oppositions	Pending
11/8/2004	Summary Judgment Replies	Pending
11/19/2004	Deposition Designations Exchanged	Pending
11/19/2004	Mediator Selected	Pending
11/19/2004	Summary Judgment Hearing	Pending
12/3/2004	Deposition Counter-Designations & Initial Objections Exchanged	Pending
12/3/2004	Motions in Limine	Pending
12/3/2004	Witness Lists & Trial Exhibit Lists Exchanged	Pending
12/6/2004	Mediation	Pending
12/8/2004	Objections to Counter-Designations Exchanged	Pending
12/10/2004	Meet-and-Confer re Deposition Designations	Pending
12/13/2004	Deposition Designations, Counter Designations, and Objections to Designations and Counter Designations provided to the Court	Pending
12/13/2004	Joint Pretrial Stipulation	Pending
12/13/2004	Motion in Limine Oppositions	Pending
12/20/2004	Pretrial Conference (3 days)	Pending

Date	Event	Status
1/14/2005	Final Pretrial Conference	Pending
1/14/2005	Jury Instructions and Verdict Forms Exchanged	Pending
1/18/2005	Jury Trial Begins (15 days)	Pending

(Mar. 19, 2004 Agreed Order Concerning Pretrial Schedule.)

B. The Parties Have Diligently Pursued Merits Discovery

13. Since the February 20, 2004 Case Management Conference, the parties have conducted substantial written and deposition discovery addressed to the *merits* of the consolidated actions. The parties have:

- taken *22 depositions* (all of which required travel for counsel);
- briefed and resolved *11 discovery motions*;
- appeared for *5 in-person discovery hearings* (all of which required travel for counsel);
- served *seven sets of written discovery* on merits issues including interrogatories, requests for admission, and requests for production;
- served *multiple third parties* with document requests;
- conducted time-consuming document reviews of back-up e-mails and employee personnel files;
- fully briefed and argued the choice-of-law issue; and
- completed briefing the appeal of the venue issue in the Fourth District Court of Appeal.

14. The parties have conducted discovery on an aggressive weekly schedule, with multiple depositions, written submissions to the Court, and / or court appearances frequently taking place in a single week. Scheduling is complicated by the fact that each of the Case Management Conferences — and *all* of the depositions that have been conducted since the February 20 Case Management Conference — have required extensive out-of-town travel.

Indeed, since the February 20 Case Management Conference, *not a single deposition has taken place in Florida, Chicago, or Washington, D.C.*³

15. The scheduling of depositions is further complicated because many of the deponents are non-parties. Therefore, deposition scheduling requires the coordination of calendars for the witness, counsel for the parties (including travel in every instance), and sometimes counsel for third parties. (See July 9, 2004 Letters from M. Brody to T. Clare (Ex. 2); July 1, 2004 CPH Notice of Unavailability; July 9, 2004 MS Notice of Unavailability.) Additionally, various “unavoidable conflicts” and family emergencies have arisen, requiring depositions to be cancelled or postponed on short notice. (See Apr. 22, 2004, May 21, 2004 & June 16, 2004 Letters from M. Brody to T. Clare (Ex. 3).)

C. CPH’s (Renominated) Motion For Contempt Has Substantially Interfered With The Progress Of Merits Discovery

16. On March 12, 2004, CPH filed a Motion for a Rule to Show Cause. In its motion, CPH alleged that Morgan Stanley violated the Stipulated Confidentiality Order in these consolidated actions by (1) giving its own counsel, KHHTE, a copy of the CPH / Arthur Andersen Settlement Agreement; and (2) using the Settlement Agreement for an allegedly improper purpose — filing a pre-existing claim against Arthur Andersen. CPH has stated that, if its Motion for Contempt is granted, CPH may seek monetary damages, the striking of pleadings, and the revocation of the *pro hac vice* admissions of Kirkland & Ellis attorneys. (See Apr. 23, 2004 CPH’s Reply in Supp. of Its Mot. for a Rule to Show Cause at 14-17.)

³ Indeed, CPH required one key CPH witness, Paul E. Shapiro, who signed the Coleman Merger Agreement, to be deposed in New York although he claims he is a resident of Florida. (June 8, 2004 Shapiro Dep. at 6.)

17. On March 17, 2004, KHHTE attorneys filed motions for admission *pro hac vice* in these consolidated actions. CPH has objected to the admission of KHHTE attorneys pending the Court’s ruling on its Motion for Contempt.

18. During the March 19, 2004 Case Management Conference, the Court elected to defer ruling on KHHTE’s *pro hac vice* motions until it had ruled on the contempt allegations. The Court set the Motion for a Rule to Show Cause for a specially set hearing on April 30, 2004.

19. During the April 30, 2004 hearing, Morgan Stanley presented evidence and argument concerning CPH’s Motion for a Rule to Show Cause. CPH did not, however, present evidence to support its contempt allegations — but rather sought only to obtain discovery to support its allegations. Morgan Stanley objected to this procedure.

20. On May 14, 2004, the Court entered an Order renominating CPH’s “Motion for a Rule to Show Cause” as a “Motion for Contempt”. The Court’s May 14, 2004 Order did not resolve the merits of CPH’s Motion for Contempt, stating instead that “[e]ither side may set the Motion for Contempt for an evidentiary hearing, *once discovery is complete.*” (See May 14, 2004 Order on Plf’s Mot. for a Rule to Show Cause.) The Court’s May 14, 2004 Order did not address the scope of permissible discovery for that motion, stating instead that the Court would “rule on the permissible scope of discovery as disputes arise.” (*Id.*)

21. CPH has served multiple discovery requests relating to its Motion for Contempt. Morgan Stanley has done likewise. The parties have served the following discovery requests relating to the Motion for Contempt:

Date	Title
3/19/2004	Coleman (Parent) Holdings Inc.’s CPH Interrogatories to Morgan Stanley & Co., Inc.

Date	Title
3/19/2004	MacAndrews & Forbes Holdings, Inc. Interrogatories to Morgan Stanley Senior Funding, Inc.
5/28/2004	Coleman (Parent) Holdings Inc.'s Further Interrogatories Concerning its Motion for Contempt
5/28/2004	Coleman (Parent) Holding, Inc.'s Request for Production of Documents Concerning its Motion for Contempt
5/28/2004	Morgan Stanley & Co. Incorporated's Interrogatories Concerning Coleman (Parent) Holdings, Inc.'s Motion for Contempt
5/28/2004	Morgan Stanley & Co. Incorporated's Request for Production of Documents Concerning Coleman (Parent) Holdings, Inc.'s Motion for Contempt
6/10/2004	Morgan Stanley & Co. Incorporated's Further Request for Production of Documents Concerning Coleman (Parent) Holdings, Inc.'s Motion for Contempt
6/10/2004	Morgan Stanley & Co. Incorporated's Further Interrogatory Concerning Coleman (Parent) Holdings Inc.'s Motion for Contempt

22. The parties also have filed and argued a number of motions relating to the Motion for Contempt. These disputes have addressed the confidentiality of the related proceedings and the proper scope of the contempt discovery:

Date	Title
4/16/2004	Motion for Protective Order
4/23/2004	Coleman (Parent) Holdings Inc.'s Motion for Removal of Confidentiality Designations
5/05/2004	Coleman (Parent) Holdings Inc.'s Motion to Allow Arthur Andersen LLP Access to Confidential Transcript
5/21/2004	Motion for Entry of an Order to Correct Filing Error
6/04/2004	Morgan Stanley's Motion to Remove Confidential Designation from Interrogatories
6/25/2004	Coleman (Parent) Holdings Inc.'s Motion to Compel Responses to Interrogatories

23. There is *no* deadline for discovery related to the contempt allegations, and the Motion for Contempt has *not* been set for a hearing. The Court has also not ruled on the pending motions for the *pro hac vice* admission of KHHTE attorneys.

24. Notwithstanding the time and resources the parties have devoted to the renominated Motion for Contempt, the parties also have taken depositions virtually every week in New York or other cities outside Florida:

Date	Deponent	Location
2/24/2004	Smith, Bram	New York
4/2/2004	Rafii, Lilly	New York
4/6/2004	Ginstling, Norman	New York
4/22/2004	Boone, Shani	Boston
4/27/2004	Page, Joe	New York
5/12/2004	Slovin, Joe	New York
5/18/2004	Webber, Josh	Boston
5/19/2004	Hart, Michael	New York
5/25/2004	Stack, Heather	New York
6/3/2004	Dean, Alan	New York
6/4/2004	Conway, Andrew	New York
6/8/2004	Shapiro, Paul	New York
6/16/2004	Yoo, Eugene	Boston
6/18/2004	Lurie, James	New York
6/24/2004	Drapkin, Donald	New York
6/25/2004	Schwartz, Barry	New York
7/1/2004	Wright, William	New York
7/7/2004	Slotkin, Todd	New York
7/8/2004	Duffy, Robert	New York
7/8/2004	Salig, Joram	New York
7/13/2004	Stynes, James	New York
7/14/2004	Whelan, Chris	New York

ARGUMENT

I. Merits Discovery Cannot Reasonably Be Completed By September 3

The remaining factual discovery on the merits of the underlying claims cannot reasonably be completed before September 3, 2004, the deadline set in the March 19, 2004 Pretrial

Schedule. The schedule, based upon the January 2005 trial date, called for the parties to complete fact discovery in two cases in five and half months. This schedule is extremely aggressive since each action asserts complex claims for hundreds of millions of dollars, involves multiple third parties that are not subject to the jurisdiction of this Court, and relates to events that occurred *seven* years ago.

Moreover, when Morgan Stanley agreed to the proposed pretrial schedule and the alternating-weeks deposition schedule (all based on the Court's trial date), Morgan Stanley did not know that, the very next day, CPH intended to file a Motion for a Rule to Show Cause. This motion has in turn become a "lawsuit within a lawsuit" and has barred, at least temporarily, Morgan Stanley's right to have counsel of its choice participate in the consolidated actions.

Under the parties' agreed-upon deposition schedule, Morgan Stanley now has twenty days — the weeks of July 19, and August 2, 16 and 30 — left in which to take depositions. While Morgan Stanley has endeavored to narrow its witness list from the one discussed at the February 20, 2004 Case Management Conference, Morgan Stanley still anticipates that it needs to take, at a minimum, an additional 26 depositions, 4 of which will involve multiple days of testimony, totaling 30 remaining days of deposition.

Scheduling these 26 witnesses is complicated because all but 4 of them are third parties who may be represented by separate counsel and because all of the depositions will require counsel (and boxes of documents) to travel to other cities.⁴ Moreover, deposition scheduling in July and August is notoriously difficult as many deponents and counsel take vacations during

⁴ To add to the logistical headaches inherent in the trial of this action in Florida, the vast majority of witnesses and depositions are in New York. That city will host the Republican National Convention four of the last five days of fact discovery under the current schedule.

that period. (*See* July 1, 2004 CPH Notice of Unavailability; July 9, 2004 MS Notice of Unavailability.)

Taking merits depositions is not the only discovery that remains to be completed by Morgan Stanley. CPH has requested depositions of many additional party and non-party witnesses. Moreover, there are outstanding written discovery requests and documents that remain to be produced from at least two third parties. Moreover, there are three more Case Management Conferences scheduled before September 3, 2004, which are likely to be accompanied by various motions.⁵

Moreover, Morgan Stanley should not be forced into a last-minute mad dash to complete discovery when it has persistently and actively pursued discovery. For instance, on February 26, 2004 Morgan Stanley requested the depositions of eight current and former MAFCO employees who are represented by CPH counsel. (Feb. 26, 2004 Letter from T. Clare to M. Brody (Ex. 4).) For one witnesses (William Nesbitt), CPH waited until July 8, 2004 to offer a deposition date and even then the date offered overlapped with an already-scheduled deposition. (*See* July 2 & 8, 2004 Letters from M. Brody to T. Clare (Ex. 5).) For another witness (Steve Engelman), CPH waited until July to offer a deposition date and the single date offered was on a date when Morgan Stanley counsel is unavailable. (*See* July 11, 2004 Letter from M. Brody to T. Clare (Ex. 6); July 9, 2004 MS Notice of Unavailability.)

Likewise, on May 13, 2004 Morgan Stanley requested the deposition of an additional seven witnesses represented by CPH counsel. In the intervening two months CPH has not offered dates for three of those witnesses, offered and then cancelled the deposition of a fourth,

⁵ At least five motions will probably be noticed for the Case Management Conference on July 23.

and only offered a fifth witness during a scheduled Case Management Conference — a date unacceptable to Morgan Stanley counsel. CPH has also not offered dates for the two witnesses that Morgan Stanley requested on June 28, 2004.

Finally, CPH's cancellation of depositions has frustrated Morgan Stanley's ability to complete discovery. For instance, Morgan Stanley had multiple depositions scheduled the weeks of April 26 and May 24, but shortly before the depositions CPH informed Morgan Stanley that the witnesses were no longer available. (*See* Apr. 22, 2004 & May 21, 2004 Letters from M. Brody to T. Clare (Ex. 3).) Likewise, after Morgan Stanley had coordinated third party depositions the weeks of May 24, July 5 and August 2, CPH informed Morgan Stanley that the deposition dates were unacceptable. (*See* July 2, 2004 Letter from M. Brody to Z. Brown (Ex. 7); July 9, 2004 Letter from M. Brody to T. Clare (Ex. 2).)

While the purpose of this motion is not to question the events that have given rise to the cancellations of depositions and CPH's unavailability for depositions, Morgan Stanley should not be forced into the position of performing a pell-mell rush to beat the clock of discovery cut-off as a result of its good faith efforts to accommodate witnesses and counsel.

II. The Contempt Motion Has Diverted The Parties' Resources From Merits Discovery

CPH's contempt motion and related discovery have significantly disrupted discovery into the merits of the parties' claims. On March 11, 2004 when counsel were negotiating the Pretrial Schedule and deposition scheduling, CPH did not tell Morgan Stanley that the very next day CPH would file a Motion for a Rule to Show Cause, seeking discovery unrelated to the merits of the case. Given that Morgan Stanley had only five and a half months in which to complete its depositions and all discovery, CPH's lack of candor in the negotiations bespeaks volumes. The contempt motion has resulted in a serious diversion of resources, detracting from the prosecution of the core issues in this case:

- There have been *six hearings* related directly or indirectly to the Motion for Contempt, at least one every month since March.
- Including the show cause motion, there have been *six motions* filed that relate directly or indirectly to the Motion for Contempt.
- The parties have served and responded to *eight sets of discovery* concerning the contempt issues — each side having served two sets of interrogatories and two sets of document requests.
- CPH is also engaging in *third party discovery* concerning the Motion for Contempt, which is pending.

This disruption is expected to continue. Morgan Stanley anticipates that CPH will continue to seek discovery, related to its contempt allegations. As the Court has already observed, the discovery sought by CPH often goes to the heart of attorney-client and work product protected documents and information. Thus, Morgan Stanley will vigorously defend its privileges, including seeking appeals as necessary. Until the motion is set for a hearing and the Motion for Contempt denied, substantial resources will continue to be diverted from the merits.

The pending Motion for Contempt has also prevented Morgan Stanley from deploying or even fully consulting with its counsel, KHHTE, further hindering Morgan Stanley's ability to complete discovery in the allotted time. One of the assertions made in CPH's motion is that Morgan Stanley violated the Stipulated Confidentiality Order when it shared confidential information with KHHTE before they were made counsel *of record* in the pending cases. While Morgan Stanley denies CPH's assertion and its interpretation of the Confidentiality Order, Morgan Stanley has refrained from providing further confidential information to KHHTE pending a decision on the Motion for Contempt and on the *pro hac vice* motions.

Indeed, there is no apparent justice in holding Morgan Stanley to the Pretrial Schedule deadlines when Morgan Stanley has been denied the assistance of counsel it hired in late February, while at the same time CPH has enlisted an ally to its cause. After Morgan Stanley

filed suit against Arthur Andersen, CPH claimed a “unity of interest” with Arthur Andersen. Arthur Andersen counsel began, at a minimum, issuing correspondence in support of positions taken by CPH. (See Apr. 22, 2004, Apr. 26, 2004 & May 20, 2004 Letters from E. Lauer to T. Clare (Ex. 8).) The extent to which Arthur Andersen counsel has assisted CPH and the exact nature of their relationship is unclear, however, as CPH and Arthur Andersen are asserting that the communications between them are the subject of a common interest privilege, another issue this Court is going to have to resolve. At a minimum, holding Morgan Stanley to discovery deadlines while it is deprived of its full resources and while CPH has bolstered its own roster is simply unfair and smacks of gamesmanship.

III. Sound Judicial Administration And Other Considerations Favor A Prompt Resolution of the Contempt Allegation And An Extension Of Merits Discovery

Morgan Stanley requests a prompt resolution of the Motion for Contempt. The procedurally defective motion was filed on March 12 as a bogus rule to show cause. The motion has now been pending for 125 days. Under ordinary circumstances, the motion should have been submitted and ruled upon within 60 days (of April 30). See Fla. R. Jud. Admin. 2.050(F). Instead, there is no end in sight. Accordingly, Morgan Stanley is requesting that the Court close discovery on the Motion for Contempt, and set the matter for hearing as soon thereafter as possible.

There are compelling reasons why the Court should extend the deadline for completing merits discovery in light of the pending Motion for Contempt:

First, the Pretrial Schedule and deposition scheduling deadlines that the parties established are simply infeasible. Morgan Stanley agreed to the aggressive Pretrial Schedule based on discussions in which CPH never raised its intention to seek discovery related to other matters during this time period. As a result of CPH’s contempt motion, however, Morgan

Stanley has been required to divert significant resources to addressing the issues raised by CPH in its motion.

Second, CPH has opposed based on the mere pendency of the motion, the *pro hac vice* admission of Morgan Stanley's KHTE counsel and has stated that it may seek the revocation of the *pro hac vice* admissions of Morgan Stanley's Kirkland & Ellis counsel. If CPH is successful in its efforts, Morgan Stanley will, pending appeal, be forced to obtain entirely new counsel, unfamiliar with facts and issues of these cases.

Third, CPH will not be prejudiced by an extension of deadlines for merits discovery. CPH brought suit in 2003 seeking to redress only monetary damages that it claims to have suffered in 1998 — 5 years before! If CPH's claims are eventually found to have merit, CPH can be made whole through monetary damages, including interest awardable by law. Moreover, considering the complex and substantial matters at issue, even with a 90 day extension of all deadlines, this case will proceed to trial expeditiously, and well within the boundaries under the Florida Rules of Judicial Administration. *See Fla. R. Jud. Admin. 2.085(e)(1)(3)*.

Florida Rule of Civil Procedure 1.280(c) authorizes this Court to modify burdensome or prejudicial discovery or discovery deadlines. Rule 1.280(c) provides:

Upon motion by a party or by the person from who discovery is sought, and for good cause shown, the court in which the action is pending may make any order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense that justice requires

Additionally, Rule 1.280(d) authorizes the Court, upon motion of one of the parties, to issue an order controlling the timing and sequence of discovery “for the convenience of parties and witnesses and in the interest of justice.”

Rules 1.280(c) and 1.280(d), as well as the Court's inherent authority to control its own docket, provide the Court with broad discretion to modify discovery deadlines. *See, e.g.*,

Rasmussen v. South Fla. Blood Serv., Inc., 500 So. 2d 533, 535 (Fla. 1987) (“The discovery rules . . . confer broad discretion on the trial court to limit or prohibit discovery.”); *SCI Funeral Servs. of Fla., Inc. v. Light*, 811 So. 2d 796, 798 (Fla. 4th DCA 2002) (“[T]he scope and limitation of discovery is within the broad discretion of the trial court.”).

CONCLUSION

An extension of merits discovery and the pretrial deadlines best serves the interests of justice and judicial economy. Requiring merits discovery to go forward at the pace originally agreed upon by the parties, when there are now significant additional discovery issues that have been raised, would be burdensome, prejudicial, and an injustice. For these reasons, Morgan Stanley respectfully requests that this Court enter an order (1) extending all merits discovery and other pretrial deadlines; and (2) establishing deadlines for the prompt resolution of the contempt motion and all discovery related to that motion.

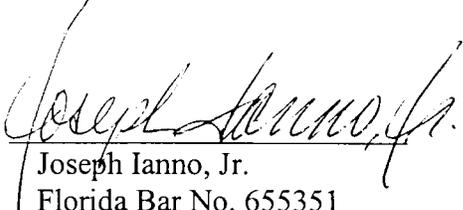
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this 15th day of July, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar No. 618349)
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

*Counsel for Morgan Stanley & Co.
Incorporated and Morgan Stanley Senior
Funding, Inc.*

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
E-mail: jianno@carltonfields.com

BY: 
Joseph Ianno, Jr.
Florida Bar No. 655351

SERVICE LIST

Jack Scarola
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy
Michael Brody
JENNER & BLOCK, LLC
One IBM Plaza, Suite 400
Chicago, IL 60611

Exhibit 1

KIRKLAND & ELLIS LLP

AND AFFILIATED PARTNERSHIPS

655 Fifteenth Street, N.W.
Washington, D.C. 20005

202 879-5000

www.kirkland.com

Thomas A. Clare
To Call Writer Directly:
(202) 879-5993
tclare@kirkland.com

Facsimile:
202 879-5200

March 11, 2004

BY FACSIMILE

Michael Brody, Esq.
Jenner & Block, LLC
One IBM Plaza
Chicago, IL 60611-7603

Re: *Coleman (Parent) Holdings v. Morgan Stanley & Co.*
Morgan Stanley Senior Funding v. MacAndrews & Forbes et al.

Dear Mike:

I write to memorialize our agreement regarding the sequencing of depositions.

We agreed — as the primary governing principle — that each side will take alternate weeks for taking and defending depositions. Each side will endeavor in the first instance to schedule its witnesses to be deposed during the weeks that have been allocated to the other side for the taking of depositions. Similarly, each side will endeavor in the first instance to schedule third party depositions during the appropriate weeks. Both sides will work together in good faith to accommodate the legitimate scheduling conflicts of third-party and party witnesses alike. Finally, I would propose, for simplicity reasons, that third-party depositions that call only for the production of documents (i.e. depositions that do not involve a personal appearance of any kind) not be subject to this sequencing agreement, and can be scheduled for any return date consistent with the applicable rules.

Please confirm that this letter accurately reflects our understanding.

Sincerely,



Thomas A. Clare

Exhibit 2

JENNER & BLOCK

July 9, 2004

Jenner & Block LLP
One IBM Plaza
Chicago, IL 60611
Tel 312-222-9350
www.jenner.com

Chicago
Dallas
Washington, DC

By Telecopy

Thomas A. Clare, Esq.
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

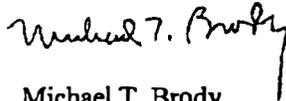
Michael T. Brody
Tel 312 923-2711
Fax 312 840-7711
mbrody@jenner.com

Re: Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co.
Morgan Stanley Senior Funding, Inc. v. MacAndrews & Forbes Holdings Inc., et al.

Dear Tom:

I write in response to your July 7, 2004 letter offering Bram Smith for deposition on August 3 or August 4, 2004. We are not available on either of those dates. Please provide us with alternative dates for the court-ordered resumption of the deposition of Mr. Smith. In the interests of efficiency, we suggest scheduling the continuations of Mr. Smith's and Mr. Hart's depositions on the same day. Although we do not agree to your attempt to limit Mr. Smith's deposition to one hour, we anticipate that both depositions can be completed in a single day, with one being scheduled in the morning and the other for the afternoon.

Very truly yours,



Michael T. Brody

MTB:cjg

cc: Joseph Ianno, Esq. (by telecopy)
John Scarola, Esq. (by telecopy)
Jerold S. Solovy, Esq.

JENNER & BLOCK

July 9, 2004

Jenner & Block LLP
One IBM Plaza
Chicago, IL 60611
Tel 312-222-9350
www.jenner.com

Chicago
Dallies
Washington, DC

By Telecopy

Thomas A. Clare, Esq.
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

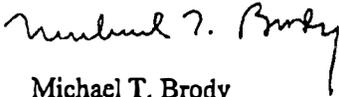
Michael T. Brody
Tel 312 923-2711
Fax 312 840-7711
mbrody@jenner.com

Re: *Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co.*
Morgan Stanley Senior Funding, Inc. v. MacAndrews & Forbes Holdings Inc., et al.

Dear Tom:

I write in response to your July 6, 2004 letter concerning the deposition of Adam Emmerich. We are not available for Mr. Emmerich's deposition on August 4, 2004. Please suggest an alternative date for Mr. Emmerich's deposition.

Very truly yours,



Michael T. Brody

MTB:cjg

cc: Joseph Ianno, Esq. (by telecopy)
John Scarola, Esq. (by telecopy)
Jerold S. Solovy, Esq.

Exhibit 3

JENNER & BLOCK

April 22, 2004

Jenner & Block LLP
One IBM Plaza
Chicago, IL 60611
Tel 312-222-9350
www.jenner.com

Chicago
Dallas
Washington, DC

By Telecopy

Thomas A. Clare, Esq.
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Michael T. Brody
Tel 312 923-2711
Fax 312 840-7711
mbrody@jenner.com

Re: *Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co.*
Morgan Stanley Senior Funding, Inc. v. MacAndrews & Forbes Holdings Inc., et al.

Dear Tom:

Due to unavoidable conflicts, we will not be able to present Mr. Slovin for his deposition next week. We will arrange an alternative date for this deposition in the near future.

Very truly yours,



Michael T. Brody

MTB:cjg

cc: Joseph Ianno, Esq. (by telecopy)
John Scarola, Esq. (by telecopy)
Jerold S. Solovy, Esq.

JENNER & BLOCK

May 21, 2004

Jenner & Block LLP
One IBM Plaza
Chicago, IL 60611
Tel 312-222-9350
www.jenner.com

Chicago
Dallas
Washington, DC

By Telecopy

Thomas A. Clare, Esq.
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

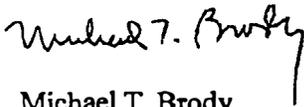
Michael T. Brody
Tel 312 923-2711
Fax 312 840-7711
mbrody@jenner.com

Re: *Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co.*
Morgan Stanley Senior Funding, Inc. v. MacAndrews & Forbes Holdings Inc., et al.

Dear Tom:

Due to scheduling conflicts, Mr. Schwartz will not be available for deposition on May 26, 2004. We are attempting to arrange an alternate date. At the present time, we believe Mr. Schwartz is available on Wednesday, June 2, 2004 or Tuesday, June 8, 2004. We will firm up Mr. Schwartz's availability early next week. Please let us know if you are available on June 2, June 8, or both.

Very truly yours,



Michael T. Brody

MTB:cjg

cc: Joseph Ianno, Esq. (by telecopy)
John Scarola, Esq. (by telecopy)
Jerold S. Solovy, Esq.

JENNER & BLOCK

June 16, 2004

Jenner & Block LLP
One IBM Plaza
Chicago, IL 60611
Tel 312-222-9350
www.jenner.com

Chicago
Dallas
Washington, DC

By Telecopy

Thomas A. Clare, Esq.
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

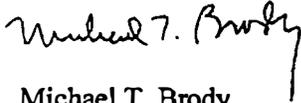
Michael T. Brody
Tel 312 923-2711
Fax 312 840-7711
mbrody@jenner.com

Re: Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co.
Morgan Stanley Senior Funding, Inc. v. MacAndrews & Forbes Holdings Inc., et al.

Dear Tom:

We have just been informed this afternoon that James D. Robinson's deposition, scheduled for Tuesday, June 22, needs to be rescheduled due to a medical emergency in his family. We will provide alternate dates for his deposition as soon as possible.

Very truly yours,



Michael T. Brody

MTB:cjg

cc: Joseph Ianno, Esq. (by telecopy)
John Scarola, Esq. (by telecopy)
Jerold S. Solovy, Esq.

Exhibit 4

KIRKLAND & ELLIS LLP

AND AFFILIATED PARTNERSHIPS

655 Fifteenth Street, N.W.
Washington, D.C. 20005

202 879-5000

www.kirkland.com

Thomas A. Clare
To Call Writer Directly:
(202) 879-5993
tclare@kirkland.com

Facsimile:
202 879-5200

February 26, 2004

By Facsimile

Michael Brody, Esq.
Jenner & Block, LLC
One IBM Plaza
Chicago, IL 60611-7603

Re: *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co. Incorporated*

Dear Mike:

I write in response to your letters of February 18, 2004 and February 25, 2004.

We have taken steps to contact the former Morgan Stanley employees identified in your deposition notice. We have spoken with Ms. Rafii and Messrs. Stynes and Webber, and will be representing all three of those individuals in connection with your deposition notice. We will let you know as soon as we have confirmed the representation arrangements for Ms. Boone and Messrs. Conway and Yoo. We also are in the process of obtaining available dates from all of the deponents identified in your notice, including the current Morgan Stanley employees identified in your notice. We hope to have that process completed by the end of this week.

We wish to request the depositions of the following current and former CPH and MAFCO employees:

- Donald Drapkin
- Paul Shapiro
- Joseph Page
- Bruce Slovin
- William Nesbitt
- Irwin Engelman
- Norman Ginstling
- Barry Schwartz

You previously have indicated that you will represent all of the deponents. We therefore assume that we will not be required to obtain commissions for any former employees. If that assumption is incorrect please let me know as soon as possible so that we may begin the process of obtaining commissions.

We would like to discuss a schedule to complete -- on a mutual basis -- the depositions that both parties have requested. I propose that we schedule a conference call on March 3, 2004 at 10:30 a.m. EST to work out such a schedule. Perhaps we can take that same opportunity also

Chicago

London

Los Angeles

New York

San Francisco

16div-005672

KIRKLAND & ELLIS LLP

Michael Brody, Esq.
February 26, 2004
Page 2

to discuss the proposed pretrial schedule that Larry Bemis sent you earlier in the week. Please let me know if you are available at that time, or if another date and time works better for you and your team.

Sincerely,

A handwritten signature in black ink that reads "Thomas A. Clare". The signature is written in a cursive style with a long horizontal stroke at the end.

Thomas A. Clare

cc: Joseph Ianno, Jr., Esq. (by facsimile)
John Scarola, Esq. (by facsimile)

Exhibit 5

JENNER & BLOCK

July 2, 2004

Jenner & Block LLP
One IBM Plaza
Chicago, IL 60611
Tel 312-222-9350
www.jenner.com

Chicago
Dallas
Washington, DC

By Telecopy

Thomas A. Clare, Esq.
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

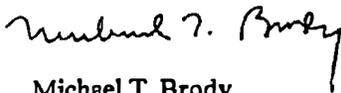
Michael T. Brody
Tel 312 923-2711
Fax 312 840-7711
mbrody@jenner.com

Re: *Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co.*
Morgan Stanley Senior Funding, Inc. v. MacAndrews & Forbes Holdings Inc., et al.

Dear Tom:

We are able to offer Mr. Shapiro for the conclusion of his deposition on July 28, 2004, at 10:00 a.m. Please advise if this date is acceptable to you.

Very truly yours,



Michael T. Brody

MTB:cjg

cc: Joseph Ianno, Esq. (by telecopy)
John Scarola, Esq. (by telecopy)
Jerold S. Solovy, Esq.

JENNER & BLOCK

July 8, 2004

Jenner & Block LLP
One IBM Plaza
Chicago, IL 60611
Tel 312-222-9350
www.jenner.com

Chicago
Dallas
Washington, DC

By Telecopy

Thomas A. Clare, Esq.
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

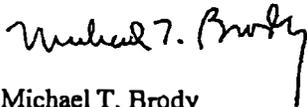
Michael T. Brody
Tel 312 923-2711
Fax 312 840-7711
mbrody@jenner.com

Re: Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co.
Morgan Stanley Senior Funding, Inc. v. MacAndrews & Forbes Holdings Inc., et al.

Dear Tom:

I write in response to your June 28, 2004 request for a two-day deposition of William Nesbitt. We question whether two days are reasonably necessary for you to complete Mr. Nesbitt's deposition. Nevertheless, Mr. Nesbitt is able to make himself available for deposition on July 27 and July 28, 2004. If you determine that you can complete Mr. Nesbitt's deposition in a single day, please let us know promptly so Mr. Nesbitt can free up his schedule.

Very truly yours,



Michael T. Brody

MTB:cjg

cc: Joseph Ianno, Esq. (by telecopy)
John Scarola, Esq. (by telecopy)
Jerold S. Solovy, Esq.

Exhibit 6

June 11, 2004

By Facsimile

Thomas A. Clare, Esq.
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

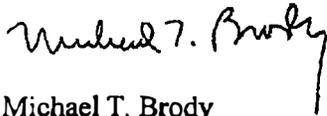
Michael T. Brody
Tel 312 923-2711
Fax 312 840-7711
mbrody@jenner.com

Re: *Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co.*
Morgan Stanley Senior Funding, Inc. v. MacAndrews & Forbes Holdings Inc., et al.

Dear Tom:

I write to advise you that Mr. Engelman is available for deposition on July 21, 2004 at 10:00 a.m. in New York. Please advise whether that date is acceptable to you.

Very truly yours,



Michael T. Brody

cc: Joseph Ianno, Esq. (by telecopy)
John Scarola, Esq. (by telecopy)
Jerold S. Solovy, Esq.

Exhibit 7

JENNER & BLOCK

July 2, 2004

Jenner & Block LLP
One IBM Plaza
Chicago, IL 60611
Tel 312-222-9350
www.jenner.com

Chicago
Dallas
Washington, DC

By Telecopy

Zhonette M. Brown, Esq.
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

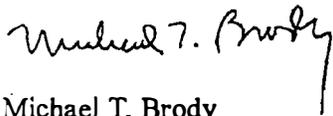
Michael T. Brody
Tel 312 923-2711
Fax 312 840-7711
mbrody@jenner.com

Re: *Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co.*
Morgan Stanley Senior Funding, Inc. v. MacAndrews & Forbes Holdings Inc., et al.

Dear Zhonette:

Your letter dated July 1, 2004 concerning the depositions of Mr. Duffy and Mr. Geller is incomplete. We agreed to go forward with the deposition of Mr. Geller on July 9, 2004, the date proposed by Mr. Geller's counsel. You advised me that Mr. Geller was no longer available on July 9, but could go forward on July 7. Because the attorney responsible for Mr. Geller's deposition was already committed to a different deposition on July 7, we were unable to take both depositions on the same date. You decided to postpone the Geller deposition. As you know, we are ordinarily willing to double track depositions and make necessary arrangements to accommodate the schedules of witnesses. With the brief notice provided Wednesday, however, we were unable to rearrange these depositions.

Very truly yours,



Michael T. Brody

MTB:cjg

cc: Joseph Ianno, Esq. (by telecopy)
John Scarola, Esq. (by telecopy)
Jerold S. Solovy, Esq.

Exhibit 8

CURTIS, MALLETT-PREVOST, COLT & MOSLE LLP

FRANKFURT MUSCAT
HOUSTON NEWARK
LONDON PARIS
MEXICO CITY STAMFORD
MILAN WASHINGTON

ATTORNEYS AND COUNSELLORS AT LAW
101 PARK AVENUE
NEW YORK, NEW YORK 10178-0061

TELEPHONE 212-696-6000
FACSIMILE 212-697-1559
VOICE MAIL 212-696-6028
E-MAIL INFO@CMP.COM
INTERNET WWW.CMP.COM

WRITER'S DIRECT.
TELEPHONE 212-696-6192
E-MAIL ELAWE@CMP.COM
FACSIMILE

April 22, 2004

BY FACSIMILE

Thomas A. Clare, Esq.
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Washington, D. C. 2005

Re: Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc.
MSSF v. MacAndrews & Forbes Holdings, Inc. et al.

Dear Mr. Clare:

This is a shortened version of the voice mail that I left on your machine.

This firm is counsel to Arthur Andersen LLP in connection with the various Sunbeam cases.

I have your letter dated April 22, 2004 to Michael Brody of Jenner & Block concerning your interest in removing the "Confidential" designation to the Court's December 4, 2003 Order.

Andersen objects to any effort to remove such Confidential Designation or to the removal of confidential treatment for any related documents and information and we wish to bring this objection to your attention.

It goes without saying that any action to remove the Confidential Designation would be adverse to Andersen's interests and we formally advise you of this fact.

CURTIS, MALLET-PREVOST, COLY & MOSLE LLP
ATTORNEYS AND COUNSELLORS AT LAW

Page 2

Thomas A. Clare, Esq.
April 22, 2004

I am available to discuss this with you at any time.

Please feel free to call me at (212) 696-6192.

Very truly yours,



Eliot Lauer

Cc: Jerold S. Solovy, Esq.
Caroline Cheng, Esq.

CURTIS, MALLET-PREVOST, COLT & MOSLE LLP

ATTORNEYS AND COUNSELLORS AT LAW
101 PARK AVENUE
NEW YORK, NEW YORK 10178-0061

FRANKFURT MUSCAT
HOUSTON NEWARK
LONDON PARIS
MEXICO CITY STAMFORD
MILAN WASHINGTON

TELEPHONE 212-896-5000
FACSIMILE 212-897-1559
VOICE MAIL 212-896-8028
E-MAIL INFO@CMP.COM
INTERNET WWW.CMP.COM

WRITEN'D DIRECT
TELEPHONE 212-696-6192
E-MAIL ELAVER@CMP.COM
FACSIMILE

April 26, 2004

BY FACSIMILE

Thomas A. Clare, Esq.
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Washington, D. C. 2005

Re: Coleman (Parent) Holdings, Inc. v Morgan Stanley & Co., Inc.
MSSF v. MacAndrews & Forbes Holdings Inc. et al.

Dear Mr. Clare:

I have your letter of April 26, 2004.

As counsel for Arthur Andersen LLP in connection with the Sunbeam cases I wish to repeat our previous advice to you that Andersen objects to any effort to remove "Confidential" designation to Exhibit 1 to the Court's December 4, 2003 Order or to the removal of confidential treatment for any related documents and information.

In addition, Andersen would expect Kirkland & Ellis to refrain from taking any steps or making any argument, express or implied, that would in any way tend to negate or diminish the confidential designation for the aforementioned materials and information or which would in any way diminish their confidential treatment.

Further, Andersen would expect any individual or entity acting in consultation with Kirkland & Ellis also to refrain from taking any steps or making any statements which would in any way diminish the confidential designation for or confidential treatment of the aforementioned materials and information.

CURTIS, MALLET-PREVOST, COLT & MOSE LLP
ATTORNEYS AND COUNSELLORS AT LAW

Page 2

Thomas A. Clare, Esq.
April 22, 2004

I tried reaching you by phone this afternoon, but you were unavailable. If you wish to discuss this matter, please call me at any time.

Very truly yours,



Eliot Lauer

Cc: Jerold S. Solovy, Esq.
Caroline Cheng, Esq.

CURTIS, MALLET-PREVOST, COLT & MOSLE LLP

FRANKFURT MUSCAT
HOUSTON NEWARK
LONDON PARIS
MEXICO CITY STAMFORD
MILAN WASHINGTON

ATTORNEYS AND COUNSELLORS AT LAW
101 PARK AVENUE
NEW YORK, NEW YORK 10178-0061

TELEPHONE 212-696-6000
FACSIMILE 212-697-1569
VOICE MAIL 212-696-6028
E-MAIL INFO@CMP.COM
INTERNET WWW.CMP.COM

WRITER'S DIRECT.
TELEPHONE 212-696-6192
E-MAIL ELAVER@CMP.COM

May 20, 2004

BY FACSIMILE

Thomas A. Clare, Esq.
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Washington, D. C. 20005

Re: Coleman (Parent) Holdings, Inc. v Morgan Stanley & Co., Inc.
Morgan Stanley Senior Funding, Inc. v. MacAndrews & Forbes
Holdings Inc. et al.

Dear Mr. Clare:

As you are aware, we are counsel for Arthur Andersen LLP in the Sunbeam matters.

On April 30, 2004, a conference in the matters captioned above was held in open court before Judge Maass, of the 15th Judicial Circuit Court, in and for Palm Beach County. We understand that the transcript of that conference was sealed.

Recently, it has come to our attention that counsel to Coleman (Parent) Holdings, Inc. and MacAndrews & Forbes Holdings Inc., has moved to unseal that transcript for the limited purpose of providing it in confidence to Arthur Andersen LLP. Other than providing a copy to this firm and its client, we understand that the transcript would remain sealed.

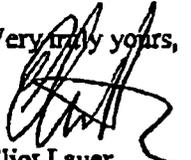
CURTIS, MALLET-PREVOST, COLT & MOSE LLP
ATTORNEYS AND COUNSELLORS AT LAW

Page 2

Thomas A. Clare, Esq.
May 19, 2004

In as much as we understand that statements in the sealed transcript pertain to Arthur Andersen LLP, we request that you consent to the unsealing of the transcript for the limited purpose of our review on behalf of Andersen.

Very truly yours,



Eliot Lauer

cc: Jerold S. Solovy, Esq.

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN
AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

Case No. CA 03-5045 AI

MORGAN STANLEY & CO., INC.,

Defendant,

MORGAN STANLEY SENIOR FUNDING,
INC.,

Plaintiff,

Case No. CA 03-5165 AI

vs.

MACANDREWS & FORBES HOLDINGS,
INC.,

Defendant

NOTICE OF HEARING

YOU ARE HEREBY NOTIFIED that the undersigned has called up for hearing the

following:

DATE: July 23, 2004

TIME: 9:00 a.m.

JUDGE: Hon. Elizabeth T. Maass

PLACE: Palm Beach County Courthouse, Room #11.1208, 205 North Dixie Highway,
West Palm Beach, FL 33401

Coleman (Parent) Holdings Inc. vs Morgan Stanley & Co., Inc.
Case No.: 2003 CA 005045 AI
Notice of Hearing

SPECIFIC MATTERS TO BE HEARD:

1. CPH and MAFCO's Motion to Remove Confidentiality Designations, filed under Seal 7/15/04;
2. CPH and MAFCO's Motion to Strike Verifications of Interrogatories, Compel Proper Verifications, and for Other Relief, filed under Seal 7/15/04;
3. CPH and MAFCO's Motion to Redact Certain References to Andersen Settlement Agreement Terms from July 12, 2004 Order, filed under Seal 7/15/04;
4. CPH and MAFCO's Motion to Compel Answers to Interrogatories and Requests for Production, filed under Seal 7/15/04.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Fax and Federal Express to all Counsel on the attached list, this 15 day of July, 2004.

JACK SCAROLA
 Florida Bar No.: 169440
 Searcy Denney Scarola
 Barnhart & Shipley, P.A.
 2139 Palm Beach Lakes Boulevard
 West Palm Beach, FL 33409
 Phone: (561) 686-6300
 Fax: (561) 478-0754
 Attorney for Coleman (Parent) Holdings Inc.
 (CPH) and MacAndrews & Forbes Holdings,
 Inc. (MAFCO)

Colerain (Parent) Holdings Inc. vs Morgan Stanley & Co., Inc.
Case No : 2003 CA 005045 AJ
Notice of Hearing

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1100
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Bret McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block LLP
One IEM Plaza
Suite 4400
Chicago, IL 60611

#230530/mp

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

CASE NO.: CA 03-5045 AI

Plaintiffs,

vs.

MORGAN STANLEY & CO., INC.,

Defendant,

MORGAN STANLEY SENIOR FUNDING,
INC.,

CASE NO. CA 03-5165 AI

Plaintiff,

vs.

MACANDREWS & FORBES HOLDINGS,
INC.,

Defendant,

NOTICE OF HEARING

YOU ARE HEREBY NOTIFIED that the undersigned has called up for hearing the following:

DATE: July 23, 2004

TIME: 9:00 a.m.

JUDGE: Hon. Elizabeth T. Maass

PLACE: Palm Beach County Courthouse, Room #11.1208, 205 North Dixie Highway,
West Palm Beach, FL 33401

SPECIFIC MATTERS TO BE HEARD:

**Coleman (Parent) Holdings Inc.'s and MacAndrews & Forbes Holdings, Inc.'s
Supplemental Motion to Compel Re: Requests for Production (Filed under seal)**

Coleman (Parent) Holdings, Inc. vs Morgan Stanley & Company
Case No.: 2003 CA 005045 AI
Notice of Hearing

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by
Fax and Federal Express to all Counsel on the attached list, this 16th day of July,
2004.



JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 684-5816
Attorney for Coleman (Parent) Holdings Inc.
and MacAndrews & Forbes Holdings, Inc

Coleman (Parent) Holdings, Inc. vs Morgan Stanley & Company
Case No.: 2003 CA 005045 AI
Notice of Hearing

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirklard and Ellis
655 14th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block LLP
One IBM Plaza
Suite 400
Chicago, IL 60611

#230530/smk

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

CASE NO: 2003 CA 005045 AI

Plaintiffs,

vs.

MORGAN STANLEY & CO., INC.

Defendant.

MORGAN STANLEY SENIOR FUNDING,
INC.,

Plaintiff,

CASE NO. CA 03-5165 AI

vs.

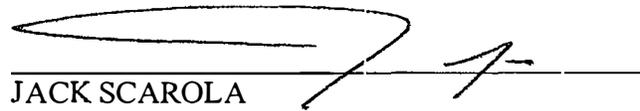
MACANDREWS & FORBES HOLDINGS,
INC.,

Defendant,

NOTICE OF FILING PLEADING UNDER SEAL

COLEMAN (PARENT) HOLDINGS INC. and MACANDREWS & FORBES
HOLDINGS, INC. hereby give notice of the filing of CPH's and MAFCO's Supplemental
Motion to Compel Re Requests for Production, filed under Seal on this date.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by
Fax and Federal Express to all counsel on the attached list on this 16th day of July,
2004.



JACK SCAROLA

Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 684-5815
Attorneys for Coleman (Parent) Holdings, Inc.
and MacAndrews & Forbes Holdings, Inc.

Coleman (Parent) Holdings Inc. vs Morgan Stanley & Company
Notice Of Filing Pleading Under Seal
Case No.: 2003 CA 005045 AI

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 14th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block LLP
One H&M Plaza
Suite 400
Chicago, IL 60611

CARLTON FIELDS, P.A.

ATTORNEYS AT LAW

Esperanté
222 Lakeview Avenue, Suite 1400
West Palm Beach, Florida 33401-6149

MAILING ADDRESS
P.O. Box 150, West Palm Beach, FL 33402-0150
Tel 561.659.7070 Fax 561.659.7368

FAX COVER SHEET

Date:	July 16, 2004	Phone Number	Fax Number
To:	Jack Scarola, Esq.	(561) 689-6300	(561) 684-5816
	Jerald Solovy, Esq.	(312) 923-2711	(312) 840-7671
	Michael Brody		(312) 840-7711
	Thomas Clare, Esq.		(202) 879-5200
From:	Joyce Dillard, CLA to Joseph Ianno, Jr.	561.659.7070	561.659.7368

Client/Matter No.: 47877/14092

Employee No.:

Total Number of Pages Being Transmitted, Including Cover Sheet: 2

Message: To follow please find a copy of Joe Ianno's letter of today's date to Judge Maass.

Original to follow Via Regular Mail Original will Not be Sent Original will follow via Overnight Courier

 The information contained in this facsimile message is attorney privileged and confidential information intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone (if long distance, please call collect) and return the original message to us at the above address via the U.S. Postal Service. Thank you.

If there are any problems or complications, please notify us immediately at:
561.659.7070

Telecopier operator: _____

WPB#567902.5

CARLTON FIELDS, P.A.

Miami Orlando St. Petersburg Tallahassee Tampa West Palm Beach

MIAMI
ORLANDO
ST. PETERSBURG
TALLAHASSEE
TAMPA

WEST PALM BEACH

CARLTON FIELDS

ATTORNEYS AT LAW

Esplanade
222 Lakeview Avenue, Suite 1400
West Palm Beach, Florida 33401-6149
P.O. Box 150
West Palm Beach, Florida 33402-0150

561.659.7070
561.659.7368 fax
www.carltonfields.com

E-MAIL: jlanno@carltonfields.com

July 16, 2004

The Honorable Elizabeth Maass
Palm Beach County Courthouse
205 North Dixie Highway, Room 11.1208
West Palm Beach, Florida 33401

VIA HAND-DELIVERY

Re: *Coleman (Parent) Holdings Co. v. Morgan Stanley & Co.*, Case No: CA 03-5045 AI
Morgan Stanley v. MacAndrews & Forbes Holdings, Inc., Case No: CA 03-5165 AI

Dear Judge Maass:

Enclosed please find a binder containing a courtesy copy of the parties Joint Submission, Notices of Hearing, and the following motions:

Morgan Stanley's Motion to Set a Hearing on the Contempt Motion and Extend Merits Discovery;

CPH and MAFCO's Motion to Remove Confidentiality Designations (filed under seal);

CPH and MAFCO's Motion to Strike Verifications of Interrogatories, Compel Proper Verifications, and for Other Relief (filed under seal);

CPH and MAFCO's Motion to Redact Certain References to Andersen Settlement Agreement Terms from July 12, 2004 Order (filed under seal); and

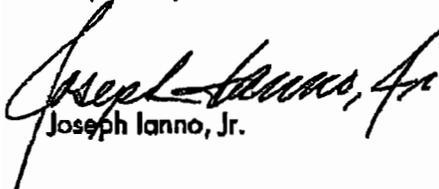
CPH and MAFCO's Motion to Compel Answers to Interrogatories and Requests for Production (filed under seal)

Honorable Elizabeth Maass
July 16, 2004
Page 2

along with supporting documents and applicable case authority. The CPH and MAFCO's motions have been filed under seal, therefore, we ask Your Honor to return those motions at the conclusion of the Case Management Conference scheduled for 9:00 a.m. on July 23, 2004.

In light of the Court's statements at Uniform Motion Calendar, Morgan Stanley has filed an affirmative motion since Mr. Bemis has canceled his vacation and will be present at the hearing to present argument on the Morgan Stanley motion as well as oppositions to the various CPH motions, including the Motion to Compel.

Respectfully,



Joseph Ianno, Jr.

/jed

Enclosure

cc: Jack Scarola (by facsimile; identical binder by Federal Express)
Jerold Solovy (by facsimile; identical binder by Federal Express)

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

v.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO., INC.,

Defendant.

MORGAN STANLEY SENIOR FUNDING, INC.,

Plaintiff,

v.

CASE NO: CA 03-5165 AI

MACANDREWS & FORBES HOLDINGS, INC.,

Defendant.

NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that a hearing has been set in the above-styled case as follows:

DATE: July 23, 2004

TIME: 9:00 a.m. (Specially Set Case Management Conference)

PLACE: Palm Beach County Courthouse, Courtroom 11A
205 North Dixie Highway
West Palm Beach, Florida 33401

BEFORE: Judge Elizabeth T. Maass

CONCERNING: Morgan Stanley's Motion to Set a Hearing on the Contempt
Motion and Extend Merits Discovery

Coleman v. Morgan Stanley
Case No: 03-CA-005045 AI
Notice of Hearing
Page 2

KINDLY GOVERN YOURSELVES ACCORDINGLY.

The undersigned counsel hereby certifies that a good faith attempt to resolve the issues contained in the foregoing motions or matters will be made with opposing counsel prior to hearing on these matters on the Court's Motion Calendar.

If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no costs to you, to the provision of certain assistance. Please contact the ADA Coordinator in the Administrative Office of the Court, Palm Beach County Courthouse, 205 North Dixie Highway, Room 5.2500, West Palm Beach, Florida 33401; telephone number (561) 355-2431 within two (2) working days of your receipt of this notice; if you are hearing or voice impaired, call 1-800-955-8771.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this 16th day of July, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar No. 618349)
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

Counsel for Defendant
Morgan Stanley & Co. Incorporated

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

BY: Joseph Ianno, Jr.
Joseph Ianno, Jr.
Florida Bar No: 655351

Coleman v. Morgan Stanley
Case No: 03-CA-005045 AI
Notice of Hearing
Page 3

SERVICE LIST

Jack Scarola
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy
Michael Brody
JENNER & BLOCK, LLC
One IBM Plaza, Suite 400
Chicago, IL 60611

Morgan Stanley

Fax

LAW DIVISION: Litigation

Attorney Work Product

Date: July 16, 2004

Subject:

To: Tom Clare

Company: Kirkland & Ellis

Fax: 202-879-5200

From: Jim Doyle

Fax: 212-762-7129

Phone: 212-762-5146

Urgent

Confirm

Total Pages ³ Including Cover

Message

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff,

vs.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO., INC.,
Defendant.

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff,

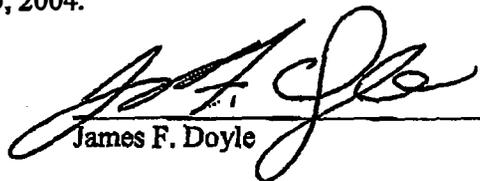
vs.

CASE NO: CA 03-5165 AI

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant.

CONSENT TO MOTION TO POSTPONE TRIAL

I, James F. Doyle, on behalf of Defendant Morgan Stanley & Co. Incorporated and Plaintiff Morgan Stanley Senior Funding, Inc. (collectively "Morgan Stanley"), hereby consent to the relief sought in Morgan Stanley's Motion to Set A Hearing on the Contempt Motion and Extend Merits Discovery dated July 15, 2004.


James F. Doyle

STATE OF New York)
COUNTY OF New York) ss

Sworn to (or affirmed) and subscribed before me this 16th day of July, 2004,
by James F. Doyle who is personally known by me [or who has
produced _____ as identification] and who took an oath.

Michael M. O'Brien
(Signature)

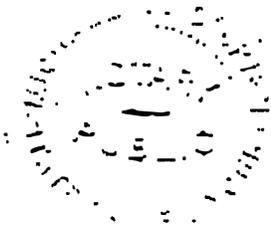
(Printed Name)

(AFFIX NOTARIAL SEAL)

NOTARY PUBLIC, STATE OF _____

(Commission Expiration Date)

(Serial Number, If Any)



MICHAEL M. O'BRIEN
Notary Public, State of New York
No. 31-5003142
Qualified in New York County
Commission Expires Oct 19, 20 06

FAX TRANSMITTAL

JENNER & BLOCK

Jenner & Block LLP
One IBM Plaza
Chicago, IL 60611
Tel 312 222-9350
www.jenner.com

Chicago
Dallas
Washington, DC

Date: July 19, 2004

To: Thomas A. Clare, Esq.

Fax: (202) 879-5200
Voice: (202) 879-5993

Joseph Ianno, Jr., Esq.

Fax: (561) 659-7368
Voice: (561) 659-7070

John Scarola, Esq.

Fax: (561) 684-5816 (before 5 PM)
Voice: (561) 686-6350, Ext. 140

From: Michael T. Brody
312 923-2711

Employee Number:

Client Number: 41198-10003

Important: This message is intended only for the use of the individual or entity to which it is addressed, and may contain information that is attorney work product, privileged, confidential, and exempt from disclosure under applicable law. If the reader of this message is not the intended recipient, or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution, or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone, and return the original message to us at the above address via postal service. Thank you.

Message:

Total number of pages including this cover sheet: 5

Time Sent:

If you do not receive all pages, please call: 312 222-9350

Sent By:

Secretary: Caryn Jo Geisler

Extension: 6490

JENNER & BLOCK

July 19, 2004

Jenner & Block LLP
One IBM Plaza
Chicago, IL 60611
Tel 312-222-9350
www.jenner.com

Chicago
Dallas
Washington, DC

By Telecopy

Thomas A. Clare, Esq.
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

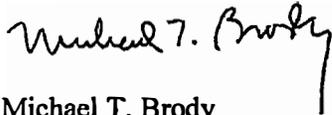
Michael T. Brody
Tel 312 923-2711
Fax 312 840-7711
mbrody@jenner.com

Re: *Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co.*
Morgan Stanley Senior Funding, Inc. v. MacAndrews & Forbes Holdings Inc., et al.

Dear Tom:

We accept August 27, 2004 for Mr. Burchill's deposition. A notice for that deposition, and for Mr. Seth's deposition next week, is enclosed.

Very truly yours,



Michael T. Brody

MTB:cjg

cc: Joseph Ianno, Esq. (by telecopy)
John Scarola, Esq. (by telecopy)
Jerold S. Solovy, Esq.

THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

CASE NO. CA 03-5045 AI

vs.

MORGAN STANLEY & CO., INC.,
Defendant.

MORGAN STANLEY SENIOR FUNDING, INC., CASE NO. CA 03-5165 AI
Plaintiff,

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
et al.,
Defendants.

NOTICE OF TAKING VIDEOTAPED DEPOSITIONS

To: Thomas A. Clare, Esq.
KIRKLAND & ELLIS, LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lake View Avenue
Suite 1400
West Palm Beach, FL 33401

PLEASE TAKE NOTICE that Plaintiff Coleman (Parent) Holdings Inc. will take the deposition upon oral examination of the following witnesses pursuant to Florida Rule of Civil Procedure 1.310 on the dates, times, and locations set forth below:

DEPONENT	DATE AND TIME
Ishaan Seth	July 30, 2004 at 9:30 a.m.
Thomas Burchill	August 27, 2004 at 9:30 a.m.

All of the depositions will be conducted at Esquire Deposition Services, 216 East 45th Street, New York, NY 10017. The depositions will be recorded by videotape and stenographic means. The depositions will be taken before a person authorized to administer oaths and will continue day to day until completed.

The videotape operator will be Esquire Deposition Services located in New York, New York.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by facsimile and mail to all counsel on the attached Service List this 19th day of July 2004.

Dated: July 19, 2004

COLEMAN (PARENT) HOLDINGS INC.

By: Michael T. Barnhart
One of Its Attorneys

Jerold S. Solovy
JENNER & BLOCK LLP
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

Jack Scarola
SEARCY DENNEY SCAROLA BARNHART
& SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33409
(561) 686-6300

SERVICE LIST

Thomas A. Clare, Esq.
KIRKLAND & ELLIS, LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lake View Avenue
Suite 1400
West Palm Beach, FL 33401

#230580/smk

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiffs,

CASE NO: 2003 CA 005045 AI

vs.
MORGAN STANLEY & CO., INC.

Defendant.

MORGAN STANLEY SENIOR FUNDING,
INC.,

Plaintiff,

CASE NO. CA 03-5165 AI

vs.
MACANDREWS & FORBES HOLDINGS,
INC.,

Defendant,

NOTICE OF FILING PLEADING UNDER SEAL

COLEMAN (PARENT) HOLDINGS INC. and MACANDREWS & FORBES
HOLDINGS, INC. hereby give notice of the filing of CPH's and MAFCO's Response in
Opposition to Morgan Stanley's Motion to Set a Hearing on CPH's Contempt Motion and to
Extend Merits Discovery, filed under Seal on this date.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by
Fax and Federal Express to all counsel on the attached list on this 21st day of JULY,
2004.


JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 684-5815
Attorneys for Coleman (Parent) Holdings, Inc.
and MacAndrews & Forbes Holdings, Inc.

Coleman (Parent) Holdings Inc. vs Morgan Stanley & Company
Notice Of Filing Pleading Under Seal
Case No.: 2003 CA 005045 AI

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block LLP
One IBM Plaza
Suite 4400
Chicago, IL 60611

CARLTON FIELDS, P.A.

ATTORNEYS AT LAW

Esperanté
222 Lakeview Avenue, Suite 1400
West Palm Beach, Florida 33401-6149

MAILING ADDRESS
P.O. Box 150, West Palm Beach, FL 33402-0150
Tel 561.659.7070 Fax 561.659.7368

FAX COVER SHEET

Date:	July 19, 2004	Phone Number	Fax Number
To:	Jack Scarola, Esq.	(561) 689-6300	(561) 684-5816
	Jerald Solovy, Esq.	(312) 923-2711	(312) 840-7671
	Michael Brody		(312) 840-7711
	Thomas Clare, Esq.		(202) 879-5200
From:	Joyce Dillard, CIA to Joseph Ianno, Jr.	561.659.7070	561.659.7368

Client/Matter No.: 47877/14092

Employee No.:

Total Number of Pages Being Transmitted, Including Cover Sheet: 5

Message: To follow please find a copy of Morgan Stanley's Notice of Filing Consent to Motion to Set a Hearing on the Contempt Motion and Extend Merits Discovery.

- Original to follow Via Regular Mail
 Original will Not be Sent
 Original will follow via Overnight Courier

The information contained in this facsimile message is attorney privileged and confidential information intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone (if long distance, please call collect) and return the original message to us at the above address via the U.S. Postal Service. Thank you.

If there are any problems or complications, please notify us immediately at:
561.659.7070

Teletypewriter operator: _____

WPB#567902.5

CARLTON FIELDS, P.A.

Miami Orlando St. Petersburg Tallahassee Tampa West Palm Beach

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

v.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO., INC.,

Defendant.

MORGAN STANLEY SENIOR FUNDING, INC.,

Plaintiff,

v.

CASE NO: CA 03-5165 AI

MACANDREWS & FORBES HOLDINGS, INC.,

Defendant.

**NOTICE OF FILING CONSENT TO MOTION TO SET A HEARING ON THE
CONTEMPT MOTION AND EXTEND MERITS DISCOVERY**

Morgan Stanley & Co. Incorporated and Morgan Stanley Senior Funding, Inc, by and through their undersigned counsel, hereby give notice that it has filed the attached Consent to Morgan Stanley's Motion to Set a Hearing on the Contempt Motion and Extend Merits Discovery dated July 15, 2004.

Coleman v. Morgan Stanley, Case No: CA 03-5045 AI
Morgan Stanley v. MacAndrews, Case No: CA 03-5045
Notice of Filing Consent
Page 2

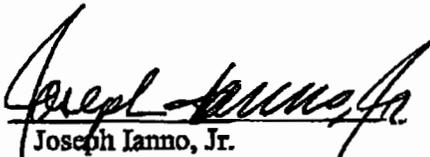
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the service list below by facsimile and Federal Express on this 19th day of July, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar No. 618349)
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

**Counsel for Morgan Stanley & Co.
Incorporated and Morgan Stanley
Senior Funding**

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
E-mail: jianno@carltonfields.com

BY: 
Joseph Ianno, Jr.
Florida Bar No: 655351

SERVICE LIST

Jack Scarola
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy
Michael Brody
JENNER & BLOCK, LLC
One IBM Plaza, Suite 400
Chicago, IL 60611

**IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA**

**COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff,**

vs.

CASE NO: CA 03-5045 AI

**MORGAN STANLEY & CO., INC.,
Defendant.**

**MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff,**

vs.

CASE NO: CA 03-5165 AI

**MACANDREWS & FORBES HOLDINGS, INC.,
Defendant.**

CONSENT TO MOTION TO POSTPONE TRIAL

I, James F. Doyle, on behalf of Defendant Morgan Stanley & Co. Incorporated and Plaintiff Morgan Stanley Senior Funding, Inc. (collectively "Morgan Stanley"), hereby consent to the relief sought in Morgan Stanley's Motion to Set A Hearing on the Contempt Motion and Extend Merits Discovery dated July 15, 2004.


James F. Doyle

STATE OF New York
COUNTY OF New York

Sworn to (or affirmed) and subscribed before me this 16th day of July, 2004,
by James F. Doyle, who is personally known by me [or who has
produced _____ as identification] and who took an oath.

Michael M. O'Brien
(Signature)

(Printed Name)

(AFFIX NOTARIAL SEAL)

NOTARY PUBLIC, STATE OF _____

(Commission Expiration Date)

(Serial Number, If Any)



MICHAEL M. O'BRIEN
Notary Public, State of New York
No. 91-5009142
Qualified in New York County
Commission Expires Oct 18, 2006

CARLTON FIELDS, P.A.

ATTORNEYS AT LAW

Esperanté
222 Lakeview Avenue, Suite 1400
West Palm Beach, Florida 33401-6149

MAILING ADDRESS
P.O. Box 150, West Palm Beach, FL 33402-0150
Tel 561.659.7070 Fax 561.659.7368

FAX COVER SHEET

Date:	July 22, 2004	Phone Number	Fax Number
To:	Jack Scarola, Esq.	(561) 689-6300	(561) 227-0799
	Jerold Solovy, Esq.	(312) 923-2711	(312) 840-7671
	Michael Brody		(312) 840-7711
	Thomas Clare, Esq.		(202) 879-5200
From:	Joyce Dillard, CLA to Joseph Ianno, Jr.	561.659.7070	561.659.7368

Client/Matter No.: 47877/14092

Employee No.:

Total Number of Pages Being Transmitted, Including Cover Sheet: 14

Message: To follow please find a copy of Morgan Stanley's Motion for Enlargement of Time to Respond to First Set of Interrogatories.

A copy will be sent via Federal Express.

Original to follow Via Regular Mail Original will Not be Sent Original will follow via Overnight Courier

 The information contained in this facsimile message is attorney privileged and confidential information intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone (if long distance, please call collect) and return the original message to us at the above address via the U.S. Postal Service. Thank you.

 If there are any problems or complications, please notify us immediately at:
 561.659.7070

Telecopier operator: _____

WPB#567902.5

CARLTON FIELDS, P.A.

Miami Orlando St. Petersburg Tallahassee Tampa West Palm Beach

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT IN
AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO., INC.,

Defendant.

MORGAN STANLEY SENIOR FUNDING, INC.,

Plaintiff,

vs.

CASE NO: CA 03-5165 AI

MACANDREWS & FORBES HOLDINGS, INC.,

Defendant.

**MORGAN STANLEY SENIOR FUNDING'S MOTION FOR ENLARGEMENT OF
TIME TO RESPOND TO FIRST SET OF INTERROGATORIES**

Morgan Stanley Senior Funding ("MSSF"), by and through its undersigned counsel, moves this Court to enlarge the time for MSSF to respond to Defendant's First Set of Interrogatories served June 22, 2004. In support of its motion, Morgan States as follows:

1. On June 22, 2004, MacAndrews & Forbes ("MAFCO") served MSSF with a First Set of Interrogatories (Ex. 1) ("June 22nd Interrogatories"). Even though this case has been pending for approximately one year, this is the first set of Interrogatories served by MAFCO upon MSSF.

2. MSSF's responses are due on July 22, 2004. As the Court is aware, during the last thirty days, counsel have attended several lengthy hearings before this Court that required extensive preparation and argument, have responded to other written discovery and have also attended numerous depositions, many of which required travel to other states for all counsel.

3. Consequently, counsel for MSSF requested an extension of time to respond to the June 22nd Interrogatories until August 2, 2004, which is less than a two-week extension of time. Counsel for MAFCO refused to agree to this extension. Attached hereto as Exhibit 2 is correspondence from MAFCO's counsel refusing to agree to this request.

4. There will be no prejudice to MAFCO if this short extension is granted. Counsel for Morgan Stanley have repeatedly granted such extensions to opposing counsel, including, without limitation:

- An extension to respond to Morgan Stanley's First Set of Interrogatories. See M. Brody letter to T. Clare dated August 20, 2003. (Attached as Exhibit 3.)
- An extension to respond to Morgan Stanley's First Set of Requests for Admission. See M. Brody letter to T. Clare dated September 16, 2003. (Attached as Exhibit 4)
- An extension to respond to Morgan Stanley's Fourth Request for Production of Documents. See M. Brody letter to Z. Brown dated February 23, 2004. (Attached as Exhibit 5)

WHEREFORE, MSSF respectfully requests that this Court enlarge the time for MSSF to respond with answers and objections to the June 22nd Interrogatories together with such other and further relief as the Court deems just and proper.

CERTIFICATE OF SERVICE

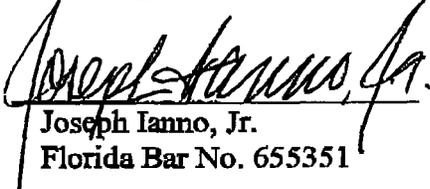
I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this 22nd day of July, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar No. 618349)
Thomas A. Clare
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

Counsel for Morgan Stanley Senior Funding, Inc.

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
E-mail: jjanno@carltonfields.com

BY:


Joseph Ianno, Jr.
Florida Bar No. 655351

SERVICE LIST

Jack Scarola
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy
Michael Brody
JENNER & BLOCK, LLC
One IBM Plaza, Suite 400
Chicago, IL 606119

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

CASE NO. CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

MACANDREWS & FORBES HOLDINGS INC. and
COLEMAN (PARENT) HOLDINGS INC.,
Defendant(s).

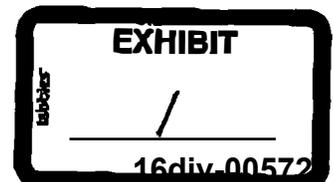
**DEFENDANT MACANDREWS & FORBES HOLDINGS INC.'S
FIRST SET OF INTERROGATORIES TO PLAINTIFF
MORGAN STANLEY SENIOR FUNDING, INC.**

Pursuant to Florida Rules of Civil Procedure 1.280 and 1.340, Defendant MacAndrews & Forbes Holdings Inc. ("Mafco"), by its attorneys, hereby requests that Plaintiff Morgan Stanley Senior Funding, Inc. answer the following Interrogatories within thirty (30) days from the date of service.

DEFINITIONS

The following definitions apply to each Interrogatory:

1. "Bank Facility" means the Credit Agreement, including amendments, and all funds extended by MSSF, First Union National Bank, and/or Bank of America National Trust & Savings Association to Sunbeam pursuant to the Credit Agreement, including, but not limited to, Tranche A, Tranche B, and the Revolving Credit Facility.



2. **"CPH" means Coleman (Parent) Holdings Inc., Coleman Worldwide Corporation, CLN Holdings Inc.**
3. **"Coleman Transaction" means the transaction by which Sunbeam acquired CPH's interest in the Coleman Company, Inc.**
4. **"Credit Agreement" means that agreement entered into by Sunbeam Corporation, as borrower, with Morgan Stanley Senior Funding, Inc., Bank of America National Trust and Savings Association, and First Union National Bank (now known as Wachovia Bank, National Association), as lenders, dated March 30, 1998 and all amendments thereto.**
5. **"February 27, 1998 Agreements" means (a) the Agreement and Plan of Merger dated February 27, 1998 among Sunbeam Corporation, Laser Acquisition Corp., CLN Holdings Inc. and Coleman (Parent) Holdings Inc., and (b) the Agreement and Plan of Merger dated February 27, 1998 among Sunbeam Corporation, Camper Acquisition Corp. and The Coleman Company, Inc.**
6. **"Identify," when used with respect to natural persons, means to state the full name of such person, and his or her last known address and telephone number, and if employed, the occupation and the job title or position of the person, and the name, address, and telephone number of the employer.**
7. **"Identify," when used with respect to a person other than a natural person, means to state the type of person (corporation, partnership, government agency, etc.), full name and address of its principal place of business concerned with each matter inquired of in these Interrogatories.**
8. **"Mafco" means MacAndrews & Forbes Holdings Inc. or any of their present and former officers, directors, and employees.**

9. "Morgan Stanley" means Morgan Stanley & Co., Inc. and any of its present and former employees, representatives, agents, attorneys, accountants, and advisors.

10. "MSSF" means Morgan Stanley Senior Funding, Inc. and any of its predecessors, successors, affiliates, subsidiaries, and present and former officers, directors, partners, employees, representatives, and agents.

11. "Subordinated Debenture Offering" means the offering of Sunbeam's Zero Coupon Convertible Senior Subordinated Debentures Due 2018.

12. "Sunbeam" means Sunbeam Corporation and any of its predecessors, successors, affiliates, subsidiaries, and present and former officers, directors, employees, representatives, and agents.

INSTRUCTIONS

13. The connectives "and" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of each Interrogatory all responses that might otherwise be construed to be outside the scope.

14. The use of the singular form of any word includes the plural and vice versa.

INTERROGATORIES

INTERROGATORY NO. 1: Identify each individual who relied upon Exhibit A or information derived from Exhibit A, in whole or in part, at any time and for any purpose. For each such individual, describe in detail when and how each individual relied upon Exhibit A or information derived from Exhibit A, and what each individual did with the information contained in Exhibit A or derived from Exhibit A.

INTERROGATORY NO. 2: Identify with particularity what steps MSSF, Morgan Stanley and/or Sunbeam undertook to develop, analyze, consider, model, evaluate, or review potential synergies, cost savings, and/or financial benefits that Sunbeam could achieve from a business combination with Coleman. Your response should identify each individual involved.

INTERROGATORY NO. 3: Identify each individual involved in creating, developing, preparing, or using the following documents, or the information contained therein: MORGAN STANLEY CONFIDENTIAL 3136; 3931; 33911; 36113; 31983-31984; 84007-84010; and 84012-84019. As to each person identified, describe in detail that individual's role in creating, developing, preparing, or using such documents or the information contained therein.

INTERROGATORY NO. 4: Identify each individual involved on behalf of MSSF and Morgan Stanley in conducting, reviewing, or participating in due diligence of Sunbeam in connection with (i) the Coleman Transaction, (ii) the February 27 Agreements; (iii) the Subordinated Debenture Offering; and (iv) the Bank Facility, and for each such individual, describe in detail what steps that individual undertook to conduct that due diligence.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by facsimile and mail to all counsel on the attached Service List, this 22nd day of June, 2004.

COLEMAN (PARENT) HOLDINGS INC.

By: *Daniel Connell*
One of Its Attorneys

Jerold S. Solovy
Ronald L. Marmor
JENNER & BLOCK LLP
One IBM Plaza
Suite 4400
Chicago, Illinois 60611
(312) 222-9350

Jack Scarola
SEARCY DENNEY SCAROLA BARNHART
& SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33409
(561) 686-6300

SERVICE LIST

Thomas A. Clare, Esq.
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lake View Avenue
Suite 1400
West Palm Beach, Florida 33401

Document Number: 1078645

JENNER & BLOCK

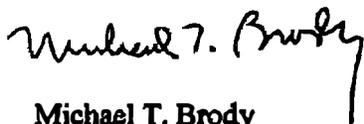
July 20, 2004

Jenner & Block LLP
One IBM Plaza
Chicago, IL 60611
Tel 312-222-9350
www.jenner.comChicago
Dallas
Washington, DC*By Telecopy*Kathryn R. DeBord, Esq.
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005Michael T. Brody
Tel 312 923-2711
Fax 312 840-7711
mbrody@jenner.comRe: *Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co.*
Morgan Stanley Senior Funding, Inc. v. MacAndrews & Forbes Holdings Inc., et al.

Dear Katie:

I write in response to your request that we agree to extend the deadline for Morgan Stanley to respond to MacAndrews & Forbes Holdings Inc.'s First Set of Interrogatories. As you know, ordinarily we agree to such requests. However, in light of our pending motion to strike Morgan Stanley's verifications on other sets of interrogatories, which is set for hearing this week, we believe it important to obtain Morgan Stanley's interrogatory responses on Thursday, as originally scheduled. The timely provision of these interrogatory answers will permit us to resolve any issues relating to the interrogatory responses without need for a further motion.

Very truly yours,



Michael T. Brody

MTB:cjg

cc: Joseph Ianno, Esq. (by telecopy)
John Scarola, Esq. (by telecopy)
Jerold S. Solovy, Esq.

CHICAGO_1129960_1

TOTAL P.02
16div-005727

JENNER & BLOCK

August 20, 2003

Jenner & Block, LLC
One IBM Plaza
Chicago, IL 60611-7605
Tel 312 222-9350
www.jenner.com

Chicago
Dallas
Washington, DC

By Facsimile

Thomas A. Clare, Esq.
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Michael T. Brody
Tel 312 923-2711
Fax 312 840-7711
mbrody@jenner.com

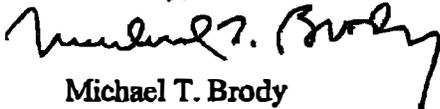
Re: *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co.*

Dear Tom:

I write to confirm that you have agreed that the time for Coleman (Parent) Holdings, Inc. to respond to Morgan Stanley & Co.'s interrogatories is extended to and including September 2, 2003.

Thank you for your agreement.

Sincerely,



Michael T. Brody

cc: Joseph Ianno, Esq. (by facsimile)
John Scarola, Esq. (by facsimile)
Jerold S. Solovy, Esq.



TOTAL P.02

16div-005728

TOTAL P. 02

JENNER & BLOCK

September 16, 2003

Jenner & Block, LLC
One IBM Plaza
Chicago, IL 60611-7606
Tel 312 823-9850
www.jenner.com

Chicago
Dallas
Washington, DC

By Telecopy

Thomas A. Clare, Esq.
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Michael T. Brody
Tel 312 923-2711
Fax 312 840-7711
mbrody@jenner.com

Re: Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co.

Dear Tom:

I write to confirm that Morgan Stanley agrees that CPH may have until September 24, 2003 to respond to Morgan Stanley's First Set of Requests for Admission.

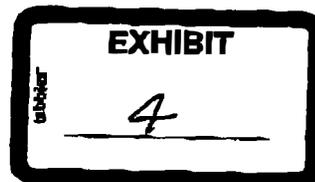
Thank you for your cooperation in this regard.

Very truly yours,



Michael T. Brody

cc: Joseph Ianno, Esq. (by facsimile)
John Scarola, Esq. (by facsimile)
Jerold S. Solovy, Esq.



FEB-23-2004 17:31

JENNER & BLOCK

3125270484

P.02/02

JENNER & BLOCK

February 23, 2004

Jenner & Block LLP
One IBM Plaza
Chicago, IL 60611
Tel 312-222-9350
www.jenner.com

Chicago
Dallas
Washington, DC

By Telecopy

Michael T. Brody
Tel 312 923-2711
Fax 312 840-7711
mbrody@jenner.com

Zhonette M. Brown, Esq.
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Re: *Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co.*

Dear Zhonette:

Thank you for agreeing to an extension to March 1, 2004 for CPH to serve its response to Morgan Stanley's Fourth Requests for Production of Documents.

Very truly yours,



Michael T. Brody

MTB:cjg

cc: Joseph Ianno, Esq. (by telecopy)
John Scarola, Esq. (by telecopy)
Jerold S. Solovy, Esq.



TOTAL P.02

16div-005730

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO., INC.,

Defendant.

_____ /

MORGAN STANLEY SENIOR FUNDING, INC.,

Plaintiff,

v.

CASE NO: CA 03-5165 AI

MACANDREWS & FORBES HOLDINGS, INC.,

Defendant.

_____ /

NOTICE OF FILING DEMONSTRATIVE EXHIBITS FROM JULY 23, 2004 HEARING

Morgan Stanley & Co. Incorporated and Morgan Stanley Senior Funding, Inc. ("Morgan Stanley"), by and through their undersigned counsel, hereby file the demonstrative exhibits utilized at the July 23, 2004 Case Management Conference in this matter as follows:

1. Exhibit 1 hereto consists of the Power Point Presentation presented by counsel for Morgan Stanley.
2. Exhibit 2 hereto consists of the calendar of events provided to the Court.

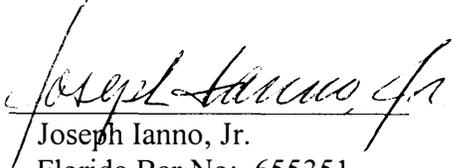
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the service list below by facsimile and Federal Express on this 23rd day of July, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar No. 618349)
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

**Counsel for Morgan Stanley & Co.
Incorporated and Morgan Stanley
Senior Funding**

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
E-mail: jianno@carltonfields.com

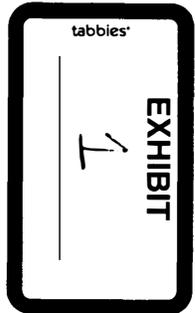
BY: 
Joseph Ianno, Jr.
Florida Bar No: 655351

SERVICE LIST

Jack Scarola
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy
Michael Brody
JENNER & BLOCK, LLC
One IBM Plaza, Suite 400
Chicago, IL 60611

**MORGAN STANLEY'S MOTION
TO SET A HEARING ON THE
CONTEMPT MOTION AND
EXTEND MERITS DISCOVERY**



July 23, 2004

Case Management Conference

Overview

- The Current Pretrial Schedule
- Progress Since February 20 Conference
 - Merits Discovery
 - [*Unexpected*] Contempt Proceedings
- What Remains to Be Done
- Proposal

The Current Pretrial Schedule

Event	Date
Amendment of Pleadings	Aug-6-2004
Completion of Fact Discovery	Sep-3-2004
Plaintiffs' Expert Disclosures	Sep-10-2004
Summary Judgment Briefs	Sep-20-2004
Defendants' Expert Disclosures	Sep-24-2004
Rebuttal Expert Disclosures	Oct-8-2004
Depositions of Experts (2 weeks)	Oct-18-2004
Summary Judgment Oppositions	Oct-25-2004
Summary Judgment Replies	Nov-8-2004
Deposition Designations Exchanged	Nov-19-2004
Mediator Selected	Nov-19-2004
Summary Judgment Hearing	Nov-19-2004
Counter-Designations & Initial Objections	Dec-3-2004

Event	Date
Motions in Limine	Dec-3-04
Witness Lists & Trial Exhibit Lists Exchanged	Dec-3-04
Mediation	Dec-6-04
Objections to Counter-Designations Exchanged	Dec-8-04
Meet-and-Confer re Deposition Designations	Dec-10-04
Designations & Objections to the Court	Dec-13-04
Joint Pretrial Stipulation	Dec-13-04
Motion in Limine Oppositions	Dec-13-04
Pretrial Conference (3 days)	Dec-20-04
Final Pretrial Conference	Jan-14-05
Jury Instructions & Verdict Forms Exchanged	Jan-14-05
Jury Trial Begins (15 days)	Jan-18-05

Items To Be Scheduled

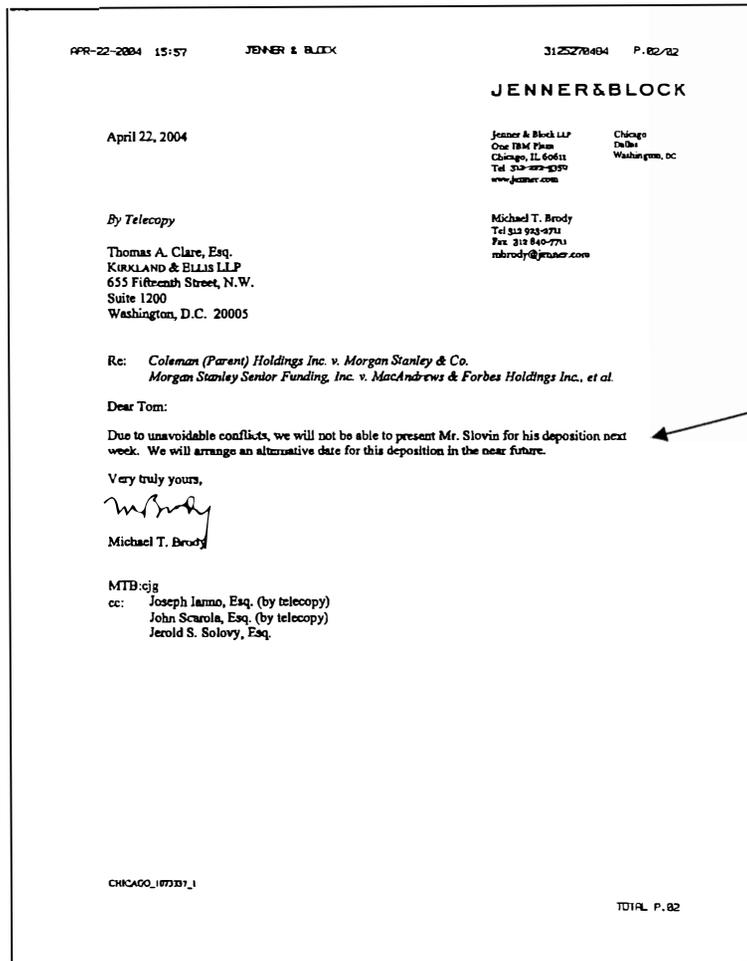
- Close of Contempt Discovery
- Evidentiary Hearing on Motion for Contempt
- Motions to Amend Pleadings to Add Punitive Damages

Depositions Completed Since Feb. 20, 2004 Case Management Conference

Date	Deponent	Location
2/24/2004	Smith, Bram	New York
4/2/2004	Rafii, Lilly	New York
4/6/2004	Ginstling, Norman	New York
4/22/2004	Boone, Shani	Boston
4/27/2004	Page, Joe	New York
5/12/2004	Slovin, Joe	New York
5/18/2004	Webber, Josh	Boston
5/19/2004	Hart, Michael	New York
5/25/2004	Stack, Heather	New York
6/3/2004	Dean, Alan	New York
6/4/2004	Conway, Andrew	New York
6/8/2004	Shapiro, Paul	New York
6/16/2004	Yoo, Eugene	Boston
6/18/2004	Lurie, James	New York
6/24/2004	Drapkin, Donald	New York
6/25/2004	Schwartz, Barry	New York
7/1/2004	Wright, William	New York
7/7/2004	Slotkin, Todd	New York
7/8/2004	Duffy, Robert	New York
7/8/2004	Salig, Joram	New York
7/13/2004	Stynes, James	New York
7/14/2004	Whelan, Chris	New York
7/22/2004	Gifford, Frank	New York

Morgan Stanley	10
CPH	13

April 22, 2004: CPH Cancels Slovin Deposition Scheduled For The Following Week



Due to unavoidable conflicts, we will not be able to present Mr. Slovin for his deposition next week.

May 21, 2004: CPH Cancels Schwartz Deposition Scheduled For The Following Week

MAY-21-2004 17:40 JENNER AND BLOCK LLP 312 527 0484 P.02/02

JENNER & BLOCK

May 21, 2004

Jenner & Block LLP Chicago
One IBM Plaza Dallas
Chicago, IL 60611 Tel 312-222-9290
www.jenner.com

By Telecopy

Thomas A. Clare, Esq.
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Michael T. Brody
Tel 312 923-8711
Fax 312 842-7711
mbrody@jenner.com

Re: *Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co.
Morgan Stanley Senior Funding, Inc. v. MacAndrews & Forbes Holdings Inc., et al.*

Dear Tom:

Due to scheduling conflicts, Mr. Schwartz will not be available for deposition on May 26, 2004. We are attempting to arrange an alternate date. At the present time, we believe Mr. Schwartz is available on Wednesday, June 2, 2004 or Tuesday, June 8, 2004. We will firm up Mr. Schwartz's availability early next week. Please let us know if you are available on June 2, June 8, or both.

Very truly yours,

Michael T. Brody

Michael T. Brody

MTB:cjg
cc: Joseph Ianno, Esq. (by telecopy)
John Scarola, Esq. (by telecopy)
Jerold S. Solovy, Esq.

CHICAGO_1045203_1

TOTAL P. 02

Due to scheduling conflicts, Mr. Schwartz will not be available for deposition on May 26, 2004.

June 16, 2004: CPH Cancels Robinson Deposition Scheduled For The Following Week

JUN-16-2004 15:06 JENNER AND BLOCK LLP 312 527 0484 P.02/02

JENNER & BLOCK

June 16, 2004

Jeener & Block LLP
One IBM Plaza
Chicago, IL 60611
Tel 312-222-9350
www.jenner.com

Chicago
Dallas
Washington, DC

By Telecopy

Michael T. Brody
Tel 312 923-7711
Fax 312 840-7711
mbrody@jenner.com

Thomas A. Clare, Esq.
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Re: Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co.
Morgan Stanley Senior Funding, Inc. v. MacAndrews & Forbes Holdings Inc., et al.

Dear Tom:

We have just been informed this afternoon that James D. Robinson's deposition, scheduled for Tuesday, June 22, needs to be rescheduled due to a medical emergency in his family. We will provide alternate dates for his deposition as soon as possible.

Very truly yours,

Michael T. Brody
Michael T. Brody

MTB:cjg
cc: Joseph Ianno, Esq. (by telecopy)
John Scarola, Esq. (by telecopy)
Jerold S. Solovy, Esq.

CHICAGO_1116299_1

TOTAL P. 02

We have just been informed this afternoon that James D. Robinson's deposition, scheduled for Tuesday, June 22, needs to be rescheduled due to a medical emergency in his family.

July 16, 2004: CPH Cancels Spoor Deposition Scheduled For The Following Week

JUL-16-2004 15:29 JENNER & BLOCK 3125270484 P.02/02

JENNER & BLOCK

July 16, 2004

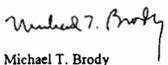
By Telecopy

Thomas A. Clare, Esq.
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Re: *Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co*
Morgan Stanley Senior Funding, Inc. v. MacAndrews & Forbes Holdings Inc., et al.

Dear Tom:

We learned today that William Spoor will be unable to proceed with the deposition scheduled for Tuesday, July 20 due to complications from recent surgery. Mr. Spoor is not able to offer any alternate dates at this time until his medical issues are resolved. We will advise you of alternate dates as soon as we can.

Very truly yours,

Michael T. Brody

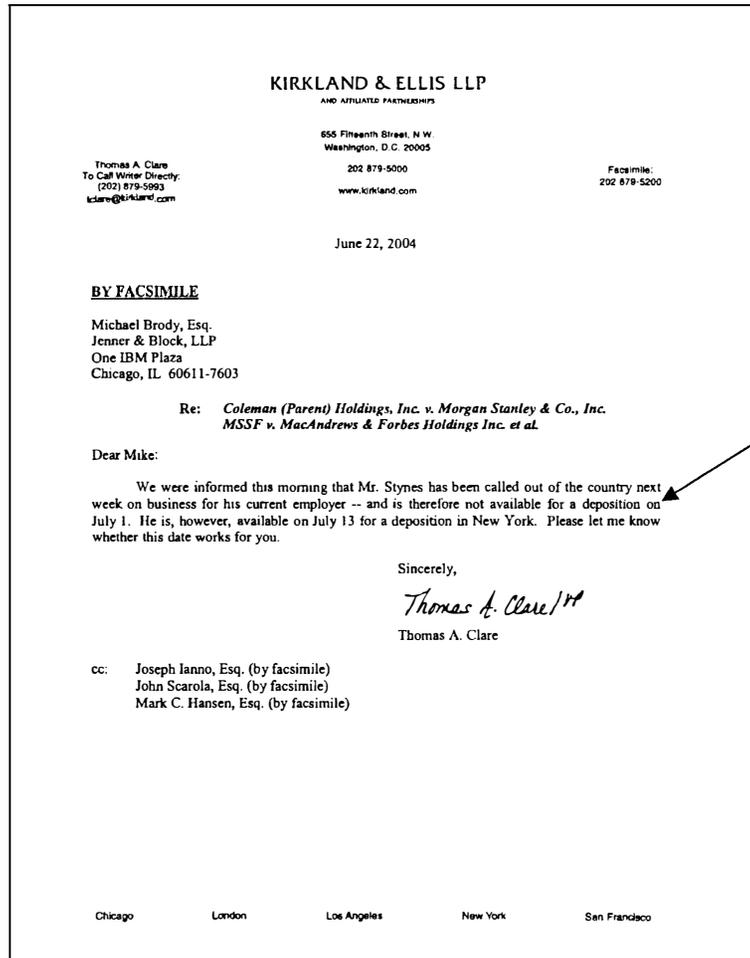
MTB:cjg
cc: Joseph Ianno, Esq. (by telecopy)
John Scarola, Esq. (by telecopy)
Jerold S. Solovy, Esq.

CHICAGO_1121504_1

TOTAL P.02

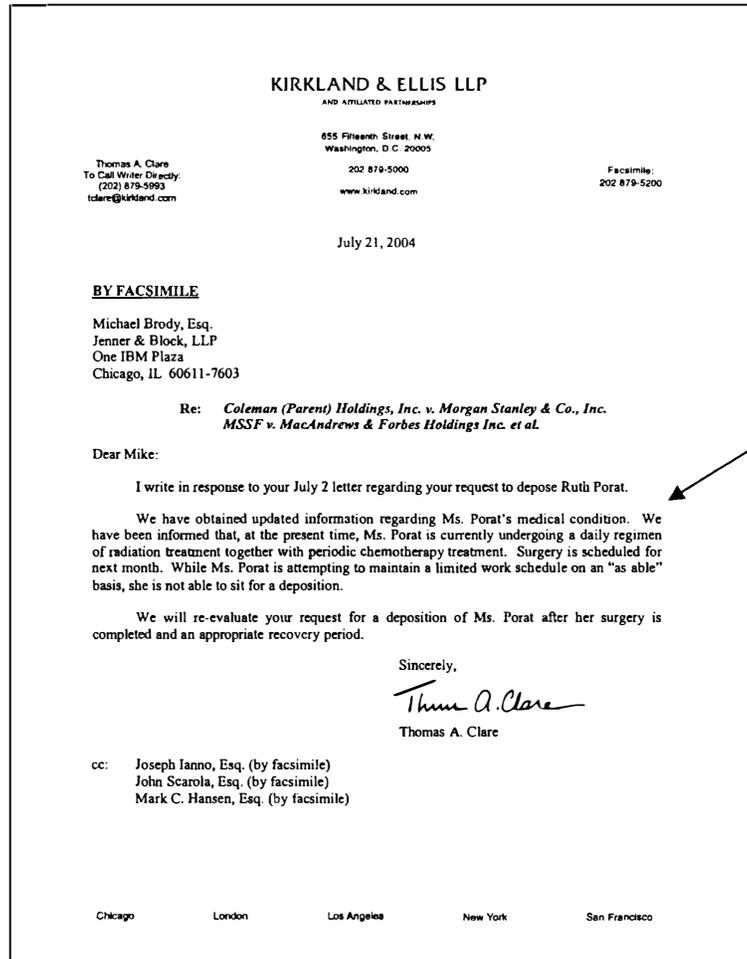
We learned today that William Spoor will be unable to proceed with the deposition scheduled for Tuesday, July 20 due to complications from recent surgery. Mr. Spoor is not able to offer any alternate dates at this time until his medial issues are resolved.

Morgan Stanley Also Has Had To Postpone Depositions



We were informed this morning that Mr. Stynes has been called out of the country next week on business for his current employer

Morgan Stanley Also Has Had To Postpone Depositions



We have been informed that, at the present time, Ms. Porat is currently undergoing a daily regimen of radiation treatment together with periodic chemotherapy treatment We will re-evaluate your request for a deposition of Ms. Porat after her surgery is completed and an appropriate recovery period.

Outstanding Requests for CPH & MAFCO Depositions

Witness	Requested
Engelman, Irwin	February 26, 2004
Nesbitt, William (2 days)	February 26, 2004
Jones, Lawrence	May 6, 2004
Jordan, Ann	May 6, 2004
Levin, Jerry	May 6, 2004
Moran, John	May 6, 2004
Robinson, James	May 6, 2004
Spoor, William	May 6, 2004
Gittis, Howard (2 days)	June 28, 2004
Maher, James (2 days)	June 28, 2004
Perelman, Ronald (2 days)	June 28, 2004

Depositions To Be Completed

Witness	Requested	Location	Days	Status
Amorison, Alison	MS	New York	1	Non-Party
Den Danto, Deidra	CPH		1	Non-Party
Deitz, Adrian	MS	London	1	Non-Party
Dunlap, Al	MS, CPH		1	Non-Party
Emmerich, Adam	MS	New York	1	Non-Party
Fannin, David	CPH	Florida	1	Non-Party
Fogg, Finn	MS	New York	1	Non-Party
Geller, Steven	MS	New York	1	Non-Party
Goudis, Richard	CPH		1	Non-Party
Griffith, Lee	CPH		1	Non-Party
Kelly, Janet	MS	Florida	1	Non-Party
Kersh, Russ	MS		1	Non-Party
McDonald, Deborah	CPH		1	Non-Party
Uzzi, Donald	MS, CPH	Texas	1	Non-Party
Wachovia	CPH	Florida	1	Non-Party
Burchill, Thomas	CPH	New York	1	Non-Party
Clark, Karen	MS		1	Non-Party
Engelman, Irwin	MS	New York	1	Party
Gittis, Howard	MS	New York	2	Party
Groeller, Johannes	CPH	London	1	Party
Harris, Brooks	CPH	New York	1	Non-Party

**Totals: 43 Days
28 Non-Parties**

Witness	Requested	Location	Days	Status
Hart, Michael (day 2)	CPH	New York	1/2	Party
Isko, Steve	MS	New York	1	Non-Party
Jones, Lawrence	MS	New York	1	Non-Party
Jordan, Ann	MS	New York	1	Non-Party
Levin, Jerry	MS	New York	1	Non-Party
Maher, James	MS	New York	2	Party
Moran, John	MS	New York	1	Non-Party
Nesbitt, William	MS	New York	2	Party
Perelman, Ronald	MS	New York	2	Party
Porat, Ruth	CPH	New York	1	Party
Reid, Bill	MS	New York	1	Non-Party
Robinson, James	MS	New York	1	Non-Party
Seth, Ishaan	CPH	New York	1	Non-Party
Shapiro, Paul (day 2)	MS	New York	1	Party
Smith, Bram (day 2)	CPH	New York	1/2	Non-Party
Spoor, William	MS	Minneapolis	1	Non-Party
R. 1.310 (ECC)	CPH	New York	1/2	Party
R. 1.310 (LFC)	CPH	New York	1/2	Party
R. 1.310 (Letters)	CPH	New York	1/2	Party
R. 1.310 (Value AH)	CPH	New York	1/2	Party
R. 1.310 (Value MS)	CPH	New York	1/2	Party
R. 1.310 (Authenticity)	CPH	New York	1/2	Party

**19 Requested by CPH
22 Requested by Morgan Stanley
2 Requested by Both Parties** 13

August 2004

Monday	Tuesday	Wednesday	Thursday	Friday
<p style="text-align: center;">2</p> <div style="border: 1px solid black; padding: 2px; margin-bottom: 2px;">MS In-Camera Submission</div> <div style="border: 1px solid black; padding: 2px; margin-bottom: 2px;">MS Interrogatory Responses</div> <div style="border: 1px solid black; padding: 2px; margin-bottom: 2px;">MS Privilege Log</div>	<p style="text-align: center;">3</p>	<p style="text-align: center;">4</p> <div style="border: 1px solid black; padding: 2px; margin-bottom: 2px;">MS Interrogatory Responses</div>	<p style="text-align: center;">5</p>	<p style="text-align: center;">6</p> <div style="border: 1px solid black; padding: 2px; margin-bottom: 2px;">Amended Pleadings Due</div>
<p style="text-align: center;">9</p>	<p style="text-align: center;">10</p> <div style="border: 1px solid black; padding: 2px; margin-top: 10px; text-align: center;">Travel for Dep. (NY)</div>	<p style="text-align: center;">11</p> <div style="border: 1px solid black; padding: 2px; margin-bottom: 2px;">Briefs for Case Mgmt. Conf. Dep. of Amam Emmerich (NY)</div>	<p style="text-align: center;">12</p> <div style="border: 1px solid black; padding: 2px; margin-top: 10px; text-align: center;">Travel for Hearing (FL)</div>	<p style="text-align: center;">13</p> <div style="border: 1px solid black; padding: 2px; margin-bottom: 2px;">Case Mgmt. Conf. (FL)</div>
<p style="text-align: center;">16</p>	<p style="text-align: center;">17</p> <div style="border: 1px solid black; padding: 2px; margin-bottom: 2px;">Briefs for Case Mgmt. Conf.</div>	<p style="text-align: center;">18</p>	<p style="text-align: center;">19</p>	<p style="text-align: center;">20</p> <div style="border: 1px solid black; padding: 2px; margin-bottom: 2px;">Briefs for Case Mgmt. Conf.</div>
<p style="text-align: center;">23</p>	<p style="text-align: center;">24</p>	<p style="text-align: center;">25</p>	<p style="text-align: center;">26</p> <div style="border: 1px solid black; padding: 2px; margin-top: 10px; text-align: center;">Travel for Hearing (FL)</div> <div style="border: 1px solid black; padding: 2px; margin-top: 2px; text-align: center;">Travel for Dep. (NY)</div>	<p style="text-align: center;">27</p> <div style="border: 1px solid black; padding: 2px; margin-bottom: 2px;">Case Mgmt. Conf. (FL) Dep. of Tom Burchill (NY)</div>
<p style="text-align: center;">30</p>	<p style="text-align: center;">31</p>			

Contempt Chronology

February 20, 2004	Case Management Conference for Scheduling
March 10-12, 2004	Good Faith Scheduling Conferences
March 12, 2004	Agreed Scheduling Order
March 12, 2004	CPH files Show Cause Motion
March 19, 2004	Case Management Conference
April 29, 2004	Meet-and-Confer for 4/30 Hearing
April 30, 2004	Hearing on Rule To Show Cause
May 14, 2004	Order

Contempt Discovery

March 19, 2004	First Interrogatories <i>(Answered June 16 and June 29)</i>
May 28, 2004	Interrogatories / Requests for Production <i>(Answered June 30)</i>
July 2, 2004	Hearing on First Motion to Compel
July 12, 2004	Order on First Motion to Compel
July 15, 2004	CPH Second Motion to Compel
July 21, 2004	Morgan Stanley Cross-Motion

The Contempt Motion Has Created A “Lawsuit Within a Lawsuit”

- 4 months
- Parallel Discovery
 - 34 Interrogatories
 - 26 Requests for Production
 - Third-party subpoena (Wachovia)
- 11 Motions Relating to Contempt
- Every Case Management Conference Dominated By Issues Relating To Contempt

The Current Pretrial Schedule

Event	Date
Amendment of Pleadings	Aug-6-2004
Completion of Fact Discovery	Sep-3-2004
Plaintiffs' Expert Disclosures	Sep-10-2004
Summary Judgment Briefs	Sep-20-2004
Defendants' Expert Disclosures	Sep-24-2004
Rebuttal Expert Disclosures	Oct-8-2004
Depositions of Experts (2 weeks)	Oct-18-2004
Summary Judgment Oppositions	Oct-25-2004
Summary Judgment Replies	Nov-8-2004
Deposition Designations Exchanged	Nov-19-2004
Mediator Selected	Nov-19-2004
Summary Judgment Hearing	Nov-19-2004
Counter-Designations & Initial Objections	Dec-3-2004

Event	Date
Motions in Limine	Dec-3-04
Witness Lists & Trial Exhibit Lists Exchanged	Dec-3-04
Mediation	Dec-6-04
Objections to Counter-Designations Exchanged	Dec-8-04
Meet-and-Confer re Deposition Designations	Dec-10-04
Designations & Objections to the Court	Dec-13-04
Joint Pretrial Stipulation	Dec-13-04
Motion in Limine Oppositions	Dec-13-04
Pretrial Conference (3 days)	Dec-20-04
Final Pretrial Conference	Jan-14-05
Jury Instructions & Verdict Forms Exchanged	Jan-14-05
Jury Trial Begins (15 days)	Jan-18-05

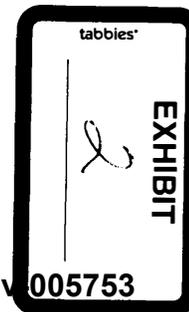
Proposal

- Prompt resolution of contempt issues
 - Crime/Fraud Procedures
 - Set deadline for close of contempt discovery
 - Set evidentiary hearing on Motion for Contempt
- Continue with merits discovery.
- Re-set pretrial deadlines once contempt issue is decided, using the same intervals as current schedule.

February 2004

Case Nos. 2003CA005045 & 2003CA005165 (15th Jud. Dist. Fla.)

Monday	Tuesday	Wednesday	Thursday	Friday
2 MS Privilege Log	3	4	5 UMC Hearing (FL)	6
Travel for Hearings (FL)				
9	10 Rule 1.310 Dep. (NY)	11	12 Dep. of Robert Kitts (NY)	13 Dep. of Alex Fuchs (NY)
Travel for Deposition (NY)				
16 Court Holiday	17 Briefs for Case Mgmt. Conf.	18 MS Document Production	19 UMC Hearing (FL)	20 Case Mgmt. Conf. (FL)
Travel for Hearings (FL)				
23	24 Dep. of Bram Smith (NY)	25 MS Appeal Brief	26	27
Travel for Deposition (NY)				



March 2004

Case Nos. 2003CA005045 & 2003CA005165 (15th Jud. Dist. Fla.)

Monday		Tuesday		Wednesday		Thursday		Friday	
1		2		3		4		5	
				Hearing (FL) MS Interrogatory Responses					
8		9		10		11		12	
						MS Document Production MS Privilege Log		Briefs for Case Mgmt. Conf. CPH Show Cause Motion	
15		16		17		18		19	
				Briefs for Case Mgmt. Conf.		MS Opp. to Show Cause		Case Mgmt. Conf. (FL)	
						Travel for Hearings (FL)			
22		23		24		25		26	
29		30		31					
				CPH Appeal Brief MS Document Production					

April 2004

Case Nos. 2003CA005045 & 2003CA005165 (15th Jud. Dist. Fla.)

Monday	Tuesday	Wednesday	Thursday	Friday
			1 MS Document Production	2 Dep. of Lilly Rafii (NY)
			Travel for Deposition (NY)	
5	6 Dep. of Norman Ginstling (NY)	7	8	9 Briefs for Case Mgmt. Conf.
Travel for Deposition (NY)				
12	13	14 Briefs for Case Mgmt. Conf.	15	16 Case Mgmt. Conf. (FL)
			Travel for Hearings (FL)	
19 MS Document Production	20 MS Appeal Reply Brief	21	22 Dep. of Shani Boone (Boston) Hearing (FL)	23 Briefs for 4/30 Show Cause Hrg.
		Travel for Deposition (Boston)		
26	27 Dep. of Bruce Slovin (postponed by CPH) Dep. of Joseph Page (CA)	28	29	30 MS Brief on Choice-of-Law Show Cause Hearing (FL)
Travel for Deposition (CA)			Travel for Hearings (FL)	

May 2004

Case Nos. 2003CA005045 & 2003CA005165 (15th Jud. Dist. Fla.)

Monday	Tuesday	Wednesday	Thursday	Friday
3	4	5	6 MS Document Production	7
10 MS Document Production MS Privilege Log	11	12 Dep. of Bruce Slovin (NY)	13	14 MS Document Production
17	18 Dep. of Josh Webber (Boston)	19 Dep. of Michael Hart (NY) MS Privilege Log UMC Hearing (FL)	20 MS Document Production	21
Travel for Deposition (Boston)		Travel for Deposition (NY)		
24 Hearing (FL)	25 Dep. of Heather Stack (NY)	26 Dep. of Barry Schwartz (postponed by CPH)	27	28 Hearing (FL)
Travel for Deposition (NY)				
31 Court Holiday				

June 2004

Case Nos. 2003CA005045 & 2003CA005165 (15th Jud. Dist. Fla.)

Monday	Tuesday	Wednesday	Thursday	Friday
	1	2	3 Dep. of Alan Dean (NY)	4 Briefs for Case Mgmt. Conf. CPH Choice-of-Law Opp. Dep. of Andrew Conway (NY)
Travel for Deposition (NY)				
7 Hearing (FL)	8 Dep. of Paul Shapiro (NY)	9 Briefs for Case Mgmt. Conf.	10	11 Case Mgmt. Conf. (Cancelled)
Travel for Deposition (NY)		Travel for Hearings (FL)		
14	15	16 Dep. of Eugene Yoo (Boston) MS Interrogatory Responses	17	18 Dep. of James Lurie (NY)
Travel for Deposition (Boston)		Travel for Deposition (NY)		
21 MS Choice-of-Law Reply	22 Dep. of James Robinson (cancelled by CPH)	23 MS Privilege Log	24 Dep. of Donald Drapkin (NY)	25 Briefs for Case Mgmt. Conf. Dep. of Barry Schwartz (NY)
Travel for Deposition (NY)				
28 Hearing on Choice-of-Law (FL)	29 MS Interrogatory Responses	30 Briefs for Case Mgmt. Conf. MS Document Production MS Interrogatory Responses MS Objections to RFP		
Travel for Hearings (FL)		Travel for Deposition (NY)		

July 2004

Case Nos. 2003CA005045 & 2003CA005165 (15th Jud. Dist. Fla.)

Monday	Tuesday	Wednesday	Thursday	Friday
			1 Dep. of William Wright (NY)	2 Case Mgmt. Conf. (FL) MS Document Production
			Travel for Deposition (NY)	Travel for Hearings (FL)
5 Court Holiday	6	7 Dep. of Todd Slotkin (NY)	8 Dep. of Joram Salig (NY) Dep. of Robert Duffy (NY)	9 MS Document Production
		Travel for Deposition (NY)	Travel for Deposition (NY)	
12	13 Dep. of James Stynes (NY)	14 Dep. of Chris Whelan (NY) UMC Hearing (FL)	15 Briefs for Case Mgmt. Conf.	16 Briefs for Case Mgmt. Conf.
	Travel for Deposition (NY)	Travel for Deposition (NY)		
19	20 Dep. of William Spoor (postponed by CPH)	21 Briefs for Case Mgmt. Conf.	22 Dep. of Frank Gifford (NY)	23 Case Mgmt. Conf. (FL)
		Travel for Deposition (NY)	Travel for Hearings (FL)	
26	27	28 Dep. of Paul Shapiro (NY)	29	30 Briefs for Case Mgmt. Conf. Dep. of Ishaan Seth (NY) Dep. of Wachovia (FL)
Travel for Deposition (NY)	Travel for Deposition (NY)	Travel for Deposition (NY)	Travel for Deposition (NY)	Travel for Deposition (FL)

IN THE FIFTEENTH JUDICIAL CIRCUIT COURT IN AND
FOR PALM BEACH COUNTY, FLORIDA
CASE NO.: 2003 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.

* * *

TRANSCRIPT OF THE PROCEEDINGS BEFORE
THE HONORABLE ELIZABETH J. MAASS

* * *

West Palm Beach, Florida
July 23rd, 2004
8:58 a.m. - 11:03 a.m.

APPEARANCES:

SEARCY, DENNEY, SCAROLA, BARNHART
& SHIPLEY, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33409
Counsel for the Plaintiff
BY: JACK SCAROLA, ESQUIRE

JENNER & BLOCK
One IBM Plaza
Chicago, IL 60611-7603
Co-Counsel for the Plaintiff
BY: JEROLD SOLOVY, ESQUIRE
JEFFREY SHAW, ESQUIRE
RONALD L. MARMER, ESQUIRE

CARLTON, FIELDS, WARD, EMMANUEL,
SMITH & CUTLER, P.A.
Esperante
222 Lakeview Avenue, Suite 1400
West Palm Beach, Florida 33401
Counsel for the Defendant
BY: JOSEPH IANNO, JR., ESQUIRE

KIRKLAND & ELLIS
655 15th Street N.W.
Suite 1200
Washington, D.C. 20005
Co-counsel for the Defendant
BY: LAWRENCE P. BEMIS, ESQUIRE
THOMAS A. CLARE, ESQUIRE

1 BE IT REMEMBERED that the foregoing
2 proceedings were had before the HONORABLE ELIZABETH J.
3 MAASS, in Chambers, in the Palm Beach County
4 Courthouse, West Palm Beach, Florida, on July 23rd,
5 2004, starting at 8:58 a.m., with appearances as
6 hereinabove noted, to wit:

7 * * *

8 THE COURT: Good morning. Have a seat.

9 MR. SCAROLA: We're seeing slides of the
10 vacation that Mr. Bemis missed.

11 THE COURT: Don't say that. I'm sure his
12 wife does not have a sense of humor about this.
13 Where do we want to start?

14 MR. SCAROLA: Tab 15, Your Honor, by
15 agreement.

16 THE COURT: Of which book?

17 MR. SCAROLA: The big thick one that doesn't
18 close very well.

19 THE COURT: The biggest one?

20 MR. SCAROLA: Yes, yes.

21 MR. IANNO: This is probably the reason we
22 needed the hearing procedures changed. That is
23 the updated binder with all the motions, responses
24 and case law in it.

25 THE COURT: And that's good. The only --

4

1 which is why we need it. I had already read the
2 first one. When I got the second one, I was
3 trying to figure out what was new. I think it's
4 good that we have an updated procedure.

5 MR. SCAROLA: Tab 15, Your Honor, is the
6 motion to strike the verifications of Michael
7 Hart.

8 And if I might address that motion briefly,
9 it arises out of the circumstance of Mr. Hart
10 having verified answers on behalf of Morgan
11 Stanley to four separate sets of interrogatories.
12 The form of verification is uniform with regard to
13 each of those interrogatories. You can find it
14 most easily by turning to tab 15-I, going one page
15 back, and you will see the verification form

16 there. Mr. Hart says, quote, I hereby declare
17 that the following answers are true and correct
18 upon the information and belief and to the best of
19 my knowledge. And it is signed by him under oath.

20 Based upon those verifications, Mr. Hart's
21 deposition was set, and he was deposed with regard
22 to the extent of his knowledge that these were
23 true and correct answers and that he had a belief
24 to the best of his knowledge that they were
25 accurate. What we discovered is that Mr. Hart

5

1 admitted that he did not have any personal
2 knowledge with regard to most of the facts. He
3 admitted that he could not remember what, if
4 anything, he had done to educate himself to verify
5 answers to interrogatories. And most incredibly,
6 he admitted that a number of material errors were
7 apparent upon even cursory review of the answers
8 that he verified.

9 And arising out of the receipt of that
10 information, we filed this motion to strike his
11 verifications. Now, upon further reflection, we
12 are modifying the relief that we are asking The

13 Court for in this case. We will not request that
14 The Court strike Mr. Hart's verifications. In
15 fact, we'll deal with the issues of credibility
16 that arise as a consequence of those verifications
17 and the issues with respect to the integrity of
18 this corporation in providing such responses at
19 trial.

20 But what we do need The Court to do in the
21 context of this motion is to clarify what the
22 obligations are of the parties in providing
23 verification of interrogatory answers because we
24 do anticipate that we'll be presenting to The
25 Court, either by agreement or by future motion, a

6

1 request or stipulation that there be a
2 supplemental update to all interrogatory answers
3 just prior to the close of discovery.

4 And we want to be able to rely upon the
5 accuracy and integrity of those responses. And
6 based upon the position that Morgan Stanley has
7 taken in responding to this motion to strike
8 Mr. Hart's verification, it is very obvious that
9 we have a serious disagreement with regard to the

10 obligations that a party has in verifying
11 interrogatory responses.
12 Let me first clarify that we have not taken
13 the position that an individual verifying answers
14 on behalf of a corporate entity must have personal
15 knowledge of all of the responses that are given,
16 but it is our position that there must be a
17 good-faith, well-founded, reasonably investigated
18 belief that the answers that are being provided
19 are in fact true, correct and complete on behalf
20 of the corporation.

21 Now, in support of their position, Morgan
22 Stanley cites the case of Shepherd versus American
23 Broadcasting Companies (phonetic). And they
24 accurately quote that case, which says that Rule
25 33(a) permits a representative of a corporate

7

1 party to verify the corporation's answers without
2 personal knowledge of every response by furnishing
3 such information as is available to the party.

4 And they stop right there.

5 What they failed to quote is the remainder of
6 that holding in the Shepherd versus American

7 Broadcasting case. The very next sentence is, of
8 course, the representative must have a basis for
9 signing the responses and for thereby stating on
10 behalf of the corporation that the responses are
11 accurate. And we clearly, if Your Honor has had
12 an opportunity to review the testimony of
13 Mr. Hart, have established that Mr. Hart had no
14 such basis, and he acknowledged that he had no
15 such basis. In some circumstances he didn't even
16 read these responses before he verified them.

17 If the discovery process is to have any
18 integrity whatsoever, we believe that The Court
19 must direct Morgan Stanley to provide
20 verifications that have some substantial meaning
21 that are based upon a well-founded belief that the
22 answers are indeed complete and accurate, that
23 there has been a reasonable investigation, that
24 the sources are believed to be reliable and that
25 there is as a consequence of that a good-faith

8

1 belief in the accuracy and integrity of the
2 responses that are being provided.

3 We ask for a lot of other things in the

4 motion. We ask for attorneys fees in addition to
5 striking these verifications. We ask for the
6 production of another corporate representative to
7 address the factual issues that arise. We'll take
8 care of that through other means, but we do
9 believe that it is appropriate in response to this
10 motion for The Court to clarify the obligation
11 that Morgan Stanley has and to tell them that the
12 next time they answer interrogatories, they better
13 answer them with a verification that in fact is
14 true and not a blatant misrepresentation.

15 THE COURT: First of all, I assume from what
16 you said when you said you were modifying the
17 relief sought and just asking for clarification on
18 what kind of verification was required, it goes
19 both ways.

20 MR. SCAROLA: Clearly, Your Honor.
21 Absolutely. We are not seeking to impose an
22 obligation on Morgan Stanley that we ourselves are
23 not prepared to live by. We just want The Court
24 to tell both parties what that verification means.

25 We've taken a very, very different position

1 with regard to what it is. We've provided
2 verifications that we believe meet those standards
3 that I have described and intend to continue to do
4 that regardless of what Your Honor's order may be
5 because that's what we think the rules require.
6 But we want that standard imposed upon the other
7 side as well.

8 THE COURT: Okay.

9 MR. IANNO: Judge, Joe Ianno. I'll be
10 responding to this motion.

11 Mr. Scarola just told me that that
12 modification was happening a few minutes before
13 this hearing at 9:00 this morning. What I think
14 he's asking for is an advisory opinion from this
15 Court that I think is improper.

16 THE COURT: That really was going to be one
17 of my questions. We have a couple things. Let's
18 back up and talk about where we want to go.

19 First of all, I agree we need interrogatory
20 answers that are complete and truthful for two
21 reasons. One, they bind the party, but, two, the
22 opposing party needs to be able to rely on the
23 answers themselves. So it strikes me that the
24 verification probably needs to be something that
25 is based on a personal, well-founded belief that

1 the answers are complete and truthful.

2 If we can reach agreement on the kind of
3 verification we need, I think that's fine. If
4 not, I would suspect what Mr. Scarola is going to
5 say is, fine, we'll go back to the motion, I'm
6 asking for any relief other than that you can
7 reverify it in a form we think is appropriate.

8 MR. SCAROLA: Almost, Your Honor. I don't
9 think that I am asking for something different
10 than what The Court is obliged to do in connection
11 with the relief that we have requested.

12 THE COURT: That's what I'm saying. It
13 would have to be confined to the single motion we
14 have unless we reach some sort of agreement on
15 some more global applications.

16 MR. SCAROLA: I agree. I think that once The
17 Court tells them with regard to these answers this
18 verification is improper, I would suspect it will
19 get proper verification.

20 THE COURT: We need to confine it to
21 just Mr. Hart's verification, or we can sort of
22 open it up and try to reach some sort of consensus
23 of what we think is appropriate for all the
24 interrogatories.

1 is blurring the line between procedure and
2 substance. There's nothing wrong with the form of
3 the verification Mr. Hart signed. What
4 Mr. Scarola is challenging is the substantive
5 deposition testimony, which we don't agree with
6 Mr. Scarola because that is an issue that I think
7 he has put his spin on it.

8 Those are issues that Mr. Scarola correctly
9 pointed out are credibility issues for trial.

10 There's no question that Morgan Stanley hasn't
11 taken the position that these interrogatories
12 responses are not binding on it. Mr. Scarola has
13 every right to rely on it.

14 The second point on that is, we are working
15 through a process of supplementing these
16 responses. If there's a different form of
17 verification required, then we can discuss it. I
18 don't think there's a question that the words that
19 are used in the interrogatory verification are
20 proper or acceptable. It's Mr. Hart -- their
21 argument is Mr. Hart didn't do what he said he did

22 there. And that's a different issue. I don't
23 think it's proper for today. After we supplement
24 and go through this process, they can come back
25 and challenge that at a later time. They can

12

1 challenge it through credibility at trial, through
2 cross examination or direction examination
3 depending on how they put their cause on.

4 I think what we're doing here today may be a
5 waste and we should be moving on, unless there is
6 an objection to the specific verification that was
7 used here.

8 THE COURT: Is there an objection to the
9 specific verification Mr. Hart signed?

10 MR. SCAROLA: No, Your Honor. We don't think
11 that the language is inadequate. We believe the
12 language is adequate.

13 The concern that we have is, that after
14 Mr. Hart has given testimony, which I suggest is
15 very clearly contradictory to the verification
16 that he has signed, Morgan Stanley comes in and
17 defends that and says that under these
18 circumstances that is adequate, that Mr. Hart can

16div-005771

19 sign these interrogatories without any
20 investigation, without reading responses, upon
21 reading them, acknowledging that there are clear
22 deficiencies in the response, and there's nothing
23 wrong with that. And That causes us great concern
24 because, if that's the attitude that they are
25 going to take in the preparation of future

13

1 verifications, we have no basis upon which to rely
2 upon those verifications.

3 THE COURT: Okay. Let's back up then. I
4 think -- I would agree the verification signed by
5 Mr. Hart is sufficient. I think the issues we're
6 faced with are what's the appropriate response if
7 one party thinks the answers to interrogatories
8 simply are incomplete. I can think of lots of
9 motions that can be filed but probably not this
10 one. Or what's the appropriate response if we
11 think a party -- not a party -- an individual has
12 verified something and violated his oath. And
13 that's a whole different thing that I didn't see
14 anybody brief today. Certainly we would need
15 Mr. Hart here if we thought we could reach that.

16div-005772

16 So I would deny the motion, but please
17 understand that I'm not saying that another motion
18 may not be well taken that raises the same sort
19 of what I think it is you're really complaining
20 about, which is incomplete or inaccurate answers
21 or somebody attesting to something that's at least
22 not true.

23 MR. SCAROLA: I think Your Honor has
24 described in your earlier comments what you
25 anticipate a verifying witness is verifying, and

14

1 we certainly intend to act upon that.

2 THE COURT: I think it's just sort of
3 intuitive. We all know what the purposes of
4 interrogatories are, and I think that's intuitive.

5 Where next?

6 MR. SCAROLA: Tabs 20 and 14 which address
7 the confidentiality designations.

8 THE COURT: Okay.

9 MR. SCAROLA: I might start with a brief
10 introductory comment with regard to the issues
11 raised by these motions, Your Honor.

12 As I assume The Court recognizes, with the

13 filing of the claims before Judge Miller against
14 Arthur Andersen, there is no longer any direct
15 confidentiality interest on the part of the CPH
16 and MAFCO that stands to be protected by continued
17 secrecy. The cat, their cat, is out of the bag.

18 And --

19 THE COURT: Which cat are we speaking of?
20 Are we talking about just the settlement agreement
21 or something else?

22 MR. SCAROLA: We're talking about the
23 settlement agreement.

24 THE COURT: Okay.

25 MR. SCAROLA: As far as the direct interest

15

1 of CPH and MAFCO in the confidentiality of the
2 settlement agreement, that cat is out of the bag.
3 Nonetheless, CPH and MAFCO have a contractual
4 obligation to protect the confidentiality interest
5 of Arthur Andersen in the terms of the settlement
6 agreement, and that is a contractual obligation
7 which we take very seriously. We must do what we
8 can to protect Arthur Andersen's interest in
9 confidentiality in the terms of that settlement

16div-005774

10 agreement, and these motions arise out of our
11 good-faith effort to fulfill that contract
12 obligation.

13 Now, that places us in a very unusual
14 position because we are here arguing to protect
15 Arthur Andersen's confidentiality obligations
16 while Arthur Andersen's counsel, Kirkland, is
17 arguing against protecting Arthur Andersen's
18 confidentiality obligations.

19 MR. BEMIS: Excuse me, Your Honor. I don't
20 represent Arthur Andersen in this proceeding.

21 THE COURT: I was going to say, I'm not sure
22 if -- if you're impugning the integrity of
23 Mr. Bemis, that's not how we do it. If you're
24 not, I'm not sure how it's relevant.

25 MR. SCAROLA: All right, Your Honor. Well, I

16

1 think it clearly is relevant because it
2 demonstrates the nature of the bona fides of the
3 arguments that are being made on the other side in
4 opposition to these motions, and I suggest that
5 there is something unusual going on here.

6 If we take a look at the specific provisions

7 that we seek to retain confidentiality of, they
8 appear after tab 20-A, page 13.

9 THE COURT: I'm not sure I'm looking at the
10 right thing.

11 MR. SCAROLA: Tab 20-A.

12 THE COURT: Okay.

13 MR. SCAROLA: Page 13, footnote nine.

14 THE COURT: Oh, I'm sorry.

15 MR. SCAROLA: We have highlighted in each of
16 the relevant documents where there's a
17 confidentiality challenge, the provisions that we
18 believe need to be retained as confidential. And
19 these all are in accord with the prior findings
20 that Your Honor has made and we believe simply an
21 extension of the earlier requests.

22 THE COURT: Okay.

23 MR. SCAROLA: The next is tab C, page five.

24 And, again, we've highlighted that language.

25 THE COURT: Page five.

17

1 MR. SCAROLA: Tab C, page five. And then tab

2 D.

3 THE COURT: Just the language, the settlement

16div-005776

4 agreement is very important to Andersen that it be
5 confidential, particularly the settlement?

6 MR. SCAROLA: Yes.

7 THE COURT: Just that language?

8 MR. SCAROLA: That's it.

9 THE COURT: Then -- I'm sorry. Where next?

10 MR. SCAROLA: Tab D, page 16. The page
11 number here is in the upper left-hand corner.

12 THE COURT: Okay.

13 MR. SCAROLA: The highlighted lines 24
14 and 25.

15 THE COURT: Okay.

16 MR. SCAROLA: Page 25, line six, seven,
17 eight, and 15 through 19.

18 THE COURT: Okay.

19 MR. SCAROLA: Page 26, lines 18 and 19. And
20 page 29, line 14.

21 THE COURT: Okay.

22 MR. SCAROLA: As I understand the position of
23 Morgan Stanley, they are not contesting the fact
24 that these requests are appropriate. They are
25 suggesting an all or nothing approach, and we are

1 obliged to resist an all or nothing approach. It
2 is our contractual obligation to point out to The
3 Court those portions of the record and pleadings
4 where there are references to matters which under
5 the terms of the settlement agreement we have a
6 contractual obligation to protect.

7 THE COURT: So I understand, the one we're
8 doing now is the motion to remove the confidential
9 designations?

10 MR. SCAROLA: That's correct, Your Honor.

11 THE COURT: Okay. What's the response?

12 MR. IANNO: Judge, what Mr. Scarola -- and we
13 point this out in our response, he fails to inform
14 The Court that these are oppositions or responses
15 to the motions filed by the plaintiffs in this
16 case which they themselves designated as
17 confidential.

18 First of all, Morgan Stanley was required to
19 designate its responses as confidential. We
20 didn't know what they were pointing to as
21 confidential in their motion. So what The Court
22 said with interrogatories a few moments ago that
23 the obligations are reciprocal, I don't think you
24 can impose upon one party to litigation
25 obligations that are different than the other

1 party. They chose to designate their motions as
2 confidential. They started the confidentiality
3 process down the road.

4 If you're going to remove confidential
5 designations, they should be removed from the
6 entirety of all the pleadings in this case that
7 are filed in the court record for the reasons we
8 set forth in our opposition papers.

9 The second point is, The Court I think had
10 some concerns as we were going through the
11 portions that Mr. Scarola said is, for instance,
12 on the last one he mentioned on page 29 of the
13 transcript, it's tab D, the only thing he says is
14 confidential is, said the amount of the
15 settlement. Well, I think that's in the court
16 record of the Coleman versus Arthur Andersen
17 litigation, and that there was a settlement, and
18 that it obviously settled for some amount. But he
19 doesn't designate the next portion where they talk
20 about terms of indemnity.

21 I think that Coleman is selectively using
22 this confidentiality order to protect interests
23 they feel is in their best interest against Morgan
24 Stanley. And I don't represent Arthur Andersen,

25 so I can be here arguing with total bona fides, as

20

1 Mr. Scarola points out, that none of this should
2 remain confidential, that what Mr. Scarola is
3 doing is trying to gain an unfair advantage for
4 Coleman in this case by designating certain
5 portions as confidential and protecting other
6 portions that are in their best interest. And I
7 think that's what The Court should encompass.

8 THE COURT: Okay. Is there anything other
9 than you think they're doing it selectively
10 improper about they're saying, sort of invoking
11 the portions of the confidentiality or that allows
12 one side or the other to comment as to how the
13 confidential designation be removed?

14 MR. IANNO: I don't think so, Your Honor.

15 THE COURT: Do we have any argument that the
16 things we just went through should somehow still
17 remain confidential?

18 MR. IANNO: I don't think any of the things
19 that Mr. Scarola just pointed out specifically are
20 confidential.

21 THE COURT: What you're telling me is you're

16div-005780

22 going to make a motion to remove a whole bunch of
23 other designations?

24 MR. IANNO: And we said that. To the extent
25 we've -- in our response we said that.

21

1 MR. BEMIS: We do have that prepared. We
2 didn't have time to get it filed for this hearing.
3 We just ran out of time with the shortness, but it
4 is coming. We are going to try to deal with that
5 issue.

6 MR. IANNO: There's a footnote in our
7 opposition to this particular motion at tab 20
8 that says, to the extent that we need to have the
9 confidentiality designation be removed from
10 Morgan -- Coleman's pleadings that are issued in
11 this case, the one's that Morgan Stanley responded
12 to, we asked The Court to do so.

13 I think it's the only fair and just thing to
14 do in this case, is, if they want the
15 confidentiality removed from Morgan Stanley's
16 pleadings, at the first instance they should
17 remove their own designation of confidentiality.
18 I think equity requires, for them to come in here

19 and request for relief, they have to come in with
20 clean hands to get the relief they're seeking in
21 this motion.

22 With regard to other pleadings that aren't at
23 issue in this motion, I think that has to be dealt
24 with separately, Your Honor. But for them to come
25 in and say, remove it from the opposition but not

22

1 from the moving papers is improper.

2 THE COURT: What's the response?

3 MR. SCAROLA: Your Honor, we've attempted in
4 good faith to identify those portions of these
5 documents which we believe we are contractually
6 obligated to protect. We are making our
7 good-faith effort to fulfill our contract
8 obligation.

9 THE COURT: Okay. I will grant the motion.
10 I'll be honest with you, and I think I've told you
11 before, my personal bias, when you choose to
12 litigate in a public forum, only the most
13 compelling of circumstances should allow the
14 parties to keep something private. I don't see a
15 lot of real compelling circumstances here from a

16 public policy perspective that would require
17 virtually anything with the settlement agreement
18 to be kept private.

19 Certainly, if you want to come in and ask to
20 have other designations removed, that's fine. So
21 it's without prejudice your right to come in and
22 say, hey, if this is coming out, all this other
23 stuff should be undesignated as well.

24 MR. IANNO: Is The Court ruling then that the
25 portions that Mr. Scarola designated are

23

1 confidential? I think that's the second part of
2 his motion or part of his motion. And my argument
3 was that the things he designated weren't even
4 confidential. So, if The Court is removing it,
5 The Court should remove the confidentiality
6 designations on everything.

7 THE COURT: On just the ones we went through,
8 the ones included in his motion.

9 MR. IANNO: Correct. I don't believe those
10 were confidential.

11 THE COURT: But they were designated
12 confidential, correct? I just want to make sure I

13 understand where we are.

14 MR. SCAROLA: The entire pleadings were
15 designated confidential. The portions that I have
16 indicated to Your Honor are those portions, the
17 only portions, which we believe need to remain
18 confidential. Our request is that only those
19 portions be retained as confidential.

20 THE COURT: Okay. That's fine.

21 MR. SCAROLA: Your Honor, the next motion
22 appears at tab 14.

23 THE COURT: Okay.

24 MR. SCAROLA: And it addresses a reference to
25 indemnification provisions that appear in The

24

1 Court's order of July 12, 2004 at page three,
2 lines four and seven.

3 THE COURT: Okay.

4 MR. SCAROLA: And we are requesting that that
5 very limited reference be redacted from the copy
6 of the court order that appears in the public
7 court file.

8 There was a response filed by Morgan Stanley
9 that points out that there is a similar reference

16div-005784

10 in the May 14, 2004 order which, quite frankly, we
11 had overlooked, at page two, line 12 and page two,
12 line 16. And we believe it would be appropriate
13 and consistent with The Court's earlier orders if
14 those references also be redacted from the public
15 record.

16 And Morgan Stanley has pointed out that the
17 clerk of the court has failed to follow The
18 Court's earlier direction to place the redacted
19 copy of the settlement agreement under seal, and
20 we agree that it would be appropriate to remind
21 the clerk of its obligation to follow The Court's
22 earlier order.

23 THE COURT: Okay. What's the response?

24 MR. IANNO: Judge, we filed a formal response
25 that I want to incorporate, but my point that I

25

1 just want to make to The Court is, this is The
2 Court's order. You write your own orders. I'm
3 sure there was a reason to do that.

4 As far as the specific words that are used,
5 the only point I'll make in addition to what
6 Mr. Scarola said, indemnification is one of those

7 few things that's recognized in the rules of civil
8 procedure that is expressly discoverable. There's
9 nothing confidential about those indemnity
10 agreements. It's just like an insurance policy.

11 Short of that, this we'll leave entirely to
12 the judgment of The Court on what you would like
13 to do with this motion.

14 THE COURT: As I understand it, this is just
15 your attempt to abide by your contractual
16 agreement with Arthur Andersen?

17 MR. SCAROLA: Yes, Your Honor.

18 THE COURT: Okay. I would deny it. As I
19 say, I have a strong bias in favor of making
20 everything public. I don't see any reason why
21 this shouldn't be public.

22 Okay. Where next?

23 MR. SCAROLA: Your Honor, there was an ore
24 tenus request to remind the clerk.

25 THE COURT: Yes. And that's agreed?

26

1 MR. IANNO: Your Honor, that was your ruling.
2 We don't think that, obviously, the settlement
3 agreement should remain confidential, but, once

4 again, that was The Court's ruling, so I don't
5 know if it's agreed to, but I think --

6 THE COURT: Do you know what docket entry
7 we're talking about?

8 MR. SCAROLA: I don't, Your Honor.

9 MR. IANNO: I can tell you the date of it.
10 It was December 18th of '03.

11 THE COURT: That was my order?

12 MR. IANNO: I don't know if that's your
13 order, Your Honor, but that's where the settlement
14 agreement appears in the court record. I think
15 it's your order. Your order was, like --
16 Mr. Scarola, correct me if I'm wrong -- about ten
17 days before that.

18 MR. SCAROLA: I'm sorry. I just don't
19 remember with any --

20 MR. IANNO: For some reason, there was a
21 delay between the date of The Court's order and
22 the clerk's filing of the papers in the case.

23 THE COURT: Probably because we generally
24 hold them to see if anybody is going to seek
25 something and we don't want to hunt them down.

1 MR. IANNO: This particular one, I think The
2 Court had provided in the order that there was a
3 certain time period.

4 THE COURT: Right, to request copies.

5 MR. IANNO: Yes.

6 THE COURT: Let me see what I can find it
7 real quick.

8 Can you ask Mary Ann if she can get the file
9 that includes 180 in this case?

10 Okay. Where to next?

11 MR. SCAROLA: Your Honor, next is tab three,
12 and that's a defense motion to extend the
13 discovery cutoff to set the motion for contempt
14 for hearing.

15 And before we get into the merits of that
16 motion, in order for us to make some assessment as
17 to what our position with regard to this motion
18 will be, we would like some guidance from The
19 Court. Obviously, a three-month discovery
20 extension that as a consequence of Your Honor's
21 trial calendar results in a six-month or year-long
22 delay in getting this case to trial is an entirely
23 different animal than an extension that results in
24 a one-month delay of the trial.

25 So, for us to be able to respond to this

1 motion and know how much there is to argue about,
2 if anything, it would help us to know, if there is
3 some extension of fact discovery, what the
4 potential implications are in terms of the
5 resetting of trial based upon what the rest of
6 Your Honor's trial calendar is.

7 THE COURT: Okay. I mean, some of these all
8 go together. Maybe we need just to have a frank
9 discussion about how you see everything fitting
10 together.

11 MR. BEMIS: And I would like to address that,
12 if I could, Your Honor, giving that is our motion.
13 And I hope to put all of those pieces together for
14 you because I think some procedural guidance from
15 The Court given the complexity as the case has
16 spun itself out since February would be immensely
17 helpful to all parties.

18 THE COURT: And I can -- let me give you sort
19 of my thumbnail sketch before you guys address it
20 because you can easily change my mind. I can tell
21 you some of the things that concern me about the
22 case.

23 First of all, to answer the question that you
24 directly raised, which was, if we extended

1 than a February '05 -- I mean, a January '05 court
2 date. And the answer is no. If this was an
3 ordinary case and it was noticed for trial today,
4 you would get a court setting of October of this
5 year for trial. So, if you extend discovery in
6 this and that means you're not going to be ready
7 to go in January, you're going to go in February,
8 March, April or May or whenever you guys are
9 actually ready. It doesn't mean that you get
10 blown off to some docket that's a year later.

11 How the merits discovery interacts with the
12 contempt discovery, I think we need to spend some
13 time talking about. I do have some concerns that
14 the contempt discovery is becoming the tail that's
15 wagging the dog. While I understand the
16 importance of the issue to plaintiffs, it strikes
17 me that some of these things, although I
18 understand your client's not a party to it, are
19 going to maybe better bedded in the other case. I
20 mean, if the claim truly lacks any merit,
21 presumably that eventually is going to be

22 addressed in that case. There's going to be some
23 sort of appropriate sanction, and that may affect
24 what's appropriate for us to do.

25 On the other hand, if the claim of Morgan

30

1 Stanley gets bedded in that case and it turns out
2 it did have merit, that may affect what's
3 appropriate here. I do want to discuss how all
4 these things interrelate, but I don't want to let
5 the contempt overwhelm the case itself.

6 MR. BEMIS: May I address this issue?

7 THE COURT: Sure.

8 MR. BEMIS: May I use the podium?

9 THE COURT: However you're more comfortable
10 is fine.

11 MR. BEMIS: In Los Angeles, Your Honor, we're
12 powerless without something to show to someone
13 else.

14 Your Honor, the relief that we've requested
15 here is first and foremost to schedule a prompt
16 resolution of the contempt issues. And that
17 involves probably three sub-issues. I'll address
18 each one separately. As an overview, we need a

19 close of discovery or an idea of when a close of
20 discovery should take place on the contempt issue.

21 We need an idea and hopefully a date for an
22 evidentiary hearing on the contempt issue.

23 Given the most recent allegations that -- of
24 crime and fraud, which is personally now directed
25 to the attorneys, we need some resolution of that.

31

1 The way that we suggest that this be accomplished
2 is that there be a continuation of the merits
3 discovery until the contempt issues are decided.

4 Now, by that I don't mean a stay. I just mean we
5 can do both, but we're going to have to have some
6 accommodations. We cannot be two places at once
7 on occasion. If we're bogged down in hearings
8 here -- and bogged down, I didn't mean it in a
9 pejorative sense.

10 THE COURT: We know you love to come here.

11 MR. BEMIS: Your Honor, I lived here for many
12 years. I love coming here, but that's not the
13 issue.

14 The issue is it takes days to prepare for
15 these hearings. We have very short briefing

16 schedules, and we usually end up getting the
17 motions on Thursday or Friday. We're trying to
18 get some relief from that, but still five motions
19 to respond to in three or four business days and
20 get the materials to your court is a difficult,
21 time-consuming task.

22 What we're suggesting is some type of
23 scheduling, and I'll get to more details on that,
24 and then a simple reset of the pretrial deadlines
25 which I think is a relatively simple task. We

32

1 sequenced out what needs to be done, but they all
2 trigger off of the close of merits discovery,
3 which we worked back from, as you may recall, from
4 the trial date. We got a trial date, and we went
5 then backwards from that after arguing.

6 I don't believe, in light of Your Honor's
7 comments plus just the facts of the case, that
8 there would be any substantial prejudice to either
9 of the parties for a short extension in setting
10 this contempt for hearing. After all, these
11 claims arose in 1998. They were not filed until
12 five years later in 2003. The damages that are

13 being sought on both sides are extraordinary.

14 The contempt issues are being pressed by CPH.

15 Having raised the issue, we're entitled to defend

16 ourselves. Now that they are challenging the

17 integrity of the lawyers in this case, we're

18 entitled to defend ourselves, we think, as well.

19 By way of overview -- there we go -- we do

20 have a current pretrial schedule, which I'm going

21 to address, and I want to point out what dates

22 affect The Court.

23 Second, I want to try to summarize for you

24 what we've done since February 20th on merits

25 discovery and what's happened on the contempt,

33

1 whether it's the dog or the tail that's driving

2 this proceeding. I want to outline for you what

3 we have identified that remains to be done,

4 hopefully in a nonargumentative fashion, raising

5 what both sides are running into scheduling-wise,

6 and then hopefully to present you with a schedule.

7 Let me spend a minute on some of the history

8 of this, just bring us up. I won't spend much

9 time on it. Let me go back to the February 20th

16div-005794

10 scheduling conference of 2004. At that time I
11 think I've told you before, and I keep falling
12 back on this, my knowledge of the case was about
13 14 days old. We thought or I thought at that time
14 that it would be a very aggressive schedule to set
15 us for February 25th for a trial. That was based
16 on whatever review I had been capable of
17 conducting of the background of the pleadings and
18 indexes and what have you. There was a proposal
19 for an August 2004 trial date. Your Honor said
20 January 18th. We then worked backwards from that
21 date.

22 I said at the time, and I believe that I was
23 accurate, that that was an aggressive schedule.
24 And given my calendar and how many hours I've
25 worked since then, I know it was an aggressive

34

1 schedule. And that was without the contempt
2 proceeding. And that proceeding, frankly, has
3 dominated the last four months.

4 Now, it is true that we did submit to The
5 Court on March the 12th, I believe, a negotiated
6 schedule, and I agreed to it. However, when I

7 agreed to that schedule, which was negotiated at
8 the February 20th conference in the early weeks of
9 March, it was really based -- not really. It was
10 in fact based on multiple letters and conferences
11 with counsel conducted in good faith I think on
12 both sides, my own suggestion that we alternate
13 weeks in depositions, that we have case management
14 conferences so we can try to remove things from
15 the 8:45 call. And we eventually on March 11th
16 did agree to a resolution, if you will, of some
17 few minor details. And, indeed, I was sitting on
18 the runway at Miami International on the airplane
19 on the telephone wrapping up the final details so
20 I was leaving for my 35th wedding anniversary
21 vacation.

22 We thought at that time that we had a
23 schedule, but at the moment that was agreed to
24 when I left, I did not know the motion for
25 contempt was going to be filed the following day.

35

1 It wasn't disclosed to us at that time. And I
2 don't want to revisit that other than to tell you
3 that that's the fact of how the schedule came

16div-005796

4 about because, had I known it was coming, I'm not
5 sure that I would have agreed to the schedule.

6 THE COURT: You weren't privy to that at the
7 March 5th letter?

8 MR. BEMIS: I was not. In all candor, Your
9 Honor, what happened was, the letter was sent to
10 Mr. Yannucci, who was out of his office. The
11 letter never reached Mr. Clare or me at the time.
12 We simply didn't know about it. They sent it. I
13 don't deny they sent it. We didn't get it. It's
14 one of those things that sometimes happens. We
15 did ask whether any additional motions were
16 coming. We were simply told, we can't talk about
17 it. That's water over the dam at this point. It
18 happened. The contempt motion was filed.

19 And we now have, of course, then set a very
20 aggressive schedule. This is a little bit hard
21 for The Court to see, but this is the current
22 pretrial schedule. And I've deleted the things
23 that we have completed. The red boxes, Your
24 Honor, are matters that involve directly The
25 Court's calendar. They don't necessary -- the

1 others are all matters that the lawyers must
2 attend to on their own.

3 We have, in addition to the items -- and we
4 have quite a few depositions to complete, which
5 I'll identify. And we have, on top of that we
6 have quite a few items that -- items we still need
7 to schedule. In addition to what I just showed
8 you, we need to deal with the close of the
9 contempt discovery which includes motions which
10 are pending, potential appeals of issues with
11 regard to that, evidentiary hearings on the motion
12 for contempt. We have motions to amend the
13 pleadings and motions regarding punitive damages.
14 All of that is not yet really firmly set into the
15 schedule.

16 What have we accomplished since the February
17 20th conference? Well, we have completed, I
18 believe, 22 -- 22 depositions. This is what we've
19 completed. Now, obviously, the names are probably
20 less significant to you than they are just to let
21 you know that we've been very busy. To complicate
22 matters, everything is outside of Florida. It's
23 not like we can set up a war room down here and
24 have all of our --

25 THE COURT: You've got that? Thank you very

1 much. I'm sorry. Go ahead.

2 MR. BEMIS: It's not that we can set up war
3 rooms of exhibits and document repositories. We
4 end up having to move usually seven to eight boxes
5 of materials to these different cities by Federal
6 Express the day before, take them out, get them
7 back, reorganize and what have you. So it's a
8 complex process, and both sides have been, I
9 think, diligently taking depositions. I think 23
10 have been taken, and I've identified about ten --
11 not about -- ten that we've taken and 13 that CPH
12 has taken.

13 Now, this is only the tip of the iceberg
14 because, in addition to trying to take
15 depositions, we have numerous situations where
16 witnesses simply aren't available after they are
17 scheduled. For example, here's a letter that we
18 received from counsel from Jenner & Block telling
19 us that a deposition that we had scheduled during
20 our allocated week right on the verge of
21 deposition can't be taken. We didn't quarrel with
22 it. We didn't file a motion to compel. We said,
23 okay, we'll have to reschedule. Well, we don't
24 get when we do that an alternative date. It's

1 schedule, and we can't replace it.

2 This one, I had actually flown to Washington
3 to fly to New York, and I got stuck there, and I
4 couldn't take the depo. Well, that's not the only
5 one. We've got another one on May 21 for Mr.
6 Schwartz, unavoidable conflicts, no explanation.
7 I don't quarrel with the explanation. That's not
8 my point today. He just didn't make it. We
9 didn't get a substitute. Here's another one.

10 They cancelled Mr. Robinson the following week.
11 Again, I don't quarrel with the reason. He just
12 doesn't show. I can't go. I'm already in
13 Washington. I've lost three days dealing with
14 this. Mr. Spoor, again, July 16th, he's
15 cancelled.

16 Morgan Stanley has had to do the same thing.
17 We've had several instances where we've had to
18 cancel depositions. I don't want to make it sound like
19 it's a one-side affair. It's not. I would argue
20 we've had more problems than they've had, but it's
21 still happening on both sides. And here's another

22 one where we recently had to do the same thing, a
23 couple of examples where we've had try to
24 reschedule and get people different dates.

25 What do we have outstanding at this point?

39

1 These are depositions we currently have scheduled.
2 I'm going to get to what we can accomplish in
3 August. This is just what has been requested, but
4 we don't have scheduled. I misspoke. This is
5 what has been requested. Here's the dates we
6 requested them. Some of these are very important
7 people. For example, Mr. Perelman, we've
8 requested his deposition. We don't have a date
9 for him. He's very last on the list.

10 Mr. Marher, those are some of the key players.

11 Those depositions in deposition will take two
12 days, counting travel, add the time up, back and
13 forth. They all have to be taken in New York.
14 It's not going to be in Florida. I want to remind
15 The Court, because these are there, we cannot
16 subpoena these people for trial. We either get
17 them one time, or we don't get them at all. We
18 only have that one opportunity to get them.

19 We think -- in addition to this, we have
20 what's been taken, what's now being requested. We
21 have accomplished a lot. We've resolved eleven
22 discovery motions since February. We've had five
23 in-person hearings here. We've done seven more
24 sets of written discovery, and we fully briefed
25 and argued the choice of law motion on time. It's

40

1 now pending before The Court.

2 The case management conferences are taking an
3 awful amount of time. Awful in the sense of --

4 THE COURT: A large amount.

5 MR. BEMIS: That's a much better selection of
6 words.

7 When I suggested case management conferences,
8 it was because I saw in my review of the pleadings
9 and the transcripts that there were a lot of 8:45
10 hearings that were requiring people to travel. I
11 think two days of travel for an 8:45, a short
12 hearing, which was economically wasteful, I
13 thought not an efficient use of time. I thought,
14 if we could aggregate these in a single hearing,
15 we might make some more progress.

16div-005802

16 That really hasn't happened. What has
17 happened is, we're getting very substantial
18 proceedings being noticed in this case at the
19 conferences. They're being done, as you heard on
20 the scheduling issues, a week in advance with
21 three to four business days to get materials to
22 The Court. That's a schedule that's worse than
23 Bush versus Gore in the Supreme Court.

24 THE COURT: I hope the order we gave will
25 help with that.

41

1 MR. BEMIS: I hope so. That explains what's
2 happened in the past. Going forward hopefully
3 we'll get some relief from this.

4 Even, again, with all of the challenges that
5 we've done, we have accomplished I think a great
6 deal. May I hand this up to The Court? It's kind
7 of a summary you might want to look at.

8 THE COURT: Have you shared it with the other
9 gentlemen?

10 MR. BEMIS: Of course, of course. This is
11 just a summary, Your Honor, of what we've been
12 doing by depositions and hearings and the dates

13 blocked out on calendars. It's not something that
14 you need to read through right now, but you might
15 want to look at it if you take this matter under
16 advisement.

17 We have much left to be done and not a lot of
18 time to do it in. We have -- if I can get to the
19 next slide here -- these are the depositions that
20 remain to be -- remain to be completed. We tried
21 to summarize them for you. Some of the requests
22 are out for these. Some we're working on
23 scheduling. Some are nonparty. Some are parties.
24 These people are on vacations. People are sick.
25 The way we've been doing this is, we're not

42

1 noticing. I know originally parties noticed
2 depositions, and then they argued about whether
3 they could get them done. I think that the
4 parties reached a good-faith accommodation, tell
5 us who you want to take, give us some dates, and
6 then we're renoticing them. And that's the
7 process that's being followed.

8 So these are the people that I believe are
9 going to be deposed. I've gone through our list,

10 and I think our list is relatively accurate of
11 what we're going to need. Whether they take all
12 that they originally told us about is a matter
13 they'll decide.

14 We've concluded, just looking at this, not
15 including travel time, we've got 43 business days
16 of occupied time that we have to deal with.
17 Twenty-eight of these are nonparty, so we don't
18 control them in the sense that we can make them
19 appear. Some require subpoenas all outside of the
20 jurisdiction of Florida, so we have to go get
21 commission orders, et cetera. Very time
22 consuming.

23 July and August are very difficult months to
24 schedule things because of vacations. We talked
25 about that in February. We thought that was going

43

1 to be a problem. We've got some witnesses who
2 have medical problems, and we've got three
3 witnesses that are in Europe. We're going to have
4 to go to London. And there's one that we think
5 we're going to have to go to Paris. I know this
6 sounds like hardship duty, but, you know, somebody

16div-005805

7 is going to have to go, and it's going to take a
8 couple days to get it done. And they're important
9 people.

10 August, on top of that, if we look at the
11 calendar we have for August, the blue tells you
12 what we've occupied, we're already booked in
13 August. We've only got I think --

14 THE COURT: I'm afraid we're not going to
15 have time for the other motions we have, which are
16 substantive if you take real long on this.

17 Cut to the bottom line. How much additional
18 time are you asking for on the merits?

19 MR. BEMIS: I think that what we need on the
20 merits -- I don't know precisely. What I'm
21 thinking is 90 days is a number that we could work
22 with, depending on what you do with the contempt
23 proceeding. I think the contempt proceeding has
24 to be set first. I'm not saying we won't work
25 with the rest, but if the contempt proceeding --

44

1 THE COURT: Why does the contempt have to be
2 set first?

3 MR. BEMIS: I think because of the relief

4 that they're -- first of all, it is a diversion
5 that is interfering with our ability to take care
6 of the merits. That's number one. Number two is,
7 the extraordinary relief that they are requesting,
8 including disqualification of Kirkland & Ellis, is
9 a very significant matter. We have invested -- my
10 clients have invested -- I say we. My client has
11 invested in their counsel. We have learned the
12 case. We have managed the documents. If we are
13 disqualified in any fashion from this case, it
14 will impact the ability of any counsel to be ready
15 for trial at any date.

16 Plus, I think just overriding fairness, these
17 allegations need to be resolved. It escalates
18 every hearing. We have gone from an improper
19 disclosure to most recently at the last hearing
20 just a mere reference to a crime and fraud to the
21 most recent papers asserting a crime and fraud
22 with an allegation now that the attorneys are
23 involved in the crime and fraud. Those are
24 serious allegations, and they need to be
25 addressed. We want them addressed. We want the

1 air cleared on it so that we can proceed.

2 Again, I'm not asking for a stay of
3 discovery. I thought about it, but I'm not. I
4 think we can probably proceed with the merits
5 discovery. It's going to interfere with the
6 merits discovery, maybe a day where I can't be two
7 places at once. I'm thinking 90 days, give us 90
8 days, at least on the close of fact discovery.

9 That puts us well within the Rules of Judicial
10 Administration, I believe, for a case of this
11 complexity, which I think is -- 18 months I think
12 is the standard under Florida law for cases like
13 this. We'll be a little bit over but not by very
14 much.

15 At some point in between that 90 days, Your
16 Honor, based on your calendar and your judgments,
17 tell us when the hearing is. Let's get ready for
18 the hearing. It's their motion. They have to go
19 first. If on top of the contempt they are going
20 to assert crime fraud, we need to know that. And
21 I need to know for very specific procedures I'm
22 going to address not now but on the other motion
23 of how that has to be handled. They are not in
24 the procedures that are being followed right now.
25 It's not fair for them to put -- in our view, for

1 those allegations to be made in open court and not
2 follow the proper procedures and give us our
3 rights to defend.

4 THE COURT: Backing into it, some of this
5 really jumps to the next motion. If you're
6 suggesting a 90-day delay in the time deadlines
7 for the underlying case, what are you suggesting
8 as deadlines for the resolution of the contempt
9 proceedings?

10 MR. BEMIS: I think I would pick a date. I
11 would pick a date first and work backwards. A
12 hearing date, what is a hearing date. I think you
13 should be able to set a hearing date within the
14 next 30 days.

15 THE COURT: But how -- that wouldn't even
16 give us time to resolve all the outstanding
17 discovery.

18 MR. BEMIS: I'm not sure, Your Honor, that
19 we'll get all of the outstanding discovery issues
20 resolved within 30 days. I don't know because I
21 don't know what you're going to do with them.

22 THE COURT: I can't believe we can get the
23 underlying discovery disputes on the contempt
24 proceeding resolved and what I permitted to be

1 days. It doesn't make any sense, particularly
2 since we already -- I already articulated my
3 belief that how Morgan Stanley believes it was
4 damaged by Arthur Andersen is something that needs
5 to be bedded for purposes of the contempt. I
6 gather from what I've read that that's not an easy
7 answer, and you guys aren't prepared to answer
8 that right now.

9 MR. BEMIS: Well, you've issued an order on
10 that. Our response is currently due on August
11 2nd.

12 THE COURT: Right.

13 MR. BEMIS: I'm not prepared to tell you as I
14 stand here today given the shortness of time that
15 I've had to assess it precisely how that's going
16 to be answered. I can't tell you at this point
17 whether we're going to take an appeal of it by
18 writ of certiorari, and some of that may depend on
19 what happens later on this morning.

20 I still think that, while 30 days may sound
21 aggressive, they filed the motion. Normally the

22 motion would have been filed when they had a
23 factual basis for the motion. We would have
24 answered it.

25 THE COURT: Not necessarily because the

48

1 discovery is not relevant necessarily directly to
2 the issues in this case. I'm not sure that's
3 fair.

4 MR. BEMIS: Well, then we have a disagreement
5 on that, and I won't belabor the point. I believe
6 the process is as I articulated it at the April
7 30th hearing. They should have filed a motion.
8 We would have answered the motion appropriately
9 with denials. They would have been put to their
10 proof of the date, and they were not. This was
11 not to be a preliminary hearing on whether we
12 should -- that issue you ruled on, and I'm not
13 trying to reargue it.

14 THE COURT: As I understand it, what you're
15 suggesting is a 90-day delay on the underlying
16 action and that the motion for contempt to be
17 heard within 30 days.

18 MR. BEMIS: Or such other period of time that

19 you think is reasonable within the 90-day period.
20 We may have to revisit the 90 days depending on
21 what you do with the contempt proceedings.
22 There's no way to predict how this is going to
23 eventually resolve itself until we get farther
24 down the trail. You also need to tell us, are you
25 going to allow them to proceed on crime fraud as

49

1 they allege because there are very specific
2 procedures.

3 THE COURT: I read your memo. It sort of
4 goes on. Some of the motions we still have left.

5 But, Mr. Scarola, just so we can try to
6 narrow the discussion some, what's your response
7 first to the request that the underlying action be
8 continued 90 days, the pretrial deadline be
9 extended in order to allow discovery?

10 MR. SCAROLA: Ninety days is too long. We
11 are willing to agree to a shorter extension.

12 THE COURT: What would that be?

13 MR. SCAROLA: We think that 30 days might be
14 appropriate. I would be happy to discuss the
15 details why.

16div-005812

16 And with regard to the contempt motion, we
17 would love to have the contempt motion disposed of
18 within the next 30 days, Your Honor, but I think
19 Your Honor's observations are very accurate in
20 that regard. I don't know how we can possibly
21 complete the necessary discovery in order to have
22 that hearing in 30 days, particularly if Morgan
23 Stanley continues to insist upon providing
24 unresponsive answers, asserting privileges that
25 have already been overruled by The Court and

50

1 insisting upon the full time for compliance under
2 the rules with regard to all of their responses.

3 If they agree to an abbreviated schedule and
4 The Court has the time to hear the motions
5 necessary to address legal issues that they
6 raised, we'll devote the resources necessary to
7 get that contempt proceeding done within 30 days,
8 but that's going to impose a significant burden on
9 them that I hear they're incapable of meeting;
10 although, it's difficult for me to understand
11 that, and I'll address that when I have an
12 opportunity to address these issues more broadly.

13 If they want to do it, they need to
14 understand that they're assuming very significant
15 obligations which are going to include an
16 abbreviated, a drastically abbreviated schedule
17 with regard to the resolution of all outstanding
18 discovery issues.

19 MR. BEMIS: All outstanding discovery has
20 been answered with the exception of the motions to
21 compel. There's no outstanding discovery. We've
22 answered. I'm not saying everybody like the
23 answers. And I understand that you have an order
24 we responded to on August 2nd and that there's a
25 motion today, but all the discovery has been

51

1 responded to by both sides. So that at least is
2 behind us.

3 THE COURT: I would rather go through the
4 rest of the motions now because how those turn out
5 I think in a lot of sense is going to affect the
6 timing on these other issues.

7 MR. SCAROLA: We suggest, Your Honor, that
8 the --

9 THE COURT: Yes, Mr. Scarola.

16div-005814

10 MR. SCAROLA: We suggest that the
11 consideration of the contempt issues really ought
12 not to influence what The Court determines with
13 regard to how we are going to proceed with the
14 trial.

15 THE COURT: I understand that would be your
16 position. I also understand as a practical matter
17 the timing of the resolution and the timing of the
18 discovery disputes and the contempt have a very
19 practical effect on the time available to work on
20 the underlying case. So I understand your client
21 would disagree, but I don't think you can bring a
22 substantive motion that does require attention and
23 discovery and then suggest it doesn't have an
24 effect on the timing on the remainder of the case.

25 MR. SCAROLA: I'm not suggesting that it

52

1 doesn't have an impact on the resources necessary
2 to be devoted to this case, but we really need to
3 consider the context in which this is occurring.
4 Kirkland & Ellis is a 1,000-lawyer firm, and the
5 litigation chairman of that firm is involved in
6 this lawsuit. Carlton, Fields is a 200-lawyer

7 firm. That's 1,200 lawyers available to devote
8 resources necessary to get this case done and to
9 meet the commitment that they made.

10 THE COURT: They probably don't want to have
11 to educate everyone on this case.

12 MR. SCAROLA: I understand that.

13 THE COURT: And I understand you disagree. I
14 think, in all honesty, I want a better sense of
15 where we're going with the contempt. That's going
16 to give me a better idea for the contempt and the
17 underlying litigation.

18 MR. BEMIS: I have a bad tendency to
19 interrupt. I apologize.

20 THE COURT: I do, too.

21 MR. BEMIS: On the contempt issue, there's
22 two ways we can proceed with this. They are the
23 movant on this. We have a, if you will, a cross
24 motion on the issue.

25 THE COURT: On what issue?

53

1 MR. BEMIS: It relates to the scope of the
2 waiver issues and how it interfaces with the new
3 allegations that are made. I suggest that we

4 address the broad issues before we go 20 --
5 there's 20 subparagraphs.

6 THE COURT: I know there are.

7 MR. BEMIS: Twenty subparagraphs. I suggest
8 that we address the broad issues of the privilege
9 and the crime fraud, what we're going to do with
10 those issues, and the sham pleadings because they
11 permeate the objections. For example, there are
12 21 --

13 MR. SCAROLA: I'm sorry to interrupt, but
14 this is our motion, and I may be able to narrow
15 the issues significantly if I'm permitted to
16 address it first.

17 MR. BEMIS: If I may just finish, and then I
18 will sit down. May I finish, Your Honor?

19 THE COURT: Yes, go ahead.

20 MR. BEMIS: There are like -- not like.
21 There are 21 cut and pasted objections which are
22 identical. We can speed some of that up by
23 addressing them if they are --

24 THE COURT: Sure. Or we can just do them in
25 order. And once I've ruled on one, you can

1 probably figure I'll rule the same way on the
2 other ones.

3 MR. BEMIS: And that is possible. I thought
4 about that process, and I respectfully do think
5 that the most expeditious way is to address the
6 structure of what they've challenged because
7 there's three things they have. One is that it's
8 a sham pleading. Number two, that crime and fraud
9 applies. And number three, that there is a
10 waiver.

11 Now, we did get your order on July 12 or
12 shortly after that. It raises substantial
13 constitutional issues. If Your Honor adheres to
14 her position, I am not going to belabor the point
15 with you, but there are issues that we didn't
16 brief that I want --

17 THE COURT: Please understand that I didn't
18 get, nor have I reviewed, nor have I set for
19 hearing any motion for rehearing, so we're not
20 going there today.

21 MR. BEMIS: Well, it's not a question of a
22 motion for rehearing. It's a question of our
23 response to their offensive position, and we, I
24 think, are entitled to raise those issues in
25 defense. If you say no, I won't address them,

1 other than to put them into the record for the
2 appellate court.

3 THE COURT: That's fine. Please understand
4 we have the July 12th order, and right now we're
5 not revisiting it.

6 Let me go to Mr. Scarola because I do want to
7 get to those motions, and we can discuss the most
8 efficient way to dispose of them.

9 What tab am I looking at?

10 MR. SCAROLA: Tab number six.

11 MR. BEMIS: Thank you, Your Honor. I'll sit
12 down.

13 THE COURT: Okay.

14 MR. SCAROLA: Thank you, Your Honor. Your
15 Honor will recall that, in the context of our
16 earlier motion to compel, we made reference to the
17 crime fraud exception to the attorney/client
18 privilege.

19 THE COURT: If I understand, you're seeking
20 to invoke that by saying that the pleading in the
21 new litigation is a sham?

22 MR. SCAROLA: Yes, Your Honor. We're
23 suggesting that the crime fraud exception is
24 broader than application simply in the context of

1 want to go there today. We have raised the crime
2 fraud exception issue to be sure that it is not
3 waived. We wish to preserve it.

4 What we ask The Court to do today is
5 something that is far simpler than to get into
6 both the substantively complex and procedurally
7 protracted process of determining the crime fraud
8 exception application in this case. What we want
9 Your Honor to do is simply to apply the rulings
10 that you have already made in your prior order of
11 July 12th to the interrogatories and request to
12 produce that are presently before The Court for
13 determination.

14 The reason why we want you to do that is
15 because we believe that we may very well receive
16 sufficient information on the basis of the rulings
17 that Your Honor has already made to allow us to go
18 forward without needing to confront the broader
19 expanse of information that may be available to us
20 if we meet the crime fraud threshold to overcome
21 privilege assertions.

22 So all we want you to do is to walk through
23 these interrogatories with us to the extent that's
24 necessary and to apply the same rulings that Your
25 Honor has previously made with regard to findings

57

1 that particular questions do not involve a
2 legitimate claim of privilege or that they are
3 encompassed within the scope of those issues where
4 Your Honor has found a waiver to exist. If we can
5 get that information, I think we may not have to
6 come back to The Court.

7 THE COURT: So, as I understand what you're
8 asking me to do today is not rule on any crime
9 fraud issue?

10 MR. SCAROLA: I'm asking you to defer ruling
11 on the crime fraud issues, simply to go through
12 these interrogatories, apply the same standards
13 that you've previously applied, extend the July
14 12th order which applied to a particular set of
15 interrogatories to the subsequently filed
16 discovery requests.

17 THE COURT: Is there any objection to holding
18 the crime fraud issue in abeyance?

19 MR. BEMIS: Yes, Your Honor. This is a
20 reprise of the rule to show cause. They throw an
21 issue before The Court like on the rule to show
22 cause, which I argued, and I think you ultimately
23 accepted I was correct that it was procedurally
24 improper. They raise an allegation with no
25 evidence, impugning the integrity of the lawyers,

58

1 accusing me of a crime of fraud.

2 THE COURT: We need to get back to what we're
3 talking about here.

4 MR. BEMIS: That's exactly what they have
5 done. They have 23 times asserted in a filing in
6 a courthouse --

7 THE COURT: So you want them to either
8 withdraw it or be prepared to have it bedded?

9 MR. BEMIS: Right. That's exactly what I
10 want.

11 THE COURT: I think that's fair.

12 MR. SCAROLA: May I have just a moment?

13 THE COURT: Sure.

14 MR. SCAROLA: Your Honor, we would request
15 permission to withdraw those allegations with

16div-005822

16 regard to the crime fraud exception without
17 prejudice to renew them when and if we believe
18 it's appropriate.

19 THE COURT: Please understand, if you're
20 going to withdraw, that's fine. It's not with or
21 without prejudice. If for some reason you think
22 they come back in, you come in and we discuss
23 whether it's procedurally appropriate or not. I
24 assume there's no objection if I just do an order
25 that says they are being withdrawn, period.

59

1 MR. BEMIS: I have an objection to the second
2 time that they have done this and then walk in and
3 say it's all right. It's not all right to make
4 these type of allegations against my client and
5 the attorneys and then say, I'm sorry, I now
6 realize I did it incorrectly, I'll withdraw it
7 after twice raising the issue. And I think anyone
8 who is sitting here and listening to it would have
9 the same reaction. It's just improper.

10 THE COURT: Well --

11 MR. BEMIS: And I apologize if I seem
12 somewhat frustrated by this, but they are serious

16div-005823

13 allegations.

14 THE COURT: I agree. And, no, you're not
15 offending me that you would take it seriously. I
16 would be upset if you didn't. I don't -- the two
17 choices I see are, either you withdraw them, I do
18 an order saying you withdrew them in open court
19 and they have left us, or we go through the
20 procedure to fully let the issues. I don't think
21 we just say, oh -- they're not going to be
22 addressed on their merits today.

23 MR. SCAROLA: Clearly, with the 45 minutes we
24 have remaining, they are not going to be addressed
25 on their merits today.

60

1 THE COURT: I think it's your call, are they
2 still with us or not.

3 MR. SCAROLA: With the understanding that
4 they are not going to be addressed on the merits
5 today, is Your Honor prepared at least to address
6 that portion of the motion that I have suggested
7 can be addressed today? And that is, application
8 of Your Honor's earlier ruling.

9 THE COURT: The first question I have to you

10 is, are you withdrawing the crime fraud issue or
11 not? That's a yes or no.

12 MR. SCAROLA: No.

13 THE COURT: Okay. So we still have those?

14 MR. SCAROLA: Yes. And we request that the
15 order in which we address these issues is to first
16 deal with the simple extension of Your Honor's
17 order to the pending interrogatories.

18 MR. BEMIS: And I, Your Honor, request that
19 we address the crime fraud issue first. It's the
20 most serious one that's made, and we should be
21 heard on it and not let it linger for another case
22 management conference.

23 THE COURT: I think we're going to go through
24 them one by one, and the order we get to them is
25 the order we get to them.

61

1 MR. BEMIS: Crime fraud is raised in the very
2 first --

3 THE COURT: It probably is. I know I read it
4 a lot.

5 MR. BEMIS: Your Honor, may we address these
6 one at a time so that each interrogatory -- so I

7 don't have to go back and do 20 of them?

8 THE COURT: That's what I'm proposing. Let
9 me figure out the best way to get the
10 interrogatories and the answers in front of me. I
11 know you repeat the interrogatories in your
12 motion. I know I have the answers. Can you tell
13 me which tab they're at?

14 MR. SCAROLA: It's under tab six, Your Honor.

15 MR. BEMIS: Your Honor, I have actually
16 assembled one volume which has the
17 interrogatories, the response, the argument and
18 the motion response on a single page.

19 THE COURT: Do you object to my looking at
20 that?

21 MR. SCAROLA: No. Do we have two copies of
22 it so we can be looking at the same thing?

23 MR. BEMIS: Sure, I think we have an extra
24 copy. There will be a small charge.

25 May I approach the bench, Your Honor?

62

1 THE COURT: Yes. Can I go back to the ore
2 tenus motion on The Court file? I didn't want to
3 forget that I had gotten this. I don't think that

4 the clerk has done anything improper. The order I
5 wrote said the only thing that was supposed to be
6 filed under seal was the complete copy of the
7 settlement agreement, not the Exhibit A to the
8 order. Exhibit A to the order was the redacted
9 copy where the only thing I redacted I think was
10 the account information.

11 So, no, the clerk has not violated my order.
12 If you're now saying you want something sealed
13 that's not sealed, you may want to make an
14 appropriate order.

15 MR. SCAROLA: Thank you, Your Honor.

16 THE COURT: So that would be denied. Okay.

17 MR. SCAROLA: Your Honor, I'm having the
18 first chance to look at what has been handed to
19 The Court. And while I don't object to Your Honor
20 using this to the extent that it may be of
21 assistance to you, I think what you'll find when
22 you look at it is that the interrogatory is set
23 out in full, Morgan Stanley's objections are set
24 out, and their reply is set out. And what we have
25 then is a one- or two-line summary --

1 THE COURT: Okay.

2 MR. SCAROLA: -- of CPH's argument which --

3 THE COURT: Well, I also have your motion
4 thing in front of me, so I have the full version
5 as well.

6 MR. SCAROLA: Okay. I just don't want The
7 Court to overlook the fact that the way in which
8 they have chosen to summarize our argument may not
9 necessarily accurately reflect our argument.

10 MR. BEMIS: Your Honor, that is -- it is
11 accurate that what we did was extract what we took
12 from our paper in terms of their objections and
13 didn't repeat a whole page of the objection as
14 much as edit. Mr. Scarola is correct, and I
15 should have pointed that out to The Court. I'm
16 sorry.

17 THE COURT: Okay. Interrogatory one.

18 MR. SCAROLA: Yes, Your Honor. The Court
19 concluded in its July 12 order that the privilege
20 has been waived with respect to the subject matter
21 of this interrogatory. The only document that
22 Morgan Stanley has produced is the April 5
23 retention letter which, not insignificantly,
24 postdates our motion for contempt by weeks. This
25 is, we suggest, an improperly asserted objection

1 that has already been addressed in the July 12th
2 order. Your Honor should overrule the objection
3 and order a full and complete response on the
4 basis of the waiver that has already been found to
5 exist.

6 THE COURT: How do you define identified? Is
7 that defined in the interrogatories?

8 MR. SCAROLA: It is, Your Honor. I don't
9 think we've included in the interrogatories in the
10 exhibits that we provided to The Court, and I
11 can't put my hands on a copy among the materials
12 that we have with us, but I know that identify is
13 a defined term, Your Honor.

14 THE COURT: Do you all have a copy of the
15 interrogatories?

16 MR. IANNO: I'm looking, Your Honor.

17 MR. BEMIS: I do someplace. I think in our
18 answers we didn't repeat the definition, so I'm
19 not sure that I even have them here.

20 THE COURT: Why don't we continue and -- I
21 just was trying to figure out exactly --

22 MR. SCAROLA: Are we going to do these one at
23 a time with our position stated?

24 THE COURT: I think we need to start. We're

25 not going to finish, but I think we need to start

65

1 with one at a time and see how far we get.

2 MR. BEMIS: Are you finished?

3 MR. SCAROLA: Yes. That's my initial
4 presentation and support.

5 THE COURT: What's the response?

6 MR. BEMIS: My response is, may I have some
7 water?

8 THE COURT: Sure.

9 MR. BEMIS: The water fountains are broken.
10 There's no water outside at all.

11 THE COURT: How long have they been broken?
12 It's a pressure issue?

13 MR. IANNO: I don't think they've worked for
14 a long time.

15 THE COURT: Really? That's bad.

16 MR. BEMIS: First of all, with regard to the
17 first allegation that we did not respond, we did
18 identify and eventually -- and I'm sure Your Honor
19 is aware of this, but pursuant to a stipulation,
20 we did produce the, what I will call the legal
21 representation agreement, some would call it a

16div-005830

22 retention letter, between Kellogg Huber and Morgan
23 Stanley. That was done, I believe, right after
24 our last hearing on July 2nd. I'm not sure that
25 Your Honor was aware of that, but we've identified

66

1 that.

2 THE COURT: I'm sorry. Is that the April 5th
3 retention letter?

4 MR. BEMIS: The April 5th retention letter.
5 There is only one that I am aware of, and that is
6 the one that is produced pursuant to our
7 stipulation. That production would not be argued
8 to be a waiver of attorney/client privilege.

9 We identified in our answers to
10 interrogatories that we -- the dates of
11 conversations which, by the way, is the same
12 information that in many respects we would be
13 required to identify pursuant to the Florida Rules
14 of Judicial Administration, 2. -- I think I've got
15 the number right off my head -- 061.

16 THE COURT: It is.

17 MR. BEMIS: We would be required to identify
18 the matter that they were retained in. We would

16div-005831

19 be required to identify the counsel, and we would
20 be required to identify the date of their
21 retention in order for foreign attorneys to
22 practice in the state. That even came up, as you
23 may recall, at the April 30th hearing. There was
24 some issues of whether we had adequately provided
25 all that information and declarations that were

67

1 filed and the application, and we did provide
2 that.

3 What I think they're asking for further under
4 the crime fraud exception were the waiver
5 argument, is that, by virtue of identifying
6 Kellogg Huber as the attorney in the case, that
7 somehow we have -- that is a sham pleading, and,
8 therefore, they're entitled to everything. And on
9 the issue of the --

10 THE COURT: I think this is just a pure
11 waiver, as I understand it.

12 MR. BEMIS: They also argue in their full
13 motion that crime fraud exception applies in the
14 very first interrogatories. I believe it's on
15 page three.

16div-005832

16 MR. SCAROLA: It is on page three at the top
17 of the page.

18 MR. BEMIS: Page three, top of the page,
19 right-hand side, runs down approximately 17 lines
20 from the top. I did not hear that withdrawn.

21 Let me address the issue of a sham pleading,
22 if I may, first. In order for them to establish a
23 sham pleading, they need to file a verified motion
24 with this court or with another court. That's an
25 issue Your Honor may have to decide, where does

68

1 that go. We think that the proper procedure under
2 Rule 1.150 is that it has to go before Judge
3 Miller. That matter is pending before her. And I
4 will not tell you that I found a case on this
5 point.

6 THE COURT: Let's, so I'm not overwhelmed --
7 I mean, I understand that argument. Let's assume
8 I'm probably not going to accept it.

9 MR. BEMIS: Then at a minimum, even if they
10 allege it's a sham pleading in this Court, they
11 need to file something that's verified that sets
12 forth the facts under verification that it's a

13 sham. That's not been done. All that's been done
14 thus far -- and if we were to go back all the way
15 to March 19th, there is no evidence that's been
16 offered in this case at all.

17 THE COURT: So you're saying they haven't
18 made a prima facie showing that would trigger it?

19 MR. BEMIS: Yes, with regard to the rule,
20 and, yes, with regard to the crime and fraud
21 exception under the Butler Pappas trilogy. Can
22 you put that up for me?

23 MR. BEMIS: I have a copy of that case. Can
24 I had that up to The Court?

25 THE COURT: I have it.

69

1 MR. BEMIS: Okay. The Butler Pappas Trilogy,
2 which has really its origin in the American
3 Tobacco case in the Fourth DCA as well as I think
4 the Supreme Court's decision in Zolon and Haines
5 (phonetic), sets forth three things that you need
6 to do and the procedure The Court has to follow.

7 The first step is that there must be an
8 allegation that the communication, whatever it is
9 that they're looking for here, and this would be

10 the communications between, I assume the way the
11 question is drafted, between Morgan Stanley and
12 Kellogg Huber, that it must have been made as part
13 of an effort to perpetrate a crime or fraud. And
14 it has to be a future crime or fraud, not past.
15 And they have to identify the crime or fraud.
16 That's what they need to do. That's not been
17 done. That's just the allegation.

18 Step two in the process is, you must
19 determine that they have made a prima fascia case,
20 and I emphasize evidence because the cases clearly
21 say argument of counsel, memorandum of law are not
22 evidence, that a client sought counsel's advice.
23 I don't know here whether their allegation is that
24 they sought my law firm's advice or they sought
25 Kellogg Huber's advice because they don't make

70

1 that allegation, and they clearly don't have any
2 evidence of it.

3 And thirdly, under step three of Butler
4 Pappas, which stems from language out of American
5 Tobacco, we are entitled to provide The Court a
6 reasonable explanation of our conduct at an

7 evidentiary hearing, a reasonable explanation of
8 our conduct which, of course, is what we have a
9 major issue with what happened on April 30th
10 because we were under the impression that you were
11 proceeding with the hearing in one fashion. It
12 turns out that ultimately the procedure became
13 more truncated. We believed at the time we were
14 entitled to provide a reasonable explanation of
15 our proceeding, and that reasonable explanation is
16 not a waiver of the privilege under the law.

17 THE COURT: Again, we're not rearguing that.

18 MR. BEMIS: I know, but, Your Honor, it's a
19 basic defense under the due process clause to the
20 allegation of crime fraud, and we're entitled to
21 present it. I make it for the record. I won't
22 repeat it, but that's our position for the record.

23 As with regard to that, we are not at any of
24 those three steps; therefore, those objections
25 ought to be plainly overruled that it's a sham

71

1 pleading. They haven't complied with whatever
2 requirement you imposed, and the Butler Pappas
3 Trilogy of procedural steps that have to be

4 followed have not been even followed in the
5 smallest element in this case.

6 Other than that, I believe we have fully
7 identified what is required by the answer, and
8 we've answered it fully. We've gone beyond that
9 by providing the legal representation agreement.

10 I don't know what more we could do other than to
11 divulge every communication between Kellogg Huber
12 and Morgan in subdetail, and we do not believe we
13 are obligated to do that, that that is protected
14 under attorney/client. That's our response to
15 interrogatory one.

16 THE COURT: What do you want to respond?

17 MR. SCAROLA: First, that Mr. Bemis has not
18 addressed the primary contention that we have
19 made, and that is that this is covered by Your
20 Honor's July 12 order that there has already been
21 a waiver with respect to these issues. That order
22 specifically found at page three, quote, it may
23 not -- referring to Morgan Stanley & Company --
24 selectively reveal only such privileged
25 information as it believes helps its position.

1 The conclusion is inescapable that defendant,
2 Morgan Stanley & Company, has waived any privilege
3 with respect to the reasons for and timing of the
4 retention of Kellogg Huber law firm, the scope of
5 its representation and the timing of the Arthur
6 Andersen suit.

7 Those determinations have been made. This
8 interrogatory addresses those issues. And on that
9 basis alone before ever reaching crime fraud
10 issues, Your Honor should overrule the objections
11 and require a full and complete response.

12 With regard to the Butler Pappas procedure,
13 we suggest that the record before this Court
14 already establishes evidentiary support for a
15 prima fascia finding of application of the crime
16 fraud exception, and that evidentiary support
17 comes by way of Mr. Bemis's own open court
18 representations to The Court about the
19 relationship between the settlement agreement and
20 the suit filed in front of Judge Miller. It comes
21 by way of the timing of that litigation, and it
22 comes by way of the patent lack of factual support
23 for damages in that Arthur Andersen suit.

24 We have cited to The Court case law that
25 supports our position that sham litigation can

1 trigger the crime fraud exception. Those cases
2 are referenced at page three of our memorandum. I
3 think it is clear that the weight of authority is
4 that baseless litigation may bring the crime fraud
5 exception into play, that any type of misconduct
6 inconsistent with the basic premises of the
7 adversary system are sufficient to trigger the
8 crime fraud exception application. But that is
9 not an issue that needs to be reached in light of
10 the fact that the waiver already found to exist
11 applies to the information being sought by this
12 interrogatory.

13 THE COURT: I will grant the motion in part.
14 I think, and I've said it before, I think we
15 clearly had a waiver as to the scope of the
16 Kellogg Huber representation and the timing of its
17 retention. I had specific representations made to
18 me in open court about why they were retained, the
19 limited purpose for which they were retained.

20 On the other hand, I do think this does ask
21 for some information which could be still deemed
22 privileged and not waived.

23 What I will do is eliminate the first
24 sentence, take out the first seven words of the

1 communication concerning the scope of the
2 representation, the entity or entities to be
3 represented and why they were retained, which I
4 think is what I previously found there was a
5 waiver on based upon the representations in court.

6 MR. BEMIS: We've answered that question.

7 THE COURT: I don't know if you've answered
8 that completely or not. If you have, you need to
9 tell us this is the complete answer. If you
10 are -- looking at the answer, I'm not sure it
11 would be complete, but you need to make that
12 representation.

13 MR. BEMIS: All right. By saying all right,
14 Your Honor, I don't want to --

15 THE COURT: I think you're saying, I
16 understand what you're telling me.

17 MR. BEMIS: Exactly. Thank you very much,
18 Your Honor. What are you doing on the crime fraud
19 sham pleading?

20 THE COURT: I would agree that there's not
21 been a prime fascia showing to support its

22 application; although, I can tell you the motion
23 for contempt I don't think requires necessarily
24 that you show -- I mean, it might sort of
25 implicate whether that was a sham pleading, but I

75

1 don't think you need to rely on that to negate all
2 the privilege claims. So I'm just -- they didn't
3 make a prime fascia showing now, but I'm still
4 finding this is something that vast portions of
5 the answers have already been published to The
6 Court.

7 MR. SCAROLA: So as to avoid having to come
8 back here to reargue these matters again, I'm
9 concerned about the representation made by
10 Mr. Bemis that the answer is already complete.

11 THE COURT: If he's going to say it's
12 complete, he's going to need to file something
13 saying I've already answered it.

14 MR. BEMIS: That's not what I said.

15 THE COURT: You know what, we have 26 minutes
16 left. We need to put it to good use.

17 MR. BEMIS: I just want the record clear that
18 I don't agree with what Mr. Scarola's conclusion

19 was. I will respond as directed by The Court or
20 preserve our objections and proceed accordingly.

21 MR. SCAROLA: May I simply inquire as to
22 whether it is Your Honor's intent that the content
23 of the communication, to the extent it falls
24 within the waiver you have described, be included
25 in the response because these responses don't

76

1 include anything about the content. That's my
2 only point.

3 THE COURT: Yes. I understand.

4 MR. SCAROLA: Thank you.

5 THE COURT: I mean, assuming that identified
6 was defined in a way that would have required the
7 disclosure of the content, I don't know the
8 definition, I'm not adding stuff to the
9 interrogatory that wasn't there.

10 MR. SCAROLA: I understand that. I
11 understand that.

12 THE COURT: Okay. Two.

13 MR. SCAROLA: It is our position with regard
14 to this interrogatory, Your Honor, that Morgan
15 Stanley has provided selective disclosures in its

16 answers. Your Honor has ruled that selective
17 disclosures result in a waiver of the privilege.
18 They can't choose to give us that portion of
19 information that they consider helps them and
20 withhold the balance. We want a full and complete
21 response on the basis of a waiver.

22 In addition, there is no privilege because of
23 the crime fraud and at-issue exceptions applying
24 under the circumstances of this case.

25 THE COURT: Do you want to respond?

77

1 MR. BEMIS: Your Honor, with regard to the
2 crime fraud, you've already ruled, so I won't
3 address that again. With regard to the balance of
4 it, we stand on our objections that we have a
5 privilege as to certain of the communications.
6 With regard to other matters, we have provided --
7 and if you'll look at the third paragraph of our
8 objection, we did state that the parties, that is,
9 I should not say the parties, that is Kellogg
10 Huber and Morgan Stanley participated, as we say,
11 in discussions with its co-counsel, Kirkland &
12 Ellis, regarding the representation and that they

13 assigned the declaration to be bound by the
14 protective order. We believe that that is the
15 answer that is required by the interrogatory.
16 With regard to other matters, it's a substance, we
17 stand on our privilege -- we stand on our
18 privilege objection, and we don't think it's
19 foreclosed by your order.

20 THE COURT: I would sustain his objection. I
21 don't think this is something I found a waiver on,
22 and I don't think there has been a waiver of
23 privilege on this one.

24 Number three.

25 MR. SCAROLA: Our arguments with regard to

78

1 number three would be the same as those that I
2 have just stated, Your Honor.

3 THE COURT: Again, I don't think there's been
4 a waiver on this.

5 Four.

6 MR. SCAROLA: May I just go back to that for
7 one moment, Your Honor?

8 THE COURT: Sure.

9 MR. SCAROLA: What The Court -- is it all

10 right if I address The Court from a seated
11 position?

12 THE COURT: However you're more comfortable.

13 MR. SCAROLA: What The Court specifically
14 found in its July 12th order was that MS & Company
15 has waived any privilege with respect to the
16 reasons for the retention of the Kellogg Huber
17 firm. And it would seem that --

18 THE COURT: Which number are we on?

19 MR. SCAROLA: We're on number three.

20 THE COURT: Okay.

21 MR. SCAROLA: It would seem that, whether
22 Kellogg Huber was provided a copy of the
23 settlement agreement in connection with the
24 reasons for the retention of that Kellogg Huber
25 firm would fall within the scope of that waiver.

79

1 THE COURT: The reasons -- I would be shocked
2 to find -- and maybe this is why I didn't do it,
3 is to match the date of the retention and
4 settlement agreement. I would be shocked to find
5 that they got the settlement agreement before they
6 were retained and the reasons for the retention

7 ended at the retention. I mean, they obviously
8 don't predate the retention.

9 MR. SCAROLA: They certainly got the
10 settlement agreement before the retention letter
11 because the retention letter comes after the
12 contempt motion was filed.

13 THE COURT: I understand that. I think it --
14 I don't think there's been a waiver as to this.
15 If what you're trying to get at is, did they get
16 the settlement agreement before or after they were
17 retained, that may be something that's
18 discoverable because, if they got it before they
19 were retained, it would suggest perhaps it played
20 a part in why they were retained.

21 MR. SCAROLA: Might I also suggest, Your
22 Honor, that there's no necessary implication of
23 any privilege at all in responding to this
24 question. If Morgan Stanley provided Kellogg
25 Huber with the settlement agreement and Morgan

80

1 Stanley had a reason for doing it, that there's no
2 attorney/client privilege communication at all
3 involved in why Kellogg Huber -- why Kellogg Huber

16div-005846

4 was provided a copy of the settlement agreement.

5 There is no implication of any communication.

6 Morgan Stanley may very well have said, I
7 want this settlement agreement to go to Kellogg
8 Huber because I want Kellogg Huber to advise us as
9 to how we are going to use this settlement
10 agreement to our advantage in the currently
11 pending litigation and trigger these provisions in
12 the settlement agreement. The President of Morgan
13 Stanley could have had that conversation.

14 THE COURT: I understand the argument.
15 What's the response?

16 MR. BEMIS: Your Honor, we fully answered the
17 question, and we didn't waive it. And you didn't
18 find that we waived it. We've identified in prior
19 interrogatories what documents were provided, when
20 they were provided. We've identified pursuant to
21 the Rules of Judicial Administration who was
22 retained, the dates that they were retained. We
23 have provided the retention letter. I don't know
24 what more we should be obligated --

25 THE COURT: We're down to 20 minutes. I

1 think what you're suggesting is maybe you want to
2 ask who gave it to him, and we can come back.

3 MR. SCAROLA: No. I really want to ask why
4 it was given to them. Why did Morgan Stanley give
5 this settlement agreement to Kellogg Huber? Why
6 did they do it? What was Morgan Stanley's thought
7 process in giving this settlement agreement to
8 Kellogg Huber? I don't care -- I don't care what
9 Kirkland & Ellis's thought process may have been
10 at this point in time. What I want to know is
11 what Morgan -- these interrogatories are directed
12 to Morgan Stanley.

13 THE COURT: I don't have a preamble to see if
14 we're asking about agents or not.

15 What's the brief response that they should be
16 able to ask your client why you gave it to the law
17 firm?

18 MR. BEMIS: Because it calls for our mental
19 impressions and conclusions.

20 THE COURT: When you say our --

21 MR. BEMIS: Kirkland & Ellis, or in the
22 context because that would be where --

23 THE COURT: Well, why wouldn't your client
24 then simply respond, I relied on advice of
25 counsel?

1 MR. BEMIS: We have already -- first of all,
2 we waived -- you found we waived no privilege with
3 respect to our mental impressions and conclusions.

4 THE COURT: Right. But when you say "our," I
5 get confused as to who you mean, you or your
6 client.

7 MR. BEMIS: I appreciate that. I should have
8 made that clear. It is our work product privilege
9 when we --

10 THE COURT: Again, our, I don't know if you
11 mean the client or yours.

12 MR. BEMIS: Kirkland's, the lawyer's
13 privilege. We have said that we discussed certain
14 issues with regard to, I think it was
15 interrogatory number one, the information was
16 provided that the decision was made based on the
17 information that was available. For us to have
18 to isolate out in the manner that they are
19 describing invades our work product privilege and
20 our communications with the client on the matter.

21 THE COURT: What you're really saying is that
22 your client's answer is that, I relied completely
23 on the advice of counsel?

24 MR. BEMIS: I'm not going to tell you what my

1 the privilege, and I'm not going to discuss what
2 my client relied on in open court. It's
3 privileged. I'm entitled to communicate with my
4 client. My client is entitled to communicate with
5 its other counsel, Kellogg Huber.

6 THE COURT: Sure. But this is the question
7 I'm asking: Interrogatory number three, and I'm
8 asking a legal question, if your client made a
9 decision to give that agreement to new counsel
10 totally apart from any input, would we agree that
11 answer wouldn't be privileged?

12 MR. BEMIS: Can I just --

13 THE COURT: Sure. Is this one where we need
14 to answer it and just do an in-camera inspection
15 on whether it's privileged or not?

16 MR. BEMIS: It may well be because what we
17 have is an in-house legal department at Morgan
18 Stanley that we -- that our communications, as you
19 might expect, we deal with the lawyers, and they
20 are lawyers licensed to practice all over the
21 country, and we communicate with them. Whatever

22 decisions that they make, they have a -- we have a
23 litigation privilege with regard to those as well.
24 If Mr. -- if his question is what business man
25 independent of any legal advice did something,

84

1 that's a totally different question than I
2 understand is being asked. I'm not even sure at
3 this point what they are asking for.

4 THE COURT: I think they're asking the
5 question, why were they provided a settlement
6 agreement. And you're lodging a privilege for
7 what may be all or a portion of the answer, as I
8 understand what you're saying.

9 MR. SCAROLA: Why did you, Morgan Stanley
10 give the settlement agreement to these lawyers?
11 That's the question.

12 THE COURT: But --

13 MR. IANNO: My problem, Your Honor, it's
14 asking for a client's decision in conjunction,
15 potentially in conjunction with lawyers either
16 inside or outside. It's clearly a bad question
17 that's being asked because they're asking for the
18 internal mental impressions. That's the problem.

19 The question is just improper, and Mr. Scarola is
20 just trying to get at that. He's trying to get at
21 decisions made in litigation.

22 THE COURT: Let me ask you this: Would it be
23 disclosure of any sort of privileged information
24 if the answer was because my lawyer told me to?

25 MR. BEMIS: Your Honor, based on the rulings

85

1 we have here, I mean no disrespect, I don't know
2 what it would lead to. I just don't know. My
3 position on this I've articulated, and you don't
4 agree with me. I think we're entitled to present
5 the defense under the due process clause in
6 article one, section nine of the Florida
7 Constitution in the Fourteenth Amendment, the
8 Pappas case, American Tobacco and a legion of
9 other cases, and they don't result in a privilege.
10 There's been no fact communication disclosures.

11 What they want to get into is our top drawer
12 as to what the legal department and the law firms
13 said to each other as to what they thought about a
14 lawsuit. And that's privileged, whether it's
15 attorney/client or work product.

16div-005852

16 THE COURT: Can you represent to me that
17 there was no business person at Morgan Stanley
18 that elected to hand over the settlement agreement
19 or that the decision to turn it over was based
20 solely on advice of counsel?

21 MR. BEMIS: I think I can. Can I just ask
22 Mr. Clare? Some of this leg work has been
23 done by -- there's a lot of work on this.

24 THE COURT: Sure.

25 MR. BEMIS: The answer is, we believe that to

86

1 be the case. If it's not, we will tell The Court.
2 We will answer it as to who the business person
3 was, if that's acceptable. My representation is,
4 based on the information I'm standing here in
5 court is what I've just told you is a correct
6 statement, that it went through the legal
7 department.

8 THE COURT: Okay. What I'm going to need
9 then is just a supplemental answer that tells us
10 whether any part of the decision was made other
11 than on the advice of counsel. And if any part
12 was, then tell us what the answer is. If it was

13 all made on advice of counsel, that's fine.

14 MR. BEMIS: We'll proceed according to your
15 order.

16 THE COURT: Okay. Four.

17 MR. SCAROLA: Your Honor, I doubt that --

18 THE COURT: We have 12 minutes left. Do you
19 want to go back and discuss scheduling, or what do
20 we want to do?

21 MR. SCAROLA: I really think that it's
22 important that we address the scheduling issues
23 before we conclude this hearing. We all need to
24 know what's going to happen as far as our trial is
25 concerned.

87

1 THE COURT: Okay. Well, I mean, that short
2 exercise has told me the discovery and the
3 contempt is going to take a bit of time. One
4 other thing I wanted to bring up is whether you'll
5 have any interest in having a special master do
6 any of the in-camera inspection.

7 MR. BEMIS: The answer is yes. In fact, we
8 requested that, and we think it's the fairest way.

9 THE COURT: From my perspective, quite

16div-005854

10 honestly, it's just a function of time more than
11 anything else.

12 MR. SCAROLA: May I have just a moment?

13 THE COURT: Sure.

14 MR. SCAROLA: Your Honor, we are not willing
15 to agree to a special master.

16 THE COURT: That's fine. Please understand
17 that's going to affect the timing.

18 MR. SCAROLA: What we are willing to do,
19 however, is to submit the issues with regard to
20 this discovery to Your Honor on the basis of the
21 submissions that have already been made in writing
22 and have Your Honor rule on the basis of those
23 written submissions. We've had an opportunity to
24 present some argument to The Court.

25 THE COURT: Are you all willing to do that or

88

1 not?

2 MR. IANNO: I mean, what this exercise has
3 also shown us is The Court has some very probing
4 questions that aren't answered in the papers, to
5 me.

6 THE COURT: If they aren't willing to do it

16div-005855

7 without argument, I'm not inclined on something
8 like this to waive argument. But let's go back to
9 the scheduling stuff we were talking about.

10 MR. SCAROLA: May I briefly address those
11 issues before Your Honor arrives at any
12 conclusions?

13 THE COURT: Sure.

14 MR. SCAROLA: Your Honor, we filed our
15 complaint in this case on May 8th, 2003, which was
16 more than a year after we entered into a tolling
17 agreement with Morgan Stanley with regard to this
18 litigation. So they were well aware for over a
19 year of the potential of this claim coming. On
20 July 10th, 2003 Your Honor denied Morgan
21 Stanley's motion to stay discovery, and they knew
22 from that point, obviously, that this case was
23 going to be proceeding.

24 Document discovery in the case was
25 substantially completed by September 8th, 2003,

89

1 and that left Morgan Stanley with a full year in
2 which to conduct deposition discovery before the
3 September 3rd, 2004 cutoff.

16div-005856

4 Morgan Stanley in that one year's period of
5 time has taken a total of 11 depositions. We have
6 taken 29. They have taken 11. I've already
7 referenced the resources available to both the
8 Kirkland & Ellis and Carlton, Fields firms, and
9 they are obviously substantial. And I think that
10 that's a factor that The Court needs to take into
11 consideration. The excuse that Morgan Stanley
12 agreed to discovery -- the discovery schedule
13 before it knew it would be obliged to defend
14 against the contempt charges, as stated in the
15 graphic that was shown, there was a quote,
16 unexpected, unquote, contempt proceeding, doesn't
17 stand even if we find as an excuse that Mr. Bemis
18 personally didn't get the March 5th letter and
19 ignore the fact that, obviously, Mr. Yannucci did
20 get the March 5th letter prior to the agreement.

21 And the reason why it doesn't stand even in
22 light of Mr. Bemis's contention that he personally
23 didn't know is that Morgan Stanley confirmed that
24 agreement to the pretrial schedule in open court a
25 full week after receiving the motion for contempt.

1 That motion had already been filed when they came
2 before The Court and formally agreed to that
3 schedule. They knew what demands they were
4 facing. They have the resources to meet those
5 demands if they chose to apply those resources,
6 and they simply haven't diligently chosen to apply
7 those resources.

8 As of the filing of the motion, we had been
9 provided and The Court had been provided with no
10 indication as to what discovery they really needed
11 to take. Witnesses hadn't been identified. We
12 had a graphic up on the board here, and I would
13 certainly like a copy of that because I would like
14 to know what it is they intend to do. We
15 obviously didn't have time to take that all down.
16 And I would ask The Court to direct them to
17 provide us with a copy of that.

18 MR. BEMIS: We're going to file a copy as
19 part of the court reporter transcript so anyone
20 reviewing it knows what was shown to The Court.

21 THE COURT: Okay. Thank you.

22 MR. SCAROLA: The bottom line is, I don't
23 think that they have met the burden that they
24 ought to be obliged to meet in order to procure a
25 three-month continuance of the trial that they are

1 asking for.

2 Now, the other argument that they make is the
3 supposed inability of Kellogg Huber to participate
4 in this case, but, remember, that they have
5 repeatedly asserted to Your Honor that the reason
6 why Kellogg Huber was retained was in order to
7 cross examine Arthur Andersen witnesses at trial.

8 So the unavailability of Kellogg Huber,
9 particularly when very able co-counsel without a
10 conflict of interest has been involved in this
11 case from the very beginning and is certainly
12 capable of cross examining Arthur Andersen
13 witnesses if in fact some disability exists on the
14 part of the Kirkland firm, that just ought not to
15 play a role in Your Honor's decision as well.

16 This discovery can be completed in the three
17 months that remain. With the resources available
18 on both sides of this case, the discovery can be
19 completed if Your Honor tells us that it needs to
20 be completed. We certainly are prepared to do it.
21 We're prepared to devote whatever attorney
22 manpower is necessary, whatever attorney-person
23 power is necessary to get that job done. And they
24 ought to be obliged to do that as well.

1 to agree to a brief continuance, a delay of 30
2 days to give them an additional month to get the
3 job done if that's going to be of some help, but
4 we ought not to be pushed back into an April trial
5 date. One of the concerns that we have is there's
6 a different composition of the venire that exists
7 in April than exists in January and February in
8 this community. That is a concern of ours.

9 THE COURT: I appreciate your candor.

10 MR. SCAROLA: Well, I'm telling Your Honor
11 exactly what the truth is in that regard. That's
12 a factor we have taken into consideration in terms
13 of setting up this schedule. It's something that
14 we need to anticipate on behalf of our client, and
15 it's an important factor to us. We're not
16 opposing a continuance for arbitrary or capricious
17 reasons. This is an important case. Both sides
18 deserve ample time in which to get it prepared,
19 but we have been given ample time in which to get
20 it prepared.

21 THE COURT: I need you to address the

22 contempt because I do think --

23 MR. SCAROLA: As far as the contempt is
24 concerned, my position remains the same. If they
25 are willing to abbreviate the proceedings

93

1 necessary to enable us to get the discovery to
2 which we are entitled, we are prepared to go
3 forward with the contempt hearing at the very
4 earliest date that Your Honor chooses to give us
5 in light of whatever burden they are willing to
6 accept, but we ought not to be obliged to proceed
7 with the final hearing on the contempt without
8 getting at least the very basic discovery that we
9 have requested at this point. We're willing to
10 submit those issues to The Court on the basis of
11 the written pleadings that we have given you.
12 Obviously, they've resisted that for whatever
13 reason, but that ought not to interfere with our
14 ability to get our trial date.

15 Let me make sure that my co-counsel doesn't
16 wish me to add anything to that or have anything
17 else to say.

18 Okay. Thank you, Your Honor.

16div-005861

19 THE COURT: Okay.

20 MR. SCAROLA: Your Honor, there is one more
21 comment that I might make. They put up a whole
22 lot of names on that board, and, obviously, there
23 are some people whose names on that list we
24 recognize and acknowledge to be significant
25 witnesses. Mr. Perelman, for example, we wouldn't

94

1 argue that that's testimony that they'll obviously
2 want to have in advance of trial. But without any
3 showing whatsoever with regard to the significance
4 of the other names, it would clearly be improper,
5 I suggest, to grant a continuance of this case on
6 the basis of inability to depose people the
7 significance of whom has never been demonstrated
8 to this Court.

9 THE COURT: What did you want to respond?

10 MR. BEMIS: I'm a little bit surprised by the
11 venire argument since we started with a venire in
12 August. We suggested a venire in October. Now
13 January is appropriate, and now April is
14 inappropriate. I don't think that's an
15 appropriate decision point on the case.

16 With regard to -- if they want to move this
17 proceeding along and abbreviate the schedule, I'm
18 shocked that they won't agree with a special
19 master so that we can move the process forward
20 before a special master, which we think not only
21 is more expeditious, but we think it has some side
22 benefits of having a neutral party who is not a
23 decision-maker have to review these matters. And
24 there is precedent for that. We cited it in our
25 papers. I won't repeat it here.

95

1 The argument, you know, fundamentally is,
2 we've got a thousand lawyers, we haven't acted
3 promptly. I reject that argument. We cannot walk
4 down the hall, grab people out and say, take seven
5 boxes of documents, very complex financial
6 documents, very complex merger transactions and
7 run out and take a deposition for two days. It
8 does not work that way.

9 We are -- we have been from the outset, we in
10 the sense of Kirkland & Ellis, my client, me
11 probably more so because I got into the case so
12 late, we have been, I have been, other people have

16div-005863

13 been catching up, if you will, from the five years
14 that these gentlemen have been prosecuting two
15 lawsuits. They already did two of these. The
16 fact that we got hundreds of thousands of
17 documents in September doesn't mean we knew what
18 was in the documents, that we understood the
19 documents, that we've collated them. We got, I
20 believe it was 400 deposition transcripts in that
21 time period. I still haven't read all the 400,
22 and I'm not sure I'll ever get through all of them
23 before we get to trial.

24 We have been working at a breakneck pace, as
25 the calendars show. The facts speak for it. If

96

1 you disagree with me on that, you will. The fact
2 is we have, not 30 days left as Mr. Scarola
3 suggests, we've got 11 days left in August that
4 are open to do something. We can't get done.

5 The depositions that I put up there are
6 depositions they wrote us that they wanted to
7 take, that we have notified them that we want to
8 take. They have been identified in various
9 documents as key players. That's what's there.

16div-005864

10 Now, will every one of them get deposed? The
11 chances are there will be some that will drop out
12 for a host of reasons, whether it be illness.
13 We've got a key witness who has had cancer. We've
14 got a witness who's a director who's in the
15 hospital. It may be that we never get some of
16 those people in the end result. The fact is, if
17 you just look at what's already scheduled, there's
18 16 business days of pending material that we've
19 requested that we don't have. And this week alone
20 I think we had, I think it was four days
21 originally, or next week we have like four days of
22 depositions scheduled, and stuff is just moving
23 day by day with cancellation. We just need some
24 breathing space, and we need at the same time to
25 get the contempt done.

97

1 We don't want a stay of discovery. All we
2 want is to give us a moving date so that we can
3 complete the fact discovery while simultaneously
4 Your Honor deciding what is a fair date to set
5 this for a hearing. All of the discovery has been
6 answered at this point. Now, you entered your

16div-005865

7 order. We understand that, and we've got these
8 motions to compel. It's not like this is starting
9 from scratch. They filed that motion on March
10 12th with no evidence. It was improperly filed.
11 They should have filed it with proper evidence.
12 They had their time. We responded. Yes, we've
13 got disagreement. We don't have any agreement
14 with what they responded to us either. But we're
15 the ones being charged. We're entitled to a
16 hearing, and we respectfully request you do it as
17 promptly as you can in whatever procedure you
18 think is appropriate. Give us a date to work
19 against, and we'll be here with bells on to try
20 this case.

21 THE COURT: Let's talk about a couple things
22 in the time we have left. First of all, I would
23 agree this case is not going to be ready for trial
24 in January. I do think it could be ready in
25 March. I don't -- my JA is out today, and at the

98

1 case management conference if you come with your
2 schedules for March and also check your schedules
3 for the dates. On the things we have leading up

16div-005866

4 to the trial, we're probably going to want to
5 reset some of those so we can get those set at the
6 next case management conference. For instance, I
7 want to check on spring vacation. I don't want to
8 set it now and then discover we all have problems.
9 If we know March is what we're looking at -- we
10 still think it's 15 days?

11 MR. BEMIS: Based on a four-day trial
12 schedule, I still think that's probably correct.
13 I think you said you work four days a week?

14 THE COURT: Fifteen days is what I asked.

15 MR. BEMIS: Fifteen trial days, excuse me.
16 But you're still doing a four day a week trial?

17 THE COURT: Yes.

18 MR. BEMIS: We're looking at 15 days spread
19 over four weeks?

20 THE COURT: Four weeks, right. I'm still
21 concerned about the motion for contempt just
22 because I don't think we can arbitrarily set a
23 time for it to be heard now unless everybody
24 agrees because I just see these discovery issues
25 are going to take a while. I'm afraid if I set

1 aside a day, say, in September or October, we're
2 going to get to that day, and the discovery
3 disputes aren't going to be resolved by then.

4 MR. BEMIS: If you give us a date in
5 September, you can change it.

6 THE COURT: I can but then I have a day open
7 in my book.

8 MR. BEMIS: We're going to be here before
9 that date in September, but give us a date to work
10 against.

11 THE COURT: I understand that. I need a
12 better sense of how long that's all going to take.
13 Quite honestly, to the extent I have to do
14 in-camera inspections, I have to try to fit those
15 in the same way I'm trying to fit in the order on
16 the conflict of laws. I just can't commit now to
17 a date and say six weeks and know we're going to
18 have all those disputes done by then.

19 MR. BEMIS: Then can we have a special
20 master?

21 THE COURT: Only if they agree to bear the
22 cost and they told me they won't, which I can't
23 make them.

24 MR. BEMIS: You're right.

25 THE COURT: I understand this is something

1 that everybody wants done.

2 MR. SCAROLA: What I will represent to The
3 Court, Your Honor, is that we'll carefully
4 consider the special master issue. We'll see if
5 there is someone available who we feel comfortable
6 with and whether the cost issues involved can be
7 appropriately agreed to.

8 THE COURT: It only makes sense if it's
9 somebody you're both going to be comfortable with;
10 otherwise, you'll just file the objections anyway
11 and come back.

12 MR. BEMIS: I don't see how the cost issues
13 can be paramount in this case.

14 MR. SCAROLA: We won't write that off
15 entirely. We have serious reservations about it.
16 We're not prepared to agree to it at this time,
17 but we'll certainly give it further careful
18 consideration.

19 MR. BEMIS: Your Honor, thank you very much.

20 THE COURT: You all have a wonderful weekend.

21 MR. SCAROLA: Thank you. You do the same.

22 MR. IANNO: Thank you, Your Honor.

23 MR. BEMIS: Thank you.

24 (Thereupon, the foregoing proceedings were

C E R T I F I C A T E

THE STATE OF FLORIDA)
)
COUNTY OF PALM BEACH)

I, Cindy A. York, Registered Professional Reporter, do hereby certify that I was authorized to and did report the foregoing proceedings at the time and place herein stated, and that the foregoing is a true and correct transcription of my stenotype notes taken during said proceedings.

IN WITNESS WHEREOF, I have hereunto set my hand this 24th day of July 2004.

CINDY A. YORK
Registered Professional Reporter

IN THE FIFTEENTH JUDICIAL CIRCUIT COURT IN AND
FOR PALM BEACH COUNTY, FLORIDA
CASE NO.: 2003 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.

* * *

TRANSCRIPT OF THE PROCEEDINGS BEFORE
THE HONORABLE ELIZABETH J. MAASS

* * *

West Palm Beach, Florida
July 23rd, 2004
8:58 a.m. - 11:03 a.m.

APPEARANCES:

SEARCY, DENNEY, SCAROLA, BARNHART
& SHIPLEY, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33409
Counsel for the Plaintiff
BY: JACK SCAROLA, ESQUIRE

JENNER & BLOCK
One IBM Plaza
Chicago, IL 60611-7603
Co-Counsel for the Plaintiff
BY: JEROLD SOLOVY, ESQUIRE
JEFFREY SHAW, ESQUIRE
RONALD L. MARMER, ESQUIRE

CARLTON, FIELDS, WARD, EMMANUEL,
SMITH & CUTLER, P.A.
Esperante
222 Lakeview Avenue, Suite 1400
West Palm Beach, Florida 33401
Counsel for the Defendant
BY: JOSEPH IANNO, JR., ESQUIRE

KIRKLAND & ELLIS
655 15th Street N.W.
Suite 1200
Washington, D.C. 20005
Co-counsel for the Defendant
BY: LAWRENCE P. BEMIS, ESQUIRE
THOMAS A. CLARE, ESQUIRE

1 BE IT REMEMBERED that the foregoing
2 proceedings were had before the HONORABLE ELIZABETH J.
3 MAASS, in Chambers, in the Palm Beach County
4 Courthouse, West Palm Beach, Florida, on July 23rd,
5 2004, starting at 8:58 a.m., with appearances as
6 hereinabove noted, to wit:

7 * * *

8 THE COURT: Good morning. Have a seat.

9 MR. SCAROLA: We're seeing slides of the
10 vacation that Mr. Bemis missed.

11 THE COURT: Don't say that. I'm sure his
12 wife does not have a sense of humor about this.
13 Where do we want to start?

14 MR. SCAROLA: Tab 15, Your Honor, by
15 agreement.

16 THE COURT: Of which book?

17 MR. SCAROLA: The big thick one that doesn't
18 close very well.

19 THE COURT: The biggest one?

20 MR. SCAROLA: Yes, yes.

21 MR. IANNO: This is probably the reason we
22 needed the hearing procedures changed. That is
23 the updated binder with all the motions, responses
24 and case law in it.

25 THE COURT: And that's good. The only --

4

1 which is why we need it. I had already read the
2 first one. When I got the second one, I was
3 trying to figure out what was new. I think it's
4 good that we have an updated procedure.

5 MR. SCAROLA: Tab 15, Your Honor, is the
6 motion to strike the verifications of Michael
7 Hart.

8 And if I might address that motion briefly,
9 it arises out of the circumstance of Mr. Hart
10 having verified answers on behalf of Morgan
11 Stanley to four separate sets of interrogatories.
12 The form of verification is uniform with regard to
13 each of those interrogatories. You can find it
14 most easily by turning to tab 15-I, going one page
15 back, and you will see the verification form

16 there. Mr. Hart says, quote, I hereby declare
17 that the following answers are true and correct
18 upon the information and belief and to the best of
19 my knowledge. And it is signed by him under oath.

20 Based upon those verifications, Mr. Hart's
21 deposition was set, and he was deposed with regard
22 to the extent of his knowledge that these were
23 true and correct answers and that he had a belief
24 to the best of his knowledge that they were
25 accurate. What we discovered is that Mr. Hart

5

1 admitted that he did not have any personal
2 knowledge with regard to most of the facts. He
3 admitted that he could not remember what, if
4 anything, he had done to educate himself to verify
5 answers to interrogatories. And most incredibly,
6 he admitted that a number of material errors were
7 apparent upon even cursory review of the answers
8 that he verified.

9 And arising out of the receipt of that
10 information, we filed this motion to strike his
11 verifications. Now, upon further reflection, we
12 are modifying the relief that we are asking The

13 Court for in this case. We will not request that
14 The Court strike Mr. Hart's verifications. In
15 fact, we'll deal with the issues of credibility
16 that arise as a consequence of those verifications
17 and the issues with respect to the integrity of
18 this corporation in providing such responses at
19 trial.

20 But what we do need The Court to do in the
21 context of this motion is to clarify what the
22 obligations are of the parties in providing
23 verification of interrogatory answers because we
24 do anticipate that we'll be presenting to The
25 Court, either by agreement or by future motion, a

6

1 request or stipulation that there be a
2 supplemental update to all interrogatory answers
3 just prior to the close of discovery.

4 And we want to be able to rely upon the
5 accuracy and integrity of those responses. And
6 based upon the position that Morgan Stanley has
7 taken in responding to this motion to strike
8 Mr. Hart's verification, it is very obvious that
9 we have a serious disagreement with regard to the

10 obligations that a party has in verifying
11 interrogatory responses.
12 Let me first clarify that we have not taken
13 the position that an individual verifying answers
14 on behalf of a corporate entity must have personal
15 knowledge of all of the responses that are given,
16 but it is our position that there must be a
17 good-faith, well-founded, reasonably investigated
18 belief that the answers that are being provided
19 are in fact true, correct and complete on behalf
20 of the corporation.

21 Now, in support of their position, Morgan
22 Stanley cites the case of Shepherd versus American
23 Broadcasting Companies (phonetic). And they
24 accurately quote that case, which says that Rule
25 33(a) permits a representative of a corporate

7

1 party to verify the corporation's answers without
2 personal knowledge of every response by furnishing
3 such information as is available to the party.

4 And they stop right there.

5 What they failed to quote is the remainder of
6 that holding in the Shepherd versus American

7 Broadcasting case. The very next sentence is, of
8 course, the representative must have a basis for
9 signing the responses and for thereby stating on
10 behalf of the corporation that the responses are
11 accurate. And we clearly, if Your Honor has had
12 an opportunity to review the testimony of
13 Mr. Hart, have established that Mr. Hart had no
14 such basis, and he acknowledged that he had no
15 such basis. In some circumstances he didn't even
16 read these responses before he verified them.

17 If the discovery process is to have any
18 integrity whatsoever, we believe that The Court
19 must direct Morgan Stanley to provide
20 verifications that have some substantial meaning
21 that are based upon a well-founded belief that the
22 answers are indeed complete and accurate, that
23 there has been a reasonable investigation, that
24 the sources are believed to be reliable and that
25 there is as a consequence of that a good-faith

8

1 belief in the accuracy and integrity of the
2 responses that are being provided.

3 We ask for a lot of other things in the

4 motion. We ask for attorneys fees in addition to
5 striking these verifications. We ask for the
6 production of another corporate representative to
7 address the factual issues that arise. We'll take
8 care of that through other means, but we do
9 believe that it is appropriate in response to this
10 motion for The Court to clarify the obligation
11 that Morgan Stanley has and to tell them that the
12 next time they answer interrogatories, they better
13 answer them with a verification that in fact is
14 true and not a blatant misrepresentation.

15 THE COURT: First of all, I assume from what
16 you said when you said you were modifying the
17 relief sought and just asking for clarification on
18 what kind of verification was required, it goes
19 both ways.

20 MR. SCAROLA: Clearly, Your Honor.
21 Absolutely. We are not seeking to impose an
22 obligation on Morgan Stanley that we ourselves are
23 not prepared to live by. We just want The Court
24 to tell both parties what that verification means.

25 We've taken a very, very different position

1 with regard to what it is. We've provided
2 verifications that we believe meet those standards
3 that I have described and intend to continue to do
4 that regardless of what Your Honor's order may be
5 because that's what we think the rules require.
6 But we want that standard imposed upon the other
7 side as well.

8 THE COURT: Okay.

9 MR. IANNO: Judge, Joe Ianno. I'll be
10 responding to this motion.

11 Mr. Scarola just told me that that
12 modification was happening a few minutes before
13 this hearing at 9:00 this morning. What I think
14 he's asking for is an advisory opinion from this
15 Court that I think is improper.

16 THE COURT: That really was going to be one
17 of my questions. We have a couple things. Let's
18 back up and talk about where we want to go.

19 First of all, I agree we need interrogatory
20 answers that are complete and truthful for two
21 reasons. One, they bind the party, but, two, the
22 opposing party needs to be able to rely on the
23 answers themselves. So it strikes me that the
24 verification probably needs to be something that
25 is based on a personal, well-founded belief that

1 the answers are complete and truthful.

2 If we can reach agreement on the kind of
3 verification we need, I think that's fine. If
4 not, I would suspect what Mr. Scarola is going to
5 say is, fine, we'll go back to the motion, I'm
6 asking for any relief other than that you can
7 reverify it in a form we think is appropriate.

8 MR. SCAROLA: Almost, Your Honor. I don't
9 think that I am asking for something different
10 than what The Court is obliged to do in connection
11 with the relief that we have requested.

12 THE COURT: That's what I'm saying. It
13 would have to be confined to the single motion we
14 have unless we reach some sort of agreement on
15 some more global applications.

16 MR. SCAROLA: I agree. I think that once The
17 Court tells them with regard to these answers this
18 verification is improper, I would suspect it will
19 get proper verification.

20 THE COURT: We need to confine it to
21 just Mr. Hart's verification, or we can sort of
22 open it up and try to reach some sort of consensus
23 of what we think is appropriate for all the
24 interrogatories.

1 is blurring the line between procedure and
2 substance. There's nothing wrong with the form of
3 the verification Mr. Hart signed. What
4 Mr. Scarola is challenging is the substantive
5 deposition testimony, which we don't agree with
6 Mr. Scarola because that is an issue that I think
7 he has put his spin on it.

8 Those are issues that Mr. Scarola correctly
9 pointed out are credibility issues for trial.
10 There's no question that Morgan Stanley hasn't
11 taken the position that these interrogatories
12 responses are not binding on it. Mr. Scarola has
13 every right to rely on it.

14 The second point on that is, we are working
15 through a process of supplementing these
16 responses. If there's a different form of
17 verification required, then we can discuss it. I
18 don't think there's a question that the words that
19 are used in the interrogatory verification are
20 proper or acceptable. It's Mr. Hart -- their
21 argument is Mr. Hart didn't do what he said he did

22 there. And that's a different issue. I don't
23 think it's proper for today. After we supplement
24 and go through this process, they can come back
25 and challenge that at a later time. They can

12

1 challenge it through credibility at trial, through
2 cross examination or direction examination
3 depending on how they put their cause on.

4 I think what we're doing here today may be a
5 waste and we should be moving on, unless there is
6 an objection to the specific verification that was
7 used here.

8 THE COURT: Is there an objection to the
9 specific verification Mr. Hart signed?

10 MR. SCAROLA: No, Your Honor. We don't think
11 that the language is inadequate. We believe the
12 language is adequate.

13 The concern that we have is, that after
14 Mr. Hart has given testimony, which I suggest is
15 very clearly contradictory to the verification
16 that he has signed, Morgan Stanley comes in and
17 defends that and says that under these
18 circumstances that is adequate, that Mr. Hart can

19 sign these interrogatories without any
20 investigation, without reading responses, upon
21 reading them, acknowledging that there are clear
22 deficiencies in the response, and there's nothing
23 wrong with that. And That causes us great concern
24 because, if that's the attitude that they are
25 going to take in the preparation of future

13

1 verifications, we have no basis upon which to rely
2 upon those verifications.

3 THE COURT: Okay. Let's back up then. I
4 think -- I would agree the verification signed by
5 Mr. Hart is sufficient. I think the issues we're
6 faced with are what's the appropriate response if
7 one party thinks the answers to interrogatories
8 simply are incomplete. I can think of lots of
9 motions that can be filed but probably not this
10 one. Or what's the appropriate response if we
11 think a party -- not a party -- an individual has
12 verified something and violated his oath. And
13 that's a whole different thing that I didn't see
14 anybody brief today. Certainly we would need
15 Mr. Hart here if we thought we could reach that.

16 So I would deny the motion, but please
17 understand that I'm not saying that another motion
18 may not be well taken that raises the same sort
19 of what I think it is you're really complaining
20 about, which is incomplete or inaccurate answers
21 or somebody attesting to something that's at least
22 not true.

23 MR. SCAROLA: I think Your Honor has
24 described in your earlier comments what you
25 anticipate a verifying witness is verifying, and

14

1 we certainly intend to act upon that.

2 THE COURT: I think it's just sort of
3 intuitive. We all know what the purposes of
4 interrogatories are, and I think that's intuitive.

5 Where next?

6 MR. SCAROLA: Tabs 20 and 14 which address
7 the confidentiality designations.

8 THE COURT: Okay.

9 MR. SCAROLA: I might start with a brief
10 introductory comment with regard to the issues
11 raised by these motions, Your Honor.

12 As I assume The Court recognizes, with the

13 filing of the claims before Judge Miller against
14 Arthur Andersen, there is no longer any direct
15 confidentiality interest on the part of the CPH
16 and MAFCO that stands to be protected by continued
17 secrecy. The cat, their cat, is out of the bag.

18 And --

19 THE COURT: Which cat are we speaking of?
20 Are we talking about just the settlement agreement
21 or something else?

22 MR. SCAROLA: We're talking about the
23 settlement agreement.

24 THE COURT: Okay.

25 MR. SCAROLA: As far as the direct interest

15

1 of CPH and MAFCO in the confidentiality of the
2 settlement agreement, that cat is out of the bag.
3 Nonetheless, CPH and MAFCO have a contractual
4 obligation to protect the confidentiality interest
5 of Arthur Andersen in the terms of the settlement
6 agreement, and that is a contractual obligation
7 which we take very seriously. We must do what we
8 can to protect Arthur Andersen's interest in
9 confidentiality in the terms of that settlement

10 agreement, and these motions arise out of our
11 good-faith effort to fulfill that contract
12 obligation.

13 Now, that places us in a very unusual
14 position because we are here arguing to protect
15 Arthur Andersen's confidentiality obligations
16 while Arthur Andersen's counsel, Kirkland, is
17 arguing against protecting Arthur Andersen's
18 confidentiality obligations.

19 MR. BEMIS: Excuse me, Your Honor. I don't
20 represent Arthur Andersen in this proceeding.

21 THE COURT: I was going to say, I'm not sure
22 if -- if you're impugning the integrity of
23 Mr. Bemis, that's not how we do it. If you're
24 not, I'm not sure how it's relevant.

25 MR. SCAROLA: All right, Your Honor. Well, I

16

1 think it clearly is relevant because it
2 demonstrates the nature of the bona fides of the
3 arguments that are being made on the other side in
4 opposition to these motions, and I suggest that
5 there is something unusual going on here.

6 If we take a look at the specific provisions

7 that we seek to retain confidentiality of, they
8 appear after tab 20-A, page 13.

9 THE COURT: I'm not sure I'm looking at the
10 right thing.

11 MR. SCAROLA: Tab 20-A.

12 THE COURT: Okay.

13 MR. SCAROLA: Page 13, footnote nine.

14 THE COURT: Oh, I'm sorry.

15 MR. SCAROLA: We have highlighted in each of
16 the relevant documents where there's a
17 confidentiality challenge, the provisions that we
18 believe need to be retained as confidential. And
19 these all are in accord with the prior findings
20 that Your Honor has made and we believe simply an
21 extension of the earlier requests.

22 THE COURT: Okay.

23 MR. SCAROLA: The next is tab C, page five.

24 And, again, we've highlighted that language.

25 THE COURT: Page five.

17

1 MR. SCAROLA: Tab C, page five. And then tab

2 D.

3 THE COURT: Just the language, the settlement

4 agreement is very important to Andersen that it be
5 confidential, particularly the settlement?

6 MR. SCAROLA: Yes.

7 THE COURT: Just that language?

8 MR. SCAROLA: That's it.

9 THE COURT: Then -- I'm sorry. Where next?

10 MR. SCAROLA: Tab D, page 16. The page
11 number here is in the upper left-hand corner.

12 THE COURT: Okay.

13 MR. SCAROLA: The highlighted lines 24
14 and 25.

15 THE COURT: Okay.

16 MR. SCAROLA: Page 25, line six, seven,
17 eight, and 15 through 19.

18 THE COURT: Okay.

19 MR. SCAROLA: Page 26, lines 18 and 19. And
20 page 29, line 14.

21 THE COURT: Okay.

22 MR. SCAROLA: As I understand the position of
23 Morgan Stanley, they are not contesting the fact
24 that these requests are appropriate. They are
25 suggesting an all or nothing approach, and we are

1 obliged to resist an all or nothing approach. It
2 is our contractual obligation to point out to The
3 Court those portions of the record and pleadings
4 where there are references to matters which under
5 the terms of the settlement agreement we have a
6 contractual obligation to protect.

7 THE COURT: So I understand, the one we're
8 doing now is the motion to remove the confidential
9 designations?

10 MR. SCAROLA: That's correct, Your Honor.

11 THE COURT: Okay. What's the response?

12 MR. IANNO: Judge, what Mr. Scarola -- and we
13 point this out in our response, he fails to inform
14 The Court that these are oppositions or responses
15 to the motions filed by the plaintiffs in this
16 case which they themselves designated as
17 confidential.

18 First of all, Morgan Stanley was required to
19 designate its responses as confidential. We
20 didn't know what they were pointing to as
21 confidential in their motion. So what The Court
22 said with interrogatories a few moments ago that
23 the obligations are reciprocal, I don't think you
24 can impose upon one party to litigation
25 obligations that are different than the other

1 party. They chose to designate their motions as
2 confidential. They started the confidentiality
3 process down the road.

4 If you're going to remove confidential
5 designations, they should be removed from the
6 entirety of all the pleadings in this case that
7 are filed in the court record for the reasons we
8 set forth in our opposition papers.

9 The second point is, The Court I think had
10 some concerns as we were going through the
11 portions that Mr. Scarola said is, for instance,
12 on the last one he mentioned on page 29 of the
13 transcript, it's tab D, the only thing he says is
14 confidential is, said the amount of the
15 settlement. Well, I think that's in the court
16 record of the Coleman versus Arthur Andersen
17 litigation, and that there was a settlement, and
18 that it obviously settled for some amount. But he
19 doesn't designate the next portion where they talk
20 about terms of indemnity.

21 I think that Coleman is selectively using
22 this confidentiality order to protect interests
23 they feel is in their best interest against Morgan
24 Stanley. And I don't represent Arthur Andersen,

25 so I can be here arguing with total bona fides, as

20

1 Mr. Scarola points out, that none of this should
2 remain confidential, that what Mr. Scarola is
3 doing is trying to gain an unfair advantage for
4 Coleman in this case by designating certain
5 portions as confidential and protecting other
6 portions that are in their best interest. And I
7 think that's what The Court should encompass.

8 THE COURT: Okay. Is there anything other
9 than you think they're doing it selectively
10 improper about they're saying, sort of invoking
11 the portions of the confidentiality or that allows
12 one side or the other to comment as to how the
13 confidential designation be removed?

14 MR. IANNO: I don't think so, Your Honor.

15 THE COURT: Do we have any argument that the
16 things we just went through should somehow still
17 remain confidential?

18 MR. IANNO: I don't think any of the things
19 that Mr. Scarola just pointed out specifically are
20 confidential.

21 THE COURT: What you're telling me is you're

22 going to make a motion to remove a whole bunch of
23 other designations?

24 MR. IANNO: And we said that. To the extent
25 we've -- in our response we said that.

21

1 MR. BEMIS: We do have that prepared. We
2 didn't have time to get it filed for this hearing.
3 We just ran out of time with the shortness, but it
4 is coming. We are going to try to deal with that
5 issue.

6 MR. IANNO: There's a footnote in our
7 opposition to this particular motion at tab 20
8 that says, to the extent that we need to have the
9 confidentiality designation be removed from
10 Morgan -- Coleman's pleadings that are issued in
11 this case, the one's that Morgan Stanley responded
12 to, we asked The Court to do so.

13 I think it's the only fair and just thing to
14 do in this case, is, if they want the
15 confidentiality removed from Morgan Stanley's
16 pleadings, at the first instance they should
17 remove their own designation of confidentiality.
18 I think equity requires, for them to come in here

19 and request for relief, they have to come in with
20 clean hands to get the relief they're seeking in
21 this motion.

22 With regard to other pleadings that aren't at
23 issue in this motion, I think that has to be dealt
24 with separately, Your Honor. But for them to come
25 in and say, remove it from the opposition but not

22

1 from the moving papers is improper.

2 THE COURT: What's the response?

3 MR. SCAROLA: Your Honor, we've attempted in
4 good faith to identify those portions of these
5 documents which we believe we are contractually
6 obligated to protect. We are making our
7 good-faith effort to fulfill our contract
8 obligation.

9 THE COURT: Okay. I will grant the motion.
10 I'll be honest with you, and I think I've told you
11 before, my personal bias, when you choose to
12 litigate in a public forum, only the most
13 compelling of circumstances should allow the
14 parties to keep something private. I don't see a
15 lot of real compelling circumstances here from a

16 public policy perspective that would require
17 virtually anything with the settlement agreement
18 to be kept private.

19 Certainly, if you want to come in and ask to
20 have other designations removed, that's fine. So
21 it's without prejudice your right to come in and
22 say, hey, if this is coming out, all this other
23 stuff should be undesignated as well.

24 MR. IANNO: Is The Court ruling then that the
25 portions that Mr. Scarola designated are

23

1 confidential? I think that's the second part of
2 his motion or part of his motion. And my argument
3 was that the things he designated weren't even
4 confidential. So, if The Court is removing it,
5 The Court should remove the confidentiality
6 designations on everything.

7 THE COURT: On just the ones we went through,
8 the ones included in his motion.

9 MR. IANNO: Correct. I don't believe those
10 were confidential.

11 THE COURT: But they were designated
12 confidential, correct? I just want to make sure I

13 understand where we are.

14 MR. SCAROLA: The entire pleadings were
15 designated confidential. The portions that I have
16 indicated to Your Honor are those portions, the
17 only portions, which we believe need to remain
18 confidential. Our request is that only those
19 portions be retained as confidential.

20 THE COURT: Okay. That's fine.

21 MR. SCAROLA: Your Honor, the next motion
22 appears at tab 14.

23 THE COURT: Okay.

24 MR. SCAROLA: And it addresses a reference to
25 indemnification provisions that appear in The

24

1 Court's order of July 12, 2004 at page three,
2 lines four and seven.

3 THE COURT: Okay.

4 MR. SCAROLA: And we are requesting that that
5 very limited reference be redacted from the copy
6 of the court order that appears in the public
7 court file.

8 There was a response filed by Morgan Stanley
9 that points out that there is a similar reference

10 in the May 14, 2004 order which, quite frankly, we
11 had overlooked, at page two, line 12 and page two,
12 line 16. And we believe it would be appropriate
13 and consistent with The Court's earlier orders if
14 those references also be redacted from the public
15 record.

16 And Morgan Stanley has pointed out that the
17 clerk of the court has failed to follow The
18 Court's earlier direction to place the redacted
19 copy of the settlement agreement under seal, and
20 we agree that it would be appropriate to remind
21 the clerk of its obligation to follow The Court's
22 earlier order.

23 THE COURT: Okay. What's the response?

24 MR. IANNO: Judge, we filed a formal response
25 that I want to incorporate, but my point that I

25

1 just want to make to The Court is, this is The
2 Court's order. You write your own orders. I'm
3 sure there was a reason to do that.

4 As far as the specific words that are used,
5 the only point I'll make in addition to what
6 Mr. Scarola said, indemnification is one of those

7 few things that's recognized in the rules of civil
8 procedure that is expressly discoverable. There's
9 nothing confidential about those indemnity
10 agreements. It's just like an insurance policy.

11 Short of that, this we'll leave entirely to
12 the judgment of The Court on what you would like
13 to do with this motion.

14 THE COURT: As I understand it, this is just
15 your attempt to abide by your contractual
16 agreement with Arthur Andersen?

17 MR. SCAROLA: Yes, Your Honor.

18 THE COURT: Okay. I would deny it. As I
19 say, I have a strong bias in favor of making
20 everything public. I don't see any reason why
21 this shouldn't be public.

22 Okay. Where next?

23 MR. SCAROLA: Your Honor, there was an ore
24 tenus request to remind the clerk.

25 THE COURT: Yes. And that's agreed?

26

1 MR. IANNO: Your Honor, that was your ruling.
2 We don't think that, obviously, the settlement
3 agreement should remain confidential, but, once

4 again, that was The Court's ruling, so I don't
5 know if it's agreed to, but I think --

6 THE COURT: Do you know what docket entry
7 we're talking about?

8 MR. SCAROLA: I don't, Your Honor.

9 MR. IANNO: I can tell you the date of it.
10 It was December 18th of '03.

11 THE COURT: That was my order?

12 MR. IANNO: I don't know if that's your
13 order, Your Honor, but that's where the settlement
14 agreement appears in the court record. I think
15 it's your order. Your order was, like --
16 Mr. Scarola, correct me if I'm wrong -- about ten
17 days before that.

18 MR. SCAROLA: I'm sorry. I just don't
19 remember with any --

20 MR. IANNO: For some reason, there was a
21 delay between the date of The Court's order and
22 the clerk's filing of the papers in the case.

23 THE COURT: Probably because we generally
24 hold them to see if anybody is going to seek
25 something and we don't want to hunt them down.

1 MR. IANNO: This particular one, I think The
2 Court had provided in the order that there was a
3 certain time period.

4 THE COURT: Right, to request copies.

5 MR. IANNO: Yes.

6 THE COURT: Let me see what I can find it
7 real quick.

8 Can you ask Mary Ann if she can get the file
9 that includes 180 in this case?

10 Okay. Where to next?

11 MR. SCAROLA: Your Honor, next is tab three,
12 and that's a defense motion to extend the
13 discovery cutoff to set the motion for contempt
14 for hearing.

15 And before we get into the merits of that
16 motion, in order for us to make some assessment as
17 to what our position with regard to this motion
18 will be, we would like some guidance from The
19 Court. Obviously, a three-month discovery
20 extension that as a consequence of Your Honor's
21 trial calendar results in a six-month or year-long
22 delay in getting this case to trial is an entirely
23 different animal than an extension that results in
24 a one-month delay of the trial.

25 So, for us to be able to respond to this

1 motion and know how much there is to argue about,
2 if anything, it would help us to know, if there is
3 some extension of fact discovery, what the
4 potential implications are in terms of the
5 resetting of trial based upon what the rest of
6 Your Honor's trial calendar is.

7 THE COURT: Okay. I mean, some of these all
8 go together. Maybe we need just to have a frank
9 discussion about how you see everything fitting
10 together.

11 MR. BEMIS: And I would like to address that,
12 if I could, Your Honor, giving that is our motion.
13 And I hope to put all of those pieces together for
14 you because I think some procedural guidance from
15 The Court given the complexity as the case has
16 spun itself out since February would be immensely
17 helpful to all parties.

18 THE COURT: And I can -- let me give you sort
19 of my thumbnail sketch before you guys address it
20 because you can easily change my mind. I can tell
21 you some of the things that concern me about the
22 case.

23 First of all, to answer the question that you
24 directly raised, which was, if we extended

1 than a February '05 -- I mean, a January '05 court
2 date. And the answer is no. If this was an
3 ordinary case and it was noticed for trial today,
4 you would get a court setting of October of this
5 year for trial. So, if you extend discovery in
6 this and that means you're not going to be ready
7 to go in January, you're going to go in February,
8 March, April or May or whenever you guys are
9 actually ready. It doesn't mean that you get
10 blown off to some docket that's a year later.

11 How the merits discovery interacts with the
12 contempt discovery, I think we need to spend some
13 time talking about. I do have some concerns that
14 the contempt discovery is becoming the tail that's
15 wagging the dog. While I understand the
16 importance of the issue to plaintiffs, it strikes
17 me that some of these things, although I
18 understand your client's not a party to it, are
19 going to maybe better bedded in the other case. I
20 mean, if the claim truly lacks any merit,
21 presumably that eventually is going to be

22 addressed in that case. There's going to be some
23 sort of appropriate sanction, and that may affect
24 what's appropriate for us to do.

25 On the other hand, if the claim of Morgan

30

1 Stanley gets bedded in that case and it turns out
2 it did have merit, that may affect what's
3 appropriate here. I do want to discuss how all
4 these things interrelate, but I don't want to let
5 the contempt overwhelm the case itself.

6 MR. BEMIS: May I address this issue?

7 THE COURT: Sure.

8 MR. BEMIS: May I use the podium?

9 THE COURT: However you're more comfortable
10 is fine.

11 MR. BEMIS: In Los Angeles, Your Honor, we're
12 powerless without something to show to someone
13 else.

14 Your Honor, the relief that we've requested
15 here is first and foremost to schedule a prompt
16 resolution of the contempt issues. And that
17 involves probably three sub-issues. I'll address
18 each one separately. As an overview, we need a

19 close of discovery or an idea of when a close of
20 discovery should take place on the contempt issue.

21 We need an idea and hopefully a date for an
22 evidentiary hearing on the contempt issue.

23 Given the most recent allegations that -- of
24 crime and fraud, which is personally now directed
25 to the attorneys, we need some resolution of that.

31

1 The way that we suggest that this be accomplished
2 is that there be a continuation of the merits
3 discovery until the contempt issues are decided.

4 Now, by that I don't mean a stay. I just mean we
5 can do both, but we're going to have to have some
6 accommodations. We cannot be two places at once
7 on occasion. If we're bogged down in hearings
8 here -- and bogged down, I didn't mean it in a
9 pejorative sense.

10 THE COURT: We know you love to come here.

11 MR. BEMIS: Your Honor, I lived here for many
12 years. I love coming here, but that's not the
13 issue.

14 The issue is it takes days to prepare for
15 these hearings. We have very short briefing

16 schedules, and we usually end up getting the
17 motions on Thursday or Friday. We're trying to
18 get some relief from that, but still five motions
19 to respond to in three or four business days and
20 get the materials to your court is a difficult,
21 time-consuming task.

22 What we're suggesting is some type of
23 scheduling, and I'll get to more details on that,
24 and then a simple reset of the pretrial deadlines
25 which I think is a relatively simple task. We

32

1 sequenced out what needs to be done, but they all
2 trigger off of the close of merits discovery,
3 which we worked back from, as you may recall, from
4 the trial date. We got a trial date, and we went
5 then backwards from that after arguing.

6 I don't believe, in light of Your Honor's
7 comments plus just the facts of the case, that
8 there would be any substantial prejudice to either
9 of the parties for a short extension in setting
10 this contempt for hearing. After all, these
11 claims arose in 1998. They were not filed until
12 five years later in 2003. The damages that are

13 being sought on both sides are extraordinary.

14 The contempt issues are being pressed by CPH.

15 Having raised the issue, we're entitled to defend

16 ourselves. Now that they are challenging the

17 integrity of the lawyers in this case, we're

18 entitled to defend ourselves, we think, as well.

19 By way of overview -- there we go -- we do

20 have a current pretrial schedule, which I'm going

21 to address, and I want to point out what dates

22 affect The Court.

23 Second, I want to try to summarize for you

24 what we've done since February 20th on merits

25 discovery and what's happened on the contempt,

33

1 whether it's the dog or the tail that's driving

2 this proceeding. I want to outline for you what

3 we have identified that remains to be done,

4 hopefully in a nonargumentative fashion, raising

5 what both sides are running into scheduling-wise,

6 and then hopefully to present you with a schedule.

7 Let me spend a minute on some of the history

8 of this, just bring us up. I won't spend much

9 time on it. Let me go back to the February 20th

10 scheduling conference of 2004. At that time I
11 think I've told you before, and I keep falling
12 back on this, my knowledge of the case was about
13 14 days old. We thought or I thought at that time
14 that it would be a very aggressive schedule to set
15 us for February 25th for a trial. That was based
16 on whatever review I had been capable of
17 conducting of the background of the pleadings and
18 indexes and what have you. There was a proposal
19 for an August 2004 trial date. Your Honor said
20 January 18th. We then worked backwards from that
21 date.

22 I said at the time, and I believe that I was
23 accurate, that that was an aggressive schedule.
24 And given my calendar and how many hours I've
25 worked since then, I know it was an aggressive

34

1 schedule. And that was without the contempt
2 proceeding. And that proceeding, frankly, has
3 dominated the last four months.

4 Now, it is true that we did submit to The
5 Court on March the 12th, I believe, a negotiated
6 schedule, and I agreed to it. However, when I

7 agreed to that schedule, which was negotiated at
8 the February 20th conference in the early weeks of
9 March, it was really based -- not really. It was
10 in fact based on multiple letters and conferences
11 with counsel conducted in good faith I think on
12 both sides, my own suggestion that we alternate
13 weeks in depositions, that we have case management
14 conferences so we can try to remove things from
15 the 8:45 call. And we eventually on March 11th
16 did agree to a resolution, if you will, of some
17 few minor details. And, indeed, I was sitting on
18 the runway at Miami International on the airplane
19 on the telephone wrapping up the final details so
20 I was leaving for my 35th wedding anniversary
21 vacation.

22 We thought at that time that we had a
23 schedule, but at the moment that was agreed to
24 when I left, I did not know the motion for
25 contempt was going to be filed the following day.

35

1 It wasn't disclosed to us at that time. And I
2 don't want to revisit that other than to tell you
3 that that's the fact of how the schedule came

4 about because, had I known it was coming, I'm not
5 sure that I would have agreed to the schedule.

6 THE COURT: You weren't privy to that at the
7 March 5th letter?

8 MR. BEMIS: I was not. In all candor, Your
9 Honor, what happened was, the letter was sent to
10 Mr. Yannucci, who was out of his office. The
11 letter never reached Mr. Clare or me at the time.
12 We simply didn't know about it. They sent it. I
13 don't deny they sent it. We didn't get it. It's
14 one of those things that sometimes happens. We
15 did ask whether any additional motions were
16 coming. We were simply told, we can't talk about
17 it. That's water over the dam at this point. It
18 happened. The contempt motion was filed.

19 And we now have, of course, then set a very
20 aggressive schedule. This is a little bit hard
21 for The Court to see, but this is the current
22 pretrial schedule. And I've deleted the things
23 that we have completed. The red boxes, Your
24 Honor, are matters that involve directly The
25 Court's calendar. They don't necessary -- the

1 others are all matters that the lawyers must
2 attend to on their own.

3 We have, in addition to the items -- and we
4 have quite a few depositions to complete, which
5 I'll identify. And we have, on top of that we
6 have quite a few items that -- items we still need
7 to schedule. In addition to what I just showed
8 you, we need to deal with the close of the
9 contempt discovery which includes motions which
10 are pending, potential appeals of issues with
11 regard to that, evidentiary hearings on the motion
12 for contempt. We have motions to amend the
13 pleadings and motions regarding punitive damages.
14 All of that is not yet really firmly set into the
15 schedule.

16 What have we accomplished since the February
17 20th conference? Well, we have completed, I
18 believe, 22 -- 22 depositions. This is what we've
19 completed. Now, obviously, the names are probably
20 less significant to you than they are just to let
21 you know that we've been very busy. To complicate
22 matters, everything is outside of Florida. It's
23 not like we can set up a war room down here and
24 have all of our --

25 THE COURT: You've got that? Thank you very

1 much. I'm sorry. Go ahead.

2 MR. BEMIS: It's not that we can set up war
3 rooms of exhibits and document repositories. We
4 end up having to move usually seven to eight boxes
5 of materials to these different cities by Federal
6 Express the day before, take them out, get them
7 back, reorganize and what have you. So it's a
8 complex process, and both sides have been, I
9 think, diligently taking depositions. I think 23
10 have been taken, and I've identified about ten --
11 not about -- ten that we've taken and 13 that CPH
12 has taken.

13 Now, this is only the tip of the iceberg
14 because, in addition to trying to take
15 depositions, we have numerous situations where
16 witnesses simply aren't available after they are
17 scheduled. For example, here's a letter that we
18 received from counsel from Jenner & Block telling
19 us that a deposition that we had scheduled during
20 our allocated week right on the verge of
21 deposition can't be taken. We didn't quarrel with
22 it. We didn't file a motion to compel. We said,
23 okay, we'll have to reschedule. Well, we don't
24 get when we do that an alternative date. It's

1 schedule, and we can't replace it.

2 This one, I had actually flown to Washington
3 to fly to New York, and I got stuck there, and I
4 couldn't take the depo. Well, that's not the only
5 one. We've got another one on May 21 for Mr.
6 Schwartz, unavoidable conflicts, no explanation.
7 I don't quarrel with the explanation. That's not
8 my point today. He just didn't make it. We
9 didn't get a substitute. Here's another one.

10 They cancelled Mr. Robinson the following week.

11 Again, I don't quarrel with the reason. He just
12 doesn't show. I can't go. I'm already in
13 Washington. I've lost three days dealing with
14 this. Mr. Spoor, again, July 16th, he's
15 cancelled.

16 Morgan Stanley has had to do the same thing.
17 We've had several instances where we've had to
18 cancel depositions. I don't want to make it sound like
19 it's a one-side affair. It's not. I would argue
20 we've had more problems than they've had, but it's
21 still happening on both sides. And here's another

22 one where we recently had to do the same thing, a
23 couple of examples where we've had try to
24 reschedule and get people different dates.
25 What do we have outstanding at this point?

39

1 These are depositions we currently have scheduled.
2 I'm going to get to what we can accomplish in
3 August. This is just what has been requested, but
4 we don't have scheduled. I misspoke. This is
5 what has been requested. Here's the dates we
6 requested them. Some of these are very important
7 people. For example, Mr. Perelman, we've
8 requested his deposition. We don't have a date
9 for him. He's very last on the list.
10 Mr. Marher, those are some of the key players.
11 Those depositions in deposition will take two
12 days, counting travel, add the time up, back and
13 forth. They all have to be taken in New York.
14 It's not going to be in Florida. I want to remind
15 The Court, because these are there, we cannot
16 subpoena these people for trial. We either get
17 them one time, or we don't get them at all. We
18 only have that one opportunity to get them.

19 We think -- in addition to this, we have
20 what's been taken, what's now being requested. We
21 have accomplished a lot. We've resolved eleven
22 discovery motions since February. We've had five
23 in-person hearings here. We've done seven more
24 sets of written discovery, and we fully briefed
25 and argued the choice of law motion on time. It's

40

1 now pending before The Court.

2 The case management conferences are taking an
3 awful amount of time. Awful in the sense of --

4 THE COURT: A large amount.

5 MR. BEMIS: That's a much better selection of
6 words.

7 When I suggested case management conferences,
8 it was because I saw in my review of the pleadings
9 and the transcripts that there were a lot of 8:45
10 hearings that were requiring people to travel. I
11 think two days of travel for an 8:45, a short
12 hearing, which was economically wasteful, I
13 thought not an efficient use of time. I thought,
14 if we could aggregate these in a single hearing,
15 we might make some more progress.

16 That really hasn't happened. What has
17 happened is, we're getting very substantial
18 proceedings being noticed in this case at the
19 conferences. They're being done, as you heard on
20 the scheduling issues, a week in advance with
21 three to four business days to get materials to
22 The Court. That's a schedule that's worse than
23 Bush versus Gore in the Supreme Court.

24 THE COURT: I hope the order we gave will
25 help with that.

41

1 MR. BEMIS: I hope so. That explains what's
2 happened in the past. Going forward hopefully
3 we'll get some relief from this.

4 Even, again, with all of the challenges that
5 we've done, we have accomplished I think a great
6 deal. May I hand this up to The Court? It's kind
7 of a summary you might want to look at.

8 THE COURT: Have you shared it with the other
9 gentlemen?

10 MR. BEMIS: Of course, of course. This is
11 just a summary, Your Honor, of what we've been
12 doing by depositions and hearings and the dates

13 blocked out on calendars. It's not something that
14 you need to read through right now, but you might
15 want to look at it if you take this matter under
16 advisement.

17 We have much left to be done and not a lot of
18 time to do it in. We have -- if I can get to the
19 next slide here -- these are the depositions that
20 remain to be -- remain to be completed. We tried
21 to summarize them for you. Some of the requests
22 are out for these. Some we're working on
23 scheduling. Some are nonparty. Some are parties.
24 These people are on vacations. People are sick.
25 The way we've been doing this is, we're not

42

1 noticing. I know originally parties noticed
2 depositions, and then they argued about whether
3 they could get them done. I think that the
4 parties reached a good-faith accommodation, tell
5 us who you want to take, give us some dates, and
6 then we're renoticing them. And that's the
7 process that's being followed.

8 So these are the people that I believe are
9 going to be deposed. I've gone through our list,

10 and I think our list is relatively accurate of
11 what we're going to need. Whether they take all
12 that they originally told us about is a matter
13 they'll decide.

14 We've concluded, just looking at this, not
15 including travel time, we've got 43 business days
16 of occupied time that we have to deal with.

17 Twenty-eight of these are nonparty, so we don't
18 control them in the sense that we can make them
19 appear. Some require subpoenas all outside of the
20 jurisdiction of Florida, so we have to go get
21 commission orders, et cetera. Very time
22 consuming.

23 July and August are very difficult months to
24 schedule things because of vacations. We talked
25 about that in February. We thought that was going

43

1 to be a problem. We've got some witnesses who
2 have medical problems, and we've got three
3 witnesses that are in Europe. We're going to have
4 to go to London. And there's one that we think
5 we're going to have to go to Paris. I know this
6 sounds like hardship duty, but, you know, somebody

7 is going to have to go, and it's going to take a
8 couple days to get it done. And they're important
9 people.

10 August, on top of that, if we look at the
11 calendar we have for August, the blue tells you
12 what we've occupied, we're already booked in
13 August. We've only got I think --

14 THE COURT: I'm afraid we're not going to
15 have time for the other motions we have, which are
16 substantive if you take real long on this.

17 Cut to the bottom line. How much additional
18 time are you asking for on the merits?

19 MR. BEMIS: I think that what we need on the
20 merits -- I don't know precisely. What I'm
21 thinking is 90 days is a number that we could work
22 with, depending on what you do with the contempt
23 proceeding. I think the contempt proceeding has
24 to be set first. I'm not saying we won't work
25 with the rest, but if the contempt proceeding --

44

1 THE COURT: Why does the contempt have to be
2 set first?

3 MR. BEMIS: I think because of the relief

4 that they're -- first of all, it is a diversion
5 that is interfering with our ability to take care
6 of the merits. That's number one. Number two is,
7 the extraordinary relief that they are requesting,
8 including disqualification of Kirkland & Ellis, is
9 a very significant matter. We have invested -- my
10 clients have invested -- I say we. My client has
11 invested in their counsel. We have learned the
12 case. We have managed the documents. If we are
13 disqualified in any fashion from this case, it
14 will impact the ability of any counsel to be ready
15 for trial at any date.

16 Plus, I think just overriding fairness, these
17 allegations need to be resolved. It escalates
18 every hearing. We have gone from an improper
19 disclosure to most recently at the last hearing
20 just a mere reference to a crime and fraud to the
21 most recent papers asserting a crime and fraud
22 with an allegation now that the attorneys are
23 involved in the crime and fraud. Those are
24 serious allegations, and they need to be
25 addressed. We want them addressed. We want the

1 air cleared on it so that we can proceed.

2 Again, I'm not asking for a stay of
3 discovery. I thought about it, but I'm not. I
4 think we can probably proceed with the merits
5 discovery. It's going to interfere with the
6 merits discovery, maybe a day where I can't be two
7 places at once. I'm thinking 90 days, give us 90
8 days, at least on the close of fact discovery.

9 That puts us well within the Rules of Judicial
10 Administration, I believe, for a case of this
11 complexity, which I think is -- 18 months I think
12 is the standard under Florida law for cases like
13 this. We'll be a little bit over but not by very
14 much.

15 At some point in between that 90 days, Your
16 Honor, based on your calendar and your judgments,
17 tell us when the hearing is. Let's get ready for
18 the hearing. It's their motion. They have to go
19 first. If on top of the contempt they are going
20 to assert crime fraud, we need to know that. And
21 I need to know for very specific procedures I'm
22 going to address not now but on the other motion
23 of how that has to be handled. They are not in
24 the procedures that are being followed right now.
25 It's not fair for them to put -- in our view, for

1 those allegations to be made in open court and not
2 follow the proper procedures and give us our
3 rights to defend.

4 THE COURT: Backing into it, some of this
5 really jumps to the next motion. If you're
6 suggesting a 90-day delay in the time deadlines
7 for the underlying case, what are you suggesting
8 as deadlines for the resolution of the contempt
9 proceedings?

10 MR. BEMIS: I think I would pick a date. I
11 would pick a date first and work backwards. A
12 hearing date, what is a hearing date. I think you
13 should be able to set a hearing date within the
14 next 30 days.

15 THE COURT: But how -- that wouldn't even
16 give us time to resolve all the outstanding
17 discovery.

18 MR. BEMIS: I'm not sure, Your Honor, that
19 we'll get all of the outstanding discovery issues
20 resolved within 30 days. I don't know because I
21 don't know what you're going to do with them.

22 THE COURT: I can't believe we can get the
23 underlying discovery disputes on the contempt
24 proceeding resolved and what I permitted to be

1 days. It doesn't make any sense, particularly
2 since we already -- I already articulated my
3 belief that how Morgan Stanley believes it was
4 damaged by Arthur Andersen is something that needs
5 to be bedded for purposes of the contempt. I
6 gather from what I've read that that's not an easy
7 answer, and you guys aren't prepared to answer
8 that right now.

9 MR. BEMIS: Well, you've issued an order on
10 that. Our response is currently due on August
11 2nd.

12 THE COURT: Right.

13 MR. BEMIS: I'm not prepared to tell you as I
14 stand here today given the shortness of time that
15 I've had to assess it precisely how that's going
16 to be answered. I can't tell you at this point
17 whether we're going to take an appeal of it by
18 writ of certiorari, and some of that may depend on
19 what happens later on this morning.

20 I still think that, while 30 days may sound
21 aggressive, they filed the motion. Normally the

22 motion would have been filed when they had a
23 factual basis for the motion. We would have
24 answered it.

25 THE COURT: Not necessarily because the

48

1 discovery is not relevant necessarily directly to
2 the issues in this case. I'm not sure that's
3 fair.

4 MR. BEMIS: Well, then we have a disagreement
5 on that, and I won't belabor the point. I believe
6 the process is as I articulated it at the April
7 30th hearing. They should have filed a motion.
8 We would have answered the motion appropriately
9 with denials. They would have been put to their
10 proof of the date, and they were not. This was
11 not to be a preliminary hearing on whether we
12 should -- that issue you ruled on, and I'm not
13 trying to reargue it.

14 THE COURT: As I understand it, what you're
15 suggesting is a 90-day delay on the underlying
16 action and that the motion for contempt to be
17 heard within 30 days.

18 MR. BEMIS: Or such other period of time that

19 you think is reasonable within the 90-day period.
20 We may have to revisit the 90 days depending on
21 what you do with the contempt proceedings.
22 There's no way to predict how this is going to
23 eventually resolve itself until we get farther
24 down the trail. You also need to tell us, are you
25 going to allow them to proceed on crime fraud as

49

1 they allege because there are very specific
2 procedures.

3 THE COURT: I read your memo. It sort of
4 goes on. Some of the motions we still have left.

5 But, Mr. Scarola, just so we can try to
6 narrow the discussion some, what's your response
7 first to the request that the underlying action be
8 continued 90 days, the pretrial deadline be
9 extended in order to allow discovery?

10 MR. SCAROLA: Ninety days is too long. We
11 are willing to agree to a shorter extension.

12 THE COURT: What would that be?

13 MR. SCAROLA: We think that 30 days might be
14 appropriate. I would be happy to discuss the
15 details why.

16 And with regard to the contempt motion, we
17 would love to have the contempt motion disposed of
18 within the next 30 days, Your Honor, but I think
19 Your Honor's observations are very accurate in
20 that regard. I don't know how we can possibly
21 complete the necessary discovery in order to have
22 that hearing in 30 days, particularly if Morgan
23 Stanley continues to insist upon providing
24 unresponsive answers, asserting privileges that
25 have already been overruled by The Court and

50

1 insisting upon the full time for compliance under
2 the rules with regard to all of their responses.

3 If they agree to an abbreviated schedule and
4 The Court has the time to hear the motions
5 necessary to address legal issues that they
6 raised, we'll devote the resources necessary to
7 get that contempt proceeding done within 30 days,
8 but that's going to impose a significant burden on
9 them that I hear they're incapable of meeting;
10 although, it's difficult for me to understand
11 that, and I'll address that when I have an
12 opportunity to address these issues more broadly.

13 If they want to do it, they need to
14 understand that they're assuming very significant
15 obligations which are going to include an
16 abbreviated, a drastically abbreviated schedule
17 with regard to the resolution of all outstanding
18 discovery issues.

19 MR. BEMIS: All outstanding discovery has
20 been answered with the exception of the motions to
21 compel. There's no outstanding discovery. We've
22 answered. I'm not saying everybody like the
23 answers. And I understand that you have an order
24 we responded to on August 2nd and that there's a
25 motion today, but all the discovery has been

51

1 responded to by both sides. So that at least is
2 behind us.

3 THE COURT: I would rather go through the
4 rest of the motions now because how those turn out
5 I think in a lot of sense is going to affect the
6 timing on these other issues.

7 MR. SCAROLA: We suggest, Your Honor, that
8 the --

9 THE COURT: Yes, Mr. Scarola.

10 MR. SCAROLA: We suggest that the
11 consideration of the contempt issues really ought
12 not to influence what The Court determines with
13 regard to how we are going to proceed with the
14 trial.

15 THE COURT: I understand that would be your
16 position. I also understand as a practical matter
17 the timing of the resolution and the timing of the
18 discovery disputes and the contempt have a very
19 practical effect on the time available to work on
20 the underlying case. So I understand your client
21 would disagree, but I don't think you can bring a
22 substantive motion that does require attention and
23 discovery and then suggest it doesn't have an
24 effect on the timing on the remainder of the case.

25 MR. SCAROLA: I'm not suggesting that it

52

1 doesn't have an impact on the resources necessary
2 to be devoted to this case, but we really need to
3 consider the context in which this is occurring.
4 Kirkland & Ellis is a 1,000-lawyer firm, and the
5 litigation chairman of that firm is involved in
6 this lawsuit. Carlton, Fields is a 200-lawyer

7 firm. That's 1,200 lawyers available to devote
8 resources necessary to get this case done and to
9 meet the commitment that they made.

10 THE COURT: They probably don't want to have
11 to educate everyone on this case.

12 MR. SCAROLA: I understand that.

13 THE COURT: And I understand you disagree. I
14 think, in all honesty, I want a better sense of
15 where we're going with the contempt. That's going
16 to give me a better idea for the contempt and the
17 underlying litigation.

18 MR. BEMIS: I have a bad tendency to
19 interrupt. I apologize.

20 THE COURT: I do, too.

21 MR. BEMIS: On the contempt issue, there's
22 two ways we can proceed with this. They are the
23 movant on this. We have a, if you will, a cross
24 motion on the issue.

25 THE COURT: On what issue?

53

1 MR. BEMIS: It relates to the scope of the
2 waiver issues and how it interfaces with the new
3 allegations that are made. I suggest that we

4 address the broad issues before we go 20 --
5 there's 20 subparagraphs.

6 THE COURT: I know there are.

7 MR. BEMIS: Twenty subparagraphs. I suggest
8 that we address the broad issues of the privilege
9 and the crime fraud, what we're going to do with
10 those issues, and the sham pleadings because they
11 permeate the objections. For example, there are
12 21 --

13 MR. SCAROLA: I'm sorry to interrupt, but
14 this is our motion, and I may be able to narrow
15 the issues significantly if I'm permitted to
16 address it first.

17 MR. BEMIS: If I may just finish, and then I
18 will sit down. May I finish, Your Honor?

19 THE COURT: Yes, go ahead.

20 MR. BEMIS: There are like -- not like.
21 There are 21 cut and pasted objections which are
22 identical. We can speed some of that up by
23 addressing them if they are --

24 THE COURT: Sure. Or we can just do them in
25 order. And once I've ruled on one, you can

1 probably figure I'll rule the same way on the
2 other ones.

3 MR. BEMIS: And that is possible. I thought
4 about that process, and I respectfully do think
5 that the most expeditious way is to address the
6 structure of what they've challenged because
7 there's three things they have. One is that it's
8 a sham pleading. Number two, that crime and fraud
9 applies. And number three, that there is a
10 waiver.

11 Now, we did get your order on July 12 or
12 shortly after that. It raises substantial
13 constitutional issues. If Your Honor adheres to
14 her position, I am not going to belabor the point
15 with you, but there are issues that we didn't
16 brief that I want --

17 THE COURT: Please understand that I didn't
18 get, nor have I reviewed, nor have I set for
19 hearing any motion for rehearing, so we're not
20 going there today.

21 MR. BEMIS: Well, it's not a question of a
22 motion for rehearing. It's a question of our
23 response to their offensive position, and we, I
24 think, are entitled to raise those issues in
25 defense. If you say no, I won't address them,

1 other than to put them into the record for the
2 appellate court.

3 THE COURT: That's fine. Please understand
4 we have the July 12th order, and right now we're
5 not revisiting it.

6 Let me go to Mr. Scarola because I do want to
7 get to those motions, and we can discuss the most
8 efficient way to dispose of them.

9 What tab am I looking at?

10 MR. SCAROLA: Tab number six.

11 MR. BEMIS: Thank you, Your Honor. I'll sit
12 down.

13 THE COURT: Okay.

14 MR. SCAROLA: Thank you, Your Honor. Your
15 Honor will recall that, in the context of our
16 earlier motion to compel, we made reference to the
17 crime fraud exception to the attorney/client
18 privilege.

19 THE COURT: If I understand, you're seeking
20 to invoke that by saying that the pleading in the
21 new litigation is a sham?

22 MR. SCAROLA: Yes, Your Honor. We're
23 suggesting that the crime fraud exception is
24 broader than application simply in the context of

1 want to go there today. We have raised the crime
2 fraud exception issue to be sure that it is not
3 waived. We wish to preserve it.

4 What we ask The Court to do today is
5 something that is far simpler than to get into
6 both the substantively complex and procedurally
7 protracted process of determining the crime fraud
8 exception application in this case. What we want
9 Your Honor to do is simply to apply the rulings
10 that you have already made in your prior order of
11 July 12th to the interrogatories and request to
12 produce that are presently before The Court for
13 determination.

14 The reason why we want you to do that is
15 because we believe that we may very well receive
16 sufficient information on the basis of the rulings
17 that Your Honor has already made to allow us to go
18 forward without needing to confront the broader
19 expanse of information that may be available to us
20 if we meet the crime fraud threshold to overcome
21 privilege assertions.

22 So all we want you to do is to walk through
23 these interrogatories with us to the extent that's
24 necessary and to apply the same rulings that Your
25 Honor has previously made with regard to findings

57

1 that particular questions do not involve a
2 legitimate claim of privilege or that they are
3 encompassed within the scope of those issues where
4 Your Honor has found a waiver to exist. If we can
5 get that information, I think we may not have to
6 come back to The Court.

7 THE COURT: So, as I understand what you're
8 asking me to do today is not rule on any crime
9 fraud issue?

10 MR. SCAROLA: I'm asking you to defer ruling
11 on the crime fraud issues, simply to go through
12 these interrogatories, apply the same standards
13 that you've previously applied, extend the July
14 12th order which applied to a particular set of
15 interrogatories to the subsequently filed
16 discovery requests.

17 THE COURT: Is there any objection to holding
18 the crime fraud issue in abeyance?

19 MR. BEMIS: Yes, Your Honor. This is a
20 reprise of the rule to show cause. They throw an
21 issue before The Court like on the rule to show
22 cause, which I argued, and I think you ultimately
23 accepted I was correct that it was procedurally
24 improper. They raise an allegation with no
25 evidence, impugning the integrity of the lawyers,

58

1 accusing me of a crime of fraud.

2 THE COURT: We need to get back to what we're
3 talking about here.

4 MR. BEMIS: That's exactly what they have
5 done. They have 23 times asserted in a filing in
6 a courthouse --

7 THE COURT: So you want them to either
8 withdraw it or be prepared to have it bedded?

9 MR. BEMIS: Right. That's exactly what I
10 want.

11 THE COURT: I think that's fair.

12 MR. SCAROLA: May I have just a moment?

13 THE COURT: Sure.

14 MR. SCAROLA: Your Honor, we would request
15 permission to withdraw those allegations with

16 regard to the crime fraud exception without
17 prejudice to renew them when and if we believe
18 it's appropriate.

19 THE COURT: Please understand, if you're
20 going to withdraw, that's fine. It's not with or
21 without prejudice. If for some reason you think
22 they come back in, you come in and we discuss
23 whether it's procedurally appropriate or not. I
24 assume there's no objection if I just do an order
25 that says they are being withdrawn, period.

59

1 MR. BEMIS: I have an objection to the second
2 time that they have done this and then walk in and
3 say it's all right. It's not all right to make
4 these type of allegations against my client and
5 the attorneys and then say, I'm sorry, I now
6 realize I did it incorrectly, I'll withdraw it
7 after twice raising the issue. And I think anyone
8 who is sitting here and listening to it would have
9 the same reaction. It's just improper.

10 THE COURT: Well --

11 MR. BEMIS: And I apologize if I seem
12 somewhat frustrated by this, but they are serious

13 allegations.

14 THE COURT: I agree. And, no, you're not
15 offending me that you would take it seriously. I
16 would be upset if you didn't. I don't -- the two
17 choices I see are, either you withdraw them, I do
18 an order saying you withdrew them in open court
19 and they have left us, or we go through the
20 procedure to fully let the issues. I don't think
21 we just say, oh -- they're not going to be
22 addressed on their merits today.

23 MR. SCAROLA: Clearly, with the 45 minutes we
24 have remaining, they are not going to be addressed
25 on their merits today.

60

1 THE COURT: I think it's your call, are they
2 still with us or not.

3 MR. SCAROLA: With the understanding that
4 they are not going to be addressed on the merits
5 today, is Your Honor prepared at least to address
6 that portion of the motion that I have suggested
7 can be addressed today? And that is, application
8 of Your Honor's earlier ruling.

9 THE COURT: The first question I have to you

10 is, are you withdrawing the crime fraud issue or
11 not? That's a yes or no.

12 MR. SCAROLA: No.

13 THE COURT: Okay. So we still have those?

14 MR. SCAROLA: Yes. And we request that the
15 order in which we address these issues is to first
16 deal with the simple extension of Your Honor's
17 order to the pending interrogatories.

18 MR. BEMIS: And I, Your Honor, request that
19 we address the crime fraud issue first. It's the
20 most serious one that's made, and we should be
21 heard on it and not let it linger for another case
22 management conference.

23 THE COURT: I think we're going to go through
24 them one by one, and the order we get to them is
25 the order we get to them.

61

1 MR. BEMIS: Crime fraud is raised in the very
2 first --

3 THE COURT: It probably is. I know I read it
4 a lot.

5 MR. BEMIS: Your Honor, may we address these
6 one at a time so that each interrogatory -- so I

7 don't have to go back and do 20 of them?

8 THE COURT: That's what I'm proposing. Let
9 me figure out the best way to get the
10 interrogatories and the answers in front of me. I
11 know you repeat the interrogatories in your
12 motion. I know I have the answers. Can you tell
13 me which tab they're at?

14 MR. SCAROLA: It's under tab six, Your Honor.

15 MR. BEMIS: Your Honor, I have actually
16 assembled one volume which has the
17 interrogatories, the response, the argument and
18 the motion response on a single page.

19 THE COURT: Do you object to my looking at
20 that?

21 MR. SCAROLA: No. Do we have two copies of
22 it so we can be looking at the same thing?

23 MR. BEMIS: Sure, I think we have an extra
24 copy. There will be a small charge.

25 May I approach the bench, Your Honor?

62

1 THE COURT: Yes. Can I go back to the ore
2 tenus motion on The Court file? I didn't want to
3 forget that I had gotten this. I don't think that

4 the clerk has done anything improper. The order I
5 wrote said the only thing that was supposed to be
6 filed under seal was the complete copy of the
7 settlement agreement, not the Exhibit A to the
8 order. Exhibit A to the order was the redacted
9 copy where the only thing I redacted I think was
10 the account information.

11 So, no, the clerk has not violated my order.
12 If you're now saying you want something sealed
13 that's not sealed, you may want to make an
14 appropriate order.

15 MR. SCAROLA: Thank you, Your Honor.

16 THE COURT: So that would be denied. Okay.

17 MR. SCAROLA: Your Honor, I'm having the
18 first chance to look at what has been handed to
19 The Court. And while I don't object to Your Honor
20 using this to the extent that it may be of
21 assistance to you, I think what you'll find when
22 you look at it is that the interrogatory is set
23 out in full, Morgan Stanley's objections are set
24 out, and their reply is set out. And what we have
25 then is a one- or two-line summary --

1 THE COURT: Okay.

2 MR. SCAROLA: -- of CPH's argument which --

3 THE COURT: Well, I also have your motion
4 thing in front of me, so I have the full version
5 as well.

6 MR. SCAROLA: Okay. I just don't want The
7 Court to overlook the fact that the way in which
8 they have chosen to summarize our argument may not
9 necessarily accurately reflect our argument.

10 MR. BEMIS: Your Honor, that is -- it is
11 accurate that what we did was extract what we took
12 from our paper in terms of their objections and
13 didn't repeat a whole page of the objection as
14 much as edit. Mr. Scarola is correct, and I
15 should have pointed that out to The Court. I'm
16 sorry.

17 THE COURT: Okay. Interrogatory one.

18 MR. SCAROLA: Yes, Your Honor. The Court
19 concluded in its July 12 order that the privilege
20 has been waived with respect to the subject matter
21 of this interrogatory. The only document that
22 Morgan Stanley has produced is the April 5
23 retention letter which, not insignificantly,
24 postdates our motion for contempt by weeks. This
25 is, we suggest, an improperly asserted objection

1 that has already been addressed in the July 12th
2 order. Your Honor should overrule the objection
3 and order a full and complete response on the
4 basis of the waiver that has already been found to
5 exist.

6 THE COURT: How do you define identified? Is
7 that defined in the interrogatories?

8 MR. SCAROLA: It is, Your Honor. I don't
9 think we've included in the interrogatories in the
10 exhibits that we provided to The Court, and I
11 can't put my hands on a copy among the materials
12 that we have with us, but I know that identify is
13 a defined term, Your Honor.

14 THE COURT: Do you all have a copy of the
15 interrogatories?

16 MR. IANNO: I'm looking, Your Honor.

17 MR. BEMIS: I do someplace. I think in our
18 answers we didn't repeat the definition, so I'm
19 not sure that I even have them here.

20 THE COURT: Why don't we continue and -- I
21 just was trying to figure out exactly --

22 MR. SCAROLA: Are we going to do these one at
23 a time with our position stated?

24 THE COURT: I think we need to start. We're

25 not going to finish, but I think we need to start

65

1 with one at a time and see how far we get.

2 MR. BEMIS: Are you finished?

3 MR. SCAROLA: Yes. That's my initial
4 presentation and support.

5 THE COURT: What's the response?

6 MR. BEMIS: My response is, may I have some
7 water?

8 THE COURT: Sure.

9 MR. BEMIS: The water fountains are broken.
10 There's no water outside at all.

11 THE COURT: How long have they been broken?
12 It's a pressure issue?

13 MR. IANNO: I don't think they've worked for
14 a long time.

15 THE COURT: Really? That's bad.

16 MR. BEMIS: First of all, with regard to the
17 first allegation that we did not respond, we did
18 identify and eventually -- and I'm sure Your Honor
19 is aware of this, but pursuant to a stipulation,
20 we did produce the, what I will call the legal
21 representation agreement, some would call it a

22 retention letter, between Kellogg Huber and Morgan
23 Stanley. That was done, I believe, right after
24 our last hearing on July 2nd. I'm not sure that
25 Your Honor was aware of that, but we've identified

66

1 that.

2 THE COURT: I'm sorry. Is that the April 5th
3 retention letter?

4 MR. BEMIS: The April 5th retention letter.
5 There is only one that I am aware of, and that is
6 the one that is produced pursuant to our
7 stipulation. That production would not be argued
8 to be a waiver of attorney/client privilege.

9 We identified in our answers to
10 interrogatories that we -- the dates of
11 conversations which, by the way, is the same
12 information that in many respects we would be
13 required to identify pursuant to the Florida Rules
14 of Judicial Administration, 2. -- I think I've got
15 the number right off my head -- 061.

16 THE COURT: It is.

17 MR. BEMIS: We would be required to identify
18 the matter that they were retained in. We would

19 be required to identify the counsel, and we would
20 be required to identify the date of their
21 retention in order for foreign attorneys to
22 practice in the state. That even came up, as you
23 may recall, at the April 30th hearing. There was
24 some issues of whether we had adequately provided
25 all that information and declarations that were

67

1 filed and the application, and we did provide
2 that.

3 What I think they're asking for further under
4 the crime fraud exception were the waiver
5 argument, is that, by virtue of identifying
6 Kellogg Huber as the attorney in the case, that
7 somehow we have -- that is a sham pleading, and,
8 therefore, they're entitled to everything. And on
9 the issue of the --

10 THE COURT: I think this is just a pure
11 waiver, as I understand it.

12 MR. BEMIS: They also argue in their full
13 motion that crime fraud exception applies in the
14 very first interrogatories. I believe it's on
15 page three.

16 MR. SCAROLA: It is on page three at the top
17 of the page.

18 MR. BEMIS: Page three, top of the page,
19 right-hand side, runs down approximately 17 lines
20 from the top. I did not hear that withdrawn.

21 Let me address the issue of a sham pleading,
22 if I may, first. In order for them to establish a
23 sham pleading, they need to file a verified motion
24 with this court or with another court. That's an
25 issue Your Honor may have to decide, where does

68

1 that go. We think that the proper procedure under
2 Rule 1.150 is that it has to go before Judge
3 Miller. That matter is pending before her. And I
4 will not tell you that I found a case on this
5 point.

6 THE COURT: Let's, so I'm not overwhelmed --
7 I mean, I understand that argument. Let's assume
8 I'm probably not going to accept it.

9 MR. BEMIS: Then at a minimum, even if they
10 allege it's a sham pleading in this Court, they
11 need to file something that's verified that sets
12 forth the facts under verification that it's a

13 sham. That's not been done. All that's been done
14 thus far -- and if we were to go back all the way
15 to March 19th, there is no evidence that's been
16 offered in this case at all.

17 THE COURT: So you're saying they haven't
18 made a prima facie showing that would trigger it?

19 MR. BEMIS: Yes, with regard to the rule,
20 and, yes, with regard to the crime and fraud
21 exception under the Butler Pappas trilogy. Can
22 you put that up for me?

23 MR. BEMIS: I have a copy of that case. Can
24 I had that up to The Court?

25 THE COURT: I have it.

69

1 MR. BEMIS: Okay. The Butler Pappas Trilogy,
2 which has really its origin in the American
3 Tobacco case in the Fourth DCA as well as I think
4 the Supreme Court's decision in Zolon and Haines
5 (phonetic), sets forth three things that you need
6 to do and the procedure The Court has to follow.

7 The first step is that there must be an
8 allegation that the communication, whatever it is
9 that they're looking for here, and this would be

10 the communications between, I assume the way the
11 question is drafted, between Morgan Stanley and
12 Kellogg Huber, that it must have been made as part
13 of an effort to perpetrate a crime or fraud. And
14 it has to be a future crime or fraud, not past.
15 And they have to identify the crime or fraud.
16 That's what they need to do. That's not been
17 done. That's just the allegation.

18 Step two in the process is, you must
19 determine that they have made a prima fascia case,
20 and I emphasize evidence because the cases clearly
21 say argument of counsel, memorandum of law are not
22 evidence, that a client sought counsel's advice.
23 I don't know here whether their allegation is that
24 they sought my law firm's advice or they sought
25 Kellogg Huber's advice because they don't make

70

1 that allegation, and they clearly don't have any
2 evidence of it.

3 And thirdly, under step three of Butler
4 Pappas, which stems from language out of American
5 Tobacco, we are entitled to provide The Court a
6 reasonable explanation of our conduct at an

7 evidentiary hearing, a reasonable explanation of
8 our conduct which, of course, is what we have a
9 major issue with what happened on April 30th
10 because we were under the impression that you were
11 proceeding with the hearing in one fashion. It
12 turns out that ultimately the procedure became
13 more truncated. We believed at the time we were
14 entitled to provide a reasonable explanation of
15 our proceeding, and that reasonable explanation is
16 not a waiver of the privilege under the law.

17 THE COURT: Again, we're not rearguing that.

18 MR. BEMIS: I know, but, Your Honor, it's a
19 basic defense under the due process clause to the
20 allegation of crime fraud, and we're entitled to
21 present it. I make it for the record. I won't
22 repeat it, but that's our position for the record.

23 As with regard to that, we are not at any of
24 those three steps; therefore, those objections
25 ought to be plainly overruled that it's a sham

71

1 pleading. They haven't complied with whatever
2 requirement you imposed, and the Butler Pappas
3 Trilogy of procedural steps that have to be

4 followed have not been even followed in the
5 smallest element in this case.

6 Other than that, I believe we have fully
7 identified what is required by the answer, and
8 we've answered it fully. We've gone beyond that
9 by providing the legal representation agreement.

10 I don't know what more we could do other than to
11 divulge every communication between Kellogg Huber
12 and Morgan in subdetail, and we do not believe we
13 are obligated to do that, that that is protected
14 under attorney/client. That's our response to
15 interrogatory one.

16 THE COURT: What do you want to respond?

17 MR. SCAROLA: First, that Mr. Bemis has not
18 addressed the primary contention that we have
19 made, and that is that this is covered by Your
20 Honor's July 12 order that there has already been
21 a waiver with respect to these issues. That order
22 specifically found at page three, quote, it may
23 not -- referring to Morgan Stanley & Company --
24 selectively reveal only such privileged
25 information as it believes helps its position.

1 The conclusion is inescapable that defendant,
2 Morgan Stanley & Company, has waived any privilege
3 with respect to the reasons for and timing of the
4 retention of Kellogg Huber law firm, the scope of
5 its representation and the timing of the Arthur
6 Andersen suit.

7 Those determinations have been made. This
8 interrogatory addresses those issues. And on that
9 basis alone before ever reaching crime fraud
10 issues, Your Honor should overrule the objections
11 and require a full and complete response.

12 With regard to the Butler Pappas procedure,
13 we suggest that the record before this Court
14 already establishes evidentiary support for a
15 prima fascia finding of application of the crime
16 fraud exception, and that evidentiary support
17 comes by way of Mr. Bemis's own open court
18 representations to The Court about the
19 relationship between the settlement agreement and
20 the suit filed in front of Judge Miller. It comes
21 by way of the timing of that litigation, and it
22 comes by way of the patent lack of factual support
23 for damages in that Arthur Andersen suit.

24 We have cited to The Court case law that
25 supports our position that sham litigation can

1 trigger the crime fraud exception. Those cases
2 are referenced at page three of our memorandum. I
3 think it is clear that the weight of authority is
4 that baseless litigation may bring the crime fraud
5 exception into play, that any type of misconduct
6 inconsistent with the basic premises of the
7 adversary system are sufficient to trigger the
8 crime fraud exception application. But that is
9 not an issue that needs to be reached in light of
10 the fact that the waiver already found to exist
11 applies to the information being sought by this
12 interrogatory.

13 THE COURT: I will grant the motion in part.
14 I think, and I've said it before, I think we
15 clearly had a waiver as to the scope of the
16 Kellogg Huber representation and the timing of its
17 retention. I had specific representations made to
18 me in open court about why they were retained, the
19 limited purpose for which they were retained.

20 On the other hand, I do think this does ask
21 for some information which could be still deemed
22 privileged and not waived.

23 What I will do is eliminate the first
24 sentence, take out the first seven words of the

1 communication concerning the scope of the
2 representation, the entity or entities to be
3 represented and why they were retained, which I
4 think is what I previously found there was a
5 waiver on based upon the representations in court.

6 MR. BEMIS: We've answered that question.

7 THE COURT: I don't know if you've answered
8 that completely or not. If you have, you need to
9 tell us this is the complete answer. If you
10 are -- looking at the answer, I'm not sure it
11 would be complete, but you need to make that
12 representation.

13 MR. BEMIS: All right. By saying all right,
14 Your Honor, I don't want to --

15 THE COURT: I think you're saying, I
16 understand what you're telling me.

17 MR. BEMIS: Exactly. Thank you very much,
18 Your Honor. What are you doing on the crime fraud
19 sham pleading?

20 THE COURT: I would agree that there's not
21 been a prime fascia showing to support its

22 application; although, I can tell you the motion
23 for contempt I don't think requires necessarily
24 that you show -- I mean, it might sort of
25 implicate whether that was a sham pleading, but I

75

1 don't think you need to rely on that to negate all
2 the privilege claims. So I'm just -- they didn't
3 make a prime fascia showing now, but I'm still
4 finding this is something that vast portions of
5 the answers have already been published to The
6 Court.

7 MR. SCAROLA: So as to avoid having to come
8 back here to reargue these matters again, I'm
9 concerned about the representation made by
10 Mr. Bemis that the answer is already complete.

11 THE COURT: If he's going to say it's
12 complete, he's going to need to file something
13 saying I've already answered it.

14 MR. BEMIS: That's not what I said.

15 THE COURT: You know what, we have 26 minutes
16 left. We need to put it to good use.

17 MR. BEMIS: I just want the record clear that
18 I don't agree with what Mr. Scarola's conclusion

19 was. I will respond as directed by The Court or
20 preserve our objections and proceed accordingly.

21 MR. SCAROLA: May I simply inquire as to
22 whether it is Your Honor's intent that the content
23 of the communication, to the extent it falls
24 within the waiver you have described, be included
25 in the response because these responses don't

76

1 include anything about the content. That's my
2 only point.

3 THE COURT: Yes. I understand.

4 MR. SCAROLA: Thank you.

5 THE COURT: I mean, assuming that identified
6 was defined in a way that would have required the
7 disclosure of the content, I don't know the
8 definition, I'm not adding stuff to the
9 interrogatory that wasn't there.

10 MR. SCAROLA: I understand that. I
11 understand that.

12 THE COURT: Okay. Two.

13 MR. SCAROLA: It is our position with regard
14 to this interrogatory, Your Honor, that Morgan
15 Stanley has provided selective disclosures in its

16 answers. Your Honor has ruled that selective
17 disclosures result in a waiver of the privilege.
18 They can't choose to give us that portion of
19 information that they consider helps them and
20 withhold the balance. We want a full and complete
21 response on the basis of a waiver.

22 In addition, there is no privilege because of
23 the crime fraud and at-issue exceptions applying
24 under the circumstances of this case.

25 THE COURT: Do you want to respond?

77

1 MR. BEMIS: Your Honor, with regard to the
2 crime fraud, you've already ruled, so I won't
3 address that again. With regard to the balance of
4 it, we stand on our objections that we have a
5 privilege as to certain of the communications.
6 With regard to other matters, we have provided --
7 and if you'll look at the third paragraph of our
8 objection, we did state that the parties, that is,
9 I should not say the parties, that is Kellogg
10 Huber and Morgan Stanley participated, as we say,
11 in discussions with its co-counsel, Kirkland &
12 Ellis, regarding the representation and that they

13 assigned the declaration to be bound by the
14 protective order. We believe that that is the
15 answer that is required by the interrogatory.
16 With regard to other matters, it's a substance, we
17 stand on our privilege -- we stand on our
18 privilege objection, and we don't think it's
19 foreclosed by your order.

20 THE COURT: I would sustain his objection. I
21 don't think this is something I found a waiver on,
22 and I don't think there has been a waiver of
23 privilege on this one.

24 Number three.

25 MR. SCAROLA: Our arguments with regard to

78

1 number three would be the same as those that I
2 have just stated, Your Honor.

3 THE COURT: Again, I don't think there's been
4 a waiver on this.

5 Four.

6 MR. SCAROLA: May I just go back to that for
7 one moment, Your Honor?

8 THE COURT: Sure.

9 MR. SCAROLA: What The Court -- is it all

10 right if I address The Court from a seated
11 position?

12 THE COURT: However you're more comfortable.

13 MR. SCAROLA: What The Court specifically
14 found in its July 12th order was that MS & Company
15 has waived any privilege with respect to the
16 reasons for the retention of the Kellogg Huber
17 firm. And it would seem that --

18 THE COURT: Which number are we on?

19 MR. SCAROLA: We're on number three.

20 THE COURT: Okay.

21 MR. SCAROLA: It would seem that, whether
22 Kellogg Huber was provided a copy of the
23 settlement agreement in connection with the
24 reasons for the retention of that Kellogg Huber
25 firm would fall within the scope of that waiver.

79

1 THE COURT: The reasons -- I would be shocked
2 to find -- and maybe this is why I didn't do it,
3 is to match the date of the retention and
4 settlement agreement. I would be shocked to find
5 that they got the settlement agreement before they
6 were retained and the reasons for the retention

7 ended at the retention. I mean, they obviously
8 don't predate the retention.

9 MR. SCAROLA: They certainly got the
10 settlement agreement before the retention letter
11 because the retention letter comes after the
12 contempt motion was filed.

13 THE COURT: I understand that. I think it --
14 I don't think there's been a waiver as to this.
15 If what you're trying to get at is, did they get
16 the settlement agreement before or after they were
17 retained, that may be something that's
18 discoverable because, if they got it before they
19 were retained, it would suggest perhaps it played
20 a part in why they were retained.

21 MR. SCAROLA: Might I also suggest, Your
22 Honor, that there's no necessary implication of
23 any privilege at all in responding to this
24 question. If Morgan Stanley provided Kellogg
25 Huber with the settlement agreement and Morgan

80

1 Stanley had a reason for doing it, that there's no
2 attorney/client privilege communication at all
3 involved in why Kellogg Huber -- why Kellogg Huber

4 was provided a copy of the settlement agreement.

5 There is no implication of any communication.

6 Morgan Stanley may very well have said, I
7 want this settlement agreement to go to Kellogg
8 Huber because I want Kellogg Huber to advise us as
9 to how we are going to use this settlement
10 agreement to our advantage in the currently
11 pending litigation and trigger these provisions in
12 the settlement agreement. The President of Morgan
13 Stanley could have had that conversation.

14 THE COURT: I understand the argument.
15 What's the response?

16 MR. BEMIS: Your Honor, we fully answered the
17 question, and we didn't waive it. And you didn't
18 find that we waived it. We've identified in prior
19 interrogatories what documents were provided, when
20 they were provided. We've identified pursuant to
21 the Rules of Judicial Administration who was
22 retained, the dates that they were retained. We
23 have provided the retention letter. I don't know
24 what more we should be obligated --

25 THE COURT: We're down to 20 minutes. I

1 think what you're suggesting is maybe you want to
2 ask who gave it to him, and we can come back.

3 MR. SCAROLA: No. I really want to ask why
4 it was given to them. Why did Morgan Stanley give
5 this settlement agreement to Kellogg Huber? Why
6 did they do it? What was Morgan Stanley's thought
7 process in giving this settlement agreement to
8 Kellogg Huber? I don't care -- I don't care what
9 Kirkland & Ellis's thought process may have been
10 at this point in time. What I want to know is
11 what Morgan -- these interrogatories are directed
12 to Morgan Stanley.

13 THE COURT: I don't have a preamble to see if
14 we're asking about agents or not.

15 What's the brief response that they should be
16 able to ask your client why you gave it to the law
17 firm?

18 MR. BEMIS: Because it calls for our mental
19 impressions and conclusions.

20 THE COURT: When you say our --

21 MR. BEMIS: Kirkland & Ellis, or in the
22 context because that would be where --

23 THE COURT: Well, why wouldn't your client
24 then simply respond, I relied on advice of
25 counsel?

1 MR. BEMIS: We have already -- first of all,
2 we waived -- you found we waived no privilege with
3 respect to our mental impressions and conclusions.

4 THE COURT: Right. But when you say "our," I
5 get confused as to who you mean, you or your
6 client.

7 MR. BEMIS: I appreciate that. I should have
8 made that clear. It is our work product privilege
9 when we --

10 THE COURT: Again, our, I don't know if you
11 mean the client or yours.

12 MR. BEMIS: Kirkland's, the lawyer's
13 privilege. We have said that we discussed certain
14 issues with regard to, I think it was
15 interrogatory number one, the information was
16 provided that the decision was made based on the
17 information that was available. For us to have
18 to isolate out in the manner that they are
19 describing invades our work product privilege and
20 our communications with the client on the matter.

21 THE COURT: What you're really saying is that
22 your client's answer is that, I relied completely
23 on the advice of counsel?

24 MR. BEMIS: I'm not going to tell you what my

1 the privilege, and I'm not going to discuss what
2 my client relied on in open court. It's
3 privileged. I'm entitled to communicate with my
4 client. My client is entitled to communicate with
5 its other counsel, Kellogg Huber.

6 THE COURT: Sure. But this is the question
7 I'm asking: Interrogatory number three, and I'm
8 asking a legal question, if your client made a
9 decision to give that agreement to new counsel
10 totally apart from any input, would we agree that
11 answer wouldn't be privileged?

12 MR. BEMIS: Can I just --

13 THE COURT: Sure. Is this one where we need
14 to answer it and just do an in-camera inspection
15 on whether it's privileged or not?

16 MR. BEMIS: It may well be because what we
17 have is an in-house legal department at Morgan
18 Stanley that we -- that our communications, as you
19 might expect, we deal with the lawyers, and they
20 are lawyers licensed to practice all over the
21 country, and we communicate with them. Whatever

22 decisions that they make, they have a -- we have a
23 litigation privilege with regard to those as well.
24 If Mr. -- if his question is what business man
25 independent of any legal advice did something,

84

1 that's a totally different question than I
2 understand is being asked. I'm not even sure at
3 this point what they are asking for.

4 THE COURT: I think they're asking the
5 question, why were they provided a settlement
6 agreement. And you're lodging a privilege for
7 what may be all or a portion of the answer, as I
8 understand what you're saying.

9 MR. SCAROLA: Why did you, Morgan Stanley
10 give the settlement agreement to these lawyers?
11 That's the question.

12 THE COURT: But --

13 MR. IANNO: My problem, Your Honor, it's
14 asking for a client's decision in conjunction,
15 potentially in conjunction with lawyers either
16 inside or outside. It's clearly a bad question
17 that's being asked because they're asking for the
18 internal mental impressions. That's the problem.

19 The question is just improper, and Mr. Scarola is
20 just trying to get at that. He's trying to get at
21 decisions made in litigation.

22 THE COURT: Let me ask you this: Would it be
23 disclosure of any sort of privileged information
24 if the answer was because my lawyer told me to?

25 MR. BEMIS: Your Honor, based on the rulings

85

1 we have here, I mean no disrespect, I don't know
2 what it would lead to. I just don't know. My
3 position on this I've articulated, and you don't
4 agree with me. I think we're entitled to present
5 the defense under the due process clause in
6 article one, section nine of the Florida
7 Constitution in the Fourteenth Amendment, the
8 Pappas case, American Tobacco and a legion of
9 other cases, and they don't result in a privilege.
10 There's been no fact communication disclosures.

11 What they want to get into is our top drawer
12 as to what the legal department and the law firms
13 said to each other as to what they thought about a
14 lawsuit. And that's privileged, whether it's
15 attorney/client or work product.

16 THE COURT: Can you represent to me that
17 there was no business person at Morgan Stanley
18 that elected to hand over the settlement agreement
19 or that the decision to turn it over was based
20 solely on advice of counsel?

21 MR. BEMIS: I think I can. Can I just ask
22 Mr. Clare? Some of this leg work has been
23 done by -- there's a lot of work on this.

24 THE COURT: Sure.

25 MR. BEMIS: The answer is, we believe that to

86

1 be the case. If it's not, we will tell The Court.
2 We will answer it as to who the business person
3 was, if that's acceptable. My representation is,
4 based on the information I'm standing here in
5 court is what I've just told you is a correct
6 statement, that it went through the legal
7 department.

8 THE COURT: Okay. What I'm going to need
9 then is just a supplemental answer that tells us
10 whether any part of the decision was made other
11 than on the advice of counsel. And if any part
12 was, then tell us what the answer is. If it was

13 all made on advice of counsel, that's fine.

14 MR. BEMIS: We'll proceed according to your
15 order.

16 THE COURT: Okay. Four.

17 MR. SCAROLA: Your Honor, I doubt that --

18 THE COURT: We have 12 minutes left. Do you
19 want to go back and discuss scheduling, or what do
20 we want to do?

21 MR. SCAROLA: I really think that it's
22 important that we address the scheduling issues
23 before we conclude this hearing. We all need to
24 know what's going to happen as far as our trial is
25 concerned.

87

1 THE COURT: Okay. Well, I mean, that short
2 exercise has told me the discovery and the
3 contempt is going to take a bit of time. One
4 other thing I wanted to bring up is whether you'll
5 have any interest in having a special master do
6 any of the in-camera inspection.

7 MR. BEMIS: The answer is yes. In fact, we
8 requested that, and we think it's the fairest way.

9 THE COURT: From my perspective, quite

10 honestly, it's just a function of time more than
11 anything else.

12 MR. SCAROLA: May I have just a moment?

13 THE COURT: Sure.

14 MR. SCAROLA: Your Honor, we are not willing
15 to agree to a special master.

16 THE COURT: That's fine. Please understand
17 that's going to affect the timing.

18 MR. SCAROLA: What we are willing to do,
19 however, is to submit the issues with regard to
20 this discovery to Your Honor on the basis of the
21 submissions that have already been made in writing
22 and have Your Honor rule on the basis of those
23 written submissions. We've had an opportunity to
24 present some argument to The Court.

25 THE COURT: Are you all willing to do that or

88

1 not?

2 MR. IANNO: I mean, what this exercise has
3 also shown us is The Court has some very probing
4 questions that aren't answered in the papers, to
5 me.

6 THE COURT: If they aren't willing to do it

7 without argument, I'm not inclined on something
8 like this to waive argument. But let's go back to
9 the scheduling stuff we were talking about.

10 MR. SCAROLA: May I briefly address those
11 issues before Your Honor arrives at any
12 conclusions?

13 THE COURT: Sure.

14 MR. SCAROLA: Your Honor, we filed our
15 complaint in this case on May 8th, 2003, which was
16 more than a year after we entered into a tolling
17 agreement with Morgan Stanley with regard to this
18 litigation. So they were well aware for over a
19 year of the potential of this claim coming. On
20 July 10th, 2003 Your Honor denied Morgan
21 Stanley's motion to stay discovery, and they knew
22 from that point, obviously, that this case was
23 going to be proceeding.

24 Document discovery in the case was
25 substantially completed by September 8th, 2003,

89

1 and that left Morgan Stanley with a full year in
2 which to conduct deposition discovery before the
3 September 3rd, 2004 cutoff.

4 Morgan Stanley in that one year's period of
5 time has taken a total of 11 depositions. We have
6 taken 29. They have taken 11. I've already
7 referenced the resources available to both the
8 Kirkland & Ellis and Carlton, Fields firms, and
9 they are obviously substantial. And I think that
10 that's a factor that The Court needs to take into
11 consideration. The excuse that Morgan Stanley
12 agreed to discovery -- the discovery schedule
13 before it knew it would be obliged to defend
14 against the contempt charges, as stated in the
15 graphic that was shown, there was a quote,
16 unexpected, unquote, contempt proceeding, doesn't
17 stand even if we find as an excuse that Mr. Bemis
18 personally didn't get the March 5th letter and
19 ignore the fact that, obviously, Mr. Yannucci did
20 get the March 5th letter prior to the agreement.

21 And the reason why it doesn't stand even in
22 light of Mr. Bemis's contention that he personally
23 didn't know is that Morgan Stanley confirmed that
24 agreement to the pretrial schedule in open court a
25 full week after receiving the motion for contempt.

1 That motion had already been filed when they came
2 before The Court and formally agreed to that
3 schedule. They knew what demands they were
4 facing. They have the resources to meet those
5 demands if they chose to apply those resources,
6 and they simply haven't diligently chosen to apply
7 those resources.

8 As of the filing of the motion, we had been
9 provided and The Court had been provided with no
10 indication as to what discovery they really needed
11 to take. Witnesses hadn't been identified. We
12 had a graphic up on the board here, and I would
13 certainly like a copy of that because I would like
14 to know what it is they intend to do. We
15 obviously didn't have time to take that all down.
16 And I would ask The Court to direct them to
17 provide us with a copy of that.

18 MR. BEMIS: We're going to file a copy as
19 part of the court reporter transcript so anyone
20 reviewing it knows what was shown to The Court.

21 THE COURT: Okay. Thank you.

22 MR. SCAROLA: The bottom line is, I don't
23 think that they have met the burden that they
24 ought to be obliged to meet in order to procure a
25 three-month continuance of the trial that they are

1 asking for.

2 Now, the other argument that they make is the
3 supposed inability of Kellogg Huber to participate
4 in this case, but, remember, that they have
5 repeatedly asserted to Your Honor that the reason
6 why Kellogg Huber was retained was in order to
7 cross examine Arthur Andersen witnesses at trial.

8 So the unavailability of Kellogg Huber,
9 particularly when very able co-counsel without a
10 conflict of interest has been involved in this
11 case from the very beginning and is certainly
12 capable of cross examining Arthur Andersen
13 witnesses if in fact some disability exists on the
14 part of the Kirkland firm, that just ought not to
15 play a role in Your Honor's decision as well.

16 This discovery can be completed in the three
17 months that remain. With the resources available
18 on both sides of this case, the discovery can be
19 completed if Your Honor tells us that it needs to
20 be completed. We certainly are prepared to do it.
21 We're prepared to devote whatever attorney
22 manpower is necessary, whatever attorney-person
23 power is necessary to get that job done. And they
24 ought to be obliged to do that as well.

1 to agree to a brief continuance, a delay of 30
2 days to give them an additional month to get the
3 job done if that's going to be of some help, but
4 we ought not to be pushed back into an April trial
5 date. One of the concerns that we have is there's
6 a different composition of the venire that exists
7 in April than exists in January and February in
8 this community. That is a concern of ours.

9 THE COURT: I appreciate your candor.

10 MR. SCAROLA: Well, I'm telling Your Honor
11 exactly what the truth is in that regard. That's
12 a factor we have taken into consideration in terms
13 of setting up this schedule. It's something that
14 we need to anticipate on behalf of our client, and
15 it's an important factor to us. We're not
16 opposing a continuance for arbitrary or capricious
17 reasons. This is an important case. Both sides
18 deserve ample time in which to get it prepared,
19 but we have been given ample time in which to get
20 it prepared.

21 THE COURT: I need you to address the

22 contempt because I do think --

23 MR. SCAROLA: As far as the contempt is
24 concerned, my position remains the same. If they
25 are willing to abbreviate the proceedings

93

1 necessary to enable us to get the discovery to
2 which we are entitled, we are prepared to go
3 forward with the contempt hearing at the very
4 earliest date that Your Honor chooses to give us
5 in light of whatever burden they are willing to
6 accept, but we ought not to be obliged to proceed
7 with the final hearing on the contempt without
8 getting at least the very basic discovery that we
9 have requested at this point. We're willing to
10 submit those issues to The Court on the basis of
11 the written pleadings that we have given you.
12 Obviously, they've resisted that for whatever
13 reason, but that ought not to interfere with our
14 ability to get our trial date.

15 Let me make sure that my co-counsel doesn't
16 wish me to add anything to that or have anything
17 else to say.

18 Okay. Thank you, Your Honor.

19 THE COURT: Okay.

20 MR. SCAROLA: Your Honor, there is one more
21 comment that I might make. They put up a whole
22 lot of names on that board, and, obviously, there
23 are some people whose names on that list we
24 recognize and acknowledge to be significant
25 witnesses. Mr. Perelman, for example, we wouldn't

94

1 argue that that's testimony that they'll obviously
2 want to have in advance of trial. But without any
3 showing whatsoever with regard to the significance
4 of the other names, it would clearly be improper,
5 I suggest, to grant a continuance of this case on
6 the basis of inability to depose people the
7 significance of whom has never been demonstrated
8 to this Court.

9 THE COURT: What did you want to respond?

10 MR. BEMIS: I'm a little bit surprised by the
11 venire argument since we started with a venire in
12 August. We suggested a venire in October. Now
13 January is appropriate, and now April is
14 inappropriate. I don't think that's an
15 appropriate decision point on the case.

16 With regard to -- if they want to move this
17 proceeding along and abbreviate the schedule, I'm
18 shocked that they won't agree with a special
19 master so that we can move the process forward
20 before a special master, which we think not only
21 is more expeditious, but we think it has some side
22 benefits of having a neutral party who is not a
23 decision-maker have to review these matters. And
24 there is precedent for that. We cited it in our
25 papers. I won't repeat it here.

95

1 The argument, you know, fundamentally is,
2 we've got a thousand lawyers, we haven't acted
3 promptly. I reject that argument. We cannot walk
4 down the hall, grab people out and say, take seven
5 boxes of documents, very complex financial
6 documents, very complex merger transactions and
7 run out and take a deposition for two days. It
8 does not work that way.

9 We are -- we have been from the outset, we in
10 the sense of Kirkland & Ellis, my client, me
11 probably more so because I got into the case so
12 late, we have been, I have been, other people have

13 been catching up, if you will, from the five years
14 that these gentlemen have been prosecuting two
15 lawsuits. They already did two of these. The
16 fact that we got hundreds of thousands of
17 documents in September doesn't mean we knew what
18 was in the documents, that we understood the
19 documents, that we've collated them. We got, I
20 believe it was 400 deposition transcripts in that
21 time period. I still haven't read all the 400,
22 and I'm not sure I'll ever get through all of them
23 before we get to trial.

24 We have been working at a breakneck pace, as
25 the calendars show. The facts speak for it. If

96

1 you disagree with me on that, you will. The fact
2 is we have, not 30 days left as Mr. Scarola
3 suggests, we've got 11 days left in August that
4 are open to do something. We can't get done.

5 The depositions that I put up there are
6 depositions they wrote us that they wanted to
7 take, that we have notified them that we want to
8 take. They have been identified in various
9 documents as key players. That's what's there.

10 Now, will every one of them get deposed? The
11 chances are there will be some that will drop out
12 for a host of reasons, whether it be illness.
13 We've got a key witness who has had cancer. We've
14 got a witness who's a director who's in the
15 hospital. It may be that we never get some of
16 those people in the end result. The fact is, if
17 you just look at what's already scheduled, there's
18 16 business days of pending material that we've
19 requested that we don't have. And this week alone
20 I think we had, I think it was four days
21 originally, or next week we have like four days of
22 depositions scheduled, and stuff is just moving
23 day by day with cancellation. We just need some
24 breathing space, and we need at the same time to
25 get the contempt done.

97

1 We don't want a stay of discovery. All we
2 want is to give us a moving date so that we can
3 complete the fact discovery while simultaneously
4 Your Honor deciding what is a fair date to set
5 this for a hearing. All of the discovery has been
6 answered at this point. Now, you entered your

7 order. We understand that, and we've got these
8 motions to compel. It's not like this is starting
9 from scratch. They filed that motion on March
10 12th with no evidence. It was improperly filed.
11 They should have filed it with proper evidence.
12 They had their time. We responded. Yes, we've
13 got disagreement. We don't have any agreement
14 with what they responded to us either. But we're
15 the ones being charged. We're entitled to a
16 hearing, and we respectfully request you do it as
17 promptly as you can in whatever procedure you
18 think is appropriate. Give us a date to work
19 against, and we'll be here with bells on to try
20 this case.

21 THE COURT: Let's talk about a couple things
22 in the time we have left. First of all, I would
23 agree this case is not going to be ready for trial
24 in January. I do think it could be ready in
25 March. I don't -- my JA is out today, and at the

98

1 case management conference if you come with your
2 schedules for March and also check your schedules
3 for the dates. On the things we have leading up

4 to the trial, we're probably going to want to
5 reset some of those so we can get those set at the
6 next case management conference. For instance, I
7 want to check on spring vacation. I don't want to
8 set it now and then discover we all have problems.
9 If we know March is what we're looking at -- we
10 still think it's 15 days?

11 MR. BEMIS: Based on a four-day trial
12 schedule, I still think that's probably correct.
13 I think you said you work four days a week?

14 THE COURT: Fifteen days is what I asked.

15 MR. BEMIS: Fifteen trial days, excuse me.
16 But you're still doing a four day a week trial?

17 THE COURT: Yes.

18 MR. BEMIS: We're looking at 15 days spread
19 over four weeks?

20 THE COURT: Four weeks, right. I'm still
21 concerned about the motion for contempt just
22 because I don't think we can arbitrarily set a
23 time for it to be heard now unless everybody
24 agrees because I just see these discovery issues
25 are going to take a while. I'm afraid if I set

1 aside a day, say, in September or October, we're
2 going to get to that day, and the discovery
3 disputes aren't going to be resolved by then.

4 MR. BEMIS: If you give us a date in
5 September, you can change it.

6 THE COURT: I can but then I have a day open
7 in my book.

8 MR. BEMIS: We're going to be here before
9 that date in September, but give us a date to work
10 against.

11 THE COURT: I understand that. I need a
12 better sense of how long that's all going to take.
13 Quite honestly, to the extent I have to do
14 in-camera inspections, I have to try to fit those
15 in the same way I'm trying to fit in the order on
16 the conflict of laws. I just can't commit now to
17 a date and say six weeks and know we're going to
18 have all those disputes done by then.

19 MR. BEMIS: Then can we have a special
20 master?

21 THE COURT: Only if they agree to bear the
22 cost and they told me they won't, which I can't
23 make them.

24 MR. BEMIS: You're right.

25 THE COURT: I understand this is something

1 that everybody wants done.

2 MR. SCAROLA: What I will represent to The
3 Court, Your Honor, is that we'll carefully
4 consider the special master issue. We'll see if
5 there is someone available who we feel comfortable
6 with and whether the cost issues involved can be
7 appropriately agreed to.

8 THE COURT: It only makes sense if it's
9 somebody you're both going to be comfortable with;
10 otherwise, you'll just file the objections anyway
11 and come back.

12 MR. BEMIS: I don't see how the cost issues
13 can be paramount in this case.

14 MR. SCAROLA: We won't write that off
15 entirely. We have serious reservations about it.
16 We're not prepared to agree to it at this time,
17 but we'll certainly give it further careful
18 consideration.

19 MR. BEMIS: Your Honor, thank you very much.

20 THE COURT: You all have a wonderful weekend.

21 MR. SCAROLA: Thank you. You do the same.

22 MR. IANNO: Thank you, Your Honor.

23 MR. BEMIS: Thank you.

24 (Thereupon, the foregoing proceedings were

C E R T I F I C A T E

THE STATE OF FLORIDA)
)
COUNTY OF PALM BEACH)

I, Cindy A. York, Registered Professional Reporter, do hereby certify that I was authorized to and did report the foregoing proceedings at the time and place herein stated, and that the foregoing is a true and correct transcription of my stenotype notes taken during said proceedings.

IN WITNESS WHEREOF, I have hereunto set my hand this 24th day of July 2004.

CINDY A. YORK
Registered Professional Reporter

**IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA**

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

v.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO., INC.,

Defendant.

MORGAN STANLEY SENIOR FUNDING, INC.,

Plaintiff,

v.

CASE NO: CA 03-5165 AI

MACANDREWS & FORBES HOLDINGS, INC.,

Defendant.

NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that a hearing has been set in the above-styled case as follows:

DATE:	August 2, 2004
TIME:	8:45 a.m.
PLACE:	Palm Beach County Courthouse, Courtroom 11A 205 North Dixie Highway West Palm Beach, Florida 33401
BEFORE:	Judge Elizabeth T. Maass
CONCERNING:	Morgan Stanley's Motion for Enlargement of Time to Comply with This Court's July 12, 2004 Order

Coleman v. Morgan Stanley
Case No: 03-CA-005045 AI
Notice of Hearing
Page 2

KINDLY GOVERN YOURSELVES ACCORDINGLY.

The undersigned counsel hereby certifies that a good faith attempt to resolve the issues contained in the foregoing motions or matters will be made with opposing counsel prior to hearing on these matters on the Court's Motion Calendar.

If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no costs to you, to the provision of certain assistance. Please contact the ADA Coordinator in the Administrative Office of the Court, Palm Beach County Courthouse, 205 North Dixie Highway, Room 5.2500, West Palm Beach, Florida 33401; telephone number (561) 355-2431 within two (2) working days of your receipt of this notice; if you are hearing or voice impaired, call 1-800-955-8771.

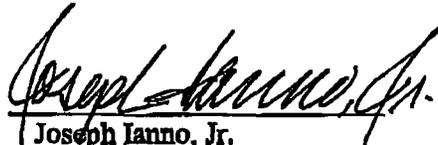
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this 28th day of July, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar No. 618349)
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

Counsel for Defendant
Morgan Stanley & Co. Incorporated

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

BY: 
Joseph Ianno, Jr.
Florida Bar No: 655351

Coleman v. Morgan Stanley
Case No: 03-CA-005045 AI
Notice of Hearing
Page 3

SERVICE LIST

Jack Scarola
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy
Michael Brody
JENNER & BLOCK, LLC
One IBM Plaza, Suite 400
Chicago, IL 60611

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT IN
AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO., INC.,

Defendant.

MORGAN STANLEY SENIOR FUNDING, INC.,

Plaintiff,

vs.

CASE NO: CA 03-5165 AI

MACANDREWS & FORBES HOLDINGS, INC.,

Defendant.

**MORGAN STANLEY'S MOTION FOR ENLARGEMENT OF TIME TO COMPLY
WITH THIS COURT'S JULY 12, ORDER**

Morgan Stanley & Co. Incorporated and Morgan Stanley Senior Funding, Inc. (collectively "Morgan Stanley"), by and through its undersigned counsel, moves this Court to enlarge the time for Morgan Stanley to comply with the Court's July 12, 2004 Order that require an in camera submission of privilege material. In support of its motion, Morgan Stanley states as follows:

1. On July 12, 2004, this Court entered an Order requiring Morgan Stanley to supplement and provide answers to certain Interrogatories relating to Plaintiff's Motion for Contempt. Specifically, the July 12, 2004 Order required Morgan Stanley to provide certain amended responses directly to the Court in a sealed envelope within twenty (20) days. The deadline for in camera submission is August 2, 2004.

2. In its Order, the Court recognized the potential for appellate review concerning waiver of certain privileges. Any review of the July 12, 2004 Order would be via Petition for Certiorari which is not required to be filed and served until August 11, 2004.

3. Morgan Stanley respectfully requests that the Court extend the deadline for providing the amended responses for in camera review until August 20, 2004 for the following reasons:

- a) On July 26, 2004, counsel for Plaintiff refused to agree to a Special Master to issue a report and recommendation concerning privilege issues. As the Court stated on July 23, 2004, the Court would not be able to rule on these issues quickly; therefore, there would be no prejudice if this short extension was granted.
- b) The deadline for seeking appellate review of the July 12, 2004 Order is August 11, 2004. Due to the other issues pending in this action, Morgan Stanley requires additional time to analyze whether to seek appellate review of the July 12, 2004 Order. If appellate review is sought, it would be unnecessary for the Court to conduct an in camera inspection until the appellate review is completed. At the very least, the deadline should be extended until after the deadline for filing a Petition for Certiorari.
- c) The next Case Management Conference in this matter is scheduled for August 13, 2004. It is anticipated that additional issues concerning the Motion for Contempt and related discovery be raised at that conference. Morgan Stanley believes that the Court's rulings at the Case Management Conference on August 13, 2004 will have a direct impact on the application of the Court's July 12, 2004 Order.

Therefore, compliance with the July 12, 2004 Order should be delayed until after the August 13, 2004 Case Management Conference.

4. Morgan Stanley will provide amended responses to the Interrogatories as required by the July 12, 2004 Order for any non-privileged information that was not required to be submitted to the Court for in camera inspection.

WHEREFORE, Morgan Stanley respectfully requests that this Court enlarge the time for Morgan Stanley to comply with the Court's July 12, 2004 Order until August 20, 2004 together with such other and further relief as the Court deems just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this 28th day of July, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar No. 618349)
Thomas A. Clare
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

Counsel for Morgan Stanley Senior Funding, Inc.

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
E-mail: jianno@carltonfields.com

BY: Joseph Ianno, Jr.
Joseph Ianno, Jr.
Florida Bar No. 655351

SERVICE LIST

Jack Scarola
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy
Michael Brody
JENNER & BLOCK, LLC
One IBM Plaza, Suite 400
Chicago, IL 606119

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

CASE NO. CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),
vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

**ORDER ON COLEMAN (PARENT) HOLDINGS, INC.'S AND MACANDREWS &
FORBES HOLDINGS, INC.'S MOTION TO COMPEL ANSWERS TO
INTERROGATORIES AND REQUESTS FOR PRODUCTION AND MS & CO. AND
MSSF'S OBJECTIONS TO INTERROGATORIES**

THIS CAUSE came before the Court July 23, 2004 on Coleman (Parent) Holdings, Inc.'s and MacAndrews & Forbes Holdings, Inc.'s Motion to Compel Answers to Interrogatories and Requests for Production, with all counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that Coleman (Parent) Holdings, Inc.'s and MacAndrews & Forbes Holdings, Inc.'s Motion to Compel Answers to Interrogatories and Requests for Production is Granted, in part, Denied, in part, and ruling deferred, in part. The Court finds that Coleman (Parent) Holdings, Inc., and MacAndrews & Forbes Holdings, Inc., failed to make a prima facie case that the crime fraud exception applies. See Butler, Pappas, et al. v. Coral Reef of Key Biscayne Developers, Inc., 873 So. 2d 339, (Fla. 3d DCA

2003). It is further

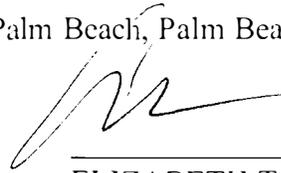
ORDERED AND ADJUDGED that MS & Co. and MSSF's Objection to Interrogatory 1 is overruled, in part. The first sentence of the interrogatory is stricken. The first seven words of the second sentence are stricken and "Identify" substituted in their place. MS & Co. And MSSF shall serve their answers to the interrogatory as so modified within 20 days. It is further

ORDERED AND ADJUDGED that MS & Co. and MSSF's Objection to Interrogatory 2 is sustained. It is further

ORDERED AND ADJUDGED that MS & Co. and MSSF's Objection to Interrogatory 3 is sustained, in part, and overruled, in part. MS & Co. shall supplement its answer to address whether any part of the decision was made other than on advice of counsel and, if so, shall answer the Interrogatory as to that part, within 20 days. It is further

ORDERED AND ADJUDGED that the Court defers ruling further on MS & Co. and MSSF's Objections to Interrogatories and Requests for Production, pending further hearing.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 28 day of July, 2004.



ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci
655 15th Street, NW, Suite 1200
Washington DC 20005

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, Il 60611

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

_____ /
CASE NO. CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

_____ /
**ORDER ON COLEMAN (PARENT) HOLDINGS, INC.'S AND MACANDREWS &
FORBES HOLDINGS, INC.'S MOTION TO COMPEL ANSWERS TO
INTERROGATORIES AND REQUESTS FOR PRODUCTION AND MS & CO. AND
MSSF'S OBJECTIONS TO INTERROGATORIES**

THIS CAUSE came before the Court July 23, 2004 on Coleman (Parent) Holdings, Inc.'s and MacAndrews & Forbes Holdings, Inc.'s Motion to Compel Answers to Interrogatories and Requests for Production, with all counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that Coleman (Parent) Holdings, Inc.'s and MacAndrews & Forbes Holdings, Inc.'s Motion to Compel Answers to Interrogatories and Requests for Production is Granted, in part, Denied, in part, and ruling deferred, in part. The Court finds that Coleman (Parent) Holdings, Inc., and MacAndrews & Forbes Holdings, Inc., failed to make a prima facie case that the crime fraud exception applies. See Butler, Pappas, et al. v. Coral Reef of Key Biscayne Developers, Inc., 873 So. 2d 339, (Fla. 3d DCA

2003). It is further

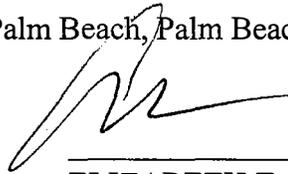
ORDERED AND ADJUDGED that MS & Co. and MSSF's Objection to Interrogatory 1 is overruled, in part. The first sentence of the interrogatory is stricken. The first seven words of the second sentence are stricken and "Identify" substituted in their place. MS & Co. And MSSF shall serve their answers to the interrogatory as so modified within 20 days. It is further

ORDERED AND ADJUDGED that MS & Co. and MSSF's Objection to Interrogatory 2 is sustained. It is further

ORDERED AND ADJUDGED that MS & Co. and MSSF's Objection to Interrogatory 3 is sustained, in part, and overruled, in part. MS & Co. shall supplement its answer to address whether any part of the decision was made other than on advice of counsel and, if so, shall answer the Interrogatory as to that part, within 20 days. It is further

ORDERED AND ADJUDGED that the Court defers ruling further on MS & Co. and MSSF's Objections to Interrogatories and Requests for Production, pending further hearing.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 28 day of July, 2004.



ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:

Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci
655 15th Street, NW, Suite 1200
Washington DC 20005

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, Il 60611

FAX TRANSMITTAL

JENNER & BLOCK

Jenner & Block LLP
One IBM Plaza
Chicago, IL 60611
Tel 312 222-9350
www.jenner.com

Chicago
Dallas
Washington, DC

Date: July 28, 2004

To: Thomas A. Clare, Esq.

Fax: (202) 879-5200
Voice: (202) 879-5993

Joseph Ianno, Jr., Esq.

Fax: (561) 659-7368
Voice: (561) 659-7070

John Scarola, Esq.

Fax: (561) 684-5816 (before 5 PM)
Voice: (561) 686-6350, Ext. 140

From: Michael T. Brody
312 923-2711

Employee Number:

Client Number: 41198-10003

Important: This message is intended only for the use of the individual or entity to which it is addressed, and may contain information that is attorney work product, privileged, confidential, and exempt from disclosure under applicable law. If the reader of this message is not the intended recipient, or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution, or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone, and return the original message to us at the above address via postal service. Thank you.

Message:

Total number of pages including this cover sheet: 5

Time Sent:

If you do not receive all pages, please call: 312 222-9350

Sent By:

Secretary: Caryn Jo Geisler

Extension: 6490

JENNER & BLOCK

July 28, 2004

Jenner & Block LLP
One IBM Plaza
Chicago, IL 60611
Tel 312-222-9350
www.jenner.com

Chicago
Dallas
Washington, DC

By Telecopy

Thomas A. Clare, Esq.
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

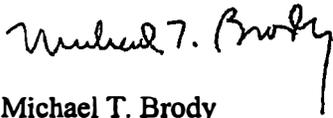
Michael T. Brody
Tel 312 923-2711
Fax 312 840-7711
mbrody@jenner.com

Re: *Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co.
Morgan Stanley Senior Funding, Inc. v. MacAndrews & Forbes Holdings Inc., et al.*

Dear Tom:

We accept August 12, 2004 for Mr. Harris' deposition. A notice of deposition is enclosed.

Very truly yours,



Michael T. Brody

MTB:cjg

cc: Joseph Ianno, Esq. (by telecopy)
John Scarola, Esq. (by telecopy)
Jerold S. Solovy, Esq.

THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

CASE NO. CA 03-5045 AI

vs.

MORGAN STANLEY & CO., INC.,
Defendant.

MORGAN STANLEY SENIOR FUNDING, INC., CASE NO. CA 03-5165 AI
Plaintiff,

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
et al.,
Defendants.

NOTICE OF TAKING VIDEOTAPED DEPOSITIONS

To: Thomas A. Clare, Esq.
KIRKLAND & ELLIS, LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lake View Avenue
Suite 1400
West Palm Beach, FL 33401

PLEASE TAKE NOTICE that Plaintiff Coleman (Parent) Holdings Inc. will take the deposition upon oral examination of the following witness pursuant to Florida Rule of Civil Procedure 1.310 on the date, time, and location set forth below:

DEPONENT

DATE AND TIME

Brooks Harris	August 12, 2004 at 9:30 a.m.
---------------	------------------------------

The deposition will be conducted at Esquire Deposition Services, 216 East 45th Street, New York, NY 10017. The deposition will be recorded by videotape and stenographic means. The deposition will be taken before a person authorized to administer oaths and will continue day to day until completed.

The videotape operator will be Esquire Deposition Services located in New York, New York.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by facsimile and mail to all counsel on the attached Service List this 28th day of July 2004.

Dated: July 28, 2004

COLEMAN (PARENT) HOLDINGS INC.

By: 
One of Its Attorneys

Jerold S. Solovy
JENNER & BLOCK LLP
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

Jack Scarola
SEARCY DENNEY SCAROLA BARNHART
& SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33409
(561) 686-6300

SERVICE LIST

Thomas A. Clare, Esq.
KIRKLAND & ELLIS, LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lake View Avenue
Suite 1400
West Palm Beach, FL 33401

KIRKLAND & ELLIS LLP

AND AFFILIATED PARTNERSHIPS

655 Fifteenth Street, N.W.
Washington, D.C. 20005

202 879-5000

www.kirkland.com

Facsimile:
202 879-5200

Michael C. Occhuzzo
To Call Writer Directly:
(202) 879-5205
mocchuizzo@kirkland.com

July 29, 2004

BY FACSIMILE AND FEDERAL EXPRESS

Michael Brody, Esq.
Jenner & Block, LLC
One IBM Plaza
Chicago, IL 60611-7603

**Re: *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc.
MSSF v. MacAndrews & Forbes Holdings Inc. et al.***

Dear Mike:

I write in response to your July 28, 2004 letter concerning Mr. Engelman's deposition. We accept the proposed date of August 4, 2004, for Mr. Engelman's deposition, however we request that the deposition begin at 9:30 a.m. Enclosed please find a Notice of Deposition for Mr. Engelman.

Sincerely,



Michael C. Occhuzzo

Enclosure

cc: Joseph Ianno, Jr., Esq.
John Scarola, Esq.
Jerold S. Solovy, Esq.

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.
MORGAN STANLEY & CO., INC.,
Defendant(s).

CASE NO: CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),
vs.
MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

NOTICE OF VIDEOTAPED DEPOSITION

PLEASE TAKE NOTICE that Defendant Morgan Stanley & Company Incorporated and Plaintiff Morgan Stanley Senior Funding will take the videotaped deposition of Irwin Engelman, pursuant to Florida Rules of Civil Procedure 1.280 and 1.310. The oral examination will take place beginning on August 4, 2004, at 9:30 a.m. and continue from day to day until completed at the offices of Kirkland & Ellis, LLP, 153 East 53rd Street, New York, New York, 10022. The deposition will be taken before a person authorized to administer oaths and recorded by stenographic and videographic means. The video operator will be Esquire Deposition Services of 216 E. 45th Street in New York, New York. The witness is instructed to bring all books, papers, and other things in his possession or under his control relevant to this lawsuit (and not previously produced in discovery) to the examination.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this 29th day of July, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar # 618349)
Thomas A. Clare
Zhonette M. Brown
Michael C. Occhuizzo
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

Joseph Ianno, Jr. (FL Bar # 655351)
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

BY:  _____

**Counsel for Morgan Stanley & Co.
Incorporated & Morgan Stanley Senior
Funding**

SERVICE LIST

Counsel for Coleman(Parent) Holdings & MacAndrews & Forbes

John Scarola

**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**

2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33409

Jerold S. Solovy

JENNER & BLOCK, LLC

One IBM Plaza, Suite 4400
Chicago, Illinois 60611

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT,
IN AND FOR PALM BEACH
COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiffs,

vs.

Case No. 2003-CA 005045 AI

MORGAN STANLEY & CO., INC.,

Defendant.

MORGAN STANLEY SENIOR FUNDING,
INC.,

Plaintiff,

vs.

Case No. 2003 CA 03-5165 AI

MACANDREWS & FORBES HOLDINGS,
INC.,

Defendant,

**WACHOVIA BANK, N.A.'S
MOTION TO QUASH SUBPOENA OR,
IN THE ALTERNATIVE, MOTION FOR PROTECTIVE ORDER**

Non-party Wachovia Bank, N.A. ("Wachovia"), pursuant to Florida Rule of Civil Procedure 1.410(c), moves to quash the subpoena served upon Wachovia by Coleman (Parent) Holdings Inc. and MacAndrews & Forbes Holdings, Inc., issued on July 12, 2004, or, in the alternative, pursuant to Florida Rule of Civil Procedure 1.280(c), moves for entry of a protective order, and in support states:

1. On or about August 4, 2003, Wachovia was served by CPH with a Notice of Deposition for August 15, 2003, together with a Subpoena Duces Tecum directed to the Custodian of Records of Wachovia bank (the “First Subpoena”).

2. The First Subpoena requested 58 categories of documents for the period January 1, 1996 through the date of trial in this matter. The First Subpoena further requested documents from two arbitrations, nine other lawsuits and two separate SEC Administrative Proceedings.

3. After an extensive review of over 20,000 pages of documents, Wachovia produced 7 banker boxes of documents responsive to the First Subpoena.

4. On or about July 12, 2004, CPH and MAFCO issued a second subpoena duces tecum for the deposition of Wachovia’s Custodian of Records (the “Second Subpoena”) attached as **exhibit A**.

5. Attachment A to the Second Subpoena requests 13 categories of documents for the period January 1, 2001 “through the date of trial” of this matter. See instructions paragraph 3, page 4. Further, the Second Subpoena seeks documents regarding four distinct Morgan Stanley entities. See definitions paragraph 6, page 4.

6. On its face, the Second Subpoena is patently overbroad, unduly burdensome, vague, ambiguous, requests commercially sensitive, privileged and/or confidential documents. Indeed, the instruction seeking documents from January 1, 2001 “through the date of trial” of this matter appears to be an attempt to make the subpoena a continuing request. Surely, if the Florida Rules of Civil Procedure do not require a party to supplement its discovery responses, a non-party cannot be expected to do so.

7. Further, in preparing this Motion, Wachovia has reviewed the Court file for the instant case to determine the relevant issues. During the course of this review, Wachovia has learned that at least some of the documents sought from Wachovia are publicly available in as much as the Coleman/Andersen settlement is attached to an order in the court file dated December 4, 2003. Accordingly, it would seem at least certain items listed in the Second Subpoena are unnecessary as the documents are publicly available to CPH and MAFCO.

8. Accordingly, Wachovia has written CPH and MAFCO's counsel to inform them of Wachovia's position and to request a narrowing of the documents sought by the Second Subpoena.

9. Due to the breadth of the Second Subpoena, some of the documents responsive to the Second Subpoena have previously been produced in response to the First Subpoena.

10. Moreover, certain documents requested may concern a depositor or borrower other than CPH and MAFCO. Pursuant to Florida Statute 655.059, the books and records of a financial institution are confidential and are only available for inspection and examination as proscribed by Florida Statute 655.059(2)(b).

11. Further, there may be confidentiality provisions in Wachovia's agreements with its borrower/depositors that preclude Wachovia from disclosing the information requested to third parties without the borrower/depositor's consent and/or prior court order.

12. Wachovia is unaware of any "agreement" by the borrower/depositor or court order requiring the release of the information requested in the Second Subpoena.

13. For these reasons, the Second Subpoena should be quashed. Alternatively, and at a minimum, a protective order is warranted to reduce the scope of the Second Subpoena, to ensure the confidentiality of Wachovia's books and records is maintained, to allow sufficient time for the preparation of a privilege log and confidentiality agreement, and to allow Wachovia sufficient time to review its records prior to producing any responsive documents.¹

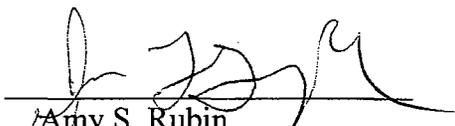
14. If required to produce documents in response to the Second Subpoena, Wachovia requests it be compensated in accordance with Florida Statute 655.059(1)(e), effective July 1, 2004, and Florida Statute 92.153. Wachovia requests the Court to establish the appropriate rate of compensation for Wachovia's search, retrieval, copying and preparation of documents in response to the Second Subpoena.

WHEREFORE, Wachovia Bank, N.A., respectfully requests entry of an order quashing the Second Subpoena or, in the alternative, entry of a protective order and for such other and further relief the Court deems just and proper.

Dated this 29th day of July 2004.

RUDEN, McCLOSKEY, SMITH,
SCHUSTER & RUSSELL, P.A.
222 Lakeview Avenue, Suite 800
West Palm Beach, Florida 33401
Telephone: 561/838-4500
Facsimile: 561/514-3437

By: _____

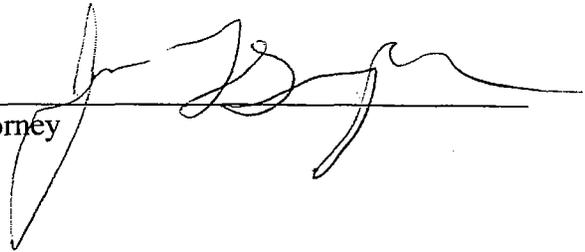

Amy S. Rubin
Florida Bar No.: 476048
Jon L. Swergold
Florida Bar No.: 108510

¹ If the Court does not quash the Second Subpoena, Wachovia anticipates it will need approximately 60 days to review its files to respond to the Second Subpoena.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document was furnished by US Mail this 29th day of July, 2004 to: Jack Scarola, Searcy Denney Scarola Barnhard & Shipley, P.A., 2139 Palm Beach Lakes Blvd, West Palm Beach, FL 33409; Jerold S. Solovy, Jenner & Bock, LLP One IBM Plaza, Suite 4400, Chicago, IL 60611, Joseph Ianno, Jr., Carlton, Fields, et al, 222 Lakeview Avenue, Suite 1400, West Palm Beach, FL 33401; and to Thomas D. Yannucci, P.C., Thomas A. Clare, Brett McGurk, Kirkland and Ellis, 655 15th Street, NW, Suite 1200, Washington, DC 20005.

Attorney

A handwritten signature in black ink is written over a horizontal line. The signature is cursive and appears to be "J. Scarola".

#23058)/smk

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiffs,

CASE NO: 2003 CA 005045 AI

vs.
MORGAN STANLEY & CO., INC.
Defendant.

MORGAN STANLEY SENIOR FUNDING,
INC.,
Plaintiff,

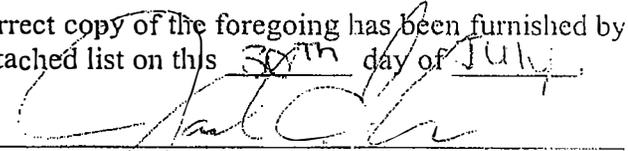
vs.
MACANDREWS & FORBES HOLDINGS,
INC.,
Defendant,

CASE NO. CA 03-5165 AI

NOTICE OF FILING PLEADING UNDER SEAL

COLEMAN (PARENT) HOLDINGS INC. and MACANDREWS & FORBES HOLDINGS, INC. hereby give notice of the filing of COLEMAN (PARENT) HOLDINGS INC.'S AND MACANDREWS & FORBES HOLDINGS, INC.'S MOTION TO CLARIFY THIS COURT'S JULY 26, 2004 ORDER ON CPH'S AND MAFCO'S ORE TENUS MOTION AND THIS COURT'S DECEMBER 4, 2003 ORDER ON MORGAN STANLEY'S MOTION TO COMPEL PRODUCTION OF SETTLEMENT AGREEMENT, Filed under Seal on this date.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Fax and Federal Express to all counsel on the attached list on this 30th day of July, 2004.



JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 684-5815
Attorneys for Coleman (Parent) Holdings, Inc.
and MacAndrews & Forbes Holdings, Inc.

Colerain (Parent) Holdings Inc. vs Morgan Stanley & Company
Notice Of Filing Pleading Under Seal
Case No.: 2003 CA 005045 AI

COUNSEL LIST

Joseph Lanno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 5th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block LLP
One IEM Plaza
Suite: 4400
Chicago, IL 60611

REVISED

THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

CASE NO. CA 03-5045 AI

vs.

MOFGAN STANLEY & CO., INC.,
Defendant.

MOFGAN STANLEY SENIOR FUNDING, INC., CASE NO. CA 03-5165 AI
Plaintiff,

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
et al,
Defendants.

**COLEMAN (PARENT) HOLDINGS INC.'S AND
MACANDREWS & FORBES HOLDINGS, INC.'S
MOTION FOR ENTRY OF ORDER CONCERNING
SUPPLEMENTATION OF INTERROGATORY RESPONSES**

Coleman (Parent) Holdings Inc. ("CPH") and MacAndrews & Forbes Holdings, Inc. ("MAFCO"), by their attorneys, hereby request that this Court enter an Order concerning the supplementation of interrogatory responses in the form set forth in Exhibit A. In support of this motion, CPH and MAFCO state as follows:

1. Throughout the course of discovery in this case, the parties have served interrogatory answers that might have become out of date with the passage of time. Given that fact and that the Florida Rules of Civil Procedure do not provide that discovery responses need to be supplemented, CPH and MAFCO respectfully request that this Court enter an Order providing for supplementation of interrogatory responses.

2. The parties already have agreed in principle that supplementation should occur. Indeed, the parties have exchanged drafts of a stipulation providing for the supplementation of

interrogatory responses, and the parties have agreed to much of the language in that stipulation. There is, however, one important point about which the parties disagree. CPH and MAFCO want to ensure that the parties' responses are "complete and accurate," but Morgan Stanley & Co., Inc. and Morgan Stanley Senior Funding, Inc. (collectively, "Morgan Stanley") object to the inclusion of such language. The parties' competing versions of the disputed stipulation provision are as follows:

CPH's and MAFCO's version: "All parties shall supplement and update their Interrogatory responses to the extent necessary to render all responses complete and accurate as of the time of the update, thirty days prior to the close of fact discovery.

Morgan Stanley's version: "All parties shall supplement and update their Interrogatory responses in compliance with the Florida Rules of Civil Procedure, to the extent necessary, on or before thirty days prior to the close of fact discovery.

3. We have asked Morgan Stanley what it finds objectionable about the "complete and accurate" standard. We also have asked whether Morgan Stanley believes that its proposed language — "in compliance with the Florida Rules of Civil Procedure" — means that interrogatory answers do not have to be "complete and accurate." But Morgan Stanley demurs, repeating only that it will provide interrogatory answers that comply with Florida's rules. If Morgan Stanley believes that Florida's rules require something other than "complete and accurate" answers, we have a very significant disagreement about the parties' discovery obligations, and since the Florida Rules of Civil Procedure do not require any supplementation, language requiring updates "in compliance with the Florida Rules of Civil Procedure" creates an ambiguity.

4. CPH's and MAFCO's version of the disputed provision is straightforward and in accordance with this Court's views about the information that interrogatories should contain. Specifically, at the July 23 hearing, this Court expressly stated that "we need interrogatory

answer: that are complete and truthful." See Ex. B, 7/23/04 Tr. 9:19-20. Morgan Stanley's refusal to agree with the uncontroversial proposition that the supplemental interrogatory responses must be "complete and accurate" causes us concern and leads us to seek relief from the Court.

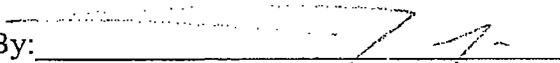
5. The Court should require both sides to provide complete and accurate supplements to their interrogatory responses 30 days before the close of fact discovery.

For the foregoing reasons, CPH and MAFCO request that this Court enter the Order concerning supplementation of interrogatories that is attached hereto as Exhibit A.

Date: July 30, 2004

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC. and
MACANDREWS & FORBES HOLDINGS, INC.

By: 
One of Its Attorneys

Jerold S. Solovy
Ronald L. Marmer
Jeffrey T. Shaw
JENNIFER & BLOCK LLP
One IEM Plaza
Chicago, Illinois 60611
(312) 22-9350

John Scarola
SEARCY DENNEY SCAROLA
BARNHART & SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33402-3626
(561) 686-6300

#11321-64

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by
Fax and Federal Express to all counsel on the attached list on this 30th day of
July, 2004.



JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 684-5816
Attorneys for Coleman(Parent)Holdings Inc.
and MacAndrews & Forbes Holdings, Inc.

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 LaSalle Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Bret McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block LLP
One IEM Plaza
Suite 4400
Chicago, IL 60611

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiffs,

CASE NO: 2003 CA 005045 AI

vs.
MORGAN STANLEY & CO., INC.,

Defendant.

MORGAN STANLEY SENIOR FUNDING,
INC.,

Plaintiff,

vs.

MACANDREWS & FORBES HOLDINGS,
INC.,

CASE NO.: 2003 CA 03-5165 AI

Defendant,

NOTICE OF HEARING

YOU ARE HEREBY NOTIFIED that the undersigned has called up for hearing the

following:

DATE: Monday, August 2, 2004

TIME: 8:45 a.m.

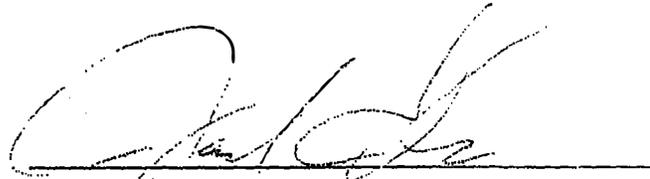
JUDGE: Elizabeth T. Maass, Judge

PLACE: Palm Beach County Courthouse, Room #11.1208, 205 North Dixie Highway,
West Palm Beach, FL 33401

SPECIFIC MATTERS TO BE HEARD: COLEMAN (PARENT) HOLDINGS INC.'S AND
MACANDREWS & FORBES HOLDINGS, INC.'S MOTION TO CLARIFY THIS COURT'S
JULY 16, 2004 ORDER ON CPH'S AND MAFCO'S ORE TENUS MOTION AND THIS
COURT'S DECEMBER 4, 2003 ORDER ON MORGAN STANLEY'S MOTION TO
COMPEL PRODUCTION OF SETTLEMENT AGREEMENT

Colerina: Holdings, Inc. vs Morgan Stanley & Company
Case No.: 2003 CA 005045 AI
Notice of Hearing

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by
Fax in Federal Express to all Counsel on the attached list, this 30th day of July,
2003.



JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 684-5816
Attorney for Plaintiffs

Coleman Holdings, Inc. vs Morgan Stanley & Company
Case No : 2003 CA 005045 AI
Notice of Hearing

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 La Jolie Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 5th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block LLP
One IBM Plaza
Suite 4100
Chicago, IL 60611

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO., INC.,

Defendant.

MORGAN STANLEY SENIOR FUNDING, INC.,

Plaintiff,

v.

CASE NO: CA 03-5165 AI

MACANDREWS & FORBES HOLDINGS, INC.,

Defendant.

**MORGAN STANLEY'S MOTION TO DISMISS OR STRIKE
PLAINTIFF'S MOTION FOR CONTEMPT**

Morgan Stanley & Co. Incorporated and Morgan Stanley Senior Funding, Inc. (collectively, "Morgan Stanley"), move to dismiss or strike the plaintiff's Motion for Contempt as legally insufficient. This motion presents a single issue: Whether Morgan Stanley can be found in contempt of court for disclosing to its counsel a document that was a matter of public record at the time of disclosure and remains so today. The answer is no, and the plaintiff's Motion for Contempt should be dismissed *now* as legally insufficient. In support of this motion, Morgan Stanley states as follows.

Statement of Undisputed Facts

1. On March 12, 2004, the plaintiff filed its Motion for an Order for a Rule to Show Cause Against Morgan Stanley. On May 14, 2004, the Court entered an Order (“May 14 Order”) converting the motion to a Motion for Contempt. At this time, the motion has not been set for an evidentiary hearing.

2. The gravamen of the Motion for Contempt is that Morgan Stanley violated the terms of the Stipulated Confidentiality Order, dated July 31, 2003, by improperly disclosing the Arthur Andersen Settlement Agreement to Morgan Stanley’s counsel Kellogg, Huber, Hansen, Todd & Evans P.L.L.C., and thereafter using the Settlement Agreement in “other litigation.”

3. On October 29, 2003, Morgan Stanley filed its Motion to Compel Plaintiff to Produce Settlement Agreement with Arthur Anderson. The Motion was heard on November 25, 2003.

4. On December 4, 2003, the Court ordered production of the Settlement Agreement (Exhibit 1), with certain provisions redacted. The Court also ordered the Clerk to file under seal the unredacted Settlement Agreement.

5. On December 8, 2003, Morgan Stanley received a copy of the *redacted* Settlement Agreement. Morgan Stanley did not receive and does not possess a copy of the unredacted Settlement Agreement.

6. On December 18, 2003, the Clerk docketed the Court’s December 4 Order. Pursuant to the Court’s Order, the Clerk filed under seal the unredacted copy of the Andersen Settlement Agreement. In addition, and pursuant to the December 4 order, the Clerk filed — not under seal — a *redacted* copy of the Settlement Agreement. The redacted copy of the Settlement Agreement in the court file discloses all of the terms of the settlement between the plaintiff and

Arthur Anderson, including the provisions that are at issue in the plaintiff's Motion for Contempt.

7. On March 1, 2004, three Morgan Stanley entities (Morgan Stanley, Morgan Stanley Senior Funding, Inc., and Morgan Stanley & Co. Incorporated) filed a civil action against Arthur Anderson. This action is pending before Judge Karen Miller.

8. On March 12, 2004, the plaintiff filed what the Court has renominated a Motion for Contempt. *See* May 14 Order at 3. The motion, which is predicated entirely upon a violation of the Confidentiality Order and the Court's December 4 Order, makes two allegations. *First*, that Morgan Stanley violated the Stipulated Confidentiality Order by disclosing to third parties, including attorneys from Kellogg Huber, on or about *February 26, 2004*, the Settlement Agreement that was a matter of public record as of *December 18, 2003*. And *second*, that Morgan Stanley then (after February 26, 2004) "used" the Settlement Agreement in other litigation — the action against Arthur Andersen filed before Judge Miller — by including as a plaintiff in that action Morgan Stanley & Co. Incorporated for the sole purpose of triggering the indemnity provision of the Settlement Agreement.

9. At the July 23, 2004 Case Management Conference, the plaintiff made an *ore tenus* motion to seal the *redacted* version of the Andersen Settlement Agreement. The Court stated that the *redacted* version of the Settlement Agreement was *not* filed under seal, and as a result, was and is a part of the public record in these consolidated actions. The Court further stated that "the only thing that was supposed to be filed under seal was the complete copy of the settlement agreement, not the Exhibit A [Exhibit 1] to the [December 4, 2003] order. Exhibit A was the redacted copy where the only thing I redacted I think was the account information [of Ronald Perelman]." Transcript of July 23, 2004, Hearing at 62:5-10.

10. On July 26, 2004, the Court entered a written order “that Plaintiff’s ore tenus Motion to Direct Clerk to Seal Exhibit to the Court’s Order on Defendant’s Motion to Compel Production of Settlement Agreement entered December 4, 2003 is Denied.”

Argument

The plaintiff’s Motion for Contempt is the legal equivalent of a complaint. The plaintiff makes specific allegations of fact unrelated to these consolidated actions, which facts the plaintiff claims entitle it to both equitable and legal relief. *See* Motion for Contempt at 10. Morgan Stanley has denied the plaintiff’s allegations.¹ Morgan Stanley brings this motion because the undisputed facts alleged in the Motion for Contempt and those of record establish that the plaintiff’s motion is legally deficient. In short, the Motion for Contempt does not state a claim upon which relief can be granted under the legal standards applicable to civil contempt proceedings in Florida. *See In re S.L.T.*, 180 So. 2d 374, 379 (Fla. 2d DCA 1965) (holding “[d]ue process of law requires that the party accused be advised of the charge and accorded opportunity to defend himself); *Merrill Lynch Trust Co. v. Alzheimer's Lifeliners Ass'n, Inc.*, 832 So. 2d 948, 954 (Fla. 2d DCA 2002) (holding “[a]n essential finding to support contempt is the party's intent to violate the court order at issue,” citing *Power Line Components, Inc. v. Mil-Spec Components, Inc.*, 720 So 2d 546, 548 (Fla. 4th DCA 1998); *see also Fla. R. Civ. P.* 1.140(b)(6). Accordingly, Morgan Stanley respectfully submits that the Motion for Contempt should either be dismissed or stricken.

¹ Morgan Stanley denies that it violated the Stipulated Confidentiality Order. For purposes of this Motion only, however, Morgan Stanley treats the allegations of plaintiff’s Motion for Contempt as true in the same manner as the Court would treat allegations of a complaint for purposes of deciding a Motion to Dismiss.

A. The Settlement Agreement Is Not Confidential Pursuant To The Terms Of The Stipulated Confidentiality Order Because It Is Publicly Available.

Pursuant to this Court's Order of December 4, 2003, Morgan Stanley received a copy of the *redacted* Settlement Agreement on December 8, 2003. The Court's December 4, 2003 Order ordered the redacted Settlement Agreement (Exhibit 1) "deemed 'Confidential'" and subject to the terms of the parties Stipulated Confidentiality Order entered July 31, 2003. Paragraph 2 of the Confidentiality Order provides that its terms do not apply to any document "generally available to the public."

This Order shall not apply to any document, testimony or other information that . . . (b) *becomes generally available to the public* other than as a result of disclosure in violation of this Order or in breach of any other legal obligation, or (c) *becomes available to a party* other than through voluntary or required production from a person or party who obtained the document, testimony or other information without any confidentiality restriction. (emphasis added)

As set forth above, the *redacted* Settlement Agreement has been included in the court file and publicly available since December 18, 2003. Pursuant to the express terms of the Confidentiality Order, the redacted Settlement Agreement is not "Confidential" and has not been Confidential since it was placed in the public records of this Court on December 18, 2003.

The plaintiff's *first* "claim" in its Motion for Contempt is that Morgan Stanley gave the Settlement Agreement to individuals not entitled to receive Confidential information. *See* Stipulated Confidentiality Order ¶ 9(c). The plaintiff alleges that Morgan Stanley's attorneys in the Andersen action were not entitled to receive a copy of the Settlement Agreement because they were not attorneys "of record" in these consolidated actions. *See* Motion for Contempt at 4. Even assuming that the plaintiff is correct, which Morgan Stanley denies, the Motion for Contempt is legally insufficient because the Settlement Agreement has been a public record since December 18, 2003. Therefore, any dissemination of the "public" document cannot, as a

matter of law, constitute a violation of the Confidentiality Order or the Court's December 4 Order.

The plaintiff's *second* "claim" is that Morgan Stanley allegedly used the Settlement Agreement for a purpose not authorized by the Confidentiality Order. This claim is also legally and factually insufficient. To find such a violation, this Court must necessarily find that the Settlement Agreement is protected by the Confidentiality Order. This claim fails as a matter of law because the Settlement Agreement is contained in the court file, which is available to anyone willing to go to the Clerk's office and ask to see the court file. The express terms of the Confidentiality Order *exclude* any document that is either publicly available or becomes available to any party other than through a violation of the Confidentiality Order. The Settlement Agreement is both publicly available and became available to any party once it was openly filed in the court file of this action. Because the Settlement Agreement is publicly available, whatever use was made of the document cannot constitute a violation of the Confidentiality Order. The plaintiff's real complaint is that the Andersen action is a sham pleading. That claim should be addressed in Judge Miller's courtroom pursuant to *Fla. R. Civ. P.* 1.150. *See, e.g., Pacheco v. Wasserman*, 701 So. 2d 104, 106 (Fla. 3^d DCA 1997) (holding "[t]o strike a pleading as a sham, a party must so move before trial, and the *trial court* must conduct an evidentiary hearing") (emphasis added).²

In sum, the plaintiff's Motion for Contempt is based entirely on alleged violations of the Confidentiality Order. In turn, these alleged violations depend entirely on the fact that the

² On July 23, 2004, Judge Miller entered an order in the Andersen action Granting the Defendants' Motion for a More Definite Statement." Andersen has not, however, according to the court record, made any claim that the action is a sham pleading under rule 1.150.

Settlement Agreement is a confidential document in accordance with the terms of the Stipulated Confidentiality Order. The facts are undisputed that as of *December 18, 2003*, the redacted Settlement Agreement was not a Confidential document. Accordingly, Morgan Stanley could not, as a matter of law, violate the December 4 Order by giving a copy of the Settlement Agreement to its counsel on *February 26, 2004*, even if they were not counsel in “this action.” Moreover, there can be no misuse of the Settlement Agreement under these circumstances that amount to contempt in this courtroom. At most, Andersen — not the plaintiff here — can proceed in Judge Miller’s courtroom pursuant to rule 1.150, which it has not elected to do at this time.

B. As A Matter Of Florida Law The Alleged Confidentiality Of A Commercial Settlement Agreement Does Not Trump The Presumption Of Public Access To Court Records.

The Court’s orders of December 4, 2003 and July 26, 2004, are in accord with the law and public policy of Florida. Florida public policy and the Florida Rules of Judicial Administration establish a presumption that “[t]he public shall have access to all records of the judicial branch of government.” *Fla. R. Jud. Admin.* 2.051(a); *see Goldberg v. Johnson*, 485 So. 2d 1386, 1388 (Fla. 4th DCA 1986) (noting “the public and press have a right to know what goes on in a courtroom”); *see also Smithwick v. Television 12 of Jacksonville, Inc.*, 730 So. 2d 795, 799 (Fla. 1st DCA 1999) (noting strong public policy in favor of open government overcame potential injury that disclosure of court record may cause to third party). These records are explicitly defined to include “the contents of the court file.” *Fla. R. Jud. Admin.* 2.051(b)(1)(A).

According to the Florida Rules and case law, there are a very narrow set of circumstances which can overcome the presumption supporting public access and the decision of a court to seal records or proceedings “should be exercised cautiously and only for the most cogent reasons.” *Goldberg*, 485 So. 2d at 1388. These exceptions are codified at rule 2.051(c)(9). *See Gombert v.*

Gombert, 727 So. 2d 355, 357 (Fla. 1st DCA 1999) (finding that rule 2.051 incorporates judicial decisions concerning when confidentiality concerns may support sealing a record). A commercial settlement agreement between two private parties does not meet the demanding criteria necessary in order to overcome the strong presumption in favor of public access to court records.

The Settlement Agreement — which is merely a contract between two parties — does not meet any of the established criteria for sealing what would otherwise be public records. Certainly the Settlement Agreement does not need to be sealed to protect the “orderly administration of justice,” a “compelling government interest,” or constitutional or statutory public policy. *See Fla. R. Jud. Admin.* 2.051(c)(9)(A)(i, iii & vii). Nor will the revelation of the Settlement Agreement result in “*substantial injury*” to an innocent third party or party. *See Fla. R. Jud. Admin.* 2.051(c)(9)(A)(v & vi). Finally, the Settlement Agreement does not contain a trade secret and need not be kept under seal in order to “obtain evidence to determine legal issues in a case.” *See Fla. R. Jud. Admin.* 2.051(c)(9)(A)(ii & iv).

The only argument that CPH has advanced in support of the confidential treatment of the Settlement Agreement is the fact that the Settlement Agreement itself contractually obligates the parties to the Agreement to keep the terms confidential. This sort of contract is not sufficient to thwart public access to court records. *Goldberg*, 485 So. 2d at 1389 (“[A] litigant’s preference that the public not be apprised of the details of his litigation is not grounds for closure.”).

C. The Settlement Agreement Is Not “Confidential.”

Even if the Settlement Agreement is somehow still “deemed Confidential” notwithstanding its filing the court files, the Settlement Agreement does not qualify as “Confidential” information under the Confidentiality Order. The Confidentiality Order affords Confidential treatment only to “proprietary or confidential trade secrets or technical, business,

financial or personnel [sic] information *of a current nature.*” July 31, 2003 Stipulated Confidentiality Order ¶ 4 (emphasis added). The Settlement Agreement does not fit within any of these categories. CPH cannot, therefore, sustain its burden to establish the confidential nature of the Settlement Agreement. *Id.* at ¶ 15 (placing the burden upon the party making the “Confidential” designation).

First, the Settlement Agreement is not “proprietary or confidential trade secrets.” *See* Fla. Stat. § 812.081(1)(c) (Trade secrets are information “for use . . . in the operation of a business and which provides the business an advantage, or an opportunity to obtain an advantage, over those who do not know or use it.”); *see also* Fla. Stat. § 364.183 (defining “proprietary confidential business information” to include, *inter alia*, trade secrets and other information that would affect the competitive position of the business); Fla. Stat. § 688.002 (defining a trade secret as “information, including a formula, pattern, compilation, program, device, method, technique, or process that [d]erives independent economic value . . . from not being generally known to, and not being readily ascertainable by . . . , other persons who can obtain economic value from its disclosure or use”). The information contained in a 2002 commercial settlement agreement between a shell corporation that does not operate a business and an accounting firm resolving a dispute arising from a 1998 transaction is not for use “in the operation of business” and does not provide a business advantage over competitors. *See American Express Travel Related Servs., Inc. v. Cruz*, 761 So. 2d 1206 (Fla. 4th DCA 2000) (reviewing process for assertion of trade secret privilege and noting burden of establishing trade secret rests on party asserting it); *Crocker Constr. Co. v. Hornsby*, 562 So. 2d 842 (Fla. 4th DCA 1990) (denying writ of certiorari for review of court order requiring production of financial information).

Second, the Settlement Agreement is not “technical, business, financial or personnel information of a current nature.” There is no “technical” or “personnel” information contained in the Agreement. Nor is there any business or financial information *of a current nature*.

Finally, settlement agreements and indemnity provisions are widely recognized as discoverable information that is not subject to special protection. *See City of Homestead v. Rogers*, 789 So. 2d 483 (Fla. 3^d DCA 2001) (ordering production of settlement agreement over objection based upon confidentiality provision in settlement agreement); *Scott v. Nelson*, 697 So. 2d 1300 (Fla. 1st DCA 1997) (ordering deposition of party to settlement agreement despite confidentiality provision in settlement agreement); Fla. Stat. § 44.102(3) (providing that privilege for communications that occur during mediation do not apply to an executed settlement agreement); *Fla. R. Civ. P.* 1.280(b)(2) (providing specifically that indemnity agreements are within the proper scope of discovery).

Conclusion

The plaintiff’s Motion for Contempt is legally deficient and fatally so. Nothing can save it. Morgan Stanley respectfully requests that the Court enter an order dismissing or striking the Motion for Contempt and enter such other and further orders as are necessary and proper. Morgan Stanley further requests that the Court reserve jurisdiction to award Morgan Stanley its attorney fees and costs as a result of having to defend the Motion for Contempt.

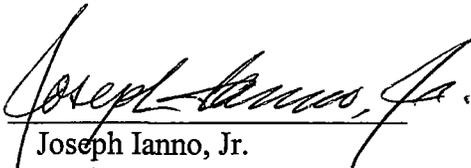
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the service list below by facsimile and Federal Express on this 30th day of July, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar No. 618349)
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

**Counsel for Morgan Stanley & Co.
Incorporated and Morgan Stanley
Senior Funding, Inc.**

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
E-mail: jianno@carltonfields.com

BY: 
Joseph Ianno, Jr.
Florida Bar No: 655351

SERVICE LIST

Jack Scarola
**SEARCY, DENNEY, SCAROLA
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy
Michael Brody
JENNER & BLOCK, LLC
One IBM Plaza, Suite 400
Chicago, IL 60611

CARLTON FIELDS, P.A.

ATTORNEYS AT LAW

Esperanté
222 Lakeview Avenue, Suite 1400
West Palm Beach, Florida 33401-6149

MAILING ADDRESS
P.O. Box 150, West Palm Beach, FL 33402-0150
Tel 561.659.7070 Fax 561.659.7368

FAX COVER SHEET

Date:	July 30, 2004	Phone Number	Fax Number
To:	Jack Scarola, Esq.	(561) 689-6300	(561) 684-5816
	Jerold Solovy, Esq	(312) 923-2711	(312) 840-7671
	Michael Brody		(312) 840-7711
	Thomas Clare, Esq.		(202) 879-5200
From:	Joyce Dillard, CLA to Joseph Ianno, Jr.	(561) 659.7070	(561) 659.7368

Client/Matter No.: 47877/14092

Employee No.:

Total Number of Pages Being Transmitted, Including Cover Sheet: 7

Message: To follow please find a copy of the Joseph Ianno's letter of today's date with its enclosed copy of Morgan Stanley's Motion to Remove Confidentiality Designations.

Original to follow Via Regular Mail Original will Not be Sent Original will follow via Overnight Courier

 The information contained in this facsimile message is attorney privileged and confidential information intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone (if long distance, please call collect) and return the original message to us at the above address via the U.S. Postal Service. Thank you.

If there are any problems or complications, please notify us immediately at:
561.659.7070

Telecopier operator: _____

WPB#567902.5

CARLTON FIELDS, P.A.

Miami Orlando St. Petersburg Tallahassee Tampa West Palm Beach

CARLTON FIELDS

ATTORNEYS AT LAW

MIAMI
ORLANDO
ST. PETERSBURG
TALLAHASSEE
TAMPA

WEST PALM BEACH

Esperon#
222 Lakeview Avenue, Suite 1400
West Palm Beach, Florida 33401-6149
P.O. Box 150
West Palm Beach, Florida 33402-0150561.659.7070
561.659.7368 fax
www.carltonfields.com

July 30, 2004

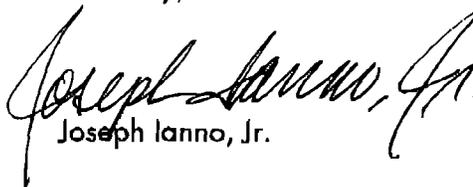
Jack Scarola, Esq.
Searcy, Denney, et al.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33401**VIA FACSIMILE**Re: *Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co. Inc.*
Morgan Stanley Senior Funding, Inc. v. MacAndrews & Forbes Holdings, Inc.

Dear Jack:

Enclosed please find Morgan Stanley's Motion to Remove Confidentiality Designations. Based on the Court's rulings and statements at the July 23, 2004 Case Management Conference, we believe that there should be no objection to the Motion and that hopefully we can submit an Agreed Order so that a hearing on the Motion is not necessary.

Please let me know if there are any objections to the Motion to Unseal. Thank you.

Sincerely,


Joseph Ianno, Jr.

/jed

Enclosure

cc: Jerry Solovy and Michael Brody (via facsimile)
Thomas Clare (via facsimile)

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff,

vs.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO., INC.,
Defendant.

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff,

vs.

CASE NO: CA 03-5165 AI

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant.

**MORGAN STANLEY & CO. INCORPORATED AND MORGAN STANLEY SENIOR
FUNDING, INC.'S MOTION TO REMOVE CONFIDENTIALITY DESIGNATIONS**

Morgan Stanley & Co. Incorporated and Morgan Stanley Senior Funding, Inc. (collectively, "Morgan Stanley") respectfully request that the Court enter an order removing the confidentiality designation from the documents set forth below that the plaintiff filed with the Court, and direct the Clerk of Court to unseal the filings of those documents. In support of this motion Morgan Stanley states as follows.

1. At the July 23, 2004 Case Management Conference, the plaintiff made an *ore tenus* motion to seal the *redacted* version of the Arthur Andersen Settlement Agreement, which is Exhibit A to the Court's December 4, 2003 order compelling production of the Settlement Agreement.

2. The Court stated that the redacted version of the Settlement Agreement was not filed under seal, and as a result, was and is a part of the public record in these consolidated

actions. The Court further stated that “the only thing that was supposed to be filed under seal was the complete copy of the settlement agreement, not the Exhibit A to the [December 4, 2003] order. Exhibit A was the redacted copy where the only thing I redacted I think was the account information [of Ronald Perelman].” (July 23, 2004 Hrg. at 62:5-10.)

3. On July 26, 2004, the Court entered a written order “that Plaintiff’s ore tenus Motion to Direct Clerk to Seal Exhibit to the Court’s Order on Defendant’s Motion to Compel Production of Settlement Agreement entered December 4, 2003 is Denied.”

4. The plaintiff filed the following documents with the Court under seal.
- (a) CPH’s March 12, 2004 Motion for a Rule to Show Cause
 - (b) CPH’s April, 23, 2004 Motion for Removal of Confidentiality Designations
 - (c) CPH’s April 23, 2004 Reply in Support of Motion for a Rule to Show Cause
 - (d) CPH’s May 5, 2004 Motion to Allow Arthur Andersen LLP Access to Confidential Transcript
 - (e) CPH’s May 20, 2004 Notice of Compliance with Order of May 17, 2004
 - (f) CPH’s May 27, 2004 Letter to Judge Maass enclosing transcript of April 30, 2004 hearing
 - (g) CPH’s May 28, 2004 Further Interrogatories Concerning Its Motion for Contempt
 - (h) CPH’s June 9, 2004 Response in Opposition to Motion for Protective Order
 - (i) CPH’s June 25, 2004 Motion to Compel Responses to Interrogatories
 - (j) CPH’s June 30, 2004 Answers to Morgan Stanley & Co.’s Interrogatories Concerning CPH’s Motion for Contempt
 - (k) CPH’s July 14, 2004 Response to Morgan Stanley & Co.’s Further Request for Production of Documents Concerning CPH’s Motion for Contempt

- (l) CPH's July 14, 2004 Answer to Morgan Stanley & Co.'s Further Interrogatory Concerning CPH's Motion for Contempt
- (m) CPH's July 15, 2004 Motion to Redact Certain References to Andersen Settlement Agreement Terms from July 12, 2004 Order
- (n) CPH and MAFCO's July 15, 2004 Motion to Compel Answers to Interrogatories and Requests for Production
- (o) CPH and MAFCO's July 15, 2004 Motion to Remove Confidentiality Designations

5. The confidentiality designations of each of these documents flows either directly or indirectly from CPH's mistaken belief that the redacted version of the Andersen Settlement Agreement was filed under seal and thus was confidential. Indeed, the Court made clear that it did not "see any reason why [the redacted Settlement Agreement] shouldn't be public." *Supra*, ¶ 2.

6. The Court's finding is entirely consistent with Florida law. *See City of Homestead v. Rogers*, 789 So. 2d 483 (Fla. 3d DCA 2001) (ordering production of settlement agreement over objection based upon confidentiality provision in settlement agreement); *Scott v. Nelson*, 697 So. 2d 1300 (Fla. 1st. DCA 1997) (ordering deposition of party to settlement agreement despite confidentiality provision in settlement agreement); FLA. STAT. § 44.102(3) (2003) (providing that privilege for communications that occur during mediation do not apply to an executed settlement agreement); Fla. R. Civ. P. 1.280(b)(2) (providing specifically that indemnity agreements are within the proper scope of discovery).

7. As further support for this Motion, Morgan Stanley submits that none of the above documents are protected by the parties' Stipulated Confidentiality Order. *First*, the Stipulated Confidentiality Order only protects information that "constitute[s], contain[s], reveal[s] or reflect[s] proprietary or confidential trade secrets or technical, business, financial or personnel [sic] information of a current nature." (July 31, 2003 Stipulated Confidentiality Order

¶ 4.) And *second*, the Stipulated Confidentiality Order excludes any document that becomes publicly available by means other than a violation of the Order. (*Id.* ¶ 2.) None of the documents (or their contents) qualify as "confidential" pursuant to the parties' Stipulated Confidentiality Order.

WHEREFORE, Morgan Stanley respectfully requests that this Court remove the confidentiality designation from the above documents and direct the Clerk of Court to unseal the filings of those documents together with such other and further relief as is just and proper.

CERTIFICATE OF SERVICE

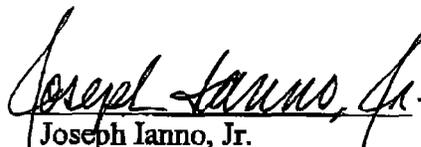
I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this 30th day of July, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar No. 618349)
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

*Counsel for Morgan Stanley & Co.
Incorporated and Morgan Stanley Senior
Funding*

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
E-mail: jjanno@carltonfields.com

BY:


Joseph Ianno, Jr.
Florida Bar No. 655351

SERVICE LIST

Jack Scarola
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy
Michael Brody
JENNER & BLOCK, LLC
One IBM Plaza, Suite 400
Chicago, IL 60611

**IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA**

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

CASE NO: CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

NOTICE OF DEPOSITION SUBPOENA DUCES TECUM OF DONALD R. UZZI

TO: Donald R. Uzzi, 4209 Beverly Drive, Dallas, Texas 75205.

Please take notice that the Morgan Stanley entities in the above-styled cause of action intend to take the oral deposition of Donald R. Uzzi pursuant to Texas Rule of Civil Procedure 201.2 and the Order of the Circuit Court of the Fifteenth Judicial Circuit In and For Palm Beach County, Florida entered on January 21, 2004 and attached hereto. The deposition will take place at 9:30 a.m. on August 19, 2004, at the offices of HAYNES AND BOONE, LLP, 901 Main Street, Suite 3100, Dallas, Texas 75202. The deposition will be videotaped and will continue from day to day until completed.

Donald R. Uzzi will also produce documents responsive to the Deposition Subpoena
Duces Tecum attached hereto. These documents and materials shall be brought with the witness
and produced on August 19, 2004, at HAYNES AND BOONE, LLP, 901 Main Street, Suite 3100,
Dallas, Texas 75202.

Respectfully submitted,



Sean Trende

Texas State Bar No. 24034176

KIRKLAND & ELLIS LLP

655 15th Street, N.W. – Suite 1200

Washington, D.C. 20005

Telephone: (202) 879-5000

Facsimile: (202) 879-5200

OF COUNSEL:

Thomas D. Yannucci, P.C.

Lawrence P. Bemis (FL Bar No. 618349)

Thomas A. Clare

KIRKLAND & ELLIS LLP

655 15th Street, N.W. – Suite 1200

Washington, D.C. 20005

Telephone: (202) 879-5000

Facsimile: (202) 879-5200

Joseph Ianno, Jr. (FL Bar # 655351)

CARLTON FIELDS, P.A.

222 Lakeview Ave., Suite 1400

West Palm Beach, FL 33401

Telephone: (561) 659-7070

Facsimile: (561) 659-7368

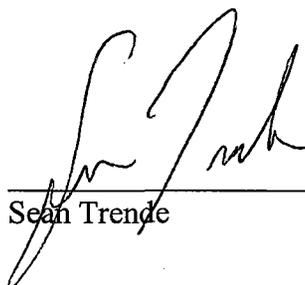
Dated: July 30, 2004

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing instrument was served on the following individuals in accordance with the Texas Rules of Civil Procedure on this 30th day of July, 2004:

John Scarola, Esq.
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33409

Jerold S. Solovy, Esq.
JENNER & BLOCK, LLC
One IBM Plaza
Suite 4400
Chicago, Illinois 60611



Sean Trende

THE STATE OF TEXAS

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.
MORGAN STANLEY & CO., INC.,
Defendant(s).

CASE NO: CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),
vs.
MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

DEPOSITION SUBPOENA DUCES TECUM

TO: Any sheriff or constable of the State of Texas or other person authorized to serve and execute subpoenas as provided in Texas Rule of Civil Procedure 176.5.

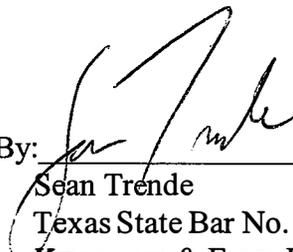
You are commanded to summon **Donald R. Uzzi**, 4209 Beverly Drive, Dallas, Texas 75205, to appear at the principal offices of HAYNES AND BOONE, LLP, 901 Main Street Suite 3100, Dallas, Texas 75202, on **Thursday, August 19, 2004 at 9:30 a.m.** to give testimony at a videotaped oral deposition and to permit inspection and copying of documents or tangible things to be used as evidence in this case.

Donald R. Uzzi is commanded to attend the oral deposition and to produce and permit inspection and copying of the following documents or tangible things described in the attached Exhibit 1. These documents and materials shall be brought with the witness and produced prior to the deposition on August 19, 2004, at HAYNES AND BOONE, LLP, 901 Main Street, Suite 3100, Dallas, Texas 75202.

Contempt. Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena is issued or a district court in the county in which the subpoena is served, and may be punished by fine or confinement, or both. TEX. R. CIV. P. 176.8(a).

DO NOT FAIL to return this writ to the Circuit Court of the Fifteenth Judicial Circuit In and For Palm Beach County, Florida with either the attached officer's return showing the manner of execution or the witness's signed memorandum showing that the witness accepted the subpoena.

ISSUED on July 30, 2004.

By: 

Sean Trende
Texas State Bar No. 24034176
KIRKLAND & ELLIS LLP,
655 15th Street, N.W., Suite 1200,
Washington, D.C. 20005

This subpoena was issued pursuant to Texas Rule of Civil Procedure 201.2, the Order of the Circuit Court of the Fifteenth Judicial Circuit In and For Palm Beach County, Florida entered on January 21, 2004 and attached hereto as Exhibit 2, and at the request of Defendants' attorneys of record Thomas D. Yannucci, P.C., Lawrence P. Bemis (FL Bar No. 618349), and Thomas A. Clare of KIRKLAND & ELLIS LLP, 655 15th Street, N.W., Suite 1200, Washington, D.C. 20005; Joseph Ianno, Jr. (FL Bar No. 655351), CARLTON FIELDS, P.A., 222 Lakeview Ave., Suite 1400, West Palm Beach, FL 33401; and Sean Trende of KIRKLAND & ELLIS LLP, 655 15th Street, N.W., Suite 1200, Washington, D.C. 20005.

EXHIBIT 1

DEPOSITION SUBPOENA DUCES TECUM

You are hereby requested to produced the following documents pursuant to the definitions and instructions contained herein:

DOCUMENTS REQUESTED

1. All documents concerning the Coleman Transaction.
2. All documents concerning the Subordinated Debenture Offering.
3. All documents concerning the Bank Facility, or the Credit Agreement.
4. All documents reflecting or concerning any communications between or among any of Sunbeam, CPH, MAFCO, CSFB, Arthur Andersen, MS & Co., MSSF, Davis Polk, Wachtell, or Skadden in 1997 or 1998.
5. All documents provided by you in any Litigation or SEC Administrative Proceeding.
6. All calendars, diaries, timekeeping sheets or records maintained by you concerning any activities related to Coleman Transaction, the Subordinated Debenture Offering, the Bank Facility, the Credit Agreement.
7. All documents related to Sunbeam's Financial Information for all or any portion of 1996, 1997, and 1998, including but not limited to Financial Statements and documents concerning Sunbeam's forecasts and plans for revenue or earnings.
8. All documents related or referring to any cost-reduction or sales program or policy in place at Sunbeam during 1997 and 1998, including but not limited to documents concerning the "early buy" program, "Initiatives for Success", and "bill and hold" sales and the "no returns" policy.

9. All documents concerning returns of Sunbeam goods or product in 1997 and 1998, including but not limited to documents regarding the “no returns” policy and conversations or communications regarding the deletion of return authorizations from the J.D. Edwards system.

10. All documents pertaining to negotiations concerning the acquisition of Coleman, Signature Brands, and First Alert, including but not limited to documents concerning conversations or communications of any kind between or among any of MS & Co., MSSF, CPH or MAFCO personnel or representatives.

11. All documents concerning Synergies that might be achieved from a business combination of Sunbeam, Coleman, Signature Brands, and First Alert, or any combination thereof.

12. All documents related to or supporting the March 16, 1998 Representation Letter provided to Arthur Anderson, including but not limited to any drafts of such letter and any Financial Information used or referenced in writing the letter or drafts.

13. All documents concerning any “comfort letter” pertaining to the Subordinated Debenture offering or the Credit Agreement, including but not limited to Arthur Andersen’s letters dated March 19, 1998 and March 25, 1998 and any drafts of such letters.

14. All documents concerning any investigation, analysis, or due diligence conducted by Sunbeam or its Advisors pertaining to the Coleman Transaction, including but not limited to documents and Financial Information pertaining to March 18, 1998 and March 24, 1998 conference calls.

15. All documents related to Sunbeam’s March 19, 1998 press release, including but not limited to documents pertaining to the contents or drafting of the press release, the decision to issue the press release, and the decision to include the press release in the Offering memorandum.

16. All documents concerning the March 19, 1998 drafting session and/or meeting that took place at Global Financial Press concerning the Offering Memorandum, including but not limited to documents concerning any conversations or communications of any kind involving MS & Co. or Arthur Andersen personnel.

17. All documents related to the sale of the Subordinated Debenture, including but not limited to documents pertaining to roadshows or other communications with investors or analysts.

DEFINITIONS

1. “Advisors” shall mean financial advisors, legal advisors, accountants, consultants and any other third-party advising or assisting Sunbeam in any way with the Coleman Transaction, including but not limited to Arthur Anderson, Coopers & Lybrand, Llama Company, MS& Co., MSSF, and Skadden.

2. “Arbitrations” shall mean *Albert J. Dunlap and Sunbeam Corporation*, No. 32 160 00088 99 (AAA); and *Russell A. Kersh and Sunbeam Corporation*, No. 32 160 00091 99 (AAA).

3. “Arthur Andersen” shall mean Arthur Andersen LLP and any of its former or present partners, officers, directors, employees, representatives and agents.

4. “Bank Facility” shall mean the Credit Agreement, including amendments, and all funds extended by Lenders to Sunbeam pursuant to the Credit Agreement, including but not limited to Tranche A, Tranche B, and the Revolving Credit Facility.

5. “Communication” shall mean any exchange or transmittal of information by any means of transmission, including, without limitation, face-to-face conversation, mail, overnight delivery, Internet, telephone, electronic mail, or facsimile.

6. The term “concerning” shall mean relating to, referring to, describing, evidencing, or constituting.

7. “Coleman” shall mean Coleman Company, Inc. and any of its subsidiaries, divisions, predecessors, successors, present and former employees, representatives, and agents

8. “Coleman Transaction” shall mean Sunbeam’s acquisition of Coleman Company, Inc. from CPH and all related communications, agreements, and transactions, including the February 27, 1998 Agreements and the March 30, 1998 closing.

9. “Cooper & Lybrand” shall mean the former Coopers & Lybrand LLP, and any of its subsidiaries, divisions, predecessors, successors, present and former employees, representatives, and agents.

10. “CPH” shall mean Coleman (Parent) Holdings Inc. and any of its former or present officers, directors, employees, representatives and agents.

11. “Credit Agreement” shall mean the agreement entered into by Sunbeam, as borrower with Lenders, dated March 30, 1998 and all amendments thereto.

12. “CSFB” shall mean Credit Suisse First Boston LLC and any of its former or present officers, directors, employees, representatives and agents.

13. “Davis Polk” shall mean Davis Polk & Wardwell and any of its former or present partners, officers, directors, employees, representatives and agents.

14. “Document” shall mean any recording in any tangible form of any information, whether handwritten, typed, printed, stored on computer disks, tapes, or databases, or otherwise reproduced. “Document” or “documents” also includes electronic documents whether stored on

servers or hard drives, e-mail, backup tapes, voicemail and video and audio recordings. A draft or non-identical copy is a separate document within the meaning of this term.

15. “Financial Information” shall mean information concerning the past or present financial condition of Sunbeam or Sunbeam securities.

16. “Financial Statements” shall mean documents reflecting Financial Information, including without limitation quarterly reports, yearly reports, balance sheets, statements of income, earnings, cash flow projections, and sources and applications of funds.

17. “First Alert” shall mean First Alert, Inc., and any of its subsidiaries, divisions, predecessors, successors, present and former employees, representatives, and agents

18. The term “identify” (with respect to documents) shall mean to give, to the extent known, the (i) type of document; (ii) general subject matter; (iii) date of the document; and (iv) author(s), addressee(s) and recipient(s).

19. “Lenders” shall mean the entities listed on Schedule 2.01 of the Credit Agreement under the heading “Lenders” and any other person that shall have become a party to the Credit Agreement as a Lender pursuant to an assignment and acceptance.

20. “Litigations” shall mean *In re Sunbeam Securities Litigation*, 98-8258-Civ.-Middlebrooks (S.D. Fla); *Camden Asset Management L.P. v. Sunbeam Corporation*, 98-8773-Civ.-Middlebrooks and 98-8275-Civ.-Middlebrooks (S.D. Fla); *Krim v. Dunlap*, No. CL 983168AD (15th Jud. Cir., Fla.); *Stapleton v. Sunbeam Corp.*, No. 98-1676-Civ.-King (S.D. Fla); *Sunbeam Corp. v. PricewaterhouseCoopers LLP*, No. CL 005444AN (15th Jud. Cir., Fla.); *In re Sunbeam Corp., Inc.*, No. 01-40291 (AJG) (Bankr. S.D.N.Y.) and any adversary proceedings therein; *SEC v. Dunlap*, No. 01-8437-Civ.-Middlebrooks (S.D. Fla.); *Oaktree Capital Management LLC v. Arthur Andersen LLP*,

No. BC257177 (L.A. Cty., CA); and *Coleman (Parent) Holdings Inc. v. Arthur Andersen LLP*, No. CA 01-06062AN (15th Jud. Cir., Fla.), or other litigation concerning the Coleman Transaction.

21. “Llama Company” shall mean Llama Company and any of its former or present partners, officers, directors, employees, representatives and agents.

22. “MAFCO” shall mean MacAndrews & Forbes Holdings, Inc. and any of its officers, directors, former or present employees, representatives and agents.

23. The “March 19, 1998 Press Release” shall mean the press release issued by Sunbeam on March 19, 1998 concerning the shortfall of first quarter 1998 sales numbers and the reasons for such shortfall.

24. “MS & Co.” shall mean Morgan Stanley & Co. Inc. and any of its former or present officers, directors, employees, representatives and agents.

25. “MSSF” shall mean Morgan Stanley Senior Funding, Inc. and any of its former or present officers, directors, employees, representatives and agents.

26. The term “person” shall mean any natural person or any business, legal or governmental entity or association.

27. The term “relating to” shall mean concerning, evidencing, referring to, or constituting.

28. The “Relevant Period,” unless otherwise indicated, shall be from January 1, 1996 through the date of service of this subpoena.

29. “SEC” shall mean the Securities and Exchange Commission.

30. “SEC Administrative Proceedings” shall mean *In the Matter of Sunbeam Corp.*, SEC Administrative Proceeding File No. 3-10481, and *In the Matter of David C. Fannin*, SEC Administrative Proceeding File No. 3-10482.

31. "Signature brands" shall mean Signature Brands USA, Inc. and any of its subsidiaries, divisions, predecessors, successors, present and former employees, representatives, and agents

32. "Skadden" shall mean Skadden, Arps, Slate, Meagher & Flom, LLP and any of its former or present partners, officers, directors, employees, representatives and agents.

33. "Subordinated Debentures" shall mean the Sunbeam's Zero Coupon Convertible Senior Subordinated Debentures Due 2018.

34. "Subordinated Debenture Offering" shall mean the offering of Sunbeam's Subordinated Debentures.

35. "Sunbeam" shall mean Sunbeam Corporation and any of its subsidiaries, divisions, predecessors, successors, present and former employees, representatives, and agents.

36. "Synergies" shall mean post-acquisition gains through increased revenue and/or decreased cost.

37. "Wachtell" shall mean Wachtell Lipton Rosen & Katz and any of its former or present partners, officers, directors, employees, representatives and agents.

38. The terms "you" or "your" shall mean Donald R. Uzzi and any of Donald R. Uzzi's present and former representatives and agents.

INSTRUCTIONS

1. Documents shall be produced as they are kept in the usual course of business, or organized and labeled to correspond to the categories in this Request. Documents attached to each other should not be separated. Documents consisting of items previously produced in the Litigations, Arbitrations, and/or SEC Administrative Proceedings with Bates numbering shall be produced in Bates number order.

2. All documents shall be produced in the file folder, envelope or other container in which the documents are kept or maintained by you. If, for any reason, the container cannot be produced, produce copies of all labels or other identifying marks.

3. The relevant period, unless otherwise indicated, shall be from January 1, 1996 through the date of service of this subpoena, and shall include all documents and information which relate in whole or in part to such period, or to events or circumstances during such period, even though dated, prepared, generated or received prior or subsequent to that period. Please supplement or correct your responses to these requests if, at any time, you become aware that your responses are incomplete or incorrect in any request.

4. If you claim the attorney-client privilege, or any other privilege or work-product protection for all or any portion of a document, you shall provide a privilege log that describes the withheld material sufficiently to allow Morgan Stanley to test the privilege or protection asserted.

5. The following rules of construction apply:

1. The connectives “and” and “or” shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery requests all responses that might otherwise be outside their scope;
2. The term “including” shall be construed to mean “without limitation”; and
3. The use of the singular form of any word include the plural and vice versa.

Exhibit 2

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CASE NO: 03 CA-005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

AGREED ORDER APPOINTING COMMISSIONERS AND COMMISSIONS

THIS CAUSE, having come before the Circuit Court in and for Palm Beach County, State of Florida, on the agreement of the parties, and

WHEREAS, it appears to the Court that:

1. Defendant Morgan Stanley & Co. Incorporated ("MS & Co.") desires to take the videotaped depositions of and obtain documents from the following witnesses who reside in California, Connecticut, Kansas, Minnesota, New York, Texas, and the District of Columbia and who have knowledge of facts relevant to this case:

Karen Kay Clark
1674 Amarelle Street
Newbury Park, CA 91320

Frank N. Gifford
126 Taconic Road
Greenwich, CT 06831-3139

Robert J. Duffy
16 Saint Nicholas Road
Darien, CT 06820-2823

Joseph P. Page
921 Sheridan Street, Apt. 119
Wichita, KS 67213-1363

William H. Spoor
622 West Ferndale Road
Wayzata, MN 55391

Adam Emmerich
Wachtell, Lipton, Rosen & Katz
51 West 52nd Street
New York, NY 10019

Steven Cohen
Wachtell, Lipton, Rosen & Katz
51 West 52nd Street
New York, NY 10019

Steven K. Geller
301 East 79th Street, Apt. 4H
New York, NY 10021-0932

Donald Uzzi
4209 Beverly Dr.
Dallas, TX 75205-3020

Ann Dibble Jordan
2940 Benton Place NW
Washington, DC 20008

2. You are hereby appointed as commissioners to take the videotaped testimony (and obtain the requested documentation) of the above witnesses and other witnesses whose discovery is sought in the commissions' jurisdiction under oath and on oral examination in accordance with the applicable Florida Statutes and Rules of Civil Procedure:

Esquire Santa Ana
2100 North Broadway, Second Floor
Santa Ana, CA 92706

Del Vecchio Reporting
117 Randi Drive
Madison, CT 06443

Harper Court Reporting
P.O. Box 3008
Wichita, KS 67201

Kirby Kennedy & Associates
5200 Wilson Road #219
Minneapolis, MN 55424

Esquire Deposition Services
216 E. 45th Street, 8th FL
New York, New York 10017-3304

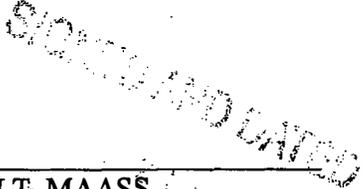
Esquire Deposition Services
703 McKinney Avenue #320
Dallas, Texas 75202

Esquire Deposition Services
1020 19th Street NW, #621
Washington, D C 20036

or any person able to administer oaths pursuant to the laws of California, Connecticut, Kansas, Minnesota, New York, Texas, and the District of Columbia and duly authorized by him.

3. This order does not purport to grant the power of the commissioners appointed to subpoena witnesses or documents, but simply the power to administer oaths and transcribe deposition testimony.

DONE AND ORDERED in Chambers, West Palm Beach, Palm Beach County, Florida
this ____ day of January, 2004.



ELIZABETH T. MAASS
Circuit Court Judge

Coleman (Parent) Holdings v. Morgan Stanley & Co. Inc.
2003 CA 005045AI
Agreed Order on Appointment of Commission

Copies furnished to:

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368

John Scarola, Esq.
SEARCY, DENNEY, SCAROLA, BARNHARDT
& SHIPLEY, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33409
Telephone: (561) 686-3000
Facsimile: (561) 478-0754

Thomas D. Yannucci, P.C.
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

Jerold S. Solovy
JENNER & BLOCK, LLC
One IBM Plaza
Suite 4400
Chicago, Illinois 60611
Telephone: (312) 222-9350
Facsimile: (312) 527-0484

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiffs,

CASE NO: 2003 CA 005045 AI

vs.

MORGAN STANLEY & CO., INC.,

Defendant.

MORGAN STANLEY SENIOR FUNDING,
INC.,

Plaintiff,

vs.

MACANDREWS & FORBES HOLDINGS,
INC.,

CASE NO.: 2003 CA 03-5165 AI

Defendant,

RE-NOTICE OF HEARING

YOU ARE HEREBY NOTIFIED that the undersigned has called up for hearing the
following:

DATE: August 4, 2004

TIME: 8:45 a.m.

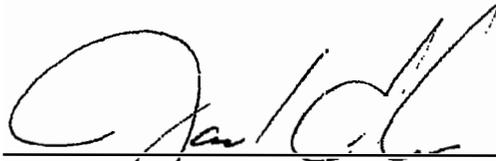
JUDGE: Hon. Elizabeth T. Maass

PLACE: Palm Beach County Courthouse, Room #11.1208, 205 North Dixie Highway,
West Palm Beach, FL 33401

SPECIFIC MATTERS TO BE HEARD: COLEMAN (PARENT) HOLDINGS INC.'S AND
MACANDREWS & FORBES HOLDINGS, INC.'S MOTION TO CLARIFY THIS COURT'S
JULY 26, 2004 ORDER ON CPH'S AND MAFCO'S ORE TENUS MOTION AND THIS
COURT'S DECEMBER 4, 2003 ORDER ON MORGAN STANLEY'S MOTION TO
COMPEL PRODUCTION OF SETTLEMENT AGREEMENT

Colman (Parent) Holdings Inc. vs Morgan Stanley & Co., Inc.
Case No.: 2003 CA 005045 AI
Notice of Hearing

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by
Fax and Federal Express to all Counsel on the attached list, this 2ND day of AUGUST,
2004.



JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 684-5816
Attorney for CPH and MAFCO

Coleman (Parent) Holdings Inc. vs Morgan Stanley & Co., Inc.
Case No.: 2003 CA 005045 AI
Notice of Hearing

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Bret McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block LLP
One IFM Plaza
Suite 4400
Chicago, IL 60611

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiffs,

CASE NO: 2003 CA 005045 AI

vs.
MORGAN STANLEY & CO., INC.,

Defendant.

MORGAN STANLEY SENIOR FUNDING,
INC.,

Plaintiff,

vs.

MACANDREWS & FORBES HOLDINGS,
INC.,

CASE NO.: 2003 CA 03-5165 AI

Defendant,

RE-NOTICE OF HEARING

YOU ARE HEREBY NOTIFIED that the undersigned has called up for hearing the

following:

DATE: August 10, 2004

TIME: 8:45 a.m.

JUDGE: Hon. Elizabeth T. Maass

PLACE: Palm Beach County Courthouse, Room #11.1208, 205 North Dixie Highway,
West Palm Beach, FL 33401

SPECIFIC MATTERS TO BE HEARD: COLEMAN (PARENT) HOLDINGS INC.'S AND
MACANDREWS & FORBES HOLDINGS, INC.'S MOTION TO CLARIFY THIS COURT'S
JULY 26, 2004 ORDER ON CPH'S AND MAFCO'S ORE TENUS MOTION AND THIS
COURT'S DECEMBER 4, 2003 ORDER ON MORGAN STANLEY'S MOTION TO
COMPEL PRODUCTION OF SETTLEMENT AGREEMENT

Coleman (Parent) Holdings Inc. vs Morgan Stanley & Co., Inc.
Case No.: 2003 CA 005045-A1
Notice of Hearing

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by
Fax and Federal Express to all Counsel on the attached list, this 3rd day of AUGUST,
2004



JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barthart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 684-5816
Attorney for CPH and MAFCO

Colerina (Parent) Holdings Inc. vs Morgan Stanley & Co., Inc.
Case No.: 2003-CA-005045-AJ
Notice of Hearing

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Bret McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jentner & Block LLP
One H M Plaza
Suite 400
Chicago, IL 60611

CARLTON FIELDS, P.A.

ATTORNEYS AT LAW

Esperanté
222 Lakeview Avenue, Suite 1400
West Palm Beach, Florida 33401-6149

MAILING ADDRESS
P.O. Box 150, West Palm Beach, FL 33402-0150
Tel 561.659.7070 Fax 561.659.7368

FAX COVER SHEET

Date:	August 3, 2004	Phone Number	Fax Number
To:	Jack Scarola, Esq.	(561) 689-6300	(561) 684-5816
	Jerold Solovy, Esq	(312) 923-2711	(312) 840-7671
	Michael Brody		(312) 840-7711
	Thomas Clare, Esq.		(202) 879-5200
From:	Joyce Dillard, CLA to Joseph Ianno, Jr.	(561) 659.7070	(561) 659.7368

Client/Matter No.: 47877/14092

Employee No.:

Total Number of Pages Being Transmitted, including Cover Sheet: 4

Message: To follow please find a copy of Morgan Stanley's Notice of Hearing for August 10, 2004.

Original to follow Via Regular Mail Original will Not be Sent Original will follow via Overnight Courier

The information contained in this facsimile message is attorney privileged and confidential information intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone (if long distance, please call collect) and return the original message to us at the above address via the U.S. Postal Service. Thank you.

If there are any problems or complications, please notify us immediately at:
561.659.7070

Telecopier operator: _____

WPB#567902.6

CARLTON FIELDS, P.A.

Miami Orlando St. Petersburg Tallahassee Tampa West Palm Beach

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

v.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO., INC.,

Defendant.

MORGAN STANLEY SENIOR FUNDING, INC.,

Plaintiff,

v.

CASE NO: CA 03-5165 AI

MACANDREWS & FORBES HOLDINGS, INC.,

Defendant.

RE-NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that a hearing has been set in the above-styled case as

follows:

DATE:	August 10, 2004
TIME:	8:45 a.m.
PLACE:	Palm Beach County Courthouse, Courtroom 11A 205 North Dixie Highway West Palm Beach, Florida 33401
BEFORE:	Judge Elizabeth T. Maass
CONCERNING:	Morgan Stanley's Motion for Enlargement of Time to Comply with This Court's July 12, 2004 Order

Coleman v. Morgan Stanley
Case No: 03-CA-005045 AI
Notice of Hearing
Page 2

KINDLY GOVERN YOURSELVES ACCORDINGLY.

The undersigned counsel hereby certifies that a good faith attempt to resolve the issues contained in the foregoing motions or matters will be made with opposing counsel prior to hearing on these matters on the Court's Motion Calendar.

If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no costs to you, to the provision of certain assistance. Please contact the ADA Coordinator in the Administrative Office of the Court, Palm Beach County Courthouse, 205 North Dixie Highway, Room 5.2500, West Palm Beach, Florida 33401; telephone number (561) 355-2431 within two (2) working days of your receipt of this notice; if you are hearing or voice impaired, call 1-800-955-8771.

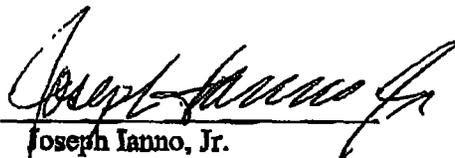
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this 3rd day of August, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar No. 618349)
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

**Counsel for Defendant
Morgan Stanley & Co. Incorporated**

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

BY: 
Joseph Ianno, Jr.
Florida Bar No: 655351

Coleman v. Morgan Stanley
Case No: 03-CA-005045 AI
Notice of Hearing
Page 3

SERVICE LIST

Jack Scarola
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy
Michael Brody
JENNER & BLOCK, LLC
One IBM Plaza, Suite 400
Chicago, IL 60611

CARLTON FIELDS, P.A.

ATTORNEYS AT LAW

Esperanté
222 Lakeview Avenue, Suite 1400
West Palm Beach, Florida 33401-6149

MAILING ADDRESS
P.O. Box 150, West Palm Beach, FL 33402-0150
Tel 561.659.7070 Fax 561.659.7368

FAX COVER SHEET

Date:	Phone Number	Fax Number
August 3, 2004		
To: Jack Scarola, Esq.	(561) 689-6300	(561) 684-5816
Jerold Solovy, Esq	(312) 923-2711	(312) 840-7671
Michael Brody		(312) 840-7711
Thomas Clare, Esq.		(202) 879-5200
From: Joyce Dillard, CLA to Joseph Ianno, Jr.	(561) 659.7070	(561) 659.7368

Client/Matter No.: 47877/14092

Employee No.:

Total Number of Pages Being Transmitted, Including Cover Sheet: 3

Message: To follow please find a copy of Morgan Stanley's Notice of Serving Confidential Answers and Objections to CPH's Interrogatories.

Original to follow Via Regular Mail

Original will Not be Sent

Original will follow via Overnight Courier

The information contained in this facsimile message is attorney privileged and confidential information intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone (if long distance, please call collect) and return the original message to us at the above address via the U.S. Postal Service. Thank you.

If there are any problems or complications, please notify us immediately at:
561.659.7070

Telecopier operator: _____

WPB#567902.6

CARLTON FIELDS, P.A.

Miami Orlando St. Petersburg Tallahassee Tampa West Palm Beach

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT IN
AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO., INC.,

Defendant.

MORGAN STANLEY SENIOR FUNDING, INC.,

Plaintiff,

vs.

MACANDREWS & FORBES HOLDINGS, INC., CASE NO: CA 03-5165 AI

Defendant.

**MORGAN STANLEY'S NOTICE OF SERVING CONFIDENTIAL ANSWERS
AND OBJECTIONS TO COLEMAN (PARENT) HOLDINGS INC.'S
INTERROGATORIES PURSUANT TO THE COURT'S JULY 12, 2004 ORDER**

Defendant Morgan Stanley & Co. Incorporated and Plaintiff, Morgan Stanley Senior Funding, Inc., by and through its undersigned counsel, hereby gives notice that on August 2, 2004 it has served its confidential Answers and Objections to Coleman (Parent) Holdings Inc.'s Interrogatories pursuant to the Court's July 12, 2004 Order.

CERTIFICATE OF SERVICE

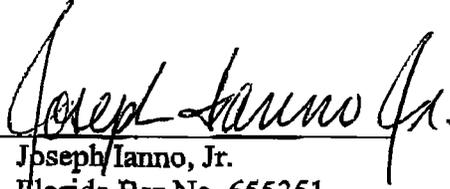
I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the below service list by facsimile and Federal Express on this 3rd day of August, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar No. 618349)
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

**Counsel for Morgan Stanley & Co.
Incorporated and Morgan Stanley
Senior Funding**

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
E-mail: jianno@carltonfields.com

BY:


Joseph Ianno, Jr.
Florida Bar No. 655351

SERVICE LIST

Jack Scarola
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy
Michael Brody
JENNER & BLOCK, LLC
One IBM Plaza, Suite 400
Chicago, IL 60611

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiffs,

CASE NO: 2003 CA 005045 AI

vs.
MORGAN STANLEY & CO., INC.,

Defendant.

MORGAN STANLEY SENIOR FUNDING,
INC.,

Plaintiff,

vs.

MACANDREWS & FORBES HOLDINGS,
INC.,

CASE NO.: 2003 CA 03-5165 AI

Defendant,

NOTICE OF HEARING

YOU ARE HEREBY NOTIFIED that the undersigned has called up for hearing the following:

DATE: August 13, 2004

TIME: 8:00 a.m.

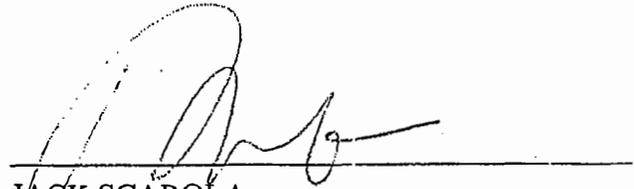
JUDGE: Hon. Elizabeth T. Maass

PLACE: Palm Beach County Courthouse, Room #11.1208, 205 North Dixie Highway,
West Palm Beach, FL 33401

SPECIFIC MATTERS TO BE HEARD: COLEMAN (PARENT) HOLDINGS INC.'S AND
MACANDREWS & FORBES HOLDINGS, INC.'S MOTION TO RESET DATE FOR FILING
MOTIONS TO AMEND PLEADINGS

Colerain (Parent) Holdings Inc. vs Morgan Stanley & Co., Inc.
Case No.: 2003 CA 005045 AI
Notice of Hearing

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by
Fax and Federal Express to all Counsel on the attached list, this 4th day of AUGUST,
2004.



JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 684-5816
Attorney for CPH and MAFCO

Coleman (Parent) Holdings Inc. vs Morgan Stanley & Co., Inc.
Case No.: 2003 CA 005045 AI
Notice of Hearing

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block LLP
One IBM Plaza
Suite 400
Chicago, IL 60611

THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

CASE NO. CA 03-5045 AI

vs.

MORC AN STANLEY & CO., INC.,
Defendant.

MORC AN STANLEY SENIOR FUNDING, INC., CASE NO. CA 03-5165 AI
Plaintiff,

vs.

MAC ANDREWS & FORBES HOLDINGS, INC.,
et al ,
Defendants.

**COLEMAN (PARENT) HOLDINGS INC.'S AND MACANDREWS
& FORBES HOLDINGS, INC.'S MOTION TO RESET DATE
FOR FILING MOTIONS TO AMEND PLEADINGS**

Coleman (Parent) Holdings Inc. ("CPH") and MacAndrews & Forbes Holdings, Inc. ("MAFCO"), by their attorneys, respectfully request this Court to reset the deadline for filing motions to amend pleadings to August 20, 2004. In support of this motion, CPH and MAFCO state as follows:

1. Under the current pretrial schedule set by this Court, motions to amend the pleadings are due to be filed or before August 6, 2004. At the July 23 case management conference, this Court indicated its intention to extend the relevant pretrial dates, and stated that it would address the new schedule further at the August 13, 2004 case management conference.

2. After the July 23 case management conference, CPH and MAFCO wrote Morgan Stanley stating CPH's and MAFCO's belief that the August 6 deadline for motions to amend pleadings remained unchanged, and asking whether Morgan Stanley had a different view. On Monday, August 2, 2004, Morgan Stanley responded in a letter stating that it disagreed with CPH's and MAFCO's position, but refusing to elaborate further.

3. In light of this Court's intention to extend the pretrial and trial dates, and in light of Morgan Stanley's apparent belief that the August 6 deadline for filing motions to amend pleadings is among the dates to be reset, CPH and MAFCO respectfully request that this Court reset the deadline for filing motions to amend the pleadings to August 20, 2004.

Dated August 4, 2004

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC. and
MACANDREWS & FORBES HOLDINGS, INC.

By: 

One of Its Attorneys

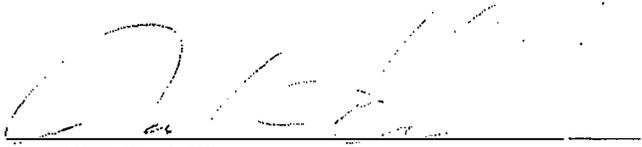
Jerold S. Solovy
Ronald L. Marmer
Jeffrey T. Shaw
JENNER & BLOCK LLP
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

John Scarola
SEARCY DENNEY SCAROLA
BARNHART & SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33402-3626
(561) 686-6300

#1131321

CERTIFICATE OF SERVICE

HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by
Fax and Federal Express to all counsel on the attached list on this 4th day of
Aug., 2004.



JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 684-5816
Attorneys for Coleman(Parent)Holdings Inc.
and MacAndrews & Forbes Holdings, Inc.

COUNSEL LIST

Josephanno, Jr., Esquire
Carlton Fields, et al.
222 Lalandeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block LLP
One IBM Plaza
Suite 400
Chicago, IL 60611

LAW OFFICES
JENNER & BLOCK LLP

ONE IBM PLAZA
CHICAGO, ILLINOIS 60611

(312) 222-9350
(312) 527-0484 FAX

DEIRDRE E. CONNELL
312-923-2661 Direct Dial
312-840-7661 Direct Facsimile

TELECOMMUNICATION TRANSMITTAL

DATE: August 5, 2004

TO: Thomas A. Clare, Esq.
KIRKLAND & ELLIS, LLP

VOICE: (202) 879-5993
FAX: (202) 879-5200

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.

VOICE: (561) 659-7070
FAX: (561) 659-7368

Jack Scarola, Esq.
SEARCY DENNEY SCAROLA
BARNHART & SHIPLEY, P.A.

VOICE: (561) 686-6350 ext.140
FAX: (561) 684-5816 or 478-0754

FROM: Deirdre E. Connell

SECY. EXT.: 6486

EMP. NO.: 035666

CLIENT NO.: 41198-10003

IMPORTANT: THIS MESSAGE IS INTENDED ONLY FOR THE USE OF THE INDIVIDUAL OR ENTITY TO WHICH IT IS ADDRESSED, AND MAY CONTAIN INFORMATION THAT IS ATTORNEY WORK PRODUCT, PRIVILEGED, CONFIDENTIAL AND EXEMPT FROM DISCLOSURE UNDER APPLICABLE LAW. IF THE READER OF THIS MESSAGE IS NOT THE INTENDED RECIPIENT, OR THE EMPLOYEE OR AGENT RESPONSIBLE FOR DELIVERING THE MESSAGE TO THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION, DISTRIBUTION OR COPYING OF THIS COMMUNICATION IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE NOTIFY US IMMEDIATELY BY TELEPHONE, AND RETURN THE ORIGINAL MESSAGE TO US AT THE ABOVE ADDRESS VIA POSTAL SERVICE. THANK YOU.

MESSAGE: Please see attached.

Total number of pages including this cover sheet: 4

DATE SENT: 8/5/04 TIME SENT: 3:38 pm SENT BY: S. EDDINGTON

IF YOU DO NOT RECEIVE ALL PAGES, PLEASE CALL (312) 222-9350, EXT: 6486

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

CASE NO. CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

**DEFENDANT COLEMAN (PARENT) HOLDINGS INC.'S
FIFTH REQUEST FOR PRODUCTION OF DOCUMENTS**

Coleman (Parent) Holdings Inc. ("CPH"), by its attorneys Searcy Denney Scarola Barnhart & Shipley P.A. and Jenner & Block LLP, hereby serves its Fifth Request for Production of Documents upon Morgan Stanley & Co., Inc. ("MS&Co."), and requests responses and the production of documents at the office of Searcy Denney Scarola Barnhart & Shipley P.A., 2139 Palm Beach Lakes Blvd., West Palm Beach, Florida, within thirty (30) days from the date of service.

DEFINITIONS AND INSTRUCTIONS

CPH incorporates by reference its Definitions and Instructions set forth in CPH's First Request for Production of Documents, served on MS&Co. on May 9, 2003.

DOCUMENTS REQUESTED

1. All documents involving, relating to, or referring to the Subordinated Debentures or to any transaction involving Subordinated Debentures, including but not limited to: (i) all documents relating or referring to any transaction in which Morgan Stanley bought or sold any Subordinated Debentures or any interest therein; (ii) all communications with any Morgan Stanley customer or counter-party to any trade involving Morgan Stanley as a broker or principal relating to the Subordinated Debentures; and (iii) any market for the Subordinated Debentures.

Dated: August 5, 2004

COLEMAN (PARENT) HOLDINGS INC.

By: 

John Scarola
SEARCY DENNEY SCAROLA BARNHART
& SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33402-3626
(561) 686-6300

Jerold S. Solovy
JENNER & BLOCK LLP
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that a copy of the foregoing has been furnished by U.S. Mail and facsimile to the following counsel of record on this 5th day of August, 2004:

Joseph Ianno, Jr.
CARLTON FIELDS
222 Lake View Avenue
Suite 1400
West Palm Beach, Florida 33401
Tel.: (561) 659-7070
Fax: (561) 659-7368

Thomas A. Clare
KIRKLAND & ELLIS
655 15th Street, N.W.
Suite 1200
Washington, D.C. 20005
Tel.: (202) 879-5000
Fax: (202) 879-5200



Deirdre E. Connell

FAX TRANSMITTAL

JENNER & BLOCK

Jenner & Block LLP
One IBM Plaza
Chicago, IL 60611
Tel 312 222-9350
www.jenner.com

Chicago
Dallas
Washington, DC

Date: August 6, 2004
To: Thomas A. Clare, Esq.
Joseph Ianno, Jr., Esq.

Fax: (202) 879-5200
Voice: (202) 879-5993
Fax: (561) 659-7368
Voice: (561) 659-7070

From: Michael T. Brody
312 923-2711

Employee Number:

Client Number: 41198-10003

Important: This message is intended only for the use of the individual or entity to which it is addressed, and may contain information that is attorney work product, privileged, confidential, and exempt from disclosure under applicable law. If the reader of this message is not the intended recipient, or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution, or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone, and return the original message to us at the above address via postal service. Thank you.

Message:

Total number of pages including this cover sheet: 8

Time Sent:

If you do not receive all pages, please call: 312 222-9350

Sent By:

Secretary: Caryn Jo Geisler

Extension: 6490

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

CASE NO. CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

COLEMAN (PARENT) HOLDINGS INC.'S MOTION TO APPOINT COMMISSION

Plaintiff Coleman (Parent) Holdings Inc. ("CPH"), pursuant to Florida Statutes § 92.251, files this Motion to Appoint Commission so that it can subpoena for depositions and documents a witness in another jurisdiction. CPH states as follows:

CPH requests that this Court appoint a commission so that it may subpoena the following witness:

Morgan Stanley Dean Witter American Value Fund (a.k.a., Witter Dean American Value Fund and Morgan Stanley Dean Witter American Opportunities Fund)
C/O Morgan Stanley Trust
Harborside Financial Center,
Plaza Two
Jersey City, NJ 07311

CPH seeks to have the following commission appointed for this purpose of obtaining documents and depositions from the above-listed witness:

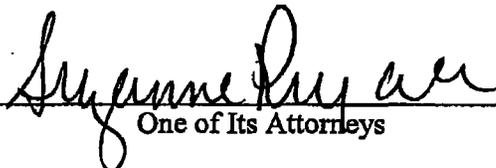
John P. Dwyer, Esq.
McElroy, Deutsch, Mulvaney & Carpenter
Three Gateway Center
100 Mulberry Street
Newark, New Jersey

or any person duly authorized by him and able to administer oaths pursuant to the laws of New Jersey.

WHEREFORE, CPH respectfully requests the entry of an order appointing the above as commission in the listed jurisdiction for purposes of this case.

COLEMAN (PARENT) HOLDINGS INC.

Dated: August 6, 2004

By: 
One of Its Attorneys

Jerold S. Solovy
JENNER & BLOCK LLP
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

Jack Scarola
SEARCY DENNEY SCAROLA BARNHART
& SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33402-362
(561) 686-6300

CERTIFICATE OF SERVICE

I, SUZANNE J. PRYSAK, hereby certify that a true and correct copy of the foregoing **COLEMAN (PARENT) HOLDINGS INC.'S MOTION TO APPOINT COMMISSION** has been served upon the parties listed below via Facsimile and U.S. Mail on this 6th day of August, 2004.

Thomas A. Clare, Esq.
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lake View Avenue
Suite 1400
West Palm Beach, FL 33401


SUZANNE J. PRYSAK

SERVICE LIST

Thomas A. Clare, Esq.
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lake View Avenue, Suite 1400
West Palm Beach, FL 33401

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

CASE NO. CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

**ORDER ON COLEMAN (PARENT) HOLDINGS INC.'S
MOTION TO APPOINT COMMISSION**

This cause came before the Court on Coleman (Parent) Holdings Inc.'s Motion to Appoint Commission so that it can subpoena for deposition and documents a witness in another jurisdiction. After reviewing the pleadings, and otherwise being advised in the premises it is ORDERED AND ADJUDGED that a commission is appointed so that plaintiff may subpoena depositions and documents from the following witness:

**Morgan Stanley Dean Witter American Value Fund (a.k.a., Witter Dean American Value Fund and Morgan Stanley Dean Witter American Opportunities Fund)
C/O Morgan Stanley Trust
Harborside Financial Center,
Plaza Two
Jersey City, NJ 07311**

The following commission is appointed for the purposes of obtaining any depositions and documents from the above listed witness, and other witnesses whose discovery is sought in the commission's jurisdiction:

John P. Dwyer, Esq.
McElroy, Deutsch, Mulvaney & Carpenter
Three Gateway Center
100 Mulberry Street
Newark, New Jersey

or any person duly authorized by him and able to administer oaths pursuant to the laws of New Jersey.

Done and Ordered in Palm Beach County, Florida this ____ day of _____, 2004.

Circuit Court Judge Elizabeth T. Maass

Copies furnished to:

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lakeview Avenue
Suite 1400
West Palm Beach, Florida 33401
(561) 659-7070
(561) 659-7368 (fax)

John Scarola, Esq.
SEARCY DENNEY SCAROLA BARNHART
& SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33409
(561) 686-6300
(561) 478-0754 (fax)

Jerold S. Solovy, Esq.
JENNER & BLOCK LLP
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350
(312) 527-0484 (fax)

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett H. McGurk
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 879-5000
(202) 879-5200 (fax)

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.

_____/

MORGAN STANLEY SENIOR FUNDING, CASE NO. CA 03-5165 AI INC.,

Plaintiff,

vs.

MACANDREWS & FORBES HOLDINGS
INC., et al.,

Defendant.

_____/

**JOINT SUBMISSION OF THE PARTIES FOR
AUGUST 13, 2004 CASE MANAGEMENT CONFERENCE**

Pursuant to the Court's Order of February 24, 2004, the parties in the above-referenced action hereby submit the following Joint Submission in advance of the August 13, 2004 Case Management Conference.

I. Agreed-Upon Statement Of Background And Procedural History

The following is the parties' agreed-upon summary of the two companion cases now pending before this Court, which have been consolidated for trial.

**A. Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co. Incorporated.
(Case No. 03 CA-005045 AI)**

Background. This case arises out of an acquisition transaction that was negotiated and consummated in late 1997 and early 1998, in which Coleman (Parent) Holdings Inc. ("CPH")

sold its 82% interest in The Coleman Company, Inc. (“Coleman”) to Sunbeam Corporation (“Sunbeam”). Morgan Stanley & Co., Inc. (“Morgan Stanley”) served as financial advisor to Sunbeam for parts of the acquisition transaction and served as the lead underwriter for a \$750,000,000 debenture offering that Sunbeam used to finance the acquisition.

CPH’s Complaint alleges claims arising from this transaction for fraudulent misrepresentation, negligent misrepresentation, aiding and abetting fraud, and conspiracy. CPH’s Complaint has sought damages of at least \$485 million and has reserved the right to seek punitive damages. Morgan Stanley denies the material allegations in CPH’s Complaint and also denies CPH’s entitlement to damages.

Procedural History. CPH filed its Complaint on May 8, 2003 (the “CPH Action”). Morgan Stanley filed its Answer on June 23, 2003 and, on June 25, 2003 filed its Motion to Dismiss Pursuant To Florida Rule of Civil Procedure 1.061 Or, In the Alternative, For Judgment On The Pleadings. The Court held a hearing on these motions on December 12, 2003. On December 15, 2003, the Court issued an Order denying both motions. On January 9, 2004, Morgan Stanley timely filed a Notice of Appeal regarding the denial of its motion to dismiss. *See* Florida Rule of Appellate Procedure 9.130(a)(3)(A) (providing for interlocutory appellate review of non-final orders “concerning venue”). On February 20, 2004, the Court consolidated CPH’s action against Morgan Stanley with Morgan Stanley Senior Funding’s action against CPH and MacAndrews & Forbes Holdings Inc.

B. Morgan Stanley Senior Funding, Inc. v. MacAndrews & Forbes Holdings Inc., et al. (Case No. 03 CA-005165 AD)

Background. This action arises out of the same series of financial transactions as the CPH Action. In 1998, Morgan Stanley Senior Funding, Inc. (“MSSF”) and other lenders entered into a credit agreement with Sunbeam under which MSSF agreed to provide senior secured

financing to Sunbeam in connection with Sunbeam's acquisition of Coleman and two smaller companies.

MSSF's Complaint alleges that, in the course of Sunbeam's acquisition of Coleman, Defendants MacAndrews & Forbes Holdings Inc. ("MAFCO") and CPH provided false information to MSSF about the "synergies" that Sunbeam would achieve from the combination of Sunbeam and Coleman. MSSF alleges that Defendant's inflated synergy projections caused Sunbeam to pay a higher price to acquire Coleman and consequently caused Sunbeam's lenders (including MSSF) to make larger loans to finance the acquisition. MSSF's Complaint alleges that it suffered hundreds of millions of dollars in damages when Sunbeam declared bankruptcy in February 2001 and defaulted on acquisition-related loans. MSSF has alleged claims for fraud and negligent misrepresentation, and has reserved the right to seek punitive damages. CPH denies the material allegations in MSSF's Complaint and also denies MSSF's entitlement to damages.

Procedural History. MSSF filed its Complaint against MAFCO and CPH on May 12, 2003 (the "MSSF Action"). The MSSF Action was initially assigned to Division AG. Because the MSSF Action and the CPH Action involve the same series of financial transactions and arise from a common set of operative facts, the parties agreed that the two cases are companion cases under Local Rule 2.009 and requested a transfer to Division AI, where the first-filed, lower numbered CPH Action was assigned. The motion to transfer was granted on June 9, 2003. Defendants CPH and MAFCO filed their Answer on June 25, 2003. On February 20, 2004, the Court consolidated MSSF's action against CPH and MAFCO with CPH's action against Morgan Stanley.

II. Report On Discovery In The Two Cases

A. Morgan Stanley's And MSSF's Position On Discovery

1. Merits Discovery

CPH, MAFCO, Morgan Stanley, and MSSF are actively pursuing written and deposition discovery in these consolidated actions. The parties have exchanged hundreds of thousands of pages of documents, have served and answered multiple sets of interrogatories and requests for admission, and have deposed more than two dozen party and non-party witnesses. Discovery in both cases is ongoing.

At the February 20, 2004 Case Management Conference, counsel for Morgan Stanley informed the Court that — according to counsel's best estimates — approximately seventy (70) additional depositions would need to be completed before the close of fact discovery. Thereafter, on or about March 11, the parties agreed to take alternate weeks for taking and defending depositions.

Since the February 20 Case Management Conference, twenty-seven (27) additional depositions have been completed. Four (4) more depositions have been scheduled and are confirmed for the weeks ahead. Morgan Stanley has ten (10) outstanding requests for deposition dates of CPH, MAFCO, and Coleman witnesses — and has attempted to secure deposition dates for several additional non-party witnesses. At the July 23 Case Management Conference, counsel for Morgan Stanley advised the Court that — according to counsel's best estimates — approximately forty-three (43) days of deposition testimony remain to be completed. That number will increase, however, in light of additional depositions requested by CPH and MAFCO since the July 23 Case Management Conference. CPH and MAFCO have requested the depositions of four (4) additional current or former Morgan Stanley employees — and have requested one (1) additional Rule 1.310 deposition (bringing the total number to 7).

In their Position on Discovery (below), CPH and MAFCO state that thirty (30) depositions have been taken by CPH and MAFCO, and fourteen (14) have been taken by MS & Co. and MSSF. But those figures — and the table prepared by CPH and MAFCO to summarize the depositions — do not accurately reflect the depositions taken by Morgan Stanley. Seven (7) of the third-party witnesses identified by CPH and MAFCO as “taken by” CPH and MAFCO were, in reality, examined by Morgan Stanley as well. Moreover, CPH and MAFCO count the Rule 1.310 deposition of Steven Fasman (taken by Morgan Stanley) as a single deposition, when in fact Mr. Fasman appeared for two separate Rule 1.310 depositions.¹ In reality, twenty-one (21) witnesses have been deposed by Morgan Stanley.

The parties have experienced considerable difficulty scheduling depositions in light of scheduling conflicts for counsel on both sides and the location of the witnesses, almost all of whom are located outside of Florida. CPH and MAFCO have offered witnesses for depositions outside of Florida on dates previously established by the Court for Case Management Conferences (or on the day before in New York) and have, on several occasions, confirmed (and then canceled or postponed) depositions previously set to go forward.

For example, CPH and MAFCO twice postponed the deposition of Barry Schwartz (now completed), postponed the deposition of Bruce Slovin (now completed), and postponed the deposition of James Robinson, for various reasons ranging from “unavoidable conflicts” to “medical emergencies.” Another CPH / MAFCO witness, Lawrence Jones, was only available on a day that had been previously scheduled by the Court for a Case Management Conference, and is now expected to be unavailable for an unspecified amount of time due to upcoming surgery. Similar scheduling considerations have required Morgan Stanley to postpone the

¹ CPH and MAFCO count the corresponding Rule 1.310 depositions of Morgan Stanley witnesses as two separate depositions.

depositions of other deposition witnesses, many of whom no longer work for Morgan Stanley and are no longer under its control.

Even when depositions have been successfully scheduled, the parties have experienced difficulties beyond their control that have prevented the deposition from going forward. When Mr. Schwartz's deposition was finally scheduled and confirmed for June 18, for example, the deposition needed to be postponed (for a third time) because Morgan Stanley's attorneys were unable to make it to New York for the deposition due to inclement weather and cancelled flights.

Morgan Stanley is of course willing to accommodate the legitimate scheduling considerations of witnesses and their counsel — but these schedule conflicts and difficulties have prevented the parties from proceeding with depositions at the pace contemplated during the February 20 Case Management Conference.

Finally, the parties have had to divert resources away from deposition discovery to address collateral issues unrelated to the merits of these consolidated actions. These issues are discussed in the next section.

2. Non-Merits Discovery

On March 12, CPH filed its Motion For A Rule To Show Cause. On May 14, 2004, the Court converted CPH's Motion for a Rule To Show Cause into a Motion for Contempt. On July 30, 2004, Morgan Stanley filed its Motion to Dismiss or Strike Plaintiff's Motion For Contempt. That motion, which is based on the Court's determination and July 26 Order that the Settlement Agreement was properly in the public domain as part of the Court's public file since December 2003, will be heard during the August 13 Case Management Conference. If granted, Morgan Stanley's Motion to Dismiss or Strike would obviate the need for further non-merits discovery, and would allow the parties and the Court to return their full attention to the merits of these consolidated actions.

On March 19, CPH served its first set of interrogatories relating to its motion for contempt. Morgan Stanley responded to those Interrogatories on June 16, 2004 and provided supplemental responses to CPH on June 29, 2004. On July 12, 2004, the Court entered an Order directing Morgan Stanley to supplement its responses to those Interrogatories within twenty days, including certain responses to be filed directly with the Court under seal. Morgan Stanley provided the non-privileged portions of its amended responses to CPH on August 2, 2004. Morgan Stanley has completed the *in camera* portion of its amended responses and is prepared to submit the *in camera* portion directly to the Court, pending the Court's ruling on Morgan Stanley's Motion for Enlargement of Time, which will be heard during Uniform Motion Calendar on August 10.

On May 28, CPH served its second set of interrogatories relating to its motion for contempt — together with a set of document requests relating to that motion. On that same date, Morgan Stanley served its own interrogatories and requests for documents on CPH relating to CPH's motion for contempt. The parties served responses and objections to this “second wave” of non-merits discovery on June 28, 2004. Based on correspondence received from CPH and MAFCO, Morgan Stanley expects additional “waves” of non-merits discovery to be served in the weeks and months ahead, further diverting the parties from the merits.

CPH's contempt motion, together with CPH's related Motion to Allow Arthur Andersen Access to Confidential Transcript (filed May 5, 2004) and other motions relating to the confidentiality of documents and pleadings, have required extensive additional briefing, necessitated attendance of counsel at multiple specially-set hearings in Florida, and the preparation of non-merits discovery requests and responses. CPH's objections also have prevented attorneys from Kellogg, Huber, Hansen, Todd, and Evans P.L.L.C. (“KHHTTE”) from participating as co-counsel and assisting with discovery. These satellite issues have prevented

the parties from conducting depositions at the pace originally contemplated during the February 20, 2004 Case Management Conference.

CPH and MAFCO, acting in concert with Arthur Andersen, are using the non-merits discovery served in these cases to manipulate the proceedings in these consolidated actions and Civil Action No. 04-22577 AA, now pending before Judge Miller. In pleadings filed with Judge Miller, Arthur Andersen has moved for sanctions against Morgan Stanley, sought to disqualify Morgan Stanley's attorneys in that action, and moved to stay all discovery in that action. Simultaneously, CPH (who has professed a "unity of interest" with Arthur Andersen) has sought, through the non-merits discovery served in these consolidated actions, to discover detailed information regarding Morgan Stanley's damages claims in the Civil Action No. 04-22577 AA. CPH seeks this information despite the fact that Arthur Andersen is not a party in these consolidated actions; Kirkland & Ellis LLP does not represent Morgan Stanley in Civil Action No. 04-22577 AA; and CPH has objected to Morgan Stanley's chosen counsel (KHTE) from appearing in these consolidated actions.

The satellite issues and gamesmanship described in this section have prevented the parties from conducting depositions at the pace originally contemplated during the February 20, 2004 Case Management Conference.

B. CPH'S And MAFCO's Position On Discovery

CPH and MAFCO stipulate only to the first paragraph of Section II.A above. CPH and MAFCO object to the remaining statements concerning discovery as incomplete, misleading, and self-serving on the part of Morgan Stanley and MSSF. CPH and MAFCO expressed these objections to Morgan Stanley and MSSF, and requested that a neutral statement of the discovery status be substituted, but Morgan Stanley and MSSF refused that request. Consequently, CPH and MAFCO provide the account of discovery that follows.

1. Deposition Discovery

As of August 6, 2004, 44 depositions have been taken. Of those depositions, 30 have been taken by CPH and MAFCO, and 14 have been taken by Morgan Stanley and MSSF:

MS/MSSF WITNESSES	AFFILIATION AT RELEVANT TIME	DATE	TAKEN BY
Boone, Shani	Morgan Stanley	04/22/2004	CPH/MAFCO
Chang, Tyrone	Morgan Stanley	01/08/2004	CPH/MAFCO
Conway, Andrew	Morgan Stanley	06/04/2004	CPH/MAFCO
Fuchs, Alexandre	Morgan Stanley	02/13/2004	CPH/MAFCO
Hart, Michael	MSSF	05/19/2004	CPH/MAFCO
Kitts, Robert	Morgan Stanley	02/12/2004	CPH/MAFCO
MS/MSSF (by John Plotnick)	Morgan Stanley	09/09/2003	CPH/MAFCO
MS E-mail Rep.(Robert Saunders)	Morgan Stanley	02/10/2004	CPH/MAFCO
Rafii, Lily	Morgan Stanley	04/02/2004	CPH/MAFCO
Savarie, Andrew	Morgan Stanley	01/22/2004	CPH/MAFCO
Seth, Ishaan	Morgan Stanley	07/30/2004	CPH/MAFCO
Smith, R. Bram	MSSF	02/24/2004	CPH/MAFCO
Strong, William	Morgan Stanley	12/04/2003	CPH/MAFCO
Stynes, James	Morgan Stanley	07/13/2004	CPH/MAFCO
Tyree, John	Morgan Stanley	09/15/2003	CPH/MAFCO
Tyree, John	Morgan Stanley	11/14/2003	CPH/MAFCO
Webber, Joshua	Morgan Stanley	05/18/2004	CPH/MAFCO
Whelan, Christopher	Morgan Stanley	07/14/2004	CPH/MAFCO
Wright, William	Morgan Stanley	07/01/2004	CPH/MAFCO
Yoo, Gene	Morgan Stanley	06/16/2004	CPH/MAFCO
MAFCO/CPH WITNESSES			
Drapkin, Donald	MAFCO	06/24/2004	MS
Engelman, Irwin	MAFCO	08/04/2004	MS
Gifford, Frank	MAFCO	07/22/2004	MS
Ginstling, Norman	MAFCO	04/06/2004	MS
MAFCO (by Steven Fasman)	MAFCO	09/15/2003 01/21/2004	MS
Page, Joseph	MAFCO	04/27/2004	MS
Salig, Joram	MAFCO	07/08/2004	MS
Schwartz, Barry	MAFCO	06/25/2004	MS
Shapiro, Paul	MAFCO	06/08/2004	MS

MS/MSSF WITNESSES	AFFILIATION AT RELEVANT TIME	DATE	TAKEN BY
Shapiro, Paul	MAFCO	07/28/2004	MS
Slotkin, Todd	MAFCO	07/07/2004	MS
Slovin, Bruce	MAFCO	05/12/2004	MS
THIRD PARTY WITNESSES			
Bornstein, Lawrence	Arthur Andersen	01/15/2004	CPH/MAFCO
Brockelman, Mark	Arthur Andersen	01/14/2004	CPH/MAFCO
Denkhaus, Donald	Arthur Andersen	11/06/2003	CPH/MAFCO
Duffy, Robert	Credit Suisse First Boston	07/08/2004	MS
Geller, Steven	Credit Suisse First Boston	07/30/2004	MS
Kistler, Vance	Arthur Andersen	10/29/2003	CPH/MAFCO
Pastrana, Dennis	Arthur Andersen	01/12/2004	CPH/MAFCO
Pruitt, William	Arthur Andersen	01/13/2004	CPH/MAFCO
Dean, Alan	Davis Polk & Wardell	06/03/2004	CPH/MAFCO
Lurie, James	Davis Polk & Wardell	06/18/2004	CPH/MAFCO
Stack, Heather	Davis Polk & Wardell	05/25/2004	CPH/MAFCO
Yales, Scott	Sunbeam	11/24/2003	CPH/MAFCO

In addition, both sides have requested deposition dates for certain individuals, and expressed interest in deposing still other individuals. Although Morgan Stanley and MSSF attempt to make it appear as if scheduling issues have been caused solely by CPH, in fact, Morgan Stanley and MSSF frequently have delayed providing dates for depositions and have changed previously set dates. In any event, Morgan Stanley's and MSSF's finger-pointing is irrelevant, because there is no motion pending before this Court concerning deposition scheduling — indeed, to date, no such motion ever has been filed.

Concerning counsel for Morgan Stanley's and MSSF's estimates about the depositions to be taken, CPH and MAFCO believe that counsel's estimate is exaggerated. In any event, given that approximately 10 attorneys presently are appearing for Morgan Stanley and MSSF in this

case, Morgan Stanley and MSSF certainly have the resources to complete all necessary depositions within any schedule dictated by the Court.

2. Discovery concerning CPH's motion for contempt

The parties have served interrogatories and document requests on each other in connection with CPH's motion for contempt. Because Morgan Stanley's and MSSF's responses to the discovery requests that CPH and MAFCO served on March 19 were insufficient, however, CPH and MAFCO filed a motion to compel. On July 12, this Court entered an order granting that motion in part, and directing Morgan Stanley and MSSF to provide further information within 20 days. On August 2, Morgan Stanley and MSSF purported to provide non-privileged information in compliance with the July 12 order, but Morgan Stanley and MSSF did not comply with the Court's direction to provide privileged information for *in camera* review. Instead, Morgan Stanley and MSSF filed a motion to enlarge the deadline for doing so. That motion, which CPH and MAFCO have opposed, is scheduled to be heard on August 10.

CPH and MAFCO also served further interrogatories and document requests in connection with CPH's motion for contempt on May 28, and Morgan Stanley and MSSF have served responses to those discovery requests. Because CPH and MAFCO believe that the responses are deficient in many respects, however, CPH and MAFCO filed a motion to compel. The Court made some rulings on that motion at the July 23 case management conference, but did not complete its review of the motion. CPH and MAFCO have re-noticed the motion for the upcoming case management conference on August 13.

III. Pretrial Schedule

On February 24, 2004, the Court entered an order setting this matter for trial in January 2005, and on March 23, 2004, this Court entered an Agreed Order setting the pretrial schedule in this matter and scheduling trial to begin on January 18, 2005. At the case management conference on July 23, this Court stated that it would be extending the trial date to March 2005.

The Court directed the parties to come to the August 13 case management conference prepared to discuss scheduling the trial as well as associated adjustments to the pretrial schedule.

Dated: August 6, 2004

John Scarola (FL Bar No. 169440)
**SEARCY, DENNEY, SCAROLA,
ARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Blvd
West Palm Beach, FL 33402-3626
(561) 686-6300

Jerold S. Solovy
Ronald L. Marmer
Jeffrey T. Shaw
JENNER & BLOCK LLP
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

**Counsel for Coleman (Parent) Holdings Inc.
and MacAndrews & Forbes Holdings, Inc.**



Joseph Ianno, Jr. (FL Bar No. 655351)
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
(561) 659-7070

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar No. 618349)
Thomas A. Clare
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
(202) 879-5000

**Counsel for Morgan Stanley & Co., Inc. and
Morgan Stanley Senior Funding, Inc.**

#1127347.v2

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff,

vs.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO., INC.,
Defendant.

_____/

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff,

vs.

CASE NO: CA 03-5165 AI

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant.

**MORGAN STANLEY & CO., INC.'S RESPONSES AND OBJECTIONS TO COLEMAN
(PARENT) HOLDINGS INC.'S SECOND SET OF REQUESTS FOR ADMISSION**

Defendant Morgan Stanley & Co. Incorporated ("MS & Co."), by its attorneys and pursuant to Florida Rule of Civil Procedure 1.370, hereby responds and objects to Coleman (Parent) Holdings Inc.'s ("CPH") Second Set of Requests for Admission.

INITIAL OBJECTIONS

1. MS & Co. objects to CPH's Second Set of Requests for Admission, including all Definitions, to the extent that they purport to impose upon MS & Co. any requirements that exceed or are otherwise inconsistent with the Florida Rules of Civil Procedure or any other applicable rule or court order.

2. MS & Co. objects to CPH's Second Set of Requests for Admission to the extent that they seek information protected from disclosure by the attorney-client privilege, the work product doctrine, or any other applicable privilege, doctrine, immunity or rule.

3. MS & Co. objects to the definitions of “Morgan Stanley” and “MSSF” to the extent that they include MS & Co.’s or MSSF’s counsel in this litigation and entities not a party to this action. Specifically, MS & Co. interprets these definitions to exclude Kirkland & Ellis LLP and Carlton Fields, P.A and affiliates, parents, and others not a party to this action.

4. MS & Co. objects to the Requests for Admission as unduly burdensome, abusive, and vexatious, since many of them are duplicative and constitute an unnecessary waste of time and concern factual allegations uniquely within the possession of CPH, MAFCO, or third parties, which could be confirmed with less expense and burden on the parties through more traditional techniques of discovery.

5. MS & Co. incorporates, as though fully set forth therein, these General Objections into each of the Responses and Objections set forth below.

RESPONSES

1. Admit that documents bates-numbered Morgan Stanley Confidential 084771 through 0085783 and Morgan Stanley Confidential 0094003 through 0094032 are true and authentic copies of original documents within the meaning of Florida Evidence Code § 90.901.

RESPONSE: Admitted.

2. Admit that documents bates-numbered Morgan Stanley Confidential 0084771 through 0085783 and Morgan Stanley Confidential 0094003 through 0094032 are records of regularly conducted business activity within the meaning of Florida Evidence Code § 90.803(6).

RESPONSE: Admitted in part and denied in part. MS & Co. admits that the referenced documents are generated in the course of a regularly conducted business activity, but denies that the documents, which largely reflect the opinions of out-of-court declarants, qualify for the hearsay exception of Florida Evidence Code § 90.803(6). MS & Co. reserves all evidentiary

objections to the admissibility of the referenced documents, but will not dispute that the documents are kept in the ordinary course of its business.

SERVICE LIST

Jack Scarola

**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**

2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy

Michael Brody

JENNER & BLOCK, LLC

One IBM Plaza, Suite 400
Chicago, IL 60611

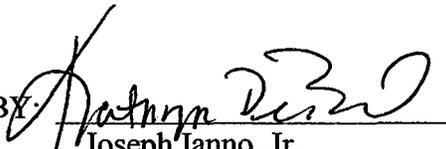
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this 5th day of August, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar No. 618349)
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

*Counsel for Morgan Stanley & Co.
Incorporated and Morgan Stanley Senior
Funding*

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
E-mail: jianno@carltonfields.com

BY: 
Joseph Ianno, Jr.
Florida Bar No. 655351

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff,

vs.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO., INC.,
Defendant.

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff,

vs.

CASE NO: CA 03-5165 AI

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant.

**PLAINTIFF'S NOTICE OF SERVING RESPONSES AND OBJECTIONS TO
DEFENDANT'S FIRST SET OF INTERROGATORIES**

Plaintiff Morgan Stanley Senior Funding, by and through their undersigned counsel, hereby give notice that Plaintiff served responses and objections to Defendant's First Set of Interrogatories, on this 9th day of August, 2004.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this 9th Day of August, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar No. 618349)
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

*Counsel for Morgan Stanley & Co.
Incorporated and Morgan Stanley Senior
Funding*

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
E-mail: jianno@carltonfields.com

BY: 
Joseph Ianno, Jr.
Florida Bar No. 655351

SERVICE LIST

Jack Scarola

**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**

2139 Palm Beach Lakes Blvd.

West Palm Beach, FL 33409

Jerold S. Solovy

Michael Brody

JENNER & BLOCK, LLC

One IBM Plaza, Suite 400

Chicago, IL 60611

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff,

vs.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO., INC.,
Defendant.

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff,

vs.

CASE NO: CA 03-5165 AI

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant.

**MORGAN STANLEY SENIOR FUNDING'S RESPONSES AND OBJECTIONS TO
MACANDREWS & FORBES HOLDING INC.'S FIRST SET OF INTERROGATORIES**

Plaintiff Morgan Stanley Senior Funding ("MSSF"), by its attorneys, and pursuant to Florida Rules of Civil Procedure 1.280 and 1.340, hereby responds and objects to MacAndrews & Forbes Holdings Inc.'s ("MAFCO") First Set of Interrogatories as follows:

GENERAL OBJECTIONS

1. MSSF objects to MAFCO's First Set of Interrogatories, including all Definitions and Instructions, to the extent that they purport to impose upon MSSF any requirements that exceed or are otherwise inconsistent with the Florida Rules of Civil Procedure or any other applicable rule or court order.

2. MSSF objects to MAFCO's First Set of Interrogatories to the extent that they seek information protected from disclosure by the attorney-client privilege, the attorney-work-product doctrine, or any other applicable privilege, doctrine, immunity or rule.

3. MSSF objects to the definitions of “Morgan Stanley” and “MSSF” to the extent that they include counsel in this litigation and entities not a party to this action. Specifically, MSSF interprets these definitions to exclude Kirkland & Ellis LLP, Carlton Fields, P.A, Kellogg Huber Hansen Todd & Evans, P.L.L.C. as well as affiliates, parents, and others not a party to this action.

4. MSSF objects to the definition of “Identify” when used with respect to a person to the extent that it seeks the addresses and phone numbers of persons named. Such persons who are employees of MSSF should not be contacted directly, but rather communications must go through counsel.

5. MSSF’s response to any interrogatory is not intended and should not be construed as an acknowledgement of relevance or factual accuracy, or that any person identified actually possesses knowledge or information relevant to the subject matter of this action.

6. MSSF’s objections and responses are based on a good faith investigation. MSSF expressly reserves the right to amend and/or modify its objections and responses.

7. MSSF incorporates, as though fully set forth therein, these General Objections into each of the Responses and Objections set forth below.

RESPONSES AND SPECIFIC OBJECTIONS

INTERROGATORY NO. 1: Identify each individual who relied upon Exhibit A or information derived from Exhibit A, in whole or in part, at any time and for any purpose. For each individual, describe in detail when and how each individual relied upon Exhibit A or in information derived from Exhibit A, and what each individual did with the information contained in Exhibit A or derived from Exhibit A.

RESPONSE: MSSF notes that Defendant’s Interrogatory No. 1 constitutes at least three separate interrogatories. Subject to and without waving its general and specific objections, MSSF responds as follows:

MAFCO and its wholly-owned subsidiary, CPH, made false statements to Sunbeam, Sunbeam's financial advisors, and Sunbeam's lenders regarding the "synergies" that Sunbeam could expect to achieve from an acquisition of The Coleman Company.

Specifically, throughout the negotiations leading to Sunbeam's acquisition of Coleman, MAFCO and CPH falsely represented that the acquisition would result in post-closing synergies of \$150.5 million per year, falsely stated that lower synergy figures were "understated," and falsely stated that Sunbeam and Morgan Stanley were not giving MAFCO and CPH "enough credit" for synergies in the valuation of a combined Sunbeam/Coleman entity. [MORGAN STANLEY CONFIDENTIAL 0044556 at 557-558] MAFCO and CPH made false synergy representations to Sunbeam and Morgan Stanley verbally and in writing. The false synergy information provided by MAFCO and CPH in writing (memorialized in the document attached as Exhibit A to MSSF's Complaint), and false synergy information derived from that document became part of the total mix of information relied on by Sunbeam, Morgan Stanley & Co., and Morgan Stanley Senior Funding in the acquisition and financing transactions that followed.

On or about December 12, 1997, Sunbeam and Coleman representatives held a meeting at MAFCO's offices in New York to discuss the proposed acquisition of Coleman and the benefits that would accrue to Sunbeam if the deal went forward. This meeting was attended by, among others, Jerry W. Levin, Coleman's Chairman and Chief Executive Officer, Joseph P. Page, Coleman's Chief Financial Officer, and Paul E. Shapiro, Coleman's General Counsel. Representatives of Sunbeam included Russell A. Kersh, Sunbeam's Chief Financial Officer, David C. Fannin, Sunbeam's Chief Legal Officer, and Peter Langerman, a director of Sunbeam and representative of its then-largest shareholder, Franklin Mutual Advisors, Inc. Coleman's

financial advisors also were present for the meeting. [CPH 1042288, at 292; CPH 1401525 at 528]

During this meeting, CPH and MAFCO representatives provided Sunbeam with a detailed written schedule identifying 15 different areas of synergies between Sunbeam and Coleman, predicting that the acquisition would result in post-closing synergies totaling \$150.5 million per year. [CPH 1020748] To maintain the credibility of this representation, CPH's and MAFCO's written schedule included detailed figures for each of the 15 areas of purported synergies, and a detailed "build-up" of these 15 areas totaling \$150.5 million. Those categories of synergies which were presented by Coleman and MAFCO to Sunbeam included the following line-items: "Transfer BBQ License," "Synergies re CG BBQ," "Corporate Staff," "International Group Staff," "Latin America Staff," "[Coleman] Europe Network Sells [Sunbeam] Products," "[Coleman] Japan Network Sells [Sunbeam] Products," "Factory Outlet Staff," "S Catalytic Appliance Line," "Consolidate Division HQ To [Del Ray Beach, FL]," "Consolidate Domestic Salesforces," "Eliminate \$20 million Oracle Expense," "Additional \$25M Writeoffs," "Global Sourcing Raw Materials," "Consolidation Logistics & Warehousing"

During the December 12, 1997 meeting, CPH and MAFCO verbally supplemented and affirmed the synergy figures contained in this schedule by providing additional information and detail about each of the fifteen line-items. These verbal representations purported to confirm the facts built into each figure and affirmed that the total calculation of \$150.5 million was a fair and prudent estimate of synergies to be gained annually from Sunbeam's acquisition of Coleman. Shortly following this meeting, Morgan Stanley received a copy of the synergy schedule from the Sunbeam officials who had participated in the meeting. [CPH 1020748] From this point forward, the December 12, 1997 synergy schedule,

and information derived from it, was important information considered by Sunbeam in determining the price Sunbeam was willing to pay for Coleman; was important information considered by MS & Co. in underwriting and fixing the terms of Sunbeam's \$750 million convertible debt offering; and was important information considered by MSSF in going forward with its bank loan to Sunbeam.

As the negotiation of the Coleman acquisition progressed, CPH and MAFCO repeatedly and consistently vouched for the \$150.5 million figure represented in their December 12, 1997 synergy schedule, as well as the factual basis from which that figure was purportedly derived. Defendants repeated these false synergy representations during negotiations leading up to the Coleman acquisition.

Specifically, on January 27, 1998, William Reid of Morgan Stanley had a discussion with representatives of The Coleman Company, in which Coleman expressed their position that the synergies had been "understated," and that it was Coleman's view that there were "at least \$150MM in synergies." [MORGAN STANLEY CONFIDENTIAL 0044556 at 558]

Subsequently, representatives of Sunbeam and Coleman held another meeting on January 29, 1998, at MAFCO's New York offices to discuss the proposed acquisition of Coleman by Sunbeam, to update the parties' discussions of synergies from the December 12, 1997 meeting, and to discuss the benefits that would accrue to Sunbeam from the proposed acquisition of Coleman. Representatives from Morgan Stanley also attended the meeting, including Tyrone Chang, Alex Fuchs, and Jim Stynes. Senior officials from the CPH and MAFCO, including MAFCO executives James Maher and William Nesbitt, attended the meeting

on behalf of Coleman. [CPH 1401525 at 529, MORGAN STANLEY CONFIDENTIAL 0033256 at 260, and CPH 1042291 at 294]

And again, on February 16, 1998, representatives from Morgan Stanley had a conversation with James Maher, of MAFCO, who reiterated MAFCO's and CPH's belief that Sunbeam/Morgan Stanley was not "giving them enough credit in for synergies in the valuation" of the combined entity. [MORGAN STANLEY CONFIDENTIAL 0044556 at 557]

At each opportunity, CPH's and MAFCO's agents and representatives discussed, affirmed, and ratified the information contained in the December 12, 1997 synergy schedule. CPH's and MAFCO's agents and representatives represented that \$150.5 million was the fair and prudent projection of annual synergies to be gained by Sunbeam through its acquisition of Coleman, and that any lower synergies figures were "understated." [MORGAN STANLEY CONFIDENTIAL 0044556 at 557-558] These assurances by CPH and MAFCO regarding the \$150 million synergies figures was important information considered by Sunbeam in determining the price Sunbeam was willing to pay for Coleman; was important information considered by MS & Co. in underwriting and fixing the terms of Sunbeam's \$750 million convertible debt offering; and was important information considered by MSSF in going forward with its bank loan to Sunbeam.

Because the December 12, 1997 schedule of synergies and subsequent verbal affirmations by CPH and MAFCO were presented to Sunbeam and Morgan Stanley during the negotiations leading to the acquisition and related financing transactions, Exhibit A, and information derived from it, played a role in the development, analysis, consideration, modeling, evaluation, or review of potential synergies, cost savings, and/or financial benefits that Sunbeam could achieve from a business combination with Coleman.

Accordingly, the following individuals, each of whom played a role in the development, analysis, consideration, modeling, evaluation, or review of potential synergies, cost savings, and/or financial benefits that Sunbeam could achieve from a business combination with Coleman, may have relied, directly or indirectly, upon Exhibit A or information derived from Exhibit A:

- Shani Boone, Analyst, Investment Banking Division
- Tyrone Chang, Analyst, Investment Banking Division [Chang at 171:24-172:12, 203:6-17]
- Benjamin D. Derito, Analyst, Investment Banking Division
- Alex Fuchs, Vice President, Investment Banking Division
- Johannes Groeller, Associate, Investment Banking Division
- Michael Hart, Executive Director, Investment Banking Division [Hart at 31:23-32:7, and 58:3-21]
- Robert Kitts, Managing Director, Investment Banking Division [Kitts at 125:12-19]
- Ruth Porat, Managing Director, Investment Banking Division
- Lily Rafii, Analyst, Global Private Wealth Management Division [Rafii at 158:23-25]
- Andrew B. Savarie, Vice President, Investment Banking Division
- Bram Smith, Managing Director, Investment Banking Division
- William Strong, Managing Director, Investment Banking Division
- James Stynes, Managing Director, Investment Banking Division
- John Tyree, Associate, Investment Banking Division
- Joshua A. Webber, Associate, Investment Banking Division
- William H. Wright, Managing Director, Investment Banking Division
- Gene K. Yoo, Associate, Investment Banking Division

Further, synergies resulting from the proposed combination of Sunbeam and Coleman were modeled, based in part on Exhibit A and information derived from Exhibit A under various scenarios with a midpoint of \$150 million, the same synergy figure represented by MAFCO and CPH. [MORGAN STANLEY CONFIDENTIAL 0026443 at 472-479] These models and results were subsequently presented to Sunbeam's Board of Directors, which included Albert Dunlap, Charles Elson, Russell Kersh, Howard Kristol, Peter Langerman, William Rutter and Faith Whittlesey, who relied on the information in the course of their analysis and ultimate resolution of matters presented before them. [CPH 0075371]

Synergies analyses were also presented to Morgan Stanley's Leveraged Finance Commitment Committee, which in the spring of 1998 may have included all or some of the following individuals: Leslie E. Bradford, Steven L. Brown, Joel P. Feldmann, Richard B. Felix, William Kourakos, Tarek F. Abdel-Meguid, Stephen R. Munger, Stephan F. Newhouse, Ralph L. Pellecchio, Michael L. Rankowitz, William J. Sanders, Marium A. Short, Dwight D. Sipprelle, Bram Smith and William Strong, [See, MORGAN STANLEY CONFIDENTIAL 0028214 at 214], and Morgan Stanley's Equity Commitment Committee, which in the spring of 1998 may have included all or some of the following individuals: Mayree C. Clark, Michael Curtis, John H. Faulkner, Carla A. Harris, John P. Havens, Richard L. Kaufman, Jim Little, Tarek F. Abdel-Meguid, Ralph L. Pellecchio, Ruth M. Porat, William J. Sanders, Dennis F. Shea, Scott M. Sipprelle, Ed Sullivan, and William H. Wright. [Conway at 62:11-63:3] Synergy information, including information derived from Exhibit A, was considered by MS & Co.'s and MSSF's decision-making groups in underwriting and fixing the terms of Sunbeam's \$750 million convertible debt offering, and in going forward with the bank loan to Sunbeam. [MORGAN STANLEY CONFIDENTIAL 0028214 at 230, 232 and 237; MORGAN STANLEY

CONFIDENTIAL 0026545 at 567]; and MORGAN STANLEY CONFIDENTIAL 0000513 at 525 and 529] Indeed, the presentations to the Leveraged Finance Commitment and Equity Commitment Committees estimated that the synergy figures presented were “conservative” estimates [MORGAN STANLEY CONFIDENTIAL 0028214 at 232], and that there could be an “upside” to the figures presented. [MORGAN STANLEY CONFIDENTIAL 0028214 at 237; MORGAN STANLEY CONFIDENTIAL 0000513 at 529]

Morgan Stanley further relied on CPH’s and MAFCO’s synergy figures through discussions with, among others, Sunbeam and Coopers & Lybrand, whose views regarding synergies appear to have been based (at least in part) on the December 12, 1997 synergy schedule and the subsequent statements by CPH and MAFCO regarding synergies. Sunbeam and Coopers & Lybrand were also involved in the preparation, development, and analysis of synergies, and thereby also may have relied, to varying degrees, on Exhibit A or information derived from Exhibit A.

INTERROGATORY NO. 2: Identify with particularity what steps MSSF, Morgan Stanley and/or Sunbeam undertook to develop, analyze, consider, model, evaluate, or review potential synergies, cost savings, and/or financial benefits that Sunbeam could achieve from a business combination with Coleman. Your response should identify each individual involved.

RESPONSE: MSSF notes that Defendant’s Interrogatory No. 2 constitutes at least two separate requests. Subject to and without waiving its general and specific objections, MSSF states that MSSF, Morgan Stanley, and/or Sunbeam took the following steps to “develop, analyze, consider, model, evaluate, or review potential synergies, cost savings, and/or financial benefits that Sunbeam could achieve from a business combination with Coleman”:

Morgan Stanley participated in numerous meetings and conference calls with Sunbeam and Coleman management in an effort to learn about the Sunbeam and Coleman businesses and about potential synergies and cost savings associated with such a combination.

[See generally, Conway at 44:4-45:7, Fuchs at 33:18-34:9, Hart at 40:3-22, 47:25-48:6]

Specifically:

- On December 11, 1997, Morgan Stanley personnel, including Alexander Fuchs, Robert Kitts and James Stynes, met with Sunbeam personnel, including David Fannin and Russell Kersh regarding Sunbeam's potential transaction and upcoming meeting with Coleman. [CPH 1042288, at 2292]
- On December 12, 1997, Sunbeam management and directors, including Russell Kersh, David Fannin and Peter Langerman, met with Coleman management, including Jerry Levin, Joseph Page and Paul Shapiro. [CPH 1042288 at 2292] At this meeting, Coleman management provided Sunbeam with a detailed written schedule identifying 15 different areas of synergies between Sunbeam and Coleman.
- On December 16, 1997, Morgan Stanley personnel spoke with Coleman personnel regarding synergies. Coleman personnel stated that Coleman should receive a majority of the credit for any synergies. [MORGAN STANLEY CONFIDENTIAL 0001846 at 1849]
- On January 27, 1998, Morgan Stanley personnel, including William Reid, spoke with Coleman/MAFCO personnel, who stated that there were at least \$150MM in synergies, and that any lower figure was "understated." [MORGAN STANLEY CONFIDENTIAL 0001846 at 1848]
- On January 29, 1998, Morgan Stanley personnel, including Tyrone Chang, Alexander Fuchs and James Stynes, met with Sunbeam personnel, including David Fannin and Russell Kersh; Coleman personnel, including Jerry Levin and Joseph Page; MAFCO personnel, including James Maher, William Nesbitt and Shapiro; and Credit Suisse First Boston personnel, including Gordon Rich to discuss benefits that would accrue from the proposed Coleman acquisition, 1998 expected performance, synergies, and preliminary due diligence. [CPH 1042288 at 2294, CPH 1401525 at 529, MORGAN STANLEY CONFIDENTIAL 0033255 at 260]
- On February 3, 1998, Morgan Stanley personnel participated on a conference call with Coleman personnel, including Jerry Levin, during which the synergies values were discussed. [MORGAN STANLEY CONFIDENTIAL 0001846 at 1847]
- On February 23-24, 1998, Morgan Stanley personnel, including Tyrone Chang, Alexander Fuchs, James Stynes and Joshua Webber, met with Sunbeam personnel, including David Fannin and Richard Goudis; Arthur Andersen personnel; Coopers & Lybrand personnel; Coleman personnel, including Jerry Levin and Joseph Page; MAFCO personnel, including William Nesbitt; and Credit Suisse First Boston personnel, including Duffy, Steven Geller and Gordon Rich to discuss, among other things, strategic due diligence and 1998 projections. [CPH 1042288, at 2299; MORGAN STANLEY CONFIDENTIAL 0033255 at 261]

- On February 25-26, 1998, Morgan Stanley personnel, including Robert Kitts, James Stynes and Joshua Webber, participated on a conference call with Sunbeam personnel, including David Fannin and Russell Kersh; MAFCO personnel, including James Maher; and Wachtell Lipton personnel to discuss due diligence on the Coleman/Sunbeam transaction. [CPH 1042288, at 2302, MORGAN STANLEY CONFIDENTIAL 0033255 at 262]
- On February 26, 1998, Joshua Webber of Morgan Stanley communicated with MAFCO personnel, including James Maher, regarding synergies analyses. [CPH 1120533]
- On March 4-5, 1998, Morgan Stanley personnel, including Thomas Burchill, Seth Ishaan, Andrew Savarie, Bram Smith, and John Tyree, met with Sunbeam personnel, including Debra MacDonald to conduct due diligence on the Coleman/Sunbeam transaction with relation to the credit facility. [MORGAN STANLEY CONFIDENTIAL 0035935]
- Date uncertain -- Morgan Stanley personnel, including Michael Hart, spoke to Coleman personnel, including Jerry Levin, and Sunbeam personnel, including Albert Dunlap, about the achievability of synergies numbers. [Hart at 40:3-15]

Additionally, Morgan Stanley researched and requested information from Coleman and Sunbeam necessary for the development, analysis, consideration, modeling, evaluation, or review of potential synergies, cost savings, and/or financial benefits that Sunbeam could achieve from a business combination with Coleman. [MORGAN STANLEY CONFIDENTIAL 0031791-799] Morgan Stanley probed management and asked questions regarding synergy plans, testing their ability to execute those synergies on the given timetable. [Smith at 278:7-18] Morgan Stanley reviewed this information, including, but not limited to the listing of synergies and cost savings provided to Morgan Stanley by Coleman (via Sunbeam) on December 12, 1997 [CPH 1020748-749]. Morgan Stanley personnel involved in this process included Tyrone Chang, Andrew Conway, Alexander Fuchs and Gene Yoo. [Fuchs at 127:7-21; Yoo at 105:2-12]

Furthermore, Morgan Stanley personnel, including Tyrone Chang and Andrew Conway, created and compiled pro forma models for the new combined business on a going

forward basis, which entailed a valuation of potential synergies and an analysis and compilation of publicly available information regarding the parties to the transaction. [Chang at 47:10-16, 174:1-10, 186;23-188:1, 190-196; Conway at 72:9-11, 77:5-78:12] Morgan Stanley received a document outlining potential synergies, which were then modeled using a range of synergies, i.e., a range of dollar values which resulted in a range of potential impacts on the transaction. [Chang at 172:6-12, 176:24-178:2; CPH 1020748-749]. Specifically, Morgan Stanley created models, including but not limited to those which examined trading analyses, precedent transaction analyses, discounted cash flow analyses, and estimated value of synergies analyses. [Chang at 190-196]

Morgan Stanley modeled the synergies under various assumptions, and discussed the synergies with the relevant companies, however Morgan Stanley did not perform an independent valuation of the potential synergies that would result from the transaction. The financial synergy data came from CPH, MAFCO, Sunbeam and Coopers & Lybrand. Morgan Stanley ultimately presented the information that was provided by the companies. [Stynes at 62:23-63:8; Yoo at 126:14-127:4, 145:21-146:4]

Apart from Morgan Stanley's efforts to "develop, analyze, consider, model, evaluate, or review potential synergies, cost savings, and/or financial benefits that Sunbeam could achieve from a business combination with Coleman," Morgan Stanley believes that representatives from Coopers & Lybrand and from Sunbeam also were involved in preparing, developing, and analyzing the synergy figures. For example, Coopers & Lybrand "physically visited facilities and would comment positively and/or negatively on the ability to achieve the preliminary synergies that ha[d] been identified." [Kitts at 100:24-101:7; Page 202:1-5; CPH 1401525 at 531; MORGAN STANLEY CONFIDENTIAL 0007317]

Sunbeam “develop[ed], analyze[d], consider[ed], model[ed], evaluate[d], or review[ed] potential synergies, cost savings, and/or financial benefits that Sunbeam could achieve from a business combination with Coleman” in several ways. Sunbeam personnel participated in numerous meetings and conference calls pertaining to due diligence issues, including but not limited to business due diligence, legal due diligence, human resources due diligence, insurance due diligence and tax due diligence. [MORGAN STANLEY CONFIDENTIAL 0007317] Additionally, Scott Yales has testified to having performed synergies analyses -- validating the assumptions, testing their viability, and coordinating these efforts with Coleman -- the source of these synergies numbers, and to having worked with Coopers & Lybrand, who was retained to validate synergistic opportunities. [Yales at 119:20-24, 127:12-128:3, 129:11-130:18]

INTERROGATORY NO. 3: Identify each individual involved in creating, developing, preparing, or using the following documents, or the information contained therein: MORGAN STANLEY CONFIDENTIAL 3136, 3931, 33911, 36113, 31983-31984, 84007-84010, and 84012-84019. As to each person identified, describe in detail that individual’s role in creating, developing, preparing, or using such documents or the information contained therein.

RESPONSE: Morgan Stanley notes that Defendant’s Interrogatory No. 3 constitutes at least fourteen separate requests. Subject to and without waiving Morgan Stanley’s general and specific objections, Morgan Stanley states that the following individuals were either involved in creating, developing, preparing, or using the documents identified in Request No. 3 or the information contained therein:

Document	Individual/Role
MSC3136	Tyrone Chang and David Fannin may have used this document. [(See CPH Ex. 96, which is a duplicate copy of MSC3136, numbered CPH0472491]
MSC3931	Morgan Stanley possesses no information as to the persons who may have had a role in the creation, development, preparation or use of this document.
MSC33911	Tyrone Chang and Eugene Yoo may have had a role in the creation, development, preparation or use of this document. (See electronic file contained in CD 46774)
MSC36113	Tyrone Chang may have had a role in the creation, development, preparation or use of this document. (See electronic file contained in CD 46775) Eugene Yoo may have also used this document in the course of negotiations with Coleman. [Yoo at 141:3-25]
MSC31983-31984	Tyrone Chang may have had a role in the creation, development, preparation or use of this document. (See electronic file contained in CD 46773) Eugene Yoo may have also used this document in the course of negotiations with Coleman. [Yoo at 141:3-25]
MSC84007-84010	Tyrone Chang may have had a role in the creation, development, preparation or use of this document. [Chang 183:20-24] Joshua Webber also testified that he had a role in the creation, development, preparation or use of this document. [Webber at 98:20-99:7] Mr. Webber further testified that Davis Wang, Ed Lam, Alexander Fuchs, Lily Rafii and James Stynes may have assisted in the creation, development, preparation and/or use of this document. [Webber at 99:23-100:22, 114:22-115:6; see also Rafii at 157:18-22, 158:23-159:2] Eugene Yoo also testified that he may have had a role in the creation, development, preparation or use of this document. [Yoo at 151:16-23] Furthermore, this document was part of a larger presentation made to the Sunbeam Board of Directors on February 27, 1998, and is entitled "Review of Anticipated

	<p>Combination of Synergies.” At that time, the Sunbeam Board of Directors was comprised of Albert Dunlap, Charles Elson, Russell Kersh, Howard Kristol, Peter Langerman, William Rutter and Faith Whittlesey [MORGAN STANLEY CONFIDENTIAL 0083960; CPH 0075371] -- thus, the aforelisted directors also may have used this document, or information contained within.</p>
<p>MSC84012-84019</p>	<p>Tyrone Chang may have had a role in the creation, development, preparation or use of this document. [Chang 183:20-24] Joshua Webber also testified that he had a role in the creation, development, preparation or use of this document. [Webber at 98:20-99:7] Mr. Webber further testified that Davis Wang, Ed Lam, Alexander Fuchs, Lily Rafii and James Stynes may have assisted in the creation, development, preparation and/or use of this document. [Webber at 99:23-100:22, 114:22-115:6; <i>see also</i> Rafii at 157:18-22, 158:23-159:2] Eugene Yoo also testified that he may have had a role in the creation, development, preparation or use of this document. [Yoo at 151:16-23] Furthermore, this document was part of a larger presentation made to the Sunbeam Board of Directors on February 27, 1998, and is entitled “Review of Anticipated Combination of Synergies.” At that time, the Sunbeam Board of Directors was comprised of Albert Dunlap, Charles Elson, Russell Kersh, Howard Kristol, Peter Langerman, William Rutter and Faith Whittlesey [MORGAN STANLEY CONFIDENTIAL 0083960; CPH 0075371] -- thus, the aforelisted directors also may have used this document, or information contained within.</p>

INTERROGATORY NO. 4: Identify each individual involved on behalf of MSSF and Morgan Stanley in conducting, reviewing, or participating in due diligence of Sunbeam in connection with (i) the Coleman Transaction, (ii) the February 27 Agreements; (iii) the Subordinated Debenture Offering; and (iv) the Bank Facility, and for each such individual, describe in detail what steps that individual undertook to conduct that due diligence.

RESPONSE: Morgan Stanley notes that Defendant’s Interrogatory No. 4 constitutes at least four separate requests. Morgan Stanley objects to Request No. 4 as overbroad and unduly burdensome to the extent that this request seeks an enumeration of every specific instance Morgan Stanley performed “due diligence” on Sunbeam. As Morgan Stanley’s witnesses have repeatedly testified, due diligence is a broad term that encompasses, among other activities, nearly every discussion that Morgan Stanley had with Sunbeam’s personnel and advisors and nearly every instance in which a Morgan Stanley representative requested information from Sunbeam or reviewed that information.

Morgan Stanley further objects to Request No. 4 as overbroad and unduly burdensome to the extent that this request seeks an enumeration of every specific instance Morgan Stanley performed “due diligence” on Sunbeam because the due diligence activities contemplated by Request No. 4 occurred over five years ago. Subject to and without waiving its general and specific objections, Morgan Stanley states the individuals listed below were among the Morgan Stanley representatives who conducted due diligence in connection with the Coleman transaction, the convertible debenture offering and the bank loan:

Name	Due Diligence Conducted
Tyrone Chang	As part of Morgan Stanley’s due diligence for the Coleman Transaction and associated debenture offering, Mr. Chang had discussions with Sunbeam management, read publicly available information, such as quarterly and annual Securities Exchange Commission filings, read analyst reports, read research reports from Oppenheimer and Bear Stearns, read estimates from Wall Street, spoke with Russell Kersh and Rich Goudis from Sunbeam, and worked with Sunbeam personnel to put together Sunbeam’s pro forma financial statements. [Chang at 46:7-17; 47:10-16; 64:2-65:23; 67:12-25; <i>see also generally</i> the entire Chang deposition transcript]
Eugene Yoo	As part of Morgan Stanley’s due diligence for the Coleman Transaction and associated debenture offering, Mr. Yoo had discussions with Sunbeam management; visited Sunbeam’s headquarters in Florida; met with the heads of various Sunbeam divisions; received a presentation by Sunbeam employees; reviewed financial filings and public documents, including filings by the SEC,

	press releases, and news stories. [Yoo at 31:14-32:23] Mr. Yoo also conducted due diligence on the Coleman Company prior to the close of the transaction. With regard to due diligence performed on the Coleman Company, Mr. Yoo assisted in coordinating the information flow between Skadden Arps, Morgan Stanley, Coopers & Lybrand, and Arthur Andersen. [Yoo at 206:4-17]
Lili Rafii	As part of Morgan Stanley's due diligence for the Coleman Transaction and associated debenture offering, Ms. Rafii gathered publicly available information about Sunbeam. [Rafii at 125:6-13] Additionally, Ms. Rafii reviewed research reports and news articles. [Rafii at 42:7-18]
Andrew Conway	As part of Morgan Stanley's due diligence for the Coleman Transaction and associated debenture offering, Mr. Conway attended meetings in Florida with members of the Sunbeam team, including but not limited to Al Dunlap, Russ Kersh, David Fannin, and Rich Goudis, and Don Uzzi. Mr. Conway also reviewed Sunbeam's public financial statements, reports, and industry materials.
Alex Fuchs	As part of Morgan Stanley's due diligence for the Coleman Transaction and associated debenture offering, Mr. Fuchs had regular discussions with Sunbeam management and employees, participated in conference calls with Sunbeam, visited Sunbeam locations, and presented the materials Morgan Stanley was developing back to Sunbeam management and employees to insure that Morgan Stanley's material accurately reflected the information provided to Morgan Stanley by Sunbeam management.
Michael Hart	As part of Morgan Stanley's due diligence for the senior loan, Mr. Hart participated in a diligence call with Jerry Levin and Al Dunlap, participated in other calls where due diligence was discussed, and reviewed various financial models to analyze the underwriting commitment and evaluate Sunbeam's overall credit worthiness. [Hart at 103:23-106:6] Morgan Stanley notes that First Union and Bank of America also conducted due diligence in connection with the senior loan.
Robert Kitts	As part of Morgan Stanley's due diligence for the Coleman Transaction and associated debenture offering, Mr. Kitts researched publicly available information regarding Sunbeam, conducted interviews with Sunbeam management, maintained an ongoing dialogue with Sunbeam personnel, reviewed research reports, and attended due diligence meetings with Sunbeam and Coleman representatives. [Kitts at 73:22-74:25; 87:6-17, 91:15-92:13] Mr. Kitts did not have any role in bring-down due diligence for the debt offering. [Kitts at 151:17-20]
Andrew Savarie	As part of Morgan Stanley's due diligence for the Coleman Transaction and associated debenture offering, Mr. Savarie attended due diligence meetings with Sunbeam, gathered information regarding Sunbeam, reviewed drafts of the offering documents, visited Sunbeam's offices, and had ongoing discussions with Sunbeam representatives about Sunbeam's business forecasts. [Savarie at 50:14-25, 57:2-23, 68:8-21, 90:2-20 and 112:16-22] Mr. Savarie also had at least one discussion with Sunbeam's accountants at Arthur Andersen and was involved in discussions with lawyers for Sunbeam and for

	the other banks. [Savarie at 58:12-59:3, 78:6-21] Mr. Savarie does not recall being involved in due diligence of the acquisition targets.
Bram Smith	As part of Morgan Stanley's due diligence for the senior loan, Mr. Smith supervised aspects of due diligence that were conducted with respect to the structuring of the senior loan. [Smith at 85:2-20] Mr. Smith attended at least one due diligence meeting at Sunbeam's offices on March 4 and 5, 1998, analyzed available projections and the possible loan structures, and participated in telephone calls and review of documents regarding Sunbeam's financial performance. [Smith at 85:21-86:9, 91:5-19, 92:8-19, 144:10-145:6] Mr. Smith also maintained an ongoing dialogue with Sunbeam in the context of asking questions related to the debt financing. [Tyree at 434:18-435:6] Morgan Stanley notes that First Union and Bank of America also conducted due diligence in connection with the senior loan.
Ruth Porat	As part of Morgan Stanley's due diligence for the debenture offering, Ms. Porat participated in telephone discussions with Sunbeam representatives regarding Sunbeam's first quarter 1998 performance, and reviewed documents prepared and presented by senior Sunbeam sales officials regarding projected sales for the balance of the first quarter. [Smith at 82:6-83:2, 141:25-142:6; Porat at 18:2-15, 73:24-74:12]
Jim Stynes	As part of Morgan Stanley's due diligence for the Coleman Transaction, Mr. Stynes had regular discussions with Sunbeam management and employees, participated in conference calls with Sunbeam, visited Sunbeam locations, and presented the materials Morgan Stanley was developing back to Sunbeam management and employees to insure that Morgan Stanley's material accurately reflected the information provided to Morgan Stanley by Sunbeam management. [Strong at 313:6-22]
William Strong	As part of Morgan Stanley's due diligence for the Coleman Transaction and related debenture offering, Mr. Strong participated in telephone discussions with Sunbeam representatives regarding Sunbeam's first quarter 1998 performance, and reviewed documents prepared and presented by senior Sunbeam sales officials regarding projected sales for the balance of the first quarter. [Strong at 286:6-15, 305:23-308:8, 336:22-337:6]
John Tyree	As part of Morgan Stanley's due diligence for the Coleman Transaction and related debenture offering, Mr. Tyree: visited Sunbeam's offices in Florida; had ongoing discussions, including teleconferences, with Sunbeam's management; conducted bring-down due diligence; reviewed financial forecasts, including the net sales for the First Quarter 1998; facilitated the due diligence process by setting up meetings and making sure the appropriate people from Morgan Stanley and Sunbeam attended the meetings; inspected Sunbeam's facilities and headquarters; requested and reviewed financial information such as publicly filed quarterly and annual reports; and analyzed research and analyst reports. [Tyree at 124:3-17, 322:10-16, 376:8-11, 409:13-18, 432:18-25, 449:6-12, 493:18-21, 501:10-18 and 558:5-17] Mr. Tyree participated in telephone discussions with Sunbeam representatives regarding Sunbeam's first quarter 1998 performance, and reviewed documents prepared and presented by senior Sunbeam sales officials regarding projected sales for

	the balance of the first quarter. Mr. Tyree also spoke with representatives from Arthur Andersen on multiple occasions during the due diligence process.
Josh Webber	As part of Morgan Stanley's due diligence for the Coleman Transaction, Mr. Webber performed due diligence on the Coleman Company [Webber at 74:11-20]
Shani Boone	As part of Morgan Stanley's due diligence for the Coleman Transaction and related debenture offering, Ms. Boone attended conference calls with Sunbeam in which due diligence was discussed. [Boone at 32:14-21]
Johannes Groeller	As part of Morgan Stanley's due diligence for the Coleman Transaction and related debenture offering, Mr. Groeller contacted several of Sunbeam's customers and participated in "bring down due diligence" sessions with Sunbeam management. [MORGAN STANLEY CONFIDENTIAL 0029176]

Furthermore, as part of Morgan Stanley's due diligence on the Coleman transaction and related debenture offering, unspecified members of Morgan Stanley's Sunbeam teams requested documentation from Sunbeam management and employees, including a) backup numbers for all new revenue streams, including any methodologies implemented in arriving at such revenue projections; b) historical and projected pricing and unit sales trends for both existing and new products; and c) information regarding new pipeline products, including how revenue projections were arrived at, and a description of the product development cycle. [CPH 0469863]

I hereby declare that the foregoing answers are true and correct upon information and belief and to the best of my knowledge.

Dated this 9 day of August, 2004.

By: [Signature]

(Print Name) RICHARD A. HART

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss

BEFORE ME, the undersigned authority, personally appeared Michael A. Hart, who after being by me first duly sworn, deposes and says that she executed the above and foregoing interrogatories and that said answers are true and correct.

Sworn to and subscribed before me this 9th day of August, 2004.

[Signature]

Name typed/printed: _____
Notary Public, State of _____
Commission No.: _____

My Notary Commission Seal:

JOHN PLOTNICK
Notary Public, State of New York
No. 31-01PL4730133
Qualified in New York County
Commission Expires 1/31/2007

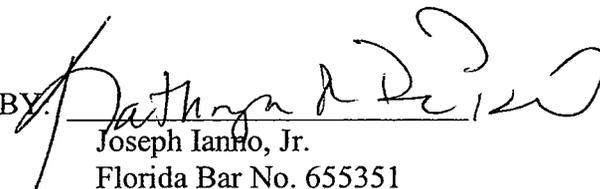
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this ___ day of August, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar No. 618349)
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

*Counsel for Morgan Stanley & Co.
Incorporated and Morgan Stanley Senior
Funding*

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
E-mail: jianno@carltonfields.com

BY 
Joseph Ianho, Jr.
Florida Bar No. 655351

SERVICE LIST

Jack Scarola
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy
Michael Brody
JENNER & BLOCK, LLC
One IBM Plaza, Suite 400
Chicago, IL 60611

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

CASE NO. CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),
vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

ORDER AND NOTICE OF HEARING

This case having come before the Court, it is

ORDERED AND ADJUDGED that hearing on Coleman (Parent) Holdings Inc.'s and MacAndrews & Forbes Holdings, Inc.'s Motion to Clarify this Court's July 26, 2004 Order on CPH's and MAFCO's ore tenus Motion and this Court's December 4, 2004 Order on Morgan Stanley's Motion to Compel Production of Settlement Agreement is hereby set for

August 13, 2004, at 8:00 a.m.

at the West Palm Beach Courthouse, Room 11A, 205 N Dixie Hwy, WPB, FL.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 10 day of August, 2004.

ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:

Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci
655 15th Street, NW, Suite 1200
Washington DC 20005

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, Il 60611

If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please contact the ADA Coordinator in the Administrative Office of the Court, Palm Beach County Courthouse, 205 North Dixie Highway, Room 5.2500, West Palm Beach, Florida 33401; telephone number (561) 355-4380 within two (2) working days of your receipt of this [describe notice]; if you are hearing or voice impaired, call 1-800-955-8771.

SPANISH

Si Ud. es una persona incapacitada que necesita de un servicio especial para participar en este proceso, Ud. tiene derecho a que le provean cierta ayuda sin costo alguno. Por favor pongase en contacto con el Coordinador de la Oficina Administrativa de la Corte ADA, situada en el 205 North Dixie Highway, Oficina 5.2500, West Palm Beach, Florida, 33401, teléfono (561) 355-4380, dentro de los dos (2) próximos días hábiles después de recibir esta [describa la notificación]; si tiene incapacidad de oír ó hablar llame al 1-800-955-8771.

CREOLE

Si ou sé yon moun ki Infirm, ki bézwen ninpôt akomodasyon pou ka patisipé nan pwosè sa-a, ou gen dwa, san'l pa kouté'w anyin, pou yo ba'w kèk sèvis. Tanpri kontakté koòdinatè ADA ya nan Biro Administratif Tribinal nan cité Palm Beach la, ki nan 205 North Dixie Highway, Cham 5.2500, West Palm Beach, Florida 33401, niméro telefonn-nan sé (561) 355-4380, rélé dé (2) jou dé lè ou résévwa [notis sa-a]; si ou bèbè ou byen soud rélé 1-800-955-8771.

FRENCH

Si vous êtes infirme, et en besoin de n'importe accommodation pour pouvoir participer á ces procédures, vous pouvez gratuitement recevoir, certains services. S'il-vous-plait contactez le coordinateur du Bureau Administratif du Tribunal de Palm Beach, située à 205 North Dixie Highway, Chambre 5.2500, West Palm Beach, Florida 33401, numéro de téléphone (561) 355-4380 durant deux (2) jours suivant la réception de [cette note]; si vous êtes muets ou sourds, appelez 1-800-955-8771.

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO., INC.,

Defendant.

MORGAN STANLEY SENIOR FUNDING, INC.,

Plaintiff,

v.

CASE NO: CA 03-5165 AI

MACANDREWS & FORBES HOLDINGS, INC.,

Defendant.

**ORDER GRANTING MORGAN STANLEY'S
MOTION FOR ENLARGEMENT OF TIME
TO COMPLY WITH THIS COURT'S JULY 12, 2004 ORDER**

THIS CAUSE having come before the Court on August 2, 2004 upon Morgan Stanley's Motion for Enlargement of Time to Comply with this Court's July 12, 2004 Order, and the Court having heard argument of counsel and being otherwise fully advised in the premises, it is hereby

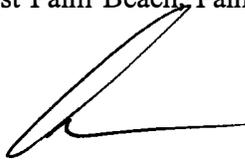
ORDERED AND ADJUDGED that:

1. Morgan Stanley's Motion for Enlargement of Time to Comply with this Court's July 12, 2004 Order is **GRANTED**, *in part*.

2. Morgan Stanley shall have up to and including ~~August 20~~, *Sp on Aug. 13,* 2004 in which to submit directly to the Court for in-camera inspection, its amended response to Interrogatory 1,

portions of the answers to interrogatory 3 omitted based on privilege with all privileged information highlighted, any affidavits detailing the specific factual basis to support each privilege claim, legal argument to support the privilege claims, and a copy of the Interrogatories and July 12, 2004 Order.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 10th
day of August, 2004.



ELIZABETH T. MAASS
Circuit Court Judge

Copies furnished to:

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
KIRKLAND & ELLIS LLP
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005

Jack Scarola
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33409

Jerold S. Solovy
JENNER & BLOCK, LLC
One IBM Plaza
Suite 4400
Chicago, Illinois 60611

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

CASE NO. CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),
vs.

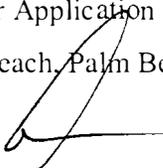
MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

ORDER

THIS CAUSE came before the Court, in Chambers, on Morgan Stanley & Co., Inc., and Morgan Stanley Senior Funding, Inc.'s Citation to Supplemental Authority, which the Court elects to treat as including a Motion to Supplement Record on Morgan Stanley & Co. Incorporated and Morgan Stanley Senior Funding, Inc.'s Motion for Application of New York Law. Based on a review of the Court file, it is

ORDERED AND ADJUDGED that Morgan Stanley & Co., Inc., and Morgan Stanley Senior Funding, Inc.'s Motion to Supplement Record on Morgan Stanley & Co. Incorporated and Morgan Stanley Senior Funding, Inc.'s Motion for Application of New York Law is Denied.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 15 day of August, 2004.



ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:

Joseph Ianno, Jr., Esq.

222 Lakeview Ave., Suite 1400

West Palm Beach, FL 33401

Thomas D. Yannucci

655 15th Street, NW, Suite 1200

Washington DC 20005

John Scarola, Esq.

2139 Palm Beach Lakes Blvd.

West Palm Beach, FL 33409

Jerold S. Solovy, Esq.

One IBM Plaza, Suite 4400

Chicago, IL 60611

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

CASE NO. CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),
vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

**ORDER ON MORGAN STANLEY & CO. INCORPORATED AND MORGAN
STANLEY SENIOR FUNDING, INC.'S MOTION FOR APPLICATION OF NEW
YORK LAW**

THIS CAUSE came before the Court June 28, 2004 on Morgan Stanley & Co. Incorporated and Morgan Stanley Senior Funding, Inc.'s Motion for Application of New York Law, with all parties well represented by counsel.

I. Introduction

This case arises out of an acquisition transaction that was negotiated and consummated in late 1997 and early 1998, in which Coleman (Parent) Holdings, Inc. ("CPH"), sold its 82% interest in the Coleman Company, Inc. ("Coleman"), to Sunbeam Corporation ("Sunbeam"). Morgan Stanley & Co., Inc. ("MS & Co."), served as financial advisor to Sunbeam for parts of the acquisition transaction and served as the lead underwriter for a \$750,000,000 debenture offering that Sunbeam used to finance the acquisition.

In 1998, Morgan Stanley Senior Funding, Inc. ("MSSF"), and other lenders entered into a credit agreement with Sunbeam under which MSSF agreed to provide senior secured financing to Sunbeam in connection with Sunbeam's acquisition of Coleman and two smaller companies.

CPH's Complaint alleges claims against MS & Co. arising from this transaction for fraudulent misrepresentation, negligent misrepresentation, aiding and abetting fraud, and conspiracy, and seeks damages of at least \$485 million.

MSSF's Complaint alleges that, in the course of Sunbeam's acquisition of Coleman, Defendants MacAndrews & Forbes Holdings, Inc. ("MAFCO"), CPH's parent company, and CPH provided false information to MSSF about the "synergies" that Sunbeam would achieve from the combination of Sunbeam and Coleman. MSSF alleges that MAFCO and CPH's inflated synergy projections caused Sunbeam to pay a higher price to acquire Coleman and consequently caused Sunbeam's lenders, including MSSF, to make larger loans to finance the acquisition. MSSF's Complaint asserts claims for fraud and negligent misrepresentation and alleges that MSSF suffered hundreds of millions of dollars in damages when Sunbeam declared bankruptcy in February 2001 and defaulted on acquisition-related loans.

II. Analysis

A. An overview

MS & Co. and MSSF (together "Morgan Stanley"), filed their Motion for Application of New York Law ("Motion"). The Motion seeks a determination that New York substantive law controls all claims in these consolidated cases.

Florida's choice of law rules govern the conflict of laws analysis. Hoffman v. Ouellette, 798 So. 2d 42 (Fla. 4th DCA 2001). A conflict of laws analysis involves a three step process. First, the court must consider whether there are potentially outcome determinative differences between the substantive laws alleged to apply. See Tune v. Philip Morris, Inc., 766 So. 2d 350 (Fla. 2d DCA 2000), rev. den. 786 So. 2d 1188 (Fla. 2001). If there are, the Court must next determine the choice of law rule to be applied for the type of

claim alleged. Finally, the court must apply the appropriate choice of law rule. Hoffman.

The parties agree that Florida applies the "significant relationship" test in tort cases. The parties disagree on whether there are potentially outcome determinative differences in New York and Florida substantive law and, if there are, which state's law prevails on application of the conflicts principles. Choice of law is made on an issue by issue basis. Crowell v. Clay Hayden Trucking Lines, Inc., 700 So. 2d 120 (Fla. 2d DCA 1997), rev. den. 705 So. 2d 569 (Fla. 1998). To resolve the dispute, then, the Court must determine whether there are material differences between New York and Florida law on each issue and, if there are, apply the appropriate conflicts principles to determine the controlling substantive law on each contested issue.

B. Step One - New York v. Florida Law

(i) Negligent Misrepresentation

Morgan Stanley contends that New York law requires Coleman to prove that it had a "special relationship" with Coleman before it can bring a claim for negligent misrepresentation. Coleman contends that the "special relationship" requirement in the New York case law is merely a term of art that designates the same group of potential recipients of misrepresentations who have a cause of action as in Florida.

Florida has adopted §552 of the Restatement (Second) of Torts as a statement of the elements for a negligent misrepresentation claim:

Information Negligently Supplied for the Guidance of Others.

(1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

(2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered

(a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and

(b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

(3) The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them.

See Gilchrist Timber Co. v. ITT Rayonier, Inc., 696 So. 2d 334, 337 (Fla. 1997). Thus, in Florida, one who has a pecuniary interest in a transaction is liable if he negligently supplies incorrect information for the benefit or guidance of another who justifiably relies on it.

New York, however, circumscribes a tighter circle of potential claimants, engrafting a requirement that the information's recipient be in a position of trust or confidence to its publisher. See American Protein Corp. v. AB Volvo, 844 F. 2d 56 (2d Cir. 1988), cert. den. 488 U.S. 852 (1988); DynCorp v. GTE Corporation, 215 F. Supp. 2d 308 (S.D.N.Y. 2002); Citibank, N.A. v. Itochu International, Inc., 2003 WL 1797847 (S.D.N.Y. 2003); Fleet Bank v. Pine Knoll Corp., 736 N.Y.S. 2d 737 (A.D. 3 Dept. 2002); St. Paul Fire and Marine Insurance Co. v. Health Fielding Insurance Brokerage, Ltd., 976 F. Supp. 198 (S.D.N.Y. 1996). The difference between Florida and New York law is material, and may be outcome determinative: the parties dispute whether MS & Co. held or acquired a position of trust or confidence over CPH, and whether MAFCO and CPH held or acquired a position of trust or confidence over MSSF.

(ii) Fraudulent Misrepresentation

Morgan Stanley contends that New York law prevents a recipient of a fraudulent misrepresentation from bringing a claim if it is a "sophisticated party" with access to information which, if checked, would have allowed it to determine the representation was inaccurate. CPH maintains that New York law is merely a specific application of the

general rule that a misrepresentation is not actionable unless reliance on it was reasonable, and that it is unreasonable for a sophisticated party in an arms' length commercial transaction to rely on information provided by its opponent that could have been verified.

Under New York law, reliance on a fraudulent misrepresentation is not reasonable if the recipient “has the means available to him of knowing, by the exercise of ordinary intelligence, the truth . . .” See Schumaker v. Mather, 133 N.Y. 590; 30 N.E. 755, 757 (1892). Thus, a sophisticated investor may not claim it was fraudulently induced to enter into a transaction if it failed to use the means available to test the representations. UST Private Equity Investors Fund v. Salomon Smith Barney, 733 N.Y.S. 2d 385, 288 A.D. 2d 87 (N.Y. App. Div. 2001).

In contrast, in Florida a recipient of a fraudulent misrepresentation may rely on it unless he knows it is false or its falsity is obvious, even if it had the means to verify the representation's accuracy. See Besett v. Basnett, 389 So. 2d 995 (Fla. 1980); M/I Schottenstein Homes, Inc. v. Azam, 813 So. 2d 91 (Fla. 2002); Sheer v. Jenkins, 629 So. 2d 1033 (Fla. 4th DCA 1993).

Clearly, there is a fundamental distinction on this point between New York and Florida which could be outcome determinative. MS & Co. claims CPH had access to information which would have allowed it to test the allegedly false representations but CPH failed to do its due diligence. MAFCO and CPH claim that MSSF had access to information that would have allowed MSSF to test the synergy representations, but MSSF failed to do its due diligence. If true, a jury could find reliance that is reasonable under Florida law to be unreasonable under New York law.

C. Step Two - Choice of Law Rule

(i) Applicable Rule

Florida has adopted the Restatement (Second) of Conflict of Laws' significant relationships test. See Bishop v. Florida Specialty Paint Company, 389 So. 2d 999 (Fla. 1980). Section 145 states the general principles with respect to tort. Section 148 states the choice of law principles for fraud and misrepresentation. Counsel agree section 148 applies.

See Trumpet Vine Investments, N.V. v. Union Capital Partners I, Inc., 92 F. 3d 1110 (11th Cir. 1996).

(ii) Procedure

The Court was unable to find any cases specifically delineating the procedure to be used for a judicial choice of law determination prior to trial. However, because application of the significant relationships test is fact-dependent, the Court concludes that a pre-trial determination is controlled by the summary judgment rule, Rule 1.510, Fla. R. Civ. P. First, the Court is unaware of any other procedural vehicle that would permit a pre-trial determination of facts. Second, it appears that when summary judgment has been used by the trial courts, the appellate courts have reviewed the orders without comment on the procedure employed. See, e.g., Rush v. Joyner, 540 So. 2d 266 (Fla. 4th DCA 1989); Bishop.

(iii) The Undisputed Facts

The following facts are undisputed:

1. CPH is a wholly owned subsidiary of MAFCO. Before the transaction with Sunbeam in March 1998, CPH was a holding company with an 82% interest in Coleman. CPH is a Delaware corporation with its principal place of business in New York City, New York.
2. MS & Co. is an investment banking firm providing financial and securities services. MS & Co. is a Delaware corporation with its principal place of business in New York City, New York.
3. CPH retained the investment bank of Credit Suisse First Boston ("CSFB") to serve as its financial advisor on the Sunbeam transaction. CSFB is a global investment bank with offices in New York. CPH worked with CSFB personnel in the New York office on the Sunbeam deal.
4. MS & Co. served as Sunbeam's financial advisor during the negotiations that led to the Coleman acquisition. MS & Co.'s contract with Sunbeam was governed by New York law.
5. New York counsel represented CPH, MS & Co., and MSSF during the course of the negotiations and closing of the Sunbeam transaction.

6. CPH retained the accounting firm of Ernst & Young, a national accounting firm with offices in New York. CPH worked with accountants in the New York office on the Coleman deal.
7. MSSF is a financial services company that provides credit services to its clients. MSSF is a Delaware corporation with its principal place of business in New York .
8. MAFCO relied on New York-based personnel at CSFB for financial services; on Wachtell, Lipton Rosen & Katz, a New York based law firm, for legal advice; and on Ernst & Young for accounting services.
9. There were numerous telephone calls between MS & Co. personnel and Sunbeam personnel in Florida concerning MS & Co.'s retention; its work for Sunbeam; and the Coleman transaction.
10. MS & Co. personnel met with Sunbeam personnel in Florida several times to discuss MS & Co.'s retention as Sunbeam's financial advisor, strategy, potential acquisition candidates, and merger issues.
11. On or about September 23 and 24, 1997; October 29, 1997; and March 4 and 5, 1998, MS & Co. personnel conducted due diligence at Sunbeam's Florida offices.
12. MS & Co. corresponded with Sunbeam at its Florida offices on a variety of issues dealing with its representation of Sunbeam and the merger.
13. On or about December 18, 1997, representatives of Sunbeam and MAFCO met in Florida to discuss a potential transaction involving Sunbeam and Coleman.
14. On or about February 3, 1998, Sunbeam personnel met with an Arthur Andersen representative at Sunbeam's Florida offices in connection with the Coleman transaction.
15. On March 5, 1998, MS & Co. personnel attended a drafting session in Florida in connection with the subordinated debenture offering.
16. On or about March 12, 1998, MS & Co. personnel conducted an accounting due diligence conference call with Arthur Andersen personnel in Florida regarding Sunbeam's financial circumstances.
17. The March 19, 1998 press release was publicly issued from Sunbeam's headquarters

- in Delray Beach, Florida; was drafted by Sunbeam's lawyers at the New York offices of Skadden Arps; was reviewed by MS & Co. in New York; and was received by CPH in New York.
18. The statements by Lawrence Bornstein of Arthur Andersen concerning Sunbeam's earnings shortfalls took place at the offices of Global Financial Press in New York.
 19. Any representations that MAFCO and CPH made to MSSF at the December 12, 1997 and January 29, 1998 meetings were made and received in New York.
 20. On February 4, 1998, Coleman sent Sunbeam a proposed Confidentiality Agreement in connection with the proposed merger. Sunbeam executed the Confidentiality Agreement. The Confidentiality Agreement provided that New York law applies to it.
 21. On February 27, 1998, Sunbeam and CPH's boards of directors met in New York and approved the merger agreement. MS & Co. made a presentation to Sunbeam's Board of Directors at the meeting in New York and provided a "fairness opinion" prior to the Board's approval of the transaction.
 22. Sunbeam and CPH signed the merger agreement later that day in New York.
 23. The merger agreement specified that the acquisition would close in New York and that all share certificates and other consideration would be exchanged by the parties at the closing in New York.
 24. Written notice of changes in circumstances having a material adverse effect was to be delivered to CPH's wholly owned subsidiary in Fort Lauderdale, Florida. No notice was received.
 25. On March 29, 1998, Sunbeam and CPH entered into a Registration Rights Agreement which provided for the registration by Sunbeam of 14,099,749 shares of Sunbeam common stock that were issued to a wholly owned subsidiary of CPH. The Registration Rights Agreement provided that it was governed by New York law without regard to New York conflicts of law principles.
 26. The Sunbeam transaction closed on March 30, 1998 in New York.
 27. CPH tendered its shares of Coleman to Sunbeam in New York. At the time of the transaction, Coleman was a public company traded on the New York Stock Exchange.

28. CPH accepted shares of Sunbeam stock in New York. At the time of the transaction, Sunbeam was a public company traded on the New York Stock Exchange.
29. The Sunbeam financing transactions were closed in New York on March 31, 1998.
30. MSSF loaned Sunbeam \$680 million in New York in part to be used for the Coleman deal.

D. Step Three - Application of the Law to the Facts

(i) Negligent Misrepresentation - CPH v. MS & Co.

Restatement (Second) of Conflict of Laws §148 (1971) provides:

§148. Fraud and Misrepresentation

(1) When the plaintiff has suffered pecuniary harm on account of his reliance on the defendant's false representations and when the plaintiff's action in reliance took place in the state where the false representations were made and received, the local law of this state determines the rights and liabilities of the parties unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in §6 to the occurrence and the parties, in which event the local law of the other state will be applied.

(2) When the plaintiff's action in reliance took place in whole or in part in a state other than that where the false representations were made, the forum will consider such of the following contacts, among others, as may be present in the particular case in determining the state which, with respect to the particular issue, has the most significant relationship to the occurrence and the parties:

- (a) the place, or places, where the plaintiff acted in reliance upon the defendant's representations,
- (b) the place where the plaintiff received the representation,
- (c) the place where the defendant made the representations,
- (d) the domicile, residence, nationality, place of incorporation and place of business of the parties,

(e) the place where a tangible thing which is the subject of the transaction between the parties was situated at the time, and

(f) the place where the plaintiff is to render performance under a contract which he has been induced to enter by the false representations of the defendant.

MS & Co. argues that subsection (1) applies; CPH argues that subsection (2) applies. The correct answer is unclear, since subsection (1) applies only if the false statements were both made and received in the same state, and subsection (2) applies if reliance occurs in whole or in part in a different state than where the representation was made. §148 does not state a rule where the place of reliance and representation are the same, but different from the place where the representation was received.

The representations were received in New York. The actionable part of CPH's reliance occurred in New York, where the contract was entered into and closed. Finally, it is undisputed that the representations relied on in Count I of CPH's Complaint were made in New York. Consequently, New York law controls unless Florida has a more significant relationship under the principles stated in section 6 of the Restatement. It does not. While Florida's public policy provides broader protection for the recipients of false information in commercial transactions, which creates greater incentives for parties to take reasonable care that their representations are correct, that interest is not paramount to New York's, under the principles outlined in section 6. Instead, certainty and predictability in commercial transactions require that New York law apply.

Even if the choice of laws was not dictated by subsection (1), application of subsection (2) would lead to the same result: CPH relied on the statements in New York; it received the representations in New York; the representations were made in New York; the parties are domiciled in New York; and CPH was required to perform in New York.

(ii) Negligent Misrepresentation: MSSF v. MAFCO and CPH

MSSF's claims against MAFCO and CPH are centered on two meetings where MSSF alleges MAFCO and CPH gave inflated synergy projections, on December 12, 1997, and

January 29, 1998. Both were face to face meetings in New York. Consequently, the allegedly false synergy projections were made, received, and relied on in New York. Florida does not have a more significant relationship to the particular issue--the group of people to which MSSF owed a duty--under the principles listed in section 6. Consequently, New York law governs whether MSSF owed a duty to MAFCO and CPH.

(iii) Fraudulent Misrepresentation: CPH v. MS & Co.

As outlined above, section 148 (1) of the Restatement dictates the application of New York law to determine whether reliance on a fraudulent misstatement is justified. Florida does not have a more significant relationship to this issue than New York, based on application of the principles outlined in section 6 of the Restatement. Though Florida has a strong public policy dictating that “(a) person guilty of fraudulent misrepresentation should not be permitted to hide behind the doctrine of caveat emptor,” that interest does not override New York’s. Besset at 997. Certainty and predictability require that the standards of due diligence governing sophisticated New York domiciled corporations entering into a commercial transaction in New York be governed by New York law.

(iv) Fraudulent Misrepresentation: MSSF v. MAFCO and CPH

Section 148 (1) of the Restatement dictates the application of New York law to determine the due diligence required to find reliance on a false statement reasonable. Application of section 6's principles does not dictate a different result.

(v) Conspiracy and Aiding and Abetting-CPH v. MS & Co.

The Court is unable to apply section 148's principles or conclude whether Florida or New York has the more significant relationship to CPH's aiding and abetting fraud and conspiracy claims, found at Counts II and III of its Complaint.

Both counts claim that MS & Co. actively worked with Sunbeam personnel to manipulate Sunbeam's finances to make it appear that Sunbeam had successfully rebounded from poor performance; to conceal and misrepresent Sunbeam's true financial condition to entice a potential purchaser or investor; and to provide CPH, both through MS & Co. and by materials it scripted for Sunbeam, false and inaccurate financial information to persuade

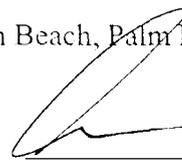
CPH to agree to, then consummate, a merger with Sunbeam.

It is unclear to the Court how, if at all, the two claims differ. However, if MS & Co. were found liable based on allegations of its participation with Sunbeam personnel in an elaborate fraud, then it would be liable for the entire fraud. See Hoch v. Rissman, Weisberg, Barrett, 742 So. 2d 451 (Fla. 5th DCA 1999), rev. den. 760 So. 2d 948 (Fla. 2000); Ford v. Rowland, 562 So. 2d 731 (Fla. 5th DCA 1990), rev. den. 574 So. 2d 141 (1990); Nicholson v. Kellin, 481 So. 2d 931 (Fla. 5th DCA 1985). Further, MS & Co. could be liable for Sunbeam's actions prior to its retention if it joined with Sunbeam to perpetuate a fraud with knowledge of its general purpose and scope. See James v. Nationsbank Trust Co. (Florida), N.A., 639 So. 2d 1031 (Fla. 5th DCA 1994). The fraud alleged is largely Florida based, and the location of its ultimate victim incidental. Florida has a strong public policy in favor of protecting the recipients of fraudulent misrepresentations. Besset. That policy is more clearly implicated if CPH is able to prove that MS & Co. was an actor in a Florida-based fraud. The allegations of conspiracy are disputed, precluding summary judgment at this juncture on the choice of law issue.

Based on the foregoing, it is

ORDERED AND ADJUDGED that Morgan Stanley & Co. Incorporated and Morgan Stanley Senior Funding, Inc.'s Motion for Application of New York Law is Granted, in part. As to Counts I and IV of CPH's Complaint and MSSF's claims against MAFCO and CPH, the Court determines that New York substantive law applies (i) to engraft a requirement that the recipient of a negligent misrepresentation be in a special relationship to its publisher for the misrepresentation to be actionable, and (ii) to engraft a requirement that a party perform reasonable due diligence as to available information in order to prove that its reliance on a misrepresentation was reasonable.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this  day of August, 2004.



ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:

Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci
655 15th Street, NW, Suite 1200
Washington DC 20005

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, Il 60611

**IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA**

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

CASE NO: CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

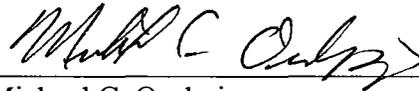
RE-NOTICE OF DEPOSITION SUBPOENA DUCES TECUM OF DONALD R. UZZI

TO: Donald R. Uzzi, 4209 Beverly Drive, Dallas, Texas 75205.

Please take notice that the Morgan Stanley entities in the above-styled cause of action intend to take the oral deposition of Donald R. Uzzi pursuant to Texas Rule of Civil Procedure 201.2 and the Order of the Circuit Court of the Fifteenth Judicial Circuit In and For Palm Beach County, Florida entered on January 21, 2004 and attached hereto. The deposition will take place at 9:30 a.m. on August 19, 2004, at the offices of HAYNES AND BOONE, LLP, 901 Main Street, Suite 3100, Dallas, Texas 75202. The deposition will be videotaped and will continue from day to day until completed.

Donald R. Uzzi will also produce documents responsive to the Deposition Subpoena
Duces Tecum attached hereto. These documents and materials shall be brought with the witness
and produced on August 19, 2004, at HAYNES AND BOONE, LLP, 901 Main Street, Suite 3100,
Dallas, Texas 75202.

Respectfully submitted,



Michael C. Occhuzzo

KIRKLAND & ELLIS LLP

655 15th Street, N.W. – Suite 1200

Washington, D.C. 20005

Telephone: (202) 879-5000

Facsimile: (202) 879-5200

OF COUNSEL:

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar No. 618349)
Thomas A. Clare
KIRKLAND & ELLIS LLP
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

Joseph Ianno, Jr. (FL Bar # 655351)
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368

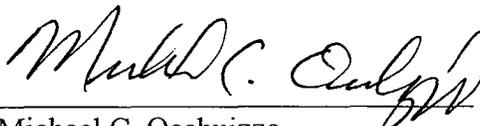
Dated: August 11, 2004

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the following counsel of record by facsimile and Federal Express on this 11th day of August, 2004:

John Scarola, Esq.
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33409

Jerold S. Solovy, Esq.
JENNER & BLOCK, LLC
One IBM Plaza
Suite 4400
Chicago, Illinois 60611



Michael C. Occhuzzo

THE STATE OF TEXAS

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.
MORGAN STANLEY & CO., INC.,
Defendant(s).

CASE NO: CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),
vs.
MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

DEPOSITION SUBPOENA DUCES TECUM

TO: Any sheriff or constable of the State of Texas or other person authorized to serve and execute subpoenas as provided in Texas Rule of Civil Procedure 176.5.

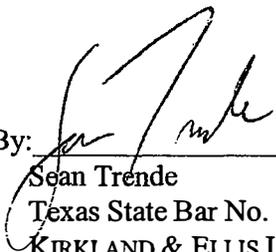
You are commanded to summon **Donald R. Uzzi**, 4209 Beverly Drive, Dallas, Texas 75205, to appear at the principal offices of HAYNES AND BOONE, LLP, 901 Main Street Suite 3100, Dallas, Texas 75202, on **Thursday, August 19, 2004 at 9:30 a.m.** to give testimony at a videotaped oral deposition and to permit inspection and copying of documents or tangible things to be used as evidence in this case.

Donald R. Uzzi is commanded to attend the oral deposition and to produce and permit inspection and copying of the following documents or tangible things described in the attached Exhibit 1. These documents and materials shall be brought with the witness and produced prior to the deposition on August 19, 2004, at HAYNES AND BOONE, LLP, 901 Main Street, Suite 3100, Dallas, Texas 75202.

Contempt. Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena is issued or a district court in the county in which the subpoena is served, and may be punished by fine or confinement, or both. TEX. R. CIV. P. 176.8(a).

DO NOT FAIL to return this writ to the Circuit Court of the Fifteenth Judicial Circuit In and For Palm Beach County, Florida with either the attached officer's return showing the manner of execution or the witness's signed memorandum showing that the witness accepted the subpoena.

ISSUED on July 30, 2004.

By: 
Sean Trende
Texas State Bar No. 24034176
KIRKLAND & ELLIS LLP,
655 15th Street, N.W., Suite 1200,
Washington, D.C. 20005

This subpoena was issued pursuant to Texas Rule of Civil Procedure 201.2, the Order of the Circuit Court of the Fifteenth Judicial Circuit In and For Palm Beach County, Florida entered on January 21, 2004 and attached hereto as Exhibit 2, and at the request of Defendants' attorneys of record Thomas D. Yannucci, P.C., Lawrence P. Bemis (FL Bar No. 618349), and Thomas A. Clare of KIRKLAND & ELLIS LLP, 655 15th Street, N.W., Suite 1200, Washington, D.C. 20005; Joseph Ianno, Jr. (FL Bar No. 655351), CARLTON FIELDS, P.A., 222 Lakeview Ave., Suite 1400, West Palm Beach, FL 33401; and Sean Trende of KIRKLAND & ELLIS LLP, 655 15th Street, N.W., Suite 1200, Washington, D.C. 20005.

EXHIBIT 1

DEPOSITION SUBPOENA DUCES TECUM

You are hereby requested to produced the following documents pursuant to the definitions and instructions contained herein:

DOCUMENTS REQUESTED

1. All documents concerning the Coleman Transaction.
2. All documents concerning the Subordinated Debenture Offering.
3. All documents concerning the Bank Facility, or the Credit Agreement.
4. All documents reflecting or concerning any communications between or among any of Sunbeam, CPH, MAFCO, CSFB, Arthur Andersen, MS & Co., MSSF, Davis Polk, Wachtell, or Skadden in 1997 or 1998.
5. All documents provided by you in any Litigation or SEC Administrative Proceeding.
6. All calendars, diaries, timekeeping sheets or records maintained by you concerning any activities related to Coleman Transaction, the Subordinated Debenture Offering, the Bank Facility, the Credit Agreement.
7. All documents related to Sunbeam's Financial Information for all or any portion of 1996, 1997, and 1998, including but not limited to Financial Statements and documents concerning Sunbeam's forecasts and plans for revenue or earnings.
8. All documents related or referring to any cost-reduction or sales program or policy in place at Sunbeam during 1997 and 1998, including but not limited to documents concerning the "early buy" program, "Initiatives for Success", and "bill and hold" sales and the "no returns" policy.

9. All documents concerning returns of Sunbeam goods or product in 1997 and 1998, including but not limited to documents regarding the “no returns” policy and conversations or communications regarding the deletion of return authorizations from the J.D. Edwards system.

10. All documents pertaining to negotiations concerning the acquisition of Coleman, Signature Brands, and First Alert, including but not limited to documents concerning conversations or communications of any kind between or among any of MS & Co., MSSF, CPH or MAFCO personnel or representatives.

11. All documents concerning Synergies that might be achieved from a business combination of Sunbeam, Coleman, Signature Brands, and First Alert, or any combination thereof.

12. All documents related to or supporting the March 16, 1998 Representation Letter provided to Arthur Anderson, including but not limited to any drafts of such letter and any Financial Information used or referenced in writing the letter or drafts.

13. All documents concerning any “comfort letter” pertaining to the Subordinated Debenture offering or the Credit Agreement, including but not limited to Arthur Andersen’s letters dated March 19, 1998 and March 25, 1998 and any drafts of such letters.

14. All documents concerning any investigation, analysis, or due diligence conducted by Sunbeam or its Advisors pertaining to the Coleman Transaction, including but not limited to documents and Financial Information pertaining to March 18, 1998 and March 24, 1998 conference calls.

15. All documents related to Sunbeam’s March 19, 1998 press release, including but not limited to documents pertaining to the contents or drafting of the press release, the decision to issue the press release, and the decision to include the press release in the Offering memorandum.

16. All documents concerning the March 19, 1998 drafting session and/or meeting that took place at Global Financial Press concerning the Offering Memorandum, including but not limited to documents concerning any conversations or communications of any kind involving MS & Co. or Arthur Andersen personnel.

17. All documents related to the sale of the Subordinated Debenture, including but not limited to documents pertaining to roadshows or other communications with investors or analysts.

DEFINITIONS

1. "Advisors" shall mean financial advisors, legal advisors, accountants, consultants and any other third-party advising or assisting Sunbeam in any way with the Coleman Transaction, including but not limited to Arthur Anderson, Coopers & Lybrand, Llama Company, MS& Co., MSSF, and Skadden.

2. "Arbitrations" shall mean *Albert J. Dunlap and Sunbeam Corporation*, No. 32 160 00088 99 (AAA); and *Russell A. Kersh and Sunbeam Corporation*, No. 32 160 00091 99 (AAA).

3. "Arthur Andersen" shall mean Arthur Andersen LLP and any of its former or present partners, officers, directors, employees, representatives and agents.

4. "Bank Facility" shall mean the Credit Agreement, including amendments, and all funds extended by Lenders to Sunbeam pursuant to the Credit Agreement, including but not limited to Tranche A, Tranche B, and the Revolving Credit Facility.

5. "Communication" shall mean any exchange or transmittal of information by any means of transmission, including, without limitation, face-to-face conversation, mail, overnight delivery, Internet, telephone, electronic mail, or facsimile.

6. The term “concerning” shall mean relating to, referring to, describing, evidencing, or constituting.

7. “Coleman” shall mean Coleman Company, Inc. and any of its subsidiaries, divisions, predecessors, successors, present and former employees, representatives, and agents

8. “Coleman Transaction” shall mean Sunbeam’s acquisition of Coleman Company, Inc. from CPH and all related communications, agreements, and transactions, including the February 27, 1998 Agreements and the March 30, 1998 closing.

9. “Cooper & Lybrand” shall mean the former Coopers & Lybrand LLP, and any of its subsidiaries, divisions, predecessors, successors, present and former employees, representatives, and agents.

10. “CPH” shall mean Coleman (Parent) Holdings Inc. and any of its former or present officers, directors, employees, representatives and agents.

11. “Credit Agreement” shall mean the agreement entered into by Sunbeam, as borrower with Lenders, dated March 30, 1998 and all amendments thereto.

12. “CSFB” shall mean Credit Suisse First Boston LLC and any of its former or present officers, directors, employees, representatives and agents.

13. “Davis Polk” shall mean Davis Polk & Wardwell and any of its former or present partners, officers, directors, employees, representatives and agents.

14. “Document” shall mean any recording in any tangible form of any information, whether handwritten, typed, printed, stored on computer disks, tapes, or databases, or otherwise reproduced. “Document” or “documents” also includes electronic documents whether stored on

servers or hard drives, e-mail, backup tapes, voicemail and video and audio recordings. A draft or non-identical copy is a separate document within the meaning of this term.

15. “Financial Information” shall mean information concerning the past or present financial condition of Sunbeam or Sunbeam securities.

16. “Financial Statements” shall mean documents reflecting Financial Information, including without limitation quarterly reports, yearly reports, balance sheets, statements of income, earnings, cash flow projections, and sources and applications of funds.

17. “First Alert” shall mean First Alert, Inc., and any of its subsidiaries, divisions, predecessors, successors, present and former employees, representatives, and agents

18. The term “identify” (with respect to documents) shall mean to give, to the extent known, the (i) type of document; (ii) general subject matter; (iii) date of the document; and (iv) author(s), addressee(s) and recipient(s).

19. “Lenders” shall mean the entities listed on Schedule 2.01 of the Credit Agreement under the heading “Lenders” and any other person that shall have become a party to the Credit Agreement as a Lender pursuant to an assignment and acceptance.

20. “Litigations” shall mean *In re Sunbeam Securities Litigation*, 98-8258-Civ.-Middlebrooks (S.D. Fla.); *Camden Asset Management L.P. v. Sunbeam Corporation*, 98-8773-Civ.-Middlebrooks and 98-8275-Civ.-Middlebrooks (S.D. Fla.); *Krim v. Dunlap*, No. CL 983168AD (15th Jud. Cir., Fla.); *Stapleton v. Sunbeam Corp.*, No. 98-1676-Civ.-King (S.D. Fla.); *Sunbeam Corp. v. PricewaterhouseCoopers LLP*, No. CL 005444AN (15th Jud. Cir., Fla.); *In re Sunbeam Corp., Inc.*, No. 01-40291 (AJG) (Bankr. S.D.N.Y.) and any adversary proceedings therein; *SEC v. Dunlap*, No. 01-8437-Civ.-Middlebrooks (S.D. Fla.); *Oaktree Capital Management LLC v. Arthur Andersen LLP*,

No. BC257177 (L.A. Cty., CA); and *Coleman (Parent) Holdings Inc. v. Arthur Andersen LLP*, No. CA 01-06062AN (15th Jud. Cir., Fla.), or other litigation concerning the Coleman Transaction.

21. “Llama Company” shall mean Llama Company and any of its former or present partners, officers, directors, employees, representatives and agents.

22. “MAFCO” shall mean MacAndrews & Forbes Holdings, Inc. and any of its officers, directors, former or present employees, representatives and agents.

23. The “March 19, 1998 Press Release” shall mean the press release issued by Sunbeam on March 19, 1998 concerning the shortfall of first quarter 1998 sales numbers and the reasons for such shortfall.

24. “MS & Co.” shall mean Morgan Stanley & Co. Inc. and any of its former or present officers, directors, employees, representatives and agents.

25. “MSSF” shall mean Morgan Stanley Senior Funding, Inc. and any of its former or present officers, directors, employees, representatives and agents.

26. The term “person” shall mean any natural person or any business, legal or governmental entity or association.

27. The term “relating to” shall mean concerning, evidencing, referring to, or constituting.

28. The “Relevant Period,” unless otherwise indicated, shall be from January 1, 1996 through the date of service of this subpoena.

29. “SEC” shall mean the Securities and Exchange Commission.

30. “SEC Administrative Proceedings” shall mean *In the Matter of Sunbeam Corp.*, SEC Administrative Proceeding File No. 3-10481, and *In the Matter of David C. Fannin*, SEC Administrative Proceeding File No. 3-10482.

31. “Signature brands” shall mean Signature Brands USA, Inc. and any of its subsidiaries, divisions, predecessors, successors, present and former employees, representatives, and agents

32. “Skadden” shall mean Skadden, Arps, Slate, Meagher & Flom, LLP and any of its former or present partners, officers, directors, employees, representatives and agents.

33. “Subordinated Debentures” shall mean the Sunbeam’s Zero Coupon Convertible Senior Subordinated Debentures Due 2018.

34. “Subordinated Debenture Offering” shall mean the offering of Sunbeam’s Subordinated Debentures.

35. “Sunbeam” shall mean Sunbeam Corporation and any of its subsidiaries, divisions, predecessors, successors, present and former employees, representatives, and agents.

36. “Synergies” shall mean post-acquisition gains through increased revenue and/or decreased cost.

37. “Wachtell” shall mean Wachtell Lipton Rosen & Katz and any of its former or present partners, officers, directors, employees, representatives and agents.

38. The terms “you” or “your” shall mean Donald R. Uzzi and any of Donald R. Uzzi’s present and former representatives and agents.

INSTRUCTIONS

1. Documents shall be produced as they are kept in the usual course of business, or organized and labeled to correspond to the categories in this Request. Documents attached to each other should not be separated. Documents consisting of items previously produced in the Litigations, Arbitrations, and/or SEC Administrative Proceedings with Bates numbering shall be produced in Bates number order.

2. All documents shall be produced in the file folder, envelope or other container in which the documents are kept or maintained by you. If, for any reason, the container cannot be produced, produce copies of all labels or other identifying marks.

3. The relevant period, unless otherwise indicated, shall be from January 1, 1996 through the date of service of this subpoena, and shall include all documents and information which relate in whole or in part to such period, or to events or circumstances during such period, even though dated, prepared, generated or received prior or subsequent to that period. Please supplement or correct your responses to these requests if, at any time, you become aware that your responses are incomplete or incorrect in any request.

4. If you claim the attorney-client privilege, or any other privilege or work-product protection for all or any portion of a document, you shall provide a privilege log that describes the withheld material sufficiently to allow Morgan Stanley to test the privilege or protection asserted.

5. The following rules of construction apply:

1. The connectives "and" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery requests all responses that might otherwise be outside their scope;
2. The term "including" shall be construed to mean "without limitation"; and
3. The use of the singular form of any word include the plural and vice versa.

Exhibit 2

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CASE NO: 03 CA-005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

AGREED ORDER APPOINTING COMMISSIONERS AND COMMISSIONS

THIS CAUSE, having come before the Circuit Court in and for Palm Beach County, State of Florida, on the agreement of the parties, and

WHEREAS, it appears to the Court that:

1. Defendant Morgan Stanley & Co. Incorporated ("MS & Co.") desires to take the videotaped depositions of and obtain documents from the following witnesses who reside in California, Connecticut, Kansas, Minnesota, New York, Texas, and the District of Columbia and who have knowledge of facts relevant to this case:

Karen Kay Clark
1674 Amarelle Street
Newbury Park, CA 91320

Frank N. Gifford
126 Taconic Road
Greenwich, CT 06831-3139

Robert J. Duffy
16 Saint Nicholas Road
Darien, CT 06820-2823

Joseph P. Page
921 Sheridan Street, Apt. 119
Wichita, KS 67213-1363

William H. Spoor
622 West Ferndale Road
Wayzata, MN 55391

Adam Emmerich
Wachtell, Lipton, Rosen & Katz
51 West 52nd Street
New York, NY 10019

Steven Cohen
Wachtell, Lipton, Rosen & Katz
51 West 52nd Street
New York, NY 10019

Steven K. Geller
301 East 79th Street, Apt. 4H
New York, NY 10021-0932

Donald Uzzi
4209 Beverly Dr.
Dallas, TX 75205-3020

Ann Dibble Jordan
2940 Benton Place NW
Washington, DC 20008

2. You are hereby appointed as commissioners to take the videotaped testimony (and obtain the requested documentation) of the above witnesses and other witnesses whose discovery is sought in the commissions' jurisdiction under oath and on oral examination in accordance with the applicable Florida Statutes and Rules of Civil Procedure:

Esquire Santa Ana
2100 North Broadway, Second Floor
Santa Ana, CA 97206

Del Vecchio Reporting
117 Randi Drive
Madison, CT 06443

Harper Court Reporting
P.O. Box 3008
Wichita, KS 67201

Kirby Kennedy & Associates
5200 Wilson Road #219
Minneapolis, MN 55424

Esquire Deposition Services
216 E. 45th Street, 8th FL
New York, New York 10017-3304

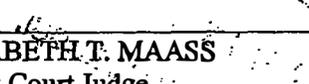
Esquire Deposition Services
703 McKinney Avenue #320
Dallas, Texas 75202

Esquire Deposition Services
1020 19th Street NW, #621
Washington, DC 20036

or any person able to administer oaths pursuant to the laws of California, Connecticut, Kansas, Minnesota, New York, Texas, and the District of Columbia and duly authorized by him.

3. This order does not purport to grant the power of the commissioners appointed to subpoena witnesses or documents, but simply the power to administer oaths and transcribe deposition testimony.

DONE AND ORDERED in Chambers, West Palm Beach, Palm Beach County, Florida
this ____ day of January, 2004.


ELIZABETH T. MAASS
Circuit Court Judge

STENOGRAPHER LIMITED
ELIZABETH T. MAASS

Coleman (Parent) Holdings v. Morgan Stanley & Co. Inc.
.2003 CA 005045AI
Agreed Order on Appointment of Commission

Copies furnished to:

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368

John Scarola, Esq.
SEARCY, DENNEY, SCAROLA, BARNHARDT
& SHIPLEY, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33409
Telephone: (561) 686-3000
Facsimile: (561) 478-0754

Thomas D. Yannucci, P.C.
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

Jerold S. Solovy
JENNER & BLOCK, LLC
One IBM Plaza
Suite 4400
Chicago, Illinois 60611
Telephone: (312) 222-9350
Facsimile: (312) 527-0484

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

_____ /
CASE NO. CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

_____ /
ORDER AND NOTICE OF HEARING

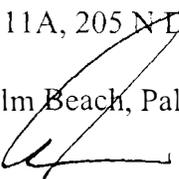
This case came before the Court, in Chambers, on the Court's own Motion. Based on the foregoing, it is

ORDERED AND ADJUDGED that the case management conference set October 15, 2004 is canceled and is hereby re-set for

October 14, 2004, at 8:00 a.m., 2 hours reserved

at the West Palm Beach Courthouse, Room 11A, 205 N Dixie Hwy, WPB, FL.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 13th day of August, 2004.



ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci
655 15th Street, NW, Suite 1200
Washington DC 20005

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, IL 60611

If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please contact the ADA Coordinator in the Administrative Office of the Court, Palm Beach County Courthouse, 205 North Dixie Highway, Room 5.2500, West Palm Beach, Florida 33401; telephone number (561) 355-4380 within two (2) working days of your receipt of this [describe notice]; if you are hearing or voice impaired, call 1-800-955-8771.

SPANISH

Si Ud. es una persona incapacitada que necesita de un servicio especial para participar en este proceso, Ud. tiene derecho a que le provean cierta ayuda sin costo alguno. Por favor pongase en contacto con el Coordinador de la Oficina Administrativa de la Corte ADA, situada en el 205 North Dixie Highway, Oficina 5.2500, West Palm Beach, Florida, 33401, teléfono (561) 355-4380, dentro de los dos (2) próximos días hábiles después de recibir esta [describa la notificación]; si tiene incapacidad de oír ó hablar llame al 1-800-955-8771.

CREOLE

Si ou sé yon moun ki Infim, ki bézwen ninpôt akomodasyon pou ka patisipé nan pwosè sa-a, ou gen dwa, san l pa kouté w anyin, pou yo ba w kèk sèvis. Tanpri kontaké koòdinatè ADA ya nan Biro Administratif Tribinal nan cité Palm Beach la, ki nan 205 North Dixie Highway, Cham 5.2500, West Palm Beach, Florida 33401, niméro téléfonn-nan sé (561) 355-4380, rélé dé (2) jou dé lè ou réséywa [notis sa-a]; si ou bèbè ou byen soud rélé 1-800-955-8771.

FRENCH

Si vous êtes infirme, et en besoin de n'importe quelle accommodation pour pouvoir participer à ces procédures, vous pouvez gratuitement recevoir, certains services. S'il-vous-plait contactez le coordinateur du Bureau Administratif du Tribunal de Palm Beach, située à 205 North Dixie Highway, Chambre 5.2500, West Palm Beach, Florida 33401, numéro de téléphone (561) 355-4380 durant deux (2) jours suivant la réception de [cette note]; si vous êtes muets ou sourds, appelez 1-800-955-8771.

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

_____/ CASE NO. CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

ORDER AND NOTICE SPECIALLY SETTING HEARING

THIS CAUSE came before the Court August 13, 2004 on Morgan Stanley's Motion to Dismiss or Strike Plaintiff's Motion for Contempt, which the Court elects to treat as including a Motion for Rehearing on a portion of the Court's December 4, 2003 Order. Based on the foregoing, it is

ORDERED AND ADJUDGED Morgan Stanley's Motion for Rehearing on a Portion of the Court's December 4, 2003 Order is granted. Rehearing on the portion of the Court's December 4, 2003 Order which subjected the redacted Settlement Agreement to the July 31, 2003 Stipulated Confidentiality Order and, on the Court's own Motion, reconsideration of the July 31, 2003 Stipulated Confidentiality Order is specially set before the Honorable Elizabeth T. Maass on August 27, 2004, at 8:00 a.m., in Courtroom 11A, 205 N. Dixie Hwy, WPB, FL 33401. It is further

ORDERED AND ADJUDGED that the attorneys/parties must submit to the Court

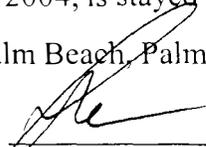
seven (7) days before the hearing:

1. copies of all relevant pleadings;
2. a copy of any memorandum of law; and
3. copies of all case law authority.

This hearing shall not be canceled absent court order. It is further

ORDERED AND ADJUDGED that all discovery relating to issues raised by Plaintiff's Motion for Contempt, including those items to be submitted to the Court for in camera inspection by 5:00 p.m., August 13, 2004, is stayed until August 30, 2004.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 13 day of August, 2004.



ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:

Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci
655 15th Street, NW, Suite 1200
Washington DC 20005

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, IL 60611

If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please contact the ADA Coordinator in the Administrative Office of the Court, Palm Beach County Courthouse, 205 North Dixie Highway, Room 5.2500, West Palm Beach, Florida 33401; telephone number (561) 355-4380 within two (2) working days of your receipt of this [describe notice]; if you are hearing or voice impaired, call 1-800-955-8771.

SPANISH

Si Ud. es una persona incapacitada que necesita de un servicio especial para participar en este proceso, Ud. tiene derecho a que le provean cierta ayuda sin costo alguno. Por favor pongase en contacto con el Coordinador de la Oficina Administrativa de la Corte ADA, situada en el 205 North Dixie Highway, Oficina 5.2500, West Palm Beach, Florida, 33401, teléfono (561) 355-4380, dentro de los dos (2) próximos días hábiles después de recibir esta [describa la notificación]; si tiene incapacidad de oír ó hablar llame al 1-800-955-8771.

CREOLE

Si ou sé yon moun ki Infirm. ki bészwen ninpôt akomodasyon pou ka patisipé nan pwosè sa-a, ou gen dwa, san'l pa kouté'w anyin, pou yo ba'w kèk sèvis. Tanpri kontakté koòdinatè ADA ya nan Biro Administratif Tribinal nan cité Palm Beach la, ki nan 205 North Dixie Highway, Cham 5.2500, West Palm Beach, Florida 33401, niméro téléfonn-nan sé (561) 355-4380, rélé dé (2) jou dé lè ou résévwa [notis sa-a]; si ou bèbè ou byen soud rélé 1-800-955-8771.

FRENCH

Si vous êtes infirme, et en besoin de n'importe accommodation pour pouvoir participer á ces procédures, vous pouvez gratuitement recevoir, certains services. S'il-vous-plait contactez le coordinateur du Bureau Administratif du Tribunal de Palm Beach, située à 205 North Dixie Highway, Chambre 5.2500, West Palm Beach, Florida 33401, numéro de téléphone (561) 355-4380 durant deux (2) jours suivant la réception de [cette note]; si vous êtes muets ou sourds, appelez 1-800-955-8771.

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

CASE NO. CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

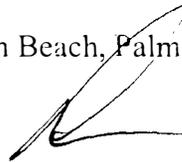
MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

ORDER FOLLOWING CASE MANAGEMENT CONFERENCE

THIS CAUSE came before the Court for a case management conference August 13, 2004, with all counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that at the next case management conference, counsel shall be prepared to discuss with specificity each party's ability to be prepared for trial beginning January 18, 2005.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 13th day of August, 2004.



ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci
655 15th Street, NW, Suite 1200
Washington DC 20005

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, Il 60611

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

Case No. CA 03-5045 AI

vs.

MORGAN STANLEY & CO., INC.,

Defendant.

MORGAN STANLEY SENIOR FUNDING, INC.,

Plaintiff,

Case No. CA 03-5165 AI

vs.

MACANDREWS & FORBES HOLDINGS, INC.,

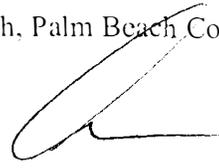
Defendant.

**ORDER ON CPH AND MAFCO'S MOTION TO RESET
DATE FOR FILING MOTIONS TO AMEND PLEADINGS**

THIS CAUSE having come to be considered upon the Coleman (Parent) Holdings Inc. and MacAndrews & Forbes Holdings, Inc.'s Motion to Reset Date For Filing Motions To Amend Pleadings, and the Court having reviewed the file and being fully advised in the premises, it is hereby,

ORDERED and ADJUDGED: *the Motion is Granted, in part. All motions for leave to file amended pleadings will be served by Sept. 7, 2004.*

DONE AND ORDERED at West Palm Beach, Palm Beach County, Florida, this 12th day of August, 2004.



ELIZABETH T. MAASS
CIRCUIT COURT JUDGE

Copies have been furnished to all counsel on the attached counsel list.

Coleman (Parent) Holdings Inc. vs Morgan Stanley & Co., Inc.
Case No.:2003 CA 005045 AI
Order

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block LLP
One IBM Plaza
Suite 4400
Chicago, IL 60611

Jack Scarola, Esq.
Searcy Denney Scarola Barnhart & Shipley
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA
CASE NO. 2003-CA-005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

MORGAN STANLEY & COMPANY, INC.

Defendant.

TRANSCRIPT OF THE PROCEEDINGS BEFORE
THE HONORABLE ELIZABETH MAASS

Palm Beach County Courthouse
West Palm Beach, Florida
Friday, August 13, 2004
8:00 a.m. - 9:02 a.m.
Reported by: Lisa D. Danforth

APPEARANCES:

SEARCY, DENNEY, SCAROLA, BARNHART & SHIPLEY, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33401
Counsel for the Plaintiff
BY: JACK SCAROLA, ESQUIRE

JENNER & BLOCK
One IBM Plaza
Chicago, IL 60611-7603
Counsel for the Plaintiff
BY: JEROLD S. SOLOVY, ESQUIRE
JEFFREY T. SHAW, ESQUIRE
RONALD L. MARMER, ESQUIRE

CARLTON, FIELDS, WARD, EMMANUEL,
SMITH & CUTLER, P.A.
Esperante
222 Lakeview Avenue, Suite 1400
West Palm Beach, Florida 33401-6149
Counsel for the Defendant
BY: JOSEPH IANNO, JR., ESQUIRE

KIRKLAND AND ELLIS
655 15th Street N.W., Suite 1200
Washington, D.C. 20005
Counsel for the Defendant
BY: THOMAS A. CLARE, ESQUIRE

KIRKLAND & ELLIS, LLP
777 South Figueroa Street
Los Angeles, California 90017

1 BE IT REMEMBERED that the foregoing
2 proceedings were had before the HONORABLE ELIZABETH
3 MAASS, in the Palm Beach County Courthouse, West Palm
4 Beach, Florida, on Friday, August 13, 2004, starting
5 at 8:00 a.m., with appearances as hereinabove noted,
6 to wit:

7 - - - -

8 THE COURT: Good morning. Have a seat.

9 MR. BEMIS: Good morning.

10 MR. SCAROLA: Good morning, Your Honor.

11 MR. IANNO: Good morning, Your Honor.

12 THE COURT: Maybe we can take care of a
13 couple of administrative matters first.

14 MR. SCAROLA: We have an agreed suggested
15 order if you'd like us to share that with you.

16 THE COURT: Sure.

17 MR. SCAROLA: We thought that we might first
18 take up the issue of the trial date. Flowing from

19 that will be a discussion of related deadlines as
20 to which there is only one dispute, and that is
21 the deadline for the amendment of pleadings.

22 THE COURT: Right.

23 MR. SCAROLA: Following that, both the motion
24 for clarification -- I'm sorry, there's a minor
25 issue with regard to the supplementation of

4

1 interrogatories --

2 THE COURT: Right.

3 MR. SCAROLA: -- that would be the third
4 matter to take up.

5 MR. BEMIS: Basically, get the merits issues
6 behind us.

7 MR. SCAROLA: Those would be the merits
8 issues. And then we would deal with the issues
9 relating to the motion to contempt, including the
10 related issues of clarification of the motion to
11 dismiss, and then finally, the discovery that
12 arises from that, assuming that the motion to
13 dismiss is not granted.

14 THE COURT: I'm happy to do it in that order.
15 The only question I would have is that what I am

16 going to do is treat the defendant's motion to
17 strike the motion for contempt as including a
18 motion for rehearing on the December order dealing
19 with the settlement agreement, and I do want to
20 rehear that. And the reason is, I've been very
21 straightforward with you guys from the beginning,
22 I am a strong proponent that if you choose to
23 litigate in a public forum, things are public
24 unless there's a compelling reason to keep them
25 private.

5

1 The reason the redacted version of the
2 settlement agreement was made confidential was
3 because that's what the parties agreed to. On
4 reflection, I'm not sure that's sufficient to
5 override the public policy reasons for having it
6 be public. And to the extent that we're now
7 fighting over, you know, was it a clerical error
8 of whether or not even the redacted version should
9 have been sealed, to me, that's immaterial if it
10 should have been public in any event, and I would
11 prefer to go back and reconsider that order.

12 There are obviously a lot of implications

16div-006181

13 that flow from what happens with that order. And
14 the reason I'm bringing that up now is, I don't
15 know that I want to do the non-merits issues today
16 until we have a chance to go back, and I want to
17 do the rehearing quickly on that, because this is
18 an important issue, but really, the reason I'm
19 bringing this up now is if I were to grant the
20 motion for rehearing and remove the
21 confidentiality provision on the settlement
22 agreement -- and really, quite honestly, I think
23 we need to go back and look at the underlying
24 confidentiality order, because it strikes me, to
25 the extent that was agreed to, it's essentially a

6

1 contract between the parties, and I need to go
2 back and look at it in light of Florida's public
3 policy in favor of open litigation. And I am
4 concerned that so many items in this case are
5 being filed under seal.

6 If that happens, is that going to affect the
7 trial date, because all of a sudden, all this time
8 and resources that we've been devoting to the
9 motion for contempt aren't needed anymore, and I'm

16div-006182

10 wondering if we can go back to the January trial
11 setting.

12 So the only reason I'm bringing it up now is,
13 you know, I'm happy to do all the resetting now
14 and talk about a March date, but I don't know if
15 we're going to get to this within a week or two if
16 it makes more sense to address all this as a
17 package when we know exactly where we're going.

18 MR. BEMIS: My initial response is that no
19 matter what Your Honor would do today with the
20 contempt proceeding, we're still behind by virtue
21 of already having spent the period from March
22 until --

23 THE COURT: I understand that, but even when
24 we were talking about moving the date to March,
25 that was assuming we were going to have

7

1 substantial resources devoted to the contempt, and
2 if that's not going to happen, I think we need to
3 go back and re-think that March date, because that
4 March date assumed in it a block of time that we
5 may not now need to devote.

6 MR. BEMIS: Well, we're going to have a real

7 problem. Our discovery cutoff would be like in
8 two weeks.

9 THE COURT: Well, those are things we'll have
10 to sit and do, but if we're not going to have the
11 contempt anymore, we need to go back and really
12 look at the pieces of the puzzle again to figure
13 out what the timing is.

14 MR. BEMIS: We have prepared an electronic
15 document that would allow the Court to see all the
16 calendar scheduling based on whatever date we plug
17 in. We can put in one date and generate a
18 calendar automatically for the Court. If you want
19 to tackle that issue now, it will take us a few
20 minutes and we can give you a suggested date.

21 THE COURT: The only thing is, I don't know
22 that it makes sense until we know what's happening
23 with the contempt.

24 MR. BEMIS: Well, then you want to proceed
25 with the contempt first, is that your suggestion?

8

1 THE COURT: No, because if I'm going to treat
2 it as a motion for rehearing, I think it's unfair
3 to plaintiffs to have them argue it now.

16div-006184

4 MR. SCAROLA: We may be prepared to argue it
5 now. I'd like just a moment --

6 THE COURT: Sure.

7 MR. SCAROLA: -- to consider that with
8 co-counsel. But let me share my initial reaction
9 with the Court, and that is, the Court may
10 determine that there is no current compelling
11 reason to maintain the confidentiality of the
12 settlement agreement. Even if the Court were to
13 make that determination that there is currently no
14 compelling reason to maintain the confidentiality
15 of the settlement agreement, that does not dispose
16 of the issue of the violation of the order that
17 was then in existence.

18 THE COURT: I understand that argument and it
19 is something I've thought about, but then I think
20 we start talking about the difference between a
21 civil contempt and a criminal contempt, and nobody
22 has ever attempted to characterize what's alleged
23 as a criminal contempt. If it's a civil contempt
24 and all I'm trying to do is coerce their behavior,
25 if it's in the public domain, it becomes sort of

1 so what.

2 MR. SCAROLA: Well, respectfully, Your Honor,
3 there are two potential remedies that attach to a
4 civil contempt. Not only does the Court have an
5 opportunity to and an obligation to consider what
6 sanction is necessary in order to compel future
7 compliance, but civil contempt also allows for
8 compensatory damages. And in this case where our
9 allegation is that as a consequence of the
10 violation, litigation was initiated for the
11 specific purpose of imposing a financial
12 obligation on us that has cost us a significant
13 amount of money already and continues to cost us
14 money and expose us to future liability, there is
15 a substantial compensatory component to a sanction
16 that would attach to the violation of that order.

17 So independent of any criminal sanction
18 concerns, any criminal contempt concerns, in the
19 context strictly of a civil contempt, the law is
20 very clear that the Court has the opportunity to
21 consider compensatory sanctions, and we would
22 certainly be asking the Court to consider
23 compensatory sanctions even if there were no
24 prospective interests to protect.

25 The second point is that the purpose of a

1 civil contempt sanction in terms of compelling
2 future compliance is not limited to that
3 particular order. It is for the purpose of
4 compelling compliance with the Court's orders,
5 period. So the imposition of a coercive sanction
6 is not strictly limited to that sole order, but to
7 compel respect for the Court's orders in general.
8 So the Court could still, even if there were no
9 prospective prospect of violation of that
10 particular order, impose a sanction to assure that
11 due respect was given to future orders of the
12 Court.

13 THE COURT: I understand that, and that's
14 something certainly we can talk about if we go
15 back and -- or when we go back and reconsider the
16 December order and how that segues into your
17 motion to strike.

18 And it's what I've said before, at some point
19 I get concerned that this case is going to get
20 derailed on a tangent. If truly Morgan Stanley &
21 Company has no claim, presumably, eventually
22 they'll be awarded 57.105 fees and eventually your
23 client will be reimbursed for the money it put
24 forward for the defense of the litigation, and at

1 that that case will be properly determined and
2 that issue will be fully vetted in that case
3 versus injecting that whole issue into this case
4 and the affect it has on the underlying
5 litigation, which is serious litigation. I mean,
6 we need to -- I mean, as I go through this stuff
7 and I look at the things that need to be done, you
8 know, it's a substantial case, and I hate to see
9 our attention diverted.

10 And as an aside, I apologize, I forgot, I did
11 finally enter the order on the conflicts of laws
12 issue. You probably haven't gotten it yet.

13 MR. SCAROLA: We did not.

14 THE COURT: If you want, we can have copies
15 run. My secretary had to take some stuff to her
16 car. It went out on Wednesday.

17 MR. BEMIS: We're prepared to argue what you
18 wish argued.

19 THE COURT: I just don't know. I mean,
20 again, this is something I understand that you
21 guys didn't know that I thought we needed to go

22 back and readdress, so it really is --
23 Do you want to take a moment?
24 MR. SCAROLA: Thank you. Yes, Your Honor.
25 THE COURT: We can do that or --

12

1 MR. SCAROLA: We'd just like to consider
2 that. Maybe --
3 THE COURT: I'm happy also to get the book
4 and see how quickly we can set a hearing just on
5 this issue, because I think this is sort of a
6 threshold issue we need to reach.
7 MR. BEMIS: I think we did brief the issue.
8 THE COURT: You did. You did some.
9 MR. BEMIS: It's articulated different.
10 THE COURT: I don't know that I saw -- I did
11 see a response from plaintiff to that argument, I
12 just didn't know if it was as fully as you would
13 have briefed it if you had known I was going to go
14 back and look at it.
15 MR. BEMIS: Our position on it was laid out
16 in two sets of papers, and I think the first is
17 that the order in itself is not inconsistent, and
18 in any event, if there is some confusion --

16div-006189

19 THE COURT: Well, I understand your position.
20 MR. BEMIS: -- it should be confidential.
21 THE COURT: You're telling me you're
22 prepared.
23 MR. BEMIS: I'm prepared.
24 THE COURT: I'm going to let plaintiffs
25 decide if they're prepared.

13

1 MR. SCAROLA: If we could just have a couple
2 of minutes then, Your Honor.
3 THE COURT: Sure. You want me to take a
4 break and you guys can talk in private?
5 MR. SCAROLA: Yes, fine.
6 THE COURT: Okay.
7 (Recess taken from 8:11 a.m. to 8:24 a.m.)
8 THE COURT: Okay. What did you decide?
9 MR. SCAROLA: Your Honor, we are going to
10 request some additional time to submit --
11 THE COURT: That's fine.
12 MR. SCAROLA: -- a written response to the
13 Court's concerns.
14 MR. BEMIS: Your Honor --
15 MR. SCAROLA: We --

16div-006190

16 MR. BEMIS: I'm sorry.

17 MR. SCAROLA: We would like until a week from
18 today. We have time set before Your Honor on the
19 27th of August.

20 THE COURT: Okay.

21 MR. SCAROLA: And while we would like to be
22 able to come back prior to the 27th, I'm scheduled
23 to be in Honduras taking depositions for eight or
24 nine days beginning on Sunday, so as a practical
25 matter, I don't know that we'd be able to get back

14

1 much before the 27th of August.

2 THE COURT: Okay.

3 MR. SCAROLA: In light of that, we would
4 request --

5 THE COURT: Do we have two hours set then?

6 MR. SCAROLA: I think we do.

7 MR. CLARE: Yes, eight to ten.

8 MR. SCAROLA: Yes, Your Honor.

9 THE COURT: Yeah. That's fine.

10 What I will do then is an order that treats
11 the motion to strike as including a motion for
12 rehearing. If we're going to go back and look at

16div-006191

13 this, I do want to go back and have us look at the
14 underlying confidentiality order as well, because
15 sort of the public policy implications are the
16 same.

17 MR. BEMIS: Yes, Your Honor.

18 THE COURT: It was the 27th, right?

19 MR. SCAROLA: Yes, Your Honor.

20 THE COURT: Okay. So what I'm going to do is
21 specially set a hearing on the -- I'm going to do
22 an order that treats your motion to strike as a
23 motion for rehearing, grant the motion for
24 rehearing, put the rehearing on the 27th together
25 with a hearing I'm setting on my own accord to go

15

1 back and reconsider the underlying confidentiality
2 order, because I think we need to go back and look
3 at that again as well.

4 And contrary to our prior modification of
5 when we need things for the case management
6 conferences, filings for those two issues, I just
7 need them the week ahead of time, and you guys
8 each give me what you want.

9 MR. SCAROLA: Simultaneous exchange on

10 Friday?

11 THE COURT: Yeah.

12 MR. BEMIS: Thank you, Your Honor. I
13 appreciate that.

14 THE COURT: Where do we want to go next then?

15 MR. SCAROLA: I think, Your Honor, that there
16 are only two matters that we can address in light
17 of the procedures that have been outlined, and the
18 first of those is the issue with regard to
19 deadline for filing motions to amend.

20 THE COURT: Right. One other thing, I'm
21 sorry, before we leave. We had talked about this
22 earlier in the week.

23 MR. IANNO: Right. And I was going to bring
24 that up as soon as Mr. Scarola finished. One
25 other thing we need to address is what we're doing

16

1 with the in camera submissions pursuant to the
2 existing court orders and the amended responses to
3 interrogatories that are coming due.

4 THE COURT: I would rather stay discovery on
5 the contempt issue until we resolve this and let
6 you guys spend two weeks doing merits stuff.

16div-006193

7 MR. IANNO: That's what we would suggest,
8 Your Honor.

9 MR. BEMIS: That was going to be our
10 suggestion.

11 MR. SCAROLA: While that ordinarily would not
12 have practical implications that we couldn't live
13 with, there has been a petition for certiorari
14 filed with regard to rulings concerning the
15 contempt matter that is currently pending.

16 THE COURT: Okay.

17 MR. SCAROLA: And if Your Honor were to
18 conduct an in camera inspection and were to find
19 that none of the materials that have been
20 proffered to the Court for in camera inspection
21 are obliged to be turned over for whatever reason,
22 those issues are mooted and we no longer need to
23 worry about the potential of having to address a
24 petition for certiorari.

25 THE COURT: Sure. But if they could do an

17

1 order to show cause, you know, that's going to
2 take them a couple weeks probably to look at at a
3 minimum.

4 MR. SCAROLA: I don't --

5 THE COURT: In all honesty, I mean, we can
6 come back -- If they do an order to show cause and
7 you're concerned that now you're spending time
8 responding to the writ of certiorari where it may
9 be mooted if I did the in camera inspection, we
10 can talk about it then, but I don't think it makes
11 sense to devote time to this until we settle this
12 issue.

13 MR. SCAROLA: Could we at least make some
14 determination as to whether there is a significant
15 amount of time involved? I understand that there
16 are very few -- that what Your Honor would need to
17 review in camera is a very limited inspection.

18 THE COURT: Do you have it now?

19 MR. IANNO: The in camera?

20 THE COURT: Yeah.

21 MR. IANNO: The one that was due on the 2nd,
22 I don't have it with me. I had it with me on
23 Tuesday. I was due to have it back to the Court
24 by five.

25 THE COURT: No, I know. I'm just wondering.

1 MR. IANNO: That one is completed, Your
2 Honor. That one is done. The rest of them; the
3 amendment to the interrogatories, the
4 non-privileged, I believe, Mr. Clare can correct
5 me, and the privileged information, those haven't
6 been completed yet. They're not due.

7 THE COURT: So is there any reason why I
8 couldn't at least look at the in camera inspection
9 on the one?

10 MR. IANNO: There's no reason you shouldn't,
11 Judge, but it does reveal attorney/client and work
12 product privilege and information that I don't
13 know if the Court really needs to look at if this
14 whole contempt issue goes away.

15 We have it prepared. I represented to the
16 Court on Tuesday that if you wanted it, we have
17 it, and I'll leave it to your discretion, but I
18 really think it's a tangential issue that the
19 Court doesn't need to review.

20 MR. SCAROLA: And my response is that it
21 would be a tangential issue with no particular
22 time pressures between now and August 27th but for
23 the petition for certiorari.

24 THE COURT: That's fine. I mean, what I'll
25 do is go ahead and look at that. I can't

1 represent that I'll have done an in camera
2 inspection before we come back. I have one in
3 front of you guys, and I'm in trial, but I'll do
4 my best and see.

5 MR. SCAROLA: Thank you.

6 THE COURT: I mean, if it's already prepared,
7 I guess --

8 MR. BEMIS: It's prepared, Your Honor. May I
9 speak?

10 THE COURT: No, Mr. Bemis. Yes, you may
11 speak. Go ahead.

12 MR. BEMIS: I would respectfully request that
13 you not look at it until you make a decision. I
14 am concerned, and it's in the petition for writ of
15 certiorari that the matters that are in there go
16 to the core nature of a lawyer's representation of
17 his client, what he tells his client, what he
18 thinks, and it is highly unusual -- and I
19 understand that the Court frequently does in
20 camera inspections, this is not unusual in that
21 sense; however, the order that you entered in this
22 case, which I respect entirely, I am not here to
23 re-argue that, it does raise some very, very
24 serious issues about attorney/client privilege and

1 those pandora's boxes, you know about it, and I'm
2 concerned that it never goes away once you've
3 opened it.

4 I'm not concerned about what you're going to
5 ultimately read about what was said, but it allows
6 you to begin to understand what our strategies are
7 and thinking of the case, which normally you would
8 never be privy to. And given that we only have
9 two more weeks before this issue is likely going
10 to come to a head, and we've done the work as you
11 ordered, I respectfully request that you hold on
12 to the document or allow us to hold it and open it
13 at the moment you make a decision that you think
14 is appropriate based on the developments either at
15 the hearing or the Court of Appeals, how that
16 resolves itself.

17 MR. SCAROLA: Your Honor, just a reminder
18 that this discovery does not relate to this
19 lawsuit. It relates to a case that's not even
20 pending before Your Honor. It relates to the
21 Andersen claim.

22 MR. BEMIS: All the more reason to wait.
23 THE COURT: Hold on.
24 MR. BEMIS: Excuse me. I'm sorry,
25 Mr. Scarola.

21

1 MR. SCAROLA: And any concern that Your Honor
2 might be influenced by learning what the strategy
3 was in the Andersen case obviously can have no
4 practical impact on this matter.

5 What does have a very clear practical impact
6 on this matter is that there's a petition for writ
7 of certiorari which may become moot if Your Honor
8 agrees that this is all privileged information
9 that should not be disclosed. In that case,
10 there's nothing for the appellate court to concern
11 itself about and there's nothing for us to be
12 addressing and responding to a writ if a writ
13 issues, and that's something that we ought to
14 know.

15 MR. BEMIS: May I address that briefly?

16 THE COURT: No. We got to stop at some
17 point.

18 MR. BEMIS: Okay. Would Your Honor like a

16div-006199

19 copy of the petition for your own reading for any
20 reason? We have it.

21 THE COURT: That's okay.

22 MR. BEMIS: All right.

23 THE COURT: Okay. Let me take that under
24 advisement. I want to think about it a little bit
25 more.

22

1 Where do we want to go next?

2 MR. IANNO: Judge, the other orders, this one
3 relates to the in camera submission that was due
4 August 2nd, is there any objection to staying the
5 other discovery that is subject to the July 28th
6 order?

7 MR. SCAROLA: Which is due when?

8 MR. IANNO: Next week.

9 MR. BEMIS: We had two interrogatories we
10 needed to supplement based on the hearing last
11 time which are part of the ones that are under
12 consideration. We suggest that that be stayed and
13 taken as a parcel based on whatever ruling you
14 enter; otherwise, we're going to be doing this --

15 THE COURT: I understand.

16div-006200

16 MR. IANNO: We had I think only four
17 interrogatories, and we still had the rest of that
18 one set to go through, but the Court had entered
19 that partial order on the part we got through.

20 THE COURT: Right.

21 In all honesty, it makes sense to me that
22 that gets stayed. I want to go back and
23 reconsider whether we're going to be proceeding
24 down the contempt road or not.

25 Where do we go next?

23

1 MR. SCAROLA: Your Honor, the two remaining
2 matters have to do with the deadline for filing
3 amendment to pleadings.

4 THE COURT: Yes.

5 MR. SCAROLA: That deadline was August 5th
6 pursuant to the original trial order entered by
7 Your Honor. When Your Honor indicated an
8 intention to move the case from its present trial
9 setting, there was a general agreement that all of
10 the deadlines would be pushed back, but there is
11 concern about amendments to pleadings, and we
12 request that the deadline for amendment to

13 pleadings be maintained at no later than August
14 20th.

15 Clearly, the parties have had ample time to
16 make a determination as to whether any amendments
17 are to be made. Because there is certainly a
18 possibility of a significantly-earlier trial date
19 than the spring trial date that was being
20 discussed, even as early as --

21 THE COURT: So I'm clear, the court order
22 now, is the date August 5th?

23 MR. SOLOVY: 6th.

24 THE COURT: The 6th? So it's passed.

25 MR. SCAROLA: It's passed, that's correct.

24

1 And there was a tacit agreement between the
2 parties that we would address that issue at this
3 hearing.

4 I think they want that date tied into
5 whatever the future trial date is in the same
6 manner in which it was tied in initially to the
7 January trial date.

8 Our position is that there is no reason for
9 further delay. And particularly now that the

10 Court has expressed an intention of moving the
11 trial back up, it's very important to us that any
12 amendments to pleadings be made promptly so that
13 the motion should be filed no later than August
14 20th.

15 MR. BEMIS: Your Honor, I'm not going to --

16 THE COURT: Let me ask you a practical
17 question. I assume as you stand here, you have no
18 to intention to amend your pleadings? Because
19 otherwise, you would have come in on some sort of
20 motion.

21 MR. BEMIS: Actually, Your Honor, the answer
22 is, we do have an attention to do some amendment
23 to the pleading, and the reason we didn't have a
24 motion was because you told us at the last hearing
25 you were going to move the trial date and we

25

1 reached an agreement we would address this today
2 in the context of --

3 THE COURT: But again, the question I'm
4 really asking is what information would you expect
5 to get between now and, you know, September,
6 whatever it is you want to move it to, that would

7 allow you to -- that would affect how you chose to
8 amend your pleadings, or wouldn't you have
9 sufficient information now if you're going to
10 amend to go ahead and amend?

11 MR. BEMIS: Well, there are two issue in
12 response to that. In direct response to your
13 question, I think the answer is that we don't know
14 that, because we still have so many depositions we
15 wish to complete. Number two, there are some
16 issues with regard to what would be in the
17 amendments that involve issues that are related to
18 matters I've already brought to the attention of
19 the Court as to how those matters can be pursued.
20 And I'm afraid if I say anything further, I'm
21 going to be accused of waiving the attorney/client
22 or the work product privilege. I don't know how
23 to be more explicit than that without telling you
24 directly what I want to do or what my client
25 thinks may have to be done.

26

1 THE COURT: But what you're telling me then
2 is you think you have sufficient information now
3 to file the motion to amend?

16div-006204

4 MR. BEMIS: I'm not sure that we do. We are
5 still in the process of taking some very, very key
6 depositions, and we knew we were not going to
7 complete those.

8 Our thought is that we simply have the
9 spacing on the amendment that we had -- whatever
10 trial date you pick, we just pick the same
11 spacing. And when I say "spacing," under the
12 order that was entered last time, the parties had
13 agreed that the amendment would be 165 days before
14 trial. That was the spacing we selected. And
15 we're suggesting, you pick a trial date based upon
16 Your Honor's judgment when we're supposed to be
17 ready, and that same spacing would apply to the
18 amendments. We'll go back 165 days, which would
19 tie all of the dates together to the same
20 reasoning we applied in March when we negotiated a
21 schedule.

22 THE COURT: Well, the only sort of flaw I see
23 in that is if we go back to a January trial date,
24 we're beyond the date.

25 MR. BEMIS: Well, if you were to go back to a

1 January trial date, which would just -- that is
2 going to be a real problem in terms of scheduling,
3 because discovery is going to close in like two
4 weeks, and we're not even close to being done. So
5 I don't know what to tell you would be the result
6 of trying to renegotiate a schedule if we had to
7 adjust the spacing that we had put in the original
8 scheduling order.

9 Your Honor may understand, we picked a date,
10 we work backward with all of those --

11 THE COURT: I understand all of that.

12 MR. BEMIS: And all we've done is said, you
13 pick a date and we can space those dates
14 automatically on the calculation formula, just go
15 back and give us the new dates.

16 THE COURT: It strikes me that we probably --
17 this is the kind of thing that needs to be
18 compromised in the middle. I understand
19 plaintiff's position that discovery has been
20 proceeding, it doesn't make sense to continue --
21 you know, the extent of the trial date was moved
22 back to accommodate some other things, it doesn't
23 make sense to continue to tie the date for
24 amendment to the trial date.

25 MR. SOLOVY: May I take a leave from

1 Mr. Bemis and may I say something, Your Honor?

2 THE COURT: Yes, you may, sir.

3 MR. SOLOVY: This is very counterproductive,
4 because this has been going on a long time. If we
5 proceed with discovery and then Mr. Bemis brings a
6 new claim at the last minute, then all that
7 discovery, you know, we're going to see, oh, Your
8 Honor, this is new, we need more time.

9 We want a trial date. They know as they
10 stand here what they want to amend, and they ought
11 to amend it, and we ought to be about our
12 business, as Your Honor said.

13 You know, a January trial date, if you're
14 going to review the contempt and there's a
15 possibility of a January trial date, let's stick
16 to it, and we're ready to file our pleading, which
17 is only to seek leave to amend the Complaint to
18 ask for punitive damages, I'll tell the Court that
19 as we stand here. They know what they're going to
20 do. And if there's going to be a January trial
21 date, they have the resources, we have the
22 resources, but if we shilly-shally around and two
23 months from now, you know -- It's all backwards,
24 Your Honor.

25 THE COURT: No, I understand that concern.

29

1 What's the response?

2 MR. BEMIS: We need the additional -- We need
3 to resolve the contempt motion before we amend the
4 pleading is our position.

5 THE COURT: You need to what?

6 MR. BEMIS: We need to resolve the contempt
7 proceeding and the related issue as to the
8 admission of Kellogg Huber before we file an
9 amended pleading.

10 THE COURT: I understand your reluctance to
11 disclose your process to me, but I can tell you,
12 the reasoning behind that is not readily apparent
13 to me.

14 MR. BEMIS: Well, I'm afraid to say anything
15 else at this point.

16 THE COURT: I understand that to be your
17 position.

18 MR. SCAROLA: May I approach the bench, Your
19 Honor?

20 THE COURT: Yes.

21 MR. SCAROLA: This is just a blank order on

16div-006208

22 that issue with envelopes. I have provided
23 opposing counsel with a copy of that order.
24 THE COURT: Okay. What I did was grant it in
25 part. Motions for leave to amend pleadings need

30

1 to be served by September 7th. That's the day
2 after Labor Day.

3 MR. SCAROLA: Thank you, Your Honor.

4 THE COURT: Okay.

5 MR. SCAROLA: Your Honor, the last remaining
6 issue has to do with supplementing interrogatory
7 responses.

8 THE COURT: We're fighting over the language?

9 MR. SCAROLA: We're fighting over five words
10 I think, Your Honor.

11 MR. IANNO: Well, it's not five words. It's
12 more of the theory behind the words, Your Honor.

13 THE COURT: Okay. Can you enlighten me
14 though what you think -- Give me an example of a
15 fact pattern that would be a distinction between
16 what each of you was proposing.

17 MR. IANNO: Sure. This has to relate,
18 obviously, back to the motion for contempt,

16div-006209

19 because what Mr. Scarola wants is an order from
20 this Court requiring us to provide, quote,
21 complete and accurate answers to the
22 interrogatories as opposed to answers in
23 accordance with the Rules of Civil Procedure.

24 THE COURT: What's the difference?

25 MR. IANNO: The difference is, Mr. Scarola's

31

1 interpretation of the word complete and accurate
2 may be totally different than what the Court or
3 counsel -- And here's two examples.

4 Complete answer to interrogatory, I met with
5 so-and-so on May 23rd. Mr. Scarola's version of
6 complete may be I met with so-and-so at 8:10 p.m.
7 at a specific location on May 23rd. And all of a
8 sudden, I'm complete as far as the Rules of Civil
9 Procedure go, because I've answered I met with
10 so-and-so on a date, but Mr. Scarola's
11 interpretation of the word complete may be you
12 have to put the time, the date, the location. And
13 that's my concern, Your Honor, is that those words
14 complete and accurate don't appear in the Rules of
15 Civil Procedure. The Rules of Civil Procedure say

16div-006210

16 you answer to the best of your ability, as I
17 understand them.

18 With regard to accurate, what happens if we
19 answer an interrogatory that says the light was
20 red and the evidence that comes out at trial says
21 and the jury finds the light was green. Was our
22 answer to interrogatory inaccurate that subjects
23 us to a contempt because we've now violated a
24 court order to provide accurate information in
25 response to an interrogatory?

32

1 And this is all coming about because of the
2 motion for contempt. I'm afraid that the
3 interpretation Mr. Scarola puts on whatever court
4 order is entered here is going to be different
5 than what we interpret the Court or an Appellate
6 Court may interpret.

7 THE COURT: Okay. Let me -- And I apologize,
8 let me back up a moment. What number is this
9 motion? I know I read it, but I can't find it.

10 MR. IANNO: It is number six.

11 THE COURT: Six.

12 MR. IANNO: And the background on it, Your

16div-006211

13 Honor, is they filed a motion, and we had gone
14 back and forth and thought we had an agreement on
15 a stipulation on doing it, and then --

16 THE COURT: Right. Now you guys -- I think
17 what you're acknowledging is that you've
18 stipulated that you'll do updated answers to
19 interrogatories, we're just fighting over the
20 words to go in the order.

21 MR. IANNO: Our position is we supplement in
22 accordance with the Rules of Civil Procedure.

23 THE COURT: Okay. What's wrong with that?

24 MR. SCAROLA: What's wrong with it is that it
25 creates an inherent ambiguity in the order,

33

1 because the Rules of Civil Procedure require no
2 supplement.

3 THE COURT: Well, why don't we say the rules
4 excluding the provision requiring that you don't
5 supplement?

6 MR. SCAROLA: You know, obviously we could do
7 that, Your Honor, but let me remind the Court that
8 when we began to address this issue at the July
9 23rd hearing, Your Honor said, quote,

10 interrogatory answers should be complete and
11 truthful, and you said that's what you expect,
12 that's what you would believe that all
13 interrogatory answers -- that's the standard that
14 you would believe all interrogatory answers would
15 meet. And whether it is expressly stated in the
16 rules or it is there by implication, it is clear
17 that the rules require complete and truthful
18 and/or accurate responses.

19 The concern about our using that language as
20 a basis for a motion for contempt is absolutely
21 illusory, because we all know that contempt
22 requires an intentional violation of the court
23 order. If Mr. Ianno believes in good faith that
24 the response that he is giving is an accurate
25 response as of the time it's filed and a jury

34

1 decides otherwise at a later time, there's no way
2 that that could form the basis for a contempt.

3 My concern is that by the very act of
4 contesting the obligation to provide accurate and
5 complete responses, the message is being conveyed
6 that there's an intent in advance to do something

7 other than that, and there ought to be no intent
8 to do something other than that. We ought to be
9 able to rely upon the supplements as being
10 complete and accurate as of the time that they are
11 filed. And this is a very real concern on our
12 part in light of qualifications that have been
13 included in virtually every interrogatory response
14 that we have received.

15 Have we found that? Okay.

16 I can't pull out the exact language right
17 now, but if it's necessary, I can provide that to
18 Your Honor, but I will represent to the Court that
19 almost every interrogatory -- in fact, I think
20 every interrogatory response we have received has
21 said that discovery is ongoing, you should not
22 consider that these responses are complete and
23 accurate, you cannot rely upon the completeness
24 and accuracy of these responses as of this time,
25 and there needs to come a point in time when

35

1 discovery ends and they're willing to stand behind
2 the responses that they are giving as the most
3 complete and most accurate information that they

4 have as of that date. We're entitled to be able
5 to rely upon interrogatory answers at some point
6 in time as giving us everything they know in the
7 most accurate form in which they know it. That's
8 all we're asking for.

9 THE COURT: Let me ask you this.

10 Is it sufficient if we say -- I'll have to
11 think about the words we use -- that the answer,
12 supplemental answer, needs to comply with the rule
13 as if the interrogatory itself had been
14 promulgated on the date of the supplemental
15 answer?

16 MR. IANNO: That's what we're saying. That's
17 what we said, Judge. And I'm personally offended
18 by Mr. Scarola's argument that there's any intent
19 here, but the point is, our only obligation as
20 officers of the court is to comply with the Rules
21 of Civil Procedure.

22 THE COURT: But does that get us where we
23 need to go? If the answer has to be in compliance
24 with the rule as if the interrogatory had been
25 promulgated as of the date of the supplemental

1 answer?

2 MR. IANNO: That's never been the issue.

3 MR. SCAROLA: In light of the Court's express
4 statement that this Court believes that the rules
5 require complete and truthful responses, we're
6 satisfied with that.

7 THE COURT: Okay. So you gave me an order,
8 correct, Mr. Scarola?

9 MR. SCAROLA: I did provide you with an
10 order, Your Honor. It includes my language.

11 THE COURT: Okay. Well, we'll just...

12 Paragraph 2 and 3 are okay. It's just
13 paragraph 1, I assume.

14 Did you share a copy of this with Mr. Ianno?

15 MR. IANNO: Yes.

16 MR. SCAROLA: Yes.

17 THE COURT: Okay.

18 Okay. So paragraph 1 would then read all
19 parties shall supplement and update their
20 interrogatory responses with answers in compliance
21 with the Florida Rules of Civil Procedure as if
22 the interrogatory had been promulgated as of the
23 date the supplemental answers are served prior to
24 the date of close of fact discovery.

25 MR. SCAROLA: Thank you, Your Honor.

1 MR. BEMIS: Thank you, Your Honor.

2 THE COURT: I already got two sets.

3 MR. IANNO: I don't know if you're rendering
4 other orders as well on your own.

5 THE COURT: Yes.

6 MR. IANNO: So just in case you need them.

7 THE COURT: Okay. Thank you.

8 One last thing.

9 MR. IANNO: Judge, while you're doing that,
10 if I may inquire. You took under advisement the
11 in camera submission that's due at 5:00. Should I
12 call the Court's JA to see if we're supposed to do
13 that at five or not?

14 THE COURT: Yeah. Well, she generally leaves
15 at 4:30, but I don't know if she's going to leave
16 early today because of --

17 MR. IANNO: The situation.

18 THE COURT: Yeah. But you can try to call
19 her right after lunch.

20 MR. IANNO: Okay. And if we don't get a hold
21 of her, do we want to agree on Monday? I mean,
22 this is purely a logistical question, Your Honor.
23 If you want it when we get it over here, if you
24 don't want it, do we get it over here anyway?

1 THE COURT: Well, I think then you get it
2 over here, and if I decided you didn't have to get
3 it over, I'll just send it back.

4 MR. BEMIS: Okay. Just send it over.

5 MR. IANNO: That's fine. We'll get it over
6 to the Court.

7 THE COURT: I'm looking for the date, and I
8 apologize, but I need to reset the date for the
9 case management conference, because I realize it
10 was set on a date I'm out of the office.

11 MR. SCAROLA: We're talking about the August
12 27th case management conference?

13 THE COURT: No. I'm here. I think it's in
14 October.

15 MR. SCAROLA: Okay.

16 THE BAILIFF: The 18th through the 29th,
17 that's the days you're out.

18 THE COURT: No, I know when I'm out. I'm
19 trying to figure out which day it was we had a
20 conference.

21 MR. CLARE: The 15th is the date.

22 MR. IANNO: October 15th.
23 THE COURT: When is the September one? I
24 know it's not August.
25 MR. SOLOVY: September 23, Your Honor.

39

1 THE COURT: That's the next one after August?
2 MR. SOLOVY: Yes.
3 THE COURT: Okay. That's not an issue. The
4 next one after that is October 15th?
5 MR. IANNO: Yes.
6 THE COURT: Yeah, that's the one I need to
7 reset.
8 We could do it the day before.
9 MR. BEMIS: What day of the week is that,
10 Your Honor?
11 THE COURT: That's a Thursday.
12 MR. SOLOVY: That's fine with us, Your Honor.
13 THE COURT: Is that okay?
14 MR. SOLOVY: Yes.
15 THE COURT: Can we do it -- Do you want to do
16 it at 8:00 that day and I'll just suspend uniform
17 motion calendar, do it eight to ten?
18 MR. BEMIS: Eight to ten?

16div-006219

19 THE COURT: Is that fine or not?
20 MR. BEMIS: No, we're here.
21 THE COURT: I'm looking at that face.
22 MR. BEMIS: We're up anyway.
23 MR. IANNO: It's not a problem.
24 THE COURT: Why don't we move it to eight to
25 ten on the 14th instead of the 15th. And I

40

1 apologize.
2 MR. BEMIS: That's all right.
3 THE COURT: Okay. Anything else?
4 MR. SCAROLA: May I make a suggestion?
5 THE COURT: Yes, sir.
6 MR. SCAROLA: Since nature abhors a vacuum
7 and we have over an hour left and we all arrived
8 here expecting to talk about trial dates, does it
9 make any sense to discuss alternative dates, one
10 date if the contempt motion goes away and another
11 date if the contempt motion stays and get that
12 done now while we've got time to talk about it?
13 THE COURT: Are you-all willing to do that?
14 MR. SCAROLA: We certainly are. We would
15 very much like to do that. We'd like to know how

16div-006220

16 to make alternative plans.

17 THE COURT: Sure. Is that something we can
18 talk about?

19 MR. BEMIS: Your Honor, normally I would say
20 yes. My reluctance to do that is I have to go
21 back -- I've already told people the trial date is
22 been moved to March sometime based on what you
23 said last time; experts, fact witnesses, whatever.
24 I've now got to go back and think about what their
25 schedules are if this thing is going to go forward

41

1 say in February or going to go forward in January,
2 which I still think is going to be impossible
3 given the compression of the schedule and the
4 delays we've already had.

5 I would suggest that I'd be willing to
6 exchange some ideas with Mr. Scarola in the next
7 week. I don't think the setting is going to be a
8 problem once you give us -- you decide the date
9 whether we all agree upon it. The other dates are
10 going to have to be dealt with. I don't know how
11 to resolve like fact discovery dates. I can't
12 tell you right now what my reaction is going to be

13 on this. I don't think I can get it done in 30
14 days.
15 We're just having a difficult time completing
16 the depositions. Every week we run into a problem
17 over this August period with people not being
18 available, and we're flying to New York every
19 week. I got up to New York this week, the
20 deposition didn't go forward. Now, I'm not going
21 to get into why it didn't go forward, but it
22 didn't go forward. We had to cancel it. I had to
23 move it. This person is not available now until
24 September after the Jewish holidays. This kind of
25 problem goes on week after week.

42

1 They had a deposition scheduled, they didn't
2 get a subpoena out last week in time for the
3 deposition, that deposition cancelled. It has to
4 be moved forward. It's just a difficult problem.

5 We've got a witness in Dallas, a key witness,
6 Mr. Uzzi, we're still trying to get the subpoena
7 served on him. We can't. We don't think we're
8 going to get him on Thursday as it stands right
9 now, but we don't know. This case is a bear in

16div-006222

10 terms of getting witnesses into depositions.

11 THE COURT: And, Mr. Scarola, I assume your
12 response is that if we have a trial date, stuff
13 starts getting done?

14 MR. SCAROLA: Absolutely, Your Honor. That's
15 my primary response.

16 And my second response is that it will make
17 it much easier for Mr. Bemis to talk to his
18 witnesses about their availability if he knows
19 what date we're targeting. And if we find out
20 today what that date is and he comes back on
21 August 27th and says I've got five experts that
22 can't be here at that time, we can readdress it at
23 that point, but at least we have something
24 tentative to begin to work with.

25 THE COURT: Let me ask you this. Originally,

43

1 what was the January start date?

2 MR. BEMIS: January 18th, Your Honor.

3 THE COURT: I don't know why we couldn't go
4 back to that.

5 MR. SCAROLA: That's great for us.

6 THE COURT: I can tell you, I looked also

16div-006223

7 at -- because we were talking about March if we do
8 the contempt, and I have to go back and check what
9 my kids' spring vacation is just in case I wasn't
10 going to be here, and that's March 21st to 28th.

11 MR. BEMIS: Yes, that's spring break, Your
12 Honor.

13 THE COURT: I suspect I probably will be
14 here, but I don't know for sure.

15 How many trial days do we need?

16 MR. IANNO: We have like 15 or 16.

17 MR. BEMIS: It's 15 trial days spread over
18 four weeks is what we calculated based on a
19 four-day trial week.

20 And, Your Honor, just moving the trial date,
21 if you go back to the original trial date, we're
22 all now back to a discovery cutoff of September
23 6th. We're not going to make that.

24 MR. IANNO: That implicates the summary
25 judgment, Your Honor, mediation deadlines and all

44

1 these things that, you know, either party files a
2 motion for summary judgment, I haven't taken this
3 deposition yet. And that's the problem with --

16div-006224

4 THE COURT: I'll tell you what I want you to
5 do. I want you to assume that if we don't do the
6 contempt, we're going back to that January 18th
7 date. And when we come back to the next case
8 management conference, if you're still complaining
9 about specific discovery issues or specific things
10 that are delaying the preparation of the trial, we
11 need to be prepared to address those in a very
12 specific fashion, not just sort of the general
13 stuff, oh, they cancelled depositions in New York
14 and I can't get this guy in Texas. You know, we
15 need very -- If there are specific issues, we need
16 to address the specific issues.

17 MR. SCAROLA: Thank you, Your Honor.

18 MR. BEMIS: Your Honor, just to advise you,
19 we cannot complete fact discovery with a January
20 trial date.

21 THE COURT: I understand that that's what
22 you're telling me, and if that's your position,
23 you need to show me very specifically why you
24 cannot; what still needs to be done, what efforts
25 you've made to get that done, why it's not gotten

1 done and when it's going to get done.

2 MR. BEMIS: All right.

3 THE COURT: Okay? And I will see you in two
4 weeks.

5 MR. SCAROLA: Thank you, Your Honor.

6 MR. IANNO: Thank you, Judge.

7 THE COURT: Thanks.

8 (Proceedings concluded at 9:02 a.m.)

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 C E R T I F I C A T E

2

3 THE STATE OF FLORIDA)
)
4 COUNTY OF PALM BEACH)

5

6 I, Lisa D. Danforth, Registered Professional
7 Reporter, Certified Real-Time Reporter, do hereby
8 certify that I was authorized to and did report the
9 foregoing proceedings at the time and place herein
10 stated, and that the foregoing is a true and correct
11 transcription of my stenotype notes taken during said
12 proceedings.

13

14 IN WITNESS WHEREOF, I have hereunto set my hand
15 this 13th day of August, 2004.

16

17

18

19

LISA D. DANFORTH, RPR, CRR

20

21

22

23

24

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA
CASE NO. 2003-CA-005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

MORGAN STANLEY & COMPANY, INC.

Defendant.

TRANSCRIPT OF THE PROCEEDINGS BEFORE
THE HONORABLE ELIZABETH MAASS

Palm Beach County Courthouse
West Palm Beach, Florida
Friday, August 13, 2004
8:00 a.m. - 9:02 a.m.
Reported by: Lisa D. Danforth

APPEARANCES:

SEARCY, DENNEY, SCAROLA, BARNHART & SHIPLEY, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33401
Counsel for the Plaintiff
BY: JACK SCAROLA, ESQUIRE

JENNER & BLOCK
One IBM Plaza
Chicago, IL 60611-7603
Counsel for the Plaintiff
BY: JEROLD S. SOLOVY, ESQUIRE
JEFFREY T. SHAW, ESQUIRE
RONALD L. MARMER, ESQUIRE

CARLTON, FIELDS, WARD, EMMANUEL,
SMITH & CUTLER, P.A.
Esperante
222 Lakeview Avenue, Suite 1400
West Palm Beach, Florida 33401-6149
Counsel for the Defendant
BY: JOSEPH IANNO, JR., ESQUIRE

KIRKLAND AND ELLIS
655 15th Street N.W., Suite 1200
Washington, D.C. 20005
Counsel for the Defendant
BY: THOMAS A. CLARE, ESQUIRE

KIRKLAND & ELLIS, LLP
777 South Figueroa Street
Los Angeles, California 90017

1 BE IT REMEMBERED that the foregoing
2 proceedings were had before the HONORABLE ELIZABETH
3 MAASS, in the Palm Beach County Courthouse, West Palm
4 Beach, Florida, on Friday, August 13, 2004, starting
5 at 8:00 a.m., with appearances as hereinabove noted,
6 to wit:

7 - - - -

8 THE COURT: Good morning. Have a seat.

9 MR. BEMIS: Good morning.

10 MR. SCAROLA: Good morning, Your Honor.

11 MR. IANNO: Good morning, Your Honor.

12 THE COURT: Maybe we can take care of a
13 couple of administrative matters first.

14 MR. SCAROLA: We have an agreed suggested
15 order if you'd like us to share that with you.

16 THE COURT: Sure.

17 MR. SCAROLA: We thought that we might first
18 take up the issue of the trial date. Flowing from

19 that will be a discussion of related deadlines as
20 to which there is only one dispute, and that is
21 the deadline for the amendment of pleadings.

22 THE COURT: Right.

23 MR. SCAROLA: Following that, both the motion
24 for clarification -- I'm sorry, there's a minor
25 issue with regard to the supplementation of

4

1 interrogatories --

2 THE COURT: Right.

3 MR. SCAROLA: -- that would be the third
4 matter to take up.

5 MR. BEMIS: Basically, get the merits issues
6 behind us.

7 MR. SCAROLA: Those would be the merits
8 issues. And then we would deal with the issues
9 relating to the motion to contempt, including the
10 related issues of clarification of the motion to
11 dismiss, and then finally, the discovery that
12 arises from that, assuming that the motion to
13 dismiss is not granted.

14 THE COURT: I'm happy to do it in that order.
15 The only question I would have is that what I am

16 going to do is treat the defendant's motion to
17 strike the motion for contempt as including a
18 motion for rehearing on the December order dealing
19 with the settlement agreement, and I do want to
20 rehear that. And the reason is, I've been very
21 straightforward with you guys from the beginning,
22 I am a strong proponent that if you choose to
23 litigate in a public forum, things are public
24 unless there's a compelling reason to keep them
25 private.

5

1 The reason the redacted version of the
2 settlement agreement was made confidential was
3 because that's what the parties agreed to. On
4 reflection, I'm not sure that's sufficient to
5 override the public policy reasons for having it
6 be public. And to the extent that we're now
7 fighting over, you know, was it a clerical error
8 of whether or not even the redacted version should
9 have been sealed, to me, that's immaterial if it
10 should have been public in any event, and I would
11 prefer to go back and reconsider that order.

12 There are obviously a lot of implications

13 that flow from what happens with that order. And
14 the reason I'm bringing that up now is, I don't
15 know that I want to do the non-merits issues today
16 until we have a chance to go back, and I want to
17 do the rehearing quickly on that, because this is
18 an important issue, but really, the reason I'm
19 bringing this up now is if I were to grant the
20 motion for rehearing and remove the
21 confidentiality provision on the settlement
22 agreement -- and really, quite honestly, I think
23 we need to go back and look at the underlying
24 confidentiality order, because it strikes me, to
25 the extent that was agreed to, it's essentially a

6

1 contract between the parties, and I need to go
2 back and look at it in light of Florida's public
3 policy in favor of open litigation. And I am
4 concerned that so many items in this case are
5 being filed under seal.

6 If that happens, is that going to affect the
7 trial date, because all of a sudden, all this time
8 and resources that we've been devoting to the
9 motion for contempt aren't needed anymore, and I'm

10 wondering if we can go back to the January trial
11 setting.

12 So the only reason I'm bringing it up now is,
13 you know, I'm happy to do all the resetting now
14 and talk about a March date, but I don't know if
15 we're going to get to this within a week or two if
16 it makes more sense to address all this as a
17 package when we know exactly where we're going.

18 MR. BEMIS: My initial response is that no
19 matter what Your Honor would do today with the
20 contempt proceeding, we're still behind by virtue
21 of already having spent the period from March
22 until --

23 THE COURT: I understand that, but even when
24 we were talking about moving the date to March,
25 that was assuming we were going to have

7

1 substantial resources devoted to the contempt, and
2 if that's not going to happen, I think we need to
3 go back and re-think that March date, because that
4 March date assumed in it a block of time that we
5 may not now need to devote.

6 MR. BEMIS: Well, we're going to have a real

7 problem. Our discovery cutoff would be like in
8 two weeks.

9 THE COURT: Well, those are things we'll have
10 to sit and do, but if we're not going to have the
11 contempt anymore, we need to go back and really
12 look at the pieces of the puzzle again to figure
13 out what the timing is.

14 MR. BEMIS: We have prepared an electronic
15 document that would allow the Court to see all the
16 calendar scheduling based on whatever date we plug
17 in. We can put in one date and generate a
18 calendar automatically for the Court. If you want
19 to tackle that issue now, it will take us a few
20 minutes and we can give you a suggested date.

21 THE COURT: The only thing is, I don't know
22 that it makes sense until we know what's happening
23 with the contempt.

24 MR. BEMIS: Well, then you want to proceed
25 with the contempt first, is that your suggestion?

8

1 THE COURT: No, because if I'm going to treat
2 it as a motion for rehearing, I think it's unfair
3 to plaintiffs to have them argue it now.

4 MR. SCAROLA: We may be prepared to argue it
5 now. I'd like just a moment --

6 THE COURT: Sure.

7 MR. SCAROLA: -- to consider that with
8 co-counsel. But let me share my initial reaction
9 with the Court, and that is, the Court may
10 determine that there is no current compelling
11 reason to maintain the confidentiality of the
12 settlement agreement. Even if the Court were to
13 make that determination that there is currently no
14 compelling reason to maintain the confidentiality
15 of the settlement agreement, that does not dispose
16 of the issue of the violation of the order that
17 was then in existence.

18 THE COURT: I understand that argument and it
19 is something I've thought about, but then I think
20 we start talking about the difference between a
21 civil contempt and a criminal contempt, and nobody
22 has ever attempted to characterize what's alleged
23 as a criminal contempt. If it's a civil contempt
24 and all I'm trying to do is coerce their behavior,
25 if it's in the public domain, it becomes sort of

1 so what.

2 MR. SCAROLA: Well, respectfully, Your Honor,
3 there are two potential remedies that attach to a
4 civil contempt. Not only does the Court have an
5 opportunity to and an obligation to consider what
6 sanction is necessary in order to compel future
7 compliance, but civil contempt also allows for
8 compensatory damages. And in this case where our
9 allegation is that as a consequence of the
10 violation, litigation was initiated for the
11 specific purpose of imposing a financial
12 obligation on us that has cost us a significant
13 amount of money already and continues to cost us
14 money and expose us to future liability, there is
15 a substantial compensatory component to a sanction
16 that would attach to the violation of that order.

17 So independent of any criminal sanction
18 concerns, any criminal contempt concerns, in the
19 context strictly of a civil contempt, the law is
20 very clear that the Court has the opportunity to
21 consider compensatory sanctions, and we would
22 certainly be asking the Court to consider
23 compensatory sanctions even if there were no
24 prospective interests to protect.

25 The second point is that the purpose of a

1 civil contempt sanction in terms of compelling
2 future compliance is not limited to that
3 particular order. It is for the purpose of
4 compelling compliance with the Court's orders,
5 period. So the imposition of a coercive sanction
6 is not strictly limited to that sole order, but to
7 compel respect for the Court's orders in general.
8 So the Court could still, even if there were no
9 prospective prospect of violation of that
10 particular order, impose a sanction to assure that
11 due respect was given to future orders of the
12 Court.

13 THE COURT: I understand that, and that's
14 something certainly we can talk about if we go
15 back and -- or when we go back and reconsider the
16 December order and how that segues into your
17 motion to strike.

18 And it's what I've said before, at some point
19 I get concerned that this case is going to get
20 derailed on a tangent. If truly Morgan Stanley &
21 Company has no claim, presumably, eventually
22 they'll be awarded 57.105 fees and eventually your
23 client will be reimbursed for the money it put
24 forward for the defense of the litigation, and at

1 that that case will be properly determined and
2 that issue will be fully vetted in that case
3 versus injecting that whole issue into this case
4 and the affect it has on the underlying
5 litigation, which is serious litigation. I mean,
6 we need to -- I mean, as I go through this stuff
7 and I look at the things that need to be done, you
8 know, it's a substantial case, and I hate to see
9 our attention diverted.

10 And as an aside, I apologize, I forgot, I did
11 finally enter the order on the conflicts of laws
12 issue. You probably haven't gotten it yet.

13 MR. SCAROLA: We did not.

14 THE COURT: If you want, we can have copies
15 run. My secretary had to take some stuff to her
16 car. It went out on Wednesday.

17 MR. BEMIS: We're prepared to argue what you
18 wish argued.

19 THE COURT: I just don't know. I mean,
20 again, this is something I understand that you
21 guys didn't know that I thought we needed to go

22 back and readdress, so it really is --

23 Do you want to take a moment?

24 MR. SCAROLA: Thank you. Yes, Your Honor.

25 THE COURT: We can do that or --

12

1 MR. SCAROLA: We'd just like to consider

2 that. Maybe --

3 THE COURT: I'm happy also to get the book

4 and see how quickly we can set a hearing just on

5 this issue, because I think this is sort of a

6 threshold issue we need to reach.

7 MR. BEMIS: I think we did brief the issue.

8 THE COURT: You did. You did some.

9 MR. BEMIS: It's articulated different.

10 THE COURT: I don't know that I saw -- I did

11 see a response from plaintiff to that argument, I

12 just didn't know if it was as fully as you would

13 have briefed it if you had known I was going to go

14 back and look at it.

15 MR. BEMIS: Our position on it was laid out

16 in two sets of papers, and I think the first is

17 that the order in itself is not inconsistent, and

18 in any event, if there is some confusion --

19 THE COURT: Well, I understand your position.
20 MR. BEMIS: -- it should be confidential.
21 THE COURT: You're telling me you're
22 prepared.
23 MR. BEMIS: I'm prepared.
24 THE COURT: I'm going to let plaintiffs
25 decide if they're prepared.

13

1 MR. SCAROLA: If we could just have a couple
2 of minutes then, Your Honor.
3 THE COURT: Sure. You want me to take a
4 break and you guys can talk in private?
5 MR. SCAROLA: Yes, fine.
6 THE COURT: Okay.
7 (Recess taken from 8:11 a.m. to 8:24 a.m.)
8 THE COURT: Okay. What did you decide?
9 MR. SCAROLA: Your Honor, we are going to
10 request some additional time to submit --
11 THE COURT: That's fine.
12 MR. SCAROLA: -- a written response to the
13 Court's concerns.
14 MR. BEMIS: Your Honor --
15 MR. SCAROLA: We --

16 MR. BEMIS: I'm sorry.

17 MR. SCAROLA: We would like until a week from
18 today. We have time set before Your Honor on the
19 27th of August.

20 THE COURT: Okay.

21 MR. SCAROLA: And while we would like to be
22 able to come back prior to the 27th, I'm scheduled
23 to be in Honduras taking depositions for eight or
24 nine days beginning on Sunday, so as a practical
25 matter, I don't know that we'd be able to get back

14

1 much before the 27th of August.

2 THE COURT: Okay.

3 MR. SCAROLA: In light of that, we would
4 request --

5 THE COURT: Do we have two hours set then?

6 MR. SCAROLA: I think we do.

7 MR. CLARE: Yes, eight to ten.

8 MR. SCAROLA: Yes, Your Honor.

9 THE COURT: Yeah. That's fine.

10 What I will do then is an order that treats
11 the motion to strike as including a motion for
12 rehearing. If we're going to go back and look at

13 this, I do want to go back and have us look at the
14 underlying confidentiality order as well, because
15 sort of the public policy implications are the
16 same.

17 MR. BEMIS: Yes, Your Honor.

18 THE COURT: It was the 27th, right?

19 MR. SCAROLA: Yes, Your Honor.

20 THE COURT: Okay. So what I'm going to do is
21 specially set a hearing on the -- I'm going to do
22 an order that treats your motion to strike as a
23 motion for rehearing, grant the motion for
24 rehearing, put the rehearing on the 27th together
25 with a hearing I'm setting on my own accord to go

15

1 back and reconsider the underlying confidentiality
2 order, because I think we need to go back and look
3 at that again as well.

4 And contrary to our prior modification of
5 when we need things for the case management
6 conferences, filings for those two issues, I just
7 need them the week ahead of time, and you guys
8 each give me what you want.

9 MR. SCAROLA: Simultaneous exchange on

10 Friday?

11 THE COURT: Yeah.

12 MR. BEMIS: Thank you, Your Honor. I
13 appreciate that.

14 THE COURT: Where do we want to go next then?

15 MR. SCAROLA: I think, Your Honor, that there
16 are only two matters that we can address in light
17 of the procedures that have been outlined, and the
18 first of those is the issue with regard to
19 deadline for filing motions to amend.

20 THE COURT: Right. One other thing, I'm
21 sorry, before we leave. We had talked about this
22 earlier in the week.

23 MR. IANNO: Right. And I was going to bring
24 that up as soon as Mr. Scarola finished. One
25 other thing we need to address is what we're doing

16

1 with the in camera submissions pursuant to the
2 existing court orders and the amended responses to
3 interrogatories that are coming due.

4 THE COURT: I would rather stay discovery on
5 the contempt issue until we resolve this and let
6 you guys spend two weeks doing merits stuff.

7 MR. IANNO: That's what we would suggest,
8 Your Honor.

9 MR. BEMIS: That was going to be our
10 suggestion.

11 MR. SCAROLA: While that ordinarily would not
12 have practical implications that we couldn't live
13 with, there has been a petition for certiorari
14 filed with regard to rulings concerning the
15 contempt matter that is currently pending.

16 THE COURT: Okay.

17 MR. SCAROLA: And if Your Honor were to
18 conduct an in camera inspection and were to find
19 that none of the materials that have been
20 proffered to the Court for in camera inspection
21 are obliged to be turned over for whatever reason,
22 those issues are mooted and we no longer need to
23 worry about the potential of having to address a
24 petition for certiorari.

25 THE COURT: Sure. But if they could do an

17

1 order to show cause, you know, that's going to
2 take them a couple weeks probably to look at at a
3 minimum.

4 MR. SCAROLA: I don't --

5 THE COURT: In all honesty, I mean, we can
6 come back -- If they do an order to show cause and
7 you're concerned that now you're spending time
8 responding to the writ of certiorari where it may
9 be mooted if I did the in camera inspection, we
10 can talk about it then, but I don't think it makes
11 sense to devote time to this until we settle this
12 issue.

13 MR. SCAROLA: Could we at least make some
14 determination as to whether there is a significant
15 amount of time involved? I understand that there
16 are very few -- that what Your Honor would need to
17 review in camera is a very limited inspection.

18 THE COURT: Do you have it now?

19 MR. IANNO: The in camera?

20 THE COURT: Yeah.

21 MR. IANNO: The one that was due on the 2nd,
22 I don't have it with me. I had it with me on
23 Tuesday. I was due to have it back to the Court
24 by five.

25 THE COURT: No, I know. I'm just wondering.

1 MR. IANNO: That one is completed, Your
2 Honor. That one is done. The rest of them; the
3 amendment to the interrogatories, the
4 non-privileged, I believe, Mr. Clare can correct
5 me, and the privileged information, those haven't
6 been completed yet. They're not due.

7 THE COURT: So is there any reason why I
8 couldn't at least look at the in camera inspection
9 on the one?

10 MR. IANNO: There's no reason you shouldn't,
11 Judge, but it does reveal attorney/client and work
12 product privilege and information that I don't
13 know if the Court really needs to look at if this
14 whole contempt issue goes away.

15 We have it prepared. I represented to the
16 Court on Tuesday that if you wanted it, we have
17 it, and I'll leave it to your discretion, but I
18 really think it's a tangential issue that the
19 Court doesn't need to review.

20 MR. SCAROLA: And my response is that it
21 would be a tangential issue with no particular
22 time pressures between now and August 27th but for
23 the petition for certiorari.

24 THE COURT: That's fine. I mean, what I'll
25 do is go ahead and look at that. I can't

1 represent that I'll have done an in camera
2 inspection before we come back. I have one in
3 front of you guys, and I'm in trial, but I'll do
4 my best and see.

5 MR. SCAROLA: Thank you.

6 THE COURT: I mean, if it's already prepared,
7 I guess --

8 MR. BEMIS: It's prepared, Your Honor. May I
9 speak?

10 THE COURT: No, Mr. Bemis. Yes, you may
11 speak. Go ahead.

12 MR. BEMIS: I would respectfully request that
13 you not look at it until you make a decision. I
14 am concerned, and it's in the petition for writ of
15 certiorari that the matters that are in there go
16 to the core nature of a lawyer's representation of
17 his client, what he tells his client, what he
18 thinks, and it is highly unusual -- and I
19 understand that the Court frequently does in
20 camera inspections, this is not unusual in that
21 sense; however, the order that you entered in this
22 case, which I respect entirely, I am not here to
23 re-argue that, it does raise some very, very
24 serious issues about attorney/client privilege and

1 those pandora's boxes, you know about it, and I'm
2 concerned that it never goes away once you've
3 opened it.

4 I'm not concerned about what you're going to
5 ultimately read about what was said, but it allows
6 you to begin to understand what our strategies are
7 and thinking of the case, which normally you would
8 never be privy to. And given that we only have
9 two more weeks before this issue is likely going
10 to come to a head, and we've done the work as you
11 ordered, I respectfully request that you hold on
12 to the document or allow us to hold it and open it
13 at the moment you make a decision that you think
14 is appropriate based on the developments either at
15 the hearing or the Court of Appeals, how that
16 resolves itself.

17 MR. SCAROLA: Your Honor, just a reminder
18 that this discovery does not relate to this
19 lawsuit. It relates to a case that's not even
20 pending before Your Honor. It relates to the
21 Andersen claim.

22 MR. BEMIS: All the more reason to wait.
23 THE COURT: Hold on.
24 MR. BEMIS: Excuse me. I'm sorry,
25 Mr. Scarola.

21

1 MR. SCAROLA: And any concern that Your Honor
2 might be influenced by learning what the strategy
3 was in the Andersen case obviously can have no
4 practical impact on this matter.

5 What does have a very clear practical impact
6 on this matter is that there's a petition for writ
7 of certiorari which may become moot if Your Honor
8 agrees that this is all privileged information
9 that should not be disclosed. In that case,
10 there's nothing for the appellate court to concern
11 itself about and there's nothing for us to be
12 addressing and responding to a writ if a writ
13 issues, and that's something that we ought to
14 know.

15 MR. BEMIS: May I address that briefly?

16 THE COURT: No. We got to stop at some
17 point.

18 MR. BEMIS: Okay. Would Your Honor like a

19 copy of the petition for your own reading for any
20 reason? We have it.

21 THE COURT: That's okay.

22 MR. BEMIS: All right.

23 THE COURT: Okay. Let me take that under
24 advisement. I want to think about it a little bit
25 more.

22

1 Where do we want to go next?

2 MR. IANNO: Judge, the other orders, this one
3 relates to the in camera submission that was due
4 August 2nd, is there any objection to staying the
5 other discovery that is subject to the July 28th
6 order?

7 MR. SCAROLA: Which is due when?

8 MR. IANNO: Next week.

9 MR. BEMIS: We had two interrogatories we
10 needed to supplement based on the hearing last
11 time which are part of the ones that are under
12 consideration. We suggest that that be stayed and
13 taken as a parcel based on whatever ruling you
14 enter; otherwise, we're going to be doing this --

15 THE COURT: I understand.

16 MR. IANNO: We had I think only four
17 interrogatories, and we still had the rest of that
18 one set to go through, but the Court had entered
19 that partial order on the part we got through.

20 THE COURT: Right.

21 In all honesty, it makes sense to me that
22 that gets stayed. I want to go back and
23 reconsider whether we're going to be proceeding
24 down the contempt road or not.

25 Where do we go next?

23

1 MR. SCAROLA: Your Honor, the two remaining
2 matters have to do with the deadline for filing
3 amendment to pleadings.

4 THE COURT: Yes.

5 MR. SCAROLA: That deadline was August 5th
6 pursuant to the original trial order entered by
7 Your Honor. When Your Honor indicated an
8 intention to move the case from its present trial
9 setting, there was a general agreement that all of
10 the deadlines would be pushed back, but there is
11 concern about amendments to pleadings, and we
12 request that the deadline for amendment to

13 pleadings be maintained at no later than August
14 20th.

15 Clearly, the parties have had ample time to
16 make a determination as to whether any amendments
17 are to be made. Because there is certainly a
18 possibility of a significantly-earlier trial date
19 than the spring trial date that was being
20 discussed, even as early as --

21 THE COURT: So I'm clear, the court order
22 now, is the date August 5th?

23 MR. SOLOVY: 6th.

24 THE COURT: The 6th? So it's passed.

25 MR. SCAROLA: It's passed, that's correct.

24

1 And there was a tacit agreement between the
2 parties that we would address that issue at this
3 hearing.

4 I think they want that date tied into
5 whatever the future trial date is in the same
6 manner in which it was tied in initially to the
7 January trial date.

8 Our position is that there is no reason for
9 further delay. And particularly now that the

10 Court has expressed an intention of moving the
11 trial back up, it's very important to us that any
12 amendments to pleadings be made promptly so that
13 the motion should be filed no later than August
14 20th.

15 MR. BEMIS: Your Honor, I'm not going to --

16 THE COURT: Let me ask you a practical
17 question. I assume as you stand here, you have no
18 to intention to amend your pleadings? Because
19 otherwise, you would have come in on some sort of
20 motion.

21 MR. BEMIS: Actually, Your Honor, the answer
22 is, we do have an attention to do some amendment
23 to the pleading, and the reason we didn't have a
24 motion was because you told us at the last hearing
25 you were going to move the trial date and we

25

1 reached an agreement we would address this today
2 in the context of --

3 THE COURT: But again, the question I'm
4 really asking is what information would you expect
5 to get between now and, you know, September,
6 whatever it is you want to move it to, that would

7 allow you to -- that would affect how you chose to
8 amend your pleadings, or wouldn't you have
9 sufficient information now if you're going to
10 amend to go ahead and amend?

11 MR. BEMIS: Well, there are two issue in
12 response to that. In direct response to your
13 question, I think the answer is that we don't know
14 that, because we still have so many depositions we
15 wish to complete. Number two, there are some
16 issues with regard to what would be in the
17 amendments that involve issues that are related to
18 matters I've already brought to the attention of
19 the Court as to how those matters can be pursued.
20 And I'm afraid if I say anything further, I'm
21 going to be accused of waiving the attorney/client
22 or the work product privilege. I don't know how
23 to be more explicit than that without telling you
24 directly what I want to do or what my client
25 thinks may have to be done.

26

1 THE COURT: But what you're telling me then
2 is you think you have sufficient information now
3 to file the motion to amend?

4 MR. BEMIS: I'm not sure that we do. We are
5 still in the process of taking some very, very key
6 depositions, and we knew we were not going to
7 complete those.

8 Our thought is that we simply have the
9 spacing on the amendment that we had -- whatever
10 trial date you pick, we just pick the same
11 spacing. And when I say "spacing," under the
12 order that was entered last time, the parties had
13 agreed that the amendment would be 165 days before
14 trial. That was the spacing we selected. And
15 we're suggesting, you pick a trial date based upon
16 Your Honor's judgment when we're supposed to be
17 ready, and that same spacing would apply to the
18 amendments. We'll go back 165 days, which would
19 tie all of the dates together to the same
20 reasoning we applied in March when we negotiated a
21 schedule.

22 THE COURT: Well, the only sort of flaw I see
23 in that is if we go back to a January trial date,
24 we're beyond the date.

25 MR. BEMIS: Well, if you were to go back to a

1 January trial date, which would just -- that is
2 going to be a real problem in terms of scheduling,
3 because discovery is going to close in like two
4 weeks, and we're not even close to being done. So
5 I don't know what to tell you would be the result
6 of trying to renegotiate a schedule if we had to
7 adjust the spacing that we had put in the original
8 scheduling order.

9 Your Honor may understand, we picked a date,
10 we work backward with all of those --

11 THE COURT: I understand all of that.

12 MR. BEMIS: And all we've done is said, you
13 pick a date and we can space those dates
14 automatically on the calculation formula, just go
15 back and give us the new dates.

16 THE COURT: It strikes me that we probably --
17 this is the kind of thing that needs to be
18 compromised in the middle. I understand
19 plaintiff's position that discovery has been
20 proceeding, it doesn't make sense to continue --
21 you know, the extent of the trial date was moved
22 back to accommodate some other things, it doesn't
23 make sense to continue to tie the date for
24 amendment to the trial date.

25 MR. SOLOVY: May I take a leave from

1 Mr. Bemis and may I say something, Your Honor?

2 THE COURT: Yes, you may, sir.

3 MR. SOLOVY: This is very counterproductive,
4 because this has been going on a long time. If we
5 proceed with discovery and then Mr. Bemis brings a
6 new claim at the last minute, then all that
7 discovery, you know, we're going to see, oh, Your
8 Honor, this is new, we need more time.

9 We want a trial date. They know as they
10 stand here what they want to amend, and they ought
11 to amend it, and we ought to be about our
12 business, as Your Honor said.

13 You know, a January trial date, if you're
14 going to review the contempt and there's a
15 possibility of a January trial date, let's stick
16 to it, and we're ready to file our pleading, which
17 is only to seek leave to amend the Complaint to
18 ask for punitive damages, I'll tell the Court that
19 as we stand here. They know what they're going to
20 do. And if there's going to be a January trial
21 date, they have the resources, we have the
22 resources, but if we shilly-shally around and two
23 months from now, you know -- It's all backwards,
24 Your Honor.

25 THE COURT: No, I understand that concern.

29

1 What's the response?

2 MR. BEMIS: We need the additional -- We need
3 to resolve the contempt motion before we amend the
4 pleading is our position.

5 THE COURT: You need to what?

6 MR. BEMIS: We need to resolve the contempt
7 proceeding and the related issue as to the
8 admission of Kellogg Huber before we file an
9 amended pleading.

10 THE COURT: I understand your reluctance to
11 disclose your process to me, but I can tell you,
12 the reasoning behind that is not readily apparent
13 to me.

14 MR. BEMIS: Well, I'm afraid to say anything
15 else at this point.

16 THE COURT: I understand that to be your
17 position.

18 MR. SCAROLA: May I approach the bench, Your
19 Honor?

20 THE COURT: Yes.

21 MR. SCAROLA: This is just a blank order on

22 that issue with envelopes. I have provided
23 opposing counsel with a copy of that order.
24 THE COURT: Okay. What I did was grant it in
25 part. Motions for leave to amend pleadings need

30

1 to be served by September 7th. That's the day
2 after Labor Day.

3 MR. SCAROLA: Thank you, Your Honor.

4 THE COURT: Okay.

5 MR. SCAROLA: Your Honor, the last remaining
6 issue has to do with supplementing interrogatory
7 responses.

8 THE COURT: We're fighting over the language?

9 MR. SCAROLA: We're fighting over five words
10 I think, Your Honor.

11 MR. IANNO: Well, it's not five words. It's
12 more of the theory behind the words, Your Honor.

13 THE COURT: Okay. Can you enlighten me
14 though what you think -- Give me an example of a
15 fact pattern that would be a distinction between
16 what each of you was proposing.

17 MR. IANNO: Sure. This has to relate,
18 obviously, back to the motion for contempt,

19 because what Mr. Scarola wants is an order from
20 this Court requiring us to provide, quote,
21 complete and accurate answers to the
22 interrogatories as opposed to answers in
23 accordance with the Rules of Civil Procedure.

24 THE COURT: What's the difference?

25 MR. IANNO: The difference is, Mr. Scarola's

31

1 interpretation of the word complete and accurate
2 may be totally different than what the Court or
3 counsel -- And here's two examples.

4 Complete answer to interrogatory, I met with
5 so-and-so on May 23rd. Mr. Scarola's version of
6 complete may be I met with so-and-so at 8:10 p.m.
7 at a specific location on May 23rd. And all of a
8 sudden, I'm complete as far as the Rules of Civil
9 Procedure go, because I've answered I met with
10 so-and-so on a date, but Mr. Scarola's
11 interpretation of the word complete may be you
12 have to put the time, the date, the location. And
13 that's my concern, Your Honor, is that those words
14 complete and accurate don't appear in the Rules of
15 Civil Procedure. The Rules of Civil Procedure say

16 you answer to the best of your ability, as I
17 understand them.

18 With regard to accurate, what happens if we
19 answer an interrogatory that says the light was
20 red and the evidence that comes out at trial says
21 and the jury finds the light was green. Was our
22 answer to interrogatory inaccurate that subjects
23 us to a contempt because we've now violated a
24 court order to provide accurate information in
25 response to an interrogatory?

32

1 And this is all coming about because of the
2 motion for contempt. I'm afraid that the
3 interpretation Mr. Scarola puts on whatever court
4 order is entered here is going to be different
5 than what we interpret the Court or an Appellate
6 Court may interpret.

7 THE COURT: Okay. Let me -- And I apologize,
8 let me back up a moment. What number is this
9 motion? I know I read it, but I can't find it.

10 MR. IANNO: It is number six.

11 THE COURT: Six.

12 MR. IANNO: And the background on it, Your

13 Honor, is they filed a motion, and we had gone
14 back and forth and thought we had an agreement on
15 a stipulation on doing it, and then --

16 THE COURT: Right. Now you guys -- I think
17 what you're acknowledging is that you've
18 stipulated that you'll do updated answers to
19 interrogatories, we're just fighting over the
20 words to go in the order.

21 MR. IANNO: Our position is we supplement in
22 accordance with the Rules of Civil Procedure.

23 THE COURT: Okay. What's wrong with that?

24 MR. SCAROLA: What's wrong with it is that it
25 creates an inherent ambiguity in the order,

33

1 because the Rules of Civil Procedure require no
2 supplement.

3 THE COURT: Well, why don't we say the rules
4 excluding the provision requiring that you don't
5 supplement?

6 MR. SCAROLA: You know, obviously we could do
7 that, Your Honor, but let me remind the Court that
8 when we began to address this issue at the July
9 23rd hearing, Your Honor said, quote,

10 interrogatory answers should be complete and
11 truthful, and you said that's what you expect,
12 that's what you would believe that all
13 interrogatory answers -- that's the standard that
14 you would believe all interrogatory answers would
15 meet. And whether it is expressly stated in the
16 rules or it is there by implication, it is clear
17 that the rules require complete and truthful
18 and/or accurate responses.

19 The concern about our using that language as
20 a basis for a motion for contempt is absolutely
21 illusory, because we all know that contempt
22 requires an intentional violation of the court
23 order. If Mr. Ianno believes in good faith that
24 the response that he is giving is an accurate
25 response as of the time it's filed and a jury

34

1 decides otherwise at a later time, there's no way
2 that that could form the basis for a contempt.

3 My concern is that by the very act of
4 contesting the obligation to provide accurate and
5 complete responses, the message is being conveyed
6 that there's an intent in advance to do something

7 other than that, and there ought to be no intent
8 to do something other than that. We ought to be
9 able to rely upon the supplements as being
10 complete and accurate as of the time that they are
11 filed. And this is a very real concern on our
12 part in light of qualifications that have been
13 included in virtually every interrogatory response
14 that we have received.

15 Have we found that? Okay.

16 I can't pull out the exact language right
17 now, but if it's necessary, I can provide that to
18 Your Honor, but I will represent to the Court that
19 almost every interrogatory -- in fact, I think
20 every interrogatory response we have received has
21 said that discovery is ongoing, you should not
22 consider that these responses are complete and
23 accurate, you cannot rely upon the completeness
24 and accuracy of these responses as of this time,
25 and there needs to come a point in time when

35

1 discovery ends and they're willing to stand behind
2 the responses that they are giving as the most
3 complete and most accurate information that they

4 have as of that date. We're entitled to be able
5 to rely upon interrogatory answers at some point
6 in time as giving us everything they know in the
7 most accurate form in which they know it. That's
8 all we're asking for.

9 THE COURT: Let me ask you this.

10 Is it sufficient if we say -- I'll have to
11 think about the words we use -- that the answer,
12 supplemental answer, needs to comply with the rule
13 as if the interrogatory itself had been
14 promulgated on the date of the supplemental
15 answer?

16 MR. IANNO: That's what we're saying. That's
17 what we said, Judge. And I'm personally offended
18 by Mr. Scarola's argument that there's any intent
19 here, but the point is, our only obligation as
20 officers of the court is to comply with the Rules
21 of Civil Procedure.

22 THE COURT: But does that get us where we
23 need to go? If the answer has to be in compliance
24 with the rule as if the interrogatory had been
25 promulgated as of the date of the supplemental

1 answer?

2 MR. IANNO: That's never been the issue.

3 MR. SCAROLA: In light of the Court's express
4 statement that this Court believes that the rules
5 require complete and truthful responses, we're
6 satisfied with that.

7 THE COURT: Okay. So you gave me an order,
8 correct, Mr. Scarola?

9 MR. SCAROLA: I did provide you with an
10 order, Your Honor. It includes my language.

11 THE COURT: Okay. Well, we'll just...

12 Paragraph 2 and 3 are okay. It's just
13 paragraph 1, I assume.

14 Did you share a copy of this with Mr. Ianno?

15 MR. IANNO: Yes.

16 MR. SCAROLA: Yes.

17 THE COURT: Okay.

18 Okay. So paragraph 1 would then read all
19 parties shall supplement and update their
20 interrogatory responses with answers in compliance
21 with the Florida Rules of Civil Procedure as if
22 the interrogatory had been promulgated as of the
23 date the supplemental answers are served prior to
24 the date of close of fact discovery.

25 MR. SCAROLA: Thank you, Your Honor.

1 MR. BEMIS: Thank you, Your Honor.

2 THE COURT: I already got two sets.

3 MR. IANNO: I don't know if you're rendering
4 other orders as well on your own.

5 THE COURT: Yes.

6 MR. IANNO: So just in case you need them.

7 THE COURT: Okay. Thank you.

8 One last thing.

9 MR. IANNO: Judge, while you're doing that,
10 if I may inquire. You took under advisement the
11 in camera submission that's due at 5:00. Should I
12 call the Court's JA to see if we're supposed to do
13 that at five or not?

14 THE COURT: Yeah. Well, she generally leaves
15 at 4:30, but I don't know if she's going to leave
16 early today because of --

17 MR. IANNO: The situation.

18 THE COURT: Yeah. But you can try to call
19 her right after lunch.

20 MR. IANNO: Okay. And if we don't get a hold
21 of her, do we want to agree on Monday? I mean,
22 this is purely a logistical question, Your Honor.
23 If you want it when we get it over here, if you
24 don't want it, do we get it over here anyway?

1 THE COURT: Well, I think then you get it
2 over here, and if I decided you didn't have to get
3 it over, I'll just send it back.

4 MR. BEMIS: Okay. Just send it over.

5 MR. IANNO: That's fine. We'll get it over
6 to the Court.

7 THE COURT: I'm looking for the date, and I
8 apologize, but I need to reset the date for the
9 case management conference, because I realize it
10 was set on a date I'm out of the office.

11 MR. SCAROLA: We're talking about the August
12 27th case management conference?

13 THE COURT: No. I'm here. I think it's in
14 October.

15 MR. SCAROLA: Okay.

16 THE BAILIFF: The 18th through the 29th,
17 that's the days you're out.

18 THE COURT: No, I know when I'm out. I'm
19 trying to figure out which day it was we had a
20 conference.

21 MR. CLARE: The 15th is the date.

22 MR. IANNO: October 15th.
23 THE COURT: When is the September one? I
24 know it's not August.
25 MR. SOLOVY: September 23, Your Honor.

39

1 THE COURT: That's the next one after August?
2 MR. SOLOVY: Yes.
3 THE COURT: Okay. That's not an issue. The
4 next one after that is October 15th?
5 MR. IANNO: Yes.
6 THE COURT: Yeah, that's the one I need to
7 reset.
8 We could do it the day before.
9 MR. BEMIS: What day of the week is that,
10 Your Honor?
11 THE COURT: That's a Thursday.
12 MR. SOLOVY: That's fine with us, Your Honor.
13 THE COURT: Is that okay?
14 MR. SOLOVY: Yes.
15 THE COURT: Can we do it -- Do you want to do
16 it at 8:00 that day and I'll just suspend uniform
17 motion calendar, do it eight to ten?
18 MR. BEMIS: Eight to ten?

19 THE COURT: Is that fine or not?
20 MR. BEMIS: No, we're here.
21 THE COURT: I'm looking at that face.
22 MR. BEMIS: We're up anyway.
23 MR. IANNO: It's not a problem.
24 THE COURT: Why don't we move it to eight to
25 ten on the 14th instead of the 15th. And I

40

1 apologize.
2 MR. BEMIS: That's all right.
3 THE COURT: Okay. Anything else?
4 MR. SCAROLA: May I make a suggestion?
5 THE COURT: Yes, sir.
6 MR. SCAROLA: Since nature abhors a vacuum
7 and we have over an hour left and we all arrived
8 here expecting to talk about trial dates, does it
9 make any sense to discuss alternative dates, one
10 date if the contempt motion goes away and another
11 date if the contempt motion stays and get that
12 done now while we've got time to talk about it?
13 THE COURT: Are you-all willing to do that?
14 MR. SCAROLA: We certainly are. We would
15 very much like to do that. We'd like to know how

16 to make alternative plans.

17 THE COURT: Sure. Is that something we can
18 talk about?

19 MR. BEMIS: Your Honor, normally I would say
20 yes. My reluctance to do that is I have to go
21 back -- I've already told people the trial date is
22 been moved to March sometime based on what you
23 said last time; experts, fact witnesses, whatever.
24 I've now got to go back and think about what their
25 schedules are if this thing is going to go forward

41

1 say in February or going to go forward in January,
2 which I still think is going to be impossible
3 given the compression of the schedule and the
4 delays we've already had.

5 I would suggest that I'd be willing to
6 exchange some ideas with Mr. Scarola in the next
7 week. I don't think the setting is going to be a
8 problem once you give us -- you decide the date
9 whether we all agree upon it. The other dates are
10 going to have to be dealt with. I don't know how
11 to resolve like fact discovery dates. I can't
12 tell you right now what my reaction is going to be

13 on this. I don't think I can get it done in 30
14 days.
15 We're just having a difficult time completing
16 the depositions. Every week we run into a problem
17 over this August period with people not being
18 available, and we're flying to New York every
19 week. I got up to New York this week, the
20 deposition didn't go forward. Now, I'm not going
21 to get into why it didn't go forward, but it
22 didn't go forward. We had to cancel it. I had to
23 move it. This person is not available now until
24 September after the Jewish holidays. This kind of
25 problem goes on week after week.

42

1 They had a deposition scheduled, they didn't
2 get a subpoena out last week in time for the
3 deposition, that deposition cancelled. It has to
4 be moved forward. It's just a difficult problem.

5 We've got a witness in Dallas, a key witness,
6 Mr. Uzzi, we're still trying to get the subpoena
7 served on him. We can't. We don't think we're
8 going to get him on Thursday as it stands right
9 now, but we don't know. This case is a bear in

10 terms of getting witnesses into depositions.

11 THE COURT: And, Mr. Scarola, I assume your
12 response is that if we have a trial date, stuff
13 starts getting done?

14 MR. SCAROLA: Absolutely, Your Honor. That's
15 my primary response.

16 And my second response is that it will make
17 it much easier for Mr. Bemis to talk to his
18 witnesses about their availability if he knows
19 what date we're targeting. And if we find out
20 today what that date is and he comes back on
21 August 27th and says I've got five experts that
22 can't be here at that time, we can readdress it at
23 that point, but at least we have something
24 tentative to begin to work with.

25 THE COURT: Let me ask you this. Originally,

43

1 what was the January start date?

2 MR. BEMIS: January 18th, Your Honor.

3 THE COURT: I don't know why we couldn't go
4 back to that.

5 MR. SCAROLA: That's great for us.

6 THE COURT: I can tell you, I looked also

7 at -- because we were talking about March if we do
8 the contempt, and I have to go back and check what
9 my kids' spring vacation is just in case I wasn't
10 going to be here, and that's March 21st to 28th.

11 MR. BEMIS: Yes, that's spring break, Your
12 Honor.

13 THE COURT: I suspect I probably will be
14 here, but I don't know for sure.

15 How many trial days do we need?

16 MR. IANNO: We have like 15 or 16.

17 MR. BEMIS: It's 15 trial days spread over
18 four weeks is what we calculated based on a
19 four-day trial week.

20 And, Your Honor, just moving the trial date,
21 if you go back to the original trial date, we're
22 all now back to a discovery cutoff of September
23 6th. We're not going to make that.

24 MR. IANNO: That implicates the summary
25 judgment, Your Honor, mediation deadlines and all

44

1 these things that, you know, either party files a
2 motion for summary judgment, I haven't taken this
3 deposition yet. And that's the problem with --

4 THE COURT: I'll tell you what I want you to
5 do. I want you to assume that if we don't do the
6 contempt, we're going back to that January 18th
7 date. And when we come back to the next case
8 management conference, if you're still complaining
9 about specific discovery issues or specific things
10 that are delaying the preparation of the trial, we
11 need to be prepared to address those in a very
12 specific fashion, not just sort of the general
13 stuff, oh, they cancelled depositions in New York
14 and I can't get this guy in Texas. You know, we
15 need very -- If there are specific issues, we need
16 to address the specific issues.

17 MR. SCAROLA: Thank you, Your Honor.

18 MR. BEMIS: Your Honor, just to advise you,
19 we cannot complete fact discovery with a January
20 trial date.

21 THE COURT: I understand that that's what
22 you're telling me, and if that's your position,
23 you need to show me very specifically why you
24 cannot; what still needs to be done, what efforts
25 you've made to get that done, why it's not gotten

1 done and when it's going to get done.

2 MR. BEMIS: All right.

3 THE COURT: Okay? And I will see you in two
4 weeks.

5 MR. SCAROLA: Thank you, Your Honor.

6 MR. IANNO: Thank you, Judge.

7 THE COURT: Thanks.

8 (Proceedings concluded at 9:02 a.m.)

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 C E R T I F I C A T E

2

3 THE STATE OF FLORIDA)
)
4 COUNTY OF PALM BEACH)

5

6 I, Lisa D. Danforth, Registered Professional
7 Reporter, Certified Real-Time Reporter, do hereby
8 certify that I was authorized to and did report the
9 foregoing proceedings at the time and place herein
10 stated, and that the foregoing is a true and correct
11 transcription of my stenotype notes taken during said
12 proceedings.

13

14 IN WITNESS WHEREOF, I have hereunto set my hand
15 this 13th day of August, 2004.

16

17

18

19

LISA D. DANFORTH, RPR, CRR

20

21

22

23

24

LAW OFFICES
J E N N E R & B L O C K L L P

ONE IBM PLAZA
CHICAGO, ILLINOIS 60611

(312) 222-9350
(312) 527-0484 FAX

DEIRDRE E. CONNELL
312-923-2661 Direct Dial
312-840-7661 Direct Facsimile

TELECOMMUNICATION TRANSMITTAL

DATE: August 13, 2004

TO: Thomas A. Clare, Esq.
KIRKLAND & ELLIS, LLP

VOICE: (202) 879-5993
FAX: (202) 879-5200

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.

VOICE: (561) 659-7070
FAX: (561) 659-7368

Jack Scarola, Esq.
SEARCY DENNEY SCAROLA
BARNHART & SHIPLEY, P.A.

VOICE: (561) 686-6350 ext.140
FAX: (561) 684-5816 or 478-0754

FROM: Deirdre E. Connell

SECY. EXT.: 6486

EMP. NO.: 035666

CLIENT NO.: 41198-10003

IMPORTANT: THIS MESSAGE IS INTENDED ONLY FOR THE USE OF THE INDIVIDUAL OR ENTITY TO WHICH IT IS ADDRESSED, AND MAY CONTAIN INFORMATION THAT IS ATTORNEY WORK PRODUCT, PRIVILEGED, CONFIDENTIAL AND EXEMPT FROM DISCLOSURE UNDER APPLICABLE LAW. IF THE READER OF THIS MESSAGE IS NOT THE INTENDED RECIPIENT, OR THE EMPLOYEE OR AGENT RESPONSIBLE FOR DELIVERING THE MESSAGE TO THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION, DISTRIBUTION OR COPYING OF THIS COMMUNICATION IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE NOTIFY US IMMEDIATELY BY TELEPHONE, AND RETURN THE ORIGINAL MESSAGE TO US AT THE ABOVE ADDRESS VIA POSTAL SERVICE. THANK YOU.

MESSAGE: Please see attached.

Total number of pages including this cover sheet: 7

DATE SENT: 8/13/04 TIME SENT: 12:30 pm SENT BY: S. EDDINGTON

IF YOU DO NOT RECEIVE ALL PAGES, PLEASE CALL (312) 222-9350, EXT: 6486
OR (312) 222-9350, EXT. 6120, 6121

**IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA**

CASE NO. CA 03-5045 AI

**COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,**

vs.

**MORGAN STANLEY & CO., INC.,
Defendant.**

CASE NO. CA 03-5165 AI

**MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff,**

vs.

**MACANDREWS & FORBES HOLDINGS INC., et al.,
Defendants.**

**COLEMAN (PARENT) HOLDINGS INC.'S
THIRD SET OF REQUESTS FOR ADMISSION**

Plaintiff Coleman (Parent) Holdings Inc., by its attorneys and pursuant to Florida Rule of Civil Procedure 1.370, hereby requests that defendant Morgan Stanley & Co., Inc. answer, under oath and in writing, the following fourth set of requests for admission within 30 days of the date of service of these requests.

DEFINITIONS AND INSTRUCTIONS

1. "CLN Holdings" means CLN Holdings Inc.
2. The "CLN Holdings Notes" means the Senior Secured First Priority Discount Notes due 2001, Senior Secured Second Priority Notes due 2001, Senior Secured First Priority

Discount Exchange Notes due 2001, and Senior Second Priority Discount Exchange Notes due 2001 of CLN Holdings, as successor to Coleman Escrow Corp.

3. "CPH" means Coleman (Parent) Holdings Inc.
4. "Coleman" means The Coleman Company, Inc.
5. "Coleman Worldwide" means Coleman Worldwide Corporation.
6. The "February 20, 1998 Term Sheet" means the Project Laser Proposed Summary Transaction Terms dated February 20, 1998, a copy of which has been marked as CPH Exhibit 188.
7. The "February 23, 1998 Letter" means the letter sent by Sunbeam to Coleman on or about February 23, 1998, a copy of which has been marked as Morgan Stanley Exhibit 134.
8. The "Holdings Merger Agreement" means The Agreement and Plan of Merger among Sunbeam Corporation, Laser Acquisition Corp., CLN Holdings Inc., and Coleman (Parent) Holdings Inc. dated as of February 27, 1998, a copy of which has been marked as Morgan Stanley Exhibit 93.
9. "Mafco" means MacAndrews & Forbes Holdings Inc.
10. "Morgan Stanley" means Morgan Stanley & Co., Inc.
11. The "Public Merger Agreement" means The Agreement and Plan of Merger among Sunbeam Corporation, Camper Acquisition Corp. and The Coleman Company, Inc. dated as of February 27, 1998, a copy of which has been marked as Morgan Stanley Exhibit 117.
12. The "Section 14(f) Information Statement" means the Information Statement Pursuant to Section 14(f) of the Securities Exchange Act of 1934, as amended, and Rule 14f-1 thereunder, a copy of which has been marked as Morgan Stanley Exhibit 130.

13. The "Sunbeam Form S-4" means the Form S-4/A filed by Sunbeam with the Securities and Exchange Commission on December 6, 1999.

14. "The Coleman Company, Inc. Notice of Merger and Appraisal Rights and Information Statement" means The Coleman Company, Inc. Notice of Merger and Appraisal Rights and Information Statement/ Sunbeam Prospectus bearing Bates-Nos. CPH 1409707-1409980.

15. When good faith requires Morgan Stanley to qualify an answer or deny only part of the matter of which an admission is requested, Morgan Stanley shall specify the part of the matter which is true, and qualify or deny the remainder.

REQUESTS FOR ADMISSION

1. The Section 14(f) Information Statement is not the "Information Statement" referred to in Section 7.3(b) of the Public Merger Agreement.

2. The Coleman Company, Inc. Notice of Merger and Appraisal Rights and Information Statement is the "Information Statement" referred to in Section 7.3(b) of the Public Merger Agreement.

3. The "Information Statement" referred to in Section 7.3(b) of the Public Merger Agreement was mailed to Coleman's stockholders on or about December 7, 1999.

4. The Sunbeam Form S-4 is the "Registration Statement" referred to in Section 7.3(b) of the Public Merger Agreement.

5. The "Registration Statement" referred to in Section 7.3(b) of the Public Merger Agreement became effective on December 6, 1999.

6. As of March 30, 1998, CLN Holdings' debt consisted solely of the CLN Holdings Notes.

7. The consideration paid to CPH in connection with Sunbeam's acquisition of CPH's interest in Coleman did not include Sunbeam's assumption of Coleman's debt.

8. The consideration paid to CPH in connection with Sunbeam's acquisition of CPH's interest in Coleman did not include Sunbeam's assumption of Coleman Worldwide's debt.

9. The Long-Term Debt reflected in CLN Holdings' 1997 consolidated financial statements consists of CLN Holding debt, Coleman Worldwide debt, and Coleman debt.

10. In exchange for its interest in Coleman, CPH received consideration consisting solely of (a) \$159,958,756; (b) 14,099,749 shares of Sunbeam stock; and (3) the assumption of the CLN Holdings Notes.

11. CPH Exhibit 9 is a true and correct copy of the "Sunbeam Corporation Discussion Materials" provided to CPH on or about February 23, 1998.

12. Morgan Stanley prepared CPH Exhibit 9.

13. CPH Exhibit 187A is a true and correct copy of the "Sunbeam Long Range Strategic Plan" provided to CPH on or about February 23, 1998.

14. Morgan Stanley was involved in the preparation of CPH Exhibit 187A.

15. Morgan Stanley received one or more drafts of the March 19, 1998 comfort letter before the March 19, 1998 press release was issued.

16. On March 17, 1998, Morgan Stanley received at least one draft of the March 19, 1998 comfort letter.

17. On March 18, 1998, Morgan Stanley received at least one draft of the March 19, 1998 comfort letter.

18. Before the March 19, 1998 press release was issued, Morgan Stanley knew that Sunbeam's sales in January and February 1998 were \$72,018,000.

19. Before the March 19, 1998 press release was issued, Morgan Stanley knew that Sunbeam's net income for January 1998 was a loss of \$9,510,000.

20. Before the March 19, 1998 press release was issued, Morgan Stanley knew that Sunbeam's sales shortfall was caused by Sunbeam's "early buy" program.

21. The February 23, 1998 Letter was not signed by or on behalf of Coleman.

Dated: August 13, 2004

COLEMAN (PARENT) HOLDINGS INC.

By: 
One of Its Attorneys

John Scarola
SEARCY DENNEY SCAROLA BARNHART
& SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33402-3626
(561) 686-6300

Jerold S. Solovy
JENNER & BLOCK, LLC
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

Document Number: 1128888

CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that a copy of the foregoing has been furnished by U.S. Mail and facsimile to the following counsel of record on this 13th day of August, 2004:

Joseph Ianno, Jr.
CARLTON FIELDS
222 Lake View Avenue
Suite 1400
West Palm Beach, Florida 33401
Tel.: (561) 659-7070
Fax: (561) 659-7368

Thomas A. Clare
KIRKLAND & ELLIS
655 15th Street, N.W.
Suite 1200
Washington, D.C. 20005
Tel.: (202) 879-5000
Fax: (202) 879-5200



Deirdre E. Connell



THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
OF FLORIDA

CHAMBERS OF
ELIZABETH T. MAASS
CIRCUIT JUDGE

COUNTY COURTHOUSE
WEST PALM BEACH, FLORIDA 33401
561/355-6050

August 16, 2004

Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

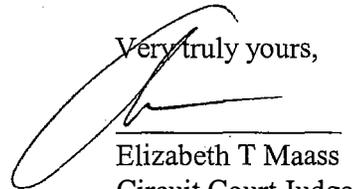
RE: Coleman v. Morgan Stanley
Case No.: 03-5045

Dear Mr. Ianno:

I am in receipt of your letter dated August 13, 2004 and its enclosures for the action referenced above.

Pursuant to my August 13, 2004 Order, I have returned the letter's enclosures, unread. I have filed the original letter, without attachments.

Very truly yours,



Elizabeth T Maass
Circuit Court Judge

copies to:
Thomas D. Yannucci
655 15th Street, NW, Suite 1200
Washington DC 20005

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, IL 60611

16div-006288

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

CASE NO. CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

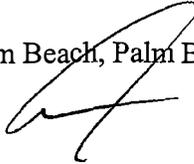
MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

ORDER AND DIRECTIONS TO THE CLERK

THIS CAUSE came before the Court, in Chambers, on its own Motion. Based on the foregoing, it is

ORDERED AND ADJUDGED that the Clerk is directed to docket and file attorney Joseph Ianno's letter dated August 13, 2004.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 16 day of August, 2004.



ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci
655 15th Street, NW, Suite 1200
Washington DC 20005

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, IL 60611

Coleman (Parent) Holdings Inc. vs Morgan Stanley & Co., Inc.
Case No.:2003 CA 005045 AJ
Order

3. This Order is without prejudice for any party to seek further supplementation.

DONE AND ORDERED at West Palm Beach, Palm Beach County, Florida, this _____
day of _____, 2004.

ELIZABETH T. MAASS
CIRCUIT COURT JUDGE

Copies have been furnished to all counsel on the attached counsel list.

Coleman (Parent) Holdings Inc. vs Morgan Stanley & Co., Inc.
Case No.:2003 CA 005045 AI
Order

COUNSEL LIST

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block LLP
One IBM Plaza
Suite 4400
Chicago, IL 60611

Jack Scarola, Esq.
Searcy Denney Scarola Barnhart & Shipley
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409

LAW OFFICES
J E N N E R & B L O C K LLP

ONE IBM PLAZA
 CHICAGO, ILLINOIS 60611

(312) 222-9350
 (312) 527-0484 FAX

DEIRDRE E. CONNELL
 312-923-2661 Direct Dial
 312-840-7661 Direct Facsimile

TELECOMMUNICATION TRANSMITTAL

DATE: August 16, 2004

TO: **Thomas A. Clare, Esq.** **VOICE:** (202) 879-5993
 KIRKLAND & ELLIS, LLP **FAX:** (202) 879-5200

Joseph Ianno, Jr., Esq. **VOICE:** (561) 659-7070
 CARLTON FIELDS, P.A. **FAX:** (561) 659-7368

Jack Scarola, Esq. **VOICE:** (561) 686-6350 ext.140
 SEARCY DENNEY SCAROLA **FAX:** (561) 684-5816 or 478-0754
 BARNHART & SHIPLEY, P.A.

FROM: Deirdre E. Connell **SECY. EXT.:** 6486

EMP. NO.: 035666 **CLIENT NO.:** 41198-10003

IMPORTANT: THIS MESSAGE IS INTENDED ONLY FOR THE USE OF THE INDIVIDUAL OR ENTITY TO WHICH IT IS ADDRESSED, AND MAY CONTAIN INFORMATION THAT IS ATTORNEY WORK PRODUCT, PRIVILEGED, CONFIDENTIAL AND EXEMPT FROM DISCLOSURE UNDER APPLICABLE LAW. IF THE READER OF THIS MESSAGE IS NOT THE INTENDED RECIPIENT, OR THE EMPLOYEE OR AGENT RESPONSIBLE FOR DELIVERING THE MESSAGE TO THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION, DISTRIBUTION OR COPYING OF THIS COMMUNICATION IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE NOTIFY US IMMEDIATELY BY TELEPHONE, AND RETURN THE ORIGINAL MESSAGE TO US AT THE ABOVE ADDRESS VIA POSTAL SERVICE. THANK YOU.

MESSAGE: **Please see attached.**

Total number of pages including this cover sheet: 4

DATE SENT: 8/16/04 TIME SENT: 3:05 pm SENT BY: S. EDDINGTON

IF YOU DO NOT RECEIVE ALL PAGES, PLEASE CALL (312) 222-9350, EXT: 6486
 OR (312) 222-9350, EXT. 6120, 6121

16div-006294

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,
Defendant.

_____ /

CASE NO. CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff,

vs.

MACANDREWS & FORBES HOLDINGS INC., et al.,
Defendants.

_____ /

**COLEMAN (PARENT) HOLDINGS INC.'S
FOURTH SET OF REQUESTS FOR ADMISSION**

Plaintiff Coleman (Parent) Holdings Inc., by its attorneys and pursuant to Florida Rule of Civil Procedure 1.370, hereby requests that defendant Morgan Stanley & Co., Inc. answer, under oath and in writing, the following fourth set of requests for admission within 30 days of the date of service of these requests.

DEFINITIONS AND INSTRUCTIONS

1. "Morgan Stanley" means Morgan Stanley & Co., Inc.
2. "Sunbeam" means Sunbeam Corp.

3. When good faith requires Morgan Stanley to qualify an answer or deny only part of the matter of which an admission is requested, Morgan Stanley shall specify the part of the matter which is true, and qualify or deny the remainder.

REQUESTS FOR ADMISSION

1. Before the March 19, 1998 press release was issued, Morgan Stanley was advised that Sunbeam's sales in January and February 1998 were \$72,018,000.

2. Before the March 19, 1998 press release was issued, Morgan Stanley was advised that Sunbeam's net income for January 1998 was a loss of \$9,510,000.

3. Before the March 19, 1998 press release was issued, Morgan Stanley was advised that Sunbeam's sales shortfall was caused, in part, by Sunbeam's "early buy" program.

Dated: August 16, 2004

COLEMAN (PARENT) HOLDINGS INC.

By: 
One of Its Attorneys

John Scarola
SEARCY DENNEY SCAROLA BARNHART
& SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33402-3626
(561) 686-6300

Jerold S. Solovy
JENNER & BLOCK, LLC
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

Document Number: 1140386

CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that a copy of the foregoing has been furnished by U.S. Mail and facsimile to the following counsel of record on this 16th day of August, 2004:

Joseph Ianno, Jr.
CARLTON FIELDS
222 Lake View Avenue
Suite 1400
West Palm Beach, Florida 33401
Tel.: (561) 659-7070
Fax: (561) 659-7368

Thomas A. Clare
KIRKLAND & ELLIS
655 15th Street, N.W.
Suite 1200
Washington, D.C. 20005
Tel.: (202) 879-5000
Fax: (202) 879-5200



Deirdre E. Connell

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

CASE NO. CA 03-5045 AI

vs.

MORGAN STANLEY & CO., INC.,
Defendant.

MORGAN STANLEY SENIOR FUNDING, INC., CASE NO. CA 03-5165 AI
Plaintiff,

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
et al.,
Defendants.

**COLEMAN (PARENT) HOLDINGS INC.'S AND
MACANDREWS & FORBES HOLDINGS, INC.'S
MOTION TO COMPEL SUPPLEMENTATION OF
RESPONSES TO REQUESTS FOR ADMISSION**

Coleman (Parent) Holdings Inc. ("CPH") and MacAndrews & Forbes Holdings, Inc. ("MAFCO"), by their attorneys, respectfully request that this Court enter an Order directing Morgan Stanley to supplement its responses to CPH's second set of requests for admission. In support of this motion, CPH and MAFCO state as follows:

1. This motion arises from Morgan Stanley's failure to provide sufficient answers to CPH's second set of requests for admission, which sought basic information relating to the admissibility at trial of certain specified Morgan Stanley documents. CPH's second set of request for admission contained the following two requests (Ex. A):

1. Admit that documents bates-numbered Morgan Stanley Confidential 0084771 through 0085783 and Morgan Stanley Confidential 0094003 through 0094032 are true and authentic copies of original documents within the meaning of Florida Evidence Code § 90.901.

2. Admit that documents bates-numbered Morgan Stanley Confidential 084771 through 0085783 and Morgan Stanley Confidential 0094003 through 0094032 are records of regularly conducted business activity within the meaning of Florida Evidence Code § 90.803(6).

2. Morgan Stanley admitted Request No. 1 but admitted Request No. 2 only in part

(Ex. B):

Admitted in part and denied in part. MS&Co. admits that the referenced documents are generated in the course of a regularly conduct business activity, but denies that the documents, which largely reflect the opinions of out-of-court declarants, qualify for the hearsay exception of Florida Evidence Code § 90.803(6). MS&Co. reserves all evidentiary objections to the admissibility of the referenced documents, but will not dispute that the documents are kept in the ordinary course of its business.

3. Morgan Stanley's vague assertion, with respect to all of the specified documents, that they do not qualify for the hearsay exception of Florida Evidence Code § 90.803(6) because they "largely" reflect opinions of out-of-court declarants is an insufficient response. Under Florida Rule of Civil Procedure 1.370(a), a party responding to a request for admission is required to be as specific as possible concerning its denials (emphasis added):

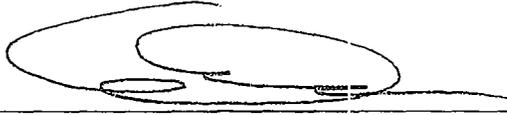
A denial shall meet the substance of the requested admission, and when good faith requires that a party qualify an answer or deny only a party of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder.

4. Under Rule 1.370, it is not sufficient for Morgan Stanley to refer to an undifferentiated group of documents, and state that they "largely" reflect opinions of out-of-court declarants. Morgan Stanley instead must "specify" the particular portions of the documents that supposedly reflect the so-called opinions. CPH and MAFCO respectfully request that this Court direct Morgan Stanley to supplement its responses to CPH's second set of requests for admission to provide this information within 14 days.

Date: August 17, 2004

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC. and
MACANDREWS & FORBES HOLDINGS, INC.

By: 
One of Its Attorneys

Jerome Solovy
Ronald L. Marmer
Jeffrey T. Shaw
JENNER & BLOCK LLP
One B M Plaza
Chicago, Illinois 60611
(312) 212-9350

John Scarola
SEARCY DENNEY SCAROLA
BARNHART & SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33402-3626
(561) 686-6300

#1138013

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by
Fax in 1 Federal Express to all counsel on the attached list on this 17th day of
AUGUST, 2004.



JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 684-5816
Attorneys for Coleman(Parent)Holdings Inc.
and MacAndrews & Forbes Holdings, Inc.

COUNSEL LIST

Josephanno, Jr., Esquire
Carlton Fields, et al.
222 Delview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block LLP
One B.M. Plaza
Suite 4000
Chicago, IL 60611

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN
AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

Case No. CA 03-5045 AI

MOICAN STANLEY & CO., INC.,

Defendant,

MOICAN STANLEY SENIOR FUNDING,
INC.,

Plaintiff,

Case No. CA 03-5165 AI

vs.

MACANDREWS & FORBES HOLDINGS,
INC.,

Defendant

NOTICE OF HEARING

YOU ARE HEREBY NOTIFIED that the undersigned has called up for hearing the
following:

DATE August 27, 2004

TIME 8:00 a.m. (Case Management Conference)

JUDGE: Hon. Elizabeth T. Maass

PLACE: Palm Beach County Courthouse, Room #11.1208, 205 North Dixie Highway,
West Palm Beach, FL 33401

Coleman (Parent) Holdings Inc. vs Morgan Stanley & Co., Inc.
Case No. 2003 CA 005045 AI
Notice of Hearing

SPECIFIC MATTERS TO BE HEARD:

- () CPH and MAFCO's Motion to Compel Supplementation of Responses to Requests for Admission filed 8/17/04;
- (?) CPH and MAFCO's Motion to Compel Complete Answers to Interrogatory Nos. 1 and 3 in MAFCO's First Set of Interrogatories to Morgan Stanley Senior Funding, Inc. (Filed Under Seal 8/17/04);
- (3) CPH and MAFCO's Motion to Compel Answers to Int. and RTP (Filed Under Seal);
- (4) CPH and MAFCO's Supplemental Motion to Compel re: document requests (Filed Under Seal);
- (5) CPH and MAFCO's Motion to Clarify This Court's July 26, 2004 Order on CPH's and MAFCO's *Ore Tenus* Motion and This Court's December 4, 2003 Order on Morgan Stanley's Motion to Compel Production of Settlement Agreement.(Filed Under Seal).

Moving counsel certifies that he or she contacted opposing counsel and attempted to resolve the discovery dispute without hearing.

Coleman (Parent) Holdings Inc. vs Morgan Stanley & Co., Inc.
Case No. 2003 CA 005045 AI
Notice of Hearing

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by
Federal Express to all Counsel on the attached list, this 17th day of August,

2004



JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 478-0754
Attorney for CPH and MAFCO

Coleman Parent) Holdings Inc. vs Morgan Stanley & Co., Inc.
Case No.: 2003 CA 005045 AI
Notice of Hearing

COUNSEL LIST

Joseph Panno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold S. Solovy, Esq.
Jenner & Block LLP
One IBM Plaza
Suite 4400
Chicago, IL 60611

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, state bar number, and address): Lawrence P. Bemis (Cal. Bar No. 213824) Mark T. Cramer (Cal. Bar No. 198952) Kirkland & Ellis LLP 777 So. Figueroa St., Ste. 3400 Los Angeles, CA 90017 TELEPHONE NO.: (213) 680-8400 FAX NO.: (213) 680-8500	FOR COURT USE ONLY CASE NUMBER: <div style="text-align: right; font-size: 1.5em; font-weight: bold;">BS091895</div>
ATTORNEY FOR (Name): NAME OF COURT: Los Angeles Superior Court STREET ADDRESS: 111 North Hill Street MAILING ADDRESS: CITY AND ZIP CODE: Los Angeles, CA 90012 BRANCH NAME: CENTRAL	
PLAINTIFF/PETITIONER: COLEMAN (PARENT) HOLDINGS, INC. DEFENDANT/RESPONDENT: MORGAN STANLEY & CO., INC.	
DEPOSITION SUBPOENA For Personal Appearance and Production of Documents and Things	

THE PEOPLE OF THE STATE OF CALIFORNIA, TO (name, address, and telephone number of deponent, if known):
 Karen Kay Clark
 1674 Amarelle Street, Newbury Park, CA 91320

1. YOU ARE ORDERED TO APPEAR IN PERSON TO TESTIFY AS A WITNESS in this action at the following date, time, and place:

Date: September 1, 2004 Time: 9:30 a.m. Address: Kirkland & Ellis LLP, 777 S. Figueroa St. Suite 3400, Los Angeles, CA 90017

- a. As a deponent who is not a natural person, you are ordered to designate one or more persons to testify on your behalf as to the matters described in item 4. (Code Civ. Proc., § 2025, subd. (d)(6).)
 - b. You are ordered to produce the documents and things described in item 3.
 - c. This deposition will be recorded stenographically through the instant visual display of testimony, and by audiotape videotape.
 - d. This videotape deposition is intended for possible use at trial under Code of Civil Procedure section 2025(u)(4).
2. The personal attendance of the custodian or other qualified witness and the production of the original records are required by this subpoena. The procedure authorized by Evidence Code sections 1560(b), 1561, and 1562 will not be deemed sufficient compliance with this subpoena.
3. The documents and things to be produced and any testing or sampling being sought are described as follows:

Continued on Attachment 3.

4. If the witness is a representative of a business or other entity, the matters upon which the witness is to be examined are described as follows:

Continued on Attachment 4.

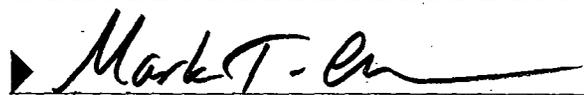
5. IF YOU HAVE BEEN SERVED WITH THIS SUBPOENA AS A CUSTODIAN OF CONSUMER OR EMPLOYEE RECORDS UNDER CODE OF CIVIL PROCEDURE SECTION 1985.3 OR 1985.6 AND A MOTION TO QUASH OR AN OBJECTION HAS BEEN SERVED ON YOU, A COURT ORDER OR AGREEMENT OF THE PARTIES, WITNESSES, AND CONSUMER OR EMPLOYEE AFFECTED MUST BE OBTAINED BEFORE YOU ARE REQUIRED TO PRODUCE CONSUMER OR EMPLOYEE RECORDS.

6. At the deposition, you will be asked questions under oath. Questions and answers are recorded stenographically at the deposition; later they are transcribed for possible use at trial. You may read the written record and change any incorrect answers before you sign the deposition. You are entitled to receive witness fees and mileage actually traveled both ways. The money must be paid, at the option of the party giving notice of the deposition, either with service of this subpoena or at the time of the deposition.

DISOBEDIENCE OF THIS SUBPOENA MAY BE PUNISHED AS CONTEMPT BY THIS COURT. YOU WILL ALSO BE LIABLE FOR THE SUM OF FIVE HUNDRED DOLLARS AND ALL DAMAGES RESULTING FROM YOUR FAILURE TO OBEY.

Date issued: 8/17/04
 Mark T. Cramer
 (TYPE OR PRINT NAME)




 (SIGNATURE OF PERSON ISSUING SUBPOENA)
 Counsel for Morgan Stanley & Co., Inc.
 (TITLE)

(Proof of service on reverse)

PLAINTIFF/PETITIONER: COLEMAN (PARENT) HOLDINGS, INC.	CASE NUMBER: BS 091895
DEFENDANT/RESPONDENT: MORGAN STANLEY & CO., INC.	

**PROOF OF SERVICE OF DEPOSITION SUBPOENA FOR PERSONAL APPEARANCE
AND PRODUCTION OF DOCUMENTS AND THINGS**

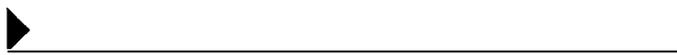
1. I served this *Deposition Subpoena for Personal Appearance and Production of Documents and Things* by personally delivering a copy to the person served as follows:
 - a. Person served (*name*): Karen Kay Clark
 - b. Address where served: 1674 Amarelle Street, Newbury Park, CA 91320
 - c. Date of delivery:
 - d. Time of delivery:
 - e. Witness fees and mileage both ways (*check one*):
 - (1) were paid. Amount: \$ _____
 - (2) were not paid.
 - (3) were tendered to the witness's public entity employer as required by Government Code section 68097.2. The amount tendered was (*specify*): \$ _____
 - f. Fee for service: \$ _____
2. I received this subpoena for service on (*date*):
3. Person serving:
 - a. Not a registered California process server.
 - b. California sheriff or marshal.
 - c. Registered California process server.
 - d. Employee or independent contractor of a registered California process server.
 - e. Exempt from registration under Business and Professions Code section 22350(b).
 - f. Registered professional photocopier.
 - g. Exempt from registration under Business and Professions Code section 22451.
 - h. Name, address, telephone number, and, if applicable, county of registration and number:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

(For California sheriff or marshal use only)
I certify that the foregoing is true and correct.

Date:

Date:



 (SIGNATURE)



 (SIGNATURE)

ATTACHMENT 3

SUBPOENA TO KAREN K. CLARK

You are hereby requested to produced the following documents pursuant to the definitions and instructions contained herein on or before August 27, 2004 at the offices of Kirkland & Ellis LLP, 777 South Figueroa Street, Suite 3400, Los Angeles, California 90017:

DOCUMENTS REQUESTED

1. All documents concerning the Coleman Transaction.
2. All documents reflecting or concerning any communications between or among any of Sunbeam, Coleman, CPH, MAFCO, CSFB, Arthur Andersen, MS & Co., MSSF, Davis Polk, Wachtell, or Skadden in 1997 or 1998.
3. All documents provided to or by you in any Litigation or SEC Administrative Proceeding.
4. All calendars, diaries, timekeeping sheets or records maintained by you concerning any activities related to Coleman Transaction.
5. All documents related to Coleman's Financial Information for all or any portion of 1996, 1997, and 1998, including but not limited to Financial Statements and documents concerning Coleman's forecasts and plans for revenue or earnings.
6. All documents pertaining to negotiations concerning Sunbeam's acquisition of Coleman, including but not limited to documents concerning conversations or communications of any kind involving MS & Co., MSSF, CPH, CSFB, MAFCO, Sunbeam, or Wachtell personnel or representatives.
7. All documents concerning potential Synergies that might be achieved from a business combination of Sunbeam and Coleman.
8. All documents concerning any investigation, analysis, or due diligence conducted by Sunbeam, Coleman, or their Advisors pertaining to the Coleman Transaction.
9. All documents pertaining to Coleman's financial condition.
10. All documents pertaining to any debt issued or incurred by Coleman or secured directly or indirectly by the stock of Coleman.
11. All documents pertaining to any intercompany agreements between Coleman and any of its direct or indirect parents or affiliates.
12. All documents related to the 1998 investigation that culminated in the restatement of Sunbeam's earnings.

Definitions

1. "Advisors" means financial advisors, legal advisors, accountants, consultants and any other third-party advising or assisting Coleman or Sunbeam in any way with the Coleman Transaction, including but not limited to Arthur Andersen, Coopers & Lybrand, CSFB, MS& Co., MSSF, Skadden, and Wachtell.
2. "Arthur Andersen" means Arthur Andersen LLP and any of its partners, officers, directors, former or present employees, representatives and agents.
3. "Communication" means any exchange or transmittal of information by any means of transmission, including, without limitation, face-to-face conversation, mail, overnight delivery, Internet, telephone, electronic mail, or facsimile.
4. The term "concerning" means relating to, referring to, describing, evidencing, or constituting.
5. "Coleman" means Coleman Company, Inc.
6. The "Coleman Transaction" means Sunbeam's acquisition of Coleman Company, Inc. from CPH and all related communications, agreements, and transactions, including the February 27, 1998 Agreements and the March 30, 1998 closing.
7. "Coopers & Lybrand" means the former Coopers & Lybrand LLP, and any of its subsidiaries, divisions, predecessors, successors, present and former employees, representatives, and agents.
8. "CPH" means Coleman (Parent) Holdings Inc. and any of its officers, directors, former or present employees, representatives and agents.
9. "CSFB" means Credit Suisse First Boston LLC and any of its officers, directors, former or present employees, representatives and agents.
10. "Document" means any recording in any tangible form of any information, whether handwritten, typed, printed, stored on computer disks, tapes, or databases, or otherwise reproduced. "Document" or "documents" also includes electronic documents whether stored on servers or hard drives, e-mail, backup tapes, voicemail and video and audio recordings. A draft or non-identical copy is a separate document within the meaning of this term.
11. "Financial Information" means information concerning the past or present financial condition of Coleman or Coleman securities.
12. "Financial Statements" means documents reflecting Financial Information, including without limitation quarterly reports, yearly reports, balance sheets, statements of income, earnings, cash flow projections, and sources and applications of funds.
13. "Litigations" means any lawsuit arising from Sunbeam's acquisition of Coleman, the settlement between CPH and Sunbeam, or any accounting irregularities at Sunbeam in the 1996-1998 period, including but not limited to: *In re Sunbeam Securities Litigation*, 98-8258-

Civ.-Middlebrooks (S.D. Fla); *Camden Asset Management L.P. v. Sunbeam Corporation*, 98-8773-Civ.-Middlebrooks and 98-8275-Civ.-Middlebrooks (S.D. Fla); *Krim v. Dunlap*, No. CL 983168AD (15th Jud. Cir., Fla.); *Stapleton v. Sunbeam Corp.*, No. 98-1676-Civ.-King (S.D. Fla); *Sunbeam Corp. v. PricewaterhouseCoopers LLP*, No. CL 005444AN (15th Jud. Cir., Fla.); *In re Sunbeam Corp., Inc.*, No. 01-40291 (AJG) (Bankr. S.D.N.Y.) and any adversary proceedings therein; *SEC v. Dunlap*, No. 01-8437-Civ.-Middlebrooks (S.D. Fla.); *Oaktree Capital Management LLC v. Arthur Andersen LLP*, No. BC257177 (L.A. Cty., CA); and *Coleman (Parent) Holdings Inc. v. Arthur Andersen LLP*, No. CA 01-06062AN (15th Jud. Cir., Fla.), or any other litigation related to the Coleman Transaction.

14. "MAFCO" means MacAndrews & Forbes Holdings, Inc. and any of its officers, directors, former or present employees, representatives, agents, subsidiaries, parents, or affiliates.
15. "MS & Co." means Morgan Stanley & Co., Incorporated, and any of its officers, directors, former or present employees, representatives and agents.
16. "MSSF" means Morgan Stanley Senior Funding, Inc. and any of its officers, directors, former or present employees, representatives and agents.
17. The term "person" is defined as any natural person or any business, legal or governmental entity or association.
18. The term "relating to" means concerning, evidencing, referring to, or constituting.
19. The "Relevant Period," unless otherwise indicated, shall be from January 1, 1996 through the date of service of this subpoena.
20. "SEC" means the Securities and Exchange Commission.
21. "SEC Administrative Proceedings" means *In the Matter of Sunbeam Corp.*, SEC Administrative Proceeding File No. 3-10481, and *In the Matter of David C. Fannin*, SEC Administrative Proceeding File No. 3-10482.
22. "Skadden" means Skadden, Arps, Slate, Meagher & Flom, LLP and any of its partners, officers, directors, former or present employees, representatives and agents.
23. "Sunbeam" means Sunbeam Corporation and any of its subsidiaries, divisions, predecessors, successors, present and former employees, representatives, and agents.
24. "Synergies" means post-acquisition gains through increased revenue and/or decreased cost.
25. "Wachtell" means Wachtell Lipton Rosen & Katz and any of its partners, officers, directors, former or present employees, representatives and agents.
26. The terms "you" or "your" means Karen K. Clark and any of Karen K. Clark's present and former representatives and agents.

INSTRUCTIONS

1. Documents shall be produced as they are kept in the usual course of business, or organized and labeled to correspond to the categories in this Request. Documents attached to each other should not be separated. Documents consisting of items previously produced in the Litigations, Arbitrations, and/or SEC Administrative Proceedings with Bates numbering shall be produced in Bates number order.
2. All documents shall be produced in the file folder, envelope or other container in which the documents are kept or maintained by you. If, for any reason, the container cannot be produced, produce copies of all labels or other identifying marks.
3. The relevant period, unless otherwise indicated, shall be from January 1, 1996 through the date of service of this subpoena, and shall include all documents and information which relate in whole or in part to such period, or to events or circumstances during such period, even though dated, prepared, generated or received prior or subsequent to that period. Please supplement or correct your responses to these requests if, at any time, you become aware that your responses are incomplete or incorrect in any request.
4. If you claim the attorney-client privilege, or any other privilege or work-product protection for all or any portion of a document, you shall provide a privilege log that describes the withheld material sufficiently to allow Morgan Stanley to test the privilege or protection asserted.
5. The following rules of construction apply:
 1. The connectives “and” and “or” shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery requests all responses that might otherwise be outside their scope;
 2. The term “including” shall be construed to mean “without limitation”; and
 3. The use of the singular form of any word include the plural and vice versa.

Dated: August 17, 2004

1 Lawrence P. Bemis (S.B.N. 213824)
2 Mark T. Cramer (S.B.N. 198952)
3 KIRKLAND & ELLIS LLP
4 777 South Figueroa Street
5 Los Angeles, California 90017
6 Telephone: 213 680-8400
7 Facsimile: 213 680-8500

8 Attorneys for Defendant
9 Morgan Stanley & Co., Inc.

ORIGINAL FILED

AUG 17 2004

**LOS ANGELES
SUPERIOR COURT**

10 SUPERIOR COURT FOR THE STATE OF CALIFORNIA

11 FOR THE COUNTY OF

12 COLEMAN (PARENT) HOLDINGS, INC.,)

13 Plaintiff,)

14 vs.)

15 MORGAN STANLEY & CO., INC.,)

16 Defendant.)

CASE NO. BS091895

DEPOSITION SUBPOENA

CCP 2029

COPY

1 Lawrence P. Bemis (Bar No. 213824)
Mark T. Cramer (Bar No. 198952)
2 KIRKLAND & ELLIS LLP
777 South Figueroa Street
3 Los Angeles, California 90017
Telephone: 213 680-8400
4 Facsimile: 213 680-8500

5 Attorneys for Defendant
Morgan Stanley & Co., Inc.
6
7
8

9 **SUPERIOR COURT FOR THE STATE OF CALIFORNIA**
10 **FOR THE COUNTY OF LOS ANGELES**

11 COLEMAN (PARENT) HOLDINGS, INC.,)

12 Plaintiff,)

13 vs.)

14 MORGAN STANLEY & CO., INC.,)

15 Defendant.)
16

CASE NO.

**NOTICE OF FILING OF AGREED ORDER
APPOINTING COMMISSIONERS AND
COMMISSIONS**

17
18 PLEASE TAKE NOTICE THAT attached hereto is a certified copy of the Agreed Order
19 Appointing Commissioners and Commissions entered on January 21, 2004, in the Circuit Court of
20 the Fifteenth Judicial Circuit in and for Palm Beach County, Florida in Case No. 03 CA-005045 AI.
21

22 DATED: August 17, 2004

KIRKLAND & ELLIS LLP

23
24 By: 

25 Lawrence P. Bemis
26 Mark T. Cramer

27 Attorneys for Defendant
Morgan Stanley & Co., Inc.
28

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CASE NO: 03 CA-005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

DOROTHY H. WILKEN, CLERK
CIR & CO. CT'S. P.B. CO. FL
CIRCUIT CIVIL 9

FILED
JAN 21 PM 4:16

AGREED ORDER APPOINTING COMMISSIONERS AND COMMISSIONS

THIS CAUSE, having come before the Circuit Court in and for Palm Beach County, State of Florida, on the agreement of the parties, and

WHEREAS, it appears to the Court that:

1. Defendant Morgan Stanley & Co. Incorporated ("MS & Co.") desires to take the videotaped depositions of and obtain documents from the following witnesses who reside in California, Connecticut, Kansas, Minnesota, New York, Texas, and the District of Columbia and who have knowledge of facts relevant to this case:

Karen Kay Clark
1674 Amarelle Street
Newbury Park, CA 91320

Frank N. Gifford
126 Taconic Road
Greenwich, CT 06831-3139

Robert J. Duffy
16 Saint Nicholas Road
Darien, CT 06820-2823

211

Joseph P. Page
921 Sheridan Street, Apt. 119
Wichita, KS 67213-1363

William H. Spoor
622 West Ferndale Road
Wayzata, MN 55391

Adam Emmerich
Wachtell, Lipton, Rosen & Katz
51 West 52nd Street
New York, NY 10019

Steven Cohen
Wachtell, Lipton, Rosen & Katz
51 West 52nd Street
New York, NY 10019

Steven K. Geller
301 East 79th Street, Apt. 4H
New York, NY 10021-0932

Donald Uzzi
4209 Beverly Dr.
Dallas, TX 75205-3020

Ann Dibble Jordan
2940 Benton Place NW
Washington, DC 20008

2. You are hereby appointed as commissioners to take the videotaped testimony (and obtain the requested documentation) of the above witnesses and other witnesses whose discovery is sought in the commissions' jurisdiction under oath and on oral examination in accordance with the applicable Florida Statutes and Rules of Civil Procedure:

Esquire Santa Ana
2100 North Broadway, Second Floor
Santa Ana, CA 97206

Del Vecchio Reporting
117 Randi Drive
Madison, CT 06443

Harper Court Reporting
P.O. Box 3008
Wichita, KS 67201

Kirby Kennedy & Associates
5200 Wilson Road #219
Minneapolis, MN 55424

Esquire Deposition Services
216 E. 45th Street, 8th FL
New York, New York 10017-3304

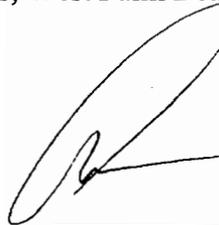
Esquire Deposition Services
703 McKinney Avenue #320
Dallas, Texas 75202

Esquire Deposition Services
1020 19th Street NW, #621
Washington, DC 20036

or any person able to administer oaths pursuant to the laws of California, Connecticut, Kansas, Minnesota, New York, Texas, and the District of Columbia and duly authorized by him.

3. This order does not purport to grant the power of the commissioners appointed to subpoena witnesses or documents, but simply the power to administer oaths and transcribe deposition testimony.

DONE AND ORDERED in Chambers, West Palm Beach, Palm Beach County, Florida
this 25 day of January, 2004.



ELIZABETH T. MAASS
Circuit Court Judge

Coleman (Parent) Holdings v. Morgan Stanley & Co. Inc.
2003 CA 005045AI
Agreed Order on Appointment of Commission

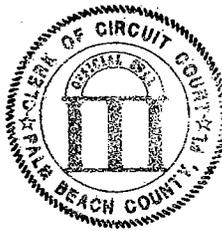
Copies furnished to:

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368

John Scarola, Esq.
SEARCY, DENNEY, SCAROLA, BARNHARDT
& SHIPLEY, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33409
Telephone: (561) 686-3000
Facsimile: (561) 478-0754

Thomas D. Yannucci, P.C.
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

Jerold S. Solovy
JENNER & BLOCK, LLC
One IBM Plaza
Suite 4400
Chicago, Illinois 60611
Telephone: (312) 222-9350
Facsimile: (312) 527-0484



PALM BEACH COUNTY - STATE OF FLORIDA
I HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY OF RECORD IN MY OFFICE

THIS 26 DAY OF January 20 04
DOROTHY H. WILKIN
CLERK CIRCUIT COURT

BY Keay M. Gandy DC

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, state bar number, and address):
 Lawrence P. Bemis (Cal. Bar No. 213824)
 Mark T. Cramer (Cal. Bar No. 198952)
 Kirkland & Ellis LLP
 777 So. Figueroa St., Ste. 3400
 Los Angeles, CA 90017
 TELEPHONE NO.: (213) 680-8400 FAX NO.: (213) 680-8500

FOR COURT USE ONLY

ORIGINAL FILED

AUG 17 2004

LOS ANGELES SUPERIOR COURT

ATTORNEY FOR (Name):
 SUPERIOR COURT OF CALIFORNIA, COUNTY OF Los Angeles
 STREET ADDRESS: 111 North Hill Street
 MAILING ADDRESS:
 CITY AND ZIP CODE: Los Angeles, CA 90012
 BRANCH NAME: CENTRAL

CASE NAME: COLEMAN (PARENT) HOLDINGS, INC. v. MORGAN STANLEY CO., INC.

CIVIL CASE COVER SHEET

Unlimited (Amount demanded exceeds \$25,000) **Limited** (Amount demanded is \$25,000 or less)

Complex Case Designation

Counter **Joinder**

Filed with first appearance by defendant (Cal. Rules of Court, rule 1811)

CASE NUMBER: BS091895

JUDGE:

DEPT.:

All five (5) items below must be completed (see instructions on page 2).

1. Check one box below for the case type that best describes this case:
- | | | |
|---|---|--|
| <p>Auto Tort</p> <p><input type="checkbox"/> Auto (22)</p> <p><input type="checkbox"/> Uninsured motorist (46)</p> <p>Other PI/PD/WD (Personal Injury/Property Damage/Wrongful Death) Tort</p> <p><input type="checkbox"/> Asbestos (04)</p> <p><input type="checkbox"/> Product liability (24)</p> <p><input type="checkbox"/> Medical malpractice (45)</p> <p><input type="checkbox"/> Other PI/PD/WD (23)</p> <p>Non-PI/PD/WD (Other) Tort</p> <p><input type="checkbox"/> Business tort/unfair business practice (07)</p> <p><input type="checkbox"/> Civil rights (08)</p> <p><input type="checkbox"/> Defamation (13)</p> <p><input type="checkbox"/> Fraud (16)</p> <p><input type="checkbox"/> Intellectual property (19)</p> <p><input type="checkbox"/> Professional negligence (25)</p> <p><input type="checkbox"/> Other non-PI/PD/WD tort (35)</p> <p>Employment</p> <p><input type="checkbox"/> Wrongful termination (36)</p> <p><input type="checkbox"/> Other employment (15)</p> | <p>Contract</p> <p><input type="checkbox"/> Breach of contract/warranty (06)</p> <p><input type="checkbox"/> Collections (09)</p> <p><input type="checkbox"/> Insurance coverage (18)</p> <p><input type="checkbox"/> Other contract (37)</p> <p>Real Property</p> <p><input type="checkbox"/> Eminent domain/Inverse condemnation (14)</p> <p><input type="checkbox"/> Wrongful eviction (33)</p> <p><input type="checkbox"/> Other real property (26)</p> <p>Unlawful Detainer</p> <p><input type="checkbox"/> Commercial (31)</p> <p><input type="checkbox"/> Residential (32)</p> <p><input type="checkbox"/> Drugs (38)</p> <p>Judicial Review</p> <p><input type="checkbox"/> Asset forfeiture (05)</p> <p><input type="checkbox"/> Petition re: arbitration award (11)</p> <p><input type="checkbox"/> Writ of mandate (02)</p> <p><input type="checkbox"/> Other judicial review (39)</p> | <p>Provisionally Complex Civil Litigation (Cal. Rules of Court, rules 1800-1812)</p> <p><input type="checkbox"/> Antitrust/Trade regulation (03)</p> <p><input type="checkbox"/> Construction defect (10)</p> <p><input type="checkbox"/> Mass tort (40)</p> <p><input type="checkbox"/> Securities litigation (28)</p> <p><input type="checkbox"/> Environmental/Toxic tort (30)</p> <p><input type="checkbox"/> Insurance coverage claims arising from the above listed provisionally complex case types (41)</p> <p>Enforcement of Judgment</p> <p><input type="checkbox"/> Enforcement of judgment (20)</p> <p>Miscellaneous Civil Complaint</p> <p><input type="checkbox"/> RICO (27)</p> <p><input type="checkbox"/> Other complaint (not specified above) (42)</p> <p>Miscellaneous Civil Petition</p> <p><input type="checkbox"/> Partnership and corporate governance (21)</p> <p><input checked="" type="checkbox"/> Other petition (not specified above) (43)</p> |
|---|---|--|

2. This case is is not complex under rule 1800 of the California Rules of Court. If case is complex, mark the factors requiring exceptional judicial management:
- a. Large number of separately represented parties d. Large number of witnesses
- b. Extensive motion practice raising difficult or novel issues that will be time-consuming to resolve e. Coordination with related actions pending in one or more courts in other counties, states or countries, or in a federal court
- c. Substantial amount of documentary evidence f. Substantial post-judgment judicial supervision
3. Type of remedies sought (check all that apply):
- a. monetary b. nonmonetary; declaratory or injunctive relief c. punitive
4. Number of causes of action (specify): 4 (plus 2 counter-claims)
5. This case is is not a class action suit.

Date: Mark T. Cramer (Cal. Bar No. 198952)

(TYPE OR PRINT NAME)



(SIGNATURE OF PARTY OR ATTORNEY FOR PARTY)

NOTICE

- Plaintiff must file this cover sheet with the first paper filed in the action or proceeding (except small claims cases or cases filed under the Probate, Family, or Welfare and Institutions Code). (Cal. Rules of Court, rule 201.8.) Failure to file may result in sanctions.
- File this cover sheet in addition to any cover sheet required by local court rule.
- If this case is complex under rule 1800 et seq. of the California Rules of Court, you must serve a copy of this cover sheet on all other parties to the action or proceeding.
- Unless this is a complex case, this cover sheet shall be used for statistical purposes only.

COPY

**CIVIL CASE COVER SHEET ADDENDUM AND STATEMENT OF LOCATION
(CERTIFICATE OF GROUNDS FOR ASSIGNMENT TO COURTHOUSE LOCATION)**

This form is required pursuant to LASC Local Rule 2.0 in all new civil case filings in the Los Angeles Superior Court.

Item I. Check the types of hearing and fill in the estimated length of hearing expected for this case:

JURY TRIAL? YES CLASS ACTION? YES LIMITED CASE? YES TIME ESTIMATED FOR TRIAL _____ HOURS/ DAYS.

Item II. Select the correct district and courthouse location (4 steps – If you checked "Limited Case", skip to Item III, Pg. 4):

Step 1: After first completing the Civil Case Cover Sheet Form, find the main civil case cover sheet heading for your case in the left margin below, and, to the right in Column A, the Civil Case Cover Sheet case type you selected.

Step 2: Check one Superior Court type of action in Column B below which best describes the nature of this case.

Step 3: In Column C, circle the reason for the court location choice that applies to the type of action you have checked.

For any exception to the court location, see Los Angeles Superior Court Local Rule 2.0.

Applicable Reasons for Choosing Courthouse Location (See Column C below)

1. Class Actions must be filed in the County Courthouse, Central District.
2. May be filed in Central (Other county, or no Bodily Injury/Property Damage).
3. Location where cause of action arose.
4. Location where bodily injury, death or damage occurred.
5. Location where performance required or defendant resides.
6. Location of property or permanently garaged vehicle.
7. Location where petitioner resides.
8. Location wherein defendant/respondent functions wholly.
9. Location where one or more of the parties reside.
10. Location of Labor Commissioner Office.

Step 4: Fill in the information requested on page 4 in Item III; complete Item IV. Sign the declaration.

	A Civil Case Cover Sheet Category No.	B Type of Action (Check only one)	C Applicable Reasons - See Step 3 Above
Auto Tort	Auto (22)	<input type="checkbox"/> A7100 Motor Vehicle - Personal Injury/Property Damage/Wrongful Death	1., 2., 4.
	Uninsured Motorist (46)	<input type="checkbox"/> A7110 Personal Injury/Property Damage/Wrongful Death – Uninsured Motorist	1., 2., 4.
Other Personal Injury/Property Damage/Wrongful Death Tort	Asbestos (04)	<input type="checkbox"/> A6070 Asbestos Property Damage	2.
		<input type="checkbox"/> A7221 Asbestos - Personal Injury/Wrongful Death	2.
	Product Liability (24)	<input type="checkbox"/> A7260 Product Liability (not asbestos or toxic/environmental)	1., 2., 3., 4., 8.
	Medical Malpractice (45)	<input type="checkbox"/> A7210 Medical Malpractice - Physicians & Surgeons	1., 2., 4.
		<input type="checkbox"/> A7240 Other Professional Health Care Malpractice	1., 2., 4.
Other Personal Injury Property Damage Wrongful Death (23)	<input type="checkbox"/> A7250 Premises Liability (e.g., slip and fall)	1., 2., 4.	
	<input type="checkbox"/> A7230 Intentional Bodily Injury/Property Damage/Wrongful Death (e.g., assault, vandalism, etc.)	1., 2., 4.	
	<input type="checkbox"/> A7270 Intentional Infliction of Emotional Distress	1., 2., 3.	
	<input type="checkbox"/> A7220 Other Personal Injury/Property Damage/Wrongful Death	1., 2., 4.	
Non-Personal Injury/Property Damage/Wrongful Death Tort	Business Tort (07)	<input type="checkbox"/> A6029 Other Commercial/Business Tort (not fraud/breach of contract)	1., 2., 3.
	Civil Rights (08)	<input type="checkbox"/> A6005 Civil Rights/Discrimination	1., 2., 3.
	Defamation (13)	<input type="checkbox"/> A6010 Defamation (slander/libel)	1., 2., 3.
	Fraud (16)	<input type="checkbox"/> A6013 Fraud (no contract)	1., 2., 3.
	Intellectual Property (19)	<input type="checkbox"/> A6016 Intellectual Property	2., 3.

COPY

SHORT TITLE: COLEMAN (PARENT) HOLDINGS, INC. v. MORGAN STANLEY & CO., INC.

CASE NUMBER

Non-Personal Injury/Property Damage/
Wrongful Death Tort (Cont'd.)

Employment

Contract

Real Property

Unlawful Detainer

Judicial Review

A Civil Case Cover Sheet Category No.	B Type of Action (Check only one)	C Applicable Reasons - See Step 3 Above
Professional Negligence (25)	<input type="checkbox"/> A6017 Legal Malpractice <input type="checkbox"/> A6050 Other Professional Malpractice (not medical or legal)	1., 2., 3. 1., 2., 3.
Other (35)	<input type="checkbox"/> A6025 Other Non-Personal Injury/Property Damage tort	2., 3.
Wrongful Termination (36)	<input type="checkbox"/> A6037 Wrongful Termination	1., 2., 3.
Other Employment (15)	<input type="checkbox"/> A6024 Other Employment Complaint Case <input type="checkbox"/> A6109 Labor Commissioner Appeals	1., 2., 3. 10.
Breach of Contract/Warranty (06) (not insurance)	<input type="checkbox"/> A6004 Breach of Rental/Lease Contract (not Unlawful Detainer or wrongful eviction) <input type="checkbox"/> A6008 Contract/Warranty Breach-Seller Plaintiff (no fraud/negligence) <input type="checkbox"/> A6019 Negligent Breach of Contract/Warranty (no fraud) <input type="checkbox"/> A6028 Other Breach of Contract/Warranty (not fraud or negligence)	2., 5. 2., 5. 1., 2., 5. 1., 2., 5.
Collections (09)	<input type="checkbox"/> A6002 Collections Case-Seller Plaintiff <input type="checkbox"/> A6012 Other Promissory Note/Collections Case	2., 5., 6. 2., 5.
Insurance Coverage (18)	<input type="checkbox"/> A6015 Insurance Coverage (not complex)	1., 2., 5., 8.
Other Contract (37)	<input type="checkbox"/> A6009 Contractual Fraud <input type="checkbox"/> A6031 Tortious Interference <input type="checkbox"/> A6027 Other Contract Dispute (not breach/insurance/fraud/negligence)	1., 2., 3., 5. 1., 2., 3., 5. 1., 2., 3., 8.
Eminent Domain/Inverse Condemnation (14)	<input type="checkbox"/> A7300 Eminent Domain/Condemnation Number of parcels _____	2.
Wrongful Eviction (33)	<input type="checkbox"/> A6023 Wrongful Eviction Case	2., 6.
Other Real Property (26)	<input type="checkbox"/> A6018 Mortgage Foreclosure <input type="checkbox"/> A6032 Quiet Title <input type="checkbox"/> A6060 Other Real Property (not eminent domain, landlord/tenant, foreclosure)	2., 6. 2., 6. 2., 6.
Unlawful Detainer - Commercial (31)	<input type="checkbox"/> A6021 Unlawful Detainer-Commercial (not drugs or wrongful eviction)	2., 6.
Unlawful Detainer - Residential (32)	<input type="checkbox"/> A6020 Unlawful Detainer-Residential (not drugs or wrongful eviction)	2., 6.
Unlawful Detainer - Drugs (38)	<input type="checkbox"/> A6022 Unlawful Detainer-Drugs	2., 6.
Asset Forfeiture (05)	<input type="checkbox"/> A6108 Asset Forfeiture Case	2., 6.
Petition re Arbitration (11)	<input type="checkbox"/> A6115 Petition to Compel/Confirm/ Vacate Arbitration	2., 5.

Judicial Review (Cont'd.)

Provisionally Complex Litigation

Enforcement of Judgment

Miscellaneous Civil Complaints

Miscellaneous Civil Petitions

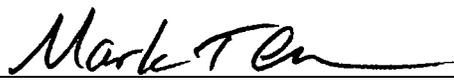
A Civil Case Cover Sheet Category No.	B Type of Action (Check only one)	C Applicable Reasons - See Step 3 Above
Writ of Mandate (02)	<input type="checkbox"/> A6151 Writ - Administrative Mandamus <input type="checkbox"/> A6152 Writ - Mandamus on Limited Court Case Matter <input type="checkbox"/> A6153 Writ - Other Limited Court Case Review	2., 8. 2. 2.
Other Judicial Review (39)	<input type="checkbox"/> A6150 Other Writ / Judicial Review	2., 8.
Antitrust/Trade Regulation (03)	<input type="checkbox"/> A6003 Antitrust/Trade Regulation	1., 2., 8.
Construction Defect (10)	<input type="checkbox"/> A6007 Construction defect	1., 2., 3.
Claims Involving Mass Tort (40)	<input type="checkbox"/> A6006 Claims Involving Mass Tort	1., 2., 8.
Securities Litigation (28)	<input type="checkbox"/> A6035 Securities Litigation Case	1., 2., 8.
Toxic Tort Environmental (30)	<input type="checkbox"/> A6036 Toxic Tort/Environmental	1., 2., 3., 8.
Insurance Coverage Claims from Complex Case (41)	<input type="checkbox"/> A6014 Insurance Coverage/Subrogation (complex case only)	1., 2., 5., 8.
Enforcement of Judgment (20)	<input type="checkbox"/> A6141 Sister State Judgment <input type="checkbox"/> A6160 Abstract of Judgment <input type="checkbox"/> A6107 Confession of Judgment (non-domestic relations) <input type="checkbox"/> A6140 Administrative Agency Award (not unpaid taxes) <input type="checkbox"/> A6114 Petition/Certificate for Entry of Judgment on Unpaid Tax <input type="checkbox"/> A6112 Other Enforcement of Judgment Case	2., 9. 2., 6. 2., 9. 2., 8. 2., 8. 2., 8., 9.
RICO (27)	<input type="checkbox"/> A6033 Racketeering (RICO) Case	1., 2., 8.
Other Complaints (Not Specified Above) (42)	<input type="checkbox"/> A6030 Declaratory Relief Only <input type="checkbox"/> A6040 Injunctive Relief Only (not domestic/harassment) <input type="checkbox"/> A6011 Other Commercial Complaint Case (non-tort/non-complex) <input type="checkbox"/> A6000 Other Civil Complaint (non-tort/non-complex)	1., 2., 8. 2., 8. 1., 2., 8. 1., 2., 8.
Partnership/Corporation Governance (21)	<input type="checkbox"/> A6113 Partnership and Corporate Governance Case	2., 8.
Other Petitions (Not Specified Above) (43)	<input type="checkbox"/> A6121 Civil Harassment <input type="checkbox"/> A6123 Workplace Harassment <input type="checkbox"/> A6124 Elder/Dependent Adult Abuse Case <input type="checkbox"/> A6190 Election Contest <input type="checkbox"/> A6110 Petition for Change of Name <input type="checkbox"/> A6170 Petition for Relief from Late Claim Law <input checked="" type="checkbox"/> A6100 Other Civil Petition	2., 3., 9. 2., 3., 9. 2., 3., 9. 2. 2., 7. 2., 3., 4., 8. 2., 9.

Item III. Statement of Location: Enter the address of the accident, party's residence or place of business, performance, or other circumstance indicated in Item II., **Step 3** on Page 1, as the proper reason for filing in the court location you selected.

REASON: CHECK THE NUMBER UNDER COLUMN C WHICH APPLIES IN THIS CASE			ADDRESS:
<input type="checkbox"/> 1. <input checked="" type="checkbox"/> 2. <input type="checkbox"/> 3. <input type="checkbox"/> 4. <input type="checkbox"/> 5. <input type="checkbox"/> 6. <input type="checkbox"/> 7. <input type="checkbox"/> 8. <input type="checkbox"/> 9. <input type="checkbox"/> 10.			1674 AMARELLE STREET
CITY: NEWBURY PARK	STATE: CA	ZIP CODE: 91320	

Item IV. *Declaration of Assignment*: I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that the above-entitled matter is properly filed for assignment to the COUNTY courthouse in the CENTRAL District of the Los Angeles Superior Court (Code of Civ. Proc., § 392 et seq., and LASC Local Rule 2.0, subds. (b), (c) and (d)).

Dated: August 17, 2004


 (SIGNATURE OF ATTORNEY/FILING PARTY)

PLEASE HAVE THE FOLLOWING DOCUMENTS COMPLETED AND READY TO BE FILED IN ORDER TO PROPERLY COMMENCE YOUR NEW COURT CASE:

1. Original Complaint or Petition.
2. If filing a Complaint, a completed Summons form for issuance by the Clerk.
3. Civil Case Cover Sheet form JC 982.2(b)(1).
4. Complete Addendum to Civil Case Cover Sheet form CIV 109 _____ (eff. Date).
5. Payment in full of the filing fee, unless fees have been waived.
6. Signed order appointing the Guardian ad Litem, JC form 982(a)(27), if the plaintiff or petitioner is a minor under 18 years of age, or if required by Court.
7. Additional copies of documents to be conformed by the Clerk. Copies of the cover sheet and this addendum must be served along with the summons and complaint, or other initiating pleading in the case.

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff,

vs.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO., INC.,
Defendant.

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff,

vs.

CASE NO: CA 03-5165 AI

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant.

NOTICE OF VIDEOTAPED DEPOSITION

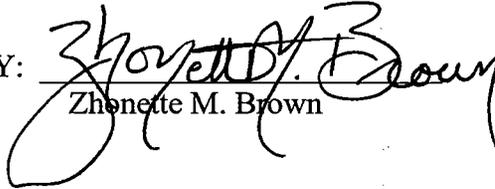
PLEASE TAKE NOTICE that Morgan Stanley & Company Incorporated and Morgan Stanley Senior Funding, Inc. will take the videotaped deposition of Karen K. Clark, pursuant to Florida Rules of Civil Procedure 1.280 and 1.310. The oral examination will take place beginning on September 1, 2004, at 9:30 a.m. and continue from day to day until completed at the offices of Kirkland & Ellis, LLP, 777 South Figueroa Street, Los Angeles, California, 90017. The deposition will be taken before a person authorized to administer oaths and recorded by stenographic and videographic means. The video operator will be Esquire Santa Ana of 2100 N. Broadway in Santa Ana, California. The witness is instructed to produce all books, papers, and other things in her possession or under her control relevant to this lawsuit (and not previously produced in discovery) on August 27, 2004.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and regular mail on this 17th day of August, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar No. 618349)
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
E-mail: jianno@carltonfields.com

BY: 
Zhonette M. Brown

*Counsel for Morgan Stanley & Co.
Incorporated and Morgan Stanley Senior
Funding*

SERVICE LIST

Jack Scarola
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy
Michael Brody
JENNER & BLOCK, LLC
One IBM Plaza, Suite 400
Chicago, IL 60611

CARLTON FIELDS, P.A.

ATTORNEYS AT LAW

Esperanté
222 Lakeview Avenue, Suite 1400
West Palm Beach, Florida 33401-6149

MAILING ADDRESS
P.O. Box 150, West Palm Beach, FL 33402-0150
Tel 561.659.7070 Fax 561.659.7368

FAX COVER SHEET

Date:	Phone Number	Fax Number
August 19, 2004		
To: Jack Scarola, Esq.	(561) 689-6300	(561) 684-5816
Jerold Solovy, Esq.	(312) 923-2711	(312) 840-7671
Michael Brody		(312) 840-7711
Thomas Clare, Esq.		(202) 879-5200
From: Joyce Dillard, CLA to Joseph Ianno, Jr.	(561) 659.7070	(561) 659.7368

Client/Matter No.: 47877/14092

Employee No.:

Total Number of Pages Being Transmitted, Including Cover Sheet: 4

Message: To follow please find a copy of Morgan Stanley's Notice of Hearing of today's date.

- Original to follow Via Regular Mail
 Original will Not be Sent
 Original will follow via Overnight Courier

The information contained in this facsimile message is attorney privileged and confidential information intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone (if long distance, please call collect) and return the original message to us at the above address via the U.S. Postal Service. Thank you.

If there are any problems or complications, please notify us immediately at:
561.659.7070

Telecopier operator: _____

WPB#567902.6

CARLTON FIELDS, P.A.

Miami Orlando St. Petersburg Tallahassee Tampa West Palm Beach

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

v.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO., INC.,

Defendant.

MORGAN STANLEY SENIOR FUNDING, INC.,

Plaintiff,

v.

CASE NO: CA 03-5165 AI

MACANDREWS & FORBES HOLDINGS, INC.,

Defendant.

NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that a hearing has been set in the above-styled case as follows:

DATE:	August 27, 2004
TIME:	8:00 a.m. (2 hours reserved)
PLACE:	Palm Beach County Courthouse, Courtroom 11A 205 North Dixie Highway West Palm Beach, Florida 33401
BEFORE:	Judge Elizabeth T. Maass
CONCERNING:	Morgan Stanley's Motion to Compel Production

Coleman v. Morgan Stanley
Case No: 03-CA-005045 AJ
Notice of Hearing
Page 3

SERVICE LIST

Jack Scarola
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy
Michael Brody
JENNER & BLOCK, LLC
One IBM Plaza, Suite 400
Chicago, IL 60611

Coleman v. Morgan Stanley
Case No: 03-CA-005045 AI
Notice of Hearing
Page 2

KINDLY GOVERN YOURSELVES ACCORDINGLY.

The undersigned counsel hereby certifies that a good faith attempt to resolve the issues contained in the foregoing motions or matters will be made with opposing counsel prior to hearing on these matters on the Court's Motion Calendar.

If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no costs to you, to the provision of certain assistance. Please contact the ADA Coordinator in the Administrative Office of the Court, Palm Beach County Courthouse, 205 North Dixie Highway, Room 5.2500, West Palm Beach, Florida 33401; telephone number (561) 355-2431 within two (2) working days of your receipt of this notice; if you are hearing or voice impaired, call 1-800-955-8771.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this *19th* day of August, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar No. 618349)
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

Counsel for Defendant
Morgan Stanley & Co. Incorporated

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

BY: *Joseph Ianno, Jr.* 0046105
JCI Joseph Ianno, Jr.
Florida Bar No. 655351

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, 1N AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.

MORGAN STANLEY SENIOR FUNDING, CASE NO. CA 03-5165 AI INC.,

Plaintiff,

vs.

MACANDREWS & FORBES HOLDINGS
INC., et al.,

Defendant.

**JOINT SUBMISSION OF THE PARTIES FOR
AUGUST 27, 2004 CASE MANAGEMENT CONFERENCE**

Pursuant to the Court's Order of February 24, 2004, the parties in the above-referenced action hereby submit the following Joint Submission in advance of the August 27, 2004 Case Management Conference.

I. Agreed-Upon Statement Of Background And Procedural History

The following is the parties' agreed-upon summary of the two companion cases now pending before this Court, which have been consolidated for trial.

A. Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co. Incorporated. (Case No. 03 CA-005045 AI)

Background. This case arises out of an acquisition transaction that was negotiated and consummated in late 1997 and early 1998, in which Coleman (Parent) Holdings Inc. (“CPH”) sold its 82% interest in The Coleman Company, Inc. (“Coleman”) to Sunbeam Corporation (“Sunbeam”). Morgan Stanley & Co., Inc. (“Morgan Stanley”) served as financial advisor to Sunbeam for parts of the acquisition transaction and served as the lead underwriter for a \$750,000,000 debenture offering that Sunbeam used to finance the acquisition.

CPH’s Complaint alleges claims arising from this transaction for fraudulent misrepresentation, negligent misrepresentation, aiding and abetting fraud, and conspiracy. CPH’s Complaint has sought damages of at least \$485 million and has reserved the right to seek punitive damages. Morgan Stanley denies the material allegations in CPH’s Complaint and also denies CPH’s entitlement to damages.

Procedural History. CPH filed its Complaint on May 8, 2003 (the “CPH Action”). Morgan Stanley filed its Answer on June 23, 2003 and, on June 25, 2003 filed its Motion to Dismiss Pursuant To Florida Rule of Civil Procedure 1.061 Or, In the Alternative, For Judgment On The Pleadings. The Court held a hearing on these motions on December 12, 2003. On December 15, 2003, the Court issued an Order denying both motions. On January 9, 2004, Morgan Stanley timely filed a Notice of Appeal regarding the denial of its motion to dismiss. *See* Florida Rule of Appellate Procedure 9.130(a)(3)(A) (providing for interlocutory appellate review of non-final orders “concerning venue”). On February 20, 2004, the Court consolidated CPH’s action against Morgan Stanley with Morgan Stanley Senior Funding’s action against CPH and MacAndrews & Forbes Holdings Inc.

B. Morgan Stanley Senior Funding, Inc. v. MacAndrews & Forbes Holdings Inc., et al. (Case No. 03 CA-005165 Al)

Background. This action arises out of the same series of financial transactions as the

CPH Action. In 1998, Morgan Stanley Senior Funding, Inc. (“MSSF”) and other lenders entered into a credit agreement with Sunbeam under which MSSF agreed to provide senior secured financing to Sunbeam in connection with Sunbeam’s acquisition of Coleman and two smaller companies.

MSSF’s Complaint alleges that, in the course of Sunbeam’s acquisition of Coleman, Defendants MacAndrews & Forbes Holdings Inc. (“MAFCO”) and CPH provided false information to MSSF about the “synergies” that Sunbeam would achieve from the combination of Sunbeam and Coleman. MSSF alleges that Defendant’s inflated synergy projections caused Sunbeam to pay a higher price to acquire Coleman and consequently caused Sunbeam’s lenders (including MSSF) to make larger loans to finance the acquisition. MSSF’s Complaint alleges that it suffered hundreds of millions of dollars in damages when Sunbeam declared bankruptcy in February 2001 and defaulted on acquisition-related loans. MSSF has alleged claims for fraud and negligent misrepresentation, and has reserved the right to seek punitive damages. CPH denies the material allegations in MSSF’s Complaint and also denies MSSF’s entitlement to damages.

Procedural History. MSSF filed its Complaint against MAFCO and CPH on May 12, 2003 (the “MSSF Action”). The MSSF Action was initially assigned to Division AG. Because the MSSF Action and the CPH Action involve the same series of financial transactions and arise from a common set of operative facts, the parties agreed that the two cases are companion cases under Local Rule 2.009 and requested a transfer to Division AI, where the first-filed, lower numbered CPH Action was assigned. The motion to transfer was granted on June 9, 2003. Defendants CPH and MAFCO filed their Answer on June 25, 2003. On February 20, 2004, the Court consolidated MSSF’s action against CPH and MAFCO with CPH’s action against Morgan Stanley.

II. Report On Discovery In The Two Cases

A. Morgan Stanley's And MSSF's Position On Discovery

1. Merits Discovery

CPH, MAFCO, Morgan Stanley, and MSSF are actively pursuing written and deposition discovery in these consolidated actions. The parties have exchanged hundreds of thousands of pages of documents, have served and answered multiple sets of interrogatories and requests for admission, and have deposed more than two dozen party and non-party witnesses. Discovery in both cases is ongoing.

At the February 20, 2004 Case Management Conference, counsel for Morgan Stanley informed the Court that — according to counsel's best estimates — approximately seventy (70) additional depositions would need to be completed before the close of fact discovery. Thereafter, on or about March 11, the parties agreed to take alternate weeks for taking and defending depositions.

Since the February 20 Case Management Conference, twenty-seven (27) additional depositions have been completed. Four (4) more depositions have been scheduled and are confirmed for the weeks ahead. Morgan Stanley has ten (10) outstanding requests for deposition dates of CPH, MAFCO, and Coleman witnesses — and has attempted to secure deposition dates for several additional non-party witnesses. At the July 23 Case Management Conference, counsel for Morgan Stanley advised the Court that — according to counsel's best estimates approximately forty-three (43) days of deposition testimony remain to be completed. That number will increase, however, in light of additional depositions requested by CPH and MAFCO since the July 23 Case Management Conference. CPH and MAFCO have requested the depositions of four (4) additional current or former Morgan Stanley employees — and have

requested one (1) additional Rule 1.310 deposition (bringing the total number to 7).

In their Position on Discovery (below), CPH and MAFCO state that thirty (30) depositions have been taken by CPH and MAFCO, and fourteen (14) have been taken by MS & Co. and MSSF. But those figures — and the table prepared by CPH and MAFCO to summarize the depositions — do not accurately reflect the depositions taken by Morgan Stanley. Seven (7) of the third-party witnesses identified by CPH and MAFCO as “taken by” CPH and MAFCO were, in reality, examined by Morgan Stanley as well. Moreover, CPH and MAFCO count the Rule 1.310 deposition of Steven Fasman (taken by Morgan Stanley) as a single deposition, when in fact Mr. Fasman appeared for two separate Rule 1.310 depositions.’¹ In reality, twenty-one (21) witnesses have been deposed by Morgan Stanley.

The parties have experienced considerable difficulty scheduling depositions in light of scheduling conflicts for counsel on both sides and the location of the witnesses, almost all of whom are located outside of Florida. CPH and MAFCO have offered witnesses for depositions outside of Florida on dates previously established by the Court for Case Management Conferences (or on the day before in New York) and have, on several occasions, confirmed (and then canceled or postponed) depositions previously set to go forward.

For example, CPH and MAFCO twice postponed the deposition of Barry Schwartz (now completed), postponed the deposition of Bruce Slovin (now completed), and postponed the deposition of James Robinson, for various reasons ranging from “unavoidable conflicts” to “medical emergencies.” Another CPH / MAFCO witness, Lawrence Jones, was only available on a day that had been previously scheduled by the Court for a Case Management Conference, and is now expected to be unavailable for an unspecified amount of time due to upcoming surgery.

¹ CPH and MAFCO count the corresponding Rule 1.310 depositions of Morgan Stanley witnesses as two separate depositions.

Similar scheduling considerations have required Morgan Stanley to postpone the depositions of other deposition witnesses, many of whom no longer work for Morgan Stanley and are no longer under its control.

Even when depositions have been successfully scheduled, the parties have experienced difficulties beyond their control that have prevented the deposition from going forward. When Mr. Schwartz's deposition was finally scheduled and confirmed for June 18, for example, the deposition needed to be postponed (for a third time) because Morgan Stanley's attorneys were unable to make it to New York for the deposition due to inclement weather and cancelled flights.

Morgan Stanley is of course willing to accommodate the legitimate scheduling considerations of witnesses and their counsel — but these schedule conflicts and difficulties have prevented the parties from proceeding with depositions at the pace contemplated during the February 20 Case Management Conference.

Finally, the parties have had to divert resources away from deposition discovery to address collateral issues unrelated to the merits of these consolidated actions. These issues are discussed in the next section.

2. Non-Merits Discovery

On March 12, CPH filed its Motion For A Rule To Show Cause. On May 14, 2004, the Court converted CPH's Motion for a Rule To Show Cause into a Motion for Contempt. On July 30, 2004, Morgan Stanley filed its Motion to Dismiss or Strike Plaintiff's Motion For Contempt. That motion, which is based on the Court's determination and July 26 Order that the Settlement Agreement was properly in the public domain as part of the Court's public file since December 2003, will be heard during the August 13 Case Management Conference. If granted, Morgan Stanley's Motion to Dismiss or Strike would obviate the need for further non-merits discovery,

and would allow the parties and the Court to return their full attention to the merits of these consolidated actions.

On March 19, CPH served its first set of interrogatories relating to its motion for contempt. Morgan Stanley responded to those Interrogatories on June 16, 2004 and provided supplemental responses to CPH on June 29, 2004. On July 12, 2004, the Court entered an Order directing Morgan Stanley to supplement its responses to those Interrogatories within twenty days, including certain responses to be filed directly with the Court under seal. Morgan Stanley provided the non-privileged portions of its amended responses to CPH on August 2, 2004. Morgan Stanley has completed the *in camera* portion of its amended responses and is prepared to submit the *in camera* portion directly to the Court, pending the Court's ruling on Morgan Stanley's Motion for Enlargement of Time, which will be heard during Uniform Motion Calendar on August 10.

On May 28, CPH served its second set of interrogatories relating to its motion for contempt — together with a set of document requests relating to that motion. On that same date, Morgan Stanley served its own interrogatories and requests for documents on CPH relating to CPH's motion for contempt. The parties served responses and objections to this “second wave” of non-merits discovery on June 28, 2004. Based on correspondence received from CPH and MAFCO, Morgan Stanley expects additional “waves” of non-merits discovery to be served in the weeks and months ahead, further diverting the parties from the merits.

CPH's contempt motion, together with CPH's related Motion to Allow Arthur Andersen Access to Confidential Transcript (filed May 5, 2004) and other motions relating to the confidentiality of documents and pleadings, have required extensive additional briefing, necessitated attendance of counsel at multiple specially-set hearings in Florida, and the

preparation of non-merits discovery requests and responses. CPH's objections also have prevented attorneys from Kellogg, Huber, Hansen, Todd, and Evans P.L.L.C. ("KHTE") from participating as co-counsel and assisting with discovery. These satellite issues have prevented the parties from conducting depositions at the pace originally contemplated during the February 20, 2004 Case Management Conference.

CPH and MAFCO, acting in concert with Arthur Andersen, are using the non-merits discovery served in these cases to manipulate the proceedings in these consolidated actions and Civil Action No. 04-22577 AA, now pending before Judge Miller. In pleadings filed with Judge Miller, Arthur Andersen has moved for sanctions against Morgan Stanley, sought to disqualify Morgan Stanley's attorneys in that action, and moved to stay all discovery in that action. Simultaneously, CPH (who has professed a "unity of interest" with Arthur Andersen) has sought, through the non-merits discovery served in these consolidated actions, to discover detailed information regarding Morgan Stanley's damages claims in the Civil Action No. 04-22577 AA. CPH seeks this information despite the fact that Arthur Andersen is not a party in these consolidated actions; Kirkland & Ellis LLP does not represent Morgan Stanley in Civil Action No. 04-22577 AA; and CPH has objected to Morgan Stanley's chosen counsel (KHTE) from appearing in these consolidated actions.

The satellite issues and gamesmanship described in this section have prevented the parties from conducting depositions at the pace originally contemplated during the February 20, 2004 Case Management Conference.

B. CPH'S And MAFCO's Position On Discovery

CPH and MAFCO stipulate only to the first paragraph of Section II.A above. CPH and MAFCO object to the remaining statements concerning discovery as incomplete, misleading, and

self-serving on the part of Morgan Stanley and MSSF. CPH and MAFCO expressed these objections to Morgan Stanley and MSSF, and requested that a neutral statement of the discovery status be substituted, but Morgan Stanley and MSSF refused that request. Consequently, CPH and MAFCO provide the account of discovery that follows,

1. Deposition Discovery

As of August 20, 2004, 44 depositions have been taken. Of those depositions, 30 have been taken by CPH and MAFCO, and 14 have been taken by Morgan Stanley and MSSF:

MS/MSSF WITNESSES	AFFILIATION AT RELEVANT TIME	DATE	TAKEN BY
Boone, Shani	Morgan Stanley	04/22/2004	CPH/MAFCO
Chang, Tyrone	Morgan Stanley	01/08/2004	CPH/MAFCO
Conway, Andrew	Morgan Stanley	06/04/2004	CPH/MAFCO
Fuchs, Alexandre	Morgan Stanley	02/13/2004	CPH/MAFCO
Hart, Michael	MSSF	05/19/2004	CPH/MAFCO
Kitts, Robert	Morgan Stanley	02/12/2004	CPH/MAFCO
MS/MSSF (by John Plotnick)	Morgan Stanley	09/09/2003	CPH/MAFCO
MS E-mail Rep.(Robert Saunders)	Morgan Stanley	02/10/2004	CPH/MAFCO
Rafii, Lily	Morgan Stanley	04/02/2004	CPH/MAFCO
Savarie, Andrew	Morgan Stanley	01/22/2004	CPH/MAFCO
Seth, Ishaan	Morgan Stanley	07/30/2004	CPH/MAFCO
Smith, R. Bram	MSSF	02/24/2004	CPH/MAFCO
Strong, William	Morgan Stanley	12/04/2003	CPH/MAFCO
Stynes, James	Morgan Stanley	07/13/2004	CPH/MAFCO

MS/MSSE WITNESSES	AFFILIATION AT RELEVANT TIME	DATE	TAKEN BY
Tyree, John	Morgan Stanley	09/15/2003	CPH/MAFCO
Tyree, John	Morgan Stanley	11/14/2003	CPH/MAFCO
Webber, Joshua	Morgan Stanley	05/18/2004	CPH/MAFCO
Whelan, Christopher	Morgan Stanley	07/14/2004	CPH/MAFCO
Wright, William	Morgan Stanley	07/01/2004	CPH/MAFCO
Yoo, Gene	Morgan Stanley	06/16/2004	CPH/MAFCO
MAFCO/CPH WITNESSES			
Drapkin, Donald	MAFCO	06/24/2004	MS
Engelman, Irwin	MAFCO	08/04/2004	MS
Gifford, Frank	MAFCO	07/22/2004	MS
Ginstling, Norman	MAFCO	04/06/2004	MS
MAFCO (by Steven Fasman)	MAFCO	09/15/2003 01/21/2004	MS
Page, Joseph	MAFCO	04/27/2004	MS
Salig, Joram	MAFCO	07/08/2004	MS
Schwartz, Barry	MAFCO	06/25/2004	MS
Shapiro, Paul	MAFCO	06/08/2004	MS
Shapiro, Paul	MAFCO	07/28/2004	MS
Slotkin, Todd	MAFCO	07/07/2004	MS
Slovin, Bruce	MAFCO	05/12/2004	MS
THIRD PARTY WITNESSES			
Bornstein, Lawrence	Arthur Andersen	01/15/2004	CPH/MAFCO
Brockelman, Mark	Arthur Andersen	01/14/2004	CPH/MAFCO

MS/MSSF WITNESSES	AFFILIATION AT RELEVANT TIME	DATE	TAKEN BY
Denkhaus, Donald	Arthur Andersen	11/06/2003	CPH/MAFCO
Duffy, Robert	Credit Suisse First Boston	07/08/2004	MS
Geller, Steven	Credit Suisse First Boston	07/30/2004	MS
Kistler, Vance	Arthur Andersen	10/29/2003	CPH/MAFCO
Pastrana, Dennis	Arthur Andersen	01/12/2004	CPH/MAFCO
Pruitt, William	Arthur Andersen	01/13/2004	CPH/MAFCO
Dean, Alan	Davis Polk & Wardell	06/03/2004	CPH/MAFCO
Lurie, James	Davis Polk & Wardell	06/18/2004	CPH/MAFCO
Stack, Heather	Davis Polk & Wardell	05/25/2004	CPH/MAFCO
Yales, Scott	Sunbeam	11/24/2003	CPH/MAFCO

In addition, both sides have requested deposition dates for certain individuals, and expressed interest in deposing still other individuals. Although Morgan Stanley and MSSF attempt to make it appear as if scheduling issues have been caused solely by CPH, in fact, Morgan Stanley and MSSF frequently have delayed providing dates for depositions and have changed previously set dates. In any event, Morgan Stanley's and MSSF's finger-pointing is irrelevant, because there is no motion pending before this Court concerning deposition scheduling — indeed, to date, no such motion ever has been filed.

Concerning counsel for Morgan Stanley's and MSSF's estimates about the depositions to be taken, CPH and MAFCO believe that counsel's estimate is exaggerated. In any event, given

that approximately 10 attorneys presently are appearing for Morgan Stanley and MSSF in this case, Morgan Stanley and MSSF certainly have the resources to complete all necessary depositions within any schedule dictated by the Court.

2. Discovery concerning CPH's motion for contempt

The parties have served interrogatories and document requests on each other in connection with CPH's motion for contempt. Because Morgan Stanley's and MSSF's responses to the discovery requests that CPH and MAFCO served on March 19 were insufficient, however, CPH and MAFCO filed a motion to compel. On July 12, this Court entered an order granting that motion in part, and directing Morgan Stanley and MSSF to provide further information within 20 days. On August 2, Morgan Stanley and MSSF purported to provide non-privileged information in compliance with the July 12 order, but Morgan Stanley and MSSF did not comply with the Court's direction to provide privileged information for *in camera* review. Instead, Morgan Stanley and MSSF filed a motion to enlarge the deadline for doing so. The *in camera* materials were submitted to the Court following the August 13 case management conference.

CPH and MAFCO also served further interrogatories and document requests in connection with CPH's motion for contempt on May 28, and Morgan Stanley and MSSF have served responses to those discovery requests. Because CPH and MAFCO believe that the responses are deficient in many respects, however, CPH and MAFCO filed a motion to compel. The Court made some rulings on that motion at the July 23 case management conference, but did not complete its review of the motion. CPH and MAFCO have re-noticed the motion for the upcoming case management conference on August 27.

III. Pretrial Schedule

On February 24, 2004, the Court entered an order setting this matter for trial in January 2005, and on March 23, 2004, this Court entered an Agreed Order setting the pretrial schedule in this matter and scheduling trial to begin on January 18, 2005. At the case management conference on July 23, this Court stated that it would be extending the trial date to March 2005. The Court directed the parties to come to the August 13 case management conference prepared to discuss scheduling the trial as well as associated adjustments to the pretrial schedule.

At that case management conference, the Court indicated that depending on the disposition of the motion for contempt, the Court might go back to an earlier trial date. In an Order entered after the case management conference, the Court directed the parties to come to the August 27 conference "prepared to discuss with specificity each party's ability to be prepared for trial beginning January 18, 2005."

Dated: August 20, 2004

 for

John Scarola (FL Bar No. 169440) ^{054 1006}
**SEARCY, DENNEY, SCAROLA,
ARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Blvd
West Palm Beach, FL 33402-3626
(561) 686-6300

Jerold S. Solovy
Ronald L. Marmer
Jeffrey T. Shaw
JENNER & BLOCK LLP
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350
**Counsel for Coleman (Parent) Holdings Inc.
and MacAndrews & Forbes Holdings, Inc.**



Joseph Ianno, Jr. (FL Bar No. 655351)
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
(561) 659-7070

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar No. 618349)
Thomas A. Clare
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
(202) 879-5000
**Counsel for Morgan Stanley & Co., Inc. and
Morgan Stanley Senior Funding, Inc.**

FAX TRANSMITTAL

JENNER & BLOCK

Jenner & Block LLP
One IBM Plaza
Chicago, IL 60611-7603
Tel 312 222-9350
www.jenner.com

Chicago
Dallas
Washington, DC

Date: August 20, 2004

To: Thomas A. Clare, Esq.
Kirkland & Ellis LLP

Fax: 202-879-5200
Voice: 202-879-5993

Joseph Ianno, Jr., Esq.
Carlton Fields, P.A.

Fax: 561-659-7368
Voice: 561-659-7070

From: Stephen P. Baker
312 840-7211

Employee Number:

Client Number: 41198-10003

Important: This message is intended only for the use of the individual or entity to which it is addressed, and may contain information that is attorney work product, privileged, confidential, and exempt from disclosure under applicable law. If the reader of this message is not the intended recipient, or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution, or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone, and return the original message to us at the above address via postal service. Thank you.

Message:

Total number of pages including this cover sheet: 4

Time Sent:

If you do not receive all pages, please call: 312 222-9350

Sent By:

Secretary: Candi

Extension: 6387

THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

CASE NO. CA 03-5045 AI

vs.

MORGAN STANLEY & CO., INC.,
Defendant.

MORGAN STANLEY SENIOR FUNDING, INC., CASE NO. CA 03-5165 AI
Plaintiff,

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
et al.,
Defendants.

NOTICE OF TAKING VIDEOTAPED DEPOSITIONS

To: Thomas A. Clare, Esq.
KIRKLAND & ELLIS, LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lake View Avenue
Suite 1400
West Palm Beach, FL 33401

PLEASE TAKE NOTICE that Plaintiff Coleman (Parent) Holdings Inc. will take the deposition upon oral examination of the following witness pursuant to Florida Rule of Civil Procedure 1.310 on the date, time, and location set forth below:

DEPONENT

DATE AND TIME

Brooks Harris	September 14, 2004 at 9:30 a.m.
---------------	---------------------------------

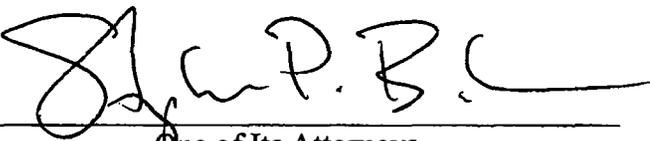
The deposition will be conducted at Esquire Deposition Services, 216 East 45th Street, New York, NY 10017. The deposition will be recorded by videotape and stenographic means. The deposition will be taken before a person authorized to administer oaths and will continue day to day until completed.

The videotape operator will be Esquire Deposition Services located in New York, New York.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by facsimile and mail to all counsel on the attached Service List this 20th day of August 2004.

Dated: August 20, 2004

COLEMAN (PARENT) HOLDINGS INC.

By: 
One of Its Attorneys

Jerold S. Solovy
JENNER & BLOCK LLP
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

Jack Scarola
SEARCY DENNEY SCAROLA BARNHART
& SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33409
(561) 686-6300

SERVICE LIST

Thomas A. Clare, Esq.
KIRKLAND & ELLIS, LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lake View Avenue
Suite 1400
West Palm Beach, FL 33401

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

CASE NO. CA 03-5045 AI

vs.

MORGAN STANLEY & CO., INC.,
Defendant.

MORGAN STANLEY SENIOR FUNDING, INC., CASE NO. CA 03-5165 AI
Plaintiff,

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
et al,
Defendants.

**COLEMAN (PARENT) HOLDINGS INC.'S AND
MACANDREWS & FORBES HOLDINGS, INC.'S
MEMORANDUM IN OPPOSITION TO MORGAN STANLEY'S MOTION TO
COMPEL PRODUCTION OF DOCUMENTS**

Coleman (Parent) Holdings Inc. ("CPH") and MacAndrews & Forbes Holdings, Inc. ("MAFCO"), by their attorneys, respectfully submit this response to Morgan Stanley's motion to compel production of a 1999 Report (erroneously identified by Morgan Stanley as a 1998 Report) for the Board of Directors of Sunbeam that was prepared by the Skadden Arps law firm.

Neither CPH nor MAFCO has a copy of the 1999 Report within their possession, custody, or control. Based on an inquiry following the July 28, 2004 deposition of Paul Shapiro, however, Jenner & Block determined that MAFCO in-house attorneys still have a copy of the exhibits that were attached to the 1999 Report. MAFCO attorneys obtained the exhibits in 1999 when they were providing legal assistance to Sunbeam, pursuant to an undertaking in an August 1993 settlement agreement between Sunbeam and CPH, which stated that CPH and associated companies such as MAFCO would "provide assistance and support to Sunbeam" on

“compliance, litigation, insurance, regulatory and other legal matters.” See 8/12/98 Settlement Agreement ¶ 3(d)(v).

After receiving Morgan Stanley’s motion, we contacted Sunbeam to determine whether it intended to invoke the privilege.¹ Sunbeam has advised us that it does invoke the privilege.

In addition, Morgan Stanley’s assertion (at 5) that the privilege has been waived because Mr. Shapiro made voluntary disclosures during his deposition regarding the 1999 Report without any objection from counsel, is without merit. There was no waiver of the privilege by Mr. Shapiro or by counsel for CPH and MAFCO because neither of those individuals had the authority to waive Sunbeam’s privilege. Mr. Shapiro, as Morgan Stanley concedes (at 5), is “a former Sunbeam executive” (Morgan Stanley also states that Mr. Shapiro is “a current MAFCO executive,” but by the time of his deposition session on July 28, 2004, he had left MAFCO). A former Sunbeam executive has no authority to waive Sunbeam’s privilege. And the Jenner & Block attorney who attended the deposition on behalf of CPH and MAFCO obviously had no authority to waive Sunbeam’s privilege either.

Finally, contrary to Morgan Stanley’s assertion (at 5), Mr. Shapiro did not testify “to the process and to the substance of the report” at his deposition. As Mr. Shapiro’s testimony establishes (MS Mot., Ex. 4, at 361:14-364:8), he remembered little or nothing about the report. Thus, Mr. Shapiro did not waive the privilege by making selective disclosures about the 1999 Report even if he had authority to waive Sunbeam’s privilege — which he clearly did not.

¹ Since emerging from bankruptcy, Sunbeam has been known as American Household, Inc.

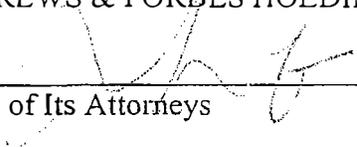
Conclusion

Because neither CPH nor MAFCO has a copy of the 1999 Report, and because Sunbeam has invoked the privilege, Morgan Stanley's motion to compel should be denied.

Date: August 20, 2004

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC. and
MACANDREWS & FORBES HOLDINGS, INC.

By: 
One of Its Attorneys

Jerold S. Solovy
Ronald L. Marmer
Jeffrey T. Shaw
JENNER & BLOCK LLP
One IEM Plaza
Chicago, Illinois 60611
(312) 222-9350

John Scarola
SEARCY DENNEY SCAROLA
BARNHART & SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33402-3626
(561) 686-6300

11414 4

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by
Fax and Federal Express to all counsel on the attached list on this 20th day of
AUGUST, 2004.



JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 684-5816
Attorneys for Coleman(Parent)Holdings Inc.
and MacAndrews & Forbes Holdings, Inc.

COUNSEL LIST

Josephanno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
Kirkland and Ellis
655 15th Street, N.W., Suite 1200
Washington, DC 20005

Jerold B. Solovy, Esq.
Jenner & Block LLP
One IBM Plaza
Suite 4400
Chicago, IL 60611

**IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA**

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

CASE NO: CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

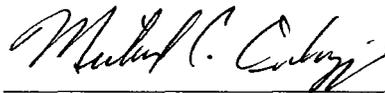
NOTICE OF DEPOSITION SUBPOENA DUCES TECUM OF DONALD R. UZZI

TO: Donald R. Uzzi, 4201 Lomo Alto Drive, Apt. 307, Dallas, TX 75219.

Please take notice that the Morgan Stanley entities in the above-styled cause of action intend to take the oral deposition of Donald R. Uzzi pursuant to Texas Rule of Civil Procedure 201.2 and the Order of the Circuit Court of the Fifteenth Judicial Circuit In and For Palm Beach County, Florida entered on January 21, 2004 and attached hereto. The deposition will take place at 9:30 a.m. on September 17, 2004, at the offices of HAYNES AND BOONE, LLP, 901 Main Street, Suite 3100, Dallas, Texas 75202. The deposition will be videotaped and will continue from day to day until completed.

Donald R. Uzzi will also produce documents responsive to the Deposition Subpoena
Duces Tecum attached hereto. These documents and materials shall be brought with the witness
and produced on September 17, 2004, at HAYNES AND BOONE, LLP, 901 Main Street, Suite
3100, Dallas, Texas 75202.

Respectfully submitted,



Michael C. Occhuizzo
KIRKLAND & ELLIS LLP
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

OF COUNSEL:

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar No. 618349)
Thomas A. Clare
KIRKLAND & ELLIS LLP
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

Joseph Ianno, Jr. (FL Bar # 655351)
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368

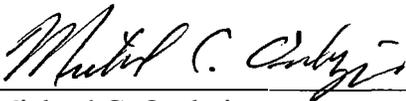
Dated: August 20, 2004

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the following counsel of record by facsimile and Federal Express on this 20th day of August, 2004:

John Scarola, Esq.
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33409

Jerold S. Solovy, Esq.
JENNER & BLOCK, LLC
One IBM Plaza
Suite 4400
Chicago, Illinois 60611



Michael C. Occhuizzo

THE STATE OF TEXAS

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

CASE NO: CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

DEPOSITION SUBPOENA DUCES TECUM

TO: Any sheriff or constable of the State of Texas or other person authorized to serve and execute subpoenas as provided in Texas Rule of Civil Procedure 176.5.

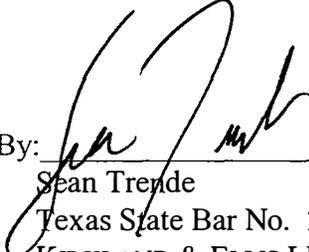
You are commanded to summon **Donald R. Uzzi**, 4201 Lomo Alto Drive, Apt. 307, Dallas, TX 75219, to appear at the principal offices of HAYNES AND BOONE, LLP, 901 Main Street Suite 3100, Dallas, Texas 75202, on **Friday, September 17, 2004 at 9:30 a.m.** to give testimony at a videotaped oral deposition and to permit inspection and copying of documents or tangible things to be used as evidence in this case.

Donald R. Uzzi is commanded to attend the oral deposition and to produce and permit inspection and copying of the following documents or tangible things described in the attached Exhibit 1. These documents and materials shall be brought with the witness and produced prior to the deposition on September 17, 2004, at HAYNES AND BOONE, LLP, 901 Main Street, Suite 3100, Dallas, Texas 75202.

Contempt. Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena is issued or a district court in the county in which the subpoena is served, and may be punished by fine or confinement, or both. TEX. R. CIV. P. 176.8(a).

DO NOT FAIL to return this writ to the Circuit Court of the Fifteenth Judicial Circuit In and For Palm Beach County, Florida with either the attached officer's return showing the manner of execution or the witness's signed memorandum showing that the witness accepted the subpoena.

ISSUED on August 20, 2004.

By: 

Sean Trende
Texas State Bar No. 24034176
KIRKLAND & ELLIS LLP,
655 15th Street, N.W., Suite 1200,
Washington, D.C. 20005

This subpoena was issued pursuant to Texas Rule of Civil Procedure 201.2, the Order of the Circuit Court of the Fifteenth Judicial Circuit In and For Palm Beach County, Florida entered on January 21, 2004 and attached hereto as Exhibit 2, and at the request of Defendants' attorneys of record Thomas D. Yannucci, P.C., Lawrence P. Bemis (FL Bar No. 618349), and Thomas A. Clare of KIRKLAND & ELLIS LLP, 655 15th Street, N.W., Suite 1200, Washington, D.C. 20005; Joseph Ianno, Jr. (FL Bar No. 655351), CARLTON FIELDS, P.A., 222 Lakeview Ave., Suite 1400, West Palm Beach, FL 33401.

EXHIBIT 1

DEPOSITION SUBPOENA DUCES TECUM

You are hereby requested to produced the following documents pursuant to the definitions and instructions contained herein:

DOCUMENTS REQUESTED

1. All documents concerning the Coleman Transaction.
2. All documents concerning the Subordinated Debenture Offering.
3. All documents concerning the Bank Facility, or the Credit Agreement.
4. All documents reflecting or concerning any communications between or among any of Sunbeam, CPH, MAFCO, CSFB, Arthur Andersen, MS & Co., MSSF, Davis Polk, Wachtell, or Skadden in 1997 or 1998.
5. All documents provided by you in any Litigation or SEC Administrative Proceeding.
6. All calendars, diaries, timekeeping sheets or records maintained by you concerning any activities related to Coleman Transaction, the Subordinated Debenture Offering, the Bank Facility, the Credit Agreement.
7. All documents related to Sunbeam's Financial Information for all or any portion of 1996, 1997, and 1998, including but not limited to Financial Statements and documents concerning Sunbeam's forecasts and plans for revenue or earnings.
8. All documents related or referring to any cost-reduction or sales program or policy in place at Sunbeam during 1997 and 1998, including but not limited to documents concerning the "early buy" program, "Initiatives for Success", and "bill and hold" sales and the "no returns" policy.

9. All documents concerning returns of Sunbeam goods or product in 1997 and 1998, including but not limited to documents regarding the “no returns” policy and conversations or communications regarding the deletion of return authorizations from the J.D. Edwards system.

10. All documents pertaining to negotiations concerning the acquisition of Coleman, Signature Brands, and First Alert, including but not limited to documents concerning conversations or communications of any kind between or among any of MS & Co., MSSF, CPH or MAFCO personnel or representatives.

11. All documents concerning Synergies that might be achieved from a business combination of Sunbeam, Coleman, Signature Brands, and First Alert, or any combination thereof.

12. All documents related to or supporting the March 16, 1998 Representation Letter provided to Arthur Anderson, including but not limited to any drafts of such letter and any Financial Information used or referenced in writing the letter or drafts.

13. All documents concerning any “comfort letter” pertaining to the Subordinated Debenture offering or the Credit Agreement, including but not limited to Arthur Andersen’s letters dated March 19, 1998 and March 25, 1998 and any drafts of such letters.

14. All documents concerning any investigation, analysis, or due diligence conducted by Sunbeam or its Advisors pertaining to the Coleman Transaction, including but not limited to documents and Financial Information pertaining to March 18, 1998 and March 24, 1998 conference calls.

15. All documents related to Sunbeam’s March 19, 1998 press release, including but not limited to documents pertaining to the contents or drafting of the press release, the decision to issue the press release, and the decision to include the press release in the Offering memorandum.

16. All documents concerning the March 19, 1998 drafting session and/or meeting that took place at Global Financial Press concerning the Offering Memorandum, including but not limited to documents concerning any conversations or communications of any kind involving MS & Co. or Arthur Andersen personnel.

17. All documents related to the sale of the Subordinated Debenture, including but not limited to documents pertaining to roadshows or other communications with investors or analysts.

DEFINITIONS

1. "Advisors" shall mean financial advisors, legal advisors, accountants, consultants and any other third-party advising or assisting Sunbeam in any way with the Coleman Transaction, including but not limited to Arthur Anderson, Coopers & Lybrand, Llama Company, MS& Co., MSSF, and Skadden.

2. "Arbitrations" shall mean *Albert J. Dunlap and Sunbeam Corporation*, No. 32 160 00088 99 (AAA); and *Russell A. Kersh and Sunbeam Corporation*, No. 32 160 00091 99 (AAA).

3. "Arthur Andersen" shall mean Arthur Andersen LLP and any of its former or present partners, officers, directors, employees, representatives and agents.

4. "Bank Facility" shall mean the Credit Agreement, including amendments, and all funds extended by Lenders to Sunbeam pursuant to the Credit Agreement, including but not limited to Tranche A, Tranche B, and the Revolving Credit Facility.

5. "Communication" shall mean any exchange or transmittal of information by any means of transmission, including, without limitation, face-to-face conversation, mail, overnight delivery, Internet, telephone, electronic mail, or facsimile.

6. The term “concerning” shall mean relating to, referring to, describing, evidencing, or constituting.

7. “Coleman” shall mean Coleman Company, Inc. and any of its subsidiaries, divisions, predecessors, successors, present and former employees, representatives, and agents

8. “Coleman Transaction” shall mean Sunbeam’s acquisition of Coleman Company, Inc. from CPH and all related communications, agreements, and transactions, including the February 27, 1998 Agreements and the March 30, 1998 closing.

9. “Cooper & Lybrand” shall mean the former Coopers & Lybrand LLP, and any of its subsidiaries, divisions, predecessors, successors, present and former employees, representatives, and agents.

10. “CPH” shall mean Coleman (Parent) Holdings Inc. and any of its former or present officers, directors, employees, representatives and agents.

11. “Credit Agreement” shall mean the agreement entered into by Sunbeam, as borrower with Lenders, dated March 30, 1998 and all amendments thereto.

12. “CSFB” shall mean Credit Suisse First Boston LLC and any of its former or present officers, directors, employees, representatives and agents.

13. “Davis Polk” shall mean Davis Polk & Wardwell and any of its former or present partners, officers, directors, employees, representatives and agents.

14. “Document” shall mean any recording in any tangible form of any information, whether handwritten, typed, printed, stored on computer disks, tapes, or databases, or otherwise reproduced. “Document” or “documents” also includes electronic documents whether stored on

servers or hard drives, e-mail, backup tapes, voicemail and video and audio recordings. A draft or non-identical copy is a separate document within the meaning of this term.

15. “Financial Information” shall mean information concerning the past or present financial condition of Sunbeam or Sunbeam securities.

16. “Financial Statements” shall mean documents reflecting Financial Information, including without limitation quarterly reports, yearly reports, balance sheets, statements of income, earnings, cash flow projections, and sources and applications of funds.

17. “First Alert” shall mean First Alert, Inc., and any of its subsidiaries, divisions, predecessors, successors, present and former employees, representatives, and agents

18. The term “identify” (with respect to documents) shall mean to give, to the extent known, the (i) type of document; (ii) general subject matter; (iii) date of the document; and (iv) author(s), addressee(s) and recipient(s).

19. “Lenders” shall mean the entities listed on Schedule 2.01 of the Credit Agreement under the heading “Lenders” and any other person that shall have become a party to the Credit Agreement as a Lender pursuant to an assignment and acceptance.

20. “Litigations” shall mean *In re Sunbeam Securities Litigation*, 98-8258-Civ.-Middlebrooks (S.D. Fla); *Camden Asset Management L.P. v. Sunbeam Corporation*, 98-8773-Civ.-Middlebrooks and 98-8275-Civ.-Middlebrooks (S.D. Fla); *Krim v. Dunlap*, No. CL 983168AD (15th Jud. Cir., Fla.); *Stapleton v. Sunbeam Corp.*, No. 98-1676-Civ.-King (S.D. Fla); *Sunbeam Corp. v. PricewaterhouseCoopers LLP*, No. CL 005444AN (15th Jud. Cir., Fla.); *In re Sunbeam Corp., Inc.*, No. 01-40291 (AJG) (Bankr. S.D.N.Y.) and any adversary proceedings therein; *SEC v. Dunlap*, No. 01-8437-Civ.-Middlebrooks (S.D. Fla.); *Oaktree Capital Management LLC v. Arthur Andersen LLP*,

No. BC257177 (L.A. Cty., CA); and *Coleman (Parent) Holdings Inc. v. Arthur Andersen LLP*, No. CA 01-06062AN (15th Jud. Cir., Fla.), or other litigation concerning the Coleman Transaction.

21. “Llama Company” shall mean Llama Company and any of its former or present partners, officers, directors, employees, representatives and agents.

22. “MAFCO” shall mean MacAndrews & Forbes Holdings, Inc. and any of its officers, directors, former or present employees, representatives and agents.

23. The “March 19, 1998 Press Release” shall mean the press release issued by Sunbeam on March 19, 1998 concerning the shortfall of first quarter 1998 sales numbers and the reasons for such shortfall.

24. “MS & Co.” shall mean Morgan Stanley & Co. Inc. and any of its former or present officers, directors, employees, representatives and agents.

25. “MSSF” shall mean Morgan Stanley Senior Funding, Inc. and any of its former or present officers, directors, employees, representatives and agents.

26. The term “person” shall mean any natural person or any business, legal or governmental entity or association.

27. The term “relating to” shall mean concerning, evidencing, referring to, or constituting.

28. The “Relevant Period,” unless otherwise indicated, shall be from January 1, 1996 through the date of service of this subpoena.

29. “SEC” shall mean the Securities and Exchange Commission.

30. “SEC Administrative Proceedings” shall mean *In the Matter of Sunbeam Corp.*, SEC Administrative Proceeding File No. 3-10481, and *In the Matter of David C. Fannin*, SEC Administrative Proceeding File No. 3-10482.

31. “Signature brands” shall mean Signature Brands USA, Inc. and any of its subsidiaries, divisions, predecessors, successors, present and former employees, representatives, and agents

32. “Skadden” shall mean Skadden, Arps, Slate, Meagher & Flom, LLP and any of its former or present partners, officers, directors, employees, representatives and agents.

33. “Subordinated Debentures” shall mean the Sunbeam’s Zero Coupon Convertible Senior Subordinated Debentures Due 2018.

34. “Subordinated Debenture Offering” shall mean the offering of Sunbeam’s Subordinated Debentures.

35. “Sunbeam” shall mean Sunbeam Corporation and any of its subsidiaries, divisions, predecessors, successors, present and former employees, representatives, and agents.

36. “Synergies” shall mean post-acquisition gains through increased revenue and/or decreased cost.

37. “Wachtell” shall mean Wachtell Lipton Rosen & Katz and any of its former or present partners, officers, directors, employees, representatives and agents.

38. The terms “you” or “your” shall mean Donald R. Uzzi and any of Donald R. Uzzi’s present and former representatives and agents.

INSTRUCTIONS

1. Documents shall be produced as they are kept in the usual course of business, or organized and labeled to correspond to the categories in this Request. Documents attached to each other should not be separated. Documents consisting of items previously produced in the Litigations, Arbitrations, and/or SEC Administrative Proceedings with Bates numbering shall be produced in Bates number order.

2. All documents shall be produced in the file folder, envelope or other container in which the documents are kept or maintained by you. If, for any reason, the container cannot be produced, produce copies of all labels or other identifying marks.

3. The relevant period, unless otherwise indicated, shall be from January 1, 1996 through the date of service of this subpoena, and shall include all documents and information which relate in whole or in part to such period, or to events or circumstances during such period, even though dated, prepared, generated or received prior or subsequent to that period. Please supplement or correct your responses to these requests if, at any time, you become aware that your responses are incomplete or incorrect in any request.

4. If you claim the attorney-client privilege, or any other privilege or work-product protection for all or any portion of a document, you shall provide a privilege log that describes the withheld material sufficiently to allow Morgan Stanley to test the privilege or protection asserted.

5. The following rules of construction apply:

1. The connectives “and” and “or” shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery requests all responses that might otherwise be outside their scope;
2. The term “including” shall be construed to mean “without limitation”; and
3. The use of the singular form of any word include the plural and vice versa.

Exhibit 2

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CASE NO: 03 CA-005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

AGREED ORDER APPOINTING COMMISSIONERS AND COMMISSIONS

THIS CAUSE, having come before the Circuit Court in and for Palm Beach County, State of Florida, on the agreement of the parties, and

WHEREAS, it appears to the Court that:

1. Defendant Morgan Stanley & Co. Incorporated ("MS & Co.") desires to take the videotaped depositions of and obtain documents from the following witnesses who reside in California, Connecticut, Kansas, Minnesota, New York, Texas, and the District of Columbia and who have knowledge of facts relevant to this case:

Karen Kay Clark
1674 Amarelle Street
Newbury Park, CA 91320

Frank N. Gifford
126 Taconic Road
Greenwich, CT 06831-3139

Robert J. Duffy
16 Saint Nicholas Road
Darien, CT 06820-2823

Joseph P. Page
921 Sheridan Street, Apt. 119
Wichita, KS 67213-1363

William H. Spoor
622 West Ferndale Road
Wayzata, MN 55391

Adam Emmerich
Wachtell, Lipton, Rosen & Katz
51 West 52nd Street
New York, NY 10019

Steven Cohen
Wachtell, Lipton, Rosen & Katz
51 West 52nd Street
New York, NY 10019

Steven K. Geller
301 East 79th Street, Apt. 4H
New York, NY 10021-0932

Donald Uzzi
4209 Beverly Dr.
Dallas, TX 75205-3020

Ann Dibble Jordan
2940 Benton Place NW
Washington, DC 20008

2. You are hereby appointed as commissioners to take the videotaped testimony (and obtain the requested documentation) of the above witnesses and other witnesses whose discovery is sought in the commissions' jurisdiction under oath and on oral examination in accordance with the applicable Florida Statutes and Rules of Civil Procedure:

Esquire Santa Ana
2100 North Broadway, Second Floor
Santa Ana, CA 97206

Del Vecchio Reporting
117 Randi Drive
Madison, CT 06443

Harper Court Reporting
P.O. Box 3008
Wichita, KS 67201

Kirby Kennedy & Associates
5200 Wilson Road #219
Minneapolis, MN 55424

Esquire Deposition Services
216 E. 45th Street, 8th FL
New York, New York 10017-3304

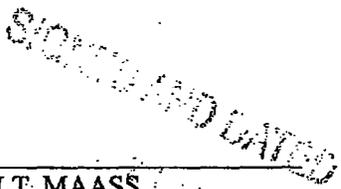
Esquire Deposition Services
703 McKinney Avenue #320
Dallas, Texas 75202

Esquire Deposition Services
1020 19th Street NW, #621
Washington, DC 20036

or any person able to administer oaths pursuant to the laws of California, Connecticut, Kansas, Minnesota, New York, Texas, and the District of Columbia and duly authorized by him.

3. This order does not purport to grant the power of the commissioners appointed to subpoena witnesses or documents, but simply the power to administer oaths and transcribe deposition testimony.

DONE AND ORDERED in Chambers, West Palm Beach, Palm Beach County, Florida
this ____ day of January, 2004.



ELIZABETH T. MAASS
Circuit Court Judge

Coleman (Parent) Holdings v. Morgan Stanley & Co. Inc.
2003 CA 005045AI
Agreed Order on Appointment of Commission

Copies furnished to:

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368

John Scarola, Esq.
SEARCY, DENNEY, SCAROLA, BARNHARDT
& SHIPLEY, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33409
Telephone: (561) 686-3000
Facsimile: (561) 478-0754

Thomas D. Yannucci, P.C.
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W. – Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

Jerold S. Solovy
JENNER & BLOCK, LLC
One IBM Plaza
Suite 4400
Chicago, Illinois 60611
Telephone: (312) 222-9350
Facsimile: (312) 527-0484

CARLTON FIELDS, P.A.

ATTORNEYS AT LAW

Esperanté
222 Lakeview Avenue, Suite 1400
West Palm Beach, Florida 33401-6149

MAILING ADDRESS
P.O. Box 150, West Palm Beach, FL 33402-0150
Tel 561.659.7070 Fax 561.659.7368

FAX COVER SHEET

Date:	Phone Number	Fax Number
August 20, 2004		
To: Jack Scarola, Esq.	(561) 689-6300	(561) 684-5816
Jerold Solovy, Esq	(312) 923-2711	(312) 840-7671
Michael Brody		(312) 840-7711
Thomas Clare, Esq.		(202) 879-5200
From: Joyce Dillard, CLA to Joseph Ianno, Jr.	(561) 659.7070	(561) 659.7368

Client/Matter No.: 47877/14092

Employee No.:

Total Number of Pages Being Transmitted, Including Cover Sheet: 13

Message: To follow please find a copy of Morgan Stanley's Opposition to Motion to Compel Supplementation of Responses to Requests for Admission.

- Original to follow Via Regular Mail
 Original will Not be Sent
 Original will follow via Overnight Courier

The information contained in this facsimile message is attorney privileged and confidential information intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone (if long distance, please call collect) and return the original message to us at the above address via the U.S. Postal Service. Thank you.

If there are any problems or complications, please notify us immediately at:
561.659.7070

Telecopier operator: _____

WPB#567902.6

CARLTON FIELDS, P.A.

Miami Orlando St. Petersburg Tallahassee Tampa West Palm Beach

16div-006371

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff,

vs.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO., INC.,
Defendant.

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff,

vs.

CASE NO: CA 03-5165 AI

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant.

**MORGAN STANLEY'S OPPOSITION TO COLEMAN (PARENT) HOLDING INC.'S
AND MACANDREWS & FORBES HOLDINGS INC.'S MOTION TO COMPEL
SUPPLEMENTATION OF RESPONSES TO REQUESTS FOR ADMISSION**

Coleman (Parent) Holdings, Inc.'s and MacAndrews & Forbes Holdings Inc.'s (collectively "CPH") Motion to Compel Supplementation of Responses to Requests for Admission improperly seeks to impose discovery obligations on Morgan Stanley that exceed the requirements of Fla. R. Civ. P. 1.370, which establishes the standard for responses to requests for admission. Accordingly, the motion must be denied.

BACKGROUND

1. On July 6, 2004, CPH served its Second Set of Requests for Admission, consisting of two separately-numbered requests. Requests for Admission Nos. 1 and 2 both relate to documents bearing bates-numbers Morgan Stanley Confidential 084771 through 0085783 and Morgan Stanley Confidential 0094003 through 0094032.

2. The documents referenced in Requests for Admission Nos. 1 and 2 are personnel evaluation materials for 28 current and former Morgan Stanley employees, consisting of 1044 pages. Morgan Stanley produced the referenced personnel evaluation materials to CPH pursuant to this Court's March 15, 2004 Order. The referenced documents also are subject to the Court's April 25, 2004 Protective Order, which limits the use of personnel evaluations during depositions.

3. Request for Admission No. 1 asked Morgan Stanley to "[a]dmit that documents bates-numbered Morgan Stanley Confidential 084771 through 0085783 and Morgan Stanley Confidential 0094003 through 0094032 are true and authentic copies of original documents within the meaning of Florida Evidence Code § 90.901." (Aug. 5, 2004 Morgan Stanley Resp. & Objs. to CPH 2d Req. for Admiss., Admiss. 1 (Ex. 1).) Morgan Stanley responded to Request For Admission No. 1 by admitting that the referenced documents are true and authentic copies of original documents. (*Id.*, Resp. 1.)

4. Request For Admission No. 2 asked Morgan Stanley to "[a]dmit that documents bates-numbered Morgan Stanley Confidential 0084771 through 0085783 and Morgan Stanley Confidential 0094003 through 0094032 are records of regularly conducted business activity within the meaning of Florida Evidence Code § 90.803(6)." (*Id.*, Admiss. 2.) Morgan Stanley admitted Request For Admission No. 2 in part and denied the request in part. The full text of Morgan Stanley's response to Request for Admission No. 2 is set forth below:

RESPONSE: Admitted in part and denied in part. MS & Co. admits that the referenced documents are generated in the course of a regularly conducted business activity, but denies that the documents, which largely reflect the opinions of out-of-court declarants, qualify for the hearsay exception of Florida Evidence Code § 90.803(6). MS & Co. reserves all evidentiary objections to the admissibility of the referenced documents, but will not dispute that the documents are kept in the ordinary course of its business.

(*Id.*, Resp. 2.)

5. On August 18, 2004, CPH filed the instant motion to compel seeking an Order from this Court directing Morgan Stanley “to supplement its responses” to Request for Admission No. 2, arguing that Fla. R. Civ. P. 1.370(a) requires Morgan Stanley to specify the “particular portions” of the documents that reflect the opinions of out-of-court declarants. (Aug. 17, 2004 CPH’s & MAFCO’s Mot. to Compel Supp. Resps. to Reqs. for Admiss. ¶ 4.)

ARGUMENT

CPH misstates the requirements of Fla. R. Civ. P. 1.370. Without citing any authority, CPH argues that Rule 1.370(a) requires a party responding to a request for admission to be “as specific as possible” concerning its denials. (CPH Motion ¶ 3.) But that requirement — which appears nowhere in Rule 1.370 or the Florida case law interpreting it — is squarely rejected by the express terms of Fla. R. Civ. P. 1.370(a). To the contrary, the obligation sought to be imposed by CPH in its motion would turn the express requirements of Rule 1.370 on its head.

Rule 1.370(a) clearly states the requirements for responding to a request for admission:

A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify an answer or deny only part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder.

Fla. R. Civ. P. 1.370.¹

Rule 1.370(a) — by its express terms — does not require a party responding to a request for admission to “specify” the portions of the request the party intends to deny. Rather, where a request for admission is comprised of a “part” to be admitted and a “part” that is to be denied, Rule 1.370(a) requires only that the responding party “specify so much of [the request] as is

¹ The quotation of Fla. R. Civ. P. 1.370(a) that appears in Paragraph 3 of CPH’s Motion is inaccurate. Rule 1.370(a) states that a denial shall “fairly” meet the substance of the requested admission. Fla. R. Civ. P. 1.370(a). The quotation that appears in CPH’s Motion omits this requirement.

true.” *Id.* The responding party is directed to “qualify or deny *the remainder*” of the request. *Id.* (emphasis added). Accordingly, Rule 1.370(a) expressly permits Morgan Stanley to “specify” the portions of Request for Admission No. 2 that are true — and “deny,” without additional specification, “the remainder.” *Id.*

CPH’s Request for Admission No. 2 asks Morgan Stanley to admit that the referenced personnel evaluation documents are “records of regularly conducted business activity within the meaning of Florida Evidence Code § 90.803(6).” (Ex. 1, Admiss 2.) That request is comprised of at least two “parts.” First, the request asks whether the referenced documents are “records of regularly conducted business activities,” which is only *one* of the required elements that must be established to meet the hearsay exception of Florida Evidence Code § 90.803(6). Second, the request for admission Morgan Stanley to admit that the documents meet *all* of the requirements of Florida Evidence Code § 90.803(6).²

Morgan Stanley’s response to Request for Admission No. 2 answered both “parts” of CPH’s request — and “specified” the “parts” of the request that are true. Morgan Stanley admitted that the referenced documents were “generated in the course of a regularly conducted business activity” and that the documents are “kept in the ordinary course of its business.” (Ex. 1, Resp. 2.) Morgan Stanley denied the “remainder” of the request because — for the reasons stated in the response — the referenced documents meet all of the requirements of Florida Evidence Code § 90.803(6). Accordingly, Morgan Stanley’s response “fairly meets” the substance of Request for Admission No. 2.

² This conclusion is confirmed by a review of Florida Evidence Code § 90.803(6)(a)-(c), which sets forth *all* of the requirements that must be established before a document will qualify for the “business records” hearsay exception. All of the requirements in these three subsections are grouped under the single subheading “Records of regularly conducted business activity.” See Fla. Evidence Code § 90.803(6).

CPH argues that it is not sufficient for Morgan Stanley's response to "refer to an undifferentiated group of documents" when identifying its basis for denying portions of the request. (CPH Motion ¶ 4.) But it is CPH (not Morgan Stanley) that has failed to comply with the requirements of Rule 1.370(a) in that regard. Fla. R. Civ. P. 1.370(a) requires that "[e]ach matter of which admission is requested shall be separately set forth." CPH's Request For Admission No. 2, which itself refers to "an undifferentiated group" of 77 documents consisting of 1044 pages, in a single request, fails to meet this requirement. Having served a blunderbuss request that does not distinguish between individual documents or "particular portions" of documents (CPH Motion ¶ 4), CPH cannot complain that Morgan Stanley framed its response in similar terms. In this respect as well, therefore, Morgan Stanley's response "fairly meets the substance of the requested admission."

CONCLUSION

CPH's Motion should be denied. Alternatively, because Request for Admission No. 2 relates to an evidentiary issue that will arise (if at all) in connection with motions in limine directed to the admissibility of particular trial exhibits, the Court should "determine that final disposition of the request be made at a pretrial conference or at a designated time before trial," as expressly permitted by Fla. R. Civ. P. 1.370(a).

CERTIFICATE OF SERVICE

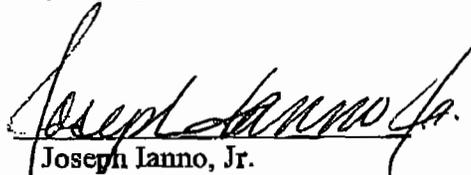
I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the below listed service list by facsimile and Federal Express on this 20th day of August, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar No. 618349)
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

*Counsel for Morgan Stanley & Co.
Incorporated and Morgan Stanley Senior
Funding*

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
E-mail: jianno@carltonfields.com

BY:


Joseph Ianno, Jr.
Florida Bar No. 655351

SERVICE LIST

Jack Scarola
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy
Michael Brody
JENNER & BLOCK, LLC
One IBM Plaza, Suite 400
Chicago, IL 60611

EXHIBIT 1

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff,

vs.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO., INC.,
Defendant.

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff,

vs.

CASE NO: CA 03-5165 AI

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant.

**MORGAN STANLEY & CO., INC.'S RESPONSES AND OBJECTIONS TO COLEMAN
(PARENT) HOLDINGS INC.'S SECOND SET OF REQUESTS FOR ADMISSION**

Defendant Morgan Stanley & Co. Incorporated ("MS & Co."), by its attorneys and pursuant to Florida Rule of Civil Procedure 1.370, hereby responds and objects to Coleman (Parent) Holdings Inc.'s ("CPH") Second Set of Requests for Admission.

INITIAL OBJECTIONS

1. MS & Co. objects to CPH's Second Set of Requests for Admission, including all Definitions, to the extent that they purport to impose upon MS & Co. any requirements that exceed or are otherwise inconsistent with the Florida Rules of Civil Procedure or any other applicable rule or court order.
2. MS & Co. objects to CPH's Second Set of Requests for Admission to the extent that they seek information protected from disclosure by the attorney-client privilege, the work product doctrine, or any other applicable privilege, doctrine, immunity or rule.

3. MS & Co. objects to the definitions of "Morgan Stanley" and "MSSF" to the extent that they include MS & Co.'s or MSSF's counsel in this litigation and entities not a party to this action. Specifically, MS & Co. interprets these definitions to exclude Kirkland & Ellis LLP and Carlton Fields, P.A and affiliates, parents, and others not a party to this action.

4. MS & Co. objects to the Requests for Admission as unduly burdensome, abusive, and vexatious, since many of them are duplicative and constitute an unnecessary waste of time and concern factual allegations uniquely within the possession of CPH, MAFCO, or third parties, which could be confirmed with less expense and burden on the parties through more traditional techniques of discovery.

5. MS & Co. incorporates, as though fully set forth therein, these General Objections into each of the Responses and Objections set forth below.

RESPONSES

1. Admit that documents bates-numbered Morgan Stanley Confidential 084771 through 0085783 and Morgan Stanley Confidential 0094003 through 0094032 are true and authentic copies of original documents within the meaning of Florida Evidence Code § 90.901.

RESPONSE: Admitted.

2. Admit that documents bates-numbered Morgan Stanley Confidential 0084771 through 0085783 and Morgan Stanley Confidential 0094003 through 0094032 are records of regularly conducted business activity within the meaning of Florida Evidence Code § 90.803(6).

RESPONSE: Admitted in part and denied in part. MS & Co. admits that the referenced documents are generated in the course of a regularly conducted business activity, but denies that the documents, which largely reflect the opinions of out-of-court declarants, qualify for the hearsay exception of Florida Evidence Code § 90.803(6). MS & Co. reserves all evidentiary

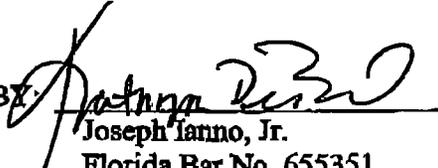
objections to the admissibility of the referenced documents, but will not dispute that the documents are kept in the ordinary course of its business.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this 5th day of August, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar No. 618349)
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
E-mail: jianno@carltonfields.com

BX: 
Joseph Ianno, Jr.
Florida Bar No. 655351

*Counsel for Morgan Stanley & Co.
Incorporated and Morgan Stanley Senior
Funding*

SERVICE LIST

Jack Scarola
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy
Michael Brody
JENNER & BLOCK, LLC
One IBM Plaza, Suite 400
Chicago, IL 60611

CARLTON FIELDS, P.A.

ATTORNEYS AT LAW

Esperanté
222 Lakeview Avenue, Suite 1400
West Palm Beach, Florida 33401-6149

MAILING ADDRESS
P.O. Box 150, West Palm Beach, FL 33402-0150
Tel 561.659.7070 Fax 561.659.7368

FAX COVER SHEET

Date:	Phone Number	Fax Number
August 20, 2004		
To: Jack Scarola, Esq.	(561) 689-6300	(561) 684-5816 227-0749
Jerold Solovy, Esq.	(312) 923-2711	(312) 840-7671
Michael Brody		(312) 840-7711
Thomas Clare, Esq.		(202) 879-5200
From: Joyce Dillard, CLA to Joseph Ianno, Jr.	(561) 659.7070	(561) 659.7368

Client/Matter No.: 47877/14092

Employee No.:

Total Number of Pages Being Transmitted, Including Cover Sheet: 49

Message: To follow please find a copy of Morgan Stanley's Opposition to Motion to Compel Complete Answers to Int. Nos. 1 and 3.

- Original to follow Via Regular Mail
 Original will Not be Sent
 Original will follow via Overnight Courier

The information contained in this facsimile message is attorney privileged and confidential information intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone (if long distance, please call collect) and return the original message to us at the above address via the U.S. Postal Service. Thank you.

If there are any problems or complications, please notify us immediately at:
561.659.7070

Telecopier operator: _____

WPB#567902.6

CARLTON FIELDS, P.A.

Miami Orlando St. Petersburg Tallahassee Tampa West Palm Beach

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff,

vs.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO., INC.,
Defendant.

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff,

vs.

CASE NO: CA 03-5165 AI

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant.

**MORGAN STANLEY SENIOR FUNDING, INC.'S OPPOSITION TO
COLEMAN (PARENT) HOLDING INC.'S AND MACANDREWS & FORBES
HOLDINGS INC.'S MOTION TO COMPEL COMPLETE ANSWERS TO
INTERROGATORY NOS. 1 AND 3 IN MAFCO'S FIRST SET OF
INTERROGATORIES TO MORGAN STANLEY SENIOR FUNDING, INC.**

Coleman (Parent) Holdings, Inc.'s and MacAndrews & Forbes Holdings Inc.'s ("MAFCO" and collectively "CPH") motion to compel further responses to Interrogatory Nos. 1 and 3 should be denied because: (1) Morgan Stanley Senior Funding, Inc. ("MSSF") has provided complete responses to MAFCO's interrogatories that comply with the Florida Rules of Civil Procedure and the standard of practice established by the Court and the parties in this case; and (2) CPH's motion improperly asks this Court to rewrite MAFCO's vague and overbroad interrogatories.

BACKGROUND

1. On June 22, 2004, MAFCO served its First Set of Interrogatories. Interrogatories Nos. 1 and 3, those at issue in this motion to compel, relate to the potential synergies resulting

from the proposed combination of Sunbeam and Coleman. More specifically, they inquire about Morgan Stanley's reliance on synergy information, and Morgan Stanley's involvement in the creation, development, preparation or use of certain synergy documents.

2. Interrogatory No. 1 asks MSSF to "[i]dentify each individual who relied upon Exhibit A or information derived from Exhibit A, in whole or in part, at any time and for any purpose. For each individual, describe in detail when and how each individual relied upon Exhibit A or in information derived from Exhibit A, and what each individual did with the information contained in Exhibit A or derived from Exhibit A." (Aug. 9, 2004 MSSF Resp. & Objs. to MAFCO's 1st Set of Interrogs., Interrog. 1 (Ex. 1) ("MSSF Resp.")). MSSF responded fully to this Interrogatory. (*Id.*, Resp. 1.)

3. Interrogatory No. 3 asks MSSF to "[i]dentify each individual involved in creating, developing, preparing, or using the following documents, or the information contained therein: MORGAN STANLEY CONFIDENTIAL 3136, 3931, 33911, 36113, 31983-31984, 84007-84010, and 84012-84019. As to each person identified, describe in detail that individual's role in creating, developing, preparing, or using such documents or the information contained therein." (*Id.*, Interrog. 3.) Again, MSSF responded fully to this Interrogatory. (*Id.*, Resp. 3.)

4. On August 17, 2004, CPH and MAFCO filed the instant motion to compel seeking an Order directing MSSF "to provide supplemental answers to Interrogatories Nos. 1 and 3 in MAFCO's first set of interrogatories," arguing merely that MSSF's responses were "patently inadequate." (Aug. 17, 2004 CPH's & MAFCO's Motion to Compel Complete Answer to Interrog. Nos. 1 & 3 in MAFCO's 1st Set of Interrogs. to MSSF at 3, 6.)

ARGUMENT

1. MSSF's Responses Are Complete Pursuant To The Florida Rules And Prior Findings Of This Court.

CPH complains that MSSF has "failed to provide complete responses to Interrogatories Nos. 1 and 3" in that MSSF has "list[ed] several individuals who 'may have relied' on Coleman's synergies estimates" or "who 'may have had a role' in the creation, development, or use of particular synergy documents." (Aug. 11, 2004 Letter from M. Brody to T. Clare (Ex. 2).) This criticism is without merit.

MSSF has responded to MAFCO's interrogatories in good faith and to the best of its ability – *i.e.*, in a manner which is consistent with its obligations under the Florida Rules of Civil Procedure. Before responding to MAFCO's interrogatories, MSSF conducted a thorough inquiry into the details and facts underlying MAFCO's requests. As has been the case throughout this discovery process, the passage of over six years time since the transaction at issue, and the resignation and/or death of numerous Morgan Stanley personnel who were involved in the Sunbeam/Coleman transaction, have limited the availability of information.

Additionally, MSSF was required to answer the interrogatories based on the broad scope and indeterminate nature of MAFCO's interrogatories themselves. Specifically, Interrogatory No. 1 requested the identity of "each individual who relied upon Exhibit A *or information derived from Exhibit A, in whole or in part, at any time for any purpose.*" (MSSF Resp., Interrog. 1 (emphasis added).) Similarly vague and overbroad is Interrogatory No. 3, which sought the identity of "each individual involved in creating, developing, preparing, or using" certain enumerated synergy documents. (*Id.*, Interrog. 3.) The breadth and vagueness of MAFCO's interrogatories necessarily compound the difficulty in providing absolute certainty in MSSF's responses.

Nonetheless, MSSF was able to identify a number of current and former Morgan Stanley employees it believed had relied, either directly or indirectly on Exhibit A in whole or in part, at any time, for any purpose, with regard to Interrogatory No. 1, or who it believed, based on its investigation, had had a role in the creation, preparation, development or use of the documents identified in Interrogatory No. 3. MSSF's good faith effort to respond to the Interrogatories is evidenced by the fact that in response to each request for the identity of relevant employees associated with a particular topic, MSSF provided MAFCO with a discrete list – one which differed according to the subject matter of the interrogatory, and the corresponding roles of Morgan Stanley personnel at the time of the transaction. As Morgan Stanley has argued before, “[s]hort of omniscience, it is impossible to determine [whether] third parties (former employees) [relied, either directly or indirectly on Exhibit A in whole or in part, at any time, for any purpose, about any particular topic].” (April 14, 2004 MS's Opp. to CPH's Motion to Compel Answers to Interrogs. at 3.)

Furthermore, this Court has *already rejected* CPH's efforts to manufacture a dispute regarding the semantics of MSSF's interrogatory responses. Specifically, when presented with nearly identical arguments in relation to a differing set of interrogatories, this Court determined that:

It's apparent to me that these answers to the interrogatories were prepared in good faith, that voluminous information was reviewed before they were prepared. This is not a case where we got a list of 200 people in response and you said they may have information. Clearly it was apparent ... that this was Defendant's good faith belief that these people have information, we simply cannot confirm for each one that he or she does.... In all honesty, I think the responses to the interrogatories sort have met the standard of practice that's been established in the case.

(April 16, 2004 Hrg. at 51-52.)

The same standard applies today. The only fact that has changed since the Court last heard this issue is that six years, rather than five and a half, have passed since the Sunbeam transaction closed. Morgan Stanley's former employees still work for others. MSSF has again reviewed large number of depositions and discovery documents in its efforts to respond to MAFCO's First Set of Interrogatories. In fact, the discovery responses that MSSF served in response to MAFCO's First Set of Interrogatories – the discovery responses at issue in the attendant motion to compel – are replete with substantiating citations to documents and deposition testimony, thereby exceeding even the thoroughness of the interrogatory responses that this Court found satisfactory at the April 16, 2004 hearing. As a result, the current motion before the Court is simply an attempt to have the Court reverse its prior order.

CPH argues that the Court should now apply a different standard to these interrogatories because their questions are more tailored, the parties have taken discovery, and MSSF is the plaintiff. While portions of CPH's argument may be true, the fact remains that MSSF was unable to engage in detailed questioning of relevant *former* employees regarding the subject matter of Interrogatories Nos. 1 and 3. MSSF did question *current* employees, it did review deposition testimony, it did review a multitude of documents, and it did review computerized meta-data information in search of answers to MAFCO's interrogatories. MSSF did the best that it could with the information that was available to it – and that is all that is required under Florida law.

Finally, CPH has further challenged the veracity of MSSF's interrogatory answers through misleading or incomplete references to the deposition testimony of various current and former Morgan Stanley employees. CPH points to specific questions and answers on discreet topics, and then extrapolates from the answers the conclusion that Morgan Stanley could not

have relied on synergy numbers provided to it by CPH or MAFCO. CPH thus concludes that MSSF's interrogatory answers are "especially egregious." (CPH Motion at 5.)

As an example of lack of veracity of MSSF's answers, CPH cites the testimony of Bram Smith, and states that "he has no basis to believe that the acquisition price of Coleman was affected by any synergy representations of CPH or MAFCO." (*Id.*) The exact question that was asked of Mr. Smith is as follows: "Do you remember anyone at the Leveraged Finance Commitment Committee's meeting saying that with respect to the potential Coleman synergies, we're relying on Coleman management for those concepts or the values associated with them?" (Feb. 24, 2004 Smith Dep. at 223 (Ex. 3).) Interrogatory No. 1 does not, however merely ask for those who relied solely or directly on Coleman synergies. To the contrary, the text of the discovery request is much broader, encompassing the actual synergies numbers themselves (Exhibit A), as well as *information derived from Exhibit A*. Further, the request broadly encompassed complete and partial reliance, at any time, and for any purpose. To the extent that someone, at some point had relied on the Coleman synergies figures, and incorporated that reliance into his or her analysis of the transaction, then a complete interrogatory answer necessarily includes any person who later reviewed and relied on that analysis.¹ This is the comprehensive response that was required of, and provided by, MSSF based on the language of the interrogatories.

¹ Interestingly, CPH and MAFCO omitted any mention of Tyrone Chang's testimony, which revealed that he did in fact review the synergy document at issue, that he modeled those synergies, and that various committee and Board presentations were presented with financial and synergy information that derived from the one-page listing that had been provided to Morgan Stanley by CPH or MAFCO. (Jan. 8, 2004 Chang Dep. at 171-172, 203 (Ex. 4).)

2. CPH's Motion Again Seeks To Have The Court Rewrite Its Interrogatories.

CPH is again trying to rewrite its interrogatory requests via motions to compel. CPH seeks the Court's assistance now because MAFCO's interrogatory requests were poorly worded, and they did not get the response that they wanted. For example, in their motion, CPH asserts that they are "entitled to know who, if anyone, in fact relied upon the synergy numbers." (CPH Motion at 3 (emphasis in original).) That is not what was asked. Rather, MAFCO broadly extended the reach of Interrogatory No. 1 to incorporate not only the synergy numbers (Exhibit A), but also "*information derived from Exhibit A, in whole or in part.*" (MSSF Resp., Interrog. 1 (emphasis added).) Neither through its questions nor its definitions did MAFCO ask MSSF to distinguish between those individuals who relied on Exhibit A, those who relied on information derived from Exhibit A, those who relied in whole, those who relied in part, those who relied at different times, or for different purposes. MSSF responded to Interrogatories Nos. 1 and 3 as written. That is all the rules require.

3. CPH Misapprehends General Objection No. 5.

CPH falsely states that MSSF has made a general objection stating "in essence that MSSF was not vouching for the accuracy of any of its responses." (CPH Motion at 3.) CPH knows this is wrong. When asked about the meaning of General Objection No. 5, Morgan Stanley wrote CPH and MAFCO that "[t]he objection was intended to disclaim the 'relevance,' 'factual accuracy' or 'actual[] possess[ion of] knowledge' of the text of MAFCO's interrogatories -- not MSSF's verified answers." (Aug. 13, 2004 Letter from T. Clare to M. Brody (Ex. 5).)

For the foregoing reasons, Morgan Stanley requests that the Court deny CPH's and MAFCO's Motion to Compel Complete Answers To Interrogatory Nos. 1 and 3 In MAFCO'S First Set Of Interrogatories To Morgan Stanley Senior Funding, Inc. in its entirety.

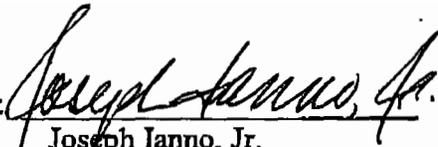
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the listed below service list by facsimile and Federal Express on this 20th day of August, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar No. 618349)
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

*Counsel for Morgan Stanley & Co.
Incorporated and Morgan Stanley Senior
Funding, Inc.*

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
E-mail: jjanno@carltonfields.com

BY: 
Joseph Ianno, Jr.
Florida Bar No. 655351

SERVICE LIST

Jack Scarola
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy
Michael Brody
JENNER & BLOCK, LLC
One IBM Plaza, Suite 400
Chicago, IL 60611

EXHIBIT 1

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff,

vs.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO., INC.,
Defendant.

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff,

vs.

CASE NO: CA 03-5165 AI

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant.

**PLAINTIFF'S NOTICE OF SERVING RESPONSES AND OBJECTIONS TO
DEFENDANT'S FIRST SET OF INTERROGATORIES**

Plaintiff Morgan Stanley Senior Funding, by and through their undersigned
counsel, hereby give notice that Plaintiff served responses and objections to Defendant's First
Set of Interrogatories, on this 9th day of August, 2004.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this 9th Day of August, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar No. 618349)
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
E-mail: jianno@carltonfields.com

BY: 
Joseph Ianno, Jr.
Florida Bar No. 655351

*Counsel for Morgan Stanley & Co.
Incorporated and Morgan Stanley Senior
Funding*

SERVICE LIST

Jack Scarola
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy
Michael Brody
JENNER & BLOCK, LLC
One IBM Plaza, Suite 400
Chicago, IL 60611

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,
Defendant.

CASE NO: CA 03-5045 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff,

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant.

CASE NO: CA 03-5165 AI

**MORGAN STANLEY SENIOR FUNDING'S RESPONSES AND OBJECTIONS TO
MACANDREWS & FORBES HOLDING INC.'S FIRST SET OF INTERROGATORIES**

Plaintiff Morgan Stanley Senior Funding ("MSSF"), by its attorneys, and pursuant to Florida Rules of Civil Procedure 1.280 and 1.340, hereby responds and objects to MacAndrews & Forbes Holdings Inc.'s ("MAFCO") First Set of Interrogatories as follows:

GENERAL OBJECTIONS

1. MSSF objects to MAFCO's First Set of Interrogatories, including all Definitions and Instructions, to the extent that they purport to impose upon MSSF any requirements that exceed or are otherwise inconsistent with the Florida Rules of Civil Procedure or any other applicable rule or court order.

2. MSSF objects to MAFCO's First Set of Interrogatories to the extent that they seek information protected from disclosure by the attorney-client privilege, the attorney-work-product doctrine, or any other applicable privilege, doctrine, immunity or rule.

3. MSSF objects to the definitions of "Morgan Stanley" and "MSSF" to the extent that they include counsel in this litigation and entities not a party to this action. Specifically, MSSF interprets these definitions to exclude Kirkland & Ellis LLP, Carlton Fields, P.A, Kellogg Huber Hansen Todd & Evans, P.L.L.C. as well as affiliates, parents, and others not a party to this action.

4. MSSF objects to the definition of "Identify" when used with respect to a person to the extent that it seeks the addresses and phone numbers of persons named. Such persons who are employees of MSSF should not be contacted directly, but rather communications must go through counsel.

5. MSSF's response to any interrogatory is not intended and should not be construed as an acknowledgement of relevance or factual accuracy, or that any person identified actually possesses knowledge or information relevant to the subject matter of this action.

6. MSSF's objections and responses are based on a good faith investigation. MSSF expressly reserves the right to amend and/or modify its objections and responses.

7. MSSF incorporates, as though fully set forth therein, these General Objections into each of the Responses and Objections set forth below.

RESPONSES AND SPECIFIC OBJECTIONS

INTERROGATORY NO. 1: Identify each individual who relied upon Exhibit A or information derived from Exhibit A, in whole or in part, at any time and for any purpose. For each individual, describe in detail when and how each individual relied upon Exhibit A or in information derived from Exhibit A, and what each individual did with the information contained in Exhibit A or derived from Exhibit A.

RESPONSE: MSSF notes that Defendant's Interrogatory No. 1 constitutes at least three separate interrogatories. Subject to and without waving its general and specific objections, MSSF responds as follows:

MAFCO and its wholly-owned subsidiary, CPH, made false statements to Sunbeam, Sunbeam's financial advisors, and Sunbeam's lenders regarding the "synergies" that Sunbeam could expect to achieve from an acquisition of The Coleman Company.

Specifically, throughout the negotiations leading to Sunbeam's acquisition of Coleman, MAFCO and CPH falsely represented that the acquisition would result in post-closing synergies of \$150.5 million per year, falsely stated that lower synergy figures were "understated," and falsely stated that Sunbeam and Morgan Stanley were not giving MAFCO and CPH "enough credit" for synergies in the valuation of a combined Sunbeam/Coleman entity. [MORGAN STANLEY CONFIDENTIAL 0044556 at 557-558] MAFCO and CPH made false synergy representations to Sunbeam and Morgan Stanley verbally and in writing. The false synergy information provided by MAFCO and CPH in writing (memorialized in the document attached as Exhibit A to MSSF's Complaint), and false synergy information derived from that document became part of the total mix of information relied on by Sunbeam, Morgan Stanley & Co., and Morgan Stanley Senior Funding in the acquisition and financing transactions that followed.

On or about December 12, 1997, Sunbeam and Coleman representatives held a meeting at MAFCO's offices in New York to discuss the proposed acquisition of Coleman and the benefits that would accrue to Sunbeam if the deal went forward. This meeting was attended by, among others, Jerry W. Levin, Coleman's Chairman and Chief Executive Officer, Joseph P. Page, Coleman's Chief Financial Officer, and Paul E. Shapiro, Coleman's General Counsel. Representatives of Sunbeam included Russell A. Kersh, Sunbeam's Chief Financial Officer, David C. Fannin, Sunbeam's Chief Legal Officer, and Peter Langerman, a director of Sunbeam and representative of its then-largest shareholder, Franklin Mutual Advisors, Inc. Coleman's

financial advisors also were present for the meeting. [CPH 1042288, at 292; CPH 1401525 at 528]

During this meeting, CPH and MAFCO representatives provided Sunbeam with a detailed written schedule identifying 15 different areas of synergies between Sunbeam and Coleman, predicting that the acquisition would result in post-closing synergies totaling \$150.5 million per year. [CPH 1020748] To maintain the credibility of this representation, CPH's and MAFCO's written schedule included detailed figures for each of the 15 areas of purported synergies, and a detailed "build-up" of these 15 areas totaling \$150.5 million. Those categories of synergies which were presented by Coleman and MAFCO to Sunbeam included the following line-items: "Transfer BBQ License," "Synergies re CG BBQ," "Corporate Staff," "International Group Staff," "Latin America Staff," "[Coleman] Europe Network Sells [Sunbeam] Products," "[Coleman] Japan Network Sells [Sunbeam] Products," "Factory Outlet Staff," "S Catalytic Appliance Line," "Consolidate Division HQ To [Del Ray Beach, FL]," "Consolidate Domestic Salesforces," "Eliminate \$20 million Oracle Expense," "Additional \$25M Writeoffs," "Global Sourcing Raw Materials," "Consolidation Logistics & Warehousing"

During the December 12, 1997 meeting, CPH and MAFCO verbally supplemented and affirmed the synergy figures contained in this schedule by providing additional information and detail about each of the fifteen line-items. These verbal representations purported to confirm the facts built into each figure and affirmed that the total calculation of \$150.5 million was a fair and prudent estimate of synergies to be gained annually from Sunbeam's acquisition of Coleman. Shortly following this meeting, Morgan Stanley received a copy of the synergy schedule from the Sunbeam officials who had participated in the meeting. [CPH 1020748] From this point forward, the December 12, 1997 synergy schedule,

and information derived from it, was important information considered by Sunbeam in determining the price Sunbeam was willing to pay for Coleman; was important information considered by MS & Co. in underwriting and fixing the terms of Sunbeam's \$750 million convertible debt offering; and was important information considered by MSSF in going forward with its bank loan to Sunbeam.

As the negotiation of the Coleman acquisition progressed, CPH and MAFCO repeatedly and consistently vouched for the \$150.5 million figure represented in their December 12, 1997 synergy schedule, as well as the factual basis from which that figure was purportedly derived. Defendants repeated these false synergy representations during negotiations leading up to the Coleman acquisition.

Specifically, on January 27, 1998, William Reid of Morgan Stanley had a discussion with representatives of The Coleman Company, in which Coleman expressed their position that the synergies had been "understated," and that it was Coleman's view that there were "at least \$150MM in synergies." [MORGAN STANLEY CONFIDENTIAL 0044556 at 558]

Subsequently, representatives of Sunbeam and Coleman held another meeting on January 29, 1998, at MAFCO's New York offices to discuss the proposed acquisition of Coleman by Sunbeam, to update the parties' discussions of synergies from the December 12, 1997 meeting, and to discuss the benefits that would accrue to Sunbeam from the proposed acquisition of Coleman. Representatives from Morgan Stanley also attended the meeting, including Tyrone Chang, Alex Fuchs, and Jim Stynes. Senior officials from the CPH and MAFCO, including MAFCO executives James Maher and William Nesbitt, attended the meeting

on behalf of Coleman. [CPH 1401525 at 529, MORGAN STANLEY CONFIDENTIAL 0033256 at 260, and CPH 1042291 at 294]

And again, on February 16, 1998, representatives from Morgan Stanley had a conversation with James Maher, of MAFCO, who reiterated MAFCO's and CPH's belief that Sunbeam/Morgan Stanley was not "giving them enough credit in for synergies in the valuation" of the combined entity. [MORGAN STANLEY CONFIDENTIAL 0044556 at 557]

At each opportunity, CPH's and MAFCO's agents and representatives discussed, affirmed, and ratified the information contained in the December 12, 1997 synergy schedule. CPH's and MAFCO's agents and representatives represented that \$150.5 million was the fair and prudent projection of annual synergies to be gained by Sunbeam through its acquisition of Coleman, and that any lower synergies figures were "understated." [MORGAN STANLEY CONFIDENTIAL 0044556 at 557-558] These assurances by CPH and MAFCO regarding the \$150 million synergies figures was important information considered by Sunbeam in determining the price Sunbeam was willing to pay for Coleman; was important information considered by MS & Co. in underwriting and fixing the terms of Sunbeam's \$750 million convertible debt offering; and was important information considered by MSSF in going forward with its bank loan to Sunbeam.

Because the December 12, 1997 schedule of synergies and subsequent verbal affirmations by CPH and MAFCO were presented to Sunbeam and Morgan Stanley during the negotiations leading to the acquisition and related financing transactions, Exhibit A, and information derived from it, played a role in the development, analysis, consideration, modeling, evaluation, or review of potential synergies, cost savings, and/or financial benefits that Sunbeam could achieve from a business combination with Coleman.

Accordingly, the following individuals, each of whom played a role in the development, analysis, consideration, modeling, evaluation, or review of potential synergies, cost savings, and/or financial benefits that Sunbeam could achieve from a business combination with Coleman, may have relied, directly or indirectly, upon Exhibit A or information derived from Exhibit A:

- Shani Boone, Analyst, Investment Banking Division
- Tyrone Chang, Analyst, Investment Banking Division [Chang at 171:24-172:12, 203:6-17]
- Benjamin D. Derito, Analyst, Investment Banking Division
- Alex Fuchs, Vice President, Investment Banking Division
- Johannes Groeller, Associate, Investment Banking Division
- Michael Hart, Executive Director, Investment Banking Division [Hart at 31:23-32:7, and 58:3-21]
- Robert Kitts, Managing Director, Investment Banking Division [Kitts at 125:12-19]
- Ruth Porat, Managing Director, Investment Banking Division
- Lily Rafii, Analyst, Global Private Wealth Management Division [Rafii at 158:23-25]
- Andrew B. Savarie, Vice President, Investment Banking Division
- Bram Smith, Managing Director, Investment Banking Division
- William Strong, Managing Director, Investment Banking Division
- James Stynes, Managing Director, Investment Banking Division
- John Tyree, Associate, Investment Banking Division
- Joshua A. Webber, Associate, Investment Banking Division
- William H. Wright, Managing Director, Investment Banking Division
- Gene K. Yoo, Associate, Investment Banking Division

Further, synergies resulting from the proposed combination of Sunbeam and Coleman were modeled, based in part on Exhibit A and information derived from Exhibit A under various scenarios with a midpoint of \$150 million, the same synergy figure represented by MAFCO and CPH. [MORGAN STANLEY CONFIDENTIAL 0026443 at 472-479] These models and results were subsequently presented to Sunbeam's Board of Directors, which included Albert Dunlap, Charles Elson, Russell Kersh, Howard Kristol, Peter Langerman, William Rutter and Faith Whittlesey, who relied on the information in the course of their analysis and ultimate resolution of matters presented before them. [CPH 0075371]

Synergies analyses were also presented to Morgan Stanley's Leveraged Finance Commitment Committee, which in the spring of 1998 may have included all or some of the following individuals: Leslie E. Bradford, Steven L. Brown, Joel P. Feldmann, Richard B. Felix, William Kourakos, Tarek F. Abdel-Meguid, Stephen R. Munger, Stephan F. Newhouse, Ralph L. Pellecchio, Michael L. Rankowitz, William J. Sanders, Mariam A. Short, Dwight D. Sippelle, Bram Smith and William Strong, [See, MORGAN STANLEY CONFIDENTIAL 0028214 at 214], and Morgan Stanley's Equity Commitment Committee, which in the spring of 1998 may have included all or some of the following individuals: Mayree C. Clark, Michael Curtis, John H. Faulkner, Carla A. Harris, John P. Havens, Richard L. Kaufman, Jim Little, Tarek F. Abdel-Meguid, Ralph L. Pellecchio, Ruth M. Porat, William J. Sanders, Dennis F. Shea, Scott M. Sippelle, Ed Sullivan, and William H. Wright. [Conway at 62:11-63:3] Synergy information, including information derived from Exhibit A, was considered by MS & Co.'s and MSSF's decision-making groups in underwriting and fixing the terms of Sunbeam's \$750 million convertible debt offering, and in going forward with the bank loan to Sunbeam. [MORGAN STANLEY CONFIDENTIAL 0028214 at 230, 232 and 237; MORGAN STANLEY

CONFIDENTIAL 0026545 at 567]; and MORGAN STANLEY CONFIDENTIAL 0000513 at 525 and 529] Indeed, the presentations to the Leveraged Finance Commitment and Equity Commitment Committees estimated that the synergy figures presented were "conservative" estimates [MORGAN STANLEY CONFIDENTIAL 0028214 at 232], and that there could be an "upside" to the figures presented. [MORGAN STANLEY CONFIDENTIAL 0028214 at 237; MORGAN STANLEY CONFIDENTIAL 0000513 at 529]

Morgan Stanley further relied on CPH's and MAFCO's synergy figures through discussions with, among others, Sunbeam and Coopers & Lybrand, whose views regarding synergies appear to have been based (at least in part) on the December 12, 1997 synergy schedule and the subsequent statements by CPH and MAFCO regarding synergies. Sunbeam and Coopers & Lybrand were also involved in the preparation, development, and analysis of synergies, and thereby also may have relied, to varying degrees, on Exhibit A or information derived from Exhibit A.

INTERROGATORY NO. 2: Identify with particularity what steps MSSF, Morgan Stanley and/or Sunbeam undertook to develop, analyze, consider, model, evaluate, or review potential synergies, cost savings, and/or financial benefits that Sunbeam could achieve from a business combination with Coleman. Your response should identify each individual involved.

RESPONSE: MSSF notes that Defendant's Interrogatory No. 2 constitutes at least two separate requests. Subject to and without waiving its general and specific objections, MSSF states that MSSF, Morgan Stanley, and/or Sunbeam took the following steps to "develop, analyze, consider, model, evaluate, or review potential synergies, cost savings, and/or financial benefits that Sunbeam could achieve from a business combination with Coleman":

Morgan Stanley participated in numerous meetings and conference calls with Sunbeam and Coleman management in an effort to learn about the Sunbeam and Coleman businesses and about potential synergies and cost savings associated with such a combination.

[See generally, Conway at 44:4-45:7, Fuchs at 33:18-34:9, Hart at 40:3-22, 47:25-48:6]

Specifically:

- On December 11, 1997, Morgan Stanley personnel, including Alexander Fuchs, Robert Kitts and James Stynes, met with Sunbeam personnel, including David Fannin and Russell Kersh regarding Sunbeam's potential transaction and upcoming meeting with Coleman. [CPH 1042288, at 2292]
- On December 12, 1997, Sunbeam management and directors, including Russell Kersh, David Fannin and Peter Langerman, met with Coleman management, including Jerry Levin, Joseph Page and Paul Shapiro. [CPH 1042288 at 2292] At this meeting, Coleman management provided Sunbeam with a detailed written schedule identifying 15 different areas of synergies between Sunbeam and Coleman.
- On December 16, 1997, Morgan Stanley personnel spoke with Coleman personnel regarding synergies. Coleman personnel stated that Coleman should receive a majority of the credit for any synergies. [MORGAN STANLEY CONFIDENTIAL 0001846 at 1849]
- On January 27, 1998, Morgan Stanley personnel, including William Reid, spoke with Coleman/MAFCO personnel, who stated that there were at least \$150MM in synergies, and that any lower figure was "understated." [MORGAN STANLEY CONFIDENTIAL 0001846 at 1848]
- On January 29, 1998, Morgan Stanley personnel, including Tyrone Chang, Alexander Fuchs and James Stynes, met with Sunbeam personnel, including David Fannin and Russell Kersh; Coleman personnel, including Jerry Levin and Joseph Page; MAFCO personnel, including James Maher, William Nesbitt and Shapiro; and Credit Suisse First Boston personnel, including Gordon Rich to discuss benefits that would accrue from the proposed Coleman acquisition, 1998 expected performance, synergies, and preliminary due diligence. [CPH 1042288 at 2294, CPH 1401525 at 529, MORGAN STANLEY CONFIDENTIAL 0033255 at 260]
- On February 3, 1998, Morgan Stanley personnel participated on a conference call with Coleman personnel, including Jerry Levin, during which the synergies values were discussed. [MORGAN STANLEY CONFIDENTIAL 0001846 at 1847]
- On February 23-24, 1998, Morgan Stanley personnel, including Tyrone Chang, Alexander Fuchs, James Stynes and Joshua Webber, met with Sunbeam personnel, including David Fannin and Richard Goudis; Arthur Andersen personnel; Coopers & Lybrand personnel; Coleman personnel, including Jerry Levin and Joseph Page; MAFCO personnel, including William Nesbitt; and Credit Suisse First Boston personnel, including Duffy, Steven Geller and Gordon Rich to discuss, among other things, strategic due diligence and 1998 projections. [CPH 1042288, at 2299; MORGAN STANLEY CONFIDENTIAL 0033255 at 261]

forward basis, which entailed a valuation of potential synergies and an analysis and compilation of publicly available information regarding the parties to the transaction. [Chang at 47:10-16, 174:1-10, 186;23-188:1, 190-196; Conway at 72:9-11, 77:5-78:12] Morgan Stanley received a document outlining potential synergies, which were then modeled using a range of synergies, i.e., a range of dollar values which resulted in a range of potential impacts on the transaction. [Chang at 172:6-12, 176:24-178:2; CPH 1020748-749]. Specifically, Morgan Stanley created models, including but not limited to those which examined trading analyses, precedent transaction analyses, discounted cash flow analyses, and estimated value of synergies analyses. [Chang at 190-196]

Morgan Stanley modeled the synergies under various assumptions, and discussed the synergies with the relevant companies, however Morgan Stanley did not perform an independent valuation of the potential synergies that would result from the transaction. The financial synergy data came from CPH, MAFCO, Sunbeam and Coopers & Lybrand. Morgan Stanley ultimately presented the information that was provided by the companies. [Stynes at 62:23-63:8; Yoo at 126:14-127:4, 145:21-146:4]

Apart from Morgan Stanley's efforts to "develop, analyze, consider, model, evaluate, or review potential synergies, cost savings, and/or financial benefits that Sunbeam could achieve from a business combination with Coleman," Morgan Stanley believes that representatives from Coopers & Lybrand and from Sunbeam also were involved in preparing, developing, and analyzing the synergy figures. For example, Coopers & Lybrand "physically visited facilities and would comment positively and/or negatively on the ability to achieve the preliminary synergies that ha[d] been identified." [Kitts at 100:24-101:7; Page 202:1-5; CPH 1401525 at 531; MORGAN STANLEY CONFIDENTIAL 0007317]

- On February 25-26, 1998, Morgan Stanley personnel, including Robert Kitts, James Stynes and Joshua Webber, participated on a conference call with Sunbeam personnel, including David Fannin and Russell Kersh; MAFCO personnel, including James Maher; and Wachtell Lipton personnel to discuss due diligence on the Coleman/Sunbeam transaction. [CPH 1042288, at 2302, MORGAN STANLEY CONFIDENTIAL 0033255 at 262]
- On February 26, 1998, Joshua Webber of Morgan Stanley communicated with MAFCO personnel, including James Maher, regarding synergies analyses. [CPH 1120533]
- On March 4-5, 1998, Morgan Stanley personnel, including Thomas Burchill, Seth Ishaan, Andrew Savarie, Bram Smith, and John Tyree, met with Sunbeam personnel, including Debra MacDonald to conduct due diligence on the Coleman/Sunbeam transaction with relation to the credit facility. [MORGAN STANLEY CONFIDENTIAL 0035935]
- Date uncertain -- Morgan Stanley personnel, including Michael Hart, spoke to Coleman personnel, including Jerry Levin, and Sunbeam personnel, including Albert Dunlap, about the achievability of synergies numbers. [Hart at 40:3-15]

Additionally, Morgan Stanley researched and requested information from Coleman and Sunbeam necessary for the development, analysis, consideration, modeling, evaluation, or review of potential synergies, cost savings, and/or financial benefits that Sunbeam could achieve from a business combination with Coleman. [MORGAN STANLEY CONFIDENTIAL 0031791-799] Morgan Stanley probed management and asked questions regarding synergy plans, testing their ability to execute those synergies on the given timetable. [Smith at 278:7-18] Morgan Stanley reviewed this information, including, but not limited to the listing of synergies and cost savings provided to Morgan Stanley by Coleman (via Sunbeam) on December 12, 1997 [CPH 1020748-749]. Morgan Stanley personnel involved in this process included Tyrone Chang, Andrew Conway, Alexander Fuchs and Gene Yoo. [Fuchs at 127:7-21; Yoo at 105:2-12]

Furthermore, Morgan Stanley personnel, including Tyrone Chang and Andrew Conway, created and compiled pro forma models for the new combined business on a going

Sunbeam "develop[ed], analyze[d], consider[ed], model[ed], evaluate[d], or review[ed] potential synergies, cost savings, and/or financial benefits that Sunbeam could achieve from a business combination with Coleman" in several ways. Sunbeam personnel participated in numerous meetings and conference calls pertaining to due diligence issues, including but not limited to business due diligence, legal due diligence, human resources due diligence, insurance due diligence and tax due diligence. [MORGAN STANLEY CONFIDENTIAL 0007317] Additionally, Scott Yales has testified to having performed synergies analyses -- validating the assumptions, testing their viability, and coordinating these efforts with Coleman -- the source of these synergies numbers, and to having worked with Coopers & Lybrand, who was retained to validate synergistic opportunities. [Yales at 119:20-24, 127:12-128:3, 129:11-130:18]

INTERROGATORY NO. 3: Identify each individual involved in creating, developing, preparing, or using the following documents, or the information contained therein: MORGAN STANLEY CONFIDENTIAL 3136, 3931, 33911, 36113, 31983-31984, 84007-84010, and 84012-84019. As to each person identified, describe in detail that individual's role in creating, developing, preparing, or using such documents or the information contained therein.

RESPONSE: Morgan Stanley notes that Defendant's Interrogatory No. 3 constitutes at least fourteen separate requests. Subject to and without waiving Morgan Stanley's general and specific objections, Morgan Stanley states that the following individuals were either involved in creating, developing, preparing, or using the documents identified in Request No. 3 or the information contained therein:

Document	Individual/Role
MSC3136	Tyrone Chang and David Fannin may have used this document. [(See CPH Ex. 96, which is a duplicate copy of MSC3136, numbered CPH0472491]
MSC3931	Morgan Stanley possesses no information as to the persons who may have had a role in the creation, development, preparation or use of this document.
MSC33911	Tyrone Chang and Eugene Yoo may have had a role in the creation, development, preparation or use of this document. (See electronic file contained in CD 46774)
MSC36113	Tyrone Chang may have had a role in the creation, development, preparation or use of this document. (See electronic file contained in CD 46775) Eugene Yoo may have also used this document in the course of negotiations with Coleman. [Yoo at 141:3-25]
MSC31983-31984	Tyrone Chang may have had a role in the creation, development, preparation or use of this document. (See electronic file contained in CD 46773) Eugene Yoo may have also used this document in the course of negotiations with Coleman. [Yoo at 141:3-25]
MSC84007-84010	Tyrone Chang may have had a role in the creation, development, preparation or use of this document. [Chang 183:20-24] Joshua Webber also testified that he had a role in the creation, development, preparation or use of this document. [Webber at 98:20-99:7] Mr. Webber further testified that Davis Wang, Ed Lam, Alexander Fuchs, Lily Rafi and James Stynes may have assisted in the creation, development, preparation and/or use of this document. [Webber at 99:23-100:22, 114:22-115:6; see also Rafi at 157:18-22, 158:23-159:2] Eugene Yoo also testified that he may have had a role in the creation, development, preparation or use of this document. [Yoo at 151:16-23] Furthermore, this document was part of a larger presentation made to the Sunbeam Board of Directors on February 27, 1998, and is entitled "Review of Anticipated

	<p>Combination of Synergies." At that time, the Sunbeam Board of Directors was comprised of Albert Dunlap, Charles Elson, Russell Kersh, Howard Kristol, Peter Langerman, William Rutter and Faith Whittlesey [MORGAN STANLEY CONFIDENTIAL 0083960; CPH 0075371] -- thus, the aforelisted directors also may have used this document, or information contained within.</p>
MSC84012-84019	<p>Tyrone Chang may have had a role in the creation, development, preparation or use of this document. [Chang 183:20-24] Joshua Webber also testified that he had a role in the creation, development, preparation or use of this document. [Webber at 98:20-99:7] Mr. Webber further testified that Davis Wang, Ed Lam, Alexander Fuchs, Lily Rafii and James Stynes may have assisted in the creation, development, preparation and/or use of this document. [Webber at 99:23-100:22, 114:22-115:6; see also Rafii at 157:18-22, 158:23-159:2] Eugene Yoo also testified that he may have had a role in the creation, development, preparation or use of this document. [Yoo at 151:16-23] Furthermore, this document was part of a larger presentation made to the Sunbeam Board of Directors on February 27, 1998, and is entitled "Review of Anticipated Combination of Synergies." At that time, the Sunbeam Board of Directors was comprised of Albert Dunlap, Charles Elson, Russell Kersh, Howard Kristol, Peter Langerman, William Rutter and Faith Whittlesey [MORGAN STANLEY CONFIDENTIAL 0083960; CPH 0075371] -- thus, the aforelisted directors also may have used this document, or information contained within.</p>

INTERROGATORY NO. 4: Identify each individual involved on behalf of MSSF and Morgan Stanley in conducting, reviewing, or participating in due diligence of Sunbeam in connection with (i) the Coleman Transaction, (ii) the February 27 Agreements; (iii) the Subordinated Debenture Offering; and (iv) the Bank Facility, and for each such individual, describe in detail what steps that individual undertook to conduct that due diligence.

RESPONSE: Morgan Stanley notes that Defendant's Interrogatory No. 4 constitutes at least four separate requests. Morgan Stanley objects to Request No. 4 as overbroad and unduly burdensome to the extent that this request seeks an enumeration of every specific instance Morgan Stanley performed "due diligence" on Sunbeam. As Morgan Stanley's witnesses have repeatedly testified, due diligence is a broad term that encompasses, among other activities, nearly every discussion that Morgan Stanley had with Sunbeam's personnel and advisors and nearly every instance in which a Morgan Stanley representative requested information from Sunbeam or reviewed that information.

Morgan Stanley further objects to Request No. 4 as overbroad and unduly burdensome to the extent that this request seeks an enumeration of every specific instance Morgan Stanley performed "due diligence" on Sunbeam because the due diligence activities contemplated by Request No. 4 occurred over five years ago. Subject to and without waiving its general and specific objections, Morgan Stanley states the individuals listed below were among the Morgan Stanley representatives who conducted due diligence in connection with the Coleman transaction, the convertible debenture offering and the bank loan:

Name	Due Diligence Conducted
Tyrone Chang	As part of Morgan Stanley's due diligence for the Coleman Transaction and associated debenture offering, Mr. Chang had discussions with Sunbeam management, read publicly available information, such as quarterly and annual Securities Exchange Commission filings, read analyst reports, read research reports from Oppenheimer and Bear Stearns, read estimates from Wall Street, spoke with Russell Kersh and Rich Goudis from Sunbeam, and worked with Sunbeam personnel to put together Sunbeam's pro forma financial statements. [Chang at 46:7-17; 47:10-16; 64:2-65:23; 67:12-25; see also generally the entire Chang deposition transcript]
Eugene Yoo	As part of Morgan Stanley's due diligence for the Coleman Transaction and associated debenture offering, Mr. Yoo had discussions with Sunbeam management; visited Sunbeam's headquarters in Florida; met with the heads of various Sunbeam divisions; received a presentation by Sunbeam employees; reviewed financial filings and public documents, including filings by the SEC,

	press releases, and news stories. [Yoo at 31:14-32:23] Mr. Yoo also conducted due diligence on the Coleman Company prior to the close of the transaction. With regard to due diligence performed on the Coleman Company, Mr. Yoo assisted in coordinating the information flow between Skadden Arps, Morgan Stanley, Coopers & Lybrand, and Arthur Andersen. [Yoo at 206:4-17]
Lili Rafii	As part of Morgan Stanley's due diligence for the Coleman Transaction and associated debenture offering, Ms. Rafii gathered publicly available information about Sunbeam. [Rafii at 125:6-13] Additionally, Ms. Rafii reviewed research reports and news articles. [Rafii at 42:7-18]
Andrew Conway	As part of Morgan Stanley's due diligence for the Coleman Transaction and associated debenture offering, Mr. Conway attended meetings in Florida with members of the Sunbeam team, including but not limited to Al Dunlap, Russ Kersh, David Fannin, and Rich Goudis, and Don Uzzi. Mr. Conway also reviewed Sunbeam's public financial statements, reports, and industry materials.
Alex Fuchs	As part of Morgan Stanley's due diligence for the Coleman Transaction and associated debenture offering, Mr. Fuchs had regular discussions with Sunbeam management and employees, participated in conference calls with Sunbeam, visited Sunbeam locations, and presented the materials Morgan Stanley was developing back to Sunbeam management and employees to insure that Morgan Stanley's material accurately reflected the information provided to Morgan Stanley by Sunbeam management.
Michael Hart	As part of Morgan Stanley's due diligence for the senior loan, Mr. Hart participated in a diligence call with Jerry Levin and Al Dunlap, participated in other calls where due diligence was discussed, and reviewed various financial models to analyze the underwriting commitment and evaluate Sunbeam's overall credit worthiness. [Hart at 103:23-106:6] Morgan Stanley notes that First Union and Bank of America also conducted due diligence in connection with the senior loan.
Robert Kitts	As part of Morgan Stanley's due diligence for the Coleman Transaction and associated debenture offering, Mr. Kitts researched publicly available information regarding Sunbeam, conducted interviews with Sunbeam management, maintained an ongoing dialogue with Sunbeam personnel, reviewed research reports, and attended due diligence meetings with Sunbeam and Coleman representatives. [Kitts at 73:22-74:25; 87:6-17, 91:15-92:13] Mr. Kitts did not have any role in bring-down due diligence for the debt offering. [Kitts at 151:17-20]
Andrew Savarie	As part of Morgan Stanley's due diligence for the Coleman Transaction and associated debenture offering, Mr. Savarie attended due diligence meetings with Sunbeam, gathered information regarding Sunbeam, reviewed drafts of the offering documents, visited Sunbeam's offices, and had ongoing discussions with Sunbeam representatives about Sunbeam's business forecasts. [Savarie at 50:14-25, 57:2-23, 68:8-21, 90:2-20 and 112:16-22] Mr. Savarie also had at least one discussion with Sunbeam's accountants at Arthur Andersen and was involved in discussions with lawyers for Sunbeam and for

	the other banks. [Savarie at 58:12-59:3, 78:6-21] Mr. Savarie does not recall being involved in due diligence of the acquisition targets.
Bram Smith	As part of Morgan Stanley's due diligence for the senior loan, Mr. Smith supervised aspects of due diligence that were conducted with respect to the structuring of the senior loan. [Smith at 85:2-20] Mr. Smith attended at least one due diligence meeting at Sunbeam's offices on March 4 and 5, 1998, analyzed available projections and the possible loan structures, and participated in telephone calls and review of documents regarding Sunbeam's financial performance. [Smith at 85:21-86:9, 91:5-19, 92:8-19, 144:10-145:6] Mr. Smith also maintained an ongoing dialogue with Sunbeam in the context of asking questions related to the debt financing. [Tyree at 434:18-435:6] Morgan Stanley notes that First Union and Bank of America also conducted due diligence in connection with the senior loan.
Ruth Porat	As part of Morgan Stanley's due diligence for the debenture offering, Ms. Porat participated in telephone discussions with Sunbeam representatives regarding Sunbeam's first quarter 1998 performance, and reviewed documents prepared and presented by senior Sunbeam sales officials regarding projected sales for the balance of the first quarter. [Smith at 82:6-83:2, 141:25-142:6; Porat at 18:2-15, 73:24-74:12]
Jim Stynes	As part of Morgan Stanley's due diligence for the Coleman Transaction, Mr. Stynes had regular discussions with Sunbeam management and employees, participated in conference calls with Sunbeam, visited Sunbeam locations, and presented the materials Morgan Stanley was developing back to Sunbeam management and employees to insure that Morgan Stanley's material accurately reflected the information provided to Morgan Stanley by Sunbeam management. [Strong at 313:6-22]
William Strong	As part of Morgan Stanley's due diligence for the Coleman Transaction and related debenture offering, Mr. Strong participated in telephone discussions with Sunbeam representatives regarding Sunbeam's first quarter 1998 performance, and reviewed documents prepared and presented by senior Sunbeam sales officials regarding projected sales for the balance of the first quarter. [Strong at 286:6-15, 305:23-308:8, 336:22-337:6]
John Tyree	As part of Morgan Stanley's due diligence for the Coleman Transaction and related debenture offering, Mr. Tyree; visited Sunbeam's offices in Florida; had ongoing discussions, including teleconferences, with Sunbeam's management; conducted bring-down due diligence; reviewed financial forecasts, including the net sales for the First Quarter 1998; facilitated the due diligence process by setting up meetings and making sure the appropriate people from Morgan Stanley and Sunbeam attended the meetings; inspected Sunbeam's facilities and headquarters; requested and reviewed financial information such as publicly filed quarterly and annual reports; and analyzed research and analyst reports. [Tyree at 124:3-17, 322:10-16, 376:8-11, 409:13-18, 432:18-25, 449:6-12, 493:18-21, 501:10-18 and 558:5-17] Mr. Tyree participated in telephone discussions with Sunbeam representatives regarding Sunbeam's first quarter 1998 performance, and reviewed documents prepared and presented by senior Sunbeam sales officials regarding projected sales for

	the balance of the first quarter. Mr. Tyree also spoke with representatives from Arthur Andersen on multiple occasions during the due diligence process.
Josh Webber	As part of Morgan Stanley's due diligence for the Coleman Transaction, Mr. Webber performed due diligence on the Coleman Company [Webber at 74:11-20]
Shani Boone	As part of Morgan Stanley's due diligence for the Coleman Transaction and related debenture offering, Ms. Boone attended conference calls with Sunbeam in which due diligence was discussed. [Boone at 32:14-21]
Johannes Groeller	As part of Morgan Stanley's due diligence for the Coleman Transaction and related debenture offering, Mr. Groeller contacted several of Sunbeam's customers and participated in "bring down due diligence" sessions with Sunbeam management. [MORGAN STANLEY CONFIDENTIAL 0029176]

Furthermore, as part of Morgan Stanley's due diligence on the Coleman transaction and related debenture offering, unspecified members of Morgan Stanley's Sunbeam teams requested documentation from Sunbeam management and employees, including a) backup numbers for all new revenue streams, including any methodologies implemented in arriving at such revenue projections; b) historical and projected pricing and unit sales trends for both existing and new products; and c) information regarding new pipeline products, including how revenue projections were arrived at, and a description of the product development cycle. [CPH 0469863]

I hereby declare that the foregoing answers are true and correct upon information and belief and to the best of my knowledge.

Dated this 9 day of August, 2004.

By: [Signature]

(Print Name) RICHARD A. HART

STATE OF NEW YORK)
COUNTY OF NEW YORK)^{ss}

BEFORE ME, the undersigned authority, personally appeared Michael A. Hart who after being by me first duly sworn, deposes and says that she executed the above and foregoing interrogatories and that said answers are true and correct.

Sworn to and subscribed before me this 9th day of August, 2004.

[Signature]

Name typed/printed: _____
Notary Public, State of _____
Commission No.: _____

My Notary Commission Seal:

JOHN FLOTBECK
Notary Public, State of New York
No. 37-01PL4730133
Qualified in New York County
Commission Expires 1/31/2007

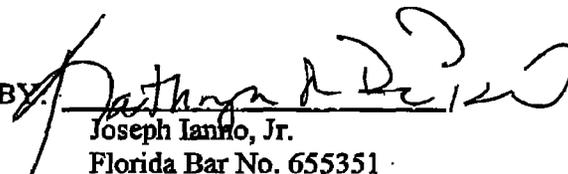
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this ___ day of August, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar No. 618349)
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

*Counsel for Morgan Stanley & Co.
Incorporated and Morgan Stanley Senior
Funding*

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
E-mail: jianno@carltonfields.com

BY: 
Joseph Ianno, Jr.
Florida Bar No. 655351

SERVICE LIST

Jack Scarola
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy
Michael Brody
JENNER & BLOCK, LLC
One IBM Plaza, Suite 400
Chicago, IL 60611

EXHIBIT 2

AUG-11-2004 10:17

JENNER AND BLOCK LLP

312 527 0484 P.02/03

JENNER & BLOCK

August 11, 2004

Jenner & Block LLP
 One IBM Plaza
 Chicago, IL 60611
 Tel 312-527-9350
 www.jenner.com

Chicago
 Dallas
 Washington, DC

By Telecopy

Thomas A. Clare, Esq.
 KIRKLAND & ELLIS LLP
 655 Fifteenth Street, N.W.
 Suite 1200
 Washington, D.C. 20005

Michael T. Brody
 Tel 312 923-2711
 Fax 312 840-7711
 mbrody@jenner.com

Re: *Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co.*
Morgan Stanley Senior Funding, Inc. v. MacAndrews & Forbes Holdings Inc., et al.

Dear Tom:

I write concerning certain deficiencies in MSSF's August 9, 2004 responses to Mafo's interrogatories.

General Objection No. 3: MSSF objects to CPH's definitions of "Morgan Stanley" and "MSSF" to the extent that they include entities not a party to this action. MSSF may not unilaterally modify our interrogatories by redefining their terms. By doing so, MSSF has violated Florida Rule of Civil Procedure 1.340(a), which provides that a party "shall furnish the information available to that party." To the extent that MSSF has information responsive to Mafo's interrogatories as phrased, MSSF must provide that information. Please inform us if as a result of that objection, MSSF withheld any information otherwise responsive to the interrogatories. If so, we request that MSSF withdraw that objection and provide a full response to the interrogatories immediately.

General Objection No. 5: MSSF states that its response to any interrogatory "is not intended and should not be construed as an acknowledgment of the relevance or factual accuracy, or that any person identified actually possesses knowledge or information relevant to the subject matter of this action." MSSF cannot circumvent Florida Rule of Civil procedure 1.340(a) requiring verifications that interrogatory answers are true and correct with an objection that essentially disclaims the verification. Please retract General Objection No. 5 immediately.

Interrogatory Response Nos. 1 & 3: MSSF fails to provide complete responses to Interrogatory Nos. 1 and 3. In response to those interrogatories, MSSF lists several individuals who "may have relied" on Coleman's synergies estimates, and several others who "may have had a role" in the creation, development, or use of particular synergy documents. Given the extensive discovery that has taken place in this case to date, MSSF's responses are insufficient

CHICAGO_1138311_1

16div-006420

AUG-11-2004 10:17

JENNER AND BLOCK LLP

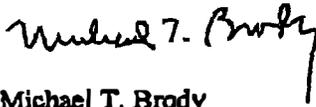
312 527 8484 P.03/03

Thomas A. Clare, Esq.
August 11, 2004
Page 2

and inadequate under the Florida rules. Please amend those responses immediately to provide more definitive answers.

Given MSSF's delay in providing responses to these interrogatories, it is imperative that MSSF amend its interrogatory answers immediately. Please provide amended interrogatory responses by August 13, 2004 or the parties will be at issue.

Very truly yours,



Michael T. Brody

cc: Joseph Ianno, Esq. (by telecopy)
John Scarola, Esq. (by telecopy)
Jerold S. Solovy, Esq.

EXHIBIT 3

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE CIRCUIT COURT OF THE FIFTEENTH
JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS,)
INC.,)
Plaintiff,)
vs.)
MORGAN STANLEY & CO., INC.,)
Defendant.)
-----)

DEPOSITION OF R. BRAM SMITH
New York, New York
Tuesday, February 24, 2004

Reported by:
PAMELA J. MAZZELLA, RPR
JOB NO. 157119

COPY

1 Smith

2 A. I never met the man.

3 Q. Did you have discussions with any
4 member from Coleman company regarding
5 potential synergies before the senior loan
6 closed?

7 A. I did not.

8 Q. Anybody with Coleman (Parent)?

9 A. I did not.

10 Q. Or McAndrews & Forbes?

11 A. I didn't.

12 Q. Do you remember anyone at the
13 Leveraged Finance Committee -- excuse me.

14 Do you remember anyone at the
15 Leveraged Finance Commitment Committee's
16 meeting saying that with respect to the
17 potential Coleman synergies, we're relying on
18 Coleman management for those concepts or the
19 values associated with them?

20 A. No.

21 Q. Do you recall there being
22 discussion at the Leveraged Finance
23 Commitment Committee's March 20 meeting
24 concerning the fact that the funds raised
25 through the convertible debenture offering

EXHIBIT 4

CONFIDENTIAL

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS, INC.,)
)
 Plaintiff,)
)
 vs.)
)
 MORGAN STANLEY & CO., INC.,)
)
 Defendants.)

No. 2003
CA005045 AI

CERTIFIED
COPY

C O N F I D E N T I A L
VIDEOTAPED DEPOSITION OF TYRONE CHANG
Los Angeles, California
Thursday, January 8, 2004

Reported by:
PAMELA A. STITT
CSR No. 6027
JOB No. 130476

ESQUIRE DEPOSITION SERVICES
(323) 938-2461

CONFIDENTIAL

1 Q Do you recall making any requests for
2 information from Coleman?

3 A I don't remember, no.

4 Q Earlier you testified about the list of due
5 diligence topics that either Mr. Kitts or Mr. Fuchs
6 referred you to from another deal --

7 A Uh-huh.

8 Q -- or from another file.

13:47 9 Could this be a document that you prepared
10 after consultation of that file?

11 A I don't remember.

12 Q The third --

13 A But I think that that list was pulled earlier
14 on.

15 Q In connection with your visits to Florida?

16 A Yes.

17 Q The third bullet item refers to "Synergies."

18 The third bullet item on the first page refers to

19 "Synergies."

20 MR. CLARE: The fourth bullet.

21 MR. BRODY: You are right. Thank you, Tom.

22 THE WITNESS: Yes.

23 BY MR. BRODY:

13:48 24 Q Do you have a recollection of doing work on
25 synergies in connection with the combination of Coleman

CONFIDENTIAL

1 and Sunbeam?

2 A I remember a page of -- I think I might have
3 mentioned this before as well -- a page that was
4 presented to Morgan Stanley from Sunbeam, sources I am
5 not sure of, that listed synergies.

6 Q As an analyst did you do any work to analyze
7 those synergies?

8 A I modeled in a range of synergies.

9 Q Pardon me?

13:48 10 A I modeled in a range of synergies, a variety of
11 synergies in terms of dollar amounts and in terms of
12 potential impacts on transactions.

13 Q Who directed you to do that, to model a
14 variety of synergies?

15 A One of my superiors.

16 Q Do you know which one?

17 A I don't remember.

18 Q What task were you given?

19 A I don't remember a specific task.

20 Q What information did you use in order to
21 prepare that model?

22 A The model was based on -- Historical
13:49 23 information was based on publicly released information
24 from Sunbeam, and the expected earnings were based on
25 information from Wall Street and all of it was vetted by

172

CONFIDENTIAL

1 A Yes.

2 Q Is this section a section you prepared?

3 A I don't remember.

4 Q Do you remember preparing it in any way?

5 A I don't remember.

6 Q Turning to the first page of the document there
7 is a "Summary of Potential Operating Efficiencies."

14:37 8 A Okay.

9 Q Do you know what the source of this was?

10 A The only thing I remember about synergies was
11 the page that was provided that I mentioned before.

12 Q That was provided by Sunbeam?

13 A That I think was provided by Sunbeam, yes.

14 Q Were you ever told that the page provided by --
15 that the synergy information provided by Sunbeam had
16 come from Coleman?

17 A I don't know who that came from.

18 Q But you were never told that?

19 A No, I was never told that.

20 Q Okay. If you turn to page -010, "Repositioning
14:37 21 Highlights" --

22 A Uh-huh.

23 Q -- we have seen a version of that before.

24 Did you have anything to do with the creation
25 of that document?

203

EXHIBIT 5

KIRKLAND & ELLIS LLP

AND AFFILIATED PARTNERSHIPS

665 Fifteenth Street, N.W.
Washington, D.C. 20005Thomas A. Clare
To Call Writer Directly:
(202) 879-5993
tclare@kirkland.com202 879-5000
www.kirkland.comFacsimile:
202 879-5200

August 13, 2004

BY FACSIMILEMichael Brody, Esq.
Jenner & Block, LLP
One IBM Plaza
Chicago, IL 60611-7603Re: *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc.*
MSSF v. MacAndrews & Forbes Holdings Inc. et al.

Dear Mike:

I write in response to your August 11, 2004 letter regarding alleged "deficiencies" contained in Morgan Stanley Senior Funding's Responses and Objections to MacAndrews and Forbes Holding Inc.'s First Set of Interrogatories.

General Objection No. 3: MSSF has not withheld any information based on its General Objection No. 3, which states that "MSSF objects to the definitions of 'Morgan Stanley' and 'MSSF' to the extent that they include counsel in this litigation and entities not a party to this action. Specifically, MSSF interprets these definitions to exclude Kirkland & Ellis LLP, Carlton Fields, P.A., Kellogg Huber Hansen Todd & Evans, P.L.L.C. as well as affiliates, parents, and others not a party to this action." MSSF has provided to MAFCO all information available to both MSSF and MS & Co.

General Objection No. 5: MAFCO misreads MSSF's General Objection No. 5, which reads, "MSSF's response to any interrogatory is not intended and should not be construed as an acknowledgement of relevance or factual accuracy, or that any person identified actually possesses knowledge or information relevant to the subject matter of this action." The objection was intended to disclaim the "relevance," "factual accuracy" or "actual[] possess[ion of] knowledge" of the text of MAFCO's interrogatories – not MSSF's verified answers.

Interrogatory Response Nos. 1 & 3: MAFCO complains that MSSF has "fail[ed] to provide complete responses to Interrogatories Nos. 1 and 3" because of the utilization of terms "may have relied" and "may have had a role" in MSSF's responses. As an initial matter, MSSF has responded to Interrogatories Nos. 1 and 3 as definitively as possible in light of (a) the manner in which MAFCO asked the questions (i.e., "who relied upon Exhibit A or information derived

Chicago

London

Los Angeles

New York

San Francisco

16div-006431

KIRKLAND & ELLIS LLP

Michael Brody, Esq.

June 25, 2004

Page 2

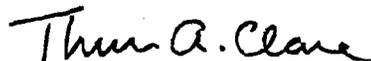
from Exhibit A, in whole or in part, at any time and for any purpose"); (b) the limited information available to Morgan Stanley about who created or worked on certain documents; and (c) the fact that the interrogatories purport to request, at least in part, information known solely by third parties outside of Morgan Stanley's control.

Furthermore, the Court has already rejected your efforts to manufacture a dispute regarding the semantics of interrogatory responses; In denying Coleman (Parent) Holdings Inc.'s April 9, 2004 Motion to Compel Answers To Interrogatories, which raised substantially identical issues, Judge Maas determined:

"[i]t's apparent to me that these answers to the interrogatories were prepared in good faith, that voluminous information was reviewed before they were prepared. This is not a case where we got a list of 200 people in response and you said they may have information. Clearly it was apparent . . . that this was Defendant's good faith belief that these people have information, we simply cannot confirm for each one that he or she does.... In all honesty, I think the responses to the interrogatories sort have met the standard of practice that's been established in the case." (4/16/04 Case Management Conference, at 51:14-52:7)

The same standard applies today.

Sincerely,



Thomas A. Clare

cc: Joseph Ianno, Esq. (by facsimile)
John Scarola, Esq. (by facsimile)
Mark C. Hansen, Esq. (by facsimile)

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,

Defendant(s).

CASE NO: CA 03-5165 AI

**MORGAN STANLEY SENIOR FUNDING,
INC.,**

Plaintiff(s),

vs.

**MACANDREWS & FORBES HOLDINGS,
INC.,**

Defendant(s).

NOTICE OF VIDEOTAPED DEPOSITION

PLEASE TAKE NOTICE that Morgan Stanley & Company Incorporated and Morgan Stanley Senior Funding, Inc. will take the videotaped deposition of William Nesbitt, pursuant to Florida Rules of Civil Procedure 1.280 and 1.310. The oral examination will take place on August 31, 2004, at 9:30 a.m. and on September 1, 2004 at 9:30 a.m., and will continue from day to day until completed at the offices of Kirkland & Ellis, LLP, 153 East 53rd Street, New York, New York, 10022. The deposition will be taken before a person authorized to administer oaths and recorded by stenographic and videographic means. The video operator will be Esquire Deposition Services of 216 E. 45th Street in New York, New York. The witness is instructed to bring all books, papers, and other things in his possession or under his control relevant to this lawsuit (and not previously produced in discovery) to the examination.

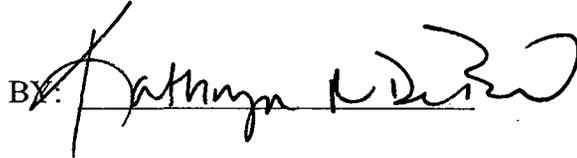
Dated: August 23, 2004

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar # 618349)
Thomas A. Clare
Zhonette M. Brown
Michael C. Occhuizzo
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

Michael K. Kellogg
Mark C. Hansen
James M. Webster
Rebecca A. Beynon
**KELLOGG, HUBER, HANSEN,
TODD & EVANS P.L.L.C.**
Sumner Square
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
Telephone: (202) 326-7900
Facsimile: (202) 326-7999
(*Pro Hac Vice* Pending)

**Counsel for Morgan Stanley & Co.
Incorporated & Morgan Stanley Senior
Funding**

Joseph Ianno, Jr. (FL Bar # 655351)
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

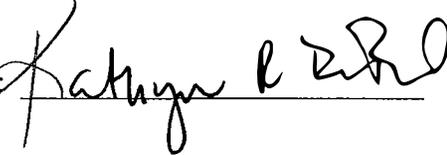
BY: 

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and federal express on this 23rd day of August, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar # 618349)
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

Joseph Ianno, Jr. (FL Bar # 655351)
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
e-mail: jianno@carltonfields.com

BY: 

**Counsel for Morgan Stanley & Co.
Incorporated & Morgan Stanley Senior
Funding**

SERVICE LIST

Counsel for Coleman(Parent) Holdings & MacAndrews & Forbes

John Scarola
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33409

Jerold S. Solovy
JENNER & BLOCK, LLC
One IBM Plaza, Suite 4400
Chicago, Illinois 60611

CARLTON FIELDS, P.A.

ATTORNEYS AT LAW

Esperanté
222 Lakeview Avenue, Suite 1400
West Palm Beach, Florida 33401-6149

MAILING ADDRESS
P.O. Box 150, West Palm Beach, FL 33402-0150
Tel 561.659.7070 Fax 561.659.7368

FAX COVER SHEET

Date:	Phone Number	Fax Number
August 20, 2004		
To: Jack Scarola, Esq.	(561) 689-6300	(561) 684-5816
Jerold Solovy, Esq.	(312) 923-2711	(312) 840-7671
Michael Brody		(312) 840-7711
Thomas Clare, Esq.		(202) 879-5200
From: Joyce Dillard, CIA to Joseph Ianno, Jr.	(561) 659.7070	(561) 659.7368

Client/Matter No.: 47877/14092

Employee No.:

Total Number of Pages Being Transmitted, Including Cover Sheet: 58

Message: To follow please find a copy of Morgan Stanley's Supplemental Memorandum in Response to the Court's Order of August 13, 2004, and Motion to Dismiss or Strike Plaintiff's Motion for Contempt.

- Original to follow Via Regular Mail
 Original will Not be Sent
 Original will follow via Overnight Courier

The information contained in this facsimile message is attorney privileged and confidential information intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone (if long distance, please call collect) and return the original message to us at the above address via the U.S. Postal Service. Thank you.

If there are any problems or complications, please notify us immediately at:
561.659.7070

Telecopier operator: _____

WPB#567902.6

CARLTON FIELDS, P.A.

Miami Orlando St. Petersburg Tallahassee Tampa West Palm Beach

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,
Defendant.

CASE NO: CA 03-5045 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff,

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant.

CASE NO: CA 03-5165 AI

**MORGAN STANLEY'S SUPPLEMENTAL MEMORANDUM IN
RESPONSE TO THE COURT'S ORDER OF AUGUST 13, 2004, AND
MOTION TO DISMISS OR STRIKE PLAINTIFF'S MOTION FOR CONTEMPT**

Something has gone wrong here, very wrong. For almost *six* months the parties have been embroiled in a unilaterally "sealed" contempt proceeding about a document — a settlement agreement explicitly discoverable under Fla. R. Civ. P. 1.280(b)(2) — that is not confidential under Florida law, should not be confidential under the Stipulated Confidentiality Order, has properly been a matter of public record since no later than December 18, 2003, and in any event was never treated in a contemptuous manner by Morgan Stanley or its counsel. To make matters worse, the contempt proceeding has nothing to do with the merits of these consolidated actions.

Morgan Stanley & Co. Incorporated and Morgan Stanley Senior Funding, Inc. (collectively, "Morgan Stanley") move for reconsideration of two of the Court's earlier Orders, and also move to dismiss or strike the plaintiff's Motion for Contempt as legally insufficient. This motion presents three issues:

First, whether the Court should reconsider its “approval” of the Stipulated Confidentiality Order to the extent it authorizes the sealing of court records in violation of Florida law. The answer is yes. (Arguments A and B)

Second, whether the Court should reconsider that portion of the December 4, 2003 Order that makes the Settlement Agreement subject to the Confidentiality Order. The answer is yes. The Settlement Agreement should not have designated as confidential even for the limited period set forth in the Court’s order. (Argument C)

And *third*, whether Morgan Stanley can be found in contempt of court for disclosing to its counsel a document that was a matter of public record at the time of disclosure and remains so today. The answer is no. The plaintiff’s Motion for Contempt should be dismissed *now* as legally insufficient. (Argument D)

In support of this motion, Morgan Stanley states as follows.

Statement of Undisputed Facts

1. On March 12, 2004, the plaintiff filed its Motion for an Order for a Rule to Show Cause Against Morgan Stanley. On May 14, 2004, the Court entered an Order (“May 14 Order”) converting the motion to a “Motion for Contempt.”

2. The gravamen of the Motion for Contempt is that Morgan Stanley violated the terms of the Stipulated Confidentiality Order (“Confidentiality Order”) dated July 31, 2003 by improperly disclosing the Arthur Andersen Settlement Agreement (“Settlement Agreement”) to Morgan Stanley’s counsel Kellogg, Huber, Hansen, Todd & Evans P.L.L.C., and thereafter using the Settlement Agreement in “other litigation.”

The Stipulated Confidentiality Order

3. On July 28, 2003, the parties submitted to the Court a "proposed Stipulated Confidentiality Order," which the parties asked the Court to sign if it met with the Court's "approval." (July 28, 2004 Letter to the Court from J. Scarola (Ex. 1).)

4. The parties did not request a hearing on the Confidentiality Order, and the Court did not hold a hearing.

5. The Court "signed and dated" the Confidentiality Order on July 31, 2003, without modification or amendment. (July 31, 2003 Stipulated Confidentiality Order (Ex. 2).)

The Motion to Compel Production of the Settlement Agreement

6. On October 29, 2003, Morgan Stanley moved to compel the production of the Settlement Agreement between the plaintiff and Arthur Andersen, which served as the public accountant and the outside auditor for Sunbeam Corporation between 1996 and 1998, the time period at issue in the plaintiff's complaint. There is no dispute that the Settlement Agreement was called for under various Morgan Stanley requests for production served upon CPH. There is also no dispute that CPH refused to produce the Settlement Agreement, even under the terms of the Confidentiality Order.¹

7. The Court heard the motion on November 25, 2003. At the outset of the hearing, the Court stated that a number of documents had been filed under seal and questioned the propriety of filing documents under seal.

¹ CPH argued that the Settlement Agreement was subject to a contractual confidentiality provision that prohibited disclosure of the Settlement Agreement to Morgan Stanley. CPH did not claim and has never claimed that the Settlement Agreement is privileged from disclosure. Indeed, CPH conceded that at least the Settlement Agreement amount would be discoverable, albeit after trial and assuming a judgment against Morgan Stanley. (See, e.g., Nov. 5, 2003 CPH's Resp. in Opp. To Def's Mot. to Compel Prod. of Settlement Agreement with Arthur Andersen.)

THE COURT: This is Coleman and Morgan Stanley. It's defendant's motion, I think, to compel production of a settlement agreement.

MR. IANNO: That's correct.

MR. CLARE: That's correct.

THE COURT: You-all can have a seat. The first motion I have though, and I apologize, I didn't have time to go through the files to try to find this, I see that defendant has filed certain things under seal or has tendered certain things under seal, and I hope that none of them have been filed yet. Was there an order entered that permitted that procedure?

MR. IANNO: Yes, Your Honor. Joe Ianno. I believe that the confidentiality order that was entered in this case provided for that.

THE COURT: You're going to have to tell me, because I thought —

MR. IANNO: I didn't bring the confidentiality order with me.

THE COURT: Because, obviously, under the Rules of Judicial Administration, things can't get filed under seal --

MR. IANNO: Without notice to media.

THE COURT: And all that. And I thought when I looked at the proposed order in this case, either I struck through that stuff or I mailed it back to you guys and said I can't sign this. And if I haven't done that yet, that's why we need to find that order.

I haven't looked at any of the stuff that was given to me under seal. I need to just give it back to you. It's not my policy to look at things that can't be part of the court record absent a clear order that permits me to do so.

It could be somehow I signed it and I forgot.

(Nov. 25, 2003 Hrg. at 3-4 (Ex. 3).)

8. In the course of the November 25, 2003 hearing, CPH provided the Court with a copy of the Settlement Agreement. The Court apparently made a copy of the Settlement Agreement and then returned the original to counsel for CPH. (*Id.* at 20, 24.)

The December 4, 2003 Order

9. On December 4, 2003, the Court entered its order ("December 4 Order") compelling production of a redacted copy of the Settlement Agreement, which was attached to the order as "Exhibit 1." The Court placed the *unredacted* Settlement Agreement in the Court file in a "sealed" envelope, with directions that it not be opened without further order of the Court or an appellate court.

10. The Court ordered the *redacted* Settlement Agreement be produced to Morgan Stanley, sequenced as follows:

- December 5 at 12 noon, production to CPH
- December 8 at 4 p.m., production to Morgan Stanley
- December 9 at 4 p.m., the file was released from the Court's chambers.

11. On December 8, 2003, Morgan Stanley received a copy of the *redacted* Settlement Agreement. Morgan Stanley did not receive and does not possess a copy of the *unredacted* Settlement Agreement.

12. On December 18, 2003, the clerk docketed the Court's December 4 Order. Pursuant to the December 4 Order, the clerk filed under seal the *unredacted* copy of the Settlement Agreement. In addition, and pursuant to the December 4 Order, the clerk filed — not under seal — a *redacted* copy of the Settlement Agreement. Thus, as of August 20, 2004, the *redacted* version of the Settlement Agreement has been a matter of public record for 247 days.

13. The *redacted* copy of the Settlement Agreement in the public court file discloses all of the terms of the settlement between the plaintiff and Arthur Andersen, including the provisions that are at issue in the plaintiff's Motion for Contempt.

The Motion for Contempt

14. On March 1, 2004, three Morgan Stanley entities (Morgan Stanley, Morgan Stanley Senior Funding, Inc., and Morgan Stanley & Co. Incorporated) filed a civil action against Arthur Andersen. This action is pending before Judge Karen Miller. Kellogg, Huber, Hansen, Todd & Evans, PLLC (“KHHTE”) represents Morgan Stanley in that action.

15. On March 12, 2004, the plaintiff filed the Motion for Contempt. The motion, which is predicated entirely upon a violation of the Confidentiality Order and the Court’s December 4 Order, makes two allegations. *First*, that Morgan Stanley violated the Confidentiality Order by disclosing to third parties — including attorneys from KHHTE — on or about *February 26, 2004*, the Settlement Agreement that was a matter of public record as of *December 18, 2003*. And *second*, that Morgan Stanley then (*after February 26, 2004*) “used” the Settlement Agreement in other litigation — the action against Arthur Andersen — by including as a plaintiff in that action Morgan Stanley & Co. Incorporated for the sole purpose of triggering the indemnity provision of the Settlement Agreement.

16. Ever since CPH filed the Motion for Contempt, the parties have been engaged in contentious discovery and have appeared before the Court six times at Case Management Conferences to argue matters spawned by the Motion. The Motion has, for all practical purposes, dominated these proceedings since March 12.

17. At the July 23, 2004 Case Management Conference, the plaintiff made an *ore tenus* motion to seal the *redacted* version of the Settlement Agreement. The Court stated that the *redacted* version of the Settlement Agreement was *not* filed under seal, and as a result, was and is a part of the public record in these consolidated actions. The Court further stated that “the only thing that was supposed to be filed under seal was the complete copy of the settlement agreement, not the Exhibit A [Exhibit 1] to the [December 4, 2003] order. Exhibit A to the order

was the redacted copy where the only thing I redacted I think was the account information [of Ronald Perelman].” (July 23, 2004 Hrg. at 62 (Ex. 4).)

18. On July 26, 2004, the Court entered a written order “that Plaintiff’s ore tenus Motion to Direct Clerk to Seal Exhibit to the Court’s Order on Defendant’s Motion to Compel Production of Settlement Agreement entered December 4, 2003 is Denied.”

19. On July 30, 2004, Morgan Stanley moved to Dismiss or Strike the Motion for Contempt on the grounds that it was legally insufficient because: (a) the Settlement Agreement is publicly available and thus was not confidential under the terms of the Confidentiality Order; (b) the Settlement Agreement is a public record; and (c) the Settlement Agreement is not “Confidential” under the terms of the Confidentiality Order.

20. On August 13, 2004, the Court entered an order on Morgan Stanley’s Motion to Dismiss or Strike (“August 13 Order”). In that order the Court elected to treat Morgan Stanley’s motion as including a “Rehearing of a portion of the Court’s December 4, 2003 Order.” And on its own motion, the Court is reconsidering the “July 31, 2003, Stipulated Confidentiality Order.”

Argument

In *Miami Herald Publishing Company v. Lewis*, 426 So. 2d 1, 8 (Fla. 1982), which was a criminal proceeding, the Florida Supreme Court, following decisions of the United States Supreme Court, held that a trial is a public event and what transpires in the courtroom is “public property.” Several years later the court held in *Barron v. Florida Freedom Newspapers, Inc.*, 531 So. 2d 113, 116 (Fla. 1988) that the same was true of civil proceedings; both civil and criminal court proceedings in the state are “public events and adhere to the well established common law right of access to court proceedings and records.” The plaintiff, having filed an action in this state against Morgan Stanley for hundreds of millions, if not billions, of dollars, is not only trying to litigate in secret, but it is using this secrecy as a predicate for a baseless

contempt proceeding that has as its objective defaulting Morgan Stanley in this courtroom, and dismissing Morgan Stanley's 1998 claims against a third party — Andersen — in Judge Miller's courtroom.

The root of this secrecy is the Stipulated Confidentiality Order of July 31, 2003.

A. The Court Should Reconsider The July 31, 2003 Confidentiality Order Because The Order Is Contrary To Florida Law To The Extent It Allows Parties To Unilaterally File Documents Under "Seal".

The July 31 Confidentiality Order allows the parties to designate documents, depositions and court filings ("Litigation Materials") as "Confidential." (See Stipulated Confidentiality Order ¶¶ 1, 4.) The Confidentiality Order further permits the parties to file unilaterally and without further order of the Court, Confidential Litigation Materials under seal. (See Stipulated Confidentiality Order ¶¶ 9(a), 14-15 (setting forth the procedure for filing documents under seal and removing confidentiality designation).) Indeed, CPH has filed *thirty-six* court documents "under seal" since the first Case Management Conference on February 20, 2004.² This procedure violates Florida law, and until a few weeks ago, an administrative rule of this Court.

Article 1, section 24 of the Florida Constitution provides that the public has a right to inspect or copy any public record, which includes the records of this Court.

Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body This section specifically includes the legislative, executive, and judicial branches of government

FLA. CONST. Art. I, § 24.

² Morgan Stanley has filed court filings under seal, but only as a consequence of CPH's motion for contempt, and only with respect to matters relating to the Settlement Agreement. In addition, Morgan Stanley has moved to strike the Confidential designation of numerous CPH court filings. (See July 30, 2004 Morgan Stanley's Motion To Remove Confidentiality Designations.)

In addition, the Florida Rules of Judicial Administration provide that the “public shall have access to all records of the judicial branch of government, except as provided ...” Fla. R. Jud. Admin. 2.051(a). Litigation Materials, as defined in the Confidentiality Order are, to the extent they are filed with the court, clearly “records of the judicial branch.” *See Id.* at 2.051(b)(1). And while the rule contemplates that “confidential” records can be withheld, the rule places strict limits on what is confidential. *See Id.* at 2.051(c)(9)(A)(i)-(vii). Moreover, the court cannot close — or “seal” — a court record without reasonable notice to the public. *Id.* at 2.051(c)(9)(D). And while this rule does not itself apply to court proceedings, which requires *prior* notice, a court can elect to give prior notice in appropriate cases. *Id.* 2.051 (Committee Commentary).³

The Confidentiality Order and CPH’s continuous filings under seal fly in the face of these legal requirements for denying the public access to court records. Indeed, the Stipulated Confidentiality Order is contrary to the court’s own Administrative Order that existed until July 13, 2004, which prohibited the filing of documents under seal unless pursuant to court order entered after notice to the media of the hearing on the motion.⁴ Administrative Order 2-032-2/00 (vacated as unnecessary because covered by existing law).

Accordingly, the Court should reconsider its order of July 31, 2003 approving the Confidentiality Order. Specifically, the Court should strike from the Confidentiality Order:

³ Florida courts cannot close their proceedings to the public without *prior* notice to the media. *See, e.g., Miami Herald Publishing Co. v. Lewis*, 426 So. 2d 1 (1982) (criminal); *Barron v. Florida Freedom Newspapers, Inc.*, 531 So. 2d 113 (Fla. 1988) (civil).

⁴ On July 13, 2004, Judge Fine signed Administrative Order 2.032-7/04, vacating Administrative Order 2-032-2/00, which order specifically addressed the sealing of court records and the closure of proceedings. As Judge Fine stated in Administrative Order 2.032-7/04, the earlier order was no longer necessary because “it is a matter of existing law.”

- Paragraph 9 (a) after the first full sentence ending with "... Court personnel)." The court should add a sentence that reads: "No document may be filed under seal without complying with Fla. R. Jud. Admin. 2.051."
- Paragraph 4 should be amended to add the following sentence at the conclusion of the paragraph: "Notwithstanding anything to the contrary in this paragraph 4, the parties' designation of Litigation Materials as Confidential shall not be determinative of whether such Litigation Materials are Confidential pursuant to Fla. R. Jud. Admin. 2.051(c)(9)."
- Paragraph 20 should be deleted in its entirety after the first full sentence ending with the word "court."

B. The Court Should Rehear That Portion Of The December 4 Order That Makes The Redacted Settlement Agreement Subject To The Stipulated Confidentiality Order

The Court should reconsider that portion of its December 4 Order that provides the redacted Settlement Agreement is "hereby deemed 'Confidential' and subject to the terms of the parties' Stipulated Confidentiality Order entered July 31, 2003."⁵ This issue, which turns on an agreement of the parties, is separate and apart from whether under Florida law the Settlement Agreement can be filed under seal in the Court's file.

Even if the Settlement Agreement is somehow still "deemed Confidential" notwithstanding its filing in the Court file, the Settlement Agreement does not qualify as "Confidential" information under the *Confidentiality Order*. Morgan Stanley has never been heard on this issue.

⁵ At the hearing on Morgan Stanley's motion to compel production of the Settlement Agreement, Morgan Stanley stated, without having seen the Settlement Agreement, that Morgan Stanley would agree not to disclose the Settlement Agreement in violation of the Stipulated Confidentiality Order. (11/25/2003 Hrg. at 23 (Ex. 3).) This statement did not preclude Morgan Stanley from challenging the Confidentiality of the Settlement Agreement *after* Morgan Stanley actually saw the Agreement. (See Stipulated Confidentiality Agreement ¶¶ 14-15.) And in fact, Morgan Stanley attempted to get CPH to remove the Confidential designation, which it refused to do. (See April 22, 2004 Letter from T. Clare to M. Brody (Ex. 5); April 22, 2004 Letter from M. Brody to T. Clare (Ex. 6).)

The Confidentiality Order affords Confidential treatment only to “proprietary or confidential trade secrets or technical, business, financial or personnel [sic] information of a current nature.” (Stipulated Confidentiality Order ¶ 4 (emphasis added).) The Settlement Agreement does not fit within any of these categories. CPH cannot, therefore, sustain its burden to establish the confidential nature of the Settlement Agreement. (*Id.* at ¶ 15 (placing the burden upon the party making the “Confidential” designation).)

First, the Settlement Agreement is not “proprietary or confidential trade secrets.” See Fla. Stat. § 812.081(1)(c) (Trade secrets are information “for use . . . in the operation of a business and which provides the business an advantage, or an opportunity to obtain an advantage, over those who do not know or use it.”); see also Fla. Stat. § 364.183 (defining “proprietary confidential business information” to include, inter alia, trade secrets and other information that would affect the competitive position of the business); Fla. Stat. § 688.002 (defining a trade secret as “information, including a formula, pattern, compilation, program, device, method, technique, or process that [d]erives independent economic value . . . from not being generally known to, and not being readily ascertainable by . . . , other persons who can obtain economic value from its disclosure or use”). The information contained in a 2002 commercial settlement agreement between a shell corporation that does not operate a business and an accounting firm resolving a dispute arising from a 1998 transaction is not for use “in the operation of business” and does not provide a business advantage over competitors. See *American Express Travel Related Servs., Inc. v. Cruz*, 761 So. 2d 1206 (Fla. 4th DCA 2000) (reviewing process for assertion of trade secret privilege and noting burden of establishing trade secret rests on party asserting it); *Crocker Constr. Co. v. Hornsby*, 562 So. 2d 842 (Fla. 4th DCA

1990) (denying writ of certiorari for review of court order requiring production of financial information).

Second, the Settlement Agreement is not “technical, business, financial or personnel information of a current nature.” There is no “technical” or “personnel” information contained in the Agreement. Nor is there any business or financial information “of a current nature.”

Finally, settlement agreements and indemnity provisions are widely recognized as discoverable information that is not subject to special protection. *See City of Homestead v. Rogers*, 789 So. 2d 483 (Fla. 3d DCA 2001) (ordering production of settlement agreement over objection based upon confidentiality provision in settlement agreement); *Scott v. Nelson*, 697 So. 2d 1300 (Fla. 1st DCA 1997) (ordering deposition of party to settlement agreement despite confidentiality provision in settlement agreement); Fla. Stat. § 44.102(3) (providing that privilege for communications that occur during mediation do not apply to an executed settlement agreement); Fla. R. Civ. P. 1.280(b)(2) (providing specifically that indemnity agreements are within the proper scope of discovery).

C. The Settlement Agreement Is Not Confidential Under Florida Law And Therefore Cannot Be “Sealed”.

The Court’s orders of December 4, 2003 and July 26, 2004 are in accord with the law and public policy of Florida. The plaintiff made the Settlement Agreement a court record when it refused to produce the Agreement, thereby forcing Morgan Stanley to move to compel its production. The Court made the redacted version of the Settlement Agreement a judicial record on December 4, 2003. Once the Settlement Agreement became a judicial record, the Agreement could not be “sealed” without compliance with the Florida Rules of Judicial Administration. Those rules require both a finding that the document is “confidential,” *and* reasonable notice to the public of any order closing any court record. Fla. R. Jud. Admin. 2.051(c)(9)(A),(D).

Florida public policy and the Florida Rules of Judicial Administration establish a presumption that “[t]he public shall have access to all records of the judicial branch of government.” Fla. R. Jud. Admin. 2.051(a); see *Goldberg v. Johnson*, 485 So. 2d 1386, 1388 (Fla. 4th DCA 1986) (noting “the public and press have a right to know what goes on in a courtroom”); see also *Smithwick v. Television 12 of Jacksonville, Inc.*, 730 So. 2d 795, 799 (Fla. 1st DCA 1999) (noting strong public policy in favor of open government overcame potential injury that disclosure of court record may cause to third party). These records are explicitly defined to include “the contents of the court file.” Fla. R. Jud. Admin. 2.051(b)(1)(A).

Because the power and authority of a court to seal records or proceedings “should be exercised cautiously and only for the most cogent reasons,” *Goldberg*, 485 So. 2d at 1388, Florida rules and case law provide very few exceptions to the general rule of public access. See *Gombert v. Gombert*, 727 So. 2d 355, 357 (Fla. 1st DCA 1999) (finding that rule 2.051 incorporates judicial decisions concerning when confidentiality concerns may support sealing a record). The Settlement Agreement — which is merely a contract between two parties — does not meet any of the established criteria for sealing what would otherwise be public records. Certainly the Settlement Agreement does not need to be sealed to protect the “orderly administration of justice,” a “compelling government interest,” or constitutional or statutory public policy. See Fla. R. Jud. Admin. 2.051(c)(9)(A)(i, iii & vii). Nor will the revelation of the Settlement Agreement result in “substantial injury” to an innocent third party or party. See Fla. R. Jud. Admin. 2.051(c)(9)(A)(v & vi). And as shown in section B, the Settlement Agreement does not contain a trade secret and need not be kept under seal in order to “obtain evidence to determine legal issues in a case.” See Fla. R. Jud. Admin. 2.051(c)(9)(A)(ii & iv). Finally, the

Settlement Agreement could not be sealed without notice to the public, as explicitly set forth in rule 2.051 (c)(9)(D).

The only argument that CPH has advanced in support of the confidential treatment of the Settlement Agreement is the fact that the Settlement Agreement itself contractually obligates the parties to the Agreement to keep the terms confidential. This sort of contract is not sufficient to thwart public access to court records. *Goldberg*, 485 So. 2d at 1389 (“[A] litigant’s preference that the public not be apprised of the details of his litigation is not grounds for closure.”).

D. The Settlement Agreement Is Not Confidential Pursuant To The Terms Of The Stipulated Confidentiality Order Because It Is Publicly Available.

The plaintiff’s Motion for Contempt is the legal equivalent of a complaint. The plaintiff makes specific allegations of fact unrelated to these consolidated actions, which facts the plaintiff claims entitle it to both equitable and legal relief. (*See* March 12, 2004 CPH’s Motion for a Rule to Show Cause at 10 (“CPH Motion for Contempt”).) Morgan Stanley has denied the plaintiff’s allegations.⁶ Morgan Stanley contends that the facts alleged in the Motion for Contempt and those of record establish that the plaintiff’s motion does not state a claim upon which relief can be granted. Accordingly, the Motion for Contempt should either be dismissed or stricken.

Pursuant to this Court’s Order of December 4, 2003, Morgan Stanley received a copy of the *redacted* Settlement Agreement on December 8, 2003. The Court ordered the redacted Settlement Agreement (Exhibit 1) “deemed ‘Confidential’” and subject to the terms of the parties Stipulated Confidentiality Order entered July 31, 2003. Paragraph 2 of the Stipulated

⁶ For purposes of this Motion only, however, Morgan Stanley treats the allegations of plaintiff’s Motion for Contempt as true in the same manner as the Court would treat allegations of a complaint for purposes of deciding a Motion to Dismiss.

Confidentiality Order provides that its terms do not apply to any document “generally available to the public.”

This Order shall not apply to any document, testimony or other information that . . . (b) *becomes generally available to the public* other than as a result of disclosure in violation of this Order or in breach of any other legal obligation, or (c) *becomes available to a party* other than through voluntary or required production from a person or party who obtained the document, testimony or other information without any confidentiality restriction.

(Emphasis added.)

The *redacted* Settlement Agreement has been included in the court file and publicly available since December 18, 2003. Pursuant to the express terms of the Confidentiality Order, the *redacted* Settlement Agreement is not “Confidential” and has not been Confidential since it was placed in the public records of this Court on December 18, 2003. And even if this construction of the Confidentiality Agreement is wrong, the unmistakable fact is that the court filed the Settlement Agreement in the public records, making it available to anyone who wanted to look at it. *See, e.g., Lifecare Int’l, Inc. v. Barad*, 573 So. 2d 1044 (Fla. 3d DCA 1991) (holding that records previously available in court file could not be made confidential); *Sarasota Herald Tribune v. Holtzendorf*, 507 So. 2d 667 (Fla. 2d DCA 1987) (affirming public’s right to view court files).

The plaintiff’s *first* “claim” in its Motion for Contempt is that Morgan Stanley gave the Settlement Agreement to individuals not entitled to receive Confidential information. (*See* Stipulated Confidentiality Order ¶ 9(c).) The plaintiff alleges that Morgan Stanley’s attorneys in the Andersen action — KHHTE — were not entitled to receive a copy of the Settlement Agreement because they were not attorneys “of record” in these consolidated actions. (*See* CPH Motion for Contempt at 4.) Even assuming that the plaintiff is correct, which Morgan Stanley denies, the Motion for Contempt is legally insufficient because the Settlement Agreement has

been a public record since December 18, 2003. Therefore, any dissemination of the “public” document cannot, as a matter of law, constitute a violation of the Confidentiality Order or the Court’s December 4 Order.

The plaintiff’s *second* “claim” is that Morgan Stanley allegedly used the Settlement Agreement for a purpose not authorized by the Confidentiality Order. This claim is also legally and factually insufficient. To find such a violation, this Court must necessarily find that the Settlement Agreement is protected by the Confidentiality Order. This claim fails as a matter of law because the Settlement Agreement is contained in the public court file.

The express terms of the Confidentiality Order *exclude* any document that is either publicly available or becomes available to any party other than through a violation of the Confidentiality Order. The Settlement Agreement is both publicly available and became available to any party once it was openly filed in the court file of this action. Because the Settlement Agreement is publicly available, whatever use was made of the document cannot constitute a violation of the Confidentiality Order. The plaintiff’s real complaint, if any, is that the Andersen action is a sham pleading. That claim should be addressed in Judge Miller’s courtroom pursuant to Fla. R. Civ. P. 1.150. *See, e.g., Pacheco v. Wasserman*, 701 So. 2d 104, 106 (Fla. 3d DCA 1997) (holding “[t]o strike a pleading as a sham, a party must so move before trial, and the *trial court* must conduct an evidentiary hearing”) (emphasis added).

In sum, the plaintiff’s Motion for Contempt is based entirely on alleged violations of the Confidentiality Order. In turn, these alleged violations depend entirely on the fact that the Settlement Agreement is a confidential document in accordance with the terms of the Stipulated Confidentiality Order. The facts are undisputed that as of *December 18, 2003*, the redacted Settlement Agreement was not a Confidential document. Accordingly, Morgan Stanley could

not, as a matter of law, violate the December 4 Order by giving a copy of the Settlement Agreement to its counsel on *February 26, 2004*, even if they were not counsel in “this action.” Moreover, there can be no misuse of the Settlement Agreement under these circumstances that amounts to contempt in this courtroom. At most, Andersen — not the plaintiff here — can proceed in Judge Miller’s courtroom under rule 1.150.

Conclusion

The Court should reconsider its July 31, 2003 Order and amend the Confidentiality Agreement to comply with Florida law.

Under Florida law and the Confidentiality Agreement itself, the Settlement Agreement is not Confidential. Accordingly, the Court should reconsider and amend its December 4, 2003 Order by deleting the language making the redacted Settlement Agreement subject to the Confidentiality Agreement.

Moreover, and equally as important to these proceedings, the Court should dismiss or strike the plaintiff’s Motion for Contempt because it is legally deficient and fatally so. Nothing can save it.

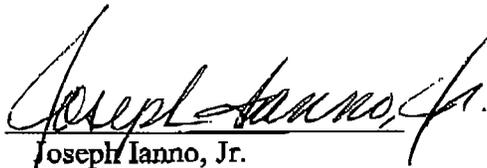
Finally, Morgan Stanley requests that the Court reserve jurisdiction to award Morgan Stanley its attorney fees and costs as a result of having to defend the Motion for Contempt. *Lamb v. Fowler*, 574 So. 2d 262, 263 (Fla. 1st DCA 1991) (“[I]t is now well established that the court is empowered, in its discretion, to assess fines and award attorney’s fees and costs as sanctions for civil contempt.”).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the listed below service list by facsimile and Federal Express on this 20th day of August, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar No. 618349)
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
E-mail: jianno@carltonfields.com

BY: 
Joseph Ianno, Jr.
Florida Bar No. 655351

*Counsel for Morgan Stanley & Co.
Incorporated and Morgan Stanley Senior
Funding, Inc.*

SERVICE LIST

Jack Scarola
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy
Michael Brody
JENNER & BLOCK, LLC
One IBM Plaza, Suite 400
Chicago, IL 60611

EXHIBIT 1

SEARCY DENNEY SCAROLA BARNHART & SHIPLEY P.A.

*Attorneys
at Law*

2139 PALM BEACH LAKES BLVD.
WEST PALM BEACH
FLORIDA 33408

P.O. DRAWER 3828
WEST PALM BEACH
FLORIDA 33402-3828

(561) 886-0300
1-800-780-8007
FAX:
(561) 478-0764

ATTORNEYS AT LAW:

- ROSALYN SIA BAKER
- P. GREGORY BARNHART
- LANCE BLOCK*
- EARL L. DENNEY, JR.*
- SEAN O. DOMINICK
- JAMES W. GUSTAFSON, JR.
- DAVID K. KELLEY, JR.*
- WILLIAM B. KING
- DARRYL L. LEWIS
- WILLIAM A. NORTON*
- PATRICK E. QUINLAN
- DAVID J. SALES*
- JOHN SCAROLA
- CHRISTIAN D. SEARCY*
- HARRY A. SHEVIN
- JOHN A. SHIPLEY III*
- CHRISTOPHER K. SFEED*
- KAREN E. TERRY
- C. CALVIN WARRINER III*
- DAVID J. WHITE*

*SHAREHOLDERS

PARALEGALS:

- VIVIAN AYAN-TEJEDA
- LAURIE J. BRIGGS
- DEANE L. CADY
- DANIEL J. CALLOWAY
- EMILIO DIAMANTIS
- DAVID W. GILMORE
- TED E. KULESA
- JAMES PETER LOVE
- CHRISTOPHER J. PILATO
- ROBERT W. FITCHER
- WILLIAM H. SEABOLD
- KATHLEEN SIMON
- STEVE M. SMITH
- WALTER A. SYDN
- BRIAN P. SULLIVAN
- KEVIN J. WALSH
- JUDSON WHITEHORN

July 28, 2003

Hon. Elizabeth T. Maass
Palm Beach County Courthouse.
Room #11.1208
205 North Dixie Highway
West Palm Beach, FL 33401

Re: Coleman Holdings Inc. v. Morgan Stanley & Co., Inc.
Case No. 2003 CA 005045 AI

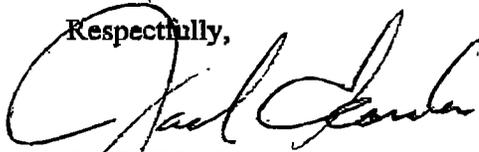
Morgan Stanley Senior Funding, Inc. v. MacAndrews & Forbes, et al.
Case No. 2003 CA 005165 AI

Dear Judge Maass:

Enclosed please find an original and four copies of proposed Stipulated Confidentiality Orders in both of the above-styled matters.

If same meet with your approval, we ask that your Honor sign same, returning conformed copies to all counsel in the envelopes provided.

Respectfully,



JACK SCAROLA
JS/mm
Enc.

cc: Jenner & Block, LLC
Joseph Ianno, Jr., Esq.
Thomas A. Clare, Esq.

WWW.SEARCYLAW.COM



3. Litigation Materials and the information derived therefrom shall be used solely for the purpose of preparing for and conducting this litigation, and shall not be disclosed or used for any other purpose.

4. Any party or non-party may designate as "Confidential" any Litigation Materials or portions thereof which the party or non-party believes, in good faith, constitute, contain, reveal or reflect proprietary or confidential trade secrets or technical, business, financial or personnel information of a current nature. If a party or non-party produces Litigation Materials that have been produced in another litigation or to any government entity and such Litigation Materials have been designated confidential or were accompanied by a request that confidential treatment be accorded them, such Litigation Materials shall be deemed to have been designated "Confidential" for purposes of this Stipulation and Order.

5. Any documents or other tangible Litigation Materials may be designated as "Confidential" by marking every such page "Confidential" or by informing the other party in writing that such material is Confidential. Such markings will be made in a manner which does not obliterate or obscure the content of the document or other tangible Litigation Material. If Litigation Material is inspected at the choice of location of the party or non-party producing or disclosing Litigation Materials (a "producing party"), all such Litigation Material shall be presumed at such inspection to have been designated as Confidential by the producing party until such time as the producing party provides copies to the party that requested the Litigation Material. Production of Confidential Material for inspection and copying shall not constitute a waiver of confidentiality.

6. Depositions or other testimony may be designated "Confidential" by any one of the following means:

(a) stating orally on the record, with reasonable precision as to the affected testimony, on the day the testimony is given that this information is "Confidential"; or

(b) sending written notice designating, by page and line, the portions of the transcript of the deposition or other testimony to be treated as "Confidential" within 10 days after receipt of the transcripts.

7. The entire transcript of any deposition shall be treated as Confidential Material until thirty days after the conclusion of the deposition. Each page of deposition transcript designated as Confidential Material shall be stamped, as set forth in paragraph 5 above, by the court reporter or counsel.

8. In the event it becomes necessary at a deposition or hearing to show any Confidential Material to a witness, any testimony related to the Confidential Material shall be deemed to be Confidential Material, and the pages and lines of the transcript that set forth such testimony shall be stamped as set forth in paragraph 5 of this Stipulation.

9. Litigation Materials designated "Confidential" and any copies thereof, and the information contained therein, shall not be given, shown, made available or communicated in any way to anyone except:

(a) The Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida (the "Court") (including Clerks and other Court personnel). Litigation Materials designated "Confidential" and any copies thereof, and the information contained therein, that are filed with the Court or any pleadings, motions or other papers filed with the Court, shall be filed under seal in a separate sealed envelope conspicuously marked "Filed Under Seal - Subject to Confidentiality Order," or with such other markings as required by Court rules, and shall be kept under seal until further order of the

Court. Where possible, only those portions of filings with the Court that disclose matters designated "Confidential" shall be filed under seal;

(b) counsel to the parties, including co-counsel of record for the parties actually assisting in the prosecution or defense of this litigation, and the legal associates and clerical or other support staff who are employed by such counsel or attorneys and are working under the express direction of such counsel or attorneys;

(c) parties and current officers and employees of parties to the extent reasonably deemed necessary by counsel disclosing such information for the purpose of assisting in the prosecution or defense of this litigation;

(d) outside photocopying, graphic production services, litigation support services, or investigators employed by the parties or their counsel to assist in this litigation and computer personnel performing duties in relation to a computerized litigation system;

(e) any person who is a witness or deponent, and his or her counsel, during the course of a deposition of testimony in this litigation;

(f) any person who is a potential fact witness in the litigation, provided, however, that a person identified solely in this subparagraph shall not be permitted to retain copies of such Litigation Material;

(g) court reporters, stenographers, or videographers who record deposition or other testimony in the litigation;

(h) experts or consultants retained in connection with the litigation;

(i) any person who is indicated on the face of a document to have been an author, addressee or copy recipient thereof, provided, however, that a person identified

solely in this subparagraph shall not be permitted to retain copies of such Litigation Material; and

(j) any other person, upon written consent from the party or person who designated such Litigation Materials "Confidential."

10. Before any person included in paragraph 9(f) or (h) is given access to Litigation Materials designated "Confidential," and before any person included in subparagraph 9(e) is permitted to retain any copy of Litigation Materials designated Confidential, such person shall be provided with a copy of this Order and shall acknowledge in a written statement, in the form provided as Exhibit A hereto, that he or she read the Order and agrees to be bound by the terms thereof. Such executed forms shall be retained in the files of counsel for the party who gave access to Litigation Materials to the person who was provided such access. Such executed forms shall not be subject to disclosure under the Florida Rules of Civil Procedure unless a showing of good cause is made and the Court so orders.

11. The inadvertent production of privileged or arguably privileged materials shall not be determined to be either: (a) a general waiver of the attorney-client privilege, the work product doctrine or any other privilege; or (b) a specific waiver of any such privilege with respect to documents being produced or the testimony given. Notice of any claim of privilege as to any document claimed to have been produced inadvertently shall be given within a reasonable period of time after discovery of the inadvertent production, and, on request by the producing party, all inadvertently produced materials as to which a claim of privilege is properly asserted and any copies thereof shall be returned promptly.

12. Nothing in this Order shall prevent any producing party from disclosing or using its own "Confidential" Litigation Materials as it deems appropriate, and any such disclosure shall not be deemed a waiver of any party's right or obligations under this Order with

respect to any other information. If a party or non-party that designates information "Confidential" discloses or uses such "Confidential" Litigation Materials in a manner inconsistent with the claim that such information is confidential, any party may move the Court for an order removing such "Confidential" designation pursuant to paragraph 15 herein. Nothing in this Stipulation and Order shall impose any restrictions on the use or disclosure by any party of documents, materials, testimony or other information produced as Litigation Material obtained by such party independently of discovery in this litigation.

13. The parties do not waive any right to object to any discovery request, or to the admission of evidence on any ground, or seek any further protective order, or to seek relief from the Court from any provision of this Order by application on notice on any grounds.

14. If any party objects to the designation of any Litigation Materials as "Confidential," the party shall first state the objection by letter to the party that made such designations. The parties agree to confer in good faith by telephone or in person to attempt to resolve any dispute respecting the terms or operation of this Order. If the parties are unable to resolve such dispute within 5 days of such conference, any party may then move the Court to do so. Until the Court rules on such dispute, the Litigation Materials in question shall continue to be treated as "Confidential," as designated.

15. Upon motion, the Court may order the removal of the "Confidential" designation from any information so designated. In connection with any motion concerning the propriety of a "Confidential" designation, the party making the designation shall bear the burden of proof.

16. Within 60 days of the conclusion of this litigation as to all parties, all Litigation Materials designated "Confidential" and all copies or notes thereof shall be returned to counsel for the producing party who initially produced the Litigation Materials, or destroyed,

except that counsel may retain their work product and copies of court filings, transcripts, and exhibits, provided said retained documents will continue to be treated as provided in this Order, as modified by rulings of the Court. If a party chooses to destroy documents after the litigation has concluded, that party shall certify such destruction in writing to the producing party upon written request for such certification by the producing party.

17. The failure of any party to challenge the designation by another production party of Litigation Material as "Confidential" during the discovery period shall not be a waiver of that party's right to object to the designation of such material at trial.

18. This Stipulation applies to all non-parties that are served with subpoenas in connection with this litigation or who otherwise produce documents or are noticed for deposition in connection with this litigation, and all such non-parties are entitled to the protection afforded hereby upon signing a copy of this agreement and agreeing to be bound by its terms.

19. Any party may move to modify the provisions of this Order at any time or the parties may agree by written stipulation, subject to further order of the Court, to modify the provisions of the Order. Should any non-party seek access to the Confidential Material, by request, subpoena or otherwise, the party or recipient of the Confidential Material from whom such access is sought, as applicable, shall promptly notify the producing party who produced such Confidential Materials of such requested access and shall not provide such materials unless required by law or with the consent of the producing party.

20. This Order shall not apply to any Litigation Materials offered or otherwise used by any party at trial or at any hearing held in open court. Prior to the use of any Litigation Materials that have been designated Confidential at trial or any hearing to be held in open court, counsel who desires to so offer or use such Confidential Material shall take reasonable steps to afford opposing counsel and counsel for the producing party who produced such Confidential

Material a reasonable opportunity to object to the disclosure in open court of such Confidential Material, and nothing herein shall be construed a wavier of such right to object.

21. Written notice provided pursuant to this Order shall be made to counsel of record by facsimile.

22. The provisions of this Order shall survive the final termination of the case for any retained Confidential Litigation Material thereof.

COLEMAN (PARENT) HOLDINGS, INC.

MORGAN STANLEY & CO., INC.

By 
John Scarola
SEARCY, DENNEY, SCAROLA,
BARNHART & SHIPLEY P.A.
2139 Palm Beach Lake Boulevard
West Palm Beach, FL 33409

By 
Joseph Ianno, Jr.
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Jerold S. Solovy
Ronald L. Marmer
Robert T. Markowski
Deirdre E. Connell
JENNER & BLOCK, LLC
One IBM Plaza, Suite 4400
Chicago, IL 60611

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
KIRKLAND & ELLIS
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005

SO ORDERED;

This _____ day of _____, 2003

CIRCUIT JUDGE

COPIES PROVIDED TO COUNSEL OF RECORD ON THE ATTACHED LIST

COUNSEL LIST**Counsel for Plaintiff
COLEMAN (PARENT) HOLDINGS INC.**

SEARCY DENNEY SCAROLA
BARNHART & SHIPLEY P.A.
John Scarola, Esq.
2139 Palm Beach Lake Blvd.
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 684-5816

JENNER & BLOCK, LLC
Jerold S. Solovy, Esq.
Ronald L. Marmer, Esq.
Robert T. Markowski, Esq.
Deirdre E. Connell, Esq.
One IBM Plaza, Suite 4400
Chicago, IL 60611
Phone: (312) 222-9350
Fax: (312) 527-0484

**Counsel for Defendant
MORGAN STANLEY & CO., INC.**

CARLTON FIELDS, P.A.
Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Phone: (561) 659-7070
Fax: (561) 659-7368

KIRKLAND & ELLIS
Thomas D. Yannucci, P.C.
Thomas A. Clare, Esq.
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Phone: (202) 879-5000
Fax: (202) 879-5200

**IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA**

_____)	
COLEMAN (PARENT) HOLDINGS INC.,)	
)	
Plaintiff,	)	Case No.: 2003 CA 005045 AI
v.)	
)	
MORGAN STANLEY & CO., INC.,	)	Judge Elizabeth I. Maass
)	
Defendant.)	
_____)	

Exhibit A

**DECLARATION OF ACKNOWLEDGMENT AND
AGREEMENT TO BE BOUND BY PROTECTIVE ORDER**

I, _____, declare under penalty of perjury that:

1. My address is _____.
2. My present employer is _____.
3. My present occupation or job description is _____.

4. I hereby certify and agree that I have read and understand the terms of the Confidentiality Order in the above-captioned actions. I further certify that I will not use "Confidential" information for any purpose other than this litigation among the parties, and will not disclose or cause "Confidential" information to be disclosed to anyone not expressly permitted by the Order to receive "Confidential" information. I agree to be bound by the terms and conditions of the Order.

5. I understand that I am to retain in confidence from all individuals not expressly permitted to receive information designated as "Confidential," whether at home or at

work, all copies of any materials I receive which have been designated as "Confidential," and that I will carefully maintain such materials in a container, drawer, room or other safe place in a manner consistent with the Order. I acknowledge that the return or destruction of "Confidential" material shall not relieve me from any other continuing obligations imposed upon me by the Order.

6. I stipulate to the jurisdiction of this Court.

Date: _____

(Signature)

Document No. 94S236

EXHIBIT 2

**IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA**

<hr/>)	
MORGAN STANLEY SENIOR FUNDING, INC.,)	
)	
	Plaintiff,	)	Case No.: 2003 CA 005165 AG
v.)	
)	
MACANDREWS & FORBES HOLDINGS INC.,		)	Judge Elizabeth I. Maass
and COLEMAN (PARENT) HOLDINGS INC.,)	
)	
	Defendants.)	
<hr/>)	

STIPULATED CONFIDENTIALITY ORDER

The parties hereto hereby stipulate and agree to the following Confidentiality Order:

1. Scope of Order. This Order shall apply to all non-public and Confidential (as hereinafter defined) materials produced in this litigation and all testimony given in any deposition by any party to the litigation or by any person or entity that is not a party hereto (a "non-party"), to all non-public and Confidential information disclosed by any party hereto during the course of the captioned litigation and to all non-public information disclosed to any party hereto by any non-party in response to the service of a subpoena or notice of deposition on a non-party in connection with the captioned litigation ("Litigation Materials").

2. This Order shall not apply to any document, testimony or other information that (a) is already in a receiving party's possession at the time it is produced, (b) becomes generally available to the public other than as a result of disclosure in violation of this Order or in breach of any other legal obligation, or (c) becomes available to a party other than through voluntary or required production from a person or party who obtained the document, testimony or other information without any confidentiality restriction.

**IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA**

<hr/>)	
COLEMAN (PARENT) HOLDINGS INC.,)	
	Plaintiff,	)	Case No.: 2003 CA 005045 AI
v.)	
MORGAN STANLEY & CO., INC.,		)	Judge Elizabeth I. Maass
	Defendant.)	
<hr/>)	

STIPULATED CONFIDENTIALITY ORDER

The parties hereto hereby stipulate and agree to the following Confidentiality Order:

1. Scope of Order. This Order shall apply to all non-public and Confidential (as hereinafter defined) materials produced in this litigation and all testimony given in any deposition by any party to the litigation or by any person or entity that is not a party hereto (a "non-party"), to all non-public and Confidential information disclosed by any party hereto during the course of the captioned litigation and to all non-public information disclosed to any party hereto by any non-party in response to the service of a subpoena or notice of deposition on a non-party in connection with the captioned litigation ("Litigation Materials").

2. This Order shall not apply to any document, testimony or other information that (a) is already in a receiving party's possession at the time it is produced, (b) becomes generally available to the public other than as a result of disclosure in violation of this Order or in breach of any other legal obligation, or (c) becomes available to a party other than through voluntary or required production from a person or party who obtained the document, testimony or other information without any confidentiality restriction.

3. **Litigation Materials and the information derived therefrom shall be used solely for the purpose of preparing for and conducting this litigation, and shall not be disclosed or used for any other purpose.**

4. **Any party or non-party may designate as "Confidential" any Litigation Materials or portions thereof which the party or non-party believes, in good faith, constitute, contain, reveal or reflect proprietary or confidential trade secrets or technical, business, financial or personnel information of a current nature. If a party or non-party produces Litigation Materials that have been produced in another litigation or to any government entity and such Litigation Materials have been designated confidential or were accompanied by a request that confidential treatment be accorded them, such Litigation Materials shall be deemed to have been designated "Confidential" for purposes of this Stipulation and Order.**

5. **Any documents or other tangible Litigation Materials may be designated as "Confidential" by marking every such page "Confidential" or by informing the other party in writing that such material is Confidential. Such markings will be made in a manner which does not obliterate or obscure the content of the document or other tangible Litigation Material. If Litigation Material is inspected at the choice of location of the party or non-party producing or disclosing Litigation Materials (a "producing party"), all such Litigation Material shall be presumed at such inspection to have been designated as Confidential by the producing party until such time as the producing party provides copies to the party that requested the Litigation Material. Production of Confidential Material for inspection and copying shall not constitute a waiver of confidentiality.**

6. **Depositions or other testimony may be designated "Confidential" by any one of the following means:**

(a) stating orally on the record, with reasonable precision as to the affected testimony, on the day the testimony is given that this information is "Confidential"; or

(b) sending written notice designating, by page and line, the portions of the transcript of the deposition or other testimony to be treated as "Confidential" within 10 days after receipt of the transcripts.

7. The entire transcript of any deposition shall be treated as Confidential Material until thirty days after the conclusion of the deposition. Each page of deposition transcript designated as Confidential Material shall be stamped, as set forth in paragraph 5 above, by the court reporter or counsel.

8. In the event it becomes necessary at a deposition or hearing to show any Confidential Material to a witness, any testimony related to the Confidential Material shall be deemed to be Confidential Material, and the pages and lines of the transcript that set forth such testimony shall be stamped as set forth in paragraph 5 of this Stipulation.

9. Litigation Materials designated "Confidential" and any copies thereof, and the information contained therein, shall not be given, shown, made available or communicated in any way to anyone except:

(a) The Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida (the "Court") (including Clerks and other Court personnel). Litigation Materials designated "Confidential" and any copies thereof, and the information contained therein, that are filed with the Court or any pleadings, motions or other papers filed with the Court, shall be filed under seal in a separate sealed envelope conspicuously marked "Filed Under Seal - Subject to Confidentiality Order," or with such other markings as required by Court rules, and shall be kept under seal until further order of the

Court. Where possible, only those portions of filings with the Court that disclose matters designated "Confidential" shall be filed under seal;

(b) counsel to the parties, including co-counsel of record for the parties actually assisting in the prosecution or defense of this litigation, and the legal associates and clerical or other support staff who are employed by such counsel or attorneys and are working under the express direction of such counsel or attorneys;

(c) parties and current officers and employees of parties to the extent reasonably deemed necessary by counsel disclosing such information for the purpose of assisting in the prosecution or defense of this litigation;

(d) outside photocopying, graphic production services, litigation support services, or investigators employed by the parties or their counsel to assist in this litigation and computer personnel performing duties in relation to a computerized litigation system;

(e) any person who is a witness or deponent, and his or her counsel, during the course of a deposition of testimony in this litigation;

(f) any person who is a potential fact witness in the litigation, provided, however, that a person identified solely in this subparagraph shall not be permitted to retain copies of such Litigation Material;

(g) court reporters, stenographers, or videographers who record deposition or other testimony in the litigation;

(h) experts or consultants retained in connection with the litigation;

(i) any person who is indicated on the face of a document to have been an author, addressee or copy recipient thereof, provided, however, that a person identified

solely in this subparagraph shall not be permitted to retain copies of such Litigation Material; and

(j) any other person, upon written consent from the party or person who designated such Litigation Materials "Confidential."

10. Before any person included in paragraph 9(f) or (h) is given access to Litigation Materials designated "Confidential," and before any person included in subparagraph 9(e) is permitted to retain any copy of Litigation Materials designated Confidential, such person shall be provided with a copy of this Order and shall acknowledge in a written statement, in the form provided as Exhibit A hereto, that he or she read the Order and agrees to be bound by the terms thereof. Such executed forms shall be retained in the files of counsel for the party who gave access to Litigation Materials to the person who was provided such access. Such executed forms shall not be subject to disclosure under the Florida Rules of Civil Procedure unless a showing of good cause is made and the Court so orders.

11. The inadvertent production of privileged or arguably privileged materials shall not be determined to be either: (a) a general waiver of the attorney-client privilege, the work product doctrine or any other privilege; or (b) a specific waiver of any such privilege with respect to documents being produced or the testimony given. Notice of any claim of privilege as to any document claimed to have been produced inadvertently shall be given within a reasonable period of time after discovery of the inadvertent production, and, on request by the producing party, all inadvertently produced materials as to which a claim of privilege is properly asserted and any copies thereof shall be returned promptly.

12. Nothing in this Order shall prevent any producing party from disclosing or using its own "Confidential" Litigation Materials as it deems appropriate, and any such disclosure shall not be deemed a waiver of any party's right or obligations under this Order with

respect to any other information. If a party or non-party that designates information "Confidential" discloses or uses such "Confidential" Litigation Materials in a manner inconsistent with the claim that such information is confidential, any party may move the Court for an order removing such "Confidential" designation pursuant to paragraph 15 herein. Nothing in this Stipulation and Order shall impose any restrictions on the use or disclosure by any party of documents, materials, testimony or other information produced as Litigation Material obtained by such party independently of discovery in this litigation.

13. The parties do not waive any right to object to any discovery request, or to the admission of evidence on any ground, or seek any further protective order, or to seek relief from the Court from any provision of this Order by application on notice on any grounds.

14. If any party objects to the designation of any Litigation Materials as "Confidential," the party shall first state the objection by letter to the party that made such designations. The parties agree to confer in good faith by telephone or in person to attempt to resolve any dispute respecting the terms or operation of this Order. If the parties are unable to resolve such dispute within 5 days of such conference, any party may then move the Court to do so. Until the Court rules on such dispute, the Litigation Materials in question shall continue to be treated as "Confidential," as designated.

15. Upon motion, the Court may order the removal of the "Confidential" designation from any information so designated. In connection with any motion concerning the propriety of a "Confidential" designation, the party making the designation shall bear the burden of proof.

16. Within 60 days of the conclusion of this litigation as to all parties, all Litigation Materials designated "Confidential" and all copies or notes thereof shall be returned to counsel for the producing party who initially produced the Litigation Materials, or destroyed,

except that counsel may retain their work product and copies of court filings, transcripts, and exhibits, provided said retained documents will continue to be treated as provided in this Order, as modified by rulings of the Court. If a party chooses to destroy documents after the litigation has concluded, that party shall certify such destruction in writing to the producing party upon written request for such certification by the producing party.

17. The failure of any party to challenge the designation by another production party of Litigation Material as "Confidential" during the discovery period shall not be a waiver of that party's right to object to the designation of such material at trial.

18. This Stipulation applies to all non-parties that are served with subpoenas in connection with this litigation or who otherwise produce documents or are noticed for deposition in connection with this litigation, and all such non-parties are entitled to the protection afforded hereby upon signing a copy of this agreement and agreeing to be bound by its terms.

19. Any party may move to modify the provisions of this Order at any time or the parties may agree by written stipulation, subject to further order of the Court, to modify the provisions of the Order. Should any non-party seek access to the Confidential Material, by request, subpoena or otherwise, the party or recipient of the Confidential Material from whom such access is sought, as applicable, shall promptly notify the producing party who produced such Confidential Materials of such requested access and shall not provide such materials unless required by law or with the consent of the producing party.

20. This Order shall not apply to any Litigation Materials offered or otherwise used by any party at trial or at any hearing held in open court. Prior to the use of any Litigation Materials that have been designated Confidential at trial or any hearing to be held in open court, counsel who desires to so offer or use such Confidential Material shall take reasonable steps to afford opposing counsel and counsel for the producing party who produced such Confidential

Material a reasonable opportunity to object to the disclosure in open court of such Confidential Material, and nothing herein shall be construed a wavier of such right to object.

21. Written notice provided pursuant to this Order shall be made to counsel of record by facsimile.

22. The provisions of this Order shall survive the final termination of the case for any retained Confidential Litigation Material thereof.

COLEMAN (PARENT) HOLDINGS, INC.

MORGAN STANLEY & CO., INC.

By 
John Scarola
SEARCY DENNEY, SCAROLA,
BARNHART & SHIPLEY P.A.
2139 Palm Beach Lake Boulevard
West Palm Beach, FL 33409

By 
Joseph Ianno, Jr.
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Jerold S. Solovy
Ronald L. Marmer
Robert T. Markowski
Deirdre E. Connell
JENNER & BLOCK, LLC
One IBM Plaza, Suite 4400
Chicago, IL 60611

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
KIRKLAND & ELLIS
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005

SO ORDERED;

This _____ day of _____, 2003

SIGNED AND DATED
JUL 31 2003
JUDGE ELIZABETH T. MAASS

CIRCUIT JUDGE

COPIES PROVIDED TO COUNSEL OF RECORD ON THE ATTACHED LIST

COUNSEL LIST

**Counsel for Plaintiff
COLEMAN (PARENT) HOLDINGS INC.**

SEARCY DENNEY SCAROLA
BARNHART & SHIPLEY P.A.
John Scarola, Esq.
2139 Palm Beach Lake Blvd.
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 684-5816

JENNER & BLOCK, LLC
Jerold S. Solovy, Esq.
Ronald L. Marmer, Esq.
Robert T. Markowski, Esq.
Deirdre E. Connell, Esq.
One IBM Plaza, Suite 4400
Chicago, IL 60611
Phone: (312) 222-9350
Fax: (312) 527-0484

**Counsel for Defendant
MORGAN STANLEY & CO., INC.**

CARLTON FIELDS, P.A.
Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Phone: (561) 659-7070
Fax: (561) 659-7368

KIRKLAND & ELLIS
Thomas D. Yannucci, P.C.
Thomas A. Clare, Esq.
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Phone: (202) 879-5000
Fax: (202) 879-5200

work, all copies of any materials I receive which have been designated as "Confidential," and that I will carefully maintain such materials in a container, drawer, room or other safe place in a manner consistent with the Order. I acknowledge that the return or destruction of "Confidential" material shall not relieve me from any other continuing obligations imposed upon me by the Order.

6. I stipulate to the jurisdiction of this Court.

Date: _____

(Signature)

Document No. 945236

EXHIBIT 3

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA
CASE NO. 2003-CA-005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

ORIGINAL

vs.

MORGAN STANLEY & COMPANY, INC.

Defendant.

TRANSCRIPT OF THE PROCEEDINGS BEFORE
THE HONORABLE ELIZABETH MAASS

West Palm Beach, Florida
November 25, 2003
4:37 p.m. - 5:18 p.m.

1 BE IT REMEMBERED that the foregoing
2 proceedings were had before the HONORABLE ELIZABETH
3 MAASS, in the Palm Beach County Courthouse, West Palm
4 Beach, Florida, on November 25, 2003, starting at
5 4:37 p.m., with appearances as hereinabove noted,
6 to wit:

7

- - - -

8 THE COURT: This is Coleman and Morgan
9 Stanley. It's defendant's motion, I think, to
10 compel production of a settlement agreement.

11 MR. IANNO: That's correct.

12 MR. CLARE: That's correct.

13 THE COURT: You-all can have a seat.

14 The first motion I have though, and I
15 apologize, I didn't have time to go through the
16 files to try to find this, I see that defendant
17 has filed certain things under seal or has
18 tendered certain things under seal, and I hope
19 that none of them have been filed yet. Was there
20 an order entered that permitted that procedure?

21 MR. IANNO: Yes, Your Honor. Joe Ianno.
22 I believe that the confidentiality order that was
23 entered in this case provided for that.

24 THE COURT: You're going to have to tell me,
25 because I thought --

1 MR. IANNO: I didn't bring the
2 confidentiality order with me.

3 THE COURT: Because, obviously, under the
4 Rules of Judicial Administration, things can't get
5 filed under seal --

6 MR. IANNO: Without notice to media.

7 THE COURT: And all that. And I thought when
8 I looked at the proposed order in this case,
9 either I struck through that stuff or I mailed it
10 back to you guys and said I can't sign this. And
11 if I haven't done that yet, that's why we need to
12 find that order.

13 I haven't looked at any of the stuff that was
14 given to me under seal. I need to just give it
15 back to you. It's not my policy to look at things
16 that can't be part of the court record absent a
17 clear order that permits me to do so.

18 It could be somehow I signed it and I forgot.

19 MR. IANNO: I don't believe that the motion
20 at issue though, Your Honor, was filed under seal.

21 THE COURT: No, just some of the stuff. I'll
22 give you guys -- Whoever gave me this stuff, I'm
23 just going to give it back.

24 MR. SCAROLA: I think what was filed under
25 seal was your reply memorandum.

1 amount of the settlement which relates solely to
2 the issue of setoff, and upon court order, we are
3 prepared to make a confidential disclosure of the
4 amount of that settlement under the terms of the
5 confidentiality agreement previously entered. We
6 would designate that as confidential information
7 in order to restrict its proper use to this case
8 and make the disclosure with regard to that
9 amount.

10 THE COURT: Any objection to my making a
11 photocopy of it?

12 MR. SCAROLA: No, not at all.

13 THE COURT: Thanks.

14 Was the settlement consummated?

15 MR. SCAROLA: Yes.

16 THE COURT: Under its terms?

17 MR. SCAROLA: Yes.

18 THE COURT: Okay.

19 Do you accept that representation?

20 MR. CLARE: That it was consummated under its
21 terms?

22 THE COURT: Yeah.

23 MR. CLARE: I don't have any reason to
24 believe or not believe that that's incorrect.

25 I would say that this is a non-privileged

1 that agreement, and we believe that to the extent
2 permissible by law, that it should be enforced,
3 and it should only be breached or allowed to come
4 out in the open to the extent that it is clearly
5 established that it is relevant. And we believe
6 that the proper procedure is for the Court to look
7 at it in camera and to make that judgment, and
8 we'd ask that you do that.

9 THE COURT: What did you want to respond,
10 sir?

11 MR. CLARE: On Mr. Scarola's final point,
12 with the Court's permission, I'll hand to counsel
13 and to Your Honor just some citations to Florida
14 cases that are all cited in our brief that make
15 the point that a contractual confidentiality
16 provision cannot be used to subvert discovery.

17 There's a protective order in this case. We
18 will agree to be bound by the full extent of the
19 confidentiality order in terms of disclosing it.
20 We will go one step further and agree to make it
21 attorney's eyes only with the proviso that I be
22 able to show it to a limited number of in-house
23 attorneys at Morgan Stanley for the purposes of
24 evaluating it for the purposes that I've
25 identified for Your Honor.

1 So with the confidentiality order, the
2 balancing test that Mr. Scarola has already
3 identified has already been done. Those privacy
4 considerations that Arthur Andersen is worried
5 about about disclosure, nothing's going to be in
6 the open. This is all going to be treated as the
7 highest degree of confidentiality under the
8 protective order that Your Honor has already
9 signed, and we agree and are willing to accept
10 those restrictions on our use of it.

11 THE COURT: Okay. Let me take another
12 advisement, okay?

13 Thank you very much.

14 MR. SCAROLA: Your Honor, there is one
15 additional brief matter, if we could impose upon
16 the Court. We had actually set it for an 8:45
17 hearing this morning, and because of Your Honor's
18 crowded calendar, we hoped that we might just
19 bring it to you this afternoon.

20 THE COURT: Sure. What is that?

21 You can take this back, sir. Thanks.

22 MR. SCAROLA: Your Honor, it relates to the
23 exchange of correspondence with which we barraged
24 you concerning the entry of an order --

25 THE COURT: Oh, yeah. Okay.

EXHIBIT 4

IN THE FIFTEENTH JUDICIAL CIRCUIT COURT IN AND
FOR PALM BEACH COUNTY, FLORIDA
CASE NO.: 2003 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.

* * *

TRANSCRIPT OF THE PROCEEDINGS BEFORE
THE HONORABLE ELIZABETH J. MAASS

* * *

West Palm Beach, Florida
July 23rd, 2004
8:58 a.m. - 11:03 a.m.

1 THE COURT: Yes. Can I go back to the ore
2 tenus motion on The Court file? I didn't want to
3 forget that I had gotten this. I don't think that
4 the clerk has done anything improper. The order I
5 wrote said the only thing that was supposed to be
6 filed under seal was the complete copy of the
7 settlement agreement, not the Exhibit A to the
8 order. Exhibit A to the order was the redacted
9 copy where the only thing I redacted I think was
10 the account information.

11 So, no, the clerk has not violated my order.
12 If you're now saying you want something sealed
13 that's not sealed, you may want to make an
14 appropriate order.

15 MR. SCAROLA: Thank you, Your Honor.

16 THE COURT: So that would be denied. Okay.

17 MR. SCAROLA: Your Honor, I'm having the
18 first chance to look at what has been handed to
19 The Court. And while I don't object to Your Honor
20 using this to the extent that it may be of
21 assistance to you, I think what you'll find when
22 you look at it is that the interrogatory is set
23 out in full, Morgan Stanley's objections are set
24 out, and their reply is set out. And what we have
25 then is a one- or two-line summary --

EXHIBIT 5

KIRKLAND & ELLIS LLP

AND AFFILIATED PARTNERSHIPS

655 Fifteenth Street, N.W.
Washington, D.C. 20005Thomas A. Clare
To Call Writer Directly:
(202) 879-5993
tclare@kirkland.com

202 879-5000

www.kirkland.com

Facsimile:
202 879-5200

April 22, 2004

BY FACSIMILEMichael Brody, Esq.
Jenner & Block, LLC
One IBM Plaza
Chicago, IL 60611-7603**Re: *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc.*
*MSSF v. MacAndrews & Forbes Holdings Inc. et al.***

Dear Mike:

Pursuant to Paragraph 14 of the Stipulated Confidentiality Order, we object to the designation of Exhibit 1 to the Court's December 4, 2003 Order as "Confidential." The document does not contain "proprietary or confidential trade secrets or technical, business, financial or personnel information of a current nature" as required by Paragraph 2 of the Stipulated Confidentiality Order, and is not otherwise confidential under Florida law.

Please let me know by the close of business today whether you will consent to the removal of the "Confidential" designation for this document. Anticipating that you will not consent, and given the pendency of the Motion to Show Cause, we believe that additional procedures set forth in Paragraph 14 of the Stipulated Confidentiality Order are futile. Please let me know by the close of business today whether you disagree.

Sincerely,



Thomas A. Clare

cc: Joseph Ianno, Esq. (by facsimile)
John Scarola, Esq. (by facsimile)

EXHIBIT 6

APR-22-2004 17:20

JENNER & BLOCK

3125270484 P.02/02

JENNER & BLOCK

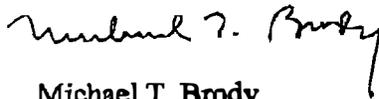
April 22, 2004

Jenner & Block LLP
One IBM Plaza
Chicago, IL 60611
Tel 312-222-9350
www.jenner.comChicago
Dallas
Washington, DC*By Telecopy*Thomas A. Clare, Esq.
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005Michael T. Brody
Tel 312 923-2711
Fax 312 840-7721
mbrody@jenner.comRe: *Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co.*
Morgan Stanley Senior Funding, Inc. v. MacAndrews & Forbes Holdings Inc., et al.

Dear Tom:

This letter is in response to your letter of this morning, in which you ask us to "consent" to the removal of the confidential designation for the settlement agreement that Judge Maass directed CPH to produce by her order dated December 4, 2003. We do not agree that the confidential designation may be removed.

Very truly yours,



Michael T. Brody

MTB:cjg

cc: Joseph Ianno, Esq. (by telecopy)
John Scarola, Esq. (by telecopy)
Jerold S. Solovy, Esq.

CHICAGO_1073277_1

TOTAL P.02

16div-006495

GREENBERG
ATTORNEYS AT LAW
TRAURIG

Transmittal Cover Sheet

TO

Name: Joseph Ianno, Jr., Esq.
Company: Carlton Fields, P.A.
Fax No.: 659-7368
Phone No.: 659-7070

Name: Jerold S. Solovy, Esq.
Company: Jenner & Block, LLC
Fax No.: 312-840-7671
Phone No.: 312-923-2711

Name: Jack Scarola, Esq.
Company: Searcy, Denney et al.
Fax No.: 478-0754
Phone No.: 686-6300

Name: Michael Brody, Esq.
Company: Jenner & Block, LLC
Fax No.: 312-840-7711
Phone No.: 312-923-2711

Name: Thomas D. Yannucci, Esq.
Copy to: Lawrence P. Bernis, Esq.
Copy to: Thomas A. Clare, Esq.
Copy to: Zhonette M. Brown, Esq.
Company: Kirkland & Ellis LLP
Fax No.: 202-879-5200
Phone No.: 202-879-5000

FROM Lorie Gleim, Esq.

File Number 16560.071300

Comments

Date August 25, 2004

No. Pages Including this cover sheet 9

Please notify us immediately if not received properly at 561-650-7900.

The information contained in this transmission is attorney privileged and confidential. It is intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone collect and return the original message to us at the address below via the U.S. Postal Service. We will reimburse you for your postage. Thank you.

777 South Flagler Drive, Suite 300 East, West Palm Beach, Florida 33401 (561) 650-7900 Fax (561) 665-6222

Greenberg Traurig

LORIE M. GLEIM, ESQ.
WEST PALM BEACH OFFICE
DIRECT DIAL: (561) 650-7948
Email: lgleim@gtlaw.com

August 25, 2004

VIA HAND DELIVERY

Honorable Elizabeth T. Maass
Palm Beach County Courthouse
205 N. Dixie Highway, Room 11-1208
West Palm Beach, FL 33401

Re: Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc.
Case No. 03-CA-5045-AJ

Dear Judge Maass:

Enclosed please find Third Party Sunbeam's Memorandum of Law in Response to Morgan Stanley's Motion to Compel Documents along with the relevant case law. This Memorandum supports Sunbeam's position at the Case Management Conference now scheduled for Friday, August 27, 2004 at 8:00 a.m.

If Your Honor requires any further documentation, please do not hesitate to contact my office.

Respectfully,


Lorie M. Gleim

LMG/dt
Enclosures

cc: Mark F. Bideau, Esq.
Joseph Ianno, Esq. (via fax w/enc., no case law)
Thomas D. Yannucci, Esq. (via fax w/enc., no case law)
Jack Scarola, Esq. (via fax w/enc., no case law)
Jerold S. Solovy, Esq. (via fax w/enc., no case law)

ALBANY
AMSTERDAM
ATLANTA
BOCA RATON
BOSTON
CHICAGO
DALLAS
DENVER
FORT LAUDERDALE
LOS ANGELES
MIAMI
NEW JERSEY
NEW YORK
ORANGE COUNTY, CA
ORLANDO
PHILADELPHIA
PHOENIX
SILICON VALLEY
TALLAHASSEE
TYSONS CORNER
WASHINGTON, D.C.
WEST PALM BEACH
WILMINGTON
ZURICH

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN
AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff,

CASE NO. 03 CA 5045 AI

v.

MORGAN STANLEY & CO., INC.,
Defendant.

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff,

CASE NO. CA 03-5165 AI

v.

MACANDREWS & FORBES HOLDING, INC.,
et al.,
Defendants.

**THIRD PARTY SUNBEAM'S MEMORANDUM OF LAW IN
RESPONSE TO MORGAN STANLEY'S MOTION TO COMPEL DOCUMENTS**

Third Party, Sunbeam Corporation, n/k/a American Household, Inc. ("Sunbeam"), is in receipt of Morgan Stanley's Motion to Compel Production of Documents and Coleman (Parent) Holdings, Inc.'s and MacAndrews & Forbes Holdings, Inc.'s Memorandum in Opposition to Morgan Stanley's Motion to Compel Production of Documents.

While Third Party Sunbeam was not served with the Motion and Opposition as it is not a party to the case, Sunbeam received courtesy copies of the pleadings. Since Morgan Stanley raised in its Motion the issue of whether a Report to the Board of Directors of Sunbeam prepared by the law firm of Skadden, Arps, Slate, Meagher & Flom, LLP is privileged, Sunbeam hereby

responds to Morgan Stanley's Motion. Sunbeam files this submission invoking Sunbeam's privilege because the Report is subject to a privilege belonging to Sunbeam, and Sunbeam has a continuing interest in protecting that privilege. Sunbeam apologizes for its late submission to the court; Sunbeam only recently was advised of the Motion, has not been subpoenaed for the Report, and has not made an appearance in this action.

I. THE REPORT PREPARED BY COUNSEL FOR THE BOARD OF DIRECTORS OF SUNBEAM IS CLEARLY PRIVILEGED UNDER BOTH THE ATTORNEY CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE.

Under Florida law, a "court shall protect against disclosure of the mental impressions, conclusions, and opinions or legal theories of an attorney or other representative of a party concerning . . . litigation." Fla. R. Civ. P. 1.280(b)(3). In this case, the Board of Directors of Sunbeam hired the law firm of Skadden Arps to investigate and prepare a report providing their legal opinions, analyses and theories regarding the legal implications of Sunbeam's accounting practices. The Report is quintessential work product, protected by the attorney-client privilege, and therefore not subject to discovery under Rule 1.280(b)(3) of the Florida Rules of Civil Procedure.

Florida law also provides that "[a] person who has a privilege against the disclosure of a confidential matter or communication waives the privilege if the person . . . while holder of the privilege, voluntarily discloses . . . or consents to disclosure of, any significant part of the matter or communication." Fla. Stat. §90.507 (2004) (emphasis added). Thus, as discussed in greater detail below, only Sunbeam, as holder of the work product and attorney client privileges that protect against disclosure of the Report, has the authority to waive such privileges. Sunbeam has consistently maintained and treated the Report as privileged and has never voluntarily provided, or consented to the production of the Report to any third party.

Contrary to Morgan Stanley's assertions, and despite the SEC's numerous requests, Sunbeam did not provide the Report to the SEC. Sunbeam maintained that the Report is protected by the work product and attorney client privileges. Moreover, Sunbeam has refused to produce the Report in each of the many lawsuits pending against it. The Report is consistently listed on Sunbeam's privilege logs as a privileged document.¹ Sunbeam asserts now, as it has always asserted, that the Report is privileged and confidential.

II. SUNBEAM HAS NEVER WAIVED THE PRIVILEGE.

Morgan Stanley asserts that Sunbeam waived any privileges it has associated with the Report because of the deposition testimony of Mr. Paul E. Shapiro. Morgan Stanley is wrong. At the time of his July 28, 2004 deposition, Mr. Shapiro was a former executive of Sunbeam and a former employee of MacAndrews & Forbes Holdings, Inc.² During the deposition, Mr. Shapiro acknowledged the existence of the Report and explained that it was the subject to "all kinds of issues regarding confidentiality and privilege." July 28, 2004 Shapiro deposition at pg. 363. Contrary to Morgan Stanley's Motion, Mr. Shapiro "*did not discuss the document in detail*" nor did he "*testify] extensively about the internal investigation undertaken by Sunbeam in 1998, including the substance of the written report issued by the Special Committee, as well as the oral presentation of the [R]eport's findings to the Sunbeam Board.*" Motion pgs. 1 and 3. Instead, Mr. Shapiro acknowledged the existence of the document and provided his vague recollection. He certainly did not discuss the document in detail as suggested by Morgan Stanley.

¹ Sunbeam would be severely prejudiced if this Court were to find that the Report is not privileged as Sunbeam is still a party to lawsuits involving the issues raised in the Report and it would be patently unfair and prejudicial for Sunbeam's lawyers work product and analysis to become discoverable.

² Sunbeam has not been provided a copy of Mr. Shapiro's deposition and Sunbeam was not present at the deposition. The only pages that Sunbeam has been provided were those attached to the Motion.

a. Mr. Shapiro did not have the authority to waive Sunbeam's privilege.

The attorney client and work product privileges belong to Sunbeam and cannot be waived by Mr. Shapiro who is without corporate authority to waive such privileges. See Fla. Stat. § 90.507 (2004). It is well settled that the attorney client and work product privileges apply when the client is a corporation. Fla. Stat. § 90.502(1)(b) (2004). The power to exercise the corporate attorney-client privilege in particular rests with the corporation's management. See Tail of the Pup, Inc. v. Webb, 528 So.2d 506, 507 (Fla. 2d DCA 1988). Moreover, as the United States Supreme Court explained in Commodity Futures Trading Commission v. Weintraub, ". . . when control of a corporation passes to new management, the authority to assert and waive the corporation's attorney-client privilege passes as well." 471 U.S. 343, 349 (1985) (emphasis added); see generally Scottsdale Ins. Co. v. Camara De Comercio Latino-Americana de los Estados Unidos, Inc., 813 So.2d 250 (Fla. 3d DCA 2002) (standing for the proposition that the work product privilege cannot be asserted by someone other than the holder of the privilege). Accordingly, a former executive, like Mr. Shapiro, is without authority to waive the attorney client or work product privilege on behalf of a corporation.

Nevertheless, Morgan Stanley relies on the Third District's decision in Hoyas v. State, 456 So.2d 1225 (Fla. 3d DCA 1984), for the proposition that "Mr. Shapiro's voluntary disclosures have waived any privileges associated with the [Report]." Motion, pg. 5. Hoyas is inapposite. In Hoyas, the court found that a criminal defendant, as holder of the attorney client privilege, waived the privilege when he voluntarily disclosed, on direct examination at trial, that he "told [his] attorney [he] hadn't done it." Id. at 1227.³ Unlike the criminal defendant in

³ The court further explained that although the Florida Supreme Court had held in Seaboard Air Line Ry. v. Parker, 62 So. 589 (1913), that no waiver occurred where a client/plaintiff testified on cross-examination, without objection, that he had not made a certain statement to his then-attorney, Hoyas "made an affirmative statement in response to a question from his own counsel during direct examination, thus belying any claim that he was

Hoyas, Mr. Shapiro was not the holder of the privilege, let alone a party to the action, and he did not voluntarily disclose privileged information.

- b. Even if Mr. Shapiro had the authority to waive the privilege, which he did not, his comments about the Report did not waive the privilege.**

Even if it were true that former executives have the authority to waive a corporate privilege (they do not), Mr. Shapiro did not waive Sunbeam's attorney client and work product privileges by way of his vague recollection of the Report during his July 28, 2004 deposition. Waiver occurs only where "[a] person who has a privilege against the disclosure of a confidential matter or communication waives the privilege if the person . . . while holder of the privilege, voluntarily discloses . . . or consents to disclosure of, any significant part of the matter or communication." Fla. Stat. §90.507 (2004) (emphasis added). It is evident that Mr. Shapiro did not disclose "any significant part of the matter or communication." In fact, Mr. Shapiro indicated that the Report was privileged and confidential. July 28, 2004 Shapiro deposition at pg. 363. Clearly, Mr. Shapiro's deposition testimony did not waive Sunbeam's privileges.

- c. Sunbeam has never waived the privilege and does not waive it now.**

Morgan Stanley in an offhanded fashion and in the last sentence of its Motion, suggests that if MAFCO or Coleman Parent has a copy of the Report, then their possession of it would establish a waiver of any privilege that Sunbeam has. Morgan Stanley is wrong. If MAFCO or Coleman Parent were to have a copy of the Report, the Report would have been given to the attorneys at MAFCO who were providing legal services to Sunbeam pursuant to an August 12, 1998 Settlement Agreement. Pursuant to that Agreement, MAFCO was to provide management services to Sunbeam including, assistance and support with "litigation...and other legal matters."

surprised or misled." Hoyas v. State, 456 So.2d 1225 (Fla. 3d DCA 1984) (emphasis added). Mr. Shapiro's situation was more akin to the facts presented in Parker because he was not being deposed by his own counsel.

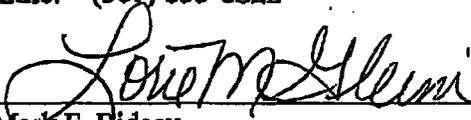
See Agreement ¶3(v). Any disclosure to MAFCO or Coleman Parent would have been made pursuant to the Agreement, subject to the attorney client and work product privileges, and in furtherance of Sunbeam obtaining legal advice and counsel. Therefore, such purported disclosure was no waiver of Sunbeam's privilege. Since Sunbeam has never voluntarily provided the Report to any third party and has never waived the privilege, the Report is protected by the attorney client and work product privileges and as such cannot be produced in this litigation.

WHEREFORE Sunbeam respectfully requests that this Court deny Morgan Stanley's Motion to Compel Production of Documents to the extent that it seeks to obtain Sunbeam's privileged Report.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via facsimile and mail to the addressees on the attached Service List, this 25 day of August, 2004.

GREENBERG TRAURIG, P.A.
777 South Flagler Drive - Suite 300E
West Palm Beach, FL 33401
Telephone: (561) 650-7900
Facsimile: (561) 655-6222

By: 
Mark F. Bideau
Florida Bar No. 564044
Lorie M. Gleim
Florida Bar No. 0069231

SERVICE LIST

Joseph Ianno, Esq.
Carlton Fields, P.A.
222 Lakeview Avenue, Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci, Esq.
Lawrence P. Bemis, Esq.
Thomas A. Clare, Esq.
Zhonette M. Brown, Esq.
Kirkland and Ellis
655 15 Street, NW, Suite 1200
Washington, DC 20005

Jack Scarola, Esq.
Searcy Denney Scarola Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33401

Jerold S. Solovy, Esq.
Michael Brody, Esq.
Jenner & Block, LLC
One IBM Plaza, Suite 400
Chicago, IL 60611

WPB-FS\GLEIM\509693v03\8/25/04\16560.071300

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

_____/

CASE NO. CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

_____/

ORDER AND NOTICE OF HEARING

This case came before the Court August 27, 2004 for a case management conference,
with all counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that the continuation of the case management
conference is hereby set for

September 2, 2004, at 4:00 p.m., 1 hour reserved

at the West Palm Beach Courthouse, Room 11A, 205 N Dixie Hwy, WPB, FL.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 
day of August, 2004.

ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci
655 15th Street, NW, Suite 1200
Washington DC 20005

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, IL 60611

If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please contact the ADA Coordinator in the Administrative Office of the Court, Palm Beach County Courthouse, 205 North Dixie Highway, Room 5.2500, West Palm Beach, Florida 33401; telephone number (561) 355-4380 within two (2) working days of your receipt of this [describe notice]; if you are hearing or voice impaired, call 1-800-955-8771.

SPANISH

Si Ud. es una persona incapacitada que necesita de un servicio especial para participar en este proceso, Ud. tiene derecho a que le provean cierta ayuda sin costo alguno. Por favor pongase en contacto con el Coordinador de la Oficina Administrativa de la Corte ADA, situada en el 205 North Dixie Highway, Oficina 5.2500, West Palm Beach, Florida, 33401, teléfono (561) 355-4380, dentro de los dos (2) próximos días hábiles después de recibir esta [describa la notificación]; si tiene incapacidad de oír ó hablar llame al 1-800-955-8771.

CREOLE

Si ou sé yon moun ki infim, ki bézwen ninpôt akomodasyon pou ka patisipé nan pwosè sa-a, ou gen dwa, san'l pa kouté'w anyin, pou yo ba'w kèk sèvis. Tanpri kontaké koòdinatè ADA ya nan Biro Administratif Tribinal nan cité Palm Beach la, ki nan 205 North Dixie Highway, Cham 5.2500, West Palm Beach, Florida 33401, niméro telefonn-nan sé (561) 355-4380, rélé dé (2) jou dé lè ou résvwa [notis sa-a]; si ou bèbè ou byen soud rélé 1-800-955-8771.

FRENCH

Si vous êtes infirme, et en besoin de n'importe quelle accommodation pour pouvoir participer à ces procédures, vous pouvez gratuitement recevoir, certains services. S'il-vous-plait contactez le coordinateur du Bureau Administratif du Tribunal de Palm Beach, située à 205 North Dixie Highway, Chambre 5.2500, West Palm Beach, Florida 33401, numéro de téléphone (561) 355-4380 durant deux (2) jours suivant la réception de [cette note]; si vous êtes muets ou sourds, appelez 1-800-955-8771.

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

_____/

CASE NO. CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),
vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

ORDER AND NOTICE OF HEARING

This case came before the Court August 27, 2004 on Morgan Stanley's Motion to Compel Production of Documents, with all parties and non-party Sunbeam Corporation, n/k/a American Household, Inc. ("Sunbeam"), well represented by counsel. In open Court counsel for Sunbeam consented to this Court's jurisdiction over Sunbeam solely to determine whether the subject report, its exhibits, and the transmittal letter to MAFCO are privileged and whether the privilege has been waived, and agreed to waive the formality of subpoenaing the items from Sunbeam. Counsel for MAFCO agreed to supply a copy of the transmittal letter to counsel to Sunbeam and acknowledged that it has no independent basis to claim the item is privileged. Based on the foregoing, it is

ORDERED AND ADJUDGED that hearing on Morgan Stanley's Motion to Compel Production of Documents and any Motion for Protective Order to be filed by Sunbeam shall be held

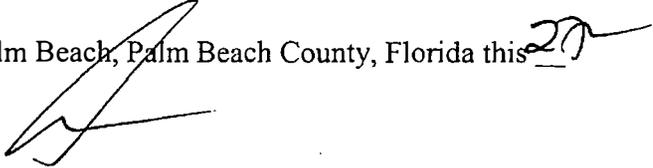
September 23, 2004, at 3:00 p.m.

at the West Palm Beach Courthouse, Room 11A, 205 N Dixie Hwy, WPB, FL. Morgan Stanley shall be permitted to depose any affiant whose affidavit is submitted to support any Motion for Protective Order prior to the hearing set herein. The movant shall supply the Court with

1. copies of all relevant pleadings;
2. a copy of any memorandum of law; and
3. copies of all case law authority.

at least 10 days prior to the hearing set herein. Any response thereto shall be supplied to the Court at least 5 days prior to the hearing set herein.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 20 day of August, 2004.


ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci
655 15th Street, NW, Suite 1200
Washington DC 20005

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, IL 60611

Mark F. Bideau, Esq.
777 S. Flagler Dr., Suite 300E
West Palm Beach, FL 33401

If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please contact the ADA Coordinator in the Administrative Office of the Court, Palm Beach County Courthouse, 205 North Dixie Highway, Room 5.2500, West Palm Beach, Florida 33401; telephone number (561) 355-4380 within two (2) working days of your receipt of this [describe notice]; if you are hearing or voice impaired, call 1-800-955-8771.

SPANISH

Si Ud. es una persona incapacitada que necesita de un servicio especial para participar en este proceso, Ud. tiene derecho a que le provean cierta ayuda sin costo alguno. Por favor pongase en contacto con el Coordinador de la Oficina Administrativa de la Corte ADA, situada en el 205 North Dixie Highway, Oficina 5.2500, West Palm Beach, Florida, 33401, teléfono (561) 355-4380, dentro de los dos (2) próximos días hábiles después de recibir esta [describa la notificación]; si tiene incapacidad de oír ó hablar llame al 1-800-955-8771.

CREOLE

Si ou sé yon moun ki infim, ki bézwen ninpôt akomodasyon pou ka patisipé nan pwosè sa-a, ou gen dwa. san'l pa kouté'w anyin, pou yo ba'w kèk sèvis. Tanpri kontaké koòdinatè ADA ya nan Biro Administratif Tribinal nan cité Palm Beach la, ki nan 205 North Dixie Highway, Cham 5.2500, West Palm Beach, Florida 33401, niméro téléfonn-nan sé (561) 355-4380, rélé dé (2) jou dé lè ou résévwa [notis sa-a]; si ou bèbè ou byen soud rélé 1-800-955-8771.

FRENCH

Si vous êtes infirme, et en besoin de n'importe quelle accommodation pour pouvoir participer à ces procédures, vous pouvez gratuitement recevoir, certains services. S'il-vous-plait contactez le coordinateur du Bureau Administratif du Tribunal de Palm Beach, située à 205 North Dixie Highway, Chambre 5.2500, West Palm Beach, Florida 33401, numéro de téléphone (561) 355-4380 durant deux (2) jours suivant la réception de [cette note]; si vous êtes muets ou sourds, appelez 1-800-955-8771.

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

CASE NO. CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

ORDER ON DEFENDANTS' ORE TENUS MOTION TO EXTEND STAY

THIS CAUSE came before the Court August 27, 2004 on Morgan Stanley & Co. and Morgan Stanley Senior Funding, Inc.'s ore tenus Motion to Extend Stay, with all counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that Morgan Stanley & Co. and Morgan Stanley Senior Funding, Inc.'s ore tenus Motion to Extend Stay is Granted. Stay on discovery dealing with issues raised by the Motion for Contempt is stayed through September 3, 2004.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this  day of August, 2004.

ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:

Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci
655 15th Street, NW, Suite 1200
Washington DC 20005

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, Il 60611

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff,

vs.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO., INC.,
Defendant.

_____ /

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff,

vs.

CASE NO: CA 03-5165 AI

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant.

_____ /

NOTICE OF VIDEOTAPED DEPOSITION

PLEASE TAKE NOTICE that Defendant Morgan Stanley & Company Incorporated and Plaintiff Morgan Stanley Senior Funding, Inc. will take the videotaped deposition of Lawrence Jones, pursuant to Florida Rules of Civil Procedure 1.280 and 1.310. The oral examination will take place beginning on September 3, 2004, at 9:30 a.m. and continue from day to day until completed at the offices of Harper Court Reporting, 401 North Market Street, Wichita, Kansas 67201. The deposition will be taken before a person authorized to administer oaths and recorded by stenographic and videographic means. The video operator will be Harper Court Reporting, 401 North Market Street, Wichita, Kansas 67201. The witness is instructed to bring all books, papers, and other things in his possession or under his control relevant to this lawsuit (and not previously produced in discovery) to the examination.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this 30th day of August, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar No. 618349)
Thomas A. Clare
Zhonette M. Brown
Larissa Paule-Carres
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
E-mail: jianno@carltonfields.com

BY: _____

*Counsel for Morgan Stanley & Co.
Incorporated and Morgan Stanley Senior
Funding*

SERVICE LIST

Jack Scarola
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy
Michael Brody
JENNER & BLOCK, LLC
One IBM Plaza, Suite 400
Chicago, IL 60611

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

CASE NO. CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

ORDER AND NOTICE OF HEARING

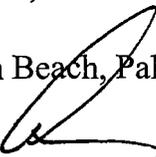
This case came before the Court, in Chambers, on the Court's own Motion. Based on the foregoing, it is

ORDERED AND ADJUDGED that the continuation of the case management conference set September 2, 2004, at 4:00 p.m. is hereby re-set for

September 2, 2004, at 10:30 a.m., 1 hour reserved

at the West Palm Beach Courthouse, Room 11A, 205 N Dixie Hwy, WPB, FL.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 1
day of September, 2004.



ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:

Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci
655 15th Street, NW, Suite 1200
Washington DC 20005

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, Il 60611

If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please contact the ADA Coordinator in the Administrative Office of the Court, Palm Beach County Courthouse, 205 North Dixie Highway, Room 5.2500, West Palm Beach, Florida 33401; telephone number (561) 355-4380 within two (2) working days of your receipt of this [describe notice]; if you are hearing or voice impaired, call 1-800-955-8771.

SPANISH

Si Ud. es una persona incapacitada que necesita de un servicio especial para participar en este proceso, Ud. tiene derecho a que le provean cierta ayuda sin costo alguno. Por favor pongase en contacto con el Coordinador de la Oficina Administrativa de la Corte ADA, situada en el 205 North Dixie Highway, Oficina 5.2500, West Palm Beach, Florida, 33401, teléfono (561) 355-4380, dentro de los dos (2) próximos días hábiles después de recibir esta [describa la notificación]; si tiene incapacidad de oír ó hablar llame al 1-800-955-8771.

CREOLE

Si ou sé yon moun ki Infirm, ki bézwen ninpôt akomodasyon pou ka patisipé nan pwosè sa-a, ou gen dwa, san'l pa kouté'w anyin, pou yo ba'w kèk sèvis. Tanpri kontaké koòdinatè ADA ya nan Biro Administratif Tribinal nan cité Palm Beach la, ki nan 205 North Dixie Highway, Cham 5.2500, West Palm Beach, Florida 33401, niméro telefonn-nan sé (561) 355-4380, rélé dé (2) jou dé lè ou résévwa [notis sa-a]; si ou bèbè ou byen soud rélé 1-800-955-8771.

FRENCH

Si vous êtes infirme, et en besoin de n'importe accommodation pour pouvoir participer á ces procédures, vous pouvez gratuitement recevoir, certains services. S'il-vous-plait contactez le coordinateur du Bureau Administratif du Tribunal de Palm Beach, située à 205 North Dixie Highway, Chambre 5.2500, West Palm Beach, Florida 33401, numéro de téléphone (561) 355-4380 durant deux (2) jours suivant la réception de [cette note]; si vous êtes muets ou sourds, appelez 1-800-955-8771.

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff,

vs.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO., INC.,
Defendant.

_____ /

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff,

vs.

CASE NO: CA 03-5165 AI

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant.

_____ /

REVISED NOTICE OF VIDEOTAPED DEPOSITION

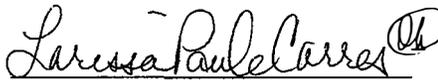
PLEASE TAKE NOTICE that Defendant Morgan Stanley & Company Incorporated and Plaintiff Morgan Stanley Senior Funding, Inc. will take the videotaped deposition of Lawrence Jones, pursuant to Florida Rules of Civil Procedure 1.280 and 1.310. The oral examination will take place beginning on September 3, 2004, at 9:30 a.m. and continue from day to day until completed at the offices of Harper Court Reporting, 401 North Market Street, Wichita, Kansas 67201. The deposition will be taken before a person authorized to administer oaths and recorded by stenographic and videographic means. The video operator will be Harper Court Reporting, 401 North Market Street, Wichita, Kansas 67201. The witness is instructed to bring all books, papers, and other things in his possession or under his control relevant to this lawsuit (and not previously produced in discovery) to the examination.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this 31st day of August, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar No. 618349)
Thomas A. Clare
Zhonette M. Brown
Larissa Paule-Carres
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
E-mail: jianno@carltonfields.com

BY: Larissa Paule Carres 

*Counsel for Morgan Stanley & Co.
Incorporated and Morgan Stanley Senior
Funding*

SERVICE LIST

Jack Scarola
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy
Michael Brody
JENNER & BLOCK, LLC
One IBM Plaza, Suite 400
Chicago, IL 60611

FAX TRANSMITTAL

JENNER & BLOCK

Jenner & Block LLP
One IBM Plaza
Chicago, IL 60611
Tel 312 222-9350
www.jenner.com

Chicago
Dallas
Washington, DC

Date: September 3, 2004

To: Thomas A. Clare, Esq.

Fax: (202) 879-5200
Voice: (202) 879-5993

Joseph Ianno, Jr., Esq.

Fax: (561) 659-7368
Voice: (561) 659-7070

John Scarola, Esq.

Fax: (561) 684-5816 (before 5 PM)
Voice: (561) 686-6350, Ext. 140

From: Michael T. Brody
312 923-2711

Employee Number:

Client Number: 41198-10003

Important: This message is intended only for the use of the individual or entity to which it is addressed, and may contain information that is attorney work product, privileged, confidential, and exempt from disclosure under applicable law. If the reader of this message is not the intended recipient, or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution, or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone, and return the original message to us at the above address via postal service. Thank you.

Message:

Total number of pages including this cover sheet: **22**

Time Sent:

If you do not receive all pages, please call: 312 222-9350

Sent By:

Secretary: Caryn Jo Geisler

Extension: 6490

JENNER & BLOCK

September 3, 2004

Jenner & Block LLP
One IBM Plaza
Chicago, IL 60611
Tel 312-222-9350
www.jenner.com

Chicago
Dallas
Washington, DC

By Telecopy
Thomas A. Clare, Esq.
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

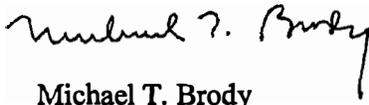
Michael T. Brody
Tel 312 923-2711
Fax 312 840-7711
mbrody@jenner.com

Re: *Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co.*
Morgan Stanley Senior Funding, Inc. v. MacAndrews & Forbes Holdings Inc., et al.

Dear Tom:

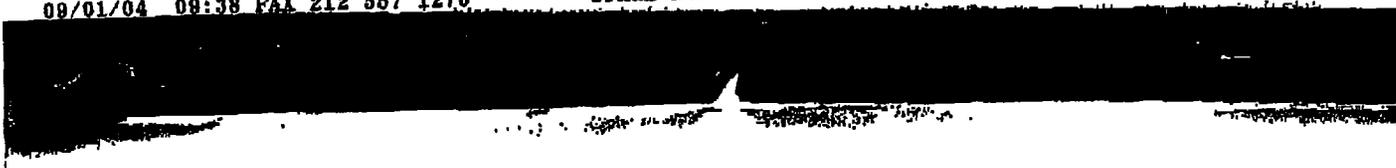
I enclose a subpoena for Brooks Harris. We thank you for agreeing in your August 23, 2004 letter to continue this September 14 subpoena for Mr. Harris to whatever date Mr. Harris ultimately is deposed. Because of the uncertainty surrounding the discovery cutoff, we are not yet able to accept or reject any of the dates you have proposed for Mr. Harris' deposition. We will be in touch with you in the near future regarding that date.

Very truly yours,



Michael T. Brody

cc: Joseph Ianno, Esq. (by telecopy)
John Scarola, Esq. (by telecopy)
Jerold S. Solovy, Esq.



At the Ex-Parte Motion Office at the Supreme Court of the State of New York, held in and for the County of New York, New York, 60 Centre Street, New York, New York on the 30 day of August 2004

LUCINDO SUAREZ

PRESENT:

Hon. _____
JUSTICE.

-----X
 In the Matter of the Application of COLEMAN :
 (PARENT) HOLDINGS, INC., for an Order to :
 take the Deposition of BROOKS HARRIS : Index No. 111511/2004
 in a Certain Action pending in the Circuit Court :
 of the Fifteenth Judicial Circuit in and for Palm :
 Beach County, Florida entitled: :
 :
Coleman (Parent) Holdings, Inc. v. Morgan : Order Pursuant to
Stanley & Co., Inc. : CPLR 3102(e)
 :
 -----X

Upon reading and filing the affidavit of Michael I. Allen, sworn to August 26, 2004 and the exhibits thereto, including a certified copy of the commission issued by the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, it is hereby

ORDERED that Brooks Harris is directed, pursuant to CPLR 3102(e), to appear before a notary public of the State of New York, duly authorized to transcribe depositions and to administer oaths, at the offices of Esquire Deposition Services, 216 East 45th Street, New York, New York, on September 14, 2004 at 9:30 a.m. to testify and give evidence in an action now pending in the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida entitled Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc., Case No. 2003 CA 005045 AL. The videotape operator will be Esquire Deposition Services located in New York, New York.

ORDERED, that personal service of a copy of this Order together with a

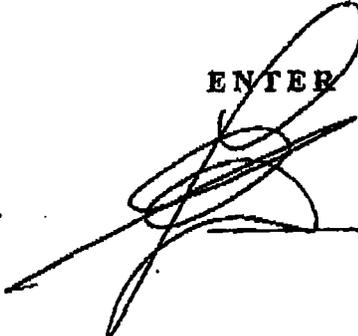
subpoena duces tecum and ad testificandum upon the above-named witness and by

OVERNIGHT MAIL AND/OR

~~mail~~ or fax upon attorneys in the underlying action on or before the 1ST day of

SEPT
August, 2004 shall be sufficient.

ENTER



J.S.C.

At the Ex-Parte Motion Office at
the Supreme Court of the State of
New York, held in and for the
County of New York, New York,
60 Centre Street, New York, New
York on the __ day of August 2004

PRESENT:

Hon. _____,
JUSTICE.

-----X
In the Matter of the Application of COLEMAN :
(PARENT) HOLDINGS, INC., for an Order to :
take the Deposition of BROOKS HARRIS : Index No. 111511/04
in a Certain Action pending in the Circuit Court :
of the Fifteenth Judicial Circuit in and for Palm :
Beach County, Florida entitled: :
: :
Coleman (Parent) Holdings, Inc. v. Morgan :
Stanley & Co., Inc. :
-----X

Upon reading and filing the affidavit of Michael L. Allen, sworn to August 26,
2004 and the exhibits thereto, including a certified copy of the commission issued by the
Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, it is hereby

ORDERED that Brooks Harris is directed, pursuant to CPLR 3102(e), to appear
before a notary public of the State of New York, duly authorized to transcribe depositions
and to administer oaths, at the offices of Shapiro Forman Allen & Miller LLP, 380
Madison Avenue, New York, New York, on September 14, 2004 at 9:30 a.m., or such
other location as agreed to, to testify and give evidence in an action now pending in the
Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida
entitled Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc., Case No. 2003
CA 005045 AI.

ORDERED, that personal service of a copy of this Order together with a subpoena duces tecum and ad testificandum upon the above-named witness and by mail or fax upon attorneys in the underlying action on or before the __ day of August, 2004 shall be sufficient.

ENTER

J.S.C.

Affirmation

duces tecum and ad testificandum for certain specified witnesses and “other witnesses whose discovery is sought” (emphasis added) in New York, which would include Brooks Harris, who resides in New York. See page 2 of the true and correct certified copy of the Commission, which is annexed hereto as Exhibit A.

3. The Florida Action arises out of, among other things, the participation of Morgan Stanley & Co., Inc., the defendant in the Florida Action in the massive fraud perpetrated by Florida-based Sunbeam Corporation in the late 1990s. The person whose testimony and documents are sought is believed to have knowledge relating to the circumstances surrounding the Sunbeam fraud and Morgan Stanley's participation in it. Upon information and belief, such information is material and necessary for Petitioner's prosecution of their claims in the Florida Action.

4. I am informed by counsel for the Petitioner in the Florida Action that counsel for defendant in that Action has been served with notice of the deposition (a copy of which is attached hereto as Exhibit B).

5. Attached hereto as Exhibit C is the subpoena addressed to Mr. Harris.

6. This request seeks an Order requiring the deposition within 20 days. The parties to the Florida Action and the deponent have all agreed to submit to the deposition on September 14, 2004, and, I am informed, travel plans have been made in anticipation of this deposition.

7. It is respectfully requested that the Order submitted herewith be made pursuant to CPLR 3102(e) requiring Brooks Harris to appear for a deposition as aforesaid,

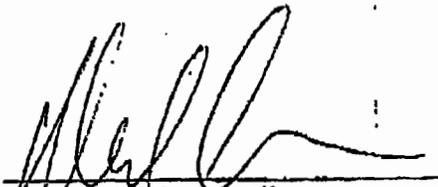
and directing him to bring with him the documents specified in the Notice of Deposition, and authorizing the commissioner to issue a judicial subpoena as necessary to obtain the witness' attendance.

8. This application is made in good faith to obtain the testimony and documents pursuant to CPLR 3102(e) and for no other reason.

9. No previous application for relief similar to that prayed for herein has been made.

10. I, therefore, respectfully request that an Order be entered directing Brooks Harris to appear at the date and time set forth for deposition upon oral examination, and directing said witness to produce for examination and copying all documents referred to above.

Dated: August 26, 2004



Michael I. Allen

Exhibit A

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS, INC.,)
)
Plaintiff,)
)
v.)
)
MORGAN STANLEY & CO., INC.,)
)
Defendant.)

Case No.: 2003 CA 005045 AI

Judge Elizabeth T. Maass

FILED
CIRCUIT CIVIL
AUG 11 2004
PALM BEACH COUNTY

ORDER ON APPOINTMENT OF COMMISSIONS

This cause came before the Court on Plaintiff's Motion to Appoint Commissions so that it can subpoena for depositions and documents witnesses in other jurisdictions. After reviewing the pleadings, and otherwise being advised in the premises it is ORDERED AND ADJUDGED that commissions are appointed so that plaintiff may subpoena depositions and documents from the following witnesses:

- Andrew B. Savarie
1136 Ash St.
Winnetka, IL 60093-2104
- R. Bram Smith
Bear, Stearns & Co. Inc.
245 Park Avenue
New York, NY 10167
- Alexandre J. Fuchs
2 Fifth Avenue, #11K
New York, NY 10011

142

SEP-03-2004 11:39

JENNER & BLOCK

3125270484

P.12/22

~~SEP-03-2004 11:39~~ 212 557 1275

~~SPAM LIT~~

- Robert W. Klits
Thomas Weisel Partners
Lever House
390 Park Avenue, 17th Floor
New York, NY 10022

- T. Chang
10990 Rochester Ave., Apt. 307
Los Angeles, CA 90024-6281

The following commissions are appointed for the purposes of obtaining depositions and documents from the above listed witnesses, and other witnesses whose discovery is sought in the commissions' jurisdictions:

Jerold S. Solovy
Jenner & Block, LLC
One IBM Plaza, Suite 4400
Chicago, IL 60611
(312) 222-9350

or any person duly authorized by him and able to administer oaths pursuant to the laws of Illinois.

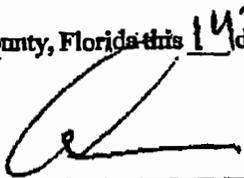
Michael I. Allen
SHAPIRO MITCHELL FORMAN ALLEN & MILLER LLP
380 Madison Avenue
New York, New York 10017

or any person duly authorized by him and able to administer oaths pursuant to the laws of New York.

Marc M. Seitzer
Susman Godfrey L.L.P.
1880 Century Park East
Suite 950
Los Angeles, California 90067
(310) 789-3102

or any person duly authorized by him and able to administer oaths pursuant to the laws of California.*

Done and Ordered in Palm Beach County, Florida this 14th day of Nov., 2003.



Circuit Court Judge Elizabeth T. Maass

* This order does not

Coleman v. Morgan Stanley
2003 CA 005045 AI
Order on Appointment of Commissions

purport to grant the power
of the commissioners appointed to
subpoena witnesses on
documents, but simply the
power to administer
oaths and transcribe
deposition testimony. n

Copies furnished to:

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lakeview Avenue
Suite 1400
West Palm Beach, Florida 33401
(561) 659-7070
(561) 659-7368 (fax)

John Scarola, Esq.
SEARCY DENNEY SCAROLA BARNHART
& SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33409
(561) 686-6300
(561) 478-0754 (fax)

Jerold S. Solovy, Esq.
JENNER & BLOCK, LLC
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350
(312) 527-0484 (fax)

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett H. McGurk
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 879-5000
(202) 879-5200 (fax)

999134



STATE OF FLORIDA • PALM BEACH COUNTY

I hereby certify that the foregoing is a true copy of the Original on file in my office. WITNESS my hand and Official Seal.

This 10th day of August, 2004

DOROTHY W. WILKEN
CLERK OF CIRCUIT COURT

BY [Signature]
Deputy Clerk

SEP-03-2004 11:40

JENNER & BLOCK

09/01/04 09:41 FAX 212 557 1275

SPAM LLP

3125270484

P.16/22

Exhibit B

THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

CASE NO. CA 03-5045 AI

vs.

MORGAN STANLEY & CO., INC.,
Defendant.

MORGAN STANLEY SENIOR FUNDING, INC., CASE NO. CA 03-5165 AI
Plaintiff,

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
et al.,
Defendants.

NOTICE OF TAKING VIDEOTAPED DEPOSITIONS

To: Thomas A. Clare, Esq.
KIRKLAND & ELLIS, LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lake View Avenue
Suite 1400
West Palm Beach, FL 33401

PLEASE TAKE NOTICE that Plaintiff Coleman (Parent) Holdings Inc. will take the deposition upon oral examination of the following witness pursuant to Florida Rule of Civil Procedure 1.310 on the date, time, and location set forth below:

DEPONENT

DATE AND TIME

Brooks Harris	September 14, 2004 at 9:30 a.m.
---------------	---------------------------------

The deposition will be conducted at Esquire Deposition Services, 216 East 45th Street, New York, NY 10017. The deposition will be recorded by videotape and stenographic means. The deposition will be taken before a person authorized to administer oaths and will continue day to day until completed.

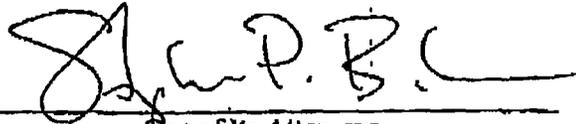
The videotape operator will be Esquire Deposition Services located in New York, New York.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by facsimile and mail to all counsel on the attached Service List this 20th day of August 2004.

Dated: August 20, 2004

COLEMAN (PARENT) HOLDINGS INC.

By:



One of Its Attorneys

Jerold S. Solovy
JENNER & BLOCK LLP
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

Jack Scarola
SEARCY DENNEY SCAROLA BARNHART
& SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33409
(561) 686-6300

SERVICE LIST

Thomas A. Clare, Esq.
KIRKLAND & ELLIS, LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lake View Avenue
Suite 1400
West Palm Beach, FL 33401

Exhibit C

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

-----X
In the Matter of the Application of COLEMAN :
(PARENT) HOLDINGS, INC., for an Order to :
take the Deposition of JAMES STYNES : Index No.
in a Certain Action pending in the Circuit Court :
of the Fifteenth Judicial Circuit in and for Palm :
Beach County, Florida entitled: :

SUBPOENA

Coleman (Parent) Holdings, Inc. v. Morgan :
Stanley & Co., Inc. :
-----X

THE PEOPLE OF THE STATE OF NEW YORK

TO: Brooks Harris
360 East 88th Street
Apartment 43A
New York, New York 10026

GREETING:

YOU ARE HEREBY COMMANDED, all business and excuses being laid aside,
to appear and attend, to give testimony in this action before a notary public of the State of New
York, at the offices of Shapiro Forman Allen & Miller LLP, 380 Madison Avenue, New York,
New York on the 14th day of September, 2004 at 9:30 a.m.

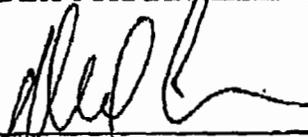
Pursuant to CPLR 3113(b) and 22 N.Y.C.R.R. § 212.15, the examination will be
videotaped by Esquire Deposition Services, Inc. 216 East 45th Street, New York, New York
10017.

Failure to comply with this subpoena is punishable as a contempt of Court and
shall make you liable to the person on whose behalf the subpoena was issued for a penalty not to

exceed fifty dollars and all damages sustained by reason of your failure to comply.

WITNESS, Honorable _____, Justice of the Supreme Court of the State
of New York, the 26th day of August, 2004.

SHAPIRO FORMAN ALLEN & MILLER LLP

By: 
Michael I. Allen

380 Madison Avenue
New York, New York 10017
(212) 972-4900

Attorneys for Coleman (Parent) Holdings, Inc.

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT IN
AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff,

vs.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO., INC.,
Defendant.

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff,

vs.

CASE NO: CA 03-5165 AI

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant.

**MORGAN STANLEY'S MOTION FOR ENLARGEMENT
OF TIME TO AMEND THE PLEADINGS**

Defendant Morgan Stanley & Co. Incorporated and Plaintiff Morgan Stanley Senior Funding, Inc. (collectively "Morgan Stanley"), by and through its undersigned attorneys, respectfully moves this Court to enlarge the time for the parties to file and serve motions for leave to amend the pleadings in these consolidated actions to and including September 21, 2004. In support of its motion, Morgan Stanley states as follows:

1. On August 12, 2004, this Court entered an Order requiring the parties to serve all motions for leave to file amended pleadings by September 7, 2004.
2. On September 1, 2004, the Palm Beach County Commission declared a state of emergency for Palm Beach County in preparation for the approach of Hurricane Frances. On September 2, 2004, the National Hurricane Center issued a Hurricane Warning condition for Palm Beach County. Governor Jeb Bush has declared — in anticipation of the hurricane — a

state of emergency for the entire State of Florida. Due to preparations for the approaching hurricane and the evacuation of substantial portions of Palm Beach County and many of the surrounding areas, Morgan Stanley's Florida counsel will be unable, in the days ahead, to participate in the preparation and review of amended pleadings and related motions.

3. Due to the approaching hurricane, the Case Management Conference that was originally scheduled for September 2, 2004 has been rescheduled (conditions permitting) for September 7, 2004. If the hearing goes forward as scheduled, it will be necessary for Morgan Stanley's out-of-town counsel to travel to Florida on September 6, 2004, and for all counsel to prepare for and appear at the Case Management Conference on the date currently set for amendment of the pleadings.

4. The Court has not yet ruled on Morgan Stanley's Motion to Dismiss or Strike Plaintiff's Motion For Contempt or the pending motions for the *pro hac vice* admission of attorneys from Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C. ("KHHTE"). The Court has taken these motions under advisement, with rulings expected in the near term. Morgan Stanley requests that KHHTE attorneys be permitted to participate in proceedings related to the amendment of the pleadings, and that the deadline for such amendments be extended until the Court has resolved the pending contempt issues and ruled on the motions for the *pro hac vice* admission of KHHTE lawyers.

5. No other deadlines or hearings related to the amendment of pleadings would need to be re-set — and there would be no prejudice to any of the parties — if this short extension was granted. The next Case Management Conference is scheduled (conditions permitting) for September 7, 2004 at 1:30 p.m., at which time the parties and the Court will discuss a workable schedule for trial and other pretrial deadlines. It is anticipated that, as part of the overall

schedule, the parties and the Court will develop a schedule for the briefing and argument of any motions relating to the amendment of the pleadings.

WHEREFORE, Morgan Stanley respectfully requests that this Court enlarge the time for the parties to file and serve motions to amend the pleadings until September 21, 2004, together with such other and further relief as the Court deems just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this 3rd day of September, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar No. 618349)
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
E-mail: jianno@carltonfields.com

BY: Thomas A. Clare
Thomas A. Clare

Counsel for:
Morgan Stanley & Co. Incorporated and
Morgan Stanley Senior Funding, Inc.

SERVICE LIST

Jack Scarola
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy
Michael Brody
JENNER & BLOCK, LLC
One IBM Plaza, Suite 400
Chicago, IL 60611

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT IN
AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff,

vs.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO., INC.,
Defendant.

_____/

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff,

vs.

CASE NO: CA 03-5165 AI

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant.

**MORGAN STANLEY'S MOTION FOR
EXTENSION OF STAY OF CONTEMPT DISCOVERY**

Defendant Morgan Stanley & Co. Incorporated and Plaintiff Morgan Stanley Senior Funding, Inc. (collectively "Morgan Stanley"), by and through its undersigned attorneys, respectfully moves this Court to extend the previously-entered stay of discovery relating to Plaintiff's Motion for Contempt. In support of its motion, Morgan Stanley states as follows:

1. On August 15, 2004, this Court entered an Order staying all discovery relating to issues raised by Plaintiff's Motion for Contempt until August 30, 2004.
2. On August 27, 2004, the Court entered an Order extending the stay of contempt through September 3, 2004.
3. On September 1, 2004, the Palm Beach County Commission declared a state of emergency for Palm Beach County in preparation for the approach of Hurricane Frances. On September 2, 2004, the National Hurricane Center issued a Hurricane Warning condition for

Palm Beach County. Governor Jeb Bush has declared — in anticipation of the hurricane — a state of emergency for the entire State of Florida.

4. Due to the approaching hurricane, the Case Management Conference that was originally scheduled for September 2, 2004 has been rescheduled (conditions permitting) for September 7, 2004. Accordingly, the parties did not have an opportunity — prior to the September 3, 2004 expiration — to appear before the Court, as originally contemplated, and address a further extension of the stay of contempt discovery.

5. The Court has not yet ruled on Morgan Stanley's Motion to Dismiss or Strike Plaintiff's Motion For Contempt. The Court has taken that motion under advisement, with a ruling expected in the near term. Morgan Stanley requests that the stay of discovery related to Plaintiff's Motion for Contempt be extended until the Court has ruled on Morgan Stanley's Motion to Dismiss or Strike Plaintiff's Motion For Contempt.

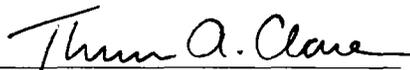
WHEREFORE, Morgan Stanley respectfully requests that this Court extend the stay of discovery relating to Plaintiff's Motion for Contempt until the Court has ruled on Morgan Stanley's Motion to Dismiss or Strike Plaintiff's Motion For Contempt, together with such other and further relief as the Court deems just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this 3rd day of September, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar No. 618349)
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
E-mail: jianno@carltonfields.com

BY: 
Thomas A. Clare

Counsel for:
Morgan Stanley & Co. Incorporated and
Morgan Stanley Senior Funding, Inc.

SERVICE LIST

Jack Scarola
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy
Michael Brody
JENNER & BLOCK, LLC
One IBM Plaza, Suite 400
Chicago, IL 60611

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff,

vs.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO., INC.,
Defendant.

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff,

vs.

CASE NO: CA 03-5165 AI

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant.

**MORGAN STANLEY'S RESPONSE TO DEFENDANT COLEMAN (PARENT)
HOLDINGS INC.'S FIFTH REQUEST FOR PRODUCTION OF DOCUMENTS**

Pursuant to Rules 1.280 and 1.350 of the Florida Rules of Civil Procedure, Defendant Morgan Stanley & Co. Incorporated ("MS & Co.") and Plaintiff Morgan Stanley Senior Funding, Inc. ("MSSF") (collectively "Morgan Stanley"), hereby interposes the following objections and responses to Coleman (Parent) Holdings Inc.'s ("CPH") Fifth Request for Production dated August 5, 2004.

GENERAL OBJECTIONS

Morgan Stanley incorporates by reference its Objections to Definitions and Instructions and its General Objections to Plaintiff's First, Second, Third, and Fourth Request for Production of Documents.

SPECIFIC RESPONSES AND OBJECTIONS

Request No. 1. All documents involving, relating to, or referring to the Subordinated Debentures or to any transaction involving Subordinated Debentures, including but not limited to

(i) all documents relating or referring to any transaction in which Morgan Stanley bought or sold Subordinated Debentures or any interest therein; (ii) all communications with any Morgan Stanley customer or counter-party to any trade involving Morgan Stanley as a broker or principal relating to the Subordinated Debentures; and (iii) any market for the Subordinated Debentures.

Morgan Stanley Response. Morgan Stanley objects to this request on the ground that it is not limited to a time period relevant to these consolidated actions, is overbroad and unduly burdensome, and seeks communications and transaction-level data regarding the trading activities of third-parties that are irrelevant to the subject matter of these consolidated actions and not reasonably calculated to lead to the discovery of admissible evidence.

Morgan Stanley has already produced, in response to CPH's First, Second, and Third Requests for Production, documents located after a good faith search involving, relating, or referring to the Sunbeam Convertible Debentures, including without limitation documents relating to Sunbeam's decision to finance the acquisitions in part with the proceeds from the Zero-Coupon Convertible Debentures, documents relating to MS & Co.'s due diligence and other activities undertaken as underwriter of the Zero-Coupon Convertible Debentures, documents relating to the marketing of the Zero-Coupon Convertible Debentures, and documents relating to MS & Co.'s decision to underwrite Sunbeam's offering of the Zero-Coupon Convertible Debentures.

Pursuant to Fla. R. Civ. P. 1.340(c), Morgan Stanley also produced, in response to the Court's July 12, 2004 Order regarding contempt discovery, and subject to objections to the relevance of such documents to the merits of these consolidated actions, records of secondary market trading activity of Sunbeam Zero-Coupon Convertible debentures by MS & Co. in its

convertible arbitrage facilitation account during the time period from March 19, 1998 to February 5, 2003. (See Morgan Stanley Confidential 0095741-812)

To the extent that additional documents relating to the Sunbeam Convertible Debentures exist, or to the extent that documents exist regarding the trading activity of Sunbeam Zero-Coupon Convertible Debenture by parties other than Morgan Stanley, CPH, or MAFCO, such documents are irrelevant to the subject matter of these consolidated actions and not reasonably calculated to lead to the discovery of admissible evidence. Accordingly, Morgan Stanley will not produce additional documents in response to this request.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this 7th day of September, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar No. 618349)
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
E-mail: jianno@carltonfields.com

BY: Thomas A. Clare
Thomas A. Clare

*Counsel for Morgan Stanley & Co. Incorporated
and Morgan Stanley Senior Funding, Inc.*

SERVICE LIST

Jack Scarola

**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**

2139 Palm Beach Lakes Blvd.

West Palm Beach, FL 33409

Jerold S. Solovy

Michael Brody

JENNER & BLOCK, LLC

One IBM Plaza, Suite 400

Chicago, IL 60611

IN THE FIFTEENTH
JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff,

vs.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO., INC.,
Defendant.

_____ /

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff,

vs.

CASE NO: CA 03-5165 AI

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant.

_____ /

**MORGAN STANLEY & CO. INCORPORATED'S RESPONSES
AND OBJECTIONS TO COLEMAN (PARENT) HOLDINGS INC.'S
THIRD SET OF REQUESTS FOR ADMISSION**

Defendant Morgan Stanley & Co. Incorporated ("MS & Co."), by its attorneys and pursuant to Florida Rule of Civil Procedure 1.370, hereby responds and objects to Coleman (Parent) Holdings Inc.'s ("CPH") Third Set of Requests for Admission.

INITIAL OBJECTIONS

1. MS & Co. objects to CPH's Third Set of Requests for Admission, including all Definitions, to the extent that they purport to impose upon MS & Co. any requirements that exceed or are otherwise inconsistent with the Florida Rules of Civil Procedure or any other applicable rule or court order.

2. MS & Co. objects to CPH's Third Set of Requests for Admission to the extent that they seek information protected from disclosure by the attorney-client privilege, the work product doctrine, or any other applicable privilege, doctrine, immunity or rule.

3. MS & Co. objects to the definition of “Morgan Stanley” to the extent that it includes MS & Co.’s counsel in this litigation and entities not a party to this action. Specifically, MS & Co. interprets these definitions to exclude Kirkland & Ellis LLP, Carlton Fields, P.A., Kellogg Huber, Hansen, Todd & Evans, PLLC and affiliates, parents, and others not a party to this action.

4. MS & Co. objects to the Requests for Admission as unduly burdensome, abusive, and vexatious, since many of them are duplicative and constitute an unnecessary waste of time and concern factual allegations uniquely within the possession of CPH, MAFCO, or third parties, which could be confirmed with less expense and burden on the parties through other techniques of discovery.

5. MS & Co. incorporates, as though fully set forth therein, these General Objections into each of the Responses set forth below.

RESPONSES

1. The Section 14(f) Information Statement is not the “Information Statement” referred to in Section 7.3(b) of the Public Merger Agreement.

RESPONSE: Admitted.

2. The Coleman Company, Inc. notice of Merger and Appraisal Rights and Information Statement is the “Information Statement” referred to in Section 7.3(b) of the Public Merger Agreement.

RESPONSE: Admitted

3. The “Information Statement” referred to in Section 7.3(b) of the Public Merger Agreement was mailed to Coleman’s stockholders on or about December 7, 1999.

RESPONSE: Morgan Stanley has made reasonable inquiry into the documents and information in its possession, however, Morgan Stanley lacks information or knowledge sufficient to answer this request, and therefore denies this request.

4. The Sunbeam Form S-4 is the “Registration Statement” referred to in Section 7.3(b) of the Public Merger Agreement.

RESPONSE: Admitted.

5. The “Registration Statement” referred to in Section 7.3(b) of the Public Merger Agreement became effective on December 6, 1999.

RESPONSE: Morgan Stanley has made reasonable inquiry into the documents and information in its possession, however, Morgan Stanley lacks information or knowledge sufficient to answer this request, and therefore denies this request.

6. As of March 30, 1998, CLN Holdings’ debt consisted solely of the CLN Holding Notes.

RESPONSE: Morgan Stanley has made reasonable inquiry into the documents and information in its possession, however, Morgan Stanley lacks information or knowledge sufficient to answer this request, and therefore denies this request.

7. The consideration paid to CPH in connection with Sunbeam’s acquisition of CPH’s interest in Coleman did not include Sunbeam’s assumption of Coleman’s debt.

RESPONSE: Denied.

8. The consideration paid to CPH in connection with Sunbeam’s acquisition of CPH’s interest in Coleman did not include Sunbeam’s assumption of Coleman Worldwide’s debt.

RESPONSE: Denied.

9. The Long-Term Debt reflected in CLN Holdings' 1997 consolidated financial statements consists of CLN Holding debt, Coleman Worldwide debt, and Coleman debt.

RESPONSE: Morgan Stanley has made reasonable inquiry into the documents and information in its possession, however, Morgan Stanley lacks information or knowledge sufficient to answer this request, and therefore denies this request.

10. In exchange for its interest in Coleman, CPH received consideration consisting solely of (a) \$159,958,756; [sic] (b) 14,099,749 shares of Sunbeam stock; and (3) the assumption of the CLN Holdings Notes.

RESPONSE: Denied.

11. CPH Exhibit 9 is a true and correct copy of the "Sunbeam Corporation Discussion Materials" provided to CPH on or about February 23, 1998.

RESPONSE: Admitted.

12. Morgan Stanley prepared CPH Exhibit 9.

RESPONSE: Morgan Stanley denies that it "prepared" CPH Exhibit 9. Morgan Stanley admits that Sunbeam provided Morgan Stanley certain information contained in Exhibit 9, that other information in Exhibit 9 was obtained from public records, and that Morgan Stanley assisted Sunbeam in the formatting and organization of such information.

13. CPH Exhibit 187A is a true and correct copy of the "Sunbeam Long Range Strategic Plan" provided to CPH on or about February 23, 1998.

RESPONSE: Admitted.

14. Morgan Stanley was involved in the preparation of CPH Exhibit 187A.

RESPONSE: Denied.

15. Morgan Stanley received one or more drafts of the March 19, 1998 comfort letter before the March 19, 1998 press release was issued.

RESPONSE: Denied.

16. On March 17, 1998, Morgan Stanley received at least one draft of the March 19, 1998 comfort letter.

RESPONSE: Denied.

17. On March 18, 1998, Morgan Stanley received at least one draft of the March 19, 1998 comfort letter

RESPONSE: Denied.

18. Before the March 19, 1998 press release was issued, Morgan Stanley knew that Sunbeam's sales in January and February 1998 were \$72,018,000.

RESPONSE: Denied.

19. Before the March 19, 1998 press release was issued, Morgan Stanley knew that Sunbeam's net income for January 1998 was a loss of \$9,510,000.

RESPONSE: Denied.

20. Before the March 19, 1998 press release was issued, Morgan Stanley knew that Sunbeam's sales shortfall was caused by Sunbeam's "early buy" program.

RESPONSE: Denied.

21. The February 23, 1998 Letter was not signed by or on behalf of Coleman.

RESPONSE: Denied.

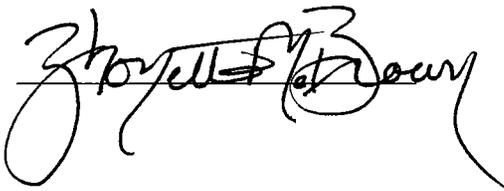
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this 13th day of September, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar No. 618349)
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

Joseph Ianno, Jr. (FL Bar No. 655351)
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
E-mail: jianno@carltonfields.com

*Counsel for Morgan Stanley & Co.
Incorporated and Morgan Stanley Senior
Funding, Inc.*

BY: 

SERVICE LIST

Jack Scarola
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy
Michael Brody
JENNER & BLOCK, LLC
One IBM Plaza, Suite 400
Chicago, IL 60611

SEARCY
DENNEY
SCAROLA
BARNHART
& SHIPLEY P.A.

*Attorneys
at Law*

WEST PALM BEACH OFFICE:

2139 PALM BEACH LAKES BLVD
WEST PALM BEACH, FLORIDA 33409

P.O. DRAWER 3626
WEST PALM BEACH, FLORIDA 33402

(561) 686-6300
1-800-780-8607
FAX: (561) 478-0754

TALLAHASSEE OFFICE:

THE TOWLE HOUSE
517 NORTH CALHOUN STREET
TALLAHASSEE, FL 32301-1231

P.O. DRAWER 1230
TALLAHASSEE, FLORIDA 32302

(850) 224-7600
1-888-549-7011
FAX: (850) 224-7602

September 15, 2004

ATTORNEYS AT LAW:

ROSALYN SIA BAKER-BARNES
F. GREGORY BARNHART
LANCE BLOCK
EARL L. DENNEY, JR.
SEAN C. DOMNICK
JAMES W. GUSTAFSON, JR.
JACK P. HILL
DAVID K. KELLEY, JR.
WILLIAM S. KING
DARRYL L. LEWIS
WILLIAM A. NORTON
DAVID J. SALES
JOHN SCAROLA
CHRISTIAN D. SEARCY
HARRY A. SHEVIN
JOHN A. SHIPLEY III
CHRISTOPHER K. SPEED
KAREN E. TERRY
C. CALVIN WARRINER III
DAVID J. WHITE
SHAREHOLDERS

Honorable Elizabeth T. Maass
Palm Beach County Courthouse
Room #11.1208
205 North Dixie Highway
West Palm Beach, FL 33401

Re: Coleman (Parent) Holdings Inc. vs Morgan Stanley & Co., Inc.
MSSFI v. MacAndrews & Forbes Holdings, Inc.
Matter No.: 029986-230580

PARALEGALS:

VIVIAN AYAN-TEJEDA
LAURIE J. BRIGGS
DEANE L. CADY
DANIEL J. CALLOWAY
EMILIO DIAMANTIS
RANDY M. DUFRESNE
DAVID W. GILMORE
TED E. KULESA
JAMES PETER LOVE
CHRISTOPHER J. PILATO
ROBERT W. PITCHER
KATHLEEN SIMON
STEVE M. SMITH
WALTER A. STEIN
BRIAN P. SULLIVAN
KEVIN J. WALSH
JUDSON WHITEHORN

Dear Judge Maass:

Enclosed please find a courtesy copy of CPH's Motion to Appoint Commission filed today in the above-styled matters. Also enclosed is an original and four copies of a proposed order. If same meets with your approval, we ask that your Honor sign same, returning conformed copies to all counsel in the envelopes provided.

Respectfully,

[Handwritten Signature]
JACK SCAROLA
JS/mep
Enc.

cc: Joseph Ianno, Esq. (Via Fax)
Thomas Clare, Esq. (Via Fax)
Jenner & Block LLP (Via Fax)



IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

_____ /

CASE NO. CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

_____ /

COLEMAN (PARENT) HOLDINGS INC.'S MOTION TO APPOINT COMMISSION

Plaintiff Coleman (Parent) Holdings Inc. ("CPH"), pursuant to Florida Statutes § 92.051, files this Motion to Appoint Commission so that it can subpoena for depositions and documents a witness in another jurisdiction. CPH states as follows:

CPH requests that this Court appoint a commission so that it may subpoena the following witness:

Dwight Sippelle
155 Lincoln Street
Englewood, New Jersey 07631

CPH seeks to have the following commission appointed for this purpose of obtaining documents and depositions from the above-listed witness:

John P. Dwyer, Esq.
McElroy, Deutsch, Mulvaney & Carpenter
Three Gateway Center

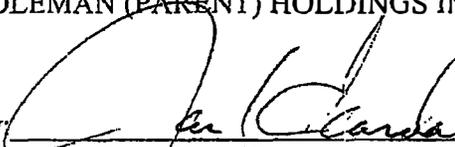
100 Mulberry Street
Newark, New Jersey

or any person duly authorized by him and able to administer oaths pursuant to the laws of New Jersey.

WHEREFORE, CPH respectfully requests the entry of an order appointing the above as commission in the listed jurisdiction for purposes of this case.

COLEMAN (PARENT) HOLDINGS INC.

Date: September 15, 2004

By: 
One of Its Attorneys

Jerold S. Solovy
JENNER & BLOCK LLP
One B M Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

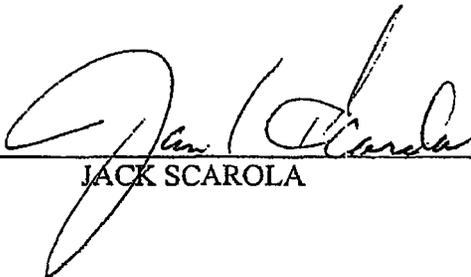
Jack Scarola
SEARCY DENNEY SCAROLA BARNHART
& SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33402-362
(561) 686-6300

CERTIFICATE OF SERVICE

I, JACK SCAROLA, hereby certify that a true and correct copy of the foregoing
COLEMAN (PARENT) HOLDINGS INC.'S MOTION TO APPOINT COMMISSION has been served
upon the parties listed below via Facsimile and U.S. Mail on this 15th day of September, 2004.

Thomas A. Clare, Esq.
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lake View Avenue
Suite 1400
West Palm Beach, FL 33401



JACK SCAROLA

SERVICE LIST

Thomas A. Clare, Esq.
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lake View Avenue, Suite 1400
West Palm Beach, FL 33401

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

CASE NO. CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

MAYNDRUEWS & FORBES HOLDINGS INC.,
Defendant(s).

**ORDER ON COLEMAN (PARENT) HOLDINGS INC.'S
MOTION TO APPOINT COMMISSION**

This cause came before the Court on Coleman (Parent) Holdings Inc.'s Motion to Appoint Commission so that it can subpoena for deposition and documents a witness in another jurisdiction. After reviewing the pleadings, and otherwise being advised in the premises it is ORDERED AND ADJUDGED that a commission is appointed so that plaintiff may subpoena depositions and documents from the following witness:

Dwight Sippelle
155 Lincoln Street
Englewood, New Jersey 07631

The following commission is appointed for the purposes of obtaining any depositions and documents from the above listed witness, and other witnesses whose discovery is sought in the commission's jurisdiction:

John P. Dwyer, Esq.
McElroy, Deutsch, Mulvaney & Carpenter
Three Gateway Center
100 Mulberry Street
Newark, New Jersey

or any person duly authorized by him and able to administer oaths pursuant to the laws of New Jersey.

Done and Ordered in Palm Beach County, Florida this ___ day of _____, 2004.

Circuit Court Judge Elizabeth T. Maass

Copies furnished to:

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lakeview Avenue
Suite 1400
West Palm Beach, Florida 33401
(561) 659-7070
(561) 659-7368 (fax)

John Scarola, Esq.
SEARIC & DENNEY SCAROLA BARNHART
& SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33409
(561) 886-6300
(561) 878-0754 (fax)

Jerrold S. Solovy, Esq.
JENNIFER & BLOCK LLP
One IEM Plaza
Chicago, Illinois 60611
(312) 422-9350
(312) 427-0484 (fax)

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett H. McGurk
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Suite 200
Washington, D.C. 20005
(202) 79-5000
(202) 79-5200 (fax)

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff,

vs.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO., INC.,
Defendant.

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff,

vs.

CASE NO: CA 03-5165 AI

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant.

**MORGAN STANLEY & CO. INCORPORATED'S RESPONSES
AND OBJECTIONS TO COLEMAN (PARENT) HOLDINGS INC.'S
FOURTH SET OF REQUESTS FOR ADMISSION**

Defendant Morgan Stanley & Co. Incorporated ("MS & Co."), by its attorneys and pursuant to Florida Rule of Civil Procedure 1.370, hereby responds and objects to Coleman (Parent) Holdings Inc.'s ("CPH") Fourth Set of Requests for Admission.

INITIAL OBJECTIONS

1. MS & Co. objects to CPH's Fourth Set of Requests for Admission, including all Definitions, to the extent that they purport to impose upon MS & Co. any requirements that exceed or are otherwise inconsistent with the Florida Rules of Civil Procedure or any other applicable rule or court order.

2. MS & Co. objects to CPH's Fourth Set of Requests for Admission to the extent that they seek information protected from disclosure by the attorney-client privilege, the work product doctrine, or any other applicable privilege, doctrine, immunity or rule.

3. MS & Co. incorporates, as though fully set forth therein, these Initial Objections into each of the Responses set forth below.

RESPONSES

1. Before the March 19, 1998 press release was issued, Morgan Stanley was advised that Sunbeam's sales in January and February 1998 were \$72,018,000.

RESPONSE: Denied.

2. Before the March 19, 1998 press release was issued, Morgan Stanley was advised that Sunbeam's net income for January 1998 was a loss of \$9,510,000.

RESPONSE: Denied.

3. Before the March 19, 1998 press release was issued, Morgan Stanley was advised that Sunbeam's sales shortfall was caused, in part, by Sunbeam's "early buy" program.

RESPONSE: Denied.

CERTIFICATE OF SERVICE

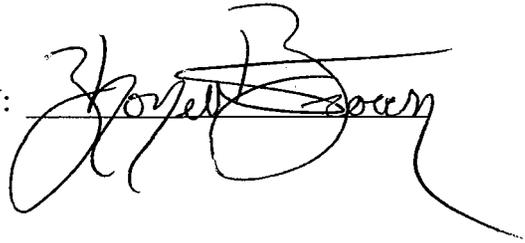
I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this 15th day of September, 2004.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar No. 618349)
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

Joseph Ianno, Jr. (FL Bar No. 655351)
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
E-mail: jianno@carltonfields.com

*Counsel for Morgan Stanley & Co.
Incorporated and Morgan Stanley Senior
Funding, Inc.*

BY:

A handwritten signature in black ink, appearing to read "Joseph Ianno, Jr.", written over a horizontal line. The signature is stylized and cursive.

SERVICE LIST

Jack Scarola
**SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.**
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy
Michael Brody
JENNER & BLOCK, LLC
One IBM Plaza, Suite 400
Chicago, IL 60611

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

_____/ CASE NO. CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

_____/

ORDER AND NOTICE OF HEARING

This case came before the Court September 15, 2004 for a status conference to discuss rescheduling the continuation of the case management conference, with all counsel present or participating by speaker telephone. Based on the proceedings before the Court, it is

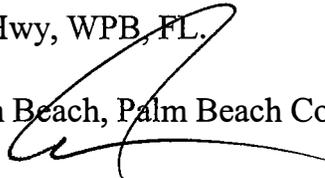
ORDERED AND ADJUDGED that the continuation of the case management conference is hereby set for

September 23, 2004, at 10:00 a.m., 2 hours reserved

at the West Palm Beach Courthouse, Room 11A, 205 N Dixie Hwy, WPB; FL. It is further

ORDERED AND ADJUDGED that the case management conference and hearing on

Motion to Compel and any Motions for Protective Order set September 23, 2004 at 3:00 p.m. are reset to September 23, 2004 at 10:00 a.m., 2 hours reserved at the West Palm Beach Courthouse, Room 11A, 205 N Dixie Hwy, WPB, FL.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this  day of September, 2004. 

ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:

Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci
655 15th Street, NW, Suite 1200
Washington DC 20005

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, IL 60611

If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please contact the ADA Coordinator in the Administrative Office of the Court, Palm Beach County Courthouse, 205 North Dixie Highway, Room 5.2500, West Palm Beach, Florida 33401; telephone number (561) 355-4380 within two (2) working days of your receipt of this [describe notice]; if you are hearing or voice impaired, call 1-800-955-8771.

SPANISH

Si Ud. es una persona incapacitada que necesita de un servicio especial para participar en este proceso, Ud. tiene derecho a que le provean cierta ayuda sin costo alguno. Por favor pongase en contacto con el Coordinador de la Oficina Administrativa de la Corte ADA, situada en el 205 North Dixie Highway, Oficina 5.2500, West Palm Beach, Florida, 33401, teléfono (561) 355-4380, dentro de los dos (2) próximos días hábiles después de recibir esta [describa la notificación]; si tiene incapacidad de oír ó hablar llame al 1-800-955-8771.

CREOLE

Si ou sé yon moun ki Infirm, ki bezwen ninpôt akomodasyon pou ka patisipé nan pwosè sa-a, ou gen dwa, san'l pa kouté'w anyin, pou yo ba'w kèk sèvis. Tanpri kontakté koòdinatè ADA ya nan Biro Administratif Tribinal nan cité Palm Beach la, ki nan 205 North Dixie Highway, Cham 5.2500, West Palm Beach, Florida.33401, niméro telefonn-nan sé (561) 355-4380, rélé dé (2) jou dé lè ou résévwa [notis sa-a]; si ou bèbè ou byen soud rélé 1-800-955-8771.

FRENCH

Si vous êtes infirme, et en besoin de n'importe quelle accommodation pour pouvoir participer à ces procédures, vous pouvez gratuitement recevoir, certains services. S'il-vous-plait contactez le coordinateur du Bureau Administratif du Tribunal de Palm Beach, située à 205 North Dixie Highway, Chambre 5.2500, West Palm Beach, Florida 33401, numéro de téléphone (561) 355-4380 durant deux (2) jours suivant la réception de [cette note]; si vous êtes muets ou sourds, appelez 1-800-955-8771.

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

CASE NO. CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

ORDER AND NOTICE OF HEARING

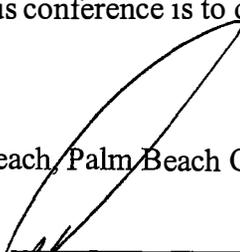
This case came before the Court, in Chambers, on the Court's own Motion and the Courthouse being closed due to hurricane Frances. Based on the foregoing, it is

ORDERED AND ADJUDGED that a status conference is specially set

September 15, 2004, at 8:45 a.m.

at the West Palm Beach Courthouse, Room 11A, 205 N Dixie Hwy, WPB, FL. Any party may appear by speaker telephone upon prior arrangement with the Court's Judicial Assistant, Nancy Ross, at (561) 355-6050. The purpose of the status conference is to discuss rescheduling the continuation of the case management conference.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 15 day of September, 2004.



ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:

Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci
655 15th Street, NW, Suite 1200
Washington DC 20005

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, IL 60611

If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please contact the ADA Coordinator in the Administrative Office of the Court, Palm Beach County Courthouse, 205 North Dixie Highway, Room 5.2500, West Palm Beach, Florida 33401; telephone number (561) 355-4380 within two (2) working days of your receipt of this [describe notice]; if you are hearing or voice impaired, call 1-800-955-8771.

SPANISH

Si Ud. es una persona incapacitada que necesita de un servicio especial para participar en este proceso, Ud. tiene derecho a que le provean cierta ayuda sin costo alguno. Por favor pongase en contacto con el Coordinador de la Oficina Administrativa de la Corte ADA, situada en el 205 North Dixie Highway, Oficina 5.2500, West Palm Beach, Florida, 33401, teléfono (561) 355-4380, dentro de los dos (2) próximos días hábiles después de recibir esta [describa la notificación]; si tiene incapacidad de oír ó hablar llame al 1-800-955-8771.

CREOLE

Si ou sé yon moun ki Infirm, ki bézwen ninpôt akomodasyon pou ka patisipé nan pwosè sa-a, ou gen dwa, san'l pa kouté'w anyin, pou yo ba'w kèk sèvis. Tanpri kontaké koòdinatè ADA ya nan Biro Administratif Tribinal nan cité Palm Beach la, ki nan 205 North Dixie Highway, Cham 5.2500, West Palm Beach, Florida 33401, niméro telefòm-nan sé (561) 355-4380, rélé dé (2) jou dé lè ou résévwa [notis sa-a]; si ou bèbè ou byen soud rélé 1-800-955-8771.

FRENCH

Si vous êtes infirme, et en besoin de n'importe quelle accommodation pour pouvoir participer à ces procédures, vous pouvez gratuitement recevoir, certains services. S'il-vous-plait contactez le coordinateur du Bureau Administratif du Tribunal de Palm Beach, située à 205 North Dixie Highway, Chambre 5.2500, West Palm Beach, Florida 33401, numéro de téléphone (561) 355-4380 durant deux (2) jours suivant la réception de [cette note]; si vous êtes muets ou sourds, appelez 1-800-955-8771.

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

CASE NO. CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).

**ORDER ON MORGAN STANLEY & CO. AND MORGAN STANLEY SENIOR
FUNDING, INC.'S MOTION TO DISMISS OR STRIKE PLAINTIFF'S MOTION
FOR CONTEMPT**

THIS CAUSE came before the Court August 27, 2004 on the Court's own Motion and on Morgan Stanley & Co. ("MS & Co.") and Morgan Stanley Senior Funding, Inc.'s ("MSSF") Motion to Dismiss or Strike Plaintiff's Motion for Contempt, with all affected parties well represented by counsel.

On July 31, 2003, the Court entered a Stipulated Confidentiality Order ("Confidentiality Order"), without hearing. Paragraph 9 (a) of the Confidentiality Order provided that:

Litigation Materials designated "Confidential" and any copies thereof, and the information contained therein, that are filed with the Court or any pleadings, motions or other papers filed with the Court, shall be filed under seal in a separate sealed

envelope conspicuously marked "Filed Under Seal-Subject to Confidentiality Order," or with such other markings as required by Court rules, and shall be kept under seal until further order of the Court. Where possible, only those portions of filings with the Court that disclose matters designated "Confidential" shall be filed under seal.

The Confidentiality Order permitted a party to designate items as confidential, subject to any other party's right to apply to the Court for a determination of the item's protectability.

On December 4, 2003, the Court entered its Order on Defendants' Motion to Compel Production of Settlement Agreement. The Order attached as Exhibit 1 a redacted copy a settlement agreement between Coleman Parent Holdings ("CPH") and certain related entities and Arthur Andersen ("Settlement Agreement"). The exhibit redacted account information only. Pursuant to the agreement of counsel, and without independent analysis by the Court, the exhibit was deemed "Confidential" and subjected to the terms of the Confidentiality Order. The Confidentiality Order requires that Confidential items may not be used for purposes outside this litigation.

The Settlement Agreement contained a provision requiring CPH to indemnify Arthur Andersen if it was sued by MS & Co. MS & Co. sued Arthur Andersen. CPH maintains that it did so, without a colorable claim against it, to trigger the indemnification provision of the Settlement Agreement. It filed a Motion for Order to Show Cause, which the Court elected to treat as a Motion for Contempt, contending that MS & Co. violated the Court's December 4, 2003 Order. Preparation of that motion for hearing has consumed substantial time by the parties and the Court.

Contrary to counsels' obvious expectations, Exhibit 1 was not filed under seal. It has been a part of the public record since December 18, 2003. Once CPH realized the omission, it sought to have the item sealed. The Court denied the application. MS & Co. and MSSF have now moved to have the Motion for Contempt dismissed or stricken, arguing that the

item has been part of the public record and therefore exempt from the Confidentiality Order by its terms; that the Confidentiality Order improperly permitted items, including the Settlement Agreement, to be deemed confidential; and that the Settlement Agreement does not meet the requirements for protection under either the Confidentiality Order or Rule 2.051 (c) (9), Rules of Judicial Administration.

The Court concludes that the Confidentiality Order impermissibly empowered the parties to file under seal items without requirement that the public be notified and delegated to the parties the right to designate items as Confidential, without judicial intervention unless they disagreed. The Court concludes these two provisions were in error.

The Court concludes, too, that the redacted version of the Settlement Agreement does not meet the requirements to permit it to be excluded from the public domain under the Rules of Judicial Administration or case law.

Finally, the Court concludes that the Motion for Contempt should not go forward. First, it is undisputed that the terms of the Settlement Agreement alleged to have been improperly used have been part of the public record since December 18, 2003. Second, the Court finds that the redacted Settlement Agreement is not subject to protection from public disclosure.

Based on the foregoing, it is

ORDERED AND ADJUDGED that the Stipulated Confidentiality Order is amended:

1. Paragraph 9 (a) is deleted and the following substituted:

(a) The Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida (the "Court") (including Clerks and other Court personnel). No document shall be filed under seal without complying with Fla. R. Jud. Admin. 2.051;

2. A new paragraph 10 is added, and the subsequent paragraphs renumbered:

10. Any party wishing to file a paper or pleading in the court file which it contends contains information or items deemed Confidential hereunder shall simultaneously file (i) a

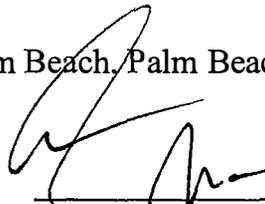
redacted version of the paper or pleading, with only the material deemed Confidential redacted, and (ii) an unredacted version in a separate sealed envelope conspicuously marked "Filed Under Seal-Subject to Confidentiality Order." Information redacted in the public filing shall be designated as either redacted pursuant to a prior order determining the material is subject to protection under the Confidentiality Order and the Rules of Judicial Administration, which shall reference the date of the order, or as redacted without prior determination of protectability. If material is redacted without a prior order finding it entitled to protection, it shall be the filing party's obligation to, within 30 days, file and serve a motion for a judicial determination of the material's protectability; schedule a hearing on the matter to be held within 90 days; and provide sufficient notice of the hearing to the public. See Rule 2.051 (c) (9) (D), Rules of Judicial Administration

It is further

ORDERED AND ADJUDGED that the Motion for Contempt is stricken. It is further

ORDERED AND ADJUDGED that Morgan Stanley's Motion for Reconsideration of July 12, 2004 Order on Plaintiff's Motion to Compel Responses to Interrogatories is Granted. The Court's July 12, 2004 Order on Plaintiff's Motion to Compel Responses to Interrogatories is vacated.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 15th day of September, 2004.



ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:

Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci
655 15th Street, NW, Suite 1200
Washington DC 20005

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, Il 60611

1 IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA
2 CASE NO. CA 03-5045 AI

3 COLEMAN (PARENT) HOLDINGS, INC.,

4 Plaintiff,

-vs-

5 MORGAN STANLEY SENIOR FUNDING, INC.,

6 Defendant.

7 _____

8 MORGAN STANLEY SENIOR FUNDING, INC.,

9 Plaintiff,

10 vs.

11 MACANDREWS & FORBES HOLDINGS, INC.

12

13 Defendant,

14 _____

15 HEARING BEFORE THE HONORABLE
ELIZABETH MAASS

16

17 Wednesday, September 15, 2004
Palm Beach County Courthouse
18 West Palm Beach, Florida 33401
8:45 - 9:15 a.m.

19

20

21 Reported By:
KATHY SZABO
22 Notary Public, State of Florida
Esquire Deposition Services
23 West Palm Beach Office Job #668687
Phone: 800.330.6952
24 561.659.4155

25

1 APPEARANCES:

2 On behalf of Coleman and MacAndrews:

3 JACK SCAROLA, ESQUIRE
4 SEARCY, DENNEY, SCAROLA, BARNHART & SHIPLEY
5 2139 Palm Beach Lakes Boulevard
6 West Palm Beach, Florida 33409

7 and

8 Via telephone on behalf of Coleman and MacAndrews:

9 JEROD S. SOLOVY, ESQUIRE
10 JENREN & BLOCK
11 IBM Plaza
12 Suite 400
13 Chicago, Illinois 60611

14 On behalf of Morgan Stanley Senior Funding:

15 JOSEPH IANNO, JR., ESQUIRE
16 CARLTON, FIELDS
17 222 Lakeview Avenue
18 Suite 1400
19 West Palm Beach, Florida 33401

20 and

21 Via telephone on behalf of Morgan Stanley Senior
22 Funding:

23 LARRY BEMIS, ESQUIRE
24 KIRKLAND and ELLIS
25 655 15th Street, N.W.
26 Suite 1200
27 Washington, DC 20005

28 3

29 P R O C E E D I N G S

30 - - -

16div-006587

3 THE COURT: We can start talking about a
4 couple of preliminary matters. We need to
5 reset --

6 MR. SCAROLA: -- the hearing relating to
7 our trial setting.

8 THE COURT: Right. That was the
9 continuation of the case management conference
10 including the discussion of the trial setting.
11 Is that the only one we missed?

12 MR. IANNO: No. I don't think we got to a
13 lot of the motions that were scheduled for the
14 hearing, was it the 23rd?

15 THE COURT: But that's still the
16 continuation of the case management conference.

17 MR. IANNO: Right. Yes.

18 MR. SCAROLA: There are various discovery
19 issues pending. There is the reset of the
20 trial date. We're awaiting an order from Your
21 Honor with regard to the contempt.

22 THE COURT: Right.

23 MR. SCAROLA: And I think that that's the
24 general description.

25 THE COURT: But the only hearing we missed

4

1 was the continuation of the case management for
2 the 7th.

3 We probably need we think at least an

4 hour, two hours? You tell me how long we need.

5 MR. SCAROLA: For what piece, for the
6 setting the trial date?

7 THE COURT: Well, in the pieces we had
8 left from the last case management conference.

9 MR. IANNO: I would say we will probably
10 spend 45 minutes to an hour just talking about
11 the trial setting and those dates, just as a
12 guess. Maybe not. But an hour at a minimum I
13 would say, Your Honor, to handle everything.

14 I know, Mr. Scarola, we were just talking
15 about some scheduling issues.

16 THE COURT: Okay. Scheduling hearing
17 issues or scheduling other issues?

18 MR. SCAROLA: I have some conflict issues.

19 THE COURT: You guys are coming back on
20 the 23rd, right?

21 MR. SCAROLA: That's correct. Yes.

22 THE COURT: At this point, I would rather
23 do it then.

24 MR. IANNO: Well, that's one of the
25 scheduling concerns.

5

1 THE COURT: Is that one of the scheduling
2 concerns?

3 MR. SCAROLA: Yes. The problem, Your
4 Honor, is that I am scheduled to be out of town
5 and my client would like me to be present when

6 we deal with --

7 THE COURT: Hi, this is Judge Maass. Who
8 do I have on the phone?

9 MR. SOLOVY: In Chicago we have Mr. Marmer
10 and Solovy.

11 MR. BEMIS: Good morning, Your Honor. In
12 Washington, Larry Bemis and Tom Clare.

13 THE COURT: Anybody else?

14 MR. BEMIS: No, Your Honor. That's all
15 from our side.

16 THE COURT: Okay. The court reporter
17 asked that you identify yourself when you
18 speak, okay?

19 MR. BEMIS: Yes, Your Honor. Larry Bemis.

20 THE COURT: We were talking about, before
21 you all got on the phone, we were simply
22 talking about what we need to reset and what
23 the parameters were, and it was at least my
24 understanding that what we need to reset is the
25 continuation of the case management conference

6

1 that was set for the afternoon of the 7th and
2 that includes the discussion of the trial
3 setting; is that correct?

4 MR. BEMIS: Your Honor, this is Larry
5 Bemis. That is our understanding.

6 THE COURT: And before you got on the

7 phone we decided we needed probably, to
8 complete those items, at least an hour and
9 preferably a little bit more. Do you think
10 that's correct.

11 MR. BEMIS: I think that's a fair
12 assessment. We might be able to do it a little
13 shorter, but that's pretty close.

14 THE COURT: Okay. And I had asked counsel
15 whether we thought we could incorporate it in
16 the hearing set Thursday afternoon.

17 Mr. Scarola said he had a conflict next week
18 that he needed to discuss and that's when we
19 got you all on the phone.

20 So Mr. Scarola, what's your concern about
21 next week?

22 MR. SCAROLA: Thank you, Your Honor.

23 Obviously, we would like to be able to
24 reach the trial-setting issues as soon as
25 possible, and if there were a way for us to do

7

1 that this week sometime before Friday morning,
2 that is our strong preference because I can be
3 present for that. I leave Friday morning and
4 don't return until Monday of the week after
5 next. That is the last week in September is
6 when I get back. I think the date is the 28th
7 or something like that. So our preference is
8 to deal with those issues before I leave.

9 THE COURT: But I thought, maybe I'm not
10 remembering, I thought when we talked about
11 this once before Mr. Bemis said that he had
12 wanted to be here physically present when we
13 discussed those issues or not.

14 MR. BEMIS: This is Larry Bemis. Yes, I
15 do want to be present. And we have a case
16 management conference next Thursday.

17 MR. SCAROLA: I understand that, and we
18 were prepared to have the case management
19 conference go forward while we were dealing
20 with discovery issues.

21 But if we are dealing with a trial-setting
22 issue, my client would like me to be present
23 when we deal with the trial-setting issue.
24 That's why we would very much like to be able
25 to resolve that before the end of this week if
8

1 that's possible.

2 THE COURT: Right. I understand that
3 concern. I'll be honest, we're closed tomorrow
4 for Rosh Hashanah and I am out of town on
5 Friday. So I can do it this afternoon, but in
6 fairness to Mr. Bemis, he's been adamant sort
7 of all along that he wanted to be present for
8 that discussion.

9 So then the question is, do you want to

10 keep that discussion on the 23rd or are you
11 also making a motion to continue that case
12 management conference?

13 MR. SCAROLA: We have two problems with
14 regard to the 23rd. We would not want to deal
15 with the trial-setting issue in my absence and
16 I will be absent on the 23rd. We're prepared
17 to go forward with other issues on the 23rd.

18 THE COURT: But we still need a hearing on
19 the trial issues.

20 MR. SCAROLA: That's correct. But we
21 would also request, Your Honor, for the
22 convenience of my Chicago co-counsel, if
23 there's a way to move the 23rd hearing earlier
24 in the day that will allow them to be able to
25 get back to Chicago for the Jewish holidays

9

1 that week.

2 THE COURT: Right. Unfortunately, that's
3 a day when the longest hearing I have the rest
4 of the day is an hour, and I have a bunch of 15
5 minute and 30-minute hearings. So there's not
6 a block of time.

7 MR. SCAROLA: What does it look like the
8 following week in terms of moving everything to
9 the following week?

10 THE COURT: The following week is set to
11 be a jury trial.

12 MR. BEMIS: This is Mr. Bemis. The
13 following week we've got depositions set in New
14 York on Tuesday which requires travel on Monday
15 and we have commitments of a firm partners'
16 meeting in Chicago and we are all tied up
17 starting on Friday. I'm just not available on
18 the 29th and the 30th.

19 I will do anything on the 23rd that they
20 want including coming in and out of court on
21 15-minute segments if that's what they want.
22 But the next week has been blocked out as a
23 result of prior scheduling.

24 THE COURT: I just lost the bailiff.

25 Hold on one second, let me go grab my JA.

10

1 (Brief recess.)

2 THE COURT: Sorry. I just wanted to check
3 on something because we spent most of yesterday
4 resetting stuff. What I can do on the 23rd
5 starting there is take you guys from 3:00 to
6 5:00 and limit you, if you can, to at 9:30 and
7 I can actually can give you two and a half
8 hours at 9:30 that day. Weren't we
9 discussing --

10 MR. SCAROLA: 9:30 on the 23rd.

11 THE COURT: Right. Instead of 3:00, just
12 flip you with some hearings that I have.

13 Because those notices, the ones that I have
14 beginning at 9:30, we only sent out the notices
15 of hearing yesterday. Those were ones I had
16 already missed, so if they are going to
17 complain about the 23rd --

18 MR. SCAROLA: Mr. Solovy, how does that
19 sound?

20 MR. SOLOVY: What would that be?

21 MR. SCAROLA: It would be 9:30 a.m. on
22 Thursday, the 23rd.

23 MR. SOLOVY: 9:30 to what, Your Honor?

24 THE COURT: Until noon. I can give you
25 until noon that day. I have a 30-minute and
11

1 then two hour hearings and then I will just --
2 wait, because then I won't fit those in.

3 I can give you a 10:00.

4 MR. SOLOVY: 10:00 to noon?

5 THE COURT: 10:00 to noon.

6 MR. SOLOVY: That would be good.

7 THE COURT: Okay.

8 MR. BEMIS: Your Honor, 10:00 to noon is
9 fine for me for the 23rd.

10 THE COURT: Although we still have the
11 issue of going back, right, and trying to get
12 the hearing discussed about the trial setting.

13 MR. SCAROLA: If it is possible somehow to
14 do that this week, then that's our preference.

16 a motion to extend the amendment to next
17 Tuesday. That's later than we would like, but
18 we're agreeable to that date, Your Honor,
19 rather than just shilly-shallying along with
20 this.

21 THE COURT: So what you're telling me is I
22 can do an agreed order extending the time to
23 file amended pleadings until next Tuesday, the
24 22nd?

25 MR. SOLOVY: The 21st.
13

1 MR. SCAROLA: The 21st.

2 THE COURT: Is everybody in agreement on
3 that?

4 MR. BEMIS: Your Honor, the answer is no,
5 we're not, because until such time as we get
6 some pending matters resolved which Your Honor
7 has under consideration, we have issues with
8 regard to getting the filing made with the
9 Court.

10 THE COURT: I'm confused. I thought the
11 only thing I had under advisement was the
12 motion to dismiss the contempt.

13 MR. IANNO: And that, the reason the 21st
14 was picked is because we thought because
15 everything was happening, we would have a
16 resolution of that.

17 THE COURT: So why does that have anything

18 to deal with the pleadings in the primary case?

19 MR. IANNO: It has to do -- and, Larry, I
20 don't know if you would like to address that or
21 do you want me to?

22 MR. BEMIS: You can go ahead and address
23 it.

24 MR. IANNO: It has to do with the
25 objection to the pro hac vice objection that is
14

1 based on contempt. If they would agree to the
2 pro hac vice admission of Kellog, Huber, that
3 issue may get resolved.

4 THE COURT: What you're telling me is that
5 their participation was so critical that you're
6 unable to determine whether you need to amend
7 the pleadings?

8 MR. IANNO: We need to have somebody that
9 can sign the pleadings.

10 MR. SCAROLA: Mr. Ianno has repeatedly
11 represented that his firm has no conflict in
12 that regard, Your Honor.

13 MR. IANNO: I can't, for other reasons.

14 MR. BEMIS: Mr. Ianno has correctly
15 summarized what our position is on this. We
16 need to have a ruling. It's not a delay
17 problem. We obviously have been internally
18 addressing this, but there are simply issues

19 that I cannot address on the telephone that our
20 other counsel are involved that implicate this
21 and they are pending a ruling on these other
22 matters and that is where we stand on this. We
23 are prepared to proceed promptly once we have
24 these other issues resolved, but, again,
25 because there are other --

15

1 THE COURT: Promptly, like a day?

2 MR. BEMIS: -- counsel involved, we are
3 not involved in the discussion related to it,
4 they cannot participate on the telephone calls
5 to the Court, we are just at a standstill on
6 this.

7 MR. SOLOVY: Well, Your Honor, obviously,
8 we take exception to that, obviously.

9 THE COURT: I understand. And I
10 understand plaintiff's consternation. In all
11 fairness, though, that motion wasn't set for a
12 hearing today, I don't think it gets argued. I
13 understand your concern.

14 MR. SCAROLA: Well, if it doesn't get
15 argued they ought to be complying with the
16 previously entered order. Simply by filing a
17 motion for extension --

18 THE COURT: I understand it doesn't toll
19 and I understand that's the argument you're
20 going to make when they come in and they want

16div-006599

21 to amend the pleading.

22 Okay. I will see everybody but

23 Mr. Scarola on the 23rd.

24 Was there anything else?

25 MR. IANNO: Mr. Scarola and I discussed,
16

1 because of these extensions, we're continuing

2 the stay of the contempt discovery that had

3 been previously extended.

4 MR. SCAROLA: That's fine. Do I need to

5 do an order?

6 MR. IANNO: I don't think so. We have it

7 on the record.

8 MR. SCAROLA: Only the order on the motion

9 to dismiss the contempt proceeding.

10 MR. IANNO: Right.

11 THE COURT: Okay. Thank you very much.

12 Thank you, sirs.

13 (The hearing was concluded.)

14

15

16

17

18

19

20

21

22
23
24
25
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

CERTIFICATE

THE STATE OF FLORIDA)
COUNTY OF PALM BEACH)

I, KATHY SZABO, Registered Professional
Reporter, State of Florida at large, certify that I
was authorized to and did stenographically report
the foregoing proceedings and that the transcript is
a true and complete record of my stenographic notes.

Dated this 22nd day of September, 2004.

KATHY SZABO
Court Reporter

24

25